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NO. 66626-6-I

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION I

JUDITH A. LONNQUIST and LAW OFFICES OF JUDITH A.
LONNQUIST, P.S.

Appellants,

v.

REBA WEISS

Appellee.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This appeal focuses on rulings of the trial court made before, during and after trial.¹ The rulings below that Appellants/Defendants challenge are as follows: 1) the June 25, 2010² order compelling Defendants to produce attorney-client privileged information (CP 158-159);³ 2) the August 31 order sanctioning Ms. Lonnquist \$300 and requiring that Defendants pay the cost of continuing Ms. Lonnquist's deposition, including the costs of the transcript and the court reporter (CP 251-252); 3) the September 13 ruling holding Defendants in contempt and imposing sanctions of \$2100 (CP 301-302); 4) the August 2 refusal to allow Defendants to amend their Answer to add a defamation counterclaim (CP 197-200); 5) the *in limine* limitation on introduction of Plaintiff's medical records prior to one year before trial (CP 587); 6) the refusal to give Defendants' proposed jury

¹ Because this appeal does not contest the factual evidence introduced at trial, no transcript was necessary for review.

² Unless otherwise noted, all dates refer to the year 2010.

³ The term "CP" with a number there-following refers to the Clerk's Papers designated by the parties. The pages have been numbered consecutively, beginning with the Complaint (Sub. Num. 1).

instructions nos. 8, 9, and 10 and the decision to give jury instructions nos. 9 and 10 instead (CP 1865-1866);⁴ 7) the decision to accept, over Defendants' objection, Plaintiff's proposed judgment (a) imposing individual liability on Defendant Lonnquist regarding the wrongful discharge in violation of public policy claim, and (b) doubling the economic damages for such wrongful discharge claim (CP 612-615); 8) the February 7, 2011, order directing the clerk to disburse funds (CP 627-628); and 9) the trial court's post-trial order denying Defendants' motion to compel disclosure of Plaintiff's fee agreement. (CP 625-626).⁵

On February 4, 2011, Defendants filed this timely appeal to challenge the trial court's erroneous rulings. Defendants ask that the Court reverse the challenged rulings, vacate the judgment, and remand the case for further proceedings consistent with this Court's rulings.

⁴ For the Court's convenience and ease of reference, the relevant jury instructions are set forth in the Appendix to this brief.

⁵ Because the trial court has not yet ruled on Plaintiff's request for attorney fees, Defendants wish to reserve issue #9 for a later time, if necessary.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred by compelling the Defendants to produce attorney-client privileged information that the client had expressly directed not to be disclosed.

2. The trial court erred by sanctioning Defendant Lonquist \$300 for protecting attorney-client privileged information and by requiring that Defendants pay the cost of continuing the deposition, including the costs of the transcript and the court reporter, even though Defendants had offered suitable alternatives to resolve the deposition issue.

3. The trial court erred by holding Defendants in contempt and imposing sanctions of \$2,100, before any contempt had even occurred.

4. The trial court erred by refusing to allow Defendants to amend their Answer to add a defamation counterclaim and an after-acquired evidence claim, when months remained before the trial date, the discovery period had not elapsed, and evidence justifying the amendment had only recently been discovered.

5. The trial court erred in imposing an *in limine* limitation on introduction of Plaintiff's medical records prior to one year before trial, where documents in the medical records showed patterns of behavior relevant to the defense.

6. The trial court erred in refusing to give Defendants' proposed jury instructions nos. 8, 9, and 10, and in giving jury instructions nos. 9 and 10 instead, thereby ignoring applicable wrongful discharge law.

7. The trial court erred by accepting, over Defendants' objection, Plaintiff's proposed judgment (a) imposing individual liability on Defendant Lonquist regarding the wrongful discharge in violation of public policy claim, without legal authority for such liability and (b) doubling the economic damages for such wrongful discharge claim, in violation of Washington's bar on punitive damages.

8. The trial court erred by directing the clerk to disburse funds before the appeal period had elapsed.

9. The trial court erred by denying Defendants' post-trial motion to compel disclosure of Plaintiff's fee agreement, which formed the basis of Plaintiff's request for attorney's fees.

B. Issues Pertaining to Assignments of Error

1. Where the Rules of Professional Conduct prohibit an attorney from disclosing client confidences, should an attorney be sanctioned for protecting the client's privilege? (*Assignment of Error #1-3*)

2. Where the attorney has sought and successfully received clarification of the court's order requiring disclosure of

attorney-client privileged information, did the court commit probable error by nonetheless sanctioning the attorney for declining to answer questions about privileged information prior to such clarification? (*Assignment of Error #1-3*)

3. Where the Rules of Professional Conduct require that the client must be advised of any court order requiring disclosure of attorney-client privileged information and give the client the opportunity thereafter to appeal, did the court commit obvious error by holding the attorney in contempt before allowing the client to exhaust her appeal rights? (*Assignment of Error #1-3*)

4. Where the attorney's refusal to answer questions seeking disclosure of privileged information was based on her good faith belief that lawful authority required her nondisclosure, did the court commit obvious or probable error by holding her in contempt, fining her \$2,100, and ordering her to pay Plaintiff, even though no contemptuous behavior had yet occurred? (*Assignment of Error #1-3*)

5. Where deposition testimony disclosed that Plaintiff had defamed Defendants and unlawfully had entered their premises and taken their property, did the trial court err by refusing to allow Defendants to amend their answer? (*Assignment of Error #4*)

6. Where emotional distress damages were an issue in the case and Plaintiff's medical records disclosed historic patterns of behavior relevant to her wrongful discharge claim, did the trial

court err by limiting admission of those records to one year prior to her discharge? (*Assignment of Error # 5*).

7. Did the trial court err by giving instructions based upon employment discrimination pattern instructions rather than based upon the narrow tort of wrongful discharge? (*Assignment of Error # 6*).

8. Did the court err by accepting Plaintiff's proposed judgment, which imposed individual liability and doubled damages without any basis in law? (*Assignment of Error # 7*).

9. Was the trial court's disbursement of funds during the appeal period premature? (*Assignment of Error # 8*).

10. Is the Plaintiff's fee agreement properly discoverable when the trial court is considering a fee award? (*Assignment of Error # 9*).

11. Should Issue #10 be deferred until after the trial court has ruled on fees?

III. STATEMENT OF THE CASE

A. Procedural History

This case was filed in May 2008 by Plaintiff Reba Weiss against her former employer, the Law Offices of Judith A. Lonquist, P.S. ("the Firm"), and its President, Judith A.

Lonnquist. Plaintiff's causes of action all arose out of her employment relationship with the Firm. (CP 1- 12).

Plaintiff's case was assigned to King County Superior Court Judge Steven Gonzalez. On October 24, 2008, Defendants moved to compel arbitration, which the trial court summarily denied on December 9, 2008. (CP 63-66). On December 15, 2008, Defendants filed a notice of appeal.

