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CASE NO. 92631-0

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

DAVID W. AIKEN,

Appellant,

vs.

CYNTHIA L. AIKEN,

Respondent.

RESPONSE TO PETITON FOR REVIEW

ON BEHALF OF CYNTHIA AIKEN

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ORIGINAL

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A. ISSUES FOR REVIEW

1. Appellant's first issue for review is whether the Court of Appeals properly "considered and interpreted" the Washington Supreme Court decision of *Gourley v Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006). The court did consider and properly interpret the *Gourley* decision and review should be denied on this basis.

2. Appellant's second issue for review is whether the Court of Appeals erred in denying Mr. Aiken's a full testimonial hearing on the merits including the opportunity to cross-examine a witnesses, including a minor child victim, who was 14 years old at the time. The court did not err in its ruling.

3. The third issue for review is whether the court of appeals erred in upholding the trial court's denial of Mr. Aiken's request to subpoena and depose the 14 year old minor daughter of Mr. Aiken. The court did not err in its ruling.

4. Mr. Aiken's fourth issue is whether the court of Appeals erred in upholding the trial court's decision on reconsideration that granted additional relief beyond the scope of the motion for

reconsideration. The court did not err in finding the trial court acted within the scope of its authority and the evidence presented.

5. And finally, did the court of appeals err in awarding Ms. Aiken attorney fees under RCW 26.50.060. The court did not err in this regard.

B. STATEMENT OF THE CASE

1. Procedural History

The Petition for Domestic Violence Protective Order and supporting sealed medical records were filed November 24, 2014. (C.P. 246, 410-472) The petition requests a restraint for the petitioner Ms. Aiken as well as for the children (CP. 247) and it includes a statement under penalty of perjury that Mr. Aiken had committed domestic violence against Ms. Aiken. (C.P. 254-55) A temporary order issued the same day signed by Commissioner *pro tem* David Patterson on an *ex parte* basis without notice to Respondent. The hearing for a one year order was set 14 days later for December 8, 2014. (C.P 325)

On December 4, 2014, supplemental sealed medical records were provided to the court by Ms. Aiken. (C. P. 366-409) On December 8, 2014, both sides appeared with counsel before Court Commissioner Lee

Tinney. (C.P. 322) Mr. Aiken had not yet been served with the pleadings although his counsel had received courtesy copies from Ms. Aiken's counsel as evidenced by his attendance at the return hearing. Mr. Aiken was formally served immediately prior to the hearing. (C.P. 317) Mr. Aiken's counsel made an oral motion for a full testimonial hearing with cross examination. Because there were also motions pending in the couple's dissolution of marriage action, the count continued the hearing for the same day and calendar as those motions and declined to rule on an oral motion. (C.P. 322) The court issued a renewed temporary order with modifications regarding visits between the father and the two younger children, M.A and Q.A. (C.P. 233)

Prior to the December 22nd hearing both sides filed documents supporting their positions. Ms. Aiken's were supplemental in nature. (C.P. 161-190, 298-303, 304-216, 332-366) The clerk's papers do not reflect a formal Response to the Petition by Mr. Aiken.

On December 22, 2014, the parties again appeared, this time before Commissioner *pro tem*, G. Geoffrey Gibbs. Mr. Aiken's attorney had filed a formal Motion on December 10th for a full evidentiary hearing and to depose R.A. (C.P. 191) Mr. Aiken's motion for an extended hearing was granted but his request for a full testimonial hearing or request to depose R.A. was denied. (CP 140)A renewed Temporary Order

entered until the next available date for extended hearings, February 3, 2015. (C.P. 296-297)

On January 9, 2015, counsel for Mr. Aiken deposed Ms. Aiken for one and half hours. (C.P. 67-136) On January 23, 2015, the parties entered into an Agreed Modified Reissuance of Temporary Order for Protection permitting the parties to both attend events for M.A. and Q.A. (C.P. 137).

Both parties submitted additional documents. Ms. Aiken's were supplemental in nature. (C.P. 294) The GAL, Jeannette Heard, filed a report. (C.P. 138, 260-264). Mr. Aiken's pleadings are not reflected in the clerk's papers.

