No. 102619

SUPREME COURT
OF THE STATE OF WASHINGTON

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CURTIS WRIGHT,

Petitioner,

vs.

PIERCE COUNTY RISK MANAGMENT,

Respondent.

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# RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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## I. INTRODUCTION

Mr. Wright, a former Pierce County law enforcement officer, appealed a Superior Court decision granting Pierce County summary judgment on the denial of his third (or fourth) industrial insurance claim for PTSD. This third (or fourth) PTSD claim arose from the same workplace exposures responsible for his first and second (and third) PTSD claims. As to the first PTSD claim, he was found to have PTSD from workplace exposures, but at the time PTSD was not a compensable occupational disease, and so his first PTSD claim was denied. That denial became final and binding.

Since then, without success, by filing two (or three) more PTSD claims, including this third (or fourth) PTSD claim, he has attempted to bootstrap that first PTSD claim under the auspices of RCW 51.32.185(1)(b), as amended in 2018, which then allowed PTSD as an occupational disease with a *prima facie* presumption of such. See *Wright v. Pierce County Risk*

*Management*, 2023 Wash. App. LEXIS 2197, 2023 WL 8078262 (November 21, 2023) at pages 2-3.

The Court of Appeals affirmed the Superior Court decision granting Pierce County summary judgment on the denial of his third (or fourth) industrial insurance claim for PTSD. *Wright v. Pierce County Risk Management*, 2023 Wash. App. LEXIS 2197, 2023 WL 8078262 (November 21, 2023)

## II. ISSUES PRESENTED FOR REVIEW

### A. Introduction

Mr. Wright has stated three issues which, he contends, had the Court of Appeals analyzed, would have resulted in a decision in his favor. Apparently, he is simply dissatisfied with the result reached by the Court of Appeals and wants the Supreme Court to reassess the Court of Appeals' analysis without regard for the strictures of RAP 13.4(b).

None of these three issues concern the grounds for accepting review under RAP 13.4(b). That is, none of them concern the Constitution of Washington or of the United States.

None of them indicates a conflict with either a Supreme Court decision or a Court of Appeals' decision. None of them presents an issue of significant public interest.

**B. Alleged Issues**

Mr. Wright had two strategies in his attempt to bootstrap his current PTSD claim under what the Court of Appeals characterized as "former RCW 51.32.185(1)(b) (2018)," the presumption statute for law enforcement officers enacted in 2018. The first strategy was to find grounds to have the first final judgment against him set aside so that it could not be a basis for claim preclusion That strategy he apparently believes is supported by his argument under item 2 below.

The second strategy was to attempt to establish, after he retired from Pierce County in August 5, 2001, that he had been rehired, by implication, when he received a subpoena from the Pierce County to testify in a criminal case. He argued that while allegedly rehired, his receipt of the subpoena triggered an aggravation of his preexisting PTSD and that all this occurred

while RCW 51.32.185(1)(b) (2018) was in effect. This strategy he apparently believes is supported by his arguments under items 1 and 3 below.

1. *RCW 51.08.013*. Mr. Wright argues that when he received a subpoena from the Peirce County prosecutor's office on January 18, 2020, he was thereby, under the terms of RCW 51.08.013, working for Pierce County. Appellant's Opening Brief in the Court of Appeals at 16-17. And the subpoena triggered an aggravation of his PTSD, which arose from his pre-retirement exposures as a Pierce County law enforcement officer. This statute is inapplicable. It refers to current employees--those employed before their retirement from employment. When Mr. Wright received this subpoena, Pierce County was not his employer. *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 426-428, 326 P.3d 744 (2014)(Div. II); *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979). Moreover, the subpoena issues

from the court, not from his former employer. This statute is irrelevant to the issues here.

This argument was rebutted in the Respondent's Response Brief in the Court of Appeals. See Appendix B at pages 21-31.

2. *Claim Preclusion as to Department Orders*. The Petitioner argues that two considerations mentioned in *Jorge Perez-Rodriquez*, BIIA Dec., 06 18718 (2008) about relief from a final judgment should have prevented summary judgment on the basis of claim preclusion in this case. Apparently, he is seeking relief from the first final judgment in 2011. Those two conditions were (1) post-judgment "changes in circumstances" and (2) "equitable considerations." Petitioner's Petition for Review at pages 12-16; Petitioner's Opening Brief in the Court of Appeals at pages 13-14.

2.1 *Change in Circumstances*. Mr. Wright apparently argues that the first final judgment should not bar his third (or forth) claim for PTSD because he had two changes in circumstances after the first final judgment in 2011. The first

change was that RCW 51.32.185 was amended in 2018 to apply a *prima facie* presumption that PTSD is an occupational disease under RCW 51.08.140. He also asserts that "justice requires" that it not apply to bar his third (or fourth) claim for PTSD. As the Court of Appeals noted "RCW 51.32.185(1)(b) (2018) ... applies to 'an applicable member following termination of service for a period of three calendar months for each year of requisite service *but may not extend more than sixty months following the last date of employment*.'" *Wright v. Pierce County Risk Management*, 2023 Wash. App. LEXIS 2197 at 6. Mr. Wright was found not to have satisfied this explicit requirement. So he does not have the benefit of that amended statute.

The second "change in circumstances" is that after he retired from Pierce County, he received a subpoena to testify, though it was later withdrawn. That argument was discussed above under "1. *RCW 51.08.013*." In essence, he argued that when he received the subpoena, he thereby again became a

Pierce County employee and that, as such, has a new claim for PTSD because the subpoena aggravated his preexisting PTSD.

2.2 *Equitable Considerations*. Mr. Wright reiterates his arguments above under part 2.1 as also qualifying for relief from the final judgments under equitable considerations.

In both his arguments under 2.1 and 2.2 above, he seeks to circumvent the Legislature's express restriction that RCW 51.32.185(1)(b) "not extend more than sixty months following the last date of employment."

3. *Violation of Court Rules*. Mr. Wright argues that the Board, the Superior Court, and the Court of Appeals should not have granted or affirmed summary judgment, arguing that he did present an issue of fact through Dr. Brown's forensic psychiatric report to thwart a summary judgment even though that report was inadmissible hearsay.

This argument was rebutted in the Respondent's Response Brief in the Court of Appeals. See Appendix B at pages 21-22 & 34-35.

As the Court of Appeals noted:

> Wright argued that he was re-exposed when he received the subpoena, supported by Dr. Gregory Brown's report. The County responded, arguing that the issue was not whether Wright had evidence showing he suffered from PTSD but whether his claim was a duplicate of SE-64111 (September 2011). The County also argued that the amendment to the IIA Wright relied on "specifically delineate[d] that it applies only to former employees up to 60 months or five years postemployment," and Wright was last employed 10 years prior. CP at 530. And because it was a duplicate claim, res judicata applied as it dealt with the "same set of facts, the same circumstances, [and] the same parties. For all intents and purposes, this [was] a duplicate claim for what Mr. Wright filed in 2018." CP at 532-33.

*Wright v. Pierce County Risk Management*, 2023 Wash. App. LEXIS 2197 at 3-4.

## III. STATEMENT OF THE CASE

The facts are well summarized in the decision of the Court of Appeals at pages 1 through 5. See Appendix A to Respondent's Answer to the Petition for Review.

///

## IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

### A. No Conflict with Supreme Court Decisions

The Court of Appeals' decision is not in conflict with a decision of the Supreme Court. The Petitioner has not identified a Supreme Court decision which he contends conflicts with the Court of Appeals' decision. The Court of Appeals correctly stated the law of the case. Mr. Wright appears to object to the appreciation and application of the facts to the law. But the fact is, the facts do not support Mr. Wright's arguments.