On December 14, 2009, this Court issued its decision holding that the case should not be submitted to arbitration. *Weiss v. Lonnquist*, 153 Wn.App. 502, 224 P.3d 787 (Div. I, 2009). The case then proceeded before Judge Gonzalez, with both parties filing motions for summary judgment. (CP 67-113). Defendants moved to dismiss Plaintiff's wrongful discharge, defamation, tort of outrage and negligent infliction of emotional distress claims; Plaintiff moved for partial summary judgment on her wrongful withholding of wages claim and to dismiss several of Defendants' affirmative defenses. The trial court granted Defendants' motion to dismiss the two infliction of emotional distress claims, but

denied summary dismissal as to the wrongful discharge and defamation claims. (CP 112). The trial court granted Plaintiff's summary judgment motion and awarded Plaintiff \$579.74 in unpaid wages. (CP 111), which Defendants subsequently paid.

During discovery, Plaintiff served requests for production seeking certain attorney-client privileged documents. In July 2008, Defendants sought a protective order based upon RPC 1.6. (CP 39-48). The trial court denied the motion and ordered that the documents be produced. (CP 158-160). During the deposition of Defendant Lonquist, Plaintiff's counsel propounded questions that Defendant could not answer without violating attorney-client privilege. Defendants then filed a motion for clarification with the court. (CP 201-205).

Because Defendants' client had a right to appeal the order compelling production of her documents, Defendant Lonquist believed that she could not respond to questions involving her client's privileged communications. Despite the pendency of Defendants' motion for clarification, Plaintiff moved to compel

deposition answers. (CP 209-213). The court granted Defendants' clarification motion, in part, but also granted that of Plaintiff, and imposed \$300 in sanctions. (CP 251). Plaintiff then sought a ruling of contempt. (CP 260-265).

Before the deposition occurred, and even before the date calendared for hearing the motion, the trial court entered its order finding Defendant Lonquist in contempt and fining her \$2,100.00. (CP 301-302). Defendants took an interlocutory appeal to this Court, which was denied, due in part to the then-proximity of the trial. (CP 623-624).

In July 2010, several months before the discovery cut-off, and four months prior to trial, the Defendants moved to amend their Answer to add a counterclaim of defamation by the Plaintiff, and an affirmative defense of after-acquired evidence based upon information discovered in recent depositions. (CP 179-196). That motion was also denied. (CP 197-198).

On November 29, the case proceeded to trial on three claims: wrongful discharge in violation of public policy,

defamation, and wrongful withholding of wages. Plaintiff made motions in limine requesting, *inter alia*, that none of Plaintiff's medical records be introduced into evidence. The trial court ruled that her medical records could be introduced, but only those covering the period one-year before trial. (CP 587).

After Plaintiff presented her case, Defendants made a CR 50 motion to dismiss both the wrongful discharge and the defamation claims. The trial court granted the motion to dismiss the defamation claim only. The Court subsequently issued its jury instructions which included Plaintiff's proposed wrongful discharge instructions based not upon wrongful discharge law, but upon the pattern instructions for employment discrimination. (CP 565; 1859-1871).

The case was submitted to the jury, which on December 13, found for the Plaintiff on both remaining claims and awarded her \$2,084.63 on her wage claim, and on the wrongful discharge claim: \$16,250.00 in emotional distress damages and \$8,204.00 in economic damages. (CP 604-05). On January 6, 2011, Plaintiff

submitted her proposed judgment, to which Defendants objected, primarily because it imposed individual liability on Ms. Lonquist where none was authorized and provided that not only the unpaid wages be doubled, but that the economic damages awarded by the jury also be doubled. (CP 606-615).

Subsequently, before the 30-day appeal period has elapsed, Plaintiff moved for disbursement of funds deposited as supersedeas in the 2010 discretionary review. On February 7, 2011, over Defendants' objections, the trial court authorized such disbursement. (CP 620-624, 62-628). Defendants filed a timely appeal.

B. Statement of Facts

Reba Weiss began working in the Law Offices of Judith A. Lonquist ("LOJAL") as an "of counsel" attorney on or about February 4, 2004. (CP 226). In the Fall of 2005, Ms. Weiss requested that LOJAL hire her as a full-time employee, as she was getting a divorce and needed a full-time job in order to retain her home mortgage. (CP 30). Although Lonquist previously had no

intention of hiring Weiss, in order to accommodate Weiss's family situation, she agreed to hire her. (CP 30). They entered into a contract which provided, *inter alia*, that Weiss was expected to perform 32 billable hours per week or 1,600 billable hours per year. (CP 30). Although that contract was subsequently terminated, the billing standard remained in effect.

Throughout her employment, although Ms. Weiss was reminded that the minimum standard for continued employment was 32 billable hours per week, she consistently failed to meet standard. (CP 30-31). Defendants provided her both oral and written warnings that her performance was unacceptable. (CP 89).⁶ When warned that she must increase her billable hours, she failed to do so. Indeed, her billable hours went down.

In addition, Plaintiff consistently failed to bring in sufficient revenue to justify her salary. She brought in very few clients of her own, and those cases that she brought with her, she lost, after incurring enormous costs and accrued fees for which the

⁶ In the 18 months prior to her termination, Plaintiff met standard in only 3 of those months. (CP 363).

firm sustained huge losses. (CP 382-383).⁷ The enormously time-consuming, but potentially rewarding case that she had brought into the firm was dismissed in large part on summary judgment. (CP 406).

On or about July 30, 2007, in attempt to keep Ms. Weiss engaged in meaningful work, Ms. Lonquist assigned her a fixed-term project preparing a summary judgment response in a case for one of the firm's clients, here called "Jane Doe." (CP 68). Scouring through the client files, Weiss latched upon two intake communications from Ms. Doe which Ms. Weiss claimed were inconsistent with Doe's later deposition testimony. Rather than contact the client for an explanation, Weiss spoke to a number of attorneys to determine whether she could claim an "ethics" violation (CP 68).

Based on Ms. Weiss's spin of the situation, a WSBA-referred attorney apparently advised her that it would be unethical for her to work on Jane Doe's case. Only then, armed with

⁷ *Keller and Alvarez v. King County Sheriff*, District Court No. C06-0023-JCC.

ammunition of her own making, did Ms. Weiss advise Ms. Lonnquist that she would not work on the case for ethical reasons, referencing only the client's deposition testimony. Ms. Lonnquist's first reaction was to inquire if Weiss had discussed her concerns with the client. She said she had not. (CP 524). Explaining that she was overloaded with other work, Ms. Lonnquist asked if Ms. Weiss could write a memorandum on the case law she had researched for the Doe case. Ms. Weiss refused. Accordingly, Ms. Lonnquist relieved Ms. Weiss of all responsibility regarding the Doe case and undertook to write the summary judgment response herself. (CP 69, 131).

No further mention of the Jane Doe case was made. On August 20, Ms. Lonnquist gave Ms. Weiss a written notice of termination due to her consistent failure to work sufficient hours and to generate sufficient revenue. Ms. Weiss thereafter chose not to return to work and consequently logged no billable hours for which pay was due. (CP 367). On August 23, 2007, Ms. Weiss abruptly left the law firm, never to return (CP 333).

Almost a year later, Ms. Weiss filed a Complaint for Wrongful Termination, Outrage, Recovery of Unpaid Wages and Statutory Penalties, Defamation and Negligent Infliction of Emotional Distress. (CP 1-12).

IV. ARGUMENT

A. The Trial Court Erred By Compelling Defendants to Produce Attorney-Client Privileged Information That the Client Had Expressly Stated Should Not Be Disclosed.

