

No. 34357-6-II

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANE DOE I,
Appellant,

vs.

THE STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES; WESTERN STATE HOSPITAL; BARRETT
GREEN; and WASHINGTON FEDERATION OF STATE
EMPLOYEES, COUNCIL 28, LOCAL 793,
Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

In 1988, the State of Washington was first warned about Barrette Green's inappropriate sexual conduct. CP at 334. Numerous complaints followed, yet the State of Washington did nothing to deter Green from this conduct for over 15 years. Similarly, in 1997, the Washington Federation of State Employees ("Union") was warned about Green's sexual harassment, yet nothing was done. CP at 1447. In their responsive briefing, neither the State nor the Union provides any persuasive explanation for these years of inaction.¹

Moreover, Respondents fail to articulate the facts of this case in the light most favorable to the non-moving party. Even the State's own termination letter to Green paints a more accurate picture of what occurred. This letter summarizes some of the harassment endured by Ms. Salazar as follows:

Beginning in the Spring of 1998, Ms. Salazar says you began to direct personal attention toward her, starting with asking her on a date, which she declined. Following that incident, on several occasions, when you would see Ms. Salazar you would give her unsolicited hugs. On one occasion, for no legitimate reason, you even left a group meeting when you saw her to talk to her, telling her that she

¹ Respondents do argue that Ms. Salazar failed to provide additional complaints. However, this argument misses the point of the notice requirements for sexual harassment. Here, Respondents were put on notice of Green's unlawful conduct from multiple sources. Because they failed to act promptly on this information, they are liable. Ms. Salazar was not required to provide them with information they already had. The sole question is whether the Respondents had notice of Green's proclivity towards sexual harassment. The evidence shows that they did.

was the only person you would do that for. During the fall of 1999 you began having private conversations with Ms. Salazar in your office, with the door closed, at which time you would share with her your desire to have the then current RN4 removed from her position.

On a weekend in 1999, while you were at a union function in Seattle, Ms. Salazar states you called her late in the evening and asked her to come to your hotel room. Ms. Salazar declined, and then you began to talk about your sexual fantasies about Ms. Salazar. She told you she was uncomfortable with that kind of talk. The following morning you again called Ms. Salazar and told her you were thinking about her and masturbating. Ms. Salazar told you she did not want to hear that kind of talk and quickly got off of the phone.

After that, when you would ask her to come to your office, Ms. Salazar tried to avoid having to go to your office. When she did come to your office, you would hug and try to kiss her. She resisted you. Despite her clear resistance, during the Fall of 1999, while in your office at work, you pressed Ms. Salazar against the wall, trapping her, and kissing her breast. Ms. Salazar told you she did not want you to do that and left. Rather than respecting her clear and unequivocal rejection of your sexual attentions, one week after this incident, you asked Ms. Salazar at work if you could go to her house. For reasons even Ms. Salazar does not understand, she agreed. Once you were there you told her that you had come to give her oral pleasure. Initially she felt obligated to go through with it, but after you had started the sexual act, she felt she could not go through with it and asked you to stop. After you stopped and she was putting on her clothes, you showed her an envelope you had brought into her home. The envelope contained a gun, or what looked like a gun. You then showed her the envelope and said, "You know what this is?" and she said, "Yeah, it's a gun."

You went to Ms. Salazar's house a second time about one month later, ostensibly to talk with her about her divorce and what was going on with that. While you were rubbing

her feet, she told you about her attempts to get a restraining order against her husband. Her husband came over while you were there and after he was gone, you took her hand and put it on your erect penis. She pulled away and said, "You're nasty."

After the last incident at her house, Ms. Salazar learned that she had been promoted to the RN4 position and she was nominated as employee of the year by a shop steward who was a close associate of yours. When Ms. Salazar became the RN4 you began making comments such as, "You are the best RN4 ever" and "You're what this unit needs." Ms. Salazar felt you were grooming her so you could continue to pursue a relationship with her. She also felt that you had used your influence to have her placed in the RN4 position in place of the previous RN4, who you had told her you wanted removed.

