

FILED

DEC 02 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 312348

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

GREGG BECKER,

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.,

Petitioners.

PETITIONERS' REPLY BRIEF

Stellman Keehnel, WSBA No. 9309
Katherine Heaton, WSBA No. 44075
DLA Piper LLP (US)
701 Fifth Avenue, Suite 7000
Seattle, WA 98104
Telephone: 206.839.4800

Keller W. Allen, WSBA No. 18794
Mary M. Palmer, WSBA No. 13811
Law Firm Of Keller W. Allen, P.C.
5915 S. Regal, Suite 211
Spokane, WA 99223
Telephone: 509.777.2211

Attorneys for Petitioner/Defendant
Community Health Systems
Professional Services Corporation

Attorneys for Petitioner/Defendant
Rockwood Clinic, P.S.

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION	1
II. ARGUMENT.....	2
A. The Jeopardy Element Is a Difficult Standard to Meet.....	2
B. There Are Adequate Alternative Remedies to Protect the Public Policy of Honesty in Business.....	3
C. Becker is a Whistleblower Who Would Be Protected by SOX if He Could Prove the Elements of His SOX Claim	5
1. Becker is a Whistleblower	5
2. SOX Provides Adequate Protection for Whistleblowers.....	6
3. Defendants Are Not Offering Inconsistent Defenses to Plaintiff's Concurrent Claims.....	8
4. SOX Adequately Protects the Public Policy Even if Becker's SOX Claim Fails on the Merits.....	11
5. Requiring an Employee to Commit an Illegal Act is an "Existing" Violation Covered by SOX	12

6. Becker's Corporate Structure Argument is a Red Herring	15
D. Even if Becker Were Not a Whistleblower, the Public Policy is Adequately Protected	16
1. Becker Must Establish the Jeopardy Element	16
2. Becker Cannot Satisfy the Jeopardy Element	21
III. CONCLUSION	23

TABLE OF AUTHORITIES

Washington Authorities

<i>Cudney v. ALSCO, Inc.</i> , 172 Wn.2d 524, 259 P.3d 244 (2011)	2, 11, 18, 21
<i>Gardner v. Loomis Armored</i> , 128 Wn.2d 931, 913 P.2d 377 (1996)	17, 18, 20
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002)	12
<i>Korslund v. DynCorp Tri-Cities Servs.</i> , 156 Wn.2d 168, 125 P.3d 119 (2005)	2, 3, 11, 18
<i>Piel v. City of Federal Way</i> , 177 Wn.2d 604, 306 P.3d 879 (June 27, 2013)	2, 18
<i>Rose v. Anderson Hay & Grain Co.</i> , 168 Wn. App. 474, 276 P.3d 382 (2012)	18, 19, 20
<i>Thompson v. St. Regis Paper Co.</i> , 102 Wn.2d 219, 685 P.2d 1081 (1984)	16, 20
<i>Weiss v. Lonquist</i> , 173 Wn. App. 344, 293 P.3d 1264 (2013)	1, 5, 8, 12, 18, 19, 20, 23

Federal Authorities

Cases

<i>Feldman v. Law Enforcement Assoc. Corp.</i> , 2013 WL 3288309 (E.D.N.C. June 28, 2013)	15
<i>Funke v. Federal Express Corp.</i> , 2011 WL 3307574 (DOL Adm. Rev. Bd. July 8, 2011)	15

<i>Livingston v. Wyeth, Inc.</i> , 520 F.3d 344 (4th Cir. 2008)	14
<i>Nunnally v. XO Communications</i> , 2009 WL 112849 (W.D. Wash. Jan. 15, 2009)	7
<i>U.S. v. Abdallah</i> , 2013 WL 3198163, *3 (S.D.N.Y. June 26, 2013).....	13
<i>Welch v. Chao</i> , 536 F.3d 269 (4th Cir. 2008)	15

Statutes

15 U.S.C. § 78	4, 9
18 U.S.C. § 1348	13
18 U.S.C. § 1349	13
18 U.S.C. § 1350(c)(1), (2)	3, 4
18 U.S.C. § 1514A	4, 7, 8, 15
18 U.S.C. § 1514A(a)(1)(C)	1, 6
Commercial Motor Vehicle Safety Act (49 U.S.C. ch. 311)	19
Sarbanes-Oxley Act, Pub.L. 107–204, 116 Stat. 745 (2002)	3
Sarbanes-Oxley Act’s Section 302, 15 U.S.C. § 7241	3
Sarbanes-Oxley Act’s Section 906(b), 18 U.S.C. § 1350.	3