On February 3, 2015, an extended hearing was held before Court Commissioner Jacalyn Brudvik. Besides the Temporary Order of Protection, the court heard several other motions filed by the parties relating to their divorce proceeding. (C.P.192) The resulting order restrained Mr. Aiken from "causing physical harm, bodily injury, assault, including sexual assault, and from molesting, harassing, threatening, or stalking all three children." It further restrains him from " "harassing, following, keeping under physical or electronic surveillance, cyber stalking as defined in RCW 9.61.260, and using telephonic, audiovisual, or other electronic means to monitor the actions, locations, or wire or

electronic communication" of all three children. Visitation was allowed, "subject to future orders in a dissolution or paternity action." The order was issued for one year, until February 3, 2016. (C.P. 10)

Ms. Aiken filed a Motion for Reconsideration of the order with supporting documents as to the child R.A. on February 13, 2015 asking that Mr. Aiken be restrained from having any contact with R.A., or going to her home or school. (C.P. 23-28, 36-66, 329-333) Mr. Aiken replied in a written declaration. (C.P. 29-40) The order was modified by the court on February 26, 2015. The court also included restraints for Ms. Aiken in this revised order. The order is in place until February 3, 2016, one year from the extended hearing of February 3, 2015. (C.P. 4, 5)

Mr. Aiken then filed his Notice of Intent to Appeal. (C.P. 27) The court of appeals issued its decision on November 9, 2015. (Exhibit A to Petition for Review)

2. Statement of the Facts.

This is an appeal of an action based on a Petition for Domestic Violence Protection Order sought by Ms. Aiken on behalf of herself and her three children, after disclosure of abuse by the oldest child. (C.P. 246, 410-472) As stated in Mr. Aiken's brief, the parties had settled their divorce issues at mediation on October 31, 2014. At the conclusion, they executed a Civil Rule 2A agreement concluding all issues in their divorce

matter. Final pleadings were drafted and circulated but had not yet entered with the court as of November 24, 2014, the day of filing of the action being considered under this appeal.

The parties have three children: R. A. age 14; M.A., age 12; and Q. A., age 10 (ages are as of November 2014). (C.P. 247) After the mediation, but before entry of the final decree and parenting plan, R.A., the oldest of the parties' three daughters, then age 14, cut herself then took an overdose of medications, stating that she did so in order to avoid visits with her father.(C.P. 253-256, 346-348) She also disclosed physical abuse to her school counselor. (C.P. 254)This was a new allegation, not previously disclosed. (C.P.254) The school counselor and the child's doctor both made reports to Child Protective Services for the State of Washington. (C.P. 295)

Ms. Aiken appeared on the next available court day on a *pro se* basis at the *ex parte* calendar on Monday November 24, 2014 to present her Petition for a Domestic Violence Restraining Order on behalf of herself and her three children. Mr. Aiken was not given notice of her appearance. The evidence she presented consisted of her declaration and counseling records from the Everett Clinic for the three children for the year 2014.(C.P.246, 410-472)

The court was provided with notice of the dissolution of marriage action and the Commissioner *pro tem* took note of the parenting issues in entering the temporary order. (C. P. 326)

The hearing was set in two weeks for December 8, 2014 at 1:00 p.m. (C.P. 325) At this hearing, Mr. Aiken's attorney made an oral motion for an extended hearing on the matter and to be able to depose and/or have R.A. testify at the hearing. (C.P. 322) The court declined to rule on an oral motion. Because there were several other motions pending in the divorce matter, the court continued the hearing on the protection order to December 22nd the same day and court calendar as the divorce matter. [1] The Temporary DVPO was reissued but the court modified the order to permit the two younger children, M.A. and Q.A. to have visits with their father. (C.P. 233)

The December 22nd hearing included Mr. Aiken's then written motion for an extended hearing, whether a one year order should enter at that time in the DVPO issue and several other issues in the divorce matter. Mr. Aiken's request for an extended hearing was granted, and the request for testimony of a minor child was denied. (C.P. 140) The Temporary DVPO was reissued. (C.P. 296, 297)The matter was yet again continued to

[1] In Snohomish County DVPO hearings are normally set on a separate calendar from family law matters.

