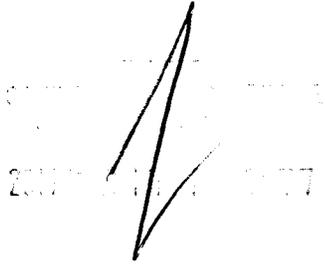


66062-4

66062-4



NO. 66062-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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DAVID FEIS,

Appellant,

v.

KING COUNTY SHERIFF'S DEPARTMENT, a division of King  
County, Deputies ERIC FRANKLIN, ABIGAIL STEELE and KYLE  
McCUTCHEN and DOES 1-5 inclusive,

Respondent.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH

---

BRIEF OF RESPONDENT KING COUNTY

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

HOWARD P. SCHNEIDERMAN, WSBA #19252  
Senior Deputy Prosecuting Attorney  
Attorneys for King County

900 King County Administration Building  
500 Fourth Avenue  
Seattle, WA 98104  
206-296-8820

ORIGINAL

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**A. STATEMENT OF THE CASE**

**1. Procedural Facts**

This case involves the issue of qualified immunity for police officers in the context of a mandatory arrest for domestic violence.

The appellant, David Feis, sued the King County Sheriff's Department, plus Deputies Abigail Steele, Kyle Mccutchen, Eric Franklin, and Detective Christina Bartlett, the respondents herein, asserting four claims: (1) false arrest; (2) false imprisonment; (3) malicious prosecution, and; (4) illegal search, under both state and federal law. CP 3-9. The respondents moved for summary judgment on July 2, 2010, asking the trial court to dismiss all of the appellant's claims. CP 161. The appellant opposed that motion, and cross moved for partial summary judgment. CP 188-189.

On July 30, 2010, the Honorable Laura Middaugh ruled that there was probable cause for the appellant's arrest for a domestic violence assault. Based on that ruling, Judge Middaugh dismissed the appellant's false arrest, false imprisonment, and malicious prosecution claims.<sup>1</sup> CP

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<sup>1</sup> The existence of probable cause is a complete defense to claims of false arrest, false imprisonment, and malicious prosecution. Hanson v. City of Snohomish, 121 Wn.2d 552, 563, 852 P.2d 295 (1993); Jones by Jones v. Webb, 45 F.3rd 178, 181 (7th Cir. 1995); Hartman v. Moore, 547 U.S. 250, 265-66, 126 S.Ct 1695, 1707, 174 L.Ed.2d 441 (2006); Peterson v. R.B. Littlejohn, 56 Wn. App. 1, 8, 781 P.2d 1329 (1989).

267-269. Ruling further that Washington's Domestic Violence Prevention Act provided the respondents with broad immunity from suit under state law, Judge Middaugh dismissed appellant's illegal search claim under state law. Judge Middaugh invited the parties to submit additional briefing and to appear for further oral argument on the illegal search claim under federal law. Finally, after additional briefing and oral argument, CP 270-275, 279-287, Judge Middaugh ruled on September 17th that the individual respondents were entitled to qualified immunity under federal law, and dismissed. CP 305-309. Now, the appellant challenges Judge Middaugh's ruling on his illegal search claim, and requests attorney's fees.

**2. Substantive Facts**

**a. The 911 Calls**

Calling 911 from the safety of a church across the street from his home on March 31, 2007, 18-year old Joshua Petersen asked for police officers to come, because his step-father, the appellant, David Feis, had just hit him. CP 23-26.

911 Operator: What's the problem?

Joshua Petersen: Well, I just got home with my brother, from -- we just went to a shop, store, whatever; and we spent some of our money. And I came home, and my step-dad was home, and he flipped out 'cause we bought stuff. I told him to fuck off, and he hit me.

\*\*\*

911 Operator: Do you need an aid car at all or anything?

Joshua Petersen: No. I just would appreciate maybe somebody else, like police officers.

\*\*\*

911 Operator: Does your dad -- does he know where you're at?

Joshua Petersen: No, I have run away. He was going to follow me in the car, but I went inside the church. So hopefully -- I don't know.

CP 23; CP 25-26.

Joshua's mother, Hope Feis, also called 911 and asked for help.

CP 27. Hope reported a verbal altercation between her husband and son that "became physical." CP 28.

The 911 Operator then spoke directly with David Feis. CP 29-30.

David admitted that he had slapped Joshua in the face, after telling him to move out of the house.

911 Operator: It's the Sheriff's Department. What's going on today?

David Feis: Well, this has been going on for quite a while. He's an 18-year-old boy....He hasn't been doing anything. Every time I ask him to do something, he's like, I don't need to listen to you....And what happened is we came back and he started calling me every other name in the book. And I said, "Get your shit and pack up." And he started telling me off. He says, "I'm going to throw you out, you lazy bastard"....I went, "Excuse me?" And I walked up there to the door. And he -- one of them -- I think it was

him -- caught me up here by the nose. And I just reached out and barely slapped him in the face.

CP 29-30, (emphasis supplied).

**b. Police Response**

A 911 dispatcher relayed Joshua and Hope's reports by radio to King County Sheriff's Deputies Abigail Steele, Kyle Mccutchen, and Eric Franklin. CP 82, ¶¶7-10; CP 100, ¶4; CP 96, ¶¶4-5. Within minutes, Deputies Steele and Franklin arrived separately at the Feis' home, and both saw David and Hope sitting on the front porch. CP 82, ¶¶11-13; CP 96, ¶¶6-7. Hope was crying and very upset. CP 82, ¶14.

Deputies Steele and Franklin approached and asked David and Hope what was going on. CP 82, ¶15; CP 96, ¶8. David quickly interrupted and began talking over Hope, so Deputy Steele asked her to step away to talk privately. CP 82, ¶¶16-17; CP 96, ¶10.

Hope stood up, took two steps forward, and collapsed on the lawn. CP 82, ¶19; CP 96, ¶11. Unconsciousness for several seconds, Hope then had a seizure; she was convulsing, shaking, and unresponsive. CP 83, ¶20; CP 96, ¶11. The deputies called immediately for an aide car, and it arrived quickly. CP 83, ¶21; CP 96 ¶12. Paramedics placed Hope in the rear of their aid car and began treating her. CP 83, ¶22; CP 96, ¶13.

**c. Edward's Report**

As the paramedics treated Hope, Deputy Steele spoke with Hope's other son, Edward Petersen-Feis. CP 83, ¶24. Edward reported that he and Joshua had gone to Sears to do some shopping, and came back home to find Hope and David sitting in the car, parked on the front lawn. CP 83, ¶25. Edward said that he saw David move the car towards Joshua, but didn't think that David was trying to run Joshua over. CP 83, ¶26. Edward told Deputy Steele that Joshua and David started getting into it and that he stepped in between the two of them and successfully prevented any problem. CP 83, ¶27.

**d. David Feis' Denial**

Deputy Franklin meanwhile spoke briefly with David Feis. CP 96, ¶14. Now, David claimed that he only pushed Joshua's hand away, contradicting his admission to the 911 operator that he had slapped Joshua in the face. CP 96-97, ¶¶15-16.

In spite of this new denial, David expressed anger towards Joshua. CP 83, ¶¶31, 33. David complained later to Deputy Steele that he was sick and tired of Joshua not working, not going to school, and costing him money by turning the heat up too high and not getting a job. Id.

