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COURT OF APPEALS
DIVISION III
SEATTLE, WASHINGTON

No. 328309

COURT OF APPEALS DIVISION III OF THE STATE OF
WASHINGTON

In the Matter of

CLUB LEVEL, INC., and RYAN FILA

CLUB LEVEL, INC., and RYAN FILA, a single man,

Plaintiffs - Appellants,

v.

CITY OF WENATCHEE, , et al.,

Defendants - Appellees.

REPLY BRIEF OF APPELLANT

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1 **CR 56(c) STANDARD**

2 In ruling on a motion for summary judgment it is the duty of the
3 trial court to consider all evidence and all reasonable inferences therefrom
4 in the manner most favorable to the nonmoving party. Meissner v.
5 Simpson Timber Co., 69 Wn.2d 949, 951, 421 P.2d 674 (1966). It is not
6 the function of the trial court to weigh the evidence presented, and
7 summary judgment must be denied if a right of recovery is indicated under
8 any provable set of facts. Smith v. Acme Paving Co., 16 Wn.App. 389,
9 392, 559 P.2d 811 (1976); Fleming v. Smith, 61 Wn.2d 181, 390 P.2d 990
10 (1964). The court must also consider that the beneficial effect of summary
11 judgments to dismiss unfounded claims must be employed with caution
12 lest worthwhile causes be dismissed short of a determination of the true
13 merit. Smith, supra at 392; Preston v. Duncan, 55 Wn.2d 678, 349 P.2d
14 605 (1960).

15 **CIVIL CONSPIRACY**

16 Judge Wickham of the Thurston County Superior Court failed to
17 consider *all* of the evidence presented in support of the motion for
18 summary judgment argued in that court.

19 The following facts are uncontested:

20 The designation of Club Level as a Location of Strategic Interest
21 (LSI) in March 2011, shortly after its opening, was based on the request of
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1 the Wenatchee Police Department (WPD), (CP 284); (CP 751-752) (CP
2 753-754); 26 reports were submitted to the Washington State Liquor
3 Control Board (WSLCB) by the WPD while during the same time only
4 four were submitted for all other liquor establishments in the City of
5 Wenatchee combined, (CP 1040-1042); of these 26 reports the WSLCB
6 found 24 of them unfounded and two resulted in a written warning, (CP
7 1040-1042); Lt. Starkey of the WSLCB testified that a liquor
8 establishment's LSI designation is primarily driven by police reports, (CP
9 699); ultimately the LSI designation of Club Level was cancelled by the
10 WSLCB, when asked why Lt. Starkey testified, "Because the officers
11 didn't observe any violations," (CP 699); Sgt. Stensatter of the WSLCB
12 was questioned regarding the policy statement of the WSLCB regarding
13 LSI designations and asked if he could point to any factual information
14 demonstrating that Fila was making a conscious choice to operate Club
15 Level in a manner consistent with the policy statement which would
16 support designating Club Level as an LSI, he testified "No, I can't", (CP
17 708); the WPD and the WSLCB personnel communicated and jointly
18 created the Good Neighbor Agreement (GNA) (CP 902-903) which would
19 permit the City to immediately suspend the business license of Club Level,
20 (CP 907-913); Off. Murphy of the WSLCB communicated with Off.
21 Drolet of the WPD and told him he would soon visit Club Level and "look
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1 for violations”, (CP 769-770); Off. Drolet sent an email to Off. Murphy
2 requesting Off. Murphy come to a WPD staff meeting stating “Basically,
3 we are brainstorming how to help Club Level/Volcano from sucking up
4 immense amounts of our time” and “I figure a few expensive tickets will
5 slow things down” (CP 766-768); Capt. Dresker, the second-highest
6 ranking member of the WPD at the time authored an email in which he
7 stated “we (WPD) need to work more proactively on our own solutions,
8 *up to and including pressing for Liquor Control to shut the business*
9 *down.*” (Emphasis added). (CP 716)
10

11 In addition to these uncontested facts, Fila provided additional
12 evidence as well. He personally testified via declaration that in 2012 he
13 was forced to relocate Club Level within the City of Wenatchee in an
14 attempt to move it to an area of town where he would have less police
15 interference. (CP 1022) Fila went through the regular relocation process
16 which required an inspection of the premises by WSLCB personnel. (CP
17 1024) Sgt. Stensatter of the WSLCB, Club Level’s assigned officer, was
18 on vacation when this inspection occurred in August 2012. Club Level
19 passed the inspection and was cleared for opening. (CP 1024) On August
20 17, 2012, a Friday night, Club Level was set to reopen. At 4:30 PM that
21 day five (5) inspectors from the City of Wenatchee from various
22 governmental divisions came into Club Level unannounced and demanded
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1 to inspect the premises again before permitting the business to reopen.
2 (CP 1024-1025) Their clear desire was to find a reason to deny Club
3 Level the ability to reopen, but Fila had prepared Club Level according to
4 prior city demands and other than one making a change to the dance floor
5 by reducing it in size was in full compliance with the demand of all the
6 various City Department Inspectors. (CP 1025)
7

8 Sgt. Stensatter upon returning from his vacation and learning that
9 Club Level had reopened contacted Fila via the telephone and threatened
10 him with arrest for opening without a permit. (CP 1022) He then came
11 into Club Level on the first Friday evening of his return at the busiest time
12 of the service hours and demanded to see the driver's license and service
13 permit for every employee at Club Level thereby deliberately interfering
14 with their ability to service customers. (CP 1022) On August 29, 2012,
15 Sgt. Stensatter then issued an Administrative Violation Notice for
16 "inadequate lighting", (CP 743-746). One day prior, on August 28th, the
17 WSLCB administratively dismissed the previously issued AVN for a
18 minor on the premises. At the administrative hearing for that AVN Sgt.
19 Stensatter knowingly testified an incorrect legal standard before
20 Administrative Law Judge Mark Kim who subsequently dismissed the
21 AVN. (CP 739-742) On August 30th he contacted personnel in the
22 licensing division of the WSLCB and notified them that the AVN had
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1 been issued and directed them that WAC 314-07-060 (4) would authorize
2 the revocation of the temporary permit Club Level was operating under at
3 the new location. (CP 747-750) A revocation of this temporary permit
4 would of course have had the effect of closing this business. Ultimately
5 the head of the Licensing Division was required to review the inadequate
6 lighting AVN and decided not to rescind the temporary permit for Club
7 Level. (CP 695)

9 As stated above, the trial court as well as this reviewing court is
10 required to consider *all* evidence presented in response to a motion for
11 summary judgment. Capt. Dresker specifically wrote in the email widely
12 disseminated on two occasions to many officers in the WPD that they
13 needed to be more proactive to affect Club Level, “*up to and including*
14 *pressing for Liquor Control to shut the business down.*” (emphasis added)
15 (CP 716) The level of proof required at trial for civil conspiracy, but not
16 on a motion for summary judgment is clear, cogent, and convincing
17 evidence. Sterling Business Forms, Inc. v. Thorpe, 82 Wn.App. 446, 451,
18 918, P.2d (1996). Even so, when the second highest administrative officer
19 on the WPD sends a widely disseminated email suggesting the WPD press
20 the WSLCB to “shut the business down”; how much clearer can it be?

24 Summary judgment is required to be denied if the evidence
25 presented when viewed in the light most favorable to the nonmoving party

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would sustain *any* provable set of facts. Smith, Supra at 392. There can be no serious question but that the evidence presented above would permit a reasonable trier of fact this to sustain a civil conspiracy cause of action.

COLLATERAL ESTOPPEL

The four elements of issue preclusion or collateral estoppel include (1) the issue decided in the earlier proceeding was identical to the issue presented in the latter proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom issue preclusion is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of issue preclusion does not work and injustice on the party against whom it is applied. Ullery v. Fulleton, 162 Wn.App. 596, 602, 256 P.3d 596 (2011). The court clearly stated the rule that a court may apply issue preclusion only if all four elements are met. *Id.* at 602-03.

