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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHEILA LAROSE,

Appellant,

v.

KING COUNTY, WASHINGTON,
and PUBLIC DEFENDER ASSOCIATION AKA
THE DEFENDER ASSOCIATION (TDA)

Respondents.

**REPLY BRIEF OF APPELLANT SHEILA LAROSE /CROSS
RESPONDENT TO KING COUNTY'S BRIEF AND TO PUBLIC
DEFENDER ASSOCIATION AKA THE DEFENDER
ASSOCIATION BRIEF**

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I. REPLY TO RESPONDENTS' INTRODUCTIONS¹

A. Time Frames and Evidence of Hostile Work Environment

Ms. LaRose began reporting "stalking type" phone calls (10 – 20 per day) to her supervisors in April 2013 through July 2013 during representation of Client A and continued to report thereafter CP 454-459 See Decl. of LaRose ¶¶ 16,18,19,20,24,26,27,28,31.

Her supervisor Ben Goldsmith admits Ms. LaRose talked to him about Client A's phone calls at least 2-4 times. CP 1165-1168. She continued to be assigned to represent Client A despite those reports until the representation was concluded at the end of July 2013. CP 454-459.

Evidence in the record includes that Ms. LaRose continued to report incessant stalking phone calls after the representation, increasing in person stalking through fall of 2013 and up to February 21, 2014, when Client A was arrested and incarcerated. Id. CP 454-459. Client A was charged by King County and then convicted [February 2015] of "felony stalking Ms. LaRose with sexual motivation." CP 48,55,119.

Respondent King County and PDA state that "each of the events LaRose alleges caused her to develop PTSD and

¹ Rather than file two briefs, Appellant is filing one reply brief as to both Respondents.

depression was a single traumatic event [...], that each of those event[s] was enough standing alone to cause her PTSD [...]", and that "This includes the stalking type phone calls to her at work beginning in 2013." [PDA Brief at 35]; while PDA argues with agility, within 10 pages, that "plaintiffs' allegations with respect to what actually occurred while she was employed by PDA are factually insufficient to support a hostile work environment claim against PDA. [PDA Brief at 24-25.] King County in equally agile counterpoint proclaims in its Statement of the Case that "**After the representation ended** [end of July 2013], Mr. Smith [Client A] **ultimately** stalked Ms. LaRose." [King County Brief at 2]

Respondents argue from a varying recitation of "facts" most favorable to them, while not acknowledging the record facts most favorable to former and now disabled Public Defender Sheila LaRose.

Respondents King County and PDA, continue to deny responsibility for actions and failures to act that proximately caused Ms. LaRose's injuries and damages.

The long-term effects of stalking are well recognized.

Stalking behavior carries dangerous consequences for victims. Victims of stalking are frequently subject to intimidation and psychological terror, justifiably so,

since stalking often turns into violence. Frequently, victims of stalking are forced to significantly alter their everyday lives in order to protect themselves or their families. Afterwards, a stalking victim can acquire serious, long-lasting emotional injuries. Victims may feel constantly nervous, anxious, unsafe, and stressed. Many will "experience a loss of trust, long-term emotional distress, and significant disruption of everyday living." While the emotional damage may be long-lasting, the most dangerous aspect is that stalking is often times only the precursor to a more serious violent act. Once states realized the dangers of stalking, they began to develop stalking laws.

Nicole Rodriguez Naeser, Comment: The Oregon Court's Stalking Failure, 41 U. Tol. L. Rev. 703, 707 (2010)

Respondents likewise persist in applying the wrong legal theories and standards for a gender-based and sexually hostile work environment where admissible evidence in the record shows a combination of severe and pervasive client harassment, lack of receiving a complaint, lack of investigation, supervisory hostility or indifference to Ms. LaRose's repeated reporting of client harassment and stalking, lack of action to reassign Client A out of the office or at least to a male attorney, along with lack of any other prompt or sufficient corrective action. This WLAD claim is not barred by workers compensation statutes and is Ms. LaRose's initial and primary claim. *Goodman v. Boeing Co.*, 127 Wash. 2d 401, 899 P.2d 265, amended (Sept. 26, 1995).

B. Respondents' Responsibility and Blame Shifting

If King County and TDA/PDA are not responsible, under WLAD and tort law, to control felony Client A's gender-based harassment and criminal (sexually motivated) stalking of LaRose in their workplace then who is responsible for safety and non-discrimination for LaRose who was specifically assigned and professionally obligated to take Client A's calls and to repeatedly meet with him, in Respondents' workplace?

King County shifts blame to avoid responsibility faulting Ms. LaRose for not filing a worker's compensation claim. When she did file a timely claim after she was diagnosed with severe PTSD and depression [disease/illness] in 2015, as she struggled to keep working and to keep her life and her daughter's well-being together – it was opposed by King County.

King County as well as PDA attempt to have this Court rely on unsupported conjecture that Ms. LaRose should be barred as having suffered "a" traumatic "injury" as defined in RCW 51.08.100². Brief of King County Pgs. 14-15, Brief of PDA Pgs. 34-35. The evidence actually supports Ms. LaRose suffering the

² "RCW 51.08.100: "Injury" means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.

cumulative effects of numerous traumatic events that accumulated over time causing her eventual diagnoses. CP 646-647, CP 650.

There is **no** medical evidence before this Court other than from Ms. LaRose's treating physician and her forensic psychiatric expert. The **admissible uncontroverted** evidence ("to a reasonable degree of medical certainty/probability") is that Ms. LaRose's disabling conditions (PTSD, major depressive disorder and generalized anxiety disorder) developed cumulatively over time and not as a result of a singular traumatic event. CP 646-647 ¶¶ 13-17 (Decl. of treating psychiatrist Stanley Shyn, MD); CP 650, (Decl. of psychiatric expert Lawrence Wilson, MD).

The causes of Ms. LaRose's disability includes the stalking events and a "sense of unsafety, betrayal and lack of support from her employer" including learning that the "employer had known before assigning [Client A] to her, that the client should not be assigned to a female attorney." CP 646-647. Decl. of Shyn, MD ¶¶13,14, 15,17.

King County, undisputedly her only employer from July 2013 through her disability leave in 2015, while blaming Ms. LaRose, offers no explanation as to why it failed to comply with WAC 296-15-320.

What elements **must a self-insurer** have in place to ensure the reporting of injuries? Every self-insurer **must**:

- (1) Establish procedures to assist injured workers in reporting and filing claims.
- (2) **Immediately provide a Self-Insurer Accident Report (SIF-2) form F 207-002-000 to every worker who makes a request, or upon the self-insurer's first knowledge of the existence of an industrial injury or occupational disease, whichever occurs first.** Only department provided SIF-2 forms may be used. Copies or reproductions are not acceptable.

Wash. Admin. Code 296-15-320 (emphasis added) See also *Magee v. Rite Aid*, 144 Wash. App. 1, 15, 182 P.3d 429, 436 (2008) (emphasis added) See also RCW 51.28.025 (duty of employer to report injury or disease)

The reasonable conclusion is that: 1) King County supervisors and managers failed to assist her or provide her the form because there was no "injury" ("producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.") that Ms. LaRose or her supervisors perceived, or 2) they were oblivious to what was going on with her. Respondents expected Ms. LaRose to fulfil the assignment of Client A- a rapid recidivist – to her -- and they failed to have policies and procedures in place to "flag" or give notice to supervision or to her regarding the prior knowledge and reassignment of Client A. CP 1140; Lines 2-13; 1143; Lines 4-9. As soon as she raised

issues about Client A, her supervisor Ben Goldsmith became irritated, dismissed her concerns and failed to conduct an investigation into her concerns. CP 376.

C. Current Status of IIA Claim

On March 16, 2018, the King County Superior Court reversed the Board of Industrial Appeals and ruled that Ms. LaRose was entitled to a hearing on her IIA claim to determine whether her PTSD was brought on by a series of “traumatic events” or is excluded from workers compensation coverage as a “mental condition or disability brought on by stress.”³ Appendix 1. It is not known at this time if King County intends to appeal that decision prior to a remand hearing. LaRose concedes that if her L& I claim is accepted and paid by King County that her negligence claims in this case are moot. But the status of IIA claims has no effect on her WLAD claims or on her claims of intentional injury.

D. PDA was Negligent in its handling of Client A

PDA maintains that “[i]t is undisputed that at the time [Client A’s] case was assigned to LaRose, PDA had no reason to foresee

³ RCW 51.08.142 "Occupational disease"—Exclusion of mental conditions caused by stress.

The department shall adopt a rule pursuant to chapter 34.05 RCW that claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of occupational disease in RCW 51.08.140.

that [Client A] would harass or stalk her." PDA brief at P. 39.

It is certainly disputed by LaRose for all the reasons outlined above and in her opening brief. Respondents provide no expert on stalking as to when and at what point stalking begins in earnest. But there can be no question.

There is a difference in making a threat and posing a threat. That is why it is so critical to understand what was known about Client A at the time of assignment to LaRose.

