100109-6

Review of Division III Cause #36994-3-III
No.

SUPREME COURT OF THE STATE OF WASHINGTON

ZINK,

v.

CITY OF MESA.

PETITION FOR REVIEW BY SUPREME COURT

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I. INTRODUCTION

Using statutes and the constitution, the principal functions of the courts is to proclaim and apply judicial precedents. The legal precedent created by a court decision is to provide authority for judges deciding similar issues. The precedent established by the high court are mandatory and judges are obliged to make their rulings as reliable as reasonably possible with preceding judicial decisions on the same issue.

The decision of Division III to not publish the opinion in its entirety is error of law that should be reviewed by the Supreme Court. This case involves important public issues that have never been decided by a Court of Appeals concerning liability under the OPMA, contempt of court, new interpretation of existing law, as well as violations of U.S. constitutional law of great public concern.

The decision rendered in this case pertains to constitutional tort claims revolving around a violation of the Open Public Meetings Act (OPMA) for which no Washington caselaw exists. As the first of its kind to determine whether an agency can be held liable for the wrongful removal of a member of the public from a meeting under 42 U.S.C. § 1983 the decision is of great public importance and contains a significant question of law under the OMPA and the United States constitution which should be decided by the Supreme Court.

The decision concerning the refusal to review the underlying order of contempt and thereby the order of contempt because Zink did not seek discretionary review is a new interpretation of a Supreme Court decision and should be reviewed by the Supreme Court. As there is no other legal authority identifying such restriction on review of orders of contempt, this issue it is of substantial public interest as it affects all parties wishing to contest an erroneously issued order of contempt. This

decision is also in conflict with other Supreme Court decisions as well as state statutes giving parties the right to appeal an order of contempt of court.

The decision that a party must provide proof that they sought professional help in order to maintain a claim of intentional infliction of emotional distress, but only from mental health professionals rather than from medical professionals is in conflict of a Supreme Court decision that a party need not seek professional help and excludes medical professionals from treating emotional distress symptoms. This is an issue that affects the public at large and should be decided by the Supreme Court.

II. IDENTITY OF PETITIONER

Petitioner is Donna Zink, a pro se appellant. Zink respectfully asks this court to accept review of the Court of Appeals partially published opinion, terminating review as designated in section II of this petition.

III. COURT OF APPEALS DECISION

Zink seeks review of *Zink v. City of Mesa*, 17 Wn. App. 2d 701, 487 P.3d 902 (2021), a partially published decision of Division III of the Court of Appeals. The decision was amended on July 15, 2021. A timely filed motion for reconsideration was denied on July 15, 2021 (RAP 12.4). A copy of the opinion is attached to this request for review at Appendix A; pages A, 1 through A, 36.

IV. OVERVIEW OF THE ISSUES

The issues in this case affects the general public as a whole. This case involves the OPMA and what relief can be had if city officials are found liable for wrongful removal of a member of the public from a council meeting.

The OPMA is a strongly worded mandate and forceful reminder that agencies must allow members of the public to be present and cannot put any restrictions on their attendance at meetings outside clear disruption of the meeting. In this case, the Mesa city council forcefully removed Zink from their meeting through arrest because she refused to follow their new policy that members of the public must be granted permission to videotape council meetings. When Zink refused to stop her recording device, she was arrested for trespassing. The charges were eventually dismissed.

After her arrest, in addition to filing suit for violation of the OPMA, Zink filed suit for several tort claims against the city of Mesa, the councilmembers present at the meeting that night, and the mayor, including constitutional claims under 42 U.S.C. § 1983 for violation of Zink's Fourth and Fourteenth Amendments.

All but Zink's claim of violation of the OPMA were dismissed either during summary judgment or on directed verdict, except for Zink's claim of negligent infliction of emotional distress which was dismissed on an order of contempt when Zink refused to attend a six-hour psychological evaluation to determine whether she had any mental health issues. The trial court found the city of Mesa had violated the OPMA but would only award a portion of the requested attorney fees.

On review, Division III affirmed the trial court's order that the city of Mesa had violated the OPMA and reversed and remanded the order back to the trial court for proper determination concerning the attorney fee award. Division III affirmed the order of contempt opining that Zink had to be held accountable for her refusal to follow a court order no matter how erroneous the order. Division III also refused to review the underlying CR 35 order leading to the order of contempt finding that Zink lost her right to review when she did not appeal the decision through discretionary review.

Division III reversed and remanded the decision on the 42 U.S.C. § 1983 Fourteenth Amendment claims against the mayor and the city of Mesa but affirmed the dismissal of the claims against the councilmembers. Division III reversed and remanded the decision on the 42 U.S.C. § 1983 Fourth Amendment claims against the mayor but found no liability against the councilmembers or the city of Mesa, affirming the dismissal of that claims against the city of Mesa and the councilmembers.

Division III affirmed the dismissal of Zink's claim of intentional infliction of emotional distress finding that her medical records were not good enough to prove she sought professional help to alleviate her symptoms.

Division III affirmed Jeff Zink's claim of loss of consortium stemming from the dismissed claims because Zink did not devote enough of her brief to argument.

V. ISSUES PRESENTED FOR REVIEW

- Does an Appellate Court violate the court rules when it refuses to publish its opinion despite that opinion meeting the requirements of RAP 12.3(d) for publication?
- Are parties required to petition the court for discretionary review under RAP 2.1(a)(2) if they are found in contempt of court or forfeit their statutory right under RCW 7.21.070 to appeal the underlying order of contempt?
- Does a claim of intentional infliction of emotional distress require a party to seek professional help in order to maintain the claim? And if so, are medical doctors (cardiologists) adequate to prove a party sought professional help or must it be a mental health professional?
- Can the governing body of a public agency, in this case councilmembers, be held individually liable for a 42 U.S.C. § 1983 Fourteenth Amendment violation if they initiate a policy that violates the OPMA and remove a member of the public refusing to follow their erroneous policy from a meeting thereby violating the party's statutory right under the OPMA to attend the meeting?

- Did Zink show that the city of Mesa and the councilmembers present at the meeting, are liable under 42 U.S.C. § 1983 for violation of Zink Fourth Amendment when they initiated a new policy that members of the public must seek permission in order to videotape council meetings and had Zink arrested for trespassing when she refused to abide by their new policy?
- Did Zink properly brief the claims of loss of consortium given the fact that the loss of consortium only stemmed from the other tort claims that were dismissed and were not stand alone claims?

VI. STATEMENT OF THE CASE

This case began in May of 2003 when Zink was arrested and charged with the crime of unlawful trespassing at an open public meeting for refusing to follow the rules of attendance set out by the councilmembers present that night. Zink was eventually released, and all charges were dropped (A, 4-5). After Zink was arrested and removed, the Council held their meeting and conducted government business (Ex 1).

In July 2005, Zinks initiated claims against Mesa and Franklin County for: 1) violation of the OPMA; 2) deprivation of Zink's constitutionally protected rights under the Fourth and Fourteenth Amendments; 3) false arrest; 4) malicious prosecution; 5) intentional infliction of emotional distress; 8) negligent infliction of emotional distress; and 9) loss of consortium associated with the claims (CP 7-8).

In 2006, many of the claims against Mesa were dismissed on summary judgment, including the loss of consortium if it was associated with a dismissed claim. Only the claims of violation of the OPMA, negligent infliction of emotional distress, 42 U.S.C. §1983 14th Amendment violation, and the loss of consortium associated with the remaining claims survived summary judgment (Zink Open 10). The Zinks sought discretionary review which was denied (CP 470-72). Thereafter

the case languished in the courts. In 2014 the Zink's filed pro se notice (CP 482-83).

In 2016, the claim of negligent infliction of emotional distress was dismissed as punishment for contempt of court when Ms. Zink refused to participate in the court ordered six-hour psychological evaluation to determine whether Zink had a mental health disorder (CP 754-55; 920; 970-79).

In 2018, the two remaining claims of violation of the OPMA and 42 U.S.C. §1983 14th Amendment violation went to trial (A, 6). The 42 U.S.C. §1983 14th Amendment claim was dismissed on a directed verdict. The jury returned a defense verdict on the OPMA claim.

Posttrial, the court set aside the jury's verdict and found the city of Mesa violated the OPMA by prohibiting Ms. Zink from recording. The court refused to enter judgment against the mayor and city council members in their individual capacities, finding there was insufficient proof as to that aspect of the case (A, 6).

Ms. Zink sought attorney fees and costs in the amount of $19,411.65, pursuant to the OPMA. RCW 42.30.120(4). She produced an attorney fee declaration from her prior attorney, documenting the work he had done on the case. The court disregarded most of the fee declaration. The court awarded $5,000.00 in attorney fees, based on its estimate of what would be reasonable under the circumstances. The court also awarded $1,511.49 in costs, for a total judgment against the city of $6,511.49 (A, 6).

The Zinks sought direct review by the Washington Supreme Court which was denied and the case was transferred to Division III (6-7).

Upon review Division III:

1) Affirmed the violation of the OPMA against the city of Mesa but not the individual council members;

2) Reversed and remanded the related award of attorney fees;

3) Affirmed the order of contempt dismissing the claim of negligent infliction of emotional distress;

4) Reversed and remanded the order dismissing the Fourteenth Amendment 42 U.S. C. § 1983 claim only as to Mayor Ross and the city of Mesa;

5) Reversed the summary judgment dismissal of false arrest, false imprisonment, and malicious prosecution only as to Mayor Ross and the city of Mesa;

6) Reversed and remanded the Fourth Amendment 42 U.S. C. § 1983 claim only as to Mayor Ross;

7) Affirmed the order dismissing the claim for intentional infliction of emotional distress; and

8) Affirmed the dismissal of the claims of loss of consortium.

It is these decisions of Division III for which Zink petitions for review.

VII. ARGUMENT WHY REVIEW SHOULD BE EXCEPTED

1. <u>This case meets the minimum requirements for publication should be published in its entirety as new precedence for use by the public</u>

Division III determined that while the decision concerning Mesa's violation of the OPMA and award of attorney's fees was of precedential value the decision on Zinks tort claims, including 42 U.S.C. § 1983 federal claims do not, declining to publish those portions of the opinion.

> In the published portion of their opinion we address Ms. Zink's claims under the OPMA. We address her remaining claims in the unpublished portion of our opinion and grant partial relief based on the trial court's summary disposition of various claims against the Zinks.

A, 2, *fn.* 1.

> The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder

having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

A, 17. Division III's determination that this decision is of no precedential value is error of law and must be reversed.

Under RAP 12.3(d), an Appellate Court is required to make a decision not to publish an opinion based at least on the following criteria:

1. Whether the decision determines an unsettled or new question of law or constitutional principle;
2. whether the decision modifies, clarifies or reverses an established principle of law;
3. whether a decision is of general public interest or importance; or
4. whether a case is in conflict with a prior opinion of the Court of Appeals.

