Court of Appeal Cause No. 32177-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

VIRGINIA E. BURNETT, APPELLANT,

v.

STATE OF WASHINGTON,
DEPARTMENT OF CORRECTIONS, RESPONDENTS.

PETITION FOR REVIEW

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A. L&I is appearing through Ms. Burnett, who is the named party to this appeal, and was represented by Tom Scribner, and now by Carman Law Office. Accordingly, it may not enter an additional attorney without the consent of either Mr. Scribner of Carman Law Office on behalf of Ms. Burnett absent a showing that RCW 2.44.040 has been satisfied, which it cannot do on the record before the Court. Accordingly, any motion filed by the Office of the Attorney General must be deemed invalid and summarily denied.....2

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I. IDENTITY OF PETITIONER

Virginia E. Burnett, by and through attorneys Janelle M. Carman and John C. Julian, respectfully requests that this Court grant this Petition for Review on the grounds identified below.

II. CITATION TO COURT OF APPEALS DECISION

Ms. Burnett seeks review of Court of Appeals decision terminating review in this matter, found at ---P.3d. ---, 2015 WL 1809216 (published April 16, 2015).

III. ISSUES PRESENTED FOR REVIEW

(1) Whether L&I's ability to "compromise" an assigned case pursuant to Chapter 51.24 RCW includes the right to a complete dismissal once the named party has relied upon the assignment to their detriment?

(2) Whether an employee involved in an assignment case pursuant to Chapter 51.24 RCW has standing to assert the Department's attorney's conflict of interest and to contest the State's failure to comply with constitutional and statutory requirements when the State takes action to force the substitute counsel solely for the purpose of dismissing an employee's appeal?

(3) Whether, upon assignment and election to pursue a third-party recovery action, L&I has a duty of good-faith to the injured worker?

(4) Whether a state employee should be barred from pursuing a tort claim against a state agency who was a third-party tortfeasor?

IV. STATEMENT OF THE CASE.

On March 9, 2009, Virginia Burnett, an employee of Walla Walla Community College, went to the Washington State Penitentiary in Walla Walla to teach a class. Clerk's Papers (CP) at 2, 36. While walking through a metal security door, a prison guard negligently closed the door on her, crushing her shoulders and upper torso and resulting in serious, long-term injury. CP at 3, 36.

At the time of her accident, Ms. Burnett had a Professional Personal Contract with Walla Walla Community College. CP at 54-55. That Contract said, in relevant part:

> Employee agrees to perform the assigned professional services and to comply with all duties and responsibilities as enumerated in the Contract between the Board of Trustees of Community College District No. 20 and the Walla Walla Community College Association for Higher Education and the Interagency Agreement between the State of Washington Department of Corrections and State Board for Community and Technical Colleges as they now exist or hereafter amended and which by this reference are incorporated into this Contract as required by RCW 28B.50.855 as now existing or hereafter amended.

CP at 55.

The Interagency Agreement between the State of Washington Department of Corrections and the State Board for Community and Technical Colleges (hereafter "Agreement"), CP at 57-72, was executed in

June 2008 between the Department of Corrections ("Department") and the State Board for Community and Technical Colleges ("Board"). The Agreement was "for the period of July 1, 2008, through June 30, 2009." CP at 57. Ms. Burnett's accident happened during the effective period of the Agreement. A copy of the entire Agreement was filed with the Superior Court as an exhibit to the *Declaration of Tom Scribner Regarding Defendant's Motion for Summary Judgment*, CP at 57-72.

Of primary import to this case, the Agreement said, in relevant part:

> 5.5 INDEPENDENT CAPACITY: The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.
>
> 5.6 AGENT OF THE OTHER PARTY: Neither party shall represent itself as an agent of the other party or hold itself out to be vested with any power or right to contractually bind or act on behalf of the other party.

Agreement, §§ 5.5 and 5.6, CP at 68 (emphasis supplied).

Following the March 9, 2009, incident, Ms. Burnett filed for benefits and received compensation from the Department of Labor and Industries (L&I) under the payment schedule established for injured workers. *See Declaration of Debra Hatzialexiou* at Exhibit 1, Appendix N.

As is most pertinent for the case at hand, Ms. Burnett received a letter from L&I informing her of her right to pursue an additional action against the third-party tortfeasor, the Department of Corrections (DOC), as its employee had caused the incident. *Id.* The letter further stated that if she did not elect to do so, the matter would be assigned to L&I. *Id.* In the event of such an assignment, if L&I obtained an award that exceeded its interest in being reimbursed for its payment to Ms. Burnett, Ms. Burnett would receive any surplus. RCW 51.24.060.

Ms. Burnett accepted that course of action. Accordingly, she did not respond to the letter, nor retain counsel. *See Declaration of Debra Hatzialexiou* at Exhibit 1, Appendix N. L&I, upon assignment, chose to pursue the cause of action against the Department of Corrections, not in its own name, but in the name of Ms. Burnett. L&I contracted with Walla Walla attorney Scott Wolfram to serve as a Special AAG to represent L&I in Ms. Burnett's name, and subsequently, attorney Tom Scribner once attorney Wolfram was elected as a superior court judge. *Id.* at Exhibit 3.

On March 1, 2012, in cooperation with Mr. Scribner's efforts, Mr. Scribner assisted Ms. Burnett in filing her *Complaint for Damages*, alleging among other things that the DOC employee was negligent in his actions, and that she suffered emotional distress and subsequent physical limitations. CP at 1. The complaint is written on letterhead from the law

office of Scott Wolfram. *Id.* However, when Attorney Scribner substituted for Attorney Wolfram, he also signed a special agreement, wherein he became a Special Assistant Attorney General for purposes of pursuing the underlying litigation. *See Declaration of Debra Hatzialexiou* at Exhibit 1, Appendix N.

On March 11, 2013, the Department filed its *Answer and Affirmative Defenses to Plaintiff's Complaint*. CP 5-9. On November 1, 2013, the Department filed its *Motion for Summary Judgment*. CP at 11-12. The motion alleged that as a result of this state employee's employment, she was barred in suing a separate state agency (despite third party tortfeasor status) under the worker's compensation regulations. CP at 14-27.

On December 23, 2013, the Walla Walla County Superior Court heard argument on the Department's *Motion for Summary Judgment* and entered an *Order Granting Defendants' Motion for Summary Judgment.* CP at 86-87. The Office of the Attorney General represented the Department of Corrections in the superior court action.

Upon Ms. Burnett's timely appeal, Division III of the Court of Appeals undertook the matter without oral argument. However, prior to

issuing its opinion, the Court requested that the parties answer five questions.[1] Appendix P.

Shortly after the questions issued, Mr. Scribner received a directive from L&I that, rather than filing a response to the court's inquiry, he should dismiss the case *with prejudice*. *See Declaration of Debra Hatzialexiou* at Exhibit 1, Appendix N. The result would have been to deprive Ms. Burnett of any hearing on the merits and to cut off her access to any overage in damages collected by the tort action.

In response to L&I's directive, Mr. Scribner declined, citing a conflict of interest between L&I and Ms. Burnett's interests, which arose

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[1] The Court of Appeals directed counsel to answer the following:
(1) Should this court give consideration to the fact that the Department of Labor & Industries, the state branch that administers workers' compensation law, is the party bringing this lawsuit? Stated differently, should this court give any deference to the Department of Labor & Industries' apparent position that Walla Walla Community College and the Department of Corrections are distinct employers for purposes of RCW 51.24.030?
(2) Does each branch of state government separately pay premiums into a Department of Labor and Industries' fund in order for its employees to be covered for work injuries?
(3) Did Walla Walla Community College pay premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries?
(4) Did the Department of Corrections pay premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries?
(5)If neither Walla Walla Community College or the Department of Corrections paid premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries, what, if any entity, did?

as a result of the assurance that this injured worker would receive any award in excess of the Department's reimbursement. RCW 51.24.060.

L&I ignored Mr. Scribner's concerns, and instead, Anastasia Sandstrom of the Attorney General's Office entered her notice of appearance in the matter on behalf of L&I itself, although it was not a named party. Appendix Q. At that point in time, Mr. Scribner remained attorney of record for Ms. Burnett.

L&I subsequently moved to compel Mr. Scribner to withdraw from the case, and also sought to dismiss the case on behalf of Ms. Burnett. Appendix M, P. DOC, also represented by the Attorney General's Office albeit via a different Assistant Attorney General, joined in this motion. Appendix H. Notably, in its pleadings, L&I expressly stated that it would *not* permit Ms. Burnett to re-elect to pursue the appeal on her own.[2] Of course, by then the statute of limitations would have prevented Ms. Burnett from filing her own separate action subsequent to a dismissal. Chapter 4.16 RCW.

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[2] As argued before the Court of Appeals, it is manifest that either the Attorney General's Office or another state actor did not want the court to issue its opinion once it believed it understood the direction the court was leaning given its question. That this is so is illustrated by the fact that there is virtually no other reason to have withdrawn the appeal once the briefing was completed. As discussed below, such a self-interested viewpoint cannot be taken as fairly representing the interest of a named, injured party, and therefore, must constitute a conflict of interest.

Neither DOC nor L&I filed any certificate pursuant to RPC 1.10 regarding a firm's dual representation.

On 1/26/15, Janelle M. Carman and John C. Julian substituted for Tom Scribner as counsel on behalf of Ms. Burnett. Appendix J.

Ms. Burnett responded to L&I's motions, and also moved to disqualify the Attorney General's Office from its representation of L&I contrary to her interests, given the apparent conflict of interest resulting from abrupt and detrimental change of direction from the Attorney General's Office and the absence of compliance with RPC 1.10. Appendix I.

On April 16, 2015, in a split decision, the Court of Appeals issued a published opinion on the motions. In its opinion, the Court held that, despite being a party in interest, Ms. Burnett lacked standing to challenge the conflict of interest brought about by the Attorney General's dramatic and detrimental about-face, and that she also lacked standing to challenge whether the State had properly satisfied RCW 2.44.040 in its actions. Slip Op. at 7-12. The Court also declined to rule on the merits of the appeal, which itself were a matter of first impression. Slip Op. at 19-20.

In yet another issue of first impression, the Court of Appeals also ruled that, pursuant to RCW 51.24.050(1), the word "compromise," includes the right to dismiss a lawsuit to the detriment of the named

injured worker, despite the lack of any other recourse, and in contradiction to stated public policy under RCW 51.04.062. The Court also held that, once L&I elected to undertake representation in an injured worker's name, no duty of good faith existed in pursuing that claim. Slip Op. at 16.

Having decided the motions, the Court of Appeals granted L&I's motion to dismiss the case without reaching the merits of the novel question raised by the appeal. Slip Op. at 19-20. Ms. Burnett was subsequently left without recourse.

In his dissent, Judge Brown aptly noted that the majority's decision "unnecessarily and unfairly harms [Ms. Burnett] and all workers similarly situated who seek a recovery in excess of [L&I]'s subrogation interest, and that "the State is now the wolf guarding the henhouse because it too has an interest in the outcome." Dissent at 1, 2.

Ms. Burnett now seeks review by this Court.

V. ARGUMENT IN SUPPORT OF REVIEW

(1) This Court should accept review because, as a matter of first impression, the Court of Appeals improperly construed the statutory language of Chapter 51.24 RCW in contravention to due process and stated public policy considerations.

In dismissing Ms. Burnett's appeal, the Court of Appeals relied primarily upon its conclusion that, pursuant to the language in Chapter 51.24 RCW, L&I's ability to "compromise" a lawsuit assigned to it also

includes the authority to completely dismiss a lawsuit regardless of its impact upon the named, injured worker. Slip Op at 15-19. That statute reads, in relevant part:

> An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or *compromise* the action in its discretion in the name of the injured worker, beneficiary or legal representative.

RCW 51.24.050 (1) (emphasis supplied).

The term "compromise" had not previously been construed in this context by any Washington court. Stated simply, the lower court ruled that, as a matter of law, RCW 51.24.050(1) grants L&I the ability to "compromise" a lawsuit, and that the term is inclusive of the right to dismiss a suit to the detriment of the named party in interest, despite the fact that the named party may have no other recourse by which to recover, be it by virtue of an expired statute of limitations, or simple inability to afford counsel.[3]

In support of its conclusion, the lower court cited to the statutory language in RCW 51.24.050(1) stating that an injured worker may elect to

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[3] This of course, becomes particularly problematic in the industrial insurance context, given that the party seeking recovery is a worker who, by definition, has been injured, and may be unable to generate sufficient income to afford an attorney, even if he or she could otherwise do so if healthy.

pursue litigation against a third-party tortfeasor, and that failure to do so assigns the matter to L&I for purposes of pursuing a third-party claim. Slip Op. at 16. The court also pointed out the statutory language under RCW 51.24.050(1) that permits L&I to "prosecute or compromise the action in its discretion in the name of the injured worker." *Id.* The court went on to note that in this instance Ms. Burnett did not elect to pursue the matter, thereby assigning the case to L&I, and that the ability to control the litigation must logically consume the ability to dismiss. *Id. at* 18-19.

However, the court ended its substantive analysis at this point, and in so doing, failed to consider whether its broad construction of the term "compromise" has either due process or public policy implications. Further, the court's construction presumes that an injured worker has the initial ability to prosecute an action against a third-party tortfeasor, when in fact, assignment may occur for a variety of reasons, including the inability to afford counsel – a plain access to justice issue that can result in the deprivation of important due process rights if the court's construction of the term "compromise" is upheld. Additionally it is manifest that such a construction proposed by the court below also permits L&I to act in contravention to explicit state policy regarding injured workers, which is to maximize outcomes for injured workers, unless a duty of good faith is implied by this Court. RCW 51.04.062

Unfortunately, in reaching this conclusion, the Court of Appeals expressly stated that to imply a duty of good faith to an assignment cause of action would be reading language into the statute that does not exist. Slip Op. at 16. Such an interpretation conflicts with well-established principles requiring good faith when representing a party's interest. *E.g.*, Civil Rule (CR) 11. Ultimately, the lower court erred by construing the duty of good faith *out* of this statute, to the detriment of all similarly situated injured workers in contradiction to the purpose of the Legislature.

Ms. Burnett contends, as she did below, that Chapter 51.04 RCW requires the Department to engage in good faith when in fact it opts to take on an assignment case. Such a construction is necessary in order to effectuate the intent of the legislature with regard to L&I claims. Indeed, our legislature has expressly stated that the intent of the L&I statues is to "focus on achieving the best outcomes for injured workers." RCW 51.04.062. The ruling by the court below directly conflicts with this stated purpose and instead erroneously removes the good faith requirement out of the statute.

By construing the term "compromise" in such a broad fashion without inferring a duty of good faith, the Court of Appeals created a policy that permits the State to undertake the prosecution of a third-party action in the name of the injured worker, and subsequently undermine that

injured worker's case by dismissing the action in such a manner where, as here, the injured worker has no further recourse after having relied upon the State's pursuit of his or her claim.[4] This cannot be consistent with stated public policy of "best outcomes for injured workers." Therefore, this Court should grant review.

(2) This Court should also accept review because the Court of Appeals denied Ms. Burnett procedural and substantive due process by improperly concluding that, despite being a named party, she did not have standing to assert a conflict of interest and seek the disqualification of the Attorney General's Office, or assert that the State failed to satisfy RCW 2.44.040 once it became apparent that her interests were no longer represented by L&I.

The essential elements of procedural due process include the right to notice and a meaningful opportunity to be heard. *Matthews v. Eldridge*, 424 U.S. 319, 348, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). Moreover, "[w]hen the State seeks to deprive a person of a protected interest, procedural due process requires that an individual receive notice of the deprivation and an opportunity to be heard to guard against erroneous

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[4]Once again, it is noteworthy that in this case the State made plain in its pleadings that it would not grant re-election of Ms. Burnett's case to her. As was pleaded below, it is reasonable to conclude this tactical decision was made because the State (inclusive of the Office of the Attorney General, L&I, and DOC) did not want to have an appellate opinion on the court's questions – clearly acting in its own self-interest, rather than pursuing Ms. Burnett's claim diligently, competently, and in good faith – an obligation all attorneys share, regardless of public or private in nature.

deprivation." *Id.* The process provided to Ms. Burnett failed to meet basic constitutional requirements. As such, review is appropriate.

To determine the level of due process to provide, a court must consider three factors: (1) The private interest affected; (2) the risk that the relevant procedures will erroneously deprive a party of those interests; and (3) any government interest involved. *City of Bremerton v. Hawkins*, 155 Wn.2d 107, 110, 117 P.3d 1132 (2005). Here, by denying Ms. Burnett standing to challenge L&I's motion to dismiss the appeal filed in her name, the Court of Appeals denied Ms. Burnett any meaningful opportunity to have her objections or appeal heard on their merits. The Court's error is compounded by virtue of the reality that it improperly engaged in fact-finding, and relied upon incorrect facts in making its erroneous determinations.

In its opinion, the lower court states that "Virginia Burnett lacks standing to assert the disqualification of the Attorney General's Office since any conflict of interest is between other parties." Slip Op. at 10. The court went on to note that this decision was based upon its belief that"[s]ince the Attorney General's Office has not represented Virginia Burnett, she lacks standing to forward her motion of disqualification." *Id.* This factual determination was in error.

Even a brief review of the record demonstrates the state first contracted with attorney M. Scott Wolfram, then attorney Tom Scribner to serve as a "Special Assistant Attorney General" in this matter.[5] *See Declaration of Debra Hatzialexiou* at Exhibit 1, Appendix N. This information is further alluded to in the pleadings filed on behalf of L&I in support of its motions. Importantly, this fact was not found by the Superior Court, but rather, appears to have been determined by the Court of Appeals on review of the motions before it. *See Generally*, Slip Op.

It is axiomatic that appellate courts do not engage in fact-finding exercises, and that the appropriate course of action where such facts are required is to remand to the trial court for fact finding. *Berger Eng'g Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959). To the extent the lower court engaged in fact-finding, and relied upon those incorrect facts in reaching its determination, such action was an abuse of its discretion, even ignoring the deprivation of due process that occurred from the

[5] Indeed, the documentation provided to the Court of Appeals in support of the State's motions to dismiss attorney Tom Scribner included the contract stating that he was acting as a "Special Assistant Attorney General," and therefore, working for the attorney general's office at the time the conflict arose. For the Court of Appeals to find that as assigned case under RCW 51.24.050, Ms. Burnett was not represented by the attorney general's office merely due to geographic limitations requiring a contract to gain said attorney is simply incorrect, and this Court should so determine on review.

resulting ruling. It appears that that abuse of discretion, at least in part, led the Court of Appeals to an erroneous decision that deprived Ms. Burnett of her due process rights with regard to this action.

The Court of Appeals also ruled that Ms. Burnett did not have standing to assert that the State failed to comply with the requirements of RCW 2.44.040 in its attempt to change counsel for the sole purpose of dismissing her appeal. Slip Op. at 12. As correctly stated by that court, the law is plain that"[o]ne lacks standing to assert an argument, when one has no proprietary, personal, or pecuniary rights at stake." *Id.* However, the court went on to properly recognize That Ms. Burnett is a real party in interest to the dispute because she stands to gain from the result of the litigation under RCW 51.24.060; Slip Op. at 13. As a matter of law then, the Court of Appeals erred in holding that Ms. Burnett lacked standing as the named party in interest for purposes of asserting that the State failed to satisfy the requirements of RCW 2.44.040, and its error deprived Ms. Burnett of due process in this matter. This Court should accept review to correct this error of law.

(3) This Court should accept review because the Court of Appeals erred by failing to review the substantive merits of the case below, and in so doing, set dangerous precedent for injured workers who assign their causes of action to the state.

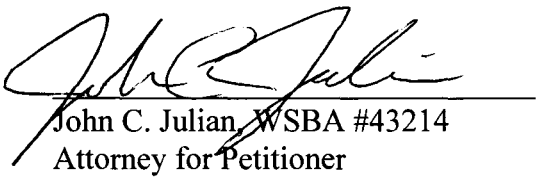
As stated above, the underlying contract issue is one of first impression in Washington. At issue was the question of whether, as a result of a state employee's employment, he or she was barred from suing a separate state agency (despite third party tortfeasor status) under the worker's compensation regulations. In refusing to reach the merits of this issue and instead permitting the State to act to prevent a definitive ruling, the Court of Appeals has essentially permitted the state to continue to assert its position that an injured state worker cannot assert a claim against third-party state tortfeasor merely because of his or her employment. This question is a matter of public policy, and certainly was not moot, given that the inter-agency contract likely exists for all similarly-situated state employees, and therefore, potentially impacts the due process rights of a great many employees who are at risk for workplace injuries. This Court should accept review on this question also, and rule upon the merits of the case.

VI. CONCLUSION

The issues in this matter present legal errors made by the court below and multiple questions of first impression which have significant public policy considerations. Accordingly, this Court should accept review, reverse the Court of Appeals, and proceed to rule upon the merits of the initial appeal, as the initial appeal presented a novel issue important

to public policy. Alternatively, this Court should at a minimum, accept review, reverse the Court of Appeals, and permit Ms. Burnett to re-elect to proceed on her own for purposes of completing the appeal, as she remains a party in interest.

Respectfully Submitted this 18th day of May, 2015 by



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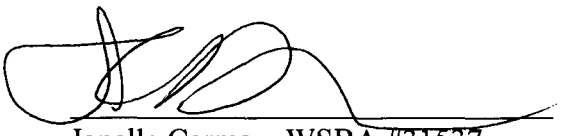

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Appendix A

FILED
APRIL 16, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

VIRGINIA E. BURNETT, Appellant, v. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Respondent, JOHN DOE GUARD, Defendant.	)	No. 32177-1-III PUBLISHED OPINION

FEARING, J. — Pending before us are three motions: (1) the Washington State Department of Labor & Industries' (DLI's) motion to remove attorney Tom Scribner from representing it, (2) Virginia Burnett's motion to disqualify the Washington State Attorney General's Office from representing DLI and her, and (3) DLI's motion to dismiss this appeal. We deny DLI's motion to remove counsel Tom Scribner as moot. We deny Virginia Burnett's motion to disqualify the Attorney General's Office. Last, we

grant DLI's motion to dismiss the appeal. Therefore, we do not reach the merits of this appeal.

FACTS

This appeal began as a challenge to the superior court's ruling that DLI, subrogee to the rights of Virginia Burnett, cannot recover on a worker compensation third party claim against the Washington State Department of Corrections (DOC) because Burnett worked in the same employ as the DOC worker who injured Burnett. Burnett, an instructor at Walla Walla Community College (WWCC or the College), sustained injuries in the course of employment with WWCC when she taught a class at the Washington State Penitentiary operated by DOC. Both WWCC and DOC are arms of state government. As Burnett walked through a metal door of the penitentiary, an eager guard closed the door on her.

DOC operates twelve prison facilities including eight major prisons and four minimum-security prisons. The Washington State Penitentiary, opened in 1887 before statehood, is a DOC men's prison located in Walla Walla. With an operating capacity of 2,200, it is the second largest prison in the state.

Like most states, the state of Washington operates a system of community and technical colleges to offer an open door to every citizen, regardless of his or her academic background or experience, at a cost normally within his or her economic means. RCW 28B.50.020. The State Board of Community and Technical Colleges (the Board) administers the community colleges. RCW 28B.50.020. The state system consists of 34

public, two-year institutions of higher education which specialize in vocational, technical, worker retraining, and university transfer programs. The state of Washington is divided into 30 community college districts with District 20 encompassing the counties of Asotin, Columbia, Garfield and Walla Walla. RCW 28B.50.040.

WWCC serves District 20. The principal WWCC campus lies east of the city of Walla Walla. The college also operates a branch campus in Clarkston, 100 miles to the east, and a teaching facility at the Washington State Penitentiary. The college has an average annual enrollment of about 9,000 students.

Research and experience show that providing education and vocational training to criminal offenders reduces recidivism. As part of its mission to rehabilitate offenders, DOC strives to provide every inmate with basic academic skills as well as educational and vocational training designed to meet the assessed needs of the offender. RCW 72.09.460. The legislature authorized correction facilities to implement postsecondary education programs with accredited community colleges. RCW 72.09.465.

DOC and the Board collaborate to provide higher education to those incarcerated in the state prison system, including the receipt of education from WWCC for prisoners confined to the Washington State Penitentiary. DOC and the Board could have, but did not, established a separate legal entity to conduct the joint undertaking. RCW 39.34.030(4). Pursuant to the Interlocal Cooperation Act, chapter 39.34 RCW, the two entities yearly enter an interagency agreement that governs this collaboration. The relevant agreement imposed on the Board the duty to hire teachers and instructors and on

DOC the duty to pay for instruction services. Section 3.1 of the agreement obligated the Board to hire 4,330 full time instructors and DOC to pay the Board up to $18,230,000 for instructional services. Sections 5.5 of the interagency agreement established the continued independence of DOC and community colleges. The paragraph reads:

> 5.5 INDEPENDENT CAPACITY: The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and *shall not be considered for any purpose to be employees or agents of the other party.*

Clerk's Papers (CP) at 68 (emphasis added).

WWCC hired Virginia Burnett as a basic skills instructor at the WWCC penitentiary campus. The College and Burnett signed a professional personnel contract. Virginia Burnett's 2009 W-2 identified her employer as "Walla Walla Community College." CP at 56.

On March 9, 2009, Virginia Burnett went to the Washington State Penitentiary to teach a class. As she walked through a metal door, a prison guard closed the door. The door crushed Burnett's shoulders and upper torso. Burnett sustained an industrial injury for which DLI paid worker compensation benefits.

PROCEDURE

RCW 51.24.030(1), a section of the Industrial Insurance Act, Title 51 RCW, authorizes actions against third person tortfeasors, such as DOC and its guard, for one who recovers worker compensation. The statute reads:

> If a third person, *not in a worker's same employ*, is or may become liable to pay damages on account of a worker's injury for which benefits

> and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(Emphasis added.) If the injured worker elects to bring suit against a third party tortfeasor, the worker must give notice to DLI. RCW 51.24.030(2). DLI may file a notice of statutory interest in the recovery. RCW 51.24.030(2).

In the event the injured worker fails to give notice of election to DLI, DLI may demand, by a certified letter, that the worker elect whether or not to pursue a claim against the third party tortfeasor. RCW 51.24.070. If the employee fails to elect to pursue a claim, DLI may take assignment of the tort claim and bring action against the tortfeasor. RCW 51.24.050(1). Any recovery obtained by DLI is distributed as follows:

> (a) The department . . . shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;
> (b) The injured worker . . . shall be paid twenty-five percent of the balance of the recovery made . . . PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker . . . may agree to a sum less than twenty-five percent;
> (c) The department . . . shall be paid the compensation and benefits paid to or on behalf of the injured worker . . . by the department . . . ; and
> (d) The injured worker . . . shall be paid any remaining balance.

RCW 51.24.050(4).

Virginia Burnett never notified DLI that she intended to pursue a claim against DOC or its employee who prematurely closed the prison door. On May 19, 2009, DLI sent a certified letter to Burnett. The letter demanded that Burnett elect whether or not to pursue a claim against DOC and its employee. Burnett signed the mail received receipt. Burnett did not respond to the letter.

On August 6, 2009, DLI wrote Virginia Burnett again and informed her that she had assigned her third party claim to DLI and DLI would pursue the claim against DOC and the guard. DLI contracted with Walla Walla attorney Tom Scribner to file suit against DOC. On March 1, 2012, Scribner filed the suit, in Walla Walla Superior Court, under the name of Virginia Burnett against DOC and "John Doe Guard" for negligence under RCW 51.24.030(1). CP at 1-2.

An assistant attorney general appeared in the lawsuit and defended DOC. The superior court granted DOC's motion for summary judgment. The superior court reasoned that WWCC and DOC are branches of the same entity, and thus the DOC guard and Virginia Burnett were employed by the same employer. DLI, under the name of Virginia Burnett, appealed to this court. The issue on appeal was whether Burnett and the DOC guard were in the same employ within the meaning of RCW 51.24.030 such that the statute barred the suit.

In December, this court reviewed the appeal without oral argument. After conference, we sent to counsel, pursuant to RAP 12.1(b), a list of questions to answer. The questions surrounded whether each branch of state government separately paid premiums to DLI to cover its respective employees. We directed the parties to answer the questions by January 7, 2015.

On January 2, 2015, Tom Scribner, on behalf of Virginia Burnett and DLI, filed a motion for extension of time to answer the questions. On January 5, DOC, through Assistant Attorney General Jason Brown, also requested an extension of time to answer

the questions. On January 5, Assistant Attorney General Anastasia Sandstrom appeared on behalf of DLI. Sandstrom also filed, on behalf of DLI, a motion to dismiss the appeal. Because of the motion to dismiss, we held in abeyance the motion to extend time to answer the panel's questions. DLI's motion to dismiss did not comply with our rules. We directed DLI to comply with the rules by providing legal argument in support of the motion to dismiss. DLI complied with this direction and also moved to disqualify Tom Scribner as counsel for DLI.

Tom Scribner withdrew from representation of Virginia Burnett and DLI. Walla Walla attorney Janelle Carman substituted for Scribner as attorney for Burnett. Assistant Attorney General Anastasia Sandstrom continues to represent DLI. Assistant Attorney General Jason Brown, on behalf of DOC, filed a joinder in the motion to dismiss the appeal. Carman, on behalf of Virginia Burnett, filed an objection to dismissal of the appeal and a motion to disqualify the Attorney General's Office from representing her and DLI based on a conflict.