**e. Joshua's Report**

Arriving shortly after the other officers, Deputy Mccutchen found Joshua at the church across the street. CP 83, ¶23; CP 100, ¶¶5-6. Joshua told Deputy Mccutchen that he and his brother Eddie had just arrived home on foot after shopping at Sears. CP 100, ¶¶7-8. David had also just arrived home, and was still sitting in his car, parked on the front lawn, Joshua stated. CP 100, ¶9. David became angry, apparently because they had spent money shopping. CP 100, ¶10. Joshua reported that David then lunged the car forward and almost hit him. CP 100, ¶11. Joshua said that he then flipped David off. CP 100, ¶12. Joshua reported that then, David got out of the car, came after him, and slapped him. CP 100, ¶13. Joshua also told Deputy Mccutchen that he was certain that David attempted to hit him with the car, and that he felt scared. CP 100, ¶14.

Deputy Mccutchen came back to the home with Joshua and relayed Joshua's report to Deputy Steele. CP 84, ¶¶34-39. Deputy Franklin then spoke briefly with Joshua, and asked him for a short version of what had happened. CP 97, ¶¶21-22. Joshua again reported that David had slapped him, and added further that it had stung. CP 97, ¶¶23-24.

**f. Hope's Report**

Deputy Mccutchen next spoke with Hope Feis inside the aide car. CP 100, ¶17; CP 84, ¶40. Hope's report of the incident was almost identical to and confirmed Joshua's report. CP 101, ¶18; CP 84, ¶45.

Hope told Deputy Mccutchen that she and David had just arrived home, when Joshua and Eddie walked up with bags in hand. CP 101, ¶19. She recalled that David yelled at the boys: "You dumb fuckers!" CP 101, ¶20. Hope reported that David then lurched the car forward and nearly hit Joshua, missing him by only about six inches. CP 101, ¶21. Joshua then flipped David off, Hope stated. CP 101, ¶22. David then got out of the car, went after Joshua, and Eddie got in between them, Hope said. CP 101, ¶23. David then slapped Joshua, and Joshua walked away, Hope reported. CP 101, ¶24.

Hope added that David had been behaving this way for nearly three years. CP 84, ¶46. Hope stated that every time she tries to leave David he threatens her and takes her car keys and cell phone. CP 84, ¶47. Hope was crying and very upset. CP 84, ¶48. Deputy Mccutchen relayed all of this information to Deputy Steele. CP 84, ¶¶41-44.

Deputy Mccutchen then prepared a written statement for Hope, to memorialize her verbal report. CP 101, ¶25. Hope reviewed her written

statement and requested several corrections, which Deputy Mccutchen made. CP 101, ¶26. Hope than initialed the corrections, confirmed that her statement was true and correct, and signed it. CP 101, ¶¶27-28; CP 107. In her signed statement, Hope again reported that David had first "lurched the car forward nearly hitting Joshua." See CP 107. She also again reported that David then went after Joshua and slapped him. CP 106.

**g. Physical Evidence**

The officers observed physical evidence that supported Joshua and Hope's reports. CP 85, ¶49. David's car was in fact parked on the front lawn, with fresh, rutted tire tracks behind the rear wheels that appeared to have been caused by a rapid acceleration, consistent with a lurching of the car. CP 49, ¶¶50-51; CP 101, ¶¶29-30; CP 97, ¶¶17-18. Dirt had been kicked up, as though the driver had spun the tires. CP 101, ¶31; CP 97, ¶18. The hood of the car was still warm to the touch, as though it had just been driven. CP 97, ¶17. Deputy Mccutchen photographed the car and the ruts behind the rear wheels. See CP 108-109, and CP 101, ¶32.

Dep. Steele also noticed a very slight redness on the right side of Joshua's face, consistent with a slap. CP 85, ¶52. Further, David was much larger than Joshua. CP 100, ¶¶15-16. David was 6'3" and weighed somewhere between 350 and nearly 500 pounds. CP 120; CP 64. Joshua

was of only slight build. CP 100, ¶16. It made sense that Joshua was afraid of David, and that this fear prompted his call to 911.

**h. The Arrest**

Deputies Steele and Mccutchen both believed that there was probable cause to arrest David for a domestic violence assault. CP 102, ¶¶33-34; CP 85, ¶¶53-54. Deputy Steele understood that where there is probable cause to believe that a suspect has committed a recent domestic violence act, Washington law requires police officers to arrest and book that suspect. CP 85, ¶55. Having decided that there was probable cause, Steele understood that she had to arrest David, and with Deputy Franklin, did so. CP 85, ¶56; CP 97, ¶27.

Deputy Steele placed David in handcuffs, told him that he was under arrest, and read him the Miranda rights. CP 85, ¶57; CP 102, ¶35. David was too large to fit inside a patrol car, so Deputy Franklin drove to the precinct several blocks away to pick up a larger jail van. CP 85, ¶¶58-60; CP 97, ¶¶23-29. Deputy Franklin returned a few minutes later, and several of the deputies then led David into the back of the jail van. CP 85, ¶¶60-61. Deputy Franklin soon drove away with David, booked him into the King County jail, and did not return. CP 85, ¶62; CP 97-98, ¶¶31-32.

**i. A Need to Protect Domestic Violence Victims**

After making an arrest for domestic violence, patrol officers must also be concerned for the ongoing safety of the victim. CP 87, ¶91.

Domestic violence victims face an increased risk of violence after they report an incident to the police -- the batterer can return home even more enraged. CP 157, ¶¶16-20; CP 87, ¶92. Many victims of domestic violence rightly fear retaliation and an escalation of violence if they call the police, and, fear that the legal system will not protect them. CP 156-157, ¶14-16. Reports of batterers returning home following an arrest and then threatening and/or assaulting the victim and witnesses are commonplace, even where court orders prohibit contact. CP 157, ¶¶18-20.

For this reason, the presence and availability of firearms in the home can place victims, and witnesses, at an even greater risk of harm following a call to the police and the perpetrator's arrest. CP 157, ¶21. Firearms have been used in more than half of all domestic violence murders. CP 157, ¶¶21-22.

Therefore, the King County Sheriff's Department began a practice of removing firearms from the home, and holding them for safe keeping, when asked to do so by the victim of a domestic violence crime. CP 157-

158, ¶¶23, 28-29. The Sheriff's Department instituted this practice to protect domestic violence victims by proactively reducing the risk of firearm violence made possible by the perpetrator's access to firearms. CP 158, ¶25. The Sheriff's Department viewed it as the best practice to ask the victim if he or she wanted them to remove firearms for safekeeping. CP 158, ¶26.

The Sheriff's Department developed a series of standard questions for investigating officers to ask domestic violence victims, including questions about weapons and firearms in the home, and whether the victim wants the officers to remove them for safe keeping. CP 157, ¶24. The Department included these standard questions in its Domestic Violence Supplemental Form. See CP 86, ¶71; CP 91-92; CP 158, ¶27. The Department's practice is to store any such firearms only temporarily, through the conclusion of the investigation or case. CP 158, ¶28. The Sheriff's Department simply returns the firearms after the investigation or case is over, unless a court order prohibits the perpetrator from possessing the firearms. CP 158, ¶29.