Defendants never disputed that Ms. Weiss had raised an ethical concern, that she perceived that Defendants' client had lied, or that she refused to work on the client's case. Rather, Defendants disputed that her expression of ethical concern was the reason for Ms. Weiss's termination, and had substantial evidence to corroborate the fact that she had been discharged for failing to meet billing minimums and for lack of productivity.

In her written discovery, identifying the firm's client by name, Plaintiff requested a number of documents that were protected by attorney-client privilege, which Defendants declined

to produce based upon RPC 1.6.⁸ *Inter alia*, the discovery sought production of facsimile transmissions from the client [later designated as “Jane Doe”] to Appellants describing her need for legal services and the nature of her contentions. (CP 110-113).⁹ Believing that they could not ethically produce such material, Appellants moved for a protective order. On June 25, 2010,¹⁰ the trial court denied the protective order and ordered their production, notwithstanding the requirements of RPC 1.6. (CP 158-160).

RPC 1.6 governs the disclosure by a lawyer of information relating to the representation of either a current or former client. Clearly, as discussed *infra*, the Requests for Production at issue herein seek documents that necessarily implicate privileged attorney-client information and confidences. Nonetheless, Plaintiff claimed that some of the requested information such as client

⁸ After her termination, Plaintiff had made an unauthorized entry to Defendants’ premises after hours and purloined the documents she later requested in discovery – facts that Plaintiff disclosed in her 8/11/10 deposition (CP 222).

⁹ Even after Plaintiff finally began referring to the client as “Jane Doe,” she persisted in using the client’s court case number in discovery documents filed with the trial court, by which the client’s true name could be traced. Since Plaintiff alleged that the client had committed perjury, protection of her identity was of special concern.

¹⁰ Unless otherwise noted, all dates refer to the year 2010.

identity, fee arrangements, and billing and cost ledgers were not privileged under RPC 1.6. (CP 127). It is true that in the past, Washington courts had held that disclosure of the client's identity, the fee arrangement with, and billing records of the lawyer were not "confidences and secrets" and thus not protected by the Canon of Ethics on Confidentiality. *See, e.g.: Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 531, 688 P.2d 506 (1984), and *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997).

However, in 2006, the Ethics Rule was broadened beyond "confidences and secrets" to far more expansive protection, i.e.: "all information relating to the representation, whatever its source." RPC 1.6. *See*: Comment Number 19, stating that "[t]he phrase 'information relating to the representation' should be interpreted broadly." The change was deliberately made to enhance the protection given to client information, such as that sought herein. *See also*: Comment Number 24.

Furthermore, in the present case, even under the pre-2006 Rules, Defendants could not have produced information such as

billing records and client identity without risking participation in Plaintiff's evident disclosure of client confidences. Plaintiff's complaint alleged that Defendants' client had committed perjury. Plaintiff's discovery requests, drafted by Plaintiff's attorney, then referred to Defendants' client by name, suggesting that Plaintiff had revealed detailed privileged information regarding Defendants' client to third parties. Given Plaintiff's use of the client's name, Defendants did not believe that they could both respond to the discovery and protect the attorney-client privilege, such as by redacting documents to avoid conveying confidential information.

When confronted with an issue pitting the attorney-client privilege against a duty imposed by the discovery rules to provide information, the courts engage in a balancing test to determine whether the administration of justice would trump the otherwise overarching Rules of Professional Conduct. *United States v. Bryan*, 339 U.S. 323, 331, 70 S. Ct. 724, 730 (1950) (quoting 8 J. WIGMORE, EVIDENCE § 2192, p. 64 (3rd ed. 1940)). Here, since the seminal facts related to Plaintiff's conduct were not in dispute,

and since Plaintiff had failed to articulate a persuasive relevance theory for the specific materials sought even if those facts were contested, the balance should have tipped overwhelmingly towards the protection given to attorney-client privilege by the Rules of Professional Conduct.¹¹

Nor did this case fall within any of the exceptions to confidentiality set forth in RPC 1.6 (b). Indeed, as shown by the Comments to RPC 1.6, the discovery sought by Plaintiff was manifestly unwarranted. Comments Number 2-4 provide, in pertinent part:

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . .

[3] The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. . .

¹¹ The public policy inherent in RPC 1.6 has been described by Washington courts. The attorney-client privilege exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery. *State ex rel. Sowers v. Olwell*, 64 Wn.2d 828, 832, 394 P.2d 681 (1964); *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990) (privilege encourages free and open communications by assuring that communications will not be disclosed to others directly or indirectly).

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to discovery of such information by a third person. . .

Jane Doe, who was not a party to the litigation, had not authorized, and did not authorize the Defendants to disclose any of her files and records, and did not want them disclosed. Accordingly, under the Rules of Professional Conduct, Defendants could not have produced them in response to Plaintiff's discovery.

The trial court erred by not weighing the lack of relevancy of the information sought against the requirements of the RPCs, the attorney-client privilege, and the interests of Jane Doe. The scales tipped heavily in favor of nondisclosure. The trial court's order to produce these client documents violated the policy inherent in RPC 1.6 and should be reversed.

B. The Trial Court Erred By Imposing Sanctions Upon Defendant Lonnquist For Protecting Her Client's Attorney-Client Privilege

On June 25, the trial court granted Plaintiff's Motion to Compel Responses to certain written discovery seeking attorney-client privileged and otherwise confidential information. (CP 158-160). The order did not conclusively resolve the RPC 1.6 issues. (CP 158-159).¹² On August 12, Plaintiff took Ms. Lonnquist's deposition. On that morning, anticipating the potential of deposition questions that might require further disclosure of information in violation of RPC 1.6, Defendants' counsel placed a telephone call to the trial court judge for guidance as to how to deal with such potential inquiries. The trial court later advised counsel that it declined to respond to the inquiry. Left without resolution to the ethical dilemma, Ms. Lonnquist declined to respond to such inquiries unless or until relieved of her ethical responsibility not to reveal information relating to her

¹² The June 25 order addressed only Plaintiff's Requests for Production Nos. 2, 3, 12, and 15 (CP 159).

representation of a client, other than the four categories of written material expressly governed by the trial court's June 25 order releasing her from her RPC 1.6 obligations as to those documents. (CP 206-208).

Promptly thereafter, on August 17, Defendants filed with the trial court their motion for clarification of the June 25 order seeking guidance as to how Ms. Lonquist could ethically respond to the questions posed to her regarding her representation of Ms. Doe. (CP 201-207). The following day, August 18, despite Defendants' earlier clarification motion, which would have, when decided by the Court, likely resolved the deposition issue, Plaintiff filed her Motion to Compel Deposition Answers seeking, *inter alia*, sanctions and an order that Ms. Lonquist pay the cost of her resumed deposition. (CP 209-213).

On August 31, the trial court issued orders on both motions. (CP 251-255). The trial court granted Defendants' motion in part by clarifying that Ms. Lonquist should answer all questions except those seeking disclosure of Jane Doe's contact information.

Anomalously, the trial court also granted Plaintiff's Motion to Compel, sanctioning Ms. Lonquist \$300 and requiring that Defendants pay the cost of continuing the deposition including the costs of the transcript and the court reporter. (CP 252).

