No. 312348
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GREGG BECKER,

Plaintiff/Respondent,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Defendants/Appellants.

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I. INTRODUCTION

A wrongful discharge claim on public policy grounds is limited to those rare instances when "other means of promoting the public policy are inadequate" and the tort claim is "'the *only available adequate means*' to promote the public policy." *Cudney v. Alsco, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244, 247 (2011).

In this case, Plaintiff Gregg Becker claims he was wrongfully terminated in violation of public policy after he refused to misrepresent financial projections, which he claims would have violated unspecified reporting accuracy requirements.

Defendants moved to dismiss Becker's public policy wrongful termination tort claim because the public policy identified by the trial court as "honesty in business" and, specifically, "honest[y] in reporting to the SEC" is adequately protected by the federal Sarbanes-Oxley Act ("SOX") Pub.L. 107–204, 116 Stat. 745, and multiple other state and federal statutes and regulations.

The Superior Court refused to dismiss the public policy tort claim, despite the existence of adequate alternative remedies to promote and protect the public policy at issue, because Becker

persuaded the Superior Court that he might not *personally* have a remedy under SOX if Defendants successfully defeated his SOX claim, which is currently pending in front of the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA").

Because the Superior Court's decision conflicts with decisions of the Washington Supreme Court in *Gardner v. Loomis Armored, Inc.,* 128 Wn.2d 931, 935, 913 P.2d 377 (1996), *Korslund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005) and *Cudney v. ALSCO, Inc.*, 172 Wn. 2d 524, 259 P.3d 244, 247 (2011), as well as decisions in *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012) and *Nunnally v. XO Communications*, 2009 WL 112849 (W.D. Wash. Jan. 15, 2009), Defendants sought discretionary review. The Superior Court certified the issue as appropriate for discretionary review by the Court of Appeals pursuant to RAP 2.3(b)(4). (CP 1309-12) The Court of Appeals granted discretionary review on February 28, 2013. (CP 1315-16)

II. ASSIGNMENTS OF ERROR

1. Did the trial court commit error in denying Rockwood's Motion to Dismiss Plaintiff's claim for wrongful termination in violation of public policy, given the fact that numerous federal and state laws adequately protect the public policy of honesty in business and honesty in reporting to the Securities and Exchange Commission ("SEC")?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a public policy of promoting honesty in business and financial reporting adequately protected by federal and state statutes and regulations so as to preclude a tort claim for wrongful termination in violation of public policy?

2. Did the Plaintiff fail to establish the jeopardy element of his claim for wrongful termination in violation of public policy?

3. Is a private cause of action for Plaintiff Becker the only adequate means to protect the public policy of honesty in business?

IV. STATEMENT OF THE CASE

A. THE PARTIES

Defendants Rockwood Clinic, P.S. and Community Health Systems Professional Services Corporation (hereinafter "Rockwood" and "CHSPSC" or collectively "Defendants") are the petitioners in this appeal. Respondent Gregg Becker (hereinafter "Becker" or "Plaintiff") is the former Chief Financial Officer ("CFO") of Rockwood.

B. FACTUAL BACKGROUND

On February 27, 2012, Plaintiff filed a Complaint for Damages in Spokane County Superior Court, alleging a state law claim for wrongful discharge in violation of public policy and a federal SOX claim. (CP 3-22)

Plaintiff alleges that he was constructively discharged because he would have been required to "engage in improper accounting practices and corporate fraud" if he had continued in his job. (CP 773-774)

Becker alleges that Community Health Systems, Inc. ("CHSI") is a publicly-traded company that must file reports with the

SEC. (CP 728) Becker alleges (incorrectly) that Rockwood was acquired by CHSI (CP 726-727) and that all reporting of Rockwood's financial results must be accurate to avoid misleading "creditors and investors about Rockwood's (and thereby CHS's) financial health." (CP 729)

As Rockwood's CFO, Becker alleges he submitted projections for "earnings before interest, tax, depreciation and amortization" ("EBITDA") showing what he believed was an "accurate" predicted operating loss for Rockwood in 2012 of $12 million. (CP 733) Becker then alleges that supervisors asked him to recalculate his projection to show how Rockwood could achieve its target budget EBITDA loss of $4 million. (CP 734) Becker admits that he did not know why he had been tasked with showing how Rockwood could achieve the $4 million loss in EBITDA, but alleges that he "reasonably believed" that this target could not be achieved. (CP 734-735) Becker refused to recalculate his projection. (CP 735)

Becker repeatedly alleges that he reported his concerns about being asked to recalculate the EBIDTA projection, explaining

that he thought a different projection would be inaccurate and could mislead investors. (CP 736-741) Becker alleges that Defendants responded to his reports by unilaterally reducing his responsibilities and circumventing his authority (CP 738) and that it was obvious he was going to be replaced. (CP 740) Becker alleges he submitted his resignation because of his concerns about the accuracy of the EBIDTA figure, the circumvention of his position as CFO, and "the apparent intent of CHS to misrepresent its projected budget through someone else." (CP 741)

Two days after filing his complaint for wrongful discharge in violation of public policy, Becker filed a SOX complaint with OSHA, alleging discriminatory employment practices in violation of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A (SOX). (CP 209-222) In his OSHA complaint, Becker asserts that, as CFO, he was directed to provide misleading financial information to and for the benefit of CHSI for its use with investors and credit facilities, and was constructively discharged because of the pressure placed on him to recalculate the EBITDA

projection and "because of the clearly expressed intent of both respondents [Rockwood and CHSI] to submit such false information with or without his cooperation." (CP 216)

