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**DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

SHEILA LAROSE,

Appellant,

vs.

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

Respondents/Cross-Appellants.

**RESPONDENT/CROSS-APPELLANT KING COUNTY'S
RESPONSE TO APPELLANT'S OPENING BRIEF**

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I. INTRODUCTION

Respondent King County respectfully requests that the Court deny Appellant Sheila LaRose's appeal from the trial court's judgment. Each of Appellant's arguments is inconsistent with Washington law. Her theories are also heavily grounded in mischaracterizations of precedent and the record, and many of them were not timely raised in the trial court.

Ms. LaRose is a former public defender who suffers post-traumatic stress disorder ("PTSD") after being stalked by a former client. She has alleged nine causes of action against the County, but at its core, this case boils down to a basic question: What is the appropriate remedy for a public defender who is injured by the criminal act of her indigent client? The answer has been provided by the Legislature: Public defenders, like other workers, should recover through the "swift, no-fault [worker's] compensation system for injuries on the job." *See State v. Lyons Enter., Inc.*, 185 Wn.2d 721, 733, 374 P.3d 1097 (2016). Unfortunately, Ms. LaRose did not pursue a timely worker's compensation claim because, in her words, "[t]here were other more immediate issues that I was attempting to deal with." CP 2468-2469. As a result, she is trying to create a remedy via this lawsuit. But the exclusive-remedy provision of the Industrial Insurance Act ("IIA") and Supreme Court precedent bar her any civil action related to Ms. LaRose's work-related injuries.

In addition, King County cross-appeals from the trial court's decision that the County is vicariously liable for the conduct of a separate party, the Public Defender Association ("PDA") (f/k/a The Defender Association). CP 3034-3045. The record uniformly established that the County lacked the ability to control PDA's conduct related to Appellant's allegations. As such, the court should have held the opposite—*i.e.*, that the County *cannot* be vicariously liable for PDA as a matter of law.

II. STATEMENT OF ISSUES

King County disputes the assignments of error alleged by Appellant and requests that the Court consider the following error:

1. The trial court erred in holding King County vicariously liable for PDA's alleged conduct on summary judgment. The County lacked sufficient control over PDA to apply vicarious liability, such that summary judgment should have been granted to the County on this issue.

III. STATEMENT OF THE CASE

While serving as a public defender, Sheila LaRose represented a client accused of stalking, anonymously referred to as "Mr. Smith," who made inappropriate comments. After the representation ended, Mr. Smith ultimately stalked Ms. LaRose. Based on these allegations, Ms. LaRose brought nine causes of action against her former employers, King County

and PDA. Each claim was dismissed below.¹ This section first explains Ms. LaRose's pertinent employment background. Next, it summarizes her initial allegations and the basis for the trial court's order dismissing her hostile work environment claim. Finally, this section describes the trial court's summary judgment rulings and the supporting evidentiary record.

A. Ms. LaRose Represented "Mr. Smith" While Employed by PDA as a Public Defender.

Ms. LaRose was a public defender at PDA until July 1, 2013, when she was hired by King County as part of its acquisition of many PDA employees. *See* CP 2414, 2119, 2216. In October 2012, PDA assigned Ms. LaRose to represent Mr. Smith. CP 2119. Mr. Smith pled guilty to stalking on July 18, 2013, shortly after Ms. LaRose became a County employee. CP 2204-05. Eight days later, Ms. LaRose sought permission to withdraw from representing him, which was granted. CP 2205.

B. While Ms. LaRose Was Employed at PDA, King County Had No Control Over Her Assignment to Represent Mr. Smith.

Prior to July 1, 2013, indigent criminal defense services in King County were provided by four non-profits, which contracted with the County and City of Seattle. CP 2119, 2123-2143. PDA was one of those

¹ Ms. LaRose does not appeal from the dismissal of her claims for (1) gender-related disparate treatment, (2) retaliation, (3) aiding and abetting an unfair practice, or (4) violation of the Domestic Violence Leave Act. CP 1909, 2029-2031, 3141-3145.

entities. CP 2119, 2216. PDA and the County contractually agreed that PDA was an independent contractor. *See, e.g.*, CP 2124, 2131. PDA was governed by its own board of directors. CP 2220-2255. PDA's manager oversaw day-to-day operations and reported to the board. CP 2138.

While Ms. LaRose worked for PDA, her clients were all PDA clients, assigned to her by a PDA docket clerk pursuant to PDA policies. CP 2119-2120. Her relationships with clients were also governed by PDA policies. *Id.* The County apportioned indigent defendants among the non-profit agencies, but PDA managed its own client relationships. CP 2120-2121. For example, PDA assigned its own clients to particular attorneys, and unilaterally decided whether and when reassignment was appropriate. CP 2119-20. The County did not have authority to dictate PDA policies regarding client assignments. *Id.* Similarly, PDA set its own policies for addressing problems with clients and was responsible for implementing them. CP 2120. PDA supervisors did not include the County in decision-making related to clients who acted inappropriately. *Id.*

Nor did King County have authority to control the provision of defense services to PDA clients. CP 2120-2121. The County did not participate in decisions about how to represent PDA clients: County employees did not review briefs, participate in investigations, attend

hearings, evaluate plea bargains, or otherwise insert the County into PDA's attorney-client relationships. *Id.*

Finally, PDA and the County contractually agreed that PDA would be responsible for its own torts. PDA was required to carry insurance to protect against claims by its employees. CP 2132-2134, 2144-2145. PDA was also required to indemnify the County from all claims arising out of PDA's negligent acts, including "any claim, demand, and/or cause of action brought by" PDA employees. CP 2131.

C. Many PDA Employees Moved to King County on July 1, 2013.

On July 1, 2013, Ms. LaRose, along with many other PDA public defenders, became a County employee. CP 2216. The decision to bring them in-house was made in response to the decision in *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), *as corrected* (Jan. 5, 2012), in which the Supreme Court held that PDA employees were entitled to Public Employees Retirement System ("PERS") benefits via the County.

The transition of certain employees from PDA to King County was governed by a Memorandum of Understanding (the "MOU"). CP 2361-2380. The MOU provided that the County would "assume responsibility for providing public defense services effective July 1, 2013." CP 2362. It required PDA to indemnify the County for any claims arising prior to July 1, 2013. CP 2378. As of today, PDA still exists as a separate entity, with

employees who “focus[] on policy work and advocacy for reform of the criminal justice system.” CP 2216. PDA’s public filings reflect significant assets. CP 2382. PDA is represented by separate counsel.

D. Dismissal of Appellant’s Hostile Work Environment Claim.

In August 2015, Ms. LaRose first filed a tort claim form with the County. CP 2504-2505. In that notice, she laid out her core allegations: PDA assigned her to represent a client accused of stalking, who subsequently harassed and ultimately stalked Ms. LaRose. Ms. LaRose’s tort claim form did not raise any disability or discrimination claim. *See id.*

Ms. LaRose filed a complaint on November 2, 2015, alleging Washington Law Against Discrimination (“WLAD”) claims. These allegations tracked the tort claim form, alleging that PDA assigned Ms. LaRose to represent Mr. Smith despite knowing he had been accused of stalking women and made an inappropriate comment to a PDA attorney. *See, e.g.*, CP 1594-1596. Ms. LaRose also alleged that PDA failed to reassign Mr. Smith to another attorney. *See id.*

Ms. LaRose’s complaint alleged her claims generally, without itemizing specific claims. CP 1599. The trial court liberally construed the complaint as attempting to assert the following causes of action under the WLAD: (1) gender-based hostile work environment; (2) retaliation; and

(3) gender-based disparate treatment. CP 1603, 1908.² King County moved to dismiss all three claims—but only the hostile work environment claim is at issue on this appeal. The County sought to dismiss this claim because it was based on the conduct of a third party, and Ms. LaRose did not allege that the County had a “right to control” Mr. Smith’s conduct. CP 1604-1606. In response, Ms. LaRose did not contend that the County had any right to control Mr. Smith. CP 14-20. Her sole argument was that she had stated a claim under non-controlling federal law. *Id.* As a result, the superior court dismissed this claim, concluding that:

Plaintiff’s Complaint reflects that her hostile work environment claim is founded on allegations of harassment by a third party outside King County’s or Public Defender Association’s control. As such, liability cannot be imputed to [Respondents] as a matter of law.

CP 1908 (citation omitted).

On May 23, 2016, Ms. LaRose moved for reconsideration. CP 89. She raised new arguments, but provided no justification for failing to include them in her original opposition to the motion to dismiss. CP 93-99. The court denied reconsideration. CP 1934. Ms. LaRose sought interlocutory review by the Supreme Court, which the Commissioner

² Ms. LaRose’s complaint initially alleged the County violated state and federal laws, so King County removed to federal court. CP 3056-3078. She then stipulated that she would not assert federal claims, and the parties agreed to remand. CP 3087-3090.

denied. CP 3128-3129, 3151. Ms. LaRose moved for reconsideration of the Commissioner's ruling, which was denied by a panel of the Supreme Court. CP 3151. Finally, on August 11, 2017, Ms. LaRose moved to reinstate her hostile work environment claim, again raising new arguments for the first time, but that motion was also denied. CP 1174-1194, 2978.

