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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

DANIEL BRAY, individually, and
JOEY TRACY, individually,

Petitioners,

v.

PIERCE COUNTY, a subdivision of the
State of Washington,

Respondent.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONERS

Daniel Bray and Joey Tracy, former Pierce County Sheriff's Department ("PCSD") deputies ("the deputies"), seek review by this Court of the Division II opinion terminating review described in Part B.

B. COURT OF APPEALS DECISION

Division II filed its opinion on July 18, 2023; that opinion is in the Appendix. The deputies moved for reconsideration, and the Court denied the motion on August 17, 2023. The order is in the Appendix. Division II's opinion represents a cascading series of errors requiring review by this Court.

C. ISSUES PRESENTED FOR REVIEW

1. Did Division II erroneously conflate the wrongful discharge and causation elements of the tort of wrongful discharge in violation of public policy?

2. Did Division II erroneously apply judicial estoppel as to proceedings for LEOFF employees' long-term disability, misapplying its own precedents on such proceedings?

3. Are deputies with pre-existing health conditions exacerbated by their employer's retaliation for

upholding the vital public policy against providing firearms to domestic violence ("DV") perpetrators and who are medically separated, constructively discharged in light of this Court's *Korslund* decision?

4. Did Division II err in ruling on causation where the deputies provided substantial evidence that their conduct in upholding the public policy against providing firearms to DV perpetrators and the County's retaliation against them for doing so were a substantial factor in exacerbating their health condition that led to their discharge?

D. STATEMENT OF THE CASE

The facts here are well-articulated in *Bray v. Pierce County*, 16 Wn. App. 2d 1001, 2021 WL 37559 (2021) ("*Bray I*").[1] By contrast, Division II's opinion provides a completely sanitized version of the egregious retaliation the deputies experienced for reporting the violation of the public policy against providing firearms to DV perpetrators by their fellow

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[1] Division II there concluded that a clear public policy existed, barring access by DV perpetrators to firearms. The Seattle *Times* editorialized on the need to uphold that policy on July 18, 2023. *https://www.seattletimes.com/opinion/editorials/keep-guns-away-from-people-charged-with-domestic-violence/*

deputies, dismissing them merely as actions the deputies "perceived to be retaliation." Op. at 2-3.[2]

Deputies Bray/Tracy's report to their supervisors that PCSD deputies[3] provided the murder weapon to a DV perpetrator who killed his wife and himself, angered their fellow deputies who felt that Bray/Tracy, by refusing to look the other way and participate in the cover-up, were violating a "Blue Code of Silence" that exists among police officers. CP 195-96, 218-20. Rather than taking responsibility for providing an angry, dangerous DV perpetrator with a gun and bullets and putting his battered spouse in severe danger, PCSD instead landed hard on the deputies and threatened in the media to take this

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[2] In addressing whether a genuine issue of material fact is present, Division II should have construed the facts, and reasonable inferences from the facts, in a light most favorable to the non-moving parties, Bray/Tracy. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). It did the exact opposite of that in providing its euphemized version of the gross retaliation against both deputies by their fellow deputies.

[3] One of those deputies, Ara Steben, was later one of their principal harassers. Br. of Appellants at 6-7.

whistleblower retaliation lawsuit "all the way to the mat." Alexis Krell, *Sheriff's Department accused of cover up, retaliation in connection with homicide case*, The News Tribune, *thenews.tribune.com/news/local/crime/article 205612084.html*.

Prior to speaking up about PCSD's violation of law and PCSD policy in the Annas murder-suicide, both deputies had exemplary records. CP 600-01, 671-72. Neither had been disciplined by the PCSD. CP 93-94, 600-01, 671-72.

When it became clear that the deputies would not "look the other way," PCSD sought to silence and discredit them. CP 69, 195-96, 218-20. Other PCSD deputies began a malicious campaign of retaliation against Bray/Tracy that included fabricated disciplinary charges, open harassment and disparagement, the undermining of their work and credibility, systematic petty and unrelenting bullying, and other unfair treatment. CP 600-08, 671-78. Supervisors began to discredit the deputies, threaten their jobs, and change their schedules abruptly only to reinstate their prior schedules. *Id*. A PCSD

supervisor even sent an email throughout the Department describing efforts to oust them from employment, ordering that PCSD should not assist the deputies so "They can sink on their own." CP 595.

The retaliation worsened. Deputy Bray was prevented from being in Bonney Lake (a large part of his patrol district) and barred from search and rescue; he was required to obtain supervisory approval for routine tasks such as obtaining warrants, towing cars, and investigating crimes. CP 604-05.

Deputy Tracy was subjected to uninvited house visits, intrusive monitoring, false criminal accusations,[4] physical assault, and even false imprisonment, all intending to intimidate and silence him. CP 675-76. Some of the more outrageous examples of retaliation included:

- PCSD deputies initiating and pursuing fabricated criminal charges against him;

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[4] The fabricated charges against Tracy were dismissed shortly after being brought against him. CP 676.

- PCSD deputies fully armed and in body armor tore through Tracy's home, gratuitously breaking his furniture, and improperly seizing personal items;
- Physically assaulting Tracy outside of his therapist's office while he was in sweatpants;
- Arresting and shackling Tracy on the fabricated criminal charges;
- Conducting a policy-violating strip search of Tracy solely for the purpose of humiliating him;
- Keeping Tracy in a small jail cell;
- Denying Tracy medical care;
- Forcing Tracy to urinate in his pants;
- Parading him around the jail to "teach him a lesson."

CP 675-76.

Both deputies had PTSD (at first undiagnosed) from a prior February 27, 2015, duty-related incident that was made worse by the Annas DV incident. CP 606-08, 676-77, 702-05. Three medical professionals testified that PTSD and its exacerbation by PCSD's misconduct, a fact nowhere mentioned in Division II's opinion. CP 702-05, 707-08, 711.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

To a casual reader, Division II's opinion is about judicial estoppel. It is not. Rather, Division II misapplies the law on the tort of wrongful discharge in violation of public policy, collapsing the requisite elements of the tort. It then misapplies the doctrine of judicial estoppel to justify its resolution of the issues, based on those improperly collapsed elements and its application of a regulation not yet even in effect. Ultimately, its opinion will give a safe home to the terrible concept of the Blue Code of Silence. Review is merited. RAP 13.4(b).

