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STATE OF WASHINGTON

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No. 34741-5-II

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

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KRISTI SOLT, Appellant,

v.

ANNIE WRIGHT SCHOOL, STANLEY CUMMINGS AND JANE ROE  
CUMMINGS, PAUL MANNING AND JANE ROE MANNING; ET AL.,  
Respondents,

BRIEF OF APPELLANT

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ORIGINAL

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**A. Assignments of Error**

*Assignments of Error.*

1. The trial court erred in granting defendants' Annie Wright School and Stanley Cummings' Motion for Summary Judgment.
2. The trial court erred in granting defendant Paul Manning's Motion for Summary Judgment.

*Issues Pertaining to Assignment of Error.*

1. When the evidence presented to the trial court establishes that Plaintiff Kristi Solt on multiple occasions informed her employer Annie Wright School that she was being repeatedly subjected to domestic violence and harassment by a co-worker who was her estranged husband, and asked for help in stopping vile and threatening behavior, and the defendants Paul Manning, Stanley Cummings and Annie Wright School failed to take remedial action sufficient to stop it, should the trial court have granted summary judgment dismissing plaintiff's hostile work environment claim?

2. When the evidence presented to the trial court establishes that after reporting her estranged husband's ongoing lewd, crude and sexually-charged comments, hundreds of telephone calls, stalking behavior and other harassment in the workplace to the defendants, and after obtaining an order of protection from the Pierce County Superior

Court and showing the protective order to the defendants, and requesting assistance by defendants in stopping the conduct, and there is evidence that the offensive workplace conduct did not stop, but rather defendants created and maintained a workplace that became increasingly hostile to the point that Ms. Solt had anxiety and panic attacks and felt compelled to give up her on-campus apartment, and, even after that, the director of security wrote a letter which inflamed another bout of harassment, should the trial court have granted summary judgment dismissing plaintiff Kristi Solt's retaliation claims?

3. When the evidence presented to the trial court establishes a prima facie case of disparate treatment on the basis of sex complete with evidence of sexual stereotyping, and that males and females were treated differently in similar circumstances, should summary judgment have been granted dismissing plaintiff Kristi Solt's disparate treatment case?

4. When the evidence presented to the trial court shows that defendant Annie Wright School had represented to its employees in its personnel policy manual that it would not tolerate abusive or harassing conduct or language that was sexist, and provided further that such conduct or language should be reported to the employee's supervisor or the Head of School for investigation and possible disciplinary action, and where Kristi Solt repeatedly reported the abusive, harassing and sexist

conduct and language she was subjected to in the workplace to her supervisor, to defendant Paul Manning and to defendant Stanley Cummings, but no investigation or disciplinary action was taken until there had been repeated criminal violations of a domestic violence protection order, and then the perpetrator of the conduct was allowed to resign with accolades and continuing pay and benefits, and the harassment did not cease even after he left, should the trial court have granted summary judgment dismissing Plaintiff Kristi Solt's negligent supervision claim?

**B. Statement of the Case.**

*1. Introduction.*

This is an appeal of a summary judgment dismissing all claims by Kristi Solt. This is a case about domestic violence and harassment on the campus of Annie Wright School in Tacoma, Washington in the years 1999 through 2002. This is a case about Annie Wright School officials' failure to protect her. This is a case about retaliation against her for seeking protection. This is a case about the creation of a hostile work environment by the person charged with the duty to provide a safe and secure campus. This is a case about domestic violence, alcoholism, harassment, gender discrimination, homophobia, out-of-control staff members, incompetent

hand-wringing administrators, and the written and unwritten codes of conduct for life "behind the hedge" at Annie Wright School.

The events complained of occurred in Tacoma shortly before the high profile domestic violence death of Crystal Brame in April of 2003. Fortunately, Kristi Solt is alive to bring this employment lawsuit, and this is not a wrongful death case, but this case must be seen from the point of view of what could have happened. Governor Locke's remarks in 2004 at the Vashon Island Domestic Violence Outreach Services Center seem to be an appropriate introduction.

The terrible tragedy of Crystal Brame's death painfully reminded us that domestic violence is found in every walk of life, every economic class, and every type of relationship or family. Far too often, this is a concealed but deadly crime. One that comes too often comes to light only after it is too late.

...

But the strongest laws and unlimited funding will not prevent domestic violence, or protect its victims. Not unless we are all committed to changing the values and attitudes in our culture that allow this violence to flourish. Whether we are elected officials, police officers, private employers, co-workers, neighbors, landlords, or citizens, let us always remember what our 1999 task force emphasized: Preventing domestic violence is everybody's business.<sup>1</sup>

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<sup>1</sup> Governor Gary Locke's remarks on June 16, 2004, at the Vashon Island Domestic Violence Outreach Services Center.  
[www.digitalarchives.wa.gov/governorlocke/speeches/speech-view.asp?SpeechSeq=605](http://www.digitalarchives.wa.gov/governorlocke/speeches/speech-view.asp?SpeechSeq=605)

2. *Condensed Summary of Facts.*

At the hearing of the motion for summary judgment, the trial court was presented evidence (condensed and summarized) as follows:

Mr. Manning was provided a copy of the letter from Patti Spaulding describing a specific incident of harassment on campus on July 22, 2001. Mr. Manning did not inform Dr. Cummings, did not investigate other than having a conversation with Mr. Selleck, did not write a report, and did not follow up to investigate the report of previous harassing telephone calls. And he failed to consider it domestic violence even though previously he had been called to intervene in an altercation at the AWS apartment where Mr. Selleck had been out of control and had ripped a telephone from the wall and had engaged in other destructive behavior. On several other occasions Mr. Manning was alerted to a continuing pattern of domestic violence which violated the order of protection, which he treated as an inconsequential matter.

There were no policies or procedures in place for dealing with domestic violence in the workplace at AWS, but Dr. Cummings has admitted that domestic violence is a crime and must not be tolerated. Dr. Cummings had been informed of the difficulties between Kristi Solt and Stuart Selleck even before he started his employment at AWS. He was first informed by Ms. Solt of a domestic violence incident in late July or early August of 2001. He became aware that there was a protective order in place at the time of the complaint. He alleged that he considered the violation serious, but he doesn't recall doing anything except speaking with Mr. Manning and then counseling Mr. Selleck that he was "treading on thin ice"; he did not ask to see the court file, talk to any police officers or other witnesses, and didn't take any notes. He considered it a "mini-crisis" that "did not raise a red flag at that time." No discipline was imposed on Mr. Selleck.

