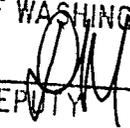


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COURT OF APPEALS
DIVISION II

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To: David Ponzoha, Court Clerk/Administrator
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

STATE OF WASHINGTON
BY 
DEPUTY

Re: WA State vs. Othniel Blancaflor/Statement of Additional
Grounds for Review/Case no. 42832-6-11/Cause #10-1-102164-9

Dear Mr. Ponzoha:

I apologize for the delayed response in providing my statement of additional grounds for review. Since it has been nearly a year when I was tried for the crimes charged against me. Trying to remember everything of what happened then was quite a challenge. Due to my failing health, mood swings and medications, I had to go back to the notes of the defense counsel to refresh my memory on the issues which took some time to find because I had moved three times since I was convicted on September 22, 2011. For this reason, I hope that you would still consider my statement in my request for a new trial or to reverse the false reporting and theft charges.

The underlying crimes as charged were the result of the industrial insurance audit that the Department of Labor & Industries performed on the business I co-owned with my ex-wife, Cynthia Blancaflor, who also worked as an auditor for the Department of Labor & Industries. The business was an adult family home called, "My Grandma's House LLC." At one point in time, we owned two adult family homes: My Grandma's House I and My Grandma's House II.

My Grandma's House I was purchased in July of 2005 and was shut down by the Department of Social and Health Services on June 1, 2009. My Grandma's House II was purchased in May of 2006 but did not receive its adult family home license until February of 2007. After barely four months of operation, My Grandma's House II was shut down by the Department of Social and Health Services on June 6, 2007.

As part of the sales-purchase agreement with former owners Joseph and Maria Orth, My Grandma's House was purchased with existing staff of caregivers: Miguelita Luna (mother of Maria Orth), Elvira Viray, and Edward Hoff. There were also fill-ins and part-time caregivers who worked for The Orth's that continued to work for us when Cynthia and I took over the business in July of 2005.

I have known and been friends with The Orth's for nearly twenty years. In October of 2004, I introduced The Orth's to Cynthia, who was then my fiancée. I did not marry Cynthia until September 17, 2005. In court, I had the time confused. I believe I stated 2004. Having knowing The Orth's and caregiver Miguelita Luna for nearly twenty years, everybody was like family. Caregivers Hoff and Viray were no strangers to me either. I've known both caregivers for nearly nine or ten years. I met Hoff through our prayer group; and I met Viray as one of The Orth's caregivers back in 1997 or 1998 when I used to visit the facility.

When I bought the business from The Orth's, I have never seen any financial statements or their federal tax returns. However, Maria Orth kept telling me that the business was profitable. Being a friend and family, I took her words for it. In hind sight, this was not a wise business decision on my part but this was a mistake I cannot undo. Maria Orth did not provide the financial records until after I signed the sales-purchase agreement on October 2, 2005.

Although federal and state records showed Cynthia as one of the owners/officers, in the business sales-purchase agreement, The Orth's named me as the sole purchaser of the business. I signed the agreement without consulting Cynthia who never reviewed the contract until The Orth's placed a lien on all of our properties in 2007.

When we took over the business from The Orth's, there were four private patients and two state funded patients. The business, at this time, was slightly above break-even point. The profit was marginal with gross income at about \$18,300; wages at 7,000; mortgage at \$2,300; monthly payment of \$1,500 towards the business note owing to The Orth's; Utilities including phone, internet, and cable was closed to \$1,000; groceries with six patients plus three caregivers was about \$1,800 plus other supplies not accounted for in this figure – bed liners, wipes, toiletries, and alike; plus other overhead costs, such as business insurance and taxes, to name a few.

If I were to take wages for myself and Cynthia, the business did not have any profit at all. MGH was operating fairly enough in 2005 as it was generating income to pay the operating costs. However, when one of the private patients moved to another homecare facility in December of 2005, we started drawing from our personal funds to cover some of the operating costs.

In the beginning of 2006, The Orth's gave us another business opportunity to buy the second adult family home, MGH II. The sale of the home closed on May of 2006. MGH II was purchased without an adult family home license even though Hoff was living in the house with one patient. Maria continued to receive the income from this one patient to pay for the mortgage of MGH II. However, it cost The Blancaflor's \$35,000 to buy the home from Maria. This \$35,000 did not include the closing cost paid to buy the house. The \$35,000 was the amount we paid in excess of the amount that our lender had approved because Maria added two bedrooms to the house with no building permit from the city of Tacoma.

