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No. 53080-5-II

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

DANIEL BRAY, individually, and
JOEY TRACY, individually,

Respondents,

v.

PIERCE COUNTY, a subdivision of the
State of Washington,

Appellant.

BRIEF OF RESPONDENTS BRAY AND TRACY

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A. INTRODUCTION

On April 17, 2015, the Pierce County Sheriff's Department ("PCSD") assisted in the service of a temporary domestic violence protection order ("DVPO") requiring David Annas to immediately vacate the home he shared with his wife, Regina Annas, and refrain from contacting her due to his alleged domestic abuse. Despite the fact that the temporary order only allowed David to remove his clothes and personal work tools from the home, a PCSD deputy retrieved a handgun and bullet magazine from inside the home and gave it to David at his request. Foreseeably, only a few hours later, David returned to his abused spouse's home to murder her, shoot her friend, and kill himself with the weapon provided to him by the PCSD deputy.

Respondent deputies Daniel Bray and Joel Tracy were shocked to learn that their fellow PCSD officer had provided David the weapon from inside the home. Bray/Tracy could not believe that PCSD deputies would violate department policies – not to mention common sense notions rooted in clear public policy abhorring domestic violence ("DV") – requiring officers to enforce DV laws and protect potential DV victims from further acts of violence. They reported this violation to their superiors and were retaliated against, and eventually terminated by the PCSD as a result.

At issue here in this case of wrongful discharge in violation of public policy is whether there is a public policy against an employer ousting law

enforcement officers from their jobs because those officers report their employer's violations of law and because public policy bars placing weapons in the hands of DV abusers. The trial court correctly determined that the answer is "yes" where Washington law provides that PCSD's actions were in direct violation of the following public policies: (1) law enforcement officers must uphold DV laws and orders protecting DV victims and must not arm DV abusers contrary to the terms of court orders, PCSD policy, and common sense; (2) law enforcement officers must speak up in the face of illegal, and dangerous acts by their fellow officers; and (3) an employer must not retaliate against an employee who has reported improper government conduct, particularly conduct creating a substantial and specific danger to public safety.

It is well-recognized public policy in Washington that law enforcement officers must enforce DV laws to protect DV victims. Placing firearms in the hands of a DV abuser is dangerous in an America that has all too often seen mass shootings whether in Newton, Connecticut, Parkland, Florida, Las Vegas, Nevada, Dayton, Ohio, or El Paso, Texas. Here, instead of protecting Regina Annas, the DV victim, PCSD deputies armed her killer, contrary to Washington's public policy, and Bray/Tracy were forced from their jobs when they spoke out against such a practice.

This Court should affirm the trial court's order.

B. STATEMENT OF THE CASE

Fearing that her estranged husband David Annas would kill her, Regina Annas obtained a DVPO pursuant to RCW 26.50.070 to remove him from their shared home. CP 98-101, 182-85. *See* Appendix. The order noted that Regina faced “irreparable harm,” provided that Regina would have exclusive right to the home, and directed David to vacate the premises although he could “take [his] personal clothing and [his] tools of the trade from the residence while a law enforcement officer is present.” CP 99. Nothing in the order allowed David to take any other property from the home, particularly a firearm, nor did the order confer authority on the officers to provide him with a firearm because a firearm was neither David’s clothing nor a tool of his trade. CP 98-101.

On April 17, 2015, PCSD deputies served the DVPO on David. CP 92, 95-96, 112. David was unarmed and working on a truck in the home’s driveway. *Id.* The officers were on notice from the law enforcement information sheet that there were firearms in the house. CP 103.¹ That information sheet also reported David was likely to react violently when served. *Id.* The serving deputies noticed that David was

¹ There is nothing in the record to show that David owned the gun. PCSD deputies never checked on the gun’s ownership. It was presumptively community property. *Yesler v. Hoehstettler*, 4 Wash. 349, 354, 30 Pac. 398 (1892). No deputy asked Regina if the gun belonged to her.

“very upset” upon that service. *Id.*² One of the deputies asked David where any guns were stored; he told the PCSD deputies “he needed to take the gun with him,” even though this request was contrary to the order’s terms that confined him to taking only “tools of trade” and “personal clothing” with him from the home. *Id.* One of the deputies walked into the home, located a Colt 1911 handgun with pearl-styled grips in a dresser drawer, unloaded the weapon’s ammunition, and, after exiting the home, provided it and the ammunition to David by placing the weapon’s ammunition, the handgun, and the holster in the back floor of David’s truck, advising him not to do anything to violate the order, including contacting Regina. *Id.*; CP 107-08. David shook hands with the deputies and then left. *Id.*

Hours later, David returned with the gun provided to him by the PCSD deputy and murdered Regina, shot her friend, and took his own life. *Id.*

Deputies Bray and Tracy were dispatched to the murder-suicide scene. CP 227-28. There, they learned that the murder weapon had been delivered by a PCSD deputy to David. *Id.* Bray and Tracy reported to their supervisors that the murder weapon had been provided to David by a

² Ironically, David told the deputies he had attempted to get a DVPO against Regina earlier that morning, but it was denied to him. CP 92.

PCSD deputy in violation of department rules,³ Washington DV law, and the order being served. CP 204-05, 228-29.⁴

Instead of taking responsibility for this action, PCSD attempted to cover up its deputies' misconduct by silencing Bray and Tracy with a malicious campaign of retaliation and hostility. CP 6. Prior to that conduct, Bray and Tracy had never received a disciplinary action. *Id.* That changed once Bray and Tracy spoke up regarding PCSD's misconduct; PCSD flooded both men with baseless investigations, unrelenting bullying, harassment, and unfair treatment. CP 7. PCSD's attacks on them not only included illegal workplace retaliation, but physical beatings, wrongful incarceration, trumped up charges, and false imprisonment. CP 7-9. Bray went on medical leave in November 2015 and never returned to duty. CP 8. Tracy continued to serve until April 2016. CP 9. Both Bray and Tracy were terminated. *Id.*

³ All Washington law enforcement agencies were required to have policies and procedures in place by January 1, 2015 regarding acceptance, storage, and return of weapons surrendered under RCW 9.41.800 when a DVPO is issued to a person. RCW 9.41.801(7). Here, *nothing* in PCSD policy required the officers to obtain the weapon for David and place it in his possession. CP 135-36. In fact, officers were trained not to remove any personal property from the home. CP 203, 216. More to the point, in DV training, PCSD deputies are specifically advised to inventory weapons and take them for safekeeping. CP 193-98.

⁴ Bray/Tracy were disturbed by the effort to conceal evidence of a crime, and PCSD's misconduct in violating the order and Department policies; they reported the misconduct so that the PCSD could take needed responsive action to ensure that nothing like this would ever happen again to a DV victim and so that the PCSD would comply with its duty to protect DV victims. CP 205, 228.

