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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

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**THERESA CARSTENSEN,**

**Appellant,**

**v.**

**DAMON RUIZ,**

**Respondent.**

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**APPELLANT'S OPENING BRIEF**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF CASE .....	2
A. PROCEDURAL HISTORY.....	5
IV. ARGUMENT .....	9
A. THE TRIAL COURT ERRED IN DISMISSING MS. THERESA CARSTENSEN'S PETITION WHEN IT WAS LEGALLY SUFFICIENT .....	9
1. Ms. Theresa Carstensen Established a Basis for a Sexual Assault Protection Order .....	10
a. <u>Ms. Carstensen provided sufficient                evidence that she was the victim of                nonconsensual sexual penetration                and contact</u> .....	10
b. <u>Ms. Carstensen established a                reasonable fear of future                dangerous acts</u> .....	11
2. Ms. Theresa Carstensen's Petition was Sufficient, Therefore, the Trial Court Erroneously Dismissed Based on <i>Roake</i> .....	13
3. Even if <i>Roake</i> Did Mandate More than Ms. Carstensen Established, the Legislature Explicitly Rejected the <i>Roake</i> Court's Interpretation of RCW 7.90.020 Clarifying its Intent.....	16

**TABLE OF CONTENTS**

	<u>Page</u>
B. THE TRIAL COURT ERRED BY CONSIDERING EVIDENCE BEYOND THE PLEADINGS AND APPLYING THE WRONG LEGAL STANDARD TO MR. RUIZ'S MOTION TO REOPEN.....	18
C. THE TRIAL COURT ERRED BY ENTERING FINDINGS OF FACT THAT ARE NOT SUPPORTED BY THE RECORD.....	22
D. EVEN IF THE REOPENING OF THE TEMPORARY ORDER WAS PROPER, MS. CARSTENSEN WAS ENTITLED TO A FULL HEARING ON THE MERITS OF THE SEXUAL ASSAULT PROTECTION ORDER.....	23
V. CONCLUSION .....	24

# TABLE OF AUTHORITIES

## Page

### CASES

<i>State v. Armendariz</i> , 160 Wn.2d 106, 110, 156 P.3d 201 (2007).....	23
<i>In re Custody of A.F.J.</i> , 179 Wn.2d 179, 184, 314 P.3d 373 (2015).....	22
<i>In re Custody of C.C.M.</i> , 149 Wn. App. 184, 194, 202 P.3d 971 (2009) .....	9, 18, 23
<i>Erection Co. v. Department of Labor and Industries of State of Wash.</i> , 121 Wn.2d 513, 518, 852 P.2d 288 (1993).....	24
<i>McCurry v. Chevy Chase Bank, FSB</i> , 169 Wn.2d 96, 102, 233 P.3d 861 (2010).....	20
<i>Nelson v. Duvall</i> , 197 Wn. App. 441, 453, 387 P.3d 1158 (2017) .....	10, 17
<i>State v. Ragin</i> , 94 Wn. App. 407, 972 P.2d 5219 (1999) .....	12
<i>Roake v. Delman</i> , 189 Wn.2d 775, 408 P.3d 658 (2018).....	<i>passim</i>

### STATUTES

RCW 7.90 .....	17, 18
RCW 7.90.005 .....	1, 11, 25
RCW 7.90.010(1) .....	10
RCW 7.90.010(5) .....	11
RCW 7.90.020 .....	10, 16
RCW 7.90.020(1) .....	10, 14, 16

## TABLE OF AUTHORITIES

	<u>Page</u>
RCW 7.90.030(1)(a).....	19
RCW 7.90.050 .....	23, 24
RCW 7.90.110 .....	23
RCW 7.90.110(3).....	4
RCW 7.90.130 .....	5, 16
RCW 7.90.130(2)(e).....	<i>passim</i>
RCW 7.92 .....	18
RCW 7.94 .....	18
RCW 10.14 .....	18
RCW 26.50 .....	18
RCW 74.34 .....	18

### **COURT RULES**

CR 12.....	16, 21
CR 12(b) .....	19
CR 12(b)(6) .....	19, 20
CR 12(c) .....	5, 7, 13, 15, 19, 20

### **OTHER AUTHORITIES**

Laws of 2019, ch. 258 § 1 .....	17
Laws of 2019, ch. 258 § 2.....	16
11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.03.01 (4 <sup>th</sup> ed.).....	12

