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Court of Appeals No. 69668-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN W. HYDE and SANDRA D. BROOKE,
husband and wife,
Plaintiffs-Appellants

v.

CITY OF LAKE STEVENS,
Defendant-Respondent.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Where Appellants Hyde and Brooke served the summons and complaint on the City Human Resources Director instead of the statutorily designated Mayor or City Clerk, the trial court had no jurisdiction, and as a matter of law, the statute of limitations extinguished the negligence claim, should summary judgment be affirmed? If the Court were to consider the additional issues presented on appeal, where the trial court properly applied the plain statutory language of LEOFF (RCW 41.26) determining that a non-commissioned officer is not entitled to sue his employer, and LEOFF created no spousal consortium claim, should summary judgment be affirmed? Also, where Hyde signed an enforceable liability release one day prior to his Taser training exposure, and the doctrine of express assumption of risk applies where Hyde acknowledged in writing the possibility of the specific physical injury before the Taser training, assumed “all risks,” and nonetheless chose to proceed with the Taser application, should the judgment be affirmed? The proper exercise of discretion refused inadmissible or untimely evidence and pleadings.

B. SUPPLEMENTAL STATEMENT OF THE CASE. CASE.

This case stems from Hyde’s probationary employment with the City of Lake Stevens’ Police Department (“LSPD”) in June 2009.

CP 721. On the fourth day of his conditional employment, Hyde participated in a routine Taser training exercise; the Taser application consisted of a three-second burst with a metal clip on Hyde's right shirt sleeve cuff and left leg sock while Hyde was lying on a carpet. CP 686, 722. Afterwards, he complained of a muscle-contraction related back injury, never completed his training, and never received his police commission. CP 686, 701, 722-24, 595. In late 2010, Appellants filed a negligence suit against the City. CP 1024-28, 806-08. In late August 2012, the City filed a summary judgment motion because specific statutory designees had never been served, and the three-year statute of limitations had expired. CP 818-50. Various other substantive defenses were also argued. *Id.* Oral argument was reset for the court's convenience, and on October 17, 2012, the trial court granted the City's motion. CP 238-39, 230-33. The court also granted in part and denied in part the City's evidentiary objection and motion to strike untimely pleadings. CP 227-229, 235-254, 1046. A Motion for Reconsideration was denied on November 14, 2012. CP 1-3. Additional statement of facts will be included in the Argument below. *See, Appendix hereto.*

C. SUMMARY OF ARGUMENT.

On *de novo* review, this Court should affirm summary judgment in favor of the City of Lake Stevens. Respondent City of Lake Stevens

(hereinafter “City”) respectfully requests the Court to affirm summary judgment for a myriad of reasons. First, Hyde and Brooke never properly served the City of Lake Stevens with a Summons and Complaint, thereby depriving the Court of jurisdiction in this case; the three year statute of limitations expired on August 11, 2012, prior to the date the City filed its CR 56 Motion to Dismiss. If the Court were to affirm on this basis, there is no need to review the remaining issues in this appeal.

If the Court were inclined to review the remaining issues, the summary judgment Order should still be affirmed.

- 1) Hyde is not entitled to sue his employer under RCW 41.26.281 (an “excess damages” cause of action) as he does not meet the plain statutory definition of “member” or “law enforcement officer;”
- 2) Brooke has no negligence claim against the City for loss of consortium given the legislative mandate found in Title 51 (the “Industrial Insurance” statute) prohibiting a suit against a government employer, and Title 41 (the “LEOFF” statute) limiting an “excess damages” cause of action deriving from an industrial injury to a *law enforcement or firefighter member or a specific designee*; spouses are not so designated;
- 3) The day before the Taser training injury, Hyde signed an enforceable liability release, waiving any right to bring a civil action against his employer, the City; and
- 4) Hyde’s claims are barred by the doctrine of express assumption of risk as he acknowledged the possibility of the specific physical injury before the Taser training, assumed “all risks,” and chose to proceed with the Taser application.

Additionally, the trial court properly exercised its discretion by (i)

refusing to consider supplemental pleadings and declarations that were based on inadmissible evidence and/or submitted outside the timelines of CR 56(c), and (ii) denying Hyde and Brooke's Motion for Reconsideration. Evidence highlighted by Appellants (*App. Br. 5-14, 21, 29, 38, 46*) that was stricken or refused on reconsideration should be disregarded: CP 164-184; 68-163; 303-317. *See*, CP 227-229; 1045-1046; CR 56(e). Evidence, issues and arguments raised for the first time on reconsideration should be rejected on appeal; because no assignment of error was made, the Order on reconsideration is not before the Court.

D. ARGUMENT.¹

1. The Summary Judgment Standard—Properly Applied.

This Court reviews summary judgment orders and related orders excluding evidence *de novo*. *Moore v. Hagge, et al.*, 158 Wn. App. 137, 147, 241 P.3d 787 (2010), *rev. den'd*, 170 Wn.2d 1028 (2011). In a summary judgment motion, the moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The moving defendant may do so by showing that there is an absence of evidence to

¹ Appellants waived any and all issues, theories or arguments which were not raised in the trial court as well as those not included in their Opening Brief. *See* RAP 2.5(a); *Smith v. Shannon*, 100 Wn.2d 26, 37-38, 666 P.2d 351(1983); *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447 (2001), *rev. den'd*, 145 Wn.2d 1004 (2001); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992).

support the non-moving party's case. *Id.* at 225, n. 1 (citation omitted). If the non-moving party fails to respond with a showing sufficient to establish the existence of an element essential to that party's case, then the trial court should grant the motion to dismiss. *Id.* at 225. The response *must* set forth specific facts showing that there is a genuine issue for trial. Conclusory allegations, unsupported by factual data, are insufficient to defeat a summary judgment motion. *See, e.g., Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e. information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion. *Id.* at 359. The trial court properly considered the uncontroverted record supporting the legal conclusion that defective service of process deprived the court of jurisdiction, amongst other conclusions of law.² There was no abuse of discretion in refusing late supplemental evidence/pleadings filed after the court continued oral argument. *O'Neill v. Farm. Ins. Co. WA*, 124 Wn. App. 516, 125 P.3d 134 (2004).

2. **The Court Lacked Jurisdiction Because the City Was Not Properly Served with Process.**

The following procedural facts were uncontroverted below. The

² Hyde and Brooke assert the trial court entered findings (*passim*); this Court's *de novo* review will reveal only legal conclusions were drawn by the court. Also, for clarity, the summary judgment motion based on damages is not before the Court. CP 657.

City of Lake Stevens is a Council-Mayor form of government. After filing the Complaint, on December 21, 2010, Hyde and Brooke served the City's Human Resources Director Steve Edin with the Summons and Complaint. CP 755-56, 774, 79. Prior to the statute of limitations expiring, the City Clerk was never served with a copy of the Summons and Complaint; neither the City Manager nor the Mayor was served with process. *Id.*; CP 752. No statutory designee specified by the Legislature was served (Mayor, City Manager or City Clerk). RCW 4.28.080.³

The City pled failure of jurisdiction “due to failure of service of process under state law” in its original Answer filed shortly after the suit was filed and *before* the initiation of discovery (January 18, 2011). CP 759, 430. The City pled “failure of service of process” as its first affirmative defense. CP 755, 760. The City denied that service was proper when served with Hyde and Brooke's First Set of [Requests for] Admissions (April 20, 2011). CP 755, 766. The City provided Appellants

³ See, CP 414-17, 250-53: Evidentiary Objection filed below. CR 56(e). Process server's hearsay should be disregarded as inadmissible. **Appellants neither appealed from nor assigned error to the Order granting objection to inadmissible evidence, waiving any arguments on appeal** (CP 1044-46; 1029). RAP 10.3(a)(4). Mr. Edin had no authority from his employer to make statements changing legal process on the City under state law. CP 383. Even if considered, the legal result is unchanged. *E.g., Landreville, infra* (plaintiff cannot rely on governmental employee's statement to process server that was in conflict with clear statute.); *Davidheiser, infra* (same). Hyde and Brooke may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having their affidavits considered at face value; the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists. *Seven Gables v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

with the Certification of Service showing that the City's HR Director was served when asked about service in Hyde and Brooke's First Interrogatories (April 21, 2011). CP 755, 774.

The Washington State court rules specifically direct a litigant to RCW 4.28.080 for service of process procedures: CR 4(d)(2) ("personal service of summons and other process shall be as provided in RCW 4.28.080..."). Hyde and Brooke had *one year and nine months* to cure the defective service after the City put them on notice in its Answer on January 18, 2011 (Taser application/alleged injury occurred on June 11, 2009; lawsuit filed on November 2, 2010; three-year statute of limitations expired mid-August 2012). CP 755-56, 759-60, 752-53, 806-08.

Service of process refers to a formal delivery of documents that is legally sufficient to charge a defendant with notice of a pending action. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988). Service of process is constitutional and jurisdictional; due process of law requires that defendants be afforded notice of proceedings involving their interest and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Service actually commences the lawsuit, gives the court jurisdiction, and provides a mechanism for tolling the statute of limitations. *Davidheiser v. Pierce Co.*, 92 Wn. App. 146, 152, 960 P.2d 998 (1998); *rev. den'd*, 137 Wn.2d 1016 (1999).

Service of a summons is specifically addressed by statute:

Service made in the modes provided in this section is personal service. The summons *shall be* served by delivering a copy thereof, as follows:

If against any town or incorporated city in the state, to the Mayor, City Manager, or during normal office hours, to the Mayor's or City Manager's designated agent or the City Clerk thereof.

RCW 4.28.080(2). (*emph. added*). The Washington State court rules specifically direct a litigant to RCW 4.28.080 for service of process procedures. CR 4(d)(2) ("personal service of summons and other process shall be as provided in RCW 4.28.080...").

Hyde and Brooke's arguments completely ignore decisive, controlling law, thereby requiring an order affirming summary judgment. *App. Br. 28-47*. This Court requires "strict compliance with the statutory requirements of service of process as a prerequisite to the Court's acquiring jurisdiction over a City." *Meadowdale Neighborhood Committee v. Edmonds*, 27 Wn. App. 261, 267, 616 P.2d 1257 (1980). "When a statute designates a particular person or officer upon whom service of process is to be made in an action against a municipality, no other person or officer may be substituted." *Meadowdale*, 27 Wn. App. at 264.⁴

In *Meadowdale*, the plaintiff served the mayor's secretary with a

⁴ *Citing*, 56 Am. Jur.2d Municipal Corporations, Counties, and Other Political Subdivisions § 854 (2d Ed. 1971).

summons and complaint instead of the mayor. This Court held that because strict compliance with RCW 4.28.080(2) is required, service was defective. The superior court's dismissal order for insufficient service was affirmed. *Meadowdale*, 27 Wn. App. at 271. This strict rule of law has been followed in Washington for over the last 30 years.⁵

In *Nitardy*, the Washington Supreme Court affirmed summary judgment dismissing a suit where plaintiff had erroneously served a summons and complaint on the secretary to the county executive instead of the county auditor. Strict compliance with RCW 4.28.080 was required. *Nitardy*, 105 Wn.2d at 135. Appellants make no effort to address or distinguish these cases. *App. Br. 28-47*.

a. Appellants' Arguments Misstate the Law.

Hyde and Brooke assert they served the City Clerk Norma Scott by twice providing the summons and complaint to HR Director Steve Edin. *App. Br. 41*; CP 474, 508 (process server served Scott by leaving a copy of the documents with Steve Edin), 513-14. Appellants cite to no legal authority for their transparently faulty proposition that serving the legal papers on Mr. Edin is the same as serving the legal papers on Ms. Scott; the process server acknowledges that she only served Mr. Edin. CP 474,

⁵ *Id*; *Nitardy v. Snohomish County*, 105 Wn.2d 133, 135, 712 P.2d 296 (1986); *Landreville v. Shoreline Comm. Coll. Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988); *French v. Gabriel*, 116 Wn.2d 584, 590-591, 806 P.2d 1234 (1991); *Davidheiser*, 92 Wn. App. 146, at 153-154.

508, 513-14. Hyde and Brooke's unsupported arguments ignore dispositive, settled precedent. Washington Appellate Courts require "strict compliance with the statutory requirements of service of process as a prerequisite to the Court's acquiring jurisdiction over a City." *Meadowdale, supra*, at 267. Serving an arbitrary City Director does not comply with RCW 4.28.080(2). Additionally, Appellants' reference to alleged statements of City employees should be disregarded as hearsay and as legally irrelevant. *See*, fn 3, *supra*. CP 410-29.

b. Davidheiser v. Pierce County is Dispositive.

In *Davidheiser*, the Plaintiff's process server erroneously served the summons and complaint on the County Risk Management Department instead of the statutory designee, the County Auditor. The trial court granted summary judgment. *Davidheiser*, 92 Wn. App. at 153-154. The Court of Appeals held that service on the County's Risk Management Department rather than the County Auditor was insufficient; defective service required dismissal. *Id.* The judgment was affirmed. *Id.* at 156.

Davidheiser asserted that a legal secretary called the County Risk Management's Office to find out who was the correct person to serve, and an unidentified person directed them to the Risk Management Department. In response to a summary judgment motion based on insufficient service of process, the Plaintiff argued that the Risk Management Department

accepts claims for damages, so service of process should be considered effective as against the County. Plaintiff also argued that the County should be estopped from challenging service because of the statement made by the unnamed person at Risk Management. Last, Plaintiff argued that the County had waived the defense by participating in discovery after filing its Answer. *Davidheiser*, 92 Wn. App. at 148-153. Hyde and Brooke make identical arguments in this case. *App. Br. 41-47, 6-7*. The Court of Appeals swiftly rejected all three arguments.

The *Davidheiser* court explained that because the statute clearly specifies who should be served, such is controlling. First, the court determined the designee for claim filing should not be construed as the same person for service of process. And like the City of Lake Stevens, because the County had not designated any separate agent to receive service of process, the specific statutory language had to be followed. *Id.* at 150-52. Second, the court determined there was no estoppel: it was unreasonable to rely on a government employee instead of the statutory language. *Id.* at 153-55. Last, the court expressly rejected the waiver argument based on engaging in routine discovery following a timely filing and service of an Answer asserting insufficiency of process. *Id.* at 155-56 (*citing French*, 116 Wn.2d at 594.)

Here, service of the Summons and Complaint on the “HR

Director” is defective service as a matter of law. As the City Clerk made clear, the HR Director is not authorized by the City to accept service of process. CP 753. Service must be effected on the City Clerk, the City Administrator, or the City Mayor. None of this occurred, even after the City notified Hyde and Brooke in its Answer of this defect. CP 755, 759.

The three year statute of limitations began to run on June 11, 2009 when Hyde was provided a Taser application in training, and knew of the basis for his claims. This lawsuit was filed on December 13, 2010. CP 1024-28. The City filed an Answer pleading defective service on January 19, 2011. CP 1013-17. Appellants’ failure over the ensuing 17 (seventeen) months to remedy this obvious defective service is fatal. The statute of limitations expired in mid-August 2012 thus depriving the court of jurisdiction. Summary judgment was proper. There is no discretion.

c. Landreville Controls Estoppel/Reliance Argument.

Appellants argue service is proper if someone at the City asserts they are qualified to accept service of process. *App. Br. 45, 6-7.* CP 414-415. This Court previously rejected the same argument, holding that service on the administrative assistant to the Attorney General was defective even though the administrative assistant told the process server she was authorized to accept service. *Landreville*, 53 Wn. App. at 331-322, *citation omitted*. Strict compliance with service of the statutory

designee is required to obtain jurisdiction. “When the Legislature has acted reasonably in naming one person or officer to have the responsibility for receiving service of process, service upon anyone else is insufficient.” *Id.* “Actual notice [of the lawsuit] standing alone, is not sufficient.” *Id.*

This Court summarily dismissed estoppel arguments based on the statements the administrative assistant allegedly made to the process server. “In light of the clear language designating the proper recipient for service of process, any reliance upon the process server’s statements regarding the administrative assistant’s authority was not reasonable.” *Landreville*, 53 Wn. App. at 332. The defective service required dismissal; summary judgment was affirmed. *Id.*⁶

Improperly serving the City’s HR Director twice does not satisfy the legislative mandate. *App. Br. 40-41, 45-46*. The HR Director denies making any assertion that he was authorized to accept service, and in fact informed the process server that he was NOT authorized;⁷ but even if the Court assumes Hyde’s assertions to be true for the limited purposes of this appeal, such does not require a different result based on over thirty years of precedent. Summary judgment should be affirmed.

⁶ The Washington Supreme Court agreed with this Court’s reliance analysis when it decided *Lybbert v. Grant*, 141 Wn.2d 29, 36-37, 1 P.2d 1124 (2000)(“The *Landreville* case, with which we are in agreement, is particularly illustrative of the point that the Lybberts’ reliance was not justifiable.”)

⁷ *See*, CP 430, 434, 383.

d. Appellants' Reliance on *Lybbert* is Misplaced.

Appellants' circular argument regarding the statute of limitations is immaterial to the City's jurisdictional argument. *App. Br. 40-42*. At the time the City filed its Answer, the statute had not yet expired and thus the statute of limitations affirmative defense was not pled.⁸ After the City filed its summary judgment motion, and after the statute had expired, Hyde's eleventh hour effort (September 4, and 24 2012) to cure the defective service by serving yet another copy of the summons and complaint -- for the first time on the City Clerk and later the Mayor -- did not resurrect the cause of action. *App. Br. 41*.⁹

Appellants cite to the factually distinguishable *Lybbert* case in an effort to shift the focus from their own patent failure of service and to instead argue the City's litigation tactics are to blame. *App. Br. 42-44*.¹⁰ Although the *Lybbert* case was decided adversely to the County, the Court's rationale was not based on *estoppel*, but rather on the principal of waiver. The County in *Lybbert* never filed an Answer until the statute of limitations had expired. *Lybbert*, 141 Wn.2d at 33. In *Lybbert*, the auto accident in question occurred in early 1993. Plaintiffs filed their lawsuit

⁸ The statute of limitations for personal injury actions is three years. RCW 4.16.080(2); *Nelson v. Schnautz*, 141 Wn. App. 466, 170 P.2d 69 (2007), *rev. den'd*, 163 Wn.2d 1054. Appellants agree that the applicable statute of limitations is three years. *App. Br. 28*.

⁹ CP 474, 567; CP 318, 330, 331. See discovery rule argument below.

¹⁰ *Lybbert*, 141 Wn.2d 29, 1 P.3d 1124 (2000).

in August 1995. In informal conversations, a County attorney represented that the County was preparing an Answer. In February 1996 Plaintiffs served the County with interrogatories asking if the County was going to be relying on the affirmative defense of insufficient service of process; the County failed to respond to this discovery request.¹¹ In late June 1996, ten months after the lawsuit was filed, the County finally served its Answer asserting defective service as an affirmative defense. The County followed by filing a motion for summary judgment on the same basis. *Id.*

The *Lybbert* Court explained, “waiver can occur in two ways:”

It can occur if the defendant’s assertion of the defense is inconsistent with the defendant’s previous behavior. It can also occur if the defendant’s counsel has been dilatory in asserting the defense.

Id. at 39 (internal citations omitted). Neither of these circumstances occurred here. The City neither engaged in discovery or other litigation before asserting its defense, nor delayed in asserting its defense.

By stark contrast to *Lybbert*, it is undisputed that Hyde and Brooke’s lawsuit was filed on November 2, 2010; the City’s Answer was filed a few months later on January 18, 2011 *before any discovery had commenced*. CP 755, 759-63, 430. The coalescence of CR 4(d)(2), RCW 4.28.080(2), common law, the City’s early denial of jurisdiction in its

¹¹ Here, the record shows Mr. Lopez never sent a letter to defense counsel inquiring about service of process. Instead, the City was globally asked to withdraw all of its objections and there was no follow-up communication. (*App. Br. 9, 44*). CP 430, 474, 555.

Answer (01/18/2011), the City's first affirmative defense in its Answer, the City's denial that service was proper when asked to admit the same by Appellants (4/20/2011), and the City's production of the process server's declaration showing the HR Director and not the Mayor, City Manager or City Clerk was served with process (CP 774) all lead to the irrefutable legal conclusions: Appellants were provided ample and early notice of the defective service; the City properly preserved and asserted this defense.

e. **French Controls Waiver Argument.**

Appellant's case is more comparable to *French v. Gabriel*, 116 Wn.2d 584, 588-94. There, the Court rejected plaintiff's arguments that under the facts of the case, the defendant waived the defense of defective service. *Id.* Hyde and Brooke completely ignore *French* because it defeats their arguments. *App. Br.* 40-47. In *French*, the defendant asserted insufficiency of process in his Answer, and then engaged in routine discovery. *Id.* at 587-88. Plaintiff argued that the defense had waived the insufficient service of process defense by "filing an untimely answer, objecting to the trial date, taking a deposition, and consenting to amendment of the complaint." *Id.* at 594. The *French* Court disagreed, holding the defendant preserved the defense by pleading it in its answer *prior* to objecting to the trial date, taking a deposition, and consenting to amendment of the complaint. *Id.* Even though the defense delayed six

months, there was no waiver as the Answer “was filed more than a year before the statute of limitations extinguished the plaintiff’s claim.” *Lybbert*, 141 Wn.2d at 44 (discussing *French*, 116 Wn.2d at 593-94).

