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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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No. 305147-III

WASHINGTON STATE COURT OF APPEALS
DIVISION III

JAY P. MEHRING, a single person,

Respondent,

vs.

CITY OF SPOKANE, a municipal corporation in and for the State of
Washington; ANNE KIRKPATRICK, a single person; DAVID
OVERHOFF, a married person; and TROY TEIGEN, a married person,

Appellants.

APPELLANTS' REPLY AND RESPONSE TO
CROSS-APPEAL BRIEF

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This brief is filed in reply and response to Respondent Mehring's Response/Cross-Appeal brief.

I. APPELLANTS' REPLY TO MEHRING'S RESPONSE BRIEF

Contrary to Mehring's statements on the applicable standards of review, when a trial court commits an error of law, it is reviewable *de novo* by this Court. Dean v. Fishing Co. of Alaska, Inc., 177 Wn.2d 399, 300 P.3d 815 (2013). Jury instructions are also reviewed *de novo* for errors of law. Anfinson v. FedEx Ground Packaging System, Inc., 174 Wn.2d 851, 860, 281 P.3d 289 (2012). Prejudice is presumed if the instruction contains a clear misstatement of the law. Id. Constitutional law errors are also reviewed *de novo*. State v. Clark, 175 Wn.App. 109, 302 P.3d 553 (2013).

A. Mehring's due process rights were not violated, much less violated "per se"; the trial court made errors of law in concluding otherwise and in so instructing the jury.

The trial court committed two errors regarding due process. First, it directed a verdict for the plaintiff on "pre-deprivation" process, determining that the omission of a local procedure, overlooked by both the City and the Guild, "per se" violated due process. Second, the court also submitted the question of "post-deprivation" process, as a separate claim, to the jury.

The trial court's ruling that Mehring's due process rights were violated "per se" for failure to follow a state procedural requirement establishes the court's failure to properly balance the elements necessary to determine what procedure was due. Procedural due process is a flexible concept, and a procedural irregularity in the pre-deprivation stage is not a due process violation as a matter of law. Pre- and post-deprivation remedies are intertwined, and a court must analyze the entire spectrum of process provided. Here, Mehring may not have gotten the felony layoff policy (FLP) process before his suspension, but that fact had to be weighed against the pre- and post-deprivation process available to him, and whether he chose to use it or not; the lack of use of a local procedural policy does not automatically constitute a federal constitutional violation as a matter of law, which is where the trial court erred.

Moreover, in properly analyzing the spectrum of process provided, the City cannot be liable for denial of due process for Mehring's failure to utilize the process available. And any delay in the post-deprivation process was ultimately irrelevant because any delay did not alter the fact that Mehring remained charged with a felony during the entire period prior to the post-deprivation hearing. From March of 1997 until October of 1998, there was one critical fact that never changed: Mehring was a Spokane police officer who was charged with a felony for threatening to

kill his wife. That fact would not have changed had the hearing been held sooner, and a hearing before the felony charge was resolved would have been fruitless for Mehring because any hearing would not have returned him to the payroll. The law did not require the City to force an unwanted hearing on Mehring, nor did it require the City to return him to his job before resolution of the charges.

1. The Mathews/Gilbert balancing test confirms that no rights were violated.

Procedural due process is a matter for the courts to decide under federal law. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). "It is by now well established that due process, unlike some legal rules, is not a technical conception with a fixed content related to time, place and circumstances." Gilbert v. Homar, 520 U.S. 924, 931 (1997). In every case, the court must evaluate the nature and timing of the procedures provided and determine whether those procedures sank below the minimum level necessary to satisfy due process. Mathews v. Eldridge, 424 U.S. 319 (1976); Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985); and Gilbert, *supra*. In this analysis, the court does not review pre-deprivation processes in a vacuum; "the existence of post-termination procedures is relevant to the necessary

scope of pre-termination procedures." Loudermill, 470 U.S. at 547, n.12. They are "inevitably intertwined." Id. at 551.

To determine what process is constitutionally due, the court must analyze:

The specific dictates of due process are determined by balancing the competing interests at stake in the particular case. Mathews v. Eldridge, 424 U.S. 319, 335 (1976). In public employment cases such as this, these interests are (1) plaintiff's private interest in retaining his position of employment, (2) defendants' governmental interest in expeditious removal or demotion of unsatisfactory employees and in avoidance of administrative burdens, and (3) the risk of erroneous deprivation. Loudermill, 470 U.S. at —; See Mathews, 424 U.S. at 335.

Williams v. City of Seattle, 607 F.Supp. 714, 720 (W.D. Wash. 1985).

Applying these factors, the Supreme Court has consistently held that "where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." Gilbert, 520 U.S. at 930 (government's interest in suspending police officer charged with a felony to preserve public confidence higher than plaintiff's private interests). And in the case of a suspension, as opposed to a termination, the lessened privacy interests at stake further dictate against the necessity of a pre-deprivation hearing. Gilbert, 520 U.S. at 932. Tweedall v. Fritz, 987 F.Supp. 1126, 1132 (S.D. Ind. 1997). Moreover, the risk of erroneous

deprivation is reduced when there is an independent probable cause determination, like the charges filed by Spokane County here. See, Gilbert, 520 U.S. at 933-934.

As a result, the trial court erred in separating the pre- and post-deprivation remedies: there could be no "per se" pre-deprivation remedy without an analysis of post-deprivation¹ process and lack of a pre-suspension process based solely on violation of the FLP could not, as a matter of law, establish a violation. Moreover, the process available was simply not utilized by Mehring and thus could not have established a violation. Ultimately, Mehring received a "Loudermill" hearing in the timeframe he demanded, and any delay did not violate a right because any earlier hearing would still have occurred while felony charges were still pending against him.

2. Violation of the felony layoff rule did not violate due process "per se."

"A right to have state (or city) laws obeyed is a state, not a federal right" and "[m]ere violation of a state statute does not infringe the federal Constitution." Snowden v. Hughes, 321 U.S. 1, 11 (1944); Love v.

¹ While the lack of post-deprivation process might rise to the level of a "distinct" constitutional violation, this does not mean that the processes available can be viewed wholly independent of one another. See, Taylor v. City of Cheney, 2012 WL 5361424 (E.D. Wash. 2012) ("existence of post-termination procedure is relevant to the necessary scope of pre-termination procedure").

Navarro, 262 F.Supp. 520, 523 (C.D. Cal. 1967); see also, Samson v. City of Bainbridge Island, 683 F.3d 1051 (9th Cir. 2012).

Failure to follow the FLP does not create an automatic violation of procedural due process. In Williams, supra, the City failed to follow a procedure outlined in one of its manuals. The court squarely rejected plaintiff's argument that this local rule was a part of his property right, and that Seattle's failure to follow it deprived him of that right, and **therefore** violated his right to due process of law. Williams held: "The process constitutionally due Williams prior to deprivation of that property interest **is determined not by the procedures set forth in the SPD Manual, but rather by the requirements of the Due Process Clause.**" Williams, 607 F.Supp. at 720, citing Loudermill, 105 S.Ct. at 1493 ("The answer to that question [what process is due?] is not to be found in the Ohio statute").

In Harris v. Birmingham Bd. of Education, 817 F.2d 1525 (11th Cir. 1987), the court says "we emphasize that the violation of a state statute outlining procedures does not necessarily equate to a due process violation under the federal constitution," unless the state procedure **also** sets the floor for minimal process guaranteed by the Fourteenth Amendment. 817 F.2d at 1528. Again, the FLP simply does not implicate due process.

In response, Mehring cites Danielson v. City of Seattle, 45 Wn.App. 235, 724 P.2d 1115 (1986), aff'd, 108 Wn.2d 788 (1987) for the proposition "an agency's failure to follow its own rules is a 'per se' violation of due process when the agency's rules represent minimal due process requirements." (Mehring Brief, p. 49) However, the court in Danielson actually overruled a prior case that held that violation of an agency's rules automatically violated due process. See, 108 Wn.2d at 797, n.3 [overruling Punton v. Seattle Public Safety Comm'n, 32 Wn.App. 959, 967, n.6, 650 P.2d 1138 (1982)]. Punton made the same error as did the trial court here, conflating local rules with due process.

Danielson is clear—as is Williams, which it cites—that violation of a local rule is **not** a per se violation of due process unless "the agency's rules represent minimal due process requirements." 108 Wn.2d at 797 n.3. Those minimal due process requirements are determined as a matter of federal law, not state law. The trial court in Danielson, like the trial court here, awarded damages based upon an erroneous belief to the contrary. 108 Wn.2d at 799. ("The Court of Appeals properly reversed the lower court's award of back pay and benefits.") The FLP is only relevant to procedural due process if it "represent[s] minimal due process requirements"; it does not.

Moreover, no error was "invited," nor is the City judicially estopped from arguing a proper application of law. The quote Mehring makes the focus of his Brief was a precisely correct statement of Danielson's holding: "local procedures like the ad hoc committee procedure are only relevant to the due process calculus, **if they indeed set the floor for due process.**" (RP 1884, Respondent's Brief, p. 27) This is an accurate statement of Danielson's holding, but no "admission" that the FLP indeed sets the floor for due process.

Contrary to Mehring's argument, the trial court did **not** hold that the FLP sets the floor for due process, the court simply decided that a violation of the FLP **was** a violation of due process. This is the Punton mistake corrected by Danielson. Nor should this Court so hold, consistent with Danielson. The FLP provides a level of procedures **in addition to** those provided by the Civil Service Commission's rules and by the Guild collective bargaining agreement rules. Civil Service Rules and collective bargaining agreement grievance procedures meet the requirements of due process. The FLP is **not** essential to satisfying Mehring's due process rights.

Based upon the foregoing, this Court is respectfully requested to reverse with instructions, rejecting Mehring's judicial estoppel, invited error, FLP and split due process arguments.

3. The post-suspension procedures provided to Mehring were constitutionally permissible, and Mehring's failure to utilize them prohibits a claim for deprivation of due process.

In both Gilbert and Loudermill, minimal pre-suspension procedures² satisfied the procedural due process test of Mathews. In both cases, the court pointed out that the minimal pre-deprivation process provided was acceptable, given that "sufficiently prompt" post deprivation procedures were available.

But the "sufficiency" of the "promptness" must be gauged, like all procedural due process issues, in light of the reasons for the delay, the context and the factual setting. FDIC v. Mallen, 486 U.S. 230 (1988) (reasons for delay paramount); United States v. Timms, 664 F.3d 436, 449-450 (4th Cir. 2012) (thirty-one month delay did not violate due process under circumstances; due process is flexible, and precise procedures required cannot be viewed in a vacuum); Kairo-Scibek v. Wyoming Valley West Sch. Dist., 880 F.Supp.2d 549 (M.D.Pa. 2012). Mehring's suggestion that Gilbert is inapplicable because he claims there were no "prompt" post-suspension hearings is incorrect; Gilbert did not present the exact circumstances here, but due process remains a fact driven inquiry. Here, there were post-deprivation procedures available, as in

² In Gilbert, supra, the only procedure utilized was verification of the felony charge against the State police officer.

Gilbert, and the fact that Mehring chose not to utilize them does not render Gilbert's reasoning void.

As a result, contrary to Mehring's claims that the delay between suspension and the hearing held after he was acquitted violates his right to post-suspension due process, any "delay" was both self-imposed and irrelevant. Mehring had process available that he failed to utilize, and he was given a hearing at the exact time he wanted it: after the criminal charges were resolved. And, importantly, any hearing prior to the resolution of criminal charges would have been fruitless, because Mehring would have still have had felony charges pending, and no amount of "process" would have changed that fact. As a result, any claims of delay did not deprive Mehring of due process.

(a) A grievance was available to Mehring.

First, Mehring's union could have grieved the layoff-without-pay. The City cannot be charged with the Guild's refusal to do so. Winston v. U.S. Postal Service, 585 F.2d 198 (7th Cir. 1978).³ The Guild was apparently not interested in grieving such an obvious case. After all, "the

³ "Plaintiffs' contention that the grievance procedure in the CBA is inadequate because they were told that they could not initiate a grievance on their own and their union refused to initiate one on their behalf is unpersuasive. First, the plain language of the CBA states: 'A grievance may be initiated by the [Union] or an aggrieved officer.' Second, a union's failure to act on an employee member's behalf does not constitute a due

Constitution does not require the government to give an employee charged with a felony a paid leave at taxpayer expense." Gilbert, 520 U.S. at 925.

