No. 102348-1

SUPREME COURT OF THE STATE OF WASHINGTON

No. 57026-2

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

DANIEL BRAY, individually, and
JOEY TRACY, individually,

Appellants,

v.

PIERCE COUNTY, a subdivision of the
State of Washington,

Respondent.

RESPONDENT PIERCE COUNTY'S RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court should deny Petitioners Daniel Bray and Joey Tracy's ("Petitioners") petition for review of an unpublished decision in which Court of Appeals Division Two applied the well-established elements of constructive discharge when evaluating a claim for wrongful termination through constructive discharge in violation of public policy. Division Two's approach is entirely consistent with the decisions of this Court and the Court of Appeals, including *Peiffer v. Pro-Cut Concrete Cutting and Breaking Inc.*, 6 Wn. App. 2d 803, 830, 431 P.3d 1018 (2018), *rev. denied*, 193 Wn.2d 1006 (2019).

Petitioners erroneously contend that Division Two should have applied the "substantial factor" test used for wrongful termination in violation of public policy claims that, unlike here, do *not* involve constructive discharge. But tellingly, Petitioners do not cite any published decision requiring a court to apply the "substantial factor" test on a constructive discharge wrongful termination claim.

Nor do Petitioners identify any decision from this Court that conflicts with Division Two's unpublished decision. Instead, Petitioners misplace their reliance on *Korslund v. DynCorp Tri-Cities Servs. Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005) to advance the unremarkable proposition that an employee who is forced to permanently leave work for medical

reasons caused by an employer's deliberately intolerable working conditions *may* have been constructively discharged. Contrary to here, the issue in *Korslund* was whether the employee resigned at *all*—not whether the plaintiff could establish the resignation was *solely* due to intolerable working conditions. Nothing in Division Two's analysis conflicts with this Court's analysis and affirmance of summary judgment in favor of the defendant employer in *Korslund*.

Petitioners similarly fail to establish how Division Two's proper application of the fundamental, well-settled doctrine of judicial estoppel warrants this Court's review. Petitioners testified under oath in an administrative hearing that they were medically separated from Respondent Pierce County (the "County") due to PTSD caused from responding to an incident in February 2015. Division Two correctly concluded that Petitioners are judicially estopped from now arguing that allegedly intolerable working conditions were the sole reason for their discharge. Accordingly, Division Two properly affirmed the trial court's partial summary judgment in the County's favor.

Finally, Petitioners fail to identify any issue of substantial public importance that would warrant this Court's review. The underlying summary judgment motion and appellate decisions apply narrow and specific facts to well-settled case law.

The Court should deny review.

II. RESTATEMENT OF ISSUES

The issues presented by the Court of Appeals Division Two's unpublished decision are properly framed as:

1. Whether Division Two properly applied the four-part constructive discharge test recognized by all three divisions of the Court of Appeals when evaluating a claim for wrongful termination through constructive discharge in violation of public policy?

2. Whether Division Two properly concluded that Petitioners are judicially estopped from arguing that alleged intolerable working conditions were the sole reason for their discharge where Petitioners previously testified under oath in their disability retirement proceedings that responding to a February 2015 murder-suicide caused their medical separation from the County?

3. Whether Division Two's narrow and unpublished decision raises any issue of substantial public importance?

III. STATEMENT OF THE CASE

The County incorporates herein the factual background set forth in its Respondent's Brief and Division Two's July 18, 2023

unpublished opinion.[1] For the Court's ease of reference, the County briefly recites only the most salient facts below.

A. Petitioners were medically separated in good standing from the County due to PTSD from a February 2015 murder-suicide.

On February 27, 2015, Petitioners responded to the scene of a suspected murder and suicide. Several months later, Petitioners reported on-the-job injuries arising from the February 27, 2015 incident and took medical leave. CP 1054, 1109; Resp. Br. 5–9, 12–13. Both Petitioners specifically identified the February 27, 2015 incident as the cause of their injuries. CP 5, 12–16, 35–36, 45, 1054; Resp. Br. 7, 12–13.

