No. 56455-6-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

SHEILA LAROSE,

Petitioner,

v.

KING COUNTY, WASHINGTON,

Respondent,

and

PUBLIC DEFENDER ASSOCIATION
D/B/A THE DEFENDER ASSOCIATION (TDA),

Defendant.

PETITION FOR REVIEW

Mary Ruth Mann
WSBA #9343
James Kytle
WSBA #35048
Mann & Kytle, PLLC
1425 Western Avenue, #104
Seattle, WA 98101
(206) 587-2700

Philip A. Talmadge
WSBA #6973
Gary W. Manca
WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Susan Mindenbergs
WSBA #20545
Law Office of
Susan Mindenbergs
705 Second Avenue, Suite 1050
Seattle, WA 98104
(206) 447-1560

Attorneys for Petitioner LaRose

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Federal Cases

Constitution

Statutes

Rules

Other Authorities

A. IDENTITY OF PETITIONER

Respondent Sheila LaRose seeks review of the decision in Part B.

B. COURT OF APPEALS DECISION

The Court of Appeals filed its opinion on May 14, 2024. A copy is in the Appendix. Sheila moved to publish it because Division II acknowledged that no Washington precedent addresses an employer's Washington's Law Against Discrimination, RCW 49.60 ("WLAD") liability for a nonemployee's conduct outside of a formal workplace contributing to a hostile work environment ("HWE"). Op. 24. Division II denied publication. *See* Appendix.

The unfortunate consequence of Division II's opinion is that female public defenders specifically, and other female employees generally, must accept that harassment and stalking off their employer's physical premises, even though that conduct has a nexus to their employment, is a condition of their employment. That public policy is contrary to the WLAD's

intent and this Court's decisions on HWE, meriting this Court's review and reversal. RAP 13.4(b)(1), (4).

C. ISSUE PRESENTED FOR REVIEW

> Where the jury was properly instructed on an HWE claim based on gender discrimination and rendered a verdict for the discrimination victim against the employer, did Division II err in overriding the jury's verdict and ruling as a matter of law that the employer had no HWE responsibility for the acts of a non-employee harasser whose unrelenting harassment for months, both at the victim's physical place of employment and other locations, had a nexus to the victim's employment?

D. STATEMENT OF THE CASE

Division II's opinion recites the facts and procedures in the case. Op. 3-18. Division II's discussion, however, fails to convey the continuous loop of phone calls, references to her home on her work phone, appearances by Client A at her parking garage, appearances by Client A at her coffee shop, a half block from her office, his surveillance of her and her daughter at her home, or his appearances at her home. Revised resp't br. ("BR") 2-13.

In Instruction 12, the trial court instructed the jury on the

relevant time period for Sheila's HWE claim. CP 10278. That instruction emanated from the County's own proposed Instruction 19. CP 9974. The relevant time period for the County's liability was the "acts or omissions of King County occurring only between July 1, 2013 and February 21, 2014, while King County was her employer." CP 10278.[1] An earlier instruction proposed by the County deleted "only" from the text. CP 7990. The trial court adopted the County's later version.

The trial court also instructed the jury in Instruction 10, that an HWE is not a series of discrete acts. CP 10276. The County did not assign error to it. Revised Br. of Appellant ("BA") 2.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

(1) Division II's Opinion on an HWE Was Analytically Flawed from the Outset

[1] As will be noted *infra*, the work environment that existed at TDA, whose managers carried over to the County, is relevant to the totality of the circumstances of the County's HWE.

Division II's opinion overrode the trial court's summary judgment and CR 50(a) motion[2] decisions, and the decisions of its own Commissioner on interlocutory review, and disregarded the jury's verdict after a long trial, to conclude that Sheila was not entitled to recover as a matter of law for her WLAD HWE claim against the County or for the County's negligence.

Division II's analysis of the County's HWE here was fundamentally flawed from the outset in major ways that tainted its analysis, rendering it erroneous. Division II failed to heed the proper protocol for CR 50 review, it parsed the County's HWE into segments, ignoring this Court's admonition in multiple cases that an HWE must be viewed as a unitary whole under the totality of the circumstances, and it neglected to apply WLAD's express liberal interpretation directive. Review is merited. RAP 13.4(b)(1), (4).

(a) CR 50 Decision Standard of Review

[2] The County did not file a CR 50(b) motion. The trial court's CR 50 decision was made on the record after a lengthy colloquy with counsel. RP 2_1748-71.

This Court has established the starting point in a CR 50 analysis – jury verdicts are presumed to stand because the jury's decisionmaking role is "the bedrock of our justice system." *Coogan v. Borg-Warner Morse Tec, Inc.*, 197 Wn.2d 790, 799, 490 P.3d 200 (2021). Juries' factfinding is constitutionally-protected. Wash. Const. art. 1 § 22; *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). Juries' verdicts are strongly presumed to be correct and are not lightly overruled on appeal. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711 (1989).

Sheila's facts on CR 50 review must be treated as true. *Mancini v. City of Tacoma*, 196 Wn.2d 864, 877, 479 P.3d 656 (2021); *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009). Judgment as a matter of law in this WLAD case where there were competing arguments on whether discrimination existed, is inappropriate. *Mikkelsen v. Pub. Hosp. Dist. No. 1 of Kittitas County*, 189 Wn.2d 516, 527-28, 404 P.3d 464 (2017) (determination of discrimination as a matter of law is "seldom

appropriate" given the difficulty of proving discriminatory motivation). Simply put, whether an HWE existed was for the jury, and the jury's verdict should stand; Division II's contrary erroneous conclusion merits this Court's review.

(b) An HWE Is a Unitary Whole Not a Series of Discrete Events as Division II Believed

At the outset, Division II parsed the County's HWE into a discrete series of events. The court established two time periods – the time during which Sheila represented Client A, and the period after the termination of her representation until he was finally prosecuted in February 2014, drawing a further distinction in the latter period between the harassment Sheila experienced at "the workplace," or at its "off-site equivalents," op. 27, and away from it. Op. 19. Division II never defined Sheila's "workplace" or the meaning of "off-site equivalents."[3]

[3] Instruction 9's language requires that the harassment alter the conditions of LaRose's employment "in the locations where she worked." CP 10275. Instruction 10, not objected to by the County, states that an HWE is not a "discrete act," but rather may be "the cumulative effects of many acts, which

Critically, Division II's focus on July 1-July 26, 2013 contradicts the *express instruction to the jury on the relevant time period*. CP 10278. Not only did the County not object to Instruction 12, RP 1_2151, it *proposed* that instruction. CP 7990, 9974. Division II *sua sponte* altered the relevant time period for the County's HWE.

Division II focused on the trees but missed the forest. In doing so, Division II failed to faithfully apply this Court's precedents requiring that an HWE be analyzed as a *unitary whole*. In *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708 (1985), this Court directed that whether harassment of an employee was sufficient to alter the terms or conditions of that employee's conditions of employment, an element of an HWE claim, must "be determined with regard to the totality of the circumstances." In *Antonius v. King County*, 153 Wn.2d 256, 268, 103 P.3d 729 (2004), the Court held that

---

considered together make up an unlawful employment practice" even if the individual acts are not actionable. CP 10276.

individual discriminatory acts create a unitary, indivisible whole for purposes of the statute of limitations as to an HWE claim, again analyzing the issue under the totality of the circumstances. *Id*. at 261. Instruction 10, CP 10276, correctly stated the law.

Division II's analysis cannot be squared with this Court's precedent. RAP 13.4(b)(1).

(c) The WLAD and an HWE Claim Must Be Liberally Construed

The WLAD makes clear that employment without gender-based discrimination is a *civil right*, RCW 49.60.010, and it is actionable when a person suffers discrimination by an employer. RCW 49.60.030(2); *Martini v. Boeing Co.*, 137 Wn.2d 357, 367-68, 374-75, 971 P.2d 45 (1999). The WLAD fulfills the Washington Constitution's civil rights provisions; the failure to enforce the right to be free of discrimination "menaces the institutions and foundation of a free democratic state." RCW 49.60.010. WLAD's provisions are "be construed liberally for the accomplishment of [WLAD's purpose of defeating

discrimination]," RCW 49.60.020.

This interpretative imperative required Division II to view with caution any WLAD construction that would *narrow* the coverage of the law. *Marquis v. City of Spokane* 130 Wn.2d 97, 108, 922 P.2d 43 (1996); *Phillips v. City of Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989); *Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 848, 292 P.3d 779 (2013).

Sheila's HWE claim is subject to this key imperative because an HWE claim arose under the common law, as this Court has interpreted RCW 49.60.180(3)'s prohibition on employer discrimination based on sex to encompass the maintenance of an HWE. *Glasgow*, 103 Wn.2d at 404-08; *Robel v. Roundup Corp.*, 148 Wn.2d 35, 44-48, 59 P.3d 611 (2002) (extending HWE to disability).

Division II's analysis of authority on the territorial/temporal scope of a WLAD HWE claim erroneously chose the more *restrictive* scope over the more liberal, requiring review. RAP 13.4(b)(1), (4).

(2) Sheila Met the Elements of an HWE Claim, as the Jury Concluded

This Court has established the elements of an HWE claim under the WLAD: (1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer. *Glasgow*, 103 Wn.2d at 406-07; *Robel*, 148 Wn.2d at 45; *Antonius* 153 Wn.2d at 261-62.[4] *Nothing* in those elements restricted the territorial/temporal scope of a HWE claim, as Division II has done.

In rendering its decision, Division II started with assumptions about an HWE claim and worked backward to justify its conclusion.

(a) Division II Improperly Restricted the Scope of an HWE Claim Temporally and Territorially

[4] It is undisputed that Client A's harassment of Sheila was unwelcome, and predicated upon her gender, given Client A's profession of love for Sheila and gifts of lingerie. RP2_715, 1054; Ex. 66 at 10, 12, 16; Ex. 306 at 7. *See* BR at 41-42.

The third *Glasgow* element is derived from the language of RCW 49.60.180(3) that bars discrimination as to compensation "or in other terms or conditions of employment." That element does not focus on where the harassment occurred or its temporal elements, but rather whether the harassment created an HWE so pervasive, analyzed under the totality of the circumstances, as to alter the conditions of the employee's employment. Whether the harassment was "pervasive," is not limited to a specific location for the work. *See*, *e.g.*, *Glasgow*, 103 Wn.2d at 406-07; *Robel*, 148 Wn.2d at 46. Thus, in *Loeffelholz v. University of Washington*, 175 Wn.2d 264, 276, 285 P.3d 854 (2012), this Court held that although a considerable amount of conduct involving sexual discrimination occurred before RCW 49.60 was amended to address sexual orientation discrimination, the pre-amendment conduct could be assessed in determining if the employer maintained an HWE. Such "unrecoverable conduct [was] admissible as background evidence to give context to any postamendment discriminatory

conduct." *Id*. at 278. That same analysis is pertinent to the pre-King County HWE at TDA and Client A's stalking/harassment away from County public defense office locations.[5]

The totality of the circumstances animates whether the HWE is "pervasive" and a "condition of employment," without regard to territorial/temporal limitations, so long as there is a *nexus*. *Id*. at 276 (noting that the acts "must have some relationship" to qualify). *See also*, *Goode v. Tukwila Sch. Dist. No. 406*, 194 Wn. App. 1048, 2016 WL 3670590 (2016) (unpublished); *Coles v. Kam-Way Transport*, 200 Wn. App. 1038, 2017 WL 3980563 (2017) (unpublished). Division II erred in concluding otherwise.

---

[5] The totality of the circumstances appropriately included Sheila's employment at TDA, even though the County was not liable for conduct before July 1, 2013 per Instruction 12. CP 10278. She worked under the same conditions, same office dynamic, and same supervisors before and after that date. *See, e.g., Lake v. A.K. Steel Corp.*, 2006 WL 1158610 (W.D. Pa. 2006) at *23 (change in corporate ownership did not bar consideration of predecessor's conduct continued under the same management as part of HWE of successor).

Sua sponte, without regard to Instruction 10 or Instruction 12, Division II essentially pared down the "totality of circumstances" Sheila experienced working for the County to only the time she represented Client A and only while on the physical premises of the County's public defense agency.[6] It had *no basis in law* for doing so.

In *LaRose v. King County*, 8 Wn. App. 2d 90, 112-13, 437 P.3d 701 (2019) ("*LaRose I*"), Division II established that a non-employee's stalking of an employee can create an HWE under the WLAD. The County has never denied in this case that a non-employee can contribute to an HWE. The odd feature of Division II's opinion, however, is its failure to acknowledge that in arriving at its conclusion, the *LaRose I* court was obviously aware of the fact that Client A's stalking/harassment of Sheila

---

[6] The County acknowledged that "off site" events such as business meetings can constitute "the workplace." Op. 24. Division II also acknowledged that a hostile workplace can include the "equivalent" of a workplace, op. at 25, 27, but gave no context or definition to that statement.

sometimes occurred outside of the confines of the formal workplace.[7]

The *LaRose I* court recounted that Client A's sexually-motivated misconduct toward Sheila in connection with her work – she received phone calls and letters from him there for months, in the parking garage (again at work), and at her home, *id.* at 99-100, and it never confined the HWE claim to harassment that occurred only in the physical County public defense office, given the fact that a public defender's work takes her to local jails, the courthouse, her car's parking garage, her favorite coffee shop, and many other locales outside an office setting. Division II's opinion contradicted its own decision in *LaRose I*.

An HWE alters the conditions of employment, under the

---

[7] Division II Commissioner Amanda Bearse denied discretionary review of the order denying the County's summary judgment motion, rejecting the County's argument for an "on-premises/off-premises" analysis, noting that Client A's conduct did not fit neatly into the County's pigeonholes. *See* Appendix. That ruling was animated by the perception that *LaRose I* nowhere confined its analysis to in-office harassment alone.

Glasgow/*Antonius* totality of the circumstances analysis, where it has a nexus to the work environment. But for her employment as a public defender, Sheila would not have experienced Client A's criminal stalking/harassment that made her employment a living hell no person would want to experience.

Moreover, the stalking/harassment by her client was *not* a condition of Sheila's employment as a public defender. But the implication of Division II's opinion[8] is that to work as a Washington public defender, a woman must accept as one of the "terms or conditions of employment," RCW 49.60.180(3), that her employer will assign and keep her exposed to clients who may harass her on the job and then stalk her when the representation ends. Division II fails to recognize that its narrow, artificial boundary makes many workplaces more dangerous. The WLAD's remedial purpose would be undermined if

[8] Unbelievably, the County argued that female public defenders had to accept harassment as an employment condition. BA 29-30.

employees had to accept that employment meant customers, clients, or coworkers would become stalkers once their formal relationship ended.[9]

This Court has made clear that Division II is wrong. In *Antonius*, the plaintiff, a correctional guard, did not have to accept "sexually derogatory comments and name-calling by inmates, co-workers, and supervisors" or "sexually explicit inmate conduct," 153 Wn.2d at 259, as a condition of her employment, and she stated an HWE claim against King County. The client's harassment before and after Sheila's formal representation of him was similarly not a condition of her employment as a public defender.

To support its narrow WLAD construction, Division II considered federal Title VII authority. Op. 24-39. But that

---

[9] Division II says that WLAD does not "protect employees from all possible injury remotely related to employment." Op. 39. But the interpretive question here is not about "possible" injury, but harassment on the basis of "sex," which the WLAD covers. RCW 49.60.180(3). Also, the injury here was directly related to the "terms or conditions of employment." *Id.*

authority confirms that there are legitimate *competing* views on the scope of an HWE claim. Sheila provided ample authority that an HWE claim requires only a "nexus between the alleged harassing activity and the workplace." EEOC, *Digest of Equal Employment Opportunity Law* Vol. XXV, No. 3 (Summer 2014), https://www.eeoc.gov/federal-sector/digest/digest-equal-employment-opportunity-law-70.[10] *See generally*, BR 43-48.[11]

The Ninth Circuit in *Christian v. Umpqua Bank*, 984 F.3d 801 (9th Cir. 2020) stated that a Title VII hostile workplace environment case involved a "constellation of surrounding circumstances, expectations, and relationships," *id*. at 809-10, and was not confined to a particular time or location. A non-

---

[10] Notwithstanding Division II's dismissive treatment of the point, op. 31-32, this Court in *N.L. v. Bethel Sch. Dist.*, 186 Wn.2d 422, 378 P.3d 162 (2016), applied a school district's duty to a student to an off-campus rape because the relevant inquiry is *the location of the negligence*, not the location of the injury. *Id.* at 435. It is no different as to the location of the conduct creating the HWE.