Maria Orth original asking price for the house was \$350, 000. This was the market value of a 5 bedroom home. Our lender only approved \$315,000, which was the market value of a 3 bedroom home. In fairness to the expenses Maria had spent to add the two bedrooms, the business took a loan to pay off Maria the difference of \$35,000 plus all the fees we paid to the city of Tacoma to get the two bedrooms up to code.

The purchase of MGH II was an investment decision with a projected profit to earn more than MGH I. Since MGH II was a much smaller home and cost much less than MGH I with 8 bedrooms, the projected operating cost was much lesser, thereby, projected profit from the home would be more than marginal than MGH I.

It took almost 9 months for MGH II to be licensed to operate an adult family home. The home was purchased in May of 2006 and then later received its adult family home license in February of 2007. Towards the last quarter of 2006, our personal funds were nearly depleted to the point where we started falling behind on some of the bills but still managed to pay even though payments were delinquent.

After MGH II received its adult family home license in February of 2007, the business started bouncing back but not long enough to recover our start-up cost because on June 6, 2007, the adult family home was shut down by the Department of Social and Health Services.

The closure of MGH was triggered by a complaint filed by a family member of a patient regarding a one-time incident in MGH II where a patient went into convulsion because Edward Hoff did not follow the administration of certain medications as prescribed by the doctor. The doctor instructed to taper the dosage of the medication. Hoff, instead of tapering the dosage, totally stopped the administration of the medication stating that he had made several attempts to contact the family member that the patient had ran out of meds. As a result, the patient started to show symptoms of withdrawal that Hoff failed to take note until the patient went into convulsion.

The incident opened another issue – failure to notify the family member of the patient about the new owner and care provider of MGH II. This issue was related to the patient who was living at MGH II where Edward Hoff was the attending caregiver. An issue that Maria Orth volunteered and promised to disclose before MGH II became licensed in February 2007.

During the investigation conducted by the Department of Social and Health Services, Maria never had a meeting with the patient's family to disclose the new ownership as she led The Blancaflor's to believe. In the end, the Department of Social and Health Services ultimately held us responsible and revoked the adult family home license at MGH II on June 6, 2007.

In addition to the internal issues with the previous owners, tension was also high with the caregivers which started when I fired Miguelita Luna (the mother of Maria Orth) in April 10, 2007. The termination of Luna led to another caregiver quitting; and two other caregivers who used to work for Maria Orth that we terminated as we determined later that they were undocumented workers. All of a sudden, we were scrambling to fill in 4 caregivers who quit and terminated. This significantly changed the staffing structure of MGH. Hoff and Viray were not happy with this change.

Following the termination of Luna, complaints after complaints were made to the Department of Social and Health Services. Investigators were coming in and out of MGH generating a lot of correspondence between the agency and Cynthia. This continued even after MGH II was shutdown. The pressure intensified when The Orth's placed a lien on all of our properties leaving us no other financial leverage to fund the operating costs of MGH whose income continued to dwindle following the death of two private patients.

The compounding pressure from everything that went on at that time took a toll on my mental and physical health; in which, I attempted to end my life in August of 2007. The result of which

left me permanently incontinent and chronic back pains from three back surgeries – first one was done in August of 2007; second in March of 2008; and the third one was done in January of 2009.

I am not sharing my emotional experience here to try to soften the fact that I made a mistake, but given the surrounding circumstance sensitive to the speculation of the crimes charged, I am requesting the court of appeals to consider my mental state at that point in time.

I was under a lot of medications. My thoughts were scattered that I really didn't know what I could have done better at that time other than to cut costs to keep the business afloat. I made a bad business decision when I stop reporting the workers to L&I and began treating the caregivers as contract labor despite instructions from my ex-wife, Cynthia Blancaflor.

Although my ex-wife educated me on the L&I reporting procedures, at that time, I still did not have a full grasp of the independent contractor rules and laws. I had been a bookkeeper and business owner for years and not once did I ever have problems or issues with contract labor until My Grandma's House.

I was overwhelmed with all the bills needed to be paid. Cynthia's salary had already been garnished by the IRS for a couple of payroll tax returns that I filed in 2006 and 2007 without sending any payments. Cynthia was livid upon receiving a notice from the IRS placing a levy on her L&I salary. In addition to the taxes owed to the IRS, we were also falling behind on the mortgages and wages to the caregivers.

The decision to change the treatment of caregivers from employees to contract labor was solely based on financial hardship. In retrospect, I never did think of the consequences of my action when I continued to lie to my ex-wife about the unreported workers. I also did not realize the seriousness of the offense. However, the evidence obtained from my home clearly shows that the business was already struggling prior to 2008:

- IRS statements showing late filings and penalties
- IRS' notice to levy Cynthia's wages to pay payroll taxes in 2006 and 2007.
- Late mortgage bills
- Bankruptcy papers
- Copies of L&I's Warrant for Unpaid Industrial Insurance Premiums which were paid in full through garnishment of income received by MGH from the Department of Social and Health Services for state funded patients.
- Bank records obtained direct from US Bank further showing negative balances and overdrafts.
- Testimonies of Hoff and Viray about the NSF checks and how Tacoma Public Utilities came to MGH to cut the electric service because of delinquent payment.