Petitioners both remained on paid sick-leave for 12 months. *See, e.g.*, CP 1056–76, 1111–36. By October 2016, Tracy's providers continued to report to the County that he was still "unable to perform any function at work"; Bray's physicians similarly reported that he was "unable to perform the essential duties of his job" and "unable to perform any/all functions of his positions at this time." CP 1076, 1136. Based on these assessments from their providers, both Petitioners were medically separated in good standing from the County in

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[1] Division Two's unpublished opinion is attached as the Appendix to the Petition for Review and cited herein as "Opinion."

December 2016.[2] CP 1029–32, 1078–81, 1103–07, 1138–42. Neither Petitioner appealed the County's decision to medically separate him. CP 1024.

B. Petitioners testified under oath in DRS proceedings that they were medically separated due to PTSD arising from the February 27, 2015 incident.

On March 12, 2018, Petitioners sued the County for, among other claims, wrongful termination through constructive discharge in violation of public policy. CP 65–78. Petitioners alleged that the County retaliated against them for their response to a separate and unrelated April 2015 murder-suicide. *Id.* Soon after, Petitioners—represented by the same counsel as in the

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[2] Although Petitioners were ultimately separated in good standing, it is undisputed that Petitioners were the subject of multiple internal investigations leading up to their termination. *See, e.g.*, CP 646, 701. Most notably, Tracy was investigated and arrested for an alleged sexual relationship with a former criminal defendant, who claimed he forced her to have sex in his patrol car in exchange for not arresting her for her numerous outstanding warrants. *See* CP 275–77, 294–98. The County voluntarily dismissed without prejudice the criminal charges against Tracy due to evidentiary concerns. CP 302–03. The trial court entered an order in this matter barring Petitioners from relying on the prosecution or voluntary dismissal of these charges as a basis for liability. CP 501–03. Yet, just as they did in the courts below, Petitioners again blatantly violate the trial court's order by continuing to reference these charges as evidence of alleged retaliation. *See* Petition 5–6.

present lawsuit—appealed for disability retirement benefits from the DRS, claiming medical discharge due to PTSD from the February 27, 2015 incident. CP 18–19, 39–40.

Both Petitioners testified under oath in the DRS proceedings that their medical separation was due to the February 27, 2015 murder-suicide. Tracy testified that his providers recommended that he go on medical leave because he would "a danger to [him]self and others," CP 43; his injuries were caused by the February 27, 2015 incident, CP 45; he was medically separated "[d]ue to [his] ongoing medical issues" and "[b]ecause all of [his] doctors said that [he] wasn't able to return to work," CP 46–47; and he knew of no other reason for his medical separation, CP 47.

Tracy also expressly testified that all of his treatment for his PTSD was related to the February 27, 2015 incident, and *not* any alleged retaliation:

> Q. What treatment, if any, did you receive for your response to the [April 2015] domestic violence murder suicide?
>
> A. None.
>
> Q. Okay. What treatment, if any, did you receive related to the subsequent retaliation that you discussed?
>
> A. None.

Q. Okay. . . What has your treatment to date been related to?

A. The murder suicide that happened in February of 2015.

CP 57.

Similarly, Bray reaffirmed that his injuries stemmed from the February 27, 2015 incident in his application for disability - retirement benefits that he filed with the DRS in 2016. CP 13–16. In the DRS proceedings, Bray testified under oath that his injuries from the February 27, 2015 incident led to his request to take medical leave, CP 24-26, and formed the basis for his medical separation from Pierce County:

Q. And why did you go on leave?

A. Because I had to do something different to try to get better. It wasn't getting better on its own. And that's what the professionals recommended. I finally relented and listed to them.

Q. And when you say "it," are you referring to how you were doing after the February 27, 2015 event?

A. Yes.

Q. Dan, tell me whether or not this letter medically separated you from work as a result of the February – February 27, 2015, event.

A. Yeah. This is – that's what this letter says, you're medically separated.

Q. Were you separated in good standing?

A. Yeah. It says that in there, too. Eligible for rehire.

CP 29.

When questioned by the administrative law judge, Bray answered even more directly:

Q. The question—the question that I would ask is to what do you attribute your symptoms that you have described to us today?

