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FILED

Division III

OCT 14 2011

~~No. 86351-2~~

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES R. KEYES

Appellant,

v.

ALEX KEIFFER, LIZ JOHNSON, and SCOTT ARMSTRONG,
individually, as representatives of their respective marital communities, and
as representatives of GROUP HEALTH COOPERATIVE; and GROUP
HEALTH COOPERATIVE, a Washington non-profit Corporation,

Respondents.

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STATE OF WASHINGTON
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BRIEF OF APPELLANT

James R. Keyes
Petitioner
P.O. Box 463
Spokane, WA 99210-0463
(509) 796-5152

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TABLE OF CONTENTS

Introduction	8
Assignments of Error	8
Issues Pertaining to Assignments of Error	9
Statement of the Case	11
Argument	
1. Application of borrowed servant doctrine	
a) Wrong procedure	14
b) Wrong analysis and result	16
2. Termination in violation of public policy	
a) Wrong procedure	27
b) Wrong analysis and result	29
3. Replevin	39
Conclusion	40

TABLE OF AUTHORITIES

Washington Cases

Berst v. Snohomish County, 114 Wn.App. 245, 251 (2002) 15

Buttelo v. S.A. Woods-Yates Am. Mach. Co., 72 Wn. App. 397,
401, 864 P.2d 948 (1993) 21

Cassidy v. Peters, 50 Wn.2d 115; 309 P.2d 767 (1957) 19

Clarke v. Bohemian Breweries, Inc., 7 Wn.2d 487,
110 P.2d 197 (1941) 19

Cudney v. AlSCO, Inc., No. 83124-6 (Sep 2011) 34, 38, 39

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755,
881 P.2d 216 (1994) cert. denied, 515 U.S. 1169 (1995) . . 14, 15

Dicomes v. State, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989) 30

Ellis v. Seattle, 142 Wn.2d 450, 460-61 (2000) 36, 38

***Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand
Aerie of Fraternal Order of Eagles***, 148 Wn.2d 224 ,
239, 59 P.3d 655 (2002) 20

Gardner v. Loomis Armored, Inc ., 128 Wn.2d 931, 941,
913 P.2d 377 (1996) 28

Hodgson v. Bicknell, 49 Wn.2d 130, 298 P.2d 844 (1956) 29

Hoffer v. State, 110 Wn.2d 415, 755 P.2d 781 (1988) 14

Hollingbery v. Dunn, 68 Wn.2d 75, 411 P.2d 431 (1966) 19

Hubbard v. Spokane County, 146 Wn.2d 699, 707,
50 P.3d 602 (2002) 27, 30, 36, 38

<i>James v. Ellis</i> , 44 Wn.2d 599, 269 P.2d 573 (1954)	19
<i>Jones v. Halvorson-Berg</i> , 69 Wn. App. 117, 847 P.2d 945 (1993)	14
<i>Krystad v. Lau</i> , 65 Wn.2d 827, 400 P.2d 72 (1965)	32
<i>Landry v. Luscher</i> , 95 Wn.App. 779, 780-81, 976 P.2d 1274 (1999)	40
<i>Nguyen v. Sacred Heart Med. Ctr.</i> , 97 Wn.App. 728, 733-734 (Div. III 1999)	39
<i>Nyman v. MacRae Bros. Constr. Co.</i> , 69 Wn.2d 285, 288, 418 P.2d 253 (1966)	15
<i>Pearson v. Vandermay</i> , 67 Wn.2d 222, 407 P.2d 143 (1965)	29
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998)	14
<i>State v. Delgado</i> , 148 Wn.2d 723, 733, 63 P.3d 792 (2003)	20
<i>State v. J.P.</i> , 149 Wn.2d 444, 450, 69 P.3d 318 (2003)	20
<i>State v. Pacheco</i> , 125 Wn.2d 150, 154, 882 P.2d 183 (1994)	20
<i>State ex rel. Zempel v. Twitchell</i> , 59 Wn.2d 419, 367 P.2d 985 (1962)	16
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 232, 685 P.2d 1081 (1984)	32
<i>Tingey v Haisch</i> , 159 Wn. 2d 652, 664 (2007)	20
<i>Wilmot v. Kaiser Aluminum & Chem. Corp.</i> , 118 Wn.2d 46 , 53-66, 821 P.2d 18 (1991)	35
<i>Wilson v. City of Monroe</i> , 88 Wn. App. 113 , 121-27, 943 P.2d 1134 (1997), review denied, 134 Wn.2d 1028 (1998)	35, 38

Wright v. Milan, 104 Wn.App. 478, 482 (Div III 2001) 31

Other States

Harless v. First National Bank of Fairmont, 246 S.E.2d 270
(W. Va. 1978) 33, 36

Palmateer v. International Harvester Co., 85 Ill.2d 124, 52
Ill.Dec. 13, 421 N.E.2d 876 (1981) 33

Permian Basin Community Centers v Bob Johns,
951 S.W.2d 497 (1997) 24

Petermann v. Teamsters Local 396, 174 Cal.App.2d 184,
344 P.2d 25 (1959) 14, 32

Sheets v. Teddy's Frosted Foods, Inc., 179 Conn. 471,
427 A.2d 385 (1980) 33

Vermillion v. AAA Pro Moving & Storage, 146 Ariz. 215,
704 P.2d 1360 (1985) 32

Wagner v. City of Globe, 150 Ariz. 82, 90 (1986) 38

U.S. Supreme Court

Denton v. Yazoo & Mississippi Railroad Co., 284 U.S. 305
(1932) 18

English v. Gen. Elec. Co ., 496 U.S. 72, 110 S. Ct. 2270,
110 L. Ed. 2d 65 (1990) 35

