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COURT OF APPEALS STATE OF WASHINGTON  
DIVISION II

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AUDREY BROYLES; VONDA SARGENT AND SUSAN SACKETT-  
DANPULLO,

Respondents.

v.

THURSTON COUNTY,

Appellant.

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REPLY BRIEF OF APPELLANT

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Plaintiffs open their response brief by asking “this Court [to] hold the County accountable for the gender discrimination and retaliation Respondents experienced.” Br. of Resp’t at 1. This view ignores the very simple precept that being accountable for one’s own actions is the necessary absence of liability for the acts of others. Many of Respondents’ arguments were anticipated in advance and are addressed in the County’s opening brief. The County therefore relies on its opening brief to counter many of the arguments Plaintiffs raise here. Nevertheless, several key points must be addressed here.

**A. Holding a County liable for the acts of the independently elected prosecutor contradicts WLAD’s incorporation of respondeat superior into the definition of “employer.”**

Before addressing the substance of plaintiffs’ continued attempts to force the County to accept responsibility for actions it could not control, it is necessary to again dispose of plaintiffs’ contention that the County waived its right to deny liability for Holm’s actions. Though plaintiffs rely on one sentence averments in the County’s answer, they conveniently ignore language from that very same pleading, expressly denying liability or responsibility for any of Holm’s actions:

[D]efendant [Thurston County] denies that any and all alleged acts or omissions complained of were on behalf of Thurston County occurred within the scope of any manager, supervisor, agent, employee or representative’s employment. Furthermore, defendant specifically denies that the acts or omissions of Prosecutor Edward Holm, an independently elected official, were on behalf of Thurston

County or that Holm was an employee, agent or representative of Thurston County. Thurston County additionally denies any agency and/or respondeat superior responsibility for the alleged actions of Harju and Powers since these defendants have been dismissed with prejudice

....

CP at 4406. When a defendant's conduct in litigation puts the plaintiff on notice that the defendant does not admit certain averments, an admission will not be presumed. *Card v. W. Farmers Ass'n*, 72 Wn.2d 45, 47, 431 P.2d 206 (1967). In *Card* a defendant counterclaimed against a plaintiff, asserting the plaintiff owed money for supplies sold. *Id.* at 46. The plaintiffs failed to reply, but the case proceeded to trial and the counterclaim was ultimately dismissed. *Id.* at 47. The defendant/counterclaimant argued on appeal that the plaintiffs' failure to reply constituted an admission that they owed defendant under the contract. *Id.* The Supreme Court rejected this argument, holding "when the trial was conducted entirely on the issues of the account, all such admissions were deemed waived and the trial court properly treated the case as if a general denial were in the record, thus putting at issue all of the material facts of the counterclaim." *Id.* Because the "defendant was put on notice that the plaintiffs were not admitting the obligation," the failure to respond as required under the predecessor rule to CR 8 was not deemed an admission. *Id.* The same is true here. The County expressly denied liability for Holm's conduct, and litigated the case throughout on the theory that

Holm—not the County—was the responsible party. Plaintiffs’ “waiver” argument lacks merit and must be rejected.<sup>1</sup>

Beyond “waiver,” two assumptions underlie plaintiffs’ response: (1) that the County Prosecutor is an “officer” of the County and therefore “is” the County, and (2) a plaintiff cannot sue the Prosecuting Attorney’s Office, only the County. Neither view finds support in the law.

**1. Agency principles, not artificial titles, determine whether liability can be imputed.**

Plaintiffs rely on language from *Glasgow v. Geogia Pacific Corp.*, 103 Wn.2d 401, 693 P.2d 708 (1985), to argue the County must shoulder liability for Holm’s malfeasance because, according to plaintiffs, he is an “officer” of the County. Br. of Resp’ts at 18. In so doing, plaintiffs rely on *Glasgow*’s statement that “[w]here an owner, manager, partner or corporate officer personally participates in the harassment,” the harassment is *ipso facto* imputed to the employer. *Glasgow*, 103 Wn.2d at

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<sup>1</sup> Plaintiffs also claim the rule from *State v. Knighten*, 109 Wn.2d 896, 748 P.2d 1118 (1988), absolving the court of any obligation to accept erroneous concessions of law is inapplicable because the County’s admission was “factual.” Br. of Resp’ts at 17. Though an employment relationship is at its core a principal-agent relationship, the existence and scope of such relationships are questions of law when material facts are undisputed. *O’Brien v. Hafer*, 122 Wn. App. 279, 284, 93 P.3d 930 (2004). “[I]f the facts are undisputed and, without weighing the credibility of witnesses, there can be but one reasonable conclusion drawn from the facts, the nature of the relationship between the parties becomes a question of law.” *Id.* Here, all parties agreed (as evidenced by Audrey Broyles’ testimony, that Holm had “had control of the entire office and the personnel.” CP at 4266. Moreover, the determination of whether Holm or the County was the plaintiffs’ “employer” under chapter 49.60 RCW ultimately necessitates statutory construction, which is always a question of law reviewed de novo. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