In his SOX complaint pending before OSHA, Becker requests a full range of relief, including back pay and benefits, front pay and benefits, compensation for loss of tenure at his prior position and the financial damage from the loss of that position, emotional distress damages, loss of reputation and loss of earning capacity, as well as an order expunging an unsatisfactory evaluation and performance improvement plan from his personnel file. (CP 217-218) In addition, Becker has demanded abatement of any further whistleblower violations, an order prohibiting the disclosure of any disparaging information about Becker to prospective employers or otherwise interfering with any applications he might make in the future, exemplary damages, attorney fees, costs of litigation and any other orders necessary to make him whole. (CP 218-19) A more comprehensive demand for remedies is difficult to imagine.

C. PROCEDURAL HISTORY

On February 27, 2012, Becker filed his Complaint in Spokane County Superior Court, alleging wrongful discharge and violation of SOX. Becker named as defendants (1) his former employer, Rockwood Clinic, P.S., and (2) in Plaintiff's nomenclature, "Community Health Systems, Inc. d/b/a Community Health Systems Professional Services Corporation d/b/a Community Health Systems PSC, Inc. d/b/a Rockwood Clinic P.S." The trial court ultimately dismissed claims against CHSI for lack of personal jurisdiction, but allowed plaintiff's claims against CHSPSC to continue. (CP 1321-23)

On March 29, 2012, Rockwood removed the case to the United States District Court for the Eastern District of Washington, based on federal question jurisdiction arising from Becker's SOX claim. (CP 25-94) Rockwood (CP 184-224), CHSI (CP 225-289), and CHSPSC (CP 290-301) filed motions to dismiss, and plaintiff filed a motion to remand the case back to state court. (CP 302-316) After Defendants responded to the remand motion, Becker filed a motion to stay his remand motion to allow him to file an

Amended Complaint to delete the basis for federal question jurisdiction (i.e., the SOX claim). (CP 659-74) The federal District Court granted Plaintiff's motion (CP 720-723) and Becker filed an Amended Complaint, which is virtually identical to his original Complaint except that it has removed all specific references to SOX, instead citing to "numerous financial reporting requirements by statute and by ethical codes." (CP 724-48) In light of this revision, the U.S. District Court ordered the case to be remanded to Spokane County Superior Court on May 30, 2012. (CP 96-97; 749-50)

With the case back in Superior Court, Rockwood filed a Motion to Dismiss the Amended Complaint pursuant to CR 12(b)(6). (CP 802-820) Defendant CHSPSC joined in Rockwood's motion. (CP 1318) The Superior Court denied the dismissal motion, concluding that Becker had stated a clear public policy which was characterized by the trial judge as honesty in business. (RP 83-84) The trial court also determined that Becker satisfied the jeopardy element of the claim. (RP 81-83) Ultimately, a written Order was entered on January 15, 2013. (CP 1024-26) The

Superior Court later certified, pursuant to RAP 2.3(b)(4), that the Order is appropriate for discretionary review because of the importance of the disputed jeopardy issue and its dispositive effect. (CP 1309-12)

The Court of Appeals granted discretionary review. (CP 1315-16) The Commissioner identified the controlling question of law as whether existing statutory and/or regulatory schemes adequately promote the public policy of honesty in business so that a private tort remedy for Becker, who is otherwise terminable at will, is not needed. (CP 1316)

V. STANDARD OF REVIEW

A trial court's ruling on a CR 12(b)(6) motion is reviewed *de novo*. The motion should be granted if the complaint fails to state a claim upon which relief can be granted. *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988). A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

The question of whether adequate alternative means exist for promoting the public policy presents a question of law where the

inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy. *Cudney v. ALSCO, Inc.*, 172 Wn.2d at 529-30 (citing *Korslund*, 156 Wn.2d at 182). Questions of law are subject to *de novo* review on appeal. *McKee v. AT&T Corp.*, 164 Wn.2d 372, 387, 191 P.3d 845 (2008); *Weiss v. Lonnquist*, 173 Wn. App. 344, 354, 293 P.3d 1264 (2013).

VI. ARGUMENT

Becker's tort claim for wrongful discharge in violation of public policy should have been dismissed under CR 12(b)(6) because existing statutory and regulatory schemes adequately promote the public policy of honesty in business so that a private tort remedy is not needed.

A. LEGAL ELEMENTS FOR CLAIM OF WRONGFUL DISCHARGE IN VIOLATION OF PUBLIC POLICY

Absent a contract to the contrary, Washington employees are generally terminable "at will." *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). The common law tort of wrongful discharge is a narrow exception to the terminable-at-will

doctrine. *Id.* at 935-36.

To prevail on a wrongful discharge claim, a plaintiff must satisfy a four-factor test. *Gardner*, 128 Wn.2d at 941 (citing Henry H. Perritt, Jr., *Workplace Torts: Rights and Liabilities* § 3.7 (1991)). Specifically, the plaintiff must show (1) "the existence of a clear public policy (the clarity element)"; (2) "that discouraging the conduct in which [he] engaged would jeopardize the public policy (the jeopardy element)"; (3) "that the public-policy-linked conduct caused the dismissal (the causation element)"; and, finally, (4) that "[t]he defendant [has not] offer[ed] an overriding justification for the dismissal (the absence of justification element)." *Id.* All four elements must be proved. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459, 13 P.3d 1065 (2000). Only the jeopardy element is at issue in this appeal.

