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FILED
COURT OF APPEALS

06 MAY 31 PM 3:53

STATE OF WASHINGTON
BY CMM

No. 33848-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANNA LYNN, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF DORI CORDOVA AND AS GUARDIAN AD LITEM FOR TROY PHILLIPS,

Appellants

v.

LABOR READY, INC., a for-profit Washington corporation,

Respondent.

APPELLANTS' REPLY AND RESPONSE ON CROSS APPEAL

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TABLE OF CONTENTS

I. SUMMARY OF REPLY 1

II. REPLY ON FACTS 2

A. Labor Ready Misrepresents Dori Cordova's Relationship to the YWCA - She was a YWCA Client at all Relevant Times as Shown by Appellants' Competent Evidence. 3

B. Labor Ready Misrepresents That Owens Was No Longer An Employee Of Labor Ready at the Time of Dori's Murder- Owens Was a Labor Ready Employee. 4

C. Even the Trial Court Determined that There Were Issues of Fact after Excluding Hearsay. 6

D. Respondent's Cross Appeal is Brought out of Vindictiveness, Bad Faith and Respondent Has UNCLEAN Hands. 8

E. The Respondent Played Games With The Civil Rules Throughout This Litigation, But It Now Seeks To Be Rewarded For Doing So. 9

F. The Appellants Did Not Have An Obligation To Provide Work Product Privileged Declarations Prior to Any Discovery Request and Prior To The Summary Judgment Response. 11

G. Unclean Hands: The Respondent Ignored Appellants' Specific Request for Declarations for Six Months and Only Produced it's Declarations with a Threatening Letter on the Eve of Moving for Summary Judgment. 13

H. The Court Ruled that Appellants Did Not Violate CR 11 or Were Sanctionable for Alleged Misrepresentations. 17

I. The Respondent Spends the Remainder and Vast Majority of Their Briefing (And attached Appendices) Arguing Issues of Fact and Requesting the Court to Accept Their Versions of the Facts. 18

III. RESPONSE TO LEGAL ARGUMENT 21

1. THE TRIAL COURT FOUND A LEGAL DUTY AND RESPONDENT DID NOT ASSIGN ERROR TO THIS FINDING. 21

2. RESPONDENT'S RELIANCE ON THE TIMING AND LOCATION OF DORI DEATH IS MISPLACE AND COMPLETELY MISSES THE POINT. 23

3. WASHINGTON SUPREME COURT HOLDS: "BREACH OF DUTY ACTIONABLE EVEN THOUGH THE APPELLANTS' INJURY OCCURRED AFTER THE DUTY ENDED." 26

4. RESPONDENT'S ARGUMENTS ON THE 'TASKS, PREMISES, OR INSTRUMENTALITIES' ARE NONSENSICAL AND IN DIRECT OPPOSITION TO APPELLANTS UNCONTESTED EXPERT ON THAT ISSUE. 27

5. IN THE CONFINES OF THIS CASE LEGAL CAUSATION SHOULD HAVE FOLLOWED THE TRIAL COURT'S FINDING OF DUTY. 30

6. PROXIMATE CAUSATION SHOULD NOT BE DECIDED BY THE TRIAL JUDGE. 32

IV. CONCLUSION 34

TABLE OF AUTHORITIES

Washington Cases

Taggart v. State, 118 Wn.2d 195, 822 P.2d 243 (1992)

.....1, 23, 30, 31

Niece v. Elmview Group Home, 131 Wn.2d 39, 929 P.2d 420 (1997)

.....21, 22, 24, 31

La Lone v. Smith, 39 Wn.2d 167, 171, 234 P.2d 893 (1951)

.....22, 24, 30

Schooley v. Pinch's Deli Market, Inc., 134 Wn.2d 468, 951 P.2d 749

(1998).....1, *32*

Couch v. Wa. Dept. of Corrections, 113 Wn.App.556, 573, 54P.3d 197 (2002) (rev. denied, 149 Wn.2d 1012, 69 P.3d 874 (2003).....26, 31
34.

Kim v. Budget Rent A Car Ststems, Inc., 143 Wn.2d 190, 204, 15, P.3d 1283 (2001).....23

Barger v. Burlington Nothern R.R. Co., 138 Wn.2d 815, 823, 982. P.2d 1149 (1999).....32

Miscellaneous Secondary Sources

Restatement (First) of Agency § 213.....22.

Civil Rule 33.....12

I. SUMMARY OF REPLY

The Respondent's response states that the dispositive matters in this case are duty, legal causation and proximate causation. BR 3. The trial court determined "I do think there is a duty," consistent with Washington law (RP 26) and the Respondent did not assign error to this determination. Next, the Washington Supreme Court has continually held that the "question of legal causation is so intertwined with the question of duty that the former [legal causation] can be answered by addressing the latter [duty]." *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998); *Taggart v. State,* 118 Wn.2d 195, 822 P.2d 243 (1992). Because the trial court determined that Washington law supports a legal duty in this case, legal causation is also established. Lastly, Washington Supreme Court law holds that proximate causation is an absolute jury determination, not a judicial determination. Id. In this case the judge erroneously held "I do not think that there is . . . proximate cause in this case." RP 26. Simply stated: (1) there is a duty under Washington law, (2) there is legal causation, and (3) a jury (not the trial judge) should decide proximate cause. Had Labor Ready used reasonable care, the evidence favorable to Appellants show that this gruesome murder was preventable.

