NO. 95531-0

Appellate Court No.: 75671-1-I

SUPREME COURT OF THE STATE OF WASHINGTON

KING COUNTY CORRECTIONS GUILD

Appellant,

v.

JARED KARSETTER and JULIE KARSETTER,

Respondents.

APPELLANT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. IDENTITY OF RESPONDENT

Respondent is the King County Corrections Guild ("Guild"), which was appellant below.

II. ARGUMENT

Petitioners Jared and Julie Karstetter's Petition for Review ("Pet. for Rev.") should be denied because this case does not meet any of the four grounds governing acceptance of discretionary review. RAP 13.4(b) identifies four exclusive circumstances when discretionary review will be permitted. Nowhere in the Petition do the Petitioners directly address the application of RAP 13.4(b) to the errors they assign to the Court of Appeal's decision. This Court and the Guild are left to guess which asserted errors correspond to which, if any, of the four circumstances cited in that rule. Accordingly, the Petition is procedurally improper and should be denied on those grounds alone. *Cf. State v. Pe'a*, 177 Wn. App. 1004 (2013) (unpublished) (appellant's statement of "additional grounds for review" not entertained by appellate court because it "fail[ed] to adequately describe the nature and occurrence of any alleged error as required by [rules of appellate procedure]").

To the extent the Guild is able to infer which of the four scenarios Petitioners' arguments are directed towards, none of those theories satisfies the requirements of RAP 13.4(b). Petitioners advance three

grounds for discretionary review. Two of these merely rehash arguments Petitioners unsuccessfully made to the court below. The third manufactures a false conflict between the Court of Appeals decision and unrelated Supreme Court precedent. Because none of the bases for acceptance of discretionary review are met, there is no reason for this Court to disturb the reasoned judgment of the Court of Appeals.

A. The Court Of Appeals Decision Does Not Conflict With Any Decision Of The Supreme Court.

The Court of Appeals held that Jared Karstetter (hereafter, "Karstetter") failed to state a claim for wrongful termination against public policy because he did not "allege facts showing that he engaged in public-policy-linked conduct." *Karstetter v. King Cty. Corr. Guild*, 1 Wn. App. 2d 822, 833, 407 P.3d 384 (2017). The Court correctly noted that in order to prove this tort, a plaintiff must allege "jeopardy," which means, in part, "engag[ing] in particular conduct" that "directly relates to the public policy, or was necessary for the effective enforcement of the public policy." *Id*. at 832 (quoting *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 290, 358 P.3d 1139 (2015)). In addition, the Court observed, the Supreme Court has recognized four categories of conduct where the existence of a public policy is clear:

> (1) where the discharge was a result of refusing to commit an illegal act; (2) where the discharge resulted due to the employee performing a public duty or obligation; (3) where

> the termination resulted because the employee exercised a legal right or privilege; and (4) where the discharge was premised on employee "whistleblowing" activity.

Id. (quoting *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)). The Court of Appeals found that Karstetter's complaint relied on the fourth category, whistleblowing activity, but held that he did not "adequately allege that he was engaged in this protected activity." *Id*.. In particular, the complaint alleged only that at the request of, and under threat of legal action by, the King County Ombudsman's Office, and with the approval of the Guild's vice president, Karstetter disclosed "certain documentation" related to a third person's whistleblower complaint concerning two Guild members' claims for parking reimbursement. Compl. ¶ 22 (CP 6). Karstetter's alleged disclosure, the Court correctly held, did not amount to "whistleblowing activity" within the meaning of *Dicomes*. 1 Wn.App.2d at 832. A *bona fide* whistleblower must seek to remedy the purported misconduct at issue or otherwise be motivated by a "desire to further the public good." *Id.* at 833 (citing *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 313, 358 P.3d 1153 (2015)). Karstetter, by comparison, alleged that he assisted the investigation only "because the King County Code and the threat of superior court action compelled him to." *Id*. Thus, although his actions concerned a third person's whistleblower complaint, Karstetter "was not a whistleblower himself."

Id. Having failed to allege participation in conduct directly related to, or necessary for the effective enforcement of a public policy, the Court held, Karstetter's wrongful termination claim should have been dismissed by the trial court. *Id*.

Karstetter now seeks to obfuscate the Court of Appeals' cogent analysis of the whistleblower issue by raising a red herring. He contends that the decision below erred by evaluating the public policy nature of the complaint's allegations through the lens of the so-called "Perritt framework," rather than the *Dicomes* categories. The Court of Appeals did no such thing. It expressly acknowledged the categories of conduct that under *Dicomes* clearly implicate a public policy; entertained Karstetter's claim that he engaged in one such activity (whistleblowing); and rejected it on the merits. *Id*. at 833 ("the whistleblower protection contemplated by Washington court" – i.e., case law beginning with *Dicomes* – "does not apply to Karstetter").

It is not entirely clear how Karstetter derives the notion that the Court of Appeals relied on the "Perritt framework" to reach its holding. However, even if it had, the result would have been the same and equally valid. First endorsed by the Supreme Court in *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), the Perritt framework is a method of evaluating the public policy component of a wrongful

termination tort.[1] It sets forth four elements a plaintiff must prove to succeed on this claim:

> (1) …the existence of a clear public policy (the *clarity* element);
> (2) …that discouraging the conduct in which they engaged would jeopardize the public policy (the *jeopardy* element);
> (3) …that the public-policy-linked conduct caused the dismissal (the *causation* element);
> (4) [And] [t]he defendant must not be able to offer an overriding justification for the dismissal (the *absence of justification* element)

Gardner, 128 Wn.2d at 941 (emphasis in original). The *Gardner* Court cautioned that its "adoption of this test does not change the existing common law" in Washington. *Id*. Rather, the Perritt analysis merely provided a helpful guide to disentangle the factors already at play and assess them in a systematic way. In fact, citing *Dicomes*, the Supreme Court in *Gardner* stated explicitly that "*[c]ommon law already contains the clarity and jeopardy elements*." *Id*. (citing *Dicomes*, 113 Wn.2d at 617) (emphasis added). Similarly, the Court noted, "[t]he causation element is also firmly established in Washington common law." *Id*. at 942 (citation omitted).[2] The Perritt framework's main innovations were to (1)

[1] The test is known as the "Perritt framework" because it was first proposed by Henry Perritt, Jr. in a 1991 article on workplace torts. *See* Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991).

[2] Even if *Gardner* had not expressly made this observation, it should be intuitive that *Dicomes* demands a causation showing. The four categories of conduct satisfy the "clarity" and "jeopardy" elements, since they assume the existence of a public policy and an employee's participation therein, but these elements have relevance to a wrongful termination tort only insofar as the employer dismissed the plaintiff for that participation.

conceptually distinguish the clarity and jeopardy elements, which "prior decisions [had] lumped…together," and (2) add the "absence of justification" element in order to analyze cases like *Gardner*, where the employer defendant offered a legitimate justification for discharge that must be weighed against the given public policy. *Id*. at 941-42.

The Court of Appeals' decision below did not turn on either of these novel aspects of the framework. It is true that the Court enumerated each of the Perritt framework's elements in *dicta*, simply to introduce the elements of a wrongful termination claim. 1 Wn. App. 2d at 830. But the Court focused solely on the jeopardy requirement, since it is as part of this element that a plaintiff must establish that his conduct directly related or was necessary for the enforcement of a public policy. *Id*. (quoting *Rose*, 184 Wn.2d at 290). As noted above, the jeopardy element is not unique to the Perritt framework. The common law already incorporates it, a proposition for which the Supreme Court cited *Dicomes* in support. *Gardner*, 128 Wn.2d at 941 (citing *Dicomes*, 113 Wn.2d at 617). It was on the jeopardy element – and that element alone – that the Court of Appeals found Karstetter's wrongful termination claim deficient. Thus, it makes no difference whether, on the dispositive jeopardy inquiry, the Court invoked *Gardner*, *Dicomes*, or some other case.