Standard Oil Co. v. Anderson, 212 U.S. 215, 221-225 (1909) 18

Federal Cases

Guillory v. County of Orange, 731 F.2d 1379, 1381
(9th Cir. 1984) 14

Moss v. Steele Rubber Products, U.S. District Court for the
Western District North Carolina. LEXIS 30133 (2010) . 25

Moyo v. Gomez, 40 F.3d 982, 985 (9th Cir. 1994) 38

**Neal v. Manpower International, Inc., and Wayne-Dalton
Corp.**, U.S. District Court Northern District of Florida,
LEXIS 25805 (2001) 26

Norris v. Lumbermen's Mut. Cas. Co., 881 F.2d 1144, 1150
(1st Cir. 1989) 35

Vizcaino v. U.S. Dist. Court for Western Dist. of Washington,
173 F.3d 713, 43 Fed. R. Serv.3d 1355 (9th Cir. 1999) . . 17

Williams v. Shell Oil Company, 18 F.3d 396 (7th Cir. 1994) 27

Statutes

RCW 7.72 Product liability actions 20

RCW 19.86 Unfair business practices -- Consumer protection . . . 35

RCW 19.86.020 Unfair competition, practices, declared unlawful . 28, 31

RCW 42.40 State employee whistleblower protection 34

RCW 42.41 Local government whistleblower protection 34

RCW 49.17.160(1) Discrimination against employee 38

RCW 49.60.030 Freedom from discrimination 22

RCW 62A.2-315 Implied warranty: Fitness for particular purpose . 28, 31

Regulations and Rules

CR 12(b)(6) 8-10, 13-15,
27, 29, 39

WAC 26-15 Whistleblower complaints in Health Care Settings ... 34

Other Authorities

Restatement (Second) of Agency § 227 (1958) 19

27 Am.Jur.2d Employment Relationship § 3 17

27 Am.Jur.2d Employment Relationship § 4 17

27 Am.Jur.2d Employment Relationship § 6 17

William L. Mauk, Wrongful Discharge: The Erosion of 100 Years
of Employer Privilege, 21 Idaho L. Rev. 201, 208 (1985) . .32, 34

INTRODUCTION

This case examines three areas of the law: the degree of fact-finding permissible by the trial court in considering a CR 12(b)(6) motion to dismiss; the extent of application of the common law borrowed servant doctrine in non-physical injury cases; and the extent to which whistleblowing activity for consumer protection invokes public policy protections against termination.

For simplicity purposes, the name Group Health will be used to identify all of the defending/responding parties to this action, including the individual parties.

ASSIGNMENTS OF ERROR

Assignments of Error

No. 1 In ordering dismissal, the trial court erred in making a finding of fact that the borrowed servant doctrine did not apply and Mr. Keyes was therefore an employee of Provisional Staffing Services.

No. 2 In ordering dismissal, the trial court erred in making a finding of fact that the public policy protections against wrongful termination were not invoked by Mr. Keyes' whistleblowing activity at Group Health Cooperative.

INTRODUCTION

This case examines three areas of the law: the degree of fact-finding permissible by the trial court in considering a CR 12(b)(6) motion to dismiss; the extent of application of the common law borrowed servant doctrine in non-physical injury cases; and the extent to which whistleblowing activity for consumer protection invokes public policy protections against termination.

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No. 2 In ordering dismissal, the trial court erred in making a finding of fact that the public policy protections against wrongful termination were not invoked by Mr. Keyes' whistleblowing activity at Group Health Cooperative.

No. 3 In ordering dismissal, the trial court erred in granting a dismissal pursuant to CR 12(b)(6) when a cause of action for replevin was viable but could be heard by a court of limited jurisdiction.

Issues Pertaining to Assignments of Error

No. 1 The trial court made a finding that Mr. Keyes was not an employee of Group Health Cooperative, a borrowing employer, but was still an employee of Provisional, a temporary staffing agency, the lending employer. There are two issues included in this error.

(a) When considering a CR 12(b)(6) motion, was it permissible for the trial court to make this finding in direct opposition to the facts as presented in the Amended Complaint, which stated that by virtue of the borrowed servant doctrine, Mr. Keyes was an employee of Group Health Cooperative?

(b) Given that the trial court did not undertake a complete analysis of the application of the borrowed servant doctrine as described in detail in previous appellate opinions, was the trial court correct in finding that the borrowed servant doctrine did not apply and Mr. Keyes remained an employee of the temporary staffing agency and was not an employee of Group Health, the borrowing employer?

No. 2 The trial court made a finding that the whistleblowing actions of Mr. Keyes, while serving as a customer service agent for Group Health Cooperative, did not meet the public policy requirement to invoke wrongful termination protections. There are two issues included in this error.

(a) When considering a CR 12(b)(6) motion, was it permissible for the trial court to make this factual finding in direct opposition to the facts as presented in the Amended Complaint, which stated that Mr. Keyes' termination by Group Health was a wrongful termination in violation of public policy?

(b) Given that the trial court did not undertake a complete analysis of what does and does not invoke public policy protections as described in detail in previous appellate opinions, was the trial court correct in finding that the termination of Mr. Keyes for consumer protection related whistleblowing actions was not against public policy?

No. 3 All of the defending parties, and the trial court, agreed to accept the Amended Complaint before oral argument on the Motion to Dismiss, and it was agreed by all parties and the trial court that the argument on the Motion to Dismiss would be on the causes of action as presented in the Amended Complaint. As for the cause of action for replevin, Group Health's only argument was that it was an insubstantial claim that could be heard by a court of limited jurisdiction. The trial court

did not address the replevin cause of action. Was the trial court correct in dismissing the action in its entirety based upon a failure to state a claim upon which relief could be granted, when the replevin claim was viable and could be heard in the trial court as well as in a court of limited jurisdiction?