407. This argument fails for two reasons, both of which the County addressed in its opening brief that plaintiffs fail to adequately rebut. First, as Division Three of this Court recognized, the labels “officer” and “manager” as they originate in *Glasgow* are “too simple” to base a determination of strict liability. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 854, 991 P.2d 1182 (2000). Rather, “[t]he analysis must look to the functions and responsibilities of the person at issue.” *Id.* Nowhere do plaintiffs cite or discuss (much less analyze) *Francom*. Though plaintiffs discount *DeWater v. State*, 130 Wn.2d 128, 921 P.2d 1059 (1995), in their attempt to segregate this case from agency principles, it is those same agency principles that form the basis for *Glasgow*’s “owner, manager, partner or corporate officer” language on which plaintiffs so heavily rely. *See Francom*, 98 Wn. App. at 855.<sup>2</sup>

Moreover, plaintiffs’ argument cannot survive the Supreme Court’s holding in *DeWater*, in which the Court applied an agency “right of control” analysis to determine whether *Glasgow*’s “owner, manager, partner or corporate officer” language was relevant at all. *DeWater*, 130

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<sup>2</sup> Plaintiffs rely heavily on the County’s policies and procedures “state[ment] that all deputy prosecuting attorneys are County employees.” Br. of Resp’ts at 20 (citing CP at 2790-91. The policies actually state attorneys in the Prosecuting Attorney’s Office “serve at the pleasure of the appointing authority,” which in the case of deputy prosecutors is Holm, not the County CP at 2791; *accord* RCW 36.27.040. Moreover, the Supreme Court has rejected the view that a county can compel elected officials to follow county policies. *See Crossler v. Hisle*, 136 Wn.2d, 287, 293-94, 961 P.2d 327 (1998).

Wn.2d at 135-38. The plaintiff there attempted to claim the foster parent “was the ‘director’ of the State’s ‘Sexually Aggressive Youth Program’ and therefore was a manager for the State,” which in turn would impute liability to the State under *Glasgow*. *Id.* at 136. The Court rejected that argument, instead turning to principles of vicarious liability to ultimately hold the lack of any ability to control negated the fourth *Glasgow* element. *Id.* at 137-41. Plaintiffs ignore this analysis, instead asserting that “*DeWater* assumes the victim is not a government employee.” Br. of Respt. at 18 n.5. *DeWater* made no such assumptions, but instead held that when a defendant has no right to control the discriminatory tortfeasor, the defendant cannot be held liable under WLAD: “Based on the record on appeal, the State *did not exercise, and did not have the right to exercise*, the degree of *control* over the Troyer foster home or its trackers *which is necessary to hold the State vicariously liable for Mr. Troyer’s alleged discriminatory acts.*” *DeWater*, 130 Wn.2d at 141 (emphasis added). Applied to this case, the County “did not exercise, and did not have the right to exercise, the degree of control over the [Prosecuting Attorney’s Office or the Prosecuting Attorney] which is necessary to hold the [County] vicariously liable for [Ed Holm’s] alleged discriminatory acts.” *Id.*

**2. Plaintiffs mistakenly assume the County Prosecutor is the alter ego of the County, and therefore cannot be sued separately from the municipal corporation.**

Relying on inapposite authorities,<sup>3</sup> plaintiffs contend “the county itself is the only legal entity capable of suing and being sued and one cannot sue the county council [sic<sup>4</sup>] or the prosecutor’s office separately.” Br. of Resp’ts at 20 (citing *Nolan v. Snohomish County*, 59 Wn. App. 876, 882-83, 802 P.2d 792 (1990)). *Nolan* does not hold a plaintiff cannot sue a prosecuting attorney’s office, but instead held legislative and quasi-judicial bodies such as the board of county commissioners were not independent legal entities. *Nolan*, 59 Wn. App. at 881. To the extent *Nolan* stood for the rule that independently elected officials such as the prosecutor or sheriff cannot be sued separately, the Supreme Court has rejected that view, holding elected officials employ deputies and are

