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No. 72123-2-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

NORIO MITSUOKA

Plaintiff-Appellant

v.

FUMOTO ENGINEERING OF AMERICA, INC.,
a Washington Corporation,
NAOYUKI YAMAMOTO, an individual,
FUMOTO GIKEN CO., LTD, a Japanese Corporation,

Defendants-Respondents

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Jeffrey Ramsdell)

RESPONDENTS' BRIEF

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I.

INTRODUCTION

In this lawsuit, Plaintiff Norio Mitsuoka (“Mitsuoka”) seeks to turn the law of at-will employment in Washington on its head. Having conceded that there is no oral or written contract for employment, Mitsuoka insists he is entitled to lifetime employment or “just cause” only termination based on some theory of an implied employment contract. Given the facts as Mitsuoka has alleged them here (after having rewritten his complaint three times), there simply can be no employment claim under Washington law. The Court need not engage in any exercise over “hypotheticals” under CR 12(b)(6), as the dispositive facts, according to Mitsuoka, are as follows

- No one offered Mitsuoka a job. He started his own company and neither Yamamoto nor FGC had any ownership interest in the company until years after its inception. Thus, he could not have conditioned any “employment” with Yamamoto or FGC on some additional consideration that would warrant liability for lifetime employment for any of these Defendants.
- No one asked Mitsuoka to go without salary at any point while he was President (and admittedly the sole employee) of FEA. Mitsuoka has repeatedly confirmed that he made the unilateral decision to go without salary at some point in 1984, and then later in 2008 during the economic downturn. The notion that these two unilateral decisions on Mitsuoka’s part could create a “just cause” only termination employment relationship is nonsensical and finds no support in Washington law.

- Mitsuoka took steps as President of the company to infuse capital to keep the company running. If this were sufficient to create a guarantee of lifetime employment, any employee who made such an investment would enjoy lifetime employment. This is not the law in Washington.

Rather, by Mitsuoka's measure, the fact that he started a separate company with nothing more than a distributorship agreement with defendant FGC is enough to guarantee lifetime employment. As is no surprise, Mitsuoka fails to cite a single case that would support this creative view of how employment relationships work in Washington, which has always been a staunch protector of the at-will relationship. Specifically, Mitsuoka fails to cite any case where post-employment consideration can create a lifetime employment or "just cause" only termination relationship.

Even in a notice pleading state, CR 12(b)(6) dismissal is proper where, as here, the facts as affirmatively alleged are so afield from any possible basis for relief in the law. This goes for Mitsuoka's tortious interference with contract and business expectancy claims as well. It also goes for his eleventh hour addition of a minority shareholder claim based on the termination of his employment.

Again, this is not about hypothetical facts – this is about the law and the basis for viable claims based on the facts alleged, which

affirmatively foreclose any avenue for relief. Where there is no basis for relief, CR 12(b)(6) dismissal is proper. The trial court properly applied the law when it granted Defendants' motion to dismiss Mitsuoka's claims, denied his subsequent motion for reconsideration, and his post-dismissal motion for leave to amend. This Court should affirm those rulings.

II.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the trial court properly dismissed Mitsuoka's wrongful termination claim where Mitsuoka did not allege that the termination was in violation of any public policy? **Yes.**
2. Did the trial court properly dismiss plaintiff's breach of contract claim where (a) Mitsuoka conceded there was no oral or written employment agreement; and (b) Mitsuoka's own allegations confirm there was no implied contract under Washington law? **Yes.**
3. Whether the trial court properly dismissed any tortious interference with contractual relations claim where, as discussed above, Mitsuoka's own allegations confirm there was no contract upon which such a claim could be founded? **Yes.**

4. Whether the trial court properly dismissed Mitsuoka's complaint where there is no viable claim for tortious interference with business expectancy in at-will employment?¹ **Yes.**

5. Whether the trial properly exercised its broad discretion in denying the motion for reconsideration, where Mitsuoka again confirmed that there was no employment relationship and, therefore, there was no error of law and substantial justice has been done? **Yes.**

6. Whether the trial court properly exercised its broad discretion in denying a motion to amend where (a) such a motion was filed after the claims had been dismissed; and (b) where such an amendment would be futile, to wit:

(1) Plaintiff's Third Amended Complaint only confirmed that, at the inception of any business relationship, Mitsuoka would start his own company and would not be employed with any defendant until years later, and then, only by virtue of their partial ownership in Mitsuoka's business.

¹ Mitsuoka's Assignments of Error 1 and 2 refer to the trial court's grant of the motion to dismiss and denial of the motion for reconsideration. Brief of Appellant ("App. Br.") at p. 2. In the Issues Related to Assignments of Error 2, referencing Assignment of Error 1 and 2, Mitsuoka refers to the minority shareholder oppression claim. *Id.* That claim, however, was not before the trial court on the motion to dismiss and would not have properly been part of any motion for reconsideration, and is therefore unrelated to Assignments of Error 1 and 2 or Issues Related to Assignments of Error 2.

(2) The only agreement was a distributorship agreement between the two companies, not an employment agreement between Mitsuoka and any defendant.

(3) There are no grounds for relief under a minority shareholder theory for the termination of Mitsuoka's employment, thus amendment would have been futile.

The answer to all questions in this Section 6 is **yes**.

III.

COUNTER-STATEMENT OF THE CASE

A. The Changing Face of Mitsuoka's Complaint.

Mitsuoka filed his first complaint in King County Superior Court. Direct and Shareholder's Derivative Complaint for Oppression of Shareholder, Breach of Fiduciary Duties, Wrongful Termination of Employment, Accounting, Dissolution ("Original Complaint") (CP 105-23). The Original Complaint painted a different picture of the claims against the defendants than exist in their current incarnation. Mitsuoka's Original Complaint was a direct and derivative shareholder's complaint related to an agreement (the "Distribution Agreement") related to the ability of Fumoto Engineering of America to distribute valves on behalf of Fumoto Giken Company. *Id.* He alleged that defendant Naoyuki Yamamoto engaged in self-dealing and/or bad faith by doing business

with his (Yamamoto's) son's business. *Id.* at pp. 8-11 (CP 112-15). According to Mitsuoka, when he objected to this practice, Yamamoto instigated the termination of Mitsuoka's employment.² *Id.* at p. 11 (CP 115). Mitsuoka also brought a claim for wrongful termination based on his theory that he was entitled to lifetime employment at President of FEA. *Id.* at p. 16 (CP 120). There were no allegations that Mitsuoka's employment with FEA was conditioned on Mitsuoka providing any certain consideration.

The only "additional consideration" Mitsuoka mentioned was as follows: (a) he made loans to the company from his personal line of credit (no mention of any detriment); (b) he worked long hours, sometimes on the weekends; (c) he had an office in his home to be responsive to company needs; and (d) in "other ways" contributed in personal ways to the company. *Id.* at p. 12 (CP 116).

Defendant FEA moved to dismiss Mitsuoka's Original Complaint.³ Nominal Defendant Fumoto Engineering of America, Inc.'s Motion to

² These claims are included in each of the four complaints Mitsuoka filed. Defendants deny Mitsuoka's allegations regarding any purported bad faith or false basis for ending his at-will employment. Defendants accept these allegations as true only for purposes of the CR 12(b)(6) motions to dismiss at issue in this appeal.

³ At the time of filing this first motion to dismiss, Mitsuoka had not yet served Yamamoto or FGC. Nominal Defendant Fumoto Engineering (continued . . .)