STATEMENT OF THE CASE

James Keyes, recruited by a temporary staffing agency, Provisional Staffing Services, was interviewed for a call center customer service position by Provisional's client Group Health Cooperative. Group Health Cooperative then hired, trained, provided a work site and equipment, and maintained full supervisory control over the Mr. Keyes. [CP 118]

Mr. Keyes' work responsibility was to act as an agent for Group Health Cooperative by answering incoming calls made to the Customer Service Department by Group Health members. These calls predominately involved questions about a member's insurance coverage or questions about a member's billing statement(s). [CP 118]

At all times Mr. Keyes represented Group Health. The only remaining connection Mr. Keyes had with the staffing agency was in submitting his work hours for payment and receiving his paycheck from Provisional. Work hours were approved by a Group Health supervisor before submission to Provisional. [RP 12-13]

During the course of this employment Mr. Keyes became aware of practices he considered abusive of Group Health members and at times violated Group Health's published policies and even the laws of the State of Washington. On one occasion Mr. Keyes returned a billing for an item that was being billed twice to the claims department to be corrected. When it was not corrected Mr. Keyes returned the billing to the claims department again, this time requesting a service credit be given the member, essentially removing the billing, and adding a note that the double billing of the member violated a Group Health policy and the consumer protection laws of the State of Washington. [CP 118]

On another occasion Mr. Keyes requested and met with a supervisor to report another case of member mistreatment that might be illegal and specifically sought guidance from the supervisor on how to handle such cases involving Group Health improprieties. [RP 14]

Shortly thereafter, Group Health notified Provisional, and not Mr. Keyes directly, that Mr. Keyes was terminated from employment at Group Health, with the stated reason being that he documented a Group Health action as being against the law. [CP 119]

This civil action for wrongful termination in violation of public policy immediately followed. [CP 1 & 3]

Discovery was attempted by Mr. Keyes, but substantially refused by the defending parties who failed to produce even a single document in response to two sets of Requests for Production. [CP 86]

The defending parties moved for dismissal for failure to state a claim upon which relief could be granted, pursuant to CR 12(b)(6). An Amended Complaint was accepted by the defending parties and the court, and based upon the Amended Complaint [RP 4], Group Health and the individual defendants made the argument that:

1) Mr. Keyes was never an employee of Group Health; [CP 11, RP 5-6]

2) there was no public policy violation; [CP 10, RP 9]

3) there was no basis for a cause of action for emotional distress; [CP 12-13]

4) that the cause of action for replevin could be heard in a court of limited jurisdiction. [RP 5]

The trial court agreed with Group Health and dismissed the action stating that:

1) the borrowed servant doctrine did not apply and Mr. Keyes was not employed by Group Health; [RP18]

2) that the elements in the accepted analysis of violation of public policy were not met; [RP 18-19]

3) that there was no expert testimony provided by declaration or affidavit to support emotional distress; [RP 19] and

4) did not address the replevin cause of action.

A motion for reconsideration was denied. [CP 114, 115]

ARGUMENT

A trial court dismissal of an action for a failure to state a claim upon which relief can be granted, pursuant to CR 12(b)(6), is reviewed de novo. *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988) citing *Guillory v. County of Orange*, 731 F.2d 1379, 1381 (9th Cir. 1984).

Dismissal is appropriate only if the complaint alleges no facts that would justify recovery. *Reid v. Pierce County*, 136 Wn.2d 195, 200-01, 961 P.2d 333 (1998). Plaintiffs' allegations and any reasonable inferences are accepted as true. *Id.* at 201. And for that reason CR 12(b)(6) motions should be granted sparingly and with care. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994).

1. Application of the borrowed servant doctrine.

(a) CR 12(b)(6) procedure.

The determination of borrowed servant status is a factual issue rather than an issue of law. *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 847 P.2d

945 (1993) citing *Nyman v. MacRae Bros. Constr. Co.*, 69 Wn.2d 285, 288, 418 P.2d 253 (1966).

The Amended Complaint made the following factual statement:

3.1 On or about 11/16/2010 the plaintiff began employment with the Defendant Group Health Cooperative as a borrowed servant provided by Provisional Staffing Services.

3.2 The plaintiff was interviewed and selected for employment with Group Health Cooperative by the Defendant Alex Keiffer. The plaintiff was trained for the position by Group Health Cooperative and coached and supervised while working in the position by the Defendant Alex Keiffer. [CP 118]

For a motion pursuant to CR 12(b)(6) the court must consider each fact as alleged in the complaint as true. *Berst v. Snohomish County*, 114 Wn.App. 245, 251 (2002) ["Courts presume the allegations of the complaint to be true for the purpose of such a motion."] citing *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994), cert. denied, 515 U.S. 1169 (1995).

Group Health's argument is that the borrowed servant doctrine does not apply and Mr. Keyes was never an employee of Group Health. [CP 11, RP 6] Group Health's argument only identifies that an issue of fact exists. An issue of fact is properly resolved at trial, not in a CR 12 motion.

The trial court erred in making a determination as to the employment status of the Plaintiff contrary to the facts as alleged in the Amended Complaint. See *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 367 P.2d 985 (1962)[Function of judgment on pleadings is to determine whether or not genuine issue of fact exists, not to determine issue of fact.]

(b) Error in failing to correctly apply borrowed servant doctrine.

Group Health's argument is that the borrowed servant doctrine does not apply in this case as its primary purpose was to limit liability in injury cases [RP 6, 17] and this is not a matter of personal injury. The reality is that while the historical application of the borrowed servant doctrine has been predominately within injury cases, the doctrine itself is not so exclusive, as it is a natural component of Master-Servant and Agency relationships and has been rightfully applied in other-than-injury circumstances, including cases involving borrowing employer related misconduct and resultant liability.