In Fila's opening brief Owens v. Kuro, 56 Wn.2d 564, 568, 354 P.2d 696 (1960) was cited for the proposition and mutuality was required in order to apply the principles of collateral estoppel. The Court has retreated from this position and it was error to cite this case as authority on that point.

1 Regardless, collateral estoppel is still not applicable under the
2 present facts because all four elements as outlined in Ullery are not
3 present.

4 First, while it is not denied that the causes of action, facts, and
5 parties appear to be closely related, the respective responsibilities and
6 methodology of achieving their claimed desire, the closure of Club
7 Level, are not identical. The WPD is a law enforcement agency, not an
8 administrative agency. The WPD of course lacks the authority to
9 terminate the “Nightclub” license possessed by Fila which would force
10 the closure of Club Level. The WSLCB alternatively is an
11 administrative agency charged with the regulation of amongst other
12 things the issuance and maintenance of nightclub licenses by holders of
13 such a license. The methodology by which they would achieve the
14 closure of Club Level is substantially different than that of the WPD.
15 While related, the facts surrounding these two causes of action are not
16 identical and collateral estoppel is inappropriate for the failure of this
17 element.
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20 Collateral estoppel is also to be denied when it would work an
21 injustice upon the party against whom it is asserted. The application of
22 collateral estoppel against Fila under the circumstances would work a
23 significant injustice not only on him, but would also place the public in
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1 Washington State at risk. As the Court stated in Smith itself citing to
2 Preston, the beneficial effect of summary judgments to dismiss unfounded
3 claims must be employed with caution lest worthwhile causes be
4 dismissed short of a determination of the true merit. Smith, supra at 392.
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6 During his oral comments made while ruling on the Motion for
7 Reconsideration Judge Wickham made it clear that he struck a
8 compromise when making his initial ruling on the Motion for Summary
9 Judgment. He granted the motion for summary judgment against all
10 remaining causes of action except the due process clause violation
11 because he was denying summary judgment on the § 1983 cause of
12 action. The proof of this lies in reviewing the Letter Opinion dated
13 June 14, 2013, in which he makes inconsistent and irreconcilable
14 comments. (CP 621-627)
15

16 When ruling on the due process clause violation Judge
17 Wickham stated “the evidence shows that law enforcement specifically
18 targeted Club Level in an excessive and unreasonable manner because
19 they wanted to put it out of business.” “Law enforcement” as used in
20 the context of this statement includes both the WPD and the WSLCB.
21 (CP 623) In contract, when addressing the civil conspiracy cause of
22 action Judge Wickham stated, “the evidence in this file does not show
23 an agreement to harm the plaintiff’s business.” “It merely shows
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1 communications between officers and the Liquor Control Board.” (CP
2 626) Prior to making this statement Judge Wickham outlined the
3 factual evidence he considered when ruling on the civil conspiracy
4 cause of action. He stated:

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6 Multiple parties have testified in various depositions as well as
7 demonstrated through the documentary evidence that a
8 continual stream of communications existed between the WPD
9 and the WSLCB officers regarding Club Level. Officer Drolet
10 authored an email to Officer Murphy stating that it was his
11 perception “a few expensive tickets” would slow things down
12 at Club Level. Issuing a few expensive tickets for the purpose
13 of slowing down a business is not a lawful purpose pursuant to
14 the 14th amendment due process clause. There also exists the
15 clear and uncontested emails from Capt. Dresker clearly stating
16 his desire to be more proactive in his own methods of
17 impacting Club Level’s business up to and including “pressing
18 Liquor Control to close the business down.”

19 Lt. Starkey had testified during his deposition that the
20 driving force behind the LSI designation is the reports
21 forwarded from the WPD. Exhibit 1 shows that 26 reports
22 were forward to the WSLCB from WPD officers regarding
23 Club Level during this relevant two year time frame. For every
24 other bar in Wenatchee combined there were only a total of
25 four reports forwarded to the WSLCB. Of these 24 complaints
26 were investigated and 22 were ultimately “unfounded” with
27 two written warnings being issued to Club Level. Not one
sustained AVN has been issued against this business despite
the fact that it was designated as an LSI almost immediately
after its creation. (CP 625-626)

Following the above statement Judge Wickham concluded his
discussion of the facts by noting that there was also “the evidence raised in
the brief, there is speculation that weekly meetings between Chief Robbins
and Sgt. Stensatter at a coffee shop were somehow less than innocent.”

1 (CP 626) This is a fair, accurate, and complete recitation of the evidence
2 which Judge Wickham stated he considered when ruling on the civil
3 conspiracy claim.

4 As noted in the end in the introductory summary judgment
5 standard portion of this memorandum it is the duty of the trial court, not a
6 suggestion, but *the duty* of the trial court to consider *all evidence*
7 presented when deciding a motion for summary judgment. Meissner,
8 Supra at 951. The above facts as recited by Judge Wickham fail to take
9 into account the request of Off. Drolet to Off. Murphy to attend a WPD
10 staff meeting to “brainstorm” ways to slow Club Level down. (CP 766-
11 768) It fails to consider the evidence of the GNA which was jointly
12 created by both the WPD and WSLCB personnel. (CP 907-913) It fails to
13 consider the actions of Sgt. Stensatter in purposely failing to adequately
14 investigate a minor located on the premises by not even interviewing Fila
15 or any Club Level staff, then testifying to a judicial officer to an incorrect
16 legal standard he knew to be incorrect. (CP 737-738, CP 681-682) After
17 that AVN was dismissed by the Board (CP 963-971) and while Club Level
18 was operating on a temporary permit Sgt. Stensatter immediately issued a
19 second AVN for “inadequate lighting” (CP 743-746) which even his
20 supervisor acknowledged was only the second time he had seen that AVN
21 issued. (CP 706) He then contacted the licensing division to notify them
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1 of the AVN he had issued while citing to WAC 314-07-060(4). (CP 747-
2 750) This factual recitation also fails to take into account that at 4:30 PM
3 on the day Club Level was to first reopen five city inspectors walk in
4 unannounced at quite literally the last moment in one final attempt to force
5 the continued closure of Club Level. (CP 1024-1025)
6

7 Judge Wickham for reasons known only to him decided to strike a
8 compromise and ignored substantial factual evidence when he granted
9 summary judgment upon every cause of action other than the due process
10 violation. He then failed to meet the legal requirements of a motion for
11 summary judgment which require giving Fila as the nonmoving party
12 every reasonable inference and denying summary judgment when *any*
13 plausible set of facts was presented to establish the various causes of
14 action.
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16 These errors were compounded by Division Two of the Court of
17 Appeals. Club Level, Inc., Et Al. v. Wa State Liquor Control Board, Et
18 Al., No. 45270-7 (Wa.Ct.App.) 2 (2014). Following their statement that
19 the trial court was correct to find the evidence demonstrated only
20 communications which occurred as a normal part of the working
21 relationship the Court stated, “The evidence submitted shows only
22 discussions between two law enforcement agencies about attempts to
23 strictly enforce the law against a bar that generated a disproportionate
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1 number of requests for police service.” (Club Level at Pg. 20-21) First,
2 the Court again chose to ignore significant evidence. Second, and
3 importantly, in making this statement the Court demonstrates that it is
4 choosing to *weigh* the evidence. As outlined above, the trial court and
5 Court of Appeals are not permitted to weigh the evidence presented.
6 Smith, Supra at 392. The duty of the trial court and the Court of Appeals
7 is to review all of the evidence in the light most favorable to the
8 nonmoving party and to deny summary judgment if there is any provable
9 set of facts. Division Two disregarded this policy, instead weighing
10 selective evidence to sustain the granting of summary judgment. This is
11 legal error and it is respectfully submitted to permit this clearly erroneous
12 decision to be used to support a collateral estoppel argument to sustain
13 summary judgment against Fila in this Court is unfair. To do so is to
14 sanction unconstitutional behavior by the WPD and WSLCB which is
15 against the public interest.

