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DIVISION II

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

STATE OF WASHINGTON
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DEPUTY

MARIE BARNETT; VICTOR GONZALEZ; MARIO GONZALEZ;
DAVID GONZALEZ; and OCTAVIO GONZALEZ,

Plaintiffs/Respondents,

v.

SEQUIM VALLEY RANCH, LLC,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

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ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. <u>ASSIGNMENTS OF ERROR</u>	1
II. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
III. <u>STATEMENT OF THE CASE</u>	2
A. Introduction.....	2
B. Background.....	3
C. Issues With Maple View Farms and Requests for Employee Cooperation.....	4
D. Employees Submit Retroactive Letter of Resignation.....	8
E. Employees File Suit More Than Three Years After the Event They Claim Constituted a Constructive Discharge.....	9
F. Sequim Valley Ranch's Motion for Summary Judgment	10
G. Trial.....	10
IV. <u>ARGUMENT AND AUTHORITIES</u>	13
A. The Trial Court Erred In Denying SVR's Motion for Summary Judgment Based on the Statute of Limitations	13
B. The Trial Court Erroneously Instructed the Jury on Constructive Discharge	26
1. <u>Standard of Review</u>	26

	<u>Page</u>
2. <u>The Jury Instructions Prejudiced SVR By Relieving the Employees of Their Burden to Prove They Had No Choice But to Quit</u>	27
3. <u>The Trial Court Erred in Refusing to Give SVR’s Proposed Instruction No. 23</u>	33
C. The Trial Court Erroneously Instructed the Jury On the Claim of Wrongful Discharge In Violation of Public Policy	35
1. <u>The Court’s Public Policy Construction Is Not Supported By the Law</u>	35
2. <u>The Jury Should Have Been Instructed On The Statutes Embodying the Public Policy</u> ...	38
D. The Verdict Is Not Supported By Substantial Evidence	46
V. <u>CONCLUSION</u>	50

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<u>1000 Virginia Ltd. Partnership v. Vertecs Corp.</u> , 158 Wn.2d 566, 146 P.3d 423 (2006).....	14
<u>Adcox v. Children’s Orthopedic Hosp. and Medical Center</u> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	24, 25
<u>Bell v. Dynamite Foods</u> , 969 S.W.2d 847 (Mo. App. 1998).....	34
<u>Blaney v. Int’l Assoc. of Machinists & Aerospace Workers</u> , Dist. 160, 151 Wn.2d 203, 87 P.3d 757 (2004).....	26, 27, 32
<u>Briggs v. Nova Services</u> , 166 Wn.2d 794, 213 P.3d 910 (2009).....	15
<u>Burnside v. Simpson Paper Co.</u> , 123 Wn.2d 93, 864 P.2d 937 (1994).....	45
<u>Charles v. Regents of New Mexico State University</u> , 256 P.3d 29 (N.M. App. 2010).....	31
<u>Clark v. Modern Group Ltd.</u> , 9 F.3d 321 (3rd Cir. 1993).....	44
<u>Christie v. United States</u> , 518 F.2d 584, 587-88 (1975).....	29, 30
<u>Cudney v. AlSCO, Inc.</u> , ___ Wn.2d ___, 259 P.3d 244 (Slip Op. Sept. 1, 2011).....	47, 48, 49
<u>Daniels v. Mutual Life Ins. Co.</u> , 340 N.J.Super 11, 773 A.2d 718 (N.J. Ct. App. 2001)..	23 n.4

	<u>Page(s)</u>
<u>Danny v. Laidlaw Transit Services, Inc.,</u> 165 Wn.2d 200, 193 P.3d 128 (2008).....	14, 35, 47
<u>Douchette v. Bethel School Dist. No. 403,</u> 117 Wn.2d 805, 818 P.2d 1362 (1991).....	<i>passim</i>
<u>Douchette v. Bethel School Dist. No. 403,</u> 58 Wn. App. 824, 828, 795 P.2d 162 (1990).....	<i>passim</i>
<u>Draszt v. Naccarato,</u> 146 Wn. App. 536, 192 P.2d 921 (2008).....	25
<u>Ellis v. Barto,</u> 82 Wn. App. 454, 918 P.2d 540 (1996).....	24
<u>Gardner v. Loomis Armored, Inc.,</u> 128 Wn.2d 931, 913 P.2d 377 (1996).....	26, 37, 45, 46
<u>Grube v. Lau Industries, Inc.,</u> 257 F.3d 723 (7th Cir. 2001).....	34
<u>Hancock v. Bureau of National Affairs, Inc.,</u> 665 A.2d 588 (D.C. Ct. App. 1994).....	23 n.4
<u>Herron v. Tribune Publ'g Co., Inc.,</u> 108 Wn.2d 162, 736 P.2d 249 (1987).....	14
<u>Hubbard v. Spokane County,</u> 146 Wn.2d 699, 50 P.3d 602 (2002).....	41, 42, 43
<u>Hue v. Farmboy Spray Co., Inc.,</u> 127 Wn.2d 67, 896 P.2d 682 (1995).....	27
<u>Jones v. Fitzgerald,</u> 285 F.3d 705 (8th Cir.2002).....	31
<u>Korslund v. DynCorp Tri-Cities Services, Inc.,</u> 156 Wn.2d 168, 125 P.3d 119 (2005).....	15

	<u>Page(s)</u>
<u>Miller v. City of Tacoma,</u> 138 Wn.2d 318, 979 P.2d 429 (1999).....	45
<u>Molsness v. Walla Walla,</u> 84 Wn. App. 393, 928 P.2d 1108 (1996).....	27, 28, 29
<u>Sedlacek v. Hillis,</u> 145 Wn.2d 379, 36 P.3d 1014 (2001).....	41
<u>Snyder v. Medical Service Corp. of Eastern Wash.,</u> 145 Wn.2d 233, 35 P.3d 1158 (2001).....	15
<u>Stephenson v. American Dental Assoc.,</u> 789 A.2d 1248 (D.C. Ct. App. 2002).....	23 n.4
<u>Stroud v. VBFSB Holding Corp.,</u> 917 SW.2d 75 (1996).....	23 n.4
<u>Thomas v. French,</u> 99 Wn.2d 95, 659 P.2d 1097 (1983).....	27
<u>Thompson v. St. Regis Paper Co.,</u> 102 Wn.2d 219, 685 P.2d 1081 (1984).....	37, 41
<u>Travis v. Tacoma Pub. Sch. Dist.,</u> 120 Wn. App. 542, 85 P.3d 959 (2004).....	15
<u>Ulchiny v. Merton Comm. School Dist.,</u> 249 F.3d 686 (7th Cir. 2001).....	34
<u>Wahl v. Dash Point Family Dental Clinic, Inc.,</u> 144 Wn. App. 34, 181 P.3d 864 (2008).....	15
<u>Yearous v. Niobrara County Memorial Hosp. By and Through Bd. of Trustees,</u> 128 F.3d 1351 (10th Cir. 1997).....	30, 34
<u>Young v. City of Seattle,</u> 30 Wn.2d 357, 191 P.2d 273 (1948).....	24

<u>Statutes</u>	<u>Page(s)</u>
RCW 4.16.005.....	14
RCW 4.16.080(2).....	14
RCW 4.44.380.....	45
RCW 9A.72.010.....	40
RCW 9A.72.110.....	40
RCW 9A.72.120.....	40
 <u>Court Rules</u>	
CR 56(c).....	14

I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Sequim Valley Ranch, LLC's motion for summary judgment where there were no genuine issues of material fact and SVR was entitled to judgment on statute of limitations grounds as a matter of law.

2. The trial court erred in failing to instruct the jury that a claim of constructive discharge requires proof that the Employees had no other alternative but to quit.

3. The trial court erred in failing to instruct the jury that the failure to pursue internal procedures to contest an allegedly wrongful employment action renders a resignation voluntary.

4. The trial court erred by instructing the jury on a public policy not supported by the law.

5. The trial court erred in failing to instruct the jury regarding the scope of the allegedly unlawful conduct relating to the public policy identified by the court.

6. The jury's verdict is not supported by substantial evidence supporting the jeopardy element of the wrongful discharge claim.

