

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS NO: 355861

Okanogan County Superior Court No: 14-2-00526-3

RYAN FRAZIER,

Plaintiff/Appellant,

v.

STEVE QUICK and JANE DOE QUICK, husband and wife,

and

OROVILLE SCHOOL DISTRICT NO. 410,

Defendant/Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

1. ISSUES ON APPEAL..... 1

2. THE TRIAL COURT’S RULINGS ON MOTIONS IN
LIMINE VIOLATED PLAINTIFF’S DUE PROCESS
RIGHTS..... 1

 a. Arbitrary and Capricious Decisions by the School Board
 Violate Due Process..... 1

 b. Plaintiff was Deprived of His Right to a Jury..... 2

 c. The Trial Court Improperly Vacated the Summary
 Judgment Made in this Case..... 3

3. STANDARD OF REVIEW..... 4

 a. By Trial Court..... 4

 b. By Appellate Court..... 5

4. DEFENDANTS’ CONFLATE “ARBITRARY AND
CAPRICIOUS” AND THE “SUBSTANTIAL EVIDENCE
RULE”..... 5

5. NON-RENEWAL OF PLAINTIFF’S PROVISIONAL
CONTRACT VIOLATED STATE LAW..... 7

6. TRIAL COURT IMPROPERLY DISMISSED CLAIMS
AGAINST QUICK..... 13

7. BOD VIOLATED RIGHT OF DUE PROCESS BY
DEPRIVING FRAZIER OF RIGHT TO ADDRESS
BOARD..... 14

8. PLAINTIFF'S DAMAGES INCLUDED	
EMOTIONAL DISTRESS.....	15
CONCLUSION.....	16

TABLE OF AUTHORITIES

Federal Cases:

<i>W. Va. State Bd. of Educ. V. Barnette</i> , 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).....	11
<i>Wooley</i> , 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752.....	11

State Cases:

<i>Alpha Kappa Lambda Frat v. WSU</i> , 152 Wn.App. 401, 216 P.3d 451 (2009).....	2
<i>Andrew v. King County</i> , 21 Wn.App. 566, 586 P.2d 509 (1978)	
<i>Bircumshaw v. State</i> , 194 Wn.App. 176, 380 P.2d 524 (2016).....	1
<i>Brotherton v. Kralman Steel Structures, Inc.</i> , 165 Wn.App. 727, 269 P.3d 307 (2011).....	6
<i>B'ness Serv. Of Am. II, Inc. v. Wafer Tech LLC</i> , 120 Wn.App. 1042, 2004 WL 444724 (Div. 2, 2004).....	4
<i>Cagle v. Burns & Roe</i> , 106 Wn.2d 911, 726 P.2d 434 (1986).....	15
<i>Dodson v. Econ Equip. Co.</i> , 188 Wash. 340, 62 Pac. 388 (1897)...	14
<i>Donahue v. Central Wash. Univ.</i> , 140 Wn.App. 17, 163 P.3d 801 (2007).....	1
<i>Dickson-McFerran Prop. V. Mackie</i> , 87 Wn.App. 1095, 1997 WL 63397 (Div. 2, 1997).....	4
<i>Eastwood v. Horse Harbor Foundation</i> , 170 Wn.2d 380, 241 P.3d 1256 (2010).....	14

<i>Federal Way Sch. Dist. v. Vinson</i> , 172 Wn.2d 756, 261 P.3d 145 (2011).....	5
<i>Foster</i> , 83 Wn.App. 347, 921 P.2d 552 (1984).....	5
<i>Grader v. City of Lynwood</i> , 45 Wn.App. 876, 728 P.2d 1057 (1986).....	5
<i>Haynes v. Seattle Sch. Dist.</i> , 111 Wn.2d 250, 458 P.2d (1988)...	8
<i>Health Ins. Pool v. Health Care Auth.</i> , 129 Wn.2d 504, 919 P.2d 62 (1996).....	4
<i>Helland v. King County Civil Service Comm'n</i> , 84 Wn.2d 858, 529 P.2d 1058 (1975).....	6
<i>Ito Int'l Corp. v. Prescott, Inc.</i> , 83 Wn.App. 282, 921 P.2d 566 (1966).....	4
<i>Kerr-Belmark Constr. Co. v. City Council</i> , 36 Wn.App. 370, 674 P.2d 684 (1984).....	5
<i>Leschi Imp. Council v. Wash. State Highway Comm'n</i> , 84 Wn.2d 271, 525 P.2d 774 (1974).....	4
<i>Nieshe v. Concrete Sch. Dist.</i> , 129 Wn.App. 632, 127 P.2d 713 (2005).....	1
<i>Norquest/RCA-W Bitter Lake Partnership v. City of Seattle</i> , 7 2 Wn.App. 467, 865 P.2d 18 (1994)	12
<i>Petroni v. Deer Park Sch. Dist.</i> , 127 Wn.App. 722, 113 P.3d 10 (2005).....	10
<i>Porter v. Seattle Sch. Dist.</i> , 160 Wn.App. 872, 248 P.3d 1115 (2011).....	7
<i>Schlosser v. Beth Sch. Dist.</i> , 183 Wn.App. 280, 333 P.3d 475 (2014).....	7

