No. 82842-3

C. JOHNSON, J. (dissenting)• The majority effectively rewrites two separate contracts and concludes that Kevin Dolan is an employee of King County (County), without ever examining or mentioning the contracts and, more troubling, explaining why the contracts need judicial rewriting. The easy answer in this case is that a contract exists to provide indigent criminal defense for the County under which employees do not qualify for enrollment in the Public Employees Retirement System (PERS) and are not state "employees" under RCW 41.40.010(12). In this case, Dolan was not hired by the County, does not get paid by the County, does not receive assignments from the County, cannot be disciplined by the County, and is not terminable by the County; still the majority concludes that Dolan is an employee of the County. The majority's result is implausible, if not exactly backward.

The issue before the court centers on whether the County's contracts with

four private nonprofit public defender corporations exert such control over the methods and means of the indigent legal defense work being performed as to make the County the employer of workers of these four corporations. Since the contracts with the County provide the only measure of control the County has over the corporations, these contracts should begin, and largely end, our inquiry. But rather than explaining specifically which provisions in the contracts make the corporations subject to the County's control, the majority earnestly avoids analyzing the extent of control the County is capable of exerting on the legal services provided by these corporations. By doing so, the majority dislodges well-established common law rules regarding employer-employee relationships and muddles the factors that merit consideration in determining whether a worker contracted by the government is an employee or an independent contractor.

No question is really presented that the fundamental common law distinction between employees and independent contractors is that an employee works under an employer who has the right to control the details of work performance, while an independent contractor is one who undertakes a project but is left free to do the assigned work and to choose the method of accomplishing it. *Hollingbery v. Dunn*,

68 Wn.2d 75, 79-80, 411 P.2d 431 (1966). The statute governing PERS eligibility also defines an "employee" in terms of the common law test concerning control over the performance of the work. RCW 41.40.010(12) (An "employee" is "a person who is providing services for compensation to an employer, unless the person is free from the employer's direction and control over the performance of work."). The Department of Retirement Systems (DRS) employs this "right to control" test as a threshold rule when administering PERS eligibility. WAC 415-02-110(2)(b). While the DRS also looks to additional non-determinative factors to focus its inquiry, *see* WAC 415-02-110(2)(d)(i)-(xix), these factors are utilized because they tend to establish day-to-day control over the work being performed. *Hollingbery*, 68 Wn.2d at 80-81. But as our common law establishes, control over the manner and means of the work being performed remains the "crucial factor" in determining whether a worker is an employee or independent contractor. *Hollingbery,* 68 Wn.2d at 81.

In the contracts, the County provides express representations of the terms and conditions forming the essence of the County's relationship with the indigent public defense corporations. The corporations are "nonprofit law firm[s] . . . organized

and operated exclusively for the purpose of providing court-appointed legal services to indigent persons." Clerk's Papers (CP) at 5690 (2007 Associated Counsel for the Accused (ACA) Contract).[1] Both the County and the corporations "agree that these legal services are provided by an independent contractor non-profit corporation." CP at 5690 (2007 ACA Contract). Additionally, both parties "agree that any and all funds provided pursuant to this Contract are provided for the sole purpose of provision of legal services to indigent persons." CP at 5690 (2007 ACA Contract). Both parties also agree to indemnify the County for the corporation's acts because "the Agency is an independent contractor, and neither it nor any of its officers, directors, employees, subcontractors, agents, or representatives are employees of the County for any purpose." CP at 5696 (2007 ACA Contract). The contracts do not bind the parties to an extended relationship because the contracts expire after one year and, consequently, must be re-negotiated annually. CP at 5691 (2007 ACA Contract). Importantly, either party may terminate the contract before the full term if the other party's conduct constitutes a material breach of the contractual terms. CP at 5694-95 (2007 ACA Contract). These provisions indicate that the

[1] The contracts for each of the four public defense corporations are substantially similar. Given that the contracts generally mirror one other, citation to each individual contract is unnecessary.

parties structured their contracts to create an independent contractor relationship primarily because that is what the contracts say.