On July 30, 2001 Dr. Cummings was notified that the Court had entered a permanent order of protection against Mr. Selleck, and that Ms. Solt was requesting his support in enforcing it. ... He didn't do anything within the first 24 or 48

hours; particularly he did not ask to speak to any police officers, didn't appoint anyone on his staff to investigate, didn't do any investigation himself, and didn't ask for legal advice. Within a "day or two" he had met with Ms. Solt and listened to some voice mail messages. ... he determined that Mr. Selleck had used school telephones to make harassing telephone calls to her on campus while on duty at AWS. Dr. Cummings was afraid of "physical violence"... Mr. Selleck was arrested, charged and convicted for this violation, and was put on probation with a suspended 365-day sentence. Additional violations occurred in September and October, and Dr. Cummings was notified of the continuing harassment.

On October 2, 2001, Dr. Cummings responded by email coldly noting that "Despite its personal impact on you, Stuart's actions do not require a response from the school at this point."... Dr. Cummings admitted he "didn't see it as a call to action". He didn't get any legal advice, didn't investigate, and didn't act at that time in any manner that he recalls, and admitted that his "first line of concern was for the school, and my second line was for Kristi". Dr. Cummings admitted that he didn't contact any outside or policies agencies, didn't formulate a plan of action, and didn't advise Ms. Solt what to do if the harassment from Mr. Selleck resumed. During this period of time, Dr. Cummings was aware of the potential for violence, "for him to come storming in with a gun", but he did not increase the level of security at the school, did not ask for additional staff to be hired to walk the grounds or inspect the premises, didn't install additional lighting in the dark areas of the school, and didn't change any locks. CP 440-443<sup>2</sup>

Because of his harassing behavior against his wife, Stuart Selleck was ultimately allowed to resign. But soon thereafter Defendant Paul Manning, Annie Wright School Director of Security, began a course of

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<sup>2</sup> All references to Clerk's Papers are herein designated by the letters "CP" followed by the page number(s).

retaliatory conduct consisting of stalking, overly intensive scrutiny, and persistent reporting of untrue or wildly hurtful accusations of inappropriate actions, which continued the harassment and created a hostile working environment.

[Manning] started watching me closely, and made a series of false accusations about me, most of which had to do with my divorce, my sexual orientation, and what he termed inappropriate behavior. Most of these accusations were related to my supervisor ... and [were a] blatant attempt to "out" me and get me fired from my position. CP 421

Defendant Manning was motivated by retaliation against Ms. Solt for her reporting Stuart Selleck's domestic violence and harassment. The trial court was also apprised of evidence that Ms. Solt sought protection from the retaliatory harassment by Mr. Manning by directly appealing to Defendant Stanley Cummings.

After complaining about Mr. Manning's harassment to her supervisor Ms. Bauska, without any remedy, Ms. Solt made an appointment and complained directly to Dr. Cummings. During an emotional meeting, she explained that she felt that Mr. Manning's conduct was motivated by her "recent legal action against Stuart Selleck", complained that she didn't feel safe in her apartment, and asked Dr. Cummings to immediately stop the harassment by Mr. Manning. Nothing was done, except for the issuance of a memo that indicated that he was washing his hands of the problem and not attempting a resolution. CP 443

As a result of the hostile work environment, Ms. Solt has had physical and and mental health problems.

Kristi Solt brought claims of gender discrimination, hostile work environment, retaliation and negligent supervision against Annie Wright School, Head of School Stanley Cummings, and Director of Security Paul Manning, in Pierce County Superior Court in 2004. The Defendants aggressively defended, predominantly by accusing her of sexual improprieties, but also by other forms of intentional humiliation. CP 432 On March 24, 2006, Judge Sergio Armijo dismissed all her claims, finding no issues of fact. CP 787-789, 790-792

3. *Kristi Solt has an exemplary record of achievement in the world of private independent schools.*

Kristi Solt was hired by Annie Wright Schools in 1995 as the Director of Residence and Activities, a position that required her to live in the staff apartments on campus. CP 433 She was promoted to the position of Dean of Students for the 2002-2003 academic year, and was permitted to live off campus. Her employment was terminated by AWS in 2004. Since the Fall of 2004, she has been employed as the Dean of Students at another private school in California. She has an exemplary record, of which she is justifiably proud.

It should be noted that it is undisputed that Ms. Solt was not fired for performance reasons. CP 486 She never broke any AWS written policy pertaining to overnight visitors in her apartment. CP 411, 501 She has never

behaved inappropriately in the presence of students or staff at AWS. CP 458, 411 She was given a glowing employment reference after her discharge. CP 508-509

4. *In the "Don't Ask – Don't Tell" private school culture at Annie Wright School it is acceptable to have discreet adult relationships in the staff apartments, unless you are presumed to be homosexual.*

The background of this lawsuit, the parties, and their interrelationships are spelled out more completely in the briefing submitted in opposition to the motion for summary judgment. CP 433-439 However, a brief history is helpful to understanding of the interpersonal dynamics and the "private school culture" presented here.

When Kristi Solt was hired by AWS, she was not married, but was in a long-term relationship with Stuart Selleck. Stuart Selleck routinely stayed overnight with Ms. Solt in the on-campus staff apartment with Kristi Solt in the eight months prior to their marriage. This was known and accepted. At AWS, there is a private school culture that Susan Bauska, AWS Head of Upper School, testified about as follows:

If you are engaging in sexual behavior, no one should know about it. If you are an adult, unmarried and living on campus, your sexuality should not be something that is evident in the lives of the children there.

