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Timothy E. Allen

THE FORESEEABILITY OF TRANSFERENCE: EXTENDING EMPLOYER LIABILITY UNDER WASHINGTON LAW FOR THERAPIST SEXUAL EXPLOITATION OF PATIENTS

Timothy E. Allen, M.A.

Abstract: Transference, or the idealization of therapists, is a phenomenon that is foreseeable in every relationship between a therapist and a patient, and makes patients uniquely vulnerable to sexual exploitation by therapists. Transference has been recognized as a basis for finding therapists directly liable for harm resulting from sexual relations with patients. However, limitations on damages directly available from therapists lead patients to seek redress from therapists' employers under theories of employer liability. Washington courts generally deny victimized patients relief from the employers of sexually exploitative therapists. This Comment argues that Washington courts should impose employer liability when therapists sexually exploit their patients, due to the foreseeability of transference. Employer liability is consistent with three existing theories of Washington agency law: (1) the exploitation of transference arises out of pursuit of the employer's business, subjecting employers to respondeat superior liability; (2) patients qualify for a special relationship with their therapist's employer, which imposes a direct duty on the employer to protect those patients; and (3) the risk of a therapist's exploitation of transference is sufficiently foreseeable to subject employers to liability on the basis of negligent supervision.

S.H.C. became a follower of a prominent Buddhist priest.[1] After years of devotion, she sought the priest's counsel for curing her headaches.[2] The priest informed S.H.C. that her headaches should be the least of her worries, as he sensed she would soon die.[3] However, the priest offered to both save her life and cure her headaches by treating her with the "Twin Body Blessing."[4] After three years of the priest's periodic "cure" in the form of sexual intercourse, S.H.C. sued the priest's temple under various theories of employer liability.[5] Division I of the Washington Court of Appeals upheld the trial court's dismissal of all claims against the temple,[6] interpreting Washington agency law to require a "special relationship" between S.H.C. and the temple before the temple could be held directly liable for any harm caused by the priest's intentional acts.[7] After reviewing available Washington precedent, the court held that

1. S.H.C. v. Lu, 113 Wash. App. 511, 515, 54 P.3d 174, 175 (2002).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 515, 54 P.3d at 176.
6. *Id.* at 531, 54 P.3d at 184.
7. *Id.* at 525, 54 P.3d at 180.

S.H.C. did not have a special relationship with the temple because her status as an adult made her "unlike the victims who have been found to be vulnerable in other cases."[8] The appellate court also refused to impose direct liability on the temple under a theory of negligent supervision.[9]

The case of S.H.C. highlights the shortcomings in Washington law regarding tort liability for employers of sexually exploitative therapists.[10] Therapists' *employers* face minimal liability in Washington courts for therapist sexual misconduct. Some courts have found employee sexual misconduct necessarily beyond the scope of employment.[11] Other courts, although willing to entertain theories of direct employer liability, have found that employers could not have reasonably foreseen the intentional tortious misconduct of their therapist employees.[12]

However, Washington courts recognize that *therapists* may be personally liable for harm caused by sexual relationships with patients on the basis that such harm is foreseeable due to patients' vulnerability.[13] Washington common law considers patients presumptively incapable of consenting to sexual relationships with their current therapists,[14] and a state criminal statute imposes the burden of proving patient consent on

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8. *Id.* at 525–26, 54 P.3d at 181.

9. *Id.* at 523–24, 54 P.3d at 180. While recognizing that genuine issues of fact existed as to whether the temple knew of the priest's sexual activities, the appellate court reasoned that the Free Exercise Clause of the First Amendment bars a civil court from imposing a duty of care on a religious authority, even where an employee's sexual misconduct was known to the authority. *Id.* The relationship of the First Amendment to employer liability for sexual exploitation by religious counselors is beyond the scope of this Comment. Jurisdictions are divided over the extent to which liability can be imposed on religious institutions that employ sexually exploitative clergy. *See generally* Marjorie A. Shields, Annotation, *Liability of Church or Religious Organization for Negligent Hiring, Retention, or Supervision of Priest, Minister, or Other Clergy Based on Sexual Misconduct*, 101 A.L.R. 5th 1 (2002); Janice D. Villiers, *Clergy Malpractice Revisited: Liability for Sexual Misconduct in the Counseling Relationship*, 74 DENV. U. L. REV. 1 (1996); James T. O'Reilly & JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31 (1994).

10. This Comment follows the Supreme Court of Minnesota by using the term "therapist" to refer to "a psychologist or psychiatrist, or, at times, to other professionals who hold themselves out as engaging in psychotherapy or counseling therapy for marital, family and sexual problems." St. Paul Fire & Mar. Ins. Co. v. Love, 459 N.W.2d 698, 700 n.1 (Minn. 1990).

11. *See infra* notes 122–131 and accompanying text.

12. *See infra* notes 187–197 and accompanying text.

13. *See* Omer v. Edgren, 38 Wash. App. 376, 378, 685 P.2d 635, 636 (1984) (analogizing relationship between psychiatrist and patient to that between guardian and ward, in which consent to sexual seduction is necessarily illusory); Wash. Ins. Guar. Ass'n v. Hicks, 49 Wash. App. 623, 627, 744 P.2d 625, 627 (1987) (recognizing legal liability appropriate where therapist mishandles transference phenomenon by engaging in sexual relationship with patient).

14. *Omer*, 38 Wash. App. at 378, 685 P.2d at 636.

therapists who raise it as an affirmative defense to charges of sexual misconduct.[15] Courts and legislatures are rightly suspicious of consent defenses because the ability of a patient to consent to a sexual relationship with her[16] therapist has long been questioned in the literature of psychoanalysis, in codes of professional ethics, and in law.[17] The idealization of therapists by patients, also known as the *transference* phenomenon,[18] is a foreseeable occurrence in a normal counseling relationship.[19] Transference makes patients particularly vulnerable to therapist suggestion and imposes upon therapists a heightened duty of care.[20]

Employers of exploitative therapists in Washington should be liable for the devastating harms that victims often suffer. Many studies document the extensive damage caused to patients by therapist sexual exploitation.[21] Yet the availability of direct damages from therapists is limited, leading plaintiffs to seek redress instead from the tortious therapists' employers.[22] However, under existing Washington law, plaintiffs lose suits against employers, whether pursued under theories of

15. *See* WASH. REV. CODE § 9A.44.050 (2002).

16. While recognizing that exceptions exist to the general rule, this Comment will use male pronouns when referring to therapists and female pronouns when referring to patients, as the vast majority of sexual relationships arising from transference are between persons of those biological sexes. *See* St. Paul Fire & Mar. Ins. Co. v. Love, 459 N.W.2d 698, 700 n.1 (Minn. 1990); Malkah T. Notman & Carol C. Nadelson, *Psychotherapy With Patients Who Have Had Sexual Relations With A Previous Therapist, in* PHYSICIAN SEXUAL MISCONDUCT 248 (Joseph D. Bloom et al. eds., 1999).

17. *See infra* Part I.B (explaining that transference makes patients vulnerable to sexual exploitation by therapists). *See also* Morgan v. Psychiatric Inst. of Wash., 692 A.2d 417, 421–22 (D.C. Cir. 1997) (holding therapist exploitation of transference denied patient ability to consent to sexual relationship with therapist); Ferguson v. People, 824 P.2d 803, 812–13 (Colo. 1992) (holding elimination of consent defense in state statute criminalizing psychotherapist-patient sexual relations not an unconstitutional violation of Due Process); Missouri v. Cone, 3 S.W.3d 833, 842 (Mo. 1999) (upholding psychiatrist's conviction for sexual assault of two patients where plaintiffs unable to appreciate their actions due to manipulation of transference and patients' severe mental incapacitation). *But see* L.A.B. v. P.N., 533 N.W.2d 413, 417 (Minn. Ct. App. 1995) (holding loyalty to therapist caused by transference phenomenon insufficient to toll running of statute of limitations for medical malpractice under provision for "insanity"); State v. Leiding, 812 P.2d 797, 799–800 (N.M. Ct. App. 1991) (holding transference phenomenon cannot satisfy element of state statute criminalizing sexual penetration where victim suffers from "mental condition" rendering victim "incapable of understanding the nature or consequences of the act").

18. *See infra* notes 28–39 and accompanying text.

19. *See* Doe v. Finch, 81 Wash. App. 342, 352, 914 P.2d 756, 762 (1996) (quoting statement of plaintiff's expert witness that it "is well known that patients commonly become infatuated with their therapists").

20. *See infra* notes 49–72 and accompanying text.

21. *See infra* Part I.B.

22. *See infra* Part II.A.

vicarious or direct liability.[23] This leaves many victims of foreseeable therapist exploitation without an effective remedy.

This Comment argues that employer liability for a therapist's exploitation of the transference phenomenon satisfies existing Washington tests for both vicarious and direct employer liability. The transference phenomenon is inherent to the therapeutic relationship, making the risk of therapist exploitation of transference foreseeable to employers. Because the dynamics of transference arise out of the employer's pursuit of business, Washington courts should recognize vicarious employer liability under the theory of respondeat superior. Further, therapists' patients satisfy the current definition of parties that deserve a special relationship with an employer, thus warranting direct employer liability. Finally, employers should face liability when they are negligent in supervising therapists, because the risk of exploiting transference is foreseeable.

This Comment begins with a description of the transference phenomenon. Part I defines transference, explores the potential harm patients suffer due to sexual relations with current or former therapists, and summarizes the reasons why therapists' employers should reasonably foresee the risk that therapists might exploit transference. Part II reviews existing legal tests in Washington for holding employers liable for intentional employee misconduct and describes how Washington courts have not held employers liable for the foreseeable harms caused by therapist employees who sexually exploit patients by mishandling transference. In response to these shortcomings, Part III argues that the foreseeability of transference supports the extension of tort liability to employers of sexually exploitative therapists.

I. THE TRANSFERENCE PHENOMENON POSES A FORESEEABLE RISK THAT THERAPISTS MIGHT SEXUALLY EXPLOIT PATIENTS

The transference phenomenon is a regular and foreseeable aspect of therapy.[24] Although it is a normal part of successful therapy, transference puts therapists in positions of power and authority that are subject to

23. *See infra* Parts II.B.–II.D.

