

No. 39797-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KRISTA OSBORNE,

Respondent,

v.

TOM SEYMOUR,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY
THE HONORABLE SALLY F. OLSEN

CORRECTED BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	RESTATEMENT OF ISSUES RELATED TO APPELLANT'S ASSIGNMENTS OF ERROR.....	1
A.	Did Sgt. Seymour violate Respondent Osborne's Fourth Amendment Rights when he entered her home without a warrant and affirmatively facilitated her estranged husband's (Bird'S) entry in violation of a Protection Order while Respondent was away, and allowed Bird to remove property and to access Osborne's computer and papers? ...	1
B.	Does the community caretaking doctrine apply when a police officer facilitates an unlawful entry by a husband barred from his wife's home while the protected wife is not present and when the home is unoccupied?.....	1
C.	Was Sgt. Seymour entitled to qualified immunity when he acted contrary to all applicable court orders and violated respondent Osborne's clearly established Fourth amendment rights, in the situation that Sgt. Seymour faced on July 28, 2004?	1
D.	Did the trial court manifestly abuse its discretion when it awarded attorneys' fees under 42 U.S.C. § 1988, <i>City of Riverside v. Rivera</i> , 477 U.S. 561 (1986), and <i>Ermine v. City of Spokane</i> , 143 Wn.2d 636 (2001), following a jury verdict that awarded compensatory and punitive damages, where counsel had already reduced their time and costs and where the trial court further reduced the attorney's fee award by 33%?.....	1
II.	STATEMENT OF FACTS AND PROCEDURAL HISTORY.....	1
A.	Procedural History	1
B.	Statement of Facts Related to Liability On Summary Judgment.	3
C.	Trial Testimony.....	12

D.	Attorneys' Fees.	15
III.	ARGUMENT	17
A.	The Trial Court Properly Instructed the Jury that Sgt. Seymour was Liable as a Matter of Law When he Entered Osborne's Home in Violation of the Fourth Amendment and Facilitated Bird's Violation of a Protection Order.	17
1.	Sgt. Seymour's Mere Entry into Osborne's Home Violated Her Reasonable Expectation of Privacy. 18	
2.	Sgt. Seymour Affirmatively Facilitated An Unlawful Entry By Bird.	19
3.	Defendant Cannot Avail Himself Of The Community Caretaking Exception As No Civil Standby Was Authorized By A Court Of Law And No Genuine Risk Of Physical Violence Existed As Osborne's Home Was Unoccupied At The Time Of The Unlawful Entry.	24
B.	The Trial Court Correctly Rejected Sgt. Seymour's Affirmative Defense of Qualified Immunity Because he Violated Osborne's Rights Under the Fourth Amendment and the Law, as it Existed on July 28th, 2004, Clearly Established Osborne's Rights.	30
1.	The Standard for the Qualified Immunity Defense	30
2.	Osborne's Constitutional Right Was Clearly Established Because Sgt. Seymour Could Not Have Reasonably Thought Entering A Private Residence Without A Warrant And In Violation Of An Existing Court Order Is Consistent With Osborne's Rights Under The Fourth Amendment.	31
3.	No Court Order Authorized a Civil Standby	37

4.	Defendant's Claimed Reliance on Outside Counsel was Objectively Unreasonable as a Matter of Law.	38
5.	Conclusion as to Liability	39
C.	The Trial Court Properly Awarded Attorney Fees Because a Common Core of Facts Related to All Causes of Action Before The Trial Court, and Because Osborne was Only Awarded Fees on Her Prevailing Claims	40
1.	General Principles	40
2.	Under the Civil Rights Act, Attorneys' Fees Need Not Be Proportionate to Damages	42
3.	Counsel Are Entitled to Fees on All Federal Claims on Which Plaintiff Has Prevailed Together with Time Expended on Claims Arising Out of A Common Core of Facts.	44
IV.	CONCLUSION	46

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Creighton</i> , 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987).....	32, 38
<i>Beier v. City of Lewiston</i> , 354 F.3d 1058, 1064 (9th Cir. 2004)	30, 33, 34
<i>Bernhardt v. Los Angeles County</i> , 339 F.3d. 920, 930 (9th Cir. 2003)	41
<i>Blum v. Stenson</i> , 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984).....	41
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d. 581, 593-601 (1983).....	41
<i>Chalmers v. City of Los Angeles</i> , 796 F.2d 1205, 1210 (9th Cir.1986)	40
<i>City of Riverside v. Rivera</i> , 477 U.S. 561, 577, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986).....	1, 42
<i>Dixon v. Wallowa County</i> , 336 F.3d 1013, 1019 (9th Cir. 2003)	39
<i>Ermine v. Spokane</i> , 143 Wn.2d 636 (2001)	1
<i>Frunz v. City of Tacoma</i> , 468 F.3d 1141, 1142 (9th Cir. 2006)	18, 39, 40
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982).....	31, 33
<i>Harris v. City of Roseburg</i> , 664 F.2d 1121, 1124 (9th Cir.1981)	29, 32
<i>Hensley v. Eckerhart</i> , 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).....	40, 44
<i>Hope v. Pelzer</i> , 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d. 666 (2002).....	33
<i>Kalmas v. Wagner</i> , 133 Wn.2d 210, 215, 943 P.2d 1369 (1997).....	17, 20, 21, 22, 25, 29

<i>Katz v. United States</i> , 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967).....	18
<i>Kerr v. Screen Extras Guild, Inc.</i> , 526 F.2d. 67, 70 (9th Cir. 1975)	41
<i>Loeffelholz v. CLEAN</i> , 119 Wn. App. 665, 82 P.3d 1199 (2004).....	45
<i>Lovell v. Poway Unified School District</i> , 79 F.3d. 1510, 1519 (9th Cir. 1996)	44
<i>Malatesta v. New York State Div. of State Police</i> , 120 F. Supp 2d 235, 237 (N.D.N.Y. 2000).....	29, 33, 35, 36
<i>Malley v. Briggs</i> , 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).....	33
<i>Marcus v. McCollum</i> , 394 F.3d 813, 816 (10th Cir. 2004)	29
<i>Marek v. Chesny</i> , 473 U.S. 1, 5, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985)....	46
<i>Morales v. City of San Rafael</i> , 96 F.3d. 359, 363 (9th Cir. 1996)	41
<i>Murdock v. Stout</i> , 54 F.3d 1437, 1440 (9th Cir. 1995)	18
<i>Payton v. New York</i> , 445 U.S. 573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).....	18
<i>Poteet v. Sullivan</i> , 218 S.W.3d 780, 790 (2007).....	26, 27, 29
<i>Saucier v. Katz</i> , 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).....	30, 31
<i>Sintra, Inc. v. City of Seattle</i> , 131 Wn.2d 640, 935 P.2d 555 (1997).....	43
<i>Soldal v. Cook County</i> , 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d. 450 (1992).....	17
<i>Specht v. Jensen</i> , 832 F.2d 1516 (10th Cir. 1987)	20, 21, 22, 23, 32
<i>State v Thompson</i> , 151 Wn.2d 793, 802, 92 P.3d 228 (2004)	24
<i>State v. White</i> , 141 Wn. App. 128, 141-142 (2007).....	24

<i>Thomas v. City of Tacoma</i> , 410 F.3d 644, 699 (9th Cir. 2005)	44, 45
<i>Thomas v. Cohen</i> , 304 F.3d 563 (6th Cir. 2001)	17
<i>Thorne v. City of El Segundo</i> , 802 F.2d 1131, 1141 (9th Cir. 1986)	44
<i>United States v. Jacobsen</i> , 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984).....	20
<i>United States v. King</i> , 244 F.3d 736, 739 (9th Cir. 2001)	31
<i>United States v. U.S. District Court</i> , 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L.Ed.2d 752 (1972).....	18
<i>United States v. York</i> , 895 F.2d 1026, 1029 (5th Cir. 1990)	25, 26
<i>Williams v. Hanover Housing Auth.</i> , 113 F.3d 1294 (1st Cir. 1997).....	40