## I. INTRODUCTION

“Sexual assault is the most heinous crime against another person short of murder. Sexual assault inflicts humiliation, degradation, and terror on victims.” RCW 7.90.005. Theresa Carstensen was raped by Damon Ruiz. She sought safety from the court system and the Court denied her the opportunity to be heard. After granting an ex parte temporary order, the trial court, relying on *Roake v. Delman*, reopened and dismissed Ms. Carstensen’s temporary protection order. The trial court erroneously interpreted and applied the law depriving Ms. Carstensen of her voice. Ms. Theresa Carstensen seeks review of the trial court’s denial of her petition for a sexual assault protection order.

## II. ASSIGNMENTS OF ERROR

- (1) The trial court erred by dismissing Ms. Carstensen’s petition for a sexual assault protection order and dismissing the petition when she had established that she had been raped.
- (2) The trial court erred by reopening Ms. Carstensen’s temporary sexual assault protection order and denying it when it was legally sufficient.
- (3) The trial court erred by entering findings of fact that are not supported by the record, specifically that “petitioner did not present facts showing that she had a reasonable fear of future dangerous acts by respondent” and “[t]he petitioner has failed to demonstrate that there is

sufficient basis to enter a temporary order without notice to the . . . opposing party.”

- (4) The trial court erred by considering evidence beyond the pleadings and applying the wrong legal standard to Mr. Ruiz’s motion to reopen.
- (5) Even if reopening the temporary order was proper, the trial court erred by denying Ms. Carstensen a full hearing on the merits of the sexual assault protection order.

### III. STATEMENT OF CASE

Ms. Carstensen lives in Lincoln County with her husband and their children. CP S22-104. She is a loving mother and wife. *Id.* On September 23, 2017, Ms. Carstensen went to a concert in Spokane with her friend, Jessica Houston, and Courtney and Damon Ruiz. CP S22-4.

After the concert, they all went out to the bar. CP S22-4. The Ruizes “bought a drink for Jessica and [Ms. Carstensen]. Immediately after drinking the drink, [Ms. Carstensen] started to feel off.” CP at S22-4. Jessica also began blacking out after the first drink at the bar. CP S22-109. According to Jessica, it was abundantly clear that Ms. Carstensen was intoxicated. *Id.* Jessica remembered that Ms. Carstensen was falling down drunk on the way back to the hotel. *Id.* The Ruizes came back to Ms. Carstensen and Jessica’s hotel room. CP S22-4. Ms. Carstensen does not remember why. *Id.*

That night Damon Ruiz raped Ms. Carstensen. CP S22-4. Her friend, Jessica, saw Damon Ruiz vaginally penetrating Ms. Carstensen on the hotel bed. CP S22-110. Ms. Carstensen remembers Mr. Ruiz having her perform sexual acts on him. CP S22-4. Throughout this time, Ms. Carstensen was coming in and out of awareness. *Id.* The last thing she remembers from the night is Courtney Ruiz leading her to the hotel shower where she saw Damon Ruiz. *Id.* The next day, Ms. Carstensen woke up in the hotel shower bleeding from her vagina. *Id.* She felt like she could not move. *Id.* Ms. Carstensen laid in the shower attempting to regain control of her body. *Id.*

After the rape, Ms. Carstensen's behavior changed. CP S22-104. "She did not want to leave the house. She stopped engaging with [her husband] and the[ir] kids." *Id.* "She used to go walking outside but stopped doing that as well." *Id.* "She really did not talk with anyone. Her friend Jessica would come over occasionally, and [her husband] would walk in to find them crying together." *Id.* On February 2, 2018, Ms. Carstensen told her sister that Damon Ruiz raped her. CP S22-113. After the sexual assault, Ms. Carstensen felt like Mr. Ruiz started to follow her. CP S22-4. She saw him at

the grocery store a number of times. *Id.* He got in line immediately after her with only one item to check out. *Id.*

“[Ms. Carstensen’s] isolating behavior lasted seven or eight months, until June of 2018.” CP S22-113. After beginning to come to grips with the rape, Ms. Carstensen told her husband what had happened to her. She then reported it to the Spokane Police Department in June of 2018. CP S22-4. On June 21, 2018, Ms. Carstensen filed for a sexual assault protection order in Lincoln County Superior Court.<sup>1</sup> CP S22-98.

