

DISTRICT COURT, BOULDER COUNTY,
COLORADO
Court Address: 1777 Sixth Street, Boulder, CO 80302

Plaintiffs: FLEET RUSSELL WHITE, JR., an individual;
and PRISCILLA BROWN WHITE, an individual

Defendants: CITY OF BOULDER a Colorado home rule
municipality; and MARK R. BECKNER, in his official
capacity as Chief of the Boulder Police Department and
Custodian of records for the Boulder Police Department.

Attorneys for Defendants:
Office of the City Attorney
Thomas A. Carr, Atty. Reg. No. 42170
Claybourne M. Douglas, Atty. Reg. No. 6346
Address:
P.O. Box 791
Boulder, CO 80306

▲ COURT USE ONLY ▲

**DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR
SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS FOR FAILURE TO STATE
A CLAIM BASED ON CLAIM PRECLUSION OR ISSUE PRECLUSION**

C.R.C.P. 121 § 1-15, ¶8 Certification: Defendants' counsel has conferred in good faith with Plaintiffs about this Motion. Plaintiffs oppose the relief requested in this Motion.

Defendants City of Boulder and Mark Beckner (collectively the "City") pursuant to C.R.C.P. 12(b), move to dismiss the Complaint and Application for Order to Show Cause (collectively the "Complaint") for the following reasons:

1. Plaintiffs' Complaint presents claims for relief that have already been, or could have been, litigated in a prior case before this Court in which the parties were identical.
2. The Complaint requests the Court order Defendants to show cause why Defendant should not permit inspection and copying of criminal justice records requested in their February 19, 2014 letter (Exhibit A), which was as follows:

All records including but not limited to meeting notes; memoranda; communications and correspondence; interviews and transcriptions, whether such records are written or electronic, that came into existence at any time during 1997 until this date that refer to, or in any way relate to, the undersigned or any member of our respective families in connection with the claims and allegations of Nancy Krebs, also known as Nancy Jo Krebs, and the investigation thereof by local, state or federal law enforcement agencies, including the Boulder Police Department.

All those certain records specified and described in the attached October 3, 2002 City of Boulder Police Department memorandum to the Boulder District Court in *White v. City of Boulder*.

- Item #1: One video tape with images of Lee Hill and *Nancy Krebs*.
- Item #2: Fourteen (14) photographs related to the Krebs investigation.
- Item #3: Detective Tom Trujillo's fifty-five (55) page report and twenty (20) page Appendices of Krebs investigation.
- Item #4: Detective Jane Harmer's three (3) page report on the Krebs investigation.
- Item #5: FBI Agent Joseph Schwecke's five (5) page report on the Krebs investigation.

Including all "actual audio and/or video tapes used for the transcriptions and reports" as referenced in the October 3, 2002 City of Boulder Police Department memo.

3. Issue preclusion and claim preclusion preserve judicial resources by preventing the relitigation of stale claims, *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.*, 167 P.3d 175, 176 (Colo. App. 2007).

4. "Claim preclusion works to preclude relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not, *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 608 (Colo. 2005) Claim preclusion bars relitigation of a claim if there is:

- (1) finality of the first judgment;
- (2) identity of subject matter;
- (3) identity of claims for relief; and
- (4) identity of parties to the two actions.

Id.

Claim preclusion serves the dual purpose of protecting litigants from the burden of relitigating the same issue with the same party or his or her privy and of promoting judicial economy by preventing needless litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). Claim preclusion bars

not only the claims actually litigated in the first proceeding, but also those that could have been litigated. *Lobato v. Taylor*, 70 P.3d 1152, 1165 (Colo. 2003).

Wall v. City of Aurora, 172 P.3d 934, 937 (Colo. App. 2007)

5. Issue preclusion, also known as collateral estoppels, bars relitigation of an issue that is identical to an issue that has been actually litigated and necessarily adjudicated in a prior proceeding. *Stanton v. Schultz*, 222 P.3d 303, 307 (Colo. 2010).

6. Claim or issue preclusion are appropriate grounds for dismissal for failure to state a claim if the elements of the defense are evident from the pleadings, *Bristol Bay Productions, LLC v. Lampack*, 312 P.3d 1155 (Colo. 2013).

