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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 328309

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

CLUB LEVEL, INC., and RYAN FILA

Plaintiffs/Appellants,

v.

CITY OF WENATCHEE, et al.

Defendants/Appellees.

RESPONSE BRIEF OF APPELLEES

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I. INTRODUCTION

The Plaintiff Ryan Fila owned and operated Club Level, a nightclub, within the City of Wenatchee. During the time Club Level was in operation, significant criminal activity occurred at or around Club Level during its hours of operation. At that time, Club Level required police resources from the City of Wenatchee above and beyond what other local bars and taverns within the City of Wenatchee required.

The United States District Court dismissed the Plaintiff's § 1983 claims on summary judgment, but remanded the state law causes of action to the Chelan County Superior Court. The Superior Court properly granted Defendants' Motion for Summary Judgment and this Court should affirm the dismissal of the Plaintiffs' Complaint.

II. STATEMENT OF THE CASE

This case was originally filed in the United States District Court for the Eastern District of Washington. The Plaintiffs moved for a temporary injunction against the City of Wenatchee Police Department. The Honorable Judge Edward Shea of the Eastern District conducted a hearing on April 14, 2012, and ruled that the Plaintiffs were not entitled to a temporary injunction. (RP 407-420.) Judge Shea ruled "The Plaintiffs have presented only a mild likelihood of success on the merits of the due process claims." (Id.)

The Defendants moved for summary judgment dismissal of the Plaintiffs' claims. On August 1, 2013, Judge Shea issued an Order Granting in Part and Denying in Part Defendants' Motion. Judge Shea ruled "In sum, even when viewed in a light most favorable to the Plaintiffs, the record before the Court is insufficient as a matter of law to establish the elements of the substantive due process violation." (RP 609.) Judge Shea further ruled "Plaintiffs offer nothing to

1 show any subjective expectation of privacy they may have had in the employee area was
2 reasonable.” (RP 612.) Finally, Judge Shea dismissed the Plaintiffs’ First Amendment right of
3 association of claims. (RP 615.)
4

5 Judge Shea’s Order also found that “at best, the Plaintiffs have demonstrated the officers
6 issued lawful citations and acted within their statutory power given to them, which is a significant
7 factor in showing that a reasonable officer would consider their actions constitutional.” (RP 616.)
8 Judge Shea ruled that the individuals Defendants were entitled to qualified immunity and
9 dismissed the Plaintiffs’ constitutional claims against the City of Wenatchee as no constitutional
10 violations were committed by any of the individual Defendants. (RP 617.) Judge Shea, pursuant
11 to 28 U.S.C. § 1367, declined to exercise supplemental jurisdiction over state law claims and the
12 Plaintiffs refiled their state law claims in Chelan County Superior Court. (RP 618.)
14

15 The Plaintiffs also filed a lawsuit against the Washington State Liquor Control Board and
16 its employees in Thurston County Superior Court. (RP 621-627.) On June 14, 2003, the Thurston
17 County Superior Court, Judge Chris Wickham, issued a decision dismissing most of the Plaintiffs’
18 causes of action against the Washington State Liquor Control Board and its employees.¹ (Id.)
19 Specifically, Judge Wickham dismissed the unlawful conspiracy claim which was alleged by the
20 Plaintiffs to have occurred between the City of Wenatchee Police Department and the Washington
21 State Liquor Control Board. (RP 625-626.) Judge Wickham dismissed the claim for civil
22 conspiracy between the Washington State Liquor Control Board and the City of Wenatchee Police
23 Department, holding:
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27 **The evidence in this file does not show an agreement to harm the Plaintiff’s**
28 **business. It merely shows communications between officers and the Liquor**
29 **Control Board. Those communications are a normal part of their working**
30 **relationship. The Plaintiff has pleaded discovery and has not demonstrated**
that the circumstances are reasonably consistent only with the existence of the

¹ Upon reconsideration, Judge Wickham dismissed all of the Plaintiffs’ causes of action.

1 **conspiracy. There is no material questions of fact to support this claim, and**
2 **therefore the Court dismisses it.**
3 (RP 626.)

4 Club Level began operations as a nightclub in August 2010. (RP 5). After Club Level
5 began operations, the Wenatchee Police Department was summoned to Club Level for an ever-
6 increasing amount of criminal activities as a result of Club Level's patrons. (RP 201-212; 231-234;
7 259-389; 499-527.) For the time period that Club Level was in operation, Club Level presented
8 the most criminal activities of any bar or tavern in the City of Wenatchee. In an effort to protect
9 the citizens of Wenatchee, the Wenatchee Police Department began to conduct more frequent
10 walkthroughs. (Id.)

11 Prior to opening Club Level, Ryan Fila (hereinafter "Fila") developed a friendship with
12 former Wenatchee Police officer, Stephyne Silvestre (hereinafter "Silvestre"). (RP 126.)
13 Silvestre claims that Fila is her best friend, they talk with one another daily, and she considers
14 him to be family. They love one another in a platonic way. (RP 101-104.) Subsequent to her
15 friendship with Fila, Silvestre reported for duty as a Wenatchee Police officer with alcohol in
16 her system and claims she had been drinking the evening before at Club Level and continued
17 drinking at the home of Fila until 4:00 a.m. (RP 105-111.)

