

NO. 49899-5-II

IN THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

Clark County Superior Court No. 16-2-05058-5

WENDY ANN MURRAY as PERSONAL REPRESENTATIVE OF THE
ESTATE OF CARL MURRAY, a deceased career professional firefighter,
for and on behalf of the Estate and RCW 4.20.020 beneficiaries,

Appellant,

vs.

CITY OF VANCOUVER, a municipal subdivision of the State of
Washington,

Respondent.

BRIEF OF RESPONDENT CITY OF VANCOUVER

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I. INTRODUCTION

Reading Plaintiff-Appellant Wendy Ann Murray’s opening brief, one gets the impression that the primary issue on appeal is whether the trial court should have delayed summary judgment under Civil Rule 56(f) to allow additional discovery. *See* Br. of Appellant at 2 (“Without full and fair discovery or opportunity to review discovery, depose witnesses, and retain experts, the trial court granted the City’s motion for partial summary judgment, dismissing the survival, outrage, loss of consortium, and strict liability [claims.]”); *see also id.* at 27, 29, 30. Other themes include whether the trial court misapplied the elements of strict liability and *res ipsa loquitor*, and what allegations are necessary to advance an outrage cause of action past the pleading stage. *Id.* at 38-44.

But therein lies the problem: the superior court decided none of those issues below. Plaintiff never moved for a CR 56(f) continuance; therefore the trial court never denied one. Defendant-Respondent City of Vancouver never argued that Plaintiff lacked sufficient evidence to prove the elements of strict liability or *res ipsa loquitor*, meaning the trial court never so held. And the City never sought dismissal of any cause of action—including outrage—under CR 12(b)(6), meaning the trial court never assessed the sufficiency of Plaintiff’s complaint. In essence, most

of Plaintiff's brief criticizes decisions the trial court never reached and reasoning the trial court never employed.

Because this Court sits in the same position as the trial court on review of a summary judgment order, *Lamar Outdoor Advertising v. Harwood*, 162 Wn. App. 385, 394, ¶ 27, 254 P.3d 208 (2011), Plaintiff's attempt to rewrite the record should be rejected. This applies not only to Plaintiff's irrelevant arguments, but also her improper reliance on hearsay filed long after the trial court entered the order at the heart of this appeal.

Once the proper summary judgment record is identified, the following facts are undisputed:

- In 2001, Carl Murray filed a form with the City alleging that he had been exposed to radon in Vancouver's Fire Stations
- In 2010, Carl Murray was diagnosed with lung cancer.
- In 2011, Carl Murray openly discussed his belief that radon from the Vancouver Fire Stations caused his cancer;
- The documents that Plaintiff claims triggered the running of the statute of limitations were available in 2011 and would have been produced had anyone, including Murray, requested them under the Public Records Act ("PRA"), ch. 42.56 RCW.
- Over five years later, on February 2, 2016, Plaintiff commenced this lawsuit.

Plaintiff ignores each of the foregoing undisputed facts, which her evidence not only fails to dispute, but in reality confirms.

Proper application of the law demands that the trial court's order be affirmed. First, the trial court correctly found no genuine issue of fact that Carl Murray discussed his belief that radon caused his lung cancer over five years before this lawsuit was commenced, which means all survival claims are barred by the statute of limitations.

Second, the trial court correctly found that RCW 41.26.270 and RCW 41.26.281 barred all causes of action by Plaintiff against the City other than negligence and intentional torts. And because Plaintiff offers only a passing reference to this issue in her opening brief, she has waived appellate consideration of it.

Third, the trial court correctly found that Plaintiff's arguments and evidence were insufficient to permit an outrage theory to advance past summary judgment, regardless of the complaint's sufficiency.

And finally, the trial court correctly agreed with the City's argument—which Plaintiff never opposed in the trial court—that Plaintiff's damages were limited “to the total damages reduced by amounts paid by COV under [chapter 41.26 RCW, the Law Enforcement Officers' and Firefighters' Retirement System Act, more commonly

known as] LEOFF, reduced further by the present value of the amounts payable by LEOFF.” CP at 82-83.

And because Plaintiff stipulated to the only other order to which error is assigned, this Court should affirm in all respects.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The City rejects Plaintiff’s statements of the issues and presents the following in lieu thereof:

(1) Whether the statute of limitations bars any claim personal to Carl Murray when he was diagnosed with cancer in 2010 and openly discussed his belief in 2011 that the cancer was caused by exposure to radon at the fire stations, but no lawsuit was filed until 2016.

(2) Whether Plaintiff’s passing reference to RCW 41.26.281 is insufficient to merit appellate consideration, and if not, whether that statute in conjunction with RCW 41.26.270 statutorily abolishes all causes of action by firefighters against their employers except for negligence and intentional torts, which necessarily prohibits a firefighter or family member from suing for the separate and independent causes of action of strict liability and loss of consortium.

(3) Whether an outrage claim fails to advance past summary judgment when there is no evidence that the defendant intended to cause severe emotional distress, and the evidence negates any reasonable

inference that the City's actions were so outrageous to be beyond all possible bounds of decency.

(4) Whether Plaintiff waives any argument that the trial court misapplied RCW 41.26.281 to limit damages when she failed to offer any argument in opposition, or, in the alternative, whether the Court should affirm the trial court's decision on the merits.

(5) Whether Plaintiff is precluded by the invited error doctrine from claiming the January 10, 2017, order dismissing the remainder of the case was in error because she stipulated to its entry.

III. STATEMENT OF THE CASE

Insofar as the factual background of this case is concerned, it is imperative to remember that “the appellate court sits in the same position as the trial court” when reviewing an order on a motion for summary judgment, *Lamar Outdoor*, 162 Wn. App. at 394, ¶ 27, or as in this case, a motion for partial summary judgment, *Lee v. Willis Enters., Inc.*, 194 Wn. App. 394, 400, ¶ 16, 377 P.3d 244 (2016). RAP 9.12 facilitates this protocol by requiring those documents called to the trial court's attention to be specifically delineated in the summary judgment order. *See Mithoug v. Apollo Radio*, 128 Wn.2d 460, 462, 909 P.2d 291 (1996) (per curiam). To this end, the Supreme Court has held that the Court of Appeals errs when it considers evidence not called to the trial court's attention before

the summary judgment order was entered. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 390, 715 P.2d 1133 (1986) (“Court of Appeals erred in relying on [a] deposition” that was filed a month after trial court’s summary judgment order); accord *Beccera Beccera v. Expert Janitorial, LLC*, 176 Wn. App. 694, 729-30, ¶¶ 95-98, 309 P.3d 711 (2013), *aff’d*, 181 Wn.2d 186, 332 P.3d 415 (2014) (denying motion to supplement record “[b]ecause none of the materials that the parties seek to add to the record were before the trial court when it made its two rulings” on summary judgment).

Plaintiff sidesteps this law altogether, summarily assuming that the “record” should consist of multiple declarations filed long after the trial court granted partial summary judgment to the City on June 10, 2016. To be sure, the overwhelming majority of the Clerk’s Papers relate exclusively to a discovery dispute that not only unfolded after partial summary judgment was entered, but also was one the trial court never decided. *See* CP at 89-484. Both the Plaintiff and City filed cross-motions to compel, but the parties withdrew the motions prior to the court hearing on November 1, 2016. *See* III VRP (Nov. 1, 2016) at 39-47. As such, 75 percent of the Clerk’s Papers (396 of 529 pages) all focus exclusively on discovery motions the trial court never decided and which, consequently, this Court is not asked to review.

Additionally, Plaintiff's disregard of proper appellate law is evidenced by the extent to which her brief relies so heavily on an exhibit to the January 4, 2017, Declaration of Matthew Johnson. CP at 504-13; Br. of Appellant at 5, 28. In that declaration, Mr. Johnson attaches a "March 17, 2011, statement of Carl Murray," CP at 504, which was filed almost six months after the trial court entered the partial summary judgment order this Court is now asked to review. CP at 514-15. It would be error to consider this document for that reason alone—Plaintiff never called the trial court's attention to it prior to partial summary judgment being entered. *Tank*, 105 Wn.2d at 390. In addition, the document cannot be considered on summary judgment because it is (1) hearsay, *Dunlap v. Wayne*, 105 Wn.2d 529, 535-36, 716 P.2d 842 (1986), and (2) improperly authenticated by an attorney without foundation for personal knowledge "that the document is what it claims to be," *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366-67, 966 P.2d 921 (1998).¹ The Court should disregard the Johnson declaration entirely.