Regulations

17 CFR § 240.21F	4
------------------------	---

I. INTRODUCTION

Becker expends considerable effort to deny he is a whistleblower. But Becker's own Brief and his First Amended Complaint reveal that he is, in fact, a whistleblower, for he acknowledges he repeatedly made internal complaints to supervisors that he was being asked to commit an illegal act. Becker did not have to file a claim with the SEC to be a whistleblower (though he has filed a whistleblower claim with OSHA and received assorted protections), because the Sarbanes-Oxley Act ("SOX") protects the public policy and provides a forum to the employee even when the employee reports his beliefs only **internally** to a person with supervisory authority. See 18 U.S.C. § 1514A (a)(1)(C).

Equally important, the analysis of whether Becker may assert a public policy-based claim is the same regardless of whether Becker is a whistleblower or simply refused to perform an illegal act. See *Weiss v. Lonquist*, 173 Wn. App. 344, 360, 293 P.3d 1264 (2013), petition for review denied, 2013 Wash. LEXIS 866 (Nov. 7, 2013)(dismissal of public policy claim where plaintiff alleged she had refused to be a party to what she believed was perjury).

The controlling question of law identified for review in this appeal is 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 1315-16) SOX and other statutes adequately promote the public policy of honesty in business and financial reporting. Becker's public policy claim must be dismissed because he cannot satisfy the jeopardy element of his claim.

II. ARGUMENT

A. The Jeopardy Element Is a Difficult Standard to Meet

To satisfy the jeopardy element, a plaintiff must show that other means of promoting the public policy are inadequate, and the actions the plaintiff took were **the only available adequate means to promote the public policy.** *Korlund v. DynCorp Tri-Cities Servs.*, 156 Wn.2d 168, 181-82, 125 P.3d 119 (2005); *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011).¹ If there are other adequate remedies available, or if the public policy is sufficiently promoted through means other than a private retaliation

¹ *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013) does not alter the jeopardy analysis set forth in *Korlund* and *Cudney*. The application of *Piel* to this case is doubtful because *Piel* relies heavily on a previous decision characterized by the Supreme Court as having already decided that the PERC statute does not provide an adequate remedy. The SOX statutory remedies at issue here are similar to the ERA and WISHA remedies from *Korlund* and *Cudney*, unlike the PERC remedies at issue in *Piel*.

suit, the public policy is not in jeopardy and a private cause of action need not be recognized. *Korslund*, 156 Wn.2d at 184.

B. There Are Adequate Alternative Remedies to Protect the Public Policy of Honesty in Business.

The Superior Court identified the public policy at issue in this case as honesty in business or honest reporting to the SEC. (CP 83-84) Defendants set forth the wide array of statutes and regulations enacted to promote and protect this public policy in their opening brief, at pages 14-23,² and we do not repeat the list here.

The primary statute that addresses false reporting that could mislead investors and lenders, which is the concern alleged by Becker in his Complaint (CP 736 ¶5.53), is the Sarbanes-Oxley Act, Pub.L. 107–204, 116 Stat. 745 (2002). Becker’s reliance on SOX to identify the public policy is clear from his Complaint. Paragraph 5.9 of his Complaint is almost a direct quotation of the Sarbanes-Oxley Act’s Section 302, 15 U.S.C. § 7241 (CP 729), and paragraph 5.10 of the Complaint paraphrases the Sarbanes-Oxley Act’s Section 906(b), 18 U.S.C. § 1350. (CP 729-30)

² Plaintiff argues that none of these statutes and regulations applies because they supposedly apply only if someone violates the law. As discussed in more detail below, if plaintiff had been asked by his employer to commit an illegal act, his employer would have violated the law. *See* Section II(C)(5). In addition, Plaintiff’s argument that none of these statutes or regulations adequately promotes the public policy because none of them provides him with a private cause of action fails because that is not the test for whether the public is adequately protected.

SOX adequately promotes the public policy of honesty in business and financial reporting in several different ways. For example, SOX imposes accurate financial reporting obligations on CEOs and CFOs. Violation of these provisions is subject to criminal penalties. 18 U.S.C. § 1350(c)(1), (2). 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)), and to disclose the effectiveness of their internal controls over financial reporting on their Forms 10-K and 10-Q. See Exchange Act Rule 13a-15(f), Rule 15d-15(f). SOX also provides a private cause of action for any employee who whistle blows and is fired as a result. See 18 U.S.C. § 1514A.