After receiving the Court's orders clarifying its prior order and granting Plaintiff's Motion to Compel, Ms. Lonquist recognized that she was still in an ethical conundrum because if Jane Doe availed herself of the thirty-day period for appeal provided to her pursuant to RPC 1.6, she could not answer deposition questions about Ms. Doe's confidential communications without mooting Ms. Doe's appeal. In accordance with the dictates of RPC 1.6, she promptly contacted Ms. Doe and provided her with the applicable court orders, and alerted her to the thirty-day appeal period. Ms. Doe thereafter directed her to retain her confidentiality while she considered her options. (CP 282-285). Ms. Lonquist then immediately placed a telephone call to the Washington State Bar Ethics Hotline. (CP 283).

The following day, she received a call from an ethics attorney for the WSBA, who told Ms. Lonnquist that as far as the WSBA was concerned, she had complied with the RPCs regarding this issue. Ms. Lonnquist asked her what she should do during the upcoming deposition and was told to seek private counsel. (CP 283). Since Ms. Lonnquist had already been consulting one of the WSBA suggested ethics attorneys, Leland Ripley, she contacted him. (*Id.*). Mr. Ripley advised Ms. Lonnquist to ask Jane Doe to express her wishes in the matter in writing, and see if her deposition could be postponed until after the appeal period. (*Id.*).

The continuation of Ms. Lonnquist's deposition was ultimately scheduled for September 27. On September 3, 2010, Plaintiff filed a motion seeking contempt, setting it for hearing without oral argument on September 14, 2010. (CP 260-265). Plaintiff cited no case law in support of her position.

On September 10, 2010, Defendants responded to the motion and submitted a declaration of ethics expert Ripley in support of its position. (CP 286-296). Plaintiff filed no reply. On

September 13, 2010, one day before the matter was set for hearing, the trial court granted Plaintiff's motion, and without any explanation or discussion, held Defendants in contempt and fined them \$2,100, notwithstanding the fact that no deposition had been conducted after the Court's August 31 order (the basis of Plaintiff's contempt request) and the fact that Defendant had not engaged in any contemptuous act. (CP 301-302). Indeed, the resumption of her deposition had not, at that time, been scheduled. Defendants moved for reconsideration of the September 13 Order, which was denied on October 11. (CP 410-411).

1. The Initial Sanction of \$300 and Payment of Court Reporter Costs Was Inappropriate

The trial court's imposition of sanctions of \$300 and its order that Defendants pay the cost of the resumed deposition was clearly an abuse of discretion. Defendants took all reasonable steps to accommodate the discovery while protecting client confidentiality: they asked the court for oral guidance, but were refused. They sought written clarification, which was not timely given. In fact, although the court ultimately granted their

clarification motion, showing that there was a need for such clarification, the trial court simultaneously imposed sanctions.¹³ The trial court's order of August 31 should be reversed.

2. The Trial Court Erred By Holding Defendant Lonnquist in Contempt and Imposing Monetary Sanctions

The trial court's contempt order of September 13 is clearly erroneous. (CP 301-302).¹⁴ No contempt had occurred at the time of the trial court's premature order. No deposition had been conducted after the Court's August 31, 2010 order (the basis of Plaintiff's contempt request), and Defendant Lonnquist had not engaged in any contemptuous act. Indeed, at that time, the resumption of her deposition had not even been scheduled. Moreover, given intervening events, no contemptuous act was ever likely to occur. Plaintiff's counsel ultimately noted Ms.

¹³ The court's error was compounded by the fact that Plaintiff's attorney concluded the original deposition of Ms. Lonnquist earlier than its 5 p.m. original conclusion time despite the facts that he had a large stack of documents in front of him on which he had not inquired, and had a number of inquiry areas on which he had not inquired that appeared central to the case but did not involve Jane Doe. (CP 240).

¹⁴ Note that the order holding Defendant Lonnquist in contempt was signed by the trial court even before the date on which the matter had been set for hearing on September 14. (CP 258-259, 301-302).

Lonnquist's deposition for September 27. On September 24, Ms. Lonnquist received a letter from Jane Doe in which she authorized compliance with the compelled disclosure.¹⁵ As a result, Ms. Lonnquist was able ethically to respond to deposition questions about communications between herself and Jane Doe. No contempt ever occurred.¹⁶

It is an abuse of discretion for a trial court to adjudge a lawyer in contempt for protecting her client's attorney-client privilege. *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968). The *Dike* court vacated the trial court's finding of contempt, *inter alia*, because it found that an attorney's disobedience of an order to reveal information was based on his belief that it was privileged, even though the court ultimately concluded that it was not. The *Dike* court acknowledged that the attorney had been faced with

¹⁵ Although Ms. Lonnquist's Declaration and the attached letter from Jane Doe were filed with the court, neither appears in the Clerk's Papers. Accordingly, they are set forth in the Appendix, at pp. 10-12.

¹⁶ There is no "anticipatory contempt." The plain language of the contempt statute requires that the refusal to appear at a deposition and answer questions has to have occurred *before* the deponent can be held to be in contempt.

conflicting obligations to his client and to the court and thus determined that a finding of contempt was inappropriate.

The same situation was presented here. Ms. Lonquist consulted with both the WSBA ethics counsel and ethics expert Leland Ripley about her conflicting obligations. She was advised by Mr. Ripley that she could not, without her client's authorization, divulge her client's privileged information even in the face of this court's orders. Thus, she had a good faith reason for declining to respond, when and if that situation arose. Such action does not constitute contempt. RCW 7.21.010(1)(c) defines "contempt" in the context of interrogation as refusing, *without lawful authority*, to answer a question. Ms. Lonquist had lawful authority for refusing to divulge attorney-client privileged information. Thus, under *Dike v. Dike* and its progeny, there was no basis for the trial court's actions herein, and this Court should review and reverse the orders sanctioning Petitioners the combined amount of \$2,400 and requiring that they pay the cost of the resumed deposition.

C. The Trial Court Wrongly Denied Defendants' Motion to Amend their Answer

On July 27, after recently taken depositions disclosed that Plaintiff had made slanderous statements about Defendants¹⁷ and had engaged in unauthorized entry of the firm's premises and removal of property, they promptly moved to amend their answer to add a counterclaim of defamation, and an affirmative defense of after-acquired evidence. Discovery cut-off was not until October 11. The trial court denied the motion, noting that "Defendant had many opportunities to timely raise this issue, including May 21, 2010." (CP 198).¹⁸ Even if that were true, (which, due to the fact that depositions in July and August had only just disclosed the extent and details of the slander, it was not), prior opportunity is not grounds for denial of a motion to amend.¹⁹

¹⁷ In August, two deponents testified that Plaintiff had told them in 2007 that "Judith and the client had agreed to lie" and had otherwise accused Defendants of suborning perjury. (CP 248).

¹⁸ As of that date, no depositions had yet been taken.

¹⁹ Washington courts are in accord with the holding of many courts that delay, excusable or not, is not sufficient reason to deny an amendment. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

In *Cambridge Townhouses, LLC, et al., v. Pacific Star Roofing, Inc., et al.*, 166 Wn.2d 475, 209 P.3d 863 (2009), the Washington Supreme Court stated:

The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party. Factors which may be considered in determining whether permitting amendment would cause prejudice include undue delay, unfair surprise, and jury confusion...

Here, the trial court erred when it denied the amendment [setting forth factual details]. No party would have suffered prejudice ... The Court of Appeals correctly reversed the trial court's ruling denying the motion to amend.

