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Division III
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No. 369943

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DONNA ZINK, et al.,

Appellant/Cross Respondent,

v.

CITY OF MESA, et al.,

Respondents/ Cross Appellants.

RESPONSE BRIEF OF RESPONDENTS AND OPENING BRIEF OF
CROSS APPELLANTS

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I. INTRODUCTION

The Respondents / Cross-Appellants, City of Mesa, Duana Ross, Elizabeth Davis, and David Ferguson (collectively “Mesa”), submit this brief in response to Appellant / Cross-Respondent Donna Zink’s opening brief.

II. ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR

1. Did the trial court properly dismiss Ms. Zink’s claims for false arrest, false imprisonment, malicious prosecution, intentional infliction of emotional distress, outrage, and 42 U.S.C. § 1983 claim for fourth amendment violation at summary judgment?
2. Did the trial court abuse its discretion in ordering Ms. Zink to submit to an independent examination pursuant to CR 35?
3. Did the trial court abuse its discretion in dismissing Ms. Zink’s claim for negligent infliction of emotional distress for her willful and knowing violation of the trial court’s CR 35 order?
4. Were the trial court’s findings of fact and conclusions of law supported by substantial evidence?
5. Were the trial court’s conclusions of law premised on incorrect application of the law?

6. Did Ms. Zink present sufficient evidence to prove her surviving 42 U.S.C § 1983 claim?
7. Did the trial court abuse its discretion in adjusting Ms. Zink's requested attorney's fees and costs for reasonableness?
8. Did the trial court abuse its discretion in adjusting Ms. Zink's requested attorney's fees and costs to segregate those attributable to her successful claim from her dismissed claims?
9. Did the trial court err in failing to award Ms. Zink a statutory attorney fee under RCW 4.84.010 as a cost awardable under RCW 42.30.120?

**III. ISSUES PERTAINING TO CROSS-APPELLANTS'
ASSIGNMENTS OF ERROR**

1. Did the trial court err in failing to dismiss Ms. Zink's claims for violation of 42 U.S.C. § 1983, violation of the Open Public Meetings Act, and negligent infliction of emotional distress on summary judgment?
2. Did the trial court commit error in refusing to enter judgment on the jury's verdict?
3. Is the trial court's finding of fact and conclusion of law that Mayor Ross placed an improper condition on Ms. Zink's attendance at the meeting scheduled for May 8, 2003 supported by substantial evidence and applicable law?

4. Did the trial court err in failing to award Mesa attorney's fees and costs?

IV. RESTATEMENT OF THE CASE

This case stems from a dispute that occurred at the City of Mesa city hall on May 8, 2003. (CP 1—28). That evening, City of Mesa had a city council meeting scheduled for 7:00 p.m.. *Id.* Ms. Zink arrived at City Hall, with her video camera, and began filming the city council members before the scheduled meeting was called to order. (Ex. 51); (CP 71—89). Before the meeting began, Mayor Ross asked Ms. Zink to turn her video camera off. (CP 72). Ms. Zink refused and told Mayor Ross to call the police. (CP 72). Mayor Ross obliged with the request because then City Attorney, the Honorable Judge Terry Tanner, advised Mayor Ross to call the police if there was a problem at City Hall. (CP 72; 1382:16—24).

While waiting for the police to arrive, Mayor Ross called the meeting to order and then immediately recessed. (CP 73). Franklin County Sheriff's Department ("FCSD") eventually arrived on the scene and interviewed Mayor Ross, council member Patrick Fay, Ms. Zink, and Mr. Zink. (CP 79—89; 218; 224). Based on their investigation and Ms. Zink's refusal to turn off her video camera, Ms. Zink was arrested for criminal trespass. (CP 222—23, 227, 231). While it is unclear if Ms. Zink was ever formally charged, the initial charge was dropped. (CP 129—30).

In July 2005, Ms. Zink filed a civil complaint against the City of Mesa, Mayor Ross, and council members Patrick Fay, Elizabeth Davis, and David Ferguson (collectively “Mesa”), FCSD, Sheriff Richard Lathim, Sergeant Pfeiffer, and Deputies Rueben Bayona and Scantlin. (CP 1—10). In her complaint Ms. Zink sought monetary damages against all defendants for claims of false arrest, false imprisonment, violation of 42 U.S.C. § 1983 for constitutional torts, malicious prosecution, violation of the Open Public Meetings Act (“OPMA”), intentional infliction of emotional distress, and negligent and reckless infliction of emotional distress. (CP 1—9). Ms. Zink’s husband, Jeff Zink, also sought monetary damages from all defendants for a claim of loss of consortium. (CP 1—9).

FCSD and Mesa moved for summary judgment on Ms. and Mr. Zink’s claims in summer 2006. (CP 2161—2249); (CP 42—63). The trial court granted summary judgment in favor of FCSD and dismissed Ms. Zink’s claims for: (1) 4th Amendment violation; (2) intentional infliction of emotional distress; and (3) OPMA violation. (Aug. 14, 2006, 27:16—28:11; 42:24—43:5; 46-:20—47:5). The trial court also granted summary judgment in favor of Mesa and dismissed Ms. Zink’s claims for: (1) false arrest; (2) false imprisonment; (3) intentional infliction of emotional distress; (4) 4th Amendment violation; and (5) malicious prosecution. (Aug. 28, 2006, 71:4—20; 73:4—6; 78:24—79:5; 81:6—10; 88:9—12).

Mr. Zink's loss of consortium claim as associated with Ms. Zink's dismissed claims was also dismissed. (Aug. 28, 2006, 92:24—93:8). Ms. Zink filed a jury demand on July 7, 2005. (CP 2139—40)

After summary judgment, FCSD entered a settlement agreement with Ms. and Mr. Zink for their remaining claims. (CP 2290—2309; 2310—21). The trial court found the settlement to be reasonable and the case was dismissed against FCSD with prejudice. (CP 2317—21).

The Zink's also voluntarily dismissed their case against council member Fay in February 2017 due to his death in August 2016. (CP 114)."

The Zinks' case against Mesa hung in limbo at the trial court for almost ten years. After continuances, a petition for discretionary review, and stays caused by council member Fay's bankruptcies, a status conference was finally scheduled for January 11, 2016 and the trial court entered a Third-Amended Case Scheduling Order. (CP 441—66; 470—72; 480—81; 488—9; 2359—2548).

Pursuant to the Third-Amended Case Scheduling Order, the parties exchanged discovery. One particular discovery matter was Mesa's motion to compel Ms. Zink to submit to an independent medical evaluation pursuant to CR 35. (CP 503—06; 571—82; 759—76). Despite Ms. Zink's opposition, the trial court granted Mesa's CR 35 motion. (CP 753—55). Ms. Zink repeatedly refused to comply with the trial court's order. (CP

894—901; 916—20; 974—79; 982—83); (Dec. 27, 2016, 21:18—22:5). As a result of her contempt, Ms. Zink’s negligent infliction of emotional distress claim was dismissed. (CP 894—901; 974—79; 982—83).

Ms. Zink’s remaining claims for violations of the OPMA and 14th Amendment, and Mr. Zink’s claim of loss of consortium went to trial on January 10, 2018. (Vol I—V, 1—1006). After it refused to rule on Ms. Zink’s motion to show cause, the trial court impaneled a jury pursuant to Ms. Zink’s jury demand. (CP 1312—28). (Vol. I, 88:14—19). After Ms. Zink rested her case, Mesa filed a motion for directed verdict to dismiss the Zinks’ claims. (CP 1497—1508). The trial court dismissed only Ms. Zink’s claim for 14th Amendment violation and submitted the OPMA claim to the jury. (Vol. V 894:20—895:4) (CP 1855—56). The jury entered a verdict in favor of Mesa. (CP 1705—06).

After the jury verdict, Mesa filed a motion to enter an order on the verdict and judgment against Ms. and Mr. Zink for attorney’s fees and costs pursuant to RCW 42.30.120(4). (CP 1709—15). The trial court heard Mesa’s motion on March 2, 2018. (CP1910—36). At this hearing, the trial court set aside the jury’s verdict and entered findings of fact and conclusions of law that Mesa did violate the OPMA on May 8, 2003 and found Ms. Zink was entitled to attorney’s fees and costs pursuant to RCW 42.30.120. (CP 1910—36).

The trial court heard oral argument on Ms. Zink's award of attorney's fees and costs on March 30, 2018 and June 22, 2018. (Vol. V 964—1006); (June 22, 2018, 1—25). A final judgment was entered on June 22, 2018 awarding Ms. Zink \$5,000 in reasonable attorney's fees and \$1,511.49 in costs. (CP 2064—65). Ms. Zink filed her Notice of Appeal on August 8, 2018. Mesa filed its cross-appeal on August 14, 2018.

V. RESPONDENTS' ARGUMENTS IN RESPONSE TO APPELLANT'S OPENING BRIEF

A. There is not substantial evidence that Mesa violated the OPMA.

The assignments of error pertaining to whether or not there was a violation of the OPMA involve different standards of review. First, the trial court's findings of fact are reviewed under the substantial evidence standard. Second, the trial court's application of the OPMA to those findings of fact is reviewed under the de novo standard.

Mesa argues that some, but not all, the trial court's findings of fact are supported by substantial evidence.¹ Even if all the findings of fact were supported by substantial evidence, those findings of fact do not satisfy the statutory requirements necessary to find Mesa violated the OPMA. As such, the trial court's conclusions of law are in error.

1. The statutory language of the OPMA and the trial court's ruling.

¹ These issues are discussed in Mesa's cross-appeal in § VI. *infra*.

The OPMA states that “[a]ll meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.” RCW 42.30.030. Members of the public shall not be required to fulfill any condition precedent to his or her attendance. RCW 42.30.040. Citizens do not have an unfettered right to attend public meetings though. Instead, citizens have a *privilege* to attend public meetings and can be removed if they are causing a disturbance. *In re Recall of Kast*, 114 Wn.2d 807, 818, 31 P.3d 677 (2001); RCW 42.30.050.

A member of a governing body is subject to a civil penalty of \$500 if that member attends a meeting of the governing body where action is taken in violation of the OPMA and that member has knowledge of the fact that the meeting is in violation thereof. RCW 42.30.120. Thus, to prevail on an OPMA claim a party must show, “(1) that a ‘member’ of a governing body (2) attended a ‘meeting’ of that body (3) where ‘action’ was taken in violation of the OPMA, and (4) that the member had ‘knowledge’ that the meeting violated the OPMA.” *Wood v. Battle Ground Sch. Dist.*, 107 Wn.App. 550, 558, 27 P.3d 1208 (2001).