LAW AND ANALYSIS

ISSUE 1: Whether the Washington State Attorney General's Office is disqualified by reason of a conflict of interest from representing DLI because the office also represents Virginia Burnett or the opposing party, DOC?

ANSWER 1: No. The assistant attorney general has not represented Burnett. Burnett has no standing to assert a conflict of interest between DLI and DOC.

We first address the motion to disqualify filed by Virginia Burnett. Burnett's

motion to disqualify the Attorney General's Office has two facets. First, she claims that the Attorney General's Office cannot represent both DLI and her. Second, she argues that the Attorney General's Office cannot represent both DLI and DOC.

Virginia Burnett's motion implies that the Attorney General's Office represents DLI and her. This first argument fails because the Attorney General's Office has never claimed or sought to represent Burnett. The notice of appearance of Assistant Attorney General Anastasia Sandstrom is only on behalf of DLI. DLI sued under Virginia Burnett's name, but DLI has the right to use Burnett's name under RCW 51.24.050(1). DLI is a real party in interest. *Dep't of Labor & Indus. v. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987), *overruled on other grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Burnett may also be a party in interest, but she is now represented separately by Janelle Carman.

Virginia Burnett also seeks to disqualify the Attorney General's Office from representing DLI because DLI's interests conflict with DOC's and DOC is already represented by the Attorney General's Office. The attorney general is a constitutionally recognized office that acts as the attorney for state officers. CONST. art. III, § 21. Numerous statutes implement this constitutional directive and charge the attorney general with representing state agencies in litigation. Under RCW 43.10.030:

> The attorney general shall:
> (1) Appear for and represent the state before the supreme court or the court of appeals in all cases in which the state is interested;
> (2) Institute and prosecute all actions and proceedings for, or for the use of the state, which may be necessary in the execution of the duties of

> any state officer;
>
> (3) Defend all actions and proceedings against any state officer or employee acting in his or her official capacity, in any of the courts of this state or the United States.

Under RCW 43.10.040:

> The attorney general shall also represent the state and all officials, departments, boards, commissions and agencies of the state in the courts, and before all administrative tribunals or bodies of any nature, in all legal or quasi legal matters, hearings, or proceedings.

The Washington state attorney general is the legal adviser to DLI. RCW 51.52.140. The attorney general represents DLI in court litigation concerning worker compensation claims. *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 774, 466 P.2d 151 (1970). RCW 72.09.530 implies that the Attorney General's Office is the attorney for DOC. *See also McKee v. Dep't of Corr.*, 160 Wn. App. 437, 248 P.3d 115 (2011).

A private law firm would be precluded from representing competing interests in the same lawsuit, such as the interests held here by DLI and DOC. RPC 1.7(a)(1); RPC 1.10(a). Ethical rules and case law treat the State Attorney General's Office differently, however. To the extent that the attorney general is not a party to an action or personally interested in a private capacity, the attorney general may represent opposing state agencies in a dispute. *Reiter v. Wallgren*, 28 Wn.2d 872, 879-80, 184 P.2d 571 (1947); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 773 (Tenn. Ct. App. 2001); 7 AM. JUR. 2D *Attorney General* § 20 (2007). A different assistant attorney general can and should be assigned to handle inconsistent

functions. *Wash. Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 480, 663 P.2d 457 (1983).

We could, but do not, rest our decision on the motion to disqualify the Attorney General's Office on the basis that Washington law permits any conflict. We base denial of the motion on another ground. We hold Virginia Burnett lacks standing to assert the disqualification of the Attorney General's Office since any conflict of interest is between other parties.

Although no Washington decision has addressed standing needed to seek disqualification of counsel, the majority, if not universal, rule is that only a party who has been represented by the conflicted attorney has standing. *See In re Yarn Processing Patent Validity Litig.*, 530 F.2d 83, 88 (5th Cir. 1976); *Info. Sys. Assocs. v. Phuture World, Inc.*, 106 So. 3d 982, 984-85 (Fla. Dist. Ct. App. 2013); *Great Lakes Constr., Inc. v. Burman*, 186 Cal. App. 4th 1347, 1356, 114 Cal. Rptr. 3d 301 (2010); 7 AM. JUR. 2D *Attorneys at Law* § 188 (2007); *see generally* Eric C. Surette, Annotation, *Standing of Person, Other than Former Client, to Seek Disqualification of Attorney in Civil Action*, 72 A.L.R.6TH 563 (2012). The standing rule draws its strength from the logic of the rule itself, which is designed to protect the interests of those harmed by conflicting representations rather than serve as a weapon in the arsenal of a party opponent. *Mills v. Hausmann-McNally, SC*, 992 F. Supp. 2d 885, 891 (S.D. Ind. 2014). Since the Attorney General's Office has not represented Virginia Burnett, she lacks standing to forward her motion of disqualification.

The dissent wishes that the majority would not address the question of whether the Attorney General's Office should be disqualified and claims that our opinion on this question is dicta. We address this issue because Virginia Burnett filed a motion to disqualify the Attorney General's Office. We need to resolve the motion to disqualify in order to resolve DLI's motion to dismiss. If we disqualified the office, we would need to determine if the pleadings filed by the office, including the motion to dismiss, should be stricken.

ISSUE 2: Must DLI demonstrate payment of Tom Scribner's bill before it may substitute other counsel?

ANSWER: No. Virginia Burnett does not hold standing to assert the pecuniary interest of an attorney.

Virginia Burnett additionally argues that this court should not entertain a motion to dismiss because the Attorney General's Office has not properly appeared for DLI and thus any motion filed by the Attorney General's Office on behalf of the appellant is invalid. Burnett claims that, under RCW 2.44.040, DLI must first provide proof that DLI paid Tom Scribner's attorney fees.

RCW 2.44.040 reads:

> The attorney in an action . . . may be changed at any time before judgment or final determination as follows:
> (1) Upon his or her own consent, filed with the clerk or entered upon the minutes; or
> (2) Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; but no such change can be made

> until the charges of such attorney have been paid by the party asking such change to be made.

The structure of the statute creates an ambiguity. The reader is uncertain as to whether the last clause requiring payment of the attorney extends to both subsection (1) and (2) of the statute. Stated differently, the statute could be read to require evidence of payment only when the withdrawal occurs by court order or the statute could be read to demand proof of payment even if the attorney withdraws by consent. Noted veteran attorney Tom Scribner voluntarily withdrew when he received differing instructions from his clients.

We choose not to construe the statute, but rather hold that Virginia Burnett lacks standing to assert the dictates of RCW 2.44.040. We applaud Burnett's desire to protect the pecuniary interests of an attorney, but the attorney should assert any right to payment. One lacks standing to assert an argument, when one has no proprietary, personal, or pecuniary rights at stake. *Aguirre v. AT&T Wireless Servs.*, 109 Wn. App. 80, 85, 33 P.3d 1110 (2001); *In re Estate of Wood*, 88 Wn. App. 973, 976, 947 P.2d 782 (1997).

ISSUE 3: Does DLI hold the prerogative to seek dismissal of the appeal without approval of Virginia Burnett?

ANSWER 3: Yes.

Virginia Burnett next argues that she has an interest in the appeal and this lawsuit since she may have a reasonable expectation of receiving some of the recovery. Accordingly, she contends that DLI lacks the statutory authority to dismiss the appeal in contravention to her wishes and to her detriment. She maintains that allowing DLI to

assume an action for the benefit of the individual and control both ends of the controversy creates an inherent conflict to the detriment of the worker and is therefore violative of public policy. We reject Virginia Burnett's arguments because Washington statutes demand a contrary outcome. Those same statutes afforded Burnett the opportunity to control this litigation and this appeal, but Burnett neglected to assert those rights.

We recognize that Virginia Burnett is a real party in interest to this dispute. She could recover some of any recovery against DOC. Nevertheless, DLI is also a real party in interest and DLI gained the right to control the litigation, including the right to dismiss the suit, when Burnett assigned her rights to the third party claim to DLI.

Because Virginia Burnett assigned her third party claim to DLI, DLI is the real party in interest as taught in *Department of Labor and Industries v. Wendt*, 47 Wn. App. 427, 735 P.2d 1334 (1987), *overruled on other grounds by State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999). Victor Wendt assaulted Roger Heinrich in the course of the latter's employment. Heinrich, a Seventh-day Adventist minister, refused to pursue any claim against Wendt for religious reasons and thereby assigned his cause of action to DLI who had paid Heinrich worker compensation benefits. DLI filed the lawsuit under the name of Heinrich, but amended the caption, at the request of Heinrich, to name the department as the plaintiff. On appeal, Wendt argued that DLI could not pursue the action in its own name. This court disagreed. We held that, pursuant to RCW 51.24.050, DLI could proceed, as the assignee, under its own name. DLI was the real

party in interest by reason of the assignment. The case does not necessarily preclude the employee from also being a real party in interest, however.

According to one line of cases, the real party in interest is the person who possesses the right sought to be enforced. *Peyton Bldg., LLC v. Niko's Gourmet, Inc.*, 180 Wn. App. 674, 680, 323 P.3d 629 (2014); *Riverview Cmty. Grp. v. Spencer & Livingston*, 173 Wn. App. 568, 576, 295 P.3d 258 (2013), *rev'd on other grounds*, 181 Wn.2d 888, 337 P.3d 1076 (2014); Philip A. Trautman, *Joinder of Claims and Parties in Washington*, 14 GONZ. L. REV. 103, 109 (1978). Under another line of decisions, the real party in interest is the person who, if successful, will be entitled to the fruits of the action. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 716, 899 P.2d 6 (1995). General doctrine recognizes that there may be more than one real party in interest. *Nw. Indep. Forest Mfrs.*, 78 Wn. App. at 716; 3A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 17, at 420 (6th ed. 2013). Virginia Burnett may be a real party in interest with DLI, but drawing this conclusion does not resolve whether DLI must obtain Burnett's approval to dismiss the appeal.

RCW 51.24.050(1) and RCW 51.24.070 control the question of whether DLI possesses the right to dismiss the appeal without Virginia Burnett's approval. The first statute reads:

> (1) An election not to proceed against the third person operates as an *assignment of the cause of action* to the department or self-insurer, which may prosecute or *compromise the action in its discretion in the name of the injured worker,* beneficiary or legal representative.

(Emphasis added.) RCW 51.24.070 reads, in relevant part:

> (1) The department . . . may require the injured worker or beneficiary to exercise the right of election under this chapter by serving a written demand by registered mail, certified mail, or personal service on the worker or beneficiary.
>
> (2) Unless an election is made within sixty days of the receipt of the demand, and unless an action is instituted or settled within the time granted by the department . . ., the injured worker or beneficiary is deemed to have assigned the action to the department . . . .
>
> . . . .
>
> (4) If the department . . . has taken an assignment of the third party cause of action under subsection (2) of this section, the injured worker or beneficiary may, at the discretion of the department or self-insurer, exercise a right of reelection and assume the cause of action subject to reimbursement of litigation expenses incurred by the department or self-insurer.

Under RCW 51.24.070, Virginia Burnett could have protected her rights to recover by notifying the department of an election to pursue the suit. Even today, she could ask the department to permit her to exercise a right of reelection. She has not requested reelection.

In *Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1998), our Supreme Court precluded the injured worker from pursuing a third party claim against the tortfeasor, when the worker failed to respond to a letter from DLI demanding that he give notice if he elected to pursue the claim. Because of the lack of a response, DLI settled the claim with the tortfeasor's liability insurance carrier. The Supreme Court has also held that DLI owns sole discretion in determining whether to compromise its right to reimbursement of worker compensation benefits. *Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 903, 814 P.2d 666 (1991).

RCW 51.24.050(1) grants DLI the right to "compromise" the third party claim and omits any reference to any veto power in the injured worker. No Washington decision addresses the meaning of "compromise" in the context of this statute. Virginia Burnett argues that the term does not extend to dismissing the suit without recovery. She contends that, as a matter of public policy, DLI has a duty to ensure that Burnett's interests are pursued diligently. Accordingly, DLI can settle but not dismiss the case.

Virginia Burnett's contention disregards logic. Burnett advocates holding DLI to a duty of good faith when compromising a claim assigned to it. We would be reading additional language into the statute if we reached this conclusion. Without a duty of good faith, presumably DLI could settle for $1,000 or even $1. These hypotheticals suggest the right to compromise includes the right to dismiss.

Decisions hold, in other contexts, that an assignee of a chose in action assumes all rights of the assignor, which rights should include the right to dismiss the chose without consent of the assignor. An assignee of a chose in action takes those rights coextensive with those of the assignor at the time of the assignment. *Home Indem. Co. v. McClellan Motors, Inc.*, 77 Wn.2d 1, 3-4, 459 P.2d 389 (1969); *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741 P.2d 1054 (1987). Burnett argues that these Washington decisions lie in another context, but Burnett cites no decisions to support her contrary position.

Other jurisdictions recognize that an assignment transfers all rights to the property assigned. As a general rule, an assignee stands in the shoes of the assignor and succeeds

to all the rights and remedies of the latter. *City of Cincinnati ex rel. Ritter v. Cincinnati Reds, LLC*, 150 Ohio App. 3d 728, 2002-Ohio-7078, 782 N.E.2d 1225, 1234. Once an assignor makes an assignment, he or she no longer retains control of the assigned claim. *Foley v. Grigg*, 144 Idaho 530, 164 P.3d 810, 813 (2007).

The dissent writes that Virginia Burnett had no option but to assign her rights to DLI in order to gain worker compensation benefits. The law reads to the contrary. Under RCW 51.24.030(2), Burnett could have elected to bring suit against DOC and retain control of the lawsuit. She failed to exercise this option.

The dissent would rule in favor of Virginia Burnett by holding that the DOC guard was not in the "same employ" of Burnett for purposes of the worker compensation statute, RCW 51.24.030(1). No Washington decision addresses this question. The overwhelming rule, if not universal rule, from other jurisdictions is that employees of separate state agencies are within the same employment, and an injured worker employed by one agency may not bring a third party complaint for negligence against an employee of another state agency. *Singhas v. N.M. State Highway Dep't*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645; *Rodriguez v. Bd. of Dirs. of Auraria Higher Educ. Ctr.*, 917 P.2d 358 (Colo. App. 1996); *Colombo v. State*, 3 Cal. App. 4th 594, 5 Cal. Rptr. 2d 567 (1991); *Linden v. Solomacha*, 232 N.J. Super. 29, 556 A.2d 346 (1989); *Egeland v. State*, 408 N.W.2d 848 (Minn. 1987); *State v. Coffman*, 446 N.E.2d 611 (Ind. Ct. App. 1983); *Wright v. Moore*, 380 So. 2d 172 (La. Ct. App. 1979); *Osborne v. Commonwealth*, 353 S.W.2d 373 (Ky. 1962).

A similar rule controls when an employee of one branch of local government sues an employee of another branch of local government for a work injury. *Jones v. Kaiser Indus. Corp.*, 43 Cal. 3d 552, 737 P.2d 771, 237 Cal. Rptr. 568 (1987); *Pulliam v. Richmond County Bd. of Comm'rs*, 184 Ga. App. 403, 361 S.E.2d 544 (1987); *Holt v. City of Boston*, 24 Mass. App. Ct. 175, 507 N.E.2d 766 (1987); *Holody v. City of Detroit*, 117 Mich. App. 76, 323 N.W.2d 599 (1982); *Berger v. U.G.I. Corp.*, 285 Pa. Super. 374, 427 A.2d 1161 (1981); *Walker v. City of San Francisco*, 97 Cal. App. 2d 901, 219 P.2d 487 (1950); *De Giuseppe v. City of New York*, 188 Misc. 897, 66 N.Y.S.2d 866 (Sup. Ct. 1946), *aff'd*, 273 A.D. 1010, 79 N.Y.S.2d 163 (1948); *Bross v. City of Detroit*, 262 Mich. 447, 247 N.W. 714 (1933). In *Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979), the Washington high court held that an employee of the county road department who was injured while driving a county truck in the course of his employment on a county road could not maintain an action against the county. The employee was limited to his rights under the worker compensation act, despite his claim that the county was serving in a dual capacity as both his employer and as a governmental agency with the duty to properly construct and maintain county roads for the use and benefit of the public.

The dissent cryptically writes that "due process includes the right to appeal." Dissent at 2. Although we have no quarrel with this proposition, the dissent cites no authority for the proposition and fails to analyze whether anyone's due process rights are violated. Virginia Burnett was given notice and an opportunity to control this litigation,

including control over any appeal, but she forewent that right. She does not argue that her assignment to DLI denied her due process.

The dissent laments that the majority engages in fact-finding, and it desires to remand the case on undeveloped issues, such as intent, waiver, notice, and disclosure. Dissent at 4. Nevertheless, the motion to dismiss does not raise any issue of waiver. No party asserts an issue of waiver. The only issue before the court on the motion to dismiss is assignment. The DLI, by unrefuted declaration, establishes that it sent notice to Virginia Burnett that she needed to assert her rights or else she assigned her third party claim to DLI. Burnett failed to assert her rights. Burnett avers no facts to the contrary. She does not contend she lacked notice or there was a failure to disclose. Fact-finding implies a need to resolve disputes of facts. Burnett has raised no issue of fact requiring an evidentiary hearing. If Burnett raised an issue of fact, we would not hesitate to remand to the trial court.

ISSUE 4: Should this court dismiss the appeal?

ANSWER 4: Yes.

DLI's motion to dismiss was filed after our judicial conference. RAP 18.2 grants us discretion whether to grant the motion under these circumstances. Stated differently, even if we agree that DLI holds the prerogative to dismiss the appeal, we could deny the motion and address the merits of the appeal.

We exercise our discretion in favor of granting the motion for several reasons. First, even if we were to issue an opinion and reverse the trial court, DLI could

voluntarily dismiss the lawsuit on remand to the superior court. CR 41(a)(1)(B). Thus, any decision on the merits would likely lack any practical import. Although we can issue an opinion in a moot case, we generally avoid issuing a decision that lacks an impact on the parties.

RAP 18.2 allows only a "party who has filed a notice of appeal" to file a motion to dismiss. One might argue that Virginia Burnett was the only party who filed the appeal, since DLI was not mentioned as the appellant on the notice of appeal. Burnett does not raise this argument. We would reject such an argument since RCW 51.24.050(1) and case law consider DLI to be the real party in interest.

The dissent wishes this court to ignore a motion to dismiss brought by the party who controls the appeal even though the motion is unopposed by the responding party, in order to rule in favor of a party who assigned her rights to the control of the litigation on a question on which other jurisdictions have ruled against that party. Then the dissent wishes this court, after ruling in favor of a party, to remand this case to the trial court to resolve facts that are undisputed and to address four irrelevant issues not raised by the parties.

The dissent may be troubled because of DLI's wasting of attorneys' and courts' time and resources by pursuing this case and then abandoning the case shortly before the issuance of this court's opinion. We concur in the dissent's umbrage.

CONCLUSION

We deny Virginia Burnett's motion to disqualify the State of Washington Attorney General's Office from representing DLI in this appeal. We grant DLI's motion to dismiss the appeal.

Fearing, J.

I CONCUR:

Korsmo, J.

No. 32177-1-III

BROWN, A.C.J. (dissenting) — Today, we fail to answer Virginia Burnett's sole assignment of error: Whether the trial court erred in summarily dismissing her negligence claim against the Department of Corrections (DOC) under the "same employ" provision of RCW 51.24.030(1). Ms. Burnett contends, and I agree, the prison guard causing her injuries and her were not in the "same employ" and therefore, the trial court erred. I would reach the merits and reverse, not dismiss. After all, Ms. Burnett had little or no choice in assigning her claim against DOC to the Department of Labor and Industries (DLI) in exchange for workers compensation benefits. Even so, she stood to statutorily share in any excess recovery over the benefits paid to her under RCW 51.24.050(4). DLI hired Tom Scribner to sue DOC in Ms. Burnett's name, giving her reason to believe her interests were being pursued at the same time as DLI's interests. Ms. Burnett's appeal is not moot. Dismissing her appeal now, without addressing the merits, unnecessarily and unfairly harms her and all workers similarly situated who seek a recovery in excess of DLI's subrogation interest.

Complicating this appeal is our process. Instead of deciding this appeal in December 2014 without argument, inquiries were later sent to appellate counsel calling for supplemental briefing. Our intrusion, at least in hind-sight, likely exposed possible

tactical and strategic problems about DLI's wisdom of pitting one state department against another and then appealing to reinstate a claim for which the State, the sovereign of both executive departments, could become liable on an excess judgment. The original briefing was silent on these topics. Unsurprisingly, motions began to fly, including those the majority describes. Mr. Scribner withdrew; Ms. Burnett's private attorney appeared, and finally, an attorney general appeared for DLI and asked us to dismiss this appeal. Of course, DOC joined that motion. But due process includes the right to appeal.

Ms. Burnett fairly argues, in essence, the State is now the wolf guarding the henhouse because it too has an interest in the outcome. Sovereign immunity does not exist. Thus, she essentially asks, if DLI wants to abandon her and its acknowledged subrogation interest in this summary judgment appeal, why not let her pursue her claim on her own with her own counsel? I tend to agree with her. I reason DLI by seeking dismissal under these circumstances has acted against workers' compensation principles and unfairly impaired Ms. Burnett's statutory right to share an excess recovery for her injuries. DLI improperly uses the assignment to shield the State, striking against her interests instead of advancing them. Misled by DLI, the majority dismisses this appeal and incorrectly reasons the assigned error is thus moot. I disagree with the majority approach for three reasons.

First, I would hold: (1) Walla Walla Community College employed Ms. Burnett as a "worker" under the Industrial Insurance Act, *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 553, 588 P.2d 1174 (1979); (2) The "dual capacity doctrine" does not operate to preclude DLI's suit, *see* 16 DAVID K. DEWOLF & KELLER W. ALLEN, WASHINGTON PRACTICE SERIES: TORT LAW AND PRACTICE, § 12:11, at 489 (4th ed. 2013); and (3) under RCW 51.24.030(1), Ms. Burnett was not in the "same employ" as the DOC guard.

While no Washington case addresses whether employees of a state agency are deemed state employees for workers' compensation purposes, three cases seem most important to the majority, *Singhas v. N.M. State Highway Dep't*, 1997-NMSC-054, 124 N.M. 42, 946 P.2d 645 (1997); *Colombo v. State*, 3 Cal. App. 4th 594, 5 Cal. Rptr. 2d 567 (1991); and *Rodriguez v. Bd. of Dirs. of Auraria Higher Educ. Ctr.*, 917 P.2d 358 (Colo. App. 1996). These cases offer little guidance. The facts and statutory schemes are distinct from our appeal. In *Singhas*, the court gave effect to New Mexico legislative intent, but Washington has no statute or definition on point. 946 P.2d at 646. In *Colombo*, both the employer and the defendant were branches of one larger state agency. 3 Cal. App. 4th at 595-96. And, unlike in *Rodriquez*, no evidence here shows one industrial insurance policy covers all state employees, or any judgment would be paid out of the same account as premiums for that policy. 917 P.2d at 358-59. Here,

we should interpret RCW 51.24.030(1) solely within the holistic statutory context of Title 51 RCW.

Even if dismissal is an option, I would reach the merits and hold our issue is not moot because it is a matter of public interest, an authoritive decision is desirable to guide public officers, and the issue is likely to reoccur. *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Dismissing eviscerates Ms. Burnett's right to appeal, and harms her and those who may follow her. The State's pecuniary interests should not be elevated over the holistic design of our workers' compensation scheme.

Second, considering all motions, no opinion should be issued dismissing this appeal merely because we have discretion to write an opinion, especially if doing so causes unnecessary harm. Exercising discretion on unreasonable or untenable grounds and applying inapplicable law to presumed facts outside our record is an abuse of discretion. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). Better would have been to stay this appeal by Chief's order and remand to the trial court with leave and direction to make any required fact-finding and rulings on the motions and get us a properly developed record with resolved facts on matters including intent, waiver, notice, and disclosure. We are not a fact-finding court; it is incorrect to presume no material facts remain on undeveloped collateral issues. Best is for us to decide the merits of the presented appeal and allow litigation of new issues at the trial court.

Third, I do not agree with opining on self-generated, collateral issues concerning the disqualification of the attorney general, alleged conflicts of interest, an attorney's pecuniary interests, Ms. Burnett's attorney-client relationships, and her standing to defend herself on these collateral matters. And, extensively opining on the merits while specifically not reaching or deciding the merits is at least dicta, and at worst advisory. *See Kitsap County Prosecuting Attorney's Guild v. Kitsap County*, 156 Wn. App. 110, 122, 231 P.3d 219 (2010) (noting appellate courts do not give advisory opinions).

In conclusion, our workers' compensation laws should be interpreted to benefit the workers who must forego private causes of action against their employers in exchange for workers compensation. These laws were not designed to shield third parties, like DOC, who are not the injured party's employer. RCW 51.24.030(1). Because I would reach the merits and reverse without addressing collateral matters and allow litigation of new issues at the trial court, I respectfully dissent.

Brown, A.C.J.

Appendix B

RCW 51.24.050
Assignment of cause of action — Disposition of recovered amount.

(1) An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

(2) If an injury to a worker results in the worker's death, the department or self-insurer to which the cause of action has been assigned may petition a court for the appointment of a special personal representative for the limited purpose of maintaining an action under this chapter and chapter 4.20 RCW.

(3) If a beneficiary is a minor child, an election not to proceed against a third person on such beneficiary's cause of action may be exercised by the beneficiary's legal custodian or guardian.

(4) Any recovery made by the department or self-insurer shall be distributed as follows:

(a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer; and

(d) The injured worker or beneficiary shall be paid any remaining balance.

(5) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(6) When the cause of action has been assigned to the self-insurer and compensation and benefits have been paid and/or are payable from state funds for the same injury:

(a) The prosecution of such cause of action shall also be for the benefit of the department to the extent of compensation and benefits paid and payable from state funds;

(b) Any compromise or settlement of such cause of action which results in less than the entitlement under this title is void unless made with the written approval of the department;

(c) The department shall be reimbursed for compensation and benefits paid from state funds;

(d) The department shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the self-insurer in obtaining the award or settlement; and

(e) Any remaining balance under subsection (4)(d) of this section shall be applied, under subsection (5) of this section, to reduce the obligations of the department and self-insurer to pay further

compensation and benefits in proportion to which the obligations of each bear to the remaining entitlement of the worker or beneficiary.

[1995 c 199 § 3; 1984 c 218 § 4; 1983 c 211 § 1; 1977 ex.s. c 85 § 3.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

Applicability -- 1983 c 211: "Sections 1 and 2 of this act apply to all actions against third persons in which judgment or settlement of the underlying action has not taken place prior to July 24, 1983." [1983 c 211 § 3.] "Sections 1 and 2 of this act" consist of the 1983 amendments of RCW 51.24.050 and 51.24.060.

Severability -- 1983 c 211: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 211 § 4.]

Appendix C

RCW 51.24.060
Distribution of amount recovered — Lien.

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;

(ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;

(iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;

(d) Any remaining balance shall be paid to the injured worker or beneficiary; and

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by a method for which receipt can be confirmed or tracked, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.

(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by a method for which receipt can be confirmed or tracked; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be

subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

[2011 c 290 § 4; 2001 c 146 § 9; 1995 c 199 § 4; 1993 c 496 § 2; 1987 c 442 § 1118; 1986 c 305 § 403; 1984 c 218 § 5; 1983 c 211 § 2; 1977 ex.s. c 85 § 4.]

Notes:

Severability -- 1995 c 199: See note following RCW 51.12.120.

Effective date -- Application--1993 c 496: See notes following RCW 4.22.070.

Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305: See notes following RCW 4.16.160.

Applicability -- Severability -- 1983 c 211: See notes following RCW 51.24.050.

Appendix D

RCW 51.04.062
Findings.

The legislature finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. Further, the legislature recognizes that controlling pension costs is key to a financially sound workers' compensation system for employers and workers. To these ends, the legislature recognizes that certain workers would benefit from an option that allows them to initiate claim resolution structured settlements in order to pursue work or retirement goals independent of the system, provided that sufficient protections for injured workers are included.

[2011 1st sp.s. c 37 § 301.]

Notes:

Finding -- Effective date -- 2011 1st sp.s. c 37: See notes following RCW 51.32.090.

Appendix E

NO. 321771-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Virginia Burnett,

Appellant,

v.

State of Washington, Department of Corrections,

Respondents.

DEPARTMENT OF CORRECTIONS RESPONSE BRIEF IN OPPOSITION TO VIRGINIA BURNETT'S MOTION TO DISQUALIFY FIRM

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I. INTRODUCTION

Virginia Burnett moves this Court to disqualify the Attorney General's Office from representing both the Department of Labor and Industries and the Department of Corrections on this appeal. Contrary to Ms. Burnett's argument, the Rules of Professional Conduct and the common law do not prohibit different Assistant Attorneys General from representing different state agencies on opposite sides of an interagency legal dispute. As such, Ms. Burnett's motion to disqualify the Attorney General's Office should be denied.