A. Murder/suicide in February 2015.

CP 35–36.

C. Procedural History.

This case has a long procedural history. *See* Resp. Br. 18–21; Opinion 6–7. The instant appeal arose after the trial court granted the County's motion for partial summary judgment as to Petitioners' wrongful termination claim. CP 1003–21, 727–29. The trial court denied Petitioners' subsequent motion for entry of judgment under CR 54(b) and/or to certify for discretionary review under RAP 2.3(b)(4). CP 730–42, 836–37.

Petitioners then moved for direct review by this Court under RAP 4.2, which the Commissioner denied, and for

discretionary review under RAP 2.3, which the Commissioner transferred to Division Two. This Court denied Petitioners' motion to modify the Commissioner's ruling. On July 18, 2023, Division Two affirmed the trial court's order granting summary judgment.

IV. ARGUMENT FOR WHY REVIEW SHOULD BE DENIED

Petitioners fail to identify any grounds warranting review under RAP 13.4(b)(1), (2), or (4). Petitioners do not identify a single Washington case that conflicts with Division Two's unpublished decision. Nor do Petitioners raise any issue of "substantial public interest" regarding the narrow issue Division Two resolved in its unpublished opinion based on this specific set of facts. The Court should deny review.

A. Division Two applied the correct test to prove a claim for constructive discharge.

The petition fails because Petitioners have not identified any precedent from this Court or the Court of Appeals that rejects the four-element test for constructive discharge that Division Two properly applied *or* any authority requiring a court to apply a "substantial factor" test on a claim for wrongful termination through constructive discharge in violation of public policy.

1. Division Two followed published Court of Appeals precedent when applying the elements of wrongful termination through constructive discharge.

"The tort for wrongful discharge in violation of public policy is a narrow exception to the at-will doctrine." *See Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 258, 359 P.3d 746 (2015). To prevail on a claim for wrongful discharge/termination, a plaintiff must prove (1) that the employee's "discharge may have been motivated by reasons that contravene a clear mandate of public policy"; and (2) that the "public-policy-linked conduct was a 'significant factor' in the decision to discharge the [employee]." *Martin v. Gonzaga Univ.*, 191 Wn.2d 712, 725, 425 P.3d 837 (2018).

Constructive discharge is an even narrower exception to this already narrow exception to Washington's at-will employment doctrine. Where, as here, Petitioners have asserted a claim for wrongful termination *through constructive discharge* in violation of public policy, they must prove a narrow and specific set of elements *separate and apart from* the elements required to prove wrongful termination in violation of public policy. *See* EMPLOYMENT DISCRIMINATION—CONSTRUCTIVE DISCHARGE—BURDEN OF PROOF, 6A WASH. PRACT., WASH. PATTERN JURY INSTR. CIV. WPI 330.52 (7th ed.).

The case law establishing the elements for constructive discharge is well-settled in Washington. As Division Two properly recognized, the two elements of wrongful discharge are modified where a plaintiff asserts a "hybrid"[3] claim for wrongful termination *through constructive discharge* in violation of public policy:

> When a hybrid claim is asserted, **the elements of a constructive discharge claim supplant the second element of the wrongful termination in violation of a public policy claim.** The first element of the tort claim applies, although it is modified to address whether the intolerable condition that led the employee to resign contravened a clear mandate of public policy. **All four elements of a constructive discharge claim apply.**

Peiffer, Wn. App. 2d at 830 (emphasis added).

"The [four] elements of constructive discharge are that (1) the employer deliberately made working conditions intolerable, (2) a reasonable person in the employee's position would be forced to resign, (3) the employee resigned because of the

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[3] Petitioners assert—without any citation—that the analysis in *Peiffer* "only" applies in instances involving a wage loss claim and a claim for wrongful termination. Where no authorities are cited in support of a proposition, the Court "may assume that counsel, after diligent search, has found none." *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 195, 372 P.2d 193 (1962).

intolerable working condition *and not for any other reason*, and (4) the employee suffered damages as a result of being forced to resign." *Id.* at 829 (emphasis added) (citing *Barnett v. Sequim Valley Ranch, LLC*, 174 Wn. App. 475, 489, 302 P.3d 500, *rev. denied*, 178 Wn.2d 1014 (2013)).