February 3, 2015. The continuance was extended to accommodate both attorney schedules and the limited time the court grants to extended hearings.[2]

The extended February hearing brought many issues before Commissioner Jacalyn Brudvik. The DVPO order she issued protected the safety of all three children but deferred to the orders in the dissolution of marriage action as to the parenting arrangements. (C.P. 10)

R.A. took another overdose of pills on that evening and this time was admitted to Fairfax Hospital. (C.P. 42, 53, 292, 331)Ms. Aiken then sought a reconsideration of the order to include language that the Mr. Aiken would not have contact with R.A. The court granted this and added restraints protecting Ms. Aiken as well, something left off of the preceding one year order. The reconsidered final order in this matter is effective until February 3, 2016. (C.P. 4-9)

[2] Snohomish County courts allow for a limited number of special set hearings under Local Rule SCLRC 7 (b) (2) (D) 110 (C). These hearings allow for extra reading time for the Commissioner and extra time for argument for the parties.

C. ARGUMENT

1. Consideration and interpretation of *Gourley*, denial of live testimony at hearing, and denial of right to depose 14 year old victim of domestic violence.

Mr. Aiken's first three assignments of error are intrinsically linked and will be addressed in the first section of this Response. Mr. Aiken's Petition does not specify how the court failed to consider and properly interpret the Supreme Court's decision in *Gourley v. Gourley*, 158 N.2d 460, 145 P.3d 1185 (2006). As a result one must make a leap and assume the claim that *Gourley* was misinterpreted was because Mr. Aiken was not allowed to have his then 14 year old daughter deposed before the hearing and then cross examined on the stand at the hearing.

Given the amount of time the appellate court took to discuss the *Gourley* decision and how that ruling applied to the Court of Appeal's holding regarding the case at bar, one can only conclude that the case was indeed considered by the court of appeals. So the question remains, was the *Gourley* decision properly interpreted by the court of appeals? The answer to that question is yes.

The *Gourley* decision addressed three main issues, 1, the reliance on hearsay in domestic violence cases, 2. due process and 3. attorney fees.

The first issue regarding the consideration of hearsay evidence is not invoked by Mr. Aiken. The court's consideration of hearsay evidence is specifically permitted in domestic violence cases under ER 1101.

A claim of lack of due process appears to be at the heart of Mr. Aiken's argument. He appears to have a strong desire to put a suicidal 14 year old under the onus of cross examination and live testimony. This in and of itself could be viewed as abusive. But that is a moral question and not a question for the law.

The court of appeals analyzed whether the procedures at the trial court provided Mr. Aiken due process under the test announced in *Mathews v. Eldridge,* 424 US 319,334,96 S. Ct. 893, 47 L.ED. 2d 18 (1976). The test balances 1. private interests affected, 2. risk of erroneous deprivation of that interest through existing procedures and the probable value of any of additional procedural safeguards, and 3. the governmental interest, including costs and administrative burdens of additional procedures. In making this analysis, the court turned to the *Gourley* decision, comparing it at length with the Aiken case. In particular the court noted that DVPOs are temporary in nature, and the government has a compelling interest in preventing domestic violence and abuse. The court also noted the statutory protections of RCW 26.50 were

afforded to Mr. Aiken. Based on the record, the court of appeals found that Mr. Aiken failed to meet his burden of proving that his due process rights were violated. He in fact had the procedural protections of the statute. He deposed Ms. Aiken and submitted the deposition transcript to the court for the hearing. The full hearing on an extended motions calendar also contained significant amounts of written evidence such as a Guardian ad Litem report, medical records and mental health records. Evidence sufficient to support the trial court's decision to grant or deny a petition for a domestic violence protection order may contain hearsay or be wholly documentary." *Blackmon v. Blackmon*, 155 Wash. App. 715, 722, 230 P.3d 233, 236 (2010) *citing Gourley*, 158 Wash.2d at 467, 145 P.3d 1185 (2006); and *Hecker v. Cortinas*, 110 Wash. App. at 870, 43 P.3d 50 (2002).

Mr. Aiken's logic is flawed. He uses the argument that because the *Gourley* decision states that cross examination may be appropriate in other cases, that means that cross examination is required in all cases. The court of appeals analysis considered the Aiken facts as juxtaposed against *Gourley* and determined cross examination was not necessary in the Aiken matter as it was not in *Gourley*. This was not error. The facts of *Gourley* and Aiken are very similar other than the type of abuse alleged. Mr. Aiken's complaints echo those of Mr. Gourley and are not persuasive.