(1) Division II Misstated the Necessary Elements of Proof of Wrongful Discharge and Causation

Division II's opinion rests on an initial flatly erroneous conclusion, derived from *Pfeiffer v. Pro-Cut Concrete Cutting & Breaking, Inc.*, 6 Wn. App. 2d 803, 431 P.3d 1018 (2018), *review denied*, 193 Wn.2d 1006 (2019), that the elements of constructive discharge and causations for the tort must be collapsed; the defendant's wrongful conduct must be the "sole cause" of the

employee's separation from employment. Op. at 9.[5] Division III, however, noted at 830 that its analysis applied *only* in a "hybrid case," *i.e.*, an RCW 49.60 case involving both discharge under that statute, and a wage loss claim, which this is *not*. Such an analysis is unsupported in this Court's jurisprudence and would contravene numerous decisions of this Court treating discharge and causation as *distinct* elements of the tort. RAP 13.4(b)(1).

(a) <u>The Deputies Were Wrongfully Discharged</u>

A wrongful discharge can be direct or constructive. *Snyder v. Med. Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001). In *Barnett v. Sequim Valley Ranch*, LLC, 174 Wn. App. 475, 302 P.3d 500, *review denied*, 178 Wn.2d 1014 (2013), Division II examined the four-factor test for proving constructive discharge, including the element that the employee

[5] In *Pfeiffer*, Division III actually *reversed* a trial court judgment as a matter of law that constructive discharge had not occurred.

"quit because of the conditions and not for any other reason." *Id.* at 489-90. The court wrote that the test for constructive discharge comes down to a question of "choice." A plaintiff has a claim if the record shows that working conditions become so intolerable that a plaintiff reasonably believes they "have no alternative but to resign their position[]." *Id*. at 490. This tracks this Court's *Korslund* decision discussed *infra*. But because an employer will rarely fire an employee for upholding a vital public policy, constructive discharges are more common; such discharges are usually more subtle, and the facts of the employer's conduct are ever the more consequential. Those facts should be evaluated by a jury, not a judge ruling as a matter of law.

Constructive discharge generally occurs where the employer makes the working conditions so intolerable that a reasonable person is forced to leave the employment; intolerable conditions may include aggravating circumstances or a continuous pattern of discriminatory treatment and is a jury

question. *Allstot v. Edwards*, 116 Wn. App. 424, 433, 65 P.3d 696, *review denied*, 150 Wn.2d 1016 (2003). In *Ritchey v. Sound Recovery Centers, LLC*, 14 Wn. App. 2d 1063, 2020 WL 6146462 (2020) at *11, (Division II upholds a jury verdict because a court could not rule on for constructive discharge as "a matter of law," because whether an employer "made working conditions intolerable and would have forced a reasonable person in [the plaintiff's] position to resign" is a question of fact that "necessarily involves subjective determinations.").

Division II suggests in a footnote, op. at 9 n.4, that in order for an employee to be constructively discharged, the employee's separation from employment must be the "sole cause" of intolerable conditions on the job. In making that statement, Division II *ignores* this Court's precedent. Central to the issue of discharge here is this Court's determination that conduct exacerbating an employee's pre-existing medical condition leading to the employee's separation from employment may constitute a constructive discharge:

> We agree that an employee who is forced to permanently leave work for medical reasons may have been constructively discharged. Deliberately creating conditions so intolerable as to make the employee so ill that he or she must leave work permanently is functionally the same as forcing the employee to quit.

Korslund v. DynCorp Tri-Cities Servs., Inc., 156 Wn.2d 168, 180, 125 P.3d 119 (2005), *overruled on other grounds in Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 258 P.3d 139 (2015). When a worker leaves employment due to health, they are constructively discharged if it results from intolerable conditions. *Id.* (citing *White v. Honeywell, Inc.*, 141 F.3d 1270, 1279 (8th Cir. 1998)). The *Korslund* court upheld Division III's conclusion that taking medical leave could be a constructive discharge, adopting the Eighth Circuit analysis in *White* that the situation in which an employee does not "quit" but is instead forced out of work through medical complications, a constructive discharge is present. *Id.* at 179-80.[6] Division II's opinion fails

[6] This principle was not overruled by *Rose*, a decision that *broadened* the common law's protections for whistleblowers.

to even address this crucial holding from *Korslund*, creating intolerable conflicts that this Court should resolve. RAP 13.4(b)(1).

Courts have readily concluded that exacerbation of an employee's pre-existing health condition making working conditions intolerable may constitute a constructive discharge, further highlighting the conflicts Division II's opinion creates. RAP 13.4(b)(2). *See, e.g.*, *Allstot,* 116 Wn. App. at 429 (police officer gave three reasons for intolerable conditions constituting constructive discharge; Division II held that while the three facts separately may not equal intolerable conditions, together they establish a pattern of intolerable working conditions); *Hartman v. Young Men's Christian Ass'n of Greater Seattle*, 191 Wn. App. 1005, 2015 WL 6872184 (in WLAD case, citing *Korslund*, Division I discerned fact issue on constructive discharge where failure to accommodate health condition worsened by employer retaliation); *Jennings v. Stevens County*, 2010 WL 3516914, at *7 (E.D. Wash. 2010) (district court denied county's summary

judgment on constructive discharge where there was fact question over whether intolerable working conditions exacerbated plaintiff's underlying ADHD and other disorders leading to her separation from employment); *Keefe v. Crowne Plaza Hotel Seattle*, 2017 WL 1210224 (W.D. Wash. 2017) (employer constructively discharged employee by refusing to accommodate her to prevent contact by fellow employee who allegedly physically and sexually assaulted, thereby exacerbating her PTSD and causing her to leave employment)..

Ultimately, not only is Division II's exceedingly narrow conception of what constitutes a "discharge" unsupported in the case law, it is exceedingly bad public policy as well.[7] A court

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[7] The County expressly argued the horrible position below, despite *Korslund*, that if an employee leaves service for medical reasons, they can *never* establish the wrongful discharge tort. CP 506 ("Under Washington law, a wrongful termination claim premised on constructive discharge requires the plaintiff to prove that their employer deliberately made their working conditions intolerable and that he or she resigned or retired *because of these conditions, not any other reason*.") (County's emphasis); CP 516.

must take the plaintiff as it finds her/him, the classic "eggshell plaintiff." *See, e.g.*, *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004); *Xieng v. People's Nat'l Bank of Wash.*, 63 Wn. App. 572, 582-83, 821 P.2d 520 (1991), *aff'd*, 120 Wn.2d 512, 844 P.2d 389 (1993) (affirming the trial court's finding that the employer was liable for aggravating employee's pre-existing PTSD). Consistent with this tort principle, a constructive discharge occurs if an employer's conduct was "an aggravating circumstance" that made a bad situation become "intolerable." *Allstot*, 116 Wn. App. at 433-34.