7. The trial court erred in entering a judgment on a jury verdict in favor of the Employees.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in determining that the Employees' constructive wrongful discharge claim was not barred by the statute of limitations where that cause of action accrues on the last date the allegedly unlawful conduct occurred and the uncontroverted evidence on summary judgment established that the Employees knew they had been constructively discharged more than three years prior to the commencement of this action?

2. Is the verdict supported by substantial evidence where the statute of limitations for a constructive wrongful discharge claim action accrues on the last date the allegedly unlawful conduct occurred and the evidence at trial established that the accrual date was more than three years before the commencement of this action?

3. Did the trial court commit reversible error when it refused to instruct the jury that a constructive discharge requires proof that the Employees had no alternative but to quit, the proposed instruction was consistent with Washington law, relieved the Employees of their burden of proof at trial, and prevented SVR from advancing its theory of the case?

4. Did the trial court commit reversible error when it refused to instruct the jury that the Employees' failure to pursue internal procedures before quitting renders their terminations voluntary where the proposed instruction was an accurate statement of the law and the failure to give it prevented SVR from advancing its theory of the case?

5. Did the trial court commit reversible error when it (1) instructed the jury on a construction of a public policy not supported by the law, and (2) when it refused to instruct the jury on the criminal statutes embodying the public policy identified by the court?

6. Is the verdict supported by substantial evidence where the jeopardy element of a *prima facie* case of wrongful discharge in violation of public policy cannot be met where the employee fails to act in a manner that could actually stop the allegedly unlawful conduct of the employer and all Employees admitted at trial that they took no action in response to the allegedly inappropriate conduct of SVR other than quitting their jobs?

III. STATEMENT OF THE CASE

A. Introduction.

This appeal arises from a judgment entered against Sequim Valley Ranch and in favor of four former employees following a jury

trial in the Clallam County Superior Court on claims alleging constructive wrongful discharge in violation of public policy.

B. Background.

Appellant Sequim Valley Ranch, LLC (“SVR”) cultivates and manages approximately 700 acres of land near Sequim, Washington. CP 1048. Prior to the end of 2004, SVR operated a commercial lavender growing operation on the Ranch. Id. At that time, SVR was the largest wholesale lavender grower and supplier in the Pacific Northwest. Id. As part of its operations, SVR also sold lavender products to the general public from its “Lavender Cottage” located on the Ranch. CP 1048-49. SVR was one of the original promoters of the highly-successful Sequim Lavender Festival. Id.

By September 2004, SVR had 12 full-time employees. CP 1049. Plaintiff Marie Barnett worked as the Manager of the Retail Cottage. Id. Plaintiff Victor Gonzalez worked as the Manager of SVR’s lavender operation and was responsible for the cultivation and harvesting of the lavender. Id. Plaintiffs Mario, David, and Octavio Gonzalez worked under Victor Gonzalez. Id. None of the Employees had a written employment agreement with SVR. Id.

C. Issues With Maple View Farms and Requests for Employee Cooperation.

The property adjacent and to the west of Sequim Valley Ranch housed a commercial dairy farm known as Maple View Farms (“MVF”). Id. By 2004, MVF was producing several million gallons of bovine urine and feces annually, which it pumped into a large, multi-million gallon, unlined lagoon located on a plateau adjacent to and upwind from SVR. Id. Between April and October of each year, MVF would spray the waste liquid from the lagoon onto fields adjacent to and upwind from SVR’s Retail Cottage, its lavender cultivation areas, and the personal residence of Stephen Clapp, a member of SVR, LLC, by using a high-pressure spray cannon. Id.

By 2004, the increasing scope of MVF’s dairy operations had become a concern to SVR. Id. While spraying of cow waste was permitted in specified amounts for use as fertilizer, SVR members and employees observed evidence of “over-spraying” and dumping of excessive and improper amounts of urine and feces. Id. SVR, through its member, Mr. Clapp, had significant concerns that over-spraying would adversely impact the Ranch’s groundwater supply and retail lavender operation, devalue the Ranch property, interfere with continued development of the Ranch, and result in potential

liabilities from exposure of SVR staff and visitors subjected to effluent sprayed from the high-power waste cannons. CP 1049-50.

SVR engaged a lawyer, Joseph Bowen, over a course of several years to try to resolve the concerns with MVF. CP 1050. Those efforts proved unsuccessful. Id. SVR later engaged the Mentor Law Group, PLLC to evaluate potential claims against MVF. Id. In investigating the potential claims, Mr. Bowen interviewed SVR employees, including Marie Barnett and the Gonzalezes, all of whom had observed over-spraying by MVF and experienced noxious odors and aerosol effluent affecting the Ranch. Id.

In April 2004, attorneys from Mentor Law Group visited SVR to interview employees about MVF's spraying activities. CP 1050. Prior to the interviews, SVR's legal counsel asked its member, Stephen Clapp, to instruct the employees to cooperate fully with the attorneys in their investigation and to provide a thorough account of what they had observed. Id. Marie Barnett and Mario Gonzalez were interviewed by legal counsel as part of this process. Id.

Following these interviews, and on the advice of legal counsel, SVR retained another law firm, Ater Wynne, LLP, as litigation counsel to evaluate a potential action against MVF. CP 1050. Ater Wynne attorneys reviewed the information and evidence

available and recommended that SVR initiate a lawsuit against MVF.

Id. SVR commenced a lawsuit against MVF in July 2004. Id.

In September 2004, SVR's litigation counsel proposed interviews of Ranch employees in anticipation of seeking injunctive relief against MVF. CP 1050-51. SVR asked only that employees be interviewed—there was no request to provide sworn testimony or to act as witnesses in the MVF lawsuit. CP 1051.

In early September 2004, SVR general counsel Bowen attempted to interview SVR employees prior to a scheduled visit by litigation counsel from Ater Wynne. CP 1051. The Gonzalez plaintiffs refused to cooperate, and Mr. Bowen recommended that Stephen Clapp ask the employees to cooperate with the efforts of the lawyers to investigate and analyze evidence. Id.

In response to the recommendation of its lawyers, SVR (through its member, Stephen Clapp) provided Ranch employees with two memoranda prior to the scheduled interviews with litigation counsel. CP 1051. In the memoranda, SVR asked its employees to give full and complete descriptions of what they had observed of the MVF spraying operations and its effects. Id. The first memorandum, dated September 9, 2004, stated in pertinent part, “[G]ive full, unequivocal and affirmative testimony to what you have been the

closest witnesses of for 3 years.” CP 1058. The second memorandum, dated September 12, 2004, stated in pertinent part, “you are asked only to testify to what you believe to the best of your knowledge is true.” CP 1061.

A meeting occurred in early September 2004 with Ranch employees, Ranch manager, Tony Parks, and SVR member Stephen Clapp. CP 991; 1051. At the meeting, Mr. Clapp stated that SVR expected the employees to cooperate in the investigation and requested that employees report information based on their own observations. CP 1052. According to Mr. Parks’ declaration, SVR asked the employees to cooperate and provide truthful and accurate information to the lawyers. CP 1074. Parks confirmed that neither he nor the other employees were asked to “lie” regarding the MVF issues. Id. Parks confirmed that SVR never made “lying” about anything a condition of employment. Id. At no point did any Ranch employee (including the plaintiffs in this case) voice concern about the request to participate in the interviews or the meaning or substance of the memoranda. CP 1052. No employee suggested or reported that they thought they were being asked to “lie”, provide false information, or participate in any illegal activity. Id.

On September 14, 2004, the Employees met with counsel from Ater Wynne and gave the requested interviews. CP 1052. Following the September staff meeting and the interviews on September 14, SVR and Mr. Clapp had no further communications with Employees with respect to the MVF issues or lawsuit and made no further requests of them. CP 1052. SVR (and none of tis members or management) ever took any adverse employment action against the Employees. Id. The Employees participated in the interviews and provided honest responses to the questions posed. 1/5/11 VRP at 20:7-13; 37:2-8; 38:6-9; 140:25-141:5; 173:2-4; 1/10/11 VRP at 61:2-9; 160:15-161:6.

D. Employees Submit Retroactive Letter of Resignation.

Following the interviews on September 14, 2004, the Employees abruptly stopped showing up for regular work, except sporadically and one at a time. CP 1052. The Employees were generally absent from the Ranch during their regular working hours for the balance of that week and were not performing their regular job tasks. CP 786. Although the Gonzalez plaintiffs were seen intermittently on the Ranch during the week after September 14, they were present only to collect and remove their personal property. Id.

