

CASE NO. 322777-III

COURT OF APPEALS, STATE OF WASHINGTON,
DIVISION III

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

MARGARETA KILGORE, a single woman,

Respondent,

vs.

SHRINERS HOSPITALS FOR CHILDREN, a Colorado corporation,

Appellant,

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The two questions before this Court on appeal are narrow. Whether under Washington law, Shriners Hospitals for Children (“Shriners”), as the employer, can maintain a common law indemnity cause of action against Margreta Kilgore, its former employee, for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, based on an implied contractual relationship between Shriners and Kilgore, as employer and employee. And second, whether common law causes of action for indemnity are subject to RCW § 4.16.080(3)'s three-year statute of limitations, as implied contracts not in writing. The answer to both of these questions is in the affirmative.

Therefore, Shriners respectfully requests that the trial court’s Order granting Plaintiff Kilgore’s Motion for Partial Summary Judgment against Defendant Shriners on its counterclaim for indemnity be reversed and the case be remanded back to the trial court for further proceedings.

II. FACTUAL CONTENTIONS

The pertinent facts of this case are fully set forth in the Opening Brief of Appellant, and in the interests of brevity will not be repeated here.

III. ARGUMENT

A. Shriners Can Maintain a Common Law Indemnity Cause of Action Against Kilgore

Whether Shriners, as the employer, can maintain a common law indemnity cause of action for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, as its former employee, is an issue of law, subject to *de novo* review. Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995); see also McDevitt v. Harbor View Medical Center, 179 Wn.2d 59, 64, 316 P.3d 469 (2013). Likewise, the appropriate standard of review of an order granting summary judgment is *de novo*, engaging in the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006).

The trial court dismissed Shriners' counterclaim for indemnity against Kilgore ruling, in pertinent part, that Shriners had "no substantive legal basis for Defendant's Counterclaim alleging that Plaintiff is liable to Defendant for wage payments made to Shriners' employees based on payroll timecard edits; therefore, there is no cognizable legal claim that Defendant may bring against Plaintiff." (CP 453-455) Thus, the trial court made a legal determination that in the entire spectrum of possible causes of action there is no cognizable legal claim that Shriners could assert against Kilgore for her wrongful timecard edits that created liability for

Shriners to make its employees whole including liquidated damages and interest associated with unlawfully withheld wages. The trial court was incorrect.

As set forth in detail in Shriners' Appellant's Brief, the Washington Supreme Court and Ninth Circuit have held, without exception, that an employer may bring an indemnity action against its employee for damages paid to a third-party because of the wrongful acts of that employee based on an implied contractual relationship between the employer and employee. Richardson & Elmer Co., 64 Wn. 403, 409-410, 116 P. 861 (1911); Gaffner v. Johnson, 39 Wn. 437, 438-39, 81 P. 859 (1905); Globe Indem. Co. v. Capital Ins. & Sur. Co., 352 F.2d 236, 238 (9th Cir. 1965); (Appellant Brief, at pp. 8-10). Washington's stance on this issue is consistent with the majority rule in other jurisdictions. 110 A.L.R. 831 (2011) (nationwide compilation of cases demonstrating majority rule).¹

Kilgore's Response Brief does not distinguish this longstanding precedent. Instead, Kilgore claims that "[t]here is no common law implied contractual indemnity right under Washington law," arguing that the

¹ Shriners' Appellant's Brief contains a compilation of cases from other jurisdictions also holding that an indemnity cause of action by the employer against employee is permitted because of the wrongful acts of that employee. (Appellant's Brief, at pp. 9-10)

Washington State Tort Reform Act (“Tort Reform Act”) extinguished the implied right of indemnity. (Respondent’s Brief, at pp. 2, 6-8 and 10-11) However, several of the cases cited by Kilgore hold just the opposite – *i.e.*, that the common law right of indemnity did survive the Tort Reform Act. (Respondent’s Brief, at pp. 7-8)

- “Where a legal duty exists between non-joint tortfeasors, an indemnity right exists at common law. This right is not affected by the Tort Reform Act. Sabey’s indemnity claim is not barred by the statute.” Sabey v. Howard Johnson & Company, 101 Wn.App. 575, 592, 5 P.3d 730 (Div. I 2000).
- “Contractual indemnity and indemnity between non-joint tortfeasors survived the adoption of RCW 4.22.040 [Tort Reform Act].” Toste v. Durham & Bates Agencies, Inc., 116 Wn.App. 516, 520, 67 P.3d 506 (Div. II 2003).
- Indemnity causes of action are available when one party incurs a “liability the other party should discharge by virtue of the nature of the relationship between the two parties.” Central Wash. Refrigeration, Inc. v. Barbee, 133 Wn.2d 509, 513, 946 P.2d 760 (1997).