CP at 1219-1220. Again, this is the State's account of what happened and is taken from the letter terminating Green's employment. The State also ignores the findings of their own investigator. CP 753-767. Because the Respondents' statement of the facts fails to present this case in the light most favorable to Ms. Salazar, it should be disregarded in its entirety.

In their responsive briefing, both the State and the Union follow the same basic outline. First, they asked this Court to ignore the evidence submitted by Ms. Salazar, incorrectly claiming that it is inadmissible. Second, they argue that Ms. Salazar's claims are barred by the applicable statute of limitations. Importantly, the State concedes that Ms. Salazar's claim for invasion of privacy is not barred by the statute of limitations. State's Br. at 34, fn. 8. Third, the State and Union contend that Ms. Salazar's claims are insufficient to support a violation of the Washington's

Law Against Discrimination (“WLAD”), to constitute a tort of invasion of privacy, to support a claim of outrage, or to support a claim for negligent retention. Respondents’ arguments are unpersuasive and do not provide grounds to dismiss Ms. Salazar’s claims as a matter of law. Because material questions of fact exist, this Court should reverse the determination below and remand this case for trial.

II. THE EVIDENCE SUBMITTED BY APPELLANT WAS PROPERLY BEFORE THE SUPERIOR COURT

Respondents do not make specific arguments in their response briefs regarding the grounds for requesting that this Court ignore certain evidence. Instead, they merely list off a series of documents and conclusively state that these exhibits are not admissible. *See* Union’s Br. at 11-13. Ms. Salazar responded with specificity to each of the arguments relating to inadmissibility in its opposition to motion to strike. CP at 1855-1863. The trial court properly denied Respondents’ motion to strike. VRP (Jan. 20, 2006) at 24:2-4. Appellant will briefly summarize why each of these documents is admissible, but refers the Court to Plaintiff’s Opposition to Motion to Strike for a more detailed analysis if the Court should engage in these evidentiary considerations despite the Respondents’ lack of briefing.

First, the Union and State make a generic claim that all of the objected to documents are hearsay. This argument is unpersuasive for

many reasons. First, many of the documents are party-opponent admissions, and therefore, they are excluded from the definition of hearsay. ER 801(d)(2). These documents include the letter terminating Green from employment, Barrette Green's Complaint in *Green v. State*, and Ms. Holter's testimony. Additionally, the Salisbury Report and the Hobson Report are also excluded from the definition of hearsay because they are party-opponent admissions. These reports were adopted and ratified by the State on multiple occasions. Deposition testimony in this case could not be clearer on this point.

Q . . . You adopted the [Salisbury Report] as true and used that for the justification for terminating Barrette Green.

A Yes.

CP at 1870.

Furthermore, the State has relied on the Salisbury Report in defending against Green's lawsuit. By submitting the Salisbury Report as evidence in their successful motion for summary judgment against Green, the State adopted and endorsed the report as an accurate determination and assessment of the working conditions at Western State Hospital. CP at 1885. In fact, in defending against Green's lawsuit, the State most concisely explained why the Salisbury Report is admissible:

In his capacity as Special Master, Mr. Reiss functioned as a representative of the Court. This is appropriately considered a document of the Court and is as appropriately

considered as any other document issued by a Court; it should be considered on judicial notice. Moreover, the Report shows that Mr. Reiss had sufficient personal knowledge of the events to establish an adequate foundation for his statements. The report is no more hearsay than any declaration submitted in support of a motion for summary judgment and should be considered.

CP at 1892-1893 (emphasis added).

For these same reasons, the Order of United States District Court Judge Ronald B. Leighton granting Defendant's motion for summary judgment in *Green v. State of Washington*, Cause No. CV03-565 and the Findings and Fact and Conclusions of Law issued by the Personnel Appeals Board on October 31, 2005 in *Green v. State* are also admissible. Furthermore, Mr. Reiss, the Special Master, incorporated both the Salisbury Reports and the expert report of Charles Hobson into his own report upon which the State relied. Simply said, there is no basis for this Court to ignore these pertinent documents. In fact, the State should be judicially estopped from arguing to the contrary. They made specific representations to the Federal Court stating that these documents were not hearsay, were credible and were admissible. The State cannot now be heard to claim, when these documents are used against it, that all of a sudden these documents are hearsay and unreliable.