24. *See* Sigmund Freud, *Transference*, *in* INTRODUCTORY LECTURES ON PSYCHOANALYSIS 431, 442–43 (James Strachey trans. & ed., 1966) (noting that "transference is intimately bound up with the nature of the illness itself" and "is present in the patient from the beginning of the treatment"); *infra* notes 28–48 and accompanying text.

abuse and mishandling.[25] When therapists exploit transference for sexual gratification, patients suffer a variety of harms.[26] Courts find that the foreseeability of patient harm is a basis for imposing liability on both therapists and their employers when the transference phenomenon is exploited.[27]

A. Transference is a Foreseeable Phenomenon in the Therapeutic Relationship

Therapists regularly probe their patients' minds and learn the intimate details of their patients' lives.[28] A zone of intimacy called transference develops during this process,[29] which makes it common for a psychotherapy patient to "fall in love with" or "idolize" the therapist.[30] Transference has been defined as "the process whereby the patient displaces on to the therapist feelings, attitudes and attributes which properly belong to a significant attachment figure of the past . . . and responds to the therapist accordingly."[31]

As a common and expected occurrence, transference is a foreseeable phenomenon in therapy.[32] Practitioners note that "[f]or any patient to experience an erotic transference is . . . entirely normal and expectable in the course of psychotherapy."[33] Mental health professionals expect and even elicit transference as a regular and accepted part of treatment.[34] The proper instigation and response to transference is considered a basic psychoanalytic technique.[35] In order to work through repressed feelings

25. *See infra* notes 49–52 and accompanying text.

26. *See infra* notes 57–62 and accompanying text.

27. *See infra* notes 63–72 and accompanying text.

28. STEVEN B. BISBING ET AL., SEXUAL ABUSE BY PROFESSIONALS: A LEGAL GUIDE 210 (1995).

29. MacClements v. LaFone, 408 S.E.2d 878, 880 (N.C. Ct. App. 1991).

30. Doe v. Finch, 81 Wash. App. 342, 352, 914 P.2d 756, 762 (1996) (quoting statement of plaintiff's expert witness).

31. St. Paul Fire & Mar. Ins. Co. v. Love, 459 N.W.2d 698, 700 (Minn. 1990) (quoting S. WALDRON-SKINNER, A DICTIONARY OF PSYCHOTHERAPY 364 (1986)).

32. *See supra* note 24 and accompanying text.

33. Kenneth S. Pope & Glen O. Gabbard, *Individual Psychotherapy for Victims of Therapist-Patient Sexual Intimacy*, *in* SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 99 (Gabbard ed., 1989).

34. Iwanski v. Gomes, 611 N.W.2d 607, 615 (Neb. 2000).

35. Zipkin v. Freeman, 436 S.W.2d 753, 755 n.1 (Mo. 1968) (quoting BLAKISTON'S NEW GOULD MEDICAL DICTIONARY 1260 (2d ed. 1956)).

and memories, the patient must often project those feelings upon someone trained to channel the feelings in a healthy direction.[36]

The appropriate handling of transference is defined for therapists by the standard practices of their profession. Therapists are trained to anticipate and deal appropriately with transference when it emerges in the therapeutic relationship.[37] Emergent transference is recognized by inappropriate emotions directed toward the therapist.[38] Once recognized, a therapist should "reject the patient's erotic overtures and explain to the patient the true origin of her feelings" in emotions felt toward other important figures in her life.[39]

Therapists are also trained to avoid the mishandling of transference. A therapist may be tempted to reciprocate the intimate feelings proffered by a patient caught in the grips of transference.[40] The proper response is *counter-transference*, requiring the therapist to self-monitor for developing feelings of intimacy[41] and to avoid emotional involvement with the patient.[42] Should a therapist find he is becoming inappropriately involved with a patient, he should terminate treatment and refer the patient to another therapist.[43]

Transference is foreseeable in every therapeutic relationship. While some courts restrict the duty to properly handle transference to licensed mental health professionals on the theory that only they "offer a course of treatment and counseling predicated upon handling the transference phenomenon,"[44] other courts have also imposed this duty on other types of counselors.[45] The transference phenomenon is not confined to mental health therapy[46] but can arise in any counseling relationship,[47] even pastoral counseling.[48]

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36. *See* MacClements v. LaFone, 408 S.E.2d 878, 880 (N.C. Ct. App. 1991).

37. Melvin S. Heller, *Some Comments to Lawyers on the Practice of Psychiatry*, TEMP. L. Q. 401, 402 (1957).

38. *Id.* at 401–02.

39. St. Paul Fire & Mar. Ins. Co. v. Love, 459 N.W.2d 698, 700 (Minn. 1990).

40. *See, e.g.*, Stuart W. Twemlow & Glen O. Gabbard, *The Lovesick Therapist*, *in* SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS, 71, 73–83 (Gabbard ed., 1989) (exploring the motivations of therapists who fall in love with their patients).

41. *Id.* at 85–87; *see* Notman & Nadelson, *supra* note 16, at 257–58.

42. Aetna Life & Cas. Co. v. McCabe, 556 F. Supp. 1342, 1346 (E.D. Pa. 1983).

43. *Love*, 459 N.W.2d at 700.

44. Simmons v. United States, 805 F.2d 1363, 1366 (9th Cir. 1986).

45. *See, e.g.*, Am. Home Assurance Co. v. Stone, 61 F.3d 1321, 1325 (7th Cir. 1995) (considering licensed social worker a "psychotherapist" under sexual exploitation statute).

46. Darnaby v. Davis, 57 P.3d 100, 103 n.1 (Okla. Civ. App. 2002).

B. *The Abuse or Negligent Mishandling of Transference Results in Foreseeable Harm to Patients*

Transference lends itself to abuse by therapists. Transference puts therapists in positions of power and authority that are easily exploited or mishandled,[49] because patients come to perceive therapists as powerful, benevolent figures.[50] Studies of therapists indicate the temptation to take advantage of their position can prove overwhelming: therapists who have had sexual relationships with patients admit that the sexual contact was for their own gratification,[51] and the proportion of therapists self-reporting sexual contact with patients is as much as twelve percent.[52]

Most patients lack the ability to give meaningful consent to a sexual relationship with a therapist. Patients who become involved in such relationships tend to be unusually vulnerable.[53] Studies show that the most reliable predictor of such sexual involvement is prior sexual victimization, usually in the form of childhood incest.[54] One commentator notes that, in cases where therapist sexual exploitation is alleged, expert witnesses often testify that therapist-patient sexuality is analogous to parent-child incest.[55] Endorsing this analogy, the Ninth Circuit has recognized that a sexual relationship between a therapist and a patient "replicat[es] at a symbolic level the situation in which a parent would be sexual with a child."[56]

Sexual relationships premised upon the exploitation of transference pose the risk of serious harm to patients. Common effects include

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47. Nelson v. Gillette, 571 N.W.2d 332, 341 (N.D. 1997).

48. Paul Johnson, *The Mission: Theological Foundation and Uniqueness of Pastoral Counseling, in* BASIC TYPES OF PASTORAL COUNSELING 41, 50 (1984).

49. BISBING, *supra* note 28, at 210.

50. Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986).

51. S.L. Zelen, *Sexualization of Therapeutic Relationships: The Dual Vulnerability of Patient and Therapist*, 22 PSYCHOTHERAPY 178, 182 (1985).

52. BISBING, *supra* note 28, at 199. *See also* Gary C. Hankins et al., *Patient-Therapist Sexual Involvement: A Review of Clinical and Research Data,* 22 BULL. AM. ACAD. PSYCHIATRY L. 109, 123 (1994) ("At least 10 percent of male and 3 percent of female psychotherapists will acknowledge being sexually involved with patients, and a sizeable portion of these professionals are involved with multiple patients.").

53. American Medical Association Council on Ethical and Judicial Affairs, *Sexual Misconduct in the Practice of Medicine*, 266 J. AM. MED. ASS'N 2741, 2743 (1991).

54. *Id.*

55. Jacqueline Bouhoutsos et al., *Sexual Intimacy Between Psychotherapists and Patients*, 14 PROF. PSYCHOL. RES. & PRAC. 185 (1983).

56. Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986) (quoting testimony of plaintiff's expert witness).

"increased depression, loss of motivation, impaired social adjustment, significant emotional disturbance, suicidal feelings or behavior, and increased drug or alcohol use."[57] Victimized patients experience feelings of abandonment, humiliation, and anger, and suffer from decreased self-esteem.[58] The harm to the patient may also be aggravated after the relationship has ended because a therapist who exploits transference seriously damages his patient's ability to trust future therapists.[59] Studies indicate that over ninety percent of patients who are sexually victimized by therapists suffer serious residual harm.[60] The compensatory damages available in actions against sexually exploitative therapists include awards for past and future pain and suffering, medical expenses, diminution in earning capacity, lost wages, loss of consortium or services, and the reasonable value of the therapists' services.[61] Sexual relationships between other professional counselors and their clients pose the risk of similar harm.[62]

The exploitation of transference makes certain relationships between therapists and patients susceptible to legal intervention. Not every personal relationship between therapists and patients reflects the exploitation of transference.[63] If a client has consented to a sexual relationship with her therapist in the absence of the power imbalance that is characteristic of transference, the relationship is no more suspect than any other relationship between consenting adults.[64] However, because of

57. Bouhoutsos et al., *supra* note 55, at 190.

58. *See* Shirley Feldman-Summers & G. Jones, *Psychological Impacts of Sexual Contact Between Therapists or Other Health Care Practitioners and Their Clients*, 52 J. CONSULTING & CLINICAL PSYCHOL. 1054, 1055 (1984); Zelen, *supra* note 51, at 181–82.

59. Twemlow & Gabbard, *supra* note 40, at 84.

60. Feldman-Summers & Jones, *supra* note 58, at 1055.

61. Elizabeth Williams, *Cause of Action for Negligence or Malpractice of Psychiatrist*, 13 CAUSES OF ACTION 2d 453, § 43 (1999).

