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Court of Appeals
Division II
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No. 50858-3-II

**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 REPLY BRIEF**

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I. INTRODUCTION

Washington courts assess vicarious liability on a case-by-case, and context-by-context, basis. Indeed, “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). Thus, simply because the Supreme Court has held that employees of the Public Defender Association (f/k/a The Defender Association) (hereafter “PDA”) were King County employees *for purposes of retirement benefits*, does not mean they must be County employees for *all purposes*, including vicarious liability for workplace torts. Nonetheless, Plaintiff’s entire argument for vicarious liability is that *Dolan* controls the outcome of this case. This argument is inconsistent with Washington law.

Plaintiff does not offer any evidence to show that King County had the ability to control or prevent the allegedly tortious conduct of PDA, including her assignment to represent “John Smith.” She cannot identify any facts showing that King County controlled PDA’s day-to-day working conditions. Following well-established law governing vicarious liability, Plaintiff has thus failed to establish that the County can be held vicariously liable for PDA’s alleged conduct. The Superior Court’s grant of summary judgment to Plaintiff on this issue should therefore be reversed.

II. BACKGROUND

In her opposition, Plaintiff has not sought to offer meaningful evidence in support of vicarious liability. In fact, she has not pointed to *any* evidence that King County had the ability to control her assignment to represent Mr. Smith while she was a PDA employee, to remove her from his case, or otherwise to take action to prevent Mr. Smith from engaging in misconduct toward her before she became a County employee on July 1, 2013. Nor has Plaintiff shown that the County was aware or had any means to become aware of her interactions with Mr. Smith before that date. The undisputed evidence therefore shows that King County did not “exercise[] or retain[] 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.” *Hollingbery v. Dunn*, 68 Wn.2d 75, 81, 411 P.2d 431 (1966).

III. ARGUMENT

A. Plaintiff Has Not Met Her Burden of Proving Vicarious Liability.

King County indisputably lacked control over the allegedly tortious conduct of PDA—including the assignment of Ms. LaRose to represent Mr. Smith, and the way Ms. LaRose’s relationship with Mr. Smith was managed before July 1, 2013. *See* CP 2119–20 (Decl. of D. Morris) ¶ 6 (PDA case

assignments were made “according to guidelines determined by the [PDA] felony supervisor, and not at the discretion of King County”); *id.* ¶ 7 (assignment policies were “not set based on any instruction from King County”); *id.* ¶ 8 (“King County did not participate . . . in each internal assignment of each particular PDA client.”); *id.* ¶ 10 (King County was not involved in PDA’s decisions “about how to handle clients who might be acting inappropriately”). As a result, the superior court erred in granting summary judgment to Ms. LaRose.

At a minimum, there is a disputed question of material fact concerning whether King County is vicariously liable for PDA’s conduct. *See, e.g., Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 119, 52 P.3d 472 (2002) (“Employers are not liable for injuries incurred by independent contractors because employers cannot control the manner in which the independent contractor works.”). However, in light of Plaintiff’s total inability to identify *any* evidence demonstrating King County’s control over PDA’s workplace, this Court should not only reverse the superior court’s grant of summary judgment to Plaintiff, but should further rule that King County is not vicariously liable for PDA’s alleged conduct as a matter of law.

B. *Dolan* Did Not Hold that PDA Employees Were King County Employees for Purposes of Vicarious Liability.

In lieu of evidence, Ms. LaRose relies entirely on *Dolan v. King County*, 172 Wn.2d 299, 258 P.3d 20 (2011), in which the Court held that “the employees of the defender organizations are employees of the county for purposes of PERS.” *Id.* at 320. But *Dolan* is inapposite. In that case, the Court focused on *PERS eligibility*, not on vicarious liability for workplace torts. In fact, the Court distinguished a prior case, *White v. Northwest Defenders Association*, which held that the County was not vicariously liable for the workplace torts of public defense agencies. The Court specifically said that the issues in the two cases—*i.e.*, PERS eligibility versus vicarious liability for workplace torts—were “not comparable.” *Id.* at 320–21. Plaintiff’s argument would simply read that language out of the Supreme Court’s opinion.

In fact, Plaintiff seems to misunderstand the significance of the *Dolan* Court’s discussion of *White*. She ignores that the *Dolan* Court found the issue of PERS eligibility was “not comparable” to the issue of vicarious liability for torts. Instead, she focuses only on whether *White* itself is binding precedent, which is beside the point. Pl.’s Opp. at 21–22. The County is not relying on *White* as precedent. Rather, the County is relying on the Supreme Court’s discussion of *White*, in the *Dolan* opinion, in which the Court explicitly distinguished PERS eligibility from vicarious liability.

In ignoring the *Dolan* Court’s discussion of *White*, Plaintiff ignores the well-established principle 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*, 62 Wn.2d at 805. This is a fundamental error in Plaintiff’s analysis, because she simply assumes that the finding of PERS eligibility in *Dolan* automatically means that King County is her employer for all purposes, including vicarious liability. But *Fisher* makes clear that determination of employer/employee status must be made on a case-by-case, and context-by-context, basis.