The only pages in the Clerk's Papers which *are* germane to the trial court's June 10, 2016, motion for partial summary judgment are pages 19-83. The City acknowledges that three documents were timely

¹ The City obviously did not object to the document prior to partial summary judgment being granted because the declaration did not exist at that time.

submitted by Plaintiff prior to the trial court's order, but were filed under the wrong cause number² and are therefore not a part of the Clerk's Papers. *See* Br. of Appellant at 16. These documents appear as appendices to Plaintiff's opening brief. *Id.*, Appx. A-C.³

The following factual narrative stems from those documents, which is all the Court should consider for purposes of determining whether partial summary judgment was properly entered. *Tank*, 105 Wn.2d at 390; *Beccera Beccera*, 176 Wn. App. at 729-30, ¶¶ 95-98.

A. Factual background

Carl Murray was hired as a firefighter for Vancouver on May 26, 1992. CP at 47. On September 17, 2001, the City received a report from an environmental engineering firm advising that testing revealed radon in two fire stations—Stations 82 and 86—were abnormally high in both weight rooms. Br. of Appellant, Appx. A at Ex. G. The report “recommend[ed] that further testing be conducted.” *Id.* Roughly a month

² Though not readily apparent from the summary judgment record, Plaintiff filed suit against the City in 2015, but took a voluntary dismissal under CR 41. *See* CP at 338, 348-49. This rendered the first action a nullity as if the action was never filed in the first place. *Beckman v. Wilcox*, 96 Wn. App. 355, 359, 979 P.2d 890 (1999).

³ It is well established that “appellants bear the burden of perfecting the record for appellate review.” *State v. Miller*, 179 Wn. App. 91, 100, ¶ 14, 316 P.3d 1143 (2014). Plaintiff never attempted to correct the misfilings at the superior court level, and Plaintiff has not asked this Court to correct the record under RAP 9.10. Nevertheless, the trial court did consider them when deciding partial summary judgment. *See* II VRP (June 10, 2016) at 32-33. Therefore, the City does not object to their consideration here. Because the declarations filed by Plaintiff are not consecutively numbered Clerk's Papers, the City cites to them by paragraph and exhibit number.

later, on October 16, 2001, Murray completed a Health Hazards Material Exposure Report, in which he was to state “[i]n [his] own words” and in “as much detail as possible ... the circumstances of [his] exposure.” CP at 46. He was directed to “[i]nclude the substance involved,” *id.*, which he did by attaching a narrative that he prepared. That narrative read in its entirety:

CMurray Exposure to Radon

**The first year of my career I was assigned to St. 82.
Thereafter, various assignment at St. 82 and St. 86 since
my hire date of 5.26.92**

Carl Murray

CP at 47. In short, a month after the 2001 initial report of elevated radon levels, Murray prepared a document that he had been “[e]xpos[ed] to [r]adon” while working at the two fire stations referenced in the September 17, 2001, engineering report. *Id.*

Plaintiff’s evidence shows that the City tested again later in 2001 and by May 2002, levels in both stations had reached acceptable levels. Br. of Appellant, Appx. A at Ex. H.⁴ Four years later, in February 2006,

⁴ A report from May 13, 2002 shows that all rooms in Station 82 had returned to levels below the 4.0 pCi/L level except for the weight room, but that was corrected before a subsequent test on May 22, 2002. Br. of Appellant, Appx. A at Ex. H. As for Station 86, the lone room with an elevated level in September 2001—the workout room—was tested again and yielded a result of 1.3 pCi/L. *Id.* (Oct. 19, 2001, letter from PBS Eng’g). The “crawl space” still had levels in excess of 4.0 pCi/L, but the record is silent as to what extent, if any, Murray worked there. On summary judgment, the court does not presume missing facts. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 889, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (construing federal rule); *see also Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226-27, 770 P.2d 182 (1989) (Washington’s standard mirrors federal law).

the City again tested both fire stations for radon. *Id.*, Appx. A at Ex. I. All rooms in Station 86 tested below threshold levels, though five canisters in Station 82 were slightly above. *Id.* (Report of 2/21/06 – Table). The City tested Station 82 again, and by July 2006, all rooms in Station 82 tested below the threshold of 4.0 pCi/L. *Id.* (Report of 7/18/06 – Table). Three years later, in 2009, Murray and every member of the Vancouver Fire Department received an email containing “health information ... about Radon and potential or possible exposures.” CP at 23, 27. Plaintiff never submitted anything disputing this evidence.

Murray was diagnosed with lung cancer on December 23, 2010. CP at 53. Murray informed his colleagues about the diagnosis, which prompted an email from Vancouver Fire Department (VFD) Division Chief Roxy Barnes on January 5, 2011, in which she wrote:

I have been doing some research and believe it would be very helpful to you Carl to identify how many shifts you worked at station 1 or 2⁵¹ since radon is one major cause of several types of lung cancer.

CP at 36 (emphasis added).

Three days later, Murray sent out a mass e-mail advising his colleagues of his lung cancer diagnosis. CP at 38. This prompted an response from Chief Barnes later that day, in which she asked “to know

⁵ The summary judgment record does not clearly reflect this, but other portions of the record does reflect that “Station 82” was later renamed “Station 1” and “Station 86” was later renamed “Station 2.” See CP at 387.

the types of cancer *so I can connect it to your radon exposure* for presumption.” *Id.* (emphasis added). She then asked Murray whether he “remember[ed] ... the paperwork for radon exposure,” and that she “plan[ned] on writing a supportive paper to nail your presumption connection for the city.” *Id.*

Murray responded the following day (January 9, 2011), and wrote:

Thanks Roxy. I do remember filling out the paperwork but that’s the only detail I can remember.... I’ll take all the help I can get and would appreciate any data that would go towards supporting my claim.

CP at 40. Barnes and Murray continued to correspond on January 9, which ended with Barnes stating her “goal is to write a paper *to connect this [cancer] to radon* so there will be no question.” *Id.* (emphasis added). Plaintiff never disputed any of the foregoing communications to or from Murray, meaning the trial court rightly accepted these facts as “established.” *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989).

Tragically, Murray passed away on July 30, 2013. Br. of Appellant, Appx. B ¶ 14. On October 4, 2013, the law firm of Ron Meyers & Associates submitted a request for public records that sought documentation regarding radon in city fire stations. *Id.*, Appx. A at Ex. C. The City acknowledged the request two days later and then formally responded on October 28, 2013, by producing, *inter alia*, the test results

and correspondence from 2001 through 2013. *Id.*, Appx. A at Exs. D-E. The production included the same testing documents Plaintiff offered in opposition to summary judgment. *Id.*, Appx. A ¶ 11. According to a declaration of Wendy Murray, who was Murray’s personal representative, it was these documents “provided by the City of Vancouver on October 28, 2013” that first made her “aware of the high levels of radon in City of Vancouver Fire Stations.” *Id.*, Appx. B ¶ 15. The record is devoid of anything suggesting that either Carl Murray or Wendy Murray were inhibited or prevented in any way from requesting and receiving these same public records in 2010 and 2011 after Murray received his diagnosis.

B. Procedural history

Plaintiff filed the underlying lawsuit on February 2, 2016. CP at 1-10. On April 29, 2016, the City moved for partial summary judgment, seeking rulings as a matter of law on the following issues:

- That all claims advanced under Washington’s survival statutes, RCW 4.20.046(1) and RCW 4.20.060, be dismissed as barred under the three-year statute of limitations;
- That all causes of action and/or theories other than negligence or intentional torts be dismissed as statutorily abolished by RCW 41.26.270 as modified by RCW 41.26.281, to include any cause of action for strict liability and/or loss of consortium;

- That Plaintiffs' cause of action for outrage (intentional infliction of emotional distress) be dismissed for insufficient evidence; and
- That any award be limited consistent with the provisions of RCW 41.26.281, which allows recovery only for "any excess of damages over the amount received or receivable under" LEOFF.

CP at 56-70. Nothing in the motion sought to dismiss Plaintiff's wrongful death cause of action under RCW 4.20.010 and 4.20.020, and nothing in the motion claimed that Plaintiff lacked sufficient evidence to proceed on a negligence theory. *Id.*

Plaintiff timely filed her opposition (though under the incorrect case number), but never sought a continuance under CR 56(f), and never opposed the City's argument on limiting damages. *See* Br. of Appellant, Appx. A & C. Rather, Plaintiff filed eight exhibits attached to the declaration of their counsel and a declaration of Murray's wife, Wendy Ann Murray. *Id.*, Appx. A-B. As stated above, none of this evidence attempted to contradict or dispute the factual narrative or evidence set forth by the City. Rather, it focused primarily on documentation of radon tests from 2001 through 2006 that were produced under the PRA on October 28, 2013. *See* Br. of Appellant, Appx. A ¶¶ 7-11 & Ex. C. Ms.

