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COURT OF APPEALS

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No. 34741-5-II

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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KRISTI SOLT, Appellant,

v.

ANNIE WRIGHT SCHOOL,  
and STANLEY CUMMINGS and JANE DOE CUMMINGS, and the  
marital community thereof; PAUL MANNING and JANE DOE  
MANNING, and the marital community thereof, Respondents,

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REPLY BRIEF OF APPELLANT

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ORIGINAL

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**I. INTRODUCTION TO REPLY**

One key to understanding this case is comprehending the traditional “private school culture” at Annie Wright School. For nearly two decades AWS was run by Headmaster Robert Klarsch, who was conservative in his values, and widely known to be homophobic. CP 413-414. Dr. Klarsch had insisted that sexual orientation must not be discussed by teachers, spoke mockingly of a person he believed to be gay, and believed that homosexuality was akin to pedophilia. This culture was not open and welcoming to disclosures of sexuality, sexual orientation, and domestic violence. This culture is extraordinarily duplicitous. For example, there is evidence that written policies are ignored, and unwritten policies are put forward for the first time in litigation; further, AWS employees remain “closeted” about their sexuality, but gossip and “outing” are the weapons used by those with an axe to grind.

When, as in this case, the facts show that matters are not as they first appear, it is clear that substantial issues of material fact remain. This case should have been submitted to a jury to determine the facts considering the totality of the circumstances.

Another key to the understanding of this case is that a soured previously consensual intimate relationship is not a “free pass” to harass. Respondent Annie Wright School has, shockingly and disturbingly,

directly blamed Kristi Solt for inciting domestic violence and harassment against herself, and has tried to “wash its hands” of any responsibility for providing a safe and non-discriminatory workplace.

## **II. ARGUMENT**

### **A. The Statute of Limitations does not bar any evidence of the conduct complained of, and does not bar any remedy.**

This case was filed on June 24, 2004 by filing a complaint, and was given Pierce County Superior Court No. 04-2-09221-9. That original complaint is largely identical to the First Amended Complaint, which was filed on August 24, 2004 and served on defendants. The only significant differences between the original complaint and the amended complaint are factual allegations concerning events that arose *after* the commencement of the suit. Defendants have had full notice of the allegations and an opportunity to fully contest those allegations, and therefore the First Amended Complaint relates back to the date of filing pursuant to CR 15(c). Therefore, all of the events occurring on or after June 24, 2001 are within the statute of limitations.

### **B. The Trial Court found that Annie Wright School was not a religious employer exempt from the WLAD; in absence of a cross-appeal, that issue is not before the Court.**

Annie Wright School again asserts that it is exempt from the WLAD, because it is a “religious organization”. Brief of Annie Wright

School and Stanley Cummings at page 20. Pierce County Superior Court Judge Armijo found that AWS was not a religious employer. CP 782. Respondents have not appealed that decision, and therefore the finding is a verity on appeal. At the very least, questions of fact present this from being decided on this record as a matter of law. CP 428, ¶ 73.

**C. The evidence below was sufficient to show a hostile work environment.**

1. *The parties agree that the elements of a hostile work environment claim are established by the case of Glasgow v. Georgia Pacific.*

For almost 22 years, the elements of a sexually hostile work environment claim have been: (1) the harassment was unwelcome; (2) the harassment was because of sex; (3) the harassment affected the terms or conditions of employment; and (4) the harassment is imputed to the employer. Glasgow v. Georgia Pacific, 103 Wn.2d 401, 406-407, 693 P.2d 708 (1985).<sup>1</sup>

2. *The harassment was unwelcome.*

Solt's evidence establishes the unwelcome conduct, by both Stuart Selleck and Paul Manning. The offensive and unwelcome conduct by Selleck was lewd, crude, and sexually charged harassing telephone calls,

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<sup>1</sup> The *Glasgow* case elements are cited in the Brief of Appellant at page 30, and in the Brief of Annie Wright School and Stanley Cummings at page 32.

e-mails, stalking and public incidents constituting domestic violence from Stuart Selleck. CP 416.<sup>2</sup> When Stanley Cummings heard just one of the hundreds of calls, he understood and agreed that it was harassment. CP 521. Susan Bauska heard the comments and found them highly objectionable. CP 494. From the facts in the record, neither AWS nor Manning can escape liability for standing idle while harassment continued by hateful, venomous, sexually charged telephone calls, stalking, e-mails to her colleagues at AWS, and public humiliation. Fuller v. City of Oakland, 47 F.3d 1522 (9<sup>th</sup> Cir 1995)

The offensive and unwelcome conduct by Paul Manning was the unprecedented “pattern of stalking, overly intensive scrutiny, and persistent reporting of untrue or wildly hurtful accusations of inappropriate actions to her supervisor and to the head of school.” CP 450.