No waiver occurred in this case because the Answer asserting insufficiency of process was filed and pled *prior* to engaging in discovery or seeking a new trial date; and the Answer was filed one year and nine months before the statute of limitations extinguished Hyde and Brooke’s claim. Like the plaintiff in *French*, Appellants had well over a year to “attempt to correct the insufficient service after [defendant] raised the defense in [its] answer.” *French*, 116 Wn.2d at 595.

Hyde and Brooke additionally contend that litigating the case *after* timely serving its Answer constitutes waiver. *App. Br. 46-47*. These arguments have also been rejected. The City’s appearance in the suit and protecting itself after asserting the defense does not constitute waiver. *Lybbert*, 141 Wn.2d at 41, 43. This Court has also rejected waiver and estoppel arguments where insufficiency of process was timely pled in the Answer and discovery was pursued on the merits thereafter: “[i]t would be foolish for the defendant to forgo discovery on the merits of the case.” *Clark v. Falling*, 92 Wn. App. 805, 815, 965 P.2d 644 (1998).

f. **Hyde and Brooke Cannot Cure the Defect by Clinging to a “Discovery Rule” Argument.**

This Court should categorically refuse Appellants’ effort to

resurrect the negligence claim that extinguished in mid-August 2012 when the three-year statute of limitations expired, by urging the Court to carve out a new judicially created discovery rule for a simple negligence case. *App. Br.* 28-37. The trial court properly concluded that no authority supports providing this limited exception to the three-year statute of limitations for negligence claims under Hyde's admitted facts.¹²

Hyde admits that on June 11, 2009 he received the training Taser application and immediately felt back pain; on that same day, he complained of injury, saw a physician for the pain, and filed a claim for injuries with the Department of Labor and Industries alleging that the pain was caused by the Taser application. CP 460, 49, 457, 686, 701. Thus, the

¹² Appellants spend two and a half pages arguing a negligent misrepresentation claim was improperly dismissed (*App. Br.* 37-40), yet no such claim was pled or argued in response to the City's motion. CP 1026-28; 196-98; & 459-72. It was raised and rejected for the first time on reconsideration. CP 186, 189-190, 25, & 1. **Appellants assigned no error to the court's Order on reconsideration (nor did they brief the issue), and thus waived any argument on appeal** (*App. Br.* 1-2). RAP 10.3(a)(4). *Matheson v. Gregoire*, 139 Wn. App. 624, 638, 161 P.3d 486, 494 (2007), *rev. den'd* 163 Wn.2d 1020 (2008), *cert. den'd*, 189 S. Ct. 197 (2008); 3 Wash. Prac., Rules Prac. RAP 10.3 (7th ed. 2008) ("Generally, the appellate court will only review a claimed error which is included in a properly drafted assignment of error.") If preserved, an order denying reconsideration following summary judgment is reviewed for a manifest abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010), *rev. den'd*, 170 Wn.2d 1019 (2011); CR 59(a). New claims and arguments are properly refused on reconsideration. Tegland, 14A Wash. Prac., § 22.25 (2012). Parties are not entitled to advance alternative legal theories on reconsideration. *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005), *rev. den'd*, 157 Wn.2d 1022 (2006). "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised *before* entry of an adverse decision." *Id.* Last, evidence is properly refused on reconsideration following summary judgment, that could have been previously submitted; such does not provide a basis for reconsideration. *Sligar*, 156 Wn. App. at 734; *Wagner v. Fidelity & Dep.*, 95 Wn. App. 896, 907, 977 P.2d 639 (1999), *rev. den'd*, 139 Wn.2d 1005 (1999).

negligence cause of action began to accrue on June 11, 2009.

i. Hyde's negligence claim accrued on June 11, 2009.

In a traditional negligence case, the statute of limitations begins to run at the time of injury whether or not the litigant is aware of the particular legal basis or theories for negligence. “In personal injury actions, the cause of action ordinarily accrues when the injury is suffered, since it usually coincides with the defendant’s negligent act and the plaintiff’s awareness of injury.” 16 Wash. Prac., Tort Law and Practice § 9.2 (3rd ed.). Appellants’ contrary arguments are legally erroneous. *App. Br. 29*. See e.g., *In re Estates of Hibbard*, 118 Wn.2d 737, 744, 826 P.2d 690 (1992), *rev. den'd*, 135 Wn.2d 1011 (1998) (“The general rule in ordinary personal injury actions is that a cause of action accrues at the time the act or omission occurs.”); *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 602-03, 123 P.3d 465 (2005), *rev. den'd*, 155 Wn.2d 1012 (2005)(“Generally, accrual of the statute of limitations begins at the time the act or omission causing the tort injury occurs”).¹³

The discovery rule is a limited exception to the general accrual rule, and may apply where “...injured parties do not, or cannot, know they

¹³ See also, *Hamilton v. Arriola Bros.*, 85 Wn. App. 207, 211, 931 P.2d 925 (1997) (discovery rule is the exception to the general rule in ordinary personal injury case that the cause of action accrues at the time the act or omission occurs); *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn. App. 176, 190, 222 P.3d 119 (2009) (trial court properly found that cause of action accrued at time of injury and was barred by statute of limitations).

have been injured.” *Estates of Hibbard* at 744, 749. “Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting, or concealment of information by the defendant.” *Id.* at 749-50. Hyde and Brooke cite to the *Hibbard* case, but omit this predatory language. *App. Br. 29. Hibbard* involved a parolee wrongful death, rape and negligence case where the Supreme Court held the discovery rule did *not* apply: the discovery rule is an “exception” to “[t]he general rule in ordinary personal injury actions...that a cause of action accrues at the time the act or omission occurs.” *Id.* at 744-45.

Hyde and Brooke have not provided any authority demonstrating any case, let alone a factually analogous case, to support the application of the discovery rule under the clear cut facts at bar. *App. Br. 29-37.*¹⁴ Even if this Court were to entertain an analysis of the discovery rule, Appellants’ fail to demonstrate its applicability. This Court has made clear that “[t]he plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period.” *E.g., Clare*, 129 Wn. App. at 603 (summary judgment rejecting discovery rule affirmed where

¹⁴ Appellants cite to factually distinguishable *Green v. APC*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998)(pre-birth injury where fetus was exposed to debilitating toxic chemical not easily discovered as an adult before statute of limitations expired). (*App. Br. 29*).

plaintiffs had sufficient knowledge of lung disease allegedly caused by industrial exposure within 3-year limitations period (products liability and negligence claims)); *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), *rev. den'd*, 161 Wn. 2d 1005 (2007) (3-year limitations for contract claim accrual applied regardless of difficulty in discerning breach). Here, reasonable minds can reach but one conclusion: Appellants had sufficient knowledge of post-Taser pain and injury such that they have failed their burden to demonstrate due diligence necessary to apply the discovery rule. .

ii. Hyde fails his burden to show discovery rule applies.

The cases cited to the trial court for the first time on reconsideration, and now on appeal, are inapposite and should be rejected. *See* fn 1, 13 *supra*. *App. Br.* 30-36; CP 190-96. *North Coast Air v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988) is a product liability/plane crash case governed by RCW 7.72.060(3)¹⁵ and thus easily distinguishable. *North Coast's* holding is limited to product liability claimants: “We conclude that the claimant in a product liability case must have discovered, or in the exercise of due diligence should have

¹⁵ “...no claim under this chapter may be brought more than three years from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause.” RCW 7.72.060(3) (Title 7.72, et seq., Product Liability Actions (enacted in 1981 following the *Ohler* decision)).

discovered, a factual causal relationship of the product to the harm.” *Id.* at 319. Product liability cases trigger the discovery rule as judicially pronounced in *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 598 P.2d 1358 (1979).

The other cases outlined by Hyde and Brooke are factually and legally distinguishable. *App. Br.* 32-36. Those cases primarily involve product liability claims and medical malpractice claims and not simple personal injury negligence claims such as in Hyde’s case; the results are at variance depending on the nature of the claim. *Tyson v. Tyson*, 107 Wn.2d 72, 727 P.2d 226 (1986) (no discovery rule in child rape case with suppressed memory allegation); *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969) (discovery rule applied in medical malpractice case); *Ohler*, 92 Wn.2d 507 (discovery rule applied in product liability case); *Sahlie v. Johns-Mansville Corp.*, 99 Wn.2d 550, 663 P.2d 473 (1983) (discovery rule applied in product liability case).¹⁶ Appellants’ case is easily distinguishable, and in fact alleges a theory that is specifically discussed in these cases as not invoking the discovery rule: alleged operator error (negligence) of equipment does not invoke the rule. *E.g.*, *North Coast*, 111 Wn.2d at 317, 322.

¹⁶ These cases are discussed at length by the dissent in *North Coast Air*, 111 Wn.2d 315, 330-337, by both the majority and dissent in *Tyson*, 107 Wn.2d 7 (1986), and are analyzed by the *Estates of Hibbard* court. 118 Wn.2d at 745-49.

Appellants' reference to the *Allen* case is equally misplaced and does not involve a garden variety negligence/personal injury case premised on alleged operator error of equipment. *App. Br.* 35-37. *Allen v. State*, 118 Wn.2d 753, 758-60, 826 P.2d 200 (1992) (negligent parole wrongful death case). There, the Court held as a matter of law that the discovery rule did *not* save a wrongful death cause of action from being barred by the statute of limitations because the plaintiff had not filed her lawsuit within three years of discovering the basis for the claim, and she failed to exercise due diligence to discover the basis for her cause of action (1979 murder and 1985 lawsuit). *Id.* Contrary to Appellants' assertion (*App. Br.* 35), the Supreme Court assumed, without deciding, the threshold issue of whether the discovery rule applied in the first instance; the parties on appeal effectively stipulated to its application. *Id.* at n.4. Instead, the Court referred to the *Hibbard* decision that was decided during the same term regarding applicability of the discovery rule. *Id.*¹⁷

Even if the Court determines the City was properly served and the statute of limitations did not expire so as to extinguish Appellants'

¹⁷ The *Allen* Court stressed that the "key consideration under the discovery rule is the factual, not the legal, basis for the cause of action." *Id.* at 758. If the Court were to accept Hyde's arguments, it would be abdicating control over the timing of accrual of a garden variety negligence claim, triggering the running of the statute of limitations clock, and placing the control of these critical aspects to individual plaintiffs and legal consultation. Delay and uncertainty would be the norm, and the ability to defend, gather witnesses and preserve evidence would be impeded by the staleness of the claim. Such should be categorically rejected.

negligence claim, alternative grounds exist to affirm summary judgment.

3. **As a Non-Commissioned Probationary Officer, Hyde Was Not Entitled To Sue the City. RCW 41.26.281.**

Hyde's right to sue arguments seek to ignore plain statutory language with no need of judicial interpretation. *App. Br. 13-21*. "Statutory interpretation begins with the statute's plain meaning, that we discern from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole." *Ent v. WSCJTC*, 2013 WL 1808243 at 2 (04/29/13) (*citations omitted*). "If the statute's meaning is unambiguous, our inquiry ends." *Id.* Statutory interpretation is a question of law reviewed *de novo*. *Id.* *Accord, Adams et. al v. City of Seattle Dept. Ret. Systems*, ___ Wn. App. ___, 294 P.3d 774 (2013). The Washington Supreme Court has already determined: "Since the language of [LEOFF] is plain and unambiguous, this Court may determine the meaning of the statute from the words themselves without judicial construction or interpretation." *Fray v. Spokane County*, 134 Wn.2d 637, 651, 952 P.2d 601 (1998). Likewise, this Court has reviewed LEOFF several times, and has always applied the plain language of the statute as written. *Adams*, 294 P.2d 774; *Locke v. City of Seattle*, 133 Wn. App. 696, 711, 137 P.3d 52 (2006), *aff'd*, 162 Wn.2d 474 (2007); *Hansen v. City of Everett*, 93 Wn. App. 921, 926, 971 P.2d 111 (1999), *rev. den'd*, 138 Wn.2d 1009.

On June 2, 2009, the City provided a conditional offer of employment to Hyde as a city police officer *contingent* upon obtaining a certification as a peace officer by meeting all requirements of RCW 43.101.200; this requirement included successful completion of basic training, among other conditions. CP 721-22, 728-29. By statutory requirement, “[a]ll law enforcement personnel...shall engage in basic law enforcement training which complies with standards adopted by the commission pursuant to RCW 43.101.080.” RCW 43.101.200(1).¹⁸ A “peace officer” means “any law enforcement personnel subject to the basic law enforcement training requirement of RCW 43.101.200 and any other requirements of that section...” RCW 43.101.010(11).

Hyde’s first day of conditional employment was June 8, 2009. CP 722. The Taser training application occurred three days later on June 11, 2009. *Id.* Before or after that date, Hyde never worked as a full-time commissioned law enforcement officer in Washington. *Id.* Prior to the Taser application, Chief Celori had not sworn in Hyde or provided him with a LSPD commission card. CP 722-23. After the Taser application, Hyde was provided clerical modified duty while he was recuperating from surgery. CP 723.

Ordinarily an employer is immune from suits filed by most

¹⁸ The “commission” means “the Washington state criminal justice training academy.” RCW 43.101.010. *See general discussion of CJTC in Ent*, 2013 WL 1808243 (2013).

employees, and the worker's compensation statutory scheme provides the exclusive remedy in such cases. Pertinent to Hyde's negligence claim, the Legislature has created a general prohibition against suing an employer in negligence for a workplace injury. RCW 41.26.270 (civil actions abolished); RCW 41.26.020 (purpose); *see also*, RCW 51.04.010 *et seq.* (industrial insurance/jurisdiction of courts abolished).

“The Industrial Insurance Act is based on a compromise between workers and employers, under which workers become entitled to speedy and sure relief, while employers are immunized from common law responsibility.” *Flanigan v. Labor and Industries*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994).¹⁹ Common law claims seeking compensation from an employer for injury to an employee are barred unless a statute specifically affords the right to sue. *E.g.*, *Garibay v. State*, 130 Wn. App. 1042, 128 P.3d 617 (2005), *rev. den'd*, 158 Wn.2d 1017 (2006) (court properly dismissed claim against DLI for failure to enforce safety regulations).

a. **LEOFF's excess damages claim exception does not apply.**

In Hyde's case, such statutory right to sue is theoretically provided

¹⁹*E.g.*, *Shellenbarger v. Longview Fibre Co.*, 125 Wn. App. 41, 103 P.3d 807 (2004), *rev. den'd*, 154 Wn.2d 1021 (2005) (court properly dismissed claim against employer for injuries caused by exposure to asbestos); *Judy v. Hanford Environ. Health Found.*, 106 Wn. App. 26, 22 P.3d 810 (2001), *rev. den'd*, 144 Wn.2d 1020 (2001)(court properly dismissed claim against employer based upon statute; employee failed to establish intentional or deliberate injury); *Meyer v. Burger King Corp.*, 144 Wn.2d 160, 26 P.3d 925 (2001) (the Act abolishes most civil actions arising from on-the-job injuries and replaces them with the exclusive remedy of industrial insurance benefits).

for by LEOFF. RCW 41.26. Such governs the distribution of retirement and disability benefits for specified police officers and firefighters. In 1969, the Legislature established LEOFF. *Adams*, 294 P.3d at 776; *Fray*, 134 Wn.2d at 643. In 1971, the Legislature amended LEOFF, giving plan *members* the right to sue their governmental employers in negligence for “excess damages:”

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

RCW 41.26.281. *Fray*, 134 Wn.2d at 643-44. Also in 1971, all LEOFF members were removed from coverage under the Industrial Insurance Act. *Id.* This 1971 amendment provided “greater benefits to injured police officers and fire fighters than they would receive under the worker’s compensation system. *Fray*, 134 Wn.2d at 643.

In 1977, the Legislature again amended LEOFF, this time providing that Plan 2 members were now eligible for industrial insurance benefits. *Id.* at 644; RCW 41.26.480. Uniquely, LEOFF provides eligible police officers with an actuarial reserve system for sure and certain recovery *and* affords them a right to sue an employer in negligence for excess damages. *Hansen*, 93 Wn. App. at 926. As amended, this

exception to the general prohibition, allows a "... police officer [to] sue his employer under LEOFF only 'for any excess of damages over the amount received or receivable' through worker's compensation." *Locke v. City of Seattle*, 162 Wn.2d 474, 485, 172 P.3d 705 (2007).

b. Hyde was not a LEOFF member on injury date.

The Legislature defines "Member" as follows:

"Member" means any firefighter, **law enforcement officer**, or other person as would apply under subsections (16) or (18) of this section whose membership is transferred to the Washington law enforcement officers' and firefighters' retirement system on or after March 1, 1970, and every law enforcement officer and firefighter who is employed in that capacity on or after such date.

RCW 41.26.030(20) (*emph. added*).

The Legislature defines "law enforcement officer" as follows:

"Law enforcement officer" beginning January 1, 1994, means any person who is **commissioned** and employed by an employer on a full time, fully compensated basis to enforce the criminal laws of the state of Washington generally...

RCW 41.26.030(18) (*emph. added*).²⁰

The Department of Retirement Systems, charged with administering LEOFF, has also promulgated an administrative code provision governing the definition of "law enforcement officer."

You are a law enforcement officer **only if you are commissioned** and employed on a full-time, fully compensated basis as a:

(i) City police officer;...

²⁰ This definition was recently discussed by this Court in a different context and provided its plain meaning. *Adams*, 294 P.3d at 778.

WAC 415-104-225(1)(i) (*emph. added*). CP 723, 740. Hyde’s argument that WAC 415-02-030(24) dictates a contrary result is unsupported by the statutory scheme as a whole. *App Br. 14*. The membership definition found in WAC 415-12 refers the reader back to 41.26 RCW with the definitions that are provided above.

c. Hyde was not a commissioned officer on injury date.

As of June 11, 2009 (the day of the alleged injury), Hyde was not commissioned and was therefore not a “law enforcement officer.”

“Commissioned” means that an employee is employed as an officer of a general authority Washington law enforcement agency and **is empowered by that employer to enforce the criminal laws of the state of Washington.**

WAC 415-104-011(1) (*emph. added*). CP 723, 738.

Because Chief Celori had not yet sworn in or commissioned Hyde, he was not empowered by his employer to enforce the criminal laws of the state of Washington.²¹ CP 722-23. Though Hyde *argues* otherwise, he presented no admissible evidence in opposition to summary judgment that he was commissioned by LSPD on June 11, 2009. *App. Br. 13-14*. CP 579-80. *The City candidly acknowledged it erroneously enrolled Hyde in DRS/LEOFF retirement before Celori swore Hyde in as an officer.* CP 384. The City’s mistaken belief it could enroll Hyde in DRS/LEOFF

²¹ This court recently noted that membership in LEOFF for police officers began when they were sworn in as a police officer. *Adams* 294 P.3d at 779-80.

benefits does not control the Court's *de novo* statutory construction analysis. *E.g.*, *Hauber v. Yakima Co.*, 147 Wn.2d 655, 664, 56 P.3d 559 (2002). Hyde's untimely, self-serving, conclusory *third* declaration -- filed on reconsideration and disregarded by the court as not newly discovered evidence -- asserting that he received a commission card at the time of hire, contradicted his *second* declaration and does not create a genuine issue of material fact. *App. Br. 21*; CP 1, 164, 348, 579, 13-28. *See*, fn 13 *supra*; *Grimwood*, 110 Wn. 2d at 359.

While Hyde was working light duty in August 2009, the Basic Law Enforcement Academy (BLEA) Commander of the Washington State Criminal Justice Training Commission (WSCJTC) emphasized: "Officer Hyde may not perform the full duties of a peace officer until he has completed the equivalency academy." CP 711, 715, 678-83.