II. COUNTERSTATEMENT OF THE ISSUE

Should this Court disqualify the Office of the Attorney General from representing both the Department of Labor and Industries and the Department of Corrections where the Rules of Professional Conduct do not abrogate the authority for government attorneys from the same office to represent different state agencies on opposite sides of an appeal?

III. FACTS

Jason D. Brown, Assistant Attorney General in the Torts Division in Spokane, has represented the Department of Corrections since this lawsuit was filed nearly three years ago. Anastasia Sandstrom, Senior Counsel in the Labor and Industries Division in Seattle, filed a notice of appearance on January 5, 2015. Ms. Sandstrom also filed a motion to

dismiss this appeal on behalf of the Department of Labor and Industries, and later filed a supplemental brief in support of the motion to dismiss. Ms. Burnett responded to the Department of Labor and Industries' motion to dismiss on February 3, 2015. In her response, Ms. Burnett moves this Court to disqualify the Attorney General's Office from representing both the Department of Corrections and the Department of Labor and Industries.

IV. ARGUMENT

A. Nothing In The Rules Of Professional Conduct Prevents The Washington State Attorney General's Office From Representing Different State Agencies On Opposite Sides Of A Legal Proceeding

"When the performance of any legal duties required of the attorney general presents an actual conflict of interest, a different assistant attorney general can, and should, be assigned to handle those inconsistent functions." *Wash. State Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 480, 633 P.2d 457 (1983). The Attorney General "will be charged as a public officer with the responsibility of seeing that both sides of an issue are adequately presented to the court when there is a conflict between state officials or departments." *Reiter v. Wallgren*, 28 Wn.2d 872, 879, 184 P.2d 571 (1947). Indeed, as one Washington State Supreme Court justice noted: "[T]he Attorney General has represented both sides of the issue in

many suits brought to this court, and we have not heard it said that he neglected one or the other." *State v. Hermann*, 89 Wn.2d 349, 367, 572 P.2d 713 (1977) (Rosellini, J., dissenting).

Ms. Burnett seeks to disqualify the Attorney General's Office from representing both the Department of Labor and Industries and the Department of Corrections in this matter. Appellant's Response to Motion to Dismiss (App. Resp.) at 3-5. She mistakenly cites *Goldmark v. McKenna*, 172 Wn.2d 568, 580 n.5, 259 P.3d 1095 (2011), for the proposition that the Attorney General's Office is "held to the Rules of Professional Conduct the same as every other attorney in the state." App. Resp. at 3. *Goldmark* actually says: "[T]he attorney general, like every other lawyer in the state, *is bound by RPC 1.2(a)*." *Goldmark*, 172 Wn.2d at 580 n.5. Ms. Burnett impermissibly expands this statement to encompass the entirety of the Rules of Professional Conduct in a way not contemplated by the *Goldmark* Court nor the rules themselves.

The scope and comments of the Rules of Professional Conduct indicate government lawyers present a special situation not completely covered by the rules. For instance, defining the identity of the client is more difficult in government context. RPC 1.13, comment [9]. "Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the

government as a whole." *Id.* Government lawyers "may be authorized to represent several government agencies in intra-governmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. *These rules do not abrogate any such authority.*" RPC Scope [18] (emphasis added).

As noted by Ms. Burnett, RPC 1.10 provides: [W]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9." RCP 1.10(a). However:

> There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as a prosecuting attorney, public defender, or *attorney general*; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then *the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.*

State v. Stenger, 111 Wn.2d 516, 522-23, 760 P.2d 357 (1988) (emphases added). This is because "the salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice." *State v. Kirkpatrick*, 464 So.2d 1185, 1187 (Fla. 1985). Indeed, the duty of all government lawyers is to seek just results. *Id.* As such, "the channeling of advocacy toward a just result as

opposed to vindication of a particular claim lessens the temptation to circumvent the disciplinary rules through the action of associates." *Id.*

Here, as noted by Ms. Burnett, Anastasia Sandstrom, Senior Counsel in the Labor and Industries Division in Seattle, has filed a notice of appearance on behalf of the Department of Labor and Industries, and Jason D. Brown, Assistant Attorney General in the Torts Division in Spokane, has represented the Department of Corrections from the outset of this litigation. App. Resp. at 4-5. Admittedly, the Department of Labor and Industries and the Department of Corrections are adversaries in this appeal, and both are represented by Assistant Attorneys General. However, "when the dual roles of the Attorney General present such a conflict, two separate attorneys should handle those functions." *Johnston*, 99 Wn.2d at 481. This is exactly the situation presented in this appeal. As the Rules of Professional Conduct do not bar different Assistant Attorneys General from representing state agencies on opposite sides of an appeal, Ms. Burnett's motion to disqualify the Attorney General's Office should be denied.

V. CONCLUSION

The Rules of Professional Conduct do not prevent Assistant Attorneys General from representing different state agencies on opposite

sides of an interagency legal dispute. As such, this Court should deny Ms. Burnett's motion to disqualify the Attorney General's Office.

RESPECTFULLY SUBMITTED this 12th day of February, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Department Of Corrections Response Brief In Opposition To Virginia Burnett's Motion To Disqualify Firm was hand delivered and filed at the following address:

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DATED this 12th day of February, 2015 at Spokane, Washington.

MARKI STEBBINS

Appendix F

NO. 32177-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT,

Appellant,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES REPLY TO ANSWER TO MOTION TO DISMISS

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I. INTRODUCTION

Virginia Burnett admits that she assigned this case to the Department of Labor & Industries. She does not deny that L&I "stepped into her shoes," which means that L&I directs and controls the case. By instead arguing that L&I lacks authority to dismiss its own appeal, she fails to cite any authority requiring L&I to forever pursue an assigned case under RCW 51.24.050. None exists. Further, Burnett's arguments that the special assistant attorney general is owed any payment and that the Attorney General's Office is disqualified lack any merit. This Court should recognize the AGO as representing the real party in interest, L&I, and dismiss this appeal.

II. ARGUMENT

A. RCW 51.24.050 Authorizes L&I To Decide How To Prosecute This Case In Its Discretion

Burnett does not deny that this case is assigned to L&I. Response at 7. RCW 51.24.050 gives broad authority to L&I regarding cases assigned to it:

> An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

RCW 51.24.050(1). As the assignee, L&I directs and controls the case, including when to dismiss an appeal. *See Puget Sound Nat'l Bank v. Dep't of Rev.*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (assignee "steps into the shoes" of the assignor and has all the rights of the assignor); RAP 18.2.

While Burnett contends that dismissal is not a "compromise" because there is no settlement, she fails to recognize that parties regularly dismiss cases as a way to compromise. Response at 6. And here, L&I compromises the risk of increased costs, fees, and time prosecuting an appeal it believes lacks merit against the benefit of finality.[1] A party deciding to dismiss is compromising the claim and so her argument lacks merit.

In any event, the statute gives L&I sole authority to "prosecute" the action. RCW 51.24.050(1). Inherent in the power to prosecute is the power to decide when to no longer prosecute the action. It would make no sense to say that L&I is forever required to continue to appeal a decision.

L&I pursued the matter diligently and made a decision that the cause of action was not sustainable. Burnett had the opportunity to file an action on her own if she notified L&I. She elected not to pursue the claim and cannot now direct the Department regarding how the case is prosecuted. *See Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741

[1]In this respect, L&I satisfies either dictionary definition of "compromise" proposed by Burnett. Response at 6.

P.2d 1054 (1987). L&I, as assignee, is the "real party in interest" and, as such, is the only party with authority to make decisions about the case. *See* RCW 51.24.050, .070; *Dep't of Labor & Indus. v. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987) ("As assignee of the claim, the Department was real party in interest . . . ."), *overruled on different grounds State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). The Court should deny Burnett's request that this appeal must continue.

B. Burnett's Remaining Arguments Have No Merit

L&I may appear through the Attorney General's Office in this matter, contrary to Burnett's arguments. First, Burnett provides no declaration demonstrating nonpayment to support her argument that the Attorney General's Office cannot appear because RCW 2.44.040 requires that the "charges of such attorney" be paid before changing an attorney. Response at 2. Further, the retainer agreement explicitly provides that no fees are due unless there is a recovery, except for the case of a default. Ex. 3 at 2-3. In any scenario, there are no fees or costs due right now. Hatzialexiou 2d Decl. at 1-2.

Second, Burnett's argument that the Attorney General's Office cannot represent both the Department of Corrections and L&I fails because well-established case law holds that the Attorney General's Office may represent different agencies with different interests and no ethical violation is

present. Response at 4; *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 686, 700 P.2d 350 (1985); *see also Sherman v. State*, 128 Wn.2d 164, 186-87, 905 P.2d 355 (1995). Burnett offers no meritorious reason why this Court should not allow L&I to dismiss its own appeal upon its request.

III. CONCLUSION

Burnett does not deny that she assigned her case to L&I. As assignee, L&I may prosecute or compromise the case in its discretion. RCW 51.24.050. The power to prosecute an action includes the power to decide when to terminate it. This Court should dismiss this action upon the motion of the real party in interest, L&I.

RESPECTFULLY SUBMITTED this 4th day of February, 2015.

ROBERT W. FERGUSON
Attorney General

A. Sandstrom

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Appendix G

No. 32177-1-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS Respondents.	DECLARATION OF DEBRA HATZIALEXIOU

I, Debra Hatzialexiou, declare under the penalty of perjury that the following is true and correct to the best of my knowledge:

1. I have communicated with Tom Scribner, former special assistant attorney general, in the *Burnett v. Department of Corrections* case, regarding payment of his costs.
2. On December 30, 2014, I emailed Tom Scribner and informed him that I had his cost bill and that he would be reimbursed for those costs.
3. On February 4, 2015, this cost bill was processed for payment and Mr. Scribner will receive payment by mail.

4. Mr. Scribner has submitted no additional cost bill. No attorney fees are due under the retainer agreement.

Signed this 4th day of February, 2015 in Tumwater, Washington by

Debra Hatzialexiou

Appendix H

NO. 321771-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Virginia Burnett,

Appellant,

v.

State of Washington, Department of Corrections,

Respondents.

DEPARTMENT OF CORRECTIONS' RESPONSE BRIEF IN SUPPORT OF DEPARTMENT OF LABOR AND INDUSTRIES' MOTION TO DISMISS

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I. INTRODUCTION

Virginia Burnett filed this lawsuit in Walla Walla County Superior Court holding herself out as the sole plaintiff. In the years it has taken for this case to reach its current posture, Ms. Burnett continued to hold herself out as the sole plaintiff, even though she acknowledged as early as the third paragraph of her Complaint that she had assigned her cause of action to the Department of Labor and Industries. Thus, the Department of Labor and Industries, not Ms. Burnett, is—and always has been— the real party in interest. As the real party in interest, the Department of Labor and Industries has the sole authority to make decisions in this case, including the decision to dismiss the appeal when it becomes plain the grounds for the case are legally untenable.

The Department of Labor and Industries moves to dismiss this appeal under RAP 18.2. The Department of Corrections supports that motion. Dismissal is proper for two reasons. First, the Department of Labor and Industries and the Department of Corrections agree this cause of action is barred by the Industrial Insurance Act, Title 51 RCW, because Ms. Burnett was both employed by an agency of the State of Washington and sought to sue an agency of the State of Washington. Under Title 51, the State of Washington and its agencies are immune from such a suit. Second, the Department of Corrections, the only remaining party to the

litigations, is willing to stipulate to dismissal. As there is no legal basis for this cause of action, dismissal is appropriate.

II. COUNTERSTATEMENT OF THE ISSUE

Whether this Court has discretion to dismiss this appeal where the real party in interest is the Department of Labor and Industries, not Virginia Burnett, and both the appellant and the respondent agree there is no legal basis for the appeal.

III. FACTS

On March 1, 2012, Virginia Burnett filed a complaint in Walla Walla County Superior Court. Clerk's Papers (CP) 1-4. The complaint states in Paragraph 3:

> Plaintiff's cause of action arising out of said injury has been assigned to the Department of Labor and Industries, which is bringing this third party action pursuant to RCW 51.24.050(1).

CP 2. This is the only mention of the Department of Labor and Industries in the complaint. *See* CP 1-4. The Department of Labor and Industries does not appear in the caption of the complaint. CP 1. Instead, Virginia Burnett is identified as the sole plaintiff in the caption and in the complaint. CP 1-2. Also, Ms. Burnett's request for relief is specific to Ms. Burnett herself. CP 4. Nowhere does Ms. Burnett request repayment to the Department of Labor and Industries for the payments it made to

compensate her for her workplace injuries. CP 4. On March 14, 2013, the Department of Corrections answered the complaint. CP 5-10. In answer to Paragraph 3 of the complaint, the Department stated it "is without sufficient information to form a belief as to the truth of the matter asserted and therefore denies the same." CP 5.

Throughout the litigation on this matter, Ms. Burnett held herself out as the sole plaintiff. *See* CP 35-36, CP 90, Brief of Appellant (Br. App.) at 24-25, Reply Brief of Appellant (Reply Br. App.) at 3. Additionally, throughout this litigation, the pleadings filed by Ms. Burnett are completely silent as to the interests of the Department of Labor and Industries. *See* CP 35-51, Br. App. at 1-25, Reply Br. App. at 1-10.

On December 17, 2014, the Court sent a letter to the Department of Corrections and to Ms. Burnett requesting additional briefing on five specific questions. *See* Letter from Renee S. Townsley to Counsel (Dec. 17, 2014). Included in the five questions is the following:

> Should this court give consideration to the fact that the Department of Labor & Industries, the state branch that administers workers compensation law, is the party bringing this lawsuit? Stated differently, should this court give any deference to the Department of Labor & Industries' apparent position that Walla Walla Community College and the Department of Corrections are distinct employers for purposes of RCW 51.24.030?

Letter from Townsley to Counsel of 12/17/14, at 1. The Court directed that additional briefing be filed by January 7, 2015.

On January 2, 2015, Ms. Burnett moved for an extension of time to file the brief as requested by the Court. *See* Motion for Extension of Time to File Appellant's Supplemental Brief (Mot. Ext. Time) at 1-2. Again, Ms. Burnett holds herself out as the sole appellant in this matter. The language in Ms. Burnett's motion for extension suggests the Department of Labor and Industries and Ms. Burnett might have different responses to this Court's questions:

> Counsel for appellant has been in communication with representatives of the Department of Labor & Industries and with appellant herself in an effort to get answers to the five questions raised by the court in the December 17 letter referenced herein.

Mot. Ext. Time at 2.

On January 5, 2015, the Department of Corrections filed its own motion for an extension of time to file its brief in response to the Court's December 17, 2014, letter. Also on January 5, 2015, Anastasia Sandstrom, Assistant Attorney General, filed a Notice of Appearance on behalf of the Department of Labor and Industries and a Motion to Dismiss this appeal in its entirety. *See* Notice of Appearance, Department of Labor and Industries; Motion to Dismiss at 1-2.

On January 8, 2015, Ms. Burnett filed an Appellant's Objection to Dismissal of Appeal (App. Obj.). For the first time in this litigation, Ms. Burnett's former counsel acknowledged he represented both Ms. Burnett and the Department of Labor and Industries. App. Obj. at 1-3. Counsel stated for the first time:

> The lawsuit filed in Walla Walla County Superior Court giving rise to this appeal was filed in the name of Virginia E. Burnett on her behalf and on behalf of the Department of Labor and Industries. The firm of Minnick-Hayner represented both Virginia Burnett and The Department of Labor and Industries.

App. Obj. at 2.

On January 20, 2015, the Department of Labor and Industries filed a Supplemental Brief regarding its Motion to Dismiss and a Motion to Compel Withdrawal of Counsel. In support of these filings, the Department of Labor and Industries submits the Declaration of Debra Hatzialexiou, Legal Services Program Manager for the Department of Labor and Industries. Ms. Hatzialexiou declares this action was assigned to the Department of Labor and Industries when Ms. Burnett did not respond to the Department's demand for election in the matter on May 19, 2009. Hatzialexiou Decl. at 2, Ex. 1, Ex. 2. Importantly, Ms. Burnett concedes this cause of action was assigned to the Department of Labor and Industries in her complaint. CP 2.

Upon review of the Court's December 17, 2014, letter, Ms. Hatzialexiou decided, in consultation with Victoria Kennedy, Assistant Director for Insurance Services with the Department of Labor and Industries, that the Department of Labor and Industries should dismiss the assigned appeal in this case. Hatzialexiou Decl. at 3. This is because the Department of Labor and Industries' position is that:

> [A] state employee's employer is the State of Washington. Further, it is the [Department of Labor and Industries'] position that under RCW 51.24.030, a state employee from one agency cannot sue an employee from another state agency for conduct arising out of a work place injury. For the reasons stated in the brief of respondent filed by the Department of Corrections, the State of Washington did not waive Title 51 immunity.

Hatzialexiou Decl. at 3.

IV. ARGUMENT

A. Dismissal Is Appropriate Where The Parties Agree The Cause Of Action Is Legally Untenable

"As assignee of the claim, the Department [of Labor and Industries] was real party in interest." *Dep't of Labor & Indus. V. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987) *overruled on different grounds by State v. WWJ Corp.*, 138Wn.2d 595, 602, 980 P.2d 1257 (1999). An assignee "steps into the shoes of the assignor" and, therefore, obtains all the rights of the assignor. *Puget Sound Nat'l Bank v. Dep't of Rev.*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994). The assignee's rights are

coextensive with those of the assignor at the time of the assignment. *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741 P.2d 1054 (1987). The Industrial Insurance Act grants the Department of Labor and Industries broad authority, as an assignee of a third-party claim, to prosecute an action against a third party: "An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, *which may prosecute or compromise the action in its discretion.*" RCW 51.24.050. This broad authority necessarily includes the right to abandon the action when it becomes apparent the action is not legally tenable.

The Department of Labor and Industries moves to dismiss, because it recognizes this action is barred by the exclusive remedy provision of the Industrial Insurance Act. Supp. Br. re Mot. to Dismiss at 11. The Department of Labor and Industries and the Department of Corrections agree the "employees of state agencies have but one employer, the State of Washington." Supp. Br. re Mot. to Dismiss at 11. *See also* Br. of Respondent at 24-25; *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 168, 89 P.3d 250 (2004) ("In our view...the State – not each of its separate departments – employs its employees"). The appellant and the respondent agree the "lawsuit mistakenly sought to sue the State of Washington, [Burnett's] employer." Supp. Br. re Mot. to Dismiss at 11. As a result, it

would be futile to proceed in an appeal where the Department of Labor and Industries and the Department of Corrections agree there is no legal basis for the action. Dismissal is appropriate under RAP 18.2.

B. The Department of Corrections Stipulates To Dismissal Of This Action

"The appellate court on motion may, in its discretion, dismiss review of a case on stipulation of the parties...if the motion is made before oral argument on the merits." RAP 18.2. Further, "[t]he appellate court may, in its discretion, dismiss review of a case on the motion of a party who has filed a notice of appeal, a notice of discretionary review, or a motion for discretionary review by the Supreme Court." *Id.* Here, there is no dispute that the Department of Labor and Industries is the appellant in this action. App. Obj. at 1. Ms. Burnett concedes she assigned this claim to the Department of Labor and Industries. CP 2. Yet, despite conceding the assignment, Ms. Burnett steadfastly asserts that she is also a party to this litigation, a party with the right to oppose dismissal. App. Obj. at 1.

The Department of Labor and Industries correctly argues that Ms. Burnett is not a party to this case. Supp. Br. re Mot. to Dismiss at 10-11. Indeed, as an assignee of the claim, the Department of Labor and Industries is the only real party in interest. *Wendt*, 47 Wn. App. at 431. The lawsuit was brought in the name of Virginia Burnett, but the

Department of Labor and Industrics, as thc only real party in interest, is the sole appellant in this matter. *See* RCW 51.24.050(1). As the appellant, the Department of Labor and Industries is entitled to request dismissal of this appeal. RAP 18.2. To the extent that its approval may be necessary, the Department of Corrections stipulates that this appeal may be dismissed without the award of fees or costs because of the importance of the State of Washington's immunity from suit under Title 51.

V. CONCLUSION

RAP 18.2 gives the Court discretion to dismiss an appeal where the parties stipulate to dismissal or the motion is brought by the appellant. In this case, the Department of Corrections stipulates to the dismissal of this appeal and waives the fees and costs to which it may be entitled because of the importance of maintaining clear precedent under Title 51. Further, dismissal is appropriate as the Department of Labor and Industries and the Department of Corrections agree there is no legal basis for this cause of

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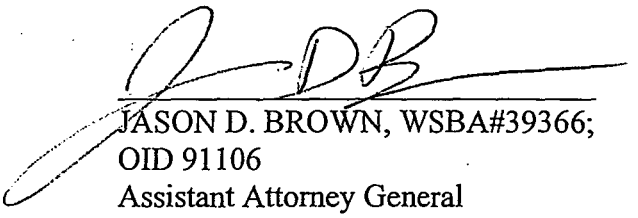
action under Title 51. The Court should dismiss this appeal pursuant to RAP 18.2.

RESPECTFULLY SUBMITTED this 2nd day of February, 2015.

ROBERT W. FERGUSON
Attorney General



JASON D. BROWN, WSBA#39366;
OID 91106
Assistant Attorney General
Attorneys for Respondent

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Department Of Corrections' Response Brief In Support Of Department Of Labor And Industries' Motion To Dismiss was hand delivered and filed at the following address:

Court of Appeals of Washington, Division III
500 North Cedar Street
Spokane, Washington 99201-2159

And one copy mailed by US Mail Postage Prepaid to:

Janelle M. Carman
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800 Fifth Ave., Suite 2000
Seattle, WA 98104

DATED this 3rd day of February, 2015 at Spokane, Washington.

MARKI STEBBINS

Appendix I

No. 32177-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

VIRGINIA BURNETT,

Appellant,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF CORRECTIONS,

Respondents.

APPELLANT'S RESPONSE TO MOTION TO DISMISS

AND

APPELLANT'S MOTION TO DISQUALIFY FIRM

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Janelle M. Carman
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John C. Julian
WSBA # 43214

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IV. ARGUMENT.....1

A. L&I is appearing through Ms. Burnett, who is the named party to this appeal, and was represented by Tom Scribner, and now by Carman Law Office. Accordingly, it may not enter an additional attorney without the consent of either Mr. Scribner of Carman Law Office on behalf of Ms. Burnett absent a showing that RCW 2.44.040 has been satisfied, which it cannot do on the record before the Court. Accordingly, any motion filed by the Office of the Attorney General must be deemed invalid and summarily denied.....2

B. Even if L&I may properly appear through Ms. Sandstrom, Ms. Sandrom's office has an inherent conflict, and therefore, must be disqualified by the Court from appearing because neither the Department, nor its representative, have shown that the conflict of interest has, or could be, cured.....3

C. Even if, *arguendo*, L&I may properly appear before the Court through the Office of the Attorney General, it nevertheless lacks statutory authority to dismiss the appeal in contravention to Ms. Burnett's wishes and to her detriment; further, doing so would contravene public policy because it would permit the State to assume an action purportedly for the benefit of an individual, and control both ends of the controversy thereby creating an inherent conflict to the detriment of the named party.....5

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I. INTRODUCTION

The Department of Labor and Industries (L&I) has filed a motion requesting this Court dismiss Ms. Burnett's action against the Department of Correction (DOC). L&I has also filed a motion to compel Attorney Scribner to withdraw his representation,

[1] as the department has putatively terminated his representation of its interests. In turn, Ms. Burnett moves this Court to disqualify the Office of the Attorney General from representing either herself or L&I, as that office is plainly conflicted. As discussed below, the motion to dismiss is deficient for numerous reasons, while the motion to compel is simply moot. The Court should deny both motions, and permit the parties to respond to the Court's additional questions prior to the issuance of a written opinion.

II. ISSUES

1. Whether L&I may properly appear before this Court in this action?
2. Whether this Court should disqualify the Office of the Attorney General because of an inherent conflict of interest and a violation of the RPCs?
3. Whether Chapter 51.24 RCW permits L&I to completely dismiss the appeal when the named party seeks to maintain the action?
4. Whether this Court should dismiss Ms. Burnett's appeal?

III. COUNTERSTATEMENT OF THE FACTS

Ms. Burnett rests upon those facts already contained within the record before the Court.

IV. ARGUMENT

A. L&I is appearing through Ms. Burnett, who is the named party to this appeal, and was represented by Tom Scribner, and now by Carman Law Office. Accordingly, it may not enter an additional attorney without the consent of either Mr. Scribner of Carman Law Office on behalf of Ms. Burnett absent a showing that RCW 2.44.040 has been satisfied, which it cannot do on the record before the Court. Accordingly, any motion filed by the Office of the Attorney General must be deemed invalid and summarily denied.

RPC 1.15 requires that an attorney is ethically obligated to withdraw when discharged by a client. Where an attorney refuses to withdraw, this Court is statutorily authorized to discharge an attorney pursuant to RCW 2.44.040, which states:

> The attorney in an action or special proceeding, may be changed at any time before judgment or final determination as follows:
>
> (1) Upon his or her own consent, filed with the clerk or entered upon the minutes; or
> (2) Upon the order of the court, or a judge thereof, on the application of the client, or for other sufficient cause; **but no such change can be made until the charges of such attorney have been paid by the party asking such change to be made.**

(emphasis supplied).

Here, even assuming, *arguendo*, that L&I's version of events is correct, as well as its conclusion that it may substitute counsel upon proper application to the Court, that department is nonetheless unable to make a showing that it has fully satisfied the requirements of RCW 2.44.040 on the record before the Court, and as such, this Court should simply deem the motion invalid, and deny it on its face. Even assuming, *arguendo*, that L&I is able to cure its deficiencies, the Court should nonetheless deny the motion and disqualify the Office of the Attorney General from pursing any claim on behalf of Ms. Burnett as discussed below.

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[1] It is Ms. Burnett's position that this motion is moot given the substitution of Attorney Scribner by Carman Law Office.

B. Even if L&I may properly appear through Ms. Sandstrom, Ms. Sandrom's office has an inherent conflict, and therefore, must be disqualified by the Court from appearing because neither the Department, nor its representative, have shown that the conflict of interest has, or could be, cured.

At the outset, it is critical to note that the Office of the Attorney General of the State of Washington is held to the Rules of Professional Conduct the same as every other attorney in the state. *Goldmark v. McKenna*, 172 Wn.2d 568, 580 n. 5, 259 P.3d 1095 (2011). Importantly, RPC 1.16 requires withdrawal if the representation will result in a violation of the Rules of Professional Conduct or other law. *State v. Rooks*, 130 Wn. App. 787, 799, 125 P.3d 192 (2005); RPC 1.16(a). RPC 1.10 states in relevant part:

> Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing along would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

RPC 1.10(a). In turn, RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) The representation of one client will be directly adverse to another client; or
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
> (b) Notwithstanding the existence of a concurrent conflict of interest under under paragraph (a), a lawyer may represent a client if:
> (1) The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) The representation is not prohibited by law;
> (3) The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) Each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

In this context, the meaning of RPC 1.16 is plain: "if a lawyer accepts dual representation and the client's interests thereafter come into actual conflict, the lawyer must withdraw." *In re Disciplinary Proceeding against Carpenter*, 160 Wn.2d 16, 28, 155 P.3d 937 (2007). A lawyer represents conflicting interest when, on behalf of one client, it is the lawyer's duty to contend that which the lawyer's duty to another client requires him or her to oppose. *In re the Welfare of Schulz*, 17 Wn. App. 134, 142, 561 P.2d 1122 (1977). When interpreting the Rules of Professional Conduct, the rules should be interpreted broadly so as to protect the public from attorney misconduct. *Eriks v. Denver*, 118 Wn.2d 451, 59, 824 P.2d 1207 (1992). Moreover, an attorney should resolve all doubts against undertaking a dual representation. *Id.* at 460. The only conclusion that can be drawn from the applicable law and professional rules then, is that neither an attorney, nor a law firm, may represent opposing interests in the same suit before the same tribunal, nor should such an endeavor be attempted.

Here, it is undisputed in this matter that the Department of Corrections is the Respondent in this matter. That department is represented by Jason D. Brown, who is employed as an attorney by the Office of the Attorney General. Moreover, it is likewise undisputed that Anastasia Sandstrom is also employed as an attorney by the Office of the Attorney General. She purports to represent L&I. In this case, it is manifest that the same attorney is purporting to represent two opposing entities[2] in the same cause, before the same tribunal, in violation of RPC 1.7, and RPC 1.16.[3] As such, the

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[2] It may be argued by L&I that it the Office of the Attorney General does not represent two conflicting entities because it seeks to withdraw the appeal on the basis of agreement. However, the fact that L&I subsequently determined it was in error in pursuing the appeal does not remove the adversarial nature of the proceedings, nor does it compromise Ms. Burnett's current position, which maintains opposition to both the DOC and L&I.

[3] Although theoretically, RPC 1.7 may permit a screening process to occur in order to attempt to cure the conflict, it is manifest that once a conflict has arisen, it is too late for such

Office of the Attorney General should not be permitted to represent either L&I or Ms. Burnett, who, as discussed below, maintains an interest in this appeal and wishes to have the Court rule on the appeal. In light of the foregoing, Ms. Burnett requests that this Court disqualify the Office of the Attorney General from representing Ms. Burnett or L&I, and permit her to maintain her appeal.