3. *There is ample evidence that the conduct was “because of sex”, not “because of personal animosity.”*

Respondent AWS relies on Succar v. Dade County Board, 229 F.3d 1343 (11<sup>th</sup> Cir. 2000) for the proposition that “sex discrimination, by

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<sup>2</sup> Kristi Solt testified that the phone calls from Selleck were “graphic in nature”, and gave a few examples, such as “You’re a whore. I bet you like licking pussy. I hope you’re not licking pussy during, you know, the day. You’re a slut. I hope you like using your vibrators. They were all conversations pertaining – of that nature.” CP 410. When Solt asked Cummings for help, he sent an e-mail stating “Despite its personal impact on you, Stuart’s actions do not require a response from the school at this point.” CP 420.

definition, does not include conduct motivated simply by personal animosity". Brief of AWS at 21. As an abstract proposition, it can be agreed that motivation potentially could be *entirely* personal animosity untainted by either gender discrimination or retaliation, and, if so, it would not violate the WLAD. However, motivation is a question of fact. And in this case there is abundant evidence that would allow a reasonable juror to conclude that sex was a substantial factor.

The evidence supports a conclusion that the harassment was not merely simple personal animosity, since the methods of harassment by Selleck were various forms of highly sexualized words and conduct. The words and conduct used by Selleck "would have failed entirely in its crude purpose had [Solt] been a man".<sup>3</sup>

Even if the motivation for the abuse is purely hatred, the use of sexually charged language to express dislike is "because of sex". Burns v. McGregor Elec. Indus., Inc., 989 F.2d 959, 965 (8<sup>th</sup> Cir. 1999)(vulgar and offensive epithets of a sexual nature are widely recognized not only as improper, but as intensely degrading, deriving their power to wound not only from their meaning but also the disgust and violence they express).

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<sup>3</sup> This language is an excerpt from Kahn v. Salerno, 90 Wn.App.110, 123, 951 P.2d 321 (1998), rev. den. 136 Wn.2d 1016, 966 P.2d 1277 (1998), quoting from Zabkowitz v. West Bend Co., 589 F. Supp. 780 (E.D. Wis. 1984)(referring to use of the terms "slut", "bitch" and "fucking cunt", among other statements and acts.)

Furthermore, personal animosity generated by a failed relationship has never been considered to “insulate” the harassment from liability, since harassment by a jilted lover expressing anger over the victim’s termination of a sexual relationship is no less harassment “because of sex” than harassment by a prospective lover expressing the desire to commence a sexual relationship. See, generally, Excel Corp. v. Bosley, 165 F.3d 635, 639 (8<sup>th</sup> Cir. 1999).

Numerous courts have recognized that sexual harassment arising from a prior personal relationship is based on sex within the meaning of Title VII. Green v. Administrators of the Tulane Educ. Fund, 284 F.3d 642, 656-57 (5<sup>th</sup> Cir. 2002). Also,

To assume as a matter of law that [harassment designed to pressure a former lover ...] is discrimination predicated not on the basis of gender but on the basis of the failed interpersonal relationship is as flawed a proposition under Title VII as the corollary that ordinary sexual harassment does not violate Title VII when the [harasser’s] asserted purpose is the establishment of a new interpersonal relationship.<sup>4</sup>

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<sup>4</sup> Babcock v. Frank, 729 F. Supp. 279, 288 (S.D.N.Y. 1990)(internal punctuations and citations omitted or modified). The undersigned acknowledges that this section of this reply brief borrows and quotes heavily from the Brief of the EEOC filed in support of Valerie P. Moore in proceedings against Reynolds Metals Co. et al. in the 4<sup>th</sup> Circuit under Cause Nos. 02-1571 and 02-1574.