As testified to by expert Geoff Brown;

Where during representation of a client supervisors or managers become aware that there is a problem with a client violating boundaries with an attorney, management must conduct an inquiry to look into what is known about the client and the interaction (what history or threat exists) before the attorney has further contact with the client. In this case if an inquiry had been conducted by management would have seen in Rebecca Lederer's file regarding the case she handled for Client "A" the Certification for Probable Cause of Detective Rande Christiansen of the Seattle Police Department. Exh "B" attached hereto [CP1261]. That certification along with what was known about Ms. Lederer asking to be removed from representation should have resulted in Ms. LaRose being removed from the case.
CP 1252

Daron Morris, Deputy Director manager over the Felony Division responded to Ms. Lederer as follows:

No problem and don't think twice about it. The combo of boundary crossing and mental illness is good reason to reassign here. I'll reassign tomorrow.
Daron

CP 75-77.

E. Admissible Evidence And State Law Support LaRose's WLAD Hostile Work Environment Claim Which is Unaffected by the Industrial Insurance Act

Under Washington's worker's compensation statute, the Industrial Insurance Act (IIA), RCW 51.24.010, *et. seq.*, workers are generally barred from suing employers over work place injuries because the IIA provides an exclusive remedy. See *Vallandingham v. Clover Park Sch. Dist.*, 154 Wn.2d 16, 26 (2005).

The Washington State Supreme Court recognizes exceptions to this statute for claims for discrimination and physical or emotional injuries flowing from that discrimination. *Goodman v. Boeing Co.*, 127 Wash. 2d 401, 405, 899 P.2d 1265, 1268, amended (Sept. 26, 1995). Washington courts have also held that, in some instances, the IIA does not bar a separate claim for emotional injuries as a result of an employer's negligence or physical assault. *Chea v. Men's Wearhouse, Inc.*, 85 Wash.App. 405 (1997). Likewise, a claim for intentional or deliberate injury is not barred. *Birklid v. Boeing*, 127 Wash.2d 853 (1995).

Despite Respondents' arguments to the contrary, the Washington Law Against Discrimination provides a remedy for Ms. LaRose against King County and PDA for creating and/or

condoning a hostile work environment. LaRose's position is supported by the Washington Human Rights Commission. The Washington Human Rights Commission in its pamphlet entitled "*Preventing Sexual Harassment*" states the following:⁴

Some Facts about Sexual Harassment

[...] Harassers may be coworkers, supervisors, employers, **or even non-employees, such as customers, contractors, clients** or vendors.

Employers have a duty to prevent and correct harassment

[...] Employers are responsible for having anti-harassment policies and reporting procedures in place. Employers **must investigate complaints and take prompt and remedial action to stop the harassment, even when done by a non-employee.**

Preventing Sexual Harassment, The Washington Human Rights Commission Pamphlet, June 2010. (Appendix 2) (emphasis added)

II. RESPONSE TO STATEMENT OF THE ISSUE OF KING COUNTY

The evidence and law support the trial court's finding that King County exercised such control over the PDA that it is

⁴ In addition to the language of the statute itself [RCW 49.60], we may also look to the Human Rights Commission's interpretation of the law as an aid in construing RCW 49.60. A court must give great weight to the statute's interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent. *Washington Water Power Co. v. Washington State Human Rights Comm'n*, 91 Wash.2d 62, 68-69, 586 P.2d 1149 (1978). *Marquis v. City of Spokane*, 130 Wash. 2d 97, 111, 922 P.2d 43, 50 (1996)

vicariously liable for TDA/PDA's actions and failures to act. The events of this case all occurred after the Supreme Court rulings in *Dolan v. King Cty.*, 172 Wash. 2d 299, 318, 258 P.3d 20, 30 (2011), as corrected (Jan. 5, 2012).

III. RESPONSE TO PDA ISSUES ON APPEAL

The Superior Court erred in dismissing LaRose's WLAD hostile work environment and disability claims; her negligence claims and her intentional injury claim.

IV. RESPONSE TO STATEMENT OF THE CASE OF KING COUNTY AND PDA

A. TDA/PDA Public Defenders were effectively employed by King County

While Ms. LaRose was an employee of TDA/PDA her employer was under the control of King County. See Argument, *Infra* at pp.17-22.

B. King County's and TDA/PDA's Roles in Referral and Assignment of Client A

King County Office of Public Defense screened and referred rapid recidivist stalker Client A to the TDA/PDA twice in 2012. Respondents fail to admit on briefing what is clear in the record. During the first representation in 2012, Client A made unwanted

gender related calls to his assigned public defender Rebecca Lederer shortly after her first contact with him, repeatedly professing love for her. There was no report or investigation other than emails among TDA/PDA supervisors and managers and Ms. Lederer, CP 75-77. Manager Daron Morris informed all felony supervisors that Client A's "crossing boundaries and mental illness" was sufficient cause to transfer him from Lederer to a male attorney Paul Vernon who closed Client A's case on September 25, 2012, with a guilty plea to stalking, CP 85. In collecting Client A's attorney hours to bill King County in late September 2012, Morris wrote that the reason Client A had so many transfers between attorneys because he was "crossing boundaries with female attorneys." CP 77. King county and TDA/PDA returned Client A, a rapid recidivist assigned to Ms. LaRose on October 31, 2012. CP 84, 449, 453-454.

Neither the County nor TDA/PDA had a system to report or flag or store a record that a clients' sexually offensive or harassing or criminal conduct toward a female attorney had resulted in change of counsel. CP 338 (Sr. Public Defender Paulsen), 862 (Deputy Director Floris Mikkelsen), 871-872 (Paul Vernon), 877(Deputy Director Daron Morris), 885 (30(b)(6) (Tim Drangsholt),

891-892 (Felony Supervisor Leo Hamaji). They relied on supervisors' individual memory and concern for womens' safety. Milo Tobin, the TDA/PDA employee who often handled incoming client phone calls and initial client assignments [upon referral from King County] testified

A. I don't remember specifics, but I do know there were times when women attorneys were harassed by male clients.

[...]

Q. Do you remember any women that you knew were receiving harassing calls or that you heard were receiving harassing calls?

A. No. It was common.

CP 1158

King County a month later on October 30, 2012, assigned Client A to PDA/TDA with a new "rapid recidivist" Felony Charge of stalking women. Anita Paulsen who worked as a public defender for TDA for 27 years and retired in March of 2013 testified:

In my experience as a public defender if a client threatens or stalks a female public defender who then asks to be removed from representing the client, the client's case or any subsequent case involving the same client would not be reassigned to another female public defender.

CP 337

Under Respondents' assignment policies or preferred practice, Client A's new case should have been assigned to the

prior attorney who represented Client A – Paul Vernon. CP 337, 363. If not assigned to Paul Vernon, then by the prior decision of Deputy Director Daron Morris, which decision was known to felony supervisors, Client A should have been assigned to a male attorney. CP 75-77; 337.

Sheila LaRose testified about a brief meeting with King County TDAD Deputy Director Floris Mikkelson in February 2014 when Client A was still calling LaRose and stalking her around her home:

“I did tell her I had been assigned this case, and Floris told me that Ben [Goldsmith] shouldn’t have done that, and she was quite upset.

CP 2434: 11-13.

Paul Vernon had told Goldsmith not to assign Client A to a female attorney CP 309, 327, 566, but Client A’s case was assigned to and remained with new felony public defender Sheila LaRose for the full representation, the next 9 months as Client A’s stalking calls, obsessive letters escalated.

C. Goldsmith’s Responses to LaRose’s Reports of Escalating Stalking Conduct

Ms. LaRose in April 2013, first reported and described Client A’s inappropriate calls to Supervisor Goldsmith telling him she

thought she needed to get off the case. King County and PDA/TDA take Goldsmith's "Okay" out of context

"... and told Mr. Goldsmith she thought she needed to get off the case. CP 177. Mr. Goldsmith said, "Okay." CP 178. LaRose elected to keep the case, however, when within two days she went back to Goldsmith and said she had changed her mind about getting off the case. CP 198. LaRose told Mr. Goldsmith she "would like to try to finish the case" for [Client A]. CP 197-98.

Brief PDA Pgs. 7-8.

PDA omits the crucial context in which Mr. Goldsmith made his one-word response to her concerns. When Ms. LaRose asked Goldsmith about getting off Client A's case, Mr. Goldsmith appeared angry, dismissive, and impatient with Ms. LaRose and said only "okay". CP 376. Mr. Goldsmith made no inquiry regarding her concerns, and withheld his knowledge of Ms. Lederer's reassignment, and that Paul Vernon had also told him not to assign Client A to a female. CP 311-312, 1165-1168. He did not remove her from the case or identify other counsel to whom he would transfer the case.

Given this context the trier of fact must consider what exactly Mr. Goldsmith meant and what Ms. LaRose "heard" when he said "okay".

