

NO. 322777-III

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

MARGRETA KILGORE, a single woman,

Respondent.

vs.

SHRINERS HOSPITALS FOR CHILDREN, a Colorado corporation,

Appellant.

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiff Margreta Kilgore brought this action against her former employer, defendant Shriners Hospital for Children, seeking damages for unlawful termination of her employment. Ms. Kilgore was discharged from her position as a Financial Services Director on July 24, 2010 after Shriners employees complained of improper payroll editing practices. Shriners investigated those complaints and independently decided to pay the employees over \$380,000.00 in unpaid wages. This sum included exemplary damages under RCW 49.52.050. Defendant made this payment to its employees on November 18, 2010.

Ms. Kilgore filed this lawsuit on September 17, 2010. On December 30, 2011, over one year following its payment to the employees, Shriners filed its Answer, Affirmative Defenses, and Counterclaims. In its counterclaim, defendant alleged that Ms. Kilgore was liable back to it for the \$380,000.00 plus wage payments made to its employees.¹

The trial court dismissed Shriners' counterclaim on summary judgment. The court held there was no factual or legal basis for the counterclaim. The court further held that the counterclaim was barred by

¹ Defendant asserted an additional counter-claim alleging that plaintiff's complaint is "patently frivolous, baseless and without foundation in law or fact." The trial court dismissed both defendant's counterclaims on summary judgment. Defendant addresses only its claim for reimbursement of wages and exemplary damages paid to employees in this appeal.

the one year statute of limitations applicable to claims for contribution defined in RCW 4.22.050. Finally, the trial court denied defendant's subsequent Motion for Reconsideration of that Order.

Shriners sought and obtained discretionary appellate review of the trial court Orders dismissing its counterclaim. It argues that its counterclaim is one for indemnity subject to a three year statute of limitations. This is simply wrong. The legislature abolished the common law right of indemnity in the 1986 Tort Reform Act. See RCW 4.22.040(3). As Shriners states clearly in its brief, any liability it had for alleged wrongful conduct on the part of Ms. Kilgore was predicated on the doctrine of respondeat superior because of the employer/employee relationship between it and Ms. Kilgore. Under these circumstances, if Shriners had any claim at all against Ms. Kilgore (it did not), it is a claim for contribution under RCW 4.22.040(1). See *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990). (Employer's claim against employee for damages paid to third party based on wrongful conduct of employee is claim for contribution under RCW 4.22.040).

Shriners' claim for contribution was subject to a one-year statute of limitations. RCW 4.22.050(3). The contribution claim accrued when Shriners paid the employees over \$380,000.00 for alleged unpaid wages and exemplary damages on November 18, 2010. *Id.* Defendant filed its

counterclaim for contribution against Ms. Kilgore over one year later on December 30, 2011. Independent of the merits of that counterclaim (there are none), the trial court properly held it was barred by the statute of limitations. Therefore, the trial court's summary judgment order dismissing Shriners' counterclaim should be affirmed.

II. STATEMENT OF THE CASE

Plaintiff Margreta Kilgore was employed with Shriners Hospital for almost 38 years from December 4, 1972 through July 24, 2010. She started as a payroll clerk and rose to the position of Director of Fiscal Services, reporting directly to the hospital administrator (CP 201-202). By all accounts, Ms. Kilgore was an exemplary employee throughout her tenure of employment with the hospital. Indeed, in her December 2009 performance evaluation, just seven months before her discharge, Shriners' hospital administrator Gene Raynaud characterized Ms. Kilgore as "the conscience of the hospital. Her actions and integrity are above reproach." (CP 244).

Ms. Kilgore's duties as Director of Fiscal Services included overseeing and administering the hospital's payroll practices. Shriners had a specific policy which covered the manner in which hourly employees recorded their time for payroll purposes. That policy provided in relevant part:

You must clock in no more than 7 minutes prior to the start of your shift, and no more than 7 minutes after your shift ends unless you have your manager's approval. . . . The 7 minute window is for payroll purposes only and does not constitute a grace period for being tardy/late for work.

(CP 207).

Under the policy, hourly employees were required to clock in or out within seven minutes of their scheduled start or end time of their shifts. Their time was recorded in 15 minute intervals for payroll purposes. If an hourly employee clocked in or out outside the seven minute window, they were required to have management approval. Absent management approval, they were not authorized to be paid for the additional time. (CP 252-253).

Ms. Kilgore had administered this payroll policy and practice for many years. It was the policy and practice of the hospital to edit employee time records back to within the seven minute window if their time cards reflected they had clocked in or out outside the seven minute window without management approval. Hospital management personnel, including the Human Resources Director and the Hospital Administrator were aware of this policy and practice. (CP 252-253; 214-215). This policy and practice was specifically addressed and discussed at a Shriners Hospital Department head meeting conducted on January 19, 2009. Hospital

Administrator Gene Raynaud was present and participated in that meeting. (CP 220-221, 223).

