NO. 41832-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Plaintiffs/Respondents,

v.

SEQUIM VALLEY RANCH, LLC,

Defendant/Appellant.

RESPONDENT'S OPENING BRIEF

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I. INTRODUCTION

In January of 2010, a Clallam County Superior Court jury found that Sequim Valley Ranch (SVR), wrongfully discharged Marie Barnett, Victor Gonzalez, Mario Gonzalez and Octavio Gonzalez, from employment in violation of public policy. The jury awarded varying amounts to each plaintiff for economic and non-economic damages totaling $427,300.00. The trial court subsequently awarded attorneys fees and SVR appealed.

II. STATEMENT OF FACTS

The plaintiffs all worked at Sequim Valley Ranch (SVR), a lavender farm located in Sequim, Washington. The plaintiffs devoted many years of their lives building SVR from nothing into one of the best lavender farms in the United States.[1]

[1] Clapp sent a letter to V. Gonzalez on September 28, 2004 ridiculing his decision to throw away "eight (8) years of sweat equity of building an operation to its peak." January 6, 2011; Pg.49; 1-18.

SVR was managed by Steven Clapp. Barnett Declaration, CP 937-975. Mr. Clapp built a house on the property where he lived part time. Despite Mr. Clapp's occasionally odd and eccentric behavior, the plaintiffs were happy working at SVR and were excited to help build and grow SVR's business. Unfortunately, things changed dramatically after SVR decided to sue its dairy farm neighbor, Maple View Farm, on July 2, 2004.

The lawsuit, *SVR v. Maple View Farms*, Clallam County Superior Court Cause No. 04-2-00582-8, alleged that Maple View Farm (MVF), was using illegal amounts of fertilizer which was polluting SVR's own air, land and water. CP 325-331. The complaint alleged further that this pollution was making people sick and causing SVR to lose business. Id.

Mr. Clapp turned this suit into a bizarre personal vendetta even though he developed no scientific proof that MVF was doing anything illegal.[2] Mr. Clapp expected and demanded that all of his employees fully support all of the allegations he was making in his lawsuit against MVF.

[2] CP 937-975. Mr. Clapp's lawsuit was ultimately dismissed with no finding of liability or damage.

See Barnett Declaration, CP 937-975. He made this very clear in conversations and in a series of letters he sent to everybody. Id. The problem was that the plaintiffs could not support the allegations in the lawsuit in good conscience. They were accustomed to the sights, sounds and smells of agriculture and dairy farming. They had not gotten sick.[3] SVR was not losing business. January 24, 2011; VRP pg. 53; 7-9. The plaintiffs had no legal training but they knew that it was a crime to testify falsely in any court case. The plaintiffs were not willing to commit a crime to save their jobs.[4]

The plaintiffs tried to explain to Mr. Clapp on several occasions before and after the suit was filed against MVF that they could not misrepresent facts or give false and misleading testimony under oath. This had nothing to do with their loyalty as employees to SVR. It was a matter of moral conscience and the law. See e.g. Barnett trial testimony, January 4, 2011, VRP pg. 6, 9-17.

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[3] Barnett trial testimony, January 4, 2011; pg. 64; 1-13.

[4] See, e.g., M. Gonzalez testimony, January 10, 2011; VRP Pg. 34; 10-20; Pg. 140; 4-25; Pg. 141; 1-2.; Barnett testimony, January 4, 2011; VRP pg. 59; 7-25; 60; 1-25; 61; 1-25; 62; 1-25; 63; 1-7.

For whatever reason, Mr. Clapp refused to accept his employees' statements and stepped up the pressure and coercive threats. Mr. Clapp wrote more letters to the plaintiffs spelling out what he expected them to do and the adverse consequences for not cooperating.[5] Eventually there was a formal meeting at SVR called to discuss the situation in September, 2004. CP 937-975. At the meeting, Mr. Clapp became hostile and angry. Id. He yelled at the plaintiffs that they had but two choices, provide

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[5] The letters are attached as exhibits to Barnett Declaration, CP 937-975. Two of the letters were reviewed by this court in another case, *Clapp v. Olympic View Publ'g Co.*, 137 Wn. App 470 (Div. 2 2007). The excerpts from the two letters discussed in the published case include:

> *The first letter described a pending lawsuit filed by Clapp and stated that the employees had to "decide before (Clapp's lawyers), come, whether you consider yourself part of a ranch or whether you think you can find a better employer, pay, benefits, perks, flexibility, and working conditions that call upon your skills and talents somewhere else on the peninsula." Another letter stated "you needn't concern yourself that what you say may or may not be accurate or either that it might subsequently be proven false; you are asked only to testify to what you believe to the best of your knowledge is true." The appellate court included "the fair sense" of the paragraph is that "1) Clapp expected his employees to affirmatively support Sequim Valley in the lawsuit without equivocation and if they did not, he might fire them and 2) the employees did not need to worry about whether their testimony was accurate or even later proven false because they would be asked to testify only to what they believe to be true. We do not read this as Clapp does, to be an exhortation to tell the truth."*

favorable testimony or be fired. Id. Mr. Clapp then stormed out of the meeting and was not seen the following week.

The plaintiffs were faced with a terrible dilemma: Quit their jobs which they enjoyed and needed or testify against MVF and commit perjury[6]. They were not sure what to do. After much soul searching, and seeing no change in their employer's attitude or position, the plaintiffs worked for one more week and then submitted a written letter of resignation on September 20, 2004. CP 937-975. The conditions at work had grown intolerable and the plaintiffs had no reasonable choice but to quit.

[6] Mr. Clapp was clear that testimony would be required. See, e.g., V. Gonzalez testimony, January 6, 2011; VRP Pg. 40; 1-25; Pg. 41; 1-41. (Clapp told employees "you will be called upon to be witnesses in court on September 12, 2004"). The plaintiffs were all subsequently deposed under oath by MVF's attorneys in the MVF litigation.

III. LEGAL ARGUMENT

A. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY ON CONSTRUCTIVE DISCHARGE IN VIOLATION OF PUBLIC POLICY

1. The Elements of Wrongful Discharge in Violation of Public Policy

The tort of wrongful discharge in violation of public policy is an exception to the at-will employment doctrine in the State of Washington. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231-33 (1984). It "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy". *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 807 (2000).

The four elements of the cause of action are: (1) the existence of a clear public policy (the clarity element), (2) discouraging the employees conduct will jeopardize the public policy (the jeopardy element), (3) the employee's public policy related conduct caused the dismissal (the causation element) and (4) the defendant cannot prove an overriding justification for the dismissal (the absence of justification element).

Brundridge v. Flour Fed. Servrs., 164 Wn.2d 432, 440 (2008) citing *Gardner v. Loomis Armor, Inc.*, 128 Wn.2d 931, 941 (1996).

Some examples of wrongful termination in violation of public policy recognized by Washington courts include: (1) employee fired for refusing to commit illegal act; (2) employee fired for performing public duty or obligation such as jury duty; (3) employee fired for exercising a legal right or privilege; (4) employee fired in retaliation for reporting employer misconduct; or (5) employee fired for missing work due to domestic violence. *See e.g. Gardner v. Lewis Armor, Inc.*, 128 Wn.2d 931 (1996); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984); *Danny v. Laidlaw Transit Services*, 165 Wn.2d 200 (2008).

2. Coercing Employee to Give False or Misleading Testimony Under Oath Violates Public Policy

In order to determine whether an express or constructive discharge from employment violates a clear mandate of public policy, the court must inquire "whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior

judicial decisions may also establish relevant public policy." *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 232 (1984).

The State of Washington has several criminal statutes outlawing perjury, subornation of perjury, and witness tampering. These statutes are clearly designed to promote and protect the integrity of the judicial system. In 2000, the Iowa Supreme Court concluded that an identical trio of Iowa statutes expressed a clear public policy not just in refusing to commit perjury, but to affirmatively encourage truthful testimony in legal proceedings. The court explained:

A policy in favor or refusing to commit perjury necessarily implies an inverse corresponding public policy to provide truthful testimony. Additionally, the integrity of the judicial system, its fundamental ability to dispense justice, depends on truthful testimony. This principle forms the basis for our perjury and related statutes. Furthermore, a reasonable employer should be aware that attempts to interfere with the process of obtaining truthful testimony, whether through intimidation or retaliation,

is a violation of this policy. Fitzgerald v. Salsbury Chemical, Inc., 613 N.W. 2d 275 (Iowa 2000).

