NO. 95531-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JARED KARSTETTER and JULIE KARSTETTER,

Petitioners,

v.

KING COUNTY CORRECTIONS GUILD,

Respondents.

AMICUS CURIAE BRIEF OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS

Jared Karstetter is an attorney licensed to practice law in the State of Washington. He was employed by the King County Corrections Guild ("Guild") under the terms of an employment contract which promised employment for five years and that the Guild could not terminate without "just cause." After his termination from employment, he sued the Guild and others, alleging breach of contract, wrongful discharge in violation of public policy, retaliation, and other torts. He requested specific performance under the terms of the contract. The Guild moved to dismiss all claims against it under CR 12(b)(6). The trial court granted the Guild's motion in part, including dismissal of the request for specific performance. The Court declined to dismiss the breach of contract or wrongful discharge claims. The Guild moved for discretionary review, which was granted. The Court of Appeals reversed, dismissing the contract and wrongful discharge claims. *Karstetter v. King Cty. Corr. Guild*, 1 Wn. App.2d 822, 407 P.3d 384 (2017).

The Court of Appeals held that the employment contract was unenforceable because it conflicted with RPC 1.6, which provides that a client can terminate an attorney without cause at any time. *Id*. at 825-27. The Court held that Plaintiff's wrongful discharge claim failed because although he pled that he was terminated for having cooperated in an official King County Ombudsman whistleblower investigation, he failed

to plead that he was a whistleblower himself. The Court concluded that he was therefore ineligible for whistleblower protection. *Id*. at 833.

The Washington Employment Lawyers Association ("WELA") is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 190 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness and dignity is fundamental to the quality of life.

WELA urges this Court to reverse the decision of the Court of Appeals and remand for further proceedings.

II. SUMMARY OF ARGUMENT

The Plaintiff, Jared Karstetter, was employed by the King County Corrections Guild as an attorney. Numerous attorneys in the State of Washington are "employees." While their employers are also their clients, the Rules of Professional Responsibility do not foreclose a damages remedy for a breach of contract or wrongful discharge.

Nothing compels a client to "employ" an attorney instead of retaining the services of a law firm as outside counsel. Clients choose to employ attorneys because clients enjoy numerous benefits not available to them with retained counsel. Along with the benefits of employing an attorney, the client assumes certain responsibilities towards its employee, which can include a negotiated agreement not to terminate the attorney except for cause. Clients should not be allowed to reap the benefits of the

employment relationship and then disavow the concomitant responsibilities. Likewise, the attorney/employee relinquishes many of the freedoms and benefits that are enjoyed as retained counsel in exchange for the promise of job security. That promise should not be illusory.

Rule of Professional Conduct 1.16(a) allows a client to terminate an attorney at any time with or without cause subject to liability to pay for the attorney's services. That Rule forecloses the possibility that an attorney can be reinstated in his position over the client's objection, so to the extent an employment contract between the client and attorney requires reinstatement it is unenforceable. But the Rules of Professional Conduct allow enforcement of an employment contract between an attorney/employee and a client/employer to the extent that it is not injurious to the public. *See LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 331 P. 3d 1147 (2014). A claim for damages for breach of contract by an attorney/employee against a client/employer is not injurious to the public.

The Guild *argues* that Karstetter's termination was justified because he produced "confidential" documents to the King County Ombudsman in violation of RPC 1.6, and that the contract is unenforceable because an action for breach of contract will compromise essentials of the attorney-client relationship. There is no evidence in the record that Karstetter produced confidential documents or disclosed client confidences, only the Guild's argument. Karstetter alleged in the

Complaint that the "Guild Vice President directed [him] to cooperate fully with the Ombudsman." CP at ¶ 22. For the purpose of a motion under CR 12(b)(6) the allegations of the Complaint must be taken as true. If confidential documents were produced, the record is silent about whether and to what extent the Guild Vice President gave informed consent as required by the RPC 1.6(a). The record is insufficient to establish whether any of the exceptions stated in the RPC 1.6(b) apply. Under these circumstances, the Court should not consider whether confidential documents were produced or client confidences revealed.