B. NUMEROUS STATUTES AND REGULATIONS PROTECT A PUBLIC POLICY OF HONESTY IN BUSINESS AND HONEST REPORTING TO THE SEC

The Superior Court determined that the at-issue public policy was the public policy requiring honesty in business and honest

reporting to the SEC. (CP 83-84)

Courts in Washington have made it clear that a public policy wrongful discharge claim must be dismissed as a matter of law unless the plaintiff can point to **a clear public policy and show that adequate alternative means for promoting that public policy do not exist**. *See, e.g., Korslund v. Dyncorp Tri-Cities Servs., Inc.,* 156 Wn.2d at 182 (rejecting as a matter of law a wrongful discharge claim because the federal Energy Reorganization Act provides means of promoting the alleged public policy); *Nunnally v. XO Communications*, 2009 WL 112849 at 9-12 (rejecting as a matter of law a SOX-based wrongful discharge claim because SOX provides adequate means of promoting the alleged public policy).

The jeopardy element guarantees that an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened. *Gardner*, 128 Wn.2d at 941-42. Becker's tort claim should have been dismissed because the public policy of honesty in business and honest reporting to the SEC is protected by a wide range of statutes and regulations. The

public policy is not in jeopardy, and a private cause of action need not be recognized, where there are other adequate means available. *Korslund*, 156 Wn.2d at 184. *Accord*, *Worley v. Providence Physician Services, Inc.*, No. 30950-9-III (July 23, 2013)(in order to establish the jeopardy element, the plaintiff has to establish that other means of promoting the public policy were inadequate and the actions she took in bringing a tort of last resort for wrongful discharge in violation of public policy, were the "only available means" to promote the public policy).

Numerous statutes and regulations exist to promote honesty in business and honest reporting to the SEC.

1. SOX Imposes a Duty of Accurate Reporting

SOX makes CEOs and CFOs directly responsible for the accuracy of all financial reports. SOX promotes the public policy by requiring public company CEOs and CFOs to certify that financial reports filed with the SEC are materially correct. SOX § 302, 15 U.S.C. § 7241. SOX requires that financial statements and disclosures "fairly present" the company's operations and financial condition in all material respects. *Id.* The CEO and CFO are

responsible for evaluating and maintaining internal controls and must ensure that material information related to the issuer **and its consolidated subsidiaries** is made known to such officials and others within such entities. *Id.* Further, they must certify that they have disclosed to the auditor and audit committee all "significant deficiencies" in the design or operation of internal controls, including any material weaknesses, and any fraud, whether or not material, that involved management or other employees who have a significant role in the issuer's internal controls. *Id.*

A separate criminal provision requires the signing officer to certify that each periodic report containing financial statements complies with securities laws and that the information in such report fairly presents, in all material respects, the financial condition and results of operations of the company. Failure to do so is a felony, punishable by up to ten years in jail. A willful violation is punishable by a fine up to $5 million and/or imprisonment of up to 20 years. SOX §906, 18 U.S.C. § 1350.

Under SOX, officers, directors and others are prohibited from fraudulently misleading their auditors. SOX §303, 15 U.S.C. § 7242.

The CEO and CFO must disgorge bonuses and profits after restatements due to misconduct. SOX §304, 15 U.S.C. § 7243. SOX gives the SEC authority to bring administrative proceedings to bar persons who are found to be "unfit" from serving as officers or directors of publicly-traded companies. SOX §305, 15 U.S.C. § 7244; 15 U.S.C. §78u-3. SOX also gives the SEC authority to temporarily freeze the pay of corporate officers pending an investigation of securities fraud. 15 U.S.C. §78u-3(c)(3).

To encourage reporting of financial fraud, regulations under the recently enacted Dodd-Frank Act provide a monetary award to anyone who voluntarily provides the SEC with information leading to a successful prosecution for violation of the federal securities laws, including for violations "about to occur." *See* 17 CFR § 240.21F, *et seq.* In addition, SOX regulations require audit committees to establish procedures for "the confidential, anonymous submission by employees of [public companies] of concerns regarding questionable accounting or auditing matters." 15 U.S.C. § 78j-1(m)(4)(B).

2. SOX Protects Whistleblowers

To further enhance the public policy of accurate financial reporting, Congress created an incentive to encourage employees and officers to report suspected fraud. SOX provides a private cause of action to any employee or officer who is retaliated against for reporting suspected fraud against shareholders, and this report can be made to any federal agency or to any person with supervisory authority over the employee. 18 U.S.C. § 1514A(a) provides in relevant part:

> No company . . . or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful act done by the employee—(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—(C) a person with supervisory authority over the employee (or such

> other person working for the employer who has the authority to investigate, discover, or terminate misconduct) . . . .

The SOX Act provides that a person who alleges discharge or discrimination by any person in violation of section 1514A(a) may seek relief by filing a complaint with the Secretary of Labor and, if the Secretary fails to issue a decision within 180 days of the filing of the complaint, the person may file an action in United States District Court. See 18 U.S.C. § 1514A(b)(1). Remedies include "all relief necessary to make the employee whole." 18 U.S.C. §1514A(c)(1). This relief may take the form of reinstatement at the same level of seniority, back pay with interest, and compensation for any special damages sustained including litigation costs, expert witness fees and reasonable attorney fees. 18 U.S.C. §1514A(c)(2). The Secretary of Labor has delegated the authority to review appeals under Section 806 and issue final agency decisions to the Administrative Review Board ("ARB"). *See* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 75 Fed. Reg. 3924, 3924-25 (Jan. 25, 2010).