The Iowa Supreme Court had plenty of precedent to back its decision from other state courts all over the country including California, Ohio, Colorado, Massachusetts, North Carolina, and North Dakota. See, e.g., In *Petermann v. International Brotherhood of Teamsters*, 174 Cal. App. 2d 184, 344 P.2d 25 (Cal. Ct. App. 1959) (California appellate courts first recognized a cause of action for wrongful discharge when an employee was terminated for refusing to perjure himself at his employer's request. The court found a clear public policy against perjury that was reflected in the penal statutes making the commission and subornation of perjury unlawful); *Merkel v. Scovill*, 570 F. Supp. 133, 140 (S.D. Ohio 1983), overruled in part (on factual basis) by 787 F.2d 174, 178 (5th Cir. 1986) (employee fired for refusing to commit perjury); *Bishop v. Federal Intermediate Credit Bank*, 908 F.2d 658 (10th Cir. 1990). (employee fired after truthful testimony at a congressional hearing); *Freeman v. McKellar*, 795 F. Supp. 733, 742 (E.D. Pa. 1992) (employee fired after truthful

testimony before grand jury); *Montalvo v. Zamora*, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401, 404 Ct. App. 1970) (employees fired because employer believed they intended to testify in a minimum wage action); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 110 (Colo. 1992) (employee fired for refusing to misrepresent quality control deficiencies, an illegal act); *DeRose v. Putnam Management Corp.*, 398 Mass. 205, 496 N.S.2d 428, 431 (Mass. 1986) (employee fired for failure to testify as employer wanted); *Williams v Hillhaven Corp.*, 91 N.C. App. 35, 370 S.E.2d 423, 426 (N.C. Ct. App. 1988) (employee fired for testifying at another employee's unemployment compensation hearing); *Ressler v. Humane Soc'y*, 480 N.W.2d 429, 431, (N.D. 1992) (employee discharged for testifying truthfully).

SVR argues that the trial court erred by giving Jury Instruction # 12 which states:

"It 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 by threats, intimidation, coercion, or

inducement." CP 165. But, SVR is wrong because the instruction given is a correct statement of law and public policy in the State of Washington.

3. Jury Instruction #16 Correctly Defined Constructive Discharge

A cause of action for wrongful discharge in violation of public policy may be based on either express or constructive discharge. *Korslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177 fn. 1 (2005); *Wahl v. Dash Point Family Dental Clinic, Inc.,* 144 Wn. App. 34, 43-44 (2008). Constructive discharge occurs where an employer deliberately makes an employee's working conditions so difficult, unpleasant or intolerable, that "a reasonable person in the employee's shoes would have felt compelled to resign". *Stork v. International Bazaar, Inc.*, 54 Wn. App. 274, 287 (1989), quoting *Nolan v. Cleland*, 686 F.2d 806, 813 (9th Cir. 1982). *See also, Micone v. Town of Steilacoom Civil Service Commission*, 44 Wn. App. 636, 643 (1978).

In 2004, the U.S. Supreme Court held that, in constructive discharge cases, a plaintiff is not required to prove that the employer deliberately intended to drive the employee from the workplace. Instead,

it is enough for the employee to prove that the work environment had become so intolerable that the employee's resignation was a fitting response. *Pennsylvania State Police v. Sliders*, 124 S. Ct. 2342 (2004). This is consistent with Washington law. *See, e.g., Bulaich v. AT&T Info. Sys.*, 113 Wn.2d 254, 261 (1989) ("deliberate act" means a deliberate act of the employer, it does not refer to specific mental intent); *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34 (2008) ("It is the act, not the result, that must be deliberate").