18 Judge Shea also engaged in the same wrongful weighing of the
19 evidence when deciding the due process cause of action on the federal
20 level. He stated, “even when viewed in the light most favorable to
21 Plaintiffs, the evidence demonstrates that the officers were concerned
22 about ongoing public disturbances being caused by Club Levels patrons,
23 and that they began issuing citations for violations of statutes designed to
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1 protect the general welfare, health, and safety of the community.” (CP
2 615-616) It is not Judge Shea’s duty to weigh the evidence and make this
3 determination. This is the duty and function of a jury. Judges decide
4 questions of law; juries decide questions of fact, including what weight to
5 be given. Judge Shea’s comments and reasoning constitute legal error.
6

7 Fila has been denied the full opportunity to present all of this
8 evidence to a jury, the entity which is charged with the duty to weigh the
9 evidence. All of the various Courts which have addressed this matter have
10 applied an incorrect legal standard. The utilization of the Thurston County
11 action as collateral estoppel will create a manifest injustice contrary to the
12 requirements of the applicable standard on a motion for summary
13 judgment.
14

15 **RES JUDICATA**

16 Res judicata serves to bar the re-litigation of claims and issues that
17 were litigated, or might have been litigated, in a prior action. Pederson v.
18 Potter, 103 Wn.App. 62, 69, 11 P.3d 833 (2000). Res judicata requires the
19 establishment of four elements. There must be an identity between a prior
20 judgment any subsequent action is to (1) persons and parties, (2) cause of
21 action, (3) subject matter, and (4) the quality of persons for or against
22 whom the claim is made. Id at 69. Res judicata is inappropriate because
23 the second and third element fail.
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1 The Court noted in Pederson that no specific test had been
2 determined to determine whether a cause of action has sufficient identity.
3 The following criteria were to be considered: (1) whether the rights or
4 interests established in the prior judgment would be destroyed or impaired
5 by the prosecution of the second action; (2) whether substantially the same
6 evidence is presented in the to actions; (3) whether the suits involve the
7 infringement of the same right; and (4) whether the two suits arise on the
8 same transactional nucleus of facts. *Id.* at 72.

10 Under the first of these criteria, the rights and interests established
11 in the Thurston County action against the WSLCB would have no effect in
12 prosecution of this action. For example, had Judge Wickham denied
13 summary judgment on the civil conspiracy charge as the evidence outlined
14 above supports, Fila as a plaintiff in this action clearly would not have
15 been permitted to bring a motion for summary judgment against these
16 Defendants. He cannot assert a denial of summary judgment as
17 conclusively resolving this issue. Similarly, the granting of summary
18 judgment has no impacting right under this litigation.

22 It is also respectfully submitted that the facts presented in these
23 two causes of action are not the same. In the litigation against the
24 WSLCB the focus of the factual evidence would have to rely upon the
25 actions of the individual WSLCB officers. This would include for
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1 example Sgt. Stensatter's efforts to have the temporary permit that Club
2 Level received when relocating suspended. Arguably this evidence has
3 little to do with the WPD. Similarly, the constant walk-throughs of the
4 WPD officers, following patrons and employees of Club Level as they
5 drove away from the establishment, parking across the street to observe
6 Club Level, and the actions of Sgt. Huson to encourage a clearly
7 intoxicated individual to reenter Club Level are actions which are engaged
8 in unilaterally by those officers and not in conjunction with the WSLCB.
9 While there is no denial that the evidence is similar, it is not substantially
10 the same and res judicata fails as a result.
11

12 In addition, these two different lawsuits arise out of a different
13 transactional nucleus of facts. The action against the WSLCB was
14 primarily focused upon the due process violation by impacting Fila's right
15 to transact the business of his choice. That cause of action is entirely
16 missing in this litigation. Further, as identified above, the actions of the
17 WPD officers also demonstrate their independent actions to impact Fila's
18 business for example under the defamation and false light causes of action.
19

20 While related, these two lawsuits are not identical in the elements
21 of proof as the various causes of action differ. Res judicata is as
22 inapplicable as collateral estoppel.
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1 **PUBLIC DUTY DOCTRINE**

2 The public duty doctrine does not serve to bar suit in negligence
3 against a government entity. Cummins v. Lewis County, 156 Wn.2d 844,
4 853, 133 P.3d 458 (2006). Local governments such as a county or city
5 may be liable for damages arising out of the tortious conduct of their
6 employees to the same extent that they were private person or corporation.
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8 Id at 853.

9 When a special relationship exists regarding the relationship
10 between the individual plaintiff in a case and the government entity the
11 public duty doctrine does not apply. Id at 854. To establish a special
12 relationship three elements must be demonstrated; (1) there must be direct
13 contact or privity between the public official and the injured plaintiff
14 which sets the letter apart from the general public; (2) there are express
15 assurances given by the public official; (3) which give rise to justifiable
16 reliance on the part of the plaintiff. Id at 854. In the Cummins decision
17 these elements could have been met by demonstrating that a 911 telephone
18 conversation had occurred and an affirmative promise or agreement to
19 provide assistance occurred. Id at 855.
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22 Fila had several direct meetings with the administration of the
23 WPD specifically to discuss his concerns regarding police activity and
24 clearly expressed his desire to be a good neighbor operating his business in
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1 a manner which was positive for all parties concerned. The actions of the
2 officers of the WPD were specifically directed at Club Level and Fila, not
3 at a member of the public in general. As outlined by Fila in his
4 Declaration, the WPD administration expressed their willingness to work
5 with him. (CP 1016-1018) The contacts between the officers of the WPD,
6 the administration of the WPD, and Fila were numerous. The actions of
7 the administration and officers of the WPD were specifically directed at
8 Fila and Club Level. This is not a situation in which this duty was owed
9 generally to the public; these interactions all involved the individual and
10 unique relationship between the administration and officers of the WPD
11 and Fila directly. Simply put, a special relationship exists and the public
12 duty doctrine does not operate to require dismissal of this cause of action.

15 **NEGLIGENT SUPERVISION**

16 Defendants continue to argue; "[i]n Washington, as a general rule,
17 law enforcement activities are not reachable in negligence." Respondent
18 Brief pg. 21. As authority for this statement the Defendants cite to Dever
19 v. Fowler, 63 Wn.App. 35, 44, 816 P.2d 1237 (1991). Dever specifically
20 dealt with a claim for a negligent investigation and did not state this broad
21 assertion. The statement that as a general rule, law enforcement activities
22 are not reachable in negligence was made in Keates v. City of Vancouver,
23 73 Wn.App. 257, 869 P.2d 88 (1994), with citation to Dever.
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1 Keates is a case that also dealt with a law enforcement
2 investigation and the interview of a plaintiff who subsequently alleged the
3 infliction of negligent infliction of emotional distress. The Court
4 dismissed the negligent infliction of emotional distress claim stating,
5 "[w]e hold, therefore, that police officers owe no duty to use reasonable
6 care to avoid inadvertent infliction of emotional distress on the subject of
7 criminal investigations." The Court went on to state, "[t]his does not mean
8 that plaintiffs may not obtain emotional distress damages as compensation
9 for the officers' breach of some other duty." *Id* at 269. Both of these
10 cases were addressing the concept of a negligence claim for negligent
11 investigation, a cause of action which does not exist in Washington State.
12 Similarly, in Rodriguez v. Perez, 99 Wn.App. 439, (2000), cited by the
13 Defendants also addresses a cause of action for negligent investigation.
14 The holding in these cases does not extend beyond the limited issue of
15 negligent investigation. Defendant's argument that law enforcement is not
16 reachable in a negligence cause of action is a mischaracterization of
17 applicable law.
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21 Plaintiffs will stand on their initial briefing for the balance of the
22 argument regarding negligent supervision. The facts outlined above in the
23 civil conspiracy portion of this memorandum demonstrate that the officers
24 of the WPD were clearly acting outside the scope of their authority. The
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1 scope of authority of police officers does not include deliberately acting to
2 negatively impact a business owner's constitutional right to pursue an
3 occupation. The deliberate, intentional acts outlined above demonstrate
4 that the officers of the WPD as well as the administration of this
5 department acted in an unconstitutional manner intending to drive Fila and
6 Club Level out of business. Briefly, these officers attempted to use a
7 lawful process to achieve an unlawful result, this exceeds their scope of
8 duty.
9

10 **DEFAMATION OF CHARACTER**

11 Defendants fail to address the Bender v. City of Seattle, 99 Wn.2d
12 582, 601, 664 P.2d 492 (1983) argument as pointed out in Appellants
13 opening brief that the right or duty to inform the public does not include
14 license to make gratuitous statements concerning the facts of the case or
15 disparaging character of other parties to an action. Defendants seek to
16 portray this as Sgt. Kruse merely reporting statements made to him
17 without any comment regarding the authenticity of the statements. As
18 pointed out both in Fila's opening brief as well as acknowledged by
19 Defendants a person abuses the qualified immunity privilege by making a
20 statement knowing it to be false or with reckless disregard as to its
21 truthfulness. Id at 601-602.
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1 The facts of this case outline that the WPD administration acted
2 with a reckless disregard for the truth of the highly inflammatory
3 information contained in the report by Sgt. Kruse, and then compounded
4 this error by including this information regarding Fila, an individual who
5 was wholly unrelated to Sgt. Stephanie Silvestre, by putting this highly
6 inflammatory and personal information into Sgt. Silvestre's personnel file.
7
8 (CP 1056-1060) This information was in fact released to the public when
9 this was provided to the Wenatchee World.

