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CASE #: 67922-8-1

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

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DONNA CHARBONNEAU ON BEHALF OF OLIVIA  
CHARBONNEAU

Respondents,

v.

TANNER FOSTER,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles Snyder

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OPENING BRIEF OF APPELLANT FOSTER

---

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## I. ASSIGNMENT OF ERROR

- A. That the trial court erred when it made a review of the factual decision of the Commissioner on a de novo review basis, rather than a substantial evidence test basis.
- B. That the Superior Court erred because its determination was heavily influenced by an improper application of RCW 7.90.090 (4).
- C. That if the Superior Court possesses the power to revise factual findings as to the credibility of witnesses, made by a Commissioner who reviews live testimony, such a de novo review procedure violates the Due Process Clause and the Equal Protection Clause.
- D. That the Superior Court erred when it struck the declaration of Deputy Sheriff Colin Bertrand from consideration.

## II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether the Superior Court erred when it reviewed the factual decision of the Commissioner on a de novo basis

rather than examining the factual decision of the  
Commissioner by applying a substantial evidence test.

- B. Whether the Superior Court misapplied RCW 7.90.090 (4) to the resolution of the case; whether RCW is unconstitutional.
- C. Whether de novo review of factual findings made by a Commissioner based upon credibility determinations after viewing live testimony violates due process and equal protection under the law.
- D. Whether in a revision of a Commissioner ruling, the Superior Court may properly disregard a declaration of a witness considered below by the Commissioner because the witness also testified in person before the Commissioner?

### III. STATEMENT OF THE CASE

#### A. COMMISSIONER'S DECISION

Whatcom County employs four (4) full-time Commissioners to assist the three (3) elected Superior Court Judges. One of the responsibilities delegated to the Commissioners is resolution of petitions for a Sexual Assault Protection Order pursuant to RCW 7.90.

In this case, Olivia Charbonneau, through her mother Donna Charbonneau, petitioned the Superior Court for a Sexual Assault Protection Order CP 157-161 alleging that Tanner Foster had raped her three times on July 17, 2011. Tanner Foster filed a declaration admitting that he had sex with petitioner but denying the allegation of rape; Foster asserted that the sex was consensual, CP 151-153. The case came on for trial on September 15, 2011 before Whatcom County Commissioner, Thomas Verge.

At trial, Ms. Charbonneau relied entirely upon declarations. Foster filed numerous declarations, and also presented live testimony: Whatcom County Deputy Sheriff, Colin Bertrand, and respondent Tanner Foster testified before Commissioner Verge.

The evidence established that on July 17, 2011, Foster picked up Charbonneau and the two went to Foster's home. Foster's parents were away and the two were alone in the house for several hours. They both drank alcohol. Charbonneau communicated with others during this period by text messaging, and also made some phone calls on her cell phone. Charbonneau made no complaints of rape during that time. For a period of time the parties left the house to pick up John Martinez, a friend of Foster and also a student at Blaine High School, where

Charbonneau and Foster also went to school. Foster drove and Charbonneau accompanied him. They picked up Martinez and all returned to Foster's house. Martinez testified by declaration that Charbonneau and Foster were holding hands at the Foster residence and he observed nothing out of the normal.

Later, Foster with Martinez and Charbonneau left the Foster home. Foster drove Charbonneau to the house of her friend, Kaleigh Effinger. He dropped her off there. Petitioner then confided in her friend that Tanner Foster had raped her. The story spread and was later reported to a teacher at Blaine High School, Mr. Coffee. The matter was then referred to the Whatcom County Sheriff for investigation.

The case was assigned to Whatcom County Deputy Sheriff Colin Bertrand. In the course of his investigation, he interviewed Charbonneau on two occasions, and also interviewed Tanner Foster. The results of his investigative action are detailed in his declaration, CP 147-149.

Bertrand found it significant that after the alleged rapes had taken place, Charbonneau texted several times and made no mention in the texts that she had been raped. Also significant, he

believed, was the fact that John Martinez, who was with Foster and Charbonneau at the Foster residence after the alleged rape had taken place, observed Charbonneau and Foster seated on the couch holding hands. Martinez reported nothing out of the ordinary; Report of Proceedings before Commissioner Verge, page 47 lines 1-11. Deputy Bertrand testified in person before Commissioner Verge that he found no probable cause to arrest, Report of Proceedings before Commissioner Verge page 46, lines 13-14. Bertrand recommended no criminal prosecution. Bertrand's recommendation was referred to Chief Deputy Prosecuting Attorney, Mac Setter, who is assigned to handle prosecution of sex offenses in Whatcom County. Setter concurred in Bertrand's evaluation of the case. No criminal charges were filed against Foster.

Deputy Bertrand's direct testimony is found at Report of Proceedings before Commissioner Verge, pages 33- 48. Bertrand was cross-examined by petitioner's attorney and that cross-examination is found at Report of Proceedings before Commissioner Verge, pages 48-62.

Tanner Foster also testified before Commissioner Verge. His brief direct testimony and cross-examination is found at Report of

Proceedings before Commissioner Verge 64-68. A copy is attached as Appendix 1.

Olivia Charbonneau was present at the hearing but declined to testify.

Commissioner Verge's opinion denying the issuance of a personal protection order is found at Report of Proceedings before Commissioner Verge, pages 78-92. Verge found that the petitioner failed to meet her burden of proof that the sex was non consensual, Report of Proceedings before Commissioner Verge, page 79, lines 11-23. He found that the evidence was insufficient, Report of Proceedings before Commissioner Verge, page 87, lines 10-13. And he found that the evidence did not support the issuance of a sexual protection order, Report of Proceedings before Commissioner Verge, page 89 lines, 14-16.

In sum, the case was a factual controversy between Charbonneau and Foster over whether, as Charbonneau claimed, Foster had raped her three times, or whether, as Foster testified, they had engaged in consensual sex. Commissioner resolved the credibility battle in favor of Foster, and signed an order finding the

evidence insufficient to sustain the issuance of a sexual protection order, CP 133.

#### B. SUPERIOR COURT DECISION

Ms. Charbonneau filed a motion to revise the decision of Commissioner Verge, which came on before Whatcom County Superior Court Judge Charles Snyder on October 28, 2011. In her written motion, she requested the Superior Court to issue a sexual protection order; she also requested a remand for additional testimony; and to redact and strike the Declaration of Deputy Bertrand. She claimed that the Commissioner denied her the opportunity to cross-examine Foster's witnesses, or to examine her own rebuttal witnesses. She also claimed that she had witnesses available to testify by way of rebuttal; see CP 131-132. There was absolutely no basis for these claims; see Report of Proceedings before the Commissioner Verge, page 68, lines 1-4.

Charbonneau moved to strike and seal the declaration of Deputy Bertrand which had been admitted and considered by Commissioner Verge, see Report of Proceedings before the Superior Court, page 2, lines 20-15. The grounds presented were numerous; see Report of Proceedings before the Superior Court

pages 3-6. Charbonneau asked for the court to reverse the factual credibility finding of Commissioner Verge.

Foster argued that the case was pure and simple a credibility dispute, which the Commissioner had resolved against the petitioner; Report of Proceedings before the Superior Court, page 2, lines 20-15.

The Superior Court granted the motion to strike the declaration of Deputy Bertrand, stating:

Deputy Bertrand is entitled, I think, as a citizen to present an affidavit in a civil matter. However, he also testified, and so in terms of the record that this Court is considering the affidavit is not going to be part of the Court's consideration. It's the testimony that is to be considered. Where there is testimony, the testimony prevails.

