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Division III

No. 863512

SUPREME COURT OF THE STATE OF WASHINGTON

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JAMES R. KEYES,

Appellant,

v.

ALEX KEIFFER, LIZ JOHNSON, and SCOTT ARMSTRONG,  
individually, as representatives of their respective marital communities,  
and as representatives of GROUP HEALTH COOPERATIVE; and  
GROUP HEALTH COOPERATIVE, a Washington non-profit  
Corporation,

Respondents.

---

BRIEF OF RESPONDENTS

---

Tracy M. Miller, WSBA #24281  
Matthew D. Mihlon, WSBA #40524  
Of Karr Tuttle Campbell  
Attorneys for Respondents

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## I. INTRODUCTION

Plaintiff-Appellant James R. Keyes appeals the CR 12(b)(6) dismissal of his claims against Group Health Cooperative (“GHC”) and three of its employees: Alex Keiffer, Liz Johnson, and Scott Armstrong (collectively the “individual Defendants”). CP 122-27, 163-64. Mr. Keyes’s attempt to frame his assignments of error in terms of “findings of fact,” is misplaced, because the only issue raised in this appeal is whether the trial court properly granted Defendants’ CR 12(b)(6) Motion to Dismiss. As a result, the scrutiny of this Court is properly directed to the legal sufficiency of the allegations in Mr. Keyes’s Complaint, and not to any “findings” or opinions of the trial court.

Mr. Keyes’s Complaint asserted three causes of action against all Defendants: (1) wrongful termination in violation of public policy, (2) negligent infliction of emotional distress, and (3) intentional infliction of emotional distress. CP 4-5. For the reasons set forth in Defendants’ CR 12(b)(6) Motion to Dismiss (CP 66-68) and this Brief, Mr. Keyes’s claims were properly dismissed pursuant to CR 12(b)(6).

First, Mr. Keyes’s Complaint failed to identify any specific public policy whatsoever that had supposedly been violated by Defendants. CP 10-11. Second, Mr. Keyes’s Complaint alleged that GHC was not his employer; this allegation was inconsistent with GHC having terminated his employment, a prerequisite for a wrongful

termination in violation of public policy claim under applicable Washington precedent. CP 11-12. Third, Mr. Keyes did not allege that any of the individual Defendants was his employer and, in any event, there is no Washington authority for imposing individual liability in a wrongful termination in violation of public policy claim. CP 12. Finally, the sole alleged basis for Mr. Keyes's emotional distress causes of action was his supposed termination of employment, which is insufficient as a matter of law to sustain a separate cause of action for infliction of emotional distress. CP 12-13.

In this appeal, Mr. Keyes does not challenge the dismissal of his causes of action for negligent and intentional infliction of emotional distress. He also does not challenge the dismissal of his wrongful termination claims against the individual Defendants, other than to define the term "Group Health" to include the individual Defendants "[f]or simplicity purposes." Brief of Appellant, p. 8 (hereinafter "App. Brief"). All of his arguments are directed at GHC, and relate only to his wrongful discharge and replevin claims. As a result, the issues raised on appeal are as follows:

## II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The issues pertaining to Mr. Keyes's assignments of error may best be stated as follows:

1. Did Mr. Keyes fail to state a claim for wrongful termination in violation of public policy because the allegations in Mr. Keyes's Complaint established that he was not employed by GHC, and thus, could not have been wrongfully terminated by GHC?

2. Did Mr. Keyes fail to state a claim for wrongful termination in violation of public policy as a matter of law because he failed to identify a clear public policy that was jeopardized by his alleged termination of employment?

3. Was Mr. Keyes's replevin claim ever properly before the trial court, considering that it was added in a proposed Amended Complaint that was not filed until after judgment was entered and a notice of appeal filed?