As a result of her fear of Mr. Ruiz, Ms. Carstensen and her family moved 23 miles out of Wilbur, Washington. CP S22-4. On December 9, 2018, Ms. Carstensen was at home and saw Damon Ruiz driving toward her house. “He pulled all the way through the driveway toward our shop.” *Id.* Ms. Carstensen was petrified and called the police immediately. *Id.* They took a while to get out and Mr. Ruiz was already gone. *Id.* “Damon stopped and talked with a neighbor business owner, as if he had business there. The business

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<sup>1</sup> In violation of RCW 7.90.110(3), the Lincoln County Superior Court denied the temporary order without providing a basis or filing it. CP S22-4 and CP S22-98, VRP 18. This means there is no record in the court system of Ms. Carstensen's first attempt to find safety other than her statement in the petition.

is not in a commercialized area, and [Ms. Carstensen] had never seen anyone stop there before.” *Id.*

#### **A. PROCEDURAL HISTORY**

On December 11, 2018, just two days after Damon Ruiz drove out to her house, Ms. Carstensen again petitioned for a sexual assault protection order (SAPO) in Lincoln County.<sup>2</sup> CP S22-9. In her SAPO petition, Ms. Carstensen declared, under penalty of perjury: “I am now very afraid because Damon has found me again despite my move. I am afraid of what he will do if he comes to my house again and finds me alone.” CP S22-4. The same day, Judge Strohmaier signed a temporary SAPO protecting Ms. Carstensen, setting a return hearing for December 21, 2018. CP S22-7.

On December 18, 2018, Mr. Ruiz filed a “Motion to Dismiss pursuant to *Roake v. Delman*, 189 Wn.2d 775, 408 P.3d 658 (2018), CR 12(c) and RCW 7.90.130.” CP S22-15. “Mr. Ruiz claims that the petitioner failed to show any reasonable fear of future dangerous acts from the respondent.” CP S22-16. On the basis of that claim, Mr. Ruiz alleged the temporary SAPO was “invalid.” *Id.* Mr. Ruiz only

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<sup>2</sup> This time, Ms. Carstensen was represented by counsel and was able to obtain a temporary order.

filed this motion and did not file a response to the petition for the sexual assault protection order. VRP 37.

With the motion, Mr. Ruiz filed significant additional declarations and exhibits. CP S22-15-74. Mr. Ruiz argued that he could assert a valid defense to Ms. Carstensen's reasonable fear of future dangerous acts. CP S22-16. Mr. Ruiz claimed that he was picking up meat from the business Ms. Carstensen mentioned in her declaration and that he had no idea she lived there until she filed the second SAPO in December. CP S22-27, CP S22-29. In this motion, Mr. Ruiz also requested that Ms. Carstensen pay his attorney fees. CP S22-24.

Ms. Carstensen filed a response brief on December 20, 2018. CP S22-75. In it, Ms. Carstensen reminded the court that "[s]exual assault is the most heinous crime against another person short of murder." CP S22-75. She asked the court to consider the merits of her rape. S22-87-88.

On December 21, 2018, the time and place set for the return hearing, the Lincoln County Superior Court heard Mr. Ruiz's motion. Verbatim Report of Proceedings (VRP) at 1. At the hearing, Mr. Ruiz's counsel said, "we're not contesting [the alleged sexual assault] at this point." VRP at 8. He alleged that the "petitioner has

the burden to prove that there was acts that are dangerous reasonable acts, that's what they need to prove[.]” VRP at 9-10. Ms. Carstensen’s attorney argued, “on the motion to dismiss the petition I think very clearly alleges the reasonable fear.” VRP at 14. The judge found that the time since the rape “dissipates” the reasonable fear. VRP at 31. The court found “that just coincidences do happen.” VRP at 27.

