NO. 98058-6

IN THE SUPREME COURT FOR
THE STATE OF WASHINGTON

ELVIRA DAVISON

Appellant/Petitioner

vs.

KING COUNTY, KING COUNTY SHERIFF'S OFFICE,

Defendants, and

KING COUNTY DEPARTMENT OF PUBLIC DEFENSE, and
KING COUNTY ASSOCIATED COUNSEL FOR THE ACCUSED

Respondents

ANSWER TO PETITION FOR REVIEW

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COUNTER-STATEMENT OF THE CASE

In this case, Ms. Davison, a social worker employed by a law firm serving dependency clients, filed suit for wrongful termination, malicious prosecution and related claims after the firm terminated her for having secretly signed on to a minor dependency client's personal checking account, then transferring funds from the client's account to her own account. But, instead of suing her employer, she sued King County. King County contracted with Davison's firm to provide the legal services.

In the trial court, Davison presented no evidence that King County controlled any aspect of her employment, or played any role whatsoever in her employer's decision to fire her, which would make it liable for her employer's actions. Instead, she argued only that, as a matter of law under this Court's holding in *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), King County was responsible for her employer's torts.

The trial court dismissed her claims on their merits on summary judgment. The Court of Appeals decided that, regardless of the merits of her claims, *Dolan* did not establish a rule of law that government employers in general or King County in particular, are liable for the tortious actions of entities with whom they contract for public defense services, and did not give Davison the right to sue King County for her employer's employment-related torts.

Davison asks this Court to review that decision. She asks the

Court to hold that *Dolan* established a rule of law that government employers are liable for all wrong-doing by entities with whom they contract for public defense services, including their employment related torts. Because neither the *Dolan* decision nor reason, common sense or public policy support her argument, King County asks the Court to reject her petition.

ARGUMENT

1. The *Dolan* decision does not extend to tort liability.

Ms. Davison's primary argument is that this Court's decision in *Dolan v. King County* makes King County responsible for her employer's employment-related torts. In a related argument she contends the Court of Appeals was bound to apply *Dolan* as she interprets it and as a general rule of law.

Dolan does not stand for the broad proposition Davison contends it does. The issue stated in *Dolan* was a narrow one: "Thus, the question before this court is the eligibility of the class for enrollment in PERS." *Dolan v. King County*, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). Accordingly, the Court stated an equally narrow holding: "Applying the pertinent statutes and common law principles, we hold that the employees of the defender entities are 'employees' under RCW 41.40.010(12) and are entitled to be enrolled in the PERS." *Id*. at 320. As the Court's statements imply, *Dolan* was not a civil tort case; it was a "status" case. It

decided whether a group of individuals were entitled to the same status, and given equivalent benefits as acknowledged county employees. *Dolan* had nothing to do with civil tort liability for wrongdoing or misconduct.

Consistent with that, the authorities the *Dolan* Court relied upon addressed the PERS and other retirement systems and the propriety of granting PERS benefits in various circumstances. The authorities did not address vicarious civil tort liability for damages caused by the allegedly wrongful conduct of one of the defender agencies.

Dolan's narrow focus was not accidental. Washington courts have recognized that whether an individual should be treated as an employee depends on the specific context of the question. In *Fisher v. City of Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963), this Court said explicitly, "under the same set of facts, an employer-employee relation may or may not exist depending upon the purpose for which the determination is desired." 62 Wn.2d at 805.

The *Fisher* decision illustrates the point. Like *Dolan*, *Fisher* is an employment status case. It was addressing the relationship between employer and employee for purposes of worker's compensation law, not employer and third party. The issue in *Fisher* was whether a worker employed by one company was an employee of another company that controlled his employer's work. The other company argued that the common law test for vicarious liability was the test of the employment

relationship, and under that test the worker was its employee because the company exerted "complete dominion and control" over the work of the claimant's employer. 63 Wn.2d at 803. The Court rejected the company's argument, noting that the test for vicarious liability and the test for employment status involved different considerations: "The basic purpose for which the rules of vicarious liability were used at common law is different from the purpose of the rules used in compensation law." 62 Wn.2d at 803-04. The Court then discussed the distinction in detail:

> '* * * The reason for the difference between the two concepts is readily explained by the difference between the nature of the two liabilities involved. The end product of a vicarious liability case is not an adjustment of rights between employer and employee on the strength of their mutual arrangement, but a unilateral liability of the master to a stranger. The sole concern of the vicarious liability rule, then, is with the master: did he accept and control the service that led to the stranger's injury? If he did, it is of no particular importance between him and the stranger whether the servant enjoyed any reciprocal or contractual rights vis-a-vis the master. Accordingly, the Restatement of Agency says plainly that the master must consent to the service, but nowhere requires that the servant consent to serve the master of even know who he is.
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> 'Compensation law, however, is a mutual arrangement between the employer and employee under which both give up and gain certain things. Since the rights to be adjusted are reciprocal rights between employer and employee, it is not only logical but mandatory to resort to the agreement between them to discover their relationship. To thrust upon a worker an employee status to which he has never consented would not ordinarily harm him in a vicarious liability suit by a stranger against his employer, but it might well deprive him of valuable rights under the compensation act, notably the right to sue his own employer for common law damages.'

63 Wn.2d at 804-05, quoting 1 Larson, *Workmen's Compensation Law* § 47.10 (1952). Applying this reasoning, the Court said, "a workman might be deemed an 'employee' for the purpose of the vicarious liability of a master to a third party while, under the same facts, he may not be an 'employee' for purposes of workmen's compensation issues." *Id.* at 806.

This reasoning is equally applicable to *Dolan*: A worker may be deemed an employee for purposes of PERS benefits, but not for purposes of tort liability. Indeed, the *Dolan* Court implicitly recognized this fact in two distinct ways. The first occurred when the Court decided that cases addressing vicarious liability for employment discrimination were "not comparable" for purposes of addressing King County's responsibility for PERS benefits. 172 Wn.2d at 321. The second occurred when the Court observed that the "traditional test of control" – the test applicable to vicarious liability, which focuses on control over the employee's day-to-day activities – was not workable in the context of the issue *Dolan* raised. 172 Wn.2d at 318, n.5.

Dolan does not stand for the proposition Davison claims it stands for, and therefore does not support her claim. The *Dolan* Court held "that the employees of the defender entities are 'employees' under RCW 41.40.010(12) and are entitled to be enrolled in the PERS." 172 Wn.2d at 302. It did not hold that King County was liable for the tortious acts of the entities or their employees. In the absence of that latter holding, the

Court of Appeals did not err in its interpretation of the *Dolan* decision.

2. The Court should not extend *Dolan* to tort liability.

Nor should *Dolan* be extended to tort liability. The question presented in *Dolan* was whether the amount of control King County exerted over the defender firms was sufficient to justify imposing on the County the obligation to provide some of the same employment benefits it provided to its acknowledged employees. But, as the *Fisher* Court noted, the question for vicarious liability is whether the entity accepted and controlled the service, i.e., the day-to-day activities, that led to the claimant's injury. 62 Wn.2d at 804. That is the question this case presents. Because the question addressed in *Dolan* is different than the question presented here, *Dolan* should not be applied here without reasoned analysis and factual support.

Davison has provided neither. She has presented no good reason for extending *Dolan* to tort liability. And, because the circumstances of the two cases are so different, good reasons favor <u>not</u> extending *Dolan*. In *Dolan*, the PERS benefits at issue could only be provided by and through the County. Thus, if under the PERS statutes the benefits were deserved, only the County could provide them. There was a compelling need to hold that the type and amount of control needed to support that financial burden was itself largely financially-based and very broad. In contrast, vicarious tort liability is based on day-to-day control over the employee's

actions. That control is generally held by the direct employer. The direct employer controls the actions that lead to tort liability, as wells how it will protect against that risk by such actions as training and the purchase of insurance. Those are different from the circumstances and considerations that factored into *Dolan.* The circumstances and considerations that factored into *Dolan* are not present here, and do not translate to imposing tort liability.

Importantly, Davison made no factual showing that the circumstances of her employment justified imposing tort liability on King County. Davison presented literally no evidence of King County's control over her or her employer. She admitted that to the trial court. (RP 56) In contrast, King County submitted direct evidence that Davison's employer acted independently of the County when it hired Davison, investigated her actions, terminated her, and defended itself in the various proceedings Davison initiated afterwards.[1] (E.g., CP 422-23) It controlled the risk of those activities by controlling the actions themselves. In addition, Davison's employer also controlled the financial risks of its activities through insurance.

