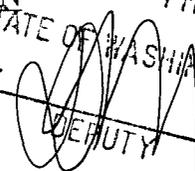


DIVISION II OF THE COURT OF APPEALS

FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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In the Matter of

THE STATE OF WASHINGTON

VS

CYNTHIA CASTILLOTE BLANCAFLOR

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(Cause No. 10-1-02165-7)

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CAPSULE SUMMARY

The Crimes in Brief:

The criminal charges were the result of the industrial insurance audit conducted on October 16, 2009 by The WA State Department of Labor & Industries herein known also as L&I.

The audit was performed on the adult family home business co-owned by Othniel and Cynthia Blancaflor called "My Grandma's House LLC" or herein known also as MGH.

The co-defendant and co-owner of MGH, Cynthia Blancaflor, was also an L&I auditor at the time. Cynthia was charged with three counts of false reporting and one count of theft in the first degree.

- A. The three counts of false reporting were charged for the years 2007, 2008; and for the first half of 2009 - from January 1, 2009 to July 31, 2009. Originally the ending was June 30, 2009. Prosecutor Dan Pullo later on revised the date on the first day of trial.

These charges were related to the unreported workers that should have been reported in the employer's quarterly reporting and payment of premiums to L&I for industrial insurance coverage of workers.

- B. The one count for theft was charged for the unpaid wages related to Workers Rights under the Wage Payment Act.

The Facts Giving Rise to the Charges:

On May 12, 2008, wage claims were filed by former workers Edward Hoff and Elvira Viray against My Grandma's House LLC.

The wage claims were reviewed by L&I's Employment Standards Unit. The review later confirmed the unpaid wages owed to Hoff and Viray. Further review also noted that the industrial insurance account of MGH showed no worker hours reported in the quarter periods of the wage claims.

Following the review, Employment Standards Unit referred MGH for audit in August of 2009.

The audit was conducted on October 16, 2009. The preliminary findings of the audit confirmed the allegation of unreported worker hours for Hoff and Viray. (*Contract Labor*)

The preliminary audit review further discovered more unreported workers in the audit period who were employed on a temporary or on-call basis (*Casual Labor*).

Along with the issues on contract labor and casual labor, the audit review also noted the following:

- Hoff and Viray's statements on Cynthia's awareness of the change in treatment of the caregivers from "employees" to "contract labor" in 2008.
- Cynthia's awareness of cash wages paid in 2008.
- Cynthia's e-mail to L&I Revenue Agent Fnot Lindgreen requesting to adjust worker hours to zero in the quarter periods where there were workers – quarters 1 and 2008.



- Awareness of having workers in quarter 4 of 2008 while the industrial insurance account remained closed.

While the audit was in progress, L&I Auditor Pamela Cormier and Cynthia had a disagreement on certain records that Cormier requested in order to complete the audit.

Auditor Cormier then reported Cynthia was not cooperative with the records requested for audit review. Thus, a residential search warrant was then issued to obtain more records that Cormier felt necessary to complete the audit.

At this point, the audit became a part of an open criminal investigation conducted by L&I Lead Investigator Mark Sexton.

Review of the records seized from the search warrant revealed the following:

- Discovery of more than one bank accounts.
- Records showing patients in quarter 3 of 2008 that were inconsistent to Cynthia's statement to the auditor that there were no patients in that quarter period.
- Cancelled checks with Cynthia's signature that were written to caregivers and cash withdrawals for wages.
- Awareness of on-call and part-time caregivers whom Othniel Blancaflor did not report to L&I

Added to the above list was Cynthia's failure to follow through with the payment plan to resolve the wage claims filed by Viray and Hoff.

There were also other unfair labor practices reported by Hoff and Viray: withholding taxes and not remitting it to the feds and the state; underpaying the employees/unpaid overtime.

In the end, the findings of the audit and criminal investigation concluded that the unpaid wages and unreported workers were intentional.

As a result, L&I submitted the case to the office of the Attorney General to prosecute Othniel and Cynthia Blancaflor for false reporting (*fraud*) and theft.

Washington State Attorney General filed the criminal charges on May 10, 2010. The trial was held in Pierce County Superior Court in Tacoma on September 12, 2011 where Cynthia was convicted on all charges. Cynthia, a first time offender, was sentenced to four months in jail.

Summary of Issues

ARGUMENT 1: Ineffective Counseling

Cynthia did not get a fair representation in this trial. The testimonies and evidence presented in court were all in favor of the prosecution, shedding no light on Cynthia's side where defense counsel Dana Ryan notably did not call any witnesses, present any evidence, or raised certain objections that reasonably should have been raised or argued.



Much like an audit plan to an audit, a case theory begins during the first interview and is refined as each bit of information is received. It encompasses what the opposition must prove, what you can prove, what objections you'll make, what motions you argue. It considers the discovery you have, the discovery you need, and the way you will go about obtaining it. It is a procedural process that was not applied in this case.

The defense counsel did not review the discoveries. Defense counsel did not conduct an investigation of the caregivers until the last minute of the trial. In fact, several investigations were hastily accomplished during lunch hours of the trial making it obvious that the defense counsel did not do his research on the case. Defense counsel did not perform due diligence in regards to research on this case. In fact, some of the evidence issues that should have been researched and addressed in the pre-trial stage were done *during* the trial.

Defense counsel did not even care to subpoena the three major witnesses to this criminal case: L&I Auditor Cormier, L&I SEC Program Specialist Preston Beegle, and Revenue Agent Fnot Lindgreen.

L&I Auditor Pamela Cormier was the auditor who performed the actual audit of the business MGH. The underlying criminal charges were based on the audit. Cormier was the one who initially determined that there was possible intent of misrepresentation on Cynthia's part. How did she arrive at that conclusion? How was the audit done? What was the reason for the audit? What were the audit allegations? Did Cynthia provide any records? What records did she review? What other additional records did she request? Why did she request such specific records?

Cormier's presence and testimony were pivotal to the trial. Although the prosecution initially listed Cormier as one of the State's witnesses, it subsequently decided not to call her to testify. Why then did defense counsel Ryan *neglect* to subpoena Cormier? In as much as Cormier was the key witness, the missed opportunity to cross exam Cormier was essential to Cynthia's defense and instrumental in the court's ultimate determination of guilt.

The defense counsel's ineptness allowed crucial questions to go unanswered. Specifically, what information did Cormier notice in the records that would seem to indicate intent to misrepresent? Were there any problems in the records or getting the records needed for the audit? What was discussed to address the problems in the audit? What did she suggest to resolve the problems? What did Cynthia suggest to resolve the problems? Could she have completed the audit without the additional records (ATM receipts & bank statements) she requested? Could she have estimated the worker hours? Was her request of the additional records reasonable given the condition of the records? Did she consider any other avenues to obtain the records she needed to complete the records without the search warrant?

Cormier's presence in the trial could have added light to Cynthia's alleged refusal to provide records. The prosecution built their case on the evidence seized from the search warrant that was obtained *because* Cynthia refused to provide records.

Defense counsel Ryan also did not subpoena L&I SEC Program Specialist Preston Beegle who did the investigation of the caregivers and the CPA firm Sutton-McCann. Again, the prosecution initially listed Beegle to testify as one of the State's witnesses, and then decided not to call him to testify. It is basic general policy to any criminal case to call the investigating officer who did the actual investigation. It is



the defense counsel's function to cross-examine key witnesses to impeach their reports and/or testimony. Beegle's none presence at the trial denied the defense the opportunity to determine, with specificity, how the findings of his investigation concluded that Cynthia *intentionally* misrepresented the payroll or employee hours to L&I.

Another major witness that was primarily listed as one of the State's witnesses was Fnot Lindgreen. Lindgreen was the Revenue Agent (*Collector*) assigned to the industrial insurance account of MGH. There was an e-mail in August of 2008 between Lindgreen and Cynthia. The e-mail discussed a couple of the quarterly reports needed to be filed and Cynthia's request to close the account. This e-mail was listed as Exhibit 10, 10A to 10E submitted as evidence in court.

This e-mail was critical to Cynthia's conviction as it contained an error suggesting "intent" to misrepresent employee worker hours. The prosecution brought in another Revenue Agent, Susan Rusch-Barnett, to read the e-mail. The prosecutor then asked a series of questions pertaining to what was written in the e-mail.

The prosecutor brought the e-mails back into focus during her cross-examination of Cynthia. All questions were answerable by yes or no and Cynthia was not able to explain anything and when she did, the prosecutor cut her off.

It is customary for L&I workers to document in LINIIS (mainframe program used for industrial insurance) any phone calls or any e-mails received from employers. In the e-mails, Cynthia wrote no workers for 081 and 082 which meant quarters 1 and 2 of 2008. This contradicted the fact that the wage claims filed by Hoff and Viray showed they were working at MGH for quarters 1 and 2 of 2008. However, Lindgreen wrote a memo in LINIIS to document the e-mail received from Cynthia stating that Cynthia requested to adjust quarters 2 and 3 of 2008 to zero hours as these were the quarter periods discussed per her phone conversation with Cynthia.

Fnot Lindgreen did not document the phone call in LINIIS but Cynthia stated to defense counsel Ryan that there was a phone conversation prior to the e-mail in question. The phone call was Cynthia's response to Lindgreen's e-mail dated August 12, 2008. In that phone conversation, Cynthia discussed to adjust quarters 2 and 3 of 2008, in addition to closing the account. Lindgreen then told Cynthia that she needed something in writing to close the account. As such, Lindgreen suggested to Cynthia that she respond to her first e-mail dated August 12, 2008 and that it would suffice as written documentation to close the account. Cynthia responded to the e-mail on August 25, 2008.

In the prosecutor's cross-examination, Cynthia was not given the opportunity to explain or make any reference to Lindgreen's memo in LINIIS contradicting the quarter periods stated in the e-mail. This memo was included in the discovery marked DLI-MGH002467 and was not included in the exhibit list of evidence submitted in court.

Early on in her interview with defense counsel Ryan, Cynthia explained the inconsistency of the e-mail and the memo when she forwarded copies of both to defense counsel Ryan via e-mail. As Cynthia was not able to explain the inconsistency in the quarter periods between the e-mail and the memo, the only other person that could have explained the inconsistency was Fnot Lindgreen who was not in the trial for cross examination because defense counsel Ryan failed to summon Lindgreen to testify. Not to mention,

defense counsel Ryan also failed to present the memo as evidence for rebuttal even though Cynthia e-mailed a copy of this memo and all the power point tools she provided for her defense. The presentation of this memo to the jury and the testimony of Fnot Lindgreen that the jury was not able to hear could have made a difference in the way the e-mail was perceived.

Hoff and Viray worked partial of quarter 2 of 2008; specifically, Hoff worked the entire month of April and Viray worked the whole month of April and five days in May. Cynthia failed to realize this back then when she was talking to Lindgreen. Cynthia made an error but this was not intent. L&I magnified this error by selecting bits and pieces of evidence to make their case. Since defense counsel Ryan failed to do his “due diligence” to defend Cynthia, the prosecution continued to move in for the win.

Furthermore, there appears to be a violation of the “hearsay” rules of evidence because three other people were allowed to testify on the statements or work reports written by available, but non-present witnesses.

- Mary Tunis testified on L&I Auditor Cormier’s audit report.
- L&I Lead Investigator Mark Sexton testified on SEC Program Specialist Preston Beegle’s investigation report.
- Revenue Agent Susan Rusch-Barnett testified on Fnot Lindgreen’s e-mail to Cynthia.

Although defense counsel Ryan argued the “hearsay” issue in court as well as the admissibility of the e-mails for evidence, the fact is that these were evidentiary issues should have been addressed in the pre-trial stage. This was a major evidence issue and yet the defense counsel did not research the issue until in the middle trial.

Another critical factor that could have made a big difference in Cynthia’s conviction and goes on further to support the argument of Ineffective Counsel was defense counsel Ryan’s failure to argue the motions in limine with primary emphasis on Othniel Blancaflor’s mental health. The prosecutor stated that mentioning Othniel Blancaflor’s mental health into the trial could impact the jury’s decision to convict.