### B. No Conflict with Published Court of Appeals' Decision

The Court of Appeals' decision is not in conflict with a published decision of the Court of Appeals. The Petitioner has not identified a published Court of Appeals' decision which he contends conflicts with the Court of Appeals' decision in this case. Again, the Court of Appeals correctly stated the law of the case. Mr. Wright appears to object to the appreciation and

application of the facts to the law. Again, the fact is, the facts do not support Mr. Wright's arguments.

**C. No Constitutional Issues**

In this case, no significant question of law under the Constitution of the State of Washington or of the United States is implicated. Mr. Wright did not raise any constitutional issues at the Board or in Superior Court. Nor has he raised any such issues in his Petition for Review.

**D. No Issue of Substantial Public Interest**

The Petition for Review does not involve an issue of substantial public interest. This case turns on the fact that the Legislature expressly limited the application of the amended RCW 51.32.185(1)(b) such that it "not extend more than sixty months following the last date of employment." Mr. Wright did not file a claim within that grace period. It would be contrary to the public interest if this Court were to thwart the public's proclamation, through their duly elected representatives, that the

amendment "not extend more than sixty months following the last date of employment."

## V. CONCLUSION

Based on the foregoing argument, the Supreme Court should deny the Petition for Review.

**RAP 18.17(b) Certification.** This document is certified by the signatory below to contain 1683 words, excluding the parts of the document exempted from the word count under RAP 18.17(b).

Respectfully submitted this 26th day of January 2024.

*WALLACE, MANN, CAPENER, BISHOP & DEBNEY, P.C.*

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# APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

November 21, 2023

# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| | |
|---|---|
| CURTIS WRIGHT,<br><br>Appellant,<br><br>v.<br><br>PIERCE COUNTY RISK MANAGEMENT,<br><br>Respondent. | No. 56979-5-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

VELJACIC, J. — Curtis Wright appeals the dismissal of his claim under the Industrial Insurance Act (IIA) for an occupational disease—-Post Traumatic Stress Disorder (PTSD)—arising from his work as a detective with the Pierce County Sheriff's Office. He argues that the superior court erred when it failed to apply the first responder occupational disease presumption to his 2021 claim following the 2018 and 2019 amendments to RCW 51.08.142 and RCW 51.32.185 of the IIA. He also argues that the superior court failed to interpret and accurately apply the doctrine of res judicata when granting Pierce County's summary judgment motion. Because the superior court properly denied his claim, we affirm.

## FACTS

### I. BACKGROUND

Wright retired from the sheriff's office after serving as a correctional officer, deputy, and detective from 1984 to 2011. In 2002, Wright was assigned to the homicide team and officer-involved shooting squad as a detective. A couple of years later, he began showing signs of coping difficulties, and his supervisors recommended he seek counseling. In early 2010, Dr. Ann Alpern

diagnosed Wright with PTSD generated from work-related traumatic incidents since 2003. Wright retired the following year—2011.

## II. 2011 INITIAL CLAIM[1]

In September 2011, Wright filed his first workers' compensation claim with the Department of Labor & Industries (Department). The Department assigned it claim number SE-64111. In his claim, Wright noted he developed an occupational disease—PTSD—due to traumatic experiences during the job with the sheriff's office.

Five months later, in 2012, the Department rejected Wright's claim. He appealed to the Board of Industrial Insurance (Board). The County filed a motion for summary judgment.

In September 2012, an industrial appeals judge (IAJ) issued a proposed decision and order (PDO) granting the County's motion for summary judgment. Though the IAJ found Wright to have PTSD caused or aggravated by his employment with the sheriff's office, it affirmed the denial

[1] Wright filed a total of at least four claims with the Department as far as we can determine from the record provided to this court. Below is a table of the claims collaterally related to this appeal-those at issue appear in bold:

| Date | Claim # Assigned | Result |
|---|---|---|
| **September 2011** | **SE-64111** | **Rejected- PTSD not recognized as an occupational disease under statute/WACs at the time** |
| June 2018 | SK-34955 | Denied- invalid and consolidated as a duplicate of SE-64111 |
| Later in 2018 | Not in record | Wright refiled claim instead of appealing the Board's decision regarding his June 2018 claim |
| **January 2020/March 2021** | **SM-13528** | **Denied- res judicata applied and deemed duplicate of SE-64111** |

of his claim on the basis that PTSD was excluded as an occupational disease within the meaning of former RCW 51.08.142 (1988) and former WAC 296-14-300 (1988), in effect at the time.

The following month, the Board entered an order adopting the PDO. Wright did not appeal this order.

## III. AMENDMENT TO INDUSTRIAL INSURANCE ACT

In 2018, the legislature amended the IIA, specifying what classified as a legally recognized occupational disease and expressly excluding PTSD. Former RCW 51.08.142 (2018).

The amendments to the IAA included changes to chapter 32 "Compensation." A new subsection was added, establishing a "prima facie presumption that [PTSD] is an occupational disease" for firefighters and law enforcement officers. Former RCW 51.32.185(1)(b) (2018). However, the presumption only applies to "an applicable member following termination of service for a period of three calendar months for each year of requisite service *but may not extend more than sixty months following the last date of employment*." Former RCW 51.32.0185(2) (emphasis added).

## IV. 2018 CLAIM

Wright filed a new appeal in June of 2018. The claim was assigned case number SK-34955. In April 2019, the Department issued an order determining SK-34955 (June 2018) was invalid and a duplicate of SE-64111 (September 2011). Consequently, claim SK-34955 (June 2018) was consolidated with SE-64111 (September 2011) and denied.

Wright appealed to the BIIA. The County filed a motion for summary judgment. An IAJ affirmed the Department's 2018 order denying Wright's new claim SK-34955 (June 2018) as a duplicate of SE-64111 (September 2011) via PDO. Notably, the PDO stated Wright's claims were prohibited from being relitigated under res judicata as the parties involved in the present appeal

were the same, the claims involved the same matter and raised the same cause of action, which was resolved in a final and binding order in 2012 (pertaining to the 2011 claim). Lastly, it stated that the amendments to the IIA did not apply retroactively to Wright's claim. Wright filed a petition for review with the full Board.

In May 2020, the Board adopted the IAJ's PDO and granted the County's motion, affirming that SK-34955 (June 2018) was a duplicate of SE-64111 (September 2011). Wright did not appeal the Board's decision, instead he refiled yet another claim.[2] The final disposition of this claim is unknown, as it is not apparent from the record before us.

V. 2020/2021 CLAIM

In Early 2020, Wright received a subpoena from the Pierce County Prosecuting Attorney's Office.[3] Consequently, he filed a new claim with the Department, asserting another incident of PTSD. The Department assigned it claim number SM-13528.

In March 2021, the Department denied Wright's SM-13528 (January 2020) claim as a duplicate of SE-64111 (September 2011) and consolidated the two. Wright appealed. The County filed a motion for summary judgment asserting res judicata applied.

The AIJ held a telephonic motion hearing on October 13. The sole issue addressed was "[w]hether the Department correctly determined that the injury or occupational disease/condition was a duplicate of the injury or occupational disease/condition covered by Claim SE-64111 [(September 2011)]." Clerk's Papers (CP) at 514. The court further noted that all parties "agreed that the motion for summary judgment was going to be determinative in this case." CP at 515.

[2] The record provided to this court does not reference or give a claim number for this claim.

[3] The subpoena was cancelled by the prosecutor's office shortly after it was issued.

Wright argued that he was re-exposed when he received the subpoena, supported by Dr. Gregory Brown's report.[4] The County responded, arguing that the issue was not whether Wright had evidence showing he suffered from PTSD but whether his claim was a duplicate of SE-64111 (September 2011). The County also argued that the amendment to the IIA Wright relied on "specifically delineate[d] that it applies only to former employees up to 60 months or five years post-employment," and Wright was last employed 10 years prior. CP at 530. And because it was a duplicate claim, res judicata applied as it dealt with the "same set of facts, the same circumstances, [and] the same parties. For all intents and purposes, this [was] a duplicate claim for what Mr. Wright filed in 2018." CP at 532-33.