The Court of Appeals ruled that Karstetter was not engaged in protected activity because "Karstetter alleges that he provided information to the investigator of a whistleblowing complaint but was not a whistleblower himself." 1 Wn. App.2d 822, 833, 407 P.3d 384 (2017). Contrary to the Court of Appeals opinion, Karstetter was entitled to whistleblower protection. The purpose of a claim for wrongful discharge in violation of public policy is to expose the violations of public policy. The denial of whistleblower protection to those who cooperate in an official whistleblower investigation frustrates the exposure of public policy violations. Clearly established state and King County law define whistleblowers to include those who participate in whistleblower investigations. Accordingly, the termination from employment of employees who cooperate with a whistleblower investigation is a violation of a clear mandate of public policy. For good reason, cooperation in an

official investigation is protected activity under both state and federal anti-discrimination statutes.

In *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015), this Court made clear that there exist two separate methods to prove a claim of wrongful discharge in violation of public policy. The primary method is based upon this Court's seminal decision in *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Under this approach, an employee must demonstrate that the claim falls within one of the four traditional categories of cases recognized in *Thompson, Rose,* 184 Wn.2d at 286-87, that a statutory remedy is not exclusive, *id*. at 285, and that a "substantial factor" in the decision to terminate employment was the employee's protected activity, *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015). Because Plaintiff was entitled to whistleblower protection, Mr. Karstetter's case falls within one of the four traditional categories. The Court of Appeals erred when it failed to apply the *Thompson* framework and instead applied the alternative, rarely applicable Perritt framework.

If Plaintiff is entitled to whistleblower protection, then his conduct necessarily relates directly to public policy. The jeopardy element of a wrongful discharge claim is only part of the Perritt framework, and not the *Thompson* framework. Incorporating the jeopardy element into the *Thompson* framework serves no meaningful purpose and creates unnecessary confusion, which has plagued the lower courts.

The decision of the Court of Appeals should be reversed and the case remanded.

III. ARGUMENT

A. The Defense Allegation that Karstetter Disclosed "Confidential" Documents or Communications Should Not Be Considered on a Motion to Dismiss.

Rule of Professional Conduct (RPC) 1.6(a) provides: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Informed consent "denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." RPC 1.OA(e). The procedural posture of this case forecloses considering Defendant's assertion that it terminated Plaintiff because he released confidential documents or revealed client confidences to the Ombudsman.

The Court of Appeals reversed the trial court decision to deny the Defendant's Motion to Dismiss pursuant to CR 12(b)(6). 1 Wn. App.2d at 823. All allegations set forth by the nonmoving party are presumed to be true. *Kinney v. Cook,* 159 Wn.2d 837, 842, 154 P.3d 206 (2007). If it is possible that facts could be established to support relief, the motion is not

to be granted. *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 488, 325 P.3d 193 (2014).[1] In relevant part, Plaintiff pled:

> On March 4, 2016, Mr. Karstetter was contacted by the King County Ombudsman's Office regarding a whistleblower complaint involving parking reimbursement to two Guild members. The Guild Vice President directed Mr. Karstetter to cooperate fully with the Ombudsman. Pursuant to the King County Code, Mr. Karstetter was compelled to produce certain documentation under threat of Superior Court action for compelled compliance.

CP 2, at ¶ 22. Nothing in Plaintiff's Complaint alleged the release of "confidential" documents or communications. Nothing in the Complaint alleged a legitimate reason for termination. To the contrary, the Complaint alleges that Plaintiff was terminated "without just cause," for the "disclosure of information to the Ombudsman and disloyalty." *Id*. at ¶ 26.

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[1] Washington is a notice pleading state and requires a simple concise statement of the claim and the relief sought. *Pac. Nw. Shooting Park Ass'n v. City of Sequim,* 158 Wn.2d 342, 352, 144 P.3d 276 (2006). "It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." *State v. Adams*, 107 Wn.2d 611, 620, 732 P.2d 149 (1987); *Simpson v. State*, 26 Wn. App. 687, 691, 615 P.2d 1297 (1980). CR 12(b)(6) motions should be granted "sparingly and with care" and "only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Hoffer v. State*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). Even hypothetical facts not part of the record may be considered. *Id.* The trial court may grant a CR 12(b)(6) motion only when the plaintiff can provide no conceivable set of facts consistent with the Complaint that would entitle him or her to relief. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015). *See also Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998) (dismissal pursuant to CR 12(b)(6) is appropriate only when "it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery").

For the purposes of a motion to dismiss, these allegations must be taken as true.