62. *See, e.g.*, Shirley Feldman-Summers, *Sexual Contact in Fiduciary Relationships*, *in* SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 193, 205–09 (Gabbard ed., 1989) (arguing that the risk of harm due to therapist-client sexual contact is present in other fiduciary-client relationships); JOEL FRIEDMAN & MARCIA MOBILIA BOUMIL, BETRAYAL OF TRUST: SEX AND POWER IN PROFESSIONAL RELATIONSHIPS 30–43 (1995) (arguing that sexual relations with clergy, attorneys, professors and physicians are harmful to their clients).

63. *See, e.g.*, Doe v. Swift, 570 So.2d 1209, 1213 (Ala. 1990) (noting transference requires period of time for trust in therapist to develop); Sisson v. Seneca Mental Health Council, 404 S.E.2d 425, 429 (W. Va. 1991) (holding transference requires both period of time for trust to develop as well as actual therapy sessions).

64. *Cf.* Jacobsen v. Muller, 352 S.E.2d 604, 607 (Ga. Ct. App. 1986) (holding summary judgment for psychologist appropriate where plaintiff was aware that sexual advances were beyond the duties of psychologist yet responded positively).

the high risk of harm to clients who enter such relationships under the influence of transference, many states impose some form of liability on therapists who exploit transference by engaging in sexual relations with their clients.[65] Similarly, therapist organizations uniformly proscribe therapist-patient sexual relations in their codes of professional ethics.[66]

Courts have held that the foreseeability of transference can serve as a basis for both therapist and employer liability for the harm caused to patients by sexual relations with therapists. In *Simmons v. United States*,[67] the Ninth Circuit invoked the established nature of the transference phenomenon to distinguish between the heightened duty imposed on therapists to refrain from sexual relations with clients and the lesser duty owed by other professionals to clients.[68] The court found the transference phenomenon to be a normal professional technique whose mishandling would constitute malpractice,[69] stressing that "the same kind of authority power" held by the therapist is also held by any "powerful, benevolent parent figure."[70] More recently, a federal district court in the Eastern District of Virginia ruled that the widespread public awareness of the problem of therapist sexual exploitation justified imposing employer liability for therapist sexual misconduct.[71] The failure to explore the role of transference in an allegation of therapist sexual exploitation may even constitute attorney malpractice.[72]

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65. Many states criminalize therapist-patient sexual contact. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1418 (West 2001); CAL. BUS. & PROF. CODE § 729 (West 2003); COLO. REV. STAT. ANN. §§ 12-43-222(1)(r), 12-43-226(2) (West 2002); CONN. GEN. STAT. ANN. § 53a-71(a)(6) (West 2001); FLA. STAT. ANN. § 491.0112 (West 2001); GA. CODE ANN. § 16-6-5.1(c)(2) (Harrison 1999); IOWA CODE ANN. § 709.15 (West 1993); MINN. STAT. ANN. § 609.345 (West 2002); N.D. CENT. CODE § 12.1-20-06.1 (1997); N.H. REV. STAT. ANN. § 632-A:2(I)(g) (2002); S.D. CODIFIED LAWS § 22-22-29 (Michie 1998); TEX. PENAL CODE ANN. § 21.011(b)(9) (Vernon 2002); WIS. STAT. ANN. § 940.22(2) (West 2002). Additionally, some states impose statutory civil liability. *See, e.g.*, CAL. CIV. CODE § 43.93(b)(2) (West 2003); ILL. COMP. STAT. ANN. § 140/2(2) (West 2002); MINN. STAT. ANN. § 148a.02 (West 1989); TEX. CIV. PRAC. & REM. CODE ANN. § 81.002 (Vernon 1997); WIS. STAT. ANN. § 895.70(2) (West 2002).

66. *See* Elissa P. Benedek & David Wahl, *Sexual Misconduct, The American Psychiatric Association, and the American Medical Association*, *in* PHYSICIAN SEXUAL MISCONDUCT 96–102 (Joseph D. Bloom et al. eds., 1999).

67. 805 F.2d 1363 (9th Cir. 1986).

68. *Id.* at 1366.

69. *Id.* at 1365.

70. *Id.* (quoting testimony of plaintiff's expert witness).

71. Doe v. United States, 912 F. Supp. 193, 194–95 (E.D. Va. 1995).

72. *See* Jacobsen v. Boyle, 397 S.E.2d 1, 2–3 (Ga. Ct. App. 1990) (holding a question of fact whether attorney committed malpractice by failing to introduce expert testimony on the phenomenon of transference in action by plaintiff against sexually exploitative therapist).

In sum, transference is a normal and foreseeable phenomenon in effective therapy.[73] Therapists are trained to anticipate transference and respond to it in a manner that furthers their patients' well-being.[74] However, transference also provides an opportunity for therapists to sexually exploit their patients.[75] Courts have recognized that the foreseeability of transference may give rise to liability for therapists and their employers when patients are harmed by such sexual exploitation.[76]

II. WASHINGTON LAW CURRENTLY LIMITS PLAINTIFFS' ABILITY TO OBTAIN RELIEF FOR THERAPIST SEXUAL EXPLOITATION

Therapists can be held directly liable for harm caused by sexual relations with their patients.[77] However, the limitations on damages recoverable from therapists lead plaintiffs to seek compensation from their therapists' employers.[78] Employers of exploitative therapists may be found liable under one form of vicarious and two forms of direct employer liability.[79] One form of vicarious liability, respondeat superior, holds an employer liable for the torts of an employee.[80] Respondeat superior liability, unlike direct liability, does not require the injured party to prove fault on the part of the employer.[81] The two forms of direct employer liability require plaintiffs to prove either (1) the employer breached a duty owed by the employer directly to third parties, or (2) the employer's own negligence in supervising its employee.[82] Plaintiffs in Washington courts have sued employers of sexually exploitative therapists under all three theories of liability with relatively little success.[83]

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73. *See supra* notes 28–36 and accompanying text.
74. *See supra* notes 37–43 and accompanying text.
75. *See supra* notes 49–52 and accompanying text.
76. *See supra* notes 67–72 and accompanying text.
77. *See infra* notes 84–92 and accompanying text.
78. *See infra* notes 100–106 and accompanying text.
79. BISBING, *supra* note 28, at 181.
80. *See* DAN B. DOBBS, THE LAW OF TORTS 905 (2000).
81. *See id.* at 906.
82. BISBING, *supra* note 28, at 181–82.
83. *See infra* notes 122–131, 169–172, 195–197 and accompanying text.

A. *Washington Law Imposes Direct Liability on Therapists, but the Limited Damages Available to Victims Leads Them to Seek Further Redress from the Therapists' Employers*

Washington law imposes liability on therapists for harm resulting from sexual relations with patients. In *Omer v. Edgren*,[84] Division III of the Washington Court of Appeals held that a fiduciary relationship[85] exists between a psychiatrist and patient.[86] Analogizing the relationship to that between a guardian and ward, the court held that sexual relations between a psychiatrist and patient may cause actionable harm due to the "malpractice, deceit, assault, and coercion by a person in a position of overpowering influence and trust."[87] In *Omer*, the plaintiff had an ongoing sexual relationship with her psychiatrist during her fifteen years of treatment.[88] The court noted that permitting a patient who had been the victim of "deliberate and malicious abuse of power and breach of trust by a psychiatrist" to pursue a civil remedy, vindicated not only "a wrong against her" but also a wrong against "the public interest as well."[89]

Therapists are subject to malpractice liability where they mishandle the transference phenomenon. Therapist liability is premised upon the unique characteristics of psychotherapy as a profession.[90] Mishandling transference by engaging in sexual relations with a patient has been recognized as a basis for imposing liability on therapists.[91] The

84. 38 Wash. App. 376, 685 P.2d 635 (1984).

85. Fiduciary relationships arise "when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first . . . ." BLACK'S LAW DICTIONARY 640 (7th ed. 1999). Fiduciary relationships entail "a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person . . . ." *Id.* at 523. *See also* Flannigan, *The Fiduciary Obligation*, 9 OXFORD J. LEGAL STUD. 285, 286-97 (1989) (analyzing the trust-based nature of the fiduciary relationship).

86. *Omer*, 38 Wash. App. at 378, 685 P.2d at 637. *See also* Hoopes v. Hammargren, 725 P.2d 238, 242 (Nev. 1986) (noting that all physicians, including those practicing psychiatry, have a fiduciary relationship with their patients); Eckhardt v. Charter Hosp. of Albuquerque, 953 P.2d 722, 727–28 (N.M. Ct. App. 1997) (noting that non-physician mental health counselors owe their patients a fiduciary duty of confidentiality); Hunter v. Brown, 4 Wash. App. 899, 905, 484 P.2d 1162 (1971) (characterizing the relationship between physician and patient as fiduciary).

87. *Omer*, 38 Wash. App. at 378, 685 P.2d at 636 (summarizing the rationale of the New York Court of Appeals in *Roy v. Hartogs*, 366 N.Y.S.2d 297, 299–301(N.Y. 1975)).

88. *Id.*

89. *Id.* at 379, 685 P.2d at 637 (quoting the New York Court of Appeals in *Roy*, 366 N.Y.S.2d at 301).