"Numerous Washington cases establish that these four elements are necessary for a wrongful constructive discharge claim." *Barnett*, 174 Wn. App. at 489. *See, e.g.*, *Haubry v. Snow*, 106 Wn. App. 666, 667, 31 P.3d 1186 (2001) (Division One holding that an employee asserting claim for constructive discharge "must prove," in part, that "she did quit because of the [intolerable] conditions and not for any other reason); *Crownover v. State ex rel. Dep't of Transp.*, 165 Wn. App. 131, 149, 265 P.3d 971 (2011), *rev. denied*, 173 Wn.2d 1030 (2012) (Division Three holding that an employee "must show" that "the employee resigned solely because of the intolerable conditions").

In other words, all three divisions of the Court of Appeals require plaintiffs asserting a wrongful termination through constructive discharge in violation of public policy to prove that they left their position due to intolerable working conditions and not for any other reason. Division Two properly applied this well-established standard to conclude that Petitioners' sworn testimony established that their separation from the County was

not due solely to alleged retaliation or any other allegedly intolerable working conditions.

Further, no question of fact warrants this Court's review: Petitioners' own testimony and records, plus their healthcare providers' statements, prove as a matter of law that Petitioners resigned due to the PTSD they suffered from witnessing a murder-suicide while on duty. *See* Resp. Br. 5–18. These undisputed facts conclusively foreclose Petitioners from recovery under a theory of constructive discharge. *Peiffer*, 6 Wn. App. 2d at 830.

Division Two's Opinion is entirely consistent with established Court of Appeals precedent. Review is not warranted under RAP 13.4(b)(2).

2. Division Two's opinion does not conflict with this Court's precedent because this Court has never applied the "substantial factor" test to cases involving claims for constructive discharge.

Review is similarly not warranted under RAP 13.4(b)(1). Contrary to Petitioners' assertions, there is no precedent—from either this Court or the Court of Appeals[4]—holding that the

[4] Contrary to Petitioners' assertions, Division Two's recently published opinion in *Paddock v. Port of Tacoma*, __ Wn. App. 2d __, 531 P.3d 278 (2023) is not inconsistent with the unpublished Opinion. *Paddock* did not involve a claim for constructive discharge. The plaintiff brought a claim for wrongful termination in violation of public policy after being

"substantial factor" test must be applied in cases where a claim for constructive discharge is pled. In so arguing, Petitioners willfully ignore that none of their cited "precedent" applies the "substantial factor" test in cases involving constructive discharge. Indeed, this Court has never held that the test for proving constructive discharge includes a "substantial factor" test. Petitioners have failed to establish any conflict between Division Two's Opinion and this Court's precedent. RAP 13.4(b)(1).

First, Petitioners improperly argue that *Korslund v. DynCorp Tri-Cities Servs. Inc.*, 156 Wn.2d 168, 180, 125 P.3d 119 (2005) conflicts with Division Two's unpublished decision. In *Korslund*, this Court recognized that "an employee who is forced to permanently leave work for medical reasons *may* have been constructively discharged," such as where an employer is "[d]eliberately creating conditions so intolerable as to make the employee so ill that [they] must leave work permanently." *Id.* (emphasis added). But the issue presented in *Korslund* was whether the employee resigned at all— not whether the plaintiff

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terminated from his position. *See id.* at 280. Because he did not assert a claim for constructive discharge, the court did not need to supplant the "substantial factor" element of a wrongful termination claim with the four elements of constructive discharge, as required by *Barnett* and *Peiffer.*

could establish the resignation was *solely* due to intolerable working conditions. *See id.* at 178–80. *Korslund* did not even reach the issue of whether the plaintiffs' medical leave constituted constructive discharge: the Court concluded that the plaintiffs had failed to meet the public policy standard for their claim and upheld summary judgment in favor of the defendant employer. *Id.* at 181.