Dismiss (CP 130-48). As related to the wrongful termination claim, FEA argued that there were insufficient facts to support any lifetime employment or “just cause” only termination claim. *Id.* at pp. 15-18 (CP 144-47). Specifically, FEA argued that (a) Mitsuoka had the authority as President of FEA to determine how and when loans to the company were made; (b) any hours worked would have been commensurate with Mitsuoka’s salary and consistent with the notion that he was a salaried employee; and (3) Mitsuoka’s creating a home office was simply “working from home,” which is to be expected from the president of a company. *Id.* at p. 16 (CP 145). Instead of responding to the motion to dismiss, Mitsuoka filed a Motion for a Change of Judge. Motion and Declaration for Change of Judge (CP 275-77).

B. Mitsuoka Files an Amended Complaint in Response to the Motion to Dismiss.

In his First Amended Complaint, Mitsuoka abandoned his shareholder claims and purported to refine his employment claims. Plaintiff’s First Amended Complaint for Tortious Interference with Contractual Relations and Wrongful Discharge (CP 154-63). Mitsuoka abandoned any reference to working long hours and working from home.

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of America, Inc.’s Motion to Dismiss at p. 3 n.2 (CP 132).

Instead, he alleged that “[i]n the early days of the Company, Plaintiff was not paid his salary and went for about six months without pay that he had earned.” *Id.* at p. 3 (CP 156). Mitsuoka had not yet confirmed that he started FEA as his own autonomous company, and that neither Yamamoto nor FGC were owners of the company at the time he went without salary. He did raise the issue of the loans again, but did not offer any allegation as to how those loans might have been detrimental to him. *Id.* at p. 4 (CP 157). Rather, Mitsuoka confirmed that the crux of his lifetime employment claim was based on the allegation that “Plaintiff *believed* that as long as FEA was successful, he would have employment permanently.” *Id.* at p. 2 (CP 155) (emphasis added). Mitsuoka did not allege that any defendant actually promised him lifetime employment or conditioned any employment on his forfeiting any opportunity or offering any consideration.

C. Defendants Remove and Mitsuoka Again Amends His Complaint.

Given that FEA was merely a nominal defendant, Defendants removed the case to the United States District Court for the Western District of Washington. Notice of Removal to Federal Court (CP 187-91). Defendants then moved again to dismiss Mitsuoka’s complaint (this time, the First Amended Complaint). Defendants’ Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (CP 342-50). Defendants argued that Mitsuoka

was not an employee of either Yamamoto or FGC. *Id.* at p. 6 (CP 347). Defendants also argued that the consideration offered was insufficient to overcome Washington's strict at-will only employment rule. *Id.* at pp. 8-9 (CP 349-50). Specifically, Defendants argued that (a) Mitsuoka's foregoing salary in 1984 could not justify a claim for lifetime employment 28 years later; (b) there was no evidence that personally guaranteeing leases was detrimental to him; and (c) there was no allegation that the loans made to the company were actually detrimental to Mitsuoka as opposed to beneficial to him. *Id.*

In light of these arguments, Mitsuoka did not oppose the motion to dismiss, but rather sought to amend his complaint. Plaintiff's Motion for Leave to Amend Complaint and for Remand to King County Superior Court (CP 361-71). Mitsuoka revised his complaint to identify FEA specifically as an actual – as opposed to a nominal – defendant. *Id.* at p. 7 (CP 367). The district court granted Mitsuoka's motion to amend and remanded the case to the King County Superior Court. Minute Order (CP 453-54).

D. The Allegations in the Second Amended Complaint Still Cannot Survive Dismissal Under CR 12(b)(6).

Mitsuoka's Second Amended Complaint contained nearly identical allegations to the First Amended Complaint. The Distribution Agreement

between FEA and FGC remained the only agreement Mitsuoka cited to support his claims. Plaintiff's Second Amended Complaint (CP 496-504). As for his ongoing argument for an implied contract of employment, he cited his having gone without pay on two occasions, once in 1984 and once in 2008:

Plaintiff had [the] sole discretion to determine the salary FEA paid to him, which was generally commensurate with Plaintiff's investment in, growth and profitability of the FEA. In the first six months of the FEA existence in California, it did not pay Plaintiff salary he earned. He was not paid until such time as FEA had sufficient revenue. Later, following the housing market crash in 2008, ***plaintiff unilaterally stopped payment of the salary FEA owed to him*** because of the severe reduction in revenue and profit caused by the crash.

Second Amended Complaint at p. 4 (CP 375). He also alleged tortious interference with a contract based on Yamamoto's alleged knowledge of his (Mitsuoka's) expectation of lifetime employment. *Id.* at p. 12 (CP 383). This included a new allegation for tortious interference with a business expectancy. *Id.*

Defendants again moved to dismiss, explaining that: (a) the only contract cited was the Distribution Agreement between FEA and FGC – not an employment agreement; (b) Mitsuoka did not allege that Yamamoto or FGC knew of any expectation of lifetime employment; and (c) Mitsuoka failed to allege any violation of a public policy that would support his wrongful termination claim. Motion to Dismiss Plaintiff's

Second Amended Complaint (CP 473-483). In opposing the motion, Mitsuoka admitted that the “factual gravamen of the employment claim” was an implied contract, and he conceded “the absence of an express oral or written agreement.” Plaintiff’s Opposition to Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint at p. 3 n.1 (CP 515).

Mitsuoka relied almost exclusively on the case of *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 1219 (1991), arguing to the trial court that *Malarkey* is the “controlling authority” on the issue of implied contracts of employment. *Id.* at pp. 7-9 (CP 519-21). Again, Mitsuoka cited his having gone without pay and guaranteeing loans as the basis for his “just cause” only termination theory. *Id.* at pp. 10-11 (CP 522-23). On reply, Defendants cited the case of *Bakotich v. Swanson*, 91 Wn. App. 311, 957 P.2d 275 (1998), which is the only case that has cited *Malarkey*. Reply on Defendants’ Motion to Dismiss at pp. 5-7 (CP 564-66). Defendants also confirmed that Mitsuoka had not cited a single case where post-employment consideration gave rise to “just cause” only termination. *Id.* at pp. 1-2 (CP 560-61).

At oral argument on Defendants’ motion to dismiss, the trial court (Honorable Jeffrey Ramsdell), examined both *Malarkey* and *Bakotich*. May 23, 2014 VRP at 10-23. The court observed that the “additional consideration” Mitsuoka cited was really just the typical contribution that

the president of a company would make to help his company succeed. *Id.* at p. 43. The court granted Defendants' motion to dismiss, dismissing Mitsuoka's claims with prejudice. Order Granting Defendants' Motion to Dismiss Second Amended Complaint (CP 1-2).

E. Mitsuoka Moves for Reconsideration and Simultaneously Moves for Leave to Amend His Complaint for a Third Time: Mitsuoka Confirms that He Did Not Get an Offer of Employment But that He Actually Started His Own Business.

Mitsuoka moved the trial court for reconsideration of the grant of the motion to dismiss. Plaintiff's Motion to Reconsider May 23, 2014 Order and for Leave to Amend Complaint (CP 5-18). Mitsuoka acknowledged that the trial court may not have found an implied employment contract, but that there were sufficient allegations to support a claim for tortious interference with a business expectancy in his at-will employment with FEA. *Id.* at pp. 2-3 (CP 6-7). Notably, this was the first time Mitsuoka had ever argued a business expectancy based on an at-will theory.