## III. STATEMENT OF THE CASE

The facts herein are based on Mr. Keyes's Complaint. CP 3-6. In his Complaint, Mr. Keyes alleged that in November 2010 he "began working for GHC as a temporary employee contracted through Provisional Staffing Services" ("Provisional") to answer telephone calls from GHC's patients regarding their health care coverage and billing. CP 4. He further alleged that in the course of performing these tasks, he

discovered that GHC was engaging in billing practices he felt were unethical or unlawful, informed a “supervisor” of these practices, and requested GHC give a patient a service recovery credit (essentially a refund) in order, in Mr. Keyes’s opinion, for GHC to avoid civil liability. *Id.* Mr. Keyes alleged that he was then informed by Provisional that “Group Health Cooperative was terminating his employment, specifically because he had sought a credit for a member to avoid liability for Group Health Cooperative.” *Id.*

Mr. Keyes’s Complaint alleged a cause of action for wrongful termination in violation of public policy, but did not identify the “routine billing practices” that allegedly could have lead to civil liability, the legal basis for the alleged liability, or a public policy related to these billing practices or potential liabilities. CP 4-5. Although he had sued three individuals, Mr. Keyes made no allegations about them specifically, except that they were Washington residents. CP 3.

Defendants answered Mr. Keyes’s Complaint on April 14, 2011, and filed a Motion to Dismiss pursuant to CR 12(b)(6), on May 31, 2011. CP 149-54, 66-68. Mr. Keyes responded on June 6, 2011, by filing a motion to amend his complaint and filing an opposition memorandum based on the language in his proposed Amended Complaint, essentially offering the language of his proposed Amended Complaint as hypothetical facts to save his action. CP 155-62, 69-78.

His proposed Amended Complaint alleged that Mr. Keyes “began employment with the Defendant Group Health Cooperative as a borrowed servant provided by Provisional Staffing Services.” CP 159. With respect to the circumstances supporting the alleged violation of public policy, Mr. Keyes described one incident in which he allegedly determined that a patient “was billed for something they should not have been billed for,” and asked that the bill be corrected, which unnamed others refused to do. *Id.* As a result, Plaintiff claimed he “not[ed]” that without correction the billing was “incorrect and unjust,” and requested that a credit be given to the patient because the “particular billing practice” violated GHC’s “internal cost share policy and laws of the State of Washington.” *Id.* He claimed by doing so he had “raised concerns that [GHC] was acting unethically, violating its own internal policies and the consumer protection and product liability laws (including but not limited to RCW 19.86 *et. seq.* and RCW 62A.2-315) of the State of Washington while taking actions which harmed consumers and unjustly enriched [GHC] . . . .” *Id.*

At the hearing on the pending motions, on June 10, 2011, Defendants’ counsel did not object to Mr. Keyes’s proposed Amended Complaint, arguing that its filing would not cure the defects of Mr. Keyes’s claims. RP 3-4. Though no order was entered on Mr. Keyes’s Motion to Amend the Complaint, for purposes of the argument on

Defendants' Motion to Dismiss, the court considered the proposed hypothetical facts set forth in the proposed Amended Complaint, but concluded the amendment would not cure the defects in Mr. Keyes's claims. Therefore, the trial court dismissed Mr. Keyes's claims in their entirety. RP 6-7, 10-11, 18.

In its oral ruling, the court did not discuss a replevin claim that Mr. Keyes had added to his proposed Amended Complaint, but which had not been mentioned in Mr. Keyes's Memorandum Opposing CR 12(b)(6) Dismissal. RP 18-20.

Mr. Keyes filed a Motion for Reconsideration, which was subsequently denied. CP 84-96, 115-116. Final judgment was entered on July 22, 2011. CP 165-67. This final judgment and the order dismissing Mr. Keyes's claims are the subject of this Appeal.

On August 5, 2011, after final judgment had been entered and even though no order granting his motion to amend had been entered, Mr. Keyes filed his Amended Complaint and Notice of Appeal. CP 117-121, 122-127. Because judgment had already been entered and an appeal filed, Defendants did not answer the Amended Complaint.

Mr. Keyes seeks direct review before the Supreme Court. CP 122-127. Defendants submit that there is no reason for direct review, as argued in detail in Defendants' Answer to Statement of Grounds for

Direct Review, and request that the Court of Appeals affirm the trial court's dismissal of Mr. Keyes's claims.