Few employers simply fire employees because they advance key public policies. Rather, as here, they make life miserable for employees who have the fortitude to fight for important policies or blow the whistle. The trial court's decision, upheld by Division II's refusal to address it, would only serve to allow employers to so intensely harass troublesome employees who had the courage to advance important public policies that they would leave employment for medical reasons. Such an

atrocious public policy ill benefits the rationale for the tort – to uphold vital public policies. This further warrants review, as this Court should clarify that the tort of wrongful discharge still has teeth to protect citizens of this state from unlawful abuse. RAP 13.4(b)(4).

Bray/Tracy were discharged when the County's actions exacerbated their pre-existing PTSD and forced them from their law enforcement service. This Court must uphold its analysis in *Korslund*. Review is merited. RAP 13.4(b)(1).

(b) The Deputies' Upholding of the Public Policy Against Giving Firearms to DV Perpetrators Was a Substantial Factor in Their Wrongful Discharge

In collapsing the discharge and causation elements of the tort, Division II evades this Court's clear case law establishing that the causation element of the tort of wrongful discharge in violation of public policy only requires that the violation be a "substantial factor" in the employee's discharge. Instead, Division II asserts that the tort requires proof that the employee's

departure from employment was caused *solely* by his or her upholding the public policy. Op. at 9. Division II's opinion conflicts with this Court's established precedent. RAP 13.4(b)(1).

The *Wilmot* court *rejected* sole cause for the causation element. Wilmot v. Kaiser Aluminum and Chemical Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991) ("…we reject one test of causation, i.e., that retaliation for pursuing workers' compensation benefits was the sole cause for the discharge."). Rather, a plaintiff need prove only that the policy-linked conduct was a *substantial factor* in the employer's decision to take adverse action. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 311, 898 P.2d 284 (1995); *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 726, 425 P.3d 837 (2018). The causal bar is *low*, as this Court noted in *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (the actions in furtherance of the public policy need only be *a* cause of the discharge, *not* the sole cause). *See also*, *Scrivener v. Clark Coll.*,

181 Wn.2d 439, 442, 334 P.3d 541 (2014) (an employee has a claim under the Washington Law Against Discrimination if unlawful discrimination is a "substantial factor motivating" an employer's adverse employment action).[8]

Bray/Tracy were retaliated against until they were medically separated from County employment *because* of their whistleblower activities in opposing PCSD misconduct which endangered DV victims (handing a firearm to an abuser while serving a DV protection order). Applying the *Wilmot* court's analysis, 118 Wn.2d at 69, as to the necessary circumstantial evidence of causation, PCSD's retaliatory conduct was for the deputies' public policy-linked whistleblowing; that was demonstrated by (1) timing – PCSD's began targeting and

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[8] Proximate cause under a "substantial factor" standard is a *fact question*. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 641-42, 911 P.2d 1319 (1995); *Paddock v. Port of Tacoma,* __ Wn. App. 2d ___, 531 P.3d 278 (2023) (Division II reversed summary judgment; a genuine issue of material fact existed on whether the employer's wrongful conduct was a substantial factor in the employee's discharge).

ostracizing them *after* their reports of the Annas murder-suicide; (2) performance histories – the deputies were model employee and commended for their law enforcement work until they reported the Annas murder-suicide; and (3) nature and severity of the retaliation – demonstrating PCSD's strong intent to force the deputies out of service.

Division II's opinion merits review under RAP 13.4(b)(1) where it so clearly contravenes this Court's analysis of causation in the wrongful discharge/public policy tort.

(2) Division II Misapplied the Doctrine of Judicial Estoppel

Division II's principal legal analysis in its opinion is its erroneous belief that the deputies were "judicially estopped" to claim that they were discharged for upholding the DV/firearms public policy it had upheld in *Bray I*. Op. at 9-15. Division II is wrong, and its opinion represents an outlier to the point of conflict that this Court should address. RAP 13.4(b)(1), (2).

As part of its strategy to divert attention from *Korslund* and to highlight its thinly veiled collateral source argument,[9] the County argued "estoppel" minimally and belatedly in the trial court and later in greater detail in its appellate pleadings.[10] Division II's analysis rests on judicial, not equitable, estoppel.[11]

Judicial estoppel is an *equitable* doctrine that applies when a party takes a *clearly* inconsistent position in a subsequent legal

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[9] The County's unsubtle, deliberate, and repeated reference to the amount of public dollars for deputies' pensions in pleadings throughout this case evidenced this effort. Such benefits are irrelevant under collateral source principles. *See*, *e.g.*, *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964) (Social Security payments/veterans' pension benefits); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998) (worker compensation benefits). *See also*, *Sutton v. Shufelberger*, 31 Wn. App. 579, 643 P.2d 920 (1982) (disability pension benefits).

[10] There is considerable irony in the fact that Division II spent as much time in its opinion justifying the County's raising of equitable estoppel in a footnote in its motion and judicial estoppel on its reply on summary judgment, op. at 10-12, as it did in analyzing the doctrine itself.

[11] The County could not establish the detrimental reliance element of equitable estoppel. The County never opposed the deputies' application to DRS for LEOFF benefits.

proceeding from what it took in an earlier legal proceeding, courts were misled by those inconsistent positions, and the party derives an unfair advantage. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007). Our courts have not applied the doctrine unless the party's positions are truly inconsistent. *See, e.g.*, *In re CIR of Amburgey and Volk*, 8 Wn. App. 2d 779, 440 P.3d 1069 (2019); *Petersen v. McCormic*, 9 Wn. App. 2d 1056, 2019 WL 2950187 (2019).

Division II's judicial estoppel discussion misstates what occurred in the deputies' relevant DRS proceedings, applying the incorrect version of WAC 415-104-480(2) to arrive at its incorrect result. Op. at 4-5. Tracy testified that his disability was occasioned by their *ongoing* PTSD. CP 46. While that PTSD originated in the initial February 2015 murder-suicide response, the PTSD was exacerbated by the retaliation they experienced for their report of misconduct in the Annas case. CP 18-57, 600, 677. That was precisely why his treatment was *ongoing*. As Division II noted, Bray testified to treatment by five doctors for

that same *ongoing* PTSD problem that included reaction to the Annas-related retaliation. Op. at 4. Bray did not testify before DRS that his retaliation by the PCSD and his fellow deputies did not cause his constructive discharge due to PTSD, as Division II reasoned. *Id*.