This case involves a finding that an agency violated the OPMA leading to federal constitutional violations as well as other tort claims. While decisions concerning OPMA violations are of public import and therefore of precedential value, if that OPMA violation also leads to viable claims for relief under the federal constitution and other tort claims the public interest substantially increases. Especially since this is the first case to address the issue of whether public agencies and individuals of that agency can be held liable for violation of a person's 4th and 14th Amendment rights as well as other tort claims if they erroneously remove a person from a public meeting by force. Because no court decision has ever determined whether an OPMA violation can lead to tort claims and federal constitutional violations this case has great precedential value and must be published.

As argued by Zink in her request to publish (Appendix B, 2-4), the opinion in this case is of precedential value because it settles a question of constitutional principle under a 42 U.S.C § 1983 claim that has never been decided and is needed

for clarification at the trial level. The evidence of this need for direction by upper courts can be found in the trial court's own words.

> Section 1983, when you read it, says that a claim can be brought for violations of the Federal Constitution or a federal statute. What we have here is a State statute. And some courts have articulated that State -- the violation of State statutes can give rise to a 1983 action, but I've always seen it phrased in terms of a State statute that -- that grants a property right. Because if there are certain property rights, then the violation of the statute would rise to a violation of the Federal Constitution. Your -- your building permit is – is one example of that under the -- our land use laws. Once you have a permit, you have a vested right to construct under that -- under the law that was in effect at the time you got the permit. If that is violated -- and that implicates federal constitutional due process law because if they, as they did in your case, expired that, without due process, it does implicate the Federal Constitution.
>
> But, unfortunately, I don't believe, and I have to rule, that the violation of the Open Public Meetings Act does not implicate federal constitutional rights. And so, without that, the -- the 1983 case can't go forward. And -- and I've been studying and fussing and fussing and studying, and I -- I wish I could point you to the couple of cases that -- that -- that I found that helped me out here.

RP (Vol V) 894:20-895:20 (emphasis added). The lack of caselaw on the issue of whether a party has a 42 U.S.C § 1983 claim under a state statute was the sole cause of the dismissal of Zink's claim. In reviewing the trial courts words at trial, it is clear, the court was looking for guidance as to whether a violation of a "statutory right" to attend a public meeting implicates 42 U.S.C § 1983 and found none.

There is no caselaw clarifying how and when a party must seek appellate review in the case of a contempt of court order. Division III's determination that a party must file for discretionary review under RAP 2.1(a)(2) in order to have a "right" to appellate review of an order of contempt is a new decision that clarifies

and/or modifies the rules concerning a party's right to review of contempt orders under RCW 7.21.070 and currently established caselaw.

Division III's determination that a party must seek professional help in order to maintain a claim of intentional infliction of emotional distress reverses an established principle of law.[1] Furthermore, no court has ever established that seeking professional help for severe emotional distress does not include medical doctors.

Likewise, Division III's decision that a party has a claim of false arrest, malicious prosecution and 4th amendment violation if wrongfully removed from an open public meeting through arrest determines a new question of law that is of great public import because it affects the liability of public agencies for violations of the OPMA. Prior to this case, a violation of an OPMA did not have such consequences.

Clearly the decisions of Division III in this case meets the minimum requirements for publication under RAP 12.3(d). Division III's refusal to publish despite the clear precedential value of its decision is an error that erodes the publics' confidence that our judicial system is fair and administers equal justice in all cases, leading to the impression that publication of opinions is not based on court rules but on the parties involved.

2. The opinion of Division III deprives a party of their statutory right to review of a trial court's order of contempt of court under RCW 7.21.070

The decision that a party must seek discretionary review of an order of contempt or forfeit their right to review has never been made by a Court of

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[1] To avoid redundancy, Zink argues the issue of the necessity of seeking profession help to maintain a claim of intentional infliction of emotional distress in section VII, sec. 3 below.

Appeals. Such a decision affects all parties erroneously found in contempt of court who wish to seek review, is in opposition to statutory rights and previous caselaw, and this important public legal issue should be determined by the Supreme Court.

In the unpublished portion of their opinion concerning the contempt of court order against Zink, Division III opined that because "[t]he trial court had jurisdiction in the case and authority to issue discovery orders," Zink's only option, as mandated by the decision of the Supreme Court in *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968),[2] was to "either to seek relief in this court through discretionary review or to comply with the order and preserve an objection for appeal" (A,19). Based solely on the decision in *Dike*, Division III denied Zink's request for review of the CR 35 order leading to the order of contempt because:

> Because Ms. Zink neither sought interlocutory review of the CR 35 order nor submitted to the evaluation, the trial court was entitled to treat the discovery order as final and impose sanctions. Ms. Zink was warned that failure to comply with the terms of the CR 35 examination would result in dismissal of her negligent infliction of emotional distress claim, yet she refused to comply. Given this circumstance, the trial court's dismissal order was an appropriate exercise of discretion. Dismissal will not be reevaluated at this point, regardless of the propriety of the underlying discovery order.

A,20. As discussed below, Division III's decision misrepresents and is in conflict with the Supreme Court decisions including *Dike*, RCW 7.21.070, court rule CR 54(2)(b) and appellate rules RAP 2.1(a)(1) and RAP 2.4(a).

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[2] "[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt." *Dike*, 8.

a) The decision in *Dike* does not require a party to seek review of an order of contempt of court through discretionary review

Zink agrees that the trial court had the right to issue the CR 35 order and the order of contempt no matter how erroneous. Had Zink complied with the CR 35 order there would have been no order of contempt entered. Zink agrees that under the decision in *Dike*, the Supreme Court made clear that a party refusing to adhere to a trial court order, no matter how erroneously made, is liable for contempt.[3] The *Dike* Court determined this to be so because the authority of a trial court to decide an issue includes the authority to make a wrong decision that "is as binding as one that is correct until set aside or corrected in a manner provided by law." Freeman on Judgments, 5th Ed., section 357, p. 744" (*Id.*, 8).

However, in that same decision, the Supreme Court clarified that a party only remains liable until an erroneous contempt of court order is reviewed on appeal and found to be erroneous.

> Consequently, the authorities are in accord that where the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court.

Id., 8 (emphasis added). Despite the clear mandate in *Dike*, that an order of contempt is appealable, Division III determined that a party can only seek a review of an order of contempt though discretionary review (RAP 2.1(a)(2) rather than as a matter of right (RAP 2.1(a)(1).

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[3] Zink provided argument as to why the trial court's order on the CR 35 which led to order of contempt motion was in error in opening briefing to Division III (Zink Open, 28-37).

> The trial court had jurisdiction in the case and authority to issue discovery orders. As a result, Ms. Zink was not entitled to simply ignore the trial court's discovery order. See Dike v. Dike, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) ("[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt."). Her options were either to seek relief in this court through discretionary review or to comply with the order and preserve an objection for appeal. See id.

A, 19 (emphasis added). Nothing in the *Dike* decision decrees that a party must seek discretionary review of an order of contempt under RAP 2.1(a)(2) or lose their right to appeal an erroneously issued order of contempt, which by necessity includes the underlying order leading to contempt, under RAP 2.1(a)(1).

In fact, discretionary review is not favored in the appellate courts "because it lends itself to piecemeal, multiple appeals" (*Right-Price Rec. v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002). With this in mind, CR 54(2)(b) clarifies that parties must wait until all claims have been resolved before filing for review of any of the claims in the appellate court.

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the courts own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties **shall not** terminate the action as to any of the claims or parties, and the order or other form of

> decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

CR 54(2)(b)(emphasis added). Under CR 54(2)(b), the order of contempt against Zink did not become final and appealable until the final judgment was rendered on the remaining claims (42 U.S.C § 1983 14th Amendment and OPMA) and the action was terminated.

Zink agrees that the trial court had the authority to find her in contempt when she refused to participate in the six hour long psychological evaluation. Zink agrees that had she not timely appealed at the conclusion of the entire case (CR 54(2)(b)), the order would stand no matter how erroneously made. But, Zink did properly appeal the issue at the conclusion of the entire case and has a statutory right under RCW 7.21.070 (see below) to review of the erroneous order of contempt under RAP 2.1(a)(1). Division III decision deprives her of her right to appeal the trial court's order on contempt and the issue must be remanded back to Division III for proper review.[4]

b) RCW 7.21.070 gives Zink a "statutory right" to proper review of the order of contempt issued against her which would by necessity include a review of the underlying order leading to the order of contempt.

Under RCW 7.21.070, a party has been specifically given a "statutory right" to appeal an order of contempt of court by our legislature. This right, given to all parties, has a long history dating back to when the state of Washington was still a territory.

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[4] The appellate court will, at the instance of the appellant, review the decision or parts of the decision designated in the notice of appeal ... RAP 2.4(a). Zink properly designated she requested review of the trial court's order of contempt and the CR 35 order leading to the order of contempt in her opening brief (Zink Open, 28-37).

> Either party to a judgment in a proceeding for a contempt, may appeal therefrom in like manner and with like effect as from a judgment in an action, ...

Statutes of the Territory of Washington 1869, General Laws, Sec. 680, pg. 171 (see also Code of Washington 1881, sec. 738, pg. 158).

The Supreme Court addressed the issue of the appealability of an order of contempt in a decision rendered in 1909. That Court determined that "[a]n order adjudging a person to be in contempt is made appealable by statute.- Bal. Code, § 5811 (P. C. § 1480)." *Drainage Dist. No. 1, King County v. Costello*, 53 Wash. 67, 70, 101 Pac. 497 (1909). The issue was again addressed in 1952 by the Supreme Court who again clarified that a party has a statutory right to review of an order of contempt of court.

> We have said that an order adjudging a person to be in contempt of court is made appealable by statute. Drainage Dist. No. 1, King County v. Costello, 53 Wash. 67, 101 Pac. 497; State ex rel. Mangaoang v. Superior Court, 30 Wn. (2d) 692, 193 P. (2d) 318.

Arnold v. Nat'l Union of Marine Cooks & Stewards Ass'n, 41 Wn.2d 22, 27, 246 P.2d 1107 (1952). And again in 1982, the Supreme Court acknowledged that a party has a "right to appeal" from an order of contempt under RCW 7.20.140[5] (*Griffin v. Draper*, 32 Wn. App. 611, 614, 649 P.2d 123 (1982)).

As determined by the Supreme Court, under RCW 7.21.070,[6] Zink has a "statutory right" to review of the order of contempt against her for refusing to submit to a six-hour psychological evaluation as ordered by the trial court under CR 35. Division III's refusal to conduct a review of the underlying CR 35 order

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[5] Either party to a judgment in a proceeding for a contempt, may appeal therefrom in like manner and with like effect as from judgment in an action ... RCW 7.20.140, Laws of 1984, c. 258 § 70.

[6] RCW 7.20.140 was recodified under RCW 7.21.070 (Laws of 1989 c 373 § 7, p. 1943).

leading to the order of contempt is an erroneous interpretation of the Supreme Court's decision in *Dike* and violates the right Zink has been given by statute.