Therefore, Karstetter's suggestion that the Court of Appeals should have considered *Dicomes*' gloss on the clarity and jeopardy elements in isolation is nonsensical.

Karstetter makes much of the fact that in *Rose v. Anderson Hay*, the Supreme Court stated in an aside that it was "unnecessary" in that case to consult the Perritt framework because the conduct at issue fell "directly within the realm of wrongful discharge in violation of public policy." *Rose*, 184 Wn.2d at 287. Karstetter extrapolates from this *dicta* that when a plaintiff "alleges that his conduct falls within a *Dicomes* category," a court must take that legal conclusion at face value and find that he has satisfied his burden of production. Pet. for Rev. at 7. *Rose* said nothing of the sort. That case suggested only that when the alleged *facts* – there, allegedly terminating the plaintiff for refusing to break the law – facially hew to one of the *Dicomes* categories, it is unnecessary to rely on the Perritt framework. *Rose*, 184 Wn.2d at 287. But deciding whether the facts correspond to a *Dicomes* category is a legal determination that a court must make, not defer to a plaintiff's *ipse dixit* assertion. *See J.S. v. Village Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 119, 359 P.3d 714 (2015) ("we are not required to accept the complaint's legal conclusion's as correct"). The Court of Appeals *did* evaluate whether the facts as alleged by Karstetter fell within the scope of one of the *Dicomes* categories. Moreover, when *Rose* stated that it was unnecessary to consult the Perritt framework for cases that clearly implicated a public policy, it did not suggest thereby that a court dispense with the aspects of the framework

which overlap with the common law. There is no rational way to determine whether a plaintiff has sufficiently pled a wrongful termination claim without examining whether the facts alleged in the pleadings establish the existence of a public policy, the plaintiff's participation therein, and his dismissal because of that activity. Read in context, *Rose* implies at most that when the public policy is obvious and important enough, it is not necessary to weigh it against an employer's justification. However, that principle has no application here. The Court of Appeals never reached the absence of a justification element because it found, as a threshold matter, that Karstetter did not allege participation in any conduct that would involve a public policy concern.

Although framed at the outset as a conflict between the Court of Appeals and the Supreme Court's decisions in *Rose* and related cases, *see Becker v. Comm'ty Health Sys*, 184 Wn.2d 252, 359 P.3d 746 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015) (collectively, as Karstetter calls them, the "*Rose* trilogy"), this assignment of error is really a thinly disguised attempt to reargue the application of the jeopardy element to the facts at bar. *See infra*. Karstetter gives the *Rose* trilogy marquee placement in his "Issues Presented" section and one of the topic headings for the body of his argument. But he is curiously silent about these cases' actual holdings – the misconstrued *dicta* above

notwithstanding.[3] That is likely because the *Rose* trilogy concerns an issue that has nothing to do with this case – the preclusive effect (or lack thereof) of alternative statutory remedies on a wrongful termination claim. *See Rose*, 184 Wn.2d at 274; *Rickman*, 184 Wn.2d at 303; *Becker*, 184 Wn.2d at 255 (all holding that alternative statutory remedies do not preclude a wrongful termination claim, unless they are meant to be exclusive). Here, the Guild never claimed, and the Court of Appeals never held, that Karstetter must pursue a remedy through another statute. Such a conclusion would contradict the Court's actual holding that Karstetter's activity did not relate to any public policy – and consequently would not be the subject of a public policy statute. Accordingly, there is no conflict between the decision below and the Supreme Court's precedents.

The Court's consideration of this ground should end here, since none of Karstetter's remaining arguments hereunder deal with bases for discretionary review pursuant to RAP 13.4(b). The Guild is, nonetheless, compelled to address Karstetter's revisionist presentation of his complaint's allegations and the Court of Appeal's analysis thereof. Karstetter expends the lion's share of his briefing on this ground in an attempt to recast his disclosure of client confidences as heroic whistleblowing or the performance of a public duty. The Court of Appeals

[3] Indeed, it does not appear that Karstetter discusses *Becker* at all, outside of the Issues Presented.

correctly found such puffery to lack merit and not to be grounded in the factual allegations of Karstetter's Complaint.

First, for a lawyer to produce sensitive client documents simply because a public entity (in this case, the King County Ombudsman's Office) has allegedly threatened to take legal action otherwise is not whistleblowing. Nor is it assisting anyone to blow the whistle. According to Karstetter's allegations, a third party had *already* made a whistleblower complaint to the King County Ombudsman, who was in the process of investigating it. Compl. ¶ 22 (CP 8). Thus, the government was aware of the alleged malfeasance by the time it made demands on Karstetter. He does not allege that he chose to warn the Ombudsman about the parking reimbursement issue. The Ombudsman brought it to his attention. *Id*. Further, as the Court below observed, Karstetter pled that he was motivated to disclose the Guild's documents by the threat of an action in superior court and his understanding of his obligations under the King County Code. *Id*. He therefore did not possess the requisite motivation to act as a whistleblower.

Next, Karstetter attempts to characterize his disclosures as the performance of a public duty, a category of *Dicomes* conduct he never raised in the proceedings below. This effort is procedurally improper. With rare exception, the Supreme Court does not entertain arguments

"raised first in a petition for review." *Crystal Ridge Homeowners Ass'n v. City of Bothell*, 182 Wn.2d 665, 678, 343 P.3d 746 (2015). Karstetter never argued, and the Court of Appeals never considered, whether his conduct constituted the performance of a public duty.[4] Accordingly, Karstetter may not introduce this novel theory at this late date.

In any event, Karstetter's public duty argument fails on the merits. An attorney does not have a duty, absent court order, to disclose documents in his client's possession. *See Sheridan v. Reinke*, No. 1:10-cv-00359-EJL, 2013 WL 253328, at *2 (D. Idaho Jan. 22, 2013) ("Until parties are formally served with discovery there is no obligation to respond to informal requests."). That a request was made by an arm of the government and was accompanied by a threat to sue to compel such

[4] Karstetter skirts this problem by asserting, incorrectly, that he alleged two separate claims for relief corresponding to the whistleblower and public duty "claim" each. Pet. for Rev. at 8. To begin with, the applicability (or lack thereof) of a *Dicomes* category is not a claim for relief. It is a legal concept cited to support factual allegations that may or may not fit into a valid claim for relief. *See AngioScore, Inc. v. TriReme Med., LLC*, 760 F. Supp. 3d 951, 959, n.4 (N.D. Cal. 2014) (a "legal theory" is "not a claim in and of itself"). At any rate, Karstetter is simply wrong that Count II of the Complaint in any way alleges he performed a public duty. That count states in its entirety, "Defendants have wrongfully discharged Plaintiff." Compl. at 8, "Causes of Action." (CP 8.) Karstetter also contends, erroneously, that the Court of Appeals "apparently conflated these two separate claims" into one for whistleblowing activity. Pet. for Rev. at 8, n.14. While it is true that the Court of Appeals evaluated the application of only the fourth *Dicomes* category to the pleadings, that is because that was the only public policy category Karstetter specifically raised during that proceeding. *See* Brief of Respondents at 20 ("While there are various sources of public policy, whistleblower and non-retaliation [for whistleblowing] are chief among them.") (App. at 25). The Court was right to limit the scope of its analysis to the specific public policy grounds Karstetter relied upon in his briefing. Appellate courts cannot "consider arguments that are not developed in the briefs…." *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010).

disclosure does not change the equation. Lawyers constantly face the possibility that their clients will be sued, including by public agencies. Their duty, however, is not to yield to every such threat, but to zealously defend their client's interests and make concessions only when doing so aligns with those interests. *See* RPC 1.3(1) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor."). Were the rule otherwise, there would be no such thing as a discovery dispute in cases in which the government acts as plaintiff. It could make unlimited discovery demands upon other parties, who would be duty-bound to disclose the requested information. Obviously, that is not how our legal system works. As the Guild's attorney, Karstetter abdicated his duty to defend his client's interests when he disclosed its confidences. His actions are more consistent with legal malpractice than performing a public duty. The only case Karstetter cites to support the existence of a public duty to volunteer client confidences is *Gaspar v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 128 P.3d 627 (2006). That case is inapposite. In *Gaspar*, an appellate court held only that lay citizens have a public duty to cooperate with law enforcement officials, upon request, to aid criminal investigations. *Id*. at 637. That case did not involve the duties of an

attorney *representing an entity whose members were under investigation*, as was the case here. Moreover, *Gaspar* was limited to duties arising during criminal investigations. Karstetter has not alleged that the Ombudsman's office was conducting a criminal investigation.

