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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 313701-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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AMANDA SARAH BETH McIVER and JAMIE McIVER,

Appellants

v.

CITY OF SPOKANE, SPOKANE PARKS AND RECREATION  
DEPARTMENT, MIKE AHO, JANE DOE AHO, KIMBRE VEGA,  
JOHN DOE VEGA, PALADIN ALENT, AND JANE DOE ALENT,

Respondents.

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BRIEF OF RESPONDENTS

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## **I. INTRODUCTION.**

Former City of Spokane employee Amanda Sarah Beth McIver (“McIver”) brought suit against the City of Spokane, the Spokane Parks Department and City of Spokane employees, Mike Aho, Kimbre Vega, and Paladin Alent<sup>1</sup> for slander, libel, negligent supervision/training, and civil rights violations under Washington’s “whistle blower” statute.<sup>2</sup>

On September 24, 2012, the trial court granted the City’s 12(b)(6) Motion to Dismiss McIver’s libel and slander claims. Clerk’s Papers<sup>3</sup> 130-132 (Order Granting in Part and Denying in Part Defendants’ Motion to Dismiss). On November 30, 2012, the trial court granted the City’s Motion for Summary Judgment as to McIver’s remaining claims for negligent supervision and training and violation of Washington’s Whistleblower Act. CP 269-270 (Order Granting Motion to Dismiss). McIver assigns error to both rulings.

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<sup>1</sup>The term “the City” will collectively refer to all Defendants unless otherwise delineated.

<sup>2</sup> RCW 42.40 *et seq* and RCW 49.60.

<sup>3</sup> Reference to the Clerk’s Papers will be abbreviated “CP” and cited to the material page(s) of the document.

## **II. ASSIGNMENT OF ERROR.**

### **A. RESTATEMENT OF ISSUES PRESENTED BY McIVER.**

1. The trial court erred in dismissing McIver's claims because it allowed the City of Spokane to take two different positions in two different cases.

2. The trial court erred in applying an incorrect standard in dismissing portions of McIver's Complaint by granting a 12(b)(6) Motion and then terminated the action by improperly granting summary judgment and dismissing the balance of McIver's claims.

## **III. STATEMENT OF THE CASE.**

At all times relevant, McIver was employed by the City of Spokane Parks and Recreation Department. CP 4 (Complaint at ¶ 4.1). The Parks Department hired McIver as a temporary seasonal employee on June 1, 2008. CP 136 (Declaration of Becky Davis ¶ 5). McIver was assigned to Northeast Youth Center ("NEYC"). *Id.* One of McIver's duties at NEYC was to transport children in a City-owned van. CP 6 (Complaint at ¶ 5.2).

On April 23, 2009, McIver's City of Spokane van was rear-ended by another City-owned van, driven by City employee Alex Aragon. CP 6 (Complaint at ¶ 4.7). The post-accident investigation revealed that several young children in McIver's vehicle were not in

child restraint/booster seats. CP 246-247 (Declaration of Sheila Oropeza, Ex. A, Citation). Mclver was cited by the Spokane Police Department for the absence of using child restraints. *Id.* On June 10, 2009, Mclver's citation was dismissed with prejudice. CP 96 (Affidavit of Amanda Sarah Beth Mclver, Ex. C, Motion and Order Dismissing Charges); CP 262 (Declaration of Sheila Oropeza, Ex. A, Municipal Court Letter dismissing case).

On or about April 25, 2009, an article about the collision was published in the Spokesman Review. CP 93 (Affidavit of Amanda Sarah Beth Mclver, Ex. B, April 25, 2009 Spokesman Review Article). The article quoted NEYC director, Defendant Kimbre Vega, as stating "I don't know why they [the children in the collision] weren't in their booster seats." *Id.* The article identified Mclver and Aragon as City employees and drivers of the subject vehicles but other than stating that Mclver and Aragon passed post-accident drug tests, the article made no reference Mclver. *Id.* at 93 – 94. Neither Defendant Vega nor any City employee spoke of Mclver in the article. *Id.*

Following the subject accident, Mclver remained with the Parks and Recreation Department until September 16, 2011 when

her position was eliminated due to a reduction in force.<sup>4</sup> CP 136 (Declaration of Becky Davis at ¶ 8). During her two and a half year tenure with the City, McIver received two pay raises and was not subject to discipline. *Id.*, ¶¶ 6, 8, 10.

