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## **I. INTRODUCTION**

Respondent Fife RV & Auto Center, Inc. (“Fife RV”), respectfully requests that the trial court be affirmed. The appeal lacks merit.

On the evening of July 7, 2008, David Patrick White brutally assaulted 70-year-old Respondent Larry Pletcher with a steel tire iron, repeatedly beating him about the head and severely injuring Mr. Pletcher. Mr. Pletcher sued Mr. White for personal injuries. The civil case was stayed until a jury convicted Mr. White of felony assault and two other crimes. Mr. White was sentenced to incarceration in state prison.

After the conviction, the stay of the civil case was lifted. Despite his felony assault conviction, Mr. White had the audacity to counterclaim against Mr. Pletcher, alleging that Mr. Pletcher was the aggressor. Mr. White also filed a third-party complaint against Fife RV, alleging respondeat superior and negligent supervision.

Fife RV filed a motion for summary judgment and dismissal of all claims, and Mr. Pletcher joined the motion. Mr. White failed to timely file and serve his opposition, and the trial court granted Fife RV’s motion to strike the untimely brief. The trial court granted Fife RV’s motion for summary judgment and dismissed all of Mr. White’s claims. Mr. Pletcher then voluntarily dismissed his lawsuit against Mr. White, but Mr. White appealed the dismissal of his counterclaims.

## **II. ASSIGNMENTS OF ERROR**

Fife RV does not assign any error to the trial court’s rulings. Fife RV submits that the trial court should be affirmed in every respect.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The doctrine of collateral estoppel prevents a party from relitigating decided issues that were raised and litigated by that same party in a prior proceeding. During his criminal trial, Mr. White testified that he acted in self-defense, and the State had the burden to disprove this beyond a reasonable doubt. The jury convicted Mr. White of multiple crimes, including felony assault. Was the trial court correct to (1) hold that Mr. White was collaterally estopped from relitigating the facts of the underlying assault following his criminal conviction and (2) dismiss his claims by summary judgment? Yes.

2. Washington's felony tort statute, RCW 4.24.420, provides a complete defense to all claims for personal injury where the injury occurred during, and was proximately caused by, the plaintiff's commission of a felony. Mr. White's alleged injuries were sustained during the felony for which he was convicted by a jury. Does RCW 4.24.420, Washington's felony tort statute bar Mr. White's claims? Yes.

### IV. COUNTER-STATEMENT OF THE CASE

#### A. Mr. White was convicted by a jury of second-degree felony assault against Mr. Pletcher.

On October 1, 2009, Mr. White was convicted of second-degree felony assault with a deadly weapon. CP 63-74. In order to convict, the prosecution had to prove that Mr. White did not act in self-defense. *See State v. Acosta*, 101 Wn.2d 612, 618-19, 683 P.2d 1069 (1984) (holding that where there is any evidence of self-defense, the State bears the burden

of proving—beyond a reasonable doubt—that the criminal assault defendant did not act in self-defense).

The jury convicted Mr. White because on the evening of July 7, 2008, Mr. White brutally attacked Mr. Pletcher with a steel tire iron, repeatedly beating him about the head and causing Mr. Pletcher severe injury. *See* CP 32–36; *see also* CP 43.<sup>1</sup> Mr. Pletcher defended himself by hitting Mr. White with a fire extinguisher, while attempting to disengage. CP 37–41.

After bludgeoning Mr. Pletcher, Mr. White fled the scene of his crime, stole license plates from a third party's vehicle in an effort to evade capture, refused to stop for police cruisers which were in pursuit of his vehicle, and ultimately proceeded to crash his vehicle into a ditch near Interstate 5. CP 50–52. He was taken into custody by a K-9 unit following a police search in the area of his vehicle crash. CP 52; CP 60–61. Mr. White was convicted of felony assault with a deadly weapon in the second degree, attempting to elude a police vehicle (also a felony), and third-degree possession of stolen property (a gross misdemeanor). CP 63–74; CP 76–80.