[11] Those authorities were further supported in the powerful Division II *amici curiae* briefing.

employee harasser sent the plaintiff teller unwanted communications and stalked her at an off-premises bank charitable event. *Id.* at 807. *See also, Fuller v. Idaho Dep't of Corrections,* 865 F.3d 1154 (9th Cir. 2017) (correctional staff raped by fellow staffer away from work site stated HWE claim against agency employer).

Client A's "offsite" conduct had the requisite nexus to Sheila's workplace; nevertheless, Division II chose to override the jury's verdict, and decide, as a matter of law, an issue of fact – it decided that Sheila's parking garage, or customary lunch locale, or her home were not the "equivalent" to a workplace. Op. 34.

Division II barely mentions the WLAD's text and purpose. When it does, the court misapplies the WLAD. Op. 39. *Nothing* in the WLAD's text confines its protections to the physical workplace. Everything Sheila experienced arose from the "terms or conditions of employment." RCW 49.60.180(3). Her representation, Client A's 1,000 phone calls to her work phone,

his stalking in the garage, her coffee shop, and her home, all occurred because of "employment" and her "sex." RCW 49.60.180(3). RCW 49.60.020 instructs courts to interpret those words *liberally*, not rewrite the WLAD to add temporal/geographical limits to its protections that appear nowhere in WLAD's text.

Division II's truncated sense of an HWE limited to the physical confines of an office, or some undefined "equivalent" location, will permit all kinds of *egregious* misconduct that even the County conceded could occur. BA 17 n.6 (rape at an "offsite" business meeting).[12] The Division II *amici curiae*, including the National Women's Law Center, the Washington Employment Lawyers Association, and 38 other organizations, articulated a wide range of potentially adverse consequences of Division II's

[12] *See Little v. Windemere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002) (employee stated an HWE claim against employer for rapes by business client after business dinner at restaurant and subsequent post-rape adverse employment actions; HWE not restricted to physical confines of an office).

acceptance of the County's narrow sense of an HWE. And, these days, when much work is virtual, Division II did not even contemplate the reality of cyberstalking/cyberharassment.

Because Division II fails to provide a clue as to the definition of a "workplace," the public is left with its ill-defined contours of that concept. Division II never clearly articulates why certain "off-premises" harassment is the "equivalent" of a hostile workplace, but Sheila's parking garage and customary work-related coffee shop located a mere half block from her office are not. The better analysis is the nexus to employment approach of the federal cases.

Female employees should not be required to endure sexualized stalking from clients as one of the conditions of their employment. BR 28-30. Ultimately, this Court, not Division II, should articulate the proper scope of an HWE claim in Washington. Review is required. RAP 13.4(b)(4).[13]

---

[13] Division II compounded the injustice of its HWE decision by rejecting remand for trial on Sheila's negligence

(b) Client A's Behavior Was Imputed to the County

Sheila also met the final *Glasgow* element. *Glasgow*, 103 Wn.2d at 407. Client A's conduct is imputed to the County, as the jury determined on proper instruction in Instruction 11. CP 10277. Division I's decision overriding the jury's decision on the adequacy of the County response to Sheila's HWE concerns merits review. RAP 13.4(b)(1).

---

claim against the County, an issue the jury did not reach on the verdict form. CP 10298; op. 45-47.

In order for Title 51 RCW immunity to apply, there must be an *injury to the employee in the course of her employment*. RCW 51.04.010, RCW 51.28.010. The County urged the trial court to give an instruction to the jury on this point that focused on a single traumatic event regarding Sheila's PTSD. CP 9984. The trial court gave that instruction, CP 10291, and the jury addressed the single traumatic event in its verdict. CP 10300. Client A's actions at Sheila's home was that event. *LaRose I* at 116-17. If the window smashing at Sheila's home was a *work-related event* to which IIA immunity applied, then its decision that Client A's conduct at Sheila's home was not part of an HWE is wrong. If it was not work-related, then a jury on remand must address the County's negligence for it, contrary to Division II's opinion. Division II, and the County, can't have it both ways. This Court should remand the case for trial on negligence, even if it denies review.

Division II apparently believed that Sheila brought the harassment to the attention of the appropriate County manager, as this Court required in *Robel*, 148 Wn.2d at 48 n.5.[14] Op. 4-14. Sheila reported her harassment to the persons who had authority over her. *See generally*, BR 49-53. Director Mikkelsen and Deputy Director Morris *admitted* they, too, spoke with Sheila about Client A. RP1_1806-10; CP 12982-83.

Nevertheless, Division II decided *as a matter of law* that the County responded to Sheila's concerns adequately. Op. 39-45. But this was a *fact issue*, *Christian*, 984 F.3d at 812; *Matewos v. Nat'l Beverage Corp.*, 24 Wn. App. 2d 1008, 2022 WL 13763262 (2022) (unpublished); *LaRose I* at 113, and the jury ruled against the County. Ample evidence supported the jury's decision that the County failed to meet its obligation to remedy

---

[14] *Accord*, *Alonso v. Qwest Commc'n Co.,* 178 Wn. App. 734, 752-53, 315 P.3d 610 (2013); *Coles*, *supra* at *8; *Calcote v. City of Seattle*, 7 Wn. App. 2d 1019, 2019 WL 296026 (2019) (unpublished), at *14, *review denied*, 193 Wn.2d 1025 (2019); WPI 330.24.

her concerns. Division II failed to consider Sheila's evidence *supporting* the verdict.

On a multiplicity of levels, the County response to Sheila's harassment fell short. *See generally*, BR 54-62. Systemically, the County had no policies, procedures, or protocols for protecting public defenders, especially females, from known or foreseeable gender-based stalking, threats, and other harassment, although it knew that felony division public defenders were dealing with a population engaged in such conduct. RP1_1064-65, 1406-07; RP2_206. Although the County has systems of "flagging" and "classification" for similar concerns of law enforcement officer and court personnel safety, RP2_550-53, it had no such system for public defenders. It did not inform public defenders of the heightened danger from clients who had previously sexually harassed public defenders. RP1_1389, 1414-15, 1628; RP2_ 951-53, 994-95, 1547; Ex. 72; CP 12982-83.

In Sheila's case, the County's staff *knew* Client A was a

risk to female public defenders because Rebecca Lederer had been removed as his counsel and replaced with a male attorney. Ex. 38. That lawyer told Ben Goldsmith, Sheila's supervisor, not to assign Client A to female attorneys. RP2_962. The County failed to take simple steps to stop her living hell.

Morris and Goldsmith, Sheila's supervisors, gave excuses for not protecting her from Client A's *constant* harassment after her withdrawal in July 2013 to his arrest in February 2014. They also failed to reassign Client A to a male attorney, as had occurred in Lederer's case.

For months, Sheila reported to those supervisors her concerns, worries, and inability to sleep, as Client A obsessively made more workday calls, leaving voicemails on her office phone,[15] and sent letters; his conduct escalated to following her

[15] Client A's calls to LaRose were not fully "screened out" during the July 2013-February 2014 period. LaRose only began to send his calls directly to voicemail only in October/November 2013. RP1_1023-24. County staff could not recall when their screening started because the phone system changed. RP1_953-54. County staff did not receive a protocol on handling calls until

to her nearby coffee shop, leaving her lingerie, cards, and writings on her car, at her office parking garage, and stalking her at home. Client A called Sheila at work to tell her of his stalking at her home, his observations of her there, and his efforts to elude police. RP2_959-61. All the while, during the course of that nearly *eight-month period*, her supervisors never bothered to tell her about Client A's earlier harassment history with Lederer, or Lederer's reassignment. RP1_1389, 1414-15; RP2_952-53, RP2_994-95; Ex. 72. They never offered Sheila reassignment, did not remove her from Client A's case, and did not take the steps they *later* took – including contacting the King County Prosecutor – to protect Sheila from Client A. RP1_932; Ex. 62, 63A (first time supervisors told the office receptionist to reroute his calls to her).

Division II also glided past the reasons for Sheila not reporting Client A to law enforcement herself. Public defenders

---

February 2014. Ex. 62, 62a; RP1_925-36.

could not report clients to the authorities without management approval. Ex. 19-K. Sheila felt pressure and the power dynamics of her relationship with her supervisors was not lost on the jury.[16] *Sheila feared for her job (as a single mother)*. Goldsmith was angry and frustrated with Sheila because she recently asked to be removed from a murder case; Goldsmith forced her to bring her case files into a conference for a review by him and Morris.

Division II was oblivious to the internal public defender office dynamics; Sheila had to continue to represent Client A because public defenders were expected to accept client hostility, even sexual harassment, as a condition of their employment. RP1_734-35; BA 28-31. Sexist calls and comments were "common" for female public defenders. RP1_734-37; RP2_217, 1053; CP 13003. Management put the safety of female public

---

[16] Ironically, for the time leading up to July 26, 2013 Sheila's supervisors treated Client A's harassing calls to Sheila as "client complaints," an adverse factor in her evaluations. CP 13015-16; ex. 45 (5/24/13 entry re: meeting with supervisors on client writings that implicated Client A in stalking Sheila); ex. 58-A at 4 (no client complaints after July 26).

defenders second. RP2_230, 1675-77. For example, when facing sexual and violent calls, RP2_217, Deputy Director Daugaard admonished a female public defender not to obtain a protective order without express management approval because of client relationships. RP2_230; Ex. 19-K. While at TDA, a public defender complained about receiving such calls; her supervisor told her that it was part of the job. RP1_734-37. Another public defender experienced similar management indifference when a client threatened her with violence. RP2_1675-77. While Morris protested that the office culture was different than that, he admitted he had never talked to the felony attorneys as a group to tell them there was no expectation of suffering through criminal behavior or boundary crossing as a badge of honor. CP 13020.

Finally, Division II entirely ignored Sheila's expert testimony on the County's failure to act and its power to do so. The County could have acted *earlier* than February 2014 by taking LaRose off the Smith case, as LaRose's expert, Geoff

Brown, testified, RP1_793-807; RP2_184-211, or by calling the police once harassment started, as County expert, Collin Sanders, testified. RP1_1698-1701. That expert testimony supported the jury's verdict that the County's corrective measures were *not* reasonable.[17]

The jury was entitled to rule that the County's response to Sheila's concerns was ineffectual, and Division II had no right to override that factual determination. Review is merited. RAP 13.4(b)(1).

F. CONCLUSION

Ultimately, Division II's opinion misstates the law, taking a highly restrictive view of HWEs in violation of RCW 49.60.020 and this Court's precedents; it usurps the jury's role, something an appellate court cannot do. *Coogan*, 197 Wn.2d at 796. Division II overstepped its role and substituted its judgment

---

[17] Expert testimony creates a genuine issue of material fact foreclosing a decision as a matter of law on an issue. *Strauss v. Premera Blue Cross,* 194 Wn.2d 296, 301, 449 P.3d 640 (2019).

for the jury's.

This Court should grant review and reinstate the judgment on the verdict and the trial court's fee award. Costs on appeal, including reasonable attorney fees,[18] should be awarded to Sheila.

This document contains 4,879 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 10th day of July, 2024.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA #6973
Gary W. Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

[18] Sheila is entitled to appellate fees where the trial court awarded fees. RAP 18.1(b); RCW 49.60.030(2); *Martini,* 137 Wn.2d at 377.

Mary Ruth Mann, WSBA #9343
James Kytle, WSBA #35048
Mann & Kytle, PLLC
1425 Western Avenue, #104
Seattle, WA 98101
(206) 587-2700

Susan Mindenbergs, WSBA #20545
Law Office of Susan Mindenbergs
705 Second Avenue, Suite 1050
Seattle, WA 98104
(206) 447-1560

Attorneys for Petitioner
Sheila LaRose

APPENDIX

Instruction 8:

Harassment on the basis of sex or gender is unlawful employment discrimination.

CP 10274.

Instruction 9:

To establish her claim of harassment by a non-employee on the basis of sex or gender, Sheila LaRose has the burden of proving each of the following propositions:

1) That there was language or conduct of a sexual nature, or that occurred because of plaintiff's gender, which may include language or conduct of a non-employee client or former client;

2) That this language or conduct was unwelcome in the sense that Sheila LaRose regarded the conduct as undesirable and offensive and did not solicit or incite it;

3) That this conduct or language was so offensive or pervasive that it altered the conditions of Sheila LaRose's employment in the locations where she worked; and

4) That management knew through complaints or other circumstances, of this conduct or language and failed to take reasonably prompt and adequate corrective action reasonably designed to end it;

As to Employer PDA/TDA:

If you find from your consideration of all of the evidence that each of these propositions has been proved as to employer

PDA/TDA, then your verdict should be for Sheila LaRose regarding employer PDA/TDA on this claim.

On the other hand, if any of these propositions has not been proved as to employer PDA/TDA then your verdict should be for TDA/TDA on this claim.

As to employer King County:

If you find from your consideration of all of the evidence that each of these propositions has been proved as to employer King County, then your verdict should be for Sheila LaRose regarding King County on this claim.

On the other hand, if any of these propositions has not been proved as to employer King County TDA, then your verdict should be for King County on this claim.

CP 10275.

Instruction 10:

A hostile work environment claim is not necessarily a discrete act, but may be the cumulative effects of many acts which considered together make up an unlawful employment practice, whether those acts are independently actionable or not.

CP 10276.

Instruction 11:

A "manager" is a person who has the authority and power to affect hours, wages, and working conditions. "Management" means one or more managers.

CP 10277.

Instruction 12:

In determining whether the Plaintiff has proven the elements of a hostile work environment with respect to the Public Defender Association (formerly known as The Defender Association or "TDA"), you should consider acts or omissions of the Public Defender Association occurring only until June 30, 2013, while the Public Defender Association was her employer.

In determining whether the Plaintiff has proven the elements of a hostile work environment claim with respect to King County, you should consider acts or omissions of King County occurring only between July I, 2013 and February 21, 2014, while King County was her employer.

You should decide the case against each Defendant separately as if it were a separate lawsuit. These instructions apply to each Defendant.

CP 10278.

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

SHEILA LAROSE,

Plaintiff,

v.

KING COUNTY, WASHINGTON, and PUBLIC DEFENDER ASSOCIATION D/B/A THE DEFENDER ASSOCIATION (TDA),

Defendants.

Case No. 15-2-13418-9

VERDICT FORM

We the jury make the following answers to the questions submitted by the Court:

1. On the claim of gender based **Hostile Work Environment**:

We find for PDA / TDA [Sheila LaRose or PDA/TDA]

We find for Sheila LaRose [Sheila LaRose or King County]

2. **If you find for Sheila Larose** on the Hostile Work Environment claim then determine, what amount, if any, you are awarding for **Non- Economic Damages**?

Emotional Distress:	$ 500,000
Loss of enjoyment of life:	$ 1,500,000
Humiliation:	$ ø
Pain and Suffering:	$ 500,000
Personal Indignity:	$ ø
Fear and Anxiety:	$ 1,500,000
Embarrassment:	$ ø
Anguish:	$ 800,000
Total Non-Economic Damages:	$ 4,800,000

ORIGINAL

If you find for Sheila LaRose on the claim of Hostile Work Environment, please answer the following questions:

What do you find to be the **Economic Damages**?

Past Lost Wages and fringe benefits: $ 800,000

Future Lost Wages and fringe benefits: $ 1,400,000

If you find for the Defendants on failure to mitigate damages what is the total reduction that should be made for "wage losses?" $ Ø

If you find for Sheila LaRose on all Hostile Work Environment claims against each Defendant, then there is **no need** to determine whether either Defendant was negligent and you must stop here.

If you do not find for **Sheila Larose on the Hostile Work Environment** claims as to both defendants, then please answer the following questions as to any Defendant against whom you did not find to have created a hostile work environment:

1. Was King County negligent? Yes_____ No_____
2. Was King County's negligence a proximate cause of Sheila LaRose's damages? Yes_____ No_____
3. Was PDA/TDA negligent? Yes_____ No X
4. Was PDA/TDA's negligence a proximate cause of Sheila LaRose's damages? Yes____ No X

If you answered yes to 1 & 2 or 3 & 4 above, please answer the following questions:

What do you find to be Shelia LaRose's Past **Lost Wages and Fringe Benefits**?

$_____

ORIGINAL

If you find for the Defendants on failure to mitigate damages, what reduction should be made for "wages losses?" $_____

If you find for Sheila LaRose on the **Negligence Claim** then determine what amount, if any, you are awarding for **Non- Economic Damages**?