In early 2022, an IAJ issued a PDO affirming the Department's order of March 2021 regarding SM-13528 (January 2020/March 2021). The PDO addressed substantive issues, including res judicata. Notably, the IAJ found SM-13528 (January 2020/March 2021) to be a duplicate of SE-64111 (September 2011) rendering it precluded by res judicata.

Additionally, in its findings of fact, the IAJ noted that "Mr. Wright did not suffer a new exposure or an additional exposure in the course of his employment with Pierce County that would cause or worsen the condition of PTSD since his retirement from employment with Pierce County [in] 2011." CP at 174. Wright appealed. The Board denied his appeal and adopted the IAJ's PDO affirming the Department's March order determining that Wright's claim SM-13528 (January 2020/March 2021) was a duplicate of the final and binding decision in SE-64111 (September 2011). Wright appeals this denial of his fourth claim filing.

[4] Relatedly, Wright claims that, for purposes of establishing that he suffers from PTSD, he could utilize expert opinions from evaluating experts near his residence in Nevada. This is immaterial because, as we discuss below, his current claim is a duplicate of a claim that was previously denied. An evaluation of his condition does not change this crucial fact.

## ANALYSIS

Wright contends that the trial court erred when granting the County's motion for summary judgment and dismissing his claim, SM-13528 (January 2020/March 2021), as a duplicate of his original 2011 claim, SE-64111 (September 2011), under the doctrine of res judicata.[5]

The County counters that res judicata precludes revisiting the denied claim, SE-64111 (September 2011), of which Wright's current claim, SM-13528 (January 2020/March 2021), is a duplicate.

### I. SUMMARY JUDGMENT

We review summary judgment orders de novo. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 410, 430 P.3d 229 (2018). Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." CR 56(c). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas County*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). "The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating material fact. Summary judgment is appropriate if the nonmoving party fails to do so." *Walston v. Boeing Co.*, 181 Wn.2d 391, 395-96, 334 P.3d 519 (2014) (internal citations omitted). Thus, in an appellate review of a grant of summary judgment, we review only the record and those matters which have been presented to the superior court for its consideration before entry

[5] Wright also argues several fairness and equitable claims including potential fraud, bias, and notice. However, because an issue not raised in a summary judgment proceeding below should not be considered on appellate review, we do not reach the merits of his arguments. *Haueter v. Cowles Pub. Co.*, 61 Wn. App. 572, 590, 811 P.2d 231 (1991).

of judgment. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986); *Tapper v. Emp. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

A pro se party is bound by the same rules as a represented party. *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997) ("[P]ro se litigants are bound by the same rules of procedure and substantive law as attorneys.").

II. INDUSTRIAL INSURANCE ACT (IIA)

A. Legal Principles

The IIA provides the exclusive remedy for those injured during the course of their employment. *Wash. Ins. Guar. Assn'n v. Dep't of Lab. & Indus.*, 122 Wn.2d 527, 530, 859 P.2d 592 (1993); RCW 51.04.010. "'On an appeal under the [IIA], Title 51 RCW, our review is limited to the superior court's decision, not the Board's decision.'" *Christiansen v. Dep't of Lab. & Indus.*, 26 Wn. App. 2d 560, 566, 527 P.3d 1176 (2023) (quoting *Masco Corp. v. Suarez*, 7 Wn. App. 2d 342, 346, 433 P.3d 824 (2019)).

As noted previously, the IIA expressly excludes PTSD as a legally recognized occupational disease and did at the time of Wright's employment with Pierce County. Former RCW 51.08.142 (2018); RCW 51.08.142 (2020). Nevertheless, the legislature's 2018 amendment to chapter 51.32 included subsection .185(1)(b), which stated that for law enforcement officers, "there shall exist a prima facie assumption that [PTSD] is an occupational disease under RCW 51.08.140." Former RCW 51.32.185(1)(b). But the presumption "shall be extended to an applicable member following termination of service for a period of three calendar months for each year of requisite service, *but may not extend more than sixty months following the last date of employment*." Former RCW 51.32.0185(2) (emphasis added).

## III. RES JUDICATA

Wright argues that the trial court erred in its interpretation and application of res judicata. The County responds that res judicata applies because Wright's 2021 (SM-13528) claim arose from the same workplace exposures underlying previous claims, involves the same parties, and a final and binding decision on the merits was entered in 2011 (SE-64111), when Wright initially filed. The County also argues that the decision and order stated PTSD was not recognized as an occupational disease for which an individual could receive benefits under the IIA at the time, and that all subsequent decisions concluded that each of his other claims were duplicates of the 2011 (SE-64111) claim. It further argues that even if we were to disagree, the 2018 amendment to the IIA expressly outlines a 60-month timeframe from when an individual can receive benefits and Wright failed to meet it. We agree with the County that res judicata bars Wright's claim.

### A. Legal Principles

We review an application of res judicata de novo. *Lynn v. Dep't of Lab. & Indus.*, 130 Wn. App. 829, 837, 125 P.3d 202 (2005). Res judicata "applies when a plaintiff's claim against a party has been dismissed by final judgment in one action and the plaintiff asserts the same claim against the same party in a subsequent action." *Shandola v. Henry*, 198 Wn. App. 889, 902, 396 P.3d 395 (2017) (emphasis omitted).

To establish res judicata, the proponent must establish the following: that the "'subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against the claim made.'" *Penner v. Cent. Puget Sound Reg'l Transit Auth.*, 25 Wn. App. 2d 914, 924, 525 P.3d 1010 (quoting *Harley H. Hoppe & Assoc. v. King County*, 162 Wn. App. 40, 51, 255 P.3d 819 (2011)), *review denied*, 1 Wn.3d 1026 (2023).

In other words, res judicata applies when a previous claim for which there was a final judgment on the merits and the current claim are so similar that the current claim could have been litigated in the former action. *Storti v. Univ. of Wash.*, 181 Wn.2d 28, 40, 330 P.3d 159 (2014). Summary judgment is a final judgment on the merits. *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 892, 1 P.3d 587 (2000).

B. Res Judicata Applied to Wright's Latest Workers' Compensation Claim.

Here, Wright's 2021 (SM-13528) claim meets all elements of res judicata. First, it is undisputed that the claims involve the same subject matter: PTSD stemming from his work with the sheriff's office from 2004 until his retirement in 2011. Second, it is also undisputed that Wright's 2021 (SM-13528) claim involves the same cause of action—a claim filed for workers' compensation rooted in Wright's alleged PTSD. Finally, there does not appear to be a dispute regarding the concurrence of identity or quality between the parties in both the original 2011 (SE-64111) claim and the 2021 (SM-13528) claim—Wright and Pierce County. Thus, there is no genuine issue of material fact as to any of these elements and the superior court properly applied the doctrine of res judicata. The trial court did not err.

Additionally, because former RCW 51.32.185(2) is clear in that Wright had 60 months or five years from "*the last date of employment*"—August 2011, and he did not appeal the order and did not refile until 2018—seven years after his last date of employment—he failed to meet the prerequisites for coverage under the new statute in any event.

Because res judicata bars Wright's claim in the case before us, we do not reach the other arguments presented by the County or Wright.

## IV. ATTORNEY FEES

Lastly, Wright requests attorney fees. Because he did not prevail, he is not entitled to attorney fees. We deny his request.

## CONCLUSION

The trial court properly granted the County's motion for summary judgment and dismissed Wright's claims for workers' compensation based on res judicata. Wright is not entitled to attorney fees. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljačić, J.

We concur:

Cruser, A.C.J.

Price, J.