90. Benavidez v. United States, 177 F.3d 927, 930 (10th Cir. 1999).

91. *See* Patel v. Himalayan Int'l Inst., CV-94-1118, 1999 U.S. Dist. LEXIS 22532, at *45 (M.D. Pa. Dec. 9, 1999). *See also* Corgan v. Juehling, 522 N.E.2d 153, 156–57 (Ill. 1988) (citing cases recognizing malpractice where therapists have sexual relations with patients); St. Paul Fire & Mar.

foreseeability of transference transforms what would otherwise be an intentional tort into an action for negligence. Division I of the Washington Court of Appeals explained in an unpublished opinion that intentional sexual misconduct by therapists constitutes professional negligence subject to coverage by malpractice insurance, "even though similar contact between other professionals and their clients would be excluded by malpractice insurance as an intentional tort . . . because therapists, unlike doctors and other professionals, have to deal with transference as an aspect of the course of treatment."[92]

Washington courts have relied on the distinctive characteristics of transference to distinguish between imposing liability on malpractice insurers of therapists who have sexual relationships with their patients and insurers of other professionals who have sexual relationships with their clients. In *Washington Insurance Guaranty Ass'n v. Hicks*,[93] Division I of the Washington Court of Appeals relied on the distinction made in *Simmons* between the duty of therapists toward clients and that of other professionals,[94] in holding that a malpractice policy did not cover an insured chiropractor for sexual contact with the plaintiff during a visit to the chiropractor's office for treatment.[95] The court noted that the lack of transference in normal chiropractic care placed the chiropractor's sexual misconduct beyond the norms of standard professional practice, and therefore outside the realm of insured acts.[96] Similarly, in *Standard*

Ins. Co. v. Love, 459 N.W.2d 698, 701 (Minn. 1990) (holding transference gives rise to therapist duty to refrain from personal relationship with patient during or outside therapy); MacClements v. LaFone, 408 S.E.2d 878, 880 (N.C. Ct. App. 1991) (noting sexual intimacy between therapist and patient constitutes malpractice or gross negligence); Darnaby v. Davis, 57 P.3d 100, 103 (Okla. Civ. App. 2002) (noting many courts recognize a cause of action against therapists who engage in sexual acts with patients); Sisson v. Seneca Mental Health Council, 404 S.E.2d 425, 429 (W. Va. 1991) (listing jurisdictions where therapist sexual contact with patient constitutes malpractice); *see also* C. Katherine Mann & John D. Winer, *Medical Negligence: Psychotherapist's Sexual Contact With Client*, *in* 14 AM JUR. PROOF OF FACTS 3d 319 (2002); Brendan de R. O'Byrne, Annotation, *Civil Liability of Doctor or Psychologist for Having Sexual Relationship With Patient*, 33 A.L.R. 3d 1393 (1970).

92. Lavalley v. Ritchie, No. 42251-1-I, 1999 Wash. App. LEXIS 933, at *7–8 (1999). *But see* Am. Home Assurance Co. v. Cohen, 124 Wash. 2d 865, 872, 881 P.2d 1001, 1006 (1994) (reserving judgment as to whether sexual misconduct by psychologists constitutes malpractice). While negligence will lie in an action against a therapist, Washington courts turn to the intentional nature of the sexual relationship to remove it from the sphere of employer liability. *See infra* notes 122–131, 187–196 and accompanying text.

93. 49 Wash. App. 623, 744 P.2d 625 (1987).

94. *See supra* note 67–68 and accompanying text.

95. *Hicks*, 49 Wash. App. at 627, 744 P.2d at 627.

96. *Id.* at 627–28, 744 P.2d at 627.

Fire Insurance Co. v. Blakeslee,[97] Division II of the Washington Court of Appeals held that a dentist's intentional sexual assault of a patient while the patient was in a semiconscious state induced by nitrous oxide was not covered under the dentist's professional liability policy.[98] The court followed *Hicks*' lead by excluding from malpractice coverage sexual contact not necessitated by the particular course of medical treatment.[99]

Although therapists may be found liable for the exploitation of transference, victims of sexually exploitative therapists face difficulty recovering damages directly from therapists because of exclusionary clauses in therapists' malpractice policies. A patient's ability to initiate a suit against a sexually exploitative therapist generally depends on finding an attorney willing to undertake such a suit on a contingent fee basis.[100] However, the availability of monetary relief is limited. Uninsured therapists are virtually judgment-proof.[101] Although courts have held that sexual exploitation of transference constitutes a professional breach of duty that is subject to coverage under malpractice insurance,[102] many insurance companies specifically exclude coverage for sexual misconduct from their professional malpractice policies.[103] Courts in other jurisdictions have upheld these exclusionary clauses for sexual misconduct and denied relief to plaintiffs that alleged the misuse of transference in malpractice claims,[104] and Washington courts have

97. 54 Wash. App. 1, 771 P.2d 1172 (1989).

98. *Id.* at 11, 771 P.2d at 1177.

99. *Id.* at 9, 771 P.2d at 1176.

100. Larry H. Strasburger, *"There Oughta Be A Law:" Criminalization of Psychotherapist-Patient Sex as a Social Policy Dilemma*, *in* PHYSICIAN SEXUAL MISCONDUCT 19, 20 (Joseph D. Bloom et al. eds., 1999).

101. Alan A. Stone & Duncan C. MacCourt, *Insurance Coverage for Undue Familiarity*, *in* PHYSICIAN SEXUAL MISCONDUCT 37, 38 (Joseph D. Bloom et al. eds., 1999).

102. *See* Snyder v. Nat'l Union Fire Ins. Co., 789 F. Supp. 646, 649 (S.D.N.Y. 1992) (noting the majority rule is that "sexual contact is not a medical incident for insurance purposes unless the physician is a psychiatrist and the sexual incident arises out of a therapeutic relationship."); R.W. v. Schrein, 652 N.W.2d 574, 581 (Neb. 2002) (noting majority of jurisdictions limit malpractice coverage for therapist sexual contact to mishandling of transference phenomenon).

103. *See generally* BISBING, *supra* note 28, at 910–13; Stone & MacCourt, *supra* note 101, 37–88; Christopher Vaeth, Annotation, *Coverage of Professional-Liability or Indemnity Policy for Sexual Contact with Patients by Physicians, Surgeons, and Other Healers*, 60 A.L.R. 5th 239 (1998); Linda Jorgenson et al., *Therapist-Patient Sexual Exploitation and Insurance Liability*, 27 TORT & INS. L.J. 595 (1992).

104. BISBING, *supra* note 28, at 911. *See, e.g.*, Govar v. Chi. Ins. Co., 879 F.2d 1581, 1582–83 (8th Cir. 1989) (finding no insurer liability for damages arising out of therapist-patient sexual relationship where professional liability policy excluded claims arising out of sexual acts); Chi. Ins. Co. v. Griffin, 817 F. Supp. 861, 865–66 (D. Haw. 1993) (holding malpractice policy exclusion for "sexual contact" excludes from coverage insurer liability for therapist's sexual relationship with

followed suit.[105] As a consequence, plaintiffs have sought redress from therapists' employers.[106]

B. *Washington Courts Use the "Scope of Employment" Test to Limit Vicarious Employer Liability for the Sexual Misconduct of Tortious Therapists*

Under the vicarious liability theory of respondeat superior, employers are held strictly liable for the tortious act of their employees.[107] The nature of respondeat superior liability varies by jurisdiction.[108] Generally, respondeat superior liability makes employers "stand good" for the wrongs committed by their employees.[109] To ensure that liability is imposed fairly, courts have limited the sphere of employer liability to harm posed by an employee's conduct when acting "within the scope of . . . employment."[110] Defining what conduct falls within the scope of employment is notoriously difficult,[111] and jurisdictions are divided as to

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patient); Chi. Ins. Co. v. Manterola, 955 P.2d 982, 984–87 (Ariz. Ct. App. 1998) (upholding exclusion under professional liability policy for therapist behavior that "threatened, led to or culminated in any sexual act").

105. *See, e.g.*, Am. Home Assurance Co. v. Cohen, 124 Wash. 2d 865, 871, 881 P.2d 1001, 1005 (1994) (holding insurer may provide lesser coverage for psychologist's sexual misconduct than for nonsexual misconduct); Nat'l Union Fire Ins. Co. v. NW Youth Servs., 97 Wash. App. 226, 232, 983 P.2d 1144, 1148 (1999) (holding therapist sexual relationship with patient within professional liability policy exclusion for acts outside scope of employment).

106. Jorgenson et al., *supra* note 103, at 597, 600 n.33.

107. *See* DOBBS, *supra* note 80, at 905.

108. *See* BISBING, *supra* note 28, at 181–82.

109. DOBBS, *supra* note 80, at 906.

110. *Id.* at 910. An alternative approach to respondeat superior liability is the theory of job-created authority, which supports employers absorbing as a foreseeable business expense any harm made peculiarly possible by the nature of the employment. *See id.* at 914. *See also* Rochelle Weber, Note, *Scope of Employment Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1533 (1992):

> People are rarely employed to commit torts, but employers may put employees in positions where they can do so. For example, employing a therapist who will use transference, which places the patient in a vulnerable position, necessarily entails the danger of misuse and therefore should be considered a cost of doing business.

Washington courts have consistently rejected the job-created authority theory as a form of enterprise liability. *See, e.g.*, Niece v. Elmview Group Home, 131 Wash. 2d 39, 52–59, 929 P.2d 420, 428–31 (1997) (holding vicarious employer liability for sexual assault committed by employee inappropriate in absence of clear legislative intent); Kuehn v. White, 24 Wash. App. 274, 279–80, 600 P.2d 679, 682–83 (1979) (noting, in absence of legislation, no employer liability for employee's intentional tortious or criminal acts committed outside scope of employment).

111. *See* WILLIAM L. PROSSER, TORTS § 70, at 460 (4th ed. 1971) ("This highly indefinite [language] which sometimes is varied with 'in the course of the employment,' is so devoid of

whether intentional sexual misconduct falls within a therapist's scope of employment.[112]

In Washington, the doctrine of respondeat superior provides that the employer[113] is liable for the acts of an employee committed within the scope or in the course of employment.[114] The general test for determining whether an employee is acting in the scope of employment is whether the employee is engaged in the furtherance of the employer's interest.[115]

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meaning in itself that its very vagueness has been of value in permitting a desirable degree of flexibility in decisions.").