To further encourage employees to step forward and report instances 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.*

An employee's personal civil suit cannot be the only available adequate means to promote the public policy of honest financial reporting when, as here, a multitude of statutes, regulations and administrative agencies specifically provide the authority and jurisdiction to investigate complaints and enforce the laws and regulations. See *Weiss v. Lonquist*, 173 Wn. App. at 360.

C. Becker is a Whistleblower Who Would Be Protected by SOX if He Could Prove the Elements of His SOX Claim

1. Becker is a Whistleblower

Becker's Complaint clearly establishes that he is a whistleblower. Becker alleges he made multiple internal reports that he believed he was being directed to violate the law by submitting an inaccurate figure for EBIDTA loss to be used with investors and lenders. (CP 736, ¶ 5.53) Becker reported his concerns to his CEO. (CP 736, ¶ 5.52; CP 739, ¶¶ 5.72, 5.73; CP 740, ¶ 5.76; CP 741, ¶ 5.85; CP 743, ¶ 6.3) He reported the same to internal auditor Mike Lynd (CP 738-39, ¶ 5.68) and to other finance personnel at CHSPSC with whom he worked. (CP 738 ¶ 5.62; CP 741, ¶ 5.85; CP 743, ¶ 6.3)

In his Brief, at page 7, Becker admits that he is a whistleblower, stating: “Becker told his superiors at Rockwood and at CHS that the demands made of him were to engage in illegal and criminal acts” (citing to the Complaint ¶ 5.52 (CP 736)), and again at page 8, where he states: “Becker advised CHS that if it intended to misrepresent Rockwood’s projected budget under the auspices of Becker’s department, with Becker as the financial CFO, he would have no option but to submit his resignation” (citing ¶¶ 5.85, 5.86 of the Complaint). (CP 741)

Becker’s internal reports to his supervisors qualify him as a whistleblower under SOX. See 18 U.S.C. § 1514A(a)(1)(C) (protecting employees who report their concerns to “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).”).

2. SOX Provides Adequate Protection for Whistleblowers

Despite having clearly alleged that he is a whistleblower, Becker tries to convince the Court that he is not. The reason for his fanciful characterization in the face of his own allegations of whistleblowing is that SOX plainly provides adequate protection for

whistleblowers. In *Nunnally v. XO Communications*, No. C07-1323JLR, 2009 WL 112849 (W.D. Wash. Jan. 15, 2009), a SOX whistleblower filed a claim for wrongful discharge in violation of public policy. The Court dismissed the claim for failure to satisfy the jeopardy element, holding that SOX adequately protects whistleblowers. *Id.* at *11. The Court found that the remedy SOX provides for whistleblowers is robust, including “all relief necessary to make the employee whole.” *Id.* at *10 (quoting 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.” *Id.* (citing 18 U.S.C. § 1514A(c)(2)).

Although not necessary to resolve this appeal on the motion to dismiss, Becker acknowledges that he is currently pursuing a SOX claim with OSHA based on the same facts underlying his wrongful discharge claim. (CP 209-222) But Becker asserts that no expedient remedies are available under SOX to provide him relief, because OSHA has taken no action on his Complaint. While it is true that OSHA has not taken dispositive action as of this date, Becker’s statement is also misleading because he has made no

effort to take any of the simple steps available to him to significantly advance and prosecute his SOX claim.

SOX provides that if OSHA does not investigate and issue a decision on the merits within 180 days, the complaining party may file a civil action in U.S. District Court. 18 U.S.C. § 1514A. The doors to federal court are wide open to Becker. This alternative has been available to Becker for over a year, but he has taken no action to file his SOX claim in federal court. Where a plaintiff chooses not to make use of an alternative process available to protect the public policy, he cannot satisfy the jeopardy element of the public policy claim. *Weiss*, 173 Wn. App. at 360.