Ms. Bauska conceded that:

You don't have to introduce the person who you wish to stay overnight in your apartment at Annie Wright as to the exact nature of your relationship. ... You can have discreet adult relations in your apartment if it is not in a manner to offend the sensibility of [the] private school culture. You do not have to say "this is my new boyfriend and he and I are having sex three times a week, Mr. Manning." CP 438, 502

Although discreet adult relations were acceptable in the resident staff apartments, in the private school culture at Annie Wright School, homosexual orientation and conduct was considered unacceptable. Kristi Solt has made her career in private schools, and understands the private school culture. She worked at AWS for nine years, and well understood its particular culture, formed over a long period of "absolute" leadership by conservative Headmaster Robert Klarsch.

... Mr. Klarsch was widely known in the school to not approve of homosexuality. ... The other staff members who were gay or lesbian remained carefully discreet and deeply "in the closet". Mr. Klarsch had expressed beliefs that homosexuality was right up there with pedophilia, and simply could not be part of the school program at Annie Wright. There was no equal employment policy at the school providing protection of staff members on the basis of sexual orientation, those coming "out" could be terminated on that basis alone.

CP 414-415

Kristi Solt and Stuart Selleck were married in March of 1996, and lived as a married couple in the resident staff apartments on campus until they separated at the end of 1999. Mr. Selleck was hired by Annie Wright

School, and worked on campus, reporting to Paul Manning, the Director of Security for AWS. They became close friends. Kristi Solt explained as follows:

While most staff members learn that the private school culture requires absolute discretion, it is common knowledge that other staff members, married and unmarried, have overnight visitors, and presumably sexual relations, in the AWS staff apartments. ...

It was common knowledge that while I was employed at AWS and living in the resident staff apartment, and before I was married to Mr. Selleck, a period of approximately eight months, that Mr. Selleck routinely stayed overnight with me in the apartment. This fact was abundantly clear to Mr. Manning, because he would call Stu at the apartment when he needed him for work. Mr. Manning was friendly toward both Stu and me when we were a couple, both before our marriage and during it. It was only after we separated that he became upset, and began to monitor who was visiting me at my apartment. It seemed to matter a great deal to Mr. Manning and Mr. Selleck that my overnight guest was a woman, and not a man.

CP 411

Although Kristi Solt has never testified that she is a lesbian, and she has never directly discussed her sexual orientation with Paul Manning or Stanley Cummings, during her separation from her husband, she formed a new relationship with a woman, and disclosed to her husband that she had issues with her sexual orientation. And that disclosure became a weapon used against her by Mr. Selleck and others, after their separation, to harass her. CP 415 Because discretion was, and still is, required in the

private school culture, Kristi Solt has never openly disclosed the particulars of her relationships with either men or women, not even to Susan Bauska, a person she considered a friend at that time. CP 415 There is no evidence that Kristi Solt and her friend Angela Morrison ever behaved inappropriately in public, and particularly in any manner other than friends in front of students and staff at Annie Wright School.<sup>3</sup> CP 458-459

5. *Kristi Solt was the victim of ongoing harassment and domestic violence in the workplace, and Annie Wright School management knew it, but didn't follow its own procedures or take adequate action to stop it.*

The nature of domestic violence is that it is more broad than simply acts of physical violence.

While physical violence is ordinarily the sole aspect of domestic violence that reaches the legal system, domestic violence includes many other forms of coercion and control. Domestic violence is a pattern of assaultive and coercive behaviors, including physical, sexual, and psychological attacks, social isolation, and economic coercion. Most domestic violence victims are subjected to "an *ongoing*" strategy of intimidation, isolation, and control that extends to all areas of life, including sexuality; material

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<sup>16</sup> It is deeply distressing for Kristi Solt to read the lurid allegations against her as part of the defense against her claims. The "gay-bashing" nature of the defendants' motion for summary judgment is reprehensible and highly objectionable, and is itself a form of retaliation that should not be countenanced by this Court. See, CP 409, 432, 444 n. 64.

needs, relations with family, children, and friends; and work.<sup>4</sup>

In October and November of 1999, the marriage of Stuart Selleck and Kristi Solt began to break up, and she told Mr. Selleck that she wanted to separate. In November of 1999, during an argument, Mr. Selleck knocked over a table and pulled the phone out of the wall. CP 415 Ms. Solt called Mr. Manning, AWS's Director of Security, to come and stay while she packed a few things to leave the apartment. CP 416 The couple finally separated in December of 1999, with Mr. Selleck moving out of the staff apartment. After the separation, Mr. Selleck started calling to harass her, particularly after he had been drinking. He would call repeatedly, sometimes 30 to 50 calls in a day. Ms. Solt's health began to deteriorate. CP 416 By April and May of 2001, Mr. Selleck began drinking more and calling and harassing her more frequently. At least some of the calls were during his work hours. *Id.* Mr. Selleck was angry and used sexually graphic and lewd words to harass her. CP 416, 574

In late Spring, Mr. Selleck was in her apartment without her consent and obtained Ms. Solt's cell phone records. He used them to make harassing calls to her friends and colleagues. Ms. Solt also noticed that a door hinge to her bedroom had been removed, even though she had locked

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<sup>4</sup> From the Memorandum of Amicus Curiae Washington State Coalition Against Domestic Violence in Support of Appellant Ramona Danny, filed in the Supreme Court

her apartment. CP 417 Concerned that Mr. Selleck still had access to her apartment, she asked Mr. Manning to change the locks or bar Mr. Selleck from her apartment, but she became aware that Mr. Manning was blaming her for the difficulties and was siding with Mr. Selleck. CP 417 Mr. Manning also told her that they would have to take the matter to Head of School Robert Klarsch. Ms. Solt did not want to do that because that would involve him in the details of her problem with domestic violence, and would possibly raise the issues of her sexual orientation. CP 417

Unrestrained, in June and July of 2001, Mr. Selleck's harassment increased and became more frequent and public. The harassment was "extremely filthy and ugly and difficult to endure". It was taking a toll on her sleep and mental health. CP 417 On July 10, 2001, Mr. Selleck called continuously, more than 30 times that day, using different payphones to avoid a block on his telephone number. *Id.* Mr. Selleck began stalking Ms. Solt and her friends. *Id.* On July 11th, Mr. Selleck was waiting outside her apartment on campus, and when she exited the building shouted obscenities. Later he left a telephone message that said "You are going down", which she found very threatening. On that same date, Ms. Solt received mail at work that was an attempt to humiliate her. CP 418

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of Washington under No. 78421-3.