112. *See, e.g.*, Simmons v. United States, 805 F.2d 1363, 1370 (9th Cir. 1986) (holding therapist sexual relationship with patient within scope of employment); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 349 n.9 (Ala. 1990), *modified*, Veco, Inc. v. Rosebrock, 970 P.2d 906, 924 n.36 (Ala. 1999) (holding therapist's sexual contact with patient within scope of employment); Marston v. Minn. Clinic of Psychiatry & Neurology, Ltd., 329 N.W.2d 306, 311 (Minn. 1982) (holding whether therapist's sexual relation with patient within scope of employment was a question of fact); Plummer v. Ctr. Psychiatrists, Ltd., 476 S.E.2d 172, 175 (Va. 1996) (holding whether therapist's sexual exploitation during treatment within scope of employment was a question of fact). *But see, e.g.*, P.S. v. Psychiatric Coverage, Ltd., 887 S.W.2d 622, 625 (Mo. Ct. App. 1994) (holding therapist sexual relations with patient outside scope of employment even where sexual misconduct occurs during or in connection with therapy); Cosgrove v. Lawrence, 520 A.2d 844, 848–49 (N.J. Super. Ct. Law Div. 1986) (holding therapist sexual misconduct outside scope of employment even where motivation is to promote therapy); Noto v. St. Vincent's Hosp. & Med. Ctr., 559 N.Y.S.2d 510, 511 (N.Y. App. Div. 1990) (holding sexual misconduct of psychiatrist outside scope of employment); Block v. Gomez, 549 N.W. 2d 783 (Wis. Ct. App. 1996) (holding therapist sexual relationship with patient outside scope of employment because not motivated by purpose to serve employer); Birkner v. Salt Lake County, 771 P.2d 1053, 1058 (Utah 1989) (holding therapist sexual contact with patient outside scope of employment because not intended to further employer interest). *See generally* Paul A. Clark, *Applying Respondeat Superior to Psychotherapist-Patient Sexual Relationships*, 21 AM. J. TRIAL ADVOC. 439 (1997); Adrian Tabangay, *Scope of Employment, Sex and Transference: When Is an Employer Liable for Therapist Sexual Relations?*, 28 J. HEALTH & HOSP. L. 108 (1995); Adam A. Milani, *Patient Assaults: Health Care Providers Owe a Non-Delegable Duty to Their Patients and Should be Held Strictly Liable for Employee Assaults Whether or Not Within the Scope of Employment*, 21 OHIO N.U. L. REV. 1147 (1995); Linda M. Jorgenson et al., *Transference of Liability: Employer Liability for Sexual Misconduct by Therapists*, 60 BROOK. L. REV. 1421 (1995); Christine W. Young, *Respondeat Superior: A Clarification and Broadening of the Current "Scope of Employment" Test*, 30 SANTA CLARA L. REV. 599 (1990).

113. Employers are "masters" and employees "servants" for purposes of the traditional terms of respondeat superior. *See* DOBBS, *supra* note 80, at 905.

114. *See Niece*, 131 Wash. 2d at 48, 929 P.2d at 425–26; Dickenson v. Edwards, 105 Wash. 2d 457, 466, 716 P.2d 814, 819 (1986).

115. *Dickenson*, 105 Wash. 2d at 467, 716 P.2d at 819. The issue of whether a particular employee is engaged in furtherance of the employer's interest is often one for the trier of fact, as in the example of a messenger who negligently injures someone while driving back to work from a baseball game. *See* DOBBS, *supra* note 80, at 912.

Thus, an employer can be liable for an employee's intentional sexual misconduct if it is committed in pursuit of the employer's business.[116]

Washington courts have been reluctant to find that an employee's intentional sexual misconduct was motivated by a desire to further the employer's interest, and therefore have held that the misconduct was outside the employee's scope of employment.[117] This position is in opposition to the Ninth Circuit Court of Appeals' earlier interpretation of Washington law.[118] Applying Washington law, the Ninth Circuit held in *Simmons v. United States*[119] that a counselor was acting within the scope of employment when he engaged in a long-term sexual relationship with a client.[120] The court reasoned that because the sexual relationship arose from the counselor's mishandling of transference, a phenomenon arising within the scope of the employee's duties, the employer was liable under Washington agency law.[121]

However, Washington courts have rejected *Simmons* as a basis for imposing liability on the employers of tortious employees. Division I of the Washington Court of Appeals expressly rejected *Simmons* in *Thompson v. Everett Clinic*.[122] In *Thompson*, the plaintiff sued a clinic where he had been sexually assaulted by a physician during a physical examination, bringing his claim under a theory of respondeat superior.[123] The *Thompson* court applied the intentionality rule of *Kuehn v. White*,[124] that a servant's intentionally tortious or criminal acts will not be attributed to the employer "even though the employment situation provided the opportunity for the servant's wrongful acts or the means for carrying them out."[125] The *Thompson* court interpreted *Kuehn* to mean that "a tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if it emanated from a wholly personal motive of the agent and was done to

116. Henderson v. Pennwalt Corp., 41 Wash. App. 547, 552, 704 P.2d 1256, 1260–61 (1985) (holding employer liable if wrongful sexual act performed in furtherance of employer's interest).

117. *See infra* notes 122–131 and accompanying text.

118. In federal court, state law determines whether a federal employee's act is within the scope of employment for purposes of the Federal Tort Claims Act. Pelletier v. Fed. Home Loan Bank of S.F., 968 F.2d 865, 876 (9th Cir. 1992).

119. 805 F.2d 1363 (9th Cir. 1986).

120. *Id.* at 1369.

121. *Id.* at 1369 (citing Smith v. Leber, 34 Wash. 2d 611, 623, 209 P.2d 297, 303 (1949)).

122. 71 Wash. App. 548, 553, 860 P.2d 1054, 1057–58 (1993).

123. *Id.* at 550, 860 P.2d at 1056.

124. 24 Wash. App. 274, 600 P.2d 679 (1979).

125. *Id.* at 278, 600 P.2d at 682.

gratify solely personal objectives or desires of the agent."[126] Thus, the court held that the clinic was not liable for the physician's misconduct because it was a wholly personal and intentional act that was not done in furtherance of the clinic's business.[127]

In *Lavalley v. Ritchie*,[128] an unpublished opinion of Division I of the Washington Court of Appeals, the court relied on *Kuehn* and rejected *Simmons* in holding that a therapist's sexual relationship with a client initiated during therapy was beyond the scope of employment because it was not furthering the purpose of the employer.[129] In reaffirming its earlier rejection of *Simmons*, the court noted that the therapist's "wholly personal motive" in the relationship with his patient was "too far removed from his counseling duties" to warrant imposing respondeat superior liability on his employer.[130] Washington courts have focused on the presence of a personal motivation to generally exclude employers from liability for the sexual misconduct of their employees.[131]

While Washington courts have not distinguished between therapist employees and other employees in determining employer liability for sexual misconduct, courts in other jurisdictions have held employers of sexually exploitative therapists liable under a scope of employment test on the theory that the exploitation was a foreseeable risk in the nature of therapy. The Supreme Court of Minnesota held in *Marston v. Minneapolis Clinic of Psychiatry*[132] that the test for whether an employee's act is within the scope of employment should be a factual one, based on both foreseeability and whether the act bore a relation to or was connected with acts otherwise within the scope of employment.[133] In

126. *Thompson*, 71 Wash. App. at 553, 860 P.2d at 1058.

127. *Id.* at 554, 860 P.2d at 1058. *Accord* Doe v. Swift, 570 So.2d 1209, 1213 (Ala. 1990) (holding personal motivation placed therapist's sexual acts beyond scope of employment); Dausch v. Rykse, 52 F.3d 1425, 1428 (7th Cir. 1994) (holding sexual acts for therapist's personal benefit and thus beyond scope of employment).

128. No. 42251-1-I, 1999 Wash. App. LEXIS 933 (1999).

129. *Id.* at *10.

130. *Id.* at *8–10.

131. *See, e.g.*, Bratton v. Calkins, 73 Wash. App. 492, 500–01, 870 P.2d 981, 986 (1994) (holding teacher's sexual relationship with student beyond scope of employment because motivated by personal desires). The Washington State Supreme Court did not distinguish between therapists and other professionals when it concluded that "neither current Washington case law nor considerations of public policy favor the imposition of respondeat superior or strict liability for an employee's intentional sexual misconduct." C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash. 2d 699, 718–19, 985 P.2d 262, 272 (1999).

132. 329 N.W.2d 306 (Minn. 1983).

133. *Id.* at 311.

Doe v. United States,[134] a federal district court in the Eastern District of Virginia reasoned that a psychologist's sexual exploitation of a patient under hypnosis was foreseeable and therefore within the psychologist's scope of employment, given the increasing public awareness of the ethical edicts prohibiting therapist sexual exploitation of clients.[135] And the Supreme Court of California recognized, in *Lisa M. v. Henry Mayo Newhall Memorial Hospital*,[136] that sexual relations resulting from the mishandling of transference may be a foreseeable intentional tort for which an employer may be liable under a theory of vicarious liability.[137]

In sum, Washington courts have rejected imposing vicarious liability on employers for an employee's intentional sexual misconduct.[138] This distinguishes Washington courts from courts in other jurisdictions that have determined the scope of employer liability based on the foreseeability of the risk of an abuse of transference.[139] However, in the absence of respondeat superior liability, employers may be held liable for acts of employee sexual misconduct under two theories of direct employer negligence. The sources of direct employer liability for the sexual misconduct of employees are duties that arise out of (1) a special relationship with a party whose well-being has been entrusted to the employer, or (2) the employer's negligent supervision of the employee.[140] An employer's liability for the breach of these duties is "analytically distinct and separate from" respondeat superior liability,[141] and is not limited by the scope of employment test.[142]

C. *Washington Courts Have Been Unwilling to Recognize a "Special Relationship" Between Patients and Therapists' Employers*

Under Washington law, an employer has a duty to make reasonable efforts to protect parties with whom it stands in a "special relationship" from foreseeable harm caused by employees' intentional or criminal

134. 912 F. Supp. 193 (E.D. Va. 1995).
135. *Id.* at 194–95.
136. 907 P.2d 358 (Cal. 1995).
137. *See id.* at 365.
138. *See supra* notes 122–131 and accompanying text.
139. *See supra* notes 132–137 and accompanying text.
140. Niece v. Elmview Group Home, 131 Wash. 2d 39, 48–53, 929 P.2d 420, 426–28 (1997).
141. *Id.* at 48, 929 P.2d at 426.
142. *Id.*

conduct.[143] This duty, based on the Restatement (Second) of Torts § 315, represents an exception to the general rule that one has no legal duty to protect others from the intentional or criminal acts of third parties.[144] In the case of the patients of therapists, a special relationship can arise from either the employer's duty to control therapists' actions toward patients, or from a right of protection owed patients by employers.[145]

Washington courts have recognized the existence of a special relationship when one party has entrusted its well-being to another and as a consequence has become particularly vulnerable. In *Funkhouser v. Wilson*,[146] Division I of the Washington Court of Appeals noted that the special relationship between a hospital or nursing home and its patients is based on the vulnerability of the physically or mentally ill and their inability to care for themselves.[147] The court identified multiple factors to consider when determining whether the vulnerability created by entrustment gives rise to a legal duty of protection:

> [T]he balancing of the societal interests involved, the severity of the risk, the burden upon the defendant, the likelihood of occurrence, the relationship between the parties, the temptation presented by the act or failure to act, the gravity of the harm that may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take.[148]

The special relationships recognized to date by Washington courts include those between a school and its students,[149] an innkeeper and its guests,[150] a common carrier and its passenger,[151] an employer and its

143. Petersen v. State, 100 Wash. 2d 421, 426, 671 P.2d 230, 236 (1983) (adopting rule of RESTATEMENT (SECOND) OF TORTS § 315 (1965)).

