NO. 100076-6

SUPREME COURT
OF THE STATE OF WASHINGTON

DAMON RUIZ,

Petitioner,

v.

THERESA CARSTENSEN,

Respondent.

PETITIONER'S FIRST AMENDED PETITION FOR REVIEW OF COURT OF APPEALS DECISION

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A. IDENTITY OF PETITIONER

The petitioner, Damon Ruiz, by and through his attorney petitions this court to accept review of the Court of Appeals Division III decision.

B. COURT OF APPEALS DECISION

The petitioner requests that this court review the decision of the Court of Appeals Division III filed on May 27, 2021 designated in Appendix 1 and the denial of petitioner's motion for reconsideration filed on July 13, 2021 as designated in Appendix 2.

C. ASSIGNMENTS OF ERROR

1. The Court of Appeals erred in this case when its decision conflicts with a decision of the Supreme Court, *Roake v. Delman*, 189 Wn.2d 775 (2018).

2. The Court of Appeals erred in this case when its decision violated due process and separation of powers doctrine which involves a significant question of law under the Constitution of the State of Washington or of the United States.

E. STATEMENT OF THE CASE

1. On September 23, 2017, Mr. and Mrs. Ruiz went to the Jason Aldean concert in Spokane with Ms. Carstensen and Ms. Carstensen's girlfriend. (CP at S22-55). After the concert they went "bar hopping" with Ms. Carstensen and her girlfriend. (CP at S22-55). Ms. Carstensen's husband was not present during this event. (CP at S22-55). Afterwards, the four of them went back to the hotel and had consensual foursome sexual encounters. (CP at S22-56). Nowhere in the record shows that the Petitioner ever reported any allegations of inappropriate sexual contact on anyone's part involving the September 23, 2017 incident and no police report was filed until after the July 2018 assault of Respondent's wife and child. CP at S22-4, S22-76 and VRP 26, 29. On July 6, 2018, Ms. Carstensen and her husband went to Ms. Ruiz place of employment at the Wilbur Register Newspaper located in downtown Wilbur and began yelling and screaming causing the employer to call 911. (CP at S22-54-55). During this disturbance, Ms. Carstensen assaulted Ms. Ruiz and her child and damaged some of Ms. Ruiz's property. (CP at S22-53-58).

Additionally, Ms. Ruiz alleged that Ms. Carstensen and her husband stalked and harassed her and her family. (CP at S22-65-66). On July 9, 2018, Ms. Ruiz filed for and on July 24, 2018 was granted an Anti-Harassment Order against Ms. Carstensen and her husband Justin Carstensen. (CP at S22-60-74). On August 1, 2018, the Lincoln County Prosecutor filed criminal charges against Ms. Carstensen of (2) two counts of Fourth Degree Assault and (1) one count of Malicious Mischief Third Degree. (CP at S22-50-51). On December 8, 2018, Mr. Ruiz and his minor son traveled to Mr. Wagoner's butcher business located just outside of Wilbur to pick up some pre-ordered pork. (CP at S22-28). Unknown to Mr. or Mrs. Ruiz, Ms. Carstensen and her husband had recently rented a house in the same compound and general location as the butcher shop. (CP at S22-27-47). Mr. Carstensen observed Mr. Ruiz and minor son traveling in the area to pick up the pork and mistakenly concluded that Mr. Ruiz was stalking or harassing Ms. Carstensen. (CP at S22-27-47). However, Mr. and Mrs. Carstensen did not know or understand that Mr. Wagoner did operate and conduct butcher business at the same compound

location. (CP at S22-4, S22-27-47) (VRP 42-43). Mrs. Carstensen filed her sworn written statement which the court considered in granting the temporary SAPO which she incorrectly states: "Damon stopped and talked with a neighbor business owner as if he had business there". (CP at S22-4, S22-27-47) (VRP 42-43). "The business is not in a commercialized area, and I had never seen anyone stop there before". (CP at S22-4, S22-27-47) (VRP 42-43). As a result, on December 11, 2018, Ms. Carstensen filed the Petition for a Sexual Assault Protection Order (SAPO) and was granted a Temporary SAPO without prior notice and opportunity for Mr. Ruiz to respond which is at issue in this appeal. (CP at S22-1-9). On December 18, 2018, Mr. Ruiz filed a response and motion to reopen temporary SAPO and dismiss the temporary SAPO (CP at S22-13-50) and on December 21, 2018, a hearing was held, and all parties were present and represented by counsel before the Honorable Superior Court Judge John F. Strohmier. VRP 1-52. During this hearing, the judge reopened the temporary SAPO and asked the parties for any additional evidence including testimony of "statements or actions made at