With the human voice, inflection and intonation can mean everything. See *State v. Olson*, 887 N.W.2d 692, 698-99 (Minn. App. 2016) (noting that question of whether a statement constitutes a threat depends on the context in which it is used).

...inflection and emphasis are guideposts to meaning. We all know that the printed word, stripped of spoken inflection, can be very misleading. Consider how, depending on tone of voice, the reply, "Yeah, right," can indicate substantial agreement - or its opposite.

Clifford S. Fishman, Article: Recordings, Transcripts, And Translations As Evidence, 81 Wash. L. Rev. 473, 519 (2006)

D. Significance of Whether Client A Made Harassing Calls to or Stalked Leona Thomas

PDA relies on the declaration of public defender Leona Thomas for the proposition that she represented Client A from March 2, 2012 to June 7, 2012 prior to his case being transferred to Rebecca Lederer and Client A allegedly never made any inappropriate, offensive or threatening comments to her. CP 2664. PDA brief at 9-10. Ms. Thomas' declaration has no information as to how many times Ms. Thomas actually had contact with Client A during this period of time. Thus, it is of no consequence as to the material facts of this case.

On the other hand, Ms. Lederer began contact with Client A in June 2012 and on July 2, 2012 the case was reassigned because the stalking type calls had begun. CP 76. Ms. LaRose's

timesheets are before the Court and show how many face to face contacts she had with Client A [more than 20] as well as some of the issues she raised with supervisors. CP 456-457; 1545-1548. Time entry for May 24, 2013 of LaRose.

V. REPLY TO RESPONDENTS' ARGUMENT

A. The Trial Court Correctly Rules that King County is Vicariously Liable for the actions of PDA/TDA

A servant or employee may be defined as a person employed to perform services in the affairs of another under an express or implied agreement, and who with respect to his physical conduct in the performance of the service is subject to the other's control or right of control. *Miles v. Pound Motor Co.*, 10 Wn.2d 492, 117 P.2d 179 (1941); Restatement (Second), Agency § 220 (1958); 56 C.J.S. *Master and Servant* § 1b (1948); 35 Am. Jur. *Master and Servant* § 2 (1941).

An independent contractor, on the other hand, may be generally defined as one who contractually undertakes to perform services for another, but who is not controlled [*80] by the other nor subject to the other's right to control with respect to his physical conduct in performing the services. Restatement (Second), Agency § 2(3) (1958). See, also, *Miles v. Pound Motor Co.*, *supra*, and cases cited therein.

Hollingbery v. Dunn, 68 Wn.2d 75, 79-80, 411 P.2d 431, 435 (1966)

The facts and law in *Dolan v. King Cty.*, 172 Wash. 2d 299, 318, 258 P.3d 20, 30 (2011), as corrected (Jan. 5, 2012) control and show that King County is vicariously liable for the actions of PDA.

The county manage[s] its public defense program through the OPD [Office of Public Defense], a division of King County's Department of Community and Human Services and ultimately part of the county's executive branch. The OPD was and is responsible for screening eligible defendants, assigning cases, negotiating and administering the contracts with the four defender groups, and managing the funds provided by the county. The OPD and the public defender organizations negotiate new contracts annually.

Dolan v. King Cty., Id. At 303. (2011), as corrected (Jan. 5, 2012)

In *Dolan v. King Cty.*, Id. the trial court made the following findings:

The increasing authority exercised by the Office of Public Defender demonstrates that the county clearly maintains control over the existence and regulation of these public defender organizations simply by lack of bargaining power in the budget process. The retention of authority to screen and assign the various cases to the public defender organizations as well as the real lack of arm's length bargaining in regard to critical terms like benefit packages would demonstrate that their authority and autonomy is really no different than any other King County public agency.

CP 407

10. The County assigns cases to one of the agencies, unless they have a disqualifying conflict of interest, in which instance the case is assigned to one of the attorneys in private practice on the County's panel of attorneys to represent indigent defendants.

CP 415

An agency cannot refuse a case assigned to it by the County unless it has a disqualifying conflict of interest. A panel attorney, in contrast, can refuse a case. A defendant cannot choose which public defense agency will provide representation.

CP 415

King County argues, as it did in *Dolan*, that for vicarious liability to apply requires: "the principal's ability to control day-to-day work." Brief of King County p. 57. The County's argument is incorrect as applied in this (LaRose) case, as the Supreme Court in *Dolan* made clear:

The county argues that the defenders are free to defend clients without interference and may hire and fire without interference, and **that the county does not interfere with the defender groups' day-to-day activities**. Thus the county reasons that it merely seeks a result as a principle and does not control the manner in which the independent contractors perform. *Id.* at 21 (citing *Hollingbery [v. Dunn]*, 68 Wash.2d[75] at 80-81 [1966],411 P.2d 431; Restatement (Second) of Agency § 220 (1958)). Under its reasoning, the county could turn its sheriffs department into a nonprofit corporation and because the sheriff generally has authority to hire and fire and carry out police work, the sheriffs department would become an independent contractor. **The county is wrong.**[FN15]

Dolan v. King Cty., 172 Wash. 2d 299, 318, 258 P.3d 20, 30 (2011), as corrected (Jan. 5, 2012) (emphasis added).

... [C]ontrol over the details of the work is generally the fundamental inquiry in determining employment relationships. However, that test is unhelpful in this case for several reasons. First, "a public defender is not amenable to administrative direction in the same sense as other employees of the State." *Polk County v. Dodson*, 454 U.S. 312, 321, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981). **Because "a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client," and "it is the constitutional obligation of the State to respect**

the professional independence of the public defenders whom it engages," insistence on the traditional test of control over the details of the employee's day-to-day job performance is unworkable in this context.

Id. at 321-22, 102 S.Ct. 445. *Dolan v. King Cty.*, 172 Wash. 2d 299, 318, fn 15, 258 P.3d 20, 30 (2011), as corrected (Jan. 5, 2012) (emphasis added)

The defender organizations were created specifically to carry out a constitutionally mandated function of the county. Generally, independent contractors determine their own formal structure, such as the composition of their boards, articles, and bylaws; but the county has imposed stringent control over the defender organizations' formal structure. Generally, independent contractors may have many clients, but the defender organizations are true captives of the county in the sense that they cannot have other clients without the county's consent and the county provides virtually all of the organizations' funding. Independent contractors can usually bid for or negotiate contracts; the contracts of the defender organizations are merely a pass-through of the county's budgeting process. Independent contractors may generally lease space or acquire property without approval; the defender *320 organizations may not lease or acquire property without the county's approval and the county has asserted that property owned by the organizations belongs to the county.

Id. at 319-320.

This reasoning is further bolstered by the fact that it is King County that is prosecuting the TDA/PDA clients, including Client A, that it assigned to TDA/PDA requiring that there be some matters that it should not have control over or have knowledge of regarding the

representation, which would violate bar rules and the Constitution.

After evaluating all of King County's arguments the Supreme Court concluded:

We affirm the trial court's determination that employees of the agencies are also county employees for the purposes of PERS. **We hold that King County has such a right of control over the defender organizations that they are arms and agencies of the county.** We remand to the trial court for further proceedings consistent with this opinion.

Id. at 321 (emphasis added).

King County's reliance on *White v. Northwest Defenders Ass'n*, No. 94-2-09128-0 (King County Super. Ct. Dec. 2, 1994) an unpublished and apparently unappealed trial court decision, for the proposition that an employee of another defender organization was not an employee of King County for purposes of a hostile work environment claim is meritless.

Moreover, collateral estoppel requires identical parties or privity with the original parties. *Id.* Ted White was fired from NDA in 1994, and the class includes persons who have worked for one of the four defender organizations between 2003 and 2009. Thus he is not, as the county asserts, a "member of the class," and there is no privity. Br. of Pet'r at 60. We reject the county's collateral estoppel argument.

Dolan at 321.

Furthermore, the *White* case was decided years before the facts in *Dolan* were developed fully to explore the relationships between King County and the defender organizations.

The cases cited by King County are your typical independent contractor type cases. As pointed out above the analysis does not work in a situation involving public defenders. *Dolan* at 318 n.15. King County argues “There is nothing [King County] could have done to alter Ms. LaRose’s relationship with [Client A], which precludes vicarious liability for PDA’s conduct” King County Brief P. 58.

In light of the evidence as outlined above this assertion is not supported by the record before this Court. King County has ignored the evidence most favorable to Ms. LaRose and the applicable law.

B. The Trial Court Should Not Have Dismissed LaRose’s Hostile Work Environment Claim.

1. Standard of Review

Both King County and PDA erroneously argue this appeal from facts most favorable to the Employers who are the “moving party” in the CR 12(b)(6) motion to dismiss and the CR 56 summary judgment motions. All dismissals of Ms. LaRose’s claims must be reviewed *de novo* and decided based on the evidence and

inferences most favorable to Ms. LaRose, the “non moving party”.