**j. A Need to Protect Joshua -- Deputy Mccutchen's Search**

Deputy Steele spoke with Joshua after arresting David, while paramedics continued to treat Hope in the back of the aid car. CP 86,

¶¶63, 66-67. Before Deputy Steele asked him any questions, Joshua spontaneously blurted out: "He tried to run me over." CP 86, ¶64. Joshua was nervous, afraid, and upset. CP 86, ¶65.

Deputy Steele then asked Joshua all of the standard questions on the Domestic Violence Supplemental Form, and wrote down all of his answers. See CP 86, ¶66-77; CP 91-92. Responding to those questions, Joshua reported that he was born on December 7, 1988 -- making him then 18-years old. CP 91. Joshua again reported that he lived in the family home, and gave Deputy Steele two phone numbers, the home number and a personal cell phone number. CP 86, ¶¶68-70; CP 91.

In response to the firearms questions, Joshua reported that David kept guns in the house and possibly in his car. CP 86, ¶73. Joshua reported that David had previously threatened to use his guns. David "said he could take care of business with them." CP 86, ¶74; CP 91. Joshua told Deputy Steele that he wanted the deputies to remove David's guns. CP 86, ¶75; CP 91. Joshua also reported that David had assaulted him 4 or 5 times previously, most recently, one month before, but that he had not reported these incidents to the police. CP 86, ¶77; CP 92. After Deputy Steele recorded the last of his answers, Joshua signed the Domestic Violence Supplemental form. CP 87, ¶78; CP 92.

Deputy Steele then prepared a written statement for Joshua using an electronic tablet. CP 87, ¶¶79, 83; CP 94. Deputy Steele read the completed statement back to Joshua, and he verified that it was accurate. CP 87, ¶¶80-81. Like his earlier report to Deputy Mccutchen, Joshua's written statement described how David nearly hit him with the car and then exited the vehicle, ran after Joshua and slapped him. CP 87, ¶83; CP 94. Joshua again reported that he truly believed that David was going to run him over, and felt terrified. CP 87, ¶84. Joshua also indicated in his written statement that he was 18-years old and lived in the family home. CP 87, ¶82.

Deputy Steele was concerned for the safety of both Joshua and Hope -- because of their obvious fear, their reports of previous unreported incidents, Hope's severe agitation, David's expression of on-going anger towards Joshua, and the likelihood that David would soon post bail, return home, and possibly be even more enraged. CP 87, ¶¶85-90. To protect Joshua, Deputy Steele asked Deputy Mccutchen to remove the guns from the residence. CP 88, ¶¶93-92, 98; CP 102, ¶36. She told Deputy Mccutchen that Joshua was afraid of the guns remaining there because of the escalated situation with David. CP 102, ¶37.

Deputy Steele made the decision to remove the firearms solely based on safety concerns, and not to search for evidence. CP 88, ¶¶94, 98. Neither Deputy Steele nor Deputy Mccutchen believed that David's firearms were evidence of a crime. CP 88, ¶95; CP 102-103, ¶¶45-46. In fact, Joshua had told Deputy Steele that David did not use a weapon or firearm in the incident. CP 86, ¶76; CP 88, ¶95. In addition, the entire incident had occurred outside in the front yard of the residence; therefore, there was no investigatory reason, only a safety reason, for a deputy to enter the home. CP 88, ¶¶96-97.

One of the deputies, possibly Mccutchen (the record is unclear) looked briefly in the car and found no firearms. CP 102, ¶38; CP 97-98, ¶¶31-33. Deputy Mccutchen then went inside the house, accompanied only by Joshua, while Deputy Steele stayed outside and completed her paperwork. CP 88, ¶¶101, 103; CP 102, ¶40; CP 98, ¶33. Joshua directed Deputy Mccutchen to a bedroom where he quickly found three handguns, a shotgun, and ammunition. CP 102, ¶41. Several of the weapons were located under the bed, so Deputy Mccutchen had to move the mattress. Id. Deputy Mccutchen then immediately left the bedroom and went back outside. CP 102, ¶42. Deputy Mccutchen was inside the house for only a

few minutes. CP 88, ¶102; CP 102, ¶43; CP 80. Deputy Steele took the firearms and locked them in the trunk of her car. CP 88 ¶104.

Joshua left in the aide car and accompanied Hope to the hospital. CP 88 ¶105. Deputy Steele returned to the precinct shortly thereafter, recorded the make, model, caliber and serial number of each firearm on the Domestic Violence Supplemental Form, and with Deputy Mccutchen, stored the firearms in the evidence locker for safekeeping. CP 89, ¶¶106-108; CP 103, ¶52.

**k. The First Appearance**

David appeared in Court for his first appearance two days later, on April 2nd. CP 123, ¶16; CP 127. The Court ruled that there was probable cause for David's arrest and his continued detention in jail for domestic violence assault. CP 123, ¶17. The Court further ruled that David could not possess any weapons or firearms, could not have contact with Joshua, and had to post \$10,000 bail to be released from jail. CP 123, ¶18; CP 127.

**i. Hope's Recorded Interview**

That same day, Detective Christina Bartlett began a follow-up investigation by reviewing the deputies' reports, witnesses' statements, and

photographs. CP 111, ¶¶6-9. Det. Bartlett then called Hope Feis and obtained a detailed, tape-recorded statement. CP 111, ¶10; CP 114-120.

In this interview, Hope tried to protect David by softening her words. As Hope now passively described it, David did not lurch the car at Joshua, but rather "it went forward..." CP 115-116. As Hope now described the slap, David "tapped him [Joshua] on the back of the head..." CP 116.

Hope, however, did not mince her words in describing David's uncontrolled rage behind the wheel of the car, and his demand that Joshua had to leave home.

[I]t started when we went out to breakfast. The boys had talked about going over to Marshall's, which was right across the street at Shay's Restaurant, and I, I said it was fine. I didn't think anything about it.

My husband got mad, and he goes, you stupid fuckers; you guys just think you can do whatever the hell you want all the time.

And I, and I finally I just told him, you know, you need to calm your voice. We're in a public place you know. Let them go, which I, you know, that for me was the best idea.

And he [David] and I went to a thrift store to look around, and his anger became more intense, and um, when we went into the thrift store, I was looking at a bedroom set, and I pointed out the large amount that the thrift store was charging for it, and he called me a fucking whore, and he goes, you're so fucking stupid. You get to do whatever you want, but I never get to do anything.

So I thought, you know what, I'm gonna go to the front of the store and just let this relax. I looked around for about 20 minutes and came back, and his mood had changed, so we got in the car to go home.

And then he started screaming at me and cussing at me, belittling me, telling me I had to make Joshua leave ah, because Joshua lays on his ass 24 hours a day, 7 days a week, eats all the food, jacks up the heat, ah, causes large ah, water bills and heat bills. And it just went on to the point I said, you know what, this needs to stop.

We got to the house, and the boys were, had walked up behind the car, and they were walking up on the lawn, um and Eddie showed me that he had bought some stuff at Marshalls, and Dave became unglued and called him a fucking bastard and a retard and mental midget. Why would you spend more money and get more fucking clothes so we can do more fucking laundry?

And finally, I said, that's enough. I said, boys, go ahead and go into the house 'cause I, my thinking was if we go somewhere else, maybe he [David] would cool down. Well Josh had walked in front of, in front of the car, because Dave always parks up on the lawn.

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And ah, it was like I don't know if Dave took his foot off the brake because it didn't lurch. The car didn't lurch, but it, it missed Josh by about six inches.