SVR argues that the trial court's Jury Instruction # 16 was improper. Jury Instruction # 16 (set forth at CP 169) stated:

> *"Constructive discharge occurs when an employer deliberately creates working conditions so intolerable that a reasonable person in the shoes of the employee would feel compelled to resign. To establish constructive discharge, each plaintiff must prove the following:*

1. *That the defendant deliberately made working conditions intolerable for him/her;*
2. *That a reasonable person in his/her position would be forced to quit;*
3. *That he/she did quit because of the conditions and not for any other reason; and*
4. *That he/she suffered damage as a result of being forced to quit."*

This instruction is squarely based on Washington law as articulated in several cases, including *Korsland v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn 2d 168 (2005). This trial court committed no error and SVR's argument has no legal or factual basis.

4. <u>The Trial Court Properly Rejected SVR's Proposed Jury Instruction #23 Regarding the Employer's Non-Existent "Internal Procedures"</u>

SVR argues that the trial court erred by refusing to give SVR's proposed instruction # 23:

"If Plaintiffs failed to pursue internal procedures to contest any claimed employment actions taken by (SVR) or which the Plaintiffs base their claims, Plaintiff's resignations will be deemed voluntary, and not a constructive discharge."

The trial court did not err, however, in refusing to give this instruction because it is an incorrect statement of law and had no factual basis in the evidentiary record.

SVR called no witness to explain these mysterious "internal procedures" referenced in proposed instruction #23. SVR had no employee handbook or policy manual admitted into evidence. This is why the trial court concluded there was no evidence of any "internal procedure" that the plaintiffs should have followed which might have supported the instruction. See court's statement, 11/12/11, VRP 47:6-7.

B. THE TRIAL COURT PROPERLY DENIED SVR'S SUMMARY JUDGMENT MOTION BASED ON STATUTE OF LIMITATIONS

1. Plaintiffs' Claims for Wrongful Constructive Discharge in Violation of Public Policy Accrued When They Resigned

An action for wrongful termination is a tort claim that must be filed within three years after it has *accrued.* RCW 4.16.080. In Washington, a tort cause of action *accrues* when the harm occurs and the party has the right to seek relief in the courts. *Unisys Corp. v. Senn*, 99 Wn. App. 391 (2000). In a constructive discharge claim, the plaintiff alleges that he was forced to quit by intolerable work conditions. *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn. 2d 168 (2008). Obviously, there is no claim until the employee quits. The employee has suffered no harm and has no right to seek redress in the courts **until his resignation** which is when the claim accrues for purposes of the statute of limitations. In this case, the plaintiffs tendered their resignations on September 20,

2004 to be effective as of their last day worked, September 18, 2004[7]. The suit was filed on September 17, 2007 and was therefore timely filed.

In *Alberta Douchette v. Bethel School District No. 403*, 117 Wn.2d 805 (1991), the plaintiff alleged that her working conditions became so intolerable that she became ill and collapsed on the job in January 1983. She never returned to work but submitted a letter of resignation on February 16, 1983 claiming an "effective date" of March 15, 1983. Douchette did not file her wrongful discharge suit until March 17, 1986. The court ruled that the plaintiff's claim for wrongful termination (if one existed) accrued on February 15, 1983, *the day she submitted her letter of resignation.* This is consistent with the decisions of many other courts all over the country. See e.g. *Draper v. Coeur Rochester, Inc.,* 147 F.3d 1104 (9th Cir. 1998) (in constructive discharge cases the period of limitations "begins to run on the date of resignation"); *Mullins v. Rockwell Int'l Corp.,* 15 Cal. 4th 731 (1997) (constructive discharge claim accrues on

[7] The Petitioner's claim that September 14, 2044 was "the last day (the plaintiffs) were physically present at SVR and working." Petitioner's Brief, Pg. 20. But this is contrary to the facts in the case. See, e.g., V. Gonzalez testimony, January 6, 2011; Pg. 30; 4-25; Pg. 31; 1-23.

date of actual termination); *Stupek v. Wyle Laboratories Corp.,* 963 P.2d 678 (Or. 1998); *Whye v. City Council for the City of Topeka,* 274 Kan. 1016, 102 P.2d 384 (Kan. 2004) (the cause of action for wrongful constructive discharge "accrues and the statute of limitations begins to run when the plaintiff tenders his or her resignation or announces a plan to retire"); *Daniels v. Mutual Life Insurance Co.,* 773 A.2d 718 (N.J. 2001) (the period of limitations in constructive discharge cases begins to run on the date that the resignation is tendered because the:

> Harm has been done when the employee feels compelled to resign. In short, in an actual termination situation, the retaliatory action which starts the running of the period of limitations is the separation from work. In a constructive discharge situation, the retaliatory action is the creation of intolerable conditions which a reasonable employee cannot accept. The conditions become intolerable when the employee tenders his or her resignation);

University of Texas Medical Branch v. Hohman, 6tg S.W. 3d 767, 773-74 (Tex. App. 1999) (the court rejected the employer's argument that constructive discharge claims accrued before the employees tendered their resignations); *See also, Hancock v. Bureau of National Affairs, Inc.,* 645 A.2d 588 (D.C. 1994); *Lowell v. Glidden-Durkee, Division of SCM Corp.*, 529 F. Supp. 17 (N.D. III. 1981).

The plaintiffs in *this* case claim wrongful discharge in violation of public policy. This is a common law tort claim. It is not a statutory claim asserted pursuant to RCW 49.60 *et seq.*

Discrimination claims brought under state or federal statutes have special rules including statutes of limitation. The rules and procedures governing statutory discrimination claims do not apply to a common law tort claim for wrongful discharge in violation of public policy.

2. <u>The Petitioners Argument – That no Employee Worked for Five Days Prior to Resignation – is Contrary to the Facts</u>

The defense argues that the plaintiffs quit working before they resigned. Specifically, the Petitioner claims that September 14, 2004 was

"the last day (the respondents) were physically present at SVR and working." Petitioner's Brief, Pg. 20. This conclusion is squarely contradicted by the evidence presented in the case. See, Barnett Declaration, CP 937-975; January 6, 2011; VRP Pg. 30; 4-25; Pg. 31; 1-23; January 5, 2011; VRP Pg. 19; 14-25; Pg. 20; 1-22.

As explained above, the critical date for claim accrual is the date of resignation but even if it were last day worked, the defense has submitted no evidence the dates were different. The resignation letter itself makes clear the plaintiffs worked until September 18, 2004 and there is no contradictory evidence in the record.

C. THE DAMAGE AWARDS ARE BASED ON SUBSTANTIAL EVIDENCE AND DO NOT SHOCK THE CONSCIENCE

A jury damage award should be overturned only in the most extraordinary circumstances. Those circumstances are: (1) the award is outside the range of the evidence (2) the jury was obviously motivated by passion or prejudice or (3) the verdict amount is shocking to the court's conscience. *Washburn v. Beatt Equip. Co.*, 120 Wn. 2d 246, 268-69

(1992); *Sofie v. Fibreboard Corp.*, 112 Wn. 2d 636, 654-55 (1989). None of these circumstances exist in this case.

Wrongful termination in violation of public policy is a tort cause of action that allows for recovery of tort damages. *Cagle v. Burns & Roe, Inc.*, 110 Wn.2d 911, 916 (1986). The recoverable damages include lost wages. *Ford v. Trendwest Resorts*, 146 Wn.2d 146, 154 (2002). The prevailing plaintiff is also entitled to recover compensation for general damages or emotional distress. *Wahl v. Dash Point Family Dental Clinic, Inc.*, 144 Wn. App. 34 (2008).

The Petitioner made no effort to provide this court with a full record sufficient to review its damage argument on appeal. The testimony that has been presented provides no basis for disturbing the jury's decision on appeal.

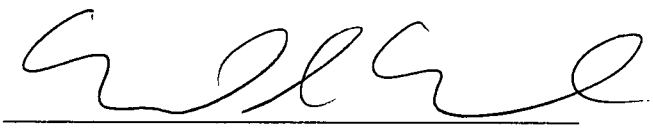
IV. REQUEST FOR ATTORNEYS FEES ON APPEAL

The Respondent's request the award of attorney's fees on appeal consistent with the trial court's finding that this is an action to recover wages and award costs and attorneys fees.

V. CONCLUSION

For the foregoing reason, the Respondents request that this court affirm the decision of the Clallam County Superior Court.

DATED: This 27 day of February, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that the Respondent's Opening Brief was forwarded on this 27th day of February, 2012, for service upon:

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

DATED: this 27th day of February, 2012.

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