Othniel Blancaflor was diagnosed as bi-polar suffering from depression with suicidal tendencies. In 2007, after a series of events such as the closure of the second adult family home, the traumatic death of patients and a downfall of the real estate market, Othniel suffered a severe mental breakdown. These problems were further magnified by the liens that the previous owners of the adult family home had on all of The Blancaflor’s properties. Othniel’s diminished mental capacity and his inability to make lawful, pertinent and necessary business decisions is an important fact that should have been at least heard and evaluated.

In addition to, and probably because of the afore-mentioned mental issues, in 2007 in his University Place residence, Othniel attempted to hang himself. He used bathrobe belts which were not able to hold his weight. When the belts snapped, he fell from the second floor balcony to the first floor, landing on his back. He sustained serious back injury that left him incontinent and in severe and chronic pain.

The business went through a series of calamities that took a serious toll on the mental and emotional stability of Othniel and created a lot of tension in the business. Cynthia and Othniel fought and argued repeatedly resulting in many responses to the home by police. Interview and statements from caregivers Miguelita Luna, Myla Mariano, and Helen Griffith all corroborate the on-going domestic violence.

After Othniel attempted to commit suicide in August of 2007, Othniel's behavior became increasingly erratic and less predictable because of the many, many pain pills, nerve pills, psycho-pharma meds and anti-depressant pills that he was taking (Tramadol for pain , Gabapentin for nerve pain, Nitroglycerin for chest pain, Risperidone for hearing voices and Flouxetine for anti-depressant). For her own safety, Cynthia was afraid to question or challenge him concerning the business, employee status, book-keeping and accounting practices.

Othniel Blancaflor's mental health was a material fact. Othniel had been in and out of St. Joseph hospital's mental ward for suicidal and his bouts of depression sensitive to the time of speculation for this case. The prosecution raised concerns over the professional opinion of Othniel's mental health condition which sounded as if there were no discussion ever made about the issue in the pre-trial stage. If there was no discussion, why did defense counsel Ryan not make it known? Why did Othniel's defense counsel did not make it known? Why was no effort made to obtain an order of a professional evaluation to assess Othniel's mental health?

Othniel Blancaflor provided his defense counsel, Curtis Huff, his medical records. Did Othniel's defense counsel ever make copies of it for the prosecution? If so, did the prosecution made any effort to call the doctors on Othniel's medical file to ascertain whether the information regarding Othniel's mental health were true?

People make mistakes and in reflection, it is probable that Cynthia may not have done enough by merely asking or reminding Othniel about the quarterly filings to L&I, but Cynthia would have no way of knowing that Othniel would be less than truthful to her? If state of mind and intent are issues, then mental health should also be relevant in this case.

Defense counsel Huff argued the motion but defense counsel Ryan did not support him. Defense counsel Ryan's joint force with Huff may or may not have made any impact in the trial judge's decision, but the chance that Ryan did not take to argue the motion could have made the difference in Cynthia's conviction.

Defense counsel Ryan was not ready at all for this trial. Everything was done impromptu and there was no defense plan. When State witnesses took the stand, defense counsel Ryan had just started reading the investigation transcripts and taking notes. He therefore missed many of the key points in the testimonies of the witnesses.

The prosecution placed great emphasis on Cynthia's knowledge of the law and her experience as an L&I Auditor along with the testimonies and evidence presented in court to purport "intent." Never did defense counsel refute or object to key points of the case that were addressed in court.

1. Cynthia's Refusal to Provide Records or Not Forthcoming with Records/Cross-examination of Mary Tunis and Mark Sexton

There were conflicting testimonies from Field Audit Supervisor Mary Tunis and Lead Investigator Mark Sexton who each testified that Cynthia refused to provide or was not forthcoming with the records needed in the audit as reported by L&I Auditor Cormier.



For the purpose of clarity, the testimony of Tunis and Sexton per above, referred to the time before the search warrant - taking the focus *back* towards the part of the audit when Cormier and Cynthia had a discussion regarding the ATM receipts.

Tunis then contradicted her statement when she stated that there were records provided in the audit. Tunis even further described the type of records provided in the audit and how the review of these records came to the initial findings of the unreported workers.

Further, Sexton testified that Cynthia told L&I Auditor Cormier that the records were in the garage at her home. Sexton went on to describe how the business records were extremely co-mingled with other personal records; and that pictures and videos were taken to document the condition of the records as the L&I search team found it in Cynthia's home.

Sexton's testimony on the condition of the records corroborated with Cynthia's statement that the records were in the garage; and because of the last minute residential move due to home foreclosure, business records were boxed and mixed with personal records. This was documented in Cynthia's e-mails to L&I Auditor Cormier included in the exhibit list submitted in court.

If Cynthia was not forthcoming with the information and had any intent to hide the records from L&I, why would Cynthia tell L&I where the records were? Why would she bring up partial records to the audit that cued in to the unreported workers as identified in Cormier's preliminary review? Or for that matter, why would Cynthia provide any records at all for the audit when she was fully aware that estimating worker hours are allowed within the guidelines set forth under WAC 296-17-3501(2)?

If Cynthia wanted to evade determination of the correct amount of premiums to L&I, why not limit the damage to just Hoff and Viray who were the only known workers named in the audit allegation as it was initially assigned?

Cynthia could have just stated to Cormier that there were no records at all or could have simply could just moved the records from her house to somewhere else and then fabricated a lie that the records were damaged in a fire or flood. There are multiple scenarios that a person with intent and purpose could have went about this incident, especially someone who is knowledgeable in the procedures of an audit... but in this case, Cynthia told the truth.

The whole case was about **intent** and the statements of L&I officials Tunis and Sexton set the perfect stage to challenge and refute the prosecution's claim of intent but defense counsel Ryan failed to pick this up in his cross examination of Tunis and Sexton.

2. Failure to address refusal to provide records when Cynthia took the stand

Defense counsel Ryan, however, had the opportunity to raise the issue on refusing to provide records or not being straightforward with the records when Cynthia took the stand.

Tunis and Sexton had already established the poor condition of the records as it was found in Cynthia's home – which would have been a good lead to establish a series of questions into the reasons why the records were severely co-mingled and then, delve into the issue of the missing bank statements and ATM receipts that Cormier had requested in the audit.



Bringing those questions would have given a favorable light for Cynthia's defense to explain that the refusal of providing the ATM's and missing bank statements was a disagreement purely from a professional standpoint and not to be misconstrued as refusal to provide with intent to hide or withheld records from L&I. It was merely what was practical given the condition of the records, the cost to obtain the missing bank statements and the work involved to dig all ATM receipts for 2006, 2007, 2008 and 2009.

In her first interview with defense counsel Ryan, Cynthia explained the law of estimating worker hours in the absence of time records and payroll records. Cynthia provided him a copy of WAC 296-17-35201 and WAC 296-17-31021.

Cynthia explained to defense counsel Ryan that before the search warrant, the only allegation in the audit that was apparent at that time, was the unreported workers; and this was also inferring from the records Cormier had requested before the audit and when the audit was in progress.

The review of bank statements and ATM receipts would yield little or no value to address the audit allegation of unreported workers because the amounts shown on the bank statements and ATM receipts would only be indicative of business activities. It would not identify any names of unreported workers to be able to reasonably estimate the worker hours.

As such, Cynthia suggested estimating worker hours at 520 hours per quarter for each worker found in the audit where no time records and payroll records were kept according to WAC 296-17-35201(2) and WAC 296-17-31021.

Further, Cynthia informed defense counsel Ryan that during her meeting with Cormier on December 8, 2009, Cormier did not ask for anymore records other than the time records. She made no mention of the ATM receipts or the missing bank statements.

In this meeting, Cormier stated that she would work on completing the audit and even scheduled a teleconference meeting on December 11, 2009 to discuss the preliminary audit results with Cynthia. However, no teleconference happened on December 11th. Instead, L&I search team and Cormier showed at Cynthia's house with a search warrant. Cormier's note of this meeting was in the audit file included in the discovery. Cynthia e-mailed defense counsel Ryan a copy of Cormier's note of this December 8th meeting.

These bits and pieces of information were integral in weaving the very fabric of Cynthia's defense to refute the prosecution's claim of intent. Cynthia gave defense counsel Ryan all the tools to make her case - power points, a proof chart that listed the evidence implying intent and then the rebuttals but none of this made it to trial.

3. Search Warrant/Due Process Clause

There were some potentially helpful leads which defense counsel Ryan could have used to advance the case i.e. when Sexton stated that Cynthia was given the opportunity to bring the records for review to the L&I office. How practical would it be for the records to be delivered for review in their condition? Wouldn't it be more practical if L&I Auditor Cormier had conducted the audit at Cynthia's house since she knew exactly what records she wanted to review?



There were other avenues that Cormier and/or L&I could have taken besides a residential search warrant. If the bank statements and ATM receipts were so critical to the audit, why was it that Cormier did not subpoena the bank instead of obtaining a residential search warrant in December 2009? Why did Cormier wait until February 2010 to send a search warrant to the bank?

Additionally, since Cormier wanted to review the personnel file and patients business records (listed in the search warrant), why did she not request for it in her original checklist of records needed for audit review? Why didn't Cormier mention these records in her e-mail to Cynthia when she asked for additional records .i.e. ATM receipts?

Why did Cormier indicate in the December 8th meeting that she would work on completing the audit and scheduled a teleconference for preliminary audit results when she was not satisfied with the records?

This would have cast a more favorable perspective from the jury had defense counsel Ryan argued the records and search warrant issues especially when Tunis had already testified early on in the trial that the audit of MGH was unusual because Cynthia was an L&I worker; and as such, L&I wanted to do a thorough examination.

There was evidence in the discovery pointing to Cynthia being "singled out" by L&I such as L&I Auditor Cormier's notes in the audit file which showed that L&I all along had planned to do the search warrant as early as October 13, 2009, which was three days before the audit on October 16, 2009. There was another note by Cormier where she was instructed by the Audit Manager, Cathy Vargas, to review all ATM receipts. In a normal audit, you take samples. Cynthia e-mailed copies of the audit notes to defense counsel Ryan but they were not presented in court.

Interestingly, Tunis, during her testimony, asked the prosecutor if she could relate what was mentioned in the briefing on how L&I had it all set up when they assigned the audit to her unit. The prosecutor, however, instructed Tunis to just talk about how the audit was assigned to her unit and leave out what was discussed in the briefing. This would put the timeframe of the briefing before the audit notice was received on September 28, 2009.

Subsequent to September 28th, e-mails were generated between Cormier and Cynthia that were included in the exhibit list – Exhibits 110, 110A to 110E. These e-mails were all related to the records in the audit. Cynthia had specifically instructed Cormier that any questions regarding the records in the audit would be best answered by Othniel since he was the one who was responsible for the bookkeeping and quarterly reporting to the State. This e-mail was dated October 6, 2009.

Despite Cynthia's instruction on October 6, 2009, Cormier was still sending questions on the audit to Cynthia who relayed the questions to Othniel and then back to Cormier. As expected, there were inconsistencies in the message which L&I took advantage of. From the time when the audit notice was received on September 28th, Cormier only interviewed Othniel twice on October 13th and October 20th which was documented in the audit notes included in the discovery. Again, a copy of the audit notes were e-mailed to defense counsel Ryan as part of the evidence Cynthia had noted in the discovery for rebuttal.

Further, when the audit became a part of an open criminal investigation beginning December 11, 2009 to when the criminal investigation was completed in April 2010, Lead Investigator Mark Sexton did not interview Othniel who was the other suspect to the crimes charged. Was it an *error* to leave out the person

who was responsible for the books and quarterly reports? Or was this part of the briefing on how the audit and criminal investigation would be handled making it easier for L&I to center the plot on Cynthia?

In the cross-examination of defense counsel Huff with Sexton, Huff asked Sexton if he was aware that L&I Auditor Cormier, throughout the entire time of the audit, interviewed Othniel only twice and this was before the audit became a part of an open criminal investigation. Sexton responded that yes, he was aware. Defense counsel Huff then asked him did he ever interviewed Othniel? Sexton said "NO" because he was told that Othniel was supposed to give a deposition. A deposition to what exactly remained unclear due to the fact that the investigation was still open and the criminal charges were not filed until May of 2010.