# APPENDIX B

No. 56979-5

COURT OF APPEALS DIVISON II
OF THE STATE OF WASHINGTON

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CURTIS WRIGHT,

Appellant,

vs.

PIERCE COUNTY RISK MANAGMENT,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
THE HONORABLE JAMES ROBERT ORLANDO

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# RESPONDENT'S RESPONSE BRIEF

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## I. Introduction

Mr. Wright, a former Pierce County law enforcement officer, has appealed a Superior Court decision granting Pierce County summary judgment on the denial of his third industrial insurance claim for PTSD. This third PTSD claim arose from the same workplace exposures responsible for his first and second PTSD claims. As to the first PTSD claim, he was found to have PTSD from workplace exposures, but at the time PTSD was not a compensable occupational disease, and so his first PTSD claim was denied. That denial became final and binding. Since then, without success, by filing two more PTSD claims, including this third PTSD claim, he has attempted to bootstrap that first PTSD claim under the auspices of RCW 51.08.142, as amended in 2018, which then allowed PTSD as an occupational disease.

## II. Issues Presented

1. Is there an issue of fact that the Mr. Wright's third PTSD claim is not a duplicate of his first and second PTSD

claims? That is, is there an issue of fact that Mr. Wright's third PTSD claim is not based solely on his pre-retirement exposures as a law enforcement officer for Pierce County?

*Pierce County's Response.* There is no issue of fact that Mr. Wright's third PTSD claim is a duplicate of his first and second PTSD claims. Mr. Wright's third PTSD claim is based solely on his pre-retirement exposures as a law enforcement officer for Pierce County.

2. Is there is a legal basis under Title 51 for finding that Mr. Wright's third PTSD claim, if not based solely on his pre-retirement exposures, is based on some legally relevant post-retirement exposure?

*Pierce County's Response.* There is no legal basis under Title 51 for finding that Mr. Wright's third PTSD claim is based on some legally relevant post-retirement exposure.

3. If the answer to question number 2 is in the affirmative, is there an issue of fact that Mr. Wright's third

PTSD claim is compensable under Title 51 by his pre-retirement employer based on his post-retirement exposures?

*Pierce County's Response.* The answer to question number 2 is not in the affirmative. So this issue is moot.

## III. Statement of the Case

Mr. Wright has filed a series of claims for PTSD as a result of his experiences as a law enforcement officer for Pierce County.

1. On September 21, 2011 (or September 22, 2011), he filed his first claim for an occupational disease characterized as PTSD from a series of work experiences with Pierce County before July 29, 2010, his last day of actual work for Pierce County. **CP** 203, 368, 372, 377, 380, 388. This claim was assigned Claim No. SE-64111. **CP** 368, 370. Mr. Wright retired on August 5, 2010. **CP** 386, 388. So the parameters of Mr. Wright's exposures which could cause potentially compensable PTSD were fixed by his period of employment. What exposures he had afterwards would be irrelevant.

The Department of Labor and Industries (the Department) rejected the claim and, on appeal, on October 10, 2012, the Board of Industrial Insurance Appeals (the Board) found that although Mr. Wright had PTSD from his employment with Pierce County, it affirmed the Department order because at that time PTSD was not legally recognized as an occupational disease under RCW 51.08.142 and WAC 296-14-300. **CP** 369, 377-78. Mr. Wright did not appeal this Decision and Order and so it became final and binding on him. **CP** 380. *E.g.*, *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 569, 937 P.2d 565 (1997); *Peterson v. Dep't of Labor & Indus.*, 17 Wn. App.2d 208, 235, 485 P.3d 338 (2021). At this time, he no longer worked for Pierce County. **CP** 368, 370, 372, 377, 380, 388. And so any post-employment exposures would not enlarge the class of relevant exposures arising naturally and proximately from his employment. RCW 51.08.140; *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 481, 745 P.2d 1295 (1987).

On June 7, 2018, RCW 51.08.142 and RCW 51.32.185 were amended to create a presumption for law enforcement officers that PTSD was an occupational disease. The amendment was not retroactive. The presumption applied to claims filed not more than 60 months (five years) after the employee's last day of employment, depending on the employee's years of service. **CP** 386. Because Mr. Wright retired on August 5, 2001, if the presumption were applied to him (which it did not), he would be beyond the window of 60 months given that he did not file his second claim for the same set of facts until June 4, 2018. The 60 months expired August 5, 2016.

2. On June 4, 2018, Mr. Wright filed his second PTSD claim resulting from his pre-retirement work experiences with Pierce County. **CP** 203, 379; 380. This claim was originally assigned Claim No. SK-34955, but later reassigned with Claim No. SE-64111 because the Department determined it duplicated the PTSD claim filed on September 11, 2011. **CP** 380-81. Mr.

Wright alleged that he was subpoenaed to testify in cases involving his work as a detective for Pierce County after February 7, 2012, the date of the Department order denying his claim. **CP** 386. At the time, he was no longer employed by Pierce County. He did not provide evidence about who subpoenaed him, not that it would matter. A subpoena is a command from the court to provide testimony. CR 45. It does not legally make you an employee of the entity issuing the subpoena. The parties filed cross motions for summary judgment. **CP** 380. On May 19, 2020, the Board adopted the Industrial Appeals Judge's (IAJ's) Proposed Decision and Order (PDO) granting Pierce County summary judgment on the basis that the claims were duplicates and so the second claim was subject to *res judicata.* **CP** 387-89, 391. On Mr. Wright's appeal to Superior Court, the trial court affirmed the Board's order. **CP** 192.

3. On January 12, 2021, Mr. Wright filed his third PTSD claim related to his pre-retirement employment with Pierce

County Sheriff's Department. **CP** 192, 200. On March 24, 2021, the Department rejected the claim as a duplicate of Mr. Wright's two earlier PTSD claims, identified as Claim No. SE-64111. **CP** 200, 505. This third PTSD claim was consolidated with these previous claims under Claim No. SE-64111. **CP** 200, 505. On January 10, 2022, the IAJ issued a PDO affirming the Department order finding that Mr. Wright had filed a duplicate claim. **CP** 199-201. The IAJ noted that the March 24, 2021 Department order was limited to the issue of whether or not the third PTSD claim was a duplicate claim. **CP** 193, 199. But the IAJ also addressed the issue whether or not the claim was barred by *res judicata* on the contingency that the Board, if it accepted the claimant's Petition for Review, would enlarge the scope of the inquiry to the issue of *res judicata*. **CP** 196-98. The IAJ determined that the third PTSD claim was barred by *res judicata*. **CP** 198. On February 16, 2022, the Board denied Mr. Wright's Petition for Review and adopted the IAJ's PDO as its Decision and Order (without

expressly limiting the scope of its decision to that of a duplicate claim), affirming the Department's order that the third PTSD claim duplicated the pervious two final and binding PTSD claims. **CP** 104.

As to the third PTSD claim, Mr. Wright claimed that he aggravated his PTSD by having received a subpoena from Pierce County Prosecutor's office on January 18, 2020 to provide evidence about the incident in Lakewood where four police officers were murdered in a coffee shop. **CP** 223-26. Shortly later, the prosecutor's office cancelled this subpoena. **CP** 197, 224.

Presumably, Mr. Wright mistakenly believed that receiving the subpoena from an agency in Pierce County (*viz*., the Prosecutor's office) different from the agency he used to work for (*viz*., the Sheriff's department) constituted an *ex post facto* exposure during his employment or a re-employment with Pierce County as a law enforcement officer, or that his former employer triggered some symptom(s) of his PTSD and that

such an event falls within the scope of RCW 51.08.142 or RCW 51.32.185. **CP** 223-26.