The courts routinely agree that the totality of the circumstances must be considered, and that animosity arising from the disintegration of a previous intimate relationship is only one factor.

... the record must be evaluated as a whole... particularly in the discrimination area, it is often difficult to determine the motivations of an action and any analysis is filled with pitfalls and ambiguities. A play cannot be understood on the basis of some of its scenes but only on its entire performance, and similarly, a discrimination analysis must concentrate not on individual incidents, but on the overall scenario.

Durham Life Ins. Co. v. Evans, 166 F.3d 139, 149 (3d. Cir. 1999).

Respondent AWS's heavy reliance on the *Succar* case is misplaced. The 11<sup>th</sup> Circuit has now distinguished its own *Succar* case, and found that a personal relationship does not give a "free pass" to harass at work. Lipphart v. Durango Steakhouse, 267 F.3d 1183 (11<sup>th</sup> Cir. 2001)

4. *There is ample evidence that the harassment was "because of discrimination" or "because of retaliation", not "because of security"; the determination of motivation is a factual issue for decision by a jury in this case.*

The Brief of Respondent Manning also raises the factual issue of motivation. There is evidence in the record that would justify a reasonable juror in finding that the motive for creation of a hostile work environment

by Manning was either gender-based or retaliatory.<sup>5</sup> Manning denies that he constantly shared personal information about Solt, but he admits that he “paid attention to, and then reported to Cummings about, the frequency and duration of Ms. Morrison’s truck being parked on 10<sup>th</sup> Street. Brief of Manning at 31. Manning says it was “because of security”, but just because Manning argues that actually his motivation was “because of security”, he does not get a “free pass” to treat Solt differently than he did other resident staff members and others on the AWS campus. Solt’s evidence is directly contradictory to Manning’s – i.e., Morrison was introduced to Manning, Bauska, Cummings, the other Resident staff, and others at Annie Wright School, even to members of the Security staff. She was not an “unknown visitor”. CP 458. No other resident staff members had been monitored in a similar fashion *ever*, there was no policy regarding “screening visitors”, and no evidence that Ms. Morrison was a threat in any way. CP 423-424, 468-469.

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<sup>5</sup> During the ruling after oral argument on the motion for summary judgment, I asked Judge Armijo for clarification of his ruling. CP 780. On page 58 of the Verbatim Report of Proceedings, at lines 21-25, I specifically recall asking him “we claim that there was retaliation **in the** creation of a hostile work environment. Has that also been dismissed as part of your ruling? (There is a transcription error and records my words as “...retaliation **and** creation of...; I pointed this out to Carla Higgins, CSR, but by the time I did so, the tape had been erased and she was unwilling to change her transcription.) This phraseology is consistent with my follow-up question on page 59 of the transcript. CP 783.

Respondent AWS now argues that “if the security department had completely ignored the frequent and obvious overnight presence of a non-employee, it would not have done its job.” Brief of AWS at 35. Leaving aside for a moment that there is a dispute of fact of how frequent and obvious the presences were, the fact is that there would be no way to prove the frequency and obviousness of overnight visitors because there was no one monitoring it at any time prior to Manning’s close scrutiny of Solt. CP 468, 411, 580. The evidence is that the security department in fact completely ignored numerous overnight visitors to other staff members’ apartments, including a fiancé of a woman employee who lived in the staff apartments for about one month. CP 585. And the fact that Paul Manning *himself* had often stayed overnight with Susan Bennett, prior to their marriage, when she was an employee and he was not, supports the contention that Manning’s conduct was completely extraordinary. CP 583-584.

And in order to show that the discrimination was “because of sex” there does not need to be evidence that Manning’s motivation was either sexual desire or generalized animus to females, since he clearly was an advocate for his male co-worker and against his female co-worker.