"The employer and employee relationship may be viewed as falling within the broader relationship of principal and agent and some courts equate the term "employee" with "agent." Agency and employment relationships are similar in that both involve employment and service under

an express or implied agreement." 27 Am.Jur.2d Employment Relationship § 3.

"An employer is the person for whom the employee performs services according to the employer's right to control what will be done and how it will be achieved. An employer is also defined as a principal who employs an agent to perform service in his or her affairs and who controls or has the right to control the physical conduct of the agent in the performance of the service." 27 Am.Jur.2d Employment Relationship § 4.

"A worker in the general employ of an employer may be loaned to a "special" employer, who borrows the employee with respect to certain work. Generally, an employment relationship between a loaned employee and a special employer is characterized by an express or implied contract for hire between the special employer and the employee, work that is essentially that of the special employer, and the special employer's right to control the work." 27 Am.Jur.2d Employment Relationship § 6. See also *Vizcaino v. U.S. Dist. Court for Western Dist. of Washington*, 173 F.3d 713, 43 Fed. R. Serv.3d 1355 (9th Cir. 1999)[An employee permitted by his or her employer to perform services for another may become the employee of such other in performing the services.]

In the days, long ago, before we had equal rights, before we had rights for people with disabilities, before we had a right to not be sexually harassed in the workplace, before we had a right to not be discriminated against, before we had a right to report that our employer was violating the law without being fired, our U.S. Supreme Court stated, without being cognizant that such new public policies would come to exist:

One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person with all the legal consequences of the new relation.

To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work." *Denton v. Yazoo & Mississippi Railroad Co.*, 284 U.S. 305 (1932) quoting *Standard Oil Co. v. Anderson*, 212 U.S. 215, 221-225 (1909). Underline emphasis added.

"With all the legal consequences of the new relation." Those are powerful words, and from the Supreme Court of the United States. Notice that nothing in the definition is contingent upon the nature of the civil action. Being, or not being, a borrowed servant is solely about the

relationship between the worker and the employer, and not as Group Health would have the Court believe, the type of litigation.

"The determining consideration in the relationship in the case of master and servant is (1) whether or not there is control in fact or the right to control the servant's physical conduct in the performance of his duties." *Hollingbery v. Dunn*, 68 Wn.2d 75, 411 P.2d 431 (1966); *Cassidy v. Peters*, 50 Wn.2d 115; 309 P.2d 767 (1957); *James v. Ellis*, 44 Wn.2d 599, 269 P.2d 573 (1954); *Restatement (Second) of Agency* § 227 (1958). "Such control or right of control in the case of the loaned servant must create a relationship of subordination between the borrowing master and the borrowed servant rather than a relationship of cooperation." *Clarke v. Bohemian Breweries, Inc.*, 7 Wn.2d 487, 110 P.2d 197 (1941).

It is undisputed that Mr. Keyes was at all times under the direct and exclusive control and supervision of Group Health. A borrowed servant.

The problem with Group Health's argument for selective application of the borrowed servant doctrine is that it forces an application of the common law to produce an absurd result, a result that leaves borrowing employers free to abuse employees and violate laws protecting workers against retaliatory termination for discriminatory reasons or whistleblowing activity.

Let's look at how law is interpreted.

Where the legislature provides no statutory definition and a court gives a term its plain and ordinary meaning by reference to a dictionary, the court "will avoid literal reading of a statute which would result in unlikely, absurd, or strained consequences." *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). A reading that produces absurd results must be avoided because " 'it will not be presumed that the legislature intended absurd results.' " *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (quoting *State v. Delgado*, 148 Wn.2d 723, 733, 63 P.3d 792 (2003) (Madsen, J., dissenting)). The outcome of plain language analysis may be corroborated by validating the absence of an absurd result. Where an absurd result is produced, further inquiry may be appropriate. See *Tingey v Haisch*, 159 Wn. 2d 652, 664 (2007).

In construing a statute, the court's primary objective is to carry out the intent of the Legislature. *State v. Pacheco*, 125 Wn.2d 150, 154, 882 P.2d 183 (1994). If a term is not defined in a statute, the court may look to common law or a dictionary for the definition. *Pacheco*, 125 Wn.2d at 154. As a general rule, the court presumes the Legislature intended undefined terms to mean what they did at common law. *Pacheco*, 125 Wn.2d at 154. Although the Legislature preempted common law product liability with the enactment of RCW 7.72, courts still rely on the common law for the

meaning of undefined statutory terms. "Legislative intent can . . . be derived from the body of common law that was preempted by the statute." *Buttelo v. S.A. Woods-Yates Am. Mach. Co.*, 72 Wn. App. 397, 401, 864 P.2d 948 (1993).

So if laws are construed so as to not produce strained or absurd results, and the construction of laws still rely upon the common law, then it makes sense that the common law will not be construed to produce absurd results (if it did, it would never have existed long enough to become common law).

But an absurd result is exactly what Group Health is looking for. Group Health is asking the Court to affirm the absurd; that the borrowed servant doctrine applies sometimes but not other times, specifically, that it applies when it will protect them from liability in the event of an employee injury, but will not apply when it would leave them liable for their own acts of misconduct and violation of legislated or common law rights of their borrowed employees. This despite the fact that other jurisdictions, state and federal, have led the way in applying the borrowed servant doctrine to such cases where the borrowing employer is to be held responsible.

Here is a hypothetical example to illustrate.