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And, and Dave, you know, pushed down on the brake, and the car stopped really fast, and it missed Joshua maybe about six inches. And I put it in park, and I said, knock it off; let's just get over the anger. Let's just go in and have a nice day. Well, Joshua was flipping him off, and they were calling each other fuckers and stuff, and Joshua then locked the front door, and Dave went up to him, and Eddie got in-between 'em, and Dave took the open part of his fingers, and tapped him on the back of the head, and Josh said,

you know what, I can control my temper unlike you who can't control yours, and Joshua left.

CP 114-116 (emphasis supplied).

Later in her interview, Hope inadvertently confirmed that David's "tap" to Joshua's head was in fact a "hit". CP 119. Specifically, Hope described a telephone conversation which she had just had with David, who was then still in jail. David had complained to Hope that the officers should have arrested Joshua, not him. Id. Hope reported that she set David straight:

I said [to David], well, Joshua's a minor child to begin with, and Joshua didn't hit you. I said, you hit him.

Id. (emphasis supplied).

Hope also twice confirmed that Joshua lived in the family home. First, Hope reported that she was going to have Joshua move out of the house before David returned from jail. CP 117.

And all I can see is that they're two adult males, and they're feeding off of each other, so I, I'm moving Joshua out of here today. He, Joshua will not be here when Dave comes back.

Id. (emphasis supplied). Later, Hope reported that she had told David (during their telephone call) that Joshua should move out, not visa versa.

[F]irst he's [David] saying he's gonna move out. I said, what purpose would it serve if you moved out. Joshua is eighteen. Joshua wants to move out. I can't have Joshua as a minor child until Joshua is ninety years old. That's not gonna fly either. And

um, I just think if Joshua and Dave were not together, 99 percent of this would never happen.

CP 119 (emphasis supplied).

Hope also explained that David has an extremely hard time with Joshua, because Joshua is gay. CP 117-118. She reported that David's attitude and relationship with Joshua changed when Joshua came out, at age sixteen. CP 118. Joshua had reported similarly to Deputy Steele that David called him "rump-ranger" and other names just before making the car lurch at him. CP 94.

Det. Bartlett decided that there was probable cause to believe that David assaulted Joshua. CP 112, ¶14. She submitted the case to the King County Prosecuting Attorney's Office for review and consideration of a possible assault charge. CP 112, ¶15.

The next day, David posted a bail bond of \$10,000 and was released from jail. CP 123, ¶¶19-20; CP 129, 132.

**m. Criminal Prosecution**

The Prosecuting Attorney's Office charged David with assault in the fourth degree and he appeared for arraignment on April 4th. CP 123, ¶¶20-21; CP 132, 134, thereto. At the arraignment, Judge Pro Tem Faye Chess ordered David to surrender his firearms to the King County Sheriff's Office and to have no contact with Joshua. CP 123, ¶22; CP 148, 151.

The Prosecuting Attorney's Office issued subpoenas for Joshua and Hope to testify in trial on the assault charge, on September 12, 2007. CP 124, ¶¶24-25; CP 133. As that date approached, both the Prosecuting Attorney's Office and Sheriff's Department were unable to find or even contact Joshua. CP 124, ¶¶26-28.

Joshua and Hope both failed to appear for the trial, in spite of their subpoenas. CP 124, ¶29. Without these necessary witnesses, the Deputy Prosecuting Attorney was unable to proceed and was forced to move to dismiss the case. CP 124, ¶30. The Honorable Linda Thompson granted that motion, and dismissed. CP 124, ¶31; CP 146.

David's attorney then moved for an order releasing his firearms, and Judge Thompson granted that motion. CP 124, ¶¶32-33; CP 154.

**n. David's Lawsuit**

On December 31, 2008, David sued the King County Sheriff's Department, Detective Bartlett, Deputy Franklin, Deputy Steele and Deputy Mccutchen. Complaint. CP 1-3. David now claimed, in deposition testimony, that Joshua had attacked him -- by punching him repeatedly in the face and chest after demanding \$100 from Hope. CP 37-42. David denied that he lunged the car at Joshua, slapped Joshua, or lost his temper with Joshua, ever. CP 40-42.

David acknowledged his original admission, to the 911 operator, that he had "slapped" Joshua, but denied that it was anything more than harmless self defense.

I believe the word I said [to the 911 operator] was "slapped", but I put -- it was an open hand, and I just straight-armed, was holding him -- I guess you call it, like, a -- like a tree, you know, straight-armed. It reminded me of the cartoons.

CP 39.

David also now claimed that Joshua did not live at home on the day of the arrest, and had moved out earlier to an unknown location. CP 37-38, 40-41.

I believe he was living with his boyfriend; I believe his name is Kurtis. In Rainier Valley.

CP 41.

David claimed that he could not work because of the arrest, and sought damages for his lack of employment. CP 44. David also claimed that Deputy Mccutchen went on a rampage in his bedroom, rummaged through Hope's jewelry, threw it on the floor, and stomped on it. CP 43-44, 47-49. David claimed further that Deputy Mccutchen stole from him, but could provide no details of missing property. CP 44.

Question: And are there any other damages that you are claiming in this lawsuit?

David: I am missing a lot right now. I don't have a full list right now. I can't remember them all.

Question: So you are saying the police officers stole from you?

David: I didn't say stole from us.

Question: Well, you said you are missing a lot.

David: I'm missing -- I can't remember everything that we're -- we're damaged by....

CP 47- 48.

Hope and Edward continued to live with David and supported his lawsuit. CP 52, 55-69; CP 72, 74-80. The three were estranged from Joshua, and purported to not know where he lived, or even his telephone number. CP 35-36; CP 52-56; CP 73-74.

In deposition testimony, Hope wholly contradicted her previous reports to the deputies and Detective Bartlett. Hope now denied that David ever slapped Joshua, or that David was even inside the car when it lurched forward. (She claimed he hopped out moments before). CP 60, 61. Hope asserted that she called 911 not because of David, but to stop Joshua, who was having a temper tantrum. CP 65. Hope also asserted that she had kicked Joshua out of the home seven months before, at the start of his senior year of high school. CP 58.

Edward Feis acknowledged, in deposition testimony, that Deputy Mccutchen only entered and searched the two areas of the home where David's guns were in fact located -- the bedroom and hallway closet. CP 79-80. Edward admitted that after finding the guns, Deputy Mccutchen left the house immediately, and did not search any other rooms. Id. Edward reported that Deputy Mccutchen was only inside the house for "[p]robably four or five minutes." CP 80.

## **B. ARGUMENT**

### **1. Introduction**

Deputies Steele, Mccutchen and Franklin were legally required by the Domestic Violence Protection Act to arrest and detain David Feis for domestic violence assault. The deputies were also required to provide David's victim, Joshua Petersen, with maximum protection. Joshua was at risk of further harm -- a risk heightened by David's arrest, and the presence of firearms in his home. Joshua asked the deputies to remove the guns from the home. Deputy Steele reasonably believed that this was needed to protect Joshua, and there was a reasonable basis to associate Joshua's need for help with the home. Deputy Mccutchen's search was proper under the community caretaking doctrine and no warrant was required. The search was entirely non-investigatory, and limited in scope

and duration; its sole purpose was to protect Joshua from further harm.

The deputies and Detective Bartlett are also immune from suit under both state and federal law.