<i>Snider v. Board of County Comm'rs of Walla Walla County</i> , 85 Wn.App. 371, 932 P.2d 704 (1997).....	13
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989)...	2
<i>Spokane Cy. Fire Protec. Dist. 8</i> , 27 Wn.App. 491, 618 P.2d 1326 (1980).....	5
<i>State v. Ford</i> , 110 Wn.2d 827, 755 P.2d 806 (1988).....	13
<i>State v. K.H.H.</i> , 185 Wn.2d 745, 374 P.3d 1141 (2016).....	11
<i>Strong v. Terrell</i> , 147 Wn.App. 376, 195 P.3d 977 (2008).....	15
<i>William v. Seattle Sch. Dist.</i> , 97 Wn.2d 215, 643 P.2d 426 (1982).....	6

Statutes:

RCW 7.16.040.....	8
RCW 28A.400.010.....	13
RCW 28A.405.030.....	11
RCW 28A.405.100.....	9, 10
RCW 28A.405.220.....	8
RCW 41.59.010 thru 41.59.170.....	9
RCW 41.59.910.....	9

Other Authority:

Washington State Constitution Article 1 §21.....	2
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1. ISSUES ON APPEAL

Defendants incorrectly argue that Plaintiff has limited his challenge to only certain of the Trial Court's Findings of Fact (Response Brief p. 16). However, Plaintiff clearly stated that although certain facts are more significant, all Findings of Fact are at issue here. (Appellant's Opening Brief p. 16).

Certain Conclusions of Law are not at issue, however there are many that were decided incorrectly by the trial court. Those matters have been addressed in Plaintiff's opening brief and are discussed further here.

2. THE TRIAL COURT'S RULINGS ON MOTIONS IN LIMINE VIOLATED PLAINTIFF'S DUE PROCESS RIGHTS

a. Arbitrary and Capricious Decisions by the School Board Violate Due Process

It is clear that decisions by any governmental entity that are arbitrary and capricious violate a citizen's right to substantive due process. *Bircumshaw v. State*, 194 Wn.App. 176, 380 P.3d 524 (2016); *Nieshe v. Concrete Sch. Dist.* 129 Wn.App. 632, 127 P.2d 713 (2005).

Courts grant relief where (among other reasons) the decision is outside the statutory provisions, or the governmental entity engaged in unlawful procedures, or the decision is not supported by substantial evidence considering the entire record. *Donahue v. Central Wash. Univ.*,

140 Wn.App. 17, 23, 163 P.3d 801, 805 (2007). Under the “substantial evidence” standard, an agency finding of fact will be upheld only if it is supported by “evidence that is substantial when viewed in light of the whole record before the court.” *Alpha Kappa Lambda Frat. v. WSU*, 152 Wn.App. 401, 417-418, 216 P.3d 451, 460 (2009)

In this case, it is clear that the Oroville School Board intentionally refused to accept proof that the Superintendent’s recommendation for non-renewal was fatally flawed. It proceeded despite knowing it was disregarding evidence that contradicted false claims by the Superintendent. Furthermore, the Board ignored statutory requirements for conducting evaluations of provisional teachers. Therefore, the decision by the Board, and subsequent decision by the trial court, are not supported by substantial evidence because relevant and significant evidence was improperly excluded.

b. Plaintiff was Deprived of His Right to a Jury

The trial court improperly deprived Plaintiff of his right to trial by jury. It is undisputable that the Washington State Constitution provides for trial by jury in civil actions. *Washington State Constitution* Article 1 §21. This expressly includes the right to a jury determination of damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989). In this case there were jury questions whether the Board was arbitrary and capricious,

and whether those wrongful acts caused Plaintiff to suffer emotional distress.