The court denied Mr. Ruiz’s CR 12(c) motion to rule on the pleadings and his request for attorney fees. VRP 40, 48. The court found that it would “allow [the SAPO] to be reopened with a meritorious defense.” VRP at 38. The court considered all the additional evidence filed by the Respondent and granted the motion to reopen. VRP 45-46. The court based this solely on its finding that it must make a finding of reasonable fear to issue a sexual assault protection order. VRP 46. The court said “I’m going to hang my hat on that[.]” *Id.*

The court did not address the merits of the SAPO except to say a couple of times that Ms. Carstensen was very intoxicated and likely could not consent. VRP 25, 26, 39. The judge said, “I’m only just addressing the temporary order here.” VRP at 55. On the record, the court said:

The concern, I guess, the difference we do have with the petitioner, the Court here, is she's more subjective, I totally believe where she's coming from, this is very disconcerting to her; no question and her husband too. But I do find that she was very extremely drunk to – to, most likely lack of fully consent, but that is not the key issue here.

VRP at 39.

Ms. Carstensen's counsel argued that the reasonableness test should be whether it was reasonable for Ms. Carstensen to be fearful in light of all the circumstances, including that Mr. Ruiz had previously raped her. VRP 23-24. The court rejected this argument adopting a purely objective standard of reasonableness. VRP 32-33.

After significant argument on the form of the order, the court chose to add a box to the form denial that said "reopen temporary order and dismiss the petition" and checked the box that said "[t]he petitioner has failed to demonstrate there is a sufficient basis to enter a temporary order without notice to the . . . opposing party." CP S22-122. The court also wrote in: "Petitioner did not present facts showing that she had a reasonable fear of future dangerous acts by respondent." CP S22-123.

Ms. Theresa Carstensen filed this appeal timely. CP S22-119.

#### IV. ARGUMENT

Ms. Theresa Carstensen asks this Court to reverse the trial court's dismissal of her sexual assault protection order and remand for a hearing on whether nonconsensual sexual penetration or conduct occurred. The trial court erred: (A) in dismissing Ms. Carstensen's petition when it was legally sufficient; (B) by applying the wrong legal standard to a motion to reopen under RCW 7.90.130(2)(e); (C) in entering unsupported findings of fact; and (D) by refusing to hear the merits of Ms. Carstensen's rape allegations.

##### **A. THE TRIAL COURT ERRED IN DISMISSING MS. THERESA CARSTENSEN'S PETITION WHEN IT WAS LEGALLY SUFFICIENT.**

The trial court erroneously dismissed Ms. Theresa Carstensen's sexual assault protection order petition when (1) she had alleged facts sufficient to establish a reasonable fear of future dangerousness, (2) *Roake* did not demand anything other than a prima facie showing of reasonable fear, and (3) the Legislature proclaimed that *Roake* was erroneously decided.

All of these errors are errors of law and are, therefore, reviewed de novo. *In re Custody of C.C.M.*, 149 Wn. App. 184, 194, 202 P.3d 971 (2009).

**1. Ms. Theresa Carstensen Established a Basis for a Sexual Assault Protection Order.**

RCW 7.90.020(1) defines the petition requirements for a SAPO at the time of the hearing:

A petition for relief shall allege the existence of nonconsensual sexual conduct or nonconsensual sexual penetration, and shall be accompanied by an affidavit made under oath stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought.

Ms. Carstensen established both elements of RCW 7.90.020.

- a. Ms. Carstensen provided sufficient evidence that she was the victim of nonconsensual sexual penetration and contact.

Damon Ruiz raped Ms. Theresa Carstensen. Nonconsensual is defined as “a lack of freely given agreement.” RCW 7.90.010(1). Division I, in interpreting nonconsensual, held “the ability to consent to sexual conduct or penetration, or to freely agree to sexual conduct or penetration, necessarily means that the individual giving consent must have the mental capacity to consent.” *Nelson v. Duvall*, 197 Wn. App. 441, 453, 387 P.3d 1158 (2017). Thus, someone who is intoxicated lacks the capacity to consent. See *id.* “Sexual penetration’ means any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or

anus of another person ...”, RCW 7.90.010(5). Ms. Carstensen described being drugged and raped. Her friend also described her as falling-down drunk on the way back to the hotel. Mr. Ruiz would have necessarily been aware of her intoxicated status. She remembered Damon Ruiz orally penetrating her with his penis. She provided the declaration of a friend who also saw Damon Ruiz raping her. She described being left bleeding on the floor of the shower unable to fully control her body. There can be no question that Ms. Carstensen established a prima facie case of nonconsensual sexual conduct and penetration based on her inability to consent.

b. Ms. Carstensen established a reasonable fear of future dangerous acts.