Dowler v. Clover Park School District No. 400, 172 Wn2d 471, 484, 258 P.3d 676 (2011)

“[W]hen matters outside the pleadings are presented to, and not excluded by, the superior court,” we treat a CR 12(b)(6) motion to dismiss as a motion for summary judgment. *Brummett v. Wash.'s Lottery*, 171 Wn. App. 664, 673, 288 P.3d 48 (2012); CR 12(c). [...] We review a summary judgment order de novo. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). Summary judgment is appropriate where, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz*, 175 Wn.2d at 271. “A genuine issue of material [***8] fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation.” *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If reasonable minds could reach but one conclusion, the issue may be determined on summary judgment. *Sentinel C3, Inc. v. Hunt*, 181 Wn.2d 127, 140, 331 P.3d 40 (2014).

Sudar v. Fish & Wildlife Comm'n, 187 Wn. App. 22, 29, 347 P.3d 1090, 1093 (2015)

The Trial Court considered matters other than the pleadings in its ruling on King County's CR 12(b)(6) Motion to Dismiss, Respondents' CR 54 Motions for Summary Judgment and

LaRose's Motion for Reconsideration.⁵

2. Admissible Evidence Favorable to LaRose Establishes Material Issues of Fact for Trial on a WLAD Hostile Work Environment Claim

The evidence most favorable to Ms. LaRose includes evidence of the tolerance of client gender based harassment of female attorneys, *supra at* pp 11-17, that after Ms. LaRose had significant contact with Client A⁶ She notified management repeatedly in April and May 2013 and continuing thereafter through 2013 through February 2014 of Client A's incessant harassing stalking type calls on Respondents' phones [10 – 20 per day CP 455 ¶ 16], his obsessive writings were discussed with supervisors as evidence of his stalking conduct, CP 1545-1546 (5/24/2013), and his dangerous tracking her around the workplace and eventually to her home, laying in wait surveilling her and breaking her bedroom window in her back yard CP 454-462. Decl. of LaRose.

The evidence most favorable to Ms. LaRose further includes testimony of Sr. Public Defender Anita Paulsen, completely ignored

⁵ See, Corrected order Dated May 20, 2016 CP 3003-3006, Order denying Motion for Reconsideration June 10, 2016 CP 3007 and Order denying Motion to Reinstate claim dated August 24, 2017. CP 3014 VRP 3/15/2016 P.37:20-23; 40:6-10

by Respondents King County and PDA including but not limited to:

1) While I was a public defender I represented several male clients who made threats of physical violence against me that I took seriously.

2) One of the most serious was from a former client who started calling from prison as his release date approached. He called repeatedly, leaving sexually graphic and violent messages about the harm he planned to inflict on me and the social worker that assisted me with his case once he was released.[...]

CP 336

3) I have had several other experiences wherein I was physically threatened by a client. Generally speaking, these cases resulted in TDA conflicting out of the case or the case being transferred to a male attorney.

CP 337

4) [...] There has always been a subtext, for want a better term, that it is a sign of weakness if one is unable to handle the stresses of the job. It makes reporting stresses difficult for fear of being perceived as weak.

CP 337

6) In the last few years at TDA and TDAD there seemed to be a dramatic shift in the client population. There seemed to be many more clients suffering from dangerous mental health issues.

CP 337

7) I am not aware of any formal policy or procedure at

⁶ Ms. LaRose received the assignment to represent Client A on October 31, 2012, however, he failed to appear for arraignment, thus a warrant was issued putting Ms. LaRose's representation "on hold" until he was arrested on the warrant in 2013. CP1545

TDA/TDAD during the time I was there for safety of public defenders representing clients with a history of violence against counsel nor for post event debriefing

CP 338

3. Respondents' and the Trial Court's Reliance on *DeWater v State* Regarding a RCW 49.60.180 Hostile Work Environment Claim Brought by Respondents' Employee LaRose is Misplaced

King County's reliance on *DeWater v. State*, 130 Wash.2d 128,132 (1996) is without merit. *DeWater* is not analogous to the facts or law before this Court. In *DeWater*, the State was a step removed from each critical fact as to the employer status, employee status, "employer's workplace" relationships absent in *DeWater*, but present in this case between King County and Sheila LaRose. King County is the employer of the employee being harassed in King County's workplace.

The issue decided by the Court in *DeWater* was "Is the State vicariously liable for the discriminatory acts of a licensed foster parent toward a worker in the foster parent's home?" *Id.* at 133. That issue is far from the issue present in the case *sub judice*.

At Page 7 of the King County Brief, King County has misunderstood LaRose's citation to *DeWater* that the State had no notice of Troyer's conduct. The State had **no notice** from Ms.

DeWater about the alleged harassment by Troyer of Ms. DeWater. *DeWater v. State*, 130 Wash.2d 128,132 (1996). The State did have notice that Mr. Troyer in 1990 at a prior place of employment had made a sexually inappropriate comment to a social worker in the presence of a teenage client and for which he was reported and reprimanded. *Id.* at 132. In this case Respondents had prior notice that Client A could not “maintain boundaries with female attorneys” and should not be assigned to a female attorney, before Ms. LaRose was assigned to meet with him over 20 times. In ongoing reports and notice, King County supervisors were informed of Client A’s 10 – 20 times per day phone calls with sexual content, from April 2013 through February 2014 when Client A was finally arrested.

The County’s statement that “*Bartlett* discusses negligence claims and has no bearing on WLAD claims” is inaccurate. King County Response Brief P. 25. The standard for liability for a hostile work environment claim under Title VII is strict liability for a

manager and **negligence** for a supervisor or co-worker,
independent contractor or customer.

Under Title VII, an employer's liability is determined by the status of the harasser and the type of injury caused by the harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998). One standard exists for harassment by supervisors and another for harassment by coworkers. The standard for supervisors is strict liability (*id.* at 765, 118 S.Ct. 2257), and the standard for coworkers is **negligence** (*id.* at 758–59, 118 S.Ct. 2257; *Williams v. Waste Mgmt. of Illinois*, 361 F.3d 1021, 1029 (7th Cir.2004)). The greater the potential injury to the employee, the greater care the employer must take. *Baskerville v. Culligan Int'l Co.*, 50 F.3d at 432 (“Just as in conventional tort law a potential injurer is required to take more care, other things being equal, to prevent catastrophic accidents than to prevent minor ones, so an employer is required to take more care, other things being equal, to protect its female employees from serious sexual harassment than to protect them from trivial harassment.”) (citations omitted).....

Dunn [v. Washington County Hospital, 429 F.3d 689 (7th Cir.2005)] holds that for purposes of Title VII hostile work environment liability based on **negligence**, whether the potential harasser is an employee, independent contractor, or even a customer is irrelevant: “The genesis of inequality matters not; what *does* matter is how the employer handles the problem.” *Id.* at 691 (emphasis in original). This is because “[e]mployers have an arsenal of incentives and sanctions ... that can be applied to affect conduct” that is causing the problem. *Id.*

Erickson v. Wisconsin Dep't of Corr., 469 F.3d 600,604- 605 (7th Cir. 2006) (female department of corrections guard raped by male prisoner sued under Title VII for hostile work environment)

Washington law recognizes that federal law should be not the ceiling but rather the floor for the rights of Washington's citizens; in other words, Washington's laws prohibiting discrimination must be interpreted to be at least as powerful and protective as federal law. See, e.g.: *Antonius v. King County*, 153 Wn.2d 256, 267, 103 P.3d 729 (2004); *Jones v. Rabanco, Ltd.*, 439 F. Supp. 2d 1149 (W.D. Wash. 2006).

Federal cases are not binding on this court, which is "free to adopt those theories and rationale which best further the purposes and mandates of our state statute." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 361-62, 753 P.2d 517 (1988). Where this court has departed from federal antidiscrimination statute precedent, however, it has almost always ruled that the WLAD provides greater employee protections than its federal counterparts do.⁷

⁷ See *Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 359, 20 P.3d 921 (2001) (noting that the WLAD covers a broader range of employers than does Title VII); *Martini v. Boeing Co.*, 137 Wash.2d 357, 372-73, 971 P.2d 45 (1999) (noting that the WLAD's express liberal interpretation mandate and greater damages provisions distinguish it from Title VII); *Marquis v. City of Spokane*, 130 Wash.2d 97, 110-11, 922 P.2d 43 (1996) (finding that the WLAD creates a cause of action for discrimination against independent contractors on the basis of sex, race, national origin, religion, or disability, partly on the basis that the WLAD prohibits discrimination in a broader range of contexts than does Title VII). But see *Dailey v. N. Coast Life Ins. Co.*, 129 Wash.2d 572, 575-76, 919 P.2d 589 (1996) (finding that the WLAD does not incorporate ostensible amendments to Title VII authorizing punitive damages, partly on the basis that Washington courts require express statutory authorization for exemplary damages). *Kumar*, 180 Wash.2d at 491, fn 14.