Pierce County filed a motion for summary judgment at the Board, asserting that this third PTSD claim duplicated the two previous PTSD claims and that it was barred by *res judicata*. **CP** 355-65. Mr. Wright filed a response. **CP** 223-32. To that response, he attached a forensic report from Dr. Gregory Brown and a letter and illegible treatment notes from Dr. Dennis Stock, both of whom practice medicine and psychology respectively in Nevada. **CP** 280-86, 295-317, 319. Neither Dr. Brown nor Dr. Stock was proven to be licensed in the State of Washington. **CP** 194. The report, letter and treatment notes were not supported by an affidavit or declaration under Civil Rule 56. **CP** 194, 280-86, 295-317, 319. In any case, none of these documents would be relevant to the issue under consideration. If he had an aggravation from whatever source, it was for a condition for which his claim was denied more than seven years earlier.

The IAJ said, in referring to Drs. Brown and Stock, that RCW 51.08.142(2)(b) requires that a law enforcement officer be evaluated by a Washington State licensed psychiatrist or psychologist. This section of the statute does not apply to Mr. Wright. **CP** 194. He was hired before June 7, 2018 and, by 2012, had been diagnosed with PTSD arising from his employment as a law enforcement officer for exposures before he retired. **CP** 203, 377, 388. This error is harmless. As to the report, letter and treatment notes, the appellant failed to follow the requirements of CR 56, which requires that these records be submitted by declaration or affidavit. They were not. They are rank hearsay. Moreover, as indicated above, they are irrelevant.

- **Record on Review**

*Superior Court.* Upon appeals to the Superior Court, only such issues of law or fact may be raised as were properly included in the notice of appeal to the Board, or in the complete record of the proceedings before the Board, *viz.*, the Certified Appellate Board Record (CABR). The hearing in the Superior

Court shall be *de novo*, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board in the Superior Court, as provided in RCW 51.52.110. RCW 51.52.115; *Sepich v. Dep't of Labor & Indus.*, 75 Wn.2d 312, 316, 450 P.2d 940 (1960); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012)(Div. II).

Not part of the record on review are the following:

(1) Exhibits attached to the appellant's Opening Brief;

(2) Exhibits to attached to the appellant's Petition for Review not presented and admitted into evidence at the Board hearing, particularly attachments number 1 and 4;

(3) Exhibits attached to the appellant's Notice of Appeal at the Board;

(4) Exhibits submitted to the trial court which were not presented and admitted into evidence at the Board hearing; and

(5) Exhibits concerning other industrial insurance claims, wherever presented.

The appellant must have raised an issue before the Board to preserve it on appeal. RCW 51.52.115; *Value Village v. Vasquez-Ramirez*, 11 Wn.App.2d 590, 599, 455 P.3d 216 (2019), *review denied*, 195 Wn.2d 1017 (2020).

In the Superior Court, the parties may submit briefs arguing for summary judgment. But the facts upon which the trial court would assess the merits of granting or denying summary judgment would be limited to the CABR. *Id.* The Superior Court receives briefing as to legal arguments based on facts in the CABR admitted into evidence by proffer or by judicial notice at the Board hearing.

Issues not raised in the Superior Court hearing for summary judgment cannot be considered for the first time on appeal. *Ashcraft v. Wallingford*, 17 Wn. App. 853, 860, 565 P.2d 1224 (1977)(Div. III).

*Court of Appeals.* On review of an order granting or denying a motion for summary judgment, the appellate court will consider only evidence and issues called to the attention of

the trial court. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. *Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 816, 370 P.2d 867 (1962). Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel. RAP 9.12; *Am. Universal Ins. Co. v. Ranson*, 59 Wn.2d 811, 815-16, 370 P.2d 867 (1962); *Kataisto v. Low*, 73 Wn.2d 341, 342-43, 438 P.2d 623 (1968).

The appellant bears the burden of perfecting the record on appeal. RAP 9.2; *Tacoma S. Hosp., LLC v. Nat'l Gen. Ins. Co.*, 19 Wn. App.2d 210, 220-21, 494 P.3d 450 (2021)(Div. II). When the appellant has failed to meet its burden of perfecting the record, the Court of Appeals may decline to address the merits of an issue. *Id.* at 220; *Yorkston v. Whatcom County,* 11 Wn. App.2d 815, 825, 461 P.3d 392 (2020)(Div. I). As a rule,

the Court of Appeals should avoid deciding a case based on noncompliance with the Rules of Appellate Procedure. *Id.* at 220-21; *Rhinevault v. Rhinevault*, 91 Wn. App. 688, 692, 959 P.2d 687 (1998)(Div. I).

In this appeal, the Superior Court, in its order granting Pierce County's Motion for Summary Judgment, considered the following documents:

(1) Pierce County's Motion for Summary Judgment (contained in a document captioned Motion to Dismiss);

(2) Declaration of Joseph A. Pickels in Support of Pierce County's Motion to Dismiss;

(3) Certified Appellate Board Record; and

(4) Mr. Wright's Response to Pierce County's Motion to Dismiss (Motion for Summary Judgment) with attachments 1-6, with attachment number 3 being inadmissible hearsay and not admitted into evidence at the Board hearing. **CP** 1-2.

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- **Standard of Review**

*Superior Court.* The Superior Court is an appellate court on appeals from the Board of Industrial Insurance Appeals. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2 1, 5-6, 977 P.2d 570 (1999); *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 490-91, 288 P.3d 630 (2012)(Div. II). It reviews the decision and order of the Board on a Motion for Summary Judgment *de novo*. RCW 51.52.115.

*Court of Appeals.* The Court of Appeals reviews a decision of the trial court on a motion for summary judgment *de novo* on the same standard as did the trial court. *Neubert v. Yakima-Tieton Irrigation Dist.*, 117 Wn.2d 232, 236, 814 P.23d 199 (1991); *Tacoma S. Hosp., LLC v. Nat'l Gen. Ins. Co.*, 19 Wn. App.2d 210, 221, 494 P.3d 450 (2021); *Anderson v. Weslo, Inc.*, 79 Wn. App. 829, 833, 906 P.2d 336(1995)(Div. II). It is a review of an issue of law.

A motion for summary judgment must be granted if, after considering the evidence in the light most favorable to the non-

moving party, there is no genuine issue of material fact (a fact upon which the outcome of the litigation depends) and reasonable persons can reach but one conclusion. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 690, 974 P.2d 836 (1999); *Fell v. Spokane Transit Author.*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996).

A party moving for summary judgment has the initial burden of proving, by uncontroverted evidence, that there is no genuine issue of material fact. CR 56(c); *Maloney v. Tribune Publishing Co.,* 26 Wn. App. 357, 359, 613 P.2d 1179 (1980). This can be done by either (1) pointing out the absence of competent evidence to support the plaintiff's case or (2) establishing through affidavits that no genuine issue of material facts exists. *Fisher v. Ald Tire, Inc.,* 78 Wn. App. 902, 906, 902 P.2d 166 (1995), *review denied*, 128 Wn.2d 1025 (1996).

Once a party has made a *prima facie* showing that there is no genuine issue of material fact, the burden shifts to the non-

moving party, who must then set forth specific facts showing that there is a genuine issue of material fact for trial. *Nat'l Union Ins. Co. v. Puget Power*, 94 Wn. App. 163, 178-79, 972 P.2d 481 (1999).

In response to a summary judgment motion, the non-moving party may not merely rely upon mere allegations or denials, but must instead affirmatively set forth specific facts showing the existence of a genuine issue for trial. CR56(e); *Ruffer v. St. Frances Cabrini Hospital*, 56 Wn. App. 625, 628, 784 P.2d 1288, *review denied*, 114 Wn.2d 1023 (1990). The non-moving party must testify to facts based on personal knowledge. CR 56(e); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

If the non-moving party cannot provide specific facts to show there is a genuine issue for trial, the moving party is entitled to summary judgment as a matter of law. CR 56(c); CR 56(e); *Preston v. Duncan*, 55 Wn.2d 678, 682, 349 P.2d 605 (1960).

