

No. 39797-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

KRISTA OSBORNE,

Respondent,

v.

TOM SEYMOUR,

Appellant.

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

CORRECTED BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order on Plaintiff's Motion for Summary Judgment on June 16, 2008. (CP 261)¹

2. The trial court erred in giving Instructions 12-15, instructing the jury that appellant Sgt. Tom Seymour had violated plaintiff's civil rights as a matter of law. (CP 405-08; 6/30 RP 8-9)

3. The trial court erred in entering its Order and Judgment on the jury's verdict on September 1, 2009. (CP 266)

4. The trial court erred in entering its Findings of Fact and Conclusions of Law on Motion for Attorneys' Fees and Costs, and in particular the following portions of the Findings:

. . . The evidence and argument presented to the jury and the result secured for Plaintiff was significant to Plaintiff. The fact that the jury awarded punitive damages should tend to serve a deterrent effect with respect to potential future conduct by Sgt. Seymour and other Pierce County deputies.

¹ The trial court also denied the Pierce County defendants' motion for summary judgment dismissing plaintiff's claims on the grounds of qualified immunity, based on a different set of pleadings, on June 16, 2008. (CP 1108) On appeal, appellant challenges the trial court's grant of summary judgment of liability to plaintiff, denial of qualified immunity to appellant on summary judgment, and failure to submit any disputed facts relevant to qualified immunity to the jury for determination. Appellant has designated as clerk's papers the pleadings considered in this second motion for summary judgment, to preclude any argument that the issue and pleadings are not properly before this court for consideration on review.

(FF 8, CP 697)

Time spent by counsel and the counsel's staff to prepare the case for trial and to conduct the trial was necessary to obtain an actual judgment against Defendant Seymour and is compensable. . . . Time spent to prepare this case for trial and to prove that Plaintiff suffered damages as a result of the actions of Defendant Seymour, and not solely as a result of tortious acts by Defendant Lloyd Bird, was reasonable and necessary to obtain an actual monetary judgment against Seymour.

(FF 18, CP 701)

. . . Ms. Henson's and Defendant Seymour's analysis fails to incorporate, or even mention, the analysis required by the United States Supreme Court Decision in *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

(FF 21, CP 702)

Plaintiff's counsel appropriately segregated out a portion of the time spent on the claims involving Mr. Bird (Declaration of Fred Diamondstone Re: Attorneys' Fee and his attached itemized billing). Defendants have wholly failed to present any evidence that the segregation by Plaintiff's counsel Mr. Diamondstone was inaccurate or incomplete.

(FF 22, CP 702-03)

. . . While certain "block billed" time entries during the course of trial from June 15 through July 1, 2009 are less specific, such billing during the course of trial, with long courtroom days and long mornings and evening spent to prepare testimony, prepare or revise jury instructions, respond to evidentiary issues that arise in the course of trial, and prepare for closing arguments is understandable.

(FF 23, CP 703)

. . . [T]he Court finds that all of the revised expenses claimed by Mr. Cochran's past and present firms to be reasonable, with the exception of \$110.92 spent on meals.

(FF 25, CP 705)

. . . Plaintiff's success was substantial, though not complete.

(FF 27, CP 705-06)

. . . Since the Bird claims constituted approximately one-third of the claims that went to trial, the Court finds that an additional reduction of 33% to both Mr. Diamondstone's and Mr. Cochran's fees is appropriate.

(FF 30, CP 707)

The reasonable number of hours spent by Plaintiff's counsel for all time spent on the civil rights claims upon which Plaintiff prevailed is compensable. The time reasonably spent by counsel in overlapping claims, i.e. time spent that necessarily covered both the successful civil rights claims against Sgt. Seymour and other claims is partially compensable.

(CL 3, CP 707)

Plaintiff achieved substantial success with her recovery of compensatory and punitive damages.

(CL 5, CP 708)

Plaintiff should be awarded fees and costs as follows:

Diamondstone Fees originally sought	\$155,785.00
33% reduction	(51,409.05)
Supplemental Fees for Diamondstone	3,745.00
33% reduction	(1,235.85)
Cochran, et al. Fees	293,381.12
33% reduction	<u>(96,815.77)</u>
Subtotal Fees	\$303,450.45
Diamondstone Costs	8,286.59
<u>Cochran Costs</u>	<u>28,917.10</u>
Subtotal Costs	\$37,203.69
TOTAL	\$340,654.14

(CL 7, CP 708)

5. The trial court erred in entering its Supplemental Order and Judgment Against Defendant Tom Seymour for Attorney's Fees and Costs on February 17, 2010. (CP 711)

II. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether appellant was entitled to qualified immunity because a civil standby does not violate the Fourth Amendment, and the law governing what constitutes a civil standby is neither clear nor settled? (Assignments of Error 1, 3)

2. Whether a reasonable officer would have believed his conduct was within the community caretaking function of a civil standby raised disputed issues of fact that precluded summary judgment for plaintiff? (Assignments of Error 2, 3)

3. Whether the \$340,000 fee award must be reversed given the trial court's erroneous grant of summary judgment and plaintiff's limited success? (Assignments of Error 4, 5)

