

No. 48497-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RUSSELL BURKE and JULIE BURKE, and their marital community,

Plaintiffs/Appellants,

v.

CITY OF MONTESANO; KEN ESTES and "JANE DOE" ESTES;
KRISTY POWELL and "JOHN DOE" POWELL; and ROCKY
HOWARD "JANE DOE" HOWARD,,

Defendants/Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
THE HONORABLE ERIC PRICE
THURSTON COUNTY SUPERIOR COURT CASE NO. 14-2-01089-1

BRIEF OF APPELLANT

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I. INTRODUCTION

Regarding a public employee's First Amendment rights, the United States Supreme Court had said that "[t]o the victor belong only those spoils that may be constitutionally obtained." *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 64, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). This case concerns an effort to take more than is constitutionally permitted from an employee based upon his exercise of right to support the candidate of his choice.

Russell Burke, a 26-year employee with the Public Works Department of the City of Montesano at the time, supported a candidate in the 2011 mayoral election for the City. The candidate he supported lost. The winner, Kenneth Estes, directly confronted Burke about his support and retaliated against Burke, tarnishing Burke's flawless employment record and ultimately terminating him.

After Burke's termination, Burke and his spouse filed a lawsuit against the City, Mayor Estes, and other participants in the retaliation, asserting a cause of action for termination in violation of public policy. The trial court granted summary judgment against the Burkes. In granting the motion, the trial court failed to view the evidence, and reasonable inferences therefrom, in the light most favorable to them on the factual issue of causation.

The Burkes produced prima facie evidence of retaliation for Mr. Burke's constitutionally protected political activity by virtue of Mayor Kenneth Estes's direct confrontation of Mr. Burke for his activity, the proximity in time between Burke's activity and the City's adverse employment action against him, and the pretextual nature of the City's proffered justification for terminating Burke.

Based upon this evidence, the Burkes respectfully request that this Court reverse the order of summary judgment entered by the trial court against them on their claim for termination in violation of public policy.

II. ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment in favor of the respondents on the appellants' termination in violation of public policy claim.

III. STATEMENT OF THE ISSUES

Should this Court reverse the trial court's entry of summary judgment in favor of the defendants on the plaintiffs' termination in violation of public policy claim because genuine issues of material fact exist regarding whether retaliation based on Burke's constitutionally and statutorily protected activity was a substantial motivating factor in his termination? Yes.

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IV. STATEMENT OF THE CASE

A. Prior to Mayor Estes taking office, Burke was a 26-year public works employee with a flawless employment record.

In April of 1986, Russell Burke (“Burke”) was hired by the City of Montezano (“City”) as a Utility Maintenance Worker. CP at 781. Over the following 23 years, Burke was promoted to Streets Supervisor, Assistant Public Works Director, and Public Works Supervisor. CP at 781. Burke became the Public Works Supervisor in March of 2010. CP at 781. During the time he was in this position, the City did not have a Public Works Director, so Burke performed the majority of the duties of a Public Works Director. CP at 781. And, in this position, he was the highest-ranking member of the Public Works Department. CP at 781. Burke was the City’s Public Works Supervisor until shortly after Mayor Estes took office in January of 2012. CP at 781, 783-84.

Before Mayor Estes took office, Burke had a flawless employment record. *See* CP at 83, 781. He was praised for his leadership of the Public Works Department, being told that it was the best it had ever been. CP at 781. A formal performance evaluation he received for 2011 was positive, stating that “[o]verall you have been a great City employee” and “[y]ou care about the City and the Citizens and the work you do clearly shows

how much you love your community and position.” Clerk’s Papers (CP) at 781, 791-96.

B. Then Mayor-Elect Estes Confronted Burke Regarding Burke’s Political Activity Less Than One Month before Taking Office.

During the 2011 mayoral campaign, Burke supported candidate Doug Streeter. CP at 781. Burke offered various forms of support for Mr. Streeter, including hosting a campaign party for him during the summer of 2011. CP at 781-82. Burke hosted the party because he wanted to raise money for Mr. Streeter’s campaign and because he wanted to express his support for Mr. Streeter’s campaign to his family, friends, and other citizens in Montesano. CP at 781-82. Despite Burke’s support, Mr. Streeter lost the election to Kenneth Estes. CP at 782.

In approximately December of 2011, shortly after the election results were published, Mayor-Elect Estes visited Burke at work in the Public Works Department and confronted him about the campaign party. CP at 782. Mayor-Elect Estes was visibly upset and repeatedly questioned Burke about why he had the party, creating the impression that he was upset because Burke supported his opponent. CP at 782. Another Public Works Department employee, Jason Manley, witnessed the interaction and described Mayor-Elect Estes’s conduct as “grilling” Burke about having the party. CP at 566-67.

In addition to confronting Burke about the campaign party, Mayor-Elect Estes attempted to give Burke a campaign button. CP 782 The button said “I was one of the 70% for Mayor Estes 2011.” CP at 782, 99. Of course, Mayor-Elect Estes knew that Burke had not supported him when he offered the button. CP at 439-40; 450 (166:10-16¹); 568.

Burke rejected the button because he did not want to make a false representation about which candidate he had supported. CP at 782. When Burke rejected it, Mayor-Elect Estes laughed at him. CP at 782. Mayor-Elect Estes did not offer a button to any of the other Public Works Department Employees. CP at 449-50 (165-166:2), 782. Based on this interaction, Burke became concerned about his job security. CP at 782. His concerns were confirmed when another employee of the Public Works Department, Norm Case, told him multiple times that he would regret having the campaign party and that it would come back to haunt him. CP at 783.

C. Once Mayor Estes took office, Burke was subjected to swift and repeated acts of retaliation.

Within three months of Mayor Estes confronting Burke and within two months after Mayor Estes taking office, Burke was subjected to

¹ In an effort to save paper, some of the transcripts were filed in condense format. Citations to the Clerk’s Papers that contain parentheticals refer to the specific page and line in the following format CP at *Clerk’s Papers Page (Transcript Page Number(s): Line Number(s))*. In instances where a citation contains a parenthetical that omits a colon, the number within the parenthetical references the page of a transcript.

retaliation. The retaliation included a demotion, the denial of a promotion, unwarranted discipline, diminished authority, a police investigation based upon false information provided by respondents, internal investigations, and, ultimately, Burke's termination on June 17, 2013.