The trial court also determined that even considering the Respondent's numerous hearsay objections and motion to strike all hearsay at the summary judgment hearing, there still remained significant issues of fact that would prevent summary judgment on factual issues. CP 1409. These Appellants have a constitutional right to a jury trial on whether and how much Labor Ready should compensate them for injuries caused by its negligence in placing this Level 3 sex offender in a position that provided access to vulnerable women. Notwithstanding Labor Ready's fear-mongering about "creating new law," this Court cannot doubt that a jury will reasonably follow the law and reach a just conclusion. The Court should reverse and remand for trial.

II. REPLY ON FACTS

Labor Ready's statement of the case is remarkably one-sided, unfair and argumentative. *But see* RAP 10.3(a)(4) & (b). Every fact stated by Labor Ready was and is specifically contested by Appellants' competent "non-hearsay" evidence. RP 3, CP 1409. Labor Ready makes repeated leaps in their factual argument that are not supported in the record. For instance, Labor Ready repeatedly states that Dori met sex offender Owens at the Jensonia relying exclusively on the fact that Dori and Owens lived in the same building and on three highly contested declarations. BR 9-10. Respondent's "star" witness Roman Antioquia

was the legal owner of the gun used to murder Dori and he personally showed the gun off to the murderer. CP 669. Even the trial court agreed that Appellants produced competent, non hearsay, evidence demonstrating material factual issues that Dori met Owens at the YWCA while he was employed there. CP 1409. Respondent Labor Ready's "factual" recitation is not a fair or accurate statement; much less a statement of the facts taken in light most favorable to the nonmovants.

Labor Ready's statement is also argumentative, (repeatedly asserting as facts its legal arguments,) stating as factual assertions that Owens "did not use the task, instrumentalities, or premises of his temporary, intermittent janitor position at the YWCA to murder Cordova." (BR at 13). The Court should thus disregard Labor Ready's attempt to beg the central legal issues presented in this appeal by presenting its legal arguments as facts.

A. Labor Ready Misrepresents Dori Cordova's Relationship to the YWCA - She was a YWCA Client at all Relevant Times as Shown by Appellants' Competent Evidence.

Labor Ready misrepresents that Dori Cordova was not a client of the YWCA by stating that she was not "officially involved" in a YWCA "program" at the time of her murder. BR 13-14. The assertion that Dori was not a YWCA client is completely false and misleading, as proven by Appellants' competent evidence. CP 510-513, 1238. At the time of her

death, Dori had a YWCA advocate (Caseworker), Traci Underwood. Id. Lawrence Owens specifically used YWCA instrumentalities (his connections at the YWCA) to help Dori apply for YWCA housing, a fact documented in Mr. Howell's counseling records of January 21, 2004:

> On January 21, 2004 this therapist is visiting Dori Cordova and Troy in their home. She stated that she has another job interview coming up and that she has also identified another house where she can live and it is much better than the hotel where she is living now. It is the Lexington House that is owned and run by the YWCA and she has submitted her application for that.

CP 1227; see also testimony at CP 438-439, 454.

Dori was a YWCA client at the time of her death, had a YWCA advocate or caseworker and was literally loading the car to move into a YWCA shelter when she was gunned down by Owens. CP 1260. Appellants' competent evidence proves that Dori was a YWCA client during all relevant times to this action.

B. Labor Ready Misrepresents That Owens Was No Longer An Employee Of Labor Ready at the Time of Dori's Murder-Owens Was a Labor Ready Employee.

Labor Ready continues to make misrepresentations to this Court, as it did to the trial court, on the employment status of Owens at the time of the murder. BR 13, 25, 27, 29 and 30. Owens was a current employee of Labor Ready, an employee in good standing with Labor Ready. CP

1320-1321. The Respondent repeatedly characterizes Lawrence Owens as a former employee or a person "who had last worked for the YWCA" as an agent for Labor Ready five days prior to murdering Dori Cordova. BR 13, 25, 27, 29 and 30. This representation is entirely false and completely inaccurate. CP 384-385. Lawrence Owens was in good standing with Labor Ready through the time that he killed Dori and was killed by the Seattle Police on March 17, 2004. CP 384-385. As testified to by Shauna Rossio, the manager at Labor Ready:

> Q. Was Lawrence Owens ever coached or counseled prior to the time he was killed, to your knowledge?
>
> A. I don't believe so.
>
> Q. Was Lawrence Owens ever referred to employee services for any issues or problems prior to the time that he was killed?
>
> A. No.
>
> Q. To your knowledge was Lawrence Owens ever terminated by Labor Ready prior to the time that he was killed.
>
> A. Not in the Seattle branch 1104.
>
> Q. Are you aware of any other branches where he was terminated from.
>
> A. No.

CP 386-387. (Owens only worked for Labor Ready Branch 1104.) *Id.*

Shauna Rossio, the manager of Labor Ready Branch 1104, had the most contact with Lawrence Owens and directly hired him. *Id.* She testified that Lawrence Owens was an employee of Labor Ready in good standing through the date that he murdered YWCA client Dori Cordova. Any representation by Labor Ready otherwise is completely false and is not supported by the record. Id.

C. Even the Trial Court Determined that There Were Issues of Fact after Excluding Hearsay.

Labor Ready continues its mantra declaring that the only evidence that supported Appellants' claims was hearsay. (BR at 10, 11). What Labor ready fails to tell this Court is it successfully moved to strike all inadmissible hearsay prior to the summary judgment and the trial court granted the motion and ruled that even after excluding hearsay, there remained material issues of fact that would survive summary judgment. CP 1409. Specifically, at the September 9, 2005 hearing, Judge Nelson orally ruled before any argument:

> I have spent considerable time reviewing plaintiff's submissions as well as Defendant's submissions, and with respect to the motion to strike, I am excluding all inadmissible hearsay. But after I have done so, I do find that there are material issues of

fact that would survive summary judgment.