An August 26, 2009 email from the BLEA Commander emphasized that Hyde had no authority to perform police duties, to include exercising patrol or arrest powers: "Until he attends the equivalency academy, he would not be considered a certified peace officer." CP 711, 717, 678, 681. LSPD Commander Lorentzen replied with an e-mail stating, "...we do understand Hyde would not be a certified peace officer and will not be exercising any powers until he is done with the academy." CP 711, 717. Hyde did not complete the WSCJTC equivalency academy

and obtain his WSCJTC peace officer certificate until January 15, 2010, approximately seven months after the June 2009 training incident at issue. CP 712, 719-20. LEOFF provides: “No person who is serving in a position that is basically clerical or secretarial in nature, and who is not commissioned shall be considered a law enforcement officer.” RCW 41.26.030(18)(a). *Accord*, WAC 415-104-225(1)(e)(i) (“You are not a law enforcement officer if you are employed in a position that is clerical or secretarial in nature and you are not commissioned.”)²²

Because Hyde does not fall within the definition of “member” or “law enforcement officer” as provided by the Legislature in LEOFF, he is not afforded the right to sue his employer.

d. Hyde’s contrary arguments are unavailing.

Hyde’s cursory arguments regarding his June 11, 2009 legal status under LEOFF both overstate the scope of Request for Admission No 8, and understate the complexity and breadth of LEOFF. *App. Br. 1, 3, 13-*

²² *Contra, Locke*, 162 Wn.2d at 483-485 (firefighter in training entitled to bring negligence action against City seeking recovery for injuries and excess damages suffered as a proximate cause of training exercise due to the specific statutory and WAC definition of “firefighter”). Although Hyde has waived any arguments in this regard by not urging them below or in his Opening Brief (*see* fn 1), the material distinction between Hyde’s and Locke’s case is the plain statutory definitions. Under LEOFF, a firefighter need only serve “...in a position which requires passing a civil service examination for firefighter, and who is actively employed as such.” *Locke*, 162 Wn.2d at 483, *citing*, RCW 41.26.030(4)(a). *Compare*, Legislature’s and DRS’ definitions for a “law enforcement officer,” which specifically require a commission and the power to enforce criminal laws in the State of Washington. Moreover, Locke had already successfully passed the City of Seattle Public Safety Civil Service Commission fire fighter examination prior to the training injury at issue. *Id.* at 484. Here, it is undisputed that Hyde did not complete the WSCJTC academy until seven months after his Taser training. CP 722-24.

20. The City never admitted Hyde's injuries were "covered." CP 517, 766. RCW 41.26, *et seq.* provides a complex statutory scheme which, among other things, defines who is eligible and not eligible for benefits, specifies under what circumstances a member can sue his or her employer, and directs Plan 2 members to Title 51 for Industrial Insurance Act workers' compensation benefits. RCW 41.26.005, *et seq.*; 41.26.410, *et seq.*; 41.26.030 (18) (a)-(d)); and 41.26.480 ("...[Plan 2] members shall be eligible for industrial insurance as provided by Title 51 RCW, as now or hereafter amended, and shall be included in the payroll of the employer for such purpose.") *Fray*, 134 Wn.2d at 648. Hyde's arguments regarding the import of RFA No. 8 provide at best, a red herring. *App. Br. 13*; CP 517.

The City agrees that RCW 41.26, *et seq.* applies to evaluate Hyde's case and injury, and that he is eligible to receive Title 51 workers' compensation benefits as directed by RCW 41.26.480; the statutes are read together.²³ However, the City has in fact always asserted and maintained that Hyde was a non-commissioned probationary employee as of the date of his Taser application, and the City was entitled to Title 51 immunity found in the Industrial Insurance Act. CP 755, 759-60, 766, 832-36.

Additionally, Hyde's arguments and inadmissible evidence

²³ Courts have construed the LEOFF 2 benefits scheme to reconcile Ch. 41.26 RCW (LEOFF) with Title 51 RCW (L & I) and give effect to both. These two statutes "are complimentary not conflicting." *Fray*, 134 Wn.2d at 649; *Hansen*, 93 Wn. App. at 926.

concerning LEOFF as a remedial statute were submitted for the first time on reconsideration and provide no basis to overturn summary judgment. *App. Br. 13-17*; CP 198-204. *See, fn 1, 3, 13 supra*. Hyde’s attempt to make an end run around well-established principles of statutory interpretation should be rejected. Hyde states a general proposition that because LEOFF is a “remedial statute,” it must be construed liberally to ignore the definitions. *App. Br. 17*. Hyde’s proposal goes too far. “If a term is defined in a statute, that definition is used.” *Cowiche*, 118 Wn. 2d at 813. Hyde’s argument flies in the face of well-established case-law holding that an unambiguous statute is not subject to judicial construction in the first instance. *Ent*, 2013 WL 1808243, at 2; *Fray* 134 Wn.2d at 651; *see also, Home Street, Inc. v. State, Dept. of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009)(“...plain language does not require construction.”).²⁴ Mere analysis of LEOFF does not *ipso facto* open the door to liberal statutory construction. *E.g., Olesen v. State*, 78 Wn. App. 910, 915, 899 P.2d 837 (1995) (“remedial” should only be used to address law of remedies, and RCW 41.26 amendments do not necessarily implicate remedies; remarried “widow” was not entitled to benefits).

Indeed, the Washington State Supreme Court recently addressed the issue of statutory construction in the context of a statute that amicus

²⁴ *Accord;* *Jongeword v. BNSF*, 174 Wn.2d 586, 278 P.3d 157 (2013); *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66, 69 (2002).

alleged to be remedial: “Neither a liberal construction nor a strict construction may be employed to defeat the intent of the legislature, as discerned through traditional processes of statutory interpretation.” *Estate of Bunch v. McGraw Res. Center*, 174 Wn.2d 425, 435, 275 P.3d 1119 (2012). Because the statutory language and definitions are unambiguous, the Court’s inquiry ends. *Id.*; *Ent*, 2013 WL 1808243 at 2. Hyde’s invitation for the Court to completely ignore the Legislature’s own definitions (“regardless of any statutory definition,” *App. Br. 17*), is not prompted by any method of statutory construction.

Hyde primarily relies on an anomalous Division Three case with dissimilar facts to advance his argument. *Newlun v. Department of Ret. Syst.*, 53 Wn. App. 809, 770 P.2d 1071 (1989), *rev. den'd*, 113 Wn.2d 1014. There, the Court highlighted an actual conflict between two sections of LEOFF regarding the definition of “member” and eligibility to apply for disability retirement benefits. *Id.* at 821. No such actual conflict has been identified by Hyde, rendering the *Newlun* case irrelevant to Hyde’s ineligibility to sue under RCW 41.26.281. The plain meaning of “member” and “law enforcement officer” dictates dismissal of Hyde’s negligence claim. The summary judgment Order should be affirmed.

4. **Brooke (Hyde’s Wife) Has No Loss of Consortium Claim Arising From Her Husband’s Workplace Injury.**

Brooke’s loss of consortium arguments also call for the Court on

de novo review to apply established principles of statutory construction. *App. Br. 21-23*. Over a hundred years ago, the Legislature enacted the Industrial Insurance Act and abolished personal injury suits by employees against employers. RCW 51.04.010.²⁵ In 1971, the same year the Legislature granted LEOFF members a right to sue their employers for negligence, it separately “**abolished civil causes of actions for personal injury against their governmental employers ‘except as otherwise provided in this chapter.’**” *Fray*, 134 Wn.2d at 644; RCW 41.26.270 (*emph. added*). Currently, LEOFF provides the exclusive remedy for industrial injuries for injured law enforcement officers regarding wage loss, medical bills, and disability benefits. *Flanigan*, 123 Wn.2d at 422.

By its express terms, RCW 41.26.481 -- a statutory exception to the ordinary prohibition against suing the government employer for workplace injuries -- does not provide a cause of action for a living member’s spouse for loss of consortium; the spouse is not listed as a person who can sue the employer. RCW 41.26.481 (**member, the widow, widower, child, or dependent of the member**). This legislative expression is consistent with the well-established rule that an employee

²⁵Enacted in 1911, the Industrial Insurance Act, Title 51 RCW, establishes compulsory state industrial insurance that provides swift compensation to injured workers to the exclusion of every other remedy. *McIndoe v. Dep’t of Labor & Indus.*, 144 Wn.2d 252, 256, 26 P.3d 903 (2001); *Hildahl v. Bringolf*, 101 Wn. App. 634, 640, 5 P.3d 38 (2000), *rev. den’d*, 142 Wn.2d 1020 (2001).

cannot sue the employer and neither can the employee's spouse.

An employee cannot sue the employer and neither can the employee's beneficiaries. **Thus, an employer is immune from a suit brought by an employee's spouse**, not only when the spouse is attempting to recover damages suffered by the employee, but also when the spouse suffers separate and distinct damages, such as a loss of consortium.

Flanigan, 123 Wn.2d at 423 (*emph. added*); *citing, Provost v. P.S.P. & L. Co.*, 103 Wn.2d 750, 756, 696 P.2d 1238 (1985), *et al.*²⁶

The Legislature's omission of "spouse" as a statutory beneficiary under LEOFF is intentional and the result sound; the member's family is generously provided for by the interplay between Title 41 and Title 51 and the accompanying myriad of rich benefits.²⁷ *E.g., Gillis v. City of Walla Walla*, 94 Wn.2d 193, 616 P.2d 625 (1980) (injured firefighter entitled to excess damages beyond the amount received or receivable in time loss payments, medical payments and disability retirement benefits); *Locke*, 162 Wn.2d at 485 (same). A husband or wife is a statutory beneficiary under Title 51 for worker's compensation benefits. RCW 51.08.020. The Legislature increases time loss payments and permanent disability benefits

²⁶ "[A] loss of consortium action by the 'deprived spouse' will not be recognized if action for the underlying injury to the impaired spouse cannot be brought or is prohibited or abolished." WPI 32.04 cmt., Wash. Pract. Vol. 6, p. 371 (5th ed. Supp. 2011), *citing, Provost* (worker's compensation exclusive remedy; barred action for loss of consortium).

²⁷ *E.g.*, time loss payments (RCW 41.26.480; 51.32.060), medical service payments (RCW 41.26.150; 51.28.020; WAC 296-20-020), disability payments (RCW 41.26.470; 51.32.055 and 51.32.130), supplemental disability payments (RCW 41.04.505; WAC 415-104-380), retirement benefits (RCW 41.26.420; 51.32.130 and 51.44.070), and death benefits (RCW 41.26.510; 51.32.050 and 51.32.130).

where there is a spouse or children. (RCW 51.32.060 and 51.32.090).²⁸

Brooke's argument regarding "dependent" being listed as a person who can sue does not provide her with a cause of action. *App. Br. 22*. Title 41 and Title 51 are complimentary and interrelated. *Fray*, 134 Wn.2d at 649; *Hansen*, 93 Wn. App. at 926. Though Title 41 does not define dependent, the Legislature was well aware that the interrelated Title 51 defines "dependent" as follows:

"Dependent" means any of the following named relatives of a worker **whose death results from any injury and who leaves surviving no widow, widower, or child**, viz: Father, mother, grandfather, grandmother, stepfather, stepmother, grandson, granddaughter, brother, sister, half-sister, half-brother, niece, nephew, who at the time of the accident are actually and necessarily dependent in whole or in part for their support upon the earnings of the worker.

RCW 51.08.050 (*emph. added*).

As with any statutory cause of action, LEOFF language must be given its plain meaning. *Fray*, 134 Wn.2d at 651;²⁹ Reviewing LEOFF, the *Fray* Court explained: "Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions." *Id.* at 651 (*citation omitted*). "If the Legislature

²⁸ LEOFF defines "surviving spouse" and "child" but makes no reference to "spouse" except as an exception discussed referencing death benefits. RCW 41.26.030 (6) & (7).

²⁹ *Lake v. Woodcreek Homeowners*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010) (same). "While we look to the broader statutory context for guidance, we 'must not add words where the legislature has chosen not to include them,' and we must 'construe statutes such that all of the language is given effect.'" *Id.* (*citation omitted*); *City of Seattle v. Fuller*, 2013 WL 1843342, __ P.3d __ (2013) (same).

in 1971 had intended to carve out an excess damages cause of action for a living member's spouse, it certainly could have included "spouse" amongst the short list of persons provided with the novel right to sue. The right to sue provision only refers to the "member," "widow," "child" or "dependent," and the definition of "dependent" only refers to other "...named relatives of a worker whose *death* results from an injury." *Id.* (*emph. added*). Following legislative intent, and consistent with the statutory scheme as a whole and established case-law interpreting the same -- as with the Industrial Insurance Act -- a spouse is not entitled to sue a member's governmental employer under the LEOFF right to sue provision. Summary judgment should be affirmed.³⁰

5. Hyde Signed an Enforceable Liability Release.

Hyde apparently argues that because the liability release excluded rights available under worker's compensation laws, the release did not waive Hyde's right to sue under RCW 41.26.281. *App. Br.* 23-24. This argument is specious. The excess damages cause of action under RCW 41.26.281 is not a Title 51 "worker's compensation law," but rather a cause of action found within the LEOFF retirement system law encompassing an actuarial reserve system; in 1977, the Legislature amended LEOFF and allowed LEOFF Plan 2 members to also access

³⁰ *Flanigan*, 123 Wn.2d at 423; *Provost*, 103 Wn.2d at 753-56; RCW 51.04.010 *et seq.*; RCW 51.32.010; RCW 41.26.270.

worker's compensation benefits under Title 51. RCW 41.26.480. *Fray*, 134 Wn. 2d at 648.³¹

“A release is a contract in which one party agrees to abandon or relinquish a claim, obligation or cause of action against another party.” *Boyce v. West*, 71 Wn. App. 657, 662, 862 P.2d 592 (1993). A release is to be construed according to contract legal principles. *Id.* “Exculpatory clauses in pre-injury releases are strictly construed and must be clear if the exemption from liability is to be enforced.” *Vodapest v. MacGregor*, 128 Wn.2d 840, 848, 913 P.2d 779 (1996). If a liability release is clear, the general rule in Washington is that exculpatory clauses are enforceable unless (1) they violate public policy; (2) the negligent act falls greatly below the standard established by law for protection of others; or (3) they are inconspicuous. *Id.* *Hyde did not argue below, and does not argue on appeal that the liability release is not enforceable based on these exceptions; such arguments are waived and enforceability is legally conceded. See, fn 1 supra.* Washington Courts have repeatedly upheld releases in a variety of training or high risk adult sports contexts.³² The

³¹ See discussion *supra* at p. 30, regarding import of RFA No. 8 (*App. Br. 13*). CP 517. RCW 41.26, *et seq.* applies to evaluate Hyde's case and injury; as directed by LEOFF, he is eligible to receive Title 51 worker's compensation benefits. RCW 41.26.480.

³² See, e.g., *Chauvlier*, 109 Wn. App. 334, 345, 35 P.3d 383 (2001)(recreational skiing); *Shields v. Sta-Fit Inc.*, 79 Wn. App. 584, 903 P.2d 525 (1995), *rev. den'd*, 129 Wn.2d 1002 (1996)(personal training--weight lifting); *Boyce v. West*, 71 Wn. App. 657 (university scuba diving course); *Scott v. Pacific West Mt. Resort*, 119 Wn.2d 484, 490-

liability release that Hyde executed during his Taser training course is likewise enforceable. Even if Hyde and Brooke had not waived these arguments, these exceptions to enforceability do not apply.³³

a. The Release is Not Void for Public Policy.

Contracts of release of liability for negligence are valid unless a public interest is involved. *Boyce*, 71 Wn. App. at 663. Such is absent in Hyde's case. "There is in the ordinary case no public policy which prevents the parties from contracting as they see fit, as to whether the plaintiff will undertake the responsibility for looking out for himself." *Wagenblast v. Odessa School Dist.*, 110 Wn.2d 845, 848, 758 P.2d 968 (1988), *citing*, W. Keeton, P. Dobbs, R. Keeton and D. Owen, *Prosser and Keeton on Torts* 868, at 482 (5th ed. 1984). There are instances where public policy reasons for preserving an obligation of care owed by one person to another outweigh the traditional regard for the freedom to contract. *Id.* at 849. However, Hyde's case presents the "ordinary case."

The release form Hyde signed begins with the introduction: "Any person that *volunteers* to experience a Taser device electrical discharge ("Taser exposure") must read and sign this Form prior to any Taser

95, 834 P.2d 6 (1992)(ski school-- race course); *Conradt v. Four Star Prom., Inc.*, 45 Wn. App. 847, 728 P.2d 617 (1986)(auto demolition race); *Wagenblast*, 110 Wn.2d at 849 (enforceable agreements discussed); *Vodapest*, 128 Wn.2d at 848-49 (same).

³³ Brooke's claim is also barred. *E.g.*, *Conradt*, 45 Wn. App. 847 (wife's loss of consortium claim barred by husband's signing a release before the demolition race).

exposure.” CP 686, 690 (*emph. added*). The title on the top of the form begins with “Volunteer.” CP 686, 690-91. Hyde acknowledged on the same day he received the Taser exposure that his back pain started after “Taser voluntary training.” CP 686, 701. The post-training report Hyde filled out is entitled “...Volunteer Exposure Report.” CP 686, 693. Whether or not a pre-injury liability release violates public policy is determined by evaluating the six *Wagenblast* factors pertaining to public regulation, public service, public access, control, bargaining power, and adhesion contract analysis.³⁴ *Wagenblast*, 110 Wn.2d at 851.

These six considerations provide a flexible formula for the Court’s analysis. *Id.* This Court has highlighted the most important “common determinative factor for Washington Courts has been the services’ or activities’ importance to the public.” *Chauvlier*, 109 Wn. App. at 344. LSPD’s voluntary private Taser training for probationary officers is of no import to the general public.³⁵ The release is not void for public policy.

³⁴ Adhesion contract analysis is a question of law and the decision must be based on the factual circumstances surrounding the transaction. *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 224 P.3d 818 (2009), *aff’d on other grounds*, 173 Wn.2d 451 (2012). Here, though the release is a standard Taser contract, it is undisputed that the LSPD does not require officers to carry a Taser or sign the release; if Hyde had chosen to forego the Taser training, other forms of nonlethal force were available to him. CP 581, 724-25.

³⁵ On the undisputed facts in this case, because Hyde participated in a private law enforcement training exercise providing no service to the public, the determinative *Wagenblast* public policy consideration is missing. Washington Courts consider essential public services to include hospitals, housing, public utilities and public education. *Shields*, 79 Wn. App. at 589. The “public policy” inquiry by definition involves the public. It takes no extended discussion to conclude the release at issue in no way

b. The Conduct Did Not Fall Below Ordinary Negligence.

There is no allegation in Hyde and Brooke's Complaint that the City's conduct fell below that of ordinary negligence. CP 1027 ("... was directly and proximately caused by the negligence of Defendant...") Absent an allegation of gross negligence properly pled and substantial evidence, summary judgment is proper. *Boyce*, 71 Wn. App. at 665.

c. The Exculpatory Clause Was Not Inconspicuous.

In determining whether waiver language is sufficiently conspicuous to be enforceable, this Court considers:

- 1) Whether the waiver is set apart or hidden within other provisions;
- 2) Whether the heading is clear;
- 3) Whether the waiver is set off in capital letters or in bold type;
- (4) Whether there is a signature line below the waiver provision;
- (5) What the language says above the signature line; and
- (6) Whether it is clear the signature is related to the waiver.

implicated or contemplated the public at large. *E.g.*, no extended discussion is required to conclude private scuba, mountain climbing, or skiing instruction does not involve a public interest. *Boyce*, 79 Wn. App. at 664; *Chauvlier*, 109 Wn. App. at 344-45. *Contra, Eelbode v. Chec Medical Centers Inc.*, 97 Wn. App. 462, 470-72, 984 P.2d 436 (1999) (Division Two determined that a pre-injury release for a pre-employment physical exam that was required, regulated by the Legislature, described in job application, and involved any member of the public who wished to apply for the job violated public policy.). By contrast here, (1) the private Taser training is *not* regulated by the Legislature; (2) LSPD provided no public service; (3) general members of the public are *not* invited to participate, rather, extensive background investigation, written, physical, psychological, medical and polygraph testing occurs prior to the conditional offer of employment and field training (CP 723, 730-32); (4) any control the Taser trainer had over Hyde was voluntarily assumed (*e.g. Shields*, 79 Wn. App. at 590); (5) Hyde acknowledged that Chief Celori did *not* require signing the release or receiving the Taser exposure. (CP 581, 724-25, 743-46); and (6) the Taser release is styled for "volunteers," providing Hyde with a choice, and thus it is *not* an adhesion contract (*e.g. Chauvlier*, 109 Wn. App. at 345; *Shields*, 79 Wn. App. at 590). CP 686, 690-91, 693, 701.