Mehring argues that the Human Resources director, Christine Cavanaugh, testified that the collective bargaining agreement does not allow for grievance arbitration of "layoffs," but this testimony was about layoffs in general and not employee disciplinary suspensions. (RP 1534-1535) But Mehring's lawyer never asked her about **suspension** (i.e., disciplinary) layoffs, which are not the same. (Exhibit 6) "Management rights" do not extend to disciplinary actions. Cf. Pasco Police Officers Association vs. City of Pasco, 1994 WL 900087 (Wash.Pub.Emp.Rel.Com.) (employer cannot force union to accept "management rights" clause precluding usual disciplinary procedures); Washington State Patrol Troopers Ass'n v. Washington State Patrol, 2013 WL 5181087 (Wash.Pub.Emp.Rel.Com.) (unfair labor practice to interfere with union efforts to collect evidence in anticipation of Loudermill hearing, notwithstanding management rights clause); Snocom Dispatchers Association v. Southwest Snohomish County Public Safety Communications Agency, 2011 WL 3894532 (Wash.Pub.Emp.Rel.Com.)

process violation by the employer because the employee can sue the union for breach of duty of fair representation." Winston, 585 F.2d at 209.

(employer required to post signs telling work force that it would not interfere with their rights to grieve discipline, inter alia).

(b) An independent Civil Service Commission investigation/hearing was available.

Second, Mehring could **himself** have instituted a Civil Service procedure. Mehring's Guild President testified at trial that the Guild does not assist members who want to start Civil Service procedures. (RP 588-590) Mehring argues that Civil Service Rule IX (which he misreads) does not allow an appeal from a felony layoff (i.e., suspension), but Mehring overlooks Civil Service Rule XI (Exhibit 6), which states that the Civil Service "Commission may investigate any and all matters relating to conditions of Civil Service employment either in response to employees' complaints, their duly authorized representatives, or on its own initiative."

By Spokane Charter, the Civil Service Commission is wholly independent of the City Council or Mayor. See Charter §§52-54, available online at <http://www.spokanecity.org/services/documents/charter/>. Cf. Harden v. City of Spokane, 135 Wn.App. 742, 145 P.3d 1244 (2006), for a discussion of some aspects of the independence of the Commission.

(c) A hearing was actually scheduled: Garrity is irrelevant.

Third, Kirkpatrick actually did attempt to convene a hearing, which the parties called a Loudermill hearing, not long after the suspension. (Exhibit 16; RP 828, 1032) As Guild President Wuthridge testified, the Guild opposed it, and wanted to "bargain" over the format chosen, threatening unfair labor practice charges against Kirkpatrick. (RP 586-589)

Mehring claims that Garrity v. New Jersey, 385 U.S. 493 (1967), which holds that a confession coerced by threats to fire the officer is inadmissible, nullifies Kirkpatrick's proffered hearing, because she did not offer immunity. Garrity stands for the proposition that a police officer cannot be fired **for insubordination** for refusing to answer questions about a pending criminal charge, and thus (in general, subject to exceptions) cannot be asked about the criminal charge if insubordination is at issue, unless immunity is granted. See, Aitchison, "The Rights of Police Officers" at 169 (5th Ed. LRIS 2004) (the employer has the right to refuse to compel an employee to make statements in a disciplinary process; the Garrity rule provides the employee with the choice, and this choice does not violate the employee's rights). Mehring claims that Washington law is inconsistent with the treatise by the Guild's lawyer, but this is incorrect.

In Seattle Police Officers' Guild v. City of Seattle, 80 Wn.2d 307, 494 P.2d 485 (1972), the court cited Gardner v. Broderick, 392 U.S. 273 (1968) for the proposition that it did not violate Garrity rights to discharge city police officers who refused to answer questions in the context of a police department internal administrative investigation into alleged police misconduct. The court noted that where the questions were specifically, directly and narrowly related to past performance of their official duties, the officers were not required to waive any immunity from prosecution, and they were advised that refusal to cooperate could lead to their dismissal, Garrity was not implicated. 80 Wn.2d at 314-315. Thus, Kirkpatrick easily could have conducted the hearing she scheduled in such a way as not to implicate Garrity.

We will never know whether Kirkpatrick would have discharged Mehring for his responses, or whether her questions would have complied with Gardner and Seattle Police Officers' Guild. The Guild shortstopped Kirkpatrick's efforts by threatening her with legal action, so she acquiesced. (RP 590) Mehring's claim that Garrity rights would *necessarily* have been violated, rendering Kirkpatrick's "sufficiently prompt" post-termination hearing a nullity, is thus entirely without merit.

Garrity does not apply here because Kirkpatrick was not threatening to fire Mehring for insubordination. Aitchison, "The Rights of

Police Officers”, supra. But even if it **did** apply, because Mehring's Guild agents would not let the proceeding go forward, we cannot speculate about its contents. The point here is that Garrity and its progeny do not always require a grant of immunity, as Mehring claims. And, Kirkpatrick did **not** automatically violate Garrity (or violate it at all) simply by scheduling a Loudermill hearing.

(d) The City is not liable for Mehring's failure to utilize the procedures.

But more to the point, where there are procedures available which can remedy the problem, but of which the employee does not avail himself, there simply is no due process issue. Mehring was provided all procedures required by Civil Service, and of course his union did not grieve the action, as it could have. This inaction cannot be ascribed to the City. Winston, 585 F.2d at 210, n. 35 (union owes duty of fair representation; if the union does not believe that grounds exist for a grievance, or does not meet the grievance procedure time frames, this is not a violation of due process). See, Alvin v. Suzuki, 227 F.3d 107, 116 (3rd Cir. 2000), the court stated:

In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate. “[A] **state cannot be held to have violated due process requirements when it has made procedural protection available and the**

plaintiff has simply refused to avail himself of them.” Dusanek v. Hannon, 677 F.2d 538, 543 (7th Cir.1982); see also Bohn v. County of Dakota, 772 F.2d 1433, 1441 (8th Cir.1985). A due process violation "is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 126 (1990). **If there is a process on the books that appears to provide due process, the plaintiff cannot skip that process and use the federal courts as a means to get back what he wants.** See McDaniels v. Flick, 59 F.3d 446, 460 (3d Cir.1995); Dwyer v. Regan, 777 F.2d 825, 834–35 (2d Cir.1985), modified on other grounds, 793 F.2d 457 (2d Cir.1986); Riggins v. Board of Regents, 790 F.2d 707, 711–12 (8th Cir.1986).

This requirement is to be distinguished from exhaustion requirements that exist in other contexts. Alvin appears to conflate the two, and contends, as an alternative to his claim that he attempted to use the available procedures, that he need not go through the processes available because of the general rule there is no exhaustion requirement for 42 U.S.C. § 1983 claims. See Patsy v. Board of Regents of Florida, 457 U.S. 496, 516 (1982); Hohe v. Casey, 956 F.2d 399, 408 (3d Cir. 1992). However, exhaustion *simpliciter* is analytically distinct from the requirement that the harm alleged has occurred. Under the jurisprudence, **a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies.** See Zinermon, 494 U.S. at 126. Applying these principles to this case, we conclude that, viewing the facts in the light most favorable to Alvin, he did not avail himself of the procedures provided by the University because he did not follow the University regulations regarding the use of the grievance procedure. (Emphasis supplied.)

Like the plaintiff in Alvin, Mehring confuses the concept of "exhaustion of administrative remedies" with the point that a "procedural

due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies." Id., 227 F.3d at 116. See also, Reilly v. City of Atlantic City, 532 F.3d 216, 235 (3rd Cir. 2008) ("carefully" distinguished failure to take advantage of process available from exhaustion, explaining that taking advantage of available processes is not a procedural hurdle, but is akin to an element of the claim because "a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies."

As another court held, "having waived this golden opportunity to exercise his due process rights ['to furnish his version of relevant events at a pre-termination hearing'], [the plaintiff] cannot now be heard to decry their deprivation." Conward v. Cambridge School Committee, 171 F.3d 12, 24 (1st Cir. 1999).

The availability of procedures, of which Mehring and his union simply did not avail themselves, is fatal to Mehring's claim. In addition, these are "sufficiently prompt" post-deprivation procedures which satisfy Gilbert and Loudermill.

The availability of other remedies, the improper focus on state procedures, and the reasons for the delayed hearing all distinguish this

case from Association for L.A. Deputy Sheriffs (ALADS) v. County of Los Angeles, 648 F.3d 986 (9th Cir. 2011), the case on which Mehring relies. In that case, the County simply did not grant an opportunity to several deputy sheriffs to have a hearing on their suspensions—even years after the fact. Here, by contrast, what due process requires—an opportunity to be heard at a meaningful time, in a meaningful way—was provided for Mehring. The City provided these opportunities through a collective bargaining agreement that his union would have pursued had it seen any benefit to doing so, by a Civil Service Commission that Spokane’s citizens created and empowered, and by a hearing Kirkpatrick tried to schedule but Mehring’s union demanded that she delay. These facts, plus the fact that Mehring actually was heard, in a letter his lawyer sent Kirkpatrick in May 2007, clearly distinguish this case from ALADS. Simply stated, ALADS has no bearing on this case.

(e) The lack of timeliness of any hearing is not relevant since Mehring still would have had felony charges pending.

Ultimately, any claim that Mehring's due process rights were violated because his post-suspension hearing was delayed ignores the fact that felony charges remained pending until he was acquitted on October 17, 2008. Mehring insisted that his “Loudermill” hearing not take place until after the criminal charges were decided. Mehring got his self-

delayed "Loudermill" hearing on December 10, 2008. (Ex. 32). Mehring does not dispute the fact that he obtained a post-suspension hearing 54 days after his acquittal. Had the hearing occurred any earlier, the result would not have impacted his suspension or property rights because he would have remained suspended based on the felony charges being pursued by Spokane County.⁴

The sufficiency and promptness of a hearing to which a public employee is entitled is dependent on context. Timm's, 664 F.3d at 449-450. The context here establishes that the only hearing which would have mattered is one offered after the felony charges were resolved. Mehring was not deprived of a constitutional right.

B. Kirkpatrick is entitled to qualified immunity from Mehring's retaliation claims.⁵

Mehring amended his complaint on the eve of trial to allege that Kirkpatrick took retaliatory actions against him for filing a complaint in 2009. (CP 1840) He alleged that he was entitled to compensatory and punitive damages under 42 U.S.C. §1983 for violations of his First

⁴ While Mehring occasionally confuses the issue and repeats a random statement by the prosecutor about his lack of interest in the charge, or that the City or Kirkpatrick brought the charges or pursued them, it is undisputed the County acted as an independent body.

⁵ This Court can choose to determine, at its discretion, whether the First Amendment right claimed was "clearly established" first, or it can address whether any right was violated. See, Pearson v. Callahan, 555 U.S. 223, 236 (2009). The City will first outline the right to qualified immunity, then the lack of any basis for the retaliation claim.

Amendment rights. (CP 1840) The jury agreed, and the trial court decided not to grant a directed verdict on the First Amendment claims, and declined to grant judgment as a matter of law on either the First Amendment claims or Kirkpatrick's qualified immunity defense. (CP 3020) Qualified immunity can be raised at any stage of the proceedings, or can be raised by the Court of Appeals sua sponte. Community House, Inc. v. City of Boise, 623 F.3d 945, 968 (9th Cir. 2010).

As Appellants pointed out in their Opening Brief, qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Harrell v. Washington State DSHS, 170 Wn.App. 386, 406, 285 P.3d 159 (2012), quoting Malley v. Briggs, 475 U.S. 335, 341 (1986). To defeat qualified immunity, Mehring had the burden to come forward with authorities to show that the conduct was clearly unconstitutional, such that a reasonable chief of police would have known that it was unconstitutional. The conduct relied on by Mehring fails to meet this standard.

In order to defeat an assertion of qualified immunity, a plaintiff must allege that the official violated a "clearly established" right. Anderson v. Creighton, 483 U.S. 635, 639-640 (1987). A plaintiff does not fulfill this requirement simply by alleging the defendant violated some

constitutional provision. Rather, "the right the official is alleged to have violated must have been 'clearly established' in a **more particularized**, and hence **more relevant**, sense." Anderson, 483 U.S. at 640 (emphasis added). As courts have explained, "clearly established rights" are those defined with sufficient clarity that a reasonable official would understand that what she is doing violates that right. Shea v. Smith, 966 F.2d 127, 130 (3d Cir. 1992).

This Court may reverse for entry of judgment in Kirkpatrick's favor. See Harrell, *supra.*; McLaughlin v. Watson, 271 F.3d 566, 572 (3rd Cir. 2001) (court did not remand for trial but dismissed claims entirely on qualified immunity grounds).

Mehring misapprehends the nature of the right that must be "clearly established" to defeat qualified immunity. The right alleged must be particularized, and the particularized right must have been established "beyond debate." No such right exists here.

As the Shea court pointed out, "'Clearly established rights' are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right. A plaintiff need not show that the very action in question has previously been held unlawful, but she needs to show that in light of preexisting law the unlawfulness was apparent. Thus, an official who conducts an illegal search may not be held

personally liable if he could have reasonably believed that the search comported with the Fourth Amendment." Shea, 966 F.2d at 130, citing Harlow v. Fitzgerald, 457 U.S. 800 (1982) and Anderson, supra.