3. The decisions that a claim of intentional infliction of emotional distress requires proof a party sought professional help for emotional distress and that the professional help sought cannot be from medical professionals are errors of law and in conflict with a Supreme Court decision that a party need not seek professional help

Citing to *Kloepfel v. Bokor*, 149 Wn.2d 192, 198, 66 P.3d 630 (2003),[7] Division III found that Zink did not meet the third element because she did not provide evidence that her distress was ongoing or that it led Ms. Zink to seek medical help.[8]

a) The decision is in direct conflict with the Supreme Court decision in *Kloepfel v. Bokor*

In *Kloepfel*, the Supreme Court reviewed the specific legal question of whether a claim of intentional infliction of emotional distress (tort of outrage) requires proof of severe emotional distress by objective symptomology and medical diagnosis (*Id.*, 193-94). The *Kloepfel* Court clarified that:

> We hold that the objective symptomatology requirement, which properly applies to the tort of negligent infliction of emotional distress, is not a requirement for proof of intentional infliction of emotional distress or outrage.

Id. 194. Specifically, the Court found that although Kloepfel "did not seek professional care of a doctor or counselor, her physical symptoms of emotional distress included nervousness, sleeplessness, hyper-vigilance, and stomach upset"

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[7] Quite simply, objective symptomatology is not required to establish intentional infliction of emotional distress. "The general rule is firmly established that physical injury or bodily harm - 'objective symptomology' - is not a prerequisite to recovery of damages where intentional (and, in most states, reckless) emotional harm has been inflicted." *Kloepfel*, 198.

[8] Division III did not clarify what type of professional help Zink was required to seek.

(*Id.* 195). The *Kloepfel* Court determined that a claim of intentional infliction of emotional distress includes:

> [A]ll highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea." Restatement (Second) of Torts, supra, cmt. j at 77. Severe emotional distress is, however, not "transient and trivial" but distress such "that no reasonable man could be expected to endure it." Id.; Grimsby, 85 Wn.2d at 59. The elements of outrage provide sufficient limitation on claims, and there is no need to graft the objective symptomatology requirement to intentional infliction of emotional distress.

Id., 203. Despite this clear mandate, Division III found Zink had not met the third element of her claim of intentional infliction of emotional distress because "there is no evidence showing her distress was ongoing or that it led Ms. Zink to seek professional help" (A,31).

The decision that Zink was required to provide proof that she sought medical intervention for her symptoms in order to maintain her claim of intentional infliction of emotional distress is the same as that of requiring objective symptomology, which the Supreme Court in *Kloepfel* determined was not necessary to establish a claim of intentional infliction of emotional distress.

b) Zink provided medical records and testimony showing she sought help from medical doctors for treatment of her symptoms related to emotional distress and the medical records provided clearly show the intensity and duration of Zink's symptoms

In reviewing the trial court's dismissal of the intentional infliction of emotional distress claim, Division III found that while Zink had proven the first two elements of the tort (A, 30),[9] she had not proven the third element because "[w]hile Zink

[9] In response to Zink's opening brief, Mesa did not argue that Zink did not meet the third element of an intentional infliction of emotional distress. The Mesa only argued that Zink did not meet the first two elements of the claim of intentional infliction of emotional distress (Mesa Resp/Open, 41-4). The two elements Division III found Zink met (A 30).

claims to have suffered a panic attack, there is no evidence showing her distress was ongoing or that it led Ms. Zink to seek professional help" citing to *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 872-73, 324 P.3d 763 (2014)(general statements that victim was "traumatized and very upset" insufficient to prove severity without evidence of intensity and duration of those symptoms" (A,31).

In opening briefing at pg. 57, Zink provided the Court with evidence of more than just generalized statements that she was traumatized and very upset or that she merely suffered a panic attack.[10] The medical records provided to the Court show Zink suffered not only mental distress, but she also suffered physical symptoms weeks and months after the arrest which manifested in documented episodes of sinus tachycardia, increased heart rate, arrythmia, frequent PVC's,[11] (CP 141-43) difficulty breathing, dizziness, (CP 138:22-24) as well as paranoia, anxiety, and panic attacks (CP 137:8-9) that worsened when she attended the next council meeting after the arrest two weeks later (CP 138:3-9) and did not resolve even during sleep (CP 138:9-10). Zink provided irrefutable evidence that she sought professional medical help from two separate and individual cardiologists licensed in the state of Washington to treat Zink's symptoms (CP 145).[12]

Specifically, Zink provided evidence that two weeks after her arrest at the council meeting, she sought out a cardiologist, Dr. Sambasivan, for the physical cardiac symptoms she was experiencing (CP 137:23-5), she was diagnosed with frequent PVCs and episodes of sinus tachycardia and was prescribed medication for

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[10] It should be noted that the symptoms of a panic attack are palpitations, accelerated heart rate, shortness of breath and feeling dizzy; symptoms greater than generalized statements of being traumatized or very upset.

[11] Premature ventricular contractions.

[12] No person may practice or represent himself or herself as practicing medicine without first having a valid license to do so (RCW 18.71.021).

anxiety (CP 143-44). The unrefuted evidence provided shows that Zink sought out a cardiologist due to the fact that in 2001, two years prior to her arrest, Zink was diagnosed and treated for a cardiac condition known as Wolff-Parkinson-White which was successfully treated by Dr. Chilson, a cardiologist at Inland Cardiology in Spokane Washington and has not returned (CP 138:15-19; 145). After objective testing (CP 141-43) she was referred back to Dr. Chilson and was seen approximately five weeks later (CP 145). She was still experiencing symptoms at that time and was diagnosed with "probable reactive sinus tachycardia secondary to catecholamines associated with stress" (CP 145) and directed to continue to take the prescribed medication for anxiety which she continued to do as late as November of 2003; six months after her arrest (CP 144). All of this evidence was provided and cited to by Zink in her opening brief.

Although the Supreme Court in *Kloepfel* found that a party need not provide objective symptomology for a claim of intentional infliction of emotional distress, Zink unquestionably showed she sought professional medical help for her emotional distress symptoms and that the records generated show the intensity and duration of her symptoms. Clearly, Division III's determination that seeking medical help is not seeking professional help or show the duration of her symptoms is error of law and fact and must be reversed.

4. Dismissal of the 42 U.S.C. § 1983 Fourteenth Amendment claim against councilmembers Davis and Ferguson was error of law and is in conflict with decision of federal courts

Division III determined that while the record showed that Mayor Ross and the city of Mesa could be held liable under for a Fourteenth Amendment violation under 42 U.S.C. § 1983, the councilmembers couldn't and affirmed the dismissal of the claim of Davis and Ferguson. This is error of law.

While liability under RCW 42.30.120[13] can only attach to a councilmember who knowingly violates of the OPMA (A, 12-13), knowledge of wrongdoing is not a requirement to establish a prima facie case for relief under 42 U.S.C § 1983. As noted by Division III:

> To establish a claim for relief under 42 U.S.C. § 1983, a plaintiff must prove two elements: (1) some person deprived them of a federal constitutional or statutory right and (2) the person in question was acting under color of state law. Sintra, Inc. v. City of Seattle, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992), abrogated on other grounds by Chong Yim v. City of Seattle, 194 Wn.2d 682, 702-03, 451 P.3d 694 (2020).

A, 20-21. It cannot be disputed that the council members were acting under the color of law in their official capacity as the governing body of Mesa on the night of May 8, 2003.[14]

> The May 8 session attended by Ms. Zink readily meets the foregoing definition of a meeting. The fact that action had yet to be taken does not mean there was no meeting. It is undisputed that at the time Ms. Zink recorded the proceedings, the mayor and city council members had gathered together with the collective intent to hold a meeting.

A, 8-9. Clearly the evidence shows, and Division III found, that the councilmembers executed a policy when they collectively directed the Mayor, as the presiding officer of the meeting, to stop Zink's recording of the meeting; depriving Zink of her statutory "right to attend a public meeting by unlawfully

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[13] (1) Each member of the governing body who attends a meeting of such governing body where action is taken in violation of any provision of this chapter applicable to him or her, with knowledge of the fact that the meeting is in violation thereof, shall be subject to personal liability in the form of a civil penalty in the amount of five hundred dollars for the first violation.

[14] As a noncharter code city, the city council is the governing body of Mesa. Former RCW 35A.12.010 (1997) (A 2).

conditioning attendance on Zink's forgoing the video records of the meeting" (A, 22).

> The mayor was not some sort of a rogue third party. She was the city's chief executive and served as a presiding officer of the city council. When speaking to the 911 operator, Mayor Ross used the first person plural "we" throughout the brief conversation. In addition, while talking during Ms. Zink's recording, the mayor made abundantly clear she was speaking for the council when she directed Ms. Zink to stop recording. Ms. Zink has therefore stated a claim that the city of Mesa's governing body established an invalid condition precedent on her attendance at a public meeting.

A, 12 (published portion of opinion)(emphasis added). The facts are clear and undisputable. The "[council members and] Mayor Ross, in [their] capacity as [the governing body and] the presiding officer at the city council meeting, made a deliberate choice to prohibit members of the public from video recording council meetings." (A, 22-23).[15] By statute it is the councilmembers who establish policy and rules for council meetings.

> The council shall determine its own rules and order of business, and may establish rules for the conduct of council meetings and the maintenance of order.

RCW 35A.12.120. By statute only the council members had the authority to remove Zink from the meeting.

> [T]he governing body may remove a member of the public who is disrupting the orderly conduct of business. RCW 42.30.050. But any

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[15] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.") (A, 23).

> such removal must be reasonable. In re Recall of Kast, 144 Wn.2d 807, 811-12, 31 P.3d 677 (2001) (per curiam).

A, 9 (published portion of opinion). Division III acknowledged that Mayor Ross was enforcing the council members policy that members of the public were prohibited from video recording council meetings.

> In making this determination, Mayor Ross indicated she was enforcing the will of the council members who did not wished to be on video. Given this record, Ms. Zink has asserted facts sufficient to establish municipal and individual liability. See Pembaur v. City of Cincinnati, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.").

A, 23. The council members as the governing body, who instructed Mayor Ross to enact their policy to place restrictions on Zink's attendance at the council meeting, are equally, if not more, responsible for the violation of Zink's statutory right under the OPMA. Zink not only established a prima facia case for relief under 42 U.S.C. § 1983 14th Amendment due process claim against Mayor Ross (individually) and the City of Mesa (as a municipality), Zink showed a prima facia case against the three members of the city council enforcing their policy decision on that night to exclude any members of the public who wished to videotape the meeting.[16] Division III's decision that the Zinks presented a viable claim of individual liability but only against Mayor Ross is error of law and must be amended to include the council members. (A, 22).[17]

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[16] Councilmember Fay was voluntarily dismissed due to his death (A, 5).