With regard to the reasonable fear, there is no definition within the statute and no case law interpreting what is “reasonable.” “[T]he lead opinion [in *Roake*] does not expressly raise the dismissal standard to require *plausible* fearfulness in the petition, and all evidence of legislative intent in the SAPO act is to the contrary. See e.g., RCW 7.90.005 (“Sexual assault inflicts humiliation, degradation, and terror on victims.”)” *Roake*, 189 Wn.2d at 810 (Yu, J. *dissenting*). The Washington Pattern Jury Instruction defines reasonable fear in the context of harassment as:

'Reasonable fear' is fear that a reasonable person who is of the same gender as the person threatened would have, *under all the circumstances*.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 36.03.01 (4th ed.)  
(emphasis added).

When analyzing the circumstances, a trial court can consider evidence of prior behavior to determine whether a person's fear is reasonable. See *State v. Ragin*, 94 Wn. App. 407, 972 P.2d 5219 (1999). In this case, the trial court needed to consider the facts and circumstances of the rape in order to determine whether Ms. Carstensen's fear was reasonable. Thus, Ms. Carstensen did not need to allege a fear that would be reasonable to someone who had never been sexually assaulted, rather the court should have looked at her fear from the perspective of a sexual assault survivor.

In the proper light, Ms. Carstensen's fear was reasonable. Ms. Carstensen described Mr. Ruiz repeatedly showing up at the grocery store and staring her down. She described how he would walk into the store after her, get a single item, and check out behind her while staring at her. She described being so afraid, she moved her family 23 miles outside of town and still he drove through her driveway past her house. He stared in the house she bought as a sanctuary to be free of him. Ms. Carstensen was petrified and

immediately called the police. This is sufficient to establish a reasonable fear of future dangerousness. In fact, the trial court, by denying the CR 12(c) motion to dismiss, necessarily found the pleadings sufficient.

The trial court committed an error of law when it applied the wrong legal standard for determining reasonableness. The court determined Ms. Carstensen's fear was not objectively reasonable, ignoring all the circumstances. The court relied on the declarations filed by Mr. Ruiz to make the determination that Mr. Ruiz had an innocent, non-pretextual reason for going out to her house. The trial court should have considered the facts of the rape, the fear that the rape engendered in Ms. Carstensen, and the fact that Ms. Carstensen did not know or believe Mr. Ruiz's "innocent" purpose in coming to her home. Ms. Carstensen presented sufficient evidence of a reasonable fear of future dangerousness to withstand a sufficiency motion.

**2. Ms. Theresa Carstensen's Petition was Sufficient, Therefore, the Trial Court Erroneously Dismissed Based on *Roake*.**

Whether couching it as a petition to reopen a 12(c) motion, or a motion pursuant to *Roake*, the analysis is based on the pleadings alone. RCW 7.90.130(2)(e) allows the respondent to "petition the

court, to reopen the order if he or she did not receive actual prior notice of the hearing and if the respondent alleges that he or she had a meritorious defense to the order or that the order or its remedy is not authorized by this chapter.”

The Washington Supreme Court in *Roake*, “[held] that RCW 7.90.130(2)(e) provides the procedure and opportunity to contest the sufficiency and validity of the petition and temporary order, and that the trial court correctly held that Roake's petition was legally insufficient under RCW 7.90.020(1).” *Roake v. Delman*, 189 Wn.2d 775, 777, 408 P.3d 658 (2018). The Supreme Court clarified that this is a motion on *the pleadings*. *Id.* at 784.

In *Roake*, Megan Roake was a college student at the University of Washington when Maxwell Delman, also a student at UW, violently raped her. *Id.* at 777. The rape took place near the end of the quarter. *Id.* When Ms. Roake returned to school, she reported the rape to the police and the university student conduct office. *Id.* at 777-78. The student conduct office issued a no contact order pending the outcome of its investigation. *Id.* While it was pending, Ms. Roake saw Mr. Delman a couple of times on campus and at one or more parties. *Id.* In January of 2015, Ms. Roake petitioned the court for a sexual assault protection order, describing

the violent rape, the times she had seen Mr. Delman, and stating that she did not know what he was capable of. *Id.* at 778. The court issued a temporary sexual assault protection order and set a hearing fourteen days out. *Id.* After multiple continuances, Mr. Delman, through counsel, filed a motion to dismiss pursuant to CR 12(c). *Id.* at 778-79.