III. STATEMENT OF FACTS

Pierce County Sheriff's Deputy Sgt. Tom Seymour appeals the money judgment entered against him under 42 U.S.C. §§ 1983 and 1988 for \$17,500 in damages and \$340,654.14 in fees and costs. (CP 266) The trial court ruled on summary judgment and instructed the jury that appellant was liable for violating plaintiff/respondent Krista Osborne's Fourth Amendment rights as a matter of law in the course of a civil standby while she was not at the home she had shared with her ex-husband, defendant/judgment debtor Lloyd Bird. (CP 262) Because Sgt. Seymour challenges this ruling on appeal, this brief sets out facts relevant to that determination from the relevant summary judgment record (CP 48-261) in a light most favorable to defendant/appellant. ***Lesley v. State***, 83 Wn. App. 263, 266, 921 P.2d 1066 (1996), *rev. denied*, 131 Wn.2d 1026 (1997). Additional evidence that was elicited at trial is identified by supplemental "RP" cites in the following statement of facts:

A. After Both Spouses Obtained Protection Orders, Sgt. Seymour Undertook A Civil Standby When Defendant Bird Entered The Dwelling He Had Shared With His Wife, Plaintiff Osborne, To Retrieve His Belongings.

Plaintiff Krista Osborne and defendant Lloyd Bird married in May 2003, fifteen years after they had met at work when they were both Pierce County Sheriff's deputies. (RP 739-40) By the time they married, Osborne had become a police officer with Federal Way, while Bird remained employed with Pierce County. (RP 738-39)

On Saturday, July 24, 2004, Osborne and Bird had an argument about Bird's daughter from a previous marriage, Jenna. Osborne insisted Bird call Jenna about a missing DVD. (RP 803) Bird tossed the phone back at Osborne and told Osborne to call Jenna herself. (RP 804-05) The next day, Bird disinvited Osborne on a planned overnight motorcycle trip with other deputies and left on the motorcycle trip alone. (RP 805-06)

While Bird was gone on his motorcycle trip, Osborne called the police and reported she had been a victim of domestic violence during the parties' dispute the previous day. (RP 810-11) Osborne requested a protection order. (RP 811) Since it was a Sunday, the normal method of securing a protection order through the Clerk's

office was unavailable, so the Pierce County deputies who responded helped Osborne obtain an emergency protection order. (CP 84, 86)

Regular protection orders have a provision allowing a civil standby when the defendant is ordered to vacate or prevented from returning to his home by the order. (CP 207-08) Osborne most likely would have been required to allow Bird a civil standby to obtain his personal belongings from their shared residence. (CP 207-08) The emergency protection order secured by Osborne did not specify whether a civil standby could be conducted, but also did not prohibit it. (CP 86)

On Tuesday, July 26, 2004, Bird obtained his own protection order. (CP 136) Bird did not fill out the portion of the petition requiring the person seeking a protection order to inform the court whether any protection order had previously been entered. (CP 1050 (Trial Ex. 2)) He did not check either the "box" that a protection order had earlier been obtained, nor the "box" that one had not. (See CP 1050 (Trial Ex. 2)) Bird obtained a modified protection order on Wednesday, July 27, 2004, to list a different residential address. (CP 140) Neither of the orders secured by

Bird specified that a civil standby could be conducted at the home Bird had shared with Osborne, but also did not prohibit it. (CP 136, 140)

Osborne knew the civil standby was going to occur. She knew that civil standbys were commonly allowed under these circumstances, and had been the accompanying officer on a number of civil standbys. (CP 222-24; RP 812-13) She packed some of Bird's belongings in anticipation of the standby. (CP 222-24)

Appellant Tom Seymour was asked to accompany Bird as an officer on the civil standby. (CP 229) Before accompanying Bird to his home on Thursday, July 28, Sgt. Seymour was "familiar" with the Bird/Osborne orders, but had not examined either protection order "in detail" to confirm its provisions. (CP 155) Sgt. Seymour did check with the Sheriff Department's legal advisor, Craig Adams, who confirmed that a civil standby would normally be allowed under these circumstances. (CP 153) Sgt. Seymour confirmed that advice with the Deputy Pierce County Clerk, who worked with domestic violence protection orders. (CP 229) Sgt.

Seymour also consulted with the on-duty sergeant in University Place, where the Bird/Osborne residence was located. (CP 227)

Sgt. Seymour and two other officers accompanied Bird on the civil standby the afternoon of Thursday, July 28. (CP 147-48) Bird's daughter Jenna, who lived in the home and was not restrained by Osborne's emergency protection order, accompanied her father into the home. (CP 86, 149, 260)

Osborne was not at home when Bird and his daughter entered the home, accompanied by Sgt. Seymour. (CP 224) Although Osborne had packed some of Bird's belongings and placed them in the garage (CP 222-24), Bird and his daughter wanted additional items from the house. Bird, his daughter, and Sgt. Seymour went into the house. (CP 155) Sgt. Seymour stayed downstairs while Bird and his daughter went upstairs. (CP 157-58)

Bird and his daughter took several boxes of belongings out of the home. Sgt. Seymour inspected and photographed the removed items. (CP 158, 166, 193-94) Sgt. Seymour was stationed downstairs in a place where neither Bird nor his daughter could take items from the home without passing by him. (CP 157-59)

Plaintiff was not present during the civil standby, thus did not see or speak with Sgt. Seymour during the entry into the home she had shared with Bird and his daughter. (See CP 224) Sgt. Seymour had no contact with plaintiff, and made no threats of force or arrest against her. (See CP 222-24)

B. Osborne Sued Pierce County And Several Individual Defendants, Alleging Violation Of Her Civil Rights And Various Torts.