E. Following Dismissal of her Hostile Work Environment Claim, Ms. LaRose Alleges Several New Claims.

Following dismissal of her original complaint, Ms. LaRose filed an amended complaint on May 23, 2016, alleging seven claims. CP 1910-1933. In pertinent part, she brought claims for: "Violation of 'Special Relationship' Duty of Care" (Claim A); "Negligent Infliction of Emotional Distress" (Claim B); "Disability Discrimination and Failure to Accommodate" (Claim D); and "Allow[ing] Injury to Plaintiff with Actual Knowledge and Willful Disregard" (Claim F). *Id.* The amended complaint also re-alleged her dismissed hostile work environment claim (Claim C). CP 1926. The County moved to re-affirm dismissal of this claim, CP 3105-3110, which was granted. CP 2029-2031.

F. Ms. LaRose's Assignment to Represent Mr. Smith.

The amended complaint alleges PDA knew Mr. Smith had stalked his previous PDA attorney, Rebecca Lederer, before Ms. LaRose represented him. CP 1913-14. This allegation has been refuted, however,

by undisputed evidence: Ms. Lederer testified that Smith did not stalk her. CP 2667-68. He simply left Ms. Lederer one or two voicemails saying he “loved” her, she told him to stop, and he did. *Id.*³ Further, she testified that there is typically no safety concern in this situation. CP 2668.

Ms. Lederer did think Smith’s affection could affect the quality of the representation, so she requested reassignment. *Id.* Her supervisor, Daron Morris, granted her request. *Id.*⁴ Notably, prior to Ms. Lederer, Smith was represented by another female PDA attorney, and he never behaved inappropriately toward her. CP 2664. Thus, the undisputed evidence reflects no pattern of Smith harassing female attorneys.

Ms. LaRose also alleges that Mr. Morris decided Smith can only be represented by a man. App. Br. at 8. But Mr. Morris testified that after reassigning Mr. Smith, he “did not believe that it would be necessary for [him] to be assigned to a male attorney on every subsequent case”

³ Appellant’s brief continues to misleadingly claim Mr. Smith engaged in “harassing/stalking” conduct toward Ms. Lederer, began a “stalking pattern” toward her, and initiated “harassment and stalking” of her. App. Br. at 6, 6, 29.

⁴ Appellant misleadingly excerpts an email exchange to make it appear as though Mr. Morris reassigned Mr. Smith on his own initiative. App. Br. At 6-7 (citing CP 75-77). But she leaves out that Mr. Morris told Ms. Lederer, “I will let you make the call” as to whether reassignment was appropriate and only reassigned after Ms. Lederer asked him to do so. CP 75-76. As discussed below, this is similar to what happened in this case: Ms. LaRose reported inappropriate conduct, and her supervisor let Ms. LaRose decide whether to keep the case. But unlike Ms. Lederer, Ms. LaRose declined reassignment. *See infra* at 10-11.

CP 2414. Further, Ms. LaRose claims that Paul Vernon, the attorney to whom Smith was reassigned, told PDA supervisor Ben Goldsmith that Smith “should not be assigned to a female attorney **before** Client A was assigned to LaRose.” App. Br. at 9. But Appellant cites only hearsay: her own deposition (CP 566) and a declaration from a co-worker, Twyla Carter (CP 327), describing alleged out-of-court statements. Mr. Vernon does not speak for the County on the topic of case assignments, and in any event, has testified that he “do[es] not remember making that statement,” and “do[es] not believe [he] would have told a supervisor that any client should or should not be represented by a female attorney.” CP 2672.

PDA assigned Ms. LaRose to represent Mr. Smith on a new stalking case on October 31, 2012. CP 188. The evidence indicates that a docket clerk assigned the case pursuant to a PDA policy that based assignments on the attorneys’ availability and caseloads. CP 2119, 2422. The clerk did not know about Ms. Lederer’s prior withdrawal. CP 2421.

In the amended complaint, Ms. LaRose also alleged that, during the representation, Mr. Smith started calling her with inappropriate comments. CP 1917, ¶ 2.32. She alleged that in April 2013, she told her PDA supervisor, Ben Goldsmith, “that she thought she needed to be removed from the ‘Smith’ case,” but that “Goldsmith did not remove her or put other safeguards in place.” CP 1917. But Ms. LaRose’s own

testimony showed this allegation was misleading: She testified that in April 2013, she told Mr. Goldsmith that she thought she should withdraw from Mr. Smith’s case—and that Mr. Goldsmith agreed to her request. CP 2427. After additional thought, however, Ms. LaRose told Mr. Goldsmith that she changed her mind, because she personally decided to “finish the case.” *Id.*; *see also* CP 2437. Following that conversation with Mr. Goldsmith, she never made another request for reassignment. CP 2821-22. Ms. LaRose therefore continued to represent Mr. Smith through the entry of a guilty plea—by her own choice—until she withdrew from representing him on July 26, 2013. *See* CP 1919, ¶ 2.43.

G. Following His Release, Mr. Smith Stalks Ms. LaRose.

Unfortunately, after Mr. Smith’s release from jail, he went on to stalk Ms. LaRose. Beginning in February 2014, he accosted her in a parking garage, snuck into her backyard, watched her in her home, broke her window, threatened to kill her ex-husband, and left underwear on her vehicle, among other things. *See, e.g.*, CP 1921-1922. ¶¶ 2.49, 2.53. Mr. Smith’s stalking threatened physical and sexual assault. CP 2470, 2482-2483. Ms. LaRose began to suffer symptoms “at the time” the stalking took place, including fearfulness, depression, anxiety, anger, sleep disorder, and difficulty concentrating, which affected her work. CP 2485-

2487. As a result of the trauma from Mr. Smith’s stalking, Ms. LaRose suffers from post-traumatic stress disorder. CP 2483-2484.

Smith never got inside Ms. LaRose’s workplace, and her offices were protected by County security measures. CP 2449, 2661-2662. After learning Mr. Smith was stalking Ms. LaRose, her supervisors offered her assistance, such as places to stay (including their own homes), a wearable alarm, and screening of phone calls.⁵ CP 2434-2436, 2441-2443. Other County departments, including the Prosecuting Attorney’s Office and the Sheriff’s Office, took additional steps to protect her, by, for example, circulating a bulletin to key personnel (*e.g.*, courthouse security) to prevent Mr. Smith from reaching Ms. LaRose at work. CP 2447-2449. Eventually, Ms. LaRose’s supervisors and colleagues worked with her to lure Mr. Smith to a coffee shop, where they called the police, which led to his arrest on February 21, 2014—only three days after Ms. LaRose first notified her colleagues that he had come to her house. CP 2450-2454.

⁵ Ms. LaRose claims that, after she reported Smith in 2014, supervisors withheld “normal supervisory communication.” App. Br. at 19 (citing CP 538-539). This makes no sense, as her declaration specifically mentions meeting with supervisors, and the record contains numerous emails showing them trying to help her. *See* CP 538-539; *see also, e.g.*, CP 80; CP 81-82. The only supervisor Appellant claims did not communicate with her was Ben Goldsmith, but she admits that he did take steps to try to help her. *See, e.g.*, CP 2447.

In February 2015, Mr. Smith was convicted of stalking Ms. LaRose and given an “exceptional sentence” of seven years. CP 48-53, 1598, 2458. He remains incarcerated. Many of Ms. LaRose’s colleagues attended her testimony at sentencing to show support. CP 2456-2457.

H. Ms. LaRose Does Not File a Timely Benefits Claim.

Ms. LaRose’s PTSD is a work-related injury, so she could have sought worker’s compensation benefits. She chose not to do so, however, until after the statute of limitations had passed, filing this lawsuit instead.

Workers can submit two types of claims for worker’s compensation. CP 2508-2509, ¶ 7. First, a worker may claim an “injury,” defined as “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.” RCW 51.08.100. Mental conditions arising from single traumatic events are compensable as “injuries.” WAC 296-14-300(2). A “single traumatic event” need not be isolated to give rise to an “injury.” Rather, “[a] single traumatic event . . . that occurs within a series of exposures will be adjudicated as an industrial injury . . .” WAC 296-14-300(2)(D) (emphasis added). The WAC provides a non-exhaustive list of examples of “single traumatic events,” including witnessing or experiencing “[a]ctual or threatened death, actual

or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.” *Id.* at (2)(b)-(c) .

Second, a worker may seek benefits for an “occupational disease,” that is, a “disease or infection [that] arises naturally and proximately out of employment.” RCW 51.08.140. Unlike injury claims, “[m]ental conditions . . . caused by stress” are excluded from the definition of occupational diseases. RCW 51.08.142; *see also* WAC 296-14-300.

“Injury” claims are subject to a one-year statute of limitations, whereas occupational disease claims are subject to a two-year limitations period and tolling. *Compare* RCW 51.28.050 *with* RCW 51.28.055.

The undisputed evidence shows Ms. LaRose suffered an “injury” under the IIA. As her expert psychiatrist, Dr. Lawrence Wilson, testified, when Mr. Smith stalked Ms. LaRose, she directly experienced threats of both physical and sexual assault. CP 2482-2484. She suffered an immediate response, including depression, fear, anxiety, and sleep disorders, which affected her work. CP 2485-2488. Dr. Wilson testified each incident was independently sufficient to cause her PTSD. CP 2490-2491. Similarly, Ms. LaRose’s psychiatrist, Dr. Stanley Shyn, testified Ms. LaRose directly experienced threats of physical and sexual assault when Mr. Smith stalked her, and that each incident, standing alone, was sufficient to cause her PTSD. CP 2482-2484, 2490-2491; *see also* RCW

51.08.100 (defining “injury” as “a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result . . .”).⁶

Had Ms. LaRose submitted a worker’s compensation “injury” claim within one-year after she was traumatized by Smith, she would have been eligible for worker’s compensation benefits. CP 2508-2509. But Ms. LaRose did not. Instead, she filed this lawsuit on November 2, 2015. CP 1592. On March 18, 2016, PDA argued (correctly) in a motion to dismiss that Ms. LaRose’s tort claims were preempted by the exclusive-remedy provision of the worker’s compensation statute, the IIA. CP 1624-1626. Only *afterward* did Ms. LaRose file a worker’s compensation claim, on May 4, 2016. CP 2513, 2891-2892. By then, however, her injury claim was untimely under the applicable one-year limitations period—she identified her date of injury/exposure as March 21, 2015—which led to the denial of her injury claim by the County and the Department of Labor and Industries (“DLI”). CP 2515, 2891-2894.