18 Subsequent to the alcohol incident, Silvestre was evicted from her rental and moved in
19 with Fila. (RP 112.) A succinct Statement of Facts and Findings of Fact of events occurring
20 subsequent to the Silvestre alcohol incident is set forth in the grievance opinion re: Silvestre,
21 dated October 31, 2012. (RP 140-145.) The above-referenced Statement of Facts and Findings
22 of Fact were made subsequent to sworn testimony under oath provided at the Arbitration
23 Hearing held on June 27-28, 2012, in Wenatchee, WA with testimony being provided *inter*
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1 *alia*, Defendants Chief Robbins; Captain Dresker; Captain Jones of the Wenatchee Police
2 Department; Stepayne Silvestre; Ryan Fila, and Janet Thompson. (RP 136-164.)
3

4 After the Silvestre alcohol incident, a number of officers reported that they were
5 concerned with Silvestre frequenting Club Level when the officers were frequently called upon
6 to address criminal complaints. (RP 144.) On February 24, 2011, a checkbook belonging to
7 Club Level was found in Silvestre's patrol car, showing a check for \$400.00 had been written
8 to Silvestre on the Club Level account. (RP 113, 144.) On March 17, 2011, Silvestre sent a text
9 message to a member on her shift declining to attend a St. Patrick's Day function, indicating in
10 the text that she was working at Club Level. (RP 114-115, 144.)
11

12
13 On March 27, 2011, Silvestre reported that she was a patron at Club Level when she left
14 her police cell phone in the bathroom of Club Level, and the same was eventually lost at that
15 location. The phone had an unprotected password containing sensitive police information. (RP
16 116-118, 144.) These issues involving Silvestre and Club Level were of concern to the
17 Wenatchee Police Department because she was working at Club Level without having obtained
18 the requisite approval from the Department. This began an Internal Investigation. (RP 136-
19 164.) During the course of the investigation, on April 6, 2011, Silvestre, while on duty,
20 observed that a complaint involving Fila and herself was being reported, requesting police
21 assistance as to how to evict the tenants residing at the Thompson home. The Reporting Party
22 also called back and stated that there were concerns because one of the tenants included a
23 Wenatchee Police officer. (RP 119, 120, 141, 142, 144.) Silvestre, upon seeing that the
24 Reporting Party was calling regarding herself and Fila, called Fila informing him of the
25 complaint. (RP 121, 142-145.)
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1 Detective Sergeant John Kruse was requested to investigate the matter because it
2 involved Wenatchee Police Department Officer Silvestre. (RP 423-437.) Sergeant Kruse
3 contacted the complaining party identified as Gillian Debruyn, wherein she outlined her
4 concerns for her friend, Jan (Janet) Thompson. According to Debruyn, Thompson had informed
5 her that she was concerned that Fila was mistreating her mother and she was concerned as to
6 how to evict him from her house, based on his temper. (Id.) Sergeant Kruse also interviewed
7 Janet Thompson and authored a report regarding the investigation. The information in the
8 report was provided by Debruyn and Thompson, as far as their impressions, statements, and
9 opinions. (Id.) Sergeant Kruse, upon recording the statements and information from Debruyn
10 and Thompson, had no knowledge whether the information provided was false, nor was the
11 information obtained with reckless disregard for the truth. (Id.) Sergeant Kruse did not
12 publicize the information to anyone other than his report contained in the Silvestre
13 Investigation file, and his sworn testimony at the Silvestre Arbitration grievance hearing on
14 June 27, 2012. (Id.)

19 The Internal Investigation file concerning Silvestre was sent to The Wenatchee World
20 newspaper, subsequent to the newspaper's Public Disclosure Request. (RP 438-445.)
21 Following the April 6, 2011, issue involving Silvestre and Fila, Janet Thompson learned that
22 the Wenatchee Police Department was concerned that Silvestre was working at Club Level and
23 provided information to the Wenatchee Police Department based on her personal knowledge of
24 functions Silvestre engaged in at Club Level. (RP 214-223.) Thompson testified that after she
25 disclosed to the Wenatchee Police Department what her observations were of Silvestre working
26 at Club Level, Fila requested that she recant her statements because Fila was concerned
27 Silvestre would lose her job. Thompson refused to lie for Fila's benefit. (RP 174, 224-225.)
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1 On May 18, 2011, after Thompson refused to recant her statements about Silvestre, Fila
2 filed a complaint against Chief Robbins and Captain Dresker. (RP 242-249.) The complaint
3 was investigated by City Attorney Steve Smith who authored a letter to Fila stating the
4 complaint was unfounded. (Id.)

6 After considering two days of sworn testimony, the Arbitrator ruled that Silvestre's
7 demotion in rank from Sergeant to Patrol Officer First Class was appropriate. (RP 162.) The
8 Arbitrator also ruled, after careful consideration of the sworn testimony of witnesses, including
9 Fila and Silvestre, that Silvestre breached her confidentiality ethics as a sworn police officer.
10 (RP 156-158.) The Arbitrator ruled that Silvestre engaged in work and off-duty employment
11 for Fila and Club Level in violation of policy and in violation of police ethical standards. (RP
12 158-161.) Silvestre voluntarily resigned from the Wenatchee Police Department after the
13 Arbitration hearing, but prior to the Arbitration decision of October 31, 2012.

16 The Wenatchee Police Department conducts walkthroughs of nightclubs and liquor
17 establishments in the City of Wenatchee, in order to facilitate voluntary compliance with the
18 alcohol and criminal laws of the State of Washington. (RP 231-234; 254-267; 270-277; 391-
19 395.) In addition to walkthroughs, the Wenatchee Police Department would respond at Club
20 Level based on calls for service from patrons, civilians, or employees of Club Level. (RP 308-
21 327.) Sergeant Mark Huson of the Wenatchee Police Department has provided his Declaration
22 and Supplemental Declaration addressing specific concerns alleged by Plaintiff in his
23 Complaint regarding his conducting a walkthrough at Club Level. (RP 259-267.) Wenatchee
24 Police Practices Expert, Michael S. Painter, has reviewed police reports and videos supplied by
25 the Plaintiffs, including, among other evidence, police radio logs, computer aided dispatch
26 records, and the Wenatchee Police Department Code of Conduct Policy. (RP 201-212.) Mr.

