

63599-9

63599-9

No. 63599-9-1

---

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

---

ANTONIO ABEL and KEITH FREEMAN,  
Plaintiffs/Appellants,

v.

CITY OF ALGONA; STEVEN T. JEWELL and JANE DOE JEWELL;  
DAVID HILL and JANE DOE HILL; and JOSEPH SCHOLZ,  
Defendants/Respondents

---

**BRIEF OF APPELLANTS FREEMAN AND ABEL**

Olsen Law Firm PLLC  
Walter H. Olsen, Jr.  
WSBA No. 24462  
604 W. Meeker Street, Suite 101  
Kent, WA 98032  
(253) 813-8111 (phone)  
(253) 813-8133 (fax)  
Attorneys for Appellants

**ORIGINAL**

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT 13 PM 4:31  
3

**TABLE OF CONTENTS**

**Page No.**

**INTRODUCTION . . . . . 1**

**ASSIGNMENTS OF ERROR . . . . . 4**

**STATEMENT OF THE CASE. . . . . 4**

**A. Scholz, Hill, Jewell, and the City Implemented an Illegal Policy to Clean House of its Long Term Employees and Their Unions, and Start Over with New Employees Without Regard to The Legality or Liability of Their Actions. . . . . 4**

**B. Jewell’s Criminal and Civil Investigation Are Probative of the City’s Ongoing and Continuous Effort to Clean House Since 2005. . . . . 6**

**C. The City Took No Action on Federal Way’s Report From November 14, 2006 Until Late December 2006, Which is Probative of the City’s Ongoing and Continuous Effort to Clean House. . . . . 11**

**D. Jewell, Schols, Hill, and McGehee Retaliated and Discriminated Against Gustafson, Freeman, and Abel, Which is Probative of the City’s Ongoing and Continuous Effort to Clean House. . . . . 13**

**E. The City Violated Both Its Agreements With the Police Officers, and Washington Law, With its Ongoing and Continuous Effort to Clean House. . . . . 15**

**F. Procedural History. . . . . 17**

**ARGUMENT. . . . . 18**

**A. Standard of Review. . . . . 18**

**B. The City’s Actions and Inactions Since 2005; and Reasonable Inferences Therefrom, Confirm**

	<b>That the City is Subject to Liability for Negligent Hiring and Supervision of its Employees' Ongoing and Continuous Effort to Clean House (Assignment of Error Nos 1-2).</b> .....	<b>19</b>
<b>C.</b>	<b>The City's Ongoing and Continuous Effort to Clean House Since 2005, and Reasonable Inferences Therefrom, Confirm That the City is Subject to Liability for Breach of Implied or Express Employment Agreements (Assignment of Error Nos. 1-2).</b> .....	<b>24</b>
<b>D.</b>	<b>The Court Erred by Striking the Police Officers' Expert Testimony of a Police Administration and Discipline Expert (Assignment of Error No. 3).</b> .....	<b>31</b>
	<b>1. Standard of Review.</b> .....	<b>31</b>
	<b>2. Van Blaricom's Expert Testimony is Admissible and Identifies an Issue of Fact Regarding the City's Repeated Investigations of the Police Officers.</b> .....	<b>33</b>
	<b>CONCLUSION.</b> .....	<b>37</b>

**TABLE OF AUTHORITIES**

Page No.

*Cases*

*Anderson v. State Farm Mut. Ins. Co.*, 101 Wash. App. 323, 329, 2 P. 3d 1029 (2000). . . . . 18

*Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wash.2d 127, 138, 769 P.2d 298 (1989). . . . .26, 28

*Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wash.App. 616, 623, 128 P.3d 633, 637 (2006). . . . . 19

*Bulman v. Safeway, Inc.*, 144 Wash.2d 335, 354, 27 P.3d 1172 (2001). . . . . 25

*Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). . . . .32

*Hangarter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9<sup>th</sup> Cir. 2004). . . . .34, 36

*Haubry v. Snow*, 106 Wn.App. 666, 677, 31 P.2d 1186 (2001). . . . .22, 30

*Nielson v. AgriNorthwest*, 95 Wn.App. 571, 578, 977 P.2d 613 (1999). . . . . 23

*Peck v. Siau*, 65 Wash.App. 285, 288 (1992). . . . .19

*Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). . . . . 32

*Sneed v. Barna*, 80 Wn.App 843, 850, 912 P.2d 1035 (1996). . . . .23, 31

*Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711 (1989). . . . . 33

*State v. Kirkman*, 159 Wash.2d 918, 929, 155 P.3d 125 (2007). . . . . 34

*State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). . . . .33

*State v. Petrich*, 101 Wash.2d 566, 575-76, 683 P.2d 173 (1984). . . . .34

<i>State v. Ring</i> , 54 Wash.2d 250, 255, 339 P.2d 461 (1959) . . . . .	34
<i>State v. Thomas</i> , 123 Wn.App. 771, 778, 98 P.3d 1258 (2004) . . . . .	32
<i>Swanson v. Liquid Air Corporation</i> , 118 Wash.2d 512, 520, 826 P.2d 664 (1992) . . . . .	24, 25
<i>Viking Props., Inc. v. Holm</i> , 155 Wash.2d 112, 119, 118 P.3d 322 (2005) . . . . .	18
<i>Warrner v. Regent Assisted Living</i> , 132 Wn.App. 126, 135-35, n. 13, 130 P.3d 865 (2006) . . . . .	32
<i>Washington v. Boeing</i> , 105 Wn.App. 1, 15, 19 P.3d 1041 (2000) . . .	23, 31
<i>Wilson v. Steinbach</i> , 98 Wash.2d. 434, 437, 656 P.2d 1030 (1982) . . . .	19

***Other Authorities***

<i>Advanced Strategies in Employment Law</i> , 485, 488 (1987) . . . . .	25
Federal Rule of Evidence 704 . . . . .	33, 34
U.S. CONST. amend. VII . . . . .	33
WASH. CONST. art. I, §§ 21, 22 . . . . .	33
WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 9 (2d ed. 1994) (WPIC) . . . . .	33

## INTRODUCTION

This case is about a small town and its policy makers who adopted a policy and practice to clean house of its long term employees and their unions, and start over with new employees without regard to the legality or liability of their actions, or the damage it would cause its police officers Keith Freeman and Antonio Abel. CP 893.

Ultimately, the following fundamental legal issue has remained in this action since its commencement: whether the City may avoid liability for negligence or contractual damages to Freeman and Able by merely paying them during their suspension and criminal investigation? CP 521; RP 20-21.

In granting the City's motion for summary judgment of dismissal, the trial court tacitly ruled that the police officers could not be damaged as a matter of law, merely because the City paid them their salaries during their suspension.

But neither the City nor this Court should allow that public policy to prevail in Washington, because its unintended consequence would leave a gaping hole in society for any city or government to walk through as this city did, in order to evade liability to its employees, by simply paying them during any wrongful or illegal employment action.

Alternatively, if the Court concludes that Freeman and Able were not damaged because the City paid them during their suspension and criminal investigation, then the Court should consider whether Freeman and Able were damaged by their constructive termination from their positions as police officers.