On July 14, 2006, plaintiff sued Bird, Sgt. Seymour, Bird's daughter Jenna, Brendan Phillips, a neighbor and total stranger, who had ended up, drunk, in Osborne's backyard several months after the civil standby, who Osborne accused of acting as an "agent" for Bird (6/25 RP 1263-65; CP 18-20), another deputy, Sgt. Greg Stonack, who had remained in his police vehicle on the street outside the home during the civil standby, Pierce County Sheriff Paul Pastor, and Pierce County. (CP 15-20) Osborne alleged conspiracy, assault, intentional infliction of emotional distress, tortious interference with employment, and violation of her civil rights, for events occurring between July 24, 2004, and June 30, 2005, related to the break-up of her marriage to defendant Bird. (CP 15-20) The Pierce County defendants answered and raised

affirmative defenses, including qualified immunity. (CP 27)
Defendant Bird counterclaimed for defamation of character and intentional infliction of emotional distress. (CP 39-41)

C. The Trial Court Ruled That Sgt. Seymour Violated Plaintiff's Fourth Amendment Rights And Denied Qualified Immunity As A Matter of Law.

On November 15, 2007, Osborne moved for partial summary judgment to establish Sgt. Seymour's liability for violation of her civil rights. (CP 48) The Pierce County defendants, including Sgt. Seymour, moved for partial summary judgment on the grounds that a civil standby could not be an improper search or seizure under the Fourth Amendment and that the officers were entitled to qualified immunity. (CP 1119-33)

On June 16, 2008, visiting Kitsap County Superior Court Judge Sally F. Olsen entered an order granting plaintiff's motion for partial summary judgment, holding 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 at her residence on July 28, 2004, by entering the residence and enabling Lloyd Bird to enter the residence." (CP 262) In the same order the trial court granted plaintiff summary judgment and denied

Sgt. Seymour's cross-motion for summary judgment on the grounds of qualified immunity "on the basis that plaintiff's Fourth Amendment rights were violated by defendant Seymour and that her Fourth Amendment rights were clearly established such that it would have been clear to a reasonable officer that his conduct was unlawful in the situation that Sgt. Tom Seymour faced on July 28, 2004." (CP 262)

D. After Dismissing Her Claims Against Other Defendants, Plaintiff Was Awarded \$17,500 In Damages After A Two-Week Trial To A Jury That Had Been Instructed That Sgt. Seymour Had Violated Her Constitutional Rights As A Matter of Law.

The trial court's orders had not addressed the claims of the other Pierce County defendants who sought to be dismissed on the grounds of qualified immunity. (*Compare* CP 262, CP 1108-09) The Pierce County defendants unsuccessfully moved for discretionary review. (CP 279) Thereafter, plaintiff dismissed her claims against Bird's daughter (CP 273) and Mr. Phillips, the drunk stranger who she alleged had been engaged in a "conspiracy" with her ex-husband. (6/15 RP 72) The case against Bird, Sgt. Seymour, and Pierce County went to trial before Judge Olsen and a 12-person jury on June 15, 2009.

On the first day of trial, plaintiff took a voluntary nonsuit on her claims against Sheriff Pastor and Sgt. Stonack. (6/15 RP 55) The trial focused largely on plaintiff's trespass and outrage claims against her ex-husband, defendant Bird (*see, e.g.*, RP 339-414, 1258-72, 1385-1422), and on her claim that the already-adjudicated violation of her constitutional rights by Sgt. Seymour during the civil standby was the result of Pierce County's failure to properly train its officers. (*See, e.g.*, RP 415-462, 501-536, 679-725, 1081-109, 1274-1348) After a two-week trial, the trial court over objection instructed the jury that Sgt. Seymour's conduct violated plaintiff's constitutional right under the Fourth Amendment as a matter of law, and that the jury's only task was to determine what damages plaintiff was entitled to because of this violation of her civil rights. (CP 405-07)

Plaintiff sought \$515,000 in damages against Pierce County and Sgt. Seymour, asking the jury for \$450,000 in compensatory and \$65,000 in punitive damages. (6/30 RP 48) In a special verdict, the jury awarded \$2,500 in compensatory and \$15,000 in punitive damages, against Sgt. Seymour alone. (CP 436) The jury rejected plaintiff's claim that Pierce County's failure to properly train

its deputies had caused plaintiff damages. (CP 437) The jury also awarded plaintiff \$15,000 in damages for trespass against her ex-husband, defendant Bird. (CP 439)

Defendant Sgt. Seymour filed a timely notice of appeal from the \$17,500 judgment entered on the jury's verdict on September 24, 2009. (CP 263)

E. The Trial Court Awarded Plaintiff \$340,000 In § 1988 Attorneys' Fees And Costs.

The § 1983 claim against Sgt. Seymour was the only one on which plaintiff had prevailed that carried the possibility of a fee award. Plaintiff had lost on the improper training claim against Pierce County, the only other claim that might have justified an award of fees, and the one that had occupied the bulk of trial time. (CP 437) Plaintiff's common law state claim against her ex-husband Bird did not carry the possibility of an award of fees. Plaintiff nevertheless sought all of her fees and costs, totaling \$512,585.75. (CP 518)

Given plaintiff's limited success, and fees claimed for work performed on claims unrelated to those against Sgt. Seymour and compensable under § 1988, on which plaintiff had had the benefit of the grant of summary judgment and instructions directing a

verdict on liability, defendant Seymour proposed an award of fees not exceeding \$35,000. (CP 622)