In her brief, Ms. LaRose writes that “the [DLI] . . . [found] no industrial injury and no covered occupational disease.” App. Br. at 42. But the DLI made no such finding regarding her injury claim. CP 2891-2894. The DLI only denied her injury claim because “[n]o claim has been

⁶ Ms. LaRose confirmed Mr. Smith threatened physical and sexual assault. CP 2470.

filed by said worker within one year after the day upon which the alleged injury occurred.” CP 2893. On the other hand, the DLI did deny her “occupational disease” claim on the merits, concluding she did not meet the statutory definition of an “occupational disease,” which, unlike an “injury” claim, excludes mental conditions caused by stress. *Id.*

Ms. LaRose appealed to the Board of Industrial Insurance Appeals (“BIIA”), and at that point sought to characterize her condition *solely* as an “occupational disease.” CP 731-736, 2884-2888. Ms. LaRose unilaterally stipulated—without County sign-on—that she was not seeking benefits for an “injury” and that, in her view, she had not suffered a single traumatic event. CP 2884. Ms. LaRose had nothing to lose with that concession because she had missed the deadline to file an “injury” claim—and the Board accepted this concession. CP 733, 739. But, while Ms. LaRose did suffer an “injury” under the regulatory framework—and experienced at least one single traumatic event—she does not have an “occupational disease” for the reasons set forth by the Department. Accordingly, the BIIA denied her appeal. CP 731-739, 2509.

Ms. LaRose’s brief mischaracterizes the BIIA ruling, suggesting the Board affirmatively found she did not suffer an injury. App. Br. at 43. This characterization ignores that the Board’s finding simply followed Ms. LaRose’s own, unilateral assertion that she had not. CP 733, 739.

Ms. LaRose is now pursuing an additional appeal in the Superior Court, challenging the denial of her workers' compensation claim, which is still pending as of this writing. CP 2509.

I. Ms. LaRose Is Diagnosed with PTSD, and King County Offers Her Substantial Accommodations.

Ms. LaRose first requested an accommodation for a medical condition in March 2015, when she asked for temporary leave. CP 2460-2461. That request was granted. *Id.* After returning to work, Ms. LaRose also requested multiple accommodations through counsel, including an assistant to help with her paperwork and a hold on the assignment of any new cases to her. CP 2473-2474. Those requests were also granted. *Id.*

Nevertheless, Ms. LaRose went on leave again on December 18, 2015. CP 2471-2472. By January 2016, she concluded she could no longer work for the County in any capacity. CP 2475-2478. She did not tell the County at the time, however. Over the next 1½ years, King County's Disability Services office made extensive efforts to accommodate Ms. LaRose. CP 2517-2523. For example, it offered a transitional duty assignment and alternative positions in the Department of Public Defense and other County agencies. CP 2519-2521, 2536-2538, 2580-2586, 2591-2598. Ultimately, however, Ms. LaRose and her doctors made clear the only accommodation she sought was leave. CP 2519-2520,

2548-2552. The County granted this accommodation repeatedly, giving her 60 extra days of paid leave, and permitting her to take 385 days of leave total. CP 2517-2522, ¶¶ 2, 10, 14, 19.

Eventually, Ms. LaRose’s doctor informed the County that it was his “assessment that Sheila is not able to work for King County in any capacity, and I do not see this changing for the foreseeable future.” CP 2521-2522, 2604-2606. Accordingly, Ms. LaRose was medically separated from her employment effective June 9, 2017. CP 2522. Nevertheless, the County is still providing Ms. LaRose with access to a reassignment program, under which she has priority eligibility for any County position for which she is qualified—if she chooses to apply and receives a release from her doctors. CP 2522-2523.

J. King County’s Motions for Summary Judgment.

King County initially moved for partial summary judgment on July 7, 2017, arguing that it could not be held vicariously liable for acts or omissions of PDA, which was denied on August 11, 2017. CP 2100-2117; CP 3146-3148. On August 17, 2017, Ms. LaRose moved to amend the court’s order, seeking an affirmative ruling granting partial summary judgment to Ms. LaRose and holding that the County was vicariously liable for PDA’s acts or omissions as a matter of law, which the court granted on August 29, 2017. CP 2753-2757; CP 2983-2985.

Second, on July 21, 2017, the County filed a motion for summary judgment on Appellant's remaining claims. CP 2389-2418. The superior court granted King County's motion in all respects on August 29, 2017, which resulted in a final judgment for the County. CP 2992-2995.

IV. ARGUMENT AND CITATION TO AUTHORITY

Ms. LaRose appeals the superior court's orders dismissing her hostile work environment claim and granting summary judgment on her negligence, deliberate injury, and disability discrimination claims. CP 2996-3021. King County cross-appeals the summary judgment rulings on vicarious liability. CP 3034-3045. The Court should deny Appellant's appeal and grant the County's cross-appeal.

A. The Trial Court Correctly Dismissed Appellant's Hostile Work Environment Claim Pursuant to *DeWater v. State*.

1. Standard of Review.

This Court reviews decisions granting motions to dismiss *de novo*. *See, e.g., In re C.M.F.*, 179 Wn.2d 411, 418, 314 P.3d 1109 (2013). A complaint should be dismissed if it fails to state a claim upon which relief can be granted. *Yurtis v. Phipps*, 143 Wn. App. 680, 689, 181 P.3d 849 (2008). The complaint's factual allegations are presumed to be true, but not the complaint's legal conclusions. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717–18, 189 P.3d 168 (2008). A motion to dismiss should

be granted if “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Yurtis*, 143 Wn. App. at 689 (quotation omitted). Dismissal is also appropriate if the complaint “includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007) (quotation omitted).

By contrast, where the plaintiff raises an argument for the first time on a motion for reconsideration, this Court only reviews the denial of reconsideration for abuse of discretion, even as to issues of law. *West v. Dep’t of Licensing*, 182 Wn. App. 500, 516-17, 331 P.3d 72 (2014); *see also River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (“[A] motion for reconsideration . . . may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts. But while the issue is preserved, the standard of review is less favorable.”) (citations omitted).

2. Washington Supreme Court Precedent Forecloses a WLAD Hostile Work Environment Claim Where the Employer Lacks Control Over the Alleged Harasser.

In Washington, a plaintiff pursuing a claim for hostile work environment against an employer first must prove that she experienced “offensive conduct.” *Doe v. State Dep’t of Transp.*, 85 Wn. App. 143, 148-49, 931 P.2d 196 (1997). The plaintiff “must then establish that”:

(1) the harassment was unwelcome; (2) was based on his or her sex [or other protected class]; (3) affected the terms or conditions of employment; and (4) can be imputed to the employer.

Id. at 148. Further, where, as here, the plaintiff claims that her employer should be liable under the WLAD for a hostile work environment based on the conduct of a *third party*, the plaintiff must prove that the employer had the “right to control” that party’s conduct. *See DeWater v. State*, 130 Wn.2d 128, 137, 921 P.2d 1059 (1996)). In the Supreme Court’s controlling decision in *DeWater*, the Court held as a matter of law that the defendant was not liable for a contractor’s sexual harassment of a worker who was paid by the defendant, because the defendant did not retain the right to *control* the manner of the contractor’s operations. *Id.* at 137.

Contrary to Appellant’s suggestion, *DeWater* is not some outlier. Rather, it is a binding application of the basic principle that a WLAD hostile work environment claim requires proof that the alleged harassment can be imputed to the employer. *See, e.g., Glasgow v. Georgia-Pac. Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985); *DeWater*, 130 Wn.2d at 135. The *DeWater* Court followed well-established precedent by applying basic agency principles to determine the scope of liability. *DeWater*, 130 Wn.2d at 137 (“A principal generally is not vicariously liable for the acts of an independent contractor.”). In so doing, the Court held that a third

party's conduct could not be imputed to an employer, as a matter of law, if the employer did not have the right to control the third party. *Id.*

In this case, the complaint showed the County had no control over Mr. Smith. This case was even more clear-cut than *DeWater*, where the defendant employed the harasser as a contractor. *Id.* at 131. By contrast, Ms. LaRose admits the County did not employ Mr. Smith *in any capacity*. CP 1594 at ¶ 2.12. Rather, she admits Mr. Smith was simply a criminal defendant whom Ms. LaRose represented, as a public defender. *Id.*

In the court below, Ms. LaRose implicitly conceded that the County had no ability to control Mr. Smith. The County specifically argued for dismissal based on its lack of control over Mr. Smith, CP 1604-1605, and Appellant did not dispute this point in her opposition, CP 1-29. Accordingly, there was no basis for the trial court to decline to apply *DeWater*. The trial court correctly dismissed Appellant's hostile work environment claim on this ground. CP 1908.

