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No. 95531-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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JARED KARSTETTER and JULIE KARSTETTER,

Plaintiffs-Petitioners,

vs.

KING COUNTY CORRECTIONS GUILD, et al.,

Defendants-Respondents.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen Street  
Camas, WA 98607  
(360) 852-3332

Daniel E. Huntington  
WSBA No. 8277  
422 W. Riverside, Ste.1300  
Spokane, WA 99201  
(509) 455-4201

On Behalf of  
Washington State Association  
for Justice Foundation

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the elements of proof required to establish a common law claim for wrongful discharge in violation of public policy under Washington law.<sup>1</sup>

## II. INTRODUCTION AND STATEMENT OF THE CASE

Jared Karstetter (Karstetter) was fired from his position as in-house counsel for the King County Corrections Guild (the Guild) after he provided information requested by the King County Ombudsman's Office (Ombudsman), regarding its investigation of a Guild officer. At issue on review are two causes of action asserted by Karstetter against the Guild arising out of his termination: 1) wrongful discharge in violation of public policy, and 2) breach of contract. This brief addresses issue (1), the wrongful discharge claim. The facts are drawn from the published Court of Appeals' opinion and the briefing of the parties. *See Karstetter v. King Cty. Corr. Guild*, 1 Wn. App. 2d 822, 407 P.3d 384 (2017), *review granted*,

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<sup>1</sup> With the permission of this Court, WSAJ Foundation previously submitted an amicus brief in *Martin v. Gonzaga*, 200 Wn. App. 332, 402 P.3d 294 (2017), *review granted*, 190 Wn.2d 1002 (2018), which raises similar issues to those addressed herein. *Martin* is currently pending with this Court.

190 Wn.2d 1018 (2018); Karstetter Pet. for Rev. at 3-5; Guild Ans. to Pet. for Rev. at 5-7; Karstetter Supp. Br. at 1-2; Guild Supp. Br. at 2-6.

For purposes of this brief, the following facts are relevant. The Guild is a labor organization that serves corrections officers and sergeants of the King County Department of Adult and Juvenile Detention. Between 1996 and 2016, Karstetter served as in-house counsel for the Guild, subject to employment contracts that provided for-cause termination and other protections. His most recent employment contract was executed in 2011. The contract had a term of five years and provided that the Guild could not terminate Karstetter's employment without just cause. It also required notice, an opportunity to correct, and arbitration of any disputed termination.

The Ombudsman contacted Karstetter in March of 2016, seeking select Guild financial records as part of its investigation of a Guild officer who was suspected of taking improper parking reimbursements. Karstetter states that he complied with the Ombudsman's request after being directed to do so by the Guild's Vice-President. In April of 2016, the Guild terminated Karstetter, stating as its reason that Karstetter "disclosed the Guild's client confidences." *Karstetter*, 1 Wn. App. 2d at 824.

Karstetter brought suit against the Guild, alleging retaliation, negligent infliction of emotional distress, tortious interference with employment, wrongful discharge in violation of public policy and breach

of contract. The Guild filed a motion to dismiss, which the trial court granted in part, dismissing all claims except wrongful discharge and breach of contract. The Guild sought interlocutory review of the trial court's ruling with respect to these claims, which the Court of Appeals granted.

The Court of Appeals reversed the trial court's denial of the Guild's motion with respect to the wrongful discharge and breach of contract claims. Regarding wrongful discharge, the court held that claim should have been dismissed, reasoning that Karstetter's conduct does not qualify as whistleblowing activity because it was not undertaken for the purpose of furthering the public good. The court explained:

Karstetter alleges that he provided information to the investigator of a whistleblowing complaint but was not a whistleblower himself. Karstetter does not show that he reported any misconduct to remedy that misconduct or that his actions were motivated by a desire to further the public good. To the contrary, Karstetter alleges that he helped with the investigation because the King County Code and the threat of superior court action compelled him to. Thus, the whistleblower protection contemplated by Washington courts does not apply to Karstetter.

*Karstetter*, 1 Wn. App. 2d at 833. Importantly, notwithstanding the fact that Karstetter's conduct allegedly constituted whistleblowing — one of the four categories of conduct that typically form the basis for the tort of wrongful discharge in violation of public policy — the Court of Appeals relied on the Perritt test as establishing the proof requirements for a wrongful discharge claim: “A wrongful discharge in violation of a public

policy claim has four elements: . . . the *clarity* element . . . the *jeopardy* element . . . the *causation* element . . . [and] the *absence of justification* element.” *Karstetter*, 1 Wn. App. 2d at 831-32 (brackets added; citing *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996)). *Karstetter* thereafter petitioned for review, which this Court granted.