Section 1107 of SOX provides for criminal penalties for retaliation against whistleblowers. 18 U.S.C. § 1513(e).

SOX whistleblower protection extends to employees of "any subsidiary or affiliate whose financial information is included in the consolidated financial statements of [a publicly-traded] company." *See* 18 U.S.C. § 1514A. In paragraph 5.14 of his Amended Complaint, Plaintiff alleges that Rockwood's financial information is included in the consolidated financial statements of CHSI, a publicly-traded company. (CP 730) Thus, as a Rockwood employee, Becker himself admitted he is protected by SOX, as demonstrated by Becker simultaneously pursuing a SOX claim before OSHA. (CP 209-222)

The Third Circuit recently held that Section 806 even protects an employee's communication about a violation that has not yet occurred "as long as the employee reasonably believes that the violation is likely to happen." *See Wiest v. Lynch*, 710 F.3d 121, 133 (3d Cir. 2013). The ARB has consistently held that "disclosures concerning violations about to be committed (or underway) are covered as long as it is reasonable to believe that a violation is

likely to happen." *Funke v. Federal Express Corp.*, ARB 09-004, 2011 DOLSOX LEXIS 55 at *23 (ARB July 8, 2011); *Sylvester v. Parexel Int'l LLC*, ARB 07-123, 2011 DOLSOX LEXIS 39, 2011 WL 2165854 (May 25, 2011). Similarly, courts have held that imminent crimes, or at least crimes in their infancy, are within the scope of Section 806. *Leshinsky v. Telvent GIT, S.A.*, 2013 U.S. Dist. LEXIS 62364, *32-33, Fed. Sec. L. Rep. (CCH) ¶ 97,410, 2013 WL 1811877 (S.D.N.Y. May 1, 2013).

To provide additional incentive for employees and officers to report suspected securities fraud to the SEC, the recently-enacted Dodd-Frank Act contains a section titled "Securities Whistleblower Incentives and Protection," 15 U.S.C. § 78u-6 (2012), which, *inter alia*, provides a private cause of action for whistleblowers alleging retaliatory discharge or other forms of discrimination under certain circumstances. 15 U.S.C. § 78u-6(h)(1)(B)(i).

The Dodd-Frank Act defines a "whistleblower" as any individual who provides information relating to a violation of the securities laws to the SEC in a manner established, by rule or regulation, by the Commission. 15 U.S.C. § 78u-6(a)(6). The anti-

retaliation provisions of the Dodd-Frank Act protect whistleblowers from retaliation in three categories of circumstances, as follows:

> No employer may discharge . . . or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower - -
>
> (i) in providing information to the Commission in accordance with this section;
>
> (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission upon or related to such information; or
>
> (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

15 U.S.C. § 78u-6(h)(1)(A).

The SEC website encourages reporting of possible future violations of the federal securities laws, including false or misleading statements about a company, which could be contained in SEC reports or financial statements. *See* *http://www.sec.gov/complaint/tipscomplaint.shtml*.

3. Other Statutes Also Protect the Public Policy of Honesty in Business and Financial Reporting

In addition to SOX, there are a vast number of state and federal laws, enforcement mechanisms, and penalties that work together to promote the public policy of honesty in business by preventing, policing, and punishing corporate financial fraud. In Washington, RCW 9.24.050 makes it a class B felony for any "director, officer or agent of any corporation" to "knowingly make or publish" a report "containing any material statement that is false or exaggerated." This statute provides for substantial punishments of up to 10 years in state prison and $5,000 in fines for each violation.

The Securities Exchange Act of 1934 subjects any person or entity to felony criminal prosecution for willfully violating the federal securities laws, including causing false financial information to be filed with the SEC, and provides for penalties of up to 20 years in prison and $25,000,000 in fines. *See* 15 U.S.C. § 78ff(a). In addition, any person or company who engages in a scheme to defraud in the sale of securities, or who uses any mail or wire carrier in the course of their fraudulent conduct, including for

financial fraud, can be prosecuted for a felony. 18 U.S.C. §§ 1341, 1343, 1348. It is also a federal crime to knowingly and willfully make a false or fraudulent statement in any matter within the jurisdiction of the executive, legislative, or judicial branch of the U.S. government, including financial reporting under the purview of the SEC. *See* 18 U.S.C. § 1001.

In addition to criminal enforcement, the federal government has civil enforcement powers. The SEC has broad powers to obtain injunctive relief, disgorgement, civil monetary penalties, and officer/director bars against any person who violates the SEC's financial reporting obligations. *See, e.g.,* 15 U.S.C. §§ 77t, 77q(a), 78j(b) and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5).

Private citizens can also ensure honesty in business through civil lawsuits. Federal securities laws provide for a private right of action, including class actions, by shareholders against a company or individual who violates the securities laws. *See* 15 U.S.C. § 78j(b) and Rule 10b-5. The Washington State Securities Act similarly creates a private right of action against a party that violates state securities laws. RCW 21.20.430.

4. As a Matter of Law, Becker Cannot Establish That His Acts Were The Only Way To Protect The Public Policy

Because of this rich array of criminal and civil enforcement mechanisms, Becker cannot show that his actions—refusing to recalculate the EBITDA projection and then quitting his job—were the only available adequate means to promote the public policy of honesty in business. *Cudney,* 172 Wn.2d at 537.