A meeting is defined as “a meeting in which an action is taken.” RCW 42.30.020(4). An action is “the transaction of the official business of a public agency by a governing body including...receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). Unless the OPMA applies, no OPMA violations can occur. *Eugster v. City of Spokane*, 118 Wn. App. 383, 424, 76 P.3d 741 (2003).

At the close of trial, the jury quickly returned a verdict that an OPMA violation did not occur on May 8, 2003. (CP 1705—06); (Vol. V 960:9—24). The trial court later decided that the case should be decided by the bench and set the jury’s verdict aside. (CP 1926. 17:25—18:5).² Ultimately, the trial court found that Mesa violated the OPMA but that the individual members did not know the violation occurred. (CP 2061—62).

In support of its ruling, the trial court entered findings of fact that only Mayor Ross, not the governing body, performed the following acts: (1) called the Franklin County Sheriff’s Department; (2) refused to hold the regularly schedule meeting with Ms. Zink present; (3) requested the Franklin County Sheriff’s Department to remove Ms. Zink; (4) placed a condition on Ms. Zink’s attendance at the May 8, 2003 meeting; and (5)

² Mesa is appealing the trial court’s decision to take the decision from the jury.

she acted without knowledge that her actions were in violation of the OPMA. (CP 2061).

With these findings of fact, the trial court concluded as a matter of law that Mayor Ross's decision to not hold the meeting with Ms. Zink present was an "action" pursuant to RCW 42.30.020(3). (CP 2062). Mesa took "final action" pursuant to RCW 42.30.020(3) when it held the regularly scheduled meeting on May 8, 2003 after Ms. Zink was excluded from the meeting. (CP 2062). Mayor Ross's action of placing a condition on Ms. Zink's attendance violated RCW 42.30.040. (CP 2062).

2. Some, but not all, of the trial court's findings of fact are supported by substantial evidence.³

"In reviewing findings of fact entered by a trial court, an appellate court's role is limited to whether substantial evidence exists to support its findings." *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

³ Mesa appeals the trial court's finding of fact and subsequent conclusion of law that a meeting occurred on May 8, 2003 that was in violation of the OPMA. *Infra* § VI. Mesa also appeals the finding of fact and subsequent conclusion of law that Mayor Ross placed an impermissible condition on Ms. Zink's attendance in violation of the OPMA. *Id.*

“Where the trial court has weighed the evidence, the reviewing court’s role is simply to determine whether substantial evidence supports the findings of fact and, if so, whether the findings in turn support the trial court’s conclusions of law.” *In re Marriage of Rockwell*, 141 Wn.App. 235, 242, 170 P.3d 572 (2007). The reviewing court should “not substitute [its] judgment for the trial court’s weigh the evidence, or adjudge witness credibility.” *In re Marriage of Greene*, 97 Wn.App. 708, 714 986 P.2d 144 (1999).

Here, Ms. Zink challenges the following findings of fact: (1) that only Mayor Ross took action rather than the entire city council; and (2) that Mayor Ross and the council members did not know Mayor Ross’s action violated the OPMA. (Zink Brief, pp. 20—28).⁴

a. Substantial evidence supports the trial court’s finding that only Mayor Ross made the decision to call FCSD to have Ms. Zink removed.

The video evidence of May 8, 2003 definitively shows that the only person who engaged with Ms. Zink when she began videotaping the city council members was Mayor Ross. (CP 72); (Ex. 51). Council members Fay, Ferguson, and Davis did not voice any opinion or objection regarding the interaction between Mayor Ross and Ms. Zink. *Id.* While the

⁴ Mesa appeals the trial court’s finding of fact and conclusion of law that having Ms. Zink removed was an impermissible condition and violation of the OPMA. *Infra* § VI. However, substantial evidence exists to support the trial court’s finding that only Mayor Ross acted in having Ms. Zink removed, not the whole city council.

testimony of council members Ferguson and Davis show that they did not want to be videotaped before the meeting, it does not show that they made a collective decision or even directed Mayor Ross to have Ms. Zink removed. (CP 72); (Ex. 51); (Vol. III, 521:8—20; 523:13—25; 532:8—10; 527: 25—528:13; 578:25—579:3; 583:18—24; 584:9—12; 589:2—16). The council members did not need to correct Mayor Ross’s statements that they did not want to be videotaped because that was the truth. *Id.*

Ms. Zink cites to *Laue v. Estate of Elder* to establish that the city council members’ silence during the events of May 8, 2003 established that they acquiesced to Mayor Ross’s decision to have Ms. Zink removed. (Zink Brief, p.23). However, the council members’ silence can only show, if anything, their intent to acquiesce or agree with Mayor Ross’s recitation of facts—i.e. that they did not want to be videotaped. *See Laue*, 106 Wn.App. 699, 709, 25 P.3d 1032 (2001).

The evidence clearly supports the finding that Mayor Ross alone decided to call the FCSD to handle the situation with Ms. Zink. (CP 72); (Ex. 51); (Vol. III, 521:8—20; 523:13—25; 532:8—10; 527: 25—528:13; 578:25—579:3; 583:18—24; 584:9—12; 589:2—16). No other council members participated in this decision. *Id.* As such, the trial court’s finding that only Mayor Ross made the decision that in turn placed a condition on

Ms. Zink's attendance is supported by substantial evidence and must stand.⁵

b. Substantial evidence supports the trial court's finding that Mayor Ross and the council members did not know that Mayor Ross's act violated the OPMA.

The civil penalty provided in RCW 42.30.120(1) is only awardable if the member of a governing body attended a meeting with knowledge that the meeting violated the OPMA. *Wood*, 107 Wn.App. at 558; RCW 42.30.120(1). While Mesa disputes that Mayor Ross's act violated the OPMA,⁶ there is ample evidence in support of the trial court's finding that she and the other council members did not know the act violated the OPMA.

The trial court based its findings of fact on testimony that the council members were not trained on the OPMA or that any of them had any particular knowledge of the OPMA requirements. (CP 1928:8—12). Additionally, Mayor Ross conferred with the City Attorney, now the Honorable Judge Terry Tanner, who advised her that the council could have Ms. Zink removed if she caused a disruption. (Vol. II, 300:10—301:13); (CP 1382:16—24). While the trial court found that this was “poor advice” as applied to the events of May 8, 2003, the record demonstrates

⁵ Mesa disputes that this was an improper condition rather than the proper response to a disturbance. *See infra* § VI.

⁶ *See infra* § VI.

that Mayor Ross rightfully relied upon it. (CP 1928:13—15). Substantial evidence supports that neither Mayor Ross nor the council members knew the meeting held after Ms. Zink was removed violated the OPMA and the finding should be affirmed.

3. Based on the trial court's findings of fact, the conclusions of law are in error.

Conclusions of law determined by the trial court are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). The trial court first erroneously concluded as a matter of law that Mayor Ross's decision to not hold the meeting with Ms. Zink present was an "action" under RCW 42.30.020(3). (CP 2062).

Pursuant to RCW 42.30.020(3), an action is "the transaction of the official business of a public agency by a governing body including...receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions." (emphasis added). The trial court made explicitly clear that Mayor Ross, not the city council or governing body, took action in deciding to not hold the meeting with Ms. Zink present. (CP 2060—63). This finding plainly does not meet the definition of "action" under the OPMA. RCW 42.30.020(3).

Without an action by the governing body, Mayor Ross's independent act does not satisfy the statutory requirements necessary to

establish a meeting occurred and therefore cannot a violation of the OPMA. RCW 42.30.020; RCW 42.30.120. The trial court's conclusion of law is clear error and must be reversed. (CP 2060—63). Upon reversal, the trial court must conclude that as a matter of law, the OPMA was not violated.

B. The trial court did not abuse its discretion in dismissing Zink's claim of negligent infliction of emotional distress.

An appellate court reviews a trial court's discovery orders for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (citing *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 778, 819 P.2d 370 (1991)); see also *Eugster v. City of Spokane*, 121 Wn.App. 799, 815, 91 P.3d 117 (2004) (ruling decisions under CR 37 require the exercise of judicial discretion). A trial court's discovery order will be reversed "only 'on a clear showing' that the court's exercise of discretion was 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

A discovery ruling is "based 'on untenable grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (quoting *State v. Rundquist*, 79 Wn.

App. 786, 793, 905 P.2d 922 (1995)). An exercise of discretion is “manifestly unreasonable” if “the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person would take.’” *Id.* (quoting *State v. Lewis*, 115 Wn.2d 294, 298—99, 797 P.2d 1141 (1990)); *T.S.*, 157 Wn.2d at 424.

1. The trial court did not abuse its discretion because discovery was in fact “open.”

On January 14, 2016, the trial court entered a “Third Amended Civil Case Schedule Order” and sent it to the parties. (CP 490—91). This order established November 8, 2016 as the new discovery cut-off date. (CP 490). Mesa made its CR 35 motion in August 2016. (CP 503). The trial court did not “re-open” discovery and did not need to. (CP 490).

2. The trial court did not abuse its discretion because Mesa satisfied its burden under CR 35(a).

Pursuant to CR 35(a), if the mental or physical condition of a party is in controversy, then the trial court may order a party to submit to an independent medical examination upon a showing of good cause and upon notice to the person to be examined. The movant has the burden of establishing that the mental or physical condition of a party is in controversy and that good cause for the exam exists. *In re Welfare of Green*, 14 Wn.App. 939, 941—44, 546 P.2d 1230 (1976) (citing *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234 (1964)).

Ms. Zink’s mental health, specifically whether or not she had a diagnosable emotional disorder, was in controversy and good cause existed to require an independent examination. (CP 771:13—20; CP 583—94). Ms. Zink alleged that Mesa negligently inflicted emotional distress and physical illness upon her in the form of “an anxiety disorder,” “anxiety problems,” “paranoia problems,” and “panic attacks.” (CP 7; 585; 591—92). However, Ms. Zink’s medical records produced in discovery only detailed her subjective symptomatology and did not have any actual diagnosis. (CP 695—750). Ms. Zink did not seek mental health counseling in relation to the May 3, 2003 events because she “pretty much [knew] what was wrong with her.” (CP 585; 594).

To successfully pursue a claim for negligent infliction of emotional distress, Ms. Zink’s allegations needed be corroborated by objective symptomatology. *Hegel v. McMahon*, 136 Wn.2d 122, 133, 960 P.2d 24 (1998).⁷ According to the Supreme Court—

“to satisfy the objective symptomatology requirement established in *Hunsley*, a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence. This approach calls for objective evidence regarding the severity of the distress, and the casual link between the observation at the scene and the subsequent emotional reaction...in order for [subjective]

⁷ This rule applies to all claims of negligent infliction of emotional distress, not just third-party witnesses or by-standers as Ms. Zink claims in her pleadings. See *Kloepfel v. Bokor* 149 Wn.2d 192, 198—00, 66 P.3d 630 (2003) (discussing *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976)).

symptoms to satisfy the objective symptomatology requirement, they must constitute a diagnosable emotional disorder.” *Hegel*, 136 Wn.2d at 135; *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976).