Manning has testified that he did not inform Dr. Cummings that Selleck had engaged in menacing and harassing acts toward Solt on the

AWS campus, even though it had been reported in writing by Patty Sprague on July 22, 2001. This is ratification of the conduct. CP 547-548. Manning felt that Selleck's situation was not being fairly handled by Cummings and wanted to correct Cummings' "skewed" view. CP 553. Despite direct knowledge that Selleck was harassing Solt on the AWS campus, nevertheless he didn't feel Selleck was "creating a problem in the workplace". CP 555. He regarded the termination of Selleck as a "debacle". CP 557. Manning thought that Solt was a "loud, frequent, public, and reckless critic of the personnel" in Manning's department. CP 560. Manning has testified that he felt "sorry" when Selleck was fired for breaching the protection order. CP 547. It is undisputed that Manning resigned in protest over how Selleck's employment termination was handled, being particularly upset about how Solt had been allowed to remain as an employee in good graces with the administration. CP 530. Manning was "very dejected" and turned in his resignation soon after Selleck's termination. CP 529. It is established that long after Selleck's termination, Manning was writing letters supporting Selleck, and testified that he wanted Selleck to know of what he "tried to do on his behalf". CP 559. Clearly, Manning directly linked his grievances against Solt to her act of getting a protective order against Selleck. CP 560. And Manning continued to socialize with Selleck after his termination, even visiting him

in Texas. CP 561-562. Manning was clearly biased against Solt and in favor of Selleck.

Under all these circumstances it is not possible to decide, as a matter of law, that Manning's motivation was solely "because of security". There simply was no policy forbidding an AWS staff member residing in the residence apartments to have guests. CP 531. The evidence in the record would equally support a reasonable juror's finding that Manning's motivation was to spy on Solt to get evidence that she was a lesbian, to "out" her sexuality in a traditional private school culture, and paint her in the worst possible light with her superiors at Annie Wright School. And, even Susan Bauska had her suspicions that Manning was motivated by homophobia rather than security. CP 510.<sup>6</sup>

Further, the argument by Manning that there is no issue of fact about whether Manning was reporting personal details and accusations to Cummings and Bauska is unavailing as well. It was Solt's testimony that her supervisor Susan Bauska told her that these conversations took place

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<sup>6</sup> Bauska wrote to Manning and *inter alia* said "Regarding your concern's about Angie's truck: would you clarify for me if your concern is based on safety reasons or homophobia? I need some clarification here." CP 510.

and the content thereof. CP 469-470. This is admissible and relevant evidence.<sup>7</sup>

Manning also admits that “in a vacuum”, Solt’s testimony about what was reported to her by her supervisor Susan Bauska, “might create an issue of fact as to what Manning said at those meetings”. Manning Brief at 32. He asks this Court to credit the testimony of the participants in those meetings but entirely discredit Solt’s testimony. This is a credibility question that cannot be decided on summary judgment. Manning contends that Solt has “failed to present one shred of evidence.” Manning Brief at 35. But the evidence is that Susan Bauska told Solt that

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<sup>7</sup> Footnote 3 at page 35 of Manning’s Brief posits a false analogy. The false premise is that the attorney is asserting as *his own* first-hand knowledge the content of communications made in chambers where he was not present. Clearly that would be speculation. But if a person who was present during the discussion in chambers later told the attorney what was said during the discussion in chambers, the attorney has his own first-hand knowledge of what he heard. The second-hand nature of the contents of the communication creates the necessity of invoking the rules pertaining to what is and is not hearsay evidence. If the statements are not offered for the truth of the matter stated, then it is not hearsay at all under ER 801(c). If the statements constitute an admission by a party-opponent, it is not hearsay under ER 801(d)(2), and is admissible for all purposes, including for the truth of the matter asserted. In this case Solt testified from first-hand knowledge that Bauska told her the contents of the objectionable harassing communications. Bauska was, of course, the Head of Upper School and a speaking-agent for AWS on the subject, and her version of what was said by Manning and Cummings about her divorce, financial situation and “other inappropriate activities” is admissible evidence. The fact that there is now a general denial of the content of those communications, does not go to admissibility, it goes to credibility (which cannot be determined in a summary judgment setting, since all evidence and inferences are taken in the light most favorable to the non-moving party), and would be admissible as impeachment in any event.

Manning was repeatedly making those statements, and that others knew about Manning's criticisms as well. CP 496, 569, 570, 597.

There are questions of fact as to why Manning harassed Solt.