The Respondents also object to the Collinsworth Report. However Dr. Collinsworth's Report is not hearsay as it does not go to the truth of the matter asserted but instead to the mental state of sexual harassment

victims and abuse survivors like Ms. Salazar. Respondents do not question her qualifications to testify as an expert. Her opinions are admissible for purposes of summary judgment in the same way they would be admissible at trial.

In their responsive briefing, both the State and the Union object to the evidence relied on by Ms. Salazar. However, once this Court takes a moment to review these documents it will become apparent that the arguments are unsupported. In fact, the State has relied on these same documents in its own motions for summary judgment. In doing so, they have proclaimed to another court that they are admissible and do not constitute hearsay. The State has adopted and ratified these documents and based on principles of judicial estoppel it cannot now claim that these documents are inadmissible.

III. APPELLANT'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS

In their responsive briefs, both the State and the Union argue that Ms. Salazar's claims are barred by the statute of limitations. The State however, as noted earlier, concedes that her claim for invasion of privacy is not barred by the statute of limitations. State's Br. at 34. fn. 8. Under the same logic employed by the State regarding the invasion of privacy claim, the claim for negligent retention is also clearly within the statute of limitations because this claim did not begin until November 24, 2003,

when Green was fired. Concerning the other claims asserted by Ms. Salazar, Respondents are mistaken in concluding that her claims are barred by the statute of limitations.

First, the court in *Antonius v King County*, 153 Wn.2d 256, 103 P.3d 729 (2005) held that the statute of limitations for a hostile work environment claim runs from the last circumstances that contributed to the hostile work environment. In this case, the evidence shows that Green's prevalent sexual harassment permeated Western State Hospital, creating a toxic environment specifically for those women that were abused by Green in the past. This environment continued until the point of his termination. Ms. Salazar worked in fear of Green because of his powerful connections to the Union and his ability to destroy a person's career. The State knew about Green's inappropriate behavior since as far back as 1988, yet it took no action for over 15 years. CP at 334.

The States incorrectly claims that no acts of discrimination occurred within the three years preceding the filing of this lawsuit. This claim is most easily rejected by referring to the State's own letter of November 6, 2003. CP at 1218. There, Karl Brimner, wrote to Green as follows:

You are being disciplined for the following acts of misconduct, engaging in inappropriate conduct directly toward your coworkers Ms. Linda Salazar, Ms. Jackie Delgado, and Ms. Cheryl Reis, starting in the early 1990's through 2003.

CP at 1218 (emphasis added). As noted above, this letter also summarizes some of the harassment endured by Ms. Salazar, including many actions that occurred within the three years preceding the filing of this lawsuit. Specifically, the letter explains the stress that Ms. Salazar felt after being placed in an RN4 position and nominated as employee of the year by one of Green's associates.

After the last incident at her house, Ms. Salazar learned that she had been promoted to the RN4 position and she was nominated as employee of the year by a shop steward who was a close associate of yours. When Ms. Salazar became the RN4 you began making comments such as, "You are the best RN4 ever" and "You're what this unit needs." Ms. Salazar felt you were grooming her so you could continue to pursue a relationship with her. She also felt that you had used your influence to have her placed in the RN4 position in place of the previous RN4, who you had told her you wanted removed.

CP at 1219-1220. Until Green was removed in November of 2003, Ms. Salazar continued working in an environment where she knew she must keep Green happy in order to keep her position. Through his connection to the Union, Green had considerable power and influence. He could assist people if he liked them and destroy their career if he did not. Green's statements to this effect are discrete acts of actionable discriminatory conduct that contributed to the hostile working environment. This is not the type of working environment permitted under Washington law, and viewing this evidence in the light most

favorable to Ms. Salazar, these events along with those described in Appellant's opening brief, constitute a hostile workplace.

