

NO. 35950-2-II

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

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AUDREY BROYLES; VONDA SARGENT AND SUSAN SACKETT-  
DANPULLO,

Respondents.

v.

THURSTON COUNTY,

Appellant.

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BRIEF OF APPELLANT

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Michael A. Patterson, WSBA No. 7976  
Patricia K. Buchanan, WSBA No. 19182  
Karen A. Kalzer, WSBA No. 25429  
Of Attorneys for Appellant  
Thurston County

PATTERSON, BUCHANAN  
FOBES, LEITCH, KALZER & WAECHTER, P.S., INC.  
Two Union Square  
601 Union Street, Ste. 4200  
Seattle, WA 98101  
(206) 652-3500

PM 8-31-07

## TABLE OF CONTENTS

	<b>Page</b>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	iv
I. INTRODUCTION .....	1
II. ASSIGNMENTS OF ERROR .....	1
A. Assignments of Error .....	1
B. Issues Pertaining to Assignments of Error .....	3
III. STATEMENT OF THE CASE.....	5
A. Plaintiffs Broyles, Sargent, and Sackett-DanPullo were deputies serving at the pleasure of Holm. ....	6
1. Complaints arise over conduct of senior deputy prosecutor Jack Jones and Chief Deputy Phil Harju’s corollary supervision.....	7
2. Broyles, Sargent, Sackett-DanPullo, and non-party Christy Peters approach Holm in early November 2000 to discuss concerns about the work environment, which prompts office reorganization. ....	10
3. Plaintiffs complain following reorganization, but provide little details.....	14
4. Plaintiffs file a tort claim with the County, alleging for the first time numerous acts of discrimination by Holm, Harju, and Jones.....	15
B. Each of the plaintiffs ultimately leaves employment with the Thurston County Prosecuting Attorney’s Office. ....	16
C. Procedural History .....	18
1. The plaintiffs’ first lawsuit results in substantive dismissal of all claims against Harju, all claims of race and marital discrimination, and a nonsuit to the remainder. ....	19
2. The plaintiffs refile their lawsuit in a new forum. ....	20
IV. SUMMARY .....	26

TABLE OF CONTENTS

(continued)

	Page
V. ARGUMENT .....	27
A. As a matter of law, Thurston County cannot be held liable for the alleged unlawful employment actions of Prosecutor Ed Holm, an independently elected official over whom the County had no right to control. ....	28
1. Employers are strictly liable for the hostile work environments caused by officers in the highest echelons because agency principles dictate the owner or officer is the alter ego of the principal. ....	31
2. A county’s elected offices can be sued independently from a county itself because the county cannot control the actions of elected official and such official is statutorily responsible for his or her own deputies. ....	36
3. Because it is the county office and not the county that controls the acts of the elected official and his or her deputies, it is the official—in this case Holm—who is liable for any employment wrongs committed against these plaintiffs. ....	41
4. Because Thurston County could not control the manner in which Holm managed the PAO, as a matter of law it cannot be liable for his employment misfeasance such as discrimination. ....	45
B. The trial court committed reversible error by denying summary judgment and allowing the plaintiffs to support their hostile work environment claims on acts that were barred by either the statute of limitations or collateral estoppel. ....	47
1. The jury was impermissibly allowed to find a hostile work environment on conduct of Jones and Harju, which occurred prior to May 6, 2001 and was untimely and had no relation to timely hostile conduct. ....	48
2. The trial court erred by refusing to apply collateral estoppel to prevent the plaintiffs from arguing that	

Harju’s acts were discriminatory, when a prior summary judgment order held the opposite.....	56
3. Sackett-DanPullo was erroneously allowed to present testimony of discrimination on marital status, which had been dismissed as a matter of law. ....	60
C. The trial court erred by precluding testimony of a key defense witness that the plaintiffs did not have a subjective belief of discrimination until meeting with attorneys.....	61
D. A new trial is warranted because the jury’s verdicts were excessive due to counsel’s misconduct. ....	64
E. The trial court abused its discretion when it awarded attorney fees for a case in which the plaintiff was not the prevailing party and also allowing a multiplier for the same reasons used in determining the lodestar. ....	66
1. Ignoring settled law that a defendant is a prevailing party when a plaintiff takes a voluntary dismissal, the trial court erred by allowing the plaintiffs to recover duplicative attorney fees for two actions. ....	66
2. By considering risk when determining the lodestar, the trial court erred by relying on risk again as a basis to award a multiplier. ....	71
VI. CONCLUSION.....	73
<b>APPENDICES</b>	
<b>Appendix A (Jury Instructions).....</b>	<b>A-1</b>
<b>Appendix B (Findings of Fact).....</b>	<b>B-1</b>
<b>CERTIFICATE OF SERVICE.....</b>	<b>x</b>

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>WASHINGTON CASES</b>	
<i>Alcoa v. Aetna Cas. &amp; Sur. Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000).....	47
<i>Andersen v. Gold Seal Vineyards</i> , 81 Wn.2d 863, 505 P.2d 790 (1973).....	67, 70
<i>Antonius v. King County</i> , 153 Wn.2d 256, 703 P.2d 729 (2004).....	<i>passim</i>
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	26, 47, 48
<i>Beckman v. Wilcox</i> , 96 Wn. App. 355, 979 P.2d 890 (1999).....	67
<i>Blair v. Wash. State Univ.</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987).....	67, 68
<i>Bowers v. Transamerica Title Ins. Co.</i> , 100 Wn.2d 581, 675 P.2d 193 (1983).....	71
<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862, 101 P.3d 67 (2004).....	27
<i>Brown v. Scott Paper Worldwide Co.</i> , 143 Wn.2d 349, 20 P.3d 291 (2001).....	58
<i>Carter v. King County</i> , 120 Wash. 536, 208 P. 5 (1922).....	41, 42, 46
<i>Christensen v. Grant County Hosp., Dist. No. 1</i> , 152 Wn.2d 299, 96 P.3d 957 (2004).....	56, 57
<i>Clarke v. State Attorney Gen. 's Office</i> , 133 Wn. App. 767, 138 P.3d 144 (2006).....	64
<i>Cockle v. Dep't of Labor &amp; Indus.</i> , 142 Wn.2d 801, 16 P.3d 583 (2001).....	31
<i>Cowles Publ'g Co. v. Pierce County Prosecutor's Office</i> , 111 Wn. App. 502, 45 P.3d 620 (2002).....	36
<i>Crossler v. Hisle</i> , 136 Wn.2d 287, 961 P.2d 327 (1998).....	42, 74
<i>Dailey v. N. Coast Life Ins. Co.</i> , 129 Wn.2d 572, 919 P.2d 589 (1996).....	22, 65

	<b>Page(s)</b>
<i>Davis v. Dep't of Licensing,</i> 137 Wn.2d 957, 977 P.2d 554 (1999).....	37, 40
<i>Dempere v. Nelson,</i> 76 Wn. App. 403, 886 P.2d 219 (1994).....	65
<i>Dep't of Ecology v. Campbell &amp; Gwinn, L.L.C.,</i> 146 Wn.2d 1, 43 P.3d 4 (2002).....	37
<i>DeWater v. State,</i> 130 Wn.2d 128, 921 P.2d 1059 (1995).....	34, 35
<i>Dietz v. Doe,</i> 131 Wn.2d 835, 935 P.2d 611 (1997).....	62
<i>Drewett v. Rainier School,</i> 60 Wn. App. 728, 806 P.2d 1260 (1991).....	61
<i>Escude v. King County Pub. Hosp. Dist.,</i> 117 Wn. App. 183, 69 P.3d 895 (2003).....	67
<i>Folsom v. Burger King,</i> 135 Wn.2d 658, 958 P.2d 301 (1998).....	28
<i>Foothills Dev. Co. v. Clark County Bd. of County Comm'rs,</i> 46 Wn. App. 369, 730 P.2d 1269 (1986).....	29-30
<i>Francom v. Costco Wholesale Corp.,</i> 98 Wn. App. 845, 991 P.2d 1182 (2000).....	33-34
<i>Glasgow v. Georgia-Pacific Corp.,</i> 103 Wn.2d 401, 693 P.2d 708 (1985).....	<i>passim</i>
<i>Hue v. Farmboy Spray Co.,</i> 127 Wn.2d 67, 896 P.2d 682 (1995).....	48
<i>In re McGlothlen,</i> 99 Wn.2d 515, 663 P.2d 1330 (1983).....	62
<i>In re Personal Restraint of Hinton,</i> 152 Wn.2d 853, 100 P.3d 801 (2004).....	70
<i>Johnson v. Dep't of Soc. &amp; Health Servs.,</i> 80 Wn. App. 212, 907 P.2d 1223 (1996).....	50
<i>Kyreacos v. Smith,</i> 89 Wn.2d 425, 572 P.2d 723 (1977).....	57
<i>Malo v. Alaska Trawl Fisheries, Inc.,</i> 92 Wn. App. 927, 965 P.2d 1124 (1998).....	44, 45
<i>Miles v. Child Protective Servs. Dept.,</i> 102 Wn. App. 142, 6 P.3d 112 (2000).....	68

	<b>Page(s)</b>
<i>Nat'l Union Fire Ins. Co. v. N.W. Youth Servs.</i> , 97 Wn. App. 226, 983 P.2d 1144 (1999).....	57
<i>Nielson ex rel. Nielson v. Spanaway Gen. Med. Clinic</i> , 135 Wn.2d 255, 956 P.2d 312 (1998).....	57
<i>Osborn v. Grant County</i> , 130 Wn.2d 615, 926 P.2d 911 (1996).....	45
<i>P. Life Ins. Co. v. Dep't of Employment Sec.</i> , 97 Wn.2d 412, 645 P.2d 693 (1982).....	66
<i>Rains v. State</i> , 100 Wn.2d 660, 674 P.2d 165 (1983).....	56
<i>Ramsey v. Mading</i> , 36 Wn.2d 303, 217 P.2d 1041 (1950).....	63
<i>Sales v. Weyerhaeuser Co.</i> , 138 Wn. App. 222, 156 P.3d 303 (2007).....	47, 66
<i>Satsop Valley Homeowners Ass'n v. N.W. Rock, Inc.</i> , 126 Wn. App. 536, 108 P.3d 1247 (2005).....	28
<i>Seattle-First Nat'l Bank v. Kawachi</i> , 91 Wn.2d 223, 588 P.2d 725 (1978).....	56
<i>Seattle Police Officers Guild v. City of Seattle</i> , 151 Wn.2d 823, 92 P.3d 243 (2004).....	28, 47
<i>Spokane County v. State</i> , 136 Wn.2d 644, 966 P.2d 305 (1998).....	18
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2004).....	37
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984).....	42
<i>State v. Henjum</i> , 136 Wn. App. 807, 150 P.3d 1170 (2007).....	31
<i>State v. J.P.</i> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	40
<i>State v. Knighten</i> , 109 Wn.2d 896, 748 P.2d 1118 (1988).....	30
<i>State v. Powell</i> , 62 Wn. App. 914, 816 P.2d 86 (1991).....	65
<i>State v. White</i> , 135 Wn.2d 761, 958 P.2d 982 (1998).....	42

	<b>Page(s)</b>
<i>Tribble v. Allstate Property and Cas. Ins. Co.</i> , 134 Wn. App. 163, 139 P.3d 373 (2006).....	66
<i>VersusLaw, Inc. v. Stoel Rives, LLP</i> , 127 Wn. App. 309, 332, 111 P.3d 866 (2005), <i>review denied</i> , 156 Wn.2d 1008 (2006).....	61
<i>Wachovia SBA Lending v. Kraft</i> , 158 P.3d 1271 (Wash. Ct. App. 2007).....	67
<i>Walji v. Candyco, Inc.</i> , 57 Wn. App. 284, 787 P.2d 946 (1990).....	69, 70
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	37
<i>Xieng v. Peoples Nat'l Bank</i> , 63 Wn. App. 572, 821 P.2d 520 (1991), <i>aff'd</i> 120 Wn.2d 512, 844 P.2d 389 (1993) .....	71
<i>Young v. Key Pharms., Inc.</i> , 112 Wn.2d 216, 770 P.2d 182 (1989).....	58

#### **UNITED STATES SUPREME COURT CASES**

<i>Ledbetter v. Goodyear Tire &amp; Rubber Co., Inc.</i> , ___ U.S. ___, 127 S. Ct. 2162, 167 L. Ed. 2d 982 (2007).....	52
<i>Nat'l R.R. Passenger Corp. v. Morgan</i> , 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)..... <i>passim</i>	
<i>Woods v. Interstate Realty Co.</i> , 337 U.S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949).....	42

#### **UNITED STATES COURTS OF APPEALS CASES**

<i>In re Grand Jury Subpoenas</i> , 902 F.2d 244 (4th Cir. 1990) .....	62
<i>Meade v. Grubbs</i> , 841 F.2d 1512 (10th Cir. 1988) .....	44
<i>Sischo-Nownejad v. Merced Cmty. Coll. Dist.</i> , 934 F.2d 1104 (9th Cir.1991) .....	50
<i>Thompson v. Duke</i> , 882 F.2d 1180 (7th Cir. 1989) .....	43, 44

	<b>Page(s)</b>
<i>United States v. McPartlin</i> , 595 F.2d 1321 (7th Cir. 1979).....	63

**UNITED STATES DISTRICT COURT CASES**

<i>Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.</i> , 152 F.R.D. 132 (N.D. Ill. 1993).....	62, 63, 64
<i>McGrath-Malott v. Maryland</i> , No. RDB-06-879, 2007 WL 609909 (D. Md. Feb. 23, 2007).....	43

**NON-WASHINGTON STATE CASES**

<i>Moy v. County of Cook</i> , 159 Ill.2d 519, 640 N.E.2d 926 (1994).....	44
--	----

**WASHINGTON CONSTITUTION & STATUTES**

CONST. art. I, § 33 .....	46
CONST, art. IV, § 9 .....	46
RCW 4.12.040.....	69
RCW 4.12.050.....	69
RCW 4.16.080(2).....	49
RCW 4.84.330.....	67
RCW 5.60.060(2).....	62
Former RCW 29.04.170 (1999), <i>recodified as amended at RCW 29A.20.040</i> .....	18
Ch. 36.27 RCW.....	31
RCW 36.01.010.....	37
RCW 36.01.030.....	38
RCW 36.16.020.....	17
RCW 36.16.032.....	38
RCW 36.16.030.....	38

	<b>Page(s)</b>
RCW 36.16.050.....	38
RCW 36.16.060.....	40
RCW 36.16.070.....	38, 39, 40
RCW 36.16.125.....	40
RCW 36.27.040.....	<i>passim</i>
RCW 36.28.020.....	39, 40
RCW 49.60.030(2).....	66
RCW 49.60.180.....	31
RCW 49.60.210.....	44, 45
LAWS OF 1991, ch. 363.....	38
BAL. CODE § 3987 (1918).....	42

**FEDERAL STATUTES**

42 U.S.C. §§ 2000e <i>through</i> e-17 .....	32
--	----

**COURT RULES**

CR 12(h)(2).....	29
CR 41(a).....	67, 70
CR 41(a)(1)(B).....	19
CR 56(c).....	28
CR 59(a)(1) .....	47
CR 59(a)(5) .....	64
CR 59(a)(8) .....	47
RAP 9.10.....	26
RAP 9.12.....	5, 8
RAP 10.4(e) .....	1

**OTHER AUTHORITIES**

RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) .....	33
RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006) .....	33, 34
WILLIAM SHAKESPEARE, HAMLET (1603) .....	5

## I. INTRODUCTION

Three former deputy prosecutors of the Thurston County Prosecuting Attorney's Office claimed that defendant/appellant Thurston County was liable under Washington's Law Against Discrimination, chapter 49.60 RCW (WLAD), for the discriminatory acts of Prosecuting Attorney Ed Holm. Plaintiffs/respondents Audrey Broyles, Vonda Sargent, and Susan Sackett-Danpullo<sup>1</sup> constantly pointed the finger at Holm as the wrongdoer, but argued that the County was the liable party. And though the County was constitutionally and statutorily prohibited from controlling Holm's actions, it was the County—not Holm—that was imposed with a judgment ultimately exceeding three million dollars resulting from Holm's actions. The County appeals to correct this mistake and several others.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

Thurston County assigns error to the following decisions:

1. The trial court erred by denying in part Thurston County's first motion for summary judgment.
2. The trial court erred by denying Thurston County's motion for summary judgment based on the statute of limitations.