Johnson v. UBAR, LLC, 150 Wn. App. 533, 538, 210 P.3d 1021 (2009). Here, the exculpatory language is set apart as its own provision within the release document. CP 686, 691. The heading is clear and set off in capital letters and bold type stating “**LIABILITY RELEASE, COVENANT NOT TO SUE, AND HOLD HARMLESS.**” *Id.* The signature line immediately follows the conclusion of the “**LIABILITY RELEASE, COVENANT NOT TO SUE AND HOLD HARMLESS**” section of the document. *Id.* There is no other language beneath the release heading preceding the signature line. *Id.* Reasonable minds cannot disagree. *E.g.*, *Chauvlier*, 109 Wn. App. at 342. The release is enforceable.

6. Express Assumption of Risk Applies.

Hyde’s argument that the jury must decide the assumption of risk defense under these uncontroverted facts is flawed. *App. Br.* 24-28. Hyde’s reliance on *Lascheid* is misplaced, and confuses implied assumption of risk analyzed by Division Three in *Lascheid* with express assumption of risk that is at issue here. *Lascheid v. City of Kennewick*, 137 Wn. App. 633, 640, 154 P.3d 307 (2007), *rev. den’d*, 164 Wn.2d 1037 (2008)(discussing “implied primary assumption” of risk; such provided a jury question for LEOFF officer where a genuine issue of fact existed as to whether training and field conditions were the same for operating a police

car in an emergency). It is undisputed that *the day before* the Taser application, Hyde spent hours reviewing the written Taser “PowerPoint” training slides depicting tool operations, providing video of Taser application on individuals and physical reaction, and providing *all the volunteer exposure warning information regarding specific back injury risk*; afterwards Hyde signed the written volunteer form and liability release form assuming “all risks.” CP 756, 813-816. He also shot a Taser at a silhouette target. *Id.* The next day, Hyde voluntarily returned to the LSPD to receive the practical portion of the training, including the Taser application. *Id.* CP 685-86, 756.

Express assumption of risk may arise from an exculpatory contract where, as in the case at bar, Hyde agreed to relieve the defendant of liability for “all risks.” See e.g., Scott, 119 Wn.2d at 496; Boyce, 71 Wn. App. at 667; Johnson v. NEW, Inc., 89 Wn. App. 309, 311, 948 P.2d 877 (1997). This Court follows the general rule that express assumption of risk based on a liability release bars a negligence claim, even if “negligence” is not stated in the release. *Blide v. Rainier Mountaineering, Inc., 30 Wn. App. 571, 636 P.2d (1981), rev. den’d, 96 Wn.2d 1027 (1982).* The *Boyce* court also concluded that an agreement to assume “all risks” is broad enough to include negligence. 71 Wn. App. at 667 “Express assumption occurs when parties agree in advance that one of

them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence.” *Scott*, 119 Wn.2d at 496 (*citation omitted*). Before a person may expressly assume the risk of another’s conduct, it must be shown that the person had knowledge of the specific risk which caused the injury, the person appreciated and understood its nature, and the person voluntarily chose to incur it. WPI 13.04 Commentary 2009.

The doctrine of assumption of risk has four facets. *Scott*, 119 Wn.2d at 496. The first and second facets, express assumption of risk and implied primary assumption of risk, bear not on the plaintiff’s duty to exercise ordinary care for his or her own safety, but rather on the defendant’s duty to exercise ordinary care for the safety of others. *Id.* at 496; *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Because both facets raise the question of whether the plaintiff consented, before the accident or injury, to the negation of a duty that the defendant would otherwise have owed to the plaintiff, when either facet applies, it bars any recovery based on the duty that was negated. *Id.* Only express assumption of risk applies here.

Express assumption of risk serves as a bar to negligence, relies on contract principles and remains viable as a defense. *See, e.g., Scott*, 119 Wn.2d at 495-96 (“we hold that [child’s] parents’ cause of action is barred

by the release”); *Johnson*, 89 Wn. App. at 311 (liability release provided express assumption of risk for negligent ski boot binding adjustment injury); *Boyce*, 71 Wn. App. at 667 (adult student scuba diver expressly assumed risk of negligent instruction resulting in death by signing liability release); *Blide*, 30 Wn. App. at 572 (adult student mountain climber assumed risk of negligent lowering into crevasse by signing release).

a. **Hyde was expressly advised of specific back injury risk.**

At deposition, Hyde admitted that the day before he received the Taser application, he reviewed PowerPoint slides and a Release form that warned him of the risk of specific back injuries. District courts have found the warnings to be clear.³⁶ Hyde testified to being warned, (1) “[t]hat you could have muscular injuries, tendon injuries, falling injuries, burn injuries, infection, all of it” (CP 814); (2) that Taser application could lead to “sports-type injuries,” “[a]nd fractured bones” (CP 756, 814-15); and (3) of the risk of volunteer exposure to include muscle contractions.” *Id.* Ofc. Aukerman answered any questions that Hyde had regarding the Taser training. CP 756, 813-816. The written release identified potential Taser related health risks: muscle contraction-related risks, secondary injury risks; strain injury risks; ruptures; dislocations; joint injuries; nerve injuries; fractures of bones and vertebrae. *Id.* at CP 685-86.

³⁶ E.g., *Kandt v. Taser International*, 2012 WL 2861583 (N.D.N.Y 2012); *Butler v. Taser Int'l, Inc.* Cause No. CV-0030-K (2012 Texas) (warnings clear).

b. Hyde assumed “all risks” with Taser exposure.

Hyde acknowledged the risk of “strong muscle contractions, physical exertion and stress” and expressly acknowledged that tasing involved “the risk of physical injury.” Indeed, he “voluntarily agree[d] to experience a TASER Exposure and [he] assume[d] all risks, whether known or unknown, foreseen or unforeseen, inherent in the TASER Exposure.” CP 686, 690-91 (*emph. added*). Physical injury is an expressly stated risk to which Hyde agreed.³⁷ This language of assuming “all risks” provided a defense in *Blide and Boyce, supra*.

Hyde suggests that he did not voluntarily consent to the risk of vertebrae, joint or nerve injury because Aukerman told him he was required to receive the Taser application in order to work for the LSPD (*App. Br. 6, 23-24*). CP 815. This factual dispute is not material to the Court’s summary judgment determination because -- even if true -- at all times Hyde voluntarily submitted to the trainee-trainer relationship: Hyde was an adult who had the options to review his offer letter, speak with Chief Celori, speak with his field training officer, or review the LSPD policy manual to see if a Taser training exposure was required; he could also choose to not continue his probationary officer training and seek other

³⁷ E.g., *Black v. Dist. Bd. of Trustees of Broward Cmty. Coll. Florida*, 491 So.2d 303, 306 (Fla. Dist. Ct. App. 1986); *rev. den’d*, 500 So.2d 543 (Fla., Nov. 20, 1986) (“Spirited participation in police training, no less than participation in sports, is an activity which is beneficial to society...a risk that is undertaken voluntarily by most trainees...”).

employment. Hyde's subjective beliefs, stress or pecuniary motivations do not overcome a properly supported summary judgment. *E.g., Shields* 79 Wn. App. at 590 (weight trainee could have left training session); *Saville v. Sierra College*, 133 Cal. App. 4th 857, 869-872 (2005) (student in police officer training course was an adult who at all times could have withdrawn from participation).³⁸ Reasonable minds cannot differ that Hyde expressly consented to "all risks" and the specific risk that allegedly caused his injury. Hyde's lawsuit is barred by the express assumption of risk.

7. **The Court Properly Exercised Its Discretion Excluding Inadmissible and Late Evidence and Briefing.**

Appellants complain the court refused inadmissible evidence, and late supplemental evidence and briefing they submitted after all briefs were filed and the court continued oral argument; however, they fail to show an abuse of discretion. *App. Br.* 47-48. CP 238-39, 245-46. A court may not consider inadmissible evidence, and may refuse untimely supplemental pleadings when ruling on a motion for summary judgment. *Fire Prot. Dists. v. Housing Auth.*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Brown v. People's Mort. Co.*, 48 Wn. App. 554, 559, 739 P.2d 1188 (1987); CR 56 (c), (e); CR 6 (b). *See*, fn 3 *supra.*; CP 1044-46; 227-

³⁸ *Compare, Hamilton v. Martinelli & Assoc.*, 110 Cal. App. 4th 1012, 1023 (2003)(plaintiff employed as probation corrections officer; as condition of employment, she was injured while required to complete a training course and pass proficiency test; Court held neck and back injuries inherent risk of performing training maneuver and employment duties entailed very risk of injury of which she complained.)

229; 245-254; 410-423 (Objections, Orders). The Order granting in part the City's evidentiary objections and motion to strike states: "The Court would have reached the same result on the legal issues even if it had not granted the objection or motion to strike the inadmissible or untimely pleadings." CP 1046. The Order striking late supplemental declarations and briefing was completely discretionary, carefully evaluated, and should be affirmed. *Id.*, CP 227 (Minute Order). *Brown*, 48 Wn. App. at 559.³⁹

E. CONCLUSION.

On *de novo* review, summary judgment should be affirmed because the court lacked jurisdiction where no statutory designee was served before the three year statute of limitations for personal injury actions expired and extinguished Hyde and Brooke's negligence claim. Even if this Court were to determine there was jurisdiction, summary judgment should be affirmed because Hyde was not a "member" or "law enforcement officer" under LEOFF entitled to sue his employer; there is no spousal loss of consortium claim under LEOFF's limited right to sue for excess damages; and the signed liability release and express assumption of risk provide a complete defense to the negligence claim. The Order striking inadmissible and late supplemental briefing and

³⁹ Hyde waived arguments on appeal by not appealing or assigning error to the court's additional Order on objection to inadmissible evidence (CP 1044-46). RAP 10.3(a)(4). Even on *de novo* review, Hyde fails to show any error in refusing inadmissible evidence. *Moore*, 158 Wn. App. at 147.

evidence demonstrated a proper exercise of discretion and should also be affirmed.

RESPECTFULLY submitted this 6th day of June, 2013.

KEATING, BUCKLIN & McCORMACK, INC., P.S.



Brenda L. Bannon, WSBA #17962
Attorneys for Respondent City of Lake Stevens
KEATING, BUCKLIN & McCORMACK
800 Fifth Avenue, Suite 4141
Seattle, WA 98104
(206) 623-8861 phone; (206) 223-9423 fax
bbannon@kbmlawyers.com

DECLARATION OF SERVICE

The undersigned, hereby declares under penalty of perjury of the laws of the state of Washington that she is of legal age and not a party to this action; that on the 6th day of June, 2013, she caused a true and accurate copy of the foregoing: Brief of Respondent to be:

- faxed; and/or
- emailed; and/or
- mailed via U.S. Mail, postage pre-paid; and/or
- sent via ABC Legal Messengers, Inc.

to:

Carl A. Taylor-Lopez
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Facsimile: 206-322-1979
clopez@lopezfantel.com

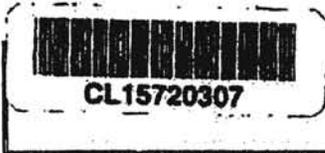


Shelly Ossinger, Legal Assistant
Keating, Bucklin & McCormack, Inc., P.S.
sossinger@kbmlawyers.com (206) 623-8861

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APPENDIX

FILED



SUPERIOR COURT OF
WASHINGTON
FOR SNOHOMISH COUNTY

2012 OCT 17 PM 4:03
SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

STEVEN W. HYDE ET UX
(PLAINTIFF)
AND

CAUSE NO. 10-2-10516-4
JUDGE: GEORGE F. B. APPEL
REPORTER: NOT REPORTED
CLERK: JANIE MCCOLLEY
DATE: 10-17-12 @ 9:00 A.M.

CITY OF LAKE STEVENS
(DEFENDANT)

THIS MATTER CAME ON FOR: SUMMARY JUDGMENT

PLAINTIFF APPEARED: NO

COUNSEL: CARL LOPEZ

DEFENDANT APPEARED: THROUGH COUNSEL

COUNSEL: BRENDA BANNON

DOCUMENTS FILED:

ORDERS ENTERED: ORDER GRANTING DEFENDANT'S MOTION TO STRIKE UNTIMELY
"SUPPLEMENTAL" BRIEFING & EVIDENCE; AND ORDER GRANTING DEFENDANT
CITY OF LAKE STEVENS' MOTION FOR SUMMARY JUDGMENT ENTERED, TO BE
FILED BY COUNSEL BANNON.

PROCEEDINGS/COURT'S FINDINGS:

DEFENDANT'S MOTION TO STRIKE: THE COURT WILL STRIKE THE E-MAIL STRING
BETWEEN THE PLAINTIFF AND MR. MINOR; THE IME REPORT KOPP; THE LANGUAGE IN
PARAGRAPH 3 OF KAREN BUTTERFIELD DECLARATION; THE RISK CLASS CODING; THE
UNSWORN STATEMENTS OF CITY WITNESSES; THE DISCOVERY PLEADINGS; THE LANGUAGE
IN THE PLAINTIFF'S DECLARATION "I WAS GIVEN A GUN" AND "I HAVE ALSO WRITTEN
TICKETS".

THE COURT DOES NOT STRIKE THE FOLLOWING: "I HAD NO BACK PROBLEMS"; "THE
INJURY RESOLVED"; "I WAS TOLD BY THE TRAINING OFFICER"; AND "THE TASING
INJURED MY BACK".

THE SEPTEMBER 30, 2009 DECLARATION GIVEN THE LETTER N IN DEFENDANT'S
MATERIALS IS STRICKEN AS HEARSAY.

THE COURT STRIKES THE SUPPLEMENTAL BRIEF AND MATERIALS. THE COURT
STRIKES THE MATERIALS AS A SURREPLY FROM THE CITY.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT: GRANTED. THE CASE IS
DISMISSED.

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FILED

2012 NOV 20 PM 3:20

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15720523

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D.
BROOKE, husband and wife,

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

NO. 10-2-10516-4

**ORDER GRANTING IN PART
DEFENDANT CITY OF LAKE
STEVENS' OBJECTION TO
INADMISSIBLE EVIDENCE ON
SUMMARY JUDGMENT**

THIS MATTER CAME before the undersigned Judge of the above-entitled court on Defendant City of Lake Stevens' Objection to Inadmissible Evidence on Summary Judgment. Defendant City of Lake Stevens appeared by and through its counsel of record Brenda L. Bannon and Keating, Ducklin, & McCormack, Inc., P.S., and Plaintiffs appeared by and through their counsel of record Carl A. Taylor Lopez and Lopez & Fantei;

The Court considered the following pleadings and evidence:

1. Defendant City of Lake Stevens' Objection to Inadmissible Evidence on Summary Judgment;
2. Plaintiffs' Reply [sic] in Opposition to Defendant's Motion for Summary Judgment;
3. Plaintiffs' Reply [sic] in Opposition to Defendant's Motion for Partial Summary Judgment Re Damages;

(Proposed) Order Granting in Part Defendant City of Lake Stevens' Objection to Inadmissible Evidence on Summary Judgment - 1

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6000 15TH AVENUE, SUITE 200
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4. Declaration of Carl A. Taylor Lopez and Exhibits Therein;

5. Declaration of Steven Hyde;

Having considered the foregoing evidence and pleadings, as well as argument by counsel, and being fully informed of the facts herein, the Court rules as follows:

Unauthenticated evidence, unsworn certifications, irrelevant evidence, hearsay, and impermissible lay opinions are inadmissible and therefore improper on summary judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED that the City of Lake Stevens' Evidentiary Objection is GRANTED, as indicated below:

- The email string between Plaintiff Hyde and Ray Minor of Taser International, Inc. is stricken. (Exhibit 2 to the Lopez Declaration) (ER 901, 801-802).
- The Corvel IME Services Independent Medical Evaluation Report authored by Stanley Kopp, MD dated August 17, 2012 is stricken (Exhibit 3 to the Lopez Declaration). (ER 901, 801-802).
- The following sentence in paragraph 3 of the Declaration of Carolyn Butterfield regarding service of summons and complaint is stricken: "I have been instructed by personnel at the City offices..." (Exhibit 7 to the Lopez Declaration). (ER 801-802).
- The following Sentences of Paragraph 3 of the Declaration of Carolyn Butterfield regarding service of summons and complaint are stricken: "While serving the summons and complaint... He stated that he was... based on that representation, I left a copy of the summons and complaint within him." (Exhibit 7 to the Lopez Declaration). (ER 801-802).
- The following sentence of ¶14 of the Lopez Declaration lacks foundation, is irrelevant and is stricken: "Risk Class 6905 is the category for county and city law enforcement officers." (ER 901, 401-402).
- The unsworn witness statements submitted in support of Plaintiffs' Opposition to Summary Judgment are not competent proof on summary judgment, are hearsay and are stricken. (Ex. 9 to Lopez Declaration) (ER 801-802).

Granting Order (Granting in Part Defendant City of Lake Stevens' Objection to Inadmissible Evidence on Summary Judgment - 2

U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEASIDE
CLERK OF COURT
1000 1ST AVENUE
SEASIDE, WASHINGTON 98148
PHONE: (206) 465-8300
FAX: (206) 465-8301

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- The discovery pleadings index and general pleadings index (Exhibits 1-4 and 15 to the Lopez Declaration) are stricken. (LR 801-802).
- The following sentence of paragraph 4 of Steve Hyde's Declaration is stricken as irrelevant: "I was given a gun and other items related to law enforcement by Lake Stevens. I have also written tickets and reports while employed by Lake Stevens." (LR 401-402).
- The following sentence of paragraph 5 of Steve Hyde's Declaration is stricken: "I asked Lake Stevens if I would be administered an oath; I was told, to my surprise, they do not administer one." (LR 401-402; ER 801-802).
- DENIED: The following sentence in paragraph 6 of Steve Hyde's Declaration is ALLOWED: "I had no back problems prior to my employ with Lake Stevens that interfered with my ability to work." (ER 701).
- DENIED: The following sentence in paragraph 7 of Steve Hyde's Declaration is ALLOWED: "The injury resolved 20 years ago and did not interfere with my subsequent employments, which were physical." (ER 701).
- DENIED: The following sentence of paragraph 8 of Steve Hyde's Declaration is ALLOWED: "I was told by the training officer that I had to be tased if I wanted the job." (ER 801-802).
- DENIED: The following sentence of paragraph 9 of Steve Hyde's Declaration is ALLOWED: "The tasing injured my back." (ER 701).
- The following sentence of Paragraph 11 of Steve Hyde's Declaration is stricken: "September 30, 2009 Mr. Minor sent me an email in which he stated the method of tasing performed on me in training was not recommended." (ER 801-802).

As noted above, except where the motion to strike was specifically denied, the above described evidence will not be considered on summary judgment. The Court would have reached the same result on the legal issues even if had not granted the objection or motion to strike the inadmissible evidence or the untimely pleadings.

DONE IN OPEN COURT this 20th day of November 2012.


Hon. George I. Appel
Snohomish County Superior Court Judge

Proposed Order Granting in Part Defendant City of Lake Stevens' Motion to Exclude Evidence on Summary Judgment - 3

RECEIVED, 2012 NOV 20 10 50 AM
SNOHOMISH COUNTY SUPERIOR COURT
CLERK, 4000 UNIVERSITY BLVD., SUITE 100
EVERETT, WA 98201
TEL: 425.336.7000 FAX: 425.336.7001

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FILED

2012 AUG 23 PM 3:41 Hearing Date: 9/20/2012
Hearing Time: 9:30 a.m

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15772884

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D.
BROOKE, husband and wife,

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

NO. 10-2-10516-4

**DECLARATION OF CITY CLERK
NORMA SCOTT IN SUPPORT OF
DEFENDANT CITY OF LAKE
STEVENS' MOTION FOR
SUMMARY JUDGMENT**

I, NORMA SCOTT, declare as follows:

1. I am the City Clerk for the City of Lake Stevens. I have been so employed for over five years. I am over the age of 18, and otherwise competent to testify herein. I am the City's records custodian. I am also authorized to accept service of process on behalf of the City of Lake Stevens. I am familiar with the organizational structure of the City of Lake Stevens.

2. The City of Lake Stevens is a Council-Mayor form of government.

3. I have not been served with a copy of the Summons or Complaint in this matter. I have checked City records, and this inquiry includes checking with the offices of the City Administrator and the City Mayor. I have found no record of any service of process by Plaintiffs Steven W. Hyde and Sandra D. Brooke against the City of Lake Stevens Mayor or City Administrator to initiate the lawsuit in the above entitled action.

DECLARATION OF NORMA SCOTT - 1

KEATING, BUCKLEY & McDERMACK, INC., P.S.

ATTORNEYS AT LAW
200 PIONEER SQUARE, SUITE 4001
SEATTLE, WASHINGTON 98101-3175
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FAX: (206) 465-3000

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4. Based on my knowledge of authorized process at the City and my tenure at the City, to my knowledge, the City's Human Resources Director Steven Edin is not authorized to accept service of process on behalf of the City of Lake Stevens.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FORGOING IS TRUE AND CORRECT.