Mitsuoka, however, did not base the bulk of his motion for reconsideration on the prior allegations. Instead, he focused on the newly-minted allegations in the Proposed Third Amended Complaint. However, instead of forming the basis of an implied employment complaint,

Mitsuoka confirmed several dispositive facts in his Proposed Third Amended Complaint:

- Mitsuoka heard Yamamoto and his company were looking for a distributor for oil changer valves. (CP 26).
- “*Mitsuoka was looking for an opportunity to start his own business.*” *Id.* (emphasis added).
- The only affirmative statement that Yamamoto made to Mitsuoka regarding any ongoing business relationship was specifically related to the distribution agreement only: “You can be the *exclusive distributor* for as long as you want.” (CP 27) (emphasis added).
- The parties “agreed that Mitsuoka would start a new company *either as a sole proprietor or other entity form.*” *Id.* (emphasis added). There was no discussion of lifetime employment in this new company – as it had not even been formed yet.
- The Distributorship Agreement was between the “New Mitsuoka enterprise”(called TATM) and FGC, to which Mitsuoka was not a party and which was not an employment agreement. (CP 28).
- Neither Yamamoto nor FGC had any ownership interest in TATM when it was formed in 1984. *Id.*⁴

⁴ Given these facts, the remaining new allegations of the Proposed Amended Complaint (e.g., the friendship between Mitsuoka and Yamamoto) cannot operate to defeat CR 12(b)(6) on Mitsuoka’s implied employment contract claim. Further, any discussion of “custom” because Yamamoto and Mitsuoka are both Japanese is also irrelevant. Moreover, to accept Mitsuoka’s suggestion that the nationality of the players must be considered in determining whether at-will employment or “just cause” only termination existed, would put this Court (and every trial court) in the business of making cultural determinations about the parties. Instead, the only “custom” the Court need look at was the relationship between the two
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Mitsuoka also purported to add a claim for minority shareholder oppression. [Proposed] Plaintiff's Third Amended Complaint at pp. 20-21 (CP 445-45).

In opposition, Defendants explained that (a) Washington courts have specifically confirmed that there is no claim for tortious interference with business expectancy in at-will employment, and (b) the facts as now confirmed foreclosed any claim for an expectation of lifetime employment based on Mitsuoka's own admission that he started his own business (and thus, no promise of lifetime employment by Yamamoto or FGC would have been possible). Finally, Defendants argued that it would be futile to amend the complaint again, as there is no claim for minority shareholder oppression based on termination of employment. Defendants' Opposition to Plaintiff's Motion for Reconsideration and Motion for Leave to Amend⁵ (CP 74-89). The trial court denied the motion for reconsideration and for leave to amend. Order Denying Plaintiff's Motion for Reconsideration

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parties based on the facts alleged. Here, the "custom" between Mitsuoka and Yamamoto was that Mitsuoka would start and run an autonomous business that would distribute valves for FGC.

⁵ As the trial court had already dismissed Mitsuoka's claims with prejudice, a motion to amend was procedurally improper. Nonetheless, as amendment was improper on the merits, Defendants addressed the futility of the request for amendment.

and Motion for Leave to Amend (CP 97-98). This appeal follows. Notice of Appeal (CP 99).

IV.

ARGUMENT

A. Standard of Review: *De Novo* Review of a Motion to Dismiss and Abuse of Discretion on a Motion for Reconsideration.

Orders to dismiss for failure to state a claim are reviewed *de novo*. *Cutler v. Phillips Petroleum Co.*, 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Dismissal is proper where there are no facts that would justify the relief requested. *Id.* CR 12(b)(6) requires dismissal where the plaintiff includes contentions that show on the face of the complaint that there is some insuperable bar to relief. *Id.* While the factual allegations of the complaint are presumed to be true, *id.*, the plaintiff's legal conclusions are not. *West v. State, Washington Ass'n of County Officials*, 162 Wn. App. 120, 252 P.3d 406 (2011).⁶

⁶ On appeal, Mitsuoka argues that the trial court improperly applied a summary judgment standard by viewing the facts in the light most favorable to the non-moving party. App. Br. at 25 (citing VRP 48). Yet, Mitsuoka himself argued below that the applicable legal standard a Rule 12(b)(6) motion is that "[t]he complaint must be construed in the light most favorable to the non-moving party." Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint at p. 5 (CP 517). Mitsuoka cannot now complain that the trial court applied the very standard he invited. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002) (party prohibited from setting up a potential error and
(continued . . .)

Mitsuoka hangs his hat on the argument that the trial court (and this Court) must consider all hypothetical facts that are asserted in the complaint. App. Br. at pp. 24-25. While this is the basic premise on a CR 12(b)(6) motion, it is not the end of the analysis. Rather, although the court may consider hypothetical facts when deciding a motion to dismiss, the court should not lose sight of the ultimate question: whether the plaintiff's claim is legally sufficient to entitle the plaintiff to relief. If the plaintiff would not be entitled to relief even under hypothetical facts, a dismissal will be granted. *Gorman v. Garlock, Inc.*, 121 Wn. App. 530, 539, 89 P.3d 302 (2004) (affirming CR 12(b)(6) dismissal and holding “[w]hile we must consider all conceivable facts, we cannot consider allegations that contradict the specific provisions and intent of the [law]. The hypothetical must be reasonable and lawful.”); *see also Havsy v. Flynn*, 88 Wn. App. 514, 521-22, 945 P.2d 221 (1997) (complaint for intentional interference with business expectancy dismissed, where complaint did not allege elements essential to the claim and court could not hypothesize facts consistent with the complaint that would be legally sufficient to support plaintiff's claim).

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then challenging it on appeal).

Indeed, when the affirmative allegations of the complaint legally foreclose any claim for relief, dismissal under CR 12(b)(6) is proper and should not be disturbed on appeal. For example, in the case of *Dennis v. Heggen*, 35 Wn. App. 432, 667 P.2d 131 (1983), cited in Mitsuoka’s brief (App. Br. at p. 23), this Court affirmed a grant of CR 12(b)(6) dismissal where the complaint was not lacking in more detailed allegations, but rather where the allegations in the complaint showed that the plaintiff had no grounds for relief on the legal theory alleged. *Id.* at 435 (affirming dismissal where the “unlimited and unambiguous” allegations in the complaint foreclosed the relief sought). Similarly here, even assuming the facts of Mitsuoka’s complaint to be true, the trial court’s rulings were proper on CR 12(b)(6) and should be affirmed.

B. Standard of Review on a Motion to Dismiss Is Abuse of Discretion.

This Court reviews the trial court’s denial of a motion for reconsideration for an abuse of discretion. *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914 (2010) (affirming trial court’s denial of motion for reconsideration) (citing *Drake v. Smersh*, 122 Wn. App. 147, 151, 89 P.3d 726 (2004) (applying the abuse of discretion standard and affirming denial of motion for reconsideration)). “A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds.”

Sligar, 156 Wn. App. at 734 n.37 (citing *Weyerhaeuser Co. v. Commercial Union Ins.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000)). Courts rarely grant relief for lack of substantial justice because of the other broad grounds available under CR 59. *Lian v. Stalick*, 106 Wn. App. 811, 825, 25 P.3d 467 (2001).

Mitsuoka cursorily and unsuccessfully argued in the trial court that reconsideration was warranted given an “error of law” and in the name of “substantial justice.” Plaintiff’s Motion to Reconsider the Court’s May 23, 2014 Order and for Leave to File Third Amended Complaint at p. 5 (CP 9). Mitsuoka gives these arguments the same cursory treatment here. Mitsuoka still has not identified any particular error of law, and the phrase “substantial justice” does not appear in his brief. Applying the abuse of discretion standard, the trial court’s denial of the motion for reconsideration should be affirmed.