Kumar v. Gate Gourmet Inc., 180 Wash. 2d 481, 491, 325 P.3d 193, 197–98 (2014)

When interpreting WLAD, we are particularly mindful that “a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority.” *Marquis v. City of Spokane*, 130 Wash.2d 97, 109, 922 P.2d 43 (1996). To further this important purpose, both the legislature and Washington courts require that even in a plain language analysis, WLAD's provisions must be given “liberal construction.” *Id.* at 108, 922 P.2d 43 (citing RCW 49.60.020).

Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171, 189 Wash. 2d 607, 614, 404 P.3d 504, 508 (2017), reconsideration denied (Dec. 28, 2017)

Under the Respondents' reading of *DeWater* an employer could assign a customer/client with a known propensity to harass women to a female employee without revealing the known propensity and when the expected harassment occurs claim the *DeWater* decision relieves them of all legal liability under Washington law because the harasser was not an employee. This outcome or standard is not in any way supported by the WLAD or *DeWater*. By failing to reveal their knowledge of Client A's harassment of Ms. Lederer, Mr. Vernon's recommendations, and taking no action to investigate Ms. LaRose's concerns nor reveal what they knew about Client A to her -- they participated in causing the hostile work environment and should be held responsible.

King County maintains that the *DeWater* decision requires that the employer must have the right to control the conduct of a third party before it can be held accountable for a hostile work environment. King County Brief at 22. King County is in error. King County has the right to control the workplace and bar the client from the workplace or by controlling the client by reassigning the client to another attorney as was done in assigning Client A to Paul Vernon—for the benefit of the employer, the employee, the client and to comply with Washington law. *Little v. Windemere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2001) See Washington Human Rights Pamphlet Sexual Harassment, *supra* at p. 10, Appendix 2.

PDA argues that in *DeWater* the Supreme Court refused to rely on the relationship between the employer and employee as a basis for liability. Brief of PDA P. 23

The nature of Ms. DeWater's employment or contractual relationship with Mr. Troyer is not before us in this case. An issue of fact remains with respect to that relationship which must be determined by the trier of fact. **It is only the status of Mr. Troyer [Foster Home Licensee] that determines the State's liability in this case; we therefore do not consider the nature of the relationship that Ms. DeWater had with the State.**

DeWater, 130 Wash.2d at 132 [Emphasis Added]

PDA's interpretation is at odds with Washington law. See *Bartlett v. Hantover*, 9 Wash.App. 614, 621, 513 P.2d 844 (1973), rev'd on other grounds, 84 Wash.2d 426, 526 P.2d 1217 (1974) and the Washington Human Rights Commission pamphlet on Sexual Harassment, *supra* at p. 10, Appendix 2.

Further, while the Court did not deal with what Ms. DeWater's relationship was with the State, in this case LaRose is the Respondents' employee and in the Respondents' workplace assigned by the employer to continually meet with and serve the Respondents' client who is the criminal sexual harasser. The duties outlined in *Bartlett* and by the Washington Human Rights Commission apply to Ms. LaRose and Respondents.

Finally, unlike the State in *DeWater*, Respondents here do control the work environment and the contacts with Ms. LaRose and their client. They determine which public defender gets assigned to which client and what information is maintained.

The *DeWater* decision speaks in terms of independent contractor vs. employer. It says nothing about the responsibility of an employer to its employees when it allows its customers/clients to harass its employees.

Mr. Troyer had complete authority to hire, fire and supervise the trackers who worked in his home. He set their schedules and directed their work. The trackers had no contact with any State agent who had supervisory duties over the foster home. *DeWater* at 141.

4. LaRose Distinguished *DeWater* As Inapplicable to LaRose's Case In the Trial Court

King County further claims Ms LaRose raised only one counter argument to their claim that *DeWater* applied. This is inaccurate. During oral argument on the Respondents' motions LaRose presented argument distinguishing *DeWater* while presenting the applicable WLAD and Title VII precedent without objection. VRP 4/21/2016, Pgs. 41-44. LaRose pointed out that in *DeWater* Mr Troyer hired Ms. DeWater as a tracker and that he was both the employer and alleged to have harassed her.

"The State is the third party being brought into this action. The State has no contact, according to the decision, with the trackers. Has no control of their relationship or how they do their job. The State has no control of this workplace, other than to license it, and when children are placed there, the State pays a bill, gets billed and pays."

VRP 4/21/2016 Pg. 42.

LaRose's position is further supported by the Washington Human Rights Commission's position on Sexual Harassment *supra* at p. 10, Appendix 2.

Since its enactment, the WLAD has been administered by the Washington Human Rights Commission (HRC). The HRC has the power to “adopt, amend, and rescind suitable rules to carry out [its] provisions ... and the policies and practices of the commission in connection therewith.” RCW 49.60.120(3)

Kumar v. Gate Gourmet Inc., 180 Wash. 2d 481, 489, 325 P.3d 193, 197 (2014)

The Washington Human Rights Commission in its publication entitled “*Preventing Sexual Harassment*” states the following:

Employers have a duty to prevent and correct harassment.

Employers are responsible for having anti-harassment policies and reporting procedures in place. Employers must investigate complaints and take prompt and remedial action to stop the harassment, **even when done by a non-employee.** [emphasis added]

The Washington Human Rights Commission Publication: *Preventing Sexual Harassment* (Appendix 2) June 2010.

The issue of non-employee harassment is very familiar to King County from prior litigation. Female employees have previously alleged non-employee harassment against King County resulting in a successful “Consent Decree” in the case of *Holloway v. King County*, No. 9-72-2395-6SEA. See *Consent Decree*, CP 1664, and *4th Amended Complaint* CP 1699 ,1701 (King County

female correction officers sue for harassment by male inmates of the King County Jail in violation of RCW 49.60). *See also, Antonius v. King County*, 153 Wash.2d 256, 260, 103 P.3d 729,731 (2004) (references the *Holloway* case.)

It is significant to the issue of Respondents' "notice" of a hostile work environment, that King County's CR 30(b)(6) witness confirmed that the clientele King County Office of Public Defense assigns to TDA/TDAD felony division, is the same population incarcerated in the King County Jail. CP 1237.

The Respondents employed male and female attorneys in 2012. Evidence in the record, with inferences therefrom, allow conclusion that it was "common" for female attorneys in the agency to receive threats and harassment including offensive sexual and gender-based messages from clients referred to the agency by King County. CP 336-338; CP 1158. The Respondents did not have any policy or procedure or training in place for safety of female attorneys in representing clients with such conduct. CP 338; CP 31-32 Para 3, 5; CP 37 Para. 21

Finally, Larose respectfully submits that when considering *DeWater* it was decided on the peculiar facts before it and as is usually the case courts use judicial restraint:

"[T]he cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more — counsels us to go no further." *Moore v. McKinney*, 335 Ga. App. 855, 857 (783 SE2d 373) (2016) (quoting *PDK Labs. Inc. v. U.S. Drug Enforcement Admin.*, 362 F3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring)) (punctuation omitted).

C. Zealous Representation of a Client means looking after the best interests of the client and their attorney

This case is not about zealous representation of a client. King County brief at P. 27. If it were, then King County would acknowledge its duty to provide full knowledge to a public defender about the known propensities of a client and "out of an abundance of caution" not assign the client to a female attorney he is likely to harass/stalk. Representation in the best interest of the client would be to assign an attorney who could best handle it **without igniting known criminal propensities in the client that could result in the client being charged with a crime against his or her attorney**. Given King County's knowledge and Client A's history it would clearly have been in the best interest of Client A to have been represented by a male attorney "out of an abundance of caution" (quoting King County's supervisor Daron Morris CP 2414, ¶ 5.)

It is easy to conclude that if Client A had been represented by a male public defender he would not have been charged and convicted of stalking Ms. LaRose for which he received an enhanced sentence. CP 48-53.

Anita Paulsen who worked as a public defender for TDA for 27 years and retired in March of 2013 testified that:

In my experience as a public defender if a client threatens or stalks a female public defender who then asks to be removed from representing the client, the client's case or any subsequent case involving the same client would not be reassigned to another-female public defender. CP 337.

King County's conduct in the assignment of Client A is a disaster for both Ms. LaRose and for Client A who deserved zealous representation from a male public defender who had been made aware of all the facts and circumstances.