Similarly, Kilgore’s statement that “[a]ll of the cases relied upon by Shriners pre-date by many years the 1986 Tort Reform Act which expressly abolish this implied right of indemnity,” is irrelevant. (Respondent’s Brief, at p. 7) None of cases cited by Shriners in support of its indemnity cause of action have been overruled. (Appellant’s Brief, at pp. 9-10) Moreover, several cases cited by Kilgore herself, hold that the

common law right of indemnity did survive the Tort Reform Act; thus, post-dating the Tort Reform Act itself. See e.g., Sabey, 101 Wn.App. at 592; Toste, 116 Wn.App. at 520; Central Wash. Refrigeration, Inc., 133 Wn.2d at 513.

Moreover, Kilgore's assertion that because Shriners' is vicariously liable to its third-party employees under the doctrine of respondeat superior, its cause of action "is properly characterized as one for contribution," rather than a cause of action for contractual indemnification, is misplaced. (Respondent's Brief, at pp. 2, 6 and 9) The doctrine of respondeat superior, does not define the cause of action, but instead, describes the relationship between the parties, *i.e.*, imputed liability to Shriners because of Kilgore's acts.

The doctrine of respondeat superior holds "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary. By definition, this liability extends to holding an employer (or principal) liable for its employee's (or agent) actions, independent of the Tort Reform Act. For example, the employer may be liable for contracts entered into by its employee/agent. See Restatement (Second) of Agency § 140 (1958) (principal is liable to third persons where its agent had "power arising from the agency relation"); 3 C.J.S., Agency § 140 (a principal

may be liable to a third person for the acts of its agent); Central. Wash. Refrigeration, Inc., 133 Wn.2d at 513 (contractual relationship provided basis for implied indemnity claim between buyer and seller, when buyer incurred liability to a third party for a seller's breach of warranty); Universal Underwriters Ins. Co. v. Security Ind., Inc., 391 F.Supp. 326, 328 (W.D. Wash. 1974) (contractual indemnity action brought by insured of third-party defendant in previous lawsuit, to recover attorney fees and costs in defending lawsuit, against former third-party plaintiff). Thus, respondeat superior identifies the relationship, not the nature of the cause of action.

To that end, the Kirk v. Moe, 114 Wn.3d 550, 789 P.2d 84 (1990) case cited by Kilgore, is distinguishable from the present. (Respondent's Brief at pp. 2 and 6) In that case, the employer was subject to liability to a third party for personal injuries caused by the tort of his employee. The employer sought contribution from the employee for amounts paid to the third-party. Id. at 552-53.

Contrary to the Kirk case, this matter is not a negligence case involving an employee tort. Instead, Kilgore's wrongful timecard editing

practices violated state and federal statutes for unpaid wages.² Shriners' has a common law right of indemnity against Kilgore for the value of the liquidated damages and interest portion of these third-party payments to its employees. This is an indemnity cause of action between non-joint tortfeasors, outside the Tort Reform Act. Sabey, 101 Wn.App. at 592 (“[w]here a legal duty exists between non-joint tortfeasors, an indemnity right exists at common law. This right is not affected by the Tort Reform Act”); Toste, 116 Wn.App. at 520 (“[c]ontractual indemnity and indemnity between non-joint tortfeasors survived the adoption of RCW 4.22.040”)

Shriners is not seeking a partial “contribution,” but rather, seeking the entirety of liquidated damages and interest paid due to Kilgore’s falsification practices, based on a long history of common law precedent granting employers an implied right of indemnity against the employee for damages paid to a third-party because of that employee’s actions.

Given the foregoing, the trial court’s ruling that Shriners has “no cognizable legal claim” that it could bring against Kilgore is in error and should be reversed. (CP 453-455) Shriners’ counterclaim for

² Kilgore violated R.C.W. § 49.48.030, the Washington Minimum Wage Act, R.C.W. § 49.46 *et seq.*, and the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 206 (minimum wage), 29 U.S.C. § 207 (overtime) and 29 U.S.C. § 216(b) (liquidated damages).

indemnification arises from contract and survived the adoption of the Tort Reform Act. The Tort Reform Act, in general, and the one-year statute of limitations sets forth in RCW § 4.22.050(3), in particular, has no application to Shriners' counterclaim for indemnification against Kilgore.