The reason for this requirement is apparent. Without the requirement of specificity with respect to the right asserted, "**[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.**" Anderson, supra, 483 U.S. at 639. All a plaintiff would have to do (and all Mehring does here) is assert a generalized right to be free from retaliatory conduct impacting his First Amendment rights. But the law requires much more.

In Ashcroft v. al-Kidd, ___ U.S. ___, 131 S.Ct. 2074, 2083 (2011) the Court held that "[a] Government official's conduct violates clearly established law when, at the time of the challenged conduct, "[t]he contours of [a] right [are] sufficiently clear" that **every "reasonable official would have understood that what he is doing violates that right."** Anderson, 483 U.S. at 640. There is no requirement of a case directly on point, but existing precedent must have placed the statutory or constitutional question "beyond debate." See, ibid, Malley, 475 U.S. at 341.

In McLaughlin, 271 F.3d at 572, the plaintiffs alleged that the local United States Attorney interfered with an ongoing drug investigation (plaintiffs were lawyers in the state attorney general's office) and tried to get them fired. The court adopted Anderson's requirement that the right claimed must be particularized, holding that because the plaintiffs cited no cases on point, the right was not established with sufficient clarity to defeat qualified immunity.

[T]he District Court must go one step further and determine whether the facts alleged by plaintiffs violated a “clearly established right.” **This necessarily entails an analysis of case law existing at the time of the defendant's alleged improper conduct. Without such an analysis there is no way to determine if the defendant should have known that what he or she was doing was constitutionally prohibited.** See In Re City of Philadelphia Litg., 49 F.3d at 961 (if the law is not established clearly when an official acts, he is entitled to qualified immunity because he “could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to ‘know’ that the law forbade conduct not previously identified as unlawful.”) (quoting Harlow, 457 U.S. at 819). **In other words, there must be sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited. ...Notably, Plaintiffs' Brief fails to mention even one case in this Circuit or elsewhere to suggest that Stiles violated a "clearly established" right.**

McLaughlin, 271 F.3d at 572 (emphasis added). See also, Walsh v. Ward, 991 F.2d 1344, 1346-47 (7th Cir. 1993) (fire captain transferred to different shift, curtailing opportunity for outside employment; court found

that superiors were entitled to immunity because no case had previously held that impacting other work opportunities was an adverse employment action, and thereby retaliatory).

Given these legal standards, it is apparent that Chief Kirkpatrick is entitled to qualified immunity. Mehring does not even respond to the list of actions (in Appellants' Opening Brief, p. 35)⁶ that allegedly violated his First Amendment rights, much less make any effort to show that any reasonable chief of police would have known that it was unconstitutional (and "beyond debate") to take those actions. As in McLaughlin, Mehring does not "mention even one case in this [state] or elsewhere to suggest that [Kirkpatrick] violated a "clearly established" right.

Instead, Mehring argues that the right to be free from retaliation in violation of the First Amendment was clearly established.⁷ But that level of generality has been rejected for over twenty-five years by the Supreme

⁶ The list from Appellants' Opening Brief, p. 35, is paraphrased here: (1) denial of City email system to tell Mehring's side of the story; (2) Mehring's refusal to deal with parking tickets was noted by Captain Braun on his personnel evaluation; (3) Human Resources put Mehring on paid leave for counseling after Mehring submitted interrogatory answers calling his mental state into question; and (4) Kirkpatrick correctly believed Mehring had violated the order putting him on paid leave when he did not check in with command staff before taking a vacation from his leave (no disciplinary action taken). (RP 842, 1710, 1390, 1396) None of these actions was the kind of actions that "existing precedent" showed to be unconstitutional "beyond debate."

⁷ See Mehring's Brief, at p. 56: "the question here is whether existing law at the time of Kirkpatrick's conduct provided her notice that the First Amendment prohibits retaliation against an employee for seeking redress..." That is **not** the law, for it disregards Anderson, Ashcroft, and the many other authorities cited above.

Court. Because there was no "sufficient precedent at the time of action, factually similar to the plaintiff's allegations, to put defendant on notice that his or her conduct is constitutionally prohibited," Mehring cannot defeat Kirkpatrick's qualified immunity defense.

Mehring makes no effort to show that any one of the alleged bad acts cumulatively, clearly violated Mehring's First Amendment rights. This failure is fatal to his claims.

Accordingly, the Appellants ask this Court to dismiss the First Amendment §1983 claims against Kirkpatrick. This will necessarily result in the dismissal of the punitive damages claim and award and will require remand on the attorney's fee issue and a new trial on Mehring's claim for emotional distress to the extent Mehring's remaining claims survive this appeal. This will also render moot the cross-appeal issues pertaining to interest and the judgment summary.

C. Mehring did not, as a matter of law, establish the elements to a retaliation claim under 42 U.S.C. §1983.

Whether speech is constitutionally protected is a matter of law for the court. Meyer v. University of Washington, 105 Wn.2d 847, 850, 719 P.2d 98 (1986). Under 42 U.S.C. §1983, a public employee may state a cause of action for being discharged or otherwise disciplined for

exercising the right of free speech. White v. State, 131 Wn.2d 1, 10, 929 P.2d 396 (1997).

However, an employee's right to speak out is not absolute. In order to present a prima facie case of retaliation in employment based on the exercise of First Amendment rights, a public employee must demonstrate: (1) the speech deals with a matter of public concern; (2) the employee's free speech interest is greater than the employer's interest in promoting the efficiency of the public services provided; (3) the speech was a substantial or motivating factor in the personnel decision adverse to the employee; and (4) in the absence of the protected speech, the employer would not have made the same personnel decision. Binkley v. City of Tacoma, 114 Wn.2d 373, 382, 787 P.2d 1366 (1990); Wilson v. State, 84 Wn.App. 332, 340-41, 929 P.2d 448 (1996) (citations omitted); Dewey v. Tacoma Sch. Dist. No. 10, 95 Wn.App. 18, 24, 974 P.2d 847 (1999).

Because Mehring did not meet these elements, as a matter of law, his First Amendment claim fails.

1. Mehring's speech did not deal with a matter of public concern.

Whether speech relates to a matter of public concern is a matter of law for the courts, reviewable de novo. Wilson, 84 Wn.App. at 341. If an employee dresses up an essentially private controversy in public clothing,

the court will not be fooled. See, id. at 84 Wn.App. 342, citing Connick v. Myers, 461 U.S. 138, 147-148 (1983) (pointing out that the First Amendment retaliation issue arose from the McCarthyism of the 1940s and 1950s, and goes to the principle of self-government, not self-interest).

Whether an employee's speech addresses a matter of public concern is determined by the content, form and context of the statement, as revealed by the whole record. Connick, 461 U.S. at 147-48. Content is the most important factor. See e.g., Wright v. Illinois Dep't of Children & Family Servs., 40 F.3d 1492, 1501 (7th Cir.1994), cited in White, 131 Wn.2d at 11.

The court looks to the "point" of the speech to determine whether the employee intended to raise an issue of public concern. Binkley, 114 Wn.2d at 384-385. "Was [Mehring] acting as an aggrieved employee, attempting to rectify problems in his own working environment, or was he acting as a concerned citizen bringing wrongdoing to light?" Binkley, 114 Wn.2d at 385, citing Connick, 461 U.S. at 147-148 and Linhart v. Glatfelter, 771 F.2d 1004, 1010 (7th Cir. 1985). The Binkley court reversed a jury award for the plaintiff, because the "point" of the speech in question was not a matter of public concern, although there was a slight public concern element, as there was in the Connick case, which Binkley examines at some length. See, 114 Wn.2d at 383-384.

This Court is invited to review Mehring's 2009 complaint. (CP 9) Contrary to the current position taken, the Complaint alleges a conspiracy, largely for private and sexual reasons, between some fellow police officers to get rid of Mehring so one or more of them could sleep with his wife. (CP 9) In support of his original theory, Mehring testified at trial that he thought one of the original defendants, a fellow officer, **was** having an affair with his wife. (RP 1004, 1229) The complaint asserts multiple causes of action against the officers, is filled with invective, and asserts that private animosity motivated the alleged behavior.

There is nothing public-spirited in the complaint. Mehring wanted money because of the dirty-handed tactics of which he accused his fellow officers and Kirkpatrick. The same is true here on appeal. The **point** of Mehring's complaint was money and personal animosity.

Mehring argues that the mere fact that he alleged a constitutional issue in his complaint entitles him to make a retaliation claim under the First Amendment. But he cites no authority for the proposition that an allegation that City officials overlooked a Human Resources policy (the only constitutional issue raised in his complaint that survived) automatically entitles him to First Amendment protection.

Instead, Mehring relies on Karl v. City of Mountlake Terrace, 678 F.3d 1062 (9th Cir. 2012). In Karl, a confidential assistant was transferred,

demoted and fired, all for giving testimony under subpoena in a civil rights action about harassment and discrimination in her office. A key distinction is that the plaintiff in Karl case had nothing to gain from the testimony that ultimately got her fired. The Ninth Circuit appropriately concluded that retaliation for giving testimony under subpoena about harassment in a police chief's office in a §1983 case involved a matter of public concern.

But this case is not Karl. In Karl, as in the "public concern" cases generally, the employee was not motivated by his or her personal gain or personal animosity. See e.g., White, 131 Wn.2d 1 (employee reported suspected patient abuse at nursing home; matter of public concern, although speech issues did not cause the employment action). As the Wilson court stated:

Mere cloaking of otherwise private matters in the mantle of public concern is insufficient to raise First Amendment concerns. Connick, 461 U.S. at 147-48; Binkley, 114 Wn.2d at 387, 787 P.2d 1366. An employee who acts as a concerned citizen interested in bringing problems to light **more likely raises a matter of public concern than does one who attempts to rectify work place problems.** Binkley, 114 Wn.2d at 385, 787 P.2d 1366.

84 Wn.App. at 342 (emphasis supplied); see also, White, supra, in which the court, also discussing Connick, stated:

[T]he Connick court made it plain that an individual cannot bootstrap his individual grievance into a matter of public concern either by bruiting his complaint to the world or by invoking a supposed popular interest in all aspects of the way public institutions are run.

105 Wn.2d at 851.

Bootstrapping is exactly what Mehring is attempting here. The **point** of the complaint, its emphasis, its content, reveal starkly that Mehring was **not** trying to reveal to the citizens of Spokane a flaw in the police department. He was getting even for perceived, and highly personal, affronts, and he wanted a lot of money for it. See also, Desrochers v. City of San Bernadino, 572 F.3d 703 (9th Cir. 2009) (in a close case, when the subject matter of a public employee's statement is only marginally related to issues of public concern, the fact that it was made because of a grudge or other private interest may lead the court to conclude that the statement does not substantially involve a matter of public concern).⁸

⁸ The Desrochers court added:

We reach our conclusion in light of the Supreme Court's repeated admonition that "while the First Amendment invests public employees with certain rights, it does **not empower them to constitutionalize the employee grievance.**" Garcetti, 547 U.S. at 420; see also Connick, 461 U.S. at 154. "[A] federal court is not the appropriate forum in which to review the wisdom of a personnel decision...." Connick, 461 U.S. at 147. To transform every workplace squabble into the proverbial "federal case" would be to trivialize the "great principles of free expression" the First Amendment embodies. Id., at 154.

572 F.3d at 718-719.

Accordingly, Appellants ask this Court to reverse the retaliation claim on this question of law, with directions to dismiss. Such a determination would render moot much of the remainder of the case.

2. Alternatively, on balance, the City's "strong state interest" in effective functioning outweighs the small "public" component to Mehring's speech.

In Binkley, 114 Wn.2d at 373, the court decided that a vote of "no confidence" in its Public Utilities Director had some minor impact upon the public interest, but that interest was not stronger than Tacoma's "strong state interest" in the effective management of its Department of Public Utilities. 114 Wn.2d 373, at 385-386. The employee must show that his or her free speech interest is greater than the employer's interest in promoting the efficiency of the public services provided; this is the second element of a retaliation claim, putting into effect the Pickering v. Board of Education of Tp. High School, 391 U.S. 563 (1968) balancing test used in Connick and followed in Binkley.

The governmental interest element of the Pickering balancing test "focuses on the effective functioning of the public employer's enterprise." Rankin v. McPherson, 483 U.S. 378, 388 (1987). As the Supreme Court noted in Rankin, the government has a "strong state interest" in avoiding interference with work, personnel relationships, or disruptions in the public employer's function. Rankin, at 388.

Moreover, the Connick court, applying the Pickering balancing test, held that "[w]hen close working relationships are essential to fulfilling public responsibilities, **a wide degree of deference to the employer's judgment is appropriate.**" Connick, 461 U.S. at 151-52 (emphasis added). The Connick court further noted that it is not necessary "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Connick, 461 U.S. at 152.

Applying the balancing test here, Mehring did not show that the claimed public interest outweighed the strong state interest in effectively managing the Spokane Police Department, which is his burden under Binkley. Indeed, even on appeal, Mehring's brief attaches Appendices quoting Kirkpatrick's policies with displeasure; much like the state prosecutor's questionnaire in Connick and the vote of no confidence in Binkley, every one of the actions of which Mehring complains were efforts by Kirkpatrick or her senior staff⁹ to run an effective, efficient police department.