#### IV. ARGUMENT

##### A. Standard of Review

Whether dismissal under CR 12(b)(6) was appropriate is a question of law that is reviewed de novo. *San Juan Cy. v. No New Gas Tax*, 160 Wn.2d 141, 164, 157 P.3d 831 (2007). Dismissal is appropriate when the plaintiff "can prove no set of facts, consistent with the complaint, which would justify recovery." *Id.* This Court can affirm the trial court's decision "on any grounds established by the pleadings and supported by the record." *Otis Housing Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 587, 201 P.3d 309 (2009).

##### B. Mr. Keyes's Claim of Wrongful Termination in Violation of Public Policy Was Properly Dismissed.

The common law tort of wrongful termination in violation of public policy is a "narrow" exception to the general Washington rule of "at will" employment. *Danny v. Laidlaw Transit Services, Inc.*, 165 Wn.2d 200, 207-08, 193 P.3d 128 (2008). For the reasons set forth below, Mr. Keyes has failed to state such a claim, and it was, therefore, properly dismissed pursuant to CR12(b)(6).

1. Mr. Keyes's Own Allegations That He Was a "Borrowed Servant" Preclude a Wrongful Termination Claim against GHC.

The tort of wrongful discharge provides a cause of action "when an *employer discharges an employee* for reasons that contravene a clear mandate of public policy." *Korlund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 178, 125 P.3d 119 (2005) (emphasis added). Numerous Washington cases have limited this cause of action to discharges of employees by their employers. *See, e.g., White v. State*, 131 Wn.2d 1, 18-20, 929 P.2d 396 (1997) (no cause of action where disciplinary actions do not result in discharge); *Roberts v. Dudley*, 140 Wn.2d 58, 76, 993 P.2d 901 (2000) ("the tort of wrongful discharge in violation of public policy clearly applies only in a situation where an employee has been discharged.").

A fundamental prerequisite to a cause of action for wrongful discharge by an employee against an employer is that there be an employment relationship. There is absolutely no basis in law to extend this narrowly construed cause of action to other types of relationships. It follows that an employee cannot maintain a wrongful discharge claim against entities other than his employer, like entities that contract or otherwise do business with his employer. The only published Washington appellate case on this issue is *Awana v. Port of Seattle*, 121

Wn. App. 429, 89 P.3d 291 (Div. I 2004), which Mr. Keyes's briefing does not cite.

The plaintiffs in *Awana* were employed by Alpha Insulation, Inc. ("Alpha") to perform asbestos abatement work. *Id.* at 431. Alpha had a contract with the Port of Seattle to work on a renovation of Sea-Tac International Airport. *Id.* After the plaintiffs complained about inadequate asbestos containment procedures and refused to work pending better procedures, Alpha transferred them to a related project and then terminated them. *Id.* at 431-32.

The plaintiffs thereafter brought wrongful termination in violation of public policy claims against the Port. The Court of Appeals affirmed summary judgment in favor of the Port on those claims. The court so ruled even though the Port, as the owner and general contractor, had a duty to provide a safe workplace and the Port allegedly had a right to control the work of its subcontractors' employees. Key to the court's analysis in granting summary judgment to the Port was the fact that the Port did not have control over its subcontractor's employment relations, and therefore, could not terminate, or refrain from terminating, its subcontractor's employees. *Id.* at 433-34. As the court noted, "Appellants do not explain how an owner/contractor is to carry out a duty to refrain from retaliatory discharge of workers employed by subcontractors." *Id.* at 434.

In concluding that the Port could not be sued for wrongful discharge as the plaintiffs' "de facto" employer, the *Awana* court rejected the plaintiffs' invitation to apply the legal standard used for distinguishing between employees and independent contractors (from cases such as *Nat. Mutual Ins. Co. v. Darden*, 503 U.S. 318, 112 S. Ct. 1344, 117 L. Ed. 2d 581 (1992), which rely greatly on the degree of control over a worker's activities). *Id.* at 435. The only fact that the court found salient to its decision was that Alpha had the ability to terminate the plaintiffs' employment and the Port did not. *Id.*

The *Awana* court also declined to extend the wrongful discharge doctrine beyond discharges by a plaintiff's employer to the employer's contractors, on the basis that the plaintiffs could have maintained a claim against Alpha for wrongful discharge, and provided sufficient facts existed, could have also sued the Port for tortious interference with contractual relations. *Id.* at 436. The court specifically held that the wrongful discharge doctrine is "a narrow and specialized craft, and should not be sent adventuring when no rescue appear[ed] to be called for." *Id.* at 437.