By way of background and introduction of the parties, the City of Algona (the "City") is a small rural town which is approximately thirty (30) miles south of Seattle, Washington. CP 917, 878. Appellants Keith Freeman and Antonio Abel (the "police officers") were employed by the City as police officers. Dwain Beck ("Beck") is a resident of the City and was a city council member for the City from 2004 to 2007. CP 892-893. In 2003, Beck ran for election as a city council member of Algona. CP 893. At the time, Respondent Dave Hill ("Hill") was also running for a position on the City Council, and Respondent Joe Scholz ("Scholz") was already on the City Council but running for election as Mayor of Algona. *Id.*

While running for election, Beck, Scholz, and Hill ("Campaign Allies") would meet at Joe Scholz' home in one of his rooms which they called the "War Room" for planning their election campaigns and the future of Algona. *Id.* During those meetings, both Scholz and Hill admitted to Beck that they wanted to clean house at the City without cause, and thereby remove its long term employees and their unions, and start over with new employees ("clean house"). *Id.*

True to their word, the faces of City Hall have drastically changed since Joe Scholz, and later Dave Hill, became mayor of Algona. Indeed, since this matter commenced, only one police officer, and one public works director, remained from the group of employees who worked at Algona in 2003. CP 879, 945.

The City has engaged in an ongoing and continuous policy and practice to clean house at the City since as early as Scholz and Hill came to power in January 2004, or at least by May 2005 when it hired Respondent Steven Jewell ("Jewell") as its police chief. CP 893-896, 944-952. That ongoing and continuous policy and practice caused damage to Freeman and Abel as discussed below. The City took action to clean house by commencing and completing no less than eight (8) criminal and civil investigations against its officers and Beck during an eighteen (18) month period from May 2005 until November 30, 2006 when Jewell resigned. CP 914-939, 897-910, 880, 885-890, 944-952.

In comparison, the City does not dispute that it had not until then commenced civil or criminal investigation against any officer or council member in its history as a City. CP 852-875; CP 1202-1207.

To consider and understand why the City would commence eight (8) criminal investigations in eighteen (18) months, when none had been commenced before or after, the Court should consider the above manner in which Scholz and Hill came to power at the City in 2005, and the below manner in which the City exercised its power at all times since then.

## ASSIGNMENTS OF ERROR

1. The trial court erred in granting the City's motion for summary judgment of dismissal of the police officers' negligence and breach of contract claims.
2. The trial court incorrectly deferred to the City and its policy makers when the policy makers dispute whether the City adopted a policy and practice to clean house of its long term employees and their unions without cause.
3. The trial court erred in striking Appellants' Police Administration Expert in opposition to the City's motion for summary judgment of dismissal.

## STATEMENT OF THE CASE

**A. *Scholz, Hill, Jewell, and the City Implemented an Illegal Policy to Clean House of its Long Term Employees and Their Unions, and Start over with New Employees Without Regard to the Legality or Liability of Their Actions.***

In November 2003, Hill and Beck were elected as Council Members for Algona, and Scholz was elected as Mayor, and they (the "Campaign Allies") each began their respective positions in January, 2004. CP 892-893. By May 2005, the Campaign Allies' joint campaign soon soured against Beck, because Beck resisted Hill's and Scholz' policies and executive action, including without limitation their efforts to remove the City's long-term employees and their unions from the City without just cause. CP 894, 896-891.

Indeed, by May 2005, the personal and political acrimony between Hill and Scholz and Beck was in plain view of the public during city council meetings. For example, Beck often brought Agenda items research he obtained from internet sites including the Municipal Research and Services Center of Washington ([www.mrsc.org](http://www.mrsc.org)) to council meetings. Hill and Scholz would then insult Beck and verbally abuse him for simply asking questions based on the compiled research. CP 894-895.

Beck opposed the hiring of Steve Jewell as an interim police chief for Algona during the spring of 2005. When Jewell's hiring came before the City Council during the spring of 2005, Beck researched Jewell on the internet to prepare himself for this agenda item, as he had done in the past on other agenda items. Based on his research, and the fact that the City had not investigated Jewell's background, Beck voted against the hiring of Jewell, and encouraged the other council members to also vote against Jewell's hiring. CP 894-895.

During the hiring or employment of Jewell, Beck and the Police Officers contend that Scholz and Hill directed Jewell to attempt to cause the removal of Beck from city council, and cause the termination of the police officers' employment as part of the City's agenda to "clean house" at the City. As an example of Jewell's repeated attempts to "clean house," Jewell was police chief from May 2005 until November 2006, or eighteen months. During that year and a half, Chief Jewell commenced five different criminal investigations against Beck, two criminal investigations against Community

Service Officer Adena Gustafson, and a criminal investigation against police officers Keith Freeman and Tony Abel. Prior to Jewell's arrival, the City had not done *any* police investigations of any city council member or police officers. CP 914-939, 897-911, 880, 885-890, 944-952.

**B. *Jewell's Criminal and Civil Investigation Are Probative of the City's Ongoing and Continuous Effort to Clean House Since 2005.***

Jewell's Criminal and Civil Investigations to "clean house" culminated during the summer and fall of 2006, when Jewell took it upon himself<sup>1</sup> to investigate a minor automobile incident in which Beck backed into a car owned by Algona resident Kim Carter while it was parked on private property at an Algona apartment building. CP 901-910, 887-891, 948-952. After the minor accident, Carter took Beck to small claims court and obtained a judgment against Beck for approximately \$1,500.00. Beck paid Carter \$700 after the court hearing. CP 902. Carter subsequently taped harassing documents on Beck's property and left harassing messages on Beck's answering machine in an attempt to collect the balance of the judgment. *Id.* On Saturday, October 21, 2006, Carter entered onto Beck's property and into his home without permission. *Id.*

On October 21, 2006, Beck contacted the Department to complain about Carter's trespass onto his property. CP 902; 948. Beck accomplished this by contacting officer Freeman on his cell-phone, after Beck either first

---

<sup>1</sup>No public police department has jurisdiction to investigate a motor vehicle accident on private property, let alone a police chief.

tried to call the Department with no answer or he presumed that no one was there because there is at most one police officer on patrol at any given time at the City, and no one else is on shift at the Department during the weekend. CP 902.

It was not uncommon for any Algona police officer to take work related calls on their personal cell phones, especially when performing patrol and detective duties that may take them physically out of the Department for extended periods of time. CP 902; CP 536.

At the time of Beck's phone call on October 21, 2006, Freeman was at the City's police station and was about to get off duty. CP 947-949. After Beck reported his citizen complaint, Freeman suggested that Beck obtain an anti-harassment order. *Id.*; CP 949-950. However, Beck wanted to avoid filing formal charges against Carter; therefore, Beck requested that Freeman issue a simple verbal no-trespass order to Carter.<sup>2</sup> *Id.*

After receiving Beck's request, Freeman asked Abel, who had just come on duty, to accompany him to Carter's home. CP 949. Freeman and Abel found Carter at her home and Freeman issued Carter a verbal no-trespass order and requested that she stay away from Beck's property. *Id.* Carter was neither arrested nor cited for any crime, and she voluntarily agreed to not trespass onto Beck's property again. CP 949-950.

Prior to visiting Carter's home, Freeman and Abel did not report their

---

<sup>2</sup>The issuance of verbal no-trespass orders is a regular practice of the City's police department. CP 949, 749.

five minute low-level contact to dispatch, which was consistent with the Department's policies, procedures, and actual practice as it relates to issuing a verbal no-trespass order, and other low level police activity. CP 949-950, 749, 1005, 1031-1032.

However, Carter complained to her apartment neighbor, who was the then-Mayor Scholz, and Scholz suggested that Carter contact the City's police chief, Jewell, regarding her complaint. On October 23, 2006, Carter then met with Jewell to complain about Beck's actions. CP 1005, 1031.

