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SUPREME COURT OF THE STATE OF WASHINGTON

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JARED KARSETTER AND JULIE KARSETTER

Petitioners,

V.

KING COUNTY CORRECTIONS GUILD,

Respondent.

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RESPONDENT KING COUNTY CORRECTIONS GUILD'S  
BRIEF IN ANSWER TO AMICUS CURIAE BRIEF OF THE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE  
FOUNDATION

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**TABLE OF CONTENTS**

IDENTITY OF RESPONDENT..... 1

SUMMARY OF ARGUMENT ..... 1

ARGUMENT ..... 3

    I.    The Debate over the *Thompson* Versus Perritt Framework is  
          Immaterial and Does Not Affect the Outcome of This Case..... 3

    II.   WSAJF’s Request to Expand the Definition of “Whistleblower”  
          for Purposes of Establishing the Public Policy Element of a  
          Wrongful Termination Claim Should be Rejected. .... 9

CONCLUSION..... 10

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>Dicomes v. State</i> , 113 Wn.2d 612, 782 P.2d 1002 (1989).....	<i>passim</i>
<i>Gardner v. Loomis Armored Inc.</i> , 128 Wn.2d 931, 913 P.2d 377 (1996).....	<i>passim</i>
<i>Karstetter v. King Cty. Corr. Guild</i> , 1 Wn. App. 2d 822, 832, 407 P.3d 384 (2017).....	6, 7
<i>Martin v. Gonzaga University</i> , No. 95269-8, __ P.3d __ (2018) .....	1, 6, 9
<i>Rickman v. Primera Blue Cross</i> , 184 Wn.2d 300, 358 P.3d 1153 (2015).....	9, 10
<i>Rose v. Anderson Hay &amp; Grain Co.</i> , 184 Wn.2d 268, 358 P.3d 1139 (2015).....	3, 4, 6, 7
<i>State v. Vidal</i> , 82 Wn.2d 74, 508 P.2d 158 (1973).....	8
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984).....	<i>passim</i>

## **IDENTITY OF RESPONDENT**

Respondent is the King County Corrections Guild (“Guild”), which was appellant below.

## **SUMMARY OF ARGUMENT**

In earlier rounds of briefing, the Guild explained why the Court of Appeals’ reference to the Perritt framework, as articulated in *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996), did not affect the court’s well-reasoned analysis of the public policy element to a wrongful termination claim. Guild Ans. to Pet. for Rev. at 2-8; Guild Supp. Brief at 15-18. The Guild incorporates those explanations by reference. It elaborates below only to the extent necessary to respond to WSAJF and WELA’s mischaracterizations of the Guild’s arguments and the relevant case law. The Guild also discusses the relevance of this Court’s recent opinion in *Martin v. Gonzaga University*, No. 95269-8, \_\_\_ P.3d \_\_\_ (2018), which touched on the relationship between the traditional analysis and the Perritt framework.

Both the Washington State Association for Justice Foundation (“WSAJF”) and the Washington Employment Lawyers Association (“WELA”) argue in their respective briefs that the Court of Appeals below erred when it invoked the so-called “Perritt framework” in setting forth the elements of a wrongful termination claim. The *amici* are correct that the

*Thompson-Dicomes* factors technically control. However, as both *amici* admit (either expressly or tacitly), the application of either test leads to the same fundamental inquiry, which revolves around Karstetter's alleged status as a whistleblower for purposes of establishing the clear public policy element of a wrongful termination tort. As a result, the *amici*'s quibble with the Court of Appeal's enunciation of the wrongful termination standard is purely academic and provides no grounds for reversing the decision below.