the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts" as stated in RCW 7.90.020(1). VRP 36, 39, 43. The trial court applied the law as the Washington Supreme Court required in *Roake* when the temporary SAPO is reopened by the respondent and contested. VRP 36, 39, 43. Mr. Ruiz motioned the court to do such (CP at S22-15-74) and Ms. Carstensen offered no additional information. VRP 36, 39, 43. The court gave all parties an opportunity to bring in additional information "if anyone had anything, so I left it (temporary hearing) open... No one brought anything new..." so the judge ruled that the temporary SAPO "will not continue" and is denied and dismissed. VRP 52. (CP at S22-122-124). The judge also found that the petitioner's allegations that Mr. Ruiz has "rapey eyes" was subjective and a clear example of Mrs. Carstensen's attitude and lack of factual basis for the temporary SAPO. VRP 44. The judge stated that "when you talk about the declaration that his (rapey) eyes or something like that, ... you've got to step back and step back..." "I've never seen anybody come in

here and I could tell by looking at them they're guilty of a crime". VRP 44.

F. ARGUMENT

1. The Court of Appeals erred in this case because its decision conflicts with a decision of the Supreme Court, *Roake v. Delman*, 189 Wn.2d 775, 408 P.3d 658 (2018).

A. Mr. Ruiz first claims that the facts in the present case are almost the same facts as in *Roake*.

Mr. Ruiz asserts that in both cases, all parties lived in a small community and occasionally saw each other in passing. At no time in both cases was there any discussions, threats, or assaults. CP at S22-27 to S22-50. *Roake* at 777-778. In both cases, the petitioners were granted a temporary protection order without notice to the other side and the respondents contested the then required reasonable fear of future dangerousness and the trial court agreed and dismissed the temporary protection order. CP at S22-27 to S22-50. *Roake* at p778-780. Ms. Roake claimed that that she did "not know what he [was] capable of". Ms. Carstensen claimed that Mr. Ruiz had rapey eyes and she or her husband has encountered him several times in the small town. (CP at S22-1-9). *Roake* at p778-780. CP at S22-27 -50.

RP 1-52. Finally, even the trial court held that the facts in this case are similar to *Roake*. RP 36.

B. The Trial Court Followed the Procedures as Outlined By the *Roake* Supreme Court.

(1). Mr. Ruiz claims that the Court of Appeals erred when it held that the trial did not follow the procedures as outlined in *Roake.* At page 10 of the decision, the Court of Appeals held:

> In this case, unlike in Roake, the trial court did not dismiss the petition on the pleadings but instead found that at the time Ms. Carstensen filed her petition, it was legally and factually sufficient and valid. After finding the pleadings sufficient, the trial court then considered Mr. Ruiz's petition to reopen the temporary order and raise a meritorious factual defense to the temporary order. The trial court then considered declarations outside of the pleadings to hold that Mr. Ruiz had a meritorious defense because Ms. Carstensen had failed to prove a reasonable fear of future dangerous acts. By doing so, the trial court conflated sufficiency of the evidence with credibility of the evidence. See p. 10 of decision.

However, Mr. Ruiz refers this court to the record which is very clear that the trial court and Ms. Carstensen's counsel agreed that the temporary order be addressed first pursuant to *Roake* which occurred. Thus, Mr. Ruiz claims that the record shows

that the superior court did not find that the petition was legally and factually sufficient and valid. RP 6-24. Also see RP 36. In fact, the trial judge specifically stated that he will address Mr. Ruiz's motion to reopen the temporary first. RP 6. Therefore, the record is clear that the trial court did not find the SAPO petition was valid first as COA claim. Mr. Ruiz further claims that the transcript shows that the trial court throughout the hearing references its decision as directed in *Roake*. See RP 6,7,9,10,11,17,36,38,48,49 of the transcript.

(2). Mr. Ruiz next claims that the COA then incorrectly held that if the petition and temporary orders are sufficient, the trial court abused its discretion by not moving forward with a full hearing on the final order. Please see p12 of the decision that states:

> Mr. Ruiz raised a factual defense to the claims made in Ms. Carstensen's petition. **If the petition and temporary order are sufficient and valid, the trial court should move forward with a full hearing on the final order. RCW 7.90.050[i]. In failing to do so, the trial court abused its discretion. See p. 12 of Decision.**

However, Mr. Ruiz points to the report of proceedings and record where the trial court here just as the trial court did in *Roake*, reopened the temporary order after Mr. Ruiz brought forward evidence of the meritorious defense to petitioner's allegations of reasonable fear of future dangerous acts. This was in the form of a Motion to Reopen the Temporary Order and Dismissal of the SAPO just as was done legally in *Roake.* CP S22-15 to S22-74. RP 6-24.

(3). Mr. Ruiz also claims the COA erred when it ruled that the Trial Court did not follow the procedure as authorized in RCW 7.90.130(2)(e) and *Roake*. This contested portion of the decision states:

> In this case, Mr. Ruiz disputed Ms. Carstensen's factual claim of future dangerous acts. Instead of holding a fact finding hearing and taking evidence, the trial court considered declarations beyond the pleadings to determine credibility not sufficiency. This procedure is not authorized by RCW 7.90.130(2)(e) or *Roake*. See P. 11 of decision.