C. Standard for Leave to Amend: The Trial Court Has Broad Discretion to Deny a Motion to Amend.

The Court has broad discretion to determine whether to allow amendment of a pleading pursuant to CR 15(a). *Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 483-84, 209 P.3d 863 (2009). The trial court’s decision to deny a motion to amend will not be disturbed on review except on a clear showing of abuse of discretion, that

is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *In re Marriage of Tahat*, 182 Wn. App. 655, 665-66, 334 P.3d 1131 (2014) (citing *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *State ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

While prejudice to the adverse party is a consideration, the trial court may also independently consider whether the amendment would be futile. Thus, prejudice – or the alleged lack thereof – is not dispositive of whether a motion to amend should be granted. Rather, where amendment would be futile, a motion for leave to amend is properly denied. *Shelton v. Azar, Inc.*, 90 Wn. App. 923, 928, 954 P.2d 352 (1998). In *Shelton*, when affirming the trial court’s motion to dismiss the plaintiff’s motion for leave to amend, the court confirmed:

Generally, courts are to freely allow parties to amend their pleadings: “leave shall be freely given when justice so requires,” unless prejudice to the opposing party would result. ***But a trial court may also consider whether pursuit of the new claim would be futile.***

Id. (emphasis added; footnotes omitted).

Moreover, the Court may consider whether the plaintiff has previously amended the complaint. *See, e.g., Forbus v. Knight*, 24 Wn.2d 297, 310, 163 P.2d 822 (1945); *Magee v. Cohn*, 187 Wn. 157, 163, 59 P.2d 1131 (1936). Denying a motion to amend is proper where the facts

alleged in the fourth complaint are virtually identical to those in the prior complaints. *Peirce v. Schalkenbach Home for Boys, Inc.*, 5 Wn.2d 365, 369, 105 P.2d 288 (1940) (“The facts alleged in the complaint and in the first, second and third amended complaints were essentially the same. . . . The trial court did not abuse its discretion in refusing permission to appellant to file an additional complaint.”).

Despite his first three bites at the apple, Mitsuoka failed to allege facts to show that he was entitled to the relief requested under CR 12(b)(6). This is true even under a liberal view of the facts because indeed the facts as Mitsuoka alleged affirmatively foreclose any claims against the Defendants.

D. The Trial Court Properly Dismissed Any Claim for “Wrongful Discharge.”

As a threshold matter, Mitsuoka has long since abandoned his wrongful termination claim, and it is not properly part of this appeal. In his Second Amended Complaint, Mitsuoka alleged a cause of action for wrongful termination. Plaintiff’s Second Amended Complaint at pp. 13-14 (CP 467-68). It appeared that Mitsuoka was simply conflating a notion of “wrongful termination” and that of a breach of implied and express contracts. *Id.*

In any event, in their Motion to Dismiss Plaintiff's Second Amended Complaint, Defendants argued that Mitsuoka had failed to cite to or provide facts in support of a common law wrongful termination claim (clarity, jeopardy, causation, absence of justification). Motion to Dismiss Plaintiff's Second Amended Complaint at pp. 10-11 (CP 482-83). In response, Mitsuoka conceded that he was not asserting wrongful termination in violation of public policy claims. Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint at p. 2 (CP 514) ("Plaintiff does not claim his termination was 'in violation of public policy.'").

There is no tort of "wrongful discharge" independent of a claim for wrongful termination in violation of public policy. *See, e.g., Reninger v. State Dep't of Corrections*, 134 Wn.2d 437, 446-47, 951 P.2d 782 (1998) (confirming no claim for violation of public policy where the plaintiff does not allege a public policy was violated and is seeking to redress "a purely private interest."). Mitsuoka admitted he is not alleging a public policy claim at the trial court (and makes no such allegation in this appeal). Thus, the trial court properly dismissed any wrongful termination cause of action, which should not be disturbed on appeal.

E. The Trial Court Properly Dismissed Claims Predicated on the Breach of an Express Oral or Written Employment Contract, as Mitsuoka Has Confirmed that No Such Agreement Exists.

The long-standing rule in Washington is that, in the absence of a contract for a specified period of time, the employment relationship is at-will, and can be terminated at any time with or without cause. *Snyder v. Med. Servs. Corp. of E. Wash.*, 145 Wn.2d 233, 238, 35 P.3d 1158 (2001) (quoting *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 891, 568 P.2d 764 (1977) (citing *Webster v. Schauble*, 65 Wn.2d 849, 400 P.2d 292 (1965))). Washington courts guard this rule vigorously and narrowly construe any purported exception to this rule. *Snyder*, 145 Wn.2d at 239; *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984). *See also* Defendants' Opposition to Plaintiff's Motion for Reconsideration and Motion for Leave to Amend at p. 4 (CP 77). Consequently, Washington courts have repeatedly rejected claims for implied employment contracts. *Thompson*, 102 Wn.2d at 225 (affirming the trial court's grant of summary judgment on implied contract claim); *see also Greaves v. Med. Imaging Sys., Inc.*, 124 Wn.2d 389, 394-95, 879 P.2d 276 (1994); *Roberts*, 88 Wn.2d at 894-96; *Bakotich v. Swanson*, 91 Wn. App. 311, 319, 957 P.2d 275 (1998).

Mitsuoka claims he has alleged the existence of an "express" and an implied contract. App. Br. at pp. 26-27. "Express" is in quotation

marks here because, although he uses the term “express,” he is unclear as to what that actually means. What was undisputed at the trial court and remains undisputed on this appeal is that there was no oral or written employment agreement between Mitsuoka and any Defendant referring to lifetime employment or just cause termination. *See, e.g.*, Plaintiff’s Opposition to Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint at p. 3 n.1 (CP 515) (recognizing “the absence of an express oral or written agreement”). On appeal (as was the case in the Second and Third Amended Complaints), Mitsuoka cites only the Distributorship Agreement between two corporate entities, FEA and FGC, entered into in 1984. *See, e.g.*, App. Br. at p. 27.

Thus, conceding “the absence of an express oral or written agreement” means that the only question before the trial court (and this Court on appeal) on the contract claim is: “Was there an implied contract of employment?” Applying the law to all of the facts Mitsuoka has alleged – even in his Third Amended Complaint – the answer is an unequivocal “no.”

Specifically, Mitsuoka’s implied contract theory is based on two notions: (1) the circumstances of the formation of their “business relationship and the founding of FEA imply a just-cause termination arrangement;” and (2) Mitsuoka provided “additional consideration”

warranting just-cause only termination. App. Br. at p. 27. Both theories fail, however, based on the facts alleged and dismissal, denial of reconsideration, and denial of the motion to amend were proper.

For purposes of addressing both the set of facts before the trial court on the motion to dismiss and then the subsequent motion for reconsideration (including those in the Proposed Third Amended Complaint), Defendants address both, as the trial court's ruling were proper under both the *de novo* and abuse of discretion standards for both sets of facts.