10 The evidence demonstrates that a reasonable trier of fact under the
11 circumstances could determine that the Defendants acted in a deliberate
12 fashion by including highly personal and inflammatory evidence in Sgt.
13 Silvestre's personnel file when this information is clearly unrelated to Sgt.
14 Silvestre herself. Whether Fila did hit his boyfriend or physically and/or
15 financially abused elderly individuals has nothing to do with whether Sgt.
16 Silvestre appropriately acted in her job as a law enforcement officer.
17
18 Given the knowledge of the Defendants that including this information in
19 an officer's personnel file would immediately make it public demonstrates
20 that for the purposes of a defamation cause of action Defendants acted
21 with a reckless disregard for the truth intending that this information
22 would then be made public and cause harm to Fila.
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The elements of a cause of action for defamation of character are established under these facts and the granting of summary judgment was error.

FALSE LIGHT

The false light claim alleged was not present in the Thurston County cause of action and thereby is not subject to any collateral estoppel or res judicata argument.

Fila will stand on the pleading of the opening brief regarding the False Light claim. A reasonable trier of fact could determine that Sgt. Kruse acted with reckless disregard when he purposely included highly personal, embarrassing, and inflammatory material in the personnel file on a fellow officer even though the information was without question completely unrelated to the actions of the individual officer, in this case Sgt. Silvestre. Sgt. Kruse as well as the administration of WPD who knowingly included this information in Sgt. Silvestre's personnel file was also aware at the time that this personnel file would be available to the public. (CP 1056-1060)

NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Defendants once again rely upon their overly broad interpretation of the Keates decision and claim that law enforcement is not subject to liability in tort. As pointed out in Fila's opening brief the Keates decision was factually distinguishable in that this case was dealing with the concept

1 of a criminal investigation. The facts of this situation do not address a
2 criminal investigation. These facts address the deliberate and intentional
3 actions of the Defendants to violate Fila's constitutional right to pursue an
4 occupation. The Keates decision is not to be broadly interpreted as argued
5 by Defendants. Fila will stand on the initial pleading in his opening brief
6 for the balance of his argument on the negligent infliction of emotional
7 distress claim.
8

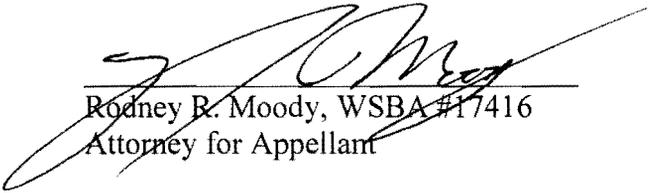
9 CONCLUSION

10 With due respect to Judge Shea, Judge Wickham, and the panel of
11 Division Two, clear legal error has been committed when these various
12 judicial officials failed to consider *all of the evidence presented* in
13 response to the motions for summary judgment, then in addition chose to
14 weigh the evidence presented, and then granted summary judgment with a
15 disregard for the appropriate standard applicable on a motion for summary
16 judgment. Clear legal error has been committed and these decisions
17 cannot be utilized for the purpose of granting summary judgment in this
18 cause of action because of the concepts of collateral estoppel or res
19 judicata. The factual evidence submitted by Fila to support the cause of
20 action for civil conspiracy is literally overwhelming. This evidence
22 includes a clear and direct statement by the second highest placed law
23 enforcement member of the WPD that they needed to be more proactive
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1 in their own efforts to negatively impact Club Level, including pressing
2 Liquor Control to shut the business down. No clearer statement of intent
3 could possibly exist. The granting of summary judgment was error.

4 Factual evidence to support the causes of action for defamation of
5 character, false light, negligent infliction of emotional distress, and
6 tortious interference with the business relationship (which was not argued
7 by Defendants in their responsive memorandum) all exist such that a
8 reasonable jury could conclude that a sustainable cause of action exists.
9 The granting of summary judgment was legal error and should be
10 reversed.
11

12 RESPECTFULLY SUBMITTED this 10 day of February, 2015.

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16 Rodney R. Moody, WSBA #17416
17 Attorney for Appellant
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APPENDIX A
SUPPLEMENTAL AUTHORITY

FILED
COURT OF APPEALS
DIVISION II

2014 DEC 30 AM 9:48

STATE OF WASHINGTON

BY lp
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLUB LEVEL, INC., and RYAN FILA, a
single man,

Appellants,

v.

WASHINGTON STATE LIQUOR CONTROL BOARD; PAT KOHLER, in her individual capacity as Executive Director of the Washington State Liquor Control Board; SHARON FOSTER, in her individual capacity as a member of the Washington State Liquor Control Board; RUTHANN KUROSE, in her individual capacity as a member of the Washington State Liquor Control Board; CHRIS MARR, in his individual capacity as a member of the Washington State Liquor Control Board; SERGEANT TOM STENSATTER, in his individual capacity as a Sergeant employed by the Washington State Liquor Control Board; and MATT MURPHY, in his individual capacity as an officer employed by the Washington State Liquor Control Board,

Respondents.

No. 45270-7-II

UNPUBLISHED OPINION

BJORGEN, A.C.J. — Ryan Fila and Club Level Inc. (collectively, Fila) appeal from the trial court's dismissal on summary judgment of Fila's suit against the Washington State Liquor Control Board (WSLCB) and certain of its employees. In his suit Fila challenged enforcement

actions taken by WSLCB employees involving Fila's nightclub, Club Level, claiming violation of his right to due process, negligent supervision, civil conspiracy, and tortious interference with a business expectancy. Fila argues on appeal that the trial court erred in granting summary judgment to the WSLCB because (1) the right to pursue the occupation of nightclub owner free from excessive police interference is clearly established under federal law, such that qualified immunity does not bar his cause of action under 42 U.S.C. section 1983; (2) his negligent supervision claim against the WSLCB is not redundant of his other claims; and (3) he submitted sufficient evidence to create a material issue of fact as to his claims of civil conspiracy and tortious interference with a business expectancy. We affirm the trial court.

FACTS

The parties' characterizations of the record differ in some respects. Because the trial court dismissed Fila's claims on the WSLCB's motion for summary judgment, we present the facts in the light most favorable to Fila, the nonmoving party.

FACTUAL BACKGROUND

Fila opened Club Level in August 2010, on the second floor of a downtown Wenatchee building owned by Arturo Rodriguez. Rodriguez operated a nightclub in the same building known as "Volcano" or "El Volcan," where Fila had served as bar manager. Clerk's Papers (CP) at 139-40.

Club Level quickly attracted the attention of local law enforcement officials. On January 2, 2011, Officer Kirk Drolet of the Wenatchee Police Department (WPD) sent an e-mail to WSLCB officer Matthew Murphy, stating that WPD officers "are brainstorming how to help Club Level/Volcano from sucking up immense amounts of our time," that Drolet "figure[d] a few expensive tickets [would] slow things down," and requesting "some info from you on things

we can do to help Club Level . . . and Fuel . . . and Sharx.”¹ CP at 299. Murphy responded by offering some suggestions for how to write certain citations and stated, “If you write a citation for RCW 66.44.200[, prohibiting alcohol sales to persons apparently under the influence of liquor, p]lease let me know and I will also go and cite the bar and possibly the bartender.” CP at 300.