Appellant cites *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974) as authority for his position that he should have been allowed to cross examine his minor daughter. *Davis* is a criminal case where the issue is the ability to cross examine a prosecution witness who had identified the defendant in the crime. The right to confront witnesses in a criminal case is a constitutional right. U.S. Const. Amend. VI; Wash. Const. art. I § 22. Ms. Aiken agrees that right exists. This however, is not a criminal case.

In her concurring decision in *Gourley*, Judge Christine Quinn-Britnall serving as a justice *pro tempore* accurately points out that the constitutional right to confrontation of accusers is explicitly limited to criminal prosecutions. U.S. Const. Amend. VI; Wash. Const. art. I § 22. This concurring opinion also pointed out that due process is not a legal rule but is flexible and calls for such procedural protections as the particular situation demands. *Gourley* at 474.

Appellant also cites *In re Marriage of Rideout*, 150 Wash. 2d 337, 77 P.3d 1174, (2003), *as corrected* (Oct. 27, 2003). *Rideout* is a civil contempt case where a mother was found in contempt for failing to follow the parenting plan. The hearing was on the written statements only and no live testimony was provided. The court upheld the finding of contempt

despite there being no oral testimony. Mr. Aiken again refers to statements by the court that are *dicta* and not the holding of the court; the court's holding that no oral testimony was required is contrary to the result Mr. Aiken is now seeking.

Since *Gourley*, the Washington courts have consistently upheld the constitutionality of the domestic violence protection laws. In addition the courts have addressed the due process and right to cross examination issue in several cases.

> Given all, we hold DVPA protection orders are special proceedings. Thus, the trial court retained the inherent authority and discretion to decide the nature and extent of any discovery under the DVPA. Therefore, the trial court did not err in denying Mr. Crosby's discovery request because he fails to show an abuse of discretion.

Scheib v. Crosby, 160 Wash. App. 345, 352, 249 P.3d 184, 187 (2011).

See also *Blackmon v. Blackmon*, 155 Wash. App. 715 (2010); *Spence v. Kaminski*, 103 Wash App 325 (2000); *Hecker v. Cortinas*, 110 Wash. App. 865 (2002).

2. Whether the court may issue an order beyond the scope of the relief requested in a motion for reconsideration.

Motions for reconsideration are filed under Civil Rule 59. CR 59 (e) defines how those motions are to be heard; including whether they will

be heard on written documents only or with oral argument upon request. Mr. Aiken failed to request oral argument.

Snohomish County local civil rules, (SCLR 59 (e) (3) (B)), provide the method for filing a motion for reconsideration. The rule further states, "Absent order of the court, the motion will be taken under advisement. Oral arguments will be scheduled only if the court request the same." Mr. Aiken did not request oral argument.

Mr. Aiken cites no legal authority for the basis of his claim that the court erred by affirming the trial court's granting of an order purportedly beyond the scope of the Motion for Reconsideration. Commissioner Brudvik's order is clearly within the relief requested in the original Petition for a protective order, it is within her judicial power, and not an abuse of discretion to *sua sponte* grant this relief.

> [a] court granting a protection order "shall have broad discretion to grant such relief as the court deems proper." Sitting in equity, a court "may fashion broad remedies to do substantial justice to the parties and put an end to litigation." *Carpenter v. Folkerts,* 29 Wash.App. 73, 78, 627 P.2d 559 (1981) (citing *Esmieu v. Hsieh,* 92 Wash.2d 530, 535, 598 P.2d 1369 (1979)).

Hough v. Stockbridge, 150 Wash. 2d 234, 236, 76 P.3d 216, 217 (2003).

The court of appeals properly found that the court did not abuse its discretion in this reconsideration as the facts before the judicial officer support the relief granted.

3. Attorney fees.

Mr. Aiken challenges the appellate court's award of attorney fees and costs in this action in his concluding paragraph of the Petition for Review without citation to any legal authority to support a finding that there is error in this award of fees. Attorney fees may be awarded under the domestic violence statute, RCW 26.50.060 (1)(g)[3]. Mr. Aiken compares this language to RCW 26.09.140 which specifically states that the court may award fees upon any appeal. It is conjecture, but the undersigned assumes this means that Mr. Aiken believes that if the underlying statute does not specify an award on appeal, then it is not permitted. However, despite the lack of specific language relating to appeals, and despite the fact Ms. Aiken did not seek fees in the underlying action, fees may be awarded on appeal.