#### **IV. ARGUMENT.**

##### **A. THE TRIAL COURT DID NOT ERR IN DISMISSING McIVER'S CLAIMS**

In this appeal, McIver appeals the trial court's order of dismissal of her libel and slander claims, pursuant to Rule 12(b)(6), and order of summary judgment dismissing her remaining claims against the City.<sup>5</sup>

##### **1. Standard of Review on Appeal.**

In reviewing an order of dismissal pursuant to Rule 12(b)(6) or Rule 56, the appellate court engages in the same inquiry as the trial court. *McMann v. Benton County*, 88 Wn. App. 737, 740, 946

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<sup>4</sup> McIver's employment with the City was interrupted on October 29, 2010 when her position was eliminated due to a reduction in seasonal work force. She was re-hired by the City March 6, 2011. Her position was again (and finally) eliminated September 16, 2011 due to the end-of-season reduction in workforce. See CP 136-137 (Declaration of Becky Davis ¶¶ 6-8).

<sup>5</sup> The purported errors of the trial court are not clearly set forth in McIver's brief. Excepting her judicial estoppel argument, McIver does not specifically address the merits of her various claims asserted against the City. An argument unsupported by citation of authority need not be considered on appeal unless meritorious on its face. *Somer v. Woodhouse*, 28 Wn. App. 262, 270, 623 P.2d 1164, 1169 (1981). Therefore, the City requests McIver's claims be given commensurate consideration. For clarity purposes, the City addresses each of McIver's claims individually followed by an analysis of the inapplicability of the doctrine of judicial estoppel.

P.2d 1183 (1997). The dismissal is reviewed de novo. *Dussault ex rel. Walker-Van Buren v. American Intern. Group, Inc.*, 123 Wn. App. 863, 99 P.3d 1256 (2004).

Summary judgment is proper when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Dussault, supra*. Once there has been an initial showing of the absence of any genuine issue of material fact, the party opposing summary judgment “must respond with more than conclusory allegations, speculative statements, or argumentative assertions of the existence of unresolved factual issues.” *Id.* McIver fails to demonstrate that a genuine issue of fact existed for any of her claims.

2. **McIver failed to present a *prima facie* case of libel or slander.**

Libel and slander<sup>6</sup> are separate manifestations of the same tort – defamation - each proven by the same elements. See RESTATEMENT (SECOND) OF TORTS § 568. A defamatory statement

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<sup>6</sup> Libel consists of publication of defamatory matter by written or printed words. *Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 680 P.2d 432 (1984). Slander is a species of defamation in which the publication is by spoken words, transitory gestures, or by any form of communication not within the realm of libel. RESTATEMENT (SECOND) OF TORTS § 568(2).

injures one's reputation by causing the defamed person to be shunned by others or hurt in business relations. *Mark v. Seattle Times*, 96 Wn.2d 473, 493, 635 P.2d 1081 (1981); *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wn. App. 33, 44, 88 P.2d 1196 (1995). The question of whether a statement is capable of being defamatory is a question of law for the court. *Benjamin v. Cowles Publishing Co.*, 37 Wn. App. 916, 922, 684 P.2d 739 (1984); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 55, 59, P.3d 611 (2002); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

Mclver's defamation claim is based solely on a statement attributed to Defendant Vega in the Spokesman Review article regarding the subject accident. As to why the children were not in child-restraint seats, Vega told the reporter "I don't know why they weren't in their booster seats." CP 93 (Affidavit of Amanda Sarah Beth Mclver, Ex. B, April 25, 2009 Spokesman Review Article). Though Vega's statement does not reference Mclver or indicate any wrongdoing, Mclver alleges her reputation suffered as a result. CP 6-7 (Complaint at ¶¶ 4.11, 4.12, 5.11, 5.12); CP 88 (Affidavit of Amanda Sarah Beth Mclver ¶ 16).

A plaintiff succeeds on a defamation claim by proving, by a preponderance of the evidence, four elements: 1) falsity; 2) lack of privilege; 3) fault; and 4) damages. *Woody v. Stapp*, 146 Wn. App. 16, 21, 189 P.3d 807 (2008). Specific, material facts rather than conclusory statements must be presented that would allow a jury to find that each element of defamation exists. *LaMon v. Butler*, 112 Wn.2d 193, 196, 770 P.2d 1027 (1989). In addition, a plaintiff must prove the allegedly defamatory statement was “of and concerning” him/her. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) (internal citations omitted).