However, Mr. Ruiz disagrees and claims that the trial court followed the proper procedure as directed in *Roake.* In addition to the same argument made in A(1) and A(2), he points out that the *Roake* Supreme Court held that the respondent is legally

allowed to petition the court to reopen the order under the 2018 version of RCW 7.90.130 and CR 12 if he or she alleges a meritorious defense to the sufficiency of a temporary SAPO. See *Roake* at p.782. In the present case, Mr. Ruiz filed such motion to reopen and dismiss just as legally allowed in *Roake*. See CP S22-15 to S22-74. Additionally, Mr. Ruiz did challenge the SAPO petition by bringing forth such motion[ii].

(4). Mr. Ruiz also claims that the trial court did follow the correct procedures as outlined in *Roake* when it dismissed the SAPO. RP 52. He claims that according to *Roake*, a legal SAPO Petition must contain 2 elements of (1) sexual assault factual basis and (2) reasonable fear of future dangerous acts. See 2018 version of RCW 7.90.020(1). Therefore, Mr. Ruiz asks this court to review the relevant 2018 version of RCW 7.90.020(1) that clearly states that the SAPO petition must contain both elements and by Mr. Ruiz challenging the element of reasonable fear of future dangerous acts, he did challenge the petition according to law[iii]. See CP S22-122 to S22-124. Mr. Ruiz believes that based on these arguments, the Court of Appeal's decision in this case that the trial judge did not follow

the correct procedures conflicts with the Washington State Supreme Court decision in *Roake*.

(5). Mr. Ruiz also claims that the trial judge did follow the proper procedure as required in RCW 7.90.130 and *Roake* and considered the pleadings[iv] and any other evidence the parties wanted to submit including testimony.[v]

Mr. Ruiz contends that the COA decision is in conflict with and overlooked the language in *Roake* which supports the procedure followed by the trial court in this case. This contested portion of the Court of Appeal's decision at p.11 reads as follows:

> The majority went on to hold that when "a respondent brings a challenge to the sufficiency of the initial petition, either under RCW 7.90.130 or by way of a motion to dismiss as filed here, a trial court resolves that claim on the pleadings." Roake, 189 Wn.2d at 784 (emphasis added). Thus, under Roake, sufficiency and validity are determined on the pleadings. But when a respondent disputes a factual claim made in the petition, the court must hold a fact finding hearing and resolve the issue based on testimony or evidence submitted. Id. In this case, Mr. Ruiz disputed Ms. Carstensen's factual claim of future dangerous acts. Instead of holding a fact finding hearing and taking evidence, the trial court considered declarations beyond the pleadings to determine credibility not sufficiency. This procedure is not authorized by RCW 7.90.130(2)(e) or *Roake*. See P. 11 of Decision.

However, Mr. Ruiz claims that this Court of Appeal's decision is incorrect and in conflict with *Roake*. He refers this court to the portion of the *Roake* decision that rules otherwise. In that decision, this Court held:

> Here, Delman effectively did that by filing the motion to dismiss. Based on the motion, the trial court heard argument on the motion on the date the final hearing was scheduled. This was proper procedure established under RCW 7.90.130, which provides that a respondent may petition the court to reopen the ex parte temporary order where the respondent alleges that he or she had a meritorious defense to the order. Delman argued that Roake's petition was legally insufficient, which is such meritorious defense. See *Roake* at p. 782-783. (Emphasis added).

In the present case, the petitioner, Mr. Ruiz, filed the motion to reopen/dismiss and on the date of the scheduled final hearing, the trial court heard argument on the motion and dismissed after finding that the petitioner did not prove future reasonable fear of dangerous acts as required by law. However, the trial judge in the present case even went further and allowed any party to present any evidence including testimony which was rejected by all parties. RP 27, 33-34, 35, 52. Mr. Ruiz asks this court to

review the transcript of the proceedings at page 50-52. The trial judge clearly states:

> Court: The parties had an opportunity to bring in additional information if anyone had anything, so I left it open for the hearing, for the temporary hearing. No one brought anything new to the table, and so I ruled on the temporary order that that was not going to continue. RP 52.

The trial court even went further than required and stated to Ms. Carstensen's counsel that the pretext claim that Mr. Ruiz just used the "pick up meat" to really put fear in her was unbelievable. The judge stated:

> Court: I don't believe the evidence that I've seen -- read will lead me to believe that particular was a pretext unless you have some live testimony to convince me otherwise, which I don't know because I think you would of given it to me by now. RP 27. (emphasis added).