⁹ One of Mehring's chief complaints was that Captain Braun noted on Mehring's personnel evaluation form that Mehring was not taking administrative responsibility for his parking tickets. Captain Braun explained the problem—Mehring, by ignoring his parking tickets, was creating more work for others. This was not even an act by Kirkpatrick. (RP 1710)

For example, Mehring complained repeatedly at trial concerning Kirkpatrick's stated concerns that his interrogatory answers showed him to have serious psychological issues. Mehring was placed on administrative leave by Human Resources after he submitted interrogatory answers suggesting to Kirkpatrick that he had significant psychological issues (RP 1389) including the statement that "death would be a relief." Mehring was placed on paid administrative leave pending a fitness for duty evaluation.

An effective police department which arms people with guns and badges to enforce the laws cannot tolerate a person with suspected psychiatric issues to continue without **some** kind of fitness for duty evaluation. See, *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir, 2010) (objectively reasonable basis for requiring a fitness for duty evaluation defeated plaintiff's claims).

Another action of which Mehring complained was Kirkpatrick's decision not to allow Mehring to utilize the City's email system to "tell his side of the story" involving his lawsuit. Kirkpatrick testified that this was a leadership issue regarding matters that have the potential for disruptive rumors. (Exhibit 54)

Similarly, Mehring's complaint that he was called on the carpet after he violated the order placing him on administrative leave by taking a vacation from his paid leave without reporting to command staff as

ordered is also an efficiency issue. Though Mehring was found not to have committed a disciplinary violation (he was never actually disciplined for any actions complained of in his retaliation claim) because he had called in to his sergeant and had claimed to have misunderstood the direct order, he **did** violate the order, and a police department cannot long function when its officers are free to pick and choose which of their Chief's orders to follow and which may be disregarded.

Ultimately, the trial court was required to decide, as a matter of law, whether Appellants (and Kirkpatrick personally) committed actionable retaliation in violation of the First Amendment. The questions whether the speech was a matter of public concern, and the Pickering balancing of the strong state interest in effective management of governmental agencies was outweighed by the public import of the speech, are questions for the court as a matter of law. Binkley, supra, 114 Wn.2d at 382.

The trial court did not accord the "wide degree of deference to the employer's judgment" required by Binkley and Connick. This was error, requiring reversal. Appellants ask this Court to grant judgment to them on Mehring's First Amendment claims, and dismiss this claim without remand.

D. The punitive damages award was based upon an insufficient showing that Kirkpatrick showed an evil motive and callous disregard for Mehring's federally protected rights.

Mehring asserts there was substantial evidence upon which the punitive damages award was based and cites eight supporting claims to justify such an award. (Mehring Brief, p. 59) However, none of these claims, taken individually or viewed collectively, meet the high standard of conduct "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others". Smith v. Wade, 461 U.S. 30, 56 (1983).

Mehring's punitive damage claim is based on a number of personnel actions, none of which amounted to actual discipline or were retaliatory. None of them involved punishment. There was no adverse employment action, much less an appropriate basis for an award of punitive damages.

The filing of a lawsuit does not grant a police officer special immunity from ordinary employer actions. Rendish v. City of Tacoma, 123 F.3d 1216 (9th Cir. 1997).

In this case, everything done was done for a legitimate, non-retaliatory reason. Mehring came forward with no evidence of pretext.

There was no evidence presented that Kirkpatrick acted with the kind of "malice, wantonness or oppressiveness to justify punitive damages," required to support a jury verdict awarding punitive damages. Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989).

The following sets forth Mehring's claimed support for the punitive damages award.

Punitive Claim #1 - Kirkpatrick admitted that Mehring's reinstatement was not her decision.

In support of this claim, Mehring relies upon testimony from Kirkpatrick that the decision to reinstate Mehring was made by the City and, if it had been up to Kirkpatrick, she would have terminated Mehring. (RP 763) He also relies upon Exhibit 34 which was an unsigned document prepared by Kirkpatrick which states:

I disagree with the ARP's finding of unfounded. There is insufficient evidence simply based on the acquittal. Jay Mehring will be re-instated as a detective in this department. I have put the City on notice that the City may be subject to a negligent retention lawsuit based on this record. This is the City's determination to have Jay Mehring reinstated.

This document was found in Kirkpatrick's personal computer files and produced in discovery. (RP 1379) This document was never placed in Mehring's file nor was it part of the Internal Affairs record. (RP 1379) Kirkpatrick never signed this or turned it in. (RP 1379)

As a preliminary matter, this claim is barred as it arose prior to the lawsuit being filed. The challenged exhibit is dated 12/22/2008. (Exhibit 34) The lawsuit was not filed until December 15, 2009. (CP 9) By definition, punitive damages arising from a retaliation claim must arise post filing of the lawsuit. This exhibit predated the filing of the lawsuit by nearly one year.

Moving beyond the time bar issue, the Internal Affairs investigation was based on an allegation of conduct unbecoming. (Exhibit 32) The first step in that process is an Administrative Review Panel (ARP). The ARP takes the investigation from Internal Affairs, reviews it, and makes recommended findings. (RP 522) In this case, the ARP came back with a recommended finding of "unfounded". (RP 524)

ARP findings are only recommendations. (RP 1374) The Chief makes the ultimate decision. (RP 580) An ARP recommendation is not binding on anyone. The final determiner of discipline is Kirkpatrick who is not bound to follow the recommendation. (RP 1741) Here, the ARP determined that it could not consider any of the evidence presented in Mehring's criminal trial. (Exhibit 32) The ARP thought that since there was an acquittal, there was no evidence to support the complaint and concluded the complaint was unfounded. (RP 1376) This was, of course, all of the evidence against Mehring. (RP 1376) As a result of this

erroneous conclusion, the ARP recommended that Mehring be found not to have committed the infraction of "conduct unbecoming". (RP 524, 757) Kirkpatrick disagreed with this recommendation. She believed that Mehring did exactly what he was charged with. She chose to not follow the ARP recommendation and decided that a finding of "insufficient evidence" was the more appropriate finding. (RP 1377) However, she fully abided by the jury's decision and Mehring was reinstated and made fully whole. (RP 1378)

The fact that Kirkpatrick exercised her discretion in not following the recommendation of the ARP does not form the basis for a conclusion that she abused that discretion. Further, this exercise of her discretion was not a sufficient basis upon which to support a punitive damages award.

The mere exercise of discretion given to a public officer by virtue of statute and regulation cannot alone be the basis for a finding of punitive damage. However, Mehring's argument is exactly that: Kirkpatrick's rejection of a recommendation by the ARP alone constitutes an appropriate basis for punitive damages; this would mean that her valid exercise of her legally vested discretion to approve, reject, modify or accept a decision by a lower administrative body is a sufficient basis for a finding of maliciousness, wantonness and oppressiveness. A party that acts within the confines of legally vested authority should not be subjected

to punitive damages solely because she exercised that authority, and there must be more than the mere exercise of that discretion to constitute a basis for punitive damages here; Mehring has no such basis. See, N.W. Steelhead v. Dept. of Fishing, 78 Wn.App. 778, 896 P.2d 1292 (1995) (agency heads may substitute their own findings of fact for those made by hearing officers).

Punitive Claim #2 - Claim: Refusal to allow Mehring to use the Police Department email system for personal use.

Mehring relies on the following exchange to support this claim:

Question (by Mr. Dunn:) Ma'am, right after you sent your sergeants, your captains, your lieutenants, your command staff certain of the pleadings in this case outlining your position and the City's position in this lawsuit, you're aware that Mehring requested the same privilege, to send certain pleadings out to the police department as well, true?

Answer (by Chief Kirkpatrick:) That's correct.

Q. And you denied that request, correct?

A. Through my email but it was from the City, yes. The City denied it.

Q. You denied the request, right?

A. Yes.

(RP 842)

By way of background, on July 27, 2010, Kirkpatrick sent an email to her command staff, which stated:

One of the suggestions that have been made to me that would help morale in the Department is for me to share more information with the leadership of the Department

regarding matters that have potential for disruptive rumors. In an effort to try to follow through on that advice and in an effort to get ahead of any rumor mill spin, I am forwarding the City's responsive brief and motion for Summary Judgment that have been recently filed in the Jay Mehring lawsuit against me and Sgts. Teigen and Overhoff. The above was filed in Superior Court and therefore a public record.

Mehring's claims are also of public record.

Emphasis original. (Exhibit 54)

On August 4, 2010, Mehring responded to the above email by sending an email to his supervisor, David Singley. He also copied the entire Spokane Police Department. In his email, Mehring stated:

In the interest of fairness, I am respectfully requesting permission through my chain of command, to post my court filings in this same manner. I spent nearly two years without the ability to defend myself or my reputation in this case and would appreciate the opportunity to do so equally with my employer and amongst my peers.

(Exhibit 56)

It is interesting to compare the two emails. Kirkpatrick's email was sent only to sergeants, captains, lieutenants, and command staff; nothing was sent to the rank and file. In contrast, Mehring's email was sent to the entire department, which assumedly included his "peers."

(Exhibit 56)

The Spokane Police Department has an email policy which provides:

E-mail messages addressed to the entire department are only to be used for official business related items that are of particular interest to all.

(Exhibit 546; RP 1743, 1744)

After Mehring sent his email to the entire Department, the HR Director told him that the email was his personal business and that he could not use the City's email system for personal business. (RP 1189) No punishment was involved. (RP 1189)

Mehring's personal suit was a personal matter that he initiated. It was not a Department issue. (RP 1745) Mehring's complaint that he was not allowed to continue to use the Spokane Police Department email system for his own personal use had no merit and is not a proper basis for an award of punitive damages.

Punitive Claim #3 - Kirkpatrick placed Mehring on administrative leave.

This claim arises from the interrogatory answers filed by Mehring shortly before Kirkpatrick's deposition on September 9, 2009. Those interrogatory answers described Mehring's current mental state as:

...to the point where I had felt as if liquid pain was running through my veins, stemming from the center of my chest to the ends of my extremities, the pain makes

it very difficult for me to breathe, impossible to sleep and difficult to think and/or concentrate.

(RP 1389) Mehring also stated that "death would be a relief". (RP 1389)

On September 9, 2010, Mehring was placed on administrative leave to allow him:

...to take care of yourself and receive psychological evaluation and/or treatment. This paid administrative leave was not disciplinary, and you will not lose any regular pay or benefits for the duration of this leave.

(Exhibit 60)

This leave was imposed following Kirkpatrick's review of Mehring's interrogatory answers as well as his actions of appearing at her deposition while armed after an agreement had been reached that no firearms would be brought to the deposition. (RP 638) Kirkpatrick was alarmed by Mehring's interrogatory answers, which presented her with the very real likelihood that a psychologically compromised officer might be in her employ. (RP 1394) She also felt that Mehring's act of showing up armed at her deposition was a direct challenge to her. (RP 625)

The HR Department, concerned about Mehring's mental or physical condition, referred him to the Employee Assistance Program, and put him on paid leave. (RP 584)

Mehring was placed on leave by the HR Department. The administrative leave letter (Exhibit 60) was sent by the Attorney/Acting

HR Director. (RP 529-30; RP 632, 688) This was not Kirkpatrick's decision. (RP 864, 1711)

No argument or law has been advanced by Mehring that would make it unlawful to place a police officer on paid administrative leave for counseling after he stated in discovery answers that his mental health had been compromised. Further, there is no basis that such an action could support an award of punitive damages.

Punitive Claim #4 - Kirkpatrick threatened multiple psychological evaluations.

In this claim, Mehring relies upon three letters sent to him by the HR Department. The first, Exhibit 64, is a September 17, 2010 letter in which the City referred him to the City's Employee Assistance Program (EAP). This was a mandatory referral which Mehring was to pursue as part of his paid administrative leave.

The second letter, also sent from the HR Department, advised Mehring on January 18, 2011 that a fitness for duty examination had been scheduled for him with Dr. Ekemo in Bellevue, Washington. (Exhibit 74)¹⁰ A fitness for duty exam involves a battery of written tests

¹⁰ Kirkpatrick testified concerning the need for a Fitness For Duty evaluation:
A. ... I just want a fitness for duty for two reasons: If he needs help, let's get that in place. That's what Dr. Ekemo will do. He'll send back a report to me that says we need to do this to get the person fit for being able to continue with their duties. He's never sent one

and a structured clinical interview. It makes an assessment in terms of psychological fitness whether the examinee can do the essential functions of the job. It is not counseling. It is assessment. (RP 1506) The primary focus is a determination of whether the person should be carrying a gun and perform the essential functions of the job. (RP 1508) Under a fitness for duty exam, the officer can get help if it is needed or a determination if the officer is able to continue with his duties. (RP 1394)

Mehring also relies upon Exhibit 77, another letter from the HR Department, which rescheduled his appointment with Dr. Ekemo from January 26, 2011 to March 3, 2011. (Exhibit 77)

Mehring's interrogatory answers raised legitimate concerns concerning his psychological well being. The evaluations he was ordered to attend were directed by the HR Department. Even if there was proof

back not. And I have a document in my file, it's my CYA document, folks. It's the document that says I have had this person checked out and if something happens in the future, at least Anne Kirkpatrick has done her duty and I have a report to show that I did my due diligence.