Ms. Solt filed a petition for Order of Protection, and a temporary order was entered in Pierce County Superior Court on July 13, 2001. Despite the protection order, on July 20th, Mr. Selleck started a new type of harassment, drunkenly and loudly yelling abusive comments and making obscene gestures toward her while she was on campus. There were children present, and the conduct was seen by Patti Spaulding, an AWS co-worker. CP 418 This conduct violated the order of protection and constituted a crime on campus. This conduct also violated the specific terms of the AWS Personnel Policy Manual, which prohibits, *inter alia*, threatening or intimidating acts, disorderly conduct, sexual or racial harassment [and] use of abusive or profane language. CP 601-604

Ms. Spaulding wrote a letter to Paul Manning describing the incident, and putting him on notice of the multiple harassing telephone calls as well. CP 418 Despite this Mr. Manning did not investigate or take any action to stop the harassment and did not inform Stanley Cummings, the new Head of School. Mr. Selleck was not disciplined in any way for his abusive, obscene, and sexist conduct. CP 419

On July 27, 2001, Ms. Solt was granted a permanent order of protection, and informed Mr. Manning, and gave him a copy. Ms. Solt also gave a copy of the permanent order of protection to her supervisor Susan Bauska and to Stanley Cummings. Dr. Cummings had received both

a copy of the temporary order and the permanent order. CP 519-520 Nothing was done, except that he put the protection orders in the side drawer of his desk. CP 520 None of the disciplinary procedures specified in the AWS personnel policy manual were followed; there was no formal written warning, no discussion, no suspension with or without pay.

The permanent order was violated by Mr. Selleck at the first opportunity. Ms. Solt informed AWS management of the crime, and the details of the ongoing harassment. CP 419 On August 13, 2001 Mr. Selleck was arrested for violating the protective order. The harassment was, again, on campus and Dr. Cummings realized that the calls were coming from Annie Wright telephones. CP 419, 521 Dr. Cummings explained that his first concern was that "he shouldn't be using a school phone to make a call like that". CP 522

Stuart Selleck was allowed to "leave with dignity" and Dr. Cummings drafted a resignation letter for his signature. Mr. Selleck kept his pay and benefits for a month. CP 523 Later, Dr. Cummings sent an e-mail praising Mr. Selleck's job performance and stating that he will be "greatly missed".

Despite the termination of his employment, and the permanent protective order, Mr. Selleck's harassment and abuse did not stop. CP 526, 420

6. *Defendant Paul Manning retaliated against Kristi Solt by creating a hostile work environment and, "outing" her sexuality; Defendants Annie Wright School and Stanley Cummings ratified this retaliation .*

Although Paul Manning had originally agreed with the termination of his friend Stuart Selleck, he was upset because he had lost a staff member that he was friendly with, and he did not "want to let go of it". CP 525 Mr. Manning blamed Ms. Solt, and felt like an injustice had been done by the termination.<sup>5</sup> *Id.* Mr. Manning had resigned from his position due to his dejection from the termination of Mr. Selleck, but his resignation was rescinded. CP 529

After Mr. Selleck's termination, Mr. Manning became less friendly to Ms. Solt, and started monitoring her very closely, even though school was not yet in session. CP 420 According to Susan Bauska, Mr. Manning repeatedly made comments to her and accusations of improprieties about Ms. Solt, including supposed details from her divorce, her debts, her sexual orientation, and what he deemed inappropriate behavior including having "orgies with other women" in her apartment. CP 421 By December of 2001, his scrutiny of her comings and goings, the fact that he

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<sup>5</sup> Ms. Solt specifically did not want Mr. Selleck terminated. She recognized that his problems were, in a large measure, related to his alcoholism. Also, she had been acting as primary parent to Stuart Selleck's daughter, who was residing with her in the campus apartment while attending Annie Wright. If Mr. Selleck was fired, she would no longer be able to attend Annie Wright. Earlier application of the AWS disciplinary procedure

was apparently monitoring her apartment around the clock, and the constant barrage of reports of supposedly improper behavior, became sufficiently oppressive that Ms. Solt began having panic attacks and heart arrhythmia. CP 421 From Susan Bauska's testimony in the record, the monitoring was related to Paul Manning's belief that Ms. Solt was sexually involved with her female overnight guest. CP 503

When Ms. Bauska was unable to stop Mr. Manning's conduct, Ms. Solt complained directly to Dr. Cummings. She presented a lengthy memo and explained that she believed that Mr. Manning's conduct was motivated by her "recent legal action against Stuart Selleck." CP 422 She emotionally told Dr. Cummings that she didn't feel safe in her apartment, and asked for his help. *Id.* Despite this, Dr. Cummings did nothing except write a memo entitled "Moving On", explaining that he would not attempt a resolution. CP 422 Ms. Solt was deeply dissatisfied with this, and found out that Mr. Manning was also not content. CP 423 On February 27, 2002 Ms. Solt received a letter written by Mr. Manning on February 14, 2002, in which he repeats accusations against her, makes up new accusations, and makes an obvious attempt to "out" her sexual orientation. CP 423

Even more egregiously, Mr. Manning also sent a copy of his letter of February 14, 2002 to Mr. Selleck in Texas, who had not been

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would have been a better means to address the ongoing harassment, which worsened over

heard from for months. This was an intentional effort to stir up Mr. Selleck's anger. The effect was like "pouring gas on a smoldering fire". CP 424 In mid-March, Mr. Selleck immediately resumed sending ignivomous e-mails to a greatly expanded list of recipients in the AWS community. The scurrilous and hurtful accusations by Selleck regarding her presumed sexual orientation and conduct was never public knowledge until then. CP 424

When Ms. Solt asked what would happen to Mr. Manning for his violation of the directive from Dr. Cummings to "move on", she was told, "Nothing will happen to Paul". CP 424 By failing to take any remedial action, Dr. Cummings ratified the hostile work environment. Solt was extremely distressed, and her therapist put her on medical leave.