In particular, as *Dolan*’s distinction between the PERS and vicarious liability contexts suggests, courts apply a *much* more liberal interpretation of who constitutes an “employee” where benefits are at issue, as opposed to vicarious liability. See *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 869, 281 P.3d 289 (2012); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (“Obviously control is characteristically associated with the employer-employee relationship but in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”); *Real v. Driscoll Strawberry Associates, Inc.*, 603 F.2d 748, 754 (9th Cir. 1979) (“The common law concepts of ‘employee’ and ‘independent contractor’

are not conclusive determinants of the [Fair Labor Standards Act's] coverage.” (citations and footnotes omitted).

For example, in interpreting Washington’s Minimum Wage Act, the Supreme Court rejected the “right of control” test in favor of the “economic reality test,” which focuses on whether putative employees are “as a matter of economic reality[,] . . . dependent upon the business to which they render service.” *Anfinson*, 174 Wn.2d at 869 (quotation omitted). The Court explained that “[t]he right-to-control test serves to limit an employer’s liability for the torts of another,” whereas wage laws should be construed more broadly. *Id.* at 870.

The Ninth Circuit’s decision in *Lewis v. United States*, 680 F.2d 1239 (9th Cir. 1982), is also instructive. There, a plaintiff sued the United States after being hit by a car owned by the Federal Reserve Bank. The court concluded that the Federal Reserve was not an agent of the government because the United States did not exert control over its daily operations. *Id.* at 1243. In so holding, the court distinguished a prior case, which held that Federal Reserve Banks *were* federal agents for purposes of benefits. *Id.* (distinguishing *Brinks Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 116, 120 (D.D.C.1979)). The court explained that the policies favoring a liberal standard in the context of employee benefits did not apply to the vicarious liability context. *Id.* So

too here: the principles of economic control underlying the *Dolan* Court's holding on employee benefits does not apply to the vicarious liability context.

As our Supreme Court has held, a person can be an employee for some purposes but not others, and the employment relationship is more broadly construed when benefits are at stake. Thus, the *Dolan* Court focused on King County's financial control of the agencies, and their economic dependence, without regard to whether the County controlled the methods by which they worked. By contrast, in tort cases, "the principal's supervisory power [is] crucial . . . to the question [of] whether the employer ought to be legally liable for the worker's actions." *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 51, 244 P.3d 32 (2010) (quotation omitted; final alteration in original). Accordingly, the *Dolan* findings regarding *benefits* do not control vicarious liability. In fact, *Dolan* undermines Ms. LaRose's claims because the Court found that the County lacked control over PDA's day-to-day operations. *Dolan*, 172 Wn.2d at 307 ("[T]he defender organizations have autonomy to make day-to-day decisions on the representation of indigent clients.").

Although *Dolan's* findings that the County lacked control over PDA's daily operations undermine Plaintiff's vicarious liability argument, she nonetheless briefly relies upon certain findings of the trial court in

Dolan, suggesting that they contradict the County’s cited evidence. *See* Pl.’s Opp. at 18. But once again, Plaintiff’s argument arises from her erroneous assumption that the issues in *Dolan* and this case are the same. The findings she cites are irrelevant here, because they relate to the County’s control over *finances* of PDA, including benefits, which were relevant to the Court’s analysis of PERS eligibility. *See, e.g.*, Pl.’s Opp. at 18 (quoting the *Dolan* trial court’s finding that there was a “real lack of arm’s length bargaining in regard to critical terms like benefit packages”). On the other hand, to the extent the *Dolan* Court made findings that would have been relevant to vicarious liability for workplace torts, those findings were in accord with the County’s position on this motion. *See, e.g., Dolan*, 172 Wn.2d at 307 (“There is no dispute the defender organizations have autonomy to make day-to-day decisions on the representation of indigent clients.”).¹

Plaintiff has presented no evidence suggesting that King County may be held vicariously liability for PDA’s conduct. Instead, her argument on vicarious liability relies entirely on a misinterpretation of the *Dolan* case. In accepting Plaintiff’s argument that *Dolan* controls this case, the Superior

¹ The trial court findings are also irrelevant because they have no precedential value. *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 224 n. 19, 5 P.3d 691 (2000). Plaintiff does not attempt to apply the elements of collateral estoppel or *res judicata*.

Court erred, and this Court should reverse the grant of summary judgment in favor of Plaintiff. In fact, in light of the total lack of evidence supporting Plaintiff's vicarious liability argument, this Court should grant summary judgment to King County, and hold that it cannot be held vicariously liable for PDA's conduct.

* * * *

Under Plaintiff's theory, King County would automatically be vicariously liable for *any and all* tort claims against the former public defense agencies. This is not something the *Dolan* Court foresaw or endorsed. Plaintiff's attempt to read such a holding into *Dolan* should be rejected.

IV. CONCLUSION

For the foregoing reasons, King County respectfully requests that this Court reverse the superior court's order granting summary judgment to Plaintiff on the question of vicarious liability. Instead, this Court should instruct the trial court to enter summary judgment for King County on this issue on remand.

RESPECTFULLY SUBMITTED this 18th day of May, 2018.

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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 May 18, 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 18th day of May, 2018.

s/Erica Knerr
Erica Knerr

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