Because Karstetter's first assignment of error does not demonstrate any conflict between the Court of Appeals' decision and Supreme Court precedent, and because its primary object is instead to raise issues that are procedurally barred, unmeritorious, and unconnected to permissible bases for review, the Court should not accept discretionary review.

B. Karstetter's Argument Concerning In-House Lawyers Raises A Non-Adjudicable Policy Concern, Fails To Raise An Issue Of Substantial Public Interest, Is Asserted Without Proper Standing, And Is Wrong On The Merits.

Karstetter's second assignment of error makes two claims stemming from his purported status as the Guild's in-house counsel. Citing no authority, Karstetter first equates in-house legal counsel with lay employees for purposes of contract enforcement. He then revives the argument urged upon the court below that there are questions of fact that must be resolved before a court can apply the well-established rule that a client has absolute authority to terminate its relationship with an attorney.

As an initial matter, by advocating for an exception to the rule – articulated in plain language – that all lawyers are engaged in an at-will capacity, *see* RPC 1.16(a)(3) and Comment 4 thereto, Karstetter seeks to

amend the Rules of Professional Conduct through an adjudication. That is not the appropriate method to amend the RPCs. Although the Supreme Court promulgates the rules and has the ultimate authority to amend them, *see Hizey v Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992), it maintains a specific procedure for doing so. That procedure calls for the collection of input from practitioners during a notice and comment period. The Supreme Court disfavors making changes to the RPCs through judicial opinion. *See In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 346, 126 P.3d 1262 (2006) (Sanders, J., concurring) ("We may not expand the scope of a rule by fiat. If we conclude that [a change should be made], we should simply rewrite the rule to clearly prohibit that conduct…Lawyers should not have to read slip opinions to divine their professional obligations."). Karstetter's assertion that in-house attorneys have different "concerns and vulnerabilities" than their firm-based counterparts, Pet. for Rev. at 11-12, is the sort of empirical claim that must be assessed by soliciting multiple viewpoints through notice and comment. He cannot circumvent this deliberative process by demanding that his conclusory generalizations be encoded, *sub silentio*, into the Rules of Professional Conduct.

Even if the Court were inclined to entertain Karstetter's proposal, the issue does not meet any of the possible grounds for discretionary

review. Karstetter does not even attempt to prove that any of these grounds are met. As far as the Guild can tell, the only one of the statutory bases that Karstetter could even conceivably rely on is the existence of "an issue of substantial public interest." RAP 13.4(b)(4). But the at-will status of in-house counsel is not a matter of substantial public interest. As Karstetter readily acknowledges, the Court of Appeals' decision affects "only those employees who fall within the *narrow band* of those who have a law license." Pet. for Rev. at 12 (emphasis added). Actually, the affected "band" is even narrower than that. It encompasses only those attorneys who are exclusively employed in-house at a corporation or other organization, which may amount to slightly over 3,000 individuals in this state. *Id.* at 11, n.18. Only some unknown subset of those individuals actually have employment contracts with their employers that provide for anything other than terminable-at-will employment. An issue that affects the employment status of only miniscule sub-class of Washington citizens is not a matter of substantial public concern.

In addition, Karstetter lacks standing to pursue his theory. "The doctrine of standing prohibits a litigant from raising another's legal rights." *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d, 107, 138, 744 P. 2d 1032 (1987). A challenge to standing is jurisdictional and "may be raised at any time." *Stevens Cty. v. E. Wash. Growth Mgmt.*

Hearings Bd., 163 Wn. App. 680, 686, 262 P.3d 507 (2011). Here, Karstetter contends that he was the Guild's in-house counsel and that the Court of Appeals has deprived that class of attorneys of contractually negotiated job protections. However, the first half of that statement is untrue based on Karstetter's own pleadings.

In laying out the process for acquiring "a limited license to practice law as in-house counsel," the Admission and Practice Rules ("APR") define "in-house counsel" as an attorney who is employed "*exclusively* for a profit or not for profit corporation, including its subsidiaries and affiliates, association, or other business entity…." APR 8(f) (emphasis added).[5] Karstetter admits that he was not employed exclusively by the Guild. At the outset of his complaint, he describes his practice as serving "*virtually* exclusively" as the Guild's in-house counsel, Compl. ¶ 5 (CP 2) (emphasis added), relying on the modifier "virtually" to obscure his other engagements. But these other engagements are apparent from Karstetter's complaint. In his statement of facts, Karstetter alleges that the circumstances of his separation from the Guild negatively impacted his relationships *with other clients*, thus establishing that he had such clients. The publication of the notice announcing his separation, Karstetter alleges,

[5] Although this provision concerns only those attorneys planning to practice in-house with a limited license, there is no reason to believe that the exclusivity component of the "in house counsel" definition does not apply to all attorneys, whether limited or not.

"almost resulted in the loss of a small Union client." *Id.* ¶ 30 (CP 7). Since he was not employed by the Guild exclusively, Karstetter was not an in-house counsel, and thus has no standing to raise the putative rights of actual in-house attorneys. Indeed, were the Court to carve an exception to the at-will employment rule for in-house counsel, it would not change the outcome of this case. Although Karstetter stresses the unique position of such lawyers, he does not, nor could he, allege that the law should contain special protections for self-employed attorneys who happen to derive most of their business from one particular client – precisely the case here. To accept Karstetter's Petition would lead the Court to issue an impermissible advisory opinion on a non-justiciable matter. *See Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P. 2d 920 (1994) (advisory opinions are a "prohibited area").

Finally, Karstetter's effort to deduce an implied exception to the at-will rule is wrong on the merits. Karstetter argues that the Guild should be stripped of the otherwise universal right to terminate an attorney at will because the Guild is, supposedly, a "[]sophisticated consumer of legal services." Pet. for Rev. at 14. But the right to terminate counsel is not contingent on the client's level of sophistication and has never been justified on this basis. As the Court of Appeals observed, the rule exists because no client should be "unwillingly saddled with an attorney she

neither wants nor needs." 1 Wn. App. 2d at 826 n.6 (quoting *Barr v. Day*, 124 Wn.2d 318, 328, 879 P. 2d 912 (1994)).[6]

Karstetter also argues that *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P. 3d 1147 (2014), relied upon by the Court below, is distinguishable because it was based on a factual finding that the challenged contract terms violated the public policy embodied in the RPC at issue. But the Court of Appeals addressed this very contention, explaining that "[u]nlike *LK Operating*, the trial court needed no more factual inquiry to determine that the termination provision violated public policy. No hypothetical set of facts could reconcile this provision with Washington's strong public policy of allowing a client great freedom in a decision to fire its attorney." 1 Wn. App. 2d at 828. The Court of Appeals cited *LK Operating* for the proposition that the public policies embedded in the Rules of Professional Conduct trump contract terms, to the extent there is a conflict between the two. *LK Operating* does not hold that discovery is necessary to determine the existence of such a conflict in all instances. The conflict in this case is obvious from the face of the pleadings and no further facts need be adduced to confirm it.

