

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 39797-8-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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KRISTA OSBORNE,

Respondent,

v.

TOM SEYMOUR,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR PIERCE COUNTY  
THE HONORABLE SALLY F. OLSEN

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

Alleging a systemic pattern and practice that encouraged its sheriffs to breach the Fourth Amendment rights of victims of domestic violence, respondent Krista Osborne sued Pierce County and numerous individual law enforcement officers seeking \$515,000 in compensatory and punitive damages. She was largely unsuccessful. Respondent recovered a total of \$17,500 against appellant Sergeant Seymour alone, and only with the aid of an instruction directing the jury that Sgt. Seymour had violated her right to be free from unreasonable search and seizure as a matter of law when he allowed her estranged husband to retrieve personal possessions from the couple's home following entry of competing restraining orders that neither expressly authorized nor precluded a civil standby.

Because whether such a civil standby is constitutionally impermissible in the absence of express judicial authorization is an issue of Fourth Amendment law that has never been clearly established, the trial court erred in granting Osborne summary judgment and instructing the jury that it must find that Sgt. Seymour violated Osborne's constitutional rights. Moreover, the trial court's

award of over \$340,000 in attorney fees and costs in pursuing this case through trial failed to appropriately reflect Osborne's limited success, most notably her failure to obtain any relief in her principal claim against the target defendant Pierce County.

## II. REPLY TO RESTATEMENT OF THE CASE

**Because The Trial Court Held On Summary Judgment, And Instructed The Jury That Sergeant Seymour Violated Osborne's Fourth Amendment's Rights As A Matter Of Law, This Court Must Review The Evidence In The Light Most Favorable To Appellants.**

In granting respondent Krista Osborne's motion for summary judgment and denying appellant Sgt. Seymour's motion for qualified immunity, the trial court held that Sgt. Seymour violated Osborne's Fourth Amendment rights and was liable for the deprivation of her constitutional rights as a matter of law. The jury's resulting award of compensatory and punitive damages was based upon, if not compelled by, this erroneous pre-trial ruling.

Because this dispositive liability ruling was made on summary judgment, this court reviews only the evidence that was brought to the attention of the trial court and recited in the trial court's summary judgment order. (CP 261-62) See RAP 9.12. Moreover, this court reviews that specific evidence in the light most favorable to appellant Sgt. Seymour, the non-moving party below.

***Fell v. Spokane Transit Authority***, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996). Indeed, any contrary standard would be unfair when a pretrial grant of partial summary judgment has the effect of limiting the scope of evidence presented at trial.

Osborne's "Statement of Facts Related To Liability On Summary Judgment" (Resp. Br. 3-12) ignores this governing standard of review, focusing only on those facts that support the trial court's determination of liability as a matter of law. Osborne's responsive brief takes the disputed issues of fact in the light most favorable to her, rather than Sgt. Seymour, the non-prevailing party, and relies on evidence that was not before the trial court when it held as a matter of law that "Defendant Seymour is found to have violated Plaintiff's Fourth Amendment Right to be free from unreasonable search and seizure." (CP 262)

For instance, while Osborne contends that her July 25, 2004 emergency order of protection did not authorize a civil standby for the benefit of the respondent under that order, Lloyd Bird, she fails to mention that the handwritten order did not contain any "box" referencing a civil standby at all, because it was entered on a Sunday on a non-conforming "emergency form." (CP 86) Instead,

Osborne cites to the original and modified orders of protection that Bird obtained on July 26<sup>th</sup> and July 27<sup>th</sup> to argue that Bird's orders did not authorize a civil standby. However, Bird's original order left unchecked both box 4 (which would have authorized *Osborne* to retrieve personal possessions), as well as box 6 (which would have granted *Bird* the right to take possession of specified personal property). The modified order on July 27, like Osborne's original order, made no mention of a civil standby at all. (CP 136-41) Thus a civil standby was neither expressly authorized nor barred by the conflicting protective orders at issue in this case.

Citing deposition testimony that was not before the trial court when it found a violation of Osborne's Fourth Amendment rights, (e.g., CP 786-87, 811-17), Osborne also attempts to establish that Sgt. Seymour necessarily knew that a civil standby under these circumstances would violate Osborne's right to be free from unreasonable search and seizure. (Resp. Br. 5) Even the cited depositions, however, reflect only that Bird, and not Sgt. Seymour, was specifically advised that Bird could not obtain his motorcycle from the property where Osborne's residence was located. Osborne attempts to equate Bird's knowledge with that of Sgt.

