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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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Virginia Burnett,

Appellant,

v.

State of Washington, Department of Corrections,

Respondents.

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**BRIEF OF RESPONDENT**

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	COUNTERSTATEMENT OF ISSUES.....	1
III.	COUNTERSTATEMENT OF THE CASE.....	2
	A. Factual Background.....	2
	B. Procedural Background.....	6
IV.	STANDARD OF REVIEW.....	6
V.	SUMMARY OF ARGUMENT.....	8
VI.	ARGUMENT.....	9
	A. Ms. Burnett’s Negligence Claim Is Barred By The Exclusive Remedy Provisions Of The Industrial Insurance Act.....	9
	1. Unless caused by a third party with a different employer, workers’ compensation is the exclusive remedy for workplace injuries.....	9
	2. The Exclusive Remedy Provision bars a lawsuit by an employee of one governmental department against another governmental department.....	12
	B. Court Opinions From Other Jurisdictions Support The Trial Court’s Interpretation Of RCW 51.24.030(1).....	15
	1. Other jurisdictions have declined to distinguish one department of state government from another for purposes of the exclusive remedy provision. ....	15
	2. Ms. Burnett’s employment satisfies all the factors considered by <i>Singhas</i> and <i>Colombo</i> for finding employment by the state, not an individual agency. ....	20

C.	Washington Court Opinions Support Treating Employees Of State Agencies As State Employees, Not Employees Of Separate Agencies.....	24
1.	The Department’s immunity is bolstered by <i>Martini ex rel. Dussault v. State.</i> ....	24
2.	Ms. Burnett’s reliance on <i>Bennerstrom v. Dep’t of Labor &amp; Indus.</i> is misplaced. ....	25
D.	The Interagency Agreement Does Not Override The State’s Statutory Immunity .....	28
1.	The explicit intention of the parties in the Interagency Agreement is to work collaboratively to provide educational opportunities to offenders housed in the State’s prisons. ....	29
2.	The Interagency Agreement does not operate as a waiver of Industrial Insurance Act immunity.....	31
3.	The Interagency Agreement expressly prohibits any construction that creates rights enforceable by third parties. ....	33
VII.	CONCLUSION .....	35

## TABLE OF AUTHORITIES

### Cases

<i>Atherton Condo Ass'n v. Blume Development Co.</i> 115 Wn.2d 506, 799 P.2d 250 (1990).....	7
<i>Bennerstrom v. Dep't of Labor &amp; Indus.</i> 120 Wn. App. 853, 86 P.3d 826 (2004).....	25, 26, 27, 28
<i>Birklid v. Boeing</i> 127 Wn.2d 853, 904 P.2d 278 (1995).....	10
<i>Brand v. Dep't of Labor &amp; Indus.</i> 139 Wn.2d 659, 989 P.2d 1111 (1999).....	10
<i>Brandt v. State</i> 428 N.W.2d 412 (Minn. Ct. App. 1988).....	17
<i>Brown v. Prime Const. Co., Inc.</i> 102 Wn.2d 235, 684 P.2d 73 (1984).....	31
<i>Cena v. State</i> 121 Wn. App. 352, 88 P.3d 432 (2004).....	11, 32
<i>Centralia Coll. Ed. Ass'n</i> 82 Wn.2d at 129.....	23
<i>Centralia Coll. Ed. Ass'n v. Bd. of Trustees of Cmty. Coll. Dist. No.</i> 12, 82 Wn.2d 128, 508 P.2d 1357 (1973).....	14, 28
<i>Colombo v. State</i> 3 Cal. App. 4th 594, 5 Cal.Rptr.2d 567 (1991).....	16, 21, 24, 27
<i>Egeland v. State</i> 408 N.W.2d 848 (Minn. 1987).....	17
<i>Fisher v. Seattle</i> 62 Wn.2d 800, 384 P.2d 852 (1963).....	26

<i>Green v. Turner</i> 437 So.2d. 956 (La. Ct. App. 1983).....	16
<i>Hafer v. Melo</i> 502 U.S. 21, 112 S. Ct. 358 (1991).....	23
<i>Harrell v. Washington State ex rel. Dep't of Soc. &amp; Health Servs.</i> 170 Wn. App. 386, 285 P.3d 159 (2012).....	23
<i>Howland v. Grout</i> 123 Wn. App. 6, 94 P.3d 332 (2004).....	6
<i>Indiana State Highway Dep't v. Robertson</i> 482 N.E.2d 495 (Ind. Ct. App. 1985) .....	16
<i>Kincel v. Department of Transportation</i> 867 A.2d 758 (Pa. Commw. Ct. 2005) .....	18
<i>LaMon v. Butler</i> 112 Wn.2d 193, 770 P.2d 1027 (1989).....	8
<i>Linden v. Solomacha</i> 232 N.J. Super. 29, 556 A.2d 346 (1989).....	17
<i>Linzee v. State of New York</i> 122 Misc. 2d 207, 470 N.Y.S.2d 97 (Ct. Cl. 1983).....	18
<i>Maggio v. Migliaccio</i> 266 N.J. Super. 111, 628 A.2d 814 (1993).....	17
<i>Marsland v. Bullitt Co.</i> 71 Wn.2d 343, 428 P.2d 586 (1967).....	26
<i>Martini ex rel. Dussault v. State</i> 121 Wn. App. 150, 89 P.3d 250 (2004).....	24
<i>Mazurek v. Skarr</i> 60 Wis. 2d 420, 210 N.W.2d 691 (1973).....	18, 19
<i>McGuire v. Honeycutt</i> 387 So.2d 674 (La. Ct. App. 1980).....	17