C. Even if, *arguendo*, L&I may properly appear before the Court through the Office of the Attorney General, it nevertheless lacks statutory authority to dismiss the appeal in contravention to Ms. Burnett's wishes and to her detriment; further, doing so would contravene public policy because it would permit the State to assume an action purportedly for the benefit of an individual, and control both ends of the controversy thereby creating an inherent conflict to the detriment of the named party.

The Legislature has provided in pertinent part:

> (1) An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.
>
> (4) Any recovery made by the department or self-insurer shall be distributed as follows:
>
> (a) The department or self-insurer shall be paid the expenses incurred in making the recovery including reasonable costs of legal services;
>
> (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the recovery made, which shall not be subject to subsection (5) of this section: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;
>
> (c) The department and/or self-insurer shall be paid the compensation and benefits paid to or on behalf of the injured worker or beneficiary by the department and/or self-insurer; and
>
> (d) The injured worker or beneficiary shall be paid any remaining balance.

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measures once a motion to disqualify has been filed. *E.g., In re Marriage of Wixom and Wixom*, 182 Wn. App. 881, 332 P.3d 1063, 1072-76 (2014).

RCW 51.24.050(1), (4). On the whole, the meaning of distribution language of the statute is plain insofar as it is manifest that both L&I *and* the injured party[4] have a reasonable expectation regarding any recovery, and therefore, an interest in the action. To the extent that L&I interprets the word "compromise" to mean that it may entirely dismiss an action, that is nowhere to be found in the common law. It may be readily observed that the case law cited by L&I to support its position that it is assigned total rights under the statute pertain to other forms of assignment. See Supplemental Brief Regarding Motion to Dismiss. In any event, the question of what the word compromise means in RCW 51.24.050(1) appears to be an issue of first impression in the State of Washington, as is the extent to which the associated meaning applies to L&I.

This Court will not interpret statutes unless an ambiguity exists. *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 788, 985 P.2d 262 (1999). However, when called upon to interpret statutes, this Court gives words their plain, common meaning, and attempts to give expression to the legislative intent. *In re Marriage of Tahat*, 182 Wn. App. 655, 670, 334 P.3d 1131 (2014). Here, even a casual viewing of various sources indicates that the word "compromise" has two ordinary definitions. First, it may be understood as "a settlement, in which each side gives up some demands or makes concessions." Second, a compromise may also be understood to be where one "weakens or gives up one's principles." *New World Dictionary, Second College Edition*, 1978. Certainly, Ms. Burnett's position is that the statute contemplates permitting L&I to either pursue or *settle* cases in the name of the injured party. It is likely that L&I would urge this Court to adopt the latter meaning, and hold that the ability to weaken a suit means that it can weaken a suit to the point

[4] Ms. Burnett.

of dismissal. However, as discussed below, the second reading would make little sense in light of the statutory mechanisms in place and the interests involved.

It is manifest from a plain reading of Chapter 51.24 RCW that the intent behind the statute is to permit L&I to recover as nearly as possible, those costs incurred in addressing injured workers. Moreover, it plainly contemplates that L&I, having greater resources than an injured worker, can pursue a third party claim under the assignment mechanism should it wish to do so. RCW 51.24.070. However, as a matter of policy, L&I owes a duty to ensure that Ms. Burnett's interest are pursued diligently once the obligation has been undertaken,. For L&I to now attempt to dismiss the action can only cause a prejudice to Ms. Burnett by contravening her wishes and expectations upon assignment. Certainly at this juncture in the appellate process, there can be no real detriment to permitting the appeal to be decided by this Court, and L&I's motivation must be questioned, particularly given the apparent conflict in positions and interests.[5]

Should this Court feel it necessary to construe RCW 51.24.070, Ms. Burnett urges this Court to interpret the statute as permitting either prosecution or *settlement* of an assigned case, and that as a result, L&I lacks the statutory authority to dismiss the appeal to her detriment. This result is also desirable as a matter of policy as discussed above.

---

[5] It must be observed that L&I's stated reason for wishing to dismiss this appeal at this juncture makes little sense. It essentially states that it has realized the error of its argument upon review of the Court's supplemental questions to be addressed. This makes little sense, as the result from an incorrect position would simply be an affirmation of the trial court's grant of summary judgment. On the contrary, what makes more sense is that L&I, or its representatives, view the Court's questions as an indication of its ruling, and are concerned with the ramifications of a positive outcome. This of course, would be the result Ms. Burnett wishes to see, and the Department's motivation for wishing to dismiss must certainly cause it to be conflicted in yet another fashion, meriting its disqualification from this suit.

CONCLUSION

L&I's motion to dismiss should not be considered by this Court, because the department is not properly before the Court given its failure to satisfy RCW 2.44.040. Moreover, the Office of the Attorney General should not be permitted to represent L&I because it has a plain conflict with the Respondent in this matter, as it also represents that party. Even if, *arguendo*, the motion is properly before the Court, it would be manifestly unfair to permit the Department to dismiss the appeal, and in doing so, deny Ms. Burnett the benefit of this Court's decision. The mere position of L&I is in conflict with Ms. Burnett, and at a minimum, she should be permitted to maintain the action as the named party who also maintains an interest under Chapter 51.24 RCW, even as the assignor.

Respectfully submitted this 3rd day of February, 2015, by:

John C. Julian, WSBA #43214
Co-Counsel for Appellant

Janelle M. Carman, WSBA #31537
Co-Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered this *Response to Motion* as follows to the following individuals via U.S. prepaid postage:

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Ave
Suite 2000
Seattle, WA 98104

James Brown
Assistant Attorney General
1116 West Riverside Ave
Spokane, WA 99201

Virginia Burnett
411 SE Elm Street
College Place, WA 99324

Tom Scribner
249 W. Alder Street
Walla Walla, WA 99362

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

DATED this 3 day of February, 2015, at Walla Walla, Washington

sign: Morgan Carter

print name: Morgan Carter

Appendix J

DIVISION III COURT OF APPEALS
IN AND FOR THE STATE OF WASHINGTON

VIRGINIA BURNETT, Appellant, vs. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondents.	No. 32177-1-III **NOTICE OF SUBSTITUTION**

PLEASE TAKE NOTICE that Tom Scribner hereby withdraws as counsel of record for the Appellant, VIRGINIA BURNETT, in the above-entitled action, and Carman Law Office and Janelle M. Carman, 6 E. Alder Street, Suite 418, Walla Walla, Washington, are hereby substituted as her counsel of record.

Respectfully submitted this 23 day of January, 2015.

By: Tom Scribner

Tom Scribner, WSBA #11285
Withdrawing Attorney for Appellant

Please direct all further correspondence, pleadings, and other pertinent information to the undersigned at the above address and telephone number.

Respectfully submitted this 26 day of January, 2015.

By _____
Janelle M. Carman, WSBA #31537
Co-Counsel for Appellant

and

_____
John C. Julian, WSBA #43214
Co-Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I caused to be delivered this *Notice of Substitution* as follows to the following individuals via U.S. prepaid postage.

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Ave
Suite 2000
Seattle, WA 98104

Virginia Burnett
411 SE Elm Street
College Place, WA 99324

Tom Scribner
249 W. Alder Street
Walla Walla, WA 99362

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

DATED this 26 day of January 2015, at Walla Walla, Washington

sign: Morgan Carter
print name: Morgan Carter

Appendix K

NO. 32177-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondents.

DEPARTMENT OF LABOR & INDUSTRIES SUPPLEMENTAL BRIEF REGARDING MOTION TO DISMISS

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Assistant Attorney General
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I. INTRODUCTION

The Department of Labor & Industries "stepped into the shoes" of Virginia Burnett when her potential "third party" case was assigned to L&I. Although generally a worker's sole remedy for work place injuries is the industrial insurance system, in limited cases a worker may sue a "third party" for damages related to an injury. RCW 51.24.050 and RCW 51.24.070 require a worker to decide whether to proceed in a potential "third party" lawsuit if L&I sends a letter requesting a decision. If there is no response, the case is assigned to L&I. An L&I staff person initially thought that Burnett might have a third party claim and requested her to decide whether to proceed. She did not respond. By failing to assert her right to any claim against a potential third party, RCW 51.24.050 and 51.24.070 assigned the cause of action to L&I.

As assignee, L&I directs the action in the case, including dismissing the appeal. While the case is captioned Virginia Burnett, L&I is the real party in interest and can "prosecute or compromise the action in its discretion." RCW 51.24.050. L&I has decided to end the appeal. Since Burnett is no longer a party to the case, it is irrelevant whether she would like the case to proceed. The Court should dismiss the appeal.

II. ISSUE

RCW 51.24.050 and RCW 51.24.070 provide that L&I may "prosecute or compromise an action" "in its discretion in the name of injured worker," where the injured worker has elected to not proceed. Since the injured worker has assigned this case to L&I, should the Court grant the Department's motion to dismiss the appeal?

III. FACTS

A. Virginia Burnett Did Not Elect To Proceed in This Lawsuit

Virginia Burnett worked for Walla Walla Community College, teaching inmates at the Washington State Penitentiary. CP 1.[1] Burnett sustained an industrial injury on March 9, 2009, and received industrial insurance benefits from L&I. CP 2. When she was injured, she was "working at her job as teacher at the Washington State Penitentiary" run by the Department of Corrections. CP 2.

The industrial insurance system generally is a worker's sole remedy for an injury. An exception is when a "third party" causes the workplace injury. RCW 51.24. A worker may bring a third party cause of action when the injury is caused by a person that does not work for the worker's employer. RCW 51.04.010; RCW 51.24.030. When an L&I

[1] In addition to the clerk's papers, L&I relies on the declaration of Debra Hatzialexiou also filed in support of L&I's motion to compel withdrawal of counsel.

staff person initially evaluated this case, the staff person thought that Burnett might have a "third party" cause of action. *See* Ex. 1.[2]

As required by RCW 51.24.070, L&I sent a letter to Burnett informing her of the potential third party claim. Consistent with that statute, the letter demanded that Burnett respond to L&I with her election within 60 days or the case would be assigned to L&I:

> By this notice, demand is hereby made for you to exercise your right of election pursuant to RCW 51.24.070. Unless an election is made within 60 days from the receipt of this demand, this action will be deemed assigned to the department. The department may then prosecute or compromise the action in its discretion.

Ex. 1. Burnett did not respond to the letter. Hatzialexiou Decl. at 2; Ex. 2.

L&I sent a letter to Burnett that informed her that since she did not respond to the demand for election, her potential "third party action is now deemed assigned to the department to prosecute or compromise in its discretion." Ex. 2. Burnett again did not respond. Hatzialexiou Decl. at 2. L&I engaged a special assistant attorney general, M. Scott Wolfram of Minnick – Hayner to represent L&I. Hatzialexiou Decl. at 2. It then substituted Tom Scribner of Minnick – Hayner as its special assistant attorney general. Ex. 3.

[2] All exhibits are attached to the Debra Hatzialexiou declaration.

The retainer agreement specified that the cause of action was "assigned to L&I." Ex. 3 at 1. It also specified that "[f]or the claims/actions pursued under this agreement, L&I is the client and is afforded such right as are attendant on an attorney – client relationship." Ex. 3 at 3.

On March 1, 2012, Wolfram filed a complaint for L&I in the name of Burnett as allowed by RCW 51.24.050. CP 1-4. The complaint specified that the action had been assigned to L&I:

> Plaintiff's cause of action arising out of said injury has been assigned to the Department of Labor & Industries, which is bringing this third party action pursuant to RCW 51.24.050(1).

CP 2. The Department of Corrections answered the complaint, asserting Industrial Insurance Act immunity as an affirmative defense. CP 8. Claiming that the exclusive remedy under the Act bars the claim, the Department of Corrections moved for summary judgment. CP 11-26. The superior court granted the motion. CP 86-87. On the behalf of L&I, Scribner filed a notice of appeal. CP 88-91; Hatzialexiou Decl. at 3.

B. As Assignee, L&I Decided To Dismiss the Appeal

In December 2014, the Court sent a letter requesting answers to five questions about the case. Upon review of the case after receiving the letter, L&I decided that the position it had taken previously was incorrect.

Hatzialexiou Decl. at 3. This is because L&I concluded that a state employee's employer is the State of Washington. Hatzialexiou Decl. at 3. Further, L&I determined that under RCW 51.24.030, a state employee from one state agency cannot sue an employee from another state agency for conduct arising out of a work place injury. Hatzialexiou Decl. at 3. The State of Washington had not waived Title 51 immunity. Hatzialexiou Decl. at 3.

On January 5, 2015, Anastasia Sandstrom, Assistant Attorney General, filed a notice of appearance on the behalf of L&I. On that same day, L&I, by and through AAG Sandstrom, moved to dismiss. On January 8, 2015, this Court requested supplemental briefing on the motion to dismiss.[3]

On January 8, 2015, Scribner sent an "Objection to Dismissal of Appeal." In it Scribner argues that Burnett "should be allowed to continue with her claim for general damages and other special damages . . . ." Objection at 3. Burnett has not directly asked the Department to exercise its discretion and allow re-election under RCW 51.24.070(4). Hatzialexiou Decl. at 5. But to the extent that her statements in the objection constitute a

[3] The court's letter also said it considers Tom Scribner the spokesperson for the appellant. By separate motion, L&I brings a motion to compel withdrawal of counsel.

request for reelection, the Department in its discretion denies such a request. Hatzialexiou Decl. at 5.

IV. ARGUMENT

RAP 18.2 allows an appellant to request dismissal of an appeal. Therefore, as the appellant, L&I may move to dismiss the appeal.

A. RCW 51.24.050 and RCW 51.24.070 Assign This Case to L&I

For work place injuries, a worker's exclusive remedy is generally the Industrial Insurance Act. RCW 51.04.010: RCW 51.32.010; *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995); *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004). RCW 51.24.030 provides a limited exception, allowing a worker to sue a third party for damages, provided the third party is "not in the worker's same employ."[4] A worker may decide to pursue a lawsuit on his or her own, subject to L&I's interest in recouping the claim costs. RCW 51.24.030, .060. But if the worker decides not to pursue a claim, then the matter is assigned to L&I:

> An election not to proceed against the third person operates as an assignment of the cause of action to the department or self-insurer, which may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative.

RCW 51.24.050(1). This allows L&I to recover its claim costs, with the worker receiving his or her share of the recovery. RCW 51.24.050(4). L&I

[4] RCW 51.24.020 allows for suits against the employer for deliberate injury. This statute is not at issue.

may demand that the worker exercise his or her right to pursue the third party claim (the "right to election") by sending a demand letter to the worker:

> The department or self-insurer may require the injured worker or beneficiary to exercise the right of election under this chapter by serving a written demand by registered mail, certified mail, or personal service on the worker or beneficiary.

RCW 51.24.070(1). If the worker does not respond within 60 days, as was the case here, then the claim is "deemed . . . assigned" to L&I:

> Unless an election is made within sixty days of the receipt of the demand, and unless an action is instituted or settled within the time granted by the department or self-insurer, the injured worker or beneficiary is deemed to have assigned the action to the department or self-insurer.

RCW 51.24.070(2). The worker may request re-election, which the Department may in its discretion grant:

> If the department or self-insurer has taken an assignment of the third party cause of action under subsection (2) of this section, the injured worker or beneficiary may, at the discretion of the department or self-insurer, exercise a right of reelection and assume the cause of action subject to reimbursement of litigation expenses incurred by the department or self-insurer.

RCW 51.24.070(4). Burnett has not asked the Department to exercise its discretion to allow her to re-elect her claim. Hatzialexiou Decl. at 5. But if

statements made in the Objection to Dismissal of Appeal constitute a request, L&I has denied it. Hatzialexiou Decl. at 5.

Under RCW 51.24.050 and RCW 51.24.070, if a worker does not exercise the "right to election" as here, any claim for damages arising out of her workplace injury belongs to L&I. Here, Burnett did not respond to the demand regarding election, so the matter is assigned to L&I. L&I has not granted a re-election request per RCW 51.24.070(4), so the assignment remains. Hatzialexiou Decl. at 5.

B. An Assignee Steps Into the Shoes of the Assignor and May Take Any Necessary Action in the Case

RCW 51.24.050(1) gives L&I broad authority regarding a workplace injury claim that is assigned to L&I. The statute provides an "assignment" to L&I. *Id.* L&I "may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative." RCW 51.24.050(1). By its very terms, L&I may decide "in its discretion" whether to dismiss an appeal in the claim.

An assignee "steps into the shoes" of the assignor and has all the rights of the assignor. *Puget Sound Nat'l Bank v. Dep't of Rev.*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993). "[T]he assignee acquires whatever rights the assignor possessed prior to

the assignment." *Puget Sound Nat'l Bank*, 123 Wn.2d at 292-93; *Steinmetz v. Hall-Conway-Jackson, Inc.*, 49 Wn. App. 223, 227, 741 P.2d 1054 (1987).

Here, Burnett had the potential right to sue under RCW 51.24.030, setting aside the question of whether Title 51 immunity applied. Part of the rights in a lawsuit and in an appeal from a trial court decision is the right to decide when to no longer pursue the cause of action. Under RAP 18.2, an appellant may move to dismiss an appeal. This is a right under the appeal, which L&I acquired as the assignee.

While the case is captioned "Virginia Burnett, Appellant," this is because L&I may use the name of the worker in the lawsuit. RCW 51.24.050(1). That the case is so captioned does not divest L&I of its rights as statutory assignee. *See* RCW 51.24.050(1). By assigning her cause of action, L&I, as assignee, acquired any and all right, title and interest that Burnett had in the action. L&I, as assignee, was the "real party in interest" and, as such, is the only party with authority to resolve the case. *See* RCW 51.24.050, .070; *Dep't of Labor & Indus. v. Wendt*, 47 Wn. App. 427, 431, 735 P.2d 1334 (1987) ("As assignee of the claim, the Department was real party in interest . . . ."), *overruled on different grounds State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999).

One of the rights in a cause of action is the right to decide when to no longer pursue the cause of action. Here, L&I has that right as assignee because it "stepped into the shoes" of Burnett. It is the appellant and as appellant, it may move to dismiss. RAP 18.2.

C. Barnett Is Incorrect That She Is a Party to This Case

Barnett correctly identifies L&I as a party to this matter. Objection at 1. But she incorrectly identifies herself as a party. *Id.* at 1 (calling herself appellant). As assignor, Barnett is not a party to this action any more, she merely has a right to her portion of any recovery. RCW 51.24.050. Because of this, this Court must reject her request to "continue with her claim for general damages and other special damages . . . ." Objection at 3. She does not have standing as an assignor to request that the case not be dismissed.

After the case is assigned, the assignor no longer may make binding decisions in the case. *Steinmetz*, 49 Wn. App. at 227. The *Steinmetz* Court held that the assignee of an insured's malpractice claim against an insurance broker was entitled to sue for negligence in spite of the fact that the assignor later entered into a covenant not to sue with insurer. *Id.* at 228. The court emphasized that the assignee receives all of the assignor's rights as of the time of assignment; subsequent actions by the assignor do not affect those rights. *Id.* at 227-28. Burnett's

subsequent action in trying to maintain this appeal do not affect the rights given to L&I at the time of assignment, namely to make decisions in its discretion about the appeal.

D. L&I Moves To Dismiss This Action Because It Is Barred by RCW 51.04.010

Although a party need not give a reason for seeking to dismiss its appeal, L&I moves to dismiss its appeal because it asserts an invalid claim. The case is premised on the notion that a state employee for Walla Walla Community College has a different employer than a state employee from the Department of Corrections, and therefore, there may be a lawsuit under RCW 51.24.030. But employees of state agencies have one employer, the State of Washington. An injured worker may only sue someone that is not a co-worker and is not an employer. RCW 51.24.030; RCW 51.04.010. The lawsuit mistakenly sought to sue the State of Washington, her employer. RCW 51.04.010 and RCW 51.24.030 prohibit this. Because of the important interests L&I has in enforcing and administering the provisions of Title 51, it cannot pursue a claim that is prohibited by the Industrial Insurance Act.

V. CONCLUSION

The Legislature has decided that L&I is the assignee of potential third party cases when the worker does not elect to pursue the claim.

Because L&I is the assignee of this case, it may make decisions about whether or not to maintain the appeal. As assignee L&I is the real party in interest and is the appellant in this case. This Court should grant its motion as appellant to dismiss under RAP 18.2.

RESPECTFULLY SUBMITTED this 30th day of January, 2015.

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
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Appendix L

No. 32177-1-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS Respondents.	DECLARATION OF ANASTASIA SANDSTROM

I, Anastasia Sandstrom , declare under the penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the assistant attorney general assigned to represent the Department of Labor and Industries in this matter.
2. On January 9, 2015, I directed Tom Scribner to withdraw as L&I's representative in this matter. I sent him a notice of withdrawal that specified that he would be withdrawing "from representing the State of Washington Department of Labor and Industries, assignee of a claim assigned by Virginia Burnett." He refused to withdraw and to sign the notice.
3. I responded to his refusal by pointing out that the notice of withdrawal was limited to the Department and that he could

propose alternative language. I also asked him to cite the court rule or rule of professional conduct that allows him to decline to withdraw from client representation after a direction from the client. He did not respond.

4. On January 8, 2015, Mr. Scribner sent an "Objection to Dismissal of Appeal" that was received by my office on January 12, 2015.

Signed this 16th day of January, 2015 in Seattle, Washington by

A. Sandstrom

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
800 Fifth Ave., Suite 2000
Seattle, WA 98104

Appendix M

No. 32177-1-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS Respondents.	MOTION TO COMPEL WITHDRAWAL OF COUNSEL

I. INTRODUCTION

Department of Labor and Industries (L&I) initially retained Tom Scribner to represent the agency in this case. After Scribner took positions that are directly contrary to L&I's decisions, the agency terminated Scribner as its counsel. Despite being terminated, Scribner refused to withdraw as L&I's attorney. Therefore, L&I requests that the Court compel the withdrawal of Scribner and permit L&I to be represented by the Attorney General's Office.

II. STATEMENT OF RELIEF SOUGHT

L&I moves to compel withdrawal of Tom Scribner. L&I also moves to have Anastasia Sandstrom recognized as counsel for L&I. This substitution of counsel will not impact the case schedule.

III. FACTS

Virginia Burnett worked for Walla Walla Community College, teaching inmates at the Washington State Penitentiary. CP 1.[1] Burnett sustained an industrial injury on March 9, 2009, and received industrial insurance benefits from L&I. CP 2. When an L&I staff person initially evaluated this case, the staff person thought that Burnett might have a "third party" cause of action. *See* Ex. 1.

As authorized by RCW 51.24.070, L&I sent a letter to Burnett informing her of the potential third party claim. The letter demanded that Burnett respond to L&I within 60 days or the case would be assigned to L&I. Ex. 1. Burnett did not respond to the letter. Hatzialexiou Decl. at 2; Ex. 2. L&I sent a letter to Burnett that informed her that since she did not respond to the demand for election, her "third party action is now deemed assigned to the department to prosecute or compromise in its discretion." Ex. 2. Burnett again did not respond. Hatzialexiou Decl. at 2.

Since Burnett declined to proceed in this lawsuit by exercising her "right to election," this case became assigned to L&I. Hatzialexiou Decl. at 2; Ex. 1, 2; RCW 51.24.050, .070.[2] In 2013, L&I retained Tom Scribner as a special assistant attorney general to represent L&I in this

[1] In addition to the clerk's papers, L&I relies on the declaration of Debra Hatzialexiou also filed in support of L&I's motion to dismiss, and the declaration of Anastasia Sandstrom.

[2] All exhibits are attached to the Debra Hatzialexiou declaration.

assigned case. Ex. 3 at 1. The retainer agreement specified that the cause of action was "assigned to L&I." Ex. 3 at 1. It also specified that "[f]or the claims/actions pursued under this agreement, L&I is the client and is afforded such right as are attendant on an attorney - client relationship." Ex. 3 at 3.[3]

On December 30, 2014, L&I directed Tom Scribner, its then counsel, to dismiss this appeal. Hatzialexiou Decl. at 3. He refused, saying he was not going to dismiss the appeal because he had a conflict. *Id.* at 2-3 He described the conflict as stemming from his assertion that his firm represented both L&I and Burnett and she did not wish to dismiss. *Id.* L&I was unaware that he had purportedly formed an attorney-client relationship with Burnett, contrary to his agreement with L&I. Hatzialexiou Decl. at 2. On January 6, 2015, L&I terminated him from his contract as special assistant attorney general. Hatzialexiou Decl. at 4. Anastasia Sandstrom, Assistant Attorney General, now represents L&I in this matter. *Id.* at 4.

On January 9, 2015, Scribner was directed to withdraw "from representing the State of Washington Department of Labor and Industries,

[3] This case remains assigned to L&I. On January 8, 2015, Scribner sent an "Objection to Dismissal of Appeal" received on January 12, 2015. Sandstrom Decl. at 2. In it Scribner argues that Burnett "should be allowed to continue with her claim for general damages and other special damages." Burnett has not directly asked L&I to exercise its discretion and allow re-election under RCW 51.24.070(4). To the extent that her statements in the Objection constitute a request for reelection, the Department in its discretion denies such a request. Hatzialexiou Decl. at 5.

assignee of a claim assigned by Virginia Burnett." Sandstrom Decl. at 1. He refused. *Id.* He was not asked to withdraw at that time from his newly claimed status as counsel to Virginia Burnett. Sandstrom Decl. at 1.[4] He cited no Rule of Professional Conduct or civil rule in support of the notion that an attorney can refuse to withdraw from representing a client in court. Sandstrom Decl. at 1-2. AAG Sandstrom has filed a notice of appearance in this matter. *See* Notice of Appearance.

IV. GROUNDS FOR RELIEF

L&I has terminated Scribner from representing the agency but he has refused to withdraw as its attorney. Under the third party scheme, Scribner represented L&I. The Rules of Professional Conduct require lawyers to abide by the client's decisions regarding representation and prohibit lawyers from representing a party without the party's authorization. RPC 1.2(a), (f). Accordingly, this Court should grant L&I's motion to compel the withdrawal of Scribner.

A. This Case Is Assigned To L&I and It May Take Any Action To Manage the Case

As explained in L&I's supplemental brief, this case is assigned to L&I under RCW 51.24.050 and .070. Under RCW 51.24.050 and RCW 51.24.070, if a worker does not exercise the "right to election," as here,

[4] Per the January 8, 2015 objection to dismissal of appeal, a new firm will be substituting for Burnett in whatever capacity she may have in this case. Objection at 2.

any claim for damages arising out of her workplace injury is deemed assigned to L&I. Here, Burnett did not respond to the demand regarding election, so the matter is assigned to L&I.

RCW 51.24.050(1) gives L&I broad authority regarding a workplace injury claim that is assigned to L&I. The statute provides an "assignment" to L&I. *Id.* L&I "may prosecute or compromise the action in its discretion in the name of the injured worker, beneficiary or legal representative." RCW 51.24.050(1). An assignee "steps into the shoes" of the assignor and has all the rights of the assignor. *Puget Sound Nat'l Bank v. Dep't of Rev.*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Estate of Jordan v. Hartford Accident & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993). "[T]he assignee acquires whatever rights the assignor possessed prior to the assignment." *Puget Sound Nat'l Bank*, 123 Wn.2d at 292-93.

One of the rights a party has is to determine its counsel. RPC 1.2(f). A case assigned under RCW 51.24.050 may be prosecuted by a special assistant attorney general. RCW 51.24.110(1), (2). Attendant to the power to retain counsel is the power to terminate counsel. Indeed RAP 18.3 and CR 71 authorize withdrawal of counsel. Here, L&I has

terminated Scribner as its counsel and he should accordingly withdraw from representing it.

B. An Attorney Is Ethically Obligated to Withdraw as Counsel When Terminated By the Client

Scribner has failed to comply with the rules of professional conduct concerning representation. *See* RPC 8.4(a). An attorney must "abide by a client's decision concerning the objectives of representation." RPC 1.2(a). When representation is terminated, "a lawyer shall take steps to the extent reasonably practicable to protect a client's interests . . . ." RPC 1.16(d). Here the client has expressed its interests: withdrawal. No authority exists to refuse to withdraw, and the Supreme Court has sanctioned attorneys for similar actions. *See In re Disciplinary Proceeding Against Eugster*, 166 Wn.2d 293, 209 P.3d 435 (2009). After an attorney has been terminated, he may ethically continue to act on behalf of an organization only if he "is authorized or required to so act by law or a court order." RPC 1.2(f). There is no law or court order that would permit Scribner to continue to represent the agency. There is no law or court order that would limit L&I's ability to terminate Scribner.

In addition to violating multiple ethics rules by continuing to hold himself out as L&I's attorney, Scribner violated RPC 1.7 by developing an attorney-client relationship with Burnett without obtaining L&I's consent.

Scribner asked L&I to waive the conflict and allow him to continue to represent Burnett. Hatzialexiou Decl. at 4. L&I declined. *Id.* Despite this, at this time L&I has opted not to demand that Scribner withdraw from representing Burnett because L&I understands that a notice of substitution will be forthcoming.[5] Sandstrom Decl. at 1; Objection at 2.

Because Scribner no longer represents L&I, this Court should recognize AAG Sandstrom as L&I's counsel for representing it in this assigned case.