Before Mr. White was convicted, Mr. Pletcher initiated this civil action against Mr. White to recover for the substantial bodily injuries that Mr. White's attack inflicted upon him. *See generally* CP 84–89. Mr. White

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<sup>1</sup> At the time of the assault, Mr. Pletcher was an employee of Fife RV, and worked on the company's sales lot as a salesman. CP 30. The attack by Mr. White took place on Fife RV's sales premises, where Mr. White was posing as a customer. *See* CP 31.

asserted a counterclaim for injuries that he allegedly received at the hands of Mr. Pletcher. *See* CP 91–102. Mr. White also filed a third-party complaint against Fife RV, alleging that Fife RV (1) was vicariously liable for Mr. Pletcher’s alleged intentional torts, (2) was negligent in supervising Mr. Pletcher, (3) committed false imprisonment of Mr. White, and (4) intentionally and negligently inflicted severe emotion distress upon him. *See id.*

**B. The jury at Mr. White’s criminal trial found that he did not act in self-defense.**

In order to find Mr. White guilty of felony assault with a deadly weapon in the second degree, the jury had to find that Mr. White intentionally assaulted Mr. Pletcher and recklessly inflicted substantial bodily harm on him. RCW 9A.36.021(1)(a). The jury had to conclude that Mr. White’s use of force was unlawful. *See State v. Rush*, 14 Wn.2d 138, 139–40, 127 P.2d 411 (1942) (discussing common law elements of felony assault). The jury determined that Mr. White did not act in self-defense. *See Acosta*, 101 Wn.2d at 616 (stating that the prosecution must prove beyond a reasonable doubt that the criminal defendant did not act in self-defense, or state differently, that the criminal defendant acted unlawfully).

Mr. White testified in his own defense at his criminal trial, claiming unequivocally that he acted in self-defense:

Q: Were you swinging [the tire iron] at the time?

A: I was blocking and swinging the whole time.

Q: During the time you were blocking and swinging, were you trying to injure Larry Pletcher?

A: **I was trying to protect myself.**

CP 49 (emphasis added). On cross-examination, Mr. White gave a similar account of his actions, admitting that he hit Mr. Pletcher with the tire iron, but denying that he had done anything other than act in self-defense:

Q: All right. At some point, you intentionally struck Mr. Pletcher with the tire iron?

A: Incorrect.

Q: You never struck Mr. Pletcher with the tire iron?

A: **I defended myself.**

Q: That wasn't my question.

A: I know. I can't answer your question.

Q: Did you strike him. I mean, here is the tire iron. The question is, at some point did you take this object, Exhibit No. 74A, and strike Mr. Pletcher?

A: Yes.

Q: All right. You did that intentionally?

A: No.

Q: You did it accidentally?

A: **I did it while I was defending myself. I wasn't intentionally doing anything.**

CP 57 (emphasis added).

Mr. White also acknowledged that Mr. Pletcher had always been cordial and professional in their interaction, and that he could think of no reason that Mr. Pletcher would have attacked him without provocation:

Q: Mr. Pletcher then gave you details about the Open Road fifth wheel?

A: Yes.

Q: Mr. Pletcher was nice?

A: Excellent.

Q: Treated you with respect?

A: Yes.

....

Q: All right. Up to that point, you had had no problems with Mr. Pletcher?

A: None.

Q: You had no reason, any excuse or reason, why he would have struck you for no reason?

A: Correct.

CP 53; CP 56–57. The jury obviously found Mr. White not credible, and it convicted him of felony assault. *See* CP 63–74; CP 76–80.

C. **Mr. White's trial testimony directly contradicted his allegations in the counterclaim and third-party complaint.**

In this civil suit, Mr. White alleged that Mr. Pletcher intentionally assaulted and battered him, causing him injury. *See* CP 99. But Mr. White testified at his criminal trial that he never actually saw Mr. Pletcher—or anyone else—initially attack him, and that he does not know how he first became injured:

Q: How did State's Exhibit 74A, the tire iron, come into play in this scenario, Dave?

A: **I don't know.**

Q: Did you end up getting struck with this?

A: Yes.

Q: How did that happen?

A: **I don't know.**

CP 48 (emphasis added). On cross-examination, Mr. White likewise admitted that he did not know who had supposedly caused him injury:

Q: Your testimony is that at some point Mr. Pletcher got up and headed toward the door. Showing you on Exhibit No. 50, this would be—it says 64-inch hide-a-bed. That's where you were sitting?