Contrary to arguments by Defendants, it was improper for the trial court to dismiss the jury and compel the Plaintiff to try this case to the bench.

c. The Trial Court Improperly Vacated the Summary Judgment Made in This Case

The Court denied the Defendants' motion for summary judgment (CP 462-465). Subsequently, the Court issued a Memorandum Decision (CP 1972-1974) in response to Defendants' Motion for Reconsideration. In doing so, the Court expressly found:

“A.1. The decision of the Oroville School Board was made “arbitrary and capricious” based upon the facts as “subjectively” submitted to them by the Superintendent Steve Quick, including adequacy or methodology of evaluation, and with disregard for other important evaluations, observations, recommendations, or comments of others along with the possible withholding of information as alleged or stated in declarations. Further it appears that a proper review and consideration of information by the individual board members was not made or they failed to perform their duty as a board member.”

At the pretrial hearing the judge specifically reiterated his intent to find that the acts of the Board were “arbitrary and capricious”. (VRP 9:8 – 10:11). For reasons that were unclear then, and remain unclear, the trial judge seemed to believe he could not issue a Summary Judgment Order in favor of the Plaintiff *sua sponte* (VRP 14:25-15:8), which is clearly not a correct statement of the law. *Business Serv. Of Am. II, Inc v. WaferTech, LLC*, 120 Wn.App. 1042, 2004 WL 444724 (Div. 2, 2004) – citing *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504,507, 919 P.2d 62 (1996); *Dickson-McFerran Prop. v. Mackie*, 87 Wn.App. 1095, 1997 WL 633947 (Div. 2, 1997) – citing *Ito Int’l Corp. v Prescott, Inc.*, 83 Wn.App. 282, 288 n.2, 921 P.2d 566 (1966).

The trial court incorrectly dismissed the jury. Whether the acts of the School Board were arbitrary and capricious were questions of fact, not of law.

3. STANDARD OF REVIEW

a. By the Trial Court

The Supreme Court explained in *Leschi Imp. Council v. Wash. State Highway Comm’n*, 84 Wn.2d 271, 525 P.2d 774 (1974) that judicial review of findings of fact made by administrative agencies, is whether the findings are supported by substantial evidence, and have a rational basis. Here, certainly, by excluding critical evidence the determination by the

Oroville School Board was clearly an error and made arbitrarily and capriciously.

b. By the Appellate Court

The Court of Appeals does not rely on the Findings and Conclusions entered by the trial court. *Grader v. City of Lynnwood*, 45 Wn.App 876, 880, 728 P.2d 1057, 1059 (1986) citing *Spokane Cy. Fire Protec. Dist 8*, 27 Wn.App. 491, 493, 618 P.2d 1326, 1327 (1980).

4. DEFENDANTS CONFLATE “ARBITRARY AND CAPRICIOUS” AND THE “SUBSTANTIAL EVIDENCE RULE”

Throughout the Reply Brief, Defendants use the terms “substantial evidence” and “arbitrary and capricious” interchangeably, the two legal doctrines are entirely different.

“Arbitrary and capricious action is “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Foster*, 83 Wn.App. at 347, 921 P.2d 552 (quoting *Kerr–Belmark Constr. Co. v. City Council*, 36 Wn.App. 370, 373, 674 P.2d 684 (1984)).”

Federal Way Sch. Dist. v. Vinson, 172 Wn.2d 756, 769, 261 P.3d 145, 152 (2011).

On the other hand, “substantial evidence” rule provides that an appellate court will not substitute its judgment for that of the trial court

with regard to weight and credibility of the evidence. *Brotherton v. Kralman Steel Structures, Inc.*, 165 Wn.App. 727, 736, 269 P.3d 307, 311 (2011).

Defendants argue that as long as there is any evidence to support the trial court's decision, that decision must be affirmed on appeal (Response Brief p.5-6). But certainly, in this case, the substantial evidence rule cannot apply. The trial court made no findings or conclusions regarding credibility or weight, and simply failed to even mention (or, apparently, consider) all of the evidence and witnesses supporting Plaintiff's claims. Clearly, the substantial evidence rule is not available when both the Board looks at only part of the evidence, and doesn't merely disregard other evidence, it actively prevents Plaintiff from presenting supporting documentation and other information.