Murray alleged in her declaration that the City never explicitly admitted that Murray's cancer was caused by radon, *id.*, Appx. B ¶¶ 2-4, 6-9, 11-13, and that none of Murray's doctors drew a causal link between radon and the cancer, *id.* ¶¶ 7-9, 14, 16.

After hearing from both sides, the trial court informed the parties that it would take the matter under advisement. I VRP (May 27, 2016) at 24. But shortly thereafter, the Court advised the parties that it intended to grant Defendants' motion. *See* II VRP (June 10, 2016) at 32. Defendants then prepared a proposed order and set a presentation hearing eight days later. CP at 536-40. Plaintiff never objected to the proposed order and did not attend the hearing when the order was entered. CP at 541. On June 10, 2016, the trial court signed the City's proposed order. CP at 81-83, 541; II VRP (June 10, 2016) at 32-34. The order left the RCW 4.20.010-.020 wrongful death claim under a negligence theory as the only remaining cause of action. CP at 83.

Plaintiff attempted to seek discretionary review, CP at 84-88, which a commissioner of this Court denied on September 29, 2016, CP at 487-92. After review was denied, the City sought clarification of the Court's June 10, 2016, order vis-à-vis what damages were still recoverable. CP at 485-86, 493-99. The hearing was moved several times, CP at 485-86, 500-03, 517-18, but ultimately the parties entered

into a stipulation dismissing Plaintiff's remaining causes of action with prejudice, though the claims could be reinstated if the June 10, 2017, partial summary judgment order was reversed on appeal. CP at 519-21. That stipulation, which was signed by the Court on January 10, 2017, constituted a final judgment, CP at 521, and enabled Plaintiff to appeal the June 10, 2016, partial summary judgment order as a matter of right. *See* RAP 2.2(a). She did so timely. CP at 522-24.

IV. ARGUMENT

If this Court were reviewing a trial court's denial of a CR 56(f) request for a continuance, the standard of review would be an abuse of discretion. *Bldg. Indus. Ass'n v. McCarthy*, 152 Wn. App. 720, 743, ¶ 39, 218 P.3d 196 (2009). But, as stated herein, the trial court was never presented with a CR 56(f) request, so the standard of review here is de novo as this Court "perform[s] the same inquiry as the superior court." *Lee*, 194 Wn. App. at 400, ¶ 16.

Summary judgment exists to "avoid a useless trial when no genuine issue of material fact remains to be decided." *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). It should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All reasonable inferences are drawn in the nonmoving party's favor;

however, such inferences are drawn solely from evidence offered that would be admissible at trial. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Burmeister*, 92 Wn. App. at 365. Parties opposing summary judgment cannot rely on the allegations in their complaint, speculative assertions, conclusory statements, or inadmissible evidence to create a genuine factual issue for trial. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 795, 64 P.3d 122 (2003); *White*, 131 Wn.2d at 9. To this end, it is imperative to note that the lone facts pertinent to summary judgment—material facts—are those 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). Thus, factual disputes having no impact on the outcome of the litigation are irrelevant for purposes of summary judgment. *Id.*

In order to effectively consider whether the trial court's ruling was correct, it is necessary to first understand what the trial court actually decided. The trial court granted dispositive relief to the City as follows:

- All claims personal to Carl Murray, which were advanced under Washington's survival statutes, were barred by the applicable statute of limitations;
- As to the wrongful death claims brought by Wendy Murray on her behalf and on behalf of the statutory beneficiaries, RCW

41.26.270 and RCW 41.26.281 abolished all causes of action other than negligence and intentional torts, which necessarily compelled dismissal of Plaintiff's separate causes of action for strict liability and loss of consortium;

- Plaintiff had insufficient evidence to advance an outrage cause of action past summary judgment; and
- RCW 41.26.281 bars recovery of any damages other than “excess damages; that is, the total damages reduced by amounts paid by LEOFF, reduced further by the present value of the amounts payable by LEOFF.” *Hansen v. City of Everett*, 93 Wn. App. 921, 928, 971 P.2d 111 (1999).

CP at 81-83. The dismissal of the survival claims left only a wrongful death cause of action under RCW 4.20.020, and the dismissal of the lone intentional tort (outrage) and all causes of action other than negligence left only a negligence theory under the wrongful death statute. CP at 83.

Rather than addressing what the trial court did, Plaintiff instead takes a detour and criticizes the trial court for reasoning it never employed. She argues that “the judge conducted a trial without plaintiff having any meaningful chance to review documents, retain experts, conduct CR 30(b)(6) and other depositions and produce witnesses in a jury trial.” Br. of Appellant at 30; *see also id.* at 27. She bolsters this

argument by complaining the City improperly served “nearly 200,000 pages of unorganized and unresponsive discovery from the City,” which hindered her ability to respond to the issues raised in the motion for partial summary judgment. *Id.* at 17.

Undermining this entire argument is Plaintiff’s “[f]ailure to request a continuance under CR 56(f),” which under precedent “waives the issue.” *Avellaneda v. State*, 167 Wn. App. 474, 485, n.5, 273 P.3d 477 (2012) (citing and following *Guile v. Ballard Community Hosp.*, 70 Wn. App. 18, 24-25, 851 P.2d 689 (1993)). Any complaint over discovery, including whether sufficient discovery had been completed prior to the trial court’s partial summary judgment order, has been waived and need not be considered. *Id.*⁶

A. The statute of limitations bars all claims advanced under the survival statutes.

The primary issue on appeal is whether the statute of limitations bars the survival claims advanced on Carl Murray’s behalf. At common

⁶ For this reason, Plaintiff’s citation to *Washington State Physicians Insurance Exchange & Association v. Fisons*, 122 Wn.2d 299, 858 P.2d 1054 (1993), is plainly inapposite. The same can be said for Plaintiff’s citation to *Target National Bank v. Higgins*, 180 Wn. App. 165, 321 P.2d 1215 (2014). *Target* held that a trial court impermissibly reduced an attorney fee award to a plaintiff in an action alleging credit card default. *Id.* at 169, 172-94. The portion of the opinion cited by Plaintiff rejected the notion that an attorney fee award under RCW 4.24.250 should be limited by the amount in controversy, going so far as to “applaud[]” Ms. Higgins’ counsel “for performing a service to that portion of the community that often lacks legal assistance.” *Target*, 180 Wn. App. at 193. It is puzzling how Plaintiff here believes *Target* suggests that the trial court should have allowed a continuance when she never requested one. Regardless of how obstinate *Target* acted in that lawsuit, Plaintiff “is precluded from raising this issue on appeal” because she never sought a CR 56(f) continuance. *Guile*, 70 Wn. App. at 24-25.

law existed an “anomaly which allowed tort victims to sue if they survived but barred their claims if they died.” *Estate of Otani v. Broudy*, 151 Wn.2d 750, 755, 92 P.3d 192 (2004). “Washington’s survival statutes preserve causes of action that the decedent could have brought had he or she survived.” *Id.* “Unlike Washington’s wrongful death statutes, the survival statutes do not create new causes of action for statutorily named beneficiaries but instead preserve causes of action for injuries suffered prior to death.” *Id.* “A survivor takes the rights of the decedent—no more and no less.” *White v. Johns-Manville Corp.*, 103 Wn.2d 344, 360, 693 P.2d 687 (1985 (citation omitted)). “A survival action does not have a separate statute of limitations period beginning at the time of the death. If the limitation period has run and would have barred the decedent from asserting his or her personal injury claim, any ‘survival’ claim by a personal representative is also barred.” *Miller v. Foster Wheeler Co.*, 98 Wn. App. 712, 716, 993 P.2d 917 (1999).

This means that if the statute of limitations would have precluded Carl Murray from suing at any time prior to February 2, 2016—when this lawsuit was filed—then the survival claims under RCW 4.20.046(1) and 4.20.060 are time barred. *Accord Ives v. Ramsden*, 142 Wn. App. 369, 384, ¶ 28, 174 P.3d 1231 (2008) (“the only prerequisite to maintaining a

survival action is that the decedent could have maintained the action *had he lived*") (italics in original). As shown below, the claims are untimely.

1. Once a person knows all facts that would trigger a duty to investigate further, the statute of limitations starts running.

Statutes of limitation exist to “protect ... the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.” *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) (internal quotation marks and citations omitted). The statute of limitations on personal injury claims is three years from the date of accrual. RCW 4.16.080(2). Accrual generally occurs “at the time the act or omission causing the tort injury occurs.” *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 602, ¶ 5, 123 P.3d 465 (2005).