On February 17, 2010, the trial court entered a judgment for fees of \$303,450.45 and costs of \$37,203.69, reducing the fees requested by plaintiff by a third on the reasoning that the uncompensable claims against Bird were one-third of those that had eventually gone to trial. (CP 706-07, 711) Sgt. Seymour timely amended his notice of appeal to include the trial court's \$340,654.14 fee and cost award on February 23, 2010. (CP 1172)

IV. ARGUMENT

A. Introduction And Standard Of Review.

The purpose of qualified immunity is to promote vigorous performance of public safety duties without fear of liability. ***Pearson v. Callahan***, 129 S.Ct. 808, 817 (2009). So long as “officers of reasonable competence could disagree on this issue, immunity should be recognized.” ***Malley v. Briggs***, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L.Ed.2d 271 (1986). The facts must be examined, “not as an omniscient observer would perceive them but as they would have appeared to a reasonable person in the position of the . . . officers.” ***Wagner v. Washington County***, 493 F.3d 833, 837 (7th Cir. 2007).

On summary judgment, “a defendant asserting immunity is not required to establish the defense beyond peradventure, as he would have to do for other affirmative defenses.” **Cousin v. Small**, 325 F.3d 627, 632 (5th Cir.), *cert. denied*, 540 U.S. 826 (2003). “The moving party is not required to put forth evidence to meet its summary judgment burden for a claim of qualified immunity: rather it is sufficient that the movant in good faith pleads that it is entitled to immunity. Once the movant asserts this affirmative defense, the burden shifts to the plaintiff to rebut it.” **Poteet v. Sullivan**, 218 S.W.3d 780, 797 (Tex.App. 2007), *cert. denied*, 129 S.Ct. 623 (2008), *citing Cousin*, 325 F.3d at 632. If the application of the qualified immunity defense depends on a determination of disputed facts, those facts must be determined by a jury. **Act Up!/Portland v. Bagley**, 988 F.2d 868, 873 (9th Cir 1993).

The trial court erred in granting judgment as a matter of law that Sgt. Seymour’s conduct in assisting at a civil standby violated plaintiff’s Fourth Amendment rights and that no reasonable officer could have acted as Sgt. Seymour did given the information he had at the time of the civil standby. (CP 262) The law governing civil standbys is neither clear nor settled, and even if Sgt, Seymour were

not entitled to judgment as a matter of law there were disputed issues of fact whether a reasonable officer could have believed that this was a civil standby that did not implicate the Fourth Amendment. The trial court's \$340,000 attorney fee and costs award cannot stand given the trial court's erroneous grant of summary judgment, or even if the jury was properly instructed that Sgt. Seymour had violated plaintiff's civil rights, given her limited success at trial. This court should reverse.

B. The Law Governing Civil Standbys Is Neither Clear Nor Settled. Sgt. Seymour Was Entitled To Qualified Immunity Because A True Civil Standby Does Not Violate The Fourth Amendment.

1. Civil Standbys Do Not Implicate The Fourth Amendment.

The Fourth Amendment protects citizens from unreasonable governmental searches and seizures. However, "[n]ot every encounter between a citizen and a police officer rises to the stature of a seizure." *State v. Mennegar*, 114 Wn.2d 304, 310, 787 P.2d 1347 (1990). When a police officer is engaged in a "community caretaking function," the Fourth Amendment is not implicated. *Kalmas v. Wagner*, 133 Wn.2d 210, 217, 943 P.2d 1369 (1997); *Mennegar*, 114 Wn.2d at 312-13. As relevant here, a civil standby

is a “community caretaking function” that does not implicate and cannot violate the Fourth Amendment. **Kalmas**, 133 Wn.2d at 217.

In a civil standby, a police officer is present at the request of a party to a civil dispute in order to prevent violence. **Harris v. City of Roseburg**, 664 F.2d 1121, 1127-30 (9th Cir. 1981). The officer monitors the scene to ensure the peace is kept; the officer’s function is to “stand by” in the event trouble ensues. **Beal v. City of Seattle**, 134 Wn.2d 769, 774, 954 P.2d 237 (1998). In **Kalmas**, for instance, two Pierce County sheriff’s deputies accompanied a property manager and her assistant into a dwelling for the purposes of showing the home, over the objection of a tenant whose lease was being terminated later in the month. Plaintiff claimed that the officers threatened to arrest him if he did not permit entry into the residence, and then accompanied the property manager and her assistant into the residence. **Kalmas**, 133 Wn.2d at 214.

Our state Supreme Court held in **Kalmas** that no Fourth Amendment violation had occurred on which to base plaintiff’s ensuing civil rights action, reversing the decision of the Court of Appeals, which would have remanded the case for trial on whether a search had been conducted by the officer and whether the search

was unreasonable. 133 Wn.2d at 216, 220. The majority held as a matter of law that, given the landlord's, albeit limited, statutory and contractual right to access the dwelling in order to show it, the officers could not have facilitated an unreasonable private search by an individual who also had a right to access the dwelling. **Kalmas**, 133 Wn.2d at 219.