On June 15, 2010, a Shriners employee filed an anonymous complaint on the hospital ethics hotline alleging that Ms. Kilgore and another management employee were “falsifying” employee time cards by editing time reflected on the cards that was outside the seven minute window. Shriners investigated the employee complaint and concluded that the editing of time cards for unauthorized time outside the seven minute window violated wage and hour laws. On November 18, 2010, Shriners paid the employees for unpaid wages and exemplary damages. (CP 400-401).

Defendant discharged plaintiff from her employment on July 24, 2010. (CP 201-202). Ms. Kilgore then filed this wrongful termination suit on September 17, 2010. (CP 1-8). On December 30, 2011, over one year following its payment of wages and exemplary damages to the employees, Shriners filed its counterclaim against Ms. Kilgore. (CP 9-15).

On September 18, 2013, plaintiff filed a Motion for Partial Summary Judgment seeking dismissal of defendant’s counterclaim. (CP 183-184). On December 6, 2013, the trial court entered an Order Granting Plaintiff’s Motion for Partial Summary Judgment and dismissing defendant’s counterclaim. (CP 450-452). The Order provides:

1. There is no basis on substantive grounds to support defendant's counterclaim alleging that plaintiff is liable to the defendant for wage payments made to Shriners employees based on payroll time and edits.
2. Defendant's claim against plaintiff for the wage payments paid to Shriners employees is barred by the one year statute of limitations set forth in RCW 4.22.050.

(CP 451).

Defendant then moved for reconsideration of the trial court's summary judgment order. (CP 413-415). The trial court denied that motion on January 14, 2014. (CP 453-455). Shriners moved for CR 54(B) certification on January 31, 2014. (CP 463-465). The trial court granted that motion on February 7, 2014. (CP 470-474). This appeal timely followed. (CP 475-479).

III. SUMMARY OF ARGUMENT

Shriners' argument on appeal fails for two reasons. First, its claim for common law indemnity is unavailable under Washington law. The common law right of indemnity between joint tortfeasors has been abolished. RCW 4.22.040(3). Any claim Shriners may have had against Ms. Kilgore is based on respondeat superior because of the employer-employee relationship between the two. That claim is one for contribution under RCW 4.22.040(2). *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).

The trial court properly held that Shriners' contribution claim was barred by the one year statute of limitations. See RCW 4.22.050(3).

Second, Shriners produced no evidence to support a finding of liability against Ms. Kilgore premised on any legal theory. The trial court properly granted summary judgment dismissing defendant's counterclaim on substantive grounds.

IV. ARGUMENT

1. Defendant's counterclaim is for contribution and is barred by the one year statute of limitations.

The trial court dismissed Shriners' counterclaim on summary judgment, holding, in part, that its claim was for contribution and barred by the one year statute of limitations, RCW 4.22.050(3). Defendant contends this was error because its counterclaim is based on a common law right of indemnity, and is therefore subject to a three year limitation period. The dispositive issue is whether Shriners' counterclaim is one for contribution or indemnity. Defendant's argument that it has a common law right of indemnity is simply wrong. There is no common law implied contractual indemnity right under Washington law. See *Toste v. Durham & Bates Agencies, Inc.*, 116 Wn. App. 516, 523-525, 67 P.3d 506 (2003) (holding that RCW 4.22.040 and RCW 4.22.060 extinguished the implied right of indemnity.)

RCW 4.22.040(1) provides in relevant part: “The common law right of indemnity between active and passive tortfeasors is abolished. . . .” In abolishing indemnity rights between joint tortfeasors, the legislature intended such rights would be replaced with contribution rights. *Sabey v. Howard Johnson Co.*, 101 Wn. App. 575, 589, 5 P.3d 730 (2000), *citing Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 560, 663 P.2d 482 (1983); See also, RCW 4.22.040(1). Because there is no common law right of indemnity, the claim alleged by Shriners against Ms. Kilgore for wages and exemplary damages paid to its employees is one for contribution. See *Gass v. MacPhersons, Inc. Realtors*, 79 Wn. App. 65, 899 P.2d 1325 (1995). The claim for contribution is subject to a three year statute of limitations. RCW 4.22.050(3). Shriners’ contribution claim accrued when it paid the employees on November 18, 2010. It filed the counterclaim over one year later on December 30, 2011. The trial court properly held it was time barred.

Shriners argues: “Under Washington law, an employer may bring an indemnity action against the employee for damages paid to a third party because of the wrongful acts of that employee based on an implied contractual relationship between the employer and employee.” (Brief of Appellant, p. 8). Defendant cites *Glover v. Richardson & Elmer Co.*, 64 Wash. 403, 409-410, 116 P. 861 (1911); *Gaffner v. Johnson*, 39 Wash. 437,

438-39, 81 P. 859 (1905), and a string of cases from jurisdictions throughout the country in support of this proposition. All of the cases relied upon by Shriners pre-date by many years the 1986 Tort Reform Act which expressly abolished this implied right of indemnity.

