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STATE OF WASHINGTON
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SUPREME COURT
OF THE STATE OF WASHINGTON

ABUBACARR WAGGEH, Petitioner, v. THE STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and MIKE OBENLAND, and DANIEL W. WHITE, SUPERINTENDENT OF SPECIAL OFFENDER UNIT/INTENSIVE MANAGEMENT UNIT, Respondents.	No. 99333-5 PETITIONER'S REPLY IN SUPPORT OF MOTION TO STRIKE RESPONDENTS' ANSWER TO PETITION FOR REVIEW

I. INTRODUCTION

Respondent Department of Corrections ("DOC") now admits that it used 24-point line spacing. With that extra room, DOC could present its arguments in more detail than petitioner Abubacarr Waggeh could. That prejudicial advantage should not stand without a remedy for Waggeh.

DOC's advantage resulted from DOC breaking the rules, and nothing in its response proves otherwise. Against the weight of authority presented in Waggeh's motion, DOC offers only its own say-so and two non-binding rules. But DOC's law firm — the Attorney General's Office — has properly formatted its filings here before. And the non-binding rules that DOC cites do not say that 24-point spacing equates with double

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spacing. This Court should grant Waggeh's motion.

II. REPLY ARGUMENT

A. DOC's Extra Space Created an Unfair Advantage for DOC

DOC's formatting harmed petitioner. But DOC insists that its trick did not prejudice Waggeh. Resp'ts' Ans. at 2–3. That is wrong. As DOC does not deny, DOC's loose interpretation of RAP 10.4(a)(2) resulted in DOC having two-and-a-half more pages to develop its legal arguments. (3/5/21 Decl. of Manca ¶ 2.)

If Waggeh had as much space, Waggeh's petition could have shown in more detail that the Court of Appeals decision is a serious setback for the Washington Law Against Discrimination ("WLAD"), RCW 49.60. As Waggeh's petition pointed out, Division I's resurrection of a "good faith" defense for employers makes discrimination harder to prove. (Pet. at 13–14.) And "it leaves victims without a remedy for discrimination and retaliation at the hands of direct supervisors, co-workers, and, in the case of Black DOC officers, white inmates." (*Id.* at 14–15.) Two-and-a-half extra pages would have allowed Waggeh to further explain this conflict between Division I's decision and WLAD's essential purposes. And Waggeh could have marshalled more precedent for his argument that WLAD should hold employers liable if they negligently permit themselves to become tools of discrimination, contrary to Division I's "good faith" rule. (Pet. at 14–15.)

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But instead, cases like *Vasquez v. Empress Ambulance Serv., Inc.*, 835 F.3d 267 (2d Cir. 2016) were on the cutting room floor. In *Vasquez*, the Second Circuit concluded that an employer's good-faith belief in a lower-level employee's false — and racially motivated — accusation against the plaintiff does not itself defeat a disparate-treatment claim under Title VII, the federal analogue to WLAD. Rather, as Waggeh argues here, the court held that an employer "adopts an employee's unlawful animus by acting *negligently* with respect to the information provided." *Vasquez*, 835 F.3d at 275. In this way, a lower-level employee's unlawful motivation will be "imputed to the employer." *Id.*; *see also*, *Naumovski v. Norris*, 934 F.3d 200, 220 (2d Cir. 2019) (stating this same rule would extend to false rumors that had been circulated in the workplace by non-employees). And this imputed motive will "support a claim under Title VII." *Vasquez*, 835 F.3d at 275. In reaching this decision, the Second Circuit did not limit the plaintiff to a hostile-work-environment claim, as DOC would have this Court do. No, the Second Circuit drew on hostile-work-environment cases' reasoning about imputed agency when an employer acts negligently. *Id.* at 273–74. Here, Waggeh should be granted two-and-a-half pages to develop arguments like this one, as he requested in his motion to strike.