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[5] Although L&I is not asking that Scribner be ordered to end the attorney-client relationship with Burnett given the upcoming notice of substitution, the agency will continue to argue that Burnett does not have standing to oppose dismissal in this matter. The case has been assigned to L&I and an assignor has no right to oppose actions taken by the assignee.

V. CONCLUSION

Scribner has no basis to refuse to withdraw from representing a client in a case. This Court should order the withdrawal of Scribner from representing L&I, the assignee in this matter. The Court should recognize AAG Sandstrom as representing L&I. By separate motion, L&I has asked the Court to dismiss this appeal.

DATED this 16th day of January, 2015.

Respectfully submitted,

ROBERT W. FERGUSON
Attorney General

A. Sandstrom

Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
Office Id. No. 91040
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

Appendix N

No. 32177-1-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS Respondents.	DECLARATION OF DEBRA HATZIALEXIOU

I, Debra Hatzialexiou, declare under the penalty of perjury that the following is true and correct to the best of my knowledge:

1. I am the legal services program manager for the Department of Labor & Industries. As part of my responsibilities, I oversee the department's third party program. Upon consultation with senior department management as appropriate, I am authorized to make decisions about the positions the department takes in lawsuits, such as whether or not the department will initiate or maintain a law suit or an appeal. I am authorized to make decisions about the *Burnett v. Department of Corrections* case.
2. The following are true and correct documents from the Department's file:

Ex. 1: Letter dated May 19, 2009, with certified receipt, to Virginia Eileen Burnett

Ex. 2: Letter dated August 6, 2009, to Virginia E. Burnett

Ex. 3: Retainer agreement with Tom Scribner

3. Per the department records, Ms. Burnett did not respond to the department's demand for election in this matter on May 19, 2009. She did not assert the case should not be assigned after the August 6, 2009 letter was sent. The case became assigned to the department.

4. Michael Patjens, department tort claims investigator, contracted first with M. Scott Wolfram, SAAG (Retainer agreement, #2009-000102) of Minnick-Hayner to represent the department. He then contracted with Tom Scribner of Minnick-Hayner to represent the department instead of Mr. Wolfram as Mr. Wolfram left the firm for a position as judge with the Superior Court of Walla Walla County. Mr. Patjens discussed with Mr. Scribner that the department is the client and that the claim is brought in the name of the worker on behalf of the State of Washington.

5. Department records indicate that the department was unaware of any attorney client contact or relationship between Mr. Scribner and Ms. Burnett at any point during the time period after he executed the contract on July 30, 2013, until January 2, 2014.

6. Mr. Patjens authorized filing the complaint in the *Burnett v. Department of Corrections* matter. Mr. Patjens also authorized filing the appeal in the Court of Appeals in this matter.

7. Upon review of the *Burnett* matter after the Court sent its December 17, 2014 letter with questions for the parties, I decided, in consultation with Assistant Director for Insurance Services, Victoria Kennedy, that the department should dismiss its assigned appeal in *Burnett*. This is because it is the department's position that a state employee's employer is the State of Washington. Further, it is the department's position that under RCW 51.24.030, a state employee from one state agency cannot sue an employee from another state agency for conduct arising out of a work place injury. For the reasons stated in the brief of respondent filed by the Department of Corrections, the State of Washington did not waive Title 51 immunity.

8. On December 30, 2014, I emailed Tom Scribner and directed him, as the department's special assistant attorney general, to dismiss the *Burnett* appeal. I followed up with an email on January 2, 2015, asking whether he had dismissed the appeal and he responded that he was not going to dismiss the appeal because his firm had a conflict. He described the conflict as stemming from

the fact that his firm represented both the department and Ms. Burnett, and she did not wish to dismiss. In my email on January 2, 2015, I requested that he direct all communication about the case to me, and that Ms. Burnett may separately request to re-elect. On January 5, 2015, he followed up with a letter reiterating his refusal to dismiss the appeal. On January 5, 2015, I authorized Anastasia Sandstrom, Assistant Attorney General, to file a motion to dismiss since Mr. Scribner was no longer representing the department's interests. AAG Sandstrom now represents the department in this matter. On January 6, 2015, I terminated Mr. Scribner from his contract as special assistant attorney general in the *Burnett* matter. Mr. Scribner has acknowledged that there is a conflict between his representation of the department and his representation of Ms. Burnett. He asked the department to waive this conflict so as to allow him to continue to represent Ms. Burnett. I declined to waive the conflict.

9. As of the date of this declaration, Ms. Burnett has not requested to re-elect under RCW 51.24.070(4). To the extent that her statements in the January 8, 2015 Objection to Dismissal of Appeal constitute a request for reelection, the Department in its discretion denies such a request.

Signed this 16th day of January, 2015 in Tumwater, Washington by

Debra Hatzialexiou

Exhibit 1

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

PO BOX 44288 • OLYMPIA WA 98504-4288
http://www.lni.wa.gov/3rdparty/

CERTIFIED

May 19, 2009

VIRGINIA EILEEN BURNETT
411 SE ELM ST
COLLEGE PLACE, WA 99324

Claim number:	AE99908
Injured Worker:	VIRGINIA E. BURNETT
Date of Injury:	03/09/2009
Employer:	WALLA WALLA COMMUNITY COLLEGE

Dear VIRGINIA E. BURNETT:

The accident report you filed with the Department of Labor and Industries indicated a "third party" caused your injuries. A third party claim occurs when an injury or occupational disease is caused by a person who does not work for your employer, or when it is caused by equipment failure or a defective product.

By this notice, demand is hereby made for you to exercise your right of election pursuant to RCW 51.24.070. Unless an election is made within 60 days from the receipt of this demand, this action will be deemed assigned to the department. The department may then prosecute or compromise the action at its discretion.

If you have any questions regarding your third party action, please call the number below.

Thank you for your cooperation.

Please direct all correspondence for the Third Party to:

THIRD PARTY SECTION, PO BOX 44288, OLYMPIA WA 98504-4288.

Sincerely,

Lori L Butterfield
Third Party Adjudicator
Phone: 360-902-5102

TPTY-EC AUTO

Enclosure

cc: WALLA WALLA COMMUNITY COLLEGE

7009 3321 9445 4001 4072

A. Received by (Please Print Clearly) Virginia Burnett	B. Date of Delivery 6-3-09
C. Signature X	☐ Agent ☐ Address
D. Is delivery address different from item 1? If YES, enter delivery address below:	☐ Yes ☐ No

Service Type CERTIFIED MAIL

Restricted Delivery? *(Extra Fee)* ☐ Yes

Article Addressed to:
VIRGINIA EILEEN BURNETT
411 SE ELM ST
COLLEGE PLACE, WA 99324

Reference Information

AE99908

EC

RECEIVED

JUN 09 2009

THIRD PARTY UNIT

S Form 3811, July 2001 Domestic Return Receipt

Exhibit 2

STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES

PO BOX 44288 • OLYMPIA WA 98504-4288
http://www.lni.wa.gov/3rdparty/

August 6, 2009

VIRGINIA E. BURNETT
411 SE ELM ST
COLLEGE PLACE WA 99324

Claim number:	AE99908
Injured Worker:	VIRGINIA E. BURNETT
Date of Injury:	03/09/2009
Employer:	WALLA WALLA COMMUNITY COLLEGE

Dear VIRGINIA E. BURNETT:

Since you did not respond to our demand for election, your third party action is now deemed assigned to the department to prosecute or compromise at its discretion.

To assist us in evaluating your claim, please complete the enclosed assessment of damages form and return it in the envelope provided. If you have any questions regarding your third party action, please call the number below.

Thank you for your cooperation.

Please direct all correspondence for Third Party to:

THIRD PARTY SECTION, PO BOX 44288, OLYMPIA WA 98504-4288.

Sincerely,

Michael D Patjens
Third Party Adjudicator
Phone: 360-902-4412

TPTY-ED AUTO

Enclosure

cc: WALLA WALLA COMMUNITY COLLEGE

Exhibit 3

L&I Contract No. 2013000059

RETAINER AGREEMENT

Under the authority granted by RCW 51.24.110, this retainer agreement is made and entered into by and between the Washington State Department of Labor & Industries ("L&I" or the "Department"), and Tom Scribner Attorney-At-Law, ("Contractor"), at the following addresses:

Tom Scribner
Attorney at Law
249 W Alder St
Walla Walla WA 99362
UBI: 600203830
FED TAX ID/SSN: 910965497
Phone: 509-527-3500

Michael D Patjens, Contract Manager
Department of Labor and Industries
PO Box 44288
Olympia, WA 98504-4288
Phone: 360-902-4412
Email: PATJ235@LNI.WA.GOV

PURPOSE

It is the purpose of this Agreement for L&I to obtain the services of a special assistant attorney general to prosecute one or more legal actions against a third party(s). Each cause of action was assigned to L&I under RCW 51.24.050 and/or RCW 51.24.070. It is L&I's intent to pursue the cases assigned to the Contractor in the most economical, efficient and feasible manner; and to the main extent possible to use L&I resources when appropriate or possible.

THEREFORE, IT IS MUTUALLY AGREED THAT:

PERIOD OF PERFORMANCE

Subject to its other provisions, this Agreement shall begin upon execution of the Agreement, and end on 7/2/2017 unless terminated in accordance with the Termination of Agreement clause or completion of assigned cause(s) of action, or extended as provided herein.

PERFORMANCE REQUIREMENTS

As a special assistant attorney general the Contractor shall:

1. Begin work on case, or notify L&I of status, within 3 months of executing contract.

2. Obtain prior authorization from L&I's Contract Manager to: (1) file suit (or make formal demand for UIM arbitration), (2) incur any costs beyond authorized thresholds, or (3) settle cases.

3. File suit within the statute of limitations, or notify L&I if not filing suit 6 months prior to limit.

4. Respond to L&I written inquiries for status of case within 20 days.

5. Abide by all terms of this contract, and act in the best interest of its client, which is the department, at all times. In the event any potential conflict of interest arises, e.g., the injured worker asserts an attorney-client relationship, etc., the attorney must notify the Department in writing of the existence and nature of the potential conflict within 20 calendar days.

NOTE: Failure to meet performance requirements may result in removal from the list of attorneys eligible to represent the department in accordance with WAC 296-14-900. See REMOVAL OF SPECIAL ASSISTANT ATTORNEY GENERAL clause below.

COMPENSATION

L&I will pay the Contractor in accordance with Attachment C, Payment Of Fees & Costs, which is incorporated by reference herein:

When a recovery is made L&I shall pay the Contractor's attorney's fees from the recovery, AND costs incurred in the Contractor's representation of L&I as specified in Attachment C.

When a recovery is not made L&I shall pay only the Contractor's costs. Payment shall not exceed the maximum cost limit as specified in Attachment B.

STATEMENT OF WORK

As a special assistant attorney general, the Contractor shall pursue one or more legal claims/actions against a third party(s). These actions are for the recovery of damages sustained by a worker who died, was injured, or is suffering from a disease contracted in the course of employment. As appropriate the Contractor shall:

1. Review, evaluate and investigate facts relating to the claims/actions, and to determine if it is worthwhile to pursue litigation.

2. Pursue claims, bring actions, or enter an appearance on behalf of L&I, in actions already filed, in the proper courts of law, and to do all acts incidental and appropriate to such actions to obtain maximum recovery of damages. Consult with and inform L&I's Contract Manager of the progress of all matters covered by this agreement. Where time permits, the Contractor shall offer L&I's Contract Manager the opportunity to review court documents and briefs prior to filing. The Contractor shall, upon request, promptly furnish L&I's Contract Manager with copies of all correspondence and all court documents and briefs prepared in connection with the services rendered under the agreement. The Contractor shall allow L&I's Contract Manager to inspect files and records related to these actions at the Contractor's place of business at such times as are reasonable for the purposes of this agreement.

3. Adjust, settle, or compromise, the claims/actions, or cause the dismissal of the actions.

4. Obtain judgment, and levy execution to judgment to obtain maximum recovery of damages.

TERMS AND CONDITIONS

All rights and obligations of the parties to this Agreement shall be subject to, and governed by, the following: the provisions of WAC 296-14-900 through 296-14-960, Special Terms and Conditions contained in the text of this Agreement; and the General Terms and Conditions, Attachment A, which is incorporated by reference herein.

APPOINTMENT AS SPECIAL ASSISTANT ATTORNEY GENERAL

The Contractor is capable of performing, and agrees to perform the legal services as set out in this Agreement. The legal authority of the Contractor to represent L&I is provided in Attachment D, Appointment as Special Assistant Attorney General, which is incorporated by reference herein.

REMOVAL OF SPECIAL ASSISTANT ATTORNEY GENERAL

In accordance with WAC 296-14-940, the Department, in conjunction with the Office of the Attorney General of Washington State and the Washington State Bar Association, may remove an attorney for cause from the lists of attorneys eligible to represent L&I. Cause includes, but is not limited to:

1. Misuse of the designation "special assistant attorney general";

2. Lapse of any qualification; or

3. Failure to meet performance requirements of the department contract.

CONTRACTOR'S RELATIONSHIP WITH L&I

1. Attorney-Client Relationship. For the claims/actions pursued under this agreement, L&I is the client and is afforded such rights as are attendant on an attorney - client relationship.

2. Authority to Settle. Pursuant to RCW 51.24.050(1), L&I has the exclusive authority to compromise the assigned cause(s) of action and retains the right to approve any settlement offer.

3. Confidentiality: Except as governed by the Civil Rules of Discovery, any documents, data and records given to or prepared by the Contractor under this agreement shall not be made available to any individual or organization by the Contractor without prior written approval of L&I's Contract Manager. Any information secured by the Contractor from L&I or the Attorney General's Office in connection with carrying out this agreement shall be kept confidential unless disclosure of such information is required by the Civil Rules of Discovery or as approved in writing by L&I or the Attorney General's Office.

4. Power of Attorney to Execute Documents. L&I gives the Contractor a power of attorney to execute all documents connected with the claims / actions for the prosecution for which the Contractor is retained. The documents include, but are not limited to, pleadings, contracts, commercial papers, verifications, dismissals, and orders L&I or its attorney could properly execute. This power is subject to the conditions specified in the Statement of Work § 3 and in the Contractor's Relationship With L&I § 3 above.

5. Employment Of Associates Or Assistant Counsel Experts And Investigators. The Contractor shall not employ any person employed by either L&I or the Washington State Attorney General's Office at any time during the term of this agreement for any work required by the terms of this agreement. L&I does authorize the Contractor to:

   5.1 Employ, at the Contractor's expense, associates or assistant counsel who are members of the Contractor's law firm.

   5.2 Employ, at the Contractor's expense, associates or assistant counsel who are not members of the contractor's law firm upon prior written approval of the department and appointment as a special assistant attorney general.

   5.3 Retain experts and investigators whose examination and investigation might further the litigation of the claims or causes of action.

LICENSE TO APPEAR

The Contractor warrants that the Contractor is now or will be duly licensed to practice law before any State or Federal administrative or judicial forum, court or tribunal before which the Contractor appears on behalf of L&I. The Contractor may seek appointment of a Special Assistant Attorney General to act as co-counsel where appearance by L&I or the Attorney General's Office is required in a forum or jurisdiction where the Contractor is not licensed to practice.

RECOVERY AND DISTRIBUTION PROCEDURE

1. Any release for the purpose of effectuating a recovery shall be signed by L&I's Contract Manager.

2. All bills of exchange, checks or drafts for amounts recovered by settlement or judgment shall be drawn solely in the name of L&I, and shall be forwarded to L&I's Cashier with the Claim Number and the caption of the cause of action affixed to each bill of exchange, check or draft.

3. Upon receipt of the gross recovery, L&I shall pay the Contractor the agreed attorney's fees and costs specified under Attachment C, and distribute the balance according to RCW 51.24.050(4).

ATTORNEY'S LIEN

Pursuant to RCW 60.40.010, the Contractor has a lien for the Contractor's fees and costs specified in Attachment C.

FAVORABLE OUTCOME NOT WARRANTED

The Contractor makes no warranties regarding the successful conclusion of the claim(s) or action(s). Any such statements are the Contractor's opinion only.

TERMINATION OF AGREEMENT

The rights and remedies of L&I provided in this clause shall not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement. Regardless of the reason for termination, the parties agree that written notice of termination is required from the terminating party. See also the Termination Procedures clause.

1. Inability to Perform:

   If, because of an occurrence beyond the control of the Contractor, it becomes impossible for the Contractor to render the services set forth in this agreement, L&I may terminate the agreement as a Termination For Convenience except that the 30 day advance notice is not required. Such termination shall take effect upon service of notice as set out in the Termination Procedure clause. L&I shall reimburse the Contractor as set out in §2.1 below.

2. Termination For Convenience.

   2.1 By L&I. Notwithstanding any contrary provision in the agreement, L&I may elect to terminate this agreement upon thirty (30) days written notice to the Contractor. If L&I elects to terminate, the Contractor shall be entitled to (1) reimbursement for costs advanced specified in Attachment C; and (2) attorney's fees, if eligible, based on the reasonable value of service actually rendered, provided the attorney's fees do not exceed

the percentage of the gross recovery specified in Attachment C. To be eligible for attorney's fees the Contractor must provide supporting records and documentation of services rendered to L&I within 30 days of the notice of termination. Payment for attorney's fees shall be made by L&I at the time of recovery or closure of the action. Reimbursement to the Contractor for costs advanced shall be made by L&I within ninety (90) days of termination of the agreement.

2.2 By the Contractor. The Contractor may terminate this agreement upon ninety (90) days written notice to L&I. The Contractor shall be entitled to reimbursement for costs advanced specified in Attachment C. Reimbursement to the Contractor for costs advanced shall be made by L&I at the time of recovery or closure of the action. The Contractor shall not be entitled to attorney's fees.

3. Termination For Reassignment

If the worker requests to exercise a right of re-election under RCW 51.24.070, a written agreement between worker's counsel and the Contractor shall be made for payment of the reasonable value of service actually rendered by Contractor and costs prior to reassignment. Any decision to approve the worker's re-election is in the discretion of L&I.

4. Termination For Default

If either party violates any material term or condition of this contract, the other (aggrieved) party may give the violating party written notice of the violation. The violating party will correct the violation within 30 days or as otherwise mutually agreed. If the violation is not corrected, the aggrieved party may, at its sole discretion, immediately terminate this contract by written notice to the violating party. Upon termination, the violating party shall be liable for damages as authorized by law. L&I shall have the right to deduct damages from any payment due the Contractor for costs advanced specified in Attachment C. Any remaining payment due the Contractor for costs advanced shall be made by L&I at the time of recovery or closure of the action. The Contractor
shall not be entitled to attorney's fees.

The termination shall be deemed to be a Termination for Convenience if it is determined that:

- the violating party was not in default; or
- failure to perform was outside of the violating party's control, fault or negligence.

This clause shall not apply to any failure to perform which is the result of the aggrieved party's willful or negligent acts or omissions.

TERMINATION PROCEDURES

1. Notice of Termination. Written notice of termination is required. Notice is deemed duly served if delivered in person to the party to whom it is intended, or if delivered at, or sent by registered mail to, the business address of the person for whom it is intended, as specified in this agreement.

2. Treatment of Assets. Upon termination of this contract, in addition to any other rights provided in this contract, L&I may require the Contractor to deliver to L&I any property specifically produced or acquired for the performance of any part of this contract which has been terminated. The provisions of the Treatment of Assets clause shall apply.

3. Stop Work. After receipt of a notice of termination, and except as otherwise directed by L&I's Contract Manager, the Contractor shall stop work under the contract on the date, and to the extent specified in the notice.

WAIVER

Unless the contract is amended in writing by an authorized representative of L&I, waiver of a default under this contract, or failure by L&I to exercise its rights shall not:

- be considered a modification or amendment to the contract; or
- constitute a waiver of any subsequent default.

ASSURANCES

L&I and the Contractor agree that all activity pursuant to this Agreement will be in accordance with all the applicable current or future federal, state and local laws, rules, and regulations.

GOVERNANCE

This Agreement shall be construed and interpreted in accordance with the laws of the state of Washington and the venue of any action brought hereunder shall be in the Superior Court for Thurston County.

ORDER OF PRECEDENCE

The items listed below are incorporated by reference herein. In the event of an inconsistency in this Agreement, unless otherwise provided herein, the inconsistency shall be resolved by giving precedence in the following order:

1. Applicable Federal and Washington State Statutes and Regulations;
2. Special Terms and Conditions as contained in the basic Agreement;
3. General Terms and Conditions, Attachment A;
4. List of Claims / Cases, Attachment B,
5. Payment of Fees & Costs, Attachment C; and
6. Appointment as Special Assistant Attorney General, Attachment D.

SEVERABILITY

If any provision of this Agreement or any provision of any document incorporated by reference shall be held invalid, such invalidity shall not affect the other provisions of this Agreement which can be given effect without the invalid provision, or part thereof if such remainder conforms to the terms and requirements of applicable law and the intent of this agreement, and to this end the provisions of this Agreement are declared to be severable.

AGREEMENT / CONTRACT MANAGEMENT

Michael D Patjens, Contract Manager for L&I's Third Party Section, shall administer this agreement.

ALL WRITINGS CONTAINED HEREIN

This Agreement sets forth in full all the terms and conditions agreed upon by the parties. Any other agreement, representation, or understandings, verbal or otherwise, regarding the subject matter of this Agreement shall be deemed to be null and void and of no force and effect whatsoever.

IN WITNESS WHEREOF, the parties have executed this Agreement.

Contractor

7/30/13

Tom Scribner — Date
Attorney-At-Law

State of Washington
Department of Labor and Industries

8/09/13

Erick Agina — Date
Supervisor, Third Party Section

APPROVED AS TO FORM ONLY:

Approval on file — 9/21/99
Penny Allen — Date
Assistant Attorney General

Attachment A
GENERAL TERMS & CONDITIONS

DEFINITIONS

As used throughout this contract, the following terms shall have the meanings set forth below:

A. "Contractor" shall mean that agency, firm, provider, organization, individual or other entity performing services under this contract.

B. "Contract Manager" shall mean the representative identified in the text of the contract who is delegated the authority to administer the contract.

C. "Subcontractor" shall mean one not in the employment of the Contractor, who is performing all or part of those services under this contract under a separate contract with the Contractor. The terms "subcontractor" and "subcontractors" mean subcontractor(s) in any tier.

INDEPENDENT CAPACITY OF THE CONTRACTOR

The Contractor and its employees or agents performing under this contract are not employees or agents of L&I. The Contractor will not hold itself out as, nor claim to be, an officer or employee of L&I or of the state of Washington by reason of this contract, nor will the Contractor make any claim of right, privilege or benefit which would accrue to a civil service employee under Chapter 41.06 RCW or Chapter 28B.16 RCW.

NONDISCRIMINATION & CIVIL RIGHTS

During the performance of this contract, the Contractor shall comply with all federal and state nondiscrimination laws, regulations and policies. In the event of the Contractor's noncompliance or refusal to comply with any nondiscrimination law, regulation, or policy this Contract may be rescinded, canceled, or terminated in whole or in part, and the Contractor may be declared ineligible for further contracts with the Agency. The Contractor shall, however, be given a reasonable time in which to cure this noncompliance. Any dispute may be resolved in accordance with the "Disputes" procedure set forth herein.

ASSIGNABILITY

The work to be provided under this contract, and any claim arising thereunder, shall not be assigned or delegated by either party in whole or in part, without the express prior written consent of the other party, which consent shall not be unreasonably withheld.

SUBCONTRACTS

The Contractor shall not enter into subcontracts for any of the services contemplated under this Agreement without obtaining the prior written approval of L&I's Contract Manager. In the event L&I's Contract Manager gives consent, the Contractor shall incorporate the terms of this Retainer Agreement into its contract with the subcontractor. This clause does not include contracts of employment between the Contractor and personnel assigned to work under the contract. This clause shall be incorporated into all contracts of any tier with whom the Contractor must work in performing this Agreement.

SITE SECURITY

Contractor staff shall conform in all respects with physical, fire or other security regulations while on L&I premises. Failure to comply with safety regulations may be grounds for revoking or suspending security access to these facilities. L&I reserves the right and authority to immediately revoke security access to Contractor staff for any real or threatened breach of this provision. Upon reassignment or termination of any Contractor staff, Contractor agrees to promptly notify L&I.

INDEMNIFICATION

The Contractor shall defend, protect and hold harmless L&I, or any of L&I's agents, from and against all claims, suits or actions arising from both negligent and intentional act/s or omission/s of the Contractor, or agents of the Contractor, while performing the terms of this contract. L&I shall defend, protect and hold harmless the Contractor, or any of the Contractor's agents, from and against all claims, suits or actions arising from both negligent and intentional act/s or omission/s of L&I, or agents of L&I, while performing the terms of this contract. In the case of negligence of both L&I and the Contractor, any damages allowed shall only be levied in proportion to the percentage of negligence attributable to each party.

The Contractor shall provide insurance coverage in adequate quantity to protect against legal liability arising out of contract activity. Additionally, the Contractor is responsible for ensuring that any subcontractors provide insurance coverage for the activities arising out of subcontracts.

COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agency maintained by the Contractor for the purpose of securing business. L&I shall have the right, in the event of breach of this clause by the Contractor, to annul this contract without liability or, in its discretion, to deduct from the contract price or consideration or recover by other means the full amount of such commission, percentage, brokerage or contingent fee.

CONFLICT OF INTEREST

With a few exceptions, RCW 42.52.120(1) prohibits a state officer or state employee from receiving anything of economic value under any contract or grant outside of his or her official duties. The Governor, or a state agency affected by a violation of Chapter 42.52 RCW or the rules adopted under it, may request that the Attorney General bring an action in superior court to cancel or rescind a state action taken by a state employee or state officer when a violation of the ethics law or rules substantially influenced the state action and the interests of the state require the cancellation or rescission. The Governor may suspend the action pending a determination of the court action.

COLLECTIVE BARGAINING AGREEMENT

L&I shall contract for and administer services contracts in a manner consistent with the Collective Bargaining Agreement, effective May 1, 1997, between L&I and the Washington Federation of State Employees, Council 28, which includes in part the following language in Article 22, Contracts for Services:

The Department is prohibited from hiring former employees for a period of two (2) years following the last date of employment with the Department: a) as a Contractor performing work for the Department, or b) as an employee of a Contractor, if the contract is for work to be performed for the Department. This requirement may be waived with the expressed written consent of the Department's Statewide Union/Management Committee.

TREATMENT OF ASSETS

The Contractor shall maintain files, data, records, and any other documents as is reasonable and within the custom and practice of personal injury litigation attorneys. All such documents shall become and remain the property of L&I. L&I shall have the right to use all such documents without restriction or limitation and without compensation to the Contractor. The Contractor shall have no right or interest in these documents, data and records, except in the form of an attorney's lien pursuant to RCW 60.40.010.

1. Until completion of services under this Agreement, all such documents shall at L&I's option, be appropriately arranged, indexed and delivered to L&I's Contract Manager by the Contractor.

2. All reference to the Contractor under this clause shall include any of his or her employees or agents, or sub-contractors.

RECORDS, DOCUMENTS, AND REPORTS

The Contractor shall maintain all books, records, documents, data and other evidence relating to this contract and performance of the services described herein, including but not limited to accounting procedures and practices which sufficiently and properly reflect all direct and indirect costs of any nature expended in the performance of this Contract. Contractor shall retain such records for a period of six years following the date of final payment. At no additional cost, these records, including materials generated under the contract, shall be subject at all reasonable times to inspection, review or audit by the Agency, personnel duly authorized by the Agency, the Office of the State Auditor, and federal and state officials so authorized by law, regulation or agreement.
If any litigation, claim or audit is started before the expiration of the six (6) year period, the records shall be retained until all litigation, claims, or audit findings involving the records have been resolved.

CONFIDENTIALITY

The use or disclosure by any party of any information concerning L&I for any purpose not directly connected with the administration of L&I's or the Contractor's responsibilities with respect to services provided under this contract is prohibited except by prior written consent of L&I. The Contractor shall maintain as confidential all information concerning the Contractor's study findings and recommendations, as well as the business of L&I, its financial affairs, relations with its clientele and its employees, and any other information which may be specifically classified as confidential by L&I in writing to the Contractor. To the extent consistent with RCW 42.17.310 ("The Public Disclosure Act"), L&I shall maintain all information that the Contractor specifies in writing as confidential. The Contractor shall have an appropriate contract with its employees to this effect.

ACCESS TO DATA

In compliance with chapter 39.29 RCW, the Contractor shall provide access to data generated under this contract to L&I, the joint legislative audit and review committee, and the state auditor at no additional cost. This includes access to all information that supports the findings, conclusions, and recommendations of the Contractor's reports, including computer models and methodology for those models.

REGISTRATION WITH DEPARTMENT OF REVENUE

The Contractor shall comply with the Washington State law requiring registration with the Department of Revenue and shall be responsible for payment of all taxes due on payments made under this contract. The Department of Revenue is located at the General Administration Building, Olympia, Washington, 98504.

TAXES

All payments accrued on account of payroll taxes, unemployment contributions, any other taxes, insurance or other expenses for the Contractor or its staff shall be the sole responsibility of the Contractor.