Seymour, arguing that Sgt. Seymour “injected himself in the case” by assisting Bird in obtaining his protective orders. (Resp. Br. 4) However, Sgt. Seymour’s cited deposition testimony fails to support that allegation. That testimony instead reflects the fact that Sgt. Seymour was the Domestic Violence Unit supervisor in July 2004, (CP 89), and that Bird came to his office, next door to the clerk’s office, shortly after obtaining his July 26<sup>th</sup> order of protection. (CP 99)

Osborne’s contention that she never anticipated that Bird would retrieve his possessions pursuant to a civil standby is also refuted by the summary judgment record. Osborne packed some, but not all, of Bird’s personal possessions and stacked them “so I wouldn’t have to have him going up and down the stairs, up into the bedroom.” (CP 222) She did not testify that she anticipated transferring those items to Bird at the August 4 show cause hearing, as she states in her brief. (Resp. Br. 28) Nor was there any evidence submitted on summary judgment that she had related to anyone that she packed the belongings so Bird would not enter the residence she shared with him to retrieve his belongings.

Osborne also contends that Sgt. Seymour was warned by one of his subordinates, Deputy Alonso, that a civil standby was prohibited under the terms of Osborne's July 25<sup>th</sup> order. But Alonso testified that University Place Sgt. Stonack, the supervisor officer in the police department of University Place, where the residence was located, also believed that a civil standby was justified under these circumstances. (CP 186) While Det. Alonso testified that he felt "uncomfortable" when he realized that Osborne was not at home, he also believed that they "possibly had the right to do that," and testified that he was unaware of any specific policy that prohibited a civil standby under these circumstances. (CP 189) Osborne cannot dispute the fact that Sgt. Seymour contacted the Department's legal advisor Craig Adams, and her attempt to refute Sgt. Seymour's testimony that he discussed the availability of civil standbys with the Pierce County Deputy clerk does nothing more than create a disputed issue of fact. (CP 153, 229)<sup>1</sup>

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<sup>1</sup> Osborne improperly cites to evidence that was relied upon by the trial court in its subsequent order denying qualified immunity to argue that Sgt. Seymour did not disclose to either Adams or the Deputy Clerk that the protection orders did not specifically authorize a civil standby. (Resp. Br. 12, *citing* CP 871-72)

Upon entering the residence, it was undisputed that Sgt. Seymour remained downstairs in order to minimize his intrusion into the residence, and to inspect the belongings that Bird and Bird's daughter, who was not barred by the protective orders from retrieving her possessions, removed from the house. (CP 157-59) Osborne also ignores the fact that at Sgt. Seymour's request, Det. Alonsio provided Sgt. Seymour a digital camera that Sgt. Seymour used to inventory the removed items from the Bird/Osborne residence. (CP 166, 193-94)

### III. REPLY ARGUMENT

#### A. **The Trial Court Erred In Holding That Sgt. Seymour's Performance Of A Civil Standby Violated Osborne's Fourth Amendment Rights As A Matter of Law.**

The Fourth Amendment prohibits *unreasonable* searches and seizures. See **State v. Eisfeldt**, 163 Wn.2d 628, 634, ¶18, 185 P.3d 580 (2008) ("The Fourth Amendment protects only against 'unreasonable searches' by the State, leaving individuals subject to any manner of warrantless, but reasonable searches.") Osborne apparently concedes that Sgt. Seymour's presence in the downstairs portion of the residence was not in and of itself unreasonable, instead arguing that Sgt. Seymour is liable for

facilitating an unreasonable search by Bird, in his capacity as a private party, while performing a civil standby. (Resp. Br. 20-23)

A civil standby occurs when a police officer is present at the request of a party to a civil dispute for a limited purpose and in order to prevent a breach of the peace. See **Beal v. City of Seattle**, 134 Wn.2d 769, 774, 954 P.2d 237 (1998); **Kalmas v. Wagner**, 133 Wn.2d 210, 217, 943 P.2d 1369 (1997). Starting from the premise that every unconsented entry by the police into a citizen's residence implicates the Fourth Amendment, Osborne argues that Sgt. Seymour's actions in allowing Bird to go upstairs and retrieve personal property from his home was a clearly established violation of Osborne's constitutional rights because no order nor warrant provided express authority for Sgt. Seymour's actions and Sgt. Seymour facilitated Bird's "invasion of her home." But a civil standby need not be pursuant to a court order, and whether Sgt. Seymour facilitated an illegal search in violation of the Fourth Amendment while performing a civil standby is neither a matter of clearly established law, nor one that could have been adjudicated on summary judgment.