Mr. Keyes makes no effort whatsoever to address *Awana* and cites no Washington authority for the proposition that a "borrowed servant" may sue the borrowing employer for wrongful termination.

Instead, Mr. Keyes cites cases applying the control-based employee status test that was rejected in *Awana*, or are otherwise inapposite.

For example, *Permian Basin Cmty. Ctr. v. Johns*, 951 S.W.2d 497 (Tex. App. 1997), was a case under the Texas Whistleblower Act, Tex. Gov't Code Ann. § 554.001 (Vernon 1994 and Supp. 1997), a statute that prohibited any discrimination (not only discharge) against a public employee for good faith reports of violations of the law to law enforcement agencies. The statute defined "public employee" as "a person who performs services for compensation under a written or oral contract for a state or local governmental body. The term does not include independent contractors." *Permian*, 951 S.W.2d at 500. The result therefore depended on distinguishing between employee and independent contractor status. The *Awana* court, however, specifically declined to apply this legal standard.

Mr. Keyes's reliance on *Moss v. Steele Rubber Prods., Inc.*, 2010 U.S. Dist. LEXIS 30133 (W.D.N.C. 2010), is also misplaced as the court's ruling in that case depended on its finding that Title VII incorporated the common law control-based distinction between employees and independent contractors. Similarly, *Williams v. Shell Oil Co.*, 18 F.3d 396 (7th Cir. 1994), also turned on the inapplicable common law control-based employment test.

*Neal v. Manpower Int'l, Inc.*, 2001 U.S. Dist. LEXIS 25805 (N.D. Fla. 2001), also does not support Mr. Keyes's arguments. *Neal* was a sexual harassment claim under the Florida Civil Rights Act, and no termination from employment was required or alleged to establish liability.

As shown, none of the above cases support Mr. Keyes's position because control of a worker's day-to-day work does not equate with the ability to terminate the worker's employment, the only factor that is relevant to deciding whether a wrongful termination claim will lie against a particular entity under Washington law. *Awana*, 121 Wn. App. at 435.

The Spokane Superior Court correctly applied *Awana* to dismiss Mr. Keyes's wrongful discharge claim at the CR 12(b)(6) stage, because the allegations in both his Complaint and proposed Amended Complaint, plainly established that Mr. Keyes was employed by Provisional as a temporary employee, and *not* by GHC or any of the individual Defendants. While a CR 12(b)(6) motion must be denied if hypothetical facts could entitle the plaintiff to relief, it is well established that those facts must be "consistent with the complaint." *See, e.g., Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978). Here, Mr. Keyes's allegations that he was "hired" and "terminated" by GHC are inconsistent with his allegations in both the original Complaint and

proposed Amended Complaint that he was working “for GHC as a temporary employee contracted through Provisional Staffing Services,” or was a “borrowed servant provided by Provisional Staffing Services,” respectively. CP 3, 159 (Complaint, proposed Amended Complaint, ¶¶ 3.1-3.2).

Where there is a borrowed servant, there necessarily is also a “general employer,” in this case Provisional, that actually employs the worker, and does “all of those things every employer is required to do, such as employee reporting, payment of industrial insurance premiums, internal revenue withholding, and general bookkeeping” and then “charges its customers . . . for the services of its employees.” *Novenson v. Spokane Culvert & Fabricating Co.*, 91 Wn.2d 550, 552-53, 588 P.2d 1174 (1979). As Mr. Keyes admitted in his brief, he “submitted his work hours for payment and receiv[ed] his paycheck from Provisional.” App. Brief at 11. He admitted in oral argument at the hearing on Defendants’ Motion to Dismiss that Provisional responded to his claim for unemployment insurance. RP 12-13. He also admitted that Provisional informed him of his termination by telling him that they didn’t “have a client we can send you out to anymore.” RP 11. As a result, if Mr. Keyes was a borrowed servant on loan to GHC from Provisional, or an employee of Provisional contracted to perform work for GHC, as he variously alleges, the trial court properly

concluded that he was not GHC's employee under *Awana*, could not have been terminated by GHC, and therefore could not maintain a wrongful termination claim against GHC.