Q. In what context would this CYA issue come up?

A. If there is a -- we've already had one event where I'm going to use the term he snapped. The threat got him arrested and taken to charge. That is a felony that he was arrested for. What my concern was, is there going to be another event in the future. And if so, I have at least my part of showing that I have done my due diligence as a chief of police to make sure that he has at least been checked and/or if he needs more additional help, let's get the help. The issue is getting the person helped. But I also have a duty to make sure they shouldn't carry a gun and enforcing the laws.

(RP 1394-95)

presented that Kirkpatrick ordered these evaluations, Mehring failed to present any factual basis or legal reasoning that the ordering of such evaluations was unlawful, much less the basis for an award of punitive damages.

Punitive Claim #5 - Kirkpatrick advised Mehring's peers that she had concerns over his mental and emotional status.

In this claim, Mehring seeks to justify the award of punitive damages based upon an email that Kirkpatrick sent to her senior command staff on September 10, 2010, the day following her deposition.

(Exhibit 62) That email provided:

You are probably aware by now that Det. Jay Mehring was placed on paid administrative leave as of yesterday, 9/9/10. In order to keep my senior staff accurately advised as to what has transpired, I would like to give you the following information. Very recently, the City received information in Det. Mehring's civil lawsuit regarding his mental & emotional status. This information caused the City enough concern that H.R. determined that paid administrative leave was appropriate at this time.

I understand that rumors of other motivations for this administrative leave may currently be circulating within the department. I wanted you, as senior staff, to hear an accurate explanation regarding this issue. I fully expect that you will acknowledge and respect that this is a confidential matter and that Det. Mehring's right to privacy should be protected.

(Exhibit 62)

First, the email was not sent to Mehring's "peers." Rather, it was sent to Kirkpatrick's senior command staff. Her command staff was comprised of (1) one Assistant Chief, (2) two majors who handle the two bureaus of the Department and (3) three captains. This was Kirkpatrick's immediate management team which made executive decisions together. (RP 1319, 1339)

Second, when sending this information to her senior command staff, Kirkpatrick expressly set forth her expectation that this was a confidential matter and that Mehring's right to privacy should be protected. (RP 865)

No showing has been made that sending this email to Kirkpatrick's senior command staff was unlawful, much less a proper basis for an award of punitive damages.

Punitive Claim #6 - Kirkpatrick initiated an Internal Affairs investigation for insubordination.

In this claim, Mehring asserts that Kirkpatrick's actions in initiating an Internal Affairs investigation based on his non-compliance with the terms of his paid personal leave justifies an award of punitive damages. (Mehring Brief, pp. 59-60)

When Mehring was placed on paid personal leave on September 9, 2010, he was instructed that the conditions are "...a direct and written

order. Therefore, any failure to comply completely would be considered an act of insubordination that may warrant disciplinary action up to and including termination." (Exhibit 60)

The letter also provided:

You will be assigned to a work shift of Monday through Friday from 0800 hours to 1600 hours Monday through Friday, unless the City alters this assignment. These hours will be considered your normal workday while you are on paid administrative leave, so you are required to be available during these hours by your department pager number or department cell phone as determined by Captain Braun. Additionally, you are required to comply with the following conditions for the duration of your administrative leave:

...6. If the need arises for you to be beyond your pager, or cell phone, range during the assigned work shift identified above, **it is important that you prearrange your unavailability with Captain Braun or another member of the Police Department Command Staff.** (Emphasis added)

(Exhibit 60)

Rather than comply with this order, Mehring contacted his direct supervisor, Sgt. Singley, and requested discretionary vacation leave. This was approved and Mehring left the Spokane area. (Exhibit 60)

The Internal Affairs investigation for insubordination was filed because Mehring disobeyed a direct written order. After initiating the Internal Affairs investigation, Kirkpatrick removed herself from it. (Exhibit 88)

The Internal Affairs investigation was officiated by Assistant Chief James Nicks ("Nicks"). Nicks made a finding of "not sustained – no sanction." (Exhibit 91)

In this case, Kirkpatrick believed that Mehring had violated the conditions of his paid administrative leave. Acting within her authority, she initiated an Internal Affairs investigation. That investigation ran its course and resulted in a finding of "not sustained – no sanction." The fact that Kirkpatrick initiated this investigation is not a sufficient basis for an award of punitive damages.

Punitive Claim #7 - Kirkpatrick placed Mehring on a "60 minute reporting leash" and required him to report directly to her when seeking leave or time off.

At the time Nicks entered his finding in the Internal Affairs investigation for insubordination, he revised the terms of Mehring's paid administrative leave. The new terms, as set forth by Nicks, provided:

Effective immediately, your working hours will be from 8:00 a.m. to 4:00 p.m. Monday through Friday. During those hours you will be available at all times by cell phone number 208-661-2585. During the work hours of your administrative leave, you will be required to make yourself available when needed, with a maximum response time of 60 minutes to the Public Safety Building. The following are specific conditions pertaining to your administrative leave status: ... (6) All requests for vacation, sick leave, compensatory time and other forms of leave must be approved by the Chief of Police.

(Exhibit 91)

Long before Nicks revised the terms of Mehring's paid administrative leave, Kirkpatrick had removed herself from this investigation. (Exhibit 88) This was Nicks' Internal Affairs investigation. (RP 1484) The findings were signed by Nicks. (RP 1080) Kirkpatrick had no hand in this. Nicks handled this and signed off on it. (RP 864) This claim does not support an award of punitive damages.

Punitive Claim #8 - Kirkpatrick forwarded psychological notes to Mehring's peers.

On June 28, 2011, counsel for Mehring provided an email to the City with copies of Mehring's medical records from Dr. Deanette Palmer. (Exhibit 147) Kirkpatrick received this email and forwarded it to "SPD Command Staff" with a note: "FYI – not to be shared below executive rank (Assistant Chief, Majors and Captains, Chief)." (Ex. 147)

Kirkpatrick forwarded these notes to her six-person command staff, along with a strict warning that they were not to be further disseminated.¹¹ (RP 1399-1400; Exhibit 147) Kirkpatrick understood that there was no order of confidentiality that prevented her from sharing these notes with her command staff. (RP 1399-1400) In fact, these

¹¹ Mehring continually refers to the command staff as his "peers". His terminology is misleading. To the extent that Mehring's email concerning this case that he sent to the

psychotherapy notes were never subject to a confidentiality order from the court. (RP 1399-1400)

Chief Kirkpatrick testified:

Q. And insofar as the case and the claims in it affect the police department and the City, tell the jury whether you shared information that came in with respect to this matter with your command staff, your command group?

A. (by Kirkpatrick) My command staff because we, the City is also being sued, everything associated with this particular case has been shared with the command staff and I sought counsel, I sought legal counsel from my legal team asking can I share all confidential information? I was told yes, as long as it was just with those top six and that's what I have done.

(RP1398-99)

Additionally, the jury was instructed:

A person who files a civil lawsuit alleging mental/emotional harm waives the psychotherapist-patient privilege as to the records related to that claim.

(Instruction No. 21; CP 2694)

In any event, when Mehring filed this lawsuit, he waived any privilege he had with Dr. Palmer. Mehring did not assign error to Instruction No. 21 or raise it in his cross-appeal. Instructions to which no exceptions are taken became the law of this case. Gregoire v. City of Oak

entire Police Department it can be said that it went to his "peers". However, Kirkpatrick's dissemination of these notes to her command staff hardly included Mehring's "peers".

Harbor, 170 Wn.2d 628, 244 P.3d 924 (2010); Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 32 P.3d 250 (2001). Accordingly, it is the law of the case.¹² The trial court agreed with this argument and so instructed the jury. (CP 2694) The trial court ruled: "There is no specific statute that prohibits the chief, who was a recipient of these, from disseminating them". (RP 1912)

Mehring has failed to make the requisite showing to support an award of punitive damages based on this alleged conduct.

E. There is insufficient evidence to support the decision to send the outrage claim to the jury and for the outrage award.

The trial court must initially decide that the alleged conduct could reasonably be regarded as extreme and outrageous to then warrant a factual determination by a jury regarding an intentional infliction of emotional distress. Pettis v. State, 98 Wn.App. 553, 990 P.2d 453 (1999).

When conduct offered to establish the element of extreme and outrageous conduct for purposes of a claim of outrage is not extreme, the

¹² Defense counsel argued to the trial court:
Your Honor, plaintiffs are overlooking RCW 5.60.060(4). By bringing this claim alleging emotional distress issues, there's been a waiver of the physician, in this case, psychotherapist-patient privilege with regard to that-to any privilege related to his treatment for emotional distress. He put that in issue. She did not publicly disseminate that. She sent it to her command staff. The City was also a defendant. These were the people with whom she collegially shares all information and helps her make all decisions, including decisions related to the City's conduct in litigation. The fact that they sued her also individually does not make her any less a department head

trial court must withhold the case from the jury notwithstanding proof of intense emotional suffering. Brower v. Ackerley, 88 Wn.App. 87, 943 P.2d 1141 (1997).

The trial court must determine that the plaintiff's alleged damages are more than mere annoyance, inconvenience, or normal embarrassment that is an ordinary fact of life. Brower, *supra*.

It is for the trial court to determine in the first instance whether defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery for outrage. Bowe v. Eaton, 17 Wn.App. 840, 845, 565 P.2d 826 (1977).

In response to the City's argument that there was insufficient evidence for the outrage claim to have gone to the jury, Mehring set forth eight claims to support the outrage award. These claims, individually and collectively, fail to meet the high requisite showing that each is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community". Grimsby v. Samson, 85 Wn.2d 52, 59, 530 P.2d 291 (1975).

whose department is being accused of a variety of things from outrage to retaliation. So the fact is that he waived those claims. (RP 1911-12)

Outrage Claim #1 - Kirkpatrick "outed" Mehring.

Mehring claims that Kirkpatrick "outed" him as an undercover drug enforcement detective and subjected him and his family to potential harm. (Mehring's Brief, p. 63)

Following Mehring's arrest, Kirkpatrick held a press conference in which the media was advised that Mehring had been arrested. (RP 736) It was disclosed that Mehring worked undercover. (RP 736) Kirkpatrick also disclosed a photo of Mehring. (RP 746)¹³

The disclosure of Mehring's photograph to the media was consistent with the City's policy and procedure manual. (RP 1401)

The issue of whether the disclosure of Mehring's arrest was the subject of considerable colloquy during trial. These discussions resulted in the trial court instructing the jury:

The Washington Public Disclosure Act, is a strongly worded mandate for broad disclosure of public records that are not specifically exempted from disclosure. A public employee charged with a crime does not have a right to prevent disclosure of public records related to his job, his arrest or charges against him.

¹³ Indeed, during Mehring's trial, a Seattle police detective was arrested and charged with DUI. The officer's picture was released to the press, and the press knew he was a police detective named John G. Fox. See e.g., http://www.stpns.net/view_article.html?articleid+105543565064810314660. The Seattle Weekly identified Fox as "a member of SPD's narcotics team." http://blogs.seattleweekly.com/dailyweekly/2011/10/seattle_cop_arrested_for_drunk.php. The point is that an officer's arrest is newsworthy, and the press gets this kind of information. His photograph: <http://seattletimes.nwsourc.com/html/localnews/2016636808.spddui29m.html>.

(Instruction No. 26A; CP 2700) Mehring did not assign error to Instruction 26(A) in his cross-appeal. Accordingly, this instruction became the law of the case. See, Grimsby, supra.

When this issue is boiled down, Kirkpatrick disclosed information concerning Mehring's arrest that was consistent with both City policy and the Washington Public Disclosure Act. There is no basis for this conduct to support an outrage award.

Outrage Claim #2 - Kirkpatrick forwarded psychotherapy notes to senior command staff.

Here, Mehring claims that "Kirkpatrick intentionally forwarded his private, confidential psychotherapy notes via an informal, non-confidential email system to unauthorized members of the police force-his peers." (Mehring's Brief, p. 63) This is the same argument made in support of his punitive damages claim. The discussion set forth in response to Punitive Claim #8 is hereby incorporated by reference.

Outrage Claim #3 - Kirkpatrick threatened Mehring's psychologist with non-renewal of her contract.