On September 21, 2004, the Employees sent a letter by facsimile to Mr. Clapp. CP 1065. The document, signed by all five of the Employee-plaintiffs, stated, “[t]his is to inform you that September 18, 2004 was the last day of work for all employees listed in this document.” Id. The Employees’ letter further stated that they had been “constructively discharged” when SVR allegedly asked them to “commit perjury” or find employment elsewhere during the September 13, 2004 meeting:

At the meeting on September 9th 2004 you made it clear to us that we had two choices, 1) Meet with your attorneys, supply them with evidence and sign affidavits and then go to court and testify to what you say . . . 2) Or we all must go find work elsewhere.

By asking us to commit perjury or be fired, you in affect [sic] Constructively Discharged us.

CP 1065. Of the 12 full-time Ranch employees, only the five Plaintiffs quit their jobs. CP 1052.

E. Employees File Suit More Than Three Years After the Event They Claim Constituted a Constructive Discharge.

On September 17, 2007, the Employees commenced this lawsuit in the Clallam County Superior Court. CP 1302-05. The Employees alleged claims against Sequim Valley Ranch and its manager, Stephen Clapp, for constructive wrongful discharge in

violation of public policy and recovery of overtime wages. Id. The Employees expressly alleged in the complaint that they were forced to resign “rather than to commit the crime of perjury.” CP 1304.

F. Sequim Valley Ranch’s Motion for Summary Judgment.

Sequim Valley Ranch moved for summary judgment dismissal of the Employees’ claims. SVR provided uncontroverted evidence establishing that the wrongful discharge claim was barred by the statute of limitations and that the Employees could not maintain overtime wage claims as a matter of law. CP 1076-95; 1066-75; 1048-65; 811-22; 785-86. The trial court granted SVR’s motion in part and denied it in part. The trial court dismissed the Employees’ wage claims, but concluded that the commencement of the claims for wrongful discharge were within the statute of limitations period. CP 654. SVR sought discretionary review in this Court and its motion was denied. CP 643-49.

G. Trial.

At trial, Employees Marie Barnett and Victor Gonzalez admitted on cross-examination that they were not directed to “lie” by their employer. 1/5/11 VRP at 26:6-20; 1/5/11 VRP at 176:1-3. All Employees admitted that they had not been asked to “testify

under oath”, they in fact did not testify under oath, and that no court reporter was present at the interviews with SVR’s counsel. 1/5/11 VRP at 29:21-24; 30:4-13; 176:4-18; 176:19-22; 177:1-2; 1/10/11 VRP at 84:12-18; 84:19-85:1; 1/10/11 VRP at 161:7-15; 161:23-24.

At the conclusion of the trial, SVR’s counsel moved for a directed verdict on the ground that there was no evidence that the Employees had been constructively discharged for refusing to commit “perjury” where they each admitted they had not been asked to testify under oath or in the presence of a court reporter and where the interviews were not part of any official proceeding. CP 217-22; 1/11/11 VRP at 3:14-6:7.

The trial court denied the motion for directed verdict. 1/11/11 VRP at 11:13-15. In doing so, the trial judge explained that the “public policy” at issue was not perjury, but rather “the intent to interfere with the process of obtaining truthful testimony.” 1/11/11 VRP at 9:9-12. The trial judge concluded that the evidence could support a claim not made in the complaint—that SVR was “attempting to influence the testimony of plaintiffs by intimidat[ion] or coercion” based on the threat of losing their employment. 1/11/11 VRP at 9:2-11:15.

Based on the sole cause of action remaining in the complaint as articulated by the Employees, SVR proposed jury instructions that included the statutory definition of perjury. CP 566.¹ SVR later proposed additional instructions that included the statutory definitions of other sections within the perjury statutes (Chapter 9A.72 RCW – “Perjury and interference with official proceedings”), in light of the trial court’s pronouncement that the public policy at issue was interference with the process of obtaining truthful testimony through witness “tampering”, “intimidation” or “coercion”. 1/12/11 VRP “Vol. II” (11:56 a.m. excerpt) at 4:24-5:7.

The trial court declined to use these instructions and instead instructed the jury in part that “[i]t is a violation of public policy in the State of Washington for anyone to interfere with the process of obtaining truthful testimony, either oral or written, in any official proceeding either by threats, intimidation, coercion, or inducement.” CP 165. The trial court declined to give instructions setting forth the substance of any of the statutes which the court identified as reflecting the public policy against interfering with the process of

¹ As reflected in the record, SVR submitted its proposed jury instructions several months before start of the trial and prior to a previous trial date that was later continued. CP 535-89.

obtaining truthful testimony. Id.; 1/12/11 VRP "Vol. II" (13:50 p.m. excerpt) at 38:1-39:9; CP151-80.

At the conclusion of the trial testimony, the trial court dismissed the claims of Employee David Gonzalez with prejudice on the motion of SVR. CP 215-16. The trial court also dismissed all claims against Stephen Clapp, leaving only the constructive wrongful discharge claims of Marie Barnett and Victor, Mario, and Octavio Gonzalez for consideration by the jury. CP 231-32.

The jury returned a special verdict in favor of the Employees, concluding that they had been constructively discharged in violation of public policy. CP 143-44. The trial court entered a judgment on the verdict in favor of the Employees in the amount of \$427,230. CP 118-121. Sequim Valley Ranch timely appealed. CP 64-69.

IV. ARGUMENT AND AUTHORITIES

A. The Trial Court Erred In Denying SVR's Motion for Summary Judgment Based on the Statute of Limitations.

Sequim Valley Ranch respectfully submits that the trial court erroneously denied its motion for summary judgment when it concluded that the Employees' wrongful discharge claims were not barred by the statute of limitations.

An appellate court reviews summary judgment decisions *de novo*, performing the same inquiry as the trial court. Herron v. Tribune Publ'g Co., Inc., 108 Wn.2d 162, 169, 736 P.2d 249 (1987). Summary judgment is appropriate where the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c).

The Employees alleged that they were wrongfully discharged in violation of public policy and that their discharge was constructive rather than express. CP 1304. A cause of action for wrongful discharge in violation of public policy is a tort claim and subject to a three-year statute of limitations. Danny v. Laidlaw Transit Services, Inc., 165 Wn.2d 200, 207, 193 P.3d 128 (2008); RCW 4.16.080(2).

Statutes of limitations begin to run when a cause of action accrues. RCW 4.16.005. Typically, a cause of action accrues when the party has the right to apply to a court for relief. 1000 Virginia Ltd. Partnership v. Vertecs Corp., 158 Wn.2d 566, 575-76, 146 P.3d 423 (2006). Stated differently, an action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action (and the harm sustained). Id.

“Constructive discharge” is not a cause of action: “Washington law does not recognize a cause of action for constructive discharge; rather the law recognizes an action for wrongful discharge which may be either express or constructive.” Snyder v. Medical Service Corp. of Eastern Wash., 145 Wn.2d 233, 238, 35 P.3d 1158 (2001). Constructive discharge is just a way of proving the discharge element of a claim of wrongful discharge in violation of public policy. See Briggs v. Nova Services, 166 Wn.2d 794, 808 n. 2, 213 P.3d 910 (2009) (Chambers, J. concurring); Korslund v. DynCorp Tri-Cities Services, Inc., 156 Wn.2d 168, 177 n. 1, 125 P.3d 119 (2005). To establish constructive discharge, the employer must engage in a deliberate act that made working conditions so intolerable that a reasonable person would have felt compelled to resign. Wahl v. Dash Point Family Dental Clinic, Inc., 144 Wn. App. 34, 44, 181 P.3d 864 (2008). This is an objective standard—an employee’s subjective belief that he or she had no choice but to resign is irrelevant in considering whether a constructive discharge occurred. Travis v. Tacoma Pub. Sch. Dist., 120 Wn. App. 542, 551, 85 P.3d 959 (2004).

Both this Court and our Supreme Court analyzed the accrual of a constructive wrongful discharge claim in Douchette v. Bethel

School Dist. No. 403, 117 Wn.2d 805, 818 P.2d 1362 (1991).