A: Correct.

Q: You get up to go to the door?

A: Correct.

Q: He was in the lead?

A: Correct.

....

Q: You testified the next thing you knew is you had been hit, correct?

A: Correct. Okay. Correct.

Q: **You didn't see anyone hit you?**

A: **Correct.**

Q: The only two people that were there were you and Mr. Pletcher?

A: Correct.

Q: And so you assumed that Mr. Pletcher hit you?

A: **Actually, I didn't know what had hit me. I didn't know whether I had walked into something. All I knew is that I was in pain.**

Q: At some point, you realized you hadn't walked into something, correct?

A: Correct.

Q: All right. **And your indication here is that Mr. Pletcher is the one who struck you with some object on the head. Is that correct?**

A: **I have not said that.**

Q: **Well, I'm asking you.**

A: **I don't know.**

CR 54–55 (emphasis added). By his own sworn testimony in open court, Mr. White contradicted the allegations in his Counterclaim and Third-Party Complaint that it was Mr. Pletcher who attacked him. *Compare id. with* CP 91–102. Mr. White testified that he did not know who supposedly injured him before he attacked Mr. Pletcher. CR 54–56.

Mr. White's claims of false imprisonment were also directly contradicted by his own testimony. *Compare* 99–100 *with* CP 58–59. Mr. White's counsel informed counsel for Fife RV that Mr. White was withdrawing or dropping this claim. VRP 10:8–10. Mr. White provided no evidence to support his negligent supervision claim. VRP 10:10–12. Mr. White's appeal brief does not argue in support of the false imprisonment

claims or negligent supervision claims. *See* Brief of Appellant White at 8–12. Mr. White also cites no facts or evidence supporting those claims. *See id.* at 1–8. Therefore, they are abandoned.

**D. Mr. White did not timely submit any opposition papers, and his opposition papers, which were handed to the trial court on the morning of the hearing were struck.**

Mr. White’s papers in opposition to Fife RV’s motion for summary judgment were due on November 1, 2010, but the trial court was not handed his answer to the motion until the morning of the hearing. VRP 3:22–25. The trial court granted Fife RV’s motion to strike the untimely submission. *See* CP 150–151; *see also* CP 142–143; CP 146–147.

The trial court permitted Mr. White’s lawyer to argue, but it struck Mr. White’s opposition, noting that it was “very untimely.” VRP 4:10–11; VRP at 4:16–17. Any affidavits or evidence submitted by Mr. White’s lawyer were also struck. *See* VRP at 4:19–21. Mr. White did not assign error to this ruling. *See* Brief of Appellant White at 1. He also did not make any argument that the ruling is error. *See id.* at 8–12.

**V. ARGUMENT AND AUTHORITY**

**A. Summary of argument**

The trial court was correct to dismiss Mr. White’s claims as a matter of law. Mr. White could not establish the elements of his civil claims because the doctrine of collateral estoppel prohibits the relitigation of facts that were necessarily determined in his criminal trial. Moreover, Mr. White could not contradict his prior sworn testimony in order to create

questions of material fact in response to Fife RV's summary judgment motion.

In addition, Mr. White was statutorily prohibited from seeking damages for his injuries, which he sustained while feloniously and severely beating Mr. Pletcher nearly to death. *See* RCW 4.24.420. Mr. White could not establish the elements of his civil claims, and summary judgment was proper. The trial court should be affirmed.

**B. Standard of review**

A trial court's grant of dismissal by summary judgment is reviewed *de novo*. *E.g., Davies v. Holy Family Hospital*, 144 Wn. App. 483, 491, 183 P.2d 283 (2008). Mr. White has not assigned error to the trial court's granting of Fife RV's motion to strike Mr. White's untimely summary judgment opposition, which if appealed would be reviewed for abuse of discretion. *Id.* at 499. Therefore, all issues raised in Mr. White's appeal are reviewed *de novo*.

**C. Documents not considered by the trial court should be struck under RAP 9.12.**

Mr. White did not timely oppose Fife RV's motion for summary judgment, and the trial court struck his opposition papers, which were not filed until the morning of the hearing. VRP 3:22–25. Those materials are not to be considered by this Court. RAP 9.12.