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<sup>3</sup> For example, plaintiffs cite *State v. Bryant*, 146 Wn.2d 90, 42 P.3d 1278 (2002), for the proposition that “[b]oth the majority and the concurrence concluded that the Prosecutor acted as an agent of the County, and that he also acts, at times, as an agent of the State.” Br. of Resp’ts at 19 (citing *Bryant*, 146 Wn.2d at 102 n.5, 107. Plaintiffs misread *Bryant*. First, the “majority” opinion by Justice Chambers is not a majority opinion, given that only one other justice (Justice Smith) signed. *See id.* at 106. Rather than espouse any holding that prosecutors are agents of the County, Justice Chambers’ plurality opinion ordered dismissal of the criminal defendant’s charges by relying on the “fundamental fairness” doctrine. *Id.* at 104-05. On the other hand, Chief Justice Alexander concurred, and Justices Johnson, Sanders, and Madsen agreed, that the charges from the adjacent county had to be dismissed because prosecutors were agents of the state, not the county. *See id.* at 107 (Alexander, C.J., concurring). It was only the dissent that claimed county prosecutors are agents of their respective counties alone. *See id.* at 111 (Owens, J., dissenting). *Bryant*, to the extent relevant at all, supports the County’s position.

<sup>4</sup> Counties in Washington do not have “councils,” but rather operate through their respective county commissioners. RCW 36.16.030; RCW 36.32.010.

responsible for their misconduct.<sup>5</sup> *Carter v. King County*, 120 Wash. 536, 538-39, 208 P. 5 (1922); accord *State ex rel. Day v. King County*, 50 Wn.2d 427, 429, 312 P.2d 637 (1957) (construing *Carter* to stand for the rule that “a deputy sheriff was not a servant of the county”).<sup>6</sup>

Nor does the plaintiffs’ citation to Justice Talmadge’s concurring opinion in *Crossler v. Hisle*, 136 Wn.2d 287, 961 P.2d 327 (1998), support their desired result. See Br. of Resp’ts at 20 (citing *Crossler*, 136 Wn.2d at 299 (Talmadge, J., concurring)). Justice Talmadge asserted the majority opinion, which held an independently elected judge was not bound to accept the terms of the county’s personnel handbook, should not be read to immunize governments from discrimination laws. The County has never taken the view that the WLAD was inapplicable to plaintiffs. Instead, it has only argued that WLAD must be applied to the proper party, which in this case it was not.

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<sup>5</sup> To be sure, these very plaintiffs sued Ed Holm in *Broyles I*, and he was represented by his own counsel independent from the county’s attorneys. See CP at 4971-87, 5000. That they claim now that a prosecutor cannot be sued is belied by their own actions and also case law. E.g., *Anderson v. Manley*, 181 Wash. 327, 331, 43 P.2d 39 (1935) (“[I]t is true that a prosecuting attorney acting in a matter which is clearly outside of the duties of his office is personally liable to one injured by his acts.”); see also *Thurston County v. Gorton*, 85 Wn.2d 133, 137, 530 P.2d 309 (1975).

<sup>6</sup> As anticipated, plaintiffs attempt to circumvent *Carter* by pointing to a former statute that provided counties were “not responsible for the acts of the sheriff.” See Br. of Resp’ts at 20 (quoting BAL. CODE § 3987 (1918)). Notably, the *Carter* opinion is devoid of any citation to or reliance on Section 3987. The statute’s existence notwithstanding, the Court employed a “right of control” analysis to determine whether the sheriff or the county employed the tortfeasor deputy, holding the sheriff did. Contrary to plaintiffs’ view, it is the reasoning employed by the *court* that carries stare decisis effect, not a *post hoc* concocted rationale. *State v. White*, 135 Wn.2d 761, 767 n.3, 958 P.2d 982 (1998).

**3. Federal cases from the Third and Tenth Circuits do not support plaintiffs' arguments.**

Plaintiffs cite two federal court cases *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), and *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993), to further support their view that the County, not Holm, is responsible for Holm's actions. Neither of these cases premised their holdings on anything resembling Washington law, which holds that deputies are employees of the elected officer who hires them, not the County. *See Carter*, 120 Wash. at 538-39. *Sauers* concluded that a Title VII suit against the "County Attorney" "proceed[s] only in his official capacity," the suit "operated as a suit against Salt Lake County itself." *Sauers*, 1 F.3d at 1125. The *Sauers* court cited no authority to reach this conclusion beyond *Kentucky v. Graham*, 473 U.S. 159, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985), in which the Supreme Court reiterated that "official capacity" suits against government officials are functionally equivalent to suing the municipality. *See Graham*, 473 U.S. at 165, *cited in Sauers*, 1 F.3d at 1125. Though more detailed in its analysis, the *Coleman*<sup>7</sup> court premised its holding on a faulty premise, namely that

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<sup>7</sup> It should be noted that two years after *Coleman* was decided, present Supreme Court Justice Samuel Alito lamented about the absence of any certification statute in New Jersey, which left the Third Circuit to "predict" how the state supreme court would rule in given situations, a process Justice Alito called "particularly inappropriate for resolution by a federal court." *See Michaels v. New Jersey*, 150 F.3d 257, 258 (3d Cir. 1998) (Alito, J.).

prosecuting attorneys cannot be sued. This premise is at odds with Washington law, *see supra*, and therefore has no application here.