Indeed, Appellant's opposition to King County's motion to dismiss raised only one counter-argument: She argued that *federal* precedent justified her hostile work environment claim. CP 15-20. Ms. LaRose makes a similar argument now. App. Br. at 31-33. The flaw in this argument, of course, is that the Supreme Court's interpretation of the WLAD is binding—regardless of how federal courts interpret federal law.

See, e.g., Dailey v. N. Coast Life Ins. Co., 129 Wn.2d 572, 575-76, 919 P.2d 589 (1996) (finding Washington precedent controlling in holding that punitive damages were not available under the WLAD, even though federal precedent holds that punitive damages are available under Title VII). It is true that Washington courts frequently follow federal precedent, but our Supreme Court has made clear that this practice does *not* apply when there is already controlling Washington precedent. *Id.*; *see also Antonius v. King County*, 153 Wn.2d 256, 266, 103 P.3d 729 (2004) (“[F]ederal discrimination cases are not binding.”). Appellant did not make *any* other arguments regarding *DeWater* in her opposition.

3. Appellant’s Present Attempts to Circumvent *DeWater* Lack Merit.

Following dismissal and now on appeal, Ms. LaRose has tried to press new arguments to escape *DeWater*. These arguments fail because Ms. LaRose did not timely raise them, and the trial court had the discretion to disregard arguments raised for the first time *after* dismissal. *See, e.g., River House Dev.*, 167 Wn. App. at 231 (“The trial court’s discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse.”). Further, each of these belated arguments also fails on the merits.

First, Appellant tries to distinguish *DeWater* on the basis that King County allegedly had notice that Mr. Smith engaged in misconduct with a prior female attorney. App. Br. at 27. Appellant asserts the defendant received no such notice in *DeWater, id.*, but that is incorrect. In fact, the *DeWater* Court rejected such an argument, holding the defendant was not liable even though it “had notice of an inappropriate sexual comment made to a caseworker at [the harasser’s] previous place of employment.” 130 Wn.2d at 136. Thus, even assuming the County had notice of Mr. Smith’s inappropriate comments to Ms. Lederer, the County’s lack of control still precludes her hostile work environment claim under *DeWater*.

Second, Appellant now suggests that the County had control over Mr. Smith because public defense clients overlap with the inmate population. App. Br. at 30-31. Appellant cites to *Antonius v. King County*, 153 Wn.2d at 267, and claims that the plaintiff in that case “prevailed on a hostile work environment claim based on ‘non-employee’ conduct,” namely, a claim based on the behavior of inmates toward a jail employee. App. Br. at 30. Appellant mischaracterizes *Antonius*, which never reached the merits—the opinion cited by Ms. LaRose merely addressed the statute of limitations. *Antonius*, 153 Wn.2d at 273-274. And, in any event, her analogy fails because a jail has far more control over inmates in its custody than a public defender could have over a client.

Third, Ms. LaRose contends *DeWater* is inconsistent with the Court of Appeals decision in *Bartlett v. Hantover*, 9 Wn. App. 614, 513 P.2d 844 (1973), *rev'd on other grounds*, 84 Wn.2d 426, 526 P.2d 1217 (1974). App. Br. at 34-36. But there is no conflict. *Bartlett* and *DeWater* deal with different areas of law. *Bartlett* discusses negligence claims and has no bearing on WLAD claims. *Bartlett*, 9 Wn. App. at 620. Indeed, the Superior Court's dismissal of Ms. LaRose's WLAD claim based on *DeWater* did not affect her ability to bring a negligence claim based on *Bartlett*—which is why her negligence claim was not dismissed until summary judgment, and then on different grounds. CP 2992-2995.

Fourth, Ms. LaRose suggests *DeWater* only addresses the issue of “whether the State may be vicariously liable for the actions of a licensed foster parent toward persons working in the foster home.” App. Br. at 26 (quoting *DeWater*, 130 Wn.2d at 133-134). This argument rests on an incomplete quotation; the full quotation is:

We do not consider the merits of Ms. DeWater's underlying claims of sexual harassment and wage discrimination. The only issue before us is whether the State may be vicariously liable for the actions of a licensed foster parent toward persons working in the foster home.

DeWater, 130 Wn.2d at 133–34 (emphasis added). By selective omission, Ms. LaRose suggests the Court's opinion was limited to foster homes. But

the Court plainly was saying that its opinion focused only on *vicarious liability*, not on the merits of the plaintiff's underlying claims.

Fifth, Appellant tries to distinguish *DeWater* by arguing that here, unlike in that case, the defendant has an employment relationship with the plaintiff. App. Br. at 36. *DeWater* expressly forecloses this theory. There, the Court specifically stated that it was “only the status of [the plaintiff's third-party harasser] that determines the State's liability in this case; we therefore do not consider the nature of the relationship that [the plaintiff] Ms. DeWater had with the State.” 130 Wn.2d at 132, n. 3.

Finally, Appellant argues that *DeWater* does not apply because supervisors “participate[d] in the harassment.” App. Br. at 28. But this is a strawman, because Ms. LaRose premises this argument only on the idea that her supervisors allowed her to represent Mr. Smith—a third party beyond King County's control and the sole alleged harasser—and not on any allegations of harassment by supervisors themselves.⁷ *Id.* at 28-29.

⁷ Ms. LaRose's background section on appeal references alleged “sexual and offensive comments [made] by supervisors and some attorneys in the Felony Division including joking about sex and sexual violence against women and children.” App. Br. at 21. The complaint referenced no such allegation, and Ms. LaRose has never argued—before the trial court or on appeal—that her hostile work environment claim was premised on offensive comments made by supervisors or co-workers. Any such theory would now be waived. *See, e.g., Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).

4. The Trial Court’s Ruling is Also Consistent with the Public Defender’s Duty to Zealously Represent Indigent Defendants.

If accepted, Ms. LaRose’s claims would give rise to public policy problems. The essence of her complaint is that the County had a duty not to assign her to represent a stalker—against stalking charges. But it is the responsibility of the public defender to provide zealous representation, even for clients accused of egregious conduct. *See Bohn v. Cody*, 119 Wn.2d 357, 367, 832 P.2d 71 (1992) (“Attorneys have a duty of zealously representing their clients within the bounds of the law.”). Appellant seeks to contravene this duty by requiring public defenders to assess the guilt of each client based in-part on their underlying charges, and assign attorneys to represent clients based on that assessment. *See, e.g.*, CP 1924-1925 (alleging negligence in assigning Ms. LaRose to represent Smith because Respondents “knew of prior criminal complaints and complaints from staff attorneys that ‘Smith’ had a pattern of criminal harassment . . . rising to the level of criminal felony stalking of professional women.”). Following Appellant’s theory, if the public defender believed a defendant was guilty of a gender-based crime then it would be required to refrain from assigning a woman attorney because the defendant *may* have a criminal propensity and *may* offend against his attorney. Such a holding

would interfere in the management of public defender services and could deprive many indigent clients of optimal representation.

B. The Trial Court Correctly Granted Summary Judgment for King County on Appellant’s Remaining Claims.

1. Standard of Review.

“Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Potter v. Wash. St. Patrol*, 165 Wn.2d 67, 78, 196 P.3d 691 (2008).

“A material fact is one upon which the outcome of the litigation depends in whole or in part.” *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 812, 239 P.3d 602 (2010). On summary judgment, the party bearing the burden of proof must identify admissible evidence showing “specific facts that sufficiently rebut the moving party’s contentions and disclose that a genuine issue as to a material fact exists.” *Seven Gables Corp. v. MGM/UA Entm’t. Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225 & n. 1, 770 P.2d 182 (1989). The non-moving party may not “rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value . . .” *Seven Gables*, 106 Wn.2d at 13.

2. Appellant’s Negligence Claims Are Barred By the IIA.

The trial court correctly dismissed Appellant’s negligence claims because they are barred by the exclusive-remedy provision of the IIA. *See* RCW 51.04.010. Because Appellant’s tort claims arise from a work-related injury, her sole remedy was a workers’ compensation claim under the IIA. *See State v. Lyons Enter. Inc.*, 185 Wn.2d 721, 733, 374 P.3d 1097 (2016). This statute arises from a “grand compromise that granted immunity to employers from civil suits initiated by their workers and provided workers with a swift, no-fault compensation system for injuries on the job.” *Id.* (quotations omitted). As such, “[t]he IIA immunizes, from judicial jurisdiction, all tort actions which are premised upon the fault of the employer vis-à-vis the employee.” *Hatch v. City of Algona*, 140 Wn. App. 752, 757, 167 P.3d 1175 (2007) (quotation omitted). “The liberal construction of the IIA necessitates that all doubts be resolved in favor of coverage.” *Lyons Enter.*, 185 Wn.2d at 734 (emphasis added).

a. Appellant Bears the Burden to Prove that Her Injury Was Outside the Scope of IIA Coverage.

Even where a worker has been denied benefits, the IIA’s exclusive-remedy provision still applies if the injury was within the scope of the IIA’s coverage: “Where the employee’s disease or injury is covered by the [IIA], but the employee fails to establish entitlement to

compensation, the exclusive remedy provisions will [still] defeat any common law action.” *McCarthy v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 812, 824, 759 P.2d 351 (1988).

The burden to prove that an injury is outside the scope of IIA preemption is on the plaintiff. *Id.* at 825. And this is a heavy burden. The plaintiff must convince the court, “as a matter of law,” that she “could not show that the Act covered the particular injury or disease.” *Id.*

b. Ms. LaRose’s Claim Was Within the Scope of IIA Coverage.