Thus, the trial court did hold a fact finding hearing and after considering all the evidence submitted by the parties, the trial court held that Mr. Ruiz had no knowledge of her location and was only picking up meat from an established butcher business. As a result, Mr. Ruiz argues that the superior court judge held just as in *Roake* that the then petitioner, Ms. Carstensen, did not

have true objective future fear of dangerous act and thus, dismissed the restraining order. See CP S22-122 to S22-124. Thus, Mr. Ruiz argues that the trial court did follow the exact procedure as clearly stated by the *Roake* Supreme Court. He respectfully claims that the Court of Appeals was just making the same argument as the Court of Appeals did in Roake v. Delman, 194 Wn. App. 442, 377 P.3d 258 (2016), that was reversed by this supreme court. In that case, the court of appeals held:

> We conclude that the SAPO Act, by its plain language, requires that a petition include an allegation that the respondent made specific statements or actions giving rise to a reasonable fear of future dangerous acts. However, the act does not require that a petitioner prove this allegation to obtain a protection order. See *Roake v. Delman*, 194 Wn. App. 442 at 453, reversed in *Roake v. Delman*, 189 Wn.2d 775 (2018).

Ms. Carstensen's counsel made the same argument as the Court of Appeals and argued:

> MR. ULRICH: I am arguing that the Court does not need to consider the reasonable fear element in issuing the final order. RP 17

However, the *Roake* Supreme Court disagreed with the COA as well as counsel for Ms. Roake and held:

> The Court of Appeals misunderstood the procedural posture and focused its analysis on RCW 7.90.090(1)(a), which establishes the requirements necessary for issuance of a final protection order. *Roake* at p. 783. (Emphasis added).

In the present case, the Court of Appeals also held that:

> If the petition and temporary order are sufficient and valid, the trial court should move forward with a full hearing on the final order. RCW 7.90.050. In failing to do so, the trial court abused its discretion." See p. 5 of Decision. There is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.[vi] RCW 7.90.110(1). See p. 6-7 of decision. Emphasis added.

However, Mr. Ruiz argues that the Supreme Court in *Roake* rejected this argument, and the Honorable Division III Court of Appeal's judges overlooked this point and made the same argument. As a result, Mr. Ruiz contends the Court of Appeals erred in this case when it went on to find that the trial court

abused its discretion by holding that Ms. Carstensen did not prove reasonable fear of future dangerous act.

(6). Mr. Ruiz also claims that the COA decision that the trial judge must believe everything that Ms. Carstensen states without more regarding proving reasonable fear of future dangerous acts violates Due Process and would lead to an absurd result.

The decision at issue which Mr. Ruiz asks this court to reverse states the following:

> While Mr. Ruiz denied these allegations, the court was required to accept Ms. Carstensen's version of events if it was going to decide Mr. Ruiz's motion under RCW 7.90.130(2)(e). Instead, the trial court accepted Mr. Ruiz's explanation. Viewing the evidence in a light most favorable to Ms. Carstensen, her petition is sufficient and valid. See page 12 of Decision.

However, Mr. Ruiz claims that the superior court judge considered this point and ruled that if any judge just believed everything a petitioner stated as true without more, this could lead to absurd results. RP 12-13.

(7). Ms. Carstensen Should Not Be Rewarded Under Invited Error for Setting Up Alleged Error.

Mr. Ruiz also claims that Ms. Carstensen's decision to not present testimony or any other additional evidence as requested by the trial judge regarding reasonable fear of future dangerous acts was invited error which was totally the Ms. Carstensen's free choice to offer testimony or not. Thus, she chooses to rest which is her prerogative. Under the doctrine of invited error, a party may not materially contribute to an erroneous application of law at trial and then complain of it on appeal. I*n re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132 (1995). The invited error dogma precludes a party from seeking appellate review of an error it helped create. *State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990).* The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal. *State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996).* Therefore, Mr. Ruiz asks this court to reverse the COA and not reward a party who sets up any alleged error.

(8). Finally, Mr. Ruiz asks this court to also reverse the Court of Appeal's findings that appears to state that he agreed that he sexually assaulted the petitioner.

Mr. Ruiz refers this court to the COA finding at page 4 of the decision, the COA wrote:

> For purposes of the motion to reopen and dismiss, Mr. Ruiz did not dispute the sexual assault but claimed that the temporary order was invalid because it failed to prove a reasonable fear of future dangerous acts from the respondent as required by *Roake.* P. 4 of COA decision.

However, Mr. Ruiz argues that according to WPIC 35.50 Assault—Definition: An act is not an assault, if it is done with the consent of the person alleged to be assaulted. Thus, Mr. Ruiz claims that the COA overlooked this fact plus Mr. Ruiz's declaration submitted in this SAPO hearing (CP at S22-27 to S22-31) and his statement to law enforcement where he clearly disputes that he sexually assaulted the respondent. See first paragraph in CP22-56.