Bray/Tracy filed the present action in the Pierce County Superior Court on March 12, 2018 alleging numerous recovery theories, including wrongful termination in violation of public policy. CP 378-91. The case was assigned to the Honorable Susan Serko. The County initially refused to disclose its internal policies relevant to this case, but Bray/Tracy eventually uncovered key internal policies during discovery. CP 87-88, 175-77, 200-26. In light of the new evidence, generated in that discovery, Bray/Tracy filed a later amended complaint in July 2018. CP 1-15, 398-99, 420-34. PCSD filed a CR 12(b)(6) motion to dismiss. CP 328-47. The trial court denied the motion to dismiss. CP 372-74. Undeterred, PCSD then filed a motion for summary judgment. CP 16-33.⁵ The trial court denied the motion, CP 273-75, but certified the case under RAP 2.3(b)(4). CP 321-23.⁶ This Court granted review. *See* Appendix.

C. SUMMARY OF ARGUMENT

Washington law has long recognized a tort for wrongful discharge in violation of public policy. An element of that tort requires the plaintiff to document the existence of a clear public policy.

Deputies Bray and Tracy fully established the existence of

⁵ In June 2018, the Estates of Regina Annas and Rachel Holland, also filed a wrongful death and personal injury lawsuit against Pierce County arising from its negligence in arming David Annas. CP 86.

⁶ The court did not articulate the precise issue it was certifying under its order. CP 3.

powerful public policies in Washington, derived from statutes, judicial decisions, and regulations mandating that law enforcement officers protect potential DV victims from the risk of violence generally and by keeping firearms from DV abusers. Further, there is also a clear public policy mandating that law enforcement officers report instances of violations of law and policy. Consistent with that public policy, law enforcement officers are protected under Washington law from retaliation for reporting violations of the protective obligation toward DV victims, or violations of law and/or policy.

The trial court correctly determined that Bray/Tracy established the clarity element of their claim, and properly denied summary judgment to the County.

D. ARGUMENT

(1) Standard of Review on Summary Judgment

The County's discussion in its brief at 6-9 of the standard of review as to a decision on summary judgment deliberately omits critical points in the legal analysis. Summary judgment is a drastic remedy "appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Kittitas County v. Allphin*, 190 Wn.2d 691, 700, 416 P.3d 1232 (2018); CR 56(c). It is appropriate only where a trial would truly be "useless." *Wheeler v.*

Ronald Sewer Dist., 58 Wn.2d 444, 446, 364 P.2d 30 (1961). The County, as the moving party, bore the burden of establishing its right to judgment as a matter of law.

Peppering throughout its brief are references to what the County alleges are Bray/Tracy's "self-serving" declarations, appellant br. at 5, 12, but these declarations *must* be credited by this Court on review of a summary judgment decision. Again, the County deliberately omits a critical legal point. In addressing whether a genuine issue of material fact is present, a court must construe the facts, and reasonable inferences from the facts in a light most favorable to the non-moving party, here, Bray/Tracy. *Ranger Ins. Co. v. Pierce Cty.*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). Where there are significant witness credibility issues present in a case, it has long been the rule in Washington that summary judgment is inappropriate. *Amend v. Bell*, 89 Wn.2d 124, 129, 570 P.2d 138 (1977); *Powell v. Viking Ins. Co.*, 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) ("Credibility issues involving more than collateral matters may preclude summary judgment.").

Moreover, it hopes this Court will ignore the opinion of Bray/Tracy's well-qualified police practices expert Susan Peters, and credit only the PCSD version of the deputies' DV-related obligations. Even if this Court were to treat PCSD's self-serving, truncated analysis of

deputies' DV-related duties as expert testimony, when expert opinions come to differing conclusions on a key issue, that creates a plain issue of fact for the jury. In a case involving alleged insurer bad faith, Division I put the point succinctly:

At the summary judgment stage with which we are concerned, both appeared qualified to render opinions whether the accident caused Leahy's DM. There was a clear conflict between two experts on a central question: causation. Could this insurer, on this record, claim that there was no genuine issue of material fact on the reasonableness of its action in solely relying on its expert? We think not.

Leahy v. State Farm Mut. Auto. Ins. Co., 3 Wn. App. 2d 613, 633, 418 P.3d 175 (2018).⁷

This Court reviews decisions on summary judgment *de novo*. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011).

(2) Washington Law Recognizes the Tort of Wrongful Discharge in Violation of Public Policy

While Washington law has recognized the common law at-will employment doctrine that allows an employer to terminate an employee at

⁷ See also, *Chen v. City of Seattle*, 153 Wn. App. 890, 900, 223 P.3d 1230 (2009), review denied, 169 Wn.2d 1003 (2010); *Bowers v. Marzano*, 170 Wn. App. 498, 290 P.3d 134 (2012) (experts in disagreement on cause of auto crash); *Advanced Health Care, Inc. v. Guscott*, 173 Wn. App. 857, 295 P.3d 816 (2013) (differing opinions in medical negligence action as to cause of patient's injury). See also, *C.L. v. State Dep't of Soc. & Health Servs.*, 200 Wn. App. 189, 200, 402 P.3d 346 (2017) ("In general, when experts offer competing, apparently competent evidence, summary judgment is inappropriate.").

the employer's discretion, *Roberts v. ARCO*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977), our courts have also understood the harshness of that common law rule by recognizing an exception to it where the employer's actions otherwise frustrate "a clear manifestation of public policy." *Id.* at 897.

Our Supreme Court in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) held that an employee states a cause of action in tort where she/he pleads and proves "that a stated public policy, either legislatively or judicially recognized, may have been contravened." Thus, courts "inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Id.*

The Court amplified upon the tort's elements in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996), noting that the tort has arisen in four distinct situations:

- (1) where employees are fired for refusing to commit an illegal act;
- (2) where employees are fired for performing a public duty or obligations, such as serving jury duty;
- (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and
- (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistle-blowing.

Id. at 936. The *Gardner* court articulated four elements for the tort:

- (1) The plaintiffs must prove the existence of a clear public policy (the *clarity* element).
- (2) The plaintiffs must prove that discouraging the

conduct in which they engaged would jeopardize the public policy (the *jeopardy* element).

(3) The plaintiffs must prove that the public policy-linked conduct caused the dismissal (the *causation* element).

(4) The defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element).

Id. at 941 (citations omitted). These elements for the tort remain the law in Washington. These elements were derived from a treatise authored by Henry Perritt. Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* (1991); *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015).

But our Supreme Court has also indicated that the Perritt elements do not apply in circumstances that do not fall “neatly” within the four classic situations identified by the *Gardner* court, requiring a more “refined” analysis. *Becker v. Community Health Sys., Inc.*, 184 Wn.2d 252, 259, 359 P.3d 746 (2015). However, the Perritt elements provide “helpful guidance” in such situations. In *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 425 P.3d 837 (2018), the Court focused on the core elements of the tort as set forth in *Thompson*, and further developed in *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 812 P.2d 18 (1991). That is, a plaintiff employee must show that his or her “discharge may have been motivated by reasons that contravene a clear mandate of public

policy.” 102 Wn.2d at 232. Then, “the burden shifts to the employer to prove that the dismissal was for reasons other than those alleged by the employee.” *Id.* at 232-33.

Under either the *Thompson* analysis or the Perritt elements of *Gardner*, a clear element of public policy is necessary to establish the tort. It is referred to as the “clarity element” accordingly in this brief. The only element of the tort at issue in this case is the clarity element – whether Bray/Tracy were terminated in violation of a clear public policy.