Report of Proceedings before the Superior Court, page 14, lines 1-7.

After striking the affidavit of Deputy Bertrand, the court reviewed the record and reversed the factual determination made by Commissioner Verge; a copy of that portion of Superior Court Judge Snyder's opinion is attached to this brief as Appendix 2. The court, in its own words, made "its own independent determination based upon the record below as to whether or not there is a basis

for such an order. I'm going to look at it from that perspective.”

Report of Proceedings of the Superior Court, page 16, lines 14-18.

#### IV. SUMMARY OF ARGUMENT

The Superior Court should not have adopted a de novo review standard. The Commissioner had the opportunity to review live testimony and resolved it against the petitioner. The Commissioner's finding of fact that Tanner Foster did not rape Olivia Charbonneau was based upon his review of the live testimony of appellant Foster. Charbonneau was present in court and available to testify, but she chose not to, and instead to rely upon her written declaration. That petitioner did not persuade the trier of fact that she had been raped is a factual finding, which is integral to the decision of Commissioner Verge. Superior Court Judge Snyder, upon reviewing the record, reached a contrary factual resolution of the case.

Foster argues that, at least in cases where the Commissioner makes findings of fact based upon the examination of live testimony, a later reviewing Superior Court must make its examination based upon substantial evidence, and not de novo.

Furthermore, if it is necessary for the court to review a factual decision in this case, the Superior Court erred in its reversal by applying RCW 7.90.090 (4), which is overly vague in how it is to be applied, and which appears to prohibit consideration of evidence of intoxication in weighing credibility. The Superior Court also erred in striking Deputy Bertrand's declaration.

## V. ARGUMENT

- A. Where the Commissioner resolves a sexual protection order case and finds that the alleged victim did not prove that she was raped; when this finding is based upon viewing live testimony; and when the Superior Court is asked to revise the order, the Commissioner's decision should be reviewed on a substantial evidence test and not de novo.

RCW 2.24.050 mandates that such revision shall be "upon the records of the case and the findings of fact and conclusions of law entered by the court commissioner." But it does not specify what standard for review the Superior Court is to use.

In re Marriage of Moody, 137 Wn2d 979, 976 P.3d 1240 (1999) had to do with an action to vacate the maintenance

provisions of a decree of legal separation. The court commissioner denied the motion, and the husband Moody moved to revise, asking the superior court to consider new issues with new evidence. The Superior Court declined to do so, and, agreeing with the commissioner, denied the motion. In its consideration, the Washington Supreme Court remarked that when superior courts revise the rulings of commissioners, the statute itself is clear in its limitations. Courts must review the issues originally presented in the record of the case, along with the findings of fact and conclusions of law. But Moody also shows that reviewing courts acknowledge a distinction between those cases which include live testimony, and those which do not.

*In an appropriate case, the superior court judge may determine that remand to the commissioner for further proceedings is necessary. Generally, a superior court judge's review of a court commissioner's ruling, pursuant to a motion for revision, is limited to the evidence and issues presented to the commissioner. In cases such as this one, where the evidence before the commissioner did not include live testimony, then the superior court judge's review of the record is de novo.*

Moody at 992-993. (Emphasis added.)

Subsequent to Moody, the Court of Appeals considered the scope of Superior court review of a Commissioner's ruling in State

v. Lown 116 Wa. App. 402, 66 P.3d 660 (2003). Lown, a juvenile, had pleaded guilty to several crimes and the imposition of confinement was deferred. Lown was placed on supervision and required not to use drugs. But Ms. Lown did use drugs, and the state moved to revoke the deferred disposition. The state appealed the commissioner's decision to the superior court, but the court sustained the lower court ruling, finding that, like Moody, the superior court was limited in its review:

"Limited to the record" means that the judge can request a certified record of the proceedings, but does not make his or her own findings. The superior court judge is in the same position as we would be.  
"Revision" is synonymous with "review."

Lown at 407.

The Lown court went on to describe the scope of such review, explaining that findings would be reviewed for substantial evidence, and that only conclusions would be reviewed de novo.

Because "revision" is synonymous with "review," when a commissioner's findings and conclusions are challenged, the superior court judge reviews the findings for substantial evidence and the conclusions de novo. This is what the superior court did here.

Lown at 407-408. (Citations omitted.)

In In re Marriage of Rideout, 150 Wn2d 337, 77 P.3d 1174 (2003), the Washington Supreme Court affirmed a finding of

contempt made by a Commissioner. Upon revision, the Superior Court, using a substantial evidence standard, concurred. The Supreme Court agreed that there is a clear distinction between cases in which testimony is presented, and cases, which are based upon documentary evidence. Further, the Court commented on the matter of credibility, one of the main points at issue in this case:

there are cases that stand for the proposition that appellate courts ... may generally review de novo decisions of trial courts that were based on affidavits and other documentary evidence. ... The aforementioned cases differ from the instant in that they did not require a determination of the credibility of a party. Here, credibility is very much at issue... Here, where the proceeding at the trial court turned on credibility determinations and a factual finding of bad faith, it seems entirely appropriate for a reviewing court to apply a substantial evidence standard of review.

Rideout at 350-351. (Citations omitted.)

In Rideout, the court recognized the distinction between matters which involve only written submissions of evidence, and those which involve upon live testimony. When considering written evidence only, "the [reviewing] court is in the same position as trial courts..." But when cases hinge upon live testimony, "issues of credibility are ordinarily better resolved in the crucible of a courtroom, where a party or witness' fact contentions are tested by

cross-examination, and weighed by a court in light of its observations of demeanor and related factors.” Rideout at 350-352.

The procedural safeguards of our court system strongly support the application of the substantial evidence standard of review. As the Supreme Court noted in Rideout, “trial judges and court commissioners routinely hear family law matters. In our view, they are better equipped to make credibility determinations..” The court held that “the appropriate standard of review here is not de novo, but rather is whether the trial court's findings of fact are supported by substantial evidence.” Rideout at 352.

In State v. Ramer, 151 Wash2d 106, 86 P.3d 132 (2004), the Washington Supreme Court affirmed a decision of the Superior Court which overturned a determination made by a commissioner involving the capacity to commit a crime. The Washington Supreme Court affirmed the Superior Court’s conclusion and in so doing made the following comment on the scope of review by the Superior Court when revising a decision of a Commissioner:

We review the superior court's ruling, not the commissioner's. All commissioner rulings are subject to revision by the superior court. RCW 2.24.050; see also CONST. art. IV, § 23. On revision, the superior court reviews both the commissioner's findings of fact and conclusions of law de novo based upon the evidence and issues presented to the commissioner.

The Supreme Court, in a footnote, stated that any language to the contrary, as might be found in State v. Lown, 116 Wash.App. 402, 66 P.3d 660 (2003), is disapproved.

The Ramer Court cited State v. Wicker, 105 Wash.App. 428, 433, 20 P.3d 1007 (2001) and In re Marriage of Moody, 137 Wash.2d 979, 993, 976 P.2d 1240 (1999) as cases which supported its ruling that a Superior Court may review a Commissioner's findings and conclusions de novo.

But in so doing, the Court did not deal with the significance of the language in Moody which carved an exception to the de novo review standard for cases in which credibility is involved – when a Commissioner, as here, is presented with inconsistent positions and must make credibility findings based on live testimony.