More common is the sort of entry into a dwelling at issue here, in which a civil standby is requested when property is being removed by a resident or former resident. **People v. McElroy**, 126 Cal. App. 4th 874, 882, 24 Cal.Rptr.3d 439 (2005). "It is well settled that police officers who perform civil standbys to keep the peace during a private party's repossession of property when right to possession of that property is disputed are not state actors if they act only to keep the peace . . ." **Poteet v. Sullivan**, 218 S.W.3d 780, 788 (Tex.App. 2007). "[T]hey cross the line if they affirmatively intervene to aid the reposessor." **Poteet**, 218 S.W.3d at 788, quoting **Marcus v. McCollum**, 394 F.3d 813, 818 (10th Cir. 2004) (citing cases). "[M]ere acquiescence by the police to 'stand by in case of trouble' is insufficient to constitute state action," but

“police intervention and aid will constitute state action.” **Poteet**, 218 S.W.3d at 789, *citing Harris*, 664 F.2d at 1127.

Neither these nor any other cases suggest that under any circumstances, however, would a *plaintiff* be entitled to summary judgment that a peace officer undertaking a civil standby at the request of a homeowner seeking to retrieve personal belongings violated the Fourth Amendment and was not entitled to qualified immunity as a matter of law.

In ***Malatesta v. New York State Division of State Police***, 120 F. Supp. 2d 235 (N.D. N.Y. 2000), for instance, a criminal court had suppressed evidence obtained pursuant to an illegal search warrant obtained by New York state troopers as a result of information concerning stolen property obtained when the troopers entered plaintiff's home while assisting an individual who claimed plaintiff's husband, his grandson, refused to return a pickup truck that belonged to the grandfather. The grandfather had no order authorizing repossession of the truck, nor any proof that he owned it. Nevertheless, the troopers went to plaintiff's home with the grandfather, who planned to “retrieve the truck himself while troopers stood by to insure that there was no breach of the peace-a

procedure known as a ‘civil standby.’” **Malatesta**, 120 F. Supp. 2d at 238. While there, the troopers found stolen property, and returned later with a search warrant.

A state court judge had “suppressed all evidence flowing from the original ‘civil standby’ entry, determining that this entry was illegal.” **Malatesta**, 120 F. Supp. 2d at 238 n.3. Nevertheless, in plaintiff’s subsequent § 1983 action, the federal court on summary judgment determined that the New York troopers were entitled to qualified immunity, because ‘officers of reasonable competence could disagree’ on the legality” of their actions:

The extent to which police officers can act to prevent a breach of the peace at the scene of a self-help repossession is less than clear. . . . [N]either party has cited a case which directly addresses the constitutionality of a ‘civil standby.’ This fact, coupled with the fact that the New York State Police have had a long-standing practice of performing civil standbys to prevent breaches of the peace during private repossession, demonstrates that reasonable police officers could disagree over the lawfulness of the December 6, 1997 entry onto plaintiff’s property. Accordingly, the remaining defendants are entitled to qualified immunity for this conduct.

Malatesta, 120 F. Supp.2d at 240, citing **Lennon v. Miller**, 66 F.3d 416, 420 (2nd Cir. 1995) (quoting **Malley**, 475 U.S. at 341). See also **Revis v. Meldrum**, 489 F.3d 273, 285 (6th Cir. 2007) (officer

who evicted plaintiff from home in executing on judgment after consulting with county attorney entitled to qualified immunity, even though the eviction violated due process, in part because of the “lack of settled jurisprudence” on the notice required before execution on realty).

Thus, even if the peace officer’s conduct during a civil standby was a violation of the Fourth Amendment, that does not preclude the application of qualified immunity. Yet that was the consequence of the trial court’s circular reasoning on summary judgment here, where the court as a matter of law held that Sgt. Seymour was not entitled to qualified immunity because he had violated the Fourth Amendment. (CP 262) Given the unsettled nature of the law governing civil standbys and the police’s community caretaking function, the trial court’s rejection of qualified immunity as a matter of law because it had determined Sgt. Seymour had engaged in an illegal search was error.

2. The Law Governing Civil Standbys On Protection Orders Is Unclear.

An officer is entitled to qualified immunity if the law governing the complained-of conduct is not clear and settled. *Gausvik v. Abbey*, 126 Wn. App. 868, 890 ¶¶ 73, 107 P.3d 98, rev.

denied, 155 Wn.2d 1006 (2005). The proper scope of a civil standby is particularly unclear in cases where a protection order has been issued, and particularly given the uncertain legal effect under Washington law of the protection orders both Osborne and Bird relied upon in claiming exclusive use (Osborne) or the right to retrieve belongings (Bird) from the home they had shared when Sgt. Seymour undertook this civil standby on behalf of Bird. Plaintiffs relied heavily on the fact that other officers expressed concern that the civil standby might be improper. (CP 180-83, 190-91, 231-33, 252) But the fact that other law enforcement personnel expressed conflicting views on the appropriateness of the civil standby is evidence that the right at issue was not clearly established, but subject to reasonable debate, and inappropriate for a summary judgment determination that Sgt. Seymour was not entitled to qualified immunity as a matter of law. And to the extent the trial court relied on the disputed evidence what Sgt. Seymour told, and was told, by the individuals he consulted, the trial court's summary judgment was doubly wrong. See Arg. §C, *infra*.

In ruling that officers who had evicted residents from a women's shelter were entitled to qualified immunity from Fourth

Amendment claims, for instance, the concurring judge pointed out that “[o]ur inquiry is not whether *an* officer would have concluded that plaintiffs were tenants. Rather, it is whether it would have been unreasonable for an officer in the same circumstances to act as the officers in this case did.” ***Thomas v. Cohen***, 304 F.3d 563, 585 (6th Cir. 2002), *cert. denied*, 538 U.S. 1032 (2003). It would make for poor public policy indeed to restrain a peace officer from assisting an individual with a protection order in obtaining personal belongings from his or her home based upon a concern that the officer’s actions may “cross the line” from a lawful civil standby to a Fourth Amendment violation.