However, Washington follows the discovery rule. *Id.* “Under Washington’s discovery rule, a cause of action does not accrue until a party knows or reasonably should have known the essential elements of the possible cause of action.” *Id.* at 602, ¶ 6 (citing *Ohler v. Tacoma Gen. Hosp.*, 92 Wn.2d 507, 511, 598 P.2d 1358 (1979)). In other words, “when a plaintiff is placed on notice by some appreciable harm occasioned by another’s wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of the actual harm. The plaintiff is charged

with what a reasonably inquiry would have discovered.” *Green v. A.P.C.*, 136 Wn.2d 87, 96, 960 P.2d 912 (1998). This means that “[o]ne who has notice of facts sufficient to put him upon inquiry is deemed to have notice of *all* acts which reasonable inquiry would disclose.” *Id.* (citation and internal quotation marks omitted).

2. The survival claims accrued no later than when Murray discussed his belief that radon caused his cancer, which was five years before this lawsuit was filed.

This lawsuit was filed February 2, 2016. CP at 1. After one “adds 60 days to the end of the [three-year] statute of limitations” because Plaintiff served the City with a tort claim prior to suing, *Castro v. Stanwood Sch. Dist. No. 401*, 151 Wn.2d 221, 226, 86 P.3d 1166 (2004) (citing RCW 4.96.020(4)), the survival claims are barred if they accrued prior to December 4, 2012. They undisputedly did.

Instructive on this point of law is *Clare*. That case involved a man who died of metastatic mesothelioma in 1996 within six months of being diagnosed. *Clare*, 129 Wn. App. at 601, ¶ 2. Prior to his death, the man’s physician noted in his medical records that his prior work as a truck mechanic “likely exposed him to asbestos dust.” *Id.* Six years after his death, his surviving spouse sued, but the trial court granted summary judgment and Division One this Court affirmed. *Id.* at 601-02, ¶ 4. The court reasoned that “[a] claimant who knows of the harm and the

immediate cause of the harm, but fails to make any meaningful inquiry, has breached the due diligence duty” necessary to invoke the discovery rule. *Id.* at 604, ¶ 10. The court further explained that although the decedent and the family “may not have specifically known the legal cause, they certainly had facts giving rise to a duty to inquire.” *Id.* at 605, ¶ 11; *see also Miller*, 98 Wn. App. at 716 (affirming dismissal of survival claims based on the statute of limitations because “[e]ven if a specific date of injury cannot be determined because the ‘injury’ resulted from the exposure to a harmful substance over a period of time, as alleged in these cases, it is undisputed here that [the decedents] knew of their ‘injury’ and its cause by the time of their individual diagnoses.”).

This case is no different. Carl Murray was diagnosed with cancer on December 23, 2010, CP at 51-55, and he openly discussed the belief that radon in Vancouver’s fire stations caused his cancer when he communicated with Division Chief Barnes on and before January 9, 2011, CP at 36, 38, 40-41. And there is no genuine dispute that Murray knew he had been exposed to radon because he reported the same to the City in October 2001 with a document bearing the heading “**CMurray Exposure to Radon.**” CP at 47. At the very latest, Carl Murray’s discussion in 2011 that he believed in a causal link between radon in Vancouver’s Fire Stations and his lung cancer supplied “facts giving rise to a duty to

inquire,” triggering the statute of limitations. *Clare*, 129 Wn. App. at 605, ¶ 11. Because the statute of limitations started running on January 9, 2011, at the latest, Murray was obligated to file a tort claim under RCW 4.96.020 on or before January 9, 2014, and then commence suit 60 days later to be considered timely. It is undisputed that he did not do so.

3. The only authority cited by Plaintiff negates the premise on which she relies.

Plaintiff cites no authority to support her invocation of the discovery rule other than a lengthy block quote from *White*, 103 Wn.2d 344. An examination of not only *White*, but also other cases applying the discovery rule, demonstrates that Plaintiff’s reliance is unfounded.

The issue in *White* was whether the discovery rule could apply after a decedent passes away. *Id.* at 345. The case came to the Supreme Court on certification from the federal district court, on “stipulated facts.” *Id.* Importantly, it was “stipulated” for purposes of that case “that the decedent never knew that he was suffering from any adverse effects of exposure to asbestos-containing materials,” and that the personal representative “did not learn until [over four years after the decedent’s death] that his death may have been due to asbestos exposure.” *Id.* In fact, the Court there stressed that it was “*not faced with ... a case in which the deceased is alleged by the defendant to have known the cause of the disease which subsequently caused his death.*” *Id.* at 347 (emphasis

added). But in its analysis, the Court drew a distinction between wrongful death claims asserted under RCW 4.20.010 and 4.20.020 and survival claims under RCW 4.20.046(1) and 4.20.060. *Compare White*, 103 Wn.2d at 352-56 (wrongful death) *to id.* at 356-60 (survival).

What is striking about Plaintiff's lengthy quotation of *White* (given that there is no discussion of how the Court analyzed the facts before it) is the plain omission of the Court's actual holding when it comes to applying the discovery rule to survival claims: "The statute of limitation pertinent to a survival action commences at the *earliest* time *at which the decedent* or his personal representatives knew, *or should have known*, the causal relationship between the decedent's exposure to asbestos and his ensuing disease." *Id.* at 360 (emphasis added). This sentence alone undermines the entire basis of Plaintiff's argument that "[t]he statute of limitations does not run in Washington until the Plaintiff knows of the cause of his occupational disease." Br. of Appellant at 32. That is not the law:

[T]he discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, *through the exercise of due diligence, should have discovered* the basis for the cause of action. A cause of action will accrue *on that date* even if *actual* discovery did not occur until later.

Allen v. State, 118 Wn.2d 753, 758, 826 P.2d 200 (1992) (first italics added). Plaintiff's unsupported effort to rewrite Washington precedent should be rejected.

4. By conceding that her claims accrued when she received public records that she and Murray undisputedly could access anytime from 2001 through 2006, Plaintiff inherently admits that the survival claims are time barred.

Rather than acknowledging Murray’s discussion of radon and cancer in 2011, Plaintiff claims that the discovery rule tolled the statute of limitations until “the City responded to the Public Records requests on October 28, 2013 or March 20, 2014.”⁷ Br. of Appellant at 33. Even if one accepted that premise—that the statute of limitations is tolled until a public entity provides public records—it conclusively mandates that the survival claims are barred here.

Reichelt v. Johns-Manville Corp., 107 Wn.2d 761, 733 P.2d 530 (1987), explains why. The plaintiff there developed asbestosis from years of working for insulation contractors and distributors from 1953 until 1974. *Id.* at 763. He and his wife did not file suit until 1980, the same month he was diagnosed with pulmonary disease. *Id.* The trial court dismissed his negligence claim as time barred, noting evidence that the plaintiff worker had filed a workers’ compensation claim in 1971 for

⁷ Plaintiff’s reference to the different dates is misleading. The only record disclosed on March 20, 2014, that was not disclosed on October 28, 2013, was the test results from June 10, 2013, at Fire Station 6. Br. of Appellant, Appx. A at Ex. F. There is nothing in the record that discusses (a) whether the radon levels were at that station were high, or (b) whether (and if so, when) Murray ever worked at Fire Station 6. Again, on summary judgment, missing facts are not presumed. *Lujan*, 497 U.S. at 889. Though the date discrepancy ultimately has no bearing on whether the discovery rule tolled the statute of limitations vis-à-vis the survival claims, it should be made clear that Plaintiff concedes information in public records that would have been produced upon request at any time from 2011 forward were enough to trigger the statute of limitations..

asbestosis. *Id.* at 763-64. The plaintiff attempted to invoke the discovery rule by relying on three pieces of evidence: (1) his affidavit stating that he “did not know [within three years of filing suit] that the defendants might have committed wrongful acts, been negligent, or breached legal duties,” (2) his wife’s affidavit that she “did not believe [within three years of filing suit] that my husband’s condition was functionally limiting,” and (3) an attorney’s affidavit that lawyers “did not become aware of facts showing that asbestos manufacturers were negligent until” three years before suit was filed. *Id.* at 765. The trial court rejected these arguments and found the lawsuit barred by the statute of limitations. The Supreme Court affirmed, reasoning that the plaintiff knew of his physical harm and the dangers posed by asbestos more than three years before suit was filed. *Id.* at 772-73. Rejecting an argument similar to what Plaintiff makes here, the Court wrote:

Mr. Reichelt would have us adopt a rule that would in effect toll the statute of limitations until a party walks into a lawyer’s office and is specifically advised that he or she has a legal cause of action; that is not the law. A party must exercise reasonable diligence in pursuing a legal claim. If such diligence is not exercised in a timely manner, the cause of action will be barred by the statute of limitations.