**1. Sgt. Seymour Did Not Violate Osborne's Fourth Amendment Rights By Entering Her Home Under A Civil Standby.**

Osborne concedes that a civil standby may constitute an authorized "community caretaking function" outside of the scope of the Fourth Amendment, but contends that Sgt. Seymour violated her rights "when he entered her home without consent and in violation [of] a court order." (Resp. Br. 23) While the protection orders obtained by Osborne and Bird prevented Bird from entering the residence, they did not by their terms prevent the police from standing by while Bird retrieved his personal property. Moreover, Osborne ignores the fact that Sgt. Seymour entered the residence accompanied by Bird's daughter, who lived there and was under no prohibition barring her access to the home that she had shared with Osborne and her father.

Osborne's concession that "a civil standby need not be ordered by a court" (Resp. Br. 37) substantially undermines her argument that Sgt. Seymour violated her Fourth Amendment rights because he allowed Bird access to the residence. Indeed, Washington law makes clear that a civil standby need not be pursuant to a court order in order fall outside the scope of the

Fourth Amendment. As discussed in the opening brief, RCW 26.50.080 allows a court to authorize law enforcement to assist a *petitioner* under a protective order in obtaining designated personal property, but does not prevent law enforcement from assisting a petitioner in the absence of a court order. Moreover, no statute addresses whether law enforcement may assist a *respondent* who is barred from a residence under a protective order from obtaining personal property from the residence.

The Washington Supreme Court has held that a civil standby may be proper without any express court authorization. Osborne's claim that the entry violated the Fourth Amendment "if the scope of the entry exceeded the scope of the protection order" (Resp. Br. 21), is not supported by *Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997), where the Fourth Amendment was not implicated even though no court order or warrant authorized the officer to enter the residence while a property manager showed it to a prospective renter. The *Kalmas* Court's analysis instead turned on a "balancing of the individual's interest in freedom from police interference against the public's interest in having the police perform a 'community caretaking function.'" 133 Wn.2d at 216-17.

To hold that law enforcement officers are barred from assisting a respondent under a protection order from removing personal property from a residence in the absence of express judicial authorization, as Osborne argues, would only encourage respondents to engage in self-help and undermine the State's interest in reducing domestic confrontations and breaches of the peace. Because Washington law encourages law enforcement to have the flexibility to perform such "community caretaking functions," the trial court erred in holding that Sgt. Seymour violated Osborne's rights as a matter of law by accompanying Bird to his former residence in the absence of a warrant or court order allowing him to do so.

Osborne argues that there was no "public interest in having the police perform a caretaking function" because she was absent from the residence and there was therefore no risk of a confrontation. (Resp. Br. 29) However, had the officers waited until Osborne returned to the home, the potential for a confrontation would have dramatically increased. Osborne's reasoning makes for poor public policy, as it would assure that all civil standbys

would incite the very threat of violence that the community caretaking function is designed to avoid.

Moreover, as the cases she cites demonstrate, Osborne's absence from the residence made the civil standby less intrusive, and minimized the threat to her protected Fourth Amendment right to be free from an unlawful seizure. For instance, in ***Specht v. Jensen***, 832 F.2d 1516 (10<sup>th</sup> Cir. 1987), 837 F.2d 940, 853 F.2d 805 (1988), *cert. denied*, 488 U.S. 1008 (1989), the case that Osborne contends is "dispositive" here (Resp. Br. 23), the Tenth Circuit held that the officers engaged in an illegal search because they not only thoroughly searched Specht's office when he was not present,<sup>2</sup> but then upon entering Specht's home, threatened to jail Mrs. Specht and denied her permission to call her lawyer. 832 F.2d at 1524. Similarly, the officers performing a domestic civil standby not only had a locksmith pick the lock to enter the plaintiff's home but "confined him to a corner of the home's entryway, . . . physically restrained him by holding his shoulders, arms, and wrists . . . [and]

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<sup>2</sup> The Tenth Circuit held that whether the officers' warrantless search of Specht's office when he was not present violated the Fourth Amendment "raised a fact issue regarding a visual inspection of that which the Spechts could reasonably have expected to remain private." 832 F.2d at 1520. See § A.3, *infra*.

each time he tried to move, the officers would shove him back into the corner,” in ***Poteet v. Sullivan***, 218 S.W.3d 780, 785 (Tex. App. 2007), *cert. denied*, 129 S.Ct. 623 (2008) (Resp. Br. 26).