Defense counsel Huff further took the question to Sexton's investigation training and his experience as an investigator, asking Sexton if it was unusual for investigators in a crime investigation not to investigate a suspect. It was evident that Sexton could not think of why investigators would not investigate a suspect in a criminal investigation when he responded, "Sometimes in the process of 'developing information,' investigators would defer to interview the suspect." Sexton even went on to mention that at that point in time, he thought it would be best to let the Attorney General take a deposition on Othniel.

Defense counsel Huff again asked Sexton even if Othniel were to be deposed, what other reasons why an investigator would *not* investigate the suspect in a crime investigation? Sexton's stunning answer was because the SEC Unit in L&I had already conducted so many interviews with caregivers stating they work at MGH. This was interesting as Sexton used the term "*developing information*" as opposed to "gathering information."

The sequence of events that took place before and during the audit tied to the evidence in the audit notes and e-mails. L&I was building a case as validated by Tunis' testimony. From the start, the audit was treated as a criminal investigation. Cynthia was already a suspect to a crime before she even knew it on December 11, 2009.

If it is legal for any government official to lie to obtain and cherry-picked the information they needed to make their case, how would any citizen of the state be able to protect his or her rights to a fair trial?

L&I came to Cynthia's house took more than what was listed on the search warrant and then L&I Lead Investigator Sexton conveniently stated in court that Cynthia gave them permission when she did not. The truth was the records were severely commingled and L&I officials did not want to spend the time needed to sort through the records specifically listed on the search warrant so they decided to take it to the office.

Sexton further stated in his testimony that he didn't warn Cynthia on her Miranda rights because she was not taken into custody; and as a limited peace officer, Sexton did not have the authority to arrest. Sexton proceeded to interrogate Cynthia because he felt that it was a good time to ask Cynthia some questions. The details of this interrogation were discussed in court. CP725 L10-L25.

Had defense counsel Ryan taken the amount of time needed to understand this case and had he studied the evidence provided to him by Cynthia, the disposition of this case might have been resolved more favorably for Cynthia. Prior to the trial, Cynthia brought her concerns to defense counsel Ryan about L&I possibly violating her rights under the 4th amendment by way of the due process clause of the 14th amendment, but defense counsel Ryan did not respond.



This was a very involved criminal case as the charges were based on an L&I audit of industrial insurance premiums. To that, added the approximately 7,400 pages of discovery that the prosecution presented over the course of fifteen months. There were initially 2,709 pages given in July of 2010, then close to 4,000 pages given in March of 2011, 500 pages in May 2011, and even more were handed in during the trial.

Continuance after continuance was filed on the case but defense counsel Dana Ryan never reviewed the discovery instead, burdening Cynthia with the task. After sifting through the evidence Cynthia created a spreadsheet listing all evidence of no relevance, duplicates, and blank pages.

Cynthia found approximately 1,500 pages of banking documents belonging to the previous owner of the adult family home, approximately 1,000 pages of duplicates and blank pages, approximately 1,000 pages of business related documents belonging to the previous owners of the business, approximately 500 pages of documents that were of no relevance to the case including disaster preparedness handbook, adult family homecare annual re-inspection manual, to name a few; and one odd invoice (patient billing) dated February of 2010 which was puzzling since L&I had seized both computers that were used for business on December 11, 2009. In short, L&I created a paper flood, specifically designed to overwhelm defense counsel Ryan.

There were also patients medical records protected under the HIPAA law that were seized during the residential search warrant. These were daily logs to include medication logs and care plans that contained medical history of the patients. These were not patient's records related to business as would admission and financial agreements. Cynthia expressed this concern as well in her letter to L&I dated July 15, 2010 requesting for reconsideration of the audit results.

All of the above information was seized thru the residential search warrant and the warrant L&I sent to the bank. Cynthia e-mailed defense counsel Ryan the list of the above evidence for review. Again, defense counsel Ryan never reviewed the list.

Cynthia also requested defense counsel Ryan to set a contested omnibus hearing to determine if discovery was in compliance but this never took place. Cynthia never waived her right to an omnibus hearing. The omnibus simply kept getting postponed and the defense counsel kept giving her papers to sign each time it was rescheduled.

Cynthia also requested the defense counsel to review the prosecutor's declaration attached to the information filed on May 2010 as well as L&I's affidavit in support to the search warrant. The affidavit in support to the search warrant and the prosecutor's declaration made statements about theft relating to the unpaid wages. Cynthia initially signed a payment plan with L&I for these wages and made one payment. However, when the business was shutdown, Cynthia was not able to follow through with the payments. Cynthia requested that the payments be reduced, but L&I refused. Cynthia then included the wage claims in the Chapter 13 bankruptcy. Since no omnibus was ever held, review of the evidence was never done.

Although defense counsel raised the issue with the trial judge, Judge Arend allowed it without even looking at the evidence. Per RCW 9A.56.020 (2) (a): In any prosecution for theft, it shall be a sufficient defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.

Prosecutor DanPullo contended that there was enough to go on with the theft charge because caregiver Viray stated that Cynthia did not want to pay her. This information was biased as Viray was asking to get paid after she filed the wage claims. Once the wage claims are filed payments are made through L&I but it took L&I over a year to process the wage claims because of the back log in Employment Standards Unit, a fact testified by Industrial Relations Specialist Catherine Tinker testified to this. CP 305 L6 –L12.

Cynthia explained the situation to Viray who did not understand the process. Wage claims are settled with or through L&I and that was why the payment plan agreement was between Cynthia and L&I, not between Cynthia and Elvira Viray; thus, supporting the argument that the theft charges should be reversed.

4.Failure to emphasize the Timeline in the L&I Reporting Errors & Cynthia’s Employment with L&I/False Reporting Conviction in 2007.

The original audit period covered from October 1, 2006 to June 30, 2009. However, when the audit became a part of the criminal investigation, the audit was extended to July of 2005 when the business was purchased.

Cynthia did not work for L&I until March of 2006 and received her auditor training on April of 2006. L&I realized that in 2005, there was no “intent” since Cynthia was not an L&I Auditor. As a result, 2005 was dropped from the audit. 2006 was also dropped because of the three-year statute of limitation. The new audit period then covered 2007, 2008, and first seven months of 2009.

L&I Auditor Cormier reviewed the records and determined that there were fill-in caregivers that were not reported in 2005, 2006, and 2007. This was the casual labor issue. During these periods of the audit, Othniel managed the payroll with the technical assistance of the CPA firm, Sutton-McCann.

Cynthia produced and provided a power point (a timeline) for defense counsel Ryan to illustrate the pattern of the errors even though 2005 and 2006 were dropped in the audit. Cynthia also attached the files of Othniel’s payroll correspondence with Sutton-McCann along with copies of the payroll checks with Othniel’s signatures on it.

Cynthia also attached a copy of the transcript investigation per Sharon Holcomb’s interview with L&I SEC Specialist Preston Beegle stating that she only had one contact with Cynthia and that was when Cynthia requested for payroll records needed for the L&I audit. Othniel was in Illinois the entire time of the audit and criminal investigation.

The whole purpose of the timeline that Cynthia created was to show that the errors were pre-existing and consistent throughout 2005, 2006, and 2007; and Othniel alone did the payroll with the help of a CPA firm for that entire period. From the start, Cynthia had no knowledge of the errors. Otherwise, those same errors in 2007 would have been corrected. Cynthia relied that Othniel had been thought well by Sutton-McCann.

The consistency of the errors, the testimony of Sharon Holcomb, and payroll correspondence between Othniel and Sutton McCann would have made a great impact in the false reporting charges for 2007. Cynthia was aware of the workers working there but was not aware of who were reported to the State since she did not part-take in the payroll, quarterly reports and bookkeeping of MGH.



The very core of Cynthia's defense was that she did not do the bookkeeping or the quarterly reporting for the business; and that although she knew of the workers, she had no knowledge that they were not reported to L&I as she was not involved in the payroll, quarterly reporting, or bookkeeping of MGH.

From the time MGH was purchased in July of 2005, Othniel had always been the one in charge of payroll and bookkeeping. Othniel adapted the payroll and bookkeeping system from the previous owner.

Cynthia's role was on the medical/patient care part of the business only.

In 2008 and 2009, Othniel did the payroll without the assistance of the CPA firm. 2008 was when the caregivers were paid cash and treated as independent contractors. During these years, payroll records were no longer maintained. In lieu of payroll records, Othniel maintained cash spreadsheets listing the name of the caregivers which tracked the salaries paid and owed. The spreadsheets showed the running balance owed to each caregiver.

Form 1099's were issued in 2008 and were later amended when the IRS determined in the bankruptcy hearing that the caregivers did not qualify as independent contractors for federal tax purposes. Accordingly, 2008 payroll tax returns (941's) were filed to amend the 1099's initially filed for the year.

Also, during the years 2008 and 2009, H&R Block prepared The Blancaflor's federal tax returns - forms 1040's and Schedule C's. Kathy Mendenhall from H&R Block assisted Othniel in preparing the federal tax returns since 2005. Mendenhall provided a written statement that Othniel was the contact person and also the one that brought the accounting papers to the H&R Block office. Defense counsel Ryan was provided a copy of this statement to show that Cynthia was never involved in the accounting and bookkeeping of MGH in 2008 and 2009. Again, this statement was never presented.

5. Failure to present to the jury that The Blancaflor did not withheld from Hoff and Viray's paychecks so there was nothing to remit to the feds and the state:

One of the power points e-mailed to defense counsel Ryan was a reconciliation of Hoff's and Viray's paystubs and cash wages paid to show that taxes were not withheld from their pay and that the difference was a reduction in their pay because the business was having financial difficulties.

Here is a Reconciliation of Edward Hoff's Pay (Pay Stub VS Cash)

	Pay Stub	Cash	Difference
Gross Pay	\$667.60	\$650	\$17.60
Less:			
Fed W/H	-95.00		
Soc Sec	-42.01		
Medicare	<u>-9.83</u>		
Total Tax	-\$146.84		



L&I	-14.66	
Total Tax Ded	<u>\$161.50</u>	
Net Pay	\$516.10	\$650

Here is a Reconciliation of Elvira Viray's Pay (Pay Stub VS Cash)

	Pay Stub	Cash	Difference
Gross Pay	\$867.20	\$800	\$ 67.20
Less:			
Fed W/H	-98.00		
Soc Sec	-53.76		
Medicare	-12.58		
Total Tax	-\$164.34		
L&I	-14.66		
Total Tax Ded	<u>\$179.00</u>		
Net Pay	\$688.20	\$800	

Take a look at the highlighted amounts and notice the difference. Does this look like tax withheld and not remitted?

The only time Othniel made a mistake was the January pay when he just started treating the caregivers as contract laborers. It was a one-time mistake and DanPullo called it stealing. Again, L&I Auditor Cormier did not verify the records and in her audit notes she included in the discovery, Cormier stated that based on payroll records and the cash sheet, it *appeared* that taxes were not taken. It is a case that can be proven with basic mathematics. Even if she did not do the math, an accountant can see that the difference in pay was not tax withheld. Rule of thumb is about 20% and you can see that the difference in the amount did not represent 20% of the caregivers' check. The prosecutors repeatedly criticized the Blancaflors' books when a financial audit was not even done.

6. Failure to address the accusation of Hoff and Luna stating they were short-paid one month:

Cynthia summarized all the issues in this case to defense counsel Ryan indicating all the main points where the prosecutor might see "intent" and the possible evidence that the prosecutor would focus on. For example, the complaint of Hoff and Luna stating that they were short paid. Luna was in December 2006 and Hoff in December 2007.

Othniel had explained to Hoff and Luna that they were not short paid. When Hoff and Luna used to work for Maria Orth, they were paid every other week which would come out to 26 pay checks. They were paid hourly. Luna was paid \$8 per hour and Hoff was paid \$6 per hour.

When The Blancaflors took over, the caregivers were paid on a salary basis. Othniel set the pay dates to every 10th and 25th of the month, taking their annual salary and dividing it by 12 months, then dividing it by 2 to come up with the gross pay for the 10th and the 25th.