Judge Middaugh ruled correctly. This Court should affirm her rulings. Neither is David Feis entitled to attorney's fees here.<sup>2</sup>

## 2. Mandatory Arrest

Via the Domestic Violence Prevention Act (DVPA), the legislature burdened Washington police officers with unique duties to protect and render aid to domestic violence victims. See RCW 10.99 et seq; Laws of 1984, ch. 263. First, under the DVPA, if there is probable cause to believe that a suspect has committed a recent act of domestic violence, investigating police officers are required to arrest and take the suspect into custody. See RCW 10.99.030(6)(a); RCW 10.99.100(2); Donaldson v. City of Seattle, 65 Wn. App. 661, 670, 831 P.2d 098 (1992), rev. dismissed 120 Wn.2d 1031 (1993).

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<sup>2</sup> An award of reasonable attorney's fees in a civil rights action under 42. U.S.C § 1983 is discretionary, and must be considered first in the trial court. Benchmark Land Co. v. City of Battle Ground, 94 Wn.App.537, 550, 972 P. 2d 944 (1999), affirmed on other grounds, 146 Wn.2d 685, 49 P.2d 860 (2002).

Such discretion is best exercised at the conclusion of all matters in the trial court.

Id.

Generally, where an officer has legal grounds to make an arrest he has considerable discretion to do so. In regard to domestic violence, the rule is the reverse. If the officer has legal grounds to arrest pursuant to the statute, he has a mandatory duty to make the arrest.

Donaldson, *supra* (citing RCW 10.31. and RCW 10.99).

An investigating officer has probable cause to make an arrest when he/she receives information of an offense from a victim or witness who it seems reasonable to believe is telling the truth. Gramenos v. Jewel Cos., 797 F.2d 432, 439 (7th Cir. 1986) (quoting Daniels v. United States, 393 F.2d 359, 361 (D.C. Cir. 1968). Officers have probable cause when:

...the facts and circumstances within their knowledge and of which they [have] reasonably trustworthy information [are] sufficient to warrant a prudent [person] in believing that the [suspect] has committed or was committing an offense.

Sheik-Abdi v. McClellan, 37 F.3d 1240, 1246 (7th Cir. 1994), *cert.*

*denied*, 513 U.S. 1128, 115 S.Ct. 937 (1995). *See also* Beck v. State of Ohio, 379 U.S. 89, 91, 85 S. Ct. 223 (1964). Only the probability of a crime is required, not even a prima facie showing of it. State v. Gaddy, 114 Wn. App. 702, 706, 60 P.3d 116 (2002) (citing State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981)).

The Court is to look to the officer's knowledge at the time of the arrest. *Id.* (citations omitted) (emphasis added). *Accord* State v. Moore,

161 Wn.2d 880, 887, 169 P.3d 469 (2007). Courts evaluate probable cause:

...not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person in the position of the arresting officer -- seeing what he saw, hearing what he heard.

Mahoney v. Kesery, 976 F.2d 1054, 1057 (7<sup>th</sup> Cir. 1992) (emphasis supplied).

Here, the evidence known to Deputies Steele, Mccutchen and Franklin at the time was more than sufficient for a reasonable and objective person to believe that David Feis committed assault in the fourth degree.<sup>3</sup> By lurching his car at Joshua, David intentionally created a reasonable apprehension and fear of bodily injury. Joshua and his mother, Hope, both reported that David angrily lunched his car at Joshua, missing him by inches. CP 100, ¶¶10-13; CP 106; CP 82-83, ¶¶19-24. Joshua stated that he was frightened and certain that David tried to hit him with the car. CP 100, ¶14. Both Joshua and Hope appeared shaken and afraid; Hope was exceptionally agitated. CP 87, ¶¶86-87. The deputies also observed fresh, rutted tire tracks behind the rear wheels of the car, as

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<sup>3</sup> Assault in the Fourth degree is committed in several ways, including by: (1) intentionally creating a reasonable apprehension and fear of bodily injury, or; (2) intentionally committing an unlawful touching, regardless of whether physical harm results. State v. Davis, 60 Wn. App. 813, 821, 808 P.2d 167, review granted 118 Wn.2d 1027, 828 P.2d 564, affirmed 119 Wn.2d 657, 835 P.2d 1039, recon. denied (1991).

though caused by a rapid acceleration. CP 85, ¶¶50-51; CP 101, ¶¶29-30; CP 97, ¶¶17-18. Dirt had been kicked up from spinning tires, consistent with an intentional lurching of the car, and the hood was still warm. CP 101, ¶31; CP 97, ¶¶17-18. Edward Petersen-Feis too told the deputies that David moved the car forward towards Joshua. CP 83, ¶26.

Further, by slapping Joshua, an intentional, unlawful touching, David committed another assault in the fourth degree. Hope and Joshua both reported that David got out of the car, went after Joshua, and then slapped him in the face. CP 100, ¶¶10-13; CP 106; CP 82-83, ¶¶19-24. David himself grudgingly admitted to the 911 operator that he slapped Joshua in the face. CP 29-30. Joshua reported further that the slap to the face hurt -- it stung. CP 97, ¶24. Deputy Steele noticed a very slight redness on the right side of Joshua's face, consistent with a slap. CP 85, ¶52. David's significant size advantage also made it more likely that he was the aggressor over the slight-of-build Joshua.

There was probable cause for the deputies to arrest David Feis for assault in the fourth degree. Under the DVPA, the deputies had no discretion. They were legally required to arrest David.

### 3. A Duty to Protect Domestic Violence Victims

The DVPA also imposes a duty on local municipalities and their police departments to protect victims of domestic violence. Donaldson v. City of Seattle, supra, 65 Wn. App. at 667; RCW 10.99.010. The legislature defined "victim" broadly in the DVPA to encompass the full range of domestic relationships, not only battered spouses. RCW 10.99.020. Any "family or household member who has been subjected to domestic violence" including "stepparents and stepchildren" is a victim, and entitled to protection. RCW 10.99.020(3) and (4).

The legislature announced in its statement of intent that:

[t]he purpose of this chapter is to recognize the importance of domestic violence as a serious crime against society and to assure the victim of domestic violence the maximum protection from abuse which the law and those who enforce the law can provide.

RCW 10.99.010 (emphasis supplied).

The Legislature reiterated elsewhere that:

[t]he primary duty of peace officers, when responding to a domestic violence situation, is to enforce the laws allegedly violated and to protect the complaining party.

RCW 10.99.030 (5) (emphasis supplied).

The legislature also explicitly recognized the "likelihood of repeated violence directed at those who have been victims of domestic violence in the past...." RCW 10.99.040(2)(a). See also RCW 10.99.030.

The legislature acknowledged the cycle of domestic violence and its lethal consequences, and declared that stopping this is to be a state priority.

The collective costs to the community for domestic violence include the systematic destruction of individuals and their families, lost lives, lost productivity, and increased health care, criminal justice, and social service costs.

Children growing up in violent homes are deeply affected by the violence as it happens and could be the next generation of batterers and victims.

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Many communities have made headway in addressing the effects of domestic violence and have devoted energy and resources to stopping this violence. However, the process for breaking the cycle of abuse is lengthy. No single system intervention is enough in itself.

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Given the lethal nature of domestic violence and its effect on all within its range, the community has a vested interest in the methods used to stop and prevent future violence.

Finding--1991 c 301 § 1 (emphasis supplied). See also RCW 10.99.010.