Thus, in order to adequately evaluate the validity of and defend against Ms. Zink’s claim for negligent infliction of emotional distress, Mesa needed to explore whether Ms. Zink actually suffered from emotional distress as alleged and the extent of her damages if any. (CP 503—06; 583—87).

Mesa articulated and the trial court recognized this controversy in Mesa’s CR 35 motion. (CP 503—503—43; 583—94; 771:10—72:8). Mesa also established and the trial court agreed that good cause existed because Mesa needed the opportunity to have an independent evaluation and questioning of Ms. Zink’s claim. (CP 506; 586; 759—74). In fact the trial court specifically noted that “the defense is entitled to the medical examination.” (CP 771:21—72:6). The trial court’s ruling was not based on untenable grounds or made for untenable reasons because it was supported by facts in the record and reached applying the proper CR 35 standard. *See State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003); (CP 771:21—72:6). The CR 35 Order should be affirmed.

3. The trial court did not abuse its discretion because the examination sought discoverable evidence.

Generally speaking, “all relevant information likely to lead to admissible evidence is discoverable.” *Neighborhood Alliance of Spokane Cnty. v. Cnty. of Spokane*, 172 Wn.2d 702, 717, 261 P.3d 119 (2011); *see also* CR 26(b). “Evidence is relevant if it has ‘any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.’” *Clarke v. Off. Of Atty. Gen.*, 133 Wn.App. 767, 778, 138 P.3d 144, 149 (2006) (citing ER 401). Even if the evidence is relevant, privileged information is not discoverable. CR 26(b)(1). Ms. Zink objected to Mesa’s CR 35 motion claiming the information sought in the examination was irrelevant and privileged under RCW 70.02 et seq. (CP 577—81).

In ordering Ms. Zink to submit to a CR 35 examination, the trial court considered whether or not the information sought was relevant and balanced Ms. Zink’s interest in privacy against Mesa’s interest in defending this matter. (CP 772:14—23). Contrary to Ms. Zink’s recitation of the record, the trial court did not give a blanket statement that it did not know whether the CR 35 examination would be relevant. (Zink Brief, p. 34 (citing CP 774:19—20)(CP 774:11—23)).

As for Ms. Zink’s claim of privilege, Ms. Zink waived any claim of privilege regarding her diagnosis of stress and anxiety by claiming it as an injury that resulted from the events of May 8, 2003. (CP 7; CP 585; 591—

92; 695—750). “The introduction by the patient of medical testimony describing the treatment and diagnosis of an illness waives the privilege as to that illness, and the patient’s own testimony to such matters may have the same effect.” *Randa v. Bear*, 50 Wn.2d 415, 421, 312 P.2d 640 (1957) (citing *McUne v. Fuqua*, 42 Wn.2d 65, 253 P.2d 632 (1953); *State v. Wilson*, 182 Wash. 319, 47 P.2d 21 (1935); 58 Am. Jur. 253, Witnesses, § 447)). Ms. Zink impliedly, if not intentionally, waived any privilege regarding her mental health as it pertains to whether or not she suffered from emotional distress as a result of the events of May 8, 2003. *Id.*; see also *State v. Wilson*, 182 Wash. 319, 47 P.2d 21 (1935).

Even though the CR 35 examination was both relevant and non-privileged, the trial court obliged and specifically limited the scope of the exam to only relevant and non-privileged information as requested by Ms. Zink and in compliance with CR 26. (CP 580; 755). Ms. Zink was also granted a protective order for the information gleaned from the examination. (CP 755). The CR 35 Order was likely to lead to discovery of relevant non-privileged information. The trial court did not abuse its discretion and the decision should be affirmed. (CP 771:13—20; 755).

4. The trial court’s CR 35 Order satisfies CR 35(a).

Under CR 35(a), an order compelling examination “shall specify the time, place, manner, conditions, and scope of the examination and the

person or persons by whom it is to be made.” The CR 35 Order satisfies each of these requirements.

Time and place was to be that which was convenient. (CP 755). Manner, conditions, and scope were to be the tests and evaluations that are necessary, as determined by Dr. Barnard, to assess whether Ms. Zink had a mental health condition in connection with the events of May 8, 2003. (CP 755. As the Honorable Judge Mitchell noted, he designated Dr. Barnard to use his professional judgment in determining the appropriate tests and questions because Judge Mitchell is not a psychiatrist. (Nov. 11:12—12:7).

The plain language of the trial court’s order satisfies the plain language requirements of CR 35(a). Ms. Zink’s desire to have each and every test or question identified in the order is simply not required under CR 35(a). The trial court did not abuse its discretion and the CR 35 Order should be affirmed.

5. The trial court did not abuse its discretion in dismissing Ms. Zink’s claim for negligent infliction of emotional distress as a sanction pursuant to CR 37.

Mesa filed a motion to dismiss Ms. Zink’s claim for negligent infliction of emotional distress after Ms. Zink willfully refused to comply with the CR 35 Order. (CP 894—901). Under CR 37(b)(2)(c), the trial court has broad discretion to dismiss an action for a party’s failure to obey

an order made under CR 35. See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (citing *Phillips v. Richmond*, 59 Wn.2d 571, 369 P.2d 299 (1962)).

Dismissal under CR 37 is appropriate if the violation of court order was willful, done without reasonable excuse, and substantially prejudices the defendant's ability for trial. *Rhinehart v. Seattle Times*, 51 Wn.App. 561, 574, 754 P.2d 1243 (1988) (citing *Anderson v. Mohundro*, 24 Wn.App. 569, 573—74, 604 P.2d 181 (1979)); *Rivers v. Conf. of Mason Contractors*, 145 Wn.2d 674, 686, 41 P.3d 1175 (2002). The record must demonstrate that the violation was willful or deliberate, the violation substantially prejudiced the opponent's ability to prepare for trial, and a lesser sanction would not have sufficed. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (citing *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989)). "A party's disregard of a court order without reasonable excuse or justification is deemed willful." *Rivers*, 145 Wn.2d at 686—87 (citing *Woodhead v. Discount Waterbeds Inc.*, 78 Wn.App. 125, 130, 896 P.2d 66 (1995)).

Pursuant to the CR 35 Order, Mesa's attorney scheduled an examination for Ms. Zink with Dr. Barnard. (CP 920). Mesa informed Ms. Zink of the scheduled examination with two weeks' notice. (CP 919—920). Ms. Zink refused to attend the scheduled examination claiming she

was unavailable and plain unwilling to attend an evaluation lasting longer than one hour. (CP 916—920). Mesa then filed its CR 37 motion requesting dismissal of Ms. Zink’s claim for negligent infliction of emotional distress. (CP 894—901).

The trial court heard oral argument on Mesa’s motion to dismiss on December 27, 2016. (Dec. 27, 2016 1—31). On the record, the trial court found that Ms. Zink’s violation of the CR 35 Order was willful. (Dec. 27, 2016, 21:18—5). Specifically, that Ms. Zink’s reason for refusing to submit to examination until Dr. Barnard divulged each of the tests and questions that would be involved in the examination was contrary to the CR 35 Order and therefore willful. (Dec. 27, 2016, 21:18—5).

The trial court then explicitly considered whether or not a lesser sanction was available. (Dec. 27, 2016, 22:6—23:16). Ultimately, in balancing the due process rights of Mesa to defend against Ms. Zink’s claim and in considering Ms. Zink’s violation of the order with only six weeks before trial, the trial court found that no lesser sanction was available. (Dec. 27, 2016, 22:6—23:16).

Despite these findings, the trial court did in fact give Ms. Zink a lesser sanction and granted her an extension to comply with the September 29, 2016 order. (CP 970—71). In essence, the trial court gave Ms. Zink

one more chance to comply with the CR 35 Order. (Dec. 27, 2016, 23:2—13; 26:11—24) (CP 970—71). The trial court made it explicitly clear to Ms. Zink that her failure to comply with the CR 35 Order by January 13, 2017 would result in the dismissal of her claim. (Dec. 27, 2016, 26:11—24; 30:7—10); (CP 970—71).

At this hearing, Ms. Zink made it perfectly clear that she was not going to comply with the CR 35 Order. (Dec. 27, 2016, 24:11—3; 26:25—27:14; 30:11—14). Ms. Zink honored those statements and again refused to submit to examination with Dr. Barnard. (CP 974—79). In email correspondence with Mesa’s attorney, Ms. Zink detailed why she was refusing to comply with the CR 35 Order; which, were the same reasons she submitted in response to Mesa’s motion to dismiss and the same reasons the trial court found to be willful violations of the CR 35 Order. (CP 974) (Dec. 27, 2016, 21:18—5). Ms. Zink went so far as to say her “best legal strategy in this case [was] to allow Judge Spanner’s order dismissing our claims of negligent infliction of emotional distress to stand and take the issue up on appeal...” (CP 974).

In accordance with Ms. Zink’s correspondence indicating that she would prefer to have her claim dismissed, Mesa presented an order dismissing her claim of negligent infliction of emotional distress and Mr.

Zink's loss of consortium claim. (CP 982—83). The trial court entered the order dismissing Ms. Zink's claim on January 17, 2017. *Id.*

Here, the record clearly establishes that the trial court did not abuse its discretion in entering order of dismissal. If anything, Ms. Zink consented to the dismissal by snubbing her nose at the trial court's orders and instructing Mesa's attorney to cancel her scheduled appointment with Dr. Barnard so she could proceed to trial with her remaining claims. (CP 974). The trial court considered the requisite elements prior to dismissing her claim and even granted Ms. Zink another chance to comply. (Dec. 27, 2016, 1—20) (CP 970—71); *see also Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (citing *Snedigar v. Hodderson*, 53 Wn.App. 476, 487, 768 P.2d 1 (1989)). The trial court's order dismissing Ms. Zink's claim was not an abuse of discretion and should be affirmed.

C. Because Mesa complied with CR 26(i), the trial court had authority to entertain Mesa's discovery motions.

Ms. Zink's claim that the trial court abused its discretion in entering orders on Mesa's CR 35 and CR 37 motions because Mesa did not comply with CR 26(i) is incorrect. (Zink Brief, p. 32). A court cannot consider a motion pursuant to CR 26 through 37 unless the parties have conferred with respect to the motion. CR 26(i). "A motion seeking an order to compel discovery or obtain protection shall include counsel's

certification that the conference requirements of [CR 26(i)] have been met.” CR 26(i). “Because the language of CR 26(i) is mandatory, not permissive, the trial court’s decision to hear a [motion brought pursuant to CR 35 or CR 37] is a question of law that [the appellate court] reviews de novo.” *Rudolph v. Empirical Research Sys.*, 107 Wn.App. 861, 866, 28 P.3d 813 (2001).