For illustration purposes, below is Hoff's salary per his paystub (included in the exhibit list):

Annual Salary	Divided By	Monthly Salary	Divided by	Gross Pay 2 weeks
16,262	12	1355	2	677.60

Hoff was receiving \$677.60 per paycheck on the 10th and 25th of each month. The paycheck for the 10th covered the pay period from day 1 to day 15. The paycheck for the 25th covered the pay period from day 16 to day 30. There was no week lag. Othniel explained this to Hoff and Luna repeatedly but they did not understand.

The problem with the criminal investigation was the one-sided representation. L&I never gave Othniel the opportunity to explain; in fact, L&I Auditor called Othniel twice during the entire audit. Further, the Lead Investigator never talked to Othniel about all of the other complaints that the caregivers were telling them. Lead Investigator Sexton even tried to cover this error in court by stating he was told that AG would get a deposition from Othniel. CP720 L18 – L25, CP721 L1- L25. The criminal investigation started December 11, 2009 and the deposition Sexton talked about was not until the charges were filed in May 2010.

Let it be noted that the above pay did not include board and lodging, utilities, supplies, cable and internet. The prosecutor did not even put this into consideration. The standard allowance for food per person is \$200. For a furnished room, minimum is \$400 not including utilities.

Prosecutor DanPullo discussed this issue in court and defense counsel Ryan did not even address it. Additionally, the L&I Auditor, in her audit notes included in the discovery, did not verify this issue. Cormier directly went with the caregivers' statement and did not even look at the records or bother to call Othniel who prepared the payroll.

ARGUMENT 2: Evidence was insufficient to prove the charged crime of employer's false reporting or failure to secure compensation:

- There is no argument that wages were owed to the caregivers, Edward Hoff and Elvira Viray, per wage claims filed on May 12, 2008.
- There is no argument that workers were not reported to L&I from January 1, 2007 thru June 30, 2009.
- There is no argument that premiums were owed to L&I from January 1, 2007 thru June 30, 2009.
- There is no argument that the law was broken for failure to pay and/or report the industrial insurance premiums owed to L&I. The argument is in the "INTENT" of the actions.

The law under RCW 51.48.020 essentially states that - an employer who knowingly fails to report with INTENT TO EVADE determination and payment of the correct amount of the premiums *also* knowingly makes misrepresentations regarding payroll or employee hours and that the mere failure to pay or mere failure to report is not evidence of misrepresentation. It therefore follows that any claims of misrepresentation must be supported by the evidence, the law, and a conclusion that flows from the application of the law.

The prosecution must prove, beyond reasonable doubt, that Cynthia knowingly and intentionally misrepresented the payroll or worker hours to L&I. In this case, the prosecution did not.

The prosecution presented the following elements of intent and evidence:

Element 1 – Cynthia’s refusal to provide or not forthcoming with the records needed in the audit was inferred as withholding or hiding records from L&I when the following evidence was seized from the search warrant:

Numerous copies of checks, counter cash withdrawals, bank statements, training certificates of caregivers, patient medical bios, admission agreements, financial agreements, DSHS inspection records, etc. – all of which evidenced that there were unreported workers, that there were more than one bank accounts, and that there were business activities.

DEFENSE:

The testimonies of Mary Tunis and Mark Sexton had already asserted the fact that Cynthia’s statement regarding the condition of the records was the main reason why the records she provided in the audit were incomplete. CP654 L2-L12, CP657 L8-L13. It was not because Cynthia was trying to withhold records or trying to hide records from L&I. The fact that Cynthia told L&I the truth where the records were; the fact that she provided what records she could gather given the condition of the records with barely two weeks to prepare for a three-year audit strongly demonstrate that she was not hiding records; she was trying to comply. The audit notice was received September 28, 2009 and the audit was done October 16, 2009.

If defense counsel Ryan had emphasized this issue in his cross examination of Tunis and Sexton as well as when Cynthia took the stand, the jury might have perceived the above evidence differently.

The auditor’s initial checklist of records requested for audit review and subsequent e-mails discussing the additional records requested would also show that Cynthia was never asked to provide the patients records, DSHS inspection records, personnel file of the caregivers, the admission and financial agreements. Cynthia was never given the opportunity to provide these records to the auditor. So if the opportunity to provide was not offered, how can you refuse? It appears that it is safe to assume Cormier knew the exact records she wanted to review and the scope of her audit.

There were also technical issues in the additional records requested that were not addressed in court mainly because L&I Auditor Cormier was not there to testify and be cross examined. The work involved of digging ATM receipts for 2006, 2007, 2008, and 2009 plus the cost to obtain the missing bank statements was not a practical approach at all when there were other avenues that could have been taken besides ATM receipts. This was the reason why Cormier moved forward with the search warrant.



Cynthia's refusal to provide the ATM receipts as Cormier requested was purely from a professional stand point because said info could have been justified by the WAC's that support the estimation of worker hours.

The above testimonies and evidence could have had a significant impact in the way the jury would have perceived the evidence seized through the search warrant.

Further, the following evidence would also show that L&I did not find any more unreported workers in the search warrant.

List of unreported workers in the preliminary review, list of unreported workers (part-timers) per Cormier's audit notes and notes of the December 8, 2009 meeting with Cynthia – would show that the names of the caregivers identified on the canceled checks found in the search warrant as presented in court, were the same name of the unreported caregivers Cormier found from the records provided by Cynthia. The reason L&I found more checks but not more names of unreported workers were because of the previously mentioned foreclosure proceedings.

The fill-in caregivers found outside the audit period may be relevant to establish history but history also showed that these errors were pre-existing errors. These errors took place all the way back to 2005 when Cynthia was not even an L&I auditor. Cynthia was hired by L&I on March 28, 2006.

Moreover, the CPA firm Sutton-McCann was helping Othniel prepare the payroll reports. Othniel Blancaflor essentially took the bookkeeping system of the previous owner who was also a previous client of Sutton-McCann. If the previous owner of MGH was reporting the workers correctly, would it not be obvious to Sutton-McCann that the number of workers reported significantly dropped? Granted Sutton-McCann only provided compilation services, but the firm still have a due diligence to state the obvious and advise his client the proper reporting of those workers.

Othniel and Cynthia had specific duties in that business and this was documented. Cynthia e-mailed defense counsel Ryan a copy of this because he asked Cynthia for it. The accounting and bookkeeping was always Othniel's responsibility. Cynthia never touched the books from 2005 and on. Othniel worked with Sutton-McCann for the payroll and with Kathy Mendenhall from H&R Block for the federal tax returns. L&I did not even interview Mendenhall who provided a written statement and was given to defense counsel Ryan as well.

Element 2 – Cynthia's awareness of the change of wage payment from checks to cash inferred as paying caregivers under the table; and the fact that the cash spreadsheets of wages paid were calculated at gross and no deductions were taken for taxes or L&I premiums inferred Cynthia knew that the caregivers were not reported to L&I.

Evidence presented to show intent were copies of cash spreadsheets per Exhibits 12, 13 and 14; and 2008 form 1099's.

DEFENSE:

The bank statements showing continuous overdrafts and the testimonies of Hoff and Viray show that there were NSF checks that validate Othniel's decision to start paying the caregivers cash.

It was a significant change in accounting but everything was documented. The cash spreadsheets detail the name of the caregivers, the pay dates, what was paid and what was owed. Hoff and Viray were given their 2008 1099's that were later amended as the IRS determined, during the bankruptcy hearing, that they did not qualify as independent contractors for the IRS. The Sharpes were given W-2's.

Exhibits 12, 13, 14, and 42 were copies of the cash spreadsheets that were maintained to track the wages of caregivers Hoff, Viray, and The Sharpe family. This was a running balance of monies paid and owed to the caregivers. Exhibits 41 and 54 were the copies of 2008 1099's that were issued to Hoff and Viray. 2008 and 2009 form 941's were also filed (payroll tax returns), copies of which were included in the discovery. The records per above meets the requirement under WAC 296-17-35201(2) - Employers who pay their workers by cash are required to keep and preserve records of these cash transactions which provide a detailed record of wages paid to each worker.

Cash payments of wages are allowed under the industrial insurance laws per above WAC but records to track what was paid and who were the workers paid must be maintained. The cash spreadsheets met this requirement. Then there was the 2008 form 1099's that were issued to Hoff and Viray to support the cash wages.

Othniel and Cynthia were upfront about the cash wages with L&I Auditor Cormier even before the audit began on October 16, 2009. The counter cash withdrawals and checks made out to cash along with the cash spreadsheets detailing the names of the caregivers paid were consistent as "records" of these cash transactions. Although the cash counter withdrawals were not provided in the initial audit review of records, checks made out to cash were included. Some of the checks made out to cash were included in Cormier's list of checks per e-mails dated October 20th and 21st.

The cash payments were also recorded in the books of accounting that were presented in Exhibits 166 and 168. Othniel charged the cash wages to an account called "Outside Services." Exhibits 166 and 168 were MGH's income statements ending May 31, 2009. The two reports showed a summary of revenue and expenses and because it is a summary, the details to show what made up to the total charges under the account "Outside Services" were not reflected in Exhibits 166 and 168.

The two reports reflected two different bottom line totals for net losses which were printed at different points in time. The print-outs did not show when the two reports were printed. In accounting, the details to the charges are reflected in the General Ledgers which were included in the records seized through the search warrants.

The General Ledgers were evidence included in the discovery but the prosecution chose only to present the summaries which were the Income Statements. Prosecutor Jarmon raised the issue of the reliability of the figures shown in the two Income Statements because of the two different totals.

L&I had the General Ledgers to explain the differences. L&I seized all of these records as they have decided to do a full scope audit. The Income Statements (Exhibits 166 and 168) presented in court were printed at time of posting (recording of whatever transactions that changed the totals). The details of these postings were in the General Ledgers that L&I kept for evidence but was not submitted as evidence in court.

Prosecutor Jarmon showed Othniel the two Income Statements and brought his attention to the two different totals. Othniel could not explain the differences because he did not have all the records in front of him (referring to the books in the computer). CP827 L17 –L25, CP828, CP829, CP830, CP 831

L&I Auditor Cormier, who was not at the trial, should have the answer to Prosecutor Jarmon's question. If Cormier had testified, some good questions to ask in the cross-examination would have been:

- What records did she review?
- Did she review the Income Statements?
- Did she review the *General Ledger* details?

Without the presence of L&I Auditor Cormier to explain what records she reviewed and/or records she had audited, Prosecutor Jarmon's comment on the reliability and accuracy of the figures reflected on the Income Statements can be interpreted as malicious intent due to the fact that the evidence was filtered to show the Income Statements without the General Ledgers that contradicted them.

L&I Auditors do not perform financial audits, they perform compliance audits. Prosecutor Jarmon further quoted that the Income Statements were "self-serving" which was a very conclusive statement as if there was a financial audit conducted on the records of MGH.

The book of records showed that the cash wages were documented and in compliance with the statute set forth under WAC 296-17-35201(2) - justified that the cash wages paid were not made under the table. If anything else, this was a reporting issue because the cash wages should have been recorded and charged to payroll as opposed to "Outside Services".

The cash spreadsheets showing wages as gross did not raise a red flag for Cynthia because it was already understood with Othniel that he would continue to report the hours of the caregivers to L&I.

The one thing that needed to be clarified and understood about industrial insurance premiums was that it is calculated based on the number of hours worked by an employee. Thus, the record of focus in an industrial insurance audit is the time records. When time records are not available, hours could be estimated based on payroll records or other verifiable records that could be used to reasonably estimate worker hours i.e. check registers or canceled checks to name a few. Unless otherwise provided, the rules for estimating worker hours are outlined under WAC 296-17-35201.

In the case of adult family home care and live-in caregivers, the rules of estimating worker hours are specifically set forth under WAC 296-17-31021. The method proposed is to take the gross income plus allowance for board and lodging divided by the industry's average hourly wage. The resulting number of hours from this calculation cannot exceed 520 hours. For live-in caregivers, time records were not needed and the payroll records were not essential to estimate the worker hours.