[17] The Zinks presented a viable claim that Mayor Ross, acting in her official capacity, deprived Ms. Zink of her right to attend a public meeting by unlawfully conditioning attendance on Ms. Zink's

1. **Dismissal of the 42 U.S.C. § 1983 Fourth Amendment claim against councilmembers Davis and Ferguson and the city of Mesa was error of law and is in conflict with decision of federal courts**

While Division III reversed the dismissal of Zink's 42 U.S.C. § 1983 Fourth Amendment claim against Mayor Ross individually, the Court found that the other councilmembers present that night were not individually liable because they did not play a role in instigating Zink's arrest (A, 28). Division II found that the city of Mesa could not be held liable because the record is devoid of any evidence that Zink was arrested due to a custom or policy (a, 29).

To establish a cause of action under 42 U.S.C. § 1983, a plaintiff must show (1) the defendant violated a federal constitutional or statutory right, and (2) the defendant acted under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981). A plaintiff who proves these elements is entitled to at least nominal damages. *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992). Here, Division III acknowledges that Zink's Fourth and Fourteenth Amendment rights were violated when she was arrested for trespassing at a meeting open to the public. There can be no question that the councilmembers and the mayor were acting in their official capacity (under the color of law) on the night of the arrest.

a) Individual liability under 42 U.S.C. § 1983

Federal courts have opined that individual liability under § 1983 attaches when a party causes or participates in an alleged constitutional deprivation.

> Section 1983 creates a cause of action based upon personal liability and predicated upon fault. An individual cannot be held liable in a § 1983

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foregoing the video recording of the meeting. As a result, the Zinks were entitled to a jury trial on their § 1983 due process claim against Mayor Ross (A, 22).

> action unless he caused or participated in an alleged constitutional deprivation.
>
> A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary.

Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983)..

In this case, the casual connection or affirmative link is the new policy of the councilmembers that members of the public could not attend the meeting with an operating video camera. But for the new policy of the governing body, the police would not have been called and Zink would not have been arrested for trespassing for attending the open public meeting.

As noted by Division III, "Mayor Ross indicated she was enforcing the will of the council members who did not wished to be on video" (A, 23). While Mayor Ross was the one who called the police and requested Zink be removed, she was not the individual who enacted the new policy. Only the councilmembers can enact policy concerning council meetings (RCW 35A.12.120).[18] Rather, the mayor was acting in her official capacity as the presiding officer of the meeting.[19] It was the new policy of the councilmembers on videotaping council meetings that was the direct cause of Zink's arrest and under the decision in *Wolf-Lillie* they can be held individually liable for a 42 U.S.C. § 1983 Fourth Amendment violation.

b) Municipal liability under 42 U.S.C. § 1983 Fourth Amendment

Division III determined that Zink has not shown sufficient facts against the city of Mesa that she was arrested pursuant to an official city policy or custom. The policy leading to Zink's arrest and violation of § 1983 Fourth Amendment is the

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[18] The council shall determine its own rules and order of business, and may establish rules for the conduct of council meetings and the maintenance of order (RCW 35A.12.120),

[19] Meetings of the council shall be presided over by the mayor, if present... (RCW 35A.12.110).

same policy leading to the § 1983 Fourteenth Amendment violation. It was the councilmembers new enunciated policy that members of the public could not attend their open public council meetings with an operating video camera without permission from the council.

> She's already been told once and that's enough (CP 72:6).
>
> You can't have the camera in here (CP 72:7).
>
> And you have to have written permission to tape us CP 72:11).
>
> Well we would like to, she's, we would like for her to be removed from city hall (CP 72:29)
>
> We'd like her to remove the camera from City Hall... turn if off (CP 79:4); None of us would like to be on your movie (CP 81:1).

Which was the direct cause of Zink's arrest and removal from the meeting.

> Apparently the prosecutor has been talked to about this before and you can not record in here (CP 86:30-31)
>
> Basically these people are telling you to leave and your going to have to leave (CP 88:30-31)
>
> She needs to leave. If she doesn't want to leave she can be arrested for trespassing (CP 89:8).

Our Supreme Court in *Monell* determined that:

> Local governing bodies (and local officials sued in their official capacities) can, therefore, be sued directly under 1983 for monetary, declaratory, and injunctive relief in those situations where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. In addition, local governments, like every other 1983 "person," may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels.

Monell v. Department of Soc. Svcs. 436 U.S. 658, 690-91 (1978). Based on the decision in *Monell*, the Court in *Wolf-Lillie*, 870, enunciated that liability attaches

to a local governmental entity when a person's rights are violated through the execution of a government's policy or custom or edict representing official policy (*Id.* 870). Informal actions reflecting a general policy of official conduct ("you have to have written permission to tape us" (CP 72:11)) which even tacitly encourages conduct depriving citizens of their constitutionally protected rights, satisfies the standards of a § 1983 claim.

> We must therefore reject at the outset appellant's suggestion that an 'official policy' within the meaning of Monell cannot be inferred from informal acts or omissions of supervisory municipal officials. Indeed, by holding that a municipality can be held liable for its 'custom' Monell recognized that less than formal municipal conduct can in some instances give rise to municipal liability under § 1983.

Webster v. City of Houston, 689 F.2d 1220, 1227 (5th Cir.1982). Even a single decision of the municipality constitutes a policy for the purposes of § 1983 claim.

> [I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances. No one has ever doubted, for instance, that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future - because even a single decision by such a body unquestionably constitutes an act of official government policy.

Pembaur v. Cincinnati, 475 U.S. 469, 480, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). Clearly the record provided shows that the City of Mesa councilmembers and Mayor were instigating a policy decision concerning videotaping the council meetings when they told Zink to remove her camera or leave, called the police when Zink refused, and told the police they wanted Zink removed because she was videotaping the meeting in opposition to their policy prohibiting the videotaping council meetings without permission. This was the direct cause of Zink's arrest for

trespassing because they did not want her there ("Because you'll be trespassing. Because basically they don't want you here" (CP 87:12)).

The decision of Division III that Zink that the record is devoid of evidence showing Zink was arrested pursuant to an official policy or custom is an erroneous application of the law and the record provided and must be reversed. [20]

2. <u>There was no independent loss of consortium claim and the claims were dismissed solely based on the dismissal of the claims they were attached to and dismissal was in error</u>

Division III determined that because Zink did not devote a section of her brief to the loss of consortium claim they would not review it, affirming the dismissal of the loss of consortium claim.

The loss of consortium claims were not standalone claims and were dismissed solely on the basis that Zink's tort claims were dismissed. The trial court on summary judgment made this clear in its written order.

> The court dismisses Jeff Zink's claim of loss of consortium, to the extent that such a claim is based upon claims of false arrest, false imprisonment, intentional infliction of emotions distress, and violations of the fourth amendment, but not to the extent such claims are based upon violations of the Open Public Meetings Act, negligent infliction of emotional distress, or violations of the fourteenth amendment.

(CP 469:1-7). In dismissing the loss of consortium claim associated with the claim of negligent infliction of emotional distress, the trial court enunciated in its written order that:

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[20] On May 8, 2003, the City's highest authority, the Administrator (Mayor) and the Legislative Body (City Council) initiated an official policy that Zink could not video tape the Council meeting. The City acted by and through its official policy when its Legislative and Administrative bodies collectively decided that Zink could not record the council meeting and called the police to remove her (Zink Open, 59).

> IT IS FURTHER ORDERED that the claim of loss of consortium by Jeff Zink which flows from the claim of plaintiff for negligent infliction of emotional distress shall also be dismissed.

(CP 983:13-17). And in dismissing Zink's 14th Amendment claim the trial court did not distinguish between the 14th Amendment claim and the loss of consortium associated with that claim (CP 1855-56). The trial court merely dismissed the 14th Amendment claim and did not mention the attached loss of consortium claim. But for the dismissal of Zink's tort claims, the of loss of consortium claims would not have been dismissed.

Zink identified that the lose of consortium was associated with the dismissed claims (Zink Open, 44). There was no argument to develop other than to brief the Court on the underlying issues surrounding the dismissal of the claims from which the loss of consortium claim arose and was dismissed.

Had the underlying claims not been dismissed, Jeff Zink's loss of consortium claims would still be valid. Therefore, by reinstating the underlying claims, Jeff Zink's loss of consortium claims must also be reinstated.

VIII. CONCLUSION

For the forgoing reasons, this court should accept review under RAP 13.4(b).

RESPECTFULLY SUBMITTED this 16th day of August 2021.

By _____
Donna Zink
Pro se

Appendix A

FILED
JUNE 1, 2021
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

DONNA ZINK and JEFF ZINK, wife and husband, and the marital community composed thereof, Appellants / Cross Respondents, v. CITY OF MESA, a Washington Municipal Corporation; DUANA RAE ROSS, a married woman; DAVID FERGUSON, a married man; and ELIZABETH DAVIS, a married woman, Respondents / Cross Appellants, PATRICK FAY, a married man; FRANKLIN COUNTY, a Washington Municipal Corporation; RICHARD LATHIM, in his capacity as Franklin County Sheriff; RUBEN BAYONA, an individual; FRANKLIN COUNTY SHERIFF'S DEPUTY SCANTLIN, an individual; and BRIAN PFEIFFER, an individual, Defendants.	)	No. 36994-3-III OPINION PUBLISHED IN PART

PENNELL, C.J. — The Open Public Meetings Act of 1971 (OPMA), chapter 42.30 RCW, is a powerfully worded statute that broadly protects the public's right of access to all forms of public meetings. Under the terms of the statute, governmental bodies cannot

set conditions on the right to attend a public meeting unless reasonably based on the need to keep order.

Donna Zink was excluded from a Mesa city council meeting because she sought to video record the proceedings. The video recording was not inherently disruptive; Ms. Zink was prohibited from making a recording simply because at least some members of the city council did not wish to be on video. By conditioning Ms. Zink's attendance at the city council meeting on her agreement not to make a video recording, Mesa violated Ms. Zink's rights under the OPMA. We affirm the trial court's order granting Ms. Zink's OPMA claim against Mesa, but reverse the court's award of attorney fees, as it was too restrictive.[1]

FACTS

Mesa is a noncharter code city, with a mayor and city council organized under chapter 35A.12 RCW. As a noncharter code city, the city council is the governing body of Mesa. Former RCW 35A.12.010 (1997). The mayor serves as presiding officer for the city council, having a vote only in case of a tie concerning certain matters.

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[1] In the published portion of this opinion we address Ms. Zink's claims under the OPMA. We address her remaining claims in the unpublished portion of our opinion and grant partial relief based on the trial court's summary disposition of various claims against the Zinks.

Former RCW 35A.12.100 (1979). In 2003, the Mesa city council consisted of five members. The mayor was Duana Ross.

The Mesa city council had a meeting scheduled to commence at 7:00 p.m. on May 8, 2003. There were routine items on the agenda. Three of the council's five members were present for that day's meeting, constituting a majority of the governing body.

Local resident Donna Zink appeared for the May 8 city council meeting and began video recording a few minutes before 7:00 p.m., utilizing a mini-recorder and tripod. Ms. Zink had previously recorded other city council meetings. She had also notified the city attorney of her intent to video record the council meetings and had not received any objections.