### III. ISSUES PRESENTED

- (1) Whether the Perritt test applies to a claim for wrongful discharge in violation of public policy that is predicated on whistleblower activity.
- (2) Whether a common law claim for wrongful discharge in violation of public policy predicated on whistleblower activity requires proof of motive, *i.e.*, that the employee’s personal motivation for engaging in the public policy linked conduct was to further the public good.

### IV. SUMMARY OF ARGUMENT

The Court has recognized four categories of public policy linked conduct that typically form the basis for the tort of wrongful discharge in violation of public policy: (1) an employee’s refusal to commit an illegal act; (2) an employee performing a public duty or obligation (*e.g.*, jury duty); (3) an employee exercising a legal right or privilege (*e.g.*, workers’ compensation benefits); and (4) “whistleblowing” activity. In the rare cases falling outside of these four categories, the Perritt test may be used for a more refined analysis. This test should be unnecessary and

inapplicable, however, where the facts fall within one of these four recognized categories, such as whistleblowing.

The purpose of the wrongful discharge tort is to protect clear public policies by prohibiting employer conduct that frustrates those policies. The focus of this inquiry is on whether the employer's conduct frustrates a clear public policy, and an employee's purpose in undertaking public policy linked conduct is irrelevant.

In the majority of wrongful discharge claims falling within one of the four traditional categories, the elements of the claim may be drawn from the traditional framework for the tort, as refined by subsequent case law, and may be modeled after the analogous claim of retaliation under the Washington Law Against Discrimination.

## V. ARGUMENT

### A. **The Perritt Test Is Inapplicable To A Common Law Claim For Wrongful Discharge In Violation Of Public Policy Predicated On Whistleblower Activity.**

The Court adopted the cause of action for wrongful discharge in violation of public policy in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Recognizing the default rule of at-will employment, the Court described the tort as a “narrow public policy exception” created to protect clear public policies. *Thompson*, 102 Wn.2d at 232.

Following *Thompson*, the Court examined the nature of the tort in *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989), and observed that wrongful discharge claims generally involve public policy linked conduct falling into one of four categories: (1) refusal to commit an illegal act; (2) performance of a public duty or obligation; (3) exercise of a legal right or privilege; or (4) whistleblowing. *See Dicomes*, 113 Wn.2d at 618.

In 1996, the Court was presented with an unusual set of facts that did not fall squarely into one of the categories recognized in *Dicomes*. *See Gardner v. Loomis Armored Inc.*, *supra*. The Court recognized that adhering to these categorical limitations generally ensured the tort would remain a narrow exception to the at-will employment rule. However, the Court noted the unique facts before it, and explained that “[b]ecause this situation does not involve the common retaliatory discharge scenario, it demands a more refined analysis than has been conducted in previous cases.” *Gardner*, 128 Wn.2d at 940 (brackets added).

The “more refined analysis” was found in a test developed by Professor Henry Perritt. *See* Henry H. Perritt Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991). The Perritt test identifies four factors that may be used to analyze a wrongful discharge claim: (1) clarity; (2) jeopardy; (3) causation; and (4) absence of justification. *See Gardner*, 128 Wn.2d at 941 (citing Perritt).

When the Court adopted the Perritt test in *Gardner*, it was faced with a specific problem presented by the unique facts of that case. The Court noted the adequacy of the *Thompson* formulation for cases falling into any of the four categories recognized in *Dicomes*, but concluded it needed a “more refined analysis” to resolve the issues before it. *See Gardner*, 128 Wn.2d at 940.

Recently, the Court stated explicitly what *Gardner* implied — that the Perritt test is unnecessary and inapplicable when the public policy at issue falls into one of the four categories recognized in *Dicomes*. *See Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 287, 358 P.3d 1139 (2015) (clarifying that “when the facts do not fit neatly into one of the four . . . categories, a more refined analysis may be necessary. *In those circumstances, the courts should look to the four-part Perritt framework for guidance. But that guidance is unnecessary here . . . These facts fall directly within the realm of wrongful discharge in violation of public policy.*” (italics added)); *see also Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 259, 359 P.3d 746 (2015).<sup>2</sup>

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<sup>2</sup> On the same day these opinions were issued, the Court applied the Perritt test to a case appearing to fall into one of the recognized categories of public policy related conduct. *See Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 311–14, 358 P.3d 1153 (2015), *as amended* (Nov. 23, 2015) (involving an employee’s allegation that she was terminated after voicing concerns about her employer’s intent to commit an illegal act). The Court in *Rickman* did not discuss whether the facts before it involved one of the four recognized categories. Notably, the Court did not disavow the rule announced in both *Rose* and *Becker* that the Perritt test is inapplicable to cases falling into any of the four categories recognized in *Dicomes*.