1 Painter opines that the manner in which the walkthroughs were conducted was appropriate and
2 customary, given his training and experience in conducting similar walkthroughs throughout
3 his law enforcement career, as well as premised on his knowledge of the liquor laws and
4 criminal laws in the State of Washington. (Id.) Mr. Painter also opines that, based on records
5 reviewed, Club Level has a history of providing an environment for violence and disorderly
6 conduct at a rate higher than any other liquor establishment in the City of Wenatchee.
7 Therefore, a higher frequency of walkthroughs was appropriate. (Id.)
8

9
10 There has never been an intent or effort to close Club Level down by the Wenatchee
11 Police Department. (RP 234, 275, 276, 311.) Club Level has never been shut down from
12 operating its business as a result of any Wenatchee Police Department activities. (RP 81, 82.)
13 Club Level Manager, Kyle Delaney, also admits that the establishment was never closed for
14 any period of time as a result of any actions by the Wenatchee Police Department. (RP 96.)
15

16 Eric Nelson, Director of the Wenatchee YMCA, has registered his complaint against
17 Club Level and his concern that public safety and public interests are compromised, based on
18 violence and public urination from patrons of the establishment. (RP 251-257.) Recently,
19 Crystal Fox, a patron of Club Level, expressed her concern that Fila was specifically coaxing
20 her into not reporting a theft crime occurring inside Club Level because he did not want police
21 presence in his business. (RP 446-467.)
22

23 Also, on or about February 9, 2013, a serious felony assault took place inside Club
24 Level at their new location at 240 N. Wenatchee Ave., wherein Club Level patrons viciously
25 beat a Hispanic patron. The incident was observed by Club Level personnel who failed to
26 report the crime to the Wenatchee Police Department. (RP 201-212, 464-484.) Further, John
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1 Watson, Silvestre's brother who was previously arrested for a felony warrant, was attempting
2 to clean up the blood evidence before police arrived. (Id.)

3
4 Neeta Verma and her husband are the business owners of the Econolodge Motel located
5 adjacent to Club Level's present location. (RP 485-492.) Based on activities that Ms. Verma
6 personally observed of Club Level patrons being highly intoxicated, fighting in public,
7 destroying property, and urinating in public, she wrote a letter of complaint addressed to the
8 Chief of the Wenatchee Police Department, Tom Robbins. (Id.) Ryan Fila, among others, was
9 copied on the complaint lodged by his fellow business owner. (Id.) Following the receipt of
10 the complaint, Fila, Delaney, and a third male, entered Ms. Verma's business premises and
11 confronted her in a threatening and intimidating manner. (Id.) Club Level Manager, Kyle
12 Delaney, also subjected Ms. Verma to a racially insulting remark. (Id.) Ms. Verma has
13 expressed her concern that in the interests of public safety, law enforcement should not be
14 precluded from enforcing criminal and alcohol laws occurring in or at Club Level.
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18 Eddie Cantu is a licensing manager for the Washington State Liquor Control Board. (RP
19 494-497.) Mr. Cantu learned that Club Level was physically relocating its nightclub from 27
20 S. Chelan Ave. to 240 N. Wenatchee Ave. in Wenatchee, WA. (Id.) Mr. Cantu testifies that,
21 prior to opening and serving alcohol at the new location, Club Level was required to obtain a
22 new liquor license. (Id.) Club Level was not issued a liquor license until August 24, 2012.
23 (Id.) Mr. Cantu testified further, based on his background as a licensing manager, that RCW
24 66.44.090 prohibits the sale of alcohol without a valid license or permit. (Id.) It is undisputed
25 that Club Level opened at its location of 240 N. Wenatchee Ave. on the weekend of August 17-
26 18, 2012, and was serving alcohol. According to Mr. Cantu's Declaration, Club Level was
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1 selling alcohol in violation of RCW 66.44.090 on its opening weekend before the license had
2 been issued. (Id.).

3
4 The City of Wenatchee did nothing to cause Club Level to move to its present location.
5 General Manager, Delaney, testifies that the move was to a better location with better visibility
6 and access. (RP 94.) Frank Kuntz, the Mayor of the City of Wenatchee, wrote a letter dated
7 August 16, 2012, to the Washington State Liquor Control Board, at the request of Fila, stating
8 that the City had no objection to the physical relocation of the club. (RP 179.)
9

10 III. ARGUMENT

11 This Court should affirm the dismissal of Plaintiffs' Complaint as there is no evidence
12 creating a question of fact.

13 A. Summary Judgment Standard.

14 In a summary judgment motion, the moving party bears the initial burden of showing
15 the absence of an issue of material fact. Young v. Key Pharm., Inc., 112 Wn.2d 216, 225
16 (1989). The burden is on the moving party for summary judgment to demonstrate that there is
17 no genuine dispute as to any material fact and all reasonable inferences from the evidence must
18 be resolved against him. Barber v. Bankers Life & Cas. Co., 81 Wn.2d 140, 142 (1971). The
19 facts required by CR 56(e) are evidentiary in nature, and ultimate facts or conclusions of facts
20 are insufficient. Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 359-60 (1988). A
21 non-moving party in a summary judgment cannot rely on speculation, argumentative assertions
22 that unresolved factual issues remain, or in having its affidavits considered at face value; for
23 after the moving party submits adequate affidavits, the non-moving party must set forth specific
24 facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as
25 to a material fact exists. Seven Gables Corp. v. MGM/UA Entm't, Co., 106 Wn.2d, 1, 13
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1 (1986). Summary judgment is proper when the only question before the Court is one of law.
2 Better Fin. Solutions, Inc. v. Trans Tech Elec., Inc., 112 Wn.App. 697, 702-03 (2002).