(RP 3, September 9, 2005 hearing)

Labor Ready devotes the substantial portion of its "facts" on the issue of when and how Dori and Owens met, hypocritically relying, itself, on its own hearsay evidence (CP 53-97) while at the same time arguing that Appellants' evidence was based exclusively on hearsay. (BR 10-11, 32-34). Appellants presented more than enough competent evidence to satisfy the trial court on the issue of hearsay and the trial court produced a written order holding that Appellants produced admissible material issues of fact and specifically ruled:

> "It is hereby ordered that Labor Ready's motion to strike is GRANTED as to this testimony which is inadmissible hearsay and DENIED as to the testimony which is admissible as set forth in plaintiff's briefing. It is further ordered that all references to inadmissible testimony in plaintiff's response to Labor Ready's motion for summary judgment are hereby STRICKEN, but admissible testimony remains. After the inadmissible testimony is stricken, there remains material issues of disputed fact, so the matter is heard on further summary judgment regarding legal duty and legal proximate cause, using the version of the facts to be proven at trial, e.g. that the parties did not meet until January 2004 at the YWCA facility. (On summary judgment view disputed facts in light most favorable to the non-moving party.)

CP 1409.

In essence, although Labor Ready seeks to prejudice the Court by focusing on its biased factual spin, the factual disputes survive summary judgment and this Court should view the facts in the light most favorable to Appellants. Id. If a jury finds Labor Ready liable or not liable, justice will be done.

D. Respondent's Cross Appeal is Brought out of Vindictiveness, Bad Faith and Respondent Has UNCLEAN Hands.

Respondent has brought a cross appeal in bad faith to distract this Court from dealing with the trial court's clear error in dismissing this case on summary judgment. Appellants' counsel believes that Respondent's briefing for sanctions made to this Court and to the trial court was also based on vindictiveness because the Appellants' previous attorneys, Gordon, Thomas, Honeywell, et al, obtained sanctions against Respondent attorney's previous law firm Bogle and Gates. (RP 16, 21, 22 October 7, 2005). This occurred while Mr. Corr, Respondent's lead counsel, was in charge of the litigation department of Bogle and Gates. Id.

Respondent's motivated vindictiveness also stems from the fact that Appellants made a motion for sanctions against Respondent's counsel at the trial court prior to the summary judgment motion after finding evidence that Respondent lied to a witness to obtain a false declaration. RP 3-8, August 19, 2005. Specifically in this litigation, Appellants

brought a motion for sanctions against Respondent for making false statements to a witness and "tricking" the witness into signing a false declaration, which she later recanted. RP 6, August 19, 2005. As presented to the trial Court and testified to by witness Baldarama, Respondent hired a private investigator that intentionally lied to this witness, telling Ms. Baldarama that he was "working for the plaintiff" when in fact he was working for Defendant Labor Ready. RP 4, August 19, 2005; (Baldarama was the elementary school counselor for Dori's son Troy). After this motion, the Court ordered that the parties to specifically inform witnesses who they worked for prior to interviewing witnesses. (RP 18-19).

As shown below, it was actually Respondent that abused discovery and "played games with this litigation" and then sought to be rewarded for that gamesmanship. CP 2091-2095.

E. The Respondent Played Games With The Civil Rules Throughout This Litigation, But It Now Seeks To Be Rewarded For Doing So.

The Appellants complied with the discovery process in this case. Pursuant to the initial case scheduling order, CP 1815, Appellants disclosed primary witnesses on May 24, 2005. CP 1879-1889. Appellants diligently supplemented these disclosures on June 15, 2005, (CP 1891-1901), and on June 29, 2005. CP 1903-1914. On June 16, 2005, Labor

Ready engaged in "litigation motion lotto" by making three baseless motions to disrupt the trial date, including a: (1) Motion to change the venue of this case, (2) Motion to continue the trial date, and a (3) Motion to Change the case to a "Complex Track" case. CP 1846. Labor Ready's counsel argued that it had recently taken over the case on May 24, 2005, and that "Labor Ready needs a continuance to prepare its defense to this multi-million dollar lawsuit." CP 1850. On July 8, 2005, the Respondent's motion to continue the trial date was heard and this Court continued the trial by 6 months, to May 9, 2006. CP 1817.

Respondent's stated reasons for a continuance were discovered to be false and disingenuous shortly thereafter. Approximately three weeks after this hearing date, Labor Ready was ready to move for summary judgment (even though it had just told the trial court that the case was "complex" and that it needed a considerable amount of time to conduct discovery.) CP 1948-1950. Specifically, Respondent argued to the trial court on July 8, 2005, that it needed the trial extension to prepare for this case, including summary judgment; but, on August 5, 2005, Respondent sent a threatening letter to Appellants' counsel stating that it was now ready to bring a summary judgment motion and would do so within a week if Appellants did not dismiss their case. Id. This is clear evidence of "civil gamesmanship" engaged in by Respondent.

F. The Appellants Did Not Have An Obligation To Provide Work Product Privileged Declarations Prior to Any Discovery Request and Prior To The Summary Judgment Response.