The extra space might seem trivial to DOC and its attorneys, who are frequent participants in this state's courts. But this case is the only shot

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for Waggeh. It is his only chance to finally achieve justice for the race-based maltreatment he endured while employed at the Monroe Correctional Complex. He should receive an equal opportunity to make his case.

B. DOC Fails to Counter the Weight of Authority Holding that Double Spacing and 24-Point Spacing Is Not the Same Under Modern Court Rules

DOC's response does not explain why the federal district court orders cited in Waggeh's motion are unpersuasive authorities. *See* Resp'ts' Ans. at 1–3. Rather, DOC cites the federal appellate rules of procedure, a Thurston County rule, and a declaration from a DOC attorney who has practiced in Washington for no more than two years. *Id.* Those citations do not help DOC's position.

DOC cites FRAP 27(d)(1)(D). But that rule applies to motions, not briefs. Briefs filed in the U.S. Court of Appeals must comply with FRAP 32, not FRAP 27. By citing FRAP 27, DOC only underscores its loose approach to courts' formatting rules — rules meant to level the playing field and to standardize the filings that judges, commissioners, and law clerks are tasked with reading.

In any event, DOC is wrong that "briefs are routinely submitted to [the Ninth Circuit] with 24 point spacing." DOC Ans. at 2. Both FRAP 27(d)(1)(D) and FRAP 32(a)(4) require parties' filings to use "double-spaced" text. The rules say nothing about 24-point spacing. Not only are the

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rules silent on DOC's central claim, but also what they do say undermines DOC's argument. Both rules require 14-point font size, not 12-point size. *See* FRAP 27(d)(1)(E); FRAP 32(a)(5). So, mathematically, DOC's construction of the federal rules as allowing 24-point spacing makes no sense. DOC also overlooks a crucial distinction between the federal rules and Washington's rules: the federal rules use word limits, rather than page limits. *Compare* FRAP 27(d)(2) *and* FRAP 32(a)(7)(B), *with* RAP 10.4(b) *and* RAP 13.4(f). This difference matters. In the U.S. Court of Appeals, a party's formatting tricks will not gain any advantage. But in Washington appellate courts, smaller line spaces or other tinkering (margins, font size, etc.) will result in more briefing space for the offending party.

Thurston County's local rules do not support DOC's position either. That county's Local Rule 10 says merely that "[t]he text of any brief must appear double spaced." LCR 10(d)(3). That rule does not condone 24-point spacing, unlike the local rules of the U.S. District Court for the Western District of Washington. *See* W.D. Wash. LCR 10(e)(1) (requiring legal memoranda to "be double spaced *or* exactly 24 points" (emphasis added)). Besides this lack of support in the Thurston County local rules' text, DOC locates no support in the record. DOC claims that "briefs to that court are routinely submitted with 24 point spacing." DOC Ans. at 2. But DOC offers no evidence supporting that bald claim.

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The evidence that is available contradicts DOC's claim about the practices of the Attorney General's Office. In another case pending before this Court, the AGO submitted an answer to a petition for review. The AGO formatted the answer with 21 lines per full page. (Ex. E.) The same was true for an AGO-authored petition in another case — 21 lines per full page. (Ex. F.) That spacing is identical to the spacing that Waggeh used here, confirming that the AGO can and does use Microsoft Word's double-spacing tool for important filings in this Court. The AGO's practices are, at the very least, inconsistent — a fact that confirms the need for clarity about RAP 10.4(a)(2)'s meaning.

In conclusion, the motion to strike should be granted. At the least, the Court should issue a ruling that expressly states whether 24-point spacing complies with RAP 10.4(a)(2) so that the rules are fair for everyone until the Court's new word-limit rules take effect. But a better remedy would be to strike DOC's answer or to allow Waggeh to file a 2.5-page rebuttal.

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DATED this 29th day of March, 2021.