Indeed, Mr. Keyes seems to harbor a fundamental misunderstanding that all employment status issues are treated alike regardless of the jurisdiction or specific claim or issue involved. For example, he quotes a 1932 United States Supreme Court case for the proposition that a borrowing employer takes on all legal obligations of the general employer, despite admitting that the Court could not have been considering wrongful termination claims because they did not exist at the time. App. Brief at 18.

Furthermore, the proposition that a borrowing employer takes on all of the obligations of the general employer is clearly not true under Washington law. In *Novenson*, 91 Wn.2d at 552-53, the Washington Supreme Court described a general employer as retaining an obligation to do "all of those things every employer is required to do, such as employee reporting, payment of industrial insurance premiums, internal revenue withholding. . . ."

A similar misunderstanding of the law apparently underlies Mr. Keyes's contention that upholding *Awana* would curtail the protections of the Washington Law Against Discrimination ("WLAD"), RCW 49.60 *et seq.*, for all borrowed workers, which he enunciates through a highly

inappropriate “hypothetical” in his brief involving sexual harassment by one of the individual Defendants. App. Brief at 21-23. Mr. Keyes’s argument is misplaced because the WLAD’s coverage extends broadly to allow claims by employees against employers, which includes “any person acting in the interest of an employer, directly or indirectly.” RCW 49.60.040(11). In addition, the broad declaration of rights in RCW 49.60.030 has resulted in the WLAD being interpreted to cover independent contractors regardless of whether they meet the common law employment test. *See Marquis v. City of Spokane*, 130 Wn.2d 97, 110-13, 922 P.2d 43 (1996). Contrary to Mr. Keyes’s argument, the WLAD’s prohibition on sexual harassment would apply to the (offensive) hypothetical he posed. Neither *Awana* nor any other wrongful discharge in violation of public policy case can change the broad statutory scope of the WLAD. Thus, the parade of horrors—the rampant discrimination suggested by Mr. Keyes—would not occur if this Court applies *Awana* to dismiss his claims.

The common law wrongful discharge tort is a narrow and specialized device, as the Washington Supreme Court has emphasized since its creation. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984); *Cudney v. AlSCO, Inc.*, No. 83124-6, p. 5 (Sept. 1, 2011). Mr. Keyes’s unfortunate choice to sue GHC rather than his employer, Provisional, does not create a social need to extend a

limited and narrow common law cause of action in an unprecedented and unfair way to entities that have no ability to avoid liability, because they have no control over a worker's termination by his employer. This Court should apply the analysis from *Awana* and hold that the tort of wrongful discharge does not apply to one entity that "borrows" an employee from another entity, as Mr. Keyes alleges occurred here.

2. The Public Policies Identified by Mr. Keyes Are Insufficient to State a Claim for Wrongful Discharge in Violation of Public Policy.

In order to prove wrongful discharge in violation of public policy, a plaintiff must prove "(1) the existence of a clear public policy (the clarity element); (2) that discouraging the conduct in which they engaged would jeopardize the public policy (the jeopardy element); (3) that the public-policy-linked conduct caused the dismissal (the causation element); and (4) [the defendant] must not be able to offer an overriding justification for the dismissal (the absence of justification element)." *Danny*, 165 Wn.2d at 207 (2008) (internal quotations and emphasis omitted). Dismissal of Mr. Keyes's wrongful termination claim should be upheld because he cannot satisfy these elements.

a. Mr. Keyes's Initial Complaint Did Not Identify a Public Policy at All.

Mr. Keyes's Complaint failed even to allege the specific public policy he was claiming had been violated by GHC. Thus, he did not

meet the requirement that a wrongful discharge plaintiff must “plead . . . that a stated public policy, either legislatively or judicially recognized, may have been contravened.” *Snyder v. Medical Serv. Corp. of E. Wash.*, 145 Wn.2d 233, 239, 35 P.3d 1158 (2001). From Mr. Keyes’s Complaint, it was impossible even to identify a public policy allegedly violated, much less evaluate whether the policy was sufficiently clear to support a wrongful termination claim. Mr. Keyes’s proposed Amended Complaint, which was not filed until after judgment was entered, suggested that a public policy might be found by virtue of GHC allegedly “acting unethically, violating its own internal policies and the consumer protection and product liability law (including but not limited to RCW 19.86 et seq. and RCW 62A.2-315) of the State of Washington while taking actions which harmed consumers and unjustly enriched [GHC] . . . .” CP 160. Of these supposed public policies, most do not satisfy the clarity element, and the only one that might satisfy the clarity element does not satisfy the jeopardy element.

b. Ethics, Internal GHC Policies, and the Uniform Commercial Code Are Not Clear Sources of Public Policy.