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<sup>1</sup> The individual plaintiffs will be referred to name where feasible, but for ease will be referred to collectively as "plaintiffs." See RAP 10.4(e).

3. The trial court erred by denying Thurston County's motion for dismissal of claims that are barred by collateral estoppel.

4. The trial court erred by denying Thurston County's motion for summary judgment dismissal of plaintiffs' claims of retaliation and plaintiff Sargent's claim of constructive discharge.

5. The trial court erred by denying Thurston County's motion for judgment as a matter of law, raised at the conclusion of plaintiffs' case.

6. The trial court erred by denying Thurston County's motion for judgment as a matter of law and/or new trial, brought after verdict.

7. The trial court erred by giving Instruction No. 20.

8. The trial court erred by failing to give Defendants' Proposed Instruction Nos. 47, 48, and 61 (CP at 1043-44, 1057).<sup>2</sup>

9. The trial court erred by allowing the plaintiffs to present evidence to the jury of claims which had been or should have been dismissed, including marital status discrimination and the alleged hostile environment perpetrated by Jack Jones and Phil Harju.

10. The trial court erred by denying the County the opportunity to question plaintiff Sargent about her claim of discrimination against State Farm, her subsequent employer.

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<sup>2</sup> Pursuant to this Court's General Order 1998-2, the County consolidates its assigned errors pertaining to the trial court's failure to give these instructions.

11. The trial court erred by denying the defendants the opportunity to solicit testimony from Christy Peters to the substantive discussions that took place in December 2000 with the plaintiffs and their attorneys.

12. The trial court erred by refusing to declare a mistrial when plaintiffs' counsel asked the jury to award damages based on an emotional appeal rather than on the evidence.

13. The trial court erred by awarding \$1,296,108.00 in attorney fees and \$158,474.62 in costs, specifically its decisions to (1) allow recovery of fees incurred during an action the plaintiffs voluntarily dismissed, and (2) awarding a multiplier.

14. The trial court improperly made the following findings of fact in its findings and conclusions pertaining to the award of attorneys' fees: 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 14.

**B. Issues Pertaining to Assignments of Error**

1. Whether a County can be held liable for the alleged discriminatory acts of an independently elected official, over whom the County has no right of control for purposes of employment decisions.

2. Whether the trial court erred by allowing a hostile work environment claim to be predicated on conduct occurring more than three years before the filing of the complaint and absent any finding by the jury

that such conduct was related to the timely conduct and when the only reasonable inference was that conduct by Jack Jones and Phil Harju were unrelated to conduct within three years of filing.

3. Whether the trial court erred by allowing the plaintiffs to reassert the actions of Phil Harju were discriminatory when a previous court had held his actions did not, as a matter of law, violate WLAD.

4. Whether a conversation is outside the purview of the attorney-client privilege when there are multiple persons conversing with lawyers, one of whom has no subjective belief that the purpose was to establish an attorney-client relationship.

5. Whether these verdicts are so excessive as to be the result of passion and prejudice in light of plaintiffs' counsel's admonition to the jury during closing, contrary to an order in limine, to render a verdict so this "doesn't happen again."

6. Whether a prevailing WLAD plaintiff should be barred from recovering costs and fees incurred during a previous action that she voluntarily dismissed and later successfully represented to the trial court was a separate action.

7. Whether the trial court erred in awarding a multiplier based on the risk involved in prosecuting a discrimination case when such risk was also used as a basis for determining the lodestar.

### III. STATEMENT OF THE CASE

Lord Polonius said to Queen Gertrude and King Claudius that “brevity is the soul of wit.”<sup>3</sup> Certainly all litigants should strive to be brief. Here, however, the underlying litigation entailed two actions, both of which proceeded through multiple summary judgment motions and pretrial and one of which entailed pre-trial briefing, a three-week trial, and post-trial briefing. No matter how the County endeavors to detail the underlying facts briefly, the interests of justice require a detailed description of the relevant facts and underlying procedural history is necessary to fully place the trial court’s multiple errors in context, all of which ultimately forced the Court to accept liability for the actions of individuals it could not legally control.<sup>4</sup>

Because the County seeks reversal of the trial court’s orders denying summary judgment, primary focus on the record will be the Clerk’s Papers (CP) relevant to those motions. *See* RAP 9.12. The County will cite to the trial transcripts as necessary. As discussed in greater detail *infra*, this appeal arises from a lawsuit filed on May 5, 2004. *See* CP at 4416. That date of demarcation is referenced throughout, especially in regards to the alleged hostile conduct occurring prior to that

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<sup>3</sup> WILLIAM SHAKESPEARE, *HAMLET* (1603).

<sup>4</sup> The Court has permitted the County to present its arguments within 80 pages. *See* Order (Aug. 27, 2007).

date had no relation to alleged hostile conduct occurring afterwards. Moreover, that date also divides allegations in regards to discrete acts plaintiffs claimed were discriminatory. *See infra*.

**A. Plaintiffs Broyles, Sargent, and Sackett-DanPullo were deputies serving at the pleasure of Holm.**

Holm was elected Prosecutor in 1998, taking office on January 1, 1999. CP at 4606. All three plaintiffs—Broyles, Sargent, and Sackett-DanPullo—were already deputies under Holm’s predecessor, Bernadean Broadous. CP at 4262-63, 4275-77.

After Holm took office, he assigned Broyles to supervise the Juvenile Division in addition to her pre-existing duties as a felony deputy prosecuting domestic violence cases. CP at 5006.<sup>5</sup> The following year (2000), he developed a separate division devoted to Domestic Violence, which Broyles led. CP at 5007-08, 5067-71. Sargent had previously been prosecuting misdemeanors, but Holm promoted her after his election so that she could prosecute felony domestic violence cases. CP at 5263-65, 5273, 5346-47. Broyles was Sargent’s direct supervisor. *See* CP at 5551. Sackett-DanPullo prosecuted juvenile and misdemeanor cases from her

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<sup>5</sup> Thurston County supported its September 2006 summary judgment motions with, *inter alia*, a declaration of its counsel, Michael A. Patterson, which attached 73 exhibits. *See* CP at 3455-63. For reasons unknown, the 73 exhibits that accompanied Mr. Patterson’s declaration were served on plaintiffs’ counsel, as well as given to the visiting judge as working copies, but were detached from the document filed with the clerk. The Mason County Clerk has corrected this error and forwarded the 73 exhibits to this court, which appear separately from the originally filed declaration. *See* CP at 4951-6028.

1995 until the summer of 2000, when she requested a transfer to felony. CP at 5152-54, 5156-60, 5164-66.

Until January 25, 2001, the date on which Holm's reorganization took effect, *see infra*, Phil Harju was the supervisor of all criminal divisions. CP at 4695. He supervised Broyles from 1993 to January 2001, with the exception of a few months in the mid-1990s. CP at 4695, 5034-37. Harju directly supervised Sargent from January 1999 until March 2000, after which time he remained in an overall supervisory position. CP at 4695, 5348. Though Broyles directly supervised Sargent upon Sargent's transfer to Domestic Violence, Harju remained in overall charge until the January 2001 reorganization. CP at 4695.

**1. Complaints arise over conduct of senior deputy prosecutor Jack Jones and Chief Deputy Phil Harju's corollary supervision.**

Jack Jones was a senior deputy at the time, and was known throughout the office for his temper. CP at 4699, 4715. However, he had no supervisory authority. CP at 4695. Jones's abusive conduct, which included throwing files, swearing, and losing his temper, primarily occurred prior to January 2001, when Holm reorganized the office. *See* CP at 4699, 5573. Broyles testified that Jones had "a very volatile temper," as evidenced by her witnessing Jones throwing files at Christy Peters, another female DPA. CP at 4699. She further alleged that Jones

sent her “e-mails that she perceived as threatening.” *Id.* In particular, she identified an e-mail dated November 3, 2000, which was written in all capital letters. *See* CP at 4708.<sup>6</sup> She also complained about a time Jones lost his temper at a restaurant gathering, during which he yelled at the waitress, which took place prior to November 2000. CP at 4699, 5576-77.

Sargent similarly complained that Jones was “rude” not only to her but also Thurston County Superior Court Judge Christine Pomeroy. CP at 4742. She also contended that Jones used his size to intimidate. *Id.* Sargent took issue that Jones took months between April and November 2000 to apologize to her after she complained for failing to prepare for an arraignment. *See* CP at 5308-12. Sargent also complained about Jones throwing files and yelling at her, all of which occurred in 2000. CP at 5303, 5308-12, 5588-89.

Sackett-DanPullo testified that Jones never displayed any anger toward her until September 2000 when she transferred to the felony division. *See* CP at 5195-98. In a written statement, she identified several examples in which Jones acted unruly towards others, but failed to identify any incident where Jones harassed her. *See* CP at 4725-26.

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<sup>6</sup> The actual e-mail was never filed in connection with the various summary judgment motions and therefore cannot be considered for review of those orders. RAP 9.12. However, the e-mail was admitted at trial as Exhibit 268.

The severity of Jones's actions notwithstanding, it is undisputed that every action about which the plaintiffs complained took place long before May 6, 2001, with the exception of two incidents involving Sackett-DanPullo that occurred in the courtroom in September 2001. *See* CP at 4726. The first incident occurred when Jones learned that Sackett-DanPullo had signed an order for him when he was unavailable. *Id.* Jones "got into [Sackett-DanPullo's] face and said 'in the future I would appreciate it if you did not sign my orders.'" *Id.* Later that day Sackett-DanPullo refused to sign a continuance on Jones's behalf until she received permission. *Id.* In Sackett-DanPullo's words, Jones "stomped into the courtroom, came right to my face – so close I could feel his breath on my face, and said that he said not to sign orders that does not go to continuances." *Id.* This "frightened" Sackett-DanPullo. *Id.* Jones finished the calendar and approached Sackett-DanPullo when no one else was in the courtroom and "in an angry tone said, 'I had 32 fucking cases on today.'" CP at 4727.

The second incident took place in July 2002 and also happened when she and Jones were in court. CP at 5230-32. Jones was rude to Sackett-DanPullo when he had "control of the calendar," bickering with Sackett-DanPullo about when the judge would "call bench warrants." CP at 5231. Jones was rude in refusing to call the warrants before a certain

time, and Sackett-DanPullo took issue with “the tone of his voice,” which was “angry.” CP at 5232.

The remainder of Jones’s conduct to which plaintiffs took issue was either directed at other persons, *e.g.*, CP at 4699 (Broyles identifying where Jodi Lynn-Erickson “had several experiences where Jack has been physically and verbally aggressive with her”), toward males, *e.g.*, CP at 4808 (throwing computer box at male employee), or occurred long before May 6, 2001. Plaintiffs identified no other deputy who created a physically intimidating hostile work environment. Rather, as discussed *infra*, their complaints were focused on ineffective management, disparate treatment, and sexual gestures by Holm and Harju.

**2. Broyles, Sargent, Sackett-DanPullo, and non-party Christy Peters approach Holm in early November 2000 to discuss concerns about the work environment, which prompts office reorganization.**

On November 3, 2000, all three plaintiffs and a fourth female DPA, Christy Peters, met with Holm and Chief Civil Deputy Jim Powers to complain about their work environment. *See* CP at 5122-23, 5296-97, 5604. They complained primarily about Jones’s abusive behavior and Harju’s inability to supervise and control him. CP at 5122-23, 5296-97. Broyles asked Holm to strip Harju of his supervisory duties, to which Sargent agreed. CP at 5134-35, 5304. Sackett-DanPullo complained that, during the time she had worked under Harju that he was demeaning to

female deputies and that Harju stared at her chest. CP at 5184-89. Sargent also requested that Holm move or discipline Jones. CP at 5304.

Holm told the women that “it was going to get worse before it g[ot] better,” but also “to continue to let him know of ongoing problems.” CP at 4637. He also referred the deputies to County’s Human Resources Director, Peggy Quan, so that she could “aid[] [Holm] in dealing with the complaints.” CP at 5604. However, there is no dispute that neither Quan nor the County could force Holm to do anything. CP 5573-74; *see also* CP at 4649 (Broyles testifying that “human resources didn’t have any control over Ed or Jack or anyone”). Rather, the referral was done to make suggestions to the elected official, who had unbridled authority to select his own resolution.

Quan met with Broyles, Sargent, Sackett-DanPullo, and Peters individually over the next few days. *See* CP at 5579-84. Quan’s notes from the November 8, 2000 meeting indicate that Broyles “[e]xpressed concerns about gender bias” but primarily complained about Jones’s abusive behavior and Harju’s ineffective supervision. CP at 5582. Sackett-DanPullo and Sargent raised similar concerns, as did Peters. *See* CP at 5576-84. Quan testified that she confirmed with Holm that “their major concerns had to do with the ineffective supervision by Phil Harju and the fact that Jack Jones was a bully.” CP at 5573. During these

meetings with Quan, however, none of the plaintiffs raised any concern about (a) Harju's alleged tendencies to stare at women's breasts, or (b) Holm's sexually inappropriate behavior that would later form the primary focus of their tort claim, to which all plaintiffs would later admit at deposition. *See* CP at 4651-52, 5028-30, 5101-02, 5296-97, 5185-91.