The Guild asserts, however, that Karstetter's termination was justified because he disclosed "client confidences." Answer to Petition at 9; Resp. Supp. Br. at 19. According to the Guild, "Karstetter abdicated his duty to defend his client's interests when he disclosed its confidences." Answer to Petition at 12. The Guild argues that to the extent an attorney may prevail in a breach of contract, the attorney may do so only where it does not compromise essentials of the attorney-client relationship, and in this case the disclosure of confidential documents strikes at the heart of the attorney-client relationship. Resp. Supp. Br. at 13-14. The record does not support the Guild's arguments.

There is nothing in the record to support the Guild's asserted reason for terminating the Plaintiff or that "confidential" documents or communications were produced to the Ombudsman.[2] Moreover, even if "confidential" documents were produced the Plaintiff's allegation that the Guild Vice President authorized full cooperation implies consent. The record is insufficient to meet the Guild's burden of showing its consent was not informed as required by RPC 1.OA(e). Here, there are conceivable facts consistent with the Complaint that would entitle Plaintiff

[2] The Guild references a letter from the Public Safety Law Group. Resp. Supp. Br. at 3. The references in that letter which alleged breach of attorney-client confidences are unrelated to the information Karstetter provided to the Ombudsman. CP 102-103. The authors of this letter did not make the decision to terminate Mr. Karstetter and their legal opinions are irrelevant.

to relief. *Becker v. Cmty. Health Sys., Inc.*, 184 Wn.2d 252, 257-58, 359 P.3d 746 (2015). The Defendant's assertion that it terminated Plaintiff because of the release of confidential documents or communications to the Ombudsman should not be considered on a motion to dismiss, especially when all reasonable inferences are to be made in favor of the non-moving party. *J.S. v. Vill. Voice Media Holdings, L.L.C.*, 184 Wn.2d 95, 100, 359 P.3d 714, 716 (2015) ("we accept as true the allegations in a plaintiff's complaint and any reasonable inferences therein").

B. Karstetter States a Claim for Damages for Breach of Contract.

The Court of Appeals ruled that the employment contract was unenforceable because it conflicts with RPC 1.16(a), which allows a client to fire a lawyer at any time and for any reason. 1 Wn. App.2d at 826. This ruling establishes that *all* in-house attorneys in Washington are employees at will regardless of contractual promises of job security, and that an attorney/employee can *never* enforce an employment contract for a definite term or one which contains a "for cause" termination provision. The ruling is harmful to the public policy advanced by whistleblowers and it is unnecessarily broad. An attorney/employee may sue an employer for breach of contract and recover economic damages consistent with Washington law.

In *LK Operating, LLC v. Collection Group,* LLC, 181 Wn.2d 48, 331 P. 3d 1147 (2014), the Court held in bold letters "[w]e do not hold

that every RPC violation necessarily renders every contract connected to the violation is (sic) voidable in all circumstances." *Id*. at 87.

> Just because the RPCs can be a valid source of public policy does not mean that every violation of every RPC that relates a contract renders the contract unenforceable. The underlying inquiry in determining whether a contract is unenforceable because it violates public policy is whether the contract itself is injurious to the public. While all RPC violations are in some way injurious to the public, not all RPC violations will render any related contract injurious to the public.

Id. The Court recognized that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id*. at 88. Applying RPC 1.8, the Court ruled that "[a] contract entered in violation of former RPC 1.8(a) may still be enforced where it is shown, based on the specific factual circumstances that, notwithstanding the violation, the contract itself does not contravene the public policy underlying former RPC 1.8(a)." *Id*. at 89.[3]

RPC 1.16(a)(3) provides that "a lawyer shall. . . withdraw from representation if the lawyer is discharged." Comment 4 provides that "[a] client has a right to discharge a lawyer at any time, with or without cause,

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[3] The doctrine of election of remedies does not foreclose a damages remedy just because specific performance is unavailable. *See In re Berry's Estate*, 196 Wn. 252, 259, 82 P.2d 549, 552 (1938) ("It seems well settled that the doctrine of election of remedies has no application when the remedy chosen is not available, and we think a remedy is not available when there is a good defense to it") (citation omitted); *Sherman v. Lunsford*, 44 Wn. App. 858, 867–68, 723 P.2d 1176, 1182 (1986) (affirming award of damages for breach of contract but reversing denial of specific performance as also available); Restatement (First) of Contracts § 384 Comment 2 ("In a suit for specific performance the plaintiff may properly ask for other forms of relief in the alternative, or for such other relief supplementary to specific performance").

subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances." The public policy advanced by the Rule prevents an attorney's representation over a client's objection. The public policy is not advanced by denying attorneys a claim for damages.