Mesa first filed its motion to compel Ms. Zink to submit to a CR 35 psychological exam in August 2016. (CP 492—97). Although the parties had exchanged email correspondence regarding the CR 35 exam, the trial court ordered the parties to have either an in-person or telephonic conference in compliance with CR 26(i) before the trial court would hear Mesa’s motion. (CP 882—83). The parties had a telephonic CR 26(i) conference on September 16, 2016 and Mesa re-noted its motion to compel pursuant to CR 35. (CP 584). Mesa’s attorney certified the CR 26(i) conference in its reply pleading and on the record during oral argument. (CP 584; 769:15—770:3). Mesa complied with the CR 26(i) conference requirement, thus enabling the trial court to hear its CR 35 motion. *Id.*

Mesa next filed its motion to dismiss Ms. Zink’s claim for negligent infliction of emotional distress pursuant to CR 37. (CP 894—901). While Mesa did not certify in its motion that the parties conferred

pursuant to CR 26(i), the parties did in fact have a telephonic conference regarding whether or not Ms. Zink was going to comply with the order compelling her to submit to a psychological exam. (Dec. 27, 2016, 17:14—18:18). Ms. Zink actually recorded and transcribed the telephonic CR 26(i) conference. *Id.* Mesa certified that the CR 26(i) conference occurred on the record. *Id.* Once again, Mesa complied with the CR 26(i) conference and the trial court was able to hear its motion to dismiss pursuant to CR 37.

Because the trial court had the authority to hear both of Mesa's discovery motions, the Court cannot reverse the trial court's orders on this basis alone.

D. Ms. Zink's 42 U.S.C. § 1983 claim was properly dismissed on directed verdict for lack of sufficient evidence.

At the close of Ms. Zink's case in chief, Mesa filed its motion for directed verdict and supporting memorandum. (CP 1497—1508). Ms. Zink did not file a response in opposition to Mesa's motion for directed verdict and instead only made an oral argument in opposition. (Vol. V 887:2—895:20).

"A motion for a directed verdict admits the truth of the evidence of the party against whom the motion is made and all inferences that reasonably can be drawn therefrom." *Rowe v. Vaagen Bros. Lumber, Inc.*,

100 Wn.App. 268, 275, 996 P.2d 1103 (2000). The trial court may grant a motion for directed verdict only if “as a matter of law, that no evidence or reasonable inferences exist to sustain a verdict for the party opposing the motion.” *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983); CR 50(a)(1)). Legally sufficient evidence exists “if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise.” *Guljosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting *Brown v. Superior Underwriters*, 30 Wn.App. 303, 306, 632 P.2d 887 (1980)). A trial court’s decision on a motion for directed verdict is reviewed de novo. *Rowe*, 100 Wn.App. 275.

1. Ms. Zink did not prove she was deprived of a statutory or constitutional right.

To prove her 42 U.S.C. § 1983 claim, Ms. Zink had to prove that while acting under the color of state law, Mesa deprived her of a right protected by the federal constitution or federal statute. *Sintra v. Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992); *Torrey v. City of Tukwila*, 76 Wn.App. 32, 37, 882 P.2d 799 (1994) (overruled in part on other grounds) (citing *Barry v. Fowler*, 902 F.2d 770, 772 (9th Cir. 1990)).⁸ Ms. Zink did not

⁸ Ms. Zink includes a discussion of municipal liability under 42 U.S.C. § 1983; however, Mesa attacked Ms. Zink’s 42 U.S.C. § 1983 claim on the basis that she failed to establish the deprivation of a constitutional right. (CP 1497—1508). The trial court did not hear argument on or even consider whether Ms. Zink presented sufficient evidence for the remaining elements necessary to establish municipal liability under 42 U.S.C. § 1983. (Vol. V, 894—95); (Zink Brief p. 43).

allege that her rights were protected under a federal statute and therefore needed to establish that Mesa deprived her of a right afforded under the federal constitution—i.e. life or liberty— or a state created property right. *See id.*; *Mission Spring, Inc. v. City of Spokane*, 134 Wn.2d 947 (1998) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701 (1972) (finding property interests are not created by the constitution but are an expectation derived from sources such as state law)); (CP 1—10); (Vol V, 892:8—13).

Ms. Zink claimed she was deprived of a liberty interest because she was deprived of her statutory right to attend the city council meeting scheduled for May 8, 2003 and was removed without due process. (Vol V, 892:8—13); (Zink Brief, p. 40—43).⁹ Although Ms. Zink argued that her attendance is a constitutional right, Washington case law rules otherwise.

While a state statute like the OPMA can create a liberty interest, it can only do so if the statute places “substantive limits on official decision making in the form of ‘specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.”” *In re Pers. Restraint of Mattson*, 166 Wn.2d 730, 738—39, 214 P.3d 141 (2009) (quoting *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138,

⁹ As an aside, Ms. Zink states that “it could be argued that Zink had a property right in the video tape.” (Zink Brief p. 41). However, this was not argued to the trial court and cannot be raised for the first time on appeal. *See Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5; (Vol. V, 873—95).

144, 866 P.2d 8 (1994)); *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989). “Only statutes that prescribe a given outcome for a specific set of facts create these ‘due process liberty interests’; ‘laws granting a significant degree of discretion cannot.’” *Mattson*, 166 Wn.2d at 738 (quoting *Cashaw*, 123 Wn.2d at 144).

The Washington Supreme Court has shed some light on whether the OPMA creates a right to attend a public meeting. In *In re Recall of Kast*, the Washington State Supreme Court ruled that “[t]he [OPMA] does not purport to grant citizens the right to interrupt meetings as they see fit; rather, citizens are granted a privilege to be present during public meetings...” 144 Wn.2d 807, 818, 31 P.3d 677 (2001) (emphasis added). Accordingly, Ms. Zink did not have a federally or state protected right to attend the scheduled meeting, but merely a privilege created by the Washington legislature to do so. *Id.*

In her case in chief, Ms. Zink did not present any evidence that the OPMA granted her a federally protected right or liberty interest in attending the meeting scheduled for May 8, 2003. (Vol. V, 894—95). The trial court properly found that Ms. Zink’s 42 U.S.C. § 1983 claim was unsupported by both the evidence presented and the applicable law. *Id.* As such, without any evidence to persuade a fair-minded, rational person of

the truth of the Ms. Zink's alleged federally protected right to attend the scheduled meeting, the trial court properly dismissed Ms. Zink's 42 U.S.C. § 1983 claim. *See Guljosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

2. Ms. Zink did not provide sufficient evidence in support of her 42 U.S.C. § 1983 claim against the council members.

The individual defendants, the council members, were also entitled to directed verdict dismissing Ms. Zink's 42 U.S.C. § 1983 claim against them individually for want of a federally protected right. *See supra* § D. 2. "Individual defendants in a Section 1983 action are entitled to qualified immunity from damage for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." WPI 340.01 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982)). Qualified immunity is a question of law to be decided by the court. *Hunter v. Bryant*, 502 U.S. 224, 227—28, S.Ct. 534 (1991).

As previously briefed, Ms. Zink's claimed deprivation of a constitutional or statutory right to attend a public meeting is not actually a right protected by federal statute, federal constitution, or the OPMA. *See supra* § D. 2. In failing to present evidence that she had a clearly established statutory or constitutional right, Ms. Zink in turn failed to

present evidence that a reasonable person, i.e. the individual council members, had knowledge of or violated a clearly established statutory or constitutional right. *See Harlow*, 457 U.S. at 818. The trial court properly dismissed Ms. Zink's 42 U.S.C. § 1983 claim against the individual defendants. *See Guljosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

E. The trial court properly dismissed a number of Ms. Zink's claims at summary judgment.

The grant of a summary judgment motion is reviewed de novo. *Campbell v. Ticor Title Ins. Co.*, 166 Wn.2d 466, 470, 209 P.3d 859 (2009). The reviewing court engages in the same inquiry as the trial court. *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). "Summary judgment is available only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 799, 855 P.2d 1223 (1993) (citing CR 56(c)). All evidence and reasonable inferences from facts then presented are considered in favor of the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin Cnty.*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

Even considering all evidence and reasonable inferences from the facts presented, the lower court properly dismissed a number of the Zinks' claims on Mesa's motion for summary judgment.

1. The trial court properly dismissed Ms. Zink's claim for false arrest.

An action for false arrest involves the "unlawful violation of a person's right of personal liberty or the restraint of that person without legal authority." *Bender v. Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983). Specifically, "false arrest occurs when a law enforcement officer, or one claiming to have the powers of a police officer, unlawfully restrains or imprisons another." *Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 529, 20 P.3d 447 (2001) (citing *Bender v. Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983)). "False arrest may be committed only by one who has legal authority to arrest or who had pretended legal authority to arrest." *Bender v. Seattle*, 99 Wn.2d 582, 590, 664 P.2d 492 (1983) (citing *Kilcup v. McManus*, 64 Wn.2d 771, 394 P.2d 375 (1964)). Probable cause for the arrest is an absolute defense to a false arrest claim. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993).

- a. *Ms. Zink presented no evidence that her arrest was without probable cause.*

"Probable cause that will defeat a claim for false arrest is proved by demonstrating the officer's knowledge of facts and circumstances that

would lead a reasonable officer to believe a crime has been committed.” *Youker v. Douglas Cnty.*, 162 Wn.App. 448, 466, 258 P.3d 60 (2011) (citing *Bishop v. City of Spokane*, 142 Wn.App. 165, 170, 173 P.3d 318 (2007)). The information the officer considers should be based on reasonably trustworthy information. *Id.*

Here, the record clearly demonstrates that the officers at the scene interviewed Mayor Ross, council member Fay, Ms. Zink, and Mr. Zink regarding what occurred at City Hall. (CP 79—89; 218; 224). Deputies Bayona and Scantlin reviewed RCWs and relayed the details of events to Sergeant Pfeiffer. *Id.* Based on the interviews and information relayed, Sargeant Pfeiffer informed Deputies Bayona and Scantlin that probable cause existed to arrest Ms. Zink for criminal trespass. *Id.*

While Ms. Zink disagrees with the officers, she has provided no evidence that would suggest that a reasonable officer would not believe a crime has been committed. *See Youker v. Douglas Cnty.*, 162 Wn.App. 448, 466, 258 P.3d 60 (2011) (citing *Bishop v. City of Spokane*, 142 Wn.App. 165, 170, 173 P.3d 318 (2007)). Rather, the testimony of the Deputies, the Sargeant, and the Sheriff establishes that probable cause existed for Ms. Zink’s arrest. (79—89; 218; 224). No reasonable jury could find that FCSD lacked probable cause to arrest Ms. Zink. As a matter of law, Ms. Zink cannot maintain her claim for false arrest.