DATED this 14th day of August, 2012, at Lake Stevens, Washington.



NORMA SCOTT, City Clerk

FILED

2012 SEP 17 PM 4:27

Judge's Civil Motion Calendar
Hearing Date: 9/20/2012
Hearing Time: 9:30 a.m.

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15607210

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D.
BROOKE, husband and wife,

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

NO. 10-2-10516-4

DECLARATION OF HUMAN
RESOURCES DIRECTOR STEVEN
EDIN IN SUPPORT OF
DEFENDANT CITY OF LAKE
STEVENS' MOTION FOR
SUMMARY JUDGMENT

I, SEVEN EDIN, declare as follows:

1. I am the Human Resources Director for the City of Lake Stevens. I have been so employed since 2006. I am over the age of 18, and otherwise competent to testify herein. I am *not* authorized to accept service of process on behalf of the City of Lake Stevens. I am *not* authorized to make statements to process servers that would change the way the City is served with legal process under state law.

2. I told the process server that left legal documents with me in late 2010 that I was *not* authorized to accept service of process, and the City Clerk could accept the papers when she returned from lunch.

3. I am familiar with the organizational structure of the City of Lake Stevens and with the personnel records a new employee fills out upon hire.

4. The City of Lake Stevens is a Council-Mayor form of government.

DECLARATION OF STEVEN EDIN - 1

ORIGINAL

BEATING, WICKLEN & MCGORMACK, INC., P.S.
ATTORNEYS AT LAW
10000 10TH AVENUE, SUITE 200
SEATTLE, WASHINGTON 98148-3178
PHONE: 206-274-1001
FAX: 206-274-1002

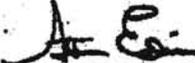
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5. I have checked City records, and see that Plaintiff Hyde was signed up for DRS administered LEOFF Plan benefits/premium payments at the time of hire. At the time these documents were provided to Hyde, it was not known that the Police Chief had not yet commissioned Hyde to enforce the laws of the State of Washington, Hyde was provided the forms in good faith believing that he would complete his training program, be commissioned, and proceed to complete the equivalency academy training. Unfortunately these things did not occur.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 14th day of September, at Lake Stevens, Washington.



STEVEN EDIN, Human Resources Director

FILED

2012 AUG 23 PM 3:41

Hearing Date: 9/20/2012
Hearing Time: 9:30 a.m.

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15772885

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D.
BROOKE, husband and wife,

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

NO. 10-2-10516-4

**DECLARATION OF CHIEF
RANDY CELORI IN SUPPORT OF
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

I, Chief Randy Celori, declare as follows:

1. I am over the age of 18, am otherwise competent to testify as to all matters herein, and make the following statements based on my own personal knowledge.

2. I am the Chief of Police of the Lake Stevens Police Department. I have held this position since 2001. I have worked at the Lake Stevens Police Department since 1995. Prior to being promoted to my current position as a City Director, I worked as a police officer, a sergeant, and a lead investigator. Prior to that, I was a military policeman for the United States Army.

3. I am generally familiar with the factual basis for Plaintiff Hyde's lawsuit and have been involved in reviewing discovery and some of the legal pleadings. On June 2, 2009, the City of Lake Stevens provided a conditional offer of employment to Plaintiff

DECLARATION OF RANDY CELORI - 1

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ATTORNEYS AT LAW
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43

1 Hyde as a city police officer contingent upon obtaining a certification as a peace officer by
2 meeting all requirements of RCW 43.101.200; this requirement included successful
3 completion of basic training, among other conditions. Attached hereto as Exhibit A is a
4 true and accurate copy of my June 2, 2009 Conditional Offer of Employment Letter to
5 Plaintiff Hyde and the City of Lake Stevens Position Description for a Police Officer. By
6 statutory requirement, Lake Stevens Police Officers must attend and successfully complete
7 the basic police academy: "[a]ll law enforcement personnel...shall engage in basic law
8 enforcement training which complies with standards adopted by the commission pursuant
9 to RCW 43.101.080." RCW 43.101.200(1). Since Hyde was a lateral hire from Florida, he
10 was required to attend the WSCJTC Equivalency Academy. WAC 139-05-200(1); 210(1).
11 See Exhibit B.

12
13 4. I have received training that the "commission" means "the Washington State
14 Criminal Justice Training Commission." RCW 43.101.010. A "peace officer" is defined as
15 "any law enforcement personnel subject to the basic law enforcement training requirement
16 of RCW 43.101.200 and any other requirements of that section..." RCW 43.101.010(11).
17 This is what I referred to in my conditional offer of employment to Hyde.
18

19 5. Plaintiff Hyde's first day of conditional employment was on June 8, 2009.
20 The Taser training exercise at issue in this lawsuit occurred a few days later with the written
21 training portion occurring on June 10, and the practical Taser application and testing
22 portion occurring on June 11, 2009.

23
24 6. Before or after those dates, Hyde never worked as a full-time commissioned
25 police officer in the state of Washington. As of June 11, 2009 (the day of the alleged
26 injury), Plaintiff Hyde was not commissioned by the City of Lake Stevens. I had not yet
27 sworn in Hyde by providing him with the oath of office, nor had I provided him with the

DECLARATION OF RANDY CELORI - 2

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ATTORNEYS AT LAW
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SEATTLE, WASHINGTON 98101-3716
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FAX 206-462-4823

1 Lake Stevens Police Department commission card. As of June 11, 2009, the City had not
2 yet received a printed commission card for Hyde. The WAG states that "commissioned"
3 means "that an employee was employed as an officer of a general authority Washington law
4 enforcement agency and is empowered by that employer to enforce the criminal laws of the
5 state of Washington." WAC 415-104-011. See Exhibit C.

6 7. After June 11, 2009, Hyde was provided clerical modified duty while he was
7 following his medical provider's activity restrictions and/or recuperating from surgery.

8 8. As of June 11, 2009, Hyde was not empowered by his employer to enforce
9 the criminal laws of the state of Washington.

10 9. After Hyde was on medical leave, in an August 26, 2009 letter, the Basic
11 Law Enforcement Academy (BLEA) Commander of the Washington State Criminal Justice
12 Training Commission (WSCJTC) emphasized this point:

13 Officer Hyde may not perform the full duties of a peace officer until he has
14 completed the equivalency academy.

15 *Decl. Lorentzen, Ex. A.* This letter was written while Hyde was working light duty and
16 receiving treatment. An August 26, 2009 email from the BLEA Commander emphasized
17 that Hyde had no authority to perform police duties, to include exercising patrol or arrest
18 powers until he attended and successfully completed the training academy. "Until he
19 attends the equivalency academy, he would not be considered a certified peace officer."
20

21 *Decl. Lorentzen, Ex. B.* Lake Stevens Police Commander Lorentzen replied with an e-mail
22 stating, "...we do understand Hyde would not be a certified peace officer and will not be
23 exercising any powers until he is done with the academy." *Id.*, Ex. B. The WAC states:
24 "You are not a law enforcement officer if you are employed in a position that is clerical or
25 secretarial in nature and you are not commissioned." WAC 415-104-225(1)(e)(i). See
26

27 Exhibit D,

DECLARATION OF RANDY CELORI - 3

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200 PERRY AVENUE, SUITE 4101
SEATTLE, WASHINGTON 98104-3176
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FAX: (206) 463-4002

10. Plaintiff Hyde did not complete the WSCJTC equivalency academy and obtain his WSCJTC peace officer certificate until January 15, 2010, approximately seven months after the June 2009 training incident at issue. See Decl. Lorenzen, Ex. C (WSCJTC Certifications).

11. Regarding the Taser weapon as an optional police tactics use of force, in 2005, I worked with the City to authorize and coordinate the Lake Stevens Police Department adding the Taser as an optional weapon for police officers to carry on their duty belt. Lake Stevens' police officers were not and are not now required to carry a Taser.

12. Based on the 2005 Taser training that I also participated in as an administrator, it is my understanding that the Taser manufacturer recommends that police officers who carry the Taser also experience the volunteer exposure to the Taser. This recommendation is provided for several reasons: (i) officers can better understand the effect of the weapon for field deployment; (ii) officers can be more confident that they can touch a suspect even during a Taser application without fear of secondary shocks; and (iii) officers can be better equipped to discuss the Taser application as a witness in court.

13. In June 2009, I required those police officers who chose to carry a Taser to attend Taser training. As part of the Taser training program at the Lake Stevens Police Department, a Taser trainee was given the opportunity to experience a Taser application. At that time, if an officer elected to carry a Taser, he/she would have to go through the voluntary application of a short burst of the Taser weapon. This training protocol was instituted to provide officers with the benefit of the knowledge and experience set forth above as recommended by the Taser manufacturer. Attached hereto as Exhibit E is a true and accurate copy of related excerpts of my deposition taken on June 30, 2011.

14. The relevant Lake Stevens Police Department policy states in part as

DECLARATION OF RANDY CELONI - 4

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ATTORNEYS AT LAW
1000 WEST 10TH AVENUE, SUITE 400
DENVER, COLORADO 80202
TEL: 303.733.8888
WWW.KENTINGBUCKLEY.COM

1 follows:

2 Electronic control weapons may be used by authorized and trained
3 personnel in accordance with this use of force policy and additional
4 guidelines established herein.

5 ***

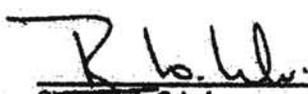
6 Only officers who have satisfactorily completed this agency's approved
7 training course shall be authorized to carry BCWs.

8 Attached hereto as Exhibit F is a true and accurate copy excerpts of this policy.

9 15. In June 2009, Lake Stevens Police Officers were required to carry a
10 handgun, handcuffs, impact weapon, and OC spray. An officer's employment at the Lake
11 Stevens Police Department was in no way contingent upon carrying a Taser, nor has it ever
12 been. Lake Stevens Police Officers were given the option of not carrying a Taser, and not
13 going through Taser training, if they did not want to carry the Taser weapon on their duty
14 belt.

15 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
16 STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

17 EXECUTED this 2nd day of August, 2012 at Lake Stevens, Washington.

18
19
20
21 
22 Officer Randy Celori

23
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25
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27
DECLARATION OF RANDY CELORI - 5

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
200 1ST AVENUE, SUITE 400
SEATTLE, WASHINGTON 98101-3217
PHONE: 206-461-4000
FAX: 206-461-4001

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FILED

Hearing Date: 9/20/2012
Hearing Time: 9:30 a.m.
2012 AUG 23 PM 3:41



CL15772887

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH

STEVEN W. HYDE and SANDRA D.
BROOKE, husband and wife,

Plaintiffs,

v.

CITY OF LAKE STEVENS,

Defendant.

NO. 10-2-10516-4

**DECLARATION OF OFFICER
WAYNE AUKERMAN IN SUPPORT
OF DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

I, Officer Wayne Aukerman, declare as follows:

1. I am over the age of 18, and am otherwise competent to testify as to all matters herein, and make the following statements based on my own personal knowledge.

2. I have been a police officer at the City of Lake Stevens Police Department for the past twelve and a half years. I have successfully attended and completed the 720 hour Basic Law Enforcement Academy (CJTC) and a 220 hour Reserve Law Enforcement Academy through the Snohomish County Sheriff's Department. I have completed 40 hours of the Field Training Officer Academy with 40 hours of instructor development and 40 hours of the Patrol Training Officer Academy.

3. Since 2006, I have been a Taser Instructor at the Lake Stevens Police Department. I have been through the Taser instructor training, and I received my instructor

DECLARATION OF WAYNE AUKERMAN - 1

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
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PHONE: 206-465-2001
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45

1 certification through the Snohomish County Sheriff's Department in 2006. Every two years
2 I go through an instructor refresher course. In 2008, I went through an instructor refresher
3 course at the Edmonds Police Department, and in 2010 I went through an instructor
4 refresher at the Pacific Police Department.

5 4. In 2009, Lake Stevens police officers were not required to carry a Taser, but
6 those who elected to do so were required to participate in Taser training, which included a
7 written portion, testing, and a practical application.

8 5. On June 10, 2009, I took Hyde through the written training portion of the
9 Taser Power Point training. The Power Point presentation specifically advises the trainee
10 that the Taser application is voluntary and of the medical risks of Taser applications. I
11 made myself available to and did in fact answer any questions that Hyde had regarding the
12 Taser, written forms, and the training. Both the Power Point and the volunteer warnings
13 repeatedly advise of injury risk.

14 6. The next day, on June 11, 2009, I conducted a private, voluntary Taser
15 training application for Steven Hyde at the Lake Stevens Police Department. The training
16 was not open to the public and was available only to Lake Stevens police officers.

17 7. On June 10, 2009, the day before the voluntary Taser application, Hyde
18 executed a document titled "Volunteer Warnings, Risks, Liability, Release, and Covenant
19 Not to Sue." The Release identified potential health risks associated with being Tased
20 including muscle contraction-related risks, secondary injury risks, strain injury risks,
21 scarring, and laser beam eye damage. Specific potential injuries warned of included
22 ruptures, dislocations, joint injuries, nerve injuries, and fractures of bones and vertebrae.
23 The Release specifically asked the potential trainee to indicate whether he/she had had any
24 injuries or known physical or mental conditions that could be aggravated by being Tased.
25
26
27

DECLARATION OF WAYNE AUKERMAN - 2

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 PLYMOUTH STREET, SUITE 401
SEATTLE, WASHINGTON 98104-0121
PHONE: (206) 425-4001
FAX: (206) 425-4002

1 Hyde did not disclose any conditions. He marked a box that stated "I have no injuries or
2 known physical or mental conditions that could be aggravated by muscle contractions,
3 physical exertion, or exposure to the electrical discharge of TASER devices." Attached
4 hereto as Exhibit A is a true and accurate copy of the Release executed by Hyde the day
5 before the Taser application.

6 8. On the afternoon of June 11, 2009, I had Hyde lay down on a carpeted floor
7 which had been the standard area for other officers undergoing the voluntary Taser
8 application. I connected two metal alligator clips¹ to Hyde (one clip on his right arm shirt
9 sleeve and the second on his left leg sock). I then performed a three second Taser
10 application to Hyde.

11 9. Following the Taser application, Hyde filled out a Volunteer Exposure
12 Report in which he indicated that the exposure lasted three seconds. He indicated that the
13 application did not cause injury and when asked about the treatment for any such injury he
14 wrote "NA." Attached hereto as Exhibit B is a true and accurate copy of Hyde's Volunteer
15 Exposure Report. Hyde also completed the written test to obtain his Taser user
16 certification. Attached hereto as Exhibit C is a true and accurate copy of Hyde's Taser
17 X26 User Certification Test.

18 10. Later that day (on June 11, 2009), Hyde indicated he was having pain in his
19 back and filled out an Employee Report of Accident, in which he described the injury as
20 follows: "During Taser voluntary training had back pain after. Difficulty getting out of
21 patrol vehicle." Attached hereto as Exhibit D is a true and accurate copy of Hyde's
22 Employee report of an Accident."
23
24
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¹ These clips essentially look like metal clothes-pins and eliminate any injury concerns stemming from the
barbs on the wire probes.

DECLARATION OF WAYNE AUKERMAN - 3

KEATING, BRUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
800 PUPPI AVENUE, SUITE 4111
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11. I never told Steven Hyde that he had to carry a Taser as a part of his employment. I also never told Hyde that he was required to receive a voluntary Taser application in order to complete the probationary training process to become a Lake Stevens Police Officer. I never told Hyde that Taser training or voluntary application was a condition of employment. Hyde was introduced to me as a training officer, and he knew I was at the basic rank of patrol officer. I was wearing a patrol officer uniform during the first few days of Hyde's employment and during his Taser training. I have never had any hiring or firing authority over employees, nor can I set conditions of employment.

12. Attached hereto as Exhibit E is a true and accurate copy of excerpts from my deposition during which I testified about the above information.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON, THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED this 2nd day of August, 2012 at Lake Stevens, Washington.


Officer Wayne Ankerman



June 2, 2009

Mr. Steven Hyde
11855 108th Ave NE
Kirkland, WA 98034

RE: Offer of Employment: Police Officer

Dear Mr. Hyde:

We are pleased to offer to you the Civil Service position of Police Officer with the City of Lake Stevens Police Department.

This letter confirms the verbal offer made to you, and your acceptance of the position. Your first day of employment is scheduled for June 8, 2009. Upon completion of your training at the Criminal Justice Training Center and a field training period, you will be given a schedule per the collective bargaining agreement. Copies of the collective bargaining agreement and the City of Lake Stevens Civil Services Rules will be provided to you.

COMPENSATION

In accordance with the current collective bargaining agreement, the position has a monthly salary range of \$4,399 to \$6,509 per month. There are 7 pay levels. Your initial pay is at Level 3, \$4,740 per month. You will be eligible for a one step increase after 12 months.

BENEFITS

As a member of our team, and in accordance with the current collective bargaining agreement, you are entitled to a full array of City benefits including paid leave time, medical coverage and participation in the Washington State Retirement System. You will begin accruing 7.33 hours vacation leave per month, which equates to 88 hours of vacation leave. You will also accrue 8 hours of sick leave per month.

Please contact Steve Edin, Human Resources Director at (425) 377-3227 for an appointment. Mr. Edin will explain your benefits to you at that time, and provide you with the necessary enrollment forms for medical insurance coverage and payroll withholding. Once this offer letter is signed and returned, your employment with the City of Lake Stevens can commence.

ORIENTATION PERIOD

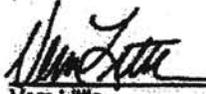
You will be required to complete a 12-month orientation period, which commences from your hire date; during which time your ability to fulfill the standards and expectations for the department and the City will be closely evaluated.

Please understand that this offer of employment is not to be construed as an employment contract or employment agreement of any kind, nor is it to be interpreted as a covenant of employment. Your employment may be terminated at any time, before or during your probationary period, with or without just cause. If you accept this offer you are agreeing to follow and obey the policies and procedures, including the department's mission and the standards of conduct that are contained in the Lake Stevens Police Department Policy and Procedure's Manual.

I would like to congratulate you on your selection. We have invested a considerable amount of time, energy and money on identifying you as our next Police Officer. We have an excellent team and are careful and thoughtful about who is selected to serve the citizens of Lake Stevens. I firmly believe your talents and experience will be a great asset to our community, and I believe you will find working with our dedicated and talented staff a rewarding experience. We look forward to your joining us.

Please sign the acknowledgement and acceptance of this position and return it to the Human Resources Department.

Sincerely,



Vern Little
Mayor

Acknowledged and Accepted:

Steven Hyde Date

cc: Randy Celori, Police Chief
Personnel File
Payroll File

**CITY OF LAKE STEVENS
POSITION DESCRIPTION**

POSITION TITLE:	Police Officer
DEPARTMENT:	Police
CLASSIFICATION:	Union, Non-Exempt
EFFECTIVE DATE:	February 27, 2009

POSITION PURPOSE:

Provide a wide range of police services to the public including but not limited to: enforcing laws, protecting life and property, maintaining peace and order, providing public service, crime prevention, and investigating civil and criminal matters..

SUPERVISION RECEIVED:

- Works under the direct supervision of a Police Sergeant.

SUPERVISION EXERCISED:

- None.

ESSENTIAL DUTIES AND RESPONSIBILITIES:

- Provide service to the public relating directly to public safety including providing assistance, answering questions, make referrals to other services, and solving community problems.
- Patrol the city to detect and prevent crime, stop unlawful behavior, enforce traffic laws, and find conditions that are hazardous to the community.
- Respond to calls for service and take appropriate action following established policy, procedure and current professional practices.
- Interview victims, witnesses, and suspects and document their statements regarding criminal and civil matters.
- Enforce City ordinances, State RCWs, Federal laws and court decisions.
- Apprehend offenders including making physical arrests and overcoming their resistance.
- Develop a detailed knowledge of the community including people, businesses, geographical features, and current problem areas.
- Use computers to create accurate, thorough and complete cases, reports, logs and other documentation that will be referred to the prosecutor or appropriate authorities.
-

* See "City of Lake Stevens, Administrative Organization" in the HR Policy and Procedures Manual.

- o Provide assistance to other city departments, public safety agencies and government agencies.
- o The duties listed above are intended only as illustrations of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related or a logical assignment to the position.

PERIPHERAL DUTIES:

- o Provide training to part-time police officers, explorer scouts and volunteers.
- o Present programs relating to crime prevention, traffic and boating safety, and drug awareness or police operations that include public speaking, organizing meetings, and creating written material.

PHYSICAL DEMANDS AND WORK ENVIRONMENT:

The work environment characteristics described here are representative of those and employee encounters while performing the essential functions of the job. Reasonable accommodation may be made to enable individuals with disabilities to perform the essential functions of the position.