STATUTES

42 U.S.C. § 1983	17, 21
42 U.S.C. § 1988.....	1, 14, 40
RCW 2.32.090.....	39
RCW 26.50.080	18, 38
RCW Ch. 10.99.....	3

RULES

CR 68	16
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I. RESTATEMENT OF ISSUES RELATED TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. Did Sgt. Seymour violate Respondent Osborne's Fourth Amendment Rights when he entered her home without a warrant and affirmatively facilitated her estranged husband's (Bird's) entry in violation of a Protection Order while Respondent was away, and allowed Bird to remove property and to access Osborne's computer and papers?
- B. Does the community caretaking doctrine apply when a police officer facilitates an unlawful entry by a husband barred from his wife's home while the protected wife is not present and when the home is unoccupied?
- C. Was Sgt. Seymour entitled to qualified immunity when he acted contrary to all applicable court orders and violated respondent Osborne's clearly established Fourth amendment rights, in the situation that Sgt. Seymour faced on July 28, 2004?
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II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Procedural History

Respondent Krista Osborne brought this lawsuit in 2006. (CP 15-21) The two lead defendants were her husband, Pierce County Deputy Sherriff Lloyd Bird, and his friend and former partner, Pierce County

Sherriff's Sergeant Tom Seymour. (CP 15) The gravamen of Osborne's complaint was Bird's violation of a no contact order with the assistance of Sgt. Seymour, the Sergeant in charge of the Domestic Violence Unit.

In November 2007, Osborne moved for Partial Summary Judgment to establish liability against Sgt. Seymour. (CP 48-77) Sgt. Seymour filed a cross motion for Summary Judgment on the grounds of qualified immunity that was joined by the other Pierce County defendants. (CP 1113 *et. seq.*; 1128-31) The trial court granted Respondent's motion, ruling that Sgt. Seymour violated her Fourth Amendment Rights and denied Sgt. Seymour's qualified immunity defense. (CP 261-62) This Court denied discretionary review on September 26, 2008. (CP 1207-12)

Trial commenced on June 15, 2009. The Jury awarded \$2,500 in compensatory damages plus \$15,000 in punitive damages against Sgt. Seymour on Special Verdict. (CP 436) The jury additionally awarded Respondent compensatory damages of \$15,000 against defendant Bird. (CP 439-40) The Court entered judgment against Sgt. Seymour and Bird on September 1, 2009. (CP 608-611). Bird has not appealed and has satisfied the judgment against him. (CP 1213-14)

The Jury found that Pierce County failed to adequately train Sgt. Seymour, but that its failure was not the proximate cause of Osborne's injury. Rather, the jury found that Sgt. Seymour violated the Fourth

Amendment, but did not act in accordance with the long standing custom, policy or practice of the Sheriff's Department. (CP 437-38)

Osborned moved for reasonable attorneys' fees and costs. (CP 518-27) The court heard oral argument on September 18, 2009 and issued Findings of Fact and Conclusions of Law on Motion for Attorneys' Fees and Costs, dated January 21, 2010. (CP 695-709) Judgment was entered for Attorneys' Fees and Costs on February 17, 2010. (CP 711-14)

B. Statement of Facts Related to Liability On Summary Judgment.

On July 25, 2004, Osborne reported to the Pierce County Sheriff's Department/University Place Police Department that her husband, Bird, physically assaulted her on the morning of July 24, 2004. (CP 81-84) Osborne's allegations constituted a report of domestic violence under RCW Ch. 10.99. Pierce County Superior Court Judge Cohoe entered an emergency protection order on Sunday, July 25, 2004. (CP 86) This order expressly (1) prohibited Bird from entering the residence at 8315 24th Street West, University Place, (2) prohibited Bird from contact with Osborne, (3) provided that Osborne would reside in the home at 8315 24th Street West, University Place, and (4) prohibited Bird was from "going upon the premises." (CP 86) Bird was advised on July 25, 2004, by Pierce County Sheriff's Sgt. Hunsinger, that a restraining order had been

issued and that he should stay away from Osborne and the residence. (CP 778-79)

Because this reported incident of domestic violence implicated a Pierce County Sheriff Department deputy as a perpetrator, the Pierce County Sheriff's Department assigned the investigation to the Tacoma Police Department. (CP 91-92) Tacoma Police assigned Detective Steve Holmes to investigate. (CP 92)

Sgt. Seymour and Bird had a personal and professional history spanning 20 years at the time of the incident. (CP 91) Both worked in the Pierce County Sheriff's Criminal Investigation Division. (CP 90) Sgt. Seymour and Bird were partners from 1984 to 1989. (CP 91) During that time, Sgt. Seymour socialized with Bird and his previous wife, Jill. *Id.*

On July 26, 2004, Sgt. Seymour injected himself in the case after Lieutenant Roger Gooch advised Sgt. Seymour of the incident between Bird and Osborne. (CP 90) Sgt. Seymour contacted Det. Holmes to advise him that would not relinquish total control over the Bird case, and that he would retain control over all of the civil issues in the investigation, including all internal protocol and restraining order issues. (CP 92; 134) Sgt. Seymour also advised Det. Holmes that he would serve Bird with Osborne's emergency protection order. (CP 92)

On July 26, 2004, Sgt. Seymour met with Bird twice, first at Bird's lawyer's office to serve the protection order and later at Sgt. Seymour's office to assist him to obtain his own restraining order. (CP 95-99) Bird obtained his order at 4:53 p.m.; the terms of the order did not allow Bird to retrieve any property from the residence or to access it in any way. (CP 136-38) Bird provided Sgt. Seymour with a copy of the order. (CP 105) At 6:00 p.m., Seymour traveled to Respondent Krista Osborne's residence and served her with the order entered on behalf of Bird. (CP 101; 105) Sgt. Seymour also obtained Bird's handguns, commission card, wallet, badge, and access card from Respondent and Bird's patrol vehicle. (CP 102)

Bird's July 26th order did not authorize a civil standby to obtain any property from the residence. The temporary order of protection by Court Commissioner Gelman left blank box #6, (CP 86) which, if checked, would have permitted Bird to obtain possession of essential personal belongings. Later that same evening, Bird contacted Sgt. Bill Cassio to seek his assistance in retrieving property but Cassio advised Bird that a visit to the house to obtain a motorcycle and other items of personal property—even with a civil standby—could not be accomplished under the terms of the two court orders. (CP 786-87; 811-17)

On July 27, Bird returned to Sgt. Seymour's office seeking a modified order. (CP 103-04) Bird also brought up the idea of a civil standby. (CP 114-15; 134) The modified order merely corrected Bird's address, but did not allow access to Osborne's residence or permit Bird to obtain any property from the residence. (CP 109-10; 140-41) Sgt. Seymour understood that on the basis of the orders that Osborne had obtained, Bird was not permitted to enter the residence before the hearing scheduled to occur on August 6, 2004. (CP 110)

Sgt. Seymour did not read the relevant court orders, even though he had them in hand. In his deposition he admitted:

Q. [W]hen Lloyd Bird brought up the idea of doing a civil standby, did you review the three orders that had been entered to assess whether a civil standby was allowed under the orders?

A: No, I did not go through them piece by piece. I knew the orders existed, of course. I've had my hands on every order. So I am aware that they're there. I'm aware of the chronological order in which these – chronological time line on which these orders have come in. But actually reviewing the order and looking at the language, no, I did not.

