

No. 304060

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

LAWRENCE CRONIN, VIRGINIA CRONIN, RICHARD HANSON,  
MICHAEL WALTERS, and DOUGLAS TURNER,

Appellants,

v.

SPOKANE POLICE DEPARTMENT AND CITY OF SPOKANE,

Respondents.

---

BRIEF OF RESPONDENTS

---

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## I. INTRODUCTION.

Petitioners, five individual citizens, sought a writ of mandamus in the Superior Court of Spokane County to compel the Respondents, City of Spokane and its Police Department, to enforce the criminal homicide laws against the medical practice of abortion at a "Planned Parenthood" office in Spokane, Washington. The Honorable Maryann Moreno, of Superior Court, granted Respondents' motion to dismiss the petition for writ of mandamus because Petitioners did not have standing and this was not a clear and cognizable claim. Petitioners now appeal the Superior Court order dismissing the petition for writ of mandamus to this Court.

## II. ISSUES.

- A. **To have standing to maintain a writ of mandamus, Petitioners must be "beneficially interested." A "beneficial interest" requires an interest beyond that shared in common with other citizens. Do Petitioners have an interest beyond that shared in common with other citizens?**
  
- B. **Does the Petition set forth a cognizable basis for the issuance of a writ of mandamus to compel the Spokane Police Department to generally enforce the criminal laws?**

### **III. STATEMENT OF THE CASE.**

In June and July of 2011, the Spokane Police Department received requests from Petitioners to enforce the criminal homicide laws against the medical practice of lawful abortion at Planned Parenthood. CP 4. Police officers with the Spokane Police Department informed Petitioners that abortion is a lawful act in Washington. CP 37, 39, 43. Because abortions at Planned Parenthood are lawful in Washington, the police officers explained to Petitioners that they could not enforce the criminal homicide laws as requested. CP 37, 39, 41, 43.

Petitioners filed a petition for writ of mandamus in the Superior Court of Spokane County on July 25, 2011, seeking to compel the Spokane Police Department to “enforce the homicide laws.” CP 3. Respondents, City of Spokane and the Spokane Police Department, moved the Superior Court for dismissal on September 30, 2011. CP 99. Respondents’ motion to dismiss the petition for writ of mandamus was granted on October 28, 2011. CP 158-59. Judge Moreno held that Petitioners lacked the requisite standing to bring a writ of mandamus and there was no basis under Washington law for the court to grant the writ. CP 159. On November 18, 2011, Petitioners filed a notice of appeal to this Court, seeking review. CP 160.

#### **IV. STANDARD OF REVIEW.**

Standing is a legal question which the court reviews de novo.

*Mack v. Armstrong*, 147 Wn. App. 522, 527, 195 P.3d 1027 (2008).

Whether there is a clear duty to act under the Washington mandamus statute is also a question of law which the court reviews de novo.

*Delaney v. Board of Spokane County Comm'rs*, 161 Wn.2d 249, 253,

164 P.3d 1290 (2007); *River Park Square, L.L.C. v. Miggins*, 143

Wn.2d 68, 76, 17 P.3d 1178 (2001). The standard of review for both

issues before this Court is de novo.

#### **V. ARGUMENT.**

- A. PETITIONERS CANNOT SEEK TO COMPEL THE SPOKANE POLICE DEPARTMENT TO ENFORCE THE HOMICIDE LAWS AT PLANNED PARENTHOOD THROUGH A WRIT OF MANDAMUS BECAUSE PETITIONERS DO NOT HAVE THE NECESSARY STANDING TO BRING THE CLAIM AND THE CLAIM IS NOT CLEAR AND COGNIZABLE.**

This Court should affirm the Superior Court ruling because Petitioners lack the requisite standing to bring a writ of mandamus, and even if Petitioners did have standing, a writ of mandamus cannot compel the Spokane Police Department to perform a discretionary act where the department has no clear duty to do so. It is well established in Washington law that “mandamus is an

extraordinary writ.” *Walker v. Munro*, 124 Wn.2d 402, 407, 879 P.2d 920 (1994); *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003), *review denied*, 151 Wn.2d 1027, 94 P.3d 959 (2004). A writ of mandamus will not issue unless each of three elements are satisfied:

(1) the party subject to the writ is under a clear duty to act, RCW 7.16.160; (2) the applicant has no “plain, speedy and adequate remedy in the ordinary course of law,” RCW 7.16.170; and (3) the applicant is “beneficially interested.” RCW 7.16.170.