1. Assuming the Facts of the Second Amended Complaint to Be True, Mitsuoka Had Nothing More than a Subjective Belief that He Had Lifetime Employment with FEA, Which Is Insufficient as a Matter of Law to Create an Implied Contract of Employment. As discussed above, the strong presumption of “at will” employment, may be overcome by proof of an “implied employment contract.” *See, e.g., Greaves*, 124 Wn.2d 389, 393-94, 879 P.2d 276 (1994); *Roberts*, 88 Wn.2d at 894-96. In *Roberts*, the Washington Supreme Court rejected the argument that an implied contract can be formed by the “employee’s subjective understanding or expectations as to his employment. . . . Even an assurance of ‘steady’ employment is not sufficient.” 88 Wn.2d at 894 (citations omitted). In affirming summary judgment for the employer, the

Court went on to hold: “At best, appellant points only to his own personal understanding that he would be employed as long as he did his job in a satisfactory manner. As noted above, such an understanding is insufficient.” *Id.* at 895.⁷

Here, looking at the Second Amended Complaint, Mitsuoka did not identify a single affirmative statement by any defendant that would even imply that he had lifetime employment with FEA. Even taking the allegations about the Distributorship Agreement being indefinite, there is no dispute that the Agreement is between FEA and FGC, not Mitsuoka and any defendant. Nor is it an Agreement for employment. Second Amended Complaint at pp. 2-10 (CP 496-504).

Rather, Mitsuoka’s allegations (and related claims) in the Second Amended Complaint are based solely on his subjective beliefs about lifetime employment. Indeed, Plaintiff does not even allege an “assurance of ‘steady’ employment.” Just as in *Roberts*, Plaintiff’s subjective beliefs are insufficient to establish an implied contract. *See also Thompson*, 102 Wn.2d at 224 (“The appellant only had a subjective understanding that he

⁷ *Roberts* is yet another case Defendants relied on and examined in both the motion to dismiss and the opposition to the motion for reconsideration. Motion to Dismiss Second Amended Complaint at p. 12 (CP 479); Defendants’ Opposition to Plaintiff’s Motion for Reconsideration and Motion for Leave to Amend at pp. 4-5 (CP 77-78). Mitsuoka does not cite to or address *Roberts* in his appeal.

would be discharged only for cause which is insufficient to establish an implied contract to that effect.”).

As noted in the trial court, Mitsuoka has struggled with the fact that he had only a subjective belief of lifetime or just cause employment:

Notably, in the Amended Complaint, Plaintiff made a different allegation: “At the time FEA was first incorporated [in 1984], Plaintiff believed that as long as FEA was successful, he would have employment permanently.” Amended Complaint at ¶ III.1 (emphasis added). Even with the opportunity to amend his complaint again, Plaintiff still makes no affirmative allegation that any Defendant offered permanent employment or that any Defendant knew of his expectancy for permanent employment.

Motion to Dismiss Plaintiff’s Second Amended Complaint at p. 3 (CP 475). Even now, Mitsuoka has conspicuously made no allegation of an offer from any defendant of continued employment. All of his allegations as to the business relationship with Yamamoto and FGC are centered on the Distributorship Agreement entered into as a result of Mitsuoka starting his own company. As will be discussed further below, even in the Third Amended Complaint, Mitsuoka still does not allege that he was promised just-cause employment. The trial court properly granted the motion to dismiss any claim based on an implied contract based on the allegations in the Second Amended Complaint.

2. The Allegations in the Third Amended Complaint Confirm that there Was No Employment Relationship with Any Defendant When

Mitsuoka Started his Own Company in 1984 – Thus Unequivocally Foreclosing Any Claim of Lifetime or Even Just-Cause Employment. By the time Mitsuoka drafted his Third Amended Complaint, he finally clarified in no uncertain terms the actual relationship between himself and defendant Yamamoto. The following is taken from the proposed Third Amended Complaint as cited in the Brief of Appellant:

- Mitsuoka heard Yamamoto and his company were looking for a distributor for oil changer valves. App. Br. at p. 4 (CP 26).
- “***Mitsuoka was looking for an opportunity to start his own business.***” App. Br. at p. 4 (CP 26) (emphasis added).
- The only affirmative statement that Yamamoto made to Mitsuoka regarding any ongoing business relationship was specifically related to the distribution agreement only: “You can be the ***exclusive distributor*** for as long as you want.” App. Br. at p. 5 (CP 27) (emphasis added).
- The parties “agreed that Mitsuoka would start a new company ***either as a sole proprietor or other entity form.***” *Id.* at p. 6 (CP 27) (emphasis added). There was no discussion of lifetime employment in this new company – as it had not even been formed yet.
- The Distributorship Agreement was between the “New Mitsuoka enterprise”(called TATM) and FGC. *Id.* at pp. 6-7 (CP 28).
- Neither Yamamoto nor FGC had any ownership interest in TATM when it was formed in 1984. *Id.* at p. 7 (CP 28).

Construing the exception to the at-will doctrine narrowly, which our Supreme Court requires a trial court and now this Court to do, there is

simply no basis in the law for an implied employment contract claim under these facts. As discussed, Mitsuoka concedes that the business was his own and neither Yamamoto nor FGC had any ownership or other relationship with the “New Mitsuoka Enterprise” other than the Distribution Agreement. The trial court properly dismissed all claims based on an implied contract theory and exercised its broad discretion in denying reconsideration of the same. This Court should affirm those rulings.

3. Mitsuoka’s Allegations Fail to State a Claim Under Either *Malarkey* or *Bakotich*. Mitsuoka relied solely on *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 505, 814 P.2d 1219, *op. corrected*, 62 Wn. App. 495, 821 P.2d 1235 (1991), to support his argument for an implied employment contract based on “additional consideration.” Plaintiff’s Opposition to Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint at pp. 7-11 (CP 519-23); App. Br. at pp. 27-28. Mitsuoka conspicuously omits any reference or discussion to *Bakotich v. Swanson*, 91 Wn. App. 311, 319, 957 P.2d 275 (1998), which was briefed on the reply on the motion to dismiss and on reconsideration. It is the only case that cites *Malarkey* and confirms that the facts as alleged foreclose any “just-cause” employment claim. Indeed, under both cases, Mitsuoka failed to state a claim upon which relief could be granted.

Mitsuoka conflates concepts found in *Malarkey*: the key difference between “additional consideration” provided at the inception of an employment relationship and some other vague notion of post-employment consideration. Under either theory, Mitsuoka’s claims were properly dismissed.⁸

The *Malarkey* case dealt exclusively with consideration viewed at the time the parties entered into the employment relationship. There, the court considered whether various undertakings by Wyborney were sufficient to take the employment relationship out of the at-will realm and rendered it a “just cause” relationship. Dispositive of the ruling in *Malarkey* was whether or not the plaintiff there “purchased a job.” 62 Wn. App. at 505.

In *Malarkey*, prior to his entering into the employment relationship, Wyborney (1) bought into the company as a minority

⁸ Indeed, not only does Mitsuoka ignore *Bakotich* and give short shrift to *Malarkey* in his brief, he seems to reject the notion that the trial court should have looked to *Malarkey* for guidance in ruling on the motions. App. Br. at p. 1 (“The trial court also seemed to believe that Mitsuoka was obliged to state facts identical to a particular case to state a claim, rather than stating facts that fit the elements of the legal tests of his claims.”). Presuming Mitsuoka is referring to *Malarkey*, his about face on the issue is curious, as he argued to the trial court that *Malarkey* is the “controlling authority and the basis for [Mitsuoka’s] wrongful termination cause of action.” Plaintiff’s Opposition to Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint at p. 7 (CP 519).

shareholder; (2) loaned the business money; and (3) – perhaps most critical – divested his interest in another lucrative investment as a condition of starting the business with the two defendants. *Id.* That is, the court was focused on whether the employee’s performance of these conditions, *i.e.*, the consideration, was “an integral part of the *employment* agreement, so as to negate the general proposition of law that ‘employment for life’ is the equivalent of indefinite employment, terminable at the will of either party.” *Id.* at 506 (emphasis the court’s; citation omitted).