Emotional Distress:	$_____
Loss of enjoyment of life:	$_____
Humiliation:	$_____
Pain and Suffering:	$_____
Personal Indignity:	$_____
Fear and Anxiety:	$_____
Embarrassment:	$_____
Anguish:	$_____
Total Non-Economic Damages:	**$**_____

In deciding the negligence claims, you must decide what percentage of Sheila LaRose's damages, if any, are attributable to each of the following:

Defendant King County:	_____%
Defendant PDA/TDA:	_____%
Plaintiff Sheila LaRose due to contributory negligence:	_____%
Client A due to his intentional conduct:	_____%
PERCENTAGES MUST TOTAL	100%

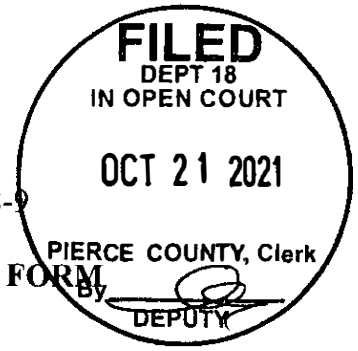
Signed and dated this 21 day of October 2021.

Signature of the Presiding Juror

Gidget Griffin

Printed Name of Presiding Juror

ORIGINAL



vs.

KING COUNTY,
PUBLIC DEFENDER ASSOCIATION,
Defendant(s).

Cause No. 15-2-13418-9

SPECIAL VERDICT FORM

Question: Do you find that Sheila LaRose suffers from a condition known as Post-Traumatic Stress Syndrome (PTSD) and/or depressive disorder?

(Yes) or No (Please circle your answer)

If you answered "Yes" to the question above, please answer the next question.

If you answered "No" to the question above, do not answer the next question.

Question: On a more probable than not basis, was Sheila LaRose's PTSD and/or depressive disorder the result of:

(1) A single traumatic event?

OR

2) Cumulative traumatic exposures?

Please circle your answer.

Presiding Juror

ORIGINAL

Filed
Washington State
Court of Appeals
Division Two

January 19, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHEILA LAROSE, Appellant, v. KING COUNTY, WASHINGTON; and PUBLIC DEFENDER ASSOCIATION D/B/A THE PUBLIC DEFENDER ASSOCATION, Appellants.	No. 55241-8-II RULING DENYING REVIEW

King County and the Public Defender Association (PDA) (collectively, respondents) move for discretionary review of the superior court's August 31, 2020 denials of their motions for summary judgment. This court considers their motions for review under RAP 2.3(b) and denies them.

FACTS

Sheila LaRose began working as a public defender for PDA in 2009. *See LaRose v. King Cnty.*, 8 Wn. App. 2d 90, 98, 437 P.3d 701 (2019). PDA assigned LaRose to

represent "Mr. Smith" (Smith) for a charge of felony stalking.[1] LaRose represented Smith from October 31, 2012, until July 26, 2013.

During LaRose's representation of Smith, he stalked and harassed her. LaRose alleges that the stalking and harassment began in late March 2013, when Smith called LaRose and told her he loved her and wanted to marry her. LaRose did not tell anyone about this incident. She explained to Smith that his statements were inappropriate and needed to stop. But Smith continued with statements such as "I love you, I want to marry you, [and] ooh baby." PDA Mot. for Disc. Rev., Appendix at 111 (excerpts of Sheila LaRose Deposition Apr. 13, 2020 at 931). LaRose "became fearful," explaining that the repeated calls from Smith were concerning, "unwanted," and "escalating." PDA Mot. for Disc. Rev., Appendix at 54 (excerpts of LaRose Deposition June 15, 2017 at 76).

In April 2013, LaRose went to one of her PDA supervisors, Ben Goldsmith, and told him the extent of Smith's harassment and the effect it was having on her mental health. She said she thought she needed to be removed from Smith's case. Goldsmith responded "[o]kay' in an irritated, dismissive, angry, impatient tone." PDA Mot. for Disc. Rev., Appendix at 54 (excerpts of LaRose Dep. June 15, 2017 at 76). Because LaRose was fearful of losing her job, she told Goldsmith two days later that she would keep Smith's case.

LaRose continued to go to Goldsmith with concerns about Smith's calls. But LaRose did not request to be removed from the case and neither Goldsmith nor anyone else offered to reassign the case to another attorney. Smith continued making phone

[1] "Smith" is a pseudonym. *LaRose*, 8 Wn. App. 2d at 96 n.1.

calls to LaRose and in May, he sent her a handwritten letter with "intrusive and sexually motivated content that frightened her." *LaRose*, 8 Wn. App. 2d at 99.

On May 24, LaRose met with Goldsmith and another supervisor, Leo Hamaji, to discuss Smith's communications. Goldsmith and Hamaji did not remove LaRose from the case and she did not ask to be removed. On June 4, LaRose met with Goldsmith and Hamaji to again discuss Smith's obsessive behaviors and the effect they were having her. Hamaji told LaRose to ignore the calls. *LaRose*, 8 Wn. App. 2d at 100.

LaRose's representation of Smith continued when she became a King County employee on July 1, 2013.[2] Smith's harassment also continued. On July 26th, the superior court granted LaRose permission to withdraw from representation of Smith because Smith had moved to withdraw his guilty plea. *LaRose*, 8 Wn. App. 2d at 100. But Smith's calls escalated. LaRose complained to Goldsmith at least three times, to which he finally responded the third time saying, "I don't know — call the cops." *LaRose*, 8 Wn. App. 2d at 100.

Smith continued to call LaRose. When he was released from custody in November 2013, he began following her and contacting her in public. LaRose informed Hamaji that the offensive calls had not stopped. She estimated that between March 2013, and February 2014, she received over 1,000 calls from Smith. *LaRose*, 8 Wn. App. 2d at 100. In February 2014,

> Smith jumped out at LaRose in the parking garage, left lingerie on her car, left literature in her mailbox, and came repeatedly to her house. He hid in her backyard, appeared at her bedroom window in the middle of the night,

[2] "In July 2013, the County ended its contract with PDA and began directly administering the public defense program. Most PDA employees, including LaRose, became County employees effective July 1, 2013." *LaRose*, 8 Wn. App. 2d at 98.

> and broke a bedroom window. He sent messages about seeing LaRose, her daughter, and a man who came to her home. LaRose sent emails to her County supervisors detailing these contacts.

LaRose, 8 Wn. App. 2d at 100.

On February 21, 2014, with LaRose's assistance, Smith was arrested and charged with felony stalking. He was convicted a year later and sentenced to seven years in confinement. *LaRose*, 8 Wn. App. 2d at 101.

In March 2015, LaRose was diagnosed with post-traumatic stress disorder (PTSD) stemming from Smith's stalking behavior. She was also diagnosed with major depressive disorder and generalized anxiety disorder. *LaRose*, 8 Wn. App. 2d at 101. Because her work as a public defender provoked stress and anxiety, LaRose requested leave in 2015. King County granted her request, but terminated her employment in 2017, because she could not keep working. *LaRose*, 8 Wn. App. 2d at 101.

Procedural History

In November 2015, LaRose sued respondents, asserting that they violated RCW 49.60 and other state and federal law by "failing to provide a non-discriminatory work environment; failing to provide a non-hostile work environment free of harassment, and by discriminating, retaliating, and aiding and abetting discrimination, based on gender, marital status and/or retaliation." PDA Mot. for Disc. Rev., Appendix at 289.

In May 2016, the superior court ruled that King County was vicariously liable for PDA's pre-July 2013 conduct, dismissed with prejudice the hostile work environment claim under CR 12(b)(6), and granted summary judgment to respondents on LaRose's remaining claims. LaRose promptly filed an amended complaint, alleging the same facts as the original complaint but with additional causes of action, including negligence and

negligent infliction of emotional distress (NIED). LaRose appealed and King County cross appealed the May 2016 order. *LaRose*, 8 Wn. App. 2d at 96.

In March 2019, this court "review[ed] the trial court's decision on the motions to dismiss as a summary judgment decision" because the trial court had "considered numerous declarations in addition to the pleadings." *LaRose*, 8 Wn. App. 2d at 103; *see McNamara v. Koehler*, 5 Wn. App. 2d 708, 713, 429 P.3d 6 (2018), *review denied*, 192 Wn.2d 1021 (2019). This court reversed the dismissal of LaRose's hostile work environment and negligence claims, but affirmed the dismissal of her disability discrimination claim.[3] This court held:

> LaRose can assert a hostile work environment claim against PDA and the County based on Smith's harassment of her. Smith's harassment of LaRose will be imputed to PDA and the County and they will be liable if they "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Glasgow*[*v. Georgia-Pac. Corp.*], 103 Wn.2d [401,] at 407[, 693 P.2d 708 (1985)].
>
> Here, LaRose has presented evidence that creates genuine issues of fact on these imputation requirements regarding both PDA and the County. There is evidence that both had notice of the harassment while they employed LaRose and whether they took adequate corrective action will be a question of fact for the trier of fact. In addition, LaRose presented evidence that creates genuine issues of fact on the other contested element[s] of a hostile work environment claim regarding PDA, and the County does not argue that there are no genuine issues of fact regarding those elements. Therefore, we reverse the trial court's dismissal of LaRose's hostile work environment claim against PDA and the County.

LaRose, 8 Wn. App. 2d at 112-13. As to LaRose's negligence claims, this court concluded that neither PDA nor King County is "entitled to summary judgment on the

[3] It also reversed the superior court's ruling that King County is vicariously liable for PDA's pre-July 2013 conduct. *LaRose*, 8 Wn. App. 2d at 97.

merits of [her] negligence claims." *LaRose*, 8 Wn. App. 2d at 124. This court remanded for further proceedings.

After remand, King County filed a new summary judgment motion on LaRose's hostile work environment and negligence claims. It argued for dismissing her hostile work environment claim because it could not be liable for conduct of a non-employee outside the workplace, Smith's conduct did not affect the terms and conditions of LaRose's employment, and no reasonable remedial action by King County would have been effective. King County also argued that the court should dismiss LaRose's negligence claims as duplicative because they depended on the same facts as her hostile work environment claim. PDA moved for summary judgment and made the same argument against LaRose's negligence claims in its motion.

In August 2020, the superior court orally denied the motions, referencing this court's "marching orders" for all claims to go to trial. PDA Mot. for Disc. Rev., Appendix at 323 (Report of Proceedings (RP) May 15, 2020 at 22). The superior court reasoned that "if the Court of Appeals objected to the simultaneous prosecution of negligence and hostile work environment [claims] in the same action," it would not have said that PDA was "not entitled to summary judgment on the merits of LaRose's negligence claims." PDA Mot. for Disc. Rev., Appendix at 322 (RP May 15, 2020 at 21). It concluded that this court "made it clear that this case needs to go forward to resolve factual issues related to the hostile work environment claim and the negligence claim." PDA Mot. for Disc. Rev., Appendix at 344 (RP May 15, 2020 at 43).

The superior court also distinguished the facts supporting LaRose's hostile work environment claim from those supporting her negligence claims. It explained that as to

the hostile work environment claim, the facts are that King County and PDA "allow[ed] [Smith] to become entrenched in his fixation on Ms. LaRose and stalk her and harass her with dozens of phone calls every day." PDA Mot. for Disc. Rev., Appendix at 326 (RP May 15, 2020 at 25). This, the court noted, was a "different issue" compared to LaRose's negligence claims, which "exclusive[ly]" involve "having policies in place, enforcing policies, doing trainings for individual employees about what to do, [and] how to recognize dangers in particular in this line of work." PDA Mot. for Disc. Rev., Appendix at 344, 326 (RP May 15, 2020 at 25, 43). In denying summary judgment on LaRose's negligence claims, the court determined that "there are certainly alternative theories that do not merge." PDA Mot. for Disc. Rev., Appendix at 327 (RP May 15, 2020 at 26). Consistent with normal practice, the superior court's written orders denying the motions for both respondents simply listed the 22 documents the court reviewed.

King County and PDA seek discretionary review.

ANALYSIS

Washington strongly disfavors interlocutory review, and it is available only "in those rare instances where the alleged error is reasonably certain and its impact on the trial manifest." *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010); *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied sub nom., Gain v. Washington*, 540 U.S. 1149 (2004). This court may grant discretionary review only when:

> (1) The superior court has committed an obvious error which would render further proceedings useless;

> (2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
>
> (3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or
>
> (4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b). King County and PDA seek discretionary review under RAP 2.3(b)(1) and (3).

Summary judgment is appropriate only if "'there is no genuine issue as to any material fact' and 'the moving party is entitled to a judgment as a matter of law.'" *Walston v. Boeing Co.*, 181 Wn.2d 391, 395, 334 P.3d 519 (2014) (quoting CR 56(c)). "The appellate court engages in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party." *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

"The moving party bears the burden of showing that there is no genuine issue of material fact. If this burden is satisfied, the nonmoving party must present evidence demonstrating material fact. Summary judgment is appropriate if the nonmoving party fails to do so." *Walston*, 181 Wn.2d at 395-96 (citations omitted). "A genuine issue is one upon which reasonable people may disagree; a material fact is one controlling the litigation's outcome." *Youker v. Douglas Cnty.*, 178 Wn. App. 793, 796, 327 P.3d 1234,

review denied, 180 Wn.2d 1011 (2014). This court reviews summary judgment decisions de novo. *Nichols v. Peterson NW, Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016).

Respondents first argue that the superior court committed obvious error and so far departed from the accepted and usual course of judicial proceedings as to call for review by relying on this court's holding in *LaRose* instead of "meaningfully consider[ing] the merits of [their] summary judgment motion[s]." King County Mot. for Disc. Rev. at 9.

Under CR 56, a defending party "may move with or without supporting affidavits for a summary judgment in such party's favor as to all or any part thereof." CR 56(b). Without a properly supported motion to stay the hearing, the superior court has a "right and duty to hear the motion for summary judgment on the basis of the showing before it." *Shoberg v. Kelly*, 1 Wn. App. 673, 676, 463 P.2d 280 (1969), *review denied*, 78 Wn.2d 992 (1970).

Here, both of the superior court's orders denying summary judgment to King County and PDA list 22 pleadings and files it considered in deciding the merits of the motions. *See State v. Sims*, 193 Wn.2d 86, 99, 441 P.3d 262 (2019) (stating that written orders "control" over oral rulings). Collectively, the court considered ten declarations, three expert declarations, and various motions in support of and in response to summary judgment. All parties had extensive opportunity to present their respective arguments during oral argument. This court does not find that the superior court did not consider the merits of respondents' motions before denying them.

A. Hostile Work Environment Claim

King County argues that the superior court committed obvious error and so far departed from the accepted and usual course of judicial proceedings as to call for review

by denying summary judgment on LaRose's hostile work environment claim because the undisputed facts show that (a) Smith's conduct occurred outside the workplace, (b) Smith's conduct did not affect the terms and conditions of LaRose's employment, (c) King County took appropriate actions to protect LaRose in the workplace, and (d) no other reasonable remedial action by King County would have been effective to prevent Smith's conduct.

Employment without discrimination is a civil right in Washington. RCW 49.60.030. RCW 49.60.180(3) establishes that it is an unfair practice for an employer "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex." Sex discrimination is a form of a hostile work environment. *Antonius v. King Cnty.*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). To establish a prima facie claim of a hostile work environment the plaintiff must show that "(1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer." *Antonius*, 153 Wn.2d at 261 (citing *Glasgow*, 103 Wn.2d at 406-07).

To prove what is commonly referred to as the fourth *Glasgow* factor, that the harassment is imputable to the employer, the plaintiff must show that the employer "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action." *Glasgow*, 103 Wn.2d at 407. In *LaRose*, this court held as a matter of first impression that "a nonemployee's harassment of an employee in the workplace" can be imputed to an employer if the employee proves these factors. *LaRose*, 8 Wn. App. 2d at 111.

King County argues that because Smith's conduct was not "in the workplace," his harassment of LaRose cannot be imputed to it under *LaRose*. King County Mot. for Disc. Rev. at 13. But it is difficult to conclude that the post-July 1, 2013 harassment occurred entirely "outside the workplace," as Smith appears to have directed at least some of these post-July 1st contacts to LaRose's workplace. King County Mot. for Disc. Rev. at 7, 14. For example, she alleges that he called her on her work phone repeatedly between March 2013, and February 2014, and he stalked her near her workplace, both in her parking garage and in a nearby coffee shop. *LaRose*, 8 Wn. App. 2d at 124-25 (referencing unwanted sexual calls at work). King County Mot. for Disc. Rev., Appendix at 29-31 (Amended Complaint).