The other case the Ramer Court cited in support of its decision was State v. Wicker, 105 Wn. App. 428, 20 P.3d 1007 (2001). This was a case in which the Court of Appeals found ineffective assistance of counsel for the failure to file a timely motion to revise. The Court in that case agreed that a Superior Court may review both a Commissioner's findings and conclusions de novo: "The Superior Court Judge need not find that error

occurred before remanding for further proceedings. For example, the Superior Court Judge may decide to acquit a defendant simply because the judge evaluates the evidence differently than the commissioner did.” State v. Wicker at 433.<sup>1</sup>

Subsequent to Ramer, the Washington Supreme Court decided In re Marriage of Langham, 153 Wn2d 553, 106 P.3d 212 (2005). In that case, the Court considered the question of the standard of review for dissolution decisions of the Commissioner upon revision by the Superior Court. The Supreme Court found de novo review was appropriate where documentary evidence was involved and initial decision did not involve credibility determinations. The Court stated:

The parties dispute the appropriate standard of review. Velle argues it should be de novo since the record is entirely documentary evidence. Margo argues for the abuse of discretion standard normally used in property settlement cases... Since the parties do not dispute the underlying facts but only the conclusions drawn from the facts, the correct standard is de novo since the trial court commissioner relied solely on documentary evidence and credibility

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<sup>1</sup> It should also be noted that in Ramer, Justice Madsen concurred and wrote separately to make clear that the majority did not announce a new ruling, citing J. P. S. 135 Wash2d 34, 954 P.2d 894 (1998). J.P.S. involved a capacity determination made directly by the Superior Court, and so does not speak to the scope of review of a Commissioner’s ruling when it is revised by the Superior Court. The second case cited by Madsen is State v. Q.D. 102 Wash.19, 685 P.2d 557 (1984). Q. D. also did not involve a ruling by a Commissioner later revised by the Superior Court.

is not an issue.

In re Marriage of Langham at 559. (Citations omitted.)

And the court in Marriage of Langham further cited cases to emphasize that the de novo method was the acceptable manner of review because the case involved no live testimony or findings of credibility.

See In re Marriage of Rideout, 150 Wash.2d 337, 351, 77 P.3d 1174 (2003) (holding the substantial evidence standard applied to a contempt proceeding based solely on documentary evidence because credibility was an issue, while noting that de novo is the general rule in such situations where credibility is not an issue); Smith v. Skagit County, 75 Wash.2d 715, 718–19, 453 P.2d 832 (1969). We note the Court of Appeals applied an abuse of discretion standard, In re Marriage of Langham & Kolde, slip op. at 6, declining to follow Division Three, which reviewed a commissioner's decision de novo when based solely on documentary evidence, In re Parentage of Hilborn, 114 Wash.App. 275, 278, 58 P.3d 905 (2002). For the reasons stated, we believe de novo review is appropriate. Cf. In re Parentage of Jannot, 149 Wash.2d 123, 126, 65 P.3d 664 (2003) (holding that abuse of discretion was the proper standard when the trial court relied solely on documentary evidence in deciding whether to modify a parentage plan).

Marriage of Langham at 559, Footnote 4.

After Marriage of Langham, the Court of Appeals reaffirmed its rule that credibility determinations by the trier of fact are reviewed under a substantial evidence standard. In State v.

Bartolome, 139 Wa. App. 518, 161 P.3d 471 (2007) the Court of Appeals held that the standard for review of criminal trials on stipulated records is the substantial evidence test. That case was presented to the Court for resolution based upon stipulated records, primarily police reports. The trial court convicted Bartolome of one count and found him not guilty of another. The Court of Appeals adopted the substantial evidence standard and rejected the proposition that the appellate court should review the case de novo.

The parties do not cite and our research has not revealed any Washington case law addressing the standard of review for criminal trials on stipulated records. A recent Washington Supreme Court decision, however, In re Marriage of Rideout, 150 Wash.2d 337, 351, 77 P.3d 1174 (2003), holds that “substantial evidence” is the appropriate standard of review for trials on stipulated or documentary records in family law cases and that appellate courts defer to trial courts, even when they rule on stipulated records in cases that turn on credibility and “where competing documentary evidence ha[s] to be weighed and conflicts resolved.”

Bartolome at 521.

Bartolome is significant because the appellate court found that, although the trial court did not make explicit finds regarding credibility, the case nonetheless “turns on credibility.”

Bartolome, like Sara Rideout, “had a right to request the opportunity to present live testimony,” Rideout,

150 Wash.2d at 352, 77 P.3d 1174. He could have gone to trial and cross-examined the live witnesses whose credibility he wished to challenge. But he, like Sara Rideout, did not exercise that right. Instead, he elected to waive this right and submitted his case to trial on an agreed stipulated record. Criminal defendants convicted in live trials do not receive de novo review on appeal. Neither should Bartolome.

Bartolome at 521.

Later, the Court of Appeals in Perez v. Garcia 148 Wa. App. 131, 198 P.3d 539 (2009) reversed a decision of the Superior Court revising a Commissioner's ruling. A local court rule permitted the Superior Court to consider new evidence in reviewing the Commissioner's findings of fact. The Court of Appeals found such a local rule invalid, and again, commented on the distinction between cases involving only documentary evidence and cases in which credibility is a factor:

Where the commissioner hears live testimony, as in this case, the superior court is to review the commissioner's findings of fact and conclusions of law for substantial evidence. Where the live testimony does not form a basis or partial basis for the commissioner's decision, the superior court's review of the record is de novo.

Perez v. Garcia at 139. (Citations omitted.)

Foster acknowledges that Ramer makes ambiguous the state of the law relating to the standard of review of a

Commissioner's rulings. Ramer, however, reached its result without addressing the implications of its holding. On the other hand, In re Marriage of Rideout, 150 Wn2d 337, 77 P.3d 1174 (2003) was decided the year before Ramer. And in that case the Supreme Court engaged in an extensive discussion about the rationale for rejecting a de novo review of documentary evidence that includes credibility findings. As well, one year after Ramer, the Washington Supreme Court handed down its decision in Marriage of Langham, 153 Wn2d 553, 106 P.3d 212 (2005), in which the Court specifically addresses the question of the standard of review in cases where the Superior Court reviews the decisions of Commissioners.

Based upon the analysis in the cases cited, it seems reasonable to direct the Superior Court to limit review of a Commissioner's ruling on the ultimate issue before him/her when live testimony is presented. Here the Commissioner found that Foster did not commit the rape and that the petitioner had not proven her allegation. The Commissioner had the opportunity to observe the demeanor of Foster and his performance on cross-examination; the Superior Court did not.

If this Court approves the Superior Court's de novo review in this case, there is no reason why, for example, in a criminal rape

trial before a Commissioner, where witnesses testify and the Commissioner acquits the juvenile, that the state cannot move to revise and the Superior Court can, pursuant to de novo review, convict the juvenile.

The Court of Appeals in State v. Mershon, 43 Wa. App. 132, 715 P.2d 1156 (1986) ruled that double jeopardy precludes any revision of facts found by a Commissioner in the adjudication of juvenile criminal offenses. It is an irrational conflict to permit de novo review here, when the same factual finding is made with respect to the commission of a criminal offense such as rape, but in the context of a civil sexual protection order proceeding. The rule should be the same: the finder of fact - the Commissioner in cases such as this – should make the factual finding in both cases.

B. Does the superior court's application of de novo review violate respondent's right to due process and equal protection under the law?