Mr. Keyes is a borrowed employee working for Group Health, the borrowing employer. Mr. Keyes is fully under the control of Group Health

supervisory personnel who control his schedule and conduct in the workplace. One day Mr. Keyes is called into private office by his supervisor Alex Keiffer, ostensibly for a coaching session, but once the door to the room was fully closed, Alex Keiffer crowds Mr. Keyes into a corner and pushes his hand down Mr. Keyes' pants and begins to fondle him. Mr. Keyes pulls away and leaves the 'coaching session' and goes to the unit manager, Liz Johnson, and reports Alex Keiffer's actions. While Liz Johnson opines that Alex Keiffer was just having a little fun and no harm was done, she also believes that Mr. Keyes might pass the complaint further up the chain of command, and since she values Alex Keiffer, a supervisor, over Mr. Keyes, a worker from a temporary staffing agency, she decides that Mr. Keyes' services will no longer be needed. She contacts the temp agency to tell them that Group Health no longer wants Mr. Keyes to come to work for them. For all intents and purposes, Mr. Keyes is terminated from employment at Group Health. The temp agency passes this information on to Mr. Keyes and informs him that the temp agency does not have another client company to send him to work at.

In this circumstance with a traditional employee Group Health would be liable for violation of RCW 49.60.030 which prohibits discriminatory behavior, including a retaliatory discharge for reporting sexual harassment. Under Group Health's preferred application of the borrowed servant

doctrine, they would be free from any liability with respect to Mr. Keyes because they considered him an employee of the temporary staffing agency and not an employee of Group Health, and they did not terminate Mr. Keyes, they simply stopped borrowing him. See RP 7.

This is an absurd result, inconsistent with opinions from other state and federal jurisdictions. If upheld, given the rise in the use of temporary staffing agencies in Washington, this promises to impose a significant barrier to justice for the workers recruited by temporary staffing agencies when those workers are left at the mercy of the behavioral ethics of the borrowing employers.

Here are some examples of results from other jurisdictions.

In an action for wrongful termination in violation of a whistleblowing statute, with respect to the plaintiff's borrowed servant status the court wrote:

Whether one is an independent contractor or an employee is measured by the amount of control the employer exerts (or has the right to exert) over the details of the work performed. This control extends to decisions concerning personnel and staffing.

We conclude there was evidence from which a jury could reasonably conclude that although Johns was paid through [Health Care Management Services], PBCC was actually Johns' employer, PBCC retained the right to evaluation

performance, hire and fire, set hours and salaries, define work assignments, and supervise the day-to-day functioning of the group home." *Permian Basin Community Centers v Bob Johns*, 951 S.W.2d 497 (1997).

In the instant case, Mr. Keyes received his paycheck from Provisional Staffing Services, but Group Health retained the right to evaluate performance, hire and fire, set hours, define work assignments and supervise the day-to-day functioning of the work environment.

In a case that substantially parallels the instant case, an employee assigned to a company through a temporary staffing agency brought an action for wrongful termination in violation of public policy, in retaliation for his reporting racial discrimination and harassment. To the borrowing employer's argument that he was not an employee of the company the court responded:

In the particular circumstances of this case, i.e., where a purported employee is assigned to his job by a temporary staffing agency, the "loaned servant" or "borrowed servant" doctrine applies. Under the loaned-servant doctrine, an employment relationship exists between an employee and his special employer when the special employer controls the means and manner of the temporary employee's work.

In the present case, the majority of the evidence as viewed through the prism of these factors compels the

finding that Moss was an employee of Steele Rubber. Steele Rubber closely supervised Moss during his time as a molder. Moss worked alongside other Steele Rubber employees performing similar tasks, was supervised directly by Steele Rubber employees, and was trained by Steele Rubber employees. Steele Rubber provided the place and instrumentalities whereby Moss was able to do his job.

Steele Rubber appears to argue that Moss has failed to establish a *prima facie* case of retaliation because no adverse employment action occurred that is attributable to Steele Rubber. This contention is meritless.

Although it is true that Moss was told by an employee of Lincoln Staffing and not Steele Rubber that he "would not need to go back" to Steele Rubber the next day, when Moss asked why he was being "fired," he was told that it was because of his complaint the previous Friday. This is certainly enough evidence for a jury to plausibly and reasonably infer that Steele Rubber made the decision to terminate Moss and that this decision was in response to Moss' complaint the previous business day, especially where there is no evidence in the record that Moss's performance at work was ever deemed less than satisfactory." *Moss v. Steele Rubber Products*, U.S. District Court for the Western District of North Carolina. LEXIS 30133. 3/29/2010. Internal citations omitted.

Amazingly similar facts and issues. Drastically different results. The exact same defense that Group Health tenders was found by the Federal Court to be meritless.

In an action for a retaliatory discharge for refusing to succumb to the sexual advances from a supervisor of the borrowing employer, the court, dismissing the temp agency and referring to Wayne-Dalton, the borrowing employer, stated:

Because Woodson was an employee of Wayne-Dalton [either as a borrowed servant or as a dual employee], Wayne-Dalton has an "opportunity to guard against [his] misconduct" through training, screening and monitoring of his performance. *Neal v. Manpower International, Inc., and Wayne-Dalton Corp., U.S. District Court for the Northern District of Florida, LEXIS 25805 (2001).*

In an action against a borrowing employer for retaliatory discharge, the court stated:

The loaned servant doctrine is a principle of agency laws in which the first principal "loans" his agent to a second principal, giving the second principal a heightened degree of control over the agent, along with the corresponding responsibility for the agent's acts and omissions.

Generally, whether an employee is "loaned" is a factual question, and the factors considered in the control of an employee include such things as the power to hire and fire

the employee and the power to control the direction and manner of performance of the work done by the employee. *Williams v. Shell Oil Company*, 18 F.3d 396 (7th Cir. 1994).