**B. The trial court erred by allowing the jury to assume, without deciding, a nexus between untimely conduct and actions occurring within three years of the action commencing.**

Undermining the plaintiffs' entire statute of limitations analysis is a fundamental misperception of the County's arguments. This misperception is best summarized by the plaintiffs' assertion that the County's proposed instructions, which the trial court refused to adopt, "address[] the *admissibility* of [Jack] Jones' and [Phil] Harju's pre-May 6, 2001 conduct." Br. of Resp'ts at 30 (emphasis added). Plaintiffs are wrong. Jury instructions do not "address admissibility," but rather provide the jury with a roadmap to reach a verdict. Here, the roadmap given by the trial court forced the jury to erroneously assume that conduct occurring prior to May 5, 2001 was automatically part of the hostile work environment claimed by the plaintiffs. This was error.

**1. Because the County appeals the denial of its post-trial motion, and because it consistently argued against liability for untimely conduct absent the existence of a relationship to timely conduct, the error was preserved.**

Plaintiffs contend this court need not consider the statute of limitations issue because summary judgment denials are not subject to review "following a trial if the denial was based upon a determination that material facts are disputed and must be resolved by the factfinder."

Br. of Resp'ts at 25 (quoting *Brothers v. Pub. Sch. Employees*, 88 Wn. App. 398, 409, 945 P.2d 208 (1997)). Even if this rule of law applied here, the County has an absolute right to appeal a denial of a post-trial motion for judgment as a matter of law and/or new trial, as well as the final verdict and jury instructions that led to it. RAP 2.2(a)(1), (9). The County argued the trial court erred by denying its motion for judgment as a matter of law and/or new trial, and cited the statute of limitations issue as a basis. See Br. of Appellant at 47-48, 51-52.

Moreover, a denial of summary judgment may be reviewed on appeal following trial if the denial “was based on a substantive legal issue.” *In re Custody of A.C.*, 124 Wn. App. 846, 852, 103 P.2d 226 (2004). Both *Antonius v. King County*, 153 Wn.2d 256, 703 P.2d 729 (2004), and *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002), tacitly reference “the court” as the arbiter of whether acts outside the limitations period are sufficiently related to acts within the limitations period to constitute a single hostile working environment. See *Morgan*, 536 U.S. at 120; *Antonius*, 153 Wn.2d at 271. If such a determination is expressly reserved for the court, then it follows *a priori* that the issue is “legal.” See *Osborn v. Mason County*, 157 Wn.2d 18, 23, 134 P.3d 197 (2006) (questions of law reserved for court). The County recognizes the more logical import, that

being whether a relationship between untimely and timely acts exists is one of fact, in which case the question is one for the jury, provided they are adequately instructed, which here they were not. As such, whether this court reviews the trial court's denial of summary judgment or denial of the County's post-trial motion for judgment as a matter of law is ultimately inconsequential.

Finally, to the extent plaintiffs assert the County's challenge of Instruction 20 is barred by the invited error doctrine, that argument is foreclosed by *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 265-69, 96 P.3d 386 (2004). The County relies on its opening brief to dispose of this assertion. *See* Br. of Appellant at 48 n.22.

**2. By failing to inform the jury that untimely acts must be related to the timely hostile environment, the trial court committed reversible error.**

“Failure to permit instructions on a party's theory of the case, where there is evidence supporting the theory, is reversible error.” *Barrett*, 152 Wn.2d at 266-67. “As with a trial court's instruction misstating the applicable law, a court's omission of a proposed statement of the governing law will be ‘reversible error where it prejudices a party.’” *Id.* at 267 (quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995)).

Contrary to the plaintiffs' view, Thurston County has never disputed that *Antonius* governs disposition of whether plaintiffs' hostile work environment claim was timely. Nor has the County ever disputed that *Antonius* adopted the analysis set forth in *Morgan*. *Antonius* and *Morgan* allow a jury to "consider[]" conduct occurring more than three years before the complaint was filed "for the purposes of determining liability." *Morgan*, 536 U.S. at 117. But *considering* evidence and *finding* liability are two distinct tasks, the latter of which cannot be presumed *a priori*. Quite the contrary:

[A]cts [occurring within three years of the action being commenced and acts occurring outside the three-year period] *must have some relationship to each other to constitute part of the same hostile work environment claim*, and if there is no relation, or if "for some other reason, such as certain intervening action by the employer" the act is "no longer part of the same hostile environment claim, then the employee cannot recover for the previous acts' as part of one hostile work environment claim."