(1) In January or February of 2012, within two months of Mayor Estes taking office, Burke was effectively demoted.

At the time Mayor Estes took office on January 1, 2012, Burke was the Public Works Supervisor. *See* CP at 781. There was no Public Works Director, so as the highest-ranking member of the Department, Burke performed the responsibilities of a Public Works Director with two exceptions: he lacked the authority to discipline his subordinates and he had less budgetary control. CP at 479 (34:19-36:21), 781. Burke was supervised by City Administrator Kristy Powell ("Powell"), who could discipline Burke's subordinates, if necessary. *See* CP at 479 (35:5-6), 781, 791-96. According to Powell, the Public Works Department was the best it had ever been under Burke's leadership in 2011. CP at 781.

Mayor Estes testified that shortly after taking office he received complaints from two members of the Public Works Department of bullying and harassment, which he attributed to a lack of leadership by Burke. CP 434 at (26:11-13). He said that Burke displayed a lack of leadership by failing to investigate the complaints. CP at 441 (76:19-77:2).

But he conceded that he did not know whether Burke was ever notified of the complaints. CP at 441 (76:10-18). In fact, Burke was never notified of the complaints, or any other issues in the Public Works Department that might warrant discipline. *See* CP at 783.

Then, after having received the complaints and concluding that Burke demonstrated a lack of leadership, Mayor Estes claimed that he actually offered Burke the Public Works Director position based on Burke's leadership. CP at 435 (30:15-19). Estes explained that he was impressed with Burke and thought Burke was a "good leader" based upon "what [he] had been told by his employees, the people working for [Burke]." CP at 430 (12:15-25). He also stated that Burke "had been the supervisor of the public works department for quite a while and [he] had no reason to believe that [Burke] was not a good leader." CP at 435 (31:2-4). Burke disputes the claim that he was ever offered the position. CP at 783.

Then, within the first or second month of Mayor Estes's tenure, Burke was effectively demoted through the appointment of Powell as the Interim Public Works Director. CP at 478 (31:21-32:4), 783. His justification for the change was Burke's lack of leadership. CP at 434 (26:7-13), 441 (76:19-77:2). However, once Powell was appointed, the

City took no action to investigate or impose discipline based on the complaints. CP at 434 (29:10-30:9), 436 (34:23-35:3).

And, Powell assumed duties far beyond conducting investigations and imposing discipline. CP at 783. She assumed the majority of Burke's authority, such that he was required to notify her of all Public Work Department activities and she selected the projects and set the schedule for the crew. CP at 783, 784, 801.

(2) In May of 2012, Burke was not offered the Public Works Director position, despite being qualified and unanimously recommended by the hiring committee, based on hostility that Mayor Estes conceded did not exist.

In February of 2012, the City solicited applications for the Public Works Director Position. *See* CP at 462. The deadline for submitting applications was February 8, 2012. CP at 462. Burke and other employees of the Public Works Department applied. CP at 462, 784. More than two months after the application deadline, the City accepted an application from Rocky Howard ("Howard"). *See* CP at 442 (82-83), 456-61.

A hiring committee interviewed candidates for the position, including Burke and Howard. *See* CP at 443 (91, 92). The committee unanimously recommended Burke for the position. CP at 443 (91:22-92:5), 463. However, the position was offered to Howard instead of

Burke,² even though Howard performed so poorly in the interview that the Mayor had doubts about his ability to perform the job. CP at 433 (90:1-91:10).

On May 1, 2012, Mayor Estes wrote a letter to the interview committee notifying it of his selection. CP at 463. Specifically, he wrote “[p]erhaps my choice will surprise you, however I interviewed each candidate with Kristy [Powell] and we both perceived serious negativity towards both she and I [*sic*] from the candidate that the board suggested.” CP at 463. However, Mayor Estes conceded in his deposition that Burke’s attitude was good from the time he took office through this meeting with Burke. CP at 445-46 (101:23-102:7, 105:6-13). He described his meeting with Burke as “very pleasurable” and “pleasant.” CP at 444 (96:12-14). In further contradiction to his letter, Mayor Estes claims to have offered the position to Burke a second time during this meeting, despite the claim of perceived negativity. CP at 443 (93:14-19). Burke denies ever being offered the position. CP at 783.

(3) After Howard became the Public Works Director, Burke was treated with hostility, his authority was reduced, and he was subjected to baseless discipline.

The first day that Howard worked as the Public Works Director in approximately May of 2012, he took Burke’s office, telling Burke that he

² The Mayor claims that he offered the position to Burke, despite previously demoting him because of a lack of leadership. CP at 441 (76:19-77:2), 434 (26:11-13).

had two hours to gather his stuff and “get the fuck out.” CP at 784. When Burke was kicked out of the office space, he effectively lost access to email. CP at 784.

In the fall of 2012, Burke was a subject of an investigation initiated based upon the allegation that members of the Public Works Department were unfriendly to an employee. *See* CP at 575-076 (42:17-20, 46:6-11).

On October 12, 2012, the Public Works employees, including Burke, were notified that Powell would be in charge during Howard’s vacation. CP at 784-85, 804. This was contrary to the City’s practice in all of its departments, where the second in command assumes control over the department when the director is absent. CP at 784. Burke was not given prior notice or any explanation for this diminution in authority. CP at 785.

On October 30, 2012, Burke was written up by Howard for failing to notify Howard of an emergency repair to a water leak. CP at 785, 806. However, Howard was present during the repair. CP at 785. Howard even went to the store to purchase supplies for the repair. CP at 785.

Despite making multiple requests, Burke remained without email access from approximately May of 2012 through early 2013. CP at 27, 40-41, 482 (62-63), 502-503 (52-55), 784. An unpaid invoice for paint purchases by the City, which appears to have been emailed to Burke when he was denied access, set into motion a series of events that led to a

criminal investigation regarding the alleged theft of paint by Burke. CP at 27, 40-41, 482 (62-63), 502-503 (52-55), 784.