Further, when I called the Department of Labor & Industries and the Washington State Department of Employment Security, I was telling the truth that I had no more employees since I no longer have payroll. All caregivers were treated as contract laborers. They were workers working under contract. They were not employees. Nobody seemed to understand when I tried to

explain this in court. There was no intention to misrepresent as my understanding of employees was staff that's on your payroll. I didn't have any at that time because I took both Hoff and Viray off payroll because I treated them as contract laborers.

Throughout the entire audit, the L&I auditor only spoke to me twice but never discussed anything about the issues in the preliminary audit results. Thereafter, the audit became part of an open criminal investigation on December 11, 2009. At this time, L&I Lead Investigator Sexton did not even call to give me an opportunity to explain myself. Sexton mentioned about the deposition that I was supposed to give to the AG but this deposition happened well after the criminal investigation was closed. The deposition came after the lawsuit was filed as part of a plea bargain offer that the AG made. After careful consideration of the plea bargain, I turned it down.

Sexton further added that L&I had already interviewed many caregivers who stated that they were working at MGH at one point in time. For this reason and the presumption that AG was to take a deposition on me, Sexton chose not to investigate me. I have never heard of a criminal investigation where the suspect was never interviewed.

This was a one-sided investigation especially when Prosecutor Jarmon questioned me about the two income statements where she commented that the figures on the report were not reliable even though L&I Auditor Cormier never reviewed our accounting records. This was noted on page 11 of Sexton's criminal investigation report stating that the Peach Tree Accounting software could not be accessed in the copied hard drive without the existence of the installed software on the host computer.

Further on paragraph 3 of page 11, L&I Investigator Mark Sexton added that "Password protected items were evident on some business records. Password protective items were not examined nor was the necessary software obtained to examine accounting records and pertinent documents were copied." This paragraph clearly indicated that a financial audit on MGH's books was not performed by L&I Auditor Cormier. The comments made by both Prosecutors DanPullo and Jarmon were purely speculative with malicious intent to sway the jury's decision.

The L&I auditor and investigators also did not let me explain about the other complaints of the caregivers regarding withholding taxes that were not remitted, overtime pays owed, and being underpaid.

I made an error once in Elvira Viray's paycheck on the first half of January right around when I started treating them as contract labor. This was just on Viray's pay but not on Hoff. The rest of the remaining period of 2008 when Hoff and Viray was working for MGH, they were paid gross but slightly lower than their normal gross pay because of a pay cut. Hoff's gross pay before the pay cut was \$ 677.60 compared to the \$650 that I paid him in cash. The difference was the reduction in pay of \$27.60 compared to the taxes that Sutton-McCann used to deduct from his pay of \$161.50.

The same applies with Viray whose gross pay used to be \$867.20 compared to the cash of \$800 that I paid her. The difference was \$67.20 was the reduction in pay compared to the total taxes

that Sutton-McCann used to deduct from her pay of \$179. Clearly the differences between the taxes taken to the reduction in pay were is nowhere close to even suspect that I withheld taxes from their pay.

The overtime pay that the caregivers claimed was owed to them was not true. Employment Standards already determined this early on that Hoff and Viray were live-in caregivers and were therefor exempt from overtime pay under the Minimum Wage Act RCW49.46.010(5)(j). The prosecutors did not appear like they did their homework.

The caregivers also complained about being underpaid. Edward Hoff and Elvira Viray were live-in caregivers who lived in the adult family home free of rent, food, supplies, and utilities.

Edward's net pay of \$516 and Elvira's net pay of \$688 every 10th and the 25th of the month did not include board and lodging.

The low-end average rent for a furnished bedroom is \$400. The standard food allowance per person is about \$200.

Excluding utilities and supplies, rent and food is already about \$600 additional to Hoff and Viray's pay a month. Add \$200 for utilities and supplies and that will be an additional \$800 to Hoff and Viray's pay.

Edward's pay would be about \$1,832/month ($516 \times 2 + 800$) and Elvira 's pay would be about \$2,176/month ($688 \times 2 + 800$).