On February 28, WPD Captain Kevin Dresker sent an e-mail to certain WPD officers who had made arrests following a fight at Club Level. Dresker noted that “Club Level is an issue,” that WPD officers “had to deal with large and unruly crowds” the previous weekend, and that “[t]his not only presents an officer safety issue but also pulls officers away from other areas of the city.” CP at 318.

Murphy requested that his supervisor, Lieutenant Kevin Starkey, designate “El Volcan (Club Level)” as a “location of strategic interest” on March 9, 2011, and Starkey agreed. CP at 284, 286. Under the location of strategic interest program, the WSLCB targeted for increased enforcement action “a small percentage of [liquor] licensees creating a disproportiona[te] threat to the health and safety of communities.” CP at 266. Under this program, WSLCB officials cooperated “with any and all law enforcement and regulatory agencies available” to target licensees with

multiple premises visits, compliance checks using operatives 20 year[s] of age and younger, extended and repeated undercover operations, extended surveillance and any other lawful practice deemed necessary.

CP at 267. WSLCB officials designated locations of strategic interest based on a variety of factors, including observations by liquor enforcement officers or police, complaints, violations,

¹ Fuel and Sharx were other Wenatchee nightclubs.

warnings, calls for emergency services, criminal activity, driving under the influence referrals, and input from local authorities and the community.

WSLCB employee Sergeant Tom Stensatter assumed responsibility for liquor enforcement in the downtown Wenatchee area on August 1, 2011. Stensatter issued a citation to Club Level on August 23, based on an incident in which WPD officers responded to a call on Saturday, August 14, and discovered and cited a person under age 21. The WSLCB subsequently issued a formal complaint against Fila based on the citation, alleging that Fila or his employees “allowed a person under twenty-one (21) years of age to enter and remain in an area classified as off-limits.” CP at 272.

Fila challenged the citation and obtained a hearing before an administrative law judge (ALJ). At the hearing, Stensatter testified that neither a licensee’s constructive knowledge that a minor has entered the premises nor efforts by bar staff to locate and remove the minor upon learning of the minor’s presence were relevant to whether the violation had occurred.

Stensatter’s testimony misstated the relevant legal standard. *See Reeb, Inc. v. Wash. State Liquor Control Bd.*, 24 Wn. App. 349, 353, 600 P.2d 578 (1979) (holding that liability for a violation arises from inaction in the face of “the licensee’s actual or constructive knowledge of the circumstances which would foreseeably lead to the prohibited activity”).

The ALJ dismissed the complaint against Fila on July 19, 2012. The ALJ concluded that Club Level did not “allow” the minor to remain on the premises because “the Licensee immediately engaged in [a] search [for] the minor upon having knowledge that the minor was present” and “continued its efforts to locate the minor until the minor was located by the law enforcement officers.” CP at 106. The WSLCB adopted the ALJ’s findings and conclusions on August 28, 2012.

Meanwhile, in September 2011, Fila notified the City of Wenatchee of his intent to sue based on the conduct of WPD. Fila filed suit in federal court against the City in February 2012. *Club Level & Ryan Fila v. City of Wenatchee*, U.S.D.C. No. CV-12-00088-EFS.

On April 25, 2012, Stensatter informed Rodriguez by e-mail that, although Rodriguez's license had originally applied to all three floors of the building containing El Volcan, and each floor had separate access from the stairwell, when Fila obtained the Club Level license for the second floor, "it created a separation of [Rodriguez's] licensed premises." CP at 387. The e-mail stated that Rodriguez could no longer serve alcohol at special events on the third floor until he obtained a new license for that floor. Stensatter notified Rodriguez of this new interpretation of the licensing regulations only three days before an event involving alcohol service was scheduled to take place on the third floor. Shortly after this incident, Fila decided to move Club Level to a different location.

Fila's attorney sent the WSLCB's executive director, Pat Kohler, a letter, dated April 25, concerning Stensatter's refusal to allow alcohol service on the third floor of Rodriguez's building. In the letter, Fila's attorney expressed "concern[] that inappropriate and undue influence is being exerted through the enforcement arm of [WSLCB] against Mr. Fila personally and Club Level" based on "personal knowledge that Sgt. Stensatter is a personal friend of Chief Tom Robbins of the WPD." CP at 332. Fila's attorney sent Kohler a second letter, dated May 1, also concerning alcohol service on the third floor. Kohler did not respond to either letter.

On June 1, Fila notified the state's Department of Risk Management of his intent to sue the state and various officials based on the conduct of the WSLCB's employees. On June 11, Fila's attorney sent Kohler a letter designated a "Formal Complaint." CP at 338. The letter described Stensatter's failure to adequately investigate the complaint concerning Club Level

allowing a minor to remain on the premises, his erroneous testimony and inappropriate laughter at the hearing concerning that complaint, and his denial of permission for alcohol service on the third floor of Rodriguez's building. The letter closed by advising Kohler that her "officers in the Chelan County area [were] dragging [her] agency into litigation" and expressing the hope that Kohler would resolve the matter short of litigation. CP at 341.

According to Fila, Stensatter subsequently told him that he "could make the relocation of this business fast, smooth and easy for [Fila] if [Stensatter] was not named in the lawsuit," but that "if he was named in the lawsuit the delay . . . could be as much as 90 days." CP at 438. Stensatter admitted that he talked to Fila about the impending lawsuit on August 4, 2012, but insisted that he merely informed Fila that, were Stensatter named in the suit, he could no longer "assist" Fila because the WSLCB, in order to prevent any conflict of interest, would assign a different officer to Club Level. CP at 183.

On August 17, Fila reopened Club Level in a new location. At 12:45 a.m. on Saturday, August 25, Stensatter conducted a premises check at the new location, demanding to see the identification and alcohol service permits for all Club Level staff, including Fila. Based on this visit, Stensatter issued Fila a citation for "inadequate lighting" on August 29, 2012, the day after the WSLCB adopted the ALJ's findings and conclusions dismissing the prior complaint involving a minor on the premises. CP at 276-77.

Stensatter called WSLCB licensing officials the next morning, informing them of the inadequate lighting citation and pointing out a regulation, WAC 314 -07.060(4), authorizing the cancellation of Fila's temporary permit based on the violation. Fila alleged that Stensatter conducted the check at the peak of Friday night service hours as "a deliberate retaliatory act on

his part which he knew [would] have a negative impact” on Fila’s business. CP at 437. The WSLCB eventually issued a formal complaint based on the citation.²

Fila’s attorney sent Kohler a fourth letter, dated August 31, 2012, informing her of Stensatter’s conduct regarding the inadequate lighting citation. Kohler did not respond. Kohler later explained that she had initially assigned a captain to look into Fila’s complaints “and brought in our HR director into this issue to see if we should investigate,” but that “because the tort claim was filed everything was placed on hold.” CP at 238-39.

In opposition to WSLCB’s summary judgment motion, discussed below, Fila submitted an analysis of WPD incident logs, obtained through discovery, concerning police involvement with various Wenatchee bars from August 2010 through August 2012. The analysis showed that Club Level had 183 incidents involving police, more than twice as many as Fuel, the Wenatchee bar with the second greatest number of such incidents. Of these 183 incidents, Club Level staff or patrons initiated 139 of them by requesting police assistance. Club Level incidents generated 44 police reports, 8 for assaults, compared to 12 reports, including 6 for assaults, resulting from incidents at Fuel. Fila’s analysis also revealed that WPD had forwarded 27 reports for Club Level to the WSLCB, compared to only 2 for Fuel and 6 for all other analyzed bars combined.