2. The Court of Appeals erred in this case when its decision violated due process and separation of powers doctrine which involves a significant question of law under the Constitution of the State of Washington or of the United States.

Mr. Ruiz respectfully asks this court to reverse the Court of Appeal's order on the basis that it violates the separation of powers doctrine which involves a significant question of law

under the Constitution of the State of Washington and of the United States. He refers to the Court of Appeals decision and basis which reversed the trial court's dismissal and remanded back to superior court with instructions that the amended RCW 7.90.020 should be applied retroactively. However, Mr. Ruiz argues that the Court of Appeals order violates the Separation of Powers doctrine since the remand was ordered to apply retroactively." See p. 13 of the Div III decision.

G. CONCLUSION

Therefore, based upon this separation of powers and *Roake* conclusions plus all the legal and factual argument above, Mr. Ruiz respectfully asks this court to grant this Petition for Review of the Court of Appeal's decisions, reverse the Court of Appeal's decisions and affirm the trial court's decision dismissing the SAPO.

Respectfully Submitted this 19th day of August 2021.

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[i] Mr. Ruiz points out that RCW 7.90.050 as cited by the COA involves service and does not apply as concluded in this portion of decision at issue.

[ii] See CP S22-22 where Mr. Ruiz writes in all caps and underlined that TRIAL COURT SHOULD RESOLVE MR. RUIZ'S CHALLENGE TO THE SUFFICIENCY OF THE INITIAL PETITION.

[iii] Also see S22-21 where Mr. Ruiz clearly states that "In the present case, Mr. Ruiz claims that this court should also find that the temporary SAPO is invalid..."

[iv] Pleadings is defined as the beginning stage of a lawsuit in which parties formally submit their claims and defenses. ww.law.cornell.edu/wex/Pleading (emphasis added).

[v] Court: So, now we're here to reopen to hear the issues of testimony. Is the testimony going to be any different than the declarations that I've already gotten? MR. ULRICH: Your Honor, the only thing we had wanted to submit today, goes back to a statement they made about the sexual assault. So, as far as the testimony about subsequent acts we're resting on the written declarations on it. RP 24.

[vi] Mr. Ruiz argues that the trial court after considering all the evidence held that Ms. Carstensen did not prove reasonable fear of future dangerous acts. He further argues that the trial judge is in a better position to make these decisions than the Court of Appeals. An abuse of discretion will be found "only 'when no reasonable judge would have reached the same conclusion.'" State v. Bourgeois, 133 Wn.2d 133 Wn.2d 389 at 406 (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)). Explaining this deferential standard, the court in *State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967)).Wilson court recalled "the oft repeated observation that the trial judge," having "seen and heard" the proceedings, "is in a better position to evaluate and adjudge than can we from a cold, printed record." In another case, the Washington Supreme Court held that the trial court has more experience making a given type of determination and a greater understanding of the issues involved. *In re Parentage of Jannot*, 149 Wn.2d 123, 126-127, 65 P.3d 664 (2003). Thus, Mr. Ruiz claims that the law supports a trial judge making such decision which answers the sole issue as claimed by the Court of Appeals. At page 7 of the Division III Court of Appeal's decision: "The only issue on appeal in this case is whether the trial court erred in finding Ms. Carstensen failed to prove she had a "reasonable fear of future dangerous acts" by the respondent." However, in the present case, Mr. Ruiz claims that the law supports the decision that the trial judge made in this case; therefore, the answer should be that the trial court made the right decision under *Roake* and the law.

Appendix 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THERESA CARSTENSEN, Appellant, v. DAMON RUIZ, Respondent.	)	No. 36560-3-III UNPUBLISHED OPINION

STAAB, J. — A prior version of the Sexual Assault Protection Order (SAPO), chapter 7.90 RCW, was poorly written and resulted in confusion and unnecessary consternation. In the plurality decision of *Roake v. Delman*, 189 Wn.2d 775, 408 P.3d 658 (2018), the Supreme Court attempted to harmonize the statutes, but the multiple opinions are difficult to reconcile with the statutory language.

After *Roake* was decided, Theresa Carstensen filed a SAPO petition and was granted an ex parte temporary sexual assault protection order against the respondent, Damon Ruiz. At a hearing for the final order, the trial court allowed Mr. Ruiz to reopen

the temporary order. The court considered declarations beyond the pleadings to find that Ms. Carstensen had failed to prove a reasonable fear of future dangerous acts for purposes of the temporary order. Relying on a concurring opinion in *Roake*, the trial court concluded that it could not issue a final order if it could not issue a temporary order and dismissed Ms. Carstensen's SAPO petition.

Ms. Carstensen appealed this ruling. While her appeal was pending, the legislature amended several statutes in chapter 7.90 RCW to clarify its intent, explicitly noting its agreement with the dissent in *Roake*, and removing any requirement for the petitioner to prove statements or events beyond the assault itself that give rise to a reasonable fear of future dangerous acts.