While performing the duties of this job, the employee is frequently required to sit, talk or hear. The employee is occasionally required to stand; walk; use hands to finger, handle, or feel objects, tools, or controls; reach with hands and arms; climb or balance; stoop, kneel, crouch, or crawl; and smell.

While performing the duties of this job, the employee frequently works in outside weather conditions. The employee occasionally works near moving mechanical parts; in high, precarious places; near explosives and is occasionally exposed to wet and/or humid conditions, fumes or airborne particles, toxic or caustic chemicals, extreme cold, extreme heat, and vibration.

QUALIFICATIONS:

- o Skills in the operation and understanding of personal computers and typical office equipment.
- o Ability to type 35 words per minute is preferred.
- o Ability to communicate effectively both verbally and in writing, including the ability to manage circumstances involving conflict and upset people.
- o Ability to deal effectively with a wide range of people who may be under stress, have emotional or mental disorders, or are impaired by drugs or medication.
- o Ability to use sound judgment under stress.
- o Ability to evaluate a number of factors and solve problems using deductive reasoning.
- o Ability to understand and follow complex oral and written instructions.
- o Be a United States Citizen.
- o A minimum of 21 years of age.

- o Possession of a valid Driver's License and the ability to obtain a Washington State Driver's License within 30 days of hire.
- o Ability to pass a written and physical fitness examination, psychological evaluation, medical examination and polygraph exam.
- o Ability to pass a background investigation.
- o Able to work variable shifts including nights, weekends and holiday hours.
- o Must be able to obtain certification as a peace officer, or timely obtain certification or exemption there from, by meeting all requirements of RCW 43.101.200 within the first six months of employment unless the basic training requirement is otherwise waived or extended by the Washington State Criminal Justice Training Commission. Successful completion of basic training is requisite to the continuation of employment of such personnel initially employed on or after January 1, 1990.
- o High School Diploma or G.E.D. Prefer a minimum of 45 quarter or 30 semester college credits towards a relevant college degree or completion of a Washington State Criminal Justice Training Commission certified reserve officer academy.
- o Successful completion of a field officer training program by a civilian law enforcement agency.
- o Any combination of education and experience, which provides the applicant with the desired skills, knowledge and ability required to perform the job may be substituted for these qualifications.

This position description does not constitute an employment agreement between the employer and employee and is subject to change by the employer as the needs of the employer and requirements of the job change.



 EMPLOYEE ACKNOWLEDGEMENT

6/5/2009



Volunteer Warnings, Risks, Liability Release and Covenant Not to Sue

Any person that volunteers to experience a TASER device electrical discharge ("TASER Exposure") must read and sign this Form prior to any TASER Exposure.

WARNINGS AND RISKS

IMPORTANT SAFETY AND HEALTH INFORMATION

Read, understand, and follow these warnings before experiencing a TASER Exposure. (These warnings are effective March 1, 2007, and supersede all other warnings by TASER devices.)



Electronic Control Device
This device is a non-lethal weapon.
It can cause injury.
It may interfere with medical devices and all forms of electrical equipment.
It may cause fire and explosion.
It may cause TASER device failure.

TASER® electronic control devices are weapons designed to incapacitate a person from a safe distance while reducing the likelihood of serious injuries or death. Though they have been found to be a safer and more effective alternative when used as directed to other traditional use of force tools and techniques, it is important to remember that the very nature of use of force and physical incapacitation involves a degree of risk that someone will get hurt or may even be killed due to physical exertion, unforeseen circumstances and individual susceptibilities.

All volunteer exposures shall be performed by a TASER certified instructor.

Spotters. All persons taking a TASER Exposure shall be supported by spotters so they don't fall. Each spotter should hold an upper arm under the armpit, so that the person can be safely supported and lowered to the ground after being hit without twisting or putting undue stress on the arm or shoulder. If probes are fired in lieu of attaching spent wires or alligator clips, then eye protection is required for both the spotter and the student being exposed. Provided that no probes are attached to the person's arms, there should be no electrical wires flowing into the spotters and they can safely support the person being shot without any negative impact.

No Minors. Because of parental/guardian consent issues, no minor shall be exposed to a TASER device.

Keep Body Parts Away From Front. Keep your hands and body parts away from the front of the TASER cartridge.

Avoid Static Electricity Discharge. Avoid contact between static electricity and the TASER cartridge since static electricity can cause unexpected discharge.

Deployment Safety Procedures

Avoid Sensitive Areas. Significant injury can occur from TASER device deployment into sensitive areas of the body such as the eyes, throat, or genitals—avoid intentionally targeting these areas without justification.

Avoid Known Pre-Existing Injury Areas. When practical, avoid deploying a TASER device at a known location of pre-existing injury (e.g., avoid targeting the back for persons with known pre-existing back injuries, avoid targeting the chest area on persons with a known history of previous heart attacks, etc.). These injuries may be provoked by such deployment.

Bevare—TASER Device Can Ignite Explosive Materials, Liquids, or Vapors. These include gasoline, other flammables, explosive materials, liquids, or vapors (e.g., gases found in sewer lines, methamphetamine lab, and butane-type lighters). Some self-defense sprays use flammable carriers such as alcohol and could be dangerous to use in immediate conjunction with TASER devices.

Deployment Health Risks

Continuous Exposure Risks. When practical, avoid prolonged or continuous exposure(s) to the TASER device's electrical discharge. In some circumstances, in susceptible people, it is conceivable that the stress and exertion of extensive repeated, prolonged, or continuous application(s) of the TASER device may contribute to cumulative exhaustion, stress, and associated medical risks.

Other Conditions. Unrelated to TASER exposure, conditions such as excited delirium, severe exhaustion, drug intoxication or chronic drug abuse, and/or over-exertion from physical struggle may result in serious injury or death.

Breathing Impairment. Extended or repeated TASER device exposures should be avoided where practical. Although existing studies on conscious human volunteers indicate subjects continue to breathe during extended TASER device applications, it is conceivable that the muscle contractions may impair a subject's ability to breathe. In tests conducted on anesthetized pigs repeated TASER device applications did cause cessation of breathing during TASER device discharges, although it is unclear what impact the anesthesia or other factors may have had on the test results. Accordingly, it is advisable to use expedient physical restraint in conjunction with the TASER device to minimize the overall duration of stress, exertion, and potential breathing impairment, particularly on individuals exhibiting symptoms of excited delirium and/or exhaustion. However, it should be noted that certain subjects in a state of excited delirium may exhibit superhuman strength and despite efforts for expedient restraint, these subjects sometimes cannot be restrained without a significant and protracted struggle.

Vegetal Response. Some individuals may experience an exaggerated response to a TASER device exposure, or localized TASER device exposure, which may result in a person falling.

Permanent Vision Loss. If a TASER probe becomes embedded in an eye, it could result in permanent loss of vision.

Seizure Risks. Repetitive stimuli such as flashing lights or electrical stimuli can induce seizures in some individuals. This risk is heightened if electrical stimuli or current passes through the head region.

Post-Deployment Procedures—Wounds and Injury Care

Probe Removal. In most areas of the body, lacerations or wounds caused by TASER probes will be minor. TASER probes have small barbs. There is a possible risk of probes causing injury to blood vessels. Follow your training and agency's guidance for probe removal.

Side Wound Treatment. TASER devices can cause skin irritation, small puncture wounds, friction abrasions, minor burns, etc. As with any injury of this type, in some circumstances infection(s) may occur. Thus, appropriately cleanse any such wounds and if necessary seek medical attention.

1 Q. Prior to coming to Washington, had you ever seen
 2 anyone use a Taser in the course of law enforcement?
 3 A. Deployed in the field, no, not in training. Just
 4 numerous videos, you know.
 5 Q. When you say numerous videos, what do you mean?
 6 A. Everything from YouTube to in our academy they
 7 made us, you know, watch, you know, short snippets about
 8 Taser and stuff and like everyone else on Cops and every
 9 other TV show, you know, where they show a Taser.
 10 Q. Okay. But never in the field, never in person?
 11 A. No.
 12 Q. Okay.
 13 A. We -- I worked on salt water most of the time.
 14 Q. Uh-huh.
 15 A. Most agencies wouldn't carry a Taser on salt
 16 water. Salt water's very conductive, and if you happen to
 17 be wet in the same area, there could be a problem with you
 18 yourself getting electrocuted.
 19 Q. Do you remember why you were watching a Taser
 20 application video at the FWC academy if they weren't using
 21 it as a tool?
 22 A. Probably more like just an orientation thing, you
 23 know, like a police training, these-at-work-shere-
 24 available-at-the-different-departments kind of deal.
 25 Q. Okay. So what time is it now?

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1 Washington?
 2 A. Most was by myself, but I did the trip to Canada
 3 with Matt Stealy and Curt Manor, M-A-N-O-S.
 4 Q. Uh-huh.
 5 A. The Friday Harbor was with Curt and Matt.
 6 Q. Uh-huh.
 7 A. And Whidbey, Curt and Matt, Windrop and
 8 Leavenworth were with Curt and Matt I think, and I know I
 9 went to Leavenworth by myself at least once.
 10 Q. Okay. So your final day at the City of Lake
 11 Stevens Police Department was June 9, 2009, correct?
 12 A. Yes.
 13 Q. And who was your field training officer?
 14 A. I wasn't June 9th?
 15 Q. I'm asking.
 16 A. June 8th or June 9th, uh-huh.
 17 Q. Okay. And who was your field training officer?
 18 A. That day was Chad. I can't recall Chad's last
 19 name right now. He was an officer with Lake Stevens. I
 20 believe he's still there. And he took me to get my
 21 uniforms.
 22 Q. Okay. Between your first day of hire and meeting
 23 Chad Officer Chad --
 24 A. Uh-huh.
 25 Q. -- and June 11th, the day that you received your

Page 79

1 A. It's 11:17, 11:16.
 2 Q. Okay. Would you like to take another short break?
 3 A. That would be great.
 4 Q. Okay.
 5 (Records was taken from 11:17 to 11:23 a.m.)
 6 Q. (By Mr. Bamann) We're back on the record. Oh, by
 7 the way, when you left PWC, do you remember what your salary
 8 was?
 9 A. Around 32.
 10 Q. Okay.
 11 A. Cost of living's a lot less down here.
 12 Q. Okay. So can you say that in full language so the
 13 record's clear what you were making?
 14 A. 32,000 annually.
 15 Q. And what was the yearly salary that you were
 16 offered by the City of Lake Stevens?
 17 A. 59, possibly 61. It was in that range.
 18 Q. Okay. And what was the annual salary that you
 19 were offered by the Federal Reserve Bank?
 20 A. I think that was an even 40.
 21 Q. Pardon me?
 22 A. An even 40,000.
 23 Q. Okay. All right. So primarily who was the person
 24 that you were riding a motorcycle with in that
 25 seven-month-or-so window of time after you moved to

Page 78

1 Taser training, what were the various items or T11 say
 2 postcards or excusers that you underwent as a new recruit
 3 there at the City of Lake Stevens Police Department? Do you
 4 remember?
 5 A. Got my uniform. I rode along. I was issued
 6 various gear like my firearm and manuals, citation books,
 7 and the normal patrol stuff you would get, the keys, the
 8 access card and FOB, went through -- I think it was Chad
 9 that was telling me about the city of Lake Stevens and all
 10 that. And then the following day was, I believe I had the
 11 day off, and then I came back --
 12 Q. Who had the day off?
 13 A. I did. The following -- the second day I had the
 14 day off, and then I --
 15 Q. Why did you have the day off the second day?
 16 A. It was a shift because Officer Wayne Aukerman was
 17 to be my FTO or PTO as they call it here, and that was his
 18 regular day off. So came in on the third day of employment
 19 during a day shift, and there was a confusion on when I was
 20 supposed to be there and when Wayne was supposed to be
 21 there, Officer Aukerman, so I spent the day riding with
 22 Pat Severson, Officer Pat Severson, and also with Sergeant
 23 Craig Valovic.
 24 And that afternoon Wayne came in, Officer Aukerman
 25 came in, and I went through the Taser training Power Point

Page 80

1 presentation on his laptop.
 2 Q. Okay. So I'm going to slow you down. So up until
 3 that point is what I want to ask you about.
 4 A. Uh-huh.
 5 Q. What all did you do in that window of time? The
 6 first day -- you said the second day you actually didn't
 7 come in. The first day you spent with Chad?
 8 A. Right.
 9 Q. And part of the third day you spent with
 10 Officer Stevenson; is that right?
 11 A. Yes, said I believe Sergeant Valvek.
 12 Q. Okay. So what all did you do with Chad? Break it
 13 down a little bit more.
 14 A. We spent quite a bit of time at the uniform supply
 15 company getting my uniforms and basic police gear and
 16 getting fitted.
 17 Q. Uh-huh.
 18 A. And then I don't really remember. I know we drove
 19 around town.
 20 Q. Okay. Were you wearing a gun?
 21 A. I don't remember. I don't remember. No, I
 22 don't -- I -- I don't remember if I was wearing a gun that
 23 day or not. I think I was in civilian clothes that day.
 24 Q. Okay. So you were sitting in the passenger seat
 25 of a Lake Stevens police car in civilian clothes, and
 Page 81

1 vehicle operations course, EVOC.
 2 Q. So on the first day, is there anything else that
 3 happened on the first day?
 4 A. Not that I can recall.
 5 Q. And you think that the firearms training may have
 6 been the first day or could have been the third day?
 7 A. The first or second day -- or third day.
 8 Q. Yeah. Just for the record, the second day you
 9 didn't work, so.
 10 A. Right.
 11 Q. Yeah. So on the third day that you came to work,
 12 were you in uniform?
 13 A. Yes.
 14 Q. Okay.
 15 A. Yes.
 16 Q. Did you wear a gun that day?
 17 A. Yes. When I was in uniform, I had a gun on.
 18 Q. Okay.
 19 A. Full gun belt. (Demonstrating.)
 20 Q. Yeah. So on the -- I'm just going to go back
 21 again. On the first day you didn't respond to any calls for
 22 service, correct?
 23 A. I can't remember.
 24 Q. Well, you don't have any recollection of --
 25 A. I have no recollection of one.
 Page 83

1 Officer Chad was driving; is that correct?
 2 A. Yes.
 3 Q. Okay. And you were there for what? Eight hours?
 4 Ten hours?
 5 A. Standard ten-hour shift, ten or 12. I can't -- I
 6 don't recall.
 7 Q. Okay.
 8 A. It would be on one of my timecards, timecards.
 9 Q. Yeah. Anything else of note that you recall that
 10 you did that first day?
 11 A. Issued equipment, got fitted, gun range. Gun
 12 range. I believe that was the first day with
 13 Sergeant Nelson. It was either the first day or the second
 14 day was --
 15 Q. It was either the first day or the third day you
 16 meant?
 17 A. Right. Well, second day of work.
 18 Q. Yeah.
 19 A. Yes, I went to the gun range.
 20 Q. Okay.
 21 A. And I got qualified on an AR-15 and my Glock.
 22 Q. Okay. Anything else that you recall on that first
 23 day?
 24 A. I don't think it was the first day. It was
 25 sometime at some point the next few weeks I did emergency
 Page 82

1 Q. Responding -- you don't have any recollection of
 2 responding to any calls for service, correct?
 3 A. Correct.
 4 Q. So you remember looking at uniforms. Chad talking
 5 to you about the city of Lake Stevens. You may or may not
 6 have gone to the gun range. You were thinking that may have
 7 been a different day, correct?
 8 A. It may have been the first day or the second day.
 9 I mean that's pretty much the first thing you want to get
 10 out of the way so you can be qualified to carry a firearm.
 11 Q. And you remember riding around in Chad's car,
 12 correct?
 13 A. Yes.
 14 Q. But nothing else that's stand-out memorable about
 15 that first day?
 16 A. No.
 17 Q. Do you remember when time you reported to work on
 18 June 11th?
 19 A. I think three or four o'clock, probably 1600, four
 20 o'clock.
 21 Q. Okay.
 22 A. Because I think that's the time when Wayne comes
 23 in for his shift.
 24 Q. Uh-huh. And when Officer Alderman wasn't there,
 25 you work for a while along with Officer Stevenson; is that
 Page 84

1 correct?
 2 A. That was the day prior to that I think. I'm
 3 calling it the second day of work. You're calling it the
 4 third day.
 5 Q. Well, I'd like to see the same language, so you
 6 started working on what day?
 7 A. The first day I started we went and got uniforms.
 8 Q. What was your first date, the first date that you
 9 showed up for work?
 10 A. I believe June 8th.
 11 Q. Okay. So you believe you came in on June 8th.
 12 June 9th you were off?
 13 A. Right.
 14 Q. Then you came in again on the 10th?
 15 A. Yes.
 16 Q. And then again on the 11th?
 17 A. Yes.
 18 Q. And the 11th was the day that you received your
 19 Taser training, correct?
 20 A. Taser exposure. I started the Taser training on
 21 the 10th, the afternoon of the 10th, with
 22 Officer Wayne Aukerman, right.
 23 Q. Okay.
 24 A. I had already started the day because there was
 25 some confusion on when I should come in and when Wayne was

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1 calls for service?
 2 A. I do not remember.
 3 Q. Did you have no recollection --
 4 A. I'm sure we did.
 5 Q. Do you have any recollection of responding to any
 6 calls for service?
 7 A. No.
 8 Q. Okay. Now, what were you told in terms of what
 9 your role was as a new recruit there, as a probationary
 10 officer?
 11 A. To go through the FITO program, to learn the
 12 procedures and protocols of the department, to get me
 13 immersed into Washington law as opposed to Florida law and
 14 to get me up to speed on their paperwork and everything else
 15 and so I can be released into the field on my own.
 16 Q. Okay. And were you told that until all that
 17 occurred, you would have no arrest powers?
 18 A. No.
 19 Q. What was your understanding in terms of your
 20 ability to effect an arrest in Washington on the first two
 21 or three days of your probationary employment?
 22 A. Oh, as soon as you're hired, you have -- you have
 23 the ability to arrest.
 24 Q. Who told you that?
 25 A. Nobody told me that, but nobody didn't tell me

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1 going to come in. Wayne was supposed to come in and do a
 2 day shift with me because pretty much the first week it's
 3 orientation, which is always easier to do in daylight hours
 4 to get your boundaries and, you know, basically drive around
 5 town and this is there, this is there, this is there.
 6 So I did a day shift with Pat Stevenson and
 7 Craig Valvick I believe during the day, and then Officer
 8 Wayne Aukerman came in, and then we started my Taser
 9 training in an interview room where we looked at the Power
 10 Point, and then once we were done with that, I went home for
 11 the day.
 12 Q. Okay.
 13 A. The third day of working, fourth day of
 14 employment, I came in in the afternoon, and I can't recall
 15 if I took the written exam prior or after the Taser
 16 exposure, but it was in the afternoon on the 11th.
 17 Q. Okay. Great. Thanks for that clarification. So
 18 the first day with Officer Chad -- has the last name come to
 19 you yet?
 20 A. I feel horrible. No, it hasn't.
 21 Q. Okay. I'm just asking if you remember -- and then
 22 you had one day that you were riding with Officer Stevenson
 23 and perhaps also Sergeant Valvick, is that correct?
 24 A. I think so.
 25 Q. Okay. And on that day did you respond to any

Page 86

1 that, I was in uniform with a gun.
 2 Q. Did you arrest anybody?
 3 A. No.
 4 Q. You said that you were told that you needed to
 5 learn the difference between Washington law and Florida law,
 6 right?
 7 A. Yes. That's why I never went to the lateral
 8 academy.
 9 Q. Right.
 10 A. Uh-huh.
 11 Q. And you didn't go to the lateral academy,
 12 otherwise known as the equivalency academy, until
 13 January 2010, correct?
 14 A. Right, correct.
 15 Q. So the day before your Taser application, you went
 16 through the Taser training with Officer Wayne Aukerman,
 17 correct?
 18 A. Aukerman, yes.
 19 Q. And that's A-L-I-K-E-R-M-A-N, correct?
 20 A. I believe so, yes.
 21 Q. Okay. Tell me about the Power Point training that
 22 you received with Officer Wayne Aukerman.
 23 A. It was a Power Point presentation showing the
 24 instrument, causes and effects, how it operates, distance
 25 and range, aiming points, proper carriage, proper removal

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1 and insertion of the Taser cartridges, standard training
 2 that Taser puts out there.
 3 Q. Okay. And so where were you when you were
 4 reviewing the Power Point?
 5 A. In one of the interview rooms in the back of
 6 the -- in the back of the Lake Stevens Department.
 7 Q. Were you with Officer Aukerman?
 8 A. Yes.
 9 Q. And was it just the two of you in the room?
 10 A. Yes.
 11 Q. And just for the record, we're describing a slide
 12 show presentation on a computer; is that correct?
 13 A. Yes, on a laptop.
 14 Q. Okay. And about how long did you spend going over
 15 the Power Point training presentation?
 16 A. I don't know.
 17 Q. What's your estimate?
 18 A. Couple hours.
 19 Q. Okay. Were there some forms also that
 20 Officer Aukerman reviewed with you?
 21 A. Yes.
 22 Q. What forms were they?
 23 A. The Taser exposure form, their release form, the
 24 after exposure form, and also I don't know if this was part
 25 of the test or not, where they actually have a profile

1 A. Yes.
 2 Q. Do you remember receiving that information?
 3 A. Yes.
 4 Q. What do you remember reviewing in those slides?
 5 A. Things about water, using them near water, be
 6 aware of your surroundings before you expose somebody so
 7 they don't fall into the road or fall off a roof or impact
 8 injuries, you know, from falling and stuff like that.
 9 Q. Do you remember receiving any other information
 10 regarding risk of injury with a volunteer exposure?
 11 A. Yes, it's all in -- it's all in there.
 12 Q. What else do you remember about that?
 13 A. That you could have muscular injuries, tendon
 14 injuries, falling injuries, burn injuries, infection, all of
 15 it.
 16 Q. Uh-huh.
 17 A. Yeah.
 18 Q. So Officer Aukerman reviewed the entire
 19 Power Point presentation with you, reviewed the volunteer
 20 guideline forms with you, reviewed the volunteer exposure
 21 warnings with you. Was there anything else that
 22 Officer Aukerman reviewed with you?
 23 A. I don't know if he actually reviewed each form,
 24 but he gave them to me to sign or read, and I can't remember
 25 if he was actually in the room when I went through the whole

1 picture of the instrument and name-the-parts type of deal,
 2 but I think that might have been on the test.
 3 Q. Uh-huh. Okay. Do you recall reviewing something
 4 called the volunteer guidelines?
 5 A. I'm sure, yes.
 6 Q. And also something called the volunteer exposure
 7 warnings?
 8 A. Yes.
 9 Q. Okay.
 10 A. If that's what those forms are called. The
 11 standard Taser forms I saw.
 12 Q. But that rings a bell that you reviewed those
 13 forms?
 14 A. Yes, uh-huh.
 15 Q. And what information do you recall receiving when
 16 you were reviewing the Power Point presentation?
 17 A. Where to aim on people, how to remove the probes,
 18 biohazard decontamination, the AFIDs I think they call them.
 19 Those are the little things that shoot out with the probes
 20 that have the ID number of the actual cartridge so it can
 21 show who actually fired their Taser and by utilizing the
 22 serial number of the cartridge.
 23 Q. Okay. And in those slides there was also
 24 information regarding risk of injury in receiving a
 25 volunteer Taser application, correct?