(CP 246-47)

Nonetheless, Sgt. Seymour decided on the afternoon of Tuesday, July 27, 2004, that Lloyd Bird was entitled to access Respondent's residence to obtain property, through a "civil standby" procedure. (CP

113) Sgt. Seymour acknowledges that he came to this conclusion despite his knowledge that Bird's July 27 order did not authorize a civil standby and despite the fact that Osborne's emergency protection order expressly prohibited Bird from entering the residence. (CP 110)

Sgt. Seymour did not contact Osborne about his plan to conduct a "civil standby" that afternoon, nor did he contact her at any point on Wednesday, July 28. (CP 120-21) He specified that he had no intention to contact her prior to going out to the house. (CP 121)

On Wednesday, July 28, 2004, Sgt. Seymour arranged and executed the civil standby. He traveled from his office to the police station in University Place. (CP 123-24) Sgt. Seymour contacted Bird's good friend, Sergeant Greg Stonack, about accompanying he and Bird on the civil standby. (CP 123-24, 127; 173) Sgt. Seymour also contacted Deputy Peter Aloisio about accompanying them. (CP 127) Sgt. Seymour proceeded to Osborne's residence with Sgt. Stonack, Dep. Aloisio, Bird, and Bird's daughter, Jenna.¹ (CP 150)

Once at the scene, Deputy Aloisio repeatedly voiced concern about whether there was legal authority for entering Ms. Osborne's home:

¹ Jenna Bird will be referred to as "Jenna" throughout this brief to avoid confusion. Jenna did not reside in Osborne's home. Jenna had moved out of the residence several weeks prior to the events of July 24-28. Jenna was to get permission before coming over to the Bird/Osborne residence, the home that Osborne had owned prior to her marriage to Bird, after Jenna had moved out of the house. (CP 260; 1115. *Accord*: RP 1195-99)

Q. What was your concern that prompted you to ask Sergeants Seymour and Stonack to call Craig Adams about whether it was appropriate to go to the Bird residence?

A. Because I had secured the emergency protection order, and I wasn't aware of a civil standby clause in that order.

Q. In fact, the protection order that you presented to Judge Cohoe that we have identified as Exhibit No. 16 expressly states that Lloyd Bird is prohibited from going on the premises, correct?

A. As I recall, yes.

(CP 181)

Q. Did you consult with Sergeant Stonack at that point about whether there should be any movement to proceed into the home?

A. I did.

Q. Tell me about that.

A. Well, I just went over and I told him I didn't feel comfortable. I asked him to make it stop. He told me that it was Sergeant Seymour's call and that he did have calls going to Craig Adams and that it was Tom's call.

Q. And what call did Tom make?

A. That they proceed.

(CP 190-191)

Dep. Aloisio acknowledged that entry into Osborne's home violated the Fourth Amendment.

Q. You are aware from your training as a Pierce County sheriff's deputy, that the Fourth Amendment prohibits entry into a house where there's not a legal basis for doing so, correct?

A. That's almost worse than the first.

Q. Let me have it read back so you have it fresh in your mind.

(Question on Page 70, Line 18- 21 read by the reporter.)

THE WITNESS: Correct.

Q. (By Mr. Cochran) You understood from obtaining the executed order from Judge Cohoe on July 25, 2004, that there was an order expressly prohibiting Lloyd Bird from entering the Bird residence, correct?

A. According to that order, correct.

Q. Sergeant Seymour did not show you any order that would have contradicted what he knew to exist from Judge Cohoe, correct?

A. Correct.

(CP 182-183)

Despite Dep. Aloisio's repeated requests to stop, Sgt. Seymour allowed Bird and Jenna to access the entire home for an hour and fifteen or twenty minutes. (CP 193) Sgt. Seymour remained almost exclusively on the first floor while allowing Bird and Jenna unsupervised access to the upper floor. (CP 158) On the second floor, Bird had unsupervised access to Ms. Osborne's computer. (CP 158-59)

All deputies and officers involved in the so-called "civil standby" later testified that the operation was unusual. Specifically, the "standby"

occurred when the party entitled to possession of the residence was not at home. Sgt. Seymour testified:

Q. ... you've always had both parties there present in a civil standby, as far as you can recall?

A. I can't think of an exception to that, no.

Q. And that's because one of the rules of the civil standby is that the property will not be removed if there is a dispute about ownership; right?

A. Correct.

(CP 248) Sgt. Stonack (CP 253) and Officer Aloisio (CP 256), both present at the "standby," testified similarly and confirmed that in their experience, standard civil standbys involved both parties, and neither man could recall an instance in which both parties were not present.

Seymour seeks to justify his actions by claiming that a court clerk and the Sheriff's Legal Advisor approved his conduct. The facts are otherwise. While Lloyd Bird was obtaining his modified order, Sgt. Seymour claims to have consulted with a staff member in the clerk's office about a "civil standby." (CP 115; 143-44) Sarah Schuab, the court clerk assigned to the domestic violence unit, actually processed the Bird's order. (CP 886-88) She denies giving any legal advice to Sgt. Seymour or Lloyd Bird as to what the order allowed or prohibited. (CP 888-89) She gave the following deposition testimony:

Q. Did Tom Seymour, to your recollection, ask you to advise him whether he could conduct a civil standby on behalf of Lloyd Bird?

A. No.

Q. Did Tom Seymour ask you to review any of the existing court orders that were in place regarding Lloyd Bird to give him legal advice about whether he could help Lloyd Bird conduct a civil standby?

A. No.

(CP 890-891) She went on to testify:

Q. Did you draw a conclusion on your own about whether Lloyd Bird was entitled to do a civil standby given what he had obtained in terms of an order from you?

A. No.

Q. And in no way did you communicate any opinion to Tom Seymour or Lloyd Bird whether they could do a civil standby; is that correct?

A. Correct.

(CP 892)

Similarly, Sgt. Seymour did not meaningfully seek advice from the Sheriff's Department Legal Advisor, Craig Adams. When Sgt. Seymour first tried to call Adams sometime after 1:00 p.m. on July 28, Sgt. Seymour was already en route to Osborne's residence. (CP 124; CP 878) Adams, who spoke to Sgt. Seymour sometime after 1:30 p.m., understood that there was a domestic violence order in place, but was not aware of any orders other than

one.² When he spoke with Sgt. Seymour, he did not know the terms of the order, nor did he know whether or not Bird had also obtained an order. (CP 869-70) Mr. Adams did not look into the County's LINX system database, to his recollection, to determine what order or orders may have been entered. (CP 871) Adams was relying on Sgt. Seymour's advice that the Sgt. had been informed by court clerk that civil standbys are typically allowed by the court. *Id.* Adams could not recall whether Sgt. Seymour advised him that the civil standby box was checked. (CP 872) Nor did Sgt. Seymour advise Mr. Adams that he was acquainted with Bird off the job or that they were personal friends. *Id.* Adams relied on Sgt. Seymour's representation that Schuab had stated that civil standbys were permitted and that was a factor that he took into account when he gave the advice that he gave to Sgt. Seymour. (CP 873) Adams was unaware that Schuab had a different account as to her conversation with Sgt. Seymour. *Id.*

C. Trial Testimony

At trial,³ those familiar with the "civil standby" testified consistently with, and at times more forcefully than, their deposition testimony. Sgt. Cassio reviewed Bird's Petition and Order that Bird had

² (CP 869); *see also* (RP 952-53)

³ Respondent sets out trial testimony separately to delineate it from what appeared before the trial court when it ruled on the Plaintiff's motion for summary judgment. *See infra* Part II.A.

obtained and advised him that no civil standby was authorized for Bird to enter Osborne's residence. (RP 447-49) Det. Anderson, assigned to the DV Unit at the time, questioned Sgt. Seymour on whether the operation was a good idea, in view of the fact that Bird and Sgt. Seymour had been partners in past years. (RP 549) Det. Anderson indicated that she would have recused herself in a similar situation and she thought that Sgt. Seymour should consider it. (RP 549-50) When Dep. Aloisio saw that Osborne was not home, he asked Sgt. Seymour to stop and not enter. (RP 633) Seymour responded that he "had an order that said it was okay to do this and we were going to do this." (RP 633) Dep. Aloisio then conveyed his concerns to Sgt. Stonack in a further effort to stop the intrusion. (RP 635-38) Sgt. Stonack replied that it was Sgt. Seymour's call. (RP 639)

As Appellant's brief acknowledges, Sgt. Seymour was "familiar" with the various court orders, but never read them carefully. Corrected Br. of Appellant at 8. At trial, Sgt. Seymour admitted that Bird's order did not allow a civil standby. (RP 935; 1049-50; 1054) He admitted he was responsible for knowing what was in the orders, but he did not recall whether he read the July 26th order, other than "really quickly." (RP 934-35) He admitted Bird's modified order did not provide for any civil standby either. (RP 936; 1049-50; 1054)