Plaintiff argued below that Sgt. Seymour’s actions could not as a matter of law constitute a lawful civil standby because the protection order did not expressly provide authorization for one. (CP 61-64) The statutes governing protection orders do not require issuance of a separate court order to authorize use of a civil standby when, as here, a petitioner seeks to secure his belongings from a shared residence. RCW 26.50.080(1) provides that the “court may order a peace officer to accompany the petitioner and assist in placing the petitioner in possession of those items

indicated in the order or to otherwise assist in the execution of the order of protection.” RCW 26.50.080(2) further provides that “upon order of a court, a peace officer shall accompany the petitioner in an order of protection and assist in placing the petitioner in possession of all items listed in the order.” But the statute does not *prevent* a peace officer from assisting the petitioner absent an explicit court order.

Further, Sgt. Seymour had confirmed that as the respondent under a protection order, Bird was entitled to a civil standby to retrieve his belongings if ordered to vacate the home. (CP 119) In fact, the mandatory form for temporary protection orders has a provision allowing a civil standby whenever the respondent is prevented from returning home by the order:

Petitioner shall have exclusive right to the residence petitioner and respondent share. The respondent shall immediately **vacate** the residence. The respondent may take respondent's personal clothing and respondent's tools of trade from the residence *while a law enforcement officer is present.*

WPF DV-2.015 Mandatory Form (bold in original; italics added).

Sgt. Seymour was also accompanying Jenna Bird, who indisputably had a legal right to enter her home. (CP 260) There is no statutory or case law suggesting she did not have a right to

retrieve possessions simply because she was accompanied by her father, who was subject to a protection order. Had Sgt. Seymour assisted at a civil standby at the request of Jenna Bird, who had earlier been denied access to the home she shared with her father and step-mother, there could be no question his conduct would have fulfilled the “community caretaking function” civil standbys are intended to promote.

Given the unsettled nature of the law and, as set out in the next section, the disputed historical facts, whether Sgt. Seymour reasonably could have believed that this was a civil standby that did not implicate the Fourth Amendment precluded summary judgment for plaintiff. The trial court erred in granting summary judgment depriving Sgt. Seymour of qualified immunity as a matter of law, and should have dismissed plaintiff’s claims against him.

C. Whether A Reasonable Officer Would Have Believed His Conduct Was Within The Community Caretaking Function Of A Civil Standby Raised Disputed Issues Of Fact That Precluded Summary Judgment For Plaintiff.

An individual defendant is entitled to qualified immunity from § 1983 liability whenever a reasonable officer could have believed that his conduct was lawful. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). The issue is one of

objective reasonableness, and depends both on the state of the law, as set out in Argument § B, *supra*, the information available to the officer, and the officer's conduct.

The facts must be examined, "not as an omniscient observer would perceive them but as they would have appeared to a reasonable person in the position of the . . . officers." ***Wagner v. Washington County***, 493 F.3d 833, 837 (7th Cir. 2007) (even though they had no probable cause to arrest, officers entitled to qualified immunity for arresting person at town hall meeting at request of couple who had a restraining order against plaintiff, but who had entered the meeting after plaintiff); *citing* ***Mustafa v. City of Chicago***, 442 F.3d 544, 547 (7th Cir. 2006) (probable cause to arrest absolute defense even were defendant officers allegedly acting with malice); ***Malatesta v. New York State Division of State Police***, 120 F. Supp. 2d 235, 240 (N.D. N.Y. 2000) (granting qualified immunity for illegal police search based on information obtained during civil standby). When, as here, whether the officer reasonably could have believed that his conduct was legal depends on disputed facts concerning either the officer's conduct or his knowledge, the issue of qualified immunity cannot be decided until

a jury decides the facts. ***Act Up!/Portland v. Bagley***, 988 F.2d 868, 873 (9th Cir 1993).

In ***Bagley***, the Ninth Circuit held that the court must “postpone the qualified immunity determination until the facts have been determined at trial,” 988 F.2d at 873-74, if either the nature of the search under the Fourth Amendment, or the officer’s conduct or the facts on which the officer acted, are disputed. See ***Torres v. City of Los Angeles***, 548 F.3d 1197, 1212 (9th Cir. 2008), *cert. denied*, 129 S. Ct. 1995 (2009) (what defendant officers knew when they arrested plaintiff and the reasonableness of defendants’ belief they had probable cause to arrest were for jury).

Although the majority held that the officers had not violated the Fourth Amendment as a matter of law, the dissenters also would have remanded for trial on the reasonableness of the police officers’ actions, and whether they “crossed the line” from a community caretaking function in ***Kalmas v. Wagner***, 133 Wn.2d 210, 220-21, 229, 943 P.2d 1369 (1997) (Alexander, J., dissenting). Disputed evidence that the defendant officers had pushed away plaintiff homeowner so that his ex-girlfriend and 10 companions, including a locksmith, could enter his home, and then in the course

of the “chaotic” entry that ensued physically restrained and threatened to jail plaintiff while his ex and her companions carried away most of his and his children’s property, similarly required a trial before the issue of qualified immunity could be decided in ***Poteet v. Sullivan***, 218 S.W.3d 780, 792 (Tex.App. 2007).