Mclver failed to present a *prima facie* case of defamation. Beginning with the first prong of the Washington defamation analysis, falsity, Mclver failed to show the innocuous statement of Vega regarding use of the booster seats in the collision was false. Mclver introduced no specific, material facts, outside of conjecture and speculation, in support of her position that Vega knew why the children in Mclver’s vehicle were not in their booster seats at the time of the accident. It is undisputed that booster seats were

available for Mclver's use on the date of the accident.<sup>7</sup> Mclver produced no evidence indicating that Vega had first-hand knowledge as to why Mclver did not buckle the children into the available booster seats. Vega merely recited her present state of mind to the reporter – that she was unaware, notwithstanding whatever role Mclver had in the collision, as to why booster seats were not in use at the time of the collision. Vega's statement was not provably false. *Schmalenberb v. Tacoma News, Inc.*, 87 Wn. App. 579, 590-91, 943 P.2d 350 (1997).

In addition to the absence of a false statement, Vega's comments to the Spokesman Review did not implicate Mclver. As stated, an actionable defamation claim requires that an offending statement be "of and concerning" the plaintiff. See *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. at 36. In explaining the "of and concerning" aspect of the analysis, the *Camer* court expounded:

A plaintiff must submit convincingly clear proof of his or her identity as a target of an allegedly libelous statement to withstand a defense motion for summary judgment. The identification of the one defamed must

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<sup>7</sup> Even with all inferences in her favor, Mclver cannot prove the absence of child booster seats. The statement of Alex Aragon attached as an exhibit to Mclver's Affidavit accompanying her Opposition to the City's 12(b)(6) motion concedes child booster seats were available to Mclver at the time of the accident. See CP 109 (Affidavit of Amanda Mclver, Ex. I, Email statement from Alex Aragon). See also: CP 148 (Declaration of Paladin Alent ¶¶ 5-19); CP 222-229 (Declaration of Kimbre Vega).

be certain and apparent from the words themselves. One cannot by implication identify oneself as the target of an alleged libel if the allegedly libelous statement does not point to him or her.

*Id.* (internal citations omitted)

No City employee is quoted mentioning McIver's name in the newspaper article. Vega's general statement as to why the children were not in booster seats did not relate to or concern McIver. McIver cannot submit convincingly clear proof of her identity as a target of alleged defamation.

Finally, McIver fails to show actual damage as a result of the purported defamation. McIver was not disciplined by the Parks Department for her role in the collision. CP 137 (Declaration of Becky Davis ¶ 10); CP 229 (Declaration of Kimbre Vega ¶ 27). Though she was issued a traffic infraction by the investigating police officer, the infraction was not related to any defamatory statement by the City but instead McIver's failure to utilize child safety seats. CP 246-247 (Declaration of Sheila Oropeza, Ex. A, Citation). The ticket was later dismissed with prejudice and McIver sustained no damage. CP 96 (Affidavit of Amanda Sarah Beth McIver, Ex. C, Motion and Order Dismissing Charges); CP 262 (Declaration of Sheila Oropeza, Ex. A, Municipal Court letter

dismissing case). Following the subject collision, Mclver retained her job with the City for over a year and a half. CP 136 (Declaration of Becky Davis ¶¶ 5-8). She received two pay raises before her position was eliminated due to budgetary shortfalls and end of season reduction in workforce. *Id.* Aside from her unsupported averments, Mclver provides no evidence of damage to her personal or professional reputation in support of her defamation claim. CP 88 (Affidavit of Amanda Sarah Beth Mclver ¶¶ 15-16).

Mclver fails to meet her burden of presenting specific, material facts in support of each element of her defamation claim. She cannot prove Vega's statement was false and she cannot prove she was damaged. She cannot even prove that she was the subject of a public statement – good or bad. She was provided ample opportunity to produce evidence in support of her claim. She did not. Mclver's defamation claim was properly dismissed by the trial court. The City respectfully requests this Court affirm the trial court's ruling.