7. *The "campus security" basis for this conduct is directly disputed.*

The defendants have asserted that Mr. Manning's intensive scrutiny was warranted by reasons of campus security and the presence on campus of Ms. Solt's "unreported overnight guest". CP12 But it is undisputed that there was no written policy prohibiting AWS staff members from having overnight visitors. CP 530 And there is no dispute that Kristi Solt was never disciplined or counseled about overnight visitors. CP 532

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time, as nothing was done until he was terminated.

Defendants concede that she was not terminated for bad performance in any way. CP 740

Rather, defendant Manning contends that there was a longstanding “informal” policy that staff members should report their unknown overnight guests to the Director of Security, or at least to someone in the security department” CP 38, 731 Plaintiff has directly disputed that there was such a policy, and has pointed out the “ridiculous” argument of counsel that campus security was threatened by an “unknown” overnight visitor to her apartment. CP 423, 467-469

I introduced her to Ms. Bauska, Mr. Manning and members of the maintenance and security department, Dr. Cummings, various administrators, the RA staff, faculty and students, and even to the President of the Board of Trustees. She was at school functions and activities. Her brother and mother stayed in my apartment overnight and Mr. Manning issued them a key so they could come and go as they pleased. She was well known around the school.

It is also ridiculous that defendant Manning claims that Ms. Morrison was not formally introduced or “screened in any way as a potential safety risk” First of all, there is evidence, both from me and from Angela Morrison that an introduction was made and that her truck was well-known from the beginning of the summer of 2001. Second, there is no evidence in the record about *anyone* being “screened”; the excerpt from my deposition upon which Manning’s counsel relies for this “screening” argument points this out. As long as a staff member invites a guest, there is no further screening. Third, the known “safety risk” was Stu Selleck, who was stalking, calling, threatening, and otherwise harassing me, and violating a protective order and committing crimes on campus. Mr. Manning did nothing about that threat to security because he was siding

with Mr. Selleck. Fourth, I disagree that there was ever a policy, formal or informal, about reporting overnight visitors to the apartments of the resident staff members.

There was no reason to suspect any threat from Angela Morrison, who was a “well-known part of the AWS community”. CP 458 Even Ms. Bauska felt that Mr. Manning’s excessive scrutiny was possibly related to his homophobia. CP 510

**C. Argument.**

*1. Introduction*

All Defendants are liable to Plaintiff for violation of the Washington Law Against Discrimination RCW Chapter 49.60 (“WLAD”). There are multiple violations of the WLAD including failing to promptly and effectively remedy a sexually hostile work environment, retaliation for opposing the hostile work environment, and disparate treatment on the basis of sex. Furthermore, all Defendants are liable to plaintiff for negligent supervision, with Defendants Annie Wright School and Cummings liable for their negligent supervision of Defendant Manning and Stuart Selleck, and Defendant Manning being liable for his negligent supervision of Stuart Selleck.

The decision of Pierce County Superior Court Judge Sergio Armijo granting summary judgment of dismissal should be reversed, and

remanded for jury trial on all claims since there remain genuine issues of material fact. The award of attorneys fees and costs for trial and appellate court proceedings should abide until after trial.

2. *Summary judgments are to be reviewed de novo.*

Cases are legion for the proposition that the Court of Appeals reviews the granting of a motion for summary judgment on a *de novo* basis. Summary judgment is appropriate under CR 56 only if the record shows that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. The moving party bears the burden of showing the absence of a genuine issue of material fact. *Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985). As the moving party, the defendant has the initial burden of “coming forth with their version of specific, evidentiary facts – not legal conclusions.” *Cascade Brigade v. Economic Dev. Bd.*, 61 Wn. App. 615, 621-622, 811 P.2d 697 (1989). The Court must consider all the facts submitted and all reasonable inferences in the light most favorable to the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030

3. *Special caution should be applied to motions for summary judgment in discrimination cases.*

Motivation is ultimately a factual question. *Shannon v. Pay 'n' Save*, 104 Wn.2d 722, 726, 709 P.2d 799 (1985). In discrimination cases,

summary judgment in favor of employers is seldom appropriate. *deLisle v. FMC*, 57 Wn. App. 79, 83, 796 P.2d 832 (1990), *rev. den.*, 114 Wn.2d 1026, 793 P.2d 974 (1990); *Johnson v DSHS*, 80 Wn. App. 212, 907 P.2d 1223 (1996); *Sangster v. Albertson's Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000); *Kampouris v. St. Louis Univ.*, 210 F.3d 845 (8<sup>th</sup> Cir. 2000) (*see*, dissenting opinion citing considerable authority for the proposition that summary judgment is inappropriate). The Ninth Circuit has made it clear that defeating summary judgment requires only minimal evidence.

This Court has set a high standard for the granting of summary judgment in employment discrimination cases. ... because the ultimate question is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by the factfinder, upon a full record.

*Lam v. University of Hawaii*, 40 F.3d 1551, 1563 (9th Cir. 1994)<sup>6</sup>  
Circumstantial evidence alone may suffice. *Burnside v. Simpson Paper*, 125 Wn.2d 93, 864 P.2d 937 (1994). *Carle v. McChord Credit Union*, 65 Wn. App. 93, 827 P.2d 1070 (1992). There is no requirement that the employee show additional independent evidence (*i.e.*, “pretext plus”) of discrimination if there has been a showing of a prima facie case and pretext. *Subia v. Dept. of Corrections*, 104 Wn. App. 105, 15 P.3d 658

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<sup>6</sup> Internal citations omitted and punctuation edited.

(2001), adopting *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L.Ed.2d 105 (2000).

And, at summary judgment, while there is a burden of production of evidence showing a genuine issue of material fact, there is absolutely no burden of persuasion on the employee in an employment discrimination case. *Burnside v. Simpson Paper*, *supra*; The issue on summary judgment is whether the plaintiff has produced some evidence “that a reasonable trier of fact could, but not necessarily would, draw an inference that an impermissible motive came into play in the adverse employment decision.” *Sellsted v. Washington Mutual Savings Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, *rev. den.* 122 Wn.2d 1018 (1993).