Mr. White has not argued about or assigned error to the trial court's striking of his papers in opposition to Fife RV's motion for

summary judgment. *See* Brief of Appellant White at 1.<sup>2</sup> Therefore, the portion of the Clerk's Papers that are comprised of his opposition papers (CP 110–128) should be struck from the record on review and not considered on this appeal.

**D. This Court should not consider issues raised for the first time on appeal or in Mr. White's reply.**

Mr. White should be prohibited from arguing for the first time on appeal new issues that he did not raise at oral argument to the trial court. This Court may refuse to review any claim of error that was not raised at the trial court. RAP 2.5(a). An appellant cannot raise an objection for the first time on appeal, unless the error falls within three strict exceptions, which do not apply here. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 684, 757 P.2d 492 (1988). On this appeal, Mr. White should not be permitted to raise argument that was contained within his untimely brief, which was struck and not considered by the trial court.

Appellant's argument should be limited to that raised by his counsel at oral argument. *See* VRP 4:9–5:3, 13:13–15:1. Similarly, the trial court should not consider issues, if any, that appellant might raise for the first time in his reply brief. *In re Marriage of Bernard*, 165 Wn.2d 895, 908, 204 P.3d 907 (2009).

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<sup>2</sup> This Court will not consider assignments of error that are unsupported by factual or legal argument. *Idahosa v. King Cy.*, 113 Wn. App. 930, 938, 55 P.3d 657 (2002) (citing RAP 10.3(a)(5); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992)).

E. Mr. White's claims are barred under the doctrine of collateral estoppel, because he is unable to relitigate facts that were already determined against him in his criminal trial.

The relevant facts in the civil case were conclusively established by the jury's verdict in the criminal trial. The facts that were determined against Mr. White in the criminal action are final. They could not be relitigated to an inconsistent civil judgment.

Moreover, Mr. White could not contradict his prior sworn testimony to create issues of material fact in order to avoid summary judgment. Therefore, because Mr. White was precluded from relitigating the facts that were necessary to support the elements of his civil claims, the trial court properly entered summary judgment.

1. The trial court correctly held that the doctrine of collateral estoppel barred Mr. White from relitigating in a civil matter the facts that were previously established in his criminal trial.

The doctrine of collateral estoppel prevents a party from relitigating issues that have been raised and litigated by that same party in a prior proceeding. *Reninger v. Dep't of Corr.*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998); *see also Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). "Collateral estoppel promotes judicial economy and prevents inconvenience, and even harassment, of parties." *Reninger*, 134 Wn.2d at 449.

Issue preclusion, otherwise known as collateral estoppel, is different than claim preclusion. Claim preclusion "is intended to prevent relitigation of an entire cause of action, [while] collateral estoppel is

intended to prevent retrial of one or more of the crucial issues or determinative facts determined in previous litigation.” *Luisi Truck Lines, Inc. v. Wash. Utils. & Transp. Comm’n*, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). This distinction appears to be completely misunderstood by Appellant. *See* Brief of Appellant at 1, 7–9, and 13.

There are four elements to issue preclusion: (1) the issue decided in the prior adjudication is identical to the one presented in the current action; (2) the prior adjudication must have resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was either a party or in privity with a party to the prior adjudication; and (4) precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. *State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (citing *Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 262–63, 956 P.2d 312 (1998)). The determination of whether application of collateral estoppel will work an injustice on the party against whom the doctrine is asserted—the fourth element—depends primarily on “whether the parties to the earlier proceeding received a full and fair hearing on the issue in question.” *Thompson v. Dep’t of Licensing*, 138 Wn.2d 783, 795–96, 982 P.2d 601 (1999). A court may apply collateral estoppel when all four elements are met. *George v. Farmers Ins. Co. of Wash.*, 106 Wn. App. 430, 443, 23 P.3d 552 (2001).