Id. Other cases are in accord. *E.g.*, *Allen*, 118 Wn.2d at 758-59 (widow’s “minimal” efforts “to discover the facts surrounding her husband’s death” not enough to trigger discovery rule); *Clare*, 129 Wn. App. at 604, ¶ 11

(following *Reichelt*); *G.W. Constr. v. Prof'l Serv. Indus.*, 70 Wn. App. 360, 367, 853 P.2d 484 (1993) (where evidence showed that engineer knew rebar was misplaced and witness testified that cracks were visible within one month of construction, discovery rule did not apply even though full extent of rebar's incorrect installation was not known until another consulting engineer performed more extensive testing).

Plaintiff makes the same arguments rejected in *Reichelt*. She argues that she could not have known about radon in the City fire stations until her attorney obtained records under the PRA in October 2013. But no one can rationally claim that Carl Murray or Wendy Murray were prevented from requesting and receiving the same public records in 2011 when he was reminded of the exposure. Certainly, the ability to obtain public records has existed since long before Murray was diagnosed, LAWS OF 1973, ch. 1, §§ 25-34 (Initiative 276), *codified as amended in* ch. 42.56 RCW, and an attorney's assistance is by no means necessary to utilize the PRA to obtain documentation from a public entity. *E.g.*, *O'Neill v. City of Shoreline*, 170 Wn.2d 138, 142-43, ¶ 4, 240 P.3d 1149 (2010); *West v. Port of Olympia*, 183 Wn. App. 306, 310, ¶ 3, 333 P.3d 488 (2014).

There can be no dispute that had Murray made the exact same request for records in 2011—i.e., the exercise of due diligence—that he would have received every record that was produced to his spouse's

attorney in October 2013. To this end, it must be remembered that “[t]he burden is on the plaintiff to show that the facts constituting the tort were not discovered or could not have been discovered by due diligence within the 3-year period.” *G.W. Constr. Corp.*, 70 Wn. App. at 367. Plaintiff did not meet that burden because her evidence functionally concedes that due diligence would have provided Murray and her with every piece of documentation in 2011 on which she based her lawsuit in 2016.

The statute of limitations began running as soon as Carl Murray, i.e., “the decedent[,] ... knew, *or should have known*, the causal relationship between [Murray’s] exposure to [radon] and his ensuing disease.” *White*, 103 Wn.2d at 360 (emphasis added). To claim that Murray had no idea that there was a “causal relationship between” radon and “his ensuing disease” is to ignore evidence that Plaintiff has never disputed, namely (a) Murray knew and believed that he had been exposed to radon while working at Vancouver Fire Stations, CP at 46-47, and (b) within a month of his December 2010 lung cancer diagnosis, Murray engaged in an open discussion with a colleague about their shared belief that the radon exposure at the fire stations caused his disease, CP at 36, 38,

40-41.⁸ This negates any genuine dispute of fact as to whether Murray “knew of [his] ‘injury’ and its cause” for over three years prior to the filing of this lawsuit. *Miller*, 98 Wn. App. at 716.

5. Any argument that the statute of limitations was tolled due to concealments has no basis in the law or summary judgment record.

Though not clearly stated, Plaintiff appears make three other arguments in favor of tolling: (a) the City allegedly “fail[ed] to report as mandated by law,” Br. of Appellant at 28, (b) “the statute of limitations does not run while the fact of [sic] lethal doses of radon are being concealed by the firefighter’s employer,” *id.* at 32, and (c) the City did not expressly admit that radon caused Murray’s cancer when it “allowed the lung cancer claim,” *id.* None of these arguments are persuasive.

It is worth noting first that Plaintiff fails to cite a single case supporting any of these propositions, meaning the court “may assume that counsel, after diligent search, has found none.” *De Heer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962). On that basis alone, the Court should disregard. Nevertheless, if the Court is inclined to consider the arguments, it should still reject them.

⁸ Plaintiff points to “decedent Carl Murray’s statement” as evidence “that he had no idea as to the cause of his lung cancer.” Br. of Appellant at 28. Presumably, Plaintiff is referring to the exhibit attached to the January 4, 2017, declaration of Matthew Johnson, CP at 504-13, which was filed long after the trial court’s partial summary judgment order, *cf.* CP at 81-83. That document, for reasons articulated above, cannot be considered in regards to whether partial summary judgment was correctly entered. RAP 9.12; *Dunlap*, 105 Wn.2d at 535-36; *Tank*, 105 Wn.2d at 390; *Burmeister*, 92 Wn. App. at 366-67.

Plaintiff cites two regulations from chapter 296-305 WAC⁹ ostensibly for the proposition that the City was mandated to “provide information to all employees relative to hazardous chemicals or substances to which they are exposed,” WAC 296.305-01509(6), and that the alleged failure to do so precludes the statute of limitations from running. *See* Br. of Appellant at 26-27. The record reveals though that the City *did* inform all Vancouver firefighters about radon both in the workplace, CP at 46-47,¹⁰ and also of the hazards of radon, CP at 27-34. But even if the City did violate a regulation, the statute of limitations is not tolled past the point “when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action.” *Allen* 118 Wn.2d at 758. And there is no dispute that Carl Murray actually discussed radon in Vancouver’s Fire Stations as the possible cause of his cancer more than three years before this lawsuit was filed. Thus, even if the City “fail[ed] to report as mandated by law,” Br. of Appellant at 28,” the statute of limitations still began running in 2011, more than three years before the complaint was filed on February 2, 2016.

⁹ WAC 296-305-01509 and WAC 296-305-01003.

¹⁰ For example, Murray filed his radon exposure claim exactly one month after the City received “radon-screening tests” that Plaintiff now quotes so heavily as her basis for contending the City should be liable. *Compare* CP at 46-47 (exposure form signed 10/16/2001) *to* Br. of Appellant, Appx. A at Ex. G (09/17/2001 letter from PBS Engineering). The reality is that Murray knew of radon exposure in 2001 and filed an exposure claim as a result.

The same analysis forecloses Plaintiff’s argument that the statute of limitations was tolled because the City “allowed the lung cancer claim.” *Id.* at 32. This argument is baseless. Washington statute establishes for firefighters “a prima facie presumption” that “cancer” is an “occupational disease[] under RCW 51.08.140.” RCW 51.32.185(1). This means that the “disease [is presumed to have] arise[n] naturally and proximately out of employment under the mandatory or elective adoption provisions of ... title [51 RCW].” RCW 51.32.185(1). As such, the City was obligated to provide the industrial insurance benefit—regardless of what actually caused Murray’s cancer—unless it could overcome the “prima facie presumption” that the cancer was an occupational disease. *Id.* Such is consistent with the “strong public policy in favor of the worker” that is “reflect[ed]” in RCW 51.32.185. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 720, ¶ 3, 389 P.3d 504 (2017). The City never sought to deny Murray the benefits to which he was appropriately entitled. *Accord* Br. of Appellant, Appx. B ¶ 3 (“It is accurate that the City of Vancouver allowed the claim as a presumptive occupational disease claim.”).

In essence, Plaintiff argues that the City should be penalized by honoring Murray’s claim for industrial insurance benefits. The upshot of this assertion is Plaintiff’s view that the statute of limitations is tolled until a defendant concedes liability. If the statute is not tolled until the time the

Plaintiff's lawyer tells her client that she might have a case, *Reichelt*, 107 Wn.2d at 772-73, then it most certainly is not tolled until a defendant falls on the sword and concedes fault, causation, and damages. The City continues to take the position that radon did not cause Murray's lung cancer, and there is evidence to support that conclusion.¹¹ But the Court need not resolve that question—if radon did cause Murray's cancer, he was tasked with the duty of due diligence in 2011 to investigate and commence litigation within three years. He did not do so.

Carl Murray's claims accrued no later than when he was informed by a colleague that radon caused his cancer, which undisputedly occurred well over three years before the complaint was filed. All survival claims are therefore time barred.

B. RCW 41.26.270 and RCW 41.26.281 abolish all causes of action other than negligence and intentional torts, and Plaintiff waived any argument to the contrary.

The trial court dismissed Plaintiff's causes of action for strict liability and loss of consortium by agreeing with the City's interpretation of two sections in LEOFF, which collectively "abolish[]" "all civil actions and civil causes of action by ... firefighters against their governmental employers for personal injuries or sickness," RCW 41.26.270, other than

¹¹ For example, Wendy Murray's declaration suggests that none of Murray's doctors believed that radon caused the cancer. Br. of Appellant, Appx. B ¶¶ 7-9. If radon did not cause Murray's cancer, then the City would not be liable in tort for it.

causes of action for “intentional or negligent act[s] or omission[s],” RCW 41.26.281. CP at 62-68, 81-83.