Fila also submitted an analysis to the superior court showing that WPD officers conducted 160 “walk-throughs” at Club Level during this same period, 16 of which involved more than two officers, compared to 113 walk-throughs at Fuel, only 2 of which involved more than two officers. Other Wenatchee bars analyzed had far fewer walk-throughs, and only one involved more than two officers. Fila also submitted an analysis purporting to show that WPD

² Fila appealed, but an ALJ affirmed the order.

officers conducted more walk-throughs and forwarded more reports to the WSLCB immediately following certain actions Fila had taken to protect his rights.

PROCEDURAL HISTORY

Fila filed this lawsuit in Thurston County Superior Court on August 30, 2012. The amended complaint named the WSLCB itself and three of its appointed members in their individual capacities, as well as Kohler, Stensatter, and Murphy. The complaint asserted various causes of action under federal and state law based on due process, equal protection, unreasonable search and seizure, negligent supervision, defamation of character, conspiracy, negligent infliction of emotional distress, outrage, tortious interference with a business expectancy, and the public disclosure act. Fila requested injunctive relief, compensatory and punitive damages, and costs and attorney fees, in part, under 42 U.S.C. section 1983.

The WSLCB moved for summary judgment as to all defendants on all claims, stipulating that Stensatter and Murphy acted within the scope of their employment at all relevant times. The WSLCB argued, among other things, that (1) its commissioners had statutory immunity, (2) the liquor control board itself was not a "person" subject to suit under 42 U.S.C. section 1983, (3) qualified immunity barred the federal claims against other WSLCB employees, and (4) the remaining claims failed because Fila had either failed to state a valid cause of action or failed to allege facts sufficient to support the cause of action asserted.

In response, Fila agreed to voluntarily dismiss the board member defendants and to dismiss all section 1983 claims against the WSLCB itself. Fila also agreed to dismiss all of his claims against individual defendants except for (1) violation of his right to due process, (2) negligent supervision, (3) civil conspiracy, and (4) tortious interference with a business expectancy.

The superior court granted in part the WSLCB's summary judgment motion, except as to Fila's due process claim. The WSLCB moved for reconsideration on the due process claim, and while its motion was pending, the United States District Court dismissed Fila's federal suit against the City of Wenatchee, the WPD, and its officers.

The trial court granted the WSLCB's motion for reconsideration, resulting in an order of summary judgment in the defendants' favor on all of Fila's claims. Fila appeals.

ANALYSIS

After discussing the standard of review for summary judgment, we first address Fila's section 1983 due process claim. We then turn to Fila's state law claims.

I. STANDARD OF REVIEW

We review a grant of summary judgment de novo, performing the same inquiry as the trial court. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407-08, 282 P.3d 1069 (2012); *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318 (2009). A court should grant summary judgment only if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c).

A party moving for summary judgment bears the burden of demonstrating that there is no genuine issue of material fact. *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton*, 115 Wn.2d at 516. If the moving party satisfies its burden, the nonmoving party must present evidence demonstrating that a material fact remains in dispute. *Atherton*, 115 Wn.2d at 516. "If the nonmoving party fails to

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do so, then summary judgment is proper.” *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005).

In determining whether summary judgment was proper, we must consider all facts, and the reasonable inferences therefrom, in the light most favorable to the nonmoving party.

Vallandigham, 154 Wn.2d at 26; *Atherton*, 115 Wn.2d at 516. Under this standard, a trial court properly grants summary judgment only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26. Thus, we consider the record in the light most favorable to Fila.

II. DUE PROCESS CLAIM UNDER 42 U.S.C. SECTION 1983

Fila bases his due process claim on 42 U.S.C. section 1983, which provides in relevant part that

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

To state a cause of action under this provision, “a plaintiff need only allege that (1) defendant acted under color of state law, and (2) defendant’s conduct deprived plaintiff of rights protected by the Constitution or laws of the United States.” *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992). Washington courts have concurrent jurisdiction with the federal courts to hear such claims. *Sintra*, 119 Wn.2d at 11; *Haywood v. Drown*, 556 U.S. 729, 734-35, 129 S. Ct. 2108, 173 L. Ed. 2d 920 (2009).

Fila contends that the trial court erred in dismissing his section 1983 claim against Kohler, Murphy, and Stensatter on summary judgment because the evidence submitted established that these employees, under color of state law, deprived him of the “right to pursue

an occupation” guaranteed by the United States’ due process clause. Br. of Appellant at 24-34. The qualified immunity from suit enjoyed by law enforcement personnel performing their official duties does not bar his claim, Fila maintains, because “[t]he right to operate a liquor establishment with a state[-]issued nightclub license free of excessive and unreasonable police interference is clearly recognized” under federal court precedents, such that “any reasonable police officer” would have realized that the conduct Fila alleged violated that right. Br. of Appellant at 32-34.

A. Defendants Implicated by Fila’s Section 1983 Claim

The WSLCB asserts that “Fila pled no [section] 1983 claim against Director Kohler” and makes “no claim that Murphy deprived Fila of any federal right” in this appeal, leaving “Stensatter as the only remaining individual defendant against whom the [section] 1983 claim was pled.” Br. of Resp’t at 14. These assertions, however, are not consistent with the record.

Under the heading “Due Process,” Fila’s complaint states, “This Cause of Action is brought by Plaintiff against *all Defendants* for deprivation of constitutional rights within the meaning of 42 U.S.C.A. § 1983.” CP at 45 (emphasis added). The complaint names Kohler as a defendant, and alleges that she failed to investigate or take action against Stensatter despite actual notice of his allegedly unconstitutional actions. Fila submitted to the trial court copies of letters his counsel sent to Kohler notifying her of Stensatter’s conduct.

Constitutional deprivations by a subordinate may subject a supervisor to liability under section 1983 if “a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation” exists. *Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989). Federal courts have imposed such supervisory liability where an official knew or should have known of a subordinate’s violations of federally protected rights and failed to act to prevent further

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misconduct. *McClelland v. Facticeau*, 610 F.2d 693, 697 (10th Cir. 1979); *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976); *Wright v. McMann*, 460 F.2d 126, 134-35 (2d Cir. 1972); *see also Ybarra v. Reno Thunderbird Mobile Home Vill.*, 723 F.2d 675, 680-81 (9th Cir. 1984).

As executive director of the WSLCB, Kohler arguably had supervisory authority over Stensatter. Kohler also had notice of the challenged conduct by Stensatter. Thus, assuming Stensatter's conduct violated a federal right, Fila sufficiently pled a section 1983 claim against Kohler.

The assertion that Fila makes no section 1983 claim against Murphy also is not supported by the record. As discussed, the complaint asserts a section 1983 claim against "all defendants," and it names Murphy as a defendant. CP at 28. The WSLCB points out that Fila's complaint alleged that Murphy violated Fila's Fourth Amendment rights and that Fila later dropped that claim. Fila's complaint, however, also alleged a due process violation against Murphy, and his brief argued that Murphy's conduct gave rise to a valid section 1983 claim. Further, as noted above, Fila's due process claims were not among those he dismissed in his response to the WSLCB's motion for summary judgment.

Thus, while no section 1983 claim remains against the state, the WSLCB as a government agency, or board members Foster, Kurose, and Marr, Fila did plead such a claim against Kohler and Murphy. The questions remain, however, whether Fila sufficiently pled a violation of a federal right, and whether qualified immunity bars his suit.

B. Qualified Immunity and the Right to Pursue an Occupation

The affirmative defense of qualified immunity protects government officials from suits for civil damages based on their performance of discretionary functions, as long as "their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). Whether qualified immunity bars a suit generally presents a question of law for the trial court. *Mitchell v. Forsyth*, 472 U.S. 511, 528, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). The protections of qualified immunity apply regardless of whether the defendant official’s alleged error of judgment is “a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.” *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004) (Kennedy, J., dissenting)).

The United States Supreme Court has “stressed the importance of resolving immunity questions at the earliest possible stage in litigation.” *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). To overcome the immunity, (1) the plaintiff must allege facts that, if proved, would “make out a violation of a constitutional right,” and (2) the right must have been “clearly established at the time of defendant’s alleged misconduct.” *Pearson*, 555 U.S. at 232 (internal quotation marks omitted). We first consider whether Fila sufficiently alleged a violation of a protected right. Concluding that he did not, we do not reach the question of whether relevant precedent had “clearly established” the right articulated.