(4) In 2013, the City prompted the Hoquiam Police Department to initiate a criminal investigations based upon false information regarding allegations of paint theft by Burke.

In early 2013, an outstanding bill from one of the City's vendors for paint purchases that had been emailed to Burke's account and a call from the auditor's office regarding a paint investigation that did not exist prompted Mayor Estes, Powell, and Howard to contact the City of Montesano Police Chief, Brett Vance. CP at 481-83. They told Vance that they were concerned about missing paint. CP at 770 (14:3-6). Chief Vance testified that he told them to ask the people who ordered the paint. CP at 770 (15:25-16:2). At that time, Powell believed that Burke was the person responsible for the City's painting. CP at 484 (71:16-19).

However, Powell never spoke with Burke about it. CP at 484 (73:9-11). She initially claimed that she did not speak with him based on a recommendation of Chief Vance, but then she conceded that she could not recall that recommendation. CP at 484 (73:12-18). Ultimately, she could not offer any explanation for not contacting Burke about the issue. CP at 485 (74:9-24). Instead, Powell claimed that Chief Vance told them that they should contact the Hoquiam Police Department. CP at 484 (73:19-23).

Powell and Howard provided false and contradictory information to the Hoquiam Police Department regarding the City's paint usage, creating the false impression that the volume of paint purchased could not have been used by the City. *See* CP at 505 (88), 509 (105), 510 (106), 511 (113), 512 (116), 512-13 (117-118), 514 (124-25), 516 (130-131), 524, 526, 527, 559 (regarding false paint estimates); *See also* CP at 225 (an affidavit for a search warrant reflecting a false estimate). Howard initially prepared an estimate of the number of gallons of yellow paint used by the Public Works Department in 2012. CP at 514 (124-25). After apparently doubling his total, he concluded that the City used 24 gallons of yellow in 2012. CP 505 (88), 511 (113), 512 (116). Howard provided this estimate to the Hoquiam Police Department in the course of its criminal investigation. CP at 507 (95-96), 512 (116).

Howard did not prepare any estimates other than the yellow paint actually used in 2012. CP at 512-13 (117-118). Nevertheless, Powell sent a February 8, 2013 email to the Hoquiam Police Department stating that she “asked Rocky Howard to provide [her] information on how much it **would take** to paint the entire city [*sic*] linear feet and curbs in a season.” CP at 524 (emphasis added). She wrote that “[h]e calculated by counting the intersections and painted areas and came up with about 36 gallons of **each color** as a generous amount.” CP at 524 (emphasis added). Howard

testified that someone had written “36 gallons” on the estimate he prepared, but he did not know who wrote it or what it represented. CP at 509 (105), 510 (106). Hoquiam Police Department’s initial report incorporated this figure, stating that it would take “36 gallons to paint all the curbs, crosswalks, and city owned parking lots within the city limits.” CP at 526.

Then on March 18, 2013, Powell sent an email to the Hoquiam Police Department stating that Howard “says that it is approximately 23 gallons of **white** annually,” even though Howard prepared no such estimate. CP at 512-13 (117-118), 559 (emphasis added). Howard conceded that he would not have been able to prepare an estimate of white paint used in the city in 2012. CP at 514-15 (125-126). The same day, the Hoquiam Police Department issued a revised report, stating Howard estimated that the white and yellow paint needed to paint all curbs and stripes was 59 gallons. CP at 527. Howard agreed that this information was false. CP at 516 (130-131).

On March 26, 2013, the Hoquiam Police Department referred the matter to the Grays Harbor County Prosecutor’s Office for charges. *See* CP at 815. After follow up investigation, the Grays Harbor County Prosecutor’s Office declined to charge Burke on June 4, 2013. CP at 815-16. In declining to charge Burke, the Prosecutor’s Office noted that the

estimate of 59 gallons attributed to Howard omitted several streets and was substantially below the amount used by the City between 2007 and 2009³. CP at 815. The same day, Howard sent an email, stating that he stood by his estimate of 59 gallons, despite not having prepared one. CP at 560.

(5) Before the criminal investigation was completed and before the City initiated an internal investigation, Powell sent an email stating that Mayor Estes wanted to terminate Burke.

Sometime on or before March 14, 2013, Mayor Estes decided to terminate Burke before the City started an internal investigation, and without any legitimate explanation. *See* CP at 489. On March 14, 2013, Powell wrote an email based on a conversation she had with Mayor Estes and Scott Snyder, the City's attorney, stating that "[o]ur objective is that this individual will no longer work here." CP at 489. In her deposition, she clarified that she was referring to Burke. CP at 481 (58:3-4).

Powell and Mayor Estes lacked any legitimate justification for their decision to terminate Burke at that time. *See e.g.* CP at 477 (18), 453 (243:1-4), 471 (101:11-25). For example, Powell testified that she did not know whether Burke had stolen any paint and that she had no opinion about it. CP at 477 (18). Mayor Estes testified that he had no proof that

³ Years outside those for which there were concerns about paint theft. *See* CP 527-528

Burke stole paint. CP at 453 (243:1-4)⁴. He also testified that some of the other allegations that the City included in its internal investigation would not have led to Burke's termination. CP at 471 (101:11-25).

(6) After Mayor Estes decided to terminate Burke, the City instituted an internal investigation that provided the City's justification for Burke's termination.

On March 22, 2013, Burke was notified that the City was commencing an internal investigation regarding alleged misconduct by Burke including the theft of paint. CP at 43-45. The City's internal investigator was William Curtright ("Curtright"). Curtright was an outside investigator used by the City to investigate alleged misconduct by Burke in this and a prior investigation. *See* CP at 43-45, 126.

During the course of this investigation, Burke's concerns about Mayor Estes retaliating against him based on his political activity deepened. CP at 786. After issues with scheduling, conflicting statements about the subject matter of the investigation, the threat of unjustified discipline during the investigation, and concerns about the City's investigator, Burke notified the City he would not submit to an interview with Curtright. *See* CP at 54, 66-67, 79, 96-97, 107, 112, 126. Instead, he offered to answer written questions or submit an interview with a different investigator. CP at 79-80, 126.