Plaintiff’s opening brief makes only a passing reference to this issue, and does so on page 26 by quoting RCW 41.26.281 and offering just two sentences: “The City’s attempts to restrict the legislature’s firefighter ‘right to sue’ statute, and eliminate other Washington law, must fail. All causes of action survive, including loss of consortium damages.” Br. of Appellant at 26. Passing treatment without “substantial argument or citation” means the argument “will not be considered.” *Otis Hous. Ass’n v. Ha*, 165 Wn.2d 582, 588 n.2, 201 P.3d 309 (2009); *see also Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (“Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.”). On this basis alone, the Court should affirm the trial court’s correct application of RCW 41.26.270 and RCW 41.26.281.

If this Court is inclined to consider the issue’s merits, it still should affirm. “Where a statute specifically designates the things upon which it operates, there is an inference that the Legislature intended all omissions.” *Fray v. Spokane County*, 134 Wn.2d 637, 651, 952 P.2d 601 (1998) (citation and internal quotation marks omitted). RCW 41.26.270 abolishes “all ... civil causes of action” other than those specifically allowed under LEOFF. As the Supreme Court stressed when it interpreted RCW

41.26.270, “The legislature could not have been more clear about its intent to abrogate a member’s civil right of action for personal injuries.” *Gillis v. City of Walla Walla*, 94 Wn.2d 193, 195, 616 P.2d 625 (1980), *disapproved on other grounds in Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 423 n.3, 869 P.2d 14 (1994).¹²

RCW 41.26.281 does not specifically allow strict liability or loss of consortium, yet both are independent and separate causes of action. *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 255, 744 P.2d 605 (1987) (strict liability); *Lund v. Caple*, 100 Wn.2d 739, 743, 675 P.2d 226 (1984) (loss of consortium). Consequently, “there is an inference” that the legislature intended to exclude strict liability and loss of consortium from those causes of action expressly allowed by RCW 41.26.281. *Fray*, 134 Wn.2d at 651.

Plaintiff ducks this issue altogether, instead embarking on a detailed analysis of what elements are necessary to prove strict liability and how they could apply here. Br. of Appellant at 40-44. The elements

¹² *Flanigan* held that benefits calculated under Washington’s Industrial Insurance Act, Title 51 RCW, “cannot take into account noneconomic damages, such as an employee’s own pain and suffering or a spouse’s loss of consortium.” and then in a footnote disapproved of “dictum” to the contrary from page 196 of the *Gillis* opinion. *Flanigan*, 123 Wn.2d at 423 n.3. That portion from *Gillis* said, “To the extent LEOFF provides disability benefits, the award, *like workers’ compensation benefits*, represents compensation for *all* components attendant to an injury, including both economic and noneconomic (*i.e.*, pain, suffering, disability and disfigurement) loss.” *Gillis*, 94 Wn.2d at 196 (first italics added). *Flanigan* held the dictum reference to “workers’ compensation benefits” inaccurately described the benefit scheme under Title 51 RCW. *Flanigan*, 123 Wn.2d at 423 n.3. The dictum in *Gillis* disapproved by *Flanigan* has nothing to do with *Gillis*’s holding, which interpreted RCW 41.26.270. That remains good law.

of strict liability were never considered by the trial court because the City never argued them in their motion for partial summary judgment. CP at 56-70. Consequently, this Court need not consider them, which includes Plaintiff's lengthy but ultimately irrelevant discussion of *Klein v. Pyrodyne Corp.*, 117 Wn.2d 1, 810 P.2d 917 (1991). Br. of Appellant at 40-43. The elements of strict liability are unrelated to whether RCW 41.26.270 abolishes the cause of action for firefighters suing employers.

The same is true for Plaintiff's attempt to resurrect the loss of consortium claim. Br. of Appellant at 40. Again, Plaintiff improperly relies on improperly authenticated hearsay filed months after the trial court entered partial summary judgment, namely "[t]he statement of Carl Murray." *Id.* This document still cannot be considered for the reasons state above. The remainder of Plaintiff's argument points to RCW 49.17.060 and corollary regulations for firefighters, but still wholly ignores RCW 41.26.270 and RCW 41.26.281. Those two statutes from LEOFF convinced the trial court to dismiss the loss of consortium claim.

RCW 41.26.270 abolished all causes of action by firefighters against their employers, and RCW 41.26.281 resurrects only negligence and intentional torts. Because strict liability and loss of consortium are neither, RCW 41.26.270 abolished them. The trial court's concurrence on this point should be affirmed.

C. There is insufficient evidence in the summary judgment record to sustain a claim of outrage by Plaintiff Wendy Murray, meaning it fails as a matter of law.

The trial court dismissed Plaintiff's outrage claim as there was insufficient evidence to permit it to advance any further. Outrage is synonymous with intentional infliction of emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 193 n.1, 66 P.3d 630 (2003). Because it is an intentional tort, it is preserved by RCW 41.26.281, but *only* when the defendant's act is intentional. *See infra* at Part IV.C.1.

Rather than address this claim under the summary judgment standard, Plaintiff focuses instead on whether she sufficiently pled outrage in the operative complaint. Br. of Appellant at 38-40. After producing four block quotes from three cases and the Restatement, she writes "this test involves more than just looking at a complaint and finding it fails to state an outrage claim because it claims 'emotional and mental distress' rather than 'severe and extreme emotional distress.'" *Id.* at 39. Whether Plaintiff sufficiently pled outrage in the complaint was never at issue. The City never sought dismissal under CR 12(b)(6). Rather, the City moved for summary judgment under CR 56, which necessarily precluded Plaintiff from "rely[ing] upon the allegations in h[er] complaint." *Johnson v. Safeway Stores*, 67 Wn. App. 10, 13, 833 P.2d 388 (1992). Plaintiff's

argument that her complaint sufficiently states a claim is beside the point and ultimately immaterial.

Applying the proper summary judgment standard, the trial court should be affirmed.

1. To sustain an outrage claim under LEOFF, a firefighter must prove the employer intended to cause the severe emotional distress.

“The tort of outrage requires the proof of three elements: (1) extreme and outrageous conduct, (2) intentional or reckless infliction of emotional distress, and (3) actual result to plaintiff of severe emotional distress.” *Kloepfel*, 149 Wn.2d at 195. Although no Washington court has considered the tort of outrage under LEOFF’s right to sue statute, RCW 41.26.281, the Supreme Court has considered the tort in the context of the Industrial Insurance Act. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 872-73, 904 P.2d 278 (1995).

Under the IIA, a worker may sue his or her employer for injuries “result[ing] ... from the deliberate intention of his or her employer.” RCW 51.24.020. *Birklid* held “[t]he plaintiffs may not predicate their outrage claim merely upon the *reckless* infliction of emotional distress, as is possible for the tort of outrage. The IIA precludes such a claim. The conduct must be *intentional* to escape the exclusivity provision of the IIA.” *Id.* at 872 (first italics in original, second italics added). But

because the facts there allowed for an inference that Boeing acted intentionally, the outrage claim could proceed. *Id.* at 873.

Birklid's analysis guides disposition here. RCW 41.26.281 does not allow for any cause of action premised on “reckless” conduct. Rather, like the exclusivity provision of the IIA, RCW 41.26.281 allows only negligent and intentional torts. Negligent conduct is categorically beneath what is necessary to prove outrage, *Grimsby v. Samson*, 85 Wn.2d 52, 59, 530 P.2d 291 (1975), which means that Plaintiff here can premise her outrage claim only on acts by the City that were intentional. *Birklid*, 127 Wn.2d at 872-73. Not a single piece of evidence that Plaintiff offered could support a finding that the City ever acted intentionally or intended to cause Wendy Murray severe emotional distress.¹³ At best the record shows that, prior to Murray’s cancer diagnosis in December 2010, the City (a) discovered elevated radon levels in the fall of 2001 and successfully reduced them in the stations Murray had worked (Stations 82 and 86) by the Spring of 2002, *see* Br. of Appellant, Appx. A at Exs. G-H, and (b) noticed elevated levels again in early 2006 and successfully reduced them by the summer of that year, *id.*, Appx. A at Exs. I-J. Attempted

¹³ The same is true for Carl Murray, but because all survival claims are time barred, the outrage claim is limited to only Wendy Murray.

mitigation, even if unsuccessful, is the antithesis of intent to injure, which is necessary before Plaintiff's outrage claim could be sustained.

Because there is no evidence the City intended to cause Wendy Murray severe emotional distress, the outrage claim fails.