**B. An Employee’s Personal Motivation For Reporting Employer Misconduct Is Irrelevant To The Determination Of Whether The Employee Has Engaged In Whistleblower Activity.**

When the Court adopted the tort of wrongful discharge in *Thompson*, it explained the doctrine was intended to promote “public policy and the community interest it advances.” 102 Wn.2d at 231. The object of protection is the *public interest*, as opposed to the private interest of the employee. The Court focused the inquiry on whether the employer’s conduct frustrates a clear public policy. This question turns primarily on whether the interest advanced by the plaintiff is one of public concern, as opposed to the private interests of the employee. *Thompson* contrasted two cases from other jurisdictions, which clarified that whether a claim may lie depends on whether “the interest alleged by the plaintiff/employee has been found to be purely private in nature and not of general public concern.” 102 Wn.2d at 232. The Court explained:

[I]n *Harless v. First Nat'l Bank*, 246 S.E.2d 270 (W.Va.1978) a bank employee was discharged after attempting to make his employer comply with the state consumer credit and protection laws. The West Virginia Supreme Court held that despite the general rule, the bank could be liable for wrongful discharge because the discharge would otherwise frustrate a clear manifestation of public policy, protection of consumers of credit. In contrast to the result reached in *Harless*, when the interest alleged by the plaintiff/employee has been found to be purely private in nature and not of general public concern, the general rule applied and no liability attached to the employer's action. *See, e.g., Campbell v. Ford Indus., Inc.*, 274 Or. 243, 546 P.2d 141 (1976) (employee/stockholder allegedly fired for pursuing stockholders' rights against employer).

*Id.* at 231-32 (brackets added); *see also Smith v. Bates Tech. Coll.*, 139 Wn.2d 793, 801, 991 P.2d 1135, 1140 (2000) (noting that “in Washington the tort of wrongful discharge is not designed to protect an employee's purely *private interest* in his or her continued employment; rather, the tort operates to vindicate the *public interest* in prohibiting employers from acting in a manner contrary to fundamental public policy”).

Following *Thompson*, the Court in *Dicomes* considered whether an employee must prove the employer's actions constituted a clear statutory violation to establish the employer conduct contravenes public policy. Rejecting this “unduly restrictive” approach, the Court clarified a plaintiff may establish that employer conduct contravenes public policy, even absent a clear statutory violation: “[W]e will consider whether the employer's conduct constituted either a violation of the letter or policy of the law, so long as the employee sought to further the public good, and not merely private or proprietary interests, in reporting the alleged wrongdoing.” *Dicomes*, 113 Wn.2d at 620 (brackets added).

The Court recently revisited its statement from *Dicomes* in *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015), *as amended* (Nov. 23, 2015), and clarified that “*Dicomes* does not provide a litmus test for a claim of wrongful discharge.” 184 Wn.2d at 312. In *Rickman*, the employer asserted the employee's conduct did not advance public policy because she had failed to confirm the illegality of the

employer's actions. The Court explained that the reference in *Dicomes* to the employee's purpose in undertaking public policy linked conduct meant only that proof of the employee's state of mind may establish that the employee's conduct furthers public policy; such a showing is not *necessary* to state a claim for wrongful discharge:

We have never adopted as an element of the four-part Perritt test, or of wrongful discharge generally, a requirement that the plaintiff confirm the validity of his or her concerns before taking action. Instead, the reasonableness of the plaintiff's conduct relates to whether the plaintiff's conduct furthers public policy goals. . . . This inquiry *may be satisfied* by showing the employee sought to further the public good, and not merely private or proprietary interests.

*Rickman*, 184 Wn.2d at 312-13 (italics added; internal citations and quotations omitted).<sup>3</sup>

Ultimately, the focal point of the tort of wrongful discharge remains on the conduct of the employer, not the employee. The policy underlying the wrongful discharge tort is that the terminable at will doctrine “cannot be used to shield an employer’s action which otherwise frustrates a clear manifestation of public policy.” *Thompson*, 102 Wn.2d at 231. “The focus under the *Dicomes* test for whistleblowing is on [the

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<sup>3</sup> The Court in *Rickman* considered the relevance of the employee's state of mind in the context of the “jeopardy” element of the Perritt test. *See Rickman*, 184 Wn. 2d at 312-13. While the Perritt test is inapplicable to claims falling within one of the four recognized categories, the substance of this test overlaps to some degree with the traditional elements under the *Thompson* framework. *See Gardner*, 128 Wn.2d at 941 (noting the common law claim as described in *Thompson* “already contains the clarity and jeopardy elements”). Moreover, because *Rickman* clarified the language in *Dicomes*, which predated *Gardner* and purported to examine the requisite showing for asserting wrongful discharge claims, its analysis offers helpful guidance here.

employer's] level of wrongdoing, not [the employee's] actions.” *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 671, 807 P.2d 830 (1991) (brackets added). The employee’s personal reasons for undertaking the public policy linked conduct should be irrelevant to this inquiry.