The right to be free from arbitrary and capricious action is a fundamental right. *William v. Seattle Sch. Dist.*, 97 Wn.2d 215, 221-222, 643 P.2d 426 (1982). Refusing to accept all of the evidence offered by the plaintiff is arbitrary and capricious. *Helland v. King County Civil Service Commission*, 84 Wn.2d 858, 863, 529 P.2d 1058, 1061 (1975).

“Arbitrary and capricious” agency action is “willful and unreasoning action” that is taken without consideration and in disregard of

the facts and circumstances of the case. *Porter v. Seattle Sch. Dist.*, 160 Wn.App. 872, 880, 248 P.3d 1111, 1115 (2011).

It is true that where there is room for two opinions, an administrative action is not arbitrary or capricious provided the agency rendered its decision honestly and with due consideration for all the facts and evidence. *Schlosser v. Bethel Sch. Dist.*, 183 Wn.App. 280, 294 333 P.3d 475, 482 (2014).

Steve Quick misrepresented to the Board and to the court that Ryan Frazier was unwilling to do lesson plans. In reality, he did daily lesson plans, and the problem was Quick's insistence on penalizing Frazier for not using the online software in addition. (VRP 139:11-141:12). He provided daily lesson plans to Steve Quick (VRP 171-172), but the binders containing those lesson plans are now missing (VRP 176-179; 278-281).

In this case the Superintendent and the Board disregarded evidence. Therefore, the trial court's determination to uphold the non-renewal is reversible error.

5. NON-RENEWAL OF PLAINTIFF'S PROVISIONAL CONTRACT VIOLATED STATE LAW

Defendants concede that the School Board is a "lower tribunal" for purposes of determining if its actions were arbitrary and capricious, and that a provisional teacher has the right to petition the court for relief

pursuant to RCW 7.16.040. (Response Brief p.7-8) Actions taken by a school board regarding employment decisions are quasi-judicial. *Haynes v. Seattle Sch. Dist.*, 111 Wn.2d 250, 458 P.2d 7 (1988).

Defendants take the extraordinary position that the Board was entitled to non-renew Mr. Frazier “for any reason as long as the nonrenewal is not arbitrary and capricious or contrary to law”. (Response Brief p.19). This is a blatant misstatement of the law, and probably explains why the Board was so confident in disregarding all evidence showing that non-renewal was contrary to all recommendations, (except those of Superintendent Quick and the Board President, Rocky Devon).

In this case, the primary reason for non-renewal was alleged failure to do lesson planning, despite testimony by school Principal Kristin Sarmiento that Ryan Frazier did more lesson planning than most teachers. (VRP 356-360). and that she recommended him for renewal (VRP 351). and that Superintendent Quick initially decided to renew the provisional contract, but suddenly changed his mind (VRP 351-355).

The state statute is crystal clear that evaluation of a provisional teacher must be made solely on basis of specified criteria:

“RCW 28A.405.220 . . .

(2) In the event the superintendent of the school district determines that the employment contract of any provisional employee should not be renewed by the district for the next ensuing term such provisional employee shall be notified thereof in writing on or

before May 15th preceding the commencement of such school term, or if the omnibus appropriations act has not passed the legislature by the end of the regular legislative session for that year, then notification shall be no later than June 15th, which notification shall state the reason or reasons for such determination. Such notice shall be served upon the provisional employee personally, or by certified or registered mail, or by leaving a copy of the notice at the place of his or her usual abode with some person of suitable age and discretion then resident therein. **The determination of the superintendent shall be subject to the evaluation requirements of RCW 28A.405.100.** (emphasis added).

There are 8 criteria listed in RCW 28A.405.100:

“RCW 28A.405.100 . . .

(2) (a) “Pursuant to the implementation schedule established in subsection (7)(c) of this section, every board of directors shall, in accordance with procedures provided in RCW 41.59.010 through 41.59.170, 41.59.910, and 41.59.920, establish revised evaluative criteria and a four-level rating system for all certificated classroom teachers.

(b) The minimum criteria shall include: (i) Centering instruction on high expectations for student achievement; (ii) demonstrating effective teaching practices; (iii) recognizing individual student learning needs and developing strategies to address those needs; (iv) providing clear and intentional focus on subject matter content and curriculum; (v) fostering and managing a safe, positive learning environment; (vi) using multiple student data elements to modify instruction and improve student learning; (vii) communicating and collaborating with parents and the school community; and (viii) exhibiting collaborative and collegial practices focused on improving instructional practice and student learning. Student growth data must be a substantial factor in evaluating the summative performance of certificated classroom

teachers for at least three of the evaluation criteria listed in this subsection.”