Douchette, a school district employee, became ill and collapsed on the job in January 1983. Douchette, 117 Wn.2d at 807. The employee did not return to work. Id. On February 16, 1983, Douchette submitted a letter of resignation to the school board. Douchette, 117 Wn.2d at 807. The letter stated that her resignation would be effective one month later, on March 15, 1983. Id.

Douchette commenced a lawsuit against her former employer on March 17, 1986, alleging causes of action for wrongful discharge, age discrimination, and outrage. Douchette, 117 Wn.2d at 808. The school district moved to dismiss based on the expiration of the statute of limitations. The trial court denied the motion and this Court accepted discretionary review. Id.

This Court reversed the trial court and dismissed the complaint based on the running of the statute of limitations. Id. On appeal, Douchette argued that her constructive wrongful discharge claim "did not accrue when the discriminatory acts occurred, since the discharge must occur before her claim accrues." Douchette v. Bethel School Dist. No. 403, 58 Wn. App. 824, 828, 795 P.2d 162 (1990). Accordingly, Douchette reasoned that her discharge did

not occur until the effective date of her resignation on March 15, 1983. Id.

A panel of this Court rejected Douchette's arguments and held that in the context of a claim for constructive discharge for wrongful practices, the statute of limitations accrues on the last possible date on which the unlawful employment practice occurred, not at the time of the employee's resignation:

[Douchette] contends that her claims include one for the common law tort of wrongful discharge (in this case a constructive discharge) because she was discharged for a reason that contravenes a clear mandate of public policy, namely, age discrimination. Therefore, she argues, her claim for a constructive discharge based on discrimination did not accrue when the claimed discriminatory acts occurred, since the discharge must occur before her claim accrues. Here, she contends the discharge occurred on the effective date of her resignation, March 15, 1983.

This identical argument was rejected by another court in Lowell v. Glidden-Durkee, Div. of SMC Corp., 529 F. Supp. 17 (N.D. Ill. 1981). There, the court rejected the employee's contention that the effective date of her resignation was the crucial date in determining when her claim for constructive discharge for unlawful practices occurred. The court instead focused on the last possible date on which the unlawful employment practice occurred and concluded that such acts necessarily occurred before the employee gave notice of her resignation. We find the reasoning of the court in Lowell persuasive and conclude that Douchette's common law tort claim for constructive wrongful discharge had occurred no later than February 15, when she notified the School District that she was terminating her employment.

Douchette, 58 Wn. App. at 828 (emphasis added).

Our Supreme Court granted review and affirmed this Court's decision. In so doing, the Supreme Court also applied the rule in Lowell to conclude that Douchette's constructive wrongful discharge claim accrued prior to the date of her resignation:

Finally, Douchette . . . argues, her claim for a constructive discharge based on discrimination did not accrue when the claimed discriminatory acts occurred. Rather, the claim accrued on the effective date of her resignation, since a discharge must occur before the claim accrues.

The Court of Appeals rejected this argument, citing Lowell v. Glidden-Durkee, Div. of SCM Corp., 529 F.Supp. 17 (N.D.Ill.1981). 58 Wash.App. at 827-28, 795 P.2d 162.

...
The Lowell court found support for its decision in Delaware State College v. Ricks, 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), in which the Supreme Court . . . reasoned: "Mere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." The Court of Appeals found Lowell persuasive and concluded Douchette's claim accrued February 15, 1983.

Because Douchette did not work for the District after she submitted her letter of resignation, her claim for wrongful discharge (if indeed one exists) accrued on February 15, 1983.

...
We conclude Douchette's discharge became effective on February 15, 1983. No continuing acts of discrimination could have occurred after that date, thus all of her claims commenced running on that date.

Douchette, 117 Wn.2d at 815-16 (citations omitted).

As reflected in its oral rulings, the trial court read Douchette differently, to hold that the statute of limitations for a constructive wrongful discharge claim begins to run at the time the employee tenders the letter of resignation:

I think the Douchette case is very clear . . . based upon the facts of that case they clearly went with the letter of resignation, even though she hadn't been to work since January. I think that's really crucial. . . . I'm going to follow what I think Douchette is pointing to is that we go with the letter of resignation. So, I'm going to deny the motion to dismiss because of the statute.

12/4/09 VRP at 15-16. The trial court employed similar reasoning to deny SVR's motion or reconsideration:

I believe that under a constructive discharge or a wrongful discharge until an employee either resigns or is fired by his employer there can be no discharge and, therefore, the Statute of Limitations cannot run without either an express or constructive discharge, a termination by the employer or a resignation by the employee, and I think this is consistent with the Douchette case, as we talked about last time you were here. It's consistent with the fact pattern there and I believe is the most logical way to address the issue.

12/18/09 VRP at 27-29.

The trial court's reasoning is contrary to the rule adopted and applied in Douchette, which holds that the statute of limitations in a constructive wrongful discharge case begins to run on the last date that the unlawful employment practice occurred—not on the date of the employee's resignation. In Douchette, the Court found the

accrual date to be February 15, 1983, which was neither the date of Douchette's resignation nor the effective date announced for her separation from employment.² Instead, the Court determined that the statute accrued on the earlier date of February 15, 1983 because it was the last possible date on which the unlawful employment practice (the alleged age discrimination) occurred in light of her announced separation on February 16, 1983. Douchette, 117 Wn.2d at 816.

Viewed in the light most favorable to the Employees, the undisputed facts on summary judgment established that the last possible date on which the alleged unlawful employment practice occurred was September 14, 2004—the day the Employee's were interviewed by SVR's counsel and the last day they were physically present at SVR and working. The same evidence established that the Employees were also aware of the injury occasioned by the alleged constructive discharge no later than that date.

² Both the trial court and the Commissioner's Ruling Denying Discretionary Review in this case overlooked this important distinction. Neither Douchette opinion states or supports the conclusion that Douchette sent a letter of resignation on February 15. See Douchette, 58 Wn. App. at 826; 117 Wn.2d at 807. Because both this Court and the Supreme Court held that the statute accrued on February 15, which was not the date of Douchette's resignation, the trial court's reasoning is erroneous.

Following the September staff meeting between the Employees and SVR, during which they claim they were instructed to lie or lose their jobs, and the interviews the Employees gave to SVR's counsel on September 14, 2004, none of the Employees showed up at the Ranch for regular work. CP 1083; 817; 785-86; 1052. The Gonzalez plaintiffs were seen only intermittently during the week prior to September 21, 2004, and were collecting and removing their personal property. CP 1052; 817; 785-86.

The Employees had no contact with Stephen Clapp following the meeting September 2004 staff meeting. CP 758; 1029 ("Mr. Clapp then stormed out of the meeting and was not seen the following week."). The Employees had no further contact with Stephen Clapp regarding the September 14, 2004 interviews or the MVF litigation. CP 1003 (Barnett Dep., at 83:14-16); CP 1952 (Clapp Decl.). The Employees admitted they were not pressured to give any particular answers during the September 14, 2004 interview and confirmed that Stephen Clapp was not present during the interview. CP 1005 (Barnett Dep., at 88:6-10).

According to the Employee's own testimony, all five of the Employees were present at the September 14, 2004 interview with

legal counsel and had already determined that they had been constructively discharged:

When [attorney] David [Peterson] went and interviewed us at the ranch regarding all that, so we told him what we knew and I don't know if he liked the answers or not. Because that pretty much was the last day there on the ranch for us,. [sic] So we didn't care if he liked it or not.

CP 1016 (Victor Gonzalez Dep., at 29:17-22) (emphasis added).

More importantly, the Employees' own September 21 letter confirming their resignations specified that they were constructively discharged at the time of the September 9, 2004 meeting:

At the meeting on September 9th 2004³ you made it clear to us that we had two choices, 1) Meet with your attorneys, supply them with evidence and sign affidavits and then go to court and testify to what you say . . . 2) Or we all must go find work elsewhere.

...

By asking us to commit perjury or be fired, you in affect [sic] Constructively Discharged us.

CP 1065.