In this case, Mr. Karstetter's contract provides that he is employed for a period of five years and can only be terminated for "just cause." The contract also contained provisions which allowed him an opportunity to correct any inappropriate conduct and to arbitrate the dispute "in a manner consistent with the Arbitration Clause contained in the Collective Bargaining Agreement." Presumably, if he prevailed at an arbitration he would have the right to reinstatement and Karstetter seeks specific performance of the contract. CP 2, at Count XI. These due process provisions and the right to reinstatement are in direct conflict with RPC 1.16(a) because they prevent a client from terminating an attorney's representation. As such, they are injurious to the public and are unenforceable.

In contrast, the payment of contractual damages for wrongful termination or breach of contract is not injurious to the public. Indeed, Comment 4 to RPC 1.16(a) recognizes that a client can discharge an attorney without cause, "*subject to liability for payment for the lawyer's services.*" (Emphasis added). It is not unusual for an attorney to sue a

former client for damages. The recovery of future economic damages depends upon the nature of the claim. If a contract provides for a definite duration, the breach of contract should provide for damages for the period remaining on the contract less reasonable mitigation. *Ford v. Trendwest Resorts, Inc.,* 146 Wn.2d 146, 154, 43 P.3d 1223 (2002) ("Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed"). If the attorney's claim is for wrongful discharge, then a violation should provide for front pay in lieu of reinstatement. *Id*. at 154 ("Awarding lost earnings to an employee discharged in violation of public policy compensates the employee's pecuniary loss, punishes the employer and deters future wrongful discharges, and vindicates the employee's actions that gave rise to the initial termination").

Consistent with the Comment to RPC 1.16(a), the parties in this case prepared a written statement contained in a contract because a future dispute about withdrawal was anticipated. So long as the Guild was able to terminate Karstetter's representation then the public policy reflected in RPC 1.16(a) is satisfied. A provision in an attorney/employee's contract which provides for damages if the contract is breached is not invariably injurious to the public.

The employee/attorney-client relationship is significantly different than the retained attorney-client relationship. The rule of law should reflect these differences. When a client/employer hires an attorney/employee it receives certain benefits from the employment relationship. As an employer, a client requires compliance with all its employment policies which are often voluminous. The employer determines all working conditions including: 1) work location; 2) work hours; 3) staffing; 4) vacations; 5) health benefits; and 6) sick leave. Indeed, in this case the contract acknowledged that compensation was below market rates and the Guild enjoyed "unfettered access" to the attorney. CP 1, at ¶ 18. The employer by contrast has very little control over a retained attorney's working conditions. The attorney/employee gives up all these rights and freedoms in exchange for the promises made in a written contract which can include a measure of job security. Nothing compels a client to hire an attorney as an employee instead of retaining outside counsel. Once that decision is made, however, the client/employer shouldn't be allowed to reap the benefits of the contract and then deny the contractual responsibilities it knowingly assumed.

C. Cooperating Witnesses are Entitled to Whistleblower Protection in Cases Alleging Wrongful Discharge in Violation of Public Policy.

The Plaintiff pled that "Defendants Guild, Weaver, Orth, Vigil and Clark have retaliated against Plaintiff for participating in a whistleblowing investigation." CP 2, at Count III. The Court of Appeals ruled that Karstetter was not engaged in protected activity because "Karstetter

alleges that he provided information to the investigator of a whistleblowing complaint but was not a whistleblower himself." 1 Wn. App.2d at 833. This was error. Contrary to the Court of Appeals opinion, Karstetter was entitled to whistleblower protection. Retaliation for having participated in a whistleblower investigation is an actionable violation of public policy.[4]

The King County Code provides legal protection for whistleblowers to include "[c]ooperating in an investigation by any official related to improper governmental action, including but not limited to local, state, federal, and internal investigation." KCC 3.42.030(E)(2). *See also* RCW 42.40.020(10)(b)(I) ("For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term 'whistleblower' also means: (I) An employee who in good faith provides information to the auditor or other public official . . . ."). While Karstetter hadn't raised these sources of public policy in the trial court, a source of public policy may be raised for the first time on appeal.[5]

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[4] The Court of Appeals ruled Karstetter's contract was unenforceable because it conflicted with RPC 1.16(a), which provides that "a client may fire a lawyer *for any reason* at any time." 1 Wn. App.2d at 827 (emphasis added). The Court of Appeals, however, declined to rule on whether an attorney can ever bring a wrongful discharge claim. 1 Wn. App.2d at 831. That issue was not raised in the Answer to the Petition for Review. It is not now before the Court. RAP 13.4(d).