(3) Bray/Tracy Documented that a Wrongful Discharge Tort Was Properly Predicated Here on the County’s Retaliation Against Them for Whistleblowing Activities

Washington law recognizes a clear public policy of forbidding retaliation against local government employees who report official misconduct. For example, RCW 42.41.010 states:

[i]t is the policy of the legislature that local government employees should be encouraged to disclose, to the extent not expressly prohibited by law, improper governmental actions of local government employees and officials.

City of Seattle v. Swanson, 193 Wn. App. 795, 811, 373 P.3d 342 (2016) (“The plain and unambiguous intent of the Local Government Whistleblower Protection Act ... is to protect local government employees who make a good faith report of improper actions taken by officials and employees and provide remedies for whistle-blowers subjected to

retaliation for making such reports.”) This is but a part of the overall public policy in Washington that bars retaliation against those who report official misconduct. RCW 42.40.010 (whistleblower protection for state employees).

Courts have held that there is a clear public policy barring retaliation against an employee for reporting employer misconduct. *Dicomes v. State*, 113 Wn.2d 612, 620, 782 P.2d 1002 (1989); *Gardner*, 128 Wn.2d at 935. Recently, in *Karstetter v. King County Corrections Guild*, ___ Wn.2d ___, 444 P.3d 1185 (2019), our Supreme Court reaffirmed that a whistleblower sufficiently alleged the elements of the wrongful discharge cause of action. The whistleblower, the in-house counsel for a correctional officers union, responded to an inquiry from the King County Ombuds regarding alleged misconduct by union members and was terminated for doing so. The Court concluded that the whistleblower was protected even though he had no specific intent to advance the public good in responding to a request for information.

But the policy forbidding retaliation against whistleblowers is effectual only if it relates to an otherwise clear public policy. *Martin*, 191 Wn.2d at 724-25 (When the appellant’s claim is based on whistleblowing he still “has the burden to show that his discharge may have been motivated by reasons that contravene a clear mandate of public policy.”).

Accord, Engstrom v. Microsoft Corp., 8 Wn. App. 2d 1060, 2019 WL 1989618 (2019). *See also, Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991) (clarity element of tort not established where nurse’s reporting of alleged patient “abuse” under RCW 70.124 was, in fact, conduct by her employer that was in compliance with Natural Death Act, RCW 70.122).

As will be noted *infra*, the clarity element is met here.

(4) Bray/Tracy Established the Clarity Element of the Wrongful Discharge in Violation of Public Policy Tort

“The tort of wrongful discharge applies when an employer terminates an employee for reasons that contravene a clearly mandated public policy.” *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207, 193 P.3d 128 (2008).⁸ To establish a claim for wrongful discharge in violation of public policy, a plaintiff must identify a public policy that was contravened by virtue of defendant discharging the plaintiff. *Id.* The question of what constitutes a clear mandate of public policy is a legal question, reviewed *de novo* by this Court. *Dicomes*, 113 Wn.2d at 612.

Since *Dicomes* and *Gardner*, our courts have recognized four broad areas in which public policy has been implicated: (1) where employees are fired for refusing to commit an illegal act; (2) where

⁸ The County chose to ignore the *Danny* decision, one that is critical here, until the very end of its brief.

employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims or engaging in union activities;⁹ or (4) where employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistleblowing.¹⁰ *Id.* at 618. These four categories of articulated public policy are not exhaustive:

This court has never characterized the list...[above]...as exhaustive. On the contrary, we have recognized that while statutes and case law are “primary sources of Washington public policy,” public policy may come from other sources.

Danny, 165 Wn.2d at 216.¹¹

⁹ See, e.g., *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013) (Police lieutenant allegedly fired for engaging in protected union activities); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 888 P.2d 147 (1995) (nonunion employees terminated for exercising their statutory right to engage in concerted action); *Wilmot*, *supra* (employees terminated for filing workers' compensation claims); *Hayes v. Trulock*, 51 Wash. App. 795, 755 P.2d 830, *review denied*, 111 Wn.2d 1015 (1998) (acknowledging the trial court's finding, not challenged on appeal, that employees were fired in retaliation for complaining to officials about the employer's refusal to pay overtime).

¹⁰ See, e.g., *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015) (employee fired for advising employer of HIPAA violation); *Becker*, *supra* (employer allegedly fired for refusal to violate federal financial reporting laws); *Farnam*, 116 Wn.2d at 659 (nurse unsuccessfully claimed retaliatory wrongful discharge when fired for complaining to media about the nursing home's legal practice of removing food tubes from terminally ill patients); *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990) (allowing a claim, analogized to whistleblowing, where sixty-year-old employee was fired in retaliation for hiring an attorney to protect her from age discriminatory practices).

¹¹ In *Rose*, our Supreme Court clarified that if a plaintiff asserts he or she was discharged in violation of one or more of the general public policies described in *Dicomes*, a court's inquiry ends there because the “facts fall directly within the realm of wrongful discharge in violation of public policy.” 184 Wn.2d at 287.

In order to determine whether there is a public policy sufficient for a wrongful termination cause of action, courts look to constitutional, statutory, regulatory schemes, and past judicial decisions. *Danny*, 162 Wn.2d at 208. Specifically, “[t]o qualify as a public policy for purposes of the wrongful discharge tort, a policy must be “truly public” and “sufficiently clear.” *Id.* (citing to *Sedlacek v. Hillis*, 145 Wn.2d 379, 389, 36 P.3d 1014 (2001)). The relevant inquiry is whether there is a clear public policy at issue.¹²

The County *ignores* the judicial policy on DV in its brief. Washington courts have discerned a public policy to be upheld under the wrongful discharge tort, for example, on the basis of prior judicial decisions. *Thompson*, 102 Wn.2d at 232; *Sedlacek*, 145 Wn.2d at 386 (“prior jurisprudence” could establish policy); *Rickman*, 184 Wn.2d at 309-10.

A statutory enactment may establish the requisite public policy. In *Thompson, supra*, the employee claimed he was terminated for instituting an accurate accounting program to comply with the federal Foreign Corrupt Practices Act that barred bribery of foreign officials to obtain business and the Court held that the clarity element was met. *Id.* at 234.

¹² This was not a situation where an employee merely had an opinion about public policy unrooted in statute, regulation, or judicial precedent as in *Martin*, 191 Wn.2d at 725 (employee allegedly fired because he believed more padding was merited on basketball courts).

The *Gardner* court ruled that the armored car company violated a clear public policy in favor of protecting human life derived from various statutes when it discharged an employee who left his armored car in violation of a company work rule to save a bank employee in a life-threatening hostage situation. 128 Wn.2d at 944-45. *Accord, Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000) (college employee who was only terminable for cause was discharged for pursuing an unfair labor practice charge although statute afforded employee such a right); *Roberts v. Dudley*, 140 Wn.2d 58, 993 P.2d 901 (2000) (Court found that the public policy against sex discrimination found in Washington Law Against Discrimination, RCW 49.60, and judicial decisions established the clarity element).

