30545-7-III

No. 10-2-00441-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES ROSE, APPELLANT

v.

ANDERSON HAY & GRAIN CO., RESPONDENT

BRIEF OF RESPONDENT

Ronald A. Van Wert, WSBA No. 32050
Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Attorneys for Respondent Anderson Hay & Grain Co.

618 W. Riverside Ave, Suite 210
Spokane, WA 99201
(509) 747-9100

30545-7-III

No. 10-2-00441-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES ROSE, APPELLANT

v.

ANDERSON HAY & GRAIN CO., RESPONDENT

BRIEF OF RESPONDENT

Ronald A. Van Wert, WSBA No. 32050
Etter, McMahon, Lamberson, Clary & Oreskovich, P.C.
Attorneys for Respondent Anderson Hay & Grain Co.

618 W. Riverside Ave, Suite 210
Spokane, WA 99201
(509) 747-9100

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Plaintiff/Appellant Charles Rose is requesting that the Court recognize a tort of wrongful discharge in violation of public policy promoting commercial motor vehicle safety. Under *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 182, 125 P.3d 119 (2005), and this Court's recent decision in *Cudney v. Alsco, Inc.*, __ Wn.2d __, 259 P.3d 244 (2011), such a public policy cause of action can only be recognized if another means does not adequately safeguard the public policy at issue. In this case, the public policy is adequately promoted by the Commercial Motor Vehicle Act ("CMVA"), 49 U.S.C. § 31105, which provides a remedy for wrongful discharge based on refusal to violate federal regulations relating to commercial motor vehicle safety. As such, Mr. Rose cannot establish a viable state cause of action. Accordingly, summary judgment dismissing all causes of action against Defendant/Respondent Anderson Hay and Grain Co. ("AHG") should be upheld.

II. ASSIGNMENT OF ERROR

AHG assigns no error to the Superior Court decision. For the reasons stated herein, Mr. Rose's asserted assignment of error is without merit.

III. STATEMENT OF CASE

Mr. Rose worked as a commercial truck driver for AHG from March 2006 through November 13, 2009. (CP 113.) Mr. Rose was terminated from AHG on November 13, 2009. (CP 113.) Mr. Rose alleges he was terminated for refusing to complete his shift, which he claims, if completed, would have forced him to exceed the maximum allowed hours-of-service under federal regulations and would require him to falsify time sheets in violation of federal regulations. (CP 2-4.)

Mr. Rose alleges his termination from AHG violates federal motor carrier regulations (49 CFR Parts 390.11, 390.13, 395.1, 395.3, and 395.13) and the CMVA. (CP 3-4.) Based on these allegations, on March 3, 2010, Mr. Rose filed an action in the United States District Court for the Eastern District of Washington. (CP 113-14.) AHG moved for dismissal based on lack of jurisdiction; pursuant to 49 U.S.C. § 31105(b), the Secretary of Labor has exclusive jurisdiction over initial

complaints under the CMVA. (CP 114.) On August 6, 2010, Mr. Rose's federal complaint was dismissed based on lack of jurisdiction. (CP 114.)

In September 2010, Mr. Rose filed a complaint in the Kittitas County Superior Court alleging wrongful termination in violation of state public policy arising from claimed violations of 49 U.S.C. § 31105. (CP 1-5.) Based substantially on this Court's decision in *Korslund*, 156 Wn.2d 119, AHG moved for summary judgment to dismiss Mr. Rose's claim as Mr. Rose failed to satisfy the jeopardy element necessary to maintain a public policy claim. (CP 6-16, 58-65.) AHG established that the CMVA provides "comprehensive remedies that serve to protect the specific public policy identified" by Mr. Rose. (CP 115); s*ee Korslund*, 156 Wn.2d at 182. Thus, an adequate alternative means of promoting the public policy exists, which, as a matter of law, forecloses Mr. Rose's public policy cause of action. (CP 115-16); *Korslund*, 156 Wn.2d at 183.

On April 18, 2011, the trial court granted AHG's Motion for Summary Judgment and entered Judgment dismissing Mr. Rose's complaint. (CP 117-121.) The trial court found that:

1. the remedies available under 49 U.S.C. § 31105(b)(3)(A)(i),

(ii), and (iii) adequately protect the public policy against retaliation and discharge of an employee for refusing to violate federal safety regulations relating to driving commercial vehicles;

2. Mr. Rose's allegations fit squarely within the protections offered by 49 U.S.C. § 31105;

3. when Mr. Rose's cause of action arose, the remedies of 49 U.S.C. § 31005 were available to him. The fact that those remedies are no longer available does not render the remedies inadequate alternative means to protect the public policy identified by Mr. Rose; and

4. based on the foregoing, Mr. Rose cannot satisfy the jeopardy element of his public policy cause of action.