[6] Further, it is self-evident that organizations cannot be presumed to have a unique level of sophistication in their relationship with their in-house counsel employees, relative to other companies and persons who employ attorneys.

C. The Court Of Appeals Decision Is Not Inconsistent With Other Appellate Court Opinions.

Karstetter's third assignment of error asserts that the decision below conflicts with two appellate opinions he cited in that proceeding. *See Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016); *Corey v. Pierce Cty.*, 154 Wn. App. 752, 225 P.3d 367 (2010). But as the Court of Appeals explained, that is not so. *Chism* dealt only with an attorney's ability to recover bonuses negotiated by contract in spite of the attorney having committed RPC violations. *Chism*, 193 Wn. App. at 858-60. The Supreme Court in that case noted that, in the face of the RPCs' silence on attorney wages, the state's general wage statutes should prevail. *Id*. at 858-59. The Guild does not dispute Karstetter's entitlement to compensation for services rendered. It seeks only the right to not continue employing Karstetter against its will. *Chism* is entirely inapposite.

Corey also does not conflict with the decision below. In that case, a court of appeals held in part that a public prosecutor could pursue a promissory estoppel claim based on the defendant prosecutor office's promise to include a just cause provision in the plaintiff's contract. 154 Wn. App. at 768-69. The appellate decision upheld that claim's viability only against the defendant's challenge that a just cause provision violated "RCW 36.27.040, RCW 41.56.030(2), and the Pierce County Charter." *Id*. at 770. The defendant there never raised the effect of RPC 1.16 on such a

contract provision, and so the court of appeals never considered it. As the court below noted, *Corey* presents no conflict because "[a]n opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." 1 Wn. App. 2d at 829 n. 16 (quoting *Cont'l Mut. Sav. Bank v. Elliot*, 166 Wash. 283, 300, 6 P. 2d 638 (1932)).

Since neither *Chism* nor *Corey* contradicts the Court of Appeals' decision in this case, the Court should reject Karstetter's third ground for discretionary review.

III. CONCLUSION

For the foregoing, reasons, Petitioners' Petition for Review should be denied.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that the original of the foregoing Answer to Petition for Discretionary Review was filed via Washington State Appellate Courts' Secure Portal Electronic Filing. I also certify that a copy of the same was served via Electronic and United States First Class mail to the following:

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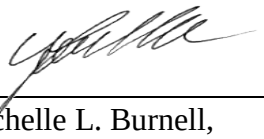
Executed this 19th day of MARCH, 2018, at Seattle, Washington.



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APPENDIX

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BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

I. INTRODUCTION

This case presents a question of whether an employer-client can avoid the contractual commitments and statutory protections owed to its employee-attorney. While a generic attorney-client relationship is terminable upon a client's expression to sever the relationship, this general rule fails to resolve the layered legal inquiry that is necessary within this employment case. Because Appellant King County Corrections Guild (hereinafter "Guild") focuses solely on the attorney-client relationship that existed between itself and Mr. Karstetter, it also strategically ignores the controlling nuance that is implicated by the dual relationship of employer-employee. Considering the rich legal history in Washington that protects persons in the workplace, this Court should affirm the trial court and permit Mr. Karstetter's nascent employment-based claims to proceed.

After decades into Mr. Karstetter's career of serving and representing the interests of corrections offers, the Guild unexpectedly terminated his employment. The employer initiated this adverse action after more than four years into a then-existing five-year employment contract. The Guild had employed Mr. Karstetter for many years pursuant to a series of employment agreements that honored the parties' long-term employment relationship, the benefit to the Guild of employing Mr. Karstetter at below-market rates and provided Mr. Karstetter with reassurance of job security on terms similar to those enjoyed by the Guild's membership. Mr. Karstetter and his wife, Julie, then brought employment and contract claims following his sudden termination.

The Guild now seeks review of Judge Oishi's refusal to grant dismissal of the breach of contract and wrongful discharge claims based on the pleadings alone. Even though it had thoughtfully negotiated and voluntarily consented to a series of employment contracts with Mr. Karstetter, the employer now attempts to assert that public policy considerations amount to an absolute defense and prohibition of these claims. On this assertion, the Guild is wrong because no source of Washington law permits an employer to retaliate and breach a contract without recourse.

II. STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court should be given the opportunity to first examine the factual circumstances and evidence of repeated negotiations and voluntary consent to a series of employment contracts between Mr. Karstetter and the Guild.

2. Whether Mr. Karstetter's employment contract with the Guild is, as a matter of law, inherently unfair to the Guild, voidable for lack of informed consent by the Guild, or is otherwise subject to unilateral avoidance by the Guild upon termination of its attorney. RPC 1.8, 1.16.

3. Whether persons licensed to practice law in Washington are, as a class, wholly exempted from the protections and remedies typically afforded to other employees under Washington law.

4. Whether persons licensed to practice law in Washington may enjoy the benefits of an employment contract with an employer-client.

III. KARSTETTER'S RESTATEMENT OF THE CASE

To understand Mr. Karstetter's claims,[1] one needs to start from the beginning. His dedication and service on behalf of the King County Corrections Officers began 1975 when he first served as a corrections officer.[2] At the time of working in this corrections position, Mr. Karstetter was a member of SEIU Local 519, Public Safety Employees, which is essentially a predecessor entity of the Guild. He then worked for Local 519 in the position of Business Representative between 1984 and 1987.[3]

After graduating from law school and passing the Bar in Washington, Mr. Karstetter remained employed with Local 519 in the position of Legal Advisor, which included the job functions of both the Business Representative and the union's in-house legal representative for non-litigation matters. Throughout his employment with Local 519, Mr. Karstetter received a Continuing Employment Contract, which contains terms like those found in the subsequent employment contracts signed by

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[1] Mrs. Karstetter's claims are dependent on the success of her husband's claims and, therefore, not before the Court in this appeal.
[2] Appx. at 2 (the Declaration of Jared Karstetter in Support of Answer to Motion for Discretionary Review is previously on file herein, but is filed with this brief in the form of an Appendix for ease of reference).
[3] *Id.*

the Guild.[4] Specifically, Mr. Karstetter received the benefit of a just cause standard and an expectation of continuing employment.[5]

Local 519 later discovered it had incurred a financial liability with SEIU and Mr. Karstetter due to a failure to contribute toward his retirement. The employer and employee then worked cooperatively to preserve their relationship and resolve the liability identified by SEIU.[6] The resolution of this internal administration issue first necessitated that Local 519 provide Mr. Karstetter with counsel and, second, that he create of The Law Firm of Jared C. Karstetter, Jr., P.S., in order to encourage an appearance of Mr. Karstetter working as a non-employee contracted counsel.[7] Despite the creation of this business entity, Local 519 and its attorney-employee did not intend to alter the fundamental and long-term nature of their employment relationship.[8] Mr. Karstetter, in fact, did not experience any appreciable change in his employment and Local 519 continued to provide him with reassurances of job security.[9]

A decertification movement occurred within Local 519 and, following a brief break in employment, Mr. Karstetter began working for the newly-birthed Guild that the corrections officers founded after separating their bargaining interests from those of the police officers.[10]

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[4] *Id.* at 2-3; Appx. at 9, 15-17 (the Declaration of Henry H. Cannon is included in the Appendix for ease of reference).
[5] Appx. at 26 (the Declaration of Rick Hubl is included in the Appendix for ease of reference). (CP 137-46).
[6] Appx. at 3-4, 9-10.
[7] Appx. at 10-11.
[8] Appx. at 3-4, 26, 30-31.
[9] Appx. at 3, 9-10.
[10] Appx. at 3-4, 26.