Appellants complied with discovery in good faith, but the Respondent did not. After Respondent made its frivolous motions to disrupt the trial date, the new discovery cutoff date was extended to March 21, 2006. CP 1817. Plaintiffs' Disclosure of Primary Witnesses date was changed to November 1, 2005. CP 1817. As of July 8, 2005, the Appellants had already provided the Respondent three witness lists. 1855-1914. As of July 8, 2005, the date of the new case scheduling order, the first date that Appellants were required to inform the Respondent of <u>any</u> witness intended to testify at trial was November 1, 2005, a date that did not occur until well after the summary judgment hearing. CP 1817. <u>No new or updated witness list was due until November 1, 2005</u>. CP 1817.

This was also the position taken by the Respondent when the Appellants specifically requested production of all declarations in their possession. Respondent admittedly violated the same "discovery abuses" it now hypocritically seeks to hold Appellants accountable to. Specifically, when asked for updated witness information by Appellants counsel, Respondent's counsel Kelsey Joyce wrote on July 27, 2005:

> As you are aware, our witness disclosures are not due until November 29, 2005 - more than four months away.

CP 1832.

The very first time that the Respondent ever asked Appellants for production of declarations that the Appellants had obtained was in a discovery request dated August 19, 2005, where the Respondent requested:

> Request for Production No. 1: Please produce all witness or potential witness statements, affidavits, declarations, interview transcripts and/or recordings, whether signed or unsigned, relating to any way to this lawsuit[.]

CP 1954-1955.

Based on Civil Rule 33, Appellants were not required to respond to this request for production for 30 days or until September 19, 2005, well after the summary judgment decision, yet Appellants responded just 11 days after this discovery was requested, on August 30, 2005, producing all declarations obtained by the Appellants that were attached to the Appellants' Response to Summary Judgment. CP 1959-1964, 1967-2051. The Appellants responded to this discovery request 19 days early, and still had until November 1, 2005, to name and determine who it would call as a testifying witness at trial, a date that became moot. Id. Appellants complied with all the applicable civil dates and civil rules and Respondent made three motions in bad faith to move the court date stating that it needed the time to do considerable discovery it was already working on

and finalizing its summary judgment motion and submissions. Id. Respondent should not be rewarded for gamesmanship and bad faith litigation tactics.

G. Unclean Hands: The Respondent Ignored Appellants' Specific Request for Declarations for Six Months and Only Produced it's Declarations with a Threatening Letter on the Eve of Moving for Summary Judgment.

The Respondent's bad faith and unclean hands in this cross appeal is attested by the fact that the Appellants previously and specifically requested declarations in its Plaintiffs' First Set of Request for Production' at Request for Production No. 30 on February 2, 2005. CP 1861-1863. Respondent did not produce the requested declarations for six months.

The Respondent put the Appellants on notice that it would move for summary judgment in a letter dated August 5, 2005 (just a few weeks after Respondent moved the trial court in bad faith for a continuance to conduct discovery, venue change and complex tracking). CP 1948-1950. In that August 5, 2005, letter, the Respondent, for the first time, produced 5 lay witness declarations, which were obtained well before August 5, 2005, and threatened to bring a summary judgment motion within a week's time. CP 1916-1940, 1948-1950. Respondent's counsel Mr. Corr never produced any of these declarations in the next 6 months after February 2, 2005 in response to Plaintiff's Request No. 30 and then sent

these 5 declarations a week prior to filing its motion for summary judgment with a letter threatening Appellants to dismiss or face sanctions. CP 1948-1950. On August 5, 2005, the Respondent produced for the first time:

- Declaration of Phyliss Yoshida, signed on 7-18-05, CP 1916-1921;
- Declaration of Ron Yoshida, signed 7-18-2005, CP 1923-1926;
- Declaration Of Scott Tysseland, signed 7-8-05, CP 1928-1929;
- Declaration of Patricia Hayden, signed 5-9-05, CP 1938-1940;
- Declaration of Roman Antioquia, CP 1934-1936; and,
- Declaration of Baldarama, signed 7-14-05, CP 1942-1946.

Respondent's counsel Corr waited over six months before producing a single declaration; however, Appellants produced all declarations 19 days prior to the time they were due.

After receiving the Respondent's threatening August 5, 2005 letter, Appellants began on that very day to obtain declarations to defeat the Respondent's summary judgment motion. 1948-1950. These declarations were signed and obtained on the following dates:

- Othello Howell, August 8, 2005, CP 1971-1993;

- Gerald Ketchum, August 16, 2005, CP 1997-1999;
- Richard Thompson, August 7, 2005, CP 2001-2003;
- Rebecca Rojas, August 18, 2005, CP 2005-2009;
- Pamela Van Sittert, August 25, 2005, CP 2017-2019;
- Nicole Wagner, August 14, 2005, CP 2021-2023;
- Michelle Phillips, August 5, 2005, CP 2028-2030;
- Roland Akers, August 7, 2005, CP 2032-2033;
- Karla Marifjeren, August 7, 2005, CP 2040-2041; and,
- Scott Tysseland, August 15, 2005, CP 2048-2049.

Only a few declarations were signed and obtained by the Appellants before August 5, 2005, including Patrick Phelps on August 4, 2005, CP 2043-2044; Donald White on July 22, 2005, CP 2037-2038; and Vernon Torrey on July 28, 2005, CP 2024-2026. The declaration of Eileen Fermanis was provided to the Respondent prior to July, 2005, when this Department of Corrections officer made it clear that she specifically warned Labor Ready that Owens was a Level 3 Sex Offender prior to his employment at the YWCA. CP 1967-1969. All of these declarations were provided to the Respondent with the Appellants' summary judgment response, most of which were provided just days after receiving them and <u>well before</u> Respondent's discovery response in this regard was due. CP 1959-2053, 195401955. This Court specifically ordered the parties to

develop and abide by a discovery plan, CP 1829, which the Appellants were actively doing. Respondent's cross appeal is in bad faith and Respondent has unclean hands.