LICENSING AND ACCREDITATION STANDARDS

The Contractor shall comply with all applicable local, state, and federal licensing and accrediting requirements / standards, necessary in the performance of this contract. (See 19.02 RCW for state licensing requirements/definitions).

INDUSTRIAL INSURANCE COVERAGE

The Contractor shall comply with the provisions of Title 51 RCW, Industrial Insurance. If the Contractor fails to secure industrial insurance coverage or fails to pay premiums on behalf of its employees, as may be required by law, L&I may collect from the Contractor the full amount payable to the Industrial Insurance accident fund. L&I may:

- deduct the amount owed by the Contractor to the accident fund from the amount payable to the Contractor by L&I under this Contract, and
- transmit the deducted amount to the Department of Labor and Industries, Division of Insurance Services.

This provision does not waive any of L&I's rights to collect from the Contractor.

RIGHTS OF INSPECTION

The Contractor shall provide right of access to its facilities to L&I, or any of its officers, or to any other authorized agent or official of the state of Washington or the federal government at all reasonable times, in order to monitor and evaluate performance, compliance, and/or quality assurance under this contract.

FUNDING CONTINGENCY

In the event funding from state, federal, or other sources is withdrawn, reduced, or limited in any way after the effective date of this contract and prior to normal completion, L&I may terminate this contract without advance notice subject to renegotiation under those new funding limitations and conditions.

LIMITATION OF SIGNATURE AUTHORITY

Only the Director or his or her delegate by writing (delegation to be made prior to action) shall have the expressed, implied, or apparent authority to alter, amend, modify, or waive any clause or condition of this contract. Furthermore, any alteration, amendment, modification, or waiver of any clause or condition of this contract is not effective or binding unless made in writing and signed by the Director or his or her delegate.

CHANGES TO CONTRACT

This Agreement may be amended by mutual agreement of the parties. Such amendments shall not be binding unless they are in writing and signed by personnel authorized to bind each of the parties.

DISPUTES

The parties agree that this dispute process shall precede any action in a judicial or quasi-judicial tribunal: When a bona fide dispute concerning a question of fact arises between L&I and the Contractor and it cannot be resolved, either party may request a dispute hearing with L&I's Contracts Office. The request for a dispute hearing must:

- Be in writing to the L&I Contracts Office, PO Box 44831, Olympia WA 98504-4831;
- State the disputed issues;
- State the relative positions of the parties;
- State the Contractor's name, address, and L&I contract number; and
- Be mailed to the Contracts Office within 30 days of notice of the issue(s) disputed.

Attachment B
CLAIM/CASE REFERRED

The Contractor shall document all costs and maintain a separate accounting for each claim.

CLAIMANT NAME	CLAIM NO.	COST THRESHOLD	MAXIMUM COST LIMIT
VIRGINIA E. BURNETT	AE99908	$300	$900

Attachment C
PAYMENT OF FEES & COSTS

L&I shall pay the Contractor as full payment for the Contractor's services and expenses as set out in this Attachment.

CONTINGENT ATTORNEY'S FEES FOR SERVICES PROVIDED

If the claim is settled or adjudicated, the following percentages of the gross recovery will be paid:

Without suit	25%
After commencement of suit or formal demand for UIM arbitration	33 1/3%
After commencement of trial	33 1/3%
On filing an appeal from final judgment	40%

COMPENSATION IF THERE IS NO RECOVERY

If there is no recovery, L&I shall owe the Contractor nothing. There will be no payment for a review or evaluation on cases not pursued. However, the Contractor shall be entitled to reimbursement for costs advanced as set out in the Legal Costs clause.

LEGAL COSTS

L&I shall reimburse the Contractor for actual ordinary, necessary, and reasonable direct costs incurred in representing L&I in the matters specified in Attachment B and approved by L&I's Contract Manager.

Costs may be accrued without prior approval up to the threshold amounts shown in Attachment B. For costs exceeding the threshold amount prior written approval must be obtained from L&I's Contract Manager. The following costs are allowable:

- Filing fees, service fees, court reporter fees, records reproduction charges;
- Medical report charges, medical research costs;
- Contracted out investigations;
- Witness fees;
- Deposition costs, video deposition costs when used for perpetuation of testimony only;
- Mediation and non-mandatory arbitration costs.

The following are deemed non-allowable as costs:

- Attorney consultation charges, paralegal expenses ;
- Investigations by employees, charges for clerical help or word processing, employee overtime;
- Fees to obtain research material e.g. copies of case law, legal material research, law library;
- Interest on costs;
- File set-up fees, file folders, routine postage, in-house copying, in-house facsimile.

RECEIPTS

The Contractor shall retain all receipts for costs, and when required, shall submit these and supporting documentation, identified by claim number for reimbursement.

BILLINGS & PAYMENTS

Approved costs shall be advanced by the Contractor and reimbursed by L&I at the time of distribution of the recovered funds following award or settlement, or as otherwise provided in this agreement. See Termination of Agreement clause.

The Contractor shall submit invoices quarterly to L&I's Contract Manager.

Invoices shall include:

1. Information as is necessary for L&I to determine:
   - 1.1 The exact nature of all costs advanced by the Contractor; and
   - 1.2 Whether the costs are allowable under the contract terms.
2. Bills or receipts, when indicated.
3. The following identifying information:
   - 3.1 L&I Contract Number which is on this Agreement;
   - 3.2 Claim number for which the costs were incurred;
   - 3.3 Federal Tax Number under which the payment will be reported;
   - 3.4 Washington Bar Association Number.
4. This signed statement must be on each invoice.

The Contractor certifies that the costs incurred stated in this invoice have met all the required standards set forth in the Retainer Agreement.

Appendix O

Tom Scribner
Minnick-Hayner
P.O. Box 1757
Walla Walla, WA 99362

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

VIRGINIA E. BURNETT, Appellant, vs. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and JOHN DOE GUARD, Respondents.	NO. 321771 APPELLANT'S OBJECTION TO DISMISSAL OF APPEAL

I. IDENTITY OF MOVING PARTY

Appellant, Virginia Burnett.

The Department of Labor and Industries has appeared through Anastasia Sandstrom. The Department is not a named party in this case. While it may be a "real party in interest," it is not the only party and does not and should not have sole right to decide whether to dismiss or continue with the appeal.

The action taken by the Department of Labor and Industries (i.e., to dismiss this appeal) creates a conflict for Minnick-Hayner, which currently represents Appellant Virginia Burnett and the Department, and jeopardizes Virginia Burnett's right of recovery.

Minnick • Hayner
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

II. STATEMENT OF RELIEF SOUGHT

That the Motion to Dismiss filed by the Department of Labor and Industries be denied and that this case continue through a decision by the panel assigned to decide the case (on its merits).

III. GROUNDS FOR RELIEF

The lawsuit filed in Walla Walla County Superior Court giving rise to this appeal was filed in the name of Virginia E. Burnett on her behalf and on behalf of the Department of Labor and Industries. The firm of Minnick-Hayner represented both Virginia Burnett and the Department of Labor and Industries.

In mid December 2014, for the first time and without reason given, Minnick-Hayner was told to dismiss the appeal. Ms. Burnett, told that the Department wanted the appeal dismissed, did not want it dismissed. Therefore, Minnick-Hayner, representing both Ms. Burnett and the Department, was being told to do conflicting things: dismiss the appeal and do not dismiss the appeal. Minnick-Hayner, representing both Virginia Burnett and the Department of Labor and Industries, had a conflict.

Minnick-Hayner notified the Department that it would not dismiss the appeal, that it had a conflict, and that arrangements were being made to have substitution of counsel for Virginia Burnett. Substitute counsel has been found for Virginia Burnett and a Notice of Substitution will soon be filed with this Court.

For reasons argued by Ms. Burnett in the Briefs that have been filed with this Court, she believes (and her attorneys believe) that she has a valid cause of action

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against the Department of Corrections and that the Order granting the Department of Corrections' Motion for Summary Judgment should be reversed.

Why the Department of Labor and Industries wants the case dismissed is still unknown to Ms. Burnett and Minnick-Hayner. That both the Department of Labor and Industries and the Department of Corrections are agencies of the State of Washington is not, according to Ms. Burnett, the issue to be decided by this Court. Ms. Burnett is not asking this Court to make new law that in any way would jeopardize the Department of Labor and Industries.

If the Department of Labor and Industries, for whatever reason(s), no longer wants to seek a recovery of its subrogation claim, Virginia Burnett still has and should be allowed to continue with her claim for general damages and other special damages not paid by (to be subrogated to) the Department of Labor and Industries.

It would be unfair to Virginia Burnett to have her cause of action summarily dismissed on the request of the Department of Labor and Industries.

DATED this 8 day of January 2015.

MINNICK-HAYNER

By: _____
Tom Scribner, WSBA #11285
Of Attorneys for Appellant

Minnick • Hayner
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of January 2015, I caused to be served a true and correct copy of **APPELLANT'S OBJECTION TO DISMISSAL OF APPEAL** by the method indicated below, and addressed to the following:

Jason D. Brown
Assistant Attorney General
Attorney General of Washington
West 1116 Riverside Avenue
Spokane, WA 99201-1194

X U.S. Mail, Postage Prepaid

Anastasia Sandstrom
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

X U.S. Mail, Postage Prepaid

Janelle Carman
Carman Law Offices
6 E. Alder St., Suite 418
Walla Walla, WA 99362

X U.S. Maill, Postage Prepaid

Judy Limburg

Judy Limburg
Signed this 8 day of January 2015
at Walla Walla, Walla Walla County, WA

Minnick • Hayner
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

Appendix P

No. 32177-1-III

COURT OF APPEALS FOR DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS Respondents.	MOTION TO DISMISS

I. IDENTITY OF MOVING PARTY

The moving party is Department of Labor and Industries (L&I). Although this case is captioned "Virginia Burnett, Appellant", this case is assigned to L&I under RCW 51.24.070 and L&I is the real party in interest.[1]

II. STATEMENT OF RELIEF SOUGHT

L&I moves to dismiss this appeal.

III. GROUNDS FOR RELIEF

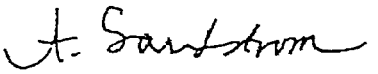
Under RAP 18.2, L&I moves to dismiss this appeal.

DATED this 5th day of January, 2015.

Respectfully submitted,

[1] Tom Scribner no longer represents L&I's interests.

ROBERT W. FERGUSON
Attorney General



Anastasia Sandstrom
Assistant Attorney General
WSBA No. 24163
Office Id. No. 91040
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

Appendix Q

No. 32177-1-III
COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

VIRGINIA BURNETT, Appellant, v. STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS, Respondents.	NOTICE OF APPEARANCE, DEPARTMENT OF LABOR AND INDUSTRIES

YOU ARE HEREBY NOTIFIED that ROBERT W. FERGUSON, Attorney General, and ANASTASIA SANDSTROM, Senior Counsel, hereby appear as the attorneys for the State of Washington Department of Labor and Industries in the above-entitled action; and you are notified that service of all further pleadings, notices, documents or other papers herein, exclusive of process, may be had on said party by serving the undersigned attorney at the address stated below.

RESPECTFULLY SUBMITTED this 5th day of January, 2015.

ROBERT W. FERGUSON
Attorney General

A. Sandstrom

ANASTASIA SANDSTROM
Senior Counsel
WSBA No. 24163
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-6993

Appendix R

Tom Scribner
Minnick-Hayner
P.O. Box 1757
Walla Walla, WA 99362

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

VIRGINIA E. BURNETT, Appellant, vs. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and JOHN DOE GUARD, Respondents.	NO. 321771 MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SUPPLEMENTAL BRIEF

COMES NOW appellant, VIRGINIA E. BURNETT, through her attorneys of record, and moves the Court for an extension of time to file her Supplemental Brief. This Motion is made for the reasons set forth herein and is supported by the Declaration of Tom Scribner filed herewith.

I. IDENTITY OF MOVING PARTY AND STATEMENT OF RELIEF SOUGHT

Appellant Virginia Burnett respectfully asks the Court to extend the due date of her Supplemental Brief from January 7, 2015 to January 28, 2015.

II. FACTS RELEVANT TO MOTION

On December 17, 2014 counsel for appellant and respondents received a letter from the court with five questions. The letter said: "Both counsel should file

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supplemental briefing addressing these questions within 21 days of the date of this letter, by January 7, 2015."

Counsel for appellant has been in communication with representatives of the Department of Labor & Industries and with appellant herself in an effort to get answers to the five questions raised by the court in the December 17 letter referenced herein. There have been delays in getting information because of the intervening holidays and people not being available to provide information and answers as requested.

Further, it may happen that there will be a substitution of counsel for the appellant. In that situation, it will take some time for her new counsel to "get up to speed" with regard to this case and to finalize and file the Supplemental Brief.

III. GROUNDS FOR RELIEF

This Motion for an extension of time is brought pursuant to RAP 18.8(a). This Motion is based on the records and files herein and supported by the Declaration of Tom Scribner filed herewith.

DATED this 31 day of December, 2014.

MINNICK-HAYNER

By: _____
Tom Scribner, WSBA #11285
Of Attorneys for Appellant

Minnick • Hayner
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of December, 2014, I caused to be served a true and correct copy of **MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SUPPLEMENTAL BRIEF** by the method indicated below, and addressed to the following:

Jason D. Brown
Assistant Attorney General
Attorney General of Washington
West 1116 Riverside Avenue
Spokane, WA 99201-1194

X U.S. Mail, Postage Prepaid

STACY PAMBRUN DEMORY
Signed this 31 day of December, 2014
at Walla Walla, Walla Walla County, WA

Minnick • Hayner
P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

Tom Scribner
Minnick-Hayner
P.O. Box 1757
Walla Walla, WA 99362

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

VIRGINIA E. BURNETT, Appellant, vs. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, and JOHN DOE GUARD, Respondents.	NO. 321771 DECLARATION OF TOM SCRIBNER IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SUPPLEMENTAL BRIEF

I, Tom Scribner, declare as follows:

1. I am the attorney of record for appellant Virginia Burnett. I make this Declaration based on my personal knowledge of the facts and in support of appellant's Motion for Extension of Time to File Appellant's Supplemental Brief.

2. I am the attorney in this firm who researched and drafted the briefs that have been filed in this case with the Court of Appeals.

3. On December 17, 2014 I received a letter from the Court of Appeals with five questions that the panel of judges assigned to the case had. I and the

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attorney for the respondents were told that we should file supplemental briefing addressing the five questions by January 7, 2015.

4. Because of the Christmas and New Year holidays, the 21 days given by the court to file supplemental briefing has been disrupted and not representative of a normal 21-day period of time. Further, I have not been able to have free contact with representatives of the Department of Labor & Industries in order to get answers to the five questions.

5. In addition to the above, it may be that this firm will have to withdraw and a new firm be substituted as counsel for Virginia Burnett. Concerning which, I have, as of this date, spoken with another attorney regarding her involvement in this case and substituting as attorney of record for Virginia Burnett. If that attorney is able and willing to do so, she will need additional time to familiarize herself with this case and prepare the Supplement Brief.

6. On behalf of our client, I respectfully request that she have until January 28 to file her Supplemental Brief.

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

Dated this 31 day of December, 2014.

Tom

Tom Scribner, WSBA #11285

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P.O. Box 1757
Walla Walla, WA 99362
(509) 527-3500

CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of December, 2014, I caused to be served a true and correct copy of **DECLARATION OF TOM SCRIBNER IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE APPELLANT'S SUPPLEMENTAL BRIEF** by the method indicated below, and addressed to the following:

Jason D. Brown
Assistant Attorney General
Attorney General of Washington
West 1116 Riverside Avenue
Spokane, WA 99201-1194

X U.S. Mail, Postage Prepaid

STACY PAMBRUN DEMORY
Signed this 31 day of December, 2014
at Walla Walla, Walla Walla County, WA

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Appendix S

Renee S. Townsley
Clerk/Administrator

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The Court of Appeals
of the
State of Washington
Division III

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http://www.courts.wa.gov/courts

December 17, 2014

Tom Scribner
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tms@gohighspeed.com

Jason D Brown
Washington State Office of the Attorney
1116 W Riverside Ave
Spokane, WA 99201-1106
jasonb@atg.wa.gov

CASE # 321771
Virginia E. Burnett v. State of Washington, Dept. of Corrections, et al
WALLA WALLA CO SUPERIOR COURT No. 122001678

Counsel:

After hearing the above case on December 2, 2014, the panel of judges assigned to this case has the following questions:

1. Should this court give consideration to the fact that the Department of Labor & Industries, the state branch that administers workers compensation law, is the party bringing this lawsuit? Stated differently, should this court give any deference to the Department of Labor & Industries' apparent position that Walla Walla Community College and the Department of Corrections are distinct employers for purposes of RCW 51.24.030.?

2. Does each branch of state government separately pay premiums into a Department of Labor & Industries' fund in order for its employees to be covered for work injuries?

3. Did Walla Walla Community College pay premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries?

4. Did the Department of Corrections pay premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries?

5. If neither Walla Walla Community College or the Department of Corrections paid premiums to the Department of Labor & Industries to cover Virginia Burnett for work injuries, what, if any entity, did?

Both counsel should file supplemental briefing addressing these questions within 21 days of the date of this letter, by **January 7, 2015.**

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jcs

Appendix T

NO. 321771

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

VIRGINIA BURNETT,

Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondents.

APPELLANT'S REPLY BRIEF

MINNICK • HAYNER, P.S.

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I.

UNDISPUTED FACTS

The following facts are not in dispute.

1. The subject accident happened on March 9, 2009 at the Washington State Penitentiary in Walla Walla. CP 2, 36.

2. At the time of the accident, Virginia Burnett was employed by the Walla Walla Community College. CP 2, 36.

3. At the time of the accident, Ms. Burnett had a Professional Personal Contract with Walla Walla Community College. CP 54-55.

4. The Professional Personal Contract said, in relevant part:

> Employee agrees to perform the assigned professional services and to comply with all duties and responsibilities as enumerated in the Contract between the Board of Trustees of Community College District No. 20 and the Walla Walla Community College Association for Higher Education and the **Interagency Agreement between the State of Washington Department of Corrections and State Board for Community and Technical Colleges** as they now exist or hereafter amended and which by this reference are incorporated into this Contract as required by RCW 28B.50.855 as now existing or hereafter amended.

CP 55 (emphasis added).

5. The Interagency Agreement between the State of Washington Department of Corrections and the State Board for Community and Technical Colleges (hereafter "Agreement"), CP 57-72, was executed in June 2008 between the Department of Corrections ("Department") and the State Board for Community and Technical Colleges ("Board").

6. The Agreement was "for the period of July 1, 2008, through June 30, 2009." CP 57. The subject accident happened during the effective period of the Agreement.

7. Ms. Burnett taught classes at the prison in Walla Walla. While walking through a metal door at the prison, a guard negligently closed the door on her, injuring her shoulder and upper torso. CP 3, 36.

Also not in dispute is the following language from the Agreement:

> 5.5 INDEPENDENT CAPACITY: The employees and agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.
>
> 5.6 AGENT OF THE OTHER PARTY: Neither party shall represent itself as an agent of the other party or hold itself out to be vested with any power or right to contractually bind or act on behalf of the other party.

Agreement, §§ 5.5 and 5.6, CP 68.

II.

ISSUES

So what are the issues? Ms. Burnett has sued the Department of Corrections. The Department claims that Ms. Burnett may not sue the Department because she is an employee of the State of Washington and the Department is an agency of the State. As such, RCW 51.04.010 applies and Ms. Burnett is or should be barred from bringing the action.

But for the Agreement, specifically sections 5.5 and 5.6, the Department's argument may carry the day. But the Agreement says what it says and Ms. Burnett's employment by Walla Walla Community College and her work at the prison were subject to the terms of the Agreement.

According to the Department of Corrections: "The Court need not analyze the Interagency Agreement to decide this case." Brief of Respondent, page 9. Which is a peculiar statement for the Department to make given that in its Brief the Department spent multiple pages discussing and analyzing the Agreement.

Assuming that this Court does not agree with the Department and refuses to sweep the Agreement under the rug, an issue, with respect to the L&I bar, RCW 51.04.010, is: do sections 5.5 and 5.6 of the Agreement apply?

If the two sections apply, what do they mean relative to Ms. Burnett suing the Department of Corrections? Ms. Burnett, an employee of Walla Walla Community College, per the express language in the Agreement, "shall not be considered for any purpose to be [an employee or agent of the Department of Corrections]." Agreement, § 5.5. What does this language mean relative to RCW 51.24.030(1), which states:

> If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

Is not the Department of Corrections, per the express language of section 5.5 of the Agreement, a "third person" relative to Virginia Burnett? Ms. Burnett is not in the "same employ" of the Department. Consequently, she should, per RCW 51.24.030(1), be allowed to continue with her action against the Department.

III.

ARGUMENT

The Department argues that Virginia Burnett may not sue the Department since both the Department and the Community College are agencies of the State of Washington. While that is factually correct, the argument totally ignores section 5.5 of the Agreement.

The approach that Ms. Burnett believes this Court should take (and that the trial court should have taken) is as follows:

1. Does the Agreement apply?

2. If the Agreement applies, what does section 5.5 mean relative to Ms. Burnett suing the Department?

There are three possible responses/answers to the second question. First, the Agreement means what it says and Ms. Burnett may sue the Department since she and the Department are not in the same employ (per the express terms of section 5.5). Second, the language and/or intent of section 5.5 of the Agreement is vague or ambiguous. In which case, this being an appeal from a motion for summary judgment in which all inferences are to be made in favor of the nonmoving party, and in which the motion should be denied if there are genuine issues of material fact, the case should

be remanded to the trial court for further discovery regarding the meaning of the language and/or intent of the parties. Third, whatever section 5.5 of the Agreement means or was intended by the parties, it does not matter. That is, regardless of the language or intent of section 5.5 of the Agreement, since both the Department and the Community College are agencies of the State, the L&I bar applies and Ms. Burnett may not sue the Department.

If this Court selects option number three, it will be saying that contracts and agreements between parties are not to be considered or given effect or that this specific Agreement, at least section 5.5 thereof, is void as against public policy. That decision, Virginia Burnett believes, would be an error.

The Department spends considerable time in its Brief, pages 15-20, discussing cases from other jurisdictions which "have declined to distinguish one department of state government from the other for purposes of the exclusive remedy provision." Brief of Respondent, page 15. But none of the cases from other jurisdictions discussed by the Department had anything that said:

> The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that part and shall not be considered for any purpose to be employees or agents of the other party.

Agreement, § 5.5. CP 68.

Moreover,

> [b]efore discussing cases from other states it should be mentioned that the statutes in other states are different than ours. In 1916 we said in *Stertz v. Industrial Ins. Comm'n,* 91 Wash. 588, 604, 158 P. 256 (1916) "[t]o seek authority in the decisions of other states is useless, for other statutes have resemblance to ours." Our statute has always been one of the most stringent in the elimination of causes of action against employers.

Thompson v. Lewis County, 92 Wn.2d 204, 208-209, 595 P.2d 541 (1979).

"[S]hall not be considered for any purpose to be employees or agents of the other party" must mean something. Clearly the Department and the Community College had something in mind with regard to this language. Assuming the parties meant what they said, and Virginia Burnett is not to be considered "for any purpose" to be an employee or agent of the Department, does that not overcome, breach or negate the L&I bar? The Department claims that it does not. The Department claims that this Court should not even consider the Agreement. The Department makes this argument because, in its opinion, irrespective of the Agreement, both the Department and the Community College are

agencies of the State of Washington. That, according to the Department, should trump everything else.

A problem with the Department's argument is that, as the Department itself admitted: "No Washington case has directly addressed the question of whether the exclusive remedy provision bars a negligence claim of an employee of one department of state government against a different department of state government." Brief of Respondent, page 12. And the two cases cited by the Department, *Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979) and *Spencer v. Seattle*, 104 Wn.2d 30, 700 P.2d 742 (1985), do not answer the question. These two cases were discussed by Ms. Burnett in her Brief at pages 14-19. In both cases, an employee of a specific governmental entity sued that governmental entity. In both cases, the employee plaintiff argued "dual capacity" as a way to get around the L&I bar. Ms. Burnett is not making that argument. Ms. Burnett is not suing the Community College.

The elephant in the room in this case is section 5.5 of the Agreement. What does it mean? What was the intent of the parties with respect to this language? Why did they include it in the Agreement? These are issues that must be addressed in order to

decide this case. Despite the Department's "The Court need not analyze the Interagency Agreement to decide this case" language, there is only one way to avoid having to come to grips with section 5.5. That is, this Court has to rule, as a matter of law, that irrespective of the language in the Agreement and the obvious intent of the parties, the fact that both the Department of Corrections and Community College are agencies of the State trumps all else and under no circumstances may an employee of one state agency sue another state agency for an on-the-job accident. That may be the law, but by including § 5.5 in the Agreement the parties appear to want to avoid or circumvent the application of said law.

CONCLUSION

The Agreement between the Department and the Board of Community and Technical Colleges is very clear: "The employees of each party . . . shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other." Ms. Burnett was an employee of Walla Walla Community College; she was not an employee of the Department of Corrections. Therefore, Ms. Burnett may sue the Department. The L&I bar does not apply. If the Agreement is not

clear on this point, then there is a genuine issue of fact as to what is meant.

In either of the above situations (i.e., the Agreement at § 5.5 means what it says or it is ambiguous), the motion for summary judgment filed by the Department should not have been granted and this case should continue.

The *Order Granting Defendant's Motion for Summary Judgment* should be reversed and the case sent back to the trial court for further proceedings.

DATED this 2 day of July, 2014.

MINNICK-HAYNER

By: Tom S
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Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 2 day of July, 2014, I caused to be served a true and correct copy of **APPELLANT'S REPLY BRIEF** by the method indicated below, and addressed to the following:

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JUDY LIMBURG
Signed this 2 day of July 2014
at Walla Walla, Walla Walla County, WA

Appendix U

NO. 321771-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Virginia Burnett,

Appellant,

v.

State of Washington, Department of Corrections,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Ms. Burnett was employed by Walla Walla Community College and assigned to work as a teacher at the Washington State Penitentiary when she was injured in the course and scope of her employment while on Washington State Penitentiary premises. She applied for, and received, workers' compensation benefits under the Industrial Insurance Act (IIA).

Ms. Burnett later filed suit against the Washington State Department of Corrections for her workplace injury, but her claim is barred by the IIA's exclusive remedy provisions. The IIA provides sure and certain relief through workers' compensation benefits, and precludes workers from bringing other causes of action against their employers relating to their workplace injuries. The trial court dismissed Ms. Burnett's case after correctly applying the IIA and Washington State Supreme Court precedent. Because Ms. Burnett was an employee of the State of Washington, she is barred from bringing a negligence claim against the Department of Corrections, a state agency. This Court should affirm the dismissal.

II. COUNTERSTATEMENT OF ISSUES

1. Whether the trial court correctly ruled the Washington State Department of Corrections is immune from Ms. Burnett's suit under

RCW 51.04.010 and RCW 51.32.010, Washington's Industrial Insurance Act exclusive remedy provisions?

2. Whether the Washington State Department of Corrections is a "third party" from which Ms. Burnett may seek damages under RCW 51.24.030(1), where she is an employee of a state agency assigned to work at the Washington State Penitentiary?

3. Whether an Interagency Agreement overrides the Department's statutory immunity under the Industrial Insurance Act?

III. COUNTERSTATEMENT OF THE CASE

A. Factual Background

Virginia Burnett was an employee of Walla Walla Community College whose work duty was to teach inmates at the Washington State Penitentiary. Clerk's Papers (CP) 1. Ms. Burnett sustained an industrial injury on March 9, 2009. CP 2. Ms. Burnett applied for, and received, workers' compensation benefits from the Department of Labor and Industries. CP 2. When Ms. Burnett was injured, she was "working in her job as a teacher at the Washington State Penitentiary." CP 2. The Department of Corrections runs the Washington State Penitentiary. CP 2. The Department of Corrections is an agency of the State of Washington. RCW 72.09.030. When Ms. Burnett was injured, she was working under contract with Walla Walla Community College. CP 33-34, 55. The

contract states it is between "the Board of Trustees of Community College District No. 20, *State of Washington*...and Virginia E. Burnett." CP 55 (emphasis added). Walla Walla Community College, organized as Community College District 20, is also a state agency. RCW 28B.50.040(20).

Ms. Burnett does not appear to dispute any of the facts listed above. However, she does insist this case turns instead on facts related to the Interagency Agreement between the Department of Corrections (Department) and the State Board of Community and Technical Colleges (Board). Community colleges are under the general supervision and control of the State Board for Community and Technical Colleges. RCW 28B.50.050; RCW 28B.50.090. This interagency agreement provides the terms and conditions under which several Washington community colleges, including Walla Walla, provide educational services to inmates of correctional institutions operated by the Department. Ms. Burnett's arguments rely on §§ 5.5 and 5.6 of the interagency agreement. Brief of Appellant (Br. App.) 3. However, other provisions in the Interagency Agreement, which Ms. Burnett ignores, are also relevant to her case.

First, the Interagency Agreement explicitly states the intention of the parties:

> It is the intention of the Board and the Department to work together, seek administrative efficiencies, and continue to develop an educational system. The educational system should foster local control and communication and value performance measurement with collaborative organizational oversight by the Board and the Department.