All parties agree that Ms. LaRose suffered a harm within the scope of IIA coverage. They simply disagree about what *type* of worker’s compensation claim she should have pursued.

As discussed above, an injured employee may file two types of worker’s compensation claims. For harms “of a traumatic nature, producing an immediate or prompt result,” including “[s]tress resulting from exposure to [] single traumatic event[s] . . . that occur[] within a series of exposures,” an employee may file an “injury” claim within one year of the exposure. RCW 51.08.100; WAC 296-14-300. For “disease[s] or infection[s] aris[ing] naturally and proximately out of employment,” excluding “[m]ental conditions or mental disabilities caused by stress,” an employee may file an “occupational disease” claim within two years.

RCW 51.08.140; RCW 51.08.142; *see also* WAC 296-14-300. King County believes Appellant’s mental conditions fit within the “injury” prong, Appellant believes they fit within the “occupational disease” prong. Either way, her tort claims are preempted.

i. King County Demonstrated that Ms. LaRose Suffered an Industrial Injury.

Ms. LaRose suffered an “injury” under the IIA because her psychological conditions arose from “single traumatic events,” within a series of exposures. *See* WAC 296-14-300(2). Her own expert psychiatrist, Dr. Wilson, testified that she directly experienced the threat of both physical and sexual assault when Mr. Smith stalked her, and that each incident, standing alone, was sufficient to cause her PTSD. CP 2482-2484, 2490-2491; *see also* RCW 51.08.100 (defining “injury” as “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”).⁸ Dr. Wilson explained that Ms. LaRose suffered an immediate response “at the time” the stalking occurred, including depressive symptoms, fear, anxiety, and sleep disorders, which also affected her work. CP 2485-2488; *see also* WAC

⁸ Ms. LaRose confirmed Mr. Smith threatened her with physical and sexual assault. CP 2470.

296-14-300(2)(b) (providing examples of “single traumatic events,” including experiencing “[a]ctual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury”). This testimony was corroborated by Ms. LaRose’s treating psychiatrist, Dr. Shyn, who testified that she directly experienced “sudden traumatic event[s],” each of which was “enough” on its own to cause Ms. LaRose’s condition. *See, e.g.*, CP 2497-2499, 2501. This unrefuted testimony establishes that Ms. LaRose suffered an “injury” within the meaning of the IIA.

Because Ms. LaRose’s condition qualifies as an “injury,” there was also unrefuted evidence that the County would have paid her benefits if she had filed an “injury” claim within one year after her trauma. *See* CP 2508-2509. Unfortunately, however, Ms. LaRose did not timely file. According to her testimony, “[t]here were other more immediate issues that I was attempting to deal with.” CP 2468-2469. Instead, she waited until May 4, 2016 before filing a claim. CP 2508, 2513. By then, her injury claim was untimely. CP 2509.

ii. Collateral Estoppel Does Not Apply.

Although the undisputed evidence demonstrates that Ms. LaRose suffered an industrial “injury,” Appellant argues that the County should be estopped from making this argument. App. Br. at 42-44. But Ms. LaRose

misconstrues both the doctrine of collateral estoppel and the nature of her IIA adjudication. To establish estoppel, she must prove that the issue at hand—whether she suffered an “injury”—was finally adjudicated on the merits. *In re Moi*, 184 Wn.2d 575, 580, 360 P.3d 811 (2015), *as amended* (Jan. 25, 2017). It indisputably was not.

While Ms. LaRose is correct that King County requested denial of her claims, she fails to quote the relevant portion of the letter. App. Br. at 41 (quoting CP 764). She omits that the County requested denial of her “injury” claim on the basis that “[n]o claim has been filed by said workman within one year after the day upon which the alleged injury occurred.” CP 764. Similarly, while she is correct that the Department of Labor and Industries denied her “occupational disease” claim on the merits (App. Br. at 42), the Department denied her “injury” claim *solely* because “[n]o claim has been filed by said worker within one year after the day upon which the alleged injury occurred.” CP 729. Finally, while she quotes language from Industrial Appeals Judge Mychal H. Schwartz indicating that she did not suffer an industrial “injury,” she omits that she *unilaterally stipulated* that she was not pursuing an “injury” claim before this finding was made. CP 2884. In short, whether Ms. LaRose suffered an “injury” was never litigated on the merits, which forecloses collateral estoppel as a matter of law. *See McCarthy*, 110 Wn.2d at 825 (“The

doctrine of collateral estoppel precludes relitigation of issues *once litigated and determined* between the parties, even though a different claim or cause of action is asserted.”) (emphasis added).

This situation is governed by the Supreme Court’s decision in *McCarthy*, 110 Wn.2d at 825. There, the plaintiff’s worker’s compensation claim was denied, and then she sued her employer for negligence. The parties disputed whether her claim was preempted. The Supreme Court held that the denial of her claim could have an estoppel effect, but that estoppel *did not inherently foreclose IIA preemption*. This question turned on the *reason* why benefits were denied:

The burden of proof is on [plaintiff]. If . . . the Board determined that her [condition] was not an occupational disease within the basic coverage of the Act, she can proceed with her common law action. If, on the other hand, the Board determined that she failed to meet her burden of proof as to some aspect of her [worker’s compensation] claim, other than basic coverage, her common law action would be barred by the exclusive remedy provisions of the Act.

Id. at 825 (emphasis added).

Similarly, in *Goyne v. Quincy-Columbia Basin Irr. Dist.*, 80 Wn. App. 676, 910 P.2d 1321 (1996), the Court of Appeals applied *McCarthy* to find that the IIA barred a plaintiff’s claims, even after benefits were denied. In *Goyne*, the BIIA concluded that the plaintiff did not have a compensable injury because he failed to prove that his stroke was caused

by exertion in the workplace. *Id.* at 682. Nevertheless, when his estate subsequently brought a claim against his employer related to the stroke, the Court found that the claim was preempted because it was the *type* of injury that is covered by the IIA, regardless of whether the plaintiff was able to prove entitlement to compensation in the worker's compensation proceeding for this specific injury. *Id.* at 682-83.

Likewise, here, the BIIA never concluded Ms. LaRose's PTSD, caused by a former client's stalking, was outside the scope of the IIA's definition of an "injury." This makes sense, because the Supreme Court has held that the IIA covers a plaintiff's injuries from criminal conduct or other violence related to an employee's work. *See Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998) (IIA barred negligence claims related to the murders of two employees); *see also Rothwell v. Nine Mile Falls School Dist.*, 173 Wn. App. 812, 821-22, 295 P.3d 328 (2013) (IIA barred negligence claim related to employee's PTSD, which arose from assignment to clean up a crime scene after student attempted suicide).

Instead, the BIIA's decision resulted from Ms. LaRose's election not to pursue an injury claim in the first place. She unilaterally stipulated to the BIIA that she had no injury claim, and took the position that her

conditions “were not brought about by a singular incident.”⁹ CP 2884. Appellant therefore failed even to attempt “to meet [her] burden of proof as to some aspect of her [worker’s compensation] claim[.]” *McCarthy*, 110 Wn.2d at 825. If Ms. LaRose had chosen to do so, she could have submitted evidence from physicians and experts to show that she did experience single traumatic events that caused her conditions. The County has submitted precisely such evidence in this case, as set forth above. The fact that Ms. LaRose chose not to do so in the worker’s compensation case does not preclude IIA immunity here. If this Court were to rule otherwise, it would enable claimants to game the system by torpedoing their own worker’s compensation claims in order to overcome IIA immunity.

iii. Ms. LaRose Herself Maintains She Has a Viable Occupational Disease Claim.

Further, although Ms. LaRose disputes her injury claim, that is almost beside the point, because she actually concedes that she had a covered benefits claim—the parties simply dispute which type of claim was applicable.

In her deposition, Ms. LaRose admitted that her injuries were covered by worker’s compensation. CP 2465-2467. Further, at the time

⁹ There was no reason for Ms. LaRose to concede this, unless she recognized her injury claim was untimely and she was trying to fabricate an argument against IIA preemption.

of summary judgment, she was still actively pursuing a separate case for worker's compensation benefits, based on an alleged "occupational disease," as defined in RCW 51.08.140. CP 2509, App. Br. 43–44. That case is still pending as of the writing of this brief. Indeed, Appellant acknowledges on this appeal that she still might obtain benefits in that case, but she argues against preemption because she might not obtain *full* recovery through worker's compensation. App. Br. at 44. This misses the point—the IIA is a *complete* bar to Appellant's negligence claims.

In sum, both sides agree that Ms. LaRose's condition was substantively within IIA coverage; they only disagree over which *type* of claim she should have pursued, and whether it was timely. This is a dispute without legal consequence; either way, Ms. LaRose's negligence claim is preempted by the IIA.

c. Ms. LaRose's Rebuttal Arguments Are Unavailing.

The application of the IIA's exclusive remedy clause is straightforward in this case, for the reasons set forth above. Nevertheless, Appellant has made three primary arguments against its application, each of which is meritless.

First, Appellant argues that she did not seek medical treatment until more than a year after she was stalked, and that she experienced a series of cumulative traumas rather than a lone event. App Br. at 38-41.