First, there is no dispute that – unlike Wyborney in *Malarkey* – Mitsuoka did *not* buy into a company owned by any defendant: “This was not a typical employment situation where an existing company hires a salaried employee for a particular position. Yamamoto was asking Mitsuoka to set up FGC’s business venture” App. Br. at p. 27. For this reason alone, any application of *Malarkey* to this case must fail.

Second, and in the same vein, Mitsuoka did not buy into or “purchase a job” with any defendant-owned company as a minority shareholder. As confirmed in the Second Amended and Proposed Third amended Complaint, Mitsuoka started his own business (independent of any defendant) as a 50 percent shareholder. Plaintiff’s Second Amended Complaint at p. 2 (CP 545); App. Br. at 7 (citing CP 28, which is ¶ 11 of

the Proposed Third Amended Complaint). There was no “buy in” – there was only the creation of a completely autonomous business with Mitsuoka as the sole employee. Second Amended Complaint at p. 3 (CP 546).

Third, Mitsuoka has not alleged that he loaned money to FEA as a condition of any employment. Indeed, as discussed above, Mitsuoka created TATM corporation in 1984 as an independent corporation of which he was a 50 percent shareholder. Unlike in *Malarkey* there was no quid pro quo investment in any company of any defendant.

Finally, there is no allegation that Mitsuoka divested himself of any interest in a lucrative business like Wyborney did in *Malarkey*. Mitsuoka may have chosen to leave a prior job, but that is not the same as only agreeing to employment *in exchange for* abandoning another business interest. Mitsuoka never alleged that he gave up any interest in a business ownership to start his own company. To the contrary, by the time of his Proposed Third Amended Complaint, Mitsuoka confirmed that creating his own business was exactly what he wanted to do – and did. App. Br. at p. 4 (“Mitsuoka was looking for an opportunity to start his own business (as in the American dream) although he had a well paying job”). There was no divestiture of ownership as a condition of any employment. Mitsuoka started his own business to enjoy a distribution relationship. This is not *Malarkey*.

Thus, if Yamamoto was not Mitsuoka's employer, and Mitsuoka was starting his own company, there is no legal basis for the claim that Yamamoto could have offered Mitsuoka "just cause" employment. Indeed, Mitsuoka does not cite any case where the inception of the agreement that resulted in an implied contract of employment was to start a separate business entity. That was certainly not the case in *Malarkey*, where Malarkey, Chance and Wyborney all went in together to form MCW, Inc. for the sole purpose of purchasing another business, Duwamish Manufacturing. *Malarkey*, 62 Wn. App. at 499. Thus, Malarkey, Chance and Wyborney were actual partners, and Malarkey and Chance knew that the Duwamish deal would not go through unless Wyborney agreed to sell off his lucrative interest in another business. *Id.* Again, this is not the case here and Plaintiff has not and cannot cite to a single case where the creation of a separate business entity to distribute another company's product could form an implied "just cause" employment contract.

To the extent *Malarkey* left any uncertainty in this analysis, the court in *Bakotich v. Swanson*, 91 Wn. App. 311, 317, 957 P.2d 275 (1998) (the only case citing *Malarkey*), clarified the legal requirements. In

Bakotich, the plaintiff argued that he was entitled to lifetime employment⁹ because, *at the time of the employment offer*, he offered to cash out his pension and invest it in the new employer’s pension plan. *Id.* The court in *Bakotich* rejected *Malarkey*’s rationale, finding that there was “nothing in the record to suggest that [the employer] would have refused [the employee] a position if he did not roll over his [pension]” *Id.*

Similarly, Mitsuoka has not alleged in any of his three complaints that FEA (or any defendant) conditioned his employment on providing “additional consideration” for any employment. Indeed, according to Mitsuoka, he would have employment for life “so long as the Company was successful.” Plaintiff’s Opposition to Defendant’s Motion to Dismiss. at p. 3 (CP 515). Thus, any later “consideration” Mitsuoka claims to have offered was not an integral part of any employment agreement and cannot form the basis of the implied contract.

4. The Trial Court Properly Rejected Mitsuoka’s Post-employment Additional Consideration Arguments. Knowing that there was no employment relationship when Mitsuoka started his own company in 1984, he argued to the trial court that post-employment consideration

⁹ By the time of the Proposed Third Amended Complaint, Mitsuoka had abandoned his argument for permanent employment, now arguing for “just cause” employment. *See, e.g.*, Proposed Third Amended Complaint at p. 15 (CP 39). This is a distinction without a difference. Mitsuoka is still arguing that he was more than an at-will employee by virtue of an implied employment contract.

should save the day. Yet, Mitsuoka has not cited a single case in Washington where post-employment consideration has formed the basis for “just cause” only termination. To adopt such a theory would run afoul of Washington’s long-standing rule that any exceptions to the at-will doctrine be narrowly construed. In short, finding “just cause” only termination whenever a plaintiff contributed to his employer would create the exception that swallowed the at-will rule.

To the contrary, any such consideration “must be consideration *in addition to required services* which results in a *detriment to the employee and a benefit to the employer.*” *Roberts*, 88 Wn.2d at 895 (emphasis added). In his Second Amended Complaint, Mitsuoka made the following cursory allegations which, even if taken as true, fail this legal test:

(a) Mitsuoka was the only employee of FEA (no explanation of how that was detrimental or how that was additional consideration for employment when it was his company), Plaintiff’s Opposition to Defendants’ Motion to Dismiss Plaintiff’s Second Amended Complaint at p. 4 (CP 516);

(b) Mitsuoka had the sole responsibility for running FEA (no explanation of how that was detrimental), *id.*;

(c) neither FGC nor Hamai exercised dominion over FEA (no detriment – as President, Mitsuoka and not the company’s shareholders would run the company), *id.*;

(d) no further infusion of capital (other than the potential *risk* to himself discussed below, Mitsuoka has not alleged how this allegation, even if true, shows a benefit to FEA *and* a detriment to him), *id.*;

(e) FEA thrived under Mitsuoka’s watch (even if true, Mitsuoka certainly cannot suggest that running the company successfully was in addition to required service or a detriment to him), *id.*;

(f) for two short periods of time, Mitsuoka *in his sole discretion* chose not to pay himself salary (surely FEA is not obligated to employ Mitsuoka for life because he chose to not pay himself salary on two occasions in 28 years), *id.*;

(g) no dividends were paid or shareholder meetings held (no allegation of how this was detrimental to Mitsuoka), *id.*;

(h) personally guaranteeing financial obligations (even if true, no allegation of how this was detrimental to Mitsuoka – even assuming FEA got a better than market rate, no allegation that Mitsuoka suffered an actual financial detriment), *id.*;

(i) personal guarantor of a line of credit (again, while there may have been risk, Mitsuoka does not allege any actual detriment), *id.* at pp. 4-5 (CP-516-17); and

(j) Plaintiff loaned FEA money while it was a California corporation (even if this were true, this would have occurred prior to 1991 when he actually started to work for a company in which defendants had any ownership), *id.* at p. 5 (CP 517).