Facts established by a criminal conviction after a trial may be given preclusive effect in a subsequent civil action involving the same

operative facts. *See, e.g., Kyreacos v. Smith*, 89 Wn.2d 425, 429–30, 572 P.2d 723 (1977) (holding that facts established by police detective’s first degree murder conviction should be given preclusive effect in a subsequent wrongful death action).<sup>3</sup> In *Kyreacos*, the Washington Supreme Court reasoned that “[w]hen 12 jurors have been convinced, unanimously and beyond a reasonable doubt, that [the defendant] was guilty of that premeditated murder, it would be totally contrary to logic and common sense to permit a civil jury to conclude otherwise.” *Kyreacos*, 89 Wn.2d at 429–30. A criminal trial provides a defendant a full and fair opportunity to develop and litigate the issues in the criminal case, such that it is appropriate to apply collateral estoppel of the criminal determinations in a related civil suit. *See Clark v. Baines*, 150 Wn.2d 905, 913–14, 84 P.3d 245 (2004). Applying that same standard here, Mr. White is collaterally estopped from relitigating the facts that were necessarily determined by the jury when it convicted him.

The elements of second degree assault, the felony of which Mr. White was convicted, are relatively straightforward. *See* RCW 9A.36.021.

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<sup>3</sup> *See also Seattle-First Nat’l Bank v. Cannon*, 26 Wn. App. 922, 927–28, 615 P.2d 1316 (1980) (holding that conviction of conspiracy and aiding and abetting embezzlement of funds from a bank conclusively established “wrongful taking” of those funds in subsequent civil action); *Maicke v. RDH, Inc.*, 37 Wn. App. 750, 755, 683 P.2d 227 (1984) (holding that second degree manslaughter conviction conclusively established negligence in subsequent wrongful death action); and *City of Des Moines v. Personal Property Identified as \$81,231 in U.S. Currency*, 87 Wn. App. 689, 700, 943 P.2d 669 (1997) (affirming trial court’s decision that a conclusive determination of the search and seizure issue in the separate criminal trial collaterally estopped the claimant from challenging the validity of the seizure in the civil forfeiture proceeding).

Conduct sufficient to be guilty of this offense includes the intentional assault of another, thereby inflicting substantial bodily harm; it also includes instances where a person assaults another with a deadly weapon. *See id.* There is no Washington statutory definition for the term “assault,” however, so courts look to the common law for a definition of the requisite factual elements. *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 504, 125 P.2d 681, 690 (1942). The common law definition of criminal assault in Washington contemplates three alternative factual circumstances in which a person may commit an “assault”: (1) battery; (2) attempted battery; and (3) creating the apprehension of bodily harm. *E.g.*, *State v. Wilson*, 125 Wn.2d 212, 218, 883 P.2d 320 (1994).<sup>4</sup>

In this case, Mr. White was convicted of assault with a deadly weapon in the second degree for his brutal beating of Mr. Pletcher with the steel tire iron. All of the facts necessary to prove second degree assault with a deadly weapon were established by Mr. White’s conviction. If they had not been established, Mr. White would not have been convicted.

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<sup>4</sup> Battery is defined as a touching that is either harmful or offensive that is neither consented to nor privileged. *State v. Humphries*, 21 Wn. App. 405, 409, 586 P.2d 130 (1978). Attempted battery is defined as an attempt, with unlawful force, to inflict bodily injury on another, accompanied with the apparent present ability to give effect to the attempt if not prevented. *E.g.*, *State v. Jimerson*, 27 Wn. App. 415, 418, 618 P.2d 1027 (1980). The third version of assault, creating the apprehension of bodily harm, involves putting a person in apprehension of harm, whether or not the defendant intended to inflict the harm, or was even capable of inflicting it. *State v. Frazier*, 81 Wn.2d 628, 630–31, 503 P.2d 1073 (1972). The defendant must act with the intent to create the apprehension. *State v. Krup*, 36 Wn. App. 454, 458–59, 676 P.2d 507 (1984). Unlike the other options, this definition of assault requires that there be actual fear on the part of the victim. *State v. Eastmond*, 129 Wn.2d 497, 503–04, 919 P.2d 577 (1996).

The jury's verdict also disposed of the notion that Mr. White acted in self-defense. By definition, an "assault" requires the use of unlawful force. *E.g., Jimerson*, 27 Wn. App. at 418. Because the use of force in self-defense is lawful, self-defense negates an element of the crime of assault. *See* RCW 9A.16.020(3); *see also Acosta*, 101 Wn.2d at 616. Where there is any evidence of self-defense, the State bears the burden of proving—beyond a reasonable doubt—that the criminal defendant did not act in self-defense. *Acosta*, 101 Wn.2d at 618–19. At his criminal trial, Mr. White claimed that he acted in self-defense, and he testified to this fact at trial. That assertion was disproved by the State and decided against him by jury that convicted him. All four elements of collateral estoppel were met.