At \$10 an hour, a non-live-in caregiver would make about \$1,600 gross monthly pay less \$320 estimated tax would leave a net pay of \$1,280. Since this is a none-live in caregiver, this caregiver would have to pay for his/her own rent, food and utilities. In this case, rent, food, and utilities are estimated at \$800 deducted from \$1,280 leaves \$480 a month. Compare this \$480 a month net of all expenses to Viray's net salary of \$1,376 per month (688×2). Does this look like Viray was underpaid? This is not even including gas that non live-in caregivers will have to pay to commute to work!

At \$8.47 an hour, a non- live-in caregiver would make about \$1,355 gross pay less \$271 estimated tax would leave a net pay of \$1,084. Since this is a none-live in caregiver, this caregiver would have to pay for his/her own rent, food and utilities. In this case, rent, food, and utilities are estimated at \$800 deducted from \$1,084 leaves \$284 a month. Compare this \$284 a month net of all expenses to Hoff's net salary of \$1,032 per month (516×2). Does this look like Viray was underpaid? Again, gas is not even included.

Hoff and Viray were so much ahead especially when you look at the daily logs of patient care which showed Edward and Elvira rarely woke up at night. Plus they have a 3 hour down time when the patients are relaxing or napping from 12:00 to 3:00 in the afternoon. Additionally, these figures are calculated sort of on the conservative side. It's hard to find a furnished room for \$400.

Further, the 2008 payment of cash for caregiver's salaries was my way of securing the caregivers' wages due to continuous overdrafts. The evidence obtained in my home showed copies of bank's notice hold on funds due to continuous overdrafts. There were never enough funds in the account to cover all costs. Sometimes US Bank covered some of the NSF checks and the ones that were not covered were returned.

L&I contended that the cash payments were payments made "under the table" to conceal the workers so therefore I was trying to avoid paying the industrial insurance premiums.

The mere payment of cash does not always equate to payments "under the table" when these payments were declared and recorded in the books. The financial statements from 2009 that were presented in court showed that I recorded the cash wages under "Outside Services." These financial statements showed that I did not conceal the cash payments made to the caregivers as L&I referred to as payments "under the table."

Further, since I treated the caregivers as "contract laborers," it therefore follows that a form 1099 for non-wage income should be issued, and I did. Both 2008 form 1099's issued to Hoff and Viray were presented in court.

On the discovery of records showing patients in Quarter 3 of 2008 where I stated none to the auditor, I was interviewed on the phone. I was in Illinois with no records to refer to. It's hard to track when patients were coming and going and dying. Additionally, the patients that were admitted in that quarter period were "mobile patients."

The patients were able to perform the normal daily activities without any caregiver assistance. They were very independent as they did not need assistance in bathing, toileting, or feeding. The only services I provided were cooking, housekeeping, managing the medication and washing the patients' clothes. L&I seized the patients' care plan records. If the auditor had reviewed the records instead of noting just the admission dates, then she would have noticed they were light care patients that I'm capable of caring for. These patients stayed no more than three months at MGH.

One of the weaknesses in our patients' admission records was that we did not mark the day when they were discharged or the day they died. The only way to tell would be to look at the med logs or daily logs which were also seized through the search warrant. However, the auditor assign was not very thorough in her examination. The auditor seized so many records that were not even reviewed.

Further, on the issue of continuing to operate with workers while our industrial insurance account was closed goes with my decision to treat the caregivers as contract laborers. I cannot justify the decision I made at that time, but given what went on, my actions were reflective of the financial hardship and not one with intent to evade paying the premiums to L&I. Had my intention been was to defraud L&I of the premiums, then I would not have been reporting the workers to L&I like I have been in 2005, 2006, and 2007.

There was a significant change in the financial situation of the business in 2008. It was for this reason that I decided to treat the caregivers as contract labor. Even if I was being stubborn and did not listen to Cynthia's instruction, the records showed that at one point in time, I reported these workers to L&I; and the change only came when the business was having financial trouble.

Additionally, my position and understanding on contract labor have been consistent since I purchased the business in July of 2005. L&I found fill-ins or part-time caregivers who were not reported in 2005, 2006, and 2007. This was because, in my books, I did not consider these workers as my employees since they were not on my payroll.

I essentially took this practice from the previous owner of the adult family home whom all of these caregivers used to work for; and personally, I did not see anything wrong with this practice as I have done this before in my previous job as a bookkeeper/accountant at Hillsdale Lumber and encountered no problems. I should have listen to Cynthia but I didn't. Instead, I stuck to what I learned based from my past experience and given the financial situation of the business, I did what was necessary and therefore request to reconsider a reversal on all crimes charged.

I hope that the appeal court would consider looking at everything to include the records and the different dynamics of the surrounding circumstance that took place when the business was in operation.

Thank you.

Respectfully,

Othniel R. Blancaflor Jr.