Even examining the contracts closely, it becomes readily apparent that the County neither exercises nor possesses control over how individuals within these corporations accomplish their public defense work. Each corporation is governed by an independent board of directors and the County has no influence over the selection of board members. CP at 5705 (2007 ACA Contract). Each corporation has a managing director selected by this independent board. CP at 5706 (2007 ACA Contract).[2] Each corporation hires its own employees without seeking approval from the County. CP at 3088-91 (Mikkelsen Decl.). Each corporation sets the level of pay of its employees. Each corporation conducts performance evaluations of its employees. CP at 2854 (Chapman Decl.). Each corporation disciplines its own staff. CP at 2854 (Chapman Decl.). Each corporation determines which benefits—health, disability, retirement, etc.—it will offer its employees and in what amount. CP at 2829 (Chapman Decl.). Each corporation, without County involvement, decides whether to terminate an employee. CP at

[2] Despite this, the majority curiously finds that the County exerts "stringent control" over the organizational structure of these corporations. Majority at 22.

3105-06 (Mikkelsen Decl.). In short, the indigent public defense corporation, in hiring employees, controls when they will work, where they will work, and which cases they are assigned. If an employee fails to perform, the corporation that hired the employee can then fire him or her. The County has no influence over the means and manner in which the employee's work is performed, or even whether the employee will continue to be employed. Put simply, the contracts empower the County to tell the corporations what must be done, but the corporations control how Dolan must then do it. In most all cases concerning whether a worker is an employee or an independent contractor, we would end our inquiry there.[3]

But the majority seemingly disregards these aspects governing the day-to-day control of the work being performed and purports to find the County's right to control the performance of work in other aspects of the relationship between the corporations and the County. Without telling us precisely which contracts control its decision or revealing how far back our inquiry must extend (the corporations' contracts are renegotiated and change annually), the majority points to some aspects of the relationship between the corporations and the County to substantiate its

[3] Presumably the majority's reasoning extends to all the public defense corporations' employees, including paralegals, investigators, support staff, and others.

result. The majority relies on such things as: the corporations must receive County approval prior to working with other clients; the corporations cannot enter into leases or acquire valuable assets without County approval; and the County provides the bulk of these corporations' revenue.[4] Majority at 21-23.

But none of these aspects of the relationship show how the County controls the method and manner of the indigent defense work performed by the corporations, only that the County legitimately included terms into its contracts to ensure adequate performance of the services provided. Since the corporations are "operated exclusively for the purpose of providing court-appointed legal services to indigent persons," the County has a valid interest to include contractual terms ensuring that these corporations expend public money solely on functions related to indigent public defense. CP at 5690 (2007 ACA Contract). The County is not subsidizing a private law firm. It is expending public money for public defense purposes. But the contractual provisions the majority hinges its decision on only exemplify how the County provides genuine oversight over the expenditure of public money, not how the County exerts control over indigent defense work performed. With this, the

[4] The majority cites to no legal authority in this state that a service provider that has primary financial dependence on one contract is thereby intrinsically under the control of its primary client.

majority decision effectively undercuts the distinction between watchful caution and control; a fundamental principle well rooted in our employer-employee common law. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 120-21, 52 P.3d 472 (2002) ("""The retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship."'" (quoting *Hennig v. Crosby Grp., Inc.*, 116 Wn.2d 131, 134, 802 P.2d 790 (1991) (quoting *Epperly v. City of Seattle*, 65 Wn.2d 777, 785, 399 P.2d 591 (1965)))); *see also Fardig v. Reynolds*, 55 Wn.2d 540, 545, 348 P.2d 661 (1960) (no "control" when only interaction between parties was "supervisory" to determine "whether or not [the work was] being done in accordance with the contract").[5] The majority dismissively avoids applying our prior employer-employee common law rules, but troublingly, the majority does not provide this court any new rule to apply going forward.