Roake responded that her statement in her petition that she “did not know what Delman was capable of” was sufficient to demonstrate her reasonable fear of future dangerous acts under the act, and that she did not have to prove the existence of acts giving rise to reasonable fear of future dangerous acts to support issuance of a final SAPO. No other assertions or statements, threats, or subsequent actions by Delman were asserted.

*Id.* at 779. “The trial court granted the motion to dismiss, holding that the petition failed to establish Roake had any reasonable fear of future dangerous acts from Delman.” *Id.* The Court of Appeals reversed. The Supreme Court issued a four-opinion plurality. The lead opinion was very narrow in its holding, finding that the SAPO statute provides a mechanism under RCW 7.90.130(2)(e) for a respondent to allege “a meritorious defense to the sufficiency of a temporary SAPO.” *Id.* at 784.

The *Roake* court held that the pleadings were legally insufficient because they failed to allege “specific statements or

actions . . . which g[a]ve rise to a reasonable fear of future dangerous acts[.]” *Id.* at 784-85 and RCW 7.90.020(1). The court applied the traditional CR 12 standard and accepted all of Ms. Roake’s statements in her pleadings as *true*, but found them legally insufficient. “Where, as here, a respondent brings a challenge to the sufficiency of the initial petition, *either under RCW 7.90.130 or by way of a motion to dismiss* as filed here, a trial court resolves that claim *on the pleadings*.” *Roake*, 189 Wn.2d at 784 (lead opinion) (emphasis added). Here, the court made a legal determination about the reasonableness of her fear after reviewing declarations well beyond the scope of the pleadings. This is improper even under *Roake*. The trial court should have only considered the pleadings; Mr. Ruiz never filed a response to the petition. Therefore, the only evidence the court could consider was Ms. Carstensen’s petition, which was sufficient.

**3. Even if *Roake* Did Mandate More than Ms. Carstensen Established, the Legislature Explicitly Rejected the *Roake* Court’s Interpretation of RCW 7.90.020 Clarifying its Intent.**

In response to *Roake*, during the next session, the Legislature struck the “reasonable fear” language. Laws of 2019, ch. 258 § 2.

Though this change in legislation is not effective until July 28, 2019, the Legislature stated their intent:

The legislature finds that the Washington supreme court's decision in *Roake v. Delman*, 189 Wn.2d 775 (2018), *does not reflect the legislature's intent regarding requirements for obtaining a civil sexual assault protection order pursuant to chapter 7.90 RCW*. The legislature intends to respond to this decision by clarifying that a petitioner who seeks a sexual assault protection order *is not required to separately allege or prove that the petitioner has a reasonable fear of future dangerous acts* by the respondent, in addition to alleging and proving that the petitioner was sexually assaulted by the respondent. The legislature agrees with the dissenting opinion's view in *Roake v. Delman* that *"experiencing a sexual assault is itself a reasonable basis for ongoing fear."*

Laws of 2019, ch. 258 § 1.

The Legislature has made it clear that the Supreme Court misinterpreted its intent. Relying on this misinterpretation, the trial court dismissed Ms. Carstensen's petition. "When the trial court[s] . . . decision rests on an improper interpretation of the law, 'the appropriate course of action is to remand to the trial judge to apply the correct rule' and make and enter the necessary findings of fact and conclusions of law." *Nelson v. Duvall*, 197 Wn. App. 441, 457, 387 P.3d 1158 (2017) (internal citations omitted). Here, the trial court, relying on a misinterpretation of the law, denied Ms.

Carstensen's temporary protection order and dismissed her petition.

This Court should reverse and remand.

**B. THE TRIAL COURT ERRED BY CONSIDERING EVIDENCE BEYOND THE PLEADINGS AND APPLYING THE WRONG LEGAL STANDARD TO MR. RUIZ'S MOTION TO REOPEN.**

The trial court erroneously considered significant evidence, other than the pleadings; did not presume the validity of the pleadings; and treated Mr. Ruiz's motion as a full hearing on the merits of his "defense." These are errors of law and are, therefore, reviewed de novo. *In re Custody of C.C.M.*, 149 Wn. App. 184, 194, 202 P.3d 971 (2009).