Even assuming *arguendo* opportunity to raise the issue earlier in these proceedings were a recognized consideration for denying a CR 15 motion, Washington courts have repeatedly concluded that prejudice to the nonmoving party is the touchstone for denial. Plaintiff offered no credible evidence of prejudice other than a counterclaim would divert her attention and that of her attorney from preparation of her case. If that were sufficient prejudice, no motion to amend would ever be granted because it is axiomatic that any new counterclaim could cause a diversion. The salient

fact is that two months remained before discovery cutoff and, at the time of the motion, much discovery remained to be completed.

The fact that the material in the amended pleading could have been included in the original pleading, or even added in May 2010, as the trial court here noted, should not preclude amendment, absent prejudice to the nonmoving party. *Caruso v. Local Union No. 690*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983). The Washington Supreme Court is in accord with the holding of many courts that delay, excusable or not, is not sufficient reason to deny an amendment.

Civil Rule 15(a) provides that leave to amend a pleading “shall be freely given when justice so requires.” The civil rules serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party. *Wilson v. Horsley*, 137 Wn.2d 500, 974 P.2d 316 (1999); *Caruso*, *Id.* at 349; *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 165,

736 P.2d 249 (1987). The trial court's denial of the motion to amend was clearly erroneous and should be reversed.

D. The *In Limine* Ruling that Defendants Could Not Introduce All Relevant Portions of Plaintiff's Medical Records Was Erroneous

In its rulings on motions *in limine*, the trial court ruled that Defendants could not introduce Plaintiff's medical records dating back more than one year prior to her discharge. (CP 587). As noted above, Plaintiff sought recovery of emotional distress damages. Furthermore, Plaintiff did not suffer mere garden-variety emotional distress. Rather, her complaint alleged "severe emotional distress" that necessitated emergency medical treatment. Accordingly, pursuant to RCW 5.60.060(4)(b), Plaintiff waived any doctor/patient confidentiality that she may have had. Nonetheless, Plaintiff sought, and the court below permitted her, to prevent Defendants from introducing evidence that any emotional distress Plaintiff experienced was tied to her long-standing depression and other psychological factors documented in her medical records having nothing to do with her termination by Defendants. Plaintiff had

asserted that issues involving her marriage, her romantic relationships, and her children had nothing to do with the emotional distress damages she claimed. The medical records excluded by the trial court call into question those assertions.

Causation is a question for the jury. Without the evidence of all of the stressors in Plaintiff's life, both systemic and contemporaneous, the jury here was deprived of highly relevant evidence. In order for the jury to make a reasonable determination of causation, it was entitled to view the entire picture. That picture included a long-standing history of behaviors related to her job performance elsewhere that were similar to behaviors leading to her termination in 2009.²⁰ All of this evidence was contained in her medical records, was relevant and probative of both causation and credibility, and should have been allowed. Plaintiff's medical history was central to her claim for emotional distress damages allegedly resulting from her termination. If her emotional distress was caused by factors other than her discharge, that evidence was key.

²⁰ For example, her medical records disclose a history of job dissatisfaction and out-sized reaction to supervisory criticism of her failure to work sufficient hours. (CP 495. 498).

Moreover, it was relevant evidence for the jury to have considered for purposes of weighing the comparative significance of her discharge versus the significance of other life stressors. By excluding medical evidence dating back more than a year before Plaintiff's discharge, the trial court: (1) limited the jury's evaluation of other possible causes of the emotional distress Plaintiff attributed to her termination, (2) deprived the jury of evidence by which it could weigh Plaintiff's contemporaneous emotional state, given her handling of past stressors, (3) impaired the jury's ability to evaluate Plaintiff's credibility in her presentation of her emotional distress. The trial court's exclusion of such evidence was clearly erroneous and should be reversed.

E. The Trial Court Erred in Refusing to Give Defendants' Wrongful Discharge Instruction and Instead Giving Plaintiff's Proposed Instructions No. 9 and 10.

Instruction No. 9, proposed by Plaintiff and given by the court below, is not a legally appropriate instruction in a wrongful discharge in violation of public policy (hereinafter "wrongful discharge") case. The instruction reads:

It is unlawful for an employer to retaliate against an employee for opposing what the employee reasonably believed to be an action in violation of public policy.

To establish a claim of discharge in violation of public policy by the defendants, the plaintiff has the burden of proving each of the following propositions:

- (1) That she was opposing what she reasonably believed to be a proposed action in violation of a clear public policy; and
- (2) That a substantial factor in the employer's decision to terminate the plaintiff was the plaintiff's opposition to what she reasonably believed to be a course of conduct in violation of public policy as defined herein [Instruction No. 10].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on this claim.

On the other hand, if any one of these propositions has not been proved, your verdict should be for the defendants on this claim. The plaintiff does not have to prove that her opposition to the proposed action was the only factor or the main factor in her termination, nor does she have to prove that she would not have been terminated but for her opposition.”

As indicated by its citation to WPI 330.05, Instruction No. 9 was taken from the model instructions for cases brought pursuant to the Washington Law Against Discrimination. (RCW 49.60 –

“WLAD”). That statute has entirely different policies and scope than the judicially created wrongful discharge tort. Whereas WLAD reflects a broad legislative policy to end employment discrimination, the tort of wrongful discharge is a narrow exception to Washington’s at-will employment policy.

For example, WLAD contains a legislatively-mandated requirement that it be “liberally construed.” RCW 49.60.020. The statutory policy is described as elimination of discrimination, which “threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. For these reasons, the pattern instructions for WLAD are broad and unique to WLAD cases.²¹

The tort of wrongful discharge, unlike discrimination and retaliation prohibited by WLAD, is a narrow exception to Washington’s at-will employment doctrine and accordingly requires jury instructions narrowly constructed to reflect the

²¹ The pattern instruction for WLAD retaliation on which the Court’s Instruction No. 9 is based is set forth in the Appendix, p. 4.

limitations of the tort. Our Supreme Court has repeatedly held that employment in Washington State is:

“at-will”, *i.e.*, employers and employees “generally can terminate their employment relationship at any time for any reason without having to explain their actions to a court. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 226, 685 P.2d 1081 (1984). Our Supreme Court has “always made clear that the tort of wrongful discharge in violation of public policy is a **narrow exception** to this employment at-will doctrine.” (emphasis added).

Briggs v. Nova Services, 166 Wn.2d 794, 801-02, 213 P.3d 910 (2009), citing *Sedlacek v. Hillis*, 145 Wn.2d 379, 385, 36 P.3d 1014 (2001). Plaintiff herein was an “at-will” employee, that is, she did not have a contract of employment. *See: Weiss*, 153 Wn. App. at 502. In Washington State, such an employee can be discharged at the wish of the employer for any lawful reason or for no reason. She could be discharged for good cause, a false cause, or for no cause at all, provided that the reason did not violate any clear mandate of public policy. A person fired, whether fairly or unfairly, but not fired in violation of a specific public policy, does not have a cause of action for wrongful discharge in violation of

public policy.²² *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 655 P.2d 1084 (1984); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991).