Both deputies applied to DRS for LEOFF disability retirement for their PTSD-related disability arising initially out of their February 27, 2015 response to a domestic murder/suicide. RCW 41.26.470 governs such line-of-duty disability claims. A law enforcement officer seeking such a disability must prove to DRS that "he or she is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months." RCW 41.26.470(9). The statute does not mention the cause of the employee's discharge. Nor does it say that the employee's separation must result *solely* from the precipitating physical or

mental condition. In fact, DRS regulations and the case law under RCW 41.26.470 is to the *contrary*.

Division II's opinion states that "by seeking disability benefits, the deputies were required to prove that the PTSD resulting from the February 2015 murder-suicide was, 'standing on [its] own, … catastrophically disabling.'" Op. at 13.

To the extent Division II's judicial estoppel analysis hinged on the premise that the deputies were required by law to argue that their line-of-duty injury, "standing on its own," was the sole cause of their separation from employment, that is incorrect both under WAC 415-104-480 and ALJ Pierce's ruling in the DRS disability benefits proceeding.

In reaching its decision, Division II cited the wrong version of WAC 415-104-480(2) in adopting the County's judicial estopped argument. Op. at 5. Division II denied the deputies' reconsideration motion on this point. ALJ Pierce did not apply the present version of WAC 415-104-480(2) because

it was promulgated *after* the deputies filed for benefits.[12] The deputies could not have taken any position based on language that did not apply in their earlier DRS administrative proceeding. In declining to apply the amended 2018 version of WAC 415-104-480(2) in her legal analysis, ALJ Pierce instead applied the 2004 version of the rule in effect in 2017 when Deputy Tracy applied for disability retirement benefits.[13]

In its 2004 form, correctly applied by Judge Pierce, WAC 415-104-480 made any member of LEOFF 2 eligible for benefits if that police officer: "a) incurred a physical or mental disability in the line of duty; b) bec[a]me totally incapacitated for continued employment in a LEOFF eligible position; and c)

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[12] WAC 415-104-480 governing LEOFF Plan 2 benefits first went into effect in 2004. The original text of the regulation remained in effect until July 16, 2018, *after* the deputies had commenced this action.

[13] ALJ Pierce came to the same conclusion in her order finding Deputy Bray eligible for benefits.

separated from a LEOFF eligible position due to the disability." WAC 415-104-480(1)(a)-(c) (2004).[14]

In *Shaw v. Dep't of Retirement Syst.*, 193 Wn. App. 122, 371 P.3d 106 (2016), a case Division II did not cite,[15] it held that RCW 41.26.470 did not require that the firefighter's LEOFF 2 employment be the *sole cause* of his disability. Rather, the disability must arise "naturally and proximately" out of the employment. In *Shaw*, the firefighter claimed that a pre-existing PTSD condition was aggravated by on-the-job false allegations of misconduct that caused him to leave his job. *Accord*, *Dillon v. Seattle Police Pension Bd.*, 82 Wn. App. 168, 916 P.2d 956

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[14] The 2018 version of the rule included new language discussing multiple injuries/conditions and duty injuries "standing on their own." WAC 415-104-480(2). This was *after* the deputies filed for benefits. This 2018 version of the rule and its new language was specifically rejected by ALJ Pierce.

[15] *Shaw* distinguished *Woldrich v. Vancouver Police Pension Bd.*, 84 Wn. App. 387, 928 P.2d 423 (1996), the case cited by Division II, op. at 13, at length, ultimately concluding that nothing in that opinion required the specific employment to be the sole cause of the officer's disability. 193 Wn. App. at 132.

(1996) (police officer accidentally shot himself while cleaning a gun; his disability was compensable nevertheless). Division II's analysis of the DRS LEOFF proceedings was also legally incorrect, conflicting with *Shaw*. RAP 13.4(b)(2).

Bray/Tracy simply had no reason to explain in the DRS proceedings that PCSD's retaliation exacerbated their PTSD symptoms; ultimately, whether Bray or Tracy's disability emanated from the February 27, 2015 incident or the April 17, 2015 incident *made no difference to DRS*. *Both* events were in the line of duty. Neither deputy derived any "benefit," to which they were not otherwise entitled from pointing to the February 27, 2015 incident.

More critically, because both deputies testified before DRS that their *ongoing* medical issues led to their separation from service, Bray/Tracy did not take a "clearly inconsistent position." *Arkison*, 160 Wn.2d at 538. They misled neither DRS nor the trial court. In this action, Bray/Tracy asserted that their PCSD retaliation was a substantial factor in exacerbating their

pre-existing medical conditions. CP 607, 677. In the administrative hearings, they testified that their PTSD symptoms had become so intolerable that they could no longer work. CP 18-57. These positions are *consistent* because the core issue here – not just *whether* the employees' PTSD had become so bad that Bray/Tracy could no longer work but *why* their PTSD symptoms had worsened to that extent – was not before DRS.

This point bears repeating. The issue of why their conditions worsened *was not before DRS*. During the administrative proceeding, the question was simply whether the deputies were disabled in the line of duty, but, in this litigation, causation and the unlawful reasons for the deputies' discharge are now the question. *See Martin*, 191 Wn.2d at 726 (discussing causation and employer's motives as tort inquiries).

Finally, it would be unjust to apply estoppel, an equitable doctrine, in a fashion that rewards the County's outrageous behavior. It is wrong as a matter of statewide policy to condone the Blue Code of Silence to cover up an incident where PCSD

deputies improperly provided a murder weapon to a DV perpetrator who then murdered his wife and killed himself. This warrants review by this Court. RAP 13.4(b)(4).

Division II's opinion on judicial estoppel rests on the wrong DRS regulation and a legal position Division II itself rejected in *Shaw*. Review is merited. RAP 13.4(b)(2).

(3) Division II's Opinion Condones the Blue Code of Silence

The larger issue present in this case is whether the deputies' egregious harassment by their colleagues when they dared to speak out about official misconduct should be condoned.

The Blue Code of Silence keeps police officers from reporting blatant misconduct by their fellow officers.[16] *See*, *e.g.*, Gabriel J. Chin, Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police*

[16] The recent news stories about inappropriate "trophies" of deceased Black perpetrators in the Seattle Police Department's East Precinct can only raise concerns about the treatment of officers who might have reported such misconduct.

Perjury, 59 U. Pitt. L. Rev. 233 (1998). As noted in Connie Felix Chen, *Freeze, You're on Camera: Can Body Cameras Improve American Policing on the Streets and at the Borders*, 48 U. Miami Inter-Am. L. Rev. 141, 149-50 (2017), the Blue Code of Silence is "the single greatest barrier to successful prosecution of police misconduct," and it advances untruthful policy testimony, or "testifying" to save fellow officers. That code is particularly noteworthy in the § 1983 liability context. *See* Myriam F. Giles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B. U. L. Rev. 17, 63-77 (2000).