Assuming RCW 2.24.050 does empower a Superior Court Judge to overturn a Commissioner's finding as to the credibility of witnesses, even when the judge does not view the live testimony, such power deprives the party adversely affected of due process

and equal protection. De Novo review places the respondent in the position of being found to have committed the alleged rape after he has been vindicated by the first finder of fact the Commissioner. It places the respondent in civil jeopardy for a second time.

#### 1. Due Process

Foster was confronted with the accusation that he had raped Charbonneau. He defended himself in a fact-finding trial before Commissioner Verge. Foster testified, as did a Deputy Sheriff who was familiar with the facts of the case because he had completed a criminal investigation concerning the accusation. Although denominated a civil action, the trial put at stake serious adverse consequences.

There was sufficient evidence for Charbonneau to prevail had the Commissioner accepted the factual presentation she advanced. But she did not. From Appellant's perspective, this motion for revision is comparable to an appeal to the Court of Appeals of a decision of a Superior Court judge or jury, when one party is found to be in favor, and the losing party appeals and requests the appellate court to reverse the finding of the trier of fact.

There are important considerations as to the adequacy of due process here. The Commissioner is a trained judge experienced in the resolution of factual controversies. Due process is implicated by granting discretion to a Superior Court, or to any court, to act in a reviewing capacity, when that includes the reading of a dry record of testimony to overturn a factual finding related to the credibility of a witness.

The analysis of Foster's due process claim is similar to the analysis employed by the Court of Appeals in Buffelen v. Woodworking C. v. Cook 28 Wa. App. 501, 625 P.2d 703 (1981). There, the Court of Appeals upheld from a due process attack the statutory grant of authority to a jury to override a credibility determination previously made by the Board of Industrial Insurance Appeals. The Board viewed testimony and made factual determinations regarding a Labor and Industry claim; the written record of the proceedings before the Board was read out loud to the jury.

The injured party in Buffelen argued that the de novo review by the jury of the Board's determination violated due process because the crucial issue in determining the facts involved the credibility of the witnesses. The statute governing review of the

Board's decision explicitly stated that it "shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the record filed by the board." RCW 51.52.115.

The court explained that in practice, when the jury reviews the Board proceedings, "counsel for the litigants adopt unique 'role playing' capacities and 'read' their respective parts to the jury, in the same manner as they would when reading a witness' deposition." As well, the Board's decision is "presumed correct and the burden is on the appealing party to establish by a preponderance of the evidence that it is incorrect." Buffalen at 504.

The court went on to address the specific question of constitutionality – "is this jury review process a constitutionally defective form of claim determination?"

Ultimately, Buffalen explains that "the critical question is whether the cumulative effect is so great as to produce a substantial risk of distortion between the jury's determination and the reality of the actual fact." The court sided with the jury because

their collective wisdom ... produces a consensus judgment after a relatively brief and reasonably controlled exposure to the best remembered recollections and cautiously mannered demeanor of presently available and solemnly sworn witnesses,

the totality of whose actual knowledge and experience is deemed by trained advocates to represent the reality of any given fact or event... it would serve no useful purpose to enumerate a litany of the vagaries and variables inherent in this revered system...

The court noted in its review that the ways in which the procedures at work in the case modified the “traditional jury process are not inconsequential;” but the court “decline[d] to declare that it violates a worker’s (or his employer’s) constitutional guaranty to due process of law.”

Buffelen v. Woodworking C. v. Cook 28 Wa. App. 501, 506-507, 625 P.2d 703 (1981).

The structure of the analysis here is similar to the case at hand, but there are significant differences. First, the statute governing the review in Buffalen is explicit that de novo review is to be used; the statute here, RCW 2.24.050, is not as clear. The accusation made to support the issuance of a sexual protection order is criminal in nature – the commission of forcible rape, one of the most reprehensible crimes. The consequences are significant. The stigma associated with an adjudication of this act is severe in terms of damage to one’s reputation and future prospects.

Here the fact-finding framework used by the Superior Court to reach the determination that Foster had raped Charbonneau was

the court's review of the written record before the Commissioner. But the Commissioner reached his own decision by reading the record of the declarations submitted, and by viewing and considering the testimony and demeanor of Tanner Foster and Deputy Bertrand. The Commissioner's remarks in his oral decision reflect that he weighed Bertram's statements and credibility in making his decision.

There is no difference in the capacity of a Commissioner or a Superior Court Judge to make an accurate determination of credibility. Both are trained lawyers with extensive experience. But there is a proper difference in context: the Commissioner is in a better position to make accurate findings because his impressions are informed by multiple and intangible factors which cannot be properly quantified in a written record – the mood of the room, the demeanor of the witnesses, their reactions upon cross-examination. A reviewing Superior Court Judge is limited to one impression – his reading of a cold record. But adoption of a *de novo* review standard puts the magistrate, here the Superior Court Judge, in the position to override the finder of fact, even when so doing, he is in an inferior position to make an accurate factual determination.

Therefore, to the extent the Court feels compelled to impose

a de novo standard of review, it should not do so because such standard violates Foster's right to procedural and substantive due process of law under the 5<sup>th</sup> and 14<sup>th</sup> amendments to the United States Constitution and to Art. 1, Sec. 22 of the Washington State Constitution.

## 2. Equal Protection

Foster's Equal Protection argument is predicated on the identification of disparate treatment, which infringes upon a protected interest. The equal protection analysis requires first an identification of intrusion on the interest and a gradation of the interest protected.

Here, the interest protected is the right to a fair factual adjudication against the accusation of a criminal act in the context of a civil proceeding.

Foster would categorize the nature of this action as quasi-criminal and not civil, because it requires proof of a significant predicate act, which is also a crime. As an analog, a quasi-criminal forfeiture action requires the government to show probable cause that a crime has been committed; once succeeding, the burden shifts to the owner of the property to rebut or otherwise to sustain

the forfeiture; see Deeter v. Smith 106 Wash.2d 376, 721 P.2d 519 (1986) for the proposition that this proceeding is a quasi-criminal proceeding.

Another example of a comparable quasi-criminal matter would be disciplinary proceedings against judges or attorneys; such proceedings the Washington Supreme Court has denominated quasi-criminal, in that they require a higher degree of proof than preponderance. Quasi-criminal hearings such as these require a higher standard of proof because a professional reputation, as Foster's reputation here, is at stake, In the Matter of Deming, 108 Wn2d 82, 736 P.2d 639 (1987), ("Over the centuries the intangible yet precious value of one's reputation has been recognized.")

The basis of review for quasi-criminal proceedings is substantial evidence. While judicial disciplinary hearings are reviewed de novo by the Washington Supreme Court, that is by virtue of an express provision in the state constitution, and is distinguishable from other quasi-criminal matters.

In the case of a drug forfeiture, where the finder of fact is the Sheriff or his designee, the standard for review is substantial evidence. The same is true if the aggrieved party removes the forfeiture to Court and an appeal from the trial court ensures.

In criminal cases, where issues of fact are decided in a pretrial suppression motion, those factual decisions are reviewed on a substantial evidence test because “the trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying... This remains true regardless of the nature of rights involved.” State v. Hill 123 Wn2d 641, 870 P.2d 313 (1994).

De novo review of sexual assault allegations where the accused has been vindicated by the first trier of fact is unique. The only comparison is the review of judicial findings of misconduct, which is de novo by the Washington Supreme Court because of an express de novo review provision in the Washington State Constitution.

C. RCW 7.90.090 (4) is unconstitutional because it is void for vagueness in its application and because it takes evidence relevant to credibility determinations (affectation by alcohol consumption) from the purview of the trier of fact.