What actions did Becker take?

1. Becker reported his concerns internally to people with supervisory authority. (CP 725; 736; 738; 738-739) Such actions can, under the circumstances discussed above, trigger SOX whistleblower provisions, providing a private cause of action. As discussed above, SOX protects employees who provide information concerning fraud or securities violations to a supervisor or other individual who has the authority to investigate, discover or terminate such misconduct. 18 U.S.C. § 1514A(a)(1). *See Nunnally v. XO Communications*, 2009 U.S. Dist. LEXIS 5979, 2009 WL 112849 (W.D. Wash. 2009)(SOX provides an alternative remedy that promotes the public interest and precludes a wrongful

discharge in violation of public policy claim premised on whistleblowing activities). Indeed, Becker took advantage of this avenue for relief by filing his whistleblower complaint with OSHA. (CP 209-222)

2. Becker alleges that he refused to alter his EBIDTA calculations. SOX protects CFOs from being required to misreport financial information by protecting employees who report financial improprieties from adverse employment action. If his internal complaints were not accomplishing his desired objective, Becker only had to report his concerns to the SEC, FBI or Attorney General to start an investigation and obtain the additional protection of the Dodd-Frank Act. *See* *http://www.sec.gov/complaint/tipscomplaint.shtml*

3. Becker alleges he quit (or was forced to quit) when he concluded that "CHS intended to misrepresent its projected budget through someone else, but under the auspices of his department." (CP 741) Thus, Becker's resignation did **not** protect the public policy, because Becker's Amended Complaint asserts that the alleged fraud would have occurred even without him. Moreover, because fraud can be difficult to detect, the public is much better protected by

requiring employees who suspect fraud to report their concerns, either internally or to a law enforcement agency, rather than resigning.

Becker's actions were not, as a matter of law, the only available adequate means of promoting the public policy of honesty in business, as is evident from the regulatory schemes described above.

In *Cudney*, an employee was fired after reporting that his manager was drinking while driving on the job. *Cudney v. ALSCO, Inc.*, 172 Wn.2d at 527-28. The terminated employee claimed wrongful discharge in violation of the public policy created by Washington's DUI laws. *Id.* at 536. The Court agreed with plaintiff on the existence of a clear public policy, but dismissed the employee's claim, holding that he failed to satisfy the jeopardy element. *Id.* at 537–38.

To satisfy the jeopardy element, the *Cudney* plaintiff had to show that the actions he took were the *"only available adequate means"* to promote the public policy of protecting the public from drunk driving. *Cudney*, 172 Wn.2d at 537. For this to be true, the

criminal laws and their enforcement mechanisms and penalties, all have to be inadequate to protect the public from drunk driving. *Id.* at 537. The *Cudney* Court held that an employee "simply cannot show that having law enforcement do its job and enforce DUI laws is an inadequate means of promoting the public policy." *Id.*

As in *Cudney*, Becker cannot show that his actions were the only adequate way to promote the public policy of honesty in business and financial reporting. The various laws and law enforcement mechanisms described above work together to enable law enforcement to protect the public from corporations and officers who make materially false reports. In addition, SOX and the Dodd-Frank Act provide private causes of action for employees who report suspected violations. Importantly, SOX already promotes the public policy by requiring CFOs to report suspected fraud to someone with supervisory authority or to any federal regulatory or law enforcement agency and then providing the CFO with a private cause of action if the CFO suffers any retaliation as a result of the report. 18 USC § 1514A. According to the Amended Complaint, Becker reported his suspicions to several individuals with supervisory authority. (CP 725;

736; 738; 738-739) Becker then availed himself of the statutory remedy by filing a whistleblower complaint with OSHA. (CP209-222)

Plaintiff has tried to argue that SOX does not adequately promote the public policy because he might not prevail on his OSHA whistleblower claims. But the relevant public policy is not about protecting the plaintiff, it is about protecting the public. As this Court recently held: "**Protecting the public is the policy that must be promoted, not protecting the employee's individual interests.**" *Rose*, 276 P.3d at 384 (emphasis added). In *Rose*, the plaintiff argued that the public policy was not adequately protected because the federal administrative remedy was not available to ***him***. *Id.* This Court disagreed, stating that "the *Korslund* court foreclosed this argument when it reasoned the other means of protecting the public policy need not be available specifically to the plaintiff so long as the other means are adequate to protect the public policy." *Id.*

Similarly, in another very recent decision, the Court of Appeals held that the plaintiff could not, as a matter of law, establish the jeopardy element even though she presumably had no remedy, for the public policy was protected:

> It is true that the bar association provides no comparable remedy offering personal relief and protection from retaliation for an attorney who refuses her supervisor's directive to engage in conduct she perceives as unethical. But we do not read *Cudney* as holding that alternative remedies, to be adequate, must provide relief personal to the employee. The Supreme Court has repeatedly emphasized that it does not matter whether or not the alternative means of enforcing the public policy grants a particular aggrieved employee any private remedy.

Weiss, 173 Wash. App. at 359.

Accordingly, the fact that Becker's OSHA whistleblower complaint may lack merit is inapposite. The public policy of honesty in business and financial reporting is already adequately promoted without giving plaintiff the additional wrongful discharge remedy.