Schuab testified that she never told Seymour that a civil standby was permissible. She stated that civil standbys are commonly permitted, but that when “they” (Bird and Seymour) asked whether Commissioner Gelman’s order permitted a civil standby, she told them “no.” (RP 499-500) Adams testified that Sgt. Seymour did not reach him until after entering Osborne’s residence. (RP 952-53) Adams was not asked to review, nor did he review, the court orders obtained by Bird. (RP 1369)

Finally, Sgt. Seymour admitted at trial that Bird and Jenna took truckloads of items from Osborne’s home. (RP 954-57) He took no inventory of the items removed, nor did he perform anything more than a cursory examination of what Bird and Jenna were taking. *Id.* Sgt. Seymour did not monitor Bird and Jenna’s activities upstairs, and could not say whether Bird took Osborne’s tax records. *Id.* Ms. Osborne’s trial testimony described (i) how the *Encyclopedia of Serial Killers* was left prominently displayed on the headboard of her bed, from which other items had been removed, as a message of intimidation, (ii) missing tax records following the civil standby and (iii) evidence that Bird accessed her computer in her absence. (RP 745-49)

The Jury found that Sgt. Seymour acted with reckless disregard of Osborne’s rights and awarded \$15,000 punitive damages in addition to

\$2,500 general damages for his unlawful entry into Osborne's home. (CP 436).

D. Attorneys' Fees.

After the verdict was entered, Respondent timely moved for reasonable attorneys' fees pursuant to 42 U.S.C. § 1988. (CP 518-27) Darrell Cochran, on his behalf and on behalf of the law firms where he worked during the course of the lawsuit, initially sought fees in the total amount of \$310,102.67 plus expenses of \$41,211.53. (CP 537-607) Cochran reduced those requests to requests for fees in the amount of \$295,313.62 and expenses of \$29,028.02. (CP 666-70)

Co-counsel Diamondstone initially requested fees in the amount of \$155,785.00, for 445.1 hours of time that he spent; Diamondstone sought no compensation for 71.0 hours spent on claims solely involving Brendan Phillips and/or Bird. (CP 465-69; RP Sept. 18, 2009 at 3-4)⁴ Diamondstone sought costs of \$8,286.59 and did not seek recompense for over \$10,000.00 in other costs including expert witness fees and travel expenses unrelated to the successful claims against Sgt. Seymour. Diamondstone later sought additional compensation for 10.7 hours spent

⁴ Appellant's brief states that Ms. Osborne only dismissed her claims against Jenna Bird after discretionary review was denied. (Corrected brief at 12) Actually, those claims were dismissed more than four months before the summary judgment hearing. (CP 1197-99)

on the fees issue. (CP 661-62) The fee application was supported by declarations from other lawyers, Hugh McGavick and Michael Wampold. (CP 441-464; 663-65)

Neither Sgt. Seymour, nor the other Pierce County defendants, ever made a CR 68 “Offer of Judgment” that would have effectively “cut-off” an ever-accruing attorneys’ fee claim, even though summary judgment had been rendered against Seymour more than a year before trial and even though this Court denied discretionary review over six months before trial. (CP 678; 687-88; 1207-12; RP Sept. 18, 2009 at 3; 17).

Judge Sally Olsen heard the summary judgment motions in the spring of 2008, conducted the pretrial hearings, and presided at trial. Judge Olsen found that the successful civil rights claims, the unsuccessful claims and the claims involving Bird “all arose out of a common core of facts.” (CP 706) The trial court calculated the total fees requested, following the adjustments, to be \$452,911.12, plus total adjusted costs to be \$37,203.69 (CP 707). The court awarded the adjusted costs as requested and reduced the adjusted fees requested by 33%, due to difficulties in segregating the time devoted to the Bird claims. (CP 706-707) Judgment was entered for a total of \$303,450.45 in fees and \$37,203.69 in costs, totaling \$340,654.14, rather than the \$488,413.23 adjusted total that Respondent’s counsel had sought. (CP 711-712)

III. ARGUMENT

A. The Trial Court Properly Instructed the Jury that Sgt. Seymour was Liable as a Matter of Law When he Entered Osborne's Home in Violation of the Fourth Amendment and Facilitated Bird's Violation of a Protection Order.

1. *Standard of Review*

An appellate court reviews summary judgment decisions de novo, engaging in the same inquiry as the trial court, and viewing facts in the light most favorable to the nonmoving party. *Kalmas v. Wagner*, 133 Wn.2d 210, 215, 943 P.2d 1369 (1997). If reasonable minds can reach different conclusions, summary judgment is improper. *Id.*

To prevail on a cause of action under 42 U.S.C. § 1983, plaintiff must show that defendant violated a federal constitutional or statutory right, and that defendant acted under color of state law. *Id.* A search or seizure that violates the Fourth Amendment is actionable under § 1983. *Id.* at 215-16 (citing *Soldal v. Cook County*, 506 U.S. 56, 113 S. Ct. 538, 121 L. Ed. 2d. 450 (1992)). A government official's abuse of power which goes beyond the scope of his or her authority will usually have been performed under the color of state law for purposes of § 1983 liability. *Thomas v. Cohen*, 304 F.3d 563 (6th Cir. 2001) (internal quotations omitted).

2. *Sgt. Seymour's Mere Entry into Osborne's Home Violated Her Reasonable Expectation of Privacy.*

The “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.” *Frunz v. City of Tacoma*, 468 F.3d 1141, 1142 (9th Cir. 2006) (citing *United States v. U.S. District Court*, 407 U.S. 297, 313, 92 S. Ct. 2125, 32 L.Ed.2d 752 (1972)). The touchstone of Fourth Amendment analysis is whether a person has a constitutionally protected “reasonable” expectation of privacy, *Katz v. United States*, 389 U.S. 347, 360, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The United States Supreme Court has made clear that people have a reasonable expectation of privacy in their homes. *Payton v. New York*, 445 U.S. 573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980).

The protection of individuals from unreasonable intrusion into their houses “remains at the very core of the Fourth Amendment,” *Murdock v. Stout*, 54 F.3d 1437, 1440 (9th Cir. 1995). The mere entry into a home by a law enforcement officer without a warrant or court order is *per se* unreasonable. *Payton*, 445 U.S. at 587. The officer bears the burden of rebutting the presumption by establishing the existence of one of the “carefully delineated” exceptions to the requirement of a court order. *Katz*, 389 U.S. at 357.

It is undisputed that no warrant or court order authorized Sgt. Seymour's entry into Osborne's home. Sgt. Seymour neither sought nor obtained Osborne's consent. (CP 121) Bird and Jenna were incapable of providing consent. Judge Cohoe's order prohibited Bird from entering Osborne's home, (CP 86), and Bird's order did not authorize any "civil standby." (CP 138) Jenna had previously moved out. (CP 260). Civil standbys may be ordered by the court so that a petitioner may obtain essential items from the home pending a judicial hearing. RCW 26.50.080. Here, Bird never petitioned for a civil standby and no court authorized one.

Sgt. Seymour wholly failed to meet his burden of proof in rebutting the presumption of unreasonableness that attached when he entered Ms. Osborne's home without a court order. No material issue of fact existed as to whether he violated Osborne's Fourth Amendment right to be free from unreasonable government intrusion into her home.

3. Sgt. Seymour Affirmatively Facilitated An Unlawful Entry By Bird.

Sgt. Seymour also violated Osborne's Fourth Amendment rights when he affirmatively facilitated Bird and Jenna's entry, illegal removal of property, and search of her private papers and computer. Although the Fourth Amendment applies only to actions of governmental officials, and

not to private conduct, *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984), when a government official “affirmatively facilitates or encourages,” an unreasonable search and seizure performed by a private person, a constitutional violation occurs. *Kalmas*, 133 Wn.2d at 218 (citing *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987)); *accord Soldal*, 506 U.S. at 67 (holding state action implicates Fourth Amendment protections in the context of police assistance of a mobile home repossession by a private party); *see also Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir.1981) (even mere presence on a standby basis can have a causal connection with illegal repossession).