By contrast, in this case Sgt. Seymour did not enter Osborne’s residence by force, but was allowed in by Jenna Bird, who had lived in the home, had her own personal property there, and was not restrained by Osborne’s order from gaining entry. (CP 260) See ***Kalmas***, 133 Wn.2d at 216 (officers’ presence in residence did not constitute a search where officers were invited to enter residence by tenant). Sgt Seymour did not perform an invasive search of Osborne’s residence. He did not restrain Osborne’s freedom of movement in any respect whatsoever. Osborne argues that “Bird unreasonably searched and seized property,” claiming that Bird was allowed to go through her private personal possessions only through the active assistance of Sgt. Seymour, but whether Sgt. Seymour “affirmatively facilitated” Bird’s invasion of Osborne’s protected privacy interests while engaging in a civil standby presents a factual issue that could not, and should not have been resolved on summary judgment. § A.3 *infra*.

Because neither Washington law nor the competing protective orders prevented law enforcement from performing a civil standby, the trial court erred in holding that Sgt. Seymour's participation in performing a civil standby while Bird retrieved personal property from his former residence violated the Fourth Amendment as a matter of law.

**2. The Law Governing Civil Standbys Under The Fourth Amendment Is Not Clearly Established.**

Even if the trial court correctly held as a matter of law that Sgt. Seymour's involvement in Bird's private search of the residence "crossed the line," it erred in rejecting Sgt. Seymour's claim for qualified immunity because that line – the scope of Osborne's Fourth Amendment rights under a civil standby – was not clearly established. Whether a civil standby may be conducted requires a balancing of the competing societal and privacy interests at stake under the particular circumstances. See *Kalmas*, 133 Wn.2d at 216-17. Consequently, the cases cited by Osborne for the proposition that the Fourth Amendment extends to "police assisted private action to repossess or regain control over property" (Resp. Br. 33) are of scant relevance in determining whether Osborne had a clearly established Fourth Amendment right to be

free from Bird's entry into his former home under police supervision following entry of a protective order.<sup>3</sup>

Osborne's generalized discourse on the right to be free from unreasonable searches and seizures fails to address whether Sgt. Seymour violated clearly established law in conducting a civil standby under these particular facts and in these particular circumstances:

[I]f the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. . . . [T]he right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

***Anderson v. Creighton***, 483 U.S. 635, 639-640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). Osborne contends she has a right to

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<sup>3</sup> See, e.g., ***Sodal v. Cook County, Ill.***, 506 U.S. 56, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992) (officers assisted in physically tearing mobile home off lot and towing it away prior to entry of unlawful detainer judgment); ***Beier v. City of Lewiston***, 354 F.3d 1058 (9<sup>th</sup> Cir. 2004) (officers arrested plaintiff for violation of protective order while attending church when his wife was also present, which was permitted under terms of order) (Resp. Br. 33-35).

freedom from “police intrusion and facilitation of unreasonable trespass,” but the specific law governing civil standby is not as clear cut as Osborne maintains. No clearly established law prohibits civil standby in the absence of a court order. No clearly established law prohibits a civil standby where the occupant of a residence is not present. Moreover, the fact that the officers on the scene themselves had conflicting notions of whether a civil standby was authorized under these circumstances supports, rather than undermines, Sgt. Seymour’s claim to qualified immunity. See ***Malatesta v. N.Y. State Div. Of State Police***, 120 F. Supp. 2d 235, 240 (N.D.N.Y. 2000) (objective reasonableness standard provides for qualified immunity if “officers of reasonable competence could disagree” on the legality of the specific conduct) (Resp. Br. 33). The trial court thus erred in denying Sgt. Seymour’s motion for qualified immunity.

**3. At A Minimum, The Reasonableness Of Sgt. Seymour’s Conduct Under The Fourth Amendment Presented Issues Of Fact That Precluded Summary Judgment.**

Even if this court refuses to hold that Sgt. Seymour’s entry into Osborne’s residence was lawful as a matter of law, it should nonetheless reverse because the jury was never asked to

determine whether Sgt. Seymour's actions exceeded the scope of a proper civil standby, and did not determine Sgt. Seymour's state of mind, or the reasonableness of his conduct under the circumstances. Instead, the trial court resolved these issues as a matter of law, instructing the jury to determine whether Sgt. Seymour acted recklessly or intentionally only after the court instructed the jury to award compensatory damages for Sgt. Seymour's adjudicated violation of Osborne's constitutional rights.