Briefly, WSAJF argues that this Court has held it unnecessary to rely on the Perritt framework when a plaintiff's alleged conduct falls within one of the four categories of public policy-related conduct identified in *Dicomes v. State*, 113 Wn.2d 612, 617, 782 P.2d 1002 (1989). While this is true, the court below did not rely on any aspect of the Perritt framework that deviates from the traditional test. WELA contends that the common law test, as introduced in *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) and fleshed out in *Dicomes*, does not incorporate the jeopardy element of the Perritt framework, which the court below invoked in finding Karstetter's whistleblower allegations insufficient. WELA errs. Several opinions of this Court, beginning with *Gardner*, have stated explicitly that the common law standard for evaluating an alleged wrongful termination – meaning the standard

articulated in *Thompson* and *Dicomes* – already incorporates the jeopardy element. That means Karstetter would have had to make the same exact showing with respect to his alleged whistleblower conduct under either framework. Accordingly, the Court of Appeals’ citation to *Gardner* was harmless and did not affect the outcome of the case. This Court should therefore decline to rule on the issue presented. Alternatively, should the Court reach this question, it must hold, for the reasons discussed in the Guild’s other briefs, that Karstetter did not adequately allege his participation in “whistleblower activity,” within the meaning of *Dicomes*.

#### **ARGUMENT**

##### **I. The Debate over the *Thompson* Versus Perritt Framework is Immaterial and Does Not Affect the Outcome of This Case.**

In its brief, WSAJF tracks the history of the tort of wrongful termination in Washington. WSAJF Brief at 5-7. It caps its discussion with a summary of the Court’s recent decision in *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015). In that case, as WSAJF observes, the Court found that recourse to the Perritt framework was unnecessary in light of the alleged facts’ clear fit into one of the recognized *Dicomes* categories of conduct implicating public policy. *Id.* at 287. WSAJF appears to imply through this doctrinal review that the Court of Appeals below erred in utilizing the Perritt framework. But as the Guild has explained elsewhere, *see* Guild’s Ans. to Pet. for Rev. at 7-8; Guild’s

Suppl. Brief at 17-18, the *Rose* Court departed from the Perritt framework at the point when it needed to consider whether the plaintiff's "dismissal was for other reasons" than those alleged. *Id.* Under the Perritt framework, this inquiry would have involved an exercise distinct from the traditional analysis: identifying or eliminating the existence of an overriding justification for discharge, even in the face of an existing public policy. *See Gardner*, 128 Wn.2d at 941 (setting forth the "absence of justification" element). *Rose* correctly avoided engaging in this inquiry where the alleged conduct clearly fell within a recognized category of public policy. But that does not mean that the Perritt framework differs in any appreciable way from the traditional standard up until the "absence of justification" element comes into play. And in fact, as discussed *infra*, this Court has expressed held that it does not. In this case, the Court of Appeals never reached the "absence of a justification" element because it found, as a threshold matter, that Karstetter did not allege participation in any conduct that would involve a public policy concern. Accordingly, the qualification raised in *Rose* has no bearing here.

For its part, WELA contends the Guild is wrong to claim that the *Thompson-Dicomes* factors already incorporate the Perritt framework's "jeopardy" element. WELA Brief at 17. It observes that *Thompson* never uses the word "jeopardy" or references the concept. *Id.* The Guild does not

dispute that. However, WELA is mistaken in asserting that none of *Thompson's* progeny discusses the relationship between the jeopardy element and the preexisting wrongful termination standard. In *Gardner*, this Court adopted Professor Perritt's four-part test for evaluating the public policy component of a wrongful termination claim. One of the elements is "jeopardy," pursuant to which "plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to [a] public policy, or was *necessary* for the effective enforcement of [a] public policy." *Gardner*, 128 Wn.2d at 945 (emphasis in original).