Similar to his position with Local 519, Mr. Karstetter worked in the position of Legal Advisor, which consists of a hodgepodge of labor relations work, both legal and administrative.[11] During his tenure, Mr. Karstetter frequently served as the 'public face' of the Guild on routine and formal matters alike. In this capacity, the former Director of the Department of Adult and Juvenile Detention recognized Mr. Karstetter's status as employment-like and acting in an official capacity on behalf of the Guild.[12] When necessary, the Legal Advisor and the Guild would agree to retain the services of outside counsel for litigation or external disciplinary proceedings.[13]

The similarity of Mr. Karstetter's employment positions is important, as he enjoyed the benefit of employment contracts with the Guild over a period of 20 years. The employment agreements between the Guild and Mr. Karstetter memorialized his historical service to the corrections community, the parties' interest to continue their employment relationship, the benefit of the Guild to have unfettered access to Mr. Karstetter, the benefit of Mr. Karstetter's services at below-market rate, his reporting relationship to the President and the Executive Board, a five-year term of employment and just cause protections.[14] His long-standing employment protections were clearly important to Mr. Karstetter, especially when considering the substantial nature of his Guild

[11] Appx. at 4.
[12] Appx. at 32-33 (the Declaration of Claudia Balducci is included in the Appendix for ease of reference). (CP 131-12).
[13] Appx. at 4.
[14] CP 11-16; Appx. at 4-5.

employment and the fact that any outside non-conflicting work could not begin to replace his employment with the Guild.[15]

The factors supporting the existence of the Guild's employment relationship with Mr. Karstetter are boundless. The Guild identified publicly Mr. Karstetter as its Legal Advisor on the staff section of its website and it did not attempt to differentiate him in any manner from the officers or other Guild members.[16] The Guild also provided its attorney-employee with business cards, a Guild email address, an iPad and name badges, in addition to issuing Mr. Karstetter secured identification that provided him access to facilities and parking structures that the general public cannot access.[17] On a somewhat informal basis, the Guild also provided compensation by handwritten check, with Mr. Karstetter identified individually as the payee.[18] Some of the his compensation took the form of "retro pay," which was triggered when the Guild members were also to receive retroactive pay or other compensation adjustments pursuant to the labor agreement.[19] Such factors support the employer-employee status of the parties and dispel the myth that Mr. Karstetter performed duties through a separate entity as a wholly removed, outside counsel to the Guild.

More directly, the attorney representing the Guild in these proceedings admitted the factual reality of Mr. Karstetter's employment

[15] Appx. at 4-6; 9-10.
[16] Appx. at 5.
[17] Appx. at 4-5, 34-35.
[18] Appx. at 36-37.
[19] *Id.*

status during a separate hearing on November 2, 2016. When appearing before the Public Disclosure Commission, Mr. Iglitzin identified Mr. Karstetter as **"the sole employee of the Guild."**[20] Except for purposes of verifying the employer-employee relationship in this case, references to other external matters involving these parties is specious, as those matters do not control the legal analysis herein.[21] The still unproven allegations of lawyer misconduct require a different legal inquiry in a separate tribunal.[22] Even if relevant to an analysis of Mr. Karstetter's pre-termination performance as an employee, Mr. Iglitzin's reprisals occurred months after the initiation of Mr. Karstetter's lawsuit and, in the end, only subjected the Guild to additional liability.[23]

On April 27, 2016, the Guild summarily terminated Mr. Karstetter's employment without warning, opportunity to confer with the Executive Board or any observation of just cause standards. It did so after more than four years into a five-year employment contract term.[24] Strangely, the Guild did not contest its voluntary assent to the employment

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[20] Appx. at 60, p. 23 ln. 16 (a certified and excerpted transcript of the Special Commission Meeting of the Public Disclosure Commission is included in the Appendix at 38-70).

[21] Appellant's Amended Opening Brief at p. 8, fn.3 (referencing the WSBA grievance and the 45-Day Citizen Action Letter to the Public Disclosure Commission, each filed by Mr. Iglitzin on behalf of the Guild).

[22] It is significant that, when complaining to the WSBA, the Guild did not attempt to assert that Mr. Karstetter had coerced the Guild into signing a series of employment contracts, nor does it assert that he engaged in ethical misconduct by negotiating an employment contract.

[23] Appx. at 85 (a true and correct copy of the PDC Compliance Officer's report is included in the Appendix at 71-85; includes staff recommendations for reference of two violations committed by the Guild to the Attorney General for possible prosecution).

[24] CP 1-16.

contract in any of the prior four years, nor had it questioned the employment of Mr. Karstetter during any of the 15 years before the most recent contract. To justify this revelatory approach of contractual avoidance, the Guild relies on alleged ethical violations by Mr. Karstetter and the advice given to it by the Public Safety Labor Group (hereinafter "Legal Defendants").[25] The soundness of the legal advice is dubious when considering the advising counsel's inability to practice law in Washington and the lack of any appreciable investigation or interview involving Mr. Karstetter.[26] By offering their opinions and encouraging the ouster of Mr. Karstetter, the Legal Defendants also earned the Guild's business as its new counsel.[27] The Karstetters then filed suit against the Guild, individual Guild officers/members and the Legal Defendants.[28]

The parties have engaged in a substantial amount of early motions practice, but little or no discovery to date. The motions practice request Mr. Karstetter to submit a number of declarations and responses.[29] Counsel for Mr. Karstetter also issued written discovery requests for information that is typically sought in employment cases.[30] The Guild filed a motion to dismiss, pursuant to CR 12(b)(6), based on an assertion that the parties' attorney-client relationship renders Mr. Karstetter's claims

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[25] Appellant's Amended Opening Brief at 3-4; CP 98-105.
[26] Appx. at 88 (the Declaration of Judith A. Lonnquist is included in the Appendix at 86-88 for ease of reference). (CP 128-30).
[27] The claims against the Legal Defendants, including tortious interference, are not before this Court on appeal.
[28] CP 1-16.
[29] CP 128-52.
[30] Appellant's Amended Opening Brief at 6-7.

barred by law.[31] After significant briefing and oral argument, the trial court granted dismissal of some claims, but permitted Mr. Karstetter to proceed on claims of breach of contract and wrongful termination.[32] The Guild then sought interlocutory review of this matter.

IV. ARGUMENT

1. Standard of review.

An inquiry as to whether certain alleged facts establish an RPC violation is a question of law that is subject to *de novo* review. *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 49, 72-73, 331 P.3d 1147 (2013). Such analyses are typically fact intensive, thus requiring all reasonable inferences and disputed facts to be interpreted in Mr. Karstetter's favor. *LK Operating*, 181 Wn.2d at 72.

The appellate review of a 12(b)(6) motion will consider whether *any plausible set of facts* that would support the valid claims can be conceived. *Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). Dismissal of an action for failure to state a claim pursuant to CR 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove *no set of facts*, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. Wash. Pub. Power*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (*quoting Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (*emphasis supplied*); *Orwick v.*

[31] CP 17-30.
[32] CP 39-40.

Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)). This Court is entitled to consider hypothetical situations that are not part of the formal record and may even be raised for the first time on appeal. *Halvorson*, 89 Wn.2d at 675. Any conceivable hypothetical will defeat motion to dismiss on the pleadings if the scenario is sufficient to support the claims at issue. *Id.* at 674.

