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REPLY TO RESPONDENT'S BRIEF

1. Mr. Blackmon's attorney relied on the promise made by Mrs. Blackmon's attorney.

Without citation, Respondent claims, RB 4, that it was improper for Mr. Blackmon's attorney to quote her attorney's letter dated September 2, 2008, stating, "I will continue the hearing." CP 39-40 It is unfortunate that Mr. Blackmon's attorney relied upon the promise of Mrs. Blackmon's attorney's because her attorney said just the opposite to the judge one week later, PVRP 7-9, when Mr. Blackmon, having relied upon the attorney's promise, unexpectedly needed more time to obtain witnesses and request a jury trial.

The broken promise of Respondent's attorney was an admission by party opponent under ER 801(d)(2)(iv). Pointing out that promise was appropriate for several reasons. First, Respondent claims the request for a jury trial was filed late. Secondly, Respondent should be equitably estopped from objecting to Mr. Blackmon's requests for a jury and for additional time to present a witness.

[A] party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.

Wilson v. Westinghouse Elec. Corp., 85 Wn.2d 78, 81, 530 P.2d 298 (1975).

2. Mr. Blackman did not waive his right to a jury trial.

Respondent claims that Mr. Blackmon waived any right to a jury trial because he failed to “follow the proper procedure”, RB 5. However, the court is not bound to the procedure of CR 38 but “in its discretion upon motion may order a trial by jury of any or all issues.” CR 39(2)(b)(i). While the court did not exercise its discretion to grant the jury, it did exercise its discretion to hear the motion. PVRP 3–7

3. Respondent misuses Blackstone.

Inexplicably, Respondent quotes Blackstone, RB 6, n. 3, as purportedly saying that the right to a jury does not extend to every action, as follows:

It is wisely therefore ordered, that the principles and axioms of law ... and not acommodated to times or to men, should be deposited in the breasts of the judges...

Blackstone’s point was, however, just the opposite—he was making the point that facts should be determined by juries but the law by judges. The actual quote says just the opposite of what Respondent claims it says:

It is wisely therefore ordered, that the principles and axioms of law, which are general propositions, flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope : the law is well known, and is the same for all ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and

adjusting a question of fact, when intrusted to any single magistrate, partiality and injustice have an ample field to range in : either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here therefore a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice.

3 Blackstone's Commentaries, 380 (Tucker Edition [1803], Volume IV).

See, AB 9.

4. Respondent misreads Mr. Blackmon's brief.

Without any basis in fact, Respondent baldly asserts Mr. Blackmon

attempts to analogize the protection order statute to a criminal assault statute when he states, "But assault actions did exist at that time as actions at law, and a 26.50 petition therefore would have some elements of an action at law."

AB 11

Having posited her straw man, Respondent goes on to distinguish an action under chapter 26.50 RCW from a criminal action of assault. In doing so, Respondent attempts to confuse the central issue on appeal—the right to a jury trial when an action is both equitable and legal. The distinction between criminal and 26.50 is immaterial. A more thorough reading of Mr. Blackmon's brief shows that he addresses the right to jury in a civil case. AB 5.

Mr. Blackmon's point is that actions at law, whether criminal or

civil, address the same factual issues as an action under chapter 26.50 RCW. If Respondent is concerned that a criminal trial is not analogous to the case at hand, the right to a jury in civil actions has been available in Washington since it became a state (and no doubt before). *Hawkins v. Front S. C. R. Co.*, 3 Wash. 592 (1892)(jury in civil assault unquestioned). The purpose in discussing assault actions at law was not to analogize but to show that an action under chapter 26.50 is primarily legal in nature.

5. Federal law is inapplicable to the Order's firearm restriction.

Respondent claims that the protection order's restrictions on firearms, CP 45, are dictated by federal law. While Respondent is accurate that the order on its face purports to acknowledge federal authority over Mr. Blackmon under 18 USC 922(g)(8),¹ such attempt to invoke federal jurisdiction—on the part of Judge Casey in signing the order and of Congress in passing the law—is violative of the U.S. Constitution, which does not authorize the federal government to reach as far as domestic matters. *U.S. v. Lopez*, 514 U.S. 549, 564–5, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995).²

¹ The Order also does not make the requisite findings for restricting firearm possession under RCW 9.41.800.