While we cannot retroactively apply the statutory amendments to Ms. Carstensen's petition without violating separation of powers, we hold that the trial court erred in finding that Ms. Carstensen's petition for a temporary SAPO was factually insufficient. We reverse the order dismissing Ms. Carstensen's SAPO petition and remand for a hearing on the final order.

FACTS

On December 11, 2018, Theresa Carstensen filed a Petition for Sexual Assault Protection Order in Lincoln County Superior Court against Damon Ruiz. In her petition, she alleged that Mr. Ruiz sexually assaulted her after a concert in Spokane on September

23, 2017.[1] Ms. Carstensen put forth that the assault was traumatic and had a significant effect on her mental and emotional health. She pointed out that both she and the respondent, Mr. Ruiz, lived in the small town of Wilbur. Over the next several months, on the rare occasion when she ventured out of the house, Ms. Carstensen would see Mr. Ruiz in town. Specifically, she alleged that on two or three occasions, Mr. Ruiz would turn into the grocery store after seeing Ms. Carstensen's car in the parking lot, and get into the checkout line behind her with only one item to purchase.

Ms. Carstensen indicated that the stress and anxiety caused by the assault caused her and her family to move 23 miles south of Wilbur to a house on the end of a road. On December 9, shortly after moving, Ms. Carstensen's husband called her to say that he had just passed Mr. Ruiz on their road driving toward their house. Ms. Carstensen looked out the window and saw Mr. Ruiz pull his vehicle into their driveway and drive toward a shop on the property. The shop is rented by a separate business. Ms. Carstensen saw Mr. Ruiz speaking with the owner of the business. Believing that Mr. Ruiz was stalking her, Ms. Carstensen called the police. Mr. Ruiz left before the police arrived. (Subsequently referred to as the "driveway incident.")

[1] For purposes of his motion, Mr. Ruiz did not dispute the assault so the detailed allegations are not necessary to our determination.

Two days later, Ms. Carstensen filed a petition for a sexual assault protection order against Mr. Ruiz and included these facts in her petition. The state-mandated form[2] provided a section to "[d]escribe statements or actions of the respondent at the time of the sexual assault(s) or later that cause the petitioner reasonable fear of future dangerous acts." Clerk's Papers (CP) at 5. In response, Ms. Carstensen declared: "He left me bleeding on the floor of the hotel room shower unable to move. He tracked me down after I moved and came to my house." CP at 5. The court issued an ex parte temporary sexual assault protection order and set a hearing for December 21, 2018, to address the request for a final order.

Prior to the hearing on the final order, Mr. Ruiz filed a motion to dismiss pursuant to *Roake*. Specifically, the motion asked the court to reopen the temporary order, find it invalid, and dismiss the petition. For purposes of the motion to reopen and dismiss, Mr. Ruiz did not dispute the sexual assault but claimed that the temporary order was invalid because it failed to prove a reasonable fear of future dangerous acts from the respondent as required by *Roake*. In support of his motion, Mr. Ruiz filed a memorandum of

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[2] RCW 7.90.180(1): "The administrative office of the courts shall develop and prepare instructions and informational brochures required under RCW 7.90.020, standard petition and order for protection forms, and a court staff handbook on sexual assault, and the protection order process. The standard petition and order for protection forms must be used after September 1, 2006, for all petitions filed and orders issued under this chapter."

authorities. Separately, Mr. Ruiz filed his own declarations explaining that several months prior, his family had ordered a pig from the butcher who rented the shop near Ms. Carstensen's home, and he arrived on that day to pick up the processed meat. He claimed he had no idea at the time that Ms. Carstensen had moved to the same address. Other than his motion and supporting declarations, Mr. Ruiz did not file a responsive pleading to Ms. Carstensen's petition.

At the hearing for the final order, the court and attorneys understandably struggled to apply *Roake's* multiple decisions. The trial court began with the motion to dismiss, which was clarified as a motion to reopen and then dismiss. Mr. Ruiz's counsel made it clear that such a motion should be based on the pleadings without considering the declarations but then argued that Mr. Ruiz's meritorious defense was based on facts set forth in the declarations, i.e., that Mr. Ruiz had a reason to show up at the shop near Ms. Carstensen's home.

The trial court found that on the day it was filed, Ms. Carstensen's petition was legally and factually sufficient because the allegations met the statute's requirements. The court denied Mr. Ruiz's motion to dismiss the petition for legal insufficiency.