Mr. Karstetter pled properly claims that are legally sufficient and suitable for trial on the merits. There is no error in the trial court's denial of the Guild's 12(b)(6) motion and this matter should be remanded for further proceedings.

2. Washington law simply does not constrain any person, even an attorney-employee, from working pursuant to an enforceable employment agreement and, therefore, the trial court did not err.

The Guild relies predominately upon RPC 1.16[33] for its assertion that *any* employment agreement with an attorney-employee is subject to unilateral avoidance based on an at-will privilege held exclusively by a client-employer.[34] The Guild's position is inherently flawed for several reasons. First, RPC 1.16 is an ethics rule of general applicability that is designed to protect clients, possibly vulnerable or less sophisticated, from being bound in contract during a legal controversy that is often sensitive, highly personal and filled with emotion for the layperson client. Second, the Guild ignores purposely the legal and factual differences between an

[33] "A client has the right to discharge a lawyer at any time, with or without cause . . ." RPC 1.16(a)(3), comment 4.
[34] Appellant's Amended Opening Brief at 10-13.

enforceable employment contract and a fee agreement involving an attorney-client relationship.[35] And third, there is an utter absence of Washington authority to support the Guild's interpretation of RPC 1.16 as applied to an employer-employee relationship.

Instead of relying on case law that interprets the application of RPC 1.16 to permit a unilateral termination of an employment contract without risk of liability, the Guild references other cases that cite ethics rules and attempts to apply those decisions by analogy.[36] These cases are not authoritative in the employment law context, nor are they sufficiently analogous. In *LK Operating*, the Washington Supreme Court analyzed former RPC 1.8(a) and whether the terms of a joint venture proposal between an attorney and client were unfair to the client's interests, or if there lacked an appreciable disclosure of terms to the client. *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 49, 89, 331 P.3d 1147 (2013). When considering whether a contract is unenforceable because it violates public policy, this Court must decide whether the contract itself is injurious to the public. *LK Operating*, 181 Wn.2d at 87. Clearly, a contract of employment – *even one that involves an attorney-employee* – is neither prohibited, nor does it violate the public good. Even when a RPC violation is asserted as a defense to a contract claim, there is no rule that declares such contracts as automatically unenforceable. *Id.* at 87-88. Referring to its reluctance to establish a strict rule, the Washington

[35] *Id.*
[36] *Id.*

Supreme Court stated that the following:

> "Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public — the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings. It would also ignore the clear admonishment that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.""

Id. (*citing* Model Rules, Scope at ¶ 20) (*italics and internal quotes in the original*).

The admonishment above is particularly relevant herein, as the trial court may later wish to evaluate whether the employer simply invoked RPC 1.16 to manipulate a defense and establish a plausible excuse for terminating the employee after four years into a five-year term.[37] Even assuming *arguendo* that Mr. Karstetter's employment agreement violated RPC 1.16, the trial court would need to conduct a separate factual inquiry outside the context of the Guild's 12(b)(6) motion.[38] Like the inquiry in *LK Operating*, there will be relevant facts, documents and witness perspectives that are more appropriate for consideration by the trial court in the context of a CR 56 summary judgment motion. *LK Operating*, 181 Wn.2d at 73 (*e.g., What was the contractual intent of the Guild officers when contracting with its attorney-employee and repeatedly extending his contracts?*). An attorney's compliance or non-compliance with ethical

[37] CP 1-16.
[38] CP 17-30.

rules is likely a factual inquiry that cannot be resolved easily on summary judgment, let alone a 12(b)(6) motion to dismiss. *See e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).

For the same reasons, the other decisions relied upon by the Guild are equally inapplicable to the facts of Mr. Karstetter's employment. *See generally Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1982); *see also Valley/50th Ave. LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). In *Belli*, the Washington Supreme Court considered whether the execution of a second fee agreement amounted to a termination an attorney identified in the first fee agreement. The case also involved an ethical analysis of a fee splitting agreement, but this decision does not discuss the enforcement of an employment contract, as is relevant to the analysis herein. *Belli*, 98 Wn.2d at 577-78. In *Valley/50th Ave.*, the Washington Supreme Court considered the ethical implications of enforcing a deed of trust between and attorney and client. It determined that a violation of RPC 1.8 might render the deed of trust void or voidable, but there remained material issues of genuine fact as to whether the law firm fully abided by its ethical duties. *Valley/50th Ave.*, 159 Wn.2d at 743-47. Again, this decision offers nothing when considering the dual status of a client-employer union organization and its attorney-employee who seeks to enforce an enforceable employment contract.

It is undisputed that a client may terminate a traditional attorney-client relationship for a variety of reasons, or no reason at all. *Fetty v.*

Wenger, 110 Wn.App. 598, 600, fn. 4, 36 P.3d 1123 (2001); *Kimball v. Public Util. Dist. 1*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). Mr. Karstetter's employment contract requires a different analysis, however. His situation is layered with an employer-employee relationship and is fundamentally different from a claim to enforce a fee agreement for representing an heir in an estate action, or to seek the reasonable value of services as outside counsel on a dam project. *Fetty*, 110 Wn.2d at 599-600; *Kimball*, 64 Wn.2d at 253-56. The fact that a client retains the right to sever an attorney-client relationship simply does not equate to a conclusion that an employer possesses an unfettered legal privilege under Washington law to void an employment contract. If such were the case, the retention of employees and the validity of their employment contracts would be in jeopardy.

Finally, the Guild argues that just cause protections are inconsistent with the norms of an attorney-client relationship.[39] Indeed, it is inconsistent for a fee agreement, but is not uncommon in employment contracts. Mr. Karstetter's interest to enforce his just cause standard for termination is based on his relationship to the Guild as its attorney-employee. Although just cause language is inconsistent with a typical attorney-client relationship, the California Supreme Court found no reason to prohibit an attorney-employee from pursuing contract-based claims, especially when any other type of employee is able to enforce the same

[39] Appellant's Amended Opening Brief at 19-20.

contractual provision. *General Dynamics Corp., v. Superior Court,* 7 Cal.4th 1164, 876 P.2d 487, 490 (1994). The *General Dynamics* decision further emphasized that "contract and tort claims in wrongful termination cases are analytically distinct from the circumstances" involved with contingent fee agreements. *General Dynamics,* 876 P.2d at 493-94. To hold otherwise will ***"compel us to embrace an intuitively unjust, even outrageous, result"*** based upon other precedents that are expressly limited to clients with contingent fee agreements. *Id.* (*emphasis supplied*).

3. Washington law permits attorney-employees to negotiate compensation and to enter into employment agreements with their client-employers and, therefore, the trial court did not err.

It is undebatable that the act of negotiating an unfair contract or taking an unreasonable fee can result in a client's avoidance of a contract and disgorgement of fees. This Court found that counsel's disqualification prior to trial, combined with his breach of fiduciary duties and the taking an unreasonable fee by accepting a transfer of the client's property, violated ethics rules and rendered the fee arrangement unenforceable. *Cotton v. Kronenberg*, 111 Wn.App. 258, 270-71, 44 P.3d 878 (Div. I, 2002). Such circumstances are totally incongruent with Mr. Karstetter's employment contract and experience with the Guild; it is implausible to argue that his employment agreements, negotiated with an elected Executive Board, were unethical or unfair to his client-employer. Where the facts demonstrate fairness, proper disclosure of terms and voluntary assent to a contract, the possibility of undue influence and coercion by counsel are negated. *Kennedy v. Clausing*, 74 Wn.2d 483, 492, 445 P.2d

637 (1968).