144. Hutchins v. 1001 Fourth Ave. Ass'ns, 116 Wash. 2d 217, 223, 802 P.2d 1360, 1364 (1991).

145. RESTATEMENT (SECOND) OF TORTS § 315. General Principle:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

146. 89 Wash. App. 644, 950 P.2d 501 (1998), *aff'd on other grounds,* 138 Wash. 2d 699, 985 P.2d 262 (1999).

147. *Id.* at 660, 950 P.2d at 509.

148. *Id.* at 661, 950 P.2d at 509.

149. McLeod v. Grant Sch. Dist., 42 Wash. 2d 316, 319–20, 255 P.2d 360, 362–63 (1953).

150. Miller v. Staton, 58 Wash. 2d 879, 883, 365 P.2d 333, 335 (1961).

151. Marks v. Ala. S.S. Co., 71 Wash. 167, 169–70, 127 P. 1101, 1101–02 (1912).

employee,[152] a hospital and its patient,[153] a business establishment and the customer,[154] a group home and its developmentally disabled residents,[155] and a church and vulnerable persons within the custody of its workers or volunteers.[156]

The duty imposed on an employer by its special relationship with third parties is broader than the duty imposed by the scope of employment test. The special relationship that arises from entrustment gives potential victims a right to protection from third parties even in the absence of a custodial or continuous relationship between the caregiver and the victim.[157] The caregiver's duty to protect potential victims extends to foreseeable injuries, even if perpetrated off the premises or outside working hours.[158] Furthermore, because the "duty is limited only by the concept of foreseeability,"[159] it includes intentional or criminal sexual misconduct.[160] Under Washington law, intentional or criminal sexual misconduct "may be foreseeable unless it is 'so highly extraordinary or improbable as to be wholly beyond the range of expectability'"[161] and is "within the general field of danger which should have been anticipated."[162]

Washington courts have held employers liable for their employees' sexual misconduct where a special relationship existed between the victim and the employer. In *Niece v. Elmview Group Home*,[163] the plaintiff, a developmentally disabled woman, sued a nursing home where she had suffered a sexual assault by a male employee.[164] The Supreme

152. Bartlett v. Hantover, 9 Wash. App. 614, 620–21, 513 P.2d 844, 848–49 (1973), *rev'd on other grounds*, 84 Wash.2d 426, 526 P.2d 1217 (1974).

153. Hunt v. King County, 4 Wash. App. 14, 19–20, 481 P.2d 593, 597, *review denied*, 79 Wash. 2d 1001 (1971).

154. Nivens v. 7-11 Hoagy's Corner, 133 Wash. 2d 192, 202–03, 943 P.2d 286, 291–92 (1997).

155. Niece v. Elmview Group Home, 131 Wash. 2d 39, 51, 929 P.2d 420, 427 (1997).

156. C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash. 2d 699, 724–26, 985 P.2d 262, 275–76 (1999).

157. Taggart v. State, 118 Wash. 2d 195, 223–24, 822 P.2d 243, 257 (1992).

158. *C.J.C.*, 138 Wash. 2d at 727, 985 P.2d at 277.

159. *Niece*, 131 Wash. 2d at 50, 929 P.2d at 427.

160. *Compare id.* at 50–52, 929 P.2d at 426–48, *with supra* notes 122–126 and accompanying text (discussing cases that preclude employer liability for an employee's intentional or criminal misconduct when issuing from wholly personal motives).

161. *Niece*, 131 Wash. 2d at 50, 929 P.2d at 427 (quoting Johnson v. State, 77 Wash. App. 934, 942, 894 P.2d 1366, 1371 (1995)).

162. *Id.*

163. 131 Wash. 2d 39, 929 P.2d 420 (1997).

164. *Id.* at 41, 929 P.2d at 422.

Court of Washington held that the sexual assault was foreseeable within the "general field of danger which should have been anticipated."[165] The court determined that the group home had a duty to prevent sexual assault because of the special relationship between the group home and its vulnerable residents.[166] Intentional or criminal sexual misconduct satisfied the test under Washington law for foreseeable harm because it was not extraordinary or improbable enough to be wholly beyond the range of expectability.[167] In a later case, the court imposed liability on a defendant church for sexual misconduct that occurred beyond the church premises and outside working hours because of the special relationship between the church and the children entrusted to its care.[168]

However, Division I of the Washington Court of Appeals declined to find a special relationship between an employer and the victim of an employee counselor's sexual misconduct in *S.H.C. v. Lu*.[169] The plaintiff in *S.H.C.* claimed that the defendant temple breached its fiduciary duty to her when its priest used sexual therapy.[170] Although S.H.C. asserted that she was vulnerable because she was devoted to the sexually exploitative priest, the court reasoned that S.H.C. was not a "particularly vulnerable" victim as required to invoke a special relationship.[171] The court did not consider the phenomenon of transference, nor did it explain why S.H.C. was not sufficiently vulnerable to merit a special relationship; it resolved the issue on the basis of a lack of available Washington precedent.[172]

Conversely, courts in other jurisdictions have held that a special relationship exists between the employer of a sexually exploitative therapist and his victim. In *Grzan v. Charter Hospital of Northwest Indiana*,[173] an Indiana Court of Appeals held that the victim of a therapist's alleged mishandling of transference could seek redress from the employing hospital.[174] The court determined that the employer owed the victim a direct duty of care where the therapist was acting outside the

165. *Id.* at 50, 929 P.2d at 427.

166. *Id.*

167. *Id.*

168. C.J.C. v. Corp. of the Catholic Bishop of Yakima, 138 Wash. 2d 699, 727, 985 P.2d 262, 276–77 (1999).

169. 113 Wash. App. 511, 524–28, 54 P.3d 174, 180–82 (2002).

170. *Id.* at 524–27, 54 P.3d at 180–81.

171. *Id.* at 525–26, 54 P.3d at 181.

172. *Id.*

173. 702 N.E.2d 786 (Ind. Ct. App. 1998).

174. *Id.* at 793–94.

scope of his employment.[175] And in *Richard H. v. Larry D.*,[176] a California appellate court held that a sexually exploitative therapist's breach of professional and fiduciary duties toward his patient was also actionable against the hospital where he was employed.[177] According to one legal commentator, the court implied in dicta that the hospital owed the patient a direct fiduciary duty because the therapist was acting on its behalf.[178]

In sum, the special relationship doctrine imposes upon employers a direct duty to protect from sexual misconduct vulnerable parties who have entrusted their well-being to the employers.[179] While courts in other jurisdictions have been willing to impose a direct duty of patient care on employers of sexually exploitive therapists,[180] the *S.H.C.* court declined to hold a religious therapist's employer liable on the basis of the special relationship doctrine.[181]

D. Washington Courts Limit Direct Employer Liability for Negligent Supervision to Employers' Ability to Reasonably Foresee the Risk of Harm Posed to Patients by Particular Therapists

Patients can bring suit against employers for negligent supervision of sexually exploitative therapists independent of any direct duty owed them by virtue of a special relationship.[182] Under the theory of negligent supervision, employers may be liable for acts committed outside an employee's scope of employment.[183] In Washington, the theory of negligent supervision for acts committed outside an employee's scope of employment is based on the Restatement (Second) of Torts § 317.[184]

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175. *Id.*

176. 243 Cal. Rptr. 807 (Cal. Ct. App. 1988).

177. *Id.* at 810.

178. *See* discussion of *Richard H.*, 243 Cal. Rptr. 807, *in* BISBING, *supra* note 28, at 217–18 n.186.

179. *See supra* notes 143–62 and accompanying text.

180. *See supra* notes 173–78 and accompanying text.

181. *See supra* notes 169–72 and accompanying text.

182. *See infra* note 184.

183. *See infra* note 184.

184. RESTATEMENT (SECOND) OF TORTS, § 317 (1965). Duty of Master to Control Conduct of Servant:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if (a) the servant (i) is upon the premises in possession of the master or upon which the servant is

Washington employers have a limited duty to supervise an employee's conduct outside the scope of employment where the employer knows or should know of "the dangerous tendencies of the particular employee."[185] Generally, Washington courts have been reluctant to impose liability on employers for the intentionally tortious acts of their employees where those acts involve sexual misconduct.[186]

Washington courts thus far have held that any harm caused in non-therapeutic settings by an employee's sexual relationship could not have been foreseen in the normal performance of the employee's duties. In *Scott v. Blanchet*,[187] plaintiffs appealed the trial court's grant of summary judgment in a suit against a teacher, high school, and archdiocese for damages resulting from a sexual relationship between the plaintiffs' daughter and her high school teacher.[188] Division I of the Washington Court of Appeals held that there was no evidence that the teacher was acting in his official capacity at the time of the sexual activities, and that the school lacked any advance knowledge of the particular teacher's proclivities.[189] Consequently, the parents could not recover against the high school or archdiocese on the basis of respondeat superior or for negligent hiring and supervision of the teacher.[190] Similarly, in *Peck v. Siau*,[191] Division II of the Washington Court of Appeals held that a school was not responsible for a teacher's sexual relations with a student, even though another teacher knew about the relationship.[192] The court reasoned that the school was not liable because the second teacher had no hiring or supervision authority over the exploitative teacher.[193]

Similarly, Washington courts to date have refused to hold the employers of sexually exploitative therapists liable under a theory of negligent supervision. In an unpublished opinion, Division I of the Washington Court of Appeals declined in *Lavalley v. Ritchie*[194] to impose

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privileged to enter only as his servant, or (ii) is using a chattel of the master, and (b) the master (i) knows or has reason to know that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control.