#### **4. No Warrant Was Required For the Search Here**

When assisting persons threatened with injury, police officers are not required to obtain a warrant before conducting a search limited in scope to the officers' non-investigatory "community caretaking" role.

Goldsmith v. Snohomish County, 558 F. Supp. 2d 1140, 1152 (W.D. WA 2008); State v. Hos, 154 Wn. App. 238, 246-48, 225 P.3d 389 (2010);

State v. Moore, 129 Wn. App. 870, 879-886, 120 P.3d 635 (2005), rev. denied 157 Wn.2d 1007, 136 P.3d 759 (2006). The community caretaking function is a well established exception to the warrant requirement, under both the U.S. and Washington State Constitutions. Hos, supra; Moore, supra.

The community caretaking exception to the warrant requirement applies where police enter private property for purposes other than the investigation of crime or the acquisition of crime evidence. State v. Acrey, 148 Wn.2d 738, 748, 64 P.3d 594 (2003). With this exception, Courts recognize that police officers have multiple functions independent of their law enforcement role, including a duty to protect and render aid to the public. State v. Acrey, supra at 748-49; State v. Gocken, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993). In addition to investigating crimes, police officers are expected to:

...prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety.

State v. Gocken, supra at 276-77 (quoting U.S. v. Erickson, 991 F.2d 529, 531 (9<sup>th</sup> Circ. 1993)).

The community caretaking exception to the warrant requirement applies when:

- (1) the officer subjectively believed that someone likely needed assistance for health and safety reasons;
- (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and
- (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Hos, supra at 246-47.

Here, it is undisputed that Deputy Steele subjectively believed that Joshua needed protection from David and was at risk due to the presence of firearms. See CP 87-88, ¶¶85-99. Joshua told her that he was concerned about David's access to firearms, and that he wanted the deputies to remove them for safe keeping. Deputy Steel communicated her subjective belief that Joshua needed protection to Deputy Mccutchen. She asked him to remove the firearms to protect Joshua from further violence, solely for his safety. CP 88, ¶¶93-98; CP 102, ¶¶36-37.

A reasonable person in this same situation would likewise believe that Joshua needed protection. First, both Joshua and Hope reported that David had assaulted Joshua before; the incident that had just occurred was not the first. So, there was already a cycle of domestic violence in the Feis' home. David's anger towards Joshua had now escalated to point that both Joshua and Hope called 911 for help. Even with the officers present, David interrupted and spoke over Hope, and continued to express anger

towards Joshua. Further, Joshua and Hope were both afraid of David. Joshua was also nervous, and upset. Hope was exceptionally agitated and collapsed.

It was also likely that David would post bail (he in fact did), and return home even angrier with Joshua and Hope. CP 87, ¶¶85-90. (Hope too was worried about what would happen when David returned from jail, as she told Detective Bartlett.) Courts acknowledge the combustible nature of domestic disputes, and that was present here. U.S. v. Martinez, 406 F.3d 1160, 1165 (9<sup>th</sup> Cir. 2005) (quoting Tierney v. Davidson, 133 F.3d 189, 197 (2<sup>nd</sup> Cir. 1998)).

Domestic violence victims face a further risk of injury as their abusers are often released quickly from jail, as this Court has recognized. Donaldson v. Seattle, supra, 65 Wn. App. at 673. The legislature likewise acknowledged that by requiring police officers to arrest and detain domestic violence suspects, it was potentially placing victims at risk of further violence. The legislature recognized:

...the likelihood of repeated violence directed at those who have been victims of domestic violence in the past, when any person charged with or arrested for a crime involving domestic violence is released from custody before arraignment or trial on bail or personal recognizance....

RCW 10.99.040(2)(a) (emphasis supplied).

Moreover, it is undisputed that firearms in the home amplify the danger of more serious violence, and have been used in more than half of all domestic violence murders. CP 157, ¶¶21-22. Indeed, Washington's appellate courts have heard many cases of serious domestic violence crimes committed with firearms. State v. Donnell Wayne Price, 154 Wn. App. 480, 483-485, 228 P.3d 1276 (2009) (murder of girlfriend with shotgun); State v. Hunter, 152 Wn. App. 30, 216 P.3d 421 (2009) (killing of girlfriend and infant with a .45); State v. Moses, 129 Wn. App. 718, 721-722, 119 P.3d 906 (2005) (murder of wife with .410 derringer); State v. Brundage, 126 Wn. App. 55, 58-60, 107 P.3d 742 (2005) (following separation, rape and kidnapping of wife with silver Reuger); State v. Pierre Dinard Price, 126 Wn. App. 617, 624-629; 109 P.3d 27 (murder of ex-girlfriend with .380 pistol); State v. Walther, 114 Wn. App. 189, 191, 56 P.3d 1001 (2002) (shooting at female roommate).

There was also a reasonable basis for Deputy Steele to associate Joshua's need for assistance with the place searched. Joshua reported that David kept guns in the house and possibly in the car.

For these reasons, the search was a lawful community caretaking act, and no warrant was required. Judge Middaugh correctly dismissed.

## 6. State Immunity

While the legislature burdened the police with the duties of mandatory arrest and protection of domestic violence victims, it also insulated police departments, their officers and detectives with broad immunity from lawsuits under state law. The DVPA provides:

A police officer shall not be liable in any civil action for an arrest based on probable cause, enforcement in good faith of a court order, or any other action or omission in good faith under this chapter arising from an alleged incident of domestic violence brought by any party to the incident.

RCW 10.99.070 (emphasis supplied).

With this statute, the legislature chose to immunize law enforcement from lawsuits concerning their conduct in the course of an arrest or their other on-the-scene actions. Roy v. City of Everett, 118 Wn. 2d 352, 357-58, 823 P.2d 1084 (1992).

The statute is designed to protect law enforcement officers in their good faith actions involving an "incident of domestic violence"....

Id. at 1088 (quoting RCW 10.99.070).

The whole point of qualified immunity is to provide protection from the necessity of defending the suit in the first place. "Because qualified immunity entitles a government official to immunity from suit rather than a mere defense to liability, it is essential that 'insubstantial claims' be resolved as quickly as possible."

Estate of Lee v. City of Spokane, 101 Wn. App. 158, 177, 2 P.3d 979 (2000) (quoting Orwick v. Fox, 65 Wn. App. 71, 83-84, 828 P.2d 12 (1992)).

In the case at bar, the Sheriff's Department and its staff are immune from suit for their mandatory arrest of David Feis. There was clearly probable cause. They are also immune for the deputies' actions at the scene of that arrest including the search. It is undisputed that Deputy Steele acted in good faith, by directing Deputy Mccutchen to remove the firearms, at Joshua's request and for his protection. There was no investigatory reason -- only a public safety reason -- for the search. Accordingly, the Sheriff's Department and its staff are immune from David Feis' state law claims.

7. **Immunity from David Feis' Federal Claims**

Government officials named as individual defendants in civil lawsuits are also entitled to qualified immunity from liability under 42 U.S.C. §1983 where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

Qualified immunity balances two important interests - the need to hold public officials accountable when they exercise power

irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.

Pearson v. Callahan, 555 U.S. 223, \_\_\_, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (citations omitted).

Qualified immunity exists to spare public officials from the need to defend their good faith mistakes in litigation, so they can carry out their official duties unhindered by worries about potential lawsuits. Amore v. Novarro, 624 F.3d 522, 529-530 (2<sup>nd</sup> Cir. 2010) (citations omitted).