Contrary to the Defendants’ argument, Division III has already decided that these criteria are mandatory.

“For classroom teachers the criteria shall be developed in the following categories: Instructional skill; classroom management, professional preparation and scholarship; effort toward improvement when needed; the handling of student discipline and attendant problems; and interest in teaching pupils and knowledge of subject matter. RCW 28A.405.100(1).” (emphasis added)

Petroni v. Deer Park Sch. Dist., 127 Wn.App. 722, 731, 113 P.3d 10, 14 (2005).

In addition to ignoring the recommendations of Mr. Frazier’s supervisor, the school principal, none of the statutory criteria were considered by Superintendent Quick or the Board.

Instead of relying honestly and fairly on all the available facts, it seems clear that Board President Rocky Devon had ulterior motives for nonrenewal, based on his personal perception that Ryan Frazier was unpatriotic. (VRP 1013:7-1014:19).

Obviously, compelling anyone to say the pledge of allegiance is unconstitutional, and this rule applies in the context of public schools.

(notwithstanding the principle of teaching patriotism described in RCW 28A.405.030¹).

“The compelled speech doctrine generally dictates that the State cannot force individuals to deliver messages that they do not wish to make. *See, e.g., Wooley*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (the State may not compel individuals to display on their vehicles a license plate motto with which they disagree); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943) (a compelled flag salute and pledge of allegiance in public schools violates the First Amendment).”

State v. K.H.-H, 185 Wn.2d 745, 749, 374 P.3d 1141, 1142-1143 (2016).

Rocky Devon unilaterally removed Ryan Frazier from the list of teachers to be renewed, without consulting the Board members. (VRP 1012:21-1013:6), and he clearly did so for illegal reasons.

Furthermore, the Board, under the guidance of Superintendent Quick, acted arbitrarily and capriciously, in disregard for the requirements to evaluate a provisional teacher as clearly articulated in state statutes.

Steve Quick looked only at the initial evaluation done a few weeks after Ryan Frazier began teaching, and intentionally ignored all the input from Principal Sarmiento. Defendants’ brief (and Superintendent Quick’s testimony) focuses on the eVal report prepared by Principal Sarmiento that

¹ “It shall be the duty of all teachers to endeavor to impress on the minds of their pupils the principles of morality, truth, justice, temperance, humanity and patriotism; to teach them to avoid idleness, profanity and falsehood; to instruct them in the principles of free government, and to train them up to the true comprehension of the rights, duty and dignity of American citizenship.”

gave and “unsatisfactory” rating, but that was for the online planning software. (Response Brief p.37-38).

Steve Quick relied on Principal Sarmiento’s inadvertent error when she included a rating for failure to use the online planner, which she confirmed was in violation of the MOU (VRP 348:6-351:11). She testified that Ryan Frazier produced lesson plans but did not use the online planner. (VRP 355:8-356:12). He did meet all state requirements for lesson planning. (VRP 357:10-20). She recommended renewal. (VRP 375:14-24). Steve Quick admitted under oath that he withheld that information from the Board. (VRP 837:13-840:6).

Defendants argue, incorrectly, that Steve Quick had evidence other than the eVal report on which he based his sudden decision not to renew Ryan Frazier’s provisional teacher contract (Response Brief p.22). However, he testified that he relied on the eVal from Principal Sarmiento. (VRP 871:1-10).

As a consequence of Steve Quick’s obvious eagerness to non-renew Ryan Frazier’s provisional teacher contract, the Board acted arbitrarily and capriciously. Finding that conduct was arbitrary and capricious does not require finding animus or deliberate flouting of the law, but it does automatically entitle the plaintiff to damages for violation of the federal constitutional protection of substantive due process. *Norquest RCW-W*

Bitter Lake P'ship v. Seattle, 72 Wn.App. 467, 480, 865 P.2d 18, 26 (1994).

Whether conduct was arbitrary and capricious is a question of fact, and the appellate court reviews whether the underlying evidence shows the board acted in disregard of facts and circumstances. *Snider v. Board of County Comm'rs of Walla Walla County*, 85 Wn. App. 371, 376-377, 932 P. 704, 707 (1997) (zoning); *State v. Ford*, 110 Wn.2d 827, 755 P.2d 806 (1988) (administrative approval of breathalyzer).