PDA brief at P. 28 states that Ms. LaRose was able to zealously represent Client A. That is what Ms. LaRose thought at the time of representation. Unfortunately, she continued to represent Client A to her great peril and damage resulting in medical disability termination by Respondent and unemployment due to disability. If PDA had followed its prior protocol of not assigning Client A to a woman "out of abundance of caution". CP

2414 para.5. And after Paul Vernon had told supervisor Ben Goldsmith not to assign Client A to a woman. CP 309, 327, 566

Further, when the employer learns of sexual harassment, “the employer should investigate promptly and thoroughly” and “take immediate and appropriate corrective action by doing whatever is necessary to end the harassment...., and prevent the misconduct from recurring.” *Perry v. Costco*, 123 Wn. App. 783, 794 (2004) citing EEOC Policy Guidance on Current Issues of Sexual Harassment, (March 19, 1990): <http://www.eeoc.gov/policy/docs/currentissues.html>

D. King County’s Position On LaRose’s Negligence Claims Are Not Supported By Admissible Evidence

King County relies on unsupported conjecture for the proposition that what happened to her was “a” single traumatic event. See *supra* at pp 4-7. The admissible, uncontroverted testimony is as follows:

Psychiatric Expert Dr. Lawrence Wilson, testified:

2. It is my opinion, however, to a reasonable degree of medical probability that the cause of Ms. Larose’s diagnosed conditions is the combination of events—the cumulative effect and experience of the events and contributing factors experienced by Ms. LaRose.

3. It is also my professional opinion, where all of Ms. LaRose’s medical treatment and diagnoses took

place after nearly two years of stalking related events, it is not medically appropriate to try and single out any one event , as if they were separate from the others, to determine whether that single event or point in time, was for Ms. LaRose, by itself a separate trauma which actually would have caused Ms. LaRose's diagnosed Post Traumatic Stress Disorder, Major Depression, and Generalized Anxiety Disorder.

CP 650.

Dr. Stanley Shyn, Ms. LaRose's treating psychiatrist corroborates that view of the causes of harm to Ms. LaRose, making clear also that management's failure to protect or assist her, having known of Client A's prior conduct toward a female attorney, are contributing causes of her disability. CP 646-647

E. Testimony of Expert Public Defense Manager Geoff Brown is Competent, Admissible and Important

King County claims that the declaration and testimony of Geoff Brown should be excluded because he did not testify as to what Washington standards for a public defender. King County Brief at 42. King County is in error. First, Ms. LaRose is not suing her employer for legal malpractice she is suing them about a failure of management regarding issues unique to nationwide Public Defender organizations. Respondents failed to take reasonable and prudent management actions and as a result allowed, created and despite repeated reports failed to take available steps to stop

the harassment and criminal misconduct toward female attorneys, particularly Sheila LaRose. The standard of care owed her includes Washington's WLAD (See *Prevention of Sexual Harassment*, Appendix 2) and tort case law, *Bartlett v. Hantover*, 9 Wash.App. 614, 621, 513 P.2d 844 (1973), rev'd on other grounds, 84 Wash.2d 426, 526 P.2d 1217 (1974). But in this field of public management of public defender organizations, the trier of fact is served by specialized knowledge of how such organizations properly plan, train, and respond to common nationwide public management challenges of protecting public defenders as employees while providing a zealous defense for those accused of felonies. ER 702. The trial court considered and did not strike Mr. Brown's testimony. Basic requirements for and standards of public defense nationwide are dictated by the Constitution of the United States. CP 2917. Further Mr. Brown's expertise and opinions are buttressed by his knowledge, experience, and review of extensive evidence CP 670-688.

King County's reliance on it's so called safety expert opinion is of no consequence as his testimony does not contain all the relevant facts upon which to base an opinion CP 2659-2660 Para. 4 (Nothing about the assignment and what the Respondents knew

about Client A and when they knew it and their failure to inform Ms. LaRose of what they knew.) Further, King County's expert does not testify to any so-called Washington standard of care for operating a public defense office. Finally, the opinion cited by King County by their expert fails in that LaRose's testimony is that she was never told about the prior history of Client A with Ms. Lederer nor what Paul Vernon had stated. Thus, any decision she made was not made on the full facts which were kept from her by the Respondents in combination with the fear of losing her job if she got off the case.

**VI. LAROSE'S DELIBERATE INJURY CLAIM SHOULD BE
DECIDED BY A JURY**

The Respondent's reliance on *Folsom v. Burger King*, 135 Wash.2d 658, 958 P.2d 301 (1998), does not support its position that there is an insurmountable bar to Ms. LaRose's claim evident in the pleadings. In *Folsom* a restaurant hired a convicted felon who murdered two employees. The estates of the victims sued the restaurant under the deliberate intention exception. The Supreme Court held that the deliberate intention exception did not apply because the record did not support that an injury was "certain to occur". *Id.* at 667. In *Folsom* there was no evidence that

management knew of any course of violence toward employees prior to the murders.

In the case at bar, even before Client A was assigned to Ms. LaRose, the Respondents knew that "Client A" made harassing calls to his female attorneys, and that management previously determined that "Client A" "could not maintain boundaries with female attorneys" and should be transferred to a male attorney. Just a month after Client A pled out his criminal charge that was assigned to a male attorney he returned as a rapid recidivist. The PDA/TDA management not only assigned "Client A" to Ms. LaRose with that actual knowledge but failed to warn her of their knowledge that he "could not maintain boundaries with female attorneys" resulting in prior harassing/stalking conduct toward female attorneys. After the October 31, 2012 assignment, LaRose notified management in April and May 2013 and thereafter, of "Client A's" harassing/stalking conduct and violation of boundaries toward LaRose. See, Decl. of LaRose CP 454-462. Management certainly knew that harm was presently occurring failed to take action to remove "Client A" or protect LaRose, while the stalking escalated for over 8 more months until LaRose, on her own got a restraining order, had repeatedly called the police, "Client A" was arrested,

charged and convicted of felony stalking with sexual motivation, and LaRose was disabled from returning to her position. Neither law nor policy supports dismissal of Ms. LaRose's claim.

In *Michelbrink v. State*, 191 Wn. App. 414, 429, 363 P.3d 6, 14 (2015) The plaintiff was injured when shot while in training for the Washington State Patrol [WSP] by a Taser. On summary judgment the WSP argued that the deliberate intention exception should not apply, relying on *Folsom*. The WSP argued that *Folsom* stood for the proposition that the plaintiff had to show that a particular injury was certain to occur for the exception to apply, e.g. that "a murder" was certain to occur. The *Michelbrink* Court rejected that argument and held that

Folsom stands for the proposition that the exception applies when "an injury is certain to occur", not that a murder was certain to occur.

RCW 51.24.020's term "such injury" was intended to require only that the employer's willful disregard of actual knowledge that an injury was certain to occur caused the employee's specific injuries, not that the employer had actual knowledge the employee's specific injuries were themselves certain to occur. Limiting employees' remedies for deliberate injury by employers to only the specific type of injury intended would not serve the intended purpose of the deliberate intention exception. *Michelbrink v. State*, 191 Wn. App. 414, 429, 363 P.3d 6, 14 (2015)

Respondents assigned a client who was actually known to be a repeat felony stalker of professional women, and who was known by the employer to obsessively target professional females upon casually meeting them. This employer had already decided that the client could not maintain boundaries with a female public defender, after being informed of the client's specific prior pattern of felony stalking of women, and after the client "called me repeatedly without any specific question" and left a "rambling voice mail where he repeatedly tells me he loves me." CP 75-77 (email chain between TDA managers, including Daron Morris, Leo Hamaji, Christine Jackson, and Ben Goldsmith, and public defender Rebecca Lederer June 29, 2012 – July 29, 2012.) King County and TDA/PDA supervisors (the same persons) discussed with Ms. LaRose a note the client had written to Ms. LaRose, which was not submitted to the Court because it would have implicated the client in stalking Ms. LaRose in May 2013.

a. [...] In May of 2013 after I had already approached Mr. Goldsmith about my worries about the calls, I received a letter from the client that had be concerned about his mental health and [...] competency [...] Mr. Hamaji and Mr. Goldsmith reviewed the letter and made a decision that I should not turn the letter over to Judge Kessler because it implicated the client in stalking behavior [...]
CP 2819

First a reasonable conclusion from the evidence is that the Respondents hid their knowledge of Client A being transferred from Ms. Lederer and their knowledge that Mr. Vernon informed supervisor Goldsmith that Client A should not be represented by a woman.

Where an employer has taken remedial steps to try to alleviate the risk of further injury to its employees, those actions are relevant both to the question of willful disregard and to the question of whether the employer was certain that injury would continue, in spite of its efforts.

Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wash. 2d 16, 29, 109 P.3d 805, 811 (2005)

In this case the Respondents took no remedial steps and failed to provide their knowledge to Ms. LaRose at a time that could have prevented further harm to Ms. Larose – or prevented it entirely by assigning Client A to a male attorney.

VII. ADEQUACY OF THE STANDARD TORT CLAIM FORM

King County states that LaRose's Tort claim is insufficient to

provide them notice of any disability claims. King County brief at 50.

King County is mistaken.

(a) The standard tort claim form must, at a minimum, require the following information:

- (i) The claimant's name, date of birth, and contact information;
- (ii) A description of the conduct and the circumstances that brought about the injury or damage;
- (iii) A description of the injury or damage;
- (iv) A statement of the time and place that the injury or damage occurred;
- (v) A listing of the names of all persons involved and contact information, if known;
- (vi) A statement of the amount of damages claimed; and
- (vii) A statement of the actual residence of the claimant at the time of presenting the claim and at the time the claim arose.