Later that day, and two days after Beck requested that Freeman issue a simple verbal no-trespass order to Carter, Chief Jewell, by Staff Memo to the Algona Police Department, advised "All Police Personnel" that Beck was under criminal investigation. The Staff Memo stated:

Mr Dwain Beck is under criminal investigation. In order to protect agency personnel from any real or perceived contact with agency personnel is [sic] that may be considered inappropriate, you are hereby ordered to cease any further contact with Mr. Beck until you are given express written permission by me to do so.

Prohibited communication shall include: personal, written, telephone (landline or cell) or electronic messaging. Moreover, any contact initiated by you shall be immediately brought that [sic] to my attention and you shall provide me with a follow-up in writing to include the date, time, location and nature of the contact. ***Prohibited contact includes any such contact that occurs as a result of your normal course of duties or would otherwise include official police matters of this department.*** Mr. Beck is prohibited from gaining access to the police department during all hours of the day. If Mr. Beck initiates contact with you during the normal course of your duties you shall immediately advise him that you must terminate your contact with him upon my order and refer him to me.

This written order is part of the official criminal investigation currently underway and shall not be shared in any form with any persons outside the police department.

Any department personnel who refuses to obey will be considered insubordinate and will be subject to disciplinary action up and including termination.

CP 1050 (emphasis added).

On or about October 27, 2006, Jewell presented Freeman with a Notice of Investigation And Administrative Assignment. The Notice advised Freeman that he was under investigation for:

- Association with Known Offenders;
- Duty to Report Misconduct; and
- Criminal Conduct.

The Notice also stated in part:

Effective immediately, you are placed on administrative reassignment with pay pending the outcome of the investigation more specifically described below. While on administrative reassignment you shall neither conduct agency business unless directed by the Chief of Police, nor report to duty as regularly scheduled.

***This administrative reassignment is not a disciplinary action.***

You are under investigation for alleged conduct ***in violation of agency policies*** with regard to your contact with City of Algona resident Kim Carter that occurred on or about October 21, 2006.

Pursuant to this Notice of Investigation and Administrative Reassignment, you are required to call the department daily between 10:00 and 10:30 a.m.; Monday through Friday, excluding holidays. The department shall take note and otherwise log each call received by you, including date and time. All messages delivered to you by the department as

well, shall be noted and otherwise logged. ***You shall remain at your residence, available by telephone and able to respond to the department office within one-hour notice between the hours of 8:00 a.m. to 12:00 p.m. and 1:00 p.m. to 5:00 p.m.***

Until notified otherwise, you are not to involve yourself in any law enforcement activities, excluding response to court subpoenas. Any coordination of such court related responsibilities shall be arranged by the Algona Chief of Police.

While on administrative assignment, ***all your equipment issued to you by the Algona Police Department, including, but not limited to your weapon(s), badges, City of Algona Police identification, building keys and cell phone shall be retained by the department and you shall not be afforded access to the department's computer equipment.***

While on administrative assignment, you shall not appear to [sic] at the Algona Police department office without official authorization from the Algona Chief of Police. If granted authorization, you shall be escorted by the Chief of Police of Algona and/or his designee.

Failure to comply with any part of this directive shall constitute insubordination, which shall result in discipline up and including termination.

CP 1069 (emphasis added)

Abel received an almost identical Notice on or about October 30, 2006. CP 1066.

Jewell also sent out a Staff Memo to the police department informing the department that Abel and Freeman were under criminal investigation and that no one in the department was to have contact with either Abel or Freeman. CP 1057.

At no point prior to the issuance of the Notices did Jewell attempt to speak with Freeman and/or Abel regarding the events of October 21, 2006.

CP 951-952.

On or about October 24, 2006, Jewell requested the City of Federal Way police department investigate Freeman and Abel's October 21, 2006 contact with Carter to determine if Freeman and Abel had committed a crime. *Id.* The Federal Way police department investigated the matter and conducted interviews of Freeman and Carter. CP 290-296. As part of its investigation, Federal Way also contacted the King County Prosecutor's office and the Federal Bureau of Investigations, and each agency concluded that no grounds existed to establish that either Freeman or Abel had committed a crime. CP 548-551.

Mayor Scholz resigned his position as Mayor for the City effective October 27, 2006. David Hill became acting Mayor on October 27, 2006. CP 906

On or about November 14, 2006, Federal Way completed its investigation and found that no grounds existed to establish that either Freeman or Abel had committed a crime. CP 548-551

**C. *The City Took No Action on Federal Way's Report From November 14, 2006 until late December 2006, Which is Probative of the City's Ongoing and Continuous Effort to Clean House.***

Neither Jewell nor the City advised the police officers that Federal Way had completed its investigation, at any time between November 14, 2006 and Jewell's last day at the City on November 30, 2006. CP 952-953.

Also, neither Jewell or Hill advised the City Council that Federal Way had completed its investigation, at any time between November 14, 2006 and

December 31, 2006. CP 907. At some point in late 2006, Hill requested that the Lakewood City Attorney's Office review the City of Federal Way's investigation of Abel and Freeman. On January 3, 2007, the Lakewood City Attorney's Office provided the City with a memorandum in which it concluded that there was insufficient evidence to charge either Abel or Freeman with a crime. CP 561-563.

In November 2006, and January 2007, Beck provided the City with facts from which it could have, and should have removed Abel and Freeman from administrative reassignment. CP 906-907.

Instead, on January 9, 2007, the City requested that the Washington State Patrol investigate the matter. CP 953.

On February 1, 2007, the City hired McGehee as its new Chief of Police. In his deposition, Chief McGehee testified that he would have completed the investigation of the police officers in "a couple weeks" rather than the eight (8) months it ultimately took the City to complete its repeated civil and criminal investigations. CP 861. Likewise, the City's sergeant, Dan Moate, testified that he could have completed the investigation of the police hours "in a couple hours." CP 1105.

On February 15, 2007, McGehee removed Freeman and Abel from their administrative reassignment and reinstated them as police officers. CP 1094-1095.

On May 30, 2007 the Washington State Patrol completed its investigation of the police officers and found that Freeman had not engaged

in any misconduct. CP 570-585.

On or about June 25, 2007, Freeman and Abel received a full exoneration by McGehee and the City as it related to their investigations of Freeman and Abel. CP 590-591.

**D. *Jewell, Scholz, Hill, and McGehee Retaliated and Discriminated Against Gustafson, Freeman, and Abel, Which is Probative of the City's Ongoing and Continuous Effort to Clean House.***

Similar to Freeman and Abel, Jewell also opened a criminal investigation of Gustafson. CP 914-918. Like Freeman, when Jewell allowed Gustafson to return to work he retaliated against her. Jewell accomplished this by forbidding Gustafson from doing any substantive police work, instead, requiring her to sit idly during her shift hours. CP 919.

While sitting idly at Jewell's direction, Gustafson witnessed then Mayor Scholz retaliate against police officer Keith Freeman because he was the union steward of the police officers' union. CP 919-920. Further, Mayor Scholz admitted to Gustafson that he wanted to terminate each police officer of the Department. *Id.*

At one point, prior to the criminal investigation, Freeman had been placed on restricted duty because of a shoulder injury suffered in the line of duty. CP 945-947. However, once recovered, Jewell never let Freeman return to uniform patrol even though he was released to full-duty on June 28, 2006 with no restrictions from his orthopedic surgeon. *Id.* Indeed, Chief Jewell initially agreed to give Freeman light duty, but later changed his mind and said he did not have light duty. CP 947.