Othniel chose to estimate the hours as he normally did with Sutton-McCann. The amounts on the cash spreadsheets did not have anything to do with calculating the hours reported to L&I. As what Cynthia understood from Othniel was - since Hoff and Viray had already taken a cut in their pay, MGH would pay the full premium to L&I and state unemployment. Othniel stated that it was the payroll tax for the IRS that was a burden, as such, the 1099's were discussed and Cynthia was fully aware of it.

Federal taxation is not Cynthia's field of expertise. Thus, the discussion of issuing form 1099's to the caregivers for federal tax purposes did not concern her. Cynthia had acquaintances that were nurses at two or three hospitals and received 1099's for their second jobs and in that sense she assumed caregivers were no different.

Cynthia further openly admitted the 2008 form 1099 issued to Hoff in her e-mail to L&I Industrial Insurance Specialist Catherine Tinker in April 2009, copy of which, was included in the discovery but not admitted in court as evidence. A copy of this e-mail was also provided to defense counsel Ryan. This e-mail was related to the wage claims which were still in process to be resolved at that time.

Cynthia was not concerned about admitting the fact that Hoff was issued a form 1099 in an e-mail to L&I Industrial Relations Specialist Tinker because as far as she was aware, Othniel was reporting the worker hours to L&I. Bear in mind, this e-mail was written five months before the L&I audit on September 2009 and the bankruptcy hearing with the IRS. The form 1099 as Othniel had told Cynthia was for federal tax purposes only. As long as the hours were reported to L&I, Cynthia was fine with Othniel issuing form 1099's to the caregivers for federal tax purposes.

In some cases, depending on the business situation, employers would sometimes report the hours of a worker to L&I even if the worker is not an employee. The reason being is that there are certain workers that do not meet the six-part test of L&I's independent contractor law under RCW 51.08.195. Thus even though these workers are not considered as employees of the business, employers would report their worker hours to L&I but would still issue them a form 1099 for federal tax purposes.

Let's explore an example relative to this case, the above mentioned situation is often found in the taxi or trucking businesses. In a taxi business, sometimes a person would come in and lease the taxi from the taxi company. This person would then become a lessee; and as a lessee, this person would be responsible for the lease payment, gas and maintenance of the taxi which are then taken as deductions from income earned remitted on a daily basis to the taxi owner. However, the taxi owner would still have control over the dispatching; and the lessee-driver cannot take the leased taxi to drive for another taxi company.

In this situation, the driver-lessee failed 1, 2 and 3 of the six-part test which are direction and control (dispatching), service provided should be outside the usual course of business (driver provides the same taxi service as owner), and independent established business (driver cannot take taxi and drive for his own or other taxi cab companies). As this issue is prevalent in the industry, to avoid the hassle of being assessed by L&I later, some taxi companies choose to report the drivers as workers to L&I for industrial insurance coverage but for federal tax purposes, taxi companies would issue the driver a form 1099. The determination of whether or not the taxi driver qualifies as independent contractor for the IRS would be outside the scope of the L&I Auditor.

Essentially, for reporting purposes, MGH was doing the same thing. Cynthia knows that the caregivers did not qualify as independent contractors for L&I, therefore, Cynthia instructed Othniel to continue reporting the hours of the caregivers to L&I even though Othniel issued them a form 1099 for federal tax purposes.

If Cynthia was aware that Othniel was not reporting the hours to L&I and if Cynthia had any intention to hide the fact that Hoff and Viray were working at MGH, then she would not have written an e-mail to the L&I Industrial Relations Specialist Tinker about the form 1099 issued to caregiver Edward Hoff.

Copy of Cynthia's e-mail to Tinker was initially included in one of the Exhibit lists but Prosecutor DanPullo kept adding or removing evidence so the Exhibit list was changed at least three times during the trial. This is noted in the trial transcript where defense counsel complained because it caused so much confusion in the numbering of the evidence. The e-mails DanPullo left on the Exhibit list were e-mails Cynthia wrote to Tinker that were not helpful to Cynthia's defense. Cynthia, however, has a copy of this e-mail as she had reviewed all 7,400 pages of discovery DanPullo had thrown in to "mud the water."

Further, contrary to the testimonies of Tunis and Niemeyer, L&I Auditors were *not* trained on the IRS 20 or 21 independent contractor requirements. Unless, L&I had just started training the auditors on this IRS law after Cynthia was pulled out from audit on September 28, 2009.

Cynthia's training profile per Exhibit 129 would show that the only IRS training she received was the handling of IRS materials. This training refers to the handling of any IRS records that auditors had obtained from employers which were to be kept in a locked file (payroll tax returns, federal tax returns).

Additionally, both Tunis and Niemeyer testified on Exhibit 148 which was the six-part test that Prosecutor DanPullo had written on a big pad and was admitted for illustrative purposes. Both auditors testified that the IRS 20 or 21 rules is part of the six-part test. RCW 51.08.195 outlines the six-part test and it *does not* include the 20 or 21 IRS independent contractor law. However, it does require for the firm or individual to file the applicable income and expenses schedule (tax returns) with the IRS.

The testimony of retired L&I Auditor Wayne Dillingham would have been a good rebuttal to Tunis and Niemeyer's testimonies. Dillingham was willing to testify on the L&I audit procedures and policies but defense counsel Ryan did not see the point of having him as an expert witness.

Element 3 – Cynthia's awareness of the 2008 change in treatment of caregivers from employees to contract labor per Hoff and Viray's testimonies inferred that Cynthia knowingly consented to Othniel not reporting the worker hours to L&I.

Evidence that further supported this element were Exhibit 114, copy of Hoff's correspondence to Cynthia dated March 15, 2009 regarding his 2008 form 1099; and Exhibits 41 and 54 which were copies of the 2008 form 1099's issued to Hoff and Viray.

DEFENSE:

Othniel Blancaflor's mental health was a material fact to this issue because it would have shed some light to the other aspect of the situation that was not discussed in court as the prosecutors requested to exclude this information under motions in limine.

After being aware of the contract labor issue and after being aware of what Othniel intended to do with the workers, Cynthia stated that Othniel was advised to continue to report the hours to L&I and was informed that the caregivers did not qualify as independent contractors. Cynthia also stated that she did follow up with Othniel by reminding him of the quarterly reports.



Prosecutor Danpullo then asked Cynthia on the stand about her job as an auditor and as a business owner and her knowledge of all the rules and laws. DanPullo asked Cynthia why was it that she did not review or audit Othniel's books in 2008 and 2009? With the restriction stipulated under the motions in limine, Cynthia was not able to mention Othniel's mental health status which would have clarified why she did not aggressively pursue to challenge Othniel on reviewing his work. Cynthia was limited to only mention Othniel's training and experience.

The business went through a series of calamities and tension was high in the house not only with caregivers but between Othniel and Cynthia as well. Diagnosed as bi-polar with suicidal tendencies, Othniel was very unpredictable. Under the prescription of numerous mood altering medications, Othniel was capable of harming himself or others. He had already harmed himself in August of 2007 where he sustained a serious back injury that left him incontinent.

The prosecution was not in the position to determine whether Othniel's mental health was relevant or irrelevant to the case as they did not have the medical expertise to make such a determination.

Othniel's medical records were provided to his defense counsel, Curtis Huff, who placed no weight on its importance to have Othniel evaluated professionally as this was a material fact. This was a pre-trial issue. A determination of a professional evaluation should have been made then.

The prosecution was also aware of Othniel's mental health issue but took no measure to investigate the matter as the main element of this crime was "intent." This should have been addressed during the criminal investigation and for the prosecution to preclude a material fact to the crimes charged, was clearly an obstruction of justice.

Prosecutors Jarmon and DanPullo raised their concerns of bringing the mental health issue into the case because all it would do was illicit the jury's sympathy and that a professional opinion on the matter had not been obtained. Again, it is not apparent as to why exactly this issue was not addressed during the criminal investigation or that L&I Lead Investigator Mark Sexton chose not to investigate Othniel when he was also a suspect to the crimes charged. CP720 L5-L7, L-18 to L-25.

Part of a criminal investigation is to gather all facts to determine the truth. This crime was focused on intent and one of the suspects has a *mental health issue*! If mental health is a factor, then the person's state of mind would be too. If state of mind is an issue, then mental health would be relevant to investigate since "intent" is the main issue of this case.

L&I Lead Investigator Sexton had a due diligence to consider all facts to the crimes being investigated. Sexton stated, in his testimony in court, that the reason he did not interview Othniel was because L&I had already interviewed so many caregivers working at MGH; and that Sexton thought that the Attorney General was supposed to depose Othniel CP721 L1-L25. On the contrary, during the time Sexton was conducting his criminal investigation no criminal charges had been filed yet, making it relatively impossible to deposition someone when there was no lawsuit.

Othniel's mental health was pivotal to Cynthia's conviction as it would give the jury a chance to weigh the situation considering the dynamics of the issues that were happening at that time such as patients dying, the business being shutdown, caregivers at conflict with each other, Othniel's health, bankruptcy, and home foreclosure.



Where does someone draw the line when they feel that their safety and the safety of others are at risk? How could anyone feel at peace when they live with someone, who if provoked, would take all the knives in the house and run off with it, driving miles on I-5 and sometimes for days, sleeping at rest stops not knowing when he would come home and what he might do when he gets home?

Where does someone place themselves when they're over their head in debt with no one to share the burden with and having to juggle everything to meet all the bills while worrying about patients and still being responsible for their audit work on top of it all? How could someone like Cynthia manage to stay on top of her audits and still go home to perform caregiving and administration duties without one day dropping the ball?

How does someone articulate all of these in a court trial when their answers are stipulated to yes or no and when attempts to explain are considered as narratives? How does someone articulate what is happening when their answers are limited because of the restriction specified under motions in limine?

Cynthia had a full plate. Certainly, there were options that could have been taken to either take some stuff off the plate or get a bigger plate; and given everything that was going on at that time, how could anyone make a choice without being subjective in their decision? The question at hand was whether Cynthia would rather risk her safety and the safety of others by challenging Othniel to audit his books? Or should Cynthia just leave it to chance and trust her husband, Othniel, to continue to report the hours to L&I as instructed? And Cynthia chose to trust her husband, in good faith, that he would continue to report the hours to L&I as he always had.

Element 4 – Cynthia handing cash payments to the caregivers indicative that Cynthia was aware of the workers that were there; therefore, Cynthia must have noticed that the cash spreadsheets were calculated at gross, no deductions were taken for L&I, and that she was aware that the workers were not reported to L&I (cash spreadsheets were already addressed in element 2).

DEFENSE:

Even though Cynthia occasionally handed the cash wages to the caregivers and the spreadsheets, Cynthia did not know who were reported and who were not reported to L&I since she did not prepare the quarterly reports or the payroll reports. She may have written some checks every now and then but the recordkeeping and accounting of all expenses was done by Othniel.

Othniel testified that he did the bookkeeping and quarterly reports for MGH. Othniel's statement was further supported by Sharon Holcomb from the CPA firm Sutton- McCann who testified that Othniel was the payroll contact. CP588 L4 – L20. In the investigation conducted by L&I, Sharon stated that she spoke to Cynthia once and that was when she called to request for payroll records needed for the L&I audit. Sharon's statement to L&I was documented per investigation transcript found in Exhibit X8, pages 25 and 27 included in the discovery but not admitted in court.

As far as the unreported fill-in caregivers in 2007, there were payroll records (Exhibits 82 to 85 on the list) and correspondence between Othniel and Sutton-McCann that supported Othniel's statement that he was responsible for the quarterly filings to L&I and not Cynthia. These records extend back to 2005 when the business was purchased, indicative that these were pre-existing errors. The errors were already there



before Cynthia joined L&I on March 28, 2006. Nothing had changed in the reporting method as Cynthia was never responsible for the books and quarterly reporting to the feds and state.

For 2008 and 2009, a written statement from Kathy Mendenhall of H&R Block stating that Othniel was the contact person for taxes and was the one who brought the papers to H&R Block. A copy of this letter was e-mailed to defense counsel Ryan but was not presented in court.

Othniel told L&I Auditor Cormier to contact Kathy Mendenhall but this never happened. Kathy Mendenhall can testify only to the federal tax part of the business since she had worked with Othniel since 2005. Mendenhall's statement would have validated that Cynthia did not do the accounting for MGH.