General “ethics” and internal corporate policies are clearly not valid sources of Washington state law or public policy and do not satisfy the clarity element of a wrongful discharge in violation of public policy claim. *See Danny*, 165 Wn.2d at 208 (“To determine whether a clear

public policy exists, we must ask whether the policy is demonstrated in a constitutional, statutory, or regulatory provision or scheme. . . . To qualify as a public policy for purposes of the wrongful discharge tort, a policy must be ‘truly public’ . . .”).

RCW 62A.2-315 of the Uniform Commercial Code (“UCC”), which Mr. Keyes labels a “product liability” law, is also not a clear source of public policy. It provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

RCW 62A.2-315. This provision merely creates a default rule that an implied warranty will apply unless modified by the seller. If there is any clear policy embodied in this provision, it is a private one: to promote and facilitate commercial transactions between private parties. *See* RCW 62A.1-102 (listing a purpose of the UCC as “to permit the continued expansion of commercial practices through custom, usage and agreement of the parties”). No Washington case has ever recognized a public policy in the UCC for purposes of a wrongful discharge claim.<sup>1</sup>

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<sup>1</sup> Additionally, this UCC provision does not even apply here. *See* Section IV.B.2.c, below.

c. Any Clear Public Policy in the Consumer Protection Act Was Not Jeopardized.

Mr. Keyes also claims that a public policy supporting his wrongful discharge claim can be found in the Consumer Protection Act, RCW 19.86 (“CPA”).<sup>2</sup> Even assuming that the CPA embodies a clear public policy against consumers being subjected to unfair or deceptive trade practices, Mr. Keyes’s claims nevertheless cannot satisfy the jeopardy element, which supports the trial court’s CR 12(b)(6) dismissal.<sup>3</sup>

To satisfy the jeopardy element, “a plaintiff must show that the other means of promoting the public policy are inadequate . . . and that the actions the plaintiff took were the ‘only available adequate means’ to promote the public policy.” *Cudney*, No. 83124-6 at 6 (internal citations and quotations omitted). This is a “strict adequacy standard” designed to maintain “only a narrow exception to the underlying doctrine of at-will employment.” *Id.*

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<sup>2</sup> To the extent he suggests in his proposed Amended Complaint that additional unidentified public policies or laws may be at issue, Mr. Keyes has failed to state them, even in his proposed Amended Complaint, and therefore has not met the standard of pleading enunciated in *Snyder*, 145 Wn.2d at 239 (2001). Mr. Keyes’s brief does cite the whistleblower provisions in Chapters 42.40 and 42.41 RCW and WAC 26-15. However, as he admits in his Brief, none of these provisions apply to a private sector worker complaining about financial practices, and thus, they also do not support his claim.

<sup>3</sup> Although the jeopardy element may involve questions of fact, it can also be decided as a matter of law in appropriate circumstances, like this case. *Cudney*, No. 83124-6 at 14 n.4.

The policies underlying the CPA are already adequately protected by the CPA itself, which provides for a private right of action,<sup>4</sup> in which treble damages and attorneys' fees can be recovered; additionally, the Attorney General can investigate potential CPA violations and bring CPA enforcement actions on behalf of the public. RCW 19.86.080-090. The Attorney General's website prominently solicits complaints of consumer protection violations from the public to carry out these provisions. See Washington State Office of the Attorney General Website, <http://www.atg.wa.gov> (last visited Nov. 11, 2011). Even if true, Mr. Keyes's unsupported contention that "consumers are often totally unaware of the times and ways that they are subjected to unfair or deceptive treatment," and therefore, that "the real power to stop such consumer abuse belongs to the employees who would take affirmative action to prevent the abuse before it is consummated," App. Brief at 37, does not support using the CPA as a basis for a wrongful discharge