...[T]o submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake....

Amore, supra (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2<sup>nd</sup> Cir. 1949)).

The purpose of this doctrine is to recognize that holding officials liable for reasonable mistakes might unnecessarily paralyze their ability to make difficult decisions in challenging situations, thus disrupting the effective performance of their public duties.

Mueller v. Auker, 576 F.3d 979, 993 (9<sup>th</sup> Cir. 2009).

Reviewing courts are required to recognize the demands of the real world in evaluating whether police officers and other public officials are

entitled to qualified immunity. Saucier v. Katz, 533 U.S. 194, 199, 121 S.Ct. 2151, 2156 (2001) (citing Davis v. Scherer, 468 U.S. 183, 196, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). The Supreme Court has cautioned that courts should afford "deference to the judgment of reasonable officers on the scene" and should avoid "20/20 hindsight vision." Id. at 205.

The qualified immunity doctrine gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law.

Hunter v. Bryant, 502 U.S. 224, 229, 112 S.Ct. 534, 116 L.Ed. 2d 599 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341 (1986)).

**a. Saucier Questions**

In ruling on qualified immunity, a court is required to consider the following two questions identified in Saucier v. Katz, supra: (1) whether the facts that the plaintiff has alleged show that the deputy's conduct violated a constitutional right and; (2) whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. If the answer to either question is "no", then the government official is entitled to qualified immunity, which is an immunity from suit, and not merely a defense to liability. Pearson v. Callahan, supra, 129 S.Ct. at 815-816. A court may also consider the Saucier questions in any order.

Pearson, 129 S.Ct. at 818 (overruling the "rigid order of battle" mandated in Saucier, *supra*).

To be "clearly established" under the second question, the right at issue must be sufficiently "particularized" and its contours sufficiently clear that "a reasonable official would understand that what he [or she] is doing violates that right." Moran v. Washington, 147 F.3d 839, 844-45 (9<sup>th</sup> Cir. 1998) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)) (emphasis added).

The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier, *supra* 533 U.S. at 202 (emphasis supplied).

Under the second question, a court should consider whether the officials could have believed their conduct lawful in light of clearly established law and the totality of the circumstances. Alexander v. County of Los Angeles, 64 F.3d 1315, 1319 (9<sup>th</sup> Cir. 1995) (following Anderson v. Creighton, *supra*). Accord ActUp!Portland v. Bagley, 988 F.2d 868, 871-872 (9<sup>th</sup> Cir. 1993) (the reviewing court must evaluate whether a reasonable officer, standing in the position of the investigating officers, could have believed that their actions were lawful).

For purposes of qualified immunity, police officers and other government officials are not expected to be legal experts.

The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct.

McCullough v. Wyandanch Union Free School Dist., 187 F.3d 272, 278 (2<sup>nd</sup> Cir. 1999) (citations omitted). "Police officers are not expected to be lawyers or prosecutors." Scarborough v. Myles, 245 F.3d 1299, 1303, n. 8 (11<sup>th</sup> Cir. 2001) (citation omitted).

A legal right may also be "clearly established" for purposes of its application by professional judges, but not:

"clearly established" in the qualified immunity context, which governs the conduct of government officials who are likely neither lawyers nor legal scholars.

Scott v. Fischer, 616 F.3d 100, 106 (2<sup>nd</sup> Cir. 2010).

Even if mistaken, officials are also entitled to qualified immunity if their mistake was reasonable. Krainski v. Nevada ex rel. Board of Regents, 616 F.3d 963, 969 (9<sup>th</sup> Cir. 2010)).

Law enforcement officials will be entitled to qualified immunity "when their decision was *reasonable*, even if mistaken." Further, "[if] officers of reasonable competence could disagree on this issue, immunity should be recognized."

Arbuckle v. City of Chattanooga, 696 F. Supp. 2d 907, 921 (E.D. Tenn. 2010) (citing Pray v. City of Sandusky, 49 F.3d 1154, 1158 (6<sup>th</sup> Cir. 1995) (quoting Castro v. U.S., 34 F.3d 106, 112 (2<sup>nd</sup> Cir. 1994), and Malley v. Briggs, 475 U.S. 335, 349, 106 S.Ct. 1092, 1100, 89 L.Ed.2d 271 (1986) (emphasis in original)).

**b. The Right Was Not Clearly Established**

Under the second Saucier question, if Deputies Steele and Mccutchen were mistaken, their mistake was reasonable. The law on non-investigatory home searches was ambiguous at the time of the search here, and remains so.

Washington State courts allow warrantless, "community caretaking" entries into the home, as discussed above. State v. Hos, supra; State v. Gocken, supra. Most significantly, Washington state courts have found the community caretaking doctrine to be consistent with both the Fourth Amendment of the U.S. Constitution and Article 1 §7 of the state constitution, which provides broader protection against search and seizure than the Fourth Amendment. Hos, supra at 245-247 (citations omitted); State v. Parker, 139 Wn.2d 486, 493 n. 2, 987 P.2d 73 (1999) ("It is already well established that article I, section 7 of our state constitution

provides to individuals broader protection against search and seizure than does the Fourth Amendment") (citations omitted).

These cases recognize the principle that:

the police may be required to perform a warrantless search, not as a response to an immediate emergency, but as part of their function of protecting and assisting the public.

Gocken, *supra* at 1080.

The purpose of the brief, narrowly-defined search here was not to investigate a crime, but rather to prevent further and more serious domestic violence against Joshua. Under the community caretaking principle, the search was lawful.

In U.S. v. Erickson, 991 F.2d 529 (9<sup>th</sup> Cir. 1993), as the appellant points out, and as Judge Middaugh recognized in her ruling, the Ninth Circuit ruled that the community caretaking doctrine applies to cars, but not to the home. However, the federal circuits have not been unanimous on the applicability of the community caretaking exception to the home. Both the 4<sup>th</sup> and 11<sup>th</sup> Circuits acknowledge a split in federal authority on the applicability of the community caretaking doctrine to the home.

Hunsberger v. J.A. Wood, *supra* at 553 (4<sup>th</sup> Cir. 2009) (citing U.S. v. Quezada, 448 F.3d 1005, 1007 (8<sup>th</sup> Cir. 2006); U.S. v. Stafford, 416 F.3d

1068, 1073 (9<sup>th</sup> Cir. 2005); U.S. v. Rohrig, *supra*; U.S. v. McGough, 412 F.3d 1232, 1236-37 (11<sup>th</sup> Cir. 2005).

In U.S. v. Rohrig, *supra* the Sixth Circuit applied the community caretaking doctrine and upheld police officers' warrantless entry into a home from which loud music blasted in the early morning, disturbing the neighborhood. The Court rejected an argument that the search was unlawful absent an emergency. *Id.* at 1521-22. The Court recognized that important governmental interests may be at stake even in the absence of life-or-death circumstances. *Id.* (citing Jersey v. T.L.O., 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985) (discussing a school's "legitimate need to maintain an environment in which learning can take place"), and U.S. v. Brown, 64 F.3d 1083, 1086 (7<sup>th</sup> Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams.")).