(CP 119-20.)

On May 11, 2011, Mr. Rose filed a *Notice of Appeal for a Direct Review to Supreme Court pursuant to RAP 4.2 (4)* and *Statement of Grounds for Direct Review*. On October 5, 2011, Mr. Rose filed Appellant's Opening Brief.

Mr. Rose's "Statement of Case" in his Opening Brief asserts various facts that are irrelevant to the issue before this Court on appeal. Mr. Rose's reference to another driver, Joe Peak, who sadly died of cancer, has no bearing on the matter before the Court. Mr. Rose's age, the size of the loads transported, his coordination and reaction time, risk of losing his license, and his reliance on the advice of his attorney are not relevant to whether a tort for wrongful discharge exists in Washington to promote commercial motor vehicle safety.

IV. ARGUMENT

A. Standard of Review

"Grants of summary judgment are reviewed de novo, [the Supreme Court] engage[s] in the same inquiry as the trial court." *Neighborhood Alliance of Spokane County v. County of Spokane*, ___ Wn.2d ____, 261 P.3d 119, 125 (2011).

B. Dismissal of federal cause of action is irrelevant

Mr. Rose dedicates a substantial portion of his Opening Brief to arguing that his federal cause of action was wrongfully dismissed by the federal district court judge. The federal court of appeals is the proper

forum to present that argument. The propriety of the federal court's decision to dismiss Mr. Rose's federal cause of action is not relevant to the question before the Court, *i.e.,* whether to establish a public policy cause of action for wrongful termination relating to a refusal to violate federal commercial motor vehicle safety regulations.

C. Preemption not at issue

Mr. Rose also argues that the CMVA does not preempt a state law claim protecting the same public policy. Mr. Rose is correct that 49 U.S.C. § 31105 would not preempt an existing state law claim. However, a state law claim does not exist for his cause of action. A state law claim would only exist if this Court were to establish such a public policy claim.

D. Mr. Rose cannot establish the jeopardy element for wrongful discharge in violation of public policy

The "wrongful discharge tort is narrow and should be 'applied cautiously.'" *Cudney*, 259 P.3d at 246 (citing *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008)). To establish a claim for wrongful discharge in violation of public policy, a plaintiff must prove, "(1) the existence of a clear public policy (*clarity* element); (2) that discouraging the conduct in which [he or she] engaged would jeopardize

the public policy (*jeopardy* element); and (3) that the public-policy-linked conduct caused the dismissal (*causation* element)." *Korslund*, 156 Wn.2d at 178 (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)). Although all elements must be proved by Plaintiff, the jeopardy element is only at issue here. To establish the jeopardy element, a plaintiff must not only prove that discouraging the conduct the plaintiff engaged in would jeopardize public policy, but also, must prove "that other means of promoting the public policy are inadequate." *Korslund*, 156 Wn.2d at 182 (citing *Hubbard,* 146 Wn.2d at 713, 50 P.3d 602; *Gardner v. Loomis Armored Inc.,* 128 Wn.2d 931, 945, 913 P.2d 377 (1996)). In *Cudney,* 259 P.3d at 246-47, this Court remarked

> this court has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment. *See Gardner,* 128 Wash.2d at 945, 913 P.2d 377; *Hubbard,* 146 Wash.2d at 713, 50 P.3d 602; *Korslund,* 156 Wash.2d at 181–82, 125 P.3d 119; *Danny,* 165 Wash.2d at 222, 193 P.3d 128.

Mr. Rose does not dispute that the CMVA provides protection for wrongful discharge based on a refusal to violate federal commercial motor vehicle safety regulations. 49 U.S.C. § 31105 provides, in pertinent part,

(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—

. . .

(B) the employee refuses to operate a vehicle because—

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security; . . .

. . .

(b) Filing complaints and procedures.—

. . .

(3)(A) If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to--

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to the former position with the same pay and terms and privileges of employment; and

(iii) pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

(B) If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.

> **(C)** Relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000.

Mr. Rose argues that the remedies provided by 49 U.S.C. § 31105 are inadequate to protect public policy because (1) they do not include emotional distress damages and (2) at the time Mr. Rose filed his state court cause of action, the remedies of 49 U.S.C. § 31105 were no longer available to him, individually.