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<sup>4</sup> Mr. Keyes was not an aggrieved party and there is no CPA cause of action for whistleblowers. But the fact that the CPA does not provide Mr. Keyes (who would be unlikely to have standing in any event) with a cause of action does not mean that its remedies are inadequate. "[W]e must remember that it is the public policy that must be promoted, not [a plaintiff's] individual interests. The other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard public policy." *Cudney*, No. 83124-6 at 16 (internal quotations omitted). Mr. Keyes's suggestion that "because the CPA's process is not mandatory and exclusive, [his] common law tort claim is permitted" is unsupported because, unlike the plaintiff in *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), Mr. Keyes could not have sued under the CPA in any event. As discussed in *Cudney*, No. 83124-6 at 12-14, the issue is not whether a remedy is mandatory and exclusive—even if it applied to the plaintiff—but whether the plaintiff can satisfy the jeopardy analysis.

claim. This is because the CPA provides private rights of action and other strong enforcement measures to those actually aggrieved and complaints to the Attorney General may be made by members of the public. Moreover, this case concerns bills that were delivered to GHC members, who then called Mr. Keyes to complain about them, not actions hidden from the view of the affected GHC members. It is impossible to believe that the measures provided by the CPA to protect consumers are so inadequate that the “only available adequate means” to protect consumers was for Mr. Keyes to take the specific actions he claims resulted in his alleged termination.

In addition to the policies in the CPA being adequately promoted by the CPA itself, and therefore not in jeopardy, these policies were also not jeopardized in the specific situation Mr. Keyes claims forced him to take action. To determine whether a public policy is in jeopardy in cases where an employee claims that reporting employer misconduct was necessary to promote the public policy, the court examines “‘the degree of alleged employer wrongdoing, together with the reasonableness of the manner in which the employee reported, or attempted to remedy, the alleged misconduct.’” *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 669, 807 P.2d 830 (1991) (quoting *Dicomes v. State*, 113 Wn.2d 612, 619, 782 P.2d 1002 (1989)). Where the alleged employer misconduct is financial in nature, a wrongful termination plaintiff must prove that the

employer actually violated the letter or policy of the law. *Ellis v. City of Seattle*, 142 Wn.2d 450, 460-61, 13 P.3d 1065 (2000). An objectively reasonable belief that a violation has occurred is not enough unless the issue concerns “imminent harm” to “public safety” or “immediate harm to life or limb.” *Id.*<sup>5</sup> Even taking Mr. Keyes’s allegations to be true, they would not be sufficient to plead a violation of the CPA.

Though it was unclear in his opposition to Defendants’ Motion to Dismiss, in his briefing in support of this appeal, Mr. Keyes has elaborated on his theory. Mr. Keyes claims that the UCC and CPA were violated when GHC allegedly billed a member for a “cost share” for a second refraction eye exam after the glasses produced based on the results of the first exam did not work because of an error in the first exam. App. Brief at 30-31. He claims that billing a member for a cost share for the second refraction (a service that he alleges was provided to the member) was an unfair or deceptive practice under the CPA, apparently because he thinks that the second refraction should have been free under the UCC’s implied warranty provision in RCW 62A.2-315.

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<sup>5</sup> Because the Court in *Cudney* was addressing a safety issue under the Washington Industrial Safety and Health Act, not a financial issue, its quotation from *Ellis* of this standard for safety cases is not to the contrary. *Cudney*, No. 83124-6 at 13. Recognizing this, Mr. Keyes argues that his actions involved “imminent harm of [GHC members] being unfairly billed.” App. Brief at 36. This argument is unpersuasive. Billing disputes do not raise public safety issues or threaten life or limb. Mr. Keyes’s claim therefore depends on showing an actual violation of Washington law and that absent his actions, the policy underlying that law would have been jeopardized. He has failed to do so.

The CPA makes “unfair or deceptive acts or practices in the conduct of any trade or commerce” unlawful. RCW 19.86.020. An act or practice is “unfair or deceptive” under the CPA if it “had the capacity to deceive a substantial portion of the public,”<sup>6</sup> or if it violated another statute declaring the act to be an unfair or deceptive trade practice.<sup>7</sup> Mr. Keyes does not claim that billing for a service that was actually received is deceptive, and it is difficult to see how it could be. Instead, he apparently looks to RCW 62A.2-315 of the UCC, to argue that GHC somehow breached an “implied warranty” by charging for the second exam. This argument fails.