A regulatory provision may also establish the necessary public policy. *Thompson*, 102 Wn.2d at 232. PCSD largely ignores this source of public policy in its brief. In *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000), for example, a municipal fire code barring non-certified personnel from servicing a fire/life safety system was the necessary policy basis for an employee fired because he refused to bypass a fire alarm system at Key Arena to sue his municipal employer. *Accord, Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002) (enforcement of zoning code).

Moreover, to establish the clarify element, the plaintiff must only establish the existence of the clear public policy, *not* that it was actually violated. *Gardner*, 128 Wn.2d at 945; *Hubbard*, 146 Wn.2d at 708-09.

Here, as will be noted *infra*, Bray/Tracy established the clarity element of the tort based on statutory, regulatory, and judicial grounds.

(5) Clear Public Policies Were Implicated Here in the Deputies' Termination

(a) Police Officers Must Protect DV Victims and Not Needlessly Endanger Them

(i) Protecting DV Victims from Their Abusers Generally

There is a clear public policy of preventing DV in Washington emanating from all branches of our state government. In 1979, the Legislature enacted the Domestic Violence Act (“DVA”), RCW 10.99.010. The 1985 Legislature then took the unusual step of *mandating* the arrest of DV abusers. RCW 10.99.030(6)(a). Soon after the DVA’s enactment, the Legislature enacted the Domestic Violence Prevention Act (“DVPA”), RCW 26.50, in 1984, to provide DV victims the ability to obtain a civil protection order against their abusers.¹³ The DVPO at issue in this case was issued pursuant to RCW 26.50.070. CP 98-101. The

¹³ The Legislature recognized that protection orders are a “valuable tool to increase safety for victims and to hold batterers accountable.” Laws of 1992, ch. 111, § 1.

Legislature adopted extensive findings in connection with the DV statutes. See Appendix.

Our Supreme Court has also repeatedly recognized a clear public policy to protect DV victims from their abusers by broadly interpreting these DV statutes. In addressing the DVA and the DVPA, the Court stated: “The legislature has articulated a clear public policy to protect domestic violence victims.” *In re Marriage of Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). In *Washburn v. City of Federal Way*, 178 Wn.2d 732, 752, 310 P.3d 1275 (2013), the Court held that police departments have a duty to reasonably serve protection orders. In *Rodriguez v. Zavala*, 188 Wn.2d 586, 398 P.3d 1071 (2017), the Court interpreted DV under the DVPA to encompass a mother’s fear that a father would harm a child, noting yet again the expansive legislative intent in enacting the DVPA to better address DV, a problem of “immense proportions” in Washington. *Id.* at 593-94. The Court recently reinforced the significance of what it described as a “deeply significant” public policy – the prevention of DV – in *City of Shoreline v. McLemore*, 193 Wn.2d 225, 438 P.3d 1161 (2019). The Court specifically noted that law enforcement officers may lawfully force entry into a house without a warrant to investigate and to effectuate an arrest for suspected DV to protect a spouse and children who reasonably appeared in immediate

danger.

Synthesizing the various sources of law on DV, the *Danny* court held in the context of the wrongful discharge tort that there is a clear public policy to prevent DV by providing DV victims “the maximum protection from abuse which the law and those who enforce the law can provide.” 165 Wn.2d at 208. In *Danny*, a federal certified question case, a scheduling manager for a school bus service provider and her children experienced ongoing violence from her husband. Her employer ultimately discharged her on pretextual grounds when she attempted to secure leave to address the DV. Canvassing legislative, judicial, and constitutional sources, the Court held that in response to the question of whether Washington law established a clear public policy of protecting DV victims and their children, and holding abusers accountable:

The legislative, judicial, and executive branches of government have repeatedly declared that it is the public policy of this state to prevent domestic violence by encouraging domestic violence victims to escape violent situations, protect children from abuse, report domestic violence to law enforcement, and assist efforts to hold their abusers accountable. The public policy in this case overwhelmingly requires an affirmative answer to the certified question.

Id. at 221.

Plainly, our Supreme Court has analyzed the DV laws referenced above, the enormity of the problem of DV in our society, and the need to

prevent DV. That Court has concluded that there is an unequivocal public policy in Washington that law enforcement officers must exert every effort to stop DV abusers from doing harm to their victims. Indeed, its PCSD Policy Manual on Domestic Violence Calls only confirms this at 320.2:

The Pierce County Sheriff's Department's response to incidents of domestic violence and violations of related court orders shall stress enforcement of the law to protect the victim and shall communicate the philosophy that domestic violence is criminal behavior. It is also the policy of this department to facilitate victims' and offenders' access to appropriate civil remedies and community resources whenever feasible.

CP 207. Thus, PCSD's own internal regulations reflect the clear public policy in this state that DV victims must be protected.

(ii) Protecting DV Victims from Their Abusers' Access to and Use of Weapons

But in addition to this general policy directed to law enforcement officers regarding their obligation to protect DV victims, there is an additional, clear public policy in our state that law enforcement officers must protect DV victims by removing firearms from dangerous DV situations, generally and not putting them in the hands of DV abusers specifically.¹⁴ Obviously, guns in the DV context greatly enhance the risk

¹⁴ As discussed in greater detail below, the County is wrong to rely on the argument that it could not restrict David's access to firearms under a temporary DVPO. This argument fails because the County had no right to affirmatively retrieve a gun and arm David when serving an order that removed him from the shared home while only allowing him to remove his clothes and tools of the trade. Additionally, this case is about

to DV victims and law enforcement officers, as the County has acknowledged. CP 265-66. The Legislature and the people of Washington themselves have spoken directly on the association of DV and firearms, articulating an unambiguous public policy that requires law enforcement officers to be cognizant of the threat posed by firearms in the hands of suspected DV offenders.

The people of this state have themselves legislated on these issues. Very recently, Initiative 940 commanded that officers must receive training to recognize and address mental health questions associated with firearms. RCW 43.101.452.¹⁵ Initiative 1639 stated that gun violence “is far too common in Washington and the United States.” Laws of 2019, ch. 3, § 1. It further stated: “Enough is enough. The people find and declare that is crucial and urgent to pass laws to increase public safety and reduce gun violence.” *Id.* The people enacted aggressive background checks to keep semiautomatic assault rifles “out of dangerous hands” and to

recognizing a public policy of protecting DV victims and removing guns from DV situations, and the Supreme Court has determined that public policy is often broader than the specific remedies afforded in a statute. *See Roberts*, 140 Wn.2d at 74 (recognizing that sex discrimination by a small business could support a claim for wrongful termination in violation of public policy even though the court previously held that such a case did not meet the technical requirements for a statutory antidiscrimination claim) (citing *Griffin v. Eller*, 130 Wash.2d 58, 922 P.2d 788 (1996)).

¹⁵ The Legislature modified the initiative in its 2019 session, but confirmed the central thrust of that initiative – enhanced officer training “to assist agencies and law enforcement officers in balancing the many essential duties of officers with the solemn duty to preserve the life of persons with whom officers come into direct contact.” RCW 36.28A.445.

generally mandate secure gun storage for all firearms. These initiatives are only the very latest in a long line of legislation aimed at curbing gun violence. For decades the Legislature has recognized that “reducing the unlawful use of and access to firearms” is a necessary step in preventing violence and “requires the concerted effort of all communities and parts of state and local governments.” Laws of 1994, 1st Sp. Sess., ch. 7, 2197. Arguably, law enforcement is the most crucial part of local government when it concerns keeping firearms out of dangerous hands.