This argument misses the point. In the court below and on this appeal, Appellant has not disputed that IIA coverage of her claim is governed by WAC 296-14-300, which makes clear that “[a] single traumatic event . . . that occurs within a series of exposures will be adjudicated as an industrial injury . . .” WAC 296-14-300(2)(d). Ms. LaRose has failed to meet her burden to prove that she did not experience one or more “single traumatic event[s]”—and her argument that these events occurred within a series of other exposures is irrelevant.

Second, Appellant argues that “these cumulative events have been determined not to qualify as compensable or as industrial ‘injuries’ under the IIA.” App. Br. at 41. This is extremely misleading. No adjudicator has ever ruled on the merits of Appellant’s industrial “injury” claim (with the exception of the Superior Court in dismissing Appellant’s claims under the IIA). Instead, following the Department of Labor and Industries’ ruling that her “injury” claim was untimely, CP 2515, Appellant expressly abandoned the claim, unilaterally stipulating that she did not have a compensable “injury.” CP 2884. The BIIA’s acceptance of this stipulation (CP 733, 739), without reviewing evidence or argument, is not a decision on the merits. In short, Ms. LaRose has failed to meet her burden to prove she did not suffer an industrial injury before the BIIA.

Third, Appellant relies on *Wheeler v. Catholic Archdiocese of Seattle*, 65 Wn. App. 552, 829 P.2d 196 (1992), *rev'd*, 124 Wn.2d 634, 880 P.2d 29 (1994), to argue that the “IIA does not preclude a negligent supervision suit against an employer by an injured employee for emotional damages from stress since [the] injury which occurred by harassment which did not occur suddenly or have [an] immediate result.” App. Br. at 44-45. Plaintiff’s reliance on *Wheeler* is misplaced, because that case does not set out a rule that emotional trauma from harassment is *per se* excluded from coverage under the IIA. Instead, the Court in *Wheeler* merely found that the evidence in that case showed that the harassment endured by plaintiff “did not occur suddenly or have an immediate result.” *Id.* at 566. By contrast, here the evidence established that Ms. LaRose began suffering symptoms at the time of the stalking, and that she experienced at least one single traumatic event. *Supra* at 31-32. Moreover, *Wheeler* pre-dated the current version of the regulation governing this determination, which makes clear that “[a] single traumatic event . . . that occurs within a series of exposures will be adjudicated as an industrial injury” WAC 296-14-300(2)(D). Ms. LaRose’s claims are therefore preempted by the IIA’s exclusive-remedy provision.

* * * *

If Ms. LaRose were to avoid the preclusive effect of the IIA, it could jeopardize access to the speedy, no-fault remedy of worker's compensation for public defenders, police, or others who may be harmed by a criminal defendant. The Court should safeguard the integrity of worker's compensation and affirm the superior court's ruling that the IIA applies to Ms. LaRose's injury.

3. Appellant Also Failed to Offer Admissible Evidence That King County Breached Any Duty of Care.

Even if Ms. LaRose's claims for negligence were not barred by the IIA, she still could not make a *prima facie* case. To prove negligent infliction of emotional distress, she must prove: (1) duty, (2) breach, (3) proximate cause, (4) damage, and (5) objective symptomatology. *See Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 505, 325 P.3d 193 (2014).

At minimum, Appellant cannot show that the County breached any duty of care. The County enacted appropriate security measures for Ms. LaRose, as set forth by the only safety expert in the case—including encouraging Ms. LaRose to call the police, discouraging Smith from calling the office, offering Ms. LaRose a personal alarm, maintaining a secure workplace, and offering Ms. LaRose alternative places to stay. CP 2444-2445, 2660-2662. Appellant had no expert of her own regarding standards of care for workplace security. Instead, she introduced an

ostensible expert regarding the standards for operating public defense agencies, Geoff Brown, a former California public defender. App. Br. at 36-37. Appellant selectively quotes from Mr. Brown's testimony, omitting key testimony showing that his opinions are inconsistent with Washington law. While Appellant's brief suggests that Mr. Brown believes that Mr. Smith should not have been assigned to any "female," Mr. Brown actually admitted that "[t]here might be circumstances where [it] would be okay" to assign Smith's case to a woman, but only if she were not a single mother. CP 2930. He further explained that he thought the case should not have been assigned to Ms. LaRose because:

I believe she was a single mother, she lived with a child. I mean, you know, it's not as if she was married to a linebacker for the Seattle Seahawks. That might have been a different situation.

CP 2924 (emphasis added). In other words, according to Mr. Brown, a public defense agency could have assigned Mr. Smith to a female attorney, but only if that attorney were married to a burly man. Mr. Brown is effectively asking public defense agencies to look into the personal lives of their employees and perform case assignments based on multiple protected classes, directly contrary to Washington law. *Blackburn v. State*, 186 Wn.2d 250, 259, 375 P.3d 1076 (2016).

In any event, King County moved to strike Mr. Brown's declaration because he openly testified that he had no knowledge of

Washington standards, and performed no research into Washington standards. CP 2873-2874. The County renews its request for the Court to strike and/or disregard Mr. Brown’s declaration here. *See, e.g., McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706-07, 782 P.2d 1045 (1989) (on summary judgment, “only a pharmacist who knew the practice and standard of care in this state could establish the standard of care for the defendants”). At the time of his deposition, Mr. Brown had not worked as a public defender for 16 years; he had *never* practiced in Washington; and he admitted that he never even researched the standard of care in Washington. CP 2915-2918, 2920. Further, his own office did not do the things he now claims King County should have done—and he cannot identify a single public defense agency *anywhere*, let alone in Washington, that did take the actions he now contends are industry standards. CP 2921-2922, 2929 (never assigned cases based on gender or marital status); 2923 (never took case away against attorney’s wishes, absent a conflict); 2926-2928 (no flagging system); 2925 (no risk assessment of cases); 2931 (did not track clients’ inappropriate comments). In short, his testimony is not based on any actual established standard, let alone the standard of care in Washington. It is conjecture. It should be excluded.

Once Mr. Brown’s inadmissible opinions are stricken, Appellant has offered no admissible evidence that the County breached any standard

of care. *See* App. Br. at 36-37 (relying exclusively on Mr. Brown to establish standards). By contrast, a well-respected Washington practitioner and public defense expert, Jeffrey Robinson, testified that in his opinion, the defendants did satisfy the applicable standards of care for public defense agencies in Washington because they appropriately assigned the case to Ms. LaRose and then allowed her to decide—based on her own professional judgment as a lawyer—whether to keep the case. CP 2944, 2947. Mr. Robinson relied on Ms. LaRose’s deposition, in which she admitted that she was the one to make this decision. CP 2944.

Appellant’s failure to offer admissible evidence that the County breached any applicable standard is an independent reason why the trial court was correct to grant summary judgment and dismiss her negligence claims. *See Cheney v. City of Mountlake Terrace*, 87 Wn.2d 338, 347, 552 P.2d 184 (1976) (“The judgment of the trial court will not be reversed when it can be sustained on any theory, although different from that indicated in the decision of the trial judge.”).¹⁰

4. Appellant’s Deliberate Injury Claim Fails Because the Record Reflects That Supervisors Tried to Assist and Protect Her.

In an attempt to circumvent IIA’s exclusive-remedy provision, Ms. LaRose has also brought a claim for deliberate injuries, pursuant to an

exception to immunity codified in RCW 51.24.020. CP 1925. “Washington courts have consistently interpreted RCW 51.24.020 narrowly,” however, “holding that mere negligence, even gross negligence, does not rise to the level of deliberate intention.” *Vallandigham v. Clover Park School Dist. No. 400*, 154 Wn.2d 16, 27, 109 P.3d 805 (2005). “Even failure to observe safety laws or procedures does not constitute specific intent to injure, nor does an act that had only *substantial* certainty of producing injury.” *Id.* (emphasis in original). Thus, to prove this claim, Appellant must show (1) *actual* knowledge that an injury was *certain* to occur; and (2) *willful disregard* of that knowledge. *See id.* at 27-28. She did not satisfy either element.

a. King County Did Not Have Actual Knowledge That Injuries Were Certain to Occur.

As an initial matter, Ms. LaRose’s employer indisputably lacked *actual* knowledge that she was *certain* to suffer a work-related injury when she was assigned by PDA to Mr. Smith’s case. The Supreme Court’s decision in *Folsom v. Burger King*, 135 Wn.2d 658, 958 P.2d 301 (1998), is instructive. There, two employees were murdered by a former co-worker during a robbery, and their estates sued the employer. There was evidence that the employer had known that the murderer presented a

¹⁰ King County joins PDA’s arguments on breach and causation. PDA Br. at § IV.E.

danger to them, and failed to take steps to protect them. *Id.* at 665-66. Based on this evidence, the superior court refused to grant summary judgment to the employer on a deliberate injury claim. The Supreme Court reversed on interlocutory appeal, and granted the employer's motion for summary judgment itself. The Supreme Court explained:

[T]he evidence viewed in the light most favorable to plaintiffs suggest that [the employer] may have known of [the murderer's] criminal history, of his sexual harassment of female co-workers, that the back door entrance did not have a security peephole and did not lock properly, that keeping cash in the restaurant may invite theft, and that there was no active security system. However negligent these acts might be, the statutory exception to employer immunity as discussed in *Birklid* requires more.

Id. at 667 (emphasis added).

Similarly, Appellant alleges that her employer should have known that her client presented a danger because he had made inappropriate comments to another female attorney. *See* CP 1913-1914. But even if she could prove those allegations, it would put this case on parallel with *Folsom*—and it would not be enough to show that the County had “actual knowledge that injury was certain to occur” or that the County “intended” for Ms. LaRose to be stalked by her client.