The county analogizes LaRose's interactions with Smith to co-employee interactions or relationships that take place outside a workplace and draws a hard line between on-premises and off-premises conduct to argue it is not liable here. King County Mot. for Disc. Rev. 13-14; King County Mot. for Disc. Rev., Appendix at 179-80 (citing cases); King County Reply to Resp. at 4. But cases cited by King County rejecting liability under these circumstances do not apply and do not support that the superior court committed obvious error in denying the county's motion. For example, Smith was not a co-worker, rather LaRose received a work assignment to represent Smith. Smith contacted LaRose at her workplace or on her work phone, likely the only way he had of reaching her while incarcerated, so his interactions with her do not neatly fit an on-premises or off-premises model. King County Mot. for Disc. Rev., Appendix at 210-13; 228-31 (discussion of issue at argument).

Further, the Washington Supreme Court has recognized that "individual discriminatory acts [may] constitut[e] a unitary, indivisible hostile work environment claim." *Antonius*, 153 Wn.2d at 258. And although the *LaRose* court used the wording "in the workplace," it nevertheless, faced with the same facts, it went on to rule, "LaRose has presented evidence that creates genuine issues of fact on these imputation requirements regarding both PDA and the County" and "LaRose presented evidence that creates genuine issues of fact on the other contested element[s] of a hostile work environment claim regarding PDA, and the County does not argue that there are no genuine issues of fact regarding those elements." *LaRose*, 8 Wn. App. 2d at 112-13; ***but see*** *LaRose*, 8 Wn. App.2d at 111 n.4 (noting the court did not reach whether summary judgment for the county was appropriate on the *Glasgow* factors). As a result, this court does not find that the superior court committed obvious error or so far departed from the usual and accepted course of judicial proceedings in rejecting King County's argument that summary judgment was appropriate because Smith's acts occurred wholly outside of the workplace.

King County next claims that Smith's conduct toward LaRose was not severe or pervasive enough after July 1, 2013, to affect the terms and conditions of her employment. A plaintiff establishes the third *Glasgow* factor by proving that the harassment was "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment." *Glasgow*, 103 Wn.2d at 406. In determining this question of fact, Washington courts evaluate the harassment in the totality of the circumstances and consider "whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work

performance." *LaRose*, 8 Wn. App. 2d at 111-12; *Elliott v. Washington Dept. of Corrections*, 74137-3-I, 2016 WL 785268 (Feb. 29, 2016) (cited under GR 14.1).

In support of its argument, King County cites *Cain v. Blackwell*, 246 F.3d 758 (5th Cir. 2001). But *Cain* is distinguishable. There, the plaintiff provided home health services to an elderly and incompetent man, who suffered from Alzheimer's and Parkinson diseases. The court found that the "unacceptable but pitiable conduct" of the patient was "crude, humiliating, and insensitive," but not severe or pervasive as to interfere unreasonably with the plaintiff's work performance or create an abusive work environment because the patient was "elderly and obviously impaired." *Cain*, 246 F.3d at 760. Further, the plaintiff "never alleged any physical conduct that made her feel threatened, nor did she accept [her employer's] offer of reassignment." *Cain*, 246 F.3d at 760.

Smith's conduct, on the other hand, cannot be easily classified as merely insensitive or the result of impairment. After July 1, 2013, Smith's phone calls to LaRose escalated, and when he was released from custody in November 2013, he began following her and contacting her. LaRose informed Goldsmith and Hamaji that Smith's behavior had not stopped. In February 2014, for example, Smith stalked LaRose in a parking garage near work, went to her home repeatedly, sent messages, and left literature in her mailbox, among other unwanted contacts. *LaRose*, 8 Wn. App. 2d at 100. Under these circumstances, this court does not find that the superior court committed obvious error or so far departed from the usual and accepted course of judicial proceedings by denying summary judgment.

King County also asserts that the superior court should have granted its motion for summary judgment on LaRose's harassment claim because she cannot establish that

Smith's harassment is imputable to King County. The County does not deny that it knew of the harassment, but asserts that it took appropriate actions to protect LaRose in the workplace and that it could not have taken any other effective, reasonable remedial action to prevent Smith's conduct. *Glasgow*, 103 Wn.2d at 407.

But again, the *LaRose* court has already found that LaRose raised issues of material fact about this. Admittedly, this court did not directly address whether summary judgment was appropriate in favor of King County's liability under all of the *Glasgow* factors. *LaRose*, 8 Wn. App. 2d at 111 n.4. But in later ruling that King County can be liable for Smith's conduct after July 1, 2013, it explicitly found that LaRose presented evidence creating a genuine issues of fact as to whether King County and PDA "(a) authorized, knew, or should have known of the harassment and (b) *failed to take reasonably prompt and adequate corrective action.*" *LaRose*, 8 Wn. App. 2d at 112 (emphasis added). As to LaRose's negligence claim, this court also held that "there also may be a question of fact regarding whether [King] County should have done more to protect LaRose once Smith was released from incarceration in November 2013[,] and his stalking escalated." *LaRose*, 8 Wn. App. 2d at 125.

King County's arguments that it took appropriate actions to protect LaRose and that there were no other reasonable remedial action it could have taken that would have been effective to prevent Smith's conduct contradicts this court's earlier conclusion that LaRose presented evidence creating issues of fact on this issue. In addition, LaRose, during her deposition, identified protective measures she believes King County should have taken in 2013, but did not. These included screening and blocking calls from Smith, and helping her obtain a no-contact order. Under these circumstances, the superior court

did not commit obvious error or so far depart from the accepted and usual course of judicial proceedings by denying summary judgment on these issues.

B. Negligence Claims

King County and PDA argue that the superior court committed obvious error and so far departed from the accepted and usual course of judicial proceedings as to call for review by denying summary judgment on LaRose's negligence claims because they depend on the same facts as her hostile work environment claim and are thus duplicative. King County also argues that LaRose cannot prove that it breached its duty of care or that any breach proximately caused her harm.

Washington law prohibits double recovery for the same emotional injuries. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 864, 991 P.2d 1182, *review denied*, 141 Wn.2d 1017 (2000). But a plaintiff may generally pursue "alternative, even inconsistent[] theories of recovery. . . . [a] jury could find one claim or the other (or neither claim) to be supported." *Beltran-Serrano v. City of Tacoma*, 193 Wn.2d 537, 546-47, 442 P.3d 608 (2019); CR 8(e)(2). And a plaintiff may maintain a separate claim for NIED if they allege that "non-discriminatory conduct caused separate emotional injuries." *Francom*, 98 Wn. App. at 865.

Here, the superior court's reasons for rejecting King County's and PDA's arguments—both because this court's opinion allowed both claims to proceed and because the underlying facts are not identical—were not obvious error. At the hearing on their motions for summary judgment, the court reasoned that "if the Court of Appeals objected to the simultaneous prosecution of negligence and hostile work environment [claims] in the same action," it would not have said that PDA was "not entitled to summary

judgment on the merits of LaRose's negligence claims." PDA Mot. for Disc. Rev., Appendix at 322 (RP May 15, 2020 at 21). It concluded that this court "made it clear that this case needs to go forward to resolve factual issues related to the hostile work environment claim and the negligence claims." PDA Mot. for Disc. Rev., Appendix at 344 (RP May 15, 2020 at 43).

Along with relying on this court's earlier opinion, the superior court distinguished the facts supporting LaRose's hostile work environment and negligence claims. It explained that as to the hostile work environment claim, the facts are that King County and PDA "allow[ed] [Smith] to become entrenched in his fixation on Ms. LaRose and stalk her and harass her with dozens of phone calls every day." PDA Mot. for Disc. Rev., Appendix at 326 (RP May 15, 2020 at 25). This, the court noted, was a "different issue" compared to LaRose's negligence claims, which "exclusive[ly]" involve "having policies in place, enforcing policies, doing trainings for individual employees about what to do, [and] how to recognize dangers in particular in this line of work." PDA Mot. for Disc. Rev., Appendix at 344, 326 (RP May 15, 2020 at 25, 43). In denying summary judgment on LaRose's negligence claims, the court determined that "there are certainly alternative theories that do not merge." PDA Mot. for Disc. Rev., Appendix at 327 (RP May 15, 2020 at 26). Because of this, respondents fail to show that the superior court erred enough to require review under RAP 2.3(b)(1) or (3).

Additionally, even assuming the superior court significantly erred in concluding the two claims spring from different underlying facts, it was not obvious error to allow LaRose's negligence claims to proceed because they are asserted in the alternative. CR (8)(e)(2). Although respondents rely on *Francom*, which affirmed summary judgment

dismissal of a simultaneous negligence claim and a Washington Law Against Discrimination (WLAD) claim, a recent Western District of Washington opinion suggests that *Francom* should not be read so broadly. *Ngo v. Senior Operations, LLC*, No. C18-1313RSL, 2020 WL 2614737, at *7 (W.D. Wash. May 22, 2020). In *Ngo*, the federal district court noted, that the *Francom* "line of reasoning has been followed only sparingly in the state courts, and a number of judges of this district doubt that a mere potential for double recovery warrants dismissal of an otherwise adequately pled claim." *Ngo*, 2020 WL 2614737, at *7; *Neravetla v. Virginia Mason Med. Ctr.*, No. C13-1501-JCC, 2014 WL 12787979, at *5 (W.D. Wash. Feb. 18, 2014). These decisions, which question the scope of *Francom* given the established rule allowing a plaintiff to pursue claims in the alternative, support that discretionary review is inappropriate. RAP 2.3(b)(1); RAP 2.3(b)(3).

Finally, respondents suggest that trial is useless under these circumstances because there is a risk of double recovery on the same facts. RAP 2.3(b)(1). But they do not fully explain how standard procedures courts use to prevent double recovery on claims asserted in the alternative would not work here. *See generally Ngo*, 2020 WL 2614747, at *7 ("Parties are permitted to assert claims in the alternative, and any concerns regarding the appropriate calculation of damages at trial can be addressed in the verdict form or, if need be, the remittitur process."); *Neravetla*, 2014 WL 12787979, at *5 ("Until such a time as Plaintiff is granted judgment on the WLAD claims, Defendants' concerns regarding a double recovery are premature[].").

King County also argues that LaRose cannot prove that it breached its duty of care or that any breach proximately caused her harm. "In an action for negligence, a plaintiff

must prove the existence of a duty, breach of that duty, resulting injury, and proximate causation." *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 618, 220 P.3d 1214 (2009). Whether a duty exists in the negligence context is a question of law reviewed de novo. *Arnold v. Saberhagen Holdings, Inc.*, 157 Wn. App. 649, 661, 240 P.3d 162 (2010), *review denied*, 171 Wn.2d 1012 (2011).

LaRose set out that King County "knew when it became LaRose's employer that Smith had been harassing her for three months [and that given] the County's duty to protect LaRose, a genuine issue of fact exists whether it should have removed LaRose from the case in July 2013." *LaRose*, 8 Wn. App. 2d at 124-25. This court also found that "there may be a question of fact regarding whether [King] County should have done more to protect LaRose once Smith was released from incarceration in November 2013 and his stalking escalated." *LaRose*, 8 Wn. App. 2d at 125; *see also supra* at pp. 14-15 (discussing remedial efforts). Finally, this court found that based on the declarations of Dr. Stanley Shyn and Dr. Lawrence Wilson, there is a question of fact as to the cause(s) of LaRose's alleged injuries. *LaRose*, 8 Wn. App. 2d at 118. Given these statements, and viewing the evidence in the light most favorable to LaRose, the superior court did not obviously err in concluding that there are questions of fact about whether King County breached its duty of care and proximately caused LaRose harm. Thus, discretionary review of this issue is inappropriate. RAP 2.3(b)(1), (3).

CONCLUSION

King County and PDA fail to show review is appropriate under RAP 2.3(b). Accordingly, it is hereby

ORDERED that King County's and PDA's motions for discretionary review are denied.

Aurora R. Bearse
Court Commissioner

cc: Patricia A. Eakes
Damon C. Elder
Lindsey E. Mundt
Christopher H. Howard
Farron Curry
James W. Kytle
Mary R. Mann
Robert J. Wayne
Hon. Stanley Rumbaugh

Filed
Washington State
Court of Appeals
Division Two

May 14, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHEILA LAROSE, Respondent, v. KING COUNTY, WASHINGTON, Appellant, PUBLIC DEFENDER ASSOCIATION D/B/A THE DEFENDER ASSOCIATION (TDA), Defendant below.	No. 56455-6-II UNPUBLISHED OPINION

CRUSER, C.J. — Sheila LaRose, a former public defender who worked under the Tacoma Defense Association (TDA) and then under King County (the County), sued TDA and the County claiming hostile work environment and negligence after she was sexually harassed and physically stalked by a client during and after her representation of the client. The jury found for LaRose on the hostile work environment claim against the County. As instructed by the trial court, the jury did not address the negligence claim against the County once it found for LaRose on the hostile work environment claim. The jury also found by special verdict that (1) LaRose suffered post-traumatic stress disorder (PTSD) and/or depressive disorder, and (2) on a more probable than not basis that her PTSD and/or depressive disorder was the result of a single traumatic event.

The County appeals. The County challenges the trial court's denial of its summary judgment motion and CR 50 motion for judgment as a matter of law. It contends that the trial court should have dismissed the hostile work environment claim because (1) a hostile work environment claim cannot be based on the actions of a nonemployee that took place outside of the work environment after the professional relationship ended; (2) a hostile work environment claim cannot be based on the actions of a nonemployee that took place in the workplace after the professional relationship ended; and (3) the County took prompt, effective, and reasonable corrective action to address the harassment that occurred during the 26 days that LaRose was representing Smith as a County employee. The County also argues that if we reverse the verdict, remand for a new trial on the undecided negligence claim against the County is not required because the jury's special verdict establishes that the negligence claim is barred by the Industrial Insurance Act (IIA), Title 51 RCW, immunity.

We agree that the trial court should have granted the County's CR 50 motion and dismissed the hostile work environment claim against the County. We also agree that remand on the negligence claim is not required.[1]

[1] Accordingly, we do not reach the other issues that the County raises.

FACTS

I. BACKGROUND[2]

A. Events During LaRose's Employment at TDA

Prior to July 1, 2013, TDA,[3] was a private firm providing public defense legal services for the County.

In 2009, Sheila LaRose, a former investigator for TDA, began working as a public defender for TDA. LaRose's first assignments as a public defender were to the involuntary treatment act (ITA)[4] unit and a misdemeanor unit.

In July 2012, LaRose transferred to the Seattle felony unit. Her supervisors in the felony unit were Benjamin Goldsmith and Daron Morris.

On October 31, 2012, the felony docket clerk for TDA assigned "Smith's"[5] felony stalking case to LaRose. LaRose was aware that Smith had prior convictions for stalking.

LaRose first met with Smith at his November 5 arraignment. But he left the courtroom prior to his case being called by the court, and LaRose was not in contact with him again until January 2013.

---

[2] Because we are reviewing a CR 50 motion, these facts are presented in the light most favorable to LaRose. *Mancini v. City of Tacoma*, 196 Wn.2d 864, 877, 479 P.3d 656 (2021); *Verizon Nw., Inc. v. Emp. Sec. Dep't.*, 164 Wn.2d 909, 916, 194 P.3d 255 (2008).

[3] After June 30, 2013, the County assumed responsibility for public defense services, and TDA (which later became known as The Public Defender Association) did not provide public defense services for King County after June 30, 2013. For clarity, we refer to TDA throughout when referring to the other defendant in this case.

[4] Ch. 71.05 RCW.

[5] Because the details of LaRose's representation of her client are privileged, we refer to LaRose's client as Smith.

Smith was finally arraigned on February 4, 2013. He was in custody at the time of his arraignment, and he remained in custody until his release following his stalking conviction.

LaRose attempted to negotiate a plea offer on Smith's behalf with the State. Smith was unhappy with the State's offer, and on March 25 he told LaRose that he wanted new counsel. After Smith spoke with Morris, LaRose remained on the case.

Following Morris' meeting with Smith, Smith started to call LaRose and tell her that he loved her, wanted to be with her, and wanted to marry her. According to LaRose, as discussed below, these "calls progressed and became sexually explicit calls." 8 Verbatim Rep. of Proc. (VRP) (Sept. 27, 2021 p.m.) at 715. Smith called LaRose "numerous times per day." *Id.*

Around the same time Smith's calls increased, LaRose became concerned that she would lose her job because she had been feeling overwhelmed by her work and had recently stepped down from a murder case on which she had been co-counsel with Goldsmith. In addition, immediately after stepping down from the murder case, Goldsmith and Morris had started conducting a review of her work. She was required to bring all of her files to Goldsmith's office, and he and Morris pulled three files to review her work.[6] LaRose believed that at this time Goldsmith "was becoming increasingly frustrated with [her]." *Id.* at 695.