Ultimately, Jewell finally approved light duty, but only after he required Freeman's orthopedic surgeon to complete additional time consuming forms, which is further evidence of Jewell's pretext to "clean house" because the longer Freeman stayed off light duty, the more he could not afford to remain off-work, and the more likely he would then soon need to find other employment to support himself. *Id.*

Like Gustafson, Jewell directed Freeman to just sit around the Department for months doing nothing. *Id.* When Freeman asked Jewell what he wanted me to do he would state "I can't tell you what to do". CP 947.

Eventually, Jewell "pigeon holed" Freeman into a temporary detective position that did not exist before, and was not acknowledged in the City's collective bargaining agreement. CP 948. Freeman was closely scrutinized and micromanaged by Jewell, and later his Sargeant Dan Moate, and was never allowed to perform at the capacity of a detective. *Id.*

After February 1, 2007, McGehee continued the City's policy and practice to clean house at the City without cause, and thereby remove its long term employees and their unions, and start over with new employees. CP 928-933, 954-955. One by one, Chief McGehee orchestrated and implemented the City's constructive termination of both Gustafson in February 2008, and Freeman in June 2008. CP 921, 927, 954.

For example, one by one, McGehee took away Gustafson's responsibilities until she literally had nothing to do in February 2008. CP 931-933. McGehee took Gustafson's office away which had been

constructed for her to interview crime victims, and put her in the back of the police department, in a small corner that did not have enough room for two (2) people to be in there. CP 931. When Gustafson's computer failed, McGehee would not allow her to obtain a new one despite her repeated requests, and she was forced to borrow a computer from someone else when she frequently needed to perform internet research and criminal background checks. CP 931.

When Gustafson's digital camera broke, which she used on a weekly if not daily basis to photograph victim injuries and city code violations, McGehee would not allow her to obtain another one despite her repeated requests. *Id.*

Finally, Gustafson arrived to work one Monday to patrol the City's bus stops as she always had, and learned that McGhee had taken the white van she used to convert it into a prisoner transport vehicle. *Id.*

**E. *The City Violated Both Its Agreements With the Police Officers, and Washington Law, With Its Ongoing and Continuous Effort to Clean House.***

The City entered into various implied and express agreements with its employees as evidenced by its then current and prior policy manuals, all of which generally provide that the police officers would not be terminated except for cause, that any investigations would be promptly considered and resolved, and further provides for a progressive discipline policy and agreements which include, among other things, a basic right to receive notice and an opportunity to be heard as to any issue of adverse employment action.

Specifically, Article 17 of the CBA-EMPLOYEE RIGHTS

provides in part:

- 17.2 APPLICATION OF DISCIPLINE** - Any formal discipline of employees shall be applied by Department Directors. Discipline shall include documented: oral warnings, written warnings, suspension or discharge for just cause.
- 17.3** An employee subject to discipline shall be afforded the right to have the Union Steward and/or Union Representative present, if requested.
- 17.10** All employees may request an attorney of their choosing to be present during a departmental investigation. The cost of such attorney shall be paid by the employees.

CP 622-623.

In addition, the City's prior dealings and employment practices with other City employees have provided among other things, that the police officers would not be terminated except for cause, that any investigations would be promptly considered and resolved, and further provided for a progressive discipline policy which required that the police officers would receive notice and an opportunity to be heard as to any issue of adverse employment action.

Specifically, the City breached implied and express agreements with the police officers, arising from their reasonable expectation that they would be treated at least as reasonably as police officer Dan Moate, the subject of the City's last disciplinary investigation. Moate ultimately admitted to Conduct Unbecoming an Officer for receiving oral sex in 2003 from an

Algona espresso barista while on duty, in uniform, and inside his patrol car. CP 1100-1101.

For Mr. Moate's admitted transgressions, he received three (3) days of paid administrative reassignment, followed by ten (10) days of unpaid suspension, some or most of which he was allowed to take vacation time to continue to be paid during his suspension. CP 866.

In comparison, the Abel and Freeman received a four months paid suspension, including the requirement of staying at their house during the day, for issuing a verbal no-trespass warning.

**F. *Procedural History.***

On May 18, 2007, Plaintiffs/Appellants Freeman and Abel filed suit against Defendants/Respondents (the "City") in King County Superior Court for violation of their rights to equal protection and due process of law under the United States Constitution, and other federal and state laws. CP 1.

On June 19, 2007, the City removed the matter to the United States Western District Court of Washington under 28 U.S.C. § 1446.

On October 8, 2008, the Honorable Benjamin H. Settle entered an Order Granting in Part Defendants' Motion for Summary Judgment of Dismissal of Freeman and Abel's federal claims.

On October 16, 2008, Judge Settle entered an Order Remanding Case which remanded the police officers' state law claims back to King County Superior Court.

On November 5, 2008, the police officers timely filed their Notice of

Civil Appeal to the Ninth Circuit Court of Appeals, and that appeal remains pending.

On May 13, 2009, King County Superior Court Judge Cheryl B. Carey entered an Order Granting Defendants' Motion to Exclude Testimony of D.P. Van Blaricom and Strike the Deposition Transcript and Reports of D.P. Van Blaricom From the Record. CP 1368-69.

On May 13, 2009, King County Superior Court Judge Cheryl B. Carey entered an Order Granting Defendants' Motion for Summary Judgment. CP 1370-74.

On May 29, 2009, Freeman and Abel timely filed this appeal. CP 1375.

## **ARGUMENT**

### **A. Standard of Review.**

The standard of review for the trial court's dismissal of the police officers' claims on summary judgment is *de novo*, viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. State Farm Mut. Ins. Co.*, 101 Wash.App. 323, 329, 2 P.3d 1029 (2000); *Viking Props., Inc. v. Holm*, 155 Wash.2d 112, 119, 118 P.3d 322 (2005).

The summary judgment order entered by the trial court, unfortunately, does not designate all of the evidence relied on as required by CR 56(h), because the trial court's order does not identify which of the police officers' evidence, if any, the trial court considered before granting the City's

motion for summary judgment of dismissal. CP 1373. Accordingly, this Court should nonetheless view all facts in this record and their inferences in a light most favorable to the nonmoving party, the Police Officers. *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982); *Barker v. Advanced Silicon Materials, LLC, (ASIMI)*, 131 Wash.App. 616, 623, 128 P.3d 633, 637 (2006).

**B. The City's Actions and Inactions Since 2005, and Reasonable Inferences Therefrom, Confirm That the City is Subject to Liability for Negligent Hiring and Supervision of its Employees' Ongoing and Continuous Effort to Clean House (Assignment of Error Nos. 1-2).**

*Assignment of Error No. 1.* The trial court erred in granting the City's motion for summary judgment of dismissal of the police officers' negligence and breach of contract claims.

*Assignment of Error No. 2.* The trial court incorrectly deferred to the City and its policy makers when the policy makers dispute whether the City adopted a policy and practice to clean house of its long term employees and their unions without cause.

The torts of negligent hiring and supervision is generally described as follows: An employer may be liable to a third person for the employer's negligence in hiring or retaining a servant who is incompetent or unfit. *Peck v. Siau*, 65 Wash.App. 285, 288 (1992). Such negligence usually consists of hiring or retaining the employee with knowledge of his unfitness, or of failing

to use reasonable care before hiring or retaining him. *Id.* It is necessary to establish such negligence as the proximate cause of the damage to the third person, and this requires that the third person must have been injured by some negligent or other wrongful act of the employee so hired. *Id.*

Ultimately, the parties dispute whether the City negligently hired and supervised its policy makers, employees and police chiefs who adopted a policy and practice to clean house of its long term employees and their unions without just cause. CP 893. If proven at trial, the City's employees' actions and inactions regarding this matter presented a risk of harm to the police officers insofar as the parties dispute whether the City's employees were hired and retained to do just that. If so, the City will have hired and retained the employees with knowledge of their unfitness, and failed to use reasonable care before hiring or retaining them.