As an indemnification cause of action, Shriners' counterclaim is governed by RCW § 4.16.080(3)'s three-year state of limitations, as implied contracts not in writing.³ Universal Underwriters Ins. Co., 391 F.Supp. at 328; Central. Wash. Refrigeration, Inc., 133 Wn.2d at 518 FN 14. On November 18, 2010, Shriners' paid its employees for the unpaid wages, liquidated damages and interest resulting from Kilgore's unlawful timecard editing practices. (CP 400-401) On December 30, 2011, Shriners' filed its counterclaim against Kilgore. (CP 9-15) Thus, Shriners' counterclaim for indemnity was timely as within RCW § 4.16.080(3)'s three-year state of limitations.

Therefore, the trial court's ruling that Shriners has "no cognizable legal claim" that it could bring against Kilgore is in error and should be reversed.

³ Shriners' Appellant's Brief discusses extensively that because Shriners' counterclaim is a common law cause of action for indemnity, not contribution, it is subject to RCW § 4.16.080(3)'s three-year statute of limitations, rendering its counterclaim timely. (Appellant's Brief, at pp. 14-17) For sake of brevity, such argument will not be reiterated here.

B. The Trial Court Did Not Rule on the Merits of Shriners' Counterclaim for Indemnity

Kilgore claims that the trial court ruled on the merits of the case. Specifically, Kilgore states that the court ruled “there was no substantive basis in law or fact to support Shriners’ counterclaim.” (Respondent’s Brief, at pp. 1, 7 and 10-12) (emphasis added) This is incorrect. The trial court did not rule on the merits of Shriners’ counterclaim for indemnity. To that end, this Court should decline Kilgore’s invitation to argue the factual merits of the case, as this is not the issue before this Court.

The trial court granted Shriners’ Motion for CR 54(b) Certification of the January 14, 2014 “Order Denying Defendant’s Motion for Reconsideration” (“Order re: Reconsideration”).⁴ (CP 470-474) In doing so, the trial court added the following language to that Order re: Reconsideration:

[t]he decision of this Order involves a **controlling question of law** as to which there is substantial ground for a difference of opinion, that immediate review of the Order may materially advance the ultimate termination of the litigation, and that there is no just reason for delay.

⁴ Notably, Kilgore incorrectly cites the December 6, 2013, “Order Granting Plaintiff’s Motion for Partial Summary Judgment re: Defendant’s Counterclaims,” as the Order appealed in this matter. (Respondent’s Brief at p. 6; CP 450-452) However, that is not the Order appealed by Shriners. Shriners’ appealed the January 14, 2014 “Order Denying Defendant’s Motion for Reconsideration,” addressed in detail above.

(CP 473) (emphasis added) The trial court did not make any rulings or findings with regard to the facts supporting Shriners' counterclaim, but rather, recognized that the appeal is appropriate on an issue of law.

Consistent with that Order for CR 54(b) Certification, the January 14, 2014 Order re: Reconsideration – the Order appealed by Shriners – also does not make any rulings or findings with regard to the merits of Shriners' counterclaim. (CP 453-455) Specifically, the Order re: Reconsideration states, in pertinent part, that:

1. There is **no substantive legal basis** for Defendant's Counterclaim alleging that Plaintiff is liable to Defendant for wage payments made to Shriners' employees based on payroll timecard edits; therefore, there is **no cognizable legal claim** that Defendant may bring against Plaintiff.
2. Defendant's claim against plaintiff for wage payments paid to Shriners employees is barred by the one year statute of limitations set forth in RCW 4.22.050.

(CP 453-455) (emphasis added).

Simply stated, the trial court never evaluated nor ruled on the merits of Shriners' counterclaim nor are there any factual findings rendered by the trial court regarding the same. Thus, the crux of Kilgore's Response devoted to mischaracterizing the facts underlying the lawsuit is irrelevant and has no bearing on this appeal. (Respondent's, at pp. 3-6 and

12) Consequently, this Court should decline Kilgore's invitation to argue the factual merits of the case, as this is not the issue before this Court.

C. **Even Though the Trial Court Did Not Address the Facts Supporting Shriners' Counterclaim for Indemnity, There is Ample Evidence Warranting Submission of the Counterclaim to the Jury at Trial**

Shriners was required to compensate its employees under both federal law (29 U.S.C. § 206, 29 U.S.C. § 207 and 29 U.S.C. § 216(b)) and state law (RCW § 49.48.030 and RCW § 49.46 et seq.) for unpaid wages, liquidated damages and interest, stemming from Kilgore's unlawful timecard edits. Contrary to Kilgore's suggestion, the unpaid wages were owed to Shriners' employees under federal and state law, without any finding of willfulness. (Respondent's Brief, at pp. 11-12) The employees were entitled to the maximum damages pursuant to the combination of Washington and federal law. Under Washington law, the employees were entitled to back wages, three-year statute of limitations and attorney fees. Under federal law, the employees were entitled to back wages, an equal additional amount as liquidated damages, a two-year statute of limitations and attorney fees. (Appellant's Brief, at p. 13)