5. *The harassment affected the terms and conditions of employment.*

Respondents would have this court believe that no reasonable juror could find that the conduct complained of by Kristi Solt could be considered to create a hostile work environment. Further, they claim that "violence is completely absent from the facts of this case". Brief of ASW and Cummings at 17. However, this case contains the element of domestic violence.<sup>8</sup>

And in addition to the evidence of domestic violence, the workplace was a place of potential physical violence as well. Dr. Cummings testified several times that he was aware of the potential for violence, including "I was afraid of physical violence." CP 522. "I was concerned for what had been verbal so far becoming violent". CP 526. "There's a person out there who's operating irrationally." Id. "... it would have eliminated the violence which was my top concern at this point; the potential for violence, physical violence." CP 527. "It was a potential for

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<sup>8</sup> As specifically stated in the Brief of Appellant, this is a case involving domestic violence, which is a term with a broader scope than simply physical violence. Brief of Appellant at 12-13

violence, for him to come storming in with a gun, I felt”. CP 528. “Stu was a loose cannon. I didn’t know what would happen when he got [Manning’s letter].” CP 535.<sup>9</sup>

Kristi Solt testified that Selleck had been angry and destructive in the staff apartment. CP 415. Solt also described a threat by Selleck that “You are going down.” CP 418. Selleck had entered her locked apartment when she was out, and apparently removed a bedroom door hinge. CP 417. During a tearful and emotional meeting with Jayasri Ghosh (the new Head of School after Dr. Cummings was terminated) and Solt, co-worker Rhondi Adair expressed a belief that Selleck had tried to hit her with his

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<sup>9</sup> Defendant Stanley Cummings wrote, Behind the Hedge: A Corruption of Time, Talent & Treasure, which he self-published in 2005. A piece of fiction according to Dr. Cummings (CP 539), it is quite obviously built upon the factual circumstances of this case. The book has been described as “an account of his tumultuous year as head of a private school” in the March/April issue of “Stanford Magazine”. [www.stanfordalumni.org/news/magazine/2006/marapr/show/publishing.html](http://www.stanfordalumni.org/news/magazine/2006/marapr/show/publishing.html) Since Dr. Cummings was not a head of a private school prior to his employment at AWS or since his termination, there is no reasonable doubt that he has crafted his novel based upon his experience at Annie Wright School. In the narrative, “Tom” (the character who is the headmaster) tells “Gene” (the director of security) who is tracking the visits of a woman to the campus apartment of “Ellen” (the resident advisor): “It’s one thing to keep a record; it’s something else again to be harassing some one.” Tom also tells Gene that Ellen is “afraid to talk to you” and “I need for you to leave Ellen alone”. *Behind the Hedge, supra, at page 131*. While not offered as proof that Dr. Cummings himself regarded the monitoring as harassment, it certainly suggests that he considered it as a plausible scenario. It is also interesting to note that the narrator who tells the story is cast as a member of the board of trustees, who describes Tom’s termination as the head of school as a “violent act” perpetrated by a board of trustees on a “fine leader and his wife”. *Id. at page vii*.

car, and thought that Solt was in danger. CP 588. Angie Morrison thought that Solt was in danger, and installed a deadbolt on her door. CP 460, 463.

Respondent AWS argues that “Solt’s delay in reporting Selleck’s behavior during the alleged initial stages of harassment shows that she did not perceive of her work environment as hostile or abusive”. Brief of AWS at 27. That is preposterous. The evidence is that she had stress-related health problems for which she sought treatment. CP 416. She found the harassment “extremely filthy and ugly and difficult to endure” and “it was taking a toll on my sleep, and mental health”. CP 417. She “felt unsafe on campus” and “could not continue to live in the AWS apartment because I was being closely watched”. CP 422.

Susan Bauska testified that Solt came to her and explained that Selleck’s harassment was “bothering her, bothering her sleep”. CP 491. Bauska also explained that she frequently communicated Solt’s complaints of harassment to Dr. Cummings, including that the harassment was “escalating”, and Dr. Cummings “asked her to continue to monitor the situation and keep him informed”. CP 495.

Although both Respondents attempt to minimize the pervasiveness and severity of the harassment, it is important to note that the preferred analysis is based upon the “reasonable woman” standard. The key case applying this standard explains as follows:

We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women. ... We realize that there is a broad range of viewpoints among women as a group, but we believe that women share common concerns which men do not necessarily share.