Respectfully submitted,

/s/ Gary W. Manca
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Attorneys for Petitioner

I, Gary W. Manca, declare as follows:

1. I am over the age of 18, competent to be a witness, and personally knowledgeable about the facts in this declaration. I am the primary appellate attorney representing petitioner Abubacarr Waggeh here.

2. Attached as Exhibit E is a copy of a page from the answer prepared and filed by the Attorney General's Office on behalf of a state agency in a case pending in this Court, *Keely v. State*, Case No. 98940-1.

3. Attached as Exhibit F is a copy of a page from the petition prepared and filed by the Attorney General's Office on behalf of a state agency in a prior case in this Court, *H.B.H. v. State*, Case No. 94529-2.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed in Seattle, Washington, this 29th day of March 2021.

/s/ Gary W. Manca
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EXHIBIT E

case-specific, unpublished ruling on factual causation, means no such thing. Nonetheless, in support, Keely argues three concepts inapposite to the decision's rationale: foreseeability, superseding cause, and field of danger. Pet. at 16-20. All three are red herrings. Foreseeability goes to scope of duty, which the decision below assumed and did not decide. Superseding cause was likewise not at issue in the decision, which simply determined that the evidence presented was insufficient to establish cause in fact. As for field of danger, it goes to the analysis of legal causation, not factual causation. Discretionary review should be denied.

Keely first raises foreseeability, contending that the decision, which the Court of Appeals explicitly restricted to cause in fact, "limits [DSHS's] duty too because the 'pertinent inquiry' – foreseeability – is the same." Pet. at 17. This erroneously conflates the scope of a legal duty that is limited by foreseeability (the RCW 26.44.050 negligent investigation duty) with the separate element of cause-in-fact. *See Hansen v. Friend*, 118 Wn.2d 476, 483, 824 P.2d 483 (1992) (foreseeability limits the scope of a duty, it does not independently create a duty). Because the Court of Appeals did not reach the duty issue, Keely, 2020 WL 6888987, at **4, 5, 6, foreseeability is inapposite.

Keely then claims the unpublished opinion creates a "rupture in the law of causation" by "sever[ing] causation analysis from the strict rules for

EXHIBIT F

failure to take appropriate protective action during the period before adoption." The court substituted "we reverse the trial court's CR 50 ruling and remand for trial." App. B. at 2. It made no substantive changes to its analysis of a new duty to investigate and conclusion that there was some evidence that might support a breach.

V. THE PETITION FOR REVIEW SHOULD BE GRANTED

This case is the first time a Washington court has gone outside the extensive statutory and regulatory framework through which the Legislature created DSHS and defined its responsibilities to the state's foster children to impose a common law tort duty to investigate. The court of appeals found this duty where there is no private sector analog conduct, contrary to the state's waiver of sovereign immunity. It found the duty by misapplying the Restatement (Second) of Torts § 315(b), because a social worker's relationship with a foster child falls outside the special relation duty contemplated by the restatement and case law. Finally, it remanded based on evidence that a trial court, after six weeks of trial, properly found it could not reasonably support a jury finding of negligence. Thus, there are three separate reasons to reverse the court of appeals. These issues meet this Court's criteria for review under RAP 13.4(b). The newly declared duty conflicts with case law of this Court and the courts of appeal, and the case raises questions of significant public interest because the newly declared

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petitioner's Reply In Support of Motion to Strike Respondent's Answer to Petition for Review*** in Supreme Court Cause No. 99333-5 to the following parties:

Andrew Biggs, WSBA #11746
Assistant Attorney General
Attorney General of Washington
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Original electronically filed with:
Supreme Court Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: March 29, 2021 at Seattle, Washington.

/s/ Frankie Wylde
Frankie Wylde, Legal Assistant
Talmadge/Fitzpatrick

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March 29, 2021 - 12:04 PM

Transmittal Information

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Comments:

Petitioners Reply In Support of Motion to Strike Respondents Answer to Petition for Review

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