Fila alleges that the WSLCB’s employees deprived him of a “liberty or property interest,” specifically his “constitutional . . . right to pursue an occupation.” Br. of Appellant at 25. Fila characterizes the right at issue as “[t]he constitutional right to operate a liquor establishment with a state[-]issued nightclub license free of excessive and unreasonable police interference.” Br. of Appellant at 32-33.

Under well-established federal law, “[a] State cannot exclude a person from [an] occupation in a manner or for reasons that contravene the Due Process or Equal Protection

Clause of the Fourteenth Amendment.” *Schwartz v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238-39, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *see also Greene v. McElroy*, 360 U.S. 474, 492, 79 S. Ct. 1400, 3 L. Ed. 2d 1377 (1959) (noting that “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts” and citing cases). Fila directs our attention to *Benigni v. City of Hemet*, in which the Ninth Circuit Court of Appeals held that a trial court had properly submitted to the jury a section 1983 claim based on infringement of the right to pursue an occupation, where the evidence sufficed to show “excessive and unreasonable police conduct was intentionally directed toward Benigni’s bar to force him out of business.” 879 F.2d 473, 478 (9th Cir. 1988).

Benigni, however, helps Fila far less than he contends. First, Fila’s allegations against the WSLCB’s employees are much less egregious than the police conduct addressed in *Benigni*, 879 F.2d at 478:

The testimony reveals that bar checks occurred nightly, up to five or six times per night, that customers were frequently followed from the [bar] and sometimes arrested, that staff and customers frequently received parking tickets, that officers parked at the old train depot across the street, and that there were usually three or four officers there at all times in the evening, and that cars were often stopped in the vicinity of the [bar] for traffic violations that had occurred elsewhere.

Furthermore, the defendants there failed to object to the trial court’s instructions on Benigni’s due process claim, and the reviewing court therefore declined to “address the adequacy of [those] instructions,” instead considering only “whether there is evidence supporting the verdict sufficient to justify submitting the various theories of liability to the jury.” *Benigni*, 879 F.2d at 476. The *Benigni* court therefore did not consider the precise nature or scope of the right identified.

Most importantly, subsequent precedents have more narrowly delineated the contours of the relevant right: the Ninth Circuit Court of Appeals later specified that, to successfully plead a substantive due process violation based on the right to pursue an occupation, the plaintiff must show that “clearly arbitrary and unreasonable” state action “having no substantial relation to the public health, safety, morals, or general welfare” prevented the plaintiff from pursuing comparable employment in the relevant industry. *Wedges/Ledges of Cal. Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 65 (9th Cir. 1994) (quoting *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926)). Under this standard, Fila has raised no material issue of fact that would require reversal of the trial court’s summary judgment order.

First, Fila did not submit evidence showing that the WSLCB employees’ conduct prevented him from operating Club Level, let alone from pursuing any comparable employment in the industry. The plaintiff in *Benigni* had alleged that police “harassment eventually forced him to sell at a loss.” *Benigni*, 879 F.2d at 475. Fila does allege in his brief, without citation to the record, that “significantly declining revenues caused by the undue attention” of the WSLCB and WPD “forced [Fila] to close Club Level in May 2013.” Br. of Appellant at 27-28. The only support for the claim in the record consists of Fila’s counsel’s statement at the hearing on the WSLCB’s motion for reconsideration that the “behavior and the pressure placed upon him by these various law enforcement agencies in Chelan County” had forced Fila to close Club Level. Verbatim Report of Proceedings (Aug. 9, 2013) at 24. Argument from counsel, however, is not evidence. *Green v. A.P.C.*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998).

Were we to overlook these deficiencies, Fila must still show that defendants’ conduct was clearly arbitrary and unreasonable and bore no substantial relation to public health or safety to show a deprivation of the right to pursue an occupation under substantive due process.

Wedges/Ledges, 24 F.3d at 65. Fila does not claim that Stensatter issued citations without probable cause to believe that the violations had occurred and points to no evidence, other than the somewhat suspicious timing of one of the citations, that the WSLCB's employees acted with a retaliatory motive. Fila availed himself of state law procedures each time the employees took adverse action against him.

Further, the state action Fila alleges has a substantial relationship to protecting public health and safety. The legislature explicitly adopted the laws that the WSLCB enforces "for the protection of the welfare, health, peace, morals, and safety of the people of the state." RCW 66.08.010. According to unrebutted evidence in the record, in the period leading up to the challenged conduct, more persons arrested in Wenatchee for driving under the influence reported last obtaining alcohol from Club Level than from any other bar. The analysis of police incident logs that Fila submitted to the superior court, showing a much higher level of police activity at Club Level than at other Wenatchee bars, also showed that 139 of the 183 incidents of police involvement there between August 2010 and August 2012 originated with complaints from patrons or Club Level staff. This figure amounted to more than double the number of patron- and staff-initiated incidents for any other bar analyzed. In light of these numbers, the WSLCB's employees could quite reasonably have decided, in the interest of public safety, to target Club Level for heavier enforcement than other local bars.

Fila did not submit evidence showing either that the employees' conduct prevented him from operating a bar or that the challenged conduct bore no substantial relation to public health, safety, or welfare. Under the standard articulated in *Wedges/Ledges*, 24 F.3d at 65, the uncontroverted evidence fails to show any violation of the substantive due process right to pursue an occupation. With that, Fila has failed to show the most basic element of any claim

under 42 U.S.C. section 1983, the deprivation of a federal right. For the same reason, Fila's claim also founders on the first prong of the qualified immunity test, since Fila has not alleged facts that would "make out a violation of a constitutional right" under *Pearson*, 555 U.S. at 232. The trial court did not err in dismissing Fila's section 1983 claim on summary judgment.

III. NEGLIGENT SUPERVISION

Fila also contends the trial court erred in dismissing his claim that Kohler and the WSLCB negligently supervised Murphy and Stensatter. The WSLCB maintains that the court properly dismissed the claim because, "where the employer admits that the employee acted within the scope of employment[,] a cause of action for negligent supervision is redundant." Br. of Resp't at 25. The WSLCB also argues that Kohler cannot be liable for Murphy's or Stensatter's conduct under this theory because she was not their employer and that Fila's evidence at most shows only that Kohler decided not to respond to letters from Fila's attorney.

The doctrine of vicarious liability or respondeat superior "imposes liability on an employer for the torts of an employee who is acting on the employer's behalf." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). Under this doctrine, "the scope of employment limits the employer's vicarious liability . . . [for] the employee's negligence or intentional wrongdoing." *Niece*, 131 Wn.2d at 48. Thus, if "the employee steps aside from the employer's purposes in order to pursue a personal objective of the employee, the employer is not vicariously liable." *Niece*, 131 Wn.2d at 48. Whether an employee acted within the scope of employment ordinarily presents a question of fact for the jury. *Gilliam v. Dep't of Soc. & Health Servs.*, 89 Wn. App. 569, 585, 950 P.2d 20 (1998).

"Even where an employee is acting outside the scope of employment," however, employers also owe a duty "to foreseeable victims[] to prevent the tasks, premises, or

instrumentalities entrusted to an employee from endangering others.” *Niece*, 131 Wn.2d at 48. “This duty gives rise to causes of action for negligent hiring, retention and supervision,” causes of action “based on the theory that such negligence on the part of the employer is a wrong to [the injured party], entirely independent of the liability of the employer under the doctrine of respondeat superior.” *Niece*, 131 Wn.2d at 48 (internal quotation marks omitted). The theories are not entirely independent, however: we have held that “a claim for negligent hiring, training, and supervision is generally improper when the employer concedes the employee’s actions occurred within the course and scope of employment.” *LaPlant v. Snohomish County*, 162 Wn. App. 476, 480, 271 P.3d 254 (2011).

The issue presented centers on the following holding from *Gilliam*:

Here, the State acknowledged [the employee] was acting within the scope of her employment, and that the State would be vicariously liable for her conduct. Under these circumstances a cause of action for negligent supervision is redundant. If *Gilliam* proves [the employee’s] liability, the State will also be liable. If *Gilliam* fails to prove [the employee’s] liability, the State cannot be liable even if its supervision was negligent. We find no error in the trial court’s dismissing the cause of action.