² “We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to

6. RCW 26.50 does not deny jury trials.

Respondent cites a number of sections of chapter 26.09 RCW as supporting her claim there should be no jury trial here, since similar issues are addressed in those matters with no right to a jury trial.³ There are several problems with this approach. The primary distinction between chapter 26.09 and 26.50 actions is that the former explicitly denies a jury trial under that chapter, RCW 26.09.010 and the latter does not.⁴

7. The court failed to exercise its discretion.

Respondent claims Judge Casey did not abuse the court's discretion in denying a jury trial because an action under chapter 26.50 RCW is "primarily equitable". In fact, Judge Casey did not exercise her discretion, as is required by *Auburn Mechanical v. Lydig Constr.*, 89 Wn.

interstate commerce. See Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

³ Several states allow jury trials in divorce. See, Texas Family Code sec. 6.703, Georgia Code Title 19, Section 19-5-1.

⁴ On the other hand, one could argue that criminal restraining orders grant equitable relief and yet the right to a jury trial remains inviolate.

App. 893, 897, 951 P.2d 311 (1998). She merely stated that there is no right to a jury trial where the “relief” is equitable. PVRP 4–5. This, however is not the law in Washington. *Auburn Mechanical* does not limit its inquiry to remedies. Rather it addresses the whole action:

Where an action is neither purely legal nor purely equitable in nature, the trial court must determine whether it is primarily legal or equitable in nature, and has wide discretion in this exercise. Any doubt should be resolved in favor of a jury trial, in deference to the constitutional nature of the right.

Id. at 898 (footnotes omitted). The fact that a protection order can not be entered unless the court determines the facts shows that at least half of the proceeding is legal. It is only the remedies that are equitable. Similarly, though a jury may try the facts in a criminal trial, it is the court that imposes a restraining order, if any.

8. Lori Harrison’s testimony was relevant to restraints on Mr. Blackmon contacting his son.

The Respondent claims the testimony of Lori Harrison would not have assisted the trier of fact to determine if domestic violence had occurred. While that general proposition is questionable,⁵ the importance of Ms. Harrison’s testimony was that she did “not consider Mr. Blackmon to be a threat to his child.” CP 43 Regardless of the value of her testimony

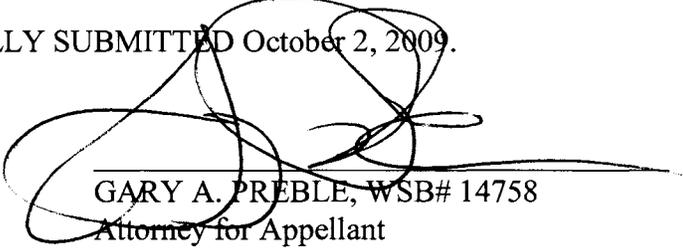
⁵ Consider the use of a psychologist by the state in a dependency action to help prove that a parent abused or neglected a child.

on the finding of domestic violence, this testimony would have been directly relevant to whether Mr. Blackmon and his son should have had their relationship significantly limited, as was done in the order. CP 44-47.

CONCLUSION

Though one may look at other issues for analogous circumstances, the court must consider whether an action under chapter 26.50 is primarily legal or primarily equitable. Any doubt must be resolved in favor of a jury trial in deference to the constitutional nature of the right—that it must remain inviolate.

RESPECTFULLY SUBMITTED October 2, 2009.



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IN THE COURT OF APPEALS
STATE OF WASHINGTON DIVISION II
STATE OF WASHINGTON
BY _____
DEPUTY

TIFFANY D. BLACKMON,

No. 38421-3-II

Petitioner,

and,

CERTIFICATE OF SERVICE

BRIAN J. BLACKMON,

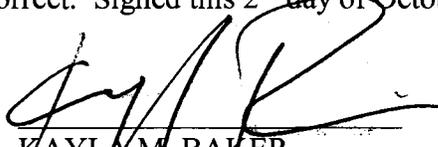
Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that on the 2nd day of October, 2009, she caused the Motion to Accept Late Filing of Reply Brief, Reply Brief of Appellant, Certificate of Service, to be served on the party listed below by the methods indicated:

Counsel/Party	Additional Information	Method of Service
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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. Signed this 2nd day of October, 2009, at Olympia, Washington.


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