[5] In *Ellis v. City of Seattle,* 142 Wn.2d 450, 466-67, 13 P.3d 1065 (2000), the Washington Supreme Court relied on provisions of the Seattle Fire Code not raised before the trial court to find a clear statement of public policy in a wrongful discharge case. The Court rejected the reasoning of the Court of Appeals to the contrary as "misguided," because the "fire

The purpose of a public policy claim is to provide protections for those who expose the violations of public policy. Under the Defendant's scenario, however, anyone who corroborates a whistleblower's allegations, but is not the person who alerted the authorities in the first instance, can immediately be terminated from employment with impunity. *See* Answer to Petition at 10; Resp. Supp. Brief at 14-16. The denial of whistleblower protection to those who cooperate in a whistleblower investigation frustrates the very purpose of the claim. It is for good reason that this is protected activity under both state and federal anti-discrimination statutes.[6] Retaliation against those who cooperate with a whistleblower investigation violates a clear mandate of public policy.

To be entitled to whistleblower protection, an employee must "desire to further the public good." That standard is satisfied where the

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code provision is not evidence; it is law." 142 Wn.2d at 459 n3. The Court announced that "[t]here is no requirement to list every statute, code, or case brought to the attention of the trial court. Nor should there be, as any court is entitled to consult the law in its review of an issue; whether or not a party has cited that law." *Id*.

[6] RCW 42.40.020(10)(b)(1) provides: "For purposes of the provisions of this chapter and chapter 49.60 RCW relating to reprisals and retaliatory action, the term 'whistleblower' also means: (I) An employee who in good faith *provides information to the auditor or other public official*, as defined in subsection (7) of this section, . . . " (Emphasis added). Under subsection 7 of the statute, a public official includes "an appropriate number of individuals designated to receive whistleblower reports by the head of each agency." Under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e—3(a), it is unlawful "for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by [Title VII], or because [the employee] has made a charge, testified, *assisted, or participated in any manner in an investigation*, proceeding, or hearing under [Title VII]." (Emphasis added).

employee's conduct furthers a policy of general public concern. The employee's personal and subjective motivation is irrelevant.[7]

D. The *Thompson* Framework Applies to Employees Entitled to Whistleblower Protection.

In *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.3d 1139 (2015), the Court made clear that there exist two separate methods to prove a claim of wrongful discharge in violation of public policy. The primary method is based upon this Court's seminal decision in *Thompson v. St. Regis*, 102 Wn.2d 219, 685 P.2d 1081 (1984). Under this approach, an employee must demonstrate that the claim falls within one of the four

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[7] The Defendant argues that Plaintiff was not entitled to whistleblower protection because he did not seek to remedy the misconduct at issue or otherwise "desire[s] to further the public good." Resp. Supp. Br. at 15-16 (citing *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 313, 358 P.3d 1153 (2015)). According to the Guild, Karstetter provided information only because the King County Code and the threat of superior court action compelled him to, and he therefore did not desire to further the public good. *Id.* at 16. Cooperating with an official whistleblower investigation furthers the public good, and nothing more is required. The issue of whether Plaintiff must be motivated to "further the public good" has been raised in *Martin v. Gonzaga University*, 200 Wn.App. 332 (2017), review granted, 412 P.3d 1262 (2018); and *Bailey v. Alpha Techs. Inc.,* No. C16-0727-JCC, 2017 WL 5454739 (W.D. Wash. Nov. 14, 2017).