Nevertheless, the trial court granted Mr. Ruiz's motion to reopen the hearing on the temporary order and found that Mr. Ruiz had a meritorious factual defense to the driveway incident. The court reasoned that without the driveway incident, Ms. Carstensen could not prove any reasonable fear of a future dangerous act. The court

noted that the contacts in town following the assault were insufficient to show future dangerousness because the contacts were inevitable in a small town, and a reasonable person's fear from the assault would dissipate as time passed. The court concluded that since future dangerousness was an element for a valid temporary order, and since it was not proved, the temporary order was invalid. The court did not consider the final order, concluding that future dangerousness was also an element of the final order, and if Ms. Carstensen's evidence was insufficient for the temporary order, it is insufficient for the final order.

Ms. Carstensen appealed the court's order.

ANALYSIS

As an initial matter, we must decide whether subsequent amendments to chapter 7.90 RCW apply to the petition in this case. Prior to 2019, RCW 7.90.040 provided that a petition for a SAPO required an allegation of nonconsensual sexual conduct along with an affidavit "stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts." RCW 7.90.020(1). To obtain a temporary sexual assault protection order, the petitioner must establish that:

> (a) The petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent; and
> (b) There is good cause to grant the remedy, regardless of the lack of prior service of process or of notice upon the respondent, because the harm which that remedy is intended to prevent would be likely to occur if the

> respondent were given any prior notice, or greater notice than was actually given, of the petitioner's efforts to obtain judicial relief.

RCW 7.90.110(1).

In *Roake*, a plurality of the Supreme Court interpreted these statutes to require that a petition must allege "a reasonable fear of future dangerous acts" in order to justify a temporary sexual assault protection order. 189 Wn.2d at 777. Since the petitioner in *Roake* did not plead future dangerousness, her temporary order was invalid, and her petition was legally deficient. *Id.* at 783.

After Ms. Carstensen's petition was denied in Superior Court, and while her appeal was pending, the legislature amended chapter 7.90 RCW. The official notes to the amendment provide: "The legislature intends to respond to [*Roake*] by clarifying that a petitioner who seeks a sexual assault protection order is not required to separately allege or prove that the petitioner has a reasonable fear of future dangerous acts by the respondent, in addition to alleging and proving that the petitioner was sexually assaulted by the respondent." RCW 7.90.020.

The only issue on appeal in this case is whether the trial court erred in finding Ms. Carstensen failed to prove she had a "reasonable fear of future dangerous acts" by the respondent. If the amended statute applies to her petition on appeal, and proving dangerousness is no longer necessary, the decision on appeal would be clear.

In deciding whether the amendments apply to this case, the first question is whether application of the amended statute to this case would be considered prospective or retroactive. "Determining whether a statute is retroactive is a question of law that we review de novo." *State v. Brake*, 15 Wn. App. 2d 740, 743, 476 P.3d 1094 (2020). We start with the subject matter regulated by the statute. *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 809, 272 P.3d 209 (2012). In this case, the subject matter of the amendments are the requirements for obtaining a sexual assault protection order.

Once we have determined the subject matter, we decide which events have new legal consequences, and consider whether those "triggering events" occurred before the effective date of the amendment. *State v. Molia*, 12 Wn. App. 2d 895, 899, 460 P.3d 1086 (2020). The amendments to RCW 7.90.020 affect the requirements for a petition for a sexual assault protection order. Thus, the "triggering event" is a judicial determination that the petition does or does not meet the statutory requirements. In this case, this event occurred before the statutory amendments became effective. Consequently, applying the amendments to Ms. Carstensen's petition would require retroactive application of the statutory amendments.

This is true even though her case was pending on appeal when the amendments became effective. In *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018), the Supreme Court considered whether a newly enacted GR 37 applied to cases pending on direct appeal. The Court recognized that the "triggering event" for the new rule was voir

dire. Since jury selection in that case had occurred before the rule's effective date, applying the new rule to cases pending on appeal would require retroactive application. *Id.* at 248-49. Athough Ms. Carstensen's appeal was pending when the statutory amendments became effective, the triggering event occurred before the effective date of the statutory amendment.

Statutory amendments generally apply proactively unless the legislature expresses otherwise. *Howell v. Spokane & Inland Empire Blood Bank*, 114 Wn.2d 42, 47, 785 P.2d 815 (1990). A statutory amendment can be applied retroactively if it is curative or remedial, even without language showing legislative intent. *Molia*, 12 Wn. App. 2d at 903-04. However, even a curative or remedial amendment will not be applied retroactively if it contravenes a judicial construction of the statute that is clarified or technically corrected because of separation of powers considerations. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 584, 146 P.3d 423 (2006). In this case, it is likely that the statutory amendments are both curative and remedial. But retroactive application of the statutory amendments to this case would contradict the controlling decision in *Roake* and violate the separation of powers doctrine. Consequently, we will apply the 2018 version of the statues as construed by *Roake*.