IV. APPELLANT HAS PRESENTED SUFFICIENT EVIDENCE TO CREATE A QUESTION OF MATERIAL FACT REGARDING HER CLAIMS OF VIOLATION OF WASHINGTON'S LAW AGAINST DISCRIMINATION

A plaintiff establishes a claim for hostile environment based on sexual harassment under RCW 49.60.180(3) by showing that the harassment is unwelcome, occurred because of a person's sex and that it affected the terms or conditions of employment. *Francom v. Costco Wholesale Corp.*, 98 Wn.App. 845, 853, 991 P.2d 1182 (2000). An employer is vicariously liable for the harassment that is committed by non-management employees when the employer knew or should have known of the harassment and failed to take reasonable prompt corrective action. *Id.*

In this case, the evidence of a hostile work environment is overwhelming. In fact, the State fired Green for this conduct and then successfully defended that decision in federal court by arguing that Green had sexually harassed women including Ms. Salazar. Under the doctrines of collateral estoppel and judicial estoppel, the State is prohibited from claiming the opposite in this matter. "Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a

clearly inconsistent position.” *Cunningham v. Reliable Concrete*, 126 Wn. App. 222, 224-225, 108 P.3d 147 (2005). As explained by the Ninth Circuit in *Hamilton v. State Farm*, 270 F.3d 778, 782 (9th Cir. 2001), courts invoke “judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of ‘general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings,’ and to ‘protect against a litigant playing fast and loose with the courts.’” (quoting *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990)).

Here, the doctrines of collateral estoppel and judicial estoppel prevent the State from contending that Green’s conduct was non-discriminatory. By now claiming that Ms. Salazar is not a victim of sexual harassment, the State is “playing fast and loose with the courts.” The State successfully argued that Green created a hostile working environment when it was defending itself in federal court. It cannot now take an inconsistent position.

Even if this Court were to hold that the doctrines of collateral estoppel and judicial estoppel do not apply, Ms. Salazar has presented sufficient evidence to create a question of material fact regarding the discrimination endured. Between the State’s admissions in its letter terminating Green’s employment, CP 1218-1220, to its own admissions in deposition testimony, CP 1063, there can be no doubt that Ms. Salazar was

subjected to a hostile working environment. This was best summarized in the deposition of by the State's Director of Human Resources for DSHS, Sherer M. Holter.

Q: In your assessment, and based on your personal and professional experience, the Salisbury report, and any other information that you had outside of that provided to you by attorneys, do you believe today that Linda Salazar was in a hostile work environment while Barrette Green was at Western State Hospital?

...

A: Based on the information provided by Ms. Salazar, it appeared that she was in a hostile work environment.

CP at 1063.

Concerning the Union, Ms. Salazar's claims are supported by the WLAD. The Union is prohibited, through its actions, omissions, and agency with respect to Green, from violating Ms. Salazar's right to be free from sexual harassment in the workplace. Under Washington law, it is unlawful to discriminate against another because of sex. RCW 49.60.010, 49.60.030. This right to be free from sex discrimination includes "[t]he right to obtain and hold employment without discrimination." RCW 49.60.030(1)(a). The legislature has dictated that these protections "shall be construed liberally for the accomplishment of the purposes thereof." RCW 49.60.020.

The Union owed Ms. Salazar a duty to refrain from gender discrimination in the workplace. Regardless of whether Ms. Salazar was a member of the union or simply an employee working in and around the Union presence, Washington law specifically states that a union may not discriminate against because of sex. RCW 49.60.190. Thus, summary judgment is improper.