Element 5 – Cynthia's request to adjust worker hours to zero in quarter periods where there were workers and closure of account when records shows there were patients in quarter 3 of 2008.

This element was supported by Exhibits 10, 10A to 10E which were copies of a series of e-mails between Revenue Agent Lindgreen (collector) and Cynthia.

DEFENSE:

The e-mails per above discussed a couple of the quarterly reports needed to be filed and Cynthia's request to close the account.

The e-mails were documented in LINIIS as a memo to the industrial insurance account of MGH. The memo was written by Revenue Agent Fnot Lindgreen (collector) to document receipt of these e-mails from Cynthia requesting to adjust the worker hours reported in quarters 1 and 2 of 2008 to zero as there were no more caregivers. Cynthia also requested to close the account effective August 26, 2008. This memo was not admitted as evidence in court and therefore was not presented to the jury.

Lindgreen was the Revenue Agent assigned to the industrial insurance account of MGH who was not present at the trial to testify and therefore defense was not able to cross-examine Lindgreen about the inconsistency of the quarter periods requested to be adjusted. In the e-mail Cynthia wrote to adjust quarters 1 and 2 of 2008. In the memo Lindgreen wrote that Cynthia had requested to adjust quarters 2 and 3 of 2008.

This e-mail was critical to Cynthia's conviction as it contained an error suggesting "intent" to misrepresent employee worker hours. The prosecution brought in another Revenue Agent, Susan Rusch-Barnett, to read the e-mail. The prosecutor then asked a series of questions pertaining to what was written in the e-mail.

The prosecutor brought the e-mails back into focus during her cross-examination of Cynthia. All questions were answerable by yes or no and Cynthia was not able to explain anything and when she did, the prosecutor cut her off.

It is customary for L&I workers to document in LINIIS (mainframe program used for industrial insurance) any phone calls or any e-mails received from employers. In the e-mails, Cynthia wrote no workers for 081 and 082 which meant quarters 1 and 2 of 2008. This contradicted the fact that the wage claims filed by Hoff and Viray showed they were working at MGH for quarters 1 and 2 of 2008.

However, Lindgreen wrote a memo in LINIIS to document the e-mail received from Cynthia stating that Cynthia requested to adjust quarters 2 and 3 of 2008 to zero hours as these were the quarter periods discussed per her phone conversation with Cynthia.

Fnot Lindgreen did not document the phone call in LINIIS but Cynthia stated to defense counsel Ryan that there was a phone conversation prior to the e-mail in question. The phone call was Cynthia's response to Lindreen's original e-mail dated August 12, 2008. In that phone conversation, Cynthia discussed the adjustment of quarters 2 and 3 of 2008 and Cynthia also requested to close the account.

Lindgreen then told Cynthia that she needed something in writing to close the account. As such, Lindgreen suggested to Cynthia to respond to her first e-mail dated August 12, 2008 and that would suffice the written documentation to close the account. Cynthia responded to the e-mail on August 25, 2008 when all auditors were crunching for time to make their quota to submit the number of audits required on a monthly basis.

In the prosecutor's cross-examination, Cynthia was not given the opportunity to explain or made any reference to Lindgreen's memo in LINIIS contradicting the quarter periods stated in the e-mail. This memo was included in the discovery marked DLI-MGH002467 and was not included in the Exhibit list of evidence submitted in court.

Early on in her interview with defense counsel Ryan, Cynthia explained the inconsistency. Cynthia explained the inconsistency of the e-mail to the memo when she forwarded copies of both to defense counsel Ryan via e-mail. As Cynthia was not able to explain the inconsistency in the quarter periods between the e-mail and the memo, the only other person that could have explained the inconsistency was Fnot Lindgreen who was not in the trial for cross examination because defense counsel Ryan failed to summon Lindgreen.

Defense counsel Ryan also failed to present the memo as evidence for rebuttal. Cynthia e-mailed a copy of this memo and all the PowerPoint tools she provided to defense counsel Ryan for her defense. The presentation of this memo to the jury and the testimony of Fnot Lindgreen that the jury was not able to hear could have made a difference in the way the e-mail was perceived.

Hoff and Viray both worked part of quarter 2 of 2008 while Hoff worked the entire month of April, and Viray worked the whole month of April and five days in May. Cynthia failed to realize this back when she was talking to Lindgreen. Cynthia made an error but this was not intent. L&I magnified this error by selecting bits and pieces of evidence to make their case. Since defense counsel Ryan failed to do his "due diligence" to defend Cynthia, the prosecution continued to move in for the win.

Further, there was a major issue on "hearsay" because of Revenue Agent Susan Rusch-Barnett testified on Fnot Lindgreen's e-mail to Cynthia. Although defense counsel Ryan argued the "hearsay" issue in court as well as the admissibility of the e-mails for evidence, the fact that these were evidenciary issues that should have been addressed in the pre-trial stage, made a difference in the amount of time he could have spent researching the "hearsay" issue to present a strong argument on the matter. This was a major evidence issue and yet everybody did not do their research until in the middle of the trial.

Also there was an inconsistency in Cynthia's answer to L&I Auditor Cormier who asked Cynthia if there were patients in quarter 3 of 2008. Cynthia responded to this question via Cormier's e-mail dated October 21, 2009.

In review of the evidence included in the discovery, records showed patients in Quarter 3 of 2008 which was inconsistent with Cynthia's statement to L&I Auditor that there were no patients in this quarter period. The records showed patients Steve Schubert and Corwin "Kelly" Kottowitz who were admitted at MGH on July 23, 2008 and August 1, 2008, respectively.

Patients Schubert and Kottowitz were both mobile patients. They were mentally and physically capable of performing daily normal activities i.e. toileting, bathing, eating, and other personal hygiene tasks. L&I seized the care plans. The care plans would show what level of care a patient needs. Just because there were patients did not necessarily mean that there were caregivers. The problem with L&I was they were only focus on the admission date; and the one weakness of MGH patients records was that it did not when the patient died or when the patient was discharged.

Schubert & Kottowitz were essentially transients. The Blancaflor's merely provided board and lodging as well as assistance in medication management.

Cynthia answered the question without any patient admission records to refer to. Information given at the time of e-mail was all based on what she could remember at that time.

The fact that Cynthia forgot to mention Schubert and Kottowitz in the e-mail could not be fairly translated as intentional since forgetfulness is very human especially right after a string of traumatic experiences i.e. having both adult family homes being shutdown by DSHS, foreclosure of all homes, Othniel's suicide attempt, garnishments, and a string of unfortunate events.

Further, despite Cynthia's statement that there were no patients from July to September 2008 (quarter 3), there were no caregivers working in this quarter period since Othniel was able to handle the management of their medication and cooking of their meals.

After Schubert and Kottowitz moved out of MGH, the two moved into their own place which was a house they rented from Curt Curtis, the realtor-property manager who used to managed the Blancaflor's rental homes. The house Schubert and Kottowitz rented was owned by Curt Curtis.

Curt Curtis provided a copy of his lease agreement with Schubert and was willing to testify that the two patients were independently able to perform the normal daily activities without the help of any caregivers except preparation of meals, medication management, laundry and housekeeping. The copy of the lease agreement was forwarded to defense counsel Ryan. However, defense counsel Ryan did not see how having Curtis as a witness would help Cynthia's case and therefore was not called to testify.

Cecily Kuibita who testified in court that she was working there in quarter 3 of 2008 miscalculated the period of time when she was working for MGH. In her testimony, Kuibita stated that she worked for MGH for six weeks starting the last week of September (within quarter 3 of 2008), the whole month of October and first week of November of 2008. CP261 L2-L6.

DanPullo then presented to Cynthia Exhibit 103 which was a copy of Kuibita's last paycheck from MGH. CP889 L23- L25, CP890 L1- L18. Check #2324 was dated November 15, 2008. This was the same check Kuibita referred to in her testimony that she did not accept because she did not have an account. CP278 L20 – L23. The check was signed by Cynthia and the memo stated the pay period from November 1, 2008 to November 15, 2008. Going back six weeks from November 15, 2008 would place Kuibita's starting day working for MGH on October 1, 2008 (within quarter 4 of 2008.) Kuibita did not work at MGH in quarter 3 of 2008.

Element 6 - Cynthia's awareness of having workers in Quarter 4 of 2008 while the industrial insurance account remained closed.

Cynthia wore one too many hats throughout this ordeal. Wife, Mom, Business Owner, Caregiver, Auditor and so on. Hardly was there ever a time when Cynthia had a break to go back and review to see her mistakes or see what she missed. Most of her time was spent checking on everyone trying to make sure everything was taken care of and if they weren't, Cynthia was there to pick up the slack.

October of 2008 was the busiest month. There were four patients admitted. For each patient, Cynthia had to develop a care plan based on the nurse's assessment of the patient's medical history and current patient care needs. Creating a care plan is comprehensive work because you have to be detailed with the patient's medication, allergy reactions to any meds or food and specific daily care needs that the caregivers need to know.

As Cynthia was working all day long at L&I and then come home at night to work on the care plan, Cynthia trusted Othniel, in good faith, to make the call to L&I and re-open the account. The staff was the frontline. Cynthia relied heavily on the staff and Othniel because they were at home every day. When you operate based on trust, you assume everybody had each other's back but in retrospect, everyone was on Cynthia's back - Caregivers, Othniel, Creditors, DSHS not to mention the pressure from financial and marital problems. Cynthia did her best effort to stay on top of things but there was only so much that she could do.

Calling L&I to re-open the industrial insurance account was one of the tasks that Cynthia happened to overlook in her busy schedule because she left Othneil responsible for making the call. It is because Cynthia did not think to follow up on her husband, Othneil, that this error has placed her in the accusation of criminal intent.

ARGUMENT 3: Prosecutor Misconduct

1. Theft Charges/Due Diligence

Cynthia was sentenced to four months in jail. This sentence included the charges of theft relating to the unpaid wages.

Prosecutor Susan DanPullo of the Attorney General's Office was hired in 2006 through new funding from L&I to increase criminal fraud prosecutions. Prosecutor DanPullo had since then successfully handled criminal cases that were settled out of court with a very impressive record. As such, one would consider DanPullo as an expert on this particular type of criminal charges.

Although Cynthia's defense counsel failed to review DanPullo's declaration (probable cause) to the information filed on May 10, 2010; DanPullo, considering her field of expertise in this particular type of crime, should have known that there was not enough evidence to move forward with the theft charges.

This case had gone on for fifteen months and in that time period DanPullo had thrown over 7,000 pages of discovery, making it impossible to review much less comprehend for Cynthia's defense counsel who did not have the expertise on this particular type of crimes.

Cynthia will be willing to provide the list of all evidence in the discovery that was accumulated over the fifteen month period. Due to the surmounting evidence in the discovery, an omnibus hearing was never held to determine if the evidence in the discovery was in compliance. Thus, the theft charges were never reviewed.

Prosecutor Susan DanPullo's declaration attached to the information of the crimes charged listed the theft charges relating to the unpaid wages owing to Hoff and Viray.

Cynthia initially signed a payment plan with L&I for these wages and made one payment. However, when the business was shutdown, Cynthia was not able to follow through with the payments. Cynthia requested to reduce the payments but L&I refused. Cynthia then included the wage claims in the Chapter 13 bankruptcy. Since no omnibus was ever held, review of the evidence was never done.

Although the defense counsel raised the issue with the trial judge, Judge Arend relying on DanPullo's words allowed to move on and tried the Blancaflor's for theft without even looking at the evidence. Prosecutor DanPullo argued that there was enough to go on with the theft charge because caregiver Viray stated that Cynthia did not want to pay her and that constituted the "INTENT TO DEPRIVE." CP733 L1 – L23.

This information was biased as Cynthia was never asked to explain this issue. Viray was asking to get paid her final wage after she filed the wage claims. Cynthia explained to Viray that because of the wage claims Cynthia cannot pay her. Once the wage claims are filed, payments are made through L&I but it took L&I over a year to process the wage claims because Employment Standards Unit was having a backlog. Industrial Relations Specialist Catherine Tinker testified to this in the trial CP298 L22-L25, CP299 L1-L3.