(1) Remedies under CMVA are robust and comprehensive

The remedies available under the CMVA include, in part, reinstatement, compensatory damages, backpay with interest, litigation costs, witness fees, attorney fees, and punitive damages up to $250,000. In *Korslund*, 156 Wn.2d at 182, this Court found the Energy Reorganization Act (ERA) "provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs." The plaintiffs in the *Korslund* case also alleged emotional injury. *Id.* at 175. Significantly, the remedies determined by the Court in *Korslund* to be adequate are all available under the CMVA. *Id.* at 181; 42 U.S.C. § 5851(b)(2)(B). However, the CMVA provides the additional remedy of punitive damages, which makes the available remedies more

comprehensive than the ERA remedies found comprehensive and adequate in *Korslund*. *See Cudney*, 259 P.3d at 248 (finding the ERA in *Korslund* a proper "guidepost" to measure comprehensive remedies).

Furthermore, federal courts have awarded emotional distress damages as compensatory damages, which are available under 49 U.S.C. § 31105. *See Simas v. First Citizen's Federal Credit Union*, 170 F.3d 37, 47 (1st Cir. 1999) (emotional distress damages fall within compensatory damages remedy under Federal Credit Union Act); *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 208 (4th Cir. 2009) (ALJ awarded compensatory damages for emotional distress under 49 U.S.C. § 31105; the Administrative Review Board overturned on other grounds); *see also* Restatement (Second) of Torts §905 (2010) ("Compensatory damages that may be awarded without proof of pecuniary loss include compensation . . . for emotional distress.")

Mr. Rose cannot show that the "robust statutory remedies" available under 49 U.S.C. § 31105 are inadequate to protect the public interest in commercial motor vehicle safety. *See generally Cudney*, 259 P.3d at 250. Like the Plaintiff in *Cudney*, 259 P.3d at 247, Mr. Rose argues for "the expansion of the 'wrongful discharge against public policy' tort when he asks to proceed despite the existence of hardy

statutory remedies that protect the relevant public policies." Such an expansion is not warranted and would be contrary to this Court's decisions in *Korslund and Cudney*.

(2) Commercial motor vehicle safety is promoted, not Mr. Rose's individual interests

Mr. Rose argues that 49 U.S.C. § 31105 is inadequate because it was unavailable to him at the time he filed his state court cause of action. As this Court established in *Hubbard*, 146 Wn.2d 699, and reiterated in *Korslund*, 156 Wn.2d at 183, and *Cudney*, 259 P.3d at 250, the "other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy." As the Court stated in *Cudney*, "we must remember that it is the public policy that must be promoted, not . . . individual interests." Thus, even if the remedies under 49 U.S.C. § 31105 were never available to Mr. Rose personally, they would preclude his public policy claim under state law because the remedies adequately protect the public interest.

Yet, the § 31105 protections were available to Mr. Rose; however, he chose to take a divergent route. The fact that the route chosen proved imprudent cannot now boost Mr. Rose into a position to argue that the federal law is unavailable to him and, consequently, a public policy cause

of action should be recognized. Allowing such would render this Court's decisions in *Korslund* and *Cudney* meaningless as any plaintiff could establish the jeopardy element of a public policy cause of action by actively seeking a cause of action in an improper forum, wait out the time to file in the proper forum, and then bring a state public policy claim arguing adequate alternative means to protect the public policy are no longer available.

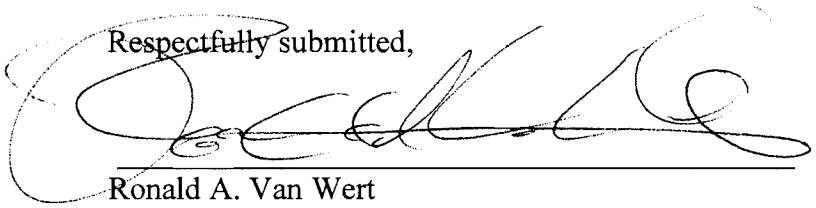
Mr. Rose has failed to show that the federal protections for commercial motor vehicle safety under the CMVA are inadequate to promote the public policy of commercial motor vehicle safety. Thus, Mr. Rose has failed to justify a tort of wrongful discharge in violation of public policy in this matter.

V. CONCLUSION

For the foregoing reasons, Anderson Hay and Grain Co. respectfully requests that the Court deny Mr. Rose's appeal and affirm the trial court's granting of summary judgment dismissing all claims against Anderson Hay and Grain Co. with prejudice.

Dated this 4th day of November, 2011.

Respectfully submitted,



Ronald A. Van Wert
Attorney for Respondent Anderson Hay & Grain Co.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 4th of November, 2011, I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

Gregory Staeheli
Attorney at Law
301 W. Indiana Avenue
Spokane, WA 99205

_____	Personal Service
__X__	U.S. Mail
_____	Hand-Delivered
__X__	Electronic Mail per request and approval

Dated this 4th day of April, 2011, signed at Spokane, Washington.

Jody L. Thiemann