V. APPELLANT HAS PRESENTED SUFFICIENT EVIDENCE TO RAISE A QUESTION OF MATERIAL FACT ON HER CLAIM OF INVASION OF PRIVACY

Mr. Karl Brimner, Director of Mental Health Division of DSHS, declared, under penalty of perjury, to the Honorable Vicki L. Hogan on April 16, 2003 that the State of Washington promised confidentiality during its investigations of additional allegations made during the Lizee lawsuit against Barrette Green:

All allegations of harassment or discrimination or workplace violence may be reported directly to the Director of Mental Health Division and/or the Director of the Human Resources Division for review and appropriate follow-up. It is my intent and that of the Secretary Braddock's to ensure that employees understand that allegations are confidential and will be appropriately addressed without retaliation and retribution.

...

Mr. Barrette Green, Western State Hospital Risk Manager, was placed on home assignment effective April 4, 2003, pending investigation of additional allegations of misconduct brought forward during the trial. Mr. Green has been directed to have no contact with Western State

Hospital employees. Other female or male employees who believe they have been the target of inappropriate actions by Mr. Green can and should be assured that they can safely come forward and report their allegations to Management without fear of retaliation or personal harm and the details of how the investigation by Jan Salisbury will be done has taken that into consideration.

CP at 1085.

Despite the above-quoted admission of the promise of confidentiality to all employees made by Mr. Brimner, the State nonetheless disingenuously argues it never made a promise of confidentiality to Ms. Salazar. And, to top it off, the State continues by improperly citing the nuances of Washington's law controlling the tort of invasion of privacy by publication. In *Fisher*, the court clarified the meaning of "publicity" by explaining that publication to a small group or a single person may qualify as publicity, under the current law, if the nature of the material disclosed was a highly offensive communication that outweighed the limited scope of the publicity. *Fisher v. The Dep't of Health*, 125 Wn. App. 869, 879, 106 P.3d 836 (2005). Additionally, "...people enjoy constitutional protections from government invasion of their right to privacy arising from the *First, Fourth, Fifth, Ninth, and Fourteenth Amendments* as well as the fundamental concept of liberty." *Id.* at 880 (emphasis in original). Although this is not a blanket right, the Courts must engage in a balancing of the state's legitimate interests of disclosure and an individual's interest in privacy. *Id.*

It is important for this Court to keep in mind that in conducting its massive investigation of the severity and extent of Green's unlawful conduct at Western State Hospital, the State knew that it could discipline Green only if his victims, like Kathleen Lizee, were given the courage to disclose the sexual harassment experienced at Western State Hospital. Likewise, the State knew that to encourage other female Western State Hospital employees to come forward would require a promise of confidentiality; a promise that the State expressly provided to Western State Hospital employees, including Ms. Salazar. The State cannot now argue that Ms. Salazar was never promised confidentiality by the State or its agent, Salisbury Consulting.

Even before the Salisbury Investigation was commenced, Mr. Brimmer proclaimed and promised to all Western State Hospital employees—on DSHS letterhead—that all information divulged by accusers would remain confidential:

“It is important to me that all employees feel that they can **safely report allegations of harassment, retaliation and workplace violence in a manner that maintains confidentiality**. As a result, I intend to review the current reporting process and implement changes as necessary. In the interim, **to fully ensure confidentiality**, I am asking all employees to report issues and concerns directly to me and/or Sherer Murtiashaw, Director of Human Resources Division. I assure you that your complaints will be delivered directly to my office or Sherer's and we will personally review them and respond in an appropriate and timely manner.

Allegations may be delivered via campus mail or the U.S. Postal Service. **Please mark all envelopes “PERSONAL AND CONFIDENTIAL”** and send them to one of the following addresses ...”

CP 1088 (emphasis added). And, again, the very next day, a promise of confidentiality was made to all Western State Hospital employees by Dennis Braddock, Secretary of DSHS:

Due to the allegations regarding sexual harassment that arose during the recent court case, Salisbury Consulting has been retained to conduct an investigation into these allegations and any related violations of DSHS policies at Western State Hospital. **In order to ensure that Ms. Salisbury and her associates are able to conduct a thorough investigation, it is important that all employees who have knowledge of any of these issues come forward with that information.**

If you feel that you are being retaliated against for having participated in this investigation, report your concerns to the Director, HRSA Mental Health Division (902-0790) or the Director, Human Resources Division (664-5861). To the extent possible, **your report will be treated confidentially** and responded to in a timely and sensitive manner.