ARCW § 4.96.020 (LexisNexis, Lexis Advance through the 2017 Third Special Session)

The case of *Medina v. Pub. Util. Dist. No. 1 of Benton Cty.*, 147

Wash. 2d 303, 310, 53 P.3d 993, 997 (2002) cited by King County

is no support for their position.

In this case Medina repeatedly specified that the 1995 claim was only for property damage to a vehicle. Thus, Medina's 1995 claim did not give the County the benefit of the waiting period to investigate the 1998 claim because no personal injury claims were made. The Legislature did not intend that RCW

4.96.010 be applied to mean that the content of a claim should be read so broadly as to negate the purpose of RCW 4.96.020(4), and we decline to do so.

We also agree with the County that treating the 1995 claim for property damage as encompassing the 1998 personal injury claims does not assist Medina because the 1995 claim was settled. Although Medina did preserve the right to file later claims, he did not preserve the original claim. That claim was disposed of and no longer exists. If Medina is correct that the 1995 claim did include the personal injury claim, then that claim has already been settled as well.

Id at 310.

A 2014 case discussing the 2009 Amendment to RCW

4.96.020 recited the legislative history:

In 2009, the legislature added a fifth section to RCW 4.96.020. "With respect to the content of claims under this section and all procedural requirements in this section, this section must be liberally construed so that substantial compliance will be deemed satisfactory." RCW 4.96.020(5). According to the House Bill Report, the stated position in favor of the amendment indicated, in part:

Injured plaintiff's claims are being denied because of the strict claim filing statutes. The original intent of the statutes was to provide notice so that the government can get the facts of the claim and investigate. They were not meant to be "gotcha" statutes. Some of the procedural requirements are tricky. Cases are being dismissed based on technical interpretations of the statute. The bill is aimed at restoring the original intent. It corrects historical unfairness and makes the statute functional. It

requires notice to the government, but eliminates the barnacles of judicial bureaucracy.

*6 H.B. Rep. on Engrossed Substitute H.B. 1533, at 4, 61st Leg., Reg. Sess. (Wash.2009); see *Myles v. Clark County*, 170 Wash.App. 521, 532, 289 P.3d 650 (2012).

Garza v. City of Yakima, No. 13-CV-3031-TOR, 2014 WL 2452815, at *5-6 (E.D. Wash. June 2, 2014)

In her Tort Claim Ms. LaRose after describing the facts causing her injuries, states *inter alia* she was injured and describes her injuries as follows:

PTSD, fear, anxiety, sleeplessness, depression. Under medical care for serious PTSD and is unable to return to her former assignment. Outcome is uncertain.

CP 2504

This was sufficient notice to King County of her disability and its impact on her employment.

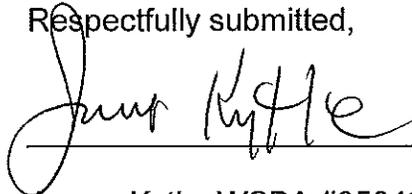
VIII. CONCLUSION

Sheila LaRose asks this Court to reverse the CR 12(b)(6) and CR 56 rulings by the trial court and the CR 54(b) Order denying her a WLAD gender based "hostile work environment" claim and disability claim. She asks for reversal of summary judgment orders dismissing negligence claims based on the employers' special relationship duty to make reasonable provision against foreseeable dangers of criminal misconduct. She asks for reversal of summary

judgment orders dismissing her intentional injury and Washington Law Against Discrimination disability discrimination claims. CP 1908, 2989-2995. Per RAP 18.1, Ms. LaRose also asks the Court for an award of reasonable attorney fees and costs under RCW 49.60.030.

DATED this 3rd day of April, 2018

Respectfully submitted,



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PROOF OF SERVICE

I certify that on this date, I caused true and correct copies of the foregoing to be served on the following parties and/or counsel of record *via electronic court e-service* as follows:

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DATED this 3rd day of April, 2018



Kim Baasch, Paralegal

APPENDIX 1

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

LaRose)	
)	
Appellant)	NO. 17-2-14683-8 sea
)	
vs.)	ORDER ON APPEAL
)	FROM THE BOARD
DLI & King County)	OF INDUSTRIAL INSURANCE
)	APPEALS
Defendant/Respondent.)	
)	

This is an appeal from a decision of the Board of Industrial Appeals on summary judgment on a legal issue and stipulated facts. Ms. La Rose claims for an occupational disease based upon repeated exposure to traumatic events, no single one of which amounts to an industrial injury, resulting in diagnoses of post-traumatic stress disorder and major depressive disorder. It is further in the record that these events are the result of the actions of one of her clients who repeatedly harassed and stalked her and her family. The Industrial Appeals Judge and Board both ruled that this injury did not qualify under the IIA as an industrial injury on the grounds that it was not a single traumatic event

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Hon. Jim Rogers
King County Superior Court
Dept. 49
516 3rd Avenue
KCC-SC-0203
Seattle, Washington 98104

1 (conceded by Ms. LaRose)¹ and further that under WAC 296-14-300, repeated exposure to traumatic
2 events is not a basis for a claim for an occupational disease.¹

3 LaRose argues that when the Department promulgated WAC 296-14-300, it acted beyond its
4 rulemaking authority and beyond what was intended by the statutes at issue, when it outlawed claims
5 for an occupational disease suffered as a result of a series of traumatic events. This Court agrees and
6 Grants Ms. LaRose's Appeal.

7
8 Further, there are sufficient facts here to allow Ms. LaRose a full hearing on the merits. The
9 Department and County repeatedly argue Ms. LaRose's mental disability or disease that she suffered
10 resulted from a series of stressful events excluded by the WAC. This is, as we say in Court, assuming
11 facts not in evidence. It has yet to be determined whether Ms. LaRose suffered her mental disease or
12 disability from repeated stress, which is not allowed, or repeated trauma.

13
14 First, the Legislative background. Amendments to WAC 296-14-300 were promulgated in
15 2015. The WAC rule is based upon RCW 51.08.142, which requires as follows "[t]he department shall
16 adopt a rule pursuant to chapter 34.05 RCW that claims based on mental conditions or mental
17 disabilities *caused by stress do not fall* within the definition of occupational disease in RCW
18 51.08.140." Second RCW 51.08.100, specifically defines "injury" under 34.05 as a "sudden and
19 tangible happening, *of a traumatic nature, producing an immediate or prompt result.*" In response to
20 RCW 51.08.142 and 51.08.140, the rule the Department adopted, WAC 296-14-300 disallowed some
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23
24 ¹ There may have been such an injury but the statute of limitations has expired for a single injury.

1 conditions as "stress" but allowed other single occurrence "traumatic" conditions under the definition
2 of "injury."

3 The Department and King County argue that a rule promulgated by the Department cannot be
4 challenged in any lawsuit unless it is by means of a separate declaratory judgement action brought
5 under the Administrative Procedures Act. This Court rules that an appellant can raise challenges to the
6 rulemaking authority of the Department in an appeal in Superior Court, where the rule itself is
7 challenged because it is claimed to exceed the bounds of rulemaking authority as applied in this case.
8 This appeal is not a challenge to the authority of the Department in the general sense. It is an "as
9 applied" challenge. An appellant can bring an "as applied" challenge under these circumstances and
10 does not need to file a separate lawsuit.
11

12 Which amendment to the WAC is at issue? During the pendency of the litigation in front of the
13 Board, the Department and County both assumed and thus argued that the matter at hand involved the
14 2015 amendments to the WAC. Now both argue that the 2013 is in fact the rule that applies to Ms.
15 LaRose. They did not make or preserve this argument below. Under RCW 51.52.104, a party waives
16 an argument "not specifically set forth" in the petition for review. The 2015 amendments are at issue.
17

18 Is the WAC at issue interpretive or legislative? The Department says interpretive; the County
19 says legislative, but before the Board the County argued that they were interpretive. This Court
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23 ¹ There is no dispute that the Legislature has outlawed workplace stress as a basis for an occupational disease.
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1 concludes that the Department is correct in this case, and this WAC is interpretive and not entitled to
2 the same deference as this Court gives to statutes.