3. **Mclver failed to present a *prima facie* case of negligent training and/or supervision.**

Mclver presents an unusual negligent supervision and training claim. The standard variety involves a third-party plaintiff

suing a defendant employer for the tortious action of its employee. The trier of fact is then asked to determine whether the employee's tortious action could have been avoided with better training and/or supervision by the employer. McIver, on the other hand, asserts a first-party claim against her employer, NEYC, alleging that *she* was improperly trained and supervised. As a result of the negligent training and supervision, McIver's job performance fell below the applicable standard of care and she sustained injury in the form of reputational damages stemming from Vega's alleged defamatory statements. As will be demonstrated, Washington law does not support such a claim.

Though labeled separately by McIver, negligent training and supervision are different names for the same tort. As with any negligence action, a *prima facie* claim for negligent supervision requires the showing of a duty, breach, proximate causation, and resulting injury. *Gurno v. Town of LaConner*, 65 Wn. App. 218, 228-29, 828 P.2d 49 (1992). The anticipated plaintiff in negligent supervision actions is not, as proposed by McIver, the employee but instead a third-party injured by the employee. See *Niece v. Elmview Group Home*, 131 Wn.2d 39, 51, 929 P.2d 420 (1997) (Washington recognizes the RESTATEMENT (SECOND) OF TORTS §

317 as the basis for a theory of negligent supervision which “creates a limited duty to control an employee for the protection of third parties.”) (emphasis added). The decision of *Haubry v. Snow*, 106 Wn. App. 666, 679, 31 P.3d 1186 (2001), further clarified the intended plaintiff in negligent hiring, supervision, and retention causes of action, stating:

“[A]n employer may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or of failing to use reasonable care to discover it before hiring or retaining him. The theory of these decisions is that such negligence on the part of the employer is a wrong to such third person, entirely independent of the liability of the employer under the doctrine of respondeat superior. It is, of course, necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired.”

(emphasis added).

Mclver's negligent supervision claim is intrinsically linked to her defamation claim. (August 10, 2012 Verbatim Report of Proceedings (hereinafter, “VRP”) pp. 19-25; November 30, 2012 VRP pp. 31, ll. 15-17; p. 36, ll. 12-17). Mclver argues that had she been properly trained on the use of booster seats she would,

presumably, have properly secured the children in her vehicle prior to the subject accident. But as a result of the negligent training and supervision of the City, McIver failed to perform her job competently. (August 10, 2012 VRP p. 20, ll. 5-15; November 30, 2012 VRP p. 24, ll. 10-16); CP 8 (Complaint at ¶ 6.4). McIver was then subject to alleged defamation as a result of her failure to perform the duties of her employment without negligence. *Id.*

McIver presents no evidence (or even argument)<sup>8</sup> as to: 1) the standard of care owed by the City to NEYC employees involved in the transport of children; 2) how the City fell below the applicable standard of care; 3) how the City's failure to train or supervise her regarding child seats breached a duty owed to McIver; 4) how the failure to train or supervise McIver regarding child seats proximately caused her damages; or 5) the nature of her damage.<sup>9</sup> She simply states that the trial court's decision was wrong and should be reversed.

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<sup>8</sup> Contrary to McIver's assertions, the evidence clearly reflects that policies, procedures and training of van drivers were in place. CP 146-154 (Declaration of Paladin Alent); CP 222-229, 232-237 (Declaration of Kimbre Vega, Ex. A Child Safety policies, Ex. B Sample Log Sheet, and Ex. C Diagram of the interior of the NEYC van).

<sup>9</sup> McIver's lack of damages is set forth in IV(A)(2), *supra*. Following the subject accident, McIver was not reprimanded or subject to other discipline. She retained her job for over 18 months.

Mclver links her failure to secure the children in child seats to the purported defamatory statements under a theory of negligent supervision. (November 30, 2012 VRP p. 36, ll. 12-17). A negligent supervision claim, however, provides a vehicle for a third-party to sue an employer for the actions of its employee. Mclver provides no support for her argument that she is permitted to bring a negligent training and supervision claim against her employer for her personal injury. The reason for the lack of support, based upon undersigned's review of Washington law, is no such authority exists. Furthermore, Mclver cannot establish the City's negligence. The court will never presume negligence - the alleging party must present substantial evidence in support thereof. *See Wilson v. Stone*, 71 Wn.2d 799, 802, 431 P.2d 209 (1967) (internal citations omitted).