By April 2013, Smith's calls reached a point that LaRose told Goldsmith about them. She also told Goldsmith that she was not sleeping and that she "thought [she] needed to get off" of Smith's case. *Id.* at 716-17.

[6] Goldsmith later testified that pulling and reviewing case files is a routine part of the evaluation process.

According to LaRose, Goldsmith responded by saying, "Okay." *Id.* at 717. But LaRose believed that he looked "angry and frustrated and disgusted with" her, and she felt that she was now certainly going to lose her job. *Id.* Several days later, because she was afraid of losing her job and Smith's case was nearly complete, LaRose told Goldsmith that she would finish Smith's case. Smith's calls continued.

On April 30, LaRose received correspondence from Smith. The first several pages of the correspondence included information about Smith's then-current stalking charge. On subsequent pages, he made more personal statements directed to LaRose about how much he loved her.

A short time later, LaRose met with Smith in jail and he gave her more correspondence. In this correspondence, Smith made "admissions" related to his charges. 17 RP (Sept. 30, 2021 a.m.) at 1366. But the final two pages of the correspondence included drawings and personal comments such as, " 'I want to be with you. I want to make family [sic] with you,' " and other statements of that nature. *Id.*

These writings concerned LaRose because in them Smith had admitted his involvement in the charged crime and because the later writings suggested that his thought processes were "more disorganized." *Id.* at 1367. This raised issues regarding Smith's mental health, and LaRose believed that he appeared to be decompensating. His personal comments to LaRose also concerned her.

On May 24, LaRose raised the issue of Smith's competency in the trial court. When LaRose informed the court that her concerns were based on his correspondence, the court told her to present the documents to the court ex parte with a motion to seal.

LaRose returned to the office and discussed her concerns about the court's directions with Goldsmith and another supervisor, Leo Hamaji. Because they viewed the first several pages of the correspondence as admissions of guilt on the stalking charge, they decided that they would not turn these pages over to the court.

Regarding the last few pages of the correspondence, "[b]oth [Goldsmith] and [Hamaji] discussed that [the correspondence] implicated [Smith] in stalking [LaRose] because of the statements made."[7] *Id.* at 1375. Accordingly, they also decided not to turn those pages over to the court. During this meeting, LaRose did not ask to be removed from Smith's case.

Smith continued to call LaRose. LaRose described these calls as personal and intrusive and sometimes of a sexual nature. LaRose told Smith to stop calling and talking to her that way, but the calls persisted.

On June 4, LaRose met with Hamaji after the content of the calls started "getting worse." *Id.* at 1378. LaRose chose to go to Hamaji because Goldsmith's responses to her concerns had made her uncomfortable, and Morris had told her that she could go to Hamaji for supervision instead of Goldsmith if she preferred.

LaRose told Hamaji about the content of the calls, that she had received 10 calls that day, and that she was "worried" about them. *Id.* at 1379. She also told Hamaji that she did not know what to do. According to LaRose, Hamaji shared a story about a similar experience he had with a female client and told LaRose to ignore the calls.

[7] LaRose characterized some of Smith's writings as "implicat[ing] him in stalking [her]." 17 RP (Sept. 30, 2021 a.m.) at 1402.

LaRose was surprised and disheartened by Hamaji's advice. She felt that Hamaji was not taking her seriously and that he did not understand the severity and impact of Smith's calls. She also felt unsupported because no one at TDA took any action to stop Smith's contacts, and she did not think that ignoring the calls was a viable solution. Additionally, she was concerned because she considered Smith's comment about wanting to have a family with her to be of a sexual nature and indicative of a fixation on her and because he did not stop calling when she told him to stop. She was particularly troubled because she knew that Smith would eventually be released from custody.

B. Events During King County Employment

1. During Representation of Smith from July 1 to July 26, 2013

On July 1, 2013, the County assumed responsibility for public defense services, and the TDA employees who chose to remain, including LaRose, became King County employees.

On July 18, Smith entered a guilty plea that would result in him soon being released from jail. Smith asked to withdraw the plea the next day. In light of the request to withdraw his plea, LaRose was permitted to withdraw from representation on July 26.

Between July 1 and July 26, during the 26-day period of representation under King County, LaRose went to Goldsmith "several times . . . about the calls." 17 VRP (Sept. 30, 2021 a.m.) at 1390. LaRose stated that when she told Goldsmith that she was still getting the calls during her representation of Smith and that she was worried, he did not respond and "was very dismissive." *Id.*

2. Period Between the End of LaRose's Representation on July 26 and Smith's Actions in February, 2014

Although LaRose's representation of Smith had terminated and she had told him not to call and threatened to call the police, Smith continued to call. LaRose estimated that he called 1000 times in a six-month period.

LaRose stated that she twice told Goldsmith that Smith was continuing to call despite her withdrawal from his case and that she was concerned. Both times, according to her, Goldsmith just shrugged. She went to Goldsmith a third time and told him that the calls were continuing and " 'getting worse.' " *Id.* at 1407. This time he shrugged and said, " 'I don't know. Call the cops or the police.' "[8] *Id.* at 1407-08.

Starting in October or November, LaRose screened her calls[9] to avoid direct contact with Smith in an attempt to get him to stop calling. If she accidentally answered when Smith called, she would hang up.

On October 31, LaRose received an employee evaluation from Morris. According to LaRose, she was surprised by this evaluation because she had received her last evaluation that past June.[10]

---

[8] There is nothing in the record suggesting that LaRose or anyone else called the police about Smith's calls. LaRose did not contact the police until the physical stalking escalated in February 2014.

[9] The County had a caller announce system that would ask callers who was calling, put the caller on hold, and permit the person receiving the call to decide whether to accept the call or send it to voicemail.

[10] At the end of June 2013, after having been in the felony unit for almost a year, LaRose received an evaluation that was signed by the person who had supervised her in another unit. Although the evaluator signed the evaluation in late June 2013, the evaluation was for the period of July 2011 through December 2012.

Morris' evaluation acknowledged that reviews of LaRose's case files had occurred in March and August 2013. Morris stated that LaRose had been having " 'some difficulties in her felony practice,' " that they had met about these issues, and that in August and September they had come up with a plan to reduce her felony workload to permit her to " 'marshal her resources and tackle some of' " these issues. *Id.* at 1396. The evaluation noted that LaRose's performance had improved in these areas.

Morris noted that LaRose had attributed her issues to her heavy felony caseload, and LaRose later testified that the heavy caseload had caused similar issues with her coworkers. The evaluation also noted that there had been numerous client complaints about LaRose's lack of communication but that there had been no client complaints since the day her representation of Smith ended. The evaluation directed LaRose to more " 'proactively engag[e] with supervisors,' " recommending more regular meetings and that she seek out supervision as the need arose. *Id.* at 1403.

LaRose later testified that she felt that the October 2013 evaluation did not take into account what had happened with regard to Smith, how Smith's case had been assigned, or that she had been reporting issues with Smith and needed help. But LaRose did not state exactly how Smith's behavior had impacted her work or when.

Shortly after this evaluation, LaRose encountered Smith in a pierogi shop near her office where she regularly got coffee. Smith had been calling her all day, but when she encountered him in person she realized that he was now out of custody. She told Smith to stay away from her and immediately left the restaurant.

LaRose reported this encounter to Hamaji, and he intercepted one of Smith's calls that same day. Hamaji told Smith to stop calling. And, in an attempt to dissuade Smith from continuing to call by appealing to his apparent attraction to LaRose, Hamaji also told Smith that LaRose was no longer his attorney and that if he continued to call her she would be in trouble.

LaRose did not call the police following this run-in with Smith. Smith's calls continued, but no one checked with LaRose to see if the calls had stopped or attempted to do anything to stop Smith from being able to call her.

According to one of the County's receptionists, at some point after Smith's release he came to the County's lobby seeking to contact LaRose, but he was not admitted. There is no suggestion in the record that LaRose was aware of this visit.

Possibly as early as early November, LaRose played several of Smith's voicemails to a colleague in the public defender's office. LaRose told her colleague that "she had been getting them most of the summer." 25 VRP (Oct. 14, 2021 a.m.) at 2097-98, 2123. LaRose's colleague characterized these calls as "scary," and she later testified that the calls "were clearly from somebody who was not well" and was "obsessed" with LaRose. *Id.* at 2099. She also believed that the calls demonstrated that Smith appeared to have "knowledge . . . of [LaRose's] movements."[11] *Id.* at 2123.

In February 2014, Smith's behavior escalated.

[11] LaRose's colleague also testified that LaRose said that she had not reported the calls to anyone, apparently because she was concerned about being loyal to her client and maintaining client confidences. The colleague testified that she told LaRose that she had to report the calls to management. But because LaRose testified otherwise, we must consider the facts in the light most favorable to LaRose and evaluate the summary judgment and CR 50 motion assuming that LaRose's testimony about reporting the calls to Goldsmith and Hamaji was correct.

On February 16,[12] LaRose discovered that Smith had left literature about converting non-Muslim women to the Muslim faith in her home mailbox and found other evidence that Smith had been to her house. LaRose reported this to the police in person and requested a "police watch" on her house. 20 VRP (Oct. 6, 2021 a.m.) at 1650. An officer came to her house and retrieved the literature. Around that same time,[13] Smith began leaving messages on LaRose's work phone saying things that suggested to LaRose that he had been at her house.

On February 17, Smith left a voice mail referring to seeing LaRose's daughter and referencing her house. That evening, LaRose saw Smith staring at her from outside of her front gate while she was in the house, and she called 911.[14]

On February 18, LaRose sent an email to the felony unit describing the recent events and Smith's continued calling. LaRose stated in the email that she had contacted the police and would be seeking an anti-harassment order. Several of LaRose's coworkers responded to this email.

In her response to LaRose's email, another female attorney, Rebecca Lederer, told LaRose that she remembered Smith and that he was " 'the only client [she had] asked to have reassigned because he started leaving [her] love messages on [her] answering machine.' " 17 VRP (Sept. 30, 2021 a.m.) at 1414-15. According to LaRose, this was the first time she learned that Lederer had been removed from one of Smith's previous stalking cases. And LaRose was upset by this new information because she did not know this when she decided to remain on Smith's case until

[12] The record is vague about whether this occurred on February 16 or 17, but as a whole, the record seems to show that this occurred on February 16.

[13] The date this started is not clear from the record.

[14] The record does not reflect whether or how the police responded to this call.

completion of the case and, had she known, she would have stood by her initial decision to ask for the case to be reassigned.

Richard Lichtenstadter, a deputy director, responded that the front desk needed to be notified to watch for Smith in case he came to the office. After receiving LaRose's email, the front desk staff was told to direct Smith's calls to supervisors rather than to LaRose and was provided with a photograph of Smith.

Director Floris Mikkelsen responded that she was sorry to hear about these events and that LaRose needed to come to Mikkelsen's office to make a plan. According to LaRose, when she met with Mikkelsen, she told Mikkelsen that she had not known about any prior issues with Smith. LaRose believed Mikkelsen was angry and stated that Goldsmith should not have assigned her the case.

Mikkelsen offered LaRose a place to stay and offered to provide her with a wearable alarm. LaRose refused these offers. Mikkelsen also told LaRose that Hamaji should accompany her to court the next day and help her obtain a temporary protection order.

On February 19, Hamaji accompanied LaRose to court where she obtained a temporary protection order.

That same day, Smith left several voicemails for LaRose in which he said that he wanted to leave her a gift and to come by her house. As LaRose approached her car after leaving work that evening, she noticed a bag and a letter on the car's windshield. LaRose's car was parked in a private garage near her office.

Suspecting that the package and letter were from Smith, LaRose immediately headed back to the elevators and called 911 on her cell phone. As she headed towards the elevators, Smith

jumped out from behind a post and frightened LaRose. The elevator opened, and LaRose got on. The men who were in the elevator when she got on stayed with her until she got out of the garage.

In the early morning hours of February 20, Smith appeared at LaRose's bedroom door that led into her fenced backyard, pressed his nose to the glass, and knocked on the door. LaRose called the police and they came to her house, but they were unable to find Smith.

LaRose also called her ex-husband, and he came to stay with her. Smith then knocked on the bedroom door again, and LaRose once again called the police. LaRose then heard an "angry knock on the back door," and while she was on the phone to 911, Smith threw a rock through LaRose's bedroom window. 11 VRP (Sept. 30, 2021 p.m.) at 959. The police were unable to locate Smith. After Smith broke the bedroom window, he left a voicemail threatening to kill her ex-husband.

LaRose emailed her colleagues about what had occurred on the evening of February 19 and morning of February 20. At work a group gathered outside of her office, and LaRose heard Paul Vernon, another public defender, slap his hand on the bookshelf and say, " 'I told Ben not to assign that case to a woman.' " *Id.* at 962.

In an attempt to obtain assistance with the situation, Goldsmith and Mikkelsen reached out to the head of the criminal division at the King County Prosecutor's Office. Lichtenstadter also called the detective on the case to convey how serious the situation was after finding out that LaRose felt that the police were not acting fast enough to protect her by apprehending Smith. Hamaji also suggested to LaRose that she should "get a stick and look at some YouTube videos about stick defense" so she could defend herself in her home while waiting for the police if Smith came to her home again. 7 VRP (Sept. 22, 2021 p.m.) at 611.

On February 21, with assistance of several of her coworkers, LaRose lured Smith to a coffee shop near her work. When Smith arrived, LaRose's coworkers called 911, and Smith was arrested. Smith was subsequently convicted of felony stalking with sexual motivation in January 2015 and sentenced to seven years of confinement.

3. Consequences of Smith's Stalking

After Smith's arrest, LaRose continued to work on felony cases until she was assigned to attorney of the day duties sometime after June 2014. As the attorney of the day, LaRose did not carry her own caseload and, instead, appeared in the courtroom to handle arraignments.

After Smith was convicted in January 2015, it became increasingly difficult for LaRose to care for herself and her daughter, and she sought medical assistance. LaRose was ultimately diagnosed with depressive disorder, generalized anxiety disorder, and PTSD.

Upon her PTSD diagnosis in March 2015, LaRose requested medical leave. When she returned from medical leave in May 2015, LaRose returned to the ITA unit. She remained there until December 2015, when she was again placed on medical leave.

In June 2017, LaRose was medically separated and her employment with the County was terminated because she was unable to return to work in the foreseeable future.

II. LAWSUIT

A. Complaint, First Summary Judgment Motion, and First Appeal

> LaRose filed a lawsuit against [T]DA and the County, alleging among other claims that her supervisors' handling of the situation with Smith had created a hostile work environment in violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW, that [T]DA and the County were negligent in failing to protect her from Smith's harassment, that [T]DA and the County deliberately injured her, and that the County discriminated against her based on her disability [(PTSD)]. The trial court dismissed the hostile work

> environment claim under CR 12(b)(6) and granted summary judgment in favor of [T]DA and the County on LaRose's remaining claims.

LaRose v. King County, 8 Wn. App. 2d 90, 96-97, 437 P.3d 701 (2019).

LaRose appealed the CR 12(b)(6) dismissal of her hostile work environment, negligence, and disability discrimination claims. *See id.* at 102. This court decided *LaRose* on March 19, 2019.

In that appeal, "LaRose argue[d] that the trial court erred by ruling as a matter of law that [T]DA and the County could not be liable under the WLAD for the harassing behavior of a nonemployee." *Id.* at 104. We held "that under the circumstances here, [T]DA and the County may be subject to liability on a hostile work environment claim based on harassment of their employee LaRose by a nonemployee." *Id.* We defined the issue as, "whether a *nonemployee's* harassment of the plaintiff can be imputed to an employer when the employer knew of the harassment and failed to take adequate corrective action." *Id.* at 105.

We "adopt[ed] the federal rule and conclude[d] that a nonemployee's harassment of an employee in the workplace will be imputed to an employer if the employer '(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.' " *Id.* at 111 (quoting *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985)). We therefore "reverse[d] the trial court's ruling that as a matter of law [T]DA and the County could not be liable under the WLAD for the harassing behavior of Smith." *Id.*

We also examined whether the trial court erred when it denied the County's motion for summary judgment on the issue of vicarious liability and when it ruled that as a matter of law the County was vicariously liable for TDA's conduct prior to July 2013. *Id.* at 127. We concluded that

the County was not vicariously liable for TDA's conduct prior to July 2013 because TDA was acting as an independent contractor and not as an agent. *Id.* at 130.