**C. Cases Falling Within One Of The Four Categories Recognized in *Dicomes* Should Be Governed By *Thompson* And Its Progeny, With Its Elements Modeled After A Claim For Retaliation Under The Washington Law Against Discrimination.**

In the majority of wrongful discharge cases, like this one, the elements of the claim should be drawn from *Thompson*, in which this Court described the traditional framework for the tort:

The employee has the burden of proving his dismissal violates a clear mandate of public policy. Thus, to state a cause of action, the employee must plead and prove that a stated public policy, either legislatively or judicially recognized, may have been contravened.

*Thompson*, 102 Wn.2d at 232.

In *Wilmot v. Kaiser Alum. & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991), the Court revisited the principles articulated in *Thompson* that underlie the wrongful discharge tort, examining them in the context of a claim of retaliatory discharge for filing a worker’s compensation claim. It noted the analogous claim for statutory discrimination under the Washington Law Against Discrimination (WLAD), and listed the elements of retaliatory discharge in that context:

[P]laintiff must show (1) that he or she exercised the statutory right to pursue workers' benefits under RCW Title 51 or communicated

to the employer an intent to do so or exercised any other right under RCW Title 51; (2) that he or she was discharged; and (3) that there is a causal connection between the exercise of the legal right and the discharge, *i.e.*, that the employer's motivation for the discharge was the employee's exercise of or intent to exercise the statutory rights.

*Wilmot*, 118 Wn.2d at 68-69 (brackets added). The Court further clarified that to meet the causation element, a plaintiff must prove by a preponderance of the evidence that retaliation (or other improper motive) “was a substantial or important factor motivating the discharge.” *Wilmot*, 118 Wn.2d at 71.

Wrongful discharge is an intentional tort, similar to statutory claims of discriminatory or retaliatory discharge. *See Cagle v. Burns and Roe, Inc.*, 106 Wn.2d 911, 915-18, 726 P.2d 434 (1986) (permitting emotional distress damages for intentional tort of wrongful discharge, in part based on “analogous” WLAD law). Consistent with the intentional nature of the tort and the case law refining its application, the elements of a claim for wrongful discharge under *Thompson* and its progeny should draw from the analogous claim of retaliation under the WLAD:

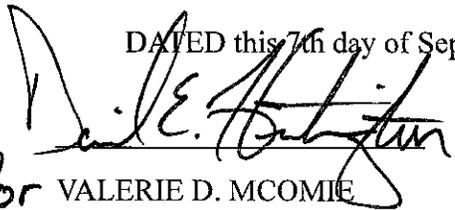
1. That the plaintiff acted in furtherance of a clear public policy;
2. That defendant discharged plaintiff; and
3. That a substantial factor in defendant’s decision to discharge plaintiff was plaintiff’s action in furtherance of the clear public policy.

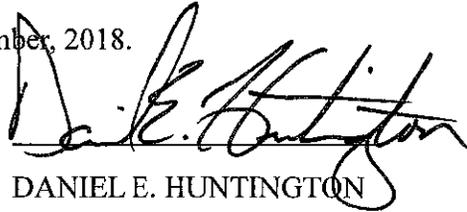
This formulation is modeled after the WPI pattern instruction for WLAD retaliation claims. *See* WPI 330.05. These elements should be appropriate in the majority of wrongful discharge claims.

## VI. CONCLUSION

The Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 7th day of September, 2018.

  
for VALERIE D. MCOMIE

  
DANIEL E. HUNTINGTON

On Behalf of WSAJ Foundation

## CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury, under the laws of the State of Washington, that on the 7th day of September, 2018, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein, and served the foregoing document by email to the following:

Judith A. Lonnquist  
lojal@aol.com

Patrick N. Rothwell  
prothwell@davisrothwell.com  
spierce@davisrothwell.com  
kliguori@davisrothwell.com

Dmitri Iglitzin  
iglitzin@workerlaw.com

/s Valerie D. McOmie  
Valerie D. McOmie, WSBA # 33240  
WSAJ Foundation

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Address:  
4549 NW ASPEN ST  
CAMAS, WA, 98607-8302  
Phone: 360-852-3332

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