*Eugster*, 118 Wn. App. at 402.

The third element, if satisfied, gives a petitioner the requisite standing to bring an action for writ of mandamus. *Retired Pub. Employees Council of Washington v. Charles*, 148 Wn.2d 602, 616, 62 P.3d 470 (2003); *see also Eugster*, 118 Wn. App. at 403. If standing is satisfied, a writ of mandamus may be appropriate “[w]here there is a specific, existing duty which a state officer has violated. . . .” *Walker*, 124 Wn.2d at 408. However, mandamus “may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.” *Id.* at 410.

Because Petitioners fail to meet the standing requirement and the Spokane Police Department does not have a clear duty to enforce the homicide laws against lawful abortion practitioners, this

Court should affirm the lower court's ruling dismissing the petition for a writ of mandamus.

- 1. Petitioners do not have standing to seek a writ of mandamus because they are not “beneficially interested” in the outcome of the action as the Washington mandamus statute requires.**

Petitioners are not “beneficially interested” parties as established in Washington and thus do not have the requisite standing for a writ of mandamus. A petitioner is “beneficially interested” within the mandamus statute “if he has an interest in the action beyond that shared in common with other citizens.” *Retired Pub. Employees Council of Washington*, 148 Wn.2d at 616; see also *Eugster*, 118 Wn. App. at 403. If a petitioner fails to demonstrate the requisite “beneficial interest” beyond that of the general public, he may not maintain an action for a writ of mandamus. See, *State ex rel. Lay v. Simpson*, 173 Wash. 512, 513, 23 P.2d 886 (1933); see also, *State ex rel. Pac. Am. Fisheries v. Darwin*, 81 Wash. 1, 11, 142 P. 441 (1914) (noting mandamus “can be invoked by a private party only where he is peculiarly and specially affected by the nonperformance of the duty. ... There must be some specific right of the applicant involved differing from that pertaining to the general public.”).

Here, the Superior Court was correct in finding, as a matter of law, that Petitioners were not “beneficially interested” parties. CP 159; RP 19, line 13 – RP 20, line 5. Petitioners have failed to demonstrate an interest in the action beyond that shared in common with other citizens. Rather, Petitioners argue that this Court should find proper standing because:

[w]e are as equal to and as aggrieved as any other citizens (sic) who report ongoing homicides, which homicides effect the safety and security of its citizens, and cause harm and hurt to the present and future life of the citizens and the community. . . . We claim the same benefits to ourselves and to the community as anyone else who is trying to stop homicides in our community.

See Appellants’ Opening Brief at 21-22. Petitioners *admit* that their interest is “equal to . . . any other citizen.” *Id.* at 21. In addition, Petitioners’ original Petition for Writ of Mandamus describes the “beneficial interest” by comparing Petitioners’ interest with “local society” and “[e]veryone.” CP 4. Petitioners have further argued that they have a “beneficial interest” because they are “citizens and taxpayers of Spokane City and County. . . . [w]e have a right to request that the homicide laws be enforced . . . as do all other citizens and individuals.” CP 55. Yet, they fail to demonstrate that their “beneficial interest” is beyond that shared in common with

local society and every other person in the community. Because the Petitioners do not have a “beneficial interest” as a matter of law, the action for a writ of mandamus cannot be maintained.

**2. Petitioners lack the requisite standing, as a matter of law, whether conceived fetuses are considered human beings or not because resolution of the legal standing issue does not require the Court to determine “who is a human being; who is a person.”**

The Petitioners want the Court to answer the following question: “who is a human being; who is a person.” CP 54; see *also*, Appellants’ Opening Brief at 1-3, 45. However, the question of fact “who is a human being; who is a person” does not need to be determined prior to determining standing as a matter of law because the “beneficial interest” required is not dependent on Petitioners’ “standing for” a person. As shown above, a “beneficial interest” is sufficient when a petitioner has an “interest in the action beyond that shared in common with other citizens.” *Retired Pub. Employees Council of Washington*, 148 Wn.2d at 616. This interest does not have to be on behalf of a person. See *e.g.*, *Retired Pub. Employees Council of Washington*, 148 Wn.2d at 620, 62 P.3d 470 (former employees had a “beneficial interest” in employer pension system); *Eugster*, 118 Wn. App. at 403 (determining “beneficial

interest” to be satisfied when one party had a rental interest and another party had an interest in securing a loan). Legal standing, within the mandamus statute, does not require this Court to first answer the question of fact: who is a human being. Therefore, Petitioners lack the “beneficial interest” necessary to bring an action for mandamus.