Under the rule announced in Douchette, the last possible date on which the unlawful employment practice occurred in this case is September 14, 2004 at the latest. All acts forming the basis of the Employee's constructive wrongful discharge claim occurred

³ Plaintiff Marie Barnett confirmed in her trial testimony that the Employees had made their decision to quit at the time of the September 9, 2004 meeting. See 1/14/11 VRP at 64:21-23 ("The meeting was prior to that. It was actually on the 9th, and we had actually made our decision to leave on the 9th[.]")

prior to that date and they were not, and could not have been, subjected to any further unlawful conduct by SVR. CP 814-15. Under the rule in Douchette, neither the date of the Employees' resignation letter (September 20, 2004) nor the stated effective date of their resignation (September 18, 2004) are material. Because the Employees did not initiate this action until more than three years after the accrual of their cause of action for wrongful discharge, this Court should reverse the judgment and dismiss the complaint as a matter of law.⁴

Because SVR's statute of limitations challenge involves the denial of its motion for summary judgment, SVR also assigns error to the sufficiency of the evidence at trial on this issue. When a trial court denies summary judgment due to factual disputes, and a trial is subsequently held on the issue, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the

⁴ Other courts similarly hold that a claim for constructive wrongful discharge accrues on the date the plaintiff is aware of the harm giving rise to the claim, not the date of a resignation notice, the effective date of resignation, or the last day of work. See Daniels v. Mutual Life Ins. Co., 340 N.J. Super 11, 17, 773 A.2d 718, 721 (N.J. Ct. App. 2001); Hancock v. Bureau of National Affairs, Inc., 665 A.2d 588 (D.C. Ct. App. 1994); Stephenson v. American Dental Assoc., 789 A.2d 1248, 1251-52 (D.C. Ct. App. 2002) ("The operative fact is not the formal termination date, but, rather, is the moment Stephenson learned of definite injury", which was the "moment when Stephenson believed his termination was attributable to his failure to perform an illegal act."); Stroud v. VBFSB Holding Corp., 917 SW.2d 75, 81 (1996) (claim based on "constructive dismissal arises when the party knows of his injury [the constructive discharge from employment] rather than the technical last date of employment.").

denial of summary judgment. Adcox v. Children's Orthopedic Hosp. and Medical Center, 123 Wn.2d 15, 35 n. 9, 864 P.2d 921 (1993). Unlike Adcox, where the defendant's statute of limitations issue challenge turned on application of the discovery rule in medical negligence claim (an issue of fact) and therefore required a sufficiency of evidence challenge on appeal, the denial of SVR's motion for summary judgment was not based on the presence of factual disputes and the jury did not consider the issue.

As set forth above, there was no dispute as to the dates of the meeting between the Employees and Mr. Clapp, the dates of the subsequent faxes from SVR, the dates of the Employee's resignation letter or stated date of separation, and no dispute that the Employees had no further contact with Mr. Clapp or SVR management after giving the interviews on September 14, 2004. The trial court determined that under its reading of Douchette, the date of accrual of the Employees' claim was the date of resignation. The question of the accrual of a statute of limitations is a question of law. Young v. City of Seattle, 30 Wn.2d 357, 361, 191 P.2d 273 (1948). Whether the statute of limitations bars a plaintiff's action is also typically a question of law. Ellis v. Barto, 82 Wn. App. 454, 457, 918 P.2d 540 (1996).

Because the trial court's determination of the statute of limitations issue did not turn on the presence of factual issues that were later tried to a jury, a sufficiency of the evidence challenge should not be required. C.f. Adcox, supra; Draszt v. Naccarato, 146 Wn. App. 536, 192 P.2d 921 (2008). But even under a sufficiency of evidence standard, the Employees' claims were time barred. Consistent with the record on summary judgment, the evidence at trial confirmed that the last date on which any allegedly unlawful employment practice occurred was September 14, 2004 at the latest. The Employees testified that the 9/9 meeting and two subsequent faxes from SVR were the reason they quit and that following the interviews on 9/14, they had no contact or interaction with SVR management and suffered no adverse action. 1/4/11 VRP 65:19-66:7; 1/5/11 VRP 13:17-22, 14:1-3, 20:7-10, 21:2-14; 60:9-24; 61:5-8; 113:25-114:5; 175:11-18; 187:9-19; 1/6/11 VRP 22:24-23:11; 23:16-19; 24:11-15; 25:15-26:7; 1/10/11 VRP 83:1-86:11; 135:20-136:5; 151:6-158:19. Under the rule applied in Douchette, the Employees' claims are time-barred under both the summary judgment and sufficiency of evidence standards.

B. The Trial Court Erroneously Instructed the Jury on Constructive Discharge.

Sequim Valley Ranch respectfully submits that the trial court committed reversible error when it refused to instruct the jury that a claim of constructive discharge requires proof that the Employees had no other alternative but to quit. CP 554 (SVR's Proposed Inst. No. 17); CP 169 (Court's Inst. No. 16). SVR also submits that the trial court committed prejudicial error in refusing to instruct the jury that the Employees failure to pursue internal procedures to contest any of the claimed, wrongful employment action render their resignations voluntary. CP 560 (SVR's proposed Inst. No. 23).

1. Standard of Review.

Alleged errors of law in jury instructions are reviewed *de novo*. Blaney v. Int'l Assoc. of Machinists & Aerospace Workers, Dist. 160, 151 Wn.2d 203, 210, 87 P.3d 757 (2004). Instructions are inadequate if they prevent a party from arguing its theory of the case, mislead the jury, or misstate the applicable law. Id.

An erroneous jury instruction is subject to review for harmless error. Blaney, 151 Wn.2d at 211. An instructional error is harmless only where it is not prejudicial to the substantial rights of the parties and in no way affected the outcome of the case.

Blaney, 151 Wn.2d at 211. “A prejudicial error, on the other hand, affects the results of a case, and is prejudicial to a substantial right.” Id. When considering an erroneous instruction given in favor of the party in whose favor the verdict was returned, the Court of Appeals “presumes prejudice, subject to a comprehensive examination of the record.” Id.

A court’s omission of a proposed statement of the governing law will be “reversible error where it prejudices a party.” Hue v. Farmboy Spray Co., Inc., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Instructional error is prejudicial if it affects or presumptively affects the outcome of the trial. Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

2. The Jury Instructions Prejudiced SVR By Relieving the Employees of Their Burden to Prove They Had No Choice But to Quit.

In its proposed Instruction No. 17, Sequim Valley Ranch asked the court to instruct the jury that in order for the Employees to establish a constructive discharge, they must prove that they “had no other alternative but to quit.” CP 554 (citing Molsness v. Walla Walla, 84 Wn. App. 393, 928 P.2d 1108 (1996)). The trial court refused to instruct the jury on this element, concluding that it did not believe it to be part of the constructive discharge inquiry.

1/11/11 VRP at 11. The Court gave a constructive discharge elements instruction that did not include the language proposed by SVR. CP 169 (Court's Inst. No. 16).

The constructive discharge instruction given by the trial court was improper because it denied SVR its right to argue its theory of the case and did not properly inform the jury of applicable law. In Molsness v. Walla Walla, the plaintiff/employee quit after receiving a memorandum from a supervisor that requested his resignation. Molsness, 84 Wn. App. at 396. The memorandum set forth the reasons for the request and indicated that action would be taken against the employee if he did not resign. Id. The employee resigned based on his belief that he had no choice. Id., at 397.

The trial court dismissed the employee's wrongful termination claim on summary judgment. On appeal, this Court first explained that "[a]n employee's voluntary resignation will defeat a claim for wrongful termination." Molsness, 84 Wn. App. at 398. The Court further explained that in a constructive discharge scenario, "[a] resignation is presumed to be voluntary, and the claimant bears the burden of introducing evidence to rebut that presumption." Id.

This Court affirmed summary judgment in favor of the employer, and in so doing emphasized the importance of objective evidence that the employee had no alternative but to terminate employment in a constructive discharge analysis:

Mr. Molsness contends his resignation was not voluntary, but was coerced by Mr. Scroggins' threat of dismissal. The plaintiff in *Christie* made a similar argument, to which the court responded:

While it is possible plaintiff, herself, perceived no viable alternative but to tender her resignation, the record evidence supports [the Civil Service Commission's] finding that plaintiff chose to resign ... rather than challenge the validity of her proposed discharge for cause. The fact remains, plaintiff *had a choice*. She could stand pat and fight. She chose not to. Merely because plaintiff was faced with an inherently unpleasant situation in that her choice was arguably limited to two unpleasant alternatives does not obviate the voluntariness of her resignation.