The relevant portion of the UCC provides:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller’s skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

RCW 62A.2-315. This UCC code section, upon which Mr. Keyes relies, does not even apply to a refraction exam, because such an exam is a service and not a good.<sup>8</sup>

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<sup>6</sup> See *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 509, 31 P.3d 698 (Div. I 2001).

<sup>7</sup> See *Segal Co. v. Amazon.com*, 280 F. Supp. 2d 1229 (W.D. Wash. 2003).

<sup>8</sup> RCW 62A.2-315 only applies to “goods,” which are defined in RCW 62A.2-105 as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale . . . .” This definition does not include

But even if a UCC provision did apply here, the Washington Supreme Court has specifically held that the UCC does *not* provide grounds for a CPA claim. *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 649 P.2d 828 (1982). Since the facts alleged do not plead—or even create a basis for an objectively reasonable belief of—a violation of the CPA, the public policy underlying the CPA was not implicated or jeopardized.

The trial court correctly dismissed Mr. Keyes's wrongful termination claim for this reason as well.

C. Mr. Keyes's Replevin Claim Was Never Properly Before the Court.

Mr. Keyes's initial Complaint, which was the subject of Defendants' Motion to Dismiss, did not include a replevin claim. CP 3-6. The proposed Amended Complaint, attached to Mr. Keyes's Motion to Amend, added a replevin claim. CP 161. However, no written order was ever entered granting Mr. Keyes's Motion to Amend. Although the trial court considered the allegations in the proposed Amended Complaint as potential hypothetical facts that might defeat a CR 12(b)(6) motion to dismiss his wrongful discharge claims, and even though the

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services, which are not movable "things," and are not covered by the UCC at all. *See, e.g., Tacoma Fixture Co., Inc. v. Rudd Co., Inc.*, 142 Wn. App. 547, 555, 174 P.3d 721 (Div. III 2008) (distinguishing common law contracts for services from UCC contracts for goods); *Urban Development, Inc. v. Evergreen Bldg. Prods., L.L.C.*, 114 Wn. App. 639, 645, 59 P.3d 112 (Div. I 2002) (UCC does not apply to contract for services).

trial court orally granted his motion to amend for that purpose, the trial court never addressed the replevin claim, which suggests that it did not intend to allow Mr. Keyes to add an entirely new claim on the eve of dismissing the action. RP 4, 18-20. As though to concede the point, Mr. Keyes did not file an order on the motion to amend, and did not file his Amended Complaint until after judgment had been entered. Indeed, he did so the very same day that he filed his Notice of Appeal. CP 117-121, 122-127, 165-67.

“A party seeking to file an amended complaint postjudgment must first have the judgment vacated or set aside.” *Ruotolo v. City of New York*, 514 F.3d 184, 191 (2nd Cir. 2008). *See also Lindauer v. Rogers*, 91 F.3d 1355 (9th Cir. 1996). Mr. Keyes did not do so. Moreover, a notice of appeal divests the trial court of jurisdiction except to take specific actions, none of which include accepting an amended complaint. *See* RAP 6.1, 7.1. Therefore, as the record stands, Mr. Keyes’s Amended Complaint is a nullity and there is no pending replevin action to be considered on appeal.

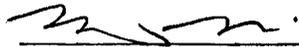
#### V. CONCLUSION

For the reasons stated herein, the trial court’s dismissal of Mr. Keyes’s claims against all Defendants pursuant to CR 12(b)(6) was correct and should be affirmed.

DATED this 16th day of November, 2011.

KARR TUTTLE CAMPBELL

By:



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CERTIFICATE OF SERVICE

I, Marilyn Hargan, hereby certify that I caused a true copy of the foregoing Brief of Respondents to be served on the following party at the below stated address by Certified U.S. Mail:

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DATED this 16th day of November, 2011.

  
Marilyn Hargan, Legal Assistant  
Karr Tuttle Campbell  
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