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Division II  
State of Washington  
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Case No. 53080-5-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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DANIEL BRAY, individually, and JOEY TRACY, individually,

Respondents,

v.

PIERCE COUNTY,

Appellant.

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**APPELLANT'S RESPONSE TO BRIEF  
OF  
AMICUS CURIAE NORTHWEST JUSTICE PROJECT**

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## I. INTRODUCTION

It is undisputed that Pierce County Sheriff's Department ("PCSD") Deputies Ara Steben and Zachary Spencer ("the Deputies") had no legal authority to confiscate David Annas' firearm when they served him with a temporary protection order. Accordingly, appellant Pierce County ("the County") did not wrongfully constructively discharge Respondents Daniel Bray and Joey Tracy in retaliation for whistleblowing because the County did not commit any unlawful conduct for which Respondents could "blow the whistle" on—and thus there could be no "retaliation." While amicus Northwest Justice Project ("NJP") may disagree with the limitation of the Deputies' legal authority to confiscate Mr. Annas' firearm, their recourse is with the legislature—not asking this Court to expand the Domestic Violence Prevention Act ("DVPA"), ch. 26.50 RCW, to impose upon the community at large, or PCSD in particular, legal duties and obligations beyond those contained in the enacted statutes. This Court should reject Respondents' and NJP's attempts to turn the sole and purely legal issue in this case into a widespread referendum on domestic violence public policy. Respondents' claims for wrongful constructive discharge in retaliation for whistleblowing fail as a matter of law.

## II. ARGUMENT

### A. **Washington courts have repeatedly rejected sweeping and amorphous claims of public policy in wrongful discharge claims.**

To maintain a wrongful discharge claim, an employee must establish that a “*clear* mandate of public policy” exists and that “the public-policy linked conduct was a ‘significant factor’ in the decision to discharge the worker.” *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725, ¶¶ 21-22 (emphasis added) (citing *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 75, 821 P.2d 18 (1991)). In a whistleblower wrongful termination claim, the employee must establish *two* clear mandates of public policy that the employer violated. The first is inherent to the cause of action—it is “the public policy found in protecting employees who are discharged in retaliation for reporting employer misconduct, *i.e.*, employee ‘whistleblowing’ activity.” *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989). The second, which is at issue here, is the “employer misconduct” that the employee reported.

Employer misconduct requires a “violation of the letter or policy of the law,” *Dicomes*, 113 Wn.2d at 620, which is only logical—there is no illegal conduct to “blow the whistle on” if the employer did not violate the law. A “violation of the letter or policy of the law” is thus an essential element of a whistleblower wrongful termination claim. *See, e.g., Bott v.*

*Rockwell Intern.*, 80 Wn. App. 326, 335-36, 908 P.2d 909 (1996) (employee must establish that his or her employer “violated either the letter or policy of the law” in order to maintain a claim for wrongful discharge in retaliation for whistleblowing; because “the focus under the *Dicomes* test is on the employer’s wrongdoing, not the employee’s actions,” “the cause of action fails if the employer acted within the law”); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671-72, 807 P.2d 830 (1991) (employee’s wrongful termination claim for whistleblowing failed in light of employer’s “undisputed compliance with the procedural requirements” of the Natural Death Act).

Accordingly, and contrary to NJP’s erroneous assertion otherwise, the “issue of domestic violence prevention and victim protection” (Amicus Br. 1) is *not* an issue before this Court. The only issue before this Court is whether Respondents have established that the County violated a clear mandate of public policy by allegedly (constructively) discharging them—specifically, whether PCSD, through the Deputies, violated the letter or policy of the law when they did not confiscate David Annas’ firearm. Because Respondents have failed to establish any employer misconduct, their whistleblower claim fails as a matter of law. *Martin*, 191 Wn.2d at 725, ¶ 21 (“the focus for whistle-blowing matters is on the *employer’s level*

*of wrongdoing*, not [the employee’s] actions to address what he *perceived* as wrongdoing”) (emphasis added).

Tellingly, NJP does not even cite to the applicable legal standard for—or even reference—the tort of wrongful discharge in violation of public policy. This is almost certainly because NJP recognizes that the tort is a “narrow exception to the at-will doctrine,” *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 723, ¶ 17, 425 P.3d 837 (2018) (emphasis added), and yet, NJP spends the entirety of its amicus brief espousing *sweeping* proclamations of domestic violence protection policy. Washington courts have *explicitly* rejected such broad and amorphous proposals of public policy.