Next, the Respondent goes to great lengths to suggest that the Appellants failed to supplement its initial response to the Respondent's request for the names of the five individuals who the personal representative "believed" to be closest to decedent Dori Cordova. BR 15-18. The personal representative answered this question to the best of her belief and opinion. Furthermore, the Appellants did not have an obligation to provide work product privileged declarations prior to its summary judgment response or discovery request asking for declarations. CP 1954-1955. The Interrogatory that Respondent alleges that Appellants did not properly respond to, No. 8, asked the <u>personal</u> <u>representative</u> who <u>she</u> <u>believed</u> to be the closest persons to the decedent and the personal representative answered that question to the best of her knowledge and ability at that time. CP 1615-1616; RP 20, October 7, 2005. As argued to the trial Court:

> "When we look at this interrogatory, name the five closest associates of the dead person. If they made a motion to compel, if they went through all of the steps that were required by CR 26 and CR 37 and said your Honor, we force you to go into the mind of this dead person and tell us who the five closest associates are, they wouldn't get it because we have no idea who Dori Cordova considered her

> five closest associates. We gave people that we knew and their clients knew.

(RP 20, October 7, 2005).

The Appellant personal representative answered this realistically unanswerable question to the best of her ability. CP 1615-1615. The fact that Respondent's cross appeal is largely based on this unintelligible discovery question highlights the bad faith that is the catalyst of Respondent's appeal.

H. The Court Ruled that Appellants Did Not Violate CR 11 or Were Sanctionable for Alleged Misrepresentations.

As further evidence the vindictiveness of Respondent's litigation tactics and its cross appeal, Respondent actually brought a motion to the trial court requesting CR 11 sanctions arguing that appellant's case was frivolous and also moved for sanctions for alleged misrepresentations. CP 1786-1804. In its briefing to this Court, the Respondent makes a huge production regarding the lack of exactness in the quotes from Mr. Ketchum's declaration. (BR 3, 5, 20, 21, 40, 41, 42). Although the language quoted is not exact, (Mr. Ketchum made a few last minute tweeks after Appellants finished its Summary Judgment response,) Mr. Ketchum's testimony is virtually the same. CP 1999. The Trial Court in its discretion found no basis to award CR 11 Sanctions or <u>sanctions for alleged misrepresentations</u>. As stated by the trial Court:

> "I see no basis to award CR 11 sanctions, nor do I think that any sanctions are appropriate for the alleged misrepresentations."

(RP 26, October 7, 2005)

The trial court did grant sanctions of $1,000 for Appellants' counsel not sending Respondent 10 declarations either received prior to July 12, 2005 or not disclosed on a previous witness list (despite the fact no witness list was due for several months). (RP 26, October 7, 2005.) Appellants' counsel believed and still believes that this sanction was inappropriate, especially in light of Respondent's demonstrated bad faith litigation tactics, but expeditiously paid the $1,000 to immediately begin this appeal.

I. The Respondent Spends the Remainder and Vast Majority of Their Briefing (And attached Appendices) Arguing Issues of Fact and Requesting the Court to Accept Their Versions of the Facts.

In an effort to capitalize on the trial court's difficult summary judgment decision, the Respondent makes a number of accusations to support its vindictive request for sanctions. Contrary to the Respondent's assertion that Appellants' counsel intentionally misled the Court with regard to the declaration of Gerry Ketchum, the appellant informed the trial court that it inadvertently included language from an earlier draft of Ketchum's declaration that was not in his final version of the draft.

Appellants do admit that the Ketchum statement on Page 6 of opening brief is not exact. Ketchum previously made that statement in an earlier version of his declaration, but changed the language around on the signed version. CP 1236-1238. In either regard, Mr. Ketchum's final version of his declaration is virtually identical and says the same thing as the misquoted draft, 'that Dori was looking for a better housing situation, including transitional housing through the YWCA.' CP 1999. That fact was the whole point of Mr. Ketchum's submission in the first place and his signed declaration does state that fact under oath. CP 1236-1238. Further, the Ketchum statement made on page 30 of Appellants' brief is based on Ketchum's declaration and Respondent is mistaken. As quoted directly from Social Worker Ketchum's declaration at CP 1238:

> "Dori was often on the verge of homelessness at the Jensonia and was consistently looking for a better housing situation, including transitional housing through the YWCA. I do know that Dori was looking for transitional housing in January 2004 and that she was contacting multiple agencies including the YWCA facility called Opportunity Place, which is located on 3rd and Lenora."

CP 1238.

In summary, the final declaration that Mr. Ketchum did sign, states virtually the same information as in the inadvertently misquoted declaration, just worded differently than earlier quoted. Id.

Similarly, the Respondent's accusation with regard to Margaret Baldarama's statement is incorrect. CP 2010-2012. Ms. Baldarama's statement at ¶ 3 in her declaration was and is accurate. CP 2011. As she testified at her deposition, the official record that she cited to as Exhibit 1 was the record that triggered her memory as to when Dori first mentioned Owens. CP 2011.

Othello Howell's declaration is also accurate. CP 1971-1975. The Respondent submitted suspect declarations from the Yoshidas stating that the Yoshidas had talked to Dori in the fall of 2003. CP 1985. In fact, Othello Howell's official records demonstrate and record that Dori and the Yoshidas did not get along and that the Yoshidas did not have Dori's phone number in January of 2004, nor did Dori have the Yoshidas' phone number. CP 1985. If Dori did not have the Yoshidas' phone number, how could she have called the Yoshidas several times in the fall of 2003? Id.