As Osborne concedes, a civil standby is exempt from the Fourth Amendment under the "community caretaking function," which allows "for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety." ***State v. Thompson***, 151 Wn.2d 793, 802, 92 P.3d 228 (2004). Whether a police officer is engaging in such a function at any particular point in time depends on whether "(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was a need for assistance; and (3) there was a reasonable basis to associate the

need for assistance with the place being searched.” *Thompson*, 151 Wn.2d at 802. As Osborne’s own brief demonstrates, analysis of these factors is necessarily a factual intensive inquiry that should not be made on summary judgment. (Resp. Br. 25)

In addition to disputed issues concerning Sgt. Seymour’s state of mind in exercising a civil standby in the absence of express judicial authority, the trial court resolved factual issues regarding whether Bird’s daughter had the authority to allow Sgt. Seymour into Osborne’s home, whether Osborne had anticipated that Bird would retrieve his items from the home prior to the August 6<sup>th</sup> show cause hearing (CP 222), whether Sgt. Seymour properly inventoried and photographed the items removed from Osborne’s home, (CP 158, 166, 193-94), whether supervising University Place officer Sgt. Stonack supported conducting the civil standby (CP 227), and whether Sgt. Seymour’s discussion with the Deputy Clerk gave him a reasonable basis for believing that civil standby could occur in the absence of express judicial authorization. (CP 229)

As the cases relied upon by Osborne demonstrate, whether police do more than “stand by in case of trouble” is generally a question of fact. See *Specht*, 832 F.2d at 1523; *Harris v. City of*

*Roseburg*, 664 F.2d 1121, 1127 (9<sup>th</sup> Cir. 1981). In *Specht*, the Tenth Circuit reviewed the factual evidence following a trial in order to hold that the officers' presence at the residence to assist the search for a computer, and their threats to arrest Mrs. Specht if she obstructed the search, were sufficient to allow a jury to resolve the factual issue of the causal connection between law enforcement participation and a private search. Similarly, in reversing the dismissal of the plaintiff's Section 1983 action, the court held that evidence that the officers forced their way into the house and physically restrained the plaintiff raised "a fact issue as to whether the actions of [the officers] went beyond keeping the peace into providing affirmative aid to the seizure of most of contents of Poteet's home" in *Poteet*, 218 S.W.3d at 789.

Finally, even if this court holds that Osborne's Fourth Amendment right protected her from an unreasonable search and seizure in this specific case, whether Sgt. Seymour should have known that his involvement in Bird's search of the residence had "crossed the line" under clearly established law depends upon a resolution of specific historical facts that remained in dispute

through trial. The trial court erred in entering summary judgment and directing the jury to find Sgt. Seymour liable as a matter of law.

**B. The \$340,000 Fee And Cost Award Cannot Stand Given The Trial Court's Erroneous Grant Of Summary Judgment And Plaintiff's Limited Success.**

Osborne was entitled to fees only as a prevailing party under her Section 1983 claim against Sgt. Seymour. Thus, if this court reverses the underlying judgment, or remands for a new trial, it must reverse the accompanying fee award. Osborne makes no contrary argument. However, even if this court affirms the \$17,500 judgment against Sgt. Seymour, it must nonetheless reverse the award of \$340,654.14 in fees and costs. To support the trial court's award of over \$340,000 fees, Osborne argues that Section 1988 entitles a prevailing plaintiff to attorney fees in a civil rights case even if the jury awards minimal damages. That may be true where a plaintiff has wholly prevailed on the one claim that authorizes an award of attorney fees, but here Osborne prevailed on only one of several civil rights claims, and recovered only a small portion of the amount of money that she sought.