### • Pro Se Litigants

A *pro se* litigant such as Mr. Wright is subject to the same standards as a licensed attorney. As this Court noted: "The law does not distinguish between one who elects to conduct his own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws." *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983)(Div. II), *review denied*, 100 Wn.2d 1013 (1983); *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993)(Div. I).

## IV. Argument in Response

### A. First Assignment of Error

On Mr. Wright's first assignment of error, his argument appears apparently on pages 10 through 14 of his Opening Brief. This assignment of error is the gravamen of Mr. Wright's appeal.

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1. Mr. Wright appears to recognize that the third PTSD claim cannot be viable if he merely duplicates his first two PTSD claims, given that they were based solely on his pre-retirement exposures as a law enforcement officer. And so, he now contends that he had post-retirement exposure that aggravated his PTSD. In particular, he contends that on January 18, 2020, his preexisting PTSD symptom(s) were triggered when he received a subpoena from Pierce County. He contends that this event creates an issue of fact bearing on the viability of his third claim for PTSD. In essence, he contends that such a fact, if true, would form a basis for an aggravation of his PTSD after the amendment to RCW 51.08.142 on June 7, 2018, and thereby be grounds for his PTSD being compensable under Title 51. **CP** 223-26.

Mr. Wright's argument concerns the timing of his traumatic exposures:

(1) *Pre-retirement exposures.* If his third PTSD claim is based solely on his pre-retirement exposures, then it is a

duplicate claim and properly disallowed. Mr. Wright's first PTSD claim was based on his complete set of exposures up to his retirement.

(1.1) There was no discontinuity in his exposures at work up to his retirement responsible for his PTSD.

(1.2) The set of exposures causing his PTSD was identical to the set of exposures he had as a law enforcement officer for the respondent.

(1.3) There was no delayed expression of his symptoms of PTSD at the time he retired.

(2) *Additional pre-retirement exposures caused a new PTSD condition. See In re Amy Poe*, BIIA Dec., 03 11095 (2004). No evidence exists that Mr. Wright had additional pre-retirement exposures causing a new PTSD condition. Moreover, the set of pre-retirement exposures responsible for his PTSD, diagnosed before he retired, was exhaustive (*viz.*, the union of the members of that set covers all the operative events within the sample space).

(3) *Post-retirement exposures.* If his third PTSD claim is based on post-retirement exposures, then these exposures did not occur in the course of his employment for Pierce County as required by RCW 51.08.142. So the third PTSD claim would be properly disallowed.

Mr. Wright appears to want to circumvent this conclusion by asserting additional premises.

(3.1) *Post-retirement aggravation of a pre-retirement occupational disease under RCW 51.32.160.* He may be contending that when he received the subpoena, that receipt aggravated his pre-existing PTSD under RCW 51.32.160. **CP** 223-26. But RCW 51.32.160 does not apply. When he initially filed a claim for and was diagnosed with PTSD, RCW 51.08.142 did not legally recognize PTSD as a compensable occupational disease. He cannot legally aggravate a disallowed PTSD claim. Moreover, for the sake of argument only, to file such a claim, Mr. Wright would have to have filed it within seven years from the date of the closing order for an

allowed claim. He filed his third PTSD claim well outside that seven-year window.

(3.2) *A post-retirement exposure while temporarily re-employed for a limited purpose by his former employer.* He may be contending he had a post-retirement exposure while temporarily re-employed for a limited purpose—*i.e.*, receiving a subpoena from his former employer to testify about a purported traumatic event—that triggered a worsening of his pre-existing PTSD. **A** subpoena is a directive from the court to appear for a specified purpose. *See* CR 45. More broadly, it is a judicial directive to exercise one's civic duty in order to preserve a well-ordered legal system. It is not an offer from the former employer (*viz.*, Pierce County) for temporary re-employment for a limited purpose of the employer. *Id.*

2. Mr. Wright next contends that the Board lacked the authority to rule on the issue of *res judicata* as to his third PTSD claim because *res judicata* is an equitable doctrine and the Board does not have equitable powers. **CP** 224-226. *See*

*Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997). The Board appears to have ruled that Mr. Wright's third PTSD claim was a duplicate of his first and second PTSD claims. **CP** 104, 191-203. As such, it was consolidated with them under Claim No. SE-64111. That first PTSD claim, pursuant to a Board order, was finally adjudicated on October 10, 2012. **CP** 203, 388. As to Mr. Wright's third PTSD claim, the Board affirmed the IAJ's PDO in which the IAJ, besides deciding that the third PTSD claim duplicated Mr. Wright's first and second PTSD claims, analyzed the issue of *res judicata,* and determined that his third PTSD claim was barred by *res judicata.* **CP** 104. Despite Mr. Wright's argument, the Board has the power to apply the doctrine of claim preclusion (*res judicata*) as a matter of *stare decisis* to claims such as Mr. Wright's third PTSD claim. *In re Lyle Applegate*, BIIA Dec.,18 16730 (2019); *Floyd v. Dep't of Labor & Indus.,* 44 Wn.2d 560, 565, 269 P.2d 563 (1954).

That is, the Board, under the principle of *stare decisis*, will grant relief in cases with such similar facts as to be almost identical to cases that have been passed upon by appellate courts. While the Board continues to honor *stare decisis*, it will grant equitable relief in appropriate circumstances and within those situations and guidelines set out by the courts. The Board, in honoring *stare decisis,* does not require that it only apply the doctrine in cases with such similar facts as to be almost identical. In doing so, the Board is not creating equitable remedies, but granting them where the courts have determined that they apply. *In re Lyle Applegate*, BIIA Dec., 18 16730 (2019).

In any case, Mr. Wright's appeal is from the Superior Court's decision, not from the Board's decision. RCW 51.52.140; *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 425, 326 P.3d 744 (2014). The Superior Court has the power to rule on the issue of *res judicata.* It did so here, finding in favor of Pierce County against Mr. Wright. **CP** 1-2.

To thwart the Superior Court's decision granting the Pierce County summary judgment, Mr. Wright would have to establish a factual issue that his third PTSD claim did not duplicate his first and second PTSD claims. *See LeJeune v. Clallam County*, 64 Wn. App. 257, 266, 823 P.2d 1144 (1992). He has failed to provide such evidence. It is difficult to imagine a possible scenario in which he could marshal such evidence. On this basis alone, his appeal should fail.

Mr. Wright did not argue that the injustice or public policy exception to *res judicata* should apply to his third PTSD claim. **CP** 223-341. *Weaver v. City of Everett*, 194 Wn.2d 464, 474, 450 P.3d 177 (2019); *Reeves v. Mason County*, 22 Wn. App.2d 99, 867, 509 P.3d 859 (2022). Legally, that exception would not apply here. He filed two earlier PTSD claims. Both were based solely on his pre-retirement exposures as a law enforcement officer, just as is this third PTSD claim. When he failed to appeal the Board's orders denying his first and second PTSD claims, they became binding on him. He did not invoke

the public policy or injustice provisions of *res judicata* as to the second PTSD claim. That should foreclose its use as to his third PTSD claim, which is based on the same set of exposures as the first two PTSD claims. If the public policy exception was not invoked in the second PTSD claim, then it is difficult to understand how it could be invoked pragmatically in the third PTSD claim other than as either a judicial amendment to RCW 51.08.142, or an extra-legal benefit to a former law enforcement officer. If *res judicata* were not applied to the third PTSD claim, that claim would still duplicate the first two PTSD claims. Both orders as to those two PTSD claims are binding on Mr. Wright, the second of which is based on *res judicata,* and so is outside the judicial reach of this Court to apply the public policy exception.