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4 To raise a genuine issue for trial, evidentiary facts as to “what took place, an act, an
5 incident, a reality as distinguished from supposition or opinion” must be alleged. Roger Crain
6 & Assocs., Inc. v. Felice, 74 Wn.App. 769, 778-79, 875 P.2d 705 (1994). The non-moving
7 party must provide more than uncorroborated statements in a complaint. See, e.g., Iwai v.
8 State, 129 Wn.2d 84, 88, 915 P.2d 1089 (2001). “A claim of liability resting only on a
9 speculative theory will not survive summary judgment.” Marshall v. Bally’s Pacwest, Inc., 94
10 Wn.App. 372, 381, 972 P.2d 475, 479 (1999). .

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13 **B. The Trial Court Properly Applied the Doctrine of Collateral Estoppel.**

14 The Trial Court properly applied the Doctrine of Collateral Estoppel against the
15 Plaintiffs, based on two other decisions involving the Plaintiffs, the United States District Court
16 decision and the Thurston County Superior Court decision.²

17
18 The purpose of collateral estoppel is to encourage respect for judicial decisions by
19 ensuring finality. State Farm Mutual Automobile Insurance Co. v. Avery, 114 Wn. App. 299,
20 304 (2002). In order to establish collateral estoppel, a party must establish:

- 21
22 **1. That the issue decided in the prior litigation was identical to an issue**
23 **presented in the second;**
24 **2. The prior action ended in a final judgment on the merits;**
25 **3. That the party estopped was a party or in privity with the party in the**
26 **prior action; and**
27 **4. That the application of the doctrine would not work an injustice.**
28 State Farm, 114 Wn. App. at 304.

29 There are two prior decisions that have collateral estoppel effect against the Plaintiffs,
30 the Order dismissing the Plaintiffs’ § 1983 claims issued by Judge Edward Shea of the Eastern

² The Thurston County Superior Court was affirmed on appeal and an unpublished opinion.

1 District of Washington and the Thurston County Superior Court decision dismissing the
2 Plaintiffs' state law claims against the Washington State Liquor Control Board.

3
4 The Plaintiffs' reliance on Owens v. Kuro, 56 Wn. 2d 564 (1960) is misplaced. The
5 Plaintiffs incorrectly argue that the City of Wenatchee must have been a party to the Thurston
6 County proceeding. First, the holding in Owens directly contradicts the element of collateral
7 estoppel cited by the Plaintiffs. (See Brief of Appellant, Pg. 27.) The Plaintiffs cite Ullery v.
8 Fulleton, 162 Wn. App. 596 (2011) setting forth the elements of collateral estoppel which only
9 require "the party against whom issued preclusion is asserted was a party to, or in privity with a
10 party to, the earlier proceeding." (Brief of Appellant, pg. 27.) Moreover, the rule in Owens has
11 been overruled:
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14 **At one time, Washington required mutuality, meaning that there had to be**
15 **identity of, or privity of parties, in the same antagonistic relationship in**
16 **both proceedings, before collateral estoppel could be asserted in subsequent**
17 **litigation. See, e.g., Owens v. Kuro, 56 Wn. 2d 564, 568, 354 P.2d 696 (1960).**
18 **Washington courts have since retreated from that traditional rule in the**
19 **context of civil cases and now apply non-mutual collateral estoppel so long**
20 **as the party against whom preclusion is sought was a party, or in privity**
21 **with a party, to the prior litigation and had a full and fair opportunity to**
22 **litigate the issue in question.**

23 State v. Mullin-Coston, 152 Wn. 2d 107, 113-114 (2004).

24 In this case, the elements of collateral estoppel have been established. With regard to
25 the Plaintiffs' civil conspiracy claims, that issue was decided by the Thurston County Superior
26 Court. First, the issue of civil conspiracy was identical, did the City of Wenatchee and the
27 Washington State Liquor Control Board conspire against the Plaintiffs. The same evidence was
28 submitted to the Chelan County Superior Court as well as the Thurston County Superior Court.
29 The second element of collateral estopped was also met at the summary judgment dismissal by
30 Thurston County Superior Court and the Appellate decision affirming that decision are final
judgments on the merit. Third, the Plaintiffs are the same party in both cases and represented

1 by the same attorney in both proceedings. Finally, application of collateral estoppel will not
2 work an injustice, as the Plaintiffs had a full and fair opportunity to litigate their claims of civil
3 conspiracy in the Thurston County Superior Court proceeding. Moreover, the application of
4 Collateral Estoppel will preclude the possibility of inconsistent rulings between the Chelan
5 County and Thurston County Superior Courts.
6

7
8 The Plaintiffs only argue that the identity of persons is not met, relying on overruled
9 and outdated case authority in Owens. The Plaintiffs had an opportunity before the Thurston
10 County Superior Court to argue that a civil conspiracy existed between the City of Wenatchee
11 and the Washington State Liquor Control Board and failed to establish this claim. All the
12 Plaintiffs established was that two law enforcement agencies spoke to one another, which is
13 insufficient to establish civil conspiracy. Finally, the purpose of collateral estoppel is to
14 prevent re-litigation of identical issues previously decided. As such, the Trial Court properly
15 applied collateral estoppel to the Thurston County Superior Court's Order and this Court
16 should affirm that decision.
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19 The order dismissing the § 1983 claims also has preclusive effect. The United States
20 District Court ruled:
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- 22 **1. The Defendants did not violate the Plaintiffs' Fourteenth Amendment**
constitutional rights to an occupation;
- 23 **2. The Defendants did not illegally search Club Level;**
- 24 **3. At best, the Plaintiffs have demonstrated that officers issued lawful**
citations and acted within their statutory power.