Additionally, we addressed whether "the trial court erred by ruling that the IIA barred her negligence claims" because LaRose's injury or disease arising in the workplace met the IIA definition of an injury or occupational disease and was potentially compensable under the IIA. *Id.* at 113. We held that on remand there were remaining questions of fact as to (1) whether a singular traumatic event could be identified as causing LaRose's injury, and (2) whether any singular traumatic event produced an immediate result. *Id.* at 118-19.

B. Post Remand Summary Judgment Motions

After remand, the County filed a new summary judgment motion seeking to dismiss LaRose's hostile work environment and negligence claims. The trial court denied the County's motion for summary judgment.[15] The case then proceeded to trial.

C. Trial

At trial, the witnesses testified to the facts described above.

On October 11, 2021, after the close of LaRose's case, the County filed a "half-time motion" for judgment as a matter of law under CR 50.[16] 16 VRP (Oct. 11, 2021 p.m.) at 1491. The County argued that the hostile work environment claim should be dismissed because LaRose had failed to offer substantial evidence to prove the elements of the claim as a matter of law.

[15] Commissioner Bearse denied the County's and TDA's motion for discretionary review of the denial of these summary judgment motions. Ruling Den. Rev., *LaRose v. King County*, No. 55241-8-II (Wash. Ct. App. Jan. 19, 2021).

[16] This motion was not argued until after all of the testimony was complete.

The County argued that there was no evidence that during the 26-day period when LaRose represented Smith as a County employee that the County could have taken any corrective action to remedy Smith's behavior because he had already "latched onto" LaRose before she became a County employee. CP at 9764. The County also argued that it was not within its power to control Smith and all it could have done was remove LaRose from the case, but LaRose told Goldsmith that she wanted to remain on the case.

Regarding the post-representation period, the County argued that it could not be liable for off-premises conduct by a nonemployee over whom the County had no control and that it had appropriately protected LaRose in the workplace. The County also argued that in LaRose's first appeal this court had specifically stated that the claims that survived were " 'in the workplace' " and that Smith's actions took place outside the workplace. *Id.* at 9768 (emphasis omitted) (quoting *LaRose*, 8 Wn. App. 2d at 109). Additionally, the County argued that it had made appropriate efforts to protect LaRose at work during this time.

The trial court denied the motion to dismiss.

D. Verdict

The jury returned a verdict in LaRose's favor on the hostile work environment claim against the County. As instructed in the verdict form, because the jury found in LaRose's favor on the hostile work environment claim, the jury did not reach the negligence claim against the County.[17] The jury returned a verdict in favor of TDA on both the hostile work environment and negligence claims.

[17] LaRose's proposed verdict form contained this limitation.

Additionally, the jury found by special verdict that (1) LaRose suffered PTSD and/or depressive disorder, and (2) on a more probable than not basis that her PTSD and/or depressive disorder was the result of a single traumatic event.[18]

The jury awarded LaRose $4.8 million in non-economic damages and $2.2 million in economic damages. The jury also awarded over $4 million in attorney and paralegal fees to LaRose's counsel.

The County appeals.

ANALYSIS

DENIAL OF CR 50 MOTION

The County argues that the trial court erred when it denied the County's CR 50 motion[19] because, (1) regarding the post-representation period, the County cannot, as a matter of law, be liable for the actions of a nonemployee that occurred outside the workplace and after the professional relationship between the nonemployee and the employer ended; (2) there was no evidence that the County failed to take prompt action that was reasonably calculated to end Smith's post-representation, on-site harassment; (3) there was no evidence that Smith's harassment during the 26-days that LaRose represented Smith as a County employee affected the terms and conditions of LaRose's employment; and (4) the evidence did not establish that the County failed to take reasonably prompt and adequate corrective action during the time LaRose represented Smith as a

[18] To find that the PTSD and/or depressive disorder was the result of a single traumatic event, the jury instructions required the jury to find that the event was "sudden and produce[d] an immediate or prompt result." CP at 10291 (Instruction 27).

[19] The County also argues that the trial court erred when it denied its motion for summary judgment. But because we hold that the trial court erred when it denied the CR 50 motion, we do not address that argument.

County employee. The County also argues that if we reverse the verdict, remand for a decision on the negligence claim against the County is not required because the jury's special verdict establishes that the negligence claim is barred under the IIA.

To determine whether the trial court erred when it concluded that the County could be liable on the hostile work environment claim based on Smith's harassing behavior, we must address three distinct sets of events, (1) Smith's post-representation harassment that occurred away from the workplace, (2) Smith's post-representation contacts with LaRose at her workplace, and (3) Smith's actions during the 26-day period of time LaRose represented Smith while she was employed by the County.

We hold that the trial court erred when it failed to grant the County's CR 50 motion to dismiss LaRose's hostile work environment claim against the County as a matter of law and reverse the verdict and the related judgment and award of attorney fees. We need not remand for a decision on whether the IIA bars the negligence claim because that issue was resolved by the jury's special verdict.

A. Legal Principles

When reviewing a trial court's decision on a motion for judgment as a matter of law under CR 50, we apply the same standard as the trial court. *Johnson v. Liquor & Cannabis Bd.*, 197 Wn.2d 605, 611, 486 P.3d 125 (2021). The trial court should grant a motion for judgment as a matter of law only after a party has been "fully heard on an issue and 'there is no legally sufficient evidentiary basis for a reasonable jury to find or have found' for that party on that issue." *Mancini v. City of Tacoma*, 196 Wn.2d 864, 876-77, 479 P.3d 656 (2021) (quoting CR 50(a)(1)).

Motions for judgment as a matter of law "should be granted only when, after viewing the evidence in the light most favorable to the nonmoving party, there is no substantial evidence or reasonable inferences therefrom to support a verdict for the nonmoving party." *H.B.H. v. State*, 192 Wn.2d 154, 162, 429 P.3d 484 (2018). Substantial evidence exists when the evidence "is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Brown v. Superior Underwriters*, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

B. Hostile Work Environment Principles

Under RCW 49.60.180(3)[20] it is an unfair practice for an employer "[t]o discriminate against any person in compensation or in other terms or conditions of employment because of . . . , sex." RCW 49.60.030(2) permits a person discriminated against in violation of the WLAD to bring a civil action.

A hostile work environment is one form of sex discrimination. *Antonius v. King County*, 153 Wn.2d 256, 261, 103 P.3d 729 (2004). To establish a prima facie claim of a hostile work environment the plaintiff must show that "(1) the harassment was unwelcome, (2) the harassment was because of sex, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer." *Id.* Our supreme court adopted this test in *Glasgow*, 103 Wn.2d at 406-07.

Under the fourth element of this test, an employer will be responsible for harassment by an individual who is not an owner, manager, partner or corporate officer if the employer "(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt

[20] Although the legislature amended chapter 49.60 RCW in many respects in 2020, we cite to the current version of the statutes in chapter 49.60 RCW because the amendments did not alter the relevant portions of the statutes. LAWS OF 2020, ch. 52, §§ 4, 10.

and adequate corrective action." *Id.* at 407. Plaintiffs can establish knowledge and failure to take adequate corrective action by showing

> (a) that complaints were made to the employer through higher managerial or supervisory personnel or by proving such a pervasiveness of sexual harassment at the workplace as to create an inference of the employer's knowledge or constructive knowledge of it and (b) that the employer's remedial action was not of such nature as to have been reasonably calculated to end the harassment.

Id.

And in *LaRose*, we adopted federal precedent and expanded the *Glasgow* test to also include harassment by a nonemployee "if the employer '(a) authorized, knew, or should have known of the harassment and (b) failed to take reasonably prompt and adequate corrective action.' " 8 Wn. App. 2d at 111 (quoting *Glasgow*, 103 Wn.2d at 407).

C. County Liability for Post-Representation Harassment Away from the Work Environment

The County's core argument is that it cannot be liable on the hostile work environment claim based on Smith's post-representation harassment that occurred away from the work environment because that harassment occurred away from the office or other work-related premises after the professional (lawyer/client) relationship that Smith had with the County ended.

LaRose responds that hostile work environment claims can extend to this type of harassment if, under the totality of the circumstances, there is "a nexus" between the harassment and the work environment. Revised Br. of Resp't at 46. And she contends that the nexus here is provided because "[b]ut for" her representation of Smith, Smith's off-site, post-representation harassment would not have occurred. *Id.*

We agree with the County.

1. Law of the Case Doctrine Does Not Apply

Initially, the County contends that our repeated use of the phrase " 'in the workplace' " in *LaRose* establishes that "it is the law of the case that harassment by a nonemployee is actionable only when it takes place 'in the workplace,' " not away from the work-related environment by a nonemployee who no longer has a work relationship with the employer or plaintiff. Br. of Appellant at 15 (quoting *LaRose*, 8 Wn. App. 2d at 97). We reject the County's law of the case argument.

As used here, the law of the case doctrine stands for the proposition that a legal decision of an " 'appellate court establishes the law of the case and it must be followed . . . on remand.' " *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 58, 366 P.3d 1246 (2015) (emphasis omitted) (internal quotation marks omitted) (quoting *United States v. Rivera-Martinez*, 931 F.2d 148, 150 (1st Cir. 1991)). The doctrine " 'forbids, among other things, a lower court from relitigating issues that were decided by a higher court, whether explicitly or by reasonable implication, at an earlier stage of the same case.' " *Id.* at 56 (internal quotation marks omitted) (quoting *Municipality of San Juan v. Rullan*, 318 F.3d 26, 29 (1st Cir. 2003)).

In *LaRose*, we addressed "whether a *nonemployee's* harassment of the plaintiff can be imputed to an employer." 8 Wn. App. 2d at 105. Although we used the phrase "in the workplace" throughout the decision, the legal question addressed was the effect of Smith's status as a nonemployee, not whether the fact Smith's actions occurred outside of the work environment or after his professional relationship with LaRose had ended precluded LaRose's hostile work environment claim against the County. *Id.* at 97, 110-11. Because we never explicitly or by reasonable implication addressed whether actions that occurred outside of the work environment

after the professional relationship ended could establish a hostile work environment claim, we reject the County's law of the case argument.

LaRose also argues that *LaRose* establishes the law of the case and that it "established that a non-employee's stalking of an employee can create a hostile work environment under WLAD if the employee establishes the *prima facie* elements of a claim."[21] Revised Br. of Resp't at 44. But, again, in *LaRose* we did not address whether actions that occurred outside of the work environment after the professional relationship ended could establish a hostile work environment claim, so we reject LaRose's law of the case argument.

2. Post-Representation Harassment Occurring Outside of the Work Environment

a. County's Arguments

i. Cases Cited in *LaRose*

The County argues that the cases we relied on in *LaRose* demonstrate that employer liability based on conduct by a nonemployee is permitted only when the relevant acts occurred within the workplace or at off-site events that are the equivalent of the workplace.

This argument is not persuasive because none of the cases that the County identifies from *LaRose* required the court to consider whether an employer's liability extended to acts by third parties that did not occur either on work premises or during off-site work-related activities, so they are inapposite. *See Beckford v. Dep't of Corr.*, 605 F.3d 951, 953-56 (11th Cir. 2010) (sexual

[21] LaRose also suggests that this issue has already been decided because it was addressed in Commissioner Bearse's denial of King County's motion for discretionary review of the trial court's August 2020 denial of its second summary judgment motion. But "the commissioner's ruling has no binding effect on an independent review of the issues here." *Dalsing v. Pierce County*, 190 Wn. App. 251, 267 n.8, 357 P.3d 80 (2015).

harassment by prison inmates on work premises);[22] *Diaz v. AutoZoners, LLC*, 484 S.W.3d 64, 72-74 (Mo. Ct. App. 2015) (sexual harassment by customers on work premises); *Dunn v. Wash. County Hosp.*, 429 F.3d 689, 690 (7th Cir. 2005) (sexual harassment by independent contractor on work premises); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 964 (9th Cir. 2002) (sexual harassment and assault by client during and immediately following business dinner).

ii. EEOC Regulation and Federal Cases

Recognizing that there are no Washington cases that address this issue, the County next asserts that federal Equal Employment Opportunity Commission (EEOC) regulation 29 C.F.R. § 1604.11(e), and federal case law demonstrate that the harassing acts must take place in the workplace. Although the County admits that "[o]ff-site work events, such as business meetings, or other environments akin to the workplace where the employer exerts control are effectively 'in the workplace' and can form the basis for a [hostile work environment claim,]" it contends that the total absence of control over Smith's behavior after the end of the professional relationship demonstrates that the harassment here was not "in the workplace." Br. of Appellant at 17 n.6.

29 C.F.R. § 1604.11 provides, in part,

> (a) Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

[22] Washington courts "have frequently recognized that while federal discrimination cases are not binding, they may be persuasive and their analyses adopted where they further the purposes and mandates of state law." *Antonius*, 153 Wn.2d at 266. Our supreme court itself has examined federal cases interpreting Title VII when examining issues of first impression related to hostile work environment claims under WLAD. *See Robel v. Roundup Corp.*, 148 Wn.2d 35, 44, 59 P.3d 611 (2002).

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.
>
> (e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees *in the workplace*, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

29 C.F.R. § 1604.11 (emphasis added).

The use of the phrase "in the workplace" in subsection (e) does suggest that hostile work environment claims are limited to sexual harassment that occurs within the physical workplace or its equivalent.

The County cites *Bodman v. Maine, Department of Health and Human Services*, 787 F. Supp. 2d 89, 102-03 (D. Me. 2011).

Bodman involved harassment of a state employee by the employee's former boyfriend (a nonemployee) who occasionally had access to the employee's work premises as part of his job with another company. 787 F. Supp. 2d at 93-94. The only harassing conduct by the former boyfriend toward the employee that occurred within the employee's workplace was when the former boyfriend sent 39 emails within a month-and-a-half period to the employee at her state email address. *Id.* at 94, 107. The remainder of the harassment occurred away from the workplace. *Id.* at 94. The federal district court concluded that the employer could not be held liable for a hostile

work environment based on the ex-boyfriend's harassment that "occurr[ed] indisputably outside of the workplace." *Id.* at 103.

Bodman is the most factually similar case that the County cites because it includes a mix of harassment that occurs away from the workplace and a source of harassment within the workplace via some method of communication. And it suggests that Smith's actions away from the workplace—his physically stalking LaRose at the pierogi shop, the parking garage, and her home—cannot be the basis of a hostile work environment claim against the County.

The parties also cite *Holmes v. Utah, Department of Workforce Services*, 483 F.3d 1057, 1068 (10th Cir. 2007), a case that also addresses off-site harassment by a nonemployee. *Holmes* also supports the conclusion that harassment by a nonemployee who does not have a professional connection to the workplace, and that occurs away from work premises, cannot form the basis of a hostile work environment claim.

Holmes involved a supervisor who was sanctioned based on his sexual harassment of employees in the workplace; retired the next year, but continued to frequent the workplace because his wife worked there; and a year after that was barred from the premises after new allegations of harassment were raised. 483 F.3d at 1060. Several employees sued the employer for hostile work environment. *Id.*

On appeal, the Tenth Circuit addressed whether the acts that occurred the year after the supervisor's retirement, which consisted of him following one of the employees from the workplace to the post office and then grabbing her and frightening her, could support a hostile work environment claim. *Id.* at 1066, 1068. The court held that this act could not establish a hostile work environment in part because it "did not occur on the premises of the employer, or otherwise

in connection with [the employee's] work, and did not involve a fellow employee or supervisor." *Id.* at 1068.

The court noted that the employees had not cited any cases establishing that an employer has "a duty under Title VII to protect employees off the work premises from the conduct of nonemployees, even if such conduct may be found to be severe in its sexual overtones." *Id.* And it stated that "[t]he fact that [the former supervisor] may have committed an assault or some other tort against [an employee] off the work premises does not automatically translate into a Title VII violation by her employer." *Id.* *Holmes* supports the County's argument that Smith's off-site behavior following the termination of LaRose's representation cannot establish a hostile work environment.