<i>Novenson v. Spokane Culvert</i> 91 Wn.2d 550, 588 P.2d 1174 (1979).....	26
<i>Rodriguez v. Board of Directors of the Auraria Higher Educ. Ctr.</i> 917 P. 2d 358 (Colo. Ct. App. 1996).....	16
<i>Seven Gables Corp. v. MGM/UA Entertainment Co.</i> 106 Wn.2d 1, 721 P.2d 1 (1986).....	8
<i>Singhas v. New Mexico State Highway Dep't</i> 120 N.M. 474, 902 P.2d 1077 (1995).....	17, 20, 24
<i>Spencer v. City of Seattle</i> 104 Wn.2d 30, 700 P.2d 742 (1985).....	passim
<i>State v. Coffman</i> 446 N.E.2d 611 (Ind. Ct. App 1985).....	16
<i>State v. Purdy</i> 601 P.2d 258 (Alaska 1979).....	15
<i>Tallerday v. DeLong</i> 68 Wn. App. 351, 842 P.2d 1023 (1993).....	11, 32
<i>Thompson v. Lewis County</i> 92 Wn.2d 204, 595 P.2d 541 (1979).....	8, 12, 13, 27
<i>Vallandingham v. Clover Park School Dist. 400</i> 154 Wn.2d 16, 109 P.3d 805 (2005).....	10
<i>West v. Zeibell</i> 87 Wn.2d 198, 550 P.2d 522 (1976).....	11, 32
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> 123 Wn.2d 891, 874 P.2d 142 (1994).....	7
<i>White v. State</i> 131 Wn.2d 1, 929 P.2d 396 (1997).....	7, 8
<i>Wright v. Moore</i> 380 So.2d 172 (La. Ct. App. 1979).....	13, 14, 17, 26

<i>Young v. Key Pharmaceuticals, Inc.</i> 112 Wn.2d 216, 770 P.2d 182 (1989).....	7
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**Other Authorities**

<u>Laws of 1891</u> , ch. 23, § 1 .....	11
<u>Laws of 2007</u> , ch. 522, § 223 and § 603 .....	22

**Rules**

RCW 1.16.080 .....	11
RCW 28B.50.040(20) .....	3
RCW 28B.50.050.....	3, 21
RCW 28B.50.090.....	3
RCW 28B.50.090(1) .....	22
RCW 39.34.020(1).....	34
RCW 39.34.030(2).....	34
RCW 4.44.180(2).....	25
RCW 4.92.060 .....	23
RCW 4.92.110 .....	23
RCW 41.06.070(2).....	23
RCW 41.56.020 .....	23
RCW 41.56.021(1).....	23
RCW 41.80.030(2)(a) .....	24
RCW 51.04.010 .....	2, 8, 10

RCW 51.04.060 ..... 31  
RCW 51.24.030(1)..... passim  
RCW 51.32.010 ..... 2, 10  
RCW 72.09.030 ..... 2, 21

## **I. INTRODUCTION**

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

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

## **II. COUNTERSTATEMENT OF ISSUES**

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

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

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

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

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Factual Background**

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

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

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

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

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

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

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

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

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

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

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<sup>1</sup> An FTE is a full-time equivalent job position. Interagency Agreement § 1(L), CP 58.

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

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

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

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

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

Interagency Agreement § 6.2, CP 69.

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

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

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

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

Interagency Agreement § 6.9, CP 71.

**B. Procedural Background**

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

**IV. STANDARD OF REVIEW**

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

judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). A material fact is one upon which the outcome of the litigation depends in whole or in part. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

To defeat summary judgment, the nonmoving party must come forward with specific, admissible evidence to sufficiently rebut the moving party's contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the non-moving party fails to make a showing sufficient to establish the existence of a necessary element to that party's case, summary judgment must be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

*Id.* (citation omitted).

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

## V. SUMMARY OF ARGUMENT

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

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

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

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

## **VI. ARGUMENT**

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

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

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

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

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

(Emphasis added.) Further, RCW 51.32.010 provides:

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

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

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

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

RCW 51.24.030(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Interagency Agreement envisions a collaborative approach between state agencies to provide educational opportunities for offenders.

The express intent of the Interagency Agreement states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>4</sup> A “public agency” is defined in RCW 39.34.020(1) as:

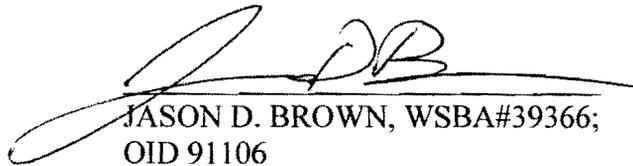
[A]ny agency, political subdivision, or unit of local government of this state including, but not limited to, municipal corporations, quasi municipal corporations, special purpose districts, and local service districts; any agency of the state government; any agency of the United States; any Indian tribe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

## VII. CONCLUSION

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

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of June, 2014.

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**CERTIFICATE OF SERVICE**

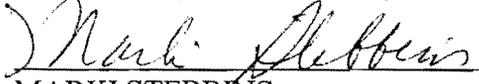
I certify under penalty of perjury in accordance with the laws of the State of Washington that the original and one copy of the preceding Respondents' Brief was hand delivered and filed at the following address:

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DATED this 9<sup>th</sup> day of June, 2014 at Spokane, Washington.

  
MARKI STEBBINS