> Here, the basis for the fee request is statutory and limits her request to appellate fees. If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP

[3] RCW 26.50.060 (1) (g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees.

18.1; *see also Landberg v. Carlson,* 108 Wash.App. 749, 758, 33 P.3d 406 (2001).

Scheib v. Crosby, 160 Wash. App. 345, 353, 249 P.3d 184, 188 (2011). Scheib v. Crosby, is a domestic violence case which specifically found that the award of fees on appeal of a domestic violence protection order case is proper.

Here again, Ms. Aiken, the victim of domestic violence is faced with incurring yet more fees to respond to this Petition for Review. She should be awarded yet more fees to defend against this continued assault through the court system.

4. Other Issues argued but not alleged to be error.

Mr. Aiken's concluding paragraph, also without citation to any legal basis at all, asks that the court should apply a different standard of review than preponderance of the evidence, and that the court should apply a clear, cogent and convincing standard to domestic violence protection order cases. However, he does not assert that the court of appeals erred by failing to make this finding in their decision. The court of appeals found that because Mr. Aiken's due process rights were sufficiently met, there is no need for a higher standard of review.

Clear, cogent, and convincing evidence exists when the ultimate fact in issue is shown by the evidence to be " 'highly probable' ". *In re*

Sego, 82 Wash.2d 736, 739, 513 P.2d 831 (1973) (quoting *Supove v. Densmoor,* 225 Or. 365, 358 P.2d 510 (1961)).

In re Dependency of K.R., 128 Wash. 2d 129, 141, 904 P.2d 1132, 1138 (1995).

The dependency statute cited in Mr. Aiken's Appellant's brief requires the State of Washington to prove parental unfitness by clear, cogent and convincing evidence.[4] A dependency case is a far cry from a one year protection order. In a dependency action the state is attempting to permanently sever the parent/child relationship. Mr. Aiken's status as a parent is not altered by the relief granted to Ms. Aiken. Mr. Aiken has not lost a "fundamental liberty" as stated in the conclusion to the Petition for Review. The court of appeals did not err in finding Mr. Aiken's due process rights were met and a higher standard of proof is unnecessary. Furthermore, such a standard of review would have a chilling effect on the willingness of domestic victims to seek protection and would be contrary to the interests of the state of Washington to protect victims of domestic violence.

[4] RCW 13.34.180(5) provides that there must be proof by clear, cogent, and convincing evidence that there is little likelihood that conditions will be remedied so that the child can be returned to the parent.

D. CONCLUSION

Appellant's petition should be dismissed. Given the content of this Petition, it is nothing more than one more opportunity for Mr. Aiken to increase his former wife's attorney fee burden. Ms. Aiken should be awarded further fees pursuant to RAP 18.1 in responding to this inadequate Petition. The Appellant has failed to provide this court with authority sufficient to support his Petition for Review. The court did not err in affirming the trial court's decision.

The decision rendered by the court of appeals is not in conflict with any other appellate decision nor with any decision reached by the Supreme Court for the State of Washington. This order expires February 3, 2016, and the issue will be moot before this court even determines if the Petition for Review should be granted.

Furthermore, there is no outstanding issue of substantial public interest. Mr. Aiken has his own interests in mind in having the restraining order set aside but the court of appeals did not err in the way it considered the underlying legal precedents, applied those to the facts, and then affirmed the trial court's decision. Mr. Aiken's Petition for Review

should be denied on all grounds and Ms. Aiken awarded further costs and fees.

Respectfully submitted this 29th day of December, 2015.

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APPENDIX

Chapter 26.50.060 Revised Code of Washington

Civil Court Rule 59

Snohomish County Local Civil Rule 59

modifications of protection orders in domestic violence cases may help to protect the safety of future domestic violence victims." [2008 c 287 § 1.]

Severability—1995 c 246: See note following RCW **26.50.010**.

26.50.055
Appointment of interpreter.

(1) Pursuant to chapter **2.42** RCW, an interpreter shall be appointed for any party who, because of a hearing or speech impairment, cannot readily understand or communicate in spoken language.

(2) Pursuant to chapter **2.43** RCW, an interpreter shall be appointed for any party who cannot readily speak or understand the English language.

(3) The interpreter shall translate or interpret for the party in preparing forms, participating in the hearing and court-ordered assessments, and translating any orders.

[1995 c 246 § 11.]