*Antonius*, 153 Wn.2d at 271 (quoting *Morgan*, 536 U.S. at 118) (emphasis added). Proposed Instructions 47, 48, and 61 all addressed the need for the jury to find a relationship before liability existed, but the trial court refused to give them.

Though plaintiffs focus on the phrase "sufficient nexus" from the County's opening brief, the proposed instruction which the trial court erroneously failed to give mirrored the quoted language from *Antonius* and *Morgan*. See CP at 1043-44, 1057. Plaintiffs attempt to circumvent this

point of law by raising a strawman, namely that “there [is no] WPI on the issue.” Br. of Resp’ts at 31. The absence of a pattern jury instruction does not compel affirmance. Certainly, even if a pattern jury instruction does exist, the court may still find it to be reversible error. *E.g.*, *State v. Cronin*, 142 Wn.2d 568, 579, 14 P.3d 752 (2000). Pattern instruction or not, the County’s theory was supported by the evidence and the law, but the trial court barred the County from arguing it to the jury. Such epitomizes reversible error. *Barrett*, 152 Wn.2d at 274-75.

**3. Plaintiffs rely on inapposite and excluded evidence to support a finding that a relationship existed between acts prior to May 5, 2001 and conduct thereafter.**

Plaintiffs claim “the allegation that Holm’s reorganization eliminated Harju’s offensive conduct was directly refuted by Broyles.” Br. of Resp’ts at 29 (citing II VRP at 134-35). What plaintiffs fail to mention is, as stated by the County in its opening brief, *see* Br. of Appellant at 55 n.25, the trial court sustained all of the County’s objections to the admissibility of Broyles’ testimony on this subject. *See* II VRP at 134-35. In reality, Broyles did not offer anything the jury could have considered to contradict the effect of Holm’s reorganization. The same is true with plaintiffs’ citation to Broyles’ description of Harju’s conduct becoming “increasingly hostile.” II VRP at 111. Bald, conclusory, self-serving descriptions are not sufficient to describe

discrimination. *Grimwood v. Univ. of Puget Sound*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). Rather, the descriptions Broyles gave to elaborate on what she meant by “increasingly hostile” included “cold-shouldering, not being responsive, not communicating, snide remarks.” II VRP at 111. This type of conduct, though without question unpleasant, simply does not give rise to liability under WLAD. See *Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 293, 57 P.3d 280 (2002). The testimony that was given did not describe “harassment . . . because of sex,” *Glasgow*, 103 Wn.2d at 406, but rather, in Broyles’ words, was conduct evidencing “that people knew that [they] had gone to Mr. Holm in confidence to talk with him about these matters.” II VRP at 111. Put simply, there was no evidence that Harju’s conduct post May 5, 2001 was gender related. The court erred by allowing the jury to find liability on Harju’s conduct.

In regards to Jack Jones, plaintiffs cite “abusive behavior” wherein Jones “sen[t] offensive e-mails, exhibiting a highly volatile temper, and thr[e]w[] files at one of the Respondents.” Br. of Resp’ts at 28 (citing I VRP at 91, III VRP at 206, and V VRP at 499). The plaintiffs *still* cite no evidence that this conduct was “because of sex,” a showing necessary to establish an *actionable* hostile work environment. *Glasgow*, 103 Wn.2d at 406; *Adams*, 114 Wn. App. at 297-98. As such, plaintiffs’ emphasis that Jones received no “training in sexual harassment,” Br. of Resp’ts at 28, is

belied by the facts that Jones *did* receive training in (1) “violence in the workplace,” (2) “the leader in each of us,” (3) “pro-active listening,” and (4) “give constructive feedback.” IV VRP at 362. These trainings directly mirror the improper conduct about which plaintiffs’ attributed to Jones, *e.g.*, his volatile temper, carrying a gun around the office, and (in the plaintiffs’ words), “exhibit[ing] hostile, intimidating behavior.” Br. of Resp’ts at 28. Lastly, though plaintiffs assert “Jones continued to exhibit hostile, intimidating behavior,” *id.*, the evidence they cite was purely conclusory, namely (1) Broyles’ conclusory statement that “contact with the general felony deputies . . . like . . . Mr. Jones . . . was increasingly worse,” II VRP at 136, and (2) Broyles’ conclusory testimony on cross-examination that Jones was “more hostile towards me,” III VRP at 202. Put simply, this conclusory testimony cited by plaintiffs was insufficient to convince a rational jury that the alleged discriminatory hostile work environment occurring prior to May 5, 2001 was sufficiently related to the conduct after that date to justify finding a single hostile work environment.

**C. Individual liability under WLAD is met by the same elements that apply to employers, which negates plaintiffs’ attempt to circumvent collateral estoppel.**

Plaintiffs contest the applicability of only one of the four elements to collateral estoppel, namely identity of issues. *See* Br. of Resp’ts at 34. Plaintiffs claim they should not have been precluded from arguing Phil

Harju's conduct was discriminatory because, in their view, "the evaluation of an individual's liability under WLAD involves far different considerations than those involved in evaluating an employer's liability under WLAD." *Id.* Plaintiffs are mistaken.