- b. *Even if Ms. Zink's arrest was without probable cause, Mesa is not liable for her arrest.*

Under Washington common law a person will not be liable for the false arrest or imprisonment of another if that person does nothing more than detail his or her version of the facts to a police officer and ask the officer for assistance. *Dang v. Ehredt*, 95 Wn. App. 670, 680, 977 P.2d 29 (1999). If the officer is left to determine the appropriate response to a situation, then the person who called the police officer cannot be held liable for the police officer's decision to make an arrest even if that arrest later found to be unlawful. *Id.*

In *McCord v. Tielsch*, the plaintiff filed a suit against the Seattle Opera Association and its general director for assault, false imprisonment, and malicious prosecution after plaintiff was arrested outside the opera house for trespass and disturbing the peace. 14 Wn.App. 564, 564—65, 544 P.2d 56 (1975). The plaintiff alleged the defendants were liable for these torts because the general director's request for police assistance caused his arrest. *Id.*

The trial court and Division One disagreed. *Id.* at 567. The Courts found there was “no evidence to indicate [the general director] suggested, contemplated, or approved of the arrest...” *Id.* at 567. Rather, the general director “simply asked the police to ‘assist his security personnel in taking

care of the problem that was out front.”” *Id.* The policemen were left with a “range of reasonable options for action, including further investigation, short of making an immediate arrest.” *Id.* Even if the general director gave erroneous information, this did not preclude the policemen’s intelligent exercise of their discretion. *Id.*

Similar to *McCord*, the undisputed record shows that Mesa, through Mayor Ross and council member Fay, did nothing more than contact the FCSD to assist them in dealing with disturbance Ms. Zink caused at City Hall. (CP 71—89); (Ex. 51). Council members Ferguson and Davis did nothing in connection with Ms. Zink’s arrest. *Id.*

It is undisputed t that FCSD, not Mesa, arrested Ms. Zink. (CP 86—89; 218; 224); (Ex. 51). Mesa did not have the legal authority to arrest Ms. Zink. (CP 1382:16—24). Neither the council members nor May Ross pretended to have the authority to arrest Ms. Zink. (CP 71—89); (Ex. 51). The only person who suggested and instructed FCSD to arrest Ms. Zink was Ms. Zink. (CP 81:29; 88:20; 126).

Contrary to Ms. Zink’s recitation of events, the record undisputedly demonstrates FCSD conducted an investigation and independently decided that probable cause existed to arrest Ms. Zink for trespass. (CP 71—89; 94—256). FCSD was not influenced by Mesa nor the council members to arrest Ms. Zink. (CP 98:7—21; 99:1—13; 107;

2221:1—7; CP 112; 115; 121; 125; 223:20—23). As a matter of law, Mesa cannot be found directly liable for false arrest. *See Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 529, 20 P.3d 447 (2001) (citing *Bender v. Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983)); *see also Dang*, 95 Wn.App. at 680.

2. The trial court properly dismissed Ms. Zink’s claim for false imprisonment.

False imprisonment occurs when one, not pretending to use the force of a law enforcement officer, detains another against the other’s will. *Jacques v. Sharp*, 83 Wn.App. 532, 536, 922 P.2d 145 (1996). When there is a false arrest, there is false imprisonment. *Heckart v. City of Yakima*, 42 Wn.App. 38, 39, 708 P.2d 407 (1985). Again, probable cause is an absolute defense to a claim of false imprisonment. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 563, 852 P.2d 295 (1993). Here, Ms. Zink’s claim for false imprisonment fails for the same reasons as her claim for false arrest. No reasonable jury could find that Ms. Zink’s arrest was without probable cause and Mesa, nor its council members, are liable for her arrest. (CP 71—89; 94—256); (Ex. 51); *supra* § E. 1. Ms. Zink’s claim for false imprisonment must be dismissed.

3. The trial court properly dismissed Ms. Zink’s claim for malicious prosecution.

“Malicious prosecution actions are not favored in the law.” *Rodriguez v. City of Moses Lake*, 158 Wn.App. 724, 728, 243 P.3d 552 (2010) (citing *Hanson v. City of Snohomish*, 121 Wn.2d 552, 557, 852 P.2d 295 (1993)). “This is because an individual ‘who acts in good faith shall not be subjected to damages merely because the accused is not convicted.’” *Id.* (quoting *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942)).

To maintain an action for malicious prosecution, the plaintiff must prove each of the following elements: (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) there was a want of probable cause for the institution or continuation of the prosecution; (3) that the proceedings were instituted or continued through malice; (4) that the proceedings terminated on the merits in favor of the plaintiff, or were abandoned; and (5) that the plaintiff suffered injury or damage as a result of the prosecution. *Hanson v. Estell*, 95 Wn.App. 642, 647, 976 P.2d 179 (1999); *Brin v. Stutzman*, 89 Wn.App. 809, 818, 951 P.2d 291 (1998).¹⁰

¹⁰ It is important to note that “[a]lthough courts continue to list all five elements, the Legislature abrogated ‘the common law requirement of showing prior abandonment by the plaintiff, or termination in favor of defendant’ by permitting ‘a defendant to cross-claim for malicious prosecution’ under RCW 4.24.350.” *Brin v. Stutzman*, 89 Wn.App. 809, 818—19, 951 P.2d 291 (1998) (quoting *Fenner v. Lindsay*, 28 Wn.App. 626, 630, 625 P.2d 180 (1981)).

a. *Ms. Zink failed to present any evidence that her arrest was without probable cause.*

“The very gist of an action for malicious prosecution is want of probable cause.” *Noblett v. Bartsch*, 31 Wash. 24, 27, 71 P. 551 (1903); *see also Hanson v. City of Snohomish*, 121 Wn.2d 552, 558, 852 P.2d 295 (1993). While “the truth of other material allegations, such, for example, as malice, may be inferred from proof of want of probable cause” because probable cause is “the very substance of the issue, [it] must be substantially and expressly proved and is never inferred or implied from the proof of anything else.” *Id.* (emphasis added); *see also Olsen v. Fullner*, 29 Wn.App. 676, 678, 630 P.2d 492 (1981). The existence of probable cause is an absolute defense to a malicious prosecution claim and the plaintiff has the burden of proving probable causes did not exist. *Hanson v. City of Snohomish*, 121 Wn.2d at 558; *Hanson v. Estell*, 95 Wn.App. 642, 647, 976 P.2d 179 (1999); *McBride v. Walla Walla Cnty*, 95 Wn.App.33, 38, 975 P.2d 1029 (1999).

Ms. Zink presented no evidence that her arrest was without probable cause. *See* § V. E. 1. a. Contrary to Ms. Zink’s argument, citizens do not need probable cause to request police assistance. *See* (Zink Brief, p.52). Rather, police need to have probable cause in order to lawfully arrest someone. Allowing Ms. Zink to pursue her claim for malicious

prosecution against Mesa because of her unsupported argument that Mesa needed probable cause to call the police is in derogation of the law. *Hanson v. City of Snohomish*, 121 Wn.2d at 558; *Hanson v. Estell*, 95 Wn.App. 642, 647, 976 P.2d 179 (1999); *McBride v. Walla Walla Cnty*, 95 Wn.App.33, 38, 975 P.2d 1029 (1999).

Without any evidence that her arrest was without probable cause, Ms. Zink cannot prove her claim for malicious prosecution against Mesa. *Id.* Ms. Zink’s claim for malicious prosecution must be dismissed.

b. Ms. Zink failed to present evidence that Mesa instituted or continued her prosecution.

Again, FCSD, not Mesa, arrested Ms. Zink. (CP 71—89; 112; 115; 121; 125; 223:20—23); (Ex. 51). The act of calling the police and detailing the events that occurred was not the institution of any alleged prosecution against Ms. Zink. Rather, it was Ms. Zink’s actions at City Hall. Her claim fails as a matter of law and must be dismissed.

c. Ms. Zink failed to present evidence that she was actually prosecuted rather than just arrested.

It is unclear if Ms. Zink was actually prosecuted — i.e. if formal charges were actually ever brought against Ms. Zink – or if she was just arrested. (Aug. 28, 2006, 73: 10—14).

“Black’s Law Dictionary defines ‘prosecution’ as ‘[a] criminal proceeding in which an accused person is tried.’” *State v. Basra*, 2019 WL

4010724 (2019) (quoting *Black's Law Dictionary* (10th ed. 2014)). “Webster’s Dictionary defines ‘prosecution’ as ‘the institution and continuance of a criminal suit involving the process of exhibiting formal charges against an offender before a legal tribunal and pursuing them to final judgment on behalf of the state or government.’” *Id.* (quoting *Webster’s Third New International Dictionary* (3d ed. 1993)).

In her affidavit, Ms. Zink provided a “Notice of Dismissal,” but did not provide any evidence or testimony that a prosecutor brought formal charges against her. (CP 128—30). While Ms. Zink alleged in her complaint that charges were brought, the record is devoid of any evidence in support of this allegation. (CP 5). Without any evidence that Ms. Zink was subject to a “criminal suit involving the process of exhibiting formal charges before a legal tribunal” or a criminal proceeding in which she was tried, Ms. Zink cannot prove her claim of malicious prosecution.

4. The trial court properly dismissed Ms. Zink’s claim for intentional infliction of emotional distress.

The elements for a claim of intentional infliction of emotional distress are the same as those for the tort of outrage. *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); *Fondren v. Klickitat Cnty.*, 79 Wn.App. 850, 861, 905 P.2d 928 (1995). To maintain a claim of outrage, the plaintiff must prove each of the following: (1) extreme and outrageous

conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to the plaintiff of severe emotional distress. *Rice v. Janovich*, 109 Wn.2d 48, 61, 742 P.2d 1230 (1987); *Fondren v. Klickitat Cnty.*, 79 Wn.App. 850, 861, 905 P.2d 928 (1995).

A claim for intentional infliction of emotional distress must be predicated on behavior so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975). The requisite conduct must be that which the recitation of the facts to an average member of the community would arouse his resentment against the actor and lead him to exclaim “outrageous!” *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201—02, 961 P.2d 333 (1998).

The tort of outrage does “not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities.” *Grimsby v. Samson*, 85 Wn.2d at 59. In this area, plaintiff must be necessarily hardened to a certain degree of rough language, unkindness and lack of consideration. *Id.* Tortious or criminal intent, or even malice will not suffice. *Waller v. State*, 64 Wn.App. 318, 336, 824 P.2d 1225 (1992). The court is tasked with determining if reasonable minds could differ on

whether the conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wash.Ap.. 382, 387, 628 P.2d 506 (1981).