⁴ Referring to a statement he made in June or July of 2013, at least three months **after** the email was sent. *See* CP 452-453 (240-42).

On June 17, 2013, Burke was terminated for insubordination. CP at 30 (¶ 40), 140-41. According to Powell and Mayor Estes, part of the reason that Burke was terminated was his failure to attend a *Loudermill*⁵ hearing. See CP at 397:12-15, 564:21-23. Powell testified in an unemployment hearing that Burke’s failure to attend a *Loudermill* hearing formed part of the basis for his termination. CP at 564:21-23. Mayor Estes testified that Burke’s failure to attend a *Loudermill* hearing on June 17, 2013 was the final action that prompted his termination. CP at 397:12-15. However, a *Loudermill* hearing was never scheduled that day. Compare CP at 122 and 127-28. And an attorney for the City notified Burke that “[u]nlike an investigation ... **the city is not compelling Mr. Burke’s attendance**” at the *Loudermill* hearing. CP at 127 (emphasis added).

V. ARGUMENT

The trial court erred in granting summary judgment on the appellants’ termination in violation of public policy claim. Summary judgment is only appropriate when the moving party can establish that there are no genuine issues of material fact and that they are entitled to

⁵ A *Loudermill* hearing is required by due process and is an opportunity for a public employee to receive notice of charges against him, to review the employer’s evidence, and to present his side of the story prior to certain forms of discipline. See *Fuller v. Employment Sec. Dep’t of State of Wash.*, 52 Wn. App. 603, 607, 762 P.2d 367 (1988) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)).

judgment as a matter of law. CR 56(c). The facts and reasonable inferences must be viewed in the light most favorable to the nonmoving party. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311, 358 P.3d 1153(2015). Summary judgment is reviewed de novo. *Id.*

Here, the facts produced by the appellants preclude summary judgment on their claim of termination in violation of public policy. This claim is composed of four elements: (1) the existence of a clear public policy, the clarity element; (2) that discouraging the conduct in which the employee engaged would jeopardize the public policy, the jeopardy element; (3) that the policy-linked conduct caused the dismissal, the causation element; and (4) the absence of an overriding justification for the dismissal, the absence of justification element. *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015).

First, the appellants' claim is based upon the existence of a clear public policy rooted in Burke's constitutional and statutory rights to free association, expression, belief, and assembly. Second, this public policy is jeopardized if the City's termination of Burke was motivated by retaliation based on his exercise of these rights. Third, whether his termination was substantially motivated by retaliation for his protected conduct is subject to multiple genuine issues of material fact. And, finally, the City is unable to offer an overriding justification that would supersede Burke's

constitutional and statutory rights. Accordingly, summary judgment is improper on the appellants' termination in violation of public policy claim.

A. The clarity element is satisfied because the Appellants' claim is based upon constitutional and statutory rights to freedom of expression, association, belief, and assembly.

The appellants' claim is based on a clear public policy rooted in Burke's constitutional and statutory rights to freedom of association, expression, belief, and assembly. Burke's constitutional and statutory rights found in the United States Constitution, the Washington State Constitution, the State Civil Service laws, and the Fair Campaign Practices Act. These constitutional and statutory schemes were violated when Burke was terminated because of his political expression, association, belief, and assembly.

"In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme." *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 936-37, 913 P.2d 377 (1996). This is a question of law. *Id.* at 937.

First, Burke exercised his constitutional rights to expression, association, belief, and assembly in supporting Mayor Estes's campaign

opponent. “[I]t has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.” *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). The freedom of expression protects a public employee’s right to engage in expression, by words or conduct, regarding matters of public concern so long as the employee’s interests are not outweighed by the employer’s interest. *See Lane v. Franks*, 134 S. Ct. 2369, 2378, 189 L. Ed. 2d 312 (2014); *See also Texas v. Johnson*, 491 U.S. 397, 404, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) (describing protected expressive conduct).

The First Amendment also protects a public employee’s right to freedom of association and belief. *See Branti v. Finkel*, 445 U.S. 507, 515, 100 S. Ct. 1287, 63 L. Ed. 2d 574 (1980). “If the First Amendment protects a public employee from discharge based on what he has said, it must also protect him from discharge based on what he believes.” *Branti*, 445 U.S. at 515. For example, the United States Supreme Court has held that patronage dismissals based on the failure to support the favored political party are unconstitutional under the First Amendment. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976). The rationale that renders patronage dismissals unconstitutional applies with equal force to required support for the winning candidate. *See e.g. Galli v.*

New Jersey Meadowlands Comm'n, 490 F.3d 265, 272 (3d Cir. 2007) (stating that “the First Amendment also protects an employee from discrimination for failure to support the winning candidate.”). Furthermore, “[a]ssembly, like speech, is indeed essential in order to maintain the opportunity for free political discussion” *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 562, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963).

Here, Burke hosted the party to raise funds for a candidate. *See* CP at 781-82. Campaign contributions are symbolic expression. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 257-58, 4 P.3d 808 (2000). Burke also hosted it to express his support for the candidate to other voters. *See* CP at 781-82. Conduct is protected where “intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it.” *Texas*, 491 U.S. at 404. The party was a clear expression of Burke’s support for a political candidate. *See* CP at 781-82. He assembled and associated with others for that purpose. *See* CP at 781-82.

The respondents have not attempted to argue that they possess any interest superior to Burke’s right to freedom of expression, association, belief, and assembly. *See* CP 264-89, 850-60. For these reasons, his

activity associated with hosting the campaign party was constitutionally protected.

Second, Burke exercised his right to expression, belief, and association when he rejected the campaign button, which was an invitation by the Mayor to make a false representation about which candidate he had supported. *See* CP at 782. The right to free expression and association also includes the right to not speak or associate. *See Wooley v. Maynard*, 430 U.S. 705, 714, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (stating that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”); *See also Roberts v. U.S. Jaycees*, 468 U.S. 609, 623, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (stating that the “[f]reedom of association therefore plainly presupposes a freedom not to associate.”). By rejecting Mayor Estes’s campaign button, Burke exercised his rights to not speak and not associate, refusing to falsely represent that he was one of the people who voted for the Mayor. *See* CP at 782. Accordingly, Burke’s conduct, both in supporting the Mayor’s opponent and rejecting the campaign button, were protected by the First Amendment of the United States Constitution⁶.