Only “clear violations of important, recognized public policies c[an] expose employers to liability,” so as to “protect[] employers from having to defend against amorphous claims of public policy violations.” *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 276, ¶ 9, 358 P.3d 1139 (2015) (emphasis added). NJP’s amicus brief goes on at length about the “community interest” in preventing domestic violence and the effect that domestic violence has on the community. (Amicus Br. 3-4) There is no doubt that domestic violence is a serious problem to the community. Indeed, the County has *never* disputed that Washington has a strong interest in preventing domestic violence and protecting victims of domestic

violence. (*See* App. Br. 27; Reply Br. 22) But NJP would charge the entire community with a legal obligation and duty to prevent domestic violence and enforce the provisions of the DVPA. (Amicus Br. 3-4) NJP’s reading of the DVPA is so expansive that the *limited* and *narrow* tort of wrongful discharge in violation of public policy would swallow the rule and expose *all* employers to liability for “amorphous claims of public policy violations” of the DVPA. *Rose*, 184 Wn.2d at 276, ¶ 9.

**B. The County did not violate the Domestic Violence Prevention Act.**

Even if this Court *were* to adopt NJP’s amorphous claims of public policy, Respondents’ wrongful termination claims fail because the County did not violate the DVPA. NJP’s assertion that the County would like to “nullify” the DVPA or “exempt” its law enforcement from the provisions thereof (Amicus Br. 5-7) is inflammatory and entirely devoid of any basis in reality.

Nothing in the DVPA, or any other statute, authorized the Deputies to confiscate Mr. Annas’ firearm—a critical fact that NJP conveniently omits from its amicus brief. (*See* App. Br. 14-17, Reply Br. 7-12) The County never “shirk[ed] its duties” (Amicus Br. 4) because it is *undisputed* that neither of the Deputies violated any internal PCSD policy, let alone the DVPA or any other law. Respondents were not constructively discharged

for “demanding accountability” (Amicus Br. 4) because *there was no unlawful act for which the Deputies even could be held “accountable.”*

While NJP may believe in hindsight that the Deputies *should* have confiscated Mr. Annas’ firearm, and that they “abdicated” their “duty” in failing to do so (Amicus Br. 1, 7), the Deputies’ actions were, at most, negligent—*not* unlawful. (App. Br. 17-18; Reply Br. 15-16) As the Pierce County Superior Court recently found in the related negligence lawsuit, the Deputies had no legal authority to confiscate the firearm.<sup>1</sup> Regardless, no Washington court has held that the “abdication” of legislative intent (Amicus Br. 1) alone can establish the clear mandate of public policy needed to maintain a whistleblower wrongful termination claim. This Court should not be the first.

NJP’s claim that the County would like to “force” domestic violence victims to “fend for themselves” (Amicus Br. 6) is as offensive as it is preposterous. The County has never insinuated anything even remotely close to such a claim. In its bald-faced attempts to illicit a knee-jerk emotional response from this Court, NJP ignores that PCSD must follow

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<sup>1</sup> In a separate negligence action against the Deputies, the Pierce County Superior Court recently held as a matter of law that the Deputies had no legal authority to confiscate Mr. Annas’ firearm when they served him with the TPO. *See Kinney, et al. v. Pierce County*, Pierce County Superior Court Cause No. 18-2-07321-4. Consistent with GR 14.1, the County again cites to this case only for “such persuasive value as the court deems appropriate.” GR 14.1.

the law *as written*. While the legislature is free to rewrite the DVPA or any other statute as it sees fit, Mr. Annas was entirely within his legal rights to retain possession of his firearm under the DVPA as currently enacted. This Court should disregard NJP's inflammatory arguments for what they really are: an attempt to turn this purely legal question pertaining to a narrow and limited cause of action into an emotional and widespread referendum on domestic violence public policy. The real question before this Court is clear: whether Respondents can maintain a cause of action for wrongful constructive discharge in retaliation for whistleblowing where the employer never violated the law, and thus there was neither misconduct to "blow the whistle" on nor any "retaliation." This Court should answer that question in the negative.

### **III. CONCLUSION**

This Court should reverse the trial court's denial of the County's motion for partial summary judgment and order the trial court to dismiss Respondents' claims for wrongful constructive termination in violation of public policy.

DATED this 13<sup>TH</sup> day of December, 2019.

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**CERTIFICATE OF SERVICE**

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

DATED this 13<sup>th</sup> day of December, 2019, at Seattle, Washington.

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## Transmittal Information

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