Ms. Zink alleged that the following actions constituted outrageous conduct so extreme in degree as to go beyond all possible bounds of decency: (1) Mesa allegedly having Ms. Zink “wrongfully arrested” without warning; and (2) having Ms. Zink transported 25 miles from her home as a result of being arrested all because she attended an open public meeting of her governing body. (Zink Brief, p. 56). Reasonable minds could not differ on whether this conduct was sufficiently extreme to result in liability. *Phillips v. Hardwick*, 29 Wash.Ap.. 382, 387, 628 P.2d 506 (1981).

As the record makes clear, the events of the evening began with Mayor Ross asking Ms. Zink to turn off her video camera and Ms. Zink responding with “call the police” and threatening to file another law suit against the City. (CP 71—89); (Ex. 51). Mayor Ross adhered to Ms. Zink’s demand and called the police. *Id.* Of course the police are going to be called in a situation like this. In fact, public policy encourages citizens to call the police if there is a dispute.

Reasonable minds could not differ that the actions of Mesa are not sufficiently extreme to result in liability for outrage. This is especially true when the person now claiming intentional infliction of emotional distress

is the one who demanded the police be called and instructed the police to arrest her. *Id.* Ms. Zink's claim of intentional infliction of emotional distress must be dismissed as a matter of law. *See Grimsby*, 85 Wn.2d at 59.

5. The trial court properly dismissed Ms. Zink's 42 U.S.C. § 1983 claim based upon fourth amendment violation.

42 U.S.C. § 1983 grants a plaintiff the right to recover damages against government actors for violations of rights under federal law, which includes the fourth amendment of the United States Constitution. § 1983 is not itself a source of substantive rights, but rather a method through which to vindicate federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865 (1989). Analysis of a § 1983 claim begins with identifying the specific constitutional right alleged to have been violated. *Id.* at 394.

The fourth amendment provides the right to be free from unreasonable searches and seizures. *McKinney v. City of Tukwila*, 103 Wn.App. 391, 401, 13 P.3d 631 (2000). An arrest without probable cause is an unreasonable seizure and thus a violation of the fourth amendment. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223 (1964). An arrest that is devoid of probable cause gives rise to an action for damages under 42 U.S.C. § 1983. *McKenzie v. Lamb*, 738 F.3d 1005, 1007 (9th Cir. 1984);

Gurno v. Town of LaConner, 65 Wn.App. 218, 223, 828 P.2d 49 (1993). It follows conversely that an arrest supported by probable cause defeats a claim for unlawful seizure.

Here again, Mesa is not liable for Ms. Zink's 42 U.S.C. § 1983 claim for the same reasons it's not liable for Ms. Zink's false arrest and false imprisonment claims. *See supra* § E. 1—2. FCSD, not Mesa, arrested, seized, and searched Ms. Zink. (CP 71—89); (Ex. 51). Ms. Zink's arrest was supported by probable cause. (CP 112; 115; 121; 125; 223:20—23). Ms. Zink's 42 U.S.C. § 1983 claim fails as a matter of law and must be dismissed.

6. Even if Ms. Zink's fourth amendment right was violated, the council members are entitled to qualified immunity from Ms. Zink's 42 U.S.C. § 1983 claim.

A city official who violates the constitutional rights of an individual is not automatically liable in damages because government officials are entitled to qualified immunity for their discretionary acts. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1986). "Individual defendants in a Section 1983 action are entitled to qualified immunity from damage for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct.

2727 (1982). Qualified immunity is a question of law to be decided by the court. *Hunter v. Bryant*, 502 U.S. 224, 227—28, S.Ct. 534 (1991).

The council members did not violate Ms. Zink’s fourth amendment rights because they did not arrest nor seize Ms. Zink. (CP 71—89; 112; 115; 121; 125; 223:20—23); (Ex. 51). Mayor Ross called the police and spoke to the officers with council member Fay. *Id.* Council members Ferguson and Davis did not even interact with the officers at the scene. *Id.*

No reasonable jury would find that the council members would have known their actions violated Ms. Zink’s fourth amendment rights. The individual council members are entitled to qualified immunity and Ms. Zink’s 42 U.S.C. § 1983 claim against the individual members must be dismissed.

7. Even if Ms. Zink’s fourth amendment right was violated by the council members, Mesa cannot be held liable.

A local governing unit may be sued directly under 42 U.S.C. § 1983 where the action alleged to be unconstitutional “implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated” by those whose act may be fairly said to represent official policy. *Monell v. New York City Dpt. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978). Additionally, “local governments...may be sued for constitutional deprivations visited

pursuant to governmental ‘customs’ even though such a custom has not received formal approval through the body’s official decision-making channels.” *Id.* at 690.

The Supreme Court found “a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.” *Id.* at 691. In so finding, the Supreme Court reasoned that the language of § 1983 plainly imposes liability of a government that, under color of some official policy, “causes” an employee to violate another’s constitutional rights. *Id.* at 692. A municipality may be held liable for § 1983 damages only where the plaintiff identifies a municipal policy or custom that is the “moving force” behind the plaintiff’s injury. *Bd. of Cnty. Commissioners of Bryan Cnty., Oklahoma v. Brown*, 520 U.S. 397, 403, 117 S.Ct. 1382 (1997).

Ms. Zink has presented no evidence that would convince a reasonable jury that her arrest was pursuant to any policy or custom of Mesa. Ms. Zink failed to even plead such facts in her complaint. (CP 1—28). The record clearly establishes that Mayor Ross called the police after Ms. Zink told her to and to stop the disturbance at City Hall. (CP 71—89); (Ex. 51).

Ms. Zink cannot present evidence that calling the police or requesting her removal for causing a disturbance were unconstitutional acts. Ms. Zink cannot present evidence that even if these acts were

unconstitutional, they were taken pursuant to a custom or policy implemented by Mesa. As a matter of law, Mesa cannot be held liable for any 42 U.S.C. § 1983 damages and Ms. Zink’s claim must be dismissed.

F. The trial court did not abuse its discretion in awarding attorney’s fees and costs in an amount less than Ms. Zink requested.

After the trial court found Mesa violated the OPMA,¹¹ Ms. Zink moved for entry of judgment in the amount of \$19,411.65 in attorney’s fees and costs pursuant to RCW 42.30.120. (CP 1881—84). As the prevailing party against Mesa, RCW 42.30.120 mandates that the trial court award Ms. Zink her costs and reasonable attorney’s incurred in connection with her OPMA action. After engaging in a meaningful review of the supporting records, the trial court awarded \$5,000 in reasonable attorney’s fees and \$1,511.49 in costs for Ms. Zink’s successful OPMA action. (June 22, 2018 15:9—21:21); (CP 2064—65).

1. Standard of review and applicable law.

Review of an award for costs and fees is under the abuse of discretion standard. *McConnell v. Mothers Work, Inc.*, 131 Wash.App. 525, 535, 128 P.3d 128 (2006). A trial court’s award should be reversed if the reviewing court determines that the trial court “exercised its discretion on untenable grounds or for untenable reasons.” *Collins v. Clark County*

¹¹ Mesa appeals this conclusion of law and supporting findings of fact. *See infra* § VI. C.

Fire Dis. No. 5, 155 Wash.App. 48, 99, 231 P.3d 1211 (Div. II. 2010) (citing *Chuong Van Pham v. City of Seattle, Seattle City Lights*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007)).

To arrive at a reasonable fee, the trial court should employ the lodestar method of multiplying a reasonable hourly rate by the number of hours reasonably expended. *Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007) (citing *Bowers v. Transamerica Title Ins. Co.* 100 Wn.2d 581, 593-602, 675 P.2d 193 (1983)). The trial court also factors in variables such as the difficulty of the issues, the skill involved, the prevailing rate for similar work, the dollar amount at issue, the contingent nature of the case, and degree of success achieved. *Id.* (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990)). Failure to make a record of the lodestar process is an abuse of discretion. *Id.*

If attorney's fees are only recoverable on some of a party's claims, then the award must segregate the time spent on varying claims. *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 672, 880 P.2d 988 (1994). The trial court need not segregate if it makes a finding that segregation is not reasonable. *Id.* at 673.

2. The trial court did not abuse its discretion in adjusting Ms. Zink's attorney's fees for reasonableness.

The trial court made a clear record of the reasons why certain of Ms. Zink's attorney's fees were unreasonable and thus unrecoverable. (June 22, 2018, 13:20—15:16). First, the trial court found that the methodology Ms. Zink's attorney employed in segregating and attributing time to the OPMA claim was unreasonable. (June 22, 2018, 13:23—14:12; 15:2—4). Next, the trial court found that the allocation and time spent on certain tasks was unreasonable. (June 22, 2018, 14:13—15:1). The trial court also found that the amount of fees claimed was unreasonable in light of the available remedy. (June 22, 2018, 15:6—14).

It is clear that the trial court considered the requisite factors and variables in ruling on Ms. Zink's attorney's fees. ((June 22, 2018, 13:20—15:16); *see also Chuong Van Pham v. City of Seattle, Seattle City Light*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007) (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 124, 786 P.2d 265 (1990))). The ruling was also based upon the trial court's years of experience as a trial lawyer and was adequately supported by an explanation on the record. (June 15:14—16); *see also Absher Constr. Co. v. Kent Sch. Dist. No. 415*, 79 Wn.App. 841, 848, 905 P.2d 1229 (1995). The trial court's decision was not exercised on

untenable grounds for untenable reasons and should therefore be affirmed.¹²

3. The trial court did not abuse its discretion in awarding Ms. Zink only those costs attributable to her OPMA claim.

Because Ms. Zink only prevailed on her OPMA claim, she can only collect reasonable attorney's fees and costs pursuant to RCW 42.30.120 that were attributable to that claim. *See Hume*, 124 Wn.2d at 672. The trial court did not find that Ms. Zink's OPMA claim was incapable of segregation from her other claims and was therefore required to segregate the attorney's fees and costs. *Id.* at 673.

It is clear from the record that the trial court engaged in a meaningful review of the costs and considered whether the costs requested were attributable to the OPMA claim. Any reduction of costs was based on sound reasoning that the entire cost could not be attributed to Ms. Zink's OPMA claim and could in fact be segregated from her other claims. (June 22, 2018, 16:1—21:21. The decision was not based on untenable grounds for untenable reasons and should be affirmed.

4. The trial court did not err in failing to award Ms. Zink statutory attorney fees under RCW 4.84.010(6).

In *City of Montesano v. Blair*, the Supreme Court found that "a party is not entitled to the attorney's fee thus provided and also the

¹² Again, Mesa disputes that Ms. Zink is even entitled to fees and costs.

statutory fee of \$10 allowed as costs to the prevailing party.” 12 Wash. 188, 189—90, 40 P. 731 (1895). This finding supports the trial court’s ruling that Ms. Zink was not entitled to “statutory attorney fees” under RCW 4.84.010(6) as a “cost” awardable under RCW 42.30.120. (June 22, 2018, 21:12—16). While a footnote in *Niccum v. Enquist*, states the statutory attorney fee is a cost under RCW 4.84.010, the case does not find that parties entitled to an award of reasonable attorney’s fees are also entitled to a statutory attorney fee under RCW 4.84.010. 175 Wn.2d 441, *fn.* 2, 281 P.3d 966 (2012). The trial court’s decision was not in error and should be affirmed.