There are two elements to this type of violation, both of which are met in this case: (1) an unreasonable search and seizure by a private person, (2) that is affirmatively facilitated or encouraged by a government official. Sgt. Seymour and Bird cannot do together what neither could do alone—invade Osborne's home with impunity.

First, Bird's entry, search, and seizure were unreasonable. A private search and seizure is unreasonable under the same test as applied to government actors—whether or not the property holder had a “reasonable expectation” of privacy. *Soldal*, 506 U.S. at 63. The reasonable expectation of privacy against intrusion by a private citizen may be set by relevant law governing the conduct of the private person.

See Kalmas, 133 Wn.2d at 219 (tenant's reasonable expectation of privacy balanced against rights granted to the landlord to enter with proper notice under the Residential Landlord Tenant Act).

Here, Bird unreasonably searched and seized property, in violation of Osborne's existing protective order, when he entered Osborne's home, accessed her computer, went through her private papers, and removed truckloads of property and a truck and motorcycle. The parties' protective orders in effect on July 28, 2004 set the parameters for permissible contact between Osborne and Bird, and thus under *Kalmas* set the relevant standard for Osborne's reasonable expectation of privacy against intrusion by Bird. Yet Sgt. Seymour allowed Bird and Jenna free and unobserved access throughout the upstairs of Osborne's home, where her bedroom and computer were located. (CP 158-59) None of the three orders allowed Bird in the home; and Jenna had no right to enter without permission. Under *Kalmas*, if the scope of the entry exceeded the scope of the protection order, the search and seizure was unreasonable. 133 Wn.2d at 220.

Sgt. Seymour "affirmatively facilitated" the unreasonable search and seizure carried out by Bird and Jenna. In *Specht*, the Tenth Circuit held that the requisite causal connection between the officer and the unreasonable private search and seizure can be established not only by

some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the unconstitutional injury. *Id.* at 1524. In *Kalmas*, the Court adopted the "affirmatively facilitated" test in *Specht*. 133 Wn.2d at 218. Bird never tried to enter Osborne's residence without the cover of an officer. After Sgt. Cassio refused to provide that cover, Sgt. Seymour did so over Aloisio's objections.

The facts in this case are similar to those in *Specht*. In *Specht*, the court considered a § 1983 claim for damages arising when a private citizen, Ken Jacobs, acting in concert with the police, bypassed traditional legal channels in an effort to retrieve personal property. 832 F.2d at 1519-20. Jacobs had obtained a state court order of possession and writ of assistance that directed any sheriff to assist Jacobs in obtaining his computer. *Id.* at 1519. One of Jacobs's friends called Jensen, a supervisor with the Steamboat Springs Police Department, whom he had known for several years, and told him that Jacobs had a court order and might need some help executing it. *Id.* Jensen told another officer to "take care of" them. *Id.* In response to Jensen's instruction, police officers were assigned to accompany the men to Specht's office and home. *Id.* Before approaching the front door, one of the officers asked Jacobs what powers

the writ provided. *Id.* at 1520. Jacobs told him that it gave the same powers as a search warrant. *Id.* Subsequently, Jacobs and the police, arriving in a police car, executed warrantless searches of both Specht's office and home. *Id.*

The court held that the officers violated Specht's Fourth Amendment Rights. *Id.* at 1524. The court reasoned that:

Even though Jacobs told Owens that the writ of assistance was equivalent to a warrant, the writ on its face was not a search warrant. Moreover, it was directed to any sheriff rather than to a police officer. These undisputed facts undermine defendants' assertion that their conduct in the face of this information was objectively reasonable as a matter of law.

Id. at 1525. Here, unlike in *Specht*, no order authorized any entry or taking whatsoever.

Specht is dispositive. Because the undisputed evidence shows Sgt. Seymour's actions far surpassed the involvement of the officers in *Specht*, there is no issue of material fact as to whether Sgt. Seymour affirmatively facilitated Bird's unreasonable search and seizure.

In sum, there is no issue of material fact as to whether the Defendant violated Ms. Osborne's Fourth Amendment rights (1) when he entered her home without consent and in violation a court order, and (2) when he affirmatively facilitated the Birds' unreasonable search and seizure.

*4. Defendant Cannot Avail Himself Of The Community
Caretaking Exception As No Civil Standby Was
Authorized By A Court Of Law And No Genuine Risk Of
Physical Violence Existed As Osborne's Home Was
Unoccupied At The Time Of The Unlawful Entry.*

Sgt. Seymour seeks to justify his unlawful entry into Osborne's home based on the community caretaking exception to the Fourth Amendment's warrant requirement. The community caretaking function exception "[permits a] limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." *State v Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004) (rejecting community care function claim). Such invasion is allowed only if (1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns, (2) a reasonable person in the same situation would similarly believe that there was need for assistance, and (3) there was a reasonable basis to associate the need for assistance with the place being searched. *Id.* at 802; accord *State v. White*, 141 Wn. App. 128, 141-142 (2007). The community caretaking analysis balances the privacy interests of a citizen against the public interest in community caretaking by police. *Kalmas*, 133 Wn.2d at 216-17. Sgt. Seymour cannot satisfy any of the tests established by prior case law. Because the officers knew Osborne was not home, no reasonable officer would have perceived a need

for assistance at her home, and any balancing of interests weighs entirely in her favor.

As this case arose in a civil context, *Kalmas* provides the applicable test. 133 Wn.2d at 216-17. The court established that a noncriminal, non-investigatory entry into a person's home could be reasonable so long as public's interest in having the police perform a community caretaking function outweighed an individual's interest in freedom from police interference. *Id.* The Court truncated its balancing analysis because the "plaintiffs themselves asked the police to perform the caretaking function," *Id.* at 217, vitiating the plaintiff's privacy interest. Here, Osborne never consented, (RP 744-45), nor did she reasonably foresee a violation of her protective order by her estranged husband aided by Sgt. Seymour, *Id.* Application of this balancing test to the facts here tilts the scales entirely in favor of Osborne and against Sgt. Seymour.

First, nothing in the record suggests that Osborne had a diminished expectation of privacy in her home as a result of the events preceding the so-called "civil standby." Sometimes, "activities or circumstances within a dwelling may lessen the owner's reasonable expectation of privacy by creating a risk of which is 'reasonably foreseeable.'" *United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990). In *York*, the court considered a situation in which a homeowner had allowed a family to stay in his home

as guests. 895 F.2d at 1027. One night, York came home intoxicated and threatened the family; two members of the family left and called the police. *Id.* at 1028. Though the police entered without a warrant to assist the guests in removing their belongings, the court held the limited entry to be reasonable. *Id.* at 1029-30. Here, Osborne did not similarly lessen her expectation of privacy because even though she expelled Bird from her home with his belongings still inside—making it foreseeable that he may try to repossess—she took the additional steps of placing items such as clothing and other personal effects in Bird’s truck, (CP 222) and obtaining a protective order. (CP 86) A court hearing was set for August 6 to address property and other issues. (CP 86)

This case is more analogous to *Poteet v. Sullivan*, a case cited by Appellant in which the Court concluded police intrusion was held *not* foreseeable. 218 S.W.3d 780, 790 (2007). *Poteet*, like the instant case, involved a “bad breakup.” 218 S.W.3d at 784. After the breakup, the two agreed to return property to one another, and Poteet had begun to return property to his ex-fiancée, Chin, through her aunt, in addition to allowing her in the house on a particular day to remove the remainder of her personal property. *Id.* After Chin came to the house with a locksmith and was turned away by police, Poteet posted a no-trespassing sign “expressly stating that Chin did live in the home and that he did not give her

permission to enter the home.” *Id.* Despite his efforts, his ex-fiancée requested and obtained a civil standby. *Id.* at 785. During the standby, police officers physically restrained Poteet and threatened him with arrest and incarceration if he impeded Chin’s efforts. *Id.* The Court of Appeals of Texas reversed summary dismissal with regard to the officers and remanded for further proceedings. *Id.* at 796-97. In analyzing the community caretaking exception, the court reasoned that:

In light of Poteet’s return of property to Chin via her aunt, his ongoing communications with Chin’s attorney about exchanging property with her, and his statement to Chin’s attorney that he would make sure that any remaining property belonging to Chin was returned to her, we cannot say that Poteet should have foreseen that Officers Sullivan and Lucio would enter his home[.]