Shortly after Ms. Zink began recording, council member Patrick Fay and Mayor Duana Ross told Ms. Zink they did not care to be on tape. Two other members of the council were present, but remained silent. The mayor told Ms. Zink she needed permission to tape the proceedings. Ms. Zink asked what law required such permission. Ms. Zink stated she was "not turning the camera off so call the police." Ex. 51 at 34 sec. through 37 sec.

Mayor Ross then called 911 at the prompting of council member Fay. During the call, Mayor Ross stated "we have some problems here with a citizen" and "we would like her to be removed from city hall." Ex. 16 at 14 sec. through 27 sec. After getting off the telephone with 911, Mayor Ross called the council meeting to order and then immediately announced a 10 minute recess.

A sheriff's deputy arrived and talked to Ms. Zink. Ms. Zink informed the officer she had a right to record the meeting as it was a public meeting and she was not causing a disturbance. A discussion ensued over whether Washington's privacy act, chapter 9.73 RCW, applied to Ms. Zink's recording, or whether the OPMA applied. While apparently reviewing the OPMA, Mayor Ross commented she had three council members objecting to the video tape because it made them feel uncomfortable while they were trying to do their jobs. Mayor Ross also stated she had tried to consult with the city attorney about the issue, but had not yet heard back.

The deputy eventually said he had conferred with council member Fay, who also worked as a sheriff's deputy. According to the deputy, council member Fay reported learning from a prosecutor that a recording could not be made without two-party consent. The deputy claimed Ms. Zink was trespassing and would be arrested if she did not either leave or stop recording. Ms. Zink did not stop recording. Ms. Zink was then handcuffed,

transported to the Franklin County jail, given a citation, and released. After Ms. Zink's removal, the council resumed its meeting and conducted business on its agenda.

Ms. Zink was criminally charged via citation with trespass in the first degree. She was arraigned on May 12, 2003, and was required to return to court for a pretrial conference on June 11. Instead of returning for a pretrial conference, the docket shows the case was dismissed through a motion of the prosecutor on May 20.

PROCEDURE

In 2005, Ms. Zink and her husband sued the city of Mesa, Mayor Ross, the three city council members present that night (collectively Mesa), Franklin County, the Franklin County Sheriff's Office, the elected sheriff, and the involved deputies. The Zinks made claims regarding violations of the OPMA as well as civil rights and emotional distress claims regarding Ms. Zink's exclusion from the meeting and arrest.

In pretrial rulings, the court disposed of all the Zinks' claims except the OPMA claim and a tort claim under 42 U.S.C. § 1983 for deprivation of liberty without due process. Also prior to trial, the Zinks settled their claims against the county. Council member Fay later died and the claims against him were voluntarily dismissed. Although the Zinks had originally been represented by counsel, they proceeded to trial pro se.

A jury trial was held in January 2018. In the middle of trial, Mesa filed a motion for directed verdict on both claims. The court granted the motion with respect to the § 1983 claim. The jury subsequently returned a defense verdict on the OPMA claim.

Posttrial, the court ruled the OPMA case was not triable to a jury as a matter of right and the court was not bound by the jury's verdict. The court set aside the jury's verdict and found the city of Mesa violated the OPMA by prohibiting Ms. Zink from recording. The court refused to enter judgment against the mayor and city council members in their individual capacities, finding there was insufficient proof as to that aspect of the case.

Ms. Zink sought attorney fees and costs in the amount of $19,411.65, pursuant to the OPMA. RCW 42.30.120(4). She produced an attorney fee declaration from her prior attorney, documenting the work he had done on the case. The court disregarded most of the fee declaration. The court awarded $5,000.00 in attorney fees, based on its estimate of what would be reasonable under the circumstances. The court also awarded $1,511.49 in costs, for a total judgment against the city of $6,511.49.

The Zinks sought direct review by the Washington Supreme Court. The Supreme Court denied review and transferred the appeal to this court, pursuant to RAP 4.2(e)(1).

ANALYSIS

Open Public Meetings Act

The OPMA provides "[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. Remedies for violations of the OPMA include mandamus or injunction as provided in RCW 42.30.130, voidance of certain actions as provided in RCW 42.30.060, and recoupment of "all costs" and reasonable attorney fees as provided in RCW 42.30.120(4).

Our review of the OPMA's legal requirements is de novo. *Wood v. Battle Ground Sch. Dist.*, 107 Wn. App. 550, 558, 27 P.3d 1208 (2001). Statutory terms are interpreted according to the rules for discerning legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002). We defer to the trial court for any applicable factual findings. *See Miller v. City of Tacoma*, 138 Wn.2d 318, 322-23, 979 P.2d 429 (1999). Here, the parties dispute whether an OPMA violation occurred in this case and, if so, whether liability extends only to the city or also to the mayor and individual city council members. These are largely legal matters and are therefore reviewed de novo.

The May 8, 2003, proceedings constituted a "meeting"

One of the elements[2] of an OPMA claim is proof a governing body conducted a "meeting." *See Eugster v. City of Spokane*, 110 Wn. App. 212, 222, 39 P.3d 380 (2002). The OPMA defines a "meeting" as a gathering "at which action is taken." RCW 42.30.020(4). Our case law has discerned the term "meeting" was intended to have broad application. *Wood*, 107 Wn. App. at 562. The basic requirements are the presence of a majority of the governing body and a collective intent to transact official business. *Citizens All. for Prop. Rights Legal Fund v. San Juan County*, 184 Wn.2d 428, 442-43, 359 P.3d 753 (2015).

The May 8 session attended by Ms. Zink readily meets the foregoing definition of a meeting. The fact that action had yet to be taken does not mean there was no meeting. It is undisputed that at the time Ms. Zink recorded the proceedings, the mayor and city

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[2] A claim against a governmental entity requires proof of five facts: (1) members (2) of a governing body or a committee thereof (3) of a public agency (4) violated or intend to violate a section of chapter 42.30 RCW, (5) at a meeting. RCW 42.30.030; former RCW 42.30.120(1) (1985). When a claim is against an individual member for personal liability, the plaintiff must prove a past violation, not an anticipatory violation, under element (4), and must also prove (6) the individual member had "knowledge of the fact that the meeting [was] in violation" of a provision of the statute. Former RCW 42.30.120(1). The current remedies for a claim against a member found personally liable are a $500 civil penalty for a first violation and a $1,000 civil penalty for subsequent violations. RCW 42.30.120(1)-(2).

council members had gathered together with the collective intent to hold a meeting. This is all that is required under the OPMA.

The OPMA includes a right to record public meetings

The OPMA recognizes very few avenues for restricting attendance at governmental meetings. The statute recognizes the authority to exclude the public from executive sessions. Former RCW 42.30.110 (2001). In addition, the governing body may remove a member of the public who is disrupting the orderly conduct of business. RCW 42.30.050. But any such removal must be reasonable. *In re Recall of Kast*, 144 Wn.2d 807, 811-12, 31 P.3d 677 (2001) (per curiam).

One of the core protections under the OPMA is that an individual's right to attend a public meeting cannot be restricted to fulfilment of a "condition precedent." RCW 42.30.040. The statute does not define what is meant by "condition precedent." *Black's Law Dictionary* defines the term as:

> An act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. • If the condition does not occur and is not excused, the promised performance need not be rendered. The most common condition contemplated by this phrase is the immediate or unconditional duty of performance by a promisor.

BLACK'S LAW DICTIONARY 366 (11th ed. 2019).[3]

Under the foregoing definition, extracting a promise not to record as a precondition on attendance at a public meeting would appear to qualify as a condition precedent. This understanding is also consistent with the purpose of the OPMA, which is to grant the people of the state of Washington the right to be informed and retain control over governmental agencies. RCW 42.30.010.

The foregoing understanding of the OPMA is consistent with a 1998 attorney general opinion. When asked by a county prosecutor whether "a county legislative body [may] prohibit an individual from using a video or audio recording device to record a meeting or hearing conducted by county officials," the Office of the Attorney General concluded:

> A county does not have authority to ban video or sound recording of a meeting required to be open to the public by the [OPMA]; the county could regulate recording only to the extent necessary to preserve order at the meeting and facilitate public attendance.

1998 Op. Att'y Gen. No. 15, at 1.

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[3] The edition of *Black's Law Dictionary* current at the time of the OPMA's enactment states: "A condition precedent . . . is one which to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." BLACK'S LAW DICTIONARY 366 (rev. 4th ed. 1968).

While we are not bound by attorney general opinions, we generally give them great weight. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 308, 268 P.3d 892 (2011). Such weight is especially appropriate here, given the opinion has been in place for over 20 years and the OPMA has been amended several times during this period with no changes that would impact the opinion.

We interpret the OPMA as prohibiting governing bodies from restricting audio or video recordings as a condition precedent to attending a public meeting. This is not to say a governing body cannot exclude a member of the public who is recording a meeting in a disruptive manner. But the undisputed facts show this is not what happened here. The video evidence demonstrates Ms. Zink did not cause a disturbance when she began recording. The discussion between Ms. Zink, Mayor Ross and others was civil and orderly. There were no threats and the discussion took place prior to the council's discussion of items on the agenda. Unlike the circumstances in *Kast*, Ms. Zink's actions did not constitute an interruption of the council's public meeting. 144 Wn.2d at 818. The decision to eject Ms. Zink from the May 8, 2003, city council meeting was not reasonable under the circumstances.

The city of Mesa violated the OPMA

Mesa argues that even if a prohibition on audio and video recordings is an invalid condition precedent under the OPMA, the city did not violate the OPMA because the condition was imposed by the mayor, not the city's governing body. We disagree. The mayor was not some sort of a rogue third party. She was the city's chief executive and served as a presiding officer of the city council. When speaking to the 911 operator, Mayor Ross used the first person plural "we" throughout the brief conversation. In addition, while talking during Ms. Zink's recording, the mayor made abundantly clear she was speaking for the council when she directed Ms. Zink to stop recording. Ms. Zink has therefore stated a claim that the city of Mesa's governing body established an invalid condition precedent on her attendance at a public meeting.

The facts do not support individual OPMA liability

Although the city of Mesa is liable for mandamus and injunctive relief under RCW 42.30.130, personal liability against the individual elected officials requires further analysis under the statute. Former RCW 42.30.120(1). To state a claim against the individual officials, Ms. Zink also had to prove each member had "knowledge of the fact that the meeting is in violation" of the OPMA. *Id.* Notably, this mens rea element

is phrased so that the member must have knowledge the meeting itself was in violation of the OPMA, not knowledge that a particular action was in violation of the OPMA.

The trial court held Ms. Zink failed to establish individual liability because Mayor Ross's actions on May 8, 2003, were taken on advice given by the city's attorney. We agree with Ms. Zink that this finding is not supported by substantial evidence. At trial, the former city attorney testified he received a call from the city council the night Ms. Zink was arrested. From the evidence at trial, it appears no one consulted the city attorney until after the Mayor ordered Ms. Zink to stop recording and called 911. At the trial, Mayor Ross testified that the city attorney was not called until just before the sheriff's deputy showed up, and it was the city's clerk/treasurer, Teresa Standridge, who called at Mayor Ross's request.