There are no model jury instructions for wrongful discharge. However, the elements of this narrow exception to the at-will doctrine were set forth in *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Plaintiff must prove: 1) the existence of a clear public policy (*the clarity element*); 2) that discouraging her conduct of raising ethical concerns would jeopardize the public policy (*the jeopardy element*); and 3) that her raising ethical concerns caused her dismissal (*the causation element*). *Briggs, Id.*; *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 206-07, 193 P.3d 128 (2008). If the plaintiff establishes three elements, the employer will still prevail by showing overriding justification for its decision to terminate (*the overriding justification element*). *Gardner, supra*; *Briggs, supra*. Accordingly, Defendants had proposed the following instruction:

²² See Defendants' Proposed Instructions Nos. 8 and 9 (App. pp. 5-6).

To prevail on her claim of wrongful discharge in violation of public policy, Plaintiff must prove the following elements:

1. The existence of a clear public policy;
2. That discouraging her conduct of raising ethical concerns would jeopardize the public policy;
3. That her raising ethical concerns caused her dismissal; and
4. That there is no alternative means other than this litigation adequate to safeguard the public policy.

If Plaintiff establishes all of the above elements, in order to prevail the Defendants must show overriding justification for their decision to terminate Plaintiff.

If you find that Plaintiff has proven all of the above four elements, and Defendants have not shown overriding justification, then your verdict should be for Plaintiff on her wrongful discharge in violation of public policy claim.

If you find that Plaintiff has not proven all of the above four elements or that Defendants have shown overriding justification, then your verdict should be for the Defendants.

The trial court erroneously declined to give such instruction.

In addition, the court below erred in its public policy instruction. A number of wrongful discharge cases address the definition of “public policy.” Using language drawn from such

authority, Defendants proposed the following public policy instruction:

INSTRUCTION NO. 10

A “public policy” is a statement in law, regulation, or rule that concerns what is right and just and what affects the citizens of the state collectively. It must truly be public and strike at the heart of a citizen’s social rights, duties, and responsibilities. Ordinarily, unfair treatment at work is an individual, not a collective concern.

Danny v. Laidlaw Transit Services, 165 Wn.2d 200, 193 P.3d 128 (2008); *Sedlacek v. Hillis*, 145 Wn.2d 379; 36 P.3d 1014 (2008).²³

Despite the fact that Proposed Instruction No. 10 was taken virtually verbatim from the cases cited, the trial court declined to give it.

The instructions given by the court failed to incorporate basic principles of wrongful discharge law, in other respects as well: It is axiomatic that the employee must be able to show that the employer’s conduct impacts society at large, not merely a matter of personal concern to the employee. *Reninger v. Dep’t of*

²³ The differentiation between public versus individual concern is not addressed in Instruction 10 given by the trial court (App. p. 8; CP 1866).

Corrections, 134 Wn.2d 437, 951 P.2d 782 (1998). Where the public policy is adequately protected by other remedies, wrongful discharge in violation of such policy will not be found. *Korslund v. Dynacorp Services*, 156 Wn.2d 168, 183-84, 125 P.3d 119 (2005). And where a plaintiff is unable to show that there was no alternative means other than this litigation adequate to safeguard the public policy on which she relies, defendants are entitled to a verdict in their favor on this claim.²⁴ None of these legal elements is contained in the instructions given by the trial court.

In fact, Court's Instruction No. 10 erroneously both presumes that Plaintiff met her burden of proving public policy and fails to direct the jury to determine whether she proved that there was no alternative means adequate to safeguard the public policy. Instruction No. 10 also erroneously includes perjury as a public policy when there was no claim in Plaintiff's case that the Defendants committed perjury.²⁵

²⁴ See Defendants' Proposed Instruction No. 8 (App. p. 5).

²⁵ Plaintiff claimed that the defendants' client may have committed perjury, but made no assertions that the individual defendant lied under oath.

Perhaps the most glaring error in the trial court's Instruction No. 9 is that it totally excludes the requirement that Plaintiff must show the absence of justification for her discharge. Nowhere in the instructions given by the trial court is there any reference whatsoever to the "*absence of justification element*" required by *Gardner*, at 941; *Briggs*, at 802, and *Korsland*, at 178; see also: *Hubbard v. Spokane*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002). Defendants had proposed instructions that included that element, which the trial court refused to submit to the jury.²⁶ Accordingly, this Court should hold that the trial court erred by giving Plaintiff's proposed Instructions 9 and 10 and not giving Defendants' proposed Instructions 8, 9, and 10.

²⁶ Defendants' Proposed Instruction No.9 addressed the elements of the at-will doctrine and concluded with the "lack of justification" element established by *Gardner* and *Briggs*: "If plaintiff does prove that her discharge violated public policy, then you must consider whether a substantial factor for her discharge was a violation of public policy, and not some other reason such as failure to meet the defendants' billable hours standard and to generate sufficient revenue, which defendant has asserted." For the complete text of the instruction, see App. p. 6.

F. The Trial Court Erred By Accepting Plaintiff's Proposed Judgment

1. There is No Individual Liability in Wrongful Discharge Cases

Unlike RCW 49.60 and RCW 49.52.050, which impose individual liability on officers and supervisors of a corporate Defendant, the court-established tort of wrongful discharge in violation of public policy does not encompass individual liability on any person or entity other than the employer. A thorough review of the universe of reported wrongful discharge cases discloses none where individual liability was imposed. This, of course, makes good sense, as “discharge,” whether lawful or not, is an action taken by the employing entity for which the employee works. Nonetheless, the trial court entered the judgment proposed by Plaintiff in which liability is imposed both on Ms. Lonnquist individually and on her law firm.²⁷

²⁷ The Judgment states: “It is ordered, judged, and decreed that Plaintiff Reba Weiss shall have judgment, **jointly and severally**, against the below named defendants Judith A. Lonnquist a single woman, and Law Offices of Judith A. Lonnquist, P.S., a Washington professional services corporation, in the amount of the jury verdict, of \$36,827.26” (emphasis added) (CP 615).

In *Awana v. Port of Seattle, et al.*, 121 Wn.App. 429, 89 P.3d 291 (Div. I, 2004), the Court rejected a claim for wrongful discharge against a defendant other than the employee's actual employing entity, holding that "Courts generally extend tort doctrines only where existing remedies are inadequate." *Id.* at 437. While that case involved whether a claim lay, in addition to the named employer, against an independent contractor rather than an individual, the principle is equally applicable here. The Law Offices of Judith A. Lonquist, P.S. is a professional services corporation, has been ongoing since 1986, employs a number of staff, and has a sizeable client roster providing ongoing income to the firm. There was simply no justification for extending liability for the modest award resulting from Plaintiff's wrongful discharge claim beyond the corporate defendant from which she was discharged. The trial court's signed judgment of January 13, 2010, should be vacated and replaced with one that does not impose individual liability regarding the wrongful discharge damages.

2. The Trial Court Erred By Doubling the Jury's Award for Wrongful Discharge.

The judgment proposed by Plaintiff and signed by the trial judge erroneously fails to segregate monetary damages for the wrongful discharge claim from the withheld wage award for the RCW 49.52 claim. Despite the fact that there were separate and distinct claims in this case, the Judgment erroneously does not address each claim separately. The two claims submitted to the jury differed in origin and applicable elements; one is statutory, the other court-created. Different jury instructions were given for each of the claims, and the special verdict form was segregated into separate questions for each claim. Nonetheless, the trial court conflated the two and, without statutory authority, doubled the economic damages on the wrongful discharge claim.