Wage claims are settled with L&I that's why the payment plan agreement was between Cynthia and L&I not between Cynthia and Elvira Viray. Further, even before the wage claims, the payment plan and the bankruptcy, Cynthia never denied the wages owing to Viray. There were cash spreadsheets that showed a running balance of what was owed and paid to Viray. The cash spreadsheets showed there were partial payments made every payday. Refer to Exhibits 12 and 13 on the list of evidence admitted.

DanPullo further added that there were other caregivers who had similar pay issues – which would be the complaint made by Hoff and Luna stating that they were short paid. This issue was explained earlier on page 15 under "Ineffective Counseling."

Further, Cecily Kuibita was not truthful on the stand when she complained about how she was still owed money; and how Cynthia made her cry. Kuibita statement in court contradicted her statement in her interview with SEC Program Specialist Beegle where she stated that she was owed no money and that

Cynthia was very understanding when she quit. Refer to Beegle's investigation summary under Exhibit 151.

Moreover, it takes more than just Viray's word to convict Cynthia for theft. Per RCW 9A.56.020 (2) (a): In any prosecution for theft, it shall be a sufficient defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.

It is apparent that Cynthia tried her best to meet all of her liabilities and responsibilities including that she filed a Chapter 13 instead of a Chapter 7 which indicates her intent... to pay.

Something to be considered also is the misconception of overtime pay by DanPullo. She mentioned in her declaration about overtime pay that the Blancaflors owed Hoff and Viray. In court DanPullo kept bashing the Blancaflors about overtime pay as if she was not aware of the overtime exemption of live-in caregivers mentioned when Catherine Tinker from Employment Standards took the stand. CP 305 L6 – L12.

DanPullo specifically asked Tinker multiple times about the overtime pay. It should have been obvious that Hoff and Viray were to be exempt from overtime pay under RCW 49.46.010 of the Minimum Wage Act. This was noted in the wage claim file given to L&I Auditor Cormier and SEC Program Specialist Preston Beegle.

DanPullo is a prosecutor. People go to jail based on her expertise and application of the law. Thus, she owes the citizen of the state the due diligence to do her job thoroughly.

2. Motions in Limine

On the first day of trial, the motions in limine were discussed. Prosecutors DanPullo and Jarmon requested Trial Judge Arend to exclude or make no mention or any reference to Othniel Blancaflor's mental health and the L&I administrative action that was done in concurrent with the criminal proceeding.

Mental Health

Prosecutors Jarmon and DanPullo stated that mentioning Othniel Blancaflor's mental health into the trial could impact the jury's decision to convict because all it would illicit sympathy. The prosecutors stated that Othniel's mental health was not relevant to the case. CP16 L6-L18, CP354 L12-L25, CP355 L1-L4

They were investigating a crime and apparently they were made aware that Othniel had mental health issues. There was certainly a lot of time put into copying almost 7,400 pages of discovery and yet there was no significance in making a single phone call to further verify this information. These actions give cause to question whether their method of investigation was one-sided to begin with.

Cynthia depended on the hope that the court appeal judge would look into this closely as it seemed obvious that both DanPullo and Jarmon were focused on making advances for their case to raise their status, not for justice to prevail. And in reference to the above mentioned, it is clear that they went as far as taking advantage of Trial Judge Arend's forgetfulness.

Judge Arend never made a ruling on Othniel's mental health because on the first day of trial, both prosecution and defense did not have their jury to convict instruction. Judge Arend wanted to review the

jury to convict instruction first to determine whether Othniel's mental health was relevant or not to the case. CP17 L1-L12

Furthermore, when the motions in limine were discussed Judge Arend explained that normally the lawyers would hand her an order for her to mark granted, denied, or reserved. Judge Arend also stated that this worked best for her because she would *forget* about it later. CP17 L17-L20

Both prosecution and defense did not have the order for Judge Arend to mark so when the prosecution requested to exclude the mention of Othniel's mental health, there was no form to mark but Trial Judge Arend reserved her ruling on the issue because she wanted to review the jury to convict instruction first.

True enough, the following day, Trial Judge Arend forgot about it. Judge Arend did not discuss making her ruling on Othniel's mental health. Arend referred to the clerk and asked for the orders on the motions in limine and told the lawyers that she hoped everybody remembered what they were. CP72 L7-L9. Nothing was discussed and DanPullo did not say anything as the prosecution reaped the benefit. The assumption was that the motion was granted because no mention of it was allowed ever in the trial.

Othniel's mental health was a material fact to Cynthia's conviction and should be considered.

Administrative Action

The prosecution also requested to exclude the mention of the administrative action that was also done in concurrent with the criminal proceeding specifically to Cynthia's employment with L&I and the possible civil penalties that L&I may imposed on Cynthia. CP18 L18-L25 DanPullo briefly explained that the administrative action pertains to the "reconsideration process" but did not explain what the issues were being addressed in that process. CP20 L18-L25, CP21 L1-L7

The reconsideration process is an alternative to an appeal. Employers are given the option to choose either or. When the employer chooses to file for reconsideration, the audit is forwarded to L&I's Litigation Unit where further review is done by a Litigation Specialist. The Litigation Specialist will then determine whether to affirm the audit or send the audit back to the Field Auditor for rework.

The audit result contained significant errors that were yet to be reviewed. There was no notice of order from L&I affirming the assessment but yet prosecutor DanPullo presented Exhibit 98 for evidence in court. CP191 L11-L12, CP192 L3-L20

Exhibit 98 was the audit summary to the details of reportable hour to L&I. This report included construction contractors who did some home repairs for MGH, a realtor from Windermere (property management) who once managed Cynthia's rental homes, and a nurse who had a consulting firm.

The above businesses had all the required business licenses but needed further review as the auditor did not do any further research whether or not they qualify as independent contractors. Cynthia did the research so she was challenging the auditor's assessment. Additionally, the auditor was not reasonable in estimating the worker hours since Cormier was picking up all the cash receipts and then picked up all the names of individuals she found in the audit at 520 hours each who were also paid cash. Cynthia argued the reasonableness of the estimate since Cormier was essentially picking up the workers twice.



There were significant errors in that audit and Mary Tunis referred to it in the report as factual information when it was not. Cynthia submitted 167 pages of adjustment explanations including supporting documentation for each 12 adjustments requested in the reconsideration of audit results.

The audit summary report was a part of the administrative action that was still open. Defense counsel Ryan argued with the prosecutor on how they can actually separate the civil side from the criminal when all of the audit information presented was part of the on-going administrative action. CP20 L3-L14

There was no notice of order from L&I affirming the audit result and yet Prosecutor DanPullo presented the audit result as evidence in court. The significant errors being reviewed favored the State thereby casting a negative message that prejudiced the jury's decision. Here again, DanPullo took advantage of the trial judge and the defense counsel who did not have any background in industrial insurance audit and the L&I processes.

3. Evidence that were not admitted but were presented and/or read in court

On the first day of trial, the issue on how the evidence was placed in the exhibit binder was discussed. The evidence, as the prosecutor had it originally in the binder was stamped "L&I Fraud" because these were the evidence used for the audit (civil side to the case). Defense counsel, both Huff and Ryan, objected to the stamp as it would prejudice the jury because it had the stamp "L&I Fraud" on it. Prosecutor DanPullo agreed and clarified that copy of the evidence without the stamp were in the binder as well and that this would be the copy of the evidence that would go to the jury.

In the binder, the copy of the unstamped evidence would be placed in a plastic sleeve but behind it would be loose copies of evidence with "L&I Fraud" stamped for the L&I investigator to refer to when he would take the stand.

DanPullo stated that the "L&I Fraud" stamped copies would help the investigator identify where the evidence was taken from i.e. search warrant, which room in the house, or records that were provided in the audit. DanPullo further stated that the loose copies would be removed at the end of the trial. CP55 L4-L11

Trial Judge Arend expressed some concerns on pulling the evidence stamped with "L&I Fraud" at the end of the trial as it would leave the possibility of forgetting to pull it out at the end of the trial. Trial Judge Arend stated that typically what are handed to the court are the exhibits and once marked, the exhibits then became property of the court. CP57 L14-L23

Trial Judge Arend then clarified to DanPullo as to what was she envisioning in her head which was having the L&I investigator take the stand with the binder in front of him (as it exists) containing documents that were admitted and documents that were not admitted, or that DanPullo would just be handing out to the L&I investigator the document that was not admitted (evidence marked with "L&I Fraud"). CP58 L8-L12

DanPullo confirmed that, that was what she was going to do. This cleared the issue with Trial Judge Arend and she take the word of the Prosecutor that all documents in the binder were identical documents CP58 L1-L6. Judge Arend then further instructed DanPullo for her paralegal to staple together all documents or evidence admitted CP56 L1-L6.

The trial judge's instruction was clear, that the evidence admitted be stapled together. The exhibit list was also marked for evidence admitted; however, DanPullo presented two exhibits that were not marked as admitted. These were Exhibits 97 and 151.

Tunis testified on Exhibit 97 which was the audit report of L&I Auditor Pamela Cormier who was not called to testify in the trial. Exhibit 97 was not moved for admission yet Prosecutor DanPullo presented it in court. CP160 L7-L25, CP161 L1-L25, CP162 L1-L25, CP163 L1-L25, CP164 L1-L10

After realizing that the exhibit had not been moved for admission Defense Counsel for Othniel Blancaflor, Curtis Huff, raised an objection. CP173 L-15 to L-19 By that time, much had been said that went on record and DanPullo stated that she was just trying to refresh Tunis' memory. Trial Judge Arend stated that DanPullo didn't have to have the evidence admitted to refresh Tunis' memory. CP173 L20 - L2. Defense counsel Huff argued that was not what DanPullo was doing. CP173 L22 - L23 DanPullo then had Tunis read the audit report – which was beyond refreshing – and went on further to ask questions about it.

Prosecutor DanPullo then shifted gears. Instead of having Tunis read the report, she instructed Tunis to look at Exhibit 97 and further instructed to put the evidence down to proceed to ask Tunis again if she remembered how many hours were reported to WA State Employment Security. CP173 L25, CP174 L1 - L2. Tunis answered she did not remember it since she did not do that part of the audit.

Prosecutor DanPullo did the same thing again on Exhibit 151 which was L&I SEC Specialist Preston Beegel's investigation report to which L&I Lead Investigator Mark Sexton had testified on.

Dan Pullo asked Sexton a series of questions off of Beegels report. Nobody noticed that Exhibit 151 had not been moved for admission. Trial Judge Arend brought it up later that Exhibit 151 should be marked as admitted as Sexton testified and answered questions about it. The prosecutor knew what evidence was marked as "admitted" and still pushed the un-admitted exhibits for presentation.

Judge Arend again commented on the same issue on the exhibits in the binder. CP245 L10 – L25, CP 735 L10-L16.

ARGUMENT 4: Trial Judge Abuse of Discretion

Exhibit 151

In the cross-examination of caregiver Cecily Kuibita, defense counsel Ryan referred to Exhibit 151 which was SEC Program Specialist Preston Beegle's investigation report as there were inconsistencies in Kuibita's statement when she took the stand. In Beegle's investigation report, Kuibita stated that she quit her job because the job was too much for her to handle. Kuibita further stated that Cynthia was very understanding when she quit and that no money was owed.

However, when Kuibita took the stand her statement was different, stating that Cynthia told her to leave, made her cry and that she was owed money.

Defense Counsel Ryan referred to Exhibit 151 and read Kuibita's statement. Trial Judge Arend interrupted defense counsel Ryan and asked what report he was reading from. Defense counsel Ryan responded that it was Beegle's investigation report. Trial Judge Arend told defense counsel Ryan that he

could not read anything from that report because the statement taken in that report was not sworn in. As such, this part of the dialog was stricken out. This was on September 14, 2011.

Later in the trial, on September 20, 2011 L&I Investigator Mar Sexton took the stand and Prosecutor DanPullo used the same Exhibit 151 and asked a series of questions from the report. Exhibit 151 had not been moved for admission yet DanPullo kept on asking questions off that report. By the time when DanPullo was done, Trial Judge Arend commented that DanPullo asked a lot of questions from the report so it needed to be admitted for evidence.