89 Wn. App. at 585. *Fila* points to the *LaPlant* court’s discussion of a federal case, *Tubar v. Clift*, No. C05-1154-JCC, 2008 WL 5142932 (W.D. Wash. 2008), in which a federal district court distinguished *Gilliam*:

In *Tubar*, Kent Police Officer Jason Clift discovered a stolen vehicle in the parking lot of Tubar’s apartment building and waited in the bushes for the driver to return. When she did, accompanied by Tubar, Clift announced his presence, which was ignored. As Tubar and the driver drove out of the parking lot and toward Clift, Clift fired three shots, injuring Tubar. Tubar brought a lawsuit against the City of Kent and Officer Clift, alleging a 42 U.S.C. section 1983 claim and state law claims for negligent hiring, training, supervision, and retention.

The City argued that Washington case law precluded Tubar’s state law claims, relying on *Gilliam*. The court distinguished *Gilliam* on the basis that Tubar had not asserted a negligence claim against Clift individually:

Here, there is no such redundancy because Plaintiff has not asserted a negligence claim against Officer Clift for which the City would be vicariously liable by admission. Instead, Plaintiff claims that the City itself is negligent for breaching its own standard of care with respect to the hiring, supervision, and training of Officer Clift. [*Tubar*, 2008 WL 5142932 at *7].

We distinguish *Tubar* from LaPlant's case for the same reason. As in *Gilliam*, LaPlant has asserted a negligence claim against the deputies for which the County would be vicariously liable. *Tubar* is inapposite.

LaPlant, 162 Wn. App. at 482-83 (footnotes omitted). From this, Fila contends that, because he asserted no negligence claim against Murphy or Stensatter, his negligent supervision claim against Kohler was not redundant.

Fila's argument fails. Although he did not assert a *negligence* claim against Murphy or Stensatter, he did assert other state law claims for which the WSLCB or state would be vicariously liable. Because the WSLCB's liability for negligent supervision would depend on the establishment of claims against Murphy and Stensatter for which the liquor board admits it would be vicariously liable should Fila prevail, *Gilliam* and *LaPlant* control. The negligent supervision claim is redundant, and the trial court did not err in dismissing it.³

IV. CIVIL CONSPIRACY

Fila contends that the trial court erred in dismissing his civil conspiracy claim because it applied an incorrect legal standard. Specifically, Fila points out that the court's letter opinion stated that "the plaintiffs must provide clear, cogent, and convincing evidence" to sustain such a

³ The WSLCB also presents strong arguments that (1) Kohler cannot be liable based on Murphy's and Stensatter's conduct because she is not their employer and that (2) Fila failed to allege facts giving rise to a negligent supervision claim because the only evidence in the record shows that, although Kohler did not respond to letters from Fila's attorney, she did assign an officer to investigate Stensatter. With our decision above, we need not resolve these issues.

claim and argues that this shows that the court failed to view the evidence in the light most favorable to the nonmoving party. We disagree.

As an initial matter, the substantive evidentiary standard at trial necessarily informs the court's inquiry on summary judgment as to whether a material issue of fact remains. *See Herron v. KING Broad. Co.*, 112 Wn.2d 762, 767-68; 776 P.2d 98 (1989). Thus, the trial court did not err in considering the clear, cogent, and convincing standard in its analysis.

To prevail on a civil conspiracy claim, the plaintiff must prove by clear, cogent, and convincing evidence that (1) "two or more persons combine[d] to accomplish an unlawful purpose or . . . to accomplish some purpose not in itself unlawful by unlawful means," and that (2) "the alleged coconspirators entered into an *agreement* to accomplish the object of the conspiracy." *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528-29, 424 P.2d 290 (1967). "While a finding that a conspiracy existed may be based on circumstantial evidence, mere suspicion is not a sufficient ground upon which to base a finding of conspiracy." *Corbit*, 70 Wn.2d at 529.

The court dismissed the claim because Fila failed to produce evidence of an agreement to accomplish the unlawful purpose alleged. As the court pointed out,

[t]he evidence in this file does not show an agreement to harm the plaintiff's business. It merely shows communications between officers and the Liquor Control Board. Those communications are a normal part of their working relationship. The plaintiff has completed discovery and has not demonstrated that the circumstances are reasonably consistent only with the existence of a conspiracy.

CP at 479.

The trial court was correct. The evidence submitted shows only discussions between two law enforcement agencies about attempts to strictly enforce the law against a bar that generated a disproportionate number of requests for police service. Fila failed to demonstrate any possibility

of showing by clear, cogent, and convincing evidence an agreement, an unlawful purpose, or the use of unlawful means. We affirm the trial court's dismissal of Fila's conspiracy claim.

V. TORTIOUS INTERFERENCE WITH A BUSINESS EXPECTANCY

Finally, Fila contends that the trial court erred in dismissing his tortious interference claim because he provided evidence of all the elements at issue in the case. Again, we disagree.

Our Supreme Court has articulated the elements of a claim for tortious interference with a contractual relationship or business expectancy as follows:

(1) the existence of a valid contractual relationship or business expectancy; (2) that defendants had knowledge of that relationship; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that defendants interfered for an improper purpose or used improper means; and (5) resultant damage.

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 157, 930 P.2d 288 (1997). To prevail on such a claim, a "plaintiff must show not only that the defendant intentionally interfered with his business relationship, but also that the defendant had a 'duty of non-interference; i.e., that he interfered for an improper purpose . . . or . . . used improper means.'"

Pleas v. City of Seattle, 112 Wn.2d 794, 804, 774 P.2d 1158 (1989) (quoting *Straube v. Larson*, 287 Or. 357, 361, 600 P.2d 371 (1979)).

The only evidence Fila presented of a legitimate contractual relationship or business expectancy concerned his lease with Rodriguez. Fila submitted a declaration in which Rodriguez averred that

Mr. Fila and I did have a contractual agreement where he would pay me \$4,000 per month to lease the space within which he was operating Club Level on the second floor. Mr. Fila was not able to fully comply with this agreement because of declining sales which he had inside Club Level. At this time Mr. Fila still owes me monies which remain unpaid from the terms of this lease.

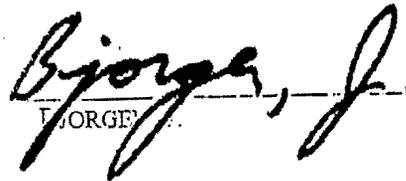
CP at 448.

Fila, however, points to no evidence that the WSLCB employees knew of his arrangement with Rodriguez. Instead, Fila merely asserts that Murphy and Stensatter must have known about the lease because they knew Rodriguez owned the building. Fila also fails to submit evidence that would raise a material issue of fact as to whether the WSLCB employees had an improper purpose or used improper means. The trial court did not err in dismissing Fila's tortious interference claim on summary judgment.

CONCLUSION

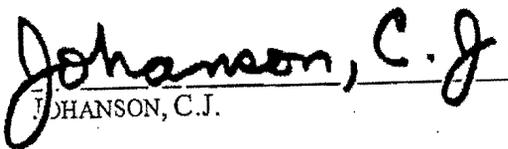
We affirm the trial court's dismissal of Fila's claims on summary judgment.

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



GEORGE

We concur:



JOHANSON, C.J.



MELNICK, J.

FILED

FEB 12 2015

[Signature]
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION THREE**

CLUB LEVEL, INC., and RYAN FILA, a single
man,
Plaintiffs - Appellants,

NO. 328309

vs.

Case No: 13-2-00869-1
Chelan County Superior Court, WA

CITY OF WENATCHEE, , et al.,
Defendants - Appellees.

DECLARATION OF MAILING

I certify that on the 11th day of February, 2015, I mailed a true and correct copy of the Reply Brief of Appellant, by depositing the same in the United States mail, postage prepaid, to Washington State Court of Appeals Division III, and Patrick McMahon Attorney at Law addressed as follows:

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DATED this 11 day of February, 2015.

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