Only the wages found to have been wrongfully withheld in violation of RCW 49.52 should have been doubled, as expressly authorized by RCW 49.52.070. Instead, the trial court added the \$2,084.63 in wages to the economic damages of \$8,204.00, to

reach a total figure of \$10,288.63, and then baselessly doubled that conflated figure to \$20,577.26. (CP 613-614).

Doubling the economic damages for wrongful discharge was clear error. The Minimum Wage Act, RCW 49.46.010(2) defines “wages” as “compensation due an employee by reason of employment.” Clearly, “economic damages,” a remedy for wrongful discharge, cannot be construed as “compensation due an employee by reason of employment.” Rather, economic damages are awarded by reason of discharge from employment. No statute authorizes a court to double post-termination economic damages.

The trial court’s judgment thereby imposes punitive damages in violation of Washington public policy. It has long been established that punitive damages are contrary to Washington public policy and will not be allowed unless expressly authorized by statute. *Barr v. Interbay Citizen’s Bank*, 96 Wn.2d 692, 699, 649 P.2d 827 (1981); *Steele v. Johnson*, 76 Wn.2d 750, 751, 458 P.2d 889 (1969); *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash.

45, 25 P. 1072 (1891). No such statute applies to the damages at issue here.

The doubling provision of RCW 49.52.070 applies only to violations of RCW 49.52.050 (1) and (2) – neither of which is violated by virtue of Plaintiff’s wrongful discharge claim. Nor was there a jury finding of “intentional and willful” withholding of post-termination economic damages, which is a prerequisite to doubling wrongfully withheld wages. Accordingly, the court below erred in awarding a total judgment of \$36,827.26, which included \$2,084.63 for the wage claim, properly doubled to \$4,169.26, and the damages resulting from the wrongful discharge claim: emotional distress of \$16,250 and economic damages of \$8,204, erroneously doubled to \$16,408. Even setting aside the other errors as discussed above, the judgment should have been for only \$28,623.26.

G. The Trial Court Erred by Prematurely Authorizing Disbursement of Funds

As noted above, on December 3, a commissioner of this Court denied Defendants’ Motion for Discretionary Review and

ruled that the orders of contempt are not appealable as of right, commenting that the “available remedy for any errors asserted ... is review from a final judgment.” (CP 623). On January 14, 2011, the trial court entered judgment, giving Defendants at least until February 14, 2011, to file a notice of appeal.²⁸

Nonetheless, on January 24, 2011, asserting that she is entitled to disbursal of the funds because this Court issued a certificate of finality, Plaintiff moved for an order directing the Clerk to disburse \$2,100 from the supersedeas bond posted by Defendants on or about October 26, 2010 in their interlocutory appeal of the contempt order. Defendants opposed the disbursement, arguing that because the trial court’s order on contempt would not be final unless or until affirmed by this Court, no supersedeas funds should be disbursed until such time as the order is final. The disbursal order of the trial court was premature

²⁸ The appeal was filed on January 4, 2011.

and should be vacated, and the Plaintiff ordered to disgorge the funds.²⁹

H. The Trial Court Erred by Denying Discovery of Plaintiff's Fee Agreement

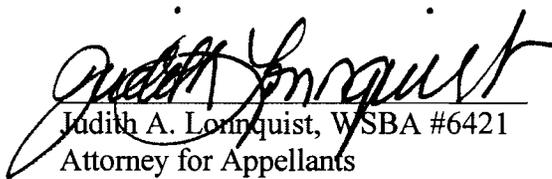
Because the trial court has yet to rule on fees, Defendants wish to reserve this issue for review in conjunction with appeal, if any, of such ruling.

V. CONCLUSION

Defendants request that the trial court be reversed, the judgment vacated, and that the case be remanded for a new trial.

Dated this 17th day of June, 2010.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.


Judith A. Lonquist, WSBA #6421
Attorney for Appellants

²⁹ Plaintiff also should be ordered to disgorge the \$300 earlier received as a court-ordered sanction.

APPENDIX

PLAINTIFF'S PROPOSED INSTRUCTION NO. 9

It is unlawful for an employer to retaliate against an employee for opposing what the employee reasonably believed to be an action in violation of public policy.

To establish a claim of discharge in violation of public policy by the defendants, the plaintiff has the burden of proving each of the following propositions:

- (1) That she was opposing what she reasonably believed to be a proposed action in violation of a clear public policy; and
- (2) That a substantial factor in the employer's decision to terminate the plaintiff was the plaintiff's opposition to what she reasonably believed to be a course of conduct in violation of public policy as defined herein [Instruction No. 10].

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on this claim. On the other hand, if any one of these propositions has not been proved, your verdict should be for the defendants on this claim.

The plaintiff does not have to prove that her opposition to the proposed action was the only factor or the main factor in her termination, nor does she have to prove that she would not have been terminated but for her opposition.

PLAINTIFF'S PROPOSED INSTRUCTION NO. 10

Public policy as used in these instructions means any of the following:

- (1) The affirmative duty pursuant to the Rules of Professional Conduct governing lawyers in Washington that a lawyer shall not:
 - (a) knowingly make a false statement of fact or law to a court or fail to correct a false statement of material fact or law previously made to the court by the lawyer;
 - (b) fail to disclose the material fact to a court when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer's client;
- (2) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the court;
- (3) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer's client;
- (4) A lawyer shall not bring or defend a lawsuit unless there is a basis in law and fact for doing so that is not frivolous; and/or
- (5) The criminal law in the State of Washington states that it is perjury to make a materially false statement under oath. It is not a defense to perjury that the person answering under oath believes that the statement was not material.

RPC 3.3(a)(1); RPC 3.3(a)(2); RPC 3.3(c); RPC 4.1; RPC 3.1; RCW 9A.72.010(1); RCW 9A.72.020; RCW 9A.72, et seq.

WPI 330.05: Employment Discrimination—Retaliation

It is unlawful for an employer to retaliate against a person for opposing what the person reasonably believed to be discrimination on the basis of *[age] [creed] [disability] [marital status] [national origin] [race] [sex]* or for providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred.

To establish a claim of unlawful retaliation by _____, _____ has the burden of proving each of the following propositions:

(1) That _____ *[was opposing what [he] [she] reasonably believed to be discrimination on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [sex]] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and*

(2) That a substantial factor in the decision to *[discipline] [demote] [deny the promotion] [terminate]* was the plaintiff's *[opposition to what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].*

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for _____ *[on this claim]*. On the other hand, if any one of these propositions has not been proved, your verdict should be for _____ *[on this claim]*.

_____ does not have to prove that *[his] [her] [opposition] [participation in the proceeding] [was] [were]* the only factor or the main factor in _____ decision, nor does _____ have to prove that *[he] [she]* would not have been *[disciplined] [demoted] [denied the promotion] [terminated]* but for *[his] [her] [opposition] [participation]*.

DEFENDANTS' PROPOSED INSTRUCTION NO. 8

To prevail on her claim of wrongful discharge in violation of public policy, Plaintiff must prove the following elements:

1. The existence of a clear public policy;
2. That discouraging her conduct of raising ethical concerns would jeopardize the public policy;
3. That her raising ethical concerns caused her dismissal; and
4. That there is no alternative means other than this litigation adequate to safeguard the public policy.