The trial court's oral ruling, which was not incorporated into its written rulings, was there was no knowledge because none of the respondents had received training on the OPMA. This was an accurate finding based on the undisputed evidence admitted at trial and should be substituted as alternative grounds for affirming the trial court's judgment. RAP 2.5(a); *see Young v. Toyota Motor Sales*, 196 Wn.2d 310, 321, 472 P.3d 990 (2020) (citing *Abbott Corp. v. Warren*, 53 Wn.2d 399, 402, 333 P.2d 932 (1959)). It was not until 2014, well after the city council meeting at issue in this case, that our

legislature adopted a training requirement for public officials. RCW 42.30.205. This case is an unfortunate example of one where no training took place.

Ms. Zink argues Mayor Ross and members of the city council likely knew their actions were illegal. But as a plaintiff, Ms. Zink bore the burden of proof. Here, there is simply no evidence of knowledge one way or the other. Given this circumstance, Ms. Zink has not and cannot established a basis for individual liability under the OPMA.[4]

The Zinks are entitled to reasonable attorney fees under the OPMA

Attorney fees are available under RCW 42.30.120(4) for violations of the OPMA. The Zinks appeal the trial court's attorney fee award, arguing it undervalued their claim for fees.

Reviewing an attorney fee award involves mixed questions of law and fact. Legal issues, such as whether attorney fees are applicable, are reviewed de novo. *See Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007). But we afford deference to the trial court's discretionary decisions about the amounts of a fee and cost award. *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).

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[4] In a cross appeal, Mesa argues the trial court erred by finding Ms. Zink's OPMA claim was not subject to a jury trial. We decline to address this claim. Mesa never requested a jury trial under CR 38. Further, any error with respect to the jury trial issue was likely invited when counsel for Mesa consistently asserted in pretrial filings and hearings that the OPMA claim was not triable to a jury.

Award methodology

The trial court denied the Zinks' full request for attorney fees after finding problems with 4 of the 120 fee entries proffered by the Zinks' attorney. Although the attorney requested almost $20,000 in fees, the court awarded only $5,000 based on the low value of the Zinks' OPMA claim and the court's "years of experience as a trial lawyer." Report of Proceedings (June 22, 2018) (RP) at 15. We agree with the Zinks that the trial court's brief analysis constituted an abuse of discretion.

In awarding attorney fees, the court is required to apply the lodestar methodology. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). This involves multiplying the reasonable number of hours spent securing a successful recovery for the client by a reasonable hourly rate. *Id.* at 434. "[I]n rare instances," the fee may be adjusted "upward or downward in the trial court's discretion." *Id.* In considering whether to make such an adjustment, the court may consider facts "'such as the contingent nature of success in the lawsuit or the quality of legal representation, which have not *already* been taken into account.'" *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 593-94, 675 P.2d 193 (1983) (plurality opinion) (quoting *Miles v. Sampson*, 675 F.2d 5, 8 (1st Cir. 1982)).

Here, the trial court's $5,000 attorney fee award was not issued pursuant to the requisite lodestar methodology. The court did not identify the number of hours reasonably

expended on the Zinks' case or the applicable rate. Nor did the court actively assess the vast majority of the billing records submitted by the Zinks. "[T]he absence of an adequate record upon which to review a fee award will result in a remand of the award to the trial court to develop such a record." *Mahler*, 135 Wn.2d at 435.

Apart from the failure to comply with the lodestar methodology, the trial court also overemphasized the lack of economic recovery. The court stated it was awarding only $5,000 in part because: "[i]t started out as a $100 claim,[5] the most the [Zinks] could have gotten is a $100 claim. Nobody in their right mind would pay a lawyer $15,000 to pursue a $100 claim." RP (June 22, 2018) at 15. This reasoning undermines the very logic of the OPMA, which mandates an award of costs and attorney fees for plaintiffs who prevail in litigation of an OPMA claim, regardless of the limited dollar amount available in statutory civil penalties. *See* RCW 42.30.120(4) (The prevailing party "shall be awarded all costs, including reasonable attorneys' fees."). The OPMA is a remedial statute, subject to liberal construction. RCW 42.30.910. As such, its provision for award of attorney fees must be liberally construed. *Progressive Animal Welfare Soc. v. Univ. of*

[5] As mentioned previously, it was actually a claim with no monetary value. Statutory civil penalties (formerly $100 but now $500) are available only against individual members of a governing body and Ms. Zink has not made out a claim for individual liability under the OPMA. Attorney fees and costs are the only amounts recoverable by a prevailing party against municipal entities under the OPMA.

Wash., 114 Wn.2d 677, 683, 790 P.2d 604 (1990). There is no liberal construction if the statutory requirement of attorney fees can be undermined because the statute provides only for limited penalties.

We reverse the trial court's OPMA fee award and remand for further proceedings.

The panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports, and that the remainder having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Negligent infliction of emotional distress

Background facts

Prior to trial, Mesa requested a CR 35 psychological examination of Ms. Zink related to her negligent infliction of emotional distress claim. Mesa's chosen examiner was Dr. Philip Barnard, a psychologist. Ms. Zink objected and Mesa filed a motion to compel. Ms. Zink argued her compliance was not justified because the proposed examination would not produce any relevant or admissible evidence. Ms. Zink offered she would participate in an exam limited in scope to only that information necessary to determine whether Ms. Zink suffered emotional distress or anxiety at the time of her alleged unlawful arrest.

The trial court ultimately ruled Ms. Zink had put her mental health at issue and, as a result, the defense was entitled to an examination under CR 35. The court refused to second guess Dr. Barnard's assessment of the appropriate scope of the examination. The court did limit dissemination of Ms. Zink's examination results.

After Ms. Zink refused to show up for the examination scheduled with Dr. Barnard, Mesa filed a motion to dismiss her negligent infliction of emotional distress claim as a sanction. The trial court determined Ms. Zink had willfully violated the order compelling an examination and, given trial was only six weeks away, dismissal of the claim was the only reasonable sanction. The court issued a written order giving Ms. Zink one last chance to submit to the CR 35 examination. Ms. Zink again refused to comply. The court then dismissed Ms. Zink's claim of negligent infliction of emotional distress.

Analysis

Ms. Zink challenges the trial court's CR 35 order and subsequent order dismissing her negligent infliction of emotional distress claim as a sanction for violating the order. We review discovery decisions, including sanctions, for abuse of discretion. *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

The record shows Ms. Zink knowingly and willfully violated the trial court's CR 35 order because she believed it was overbroad. In taking this stance, Ms. Zink invited the court's sanctions. The trial court had jurisdiction in the case and authority to issue discovery orders. As a result, Ms. Zink was not entitled to simply ignore the trial court's discovery order. *See Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968) ("[W]here the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously made, is liable for contempt."). Her options were either to seek relief in this court through discretionary review or to comply with the order and preserve an objection for appeal. *See id.*

The existence of a privilege can sometimes excuse a party's refusal to comply with an otherwise lawful order. *See id.* at 9. But here we are not talking about privilege. The CR 35 order did not require Ms. Zink to divulge information from an existing medical or treatment provider. She was instead required to participate in an evaluation with a provider retained by Mesa as part of a legal proceeding. A CR 35 examination may impinge upon a litigant's privacy interests, but it does not create a claim of privilege. *See Tietjen v. Dep't of Labor & Indus.*, 13 Wn. App. 86, 90, 534 P.2d 151 (1975) ("A [defense] CR 35 medical and mental examination is a legal proceeding [where the]

physician-patient relationship establishing privilege does not exist."). Further, many privacy interests are waived when a plaintiff files suit, including privacy implicated by a psychological examination when the trial court finds good cause for a CR 35 examination.

Because Ms. Zink neither sought interlocutory review of the CR 35 order nor submitted to the evaluation, the trial court was entitled to treat the discovery order as final and impose sanctions. Ms. Zink was warned that failure to comply with the terms of the CR 35 examination would result in dismissal of her negligent infliction of emotional distress claim, yet she refused to comply. Given this circumstance, the trial court's dismissal order was an appropriate exercise of discretion. Dismissal will not be reevaluated at this point, regardless of the propriety of the underlying discovery order.

Dismissal mid-trial of 42 U.S.C. §1983 14th Amendment due process claim

Ms. Zink appeals the trial court's directed verdict on her § 1983 due process claim. We review this issue de novo and assess whether, viewing the evidence in the light most favorable to Ms. Zink, she has established a prima facie case for relief. *In re Dependency of Schermer*, 161 Wn.2d 927, 939-40, 169 P.3d 452 (2007).

To establish a claim for relief under 42 U.S.C. § 1983, a plaintiff must prove two elements: (1) some person deprived them of a federal constitutional or statutory right and

(2) the person in question was acting under color of state law. *Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 11-12, 829 P.2d 765 (1992), *abrogated on other grounds by Chong Yim v. City of Seattle*, 194 Wn.2d 682, 702-03, 451 P.3d 694 (2020).

The trial court's directed verdict appeared to be based on the view that a violation of a nonfederal statute can form the basis of a § 1983 claim only if the statute purports to grant a property right; because the OPMA grants a liberty interest, not a property interest, § 1983 was inapplicable. To the extent this is an accurate summary of the trial court's decision, it was wrong. The United States Supreme Court has repeatedly held state laws can create protected liberty interests for purposes of § 1983 liability. *See, e.g., Kentucky v. Thompson*, 490 U.S. 454, 459-60, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989).

On appeal, Mesa argues we should uphold the trial court's directed verdict because the OPMA creates only a privilege, not a right. In support of this claim, Mesa cites the following language from the Washington Supreme Court's decision in *Kast*: "The [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 so that they can remain informed of an agency's actions." 144 Wn.2d at 818.

We disagree with Mesa that the language in *Kast* means the OPMA does not create a statutory right. What the *Kast* court held was that a citizen's authority to attend a public

meeting is not unlimited; a disruptive person can be lawfully expelled from a public meeting. But limitations do not mean the statute does not confer any rights. It simply means the rights created are, like all other rights, not absolute. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (right to free speech may be regulated by time, place manner restrictions). By its plain terms, the OPMA grants individuals the right to attend public meetings so long as they are not disruptive. Given this interpretation, Ms. Zink's § 1983 due process claim does not fail based on the theory she merely had a "privilege," not a right.

The Zinks presented a viable claim that Mayor Ross, acting in her official capacity, deprived Ms. Zink of her right to attend a public meeting by unlawfully conditioning attendance on Ms. Zink's foregoing the video recording of the meeting. As a result, the Zinks were entitled to a jury trial on their § 1983 due process claim against Mayor Ross.