Applying the 2018 version of chapter 7.90 RCW, as interpreted by *Roake*, we consider whether the trial court erred in finding Ms. Carstensen's petition factually insufficient to prove a "reasonable fear of future dangerous acts." We review the trial

court's fact-finding and decision to grant or deny a sexual assault protection order for abuse of discretion. *Nelson v. Duvall*, 197 Wn. App. 441, 451, 387 P.3d 1158 (2017). "A decision is based on untenable grounds or for untenable reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.*

In this case, unlike in *Roake*, the trial court did not dismiss the petition on the pleadings but instead found that at the time Ms. Carstensen filed her petition, it was legally and factually sufficient and valid.

After finding the pleadings sufficient, the trial court then considered Mr. Ruiz's petition to reopen the temporary order and raise a meritorious *factual* defense to the temporary order. The trial court then considered declarations outside of the pleadings to hold that Mr. Ruiz had a meritorious defense because Ms. Carstensen had failed to *prove* a reasonable fear of future dangerous acts. By doing so, the trial court conflated sufficiency of the evidence with credibility of the evidence.

The *Roake* holding was limited:[3] "We hold that RCW 7.90.130(2)(e) provides the procedure and opportunity to contest the *sufficiency and validity* of the petition and temporary order, and that the trial court correctly held that Roake's petition was legally

[3] *Roake* is a plurality decision. The holding in Justice Johnson's lead opinion is narrower than Justice McCloud's concurring opinion and is considered the majority opinion for purposes of precedent. *Wright v. Terrell*, 162 Wn.2d 192, 195, 170 P.3d 570 (2007).

insufficient under RCW 7.90.020(1)." *Roake*, 189 Wn.2d at 777 (emphasis added). The majority went on to hold that when "a respondent brings a challenge to the sufficiency of the initial petition, either under RCW 7.90.130 or by way of a motion to dismiss as filed here, *a trial court resolves that claim on the pleadings*." *Roake*, 189 Wn.2d at 784 (emphasis added).

Thus, under *Roake*, sufficiency and validity are determined on the pleadings. But when a respondent disputes a factual claim made in the petition, the court must hold a fact finding hearing and resolve the issue based on testimony or evidence submitted. *Id.* In this case, Mr. Ruiz disputed Ms. Carstensen's factual claim of future dangerous acts. Instead of holding a fact finding hearing and taking evidence, the trial court considered declarations beyond the pleadings to determine credibility not sufficiency. This procedure is not authorized by RCW 7.90.130(2)(e) or *Roake*.

By considering Mr. Ruiz's declarations, the trial court essentially converted a motion on the pleadings to a motion for summary judgment. CR 12(c);[4] *Mueller v. Miller*, 82 Wn. App. 236, 246, 917 P.2d 604 (1996). Even assuming that RCW

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[4] CR 12(c): "**Motion for Judgment on the Pleadings**. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56."

7.90.130(2)(e) authorizes a summary judgment motion, the court is still required to view the facts in a light most favorable to the nonmoving party. *Id.* Arguable, the standard of our review of a trial court's decision on the pleadings or on summary judgment is de novo. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 203, 289 P.3d 638 (2012).

Ms. Carstensen alleged that she frequently encountered Mr. Ruiz when she left her home. She also alleged that Mr. Ruiz's contacts were intentional and pretextual. While Mr. Ruiz denied these allegations, the court was required to accept Ms. Carstensen's version of events if it was going to decide Mr. Ruiz's motion under RCW 7.90.130(2)(e). Instead, the trial court accepted Mr. Ruiz's explanation. Viewing the evidence in a light most favorable to Ms. Carstensen, her petition is sufficient and valid.

Mr. Ruiz raised a factual defense to the claims made in Ms. Carstensen's petition. If the petition and temporary order are sufficient and valid, the trial court should move forward with a full hearing on the final order.[5] RCW 7.90.050. In failing to do so, the trial court abused its discretion.

[5] We recognize that the trial court gave Ms. Carstensen a chance to testify during the hearing. But having a full fact-finding hearing is different from giving a petitioner an opportunity to testify. A full hearing would allow the petitioner to examine the respondent under oath and develop relevant issues such as credibility and bias.

CONCLUSION

We reverse the trial court's order dismissing Ms. Carstensen's petition and remand for a hearing on the final order. Upon remand, the amended procedures in RCW 7.90.020 will apply to determine if the final order should be granted.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

I CONCUR:

Fearing, J.

RESULT ONLY:

Siddoway, A.C.J.

Appendix 2

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

THERESA CARSTENSEN, Appellant, v. DAMON RUIZ, Respondent.	)	No. 36560-3-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered respondent's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of May 27, 2021, is hereby denied.

PANEL: Judges Staab, Fearing, Siddoway

FOR THE COURT:

REBECCA PENNELL
Chief Judge

LAW OFFICE OF DAVID R HEARREAN PS

August 20, 2021 - 10:24 AM

Transmittal Information

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Superior Court Case Number:	18-2-00112-0

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