**3. Petitioners’ reliance on *O’Connor v. Matzdorff* is unfounded because the issue in that case involved the original jurisdiction of the court to grant a writ of mandamus, not whether the petitioner had standing to maintain the writ.**

Petitioners urge this Court to find standing, as a matter of law, because it “constitutes the highest ‘public import and urgency.’” See, Appellants’ Opening Brief at 25. In support, Petitioners rely on the Washington State Supreme Court decision in *O’Connor v. Matzdorff*, 76 Wn.2d 589, 458 P.2d 154 (1969). However, the issue before the State Supreme Court in *O’Connor* was whether the court had original jurisdiction, not whether the claimant had a “beneficial interest.” *Id.* at 592.

In *O’Connor*, a poor woman did not have the money to pay the filing fee for her complaint for replevin and motioned to proceed in forma pauperis. *O’Connor*, 76 Wn.2d at 590. The municipal court clerk refused to accept her complaint. *Id.* The woman then

petitioned the Washington State Supreme Court for a writ of mandamus compelling the municipal court to accept the complaint. *Id.* at 591. The Court did not discuss the issue of whether the woman was “beneficially interested,” but rather, whether the Court could hear the case based on original jurisdiction. *Id.* at 592. The Court held that it did have the original jurisdiction to hear the case, reasoning that “the question presented in this case is of such significant public import and urgency that we are justified in assuming original jurisdiction.” *Id.* at 593.

Petitioners argue that “this woman and her Counsel, Mr. Ehlert, were given standing not just for her, but because in legal reality, she and her Counsel were ‘standing’ for all similar individuals.” See, Appellants’ Opening Brief at 25. This was not the case. Although the Washington Supreme Court did not address the issue of the woman’s standing to bring the writ, arguably she had the standing because she had a “beneficial interest” in obtaining the money owed to her from her complaint for replevin. This interest would have been beyond any interest shared in common with other citizens. The issue of standing in *O’Connor* was not before the court and Petitioners’ reliance on it is neither on point or persuasive.

Because Petitioners have not shown an interest in the outcome beyond that shared with the general public, Petitioners have failed to satisfy an element necessary, as a matter of law, to bring an action for writ of mandamus. The lower court was correct in granting the City of Spokane and the Spokane Police Departments' motion to dismiss.

**B. PETITIONERS' CLAIM FOR WRIT OF MANDAMUS IS NOT CLEAR AND COGNIZABLE BECAUSE THE SPOKANE POLICE DEPARTMENT DOES NOT HAVE A CLEAR DUTY TO ENFORCE THE HOMICIDE LAWS AGAINST ABORTION PROVIDERS WHEN SUCH ABORTIONS ARE LAWFUL IN WASHINGTON AND MANDAMUS WILL NOT LIE TO COMPEL AN AGENCY TO GENERALLY ENFORCE THE LAWS.**

Even if the Petitioners had standing, a writ of mandamus is not the appropriate action here because the Spokane Police Department does not have a clear duty to act and cannot be compelled to generally enforce the laws. A writ of mandamus may be appropriate “[w]here there is a specific, existing duty which a state officer has violated. . . .” *Walker*, 124 Wn.2d at 408. However, mandamus “may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.” *Id.* at 410. Further, “[m]andamus will not lie to compel a general course of official conduct.” *State ex rel. Hawes v. Brewer*,

39 Wash. 65, 67-68, 80 P. 1001 (1905); *see also State ex rel.*

*Beardslee v. Landes*, 149 Wash. 570, 571, 271 P. 829 (1928).

**1. The Spokane Police Department is not under a clear duty to act because such abortions are lawful in Washington.**

Abortion is not homicide in Washington; thus, the Spokane Police Department is under no clear duty to enforce the homicide laws against Planned Parenthood. Abortions performed in accordance with Chap. RCW 9.02 are lawful. RCW 9.02.110 declares:

The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health. A physician may terminate and a health care provider may assist a physician in terminating a pregnancy as permitted by this section.