To support their view, plaintiffs cite to *Brown v. Scott Paper Worldwide*, 143 Wn.2d 349, 361, 20 P.3d 921 (2001), to assert supervisors may be held individually liable under WLAD. Certainly *Brown* held as much, determining that "individual supervisors" were encompassed by WLAD's statutory definition of "employer," and therefore could be personally liable "along with their employers." *Id.* (citing RCW 49.60.040(3)). But the false assumption on which plaintiffs rest their argument is that the elements of a WLAD claim against an individual supervisor differ from those in a claim against the employing entity. Nowhere does *Brown* make such a holding, and this court should not infer one. To be sure, *Brown* made the point to emphasize that "[e]mployer liability is not based upon independent fault, but upon the theory of respondeat superior." *Id.* at 360 n.3.<sup>8</sup> Respondeat superior finds the principal liable for the agent's acts, regardless of the intent of the principal. *Id.* Plaintiffs assert that "[a]n employer is not necessarily

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<sup>8</sup> Of course, this rule of law applies only if the court were to determine that the deputy prosecutors were employees of the County rather than the elected official that hired them. *Contra Carter*, 120 Wash. at 538-39.

released from liability if an individual supervisor is not also personally liable for his misconduct,” Br. of Resp’ts at 35, but that statement has no basis whatsoever in the law.

Rather, the elements of plaintiffs’ claims against Harju and the elements of the plaintiffs’ claims against Thurston County were identical. The court should not accept plaintiffs’ tunnel-visioned approach of looking only at the *Broyles I* court’s order to determine which issues in Harju’s summary judgment motions were actually litigated and decided. *Cf.* Br. of Resp’ts at 35. Examining the record on the whole reveals Harju had to argue that his conduct on the whole was either (a) not offensive and unwelcome, CP at 5660, (b) did not occur because of the plaintiffs’ gender, CP at 5662, or (c) was not sufficiently severe and/or pervasive, CP at 5664. He succeeded. But the plaintiffs nonetheless were allowed to present a case to the jury that would allow a finding, based solely on Harju’s conduct, that a hostile work environment existed. Collateral estoppel barred this approach and the trial court erred by allowing it.

**D. There is no plausible argument that a comment referencing the race of Sackett-DanPullo’s husband was gender based.**

Plaintiffs assert the trial court was within its discretion to allow Sackett-DanPullo to testify that she was assigned to Community Prosecution because of her husband’s race. *See* XIV VRP at 1377, 1386-87. Plaintiffs claim “the jury may conclude, based in part on this

testimony, that Holm's comments suggested women were not provided the same merit-based opportunities that men were and Sackett-DanPullo's assignment was gender-based discrimination." Br. of Resp'ts at 36-37. Nothing supports this view. Both men and women have the right to be married, and both men and women have the right to marry a person of a different race. *Cf. Loving v. Virginia*, 388 U.S. 1, 8, 87 S. Ct. 1817, 18 L Ed. 2d 1010 (1967). There is no plausible argument that a comment referencing "husband" and "black" have anything to do with gender, the only claim that survived to trial. Rather, the only possible motivation for this testimony was to cast Holm in a negative light. Plaintiffs do not dispute that this testimony was harmful, and their argument for its admissibility, like the trial court's reasons for allowing it, is "manifestly unreasonable [and] based upon untenable grounds." *Davis v. Globe Mach. Mfr. Co.*, 102 Wn.2d 68, 76, 684 P.2d 692 (1984). Reversal is necessary.

**E. Plaintiffs offer no argument to distinguish the County's authority why no attorney-client privilege barred Christy Peters from testifying as to the plaintiffs' initial meeting with Gordon Thomas.**

Plaintiffs cite and discuss one substantive case to support affirming the trial court's ruling to preclude Christy Peters from testifying that the plaintiffs had no subjective belief of gender discrimination before meeting with lawyers. That case, *State v. Emmanuel*, 42 Wn.2d 799, 259 P.2d 845 (1953), does not support their position. In *Emmanuel* the criminal

defendant sought to elicit testimony from the prosecution's key witness, who was also a named defendant in a federal civil lawsuit along with Emmanuel. *Id.* at 814. The State objected on the basis of the attorney-client privilege, which the trial court sustained. *Id.* The Supreme Court reversed, holding the State was not the proper party to claim privilege, ruling "[t]he offered testimony should have been admitted." *Id.* at 816.