3. Defendants Are Not Offering Inconsistent Defenses to Plaintiff's Concurrent Claims

While the specific details of the SOX proceedings before OSHA are not relevant to the motion to dismiss, Defendants are compelled to correct Plaintiff's misrepresentations about the OSHA proceeding.³ Becker argues that Defendants are taking inconsistent positions in this case and in his concurrent SOX claim pending before OSHA. Defendants' arguments in the parallel

³ Because this falls outside the bounds of the Complaint, the Court should not consider any of this when ruling on this appeal from denial of the 12(b)(6) motion. This section is offered only to correct the false statements Becker makes in his Brief.

proceeding are consistent. The difference is that for purposes of a 12(b)(6) motion, Defendants must accept all allegations pled in the Complaint as true. Thus, Defendants' 12(b)(6) arguments have focused on why Becker's wrongful discharge claim fails to satisfy the jeopardy element as a matter of law (*i.e.*, because SOX and other statutes adequately promote the public policy of requiring honesty in business and financial reporting).

In the OSHA proceeding, Defendants have not been forced to accept Becker's allegations as true and have thus been able to argue that Becker's SOX claim fails on the merits because Becker was never asked to violate the law. (CP 1282-1308) Defendants provided several reasons for this:

First, Becker was not directed to "provide" the at-issue "financial information" (an internal estimated EBITDA target for Rockwood for 2012). Rather, that target was provided to him as an aspirational goal and he was being asked to come up with a plan to attempt to reach that goal. (CP 1283)

Second, the figure at issue is merely a projection, not a factual, historical financial result, and thus is not covered by SOX if it falls into the narrow category of forward-looking statements carved out by 15 U.S.C. § 78u-5(c)(1)(A)(i) ("safe harbor" for

forward-looking statement that is identified as such "and is accompanied by meaningful cautionary statements...."). (CP 1283)

Third, Rockwood's 2012 EBITDA target loss of \$4 million was only an internal target used solely for incentive compensation purposes. The financial information was not intended for disclosure to, and was never disclosed to, CHSI's investors or to any lending institutions. (CP 1284)

Fourth, over three weeks before Becker resigned, CHSPSC's Vice President of Internal Audit specifically informed Becker that Rockwood's target EBITDA loss projection is not reported to the public. Thus, Becker knew that his assignment to create a plan to reduce Rockwood's loss from \$10 million in 2011 to \$4 million in 2012 had no relationship whatsoever to SOX-governed financial information. (CP 1284)

Those are arguments on the factual merits and have no bearing on the legal issue before this Court, i.e., whether the public policy is adequately promoted. Those factually-intensive merits issues will determine whether Becker wins an award in the parallel proceeding, but Defendants have never argued that SOX does not generally apply to a person in Becker's position. None of the arguments Becker advances to this Court for why SOX supposedly

does not adequately protect the public policy have been advanced by Defendants in the OSHA proceeding. While Defendants expect to prevail on the SOX claim pending before OSHA—because Becker was never asked or directed to violate SOX or any other law—this does not mean the public policy of ensuring honest financial reporting is not adequately protected. It means only that the public policy was never in jeopardy in the first place.

4. SOX Adequately Protects the Public Policy Even if Becker's SOX Claim Fails on the Merits

The focus of Becker's Brief, and every other brief filed by him in this case, is to argue that he must have a personal remedy for his alleged employment claims. Becker repeatedly argues to the Court that his concurrently pending SOX claim might not be successful, so he should be allowed to continue with this public policy claim.

Becker's position does not comport with the recent key decisions from the Washington Supreme Court that have rejected the very arguments he is asserting here. Those decisions, *Korslund*, 156 Wn.2d at 178, and *Cudney*, 172 Wn.2d at 534, n.3, clearly hold that **it does not matter** whether the alternative means of protecting a public policy provide a particular aggrieved

employee with a private remedy. Instead, the rule is clear: “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.” *Hubbard v. Spokane County*, 146 Wn.2d 699, 717, 50 P.3d 602 (2002); *see also Weiss*, 173 Wn. App. at 359.

Whether Becker may ultimately succeed in his SOX claim is irrelevant to this appeal. The question is whether the public policy of honesty in business and honest financial reporting to the SEC is adequately protected through myriad enforcement mechanisms. It is.

5. Requiring an Employee to Commit an Illegal Act is an “Existing” Violation Covered by SOX

Becker argues that he does not have a SOX claim because he refused to commit the allegedly illegal act that his superiors were allegedly requiring him to commit. In other words, he asserts that there was not an “existing” violation to report. Becker is wrong for two reasons.

