No. 305457

**COURT OF APPEALS DIVISION III**

**OF THE STATE OF WASHINGTON**

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**CHARLES ROSE, APPELLANT**

**v.**

**ANDERSON HAY AND GRAIN, RESPONDENT**

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# APPELLANT'S BRIEF ON REMAND FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

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## I. INTRODUCTION

The Washington State Supreme Court has remanded this appeal to the Washington State Court of Appeals, Division III directing attention to the application of *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013).

To appreciate the application of *Piel, supra*, the facts cited in this case to the Supreme Court, included the testimony of Appellant, Rose, that he was ordered by agents of Respondent, Anderson Hay and Grain Company, to falsify time records in order to create a false safety record of the time limits in order to exceed the actual allowed driving time of a tractor-trailer load of hay to Seattle, Washington and back to Ellensburg, WA.

Appellant also presented the deposition testimony of a fellow driver who had a very short time to live and provided a near death deposition. His name was Joe Peak. Mr. Peak testified that he too was ordered to falsify federal drive time limit records by agents of Anderson Hay and Grain. Peak testified that he refused

to do so and he was fired. He passed away shortly after his deposition.

All of the above facts were set out in our Petition for Review to the Washington State Supreme Court, which has remanded the case to the Washington State Court of Appeals, Division III for reconsideration in light of the case of *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013).

## II. LAW AND ARGUMENT

In *Piel, supra*, the State Supreme Court made the following observations and considerations at 177 Wn.2d, 604, at 606, 306 P.3d 879, 306:

> *Piel*, a police sergeant for the City, was chosen to manage the formation of a Police Union initially supported by the City. The Police Departments Administration (hereinafter PDA) soured on formation of the union and *Piel* noted the following:
>
> (1) The PDA's attitude toward union activity soured.

(2) *Piel* experienced a marked increase in his duties.

(3) *Piel's* unit was the target of unusual Internal Affairs investigations.

(4) He received negative reports on his performance, not from his Commanding Officer but from the Deputy Chief which was outside normal procedures.

(5) After an injury on the job requiring knee surgery and three months off work, he returned to work and was then informed he was demoted and relieved of some of his duties based upon alleged poor performance.

(6) *Piel* was then placed on administrative leave and then terminated. He grieved the termination and was reinstated 14 months later.

(7) The City was ordered to pay all back pay and benefits.

(8) *Piel* was then terminated allegedly over a claim of untruthfulness about violent feeling against certain members of the Police Department.

(9) *Piel* filed a Superior claim for wrongful termination claiming he was fired for engaging in protected union activity. He appealed to the Washington State Supreme Court.

The Washington State Supreme Court ruled in pertinent part as follows at *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013):

> Are the (Administrative) remedies available to a public employee under chapter 41.56 RCW adequate as a matter of law, such that the employee may not assert a tort claim for wrongful discharge in violation of public policy? (Short Answer: No)...
>
> Describing the jeopardy element, we explained it serves to "guarantee [ ] an employer's personnel management decisions will not be challenged unless a public policy is

genuinely threatened." Id. At 941-42, 913 P.2d 377) emphasis added)...

To establish jeopardy, plaintiffs must show they engaged in particular conduct and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy. This burden requires a plaintiff to "argue that other means for promoting the policy... are inadequate." *Peritt* [, *supra*] § 3.14, at 77. Additionally, the plaintiff must show the threat of dismissal will discourage others from engaging in the desirable conduct...

We considered the viability of a wrongful termination claim based upon the statutory remedies under chapter 41.56 RCW in *Smith*, 139 Wash.2d 793, 991 P.2d 1135. Consistent with our decision in *Gardner*, we recognized that the tort of wrongful termination was not limited to at-will employment settings. Id. At 806-07, 991 P.2d 1135. And we allowed the public employee's claim to go forward notwithstanding her failure to pursue administrative remedies through PERC, Id at 811, 991 P.2d 1135. In the

course of our analysis, we examined key distinctions between available tort remedies and statutory remedies and concluded that *Smith* should not be barred from bringing a tort claim "simply because her administrative and contractual remedies may partially compensate her wrongful discharge." Id. At 806, 991 P.2d 1135... (Emphasis added)

The question before the Supreme Court was whether the administrative remedies under RCW 4.56 are an adequate remedy as a matter of law such that the employee may not assert a tort claim of termination in violation of Public Policy.