25
26 The elements of collateral estoppel are met with regard to these issues, as they were
27 decided in the prior litigation with the same parties. As such, the Superior Court properly
28 precluded re-litigation of these issues and this Court should affirm the Superior Court's
29 dismissal.
30

1 **C. Res Judicata Bars the Plaintiffs' Claims.**

2 The related Doctrine of Res Judicata additionally prevents re-litigation of the civil
3 conspiracy claim. The elements of Res Judicata are:
4

5 **Identity of:**

- 6 **1. Subject matter;**
7 **2. Cause of action;**
8 **3. Persons and parties; and**
9 **4. Quality of the person for, and against, whom the claim is made.**
10 Loveridge v. Fred Meyer, Inc., 125 Wn. 2d 759, 763 (1995).

11 A judgment is binding upon a party to a previous litigation. Id. at 764.

12 In this case, Thurston County Superior Court's dismissal of the civil conspiracy claim
13 prevents re-litigation of that claim. First, there is an identical subject matter, a civil conspiracy
14 cause of action arising out of the same set of facts. The same conspirators are alleged by the
15 Plaintiffs, namely, the City of Wenatchee and its employees and the Washington State Liquor
16 Control Board and its employees. Finally, the Plaintiffs were a party to the prior litigation and
17 had a full and fair opportunity to litigate the civil conspiracy claim in Thurston County
18 Superior Court. Again, the Plaintiffs' reliance on Owens is misplaced, since Washington law
19 only requires that the party against whom the doctrine is asserted be a party to the prior
20 litigation.
21

22 This Court should find that Res Judicata precludes re-litigation of the civil conspiracy
23 claim and that the Plaintiffs had a full and fair opportunity to argue this cause of action. Since
24 Thurston County Superior Court has ruled that the Washington State Liquor Control Board did
25 not enter into a civil conspiracy with the City of Wenatchee, the Plaintiffs' claims cannot
26 establish the elements of a civil conspiracy, based solely on the actions of the City of
27 Wenatchee. Therefore, this Court should affirm Thurston County Superior Court's decision.
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1 **D. The Superior Court Properly Dismissed the Plaintiffs' Claim for Civil**
2 **Conspiracy.**

3 No evidence was presented to the Superior Court sufficient to establish a civil
4 conspiracy. In Washington, a conspiracy exists if two or more persons combine to accomplish
5 an unlawful purpose or combine to accomplish some purpose not in and of itself lawful but by
6 unlawful means. Lewis Pac. Dairymen's Ass'n. v. Turner, 50 Wn. 2d 762 (1957). "A finding
7 that a conspiracy exists may be based on circumstantial evidence, although the circumstances
8 must be inconsistent with a lawful or honest purpose and reasonably consistent only with the
9 existence of a conspiracy." Harrington v. David D. Hawthorne, CPA, PS, 111 Wn. App. 824,
10 840 (2002).

11 In this case, the evidence establishes that the City of Wenatchee, through its police
12 officers, was conducting normal and routine police procedures within the City of Wenatchee in
13 enforcing its liquor laws. As Judge Shea previously ruled, the City of Wenatchee officers were
14 acting in accordance with their statutory authority. Moreover, as Judge Wickham ruled, the
15 only evidence submitted by the Plaintiffs establishes the City of Wenatchee Police Department
16 and the Washington State Liquor Control Board communicated with each other. This is
17 insufficient to establish a conspiracy, given that these two law enforcement agencies are not
18 prohibited from communicating with each other regarding joint law enforcement activities
19 within the City of Wenatchee. The Plaintiffs are required to submit evidence that is reasonably
20 consistent only with the existence of a conspiracy and failed to do so.

21 Additionally, the Good Neighbor Agreement identified by the Plaintiffs is irrelevant as
22 it is unrelated to Club Level. The Good Neighbor Agreement applies to a different entity, the
23 Ballroom, LLC. This agreement is also irrelevant as it was never agreed to by any of the
24 parties and, therefore, was never executed.
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1 The evidence establishes that the City of Wenatchee Police Department was required to
2 police the area of Club Level extensively and copies of those police reports were provided to
3 the Washington State Liquor Control Board. These two law enforcement agencies have joint
4 responsibility for enforcing the liquor laws within the State of Washington as they apply to
5 Club Level. The evidence does not establish a civil conspiracy was entered into by the City of
6 Wenatchee and the Washington State Liquor Control Board, and this Court should affirm the
7 dismissal of this cause of action.
8

9
10 **E. Plaintiffs' Claim for Negligent Supervision was Properly Dismissed.**

11 In a negligence case, the threshold determination to be made is whether a duty is owed
12 to the plaintiff. Babcock v. Mason Co. Fire Dist. No. 6, 144 Wn. 2d 774, 784 (2001). Whether
13 or not a duty exists is a question of law. Osborn v. Mason Co., 157 Wn. 2d 18, 22-23 (2006).
14 In Cummins v. Lewis Co., 156 Wn. 2d 844, 852 (2006), the court stated the following:
15

16 **To be actionable, the duty must be owed to the injured plaintiff, and not**
17 **one owed to the public in general. The basic principle of negligence law is**
18 **expressed in the Public Duty Doctrine. Under the Public Duty Doctrine, no**
19 **liability may be imposed for a public official's negligent conduct unless it is**
20 **shown that 'A duty breach was owed to the injured person as an individual**
21 **and not merely the breach of an obligation owed to the public in general.'**