The issue of willfulness is relevant only to the employees' right to exemplary or double damages for unpaid wages under RCW § 49.52.070 and RCW § 49.52.050(2), and to the expansion of the statute of limitations

(from two-years to three-years) under federal law. Thus, the issue of willfulness addresses the nature of damages Shriners was obligated to pay its employees, not Shriners right to indemnity from Kilgore. Despite there being no requirement of willfulness, Kilgore exercised control over the payment of wages to the employees, and in addition, she knew what she was doing with respect to her edits of employee timecards. As such, Kilgore's conduct was willful.

Shriners' counterclaim for indemnity seeks reimbursement only for the \$212,183.76 in liquidated damages and interest paid by Shriners to its employees, because of the wrongful timecard editing practices of Kilgore. These damages are associated with back wages Shriners paid its third-party employees.⁵ Kilgore was terminated for those wrongful timecard edits.

Kilgore was employed by Shriners as the Director of Fiscal Services, and thus, had the responsibility for all financial runnings of the Spokane Hospital. (CP 21) Kilgore would review the hours worked by every non-exempt employee, for each and every pay period. (CP 25) Kilgore edited employee timecards based on assumptions that some of the

⁵ In total, Shriners' paid \$383,298.76 to its third-party employees. Shriners seeks indemnity only for the liquidated damages and interest portion caused by the wrongful timecard editing practices of Kilgore, not reimbursement for the back wages it owed and paid to its employees.

time recorded by the employee was personal time, not work time, and would make the edits without ever contacting the employee whose time she edited. (CP 41-42, 46)

After the timecards were reviewed and often edited by Kilgore, those time records served as the basis for what the employees were paid. (CP 31) Kilgore admitted that her practice of editing employee timecards resulted in employee's not being paid for time that the employee reported as work time and that she unilaterally made the timecard edits without even contacting the employee whose hours and subsequent pay was reduced. (CP 40-43)

Kilgore made these timecard edits despite being instructed by the hospital administrator over six-months prior to her termination that she was not to make any changes to employees' hours without manager involvement, that managers needed to be involved in decisions about changes to employees' pay, and that it should not be done unilaterally by Kilgore. (CP 290-291)

Consequently, even though the trial court did not address the facts supporting Shriners' counterclaim for indemnity, and that issue is not before the Court, contrary to Kilgore's contention, there are genuine questions of fact warranting submission of the counterclaim to the ultimate trier-of-fact for resolution of the merits at trial. Particularly, where,

Kilgore was specifically instructed not to edit employee timecard without manager involvement, and where, the facts, and all reasonable inferences drawn from the facts, are to be construed in the light most favorable to Shriners as the nonmoving party. Elcon Constr., Inc. v. Eastern Washington Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

IV. CONCLUSION

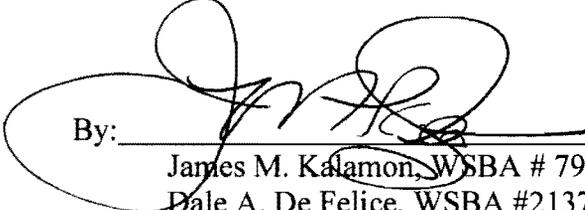
For the reasons set forth herein, together with those contained in Appellant's Opening Brief, Shriners, as the employer, has a common law indemnity cause of action against Kilgore for damages paid to its third-party employees because of the wrongful timecard edits made by Kilgore, its former employee. That counterclaim for indemnity is subject to RCW § 4.16.080(3)'s three-year statute of limitations, rendering its counterclaim timely.

Accordingly, Shriners respectfully requests that the trial court's Order granting Plaintiff Kilgore's Motion for Partial Summary Judgment

against Defendant Shriners on its counterclaim for indemnity be reversed and the case be remanded back to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 24th day of April, 2015.

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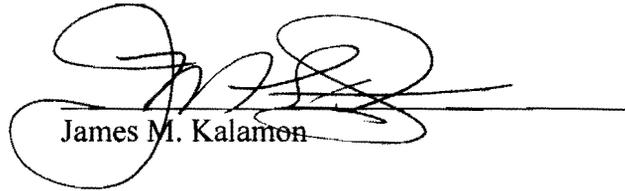
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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of April, 2015, I caused to be served a true and correct copy of the foregoing, **REPLY BRIEF OF APPELLANT**, by Hand Delivery and addressed to the following:

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Dated this 24th day of April, 2015, at Spokane, Washington.


James M. Kalamon

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