NOTES:

Severability—1995 c 246: See note following RCW **26.50.010**.

26.50.060
Relief—Duration—Realignment of designation of parties—Award of costs, service fees, and attorneys' fees.

(1) Upon notice and after hearing, the court may provide relief as follows:

(a) Restrain the respondent from committing acts of domestic violence;

(b) Exclude the respondent from the dwelling that the parties share, from the residence, workplace, or school of the petitioner, or from the day care or school of a child;

(c) Prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(d) On the same basis as is provided in chapter **26.09** RCW, the court shall make residential provision with regard to minor children of the parties. However, parenting plans as specified in chapter **26.09** RCW shall not be required under this chapter;

(e) Order the respondent to participate in a domestic violence perpetrator treatment program approved under RCW **26.50.150**;

(f) Order other relief as it deems necessary for the protection of the petitioner and other family or household members sought to be protected, including orders or directives to a peace officer, as allowed under this chapter;

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees;

(h) Restrain the respondent from having any contact with the victim of domestic violence or

the victim's children or members of the victim's household;

(i) Restrain the respondent from harassing, following, keeping under physical or electronic surveillance, cyberstalking as defined in RCW **9.61.260**, and using telephonic, audiovisual, or other electronic means to monitor the actions, location, or communication of a victim of domestic violence, the victim's children, or members of the victim's household. For the purposes of this subsection, "communication" includes both "wire communication" and "electronic communication" as defined in RCW **9.73.260**;

(j) Require the respondent to submit to electronic monitoring. The order shall specify who shall provide the electronic monitoring services and the terms under which the monitoring must be performed. The order also may include a requirement that the respondent pay the costs of the monitoring. The court shall consider the ability of the respondent to pay for electronic monitoring;

(k) Consider the provisions of RCW **9.41.800**;

(l) Order possession and use of essential personal effects. The court shall list the essential personal effects with sufficient specificity to make it clear which property is included. Personal effects may include pets. The court may order that a petitioner be granted the exclusive custody or control of any pet owned, possessed, leased, kept, or held by the petitioner, respondent, or minor child residing with either the petitioner or respondent and may prohibit the respondent from interfering with the petitioner's efforts to remove the pet. The court may also prohibit the respondent from knowingly coming within, or knowingly remaining within, a specified distance of specified locations where the pet is regularly found; and

(m) Order use of a vehicle.

(2) If a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year. This limitation is not applicable to orders for protection issued under chapter **26.09**, 26.10, or **26.26** RCW. With regard to other relief, if the petitioner has petitioned for relief on his or her own behalf or on behalf of the petitioner's family or household members or minor children, and the court finds that the respondent is likely to resume acts of domestic violence against the petitioner or the petitioner's family or household members or minor children when the order expires, the court may either grant relief for a fixed period or enter a permanent order of protection.

If the petitioner has petitioned for relief on behalf of the respondent's minor children, the court shall advise the petitioner that if the petitioner wants to continue protection for a period beyond one year the petitioner may either petition for renewal pursuant to the provisions of this chapter or may seek relief pursuant to the provisions of chapter **26.09** or **26.26** RCW.

(3) If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at any time within the three months before the order expires. The petition for renewal shall state the reasons why the petitioner seeks to renew the protection order. Upon receipt of the petition for renewal the court shall order a hearing which shall be not later than fourteen days from the date of the order. Except as provided in RCW **26.50.085**, personal service shall be made on the respondent not less than five days before the hearing. If timely service cannot be made the court shall set a new hearing date and shall either require additional attempts at obtaining personal service or permit service by publication as provided in RCW **26.50.085** or by mail as provided in RCW **26.50.123**. If the court permits service by publication or mail, the court shall set the new hearing date not later than twenty-four days from the date of the order. If the order expires because timely service cannot be made the court shall grant an ex parte order of protection as provided in RCW **26.50.070**. The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. The court may renew the

protection order for another fixed time period or may enter a permanent order as provided in this section. The court may award court costs, service fees, and reasonable attorneys' fees as provided in subsection (1)(g) of this section.

(4) In providing relief under this chapter, the court may realign the designation of the parties as "petitioner" and "respondent" where the court finds that the original petitioner is the abuser and the original respondent is the victim of domestic violence and may issue an ex parte temporary order for protection in accordance with RCW **26.50.070** on behalf of the victim until the victim is able to prepare a petition for an order for protection in accordance with RCW **26.50.030**.