2. The record does not support a finding that intermittent testing and remediation of radon levels in the workplace is so outrageous to be beyond all possible bounds of decency.

A plaintiff claiming the tort of outrage as recognized in Washington must prove the defendants' conduct was "*so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.*" *Grimsby*, 85 Wn.2d at 59 (italics in original). "[T]he defendant's conduct must be so offensive as to lead an average member of the community to exclaim, 'Outrageous!'" *Sutton v. Tacoma Sch. Dist. No. 10*, 180 Wn. App. 859, 870, ¶ 25, 324 P.3d 763 (2014) (citations omitted). This requires proof of conduct far worse than "an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (2nd 1979), *quoted and adopted in Grimsby*, 85 Wn.2d at 59. "[I]t is initially for the court to determine if reasonable minds could differ

on whether the conduct was sufficiently extreme to result in liability.” *Dicomes v. State*, 113 Wn.2d 612, 630, 782 P.2d 1002 (1989).

As articulated above, *Birklid* found that an employer acted outrageously by engaging in “human experimentation,” “cleaning and ventilating the workplace immediately before testing by government agencies to skew the test results,” and “oppressive behavior by Boeing supervisors.” *Birklid*, 127 Wn.2d at 867-68. This was what made the facts in *Birklid* sufficient to state the tort of outrage. *Id.* at 868.

In stark contrast, nothing in this case comes close to resembling that conduct. The City attempted multiple times to reduce radon levels in the fire stations. There is no dispute that even though some tests yielded results in excess of 4.0 pCi/L, the mitigation from 2001 and 2002 did significantly reduce levels from what was found in 2001. *Compare* Br. of Appellant, Appx. A at Exs. G-H *with id.*, Appx. A at Exs. I-J. Even if the City’s efforts fell short of reasonable care (which the City would dispute), such is insufficient as a matter of law to amount to outrage. *Dicomes*, 113 Wn.2d at 631.

3. Because LEOFF and the IIA should be construed in pari materia, Plaintiff's outrage claims fails because nothing suggests the City willfully disregarded actual knowledge that injury was certain to occur.

The City argued to the trial court that Plaintiff lacked sufficient evidence to sustain the elements of her outrage claim. CP at 77-78; *see also* I VRP (May 27, 2016) at 11. The primary argument advanced by the City was that LEOFF's exception for permitting firefighters to sue for intentional torts was synonymous with the corollary provision of the Industrial Insurance Act. CP at 65-66. Employing similar language as LEOFF, the IIA permits a worker to sue his or her employer for injuries "result[ing] ... from the deliberate intention of his or her employer." RCW 51.24.020. *Birklid* held that in order for this exception to apply, there must be proof "the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge." *Birklid*, 127 Wn.2d at 865.

This law applies to Plaintiff's outrage claim. RCW 41.26.270 operates the same as RCW 51.04.010, in that they both abolish all causes of action other than what their respective statutory schemes expressly allow. And like RCW 41.26.281, the IIA allows workers to sue their employers for acts "inten[ded] ... to produce ... injury." RCW 51.24.020. This means the statutes should be read in *pari materia* and construed

identically. *Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Plaintiff never produced any evidence that the City had actual knowledge that firefighters would develop lung cancer from radon, particularly after the City's efforts that undisputedly reduced radon levels in 2001 to acceptable levels in Stations 82 and 86 by the summer of 2002.

Plaintiff failed to produce sufficient evidence to advance her outrage cause of action past summary judgment. The trial court correctly dismissed it and should be affirmed.

D. Plaintiff's failure to argue to the trial court that LEOFF does not limit recovery to excess damages amounts to a waiver.

As this Court recently reaffirmed, “[a] plaintiff abandons a claim asserted in a complaint by failing to address the claim in opposition pleadings, *present evidence to support the claim, or argue the claim in response to a summary judgment motion seeking dismissal of the entire complaint.*” *West v. Gregoire*, 184 Wn. App. 164, 171, ¶ 16, 336 P.3d 110 (2014), *review denied*, 182 Wn.2d 1018 (2015) (emphasis added). When a plaintiff abandons a theory by failing to sufficiently argue it at the trial court, it is equally waived on appeal. *Id.* at 171, ¶ 16 & n.4.

The trial court held that “Defendant City of Vancouver’s Motion for Partial Summary Judgment limits Plaintiff’s damages to the total damages reduced by amounts paid by COV under LEOFF, reduced further

by the present value of the amounts payable by LEOFF.” CP at 82-83. Plaintiff never addressed this argument when she opposed summary judgment. Br. of Appellant, Appx. C (Plaintiff’s Response to Summary Judgment). By failing to “argue the claim in response to a summary judgment motion,” Plaintiff cannot claim error here. *West*, 184 Wn. App. at 171, ¶ 16. The argument has been waived.

Even if the argument was not waived, the trial court was correct. RCW 41.26.281 conditionally permits firefighters to sue their employers, but recovery is limited to “any excess of damages over the amount received or receivable under this chapter.” RCW 41.26.281. Division One of this Court applied the plain language of this section to conclude “[t]he potential amount awarded for compensatory damages under RCW 41.26.281 is limited to excess damages; that is, the total damages reduced by amounts paid by LEOFF, reduced further by the present value of the amounts payable by LEOFF.” *Hansen*, 93 Wn. App. at 928. These “excess damages” “are the only damages recoverable under the cause of action.” *Id.*; accord *Gillis*, 94 Wn.2d at 197 (construing the same statute while codified in a different section “as requiring a setoff of the amounts received and receivable under LEOFF against the total verdict awarded in a civil action”). The trial court correctly limited Plaintiff’s damages pursuant to the plain language of RCW 41.26.281.

Plaintiff does not address RCW 41.26.281's language at all. Br. of Appellant at 44-45. Instead, she points to *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989), in which the Supreme Court struck down a statutory cap on noneconomic damages. *Id.* at 669. As she has done elsewhere, Plaintiff again appears to take issue with decisions the trial court never reached. *Sofie* has no bearing on this case.

The Court should affirm the trial court on this issue.

E. Plaintiff's tangential references to safety statutes and pleas for judicial notice are immaterial to the dispositive issues and should be disregarded.

Plaintiff alludes to several other arguments that merit only a short response given that they have no bearing on the issues presented in the summary judgment order on review.

First, Plaintiff asks this Court to take judicial notice of (1) how the Environmental Protection Agency ranks radon in the list of carcinogens, (2) when the Washington State Department of Health began tracking radon, and (3) that Carl Murray's name appears on a memorial in both Olympia and Boulder, Colorado. Br. of Appellant at 1, 28-29. The Court should decline Plaintiff's invitation.

"Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review." *King County v. Cent.*

Puget Sound Growth Mgmt. Hearings Bd., 142 Wn.2d 543, 549 n.6, 14 P.3d 133 (2000). RAP 9.11 outlines six factors that must all be met before “additional evidence on the merits of the case can be taken,” two of which are “additional proof of facts is needed to fairly resolve the issues on review,” and “the additional evidence would probably change the decision being reviewed.” RAP 9.11(a)(1)-(2). The Supreme Court refused to take judicial notice of a certified copy of a recorded deed in the *Central Puget Sound GMHB* decision because King County failed to make any showing to meet those two elements of RAP 9.11(a). *Cent. Puget Sound GMHB*, 142 Wn.2d at 549 n.6. That compels denial of judicial notice here.

Lastly, Plaintiff argues that “[*r*]es ipsa loquitur applies based upon the known facts in this case.” Br. of Appellant at 44. The doctrine of *res ipsa loquitur* is “not a separate and additional form of negligence,” but rather a “method of proof.” *Tinder v. Nordstrom, Inc.*, 84 Wn. App. 787, 789, 929 P.2d 1209 (1997). Regardless of how *res ipsa loquitur* might apply here, the trial court never dismissed this “method of proof” because the City never asked it to do so. *Accord* CP at 9 n.31. Disputes over immaterial facts do not bar summary judgment. *Jacobsen v. Seattle*, 98 Wn.2d 668, 671, 658 P.2d 653 (1983). Plaintiff’s argument on this point is irrelevant and need not be considered.

F. Because Plaintiff stipulated to the dismissal of all remaining causes of action, she is barred by the invited error doctrine from claiming that order was in error.