In *Piel, supra*, the Supreme Court specifically noted that "an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened." A tractor-trailer hauling heavy loads in the opposite direction from oncoming traffic, operated by a driver who, by law, should not be driving, is consistent with the Supreme Court's concern with the public interest in not permitting employers to impose, as a condition of employment, a requirement that an employee act in a manner contrary to fundamental public policy.

Fundamental public policy is that a tired driver of a long haul tractor and trailer poses a genuine significant threat to all other drivers including drivers coming in the opposite direction.

In *Piel*, our Supreme Court noted as follows at 177 Wn.2d 612:

> What is vindicated through the course of action is not the terms or promises arising out of a particular employment relationship involved BUT RATHER THE PUBLIC INTEREST IN NOT PERMITTING EMPLOYERS TO IMPOSE AS A CONDITION OF EMPLOYMENT A REQUIREMENT THAT AN EMPLOYEE ACT IN A MANNER CONTRARY TO FUNDEMENTAL OF PUBLIC POLICY. (Emphasis added)
>
> Because the right to be free from wrongful termination in violation of public policy is independent of any underlying contractual agreement or civil service law, we conclude that Smith should not be required to exhaust her

contractual or administrative remedies. (Emphasis added)

The point of this discussion was to highlight the importance of having a tort remedy apart from the PERC (administrative remedy) in order to advance the public policy not the Plaintiff's personal compensation.

The analysis of *Piel, supra,* by the Supreme Court includes the following as 177 Wn.2d 606§608

1) ... an employer's personnel management decisions will not be challenged unless a public policy is genuinely threatened. In the instant case, please note the Federal Public Policy setting time limits for drivers of commercial vehicles.
2) What is vindicated (justified) through a tort claim is not the terms or promises of an employment relationship, but rather the public interest in not permitting employers to impose, as a condition of employment, a

requirement that an employee act in a manner contrary to fundamental public policy. Because the right to be free of wrongful terminations in violation of public policy is independent of any contractual agreement or civil service law, we conclude *Smith* should not be required to exhaust her contractual or administrative remedies (emphasis added).

3) The point of this... was to highlight the importance of having a tort remedy apart from PERC (administrative) remedy in or to advance public policy not the Plaintiff's personal compensations...

4) We see no reason to dilute the force of the double sanction. In such an instance the employer is liable for two breaches, one in contract and one in tort. It therefore must bear the consequences of both.

In *Piel, supra*, at page 614-615 the State Supreme Court noted as follows:

> Similarly, other cases have recognized the need for a public policy tort despite the existence of statutory remedies would be called into question...citing *Thompson,* 102 Wn.2d 219, 685 P.2d 1081 and *Ellis v. City of Seattle,* 142 Wn.2d 450, 13 P.3d 1065 (2000) recognizing a claim for retaliation for making safety complaints, citing cases.
>
> An overbroad reading of *Korslund* and *Cudney* would fail to account for this long line of precedent allowing wrongful discharge tort claims to exist alongside sometimes comprehensive administrative remedies. Importantly neither case purported to overrule anything...
>
> In *Smith*, we noted that *Renniger* made it "even more compelling" to hold that the public policy tort does not require first pursuing PERC administrative remedies. 139 Wash.2d at 810, 991 P.2d 1135.

## III. CONCLUSION

Appellant respectfully requests the Court of Appeals to review this case and the application of the ruling in *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). Further, Appellant requests the Court of Appeals to reverse the Summary Judgment Dismissal by the Kittitas Superior Court.

Dated this 7th day of July, 2014.

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