Mr. Keyes was in every sense and definition of the word an "employee" of Group Health Cooperative at the time when Group Health retaliated against Mr. Keyes for informing them of unlawful practices at Group Health, and the form of their retaliation was to discharge the Mr. Keyes, even though that discharge was in violation of public policy.

The trial court erred in not correctly applying the common law doctrine of the borrowed servant.

2. Wrongful termination in violation of public policy.

(a) CR 12(b)(6) procedure.

"To establish liability for the tort of wrongful discharge in violation of public policy, a plaintiff must prove (1) the existence of a clear public policy (the clarity element), (2) that discouraging the conduct would jeopardize the public policy (the jeopardy element), (3) that this conduct caused the discharge (the causation element), and (4) (if the employer presents evidence its conduct was justified) that the justification was invalid or pretextual (absence of justification element)." *Hubbard v.*

Spokane County, 146 Wn.2d 699, 707, 50 P.3d 602 (2002); see *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996).

In his Amended Complaint Mr. Keyes alleged:

4.1 Defendants Alex Keiffer and Liz Johnson together, and representing Group Health Cooperative, decided to terminate the plaintiff's employment with Group Health Cooperative specifically and deliberately in retaliation against the plaintiff [(3) causation element] because the plaintiff raised concerns that Group Health Cooperative was acting unethically [(2) jeopardy element], violating its own internal policies and the consumer protection and product liability laws (including but not limited to RCW 19.86 et seq. and RCW 62A.2-315) of the State of Washington [(1) clarity element] while taking actions which harmed consumers and unjustly enriched Group Health Cooperative, and that Group Health was undertaking those actions even though they might result in civil liability for Group Health. [CP 119]

No justification element is present as Group Health did not inform Mr. Keyes of the reason for his dismissal [CP 119], has failed to produce any evidence to support a defense of termination for other causes, and refused to produce in response to requests for production [CP 86] any

requested documents which would serve to prove or disprove any Group Health claim of termination for other causes.

Group Health disputes these facts as alleged, but that is what trials are for, not motions per CR 12(b)(6). See *Hodgson v. Bicknell*, 49 Wn.2d 130, 298 P.2d 844 (1956)[Party who moves for judgment on pleadings admits, for purpose of motion, truth of every fact well pleaded by his opponent.]; *Pearson v. Vandermay*, 67 Wn.2d 222, 407 P.2d 143 (1965)[In ruling on motion for judgment on pleadings, court must accept as true every fact pleaded by nonmoving party, and also untruth of every fact alleged by moving party and denied by his opponent's pleadings.]

The trial court erred in not accepting the facts as alleged in the Amended Complaint, specifically that Mr. Keyes was wrongfully terminated by Group Health in violation of public policy.

(b) Error in failing to correctly identify and apply public policy.

The tort of wrongful discharge in violation of public policy is generally "recognized in four different situations: where an employee is fired (1) for refusing to commit an illegal act; (2) for performing a public duty or obligation; (3) for exercising a legal right or privilege; and (4) in

retaliation for reporting employer misconduct." *Hubbard*, 146 Wn.2d at 707 -08.

What constitutes a clear mandate of public policy is a question of law. *Dicomes v. State*, 113 Wn.2d 612 , 617, 782 P.2d 1002 (1989).

In the instant case, Mr. Keyes was terminated from employment at Group Health after refusing to participate in improper activities (such as failing to provide insurance coverage to claims, billing members for services already billed and paid for, sending member's accounts to collections for amounts that should have been covered by their Group Health insurance; all behaviors found to be common at Group Health) and reporting to Group Health actions by departments which violated internal policies and/or Washington law. Mr. Keyes' reports of these violations were specifically to preempt the completion of each violation, protecting Group Health from potentially incurring civil liability while protecting Group Health members from being abused by Group Health's billing and membership departments (regardless of whether the members were aware that they were being abused.) [CP 118-119]

A textbook case of whistleblowing.

While Group Health has twice refused requests for production to produce a copy of the document at issue [CP 86], it is believed that Mr. Keyes' termination was directly related to a note sent by Mr. Keyes to the

claims department requesting a service credit for a member, essentially an action which would eliminate the member being billed a second time for a service he already had been billed and paid for.¹ This note contained an admonition that such actions [the double billing for services] violated Group Health cost shares policy and consumer protection statutes of the State of Washington.

¹ In this instance the member was billed, and paid for, the office visit for an optometrist to conduct a refraction examination of his eyes to generate a prescription for corrective eyeglasses. The member was required to fill the prescription by purchasing the glasses at an internal Group Health eye care store. The purchased glasses did not work, the refraction was incorrect. They were not fit for their intended purpose. (See RCW 62A.2-315) When the member returned to have the refraction repeated he was again billed a cost share for the refraction, a service he had already paid for but did not properly receive. (Though it was a common practice) the second billing for the refraction cost share violated Group Health's published cost share policy and could be considered an unfair and deceptive trade practice in violation of the Consumer Protection Act. (see RCW 19.86.020). This is not a medical malpractice issue but is a billing issue, directly related to the entrepreneurial aspects of the practice of medicine which properly falls under the Consumer Protection Act. *Wright v. Milan*, 104 Wn.App. 478, 482 (Div III 2001).

Employees should not have to choose between their jobs and the demands of important public policy interests; thus courts have developed the public policy exception to the at-will doctrine.

In its initial stage the public policy exception was designed to discourage discharges in violation of a statutory expression of public policy. See *Petermann v. Teamsters Local 396*, 174 Cal.App.2d 184, 344 P.2d 25 (1959) (seminal declaration of the public policy exception; employee discharged for refusal to commit perjury).