185. Niece v. Elmview Group Home, 131 Wash. 2d 39, 52, 929 P.2d 420, 427–28 (1997).

186. *See infra* notes 187–97 and accompanying text.

187. 50 Wash. App. 37, 747 P.2d 1124 (1987).

188. *Id.* at 38, 747 P.2d at 1125.

189. *Id.* at 41–44, 747 P.2d at 1127–28.

190. *Id.* at 43–44, 47, 747 P.2d at 1128, 1130.

191. 65 Wash. App. 285, 827 P.2d 1108 (1992).

192. *Id.* at 287, 289–90, 827 P.2d at 1109, 1110–11.

193. *Id.* at 290–92, 827 P.2d at 1111–12.

194. No. 42251-1-I, 1999 Wash. App. LEXIS 933 (1999).

liability on the employer of a sexually exploitative therapist even though the employer had some knowledge of the rumored affair, the therapist was living with the patient, and the therapist listed the patient's address and phone number as his own.[195] The court held that the therapist's workplace discussions about his relationship did not identify the client in sufficient detail to inform the employer of the existence of an improper relationship.[196] Recently, when faced with the question whether employer knowledge of employee sexual misconduct was sufficient to establish employer liability, Division I of the Washington Court of Appeals refused to rule on the issue in *S.H.C.*, holding that on the facts of that case it was barred by the Free Exercise Clause of the First Amendment.[197] Given the questionable precedential value of the unpublished *Lavalley* opinion and the court's recent refusal to reach the merits of the negligent supervision claim, it is unclear how other Washington courts would decide the issue.

However, courts in other jurisdictions have imposed a duty on employers to supervise against therapist sexual misconduct, based on the foreseeability of harm arising from the transference phenomenon. The Court of Appeals in the District of Columbia, in *Morgan v. Psychiatric Institute of Washington*,[198] reversed a grant of summary judgment to an employer in an action for negligent supervision, hiring and training.[199] The court held that the victim's damages from the employee therapist's exploitation of transference were foreseeable and the evidence of injury was sufficient to withstand summary judgment.[200] Similarly, in *Nelson v. Gillette*,[201] the Supreme Court of North Dakota held that "the known risk of improperly handling the occurrence of transference," when coupled with knowledge of the promiscuous sexual history of a developmentally disabled victim, may constitute a cause of action for negligent supervision against the employer of a therapist.[202] The court noted that "[a]ll counseling relationships can be affected by the transference phenomenon."[203]

195. *Id.* at *12–16.
196. *Id.* at *14.
197. S.H.C. v. Lu, 113 Wash. App. at 523–24, 54 P.3d at 180.
198. 692 A.2d 417 (D.C. 1997).
199. *Id.* at 423.
200. *Id.*
201. 571 N.W.2d 332 (N.D. 1997).
202. *Id.* at 342.
203. *Id.* at 341.

In sum, patients of sexually exploitative therapists have a difficult time receiving redress directly from their therapists.[204] As a result, patients seek compensation from the therapists' employers.[205] However, Washington courts have not held employers liable for the conduct of sexually exploitative therapists, finding the therapists' sexual misconduct outside the scope of employment.[206] Similarly, Washington courts have refused to impose a duty of protection on employers arising from the special relationship between the employer and the therapists' patients.[207] Finally, Washington courts have held employers to a heightened duty of supervision only where the sexual misconduct of a particular therapist has been foreseeable to the employer.[208]

III. EMPLOYER LIABILITY FOR THERAPIST SEXUAL MISCONDUCT SHOULD BE EXPANDED BECAUSE OF THE FORESEEABLE RISKS POSED TO PATIENTS BY THE TRANSFERENCE PHENOMENON

The foreseeability of transference places therapist sexual misconduct within existing Washington tests for employer liability. Respondeat superior liability is satisfied because the risk of exploitation of transference is foreseeable within the scope of a therapist's employment.[209] Further, a special relationship exists between therapists' employers and patients because the risk of therapist exploitation of transference satisfies the factors from *Funkhouser*, is foreseeable within the general field of danger, and is not wholly beyond the realm of expectability.[210] Finally, the general foreseeability of sexual misconduct should impose a duty on employers to supervise against therapist exploitation of the transference phenomenon.[211]

204. *See supra* notes 100–05 and accompanying text.
205. *See supra* note 106 and accompanying text.
206. *See supra* notes 122–31 and accompanying text.
207. *See supra* notes 169–72 and accompanying text.
208. *See supra* notes 187–97 and accompanying text.
209. *See infra* notes 211–30 and accompanying text.
210. *See infra* notes 231–51 and accompanying text.
211. *See infra* notes 252–64 and accompanying text.

A. *The Abuse or Negligent Mishandling of Transference Satisfies the Scope of Employment Test Because It Is a Foreseeable Risk of Furthering an Employer's Business*

Full appreciation of the transference phenomenon provides a basis under existing Washington law for holding employers liable for the tortious sexual misconduct of their therapists. Washington courts should find intentional sexual misconduct within the scope of employment if such acts are performed in furtherance of the employer's business.[212] Other courts have found therapist exploitation of the transference phenomenon sufficiently related to the pursuit of an employer's business to fall within the scope of employment.[213] The Ninth Circuit's decision in *Simmons* is particularly instructive, given that it interprets Washington agency law to impose employer liability for a therapist's sexual misconduct.[214] Confronting the issue of whether an abusive counselor's actions were in furtherance of the employer's interest, the court noted that "the centrality of transference to therapy renders it impossible to separate an abuse of transference from the treatment itself."[215] The court also noted that "a sexual relationship between therapist and patient cannot be viewed separately from the therapeutic relationship that has developed between them."[216] Where the employee's unauthorized acts are performed in conjunction with acts that the employee is instructed to perform, Washington agency law imposes respondeat superior liability.[217]

In both its *Thompson* and *Lavalley* opinions, Division I of the Washington Court of Appeals neglected to consider the unique dynamics of transference in failing to apply the theory of vicarious employer liability of *Simmons*.[218] In *Thompson*, the court ruled on allegations of sexual abuse by a physician whose motive it held to be wholly personal.[219] In the unpublished *Lavalley* opinion, the court held that a

212. *See supra* note 116 and accompanying text.

213. *See, e.g., supra* notes 132–37 and accompanying text; Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 346 (Alaska 1990); *modified*, Veco, Inc. v. Rosebrock, 970 P.2d 906, 924 n.36 (Alaska 1999).

214. Simmons v. United States, 805 F.2d 1363, 1368–69 (9th Cir. 1986).

215. *Id.* at 1370.

216. *Id.* (quoting L.L. v. Med. Protective Co., 362 N.W.2d 174, 178 (Wis. App. 1984)).

217. Smith v. Leber, 34 Wash. 2d 611, 623, 209 P.2d 297, 303 (1949). *See supra* notes 115–21 and accompanying text.

218. *See supra* notes 127–31 and accompanying text.

219. *See supra* note 127 and accompanying text.

therapist's sexual relationship with a patient during therapy was beyond the scope of employment because it determined the therapist's motive to be wholly personal.[220] But *Simmons* premised employer liability on a careful analysis of the dynamics of transference in the context of therapy.[221] Neither the *Thompson* nor *Lavalley* courts adequately examined the intricate interrelation between a therapist's normal duties and the abuse of transference.[222] Yet, when imposing direct liability on tortious therapists, Washington courts have recognized that transference poses unique and foreseeable risks of harm to the therapists' patients.[223] Thus, the *Thompson* and *Lavalley* courts should have considered how personal motivation is related to an employee's expected job duties in the unique context of transference. The *Thompson* and *Lavalley* courts' summary rejection of employer liability in the presence of an employee's personal motive is in conflict with those courts in other jurisdictions that have held employers of tortious therapists liable under the theory of respondeat superior regardless of personal motive.[224]

Because abuse or negligent mishandling of transference is a risk inherent to the therapeutic relationship, such conduct should qualify as a foreseeable risk in the normal furtherance of the employer's business. The abuse or negligent mishandling of transference originates in the power created by the therapeutic relationship.[225] It is the transference phenomenon itself that renders the patient particularly vulnerable.[226] When conducting therapy, a therapist employee is seeking to further the interest of the employer; sexual misconduct that occurs in the therapeutic setting is "best understood as inextricably related to the dynamics of the therapeutic relationship."[227] The foreseeability of the abuse or mishandling of transference should be considered a predictable result of

220. *See supra* note 129 and accompanying text.

221. *See supra* notes 119–121 and accompanying text.

222. The *Lavalley* court rejected any theory of employer liability premised on a foreseeable consequence of the employer's activity as inconsistent with its decisions rejecting theories of enterprise liability. Lavalley v. Ritchie, No. 42251-1-I, 1999 Wash. App. LEXIS 933, at *10 (1999). *See supra* note 110.

223. *See supra* notes 90–99 and accompanying text.

224. *See supra* notes 132–137 and accompanying text.

225. *See supra* notes 49–52 and accompanying text.