First, the same operative facts that are implicated in Mr. White's civil tort claims were addressed and resolved at his criminal trial. The claims advanced by Mr. White against Fife RV depend on the factual assertions that Mr. White was defending himself, was not the aggressor in the altercation with Mr. Pletcher, and was injured by Mr. Pletcher's aggression. This issue was already decided against Mr. White at his criminal trial. Mr. White was the aggressor and did not act in self-defense.

Second, Mr. White's criminal trial ended in a final adjudication on the merits. Mr. White was convicted by a jury of a felony for his brutal attack on Mr. Pletcher. He went to prison as a result.

Third, Mr. White was himself the criminal defendant in the criminal trial. There is obviously a unity of parties. Contrary to Appellant's confused rhetoric, it does not matter that Mr. Pletcher or Fife

FV were not “parties” to Mr. White’s criminal trial. *See Harrison*, 148 Wn.2d at 561 (citing *Nielson*, 135 Wn.2d at 262–63). All that matters is that Mr. White was a party to his own criminal trial, which he obviously was. The doctrine of collateral estoppel may be applied where mutuality of parties does not exist as long as the party against whom preclusion is sought was a party (or was in privity with a party) in the prior litigation. *See, e.g., State v. Mullin-Coston*, 152 Wn.2d 107, 113–14, 95 P.3d 321 (2004).<sup>5</sup> The trial court properly determined that collateral estoppel foreclosed Mr. White from relitigating issues that had already been determined in his criminal trial. Under the modern rule, it is irrelevant whether Fife RV or Mr. Pletcher were parties in the criminal trial.

Fourth and finally, Mr. White will not meet with any injustice by application of the doctrine to this case, because he had a full and fair opportunity to try to prove these factual issues at his criminal trial. *See Clark*, 150 Wn.2d at 913–14. He tried and failed. In convicting him, the jury necessarily established that Mr. White was the aggressor and did not act in self-defense. *See Acosta*, 101 Wn.2d at 618–19. Mr. White is now collaterally estopped from relitigating any of the material issues involving

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<sup>5</sup> The rule used to be different. *See Mullin-Coston*, 152 Wn.2d at 113–14 (stating that “[a]t one time Washington required mutuality, meaning there had to be identity or privity of parties in the same antagonistic relationship in both proceedings, before collateral estoppel could be asserted in the subsequent litigation.”); *see also Lucas v. Velikanje*, 2 Wn. App. 888, 471 P.2d 103 (1970) (collateral estoppel applied without mutuality of parties); *Gibson v. Northern Pacific Ben. Ass’n Hosp., Inc.*, 3 Wn. App. 214, 473 P.2d 440 (1970) (estoppel not applied because the issue was not identical, but the appellate court recognized mutuality of parties was not required).

his altercation with Mr. Pletcher at Fife RV.

2. Mr. White was also prohibited from creating an issue of material fact by contradicting his prior sworn testimony.

Mr. White submitted no affidavit in opposition to Fife RV's motion for summary judgment. Even if he had, he was prohibited from contradicting his own prior sworn testimony. Self-serving affidavits contradicting prior sworn testimony cannot be used to create an issue of material fact for purposes of resisting summary judgment. *See, e.g., McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511 (1999).

Because Mr. White could not contradict his testimony at his criminal trial, he could not present any facts that would be admissible in evidence to create questions of material fact in opposition to Fife RV's motion for summary judgment, and his claims were properly dismissed. *See* WASH. R. CIV. P. 56(e).

- F. Mr. White's claims are barred by the felony tort statute, because he was already tried and convicted of felony assault.

Even if Mr. White were not collaterally estopped from relitigating the issues that were decided against him, his claims were also barred under the felony tort statute. "It is a complete defense to any action for damages for personal injury or wrongful death that the person injured or killed was engaged in the commission of a felony at the time of the occurrence causing the injury or death and the felony was a proximate cause of the injury or death." RCW 4.24.420; *see also, e.g.,* WPI 21.08.