The public policy exception defies easy application because different factual patterns have been collected under the same general rubric of "public policy". Perhaps the easiest and least controversial pattern involves an employee's refusal to participate in illegal behavior. See *Petermann v. Teamsters Local 369*, *supra*; *Vermillion v. AAA Pro Moving & Storage*, 146 Ariz. 215, 704 P.2d 1360 (App. 1985); *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984); *Krystad v. Lau*, 65 Wn.2d 827, 400 P.2d 72 (1965).

The type of public policy exception that presents the most difficult analytic problem for courts are cases that involve the employee "whistleblower" who exposes wrongdoing on the part of his employer and is then discharged. See *William L. Mauk, Wrongful Discharge: The Erosion of 100 Years of Employer Privilege*, 21 Idaho L. Rev. 201, 239-245 (1985).

The employee who chooses to report illegal or unsafe conduct by his employer differs significantly from the employee forced to choose between his job and actual participation in illegal behavior. The latter is the paradigmatic case of a public policy violation; in contrast the whistleblower faces the arguably less onerous choice of either ignoring the known or suspected illegality or becoming an instrument of law enforcement. Nonetheless, whistleblowing employees have gained a measure of judicial protection. *See, e.g., Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981); *Sheets v. Teddy's Frosted Foods, Inc.*, 179 Conn. 471, 427 A.2d 385 (1980); *Harless v. First National Bank of Fairmont*, 246 S.E.2d 270 (W. Va. 1978).

In Washington State we believe that whistleblowing activity which serves a public purpose should be protected. So long as employees' actions are not merely private or proprietary, but instead seek to further the public good, the decision to expose illegal or unsafe practices should be encouraged. *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002).

There is a tension between the obvious societal benefits in having employees with access to information expose activities which may be illegal or which may jeopardize health and safety, and accepted concepts of

employee loyalty, see *Mauk*, 21 *Idaho L.Rev. supra* at 239-245; nevertheless the balance of actions which enhance the enforcement of our laws or expose unsafe conditions, or otherwise serve some singularly public purpose, will inure to the benefit of the public. Our own Washington legislature has recognized that whistleblowing activity is worthy of protection. In 1982 and 1992 respectively, the legislature enacted RCW 42.40 and RCW 42.41, which protects state and county employees from retaliation for their whistleblowing activity. While these RCW's are not applicable to this case, it evinces a legislative expression of public policy fully supportive of the whistleblowing activity of Mr. Keyes. In fact, if the reporting made by Mr. Keyes had been on the health care provided to Group Health members instead of on the billing and entrepreneurial aspects of their treatment, Mr. Keyes would have been protected by WAC 26-15: Whistleblower complaints in Health Care Settings.

Our Supreme Court has considered wrongful discharge in violation of public policy several times in the past year. The most recent case is *Cudney v. AlSCO, Inc.*, No. 83124-6 (Sep 2011) where in a 5:4 opinion our Supreme Court held affirmed the strict standard that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means, thereby

maintaining a narrow exception to the underlying doctrine of at-will employment.

The split decision in *Cudney* seems to contradict the stated opinion in *Wilmot v. Kaiser* that a statutory remedy does not bar a common law tort claim unless the statutory remedy is mandatory and exclusive. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46 , 53-66, 821 P.2d 18 (1991); see also *Wilson v. City of Monroe*, 88 Wn. App. 113 , 121-27, 943 P.2d 1134 (1997), review denied , 134 Wn.2d 1028 (1998). It also appears to conflict with federal opinions. See *English v. Gen. Elec. Co .*, 496 U.S. 72, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990)[A statutory remedy does not preempt common law tort claims for retaliation against whistleblowers.] See also *Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1150 (1st Cir. 1989)[statutory remedy "permissive not mandatory"].

These cases promote a result that, because the CPA's process is not mandatory and exclusive, Mr. Keyes' common law tort claim is permitted. Regardless, Mr. Keyes' claim survives the *Cudney* standard on its own merits.

There can be little argument as to the clarity element. Protecting consumers from unfair or deceptive trade practices as a matter of public policy has been deemed by our legislature of significant enough importance to pass the Consumer Protection Act, RCW 19.86 et seq. The Act even

provides for civil prosecution by either the Attorney General or by a private citizen. In the absence of a specific Washington case on whistleblowing and consumer protection, our Supreme Court has three times affirmatively cited to *Harless v. First National Bank of Fairmont*, 246 S.E.2d 270 (W. Va. 1978). In *Harless*, a bank employee was discharged after attempting to make his employer comply with the state consumer credit and protection laws. 246 S.E.2d at 272. The West Virginia Supreme Court held that the bank could be liable for wrongful discharge because the discharge would otherwise frustrate a clear public policy to protect consumers. *Id.* at 276. *Hubbard v. Spokane County*, 146 Wn.2d 699, 715 (2002).

The jeopardy element is a bit trickier. Whether a plaintiff has satisfied the jeopardy element is a question of fact. *Hubbard*, 146 Wn.2d at 715 ; *Ellis v. City of Seattle*, 142 Wn.2d 450 , 463, 13 P.3d 1065 (2000). When imminent harm is threatened, the jeopardy element "may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action." *Ellis*, 142 Wn.2d at 461. While Group Health argues that "imminent harm" necessarily implies a physical harming of a person, that is an unnatural limiting of the true meaning. A consumer can be in imminent harm of being unfairly billed an inappropriate amount or deceived into believing that he has to pay for something that he was billed for even though he really should not have to.