Our Supreme Court has evidenced policy of strict enforcement of statutes precluding certain individuals from obtaining either weapons or concealed pistol permits. *See, e.g., Barr v. Snohomish County Sheriff*, 193 Wn.2d 330, 440 P.3d 131 (2019) (sheriff not required to issue concealed pistol license to person whose sealed juvenile record contains adjudications for class A felonies and who was thereby prohibited by federal law from possessing a weapon).

These general considerations against firearm violence aside, it is the clear public policy of Washington to not place firearms in the hands of DV abusers. Washington law punishes the possession of firearms by those subject to DV-related orders or having been convicted of DV-related crimes. RCW 9.41.090(2). Such individuals may not purchase semi-

automatic assault rifles. RCW 9.41.090(2).¹⁶ Upon applying for a pistol or semi-automatic rifle, the purchaser must be warned:

CAUTION: The presence of a firearm in the home has been associated with the increased risk of death to self and others, including an increased risk of suicide, death during domestic violence incidents, and unintentional deaths to children and others.

RCW 9.41.090(6)(b)(ii).

Further, under the DVPA, when a court issues a DV protection order, RCW 9.41.800 requires those persons subject to such an order to surrender their firearms. *See Appendix.*¹⁷ Possession of a firearm while

¹⁶ This provision was part of Initiative 1639 adopted by the people in 2018.

¹⁷ The PCSD's own policy is to aggressively implement firearms surrender efforts. Policy 320.1 states:

The Weapons Identification / Surrender Program is designed to promote victim safety and batterer accountability. Studies have identified that firearms present in households that experience domestic violence raises the likelihood of them being used in future Domestic Violence incidents in that household. By identifying and ordering these firearms surrendered as part of a criminal case, victims, as well as officers responding to future incidents are safer.

The Domestic Violence Unit is responsible for this program and for collecting firearms that are ordered surrendered by the court. District Court and the Prosecutor's Office will be responsible for the defendants compliance with court orders to surrender any and all firearms. Identifying firearms in the home is crucial to the success of this effort. Deputies responding to domestics where an arrest is made, or where a report is taken, are instructed to expand their investigative questioning to determine if firearms are present in the household and to identify those firearms if possible. This will allow the Prosecutor's Office and District Court to identify those suspects who have the access to a firearm(s). See PCSD Training Bulletin 09-01 for specific procedures regarding this program.

CP 210.

subject to such an order constitutes unlawful possession of a firearm in the second degree. RCW 9.41.040(2)(a). *See* Appendix. Removal of firearms from a DV setting is so critical that courts have held that the person subject to a DVPO must surrender her/his firearms and bears the burden of documenting that fact. *In re Marriage of Bratz*, 2 Wn. App. 2d 889, 413 P.3d 612, *review denied*, 190 Wn.2d 1031 (2018). In so holding, Division I stated:

The provisions of RCW 9.41.800-.804 reflect a legislative determination that it is in the public interest to prohibit persons subject to specific domestic violence restraining orders from possessing firearms and other dangerous weapons.

Id. at 898.

This point is only reinforced by the fact that our Supreme Court has held that there is a public policy to protect human life in Washington. *Gardner*, 128 Wn.2d at 945; *Dicomes*, 113 Wn.2d at 620. In *Gardner*, the plaintiff was fired for violating a company rule requiring him to stay in the company armored truck when he stepped outside of the truck to save a woman's life. 128 Wn.2d at 934. In holding that the plaintiff was wrongfully discharged, the Supreme Court determined that there is a clear public policy in the protection of human life: "[s]ociety places the highest priority on the protection of human life. This fundamental public policy is clearly evidenced by countless statutes and judicial decisions." 128

Wn.2d at 944. This public policy of saving persons “from life threatening situations satisfies the clarity element.” *Id.* See also, *Norvell v. BNSF Railway Co.*, 2019 WL 3944391 (W.D. Wash. 2019) (plaintiff railroad employee stated claim when fired after taking emergency steps to stop a train that might have caused injuries/deaths).

But apart from these general expressions of public policy regarding possession of firearms by DV abusers and protection of their potential victims, very specific statutory, PCSD regulatory provisions, and judicial policy expressions govern how officers must treat firearms in a situation like that of David and Regina Annas. The County would have this Court believe that its deputies were limited in their obligation to Regina because a court had not ordered David to give up his weapons. Appellant Br. at 14-17. That is plainly wrong.

First, the deputies’ conduct was governed by the terms of the order itself. CP 98-101. The DVPO required David to leave the house he shared with Regina immediately and provided that he may only take with him his personal clothing and any tools necessary for his work.¹⁸ *Nothing* in that order compelled PCSD deputies to affirmatively retrieve the Colt pistol that David used to kill Regina and provide it, along with its

¹⁸ A gun is neither clothing nor a tool of David’s trade, as Deputy Bray testified. CP 202. Susan Peters fully agreed. CP 189.

ammunition, to David.

Indeed, deputies were specifically trained by the PCSD that “*If items are not specifically listed in the order there is no authority to assist in their recovery even if you believe that you know what was intended by the court.*” CP 216 (County’s emphasis). This training makes sense, as domestic disputes over personal property and vacating a shared residence can be fraught with emotion and conflict. Indeed, the Legislature recognized this fact as evidenced by RCW 26.50.080(1) which states:

When an order is issued under this chapter upon request of the petitioner, the court may order a peace officer to accompany the petitioner and assist in placing the petitioner in possession of those items indicated in the order or to otherwise assist in the execution of the order of protection. The order shall list all items that are to be included with sufficient specificity to make it clear which property is included. Orders issued under this chapter shall include a designation of the appropriate law enforcement agency to execute, serve, or enforce the order.

Here, the Colt 1911 gun was not listed in the order. CP 98-101. The PCSD deputies simply had no authority to retrieve and hand over a weapon from inside the house when executing an order to remove a suspected DV offender from the shared residence.¹⁹

Second, notwithstanding the foregoing, officers do not park their

¹⁹ Put another way, just as the PCSD deputies had no authority to allow David to remove the television, mattress, or other personal property from the home, they had no authority to give him the gun and ammunition from inside the home that he later used to kill his wife. The County’s argument that it lacked authority to legally restrict his access to firearms is a complete strawman, based upon an incorrect reading of the DVPO.

common sense at the curb in serving DV-related orders as our Supreme Court documented in *Washburn, supra*. There, where officers served a DVPO on a DV abuser and observed his victim at the residence, they were liable under *Restatement (Second) of Torts* § 302A for the obvious enhancement of the risk to the victim from an angry abuser when they merely served the order and left without ensuring that the victim would be safe after its service. It is no different here where David was visibly upset by the service of the DVPO by PCSD deputies and yet those deputies retrieved a pistol and ammunition for him.