Considering the unique circumstances of employment as an in-house counsel (*i.e.* simultaneous status as legal counselor and employee), the very limited number of Washington cases on this subject is not unsurprising. The Washington Supreme Court only recently decided, in a case of first impression, that discussions between corporate counsel and former employee witnesses are not entitled to the protection of privilege. It is the employment relationship that is *essential to the legal analysis* and former employees are fundamentally different from those persons that are currently employed. *See Newman v. Highland School Dist. No. 203*, 186 Wn.2d 769, 776-80, 381 P.3d 1188 (2016). Here too, Mr. Karstetter's employment relationship with the Guild is fundamental to the analysis of this case.

In the *Chism* decision, this Court considered the interplay between the Rules of Professional Conduct and the breach of contract claims brought by an attorney-employee of a construction company. *See generally Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (Div. I, 2016). When considering the application of RPC 1.5 and 1.7, there existed a lack of clear guidance on the issue of attorney-employee wage contracts, and inferring a conclusion from this lack of clear guidance can lead to absurd results. For example, a finding that an ethical conflict exists inherently between an attorney-employee and client-employer when negotiating compensation, "would cast doubt on the wage negotiations of scores of Washington attorneys – not only in-house corporate counsel like

Chism, but also government attorneys and numerous nonprofits attorneys." *See Chism*, 193 Wn. App. at 848. Advocating for a result that will garner short-term results, the Guild readily disregards this warning.

When evaluating RPC 1.8, this Court reached a conclusion to avoid disastrous long-term consequences. Because there is a fundamental difference between an employment contract and a fee agreement, there is a risk of applying RPC 1.8 to the disruption of a variety of employment arrangements. A broad interpretation would render each compensation agreement of an attorney-employee as *prima facie* fraudulent, thus "disturbing the settled expectations of many lawyer-employees." *See Chism*, 193 Wn. App. at 852. Notably, Mr. Chism also relied on a WSBA advisory opinion stating that RPC 1.8 does not apply to the negotiation of an employment contract as in-house legal counsel.[40] *Id.* at 853. Likewise, Mr. Karstetter's employment agreement with the Guild does not violate RPC 1.8, and should not be applicable to RPC 1.16 because an employment agreement is fundamentally different from a fee agreement and does not violate public policy.

The Guild's preferred interpretation of RPC 1.16 would yield untenable and absurd results like those contemplated and rejected in *Chism*. *Id.* at 852. For example, a client-employer may simply preempt

[40] Appx. 89 (a true and correct copy of the WSBA Rules of Pro'l Conduct Comm., Advisory Op. 1045 (1986) is included in the Appendix for ease of reference.) Respondent's counsel could not locate any relevant advisory opinions on RPC 1.16. Advisory Op. 2219 (2012) addresses the responsibilities of in-house counsel regarding supervision of others, but does not provide any meaningful guidance on the issues contested herein.

any potential liability on statutory or contractual claims by specifying a decision to terminate the attorney-client portion of their relationship and, therefore, enable the employer to disregard its legal responsibilities. Notably, the Guild cannot point to any Washington authority to suggest that an employer may sever unilaterally a contracted employment relationship, even if it does possess the right to terminate the co-existing attorney-client relationship. Assuming that RPC 1.16 applies to an employment relationship with an attorney-employee, which it should not, the Court should recognize that the Guild still had options to avoid a breach of the employment agreement; it could have placed Mr. Karstetter on administrative leave through the end of his contract, provided him the opportunity to meet and respond to the concerns of the Executive Board, or limited his work responsibilities to non-legal, non-representational tasks.

The *Corey* decision is equally instructive here. *See Corey v. Pierce Co.*, 154 Wn.App. 752, 225 P.3d 367 (Div. 1, 2009). Ms. Corey faced the decision to accept a promotion, but lose her job security as a consequence of this advancement. Before she accepted the position as the third-highest ranking deputy prosecutor for her employer-client, Pierce County, Ms. Corey secured an agreement for just cause protections applicable to her position. *Corey*, 154 Wn.App. at 757. At issue in this case is a similar just cause contractual provision, upon which Mr.

Karstetter has relied.[41] Although the *Corey* court found a lack of consideration for an express or implied contract to provide due process, it allowed her to pursue a promissory estoppel claim using the same evidence. *Corey*, 154 Wn.App. at 768. Similar to the facts in *Corey*, Mr. Karstetter received a clear and definite promise of employment security and just cause protections.[42] *Id.* at 768-70.

The *Chism* and *Corey* decisions are both Division I cases that permit attorney-employee actions against their client-employers. As such, the trial court did not err and Mr. Karstetter should be permitted to prosecute his claims.

4. Washington courts have permitted on repeated occasions attorney-employees to bring wrongful discharge actions and, therefore, the trial court did not err.

The law of wrongful discharge in Washington provides a comprehensive remedy and there exist no exceptions to attorney-employees bringing such actions. Despite the Guild's bold assertions that attorney-employees are somehow "exempt" from bringing wrongful termination actions, no Washington court has issued such a decision. The tort of wrongful discharge is available to both at-will employees and those under contract, because it "embodies a strong state interest in protecting against violations of public policy." *Wilson v. City of Monroe*, 88 Wn.App. 113, 115-16, 943 P.2d 1134 (Div. I, 1997); *accord: Smith v. Bates Tech. College*, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). In Mr.

[41] CP 1-16.
[42] *Id.*

Karstetter's case, there exist public policy implications because he asked his employer with assistance to fend off complaints from several Guild members, responded professionally and under compulsion to an Ombudsperson during an investigation of a public agency, and he participated in a King County whistleblower case. While there are various sources of public policy, whistleblower protection and non-retaliation are chief among them. *See e.g.,* RCW 42.41.010; 49.60.210. Mr. Karstetter need only assert that his actions were reasonable and taken in furtherance of the public policy. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 313, 358 p.3d 1153 (2015).

Washington courts have permitted attorney-employees to bring wrongful discharge claims in a number of cases. *See Weiss v. Lonnquist*, 173 Wn.App. 344, 359-60, 293 P.3d 1264 (2013) (wrongful termination trial verdict overturned on appeal), *review denied*, 178 Wn.2d 1025, 312 P.3d 652 (2013), *abrogated by Becker v. Cmty. Health Sys., Inc.*, 182 Wn.App. 935, 332 P.3d 1085 (2014); *see also Wise v. City of Chelan*, 133 Wn.App. 167, 135 P.3d 951 (Div. III, 2006) (municipal judge bringing breach of contract action following position elimination). In *Muhl*, the reviewing court found more than enough disputed facts to warrant reversal of summary judgment on the attorney's wrongful termination and retaliation claims. *Muhl v. Davies Pearson, P.C.*, 2015 Wash. App. LEXIS 2522, 14-28 (Div. II, 2015).[43]

[43] The *Muhl* case is cited pursuant to GR 14.1(a) as nonbinding authority that this Court may consider for its relevant persuasive value.

Still other cases offer insight when attorney-employees bring claims to enforce contracts or for wrongful termination. The Montana Supreme Court denied the notion that a client may discharge its attorney with absolute impunity and without considering the nature of the attorney-client relationship. *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 5 P.3d 1031, 1039 (2000). It rejected the "universal rule" (giving the client the right to terminate her attorney) in the context of an attorney-employee relationship because special statutory protections are extended to an employee and are not otherwise enjoyed by independent contractors. *Id.* The Tennessee Supreme Court also recognized that in-house attorneys are typically dependent on their employer-client for their livelihood; to deny this reality fails to "present an accurate picture of modern in-house practice." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 853, 860-64 (2002). An employee-lawyer should not be cheated out of his wrongful discharge action simply because it involves his client-employer. *Fox Searchlight Pictures, Inc. v. Paladino,* 89 Cal.App.4th 294, 314-15, 106 Cal.Rptr.2d 906 (2001); *see also* RPC 1.6(b)(5) (resolving issue concerning use of attorney-client privilege in claim by a lawyer against a client). Recognizing that a second relationship of employer-employee co-habits with that of attorney-client in an in-house counsel role, another court found that the Kansan equivalent of RPC 1.16 does not give a client a cloak of immunity and permitted a wrongful discharge claim brought by the attorney-employee. *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606, 610 (D.Kan. 2007).