RCW 7.90.090 (4) reads:

(4) Denial of a remedy may not be based, in whole or in part, on evidence that:

(a) The respondent was voluntarily intoxicated;

(b) The petitioner was voluntarily intoxicated; or

(c) The petitioner engaged in limited consensual sexual touching.

One of the issues that is central to the resolution of this case is how the consumption of alcohol affected the parties involved. Both the Commissioner and the Superior Court considered the alcohol in reaching their decisions.

In her oral argument before Commissioner Verge, Lynette Kolb, who then represented Charbonneau, stated:

She was intoxicated. The deputy had just testified that there was a lot of alcohol involved and the statute clearly states RCW 7.90.090 states that the denial of a rumor( sic.) (remedy) may not be based in whole or in part on the evidence that either of parties were voluntarily intoxicated.

Report of Proceedings before Commissioner Verge, page 69, lines 17-23.

In the briefing before the Superior Court, the first time RCW 7.90.090 (4) is mentioned is in petitioner's reply brief at page 3:

The SAPO statutes require that the court disregard whether either party was intoxicated or whether they had engaged in "limited consensual sexual touching." RCW 7.90.090 (4). Ms. Charbonneau is clear that she said, "no," she told her friends that she had been raped and her actions when she was safe at her

friends' home, speak volumes about the sexual assault Mr. Foster committed." CP 14.

In her oral argument before the Superior Court, petitioner's attorney, Nancy Ivarinen, who did not represent her at the hearing before Commissioner Verge, also brought up RCW 7.90.090. Petitioner explained that "the sexual assault protection statute order states, the intoxication is not to be considered by the Court or is the fact that there may have been some consensual touching," Report of Proceedings before the Superior Court, page 6, lines 4-7. But this point was not made in the written motion for revision filed by petitioner.

On revision the Superior Court opined that the Commissioner misapplied the statute by taking into account the heavy drinking of the parties involved. But the Superior Court also considered the issue of intoxication in its own resolution of the case. How the statute is appropriately applied or misapplied is not revealed in the exegesis the Superior Court provided in its oral ruling. Perhaps this explanation is lacking because it is impossible to determine how the statute is to be applied, when the trier of fact confronts sexual assault allegations in circumstances where one or both of the parties have been voluntarily consuming alcohol.

Foster argues that the language that the parties are voluntarily intoxicated can not be considered in denying a remedy is overly broad and not subject to any specific application. As such, it is unconstitutional. Giacco v. Pennsylvania, 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed 2d 447 (1966) demonstrates this point. In that case, Giacco was acquitted of two misdemeanor charges of pointing a firearm at a person. After finding him not guilty, the jury, acting pursuant to a Pennsylvania statute which allowed the jury to assess costs against the defendant, the Commonwealth or both, assessed costs of \$230.95 against the defendant on one of the two counts of which he had just been acquitted.

The United States Supreme Court found the statute to be deficient in due process explaining that

a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case... Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.

Giaccio v. State of Pa., 382 U.S. at 402-403 (1966).

The statutory command that a sexual protection order “may not be denied” based upon evidence that either or both parties involved were intoxicated suffers from a similar due process defect. RCW 7.90.090 is unconstitutional because it imposes no standards for its application. Perhaps the legislature intended to prohibit a prejudicial standard not to open the courthouse doors to cases in which any of the participants engaged in voluntary consumption of alcohol. Or perhaps the legislature meant that when a finder of fact determined a rape had occurred, he or she must not allow the intoxication of the victim or of the perpetrator to attenuate that finding. (But, in such a case, the finder would still have to determine, by a preponderance, that a rape had occurred in the first place.) There is no legislative history to inform us of the intended purpose of this statutory prohibition.

In this case, the Superior Court did consider Ms. Charbonneau’s level of intoxication when issuing its ruling. At the same time, the Superior Court faulted the Commissioner for doing the same thing, only to an alternate end. The Court explained that, to the extent the Commissioner “spoke to it in detail (voluntary consumption of alcohol) as to how he believed that impacted the petitioner’s ability to recall, or her behavior, or her response to the

events of the day. I think that that's inappropriate under the context of the statute," Report of Proceedings before the Superior Court, page 18, lines 12-18.

The Commissioner made determinations of credibility. He concluded that Charbonneau consumed too much alcohol to make sound judgments, but nevertheless engaged consensually in sex with Foster, was remorseful and regretful for her decision making, and was unclear as to the consequences of her actions because she consumed too much alcohol. Implicit in the Commissioner's remarks was his conclusion that she consented to the sex, and his adoption of Foster's testimony, who was examined and cross-examined in front of him.

The Superior Court explained that, under the statute, it was "inappropriate" for the Commissioner to consider how intoxicated the petitioner was when making his credibility assessments. But then, the Superior Court went ahead and considered how intoxicated the petitioner was in concluding that "the petitioner has established that this was non consensual because of not only that what she has said and done, but because of the fact that she was intoxicated to the level that she was."

The Superior Court's analysis of the statute is skewed because the prohibition contained in the statute is overly vague and is thus defective for that reason.

D. In a revision of a Commissioner ruling, the Superior Court cannot disregard a declaration of a witness considered by the Commissioner because the witness testified in person before the Commissioner.

By striking the declaration of Deputy Bertrand, the Superior Court breached that statutory mandate that the Superior Court base its review on the record before the Commissioner. By excluding evidence considered by the Commissioner, the effect is the same as considering new evidence, which is prohibited; Marriage of Moody 137 Wn2d 979, 976 P.2d 1240 (1999); Perez v. Garcia 148 Wn. App. 131, 198 P.3d 539 (2009).

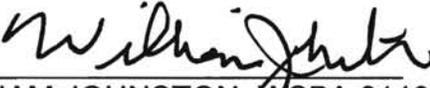
In addition, there is no basis to strike a declaration of Deputy Bertrand because witnesses testified.

## VI. CONCLUSION

Foster requests that the Court of Appeals overturn the judgment of the Superior Court. Commissioner Verge's decision is

based upon facts supported by the substantial evidence test and should be affirmed. Affectation by voluntary consumption of alcohol in a case where there are allegations of sexual assault is a fact that has to be considered and weighed by any trier of fact. RCW 7.90.090 (4) violates the due process mandate that the trier of fact be able to consider all relevant evidence, as well, the statute presents no standards for its implementation.

18<sup>th</sup>  
Respectfully submitted this day of April, 2012

  
WILLIAM JOHNSTON, WSBA 6113  
Attorney for Appellant TANNER FOSTER

1           We dealt with the issues of motion to  
2           strike or seal, we dealt with the responsive  
3           affidavit of attorney for the respondent William  
4           Johnson, so there's been a lot in terms of the  
5           declarations and then the testimony we heard  
6           earlier today of Mr. Foster and of Deputy  
7           Bertrand, so that's the record.

8           Ms. Korb had indicated the issue was  
9           whether or not it was the -- the acts that  
10          occurred on the date in question which were July  
11          17th, 2011, whether or not it was consensual. I  
12          prefer to frame it this way. The issue is, does  
13          the evidence establish that the sex acts were  
14          nonconsensual? The issue is whether the evidence  
15          presented is enough to support entry of a sexual  
16          assault protection order that the sexual assault  
17          protection order statute shows in the petition  
18          it's defined. And it says, "A sexual assault  
19          protection order is available to protect the  
20          victim of nonconsensual sexual conduct from  
21          future interactions with the assailant."  
22          Nonconsensual means a lack of freely given  
23          agreement.