For example, the City did not reasonably supervise Chief Jewell to confirm whether Federal Way had completed its investigation for weeks after Federal Way completed its investigation on November 14, 2006. CP 1116-1120; 1126.

Instead, at some point in late December, the City requested that the Lakewood City Attorney's Office review the City of Federal Way's investigation of Abel and Freeman. CP 1120.

In November 2006, and January 2007, Beck advised the City with facts from which it could have, and should have removed Abel and Freeman from administrative reassignment. *Id.*; CP 906-907.

The City failed to exercise reasonable care upon its receipt of Federal Way's written findings, or reinstate Freeman and Abel from their administrative reassignment, at any point from November 14, 2006 until February 14, 2007.

The City failed to exercise reasonable care upon its receipt of Lakewood's written findings on January 3, 2007, and reinstate Freeman and Abel from their administrative reassignment at any point from January 3, 2007 until February 14, 2007.

The City failed to exercise reasonable care upon its receipt of Lakewood's written findings on January 3, 2007, and exonerate Freeman and Abel at any point from January 3, 2007 until June 25, 2007.

The City's failure to reasonably supervise its administrative and criminal investigation of Freeman and Abel was the proximate cause of their damages in amounts to be proven at trial. CP 950; 954-956; 889-890.

In addition, the City does not and can not dispute that it did not require Jewell to submit a written application for employment to the City. CP 998-1004; 894-895. The City did not investigate Jewell's criminal history prior to his hiring. The City did not investigate Jewell's employment history prior to his hiring. The City did not investigate Jewell's mental health history prior to his hiring. The City did not investigate whether Jewell had engaged in wrongful or illegal employment practices prior to his hiring. The City did not require that Jewell complete a psychological test prior to his hiring. The City did not require that Jewell complete a polygraph test prior to his hiring.

The City did not otherwise confirm or deny the information contained in its written application for employment forms as it related to Jewell. The City did not otherwise confirm or deny the information which a reasonable person would consider and investigate before hiring a Chief of Police for the City. CP 998-1004; 894-895.

Beck advised the City Council and the City that it should not hire Jewell. Beck advised the City Council Member and the City that Jewell posed a risk of harm to the City, the Department and its police officers, and the public. The City knew, or should have know, that Jewell posed a risk of harm to the City, the Department and its police officers, and the public. *Id.*

The City failed to use reasonable care before and after hiring Jewell. Indeed, the Police Officers contend that Jewell was hand picked as part and parcel of the City's illegal policy and practice to clean house of its long term employees and their unions, as evidenced by the undisputed fact that Jewell was the only individual interviewed for the position and he was hired after a one-hour interview at a Denny's restaurant. CP 894-895. The City's actions resulted in injury to the police officers. CP 950; 954-950; 889-890.

Specifically, the police officers' injury includes but is not limited to the disputed fact<sup>3</sup> that the City's actions and inactions to clean house since 2005 culminated in its constructive termination of Freeman and Abel in the

---

<sup>3</sup>“The question of whether the working conditions were intolerable is one for the trier of fact, unless there is no competent evidence to establish a claim of constructive discharge.” *Haubry v. Snow*, 106 Wn.App. 666, 677, 31 P.3d 1186 (2001).

year following the commencement of this action in May 2007. CP 863-865 886-890, 890, 944-956, 956. “To establish constructive discharge, the employee must show: (1) a deliberate act by the employer that made [her] working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that ... she resigned because of the conditions and not for some other reason.” *Washington v. Boeing*, 105 Wn.App. 1, 15, 19 P.3d 1041 (2000) (footnote omitted). “It is the act, not the result, that must be deliberate.” *Nielson v. AgriNorthwest*, 95 Wn.App. 571, 578, 977 P.2d 613 (1999). The “intolerable” element of constructive discharge can be shown by either aggravated circumstances, or a continuing pattern of discriminatory conduct, but is not necessarily limited to discrimination claims. *Sneed v. Barna*, 80 Wn.App. 843, 850, 912 P.2d 1035 (1996).

Here, the police officers contend that the City’s strategy to clean house did just that to them and resulted in the constructive termination of Abel in February, 2008, and Freeman in June 2008. CP 863-865 886-890, 890, 944-956, 956.

Had the City exercised reasonable care to determine that Jewell was not a reasonable candidate for Chief of Police because he should not have been hand-picked by the City to clean house, the police officers’ injuries could have been avoided. Had the City not ratified Jewell’s wrongful actions, or alternatively, had the City properly supervised Chief Jewell, the police officers’ injuries could have been avoided. Indeed, there was absolutely no one at the City supervising Chief Jewell as he commenced eight (8) criminal

and administrative investigations in eighteen (18) months. CP 1046; 1114-1115; 1126.

The trial court erred in granting the City's motion for summary judgment of dismissal of the police officers' negligence claims, and this Court should reverse and remand this matter to trial with instructions as requested herein.

**C. The City's Ongoing and Continuous Effort to Clean House Since 2005, and Reasonable Inferences Therefrom, Confirm that the City is Subject to Liability for Breach of Implied or Express Employment Agreements (Assignment of Error Nos. 1-2).**

*Assignment of Error No. 1.* The trial court erred in granting the City's motion for summary judgment of dismissal of the police officers' negligence and breach of contract claims.

*Assignment of Error No. 2.* The trial court incorrectly deferred to the City and its policy makers when the policy makers dispute whether the City adopted a policy and practice to clean house of its long term employees and their unions without cause.

In general, an employment contract indefinite in duration may be terminated by either the employer or the employee at any time, with or without cause. *Swanson v. Liquid Air Corporation*, 118 Wash.2d 512, 520, 826 P.2d 664 (1992). However, an employee and employer can contractually obligate themselves concerning provisions found in an employee policy

manual and thereby contractually modify the terminable at will relationship. *Id.* Employees are entitled to justifiably rely upon promises contained within an employee handbook, and the breach of such promises may preclude termination. *Bulman v. Safeway, Inc.*, 144 Wash.2d 335, 354, 27 P.3d 1172 (2001). Employees seeking to enforce such promises must have been aware of them prior to the termination of their employment. *Id.*

In addition, it is axiomatic in employment law that an employer's inconsistent actions can negate the effect of Collective Bargaining Agreement or employee handbook. In *Swanson v. Liquid Air Corp.* 118 Wn.2d 512, 826 P.2d 664 (1992), the Washington Supreme Court reversed a summary judgment verdict and found that an employer had potentially waived an at-will employment disclaimer, and held that "an employer's inconsistent representations can negate the effect of a disclaimer." *Id.* at 532. The Court also found that "disclaimers may be overcome by contradictory employment practices" *Id.*

Also, the Court noted that "under the disclaimer approach, the employer's practice must *at all times be consistent with at-will employment*, and the employer's practices must be monitored so that consistency is assured." *Id.* (emphasis added) (citing Practising Law Institute, *Advanced Strategies In Employment Law*, 485, 488 (1987)). Further, *all* of the circumstances, and the representations and practices of the employer must be examined in order to determine the effect of the disclaimer. *Id.* at 534-535 (emphasis added). Finally, ascertaining the effect of a disclaimer will often

involve factual determinations which must be resolved by the trier of fact if there are factual disputes or if there is more than one reasonable inference from the evidence. *Id.* at 672.