As explained above, the trial court was entirely correct when it granted partial summary judgment to the City of Vancouver on June 10, 2016. CP at 81-83. This still allowed Plaintiff to pursue a wrongful death cause of action under RCW 4.20.010 and 4.20.020 by proving negligence. CP at 83. But Plaintiff voluntarily stipulated to dismiss what remained of her lawsuit, which the trial court accepted on January 10, 2017, resulting in the dismissal of all remaining causes of action. CP at 519-521. Right or wrong, she cannot claim the trial court erred in granting the stipulation. “The invited error doctrine prohibits a party from setting up an error at trial and then complaining of it on appeal.” *State v. Ellison*, 172 Wn. App. 710, 715, ¶ 9, 291 P.3d 921 (2013). Similar to *Ellison*, in which this Court barred a criminal defendant from appealing facts to which he stipulated, Plaintiff here “is bound by h[er] stipulation ... and the invited error doctrine bars h[er] from now challenging” the trial court’s January 10, 2017, order. *Id.* at 716, ¶ 11. The order should be affirmed.

V. CONCLUSION

Carl Murray undisputedly communicated with a colleague in January 2011 about their shared belief that Murray's lung cancer was caused by radon exposure, which is the exact theory of liability Plaintiff advanced in the underlying lawsuit filed five years later. Though Plaintiff complains that she should have had more time to conduct discovery prior to summary judgment, she undisputedly did not invoke the only rule that could have given the trial court discretion to delay ruling. Despite the overarching "summary-judgment-was-premature" theme of Plaintiff's brief, this case and this appeal have nothing to do with whether the trial court should have continued summary judgment to allow discovery.

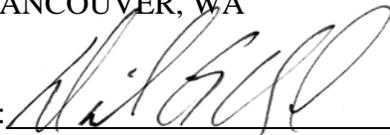
Rather than address what the trial court actually did, she argues that the wrongful death claim was improperly dismissed (though Plaintiff stipulated to its dismissal), the elements of strict liability and *res ipsa loquitor* support liability (though those elements were never at issue in the trial court), and the Court of Appeals should analyze a discovery dispute that occurred *after* summary judgment was entered and that the trial court never decided. The Court should refuse to indulge Plaintiff's attempt to claim error in decisions that never occurred.

The trial court was entirely correct when it granted partial summary judgment to the City on June 10, 2016. And because the only

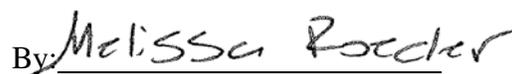
claims that remained were dismissed on stipulation on January 10, 2017,
this Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify that on or before the date referenced below I served by electronic service (per all parties' written consent, *see* CP at 530-34) a copy of the foregoing document and referenced Appendix to all counsel of record as listed below:

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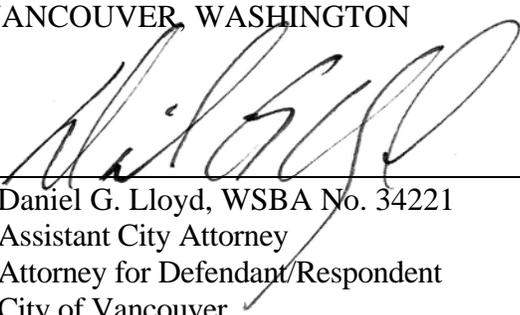
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I accomplished said service by uploading the document through the Washington State Appellate Courts' Portal on the date specified below, and also by emailing the same to counsel's designated email addresses as specified above.

DATED this 15th day of September, 2017.

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APPENDIX A
COPIES OF RELEVANT STATUTES
[RAP 10.4(c)]

RCW 4.16.080 – Actions limited to three years.

The following actions shall be commenced within three years:

....

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

RCW 4.20.010 – Wrongful death—Right of Action.

When the death of a person is caused by the wrongful act, neglect, or default of another his or her personal representative may maintain an action for damages against the person causing the death; and although the death shall have been caused under such circumstances as amount, in law, to a felony.

RCW 4.20.020 – Wrongful death—Beneficiaries of action.

Every such action shall be for the benefit of the wife, husband, state registered domestic partner, child or children, including stepchildren, of the person whose death shall have been so caused. If there be no wife, husband, state registered domestic partner, or such child or children, such action may be maintained for the benefit of the parents, sisters, or brothers, who may be dependent upon the deceased person for support, and who are resident within the United States at the time of his or her death.

In every such action the jury may give such damages as, under all the circumstances of the case, may to them seem just.

RCW 4.20.046 – Survival of actions.

(1) All causes of action by a person or persons against another person or persons shall survive to the personal representatives of the former and against the personal representatives of the latter, whether such actions arise on contract or otherwise, and whether or not such actions would have survived at the common law or prior to the date of enactment of this section: PROVIDED, HOWEVER, That the personal representative shall only be entitled to recover damages for pain and suffering, anxiety, emotional distress, or humiliation personal to and suffered by a deceased on behalf of those beneficiaries enumerated in RCW 4.20.020, and such damages are recoverable regardless of whether or not the death was occasioned by the injury that is the basis for the action. The liability of property of spouses or domestic partners held by them as community property to execution in satisfaction of a claim enforceable against such property so held shall not be affected by the death of either or both spouses or either or both domestic partners; and a cause of action shall remain an asset as though both claiming spouses or both claiming domestic partners continued to live despite the death of either or both claiming spouses or both claiming domestic partners.

RCW 4.20.060 – Action for personal injury survives to surviving spouse, state registered domestic partner, child, stepchildren, or heirs.

No action for a personal injury to any person occasioning death shall abate, nor shall such right of action determine, by reason of such death, if such person has a surviving spouse, state registered domestic partner, or child living, including stepchildren, or leaving no surviving spouse, state registered domestic partner, or such children, if there is dependent upon the deceased for support and resident within the United States at the time of decedent's death, parents, sisters, or brothers; but such action may be prosecuted, or commenced and prosecuted, by the executor or administrator of the deceased, in favor of such surviving spouse or state registered domestic partner, or in favor of the surviving spouse or state registered domestic partner and such children, or if no surviving spouse or state registered domestic partner, in favor of such child or children, or if no surviving spouse, state registered domestic partner, or such child or children, then in favor of the decedent's parents, sisters, or brothers who may be dependent upon such person for support, and resident in the United States at the time of decedent's death

RCW 41.26.270 – Declaration of policy respecting benefits for injury or death—Civil actions abolished.

The legislature of the state of Washington hereby declares that the relationship between members of the law enforcement officers' and firefighters' retirement system and their governmental employers is similar to that of workers to their employers and that the sure and certain relief granted by this chapter is desirable, and as beneficial to such law enforcement officers and firefighters as workers' compensation coverage is to persons covered by Title 51 RCW. The legislature further declares that removal of law enforcement officers and firefighters from workers' compensation coverage under Title 51 RCW necessitates the (1) continuance of sure and certain relief for personal injuries incurred in the course of employment or occupational disease, which the legislature finds to be accomplished by the provisions of this chapter and (2) protection for the governmental employer from actions at law; and to this end the legislature further declares that the benefits and remedies conferred by this chapter upon law enforcement officers and firefighters covered hereunder, shall be to the exclusion of any other remedy, proceeding, or compensation for personal injuries or sickness, caused by the governmental employer except as otherwise provided by this chapter; and to that end all civil actions and civil causes of actions by such law enforcement officers and firefighters against their governmental employers for personal injuries or sickness are hereby abolished, except as otherwise provided in this chapter.

RCW 41.26.281 – Cause of action for injury or death, when.

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

RCW 51.04.010 – Declaration of police power – Jurisdiction of courts abolished.

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided

RCW 51.24.020 – Action against employer for intentional injury.

If injury results to a worker from the deliberate intention of his or her employer to produce such injury, the worker or beneficiary of the worker shall have the privilege to take under this title and also have cause of action against the employer as if this title had not been enacted, for any damages in excess of compensation and benefits paid or payable under this title.

RCW 51.32.185 – Occupational diseases—Presumption of occupational disease for firefighters—Limitations—Exception—Rules

(1) In the case of firefighters as defined in *RCW 41.26.030(4) (a), (b), and (c) who are covered under Title 51 RCW and firefighters, including supervisors, employed on a full-time, fully compensated basis as a firefighter of a private sector employer's fire department that includes over fifty such firefighters, there shall exist a prima facie presumption that: (a) Respiratory disease; (b) any heart problems, experienced within seventy-two hours of exposure to smoke, fumes, or toxic substances, or experienced within twenty-four hours of strenuous physical exertion due to firefighting activities; (c) cancer; and (d) infectious diseases are occupational diseases under RCW 51.08.140. This presumption of occupational disease may be rebutted by a preponderance of the evidence. Such evidence may include, but is not limited to, use of tobacco products, physical fitness and weight, lifestyle, hereditary factors, and exposure from other employment or nonemployment activities

***Reviser's note:** RCW 41.26.030 was alphabetized pursuant to RCW 1.08.015(2)(k), changing subsection (4)(a), (b), and (c) to subsection (16)(a), (b), and (c).

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