The four female DPAs spoke with Holm again approximately one week after meeting with Quan. CP at 5192. According to Sargent's testimony, they "basically" reiterated the "same issues," but Sargent added that her fear of Jones had increased. CP at 5308. Holm listened to the complaints and asked that they allow him until the following January or February (2001) to address their concerns. CP at 5316. Broyles would later admit at deposition that Holm sought her counsel several occasions between November and January 2001 to discuss reorganization or reclassifying her role at the Prosecuting Attorney's Office. CP at 5017-27.<sup>7</sup> Holm also approached Broyles on January 11, 2001, admitting that "he made a mistake in not giving [her] a higher pay raise early on," but that was a mistake that he could not rectify. CP at 4696. Broyles had previously complained about her pay since Holm apparently "messed up"

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<sup>7</sup> For example, Holm approached Broyles to suggest that he was thinking of replacing Harju with Peters, a female. CP at 5125-26. According to Broyles, Holm told her "so that in case he decided to do that [promote Peters] that [she] wouldn't be upset." CP at 5126. Broyles was offended that Holm considered Peters over her, given her superior experience to her. CP at 5126-27.

her pay raise when he took office in 1999. *Id.* However, as confirmed by Quan, the County has “no authorization to correct any mistakes that may have been made in the past” regarding pay. CP at 5631.

As a result of the plaintiffs’ complaints, Holm reorganized the Prosecuting Attorney’s Office on January 19, 2001, which took effect six days later. CP at 4712-13, 5518-21, 5555. The reorganization created six separate divisions, all of which were supervised exclusively by Holm. CP at 5491, 5518-21, 5555. After the reorganization, “none of the female felony attorneys [were] supervised by Phil Harju.” CP at 4713. Broyles was placed in charge of the Juvenile/Domestic Violence Division and Sackett-DanPullo was placed in charge of Community Prosecution. *See* CP at 5555. Sargent remained a felony prosecutor in Broyles’ division, and was supervised exclusively by her. *See id.*

The plaintiffs’ complaints also had a substantial effect on Jones and his interaction with everyone else in the office. Following the November meetings, Holm directed Jones to have little or no contact with any of the plaintiffs. CP at 5589-90. At Holm’s direction, Jones kept to himself, remained in his office with his door closed, and lost 40 pounds to alleviate his tendency to intimidate. CP at 5590. He also took anger management classes. *Id.* When Holm reorganized the office, he demoted Jones to drug cases, at which point Jones had no authority to criticize any

other deputy. *Id.*; *see also* CP at 5518-20, 5597. In addition, the reorganization transferred Sackett-DanPullo to full time community prosecution which was operated out of the Lacey Police Station;<sup>8</sup> as such, her daily interaction with Jones ceased. *See* CP at 4712-13. Sargent admitted at deposition that she stopped having any verbal interaction with Jones following their complaints to Holm. CP at 5353-54. Broyles, as head of the juvenile division, also worked part-time away from the main office where Jones worked with his door shut. CP at 5048-49. Jodilyn Erikson-Muldrew, another female DPA, signed a declaration testifying that “[a]fter Jack was called in and counseled and demoted he has been completely different.” CP at 5601.

**3. Plaintiffs complain following reorganization, but provide little details.**

The plaintiffs would later claim “ongoing retaliation” occurred as a result of the office reorganization. *See* CP at 3828. Broyles provided only vague, conclusory testimony that things “didn’t get better” with either Jones or Harju. CP at 4651. However, she described an instance by written statement that took place after reorganization. First, she complained that Holm decided attorneys from her division (Domestic

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<sup>8</sup> Though Sackett-DanPullo complained that both Lacey Police and Holm refused to pay for walls to be placed around her cubicle, she “do[es] not know whether [Holm] would have put up walls if it was a male doing the Community Prosecution work.” CP at 4713.

Violence) provide “back-up coverage for Misdemeanors.” CP at 4710-11. She believed this undermined her authority. CP at 4711. She alleged that when she approached Holm, “he interrupted and yelled, ‘God damn it, is this the money thing again?,’” referring to Broyles’ prior complaints about her salary. CP at 4711. According to Broyles, these events forced her to take medical leave. CP at 4711. Broyles also relied on testimony by Sackett-DanPullo, who stated that during an August 15, 2001 meeting Holm questioned whether Broyles had complied with the Family Medical Leave Act, and then engaged in a discussion regarding the ramifications for not complying. CP at 4731. Sackett-DanPullo testified vaguely that the reorganization “only increased hostility.” CP at 4659. Sargent claimed that Jones, a non-supervisor, retaliated by “[e]l[ing] the defense bar that [she] should be turned in to the Bar Association.” CP at 4745.

**4. Plaintiffs file a tort claim with the County, alleging for the first time numerous acts of discrimination by Holm, Harju, and Jones.**

On August 22, 2001, Broyles, Sargent, and Sackett-DanPullo filed a tort claim<sup>9</sup> with the County’s Risk Management Director. The claim identified much of the conduct that had been raised with Holm and Quan the previous November, but also identified a host of inappropriate conduct by Holm himself. CP at 4222-24. This included claims that Holm made

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<sup>9</sup> See RCW 4.96.020.

comments referring to female anatomy, referring to the sexuality of female job applicants, and other sexually charged comments. CP at 4222. That same month the County hired attorney Marcia Ruskin to conduct a full investigation. See CP at 3902-03. Ruskin completed her investigation five months later, submitting a report on January 31, 2002 that found plaintiffs' allegations to be unfounded. CP at 3955-57, 3929-33.

**B. Each of the plaintiffs ultimately leave employment with the Thurston County Prosecuting Attorney's Office.**

Sargent claimed retaliation for filing the claim, citing, *inter alia*, the fact that a junior deputy was allowed to her assign cases. See CP at 4692. However, she admitted that the "junior DPA" was assigning cases to Sargent as of July 1, 2001, over a month before Sargent and the other plaintiffs filed their tort claim. See CP at 4748-49. She claimed retaliation by Harju, citing the conclusory allegation that he "[a]llowed people to take cases out of my file cabinet without any notice to me." CP at 4751. However, after complaining to Holm, he responded by saying he "c[ould] move [her] butt over there to the Taylor Building with the rest of the girls." CP at 4693.<sup>10</sup> Sargent also complained that Jim Powers, a chief deputy, "cherry picked" desirable cases and ignored her. CP at 4752. By October, two months after filing her tort claim, Sargent told Holm that she

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<sup>10</sup> The Taylor Building was, according to Sargent, where the district court prosecutors worked. CP at 4693.

“ha[d] another job, and [would] be gone in two weeks.” CP at 5259. She had accepted an offer from State Farm, and began working there two weeks later. CP at 5259-60.

Broyles returned from medical leave in September 2001. CP at 4700. Shortly before then, Holm had reorganized the office again, promoting DPA Jon Tunheim to supervise the Juvenile Division, and in turn, Broyles. CP at 5441, 5556. On December 31, 2001, Holm fired Broyles. CP at 4621-22.

After considering the matter, the County Commissioners attempted to reinstate her. CP at 4226. The Commissioners voted to reinstate Broyles’ salary and benefits “in full,” meaning Broyles received all back pay to cover the period from the date she was fired to the date of the letter, and would then receive her normal weekly check. *Id.* But illustrating the County’s inability to meaningfully control Holm was its inability to give Broyles back her job. Holm refused to be controlled by the Commissioners’ decision and steadfastly prevented Broyles from physically returning to work. CP at 5031-32, 5147, 5442-43.

Sackett-DanPullo continued to work as a deputy prosecutor for well over a year after she had filed her tort claim. Holm’s first four-year term ended in 2002, RCW 36.16.020, but he won reelection; his second term was to begin on January 1, 2003. CP at 4606; *see also* Former RCW

29.04.170 (1999), *recodified as amended at* RCW 29A.20.040. Exercising his statutory “authority [under RCW 36.27.040] to ‘clean house’ and appoint an entire new staff of deputies” upon a new term, *see Spokane County v. State*, 136 Wn.2d 644, 655, 966 P.2d 305 (1998), Holm declined to renew the appointments of three deputies: Allen Tom, Heidi Thompson, and Sackett-DanPullo. CP at 4230-34.

### **C. Procedural History**

The plaintiffs filed their first lawsuit (*Broyles I*) on January 11, 2002 in Thurston County Superior Court against four defendants: Holm, Harju, Powers, and the “Thurston County Office of the Prosecuting Attorney.” *See* CP at 4320-27. They amended their complaint three weeks later, this time suing Thurston County as “a political subdivision of the State of Washington,” though naming, in addition to the three individual defendants, “THURSTON COUNTY; (THURSTON COUNTY OFFICE OF THE PROSECUTING ATTORNEY).” CP at 3969-70. The amended complaint alleged all defendants—the County, Holm, Harju, and Powers—were liable to each of the plaintiffs for sex discrimination, a hostile work environment, and retaliation. CP at 3969-76. Sargent added a claim for race discrimination. CP at 3971. Sackett-DanPullo also claimed an additional basis for discrimination, namely marital status. *Id.* The marital status discrimination claim stemmed from Sackett-DanPullo’s

belief that she was improperly assigned to the Community Prosecution division because, in Holm’s words, she was “perfect because [she] lives in Lacey and [her] husband is black.” CP at 5397.

**1. The plaintiffs’ first lawsuit results in substantive dismissal of all claims against Harju, all claims of race and marital discrimination, and a nonsuit to the remainder.**

In March 2003 the plaintiffs agreed to dismiss all claims against Powers with prejudice. CP at 4989-90. Two months later, Harju filed three summary judgment motions, seeking full dismissal of all claims.<sup>11</sup> CP at 5640-5737. Plaintiffs filed a collective 37-page opposition, supported by individual declarations from Broyles, Sargent, Sackett-DanPullo, and their counsel. *See* CP at 5739-5802. Harju filed three separate replies. CP at 5804-59. The trial court heard oral argument on September 26, 2003, and granted the motions, dismissing all claims against Harju with prejudice. CP at 4992-93. The County and Holm also moved for summary judgment of all claims. The court granted the motions in part, dismissing Sargent’s race discrimination claims and Sackett-DanPullo’s marital discrimination claims with prejudice. CP at 4995-97. The plaintiffs took a voluntary nonsuit under CR 41(a)(1)(B) on May 3, 2004, CP at 4999, the first scheduled day of trial, *see* CP at 3147.

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<sup>11</sup> A full discussion of Harju’s motions and the bases therefor are discussed *infra*.

**2. The plaintiffs refile their lawsuit in a new forum.**

The plaintiffs refiled their action two days later in Mason County Superior Court, this time naming “THURSTON COUNTY (THURSTON COUNTY OFFICE OF THE PROSECUTING ATTORNEY)” in the caption. CP at 4416-24. The answer, though admitting the plaintiffs were “employee[s] of Thurston County” emphasized that the acts of which the plaintiffs complained were not on Thurston County’s behalf, simultaneously “den[ying] that the acts or omissions of Prosecutor Edward Holm, an independently elected official, were on behalf of Thurston County or that Holm was an employee, agent or representative of Thurston County.” CP at 4405-15.

*Summary judgment motions.* The County filed two contemporaneous summary judgment motions in the spring of 2006, arguing in part that it could not be liable because all wrongful acts occurred at the hands of Holm, over whom it had no control. *See* CP at 4106-49, 4375-4404.<sup>12</sup> The court granted the County’s motion in part, dismissing claims that were not properly included in the tort claim, but denying the motions in their remainder. CP at 3514-17.<sup>13</sup> The County

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<sup>12</sup> As discussed *infra* in regards to plaintiffs’ motion for attorney fees, these motions were heard by visiting Judge Brosey of Lewis County after the plaintiffs filed an affidavit of prejudice to remove Judge Costello.

<sup>13</sup> The court dismissed only (1) “Plaintiffs’ allegations that Thurston County failed and refused to properly investigate and respond to the claims in accordance with their own

filed several more dispositive motions the month before trial, arguing, *inter alia*, that (1) plaintiffs could not base liability on acts occurring prior to May 6, 2001 (statute of limitations); (2) plaintiffs could not base liability on acts previously dismissed on the merits, and (3) various actions cited by plaintiffs as retaliation could not form the basis for either a retaliation or constructive discharge claim. *See* CP at 3399-3452, 3464-3513. The trial court denied each of these motions.<sup>14</sup> CP at 1141-42, 2647-48, 2651-52.

***Motions in limine.*** Before trial, the parties made a number of motions in limine.<sup>15</sup> *See* CP at 2516-2646. The plaintiffs moved to exclude evidence that Sargent brought discrimination and negligent infliction of emotional distress claims against her employers both prior to the Prosecuting Attorney's Office, Foster Pepper, and the employer afterward, State Farm. *See* Verbatim Report of Proceedings (VRP) (Oct. 26, 2006) at 36-40, 47-68. The court excluded evidence to the latter

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policies and procedures;" (2) "Plaintiffs' allegations that Thurston County failed to train;" (3) "Plaintiffs' allegations that Thurston County carried out a negligent investigation;" and (4) "Plaintiffs' allegations that Thurston County wrongfully terminated Audrey Broyles' salary and benefits, after plaintiffs' voluntary non-suit in May 2004." CP at 3515-16.

<sup>14</sup> In regards to the County's summary judgment motion regarding retaliation, the trial court based its ruling on its decision to "assum[e] *the law* most favorable to" the non-moving parties. CP at 1143 (emphasis added)

<sup>15</sup> For reasons unexplained, the visiting judge, Hon. David Foscue of Grays Harbor County, never forwarded his signed orders on the motions in limine to the Mason County Superior Court Clerk, and therefore they are nowhere to be found in the docket and could

employer, but denied the motion insofar as it sought to preclude the County from introducing evidence of Sargent's prior suit, which was admissible to establish alternative causes for her alleged injury. *Id.* at 67.

The County also moved to exclude “[a]ny reference to punitive damages, including *any reference, statement or insinuation that the jury should send a message to Thurston County,*” citing case law holding punitive damages are not recoverable in WLAD claims. CP at 2643 (emphasis added); *see also Dailey v. N. Coast Life Ins. Co.*, 129 Wn.2d 572, 575-77, 919 P.2d 589 (1996). This included any reference in closing argument to sending a message. CP at 2643. The plaintiffs did not oppose this motion, and the court granted it. *See* VRP (Oct. 26, 2006) at 133-34. The County brought several other motions, one of which was to exclude evidence of claims the trial court had previously dismissed with prejudice, such as evidence of race and marital status discrimination. CP at 2527-30. The court deferred ruling. VRP (Oct. 26, 2006) at 146-56.

***Trial, jury instructions, and verdict.*** Trial commenced on October 31 and lasted three weeks. *See* CP at 4. A total of 35 different witnesses testified either live or by deposition. Though her claim for marital status discrimination had previously been dismissed, Sackett-DanPullo was

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not have been designated for the record on review. The transcript from that proceeding is the only record of how Judge Foscue ruled.

allowed to testify that she received assignments because of her husband's race.<sup>16</sup> XIV VRP at 1377. The County objected, but the Court allowed the testimony to stand, opining that it stood for the proposition that Sackett-DanPullo "would get the job for some reason other than legal qualifications." *Id.* at 1378. Sackett-DanPullo went on to testify that she was "offended" by Holm's remark because "[i]t appeared that the only qualifications for the job was that my husband was black and that I lived in the area." *Id.* at 1386-87. Much of the same evidence described *supra* was presented to the jury, including Jones's intimidation and Harju's tendency to abuse his authority over the plaintiffs.