More generally, the WLAD requires a liberal construction for the elimination of discrimination. RCW 49.60.020 This liberal construction has resulted in substantial differences between the WLAD and federal anti-discrimination laws, including a significantly lower burden of proof of motivation. For example, recognizing that employment decisions are frequently motivated by both legitimate and illegitimate reasons, and that the employer has the superior knowledge about those facts, the WLAD was liberally construed to require only that an illegal motivation was “a substantial factor” for the decision, rather than the sole motivating factor. *Allison v. Housing Authority*, 118 Wn.2d 79, 96, 821 P.2d 79 (1991).

When evaluating federal cases, only if federal precedent would better accomplish the WLAD purpose of eliminating discrimination, will it be considered persuasive. *Grimwood v. UPS*, 110 Wn.2d 355, 753 P.2d 517 (1988).

At summary judgment all inferences are made in favor of the nonmoving party.

4. *Solt produced evidence that Defendant's articulated reasons for disparate treatment were pretexts.*

Most discrimination cases do not have direct evidence of discrimination, and rely upon inferences. Even where the employee's performance is not entirely satisfactory, the plaintiff can still prevail so long as the illegal motivation was a "substantial factor" for the decision. *Allison v. Housing Authority*, 118 Wn.2d 79, 821 P.2d 34 (1991); *Mackay v. Acorn Custom Cabinetry*, 127 Wn.2d 302, 898 P.2d 284 (1995). *See, also*, CP 326-327 Inferential evidence alone can supply sufficient evidence to meet the "substantial factor" test. Solt has produced evidence that the "campus security" basis for the harassment is a mere pretext for retaliatory motivation.

At no time during her employment was Kristi Solt told that there was an informal policy of reporting overnight guests. This was a policy that was first asserted after this case was filed.

Changing the articulated reason during litigation is evidence of pretext. *Starks v. George Court Co.*, 937 F.2d 311 (7th Cir. 1991); *Edwards v. U.S.P.S.*, 909 P.2d 320 (8th Cir. 1990); *Kowalski v. L&F Products*, 82 F.3d 1283, 1290 (3d Cir. 1996).

An articulated reason which is not a true reason is a pretext. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). Pretext does not require that the facts presented by the defendant as the reason for its employment action not be true, only that they not be the reason. When a plausible reason was in fact not the reason, it is pretextual. *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627, 629 (7th Cir. 1996).

Departure from internal rules and procedures is strong evidence of pretext. *Watson v. National Linen Service*, 686 F.2d 877 (11th Cir. 1982).

5. *Questions of credibility exist in the record, and may not be decided by summary judgment.*

It is axiomatic that questions of credibility may not be decided at summary judgment, particularly if a material witness is subject to attack on his credibility. *Selberg v. United Pacific Ins. Co.*, 45 Wn. App. 469, 726 P.2d 468, 471 (1986)

6. *Defendants are liable for violations of the Washington Law Against Discrimination.*

a. *All Defendants are “employers”.*

Defendant Annie Wright School is a non-profit educational institution. CP 797, 829 It is undisputed that it employs more than eight persons. The WLAD defines “employer” as including “any person acting in the interest of an employer, directly or indirectly, who employs more than eight persons, and does not include any religious or sectarian organization not organized for private profit.” RCW 49.60.040(3) Defendant Cummings and Defendant Manning are also “employers” because they were acting on behalf of Defendant AWS.<sup>7</sup>

b. *The discrimination was because of sex.*

In Washington courts, the judicial approach to determine whether the complained of conduct was "because of sex", in cases where sexual orientation is conceivably an issue, is that the focus should not be on the sexual orientation. Rather, the inquiry should be whether the mistreatment was *because of* the plaintiff's sex or gender. Was the plaintiff harassed because he or she did not meet sexual stereotypes? Was the complained of conduct sexual in nature? Did the supervisor or alleged harasser treat

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<sup>7</sup> Brown v. Scott Paper Worldwide, 143 Wn.2d 349, 20 P.3d 921 (2001)

employees of one sex differently than others? Was the conduct objectively hostile or unreasonable?<sup>8</sup>

In *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002), a gay man was severely harassed, apparently because he did not meet gender stereotypes. A summary judgment was granted for the employer on the basis that Title VII applies only to gender discrimination was reversed. The Ninth Circuit *en banc* held that sexual orientation "neither provides nor precludes" a cause of action for sex discrimination.

In this case, there is evidence which if believed would allow the trier of fact to think that the adverse treatment would be different if the gender of the plaintiff was different, or if she was having overnight guests of a different gender, and therefore discrimination on the basis of sex is a substantial factor. There is undisputed evidence that Mr. Selleck routinely stayed overnight with Ms. Solt in the AWS apartments before they were married, and that this was never a problem. There is also evidence that other presumably mixed-gender couples, married and unmarried, were allowed to have discreet adult relationships in the apartments without scrutiny or hostility. It is because Ms. Solt was female (who had been married to a male employee) who was hosting a female visitor overnight, that there was intensive scrutiny and the retaliatory creation of a hostile work environment.

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<sup>8</sup> Washington Courts publication *Judges' Benchguide on Sexual Orientation and the Law*,

Similarly, in *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9<sup>th</sup> Cir. 2001), the plaintiff alleged sexual harassment and retaliation in violation of Title VII and the WLAD. It was claimed that the derogatory sexualized language and physical and verbal harassment was because he was effeminate and did not fit with views of a male stereotype. Following a bench trial, the trial court dismissed his claims. The Ninth Circuit reversed, holding that under both Title VII and the WLAD he was discriminated against "because of sex", because the adverse treatment was sexualized in a manner that revealed sexual stereotyping, and that the harassment would not have occurred if he was of a different gender. In this case, the ongoing harassment of Ms. Solt was specifically sexual in its derogation and hostility.

In *Frazier v. Delco Electronics*, 263 F.3d 663 (7<sup>th</sup> Cir. 2001), Judge Posner's opinion notes that behaviors that included name calling such as "slut" and "whore", making faces, and stalking are "characteristic forms of male aggression against women."<sup>9</sup> Therefore, there is evidence that shows that the complained of conduct was substantially motivated by gender.