Bray/Tracy paid an extraordinarily high price of odious harassment at the hands of their fellow deputies and the PCSD itself that worsened their PTSD, resulting in their discharge from a job they loved. Division II's head-in-the-sand treatment of this aspect of the case condoned a public policy – the Blue Code of Silence – this Court should condemn if its commitment to proper police conduct is to be upheld.

To this end, because people of color and people in LGBTQ community are disproportionately the victims of police misconduct, this question has even larger overtones for justice in our State. *See, e.g.*, *State v. E.J.J.*, 183 Wn.2d 497, 525-30, 354 P.3d 815 (2015) (González, J., concurring) (recognizing disproportionate impact of police misconduct on minorities in and out of Washington). This Court's June 4, 2020 open letter to the legal community reminds us that "racialized policing" continues in our State. If the Court hopes to encourage officers themselves to work to end racism, a "moral imperative," the Blue Code of Silence must not be condoned, but must end.

Review is merited. RAP 13.4(b)(4).

F. CONCLUSION

Division II's opinion rests on a clear misunderstanding of the elements of the wrongful discharge/public policy tort, collapsing its discharge and causation elements into a sole cause analysis contrary to this Court's decisions. That error is exacerbated by Division II's misapplication of judicial estoppel,

contradicting its own decisions on causation in DRS proceedings. The opinion ultimately condones the Blue Code of Silence, which has disastrous ramifications for citizens across the state who justifiably fear police misconduct. Review is merited. RAP 13.4(b)(1), (2), (4).

This Court should reverse Division II and finally afford Bray and Tracy their day in court.

This document contains 4,896 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of September, 2023.

Respectfully submitted,

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

July 18, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DANIEL BRAY, individually, and JOEY TRACY, individually,

Appellants,

v.

PIERCE COUNTY, a subdivision of the State of Washington,

Respondent.

No. 57026-2-II

UNPUBLISHED OPINION

LEE, J. — Former Pierce County Sheriff's Deputies Daniel Bray and Joey Tracy (collectively, the Deputies) appeal the superior court's order granting summary judgment dismissal of their claim against Pierce County for wrongful discharge in violation of public policy. The Deputies argue that the superior court erred by granting summary judgment dismissal of the claim because genuine issues of material fact exist as to whether they were constructively discharged.

We hold that judicial estoppel precludes the Deputies from creating a genuine issue of material fact as to whether they were constructively discharged. Accordingly, we affirm the superior court's order granting summary judgment dismissal of the wrongful discharge in violation of public policy claim.

FACTS

A. INCIDENTS WHILE WORKING FOR PIERCE COUNTY SHERIFF'S DEPARTMENT

The Pierce County Sheriff's Department (PCSD) hired Bray and Tracy in 2012. In February 2015, the Deputies responded to a call and found a deceased mother and daughter. Bray found a suicide note from the mother detailing how the mother killed the daughter and then herself.

In April 2015, a separate incident occurred. *Bray v. Pierce County*, No. 53080-5-II, slip op. at 2 (Wash. Ct. App. Jan. 5, 2021) (unpublished).[1] A different PCSD deputy returned a handgun and loaded magazine to a man who had just been served with a domestic violence temporary protection order. *Id.* at 2-3. The man later used the handgun to kill his wife, wound her friend, and kill himself. *Id.* at 3. The Deputies (Bray and Tracy) responded to the shooting. *Id.*

B. REPORTING AND PCSD'S ALLEGED RETALIATION

The Deputies reported the April 2015 incident to their supervisors, disclosing that another PCSD deputy had given the murder weapon to the shooter. *Id.* The Deputies told their supervisors that giving a firearm to the subject of a domestic violence dispute while serving a temporary protection order was improper, contrary to officer training, against the County's policies and procedures, and unlawful. *Id.* at 3-4. The Deputies continued to make reports to the PCSD and the County because they were unsatisfied with the County's response and its failure to conduct an investigation. *Id.* at 4.

Following the Deputies' reports about the April 2015 incident, the PCSD took numerous actions that the Deputies perceived to be retaliation for whistle blowing. The Deputies alleged that

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[1] https://www.courts.wa.gov/opinions/pdf/D2%2053080.5-II%20Unpublished%20Opinion.pdf.

supervisors threatened to demote the Deputies and separate the Deputies from working with each other. Supervisors also told the Deputies to not perform certain job duties or go to certain locations without specific requests or approval. And a supervisor emailed other officers to tell them that the Deputies needed close monitoring for unstated reasons. The email stated that other officers should deny certain requests the Deputies made and prevent the Deputies from doing certain types of work, but not remind the Deputies if they forgot to write a report and instead allow the Deputies to "sink on their own." Clerk's Papers (CP) at 595.

The PCSD also initiated eight internal affairs investigations of Bray and four internal affairs investigations of Tracy. Tracy alleged several more incidents of retaliation following his arrest on criminal charges that were eventually dismissed.

C. MEDICAL CONDITIONS AND LEAVE

After responding to the murder-suicide in February 2015, Bray began to experience mental health issues, including flashbacks, sleep problems, anxiety, and experiences similar to panic attacks. Bray began seeking treatment from a clinical psychologist who diagnosed Bray with post-traumatic stress disorder (PTSD) proximately caused by the February 2015 murder-suicide. The clinical psychologist determined that the PTSD was exacerbated by Bray's experience of being mistreated by the PCSD. In fall of 2015, another doctor determined that Bray suffered from symptoms consistent with PTSD and should not be working.

In November 2015, Bray went on medical leave and stopped working. In February 2016, Bray saw a psychiatrist. The psychiatrist diagnosed Bray with PTSD that was causally related to the February 2015 murder-suicide. The psychiatrist also determined that that "Mr. Bray's

experience of hostility and betrayal from his employer is another natural and proximate cause that resulted in his disability and inability to work." CP at 707.

In October 2015, Tracy took medical leave for a hand injury. Tracy also started seeing a licensed mental health counselor. The licensed mental health counselor determined that Tracy was experiencing PTSD symptoms stemming from trauma-related flashbacks and Tracy's experience of harassment by the PCSD. From late 2015 to early 2016, several medical providers determined that Tracy needed time off from work to improve his mental health conditions.