Unlike the circumstances in *Dolan* where only the County could

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[1] In addition to this lawsuit, Davison sought unemployment benefits from the Department of Labor and Industries, and she filed claims with the federal Equal Employment Opportunity Commission and the National Labor Relations Board. All of them failed. (CP 422-23, 426-33, 485, 491)

provide the benefit that would protect the workers, here the undisputed evidence showed that Davison's direct employer was in the best position to protect from liability. Thus, even if *Dolan* supported the legal proposition that King County could be liable for the torts of Davison's employer, Davison presented no factual support, let alone evidence of the type presented in *Dolan*, that the County should be liable for her employer's torts.

3. Davison's procedural objections are unfounded.

Davison's contention regarding the Court of Appeals' reliance on *White v. NDA*, No. 94-2-09128-0 (King County Super. Ct., Wash. Dec. 2, 1994), a trial court decision discussed in *Dolan*, is incorrect. The Court of Appeals did not elevate *White* to a rule of law as Davison contends. See Petition for Review at 9. The Court of Appeals did not even mention *White* in its analysis.

Nor does the Court's agreement with Division Two's analysis in *LaRose v. King County*, 8 Wn. App.2d 90, 128-30, 437 P.3d 701 (2019), imply such a result. *LaRose* merely recognized what the *Dolan* Court said about the *White* case: That the issues involved in *White* were not comparable to the issues involved in *Dolan*. 8 Wn. App at 129. Dicta or not, Davison has not shown why the observation is either inaccurate or should not apply here.

Her argument that the Court of Appeals applied "horizontal *stare*

decisis" is also incorrect. Horizontal *stare decisis* occurs where one court of appeals professes to be bound by the prior decision of another court of appeals. *In re Personal Restraint of Arnold*, 190 Wn.2d 136, ¶2, 410 P.3d 1133 (2018). Nowhere in its decision did the Court in this case say or even imply that it was bound to follow the decision in *LaRose*. The Court simply considered the *LaRose* Court's analysis and found it persuasive enough to follow, stating "We agree with the *LaRose* court . . .." Slip Opinion at 6. That is precisely the type of "robust, adversarial development of the law that is the gem of our current approach." *In re Personal Restraint of Arnold*, 190 Wn.2d at ¶2.

Likewise Davison's contention that only the Supreme Court can limit its decisions to its facts also is incorrect. While it is true that the Courts of Appeals "must follow decisions handed down by higher courts in the same jurisdiction," *Presbytery of Seattle v. Schulz*, ___ Wn. App. ___, ¶20, 449 P.3d 1077 (2019), analyzing the scope of a holding of the Supreme Court is a central, critical, part of the Court of Appeals' function that does not violate that rule. Indeed, RAP 13.4(b) recognizes that decisions of the Court of Appeals may conflict with decisions of the Supreme Court. Accordingly, appellate courts have interpreted Supreme Court decisions as being limited to their facts on many occasions. See, e.g., *Anaya Gomez v. Sauerwein*, 172 Wn. App. 370, 385, 289 P.3d 755 (2012), aff'd, 180 Wn.2d 610, 331 P.3d 19 (2014) (concluding that *Gates*

v. Jensen, 92 Wn.2d 246, 595 P.2d 919 (1979), had been overruled or limited to its facts); *Matter of Taylor's Estate*, 32 Wn. App. 199, 202 at n.3, 646 P.2d 776 (1982)(concluding that *Reeves v. School Dist. 59*, 24 Wash. 282, 64 P. 752 (1901), should be limited to its facts); *Marquam v. Ellis*, 27 Wn. App. 913, 915, 621 P.2d 190 (1980)(concluding that *Mallicott v. Nelson*, 48 Wn.2d 273, 293 P.2d 404 (1956), should be limited to its facts). The question is not whether the Court of Appeals is able to recognize that a decision of the Supreme Court is limited in scope but whether the court is correct in its decision.

CONCLUSION

Davison seeks reversal not based on evidence presented in her case, but on a strained and unfounded over-extension of the holding in *Dolan*. Davison fails to explain why the issues of employment status for purposes of PERS should control the issue of vicarious liability for employment related torts. She simply says it should because *Dolan* says so. But *Dolan* does not say so, and hyperbole cannot change that fact.

The Court of Appeals neither ignored nor misapplied *Dolan*. It examined the *Dolan* Court's decision and determined whether its reasoning controlled or even applied to Davison's claims. It did what it should have done. Since it did so correctly, and since there is no evidence to support imposing liability on King County under the facts of this case, review is inappropriate.

Dated this 4th day of March, 2020.

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