Interagency Agreement § 2, CP 58. Second, the Department pays the Board based on teaching services provided, according to salary schedules consistent with the Legislature's appropriations:

> Costs are based on current salary schedules in effect at the execution of this Agreement or known to take effect during the contract term. The parties agree that any salary and benefit increase which may be granted by the Legislature to take effect during the term of this Agreement must be fully funded from funds contained in this agreement. Should the Legislature grant additional funds, the FTE and contract amount would be renegotiated to reflect additional dollars. Should the Legislature not grant the Department additional funds specifically for salary and benefit increases for education, FTES may be adjusted accordingly.

Interagency Agreement § 3.1(C), CP 58-59.[1] Thus, the Legislature appropriates money to the Department to pay teachers to teach at correctional institutions.

Third, the Agreement provides for a collaborative approach to managing those working in the institutions. The Agreement charges the Department to train College staff regarding employment in an institution:

> ORIENTATION AND TRAINING: The Department will provide the College staff assigned to work at the Institution

[1] An FTE is a full-time equivalent job position. Interagency Agreement § 1(L), CP 58.

> an orientation session regarding the rules, regulations, and other matters relevant to employment within an institution setting.

Interagency Agreement § 4.10, CP 66. The Department agreed to inform the Board of penological concerns raised by the behavior of College staff:

> PERSONNEL MANAGEMENT: The Department will inform the Board of any penological concerns raised by the behavior of College staff. In the event that the penological concerns impact the ability of the College staff member to be admitted onto institution grounds, those concerns will be communicated to the Board by the Department as soon as possible.

Interagency Agreement § 4.11, CP 66. The Agreement addresses that, for teachers working in prisons, limits are placed on some of the terms of the colleges' collective bargaining agreements:

> COLLECTIVE BARGAINING AGREEMENTS:...[T]he Department's superintendents' discretionary authority to manage the Institution and regulate all matters affecting Institution security shall not be affected by Collective Bargaining Agreement (CBA) provisions. To the extent the CBA provisions conflict with maintenance of Institution security, the Board shall oppose arbitration of any claims challenging the Department superintendents' discretionary authority to manage the Institution and regulate all matters affecting Institution security. The Department superintendent agrees to, as need be, support any opposition to arbitration.

Interagency Agreement § 6.2, CP 69.

Fourth, the agreement explicitly states it shall be construed to conform to the laws of the State of Washington:

> ORDER OF PRECEDENCE: This agreement is entered into pursuant to and under the authority granted by the laws of the state of Washington and any applicable federal laws. The provisions of this Agreement shall be construed to conform to those laws.

Interagency Agreement § 5.7, CP 68. Finally, the agreement explicitly forecloses any construction that creates rights for any third party:

> CONSTRUCTION: Nothing in this Agreement shall be construed to create a right enforceable by or in favor of any third party.

Interagency Agreement § 6.9, CP 71.

B. Procedural Background

Ms. Burnett filed this lawsuit in Walla Walla Superior Court on March 1, 2012. CP 1-4. The Department answered the complaint on March 14, 2013, asserting IIA immunity as an affirmative defense. CP 8. Claiming the exclusive remedy provisions of the IIA bar her claim, the Department filed a Motion for Summary Judgment on November 5, 2013. CP 11-27. On December 23, 2013, the Honorable John Lohrmann granted the Department's Motion for Summary Judgment. CP 87-88. This appeal followed.

IV. STANDARD OF REVIEW

When reviewing an order granting summary judgment, the appellate court conducts the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004). Summary

Argumentative assertions, unsupported speculation, suspicions, beliefs and conclusions that unresolved factual issues remain are insufficient to create a genuine issue of fact. *White*, 131 Wn.2d at 9; *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Where reasonable minds can reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112 Wn.2d 193, 199 and n. 5, 770 P.2d 1027 (1989).

V. SUMMARY OF ARGUMENT

The IIA bars Ms. Burnett from additional recovery against the State of Washington because she was an employee of the State of Washington. The IIA provides the exclusive remedy for employees injured at work, which Ms. Burnett already received. RCW 51.04.010; 51.32.010. There is an exception to this rule where the worker is injured by a third person who is not in the worker's same employ. RCW 51.24.030(1). However, the exclusive remedy provisions of the IIA bar recovery by an employee of one governmental department against another governmental department for a workplace injury. *See Spencer v. City of Seattle*, 104 Wn.2d 30, 33-34, 700 P.2d 742 (1985); *Thompson v. Lewis County*, 92 Wn.2d 204, 206-08, 595 P.2d 541 (1979). Since Ms. Burnett is an employee of the State of Washington, she is barred from suing the Washington State Department of Corrections for the

injury she sustained in the course and scope of her employment. As a matter of law, Ms. Burnett failed to show she was injured by a third person not in her same employ.

Ms. Burnett argues the Interagency Agreement between the Department and the Board that governed her work at the Washington State Penitentiary forecloses the Department's assertion of IIA immunity. The Court need not analyze the Interagency Agreement to decide this case. However, if the Court does conduct such an analysis, after considering all relevant provisions in the Agreement, the Court should conclude Ms. Burnett has failed to make the required showing that she was injured by a third person.

For these reasons, this Court should affirm the trial court's dismissal of appellant's lawsuit.

VI. ARGUMENT

A. Ms. Burnett's Negligence Claim Is Barred By The Exclusive Remedy Provisions Of The Industrial Insurance Act

1. Unless caused by a third party with a different employer, workers' compensation is the exclusive remedy for workplace injuries.

The IIA, Title 51 RCW, is a self-contained system that provides exclusive procedures and remedies that apply to workers, employers, and

the Department of Labor and Industries. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). The Legislature expressly abolished all civil actions and civil causes of action for workplace injuries and, in its place, created a workers' compensation program that provides sure and certain relief to injured workers without regard to fault. RCW 51.04.010; 51.32.010; *Vallandingham v. Clover Park School Dist. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Birklid v. Boeing*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995). By intent and design, the IIA provides the exclusive remedy for employees injured at work. *Id.* RCW 51.04.010 expressly provides:

> The state of Washington,...exercising herein its police and sovereign power, declares that *all phases of the premises are withdrawn from private controversy*, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as provided in this title, and to that end all civil actions and civil causes of action for such personal injuries and *all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.*

(Emphasis added.) Further, RCW 51.32.010 provides:

> Each worker injured in the course of his or her employment...shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payments *shall be in lieu of any and all rights of action whatsoever against any person whomsoever.*

(Emphasis added.) "Person" includes the State of Washington. RCW 1.16.080.[2] The exclusive remedy provisions of Title 51 RCW are "sweeping, comprehensive, and of the broadest, most encompassing nature." *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004). *See also West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976); *Tallerday v. Delong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993). Accordingly, a worker who receives workers' compensation benefits under the IIA has no separate remedy for his or her injuries except where the IIA specifically authorizes a cause of action. *Cena*, 121 Wn. App. at 356.

However, if the workplace injury is at the hands of a third person, the IIA provides the injured worker with an opportunity to sue that third person, stating:

> If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

RCW 51.24.030(1).

Here, Ms. Burnett sues the Department, arguing the Department is such a third person, subject to liability to Ms. Burnett for her industrial

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[2] RCW 1.16.080 defines "person" for purposes of the entire code. *See* Laws of 1891, ch. 23, § 1 ("The following provisions relative to the construction of statutes shall be rules of construction and shall constitute a part of the code of procedure of this state").

injuries. *See* CP 1-2. Under Washington Supreme Court precedent, this argument fails.

2. The Exclusive Remedy Provision bars a lawsuit by an employee of one governmental department against another governmental department.

No Washington case has directly addressed the question of whether the exclusive remedy provision bars a negligence claim of an employee of one department of state government against a different department of state government. However, the Washington Supreme Court has twice considered this question in the analogous context of city and county government and concluded that the bar applies. *See Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979); *Spencer*, 104 Wn.2d 30, 700 P.2d 742 (1985).

In *Thompson*, an employee of the county road department was injured when he drove his county truck off a county road in an effort to avoid a collision. *Thompson*, 92 Wn.2d at 205-06. The employee sued the county for allegedly failing to properly construct and maintain the county road. *Id.* at 206. The employee argued the county operated in a dual capacity: in one capacity, the county was the employee's employer; in the other capacity, the county was a municipal corporation with a duty to properly construct and maintain the county roads. *Id.* The Supreme Court rejected this argument, ruling that the statutory language is clear that

the worker could not sue his employer. *Id.* at 206. Therefore, the employee's sole remedy was workers' compensation, and his negligence claim was dismissed. *Id.* at 205-07.

In *Spencer*, an employee of the city parks department was injured when he was struck by a truck while crossing a city street. *Spencer*, 104 Wn.2d at 31. As in *Thompson*, the employee sued, arguing the city was acting in one capacity as his employer and in another capacity to properly design, construct, and maintain the city crosswalk he was using at the time of the accident. *Id.* And as in *Thompson*, the Supreme Court rejected this argument, holding the employee's exclusive remedy was the workers' compensation system. *Id.* at 32. In doing so, the court stated:

> Independent research disclosed that every jurisdiction presented with the issue has rejected the dual capacity doctrine in cases involving an action by a *state*, county, or city employee against the government, which alleged negligence by another government department.

Id. at 33 (emphasis added). The Court then cited several cases from other jurisdictions in support of this rule. *Id.* at 33-34.

In *Spencer*, the Court discussed at length a Louisiana case involving a state employee. *Id.* at 34 (citing *Wright v. Moore*, 380 So.2d 172 (La. Ct. App. 1979)). In *Wright*, an employee of the Louisiana Department of Health and Human Resources was injured in a car accident

within the scope of her employment. *Wright*, 380 So.2d at 172. The employee sued the Louisiana Department of Transportation and Development for negligent repair and maintenance of a traffic signal. *Id.* The employee argued the Department of Health and Human Resources and the Department of Transportation and Development were "two separate and distinct bodies corporate and that as an employee of one she is free to sue the other in tort as a separate entity." *Id.* at 173. The Louisiana court rejected this argument, holding the State of Louisiana was the real party in interest and is indistinguishable from its executive departments. *Id.* Although *Spencer* dealt with municipalities, it characterized *Wright* as "an almost identical factual setting." *Spencer*, 104 Wn.2d at 34. Thus, even though *Spencer* involved a city, the Washington State Supreme Court appears to endorse the analysis that two state agencies are considered the "same employ" under RCW 51.24.030(1).

Ms. Burnett argues she was an employee of Walla Walla Community College, not the State of Washington. Br. App. at 10. This is despite the fact that Walla Walla Community College is an agency of the State of Washington. *Centralia Coll. Ed. Ass'n v. Bd. of Trustees of Cmty. Coll. Dist. No. 12*, 82 Wn.2d 128, 129, 508 P.2d 1357 (1973) (community college districts are state agencies). As an employee of an agency of the

State of Washington, she was an employee of the State of Washington. Because she is a State of Washington employee, the Department, also an agency of the State of Washington, is not a "third party." On the contrary, it is the same employer, the State of Washington. The Department is therefore not a "third party" within the meaning of RCW 51.24.030(1).

B. Court Opinions From Other Jurisdictions Support The Trial Court's Interpretation Of RCW 51.24.030(1)

1. Other jurisdictions have declined to distinguish one department of state government from another for purposes of the exclusive remedy provision.

As discussed above, when *Spencer* was decided in 1985, the Supreme Court found it persuasive that several other jurisdictions had adopted the rule that their exclusive remedy statutes barred an employee of one department of state government from bringing suit against another department of state government for a workplace injury. *See Spencer*, 104 Wn.2d at 33-34.

After *Spencer*, this trend has continued. Cases from other jurisdictions continue to be nearly unanimous in rejecting state employees' claims against other state agencies on facts similar to the case at bar. *See, e.g., State v. Purdy*, 601 P.2d 258 (Alaska 1979) (tort action brought by a state employee against the state for failure to properly maintain highway

barred by exclusive remedy provision); *Colombo v. State*, 3 Cal. App. 4th 594, 5 Cal.Rptr.2d 567 (1991) (tort action brought by California Highway Patrol officer against the California Department of Transportation for negligent highway maintenance barred by exclusive remedy provision); *Rodriguez v. Board of Directors of the Auraria Higher Educ. Ctr.*, 917 P. 2d 358 (Colo. Ct. App. 1996) (although plaintiff and third-party defendant were employees of different state agencies, both were employed by the state of Colorado, requiring application of the exclusive remedy provision); *Indiana State Highway Dep't v. Robertson*, 482 N.E.2d 495 (Ind. Ct. App. 1985) (tort action brought by employee of Indiana Department of Mental Health against the Indiana State Highway Department for negligent design, construction, and maintenance of an intersection barred by exclusive remedy provision); *State v. Coffman*, 446 N.E.2d 611 (Ind. Ct. App 1985) (employee of state highway department barred from pursuing negligence action against state for injuries sustained in a traffic collision with a vehicle driven by a state trooper); *Green v. Turner*, 437 So.2d. 956 (La. Ct. App. 1983) (employee of state department of transportation, having already received workers compensation, was unable to sustain a cause of action against state and tortfeasor, who was an employee of the state department of health and

human services); *McGuire v. Honeycutt,* 387 So.2d 674 (La. Ct. App. 1980) (plaintiff, an employee of the department of corrections, could not sustain an action based on negligence of an employee of the military department, as both were co-employees of the state); *Wright*, 380 So.2d 172 (tort action brought by employee of Louisiana Department of Health and Human Services against Louisiana Department of Transportation and Development for failure to maintain a traffic signal barred by exclusive remedy provision); *Egeland v. State,* 408 N.W.2d 848 (Minn. 1987) (Judge Egeland, a state employee, was barred from recovery against state for injuries sustained due to negligence of an employee of the department of transportation);[3] *Maggio v. Migliaccio,* 266 N.J. Super. 111, 628 A.2d 814 (1993) (volunteer firefighter immune from suit by state police officer, as the two were co-employees of the state); *Linden v. Solomacha,* 232 N.J. Super. 29, 556 A.2d 346 (1989) (state police officer could not sue employee of state treasury department due to exclusive remedy provision); *Singhas v. New Mexico State Highway Dep't*, 120 N.M. 474, 902 P.2d 1077 (1995) (tort action brought by employee of the New Mexico Public Defender's Department against the

[3] The Minnesota courts clarified this ruling in *Brandt v. State*, 428 N.W.2d 412 (Minn. Ct. App. 1988). In Brandt, the court held that a county employee (the court clerk) could sue the state for injuries sustained due to negligence of a state employee (Judge Egeland); the clerk, unlike the judge, was found to be an employee of the county. *Id.* at 414.

New Mexico Highway Department for failure to properly stripe and sign a highway barred by exclusive remedy provision); *Linzee v. State of New York*, 122 Misc. 2d 207, 470 N.Y.S.2d 97 (Ct. Cl. 1983) (employee of state mental health information service barred from suing another state agency, the office of mental health, as both agencies were part of the same employer, the state of New York); *Kincel v. Department of Transportation*, 867 A.2d 758 (Pa. Commw. Ct. 2005) (tort action brought by Pennsylvania State Trooper against Pennsylvania Department of Transportation for negligent highway maintenance barred by exclusive remedy provision).

One Wisconsin case, *Mazurek v. Skarr*, 60 Wis. 2d 420, 210 N.W.2d 691 (1973), provides an unusual example of the successful application of the dual capacity doctrine to state government. However, this case is distinguishable from the case at bar. In *Mazurek*, both plaintiff and defendant were members of the National Guard. *Id.* at 421. The state sought to be dismissed as a party pursuant to the exclusive remedy provisions of Wisconsin's workers compensation statute. *Id.* at 426-27. The court rejected this argument, as a specific Wisconsin statutory provision required the state to act as an insurer for any judgments "entered against a national guardsman who is acting in good faith." *Id.* at 427. Accordingly, the court found that, because by express provision of a

Wisconsin statute, the state was required to wear "two hats, that of employer and that required of it under [the insurance statute]," the exclusive remedy provision of the workers compensation statute did not apply. *Id.*

Mazurek is an unusual departure from the consensus approach of other jurisdictions. However, *Mazurek* is distinguishable from the cases cited in *Spencer*, the cases subsequent to *Spencer*, and this case, as no comparable Washington statute imposes an express duty on the state to insure Ms. Burnett. The Washington Supreme Court explicitly noted in *Spencer* that *Mazurek* is distinguishable from cases such as this one. *See Spencer*, 104 Wn.2d at 34 ("One Wisconsin case held that the state was liable to an employee, national guardsman, but the court found that the state had a separate duty under the statutes to act as an insurer and to pay judgments of national guardsmen performing in good faith.").

While no published Washington authority has dealt directly with the issue of whether an employee of one department of state government can sue another department for injuries sustained in the course of employment, the near uniformity among other jurisdictions strongly favors the defendant. This uniformity clearly influenced the Supreme Court's decision in *Spencer*. *See Spencer*, 104 Wn.2d at 33 ("Independent research disclosed that every jurisdiction presented with the issue has

rejected the dual capacity doctrine in cases involving an action by a *state*, county, or city employee against the government, which alleged negligence by another government department."). Despite the absence of any Washington case deciding the issue with respect to the State of Washington, all available authority supports the conclusion that the IIA's exclusive remedy provisions bar this action. As a result, as an employee of the State of Washington, the exclusive remedy provision bars Ms. Burnett's action against the Department of Corrections.

2. Ms. Burnett's employment satsifies all the factors considered by *Singhas* and *Colombo* for finding employment by the state, not an individual agency.

Some of the cases discussed in the previous section identify factors for determining whether the employer was the state itself, not the individual agency, for purposes of IIA immunity. For instance, in *Singhas v. New Mexico Highway Dep't*, two employees of the New Mexico Public Defender's Department sued the New Mexico State Highway Department for an automobile accident sustained while they were traveling within the scope of their employment. *Singhas*, 902 P.2d at 1078. In finding the State of New Mexico was the employer, not the Public Defender's Department, the *Singhas* court found it significant that employees of both state agencies had access to another state agency to grieve personnel actions; are paid by the state from state

funds; and are employed by agencies headed by gubernatorial appointees. *Id.* at 1079-80.

Similarly, in *Colombo v. State*, a California Highway Patrol officer sued the California Department of Transportation after he was struck by a car travelling on the highway. *Colombo*, 3 Cal. App. 4th at 595-96. In finding the State of California was the employer, not the Highway Patrol, the *Colombo* court found it significant the plaintiff was paid by the State of California, not the California Highway Patrol; the California State Personnel Board had ultimate authority over disciplinary actions; and the fact that lawsuits against agencies of the State of California are in effect lawsuits against the State itself. *Id.* at 598.

All of these factors are present under Washington statutes and the facts of this case. First, both the Department and the Board are headed by gubernatorial appointees. RCW 72.09.030 ("There is created a department of state government to be known as the department of corrections. The executive head of the department shall be the secretary of corrections who shall be appointed by the governor with the consent of the senate."); RCW 28B.50.050 ("There is hereby created the 'state board for community and technical colleges,' to consist of nine members who represent the geographic diversity of the state, and who shall be appointed by the governor, with the consent of the senate."). In addition, the

Walla Walla Community College Board of Trustees consists of gubernatorial appointees. RCW 28B.50.100 ("There is hereby created a board of trustees for each college district...Each board of trustees shall be composed of five trustees...who shall be appointed by the governor.").

Second, the budget for Walla Walla Community College, as well as the other college districts, is prepared by the State Board and submitted to the governor for further action. RCW 28B.50.090(1) (State Board shall "[r]eview the budgets prepared by the boards of trustees, prepare a single budget for the support of the entire state system of community and technical colleges and adult education, and submit this budget to the governor"). Furthermore, both the Department and the Board are funded by the Legislature. *See, e.g.*, Laws of 2007, ch. 522, § 223 and § 603. The Interagency Agreement states teacher compensation is based on current salary schedules, as adjusted by the Legislature. Interagency Agreement § 3.1(C), CP 58-59. The salary and/or FTE's provided for in the Agreement are adjusted up or down based on what is provided for by the Legislature. *Id.* The state budget provides for the Department to make Interagency Payments, such as the one contemplated by the agreement. Laws of 2007, ch. 522, § 223(5). Ms. Burnett was paid by the Board, which was paid by the Department, out of funds appropriated by the Legislature. She was thus paid by the State of Washington.

Third, in Washington, lawsuits against state agencies are, in effect, suits against the state itself. RCW 4.92.110; *Centralia Coll. Ed. Ass'n*, 82 Wn.2d at 129. In addition, suits against state employees in their official capacity are treated as suits against the state. RCW 4.92.060; *Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358 (1991); *Harrell v. Washington State ex rel. Dep't of Soc. & Health Servs.*, 170 Wn. App. 386, 405, 285 P.3d 159 (2012). So, if a coworker at the Department had sued Ms. Burnett, the lawsuit would in effect be a suit against the state, and Ms. Burnett could request defense by the Washington State Attorney General's Office. RCW 4.92.060.

Finally, as to personnel actions, there does not exist in Washington a separate state agency to hear all state employee grievances as exists in California and New Mexico. Instead, Washington has a uniform collective bargaining law that applies both to Department employees and to academic staff for the Board such as Ms. Burnett. RCW 41.56.020 (state collective bargaining applies to State of Washington political subdivisions); RCW 41.56.021(1) (same statute applies to higher education employees exempted from civil service under RCW 41.06.070(2)). All collective bargaining agreements must "[p]rovide for a grievance procedure that culminates with a final and binding arbitration of all disputes arising over the interpretation or

application of the collective bargaining agreement and that is valid and enforceable." RCW 41.80.030(2)(a). So, while there is no Washington agency designated to hear grievances under a collective bargaining agreement, Washington mandates arbitration for resolution of state employee grievances.

As the same factors are present here that were significant for the *Singhas* and *Colombo* courts, Ms. Burnett is an employee of the State of Washington for purposes of IIA immunity. The trial court properly granted the Department's motion for summary judgment.

C. Washington Court Opinions Support Treating Employees Of State Agencies As State Employees, Not Employees Of Separate Agencies

1. The Department's immunity is bolstered by *Martini ex rel. Dussault v. State*.

The Department's interpretation of RCW 51.24.030(1) is strengthened by *Martini ex rel. Dussault v. State*, 121 Wn. App. 150, 89 P.3d 250 (2004). In *Martini*, the plaintiff was injured in an automobile accident and thereafter sued the State of Washington, alleging the Department of Transportation negligently warned drivers of a construction project on I-5. *Id.* at 154. Before trial, plaintiff's counsel "moved to exclude state employees from the jury." *Id.* at 155. The particular state

employee at issue worked for the Office of the Code Reviser. *Id.* at 155 n.11. The plaintiff relied on RCW 4.44.180(2), which implies bias on the part of anyone in the employment for wages of the adverse party. *Id.* at 155. The trial court denied the challenge. *Id.* On appeal, the court of appeals reversed, concluding the State is the employer, not each separate department:

> [By ruling in the State's favor,] we would be skewing the employment relationship among the State and its employees. The State argues, in effect, that it does not employ its employees; instead, it says, each of its departments separately employs only those employees who work for that department. *In our view, however, the State—not each of its separate departments—employs its employees.*

Id. at 168 (emphasis added). The State employs its employees, including Virginia Burnett. *Martini* further bolsters the argument that Ms. Burnett is an employee of the State of Washington and workers' compensation is her exclusive remedy for her workplace injury.

2. Ms. Burnett's reliance on *Bennerstrom v. Dep't of Labor & Indus.* is misplaced.

Ms. Burnett cites *Bennerstrom* for the following proposition:

> An employment relationship for purposes of workers' compensation laws does not exist absent (a) the employer having the right to control the employee's physical conduct in the performance of the employee's duties and (b) the employee's consent to the employment relationship.

Bennerstrom v. Dep't of Labor & Indus., 120 Wn. App. 853, 856, 86 P.3d 826 (2004). However, this language is a near verbatim quote of *Novenson v. Spokane Culvert*, 91 Wn.2d 550, 588 P.2d 1174 (1979). *Bennerstrom*, 120 Wn. App. at 856 n.1. *Novenson* states:

> For the purposes of workmen's compensation, an employment relationship exists only when: (1) the employer has the right to control the servant's physical conduct in the performance of his duties, and (2) there is consent by the employee to this relationship.

Novenson, 91 Wn.2d at 553. *Novenson*, in turn, cites two earlier cases in support of this proposition: *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 428 P.2d 586 (1967) and *Fisher v. Seattle*, 62 Wn.2d 800, 384 P.2d 852 (1963). The point is the *Bennerstrom* standard for establishing an employment relationship has been the standard in Washington for at least fifty years. Importantly, it was the standard when the Supreme Court decided *Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979) and *Spencer v. Seattle*, 104 Wn.2d 30, 700 P.2d 742 (1985). It was the standard when *Spencer* cited *Wright v. Moore*, 380 So.2d 172 (La. Ct. App. 1979), with approval, for the proposition that the exclusive remedy provision applies where an employee of one state department cannot sue another state department for a workplace injury. *See Spencer*, 104 Wn.2d at 34. The Supreme Court was aware of the *Bennerstrom/Novenson/Marsland/Fisher* standard when it decided

Thompson and *Spencer*, and yet decided those cases without reference to that standard. Accordingly, that standard is not at issue in this case either, and Ms. Burnett's reliance on it is misplaced.

Even if the court were to apply *Bennerstrom* (which it need not and should not), Ms. Burnett's employment relationship with the State of Washington satisfies it. With regard to the control prong, the State of Washington is the employer with the right of control over Ms. Burnett. *See Colombo*, 3 Cal. App. 4th at 598. In *Colombo*, the plaintiff argued only the California Highway Patrol had the right of control over the plaintiff's employment. *Id.* Although the court recognized the California Highway Patrol had supervisory authority over the plaintiff, "[a]s a matter of law, it is the State of California which is the employer with the right of control over the employees of both the [California Highway Patrol] and DOT." *Id.* Similarly, Walla Walla Community College or the Board may have had supervisory authority over Ms. Burnett. However, as a matter of law, the State of Washington is the employer with right of control over Ms. Burnett.

With regard to the consent prong, "[a] worker's bare assertion of belief that he or she worked for this or that employer does not establish an employment relationship." *Bennerstrom*, 120 Wn. App. at 859. Ms. Burnett's assertion that she believed her employer to be Walla Walla

Community College, not the State of Washington, is not determinative. The fact is she worked for Walla Walla Community College, which is an agency of the State of Washington as a matter of law. *See Centralia Coll. Ed. Ass'n*, 82 Wn.2d at 129. She consented to an employment relationship with a state agency, and therefore, as a matter of law, she consented to an employment relationship with the State of Washington. CP 55 ("IT IS HEREBY AGREED, by and between the Board of Trustees of Community College District No. 20, *State of Washington*...and Virginia E. Burnett..."). Ms. Burnett's reliance on *Bennerstrom* is misplaced as it actually supports the Department's position.

D. The Interagency Agreement Does Not Override The State's Statutory Immunity

In her opening brief, Ms. Burnett responds to the various arguments advanced by the Department that the Interagency Agreement does not override the Department's IIA immunity. Br. App. at 19-24. Each of these arguments misapprehends the Department's main argument in this case, in that Ms. Burnett argues that she is not an employee of the Department. *Id.* The Department has never so argued. Instead, the Department argues Ms. Burnett is an employee of the State of

Washington. *See supra* § VI.B. With that being said, the Department replies to each of Ms. Burnett's responsive arguments in turn.

1. The explicit intention of the parties in the Interagency Agreement is to work collaboratively to provide educational opportunities to offenders housed in the State's prisons.

The Interagency Agreement envisions a collaborative approach between state agencies to provide educational opportunities for offenders. The express intent of the Interagency Agreement states:

> It is the intention of the Board and the Department to work together, seek administrative efficiencies, and continue to develop an educational system. The educational system should foster local control and communication and value performance measurement with collaborative organizational oversight by the Board and the Department.

Interagency Agreement § 2, CP 58. The express intent of the agreement is to *collaborate*, not *separate*.

Additionally, the Agreement prescribes a collaborative approach to managing the people working in the institution. The Department agreed to provide training to College staff working in the prisons regarding "employment within an institution setting." Interagency Agreement § 4.10, CP 66. In return, the Department agreed to inform the Board of any penological concerns relating to College staff working in the prisons. *Id.* § 4.11, CP 66. The Department agreed to respect the collective bargaining agreements relating to College staff. *Id.* § 6.2, CP 69.

However, the Board agreed to "oppose arbitration of any claims challenging the Department superintendents' discretionary authority to manage the Institution." *Id.* § 6.2, CP 69. This Agreement does not demonstrate an intention to separate the Department from the Board. To the contrary, the Agreement establishes a collaborative effort to provide educational opportunities to inmates by sharing management responsibilities over the teaching staff.

Ms. Burnett argues "an intention to work collaboratively does not make Ms. Burnett an employee of the Department of Corrections." Br. App. at 20. The Department agrees entirely, but neither does it mean Ms. Burnett is not an employee of the State of Washington, and in fact it is further support for that conclusion. It is interesting that Ms. Burnett uses Walla Walla County cooperating with Benton County and Spokane County cooperating with the City of Spokane as examples of separate and distinct local government units cooperating for their mutual advantage without the employees of one being employees of the other. Br. App. at 20. This case involves two agencies of state government, not separate and distinct cities and/or counties. This case is entirely different from the examples cited by Ms. Burnett. Her argument should be disregarded.