In *Thompson*, the Court recognized the wrongful discharge claim as an exception to the employment-at-will doctrine. The Court explained that "[t]he exception has been utilized in instances where application of the terminable at will doctrine would have led to a result clearly inconsistent with a stated public policy and the community interest it advances." 102 Wn.2d at 231. An employee's personal motivation is unrelated to the stated public policy or the community interest it advances. Whether an employee's conduct furthers the public good is determined by the policy the employee's conduct advances. It does not depend on the motivation of the employee in exposing a violation of public policy. As long as the employee's conduct furthers a policy of general public concern, it furthers the public good even though it may also further a private interest.

traditional categories of cases recognized in *Thompson*, *Rose*, 184 Wn.2d at 276, that a statutory remedy is not exclusive, *Rose,* 184 Wn.2d at 185, and that a "substantial factor" in the decision to terminate employment was the employee's protected activity, *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 314, 358 P.3d 1153 (2015). The alternative Perritt framework applies only when the case does not fit neatly into one of the four traditional categories of cases. *Becker*, 184 Wn.2d at 259. The Court of Appeals applied the Perritt framework. 1 Wn. App.2d at 831-32. This was error. Because Plaintiff is entitled to whistleblower protection the case falls into one of the four traditional categories, and the *Thompson* framework should have been applied.

Contrary to the Guild's argument, the jeopardy element is not a component of the *Thompson* framework. Resp. Supp. Br. at 17. Indeed, the Court in *Thompson* never mentioned the word "jeopardy" or the concept. Nor does its progeny. *See, e.g., Wilmot v. Kaiser Aluminum & Chem. Corp*., 118 Wn.2d 46, 68–69, 821 P.2d 18, 28–29 (1991) ("plaintiff must show (1) that he or she exercised the statutory right …; (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…"). The jeopardy element is exclusively the province of the Perritt framework which was adopted in *Gardner v. Loomis Armored Inc.,* 128 Wn.2d 931, 913 P.2d 377 (1996), for cases that don't "involve the common retaliatory discharge scenario." *Rose*, 184 Wn.2d at 277.

Under the Perritt framework, "plaintiff establishes jeopardy by demonstrating that his or her conduct was *either* directly related to the public policy *or* necessary for effective enforcement. *Id*. at 284 (emphasis original). The Court of Appeals ruled that to satisfy the jeopardy element of the Perritt framework, Plaintiff had to prove "that other means of promoting the public policy are inadequate." 1 Wn. App.2d at 832. This is also error. This Court in *Rose* explicitly ruled that it was unnecessary to prove that there existed no adequate alternative means to vindicate public policy. Instead, Plaintiff need only show that an alternative means to vindicate public policy was not intended to be exclusive. *Rose*, at 274 ("the existence of alternative statutory remedies, regardless of whether or not they are adequate, does not prevent the plaintiff from bringing a wrongful discharge claim"). "Finally, the adequacy component undermines the very purpose of the tort" *Id*. at 285.

If the case falls into one of the four traditional categories then establishing jeopardy is not required. If Plaintiff is entitled to whistleblower protection, then his conduct will necessarily relate directly to public policy. In practice, the result is the same under either framework. The confusion created by continuing to use language of the Perritt framework in a *Thompson*-type case is clearly demonstrated in this case by the Court of Appeals' application of all four Perritt elements. *See also Vargas v. City of Asotin*, No. 35093-2-III (April 24, 2018) (unpublished); *Billings v. Town of Steilacoom,* 2 Wn. App.2d 1, 408 P.3d 1123 (2017),

rev. denied, --- Wn.2d --- (May 2, 2018); *Coomes v. Edmonds School Dist. No. 15*, 816 F.3d 1255, 1265 (9th Cir. 2016); *Martin v. Gonzaga University*, 200 Wn. App. 332, 402 P.3d 294 (2017), rev. granted, 412 P.3d 1262 (2018).

The Court should reiterate that the vast majority of cases are analyzed under the *Thompson* framework, and that the Perritt framework only applies when the case does not fit neatly into one of the four traditional categories and the common retaliatory discharge scenario does not apply. The Court should make clear that the jeopardy element does not apply to the *Thompson* framework.

IV. CONCLUSION

The Court should reverse the Court of Appeals and remand for further proceedings.

Respectfully submitted this 7th day of September, 2018.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, ___/s/ Jeffrey Needle_____
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LAW OFFICE OF JEFFREY NEEDLE

September 07, 2018 - 9:47 AM

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Appellate Court Case Title:	Jared Karstetter, et ux. v. King County Corrections Guild, et al.
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