The County proposed instructions 48, 49, and 61, which mirrored the County's statute of limitations arguments that the plaintiffs could not recover for actions occurring prior to May 6, 2001 absent a finding such actions were sufficiently related to timely conduct. *See* CP at 1043-44, 1057. The County supported its proposed instructions with their trial brief

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<sup>16</sup> Sackett-DanPullo testified as follows:

Q And did you relay to Mr. Holm your decision that you didn't want to do the community prosecution work?

A I did.

Q And what was his response?

A He was - he goes oh, you'll be great for it. You're - you know, you live out in Lacey, which is where they thought it would be. *And your husband's black, it's a great fit for you.*

XIV VRP at 1377.

that emphasized the plaintiffs would be unable to prove a nexus between conduct prior to May 6, 2001 and conduct occurring thereafter. CP at 962-72. The court refused to give these instructions. See XXXI VRP at 3003-10. Instead the court gave instruction number 20, which instructed the jury to consider evidence relating to failing to promote or transfer any of the plaintiffs and evidence relating to Broyles' compensation solely "*for the purpose of determining if there was a hostile work environment.*" CP at 914 (emphasis added). Consistent with its statute of limitations arguments, the County argued that the jury needed to find a sufficient relationship between the conduct occurring prior to May 6, 2001 and conduct occurring thereafter for it all to constitute part of the same hostile working environment. See XXXI VRP at 3002, 3009.

During closing, plaintiffs' counsel finished his rebuttal by speaking to damages, asking the jury to "to determine what fair compensation is *and to award* that so that what will [sic] happen to these women *will never happen again.*" XXXII VRP at 3112 (emphasis added). The County objected and moved to strike, noting the motion in limine, but the trial court overruled nonetheless. *Id.* at 3112. The County moved for a mistrial, which the trial court also denied. *Id.* at 3116-17.

The jury returned a verdict in favor of all three plaintiffs, awarding Broyles \$599,000, Sargent \$250,000, and Sackett-DanPullo \$673,000. CP

at 898-903. The County subsequently moved for judgment as a matter of law or a new trial in the alternative, which the trial court likewise denied. CP at 426-27, 820-39.

*Motion for Attorney Fees.* Contemporaneous to the County's motion for judgment as a matter of law, the plaintiffs moved for attorney fees under WLAD. CP at 744-57. The plaintiffs sought to recover for work that took place in *Broyles II*, the case in which they prevailed at trial, but also for all work in *Broyles I*, the case they had voluntarily dismissed. *Id.* Over the County's opposition, the trial court granted the plaintiffs all fees requested, entering a supplemental judgment in the amount of \$1,296,108 for attorneys' fees and \$158,474.62 in costs. CP at 1-2. The court supported its award with written findings and conclusions, which incorporated by reference the judge's oral ruling. *See* CP at 4. Agreeing with the plaintiffs' proposed hourly rate in support of the lodestar, the trial court emphasized the uniqueness of the case and how few firms could handle the risk:

The plaintiffs are entitled to choose their attorney. This is a specialized lawsuit. It is, at least looking at it from hindsight as I am right now, a horribly expensive endeavor to undergo and to finance. The – the law firm has to be equipped to go without being paid; in this case it's four or five years, I guess.

....

I feel comfortable that the rates charged by the plaintiffs' attorney are reasonable *under the circumstances*

*of this – of this case. I felt from the beginning that it was a  
– an exceptional case and an exceptional challenge.*

VRP (Feb. 26, 2007) at 13-14, 15 (emphasis added).<sup>17</sup> The court then awarded a 1.5 multiplier, highlighting many of the same factors. For example, the court highlighted “the skill level of the attorney is incorporated in the attorney’s fee,” but then stressed a multiplier was appropriate because “there’s no doubt this case required a high – high level of skill.” *Id.* at 21-22. Building off his belief that the case was “an exceptional case and an exceptional challenge,” the court highlighted the risk of no recovery, and awarded a 1.5 multiplier to all work done prior to verdict. *Id.* at 24-25. This appeal timely followed.

#### IV. SUMMARY

Justice Sanders said it best: “The reciprocal of individual responsibility for one’s own misdeeds is the necessary absence of responsibility for the misconduct of others.” *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 280, 96 P.3d 386 (2004) (Sanders, J., dissenting). The plaintiffs have constantly pointed the finger at Ed Holm, Thurston County’s duly elected prosecuting attorney, as the main discriminating culprit in creating a hostile work environment for females

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<sup>17</sup> Though the written findings incorporated the oral ruling by reference, *see* CP at 4, the transcript was inexplicably omitted from the written findings when it was filed with the superior court clerk. The County has made a motion to settle the record under RAP 9.10 to correct this error, but cites to the page numbers of the transcript until such time as Clerk’s Papers page numbers are assigned.

and retaliating against them for filing a tort claim. Yet to find Thurston County vicariously liable for Ed Holm's actions, the court must find that the County had the right to control Holm. Constitutional, statutory, and case law provide the opposite: that counties cannot control independently elected officials. As such, any liability should have been placed on Ed Holm, not the County.

But even if this case is not dismissed because the County as a matter of law cannot be liable, a new trial is warranted because these verdicts were premised in large part on allegations that were barred by either the statute of limitations, as such occurred more than three years before this action was commenced, or collateral estoppel, as a prior court previously dismissed such claims on the merits.

Coupled with additional evidentiary errors, a "send a message" argument made by plaintiffs' counsel, and an award of attorneys' fees for work done in a separate case in which the plaintiffs were not the prevailing parties, the multitude of errors below demand reversal.

## **V. ARGUMENT**

Most of the errors Thurston County assigns arise from the trial court's erroneous denials of summary judgment. As such, this court must primarily employ a de novo review. *See Branson v. Port of Seattle*, 152 Wn.2d 862, 869, 101 P.3d 67 (2004). "Summary judgment is appropriate

if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; *see also* CR 56(c). Material facts are those facts on which the outcome of the litigation depends. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). As discussed in greater detail *infra*, liability for many acts depend on statutory construction principles, the statute of limitations, and collateral estoppel, all of which are legal questions reviewed de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998); *Satsop Valley Homeowners Ass’n v. N.W. Rock, Inc.*, 126 Wn. App. 536, 542, 108 P.3d 1247 (2005).

**A. As a matter of law, Thurston County cannot be held liable for the alleged unlawful employment actions of Prosecutor Ed Holm, an independently elected official over whom the County had no right to control.**

Throughout this case the County had argued that it could not, as a matter of law, be vicariously responsible for the alleged discriminatory acts of Holm, the County’s independently elected prosecutor, and his deputies. *See, e.g.*, CP at 823-31 (motion for judgment as a matter of law), 3367-96 (motion for dismissal for failure to join indispensable party), 4382-99 (motion for summary judgment). The trial court repeatedly rejected this argument, going so far one time as to say, “I think that Ed Holm is an officer of the County *and his actions are the County’s actions*, and it is the County, *as the ultimate employer*, is answerable for them.”

*See* VRP (Oct. 16, 2006) at 38 (emphasis added).<sup>18</sup> In essence, this ruling forced the County to accept strict liability for Holm’s conduct, despite a constitutional and statutory bar that prevented it from controlling Holm, much less terminating him from employment. Law, policy, and logic reject this result.

Before addressing the substantive merits, however, it is necessary to dispose of an argument raised by the plaintiffs below and anticipated here, namely that the County waived any right to claim it was not vicariously liable for Holm’s actions. The plaintiffs relied on statements made in the County’s answer that the plaintiffs were “employee[s] of Thurston County, and that [they] worked as . . . Deputy Prosecuting Attorney[s] in the Criminal Division of the Thurston County Prosecutor’s Office.” *See* CP at 4405-06 (County’s answer); *see also* CP at 3178-79. To the extent plaintiffs wish to raise that argument here, the court should reject it. First, the affirmative defense of failure to join an indispensable party “may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.” CR 12(h)(2); *see also* *Foothills Dev. Co. v. Clark County Bd. of County*

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<sup>18</sup> *See also* VRP (Apr. 16, 2006) at 62 (“It may be that the county has no control over the prosecutor with respect to the issue of decisions made by the prosecutor in the exercise of his prosecutorial functions, *but I believe they have some control over the prosecutor, and I think they have responsibility over the prosecutor for decisions that are made with respect to employment.*”) (emphasis added).

*Comm'rs*, 46 Wn. App. 369, 377-78, 730 P.2d 1269 (1986). And “contrary [to plaintiffs’ claim], it is well established that *a party concession or admission concerning a question of law or the legal effect of a statute as opposed to a statement of fact is not binding on the court.*” *State v. Knighten*, 109 Wn.2d 896, 902, 748 P.2d 1118 (1988).

Though the County admitted in its answer to an incorrect legal conclusion, namely that plaintiffs were its “employees,” it simultaneously denied any vicarious liability for the actions of Holm or his deputies. CP at 4406.<sup>19</sup> Plaintiffs cannot justifiably claim that they were misled by the County’s admission, much less justifiably relied on it, especially when the County contemporaneously removed any doubt that it would accept vicarious responsibility for any of Holm’s actions.

As such, any argument regarding waiver should be rejected. Turning to the true dispositive issue—whether the County can be vicariously liable for the employment actions of an independently elected

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<sup>19</sup> Paragraph 5 of the County’s answer provided:

[D]efendant [Thurston County] denies that any and all alleged acts or omissions complained of were on behalf of Thurston County occurred within the scope of any manager, supervisor, agent, employee or representative’s employment. Furthermore, defendant specifically denies that the acts or omissions of Prosecutor Edward Holm, an independently elected official, were on behalf of Thurston County or that Holm was an employee, agent or representative of Thurston County. Thurston County additionally denies any agency and/or respondeat superior responsibility for the alleged actions of Harju and Powers since these defendants have been dismissed with prejudice. . . .

CP at 4406.

prosecutor—ultimately requires the court to construe WLAD’s provisions with the chapter addressing the powers possessed by the Prosecuting Attorney, *see* ch. 36.27 RCW.

A detailed discussion of the principles underlying WLAD and “supervisor strict liability” juxtaposed with an analysis of the constitutional and statutory independence of county prosecutors is necessary to appreciate how the trial court’s analysis went awry. Such necessitates resolution of a question of law, thereby prompting *de novo* review. *See Cockle v. Dep’t of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). This court therefore does not defer at all. *Cf. State v. Henjum*, 136 Wn. App. 807, 810, ¶ 6, 150 P.3d 1170 (2007).

**1. Employers are strictly liable for the hostile work environments caused by officers in the highest echelons because agency principles dictate the owner or officer is the alter ego of the principal.**

Each of the plaintiffs asserted liability under a “hostile work environment” theory, a claim that derives from WLAD’s provision barring employers from “discriminat[ing] against any person . . . in other terms or conditions of employment because of such person’s . . . sex.” RCW 49.60.180(3). The Supreme Court first recognized hostile work environments as a form of illegal discrimination by way of sexual harassment in *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 405, 693 P.2d 708 (1985). *Glasgow* affirmed a finding of a hostile work

environment against two female plaintiffs who were constantly subjected to unwelcome sexual advances by a co-worker. *Id.* at 402-03. However, the plant manager did nothing to correct the behavior despite actual knowledge. *Id.* Following Title VII<sup>20</sup> authority from federal courts, the Court delineated four elements the employee must prove: (1) “[t]he harassment was unwelcome,” (2) “[t]he harassment was because of sex,” (3) “[t]he harassment affected the terms or conditions of employment, and (4) “[t]he harassment is imputed to the employer.” *Id.* at 406-07. The Court went on to provide examples of each element, describing the fourth element—imputability—as follows:

*Where an owner, manager, partner or corporate officer personally participates in the harassment, this element is met by such proof.* To hold an employer responsible for the discriminatory work environment created by a plaintiff’s supervisor(s) or co-worker(s), the employee must show that the employer (a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action. This may be shown by proving (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer’s knowledge or constructive knowledge of it and (b) that the employer’s remedial action was not of such nature as to have been reasonably calculated to end the harassment.

*Id.* at 407 (emphasis added). The plaintiffs and trial court here focused on the opening italicized phrase, arguing that Holm, as the County’s Prosecuting Attorney, was an “officer” and therefore a person whose

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<sup>20</sup> See 42 U.S.C. §§ 2000e through e-17.

actions could subject the County to strict liability. But the plaintiffs' claim relies solely on using a label attached to the alleged wrongdoer, which Division Three of this court recognized is "too simple" to base a determination of strict liability. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 854, 991 P.2d 1182 (2000). Rather, "[t]he analysis must look to the functions and responsibilities of the person at issue." *Id.* In other words, it is appropriate to turn to agency principles, the source of the nomenclature used by *Glasgow*. *Id.* at 855.

Under the Restatement, an agency exists only when the principal has the right to control the agent in some degree or fashion. "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and *subject to the principal's control, and the agent manifests assent or otherwise consents so to act.*" RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *see also id.*, cmt. c ("The person represented has a right to control the actions of the agent."). Such is consistent with the Restatement's view of employer vicarious liability. Section 7.07 provides in relevant part:

(1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

....

(3) For purposes of this section,

(a) an employee is an agent *whose principal controls or has the right to control the manner and means of the agent's performance of work*[.]

*Id.* § 7.07(1), (3). Applying these principles, Holm can be the agent of Thurston County—and therefore subject the County to vicarious liability—only if Holm was the County's agent. *Id.* § 7.07(1), (3); *see also Francom*, 98 Wn. App. at 855.

Consistent with this “right to control” analysis, the Supreme Court held the State of Washington could not be vicariously liable for a hostile work environment perpetuated by a foster parent on the State's payroll, reasoning the absence of any right to control negated the fourth element, namely imputability. *DeWater v. State*, 130 Wn.2d 128, 137-41, 921 P.2d 1059 (1995) (emphasis added). *DeWater* involved a sexual harassment claim against the State's Department of Social and Health Services and a licensed foster parent who operated a foster home. *Id.* at 131. The foster parent, Troyer, was compensated by the State through foster care payments, and also received funding from the State for training and also to hire “trackers,” who would provide 24-hour supervision. *Id.* at 131. The plaintiff, DeWater, worked as a tracker and was supervised only by Troyer. *Id.* Troyer had sole authority to set DeWater's work schedule and

ultimately terminate the employment relationship. *Id.* DeWater, however, was paid by the State, not Troyer. *Id.*

The Court held the State was not liable for DeWater's claims of, *inter alia*, hostile work environment and retaliation, basing its reasoning on principles of vicarious liability. *Id.* at 133, 135-36. The Court rejected the view that Troyer was an employee of the State, focusing on the lack of the State's ability to control him. *Id.* at 137. Though the Court used terms such as "independent contractor," the Court turned to WAC 162-16-170 to hold "the key to determining whether the relationship is that of employer/employee or of principal/independent contractor is an assessment of the employer/principal's *right to control the manner of doing the work involved.*" *Id.* at 140. Because the State had no "right to control the manner" Troyer used to complete his work, the State was not Troyer's employer and therefore not, as a matter of law, vicariously liable for Troyer's actions:

In this case there is no employee/employer relationship primarily *because there is no right to control the daily actions* of the foster parent and *thus no ability to supervise or interfere with the day-to-day interaction* between a foster parent and those working in the foster home. The State could revoke a foster parent's license and remove foster children from the home, but it would have no right to otherwise "control" the actions of the foster parent. A foster parent is therefore not a state employee.