The appellate court in ***Poteet*** reversed summary judgment and remanded the case for trial both because “Poteet has raised a fact issue as to whether the officers’ actions went beyond mere protection into actually aiding Chin in removing property from the home. . .” 218 S.W.3d at 791, and because until the disputed facts of the entry were resolved, the court could not “make the legal determination of whether the officers acted in an objectively reasonable manner” and were entitled to qualified immunity. ***Poteet***, 218 S.W.3d at 793, *citing Mangieri v. Clifton*, 29 F.3d 1012, 1016 (5th Cir. 1994)

Sgt. Seymour did not threaten or restrain plaintiff Osborne. (See CP 224) Sgt. Seymour did not let Bird and his daughter ransack the house, but made a point of documenting and inventorying those items removed. (CP 158, 166, 193-94) Plaintiff relied heavily on the fact that Sgt. Seymour let the Birds remain in

the house for a (disputed) amount of time that the trial court found was unreasonable (CP 69-70), but even if Sgt. Seymour was not entitled to qualified immunity as a matter of law given the unsettled nature of the law governing civil standbys, the *reasonableness* of Sgt. Seymour's conduct was a question for the jury – as was whether Sgt. Seymour sought the advice of others concerning the proposed civil standby, and what that advice was.

Whether a reasonable officer would have believed this civil standby was proper at a minimum raised disputed issues of fact that precluded summary judgment for plaintiff both as to Sgt. Seymour's conduct, and as to his knowledge. The trial court erred in granting summary judgment and instructing the jury that Sgt. Seymour had violated plaintiff's civil rights and was not entitled to qualified immunity as a matter of law.

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

The trial court erred in awarding fees and costs of \$340,654.14, over twenty times the jury's verdict against Sgt. Seymour, on the grounds that she had achieved "substantial success." (CP 705-06) The trial court's fee award does not

properly reflect the amount of the verdict and the plaintiff's limited success, both in terms of the issues on which plaintiff prevailed, the defendants against whom she prevailed, and the time and effort reasonably necessary to achieve that limited success.

42 U.S.C. § 1988 (b) provides, "In any action or proceeding to enforce a provision of [42 U.S.C. § 1983]...the court, in its discretion, may allow the prevailing party...a reasonable attorney's fee as part of the costs ..." In determining the amount of fees the court must consider whether the suit is primarily to defend "a private property right rather than a broader public goal," **Herrington v. County of Sonoma**, 883 F.2d 739, 746 (9th Cir. 1989), the results obtained, and the extent of the plaintiff's success. **Mendez v. County of San Bernardino**, 540 F.3d 1109, 1130 (9th Cir. 2008). The degree of success achieved is the primary consideration in determining the amount of the award. **Farrar v. Hobby**, 506 U.S. 103, 114, 113 S. Ct. 566, 574, 121 L.Ed.2d 494 (1992).

A reduced fee is appropriate where the relief granted is limited in comparison to the scope of litigation as a whole. **Hensley v. Eckerhart**, 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L.Ed.2d

(1983). In this case, for instance, plaintiff lost on her “big issue” – that it was the County’s training policies that had caused Sgt. Seymour to violate her Fourth Amendment rights. In doing so, contrary to the trial court’s findings (CP 437), plaintiff lost in her defense of the “broader public goal” she sought to obtain. Fees may only be awarded “for those claims successfully defended on the merits.” **Larez v. City of Los Angeles**, 946 F.2d 630, 649 (9th Cir. 1991). Consequently, where a party meets with only limited success, § 1988 fees will be awarded only for the successful claims. **Larez**, 946 F.2d at 649; see also **Jensen v. City of San Jose**, 806 F.2d 899, 900 (9th Cir. 1986) (a court may not award § 1988 fees for successful collateral claims unrelated to civil rights claims).

To determine the appropriate amount of an award where the plaintiff achieves only limited success, the court must use a two-step analysis. First, the court must exclude from the fee award hours expended on unrelated unsuccessful claims. Second, the court should focus on the significance of the overall relief obtained in relation to the hours reasonably expended. **Hensley**, 461 U.S. at 434-35; **Thomas v. City of Tacoma**, 410 F.3d 644, 649-650 (9th

Cir. 2005). “If it is impossible to isolate the truly unrelated claims from those related claims, the district court should instead reflect that limited success in the second step.” **Thomas**, 410 F.3d at 650 (quoting **Webb v. Sloan**, 330 F.3d 1158, 1168 (9th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004)). What the court cannot do, and what the trial court erroneously did here, is “declare victory” for the plaintiff when the jury did not.

Plaintiff brought ten different claims against seven different defendants. Of those, six were state tort law claims, and thus not compensable at all under § 1988. The remaining four claims were civil rights claims against Sgt. Stonack, Sgt. Seymour, Sheriff Pastor, and Pierce County. (CP 15-28) Plaintiff dropped her claims against Sgt. Stonack and Sheriff Pastor on the first day of trial, leaving only the claims against Sgt. Seymour and Pierce County. (6/15 RP 55) The claim against Sgt. Seymour was decided in plaintiff's favor well before trial, leaving only the issue of damages. The jury found that Pierce County was not liable to plaintiff. (CP 437)

Consequently, plaintiff could only recover under § 1988 for the sole successful civil rights claim against Sgt. Seymour. The

trial court recognized that plaintiff could not be awarded fees for her state law claims against Bird, and reduced the fees by one-third, on the theory that the claims against Bird were one-third of the claims on which the case went to trial. See *Foy v. City of Berea*, 58 F.3d 227, 229 (6th Cir. 1995) (“In order to prevail in a section 1983 action, the plaintiff must prove that some conduct by a person acting under color of state law deprived the plaintiff . . . of a right secured by the constitution or other federal laws.”) The trial court erred, however, in not further reducing the fees to reflect the plaintiff’s lack of success in her sole remaining claim against the County – the only claim reflecting any “broader public goal.” Contrary to its reasoning (CP 702), *City of Riverside v. Rivera*, 477 U.S. 561, 106 S.Ct. 2686, 91 L.Ed.2d 466 (1986) did not compel the trial court’s award, and the Court’s subsequent 1992 decision in *Farrar*, 506 U.S. at 114, prohibited it.