Based on *Korslund* and *Cudney*, Becker's public policy claim should have been dismissed, as a matter of law, because he cannot show that having law enforcement (the FBI, SEC or state officials) do their jobs, as well as the threat of class actions under federal Rule 10b-5, the threat of lawsuits under Washington's Securities Act, the duty imposed on a CFO to report financial fraud, and the broad protections of SOX, are inadequate to promote the public policy of honesty in business and financial reporting. *See*

also Worley v. Providence Physician Services, Inc., slip op. at pp. 7-10 (if current laws or regulations provide an adequate means of promoting the public policies, the tort claim for wrongful discharge in violation of public policy cannot stand).

C. IMPACT OF THE DECISION IN *PIEL v. THE CITY OF FEDERAL WAY*

In its recent decision in *Piel v. The City of Federal Way*, No. 83882-8 (June 27, 2013), the Washington Supreme Court stated that it was not retreating from its decisions in *Cudney* and *Korslund.* In *Piel*, the Court reviewed its prior decision in *Smith v. Bates Technical College*, 139 Wn.2d 793, 991 P.2d 1135 (2000) (holding public employees are not required to exhaust administrative remedies through PERC before bringing a claim for wrongful termination in violation of public policy), and explained that even though *Smith* did not explicitly undertake a jeopardy analysis of the public policy tort claim, the decision implicitly determined, as a matter of law, that the PERC remedial scheme does not provide adequate redress for an employer's public policy violation in retaliating against an employee for engaging in protected union

activity. Thus, the court in *Piel* allowed the public policy tort claim to continue despite the statutory remedies provided by PERC.

The *Piel* decision purported to ease the tension between *Smith*, *Korslund*, and *Cudney* with a closer examination of the administrative remedies at issue in each case. Significant to the *Piel* court, neither *Korslund* nor *Cudney* involved an administrative scheme that the Supreme Court had previously recognized as inadequate to vindicate an important public policy. *See Korslund*, 156 Wn.2d at 181-83 (involving federal ERA); *Cudney*, 172 Wn.2d at 526-27 (involving WISHA and Washington laws prohibiting driving under the influence). In contrast, the administrative remedies allowed through PERC were determined to fall short of addressing the broader public interests at issue in a wrongful discharge tort claim because it was directed at protecting public employees' contractual rights. *See Smith*, 139 Wn.2d at 805. *Piel* reasoned that the decision in *Smith* unequivocally held that PERC is inadequate to vindicate the public policy at issue when an employee is terminated in retaliation for asserting collective

bargaining rights. The *Piel* Court felt bound by the *Smith* decision and allowed the tort claim to proceed.

Unlike *Smith* and *Piel*, but similar to *Korslund* and *Cudney*, the Supreme Court has never found SOX or RCW 9.24.050 inadequate to protect the important public policy of honest financial reporting by corporations. In fact, a more comprehensive remedy scheme is difficult to imagine.

The remedies potentially available to Becker under SOX are similar and even more expansive than those under the ERA (*Korslund*) or WISHA (*Cudney*). As outlined above, under SOX an employee who alleges retaliatory discharge or discrimination may seek relief by filing a complaint with the Secretary of Labor and, if the Secretary fails to issue a decision within 180 days of the filing of the complaint, the person may file an action in United States District Court. *See* 18 U.S.C. § 1514A(b)(1). Remedies under SOX include "all relief necessary to make the employee whole." 18 U.S.C. 1514A(c)(1). This relief may take the form of reinstatement at the same level of seniority, back pay with interest, and compensation for any special damages sustained including litigation costs, expert

witness fees and reasonable attorney fees. 18 U.S.C. §1514A(c)(2). A party to an action in District Court is entitled to trial by jury. 18 U.S.C. § 1514A

While 18 U.S.C. §1514A(c) does not explicitly include emotional distress damages, the phrase "shall include" indicates the enumerated relief is not intended to be exhaustive. Moreover, the provision stating that a prevailing employee "shall be entitled to all relief necessary to make the employee whole" supports the reading that emotional distress damages are permitted. *Lockheed Martin Corp. v. Admin. Review Bd.*, 2013 U.S. App. LEXIS 11159, *16-17 (10th Cir. June 4, 2013).

In *Nunnally*, the Court held that SOX adequately protects whistleblowers who report what they believe to be financial improprieties. *Nunnally*, 2009 WL 112849 at *11–12. The Court rejected plaintiff's argument that SOX provided an inadequate remedy, finding plaintiff's argument to be "unpersuasive given Sarbanes Oxley's pronouncement that an employee 'shall be entitled to all relief necessary to make the employee whole.'" *Id.* at *12 (citing 18 U.S.C. § 1514A(c)(1)).

Nunnally also argued that SOX did not preclude her from filing a wrongful discharge claim in state court, because SOX provides: "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement." 18 U.S.C. § 1514A(d). The District Court rejected this argument, explaining that because SOX is the source of the public policy, the existence of the SOX remedies does not take away a state law cause of action, but rather is the source for a potential state cause of action. *Nunnally*, 2009 WL 112849 at *12. Because Nunnally failed to take full advantage of the protections to which she was entitled under SOX by not pursuing an administrative appeal, she was not entitled to a second bite at the apple.