The County also argues that limiting the harassment claim to harassment in the workplace is appropriate because it is the "employer's duty under the WLAD is to ensure a *workplace* free of discrimination" and because the only area of control an employer has is the workplace. Br. of Appellant at 18 (emphasis added). As noted above, the County admits that "[o]ff-site work events, such as business meetings, or other environments akin to the workplace where the employer exerts control are effectively 'in the workplace' and can form the basis for a [hostile work environment claim.]" *Id.* at 17 n.6. The County is correct that the purpose of hostile work environment claims under WLAD is to end discrimination *in the workplace and its off-site equivalents*, not to protect

employees from all possible injury remotely related to employment.[23] *Antonius*, 153 Wn.2d at 259; *Lapka v. Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008); *see also* RCW 49.60.010 (purpose of WLAD is eliminate and prevent discrimination in employment).

Additionally, *Bodman*, *Holmes*, and the EEOC regulation's use of the language "in the workplace" support the County's argument that the hostile work environment claims are intended to address claims of harassment within the work environment rather than off-site harassment not connected to the workplace or an existing work-relationship. When a nonemployee with no existing relationship with the employer engages in harassing behavior away from the workplace or broader work environment, the employer has no direct control over the situation and liability would be inappropriate.[24]

[23] The County cites several cases that are either inapposite because the harassment occurred on work premises or at work-related events and/or between coworkers or that rely on *dicta*. *See, e.g.*, *Powell v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024, 1025-26 (D. Nev. 1992); *Gliatta v. Tectum, Inc.*, 211 F. Supp. 2d 992, 1002 (S.D. Ohio 2002); *Stoner v. Ark. Dep't of Corr.*, 983 F. Supp. 2d 1074, 1084 (E.D. Ark. 2013); *Whitaker v. Carney*, 778 F.2d 216, 217 (5th Cir. 1985).

In a statement of additional authorities, the County also refers us to *Barlow v. State*, 2 Wn.3d 583, 540 P.3d 783 (2024). But *Barlow* addresses whether a university has a special duty under tort law to protect its students from third-party conduct occurring off campus, and it discusses control in the context of determining whether the special relationship duty that applies to "K-12 schools" should also apply to universities given the different degree of control each of these entities has over their students. 2 Wn.3d at 590-92. Hostile work environment claims are not based on the special relationship doctrine, so *Barlow* is not informative.

[24] The County also argues that limiting hostile work environment claims based on nonemployee harassment to the workplace "is consistent with the general rule that employers have no duty to protect employees from hazards outside the workplace" under the common law. Br. of Appellant at 20). But the County does not explain how the lack of a common law duty precludes a statutory duty under WLAD.

Citing *Powell v. Morris*, 37 F. Supp. 2d 1011, 1017 (S.D. Ohio 1999), the County also argues that it is absurd to require an employer to control a criminal's behavior. But the County overstates *Powell*.

Powell involved a hostile work environment claim brought by a secretary in a correctional institution. *Powell*, 37 F. Supp. 2d at 1013. The court stated, "Courts have repeatedly declined to impose sexual harassment liability upon correctional institutions for the sexually offensive conduct of inmates, as long as the defendant institution took proper preventative and remedial steps with regard to inmate behavior." *Id.* at 1017. It further stated,

> The propensity of courts to decline imposing liability for prisoner acts is based on solid logical and practical foundations: anyone who works at a prison, particularly in a position with frequent inmate contact, must expect some off-color interactions. Prison employees inherently assume the risk of some rude inmates. It is absurd to expect that a prison can actually stop all obscene comments and conduct from its inmates—people who have been deemed unsuited to live in normal society. The most we can expect and require prisons to do is to implement and enforce policies reasonably calculated to minimize such harassment and protect the safety of its employees.

Id.

Although *Powell* suggests that the nature of the work environment as a whole should be considered when determining whether harassing behavior results in a hostile work environment, it does not address harassment that occurs outside of the work environment. Accordingly, *Powell* is not helpful to the County.

b. LaRose's Arguments

LaRose argues that harassment occurring away from work premises can establish a hostile work environment when, under the totality of the circumstances, "it has a nexus to the work environment." Revised Br. of Resp't at 46. This nexus requirement is satisfied, according to

LaRose, if "[b]ut for her employment as a public defender," she would not have experienced the harassing behavior. *Id.* She cites *Glasgow*, *Antonius*, and *Doe v. Oberweis Dairy*, 456 F.3d 704, 715 (7th Cir. 2006), to support her argument.[25]

Glasgow and *Antonius* merely establish that "[w]hether the harassment *at the workplace* is sufficiently severe and persistent to seriously affect the emotional or psychological well being of an employee is a question to be determined with regard to the totality of the circumstances." *Glasgow*, 103 Wn.2d at 406-07 (emphasis added); *Antonius*, 153 Wn.2d at 261. And because all of the harassment at issue in both cases was on-site, the courts in *Glasgow* and *Antonius* had no reason to consider whether off-site harassment by a nonemployee could provide grounds for a hostile work environment claim. *Glasgow*, 103 Wn.2d at 402-403; *Antonius*, 153 Wn.2d at 259-60. And in *Oberweis Dairy*, the off-site act occurred during an ongoing work-relationship between a supervisor and an employee. 456 F.3d at 716. Thus, these cases do not support the conclusion that all that is required to establish a hostile work environment claim is some nexus to the worksite or but-for causation.

LaRose also directs this court to an excerpt from an article in The DIGEST of Equal Employment Opportunity Law that briefly discusses off-site sexual and racial harassment claims. The article cites several cases discussing the "[e]merging issue[]"of harassment claims based on conduct outside the workplace and concludes:

> These decisions demonstrate that courts may apply a totality of the circumstances approach when determining employer liability for employees' conduct outside the workplace. The fact that harassment is carried out at a location other than the

[25] Citing *Glasgow*, 103 Wn.2d at 406 n.2, LaRose states that "Title IX" cases are instructive to the application of WLAD. Revised Br. of Resp't at 46. But *Glasgow* refers to Title VII, not Title IX. 103 Wn.2d at 406 n.2.

> workplace may not be enough to protect employers from liability if there is a nexus between the alleged harassing activity and the workplace.

Jacob Workman et al., *The Law of Harassment: Assisting Agencies in Developing Effective Anti-Harassment Policies*, 25 DIG. EQUAL EMP'T OPPORTUNITY L., no. 3 (Summer 2014), https://www.eeoc.gov/federal-sector/digest/digest-equal-employment-opportunity-law-70#titlevii [https://perma.cc/8CGZ-9A4B].

LaRose refers us to three of the cases discussed in the digest article: *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 392, 409 (1st Cir. 2002); *Dowd v. United Steelworkers of Am., Loc. No.* 286, 253 F.3d 1093, 1102 (8th Cir. 2001); and *O'Rourke v. City of Providence*, 235 F.3d 713, 724 (1st Cir. 2001). But these cases can be distinguished because, unlike here, they address off-site harassment by coworkers that was related to ongoing harassment within the workplace. *Crowley*, 303 F.3d at 398-400; *Dowd*, 253 F.3d at 1101; *O'Rourke*, 235 F.3d at 724.

LaRose also contends that our supreme court's negligence analysis in *N.L. v. Bethel School District*, 186 Wn.2d 422, 378 P.3d 162 (2016), is analogous to this case. She contends that *N.L.* establishes "that the relevant inquiry is *the location of the negligence*, not the location of the injury," and that this "is no different as to the location of the conduct creating the hostile work environment," specifically, the County's failure to act. Revised Br. of Resp't at 47.

In *N.L.*, our supreme court held that a negligence claim against a school district could proceed in a case where a junior high school student was raped off campus during school hours by a high school student whom the district knew was a registered sex offender. 186 Wn.2d at 425-26. The court held that the relevant issue was whether the breach of the school district's duty to protect children from foreseeable risks of harm occurred when the students were on school grounds, regardless of where the injury occurred. *Id.* at 435. The court held that "districts have a duty of

reasonable care toward the students in their care to protect them from foreseeable dangers that could result from a breach of the district's duty. While the location of the injury is relevant to many elements of the tort, the mere fact the injury occurs off campus is not by itself determinative." *Id.*

But LaRose's negligence claim is not at issue. And, unlike the school district's duty in *N.L.*, the County's duty under WLAD is not to protect its employees from any foreseeable harm, regardless of where it occurs. Rather, the employer's duty under WLAD is to ensure that the employee is not subject to a hostile work environment. *Antonius*, 153 Wn.2d at 259; *see also* RCW 49.60.010 (purpose of WLAD is to eliminate and prevent discrimination in employment). *N.L.* does nothing to expand that duty.

c. Amici's Arguments

Amici argue that WLAD protects employees from harassment that occurs by nonemployees. That issue was resolved in *LaRose*, so it need not be further addressed in this appeal.

Amici also argue that there is Title VII precedent that establishes that the nonemployee harassment need not occur on the employer's physical premises. Amici cite *Lapka*, 517 F.3d at 983. In *Lapka*, the sexual harassment occurred when the employee was raped by a coworker after socializing following a mandatory off-site training session. 517 F.3d at 978-79. Although *Lapka* demonstrates that the workplace need not be confined to the physical facility where the employee works, it shows only that harassment in the workplace can include harassment between coworkers that occurs during work-mandated activities held off-site. But in LaRose's case, with regard to the off-site, post-representation harassment, there was no ongoing coworker relationship, any

professional relationship had been severed, and the off-site harassment did not occur during a work-related event. Thus, *Lapka* is not instructive.

Amici also cite *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 60, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986). But *Meritor Savings Bank* addressed sexual harassment of a bank employee by a supervisor that occurred both on and off the work-premises while the harassment victim was employed, and the location of the harassment was not at issue in the appeal. 477 U.S. at 60. Accordingly, *Meritor Savings Bank* is not helpful to LaRose.[26]

Amici also argue that some state appellate courts recognize that conduct occurring outside of the workplace can " 'permeate the workplace' " and can " 'contribute[ ] to the hostile work environment.' " Amicus Brief (AB) at 12-13 (quoting *Blakey v. Cont'l Airlines*, 164 N.J. 38, 56-58, 751 A.2d 538 (2000)). They quote *Blakey*, 164 N.J. 38, and cite *Doe v. Capital Cities* (1996) 50 Cal. App. 4th 1038, 58 Cal. Rptr. 2d 122. *Blakey* is not persuasive, and *Capital Cities* weighs against LaRose's argument.

In *Blakey*, the New Jersey Supreme Court addressed whether an employer could be liable on a hostile work environment claim based on online harassment by coworkers within an electronic forum available on a work-related electronic bulletin board. 164 N.J. at 48-54. The court determined that even though the electronic forum was not part of the physical workplace setting, harassment within the forum could support a hostile work environment claim if the electronic forum was "closely related to the workplace environment and beneficial to [the employer]." *Id.* at

[26] Amici also cite *Ratliff v. United States Postmaster General*, No. 2:06-cv-00115, 2008 WL 11450458 (S.D. Ohio Feb. 1, 2008), an unpublished district court opinion. But, again, *Ratliff* and the cases on which it relies all involved harassment by a coworker or work supervisor during an existing employment relationship.

46. Acknowledging that "[c]onduct that takes place outside of the workplace has a tendency to permeate the workplace," the court held that such communications could be grounds for a hostile work environment claim if the electronic bulletin board was "sufficiently integrated with the workplace" that it "should be regarded as a continuation or extension of the pattern of harassment that existed in the [employer's] workplace." *Id.* at 57-61.

Again, unlike here, *Blakey* involved harassment by coworkers. And the court in *Blakey* does not state that all harassment occurring away from the physical workplace with the potential to permeate the workplace creates a hostile work environment. The court states that it can do so if the location of the harassment is sufficiently related to the workplace environment that it should be considered an extension of the workplace. Here, Smith's physical harassment took place at locations (the pierogi shop, the public garage, and LaRose's home) that were not an extension of the workplace. And although Smith's harassing behavior may have started in the workplace, his later acts of physical stalking LaRose were not integrated into the workplace.

In *Capital Cities*, an actor brought a hostile work environment claim against a casting director who raped the actor in his home during the period of time in which the actor and the casting director had been engaging in activities that were intended to lead to an employment contract. 50 Cal. App. 4th at 1042-43. The California Court of Appeal addressed whether the fact the harassing behavior occurred in the casting director's home outside of normal work hours precluded the hostile work environment claim. *Id.* at 1047-48.

The court concluded that the harassing behavior did not have to occur on the worksite because the nature of the business relationship did "not conform to the limited and traditional [ ] process" that was common in other industries and was "not necessarily limited to a fixed cite." *Id.*

at 1050-51. The court stated, "All that is required is a showing of a legally sufficient nexus between the employment relationship and the act of harassment. That is, as long as the harassment occurs *in a work-related context*, the employer is liable." *Id.* at 1051 (emphasis added). Additionally, in analogizing to tort law, the court noted that a "but-for" causation would *not* be sufficient to establish liability and that there had to be "a causal nexus between the [act] and the employee's work." *Id.* at 1049.

Capital Cities undermines LaRose's argument that all that was required to hold the County responsible for Smith's off-site, post-representation behavior was a but-for nexus to the workplace. Instead, in *Capital Cities*, the court required that the harassment in some way relate to the employment relationship. *Id.* at 1050. And because LaRose's representation of Smith had terminated, Smith's physical stalking did not occur in a work-related context.

Amici also assert that courts have held employers accountable for failing to remedy harassment under circumstances similar to those here. Amici cite to *Christian v. Umpqua Bank*, 984 F.3d 801, 806-07 (9th Cir. 2020), to support this assertion.[27]

In *Umpqua Bank*, a bank employee brought a hostile work environment action against her employer after a bank customer stalked and harassed her in her workplace and at an employer

[27] Amici also cite *McGuinn-Roe v. Foster's Daily Dem.*, No. 94623-SD, 1997 WL 669965 (D. N.H. July 10, 1997), an unpublished federal district court order. *McGuinn-Rove* featured a mixture of on-site and off-site sexual harassment by one coworker toward another. 1997 WL 669965 at *1. The court noted that the off-site harassment "may have formed part of a pattern of such harassment," and could "be relevant to the issue of whether plaintiff experienced a hostile environment at her place of work." *Id.* at *3. But the inclusion of the off-site harassment in *McGuinn-Rove* was based on the fact the harassment was perpetrated by a coworker whom the harassed employee was forced to encounter regularly in the workplace. Because Smith was not LaRose's coworker and there was no business relationship requiring LaRose to maintain any kind of contact with Smith, *McGuinn* is unhelpful to LaRose.

sponsored charity event. 984 F.3d at 805-08. Although *Umpqua* is one of the few cases involving harassment by a nonemployee, the circumstances in *Umpqua* are not similar to the those in this case because the contacts with the nonemployee stalker all occurred while the nonemployee had an active business relationship with the employer and they all occurred on work premises or when the employee was representing her employer at an off-site function. *Id.*

Amici further contend that "denying workers protections from harassment by third parties when it takes place outside a physical workplace ignores the realities of sexual harassment and the parameters of myriad work environments." AB at 14 (boldface omitted). They argue that it is now common for workplaces to extend beyond the confines of the traditional office and that "an employer's responsibility to ensure a work environment free of discrimination, including sexual harassment, does not end at the office door, but rather extends to other locations where an employee may interact with colleagues, customers, or clients." *Id.* at 14-15. Amici is correct that hostile work environment claims are not restricted to on-premises harassment or to harassment solely by coworkers. But the crux of this issue is not just that Smith's physical harassment occurred outside of the work premises or that he was a client rather than a coworker. It is whether off-site acts by someone with *no remaining professional relationship* to the employer or employee can be the basis of a hostile work environment claim when the harassment bears no relationship to the past professional relationship.

Amici also refer us to an article stating that a significant percentage of sexual harassment cases address conduct occurring outside of the workplace, Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 563 (2001). The article reviews approximately 650 cases and determines that 23 percent of those cases involved allegations of

harassment that did not occur at the work-site. Juliano & Schwab, *supra*, at 549-50, 563. It concludes that 35 of those 650 cases involved "non[-]consensual, off-premises conduct, such as phone calls, letters, or visits to the victim's home." *Id.* at 563. But the article does not reveal whether these contacts were by coworkers or non-coworkers, or whether they occurred during a professional or business relationship or after such a relationship had terminated, so the article does little more than confirm that off-site harassment is not uncommon.

Quoting *Parrish v. Sollecito*, amici point out that harassment that occurs off-site can have consequences that "may be felt in the victim's 'workplace' or 'work environment.' " AB at 18 (quoting 249 F. Supp. 2d 342, 344-46 (S.D.N.Y. 2003)). But, *Parrish* involved harassment by a coworker or supervisor during the period of employment so, unlike here, the employee was forced to continue to encounter her harasser at the workplace. Any stressor can potentially have consequences in the employee's workplace, but that does not mean that the employer has the responsibility to protect the employee from all stressful events.