CP at 1090 (emphasis added).

In addition to the above-quoted memoranda, the State provided its employees promises of confidentiality in weekly bulletins disseminated by the State to Western State Hospital employees, including Ms. Salazar:

[T]he independent investigation into allegations of harassment, workplace violence and retaliation at WSH is ongoing. Anyone with information that could be helpful in the investigation is asked to contact Salisbury Consulting[.] Private phone numbers are as follows ...[.] To the extent

possible, your report will be treated confidentiality and responded to in a timely and a sensitive manner.

CP at 1092.

Additionally, Salisbury Consulting, based on instructions provided to it by the State, also provided Ms. Salazar with express promises of confidentiality on which she relied:

Q: Were you provided any additional verbal promises of confidentiality?

A: By Jan Salisbury.

Q: Okay. Anybody else?

A: No.

Q: Okay. And what did Jan Salisbury say to you exactly?

A: She said that the information was confidential. And when she said that she would be writing a report to the state [sic] in her investigation, that she would include the information. And I asked her then what that meant exactly, and I wanted to be sure that my name wasn't included. She said that she would provide the information but not the names.

And at that point, I said, well, if you include the information and he's privileged to the information, he'll know who it is. And so part of the -- she -- she assured me that -- that the names wouldn't be provided.

CP at 1019.

Instead of disclosing any possibilities or scenarios in which the names of accusers could be disclosed to Green, the State affirmatively

assured Ms. Salazar that her name would under no circumstances be revealed – it promised her confidentiality. CP at 1015. Ms. Salazar summarized it well when she stated during her deposition that:

“If I had not gone to Jan Salisbury and given her information about sexual harassment that had occurred at the workplace, the state [sic] wouldn’t have the information, and it wouldn’t have appeared in the letter. **When I asked Jan Salisbury about the confidentiality of my statements to her, she said that there would be no names involved.**”

CP at 1016.

The State has argued that even if Ms. Salazar’s name would not have been provided to Green, he would have known that the allegations were being made by Ms. Salazar. In making its argument, the State fails to appreciate the magnitude of its disclosure of Ms. Salazar’s name to Green. While it would be reasonable to believe that in providing the facts surrounding her atrocious experiences that only Green would know that Ms. Salazar was the accuser, the omission of her name would at the very least protect her from an announcement to the world that those private facts are directly related to her. In other words, only Green would know that Ms. Salazar was making these claims as opposed to the general public. Notably, by virtue of publishing Ms. Salazar’s name and details about Barrette Green’s sexual victimization of Ms. Salazar, the State publicized the private facts of Ms. Salazar’s life because the letter is

subject to public disclosure. The State should have known, thus, that the information contained within that letter would eventually reach the public at large. Additionally, once Ms. Salazar's name was provided to Green, it became the "buzz" of Western State Hospital subjecting Ms. Salazar to shame and emotional distress.

While the State claims that its actions were privileged, its argument is without merit because it made specific representations to induce Ms. Salazar into talking. The State cannot claim that it had the right to disclose information that it obtained through promises of confidentiality.

Based on the above, there is a question of material fact as to whether or not the State's publication of Ms. Salazar's name in its termination letter to Barrette Green was absolutely necessary to ultimately discharge Green and whether its actions were in conflict with the specific promises of confidentiality.

VI. APPELLANT HAS PRESENTED SUFFICIENT EVIDENCE TO RAISE A QUESTION OF MATERIAL FACT ON HER CLAIM OF OUTRAGE

A defendant is liable for the tort of outrage if their conduct 1) is extreme and outrageous, 2) intentionally or recklessly inflicts emotional distress, and 3) causes severe emotional distress to the plaintiff. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 51, 59 P.3d 611 (2002). An employer cannot avoid vicarious liability for the outrageous conduct of their employee unless the employer shows that the employee's conduct was

outside the scope of employment. *Id.* at 53. An employee's conduct is within the scope of employment if the employee "was fulfilling his or her job functions at the time he or she engaged in the injurious conduct." *Id.* An employee's acts that are directed toward their own personal sexual gratification are not within the scope of employment, but an employee's acts are within the scope of employment if they torment the plaintiff while the employee is performing assigned duties or is on company property during working hours. *Id.* at 54.