...

We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.

Ellis v. Brady, 924 F.2d 872 (9<sup>th</sup> Cir. 1991). Applying this standard, in a case involving a weird messages and letters in an apparent attempt woo her, the 9<sup>th</sup> Circuit reversed a lower court's holding dismissing the claims as being "isolated and trivial" on the grounds that Ms. Ellis found the complained of behavior frightening, and remanded for a trial..

Similarly, in this case, Solt found the harassment to be sufficiently troubling and frightening that she could no longer remain in the staff apartments. CP 425. Solt gained weight, and became more depressed and anxious. CP 425. She felt like her "security was threatened because ... Manning ... could easily have let Mr. Selleck into the building where I lived." CP 598. The conduct by Manning made Solt's work performance

“extremely difficult”, she was “under an incredible amount of stress and would go home and I would cry and I would worry.” CP 594.

Even after Selleck was terminated and she moved to an apartment off-campus, she did not feel free of anxiety, and she only “felt better” when she “moved away from that place ...to California.” CP 592.

When determining whether offensive conduct is severe or pervasive, which is a question of fact, the ability to avoid the conduct is often determinative. See, Contreras v. Crown Zellerbach, 88 Wn.2d 735, 567 P.2d 1173 (1977)(holding that, in a claim of outrage, discriminatory comments are to be judged by the trier of fact considering whether the employee was free to leave the place where the comments are made.) Here, where she had been living as well as working at AWS, she was not free to leave, and her complaints to her supervisor and the Head of School fell on deaf ears.

The record is replete with considerable evidence that would allow a reasonable juror to find that the complained-of conduct affected the terms and conditions of employment.

6. *The harassment is imputed to the employer.*

AWS did not have a policy protecting against discrimination on the basis of sexual orientation. It did not have a policy covering domestic violence. It did have a policy covering sexual harassment, and Solt

followed the policy. Failure to take prompt and effective remedial action amounts to ratification. See, Brief of Appellant at 31-32.

**D. There was ample evidence in the record to show negligent supervision.**

Respondents do not deny that they had a duty to provide a safe workplace for Solt. They merely claim that what actions they took were reasonable. But the question of reasonableness is a question of fact depending on all the circumstances. A reasonable juror could find that the employer had a duty to protect Solt, had notice of a condition which invoked that duty, and was negligent in protecting her from harm.

**E. The affirmative defenses of estoppel and accord and satisfaction are not properly before this court.**

Respondents did file a pleading containing affirmative defenses, but not the ones they now assert on appeal. The Civil Rules for Superior Court specifically require that the affirmative defenses of accord and satisfaction, and estoppel be pleaded. CR 8(c) It is settled law that if an affirmative defense is not affirmatively pleaded, asserted with a motion under CR12(b), or tried by the express or implied consent of the parties, it is waived. Farmers Ins. Co. v. Miller, 87 Wn.2d 70, 549 P.2d. 9 (1976); Henderson v. Tyrell, 462 P.2d 571 (1969).

The affirmative defenses have been waived and are not properly before the court, but, in any event, they are inapplicable to the facts presented in this case, and respondents have not carried their burden of proof sufficiently for these defenses to be decided as a matter of law on this record.

**III. CONCLUSION**

Based upon the foregoing, this Court is respectfully requested to reverse the orders granting summary judgment, and remand this matter for a jury trial on all claims.

DATED this 6<sup>th</sup> day of November, 2006.

Respectfully submitted,

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

A handwritten signature in black ink, appearing to read "Richard D. Reed", written over a horizontal line.

Richard D. Reed, WSBA 9381  
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STATE OF WASHINGTON

BY \_\_\_\_\_  
TERRY

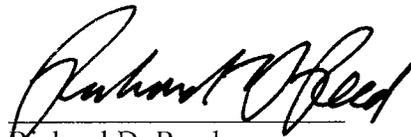
**PROOF OF SERVICE**

I hereby certify that on this 6<sup>th</sup> day of November, 2006, I caused the foregoing brief to be hand-delivered to the Washington State Court of Appeals, Division II, and a copy delivered to:

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