D. SEPARATION FROM EMPLOYMENT

On December 9, 2016, the PCSD separated the Deputies from their employment. The PCSD provided the Deputies with separate notices stating that the Deputies had a medical condition preventing them from performing the essential functions of their jobs. In the separation notices, the PCSD informed the Deputies that they were separated in good standing and that, should their health improve, the County would

> assist you in your employment search by placing your name on a re-employment register for upcoming vacant positions for which you are otherwise qualified and for which you are medically released to work. You would remain on this list for one year from your separation date or until an offer of employment is made, whichever is earlier.

CP at 1032, 1106.

Following receipt of the separation notice, Bray applied for duty-related disability retirement benefits. An administrative law judge (ALJ) held a hearing regarding Bray's application. Bray's application for duty-related disability retirement benefits stated that his injury had been diagnosed by five doctors as PTSD and directly related to his duties as a deputy sheriff. At the hearing, Bray testified that he took medical leave to treat his PTSD arising from the February

2015 murder-suicide. Bray also testified that the retaliation he faced for whistleblowing did not cause his PTSD, and he believed his PTSD was caused by the February 2015 murder-suicide. Bray was ultimately awarded catastrophic disability benefits.[2]

Tracy also applied for duty-related disability retirement benefits. An ALJ held a hearing regarding Tracy's application. At the hearing, Tracy testified that he thought the February 2015 murder-suicide caused his PTSD. Tracy also testified that his medical treatment was related to the February 2015 murder-suicide. Tracy further testified that the PCSD separated him from his employment "[d]ue to [his] ongoing medical issues." CP at 46. Tracy was ultimately awarded catastrophic disability benefits.

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[2] The Washington Administrative Code (WAC) regarding catastrophic disability provides:

> (1) If the [Department of Retirement Systems] determines you are disabled and you became disabled in the line of duty, you qualify for a catastrophic duty disability if:
>
> (a) The disability or disabilities that qualified you for a LEOFF Plan 2 duty disability benefit are so severe that considering your age, education, work experience, and transferable skills, you cannot engage in any other kind of substantial gainful activity in the labor market; and
>
> (b) Your disability or disabilities have lasted or are expected to last at least 12 months, or are expected to result in your death.
>
> (2) A person with multiple injuries/conditions, some duty-related and some not, could qualify for a catastrophic duty disability but only if the duty injury or injuries, standing on their own, are catastrophically disabling.

WAC 415-104-480.

D. Procedural History

In March 2018, the Deputies filed a complaint in superior court against Pierce County. The Deputies alleged that the PCSD wrongfully discharged them in violation of public policy.[3] In support of their wrongful discharge in violation of public policy claim, the Deputies alleged that they were constructively discharged from the PCSD when they were medically separated from employment.

The County moved for partial summary judgment on the wrongful discharge in violation of public policy claim, arguing that the Deputies failed to identify a clear mandate of public policy. The superior court denied the County's motion.

The County sought discretionary review in this court. We granted discretionary review on "'whether a clear mandate of public policy exists under these circumstances is a controlling question of law on which there is [a] substantial ground for a difference of opinion.'" *Bray*, slip op. at 1-2 (alteration in original) (quoting Ruling Granting Review, *Bray v. Pierce County*, No. 53080-5-II, at 9 (Wash. Ct. App. Apr. 8, 2019)). We affirmed, holding that "under these circumstances, Bray and Tracy have identified a clear public policy to protect victims of domestic violence and to not affirmatively arm a restrained party when serving a domestic violence protection order." *Id.* at 2.

On remand, the County again moved for summary judgment on the wrongful discharge in violation of public policy claim. This time, the County argued that the Deputies could not show

[3] The Deputies also brought claims for negligence, outrage, negligent infliction of emotion distress, abuse of process and malicious prosecution, defamation, false light, false arrest, and invasion of privacy.

they were constructively discharged, as their medical discharge was not solely because of intolerable working conditions. The County also argued that even if the Deputies were wrongfully discharged, the discharge was not connected to the public policy they advance (prevention of domestic violence). The County argued in its briefing that the Deputies were estopped from arguing that the PCSD's retaliation was the reason for their discharge.

At the hearing on the County's summary judgment motion, both parties addressed the County's estoppel arguments. The Deputies addressed the estoppel arguments on the merits and argued that the estoppel arguments were unsuccessful. The superior court granted the County's motion for partial summary judgment.

The Deputies sought discretionary review with our Supreme Court. The Supreme Court transferred the motion for discretionary review to this court.

The Deputies subsequently moved for voluntary dismissal of their remaining claims at the superior court. The superior court granted the motion, dismissing the remaining claims without prejudice, and later amended its order to dismiss the claims with prejudice. We converted the Deputies' petition for discretionary review to a notice of appeal.

ANALYSIS

A. STANDARD OF REVIEW

We review summary judgment decisions de novo and perform the same inquiry as the trial court. *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 722, 425 P.3d 837 (2018). We view all facts and reasonable inferences in the light most favorable to the nonmoving party (here, the Deputies). *Id.* Summary judgment should be granted only when the evidence presents no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. CR 56(c);

Martin, 191 Wn.2d at 722. A genuine issue of material fact exists if reasonable minds could disagree on facts that control the outcome of the matter. *Mackey v. Home Depot USA, Inc.*, 12 Wn. App. 2d 557, 569, 459 P.3d 371, *review denied*, 195 Wn.2d 1031 (2020).

B. LEGAL PRINCIPLES: WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

The tort of wrongful discharge in violation of public policy is a narrow exception to the at-will employment doctrine. *Martin*, 191 Wn.2d at 722-23. A wrongful discharge in violation of public policy claim may be based on actual or constructive discharge. *Peiffer v. Pro-Cut Concrete Cutting & Breaking Inc.*, 6 Wn. App. 2d 803, 829, 431 P.3d 1018 (2018), *review denied*, 193 Wn.2d 1006 (2019). To succeed, the "'plaintiff must plead and prove that his or her termination was motivated by reasons that contravene an important mandate of public policy.'" *Id.* at 828 (quoting *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015)).

When there has been an actual discharge, the elements for a wrongful discharge in violation of public policy claim are "(1) the employee's discharge may have been motivated by reasons that contravene a clear mandate of public policy, and (2) the public-policy-linked conduct was a significant factor in the decision to discharge the worker." *Id.* at 829.

The first element differs depending on whether the claim is based on actual or constructive discharge. *Id.* at 830. In actual discharge cases, the plaintiff carries the burden of first showing that their discharge may have been motivated by reasons that contravene a clear mandate of public policy. *Id.* at 829. When the wrongful discharge in violation of public policy claim arises from constructive discharge, the first element "is modified to address whether the intolerable condition that led the employee to resign contravened a clear mandate of public policy." *Id.* at 830.