Id. at 790. Here, Osborne did more than Poteet to maintain her expectation of privacy, including obtaining a protective order expressly barring Bird from her home, (CP 86). She previously allowed Sgt. Seymour to collect Bird’s work equipment, weapons, etc. (RP 750) She had packed up Bird’s truck with his personal items, (CP 136-38; 222) and she reasonably expected the property issues would be resolved through the August 2004 hearing listed in the temporary orders. *Id.*

Osborne’s prior employment with the Sheriff’s department and her understanding of police procedures did not lower her expectations of privacy. Sgt. Seymour argues that somehow, Osborne should have

foreseen his unannounced intrusion and facilitation of Bird's trespass because she understands that civil standbys are routine. Testimony from Osborne indicates the opposite. Osborne's understanding of civil standbys is consistent with the descriptions offered by every other police officer in this case—as a situation in which officers stand by in situations where a breach of the peace might arise. Osborne had never heard of, or participated in, a civil standby when the other party was not home or present at the location. None of the other officers had ever heard of such a standby either.

Sgt. Seymour contends that “Osborne knew the civil standby was going to occur,” but his brief offers no record citation for this assertion. *See* Corrected Br. of Appellant at 8. That assertion is contradicted by Sgt. Seymour's deposition and trial testimony that he made no effort to contact Osborne about the civil standby before he arrived at her residence on July 28th with Dep. Aloisio, Bird, and Jenna. (CP 120-21; RP 947-49) Appellant erroneously claims that Osborne packed up Bird's belongings in anticipation of the standby. Corrected Br. of Appellant at 8 (citing CP 222-24). The record actually shows that she had packed up his belongings in anticipation of the court hearing, scheduled for August 6, 2004. (CP 86, 136-38; 222)

On the other side of the balancing equation, the facts here indicate that the “public’s interest in the having the police perform a caretaking function” was non-existent. In normal civil standby situations, at least some risk of physical confrontation or other disturbance of the peace appears. *E.g.*, *Harris v. City of Roseburg*, 664 F.2d 1121, 1124 (9th Cir.1981); *Marcus v. McCollum*, 394 F.3d 813, 816 (10th Cir. 2004); *Malatesta v. New York State Div. of State Police*, 120 F. Supp 2d 235, 237 (N.D.N.Y. 2000); *Kalmas*, 133 Wn.2d at 1371; *Poteet*, 218 S.W.3d at 785. In all of those cases, parties on opposite sides of the underlying dispute were present; here, no risk existed. Sgt. Seymour assisted the invasion of Osborne’s home when she was not present, a fact he knew before entering the home. (CP 128) Sgt. Stonack stationed himself outside the home, (CP 251), to warn Seymour and Bird if Osborne returned. Moreover, Aloisio, the one officer on the scene who was not a friend of Bird, implored Sgt. Seymour to cease the intrusion. (CP 188-89) Finally, Osborne’s resort to legal proceedings diminishes any risk of physical violence, and nothing in the record indicates any such risk in the first place.

No genuine issue of material fact needs to be decided, viewing the facts in favor of Sgt. Seymour, to resolve this issue. Given the facts on the record, Osborne’s interest in the privacy of her home, personal belongings, private papers, and computer outweighs any public interest in having Sgt.

Seymour perform any “community caretaking” to allow Bird to roam throughout the house, unobserved, when Osborne was neither present nor aware of the intrusion.

B. The Trial Court Correctly Rejected Sgt. Seymour’s Affirmative Defense of Qualified Immunity Because he Violated Osborne’s Rights Under the Fourth Amendment and the Law, as it Existed on July 28th, 2004, Clearly Established Osborne’s Rights.

1. *The Standard for the Qualified Immunity Defense.*

A police officer is not entitled to the qualified immunity defense when (a) “the facts alleged show the officer’s conduct violated a constitutional right,” and (b) “that right was clearly established.” *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Courts engaging in qualified immunity analysis must view the facts “in a light most favorable to the party asserting the injury.” *Id.* The application of qualified immunity is a question of law reviewed *de novo* on appeal. *Beier v. City of Lewiston*, 354 F.3d 1058, 1064 (9th Cir. 2004).

As established above, Sgt. Seymour violated Osborne’s Fourth Amendment rights by unreasonably entering her home without a warrant and facilitating a trespass by Bird in violation of an order of protection, and by facilitating an unpermitted entry by Jenna. The analysis above satisfies the first prong of the qualified immunity inquiry. Once the threshold showing of a violation of a constitutional right is shown, the

officer has the burden of proving his right to qualified immunity as an affirmative defense. *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). He has no right to qualified immunity where the right violated was clearly established. *Saucier*, 533 U.S. at 201. Where the law puts the officer on notice that his conduct would be clearly unlawful, the resolution of the dispositive issue is clear-summary judgment based on a Fourth Amendment violation was appropriate below. *See Id.* at 202. Being misinformed is not an excuse. *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001) (officer's mistake of law precludes finding of reasonableness).

2. *Osborne's Constitutional Right Was Clearly Established Because Sgt. Seymour Could Not Have Reasonably Thought Entering A Private Residence Without A Warrant And In Violation Of An Existing Court Order Is Consistent With Osborne's Rights Under The Fourth Amendment.*

Given the Defendant's experience with the precise orders in this case and with protective orders generally, as a matter of law it was objectively unreasonable for him to believe that Ms. Osborne had consented to a civil standby. Sgt. Seymour admits he knew that the protective orders in place, including Osborne's emergency order, expressly forbade Lloyd Bird from accessing the house. (CP 113-14) A reasonable officer in the same situation would not have believed that a

civil standby was allowed in this case. As the unit supervisor for the Domestic Violence Unit, *Id.*, Sgt. Seymour had training in investigating, documenting and following up on domestic violence incidents. *Id.* He admits that as matter of practice, he reviewed protective orders and, at the time of personal service, informed persons of the relevant terms of the order. *Id.*

Osborne’s right to be free of police intrusion and facilitation of unreasonable trespass and seizure by a third party into her home was clearly established. *Soldal*, 506 U.S. at 69; *Specht*, 832 F.2d at 1523-24; *Harris*, 664 F.2d at 1127. The central question in the “clearly established” analysis is whether police action “could reasonably have been thought consistent with the rights they are alleged to have violated.” *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L.Ed.2d 523 (1987). The officer’s conduct must be evaluated at the time of the incident in light of all the circumstances surrounding the event at issue, *see Harris*, 664 F.2d at 1128, and “the information the officers possessed.” *Anderson*, 483 U.S. at 641. The standard is one of objective reasonableness:

On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.

Harlow, 457 U.S. at 818-19 (internal citations omitted). Sgt. Seymour would be “entitled to immunity under the objective reasonableness standard if ‘officers of reasonable competence could disagree’ on the legality of the defendant’s actions. *Malatesta*, 120 F. Supp 2d at 240 (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)). On the other hand, if the state of the law on July 28th, 2004 gave Sgt. Seymour fair warning that his actions were unconstitutional, qualified immunity should be denied. See *Beier*, 354, F.3d 1068 (citing *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d. 666 (2002)).

Soldal firmly established the law with regard to police-assisted private action to repossess or regain control over property. In *Soldal*, the Supreme Court considered a case where police assisted in the seizure of a mobile home by a landlord. 506 U.S at 58. The Court reversed the Seventh Circuit, holding that Fourth Amendment protection against unreasonable searches and seizures extends to non-criminal, non-investigatory actions by police. *Id.* at 69. The Court reasoned that “the right against unreasonable seizures would be no less transgressed if the seizure . . . was undertaken to collect evidence, verify compliance with a housing regulation, effect an eviction by the police, or on a whim, for no

reason at all.” *Id.* *Soldal* was issued in 1992 and gave police notice that police assisted re-possession activities implicated the Fourth Amendment.