Osborne argues that she obtained "significant" relief – a "vindication of important civil rights . . . under a private attorney

general theory,” (Resp. Br. 44, quoting *Ermine v. City of Spokane*, 143 Wn.2d 636, 648, 23 P.3d 492, cert. denied, 534 U.S. 994 (2001)) and that the court cannot consider the jury’s refusal to award her the \$515,000 that she sought at trial in awarding fees because the defendants did not make a CR 68 offer. (Resp. Br. 46) But *Ermine* requires a trial court to consider as the first factor in setting attorney fees under Section 1988 “the difference between the judgment recovered and the judgment sought,” 143 Wn.2d at 645. The trial court failed to consider this factor at all in holding that “Plaintiff achieved substantial success” by recovering \$17,500 in damages against Sgt. Seymour after asking for over almost thirty times that sum. (CL 5, CP 708)

Osborne argues that the trial court’s reduction of her attorneys’ fee petition by one-third adequately reflected her lack of success on the claims upon which she did not prevail. However, the trial court reduced counsel’s requested fees by one-third because they failed to adequately document that amount of time that they spent “on the Bird claims.” (FF 30, CP 706-07) While the trial court correctly reduced the fees to reflect counsel’s efforts on those common law intentional tort claims for which no attorney fees

are available, it erred in refusing to further reduce those fees to reflect Osborne's lack of success against Pierce County, finding instead that the claims "arose out of a common core of facts," (FF 29, CP 706), and that Osborne had succeeded in convincing the jury to find that the County failed to adequately train Sgt. Seymour, even though it ultimately refused to find the County liable. (FF 28, CP 706)

Osborne does not contest the general principle that a plaintiff seeking an award of attorney fees has the burden of segregating her time between successful and unsuccessful claims. ***Loeffelholz v. C.L.E.A.N.***, 119 Wn. App. 665, 690, 82 P.3d 1199, *rev. denied*, 152 Wn.2d 1023 (2004). Regardless of how close Osborne claims she came to imposing liability on Pierce County, she failed to do so. Osborne is not entitled to an award for the fees incurred in that effort unless she satisfies her burden of establishing that her claim against the County wholly overlapped with that against Sgt. Seymour. Osborne's unsuccessful attempt to establish Pierce County's liability for failure to train its officers to handle civil standbys or to convince the jury that the Sheriff's Department maintained a longstanding custom or practice that encouraged Sgt.

Seymour's conduct in this case was not "so intertwined" with her claim against Sgt. Seymour "as to warrant application of the exception to the segregation rule." ***Boguch v. Landover Corp.***, 153 Wn. App. 595, 620, 224 P.3d 795 (2009).

While establishing Sgt. Seymour's liability was necessary to establish Pierce County's liability, the converse is not true. Osborne spent a substantial portion of the trial attempting to prove the County's liability through the testimony of experts and deputies regarding training and Department policy that had nothing to do with whether Sgt. Seymour actually facilitated Bird's entry into Osborne's residence. Osborne argues that she was not compensated for the fees paid to her expert which she deleted from her request for fees and costs. (Resp. Br. 45) However, the trial court made no deduction for the substantial fees incurred at trial related to this unsuccessful claim. (App. Br. 34)

The trial court erred in saddling Sgt. Seymour with Osborne's fees in pursuing her claims for negligent training and supervision against Pierce County because she did not prevail on those claims. Because the trial court erred in reducing Osborne's fees solely based on the time her attorneys spent litigating the

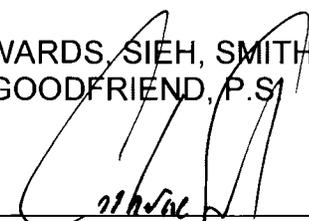
common law claims against Bird, this court should, at a minimum, reverse the award of attorney fees with instructions to further reduce those fees to reflect Osborne's limited success.

#### IV. CONCLUSION

This court should reverse the fee award and dismiss the claims against Sgt. Seymour, who given the unsettled nature of the law governing civil standbys was entitled to qualified immunity. If the court determines that disputed historical facts preclude the entry of judgment as a matter of law, the court should remand for trial before a jury properly instructed to decide the disputed factual issues relevant to appellant's claim for qualified immunity. In any event, the fee award must be reduced to properly reflect Osborne's limited success.

Dated this 24 day of October, 2010.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Catherine W. Smith

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**DECLARATION OF SERVICE**

COURT OF APPEALS  
10 OCT 22 11:05  
STATE OF WASHINGTON  
BY M

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 21, 2010, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Ronald L. Williams Pierce County Prosecuting Attorney's Office 955 Tacoma Ave South, Suite 301 Tacoma, WA 98402-2160	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Venita M. Lang Attorney at Law PO Box 1999 Gig Harbor, WA 98335-3999	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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**DATED** at Seattle, Washington this 21st day of October, 2010.

  
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Tara D. Friesen