Furthermore, as is shown by the police report, Roman Antioquia did sell the murder weapon to Owens. No one witnessed Owens steal this weapon from Antioquia. CP 669. There was no evidence of forced entry into Antioquia's roommate's car and no police officer ever investigated Antioquia's story. CP 669. Antioquia also told the police that he knew Owens was looking for a shotgun. CP 669. Antioquia had just recently purchased the shotgun prior to the gun getting into Owens' possession.

CP 669. Antioquia admitted that he showed the gun off Owens; and, further, Antioquia, without prompting, called the Seattle Police Department to inform them that he was the legal owner of the gun used to murder Dori. CP 669. All of the inferences from these facts lead to one conclusion: Antioquia sold the murder weapon to Owens. CP 669.

The remaining spin that Respondent places on their version of the facts is just that, spin. As the trial court stated, "I do find that there are material issues of fact that would survive summary judgment." CP 1409. The Appellants' submissions are based on the cited evidence and all reasonable inferences from that evidence.

III. RESPONSE TO LEGAL ARGUMENT

1. THE TRIAL COURT FOUND A LEGAL DUTY AND RESPONDENT DID NOT ASSIGN ERROR TO THIS FINDING.

The trial court agreed that there was a legal duty owed by Respondent. The duty found by the trial Court is the same duty as declared by *Niece* Court:

> Even where an employee is acting outside the scope of employment, the relationship between the employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, **or** instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision.

Niece, supra at 48. (Emphasis added).

In the *Niece* quote above, the emphasis has been added on "or"- it is not an "and." The *Niece* Court makes it clear that any one of the three can trigger liability: tasks or premises or instrumentalities. The trial judge in this case stated directly "I do think there is a duty." (RP 26). The Respondent did not designate in its 'Assignments of Error' the trial court determination that Labor Ready owed a legal duty in the context of this case with regard to its negligence. (BR 2). Although the Respondent has rehashed its summary judgment arguments in its response on the issue of duty (BR 22-27), Appellants submit that this issue is not before this Court. This duty, conceded by the trial court and Respondent, has remained a long recognized legal principle in Washington, that negligent employment or retention of an incompetent employee makes the employer liable for injuries inflicted upon a third party by the employee. *La Lone v. Smith*, 39 Wn.2d 167, 171, 234 P.2d 893 (1951) (adopting Restatement (First) of Agency § 213).

The trial court did not dismiss this case based on duty, (and further determined that there were significant issues of material fact after excluding all hearsay.) The trial court dismissed the case on legal and proximate causation in direct opposition to all Washington Supreme Court law on causation. (RP 3, 26). Appellants are merely asking this Court to

remand this case based on the Washington State Supreme Court in *Taggart* and every Washington Supreme Court case discussing causation:

> The question of legal causation is so intertwined with the question of duty that the former [legal causation] can be answered by addressing the latter [duty].

Taggart, 118 Wn.2d at 226.

Because the trial court properly found a legal duty, a finding of legal causation should have been obvious and evident.

2. RESPONDENT'S RELIANCE ON THE TIMING AND LOCATION OF DORI DEATH IS MISPLACE AND COMPLETELY MISSES THE POINT.

While a "clear-cut" or "easy" decision on the lack of duty and legal causation should have been decided on behalf of the moving parties, such an admittedly difficult decision should not have. The Supreme Court of Washington has recognized that "legal causation is a much more fluid concept than cause in fact." *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190, 204, 15 P.3d 1283 (2001). More specifically, the Court has recognized that

> "[legal cause] is grounded 'in policy determinations as to how far the consequences of a defendant's acts should extend... whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability...'" and that "... This inquiry depends upon 'mixed considerations of logic, common sense, justice, policy, and precedent.'" *Id.*

The Court has also held that where an employer knows that its employee presents an unreasonable risk of danger to others, it is liable to those foreseeable victims when it fails to exercise reasonable care. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48-49, 929 P.2d 420 (1997). Labor Ready, a corporation that makes millions of dollars every fiscal quarter for its "expertise and reliability" in placing safe and appropriate employees with organizations in need, placed a violent sexual attacker as an employee with the YWCA. Here, the determination of legal causation rested on considerations regarding logic, common sense, justice, policy, and precedent. Respondent's knowing placement of a Level Three sex offender at the YWCA should extend legal causation. Appellants' argument that the Labor Ready's negligence was the legal cause of Dori Cordova's death is well-grounded in logic, common sense, justice, policy and precedent. The Washington Supreme Court's precedence in *Niece* and *La Lone* strongly suggests that the Respondent should be liable for enabling Owens to use the tasks, premises, and instrumentalities of his employment to prey upon desperate single mother, Dori Cordova.

Additionally, good public policy dictates that corporations that hold themselves out as 'hiring experts' be held liable when they place violent sex offenders at an institution, like the YWCA, whose clientele is comprised of vulnerable women. Similarly, common sense dictates that,

for example, a daycare center should not place a convicted child molester in any position within that center, no matter how minimal the contact may be. In the case of Owens, he was a repeat sex offender with the highest likelihood of re-offending – by the Respondent placing him at the YWCA, it was not a matter of "if" he would re-offend, but "when" he would re-offend.