This court has repeatedly upheld the voluntariness of resignations where they were submitted to avoid threatened termination for cause.

Molsness, 84 Wn. App. at 398-99 (emphasis in original and quoting Christie v. United States, 518 F.2d 584, 587-88 (1975)).

Applying the reasoning of Christie, this Court affirmed the dismissal of the employee's wrongful discharge claim:

Mr. Molsness' resignation is not rendered involuntary simply because he submitted it to avoid termination for cause, nor is it relevant that he subjectively believed he had

no choice but to resign. Objectively, he did have a choice, as did the plaintiff in Christie, to “stand pat and fight.”

Molsness, 84 Wn. App. at 399.

Molsness and Christie demonstrate that objective evidence indicating that the employee had no alternative but to resign is central to establishing a claim for wrongful constructive discharge. SVR’s proposed instruction that included the “no other alternative but to quit” language was not only consistent with the analyses adopted by Molsness and Christie, but it also reflected the proper formulation of the essential elements of a constructive discharge theory as recognized by numerous other courts:

A resignation will be involuntary and coerced when the totality of the circumstances indicate the employee did not have the opportunity to make a free choice. Constructive discharge occurs when a reasonable person in the employee’s position would view the working conditions as intolerable. That is to say the working conditions, when viewed objectively, must be so difficult that a reasonable person would feel compelled to resign. A plaintiff’s subjective views of the situation are irrelevant. Essentially, a plaintiff must show that she had *no other choice* but to quit.

Yearous v. Niobrara County Memorial Hosp. By and Through Bd. of Trustees, 128 F.3d 1351, 1356 (10th Cir. 1997) (internal citations and quotations omitted; emphasis in original) (quoting Woodward v. City of Worland, 977 F.2d 1392, 1401 (10th Cir.1992)).

As other courts explain, the constructive discharge claimant's burden to prove that he or she had no other choice but to resign is an important component of proving that the working conditions had become intolerable:

To prove constructive discharge, a plaintiff must establish the defendants deliberately made or allowed her working conditions 'to become so intolerable that the employee had no other choice but to quit.'

Jones v. Fitzgerald, 285 F.3d 705, 715 (8th Cir.2002) (quoting Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir.1982)); Charles v. Regents of New Mexico State University, 256 P.3d 29, 34, (N.M. App. 2010).

SVR's proposed Instruction No. 17 properly included the requirement that Employees prove that they had no alternative but to quit. CP 554. The trial court's failure to include the requested language was improper because it did not inform the jury of the applicable law, misled the jury as to the Employee's burden to prove a constructive discharge, and also precluded SVR from arguing its theories of the case. This error was not harmless.

When considering an erroneous instruction given in favor of the party in whose favor the verdict was returned, the Court of Appeals "presumes prejudice, subject to a comprehensive

examination of the record.” Blaney, 151 Wn.2d at 211. In this case, the erroneous instruction was prejudicial to the substantial rights of SVR because it relieved the Employees of their burden to establish that they had no choice but to quit and prevented the jury from properly considering evidence elicited by SVR to demonstrate that the Employee’s did have a choice based on their objective conduct. At trial, all Employees admitted on cross-examination that they took no action or steps to contact or inquire of SVR or Mr. Clapp regarding their alleged concerns about the substance of the September 9, 2004 meeting or the faxes they identified as the bases for their self-termination. See 1/5/11 VRP at 59:22-24; 59:25-60:3; 60:12-19; 1/5/11 VRP at 134:4-7; 141:21-142:6; 187:9-19; 1/6/11 VRP at 22:8-20; 23:25-24:2; 1/10/11 VRP at 70:6-11; 83:1-24; 151:6-17; 152:13-19; 165:9-19.

In the absence of the “no other alternative but to quit” language, the jury was erroneously permitted to find that the Employees had met their heavy burden to establish a constructive discharge without considering whether they demonstrated that they had no choice but to resign. CP 169. Based on the instruction given, the jury would have no reason to consider the Employee’s admissions that they took no steps to preserve their jobs or express

their claimed concerns to their employer in determining whether the Employees had established a constructive discharge. Under Molsness and the body of case law articulating the “no choice but to quit” component of a constructive discharge claimant’s burden, that evidence should have been properly considered by the jury. Instruction No. 16 prejudicially prevented SVR from advancing its theory that the Employees did have a choice and failed to act based on the objective evidence at trial. This error affected the outcome of the trial and this Court should reverse the judgment.

3. The Trial Court Erred in Refusing to Give SVR’s Proposed Instruction No. 23.

The trial court also committed prejudicial error in denying SVR’s proposed Instruction No. 23. That instruction read,

If Plaintiffs failed to pursue internal procedures to contest any claimed employment actions taken by Sequim Valley Ranch, LLC on which Plaintiffs base their claims, Plaintiffs’ resignations will be deemed voluntary, and not a constructive discharge.

CP 560 (citing Molsness, 84 Wn. App. at 398).

As the discussion of Molsness above demonstrates, where an employee fails to pursue internal procedures to contest the employer’s unjustified employment actions, that employee’s resignation is deemed to be voluntary, not a constructive

discharge.⁵ SVR's proposed Instruction No. 23 is consistent with Molsness, is a proper statement of the law, and should have been given. As other courts explain, "[t]here is no constructive discharge where an employee quits without giving the employer a reasonable chance to work out a problem." Bell v. Dynamite Foods, 969 S.W.2d 847, 851 (Mo. App. 1998); Grube v. Lau Industries, Inc., 257 F.3d 723, 728 (7th Cir. 2001) ("[a]n employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged."); Ulchiny v. Merton Comm. School Dist., 249 F.3d 686, 704 n. 16 (7th Cir. 2001) (same); Yearous v. Niobrara County Mem'l Hosp., 128 F.3d 1351, 1356 (10th Cir. 1997) (same).

The trial court's failure to give the requested instruction prejudicially affected the outcome of the trial. As set forth above, SVR elicited admissions from all of the Employees that they took no action to contact or inquire of their employer regarding their alleged concerns about the substance of the September 9, 2004 meeting or the faxes they identified as the bases for their self-termination.

The trial court's refusal to give SVR's proposed Instruction No. 23 prevented SVR from arguing its defense to the Employees'

⁵ A panel of this Court has described Molsness as stating this very rule. Because that disposition is unpublished, SVR does not cite it.

constructive discharge claims and rendered the evidence of the Employees' admitted inaction meaningless in light of the other instructions given to the jury. See CP 151-80. Because it cannot be said that this error in no way affected the outcome of the trial, the judgment should be reversed.

C. The Trial Court Erroneously Instructed the Jury On the Claim of Wrongful Discharge In Violation of Public Policy.

Sequim Valley Ranch also respectfully submits that the trial court committed reversible error by (1) instructing the jury on a public policy construction that is not recognized and (2) refusing to provide instruction regarding the scope of the criminal statutes embodying the public policy identified by the court.

1. The Court's Public Policy Construction Is Not Supported by the Law.

As referenced above, the trial court denied SVR's motion for directed verdict on the ground that the public policy at issue was not perjury as alleged in the complaint. Rather, the court framed the public policy issues as "the intent to interfere with the process of obtaining truthful testimony." 1/11/11 VRP at 9:9-12; 11:13-15. The trial court instructed the jury that, "[i]t is a violation of public policy in the State of Washington for anyone to interfere with the

process of obtaining truthful testimony, either oral or written, in any official proceeding either by threats, intimidation, coercion, or inducement.” CP 165 (Inst. No. 12). SVR respectfully submits that this public policy construction misstates the law and constituted reversible error.

From the first recognition of this claim, our Supreme Court “has always been mindful that the wrongful discharge tort is narrow and should be ‘applied cautiously.’” Danny, 165 Wn.2d at 208 (quoting Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001)). Our courts have recognized public policy tort claims in four discrete circumstances: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers’ compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, *i.e.*, whistleblowing. Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 936, 913 P.2d 377 (1996).

When the trial court announced “interference with obtaining truthful testimony” at the conclusion of the trial, it converted the claim from one involving allegedly asking an employee to commit a

criminal act (which is a recognized basis for a public policy claim) to one that the employer committed criminal or quasi-criminal conduct, which is not a recognized basis for a public policy claim. Gardner, 128 Wn.2d at 936.