Amici argue that liability should extend to employees who, like LaRose, "only interacted with [their] harasser because of [their] employment relationship" when the employer fails to take sufficient remedial action to prevent the harassment from "escalating to include conduct outside the physical workplace." *Id.* at 18-19. But amici does not cite to any authority demonstrating that this is the rule. They cite only *Oberweis Dairy*, which involved harassment during the period of employment. 456 F.3d at 716.

d. Discussion

Although there is little direct authority addressing whether under WLAD a nonemployee's conduct outside of the work environment after the termination of a professional relationship can create a hostile work environment, persuasive authority demonstrates that the answer is no.

There is little case law discussing harassment by nonemployees away from the work environment. But 29 C.F.R. § 1604.11(e)'s express reference to "in the workplace" and *Bodman* and *Holmes* weigh in favor of concluding that WLAD does not require employers to ensure that their employees are free of non-work-related sexual harassment by nonemployees outside of the work environment. And because Smith's physical stalking of LaRose took place entirely off work premises and not during any work-related off-premises activity, after his professional relationship with LaRose and the County had ended, and did not relate to LaRose's representation of Smith beyond the fact her representation put Smith in contact with LaRose, the facts do not demonstrate that Smith's off-site harassment was in the workplace.

LaRose and amici do not cite any authority contradicting *Bodman* and *Holmes*. And although LaRose contends that she would not have been harassed by Smith but for her contact with him through her representation, *Capital Cities* suggests that but-for causation is not sufficient to establish liability. 50 Cal. App. 4th at 1049. In that case, the court held that but-for causation was insufficient and that there had to be "a causal nexus between the [harassment] and the employee's work."[28] *Id.* at 1049. Because LaRose's representation had ended, her employment no

[28] The County also contends that if a "but-for" nexus was all that was required, an employer could potentially be liable for hostile work environment claims arising from harassment at any location by anyone the employee met at work. Reply at 7. The County appears to be correct, and it is unlikely that such an absurd result would be intended.

longer required Smith to have any contact with LaRose or anyone else in the workplace. Thus, there was no causal nexus.

Additionally, although the facts of this case are disturbing, in the end the purpose of WLAD hostile work environment claims is to end discrimination in the work environment, not to protect employees from all possible injury remotely related to employment. *Antonius*, 153 Wn.2d at 259; *see also* RCW 49.60.010 (purpose of WLAD is to eliminate and prevent discrimination in employment). Imposing liability for personal harassment unrelated to the employment that occurs in locations not related to the harassment victim's employment does not further that purpose.

We hold that the trial court erred by not dismissing the portion of the hostile work environment claim against the County based on Smith's post-representation, off-site harassment of LaRose because it was not in the work environment and it was not related to her work.

D. Post-Representation Acts of Third Party Within the Workplace

We must also address the fact that some of Smith's post-representation harassment was connected to the workplace because he continued to call LaRose at work. We hold that, even assuming that the County could be held liable based on Smith's post-representation phone calls, the trial court erred by not dismissing the portion of the hostile work environment claim based on the post-representation phone calls because LaRose did not present evidence establishing that the County's response to the calls was inadequate.

29 C.F.R. § 1604.11(e) states that when the harasser is a nonemployee and the harassment is in the workplace, the EEOC "will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees" when determining if the employer is responsible for the nonemployee's acts. Smith's

post-representation conduct within the workplace consisted entirely of phone calls. Although these calls had no further relevance to Smith's representation and the County had no control over Smith's actions, the County was still aware that he was calling LaRose in the office and harassing her after July 26, 2013, and it had some ability to control Smith's access to LaRose in the workplace. Thus, it is possible that the County could be subject to a hostile work environment claim based on the continuing calls in the workplace.

However, we hold that the trial court should have dismissed the portion of the claim based on Smith's post-representation phone calls because there was no evidence that the County failed to adequately address this harassing behavior.

When addressing workplace harassment, the employer has a duty "to take prompt action reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring." *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 813 (7th Cir. 2001). "[T]he fact that an employer's efforts do not actually succeed in stopping or preventing the harassment is not determinative." *Mod. Cont'l/Obayashi v. Mass. Comm'n Against Discrimination*, 445 Mass. 96, 109, 833 N.E.2d 1130 (2005). The focus is not on whether the employer's remedial action was successful but, rather, " ' whether the employer's total response was reasonable under the circumstances as then existed.' " *Id.* (quoting *Berry*, 260 F.3d at 811).

Furthermore, the employer is not "required to take what would, with hindsight, be considered better or more effective measures." *Id.* "[A] plaintiff does not establish an employer's liability merely by showing that the employer 'could have done more.' " *Id.* (quoting *Berry*, 260 F.3d at 813). Instead, "the plaintiff must show 'that the steps that [the employer] actually took

were not reasonably likely to prevent the harassment from recurring.' " *Id.* (alteration in original) (quoting *Berry*, 260 F.3d at 813).

The County provided LaRose with a means to avoid Smith's calls because she was able to screen them. And because Smith was no longer a client, LaRose was under no obligation to listen to the messages or calls or to interact with Smith. In fact, by October or November 2013, LaRose was actively screening her calls to avoid contact with Smith. Because Smith's only workplace contact with LaRose was his calls, this response was reasonable under the circumstances that existed and it was likely to prevent Smith's harassment in the workplace.

There were certainly other actions the County could have taken to prevent Smith from calling LaRose at work, such as redirecting all of LaRose's calls through reception to ensure that none of his calls went to her voicemail or seeking an antiharassment order that would preclude Smith from contacting the County. But the fact the County could have provided different relief is irrelevant because the call screening mechanisms were reasonably likely to prevent Smith's on-site harassment, which consisted entirely of his calls.

We hold that the trial court also erred by not dismissing the hostile work environment claim against the County to the extent it was based on Smith's post-representation phone calls to LaRose at her office because LaRose did not present evidence establishing that the County failed to take reasonably prompt and adequate corrective action. *Glasgow*, 103 Wn.2d at 407.

E. County Liability During the 26-Day Period of Representation as a County Employee

1. Terms and Conditions of Employment

The County asserts that the trial court erred when it failed to dismiss the hostile work environment claim against the County based on the harassment that occurred during the 26-days

that LaRose represented Smith while she was a County employee. The County argues that although LaRose may have continued to receive unwanted phone calls from Smith during this time period, nothing in the record shows that Smith's contacts changed once the County became LaRose's employer and that the evidence failed to demonstrate that Smith's alleged harassment during that brief period affected the terms and conditions of LaRose's employment.[29] We agree.

As stated above, to establish her hostile work environment claim against the County, LaRose had to establish that Smith's harassing behavior affected the terms and conditions of her employment. *Antonius*, 153 Wn.2d at 261. Factors that the courts consider when "determining if a hostile work environment claim affects the terms and conditions of employment are the frequency and severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating or a mere offensive utterance, and whether the conduct unreasonably interferes with an employee's work performance." *LaRose*, 8 Wn. App. 2d at 111-12.

Although the County's alleged failure to intervene with Smith may have resulted in LaRose continuing to represent him during this short period of time, nothing in the record suggests that Smith's alleged harassment during this time escalated or that it interfered with LaRose's work performance or otherwise altered the terms and conditions of her employment during that 26-day period. Accordingly, the trial court erred when it refused to grant the County's motion for a

[29] The County also contends that because the facts related to the harassment did not change during the brief period of time LaRose represented Smith as a County employee and the jury rejected the hostile work environment claim against TDA, there were no grounds to find for LaRose on her claim against the County between July 1 and July 26, 2013. The County argues that the jury's verdict exonerating TDA means that the jury must have based its guilty finding on the post-representation harassment. But we are reviewing the trial court's decisions on the County's pre-verdict motions, so the trial court would not have been aware of the verdict when it made those decisions. Accordingly, we do not consider the verdict in favor of TDA when examining whether the trial court erred by not dismissing the hostile work environment claim against the County.

judgment as a matter of law in regard to the 26-day period of time in which LaRose represented Smith as a County employee.

2. Prompt and Adequate Corrective Action

The County also argues that the trial court erred in denying the County's motions because the evidence showed that the County took reasonably prompt and adequate corrective action to end the workplace harassment during the 26-day period that LaRose represented Smith as a County employee.

The County contends that the trial court's removal of LaRose from Smith's case was an adequate corrective action. We agree.

Removal from the case was an appropriate response to Smith's harassment. During this 26-day period of time that LaRose represented Smith as a County employee, as evidenced by her prior request to have the case reassigned, LaRose was aware that withdrawing from the case was an option. Although she had previously chosen not to exercise that option, once the decision was made to end her representation, that decision was executed within a week.

Although a 26-day period of representation could arguably be a long period of time if all the County had to do was substitute LaRose with another public defender, LaRose cannot make this argument because the court's jury instruction 22 provided: "A Washington Court Rule provides that once a criminal case has been set for trial, no lawyer shall be allowed to withdraw from the case, except upon written consent by the court, for good and sufficient reason shown." CP at 10286. And because this instruction has not been challenged, it is the law of the case. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016).

Notably, LaRose's argument appears to be that the acts or omissions of her *prior* supervisors at TDA (who became her supervisors at the County) can somehow create liability for the County. But the trial court instructed the jury that "[i]n determining whether [LaRose] has proven the elements of a hostile work environment claim with respect to King County, you should consider acts or omissions of King County occurring" only during the time the County was LaRose's employer. CP at 10278 (Instruction 12). In the same instruction, the court also directed the jury to "decide the case against each Defendant separately as if it were a separate lawsuit." *Id.* Thus, this argument is precluded by the trial court's instructions to the jury.[30]

To circumvent this limitation, LaRose appears to argue that the moment the County took over, the County had the duty to address Smith's harassment based on *information* LaRose's supervisors had acquired before the County became her employer. This information includes the facts of Smith's prior and then-current stalking charges, the knowledge of Smith's boundary crossing with Lederer and Lederer's request for reassignment of the case, the fact Vernon apparently told Goldsmith that Smith's cases should never be assigned to a woman, and Smith's boundary crossing with LaRose during her employment with TDA.

This argument seems to suggest that once the County took over it should have, based on this knowledge, immediately and sua sponte reassigned Smith's case and that the County's failure to do so was an actionable act or omission by the County. But, even assuming this was true, as noted previously, LaRose was removed from the case within 26 days of the County becoming her

[30] Notably, we also concluded in LaRose's prior appeal that the County was not vicariously liable for TDA's conduct prior to July 2013 because TDA was acting as an independent contractor and not as an agent. *LaRose*, 8 Wn. App. 2d at 130.

employer, and there is no evidence that during this 26 days Smith's behavior altered any of the terms and conditions of her employment.

Accordingly, we hold that the trial court erred when it refused to grant the County's motion for judgment as a matter of law in regard to the period of time in which LaRose represented Smith as a County employee because there is no evidence that the County failed to take prompt and adequate corrective action.

F. Summary and Remedy

We hold that the trial court erred when it denied the County's CR 50 motion to dismiss LaRose's hostile work environment claim to the extent it was based on (1) Smith's post-representation, off-site physical harassment, (2) Smith's post-representation phone calls, and (3) Smith's harassment during the 26-day period that LaRose represented Smith as a county employee. Accordingly, we hold that the trial court erred when it failed to dismiss LaRose's hostile work environment claim against the County and reverse the verdict and the related judgment and award of attorney fees.

We must next address whether this matter should be remanded for a new trial on LaRose's negligence claim against the County. The County asserts that remand for a new trial on the

negligence claim is precluded because the jury found that LaRose's related injuries were compensable under the IIA. LaRose does not respond to this argument.[31]

As we recognized in *LaRose*, under the IIA "employers generally are immunized from negligence liability" for injuries based on workplace injuries and occupational disease. *LaRose*, 8 Wn. App. 2d at 113-14. Thus, if LaRose suffered a workplace injury or occupational disease, she cannot also obtain relief based on a negligence claim against the County and remand is not required.

An occupational disease is "such disease or infection as arises naturally and proximately out of employment." RCW 51.08.140. "Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease." WAC 296-14-300(1). But, under WAC 296-14-300(2)(a), "[s]tress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury." "[A]n 'injury' is a 'sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.' " *LaRose*, 8 Wn. App. 2d at 114 (quoting RCW 51.08.100).

The County contends that because the jury found by special verdict that LaRose suffered from a mental health condition and that "on a more probable or not basis that this condition was

[31] LaRose unsuccessfully brought an IIA claim as an occupational disease claim, and she stipulated that "her mental conditions were not the result of a single traumatic event but, rather, the result of the cumulative effect from repeated traumatic events." *LaRose v. Dep't of Lab. & Indus.*, 11 Wn. App. 2d 862, 866, 456 P.3d 879 (2020). Neither party discusses how or if the resolution of her IIA claim in any way effects the decision on her negligence claim. But as long as the IIA *covers* an injury or disease, the bar applies even if the claimant fails to meet the burden of proof on some component of the claim and therefore cannot actually obtain compensation under the IIA *LaRose*, 8 Wn. App. 2d at 114.

the result of a single traumatic event," it found that she suffered an industrial injury and the IIA bars any recovery on her negligence claim so remand is not required. Br. of Appellant at 79; CP at 10300. We agree.

In this context, "an 'injury' is a 'sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without, and such physical conditions as result therefrom.' " *LaRose*, 8 Wn. App. 2d at 114 (quoting RCW 51.08.100). The jury found that LaRose's mental health condition was the result of a single traumatic event. Although a finding that a plaintiff experienced a single traumatic event alone would not necessarily establish an industrial injury, it does in this instance because the jury instructions required the jury to find that the relevant event was "sudden and produce[d] an immediate or prompt result" in order to find the mental health condition was caused by a single traumatic event. CP at 10291 (Instruction 27).

Because the IIA precludes LaRose's recovery on her negligence claim against the County, remand is not required.

ATTORNEY FEES ON APPEAL

LaRose requests "appellate fees" under RAP 18.1(b) and RCW 49.60.030(2). Revised Br. of Resp't at 78. Because LaRose is not the prevailing party, we deny her request for fees.

CONCLUSION

We reverse the trial court's denial of the County's CR 50 motion to dismiss the hostile work environment claim and remand for dismissal of that claim.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, C.J.

We concur:

GLASGOW, J.

VELJACIC, J.

Filed
Washington State
Court of Appeals
Division Two

June 13, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHEILA LAROSE, Respondent, v. KING COUNTY, WASHINGTON, Appellant, PUBLIC DEFENDER ASSOCIATION D/B/A THE DEFENDER ASSOCIATION (TDA), Defendant below.	No. 56455-6-II ORDER DENYING MOTION TO PUBLISH

Appellant, Sheila LaRose, moves for publication of the court's unpublished opinion filed May 14, 2024. After consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Glasgow, Cruser, Veljacic

FOR THE COURT:

CHIEF JUDGE

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division II Cause No. 56455-6-II to the following parties:

Patricia A. Eakes
Damon C. Elder
Morgan, Lewis & Bockius LLP
1301 Second Avenue, Suite 3000
Seattle, WA 98101

Mary Ruth Mann
James Kytle
Mann & Kytle, PLLC
1425 Western Avenue, #104
Seattle, WA 98101

Susan Mindenbergs
Law Office of Susan Mindenbergs
705 Second Avenue, Suite 1050
Seattle, WA 98104

David J. Hackett
Ann M. Summers
Senior Deputy Prosecuting Attorney
701 Fifth Avenue, Suite 600
Seattle, WA 98104

Original electronically filed by appellate portal to:
Court of Appeals, Division II
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 10, 2024 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

July 10, 2024 - 1:54 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56455-6
Appellate Court Case Title:	Sheila LaRose, Respondent v. King County, Appellant
Superior Court Case Number:	15-2-13418-9

The following documents have been uploaded:

- 564556_Petition_for_Review_20240710135159D2404227_9692.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- ann.summers@kingcounty.gov
- brad@tal-fitzlaw.com
- christine@sbmlaw.net
- damon.elder@morganlewis.com
- david.hackett@kingcounty.gov
- ericak@calfoeakes.com
- gary@tal-fitzlaw.com
- jkytle@mannkytle.com
- kelly.kennedy@morganlewis.com
- lixi.colmenero@morganlewis.com
- matt@tal-fitzlaw.com
- mrmann@mannkytle.com
- patty.eakes@morganlewis.com
- susanmm@msn.com

Comments:

Petition for Review

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20240710135159D2404227