⁶ As applied through the Fourteenth Amendment.

Burke's conduct was also protected under the Washington State Constitution. The Washington State Constitution is in accord, and "provides greater protection of speech than the first and fourteenth amendments to the United States Constitution." *O'Day v. King Cnty.*, 109 Wn.2d 796, 802, 749 P.2d 142 (1988). Like the federal constitution, it protects both speech and assembly. WA. Const. Art. I. §§ 2, 5. Thus, Burke's termination violated the Washington State Constitution.

Burke's termination also violated a clear public policy set forth in two statutes. First, Washington's Civil Services laws state that:

[e]mployees of the state or any political subdivision thereof shall have the right to vote and to express their opinions on all political subjects and candidates and to hold any political party office or participate in the management of a partisan, political campaign.

RCW 41.06.250(2). Second, the Fair Campaign Practices Act states that:

[n]o employer or labor organization may discriminate against an officer or employee in the terms or conditions of employment for (a) the failure to contribute to, (b) the failure in any way to support or oppose, or (c) in any way supporting or opposing a candidate, ballot proposition, political party, or political committee.

RCW 42.17A.495(2). There is no reasonable dispute that the appellants' claim is founded upon a clear mandate of public policy. Burke exercised his right to freedom of expression, association, belief, and assembly by supporting a political candidate and his rights to free expression,

association, and belief by rejecting the campaign pin offered by Mayor Estes. This element of the appellants' claim is established as a matter of law.

B. The jeopardy element is also met because Burke's conduct directly relates to the public policy because he was exercising his constitutional and statutory rights.

There is no reasonable dispute that the jeopardy element is satisfied. This element requires that a plaintiff show that "his or her conduct was ... (1) directly related to the public policy *or* (2) necessary for effective enforcement." *Rickman*, 184 Wn.2d at 311. Direct relation is established "where there is a direct relationship between the employee's conduct and the public policy" because "the employer's discharge of the employee for engaging in that conduct inherently implicates the public policy." *Rose*, 184 Wn.2d at 284. Here, there is no dispute that Burke's conduct directly related to the public policy because he was exercising his rights protected by the policy. The respondents did not raise this element in their summary judgment motion. See CP at 279-84 (raising only the first, third, and fourth elements). Accordingly, jeopardy is also present.

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C. Summary judgment is improper on the causation element of the appellants' claim because they presented evidence of a prima facie case, of pretext, and that retaliation was a substantial motivating factor in Burke's termination.

There are genuine issues of material fact regarding the causation element of the appellants' claim, precluding summary judgment. To satisfy this element, "the employee must produce evidence that the actions in furtherance of public policy were *a* cause of the firing, and the employee may do so by circumstantial evidence." *Rickman*, 184 Wn.2d at 314 (quoting *Wilmot v. Kaiser Aluminum & Chemical Corporation*, 118 Wn.2d 46, 821 P.2d 18 (1991)). Under this test, a court must determine "whether the employee's conduct in furthering a public policy was a substantial factor motivating the employer to discharge the employee." *Id.* This is a question of fact. *See e.g. Scrivener v. Clark Coll.*, 181 Wn.2d 439, 447-48, 334 P.3d 541 (2014); *See also Anthoine v. N. Cent. Crys. Consortium*, 605 F.3d 740, 750 (9th Cir. 2010) (stating, in reference to a comparable standard in a 42 U.S.C. §1983 claim, that the causation element of a First Amendment retaliation claims is "purely a question of fact."). "If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate." *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005).

In *Wilmot v. Kaiser Aluminum & Chemical Corporation*, the Court recited the *McDonnell-Douglas* burden-shifting scheme for evaluating a circumstantial public policy claim based on terminations for employees' exercise of their workers' compensation rights. 118 Wn.2d at 70. While this framework should not be used to set forth a format into which all cases must fit, it is a helpful tool in determining whether summary judgment is appropriate. See *Fulton v. State, Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 148, 152, 279 P.3d 500 (2012). Under this approach, the claimant must present evidence of a prima facie case. *Wilmot*, 118 Wn.2d at 69-70. If he does, the burden shifts to the employer to articulate a legitimate non-pretextual and non-retaliatory reason for the discharge. *Id.* If the employer meets this burden, the employee must produce evidence creating a genuine issue of material fact as to whether the employer's proffered reason is pretext or that, although the employer's stated reason is legitimate, retaliation was nevertheless a substantial motivating factor. See *Scrivener*, 181 Wn.2d at 441-42. Applying this framework to this case, summary judgment is improper because the appellants (1) established a prima facie case and (2) presented facts creating genuine issues of material fact regarding whether his protected activity was a substantial motivating factor in his termination.

(1) The appellants established a prima facie case of retaliation because Burke exercised his rights, mayor Estes knew of Burke's conduct, and Burke was terminated.

The Appellants presented evidence of a prima facie case of retaliation. “The requisite degree of proof necessary to establish a prima facie case ... is *minimal* and does not even need to rise to the level of a preponderance of the evidence.” *Fulton.*, 169 Wn. App. at 152. To meet this requirement, a claimant need only produce evidence that the actions in furtherance of public policy were a cause of the firing. *See Wilmot*, 118 Wn.2d at 70.

A prima facie case is established if the employee presents evidence that he exercised a right, the employer knew of the exercise of the right, and he was discharged. *See Id.* at 69 (stating that “[i]f the plaintiff meets this standard, a rebuttable presumption is created in favor of the employee which precludes the court from granting a motion for nonsuit or dismissal at the end of plaintiff's case.”); *See also Kahn v. Salerno*, 90 Wn. App. 110, 131, 951 P.2d 321 (1998) and *Graves v. Dep't of Game*, 76 Wn. App. 705, 712, 887 P.2d 424 (1994). Here, as discussed *supra*, Burke exercised his rights both in supporting the Mayor's opponent and in refusing to accept the Mayor's campaign button. CP at 781-82. While he offered

conflicting testimony regarding how he learned of it⁷, there is no dispute that Mayor Estes knew of Burke's conduct. CP at 439-40; 450 (166:10-16); 568. He confronted Burke about the campaign party and witnessed Burke's refusal to accept the campaign button. *See* CP at 782. And, Burke was terminated. CP at 140-41. Therefore, the appellants established a prima facie case.