The Zinks have also asserted sufficient facts for municipal liability. A local government may only be sued under 42 U.S.C. § 1983 for an action that "executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). The facts here indicate Mayor Ross, in her capacity as the presiding officer at the city council meeting, made a deliberate choice to prohibit

members of the public from video recording council meetings. In making this determination, Mayor Ross indicated she was enforcing the will of the council members who did not wished to be on video. Given this record, Ms. Zink has asserted facts sufficient to establish municipal and individual liability. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 483, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) ("[M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."). The trial court's directed verdict must therefore be reversed as to Mayor Ross and the city of Mesa.[6]

Summary judgment rulings

The Zinks appeal the trial court's summary judgment dismissal of their claims for false arrest, false imprisonment, malicious prosecution, Fourth Amendment / 42 U.S.C. § 1983, intentional infliction of emotional distress, and loss of consortium. We review de novo, viewing the evidence in the light most favorable to the Zinks.

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[6] Mesa claims qualified immunity prevents Ms. Zink from proceeding on her Fourteenth Amendment due process claim. However, the trial court expressly declined to reach that issue, and Mesa failed to adequately brief it on appeal. Accordingly, we also decline to address qualified immunity.

False arrest and false imprisonment

"False arrest occurs when a law enforcement officer, or one claiming to have the powers of a police officer, unlawfully restrains or imprisons another by physical force, threat of force, or conduct reasonably implying the use of force against the detainee should [they] resist." *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 529, 20 P.3d 447 (2001) (citing *Bender v. City of Seattle*, 99 Wn.2d 582, 591, 664 P.2d 492 (1983)). "The gist of false arrest and false imprisonment is essentially the same, viz., the unlawful violation of a person's right of personal liberty, and a false imprisonment occurs whenever a false arrest occurs." *Youker v. Douglas County*, 162 Wn. App. 448, 465, 258 P.3d 60 (2011).

Mesa claims it is entitled to summary judgment because Ms. Zink's arrest and imprisonment were conducted by an independent third party, a deputy of the Franklin County Sheriff's Office. However, the rule is not so simple. An individual is not liable for false arrest or imprisonment when they do "nothing more than detail [their] version of the facts to [law enforcement] and ask for assistance, leaving it to the officer to determine what is the appropriate response." *McCord v. Tielsch*, 14 Wn. App. 564, 566, 544 P.2d 56 (1975). But liability can attach if the individual "invites or participates" in the arrest by law enforcement. *Id.* at 566. This is also known as instigation. RESTATEMENT (SECOND)

OF TORTS § 45A cmt. c, at 70 (AM. LAW INST. 1965). An individual will not be liable for instigating a false arrest if they "leave[] to the police the decision as to what shall be done about any arrest, without persuading or influencing them." *Id.*

Considering the evidence in the light most favorable to the Zinks, one could conclude Mayor Ross and council member Fay instigated Ms. Zink's arrest and imprisonment by not only calling 911 with a request for law enforcement to remove Ms. Zink, but also actively trying to convince the responding sheriff's deputy that Ms. Zink had no legal right to record the council meeting. The activities of Mayor Ross and council member Fay went beyond merely providing truthful information to law enforcement and then allowing law enforcement to take independent action. The city officials looked through statute books and relayed legal claims in an effort to convince the sheriff's deputy there was a basis for arrest. Although the case against council member Fay has been voluntarily dismissed, the questions of fact regarding Mayor Ross's responsibility mean the order of summary judgment as to false arrest and false imprisonment was unwarranted as to Mayor Ross and the city of Mesa. *See, e.g.*,

Bender, 99 Wn.2d at 587 (city can be held vicariously liable for false arrest).[7]

Malicious prosecution

To sustain an action for malicious prosecution under the common law, a plaintiff needs to prove five elements:

> (1) that the prosecution claimed to have been malicious was instituted or continued by the defendant; (2) that there was 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.

Peasley v. Puget Sound Tug & Barge Co., 13 Wn.2d 485, 497, 125 P.2d 681 (1942). "[M]alice and want of probable cause constitute the gist of" an action for malicious prosecution. *Id.*

Mesa claims the Zinks have not stated a valid claim for malicious prosecution for three reasons: (1) none of the Mesa defendants instituted the case against Ms. Zink, (2) there was probable cause to support the case against Ms. Zink, and (3) the case against Ms. Zink did not amount to an actual prosecution. All three of Mesa's arguments fail.

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[7] There is no evidence showing any of the other council members played a part in Ms. Zink's arrest and detention. Thus, summary judgment as to the remaining council members was appropriate. With respect to the city of Mesa, it could be discretionary immunity applies. However, the trial court expressly declined to reach this issue and neither party adequately briefs it on appeal. If immunity applies, it may be addressed on remand.

First, as previously stated, there is evidence Mayor Ross and council member Fay instigated the case against Ms. Zink by calling 911, asking for Ms. Zink to be removed, and then actively engaging with the responding deputy in order to convince him there was a legal basis for believing Ms. Zink had violated the law.

Second, because Ms. Zink had a right to attend Mesa's council meeting regardless of whether she chose to video record the proceedings, there was not probable cause to arrest her for trespass. Former RCW 9A.52.010(3) (1985); former RCW 9A.52.070 (1979); RCW 9A.52.090(2).

Third, criminal charges were brought against Ms. Zink. The case was initiated by a criminal citation, as permitted by CrRLJ 2.1(b)(1). Ms. Zink made an initial court appearance on the citation, and was scheduled to return for a pretrial hearing. The fact that the case was later dismissed confirms a case existed; it does not mean no case was ever brought.

Given the documented animus between Ms. Zink and the city of Mesa, there is evidence to support all five elements of the malicious prosecution claim. Ms. Zink is therefore entitled to a jury trial on this issue as to Mayor Ross and the city of Mesa, which may be held liable under a theory of respondeat superior. *See Evans v. Tacoma Sch. Dist. No. 10*, 195 Wn. App. 25, 37, 380 P.3d 553 (2016).

Fourth Amendment 42 U.S.C. § 1983 claim

The Fourth Amendment protects the "right of the people to be secure in their persons . . . against unreasonable searches and seizures" by governmental officials. U.S. CONST. amend. IV. 42 U.S.C. § 1983 provides individuals "'a method for vindicating federal rights,'" such as a violation of the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)).

The Zinks' Fourth Amendment claim is that Ms. Zink was unlawfully arrested without probable cause. Like the tort claim for false arrest, this claim against the individual Mesa defendants turns on whether there is proof Ms. Zink was arrested without probable cause and that one of the defendant governmental officials played a role in instigating the arrest. *See Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir. 1983). The claim against the city of Mesa turns on whether there is proof Ms. Zink's arrest was due to an official custom or policy. *Id.*; *see also Monell*, 436 U.S. at 694.

As previously discussed, the facts indicate both Mayor Ross and council member Fay played a part in encouraging Ms. Zink's arrest. This is sufficient to state individual claims under § 1983. While the case against council member Fay has been voluntary dismissed, the claim against Mayor Ross should have been allowed to go to trial. We do

agree with the trial court that there are insufficient facts to justify a § 1983 false arrest claim against the other individual Mesa defendants.

Although the Zinks have proffered sufficient facts for individual liability, they have not presented sufficient facts against the city of Mesa. The record is devoid of any evidence Ms. Zink was arrested pursuant to an official city policy or custom. In her brief, Ms. Zink posits it was the city of Mesa's policy to retaliate against her based on her prior litigation with the city. This is nothing more than speculation. Regardless of whether the city was retaliating against Ms. Zink, proof of one individual instance of misconduct is not suggestive of a broader custom or policy.

Mesa claims that even if Ms. Zink was arrested without probable cause, Mayor Ross is nevertheless entitled to qualified immunity. Qualified immunity can insulate a governmental official from liability for an unlawful arrest under § 1983. However, Mesa does not provide any argument in support of this defense. Instead, Mesa simply asserts Mayor Ross did not cause Ms. Zink's arrest; a factual claim we have already discussed and rejected. The question of qualified immunity is different from causation. Qualified immunity turns on whether a governmental official's conduct was objectively reasonable based on clearly established law. *See Furfaro v. City of Seattle*, 144 Wn.2d 363, 384, 27 P.3d 1160 (2001). This is a complicated standard. Because Mesa has not adequately

briefed the issue of qualified immunity, we decline to reach the merits of this defense. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (The court "will not review issues for which inadequate argument has been briefed or only passing treatment has been made."). The § 1983 claim against Mayor Ross is instead reversed and remanded.

The court did not err in dismissing the intentional infliction of emotional distress claim

"The basic elements of the tort [of intentional infliction of emotional distress] are (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) (citing RESTATEMENT (SECOND) OF TORTS § 46 (AM. LAW INST. 1965)).[8]

The Zinks have not produced sufficient evidence to support the third element of the intentional infliction of emotional distress claim. To qualify as severe, a plaintiff's claim of emotional distress must be more than "'transient.'" *Kloepfel v. Bokor*, 149 Wn.2d 192, 198, 66 P.3d 630 (2003) (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. j, at 77 (AM. LAW INST. 1965)). The facts in the record before us do not support this

[8] The torts of outrage and intentional infliction of emotional distress are synonymous. *Kloepfel v. Boker*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003).

showing. While Ms. Zink claims to have suffered a panic attack after her arrest, there is no evidence showing her distress was ongoing or that it led Ms. Zink to seek professional help. The Zinks' claim for intentional infliction of emotional distress therefore fails. *See Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 872-73, 324 P.3d 763 (2014) (general statements that victim was "traumatized and very upset" insufficient to prove severity without evidence of intensity and duration of those symptoms)

Loss of consortium claims

Ms. Zink does not devote a section of her brief to the loss of consortium claim. Because this claim has not been developed, we will not review it further. *See State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200, 812 P.2d 858 (1991); *Univ. of Wash. v. GEICO*, 200 Wn. App. 455, 465 n.3, 404 P.3d 559 (2017). The trial court's loss of consortium ruling is affirmed.

Trial court costs

The Zinks takes issue with the trial court not awarding as a cost the $200 statutory attorney fee under RCW 4.84.080(1). This request is foreclosed by *City of Montesano v. Blair*, 12 Wash. 188, 189-90, 40 P. 731 (1895) (statutory fees are not available when the plaintiff is entitled to an award of reasonable attorney fees).

Although the trial court denied some other aspects of the Zinks' requested costs, Ms. Zink does not devote a portion of her brief to this issue. As such, we will not further review the cost award.

CONCLUSION[9]

This matter is affirmed in part, reversed in part, and remanded for further proceedings as follows:

- The trial court's judgment that the city of Mesa, but not its individual officials, violated the OPMA is affirmed. However, the related award of attorney fees is reversed and remanded. The existing award of costs and denial of statutory attorney fees is affirmed.
- The trial court's dismissal of Ms. Zink's negligent infliction of emotional distress claim as a discovery sanction is affirmed.
- The order dismissing Ms. Zink's Fourteenth Amendment 42 U.S. C. § 1983 claim is reversed as to Mayor Ross and the city of Mesa.
- The orders of summary judgment as to false arrest, false imprisonment, and malicious prosecution as to Mayor Ross and the city of Mesa are reversed and

[9] Mesa has filed a cross appeal on several issues. The merits of the cross appeal are mooted by our disposition of Ms. Zink's appeal.

remanded.