No issue of fact exists that Mr. Wright's third PTSD claim is not based solely on his pre-retirement exposures as a Pierce County law enforcement officer. **CP** 191-203. That is, it is a duplicate claim of the two PTSD claims he has previously

filed. All of them are based solely on his exposures while working as a Pierce County law enforcement officer before he retired.

There is no legal basis under Title 51 for finding that Mr. Wright's third PTSD claim, if not based solely on his pre-retirement exposures, is based on some legally relevant post-retirement exposure.

**B. Second Assignment of Error**

On Mr. Wright's second assignment of error, his argument appears apparently on pages 14 through 19 of his Opening Brief. This argument is a farrago.

Was this argument or these arguments raised in the Board hearing? At the Board hearing, the only relevant point raised in this second assignment of error was that as to RCW 51.08.013. After the Board hearing, Mr. Wright would have been apprised of the point about RCW 51.08.142. The other points were not raised and are not relevant to this third PTSD claim.

Was this argument or these arguments raised in Superior Court? In Superior Court, Mr. Wright did not assert arguments about any of these statutes. He mentioned RCW 51.08.142 without indicating its significance to the issue of whether or not there was an issue of fact that his third PTSD claim arose from his exposures as a Pierce County employee. **CP** 45-48.

Mr. Wright first argues that the Board, in reaching its decision, erred in ignoring or misinterpreting five statutes which he believes are relevant to his position, *viz.*, that the Board should have reversed the Department order finding his third PTSD claim duplicative of his first and second PTSD claims. He further argues that the trial court, in granting the respondent summary judgment, erred in ignoring these statutory violations, though he did not provide such arguments in Superior Court. **CP** 47. He further presumably argues that these purported statutory violations are relevant to the determination of whether an issue of fact exists concerning the viability of his third PTSD claim.

*RCW 51.08.142.* The IAJ said, in referring to Drs. Brown and Stock, that RCW 51.08.142(2)(b) requires that a law enforcement officer be evaluated by a Washington State licensed psychiatrist or psychologist. Appellant's Opening Brief at 14. Pierce County agrees that this section of the statute does not apply to Mr. Wright. He was hired before June 7, 2018 and, by 2012, had been diagnosed with PTSD from exposures during his employment as a law enforcement officer before he retired. This error is harmless. That is, it is not reasonably probable that, absent the error, the outcome of the trial would have been different. Phrased differently, if a different outcome was not reasonably probable without the error, then the error did not have a material effect and the judgment should not be reversed. *In re Dependency of A.C.*, 2023 Wash. LEXIS 122 at 6-11 (March 9, 2023); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

As to Dr. Brown's forensic report and Dr. Stock's letter and treatment notes, Mr. Wright failed to adhere to the

requirements of CR 56(e), which requires that these records be submitted by the person with personal knowledge by declaration or affidavit. They were not so submitted, and so were excluded by the Board from evidence. **CP** 194. They are rank hearsay. Moreover, as indicated above, they are irrelevant.

*RCW 51.08.013.* Mr. Wright contends that when he received the subpoena from the Peirce County prosecutor's office on January 18, 2020, under the terms of RCW 51.08.013, he was thereby working for Pierce County. Appellant's Opening Brief at 16-17. And so, the subpoena triggered an aggravation of his PTSD, which arose from his pre-retirement exposures as a Pierce County law enforcement officer. This statute is inapplicable. It refers to current employees--those employed before their retirement from employment. When Mr. Wright received this subpoena, Pierce County was not his employer. *Robinson v. Dep't of Labor & Indus.*, 181 Wn. App. 415, 426-428, 326 P.3d 744 (2014)(Div. II); *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588

P.2d 1174 (1979). Moreover, the subpoena issues from the court, not from his former employer. This statute is irrelevant to the issues here.

*RCW 51.04.153.* Mr. Wright contends that the respondent provided false information to the State of Washington (the Department) about Mr. Wright's shoulder injuries. Appellant's Opening Brief at 17-18. The truth and relevance of this complaint is not provided. Moreover, Mr. Wright's shoulder complaints are the subject of another industrial insurance claim, which he identifies as Claim No. SC-56363, not this third PTSD claim. Appellant's Opening Brief at 18. Moreover, none of these complaints address the basis for the Superior Court's ruling on Pierce County's Motion for Summary Judgment. So this complaint is irrelevant to the issues here.

*RCW 51.04.024.* Mr. Wright has two complaints. First, he contends he sent emails to the investigative unit formed under the auspices of this statute about Medicare fraud as to his

back and shoulder injuries. Appellant's Opening Brief at 18. He had no response. These physical complaints are the subject of another industrial insurance claim, not this third PTSD claim. See Exhibit 4 of Appellant's Opening Brief. Second, he contends he was not paid a *per diem* for an independent medical examination for his second PTSD claim filed in 2018. Appellant's Opening Brief at 18-19. This complaint does not concern his third PTSD claim. Moreover, none of these complaints address the basis for the Superior Court's ruling on the respondent's Motion for Summary Judgment. So these complaints are irrelevant to the issues here.

*RCW 51.04.063.* Mr. Wright finally contends that he provided information to the Department and Attorney General that Pierce County committed fraud apparently as to a claim resolution settlement. Appellant's Opening Brief at 19. But the fraud is not identified. Nor is the existence of a claim resolution settlement agreement. None was entered into as to this third PTSD claim. Nor is the relation of that fraud as to a

claims resolution settlement tied to the Superior Court's granting respondent summary judgment as to Mr. Wright's third PTSD claim. So this complaint is irrelevant to the issues here.

### C. Third Assignment of Error

On Mr. Wright's third assignment of error, his argument appears apparently on pages 19 through 28 of his Opening Brief. This argument is also a farrago.

Was this argument or these arguments raised in the Board hearing? At the Board hearing, none of these arguments were raised.

Was this argument raised in Superior Court? In Superior Court, none of these arguments were raised, except that he noted the IAJ may likely have been intoxicated, although he may have been referring to one of his other industrial insurance claims.

Mr. Wright argues that the trial court, in granting Pierce County the summary judgment, failed to accept his argument

that the process the Board adopted in reaching its decision granting Pierce County summary judgment was fundamentally unfair and inequitable. From the appellant's Opening Brief, he apparently has five basic grievances about the Board hearing and the ensuing bench trial:

1. The IAJ did not fairly apply CR 56.

1.1 He contends that the IAJ did not grant him more time to secure an affidavit or declaration from his medical experts. Appellant's Opening Brief at 19-22. Within the limits of CR 56(f), the IAJ can grant the non-moving party more time to secure an affidavit or declaration from his medical experts. From the CABR, it does not appear Mr. Wright raised this issue with the IAJ. He did not provide an argument that he sought but was unable to obtain declarations from Dr. Brown and Dr. Stork, owing to some problem at their end. That is, he failed to provide evidence under CR 56(f) that "for reasons stated" said affidavits or declarations were unavailable. He failed to adhere to the rules of CR 56. With information outside the CABR, he

seeks to excuse his failure to follow the rules of CR 56. He proffers the excuse that he has PTSD, which causes him to miss such significant details in CR 56. Appellant's Opening Brief at 20. He also says that the IAJ should have weighed the amount of time he had spent on his case with the amount of time needed for him to fix his oversight. Appellant's Opening Brief at 20. Are these allowable reasons under CR 56(f)? It does not appear so. Did he raise this issue with the trial court? He alluded to it descriptively without argument. **CP** 47. Are these improperly attested expert reports or chart notes relevant to the issue in this dispute? That is, if Mr. Wright provided such affidavits or declarations would those have created a relevant issue of fact as to Pierce County's Motion for Summary Judgment? The issue here was whether or not his third PTSD claim duplicated his first and second PTSD claims? The determination of this issue is not dependent on the affidavits or declarations of Mr. Wright's medical experts about a purported aggravation of a previously disallowed claim.