Like Nunnally, Becker has not taken advantage of his right to bring his SOX claim in federal District Court where he would be entitled to a jury trial and could potentially recover all relief necessary to make him whole. As previously indicated, Becker filed a SOX retaliation complaint with OSHA on February 29, 2012. (CP209-222) Since more than 180 days have passed, Becker is

entitled to bring his claim in federal District Court. 18 U.S.C. § 1514A(b)(1). His failure, or refusal, to do so is puzzling because he is claiming the same damages in the OSHA complaint as he is alleging in this state law wrongful termination in violation of public policy claim. In fact, the duplicative nature of both claims proceeding at the same time confirms that the public policy tort is not the only available adequate means to promote the public policy of honest financial reporting by corporations. His failure, or refusal, to pursue these comprehensive remedies available to him in federal court does not allow him to assert a claim for wrongful termination in violation of public policy.

In short, because of the robust statutory remedies provided by SOX, the decision in *Piel* does not change the analysis of the jeopardy element in this case. The Court should determine, as a matter of law, that the jeopardy element of Becker's public policy claim cannot be established because the other means for promoting the public policy in SOX and RCW 9.24.050 are clearly adequate to protect the relevant public policies alleged in this lawsuit.

D. THE TORT HAS THE SAME ELEMENTS WHETHER THE EMPLOYEE IS A WHISTLEBLOWER OR REFUSES TO PERFORM AN ILLEGAL ACT

In an attempt to distinguish *Nunnally*, and to avoid the jeopardy analysis of *Korslund* and *Cudney*, Becker repeatedly argued to the Superior Court that he is not a whistleblower. This contention is belied by the fact that Becker is currently pursuing a SOX whistleblower claim in front of OSHA. (CP 209-222)

Significantly, Becker's Amended Complaint repeatedly asserts that he reported his concerns about the legality of what he thought he was being asked to do. (CP 736-743) Becker specifically alleges at paragraph I of the Amended Complaint that he "directly told both defendants" that the required misrepresentations appeared to be designed to mislead financial institutions and investors about the financial health of CHSI and Rockwood. (CP 725) Becker alleges in paragraph 5.52 of the Amended Complaint that he reported to Rockwood's CEO his concerns that in order to retain his position, he was being required by both CHSPSC and Rockwood to knowingly misrepresent financial projections and budgets in direct violation of accuracy

reporting requirements, and that such actions would be illegal and criminal acts. (CP 736) Becker also alleged at paragraph 5.62 of his Amended Complaint that he "fully disclosed the issue to CHS" (CP 738) and at paragraph 5.68 of his Amended Complaint that he "communicated his concern directly to CHS Internal audit's Mike Lynd." (CP 738-739) These types of actions alleged by Becker implicate SOX, as Becker himself alleges in his SOX whistleblower complaint pending before OSHA (and that he is free to file now in federal court). Subject to certain limitations, SOX protects an employee who provides information that the employee reasonably believes constitutes a violation of the enumerated laws to a person with supervisory authority over the employee, or a person working for the employer who has the authority to investigate, discover, or terminate misconduct. 18 U.S.C. § 1514A(a)(1).

Despite Becker's repeated whistleblower complaints, he asserts that his cause of action is based on his refusal to commit an illegal act, rather than any whistleblowing. The Washington Supreme Court recognized that the public policy tort generally arises when an employer terminates an employee in four different

situations -- as a result of the employee's (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) reporting employer misconduct. *Gardner*, 128 Wn.2d at 935–36 (citing *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)). However, regardless of whether Becker is a whistleblower (as he is arguing in his contemporaneous SOX proceeding) or whether he refused to commit an illegal act (as he alleges in this lawsuit) the analysis of the public policy tort claim is the same, and the requirements that must be satisfied by a plaintiff are the same.

In *Rose*, plaintiff alleged that he was discharged "for refusing to violate certain federal work regulations." *Rose*, 168 Wn. App. at 476. This Court applied the same test to plaintiff's claim as courts have applied to whistleblower claims, holding that, "to establish the jeopardy element, the plaintiff must show other means of promoting the public policy are inadequate." *Id.* at 478-79.

The four categories have no independent significance. The Supreme Court in *Gardner* did not create four separate torts; the *Gardner* court was merely grouping cases for convenience of

analysis. *See Lins v. Children's Discovery Ctrs.*, 95 Wn. App. 486, 494, 976 P.2d 168 (1999).

Before the Superior Court, Becker argued that his claim is controlled by *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) (asserting a public policy promoting accurate accounting procedures in compliance with the Foreign Corrupt Practices Act of 1977). Since *Thompson*, however, the elements of the public policy tort claim have been substantially refined in *Gardner, Korslund, Cudney* and *Rose, supra*. *Thompson* never conducted an analysis of the jeopardy prong of the public policy tort cause of action, because that additional requirement that must be satisfied by a plaintiff was not adopted until twelve years later in *Gardner.* Moreover, since *Thompson*, both the SOX and Dodd-Frank laws have been enacted to provide substantial additional protection for the public policy of honest financial reporting to the SEC.

There is no case law to support Becker's argument that *Korslund* and *Cudney* do not apply to a claim for wrongful termination for refusing to commit an illegal act. The analysis of the

tort is the same, regardless of which of the four categories, the plaintiff falls into. *See Rose* (refusal to commit an illegal act); *Gardner* (performance of a public duty or obligation); *Cudney* (whistleblower); and *Korslund*, 156 Wn.2d 168 (whistleblower).