Moreover, the allegations in Appellant's complaint are inconsistent with the undisputed evidence. The attorney who previously represented Mr. Smith, Rebecca Lederer, testified that she was not harmed by Mr. Smith and she did not know that Mr. Smith would present a safety risk to a

subsequent female attorney. CP 2668. The supervisor who granted Ms. Lederer's reassignment likewise did not perceive that Mr. Smith presented a risk. CP 2414. Thus, Ms. LaRose's attempt to base her allegations on Ms. Lederer's experience is a *non-sequitur*.¹¹

Ms. LaRose attempts to rebut this point by arguing that an injury was certain to occur once Smith began making inappropriate comments. App. Br. at 49. She contends that, at that point, she should have been reassigned (despite her decision to keep the case). *Id.* This theory is irrelevant because she offered no evidence of causation at that stage: Her own expert witness, Dr. Wilson, admitted that removing Ms. LaRose from the case would not necessarily have prevented Mr. Smith from stalking her. CP 2489. Moreover, as set forth below, Ms. LaRose's employer made numerous attempts to help her during this period, which means she cannot establish the next element of her claim—*i.e.*, willful disregard.

b. King County Did Not Willfully Disregard Actual Knowledge That Injuries Were Certain to Occur.

Ms. LaRose cannot prove that the County *willfully disregarded* alleged knowledge of injuries that were certain to occur. According to Ms. LaRose's testimony, in April 2013—several months after the

¹¹There is also no evidence that Ms. LaRose's supervisors assigned her to represent Mr. Smith. Rather, a docket clerk performed the assignment, without being aware of Ms. Lederer's experience with Smith. CP 2422.

assignment was made—she asked her supervisor for reassignment off the case. She admits that the supervisor *agreed* to reassignment. CP 2427. Afterward, it was Ms. LaRose who changed her mind: *She personally decided to stay on the case.* CP 2427-2428, 2437.

After the case ended, Ms. LaRose contends she told the same supervisor, Ben Goldsmith, that she was still receiving calls from Mr. Smith. According to her, he responded by telling her to call the police. CP 2426. And according to the only workplace safety expert in this case, *this was correct response.* CP 2660-2661. Unfortunately, Ms. LaRose admits she ignored this advice, and she alone decided not to call the police. CP 2429-2430. She also went to another supervisor, Leo Hamaji, who responded by intervening directly: He got on the phone with Mr. Smith to try to convince him to stop calling Ms. LaRose. CP 2438-2440.

Finally, when Ms. LaRose informed colleagues that Smith had stalked her in-person, on February 18, 2014, her supervisors and colleagues took more aggressive action. Among other things, they offered her a wearable alarm to call the police (which she rejected); offered to let her stay at their homes (which she also rejected); brought in the Sheriff's Office and prosecutors to issue a bulletin; screened Smith's calls; and escorted Ms. LaRose to a coffee shop on February 21, 2014, where she

told them Smith would be, so that they could contact the police and capture him. CP 2434-2436, 2438-2443, 2447-2456.

The actions taken by King County were not even negligent, let alone *willful*. See CP 2660-2662 (expert witness opining that the County's response was reasonable and *at least* equal to workplace safety standards). While Ms. LaRose may personally question the effectiveness or speed of some actions that were taken, that would not be enough to establish willful or deliberate injuries.

The Supreme Court's opinion in *Vallandigham*, 154 Wn.2d 16, is on all fours. There, the plaintiff established that the employer school district knew a student was engaging in violent outbursts and harming employees. Nevertheless, the Supreme Court affirmed summary judgment *for the employer*, in part because the employer took steps to address the student's conduct—which proved as a matter of law that it did not *willfully disregard* such knowledge. *Id.* at 34-35. Although the steps taken by the employer were not successful, the Court refused to assess their effectiveness because that would have been akin to a negligence analysis. *Id.* at 35 (“[E]valuation of the effectiveness of a remedial measure is merely another way of evaluating its reasonableness”). The Court reiterated that it “has been abundantly clear that negligence, even gross negligence, cannot satisfy the deliberate intention exception to the IIA.”

Id. at 35. Thus, the fact that the employer made unsuccessful attempts to prevent the student’s ongoing conduct was enough to preclude a finding of willful disregard as a matter of law.

Likewise here, the employers took steps to protect Ms. LaRose from Mr. Smith. In fact, those steps contributed to Mr. Smith’s arrest. They establish as a matter of law that the County did not *willfully disregard* any risks he presented.

5. Appellant’s Disability Discrimination Claim is Meritless.

On appeal, Appellant argues for the first time that she is pursuing three disability discrimination claims: (1) hostile work environment; (2) failure to accommodate; and (3) “different treatment.” App. Br. at 50. All three theories fail, both on procedural grounds and on the merits.

- a. Appellant Did Not Allege Disability Discrimination in a Tort Claim Form, as Required Under RCW 4.96.020.

As an initial matter, Appellant’s disability claims were correctly dismissed because she failed to submit a tort claim form to King County regarding this issue. In Washington, a plaintiff cannot sue a county for discrimination without first providing a written “tort claim” to the defendant and waiting 60 days before filing a complaint. *See* RCW

4.96.020; *see Hintz v. Kitsap Cty.*, 92 Wn. App. 10, 15, 960 P.2d 946 (1998) (applying requirement to discrimination claims).

Appellant did submit a tort claim to King County—but she made no allegations about a disability or accommodations. CP 2504-2505. As a result, her tort claim did not give notice of a disability-related cause of action. The Supreme Court has made clear that where a plaintiff’s tort claim identifies one cause of action, but fails to identify a second one, the latter claim must be dismissed. *See Medina v. Pub. Utility Dist. No. 1 of Benton County*, 147 Wn.2d 303, 310-11, 53 P.3d 993 (2002) (dismissing personal injury claim because tort claim only alleged property damage). Appellant’s disability discrimination claim must be dismissed for the same reason: It was not on the tort claim she submitted to King County.

b. Appellant Never Alleged Disability Discrimination Based on a Hostile Work Environment.

Appellant briefly argues that she suffered a disability-based hostile work environment. App. Br. at 50. She offers no substantive argument as to why the record supports such a claim. *Id.* Moreover, she never raised this notion below, and instead argued only that she had disability-related claims for “different treatment” and failure to accommodate. CP 527-532, 1926-1927. Appellant clearly has waived any theory of a disability-based hostile work environment, so the County will not address this issue further

in this brief. *See Skagit Cty. Pub. Hosp. Dist. No. 1 v. Dep't of Revenue*, 158 Wn. App. 426, 440, 242 P.3d 909 (2010) (“An appellant waives an assignment of error if it fails to present argument or citation to authority in support of that assignment.”); *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) (“Failure to raise an issue before the trial court generally precludes a party from raising it on appeal.”).

c. Appellant’s Accommodation Claim Fails Because She Could Not Perform the Essential Functions of Her Job and She Was Reasonably Accommodated.

To establish a claim that King County failed to accommodate her disabilities, Appellant must show that (1) she had a medical condition; (2) she was capable of performing the “essential functions” of her job; (3) she gave the County notice of the condition “and its accompanying substantial limitations”; and (4) upon notice, the County “failed to affirmatively adopt measures that were available . . . and medically necessary to accommodate the abnormality.” *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003) (emphasis omitted). At a minimum, Appellant cannot meet the second or fourth elements of this claim.

First, Ms. LaRose cannot prove that the County failed to provide reasonable accommodations—because the undisputed evidence shows the opposite. The County offered or provided Ms. LaRose (1) an escort, (2) extra support to assist with paperwork, (3) transitional duty assignments,

(4) alternative permanent positions, (5) more than 1.5 years of paid and unpaid leave, and (6) ongoing access to a reassignment program. *Supra* 17-18. Each measure constituted a reasonable accommodation. *See, e.g., Frisino v. Seattle Sch. Dist. No. 1*, 160 Wn. App. 765, 779, 249 P.3d 1044 (2011) (“Where multiple potential modes of accommodation exist, the employer is entitled to select the mode; the employee is not.”); *Wilson v. Wenatchee Sch. Dist.*, 110 Wn. App. 265, 270, 40 P.3d 686 (2002) (“An employer need not necessarily grant an employee’s specific request for accommodation. Rather, an employer need only ‘reasonably’ accommodate the disability.”) (quotations and citation omitted). Ms. LaRose’s own doctor, whom she offered as a witness, testified that the County’s communications and accommodations (in the form of leave) were “reasonable.” CP 2495-2496, 2500.

Appellant claims her employers had an obligation to enter an interactive process in March 2013, and lists ways they allegedly failed to support her from then through January 2015. App. Br. at 54–56. But Ms. LaRose did not give notice of a disability until March 2015. CP 2460-2461. Contrary to Appellant’s suggestion, an employer does not have an obligation to diagnose employees with disabilities and provide accommodations *sua sponte*—rather, the employee must give notice of a disability. *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 409, 899 P.2d

1265 (1995) (“[T]he employer’s duty to determine the nature and extent of the disability does not impose an investigatory duty to question any employee suspected of a disability. The employer’s duty to inquire only arises after the employee has initiated the process by notice”). Accordingly, any claim that the County failed to accommodate Ms. LaRose before March 2015 is meritless.