An employee may have “a cause of action in tort for wrongful discharge if the discharge of the employee contravenes a clear mandate of public policy.” Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). The narrow, recognized grounds for a public policy tort claim exist where an employee was fired or compelled to quit in order to prevent harm to a clear public policy. In the case of being asked to commit unlawful conduct, an employee has a cognizable claim because he or she is fired or quits in order to prevent the commission of the unlawful conduct or obeys the law and the discharge is intended to force other employees to violate the law. See Thompson, 102 Wn.2d at 232-35.

Washington law does not support a public policy tort based on a claim that the employer acted unlawfully and an employee voluntarily quits in response. Such a claim does not prevent unlawful conduct from occurring, and as set forth below, does not jeopardize any public policy because the employer’s conduct, if

unlawful, can be adequately addressed by criminal sanction. Because the public policy instruction given by the trial court is not supported by the law, it allowed the jury to find liability on an erroneous basis. This Court should reverse.

2. The Jury Should Have Been Instructed On The Statutes Embodying the Public Policy.

In light of the court's pronouncement of a public policy broader than the "perjury" allegation framed in the complaint, SVR proposed instructions on the statutory definitions of witness intimidation and witness tampering contained within Chapter 9A.72 RCW ("Perjury and interference with official proceedings"). 1/12/11 VRP "Vol. II" (11:56 a.m. excerpt) at 4:24-5:7.

Although the trial judge acknowledged that there had to be a showing of a violation of public policy in order to support the Employee's wrongful discharge claim—i.e. interference with obtaining truthful testimony through threats, intimidation, coercion, or inducement—the trial court felt it unnecessary to instruct the jury on the statutory meanings of this proscribed conduct:

JUDGE WOOD: So let me go back to the policy issue, which was Number 12 of my instructions. And let me explain to you the reason I don't think it's necessary to go into the criminal statutes and try and define those for you. The criminal statutes are based upon a general public policy that we obtain truthful information in official proceedings, and that

that process is not interrupted by threats or intimidation or coercion or any types of inducement to say otherwise; so that's the public policy. The public policy isn't, gee, you shouldn't commit perjury, you shouldn't commit tampering, you shouldn't commit false swearing. The public policy is that we get a truthful, we don't interfere with it by means as stated. So I don't think it's necessary to then go through and have a jury determine whether or not there was a criminal act involved because it really doesn't matter.

1/12/11 VRP "Vol. II" (13:50 p.m. excerpt) at 38:1-17.

Sequim Valley Ranch respectfully submits that this determination constituted prejudicial error. Even if a public policy claim can be based on the allegedly unlawful acts of the employer prior to termination, the trial court was obligated to give an instruction on the nature and scope of the allegedly unlawful conduct so that the jury could weigh whether a wrongful discharge occurred in violation of public policy.

As reflected in the court's instructions, the jury was required to find that the Employees had established a constructive discharge in violation of public policy. (Inst. No. 10, CP 163). The court also instructed the jury that "[i]t is a violation of public policy in the State of Washington for anyone to interfere with the process of obtaining truthful testimony, either oral or written, in any official proceeding either by threats, intimidation, coercion, or inducement." CP 165 (Inst. No. 12).

The proscribed acts identified by the trial court as embodying the public policy are set forth in Chapter 9A.72 RCW (“Perjury and interference with official proceedings”). These statutes forbid witness tampering and intimidation and define material terms. See RCW 9A.72.110; .120; .010. The witness intimidation statute requires a statutorily-defined “threat” to be made and for the person to whom it is directed to be a “current or prospective witness” as defined in the statute. RCW 9A.72.110. The witness tampering statute specifies in pertinent part that it is implicated only where a person “attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding . . . to [t]estify falsely.” RCW 9A.72.120. The Employees here were only asked to participate in attorney interviews. They did not give testimony under oath before a court reporter. See § III (G), supra.

Washington law reflects that a court must instruct a jury of the statutes embodying the public policy identified by a court when asked to determine whether an employer discharged an employee in violation of public policy. As our Supreme Court has explained, “to state a cause of action [for wrongful discharge in violation of public policy], the employee must plead and prove that a stated

public policy, either legislatively or judicially recognized, may have been contravened.” Thompson, 102 Wn.2d at 232.

In Thompson, the Court determined that the Foreign Corrupt Practices Act embodied a clear expression of public policy in favor of careful accounting to prevent bribery of foreign officials. Thompson, 102 Wn.2d at 234. As the Court later explained in describing Thompson, “[c]onsequently, if Thompson could prove that his dismissal was a result of his compliance with the federal law or that the discharge was intended to encourage other employees to violate that law, then his dismissal was contrary to the clear mandate of public policy.” Sedlacek v. Hillis, 145 Wn.2d 379, 386, 36 P.3d 1014 (2001).

Just as Thompson could not prove that he acted in compliance with federal law or that other employees were encouraged to violate the law without some definition of the law at issue, the jury here could not properly determine whether SVR violated public policy without instruction as to the specific conduct the relevant statutes forbid or exist to curtail.

Other decisions confirm that the issue of whether unlawful conduct occurred is central to the establishment of the plaintiff’s *prima facie* case. In Hubbard v. Spokane County, 146 Wn.2d 699,

50 P.3d 602 (2002), the plaintiff alleged that he was wrongfully discharged in violation of public policy after he reported that his supervisors had pressured him to violate zoning laws and had violated a statute prohibiting municipal officers from granting special privileges or exemptions. Hubbard, 146 Wn.2d at 705-06.

Reversing summary judgment in favor of the employer, our Supreme Court first found that as a matter of law the zoning code and a statute prohibiting municipal officers from granting special privileges (RCW 42.23.070(1)) set forth a clear expression of public policy supporting a wrongful discharge claim. Hubbard, 146 Wn.2d at 708-13. The Court then turned to the jeopardy element of a plaintiff's *prima facie* case. As the Court explained, to establish the jeopardy element, a plaintiff must show that he or she "engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective performance of the policy." Hubbard, 146 Wn.2d at 713 (quoting Gardner, 128 Wn.2d at 945). The Court explained, "in determining whether the public policy has been contravened or jeopardized, a court must look to the 'letter or purpose of a statute.'" Hubbard, 146 Wn.2d at 713 (quoting Dicomes v. State, 113 Wn.2d 612, 620, 782 P.2d 1002 (1989) (emphasis in original)).

In concluding that Hubbard had presented sufficient evidence to support the jeopardy element of his wrongful discharge claim, the Supreme Court focused on evidence suggesting that the zoning codes and statutes had, in fact, been violated:

In this case, Hubbard presents evidence that Manson's acts were in fact in violation of the applicable zoning codes.

...
As Ellis, Thompson, and Harless, Hubbard asserts that he was discharged for protesting and/or preventing illegal acts by his employer. Specifically, Hubbard sought the assistance of a county prosecutor to prevent Manson from issuing a permit to build a new hotel at the airport. According to the county prosecutor, issuing the permit would be in violation of both the zoning code and the airport master plan. If, in fact, granting the permit would have violated the law, Manson would have also violated RCW 42.23.070(1) by granting a special privilege to another. Thus, Hubbard's actions would arguably have been necessary to enforce the public policy articulated by both the zoning code and RCW 42.23.070(1).

...
We therefore hold that a material issue of fact remains as to whether Manson's actions violated the zoning code and RCW 42.23.070(1)[.]

Hubbard, 146 Wn.2d at 715-16; 718.

Thompson and Hubbard illustrate that whether illegal conduct has actually occurred or been requested on the part of the employer is central to establishing a wrongful discharge claim involving allegedly unlawful conduct. The reasoned analysis of other courts support this conclusion, explaining that a court must

initially focus its inquiry on whether unlawful conduct occurred in order to further the primary purpose of the public policy exception:

When an employer that is engaging, or is about to engage, in an illegal activity seeks to coerce its employees into participating in that activity or condoning it by silence, the public's interest in exposing unlawful activities overrides the doctrine of employment at-will. The public policy exception to the doctrine of employment at-will does not exist, however, to protect the employee. Rather it is the protection of society from public harm, or the need to vindicate fundamental individual rights, that undergird an at-will employee's common law action for wrongful discharge....