22 The Public Duty Doctrine rests on the notion that a duty to the public in general is a duty to no
23 one in particular. J & B Dev. Co. v. King Co., 100 Wn. 2d 299, 304 (1983) *overruled on other*
24 *grounds*; Taylor v. Stevens Co., 111 Wn. 2d 159 (1988). There are four exceptions to the
25 Public Duty Doctrine, 1) legislative intent; 2) failure to enforce; 3) the rescue doctrine; and 4) a
26 special relationship. Cummins, 156 Wn. 2d 844 at 853(n)(7) (2006); Vergeson v. Kitsap Co.,
27 145 Wn. App. 526, 537 (2008).
28

29 Plaintiff, in his response brief, implores that the City of Wenatchee is somehow liable in
30 negligence out of one side of his mouth, yet claims the City employees acted intentionally, and not

1 negligently. However, Plaintiff fails to identify any duty of care owed by the City of Wenatchee
2 or its individual Defendants to the Plaintiff. Rather, Plaintiff attempts to elude the Public Duty
3 Doctrine by claiming that a “special relationship” exception to the doctrine applies. Plaintiff is
4 incorrect. The special relationship exception applies when (1) there is direct contact or privity
5 between the public official and the injured plaintiff which sets the latter apart from the general
6 public, and (2) there are express assurances given by a public official, which (3) gives rise to
7 justifiable reliance on the part of the plaintiff. Cummins v. Lewis Co., 156 Wn. 2d 844, 854
8 (2006). The plaintiff must specifically seek an express assurance and the government agent must
9 unequivocally give that assurance. Babcock, 144 Wn. 2d supra at 789. Neither implied nor
10 inherent assurances are sufficient. Alexander v. County of Walla Walla, 84 Wn. App. 687, 695
11 (1997). The Plaintiffs have submitted no proof that an express assurance was given, that the
12 express assurance was relied upon or that the City of Wenatchee violated that express assurance.
13 Therefore, no evidence of a special relationship exception to the Public Duty Doctrine exists.

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18 In Washington, as a general rule, law enforcement activities are not reachable in
19 negligence. See Dever v. Fowler, 63 Wn. App. 35, 44 (1991) (citations omitted). In Rodriguez
20 v. Perez,³ 99 Wn. App. 439, 443 (2000), the court recognized that there is generally no cause of
21 action for police activities (investigations) by stating the following:
22

23 **In all negligence actions, the plaintiff must prove that the defendant owed**
24 **the plaintiff a duty of care. Thus, in general, a claim for negligent**
25 **investigation does not exist under the common law because there is no duty**
26 **owed to a particular class of persons. In the area of law enforcement**
27 **investigations, the duty is typically owed to the public. For example, the**
28 **duty of a police officer to investigate crimes is a duty to the public at large**
29 **and, therefore, not a proper basis for an individual’s negligence claim.**

30 ³ The Rodriguez court ruled, however, that there is a statutory duty to investigate allegations of child physical and sexual abuse pursuant to RCW 26.44.050 based on the intent of the legislature to protect the integrity of the family. Otherwise, there is no cause of action for a negligent police investigation.

1 Consequently, because Plaintiffs have alleged that all activities of the individuals were the
2 result of police activities, there is no cause of action for individual negligence on the part of any
3 individual defendant.
4

5 In Niece v. Elmview Group Home, 131 Wn. 2d 39, 48 (1997), the court stated,
6 “Vicarious liability, otherwise known as the doctrine of respondeat superior, imposes liability
7 on an employer for the torts of an employee who is acting on the employer’s behalf.”
8 Following this principle, the court in Gilliam v. DSHS, 89 Wn. App. 569, 584-85 (1998), held
9 that “when an employee acts within the scope of employment, the employer is vicariously
10 liable.” Accordingly, a cause of action for negligent supervision is redundant. In Rodriguez,
11 99 Wn. App. at 451, the court ruled that “any negligence on the part of individual officers
12 would be attributable to their employer. If there is no negligence, or if plaintiff fails to prove
13 negligence, there is no vicarious liability to the employer.” Id. Plaintiffs are attempting to
14 allege negligent police activities in the disguise of Negligent Supervision.
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18 The City of Wenatchee Defendants have correctly stated the law that, in Washington, a
19 cause of action for negligent supervision requires a plaintiff to show that an employee acted
20 outside of the scope of his/her employment. LaPlant v. Snohomish Co., 162 Wn. App. 476, 479
21 (2011), citing Niece v. Elmview Group Home, 131 Wn. 2d 39, 48 (1997). Plaintiff attempts to
22 circumvent this binding authority by claiming that the individual officers in the case at bar were
23 acting deliberately with the design to force Club Level out of business. Plaintiff then proceeds to
24 rely on an unpublished federal case from the Western District of Washington (Tubar, III, v. Clift,
25 2008 WL 5142932)
26
27

28 First, the Tubar, III case is an unpublished decision and violates GR 14 which prohibits
29 citation and argument based on unpublished legal authorities. Skamania Co. v. Woodall, 104 Wn.
30

1 App. 525, 536 n. 11 (2001). Subsequently, in Davis v. Clark Co., 966 F.Supp. 2d 1106, 1141
2 (W.D. Wash. 2013), the Western District of Washington Court, in an published opinion, correctly
3 applied the Washington law pertaining to Negligent Supervision by stating:
4

5 **In order to make a claim against Clark County based on its independent duty**
6 **to properly train, supervise, and retain its employees under Washington law,**
7 **Plaintiffs must point to evidence that Det. Slagle (or other County employees)**
8 **were acting outside of the scope of their employment.**

9 *Niece v. Elmview Group Home*, 131 Wn. 2d 39, 48 929 P.2d 420 (1997)

10 **Plaintiffs fail to point to facts from which a jury could conclude that Det.**
11 **Slagle did so, that he “stepped aside from Clark County’s purposes in order**
12 **to pursue a personal objective.” Id. The motion to summarily dismiss the**
13 **claim should be granted because Plaintiffs have not carried their burden.**

14 Similarly, here Plaintiffs have not carried their burden to present evidence or facts
15 establishing that any individual Wenatchee police officer acted outside of the scope of his/her
16 authority. In fact, as previously argued, the Honorable Edward Shea, in his Federal Court decision
17 granting summary judgment dismissal, ruled that ... “*Plaintiff provided no evidence to show that*
18 *the Defendants’ actions were arbitrary or unreasonable.*” Consequently, any independent cause
19 of action for Negligent Investigation must be dismissed.