5. The Guild relies errantly on non-binding authority to suggest a public policy override that requires dismissal of Mr. Karstetter's claims.

As justification for its position on appeal, the Guild relies on non-authoritative decisions from Illinois that prohibit actions brought by persons identified as attorney-employees. *See* Appellant's Amended Opening Brief at pp. 17-18. In *Herbster*, an Illinois appellate court barred an attorney-employee's retaliation action, even where the employee opposed an order to destroy discoverable documents and a violation of his ethical obligations if he followed the order. *Herbster v. N. Am. Co. for Life & Health Ins.*, 150 Ill.App.3d. 21, 26-29, 501 N.E.2d 343 (1986). In the *Balla* decision, the Illinois Supreme Court held that in-house attorneys are unable to bring claims for wrongful termination or retaliatory discharge, largely due to sanctity of the attorney-client relationship and the need to protect the privileged information that one obtains in the course of performing duties as in-house counsel. *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502-05, 584 N.E.2d 104 (1991). The court prohibited Mr. Balla's claim despite evidence that his employer's alleged sale of misbranded or adulterated dialyzers posed a risk to public safety. *Balla*, 145 Ill.2d at 501-502.

Several years later, the Illinois Supreme Court reaffirmed its narrow construction of retaliatory discharge claims and the prohibition against attorney-employees obtaining relief under this tort. Even where an attorney is employed by a law firm and raises concerns about the firm's debt collections work, an employee-attorney is denied any remedy for his

subsequent discharge. *Jacobson v. Knepper & Moga, P.C.*, 185 Ill.2d 372, 376-78, 706 N.E.2d 491 (1998). Chief Justice Freeman noted his long-standing concern by stating the following in dissent:

> "[M]y colleagues today now extend the *Balla* holding to law firms and their employee attorneys. Thus, ***one class of employees in this state, attorneys, has been stripped of a remedy*** which Illinois clearly affords to all other employees in such "whistle-blowing" situations. Today's opinion serves as yet another reminder to the attorneys in this state that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility."

Jacobsen, 185 Ill.2d at 379 (*dissenting opinion, emphasis supplied*). This dissent is more closely aligned with liberal construction of Washington employment law, as the *Balla* decision has been widely rejected in other courts and never adopted by any court of Washington.

The 9th Circuit specifically considered and rejected the *Balla* decision. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 994-96 (9th Cir. 2009). When reviewing the claims of the Van Asdales, husband and wife that worked as in-house counsel in the same company, the court found the issue of attorney-client privilege as an insufficient basis to bar their claims, and found that in-house counsel were not exempted from protections against retaliation. *Id.* at 995-96.

For several reasons, the Guild's reliance on Illinois law is both misguided and conflicts directly with the established employment law jurisprudence in Washington. First, the ethics rules in Washington permit an attorney to bring a lawsuit against a former client, even when that

former client is also an employer. RPC 1.6(b)(5) (ethics rule that governs the potential use of attorney-client privileged materials in a claim by a lawyer against a former client). Second, Washington employment law is to be construed liberally for the purpose of vindicating the rights of employees where appropriate. *See e.g.*, RCW 49.60.020. Third, the Guild is unable to point to any authority that carves out a classification of "attorneys" as being exempt from the workplace remedies available under Washington law.

6. The trial court must be afforded the opportunity to evaluate the material facts and consider in equity whether the Guild may avoid Mr. Karstetter's claims.

It is undisputed that, after a series of employment agreements and an inducement of Mr. Karstetter's reliance on the same, the Guild terminated the contract in the fifth year of the most recent contract.[44] If the Guild believes the contract to violate public policy or ethics rules, it waited an awfully long time to assert its position. Considering the significant delay to suggest that multiple voluntary agreements are void as a matter of public policy, the trial court must necessarily confront the doctrines of waiver, laches, unclean hands, promissory estoppel or equitable estoppel. As discussed *supra*, promissory estoppel is a viable equitable remedy for an attorney-employee. *Corey,* 876 P.2d at 493-94.

The doctrine of equitable estoppel will deny a late assertion of a right when, by reason of the delay, the Guild placed Mr. Karstetter in an

[44] CP 11-13; Appx. 5-6.

untenable position and is injured as a result. *Young v. Jones,* 72 Wash. 277, 130 P. 90 (1913). Also, the Guild's untimely assertions might be so harmful that equity will operate as an estoppel against this desperate maneuver to repudiate the employment agreements it had entered into with Mr. Karstetter. *Amende v. Pierce County,* 70 Wn.2d 391, 398, 423 P.3d 634 (1967) (examining the doctrine of laches/equitable estoppel).

This case involves a fact-laden history and requires an in-depth examination by the trier of fact. When considering Mr. Karstetter's claims for wrongful termination and breach of contract, the trial court should also be afforded the opportunity to consider whether any equitable doctrines apply to these facts. Because returning this case to the trial court will promote justice and permit consideration of equity, this Court should affirm and remand.

V. KARSTETTER REQUESTS AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS FOR SUCCESSFULLY OPPOSING THE GUILD'S APPEAL

Instead of litigating the disputed issues of material fact pertaining to Mr. Karstetter's claims in the court below, the Guild delayed, obstructed and maneuvered with its pursuit of this interlocutory foray. It did so with little, if any, meaningful discovery of the underlying factual history of Mr. Karstetter's employment, which influences much of the analysis herein. Even if this appeal satisfies the intellectual itch pertaining to Mr. Karstetter's unique status as an attorney-employee for the Guild, it brings him no closer to the resolution of his claims in the trial court. For this reason, Mr. Karstetter respectfully requests an assessment of his

attorney fees and costs should he oppose successfully this appeal. RAP 18.1.

An award of attorney fees and costs is available to a successful party on appeal when the law governing the claims at issue will typically permit the party to receive such recovery at the trial court level. RAP 18.1(a). Pursuant to statute, an employer is obligated to pay the attorney fees and costs in any action where an employee is able to recover wages or salary owed. RCW 49.48.030. A recent case considered by Division I, the court identified strong remedial underpinnings of this wage recovery statute, a decision of which the Washington Supreme Court later affirmed. *Arnold v. City of Seattle*, 185 Wn.2d 510, 520-21, 374 P.3d 111 (2016). Because Mr. Karstetter is entitled to recover his fees and costs a statutory claim that provides for recovery of salary owed under his employment contract, this Court should likewise permit him to recovery his fees for this appeal. RAP 18.1(a); RCW 49.48.030.

VI. CONCLUSION

Based on the foregoing, the Guild cannot rely on any direct authority to support its assertion that RPC 1.16 should be given a widespread interpretation and application to the employment of an attorney-employee. Contracts that regulate the employment of attorney-employees neither violate RPC 1.8, nor are they harmful to the public. Further, because Division I issued rulings in other cases that permit attorney-employees to prosecute claims for breach of contract and

wrongful termination, Mr. Karstetter should be granted a similar opportunity to conduct discovery and pursue his claims against the Guild.

Mr. Karstetter respectfully requests this Court reject the Guild's appeal, award him fees and costs, and remand this case for further proceedings consistent with the opinion of this Court.

RESPECTFULLY SUBMITTED this 29th day of March, 2017.

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CERTIFICATE OF SERVICE

I, Kathy Olivarez, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on the date below, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

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Dated: March 29, 2017

Kathy Olivarez

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