Mr. White was convicted of felony assault, which occurred when he was allegedly injured. The jury did not believe that Mr. White was attacked first, because they convicted him. There was no evidence that Mr. White was injured by Mr. Pletcher at any time other than when Mr. White was committing felony assault. The trial court had no testimony by Mr. White that a fracas between Mr. White and Mr. Pletcher started and stopped. *See* CP 45–60.

In an attempt to imply that the trial court erred, Mr. White cites a single federal trial court order. Brief of Appellant at 11 (citing *Dickinson v. City of Kent*, 2007 U.S. Dist. LEXIS 95195 at \*8 (W.D. Wash. 2007)). There are four reasons that this citation should be disregarded.

First, the practice of citing to unpublished decisions has been “disapproved” by the Washington Supreme Court. *See Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 248, 178 P.3d 981 (2008) (stating “[l]ike the Court of Appeals, we have disapproved citing unpublished decisions.”) (citations omitted). Second, the order obviously has no precedential value because it is a trial court decision, not a published appellate opinion. Third, the order states no analysis regarding when summary judgment is appropriate for a defense under the felony tort statute, and the only purpose for citing a trial court order is to provide reasoning. *See Oltman*, 163 Wn.2d at 248–49 (reasoning, *inter alia*, that “Insofar as the analysis in another trial judge’s decision might be helpful, there is no rule or precedent that bars its consideration by a trial judge.”).

Fourth, and perhaps most importantly, the decision is not on point.

In *Dickinson*, the federal trial court denied the *plaintiff's* motion for summary judgment on liability. *Dickinson*, 2007 U.S. Dist. LEXIS 95195 at \*\*1-2. The defendant did not move for summary judgment, and the facts in the *Dickinson* case were very different.

In *Dickinson*, the plaintiff was involved in a felony for taking a motor vehicle without permission. *Id.* at \*7. The plaintiff was bit by a police dog after (1) the vehicle was stopped by a police officer who drove his patrol car in front of it; (2) the plaintiff was ordered to get out of the vehicle; and (3) an officer opened the passenger door. *Id.* at \*3. Unlike this case, the *Dickinson* case did not involve a felony assault. The facts in *Dickinson* demonstrate that the plaintiff was deprived of possession of the stolen vehicle at the time of the dog bite, because the police had already blocked its movement. Therefore, there might have been a question of fact about whether Plaintiff's felony was still occurring. There also might have been a question of fact as to whether Plaintiff's felony proximately caused the specific injuries in question. However, the *Dickinson* decision does not state any analysis on proximate cause. More importantly, *Dickinson* did not decide that defendant was not entitled to summary judgment, because it was deciding the plaintiff's motion, not a motion for summary judgment by the defense. Mr. White's reliance on *Dickinson* is misplaced.

In the instant case, the felony tort statute applied and provided a complete defense as a matter of law, because Mr. White provided no testimony or evidence to create a genuine issue of material fact. Mr. White was convicted of felony assault with a deadly weapon in the second

degree, attempting to elude a police vehicle (also a felony), and possession of stolen property in the third degree (a gross misdemeanor). There was no testimony or evidence that Mr. White's assault stopped and started. *See* CP 45-60. The criminal jury disbelieved Mr. White's testimony about being struck first, and it convicted him of felony assault, along with two other crimes. Mr. White is prohibited from seeking damages for the injuries that allegedly occurred during his felony. The trial court was correct to dismiss Mr. White's counterclaims and third-party complaint.

#### VI. CONCLUSION

Mr. White has not established a single error of law requiring reversal. The trial court should be affirmed in all respects.

Dated this 25<sup>th</sup> day of July, 2011.

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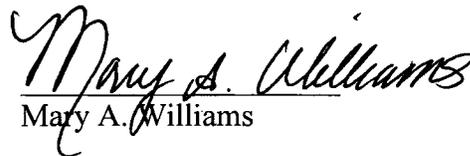
**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON

I hereby certify that on the 25<sup>th</sup> day of July, 2011, I caused to be served via E-mail and U.S. Postal Service, ordinary first class mail the foregoing *Brief of Respondent Fife RV & Auto Center, Inc.*, on the following parties at the following addresses:

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