In review of the prior mentioned, this is the same report that was denied when defense counsel Ryan made reference to it report because it was not a sworn in statement; yet when DanPullo made reference to the exact same report, it was admitted.

Kuibita's statement created an ill perspective of Cynthia Blancaflor to the jury and when defense counsel Ryan addressed those statements and pointed to the inconsistencies in the report, Trial Judge Arend told defense counsel Ryan he could not make those references. These occurrences lead to the question: Were there two different sets of rules for the prosecution and defense?

Exhibit 97, Motions in Limine, The Evidence in the Binders

Trial Judge Arend also consented to many other misconduct in court by Prosecutor DanPullo. For example, Exhibit 97 which was the audit report of L&I Auditor Cormier. The report was supposed to be used for "reference" only so to refresh Tunis' memory. However, DanPullo went on so many pages, having Tunis read and answer questions from the report which was obviously beyond just refreshing Tunis' memory. Up until the point when defense counsel Huff raised his objection, Trial Judge Arend allowed DanPullo to keep going knowing fully that Exhibit 97 has not been moved for admission; and then when defense counsel Huff objected, Trial Judge Arend stated that Exhibit 97 didn't have to be admitted to refresh Tunis' memory. Defense counsel Huff contended as DanPullo was doing more than just refreshing Tunis' memory. Trial Judge Arend was sitting on her bench watching all this took place and then described to the court that what we saw was a white horse and not a red bull! It was only after then when DanPullo shifted gears...but the damage was done.

Still on point with the audit report, this piece of information was part of the administrative action that the prosecution raised in the motions in limine. This administrative action refers to the reconsideration process which was explained earlier as L&I's internal review on the audit. DanPullo knew the issues being addressed in the reconsideration but chose not to discuss the details in court but limited her concern to the civil penalty of the audit. However, there was an on-going internal review of the whole audit. The defense counsel was already concern about the presentation of such evidence but Trial Judge Arend allowed it. There were significant errors in that audit that favored the State which had a material impact in the jury's decision to convict.

The same goes with Othniel's mental health. How could a Trial Judge forget such a material fact to a case where the focus of guilt was based on "intent." Trial Judge Arend early on openly admitted that she was forgetful. Trial Judge Arend had reserved ruling on the mental health issue as she wanted to review the jury to convict instruction. The issue was never addressed later during the trial and presumably was granted because no one brought it up. How could a Trial Judge forget about a material fact like this

throughout the entire trial?

Last but not least would the exhibit binders. Trial Judge Arend herself saw how DanPullo had confused the evidence in the binders. There about four or five discussion about the evidence in the binders being all out of sort. This was DanPullo's clever way of introducing evidence that was not admitted but yet Trial Judge Arend continued to allow it.

Hearsay

The court discussed the issue of hearsay because of Tunis testifying on Cormier's report, Sexton testifying on Beegel's report, and Susan Rusch-Barnet testifying on Fnot Lindgreen's e-mails.

The trial judge, prosecution, and defense counsel did some research and found a case that was granted then reversed and one that was granted in part but could not find where it was published. There were a few other cases mentioned but they did not provide enough information. Later, when the evidence in question was presented (audit report, investigation report, e-mails) Trial Judge Arend allowed Tunis, Sexton and Rusch-Barnett to testify on it.

The admission of the e-mails was critical because it contained information that was inconsistent to what Cynthia stated and the only person that could have explained the inconsistency would be Fnot Lindgreen who was not there to be cross-examined. Lindgreen's presence was pivotal because the other piece to evidence this inconsistency was in Lindgreen's memo log that was also not admitted for evidence in court. This memo was tagged as DLI-MGH002467 which was included in the discovery.

Lindgreen's absence left a big gap for the prosecution to fill in to build a strong link of evidence that were carefully selected to convict Cynthia.

Theft Charges

Defense counsel Huff and Ryan raised the theft charges with Trial Judge Arend, stating that there was not enough to go on to try the defendants for the crime and requested to drop the charges. Judge Arend turned to DanPullo to explain the prosecution's side on the matter. DanPullo explained that one of the caregivers, Elvira Viray, stated that Cynthia told her that she was not going to pay her, even though the evidence showed otherwise, and that there were enough caregivers who had similar wage issues.

The theft charge was specific to Viray's unpaid wages. The statements of the other caregivers were just statements with no supporting evidence. This was an issue that should have been examined closely but Judge Arend relied on DanPullo's word and proceeded to move on to try the Blancaflor's for theft without even looking at the evidence.

Trial Judge Arend, on the first day of trial, openly admitted that she was not familiar with these type of crimes and that she was just handed the briefing on the case, and that in her twelve years on the bench she had never dealt with these type of crimes. CP10 L4-L8, CP17 L1-L12

If such was the case, why was Trial Judge Arend so quick to make a ruling to allow the theft without even reviewing the law and the evidence?



Additionally, this was a pre-trial issue that was just now being brought forward on the first day of trial. Would it not be appropriate to ask the defense counsel if there was any new information or any evidence that was not addressed in the pre-trial that needed to be addressed now? Or if not, at least, obtain a brief background on the theft charge to see that there was a payment plan, that there was one payment made toward the plan, that there was an e-mail request to reduce the payment because the business was shut down, that L&I refused to reduce the payment and that because of L&I's refusal the defendant included the unpaid wages in a Chapter 13 bankruptcy to show that she had every intent to pay.

The defense counsel merely stated that there was not enough to go on but did not go into detail. At this point, would it not be appropriate for Trial Judge Arend to ask the above questions? As a trial judge, there is a duty of due diligence to review the facts and the laws especially when it was a material issue. Trial Judge Arend could have reserved her ruling and reviewed the matter closely since obviously she walked into this case inexperienced; but instead she relied on Prosecutor DanPullo's words and ruled to move on with the charge.

There has to be some set of rules or laws that trial judges are bound to when they make certain decisions. There must be some kind of standards for review as to when would it be considered as abuse of discretion considering the few times that Trial Judge Arend consented to Prosecutor DanPullo's and Jarmon's misconduct in court.

ARGUMENT 5: Jury to Convict Instruction

The jury to convict instruction did not list the specific elements of intent and the evidence to support it. This should have been articulated in the instruction, as *intent is the purpose to use a particular means to affect such result*. A prime example in this case is the change in the treatment of caregivers from employees to contract labor. Was the change made to avoid paying the L&I premiums or was it because of the obvious financial hardship that the business was going through at that time? What evidence did the prosecutor have to prove beyond reasonable doubt that the change was made solely to avoid paying the L&I premiums. Was the failure to follow up or review Othniel's work a result of plain oversight or was it a result based solely to avoid paying the premiums?

The failure to articulate the specific elements and the evidence in the instruction biased the jury's decision because people often confuse motive with intent.

Summary of Arguments

This was a very complicated and convoluted case that fell outside of the more common types of theft wherein a person *knowingly* takes something from a person without that person's consent. In its simplest form, this case is essentially a wage dispute compounded by administrative and accounting errors, a failing marriage which prevented each member of the union from transparent and effective business communication and the onset of mental and physical illness of the primary bookkeeper exacerbated by the collapse of the adult home care and real estate markets. Further, the defendant's position as an auditor for the Washington State Department of Labor and Industries lent itself to the presumptive belief that any mistakes in accounting, given her extensive training and experience, were intentional. ,

The evidence in this case is copious and not easily understood by the presiding trial judge, the jury, or sadly, the defense counsel. To reiterate, there are several issues that are worthy of review:

1. The charge of theft requires proof that items were taken “by color of aid or deception to obtain control over the property or service of another or the value thereof, with the intent to deprive him or her of such property or service.” RCW 9A.56.020 (b). In this case, scrutiny was brought to bear because of a wage dispute. Evidence (presented and denied) indicates that attempts and payment plans were made to reconcile the differences, and though inconsistencies were discovered, nothing in the evidence suggests that the defendant was aware of or knowingly conspired to obtain control of property or services.
2. Evidence that would tend to support the defendant’s claim of innocence was not admitted by the trial judge. Consequently, the jury was not able to hear issues that were pertinent to understanding the mind set and rationale of those involved: L&I Auditor Cormier who performed the audit; L&I SEC Program Specialist Preston Beegel who conducted the investigation of the caregivers; and Revenue Agent Fnot Lindgreen whose testimony was critical to the inconsistency of the quarter periods stated in her e-mails and in the memo she wrote to document receipt of these e-mails. This e-mail was critical in Cynthia’s conviction.

Among many evidence that were not presented, a couple of significant information were crucial to Cynthia’s conviction: Lindgreen’s memo and the e-mail Cynthia wrote to Industrial Insurance Specialist Catherine Tinker openly admitting the 2008 1099’s issued to Hoff five months before the audit.

3. The defense counsel failed to make proper objections, was woefully unprepared, failed to review, did not conduct proper pre-trial bargaining and did not make proper objections to the admittance or exclusion of exculpatory evidence.
4. The admittance of hearsay evidence. The jury was allowed to hear testimony from witnesses who reported on the investigations and actions of others even though the person(s) who completed the investigatory work were available and physically able to be present and testify.
5. Failure to properly instruct the jury.

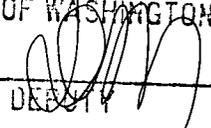
In conclusion, there are many reasons which justify a review of this case and its disposition. Cynthia request for either a reversal of all charges or be afforded the opportunity to have the **entire** case heard by an informed judge, in front of an educated jury and to be represented by a competent defense attorney.

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DIVISION II

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STATE OF WASHINGTON

BY 
DEBOSTY

To: David Ponzoha, Court Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

From: Cynthia C. Blancaflor
615 South Oxford St
Tacoma, WA 98465

Re: WA State vs. Cynthia Blancaflor
Case no. 42832-6-11

Dear Mr. Ponzoha:

My name is Cynthia Blancaflor and the following attached supplement is my "Statement for Additional Grounds for Review" in reference to the "Opening Brief" submitted by Atty. Kenneth Blanford filed on June 11, 2012.

Subsequently, I received a copy of Atty. Blanford's "Opening Brief" on July 19, 2012 outlining the following grounds for review:

- Trial judge error in denying my request for new counsel or pro se representation ten days before the trial.
- Ineffective Defense Counsel at Trial
- Insufficient Evidence to prove the charged crime of **employer's false reporting and failure to secure compensation.**

I was convicted by a jury trial on September 22, 2011. Final judgment was issued by Honorable Judge Stephanie Arrend. The case was tried at Pierce County Superior Court in Tacoma. Refer to cause no. 10-1-02165-7.

The criminal charges were based on an industrial insurance audit conducted by the Washington State Department of Labor and Industries or herein known also as L&I.

As with any other criminal case, "intent" was the focal point but there were two other aspects to this case that set it apart:

- The fact that the underlying crimes were based on an industrial insurance audit; and
- The fact that I was also an L&I employee working as a Field Auditor and at the same time co-owner of the adult family homecare business that was audited.

Inherent to the nature of the crimes, understanding the audit process and knowledge of the industrial insurance rules and laws applied to the case was an important facet to the trial where I was wrongfully convicted.

This was a highly sensitive case as it was very complicated and much more so when the Prosecution, over the course of fifteen months, introduced almost 7,000 pages of evidence in the discovery. Certainly, this did not make it any easier for my Public Defender who took on the case with no experience at all in this type of crimes.

Further, because of the uniqueness of this case, the trial judge even stated on court record that she had never dealt with this type of criminal charges in her twelve years in the bench.

As such, significant information and/or evidence to help my case were not raised during the trial and therefore were not identified in Atty. Blanford's "Opening Brief."

In light of the surrounding circumstance of this case, my additional statement for additional grounds for review will expound on these issues under Atty. Blanford's argument of "Ineffective Counsel" not only during the trial but also during the pre-trial. I will also expound on the issue of "Insufficient Evidence" to prove the charged crimes of False Reporting and Failure to Secure Compensation.

My statement of additional grounds for review will also discuss other issues not identified in Atty. Blanford's "Opening Brief."