First, Becker has alleged in his Complaint that “in order to retain his position, he was being required by both CHS and Rockwood to knowingly misrepresent financial projections and

budgets in direct violation of accuracy reporting requirements,” and that this inaccurate number “was to be used with investors and lenders.” (CP 736-37, ¶¶ 5.52, 5.53) **Requiring an employee to commit an illegal act that involves financial fraud, even if the fraud has not occurred, is itself a violation of federal law.**

Specifically, it would constitute attempted fraud, which is illegal under 18 U.S.C. § 1349, regardless of whether the company ultimately completed the fraud. See 18 U.S.C. § 1349 (“Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.”).

To be liable for attempted fraud, one only has to take a “substantial step” toward the commission of the fraud. See *U.S. v. Abdallah*, No. 12-0409-cr, 2013 WL 3198163, *3 (S.D.N.Y. June 26, 2013)(holding that the test for whether someone is liable for attempt to commit fraud is to ask whether the act “constituted a ‘substantial step’ toward the commission of the fraud”). Requiring an employee to submit an “inaccurate” figure, which “was to be used with investors and lenders,” would certainly be taking a “substantial step” towards the commission of fraud. See 18 U.S.C. § 1348

(illegal to execute, or attempt to execute, securities and commodities fraud).

Thus, the fact that no fraud had occurred by the time Becker resigned is not itself a bar to his SOX claim. The attempted fraud, which Becker alleges Defendants committed, is itself an “existing” violation protected under SOX, regardless of whether Becker refused to complete the alleged fraud.

Second, Becker misreads *Livingston*, in which the Court held that SOX protects an employee who had a reasonable belief that a violation was in progress, but not an employee who believed only that “a violation is about to happen upon some future contingency.” *Livingston v. Wyeth, Inc.*, 520 F.3d 344, 352 (4th Cir. 2008). The Court denied plaintiff’s claim because “not one link in Livingston’s imaginary chain of horrors was real or was in the process of becoming real.” *Id.* at 354. The holding in *Livingston* makes sense. Employers would be subjected to unbounded litigation if employees could bring a SOX claim on the type of speculation engaged in by the *Livingston* claimant.

Congress weighed competing values and determined that the public is best protected by allowing plaintiffs to sue for violations that are in progress and for existing violations, but not creating

limitless liability by allowing plaintiffs to sue for imagined contingent and future events. A Department of Labor Administrative Review Board recently held that an employee can bring a SOX whistleblower claim based on a violation that has not yet happened, but “is likely to happen.” *Funke v. Federal Express Corp.*, ARB Case No. 09-004, 2011 WL 3307574, at *7 (DOL Adm. Rev. Bd. July 8, 2011).⁴

6. Becker’s Corporate Structure Argument is a Red Herring

Throughout his Brief, Becker injects argument and innuendo about various corporations and organizational charts. This is a needless exercise.

SOX 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,

⁴ Becker cites *Feldman v. Law Enforcement Assoc. Corp.*, No. 5:10-CV-08-BR, 2013 WL 3288309 (E.D.N.C. June 28, 2013) and *Welch v. Chao*, 536 F.3d 269, 279 (4th Cir. 2008), but fails to explain why *Feldman* or *Welch* renders SOX inadequate to protect the public policy. In *Feldman*, the court merely held that to state a SOX whistleblower claim, the plaintiffs must reasonably believe that the conduct complained of “constituted a violation of relevant law” and found that plaintiffs did not meet this standard because “they had very little information on which to make the insider trading allegation.” 2013 WL 3288309 at *19, 20. In *Welch*, the court simply held that when claimant presented his case before the Administrative Review Board, he “utterly failed to explain how [his employer’s] alleged conduct could reasonably be regarded as violating any of the laws listed in § 1514A.” *Welch*, 536 F.3d at 279.

Becker 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 has admitted he is protected by SOX, as further demonstrated by the fact that Becker is simultaneously pursuing a SOX claim before OSHA. (CP 209-222) Indeed, Defendants have admitted that Rockwood's employees are protected by SOX because Rockwood's financial information is included in the consolidated financial statements of CHSI. (CP 853, 940, 993)

Discussion of the corporate structure of various "CHS" entities and affiliates is unnecessary. CHSI was dismissed as a party to this litigation for lack of personal jurisdiction. (CP 918-19) Becker never appealed or sought review of that order. Becker's lengthy digression into other corporate relationships is intended to be confusing so as to distract the Court from the specific issue of adequate remedies to protect the public policy of honesty in business. This ploy should not succeed.