The second element also differs depending on whether the claim is based on actual or constructive discharge. *Id.* In actual discharge cases, the plaintiff must show that "the public-policy-linked conduct was a significant factor in the decision to discharge the worker." *Id.* at 829. In constructive discharge cases, the elements of a constructive discharge claim replace this second element. *Id.* at 830. The elements of a constructive discharge claim are that

> (1) the employer deliberately made working conditions intolerable, (2) a reasonable person in the employee's position would be forced to resign, (3) the employee resigned because of the intolerable condition and not for any other reason, and (4) the employee suffered damages as a result of being forced to resign.

Id. at 829. A plaintiff must satisfy all four constructive discharge elements to satisfy the second element of a wrongful discharge in violation of public policy claim based on constructive discharge.[4] *Id.* at 830.

C. JUDICIAL ESTOPPEL AND CONSTRUCTIVE DISCHARGE

The Deputies argue that the superior court erred by granting summary judgment because a genuine issue of material fact exists as to whether they were constructively discharged. The County makes several arguments that the Deputies are precluded from arguing that they were constructively discharged, including that, because the Deputies testified in their disability retirement proceedings that their separation was due to PTSD caused by the February 2015

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[4] The Deputies appear to argue that the third element in *Peiffer* (that the employee resigned because of the intolerable condition and not for any other reason) is not an element of constructive discharge. To the extent the Deputies make this argument, they are incorrect. Resigning solely because of intolerable working conditions and not for some other reason is an element of constructive discharge. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 489, 302 P.3d 500, *review denied*, 178 Wn.2d 1014 (2013); *Crownover v. Dep't of Transp.*, 165 Wn. App. 131, 149, 265 P.3d 971 (2011), *review denied*, 173 Wn.2d 1030 (2012).

murder-suicide, the Deputies are estopped from arguing that the intolerable employment conditions were the sole reason for their discharge. We agree with the County.

1. Procedural Issues with Estoppel Arguments

As a preliminary matter, the Deputies argue that we should not address the County's estoppel arguments because (1) estoppel is an affirmative defense, (2) the County only raised estoppel in a footnote below, (3) the collateral source rule bars the County from using the Deputies' statements in the disability retirement proceedings, and (4) the County failed to preserve its judicial estoppel argument by only raising it in a reply brief below. We hold that the Deputies' arguments fail and the County is permitted to make its estoppel arguments.

a. Affirmative defense

The Deputies argue that we should not address the County's estoppel arguments because estoppel is an affirmative defense that must be specifically pleaded and proven. Affirmative defenses, including estoppel, are deemed waived if they are not "affirmatively pleaded, asserted with a motion under CR 12(b), or tried by the express or implied consent of the parties." *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 134, 144 P.3d 1185 (2006).

Here, the Deputies addressed the merits of the County's estoppel arguments at the summary judgment hearing and argued that the estoppel arguments were unsuccessful. The Deputies did not argue that the estoppel arguments could not be raised. Therefore, the estoppel arguments were tried by the implied consent of the parties, and the County did not waive its estoppel argument.[5]

[5] We note that the County filed its answer and affirmative defenses to the complaint before the Deputies testified in the disability retirement proceedings. Because the County's estoppel arguments are based on the disability retirement proceedings, it is unclear how the County could have raised estoppel as an affirmative defense in its answer.

b. Estoppel raised in a footnote

Curiously, in a footnote, the Deputies argue that we need not address the County's estoppel arguments because the County only raised estoppel in a footnote in its summary judgment motion. We disagree.

A court may decline to address an issue raised solely in a footnote where it is ambiguous or equivocal as to whether the party intended to raise the issue. *See State v. Johnson*, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993). But here, it is clear that the County intended to raise estoppel because it continued to argue estoppel throughout the summary judgment proceedings below. Moreover, the Deputies failed to raise any argument below challenging the estoppel argument's placement in a footnote. *See* RAP 9.12 ("On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."). Therefore, we reject the Deputies' argument raised for the first time in a footnote in their appellate brief complaining about the County's estoppel arguments that were initially raised in a footnote in the superior court but were fully litigated below.

c. Collateral source rule

The Deputies argue that the collateral source rule bars the County from using the Deputies' statements in the disability retirement proceedings to make its estoppel arguments. Although the County raised the estoppel arguments below, the Deputies did not mention the collateral source rule. In reviewing a summary judgment decision, we will only consider issues called to the attention of the trial court. RAP 9.12. Therefore, we do not address the Deputies' argument raised for the first time on appeal regarding the collateral source rule.

Even if we exercise our discretion and address the Deputies' collateral source rule argument on the merits, the argument fails. The collateral source rule excludes evidence of third-party payments when a tortfeasor attempts to use that evidence to reduce a damage award. *See Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). The collateral source rule excludes this evidence because it is unfairly prejudicial: "the jury could use it for improper purposes." *Id.* at 440. Here, the issue on summary judgment was liability, not damages, and there was no jury that could have used the evidence for improper purposes. Therefore, even if the argument is addressed on the merits, the collateral source rule does not apply.

d. Judicial estoppel argument raised in reply brief below

The Deputies argue that we should not address the County's argument regarding judicial estoppel because it was raised for the first time in a reply brief below. Below, both parties addressed the County's judicial estoppel argument at the summary judgment hearing, and the Deputies argued that judicial estoppel did not apply. At no point did the Deputies discuss the placement of the judicial estoppel argument in a reply brief. Because the Deputies had the opportunity to argue the judicial estoppel issue below and failed to raise the argument they now assert, we decline to consider the Deputies' contention that the County raised the judicial estoppel argument for the first time in its reply brief. *See* RAP 9.12.

2. Judicial Estoppel

The County argues that judicial estoppel precludes the Deputies from creating a genuine issue of material fact as to whether the Deputies were constructively discharged. We agree.

Judicial estoppel precludes a party from taking incompatible positions to its advantage in successive judicial proceedings. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851,

861, 281 P.3d 289 (2012). The three core factors in determining whether judicial estoppel should be applied are

> (1) whether the party's later position is "clearly inconsistent with its earlier position," (2) whether acceptance of the later inconsistent position "would create the perception that either the first or the second court was misled," and (3) whether the assertion of the inconsistent position would create an unfair advantage for the asserting party or an unfair detriment to the opposing party.

Id. (internal quotation marks omitted) (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007)).