24          There's no question that there was sexual  
25          contact, sexual intercourse here as admitted by

1 Mr. Foster and as alleged by Olivia Charbonneau.  
2 Again, the issue is does the evidence establish  
3 that the sex acts were nonconsensual?

4 I looked at the case and on August 17th,  
5 the temporary order issued, and what's important  
6 for everybody to realize is that when that  
7 temporary order is issued, I have one side of the  
8 story.

9 The original statement and the original  
10 bias for the order by Donna Charbonneau and  
11 Olivia Charbonneau were very concerning. But  
12 since the event of July 17th and since the  
13 temporary order was issued on August 17th, much  
14 more has come to light.

15 Frankly, the -- a key piece, I don't know  
16 that one has any greater weight then the other  
17 but a key piece of evidence in this case is the  
18 memorandum from Mac Setter, the Chief Criminal  
19 Deputy of the prosecutor's office. It is not  
20 defining by any means, what Mr. Setter's decision  
21 was but frankly this court knows Mr. Setter quite  
22 well, he has been the Chief Criminal Deputy in  
23 the Whatcom County prosecutor's office for 20  
24 plus years, I think is -- is my recollection.  
25 And frankly, he's the epitome of a tough hard

1           nose prosecutor. For him to come to the  
2           conclusion that there is insufficient evidence of  
3           crime and rape in the third degree that is  
4           significant information. It is a significant  
5           decision.

6                     If the opposite were true, if charges were  
7           filed, we wouldn't be having this conversation a  
8           protection order would have been issued, charges  
9           would have been filed and the protection order  
10          would have been issued.

11                    So what's even more telling is Mr. Setter's  
12          statement where he says after drinking what  
13          appears to be a large amount of alcohol, Vodka,  
14          beer, wine, the parties had sexual intercourse.  
15          He notes that the victim appears to have  
16          significant gaps in her memory which I expect is  
17          due to alcohol toxicity. He notes that a  
18          third-party, he describes as a mutual friend but  
19          it's clear from the evidence it wasn't a mutual  
20          friend referring to Mr. Rodriguez, "A  
21          third-party, a mutual friend who was present with  
22          them several hours after the events reports  
23          seeing nothing unusual in their behavior together  
24          other than them holding hands during the time he  
25          was with them." That's significant in the

1 question of whether or not rape in the third  
2 degree should be charged.

3 This is the first time that I have had a  
4 sexual assault protection order where charges  
5 were not filed where the Chief Criminal Deputy  
6 has put for this memorandum, number one.

7 Number two, it's followed by the  
8 declaration of Deputy Bertrand and I got it -- I  
9 have to state, one of the -- one of the  
10 statements of Deputy Bertrand, a law enforcement  
11 officer of 20 plus years, frankly stuck out with  
12 me when he testified today and he said, my life  
13 would have been a lot easier if had I just  
14 arrested the respondent but it would not have  
15 been the right thing to do because he did not  
16 feel there was probable cause. That is a  
17 statement frankly of an experienced officer  
18 because a younger officer would have done the  
19 easy thing when he wasn't sure but an experienced  
20 officer looks at a case differently. But for him  
21 to say my life would have been a lot easier had I  
22 arrested the respondent but it would have not  
23 been the right thing to do, was a very important  
24 statement. In addition, in his statement, in his  
25 declaration he said, "After fully investigating

1           the case I recommended in my case report that a  
2           prosecution not be pursued because of  
3           insufficient evidence." Because of insufficient  
4           evidence, and again, we go back to the question  
5           of the issue is does the evidence establish that  
6           the acts were nonconsensual, so I have the  
7           statement of the deputy and I have the state --  
8           or of the deputy, Chief Criminal Deputy, and I  
9           have statement of the Whatcom County Sheriff's  
10          officer. He references John Martinez's statement  
11          an important consideration, he estimates that  
12          based on the conversations with the petitioner  
13          and with the respondent, the estimated time of  
14          the sexual intercourse was from ten in the  
15          morning until one p.m. in the afternoon. He  
16          referenced that there were communications seem to  
17          be normal and no mention was made of any sexual  
18          intercourse or rape. He referenced that there  
19          were text messages that were sent by Ms.  
20          Charbonneau to Mr. -- to Mr. Foster and she told  
21          him that she did not do that.

22                   Now, it's clear as we go on what happened  
23                   was not that she was lying it's that she didn't  
24                   remember and she didn't remember because Ms.  
25                   Charbonneau, you drank too much.

1                   So the statement of Chief Criminal Deputy  
2                   Mac Setter and the statement of the sheriff's  
3                   deputy Colin Bertrand are compelling but I -- I  
4                   got to tell you, I've spent a lot of time  
5                   yesterday reading your second statement, Ms.  
6                   Charbonneau, and it was very concerning. And I  
7                   don't know if it's concerning from an evidentiary  
8                   standpoint or if it's concerning from a judicial  
9                   standpoint or if it's concerning from a parental  
10                  standpoint. But the decisions to consume  
11                  alcohol, wow, you said in your statement "I did a  
12                  few shots by the time the bottle was finished I  
13                  was barely drunk." Well, that's because it  
14                  hadn't hit you yet. You -- you said "Tanner went  
15                  and got a bottle of beer, I drank a glass of that  
16                  willingly. After that he got a bottle of wine."  
17                  You said "I didn't want to drink that but he  
18                  basically forced it on me." I -- I didn't really  
19                  see that evidence but then you talk about your  
20                  memory "I can only remember flashes but I  
21                  remember that what he was doing was painful and I  
22                  was crying" and that's an important piece of  
23                  evidence. "I remember telling him no." That is  
24                  clearly an important piece of evidence but your  
25                  statement says "Then the next part I remember

1           happening" and then you talk about him carrying  
2           you out to the hot tub. Later on in your  
3           statement you say "I blacked out. The next  
4           memory I have was going out to the car." On the  
5           next page you talk about I lost my memory again  
6           at about that time" and then you talk about  
7           somewhere around four p.m. I texted Dustin.  
8           There were bits and pieces and time that you were  
9           conscious, functioning, walking, talking that you  
10          don't remember because of the alcohol poisoning  
11          that occurred. And it's continually in that  
12          statement. And again, from an evidentiary  
13          standpoint it's concerning, from a judicial  
14          standpoint it's concerning, from a parental  
15          standpoint it's concerning because you're a 15  
16          year old female, you drank a lot of alcohol and  
17          you don't have memory for substantial periods of  
18          that time.

19                 More telling was you said "Kaylee asked her  
20          father Mark to take me home. At about six p.m.  
21          he dropped me off, I went straight to bed. The  
22          officer talked about the time of the events from  
23          ten until one" so the drinking started occurring  
24          earlier. "At around six p.m. he dropped me off,  
25          I went straight to bed, I could tell I was still

1           intoxicated." So eight hours after you started  
2           drinking you were still drunk by your own  
3           admission and then you still talk about I now  
4           have a fuzzy memory of saying that -- that night  
5           I drunkenly told a few more friends what had  
6           happened. I just don't remember." You said in  
7           your statement "I was very clear with the sheriff  
8           that my memory of that day was very spotty and  
9           that a lot of what I told him would be guesses."

10                   We're talking about evidence here and  
11           you're statement keeps telling me that you don't  
12           remember parts, that your evidence or your --  
13           your -- your ability remember is spotty, foggy  
14           and it's from the fog of alcohol that you  
15           consumed and the evidence is, and I'm sorry, but  
16           the evidence is that you consumed voluntarily.