*Id.* Thus, even though the State had the power to terminate a person's ability to be a foster parent—a right the County does not have vis-à-vis

removing a prosecuting attorney—the State could not be liable for the discriminating acts of Troyer.

Without question, Holm held the highest office in the Prosecuting Attorney’s Office. Yet the crucial question for this case is whether Holm was an “owner, manager, partner or corporate officer” of Thurston County, or was he an “owner, manager, partner or corporate officer” of the Thurston County Prosecuting Attorney’s Office. If it is the former, then Holm’s actions are imputable to the County. If it is the latter, then the trial court committed reversible error and the judgment must be set aside.

**2. A county’s elected offices can be sued independently from a county itself because the county cannot control the actions of elected official and such official is statutorily responsible for his or her own deputies.**

Plaintiffs have argued that the employer is the County because the County Prosecuting Attorney’s Office cannot be sued. Separate from the reality that county prosecuting attorney’s offices *have* been sued, *see, e.g., Cowles Publ’g Co. v. Pierce County Prosecutor’s Office*, 111 Wn. App. 502, 45 P.3d 620 (2002) (claimed violation of public disclosure act), an analysis of the statutes governing counties and prosecuting attorneys reveal a demarcation between counties, which exercise their powers through the legislative body, namely the commissioners, and the officially elected offices sitting within their respective counties. In other words, either may be sued.

A county government's structure and powers are defined by statute; thus any analysis must employ statutory construction principles. This examination aims to ascertain the legislature's intent, giving effect to unambiguous language alone due to the presumption "the legislature says what it means and means what it says." *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)). This principle mandates a statute's plain language is to be discerned not simply from a tunnel-vision approach considering just one section, but rather "from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002).

Title 36 RCW governs county structure. By statute counties "have capacity as bodies corporate, to sue and be sued in the manner prescribed by law." RCW 36.01.010. These powers include the ability "to purchase and hold lands; to make such contracts, and to purchase and hold such personal property, as may be necessary to their corporate or administrative powers, and to do all other necessary acts in relation to all the property of

the county.” *Id.* The “powers [of the county] can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law.” RCW 36.01.030. Curiously, plaintiffs have relied on RCW 36.16.030 to argue a prosecuting attorney is specifically delineated as an “officer” of the County to reach their desired result that strict liability exists. *See, e.g.*, CP at 3186. As a threshold, the legislature declared that the caption heading on which plaintiffs rely is not law. *See* LAWS OF 1991, ch. 363, § 168 (“Section headings as used in this act do not constitute any part of the law.”); *see also id.* §§ 46-47 (amending RCW 36.16.030). Plaintiffs commit the logical fallacy of equivocation, meaning they have taken a word used in one context to assume, without discussion, the word means the same in a different context.

Moving specifically to the text of the statute, every county has various “offices,” which are occupied by individuals elected by the people. *See* RCW 36.16.030-.032. These offices include the assessor, auditor, clerk, coroner, sheriff, treasurer, and prosecuting attorney. RCW 36.16.030. Each elected official “before he or she enters upon the duties of his or her office [to] furnish a bond.” RCW 36.16.050. Prosecuting attorneys are no different. RCW 36.16.050(6). In conjunction with the bond requirement, the legislature allows elected officials such as prosecuting attorneys to appoint deputies. RCW 36.16.070. In such cases

the county commissioners determine the compensation to which the deputies are entitled, and also “require what deputies shall give bond and the amount of bond required from each.” *Id.* It is in this section that the legislature expressed its view insofar as the agency relationship between a deputy and the officer:

A deputy may perform any act *which his principal is authorized to perform*. The officer appointing a deputy or other employee *shall be responsible for the acts of his appointees upon his official bond and may revoke each appointment at pleasure*.

*Id.* (emphasis added). This section is echoed in RCW 36.27.040, which expressly authorizes “[t]he prosecuting attorney [to] appoint one or more deputies who shall have the same power in all respects as their principal.” The section goes on to state, “The prosecuting attorney *shall be responsible for the acts of his deputies and may revoke appointments at will*.” RCW 36.27.040 (emphasis added); *cf.* RCW 36.28.020 (elected sheriff is “responsible on his official bond for [the] default or misconduct [of deputy sheriffs]”).

The language employed by the legislature supporting an agency relationship between deputies and the prosecutor—as opposed to the prosecutor and the county—is supported by the legislative directives vis-à-vis where deputies’ bonds should be held, namely in the “offices in which the oaths and bonds *of their principals* are required to be filed.” RCW

36.16.060 (emphasis added). Nothing in Title 36 states counties are responsible for the acts of its elected officers, whereas Title 36 is rife with references as to the individual responsibility, and in turn liability, of elected officials for the acts of their deputies. *Accord* RCW 36.16.070 (elected officers' bonds liable for the acts of the "principal's" deputies); RCW 36.27.040; RCW 36.28.020.

Applying this statutory structure, it becomes clear that the legislature intended county public officials to defend themselves against suits involving their office separate from other county offices. Were this not the case, the statutory mandates to a prosecuting attorney or sheriff shouldering the full "responsibility" for the wrongful acts of his or her respective deputies would be superfluous and unnecessary. Yet this is an interpretation the court cannot countenance. *Davis*, 137 Wn.2d at 963. Supporting this conclusion is RCW 36.16.125, which allows the "county legislative authority" (i.e., board of commissioners) to bring a declaratory judgment action against any "county elected official" who has abandoned office. If plaintiffs' position were correct, i.e., that county officials such as the prosecuting attorney could not be sued, then RCW 36.16.125 would illogically lead to a county suing itself for declaratory judgment. Such cannot be the law. *Cf. State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (statutes cannot be construed to lead to absurd results).

3. **Because it is the county office and not the county that controls the acts of the elected official and his or her deputies, it is the official—in this case Holm—who is liable for any employment wrongs committed against these plaintiffs.**

Case law supports the conclusion that the elected official is the employer, and therefore vicariously liable, when a deputy commits a wrong. *See Carter v. King County*, 120 Wash. 536, 538-39, 208 P. 5 (1922). In *Carter* the plaintiff sustained injuries in an auto collision with a car driven by a county deputy sheriff. *Id.* at 537. The defendant county moved for judgment as a matter of law because the plaintiff conceded during opening that the driver was acting as a deputy sheriff at the time of the accident, and the trial court dismissed the action. *Id.* The Supreme Court affirmed, reasoning that agency principles made the deputy an employee of the sheriff, not the county:

It is sought to hold the county on the doctrine of respondent superior. *This can only be done if the county had the power to hire, control, and discharge the driver involved in the injury.*

Deputy sheriffs can only be appointed by virtue of section 3990, Rem. Code. Their control is *solely vested in the sheriff. The power of control is the test of the relation of master and servant. . .* The driver was therefore a servant and employee of the sheriff, and not of the county.

. . . .

The fact that the driver was paid by King county does not constitute him a servant or agent of King county. That is a test the least conclusive. *The test always is: To whom is the person in question subject as to the manner in which he shall do his work? The master is the one who cannot only order the work, but also order how it shall be done.*

*Id.* at 539-40 (emphasis added); accord *Crossler v. Hisle*, 136 Wn.2d 287, 293-94, 961 P.2d 327 (1998).

The County anticipates that plaintiffs will attempt to discount *Carter* by pointing to a former statute that provided counties were “not responsible for the acts of the sheriff,” BAL. CODE § 3987 (1918). See CP at 3196. This argument is unpersuasive because *Carter* did not rely on that statute to hold the sheriff to be the employer. Rather, *Carter* focused on who had authority to control the deputy—the county or the sheriff. Because the latter possessed that authority and the former did not, the county was, as a matter of law, not liable. To imply *Carter* somehow lacks precedential value simply because a separate statute existed at the time ignores the rule that a court’s reasoning holds as much precedential value as the actual result of the case. See *State v. White*, 135 Wn.2d 761, 767 n.3, 958 P.2d 982 (1998) (“[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.”) (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537, 69 S. Ct. 1235, 93 L. Ed. 1524 (1949)). In essence, the Court’s reasoning that the independently elected official—in *Carter*’s case, the sheriff, and in this case, the prosecuting attorney—is the employer of the deputies is binding. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

Further supporting this result is the recently decided *McGrath-Malott v. Maryland*, No. RDB-06-879, 2007 WL 609909 (D. Md. Feb. 23, 2007). In *McGrath-Malott* a female deputy sheriff claimed she was subjected to sex discrimination at the hands of the County Sheriff. *Id.* at \*1. She sued the County Sheriff under Title VII, but also named the County's Board of Commissioners. *Id.* at \*\*1-2. The court granted the county's motion for summary judgment because under Maryland law, "the County has no control over the Sheriff's personnel decision with respect to the deputy sheriffs." *Id.* at \*4.<sup>21</sup> That the county commissioners determined the "salaries and other administrative decisions" was irrelevant. *Id.* Rather, the dispositive inquiry that mandated dismissal of the county was its inability to control the Sheriff, the official alleged wrongdoer. *Id.* Other courts agree that counties cannot be held to be vicariously liable for the alleged torts of independently elected officials because no right of control exists. *See, e.g., Thompson v. Duke*, 882 F.2d 1180, 1187 (7th Cir. 1989) (construing Illinois law, affirming dismissal of claim against county for alleged constitutional violations at jail because the "[s]heriff is an independently elected constitutional official who

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<sup>21</sup> The County recognizes that *McGrath-Malott* also cited a statute that included county sheriffs as "state personnel" for purposes of Maryland's Tort Claims Act. *See McGrath-Malott*, 2007 WL 609909, at \*4. In the event plaintiffs should highlight this language to distinguish *McGrath-Malott*, the court should reject it. The lynchpin of the court's finding that Title VII liability did not lie was the county's inability to control the sheriff.

answers only to the electorate, not to the Cook County Board of Commissioners”); *Meade v. Grubbs*, 841 F.2d 1512, 1528 (10th Cir. 1988) (refusing to hold county liable for claimed wrongful acts of deputy sheriffs because “[u]nder Oklahoma law, the Board has no statutory duty to hire, train, supervise or discipline the county sheriffs or their deputies.”); *Moy v. County of Cook*, 159 Ill.2d 519, 640 N.E.2d 926, 928 (1994) (refusing to impute liability to County for alleged wrongful act of sheriff, an independently elected official, because there was no “right to control, which include[d] the power of discharge”).

And this principle—that the alleged employer must have the power to discharge to shoulder responsibility—holds greater weight in the context of a retaliation claim. WLAD actions for unlawful retaliation are based on RCW 49.60.210, which makes it an unlawful practice “for any employer, employment agency, labor union, or *other person* to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter.” RCW 49.60.210(1) (emphasis added). Division One of this Court held the statutory construction principle *ejusdem generis* restricted application of the phrase “other person” to mean “entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person.” *Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn. App. 927, 930, 965

P.2d 1124 (1998). *Malo* affirmed summary judgment in favor of a ship co-captain, who could not as a matter of law be held liable for discriminatory retaliation because, at the time of the alleged retaliatory conduct, he did not “did not employ, manage, or supervise” the plaintiff, nor was he “in a position to discharge [the plaintiff] or to expel him from membership in any organization.” *Id.* Concluding, the court held liability could not exist “[b]ecause RCW 49.60.210 does not create personal and individual liability for co-workers.” *Id.* at 930-31.

**4. Because Thurston County could not control the manner in which Holm managed the PAO, as a matter of law it cannot be liable for his employment misfeasance such as discrimination.**

Applying these principles to the case at bar, it becomes clear that Holm—not the County—was the plaintiffs’ employer because only he was in a “position to discharge” any of the plaintiffs. *Malo*, 92 Wn. App. at 930. As the County Prosecutor, Holm had unbridled discretion to hire, fire, and deputy prosecuting attorneys as he saw fit. *See* RCW 36.27.040. Broyles recognized this authority, testifying at deposition, “He had control of the entire office and the personnel. . . . Virtually he could do anything.” CP at 4266; *accord Osborn v. Grant County*, 130 Wn.2d 615, 624, 926 P.2d 911 (1996). As the elected prosecuting attorney, he could be removed from office only by the state legislature “for incompetency, corruption, malfeasance, or delinquency in office, or other sufficient

cause,” CONST. art. IV, § 9, or public recall, CONST. art. I, § 33. In other words, Thurston County had no power to remove Holm from office.

To be sure, the undisputed facts show Holm *precluded* the County from taking any control. When the County attempted to reinstate Broyles, Holm barred her from coming back to work. *See* CP at 4226, 4264-65. Broyles admitted at deposition that Holm “chose to fire [her],” whereas the County attempted to reinstate her. CP at 4270. There has never been any factual issue over whether the County had the ability to control Holm. This argument, as demonstrated *supra*, rests on the false premise that Holm and the Office of the Prosecuting Attorney was an entity that could not be sued. *Contra Carter*, 120 Wash. at 538-39.

In sum, the County had no ability to control Holm, and therefore cannot, as a matter of law, be Holm’s principal. The overwhelming majority of plaintiff’s allegations center on Holm’s misconduct, including retaliating against the plaintiffs for filing their tort claim in August 2001. It was Holm, not the County, that fired Broyles, constructively terminated Sargent, and refused to reappoint Sackett-DanPullo. As such, the County cannot and must not be held responsible for those actions. Moreover, because Holm as the Prosecuting Attorney is statutorily “responsible for the acts of his deputies,” it is Holm that is “responsible for [any] acts of [discrimination caused by] his deputies.” RCW 36.27.040.

This issue was at the forefront in the County's first summary judgment motion. *See* CP at 4382-89. Because proper resolution of this issue is dispositive, the court should simply reverse the trial court's denial of the County's first summary judgment motion, *see* CP at 3514-17, and remand for entry of dismissal. The remaining issues would become moot.

**B. The trial court committed reversible error by denying summary judgment and allowing the plaintiffs to support their hostile work environment claims on acts that were barred by either the statute of limitations or collateral estoppel.**

In the alternative, this court must vacate the judgment and verdict below and remand for a new trial. New trials are warranted when an order of the court prevents the party from having a fair trial, or there is a legal error at trial to which the party timely objects. CR 59(a)(1), (8). Generally, review of a trial court's refusal to order a new trial is abuse of discretion, *Alcoa v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000), which necessarily occurs when the court bases its ruling on an erroneous interpretation of the law, *Sales v. Weyerhaeuser Co.*, 138 Wn. App. 222, 232, ¶ 26, 156 P.3d 303 (2007). However, the trial court's error stems from either its denial of the County's motions for partial summary judgment, or its inadequate jury instructions, both of which are reviewed *de novo*. *See Barrett*, 152 Wn.2d at 266; *Seattle Police Officers Guild*, 151 Wn.2d at 830. Such is the case here because the trial court erroneously denied summary judgment and allowed the jury to hinge a

hostile work environment verdict on evidence it had no lawful authority to consider.