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47th Washington Judicial Conference, September 21, 2004, pp. 3-11

<sup>9</sup> Citing to *McDonnell v. Cisneros* 84 F.3d 256, 259-260 (7<sup>th</sup> Cir. 1996); *Williams v. General Motors Corp.*, 187 F.3d 553, 565-566 (6<sup>th</sup> Cir. 1999), Hillary S. Axam and Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual Horseplay: Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After Oncale*, 11 Yale J. L. & Feminism 155, 161-173 (1999). The deposition excerpts establish that the sexualized derogatory and harassing conduct fits squarely within this type of male aggression toward women. See, Solt 65/18-25, for example.

c. *Sexual harassment and discrimination is present in this case.*

The elements of a hostile work environment are set forth in the seminal case of *Glasgow v. Georgia Pacific*, 103 Wn.2d 401, 406-407, 693 P.2d 708 (1985). The record here shows that there is evidence to support each element.

First, there was undoubtedly offensive and unwelcome conduct, both by Mr. Selleck and by Mr. Manning. The offensive and unwelcome conduct was lewd, crude, sexually-charged harassing telephone calls, e-mails, stalking, and public incidents by Mr. Selleck, and a pattern of stalking, overly intensive scrutiny, and persistent reporting of untrue or wildly hurtful accusations of inappropriate actions to her supervisor and the Head of School. And there is no doubt that the offensive conduct was unwelcome. Ms. Solt repeatedly complained of the conduct, made significant efforts to get it to stop, and was deeply distressed by it.

Second, there is evidence that a substantial factor motivating this offensive conduct was gender, since the harassment by Mr. Selleck was based *inter alia* upon his presumption that his wife was engaging in sexual relations with a female. It was because of sex because the conduct was derogatory in a sexualized way, and would have been entirely different if the person being harassed was a male. There is evidence that a substantial motivating factor for both Mr. Selleck and Mr. Manning was to "out" Ms.

Solt's presumed sexual orientation, which would not be done if she had been a different gender. Furthermore, whether the complained of conduct was specifically labeled “sexual harassment” is immaterial, since Ms. Solt reported both “harassment” and “stalking”. Stalking has been held to be “a characteristic form of male aggression toward women.”<sup>10</sup> It was because of sex, because the harassment was linked to sexual stereotyping. The subject of sexual stereotyping as a form of sex discrimination is complex, but it is clearly unlawful.<sup>11</sup>

Third, there is evidence that it affected the terms and conditions of employment. She testified that she was repeatedly contacted in the workplace, that the harassment was ongoing, affected her feelings of security on campus, disturbed her sleep and concentration, forced her to move from her apartment, and caused her to suffer mental health issues which affected her work performance.

And, finally, there is evidence that imputes the conduct to the employer. Defendants Cummings and Manning are employers under the definition in RCW 49.60.030(3), and their actions directly impute liability to AWS and themselves. *Glasgow, supra*. Further, it is settled law that a failure to take prompt and effective remedial action upon notice of a claim of

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<sup>10</sup> *Frazier v. Delco Elecs. Corp.*, *supra*.

<sup>11</sup> See, generally, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vanderbilt L. Rev. 1183 (1989).

harassment imputes liability.<sup>12</sup> The failure to take immediate and effective correction actions imputes liability to an employer even for actions taken by non-employees.<sup>13</sup>

d. *Retaliation is present in this case.*

In order to establish a prima facie case of retaliation under the WLAD, an employee must show that (1) she engaged in statutorily protected activity; (2) an adverse employment action was taken; (3) and there was a causal link between the employee's activity and the employer's adverse action. *Delahunty v. Cahoon*, 66 Wn.App. 829, 839, 832 P.2d. 1378 (1992)

First, to show that she engaged in a statutorily protected activity, Ms. Solt need only prove that "her complaints went to conduct that was at least arguably a violation of the law, not that her opposition activity was to behavior that would actually violate the law against discrimination."<sup>14</sup> The types of protected conduct in *Estevez v Faculty Club*, 129 Wn. App. 774, 120 P.3d 579 (2005) included obtaining a protective order and asking for her employer's assistance in avoiding contact with a stalker. Opposition activity is protected when it is based on a reasonable belief that there was a violation

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<sup>12</sup> *Kahn v. Salerno*, 90 Wn.App.110, 951 P.2d 321 (1998); *Estevez v. Faculty Club*, 129 Wn.App. 774, 120 P.3d. 579 (2005)

<sup>13</sup> *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9<sup>th</sup> Cir. 2002)

<sup>14</sup> *Estevez, supra.*

of law in the workplace. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9<sup>th</sup> Cir. 2002).

In this case, Ms. Solt engaged in a variety of opposition activity designed to stop what she reasonably believed to be sexually discriminatory and retaliatory behavior, including obtaining a protective order, asking for assistance in enforcing the protective order, asking assistance in keeping Mr. Selleck out of her apartment, asking that her employer provide new locks, complaining about harassment by Mr. Manning and asking that he not follow her or monitor her behavior, alleging that Mr. Manning's harassment was related to obtaining the protective order, reporting the previous harassment problems to Dr. Ghosh, getting a lawyer, and filing a lawsuit, all of which triggered retaliation to some degree.

Second, there is no question that an adverse employment action is present. Ms. Solt was subjected to an objectively and subjectively hostile work environment. She was repeatedly accused of improprieties. She was subjected to inordinate scrutiny, and efforts were made to "out" her as a lesbian. Her complaints fell on deaf ears, the AWS policies in place were never utilized to help her, and she was ultimately terminated because of these complaints. Harassment by a co-worker is a recognized form of retaliation. *Jensen v. Potter*, 435 F. 3d 144 (3d Cir. 2006)

The Courts recognize that employers rarely will reveal their retaliatory motive, so plaintiffs ordinarily must rely on circumstantial evidence of motivation. Proximity in time and satisfactory work performance are sufficient to make a rebuttable presumption of causation. *Estevez v. Faculty Club*, 129 Wn. App. 774, 120 P.3d 579 (2005), *supra*. *Kahn, supra*. Plaintiff's work was certainly satisfactory. And the adverse actions followed the protected conduct closely in time.