In catastrophic disability proceedings under the Deputies' retirement plan, the applicant must show that they were injured "in the line of duty." WAC 415-104-480(1). "A person with multiple injuries/conditions, some duty-related and some not, could qualify for a catastrophic duty disability but only if the duty injury or injuries, standing on their own, are catastrophically disabling." WAC 415-104-480(2). "Catastrophically disabled" means the person "is unable to perform any substantial gainful activity due to a physical or mental condition that may be expected to result in death or that has lasted or is expected to last at least twelve months." RCW 41.26.470(9); WAC 415-104-480(5)(a). For a mental disability to be sustained "in the line of duty," the mental disability must arise from the performance of the duties of police work, not from demotion or workplace discipline. *See Woldrich v. Vancouver Police Pension Bd.*, 84 Wn. App. 387, 392-93, 928 P.2d 423 (1996).

Thus, by seeking catastrophic disability benefits, the Deputies were required to prove that the PTSD resulting from the February 2015 murder-suicide was, "standing on [its] own, . . . catastrophically disabling." WAC 415-104-480(2). This means that the PTSD resulting from the

February 2015 murder-suicide, standing on its own, must have rendered the Deputies unable to perform any substantial gainful activity. RCW 41.26.470(9); WAC 415-104-480(5)(a).

Now, on their wrongful discharge in violation of public policy claim, the Deputies must show that their discharge occurred because of the PCSD's retaliation "and not for any other reason." *Peiffer*, 6 Wn. App. 2d at 829. To meet this burden, the Deputies must now take the position that the PCSD's retaliation was the sole reason why their PTSD became severe enough to prevent them from performing essential job functions, eventually resulting in their discharge.

The positions above are incompatible and clearly inconsistent with each other. And acceptance of the Deputies' current position would create the perception that either the ALJ or the court was misled as to the cause of the Deputies' inability to perform the duties of police work. Also, allowing the Deputies to assert these inconsistent positions would create an unfair advantage by allowing the Deputies to pursue different claims for their injuries by simply declaring different reasons for their inability to perform their duties of police work. Thus, the three core principles of judicial estoppel apply here and preclude the Deputies from previously asserting that the PTSD resulting from the February 2015 murder-suicide was catastrophically disabling standing on its own and rendered the Deputies unable to perform any substantial gainful activity, but now asserting that the retaliation was the sole cause for the severity of their PTSD, which prevented them from performing their essential job functions. *See Anfinson*, 174 Wn.2d at 861.

Without the assertion that their discharge occurred solely because of the PCSD's retaliation, the Deputies cannot prove the third element of constructive discharge—that the discharge occurred "because of the intolerable condition and not for any other reason." *Peiffer*, 6 Wn. App. 2d at 829. Because the Deputies' wrongful discharge in violation of public policy claim

is based solely on constructive discharge arising from the PCSD's retaliation, their wrongful discharge in violation of public policy claim fails as a matter of law. *See id.* at 830. Accordingly, we affirm the superior court's order granting summary judgment dismissal of the Deputies' wrongful discharge in violation of public policy claim.

D. SANCTIONS

In their reply brief, the Deputies ask this court to sanction the County under RAP 18.9(a) and RPC 3.1. The Deputies argue that sanctions are warranted because the County made an alternative argument regarding causation that is frivolous. We disagree.

RAP 18.9(a) provides that this court may order a party that files a frivolous appeal to pay sanctions. Because the County is not the appellant and did not file a frivolous appeal, RAP 18.9(a) cannot justify an order for sanctions against the County.

RPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." However, "'breach of an ethics rule provides only a public, *e.g.*, disciplinary, remedy and not a private remedy.'" *Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn. App. 409, 417, 157 P.3d 431 (2007) (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992)). Thus, we decline to issue sanctions against the County based on RPC 3.1.[6]

[6] The County's alternative argument regarding causation relied wholly on an unpublished case. To the extent the Deputies are arguing that reliance on the unpublished case is sanctionable, we note that the unpublished opinion was filed by this court after March 1, 2013, and the County properly identified the case as unpublished and cited to GR 14.1(a).

E. Attorney Fees and Costs on Appeal

In the conclusion of their opening brief, the Deputies state that "[c]osts on appeal should be awarded to them." Br. of Appellant at 50. To the extent the Deputies request attorney fees and costs on appeal, we deny their request.

RAP 18.1(a) provides that "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses . . . the party must request the fees or expenses as provided in this rule." RAP 18.1(b) provides that "[t]he party must devote a section of its opening brief to the request for the fees or expenses." RAP 18.1(b) "requires more than a bald request for attorney fees on appeal." *Stiles v. Kearney*, 168 Wn. App. 250, 267, 277 P.3d 9, *review denied*, 175 Wn.2d 1016 (2012).

Here, the Deputies did not provide any argument or citation to law granting them the right to attorney fees or costs, nor did they devote a section of their opening brief to their request for attorney fees or costs. Therefore, we deny the Deputies' request for attorney fees and costs on appeal.

CONCLUSION

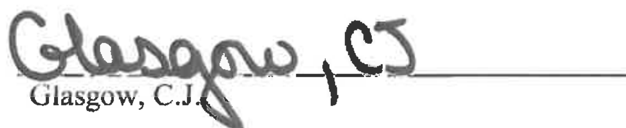
We affirm the superior court's order granting summary judgment dismissal of the wrongful discharge in violation of public policy claim.

No. 57026-2-II

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.

Lee, J.

We concur:



Glasgow, C.J.

Price, J.

Filed
Washington State
Court of Appeals
Division Two

August 17, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

DANIEL BRAY, Individually, and JOEY TRACY, individually, Appellants, v. PIERCE COUNTY, a subdivision of the State of Washington, Respondent.	No. 57026-2-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Daniel Bray and Joey Tracy (Deputies), filed a motion for reconsideration of this court's unpublished opinion filed on July 18, 2023. The County argued and quoted the WAC in effect at the time of the ALJ hearing in its Brief of Respondent to this court. The Deputies did not object in its reply brief to the applicability of the WAC cited and quoted in the County's briefing. Instead, the Deputies now raise new arguments for the first time on reconsideration, arguing about the applicable WAC without citation to the record to support their arguments. Therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT: Jj. Lee, Glasgow, Price

LEE, JUDGE

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 57026-2-II to the following parties:

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Original E-filed with:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 5, 2023 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

September 05, 2023 - 2:07 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	57026-2
Appellate Court Case Title:	Daniel Bray, et al, Appellant v. Pierce County, Respondent
Superior Court Case Number:	18-2-06355-3

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Comments:

Petition for Review

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