The language of RCW 7.90.130(2)(e) allowing the Respondent to petition to reopen the temporary order is unique in protection order proceedings. See 26.50 RCW (domestic violence protection order), 10.14 RCW (anti-harassment orders), 7.92 RCW (stalking protection orders), 74.34 RCW (vulnerable adult protection orders), 7.94 RCW (extreme risk protection orders). There is no definition or guidance on a "petition to reopen" within Chapter 7.90 RCW. The Supreme Court in *Roake* did not define "petition to reopen."

This Court should interpret RCW 7.90.130(2)(e)'s "meritorious defense" language to mean a meritorious defense such as those

articulated in Civil Rule 12(b) and (c). To interpret it more broadly, would render a permanent hearing superfluous. Most respondents have what they believe to be a meritorious defense to the facts of a protection order. The appropriate means of raising that is to respond to the petition and have a hearing on the merits.

For example, if the petitioner for a sexual assault protection order alleged that her husband raped her and then told her he would kill her if she told anyone. A “meritorious defense” under RCW 7.90.130(2)(e) would be that the petitioner is not eligible for a SAPO because the parties were in a family or household relationship. See RCW 7.90.030(1)(a). An RCW 7.30.130(2)(e) “meritorious defense” should not be that the respondent did not rape her. That is a dispute of fact for the permanent order hearing.

Interpreting RCW 7.90.130(2)(e) to allow motions on validity and sufficiency is consistent with the decision in *Roake*. Though the Supreme Court did not define what it meant to reopen, it did characterize it as a challenge to the validity or sufficiency of the pleadings. *Roake*, 189 Wn.2d at 777.

There are two mechanisms available for a sufficiency of the pleadings analysis: CR 12(b)(6) and CR 12(c). CR 12(b)(6) allows a motion to dismiss for “failure to state a claim upon which relief can

be granted.” CR 12(c) states “any party may move for judgment on the pleadings.” In both CR 12(b)(6) and CR 12(c) motions, courts must “presume that the plaintiff’s factual allegations are true and draw all reasonable inferences from the factual allegations in the plaintiff’s favor.” *Roake*, 189 Wn.2d at 806 (Yu, J. *dissenting*). The question before the Court is whether the plaintiff has established a prima facie case.

For a 12(c) motion, the court considers the filing that began the case and the response and makes a legal determination about the sufficiency of the pleadings. Here, the trial court properly determined that under CR 12(c), the pleadings were sufficient and, therefore, denied Mr. Ruiz’s CR 12(c) motion. For a CR 12(b)(6) motion, the court only considers the filing that began the case to determine if it legally sufficient. “This weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy.” *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010). It is unclear how the pleadings could be sufficient under CR 12(c), but not CR 12(b)(6).

In addition, the trial court read and considered significant additional information beyond the pleadings. In a sufficiency of the pleadings analysis, this is improper and automatically converts the

motion to a summary judgment motion that is not appropriate in the context of RCW 7.90.130(2)(e). The court also made factual findings in the guise of legal determinations. The question of whether Ms. Carstensen's fear was reasonable is a question of fact that cannot be determined on a CR 12 motion. In order to obtain a temporary protection order, of any kind, the petitioner must plead irreparable harm would result if they are not given an ex parte order. If the court's approach below is allowed to stand, a respondent could simply produce colorable evidence that the irreparable harm standard, a much higher standard than preponderance of the evidence, had not been met and the petition would necessarily be dismissed. Allowing this procedure, would mean that petitioners would likely never be able to get a hearing on the merits of their claims, instead arguing about unnecessary procedural hurdles.

"[T]he primarily procedural conclusions reached by the lead opinion [in *Roake*] may cause serious consequences for future SAPO petitions." *Roake*, 189 Wn.2d at 804 (Yu, J. *dissenting*). As Justice Yu foresaw, this lack of clarity is creating problems all over the state. This Court has the opportunity to clarify the law by adopting a clear interpretation of "meritorious defense" under RCW 7.90.130(2)(e). Consistent with *Roake*, this Court should interpret

RCW 7.90.130(2)(e) to be a challenge to the validity or sufficiency of the pleadings. The trial court considered inappropriate evidence and applied the wrong legal standard to Mr. Ruiz's motion to reopen; therefore, this Court should reverse.