VI. CROSS -APPELLANT’S ARGUMENTS IN SUPPORT OF APPEAL

A. The trial court should have dismissed Ms. Zink’s claims of negligent infliction of emotional distress and violation of 42 U.S.C. § 1983 for 14th amendment violation at summary judgment.

“The standard of review of an order of summary judgment is de novo, and the appellate court performs the same inquiry as the trial court.” *Aba Sheikh v. Choe*, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). “Summary judgment is available only where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Neff v. Allstate Ins. Co.*, 70 Wn. App. 796, 799, 855 P.2d 1223 (1993) (citing CR 56(c)). All evidence and reasonable inferences

from facts then presented are considered in favor of the nonmoving party. *Our Lady of Lourdes Hosp. v. Franklin Cnty.*, 120 Wn.2d 439, 452, 842 P.2d 956 (1993).

Trial typically bars review of a trial court's denial of summary judgment if the trial court determined an issue of fact existed that needed to be resolved by the fact finder. *Washburn v. City of Federal Way*, 169 Wn. App. 588, 610, 283 P.3d 567 (2012). However, the denial can be reviewed if "summary judgment turns solely on an issue of substantive law rather than factual matters." *Washburn v. City of Federal Way*, 178 Wn.2d 732, 745, 310 P.3d 1275 (2013) (citing *Univ. Vill. Ltd. Partners v. King Cnty.*, 106 Wn.App. 321, 324, 23 P.3d 1090 (2001)).

Even considering all evidence and reasonable inferences from the facts presented, Ms. Zink could not as a matter of law prove her claims for negligent infliction of emotional distress or under 42 U.S.C. § 1983 for 14th amendment violation and they should have been dismissed.

1. The trial court should have dismissed Ms. Zink's claim for negligent infliction of emotional distress.

To successfully pursue a claim for negligent infliction of emotional distress, Ms. Zink needed to present evidence demonstrating objective

symptomology. *Hegel v. McMahon*, 136 Wn.2d 122, 133, 960 P.2d 24

(1998) (emphasis added).¹³ According to the Supreme Court—

“to satisfy the objective symptomatology requirement established in *Hunsley*, a plaintiff’s emotional distress must be susceptible to medical diagnosis and proved through medical evidence. This approach calls for objective evidence regarding the severity of the distress, and the casual link between the observation at the scene and the subsequent emotional reaction...in order for [subjective] symptoms to satisfy the objective symptomatology requirement, they must constitute a diagnosable emotional disorder.” *Hegel*, 136 Wn.2d at 135; *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976).

Thus, Ms. Zink needed to present evidence that she had a diagnosable emotional disorder. *See Hegel*, 136 Wn.2d at 135; *see also Hunsley*, 87 Wn.2d 424. In her complaint, Ms. Zink alleged that Mesa negligently inflicted emotional distress and physical illness upon her. (CP 7). Ms. Zink elaborated upon the alleged emotional distress and claimed she was suffering from “an anxiety disorder,” “anxiety problems,” “paranoia problems,” and “panic attacks.” (CP 585; 591—92).

Ms. Zink produced medical records in support of her claim, but these only detailed Ms. Zink’s subjective symptomatology. (CP 695—750). These records do not have an actual diagnosis regarding her emotional distress or mental health. *Id.* As Ms. Zink testified during her

¹³ This rule applies to all claims of negligent infliction of emotional distress, not just third-party witnesses or by-standers as Ms. Zink claims in her pleadings. *See Kloepfel v. Bokor* 149 Wn.2d 192, 198—00, 66 P.3d 630 (2003) (discussing *Hunsley v. Giard*, 87 Wn.2d 424, 553 P.2d 1096 (1976)).

deposition, she has not sought mental health counseling in relation to the May 8, 2003 events. (CP 585; 594). Without a diagnosable emotional disorder, Ms. Zink could not as a matter of law sustain her claim for negligent infliction of emotional distress. *See Hegel*, 136 Wn.2d at 135; *see also Hunsley*, 87 Wn.2d 424.

2. The trial court should have dismissed Ms. Zink's claim for negligent infliction of emotional distress against council members Davis and Ferguson.

To prove her claim for negligent infliction of emotional distress Ms. Zink had to establish a duty, breach, proximate cause, and damage or injury. *Hunsley v. Giard*, 87 Wn.2d 424, 434, 553 P.2d 1096 (1976). Ms. Zink failed to present any evidence that council members Davis and Ferguson breached a duty owed to Ms. Zink that could be the proximate cause for her alleged stress and anxiety. The record shows council members Davis and Ferguson did absolutely nothing on the evening of May 8, 2003. (Aug. 28, 2006, 81:15—16). While they did not want to videotaped, this desire alone cannot serve as a breach of any duty allegedly owed to Ms. Zink.

The trial court even noted at oral argument that the record did not indicate council members Davis and Ferguson participated in the events or discussion with the FCSD. (Aug. 28, 2006, 84:17—23). The trial court

should have dismissed this claim against council members Davis and Ferguson.

3. The trial court should have dismissed Ms. Zink's 42 U.S.C. § 1983 claim against the council members because as a matter of law they had qualified immunity.

As previously briefed, Ms. Zink only had a privilege to attend the public meeting, not a constitutional or statutory right. *In re Recall of Kast*, 114 Wn.2d 807, 818, 31 P.3d 677 (2001); *see also* § V. D., E. 5—6 In failing to present evidence that she had a clearly established statutory or constitutional right, Ms. Zink in turn failed to present evidence that a reasonable person, i.e. the individual council members, had knowledge of or violated a clearly established statutory or constitutional right. *See Harlow*, 457 U.S. at 818; *see also* § V. D, E. 5—6. The trial court should have dismissed Ms. Zink's 42 U.S.C. § 1983 claim against the council members as a matter of law. *See Guljosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001).

4. The trial court should have dismissed Ms. Zink's 42 U.S.C. § 1983 claim against Mesa because as a municipality it cannot be held liable.

Again, a local governing unit may be sued directly under 42 U.S.C. § 1983 where the action alleged to be unconstitutional “implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated” by those whose act may be fairly said to

represent official policy. *Monell v. New York City Dpt. of Social Services*, 436 U.S. 658, 690, 98 S.Ct. 2018 (1978); *see also* § V. E. 7. As previously briefed, Ms. Zink has presented no evidence, and certainly none that would convince a reasonable jury, that her arrest or removal from City Hall was pursuant to any policy or custom of Mesa. Ms. Zink failed to even plead such facts in her complaint. (CP 1—28); *see* § V. E. 7. Ms. Zink’s claim should have been dismissed as a matter of law.

B. The trial court abused its discretion in finding the parties were not entitled to a jury trial.

Ms. Zink demanded a jury pursuant to CR 38. (CP 2139—40). Shortly before trial, Ms. Zink filed a “motion to show cause” requesting the trial court to rule as a matter of law on her claims. (CP 1312—28). The City of Mesa objected to the motion arguing the matter needed to be decided by a jury. (CP 1312—28). Rather than rule on Ms. Zink’s motion, the trial court empaneled a jury and submitted the case to the jury for verdict. (Vol. I, 88:14—19). At the conclusion of trial, the jury returned a favorable verdict for Mesa. (CP 1705—06).

On March 2, 2018, the trial court *sua sponte* concluded “that the jury was unnecessary” for Ms. Zink’s OPMA claim and set the jury’s verdict aside. (CP 1926, 17:25—18:5). In reaching this decision, the trial court reasoned the jury was unnecessary because the OPMA did not exist

in 1889 when the Washington State Constitution came into effect and the OPMA violation was not a case in equity or a case in action at law. (CP 1926, 17:10—24). The trial court then announced that it would decide on the issues presented for Ms. Zink’s OPMA claim and made findings of fact and conclusions of law in favor of Ms. Zink. (CP 1926—29; 2060—63). The trial court’s ruling that the parties were not entitled to a jury was an abuse of discretion and must be reversed with instruction to enter an order and judgment on the jury’s verdict.

“The Washington State Constitution, article 1, section 21 provides that the right to a jury trial shall remain inviolate.” *Brown v. Safeway Stores*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980). Washington courts “have consistently interpreted this constitutional provision as guaranteeing those rights to a trial by jury which existed at the time of the adoption of the constitution.” *Id.* (citing *In re Marriage of Firchau*, 88 Wn.2d 109, 114, 558 P.2d 194 (1977); *Watkins v. Siler Logging Co.*, 9 Wn.2d 703 , 116 P.2d 315 (1941)). “Accordingly, there is a right to a jury trial whether the civil action is purely legal in nature,” but not when the action “is purely equitable in nature.” *Id.* (citing *Peters v. Dulien Steel Prods., Inc.*, 39 Wn.2d 889, 239 P.2d 1055 (1952); *Dexter Horton Bldg. Co. v. King Cnty.*, 10 Wn.2d 186, 116 P.2d 507 (1941)).

The court determines the nature of the action by considering all the issue raised by all of the pleadings. *Brown*, 94 Wn.2d at 365 (citing *Seattle v. Pacific States Lumber Co.*, 166 Wash. 517, 530, 7 P.2d 967 (1932); (*Santmeyer v. Clemmancs*, 147 Wash. 354, 266 P. 148 (1928)). If the action is not purely legal or purely equitable, the court must exercise discretion to determine the primary character of the action by considering the following factors non-exclusive factors:

“(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.”

Scavenius v. Manchester Port Dist., 2 Wn.App. 126, 129—30, 467 P.2d 372 (1970) (approved and adopted in *Brown*, 94 Wn.2d at 368). Ultimately, “the preliminary task is to determine whether the various claims are equitable or legal, for if all the claims are legal, the ‘primary’ character of an action is not in question and the right to a jury is clear.” *Auburn Mechanical v. Lydig Const.*, 89 Wn.App. 893, 898—99, 951 P.2d

311 (1998). The trial court has discretion in determining whether a case is primarily equitable or legal in nature. *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 400, 633 P.2d 104 (1983) (superseded by statute on other grounds).

1. The trial court abused its discretion because it failed to determine if Ms. Zink's action was legal or equitable in nature.