1 Power Point presentation or not. I don't know if he left
 2 and came back or we went through each one. I think he left
 3 at some point, but we went through each slide.
 4 Q. Okay. Earlier you said that you were in the
 5 conference room with Officer Aukerman and the laptop
 6 reviewing the Power Point presentation, correct?
 7 A. Uh-huh, yes.
 8 Q. And your recollection is, he may have left briefly
 9 for some period of time and come back; is that correct?
 10 A. Right, right.
 11 Q. But for the most part --
 12 A. He was there.
 13 Q. -- in the room with you? And he was available to
 14 answer questions that you may have had?
 15 A. Yes.
 16 Q. Did you have questions as you went along?
 17 A. Oh, I'm sure. I don't recall them at this time,
 18 but I'm sure I did. I know him and I had a few discussions
 19 about some of the exposures they showed on the videos
 20 because there was short videos showing people being Tased in
 21 the field and the reactions of their bodies.
 22 Q. Uh-huh. Okay. And he answered your questions?
 23 A. Yes.
 24 Q. Okay. And the forms that he provided you, the
 25 written forms --

1 A. Uh-huh.
 2 Q. - by TASER International, you took your time and
 3 reviewed those, correct?
 4 A. I read through them, yes, I read the whole thing.
 5 Q. And you signed them, correct?
 6 A. Yes.
 7 Q. And, as you indicated a few minutes ago, at that
 8 point in time, you had not yet attended the Washington
 9 equivalency academy, correct?
 10 A. No, I had not.
 11 Q. And you had not yet received your certificate from
 12 the Washington equivalency academy to enforce the laws of
 13 Washington, correct?
 14 A. Correct.
 15 Q. You didn't receive that until mid January 2010,
 16 correct?
 17 A. Correct.
 18 Q. The Taser training information that you received
 19 with Officer Aukerman informed you about the risk of
 20 volunteer exposure to include muscle contractions, correct?
 21 A. Yes.
 22 Q. And sports-type injuries, correct?
 23 A. Yes.
 24 Q. And fractured bones, correct?
 25 A. Yes.

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1 Q. And you received all of that information before
 2 you received your Taser exposure, correct?
 3 A. Yes.
 4 Q. And is it your recollection that you reviewed
 5 those written forms on the same day that you reviewed the
 6 Power Point presentation?
 7 A. It was either during -- after the Power Point
 8 presentation or the next day prior to exposure.
 9 Q. What's your best recollection about that?
 10 A. No idea.
 11 Q. Okay.
 12 A. It was one or the other.
 13 Q. Okay. And some of the information regarding risk
 14 of injury is also contained in the Power Point presentation,
 15 correct?
 16 A. I believe so. I don't remember. I'm certain it
 17 was.
 18 Q. Okay. So you went home after going through the
 19 written training with Officer Aukerman; is that correct?
 20 A. Uh-huh.
 21 Q. And then you came back the next afternoon; is that
 22 right?
 23 A. Yes.
 24 Q. And it the first thing that you did on
 25 June 11, 2009 is go through the protocol for the Taser

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1 exposure training with Officer Aukerman, or did you do
 2 something else first?
 3 A. I don't remember if the test was first or the
 4 exposure was first, but that was the first thing that was
 5 Taser-related was the -- pretty much the only thing I did
 6 that day.
 7 Q. Okay. So you took the Taser training test on
 8 June 11th in the afternoon; is that correct?
 9 A. Yes.
 10 Q. And you received the volunteer Taser application
 11 that same afternoon, correct?
 12 A. Well, yes, but I wouldn't call it voluntary.
 13 Q. Okay. And you're just not sure if you took the
 14 test first or received the application first; is that
 15 correct?
 16 A. Correct.
 17 Q. Okay. So what's your recollection about showing
 18 up to work on June 11th in the afternoon and what happened
 19 next?
 20 A. Got there, either took the test or went directly
 21 to the exposure training, and that was Whyne -- I know Whyne
 22 had me take off my gun belt and radio, and I asked him if
 23 this was totally necessary to do this, and he said, if you
 24 want this job, it is, or worse to that effect. And we
 25 walked out, and he had me lay down, and a bunch of officers

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1 and everything standing around, and hooked it up to my right
 2 bloop -- or I used to have one -- and my left ankle and
 3 asked me how many seconds I wanted, and I said, well, cut it
 4 close to the middle and make it three seconds, and I got
 5 zapped, and it showed down time. It absolutely showed down
 6 time. A worse -- pretty much the worst experiences of my
 7 life.
 8 Q. Okay.
 9 A. I'd take pepper spray over it right in the face.
 10 Q. Uh-huh.
 11 A. Went to -- I remember Dennis Irwin -- he's a
 12 sergeant -- or he was a detective -- goes to help me up, and
 13 I remember saying, no, nobody's getting me up until these
 14 things are off me. Get these things off me. Went to help
 15 me up, and I felt this knot in my lower back, and something
 16 twisted my back or something, and he helped me up.
 17 And we got a call. Whyne and I got a call over
 18 at -- Oh, what's the name of that place? It's the place
 19 that has a whole bunch of doors on drill now in
 20 Lake Stevens. That's Merkin I think. Is it Merkin's or
 21 something? That area. And he said, Go get your gun belt
 22 on. We gotta go. And I could barely get my gun belt on.
 23 He was setting me to hurry up, and I got to the car. I
 24 could barely get in the car, and I was just -- I to 10 on
 25 the pain scale, I was a good 7, 8, and I told him.

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Deposition of Steven W. Hyde, 6-28-12

1 And we got to the scene. It was some sort of
 2 argument, and I can't remember what officers were there, but
 3 there was two other officers already there. Dean. Dean was
 4 already there. I could barely get out of the car, and Wayne
 5 said, Well, let's get you back to the station, and we'll
 6 send you to Everett Clinic.
 7 So I went to the Everett Clinic. The
 8 doctor looked at me, and I can't remember what he gave me.
 9 It was either anti-inflammatory or something, called it a
 10 lumbar strain, and I went home.
 11 Q. Okay.
 12 A. Uh-huh.
 13 Q. Anything else stand out about that day?
 14 A. I remember feeling like it was hazy, like a
 15 right-of-passage thing, totally unnecessary, you know,
 16 everybody laughing, you know, being absolutely petrified,
 17 calling my wife and telling her, you know, I'm completely
 18 absolutely just ready to turn the car around and go home.
 19 And she told me to suck it up, and, you know, You got the
 20 job. You just turned down another good job to get this one.
 21 You've got to do it. You don't have a choice, so suck it
 22 up. And so I did.
 23 Q. When did you call your wife?
 24 A. On the way to work.
 25 Q. Did Officer Aukerman indicate why you were getting

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1 the Taser application on the 11th rather than doing it on
 2 the same day of the Power Point presentation?
 3 A. Because I had already been there all day and
 4 because there was the confusion on when he was supposed to
 5 come in. He was supposed to do a day shift, and he didn't
 6 come in until 4:00. I think it was 4:00. It was afternoon.
 7 And I had already done almost a whole day, and we still had
 8 to go over some more stuff with the Taser before the
 9 exposure, like we went outside. Part of it was, we went
 10 outside, and he held up a target, and I had to shoot the
 11 Taser at the target.
 12 Q. When did you do that?
 13 A. I think it was the day I got Tasered, right
 14 beforehand, or it -- yeah, it had to be. Yeah, I think it
 15 was right before. You know, the aiming points.
 16 Q. Uh-huh. What was your target?
 17 A. A cardboard Taser target. I believe it had a
 18 silhouette of a person on it with the hit areas where you're
 19 supposed to hit.
 20 Q. And that was before your Taser application?
 21 A. Yes. After the application, I was pretty much
 22 done.
 23 Q. So in terms of the process of the Taser
 24 application?
 25 A. Uh-huh.

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1 Q. You were laying down, correct?
 2 A. Face up, laying down on my back.
 3 Q. Okay.
 4 A. In the squad room.
 5 Q. All right. And you are on a carpeted area,
 6 correct?
 7 A. Yes.
 8 Q. And there were clips on the end of the Taser
 9 wires, correct?
 10 A. They were alligator clips.
 11 Q. That's what they're called, right?
 12 A. Yes.
 13 Q. And so you didn't receive the dart application
 14 where the barb actually penetrates the skin, correct?
 15 A. Correct.
 16 Q. And since you were already on the ground, there
 17 was no need for spotters to assist you, correct?
 18 A. Correct. If I would have got shot with the
 19 probes, it would have been proper Taser spread, probe
 20 spread, because --
 21 Q. Let me ask the questions, okay? I'm just trying
 22 to clarify how it occurred.
 23 A. Okay.
 24 Q. So you're on the ground, correct?
 25 A. Yes.

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1 Q. And the duration of the Taser application can be
 2 as much as five seconds in the field, correct?
 3 A. Yes.
 4 Q. And in this case Officer Aukerman asked you how
 5 long you would like it, and you said three seconds, correct?
 6 A. Yes.
 7 Q. And so it was just short of three seconds,
 8 correct, in your case?
 9 A. It was right around three seconds.
 10 Q. Okay.
 11 A. It can be timed on the video.
 12 Q. Right. So you said something a few minutes ago
 13 about something that Officer Aukerman said. You asked him a
 14 question, is that correct?
 15 A. Yes.
 16 Q. Where were you when you asked him that question?
 17 A. Walking out of the squad room or the -- out of the
 18 interview room going out to the main squad room to do the
 19 exposure.
 20 Q. Why were you in the interview room?
 21 A. That's where we were doing the Power Point
 22 presentation. It was a quiet place where we could work
 23 without interruption.
 24 Q. I thought you said that happened the day before?
 25 A. We'd also went in there prior to the application.

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25 (Pages 97 to 100)



TASER INTERNATIONAL

TASER® X26 / M26 Volunteer Exposure Report

Age: 40 Sex: M Height: 5'10" Weight: 210 Check: M26 X26

Did dart contacts penetrate the subject's skin? Y/N

Length Of Exposure: 6+ Seconds; 5 Seconds; 4 Seconds; 3 Seconds; 2 Seconds; 1 Second

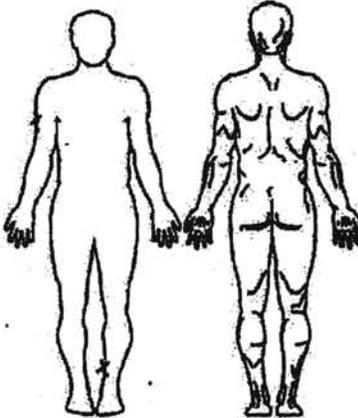
Air Cartridge Type: Regular Darts XP Darts Alligator Clips

Drive Size: YES / N Length of Exposure 3 Sec

Did the application cause injury: YES / N (If yes, advise the instructor and complete the Injury Report)

If yes, was the subject treated for the injury: YES / N/A

APPLICATION AREAS: Please place "X's" on the points of contact



Please list how the TASER affected you:

FELT LIKE BEING ELECTROCUTED BY 208 THREE PHASE 208 A/C

Could you fight the effects of the Taser and continued your attack? NO!!!

May we quote your comments? Y/N

Name/Rank: STEVEN W. HYPE Signature: [Signature] 114

EMPLOYEE'S REPORT OF AN ACCIDENT

Name:	STEVEN W. HYOE
Department:	LAKE STEVENS POLICE DEPT.
Date of Injury:	6/11/09
Time of Injury:	APPROX. 1545
Shift:	SWING 1500-0300
Part of body injured or exposed:	LOWER BACK CENTER
Describe in Detail how your injury or exposure occurred (Include tools, machinery, chemicals or fumes that may have been involved): DURING TASER VOLUNTARY TRAINING. HAD BACK PAIN AFTER. DIFFICULTY GETTING OUT OF PATROL VEHICLE	
Address where injury or exposure occurred: (Include Business name if at business location) LAKE STEVENS POLICE DEPARTMENT.	
Was this incident caused by failure of a machine or product or someone who is not a co-worker? NO	
List any witnesses: OFFICERS AURIAMAN, SGT. SAMSON, CPT. LORENZEN, OFFICER BAWW, DET. LAMBDA, OFFICER STEPHENSON, OFFICER THOMAS.	
When will you return to work?	
When did you last work? 6/10/09 1230 HR.	
Date and time you reported this incident to your supervisor: 6:30 6/11/09	
Did you require medical treatment or first aid?	
Name of hospital or clinic (if medical treatment was required):	
Attending Physician:	
Signature: <i>[Signature]</i>	
Date: 6/11/09	

Please return this form to your supervisor as soon as possible. Thank you.

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FILED

2012 SEP 10 PM 4:07

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH

Hearing Date: Thursday, September 20, 2012
Time: 10:30 a.m.



CL15613027

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

STEVEN W. HYDE and SANDRA D.)
BROOKE, husband and wife

Plaintiffs,

vs.

CITY OF LAKE STEVENS,

Defendant.

NO.10-2-10516-4

DECLARATION OF STEVE HYDE IN
SUPPORT OF PLAINTIFFS' REPLY IN
OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

I, Steve Hyde declare:

1. I am one of the Plaintiffs in the above-entitled cause. I make this declaration from personal knowledge.
2. I have worked aboard ships as a licensed merchant mariner. I have also worked in law enforcement in Florida.
3. My wife has a Ph.D. in marine biology. When she obtained a position in the Pacific Northwest, I applied for work as a police officer with the City of Lake Stevens. I was hired.
4. I was given two commission cards by Lake Stevens. They are presently in Lake Stevens' possession. Lake Stevens had me take a physical prior to employment, which I passed. I was given a gun and other items related to law enforcement by Lake Stevens. I have also

DECLARATION OF STEVE HYDE - 1

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

253

1 written tickets and reports while employed by Lake Stevens. I asked Lake Stevens if I would be
2 administered an oath; I was told, to my surprise, that they do not administer one.

3 5. Attached as Exhibit A to my declaration is a true and correct copy of the
4 inventory provided by Defendant Lake Stevens of the items taken by Lake Stevens out of my
5 locker after my injury. The list includes the two commission cards issued me by Lake Stevens.

6 6. My employments before Lake Stevens were all very physical. I had no trouble
7 handling the physical nature of my previous employments. I had no back problems prior to my
8 employ with Lake Stevens that interfered with my ability to work.

9 7. Prior to discovery of old employment records in the course of this lawsuit I did
10 not even remember that twenty years ago I received a few treatments for a back issue which I
11 had thought was the bends (I was the ship's diver). The injury resolved 20 years ago and did not
12 interfere with my subsequent employments, which were physical.

13 8. I was required to undergo abbreviated training for Lake Stevens as a lateral hire.
14 As part of that training I was required to undergo tasing. I did not want to be tased and said so. I
15 was told by the training officer that I had to be tased if I wanted the job.

16 9. Prior to the tasing I was required to sign a release from Taser International.
17 Alligator clips were then attached at my right arm and left ankle. I was then tased. The tasing
18 injured my back.

19 10. The tasing took place June 11, 2009. After conservative treatments failed, I had
20 surgery on my back, the first surgery being performed August 28, 2009.

21 11. September 25, 2009, I sent an email to Ray Minor of Taser International asking
22 about the "voluntary" tasing by Lake Stevens. I described the technique used. September 30,
23 2009 Mr. Minor sent me an email in which he stated the method of tasing performed on me in
24 training was not recommended. This was the first time I discovered that there had been anything
25 wrong with the method of taser application in my circumstance. True and accurate copies of the
26 related email correspondence is attached as Exhibit B.

DECLARATION OF STEVE HYDE - :

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

1 12. June 30, 2010 Lake Stevens Police Chief Randy Celori was deposed. At that time
2 I learned he had stated that tasing was not a requirement of training to become a Lake Stevens
3 police officer. This is when I first learned that the training officer's statement to me that I had to
4 be tased if I wanted the job was untrue.

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

7 Dated this 9 day of September, 2012 at Seattle, Washington.

8 
9 _____
10 STEVE HYDE

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DECLARATION OF STEVE HYDE . . .

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.522.5200

2 - WINDOW KEYS
COMP CARD X2
COMDATA
DOOR CARD
PROMEXE CARD
BOOK #41
KEY BOX KEY #19
STREAM LIGHT + CHARGER
7 FEET KEY
END KEY #30
FOUR WEATHER RESY

BEIT VEHICU
JUMP SUIT
SHIRTS X5
PAUITS X3
LOAD
VEST
RADIO 205LF21405 + CHARGER
LATEL MIL

CUFF BOOK
2 PAIR CUFFS
CITATION BOOK
INFILTRATION BOOK
BAIL BOOK
MISC PAPERS

TAXE N XDB-258592 2 FODS
10915 SM18753
BUSINESS CARDS 1 BOX

DUTY BEIT

LOFF, ASP MONTFL, CAPSTON, FLASH LIGHT, 4 KEYPHLS, RADIO, TAXER, MAG, PAUL

GLOCK LSA 914 3 MAGS (FN)

DLID
HAT
TIE

Date: 09/24/2009

Subject: TASER Voluntary Exposure Guidelines

San Jose Communications Center Collaboration, SJSU

am@sanjosecc.com

RE: TASER Voluntary Exposure Guidelines

Wednesday, September 24, 2009 10:07 PM

From: am@sanjosecc.com

To: am@sanjosecc.com

Attachments: taser.jpg (4KB)

Steve, since the release of Vi 11 (January 1, 2008) we have had instructions to keep the spreader realistic and at the lowest setting to the student. The guidelines state to target the back or the leg: Vi 11 (released Jan 2007) to stress the arm. Vi 11 (released May 2007) the guidelines state exposures must be to the back or to the leg. So the answer to your question is no, we do not recommend this shoulder to foot exposure. Let us know if you need anything else.