When it introduced the Perritt framework, the *Gardner* Court took pains to stress that its "adoption of this test does not change the existing common law in this state." *Id.* at 941. At the time *Gardner* was decided, the "existing common law" of wrongful termination was set forth in none other than *Thompson v. St. Regis Paper* and the follow-up case, *Dicomes v. State*. If the jeopardy element's overlap with *Thompson* and *Dicomes* was not clear enough from this statement alone, the Court made the connection more explicit in the very next sentence, insisting that the "[c]ommon law already contains the clarity *and jeopardy elements*." *Gardner*, 128 Wn.2d at 941 (emphasis added). In support of this proposition, the Supreme Court excerpted the portion of *Dicomes* which discussed the test corresponding to the jeopardy element under traditional

common law. Specifically, *Dicomes* determined that “the employee has the burden to show that the discharge contravened a clear mandate of public policy.” *Id.* (quoting *Dicomes*, 113 Wn.2d at 617) (internal alterations omitted). The *Gardner* Court then clarified that the Perritt framework’s treatment of the public policy question differed from prior case law only insofar as it sharpened the analysis by establishing a sequence of questions a court should ask:

Whereas prior decisions have lumped the clarity and jeopardy elements together, a more consistent analysis will be obtained by first asking if any public policy exists whatsoever, and then asking whether, on the facts of each particular case, the employee's discharge contravenes or jeopardizes that public policy. The jeopardy element guarantees an employer’s personnel management decisions will not be challenged unless a public policy is genuinely threatened.

*Id.* at 941-42. Later decisions have reaffirmed the jeopardy element’s inclusion within the standard common law test. *See Rose*, 184 Wn.2d at 278 (quoting *Gardner*); *Martin*, \_\_\_ P.3d \_\_\_, *slip opinion* at \*4 (same).

In the decision below, the Court of Appeals declared what should be an uncontroversial proposition: that, pursuant to the public policy requirement, Karstetter was obliged to plead facts supporting his legal theory that he engaged in “whistleblowing activity” – one of *Dicomes*’ four potential sources of public policy. *Karstetter v. King Cty. Corr. Guild*, 1 Wn. App. 2d 822, 832, 407 P.3d 384 (2017). It found that Karstetter failed to “adequately allege that he was engaged in this

protected activity.” *Id.*<sup>1</sup> While it is true that the court cited *Gardner* as the basis for demanding this showing, neither WELA, WSAJF, nor Karstetter have argued – nor can they – that Karstetter would not have needed to make the very same showing under the *Thompson-Dicomes* standard.<sup>2</sup> In fact, under that line of cases, the need to allege facts that amount to whistleblowing is only more acute because it is premised on the theory that a plaintiff’s alleged conduct falls within at least one of four specific kinds of public policy-related activities – whistleblowing being one option and the one Karstetter selected here. Moreover, the Court of Appeals actually recognized the controlling force of *Thompson-Dicomes* because, after citing *Gardner*, it quoted *Dicomes*’ outline of the “four areas where a clear public policy exists,” and from which Karstetter could choose. *Id.* Thus, the Court’s citation to *Gardner* was only a roundabout way of

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<sup>1</sup> The Court of Appeals’ reasoning as to why Karstetter’s allegations were insufficient was correct on the merits and is addressed extensively in the Guild’s Answer to the Petition, Supplemental Brief, and Response to WELA’s Amicus Brief, filed this day.

<sup>2</sup> WELA does claim that under the Perritt framework, a plaintiff must prove “that other means of promoting the public policy are inadequate,” whereas such a showing is unnecessary under the traditional test. WELA Brief at 18. WELA is mistaken. The quotation WELA offers to support the absence of this requirement under the latter standard states only that a plaintiff need not prove “the existence of alternative statutory remedies.” *Rose*, 184 Wn.2d at 274. That is not the same thing as needing to prove that a plaintiff had other means of promoting a public policy at the time he engaged in the relevant conduct. In fact, the Court in *Rose* made this very distinction, stating, “at the time of *Gardner*, the focus of the adequacy analysis was whether the employee had adequate alternatives *at the time* the employee decided to violate the employer’s policy; the analysis did not involve a review of other after-the-fact remedies that might be available.” *Id.* at 278 (emphasis in original). Moreover, in dispensing with the alternative statutory remedy requirement, the Court announced that it was “reembrace[ing] the analytical framework established in *Thompson*, *Wilmot*, and *Gardner*.” *Id.* at 274 (emphasis added). Thus, in direct contradiction to WELA’s claim, the *Rose* Court actually highlighted the compatibility of *Thompson* and *Gardner* on this point.

arriving at the central issue under *Thompson-Dicomes*: the adequacy of the whistleblowing allegations.