20 The evidence clearly establishes that the alleged Defendants all acted while in the course
21 and scope of their employment as police officers. As such, no independent cause of action exists
22 for Negligent Supervision. Moreover, the Plaintiffs’ briefing does not indicate what duty of care
23 was violated by the Defendants that forms the basis of the Plaintiffs’ Negligent Supervision claim.
24

25 Based upon the failure of the Plaintiffs to establish the elements of Negligent Supervision,
26 this Court should affirm the dismissal of the Plaintiffs’ claim for Negligent Supervision.
27

28 **F. The Plaintiffs’ Defamation Claim Was Properly Dismissed by the Trial Court.**

29 In Washington, to recover for a defamation claim, a plaintiff must establish four
30 essential elements: 1) falsity; 2) an unprivileged communication; 3) fault; and 4) damages.

1 Moe v. Wise, 97 Wn. App. 950, 957 (1997). The degree of fault necessary to make out a *prima*
2 *facie* case of defamation depends on whether the plaintiff is a private individual or a public
3 figure or public official. If the plaintiff is a private individual, a negligence standard of fault
4 will apply. Taskett v. King Broadcasting Co., 86 Wn. 2d 439, 445 (1996). In Washington,
5 courts recognize that statements communicating ideas or opinions cannot support a defamation
6 claim, as false ideas are not actionable. Corbally v. Kennewick School Dist., 94 Wn. App. 736,
7 741 (1999). A determination of whether a communication is one of fact or opinion is a
8 question of law for the court. Benjamin v. Cowles Publishing Co., 37 Wn. App. 916, 922
9 (1984). An absolute privilege applies to anyone “who is required by law to publish defamatory
10 matter.” Restatement (Second) of Torts § 592A (1986). In Washington, RCW 42.56.040
11 requires public records to be produced upon request. Here, The Wenatchee World requested a
12 copy of the internal investigation, not Silvestre’s personnel file. (RP 438-444.)

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17 Law enforcement officers enjoy a qualified privilege when releasing information to the
18 public or news media concerning official investigations and activities. Bender v. Seattle, 99
19 Wn. 2d 582, 601 (1983). Proof of the absence of a qualified privilege must be established by
20 clear, convincing evidence, not simply by a preponderance of the evidence. Id. A person
21 abuses the qualified privilege by making a statement *knowing* it to be false or with *reckless*
22 *disregard* as to its truthfulness. Bender at 601-02.

23
24 The Washington Supreme Court has specified that “the right to inform the public,
25 however, does not include a license to make gratuitous statements concerning the facts of a
26 case or disparaging the characters of the parties to an action.” Id. citing Gold Seal Chinchillas,
27 Inc. v. State, 69 Wn. 2d 828, 835 (1966). The qualified privilege was not applied in Turngren
28 v. King Co., 104 Wn. 2d 293, 310 (1985), because there was evidence that law enforcement
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1 officers made subsequent gratuitous statements that the informant was reliable, that weapons
2 had been removed prior to a search, that the police did their homework well, that the search
3 was not a hit-and-miss thing, that the informant feared for his life, and that the home was in a
4 messy state before the search. Id.

6 Here, Plaintiffs' Complaint for defamation must be dismissed. According to the
7 Complaint, there was no statement whatsoever made by Sergeant Kruse regarding the Plaintiff.
8 Rather, Plaintiff merely alleges that Ms. Debruyn made statements that it was *her impression*
9 Plaintiff was a manipulative individual who was financially exploiting Ms. Thompson.
10 Plaintiff alleges that these statements of her *impressions* were included in the internal
11 investigation for Sergeant Silvestre and this report was published in The Wenatchee World.
12 The allegations are completely void of any evidence that there was any subsequent elaboration
13 or additional statements that were provided in the public disclosure request to The Wenatchee
14 World. There is no evidence that these impressions (opinions) were false, nor is there evidence
15 that there was a reckless disregard as to the truthfulness of Ms. Debruyn's impressions. Rather,
16 all Plaintiff alleges is that the information provided by Ms. Debruyn was defamatory. No legal
17 authority holds that an allegation of wrongful conduct, contained in a police report which is
18 subject to public disclosure, is a defamatory statement by the law enforcement agency.
19 Consequently, this claim must be dismissed.