Becker cannot show that the public policy of honesty in business and financial reporting is best protected by a CFO who believes or knows that there is some kind of financial impropriety, yet refuses to report it. Indeed, a CFO who knows of financial impropriety and does not report it faces liability under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5. *See* 17 C.F.R. 240.10b-5; *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 727-30 (1975) (holding that the reporting requirements of Rule 10b-5 can be enforced by the SEC as well as a private plaintiff). Moreover, a CFO could face criminal liability under RCW 9.24.050, which prohibits corporations and their officers and agents from filing or publishing "any written prospectus, report, exhibit or statement of its affairs or pecuniary condition, containing any material statement that is false or exaggerated." That state statute makes any such act a class B felony.

If Becker is not a whistleblower, then he limited himself to refusing to submit a report he allegedly believed was fraudulent and then quitting. These actions are not the only avenues that were available to Becker, and they are clearly not the only means of promoting the public policy of honesty in business. In fact, Becker's limiting his actions and quitting undermines the public policy.

Congress could have created a private right of action for any employee who was discharged for refusing to violate truthful reporting laws, but it did not. This is for good reason: because fraud can be hard to detect, the public is ***better*** protected by requiring employees to bring potential violations to the attention of someone with the authority to correct the problem (such as a supervisor or law enforcement agency) than by allowing them to stay silent, quit, and then sue their employers privately. This is why SOX and the recently enacted Dodd-Frank Act include the whistleblowing requirement.

If the Court allows plaintiff to pursue his wrongful discharge claim, it will create an incentive for employees to keep quiet when they know that their employer has published (or likely will publish)

false financial information. Allowing plaintiff's claims to succeed will ***undermine*** the very public policy that is at issue in this case: promoting honest financial reporting.

As discussed above, the individual plaintiff does not need to have an alternative cause of action in order for the **public** to be adequately protected. Here, even if Becker had not reported his concerns to his supervisors--and thus did not have a potential SOX claim—the public policy requiring honesty in business and financial reporting would still be adequately promoted by the panoply of federal and state laws and enforcement mechanisms discussed above. *See Cudney*, 172 Wn.2d at 537 (holding that plaintiff failed to satisfy the jeopardy element, even though plaintiff did not have a private cause of action under the DUI laws, because plaintiff "simply cannot show that having law enforcement do its job and enforce DUI laws is an inadequate means of promoting the public policy.").

Becker's claim is controlled by *Korslund*, *Cudney* and *Rose*. If Becker is a whistleblower, then he cannot satisfy the jeopardy element because SOX provides adequate alternative remedies and

because the full panoply of federal and state laws adequately protects the at-issue public policy. If Becker is not a whistleblower, then allowing him to pursue a wrongful discharge in violation of public policy claim will undermine the public policy of honesty in business and financial reporting by providing an incentive for potential whistleblowers to stay silent and quit their jobs (while the public policy itself is protected by the arsenal of federal and state laws, regulations, and enforcement agencies). Becker, like the employee in *Cudney*, should have reported his concerns to law enforcement (SEC) and let them do their job.

Even if Becker was not a whistleblower and thus did not have a remedy under 18 U.S.C. § 1514A or the Dodd-Frank Act, the public policy of honesty in business and financial reporting is still adequately promoted, and so Becker has no public policy wrongful discharge claim. In *Worley*, the plaintiff alleged that her wrongful discharge claim was necessary to promote the public policies of insuring workplace safety and standard of care in the healthcare field, preventing fraud in billing, and protecting against retaliation for such violations. *Worley v. Providence Physician*

Services, Inc., slip op. at p. 8. This Court disagreed because the Washington Heath Care Act ("WHCA") already adequately promotes the public policies by requiring the department of health to "adopt rules to implement procedures for filing, investigation, and resolution of whistleblower complaints that are integrated with complaint procedures under Title 18 RCW for health professionals or health care facilities." *Id.* at 9 (citing RCW 43.70.075(4)). Thus, even though plaintiff Worley failed to make a whistleblower complaint, and thus had no personal remedy under WHCA, this Court concluded the public policies are adequately promoted, barring plaintiff from recovering under a public policy wrongful discharge claim. This Court should similarly reject Becker's claim as a matter of law.

Becker has not shown that SOX and related state and federal laws and regulations are an inadequate means of promoting the public policy of honest financial reporting, so his public policy claim should have been dismissed.

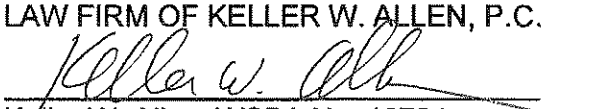
VII. CONCLUSION

The Superior Court identified the public policy at issue as

honesty in business, specifically in SEC reporting. That public policy is adequately protected by a variety of law enforcement agencies and mechanisms. SOX provides a full range of remedies for whistleblowers. Federal and Washington state laws include a very wide range of criminal and civil remedies to ensure honesty in business. Becker's decision to refuse to perform an allegedly illegal act and then quit his job was not the only adequate alternative to promote the public policy of honesty in business. Becker's tort claim for wrongful termination in violation of public policy should have been dismissed as a matter of law because Becker cannot satisfy the jeopardy element of his claim.

Respectfully submitted this 5th day of August, 2013.

LAW FIRM OF KELLER W. ALLEN, P.C.



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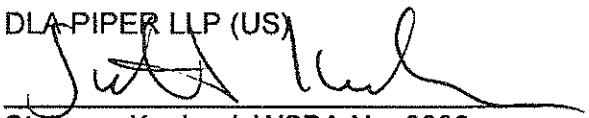

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Spokane, Washington, this 5th day of August, 2013.

Nancy E. Kidwell