Sgt. Seymour could not have reasonably believed his actions consistent with Osborne’s rights under the Fourth Amendment because he failed to read or apprehend the operative court orders governing the situation. *Cf. Beier*, 354 F.3d at 1071. *Beier* is strongly analogous to this case. In *Beier*, officers arrested a man accused of violating a protective order by attending church services at the same time as his estranged wife. *Id.* at 1062. The wife’s protective order proscribed the arrestee from going within 300 feet of the wife’s residence or workplace. *Id.* at 1061. Despite protests from the arrestee that the order did not bar his church attendance; the officers effected the arrest without reading or ascertaining the terms of the order. *Id.* at 1062. The court held that the officers were not entitled to qualified immunity because “the error [of] arresting Beier without learning the terms of the protection order was . . . not one a reasonably competent officer would make.” *Id.* at 1071. The court reasoned: “Law enforcement officers who act to enforce . . . a protection order therefore have a responsibility to familiarize themselves with the order’s *precise contents* through some official source.” *Id.* at 1069 (emphasis added). Sgt. Seymour repeatedly testified that he had the opportunity to read and review all three orders, and that he made no meaningful attempt to

ascertain the meaning of them. Sgt. Seymour should not be able to rely on his claimed ignorance as a shield against liability.

On the other side of the spectrum, reasonable officers in Sgt. Seymour's position who act with care and respect for the legal processes are entitled to qualified immunity even though their actions are later held to violate the Fourth Amendment. *Malatesta*, a case discussed by the appellant, provides an excellent example of careful and reasonable police behavior in a similar situation. 120 F. Supp 2d at 235. In *Malatesta*, officers accompanied a grandfather to his grandson's home to standby as the grandfather repossessed a truck. 120 F. Supp 2d at 238. When the tow truck operator noticed the VIN tag had been removed, the officers on scene contacted inspectors from the state police, and after a conference, informed the grandson that they would seize the truck as contraband. *Id.* at 238. After officers seized the truck, one of them obtained a search warrant to return and search for the VIN tag and the tool used to remove it. *Id.* During the execution of the warranted search, officers once again noticed other goods they believed to be stolen, and again sought an amended warrant to search and seize stolen property. *Id.* The court held that the officers were entitled to qualified immunity despite a state court's ruling that suppressed all evidence obtained from the searches. *Id.* at 240.

The Court reasoned that reasonable police officers could disagree over the lawfulness of the entry onto plaintiff's property. *Id.*

Three crucial facts distinguish the actions of the officers in *Malatesta* and bring Sgt. Seymour's unreasonable actions into clear view. First, when the grandfather originally requested the civil standby, he reported that his grandson threatened physical violence if he tried to repossess the truck. *Id.* at 237. Nothing in the record indicates that Osborne ever threatened Bird with violence. Second, in *Malatesta*, the grandson was present when police entered the property, 120 F. Supp 2d. at 238; Osborne was not. Finally, and most importantly, when the officers confronted uncertainty, they conferred with outside authority, first state police inspectors and then a court, before they proceeded. Sgt. Seymour ignored the advice of Officer Aloisio, when he asked Sgt. Seymour to halt the search. (RP 633). Moreover, Sgt. Seymour failed to meaningfully confer with any outside authority. He only spoke with the Legal Advisor after entry occurred, without reviewing the orders with him, and Sgt. Seymour only called the legal advisor to ask about Bird taking the motorcycle.

Sgt. Seymour understood the entry into Respondent's home on July 28, 2004 implicated Respondent Krista Osborne's Fourth Amendment rights. (CP 151-52) Seymour did not have a search warrant

allowing him to enter Respondent's home on July 28, 2004. (CP 153) Seymour did not have a court order that allowed him or Lloyd Bird to access the house. (CP 154) Seymour was not investigating a crime when he entered Respondent's home on July 28, 2004. (CP 155) Seymour had no belief that lives were endangered when he entered the home on July 28, 2004. *Id.* Nor had he contacted her about coming. (CP 153)

3. *No Court Order Authorized a Civil Standby.*

Sgt. Seymour's argument that a court order is a sufficient but not a necessary condition for a valid civil standby is completely divorced from the facts of this case. While a civil standby need not be ordered by a court, it must conform to the Fourth Amendment. Sgt. Seymour knew or should have known that an existing court order barred Bird's entry into the home. Sgt. Seymour facilitated Bird's entry, in contravention of an existing order; under a flimsy claim of authority based on an order that did not supersede or even acknowledge the first.

Finally, Sgt. Seymour's citation to a "mandatory form" is an unconvincing and misleading abstraction. What Sgt. Seymour leaves out of his citation to this document is the fact that this text is next to a check box where a judge authorizes this provision. On the actual order obtained by Bird, this box is not checked, (CP 136-38 and 140-41), because Bird never asked the court for such relief, even after Sgt. Cassio told Bird that

his first order did not permit a civil standby. (CP 811-17, RP 447-49) Moreover, RCW 26.50.080, the statute that permits a court to order a peace officer to assist a party, specifies that “[t]he order shall list all items that are to be included with sufficient specificity to make it clear which property is included.” The order Bird held is the appropriate point of reference, not some hypothetical order giving authorization for police-assisted civil standbys. Sgt. Cassio and Dep. Aloisio knew the limits of Bird’s order and they knew better than to conduct a civil standby under these orders. Sgt. Seymour chose to ignore the orders as well as Dep. Aloisio’s expressed concerns.

4. *Defendant’s Claimed Reliance on Outside Counsel was Objectively Unreasonable as a Matter of Law.*

This Court should reject Sgt. Seymour’s argument that questions of fact remain with regard to his seeking the advice of others concerning the “civil standby.” Corrected Br. of Appellant at 30. No testimony supports the notion that Sgt. Seymour sought any legal advice with regard to the “civil standby” before entering Osborne’s home. Schuab flatly denies giving such advice.

Even assuming that Defendant Seymour claims he relied on Schuab, her subjective beliefs about the state of the law cannot shield him from liability under an objective standard. *See Anderson*, 483 U.S. at 641.

As a court clerk, not a lawyer, she is not competent to offer legal advice to a police officer. RCW 2.32.090 prohibits “each clerk of a court” from “acting ... as an attorney of the court of which [s]he is a clerk.”

As discussed above, Part II.B at pages 11-12, the Sheriff’s legal advisor Adams was only contacted after Sgt. Seymour facilitated Bird’s entry; and Sgt. Seymour only inquired about taking the motorcycle, not the limits of the applicable orders. Sgt. Seymour fails to satisfy the relevant legal test for the “advice of counsel” defense, which has four elements: (1) whether the attorney was independent; (2) whether the advice addressed the constitutionality of the proposed action; (3) whether the attorney had all the relevant facts; and (4) whether the advice was sought before or after the officer’s action. *Dixon v. Wallowa County*, 336 F.3d 1013, 1019 (9th Cir. 2003). Here, Sgt. Seymour’s request for advice does not meet the second, third, or fourth elements. Sgt. Seymour did not apprise Adams of all the relevant facts, and failed to seek advice prior to executing the “civil standby.”

5. *Conclusion as to Liability*

In *Frunz*, a recent case all too similar to the one at bar, the Ninth Circuit’s comment cut to the heart of this matter:

Surely the citizens of Tacoma would not want to be treated in their own homes the way the jury found officers [sic] treated Frunz and her guests. A prompt payment of the

verdict, accompanied by a letter of apology from the city fathers and mothers, might have been a more appropriate response to the jury's wisdom.

468 F.3d at 1147.

C. The Trial Court Properly Awarded Attorney Fees Because a Common Core of Facts Related to All Causes of Action, and Because Osborne was Only Awarded Fees on her Prevailing Claims.

1. *General Principles.*

An appellate court reviews a trial court's award of fees, as well as the amount of fees awarded, is subject to an abuse of discretion standard of review on appeal. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.1986). A trial court abuses its discretion when its exercise is manifestly unreasonable or based on untenable grounds or reasons. *Ermine v. City of Spokane*, 143 Wn.2d 636, 641, 23 P.2d 492 (2001). The trial court's broad discretion to award fees to prevailing parties under §1988, must be guided by statutory presumption that fees should be awarded to successful plaintiffs absent unusual situations. *Williams v. Hanover Housing Auth.*, 113 F.3d 1294 (1st Cir. 1997).