D. Even if Becker Were Not a Whistleblower, the Public Policy is Adequately Protected

1. Becker Must Establish the Jeopardy Element

Remarkably, Becker tries to avoid the rigors of the jeopardy

element of the public policy tort with the argument that the four-part test identified in *Gardner* should not apply to his claim. He asserts that the Court should apply *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), without any further analysis. Plaintiff's argument asks the Court to ignore the 29 years of post-*Thompson* jurisprudence on public policy wrongful termination claims.

As explained in Defendants' opening brief, numerous decisions have refined the public policy tort since *Thompson* was decided in 1984. Those post-*Thompson* decisions have resulted in the current state of the law that instructs courts on how to analyze the four essential elements of the claim as adopted in *Gardner v. Loomis Armored*, 128 Wn.2d 931, 940, 913 P.2d 377 (1996).

Gardner recognized that public policy tort claims had generally been allowed in four situations: (1) where employees are fired for refusing to commit an illegal act; (2) where employees are fired for performing a public duty or obligation, such as serving jury duty; (3) where employees are fired for exercising a legal right or privilege, such as filing workers' compensation claims; and (4) where employees are fired in retaliation for reporting employer misconduct, i.e., whistleblowing. *Id.* at 936. Since *Thompson* was

decided, significant and relevant cases applying all four parts (including jeopardy) of the four-part test of *Gardner* to public policy tort claims include *Korslund* (whistleblower), *Cudney* (whistleblower), *Piel* (exercising a legal right), *Weiss* (refusal to commit unethical and unlawful act), and *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012) (refusal to commit illegal act in violation of commercial trucking regulations).

Becker argues that there is a general public policy that employees must have a public policy tort claim when they are fired for refusing to comply with an employer directive to engage in illegal or unethical conduct. This is the identical argument unsuccessfully urged by the plaintiff in *Weiss v. Lonquist*, 173 Wn. App. at 358.

The Court of Appeals in *Weiss* noted that, depending on the circumstances, a public policy tort claim *may* be available where an employee is discharged in retaliation for refusing to commit an illegal act, citing *Gardner*, 128 Wn.2d at 936. But the plaintiff in *Weiss* cited to no case law supporting her theory that the public policy tort claim is automatically available to an employee who is discharged in retaliation for refusing to commit an illegal act where alternative, adequate means exist to promote the public policy (in

Weiss, a professional disciplinary system specifically designed to receive and address complaints about the employer). *Weiss*, 173 Wn. App. at 359. Like the plaintiff in *Weiss*, Becker provides no support for such a contention. Becker's argument that he must have a personal claim for retaliation for refusing to violate the law circles back to his argument that a remedy is inadequate unless it provides compensation and other individualized relief to the particular aggrieved employee. The Court of Appeals rejected that very argument. *Weiss*, 173 Wn. App. at 360.

Rose v. Anderson Hay is another non-whistleblower, refusal-to-commit-illegal-act case. Like Becker, Mr. Rose alleged he was terminated when he refused to commit an illegal act (i.e., violate certain federal trucking regulations). Mr. Rose first sued in federal court, alleging his termination violated the Commercial Motor Vehicle Safety Act (CMVSA) (49 U.S.C. ch. 311). The federal court dismissed Mr. Rose's complaint for lack of jurisdiction because the Secretary of Labor has exclusive jurisdiction over initial complaints under the CMVSA.

Mr. Rose did not pursue a federal appeal, but instead filed a state law claim for wrongful termination in violation of public policy. That claim was dismissed because Mr. Rose failed to satisfy the

jeopardy element necessary to maintain a public policy tort claim. The Superior Court concluded that adequate alternative means of promoting the public policy exist because the CMVSA provides comprehensive remedies protecting the specific public policy identified by Mr. Rose. The Superior Court's dismissal was affirmed on appeal, even though Mr. Rose had no personal remedy because the statute of limitations on his federal claim had expired. *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012). The *Rose* decision, like *Weiss*, demonstrates that the four-part *Gardner* test, including the jeopardy element, must be satisfied by a public policy tort plaintiff, whether he is a whistleblower, refused to commit an illegal act, or falls into one of the other categories of plaintiffs.

Becker's reliance on *Thompson* goes too far and is not supported by any authority. *Thompson* does not create a special category of refusal-to-commit-illegal-act claims that are free from the analysis required under *Gardner*. Becker has remedies available to him if he can prove his allegations. A tort remedy is not his only available remedy to protect the public policy.