In addition, the Washington Supreme Court has found that an employer should not be allowed to make arbitrary determinations in its employment actions. *Baldwin v. Sisters of Providence In Washington, Inc.*, 112 Wash.2d 127, 138, 769 P.2d 298 (1989). The Court also found that “just cause is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for “just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.”

Alternatively, the City’s implied agreements with the police officers should be one which any public servant is deemed owed by both contract and by law, which specifically precludes any City from turning its employees’ lives upside down based on a simple routine citizen inquiry which is unreasonably transformed into an eight-month criminal and administrative investigation of the police officers.

If the City had honored its implied and express agreements with the police officers, it would have done what any reasonable City and Police Chief would have done, including without limitation the following:

It would have been entirely appropriate for Chief Jewell to have reacted to Ms. Carter's complaint by (see Exhibit "D):

- 1) Recognizing *"that the actions taken by the officer(s) were appropriate and in accordance with existing agency policy and procedures"*,
- 2) Explaining that fact *"to the complainant"*, because *"a simple misunderstanding has precipitated her complaint"*,
- 3) Accordingly, not every *"public complaint"* should result in a *"full scale investigation"* being undertaken;

CP 1131-1201; 1190.

If the City had honored its implied and express agreements, or its duty of reasonable care, its criminal investigation would not be the result of "piling on", and would need to at least be carefully considered and internally consistent, and the City violated its obligations as evidenced by the following:

**In the police vernacular, Chief Jewell's "piling on" of charges against these two officer's and the ultimate disposition thereof makes no administrative sense whatsoever:**

- 1) The charge of *"Association with Known Offenders"* would have to presume that the officer knew any such person was a *"known offender"*.
  - a) This so-called *"known offender"* was an elected Algona councilman, with no known criminal propensities or record;
  - b) Significantly, however, any contact with Councilman Beck by these two officers had occurred two days (October 21, 2006) before (October 23, 2006) Chief Jewell declared, *"Mr. Dwain Beck is under criminal investigation"*,
- 2) What *"Duty to Report Misconduct"* was violated or what *"Criminal Conduct"* was supposedly committed is unclear but was never addressed for disposition and was apparently just forgotten,
- 3) Why Officer Abel was additionally charged with *"Untruthfulness"* and *"Reporting for Duty / Reporting Late"* is also unclear but was never addressed by any investigation and was apparently just forgotten too,
- 4) Although the officers were ultimately *"exonerated"* of both *"Performance of Duty"* and *"Law Enforcement Code of Ethics"* violations, they were never given notice that they were even being investigated for those allegations,

- 5) Although officers under criminal investigation may be placed on "administrative assignment" during the conduct thereof, these officers were cleared on any criminal wrongdoing on November 14, 2006 but they were never told that they had been cleared and were continued on "administrative assignment" for another two months,
- 6) After the criminal investigation had cleared them by November 14, 2006 and any further administrative investigation was required to be "prompt" by APD Operations Manual 05.010, that further investigation was not even requested until two months later on January 9, 2007;

CP 1131-1201; 1190.

Defendants offer two theories for the dismissal of the police officers' breach of employment agreement claims. First, the City contends that the police officers are precluded from bringing this action because they failed to avail themselves of the grievance procedures of the CBA. Second, the City argues that since the police officers were neither disciplined or terminated, they are not subject to relief. Both of these arguments raise disputed questions of fact for the jury to decide.

Initially, the police officers, on several occasions, attempted to comply with the CBA grievance procedures. On several occasions the police officers, either through their attorney or their Union representative attempted to comply with the CBA. However, on each occasion, the City either denied the grievance or claimed the grievance was not well-taken because the police officers were not the subject of disciplinary action.

Generally, contractual grievance procedures must be exhausted before parties resort to the courts. *Baldwin*, 112 Wash.2d at 131. There are exceptions to the exhaustion doctrine based upon consideration of fairness

and practicality. *Id.* One such exception is recognized where pursuing the available remedies would be futile. *Id.* Futility addresses a showing of bias or prejudice on the part of the discretionary decision-makers. *Id.* Here, because of the repeated demonstrations of the City's bias against the Police Officers, and its fundamental refusal to consider a four-month suspension as a form of discipline, a question of fact exists as to whether any attempts to comply with the CBA would be futile.

In addition, the City's actions toward the police officers constituted a breach of the CBA. Specifically, Article 17 of the CBA—**EMPLOYEE RIGHTS** provides in part:

**17.2 APPLICATION OF DISCIPLINE** - Any formal discipline of employees shall be applied by Department Directors. Discipline shall include documented: oral warnings, written warnings, suspension or discharge for just cause.

**17.3** An employee subject to discipline shall be afforded the right to have the Union Steward and/or Union Representative present, if requested.

**17.10** All employees may request an attorney of their choosing to be present during a departmental investigation. The cost of such attorney shall be paid by the employees.

The City and the trial court incorrectly interpreted the above provisions to mean that the actions taken against plaintiff was not disciplinary in nature, simply because the police officers were paid while on house arrest.

But, while the police officers were on "administrative assignment" they were required to return any of the City's property back to the City, they were not allowed to visit their place of employment, and they were not

allowed to interact with their co-workers. Finally, during the hours of their employment, the Police Officers were required to remain in their homes. The above paragraph is a reasonable description of disciplinary action (“Discipline shall include documented: oral warnings, written warnings, suspension, or discharge for just cause”). By taking the above action, and then claiming its is not discipline, the City frustrated the entire purpose of the CBA and should not now be allowed to enjoy the fruit of their refusal to follow the CBA itself by now contending that the grievance procedure was not exhausted because the City stopped it at its inception. The City has breached its employment agreement with the Police Officers and should be held accountable for the Police Officers’ damages. CP 950; 954-950; 889-890.

Specifically, the police officers’ injury includes but is not limited to the disputed fact<sup>4</sup> that the City’s actions and inactions to clean house since 2005 culminated in its constructive termination of Freeman and Abel in the year following the commencement of this action in May 2007. CP 863-865 886-890, 890, 944-956, 956. “To establish constructive discharge, the employee must show: (1) a deliberate act by the employer that made [her] working conditions so intolerable that a reasonable person would have felt compelled to resign; and (2) that ... she resigned because of the conditions

---

<sup>4</sup>“The question of whether the working conditions were intolerable is one for the trier of fact, unless there is no competent evidence to establish a claim of constructive discharge.” Haubry, 106 Wn.App. 666, 677, 31 P.3d 1186 (2001).

and not for some other reason.” *Washington v. Boeing*, 105 Wn.App. 1, 15, 19 P.3d 1041 (2000) (footnote omitted). The “intolerable” element of constructive discharge can be shown by either aggravated circumstances, or a continuing pattern of discriminatory conduct, but is not necessarily limited to discrimination claims. *Sneed v. Barna*, 80 Wn.App. 843, 850, 912 P.2d 1035 (1996).

Here, the police officers contend that the City’s strategy to clean house did just that to them and resulted in the constructive termination of Abel in February, 2008, and Freeman in June 2008. CP 863-865 886-890, 890, 944-956, 956.

The trial court erred in granting the City’s motion for summary judgment of dismissal of the police officers’ breach of contract claims, and this Court should reverse and remand this matter to trial with instructions as requested herein.