...

On reason and authority, we therefore conclude that a clear violation of public policy depends on an actual violation of law.

Clark v. Modern Group Ltd., 9 F.3d 321, 331-32 (3rd Cir. 1993).

In this case, the Employees' stated claim was that they were asked to commit "perjury". Just as a jury must be informed of what constitutes perjury when an employee claims he or she was asked to perform an unlawful act, the jury should have been instructed as to what constitutes the claimed "unlawful act". The failure to instruct the jury on the statutes embodying the announced public policy resulted in the court providing the jury with an incomplete statement of the law and prejudice to SVR. Without instruction as to the laws against interference with official proceedings, the jury could not apply the relevant standards set forth in the statutes to

the evidence at trial. The jury was left to determine SVR's liability by speculating as to the relevant standards (or substituting their own personal views) when determining whether the public policy announced by the court may have been contravened. As a result, the jury necessarily speculated as to the precise public policy that was allegedly violated. This is particularly problematic where the verdict reveals that only 10 of the 12 jurors, the minimum required for a valid verdict, found liability. See CP 143-44; RCW 4.44.380.

The Court's instructions also significantly prejudiced SVR's entire defense. In order to prove this narrow exception to the at-will employment doctrine, the Employees must prove the existence of a clear public policy, not any public policy, and that public-policy-related conduct caused the dismissal. Gardner, 128 Wn.2d at 941; CP 167. The Employees' claim in the complaint, which was never amended, was that they were told to commit "perjury". SVR necessarily centered its defense at trial on this allegation and established that no Employee was asked to perjure themselves.

When the trial court modified this claim to "interference with obtaining truthful testimony" at the end of trial, SVR was stripped of its entire defense. The jury was left with no required guidance on the new formulation of the public policy claim. The compounding

effects of changing the public policy at the end of the trial and not instructing the jury on the conduct implicating that policy misdirected the jury away from the evidence supporting SVR's defense to the claim pleaded and essentially left it with no defense at all. Because these errors significantly prejudiced SVR, this Court should reverse.

D. The Verdict Is Not Supported By Substantial Evidence.

Sequim Valley Ranch respectfully submits that the verdict is not supported by substantial evidence because Employees failed to establish their *prima facie* case of wrongful discharge in violation of public policy. An appellate court should overturn a jury verdict where it is unsupported by substantial evidence. Burnside v. Simpson Paper Co., 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994). Substantial evidence is evidence sufficient to convince a fair-minded person of the truth of the matter. Miller v. City of Tacoma, 138 Wn.2d 318, 323, 979 P.2d 429 (1999).

In order to carry their burden of proof at trial, the Employees were required to prove, among other things, that discouraging the conduct in which they engaged would jeopardize the public policy (the "jeopardy" element). Gardner, 128 Wn.2d at 941. As our

Supreme Court has emphasized, the same caution that must temper the judicial identification of “public policy” applies with equal force to the jeopardy element. Cudney v. AlSCO, Inc., ___ Wn.2d ___, 259 P.3d 244, Slip Op. at p. 5 (September 1, 2011). The “jeopardy” element strictly limits the scope of claims under the tort of wrongful discharge. Danny, 165 Wn.2d at 222.

In order to establish the jeopardy element, a plaintiff must show that other means of promoting the public policy are inadequate and that the actions plaintiff took were “the only available adequate means” to promote the policy. Cudney, Slip Op. at p. 6 (emphasis in original and quoting Danny, 165 Wn.2d at 222).

In Cudney, the plaintiff claimed that he was wrongfully terminated after reporting that a manager was driving a company vehicle during business hours while intoxicated. Cudney maintained, in part, that the DUI laws embodied a clear public policy of protecting the public from drunk drivers. Id., Slip Op. at pp. 2-4. Addressing the jeopardy element, the Supreme Court first noted that Washington has a series of laws criminalizing driving under the influence of alcohol that provide for both criminal and social penalties, such as loss of status in the community. Cudney, Slip Op. at p. 14.

The Court held that the criminal statutory DUI scheme was adequate to protect the public from drunk driving. The Court explained that where the evidence reveals that the employee took no steps to alert law enforcement to the allegedly illegal conduct, his actions cannot be “the only available adequate means” to promote the public policy:

For Cudney to succeed in this claim, he must prove that telling his manager about Bartich’s drunk driving is the “only available adequate means” to promote the public policy of protecting the public from drunk driving. . . . Cudney admits that he did not call 911 and inform the police of Bartich’s drunk driving. Police and state troopers patrol our roads and highways looking for signs of driving under the influence. There is a huge legal and police machinery around our state designed to address this very problem. It is hard to believe that the “only available adequate means” to protect the public from drunk driving was for Cudney to tell his manager about Bartich’s drunk driving.

Cudney’s reporting drinking and driving to his employer is a roundabout remedy that is highly unlikely to protect the public from the immediate problem of a drunk driver on its roads.

Cudney, Slip Op. at pp. 14-15 (quoting Danny, 165 Wn.2d at 222).

Cudney illustrates that the jeopardy element cannot be established where the employee does not speak up or act in a manner that could actually stop the alleged public policy violation: “It is notable that Cudney reported the drunk driving to his employer, not to the police. . . . The statutory system in place is

adequate to promote the public policy. Cudney's problem is that he acted outside of it." Cudney, Slip Op. at n. 4. The Court distinguished Cudney's actions from those of the plaintiff in Hubbard v. Spokane County, who reported the allegedly unlawful zoning decision of a supervisor to the prosecutor:

By speaking up, Hubbard could actually stop the alleged public policy violation. That is not the case here with a DUI report to an employment supervisor with no law enforcement capability. Under a strict adequacy analysis, Cudney simply cannot show that having law enforcement do its job and enforce DUI laws is an inadequate means of promoting the public policy.

Cudney, Slip Op. at p. 16.

In this case, the Employees were required to show that their decision to quit was the only adequate available means to promote the public policy of non-interference with obtaining truthful testimony through intimidation, threats, coercion or inducement as identified by the trial court. But as reflected in the trial record, the Employees here took no action in response to their belief that SVR had acted unlawfully. The Employees neither brought their concern to SVR's attention nor reported the allegedly unlawful conduct to anyone, including when they met with SVR's lawyers on September 14, 2004. See Section B (2), supra. By their own admissions, all the Employees did in this case was resign and inform their

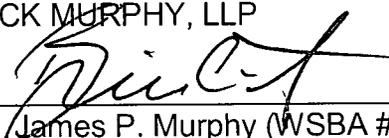
employer by facsimile that they believed they had been constructively discharged in violation of public policy. If evidence that Cudney reported the supervisor's unlawful conduct was not the only available adequate means to promote the policy of protecting the public from drunk drivers⁶, the Employees' inaction and silent self-termination cannot satisfy their burden to establish the jeopardy element of their claim. Because there is a lack of substantial evidence supporting the Employees' claims for wrongful discharge, the jury's verdict is not supported and should be reversed.

V. CONCLUSION

For all of the reasons set forth above, Sequim Valley Ranch respectfully requests that this Court dismiss the Employees' claims as untimely and reverse the verdict and judgment.

Respectfully submitted this 10th day of October, 2011

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Ranch, LLC.

⁶ Like the DUI statutes at issue in Cudney, there is a comprehensive statutory scheme criminalizing and penalizing such conduct. See Chapter 9A.72 RCW ("Perjury and interference with official proceedings"). Under Washington's common law, the Employees failed to show that the actions they took were the only available adequate means to promote the public policy against interfering with the obtaining of truthful testimony where the record demonstrates that they took no action other than quitting their jobs.

COURT OF APPEALS
DIVISION II

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PROOF OF SERVICE

I, Darcie Karn, declare that on October 10, 2011, I caused to be filed with the clerk of the Court of Appeals, Division Two, an original and one copy of APPELLANT'S OPENING BRIEF and served copies on all counsel and parties of record on the date set forth above and by the means indicated.

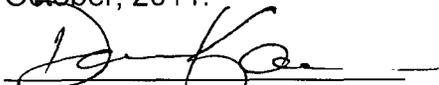
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Mercer Island, Washington, this 10th day of October, 2011.



Darcie Karn, Legal Assistant