7. The Complaint alleges that in 2002, the Plaintiffs filed an Application for Order to Show Cause _____, seeking an Order to Show Cause why the Defendants should not permit the Plaintiffs to “inspect and copy criminal justice records relating to the Krebs investigation” for events related to the JonBenet Ramsey murder investigation. Complaint ¶ 10.

8. The Complaint also alleges that, in response to the instant request, the Plaintiffs were informed that “[t]he records you seek are among the records delivered to Judge Montgomery for inspection in 2002....” Complaint ¶ 17.

9. In Case No. _____, the Honorable Leal Montgomery conducted an *in camera* review and concluded that some records should be released, and others should not. Complaint ¶¶ 11-13; *id.* Exhibits 3, 5.

10. The Plaintiffs now seek to have this Court reconsider that decision by imposing on the parties, and the Court, the time and expense of conducting another hearing and *in camera* review. The Plaintiffs do not, and cannot, allege there has been any material change in circumstances.

11. As shown by the attached affidavit (Exhibit B) of Thomas Trujillo, the Boulder Police Department has no:

[R]ecords that came into existence, at any time, since the Department delivered records to Judge Montgomery in 2002 [under Boulder District Court Case _____ 1 RULING AND ORDER 9-26-02)] that refer to, or in any way relate to, the Plaintiffs or any member of their respective families in connection with the claims and allegations of Nancy Krebs, also known as Nancy Jo Krebs, and the investigation thereof by local, state or federal law enforcement agencies, including the Boulder Police Department.

12. As Judge Montgomery stated in her September 26, 2002 Ruling and Order, “Respondents have a legitimate interest in preventing disclosure of investigatory files of any open case. It is in the

public interest that disclosure of police investigations be limited for all of the reasons Chief Beckner testified to.”

13. If the Plaintiffs wished to challenge Judge Montgomery’s 2002 decision, they could have appealed, but did not do so. Instead, they seek now to have this Court reconsider the very same issues decided by Judge Montgomery by reviewing the very same documents that were reviewed by Judge Montgomery.

14. Issue preclusion and claim preclusion bar the Plaintiffs’ Complaint because the Plaintiffs now seek the very same documents previously considered in Judge Montgomery’s 2002 decision.

15. For these reasons, this Court should dismiss the Complaint and Application for Order to Show Cause in this action with prejudice. Defendants have attached a proposed Order for the Court’s consideration.

16. Plaintiffs’ claims are substantially frivolous, groundless and vexatious, not well grounded in fact or supported by a legal theory based on existing legal principles or a good faith argument for modification of existing law. Under C.R.C.P. 11(a) and C.R.S. § 13-17-102 (2) & (6), the Court should award the Defendants the amount of their reasonable expenses incurred because of the filing of the Complaint, including reasonable attorney’s fees.

Dated this 31st day of March 2014.

Respectfully Submitted,
OFFICE OF THE CITY ATTORNEY

By: /s/ Claybourne M. Douglas
Claybourne M. Douglas, No. 6346
Senior Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March 2014, a true and correct copy of the above and foregoing was electronically filed and served *via* ICCES, or by placing said copy in the United States mail, postage prepaid, and addressed as follows:

Fleet White, Jr.
Priscilla Brown White

/s/ Mary Wallace
Mary Wallace

Fleet Russell White, Jr. and Priscilla Brown White

DATE FILED: March 31, 2014

February 19, 2014

Mark Beckner
Chief of Police
Boulder Police Department
1805 33rd Street
Boulder, Colorado 80301

Dear Mr. Beckner,

Pursuant to C.R.S §24-72-301 et seq, the undersigned hereby request that the following records in the custody or control of the Boulder Police Department be made available to us for inspection and copying:

1. All records including but not limited to meeting notes; memoranda; communications and correspondence; interviews and transcriptions, whether such records are written or electronic, that came into existence at any time during 1997 until this date that refer to, or in any way relate to, the undersigned or any member of our respective families in connection with the claims and allegations of Nancy Krebs, also known as Nancy Jo Krebs, and the investigation thereof by local, state or federal law enforcement agencies, including the Boulder Police Department.

2. All those certain records specified and described in the attached October 3, 2002 City of Boulder Police Department memorandum to the Boulder District Court in *White v. City of Boulder*,

- Item #1: One video tape with images of Lee Hill and Nancy Krebs.
- Item #2: Fourteen (14) photographs related to the Krebs investigation.
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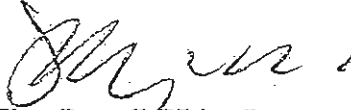
Including all "actual audio and/or video tapes used for the transcriptions and reports" as referenced in the October 3, 2002 City of Boulder Police Department memo.