**C. THE TRIAL COURT ERRED BY ENTERING FINDINGS OF FACT THAT ARE NOT SUPPORTED BY THE RECORD.**

The court erroneously found that Ms. Carstensen had failed to present a sufficient basis to enter a temporary order without notice to the opposing party. Findings of fact must be supported by substantial evidence, which refers to the quantum of evidence sufficient to persuade a fair-minded person of the truth of a proposition. *In re Custody of A.F.J.*, 179 Wn.2d 179, 184, 314 P.3d 373 (2015).

With regard to the reasonable fear finding, as addressed *supra* at 11-13, Ms. Carstensen presented sufficient evidence as to all necessary elements to obtain a sexual assault protection order. The court's finding that the evidence was insufficient to enter the order when Mr. Ruiz was not present is not supported by substantial evidence. This is complicated by the fact that originally a temporary order had been issued *ex parte*. Nonetheless, at the time the court denied the temporary order, Mr. Ruiz was not only present, he filed significant legal argument and documentary evidence, he was

represented by counsel, and was allowed to argue the motion that leads to this appeal. There is no evidence whatsoever to support the finding that Mr. Ruiz was not present.

**D. EVEN IF THE REOPENING OF THE TEMPORARY ORDER WAS PROPER, MS. CARSTENSEN WAS ENTITLED TO A FULL HEARING ON THE MERITS OF THE SEXUAL ASSAULT PROTECTION ORDER.**

Survivors of sexual assault who seek the safety of the courts, via a petition for a sexual assault protection order, are entitled to a hearing on the merits of their petition. Errors of law are reviewed de novo. *In re Custody of C.C.M.*, 149 Wn. App. 184, 194, 202 P.3d 971 (2009). “The goal of statutory interpretation is to discern and implement the legislature’s intent.” *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). When the plain language of the statute is clear, courts should look no further. *Id.* The trial court here denied Ms. Carstensen a hearing in violation of the plain and unambiguous language of RCW 7.90.050.

Upon receipt of the petition, the court shall order a hearing which shall be held not later than fourteen days from the date of the order. . . . The court may issue an ex parte temporary sexual assault order pending the hearing as provided in RCW 7.90.110.

RCW 7.90.050 (emphasis added).

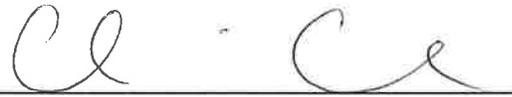
"[T]he word "shall" imposes a mandatory, jurisdictional requirement[.]" *Erection Co. v. Department of Labor and Industries of State of Wash.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). When a court receives a sexual assault protection order petition it must set a hearing within 14 days. The language of RCW 7.90.050 is also clear that the court must set a hearing, whether or not it grants a temporary ex parte order. Therefore, if a temporary order were reopened and subsequently denied, RCW 7.90.050 still mandates a hearing on the merits. Here, the court set the hearing, but refused to allow argument or testimony on the facts of the nonconsensual sexual penetration. Instead, the court allowed Mr. Ruiz to reopen the temporary order, ruled on that, but never reached the issue of the full hearing. The court only heard argument as to the Respondent's motion, denying Ms. Carstensen any chance at safety or justice. Ms. Theresa Carstensen had a due process right to a hearing on the merits. The trial court erred by ignoring the unambiguous language of RCW 7.90.050 and refusing Ms. Carstensen a hearing.

## **V. CONCLUSION**

Ms. Theresa Carstensen asks this Court to reverse the trial court's dismissal of her sexual assault protection order petition. Justice Yu's fears that *Roake* will "cause serious consequences"

have come to fruition. Sexual assault survivors are being denied the opportunity to be heard. The courts are rendering them voiceless,<sup>3</sup> retraumatizing and revictimizing survivors of the “most heinous crime short of murder.” RCW 7.90.005. Ms. Carstensen asks this Court for her voice.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of July, 2019.

A handwritten signature in cursive script, appearing to read 'Claire Carden', written over a horizontal line.

CLAIRE CARDEN, WSBA #50590  
Attorney for Appellant

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<sup>3</sup> This is especially egregious in this case because when Ms. Carstensen was pro se, she was unable to even get her petition filed. The Lincoln County Superior Court would not even give her a cause number, much less a hearing or the opportunity to be heard.

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