Dr. Deanette Palmer is a licensed psychologist of 27 years. (RP 1244) She has worked with the Spokane Police Department for 22 years under a contract where she provided emergency services and critical incident debriefing. (RP 1244) She also provided individual

counseling for officers and their dependents at their request. (RP 1245)
Dr. Palmer provided personal and family counseling to Mehring.
(RP 1251) At trial, Dr. Palmer testified concerning her counseling
sessions with Mehring relating to the present lawsuit. (RP 1254)

Mehring's case was the first time where Dr. Palmer had been a
witness against the City in a civil lawsuit regarding an officer to whom she
provided treatment. (RP 1269) Her contract with the City expired in
April of 2011. (RP 1270) When she inquired of Kirkpatrick about her
contract renewal, she received an email from Kirkpatrick indicating there
may be a problem with her contract because of some concerns in the City
Attorney's Office about the court case currently in litigation. (RP 1270)

Dr. Palmer acknowledged that her contract work for the City and
her individual treatment of Mehring had created a conflict situation.
(RP 1284)

Assistant City Attorney Rocky Treppiedi had been in touch with
Dr. Palmer in April of 2011 concerning the renewal of the contract. After
that original contact, there was a long hiatus where Dr. Palmer did not
hear from Mr. Treppiedi. Mr. Treppiedi eventually recontacted
Dr. Palmer, apologized for the delay, and explained that he had just been
busy. (RP 1283)

Dr. Palmer testified that Kirkpatrick had no opposition to the City renewing its contract with her and that Kirkpatrick and Nicks were both in support of renewing her contract. (RP 1598) Additionally, she stated that Kirkpatrick did nothing wrong to her in regard to this contract. (RP 1598) Dr. Palmer further testified that the problem with getting her contract renewed stemmed from revisions being sought by her to the contract. (RP 1600) The contract was eventually renewed. (RP 854)

The evidence pertaining to the renewal of Dr. Palmer's contract failed to show any wrongful conduct by Kirkpatrick or the City, much less sufficient evidence to meet the requisite showing for an outrage claim.

Outrage Claim #4 –Kirkpatrick placed the City on notice could that it may be subject to a negligent retention lawsuit.

In support of this claim, Mehring relies upon Exhibit 34. This is the same argument made in support of his punitive damages claim. The discussion set forth in response to Punitive Claim #1 is hereby incorporated by reference.

The basis of this allegation was a document that was located on Kirkpatrick's personal computer during discovery. (RP 1379; Exhibit 34) As such, it was never disseminated to Mehring, nor anyone else. Accordingly, it could not have caused severe emotional distress as it was something he never knew about.

Outrage Claim #5 - Kirkpatrick advised her command staff that Mehring had been placed on paid administrative leave.

Here, Mehring relies upon Exhibit 62 to support this claim. This is the same argument made in support of his punitive damages claim. The discussion set forth in response to Punitive Claim #3 is hereby incorporated by reference.

It strains credulity to argue that a memo from Kirkpatrick advising her executive command staff that Mehring had been placed on paid leave could be the basis of an outrage award.

Outrage Claim #6 - Mehring was subjected to multiple fitness for duty examinations.

Here, Mehring relies upon Exhibit 62 to support this claim. This is the same argument made in support of his punitive damages claim. The discussion set forth in response to Punitive Claim #4 is hereby incorporated by reference.

Outrage Claim #7 - Kirkpatrick retaliated with an Internal Affairs investigation as a result of Mehring not checking in with Captain Braun, as specifically ordered, before taking a vacation.

Here, Mehring relies upon Exhibit 62 to support this claim. This is the same argument made in support of his punitive damages claim. The discussion set forth in response to Punitive Claim #6 is hereby incorporated by reference.

Outrage Claim #8 - Initiation of a third Internal Affairs investigation.

As his eighth basis to support the outrage award, Mehring claims that "Appellant, on 6/30/11, initiated a third IA investigation of Mehring as a direct result of his litigation. Exhibit 146". (Mehring's Brief, p. 63)

This assertion is baseless. No evidence was presented that a third Internal Affairs investigation was conducted of Mehring as a direct result of his litigation. There was, however, evidence presented concerning an email dated June 30, 2011 from Major Meidl to Kirkpatrick and Nicks that states:

I've not heard back yet from Major Stephens as to the possibility or the-as to the possibly updated request on the internal Mehring investigation he received from someone this morning. Someone had asked to have us hold off on initiating the internal investigation until she could clear a few things through someone first...until we hear back it is my understanding that we're in a holding pattern.

(RP 1820-21)

This was a discussion among senior command staff concerning the possible filing of an Internal Affairs investigation based upon Mehring appearing at his deposition without taking personal leave. (RP 1390, 1821)

No Internal Affairs investigation was ever commenced regarding the issue of Mehring using regular work hours to attend his deposition.

(RP 1823) Mehring was never punished for attending his deposition on his work time. (RP 1823)

At best, Mehring presented evidence that there had been a discussion among senior command staff as to whether an Internal Affairs investigation should be initiated against him based on his conduct of attending to personal business while on duty. No investigation was started. The fact that senior command staff discussed the admitted violation of department policy is far short of extreme and outrageous conduct.

F. The trial court erred in not striking Mehring's claim for lost overtime pay.

During trial, Mehring told the jury that he was making a claim for lost overtime pay based on his retaliation claim:

Q. Are you making any claim for lost overtime in this case?

A. (Mehring) Yes.

Q. And why?

A. Because it's overtime that I would have had if they hadn't retaliated against me by not allowing me to go back to the task force.

(RP 1086-87)

Mehring testified that during the five years preceding his return to the Spokane Police Department following his acquittal, he averaged 186.55 hours of overtime working with the Drug Task Force. (RP 1085)

Following his acquittal, he returned to work and was assigned to the Targeted Crimes Unit. (RP 1047) Mehring claims he should have been returned to the Drug Task Force. If he had, he claims he would have been entitled to continue to be paid for overtime. Mehring claims that there was less opportunity for overtime in the Targeted Crimes Unit to which he was assigned. (RP 1054) As he claims he was not paid Drug Task Force overtime, he wanted this overtime as part of his claim as a result of the City's retaliation. (RP 1086)

Mehring knew that while he was on administrative leave his position with the Drug Task Force had been filled by the City with a patrol officer. (RP 1050) Neither Mehring nor his Union filed any grievance concerning that decision. (RP 528, 583, 592) His assignment with the Drug Task Force was a temporary rotating assignment which he had held for four years. (RP 971, 981, 894-85, 906, 1731) There was no contractual right to be on the Drug Task Force nor any contract guaranteeing that any officer would remain assigned to the Drug Task Force. (RP 592, 928)

At trial, Mehring asked the jury to award him \$10,633.35 for each of five years he claims he would have worked for he Drug Task Force after returning to work. (RP 1089) His total request was \$53,166.75. (RP 1090) The jury awarded \$45,675 in economic damages. (CP 2709)

After deduction of overpayments and payments to Dr. Palmer, this resulted in an award of \$42,735 for "lost overtime".

In Appellants' Opening Brief, the City claimed that Mehring did not properly plead any theory in this case under which his "lost overtime" claim could have been awarded. In his response, Mehring takes the position that his "lost overtime" damages were "damages suffered due to violation of Mehring's constitutional right to due process". (Mehring Brief, p. 68) This position flies directly in the face of Mehring's direct testimony to the jury that his claim for lost overtime was based on the City's alleged retaliation. (RP 1086-87)

Mehring's "lost overtime" claim was barred as a matter of law. Mehring returned to work shortly after his acquittal. (RP 1047) He did not file his lawsuit against the City until December 15, 2009. (CP 005) His retaliation claim can only be based on actions taken subsequent to the filing of litigation. (RP 1901)

After both sides rested, the City moved for judgment as a matter of law under Civil Rule 50 seeking dismissal of Mehring's "lost overtime" claim. In ruling upon this issue, the trial court determined that the "lost overtime" claim could not be brought pursuant to the retaliation claim, stating:

It's the threshold issue that we're talking about here because clearly it doesn't fall under retaliation because I only allowed the retaliation claim in on, for the most part, on events that occurred after the filing of the lawsuit in December of 2009...

And this of course was long gone by that point.

(RP 1901)

The trial court further stated:

...there's nothing to talk about it in the sense of retaliation claim because it really is not germane to the retaliation claim.

(RP 1902)

In apparent recognition that the "lost overtime" claim could not be made as part of the retaliation claim, Mehring switched gears and, contrary to what he told the jury, claimed that his "lost overtime" claim was actually part of his due process claim.

The trial court never squarely addressed the City's argument concerning this claim. Rather, it ruled: "This is just part of the damages, and it's all somewhat speculative obviously because it presupposes that the plaintiff believes he would have been successful. But that's not my call and our call. That's the jury's call." (RP 1902)

The trial court's ruling was error. "Lost overtime" wages were not recoverable under any theory that went to the jury.¹⁴

Mehring's belated claim that his "lost overtime" claim was part of his due process claim is also without merit.

The trial court ruled as a matter of law that the City had violated Mehring's due process rights by not complying with the ad hoc committee policy. (RP 1890) This violation is deemed to have occurred on March 29, 2007 when Mehring was placed on unpaid layoff status. (Exhibit 10)

The jury also determined that the City violated Mehring's right to due process by actions taken after March 30, 2007. (CP 2708) That finding, which is being challenged as part of the present appeal, is based on Mehring's claim that the City "...deprived him of his property right when they failed and/or refused to provide him due process with a sufficiently prompt, meaningful post-deprivation hearing after his unpaid layoff". (CP 2679) By definition, post-suspension deprivation would have needed to have been taken some time subsequent to March 30, 2007.

¹⁴ In his Response/Cross-Appeal brief Mehring says the City's argument is "specious" because the trial court had held that the "lost overtime" claim was "part of the damages." (Mehring Br., p. 67) The fact that the trial court states its reasoning in support of an erroneous ruling makes it no less erroneous.

After his acquittal on October 17, 2008, Mehring was placed on paid administrative leave. He was paid all back pay and lost overtime pay to that date. (RP 591, 1165) Mehring did not file his lawsuit against the City until December 15, 2009. (CP 005) This was over one year after he was assigned to the Targeted Crimes Unit where he contends he was deprived of "lost overtime" as a result of retaliation based on an incident that occurred over one year in the future.

If we accept that the "lost overtime" claim is part of the due process claim, there must be some nexus between the due process violations and that claim. Here, the due process claims accrued no later than March of 2007. Mehring was placed on paid administrative leave in October of 2008 and subsequently assigned to the Targeted Crimes Unit. No evidence was presented by Mehring that the notice issues pertaining to the due process violations had anything to do with Mehring not being reassigned to the Drug Task Force. There is no nexus between the alleged due process violation(s) and his claim.

The City had legitimate non-retaliatory business reasons for not reassigning Mehring to the Drug Task Force. By its nature, there can be no due process issue arising from this non-assignment, nor has any evidence been presented that would support such a conclusion. The

\$42,735 that was erroneously awarded to Mehring for the "lost overtime" claim should be reversed.

G. The trial court erroneously awarded excessive attorney fees on unsegregated claims based on an unreasonable hourly rate and an excessive multiplier.

In his response, Mehring acknowledges the general rule of Hensley v. Eckerhart, 461 U.S. 424, 429 (1983) that fees may not be awarded for services on an unsuccessful claim. (Mehring's Brief, p. 70)

Mehring asserted 13 causes of action in his original and Amended Complaint. (CP 09, CP 1840) He recovered under the procedural due process claim, the outrage claim, and the retaliation claim. The procedural due process claim was fee-bearing yet not factually disputed. (CP 1891) The outrage claim had no entitlement to fees. The retaliation claim was fee bearing, but was only filed nine weeks before trial. (CP 1840)

When faced with the reality that he only prevailed on two fee bearing claims, and after refusing to segregate his fees as directed by the trial court, Mehring shifted his position to argue that his case involved a "common core of facts." (Mehring's Brief, p. 70)

It is interesting to compare the dismissed causes of action with the two fee bearing claims on which Mehring prevailed. It is readily seen that the assorted unsuccessful causes of action do **not** involve a "common core of facts" with the two successful fee-bearing theories.

The primary allegations involved a conspiracy between and among the individual defendants (including two Spokane Police Officers)¹⁵ to have Mehring accused, arrested and charged for making death threats against his wife. (CP 9)

In his First Cause of Action, Mehring alleged that the defendants violated his substantive due process rights by having him arrested and prosecuted without probable cause. (CP 17-18, ¶7) Mehring did not prevail on this claim.

In his Second Cause of Action, Mehring alleged that the defendants engaged in a conspiracy for the purpose of preventing, hindering, or depriving him of equal protection. (CP 11, ¶42) Mehring did not prevail on this claim.

In his Third Cause of Action, Mehring alleged that the defendants violated his rights by falsely arresting and imprisoning him without probable cause or any supportable basis. (CP 20, ¶46) Mehring did not prevail on this claim.