- 1. The jury was impermissibly allowed to find a hostile work environment on conduct of Jones and Harju, which occurred prior to May 6, 2001 and was untimely and had no relation to timely hostile conduct.**

The plaintiffs presented substantial evidence at trial of acts occurring prior to May 6, 2001, because the trial court both denied the County's motion for summary judgment based on the statute of limitations and also its corollary proposed jury instructions. In regards to jury instructions, a trial court commits reversible error if it "fail[s] to permit instructions on a party's theory of the case, where there is evidence supporting the theory." *Barrett*, 152 Wn.2d at 266-67. "As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be 'reversible error where it prejudices a party.'" *Id.* at 267 (quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)).<sup>22</sup>

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<sup>22</sup> A point should be made in the event the plaintiffs attempt to argue "law of the case" insofar as that the County did not specifically take exception to the trial court's failure to give each of its proposed instructions on the statute of limitations, because *Barrett* squarely rejected that argument. In that case, the plaintiff claimed a bar overserved alcohol in violation of RCW 66.44.210, which barred service to patrons "apparently under the influence." The plaintiff did not take exception to the jury instruction defining the standard of care as "obviously intoxicated." The Court held that the plaintiff's pretrial motions seeking to argue his theory of the case sufficiently preserved the error for the jury instructions, even though he failed to specifically take exception to the one jury instruction he later challenged on appeal. *See Barrett*, 152 Wn.2d at 265-69; *see also id.* at 281-84 (Sanders, J., dissenting). Here, defendants argued in numerous motions for summary judgment and orders in limine, in addition to its trial brief that plaintiffs should not be allowed to recover for acts prior to May 6, 2001 absent a showing of a nexus to the conduct occurring after that date. *See, e.g.*, CP at 962-72; XIX VRP at 1801-05.

- a. **A WLAD plaintiff cannot recover for discrete acts more than three years old and likewise cannot establish a hostile work environment absent proof that the untimely discriminatory acts are related to timely acts.**

The statute of limitations on WLAD claims is three years from the date on which the discriminatory practice occurs. *Antonius v. King County*, 153 Wn.2d 256, 261-62, 703 P.2d 729 (2004); *see also* RCW 4.16.080(2). Discrimination claims brought more than three years after a discrete act occurs (i.e., termination, refusal to hire, failure to promote, transfer, retaliation, pay, and/or assignment of duties) are not actionable even if the act relates to other acts alleged in timely filed charges. *Antonius*, 153 Wn.2d at 264 (citing and following *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 108-13, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)). A different analysis applies to hostile work environment claims. A plaintiff claiming a hostile work environment can prove discrimination by pointing to acts occurring outside of the limitations period because “hostile work environment claim[s] [are] composed of a series of separate acts that collectively constitute one ‘unlawful employment practice.’” *Id.* (quoting *Morgan*, 536 U.S. at 117). Specific to the case here, *Antonius* emphasized that simply raising the moniker “hostile work environment” does not allow a plaintiff to recover for any and all discriminatory acts, no matter how old. *Id.* at 271. Rather, a court

must “determine whether the acts about which an employee complains *are part of the same actionable hostile work environment practice*, and if so, whether any act falls within the statutory time period.” *Id.* (quoting *Morgan*, 536 U.S. at 120) (emphasis added). Answering this inquiry requires a finding that the acts “have some relationship to each other.” *Id.* If the acts have no relationship to one another, “or if ‘for some other reason, such as certain intervening action by the employer’ the act is ‘no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts as part of one hostile work environment claim.” *Id.* (quoting *Morgan*, 536 U.S. at 118).

To this end, there is a significant difference between hostile work environment claims and disparate treatment claims. The former contemplate “harassment” on the basis of gender that the employee finds to be “offensive” or “undesirable.” *Glasgow*, 103 Wn.2d at 406. Conversely, disparate treatment claims contemplate discrete acts such as termination and lower pay against an employee in a protected class who is unlawfully treated less favorably than those not in a protected class. *See Johnson v. Dep’t of Soc. & Health Servs.*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996); *cf. Sischo-Nownejad v. Merced Cmty. Coll. Dist.*, 934 F.2d 1104, 1109 n. 6 (9th Cir.1991) (distinguishing theories).

**b. Plaintiffs should not have been allowed to base hostile work environment claim on the conduct of Jack Jones or Phil Harju, the wrongful conduct of whom ceased prior to May 6, 2001.**

The County asserted in both its motion for summary judgment and motion for judgment as a matter of law/new trial that the plaintiffs could not recover for certain discrete acts occurring prior to May 6, 2001, exactly three years before filing the underlying complaint. Specifically, the County argued the statute of limitations barred liability to the extent it was based on the following alleged conduct occurring prior to May 6, 2001: (a) receiving “less favorable work assignments than male prosecutors;” (b) receiving “lower pay and benefit awards than male deputy prosecutors who had similar responsibilities and/or equal workloads,” (c) receiving “pay and benefit awards equal to male deputies who had fewer responsibilities and/or lighter work loads,” (d) “the Prosecuting Attorney and his Office failed to investigate and respond to plaintiffs’ complaints or conducted a negligent investigation into their complaints,” (e) allegations that “Jack Jones allegedly created a hostile environment or otherwise sexually discriminated against the plaintiffs,” (f) allegations that Jim Powers failed to end the alleged sexual discrimination and hostile environment,” and (g) allegations that “Phil Harju . . . created a hostile environment or otherwise sexually discriminated against the plaintiffs.” *See* CP at 3464-65; *see also* CP at 831-32, 962-72.

Though hostile work environment claims are based on the “totality of the circumstances,” *Glasgow*, 103 Wn.2d at 407, the conduct must still necessarily be “harassment,” meaning conduct the employee subjectively and objectively finds offensive, *id.* at 406. The conduct cited in the County’s motion was not “harassment,” but rather allegations of disparate treatment, i.e., treating the female plaintiffs different than their male counterparts. As such, there should never have been any liability for job assignments or disparate pay, because (1) these actions are not “harassment” that can change the terms and conditions of employment, and (2) these actions are discrete insofar as the limitations period runs from the date of the act, regardless of whether it relates to subsequent occurrences. *Antonius*, 153 Wn.2d at 264. Here, the last pay decision about which Broyles and Sargent complained<sup>23</sup> occurred in January 2001. *See* CP at 4695-97, 4740. The United States Supreme Court recently reaffirmed that pay setting decisions are always discrete acts, and cannot be lumped together as a hostile work environment to avoid the statute of limitations. *See Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2162, 2169-70, 167 L. Ed. 2d 982 (2007). Washington courts find federal authority construing Title VII persuasive. *Antonius*,

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<sup>23</sup> Sackett-DanPullo never claimed her pay was deficient. *See* XVI VRP at 1600.

153 Wn.2d at 266. As such, the only pay decisions occurred prior to May 6, 2001, and were therefore not actionable.

But the trial court allowed this conduct to form the basis of a hostile work environment claim when it instructed the jury that it could consider the fact that the County failed to promote, transfer, or pay the plaintiffs equally “for the purpose of determining if there was a hostile work environment.” CP at 941 (Instruction No. 20). A jury charged with the obligation to determine whether there are facts amounting to actionable “harassment” should not be allowed to consider acts that could not to any rational person be considered as offensive *conduct* that *alters* the working environment.

On the other hand, Jones’s intimidating conduct *could* be considered “offensive conduct,” but the undisputed evidence demonstrates that Jones’s abusive behavior did not affect the plaintiffs at all after May 6, 2001. As *Morgan* noted—which our Supreme Court adopted, the “court’s task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period.” *Morgan*, 536 U.S. at 120, *followed in Antonius*, 153 Wn.2d at 271. No person other than Jones used physical intimidation to alter the working conditions. After the three plaintiffs and Peters met with Holm and Quan

in November 2000, and Holm reorganized the office and demoted Jones to drug court. Plaintiffs offered no evidence to rebut Jones's declaration, in which he testified that he secluded himself following reorganization and attended several classes addressing anger management and interpersonal relationships. *See* CP at 5587-92. *Antonius* and *Morgan* make clear that when there is "certain intervening action by the employer," the antiquated conduct cannot, as a matter of law, be used to establish liability for a hostile work environment. *Antonius*, 153 Wn.2d at 271 (quoting *Morgan*, 536 U.S. at 118). What compounds the trial court's error even further is that it refused to instruct the jury that there must be a sufficient nexus between conduct prior to three years before the complaint was filed and conduct occurring afterward. *See* XXXI VRP at 3008-09; CP at 1043-44, 1057. The County's proposed instructions 47, 48, and 61 could have remedied this error, but the trial court's refusal to so instruct the jury prevented the factfinder from examining whether a nexus existed.

Harju's conduct, on the other hand, was non-intimidating but rather (in the plaintiffs' eyes) offensive.<sup>24</sup> Nevertheless, his actions about which plaintiffs complained all occurred prior to January 25, 2001, the date of reorganization, because after that date he was no longer in a

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<sup>24</sup> Of course, a previous court found his actions in their totality was not, as a matter of law, discriminatory. *See infra*.

supervisory position. As is the case with Jones, Holm's reorganization constituted an intervening action which severed any legally cognizable nexus between Harju's conduct prior to that date and any acts of discrimination occurring after May 6, 2001.<sup>25</sup> However the jury was never instructed as much, and was allowed to hear substantial testimony by Broyles, Sargent, and Sackett-DanPullo of how Jones abused their environment, how Harju failed to control Jones, and how Harju's comments to Broyles and Sargent created a hostile environment.

In sum, the trial court allowed the jury to find a hostile work environment by considering both discrete actions and conduct that occurred long before May 6, 2001, without instructing them that the law required a finding that the conduct was related to the actions taking place within three years of the action commencing. Moreover, such an instruction would have been obviated altogether had the court properly granted summary judgment, in light of Holm's intervening action that cut off the claimed "hostile environment."

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<sup>25</sup> Broyles attempted to testify that Harju "continued to exert supervisory control" after reorganization, but was unable to provide any admissible testimony to support her conclusory allegation. *See* II VRP at 134-35.

**2. The trial court erred by refusing to apply collateral estoppel to prevent the plaintiffs from arguing that Harju's acts were discriminatory, when a prior summary judgment order held the opposite.**

Collateral estoppel, also known as issue preclusion, is grounded in sound public policies of judicial economy, finality, and preventing parties from inconvenience and harassment. *Christensen v. Grant County Hosp., Dist. No. 1*, 152 Wn.2d 299, 306-07, 96 P.3d 957 (2004). The doctrine “prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Id.* at 306 (quoting *Rains v. State*, 100 Wn.2d 660, 665, 674 P.2d 165 (1983) (quoting *Seattle-First Nat'l Bank v. Kawachi*, 91 Wn.2d 223, 225-26, 588 P.2d 725 (1978))).

Preclusion is warranted when the party asserting collateral estoppel, which here is the County, makes four showings:

(1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

*Id.* at 307. Though collateral estoppel generally precludes only relitigating an issue previously determined, the plaintiff's entire claim can and must be dismissed if the doctrine bars the plaintiff from proving an essential element to her claim. *See id.* at 312-13. *Christensen* ordered dismissal of a wrongful discharge claim by a terminated employee because a fact

essential to his tort claim was adversely decided in a prior proceeding. *Id.* The Court recognized that it was “the essence of collateral estoppel” to prevent relitigation of a fact, even if that one fact later bars a tort claim in its entirety. *Id.* at 313.

When the four elements are properly applied to Harju’s previously successful summary judgment motions, as well as those of the County in regard to Sargent’s and Sackett-DanPullo’s race and marital status discrimination claims, respectively, the inescapable result is the trial court’s error in allowing plaintiffs to reargue these issues before the jury. The second, third, and fourth elements—finality, identity of parties, and injustice—are easily satisfied and cannot seriously be contested.<sup>26</sup> The only real dispute is the first element, namely identity of issues.

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<sup>26</sup> The second element—finality—applies to summary judgment orders. *Nat’l Union Fire Ins. Co. v. N.W. Youth Servs.*, 97 Wn. App. 226, 232-33, 983 P.2d 1144 (1999). For the third element—identity of parties—it is sufficient that the party *against whom* preclusion is sought is identical to or in privity with the party from the prior proceeding. *Kyreacos v. Smith*, 89 Wn.2d 425, 428-30, 572 P.2d 723 (1977). Though it was Harju’s summary judgment motions, these same plaintiffs opposed them and lost. The same is true with the County’s summary judgment motions on Sargent’s and Sackett-DanPullo’s race and marital status discrimination claims, respectively.

Nor can plaintiffs justifiably claim injustice, the fourth element, which “is generally concerned with procedural, not substantive irregularity.” *Christensen*, 152 Wn.2d at 309. Its resolution hinges on “whether the parties to the earlier adjudication were afforded a full and fair opportunity to litigate their claim in a neutral forum.” *Nielson ex rel. Nielson v. Spanaway Gen. Med. Clinic*, 135 Wn.2d 255, 265, 956 P.2d 312 (1998). There is no argument that Harju did not fully comply with CR 56’s time requirements. Nor is there any argument that plaintiffs were hindered in any way from fully responding to Harju’s summary judgment motions. Their collective 37 page response to Harju was supported by several declarations, three of which were signed by the plaintiffs themselves. CP at (MAP55-59). Against the County, they filed They had opportunity for oral argument, and after a “full and fair hearing,” lost their battle. There was an oral argument hearing, after which the trial court granted the motion and dismissed all claims against Harju. CP at (MAP5).

The plaintiffs argued below that the summary judgment orders dismissing all claims against Harju did not involve identical issues that were actually litigated and determined, stressing that the judge gave “no basis for the ruling.” CP at 3295. Yet a careful review of Harju’s motions reveal that simply proving he lacked supervisory authority would have been insufficient to prevail. *Cf. Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 361, 20 P.3d 291 (2001). Rather, to achieve dismissal of the plaintiffs’ hostile work environment claims, Harju had to argue—and successfully did so—that his conduct on the whole was either (a) not offensive and unwelcome, CP at 5660, (b) did not occur because of the plaintiffs’ gender, CP at 5662, or (c) was not sufficiently severe and/or pervasive, CP at 5664. When a defendant moves for summary judgment, the plaintiff must generate a factual issue to each element on which she will bear the burden to prove at trial to avoid dismissal. *See Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To grant Harju’s summary judgment motion on the plaintiffs’ hostile work environment claims, the court necessarily had to find that the plaintiffs had insufficient evidence to generate a genuine issue of fact to one of these elements. *See Glasgow*, 103 Wn.2d at 406-07. As such, the prior court had determined one of three things: (1) that Harju’s conduct alone was not offensive or unwelcome, (2) that Harju’s conduct alone did not occur

because of the plaintiff's gender, or (3) that Harju's conduct alone was not sufficiently severe and/or pervasive to give rise to a WLAD violation.