6. THE TRIAL COURT IMPROPERLY DISMISSED CLAIMS AGAINST QUICK

Defendants also argue that as a matter of law, Steve Quick cannot be liable for tortious interference with contract because he is a “party” to the provisional teaching contract. This is wrong.

As discussed in Plaintiff's opening brief, the contract is between the teacher and the Board. (Appellant's Brief p.30-32) The Superintendent is merely one of the school district employees. RCW 28A.400.010.

Oroville School District may choose to defend and indemnify the superintendent, but that does not make him a party to the contract. Any liability for breach of contract would involve the district and the teacher, not the superintendent.

Other common law causes of action were appropriate because Steve Quick was merely an agent for the Board, and Washington law is clear that an agent is personally liable for his own torts, even though the principal also may be vicariously liable. *Dodson v. Econ. Equip. Co.*, 188 Wash. 340, 62 Pac. 388 (1897); *Eastwood v. Horse Harbor Foundation*, 170 Wn.2d 380, 241 P.3d 1256 (2010).

7. DEFENDANTS VIOLATED PLAINTIFF'S RIGHT OF DUE PROCESS BY DEPRIVING FRAZIER OF RIGHT TO ADDRESS BOARD

Defendants concede that other teachers were allowed not only to present evidence at a Board meeting before being terminated, they were allowed to personally address the Board. Defendants merely argue that it could treat Ryan Frazier differently ... because there is no statute that required the Board to allow him the same opportunity as others. (Response Brief p.49).

Defendants don't even comment on the fact Ryan Frazier testified he brought boxes and volumes of material to the meeting that would prove Steve Quick misrepresented the facts and misled the board by withholding critical information. (VRP 163:19-165:4).

It is clear that when Ryan Frazier met with Steve Quick, he tried to provide documentary proof that he prepared lesson plans, and some of what he did provide was not shared with the Board before they voted

to non-renew his contract, and most of which was removed from his classroom, so it was not available at trial. (VRP 171:21-179:17)

8. PLAINTIFF'S DAMAGES INCLUDED EMOTIONAL DISTRESS

Defendants argue that Plaintiff's claims of negligent infliction of emotional distress was properly dismissed. (Response Brief p.45-49).

However, the cases cited address only workplace disputes, not damages resulting from illegal termination. Defendants incorrectly argue that the dismissal of the emotional distress claim was proper.

[W]e hold that upon proof of the tort of wrongful termination of employment in violation of public policy, the claimant only is required to offer proof of emotional distress in order to recover those damages attributable to the wrongful termination."

Cagle v. Burns & Roe, 106 Wn.2d 911, 726 P.2d 434 (1986) (retaliatory discharge).

Further, based on the cases cited, Defendants seem to assert that medical testimony is required to prove emotional distress damages in the context of negligence. However, this is not true when the damages result from wrongful termination. See: *Strong v. Terrell*, 147 Wn.App. 376, 195 P.3d 977 (2008) (school district employee testified to her own emotional distress damages). The *Strong* case also holds that the claim presents a jury question. In this case, the court dismissed Plaintiff's claims on summary judgment, despite undisputed testimony that as a result of his

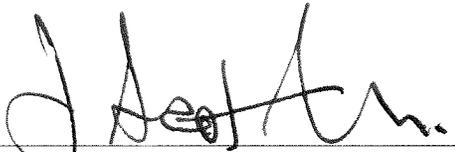
emotional distress, Ryan Frazier suffered a pneumothorax for which he was hospitalized.

CONCLUSION

Plaintiff/Appellant respectfully requests that the trial court's judgment dismissing the case be reversed, and remanded.

DATED this 24th day of August, 2018.

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By: 

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CERTIFICATE OF SERVICE

I declare, pursuant to RCW 9A.72.085 and under penalty of perjury under the laws of the State of Washington, on August 24, 2018, at Spokane, Washington, the a copy of the foregoing was duly served on all parties entitled to service by the method listed below, addressed as follows:

- | | | |
|-------------------------------------|----------------|--|
| <input type="checkbox"/> | Hand Delivery | James E. Baker |
| <input type="checkbox"/> | Overnight Mail | Jerry Moberg & Associates, P.S. |
| <input checked="" type="checkbox"/> | U.S. Mail | P.O. Box 130 |
| <input type="checkbox"/> | Facsimile | 124 3 rd Ave., S.W. |
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