Although the threshold analysis for an outrage claim is high, the Washington Supreme Court has acknowledged that "[t]his court has recognized that in an outrage claim the relationship between the parties is a significant factor in determining whether liability should be imposed." *Id.* at 52 (citing *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977) (noting that "added impetus" is given to an outrage claim if the defendant is one in a position of authority over another)).

Here, despite a decade or more of accounts of sexual harassment, despite notification from former steward Jose Aguirre, despite the complaints of Kathleen Lizee, despite the testimony of many other Green victims at trial, and despite the findings of the Salisbury Report, the Union continued to promote and retain Barrette Green as its most powerful leader at Western State Hospital. CP at 760. In fact, even after Green was formally terminated from his employment at Western State in November

2003, Green still finished out the rest of the year as the Local's president, utilizing the Local's office. With such clear and unwavering support and affirmation of Green's acts, the Union is accountable for his action and their support of his actions.

VII. APPELLANT HAS PRESENTED SUFFICIENT EVIDENCE OF NEGLIGENT RETENTION TO RAISE A QUESTION OF MATERIAL FACT

An employer may be liable for harm caused by an incompetent or unfit employee if (1) the employer knew, or in the exercise of ordinary care, should have known of the employee's unfitness before the occurrence; and (2) retaining the employee was a proximate cause of the plaintiff's injuries. *Carlsen v. Wackenhut Corp.*, 73 Wn. App. 247, 252, 868 P.2d 882 (1994) (citing *Peck v. Siau*, 65 Wn. App. 285, 288, 827 P.2d 1108 (1992)). But the employer's duty is limited to foreseeable victims and then only "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997).

Even where an employee is acting outside the scope of employment, the relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others. This duty gives rise to causes of action for negligent hiring, retention and supervision. Liability under these theories is analytically distinct and separate from vicarious liability. These causes of action are based on the theory that "such negligence on the part of the

employer is a wrong to the injured party, entirely independent of the liability of the employer under the doctrine of respondeat superior.”

Robel, 148 Wn.2d at 53, n.8 (citing another case).

The Salisbury Report, CP 753-767, and the adoption of the Salisbury Report’s findings by the State, along with the decisions by U.S. District Court Judge Ronald Leighton and the Personnel Appeals Board, confirm that, throughout his career at Western State Hospital, Green was as prolific a sexual harasser of female employees as can be imagined. Given those indisputable facts, there is certainly a jury question as to whether the State and Union knew or should have known that continuing to promote and protect Green through the ranks of Western State Hospital was endangering those female co-workers who regularly worked with and encountered Green, like Ms. Salazar. Therefore, summary judgment would be improper.

///

VIII. CONCLUSION

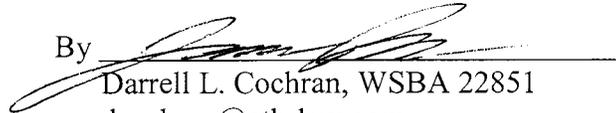
For the reasons stated above and those reasons contained in Appellant's Opening Brief, Appellant respectfully requests that this Court reverse the decision of the Superior Court and remand this matter for trial.

Dated this 2nd day of November, 2006.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,
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By



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CERTIFICATE OF SERVICE

I, **Kristin Larkin**, hereby affirm and declare, that a copy of REPLY BRIEF OF APPELLANT was sent by Legal Messenger Service to the court, and to the following recipients listed below via facsimile and Legal Messenger on November 2, 2006. Service was made at the following addresses:

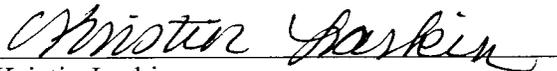
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Dated this 2nd day of Nov., 2006.



Kristin Larkin