2. The Interagency Agreement does not operate as a waiver of Industrial Insurance Act immunity.

"*No employer or worker shall* exempt himself or herself from the burden or *waive the benefits of this title* by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void." RCW 51.04.060 (emphasis added). While this language appears absolute, the courts have allowed parties to enforce agreements to waive IIA immunity when they are properly worded. *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 238, 684 P.2d 73 (1984). A waiver of IIA immunity is enforceable "only if it clearly and specifically contains a waiver of the immunity of the workers' compensation act, either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees." *Id.* at 239-40. The policy underlying this stringent requirement is it "runs contrary to the foundation of the industrial insurance scheme" to address the employer's liability to its employees by contract. *Id.* at 239. That foundation is "certainty of compensation, without regard to employer fault, traded for the employer's immunity from employee suits." *Id.* Indeed, IIA immunity is "sweeping, comprehensive,

and of the broadest, most encompassing nature." *Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432 (2004). *See also West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976); *Tallerday v. Delong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993).

Here, the Interagency Agreement is completely silent as to liability for workplace injuries. Nowhere does the agreement explicitly state that it operates as a waiver of IIA immunity. Nowhere does the agreement state that either side assumes potential liability for actions brought by employees. As the agreement is silent as to liability for workplace injury, it contains no clear and specific waiver of IIA immunity. As such, the Department, as an agency of state government, did not waive its immunity under the IIA pursuant to the Interagency Agreement.

Ms. Burnett asserts this argument misses the point in that, since Ms. Burnett is not an employee of the Department, no waiver of IIA immunity is needed. Br. App. at 21. Instead, it is Ms. Burnett's argument that misses the point. Ms. Burnett, as an employee of the State of Washington, cannot sue another department of state government for a workplace injury due to the exclusive remedy provisions of the IIA. *Supra* §§ VI.A and B. As nothing in the Interagency Agreement explicitly waives IIA immunity, the Department, as an agency of state government, may assert this immunity against a state employee (an employee of

Walla Walla Community College), for an injury that occurred at her workplace, the Washington State Penitentiary.

3. The Interagency Agreement expressly prohibits any construction that creates rights enforceable by third parties.

The Interagency Agreement's provisions "shall be construed to conform to [State] laws." Interagency Agreement § 5.7, CP 68. The Agreement states:

> Nothing in this Agreement shall be construed to create a right enforceable by or in favor of any third party.

Id. § 6.9, CP 71. However, Ms. Burnett urges a construction of the Agreement that does just that when she argues that certain sections of the Interagency Agreement make her an employee of Walla Walla Community College for purposes of eliminating the State's statutory immunity under the IIA. Br. App. 5-7.

First, at the trial court, she argued the Interagency Agreement negates the Department's argument that IIA immunity bars this action. CP 39. She conceded that IIA immunity would apply but for the Interagency Agreement. CP 49. She argued the Interagency Agreement creates a right to sue the Department where otherwise none would exist. This argument—that she is a third-party beneficiary of the Agreement—is inconsistent with Agreement § 6.9.

Now, on appeal, Ms. Burnett makes a different argument, that she is a party to the Interagency Agreement, not a third party as described in § 6.9. Br. App. at 23-24. This argument fails.

The Interlocal Cooperation Act applies only to "public agencies" which may enter into agreements with one another. RCW 39.34.030(2).[4] Here, Ms. Burnett does not meet this definition of "public agency," and she lacks the capacity to enter into an interagency agreement. Consequently, Ms. Burnett is not a party to the Interagency Agreement as a matter of law. Further, simply because the duties and responsibilities as they relate to employees of the State Board are incorporated into Ms. Burnett's Professional Personnel Contract by reference does not make Ms. Burnett a party to the Interagency Agreement. As Ms. Burnett is not a party to the Interagency Agreement, she can only be a third party to the Agreement, and § 6.9 can only be interpreted against her claim that the Interagency Agreement created a right for her to sue the Department. For this reason, Ms. Burnett's argument fails.

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[4] A "public agency" is defined in RCW 39.34.020(1) as:

> [A]ny agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe recognized as such by the federal government; and any political subdivision of another state.

VII. CONCLUSION

RCW 51.24.030(1) does not allow an employee of one agency of the State of Washington to sue the State of Washington, merely because the workplace injury occurred at a different agency of the State of Washington. The State of Washington is Ms. Burnett's employer, and the Department of Corrections is not a "third person" within the meaning of RCW 51.24.030(1). As a result, the Department, as an agency of the State of Washington, is immune from suit under the IIA. Based on the undisputed facts, summary judgment was correctly granted as a matter of law, and this Court should affirm.

RESPECTFULLY SUBMITTED this 9th day of June, 2014.

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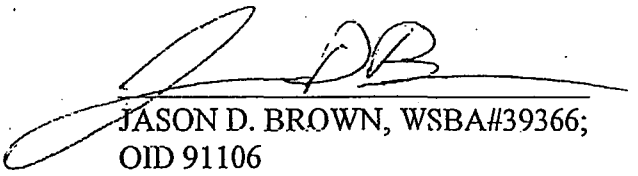

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I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Respondents' Brief was hand delivered and filed at the following address:

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DATED this 9th day of June, 2014 at Spokane, Washington.

MARKI STEBBINS

Appendix V

NO. 321771

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

VIRGINIA BURNETT,

Appellant,

vs.

STATE OF WASHINGTON, DEPARTMENT OF CORRECTIONS,

Respondents.

APPELLANT'S APPEAL BRIEF

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I.

ASSIGNMENT OF ERROR

A. The Trial Court Erred In Granting Defendants' *Motion For Summary Judgment* and Dismissing Plaintiff's *Complaint for Damages*.

1. There are genuine issues of material fact regarding the subject action.

2. Plaintiff was an employee of Walla Walla Community College; she was not an employee of the Department of Corrections.

3. The L&I bar, RCW 51.04.010, does not apply.

II.

STATEMENT OF THE CASE

A. Factual Background.

On March 9, 2009, Virginia Burnett, an employee of Walla Walla Community College, went to the Washington State Penitentiary in Walla Walla to teach a class. CP 2, 36. While walking through a metal door a prison guard negligently closed the door on her, crushing her shoulders and upper torso. CP 3, 36.

Ms. Burnett had a Professional Personal Contract with Walla Walla Community College at the time of her accident. CP 54-55. That Contract said, in relevant part:

> Employee agrees to perform the assigned professional services and to comply with all duties and responsibilities as enumerated in the Contract between the Board of Trustees of Community College District No. 20 and the Walla Walla Community College Association for Higher Education and the Interagency Agreement between the State of Washington Department of Corrections and State Board for Community and Technical Colleges as they now exist or hereafter amended and which by this reference are incorporated into this Contract as required by RCW 28B.50.855 as now existing or hereafter amended.

CP 55.

The Interagency Agreement between the State of Washington Department of Corrections and the State Board for Community and Technical Colleges (hereafter "Agreement"), CP 57-72, was executed in June 2008 between the Department of Corrections ("Department") and the State Board for Community and Technical Colleges ("Board"). The Agreement was "for the period of July 1, 2008, through June 30, 2009." CP 57. Ms. Burnett's accident happened during the effective period of the Agreement. A copy of the entire Agreement was filed with the Court as an exhibit

to the *Declaration of Tom Scribner Regarding Defendant's Motion for Summary Judgment*, CP 57-72.

Of primary import to this case, the Agreement said, in relevant part:

> 5.5 INDEPENDENT CAPACITY: The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.
>
> 5.6 AGENT OF THE OTHER PARTY: Neither party shall represent itself as an agent of the other party or hold itself out to be vested with any power or right to contractually bind or act on behalf of the other party.

Agreement, §§ 5.5 and 5.6, CP 68.

B. <u>Procedural History</u>.

On March 9, 2009, Ms. Burnett was injured at the Washington State Penitentiary in Walla Walla. CP 2, 36.

On March 1, 2012, Ms. Burnett filed her *Complaint for Damages*. CP 1.

On March 11, 2013, the Department filed its *Answer and Affirmative Defenses to Plaintiff's Complaint*. CP 5-9.

On November 1, 2013, the Department filed its *Motion for Summary Judgment*. CP 11-12.

On December 23, 2013, the Court heard argument on the Department's *Motion for Summary Judgment* and entered an *Order Granting Defendants' Motion for Summary Judgment.* CP 11-12.

III.

ARGUMENT

A. Standard of Review.

The Department's *Motion* was filed pursuant to CR 56, which states that such motions "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c).

This is an appeal from an Order Granting Summary Judgment. In reviewing an Order of Summary Judgment a Court of Appeals engages in the same inquiry as a trial court. *Callahan v. Walla Walla Housing Auth.*, 126 Wn. App. 812, 818, 110 P.3d 782 (2005). A Court of Appeals reviews an Order Granting Summary Judgment de novo. *Hill v. Sacred Heart Med. Ctr.*, 143 Wn. App. 438, 445, 177 P.3d 1152 (2008).

Summary judgment is appropriate only if the nonmoving party fails to produce sufficient evidence which, if believed, would

support the essential elements of his/her/ their claim. *Id. Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001). The appellate court should consider all facts and reasonable inferences in a light most favorable to the nonmoving party. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. 622, 628, 146 P.3d 1242 (2006); *Mountain Park Homeowners Ass'n v. Tydings,* 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). The court must determine whether a genuine issue of material fact exists and must not resolve an existing factual issue. *Woodall v. Freeman Sch. Dist.*, 136 Wn. App. at 628; *Thoma v. C.J. Montag & Sons, Inc.,* 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). A material fact is a fact upon which the outcome of the litigation depends, in whole or in part. *Morris v. McNicol*, 83 Wn.2d 491, 494, 519 P.2d 7 (1974).

B. The Trial Court Erred In Granting Defendants' *Motion For Summary Judgment*.

The Department's legal argument is that Ms. Burnett, an employee of Walla Walla Community College, is an employee of the State of Washington and, since the Department is an agency of the State of Washington, her lawsuit against the Department is against the State. Therefore, on the authority of RCW 51.04.010, according to the Department, Ms. Burnett is barred by the exclusive

remedy provision of the Industrial Insurance Act. RCW 51.04.010. CP 17.

The problem with this argument is that the connection between the Community College and the State and then between the State and the Department is broken by the express terms of the Agreement between the Department and the Board:

> The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

Agreement, § 5.5; CP 68.

Therefore, the L&I bar does not apply for the reason that Ms. Burnett is/was not in the "same employ" as employees of the Department of Corrections. The Department and the guard who negligently closed the door on Ms. Burnett, causing her injuries, were third persons, "not . . . considered for any purpose to be employees or agents of the other party." *Id.* Consequently, on the authority of RCW 51.24.030(1), Ms. Burnett may sue the Department.

> If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or

> beneficiary may elect to seek damages from the third person.

RCW 51.24.030(1).

1. There are genuine issues of material fact regarding the relationship between Ms. Burnett, an employee of Walla Walla Community College, and the Department of Corrections.

In its *Memorandum in Support of Defendants' Motion for Summary Judgment*, CP 14-26, the Department said absolutely nothing about the Agreement between the Department and the Board. Either the Department overlooked or did not consider the Agreement, or hoped that Ms. Burnett would not introduce the Agreement into this litigation. But Ms. Burnett did. In response, the Department made multiple arguments about why the Agreement should not apply or does not mean what it says. All of the arguments made by the Department in its *Reply Memo in Support of Defendants' Motion for Summary Judgment*, CP 73-84, prove that there are, or may be, genuine issues of material fact regarding the intent of and support Ms. Burnett's interpretation of the subject language in the Agreement.

Ms. Burnett does not believe that there are genuine issues of material fact regarding the intent of the Agreement. She believes that the Agreement very clearly states that she, an employee of Walla Walla Community College, was not an employee of the Department of Corrections "for any purpose." However, if this Court does not agree with her interpretation, then the intent of the Agreement is in dispute and we have an issue of material fact.

2. Ms. Burnett was an employee of Walla Walla Community College; she was not an employee of the Department of Corrections.

In its *Reply Memo*, the Department argues that "Ms. Burnett was an employee of the State of Washington, not Walla Walla Community College." CP 74. This argument misses the point and/or is incorrect.

The Department's argument is that: (1) both the Department and Walla Walla Community College are agencies of the State of Washington; (2) the complaint filed by Ms. Burnett against the Department is really against the State of Washington, which is really her employer; and (3) therefore the L&I bar should apply. But for the clear language in the Agreement, at § 5.5, this argument may carry the day. But to complete the circle - - Department to

State, State to Board, Board to Walla Walla Community College - - both the Department and the Community College would have to be similarly situated relative to each other. By application of § 5.5 of the Agreement, they, and their employees, are not similarly situated relative to each other. We are talking, per the clear language of § 5.5 of the Agreement, about two distinct entities, the employees of each who "shall not be considered for any purpose to be employees or agents of the other party." CP 68.

The Department's argument that both the Department and Walla Walla Community College are agencies of the State of Washington and therefore Virginia Burnett should not be allowed to continue with her action against the Department might apply were it not for the Interagency Agreement. However, as argued herein, it was the expressed intent of both the Department and the Board to separate the Department and the Community College with regard to the issue of employment and the right of an employee of the Community College to bring an action against the Department (or, for that matter, the right of an employee of the Department to bring an action against the Community College). There is an unbridgeable chasm between the Department and the Community College with respect to employment. By arguing that both the

Department and the Community College are agencies of the State of Washington and therefore the L&I bar should apply, the Department is attempting to render inapplicable and void the express intent of the parties in the Agreement.

Irrespective of § 5.5 of the Agreement, Ms. Burnett is further of the opinion that she was not an employee of the State of Washington, at least as concerns application of the L&I bar.

According to RCW 51.08.180, a "Worker" is "every person in the State who is engaged in the employment of an employer under this title, whether by way of manual labor or otherwise in the course of his or her employment."

When she was injured, Virginia Burnett was in the course of her employment with Walla Walla Community College, not the State of Washington. It was not the State that set or controlled Virginia's employment or hours. Her employer was the Community College. That Virginia was employed by Walla Walla Community College is confirmed as follows: (1) she was hired by Walla Walla Community College, not the State of Washington; (2) her contract of employment was with the Walla Walla Community College, not the State of Washington; and (3) her W-2 lists her employer as Walla Walla Community College, not the State of Washington.

Concerning all three issues, see Exhibits 1-3 to the Declaration of Tom Scribner, CP 52-72. Exhibit 1, CP 54, is a letter to Ms. Burnett, dated July 9, 2008, from Steven Van Ausdale, President of Walla Walla Community College, regarding her contract for the academic year July 1, 2008 through June 30, 2009. Exhibit 2, CP 55, is a copy of the Professional Personal Contract between Virginia Burnett and the Walla Walla Community College. Exhibit 3, CP 56, is a copy of Virginia Burnett's W-2 for 2009 (the year of the accident) showing that her employer was Walla Walla Community College.

The Professional Personal Contract states, in relevant part:

> Employee agrees to perform the assigned professional services and to comply with all duties and responsibilities as enumerated in the Contract between the Board of Trustees of Community College District No. 20 and the Walla Walla Community College Association for Higher Education and the Interagency Agreement between State of Washington Department of Corrections and State Board for Community and Technical Colleges as they now exist or hereafter amended and which by this reference are incorporated into this Contract as required by RCW 28B.50.855 as now existing or hereafter amended.

Professional Personal Contract Between Virginia Burnett and Walla Walla Community College, dated July 9, 2008, CP 55.

Of note is that the Professional Personal Contract between Virginia Burnett and the Community College references and

incorporates by reference the Agreement. As stated in her Contract with the Community College, Ms. Burnett was subject to "all duties and responsibilities as enumerated" in the Agreement. CP 55.

A case discussing the issue of when and where an employment relationship exists is *Bennerstrom v. Labor & Indus.*, 120 Wn. App. 853, 86 P.3d 1194 (2004). In that case an in-home care provider who was compensated for his services under a program administered by a state agency sought judicial review of an administrative denial of a claim for industrial insurance coverage. The plaintiff alleged that he was an employee of the state agency for purposes of qualifying for industrial insurance coverage. The Whatcom County Superior Court entered a summary judgment in favor of the state agency. The Court of Appeals affirmed.

> An employment relationship for purposes of workers' compensation laws does not exist (a) absent the employer having the right to control the employee's physical conduct in the performance of the employee's duties and (b) the employee's consent to the employment relationship.

Bennerstrom v. Labor & Indus., 120 Wn. App. at 856.

In this case, Walla Walla Community College had the right to control Ms. Burnett's "physical conduct in the performance of [her] duties," not the State of Washington. Virginia consented to the Community College as her employer, not the State of Washington.

With respect to the issue of an employer having the right to control an employee's job performance, the court in *Bennerstrom v. Labor & Indus.* stated:

> Among those factors that we may examine to determine control are: (1) who controls the work to be done, (2) who determines the qualifications, (3) setting pay and hours of work and issuing paychecks, (4) day-to-day supervision responsibilities, (5) providing work equipment, (6) directing what work is to be done and (7) conducting safety training.

Bennerstrom v. Labor & Indus., 120 Wn. App. at 863.

The State of Washington and certainly the Department did not control the work done by Virginia Burnett, did not determine her qualifications, did not set her hours of work or issue paychecks, etc. All of these factors were controlled/set by Walla Walla Community College.

The State of Washington and the Department were not Virginia Burnett's employer when she was injured. The L&I bar found at RCW 51.04.010 does not apply in this situation. As stated in that statute: "The common law system governing the remedy of

workers against employers for injuries received in employment is inconsistent with modern conditions." Virginia Burnett was an employee of Walla Walla Community College, her employer, at the time of the subject accident. She would be barred, on the authority of RCW 51.04.010, from suing the Community College for her injuries. She is not and should not be barred from bringing an action against the Department, which was not, at the time of her accident, her "employer."

In its *Reply Memorandum*, the Department takes issue with Ms. Burnett's reliance on *Bennerstrom v. Dept. of Labor & Indus.*

> The point is the standard for establishing an employment relationship outlined in *Bennerstrom* has been the standard in Washington for quite some time. Importantly, it was the standard when the Supreme Court decided *Thompson v. Lewis County*, 92 Wn.2d 204, 595 P.2d 541 (1979) and *Spencer v. Seattle*, 104 Wn.2d 30, 700 P.2d 742 (1985).

CP 82.

Ms. Burnett does not take issue with the *Thompson v. Lewis County* and *Spencer v. Seattle* decisions. Both of those cases dealt with an employee suing his employer for damages. We are not, in this case, dealing with an employee suing her employer. *Spencer v. City of Seattle* and *Thompson v. Lewis County* are

distinguishable from this case and do not and should not control the outcome in this case.

In *Spencer v. City of Seattle*, Mr. Spencer, an employee of the City of Seattle, was run over by a truck. He sued the truck driver. The case went to trial and resulted in a defense verdict. 104 Wn.2d at 31. Mr. Spencer thereafter sued the City for his injuries, claiming that the accident was the result of negligent design, construction and repair of the crosswalk that he had stepped into at the time of the accident. *Id.* The City argued that the state workers' compensation act prohibited Mr. Spencer, an employee of the City, from maintaining a common law cause of action against the City, his employer, for damages. *Id.* The trial court granted the City's motion. Mr. Spencer appealed. The Court of Appeals, Div. I, transferred the case to the Supreme Court. According to the Supreme Court:

> The question presented on appeal is whether the City may be sued in court by one of its employees or whether the employee's exclusive remedy is provided by workers' compensation. We hold the employee's exclusive remedy is provided by the workers' compensation act and affirm the trial court.

Spencer v. Seattle, 104 Wn.2d at 32.

In *Spencer v. Seattle*, there was no question but that Mr. Spencer was an employee of the City of Seattle. The question in *Spencer v. Seattle* turned on the interpretation and application of the "dual capacity" doctrine. In the context of discussing this doctrine, the court cited *2A A. Larson, Workmen's Compensation* § 72.81 at 14-230 (1983). With respect to the issue of a claim for damages filed against a third person, "not in a workers' same employ," the Supreme Court said:

> Larson states that a third party is usually defined in the first instance as 'a *person* other than the employer.' This is quite different than 'a person acting in a capacity other than that of employer.' The question is not one of activity, or relationship - - it is one of identity. *Larson*, at 14-231.

Spencer v. Seattle, 104 Wn.2d at 33.

As stated by the Supreme Court in *Spencer v. Seattle*: "In this case, the identity of the City as a municipality is not completely independent from and unrelated to its identity as an employer." 104 Wn.2d at 33. In this case, the identity of the Department, and, for that matter, the State of Washington, is completely independent from and unrelated to Walla Walla Community College.

The issue of the "identity" of the Department, hence the State, relative to the plaintiff in the case before this court is

answered by the Interagency Agreement between the Department and the Board. CP 59-72. That is, by the express terms of the Agreement, the Department, as an employer, is completely independent from and unrelated to Ms. Burnett. Consequently, the State is also completely independent from and unrelated to her as concerns the claim against the Department.

In *Thompson v. Lewis County*, the plaintiff, an employee of the Lewis County Road Department, was injured while in the scope of his employment. He made claim under the Washington Workman's Compensation Act and received benefits. 92 Wn.2d at 206. He then sued the County

> upon a theory of dual capacity; that is, in one capacity it was his employer, in the other capacity it was a municipal corporation or governmental agency with a duty to property construct and maintain county roads for the use and benefit of the public. In this connection it should be noted that the respondent was employed by the road department which is the same county department which had the duty to maintain the road.

92 Wn.2d at 206.

In *Thompson v. Lewis County,* the trial court entered a judgment allowing the action against the County to continue. The case was initially appealed to the Court of Appeals, Division II, which certified the question to the Supreme Court. As stated by the

Supreme Court, the question before it was: "Can an action be maintained against the employer county based upon alleged failure to properly construct and maintain a county road or is the injured workman's exclusive remedy under the Washington Workman's Compensation system?" 92 Wn.2d at 205. The Supreme Court reversed the superior court and dismissed the action "for the reason that under the facts of this case the sole remedy available to respondent was given by the Workman's Compensation Act." 92 Wn.2d at 206.

Please note that the Supreme Court said that its decision was based on "the facts of this case." *Id.* That is, whether the defendant is the employer of the plaintiff is or should be determined on the specific facts of each case. That each case is factually specific was confirmed by the Supreme Court in *Thompson v. Lewis County*: "In view of the clear language of the statute we hold that under the circumstances here presented the respondent has no cause of action for his injuries." 92 Wn.2d at 209 (emphasis added).

This point is borne out further by the *Thompson v. Lewis County* decision as follows:

> The case most relied on from another jurisdiction is *Marcus v. Green*, 13 Ill. App. 3d 699, 300 N.E.2d 512 (1973). In that case the facts were most unusual and subsequent Illinois decisions have limited its effects. In *Walker v. Berkshire Foods, Inc.*, 41 Ill. App. 3d 595, 354 N.E.2d 626 (1976), the Illinois court said in part:
>
> > If the *Marcus* decision retained any viability at the present time, it is limited to the principal that the Workman's Compensation Act bars any other remedies of an employee against his employer unless that employer is existing as one or more distinct legal entities. *Walker* at 598.

Thompson v. Lewis County, 92 Wn.2d at 209.

In this case we are dealing with two "distinct legal entities," the Department and the Community College, per the express terms of the Agreement.

C. <u>Defendants' Rebuttal Arguments Do Not Support A Motion For Summary Judgment</u>.

In its *Reply Memorandum in Support of Defendant's Motion for Summary Judgment*, CP 73-84, the defendant made multiple arguments why the Agreement between the Department and the Board should not control and/or why language in the Agreement supported the Department's position. Ms. Burnett will address each argument.

1. <u>"The explicit intention of the parties in the Interagency Agreement is to work collaboratively to provide</u>

educational opportunities to offenders housed in the State's prisons." CP 76.

Ms. Burnett agrees entirely, but an intention to work collaboratively does not make Ms. Burnett an employee of the Department of Corrections.

The Department states that the intent of the Agreement was to further or enhance the purpose of RCW 39.34.010.

> [P]ermit local governmental units to make the most efficient use of their powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby provide services and facilities in a manner and pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

RCW 39.34.010; CP 76-77.

Separate and distinct local governmental units may "cooperate" for their "mutual advantage" without the employees of one being employees of the other. Walla Walla County may cooperate with Benton County; Spokane County may cooperate with the City of Spokane. That cooperation does not make the employees of one local governmental unit employees of the other. And nothing in RCW 39.34.010 requires that the employees of the parties to any such agreement be employees of the other. The

Department quotes from § 2 of the Agreement that "It is the intention of the Board and the Department to work together, seek administrative efficiencies, and continue to develop an educational system." CP 77. That separate and distinct local governmental units may "work together, seek administrative efficiencies, and continue to develop an educational system" does not negate the express language of the Agreement:

> The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other party.

Agreement, § 5-5, CP 68.

2. **"The Interagency Agreement does not operate as a waiver of Industrial Insurance Act immunity as to the Department."** CP 78.

The Department's argument on this point is that: (1) the Agreement did not expressly waive the L&I bar; (2) such a waiver must be "properly worded"; and, therefore, (3) the L&I bar has not been waived. This argument misses the point: Virginia Burnett was/is not an employee of the Department, no waiver is needed.

As argued by the Department:

> A waiver of Industrial Insurance Act immunity is enforceable "only if it clearly and specifically contains a waiver of the immunity of the Workers' Compensation Act, either by so stating or by specifically stating that the indemnitor assumes potential liability for actions brought by its own employees."

CP 78, citing with approval *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d at 239-40.

Ms. Burnett has absolutely no argument with this language. If an employer is to waive application of the L&I bar "for actions brought by its own employees," it must specifically so state. But Ms. Burnett was not an employee of the Department. Agreement, § 5-5, CP 68.

The Department goes on to argue that the Agreement "is completely silent as to liability for workplace injuries. Nowhere does the agreement explicitly state that it operates as a waiver of Industrial Insurance Act immunity." CP 78. Were Ms. Burnett suing her employer, Walla Walla Community College, this argument and the case law cited would be applicable. But Ms. Burnett is not suing her employer; she is suing the Department. And as stated in the Agreement:

> The employees or agents of each party who are engaged in the performance of this Agreement shall continue to be employees or agents of that party and

> shall not be considered for any purpose to be employees or agents of the other party.

Agreement, § 5.5; CP 68.

The Department argues that it did not waive its immunity under the Industrial Insurance Act pursuant to the Agreement. Nowhere has Ms. Burnett argued that it has. Since Ms. Burnett is not suing her employer, no waiver of the L&I bar is needed or required.

3. **"The Interagency Agreement expressly prohibits any construction that creates rights enforceable by third parties."** CP 79.

The Department cites to § 6.2 of the Agreement: "Nothing in this Agreement shall be construed to create a right enforceable by or in favor of any third-party."

Ms. Burnett is not making a claim against the Department as a third party beneficiary of the Agreement. She is a party to the Agreement. Her Professional Personnel Contract with Walla Walla Community College, CP 55, states, in relevant part, that as an employee of the Community College Ms. Burnett agrees to perform and comply with all duties and responsibilities as enumerated in, among other things, "the Interagency Agreement between the State

of Washington Department of Corrections and State Board for Community and Technical Colleges as they now exist or are hereafter amended." *Id.* The Department states that it is Ms. Burnett's position that the "Agreement creates a right to sue the Department where otherwise none would exist." CP 79. Ms. Burnett has not so argued. The Agreement, at § 5.5, says what it says. That is, Virginia Burnett, an employee of Walla Walla Community College, is not an employee of the Department "for any purpose." Nor is she a third party beneficiary with respect to the Agreement. The Department's reliance on § 6.2 in the Agreement ("Nothing in this Agreement shall be construed to create it a right enforceable by or in favor of any third-party") is an incorrect interpretation and attempted application of that language.

CONCLUSION

The Agreement between the Department of Corrections and the Board of Community and Technical Colleges is very clear: "The employees of each party . . . shall continue to be employees or agents of that party and shall not be considered for any purpose to be employees or agents of the other." Ms. Burnett was an employee of the Walla Walla Community College; she was not an employee of the Department of Corrections. Therefore, Ms. Burnett

may sue the Department. The L&I bar does not apply. If the Agreement is not clear on this point, then there is a genuine issue of fact as to what it means.

In either of the above situations (i.e., the Agreement at § 5.5 means what it says or it is ambiguous), the Motion for Summary Judgment should not have been granted and this case should continue. The Order Granting Defendant's Motion for Summary Judgment should be reversed and the case sent back to the trial court for further proceedings.

DATED this 8 day of May, 2014.

MINNICK-HAYNER

By: _____
Tom Scribner, WSBA #11285
Of Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 8 day of May, 2014, I caused to be served a true and correct copy of **APPELLANT'S BRIEF** by the method indicated below, and addressed to the following:

Jason D. Brown, Esq.
Assitant Attorney General
Attorney General of Washington
West 1116 Riverside Avenue
Spokane, WA 99201-1194

X U.S. Mail, Postage Prepaid

Judy Limburg
JUDY LIMBURG
Signed this 8 day of May 2014
at Walla Walla, Walla Walla County, WA