Finally, and perhaps most salient for this Court, is the fact that officers are trained that in serving a DV order as here they may take a DV abuser's firearms for *safekeeping*. The February 25, 2009 PCSD Training Bulletin on Weapons Identification/Surrender Program stated:

Identifying weapons in the home is crucial to the success of this effort. Deputies responding to domestics where an arrest is made, or where a report is taken, are *instructed* to expand their investigative questioning to include the following questions. This will allow the Prosecutor's Office and District Court to identify those suspects who have the access to a firearm(s).

1. Ask the victim if the suspect possesses or has any firearms. If none, specify in your narrative (ie. "There were no weapons disclosed during conduct").
2. If firearms are present, ask to view them and inquire if they have ever been threatened with them.

3. Ask the victim if they would like to have the firearm(s) taken for safe keeping. If so, take the firearm(s) and place them into property for safe keeping.

4. If the firearm(s) are not taken for safe keeping and only identified follow the instruction below.

- List the firearms in the General report. Each firearm does not need to be listed as separate property. The number of firearms can be placed in the “Quantity” section on the property tab.

- List the weapons as “Information Only” in the “Status” section.

- Do not fill out the Firearms section.

- In the “Notes” section, list the firearm(s) if they are known. Document where the firearms are kept. List as much detail as you can (make, model, caliber) and anything else that might help identify the firearm(s) if they are known. Page two is an example of how the property tab should look depending on the information about the firearm(s). See Attachment.

CP 198 (County’s bold/emphasis). Similarly, the PCSD’s Policy Manual Section 320 on Domestic Violence Calls instructed deputies in 320.4(i) to “Collect any firearms or dangerous weapons in the home, if appropriate and legally permitted, for safekeeping or as evidence.” CP 208.

That PCSD’s training directives on the safekeeping of firearms in a DV situation are consistent with clear public policy is evidenced by the fact that Washington Association of Sheriffs & Police Chiefs Model Operating Procedures for Law Enforcement Response to Domestic

Violence and Resource Guidelines recommend the seizure of weapons for safekeeping in DV settings: “In Domestic Violence cases involving firearms in the home, State law permits the seizure of weapons for safekeeping.” CP 180. Police practices expert Susan Peters also so testified based on her extensive experience:

Law enforcement officers are trained that they may place firearms into safekeeping without a court order in specific circumstances. For example, in Pierce County, deputies are instructed to place firearms into safekeeping if the victim in a domestic violence situations requests so. The officer must ask the victim. This is reflected in an excerpt from a 2010 Pierce County training PowerPoint is attached as Exhibit A., and Pierce County Training Bulletin, issue February 25, 2009 attached as Exhibit B.

CP 191.

Thus, from the foregoing sources, legislative, judicial, and regulatory, there is a clear Washington public policy for law enforcement officers to vigorously enforce Washington DV laws generally, to execute DVPOs specifically according to their terms, to remove firearms from DV situations, and to protect the lives of persons with whom they come in contact, particularly DV victims.

(b) Police Officers May Not Commit Illegal Acts or Refuse to Speak Up in the Face of Illegal Acts Committed by Others in Law Enforcement

Consistent with the clear public policy of protecting DV victims from their abusers’ actions generally and firearms specifically is the

obligation of law enforcement officers to report circumstances where that anti-DV policy is placed at risk by the conduct of fellow officers. Bray/Tracy could not sit idly and allow their colleagues to arm David, a DV abuser, instead of protecting Regina, the DV victim.

In general terms, it has long been public policy, borne of constitutional due process concerns, that an officer's history of misconduct must be disclosed to criminal defendants to ensure that the defendant can appropriately impeach an officer as a defense to criminal charges. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Milke v. Ryan*, 711 F.3d 998 (9th Cir. 2013) (murder conviction overturned due to State's failure to turn over evidence of officer misconduct). See generally, Jonathan Abel, *Brady's Blind Spot: Impeachment Evidence in Police Personnel Files and the Battle Splitting the Prosecution Team*, 67 *Stanford L. Rev.* 743 (2015).

There is little question that failing to report officer misconduct can also constitute a basis for a civil claim under 42 U.S.C. § 1983. For example, the First Circuit so held in *Baron v. Suffolk County Sheriff's Dep't*, 402 F.3d 225 (1st Cir. 2005), a case in which a former corrections officer was harassed for reporting his fellow officers' misconduct, breaking the "code of silence." Where the officer reported "officers'

violations of prison policy, retaliation for breaching the code of silence, and prison officials' failure to investigate or put a stop to that retaliation," retaliation against officers who breach a code of silence among their colleagues at a county House of Correction "implicates the public interest." *Id.* at 235. Similarly, in *Dahlia v. Rodriguez*, 735 F.3d 1060 (9th Cir. 2013), *cert. denied*, 571 U.S. 1198 (2014), the Ninth Circuit held that an officer who reported abusive interrogation tactics by other officers stated a § 1983 claim based on the First Amendment when he was the subject of retaliation by his fellow officers and superiors. The court described such reporting as "quintessentially a matter of public concern." *Id.* at 1067.

Concealing evidence of wrongdoing, especially when that includes attempting to hide evidence as a police officer, violates clear public policy, as Peters testified. CP 189-90. RCW 9A.76.175²⁰ and RCW 42.20.040²¹ make illegal the giving of a false or misleading statement to a

²⁰ The statute states:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

²¹ The statute provides:

Every public officer who shall knowingly make any false or misleading statement in any official report or statement, under circumstances not otherwise prohibited by law, shall be guilty of a gross misdemeanor.

public servant. RCW 9A.72.150²² is a clear statement that attempting to conceal or tamper with evidence is a crime and such conduct violates public policy. In general terms, officers may not intentionally fail to perform their duties. RCW 9A.80.010.²³ Indeed, the very existence of a whistleblower protection statute itself evidences a public policy of encouraging the reporting of official misconduct.²⁴

²² The statute states in pertinent part:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he or she:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding; or

(b) Knowingly presents or offers any false physical evidence.

(2) “Physical evidence” as used in this section includes any article, object, document, record, or other thing of physical substance.

²³ The statute states in pertinent part:

(1) A public servant is guilty of official misconduct if, with intent to obtain a benefit or to deprive another person of a lawful right or privilege:

(a) He or she intentionally commits an unauthorized act under color of law; or

(b) He or she intentionally refrains from performing a duty imposed upon him or her by law.

²⁴ RCW 42.40.020(6) defines government misconduct:

(6)(a) “Improper governmental action” means any action by an employee undertaken in the performance of the employee's official duties:

Similarly, an employer's attempt to coerce employees to give favorable testimony that was false or misleading in a lawsuit violates the clear public policy of Washington, as this Court has held. *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 302 P.3d 500, review denied, 178 Wn.2d 1014 (2013).