A prevailing Plaintiff is entitled to reasonable attorney's fees in civil rights litigation. 42 U.S.C. § 1988; *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983). Reasonable fees are calculated according to prevailing market rates in the relevant community.

Blum v. Stenson, 465 U.S. 886, 895, 104 S. Ct. 1541, 79 L. Ed. 2d 891 (1984). Section 1988 “was enacted to attract competent counsel to represent citizens deprived of their civil rights . . . and to encourage compliance with and enforcement of civil rights laws.” *Bernhardt v. Los Angeles County*, 339 F.3d. 920, 930 (9th Cir. 2003) (internal quotations and citation omitted).

The customary method to determine fees is the lodestar method. *Morales v. City of San Rafael*, 96 F.3d. 359, 363 (9th Cir. 1996). This method considers the following non-exhaustive factors:

- (1) The time and labor required,
- (2) the novelty and difficulty of the questions involved,
- (3) the skill requisite to perform the legal service properly,
- (4) the preclusion of other employment by the attorney due to the acceptance of the case,
- (5) the customary fee,
- (6) whether the fee is fixed or contingent,
- (7) time limitations imposed by the client or the circumstances,
- (8) the amount involved and the results obtained,
- (9) the experience, reputation, and ability of the attorneys,
- (10) the “undesirability” of the case,
- (11) the nature and length of the professional relationship of the client, and
- (12) awards in similar cases.

Kerr v. Screen Extras Guild, Inc., 526 F.2d. 67, 70 (9th Cir. 1975); *see also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d. 581, 593-601 (1983).

2. *Under the Civil Rights Act, Attorneys' Fees Need Not Be Proportionate to Damages*

The United States Supreme Court has rejected the notion that attorney's fees in civil rights cases should be proportionate to the amount of damages that a Plaintiff recovers. *City of Riverside v. Rivera*, 477 U.S. 561, 577, 106 S. Ct. 2686, 91 L. Ed. 2d 466 (1986). In *Rivera*, eight individuals (Plaintiffs) sued the City and its police chief and 30 individual officers. 477 U.S. at 564. Claims against 17 officers were dismissed on summary judgment. *Id.* A jury awarded Plaintiffs, collectively, \$13,300.00 on their federal claims and \$20,050.00 on other state law claims. *Id.* at 564-65. Plaintiffs sought and obtained an attorney's fee award and the court awarded fees and costs in excess of \$245,000.00. *Id.* at 565. The Court "rejected the proposition that fee awards under Section 1988 should necessarily be proportionate to amount of damages a civil rights plaintiff actually recover." *Id.* at 574. The Court reasoned:

Because damages awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial monetary relief. Rather, Congress made clear that it "intended that the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases and *not be reduced because the rights involved may be nonpecuniary in nature.*" . . . [C]ounsel for prevailing parties should be paid, as is traditional with attorneys

compensated by a fee-paying client, *'for all time reasonably expended on a matter.'*”

Id. at 575 (internal citations omitted) (emphasis in original). The Court further recognized that:

A rule that limits attorney's fees in civil rights cases to a proportion of the damages awarded would seriously undermine Congress' purpose in enacting Section 1988. Congress enacted Section 1988 specifically because it found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process.

Id. at 576. Thus, under controlling precedent and legislative policy, it would be inappropriate to limit Osborne's attorney fee award based on the size of her damage awards.

Sgt. Seymour's reliance on *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997) is misplaced.⁵ See Corrected Br. of Appellant at 36. *Sintra* has been significantly limited by *Ermine*, a unanimous Washington Supreme Court decision approving reasonable fees in a nominal damage civil rights case. 143 Wn.2d at 645. The Washington Supreme Court recognized that Justice O'Connor's pivotal concurrence in *Farrar* required the Court to consider additional factors. The first factor is the significance of the legal issue, especially where the issue involves vindication of constitutional rights. *Ermine*, 143 Wn.2d at

⁵ Similarly misplaced are citations to out of state authority citing a now hobbled *Sintra*. *Cf.* Corrected Br. of Appellant at 37-38.

647. The third identified factor recognized the congressional policy that “ensures vindication of important civil rights by making fees available under a private attorney general theory . . . If the citizen does not have . . . his day in court . . . the entire Nation, not just the individual citizen, suffers.” *Id.* 648. The Court further observed that even where a plaintiff’s nominal damage award of \$1 does *not change* governmental policy, substantial, compensatory attorneys’ fees might still be appropriate. *Id.* at 649-50.

3. *Counsel Are Entitled to Fees on All Federal Claims on Which Plaintiff Has Prevailed Together with Time Expended on Claims Arising Out of A Common Core of Facts.*

Where plaintiffs pursue multiple claims where some are successful and some are not, or where some claims arise under state law or other law that is not covered the fee shifting statute, plaintiff may still recover a complete, adjusted lodestar even if plaintiff does not prevail on every claim. *Hensley*, 461 U.S. at 440; *Rivera*, 477 U.S. at 574; *Lovell v. Poway Unified School District*, 79 F.3d. 1510, 1519 (9th Cir. 1996); *Thomas v. City of Tacoma*, 410 F.3d. 644, 699 (9th Cir. 2005); *see also Thorne v. City of El Segundo*, 802 F.2d. 1131, 1141 (9th Cir. 1986) (“if the unsuccessful and successful claims are related, then the court must apply the second part of the analysis in which the court evaluates the

‘significance of the overall relief obtained in relation to hours reasonably expended on the litigation.’”) The *Thomas* court recognized: “To determine whether the claims are related, the [trial] court should focus on whether the claims on which Plaintiff did not prevail involve a common core of facts *or* are based on related legal theories.” 410 F.3d 644 (emphasis in original) (internal citation omitted).

Here, Plaintiff’s counsel excluded time devoted entirely to unrelated claims against Bird under state law, (CP 465-69), as well as costs and expert witness fees related to these claims. *Id.* Counsel also withdrew significant other time. (CP 666-70) Further, the trial court reduced the fees by an additional 33% to assure that fees were reasonable under Section 1988 for the civil rights claims, only. (Finding #30, CP 706) The court’s extensive findings of facts and conclusions of law satisfy existing case law. *Cf. Loeffelholz v. CLEAN*, 119 Wn. App. 665, 691, 82 P.3d 1199 (2004). Under *Loeffelholz*, where the “trial court finds the claims so related that no reasonable segregation of successful claims can be made, there need be no segregation of attorney fees. 119 Wn. App. at 691.

Because all claims brought to trial involve a common core of facts or are based on related legal theories, the trial court did not abuse its discretion by awarding attorney fees on Osborne’s successful claims. This

Seymour made a decision to help an old friend, and in the process trampled over Osborne's right to be free of unreasonable search and seizure, defied all applicable standards of conduct for police officers in similar situations, and ignored the express orders of the Superior Court. Sgt. Seymour's actions were manifestly unreasonable and not deserving of protection under the qualified immunity doctrine. The Jury below viewed his conduct as reckless; there is no reason this Court should not do the same. On the attorney fee question, the trial court's analysis is sound and consistent with U.S. and Washington Supreme Court decisions. The decision should be affirmed and Respondent should be awarded fees on appeal.

Respectfully submitted this 17th day of August, 2010.

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CERTIFICATE OF SERVICE

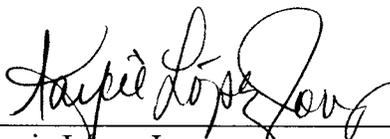
I, **Kaycie López Jones**, hereby declare under penalty of perjury under the laws of the State of Washington that I am employed at Fred Diamondstone, Attorney at Law and that on today's date, August 17, 2010, I served the forgoing **Corrected Brief of Respondent** via **Email** and **U.S. Regular Mail** to the following individuals:

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DATED this 17th day of August, 2010.



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