7. *Defendants have a duty to provide a safe workplace.*

a. *Employers have a general duty to provide a safe workplace.*

Since the enactment of the Industrial Welfare Act in 1913, there has been a general duty to provide conditions of labor which are not pernicious or detrimental to health.<sup>15</sup> Work-related homicides are one of the leading causes of fatal incidents in the workplace. The industrial welfare act is enforceable by the Department of Labor & Industries.<sup>16</sup> Pursuant to its authority, the Department of Labor & Industries has regulated the workplace in a variety of ways, including the requirement to “provide employees a workplace free from recognized hazards that are causing, or are likely to

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<sup>15</sup> RCW 49.12.010 and .020.

cause, serious injury or death”, and “do every other thing reasonably necessary to protect the life and safety of your employees.”<sup>17</sup> WISHA has recognized that violence in the workplace is a major contributor to occupational fatalities.<sup>18</sup> The Department of Labor & Industries has defined several types of workplace violence, including “Violence by Personal Relations” as:

Involving verbal threats, threatening behavior or physical assaults by an assailant who, in the workplace, confronts an individual with whom he or she has or had a personal relationship outside of work. Personal relations include a current or former spouse, lover, relative, friend or acquaintance. The assailant’s actions are motivated by perceived difficulties in the relationship or by psycho-social factors that are specific to the assailant.<sup>19</sup>

An implied cause of action may arise from regulations promulgated under the industrial welfare act provisions.<sup>20</sup> There is no doubt that in this case, the actions by Mr. Selleck fit the definition. Furthermore, Dr. Cummings feared that “physical violence” could occur, or that someone could “come in shooting”, and so was on actual notice of an unsafe condition.

b. *Annie Wright School has assumed a duty to protect its employees.*

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<sup>16</sup> RCW 43.22.270

<sup>17</sup> WAC 296-800-11005, and WAC 296-800-11035

<sup>18</sup> WISHA Regional Directive, *Violence in the Workplace*, 10/28/2005.

<sup>19</sup> Workplace Violence Task Force and Department of Labor & Industries WISHA Services Division, *Workplace Violence: Awareness and Prevention for Employers and Employees*, note 18 at 7.

<sup>20</sup> *Wingert v. Yellow Freight*, 146 Wn.2d 841, 50 P.3d 256 (2002).

Employers assume a duty to protect by expressly or impliedly promising to provide security for employees or by actually providing security for its employees.<sup>21</sup> There is no question that by adopting its personnel policy manual, AWS assumed a duty to its employees.<sup>22</sup> The policy manual boldly states that “threatening or intimidating acts, disorderly conduct, fighting, the possession or use of weapons, rudeness, [etc] ... will not be permitted.” While AWS did not formally adopt a specific policy related to domestic violence, its broad commitment to prohibit abusive and offensive conduct and the like is sufficient to impose a common law duty irrespective of a statutory duty. This comports with common sense as well.

In summary, domestic violence does not stay at home when women go to work; domestic violence frequently becomes workplace violence. It is crucial that employers view domestic violence as a serious, recognizable, and preventable problem in order to protect their business.<sup>23</sup>

*c. Employers have a common law duty to avoid criminal behavior.*

Violation of a protective order entered under RCW Chapter 26.50 is a crime.<sup>24</sup> Using telephone calls to harass, intimidate, torment or embarrass any other person is a crime, as is knowingly permitting the use of a telephone

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<sup>21</sup> *Employer Liability for Domestic Violence in the Workplace: Are Employers Walking a Tightrope Without a Safety Net?* 31 Tex. Tech. L. Rev. 139 (2000).

<sup>22</sup> Bauska 16 to 17, Cummings 11 to 12

<sup>23</sup> “... *Without a Safety Net*, supra at pp. 174.

<sup>24</sup> RCW 26.50.110; violation of the restraint is a gross misdemeanor, but after two violations, it becomes a Class C felony.

for those purposes.<sup>25</sup> An employer may be held liable for negligently supervising an employee whose conduct is criminal and beyond the scope of employment duty if the employer knew, or in the exercise of reasonable care should have known, the employee presented a risk of danger to others.<sup>26</sup>

d. *Annie Wright School was negligent.*

From the evidence in the record, a reasonable trier of fact could find that defendants were negligent in their supervision of Mr. Selleck and Mr. Manning, and that Ms. Solt was damaged as a result. A jury should decide whether the pattern of apathy, nonchalance, inertness, deliberate indifference and unresponsiveness demonstrated by Annie Wright School, Stanley Cummings, and Paul Manning was an acceptable response to domestic violence in this community. The parties are indeed fortunate that this negligence is being determined in an employment law case, and not as the central issue in a wrongful death claim.

8. *Attorneys fees and costs*

The award of attorneys fees and costs should abide until after trial. Attorneys fees and costs are available under RCW 49.60.030(2) and RCW 49.48.030 to prevailing party. *Martinez v. City of Tacoma*, 81 Wn. App.

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<sup>25</sup> RCW 9.61.230, RCW 9.61.240.

<sup>26</sup> *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054, citing *Peck v. Siau*, 65 Wn.App. at 294.

228, 914 P.2d 86 (1996), *Hayes v. Trulock*, 51 Wn. App. 795, 755 P. 2d 830 (1988).

**D. CONCLUSION**

For the foregoing reasons, the summary judgment should be reversed and remanded for jury trial on all claims.

Respectfully submitted this 1<sup>st</sup> day of September, 2006.

LAW OFFICES OF  
JUDITH A. LONNQUIST, P.S.

  
\_\_\_\_\_  
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STATE OF WASHINGTON

BY \_\_\_\_\_  
DEPUTY

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

KRISTI SOLT,

Appellant,

v.

ANNIE WRIGHT SCHOOL, and  
STANLEY CUMMINGS and JANE  
ROE CUMMINGS, and the marital  
community thereof; PAUL MANNING  
and JANE ROE MANNING, and the  
marital community thereof; et al.,

Respondent.

NO. 34741-5-II

CERTIFICATE OF SERVICE

I, Linsey M. Teppner, hereby certify that a true and correct copy of BRIEF  
OF APPELLANT, dated September 1, 2006, was sent to the persons listed below,  
and that I have attached the conformed legal messenger slips herein:

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Washington State Court of Appeals  
Division II

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