3 Did the Department exceed its rulemaking authority when it included under the definition of
4 "stress" repeated exposure to traumatic events, in adopting a rule (296-14-200 (2) (d)), as applied to
5 Ms. LaRose? The statutes RCW 51.08.142 and 51.08.140 at issue are clear and plain. In the former,
6 the Legislature could have excluded each and every mental health occupational claim. Instead, the
7 Legislature specifically limited its exclusion to claims of workplace stress. In the latter, the Legislature
8 limited "injury" to a single traumatic event, it clearly excluded certain claims of injury. Ms. LaRose is
9 not claiming an injury under this statute and it is not at issue. Under the IIA, the statute is construed in
10 favor of allowance of a claim. RCW 51.12.010. The Legislature has not excluded a claim for a mental
11 condition that result from repeated traumatic events. Whether Ms. LaRose so suffers from such a
12 disease has yet to be fully litigated. But it is not prohibited by statute and the Department acted beyond
13 its authority in barring such claims on the facts here by promulgating the WAC.
14
15

16 The dispute between these parties depends heavily on whether Ms. LaRose suffered from
17 workplace stress or repeated workplace trauma. The stipulations of the parties do not allow any
18 resolution of this issue, nor did the parties intend to do so in these proceedings so far. The fallacy in
19 the defense briefings is that both parties assume, without it being factually established, that Ms. LaRose
20 suffered only from stress and not trauma. To the extent that Ms. LaRose can prove that her PTSD is
21 the result of repeated traumatic events she may have a claim under the statute, which only prohibits
22 claims of mental disabilities based upon stress.
23
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1 Our Court of Appeals has not resolved this issue. The *Rothwell* case has an unusual procedural
2 history not applicable here. The unpublished case of Kimzey v. Department, 191 Wn.App. 1030
3 (2015) is interesting in what the Court did not reach:

4 While Kimzey argues on appeal that the medical testimony establishes "trauma" not "stress"
5 caused his PTSD, *he did not make this argument at the administrative hearing before the Board* . .
6 . Kimzey states the cause of "his psychological or psychiatric condition" is "on-the-job stress." In
7 his petition for review, Kimzey asserts his PTSD was caused by "an initiating event of an extreme
8 traumatic stressor" and the "mental stress to which Mr. Kimzey was exposed and to which he was
9 continually subjected over the period of his career."

10 *In any event, the administrative record does not support Kimzey's argument that his PTSD was*
11 *caused by only trauma.* Under the IIA, a worker who claims rights is held "to strict proof of their
12 right to receive the benefits provided by the act." *Olympia Brewing Co. v. Dep't of Labor &*
13 *Indus.*, 34 Wn.2d 498, 505, 208 P.2d 1181 (1949), *overruled on other grounds by Windust v. Dep't*
14 *of Labor & Indus.*, 52 Wn.2d 33, 323 P.2d 241 (1958).⁶ Kimzey did not present any expert
15 testimony that draws a distinction between trauma and stress as it relates to PTSD. Burgett and Dr.
16 Koch testified that during his career as a paramedic, Kimzey experienced traumatic events that
17 resulted in debilitating stress and his PTSD was caused by stress. The undisputed testimony
18 establishes that Kimzey's PTSD was caused by "intense psychological stress" and traumatic
19 incidents over the course of a 25-year career as a paramedic.

20 Because a mental condition caused by cumulative work-related stress is expressly excluded from
21 coverage as an occupational disease, the superior court erred in reversing the decision and order of
22 the Board denying Kimzey's PTSD claim for benefits as an occupational disease. [emphasis added]

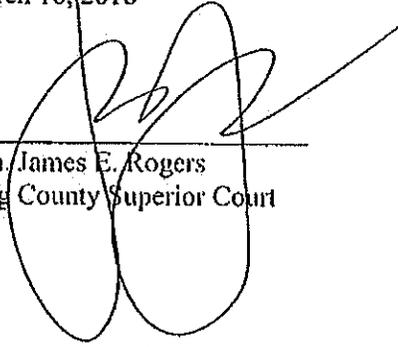
23 The Department, in enacting the WAC at issue here that bars even the consideration of such a
24 claim, has gone beyond its authority.
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Ms. LaRose's Appeal is granted as Follows:

1. The Department exceeded its ruling making authority in 2015 in enacting the WAC at issue and excluding repeated exposure to traumatic events from coverage and
2. This matter is remanded to the Board of Industrial Insurance Appeals for fact finding in Ms. LaRose's case as to whether she suffered from stress or trauma.

March 16, 2018



Hon. James E. Rogers
King County Superior Court

6 | Page
Hon. Jim Rogert
King County Superior Court
Dept. 4E
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Seattle, Washington 98104

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KING COUNTY
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SEATTLE, WA

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR KING COUNTY

17-2-14689-8 SEA

17-2-14689-8 SEA

SHEILA M. LAROSE,

Plaintiff,

v.

THE DEPARTMENT OF
LABOR & INDUSTRIES and
KING COUNTY,

Defendants.

Cause No.:

NOTICE OF APPEAL

(Clerk's Action Required)

- TO: King County Superior Court, the Clerk's office;
- AND TO: The Department of Labor and Industries;
- AND TO: The Board of Industrial Insurance Appeals;
- AND TO: King County, Employer.

YOU AND EACH OF YOU will please take notice that the above-named plaintiff, feeling aggrieved at the entry of the Order of the Board of Industrial Insurance Appeals under docket number 16 18970, dated March 28, 2017, and plaintiff having filed a Petition for Review, and that Petition for Review having been considered by the Board, and the Board having entered a final Decision and Order dated May 19, 2017, and said Order being received in our office on May 24, 2017, hereby appeals to the Superior Court of the State of Washington for King County from the whole and each and every part of said orders.

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DATED this 6 day of JUNE, 2017.

CAUSEY WRIGHT



Brian Wright, WSBA #45240
Attorney for Plaintiff

APPENDIX 2

Some Facts about Sexual Harassment

Sexual harassment can occur between parties of the same sex; men can be victims of sexual harassment; and women can be harassers. Victims of sexual harassment may also include third parties who are exposed to harassment aimed at another person. Harassers may be coworkers, supervisors, employers, or even non-employees, such as customers, contractors, clients or vendors.

It is AGAINST THE LAW TO RETALIATE against anyone who has made a discrimination complaint or participated in an investigation.



For more information about your rights and responsibilities under the law, contact us:



WASHINGTON STATE HUMAN RIGHTS COMMISSION

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Olympia, Washington 98504-2490
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PREVENTING SEXUAL HARASSMENT



WASHINGTON STATE HUMAN RIGHTS COMMISSION

Established in 1949 by the Washington State Legislature, the Washington State Human Rights Commission administers and enforces the Washington State Law Against Discrimination, Chapter 49.60 RCW.

The Mission of the Washington State Human Rights Commission is to prevent and eliminate discrimination through the fair application of the law, the efficient use of resources, and the establishment of productive partnerships in the community.

What is Sexual Harassment?

Sexual Harassment is a form of illegal discrimination that violates the Washington State Law Against Discrimination, RCW 49.60, and Title VII of the Civil Rights Act of 1964.

It is illegal for an employer to subject an employee to unwelcome sexual advances, comments or conduct when submission to such conduct is made an implicit or explicit term or condition of employment or used as the basis of employment decisions, or when such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile, or offensive work environment.



Examples of Sexual Harassment

A supervisor tells an employee that in order to stay employed or earn a promotion, the employee must give in to the supervisor's sexual demands.

An employee repeatedly comments on a coworker's appearance and makes requests for dates, although it was made clear that the comments were unwelcome and there was no interest in dating.

A client who regularly visits the employer's place of business tells sexually explicit jokes, flirts with staff, makes sexist comments and uses demeaning terms when referring to one particular gender.



The U.S. Supreme Court Identifies Two Types of Sexual Harassment

(1) "Quid pro Quo" (Latin meaning "this for that") is defined as unwelcome sexual conduct where submission is implicitly or explicitly made a term or condition of employment, or is used as a basis for employment decisions.

(2) A Hostile Work Environment results from Severe or Pervasive Harassment; a Reasonable Person would not be able to work in this environment due to the harassment.

A Hostile Work Environment is not limited to sex.

Harassment may be based on any legally protected class in employment: race/color, sexual orientation/gender identity, disability, national origin, creed, veteran status, HIV or Hepatitis C; marital status, or age (40+).

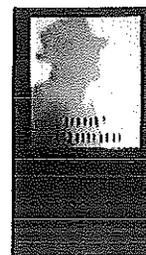


Harassment may include but is not limited to:

Unwelcome jokes, comments, gestures; Offensive or threatening words; Pictures and displays in the work environment, on clothing, sent by email or other media; Unwelcome touching, bodily contact or threats, such as grabbing, slapping, shoving, pinching or interfering with an individual's freedom of movement; Unwelcome requests for dates or flirting; Derogatory comments or language against one gender.

Employers have a duty to prevent and correct harassment.

Employers are responsible for having anti-harassment policies and reporting procedures in place. Employers must investigate complaints and take prompt and remedial action to stop the harassment, even when done by a non-employee. Best employment practices include training employees to create a harassment-free climate, providing complaint channels, and making sure that employees are aware of reporting procedures.



Employees have a duty to avoid engaging in harassment and use the employer's complaint procedures to report harassment.

If you believe you have been subjected to harassment, tell the offending party that the behavior is unwelcome and to stop immediately; document the incident; report the behavior to the appropriate manager or supervisor; use your employer's complaint procedures; cooperate in the employer's investigation.

MANN & KYTLE, PLLC

April 03, 2018 - 4:54 PM

Transmittal Information

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Superior Court Case Number: 15-2-13418-9

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