With Ray v. Township of Warren, 626 F.3d 170, 177-178 (3<sup>rd</sup> Cir. 2010), the Third Circuit issued its first published decision on whether the community caretaking doctrine applied to the home. The court issued that decision on November 23, 2010, three and one half years after the search at issue here. Thus, the law on this issue has continued to develop after

the search here. Further, the United States Supreme Court has yet to decide whether the community caretaking exception can justify a warrantless entry into the home. U.S. v. Gillespie, 332 F.Supp.2d 923, 929 (quoting Wood v. Commonwealth, 27 Va. App. 21, 497 S.E.2d 484, 487 (1998)).

As for its conceptual approach, the Ninth Circuit has "cast the 'community caretaking' function as the 'emergency doctrine.'" Goldsmith v. Snohomish County, 558 F. Supp. 2d 1140, 1152 (W.D. Washington 2008) (citing U.S. v. Stafford, 416 F.3d 1068, 1073 (9<sup>th</sup> Cir. 2005)). Thus, the Ninth Circuit's analysis conflicts with both Washington state courts, and with other federal circuits, which view community caretaking and emergencies as separate but related exceptions to the warrant requirement. Gocken, supra at 275 ("Similarly, the police may be required to perform a warrantless search, not as a response to an immediate emergency, but as part of their function of protecting and assisting the public.") (citation omitted); U.S. v. Miller, 589 F.2d 1117, 1125 (1<sup>st</sup> Cir. 1978); Hunsberger v. J.A. Wood, 570 F.3d 546, 554 (4<sup>th</sup> Cir. 2009); U.S. v. Taylor, 624 F.3d 626, 634 n. 1 (4<sup>th</sup> Cir. 2010); U.S. v. Rohrig, 98 F.3d 1506, 1521-22 (6<sup>th</sup> Cir. 1996).

We think the best reading of the relationship between the two exceptions is that when analyzing a search made as the result of a

routine police procedure, such as the policy of locating weapons in towed cars in *Dombrowski*, the court should examine the programmatic purpose of the policy -- whether it was animated by community caretaking considerations or by law enforcement concerns. But when the search in question was performed by a law enforcement officer responding to an emergency, and not as part of a standardized procedure, the exigent circumstances analysis and its accompanying objective standard should apply.

Hunsberger, supra at 554 (referencing Cady v. Dombrowski, 413 U.S. 433, 93 S.Ct 2523, 37 L.Ed.2d 706 (1973) (emphasis added).

Since state and district court judges cannot agree on when the community caretaking doctrine applies, or even on the concept itself, it is reasonable for police officers, who are not legal scholars, to be similarly uncertain about the scope of this doctrine.

It would not be clear to a reasonable officer in the situation confronted by Deputies Steele and McCutchen that the search here was unlawful. The court must base its qualified immunity analysis on the facts known to the investigating deputies at the time of their actions. Monday v. Oullette, supra; State v. Moore, supra. See also State v. Chenoweth, 160 Wn.2d 454, 476, 158 P.3d 595 (2007). Thus, the Court should ignore David and Hope Feis' new claims that contradict their respective statements, to the 911 operator and deputies, at the time of the arrest and search.

Based upon what they knew at the time, Deputies Steele and Mccutchen had no discretion on whether to arrest David Feis. They had a legal obligation to do so, under the DVPA, because there was probable cause to believe that David had committed a recent domestic violence assault.

That legal duty on Deputies Steele and Mccutchen increased the likelihood of further violence. It is undisputed that domestic violence victims face an increased risk of violence after they report an incident to the police -- the batterer can return home even more enraged. CP 157 ¶¶16-20; CP 87 ¶92. Reports of batterers returning home following an arrest and then threatening and/or assaulting the victim and witnesses are commonplace, even where court orders prohibit contact. CP 157 ¶¶18-20. It is also undisputed that the presence and availability of firearms in the home can place victims, and witnesses, at an even greater risk of harm following a call to the police and the perpetrator's arrest. CP 157 ¶21. Firearms have been used in more than half of all domestic violence murders. CP 157 ¶¶21-22. Thus, Deputies Steele and Mccutchen were confronted with a situation of a greater potential for future harm.

Deputies Steele and Mccutchen had a simultaneous responsibility, under the DVPA, to provide Joshua with the maximum protection, to

protect him from future harm, as discussed above. The DVPA is a strong call for police officers to help break the cycle of domestic violence, and therefore to minimize the risk of further violence following a mandatory arrest.

Deputy Steele asked Joshua all of the standard questions, following the Domestic Violence Supplemental Form procedure, and wrote down all of his answers. See CP 86 ¶¶66-77; CP 91-92. Joshua's answers to those questions confirmed that he was at risk for further harm.

Joshua reported that David kept guns in the house, and had previously threatened to use them. CP 86 ¶¶73-74; CP 91. Joshua told Deputy Steele that he wanted the deputies to remove the guns. Joshua also reported that David had assaulted him 4 or 5 times previously, most recently, one month before, but that he had not reported these incidents to the police. CP 86 ¶77; CP 92. A reasonable officer, in the situation that Deputies Steele and Mccutchen confronted, would be fully justified in believing that there was a need to remove the weapons from the home.

The purpose of the actual search is also critical, because community caretaking functions by police officers are by definition:

...totally divorced from the protection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

U.S. v. McGough, *supra* at 1237 (citations omitted). It is undisputed that Deputy Mccutchen's entry into the Feis' home was totally unrelated to any investigatory purpose. The sole purpose of the search was safety -- to protect the victim of a domestic violence crime from an escalation of violence -- a community caretaking function.

Moreover, Deputy Mccutchen limited the scope and duration of his search to his community caretaking function -- protecting Joshua from further harm. Deputy Mccutchen did not search for contraband or suspects. Deputy Mccutchen did not perform a sweep of the home. He limited his search of the home to the areas where David kept firearms, as Edward confirmed. Deputy Mccutchen was only in the house for four or five minutes, as Edward reported. There was no evidentiary reason for Deputy Mccutchen to conduct the search; it was wholly divorced from his investigative role.

Reviewing courts should also consider whether an officer conducted a search pursuant to a routine police procedure, and if so, the purpose of that routine procedure. Hunsberger, *supra* 570 F.3d at 554. It is undisputed that the search here was in fact part of a routine police procedure. The King County Sheriff's Department developed the Domestic Violence Supplemental Form, which contained standard

questions for its deputies to ask all domestic violence victims, including questions about firearms in the home. CP 157-158 ¶¶24, 27; CP 86 ¶71; CP 91-92. It is undisputed that the programmatic purpose of the Department's procedure is a concern for the ongoing safety of victims in domestic violence cases, and the need to protect them from the substantial risk of further harm. CP 156-158, ¶¶11-27.

For all of these reasons, even if mistaken, Deputies Steele and Mccutchen acted reasonably. Deputies Steele and Mccutchen were not plainly incompetent; they could have reasonably believed that the limited warrantless entry into the Feis' home, solely for safety, was lawful. They are entitled to qualified immunity.

**C. CONCLUSION**

Judge Middaugh ruled correctly. Deputies Steele, Mccutchen and Franklin, Detective Bartlett, and the King County Sheriff's Department respectfully ask the court to affirm Judge Middaugh's rulings.

DATED this 14<sup>th</sup> day of March, 2011.

RESPECTFULLY submitted,

DAN SATTERBERG  
King County Prosecuting Attorney

By:   
HOWARD P. SCHNEIDERMAN, WSBA #19252  
Senior Deputy Prosecuting Attorney