The Respondent's reliance on geographical and temporal connections between Owens' employment with Labor Ready and Dori's death, while ignoring the fact that logic, common sense, justice, policy, and precedent play a crucial role in determining whether legal causation exists, is wholly misplaced. With regard to legal causation, it cannot be the law or policy in Washington that a professional employer can escape liability after knowingly place a dangerous sex offender at a women's shelter allowing him to use the instrumentalities of that job to access to new victims. Under Washington law, so long as the duty was breached while the duty was in effect, it does not matter that the injury occurred after the duty ended. This is the stature of this case.

3. WASHINGTON SUPREME COURT HOLDS: "BREACH OF DUTY ACTIONABLE EVEN THOUGH THE APPELLANTS' INJURY OCCURRED AFTER THE DUTY ENDED."

Despite the Respondent's assertion to the contrary, imposing liability on a defendant for an injury that took place after its duty ended is not evidence that "legal cause was lacking" according to the Washington State Supreme Court. The Washington Supreme Court affirmed this theory in a recent negligence supervision case, *Couch v. Wa. Dept. of Corrections*, 113 Wn.App. 556, 573, 54 P.3d 197 (2002) (rev. denied, 149 Wn.2d 1012, 69 P.3d 874 (2003)). The *Couch* Court specifically held:

> We do not overlook the estate's argument that a breach of duty is sometimes actionable even though the plaintiff's injury occurred after the duty ended. That is true.
>
> The question here is whether the breach occurred while the duty was in effect, not whether the injury occurred while the duty was in effect. *Id.*

Appellants agree that a legal duty must be breached while it is in effect, not before it has commenced or after it has ended. Even assuming the Respondent's argument that its sole act of alleged negligence occurred months before the injury (initial placement of sex offender Owens at the YWCA), Washington law holds such cases actionable. In this case: the breach occurred while the legal duty was in effect, and the injury occurred

after the duty was breached. Washington law should be applied in this and Appellants' action should be reinstated.

4. RESPONDENT'S ARGUMENTS ON THE 'TASKS, PREMISES, OR INSTRUMENTALITIES' ARE NONSENSICAL AND IN DIRECT OPPOSITION TO APPELLANTS UNCONTESTED EXPERT ON THAT ISSUE.

According to Labor Ready and its "spin on the tasks, premises, or instrumentalities," the only way that it could be held liable is if while 'on the clock' Owens used a 'broom or a mop' to murder Dori while she was on the premises of a YWCA shelter while Dori was 'in a YWCA class session.' (BR 3-4) What Respondent would like this Court to ignore is the fact that it is a professional expert in hiring and placement and that it placed a violent sex offender at an organization renowned for helping vulnerable and victimized women. For vulnerable and needy women, such as Cordova, the YWCA is synonymous with trust, and anyone affiliated with that organization is trusted. That is why the YWCA testified that it would not have ever let Owens anywhere near its facilities or clients had it been informed of Labor Ready's knowledge that Owens was a dangerous sex offender. The actual name and reputation of the YWCA and what it symbolizes can be used as the "task, premises or instrumentalities." On this issue, Appellants submitted the uncontested

expert testimony of University of Washington Business Professor, Chad Higgins, Ph.D., on these issues:

> In my professional opinion, Owens was very savvy and manipulative and used the tasks of the YWCA, premises of the YWCA and the instrumentalities entrusted to him by the YWCA to endanger Dori Cordova. Specifically, Labor Ready entrusted the tasks of the YWCA to Owens by knowingly permitting a dangerous sex offender to have access to an organization that serviced vulnerable and needy women. It is also my understanding based on the evidence that Owens met with Dori at the premises of the YWCA and promised to help Dori obtain housing at the location where he worked and at other YWCA locations, using the premises of the YWCA to obtain Dori's trust.
>
> It is also my understanding that the instrumentalities of a job can include the reputation of the employing agency, the known mission and goal of the employing agency and one's affiliation with that agency. It is apparent that Mr. Owens used every aspect of the instrumentalities of his employment in these regards to endanger Dori Cordova. Dori was very familiar with the YWCA and was an active client of the YWCA, which has a mission of helping women in her predicament, which included needs for shelter and employment, and Owens specifically used the reputation and mission of the YWCA to exploit this vulnerable woman, which was very predictable. Specifically, Labor Ready knew that because of the vicious temperament and propensities of their

> employee, Lawrence Owens, he was likely to assault another female after using the instrumentalities of his employment.

CP 760-761.

As further testified by Appellants' expert, UW Business School Professor Chad Higgins:

> In the materials that Labor Ready provides to new hires, there are two aspects that are very important: Safety is priority #1, and Best Match Dispatch. (See Ex. No. 10) Labor Ready asserts that it is very concerned about safety and that it will "match the job to the best-qualified worker first." From a placement perspective, Labor Ready failed horribly in both respects by placing a known violent sex offender and predator where he would have access to vulnerable victims.
>
> Labor Ready knew the YWCA is a special organization with special needs. Labor Ready knew that the YWCA serves a vulnerable population. Labor Ready knew that the YWCA offers housing programs to people literally desperate for their lives.
>
> In my opinion, from a management "best fit" and safety perspective, it is highly probable and foreseeable that a sex offender, like Mr. Owens, would have access to women in need and would use his affiliation with the YWCA to groom/meet new victims. This is true because the YWCA serves vulnerable women and children. It was highly foreseeable that Owens would use his affiliation with the YWCA to obtain access to new victims, such as Dori Cordova, who used YWCA services.

CP 753-754.