17                   So the statement of Mac Setter, the  
18           statement of Deputy Bertrand, the statement --  
19           second statement of Ms. Charbonneau, I'm not  
20           concerned with regard, frankly, to the  
21           differences. Okay. I'm not concerned about  
22           that. And as Mr. Setter had noted in his  
23           statement the differences in it is because as  
24           time goes on you may be remembering more as time  
25           goes on but the problem is you're alcohol

1           intoxication causes great question as to what  
2           happened from your point of view and that's the  
3           problem. That's the problem.

4           The memory lapses, the voluntary  
5           intoxication of alcohol, of the statement of  
6           Chief Deputy Prosecutor Mac Sutter, the  
7           recommendation of the investigating Deputy  
8           Sheriff's office to not charge the conflicts in  
9           the statements presented by various individuals.

10           I'm sorry, Ms. Charbonneau, there just is  
11           insufficient evidence to justify the issuance of  
12           a sexual assault protection order but I have to  
13           say a couple of things. One of the things that  
14           struck me through out this hearing is you have a  
15           very strong support group of friends and your  
16           parents are backing you 100 percent. The ability  
17           to have a strong support group of friends and the  
18           ability of your parents to back you in such a  
19           difficult time when you made some really lousy  
20           choices, is incredible. And doesn't happen all  
21           the time.

22           While I'm denying this request for a sexual  
23           assault protection order, I do not want you to  
24           look at this procedure and to say that there are  
25           winners and loser because there is not. This is

1 a court room, the issue is was there sufficient  
2 evidence to warrant issuing the sexual assault  
3 protection order. That is a very clear  
4 difference. Was there sufficient evidence to  
5 warrant issuance of the sexual assault protection  
6 order? There are too many gaps in your memory of  
7 what happened. There were too many conflicting  
8 statements to find a basis to issue the order.

9 I -- I -- I just don't know what lessons or  
10 what you're going to take from this hearing. I  
11 don't know what you're going to -- how you're  
12 going to think back on this in terms of the  
13 decisions that lead up to the events of July 17th  
14 and that's between you and your parents, that's  
15 between you and the friends that support you but  
16 I hope that you leave with the knowledge of  
17 really the incredibly strong support you got from  
18 your parents and that you got from your friends.  
19 That's not a given in life, it is not. It is not  
20 a given when I sit here and watch people come  
21 before me whatever you have done throughout your  
22 life it has been so strong and so good that you  
23 have warranted that support of your friends and  
24 your parents.

25 Mr. Foster, if you leave here smug,

1           confident or feeling that you some how won  
2           something you have missed out on what happened  
3           here. And frankly if you leave here smug,  
4           confident or feeling that you have somehow one  
5           something the only thing that I know for certain  
6           is that you will be back in front of a judge  
7           again. The plain and simple fact that will never  
8           be changed is you hurt Olivia Charbonneau, you  
9           changed her life forever. You hurt her parents,  
10          you caused great harm not only to them but to  
11          your parents. You actions of July 17th are not  
12          going to be forgotten by any of those people and  
13          they are your actions.

14                 I have dismissed this case because the  
15          evidence does not support the issuance a sexual  
16          assault protection order but I want to tell you  
17          something had I issued the order no Blaine High  
18          School, no Blaine High School events, your senior  
19          year boom, gone up in smoke because of the  
20          decisions that you made on July 17th. You choose  
21          to break the trust that your parents had in  
22          leaving you at home, you choose to drink with a  
23          15 year old, you choose to have sexual  
24          intercourse. Your choices got you here, your  
25          decisions, no one else's. No one else's.

1           Now, when I dismiss this case this is how  
2           this is going to work. Olivia Charbonneau does  
3           not exist in your world. If you harass her, have  
4           contact with her, talk about her, taunt her, or  
5           if any one you know does anything of that nature  
6           it will come down on you period. She has the  
7           right to be left alone by you and by those that  
8           you know. If that doesn't happen, if you or  
9           anyone you know talks about her in a negative  
10          way, taunts her, discusses the events of July  
11          17th in any form on any social network, on any  
12          cellphone, text message, e-mail, or any other  
13          contact it will come down on you whether it's you  
14          or anybody you know. If those events happen  
15          under such circumstances she may have the right  
16          to come in and seek an anti-harassment order  
17          against you.

18                 Now, I'm saying that not because I think  
19                 it's going to happen exactly the opposite I am  
20                 confident that such things will not occur because  
21                 one, your parents laid out big bucks for a lawyer  
22                 just as Ms. Charbonneau's parents laid out big  
23                 bucks for a lawyer for her.

24                 Two, the support of your parents. Your  
25                 lawyer is a smart lawyer, Ms. Charbonneau's

1 lawyer is a smart lawyer, listen to them. Listen  
2 to your parents. You two are lucky you have the  
3 strong support of your family, imagine if you  
4 were sitting here alone without the support of  
5 your parents, what would have happened? But I'm  
6 also confident because after listening to this  
7 case you're smarter than that.

8 Now, last thing I want to tell you, if for  
9 some reason in your life you face similar  
10 accusations by another woman, rest assured that  
11 if it occurs here in Whatcom County I doubt we'll  
12 see a letter from Mac Setter making the decision  
13 not to charge you. I doubt that you're going to  
14 see Deputy Bertrand going the extra mile to  
15 support you if similar charges occur again. If  
16 it happens in another county, this file is public  
17 record another law enforcement agency is going to  
18 see the request for the sexual protection --  
19 sexual assault protection order, they're going to  
20 see the dismissal but a good deputy if -- if  
21 you're ever charged with a similar offense is  
22 going to see and is going to read it and the  
23 decision as to which way to go is probably not  
24 going to go the same way.

25 Finally, that statement, or that

1 description is not made to scare or intimidate  
2 you but it's to explain one thing. An  
3 infinitesimal percentage of men, only an  
4 infinitesimal percentage of men ever get accused  
5 of sexual assault. You're now in that club.  
6 Talk with your lawyer, talk with your family, and  
7 address the question sir, how do you change your  
8 actions, your behaviors, your choices that led up  
9 to the events of July 17th so that such an  
10 accusation never happens again. If you haven't  
11 grown up yet, you better grow up quick and figure  
12 it out because this hearing couldn't get anymore  
13 serious and your life would have been altered  
14 forever had it gone the other way.

15 The matter is dismissed for the reasons  
16 stated above.

17 Mr. Johnston, anything further for the  
18 record before I ask Ms. Korb the same thing?

19 MR. JOHNSTON: No. I think everything's  
20 been handled and I wanted to concur on the  
21 court's remarks and to assure the court that both  
22 myself and Mr. Foster's parents are certainly in  
23 agreement with respect to his conduct from  
24 henceforth and any actions whatsoever with  
25 respect to Ms. Charbonneau. We will do

1 something when the information is all available in an  
2 existing public forum is not consistent with the  
3 requirements of the rule.

4 I considered redacting the names, but the names are on  
5 the petition. They're right there in the petition, and  
6 all that information is already public knowledge. It has  
7 been since the filing of the petition, and I don't think  
8 that this Court can under GR 15 find a sufficient basis to  
9 seal that.

10 However, as I noted, I will not consider the  
11 declaration of the Deputy Bertrand in the decision here.  
12 I will consider his testimony.