**D. The Court Erred By Striking the Police Officers’ Expert Testimony Of a Police Administration and Discipline Expert (Assignment of Error No. 3).**

*Assignment of Error No. 3:* The trial court erred in striking Appellants’ Police Administration Expert in opposition to the City’s motion for summary judgment of dismissal.

**1. Standard of Review.**

Because the trial court ordered that the police officers’ expert be stricken in conjunction with a summary judgment motion, the standard of

review on this evidentiary ruling is *de novo*. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998); *Warner v. Regent Assisted Living*, 132 Wn.App. 126, 135-36, n. 13, 130 P.3d 865 (2006).

ER 702 permits a witness qualified as an expert to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue....".

The admissibility of expert testimony in Washington is governed by ER 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Application of this rule involves a two-step inquiry: whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. *Reese v. Stroh*, 128 Wn.2d 300, 306, 907 P.2d 282 (1995). The allowable bases of an expert's opinion are set forth in ER 703:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Expert testimony is helpful to the trier "if it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury." *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

**2. Van Blaricom's Expert Testimony is Admissible and Identifies an Issue of Fact Regarding the City's Repeated Investigations of the Police Officers**

The role of the jury is to be held "inviolable" under Washington's constitution. U.S. CONST. amend. VII; WASH. CONST. art. I, §§ 21, 22. The right to have factual questions decided by the jury is crucial to the right to trial by jury. *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711 (1989). To the jury is consigned under the constitution "the ultimate power to weigh the evidence and determine the facts." *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971). Indeed, in virtually every jury trial, the jury itself is instructed that "[i]t is your duty to determine which facts have been proved in this case from the evidence produced in court." 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 1.02, at 9 (2d ed. 1994) (WPIC).

But during the 18th century, the need for skilled witnesses to help resolve technical questions began to conflict with the traditional requirement that witnesses testify only from personal knowledge and refrain from expressing opinions. *State v. Montgomery*, 163 Wn. 2d 577, 590, 183 P.3d 267 (2008). As the prohibition on opinion testimony on the ultimate issue became unworkable, and the distinctions between ultimate factual issues and nonultimate issues became more spurious, jurisdictions began to reject this rule and adopt some version of Federal Rule of Evidence 704, stating that a witness, whether lay or expert, may state an opinion as to the ultimate issue to be decided by the trier of fact. *Id.*

In Washington, experts are permitted to testify on subjects that are not within the understanding of the average person. ER 702; *see also State v. Petrich*, 101 Wash.2d 566, 575-76, 683 P.2d 173 (1984). The mere fact that an expert opinion covers an issue that the jury has to pass upon does not call for automatic exclusion. *State v. Kirkman*, 159 Wash.2d 918, 929, 155 P.3d 125 (2007); *State v. Ring*, 54 Wash.2d 250, 255, 339 P.2d 461 (1959). Indeed, Fed. R. Evid. 704(a) provides that expert testimony that is “otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *Hangerter v. Provident Life and Acc. Ins. Co.*, 373 F.3d 998, 1016 (9<sup>th</sup> Cir. 2004).

Mr. Van Blaricom was asked to express an opinion regarding the defendants’ conduct towards Abel and Freeman. Mr. Van Blaricom was also asked to evaluate whether defendants conduct met the generally accepted standards of police policy and procedures. In order to do that, Mr. Van Blaricom’s particular field of expertise required him to examine the various police reports, relevant correspondence, operations manual, personnel files and other evidence.

Mr. Van Blaricom’s purpose in reviewing all of this material is not to tell the jury how to resolve factual conflicts. By statements made by Mr. Van Blaricom in his deposition, he clearly understands that it is for the jury alone to resolve factual disputes. CP 1149. Mr. Van Blaricom’s purpose in examining the proffered materials was to evaluate the roles played by defendants and their conduct toward Freeman and Abel and to determine, in

his expert opinion, whether the defendants conduct was consistent with generally accepted policies and procedures regarding internal investigations and disciplinary issues. CP 1131-1201; CP 1190.

Ultimately, because the City itself contended that they met a standard of care by following protocol, and that the trial court should defer to the City and its policy makers who simply followed protocol, the trial court should not have excluded Mr. Van Blaricom's testimony and his reasonable inferences from the City's actions and inactions involving its repeated investigations of the police officers. CP 514-517, 520-521, 526. If the trial court had considered Mr. Van Blaricom's testimony and reasonable inferences, it should have concluded as Van Blaricom did...that the City's deviation from the standard of care is itself telling or at least probative that the City implemented an illegal policy to clean house of its long term employees and their unions, and start over with new employees without regard to the legality or liability of their actions. See pp. 24-25 *infra*; CP 1131-121; CP 1190.

It is entirely appropriate for a police procedures expert to examine the available evidence and to assess the adequacy of the internal investigation conducted by the City, especially when the City moves for summary judgment on the basis that it did nothing wrong, and that both the police officers and impliedly the trial court do not know and must therefore accept the City's unilateral interpretation of this case. CP 526. Where such an internal investigation is required by departmental protocols, a police procedures expert may properly offer an opinion on the adequacy of the

departmental standards, the adequacy of their actual implementation, and compare both to the generally accepted standards. As Mr. Van Blaricom's entire report indicates, he relied on his previous experience as a Chief of Police as well as reviewing model police policies prior to arriving at his expert opinions.

Specifically, as Mr. Van Blaricom's Summary of Qualifications indicates, he served for 29 years in municipal policing, including 11 years as the Chief of Police of the City of Bellevue. Since retiring as Bellevue's Chief of Police, he has been retained in over 1400 lawsuits as a police policy expert witness. Even after leaving the Bellevue Police Department, Mr. Van Blaricom continued to attend certification classes and continuing education classes. Mr. Van Blaricom is also both a published author and teacher in the field. Mr. Van Blaricom formed his opinion in this matter not only by reviewing the germane evidence in this matter, but also reviewing the sample policies and practices in order to provide a comparison.

In short, and as indicated in *Hangarter*, the qualifications possessed by an expert must lay "at least a minimal foundation of knowledge, skill, and experience required in order to give 'expert' testimony" on the policies and practices of law enforcement work.

This is a procedurally complex police matter involving two former police officers who allege that their legal rights were violated by their employer and supervisors who sought to remove them as part of an illegal policy to clean house of its long term employees and their unions, and start

over with new employees without regard to the legality or liability of their actions.

Indeed, the City defends itself by claiming that every action taken by defendants was consistent with generally accepted police policies and procedures. CP 514-517, 520-521; CP 1131-1201; CP 1190. Therefore, it should be entirely appropriate for Mr. Van Blaricom to be able to testify that, in his expert opinion, it is not consistent with standard police policies and procedures to keep two police officers on administrative suspension for four months. Mr. Van Blaricom should be allowed to testify, and his testimony creates a factual dispute as to the City's intentions and motivations with regard to its eight investigations of its police officers during an eighteen month period, when none occurred before, or since.

### **CONCLUSION**

For the above reasons, the police officers request that the Court reverse the trial court's summary judgment of dismissal of their claims, and remand this matter to trial with instructions as requested herein.

Specifically, the police officers request that the Court reverse, remand, and hold as follows:

A. The trial court erred in striking the police officers' expert declaration in opposition to the City's motion for summary judgment of dismissal.

B. The trial court erred in granting summary judgment of dismissal of the police officers' claims.

C. The trial court incorrectly deferred to the City and its policy makers when the policy makers dispute whether the City adopted a policy and practice to clean house of its long term employees and their unions without cause.

D. Genuine issues of material fact exist as to the following:

1. Whether this case is about a small town and its policy makers who adopted a policy and practice to clean house of its long term employees and their unions, and start over with new employees without regard to the legality of their actions?