RCW 9.02.110. Unauthorized abortions are a class C felony in Washington. RCW 9.02.120. However, the Petition for Writ of Mandamus seeks investigation of all abortions provided at Planned Parenthood. CP 3. Contrary to the Petitioners' argument, the abortion laws in Washington provide the Spokane Police Department with a clear duty *not* to act and interfere.

Moreover, the police officers with whom Petitioners spoke indicated they were not able to provide any assistance because

abortions at Planned Parenthood were legal. See, CP 37, 39, 43. Because abortions performed at Planned Parenthood are lawful under RCW 9.02.110, the Spokane Police Department is not under a clear duty to act, as a matter of law, and thus, mandamus is not the appropriate remedy.

**2. The Spokane Police Department has discretion in its investigations and a writ of mandamus will not lie to compel a discretionary act or compel an official to generally enforce the laws.**

Petitioners' petition for writ of mandamus cannot be maintained because it compels the Spokane Police Department to generally enforce the laws. It is well established in Washington that "[m]andamus will not lie to compel a general course of official conduct, as it is impossible for a court to oversee the performance of such duties." *Brewer*, 39 Wash. at 67-68. Further, "[t]he office of mandamus is to compel an officer to perform a ministerial duty, and cannot be used for the purpose of compelling the performance of a duty which requires the exercise of discretion." *Id.* at 67.

In *Brewer*, it was illegal to operate saloons, cigar stands, gambling houses, prostitution houses, and other places where alcohol was sold, on Sundays in Everett, Washington. *Id.* at 66. The petitioners filed for a writ of mandamus compelling the sheriff

to enforce the laws against those in violation. *Id.* The court rejected the writ of mandamus and held that the petition “seeks to compel a general course of official conduct which the courts are not authorized to grant.” *Id.* at 67. The court reasoned:

There is no statement of any commission of crime by any particular person, and we are unable to conceive to what effect an action for contempt could be prosecuted in case there was a refusal on the part of defendants to obey the injunction of the court.

*Id.* at 68.

Similar to *Brewer*, here, Petitioners ask this court to compel the Spokane Police Department to generally enforce the criminal homicide laws against abortion providers at Planned Parenthood. However, Petitioners do not allege a commission of crime by any particular person; rather, they seek a general enforcement of the homicide laws. A writ of mandamus, though, cannot compel a general course of conduct. Moreover, unlike in *Brewer*, where there was an illegal act occurring, here, Petitioners ask the Court to enforce the homicide laws against a lawful practice.

Furthermore, when enforcing the laws, police officers are performing discretionary, not ministerial acts. The Washington State Supreme Court has clarified the distinction:

[W]here the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment, the act is ministerial; but where the act to be done involves the exercise of discretion or judgment, it is not to be deemed merely ministerial.”

*SEIU Healthcare 775NW v. Gregoire*, 168 Wn.2d 593, 599, 229 P.3d 774 (2010), (quoting, *State ex. rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926)). Police officers are consistently exercising discretion and judgment. In the particular case, there is no duty defined with precision indicating the Spokane Police Department must enforce the homicide laws against the lawful medical practice of abortion.

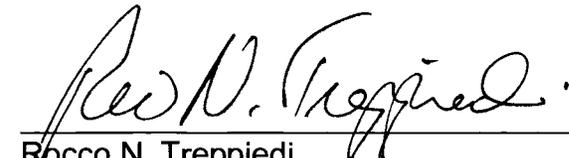
Because mandamus cannot compel the Spokane Police Department to generally enforce the laws and the department’s officers are performing discretionary acts, Petitioners’ petition for a writ cannot be maintained.

## **VI. CONCLUSION.**

The judgment of the Spokane County Superior Court should be affirmed because the Petitioners do not have standing; the Spokane Police Department does not have a clear duty to enforce the homicide laws against lawful abortion providers; and mandamus

will not lie to compel a general course of official conduct. Thus, as a matter of law, and Washington courts cannot issue a writ of mandamus in this action.

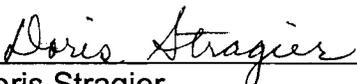
Respectfully submitted this 24<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Rocco N. Treppiedi  
Assistant City Attorney  
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DECLARATION OF SERVICE

I declare, under penalty of perjury, that on the 24<sup>th</sup> day of February, 2012, I caused a true and correct copy of the foregoing "Brief of Respondents," to be delivered to the parties below in the manner noted:

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