13 So I then go back and look at the provisions of the  
14 statute regarding sexual assault protection orders, and  
15 keeping in mind that the Court in this instance can make  
16 its own independent determination based upon the record  
17 below as to whether or not there is a basis for such an  
18 order. I'm going to look at it from that perspective.

19 It seems to me that the salient pieces of testimony are  
20 that the petitioner is somewhat younger than the  
21 respondent. The petitioner and the respondent engaged in  
22 substantial consumption of alcohol, to the extent that the  
23 petitioner was actually made ill as a result of that. The  
24 parties were together for a number of hours. There was a  
25 third-party present for a period of time, Mr. Martinez,

Appendix 2 (Oral Opinion of  
Superior Court Judge)

1 who observed what he observed. His declaration and his  
2 information is taken into account by the Court.

3 Everything looked normal to him.

4 Petitioner says there was a reason for that. She was  
5 afraid, and she felt that the best way to get things  
6 resolved and to get out of there was to act as normal as  
7 possible.

8 The petitioner made a report fairly quickly after she  
9 returned home, not too long after that, and she acted in a  
10 manner which is consistent with someone who has been  
11 somewhat traumatized.

12 On the other hand, she had text communications and  
13 telephone communications with friends during the course of  
14 the event and didn't in any of those indicate that there  
15 was a problem.

16 She responded to the respondent's text message to her  
17 later that evening after the event, which I don't think  
18 really tells the Court one thing or another about what her  
19 consent -- whether or not she gave consent at the time  
20 when they were together in the home.

21 In looking at all of this evidence, it's also clear  
22 that the evidence would show that the respondent says it  
23 was all consensual. We all agreed on all of this, and she  
24 says, no, I didn't. I said no, and it hurt, and I said  
25 stop.

1 Deputy Bertrand's testimony is that of an expert in the  
2 area of investigation. It's an opinion. It's an opinion  
3 only as to what he believes occurred based upon what  
4 people have told him and how those people have behaved in  
5 his presence.

6 It is uncontroverted that there was a substantial  
7 amount of alcohol consumed by the respondent at the time.  
8 I think the statute does specifically provide that, as I  
9 noted and I think I quoted it before, denial of an order  
10 cannot be based in whole or in part on evidence that the  
11 petitioner was intoxicated.

12 I think Commissioner Verge in his decision clearly  
13 relied upon that, and he spoke to it in many, many  
14 instances, and spoke to it in detail as to how he believed  
15 that impacted the petitioner's ability to recall or her  
16 behavior or her response to the events of the day. I  
17 think that's inappropriate under the context of the  
18 statute.

19 I also think that as Ms. Ivarinen pointed out, I  
20 believe, and I have not been cited any law that says  
21 otherwise, that the standard here is preponderance of the  
22 evidence. Is it more likely than not, more likely true  
23 than not that the sequence of events and the circumstances  
24 as set forth by the petitioner occurred, or is it more  
25 likely than not that those set forth by the respondent

1 occurred?

2 In looking at this, one has to consider as the Court  
3 would at any time reviewing the credibility of a party,  
4 look at what are their reasons for saying what they said.

5 Obviously, the respondent has many reasons for denying  
6 that it was not consensual, everything from reputation, to  
7 perhaps remorse, to the potential for criminal  
8 prosecution. He had been investigated, was being  
9 investigated by a deputy. He has a motive to say it was  
10 not -- it was consensual. There was nothing wrong.

11 The petitioner has a motive to say that it was  
12 non-consensual if she's angry, or has a reason to try and  
13 obtain, for lack of a better term, revenge against the  
14 respondent. She also has the motive of her own feelings,  
15 and potentially, her remorse for engaging in this event.

16 I also would find that the evidence is pretty clear  
17 that she consumed a substantial amount of alcohol, and  
18 therefore, her behavior and her reactions at the time of  
19 the event when she was in the residence with the  
20 respondent, and possibly somewhat afterwards, were  
21 probably colored by the fact that she was intoxicated. I  
22 think that would affect her response and the way she would  
23 do what she would do.

24 My sense of this case looking at the evidence as was  
25 presented to Commissioner Verge, and only that evidence

1 that I'm allowing to be considered here, which as I said  
2 excludes Deputy Bertrand's affidavit, but includes his  
3 testimony, is that I think by a preponderance of the  
4 evidence, the petitioner has established that this was  
5 non-consensual, because of not only what she has said and  
6 done, but because of the fact that she was intoxicated to  
7 the level that she was.

8 That would indicate to me that her free will was  
9 impacted and her recollections may be impacted, and under  
10 a circumstance such as this, the Court would have to find  
11 that a person who is in that condition may be incapable of  
12 giving the necessary consent, but it's clear to me from  
13 her testimony and from the other information she provided  
14 that she never did admit to giving consent. She never  
15 said she gave consent. She's never told anybody that she  
16 gave consent. What she's told people is that she didn't.  
17 That's consistent with the behavior, I think, of someone  
18 who has been placed in her situation.

19 Therefore, I think that the commissioner in his reading  
20 of the evidence made his decision, but I can't agree with  
21 his decision. I don't think his decision is necessarily  
22 one that I would find to be appropriate under the evidence  
23 that has been presented here and under the provisions of  
24 the statute as they apply.

25 So it is my belief and my decision that the denial of

1 the order should be revised, that an order should be  
2 entered; that the terms of that order should be that there  
3 is to be no contact between the respondent and the  
4 petitioner in the language of the statute; that that no  
5 contact include non-physical contact with her directly,  
6 indirectly, or through third-parties, regardless of  
7 whether those third parties are on the order. In other  
8 words, no emails, no phone calls, no texting, no letters,  
9 no notes, nothing, no contact of any sort to her directly  
10 or through a third-party with her.

11 There is more to be determined with regards to the  
12 issue of exclusion from school, and I think I don't know  
13 enough about the circumstances there to make a decision  
14 based on that, because there was very little testimony, in  
15 fact, no testimony about that. In the hearing, there was  
16 some information and affidavits that he lives on the  
17 borderline, close to the borderline between the Ferndale  
18 and Blaine School Districts, and could conceivably go to  
19 Ferndale. I don't know if that's true or not. I have no  
20 way to judge that.

21 At this point in time, I am not inclined to exclude him  
22 from his school, from the Blaine School District without  
23 further information or evidence presented to the Court,  
24 and therefore, I think it might be inappropriate and  
25 perhaps impossible to monitor the provision that he stay a

1 certain number of feet away from her.

2 I can provide that he remain at least 500 feet away  
3 from her residence, and I would be inclined to include  
4 that in this order.

5 The Court is to determine when the parties are under  
6 the age of 18 and attend the same school, it shall  
7 consider among the other factors the severity of the act,  
8 any continuing physical danger or emotional distress to  
9 the petitioner, and the expense difficulty and educational  
10 disruption that would be caused by transfer of the  
11 respondent to another school. I have no evidence on those  
12 things, and I'm not prepared to rule on that at this  
13 particular time.

14 So do you have an order available with you,  
15 Ms. Ivarinen?

16 MS. IVARINEN: No, I don't, Your Honor.

17 THE COURT: We need to have an order prepared. It  
18 needs to be signed by the parties. The respondent in this  
19 case needs to have, be able to have the Court go over that  
20 with him so that he understands the consequences of the  
21 order and the consequences of the violation of the order.

22 I'm going to ask that both of the parties and counsel  
23 either remain or come back with an order to be shown to  
24 the parties, and for the Court to enter today.

25 MR. JOHNSTON: Your Honor, can I ask a question?