In sum, given the foregoing Washington statutory mandates as well as the decisions arising under 42 U.S.C. § 1983 and the First Amendment, there is a clear public policy involving officer reporting of fellow officers' misconduct.²⁵ Moreover, given the clear public policy to follow and enforce the protection order being served, and DV laws, PCSD nevertheless condoned the arming of a DV abuser with a handgun for no legally cognizable reason, as Peters testified, CP 190, and then covered up its misconduct. Bray/Tracy were effectively terminated for refusing to

(i) Which is a gross waste of public funds or resources as defined in this section;

(ii) Which is in violation of federal or state law or rule, if the violation is not merely technical or of a minimum nature;

(iii) Which is of substantial and specific danger to the public health or safety;

(iv) Which is gross mismanagement;....

²⁵ This Court should not be oblivious to the fact that as to our state's largest police department in Seattle, a federal court has supervised its operations due to a pattern of misuse of force and failure to report officer misconduct. *See United States v. City of Seattle*, Cause No. 12-CV-1282-JLR (W.D. Wash. 2012) (key documents available at <https://www.wawd.uscourts.gov/special-case-notices>) (last accessed September 16, 2019).

help conceal the PCSD's misconduct.

Again, Bray/Tracy established the clarity element of the tort.

E. CONCLUSION

The County posits an extraordinarily truncated sense of the public policy attendant upon the protection of DV victims and keeping firearms from the hands of DV abusers. It is a peculiarly dangerous one, given the all too frequent headlines involving shooting deaths, particularly in domestic settings. Law enforcement officers like Bray/Tracy should be commended, rather than ostracized, for being vigilant in ensuring that Washington public policy including PCSD's own departmental policies on DV abusers and firearms are implemented.

The trial court correctly determined that Bray/Tracy established the clarity element of their wrongful discharge claim. There is a clear Washington policy protecting DV victims and not placing firearms in the hands of DV abusers. There is also a clear policy that officers must enforce DV laws and not stand aside when their colleagues violate those laws. Bray/Tracy should not have been discharged in retaliation for blowing the whistle on the violation of those clear public policies.

This Court should affirm the trial court's order. Costs on appeal should be awarded to Bray and Tracy.

DATED this 16th day of September, 2019.

Respectfully submitted,



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APPENDIX

Former RCW 9.41.040(2)(a)(ii) (2014):

It is unlawful for a person who is subject to an order under RCW 26.09 to possess a firearm where the order:

(A) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

(B) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(C)(I) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and

(II) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause injury.

Former RCW 9.41.800 (2014):

(1) Any court when entering an order authorized under chapter 7.92 RCW, RCW 7.90.090, 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.26.130, 26.50.060, 26.50.070, or 26.26.590 shall, upon a showing by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040:

(a) Require the party to surrender any firearm or other dangerous weapon;

(b) Require the party to surrender any concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(2) Any court when entering an order authorized under chapter 7.92 RCW, RCW 7.90.090, 9A.46.080, 10.14.080, 10.99.040, 10.99.045, 26.09.050, 26.09.060, 26.10.040, 26.10.115, 26.26.130, 26.50.060, 26.50.070, or 26.26.590 may, upon a showing by a preponderance of the evidence but not by clear and convincing evidence, that a party has: Used, displayed, or threatened to use a firearm or other dangerous weapon in a felony, or previously committed any offense that makes him or her ineligible to possess a firearm under the provisions of RCW 9.41.040:

(a) Require the party to surrender any firearm or other dangerous weapon;

(b) Require the party to surrender a concealed pistol license issued under RCW 9.41.070;

(c) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon;

(d) Prohibit the party from obtaining or possessing a concealed pistol license.

(3) During any period of time that the person is subject to a court order issued under chapter 7.90, 7.92, 9A.46, 10.14, 10.99, 26.09, 26.10, 26.26, or 26.50 RCW that:

(a) Was issued after a hearing of which the person received actual notice, and at which the person had an opportunity to participate;

(b) Restrains the person from harassing, stalking, or threatening an intimate partner of the person or child of the intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

(c)(i) Includes a finding that the person represents a credible threat to the physical safety of the intimate partner or child; and

(ii) By its terms, explicitly prohibits the use, attempted use, or threatened use of physical force against the intimate partner or child that would reasonably be expected to cause bodily injury, the court shall:

(A) Require the party to surrender any firearm or other dangerous weapon;

(B) Require the party to surrender a concealed pistol license issued under RCW 9.41.070;

(C) Prohibit the party from obtaining or possessing a firearm or other dangerous weapon; and

(D) Prohibit the party from obtaining or possessing a concealed pistol license.

(4) The court may order temporary surrender of a firearm or other dangerous weapon without notice to the other party if it finds, on the basis of the moving affidavit or other evidence, that irreparable injury could result if an order is not issued until the time for response has elapsed.

(5) In addition to the provisions of subsections (1), (2), and (4) of this section, the court may enter an order requiring a party to comply with the provisions in subsection (1) of this section if it finds that the possession of a firearm or other dangerous weapon by any party presents a serious and imminent threat to public health or safety, or to the health or safety of any individual.

(6) The requirements of subsections (1), (2), and (5) of this section may be for a period of time less than the duration of the order.

(7) The court may require the party to surrender any firearm or other dangerous weapon in his or her immediate possession or control or subject to his or her immediate possession or control to the sheriff of the county having jurisdiction of the proceeding, the chief of police of the municipality having jurisdiction, or to the restrained or enjoined party's counsel or to any person designated by the court.

RCW 10.99.010 (1979):

The 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. The legislature finds that the existing criminal statutes are adequate to provide protection for victims of domestic violence. However, previous societal attitudes have been reflected in policies and practices of law enforcement agencies and

prosecutors which have resulted in differing treatment of crimes occurring between cohabitants and of the same crimes occurring between strangers. Only recently has public perception of the serious consequences of domestic violence to society and to the victims led to the recognition of the necessity for early intervention by law enforcement agencies. It is the intent of the legislature that the official response to cases of domestic violence shall stress the enforcement of the laws to protect the victim and shall communicate the attitude that violent behavior is not excused or tolerated. Furthermore, it is the intent of the legislature that criminal laws be enforced without regard to whether the persons involved are or were married, cohabiting, or involved in a relationship.

Laws of 1992, ch. 111, § 1 (adopting RCW 26.50):

The legislature finds:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: Child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more. The crisis is growing.

While the existing protection order process can be a valuable tool to increase safety for victims and to hold batterers accountable, specific problems in its use have become evident. Victims have difficulty completing the paperwork required particularly if they have limited English proficiency; model forms have been modified to be inconsistent with statutory language; different forms create confusion for law enforcement agencies about the contents and enforceability of orders. Refinements are needed so that victims have the easy, quick, and effective access to the court system envisioned at the time the protection order process was first created.

When courts issue mutual protection orders without the filing of separate written petitions, notice to each respondent, and hearing on each petition, the original petitioner is deprived of due process. Mutual protection orders label both parties as violent and treat both as being equally at fault: Batterers conclude that the violence is excusable or provoked and victims who are not violent are confused and stigmatized. Enforcement may be

ineffective and mutual orders may be used in other proceedings as evidence that the victim is equally at fault.

Valuable information about the reported incidents of domestic violence in the state of Washington is unobtainable without gathering data from all law enforcement agencies; without this information, it is difficult for policymakers, funders, and service providers to plan for the resources and services needed to address the issue.