The majority decision also ignores the plain contractual declarations indicating the intentions of the contracting parties. While the majority is correct in stating that contractual language does not conclusively determine the status of the

[5] A number of the County's supervisory requirements are mandated by statute. Therefore, the County was required to include such provisions. *See* RCW 10.101.060.

corporations' workers, this court's precedent has long held that the instrument itself may show which type of relationship the parties intended. *Hollingsworth v. Robe Lumber Co.*, 182 Wash. 74, 79, 45 P.2d 614 (1935). In this case, the contracts expressly state that, "the County and the Agency agree that these legal services are provided by an independent contractor non-profit corporation." CP at 5690 (2007 ACA Contract.). While the majority reasons that we should ignore the express contractual language stating that the indigent defense corporations are independent contractors, the majority offers no explanation why we should ignore the fact that members of the class have beneficially relied on this same language when asserting their rights as a private employer, namely in unionizing and privately negotiating collective bargaining agreements. CP at 2997 (Farley Decl.), 3094-95 (Mikkelsen Decl.), 5183-225 (Ex. 145). The corporations have also tacitly endorsed other declarations and terms in their contracts. For example, the corporations declare themselves in their contracts as "nonprofit law firm[s]" and file annual tax returns accordingly. CP at 5690 (2007 ACA Contract); *see*, *e.g.*, 6146 (The Defender Association tax exemption form). The majority's decision effectively allows these corporations to pick and choose which contract provisions they wish to follow

depending on the circumstances; they can realize the benefits of being both a private employer and an agency of the County. If a reason exists for allowing the corporations to rely on their contractual declarations but not the County, the majority never reveals it.

The majority's decision judicially overwrites the intended contractual terms between the County and the indigent defense corporations and sidesteps our common law principles regarding independent contractor relationships. The effect of the majority's decision is to ghostwrite financial terms for pension funding into the parties' contracts, even though the corporations could negotiate with the County on their own accord to accomplish the same result, either now or during their annual contract renewal. Furthermore, if an employee desired to increase his retirement package, he or she could have done so by negotiating with the corporation that employee works for. But these employees are not asking this court to rewrite their employment contract with the indigent defense corporation that hired them; these employees ask this court to rewrite their employer's contract with the County for their benefit, which the majority does. But even as the majority scribbles its own language into the contracts, the majority fails to tell us how the County should have

structured its contracts to avoid inadvertently creating an employer-employee relationship with these corporations; a relationship that, from the contractual terms, the County certainly wished to avoid. Since the majority does not provide a clear rule for when an employer-employee relationship develops, perhaps the County will figure its only recourse now is to not renew its existing contracts and explore alternative avenues of providing its constitutionally mandated indigent public defense.

The majority appears to rest its decision on contractual provisions permitting the County to supervise the end-level quality of the product it bargained for.[6] But the existence of an employer-employee relationship should not be inferred from contractual provisions reserving the power to monitor performance when such provisions do not deprive the person doing the work the power to command how the work is done. Rather than adhering to settled common law principles and looking to which party controls the worker's day-to-day job performance, the majority judicially rewrites these public indigent defense contracts while providing no clear guidance or rule applicable to future cases involving government contracts with third-

[6] It is reasonable to presume that contractual provisions providing for quality assurance and for contract compliance exist in every government contract. Under the majority's reasoning, this places numerous government contracts with independent contractors at risk of being misconstrued as creating employer-employee relationships.

party corporations.

Since the County's contracts with these indigent defense corporations do not provide for control over the means and manner of the legal services provided, I would hold that the trial court erred in determining that the class members were PERS-eligible "employees."

I dissent.

AUTHOR:
Justice Charles W. Johnson

WE CONCUR:

	Justice James M. Johnson
Justice Gerry L. Alexander	Justice Debra L. Stephens