(2) There are genuine issues of material fact regarding whether Burke's protected activity was a substantial factor in his termination.

The evidence presented by the appellants creates a genuine issue of material fact regarding whether Burke's termination was substantially motivated by retaliation. Summary judgment is improper if an employee can produce evidence that creates a genuine issue of material fact regarding (1) whether the employer's proffered reason was pretext or (2) retaliation was a substantial motivating factor even though the employer's articulated justification was legitimate. *See Scrivener*, 181 Wn.2d at 441-42, 448. Here, the appellants presented evidence that the employer's proffered justification was pretext and evidence that retaliation was a substantial motivating factor in Burke's termination.

⁷ In an unemployment hearing on January 23, 2014, he testified under oath that he thought he learned it through a "rumor between some of his supporters." CP 568. Over a year later on June 17, 2015, he testified that he learned of Burke's support for Streeter because there was a sign in Burke's yard, one of over 1,000 homes he visited while doorbelling. CP 439.

First, the respondents' proffered justification is pretext. An employee can establish pretext by presenting evidence that that employer's articulated reasons "(1) had no basis in fact, (2) were not really motivating factors for its decision, (3) were not temporally connected to the adverse employment decision, or (4) were not motivating factors in employment decisions for other employees in the same circumstances." *Scrivener*, 181 Wn.2d at 447. Here, the evidence shows that the employer's articulated reason for terminating Burke was not really a motivating factor. The City's articulated reason for terminating Burke was insubordination during the course of the internal paint investigation. CP at 30 (¶ 40), 140-41. However, the City terminated Burke in part for failing to appear for a hearing that was never scheduled and the City decided to terminate Burke without justification, before the internal investigation began. *Compare* CP at 122 and 127-28, 481 (58:3-4), 489.

Part of the City's articulated reason for terminating Burke had no basis in fact. Powell and Mayor Estes have each testified that Burke was terminated, in part, because he failed to attend a *Loudermill* hearing. *See* CP at 397:12-15, 564:21-23. Mayor Estes said that Burke's failure to appear at a *Loudermill* hearing on June 17, 2013 was the final act that prompted his termination, even though no such hearing was ever

scheduled and Burke was not directed to attend a *Loudermill* hearing. *Compare* CP at 122 and 127-28.

In addition, the evidence shows that Burke's insubordination was not really a motivating factor for his termination. *See* CP at 481 (58:3-4), 489. Summary judgment is improper where an employer offers conflicting or inaccurate reasons for terminating an employee. *Renz v. Spokane Eye Clinic, P.S.*, 114 Wn. App. 611, 623-24, 60 P.3d 106 (2002). Here, an email sent by Powell before the internal investigation was initiated reveals that Mayor Estes decided to terminate Burke without any justification, **before** any claim of insubordination arose. *See* CP at 481 (58:3-4), 489. On March 14, 2013, eight days before the internal investigation began, Powell sent an email stating that her and Mayor Estes's "objective is that [Burke] will no longer work here." CP at 481 (58:3-4), 489. The respondents failed to offer any legitimate justification for terminating Burke at that time, and their deposition testimony reveals that they lacked any such justification. *See* CP at 264-89, 850-60. Accordingly, the evidence establishes that the respondents' proffered justification was pretext.

Second, circumstantial evidence creates a genuine issue of material fact regarding retaliation was a substantial motivating factor in Burke's termination. There are several recognized approaches to establishing a

genuine issue of material fact on this issue circumstantially. The most common is through an inference based upon close proximity in time between the exercise of a right and adverse employment action. *See e.g. Wilmot*, 118 Wn.2d at 69. There is some authority to support the contention that a substantial gap, such as a gap of three years, between the exercise of a right and adverse employment action can undermine a claim of retaliation. *See e.g. Dennison v. Murray State Univ.*, 465 F. Supp. 2d 733, 748 (W.D. Ky. 2006); *Strouss v. Michigan Dep't of Corr.*, 250 F.3d 336, 344 (6th Cir. 2001).⁸ However, “courts should not engage in a mechanical inquiry into the amount of time between the speech and alleged retaliatory action”; instead, “whether an adverse employment action is intended to be retaliatory is a question of fact that must be decided in the light of the timing and the surrounding circumstances.” *Anthoine*, 605 F.3d at 751.

This analysis subsumes a factual issue; what constitutes adverse employment action is a question of fact. *Boyd v. State, Dep't of Soc. & Health Servs.*, 187 Wn. App. 1, 13-14, 349 P.3d 864 (2015). “An adverse employment action involves a change in employment that is more than an inconvenience or alteration of one's job responsibilities.” *Id.* at 13. Employment action is adverse if a “reasonable employee would have

⁸ These are the cases relied upon by the respondents in their motion for summary judgment. CP 281.

found the challenged action adverse” as viewed by a reasonable person from the employee’s perspective under the circumstances of the particular case. *Id.* A demotion constitutes adverse employment action. *Id.*

Here, Burke was a longtime employee with an exceptional employment record until shortly after the Mayor took office. *See* CP at 83, 781. Prior to the Mayor taking office, Burke was a 27-year Public Works Department employee. *See* CP at 781. He had a flawless employment record and received positive performance feedback. *See* CP at 781, 791-96. Notably, just two months before Burke was terminated in June of 2013, the City’s labor attorney wrote an email about how to discipline Burke, which stated that Burke “has a completely clean employment record and you offered him a promotion just a few years ago.” CP at 83.

Mayor Estes took office on January 1, 2012. Within a month or two, Burke was effectively demoted. CP at 478 (31:21-32:4), 783, 784, 801. The circumstances leading up to and the justification for Burke’s demotion are disputed. Compare at 430-36 (30-36) and 783.