Moreover, unlike here, *Korslund* did not involve plaintiffs who had offered contradictory sworn testimony in parallel proceedings concerning the cause of their injuries. Additionally, because Petitioners are estopped from asserting that their medical separations were not caused by their PTSD from the murder-suicide, Division Two did not need to consider whether aggravation of a plaintiff's medical condition "may" constitute constructive discharge. *Korslund* is entirely distinguishable from the present case; it is certainly not in conflict with Division Two's unpublished decision.[5]

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[5] Similarly, *Allstot v. Edwards* dealt with whether a plaintiff's allegations that three separate forms of alleged intolerable conditions could, collectively, establish a genuine issue as to his constructive discharge claim. 116 Wn. App. 424, 433–34, 65 P.3d 696 (2003). But here, Petitioners allege (if they are not estopped from doing so) that a combination of intolerable conditions and preexisting PTSD resulted in their discharge. And none of *Jennings v. Stevens Cty.*, No. CV-09-219-LRS, 2010 WL 3516914 (E.D. Wash. Sept. 3, 2010), *Keefe v. Crowne Plaza*

Second, Petitioners' authority purportedly "rejecting" the sole cause element or applying the "substantial factor" test, Petition 16–17, are inapposite because they do not involve claims for constructive discharge. *See, e.g.*, *Wilmot v. Kaiser Aluminum and Chemical Corp.*, 118 Wn.2d 46, 51, 821 P.2d 18 (1991) (claim for retaliation); *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 306, 898 P.2d 284 (1995) (claim for gender discrimination); *Martin v. Gonzaga Univ.,* 191 Wn.2d 712, 725, 425 P.3d 837 (2018) (claim for wrongful discharge in violation of public policy without constructive discharge); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015) (claim for wrongful discharge in violation of public policy without constructive discharge); *Scrivener v. Clark College*, 181 Wn.2d 439, 444, 334 P.3d 541 (2014) (claim for ageism under the WLAD).

None of these cases are inconsistent with Division Two's Opinion because they do not address claims for constructive discharge. As addressed above, Washington courts have established a separate set of requirements for proving a claim for

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Hotel Seattle, 2017 WL 1210224 (W.D. Wash. 2017), or. *Hartman v. Young Men's Christian Ass'n of Greater Seattle*, 191 Wn. App. 1005, 2015 WL 6872184 (unpublished) involve contrary sworn testimony in prior proceedings, nor are they decisions that could trigger review under RAP 13.4(b). *See also* Resp. Br. 37–38.

wrongful termination through constructive discharge in violation of public policy. The cases upon which Petitioners rely are therefore inapposite and have no bearing on Division Two's analysis.

B. Division Two's judicial estoppel ruling does not implicate RAP 13.4(b)(1) or (2).

The Court of Appeals correctly ruled that Petitioners are judicially estoppped from asserting that the County's alleged retaliation "was the sole reason why their PTSD became severe enough to prevent them from performing essential job functions, eventually resulting in their discharge" due to their prior sworn statements to the DRS. Opinion 14. Petitioners fail to identify any precedent of this Court or the Court of Appeals that conflicts with Division Two's ruling so as to warrant review under RAP 13.4(b)(1) or (2).

Judicial estoppel is an equitable doctrine that precludes a party from taking incompatible positions to [their] advantage in successive court proceedings." *Haslett v. Planck*, 140 Wn. App. 660, 665, 166 P.3d 866 (2007). The doctrine also seeks "to preserve respect for judicial proceedings without the necessity of resort to the perjury statutes and to avoid inconsistency, duplicity, and the waste of time." *Id.* (ellipsis omitted). And as applies here, "judicial estoppel prevents a litigant from 'playing

fast and loose with the courts.'" *Id.* (quoting *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 782 (9th Cir. 2001)).

Three factors typically guide the decision of whether to apply judicial estoppel:

> (1) whether a party's later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538–39, 160 P.3d 13 (2007) (quoting *New Hampshire*, 532 U.S. at 750–51, 121 S. Ct. 1808)) (cleaned up).