Here, plaintiffs' asserted in opposition to Harju's motions that he:

personally subjected Plaintiffs to unwelcome conduct based upon their sex and race when he treated them differently than white male DPA's by publicly criticizing their caseloads and the caseloads of other women, requiring them to attend "mandatory" meetings that were run like a "boys club" and were offensive and uncomfortable for women, assigning women the most undesirable tasks, singling women's leave requests out for scrutiny, publicly attacking Broyles (the only woman supervising a felony unit) and calling her names, suggesting Broyles used her position due to her looks or her "special relationship" with Prosecutor Ed Holm, and continually leering and staring at their and other women's breasts and slowly and deliberately looking them and other women up and down in a sleazy fashion.

CP at 5739-40. Plaintiffs made the exact same allegations in this case, but claimed collateral estoppel did not bar them from recycling their allegations against Harju because the same judge who dismissed Harju also denied the County's and Holm's summary judgment motions. *See* CP at 3293. This argument misses the point, because it assumes the County lost summary judgment *because of* Harju's actions. Quite the contrary, the court was operating under the (legally incorrect) assumption that the County could be liable for Holm's and Jones's misconduct.

The County proposed instructions that would have allowed the jury to consider the totality of the circumstances knowing that Harju's conduct

was not, as a matter of law, discriminatory. By allowing the jury to base liability on Harju's conduct alone, the trial court erred.

**3. Sackett-DanPullo was erroneously allowed to present testimony of discrimination on marital status, which had been dismissed as a matter of law.**

Sackett-DanPullo was allowed to testify that she was assigned to Community Prosecution because of her husband's race. *See* XIV VRP at 1377, 1386-87. Regardless of whether her testimony was true and Holm assigned Sackett-DanPullo for that reason, a prior court had dismissed all claims based on Sackett-DanPullo's marital status. *See* CP at 4995-96. Though Sackett-DanPullo may detest that Holm thought she would be perfect for Community Prosecution because of her husband's race, that reason, no matter how loathsome, has nothing to do with Sackett-DanPullo's gender. Even assuming Holm's assignments can be considered for purposes of establishing a hostile work environment, *Glasgow* requires that the harassment occur because of the plaintiff's gender. *Glasgow*, 103 Wn.2d at 406-07. Here, Holm's remark and rationale was targeted toward Sackett-DanPullo's marital status and the race of her husband, not gender. Yet Sackett-DanPullo was allowed to testify that this rationale offended her and made her feel substandard. *See* XIV VRP at 1386-87. The court refused to give a limiting instruction,

thereby allowing the jury to consider this irrelevant and prejudicial evidence to find liability.

**C. The trial court erred by precluding testimony of a key defense witness that the plaintiffs did not have a subjective belief of discrimination until meeting with attorneys.**

Christy Peters went with the three plaintiffs in December 2000 to meet with the lawyers who would ultimately represent the deputies at trial. The trial court excluded her testimony at the plaintiffs' request insofar as it would discuss the subject matter of that initial meeting. XX VRP at 1954-55. The County made an offer of proof that Peters would testify that she did not believe she was a client at the time of the meeting. See XVII VRP at 1643-44. Though evidentiary rulings are generally reviewed for abuse of discretion, whether a statutory privilege bars testimony is a legal question reviewed de novo. *Drewett v. Rainier School*, 60 Wn. App. 728, 731, 806 P.2d 1260 (1991).

This inquiry must begin with the principle that privileges are strictly construed, given that they are “contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts.” *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006). To this end, applying any privilege to exclude evidence “must be balanced against the benefits to the administration of justice stemming from the general duty to give

what testimony one is capable of giving.” *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997).

RCW 5.60.060(2) bars testimony on matters protected by the attorney-client privilege. Yet this begs the question as to whether the privilege applies at all. “[T]he existence of an attorney-client relationship turns largely on the client’s subjective belief that it exists.” *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). But even if the client subjectively believes a relationship is formed, such belief must be “reasonably formed based on the attending circumstances, including the attorney’s words or actions.” *Dietz*, 131 Wn.2d at 843 (citations and internal quotation marks omitted). It is the party asserting the privilege who bears the burden to prove it exists. *Id.* An attorney’s conclusory allegation that a privilege exists is insufficient as a matter of law to establish the privilege. *Id.* at 844-45.

The plaintiffs argued below that the “common interest doctrine” required waiver by all four women before Peters could disclose the substance of the meeting. But courts have made quite clear that the “common interest doctrine” is merely an extension of the attorney-client privilege and “presupposes the existence of an otherwise valid privilege.” *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990). Such was the case in *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152

F.R.D. 132 (N.D. Ill. 1993). *Allendale* involved an insurer's suit to determine the absence of coverage for a fire loss that destroyed the insured's inventory in France. *Id.* at 134. The insured moved to compel production of various documents, which the insurers claimed were protected by the work product doctrine and the attorney-client privilege. *Id.* at 134-35. The federal district court rejected both claims, finding the privileges did not apply, noting especially that "information does not become privileged simply because it came from counsel." *Id.* at 138. When the court reached the insurer's claim that the common interest doctrine precluded disclosure, the court summarily rejected the argument:

As a threshold matter, we note that the common interest doctrine only applies to protect documents which otherwise fall under some privilege. . . . *If no privilege shields a document from discovery, then the common interest doctrine is of no use to a party.* In the present case, we have already determined that neither the work product nor the attorney-client privilege applies to the documents in question, and so technically we do not have to reach the applicability of the common interest doctrine.

*Id.* at 140 (emphasis added) (citing *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir.1979)). Peters had no subjective belief whatsoever that she was going to become a client of Gordon Thomas, no attorney-client privilege attached. Even if the plaintiffs had that belief, Peters' understanding renders her a third-party that participated in a privileged discussion, thereby causing waiver. See *Ramsey v. Mading*, 36 Wn.2d 303, 311-12, 217 P.2d 1041 (1950). Whether Washington follows other

states in requiring all co-clients to waive the privilege before the common interest doctrine will allow disclosure is, for purposes of this case, irrelevant. The fact remains that the attorney-client privilege never attached in the first place to the December 2000 meeting. The common interest doctrine is inapposite to this case and, as the *Allendale* court held, “of no use to” the plaintiffs. *Allendale*, 152 F.R.D. at 140.

A key element the plaintiffs had to prove for their hostile work environment claim was that they subjectively viewed the alleged harassment as abusive. *Clarke v. State Attorney Gen.’s Office*, 133 Wn. App. 767, 787, ¶ 66, 138 P.3d 144 (2006). Peters’ testimony to the subject matter of that meeting would have allowed the defendants to support their theory that much of the alleged harassment—including the actions of Holm—were never subjectively perceived as abusive until the plaintiffs met with their attorneys.

The trial court’s exclusion of this evidence on privilege grounds was prejudicial error, mandating reversal.

**D. A new trial is warranted because the jury’s verdicts were excessive due to counsel’s misconduct.**

New trials are warranted when the “[d]amages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.” CR 59(a)(5). An attorney commits misconduct in closing argument if he tells the jury to “send a message,” or

award anything other than compensatory damages. *Accord State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86 (1991). Such unquestionably must be the case in WLAD cases, in which punitive damages are forbidden. *Dailey*, 129 Wn.2d at 574.

Here, plaintiffs' counsel finished his closing rebuttal by instructing the jury to make an award "so that what will happen to these women *will never happen again*." XXXII VRP at 3112 (emphasis added). Unless one is blinded from reality, the only possible purpose for this instruction would be to ask for an award that sends a message to the County to "never [let this] happen again." In other words, the argument asked that the verdict be a deterrent, which is the purpose of punitive damages. *See Dempere v. Nelson*, 76 Wn. App. 403, 410, 886 P.2d 219 (1994). The evidence at trial showed that Broyles (1) was reinstated with all pay and did not lose a dime between termination and the filing of the present complaint, and (2) attended only two counseling sessions, but was still awarded close to \$600,000. The same can be said for both Sackett-DanPullo and Sargent. Accordingly, the court should vacate the judgments and, at a minimum, remand for a new trial on damages.

**E. The trial court abused its discretion when it awarded attorney fees for a case in which the plaintiff was not the prevailing party and also allowing a multiplier for the same reasons used in determining the lodestar.**

Attorney fees awards are reviewed for abuse of discretion. *Tribble v. Allstate Property and Cas. Ins. Co.*, 134 Wn. App. 163, 170, ¶ 16, 139 P.3d 373 (2006). “A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (citations and internal quotation marks omitted). “A court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law.” *Sales*, 138 Wn. App. at 232, ¶ 26.

**1. Ignoring settled law that a defendant is a prevailing party when a plaintiff takes a voluntary dismissal, the trial court erred by allowing the plaintiffs to recover duplicative attorney fees for two actions.**

The general rule in Washington is that parties bear their own costs and attorneys fees. *P. Life Ins. Co. v. Dep’t of Employment Sec.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). Here, the only basis for plaintiffs’ award of attorneys fees was RCW 49.60.030(2), which permits such an award if the plaintiffs are the “prevailing party.” The County does not dispute that, if the verdicts are upheld, the plaintiffs are the prevailing parties in *Broyles II*.<sup>27</sup> However, as a matter of law, the plaintiffs should

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<sup>27</sup> The County asks that the court consider this issue if it decides to remand for a new trial, in the interest of judicial economy should the plaintiffs prevail again on retrial.

not have been allowed to recover a penny from work incurred in a case—*Broyles I*—in which their adversaries were the prevailing parties.

Plaintiffs took a voluntary nonsuit in *Broyles I* the day before trial under CR 41(a). CP at 131. The plaintiffs admitted in their moving papers below that this was a tactical move to avoid the “risk [of] losing the right to a trial by jury.” CP at 746. When a plaintiff obtains a voluntary nonsuit, even where such dismissal is voluntary and without prejudice, the defendant is regarded as having prevailed. *Andersen v. Gold Seal Vineyards*, 81 Wn.2d 863, 867-68, 505 P.2d 790 (1973); accord *Escude v. King County Pub. Hosp. Dist.*, 117 Wn. App. 183, 193, 69 P.3d 895 (2003).<sup>28</sup> Whether the County was entitled to an award of reasonable attorneys fees from *Broyles I* is not the question, and the County does not suggest it was so entitled. But because the County was the prevailing party, the plaintiffs most certainly were not.

The plaintiffs and trial court justified the inclusion of *Broyles I* fees by relying on *Blair v. Washington State University*, 108 Wn.2d 558, 740 P.2d 1379 (1987), in which the Court held a plaintiff that partially

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<sup>28</sup> This division of the Court of Appeals recently reaffirmed that “The defendant also generally prevails where the plaintiff voluntarily dismisses its action under CR 41.” *Wachovia SBA Lending v. Kraft*, 158 P.3d 1271, 1274, ¶ 11 (Wash. Ct. App. 2007). *Wachovia* denied attorneys fees to a defendant under RCW 4.84.330 because the statute requires that final judgment be rendered in favor of the party claiming fees. *See id.* at 1274, ¶ 13. *Wachovia* is entirely consistent with the view that when the statute does not require final judgment, a voluntary nonsuit vaults the defendant to “prevailing party” status. *See Beckman v. Wilcox*, 96 Wn. App. 355, 362, 979 P.2d 890 (1999).

prevails in a WLAD claim could recover for all work made in preparation, even work on unsuccessful claim, if there is no way to reasonably segregate the unsuccessful and successful work. *Id.* at 571-72. But applying *Blair* to award fees incurred in two separate actions, one of which the plaintiffs functionally lost, takes the case too far.

First, *Blair* was one entire action, not two. To the extent the plaintiffs claim *Broyles I* and *II* were the same continuous case, judicial estoppel prevents them, contrary to the finding of the trial court. *Cf.* CP at 7 (FF 7). The doctrine of judicial estoppel is grounded in judicial integrity as it “prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation.” *Miles v. Child Protective Servs. Dept.*, 102 Wn. App. 142, 153 n.21, 6 P.3d 112 (2000) (internal quotation marks and citations omitted). In *Miles* the plaintiffs asserted in open court during dependency proceedings involving their children were abused and neglected. *Id.* at 151. This court held this admission prevented them from later asserting in their subsequent lawsuit against the State for negligent supervision of their children that the children were **not** abused and neglected. *Id.* at 153 n.21. This preclusion barred the plaintiffs from basing their lawsuit on an allegation that the State negligently removed their children from their home. *Id.* at 155-56. Here, after the Mason County bench had recused in *Broyles II*, and the

clerk assigned the County's summary judgment motions to Kitsap County Judge Leonard Costello, *see* RCW 4.12.040(1), the same judge who had granted summary judgment in favor of Harju on all claims and in favor of the County on the race and marital status claims, *see* CP at 126-27, 3894-96, 4049-51. Shortly thereafter the plaintiffs filed an affidavit of prejudice<sup>29</sup> against Judge Costello. CP at 3894-96. The County objected, noting Judge Costello's prior rulings barred an affidavit of prejudice. CP at 3886-91. Judge Brosey heard the County's arguments the same day the summary judgment motions were set, including the plaintiffs' primary argument that "the nonsuit [of *Broyles I*] create[d] a new proceeding" in *Broyles II*. VRP (Apr. 14, 2006) at 5. The court accepted the plaintiff's argument, ruling "[t]he original case [*Broyles I*] is now a nullity." *Id.* at 8. *Broyles I* and *II* are separate actions.

Such a rule makes sense, in light of the abuse a plaintiff could perpetrate by tactically working up a case to trial, only to nonsuit and duplicate the entire effort to the detriment of the defense. The facts of *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), illustrate the nonsensical results that would follow if the trial court's order is allowed to stand. *Walji* was a breach of contract action arising from a landlord-tenant lease. The lease allowed the "prevailing party [to] be

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<sup>29</sup> *See* RCW 4.12.040, .050.

entitled to a reasonable attorneys' fee and all costs and expenses." *Id.* at 287. Prior to mandatory arbitration, the plaintiff took a voluntary nonsuit without prejudice. *Id.* at 286. The court awarded all reasonable attorney fees to the defendant, and the Court of Appeals affirmed. *Id.* at 286-89. The court followed Supreme Court precedent to hold a defendant is a "prevailing party" when a plaintiff takes a voluntary dismissal under CR 41(a), which thereby entitled the defendant to all costs and reasonable attorney fees incurred due to the lease language. *Id.* at 288-89 (following *Andersen*, 81 Wn.2d at 868).

The dangerous precedent set were a rule such as this one to stand would be illustrated had the *Walji* plaintiff *refiled* his lawsuit following the dismissal, which he would be allowed to do. *See* CR 41(a)(1) (voluntary dismissals presumptively without prejudice). Had the plaintiff done that and subsequently prevailed, then the defendant would be forced—under the trial court's holding below—not only to disgorge all attorney fees to which he was rightfully entitled under the law, *see Walji*, 57 Wn. App. at 288, but also *compensate* the plaintiff for all work done at both the first and second trials. The goal of any court is to apply the law "uniformly and justly." *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 856, 100 P.3d 801 (2004). The only logical answer to the question of

whether a nonsuiting plaintiff can *ever* recover fees incurred during the dismissed action is no.

On this basis alone, the trial court abused its discretion in awarding the fees that it did. Reversal is required.