Though highlighting *Emmanuel*, plaintiffs make no effort whatsoever to distinguish *Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152 F.R.D. 132 (N.D. Ill. 1993), or *Ramsey v. Mading*, 36 Wn.2d 303, 311-12, 217 P.2d 1041 (1950), which undermine their view that the attorney-client privilege prevented Peters from testifying. And as our Supreme Court has held, "[a]n attorney/client relationship is not created . . . merely because an attorney discusses the subject matter of a transaction with a nonclient." *Sherman v. State*, 128 Wn.2d 164, 189, 905 P.2d 355 (1995) (quoting *Bohn v. Cody*, 119 Wn.2d 357, 364, 832 P.2d 71 (1992)). The exclusion of this evidence was highly prejudicial, given that Peters would have testified that plaintiffs had no subjective belief that the actions prior to that date were gender related. The absence of the plaintiffs' subjective belief was directly contrary to the proof needed to sustain their hostile work environment claims. *See MacDonald v. Korum Ford*, 80 Wn. App. 877, 885-86, 912 P.2d 1052 (1996).

**F. Adopting plaintiffs' view that fees incurred in an action voluntarily dismissed in a subsequent action promotes wasteful litigation in lieu of judicial economy.**

The County does not dispute that if the court holds the jury verdicts proper that plaintiffs were entitled to “costs of suit including reasonable attorneys’ fees.” RCW 49.60.030(2). But WLAD does not, as plaintiffs contend, allow a windfall recovery for work performed during an action they voluntarily dismissed. The plaintiffs, by their own admission, made a tactical decision shortly before trial in *Broyles I* to dismiss that case and start anew. The dismissal of that *separate* case and commencement of a *new* case allowed them to demand a jury, a new judge (as shown by their affidavit of prejudice against Judge Costello), and a new forum. The very nature of a voluntary dismissal is to “wipe[] the slate clean, *making any future lawsuit based on the same claim an entirely new lawsuit unrelated to the earlier (dismissed) action.*” *Sandstrom v. ChemLaw Corp.*, 904 F.2d 83, 86 (1st Cir. 1990) (emphasis added). This nature is at odds with the concept employed below—that a plaintiff can recover fees incurred during an “unrelated” lawsuit following trial in a *subsequent* and *different* action. To view the law otherwise allows plaintiffs to use nonsuits as both (1) a shield from judges they would prefer not to preside over the case, and (2) a sword to recover all fees incurred throughout multiple actions.

**1. Judicial estoppel mandates a finding that *Broyles I* and *Broyles II* were separate actions, thereby precluding an award of fees incurred in both cases.**

At the outset, plaintiffs' argument is premised on a view that the trial court adopted, namely that *Broyles I* and *Broyles II* were functionally one case: "[I]t is clear that in this case the nonsuit was not the end of one case and the beginning of a different case." CP at 7. Yet this view is diametrically opposed from the position the plaintiffs took when they filed an affidavit of prejudice against Judge Costello, the *Broyles I* judge who had previously ruled the plaintiffs had waived their right to a jury. See CP at 3894-96. The court accepted the plaintiffs' arguments to hold "the nonsuit [of *Broyles I*] create[d] a new proceeding" in *Broyles II*. VRP (Apr. 14, 2006) at 5.

It therefore is no surprise that plaintiffs overlook the County's discussion of judicial estoppel, a doctrine designed "to preserve respect for judicial proceedings . . . and to avoid inconsistency, duplicity, and the waste of time." *Johnson v. Si-Cor, Inc.*, 107 Wn. App. 902, 906, 28 P.3d 832 (2001) (quoting *Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 343, 641 P.2d 1194 (1982)). Put simply, plaintiffs successfully took one position to obtain (in their view) a more favorable judge, and took an entirely different position after trial to augment their fee award as much as possible. The law demands more respect.

If judicial estoppel were properly applied to bar plaintiffs from arguing that *Broyles I* and *Broyles II* were not “different case[s]” as the trial court found, CP at 7, then it rationally follows that fees incurred in one case should not be recoverable in a subsequent action. Were the converse true, a plaintiff could claim a right to recover fees incurred in past WLAD cases on which the attorney worked, because that effort was “necessary” to achieve success in the litigation at issue. *Cf. Blair v. Wash. State Univ.*, 108 Wn.2d 558, 740 P.2d 1379 (1987). The law does not countenance such an illogical result, and neither should this court.