In his Fourth Cause of Action, Mehring alleged that the defendants wrongfully interfered with and invaded his right to privacy of his private

¹⁵ David Overhoff and Troy Teigen were Spokane Police Officers and individually named as defendants. (CP 9) They were deposed, subjected to discovery, and subsequently dismissed. (CP 865)

affairs and concerns by publicly disclosing matters which were private to his personal life, employment and work history. (CP 20, ¶51) Mehring did not prevail on this claim.

In his Fifth Cause of Action, Mehring alleged that the City, pursuant to the doctrine of respondeat superior, was vicariously liable for the actions of Kirkpatrick, Officer Teigen, and Officer Overhoff. (CP 13, ¶55) Mehring did not prevail on this claim.

In his Sixth Cause of Action, Mehring alleged that the defendants inflicted severe mental anguish and emotional distress upon him. (CP 22, ¶57) Mehring did not prevail on this claim.

In his Seventh Cause of Action, Mehring alleged that he had been defamed by the defendants. (CP 22, ¶59) Mehring did not prevail on this claim.

In his Eighth Cause of Action, Mehring alleged that the defendants engaged in negligence and/or gross negligence by failing to conduct an internal investigation using the requisite standard of care. (CP 23, ¶62) Mehring did not prevail on this claim.

In his Tenth Cause of Action, Mehring alleged that the defendants wrongfully interfered with and invaded his contractual relationships and/or business expectancies. (CP 17, ¶72) Mehring did not prevail on this claim.

In his Eleventh Cause of Action, Mehring claimed the City wrongfully withheld his wages. (CP 26, ¶77) Mehring did not prevail on this claim.

In his Thirteenth Cause of Action, Mehring asserted a claim for hostile work environment. (CP 1859, ¶89) Mehring did not prevail on this claim.

In July 2011, Mehring pled for the first time the First Amendment retaliation claim. Even the Amended Complaint, however, asserted multiple erroneous causes of action, persisted in the fiction that plaintiff had been "terminated" and defendants City and Kirkpatrick were somehow related to the prosecution of Mehring by the County Prosecutor. Another survivor from the 2009 complaint was plaintiff's wage and hour claim; Mehring claimed the City owed him double damages for the time he had been on unpaid leave. This claim also failed.

The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. Hensley, 461 U.S. at 433, 437.

Case law makes clear that (a) segregation of unsuccessful claims and non-fee-producing legal theories is required; (b) segregation is the responsibility of the party seeking fees; (c) segregation must be undertaken on the record, so that an appellate court may determine why

and how the trial court arrived at the fee award involved. Travis v. Washington Horse Breeders Ass'n, Inc., 111 Wash.2d 396, 759 P.2d 418 (1988); Loeffelholz v. C.L.E.A.N., 119 Wn.App. 665, 691, 82 P.3d 1199 (2004), citing Hume v. American Disposal Co., 124 Wn.2d 656, 880 P.2d 988 (1994); and Mayer v. City of Seattle, 102 Wn.App. 66, 79-80, 10 P.3d 408 (2000).

"[A]ttorney fees should be awarded only for those services related to the causes of action which allow for fees." Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 66, 738 P.2d 665 (1987); see also, Absher Constr. Co. v. Kent School Dist. No. 415, 79 Wn.App. 841, 847, 917 P.2d 1086 (1995). In determining reasonable attorney fees, the trial court must first calculate the "lodestar" figure. Smith v. Behr Process Corp., 113 Wn.App. 306, 341, 54 P.3d 665 (2002) (quoting Bowers v. Transamerica Title Ins. Co., 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). "This figure represents the number of hours reasonably expended (discounting hours spent on unsuccessful claims, duplicated efforts, and otherwise unproductive time) multiplied by the attorney's reasonable hourly rate." Smith, 113 Wn.App. at 341.

The conspiracy, defamation, tortious interference, Fourth Amendment seizure (claiming City was responsible for Mehring's arrest) and other unsuccessful claims were all fact intensive. By contrast, the

procedural due process claim and the retaliation claim were based upon undisputed facts.

Under both state and federal law, time spent on the unsuccessful claims and the non-fee-bearing claims is not compensable. Travis, 111 Wn.2d at 410; Schwarz v. Secretary of Health & Human Resources, 73 F.3d 895, 901, 902 (9th Cir. 1995).

Over the course of two years, Mehring engaged in discovery and trial preparation based on his 13 causes of action. At the time of trial, only two fee bearing causes remained. All of the other theories, and the related discovery and trial preparation conducted thereon, were dismissed. Despite this, the trial court awarded him all of his unsegregated attorney fees.

It is also interesting to compare the claims made to support the punitive damages claim (fee bearing) and the outrage claim (non-fee bearing). Mehring advanced 8 individual claims to support each theory. If the entire case all arose out of a common set of facts, these 16 claims would have been parallel. However, three of the eight outrage claims (#1, #3, and #8) were not part of the punitive damage claims. As a result, three of the outrage claims that survived the journey to trial were entirely non-fee bearing and without any basis for fees being awarded.

It is equally interesting to compare the positions concerning the scope of legal work done on Mehring's behalf. In the context of his Retaliation Claim, he claims his actions were directed to raising matters of public concern. (Mehring's Brief, p. 55)

However, when faced with all but two of his fee bearing causes of action being dismissed, his entire case now arises from a common core of facts. That is, "his employment relationship with Appellants." (Mehring's Brief, p. 73)

Mehring claims that he had to present the same evidence regarding all of the claims he initiated. (Mehring's Brief, p. 73) This is not accurate. The fee bearing causes of action which Mehring prevailed on were based on procedural due process (lack of the ad hoc committee) and retaliation based on actions subsequent to December 15, 2009. To argue that the underlying facts for the two fee bearing causes of action on which he prevailed are the same related theory as all of the dismissed causes of action is disingenuous at best. Discovery and trial preparation were spent on a number of theories that were ultimately dismissed and solely for the non-fee bearing outrage claims. These theories had nothing to do with the ad hoc committee or any alleged retaliation.

The trial court abused its discretion in awarding unsegregated fees which allowed recovery for and rewarded unsuccessful and non-fee bearing theories of recovery.

II. CITY'S RESPONSE TO CROSS-APPEAL

A. Mehring's wage claim was properly dismissed.

In his cross-appeal, Mehring claims that the trial court erred when it dismissed his wage claim. This claim is without merit.

When Mehring was arrested, he was placed on unpaid layoff status pursuant to Civil Service Rule IX 6(d) which provides:

Any employee who has been formally charged with a felony may be laid off without pay pending court trial determination...If the employee is found not guilty of the charge, the employee shall be immediately restored to duty and shall be entitled to all back salary, and benefits due.

(Ex. 6, p. 35)

After Mehring was placed on unpaid leave, the City and the Union discovered the existence of a little known City policy (Administrative Code 0620-06-34) that required an "ad hoc committee" be convened before a person could be placed on unpaid leave. (RP 493, 869) The Union was unaware this policy existed. (RP 617) Both the City and the

Union simply overlooked this procedure. (RP 617)¹⁶ The trial court noted that: "...Everybody down the line forgot about it." (RP 1891)

Kirkpatrick testified that she expected that the Human Resources Department would have been knowledgeable about the ad hoc committee policy. (RP 1449) She also testified:

Q. And if you had known about this policy, would you have intentionally violated it?

A. No.

(RP 1450)

Pursuant to this procedure, Mehring could have presented his case for paid leave to the Deputy Mayor, who then could have decided whether City policies were best served by paid or unpaid leave. (RP 1696)

The Deputy Mayor testified at trial that regardless of what an ad hoc committee would have said, he would have followed the recommendations of Kirkpatrick and the HR Director and laid off Mehring pending resolution of the criminal case. (RP 874) The Mayor testified that the decision was the Deputy Mayor's to make, and the decision to place Mehring on unpaid leave "was the right decision". (RP 1697)

¹⁶ At the time Mehring was placed on leave, the Union President was fully satisfied that Kirkpatrick and Human Resources had fully complied with the Civil Service Rules. (RP 597, 574) On that day, the Union President had no idea that the ad hoc committee policy existed. (RP 617) Sometime later, the Union President was surprised when he found the ad hoc committee policy. (RP 495, 496)

It was the responsibility of Chris Cavanaugh, the Acting HR Director, to convene an ad hoc committee. (RP 1530) When Mehring was given his leave letter on March 30, 2007, an ad hoc committee was not convened. (RP 1530) At that time, Ms. Cavanaugh did not know the policy existed nor had she ever seen it. (RP 1530) At the March 30, 2007 meeting with Mehring, none of the attendees, including the Union representative, asked why an ad hoc committee had not been convened. (RP 1530-31)

Mehring received \$127,945 from the City in back pay nine days after he was acquitted of the criminal charges. (RP 1616, 591) He was given additional sums totaling over \$11,000 within the next two months. (RP 1165, 591) The City granted this "make whole" remedy months before Mehring filed this lawsuit. (RP 1166) Mehring does not dispute that he received his full back pay and the "make whole" remedy. Rather, he now claims that he was entitled to double damages because the City did not comply with the FLP when placing him on unpaid leave. That argument fails to demonstrate that the withholding was willful because there was no dispute that even if the City had fully complied with the FLP by first convening an ad hoc committee, he would nonetheless have still been placed on leave pending the criminal prosecution. Thus, the City's compliance or lack thereof with the FLP did not affect his leave status.

In dismissing the wage claim, the trial court stated:

...I should have taken this claim out a long time ago. The wages and hours claim is about wages and hours. This is a claim about deprivation of someone's constitutional rights which has a wage implication because they were an employee.

(RP 1895)

In rejecting Mehring's arguments to send this claim to the jury, the trial court ruled:

Be that as it may, I am not going to instruct on this because I am satisfied that this is not the kind of thing-I mean, the fact that a person-if this were the case, we'd have a wages and hours claim for everybody, because the fact that a person is working, gets laid off, and therefore doesn't get paid, it just is not what was contemplated.

(RP 1896)

The crux of the legal issue regarding "double damages" is whether the employer "willfully and with intent to deprive the employee of any part of his wages" paid any employee a lower wage than the employer was obligated to pay. RCW 49.52.050 was enacted with a group of related provisions in 1939. Ellerman v. Centerpoint Prepress, Inc., 143 Wn.2d 514, 519, 22 P.3d 795, 798 (2001); Schilling v. Radio Holdings, Inc., 136 Wn.2d 152, 961 P.2d 371 (1998). Willful means that "the person knows what he is doing, intends to do what he is doing, and is a free agent." The

"willful" failure to pay must be volitional. Brandt v. Impero, 1 Wn.App. 678, 681, 463 P.2d 197 (1969).

As noted in Hemmings v. Tidyman's, Inc., 285 F.3d 1174, 1203 (9th Cir. 2002):

Washington courts have not extended RCW §49.52.050 to situations where employers violate anti-discrimination statutes. Rather, violations of §49.52.050 have been upheld where an employer consciously withholds a quantifiable and undisputed amount of accrued pay. See e.g., Ellerman, 22 P.3d at 798 (failure to pay wages); Shilling v. Radio Holdings, Inc., 136 Wash.2d 152, 961 P.2d 371, 377 (1998) (failure to issue regular paychecks).

The language of the statute does not support the expansive interpretation urged by the Plaintiffs. In ascertaining legislative intent, "the language at issue must be evaluated in the context of the entire statute." Ellerman, 22 P.3d at 798. The key word in the statute is "obligated." If the Washington legislature intended for the provision to apply to a situation such as Plaintiffs', it could have stated that any employer who violates any statute is subject to double damages. The insertion of the word "obligated" indicates a pre-existing duty imposed by contract or statute to pay specific compensation. Thus, a willful and intentional withholding of accrued pay legally owed the employee would subject the employer to double damages.

Affirmative evidence of intent to deprive an employee of wages is necessary to establish liability under RCW 49.52.050; Pope v. University of Washington, 121 Wn.2d 479, 491, 871 P.2d 590 (1993). The non-payment of wages is willful when it is not a matter of mere carelessness, but the result of a knowing and intentional action. Schilling,

136 Wn.2d at 160; Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 500, 663 P.2d 132 (1983). Carelessness or inadvertence negates the willfulness necessary to invoke double damages under RCW 49.52.070 when the employer's failure to pay wages involves a legitimate error or inadvertence. Here, the City did not knowingly fail to follow the FLP.

Ordinarily, the issue of whether an employer acts "willfully" for purposes of RCW 49.52.070 is a question of fact. Pope, 121 Wn.2d at 490. However, where there is no dispute as to material facts, these issues may be resolved on summary judgment. Schilling, 136 Wn.2d at 160; Kadoranian v. Bellingham Police Dept., 119 Wn.2d 178, 190, 829 P.2d 1061 (1992). The present case does not present questions of fact.

In Baumgartner v. State Dept. of Corrections, 124 Wn.App. 738, 100 P.3d 827 (2004), a claim was made against the Department of Corrections claiming salary miscalculations. In upholding the trial court dismissal of this claim, the Court of Appeals discussed RCW 49.52.050 and stated:

This statute clearly applies to a claim for wrongful withholding of salary earned, not to a claim of salary misclassification.