**2. By considering risk when determining the lodestar, the trial court erred by relying on risk again as a basis to award a multiplier.**

The law presumes the lodestar—the amount determined by multiplying a reasonable hourly rate by the number of hours reasonably expended on the lawsuit—is the reasonable fee in fee-shifting cases. *Xieng v. Peoples Nat'l Bank*, 63 Wn. App. 572, 587, 821 P.2d 520 (1991), *aff'd* 120 Wn.2d 512, 844 P.2d 389 (1993). Determining the reasonable hourly rate entails consideration of a myriad of factors, including “the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney’s reputation, and the undesirability of the case.” *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Trial courts may increase the lodestar upward or downward by using a multiplier, but may do so only “to reflect factors not [previously] considered.” *Id.* at 598. Categories often cited for this adjustment are the contingent nature of success and the quality of work. *Id.* However, “to the extent, if any, that the hourly rate underlying the lodestar fee comprehends an allowance for the contingent

nature of the availability of fees, no further adjustment duplicating that allowance should be made.” *Id.* at 599. The same is true for the quality of work—if it is a basis for determining the lodestar, the court cannot cite it again to award an upward multiplier. *Id.* As such, a trial court abuses its discretion when it awards a multiplier on factors already considered when determining the lodestar.

Here, the trial court entered several findings of fact to support its award of a multiplier that merely repeated its findings supporting the lodestar. The court rejected the County’s arguments against the hourly rate proposed by plaintiffs’ counsel, emphasizing in its oral ruling (which was incorporated into the written findings, CP at 4) that the case was unique and that few firms could handle the risk or taking on such a large endeavor. VRP (Feb. 26, 2007) at 13-14. Capping his conclusions that the rate was reasonable, the court stated:

I feel comfortable that the *rates* charged by the plaintiffs’ attorney are *reasonable* under the circumstances of this – of this case. *I felt from the beginning that it was a – an exceptional case and an exceptional challenge.*

VRP (Feb. 26, 2007) at 15 (emphasis added). Yet the court applied this same finding that the case and challenge were “exceptional” as a basis to award a multiplier. CP at 8 (FF 9). In this same vein, the court allowed the plaintiffs to propose a reasonable rate for the lodestar from the entire Puget Sound region because “[t] would be difficult to find law firms in

Mason and Thurston Counties that would have the capability and capacity to deal with a case of this nature.” CP at 5 (FF 3). The court repeated itself again when discussing its reasons for the multiplier, finding “[f]ew firms in the Puget Sound region are equipped to take these kinds of risks on behalf of a client.” CP at 8 (FF 9).

Moreover, supporting its determination that the rate was reasonable, the court highlighted the fact that it was a “specialized lawsuit” to which the plaintiffs would have a hard time finding such quality representation within either Mason or Thurston Counties, the locales of their claims. CP at 5 (FF 3). The court then built off of this factor to opine:

This case required a high level of skill in the specialized area of employment law involving governmental entities as well as a high level of skill in trial preparation and trial presentation. This case was taken on a contingency basis and involved substantial risk of no recovery. Few law firms in the Puget Sound region are equipped to take these kinds of risks on behalf of a client.

CP at 8 (FF 9). In sum, the trial court cited identical factors to support an elevated rate—and in turn, an elevated lodestar—but then applied those same factors to award a multiplier. Such constituted an abuse of discretion mandating reversal of the fee award.

## **VI. CONCLUSION**

Justice Talmadge correctly recognized that employees of independently elected officials maintain their rights under WLAD. *See*

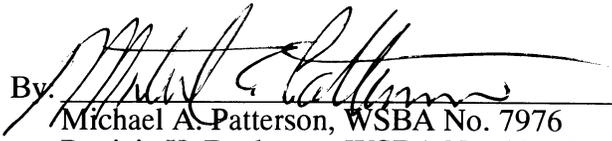
*Crossler*, 136 Wn.2d at 299 (Talmadge, J., concurring). Yet simply because an employee has “rights” does not mean those rights are enforceable against the wrong party. The County had no ability to control Ed Holm, who undisputedly *had unbridled* control over plaintiffs’ working environment and employment terms. It follows, then, that because the County could not control the plaintiffs’ working environment or employment terms, that it should never have to shoulder a verdict for wrongdoing it could not remedy.

For the foregoing reasons, this Court should reverse the trial court’s order denying summary judgment, vacate the judgment, and remand for dismissal. In the alternative, the Court should vacate the judgment and remand for a new trial, allowing the County to defend against only the allegations that are timely and were not previously dismissed. Moreover, if remand should occur and the plaintiffs prevail again, they should not be allowed to recover attorneys fees for work done in a case in which they did not prevail.

RESPECTFULLY SUBMITTED this 31st day of August, 2007.

PATTERSON BUCHANAN  
FOBES LEITCH KALZER & WAECHTER

By

A handwritten signature in black ink, appearing to read "Michael A. Patterson", is written over a horizontal line.

Michael A. Patterson, WSBA No. 7976

Patricia K. Buchanan, WSBA No. 19182

Karen A. Kalzer, WSBA No. 25429

Of Attorneys for Appellant

Thurston County

**APPENDIX A  
(JURY INSTRUCTIONS)**

**Instruction No. 20 (CP at 914)**

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the following testimony by plaintiffs:

1. That before May 6, 2001, defendant failed to promote or transfer the plaintiffs comparable to male deputies of similar knowledge, training, qualifications and experience and that plaintiffs' gender was a substantial factor in the decision.
2. That before May 6, 2001 defendant failed to make a pay award to plaintiff Audrey Broyles comparable to male deputies with similar or less knowledge, training, qualifications, experience, workloads and responsibilities and that plaintiff Audrey Broyles' gender was a substantial factor in the decision.

This testimony may be considered by you for the purpose of determining if there was a hostile work environment, [sic] it may not be considered by you for any other purpose.

Any discussion of the evidence during your deliberations must be consistent with this limitation.

**Defendant's Proposed Instruction No. 47 (CP at 1042)**

Plaintiffs are barred under the Statute of Limitations from seeking compensation for any gender discrimination prior to May 6, 2001. Therefore, any failure by Ed Holm prior to May 6, 2001, to promote a plaintiff comparable to male deputy prosecuting attorneys of similar ability, experience, training and skill or pay her comparable to male deputy prosecuting attorneys of similar ability, experience, training and skill, where a significant motivating factor is her sex, does not constitute gender discrimination.

**Defendant's Proposed Instruction No. 48 (CP at 1043)**

Alleged conduct occurring before May 6, 2007 is not recoverable unless it has some relationship to conduct occurring after May 6, 2001 so as to constitute part of the same alleged hostile work environment. To be sufficiently related the conduct must involve the same type of employment actions, occur relatively frequently, and be perpetrated by the same managers. If there is no relation, or if there is an intervening action by the employer, the act is no longer part of the same alleged hostile environment claim and, therefore, is time barred.

**Defendant's Proposed Instruction No. 61 (CP at 1057)**

Alleged conduct of Jack Jones occurring before May 6, 2001 is not recoverable unless you find the alleged conduct is sufficiently related to other conduct occurring after May 6, 2001 to form part of the same hostile work environment.

**APPENDIX B  
(FINDINGS OF FACT RE: FEES AWARD)**

**Finding of Fact No. 2 (CP at 5)**

2. Hourly Rates. The presumptive reasonable hourly rate for an attorney is the rate the attorney charges. In this case, Plaintiffs have submitted undisputed evidence of their reasonable hourly rates, which are based on the rates they charge other clients for hourly work. Based on the evidence submitted, Plaintiffs' attorney's rates were consistent with rates of other comparable lawyers in the Puget Sound area. There was no evidence offered to suggest that the rates charged by Plaintiffs' counsel were unreasonable. Defendant submitted their own attorneys' hourly rates, which were less than some of the rates charged by some of plaintiffs [sic] counsel. Nevertheless, the evidence also indicated that the rates charged by defense lawyers is often less than the rates charged by other trial lawyers in the area. Defendant also submitted evidence from another Puget Sound area lawyer that was not inconsistent with the hourly rates charged by Plaintiffs counsel.

**Finding of Fact No. 3 (CP at 5)**

3. The reasonable geographic area for purposes of determining a reasonable hourly rate for purpose of determining a reasonable hourly rate for Plaintiffs' counsel is the entire Puget Sound region. It was reasonable that Plaintiffs chose counsel outside Thurston and Mason Counties. It would be difficult to find law firms in Mason and Thurston Counties that would have the capability and capacity to deal with a case of this nature. Plaintiffs should not be unreasonable restricted from choosing counsel. The rates charged by Plaintiffs' lawyers are consistent with rates charged by other lawyers in within the Puget Sound area. Therefore, I find that the hourly rates charged by Plaintiff's lead counsel, Stephanie Bloomfield, and for co0lead counsel, J. Richard Creature, throughout this litigation are reasonable. I also find that the rate3s charged by other Gordon Thomas Honeywell attorneys and staff who worked on this matter are reasonable.

#### **Finding of Fact No. 4 (CP at 6)**

4. Amount of Time and Costs Expended. The evidence submitted specifically set forth the tasks that were performed, the time spent on the tasks, who performed the tasks and the rates charged by that attorney or staff member at the time the work was performed. The costs incurred were specifically detailed and explained, including amounts, dates of expenses and the identity of the persons or entities paid. Plaintiffs provided reasonable and detailed records that the Court has independently reviewed and evaluated. There was no evidence submitted by Defendant to suggest that the Plaintiffs' records were inaccurate. The time records did not reflect duplicative or unnecessary work. The Court was not able to identify hours that were unreasonable. To the contrary, based on the Court's review of the work performed, it was performed at a very high level and appeared to be consistent with the complexity and specialized circumstances of the case.

#### **Finding of Fact No. 5 (CP at 6)**

5. While Plaintiffs did not succeed in every claim they initially brought, all of Plaintiffs' claims derived from the same statutory protections of Washington's Law Against Discrimination (RCW 49.60 *et seq.*). The claims involved interrelated events and overlapping legal theories. The claims against the individual defendants were substantially identical to those that were tried against the County. The legal theories and evidence submitted was overlapping and part of a single set of operative facts. Essentially, the claims dismissed before trial were just different approaches to the same damages and were so closely intertwined with the claims that were tried that there is no reasonable means to segregate time among the various claims. The fact that other claims were dismissed did not result in any significant or ascertainable difference in the damages claimed by the Plaintiffs.

#### **Finding of Fact No. 6 (CP at 6-7)**

6. The time spent on unsuccessful claims is not reasonably or realistically segregable from the time spent upon successful claims for gender discrimination and retaliation. All of the fees and costs were associated with the same general issues in the litigation and out of the same operative facts. The unsuccessful claims were premised

upon the same facts and issues underlying the successful claims against the County and were merely alternate avenues of obtaining the damages that Plaintiffs were awarded at trial. All of the causes of action included in the jury verdict were causes of action which expressly authorize an award of attorneys' fees and costs to the prevailing Plaintiffs.

**Finding of Fact No. 7 (CP at 7-8)**

7. Progress toward a jury trial may be derailed by a number of issues, which are common in civil litigation. In this case, Plaintiffs filed a non-suit because of a procedural issue that arose regarding the availability of a jury trial. The nonsuit was taken to preserve an important right, the Plaintiffs' right to a jury trial. While the court cannot determine if any fault should be attributed to either party for this nonsuit, it is clear that in this case the nonsuit was not the end of one case and the beginning of a different case, but part of the continued pursuit of the same claims against the County. The nonsuit may have interrupted the progress of the case, but the Plaintiffs ultimately prevailed on the nonsuited claims against the County. Much of the work that was performed in the first case was of value and was used in the second case following the nonsuit. Depositions from before the date of the nonsuit were used at trial, exhibits that were admitted as evidence at trial were documents obtained in discovery before the date of the nonsuit, legal analysis and many pleadings drafted before the date of the nonsuit were subsequently used as well. Much of the work that was required after the nonsuit was the result of the Defendant's discovery and motion initiatives and it was appropriate that Plaintiffs' counsel respond to these initiatives in order to advocate their clients' legal rights. To cut off recovery of attorneys' fees as of the date of the nonsuit would be a contrivance and would not serve the purpose or the remedies provided by Washington's Law Against Discrimination.

**Finding of Fact No. 8 (CP at 8)**

8. I find the fees and costs sought by Plaintiffs were reasonably incurred in this matter and should be recovered without deduction or penalty.

**Finding of Fact No. 9 (CP at 8)**

9. Multiplier. The claims involved in this lawsuit required a great deal of lawyer and staff time to pursue them, due to the novelty and difficulty of the claims and the vigorous defense. Undertaking this representation significantly impacted the ability of the lead lawyers to work on other matters and constituted a significant risk to Plaintiffs' law firm if it did not recover fees. This case was unique, involving complex issues of employment law and governmental liability. From the beginning this was an exceptional case that presented an exceptional challenge for Plaintiffs' counsel. This case required a high level of skill in the specialized area of employment law involving governmental entities as well as a high level of skill in trial preparation and trial presentation. This case was taken on a contingency basis and involved substantial risk of no recovery. Few law firms in the Puget Sound region are equipped to take these kinds of risks on behalf of a client. Although the recovery was substantial, at the time of accepting the case it was a significant risk.

**Finding of Fact No. 11 (CP at 8)**

11. In light of the substantial risk and the quality of representation, the court finds that an upward adjustment from the lodestar is appropriate and a multiplier of 1.5 should be applied to all fees through the date of the jury's verdict (November 21, 2006).

**Finding of Fact No. 13 (CP at 9)**

13. The fees and costs related to work on various post trial matters were reasonable, including the time spent on the motion for fees and the motion for a supplemental judgment relating to a tax offset.

**Finding of Fact No. 14 (CP at 9)**

14. The court finds that the following amounts of fees and costs are reasonable:

Fees through 11/21/06	832,556.00
1.5 Multiplier for work prior to jury verdict	416,278.00

Fees 11/22-12/1/06	5,874.00
Fees 12/1 – 12/31/06	5,407.50
Fees 1/1 – 2/13/07	23,362.50
<u>Fees 2/14 – 2/26/07</u>	<u>12,630.00</u>
<b>Total Attorneys' Fees Awarded:</b>	<b>\$1,296,108.00</b>
<b>Costs Awarded:</b>	<b>\$158,474.62</b>

**CERTIFICATE OF FILING AND SERVICE**

I, the undersigned, declare that on or before August 31, 2007, I mailed via U.S. mail, first class, postage prepaid, the original and one copy of the foregoing BRIEF OF APPELLANT to:

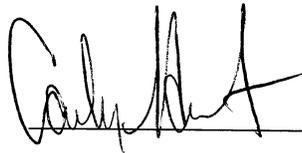
Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

I further certify that on or before the date listed below, I mailed via U.S. mail, first class, postage prepaid, one copy of the foregoing BRIEF OF APPELLANT to:

Ms. Stephanie Bloomfield  
Gordon, Thomas, Honeywell, Malanca,  
Peterson & Daheim, LLP  
P.O. Box 1157  
Tacoma, WA 98401-1157

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

EXECUTED on August 31, 2007, in Seattle, Washington.



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