Burke’s demotion was within approximately three months of Burke exercising his First Amendment rights by refusing to accept the Mayor’s campaign pin and within approximately seven months of the campaign party. *See* CP at 782. And perhaps more importantly, it occurred almost immediately after Mayor Estes was empowered with the authority

to retaliate against Burke. While this act alone is arguably sufficient to survive summary judgment, Burke was subjected to further adverse action.

Within five months of Mayor Estes taking office, Burke was denied a promotion. Compare CP 443 (91:22-92:5), 463 and 783. The denial of a promotion based on protected First Amendment conduct is unlawful. *See Rutan v. Republican Party of Illinois*, 497 U.S. at 79 (holding that “the rule of *Elrod* and *Branti* extends to promotion, transfer, recall, and hiring decisions based on party affiliation and support.”). The events related to the hiring of a public works director are disputed. Compare CP at 443 (93) and 783. Despite being qualified for the position and unanimously recommended by the interview committee, Burke was not offered the position. CP at 443 (92), 479 (34), 783. Instead, Howard, who applied late and performed so poorly in the interview that Mayor Estes was concerned about his ability to perform the job, was hired. CP at 456-61, 462, 433 (90:1-91:10).

The Mayor’s explanation for hiring Howard is a web of contradiction. He claims to have offered Burke a position, a claim that Burke disputes. Compare CP at 443 (93) and 783. However, he sent a letter at that time stating that Burke was not selected because he and Powell “both perceived serious negativity towards both she and I [*sic*] from the candidate that the board suggested...” during an interview with

Burke. CP at 463. Then, during his deposition, Mayor Estes testified that this meeting with Burke was “very pleasurable” and “pleasant.” CP at 444 (96:12-14). He also testified that Burke’s attitude, from the time he took office through this meeting, was good. CP at 445-46 (101:23-102:7, 105:6-13). This is further adverse action.

The hostile expulsion of Burke from his office and denial of access to email also arguably constitutes even further adverse employment action. “Depending on the circumstances, even minor acts of retaliation can infringe on an employee's First Amendment rights.” *Anthoine*, 605 F.3d 740, 750 (9th Cir. 2010). Here, Burke was ejected from his office in a hostile confrontation by Howard, who told Burke to “get the fuck out” CP at 784. More importantly, Burke was denied access to email for several months and his inability to access email was used with other falsehoods to create the misperception that he stole paint from the City. CP at 27, 40-41, 482 (62-63), 502-503 (52-55), 784.

In the fall of 2012, Burke was subjected to a hostile work environment investigation based on the allegation that Public Works Department employees had been unfriendly; Burke was disciplined for failing to notify Howard of an emergency water leak repair, even though Howard was present during the course of the repair; and Burke was not permitted to assume the Public Work Director’s duties when Howard was

absent, contrary to the City's practice in other departments. CP at 575-076 (42:17-20, 46:6-11), 784-85, 804, 806

Then the respondents contrived an allegation that Burke stole property from the City. See CP at CP at 505 (88), 509 (105), 510 (106), 511 (113), 512 (116), 512-13 (117-118), 514 (124-25), 516 (130-131), 524, 526, 527, 559. An opportunity to take action against Burke presented itself when the City was contacted by a vendor regarding an unpaid paint invoice that had been sent to Burke's email. See CP at 27, 40-41, 482 (62-63), 502-503 (52-55), 784. But during the time that the invoice was unpaid, Burke was unable to access his email, despite several requests for access. *Id.* Rather than contact Burke about the invoice directly, the City had Howard prepare an estimate regarding its paint usage. See CP at 514 (124-25). Based on this information, the City became concerned about missing paint, so Powell, Howard, and Mayor Estes met with the City of Montesano Police Chief. CP at 481-83, 770 (14:3-6). The Chief recommended that they speak with Burke. See CP at 484 (71:16-19), 770 (15:25-16:2). But they failed to follow this recommendation, without explanation. CP at 485 (74:9-24). Instead, they contacted the Hoquiam Police Department and provided it with false and conflicting information regarding the City's paint usage and needs, creating the impression that

paint was missing. CP at 484 (73). Despite these efforts, the Grays Harbor County Prosecutor's Office declined to charge Burke. CP at 815-16.

Perhaps believing that they had conjured upon a viable justification for terminating Burke, Powell expressed the goal she shared with the Mayor to terminate Burke. CP at 481 (58:3-4), 489. On March 14, 2013, she emailed an attorney representing the City, stating that the goal was to terminate Burke. *Id.* The respondents have not offered any legitimate basis for a decision to terminate Burke **prior to** the internal investigation.

Near the time the prosecutor declined to charge Burke, the City initiated an internal investigation. CP at 43-45. The investigator hired by the City was one that Powell attempted to convince that Burke had stolen property from the City, before the investigation had started. Compare CP at 43-45 and 490. Powell sent an email to the investigator on February 10, 2013, stating that "I have discovered a theft of property from our public works leader," apparently referring to Burke. *See* CP at 490. This was two days before Burke was notified that the City may initiate an internal investigation regarding the theft of paint. *See* CP at 40-41. Critically, Powell's deposition testimony revealed that she did not believe that Burke had stolen any paint at any point, on February 10, 2013 or at any time thereafter. CP at 477 (18). Therefore, Powell's contradiction appears to reveal an attempt to prejudice the investigator against Burke.

During the course of the investigation, the City threatened further unjustified discipline. On May 6, 2013, the Mayor threatened to discipline Burke for a failure to be available in person, when he was only required to be available by telephone. CP at 786 (¶18), 808, 810. The culmination of these issues, and others related to the manner of the investigation, furthered Burke's deep concern about retaliation. CP at 786 (¶18). These events form a chain of events spanning from the time Mayor Estes took office until Burke was terminated in June of 2013. This evidence presents several material issues of fact and supports a strong inference that retaliation was a substantial motivating factor in Burke's termination.