1.2 He contends that the CR 56 notice requirement was ignored. Appellant's Opening Brief at 22. Mr. Wright is not entirely clear about what notice requirement he believes was violated. He refers to some proceedings at the Board. He then refers to a five day notice requirement. In CR 56, the five day notice requirement refers to the time the moving party (the respondent) has to file its rebuttal documents before the motion hearing. CR 56(c). Mr. Wright appears to contend, without specifically saying so, that Pierce County did not serve its rebuttal documents on him when those documents were filed with the Board. He provides no proof that this occurred. If, for the sake of argument, this accusation were true, he would have had to raised this issue with the IAJ and obtain her ruling. If the IAJ did not rule in his favor, he would then have had raised this issue at Superior Court and argue he was prejudiced by the faulty service. He did not raise this issue in Superior Court. Yet all that does not matter. What is apparent from the exhibits, numbered 1 though 4, which he attached to his

Opening Brief, is that these complaints pertain to a claim different from his third PTSD claim. The third PTSD claim has a Claim No. SE-64111, with a Docket No. 21 14537. The exhibits which the appellant attached to his Opening Brief pertain to a Claim No. SC-56363. See Exhibit 4 to the Appellant's Opening Brief. This is Mr. Wright's industrial insurance claim as to his back. Pierce County moves to strike these exhibits 1 though 4 as being irrelevant, and not included in the CABR. Mr. Wright's entire argument is irrelevant.

1.3. He also contends he had insufficient time to review a video the respondent produced at the Board hearing. Appellant's Opening Brief at 23. He says he should have had three days' prior notice as to the video, but was provided only one day to view the video because the USBs, though provided three days as required, could not be opened. This is an evidentiary complaint. Did he establish what the IAJ ruled? Apparently, the IAJ ruled that the inability to open the USBs was no one's fault. Appellant's Opening Brief at 23. So she

did not exclude the video(s). In Superior Court, Mr. Wright raised this issue without argument. CP 48. Yet all that does not matter. It is apparent that this complaint refers to his industrial insurance claim for his back with Claim No. SC 56363. See Exhibit 4 to Appellant's Opening Brief. The appellant attached as Exhibit 4 to his Opening Brief a section of a deposition of a Fabiel Barahona. That transcript concerns Claim No. SC 56363 as to the appellant's low back claim. It does not pertain to this third PTSD claim.

2. He contends that the Department, the Board, and the Superior Court are biased in favor of employers. Appellant's Opening Brief at 23-24. Apparently, this is merely Mr. Wright's impression because he did not prevail. He provided no proof of such bias. He references events that occurred as to his second PTSD claim. Those events are not relevant to this third PTSD claim.

3. He contends that Pierce County's counsel treated him unfairly, and is dishonest. Appellant's Opening Brief at 25-26.

This is apparently merely the appellant's impression because he did not prevail. He has provided no proof to support this complaint. Moreover, it is unclear that these described events occurred as to this third PTSD claim. There is no record of this complaint in the CABR. Moreover, this complaint is irrelevant.

4. He contends that the IAJ was likely intoxicated during the Board hearing. Appellant's Opening Brief at 27. It is unclear from his argument that this complaint pertains to this third PTSD claim and not to one of his other industrial insurance claims. Apparently, this is merely Mr. Wright's impression. He provided no proof of this charge. Moreover, the complaint or accusation is irrelevant. On a Petition for Review, the Board adopted the PDO. Mr. Wright does not contend the Board was intoxicated. On appeal from the Board's order, the trial court affirmed the Board's decision affirming the Department order. Mr. Wright does not contend the trial court was intoxicated. Nor has Mr. Wright proven that

the trial court was influenced by the IAJ's alleged behavior. Mr. Wright's argument is irrelevant.

5. He contends that the Board conspired with the court reporter to deny him an audio copy of the hearing transcript. Appellant's Opening Brief at 27-28. This charge is unproven. Moreover, it is unclear that these described events occurred as to this third PTSD claim. Moreover, Mr. Wright's complaint is irrelevant.

From the foregoing, it is unclear whether Mr. Wright is asserting that the Board and Superior Court violated the due process clause of the 14th Amendment to the U.S. Constitution or merely that the trial court abused its discretion in granting respondent summary judgment in not accepting his jeremiad as to the conduct of the IAJ and Pierce County's counsel. Mr. Wright presumably incorrectly believes that this purportedly objectionable conduct impacts the issue of whether his third PTSD claim is indisputably factually based solely on his

occupational exposures as a Pierce County law enforcement officer.

- **Constitutional Violations**

The Board does not have subject matter jurisdiction to decide violations of the Constitution. *Yakima County Clean Air Auth. v. Glascam Builders*, 85 Wn.2d 255, 257, 534 P.2d 33 (1975); *Bare v. Gorton*, 84 Wn.2d 380, 383, 526 P.2d 379 (1974); *In re James Gersema*, BIIA Dec., 01 20636 (2003). But the Superior Court, even acting in its appellate capacity in Title 51 cases, does have that authority. *Yakima County Clean Air Auth.*, 85 Wn.2d at 257; *Bare*, 84 Wn.2d at 383.

This argument was not raised in Superior Court. Mr. Wright needs to raise this issue with some specificity in Superior Court for the court to address his position. Neither Pierce County nor the Court need to lump together the pebbles of his scree into a concrete legal argument.

- **Abuse of Discretion**

A trial court abuses its discretion when its decision rests on facts unsupported by the record. *Hough v. Stockbridge,* 152 Wn. App. 328, 340, 216 P.3d 1077 (2009)(Division II); *State v. Depaz,* 165 Wn.2d 842, 858, 204 P.3d 217 (2009).

Mr. Wright's arguments were not adequately raised in Superior Court. He did not specify how the IAJ abused her discretion as to any evidentiary issues.

## V. CONCLUSION

For the preceding reasons, Pierce County respectfully requests that this Court affirm the Superior Court's decision granting it summary judgment.

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**RAP 18.17(b) Certification.** This document is certified by the signatory below to contain 6977 words, excluding the parts of the document exempted from the word count under RAP 18.17(b).

Respectfully submitted this 28th day of March 2023.

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**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

| | |
|---|---|
| CURTIS WRIGHT,<br><br>Appellant,<br><br>v.<br><br>PIERCE COUNTY RISK MANAGEMENT<br><br>Respondent. | DECLARATION OF SERVICE |

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the RESPONDENT'S RESPONSE BRIEF and this DECLARATION OF SERVICE to be served on the following in the manner indicated below:

**E-Filing via Washington State Appellate Courts Portal:**

Derek Byrne, Clerk/Administrator
COURT OF APPEALS, DIVISION II

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**DATED** this 28th day of March 2023, at Lake Oswego, Oregon.

WALLACE, KLOR, MANN, CAPENER & BISHOP, P.C.

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No. 102619

**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

| | |
|---|---|
| CURTIS WRIGHT,<br><br>Petitioner,<br>v.<br>PIERCE COUNTY CITY MANAGEMENT,<br><br>Respondent. | CERTIFICATE OF SERVICE |

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declare that on the below date, I caused a true and correct copy of the RESPONDENT'S ANSWER TO PETITION FOR REVIEW and this CERTIFICATE OF SERVICE to be served on the following in the manner indicated below:

**E-Filing via Washington State Appellate Courts Portal:**

Erin L. Lennon, Clerk/Administrator
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RESPECTFULLY SUBMITTED this 26th day of January, 2024.

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## WALLACE KLOR MANN CAPENER & BISHOP PC

## January 26, 2024 - 9:17 AM

## Transmittal Information

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| **Filed with Court:** | Supreme Court |
| **Appellate Court Case Number:** | 102,619-6 |
| **Appellate Court Case Title:** | Curtis Wright v. Pierce County Risk Management |
| **Superior Court Case Number:** | 22-2-05097-2 |

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