24 The Plaintiffs' reliance on Cox v. Roskelly, 359 F.3d 1105 (9th Cir. 2004) does not
25 apply to Defamation cases. In Cox, the court was dealing with a Fourteenth Amendment claim
26 that stigmatized the information in a personnel file requiring a name-clearing hearing. Cox,
27 359 F.3d at 1110. Sergeant Silvestre was the only person that the Cox's court's analysis
28 applies to and she was provided a name-clearing hearing through the arbitration proceeding.
29
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1 The evidence establishes that the statements alleged to be defamatory were not made by
2 the City of Wenatchee or its employees and that the City has an absolute privilege. The City of
3 Wenatchee was required to disclose the police reports pursuant to the public records acts in
4 Washington. Moreover, no evidence exists in the record that the Plaintiffs allege that these
5 statements were false. This Court should affirm the Superior Court's dismissal.
6

7
8 **G. The Plaintiffs' False Light Claims Were Properly Dismissed.**

9 A false light claim arises when someone publicizes a matter that places another in a
10 false light if: 1) the false light would be highly offensive to a reasonable person and 2) the actor
11 knew of, or recklessly disregarded, the falsity of the publication and the false light in which the
12 other would be placed. Eastwood v. Cascade Broadcast Co., 106 Wn. 2d 466, 471 (1986).
13 This claim must fail as well.
14

15 Again, Sergeant Kruse investigated the allegations of Gillian Debruyn as it pertained to
16 the allegation of Fila's interaction with an elderly patient which coincided with the internal
17 investigation of whether Officer Silvestre was employed at Club Level. It is undisputed that
18 Fila and Silvestre were living at the home of this elderly patient. There is no evidence or
19 allegation that Sergeant Kruse knew that the information provided by Ms. Debruyn was false or
20 that he recklessly disregarded her statements. Rather, he simply recorded the allegations of Ms.
21 Debruyn and made them a part of the internal investigation file. Once The Wenatchee World
22 requested a public disclosure request of the Silvestre Internal Investigation File, nothing other
23 than the information provided by Ms. Debruyn was provided to the media. This claim must be
24 dismissed as the Plaintiff has no evidence to support his claim.
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28 Again, no statement was made by Sergeant Kruse regarding Ryan Fila. There is no
29 evidence that Sergeant Kruse knew the information was false or that he recklessly disregarded the
30

1 information. In addition to failing to present evidence that Sergeant Kruse knew the falsity of the
2 allegations, Plaintiff provides no authority that a police investigator accurately recording
3 statements from a complaining witness rises to a false light claim.
4

5 It is axiomatic that law enforcement investigators are provided information that may not be
6 flattering regarding individuals on a regular basis. Yet, to fail to record the information accurately
7 would be subject to criticism for being derelict in one's duties. It stretches incredulity that the City
8 of Wenatchee is responsible for the impressions and statements made by a complaining party
9 of Wenatchee is responsible for the impressions and statements made by a complaining party
10 about Ryan Fila. Therefore, the false light claim should be dismissed.

11 **H. The Plaintiffs' Negligent Infliction of Emotional Distress Claim Was Without**
12 **Evidentiary Basis.**

13 In Keates v. City of Vancouver, 73 Wn. App. 257, 269 (1994), the court ruled that
14 "there is no cause of action for inadvertent infliction of emotional distress in police
15 investigations." The court ruled that, "because the utility of the law enforcement function
16 outweighs the criminal suspect's interests in freedom from emotional distress, the law closely
17 circumscribes the types of causes of action which may arise against those who participate in
18 law enforcement activities." Id. at 267.
19

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21 As previously pointed out, police investigation activities are not reachable in
22 negligence. RCW 66.44.010 is the statute charging county and municipal peace officers with
23 the duty of investigating and prosecuting all violations of Washington's Alcoholic Beverage
24 Control laws. Id. RCW 66.28.090 requires that "liquor establishments shall, at all times, be
25 open for inspection by any liquor enforcement officer, inspector, or peace officer. Liquor and
26 law enforcement entities are not prohibited from entering bars to enforce the law." See Dodge
27 City Saloon, Inc. v. Washington State Liquor Control Board, 168 Wn. App. 388 (2012).
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1 Washington does not allow a claim against police officers for negligently causing
2 emotional distress during the course of their police activities. The court in Keates precluded
3 this claim and this Court should dismiss the Plaintiffs' claim for Negligent Infliction of
4 Emotional Distress, as it is not a recognized cause of action against law enforcement officers.
5

6 The Plaintiffs rely on one line in Keates which authorizes emotional distress claims as
7 compensations for an officer's breach of some other duty. However, the Plaintiffs' brief is
8 silent as to what the other duty is. The court in Keates, while dismissing a cause of action for
9 outrage based on lack of evidence, did consider outrage as an appropriate cause of action
10 against law enforcement officers.⁴ The Keates' court also recognized a cause of action for
11 malicious prosecution as an appropriate vehicle for emotional distress damages:
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14 **The great weight of authority holds that plaintiffs who seek redress for**
15 **emotional distress caused by being accused of a crime must prove the**
16 **elements of malicious prosecution. The strict requirements of proof of**
17 **malice and lack of probable cause were developed to strike the appropriate**
18 **balance between the public's right to have a criminal apprehended and the**
19 **suspect's right to be free from injury.**

20 Keates, 73 Wn. App. 257, 267-68 (citations omitted).

21 Based upon Keates, the trial court properly concluded that there was insufficient
22 evidence to establish the Plaintiffs' Negligent Infliction of Emotional Distress claim against the
23 City of Wenatchee and this Court should affirm the trial court's decision.

24 IV. CONCLUSION

25 This Court should affirm the Superior Court's dismissal of the Plaintiffs' causes of
26 action as the Plaintiffs' claims are barred by the Doctrine of Collateral Estoppel and the
27 Plaintiffs have submitted insufficient evidence to establish the claims.
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30

⁴ Plaintiffs, at summary judgment argument, agreed to dismiss the Plaintiffs' Outrage claim as there was insufficient evidence.

1 RESPECTFULLY SUBMITTED this 12th day of January, 2015.

2 CARLSON, McMAHON & SEALBY, PLLC

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6 PATRICK McMAHON, WSBA #18809
7 Attorney for Appellees

8 AWC05-02235SA\PLE\Response Brief of Appellee.011215

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