The trial court did not engage in any meaningful analysis or consideration of whether Ms. Zink's action was legal or equitable in nature. (CP 1926—27). There was no consideration or analysis of the factors set in *Scavenius v. Manchester Port Dist.*, 2 Wn.App. 126 (1970). The trial court did not even make a determination as to whether or not the entirety of Ms. Zink's action was primarily legal or equitable in nature. (CP 1926—27). Simply put, the trial court completely skirted the issue of whether Ms. Zink's action was legal or equitable in nature but still concluded that the parties were not entitled to a jury trial. (CP 1926—27). This is a clear abuse of discretion and must be reversed with instruction to enter an order and judgment on the jury's verdict.

2. The trial court abused its discretion because Ms. Zink's action is legal in nature and therefore entitled to a jury trial.

The difference between legal and equitable claims “is based on the nature of the action, not the form of the action.” *Auburn Mechanical*, 89 Wn.App. at 899 (citing *S.P.C.S. v. Lockheed Shipbuilding & Constr. Co.*,

29 Wn.App. 930, 934, 631 P.2d 999 (1981)). The relief sought is perhaps the most dispositive factor to consider. *Id.* (citing *Chauffeurs, Teamsters & Helpers Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339 (1990)). Actions that are based in tort and requests for monetary damages are clearly legal in nature. *Wakins v. Siler Logging Co.*, 9 Wn.2d 703 , 116 P.2d 315 (1941).

The entirety of Ms. Zink's action against Mesa is based in tort. (CP 1—28). Ms. Zink sought monetary damages against Mesa for claims of intentional infliction of emotional distress, negligent infliction of emotional distress, malicious prosecution, false imprisonment, false arrest, loss of consortium, and deprivation of her constitutional rights. (CP 1—9). Ms. Zink also sought monetary damages against Mesa for violation of the OPMA. (CP 1—9). The very acts Ms. Zink alleged to be a violation of the OPMA also served as the basis for each of her other claims. (CP 1—9).

In filing her lawsuit, Ms. Zink sought to do nothing but collect monetary damages for claims based in tort. (CP 1—9). Ms. Zink did not plead for equitable relief, nor would any be available for her claims. (CP 1—9). Her action is clearly legal in nature and the parties were entitled to a jury trial. *See Wakins v. Siler Logging Co.*, 9 Wn.2d 703, 116 P.2d 315 (1941). The trial court's decision was an abuse of discretion and must be reversed with instruction to enter judgment on the verdict.

C. The trial court's conclusion of law that Mayor Ross placed an improper condition on Ms. Zink's attendance is based on an unsupported finding of fact and is therefore in error

Citizens do not have an unfettered right to attend public meetings, but rather a privilege and can be removed if they are causing a disturbance. *In re Recall of Kast*, 114 Wn.2d 807, 818, 31 P.3d 677 (2001); RCW 42.30.050. The trial court found that Ms. Zink did not cause a disturbance at City Hall on May 8, 2003 because all Ms. Zink did was video tape the council members. (CP 1927—28). From this finding, the trial court concluded that Mayor Ross did not have the proper authority to have her removed under the OPMA. (CP 1928). This finding of fact is not supported by substantial evidence and the conclusion of law is therefore in error.

“In reviewing findings of fact entered by a trial court, an appellate court's role is limited to whether substantial evidence exists to support its findings.” *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986).

“Where the trial court has weighed the evidence, the reviewing court's role is simply to determine whether substantial evidence supports

the findings of fact and, if so, whether the findings in turn support the trial court's conclusions of law." *In re Marriage of Rockwell*, 141 Wn.App. 235, 242, 170 P.3d 572 (2007). The reviewing court should "not substitute [its] judgment for the trial court's weigh the evidence, or adjudge witness credibility." *In re Marriage of Greene*, 97 Wn.App. at 714. Conclusions of law determined by the trial court are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

The record is clear that Ms. Zink caused a disruption at City Hall on May 8, 2003. (CP 71—89); (Ex. 51). Ms. Zink's actions went beyond videotaping the council members before the meeting began. When Mayor Ross asked that she turn the video camera off, Ms. Zink refused and began challenging Mayor Ross and even threatened to file another lawsuit against Mesa. (CP 72). Throughout the ordeal, Ms. Zink badgered the council members and Mayor Ross in an attempt to get them to engage with her. (CP 72—89). Ms. Zink testified that she knew going to City Hall that evening with her video camera was going to cause trouble, but she did it anyways. (Vol. IV., 753:17—755:7).

Ms. Zink's aggressive behavior and demand for police involvement alone clearly caused a disruption at City Hall. (CP 71—89); (Ex. 51). This is further established when coupled with the fact that Ms. Zink's video camera was being used as a tool to harass the council

members. (Vol. III, 535:22—534:1). Deputy Scantlin recognized Ms. Zink's motives and asked if her whole purpose was just to harass the council members. (CP 94:10—12).

Substantial evidence does not support the finding that Ms. Zink did not cause a disruption at City Hall on May 8, 2003. As such, the trial court's conclusion that Ms. Zink was removed from City Hall in violation of the OPMA is an incorrect application of the law. *See* RCW 42.30.050. This finding of fact and conclusion of law must be reversed.

D. The trial court erred in entering judgment in favor of Ms. Zink.

On June 22, 2021, the trial court entered judgment in favor of Ms. Zink in the amount of \$6,511.49. (CP 2064—65). The entry of this judgment was in error for multiple reasons.

First, the trial court only entered the judgment after incorrectly ruling that the parties did not have a right to a jury trial and set the jury verdict aside. *See supra* § VI. B. Second, the trial court entered judgment based upon findings of fact that were unsupported by substantial evidence that in turn led to incorrect or unsupported conclusions of law. *See supra* §§ V. A; VI. C. Finally, even if the trial court's findings of fact were supported by substantial evidence, these findings simply do not support the conclusions of law the trial court entered. *Id.*

If this Court reverses any of the trial court's decisions itemized above, then this Court must vacate the judgment entered in favor of Ms. Zink and instead enter an order and judgment on the jury's verdict.

E. The trial court erred in failing to enter judgment in favor of Mesa.

Had the trial court let the jury's verdict stand, entered findings of fact supported by substantial evidence, or properly applied the OPMA, then Mesa would have been the prevailing party on Ms. Zink's OPMA claim. *See supra* §§ V. A; VI. B—C. After the jury's verdict, but before the trial court set the verdict aside, Mesa filed a post-trial motion to enter a judgment awarding Mesa attorney's fees and costs because Ms. Zink's case for violation of the OPMA was frivolous. (CP1707—15). The trial court denied the motion. (CP 1928:22—25). This finding was not supported by substantial evidence.

Pursuant to RCW 4.84.185 and RCW 42.30.120, a public agency that prevails in an OPMA action is entitled to reasonable expenses, including fees of attorneys, incurred in opposing an action brought by the non-prevailing party that the trial court finds to be "frivolous and advanced without reasonable cause." RCW 42.30.120(4). "An action is frivolous if it 'cannot be supported by any rational argument on the law or facts.'" *Eller v. East Sprague Motors & R.V.'s Inc.*, 159 Wash. App. 180,

191, 244 P.3d 447 (Div. III 2010) (citing *Clarke v. Equinox Holdings, Ltd.*, 56 Wash. App. 125, 132, 783 P.2d 82 (1989)).

“Nothing in [RCW 4.84.185] requires a court to find that the action was brought in bad faith or for purposes of delay or harassment.” *Highland Sch. Dist. No. 203 v. Racy*, 149 Wash. App. 307, 311, 202 P.3d 1024 (2009). “It is enough that the action is not supported by any rational argument and is advanced without reasonable cause.” *Eller*, 159 Wash. App. at 192.

1. The OPMA did not apply to the case tried before the Court.

The OPMA only applies to the meetings of the governing body of a public agency. RCW 42.30.010. A meeting is, “a meeting in which an action is taken.” RCW 42.30.020 (4). Action is “the transaction of the official business of a public agency by a governing body including...receipt of public testimony, deliberations, discussions, considerations, reviews, evaluations, and final actions.” RCW 42.30.020(3). Without a meeting, no OPMA violations can occur. *Eugster v. City of Spokane*, 128 Wn. App. 1, 7—10, 114 P.3d 1200 (2005).

From the record and the trial court’s findings of fact, it is established that a meeting, as defined by the OPMA, did not occur on May 8, 2003. (CP 71—89; 2060—63); (Ex. 51). The scheduled city council meeting was not called to order until after Mrs. Zink’s disruption and after

Mayor Ross called FCSD. *Id.* Mrs. Zink even admitted that no meeting had occurred or was called to order until after the FCSD was called. (Vol. IV, 755:8—10).

Once called, the “meeting” was immediately recessed and no action was taken. (CP 72—89); (Ex. 51). After Mrs. Zink was arrested, the “meeting” was called to order and the business conducted. *Id.* No action, as defined by the OPMA, occurred on May 8, 2003 prior to the removal of Donna Zink. *Id.* The trial court confirmed this by correctly finding that Mayor Ross was the only one who acted in the decision to call FCSD and have Ms. Zink removed. (CP 2060—63).

Because there was no action, there was no meeting as defined by OPMA. Accordingly, the OPMA did not apply to the case before the Court. *Eugster v. City of Spokane*, 128 Wn. App. 1, 7—10, 114 P.3d 1200 (2005). Ms. Zink’s OPMA claim was not supported by any rational argument on the law or facts and was frivolous under RCW 4.84.185. *See Eller* 159 Wash. App. at 191. The trial court’s finding to the contrary was not supported by substantial evidence and must be reversed.

2. Ms. Zink did not have an unfettered right to attend the scheduled meeting.

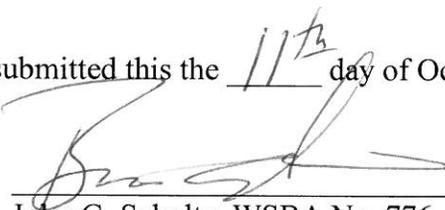
RCW 42.30.050 allowed Mesa to have Ms. Zink removed if she caused a disturbance. As discussed in § VI. C herein, the record proves

that Ms. Zink caused a disturbance at City Hall on May 8, 2003 and was not acting with “orderly conduct.” Ms. Zink’s claimed violation of the OPMA was not rooted in any rational argument on the law or the facts because she clearly caused a disturbance and was subject to removal. As such, Ms. Zink’s action was clearly frivolous. *See Eller* 159 Wash. App. at 191. The trial court’s ruling should be reversed and remanded for further proceedings on Mesa’s attorney’s fees and costs.

VII. CONCLUSION

From the record before this Court, it is clear Ms. Zink never had a viable claim against the City of Mesa or the council members for the events that occurred on May 8, 2003. Mesa respectfully requests that the Court grant its requested relief briefed herein and deny Ms. Zink’s. It is time to finally put this sixteen year long dispute to rest.

Respectfully submitted this the 11th day of October, 2019.



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