Regards,

Ray Miller
Training Manager

TASER International (P) (Q) (A) (C): TASER
3700 N. 17th St., Redwood, AZ 85745
916-459-2227 ext. 6000
Fax: 916-459-2222
www.taser.com



Please do not use TASER on people and

From: am@sanjosecc.com (mailto:am@sanjosecc.com)

Sent: Wednesday, September 23, 2009 11:00 AM

To: Ray Miller

Subject: RE: TASER Voluntary Exposure Guidelines

I guess this is a tricky subject. What I am trying to find out is if Taser will train instructors to use the techniques used on me or if this was just something my instructor came up with himself. Is it an established technique that Taser does not recommend anymore? We have about 14 or so new officers that will be hitting on me. I don't know what to have to go through the entire thing. It's not realistic and based on my experience dangerous.

Thanks,

Steve

----- Original Message -----

From: "Ray Miller" <am@sanjosecc.com>

To: "am@sanjosecc.com" <am@sanjosecc.com>

Sent: Wednesday, September 23, 2009 7:25:11 AM GMT-08:00 US/Pacific

Subject: RE: TASER Voluntary Exposure Guidelines

Steve, We tell instructors exposures should be realistic with contact points and spreads you would see in the field during normal deployments.

Regards,

Ray Miller
Training Manager

TASER International (P) (Q) (A) (C): TASER

1 of 2

23/09/2009 10:31 AM

HYDE DECL EXHIBIT B - 000001

Info: custserv@taser.com

Info: custserv@taser.com

1380 N. 20th St., Scottsdale, AZ 85260
602-479-0107 ext. 6207
Fax: 602-479-0204
www.taser.com



Please consider the environment before printing this e-mail.

From: custserv@taser.com [mailto:custserv@taser.com]
Sent: Thursday, September 20, 2007 12:07 PM
To: Ray Miller
Subject: Re: TASER Voluntary Exposure Guidelines

Thanks Ray,

I had both systems and see the differences stated above to place the clips. My question is whether or not by holding the center clip it works. I was placed face up with one probe attached to my right sleeve on my right bicep. The other probe was attached to my left neck. For some reason of this device failed and was wondering if it's possible where failure took center or was the something to screw up clip.

Thanks, Steve

----- Digital Message -----

From: "Ray Miller" <rmiller@taser.com>
To: "custserv@taser.com" <custserv@taser.com>
Sent: Thursday, September 20, 2007 12:22:21 PM GMT-08:00 US/Canada Pacific
Subject: TASER Voluntary Exposure Guidelines

Steve, I apologize for not getting this out to you sooner. Here are the guidelines. I attached the ones which were current for when you took your exposure (V1.2) as well as the new ones we released with the new training version (V1.3) we released in August. The main difference is we added guidelines for non-products. Please let us know if you need anything else.

Regards,

Ray Miller
Training Manager

TASER International (NASDAQ: TASR)
1380 N. 20th St., Scottsdale, AZ 85260
602-479-0107 ext. 6207
Fax: 602-479-0204
www.taser.com



Please consider the environment before printing this e-mail.

From: custserv@taser.com [mailto:custserv@taser.com]
Sent: Friday, September 21, 2007 12:23 PM
To: Ray Miller
Subject: Request for Voluntary Exposure Guidelines

Hi,

I just spoke to you about my exposure experience. Please send me the information in regards of the methods you recommend for exposure and methods you recommend against. I was exposed by being hit on my back and the singular clip being attached to my upper right sleeve and my

3 of 3

10/18/07 12:01 AM

HYDE DECL EXHIBIT B - 000002

2142 2000/00000000

2142 2000/00000000

All work, I have not for a long time/ etc. What, anyone has

Thank you.

Steve Hyde
1200 2000 Ave. NE
Miami, FL 33134
(305) 40-1343

3 of 3

2/18/00 10:51 AM

HYDE DECL EXHIBIT B - 000003

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FILED

Hearing Date: Thursday, September 20, 2012
Time: 10:30 a.m.

2012 SEP 10 PM 4:07

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO WASH

CL15513029

SUPERIOR COURT OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY

8 STEVEN W. HYDE and SANDRA D.)
9 BROOKE, husband and wife
10 Plaintiffs,
11 vs.
12 CITY OF LAKE STEVENS,
13 Defendant.

NO.10-2-10516-4

DECLARATION OF CARL A. TAYLOR
LOPEZ IN SUPPORT OF PLAINTIFFS'
REPLY IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

14
15 I, Carl A. Taylor Lopez declare:

16 1. I represent Plaintiffs in the above-captioned cause. I make this declaration from
17 personal knowledge.

18 2. Attached as Exhibit 1 is a true and accurate copy of Taser International, Inc.
19 Volunteer Warnings, Risks, Liability Release and Covenant Not to Sue identical to the one
20 signed by Plaintiff Steve Hyde June 10, 2009 as well as a copy of the signed version.

21 3. Attached as Exhibit 2 is a true and correct copy of an email string to and from
22 Steve Hyde and Ray Minor of Taser International, Inc.

23 4. Attached as Exhibit 3 is a true and correct copy of Corvel IME Services
24 Independent Medical Evaluation report authored by Stanley Kopp, MD dated August 17, 2012.

25
26
DECLARATION OF CARL A. TAYLOR LOPEZ - 1

ORIGINAL

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

524
54

- 1 5. Attached as Exhibit 4 is a true and correct copy of excerpts from the deposition
2 transcript of Steve Edin taken September 6, 2012.
- 3 6. Attached as Exhibit 5 is a true and correct copy of the declaration of service dated
4 November 3, 2010 authored by C. Butterfield of ABC Legal Messenger.
- 5 7. Attached as Exhibit 6 is a true and correct copy of the Notice of Appearance of
6 Defendant Lake Stevens dated November 9, 2010.
- 7 8. Attached as Exhibit 7 is a true and correct copy of Declaration of Carolyn
8 Butterfield Regarding Service of Summons and Complaint dated September 6, 2012.
- 9 9. Attached as Exhibit 8 is a true and correct copy of excerpts of Plaintiffs' First Set
10 of Requests for Admissions to Defendant and Responses Thereto.
- 11 10. Attached as Exhibit 9 is a true and correct copy of excerpts of Plaintiffs' First Set
12 of Interrogatories and Requests for Production to Defendant and The City of Lake Stevens'
13 Objections and Responses.
- 14 11. Attached as Exhibit 10 is a true and correct copy of an April 29, 2011 letter to
15 Brenda L. Bannon from Carl A. Taylor Lopez.
- 16 12. Attached as Exhibit 11 is a true and correct copy of excerpts of the deposition of
17 Lake Stevens Police Chief Randy Celori taken June 30, 2011.
- 18 13. Attached as Exhibit 12 is a true and correct copy of a printout of the confirmation
19 of the service on City Clerk dated September 4, 2012. Related declarations of service have not
20 yet been generated by ABC Legal Messenger for service on the Mayor or City Clerk. They will
21 be filed when received.
- 22 14. Attached as Exhibit 13 is a true and accurate copy of Lake Stevens' Employer
23 report of accident related to the tasing of Steve Hyde. On the document Lake Stevens indicates
24 Risk Class 6905. Risk Class 6905 is the category for county and city law enforcement officers.
- 25 15. Attached as Exhibit 14 is a true and correct copy of the discovery pleadings index
26 generated in this matter.

DECLARATION OF CARL A. TAYLOR LOPEZ - 1

LOPEZ & FANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

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16. Attached as Exhibit 15 is a true and correct copy of the general pleadings index generated in this matter.

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

Dated this 9 day of September, 2012 at Seattle, Washington.


CARL A. TAYLOR LOPEZ

DECLARATION OF CARL A. TAYLOR LOPEZ - J

LOPEZ & PANTEL
2292 W. Commodore Way,
Suite 200
Seattle, WA 98199
206.322.5200

WAC 139-05-200

Requirement of basic law enforcement training.

(1) All fully commissioned law enforcement officers of a city, county, or political subdivision of the state of Washington, except volunteers and reserve officers, whether paid or unpaid, and officers of the Washington state patrol, unless otherwise exempted by the commission must, as a condition of continued employment, successfully complete a basic law enforcement academy or an equivalent basic academy sponsored or conducted by the commission. Basic law enforcement training must be commenced within the initial six-month period of law enforcement employment, unless otherwise extended by the commission.

(2) Law enforcement personnel exempted from the requirement of subsection (1) of this section include:

(a) Individuals holding the office of sheriff of any county on September 1, 1972; and

(b) Commissioned personnel:

(i) Whose initial date of full-time, regular and commissioned law enforcement employment within the state of Washington precedes January 1, 1972;

(ii) Who have received a certificate of completion in accordance with the requirement of subsection (1) of this section, and thereafter have engaged in regular and commissioned law enforcement employment without break or interruption in excess of twenty-four months duration; or

(iii) Who are employed as tribal police officers in Washington state, natural resource investigators employed by the Washington department of natural resources, special agents employed by the Washington state gambling commission, and liquor enforcement officers employed by the Washington state liquor control board who have received a certificate of successful completion from the basic law enforcement academy or the basic law enforcement equivalency and thereafter engage in regular and commissioned law enforcement employment with that agency without break or interruption in excess of twenty-four months duration.

(3) Each law enforcement agency of the state of Washington, or any political subdivision thereof, must immediately notify the commission by approved form of each instance where a commissioned officer begins continuing and regular employment with that agency.

(4) Failure to comply with any of the above requirements of basic law enforcement training will result in notification of noncompliance by the commission to:

(a) The individual in noncompliance;

(b) The head of his/her agency; and

(c) Any other agency or individual, as determined by the commission.

[Statutory Authority: RCW 43.101.060, 06-17-021, § 139-05-200, Red 8/7/06, effective 8/7/06; 05-20-020, § 139-05-200, Red 9/28/05, effective 10/22/05; 03-19-123, § 139-05-200, Red 8/17/03, effective 10/18/03; 00-17-017, § 139-05-200, Red 8/4/00, effective 8/4/00. Statutory Authority: RCW 43.101.060(2), 89-13-004 (Order 14D), § 139-05-200, Red 8/13/89; 87-19-104 (Order 14-C), § 139-05-200, Red 9/18/87; 86-19-021 (Order 1-B), § 139-05-200, Red 9/10/86.]

WAC 139-05-210

Basic law enforcement certificate of equivalency.

(1) A certificate of completion of equivalent basic law enforcement training is issued to applicants who successfully complete the equivalency process as required by the commission. For this purpose, the term "process" includes all documentation and prerequisites set forth in subsection (5) of this section and successful completion of all knowledge and skills requirements within the equivalency academy.

(2) Participation in the equivalency process is limited to:

(a) Fully commissioned peace officers of a city, county, or political subdivision of the state of Washington, who otherwise are eligible to attend the basic law enforcement academy; or

(b) Fully commissioned peace officers who have attained commissioned law enforcement status by completing a basic training program in this or another state. For this purpose, the term "basic training program" does not include any military or reserve training program or any federal training program not otherwise approved by the commission; or

(c) Persons who have not attained commissioned peace officer status but have successfully completed a basic law enforcement academy recognized as a full equivalent to the Washington state basic law enforcement academy by the commission and within twelve months of the date of completion been made a conditional offer of employment as a fully commissioned peace officer in Washington state; or

(d) Persons whose Washington peace officer certification has lapsed because of a break in service as a fully commissioned peace officer for more than twenty-four months but less than sixty months and who are required to attend the academy.

(3) Applicants who are required to participate in the equivalency academy for the purpose of becoming a certified peace officer must attend the first available session of the equivalency academy following such applicant's date of hire unless the equivalency academy occurs within the first sixty days of the peace officer's initial date of employment in which case the peace officer must attend the next available academy as a condition of certification as a peace officer. Applicants approved to participate in the equivalency academy for training purposes only, will be admitted on a space available basis.

It is the responsibility of the applicant's agency to ensure that all necessary forms and documentation are completed and submitted to the commission in a timely manner, and as necessary, to ensure that the participation provided by this section is affected.

(4) In those instances where an applicant has attended more than one basic training program, eligibility for participation in the equivalency process will be based upon successful completion of the most recent of such programs attended.

(5) The decision to request an officer's participation in the equivalency process is discretionary with the head of the officer's employing agency, who must advise the commission of that decision by appropriate notation upon the hiring notification form. Upon receipt of such notification, the commission will provide all necessary forms and information.

(6) Upon approval of an applicant's eligibility to participate in the equivalency process, the applicant's employing agency must submit to the commission the following documentation as a precondition of participation within such process:

- (a) Proof of the applicant's current and valid driver's license;
- (b) Proof of the applicant's current and valid basic first-aid card;
- (c) A statement of the applicant's health and physical condition by an examining physician;
- (d) A record of the applicant's firearms qualification;
- (e) A liability release agreement by the applicant; and
- (f) A criminal records check regarding such applicant.

(7) If comparable emergency vehicle operations training has not been completed previously, the applicant will be required to complete the commission's current emergency vehicle operation course, as scheduled by the commission.

(8) Upon completion of the equivalency process and review and evaluation of the applicant's performance, the commission will:

- (a) Issue a certificate of completion of equivalent basic law enforcement training; or
- (b) Issue a certificate of completion of equivalent basic law enforcement training upon the applicant's successful completion

of additional training as the commission may require; or

(c) Require completion of the commission's basic law enforcement academy.

[Statutory Authority: RCW 43.101.080 and (c) 101.085, 08-20-010, § 139-05-210, Mod 9/18/08, effective 10/18/08. Statutory Authority: RCW 43.101.080, 05-30-028, § 139-05-210, Mod 8/28/08, effective 10/28/08; 04-13-070, § 139-05-210, Mod 8/18/04, effective 7/18/04; 03-07-098, § 139-05-210, Mod 3/19/03, effective 4/19/03; 00-17-017, § 139-05-210, Mod 8/4/00, effective 9/4/00. Statutory Authority: RCW 43.101.080(2), 08-18-021 (Order 1-B), § 139-05-210, Mod 9/18/08.]

WAC 415-104-011
Definitions.

All definitions in RCW 41.26.030 and WAC 415-02-030 apply to terms used in this chapter. Other terms relevant to the administration of chapter 41.26 RCW are defined in this chapter.

(1) **Commissioned** means that an employee is employed as an officer of a general authority Washington law enforcement agency and is empowered by that employer to enforce the criminal laws of the state of Washington.

(2) **Director of public safety** means a person who is employed on or after January 1, 1993, by a city or town on a full-time, fully compensated basis to administer the programs and personnel of a public safety department.

This definition applies only to cities or towns in which the population did not exceed ten thousand at the time the person became employed as a director of public safety.

(3) **Elective employer** means the employer of the LEOFF Plan 1 elected official during the member's leave of absence from the LEOFF employer for the purpose of serving in elective office.

(4) **Full-time employee** means an employee who is regularly scheduled to earn basic salary from an employer for a minimum of one hundred sixty hours each calendar month.

(5) **Fully compensated employee** means an employee who earns basic salary and benefits from an employer in an amount comparable to the salary received by other full-time employees of the same employer who:

- (a) Hold the same or similar rank; and
- (b) Are employed in a similar position.

(6) **LEOFF** means the law enforcement officers' and firefighters' retirement system established by chapter 41.26 RCW.

(7) **LEOFF employer** means the employer, as defined in RCW 41.26.030, who employs the member as a law enforcement officer or firefighter.

(8) **LEOFF Plan 1 elected official** means a LEOFF Plan 1 member who is a civil service employee on leave of absence because he or she has been elected or appointed to an elective public office and who chooses to preserve retirement rights as an active LEOFF member under the procedure described in this chapter.

(9) **Plan 1 and Plan 2.**

(a) **"Plan 1"** means the law enforcement officers' and firefighters' retirement system providing the benefits and funding provisions covering persons who first became members of the system prior to October 1, 1977.

(b) **"Plan 2"** means the law enforcement officers' and firefighters' retirement system providing the benefits and funding provisions covering persons who first became members of the system on and after October 1, 1977.

(10) **Public safety officer** means a person who is employed on or after January 1, 1993, on a full-time, fully compensated basis by a city or town to perform both law enforcement and firefighter duties.

This definition applies only to cities or towns in which the population did not exceed ten thousand at the time the person became employed as a public safety officer.

(11) **Uniformed firefighter position** means a position which may only be filled by uniformed personnel as that term is defined in RCW 41.56.030 (7)(a) as in effect on July 1, 1995. A position only qualifies as a uniformed firefighter position if the employer has identified it as such for all purposes. An employer may designate a position as uniformed regardless of whether the employer is covered by public employees' collective bargaining under chapter 41.56 RCW.

[Statutory Authority: RCW 41.50.050(8) and chapter 41.26 RCW, 02-18-046, § 415-104-011, Red 8/28/02, effective 9/30/02. Statutory Authority: RCW 41.50.050, 05-18-063, § 415-104-011, Red 7/25/03, effective 8/25/03. Statutory Authority: RCW 41.50.050(8) and 41.04.120, 03-11-078, § 415-104-011, Red 8/18/03, effective 8/18/03.]

WAC 415-104-225
Am I a LEOFF member?

If you are employed by an employer as a full-time, fully compensated law enforcement officer or firefighter, you are required to be a LEOFF member.

(1) Law enforcement officers.

(a) You are a law enforcement officer only if you are commissioned and employed on a full-time, fully compensated basis as a:

(i) City police officer;

(ii) Town marshal or deputy marshal;

(iii) County sheriff;

(iv) Deputy sheriff, if you passed a civil service exam for deputy sheriff and you possess all of the powers, and may perform any of the duties, prescribed by law to be performed by the sheriff;

(b) Effective January 1, 1994, "law enforcement officer" also includes commissioned persons employed on a full-time, fully compensated basis as a:

(i) General authority Washington peace officer under RCW 10.93.020(3);

(ii) Port district general authority law enforcement officer and you are commissioned and employed by a port district general authority law enforcement agency;

(iii) State university or college general authority law enforcement officer; or

(c) Effective January 1, 1993, "law enforcement officer" also includes commissioned persons employed on a full-time, fully compensated basis as a public safety officer or director of public safety of a city or town if, at the time you first became employed in this position, the population of the city or town did not exceed ten thousand. See RCW 41.26.030(3).

(d) If you meet the requirements of (a), (b) or (c) of this subsection, you qualify as a law enforcement officer regardless of your rank or status as a probationary or permanent employee.

(e) You are not a law enforcement officer if you are employed in either:

(i) A position that is clerical or secretarial in nature and you are not commissioned; or

(ii) A corrections officer position and the only training required by the Washington criminal justice training commission for your position is basic corrections training under WAC 139-10-210.

(2) Firefighters.

(a) You are a firefighter if you are employed in a uniformed firefighter position by an employer on a full-time, fully compensated basis, and as a consequence of your employment, you have the legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.

(b) "Fire protection activities" may include incidental functions such as housekeeping, equipment maintenance, grounds maintenance, fire safety inspections, lecturing, performing community fire drills and inspecting homes and schools for fire hazards. These activities qualify as fire protection activities only if the primary duty of your position is preventing, controlling and extinguishing fires.

(c) You are a firefighter if you qualify as supervisory firefighter personnel.

(d) If your employer requires firefighters to pass a civil service examination, you must be actively employed in a position that requires passing such an examination in order to qualify as a firefighter unless you qualify as supervisory firefighter personnel.

(e) You are a firefighter if you meet the requirements of this section regardless of your rank or status as a probationary or permanent employee or your particular specialty or job title.

(f) You do not qualify for membership as a firefighter if you are a volunteer firefighter or resident volunteer firefighter.

(b) You are a firefighter if you are employed on a full-time, fully compensated basis by an employer as an emergency medical technician (EMT). To be an "emergency medical technician" you must:

- (i) Be certified by the department of health to perform emergency medical services at the level of care of an EMT; and
- (ii) Complete the requirements of your employer, if any, to perform the job duties of an EMT.

(3) Defined terms used. Definitions for the following terms used in this section may be found in the sections listed.

- (a) "Commissioned" - WAC 415-104-011.
- (b) "Director of public safety" - WAC 415-104-011.
- (c) "Employer" - RCW 41.26.030.
- (d) "Firefighter" - RCW 41.26.030.
- (e) "Full time" - WAC 415-104-011.
- (f) "Fully compensated" - WAC 415-104-011.
- (g) "Law enforcement officer" - RCW 41.26.030.
- (h) "Member" - RCW 41.26.030.
- (i) "Public safety officer" - WAC 415-104-011.
- (j) "Uniformed firefighter position" - WAC 415-104-011.

(Statutory Authority: RCW 41.50.050(5) and 41.26.030, 09-05-011, § 415-104-225, filed 3/6/09, effective 3/6/09. Statutory Authority: RCW 41.50.050(5) and chapter 41.26 RCW, 02-18-046, § 415-104-225, filed 8/28/02, effective 9/30/02. Statutory Authority: RCW 41.26.030, 95-01-048, § 415-104-225, filed 12/14/95, effective 1/1/96; 95-16-083, § 415-104-225, filed 7/25/93, effective 8/25/93.)