Every case cited by Shriners involves an employer asserting an indemnity claim against an employee when the employer was compelled to pay damages to a third party for the wrongful conduct of the employee under the doctrine of respondeat superior. That is precisely what Shriners is attempting to do in the instant case by its own admission. Defendant states: “Shriners was responsible for paying its third party employees unpaid wages (and liquidated damages and interest) pursuant to state and federal law under the doctrine of respondeat superior because of Kilgore’s wrongful timecard editing practices.” (Brief of Appellant, p. 10). This is precisely the type of claim that is properly characterized as one for contribution, subject to the one year limitation period. See *Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).

In *Kirk*, an employer was subject to respondeat superior liability to a third party for personal injuries caused by the negligence of his employee. The employer sought contribution from the employee for the amounts he paid to the third party. The Supreme Court stated:

We hold that RCW 4.22.040 grants to Kirk, the vicariously liable principal, a right of contribution against Moe, his primarily liable agent, by virtue of Kirk's settlement with the injured party when that settlement released the agent, subject to the reasonableness of the settlement.

114 Wn.2d, at p. 556.

RCW 4.22.040(3) abolishes the common law right of indemnity under Washington law. Shriners' claim against Ms. Kilgore, based on its respondeat superior liability for her alleged wrongful acts as its employee, is a claim for contribution. *Kirk v. Moe*, 114 Wn.2d, at 556; RCW 4.22.040(1). That claim for contribution was subject to a one year statute of limitations. RCW 4.22.050(3). Because Shriners filed its counterclaim against Ms. Kilgore more than one year after its claim for contribution accrued, the trial court properly held it was barred by the one year statute of limitations. That ruling should be affirmed.

2. There is no substantive basis in fact or law to support defendant's counterclaim.

The trial court also held that there was no substantive basis in law or fact to support Shriners' counterclaim. This ruling was correct and should be affirmed.

Shriners' counterclaim identified no legal theory to support its claim that Ms. Kilgore was liable back to it for wage payments made to the third party employees. Defendant alleged that plaintiff "willfully and wrongfully

deprived Shriners employees of wages owed, causing damages to Shriners. As a direct and proximate result, plaintiff is liable to Shriners for all damages and economic loss, caused to Shriners by plaintiff's acts and/or omissions, in amounts to be proven at time of trial." (CP 13). Shriners did not identify indemnity, contribution, or any other legal theory to support this claim.

As explained above, any claim for indemnity or contribution fails as a matter of law. There is no common law indemnity claim under Washington law. RCW 4.22.040(3). If Shriners' claim is one for contribution, it is barred by the statute of limitations. Finally, Shriners produced no evidence to support its counterclaim.

Defendant alleged that plaintiff "willfully and wrongfully deprived Shriners employees of wages owed. . . ." In response to Plaintiff's Motion for Partial Summary Judgment, Shriners argued in part that Ms. Kilgore's alleged liability was based on RCW 49.52.050 and 070. (CP 296-297). These statutes provide that an officer, vice principal or agent of an employer who willfully deprives any employee of wages due may be liable to the employee for double damages. First, the statute provides that an agent of an employer may be liable to employees for wrongful withholding of wages. The statute does not say that the agent is liable back to the employer for the

wage payments made to the employees. Shriners' claim fails as a matter of law.

Second, RCW 49.52.050 and RCW 49.52.070 provide that an employer and its agent who "willfully and with intent to deprive the employee of any part of his wages" withholds wages from the employee are subject to double damages. There is no evidence in the record to support a finding that Ms. Kilgore "willfully" deprived Shriners' employees of their wages. The failure to pay wages is not willful if there is a bonafide dispute over the obligation to pay. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 160, 961 P.2d 371 (1998). Ms. Kilgore testified her intent in editing the time cards, consistent with Shriners' established seven minute window policy, was simply to make sure that employees were paid for time worked. (CP 249-250). There was no intent on her part to deprive any employee of wages due and owing. (CP 250). Shriners' Human Resources representative, Kathy Dean, testified that this was exactly Ms. Kilgore's intent, i.e., to pay employees for actual time worked, not to deprive them of wages due and owing. (CP 237-238).

Shriners produced no evidence to support a factual finding that Ms. Kilgore "willfully" deprived its employees of wages owed as alleged in its counterclaim. The trial court properly held that there was no basis in fact or law to support defendant's counterclaim. The trial court's Order

Granting Plaintiff's Motion for Partial Summary Judgment and dismissing defendant's counterclaim should be affirmed.

RESPECTFULLY SUBMITTED this 9 day of March, 2015.

PAUL J. BURNS, P.S.

By



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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the 4 day of March, 2015, at Spokane, Washington, the forgoing was caused to be served on the following person(s) in the manner indicated:

James M. Kalamon Paine Hamblen, LLP 717 West Sprague Avenue Suite 1200 Spokane, WA 99201	<input type="checkbox"/> Regular Mail <input type="checkbox"/> Certified Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Facsimile <input type="checkbox"/> Overnight Mail
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