If Plaintiff establishes all of the above elements, in order to prevail the Defendants must show overriding justification for their decision to terminate Plaintiff.

If you find that Plaintiff has proven all of the above four elements, and Defendants have not shown overriding justification, then your verdict should be for Plaintiff on her wrongful discharge in violation of public policy claim.

If you find that Plaintiff has not proven all of the above four elements or that Defendants have shown overriding justification, then your verdict should be for the Defendants.

Gardner v. Loomis Armored Inc., 128 Wn.2d 931, 913 P.2d 377 (1996); *Reninger v. Department of Corrections*, 134 Wn.2d 437, 951 P.2d 782 (1998); *Korsland v. Dynacorp Services*, 156 Wn.2d 168, 125 P.3d 119 (2005).

DEFENDANTS' PROPOSED INSTRUCTION NO. 9

It is the plaintiff's obligation to prove, by a preponderance of the evidence, that her discharge violated a clear mandate of public policy. In this regard, I remind you that plaintiff was a so-called "at will" employee, that is she did not have a contract of employment. In Washington State, such an employee can be discharged at the wish of the employer for any reason or for no reason. She could be discharged for a false cause, or for no cause at all, provided only that the reason the employer discharged the employee did not violate any clear mandate of public policy. A person fired unfairly, but not fired in violation of a specific public policy, does not have a cause of action for wrongful discharge in violation of public policy.

If plaintiff does not prove that her discharge was in violation of a public policy, you need not consider whether plaintiff's discharge was wrongful. If plaintiff does prove that her discharge violated public policy, then you must consider whether a substantial factor for her discharge was a violation of public policy, and not some other reason such as failure to meet the defendants' billable hours standard and to generate sufficient revenue, which defendant has asserted.

Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 655 P.2d 1084 (1984); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991); New Jersey Pattern Instruction 2.11 (modified).

DEFENDANTS' PROPOSED INSTRUCTION NO. 10

A “public policy” is a statement in law, regulation, or rule that concerns what is right and just and what affects the citizens of the state collectively. It must truly be public and strike at the heart of a citizen’s social rights, duties, and responsibilities. Ordinarily, unfair treatment at work is an individual, not a collective concern.

Danny v. Laidlaw Transit Services, 165 Wn.2d 200, 193 P.3d 128 (2008); *Sedlacek v. Hillis*, 145 Wn.2d 379; 36 P.3d 1014 (2008).

COURT'S INSTRUCTION NO. 9

It is unlawful for an employer to retaliate against an employee for opposing what the employee reasonably believed to be an action in violation of public policy.

To establish a claim of discharge in violation of public policy by the defendants, the plaintiff has the burden of proving each of the following propositions:

- (1) That she was opposing what she reasonably believed to be a proposed action in violation of a clear public policy; and
- (2) That a substantial factor in the employer's decision to terminate the plaintiff was the plaintiff's opposition to what she reasonably believed to be a course of conduct in violation of public policy as defined herein.

If you find from your consideration of all the evidence that each of these propositions has been proved, then your verdict should be for the plaintiff on this claim. On the other hand, if any one of these propositions has not been proved, your verdict should be for the defendants on this claim.

The plaintiff does not have to prove that her opposition to the proposed action was the only factor or the main factor in her termination, nor does she have to prove that she would not have been terminated but for her opposition.

COURT'S INSTRUCTION NO. 10

Public policy as used in these instructions means any of the following:

(1) The affirmative duty pursuant to the Rules of Professional Conduct governing lawyers in Washington that a lawyer shall not:

(a) knowingly make a false statement of fact or law to a court or fail to correct a false statement of material fact or law previously made to the court by the lawyer;

(b) fail to disclose the material fact to a court when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer's client;

(2) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the court;

(3) In the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by the lawyer's client;

(4) A lawyer shall not bring or defend a lawsuit unless there is a basis in law and fact for doing so that is not frivolous; and/or

(5) The criminal law in the State of Washington states that it is perjury to make a materially false statement under oath. It is not a defense to perjury that the person answering under oath believes the statement was not material.

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Judge Steven Gonzalez

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

REBA WEISS, a single person,

Plaintiff,

v.

JUDITH A. LONNQUIST, a single person,
and LAW OFFICES OF JUDITH A.
LONNQUIST, P.S., a Washington
professional services corporation,

Defendants.

NO. 08-2-16867-1 SEA

DECLARATION OF JUDITH A.
LONNQUIST IN SUPPORT OF
DEFENDANTS' MOTION FOR
RECONSIDERATION RE: CONTEMPT

I, Judith A. Lonnquist, hereby declare under penalty of perjury of the laws of the
United States of America as follows:

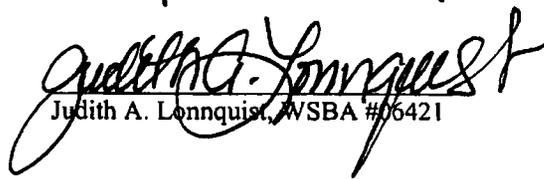
- 1. I am over the age of eighteen and am competent to testify as to the matters herein.
- 2. Rather than repeat the statements made in my Declaration of September 9, 2010, I incorporate it herein.
- 3. Attached hereto is a true and accurate copy of a letter that I received from Jane Doe, via her counsel, on September 24, 2010.
- 4. Plaintiff's attorney has noted my deposition for Monday, September 27, 2010. Now that my client has authorized me to respond to Mr. Gould's deposition

DECLARATION OF JUDITH A. LONNQUIST
IN SUPPORT OF DEFENDANTS' MOTION
FOR RECONSIDERATION RE: CONTEMPT- Page 1

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.
1218 THIRD AVENUE, SUITE 1500
SEATTLE, WA 98101-3021
TEL 206.622.2066 FAX 206.233.9165

1 questions in compliance with the Court's Orders of August 31, 2010, I no longer have the
2 ethical conflict between my obligation to comply with RPC 1.6 and my obligation to
3 comply with directives of this Court. Accordingly, it is my intention to reply to Mr.
4 Gould's questions about my client Jane Doe to the best of my ability and recall.

5 Dated this 26th day of September, 2010.

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8 Judith A. Lonnquist, WSBA #06421
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September 23, 2010

Dear Judith,

Although I disagree with the requirement that you disclose attorney-client privileged information, after reading the orders of Judge Gonzalez and discussing the situation with counsel, I hereby authorize you to comply with the court orders and respond to questions in your deposition about our communications.

Sincerely,

AKA "Jane Doe"

AKA "Jane Doe"

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LAW OFFICES OF JUDITH A.
LONNQUIST, P.S. and JUDITH
A. LONNQUIST,

Appellants,

v.

REBA WEISS,

Respondent.

NO. 66626-6

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of June, 2011, I caused to be delivered a true and correct copy of the APPELLANTS' OPENING BRIEF and this document by method indicated below and addressed to the following:

Robert B. Gould
2110 North Pacific Street
Suite 100
Seattle, WA 98103-9181

- VIA REGULAR MAIL
- VIA CERTIFIED MAIL
- VIA LEGAL MESSENGER
- VIA FAX
- VIA HAND DELIVERY

DATED this 17th day of June, 2011.



Linsey M. Teppner