Without any allegation of how these actions were beyond the requirements of his role as president or were detrimental to him, the trial court properly granted Defendants' motion to dismiss this "additional consideration" argument and denied the motion for reconsideration.¹⁰

Attempting yet another bite at the apple on this claim – yet still not providing a single case where post-employment consideration supported just-cause termination – Mitsuoka still could not allege any facts supporting the notion that these actions were sufficiently detrimental to him. *See* Proposed Third Amended Complaint at pp. 7-9 (CP 31-33). He

¹⁰ In fact, there is no allegation that any defendant ever asked Mitsuoka to provide the consideration he now claims supports lifetime employment. Mitsuoka's subjective beliefs about the effect of the post-employment consideration are legally insufficient to create an implied contract. *Cf. Bakotich*, 91 Wn. App. at 317 (even if plaintiff offered to provide such consideration, it would be insufficient to find an implied employment contract, where there was no evidence in the record that a bilateral agreement existed, "other than in Bakotich's mind.").

simply adds the language that these actions were “a detriment.” *Id.* at 8-9 (CP 32-33). This is a legal conclusion that the trial court would not have needed to consider on a motion to dismiss, and thus could not have warranted granting leave to amend the complaint. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 717-18, 189 P.3d 168 (2008).

Rather, Mitsuoka continued to focus on “risk” related to loans he apparently made to his own company. He confirmed, however, that all of those loans have been paid off and cannot cite any actual detriment he suffered. There is no hypothetical to consider here – these loan transactions are complete with no detriment to Mitsuoka. Mitsuoka cites no case that stands for the legal rule that “risk” is sufficient to create a “just cause” only termination relationship.¹¹ Without more to show an implied contract, the trial court properly denied the motion for reconsideration and for leave to amend.

¹¹ Our Supreme Court in *Roberts* rejected many of the arguments Mitsuoka made in prior briefing but touches on only briefly in his appeal. The Court in *Roberts* confirmed: (1) longevity cannot form the basis of a contractual employment relationship between the parties, 88 Wn.2d at 895; (2) foregoing another job opportunity is inadequate additional consideration, *id.*; (3) inconveniencing his family (by transfers/moves in *Roberts* versus financial risk here) cannot overcome the at-will rule, *id.* at 896; and (4) accepting a lower salary was also insufficient additional consideration, *id.*

F. Defendants Could Not Interfere with a Contract That Does Not Exist.

The elements of a claim for tortious interference with a contract are: (1) a valid contractual relationship;¹² (2) the defendant's knowledge of the relationship; (3) an intentional interference inducing a breach or termination of that relationship; (4) interference by an improper purpose or improper means; and (5) damages. *See, e.g., Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157, 930 P.2d 288 (1997). The fundamental element of such a claim is the existence of a contract. *Id.* As discussed in great depth above, the facts as Mitsuoka has alleged foreclose any claim of an implied employment contract under Washington law. In short, there can be no tortious interference with a contract that never existed. The trial court properly granted defendants' motion to dismiss and denied reconsideration on any tortious interference with a contract claim.

G. Plaintiff Has Abandoned on Appeal His Claim for a Business Expectancy Based on His At-will Employment Relationship.

Recognizing that his breach of contract claim would fail, Plaintiff belatedly added a claim for tortious interference with business expectancy

¹² As noted below, Mitsuoka has abandoned on appeal the only claim for non-contractual tortious interference. *See* Section IV.G, *infra*. Thus, the only remaining analysis is the contractual interference claim.

in his Second Amended Complaint. *Cf.* First Amended Complaint at pp. 8-9 (CP 161-62) (alleging only Interference with Contractual Relations and Wrongful Termination of Plaintiff's Employment) *with* Second Amended Complaint at pp. 11-13 (CP 505-07) (alleging Tortious Interference with Prospective Advantage or Business Opportunity against Yamamoto and Fumoto Giken). In the Second Amended Complaint, he specifically cited his continued employment as a business expectancy. Plaintiff's Opposition to Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint at pp. 11-12 (CP 523-24) ("Employment is a business expectancy and sometimes a contractual right."). Plaintiff further refined his argument on reconsideration to clarify his argument, citing *Eserhut v. Heister*, 52 Wn. App. 515, 762 P.2d 6 (1988):

Plaintiff's second cause of action is a claim for tortious interference with business expectancy. This claim does not require the existence of a contract, but only of an expectancy. Plaintiff's employment at FEA was such an expectancy, whether it is "at-will" or "for cause." *"At-will" employment is a business expectancy that can form the basis of this claim by an employed plaintiff, without any showing of the existence of an employment contract.*

Plaintiff's Motion to Reconsider the Court's May 23, 2014 Order and for Leave to File Third Amended Complaint at p. 10 (CP 14) (emphasis added).

On appeal, Mitsuoka has abandoned any argument or analysis that at-will employment can, as a matter of law, qualify as a business expectancy for a tortious interference claim. Indeed, he does not cite *Eserhut* or challenge any of the cases Defendants cited to the trial court that confirm that at-will employment cannot support a claim for tortious interference. Thus, he has abandoned the claim on appeal, and this Court should affirm the trial court's dismissal of this claim on the *de novo* standard of the CR 12(b)(6) ruling and under the more deferential standard of abuse of discretion on the motion for reconsideration.

However, even if Mitsuoka should attempt to argue at-will employment was a business expectancy in his reply brief – which he cannot¹³ – Washington courts dealing specifically with the issue of whether at-will employment can form the basis for a tortious interference claim have repeatedly confirmed that it cannot. As submitted to the trial court,¹⁴ in the 25 years since *Eserhut* was issued, Washington courts have repeatedly confirmed that employees **do not** have a valid business expectancy in at-will employment.

¹³ Arguments made for the first time in a reply brief should not be considered. *Ainsworth v. Progressive Cas. Ins. Co.*, 180 Wn. App. 52, 78 n.20, 322 P.3d 6 (2014).

¹⁴ Defendants' Opposition to Plaintiff's Motion for Reconsideration and Motion for Leave to Amend at pp. 10-11 (CP 83-84).

- *Evergreen Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 258, 263-64, 274 P.3d 375 (2012). In *Evergreen*, the trial court ruled that, as a matter of law, employees have no business expectancy in continued at-will employment. In affirming the grant of summary judgment dismissing the tortious interference claim, the court of appeals held:

To prove these [tortious interference with business expectancy] claims, *Evergreen* had to prove that it had a valid expectancy in the continued employment of the Moses Lake branch employees. See *Woody v. Stapp*, 146 Wn. App. 16, 24, 189 P.3d 807 (2008). The employees of the Moses Lake branch were at-will employees. ***Importantly, “at-will employees do not have a business expectancy in continued employment.”*** *Id.*

Evergreen, 167 Wn. App. at 258 (emphasis added).

- *Woody v. Stapp*, 146 Wn. App. 16, 24, 189 P.3d 807 (2008). In *Woody*, the trial court also dealt specifically with the question of whether at-will employment could support a tortious interference with business expectancy claim. Affirming the trial court’s grant of summary judgment, the court in *Woody* confirmed that, “at-will employees do not have a business expectancy in continued employment.” *Id.*

- *Raymond v. Pac. Chem.*, 98 Wn. App. 739, 747, 992 P.2d 517 (1999), *rev’d on other grounds*, *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 20 P.3d 921 (2001). In *Raymond*, the court had to answer the question of whether an at-will employee had a business

expectancy in ongoing employment. *Id.* The court answered no, reaffirming the basic legal principle that at-will employment “clearly limits an employee’s expectation of job security.” *Id.*

Given this legal framework, it is no wonder that Mitsuoka abandoned his argument that he had a business expectancy in his at-will employment. The trial court properly dismissed his claim and his arguments on reconsideration.