2. Whether, while running for election as council member or mayor, Beck, Scholz, and Hill (“Campaign Allies”) would meet at Joe Scholz’ home in one of his rooms which they called the "War Room" for planning their election campaigns and the future of Algona?

3. Whether during those meetings, both Joe Scholz and Dave Hill admitted to Beck that they wanted to clean house at the City without cause, and thereby remove its long term employees and their unions, and start over with new employees (“clean house”)?

4. Whether Scholz, Hill, and the City carried out their plan to clean house?

5. Whether the City has engaged in an ongoing and continuous policy and practice to clean house at the City since as early as Scholz and Hill came to power in January 2004, or at least by May 2005 when it hired Steven Jewell (“Jewell”) as its police chief?

6. Whether the City took action to clean house by commencing and completing eight (8) criminal and civil investigations against its officers and Beck during an eighteen (18) month period from May 2005 until November 30, 2006 when Jewell resigned?

7. Whether the City commenced a civil or criminal investigation against any officer or council member either before or after Jewell resigned?

8. Whether and why Beck opposed the hiring of Steve Jewell as an interim police chief for Algona during the spring of 2005?

9. Whether during the hiring or employment of Jewell, Scholz and Hill directed Jewell to attempt to cause the removal of Beck from city council, and cause the termination of the police officers' employment as part of the City's agenda to clean house at the City?

10. Whether Jewell's eight (8) criminal and civil investigations, when none occurred either before or after Jewell, are probative of the city's ongoing and continuous effort to clean house since 2005?

11. Whether Jewell's criminal and civil investigations to clean house culminated during the summer and fall of 2006, when Jewell investigated a minor automobile incident in which Beck backed into a car owned by Algona resident Kim Carter while it was parked on private property at an Algona apartment building?

12. Whether Carter subsequently trespassed onto Beck's property, or taped harassing documents on Beck's property, or left harassing messages on Beck's answering machine?

13. Whether, on Saturday, October 21, 2006, Carter entered onto Beck's property and into his home without permission?

14. Whether Beck threatened Carter by stating "Watch your back the police work for me."<sup>5</sup>?

15. Whether, on October 21, 2006, Beck contacted the Department to complain about Carter's trespass onto his property, by contacting officer Freeman on his cell-phone, after Beck either first tried to call the Department with no answer or he presumed that no one was there because there is at most one police officer on patrol at any given time at the City, and no one else is on shift at the Department during the weekend?

16. Whether it was common for any Algona police officer to take work related calls on their personal cell phones, especially when performing patrol and detective duties that may take them physically out of the Department for extended periods of time?

17. Whether at the time of Beck's phone call on October 21, 2006, Freeman was on duty?

18. Whether it was a matter of police discretion at the City for Freeman to report a five minute low-level contact to dispatch?

19. Whether Freeman's actions were consistent with the Department's policies, procedures, and actual practice as it relates to issuing

---

<sup>5</sup>The parties do not dispute that neither Freeman nor Abel had knowledge of this alleged statement, as they both received letters fully exonerating them eight (8) months later. ER 425-26.

a verbal no-trespass order, and other low level police activity?

20. Whether Carter complained to her apartment neighbor, who was the then-Mayor Scholz, and not Beck as stated in the City's Brief?

21. Whether Scholz steered Carter to contact the City's police chief, Jewell, regarding her complaint, as part of the City's agenda to clean house at the City?

22. Whether later that day, and two days after Beck requested that Freeman issue a simple verbal no-trespass order to Carter, Chief Jewell, by Staff Memo to the Algona Police Department, advised "All Police Personnel" that Beck was under criminal investigation for undue influence on Freeman and Abel?

23. Whether Freeman and Abel were disciplined for giving Carter a verbal no-trespass warning?

24. Whether Jewell put Abel and Freeman under criminal investigation as part of the City's agenda to clean house at the City?

25. Whether, at any point prior to the discipline of Abel and Freeman, Jewell sought to confirm or deny Carter's allegations with Freeman and/or Abel?

26. Whether the City took any action on Federal Way's report from November 14, 2006 until late December 2006?

27. Whether the City's inaction is probative of the city's ongoing and continuous effort to clean house?

28. Whether Hill requested that the Lakewood City Attorney's Office review the City of Federal Way's investigation of Abel and Freeman, as part of the city's ongoing and continuous effort to clean house?

29. Whether, in November 2006, and January 2007, Beck provided the City with facts from which it could have, and should have removed Abel and Freeman from administrative reassignment?

30. Whether, on January 9, 2007, the City requested that the Washington State Patrol investigate Freeman and Abel as part of the city's ongoing and continuous effort to clean house?

31. Whether the City could have completed the investigation of the police officers in "a couple hours" as the City's sargent, Dan Moate, testified, rather than the eight (8) months it ultimately took the City to complete its repeated civil and criminal investigations of police officers Freeman and Abel?

32. Whether the City's eight (8) month investigation of Freeman and Abel was probative of the city's ongoing and continuous effort to clean house?

33. Whether Jewell, Scholz, Hill, and McGehee retaliated and discriminated against police officers Freeman and Abel as part of the city's ongoing and continuous effort to clean house?

34. Whether, after February 1, 2007, McGehee continued the City's policy and practice to clean house at the City without cause, and thereby remove its long term employees and their unions, in breach of

contract and violation of Washington law?

35. Whether Chief McGehee orchestrated and implemented the City's constructive termination of both Abel in February 2008, and Freeman in June 2008?

36. Whether the City violated both its agreements with the police officers, and Washington law, with its ongoing and continuous effort to clean house?

37. Whether the City entered into various implied and express agreements with its employees as evidenced by its then current and prior policy manuals, all of which generally provide that Freeman and Abel would not be terminated except for cause, that any investigations would be promptly considered and resolved, and further provides for a progressive discipline policy and agreements which include, among other things, a basic right to receive notice and an opportunity to be heard as to any issue of adverse employment action?

38. Whether the City's prior dealings and employment practices with other City employees have provided among other things, that Freeman and Abel would not be terminated except for cause, that any investigations would be promptly considered and resolved, and further provided for a progressive discipline policy which required that the police officers would receive notice and an opportunity to be heard as to any issue of adverse employment action?

Dated this 13<sup>th</sup> day of October, 2009.

OLSEN LAW FIRM. PLLC

By: 

Walter H. Olsen, Jr. - WSBA #24462

Attorneys for Appellants

604 W. Meeker Street, Suite 101

Kent, WA 98032 (253) 813-8111

**CERTIFICATE OF SERVICE**

I certify that on this day a true copy of the BRIEF OF APPELLANTS was served via legal messenger on the following:

Court of Appeals, Division I  
One Union Square  
600 University Street  
Seattle, Washington 981901-4170

Patricia K. Buchanan  
Sean Jackson  
Patterson Buchanan Fobes  
Leitch & Kalzer PS  
2112 Third Avenue, Suite 500  
Seattle, Washington 98121  
FAX: 206-462-6701

and by electronic copy and Federal Express to:

Jeffrey S. Myers  
Law, Lyman, Daniel, Kamerrer  
& Bagdanovich, P.S.  
P.O. Box 11880  
2674 RW Johnson Blvd Road S.W.  
Olympia, Washington 98508-1880  
jmyers@lldkb.com  
FAX: 360-357-3611

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

Signed this 13<sup>th</sup> day of October, 2009, in Kent, Washington.

  
Noreen M. Peters

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 OCT 13 PM 4:31