The evidence presented by Mclver is insufficient. CP 86-109 (Affidavit of Amanda Sarah Beth Mclver with Exhibits). The City presented evidence clearly demonstrating that policies and procedures were in place by the center, including the required training of all employees regarding the state "Transportation Safety Policies", to include the use of child restraints. CR 146-154 (Declaration of Paladin Alent and Exhibits A-C, Photograph of

booster seat, Employee Checklist and Van training); CP 229-237 (Declaration of Kimbre Vega, Ex. A Child Safety policies, Ex. B Sample Log Sheet, and Ex. C Diagram of the interior of the NEYC van). The trial court did not err in dismissing her negligent training and supervision claim and the ruling should be affirmed.

4. **Mclver does not meet the definition of a “whistleblower” and the City did not discriminate against her in violation of Washington law.**

Mclver sued the City under both chapter 49.60 RCW (the Washington Law Against Discrimination) and chapter 42.40 RCW. CP 10 (Complaint at ¶ 7-11). Under RCW 49.60.210(1) it is unlawful for a government agency to discriminate against any person because she has opposed any practices forbidden by chapter 49.60 RCW. It also provides that it is an unfair practice for a government agency, manager, or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW. RCW 49.60.210(2)

To establish a *prima facie* case of whistleblower retaliation or discrimination, Mclver must show that: 1) she engaged in a statutorily protected activity; 2) the City took an adverse employment action; and 3) her activity caused the City's adverse action. See *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418 (2002). If Mclver establishes a *prima facie* case, the burden

shifts to the City to produce evidence of legitimate, non-retaliatory reasons for the employment action. See *Estevez v. Faculty Club*, 129 Wn. App. 774, 797-98, 120 P.3d 579 (2005). If the City sets forth such reasons, the presumption of retaliation is rebutted. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001), *rev'd on other grounds*. The burden then shifts back to the McIver to show that her proffered reasons are pretextual or that the whistleblowing activity was a substantial motivating factor for the City's action. *Estevez*, 129 Wn. App. at 798. In situations where the employee's evidence of pretext is weak or the employer's non-retaliatory evidence is strong, the employer is entitled to summary judgment. *Milligan*, 110 Wn. App. at 638-39.

The term "whistleblower" means:

An employee who in good faith provides information to the auditor or other public official...in connection with an investigation under RCW 42.40.040 and an employee who is believed to have reported asserted improper governmental action to the auditor or other public official...but who, in fact, has not reported such action or provided such information; or

An employee who in good faith identifies rules warranting review or provides information to the rules review committee, and an employee who is believed to have identified rules warranting review or provided information to the rules review committee but who, in fact, has not done so.

RCW 42.40.020(10)(b). McIver is not a statutorily-defined whistleblower.

McIver's whistleblower claim consists of allegations that she complained of a lack of child booster seats to her supervisor, Defendant Vega.<sup>10</sup> (August 10, 2012 VRP pp. 19-24; November 30, 2012 VRP pp. 16-19); CP 9 (Complaint ¶¶ 7.5 and 7.6). McIver provides no evidence of a complaint to the auditor. Likewise, McIver fails to identify an "investigation" with which she assisted by providing information. Finally, and perhaps most importantly, McIver presents no evidence of retaliation or anything resembling an adverse employment action by the City following her alleged report of the lack of child safety seats. She retained her job with the City for 18 months after the accident and received two pay raises. Her termination was not related to her alleged complaints but instead budgetary constraints. CP 135-145 (Declaration of Becky Davis).

Even if the City's retention of McIver and decision to give her pay raises could somehow be construed as retaliatory, McIver does not satisfy the statutory definition of "whistleblower" under RCW

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<sup>10</sup> Vega rebuts McIver's alleged report in her declaration. CP 227-228 (Declaration of Kimbre Vega at ¶ 21).