Domestic violence must be addressed more widely and more effectively in our state: Greater knowledge by professionals who deal frequently with domestic violence is essential to enforce existing laws, to intervene in domestic violence situations that do not come to the attention of the law enforcement or judicial systems, and to reduce and prevent domestic violence by intervening before the violence becomes severe.

Adolescent dating violence is occurring at increasingly high rates: Preventing and confronting adolescent violence is important in preventing potential violence in future adult relationships.

Laws of 2004, ch. 18, § 1:

The legislature reaffirms its determination to reduce the incident rate of domestic violence. The legislature finds it is appropriate to help reduce the incident rate of domestic violence by addressing the need for improved coordination and accountability among general authority Washington law enforcement agencies and general authority Washington peace officers when reports of domestic violence are made and the alleged perpetrator is a general authority Washington peace officer. The legislature finds that coordination and accountability will be improved if general authority Washington law enforcement agencies adopt policies that meet statewide minimum requirements for training, reporting, interagency cooperation, investigation, and collaboration with groups serving victims of domestic violence. The legislature intends to provide maximum flexibility to general authority Washington law enforcement agencies, consistent with the purposes of this act, in their efforts to improve coordination and accountability when incidents of domestic violence committed or allegedly committed by general authority Washington peace officers are reported.

RCW 26.50.070(1) (2010):

(1) When an application under this section alleged that irreparable injury could result from domestic violence if an order is not issued immediately without prior notice to the respondent, the court may grant an ex parte temporary order for protection, pending a full hearing, and grant relief as the court deems proper, including an order:

(a) Restraining any party from committing acts of domestic violence;

(b) Restraining any party from going onto the grounds of or entering the dwelling that the parties share, from the residence, workplace, or school of the other, or from the day care or school of a child until further order of the court;

(c) Prohibiting any party from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(d) Restraining any party from interfering with the other's custody of the minor children or from removing the children from the jurisdiction of the court;

(e) Restraining any party from having any contact with the victim of domestic violence or the victim's children or members of the victim's household; ~~and~~

(f) Considering the provisions of RCW 9.41.800; *and*

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

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CONNELLY LAW OFFICES, PLLC



The Honorable Susan K. Serko
Hearing: Friday, August 17, 2018 at 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

DANIEL BRAY, individually, and JOEY
TRACY, individually,

Plaintiffs,

vs.

PIERCE COUNTY, a subdivision of the State
of Washington,

Defendant.

NO. 18-2-06355-3

**ORDER DENYING PIERCE
COUNTY'S 12(b)(6) MOTION TO
DISMISS**

THIS MATTER having come before the above-entitled Court upon Defendant Pierce
County's Civil Rule 12(B)(6) Motion to Dismiss, and having reviewed the records including:

1. Defendant Pierce County's Civil Rule 12(B)(6) Motion to Dismiss;
2. Plaintiffs' Opposition to Defendant Pierce County's Civil Rule 12(B)(6) Motion
to Dismiss
3. Defendant's Reply in Support of its Motion to Dismiss;

4. _____; and

5. _____.

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Therefore, it is hereby, ORDERED, ADJUDGED, AND DECREED that Defendant

Pierce County's Civil Rule 12(B)(6) Motion to Dismiss is denied in its entirety.*

sub The stay of discovery is therefore lifted.

DONE IN OPEN COURT THIS 17th day of August, 2018.

Susan K. Serko

THE HONORABLE SUSAN K. SERKO
Superior Court Judge

* w/o prejudice to
revisit this issue
on summary judgment. *JRS*

Presented by:

CONNELLY LAW OFFICES, PLLC

Musette

John R. Connelly, Jr. WSBA No. 12183
Meaghan M. Driscoll, WSBA No. 49863
Jackson R. Pahlke, WSBA No. 52812
Attorneys for Plaintiff

Approved as to form:

Steven W. Fogg

Steven W. Fogg, WSBA No. 23528
Blake Marks-Dias, WSBA No. 28169
Jordan M. Hallstrom, WSBA No. 48036
Attorneys for Defendant



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The Honorable Susan K. Serko
Hearing: Friday, August 17, 2018 at 9:00 a.m.

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

DANIEL BRAY, individually, and JOEY TRACY, individually,

Plaintiffs,

vs.

PIERCE COUNTY, a subdivision of the State of Washington,

Defendant.

NO. 18-2-06355-3

ORDER DENYING PIERCE COUNTY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER having come before the above-entitled Court upon Defendant Pierce County's Motion for Partial Summary Judgment, and having reviewed the records including:

1. Defendant Pierce County's Motion for Partial Summary Judgment;
2. Declaration of Blake Marks-Dias in Support of Defendant Pierce County's Motion for Partial Summary Judgment;
3. Plaintiffs' Opposition to Defendant Pierce County's Motion for Partial Summary Judgment or in the Alternative Plaintiffs' Motion for Continuance Pursuant to CR 56(f);

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- 4. Declaration of Meaghan M. Driscoll in Support of Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment with attached exhibits;
- 5. Declaration of Sue Peters with attached exhibits;
- 6. Declaration of Daniel Bray with attached exhibits;
- 7. Declaration of Joey Tracy;
- 8. Defendant's Reply in Support of its Motion for Partial Summary Judgment;
- 9. _____; and
- 10. _____.

Therefore, it is hereby, ORDERED, ADJUDGED, AND DECREED that Defendant Pierce County's Motion for Partial Summary Judgment is denied in its entirety.

DONE IN OPEN COURT THIS 21st day of December, 2018.

Susan K. Serko

 THE HONORABLE SUSAN K. SERKO
 Superior Court Judge

Presented by:
 CONNELLY LAW OFFICES, PLLC

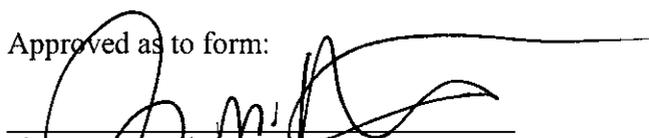
 John R. Connelly, Jr. WSBA No. 12183
 Meaghan M. Driscoll, WSBA No. 49863
 Jackson R. Pahlke, WSBA No. 52812
Attorneys for Plaintiff



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Approved as to form:



Steven W. Fogg, WSBA No. 23528
Blake Marks-Dias, WSBA No. 28169
Jordan M. Hallstrom, WSBA No. 48036
Attorneys for Defendant

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Respondents* in Court of Appeals, Division II Cause No. 53080-5-II to the following parties:

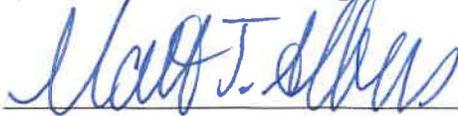
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Original E-filed with:
Court of Appeals, Division II
Clerk's Office

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

DATED: September 16, 2019 at Seattle, Washington.



Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

September 16, 2019 - 11:36 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53080-5
Appellate Court Case Title: Daniel Bray, Respondent v. Pierce County, Petitioner
Superior Court Case Number: 18-2-06355-3

The following documents have been uploaded:

- 530805_Briefs_20190916113445D2807018_8290.pdf
This File Contains:
Briefs - Respondents
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Comments:

Brief of Respondents

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