In spite of its vigorous attacks on the Court of Appeals' reasoning, WELA effectively concedes that the court's citation to the Perritt framework is harmless. "In practice," it admits, "the result is the same under either framework." WELA Brief at 18. Either way, Karstetter needs to show that he "is entitled to whistleblower protection." *Id.* WSAJF, too, makes a similar admission. In the course of disputing the motivational requirement for demonstrating whistleblower status, WSAJF acknowledges that "[w]hile 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." WSAJF Brief at 10, n.3 (quoting *Gardner*, 128 Wn.2d at 941).

Because the Court must evaluate the sufficiency of Karstetter's whistleblower activity claim under an agreed-upon set of criteria, it is immaterial whether the case to which that criteria is nominally attached is identified as *Thompson*, *Dicomes*, or *Gardner*. In this posture, there is no need for the Court to weigh in on that question. And in fact, doing so would be contrary to the Court's own policy of avoiding moot issues. *See State v. Vidal*, 82 Wn.2d 74, 79, 508 P.2d 158 (1973) ("...this court will

not decide questions which are moot or academic”).

Should the Court be inclined to reach this issue, the Guild accepts that the Court’s recent decision in *Martin v. Gonzaga University* provides the answer. In that case, this Court held that when a plaintiff alleges he was terminated in retaliation for engaging in whistleblowing activity, a court should evaluate the claim under the “standard enunciated in *Thompson* and further refined” in subsequent cases, rather than the Perritt framework. *Martin*, \_\_ P.3d \_\_, *slip opinion* at \*4.

Since Karstetter purports to be a whistleblower, the traditional *Thompson-Dicomes* test applies. Yet for the reasons discussed in the Guild’s other briefs, Karstetter’s allegations do not satisfy this test.

**II. WSAJF’s Request to Expand the Definition of “Whistleblower” for Purposes of Establishing the Public Policy Element of a Wrongful Termination Claim Should be Rejected.**

The Guild hereby refers the Court to its discussion of this point in pages 12-19 of Respondent King County Corrections Guild’s Brief in Response to Amicus Curiae Brief of the Washington Employment Lawyers Association, filed this day.<sup>3</sup>

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<sup>3</sup> The Guild responds here solely to WSAJF’s interpretation of certain *dicta* in *Rickman v. Primera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015). In that case, the Court’s statement that “*Dicomes* does not provide a litmus test for a claim of wrongful termination,” *id.* at 312, was made in the context of rejecting a prerequisite that a whistleblower substantiate his suspicions before acting. *Id.* (“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.”). The absence of a substantiation requirement says nothing about the existence of a

## CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be affirmed.

Respectfully submitted this 2nd day of October, 2018.

SCHWERIN CAMPBELL BARNARD IGLITZIN  
& LAVITT LLP

A handwritten signature in cursive script, appearing to read "Dmitri Iglitzin", written in black ink over a horizontal line.

Dmitri Iglitzin, WSBA No. 17673  
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motivational requirement. In addition, WSAJF seizes on *Rickman*'s inadvertent use of the discretionary "may," instead of the mandatory "shall" or "must," in describing the necessary motivational showing. *Id.* at 313. In light of unambiguous case law describing this showing as mandatory, WSAJF's extrapolation from *Rickman* that the showing is merely optional is unpersuasive.

## DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the state of Washington that on October 2, 2018, I caused the foregoing document to be electronically filed with the clerk of the Supreme Court of the state of Washington, and a true and correct copy to be delivered via email service to:

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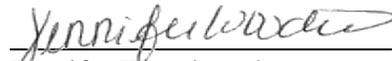
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