(5) Except as provided in subsection (4) of this section, no order for protection shall grant relief to any party except upon notice to the respondent and hearing pursuant to a petition or counter-petition filed and served by the party seeking relief in accordance with RCW **26.50.050**.

(6) The court order shall specify the date the order expires if any. The court order shall also state whether the court issued the protection order following personal service, service by publication, or service by mail and whether the court has approved service by publication or mail of an order issued under this section.

(7) If the court declines to issue an order for protection or declines to renew an order for protection, the court shall state in writing on the order the particular reasons for the court's denial.

[2010 c 274 § 304; 2009 c 439 § 2; 2000 c 119 § 15; 1999 c 147 § 2; 1996 c 248 § 13; 1995 c 246 § 7; 1994 sp.s. c 7 § 457. Prior: 1992 c 143 § 2; 1992 c 111 § 4; 1992 c 86 § 4; 1989 c 411 § 1; 1987 c 460 § 55; 1985 c 303 § 5; 1984 c 263 § 7.]

NOTES:

Intent—2010 c 274: See note following RCW **10.31.100**.

Finding—Intent—2009 c 439: "The legislature finds that considerable research shows a strong correlation between animal abuse, child abuse, and domestic violence. The legislature intends that perpetrators of domestic violence not be allowed to further terrorize and manipulate their victims, or the children of their victims, by using the threat of violence toward pets." [2009 c 439 § 1.]

Application—2000 c 119: See note following RCW **26.50.021**.

Severability—1995 c 246: See note following RCW **26.50.010**.

Finding—Intent—Severability—1994 sp.s. c 7: See notes following RCW **43.70.540**.

Effective date—1994 sp.s. c 7 §§ 401-410, 413-416, 418-437, and 439-460: See note following RCW **9.41.010**.

Findings—1992 c 111: See note following RCW **26.50.030**.

Short title—Section captions—Effective date—Severability—1987 c 460: See RCW **26.09.910** through **26.09.913**.

26.50.070

CR 59
NEW TRIAL, RECONSIDERATION, AND AMENDMENT OF JUDGMENTS

(a) Grounds for New Trial or Reconsideration. On the motion of the party aggrieved, a ve vacated and a new trial granted to all or any of the parties, and on all issues, or on some o issues are clearly and fairly separable and distinct, or any other decision or order may be v reconsideration granted. Such motion may be granted for any one of the following causes mate the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of abuse of discretion, by which such party was prevented from having a fair trial.

(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors sl been induced to assent to any general or special verdict or to a finding on any question or q to the jury by the court, other and different from the juror's own conclusions, and arrived a the determination of chance or lot, such misconduct may be proved by the affidavits of one or

(3) Accident or surprise which ordinary prudence could not have guarded against;

(4) Newly discovered evidence, material for the party making the application, which the not with reasonable diligence have discovered and produced at the trial;

(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must of passion or prejudice;

(6) Error in the assessment of the amount of recovery whether too large or too small, wh upon a contract, or for the injury or detention of property;

(7) That there is no evidence or reasonable inference from the evidence to justify the v decision, or that it is contrary to law;

(8) Error in law occurring at the trial and objected to at the time by the party making

(9) That substantial justice has not been done.

(b) Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration not later than 10 days after the entry of the judgment, order, or other decision. The motion time it is filed, to be heard or otherwise considered within 30 days after the entry of the j other decision, unless the court directs otherwise. A motion for a new trial or for reconside the specific reasons in fact and law as to each ground on which the motion is based.

(c) Time for Serving Affidavits. When a motion for new trial is based on affidavits, the the motion. The opposing party has 10 days after service to file opposing affidavits, but tha extended for up to 20 days, either by the court for good cause or by the parties' written sti may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment, the court on may order a hearing on its proposed order for a new trial for any reason for which it might h trial on motion of a party. After giving the parties notice and opportunity to be heard, the timely motion for a new trial for a reason not stated in the motion. When granting a new tri initiative or for a reason not stated in a motion, the court shall specify the grounds in its

(e) Hearing on Motion. When a motion for reconsideration or for a new trial is filed, th is to be heard may on the judge's own motion or on application determine:

(1) Time of Hearing. Whether the motion shall be heard before the entry of judgment;

(2) Consolidation of Hearings. Whether the motion shall be heard before or at the same t presentation of the findings and conclusions and/or judgment, and the hearing on any other pe

(3) Nature of Hearing. Whether the motion or motions and presentation shall be heard on submitted on briefs, and if on briefs, shall fix the time within which the briefs shall be se

(f) Statement of Reasons. In all cases where the trial court grants a motion for a new t the order granting the motion, state whether the order is based upon the record or upon facts outside the record that cannot be made a part thereof. If the order is based upon the record, definite reasons of law and facts for its order. If the order is based upon matters outside t shall state the facts and circumstances upon which it relied.