This **uncontested** expert opinion defining the YWCA's "tasks, instrumentalities or premises" should be viewed in the light most favorable to Appellants. This Court should remember that Labor Ready claim that "every worker is backed by our President's 100% Satisfaction Guarantee." Society, Washington and the law in general would be better served with a finding of legal causation. Owens did in fact use the task, premises or instrumentalities of his employment at the YWCA, as testified by uncontested expert Professor Higgins of the UW Business School, after Owens was negligently hired and placed at the YWCA and endangered the foreseeable victim (desperate and homeless single mother Dori Cordova.)

5. IN THE CONFINES OF THIS CASE LEGAL CAUSATION SHOULD HAVE FOLLOWED THE TRIAL COURT'S FINDING OF DUTY.

Labor Ready has a legal duty as defined by the principles of *Niece* and *La Lone.* The Appellants more than proved that Labor Ready, **the employer antecedently had reason to believe that an undue risk of harm would exist because of the employment** of Owens. Owens was a risk, the highest risk, for attacking vulnerable women and Labor Ready had that direct knowledge and notice. As *Taggart* Court and every other Washington Supreme Court case has concluded on this issue: "The question of legal causation is so intertwined with the question of duty that

the former [legal causation] can be answered by addressing the latter [duty]. *Taggart* 118 Wn.2d at 226. There is a legal duty, thus the trial court should have found legal causation.

It does not matter, according to the Washington Supreme Court, that the actual harm occurred outside the scope of employment or at a different location than the job site, according to the Court in *Niece.* (Recognized the duty extends outside the scope of employment, *Niece*, 131 Wn.2d at 48.) As long as the employer committed the original breach of duty that employer remains liable for their incompetent employee's misconduct. See *Couch.* In this case, Labor Ready's placement of a Level III sex offender at a YWCA facility is the exact same as placing a child molester as a janitor at a day care, it was not a matter of "if" he would reoffend, but "when" he would reoffend.

Appellants made an overwhelming showing that legal causation should be found in this case against this professional and expert employer. Appellants satisfied the Trial Court of the material issues of fact connecting Owens' employment with Labor Ready and Cordova's death. The trial court erred when it granted Respondent's summary judgment on this issue of legal causation after finding a legal duty. This error is in

direct contradiction to Washington Supreme Court law. Appellants request that this case be remanded on this issue.

6. PROXIMATE CAUSATION SHOULD NOT BE DECIDED BY THE TRIAL JUDGE.

The trial Court found duty and the Appellants demonstrated abundant evidence proving breach, including Labor Ready's supervisor, Shauna Rossio, who admitted under oath that Labor Ready should not have placed a violent and convicted sex offender at the YWCA. The trial judge did not follow the law when she decided cause in fact, which is a question for the jury. *Schooley*, 134 Wn.2d at 478. Respondent may argue that this is a rare case, but this is not an "extremely rare" or "highly extraordinary" case. A jury must decide cause in fact:

> Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury are "so highly extraordinary or improbable as to be wholly beyond the range of expectability."

See Barger v. Burlington Northern R. R. Co., 138 Wn.2d 815, 823, 982, P.2d 1149 (1999)(citation omitted).

Is it so highly extraordinary that a recently released and highly dangerous sex offender <u>knowingly</u> placed to work at an organization committed to helping vulnerable women meets and victimizes a woman that is trying to access that organization's services? No, it is not so highly extraordinary. Ask the average citizen:

> "What would happen if a dangerous sex offender (previously convicted of raping and violently assaulting women) were given a job at a YWCA woman's shelter?"

Most people would predict some form of the result of this very case. The result in this case is not "so highly extraordinary or improbable as to be wholly beyond the range of expectability." This Court must remember that Labor Ready received actual notice from the Department of Corrections that Owens was a Level-III sex offender, that Owens was a criminal risk, that Owens was a danger to women, and that Owens would likely reoffend if placed in a target-rich environment such as the YWCA. Labor Ready knowingly placed Owens with his vicious disposition and propensities at the YWCA, while failing to alert the YWCA to the readily foreseeable and preventable danger. Appellants established through non-hearsay evidence that Dori Cordova was a YWCA client and also accessing YWCA services when she met employee Lawrence Owens, negligently placed at the YWCA by Labor Ready.

Dori was a foreseeable victim as a desperate, vulnerable woman utilizing the YWCA, and because Owens was using the "tasks" and/or "premises" and/or "instrumentalities" of his job to access her. Labor Ready set the tragedy in motion when it placed it's violent sex offender at YWCA in the midst of all the vulnerable women there. The timing and place of the breach obviously does not have correlate to the harm, so long

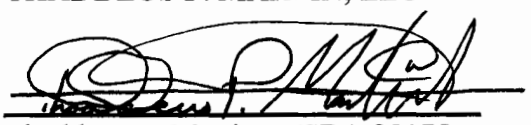
as the breach occurred when the duty existed, which are the facts of this case. See *Couch*. Proximate causation should be decided by a jury and not by the trial judge. Summary judgment on this case was improper. In sum, a jury could find cause-in-fact, which is its job.

IV. CONCLUSION

This Court should reverse and remand for trial.

Dated this 30th day of May, 2006.

THADDEUS P. MARTIN, LLC



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT I AM NOT A PARTY TO THIS ACTION AND THAT I PLACED FOR SERVICE ON COUNSEL OF RECORD THE FOREGOING DOCUMENT VIA FACSIMILE / U.S. MAILS / HAND-DELIVERY AND/OR LEGAL MESSENGER ON THE 31 DAY OF MAY, 2006.

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SIGNED Corie Hanson DATED: 05/31/06

CORIE HANSON, PARALEGAL