While the Court in *Riverside* rejected the proposition that fee awards under § 1988 should necessarily be proportionate to the amount of damages a civil rights plaintiff recovers, the Court reasoned this was because “[u]nlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and

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constitutional rights that cannot be valued solely in monetary terms... [R]egardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits that are not reflected in nominal or relatively small damages awards.” 477 U.S. at 574 (citations omitted). Six years later, however, the Court in *Farrar* limited *Riverside*, holding that even if the civil rights plaintiff technically prevails in its suit and receives nominal damages, this does not automatically entitle the plaintiff to attorney fees under § 1988.

The Court in *Farrar* stated that while “the ‘technical’ nature of a nominal damages award or any other judgment does not affect the prevailing party inquiry, it does bear on the propriety of fees awarded under § 1988.” 506 U.S. at 114. For purposes of an award of attorney fees, the Court held that the plaintiff must “prevail” in a manner that provides the plaintiff with “actual relief on the merits of his claim [that] materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.” *Farrar*, 506 U.S. at 111-12.

In *Farrar*, the petitioners received nominal damages, instead of the \$17 million in compensatory damages that they had sought.

The Court held that the petitioners were not entitled to fees under § 1988 because the “litigation accomplished little beyond giving petitioners ‘the moral satisfaction of knowing that a federal court concluded that their rights had been violated’ in some unspecified way.” *Farrar*, 506 U.S. at 114. Thus, unlike the plaintiffs in *Riverside*, the victory for the plaintiffs in *Farrar* did not secure “important social benefits,” and did not warrant an award of attorney fees.

In *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 935 P.2d 555 (1997), our Supreme Court relied on *Farrar* in reversing a \$196,381.82 fee award on a damage award of \$3. Regardless of the importance of the § 1983 issues on which plaintiff had technically prevailed, the Court held that plaintiff was not entitled to any attorney fees on its § 1983 claims. As here, “[r]ecovery of private damages was the primary purpose of Sintra’s § 1983 action.” *Sintra*, 131 Wn.2d at 666. Given the nominal damages awarded, “after seeking millions,” our state Supreme Court held that the trial court had erred in awarding any fees at all:

Where recovery of private damages is the purpose of . . . civil rights litigation, a [trial] court, in fixing fees is obligated to give primary consideration to the amount of damages awarded as compared to the amount sought.

Sintra, 131 Wn.2d at 665, *quoting Farrar*, 506 U.S. at 114 (*quoting Riverside*, 477 U.S. at 585). See also ***Choate v. County of Orange***, 86 Cal.App.4th 312, 103 Cal.Rptr.2d 339 (2000).

The California court in ***Choate*** relied on ***Sintra*** to deny plaintiff fees altogether where, in circumstances remarkably similar to those considered here, the County defendant was exonerated from liability after a long trial in which the jury awarded \$4,380 in compensatory and punitive damages against only a single sheriff deputy, who had been involved in a “street fight” with the plaintiffs. The appellate court in ***Choate*** reversed an award of fees to defendants, but then relied on ***Sintra*** in also affirming the denial of almost \$250,000 in fees requested by plaintiff:

A lion produced a mouse. A seven-week jury trial in a lawsuit seeking hundreds of thousands of dollars in damages resulted in a verdict that a single sheriff's deputy committed a civil rights violation, with an award of \$3,380 in compensatory and \$1,000 in punitive damages.

Plaintiffs sought almost \$250,000 in attorney fees for achieving this victory, which was pyrrhic in every respect save the potential of the fee

request. . . . Because of plaintiffs' extremely limited success on their civil rights claims, we follow *Farrar v. Hobby* (1992) 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 and leave each side to bear its own attorney fees.

Choate, 103 Cal Rptr.2d at 342.

In this case, the jury declined to award any damages against the County after finding that there was no County policy or practice that was the moving force behind plaintiff's injury. As the issue of Sgt. Seymour's liability was already settled, plaintiff's sole object throughout the course of the trial was to convince the jury to award a high amount of damages. Yet the jury awarded only \$17,500, against only Sgt. Seymour and not the County. The \$340,000 fee and cost award cannot stand given the trial court's erroneous grant of summary judgment, and plaintiff's limited success at trial despite having the jury instructed that Sgt. Seymour had violated her civil rights. This court should reverse the fee award.

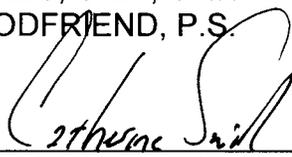
V. CONCLUSION

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.

Dated this 1st day of July, 2010.

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

By: 
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DECLARATION OF SERVICE

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

That on July 1, 2010, I arranged for service of the foregoing Corrected Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 1st day of July, 2010.



Carrie O'Brien