(g) Reopening Judgment. On a motion for a new trial in an action tried without a jury, t the judgment if one has been entered, take additional testimony, amend findings of fact and c or make new findings and conclusions, and direct the entry of a new judgment.

(h) Motion To Alter or Amend Judgment. A motion to alter or amend the judgment shall be than 10 days after entry of the judgment.

(i) Alternative Motions, etc. Alternative motions for judgment as a matter of law and fo be made in accordance with rule 50(c).

(j) Limit on Motions. If a motion for reconsideration, or for a new trial, or for judgme is made and heard before the entry of the judgment, no further motion may be made without lea first obtained for good cause shown: (1) for a new trial, (2) pursuant to sections (g), (h), or (3) under rule 52(b).

[Amended effective July 1, 1980; September 1, 1984; September 1, 1989; September 1, 2005; Apr

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SNOHOMISH COUNTY LOCAL COURT RULES

RULE 59. NEW TRIAL, RECONSIDERATION AND AMENDMENT OF JUDGMENTS; POST TRIAL MOTIONS (e) Hearing on Motion. (3) Nature of Hearing. (A) Proposed Order. Each party must include in the materials delivered to the judge a proposed order sustaining his/her side of the argument. Should any party desire a copy of the order signed and filed by the judge, a preaddressed, stamped envelope shall accompany the proposed order. (B) Oral Argument. At the time of filing a motion under this rule, the moving party shall comply with CR 59(b) by filing a calendar note, setting the motion before the court which heard the motion. Absent order of the court, the motion will be taken under advisement. Oral arguments will be scheduled only if the court requests the same. [Amended effective October 1, 1990; September 1, 1992; September 1, 1993; September 1, 1998, September 1, 2009] VI

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 29th day of December, 2015, I submitted the Response to Petition for Review to be filed with the Supreme Court of the State of Washington as follows:

Ronald R. Carpenter
Supreme Court Clerk
Supreme Court for the State of Washington
Temple of Justice
415 12th Ave SW
PO Box 40929
Olympia, Washington 98504-0929

By: email to Supreme@courts.wa.gov

I also caused a true and correct copy of the Brief of Respondent to be delivered by Legal Messenger to the following:

Appellant's Attorney:
Aaron Shields
3301 Hoyt Avenue, Suite A
Everett, WA 98201
(425) 263-9798

DATED this 29th day of December, 2015.

O'LOANE NUNN LAW GROUP, P.L.L.C.

Gail B. Nunn, WSBA No. 16827
Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

To: Gail Nunn
Cc: Jessica Lang
Subject: RE: Response to Petition for Review, Case No 92631-0

Received on 12-29-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Gail Nunn [mailto:Gail.Nunn@onglaw.com]
Sent: Tuesday, December 29, 2015 8:42 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Jessica Lang <Jessica.Lang@onglaw.com>
Subject: FW: Response to Petition for Review, Case No 92631-0

Please see below.

From: Gail Nunn
Sent: Tuesday, December 29, 2015 8:39 AM
To: 'supreme@corts.wa.gov'
Cc: Aaron Shields (aaronshields.shields@gmail.com); Jessica Lang
Subject: Response to Petition for Review, Case No 92631-0

Greetings,
Attached please find Respondent, Cynthia Aiken's Response to Petition for Review hereby being submitted for consideration by the Court.

1. Case Name: David W. Aiken Appellant vs. Cynthia L. Aiken, Respondent
2. Case No. 92631-0
3. Filed by Gail B. Nunn, attorney for Cynthia Aiken, WSBA No 16827, gail.nunn@onglaw.com

Please confirm receipt.

Sincerely,
Gail Nunn

GAIL B. NUNN
O'LOANE NUNN LAW GROUP, P.L.L.C.
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