In addition, the Mayor's confrontation of Burke is sufficient to create a genuine issue regarding the causation element. Applying a comparable standard, federal courts have recognized that evidence of an employer's expressed opposition to the First Amendment conduct establishes the causation element of a retaliation claim. *Anthoine*, 605 F.3d at 750. For example, in *Schwartzman v. Valenzuela*, the court concluded that summary judgment was improper on a First Amendment retaliation claim where the employee was warned through a memorandum by the employer that he was not authorized to speak out regarding certain issues. 846 F.2d 1209, 1212 (9th Cir. 1988). The court concluded that this and other evidence, such as proximity in time, created an issue of fact

regarding the motivation element of the relation claim. *Id.* Subsequent cases, however, have recognized that an employer's expressed opposition alone creates an issue of fact precluding summary judgment. *See e.g. Anthoine*, 605 F.3d at 750 (listing expressed opposition with other ways to prove causation, disjunctively).

Here, the Mayor's expressed opposition to Burke's First Amendment activity precludes summary judgment on the causation issue. The Mayor expressed opposition to Burke during his December 2011 visit to the Public Works Department. CP at 566-67, 782. And in contrast to the memorandum in *Schwartzman*, the Mayor's opposition was aggressive and confrontational. *Id.* Another Public Works Employee who witnessed the confrontation described Mayor Estes as "grilling" Burke about the campaign party. CP at 566-67. This expressed opposition alone is sufficient to establish causation. Considering it in light of the other evidence presented by the appellants, summary judgment is improper on the causation element.

D. There was no overriding justification for Burke's termination.

The respondents have not offered an overriding justification for adverse actions against Burke. "This fourth element of a public policy tort acknowledges that some public policies, even if clearly mandated, are not strong enough to warrant interfering with employers' personnel

management.” *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 947, 913 P.2d 377 (1996). However, “[E]xpression on public issues has always rested on the highest rung of the hierarchy of First Amendment values.” *N. A. A. C. P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982). Political expression concerning candidates for office is core political expression. *Washington State Republican Party v. Washington State Pub. Disclosure Comm'n*, 141 Wn.2d 245, 258, 4 P.3d 808 (2000).

Here, the respondents have not and cannot offer any justification that surpasses Burke’s constitutional and statutory rights. *See* CP at 264-89. In their summary judgment motion, the respondents focus their argument on Burke’s failure to participate in the investigatory process and the probable cause found for the criminal investigation. *See* CP at 283-84.

However, this position lacks any policy justification that would override Burke’s constitutional rights and is belied by the facts. First, the finding of probable cause was obtained based upon the false representations made by Howard and Powell. *See* CP at 505 (88), 509 (105), 510 (106), 511 (113), 512 (116), 512-13 (117-118), 514 (124-25), 516 (130-131), 524, 526, 527, 559 (regarding false paint estimates); *See also* CP at 225 (an affidavit for a search warrant reflecting a false estimate). Second, the Mayor decided to terminate Burke before the

investigation began. CP at 481 (58:3-4), 489. And, finally, neither argument identifies an overriding policy justification that supersedes Burke's constitutional rights. The Fifth Amendment cases cited by the respondents in their summary judgment motion are inapplicable.⁹ See CP at 283-84. Burke did not refuse to participate in the investigatory interviews based on an assertion of his Fifth Amendment right against self-incrimination; he was terminated in retaliation for his right to freedom of expression, association, assembly, and belief. Therefore, there is no overriding justification for Burke's termination.

VI. CONCLUSION

Accordingly, the appellants respectfully request that the order granting summary judgment on their claims for termination in violation of public policy and for violation of the Washington State Constitution be reversed.

RESPECTFULLY SUBMITTED this 11th day of April, 2016.

DAVIES PEARSON, P.C.

/s/ Trevor D. Osborne

Trevor D. Osborne, WSBA No. 42249

Attorneys for the Appellants

⁹ See *Seattle Police Officers' Guild v. City of Seattle*, 80 Wn.2d 307, 316, 494 P.2d 485 (1972) (holding that the Fifth Amendment privilege against self-incrimination did not preclude a police department from disciplining employees who refused to answer questions specifically, directly, and narrowly tailored to the performance of their official duties.); See also *Atwell v. Lisle Park Dist.*, 286 F.3d 987, 991 (7th Cir. 2002) (holding that discharge of employee for failing to participate in investigation was not barred by the Fifth Amendment).

DAVIES PEARSON PC

April 11, 2016 - 4:09 PM

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NO. 48497-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Thurston County Superior Court Cause No. 14-2-01089-1

RUSSELL BURKE and JULIE BURKE, and the marital community
comprised thereof,

Plaintiffs/Appellants,

vs.

CITY OF MONTESANO, a municipal corporation; KEN ESTES, in his
capacity as Mayor of the City of Montesano and "JANE DOE" ESTES,
and the marital community comprised thereof; KRISTY POWELL, in her
capacity as City Administrator of the City of Montesano and "JOHN
DOE" POWELL, and the marital community comprised thereof; ROCKY
HOWARD, in his capacity as Public Works Director of the City of
Montesano and "JANE DOE" HOWARD, and the marital community
comprised thereof,

Defendants/Respondents.

AFFIDAVIT OF SERVICE

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DAVIES PEARSON, P.C.
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Tacoma, WA 98402
253-620-1500

STATE OF WASHINGTON)
)ss.
COUNTY OF PIERCE)

JODY M. WATERMAN, being first duly sworn upon oath,
deposes and says:

I am over the age of 18 years and competent to be a witness herein;
that on the 11th day of April, 2016, I served and filed a copy of the
following documents via Email and/or First Class Mail on the court and
persons whose names, addresses and email addresses are shown below:

NAME/ADDRESS:

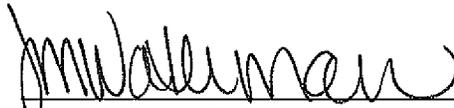
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DOCUMENTS:

1. Brief of Appellant
2. Affidavit of Service

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Court of Appeals, Division II
Via JIS Link



JODY M. WATERMAN

SIGNED AND SWORN to before me this 11th day of April, 2016,
by Jody M. Waterman.



Print Name: KATHY BATES
NOTARY PUBLIC in and for the State of
Washington.
My commission expires: 08/19/18



DAVIES PEARSON PC

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Transmittal Letter

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Case Name: Burke, Appellants/Plaintiffs v. City of Montesano, et al, Respondents/Defendants

Court of Appeals Case Number: 48497-8

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: _____

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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