226. Vigilant Ins. Co. v. Employers Ins., 626 F. Supp. 262, 265 (S.D.N.Y. 1986).

227. St. Paul Fire & Mar. Ins. Co. v. Love, 459 N.W.2d 698, 702 (Minn. 1990). *See also* Am. Home Assurance Co. v. Stone, 61 F.3d 1321, 1330 (7th Cir. 1995) (noting transference makes sexual exploitation of patient inseparable from therapeutic relationship); *Vigilant Ins. Co.*, 626 F. Supp. at 266 (noting the therapeutic relationship itself renders patient particularly vulnerable to therapist).

the "relationship between the nature of the work involved and the type of tort committed . . . ."[228] Transference inherently arises during a therapist's pursuit of the employer's business, and it is therefore within the scope of the therapist's employment.[229] Washington courts should follow the lead of other jurisdictions in recognizing that sexual misconduct with a patient is an act that, for purposes of respondeat superior liability, falls within the scope of a therapist's employment.[230]

B. *The Foreseeable Risk that a Therapist will Abuse Transference Should Qualify Patients for a Special Relationship with the Employer*

The risks posed to victims of exploitative therapists are sufficiently foreseeable to warrant a duty arising from a special relationship between victims and the employers or therapists. The unique vulnerability of patients caught in the grips of transference satisfies the existing factors for judicial recognition of a special relationship.[231] Additionally, the relationship between patients and the employers of therapists is directly analogous to special relationships already recognized by Washington courts.[232]

Washington courts should recognize that a special relationship exists between employers and therapists' patients under the *Funkhouser* factors.[233] The risk of mishandling transference is severe enough to make such mishandling likely to occur, as indicated by empirical studies[234] and professional prohibitions on sexual misconduct.[235] The same studies and self-reports of therapists demonstrate that the temptation to exploit

228. John Y. Jr. v. Chaparral Treatment Ctr., Inc., 124 Cal. Rptr. 2d 330, 340 (Cal. Ct. App. 2002) (quoting Lisa M. v. Henry Mayo Newhall Mem. Hosp., 907 P.2d 358, 364 (Cal. 1995)).

229. *Love*, 459 N.W.2d at 702 (noting that "sexual contact between therapist and patient arising from the phenomenon may be viewed as the consequence of a failure to provide proper treatment of the transference"); Mullen v. Horton, 700 A.2d 1377, 1381 (Conn. App. Ct. 1997) (holding therapist sexual misconduct within scope of employment because represents "misguided effort" to serve employer). *But cf.* Block v. Gomez, 549 N.W.2d 783, 788 (Wis. Ct. App. 1996) (rejecting employer liability premised on inseparability due to transference of patient treatment and therapist sexual misconduct).

230. *See supra* notes 132–137 and accompanying text.

231. *See infra* notes 234–243 and accompanying text.

232. *See infra* notes 244–251 and accompanying text.

233. Funkhouser v. Wilson, 89 Wash. App. 644, 661, 950 P.2d 501, 509 (1998). *See supra* notes 146–148 and accompanying text.

234. *See supra* notes 51–52 and accompanying text.

235. *See supra* note 66 and accompanying text.

transference is great.[236] The harm that may result from the abuse or mishandling of transference can be devastating.[237] Furthermore, there is a social interest in enforcing the trust relationship[238] between therapists and their patients through employer liability. No other party is effectively assuming the responsibility for compensating victims for their injuries.[239] Employers are in a position to directly allocate to the beneficiaries of the employer's services the business expense of damage awards,[240] and employers can be powerful agents in the prevention of therapist sexual abuse.[241] Heightened employer liability creates a strong incentive for an employer to exercise care in the training and supervising of its employees.[242] Finally, heightened employer liability is not so burdensome as to significantly decrease the delivery of counseling services, as demonstrated by the experience of those states that impose employer civil liability by statute.[243]

The relationship between employers and their employee therapists' patients is analogous to other relationships that Washington courts have recognized as special relationships. The *Funkhouser* court noted that the special relationship between a hospital or nursing home and its patients is based on the heightened vulnerability of the physically or mentally ill.[244] Washington courts should recognize that patients of sexually exploitative therapists possess a special relationship with the therapist's employer for the same reason, because the *Omer* court recognized that a mental health patient's ability to consent to a sexual relationship with a therapist is necessarily illusory.[245] Although the *S.H.C.* court rejected this position where an adult female was sexually exploited by her religious counselor,[246] the court did not consider the plaintiff's vulnerability from the standpoint of transference. Therapists' patients are vulnerable

236. *See supra* notes 51–52 and accompanying text.

237. *See supra* notes 57–62 and accompanying text.

238. *See supra* note 87 and accompanying text.

239. *See supra* notes 100–105 and accompanying text.

240. Weber, *supra* note 110, at 1537.

241. BISBING, *supra* note 28, at 227.

242. Weber, *supra* note 110, at 1537.

243. *See* BISBING, *supra* note 28, at 223–27. Both Minnesota and Illinois impose statutory employer civil liability if the employer knows or has reason to know that a therapist has sexually exploited a current or former patient and fails to take appropriate and timely remedial action. ILL. COMP. STAT. ANN. ch. 740, § 140/3 (West 2002); MINN. STAT. ANN. § 148A.03 (West 1998).

244. *See supra* note 147 and accompanying text.

245. *See supra* note 13 and accompanying text.

246. *See supra* notes 171–172 and accompanying text.

because the idealization of their therapists is inherent in effective therapy.[247]

Washington courts confronted with therapist sexual misconduct should follow the example of the *Niece* court, which held that sexual assault is foreseeable within the general field of danger that a group home should anticipate when caring for vulnerable residents.[248] Similarly, courts should recognize that the inherent nature of transference and the frequency of its abuse make therapist sexual misconduct foreseeable within the general field of danger that therapists' employers should anticipate.[249]

Moreover, once Washington courts recognize the special relationship between employers and therapists' patients, they should extend the duty of protection arising from the special relationship beyond the normal time and space limitations of the employer's premises.[250] The vulnerability of patients in the grips of transference warrants courts extending the duty of protection employers owe to patients to harm caused by sexual relations with therapists outside therapy sessions or off the employer's premises.[251]

C. *Employers Should Assume a Duty of Care For Purposes of Negligent Supervision Because the Risk of Abuse or Negligent Mishandling of Transference by Therapists is Generally Foreseeable to Employers*

Transference is a foreseeable phenomenon for any therapist because transference is inherent in effective therapy.[252] Therapy patients are uniquely vulnerable to therapist manipulation of transference.[253] The risk of potential harm to patients is sufficiently foreseeable to make the proper handling of transference a professional expectation of therapists[254] and for professional organizations to proscribe the exploitation of transference in their ethical codes.[255]

247. *See supra* notes 32–36 and accompanying text.
248. *See supra* notes 163–166 and accompanying text.
249. *See supra* notes 28-52 and accompanying text.
250. *See supra* note 158 and accompanying text.
251. *See supra* note 168 and accompanying text.
252. Simmons v. United States, 805 F.2d 1363, 1365 (9th Cir. 1986).
253. *See supra* notes 53–56 and accompanying text.
254. *See supra* notes 37–43 and accompanying text.
255. *See supra* note 66 and accompanying text.

While the *S.H.C.* court held that imposing such a heightened supervisory duty on a religious organization was barred by the First Amendment,[256] the duty should be imposed on employers of nonreligious therapists. The *Lavalley* court refused to impose liability on the employer of a sexually exploitative employee because the employer did not have particular knowledge of the employee's misconduct.[257] However, Washington courts have formulated the requirement of particular knowledge primarily within the context of relationships where transference is not encouraged or expected to occur.[258] The *Lavalley* court did not consider how the foreseeability of transference might warrant imposing upon employers of therapists a heightened duty of supervision.[259] Further, Division I of the Washington Court of Appeals declined to publish the decision, thus it has questionable precedential value.[260]

Washington courts confronting the issue in the future should follow other jurisdictions in recognizing that the risk of sexual misconduct posed by transference is sufficiently foreseeable to impose upon employers a heightened duty of supervisory care. The abuse of transference by therapists is foreseeable.[261] As courts in other jurisdictions have recognized, the generalized risk of therapist sexual misconduct is sufficient to impose a heightened duty of supervision on employers, even in the absence of knowledge of any risk posed by a particular employee.[262] Where the risk of foreseeable harm to a patient is coupled with recognition of the patient's vulnerability, other jurisdictions have held that employers of therapists have a duty to effectively supervise their employees.[263] As an inherent phenomenon in therapy, transference can be easily abused or mishandled.[264] Thus, Washington

256. *See supra* note 9.

257. Lavalley v. Ritchie, No. 42251-1-I, 1999 Wash. App. LEXIS 933, at *12 (1999).

258 Both *Scott* and *Peck* involved teacher-student relationships. *See supra* notes 187–97 and accompanying text. *But cf.* BISBING, *supra* note 28, at 210 ("Similarities exist in the relationship between a therapist and patient and that of a teacher and student. Both exercise power and authority over, and are able to manipulate and control, vulnerable people in their care.").

259. *Lavalley,* 1999 Wash. App. LEXIS 933, at *12–16. In upholding summary judgment for the employer on the negligent supervision claim, the *Lavalley* court only considered whether the employer's explanation of transference to the patient upon learning of the relationship after the patient had ceased her therapy might have mitigated her damages. *Id.* at *15–16.

260. *Id.* at *1.

261. *See supra* notes 90–99 and accompanying text.

262. *See supra* notes 198–203 and accompanying text.

263. *See supra* notes 201–03 and accompanying text.

264. *See supra* notes 49–52 and accompanying text.

courts should impose a heightened duty on therapists' employers to supervise against therapist sexual exploitation, even in the absence of knowledge of a particular employee's misconduct.

IV. CONCLUSION

As modern society becomes increasingly characterized by professional-client relations, the risk of harm caused by breaches of professional duty increases proportionately. Unfortunately, the law has been slow to accommodate the evolution of an increasingly fiduciary society. In Washington, this is particularly apparent in the case of the victims of therapist sexual exploitation.

The transference phenomenon is well-recognized in the fields of psychoanalysis and law. The potential harm posed by transference to clients of therapists is sufficiently established to serve as the basis for direct liability on the part of sexually exploitative therapists. But despite the inherent character of transference, courts have not applied the doctrine of respondeat superior to the employers of therapists who sexually exploit patients. Despite the unique vulnerability of patients experiencing transference, Washington courts have held that there is no employer duty to protect patients from sexual assault arising from the special relationship between patients and therapists' employers. Further, employers are not liable for negligent supervision unless they have real or constructive knowledge of the danger posed by a particular therapist, even though transference and its attendant risks are foreseeable.

The failings in existing Washington agency law reflect a failure to appreciate the foreseeability of the transference phenomenon. A proper appreciation of the foreseeable risks posed by transference would extend employer liability under existing legal tests for respondeat superior, an employer's duty of protection arising from a special relationship, and negligent supervision. Washington courts should adjudicate future claims of employer liability for sexually exploitative therapists by recognizing the foreseeability of transference.