And Ms. LaRose admits that once she gave the County notice of her disability, the County granted the accommodations she requested, including leave, reduced caseload, and extra administrative support. CP 2460-2461, 2473-2474. Appellant makes a non-specific claim that the County should have taken more steps to accommodate her when she returned from leave in May 2015, App. Br. at 56, but she fails to meet her burden to identify *specific* accommodations she allegedly needed. *See, e.g., Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 140-41, 64 P.3d 691 (2003) (“[T]he employee carries the burden of showing that a specific reasonable accommodation was available to the employer when the disability became known”). Further, Appellant omits that her doctor released her to work on regular duty. CP 2934-2940. The doctor identified just one accommodation, which was to go to a medical appointment each week. CP 2940. Appellant has not alleged that this accommodation was violated.

Second, Appellant cannot perform the essential functions of her job. “[T]o prove a claim for failure to accommodate, a plaintiff must demonstrate that he or she can perform the essential functions of the job as determined and applied by the employer. . .” *Fey v. State*, 174 Wn. App. 435, 453, 300 P.3d 435 (2013). Indeed, “an employer may discharge a handicapped employee who is unable to perform an *essential function* of the job, without attempting to accommodate that deficiency.” *Davis*, 149 Wn.2d at 534 (quotation omitted) (emphasis in original).

On December 21, 2016, Ms. LaRose’s doctor sent King County a note restricting her from working for the County in *any* capacity for the “foreseeable future.” CP 2521-2522, 2604-2606. Ms. LaRose herself agrees with the conclusion that she has been completely unable to work for King County since at least January 2016—long before she filed the amended complaint asserting this accommodation claim. CP 2475-2478. Appellant’s inability to work for King County in any capacity precludes her accommodation claim as a matter of law.

d. Appellant Cannot Satisfy the Elements of a “Different Treatment” Discrimination Claim.

Finally, Appellant argues that she has a claim based on discriminatory adverse actions, in addition to her accommodation claim. To establish this claim, she must show that she was “1) disabled; 2)

subject to an adverse employment action; 3) doing satisfactory work; and 4) her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination.” *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488, 84 P.3d 1231 (2004).

Appellant does not argue these elements, App. Br. at 53-56, and she does not have a viable claim in any event because she cannot prove she suffered a discriminatory adverse action—*i.e.*, “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *See Marin v. King County*, 194 Wn. App. 795, 808, 378 P.3d 203 (2016). Appellant argues that she experienced unpleasant interactions—but she does not try to explain why they could qualify as adverse actions. App. Br. at 53-56. A supervisor’ annoyance is not an adverse action as a matter of law. *See Marin*, 194 Wn. App. at 809-10 (action was not “adverse” because it “did not result in a discharge, demotion, or change [in plaintiff’s] benefits or responsibilities”).

The one event that could qualify as an adverse action was Ms. LaRose’s termination—but she cannot prove that it was discriminatory, as a matter of law. Again: “[A]n employer may discharge a handicapped employee who is unable to perform an *essential function* of the job, without attempting to accommodate that deficiency.” *Davis*, 149 Wn.2d

at 534 (quotation omitted; emphasis in original). The County terminated Ms. LaRose only after she confirmed that she was not capable of working for King County *in any capacity* for the foreseeable future. CP 2604-2620. The termination was therefore lawful as a matter of law.

C. The Superior Court Erred in Holding King County Vicariously Liable for PDA's Conduct, Because the County Lacked Control Over PDA's Pertinent Operations.

Ms. LaRose's claims stem principally from conduct she alleges occurred at PDA. Before she can hold King County liable for PDA's conduct, however, she must prove that the County had the right to control PDA's day-to-day operations. The undisputed evidence shows the opposite: King County lacked control over day-to-day operations of PDA.

Notwithstanding this lack of evidence, Ms. LaRose argued that King County was liable for PDA's actions as a matter of law, relying exclusively on the Supreme Court's opinion in *Dolan v. King County*. But *Dolan* is inapposite, because that case dealt with employment benefits, not vicarious liability. Courts construe employment relationships more broadly in benefits cases than in vicarious liability cases. Indeed, *Dolan* explicitly distinguished a case addressing vicarious liability for workplace torts committed by the non-profit public defender organizations. In ignoring *Dolan's* explicit language and the undisputed evidence regarding King County's lack of control over PDA, the superior court erred.

1. Legal Standard for Application of Vicarious Liability.

“The burden of establishing the essentials of defendant’s vicarious liability is upon plaintiff.” *Davis v. Early Constr. Co.*, 63 Wn.2d 252, 256, 386 P.2d 958 (1963). In Washington, “[a] principal generally is not vicariously liable for the acts of an independent contractor. Further, a principal is not generally liable for injuries to the employees of an independent contractor.” *DeWater*, 130 Wn.2d at 137 (citations omitted); *see also Hollingbery v. Dunn*, 68 Wn.2d 75, 79-80, 411 P.2d 431 (1966). “[T]he crucial factor” in determining whether a principal is vicariously liable is whether it “exercised or retained any right of control over the manner, method, and means by which the work involved was to be performed and the desired result was to be accomplished.” , 68 Wn.2d at 81. At bottom, this analysis places a commonsense emphasis on the principal’s ability to control day-to-day work. *See Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002). Ms. LaRose failed to demonstrate that King County had control over PDA’s decision to assign her to represent Smith, the manner in which she handled his case, or the manner in which PDA responded to his conduct. She has not met her burden to hold the County vicariously liable for her claims against PDA.

2. The Evidence Shows that King County Did Not Have Authority to Control PDA’s Pertinent Operations.

As the Supreme Court found, “the defender organizations [including PDA] have autonomy to make day-to-day decisions on the representation of indigent clients.” *Dolan*, 172 Wn.2d at 307. Ms. LaRose has not rebutted this conclusion or submitted evidence that King County had authority to control her relationships with Smith or with PDA supervisors. *See Hollingbery*, 68 Wn.2d at 80 (“Whether in a given situation, one is an employee or an independent contractor depends to a large degree upon the facts and circumstances of the transaction and the context in which they must be considered.”). The evidence shows that the County had zero control over PDA’s decision to assign particular clients to particular attorneys. *Supra* at 3-4. Further, the County had no control over how PDA handled clients who behaved inappropriately or whether to reassign them. *Id.* There is nothing the County could have done to alter Ms. LaRose’s relationship with Smith, which precludes vicarious liability for PDA’s conduct. *See DeWater*, 130 Wn.2d at 140-41.

Ms. LaRose has not cited evidence that the County had the ability to control her assignment to represent Smith or remove her from his case, before she became a County employee. *E.g.*, CP 340, 343. Ms. LaRose

instead relies on a single case, *Dolan v. King County*. But *Dolan* concerns employee benefits—not vicarious liability—and is thus inapposite.

3. *Dolan* Does Not Compel a Contrary Ruling.

In *Dolan*, the Supreme Court held that “the employees of the defender organizations [including PDA] are employees of the county for purposes of PERS.” *Id.* at 320. *Dolan* did not hold that PDA employees were County employees for purposes of vicarious liability. Instead, the *Dolan* Court explicitly contrasted the PERS context from vicarious liability by distinguishing a prior case—*White v. Northwest Defenders Ass'n*, No. 94–2–09128–0 (King County Super. Ct. Dec. 2, 1994)—in which another court had held the County could not be held “vicariously liable for employment discrimination” committed by a public defense agency. *Dolan*, 172 Wn.2d at 320–21. The *Dolan* Court explained that the issue of vicarious liability was “not comparable” to the issue of PERS eligibility. *Id.* The logical interpretation of the Court’s opinion is that, prior to July 1, 2013, public defenders should be treated as “employees” of the County for purposes of PERS, not for purposes of vicarious liability.

The Court’s distinction between the employee/employer relationship in the PERS context, versus vicarious liability, reflects the well-established rule that, “under the same set of facts, an employer-employee relation may or may not exist depending upon the purpose for

which the determination is desired.” *Fisher v. City of Seattle*, 62 Wn.2d 800, 805, 384 P.2d 852 (1963); *see also Stewart v. Hammond*, 78 Wn.2d 216, 224, 471 P.2d 90 (1970) (Nell, J., concurring). Courts apply a *much* broader interpretation of who constitutes an “employee” where benefits are at issue, as opposed to vicarious liability. *See, e.g., Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 869, 281 P.3d 289 (2012).

The Court’s explicit distinction between PERS eligibility and vicarious liability controverts Ms. LaRose’s claim that *Dolan* controls. The superior court ignored the clear language of *Dolan*. This was error.¹²

V. CONCLUSION

For the foregoing reasons, King County requests that the Court of Appeals affirm the judgment of the trial court on behalf of the County.

¹² *Dolan* was later settled. The trial court entered the settlement and adopted its terms as binding on all parties, including Ms. LaRose. CP 2257-2337. The settlement confirms there is no admission of liability and public defenders became employees of the County only on July 1, 2013. *Id.* at ¶¶ 73, 85, 96.

CERTIFICATE OF SERVICE

I, Erica Knerr, certify and state as follows:

1. I am a citizen of the United States and a resident of the State of Washington; I am over the age of 18 years and not a party of the within entitled cause. I am employed by the law firm of Calfo Eakes & Ostrovsky PLLC, whose address is 1301 Second Avenue, Suite 2800, Seattle, WA 98101.

2. I caused to be served upon counsel of record at the addresses and in the manner described below, on February 1, 2018, the foregoing document.

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

DATED at Seattle, Washington, this 1st day of February, 2018.

/s/ Erica Knerr

Erica Knerr

CALFO EAKES & OSTROVSKY PLLC

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