Petitioners successfully sought catastrophic disability benefits in DRS proceedings, and testified unequivocally there that they were medically separated from the County due to PTSD they suffered as a result of the February 27, 2015 murder-suicide. CP 45–47, 57 (Tracy); CP 24–29 (Bray). Catastrophic disability benefits are available to officers injured "in the line of duty," which is defined as "any action or activity occurring in conjunction with [their] employment or [their] status as a law enforcement officer . . . and required or authorized by law, rule,

regulations, or condition of employment or service." WAC 415-104-480(1); WAC 415-104-479(1).

Mental and emotional conditions arising from acts coincidentally occurring in the workplace—such as, for example, alleged retaliation—do not occur "in the line of duty" for the purposes of catastrophic disability benefits. In *Woldrich v. Vancouver Police Pension Board*, the court ruled that an officer who suffered anxiety, depression, stress, and paranoia following a demotion had not suffered a "line of duty" injury. 84 Wn. App. 387, 392–93, 928 P.2d 423 (1996). Applying *Woldrich*, if Petitioners had presented their retaliation theory to DRS, they would not have been eligible for disability benefits.

Thus, Petitioners' current theory of the cause of their medical separation—that the County exacerbated their pre-existing PTSD through alleged retaliation—directly contradicts and is clearly inconsistent with their position taken in the DRS administrative proceedings that their injuries stemmed from the February 27, 2015 incident. Acceptance of their retaliation theory would further create a perception that the DRS board was misled, and allow the Petitioners to derive an unfair advantage, by recovering twice based on two inconsistent theories of harm.[6]

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[6] *See also, e.g., Paddock*, 531 P.3d at 289–90 (holding plaintiff was judicially estopped from asserting a claim for post-wrongful discharge lost wages because he testified in a prior industrial

Division Two correctly applied judicial estoppel and did not conflict with any decision of this Court or the Court of Appeals in doing so. In the face of their sworn testimony to DRS, Petitioners cannot prove the third element of constructive discharge—that the discharge occurred "because of the intolerable condition and not for any other reason." *Peiffer*, 6 Wn. App. 2d at 829.

Petitioners suggest Division Two erred by disregarding *Shaw v. Department of Retirement Systems*, 193 Wn. App. 122, 125, 371 P.3d 106 (2016). But *Shaw* dealt with the narrow issue of whether DRS applied the correct "naturally and proximately" standard in assessing whether the claimant's disability arose from a "line of duty" incident. *Id.* On appeal, the court, the claimant and DRS agreed that the DRS presiding officer had applied the incorrect standard, and the court remanded to DRS for additional fact-finding. *Id.* By contrast, the court in *Woldrich* applied the "naturally and proximately" standard and ruled *as a matter of law* that the officer's claimed mental disability—which arose because of his demotion—did not arise in the line of duty.

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insurance hearing that he could no longer perform his job duties, thereby precluding the claim); *Herrera v. CTS Corp.*, 183 F.Supp.2d 921, 928–29 (S.D. Tex. 2002) (holding that an ADA claimant's affidavit could not defeat a summary judgment motion because testimony from the claimant's previous SSDI claim contradicted the ADA affidavit).

84 Wn. App. at 393. Division Two's Opinion here does not conflict with *Shaw* and is consistent with *Woldrich*.

Further, while appropriate standard for DRS proceedings under *Woldrich* and *Shaw* is "naturally and proximately," and here the standard is "sole cause," the difference in standards has no bearing on this case. *Woldrich* shows that Petitioners could not have recovered catastrophic disability benefits if they had presented this same theory to the DRS board; thus, their current position is "clearly inconsistent" with their former position.

Petitioners argue that Division Two's Opinion is incorrect because it cited the current version of WAC 415-104-480(2) in reaching its conclusion. First, Petitioners fail to demonstrate how this supposed conflict meets the standard demanded by RAP 13.4(b)(1) or (2). Second, Division Two correctly rejected this argument in its order denying reconsideration, recognizing that Petitioners had previously failed to raise any argument related to the applicability of WAC 415-104-480(2), and that they failed to cite the record to support their new position. Order Denying Motion for Reconsideration, Appendix. Petitioners' argument still suffers from the same defects identified by Division Two. Third, even in the absence of the "standing on their own" language present in the current version of WAC 415-104-480(2), Petitioners' newly claimed injuries did not arise in the "line of duty." *Woldrich*, 84 Wn. App. at 392–93.