The reality is that in our capitalist environment unfair and deceptive trade practices occur every day, and consumers are often totally unaware of the times and ways that they are subjected to unfair or deceptive treatment. This means that the restorative power of civil action is an inadequate remedy for such widespread abuse. The real power to stop such consumer abuse belongs to the employees who would take affirmative action to prevent the abuse before it is consummated.

This is what Mr. Keyes did when he took actions such as notifying a supervisor of legal/ethical concerns with cases, sending improperly billed items back to the claims department, and when appropriate, requesting service credits for the Group Health member to prevent abuse from occurring, and letting other departments and supervisors know when a billing or membership action appeared to violate policies or law. However, Mr. Keyes' actions were not without personal risk as Group Health had a reputation for instantly terminating any employee, particularly temps, who questioned billing practices. In fact, Mr. Keyes had witnessed another GHC employee be summarily fired and escorted from the building for questioning a billing practice [CP 73, 119]. With the termination of the Plaintiff for noting that billing practices violated Washington law there can be little doubt as to the chilling effect these personnel actions will have on other Group Health employees concerned about unethical or unlawful

practices within Group Health Cooperative. "When the rights of even one citizen may be so cavalierly dispatched none may rest easy." *Wagner v. City of Globe*, 150 Ariz. 82, 90 (1986).

In the retaliatory discharge context, Washington law has recognized a cause of action where an employee has an objectively reasonable belief an employer has violated the law. A reasonable belief by the employee, rather than an actual unlawful employment practice, is all that need be proved to establish a retaliation claim. *Moyo v. Gomez*, 40 F.3d 982, 985 (9th Cir. 1994). In fact, to establish his retaliation claim under RCW 49.17.160(1), Ellis is not required to prove an actual WISHA violation. All he has to do is prove the City terminated him for making a WISHA complaint. See *Wilson v. City of Monroe*, 88 Wn. App. 113, 943 P.2d 1134 (1997). *Ellis v. Seattle*, 142 Wn.2d 450, 460-61 (2000).

Mr. Keyes' preemptive actions are the same actions that are affirmed by our Supreme Court in *Cudney* when they stated "This is different from *Hubbard*, where we noted that it is important to protect employees against retaliation when they speak up before violations of public policy occur so that the violations can be prevented altogether." *Cudney*, No. 83124-6 at 14. See *Hubbard*, 146 Wn.2d at 717. *Hubbard* was an employee of the Spokane County Planning Department, and he reported concerns about

zoning violations to his direct supervisor, a decision maker on zoning issues. By speaking up, Hubbard could actually stop the alleged public policy violation. *Cudney, No. 83124-6 at 15.*

Mr. Keyes identified consumer abuse, spoke up to prevent it, in some cases maybe did prevent it, and was terminated because of it. He has met the jeopardy element and the trial court erred in not recognizing it. .

3. Replevin.

Causes of actions are improperly dismissed solely because another venue is available.

The Amended Complaint states a cause of action for replevin of personal property retained by Group Health. Group Health's argument that the action could have been better brought in another court because of the low dollar amount involved [RP 5]. The Superior Court is a court of general jurisdiction and this cause of action can be heard. It would have been improper to split the claims in a lawsuit to have them heard before different courts. *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn.App. 728, 733-734 (Div. III 1999)[Washington generally does not permit splitting a claim or cause of action] citing *Landry v. Luscher*, 95 Wn.App. 779, 780-81, 976 P.2d 1274 (1999). Even if the cause of action could be brought in another court, that does not meet the criteria for dismissal pursuant to CR 12(b)(6).

Mr. Keyes has paid the filing fee in this court and should not have to pay an additional filing fee to have the matter heard elsewhere. The reality is that if Mr. Keyes now sought to bring the issue in a court of limited jurisdiction Group Health would argue res judicata. Mr. Keyes has effectively been prevented from having a valid cause of action adjudicated.

CONCLUSION

The trial court erred in making determinations of fact in opposition to the facts as stated by Mr. Keyes in the Amended Complaint. Furthermore, in failing to undertake proper analysis of each issue where the court made factual determinations, the trial court made additional errors in failing to recognize that the borrowed servant doctrine applied and Mr. Keyes was in fact an employee of Group Health; and that in making it known to Group Health that one or more of their billing practices violated their internal policies and consumer protection laws of the State of Washington, Mr. Keyes is entitled to protection against a retaliatory discharge in violation of public policy.

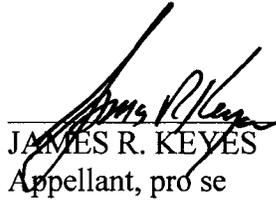
This court should reverse the dismissal and remand with a specific opinion that the borrowed servant doctrine applies, and consistent with that doctrine, Mr. Keyes was an employee of the borrowing employer, Group Health with all the legal consequences of the new relation.

This court should reverse the dismissal and remand with a specific opinion that any whistleblowing actions by Mr. Keyes serving as an agent for Group Health entitle him to public policy protection against a retaliatory wrongful discharge.

The trial court's failure to recognize and address the replevin cause of action was simply an expedient way of eliminating an action by a pro se litigant, was unreasonable, unjustifiable, and should be reversed, perhaps with the simple message "Thou shalt not steal."

With reversal, Mr. Keyes should be awarded all reasonable costs and statutory attorney fees.

RESPECTFULLY SUBMITTED this 14th day of October, 2011.



JAMES R. KEYES
Appellant, pro se

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that on October 14, 2011 I personally served the Defendants in this matter with the foregoing document by personally depositing a copy into the U.S. Mail, postage prepaid, and addressed to Tracy M. Miller, Karr-Tuttle-Campbell, 1201 Third Avenue, Seattle, WA 98101.

Signed and dated this 14th Day of October, 2011 in Lincoln County, Washington.



JAMES R. KEYES