42.40.020. In the absence of a whistleblower, there can be no retaliation. McIver's retaliation claims fail.

McIver also argues that that she has a cause of action under RCW 49.60 et seq. RCW 49.60 et seq. prohibits discrimination against any person because she has opposed any practices forbidden by the chapter. The State of Washington does not bar all forms of retaliation in the workplace. *Blackford v. Battelle Mem'l Inst.*, 57 F. Supp. 2d 1095, 1099 (E.D. Wash. 1999). Rather, pursuant to RCW 49.60.210, it is an unfair business practice "for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40." To qualify for such a cause of action, an employee must oppose practices forbidden by the statute; i.e., the laws prohibiting workplace discrimination. See 16A David K. DeWolf and Keller W. Allen, *Washington Practice: Tort Law and Practice* § 24.16 (3d ed. 2012) (citing *Coville v. Cobarc Services*, 73 Wn. App. 433, 440, 869 P.2d 1103 (1994)). An employee who opposes employment practices reasonably believed to be discriminatory is protected whether or not the practice is actually discriminatory. See RCW 42.40.020(10)(b).

As set forth above, McIver does not meet the statutory definition of a whistleblower. Accordingly, even if she was able to prove discrimination or adverse treatment, she is not within the class of person protected by RCW 49.60 et seq. The City did not violate Washington's anti-discrimination law.

Similar to McIver's negligent training and supervision claim, McIver presents few facts in support of her argument that the trial court's dismissal of her whistleblower claim was erroneous. She simply states the wrong standard was applied and the dismissal should be overturned. To reiterate, she was not reprimanded for the collision or allegedly reporting the absence of available child seats to her superior. She remained employed with the City for 18 months and was awarded a higher wage, twice. The evidence presented by McIver is insufficient to support a finding that she was either a whistleblower or subject to discrimination. Her claims are meritless and were properly dismissed.

5. **The doctrine of judicial estoppel is inapplicable to this matter.**

The bulk of McIver's Opening Brief focuses on the availability of the doctrine of judicial estoppel. The issue is a red herring intended to draw the Court's attention away from the fact

that McIver did not present adequate evidence in support of any of her claims. In an abundance of caution, however, the City briefly addresses this argument.

The basis of McIver's judicial estoppel argument is the purported inconsistency created when the City purchased new, full-back child restraint seats after the subject collision. (November 30, 2012 VRP pp. 23-25, l. 18; p. 33, ll. 6-25). McIver asserts the purchase of the new seats proves that safety seats were unavailable prior to the accident. *Id.* McIver's argument is specious at best, as McIver's own witness, Aragon, acknowledges that booster seats were indeed available. CP 109 (Affidavit of Amanda Sarah Beth McIver, Ex. I Alex Aragon email statement).

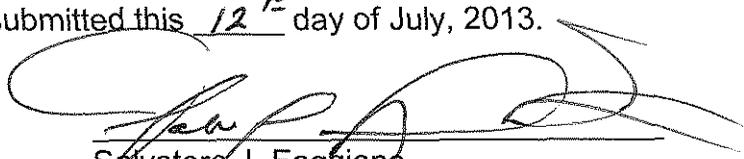
The City had safety seats available to McIver. CP 146-154 (Declaration of Paladin Alent and Exhibits A-C, Photograph of booster seat, Employee Checklist and Van training); CP 222-237 (Declaration of Kimbre Vega, Ex. A Child Safety policies, Ex. B Sample Log Sheet, and Ex. C Diagram of the interior of the NEYC van). McIver, for whatever reason, opted not to use them and as a result she was cited with an infraction. The issue, however, is irrelevant, as regardless of whether the seats were truly available, McIver fails to establish a *prima facie* case of defamation, negligent

training and/or supervision, or discrimination under Washington's Whistleblower Act.

**V. CONCLUSION.**

For the foregoing reasons, the City respectfully requests this Court to affirm the trial court's order dismissing McIver's Complaint in its entirety.

Respectfully submitted this 12<sup>th</sup> day of July, 2013.



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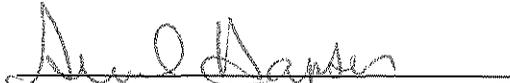
DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 12<sup>th</sup> day of July, 2013, I caused a true and correct copy of the foregoing "Brief of Respondents," to be delivered to the parties below in the manner noted:

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Douglas D. Phelps	<input type="checkbox"/> VIA FACSIMILE
Phelps & Associates, PS	<input type="checkbox"/> VIA U.S. MAIL
Attorneys at Law	<input type="checkbox"/> VIA OVERNIGHT SERVICE
2903 N. Stout Rd.	<input checked="" type="checkbox"/> VIA HAND DELIVERY
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