Baumgartner, 124 Wn.App. at 746.

The present case, just as in Baumgartner, did not involve a claim for the wrongful withholding of salary **earned**. Here, Mehring's claim

was based on the City's inadvertent failure to convene an ad hoc committee as required by administrative policy. This is clearly outside the purview of the controlling statute.

In Morgan v. Kingen, 141 Wn.App. 143, 149, 169 P.3d 487 (2007), a claim was made for double damages under RCW 49.52.070.

Discussing such a claim, the court stated:

A critical test in an action for unpaid wages under RCW 49.52.070 is whether the employer's failure to pay wages is "willful." Whether the failure to pay wages is "willful" turns on whether the employer's refusal to pay is volitional: whether "the [employer] knows what he is doing, intends to do what he is doing and is a free agent."

In the present case, the City's action of not following the ad hoc committee administrative procedure was mere oversight. There is no evidence in the record to support a finding that this action, much less decision, was a volitional act. Further, there is no support that this action was volitional or willful. There is no evidence to show an intent by the City to not follow the ad hoc rules, much less not make full payment of earned wages.

An employer's failure to pay wages is also not willful when a "bona fide" dispute exists between the employer and employee regarding the payment of wages. Schilling, 136 Wn.2d at 160; Pope, 121 Wn.2d at 490.

A bona fide dispute is one that is "fairly debatable," Schilling, 136 Wn.2d at 161. It does not matter if the employer's interpretation is erroneous. The question is whether employee's entitlement to the payments was "fairly debatable." Moore v. Blue Frog Mobile, Inc., 153 Wn.App. 1, 221 P.3d 913 (2009).

In this case, the City did not "consciously withhold a quantifiable and undisputed amount of accrued pay"; the City reasonably placed Mehring on layoff pursuant to a negotiated Civil Service rule. Even if Mehring had availed himself of his right to file a grievance or a Civil Service complaint, the non-payment of any "wages" would have been "the result of a bona fide business dispute." A bona fide dispute is one that is fairly debatable over whether all or a portion of the wages must be paid. Shilling, at 161. (For instance, when the employer deducts a disputed debt from the wages admittedly owed, the employer has not willfully withheld wages. Pope, 121 Wn.2d at 490.)

In Allstot v. Edwards, 114 Wn.App. 625, 635, 60 P.3d 601 (2002), the court's discussion about whether double damages were applicable came down to the following:

If the Town could have determined soon after Mr. Allstot was reinstated that it owed him at least \$30,783, then delaying payment of that amount for four years might indicate willful withholding of wages.

In other words, once the employer had notice of a "quantifiable and undisputed accrued amount" and then from that point "willfully withheld payment", perhaps RCW 49.52.070 double damages might be appropriate. This is not what happened in Mehring's situation. Mehring is not entitled to double damages pursuant to RCW 49.52.070.

Mehring's reliance on Mega v. Whitworth College, 138 Wn.App. 661, 158 P.3d 1211 (2007) is misplaced. Mega involved an individual employment agreement, not a collective bargaining agreement.

In Mega, the employer was required to pay the employee's salary, not a case of oversight. In Mehring's case, the City was only required to convene an ad hoc committee. Mehring presented no evidence that, had such a committee been convened, it would have reached a different decision. In fact, undisputed evidence was presented at trial that such a committee would have had the same result.

In Mega, this Court remanded the case to let the jury decide whether RCW 49.52.070 applied. No double damages were awarded. The remedy was a new trial. In the present case, if this Court agrees with Mehring, the remedy would be a new trial limited to this issue.

RCW 49.52.070 refers to liability for two times the amount of damages unlawfully **rebated** or **withheld**. Here, no wages were rebated or withheld. This was merely oversight on the City's part.

B. The trial court's Judgment and Judgment Summary were proper.

Mehring asserts that the trial court erred by refusing to allow Kirkpatrick to be identified as a Judgment Debtor. (Mehring's Brief, p. 83) That is not correct.

The Judgment **does** accurately reflect the jury award, and it properly reflects the jury's determinations. (CP 3242) What Mehring is complaining about is the **Judgment Summary**.

The consistency of the jury's verdict, the trial court's Judgment and the Judgment Summary, under RCW 4.64.030, are issues that were not presented or argued below (indeed, the point really is not even argued **now**). This Court should not decide an issue neither briefed nor argued below. See, RAP 2.5(a); Mukilteo Retirement Apartments, L.L.C. v. Mukilteo Investors L.P., 176 Wn.App. 814, 310 P.3d 814 (2013).

Rather than cite the statute or make any argument related to the question what ought to be in, or not in, a Judgment Summary, Mehring merely cites to irrelevant cases that stand for the proposition that a judgment should be consistent with jury findings. This is not novel, nor is it relevant. The Judgment **does** reflect the jury verdict against defendant Kirkpatrick. Literally—there is a Judgment against Kirkpatrick.

This issue on cross appeal does not affect Mehring's right to recover or execute. As provided by another statute Mehring does not cite, RCW 4.96.041, the City has the power to indemnify its Chief of Police, even for punitive damages, and it did so. It follows that a personal judgment against Kirkpatrick is fully and **solely** collectible from the City, a solvent entity, and Mehring does not need, nor is he benefitted by, a Judgment Summary naming Kirkpatrick separately and individually.¹⁷

The trial court's determination that the verdict against Kirkpatrick should not be reflected in the Judgment Summary was supported by RCW 4.96.041. That statute provides for indemnification of a local government official for judgments in lawsuits against the officer. If the officer is found to have acted in the good faith performance of her duties, the judgment creditor "shall seek satisfaction [of the judgment] *only* from the local governmental entity." RCW 4.96.041(4). In addition, the local government may indemnify for punitive damages, as the City agreed to do in this case.

¹⁷ It is difficult to see exactly how Mehring has standing to make this argument, related to the Judgment Summary, in this Court. Under RCW 4.96.041(4), the judgment is only collectible from the City in any event. **Thus Mehring would not even benefit from an order altering the judgment summary.** Cf. Muma v. Muma, 115 Wn.App. 1, 6, 60 P.3d 592 (2002) (party lacks standing to raise an issue that does not directly apply to him); Bunting v. State, 87 Wn.App. 647, 943 P.2d 347, 349 (1997) (party has standing to raise an issue if "it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested"). Mehring would not be benefitted from a Judgment Summary that failed to reflect the City's indemnification ordinance.

Thus, the trial court had to decide how best to proceed. The Judgment against Kirkpatrick was **only** collectible from the City, but the jury verdict **was** against Kirkpatrick. The trial court made a reasonable decision when it excluded Kirkpatrick from the Judgment Summary, which would have been improper if it reflected a Judgment against Kirkpatrick that could only be collected from the City.

The Appellant/Cross-Respondents ask this Court to affirm on the Judgment Summary issue raised on cross-appeal.

C. The trial court applied the proper interest rate in the Judgment against Kirkpatrick.

Mehring cross-appeals the trial court's decision to award post-judgment interest at the rate set by law for interest against local government entities, as opposed to the rate for individual defendants. Mehring does not discuss, or even disclose, the rationale for the trial court's decision, which was sound, or that he has no authority to support his contention. His arguments should be rejected by this Court.

1. The trial court used the correct rate for a judgment against a public agency like the City.

In 2010, the legislature amended RCW 4.56.110 to provide:

Interest on judgments shall accrue as follows:

* * * *

(3)(a) Judgments founded on the tortious conduct of a "public agency" as defined in RCW 42.30.020 shall bear interest from the date of entry at two percentage points

above the equivalent coupon issue yield, as published by the board of governors of the federal reserve system, of the average bill rate for twenty-six week treasury bills as determined at the first bill market auction conducted during the calendar month immediately preceding the date of entry. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

The City is a "public agency" within the meaning of RCW 42.30.020. Thus, the Judgment herein must bear interest at the rate determined by RCW 4.56.110(3)(a). That rate is published by the State Treasurer and is available online at <http://www.leg.wa.gov/CodeReviser/Documents/rates.htm>, is 2.061%. Mehring does not dispute the correctness of this rate.

2. A Judgment against an indemnified official, which may by law *only* be collected from the agency, is a Judgment against the agency.

The legislature requires local governments to indemnify their officials against whom judgment is awarded. RCW 4.96.041. Once the local government has acted to indemnify the official, the judgment against the individual can **only** be collected against the local government. RCW 4.96.041(4). A Judgment against an indemnified local government official, like Kirkpatrick, is thus a judgment against the local government itself, by operation of law.

The legislature has declared the interest rate upon judgments sounding in tort against local government entities. RCW 4.56.110(3)(a). Absent legislative action waiving sovereign immunity, a local government is immune from liability for interest on a judgment. See, Our Lady of Lourdes Hosp. v. Franklin County, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993). RCW 4.56.110(3)(a), which constitutes the necessary waiver, thus sets the only interest rate the trial court could charge a local government entity, by law, in a tort claim like this one.¹⁸

Thus the trial court reasoned correctly that because the judgment can, by law, only be collected from the City, the judgment is against the City, and the interest rate applicable to local governments is the correct rate. The purpose of indemnity, to make local governments answerable for the torts of their officials committed in good faith in the line of duty, and the purposes of lowering the interest rate against local agencies, related to the collectability of judgments against them and the evident unwillingness of the legislature to grant a windfall at taxpayer expense, mandate application of the "public entity" rule of RCW 4.56.110(3)(a) here.

¹⁸ Mehring does not contend that the trial court should have determined an interest rate based upon some other theory. Liability under 42 U.S.C. §1983 sounds in tort—indeed, the three year tort statute of limitations is used in civil rights cases. Southwick v. Seattle Police Officer John Doe, 145 Wn.App. 292, 186 P.3d 1089 (2008).

3. Mehring's argument that the policies supporting 42 U.S.C. 1983 require this Court to apply a higher interest is unsupported by authority.

Mehring does not contest that the tort interest rate used by the trial court is correct. He simply argues that because he sued Kirkpatrick, and the jury verdict was against her, the policies underlying 42 U.S.C. 1983 require this Court to conclude that "the highest available interest rate must be utilized." (Mehring Brief, p. 85)

This argument is without merit. Mehring cites no authority for this argument, which is entirely circular—the "highest interest **available**" is indeed the rate the trial court awarded. Civil rights judgments in federal court receive interest at a **lower** rate than that used by the legislature in RCW 4.56.110(3)(a). See, 28 U.S.C. §1961.¹⁹

The purpose of post-judgment interest is **not** to create a windfall, or to punish local governments, but to make sure that the value of a judgment does not erode over time. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 835-36 (1990). In times of low inflation, a low interest rate assures this; this is the reason for the legislature's adoption of RCW 4.56.110(3)(a), tying the interest rate on judgments to treasury bills,

¹⁹ A close reading of 28 U.S.C. 1961 reveals that the Washington interest rate applicable to municipalities is higher than the interest on §1983 judgments available in federal court. Section 1961 provides for interest at the 52-week treasury bill rate, while the state statute

and awarding a rate two percentage points higher than the coupon yield of those treasury bills. This makes sure that a judgment creditor is protected, while also making sure that the interest award is not punitive.

Despite all of Mehring's arguments about policies underlying rules, in federal court he would have been awarded a **lower** interest rate—the rate used for 52-week treasury bills (not two points higher than 26-week bills, as in Washington). The trial court's order thus effectuated the purposes of RCW 4.96.041 and the purposes of RCW 4.56.110, and avoided the anomaly of forcing Spokane's taxpayers—who **must** pay the judgment, if it is affirmed—of paying a higher interest rate simply because the judgment is nominally against Kirkpatrick too, jointly and severally.

III. CONCLUSION

The City and Kirkpatrick ask this Court to reverse the jury verdict, vacate the rulings of the Superior Court and grant judgment on their behalf.

DATED this 2nd day of December, 2013.



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provides for interest at a rate two percentage points **higher than** the 26-week treasury bill rate.

DECLARATION OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on December 2, 2013, I caused a true and correct copy of the foregoing document to be served on the following counsel in the manners noted below:

Susan C. Nelson	VIA REGULAR MAIL	<input type="checkbox"/>
Robert A. Dunn	VIA EMAIL	<input type="checkbox"/>
Dunn & Black	HAND DELIVERED	<input checked="" type="checkbox"/>
Banner Bank Building	BY FAX	<input type="checkbox"/>
111 North Post, Suite 300	VIA FEDEX	<input type="checkbox"/>
Spokane, WA 99201		

Milton G. Rowland	VIA REGULAR MAIL	<input type="checkbox"/>
Foster Pepper PLLC	VIA EMAIL	<input checked="" type="checkbox"/>
W. 422 Riverside	(with consent)	
Suite 1310	HAND DELIVERED	<input type="checkbox"/>
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	VIA FEDEX	<input type="checkbox"/>
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DATED at Spokane, Washington, on December 2, 2013.

Cheryl Hansen