2. Becker Cannot Satisfy the Jeopardy Element.

To satisfy the jeopardy element, Becker must show that the actions he took were the “*only available adequate means*” to promote the public policy of protecting the public from false financial reporting. See *Cudney*, 172 Wn.2d at 537. For this to be true, the entire array of powerful means to discourage false financial reporting—the criminal laws and their enforcement mechanisms; the SEC’s vigorous enforcement of its comprehensive regulatory scheme aimed at the very alleged conduct about which Becker complains; SOX and Dodd-Frank; federal securities class actions under Rule 10b-5; state securities laws; etc.—all have to be inadequate to promote the public policy of protecting the public from false financial reporting. *Id.* at 537. Becker’s quest is impossible. It is plain, as a matter of law, that there exist adequate alternative means to promote the public policy. Indeed, it is difficult to think of any public policy more vigorously promoted than honesty in financial reporting.

Even if Becker is not a whistleblower and does not personally have a SOX claim, the impressive array of mechanisms to promote the public policy precludes Becker from establishing the requisite jeopardy element. Becker cannot satisfy the jeopardy

element as a matter of law because the public is **better** protected by requiring employees to whistle blow.

If Becker is not a whistleblower, as he now argues, then he must not have reported to anyone—either law enforcement or a person with supervisory authority—that he was being asked to engage in conduct that he believed to be illegal. Thus, the only actions he took (contrary to what he alleges) were to stay silent, quit, and sue his employer and CHSPSC privately. Such actions **fail** to promote the public policy of honest financial reporting.

Congress could have explicitly created a private right of action for any employee who is discharged for refusing to violate financial reporting laws, even if the employee stays silent, but Congress did not do so. This is for good reason: the public is **better** protected by encouraging 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 employees to stay silent, quit, and then sue their employers privately.

If the Court does not dismiss Becker's claims, 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 Becker's claims to succeed would ***undermine*** the very public policy that is at issue in this case: promoting honest financial reporting. The fact that this plaintiff might not prevail on his whistleblower claim makes no difference because this tort is not meant to protect *him*, it is meant to protect the *public*.⁵

Because of the panoply of federal and state laws and enforcement mechanisms, including SOX, which adequately protect the public policy of requiring honest financial reporting, Becker's wrongful discharge claim must be dismissed.

III. CONCLUSION

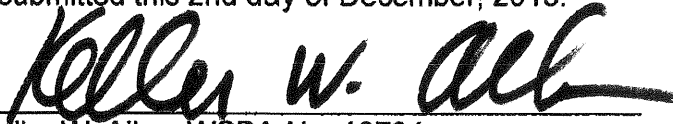
Becker never argues that the public policy of honesty in business or honest reporting to the SEC is not adequately protected. Becker centers his argument on the worry that he personally may not ultimately succeed in his SOX complaint now pending before OSHA. This is not the proper analysis of his claim.

The public policy of honesty in reporting to the SEC is adequately protected by SOX and other statutes and regulations,

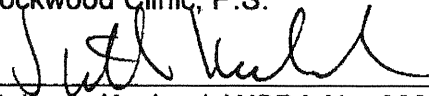
⁵ As recognized by the Court in *Weiss* there is no authority supporting the theory that the public policy tort is available to an employee who is discharged in retaliation for refusing to commit an illegal act where that employee has refused to engage with the administrative and law enforcement agencies specifically designed to receive and address such complaints. *Weiss*, 173 Wn. App. at 359.

regardless of whether plaintiff is a whistleblower or ultimately succeeds on his SOX claim. For these reasons, this Court should reverse the Superior Court's order denying Defendants' motion to dismiss.

Respectfully submitted this 2nd day of December, 2013.



Keller W. Allen, WSBA No. 18794
Mary M. Palmer, WSBA No. 13811
Attorneys for Petitioner/Defendant
Rockwood Clinic, P.S.



Stellman Keehnel, WSBA No. 9309
Katherine Heaton, WSBA No. 44075
Attorneys for Petitioner/Defendant
Community Health Systems
Professional Services Corporation

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petitioner's Reply Brief was caused to be served on the following:

Mary Schultz Mary Schultz Law, P.S. 2111 E. Red Barn Lane Spangle, WA 99031 Attorney for Respondent/Plaintiff	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email mary@mschultz.com
---	--

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 2nd day of December, 2013.


Pamela Mengel