Petitioners also argue without authority that they are not estopped by their prior sworn statements because they testified to DRS that their PTSD was "ongoing." In effect, Petitioners attempt to make the incredibly strained argument that "ongoing" PTSD is the same as PTSD exacerbated by alleged retaliation. It is not.

Petitioners continue to assert that the County "belatedly" raised its judicial estoppel argument. As detailed in the County's responding brief and in the Court of Appeals' decision, Resp. Br. 38–41; Opinion 10–12, the County timely raised judicial estoppel, and the issue was fully litigated before the trial court. Division Two also correctly rejected Petitioners' strained attempt to apply the collateral source doctrine to this matter. Opinion 10–12.

Finally, Petitioners again argue that it would be "unjust" to apply principles of estoppel in this matter. This argument assumes numerous facts that are not in evidence and belies their own testimony in the DRS proceedings. Division Two properly disregarded this argument.

Simply put, had Petitioners presented DRS with the theory they now advance, they would have been ineligible for catastrophic disability benefits. Division Two correctly recognized this fact and ruled that Petitioners are judicially estopped from advancing their position. In the face of their prior

testimony, Division Two also correctly recognized that Petitioners cannot establish that the County's alleged conduct was the sole cause of their lawful medical separation, and thus, that their constructive discharge claim fails. Petitioners fail to identify any way in which this ruling conflicts with any precedent of this Court or the Court of Appeals. Review under RAP 13.4(b)(1) and (2) is unwarranted.

C. Division Two's narrow and unpublished decision does not implicate issues of substantial public importance.

Petitioners previously moved this Court for direct review of the trial court's order on summary judgment under RAP 4.2(a). The Commissioner of this Court denied their motion for direct review, reasoning in part that he was "not persuaded" that this case involves a "fundamental and urgent issue of broad public import which requires prompt and ultimate determination." Ruling Transferring Motion for Discretionary Review, March 30, 2022 at 3.[7] Consistent with this Court's prior rulings on this subject, this case does not involve issues of substantial public interest that would justify review of the Court of Appeals' narrow and unpublished decision under RAP 13.4(b)(4).

[7] A panel of this Court's Justices then denied Petitioners' subsequent Motion to Modify the Commissioner's Ruling.

The focus of the County's motion for partial summary judgment—and Division Two's well-reasoned decision—has nothing to do with the "Blue Code of Silence" or whether the retaliation that Petitioners allege actually occurred. Instead, both the County's motion and Division Two's decision asked and answered one narrow question, which does not implicate any persons besides the parties: in light of Petitioners' sworn testimony to DRS regarding the cause of their injuries, can they establish the third element of wrongful termination in violation of public policy by means of constructive discharge? Division Two correctly answered that they cannot.

In a transparent attempt to distract the Court from the issues at hand, Petitioners argue this case implicates issues relative to victims of police misconduct, people of color, and the LGBTQ community such that review under RAP 13.4(b)(4) is merited. But again, this case involves only the narrow question of whether these specific Petitioners can establish the elements of their specific claim, given their contrary sworn testimony elsewhere. This case does not involve the broad societal issues that Petitioners identify. Petitioners' invocation of the interests of the victims of police misconduct is particularly ironic and callous, given the Petitioners' own histories of alleged misconduct. *See* CP 294–98, 646, 701.

Review under RAP 13.4(b)(4) is unwarranted.

V. CONCLUSION

The County respectfully requests that the Court deny review.

This document contains 4,949 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 5th day of October, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

On this date, I caused a true and correct copy of the foregoing document to be served via the Appellate Court E-File Portal on the attorneys of record herein:

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

DATED this 5th day of October, 2023, at Seattle, Washington.

s/ Courtney Amidon
Courtney Amidon

CORR CRONIN LLP

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