- The Fourth Amendment 42 U.S. C. § 1983 claim as to Mayor Ross is reversed and remanded.
- The order of summary judgment as to Ms. Zink's claim for intentional infliction of emotional distress is affirmed.
- Dismissal of the claim for loss of consortium is affirmed.

Pennell, C.J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, J.

Appendix B

No. 36994-3-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DONNA ZINK, et ux, Appellant/Cross Respondent,

v.

CITY OF MESA, et al, Cross Respondent/Appellant.

MOTION FOR PUBLICATION

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I. MOTION FOR PUBLICATION OF COURT OPINION

Pursuant to RAP 12.3(e), Appellant Donna Zink respectfully moves this Court to publish in its entirety the unpublished portions of the decision filed in this matter on June 1, 2021. See *Zink, et ux. v. City of Mesa*, No. 36994-3-III (Wash. Ct. App. June 1, 2021). The Court should change the unpublished status of portions of its Opinion because it contains important legal analysis that impacts the rights of those individuals that must, as a last resort, turn to the courts to enforce their rights to attend public meetings under the OPMA (RCW 42.30) and the remedies available or not available to those wrongfully removed.

The unpublished portion of the opinion also contains new and clarifying legal analysis that has never before been published affecting issues such as the need to seek professional help in cases claiming intentional infliction of emotional distress, when review of contempt of court decisions must be requested, and whether Washington State statutes can create protected liberty interests under a 42 U.S.C. § 1983 14th Amendment claim.

In summary, the Court's analysis is of critical importance to both the public and government, who seek additional clarity and guidance regarding their respective rights and responsibilities under the OPMA and constitution. Publishing the Opinion would greatly assist in this regard.

II. ARGUMENT

1. Publication is necessary because the analysis of the legal issues is new, clarifies issues of import legal principle providing guidance for all future litigants facing similar circumstances

The Court determined that the only a portion of the decision filed on June 1, 2021, would be published due to the fact that the remaining issues do not have any precedential value. (Opinion 17). Precedent refers to something that has happened in an earlier event or action that can be used as an example or guide in later similar circumstances. In the context of our judicial system, precedent defines a rule, or principle of law, that has been established by a previous ruling by a court of higher authority, such as an appeals court, or a supreme court.

A high value is placed on precedential opinions in our judicial system to ensure court rulings remain consistent ensuring that cases based on similar facts have a fair and predictable outcome. For that reason, a decision not to publish an opinion is based on the fact that the Court considers the analysis not new, not clarifying, and not important (RAP 12.3(d). Here, many of the decisions made in this opinion are new, are clarifying and are important precedent for future litigants in similar cases.

a) The legal analysis of the 42 U.S.C. § 1983 14th Amendment claim has never been set forth in any published decisions in the Washington state Appellate Courts.

For instance, the Court's decision concerning § 1983 claim in terms of a liberty interest has never been set forth in any published decision of the Washington state appellate court and it is a new decision clarifying that "state laws can create protected liberty interests for the purpose of § 1983 liability"

(Opinion 20). This is evidenced by the fact that the trial court made its erroneous decision based on the lack of appellate jurisprudence providing guidance.

> Section 1983, when you read it, says that a claim can be brought for violations of the Federal Constitution or a federal statute. What we have here is a State statute. And some courts have articulated that State -- **the violation of State statutes can give rise to a 1983 action, but I've always seen it phrased in terms of a State statute that -- that grants a property right. Because if there are certain property rights, then the violation of the statute would rise to a violation of the Federal Constitution.** Your -- your building permit is -- is one example of that under the -- our land use laws. Once you have a permit, you have a vested right to construct under that -- under the law that was in effect at the time you got the permit. If that is violated -- and that implicates federal constitutional due process law because if they, as they did in your case, expired that, without due process, it does implicate the Federal Constitution.
>
> But, unfortunately, I don't believe, and I have to rule, that the violation of the Open Public Meetings Act does not implicate federal constitutional rights. And so, without that, the -- the 1983 case can't go forward. And -- and I've been studying and fussing and fussing and studying, and I -- I wish I could point you to the couple of cases that -- that -- that I found that helped me out here.

RP (Vol V) 894:20-895:20 (emphasis added). Based solely on the lack of guidance in published caselaw in Washington state Court of Appeals providing guidance, the trial court erroneously dismissed Zink's 42 U.S.C. § 1983 14th Amendment claim necessitating this appeal. Without the guidance the decision of this Court provides, trial courts, faced with similar circumstances, could come to

similar decisions concerning constitutionally protected liberty interests for purposes of dismissal of § 1983 liberty claims as did the trial court in this case.

Likewise, the Court's decision concerning municipal and individual liability under 42 U.S.C § 1983 in the context of a policy of a governing body prohibiting attendance at their public meetings without conditions being followed is a matter of great public interest. At this time, there are no published decisions that consider whether such action by a governing body does not just violate the OPMA, it violates constitutionally protected liberty interests sufficient to establish municipal and individual liability under 42 U.S.C § 1983. This is a new question of constitutional principle never before determined by the Washington State Appellate Courts.

The Court's opinion on these issues concerning Zink's § 1983 claim have precedential value as a new clarifying constitutional principle affecting the public at large and is therefore important in guiding lower courts found in similar situations.

b) The Court's legal determination concerning severity in cases of "intentional infliction of emotional distress" is a new legal analysis never before set forth in a published opinion that provides clarification and guidance concerning the requirements needed to maintain a claim.

The Court dismissed Zink's claim of intentional infliction of emotional distress after analyzing the decisions in *Kloepfel v. Bokor*, 149 Wn.2d. 192, 198, 66 P.3d 630 (2003) and *Sutton v. Tacoma Sch.* Dist. No. 10, 180 Wn. App. 859, 872-73, 324 P.3d 763 (2014). The Court reasoned that based on the decision in *Kloepfel* mandating more than "transient" emotional distress must be shown to

qualify as severe and the decision in *Sutton* clarifying that a litigant must provide more than "general statements" of being "traumatized and very upset" to prove the intensity and duration of the symptoms of emotional distress, this Court further clarified that a litigant must also prove the emotional distress was ongoing leading to their seeking professional help (Opinion 31).

This new interpretation further clarifies what parties, seeking restitution for intentional infliction must prove in order to maintain such a claim and is important jurisprudence that will help guide both the public and the trial courts finding themselves in similar circumstances.

c) Publication of the Court's decision concerning "contempt of court" is a new legal analysis never before set forth in a published opinion and will provide much needed clarification and guidance to all future litigants faced with similar circumstance.

Although published caselaw shows that our Courts of Appeal recognize a party's right to appeal an order of contempt, which includes review of the underlying order leading to the order of contempt, until this case, no published opinion of the Court of Appeals has analyzed and clarified the point in litigation that a party must seek review under RCW 7.21.070 or lose their right to review.

In 1968, our Supreme Court noted in *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968), that judges do make erroneous decisions. But those decisions are binding until they are "set aside or corrected in a manner provided by law."

> Consequently, the authorities are in accord that where the court has jurisdiction of the parties and of the subject matter of the suit and the legal authority to make the order, a party refusing to obey it, however erroneously

made, is liable for contempt. Such order, though erroneous, is lawful within the meaning of contempt statutes until it is reversed by an appellate court. ....

Id. 8. (emphasis added). Clearly our Supreme Court recognized a party's right to review of an order of contempt.

In 1989, our Legislature enacted statute RCW 7.21.070,[1] a law that specifically grants a party review of a contempt order.

> A party in a proceeding or action under this chapter may seek appellate review under applicable court rules. Appellate review does not stay the proceedings in any other action, suit, or proceeding, or any judgment, decree, or order in the action, suit, or proceeding to which the contempt relates.

RCW 7.21.070.

These rules of appellate procedure are well established in caselaw. Normally, a party must wait to seek review of a trial court's decision until final judgment has been rendered and all claims have been disposed (RAP 2.2(a)(1)). While a party can seek discretionary review under RAP 2.2(a)(2), such permission from an appellate court is not guaranteed and is based on the criteria set out in RAP 2.3(b).

After analyzing the decision in *Dike v. Dike*, this Court mandated that litigants seeking to appeal the propriety of the underlying court order leading to contempt forfeit their right to appeal under RAP 2.1(a)(1) unless they first seek discretionary review of the interlocutory decision under RAP 2.1(a)(2) or submit to the underlying order despite the propriety of that order (Opinion 19, 20).

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[1] Session Laws 1989 c 373 § 7.

The Court's decision makes clear that a party has no right to review under RAP 2.2(a)(1) unless they first comply with the underlying order leading to the trial court's finding of contempt. The Court's decision also clarifies litigants "right" to appeal an order of contempt but only under RAP 2.1(a)(2). Neither of these two important legal principles of law have ever been enunciated in a published opinion. This is an important legal determination of jurisprudence that clarifies when a party has the right to review of an order of contempt under RCW 7.21.070 and when it is prohibited. This is of great import to the public at large because under the rules of appellate procedure, while a party can request permission for appellate review, a party has no "right" to appeal other types of orders under discretionary review. Therefore, without publication of the Court's decision, litigants found in similar circumstances will have no way of knowing that their "right" to appeal the underlying order leading to contempt will be taken if they continue to erroneously follow the normal course of appellant court rules.

Because the only remedy to correct an erroneous decision of a trial court, even in cases of contempt, is through review by an appellate court, parties must have clear guidance on when such review is allowed by an appellate court and when it is not. This case is an example of the importance of being able to discover court rules affecting the right to review.

Here, based on the lack of jurisprudence concerning the appropriate timing of a request for review of an order of contempt, Zink, unaware that she was required to file for discretionary review, followed the requirements of RAP 2.1(a)(1) and waited until the final judgment had been rendered to appeal all dismissed claims. Without the guidance of this Court's decision, Zink, having already filed for

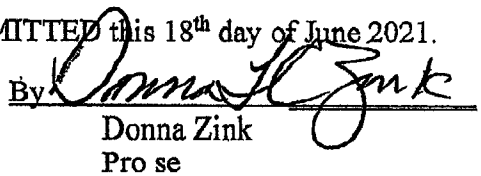
discretionary review on the claims dismissed on summary judgment (CP 460-66), a motion that was denied (CP 470-72), did not again petition the Court for review until after final judgment was rendered and she had the "right" to do so. Had this Court's decision been available when Zink objected to the underlying order which led to the contempt order, she would have petitioned the Court for discretionary review as required by the court rules. That lack of guidance has caused Zink to lose her right to appeal the decision under RCW 7.21.070.

Litigants should be able to discover the rules they must follow in seeking review of a lower court's orders. Publication of this case will help all future litigants in similar circumstances, so parties will know that the right to review of an order of contempt is through discretionary review under RAP 2.1(a)(2) and not review as a matter of right under RAP 2.1(a)(1).

III. CONCLUSION

For the foregoing reasons, Zink respectfully requests that the Court publish in its entirety its decision filed on June 1, 2021.

RESPECTFULLY SUBMITTED this 18th day of June 2021.

By 

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