Mark Beckner
February 19, 2014
Page Two

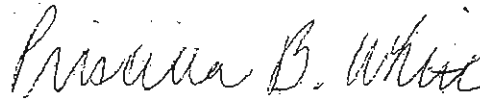
If you deny this request, please provide us with a written statement of the grounds for the denial, citing the law or regulation under which access is denied, as required by C.R.S. § 24-72-305 (6).

Your prompt response to this request will be appreciated. We can be contacted at the street address, phone or e-mail address provided above.

Thank you,



Fleet Russell White, Jr.



Priscilla Brown White

Enclosure: Boulder Police Department memorandum dated October 3, 2002

DISTRICT COURT, BOULDER COUNTY,
COLORADO
Court Address: 1777 Sixth Street, Boulder, CO 80302

DATE FILED: March 31, 2014

Plaintiffs: FLEET RUSSELL WHITE, JR., an individual; and PRISCILLA BROWN WHITE, an individual

▲ COURT USE ONLY ▲

Defendants: CITY OF BOULDER a Colorado home rule municipality; and MARK R. BECKNER, in his official capacity as Chief of the Boulder Police Department and Custodian of records for the Boulder Police Department.

Attorneys for Defendants:
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Thomas A. Carr, Atty. Reg. No. 42170
Claybourne M. Douglas, Atty. Reg. No. 6346
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**AFFIDAVIT OF THOMAS TRUJILLO IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT FOR
FAILURE TO STATE A CLAIM BASED ON CLAIM PRECLUSION OR ISSUE
PRECLUSION**

I, Thomas Trujillo, Affiant, being over the age of eighteen, and being first duly sworn, state as follows:

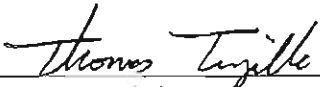
1. I am currently a Commander at the Boulder Police Department and have been employed with the department for 28 years. I was Boulder Police Department's lead investigator on the JonBenet Ramsey murder investigation.
2. After receipt of the above-captioned lawsuit, I reviewed the Department records database to determine if, subsequent to the Plaintiffs' 2002 lawsuit and judge's *in camera* review of then-responsive records, any new materials have been received that are responsive to the Plaintiffs' 2014 request.

3. Based on my research and my familiarity and understanding of the case and records, except as noted below, the Boulder Police Department has no records that came into existence at any time since the Department delivered records to Judge Montgomery in 2002

Ruling and Order dated 9-26-2002)] that refer to, or in any way relate to, the Plaintiffs or any member of their respective families in connection with the claims and allegations of Nancy Krebs, also known as Nancy Jo Krebs, and the investigation thereof by local, state or federal law enforcement agencies, including the Boulder Police Department.

4. Subsequent to Judge Montgomery's 2002 final Order, Boulder Police Department has made digital copies of the entire JonBenet Ramsey investigation record, and has made administrative note of those copies.

This concludes my Affidavit.

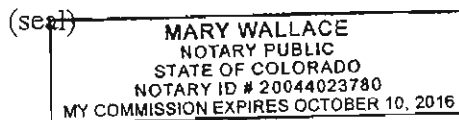

Thomas Trujillo


STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

On the 31st day of March 2014, Thomas Trujillo personally appeared before me and, being first duly sworn, stated that the facts set forth in the foregoing Affidavit are true.

Witness my hand and official seal.

My commission expires: 10/10/16




Notary Public

File: POLL2156

DISTRICT COURT, BOULDER COUNTY,
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**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM BASED ON CLAIM PRECLUSION OR ISSUE PRECLUSION**

This matter comes before this Court on the Defendants' Motion to Dismiss. The Court, being fully advised, enters the following:

Findings of Fact

1. The Plaintiffs are witnesses in the investigation of the JonBenet Ramsey homicide.
2. In February 2000, Nancy Krebs made certain public allegations regarding the Plaintiffs' alleged involvement in the homicide.

3. The Boulder Police Department investigated Ms. Krebs' allegations and in May 2000 issued a statement that the investigation found no additional information to support Ms. Krebs' allegations.