**2. The federal cases addressing fee shifting in Section 1983 cases have no application as to whether a WLAD plaintiff can recover fees for work incurred in a prior, independent, action.**

Plaintiffs cite a slew of federal cases to support their view that fees incurred in *Broyles I* were properly recoverable after verdict in *Broyles II*. None of those cases are germane. Both *Dean v. Riser*, 240 F.3d 505 (5th Cir. 2001), and *Marquart v. Lodge 837*, 26 F.3d 842 (8th Cir. 1994), are based on the premise that in federal civil rights cases, attorney fees under 42 U.S.C. § 1988 are available to a defendant “only ‘upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation.’” *Dean*, 240 F.3d at 508 (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)); accord *Marquart*, 26 F.3d at 851 (noting Eighth “Circuit has been

unwilling to award attorneys' fees where the defendant is unable to prove that the plaintiff's case is meritless"). The same is true of the other federal cases on which plaintiffs rely. See *Bratton v. City of Albuquerque*, 375 F. Supp. 2d 1114, 1117 (D. N.M. 2004) (citing *Christianburg* to state "[a] defendant must meet a stringent standard before a court may award attorney's fees to a prevailing defendant"); *Easiley v. Norris*, 107 F. Supp. 2d 1332, 1337 (N.D. Okla. 2000) (citing *Christianburg* standard to recognize "more rigorous standards apply to fee awards to prevailing defendants than to prevailing plaintiffs in civil rights cases); *Hughes v. Unified Sch. Dist.*, 872 F. Supp. 882, 884 (D. Kan. 1994) (same).

The question has never been whether the County was entitled to recover all reasonable attorneys' fees incurred in *Broyles I* due to its frivolity. But rather, the question under *Washington* law is whether the plaintiffs' failure to obtain a judgment in *Broyles I* meant the County was the prevailing party, *thereby depriving* the plaintiffs' of the ability to recover fees for that case. Federal case law notwithstanding, "the general rule [in *Washington*] pertaining to voluntary nonsuits [is] that the defendant is regarded as having prevailed." *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn.2d 863, 505 P.2d 790 (1973).

**G. Because the trial court employed the risk of the case as a basis for the lodestar, it abused its discretion by imposing a multiplier.**

The County recognizes that the trial court made several factual findings to support its decision to award a 1.5 multiplier to the lodestar. Plaintiffs however ignore and fail to discuss the fact that the trial court made the exact same findings to support the lodestar figure. When a trial court employs the same factors when determining the lodestar and awarding a multiplier, it abuses its discretion. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 599, 675 P.2d 193 (1983). Plaintiffs do not attempt to explain the trial court's oral ruling which was incorporated by reference into the written findings. CP at 4. The trial court found the plaintiffs' proposed lodestar to be proper because the case was unique and that few firms could handle the risk or taking on such a large endeavor. VRP (Feb. 26, 2007) at 13-14. The court then summarized his reasons for adopting the plaintiffs' proposed multiplier by asserting his "fe[elings] from the beginning that it was a – an exceptional case and an exceptional challenge." *Id.* at 15. Plaintiffs' ignore this basis to argue "[t]he trial court's findings . . . confirm that the rates 'are based on the rates [plaintiffs' counsel] charge other clients for hourly work.'" Br. of Resp'ts at 48 n.16. If such were the extent of the trial court's findings, plaintiffs might have a point. But it was not. The trial court cited the "challenge"

the plaintiffs faced to support the lodestar amount, and then employed the synonymous “risk” to support a multiplier. Such exemplifies an abuse of discretion and compels reversal.

**H. Conclusion**

Though WLAD aims to eradicate discrimination from the workplace, *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996), it does not necessarily follow that the deep pocket must shoulder liability whenever it occurs. *DeWater*, 130 Wn.2d at 137-41. Rather it is only when the defendant has the ability to control the discriminating actor does liability attach. Such, as a matter of law, could not have occurred here. For the foregoing reasons, and for the reasons cited in Thurston County’s opening brief, this Court should vacate the jury verdict and judgment below and remand the case for dismissal or, in the alternative, a new trial.

RESPECTFULLY SUBMITTED this 5th day of November, 2007.

PATTERSON BUCHANAN  
FOBES LEITCH KALZER & WAECHTER

By   
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**CERTIFICATE OF FILING AND SERVICE**

I, the undersigned, declare that on November 5, 2007, I filed the foregoing REPLY BRIEF OF APPELLANT pursuant to RAP 18.6(c) by mailing the original and one copy of the same via U.S. mail, first class, postage prepaid, to:

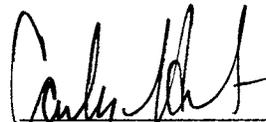
Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals, Division Two  
950 Broadway, Suite 300  
Tacoma, WA 98402

I further certify that on November 5, 2007, I mailed via U.S. mail, first class, postage prepaid, one copy of the foregoing REPLY BRIEF OF APPELLANT to:

Ms. Stephanie Bloomfield  
Gordon, Thomas, Honeywell, Malanca,  
Peterson & Daheim, LLP  
P.O. Box 1157  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED on November 5, 2007, in Seattle, Washington.



Carly Hart, Legal Assistant

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