H. The Trial Court Properly Rejected Mitsuoka’s Motion for Leave to Amend to Add a “Shareholder Oppression” Claim.

As discussed above, the newly-added factual allegations in the Third Amended Complaint would have only served to completely foreclose any employment claims. Specifically, that no one hired Mitsuoka – he started his own independent company subject only to an agreement between that company and FGC. Thus, the only remaining issue is the trial court’s rejection of Mitsuoka’s motion to amend to add a newly-minted claim for “shareholder oppression.” Given that such an amendment would have been futile, the trial court did not abuse its discretion in denying and/or not considering the motion.

As was argued to the trial court in Defendants’ Opposition to Plaintiff’s Motion for Reconsideration and Motion for Leave to Amend at pp. 11-12, there is no free-standing claim for shareholder oppression under Washington law. (CP 84-85.) The only notion of shareholder oppression arises under the corporate dissolution statute, RCW 23B.14.300. Notably,

Mitsuoka has abandoned any reference to RCW 23B.14.300, which was his main argument in favor of amendment. App. Br. at pp. 32-33.

In any event, this claim fundamentally confuses the “reasonable expectations” of a shareholder with the subjective expectations of plaintiff in this case, and with Mitsuoka’s separate relationship as an employee of FEA. As an employee, Mitsuoka was retained at-will because he never negotiated an employment contract. Defendants, acting within their rights as the majority shareholders, then terminated Mitsuoka’s employment. He remained, however, a shareholder of FEA with all of the rights and “reasonable expectations” attendant thereto. “Plaintiff’s termination, regardless of its motivation, does not relate to plaintiff’s interests as a shareholder.” *Franchino v. Franchino*, 687 N.W.2d 620, 631, 263 Mich. App. 172 (2004). To hold otherwise would be to ignore the formal distinctions between employees and shareholders and, indeed, the legal significance of the corporate form.

Thus, at the trial court, Defendants argued that amendment would be futile because there would be no legally viable “shareholder oppression” claim, citing *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007). Defendants’ Opposition to Plaintiff’s Motion for Reconsideration and Motion for Leave to Amend at pp. 11-12 (CP 84-85). In *McCormick*, Mr. McCormick was a minority shareholder in a law firm. The other two shareholders terminated McCormick’s employment and removed him from his position as a director of the corporation. 140 Wn. App. at 879-80. There was no buyback agreement

that addressed the buyback of McCormick's shares. *Id.* at 892. McCormick claimed, among other things, minority shareholder oppression based on the other two shareholders' (1) failure to invite him to shareholder meetings; (2) failed to buy out his shares upon the termination of his employment; (3) breached their fiduciary duties by trying to "freeze out" a minority shareholder; (4) "helped themselves" to the firm's profits after terminating McCormick's employment; and (5) failed to pay McCormick any of the firm's profits after his dissolution. *Id.* at 888-94. McCormick sued for dissolution of the company based on shareholder oppression and, in the alternative, to force the company to repurchase his shares.

Affirming summary judgment in favor of the majority shareholders, the court in *McCormick* concluded as a matter of law that there was no shareholder oppression. The court found that plaintiff's termination and removal as a director did not constitute oppression, and that the majority shareholders had not otherwise treated him unfairly or excluded him from participation in the company as a shareholder. As to the buyout of the shares, the court affirmed the grant of summary judgment as to oppression, reasoning:

The courts do not have the power to make a stock redemption agreement where the parties failed to do so. The statute [RCW 18.100.100] does not provide for stock redemption upon employment termination. We "cannot, based upon general considerations of abstract justice, make a contract for parties that they did not make themselves." *McCormick is not entitled to a share buyout. Thus, it was not oppressive conduct for Dunn and*

Black to refuse to buyout McCormick's shares. We affirm the trial court's summary judgment ruling.

Id. at 892 (emphasis added; internal citations omitted). Similarly, as to the payment of bonuses or firm profits, the court concluded:

Here, the directors distributed the corporation's profit as bonuses to its current employees, a practice that the firm had throughout its existence. ***When he was an employee, McCormick regularly received the corporation's profits as bonuses. This distribution of bonuses to current employees is a reasonable and honest exercise of the directors' judgment that the courts should not interfere with. This is not a breach of a fiduciary duty.***

Id. at 895 (emphasis added).

Although Defendants relied on *McCormick* in their opposition to Mitsuoka's motion to amend, he did not address the case or refute its holdings in either his reply brief on the motion to amend or in his opening brief before this Court. Rather, he relies on *Robblee v. Robblee*, 68 Wn. App. 69, 841 P.2d 1289 (1992) for the first time in his appellate brief to set up a discussion of "reasonable expectations." App. Br. at pp. 32. Mitsuoka did not argue *Robblee* to the trial court. Even if he had, it would not have made his shareholder oppression claim legally viable, and the court properly denied the motion.¹⁵

Here, Mitsuoka claims that termination of his employment constitutes oppression because his employment was the only benefit he

¹⁵ The court in *Robblee* did not, as Mitsuoka suggests, adopt either a "reasonable expectations" test or a fair dealing test. App. Br. at 32. Rather, the court in *Robblee* simply held that applying either test, the plaintiff failed to show minority shareholder oppression. 68 Wn. App. at 76-78.

received from FEA: “FEA has not paid dividends, *so that Plaintiff’s only reasonable expectation of income from his investment and ownership of the Defendant FEA company would come from his employment, which was reasonably expected to be just cause employment.*” Proposed Third Amended Complaint at p. 23 (CP 71) (emphasis in original). But that was also true in *McCormick*. There, too, the plaintiff had not received dividends, only his compensation as an employee. Here, Mitsuoka is still entitled to all of the benefits of a shareholder, including his proportionate share of any distribution of profits that may occur. Mitsuoka has not alleged that FEA has paid dividends disproportionately to the Defendants. Mitsuoka simply alleges that FEA “has not issued dividends” and that therefore, his termination, “destroys his reasonable expectations in the company.” But that simply is not the case.

Rather, Mitsuoka attempts to effectively re-cast his dismissed wrongful termination claim as a shareholder oppression claim. But just as an employee has no reasonable expectations to the interests of a shareholder, a shareholder has no reasonable expectation of continued employment. As such, allowing Mitsuoka to assert this claim would be futile. The trial court properly rejected Mitsuoka’s leave to amend. *Shelton*, 90 Wn. App. at 928 (affirming CR 12(b)(6) dismissal on the basis of futility alone without regard to any alleged prejudice or lack thereof).

Om a final note, Mitsuoka is rather glib about the liberality of permitting pleadings to be amended and points to a lack of prejudice to the Defendants based solely on the stage of the pleadings. App. Br. at pp. 34-

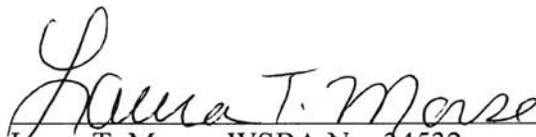
35. However, to allow claims to go forward with no legal basis merely in the name of liberal amendment would cause particular prejudice to the Defendants here, as allowing Mitsuoka to pursue these meritless claims would cause great expense to these parties (and other witnesses and documents) that are in Japan. Given the futility of amendment and the prejudice that would flow from costly discovery into these matters, the motion for leave to amend was properly rejected and should not be disturbed.

V.

CONCLUSION

Defendants respectfully request that this Court affirm the trial court's grant of the motion to dismiss, denial of the motion for reconsideration, and denial of the motion to amend.

RESPECTFULLY SUBMITTED this 21st day of January, 2015.



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