4. In 2002, the Plaintiffs sought release of all records relating to the Boulder Police Department's investigation of Ms. Krebs' allegations pursuant to the Colorado Criminal Justice Records Act, C.R.S. § 24-72-301. The Defendants refused to release the records

5. The Plaintiffs sought to compel release of the records by filing a civil action against the Defendants in the Boulder County District Court, *White v. City of Boulder*,

6. On September 12, 2002, the Honorable Lael Montgomery held an evidentiary hearing to consider whether to order Defendants to produce the records.

7. On September 26, 2002, Judge Montgomery ordered Defendants to submit the records for *in camera* review. Judge Montgomery concluded in part as follows:

The Court find an ongoing public interest in protecting the integrity of the underlying investigation however, and based on Chief Beckner's testimony, finds that some of the police interviews in the Krebs matter may harm the ongoing investigation by showing just how much the police do or do not know or by disclosing otherwise unknown witnesses.

The Court therefore orders Respondents to deliver to the Court under seal copies of the documents and evidence pertaining to the Krebs allegations and subsequent investigation for an *in camera* review. Based on that review the Court will determine what, if any, part of the file may be released to Petitioners.

8. On November 3, 2002, Judge Montgomery issued a ruling and order directing release of redacted transcripts of Ms. Krebs' two interviews as well as Detective Tom Trujillo's summary of those interviews. Judge Montgomery did not order the release of any other records. Neither party appealed Judge Montgomery's order.

9. The investigation into the JonBenet Ramsey homicide is open and ongoing.

10. The only records Defendants have that are responsive to the Plaintiffs' request are the records Judge Montgomery reviewed *in camera* in 2002.

Conclusions of Law

11. Issue preclusion and claim preclusion preserve judicial resources by preventing the relitigation of stale claims. *Dave Peterson Elec., Inc. v. Beach Mountain Builders, Inc.*, 167 P.3d 175, 176 (Colo. App. 2007).

12. “Claim preclusion works to preclude relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not.” *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 608 (Colo. 2005). Claim preclusion bars relitigation of a claim if there is:

- (1) finality of the first judgment;
- (2) identity of subject matter;
- (3) identity of claims for relief; and
- (4) identity of parties to the two actions.

Id. at 607

Claim preclusion serves the dual purpose of protecting litigants from the burden of relitigating the same issue with the same party or his or her privy and of promoting judicial economy by preventing needless litigation. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979). Claim preclusion bars not only the claims actually litigated in the first proceeding, but also those that could have been litigated. *Lobato v. Taylor*, 70 P.3d 1152, 1165 (Colo. 2003).

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13. Issue preclusion, also known as collateral estoppels, bars relitigation of an issue that is identical to an issue that has been actually litigated and necessarily adjudicated in a prior proceeding, *Stanton v. Schultz*, 222 P.3d 303, 307 (Colo. 2010).

14. Claim or issue preclusion are appropriate grounds for dismissal for failure to state a claim if the elements of the defense are evident from the pleadings, *Bristol Bay Productions, LLC v. Lampack*, 312 P.3d 1155 (Colo. 2013). If the Court considers additional material, it is appropriate to convert the motion to dismiss to a motion for summary judgment

15. The judgment in *White v. City of Boulder*, is final.

16. The instant Complaint and the Complaint in *White v. City of Boulder*, address the same subject matter, that is, the production of the same records.

17. The instant Complaint and the Complaint in *White v. City of Boulder*, seek the same relief, that is, the production of the same records.

18. The instant Complaint and the Complaint in *White v. City of Boulder*, involve the same parties.

19. As Judge Montgomery stated in her September 26, 2002 Ruling and Order, “Respondents have a legitimate interest in preventing disclosure of investigatory files of any open case. It is in

the public interest that disclosure of police investigations be limited for all of the reasons Chief Beckner testified to.”

20. Claim and issue preclusion bar the instant Complaint.

21. Plaintiffs’ claims are substantially frivolous, groundless and vexatious, not well grounded in fact or supported by a legal theory based on existing legal principles or a good faith argument for modification of existing law.

The Court being fully advised in the premises, hereby GRANTS, Defendants’ Motion to Dismiss with prejudice. Under C.R.C.P. 11(a) and C.R.S. § 13-17-102 (2) & (6), the Court awards the Defendants the amount of their reasonable expenses incurred because of the filing of the Complaint, including reasonable attorney's fees.

IT IS SO ORDERED THIS _____ DAY OF _____, 2014.

District Court Judge