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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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WITHERSPOON KELLEY

No. 30269-5-III

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

ALBERT DAVIS, APPELLANT

V.

FRED'S APPLIANCE, a corporation, RESPONDENT

APPELLANT'S REPLY BRIEF

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Respondent, Fred's Appliance, (hereinafter Fred's) first asserts that a salesperson, Steinhauer, called Appellant, Big Gay Al. (Respondent Brief, Page 6) Steinhauer apologized and never called him the name again. (Respondent Brief, Page 6). This is not and has never been the basis of the claim in this case.

Respondent then admits the claim in this case is about being called a homosexual repeated 4 times on 3 separate occasions in front unknown customers by the Store Manager Steve Ellis described to the trial court as a co-worker. (Respondent Brief, Page 7)

Respondent does not contest that the statements were made in front of customers of Fred's who appeared uncertain and uncomfortable with the statements.

Respondent next described the second "incident #2" when Manager Ellis repeated the statement and Appellant told him "don't call me that anymore." (Respondent Brief, page 7)

Respondent then represent to this Court as follows:

"Ellis complied" (CP 59:10-19)

Respondent then admits that Ellis did not comply, Ellis called Appellant Big Gay Al on two more occasions (Respondent Brief, Page 8)

Next, Respondent sets out the disputed issues of fact over the so-called apology. Respondent then asserts that Davis denies that he was profane and aggressive during the so-called apology.

These clearly are disputed issues of fact that Respondent wants the Court of Appeals to resolve in favor of Respondent. This is the same invitation that was accepted by the trial court on a motion not a trial.

Respondent then sets out additional contested issues of fact raised by the Defense at the trial all of which were contested by Appellant. Respondent's attorneys simply state their version of events, they never mention the testimony from Appellant contesting these facts and simply put their version of events before this court including the contested claims of foul language by Appellant.

Respondent then asserts that Appellant's attorneys waived any objection to striking the Appellant's Affidavit. The Respondent filed a motion to strike shortly before the motion. The Court announced the striking days later in its written ruling. Respondent's now claim that the reviewing court cannot consider all the affidavits on an appeal of a Summary Judgment. Appellant contends the Court of Appeals stands in the same position of the trial court and can consider all the evidence before the trial court.

As to the admission of the ruling of the State unemployment department, the trial court struck out the records that Fred's written reasons for termination, "insubordination had not been established". The trial court ignored the fact that Fred's

now asserted new and previous unclaimed reasons for termination now at the trial level. Appellant then appealed the striking of his testimony which is all relevant and admissible to rebut the “new reasons” asserted in the deposition of five employees.

Appellant established that he was called out as “Big Gay Al” by Defendant’s Manager on four separate occasions in front of unknown customers. Respondent then cites *Hoppe v. Hearst Corporation*, 53 Wn.App 668, 770 P.2d 203 (1989) for the proposition that whether an expression of opinion or a satirical column is capable of defamatory meaning is a question of law for the Court.

In *Hoppe*, supra, at page 672 the Court of Appeals ruled as follows:

Whether the expression of opinion or a satirical column is capable of bearing a defamatory meaning by implying the assertion of undisclosed facts is a question of law for the court.

First, the statement there goes Big Gay Al does not constitute an opinion. It is stated as a matter of fact. There is no evidence the customers laughed. The uncontested evidence is that they reacted with looks of discomfort and uncertainty.

In *Hoppe*, supra, the Court also stated at page 672 as

follows:

In making this determination the Court should consider:

1) whether the allegedly defamatory expression, in context could be reasonably understood as describing actual facts about the plaintiff...the nature of the medium in which the statement is made, the nature of the audience to whom the publication was made i.e. whether the statement appeared in an ongoing public debate in which the audience is prepared for mischaracterization and exaggerations...whether the statement is ambiguous or indefinite...whether the statement is capable of being objectively characterized as true or false.

In *Hoppe*, relied on by Respondent, the facts could not be more different than in this case. *Hoppe* dealt with a written column in the Seattle PI Newspaper by Emmett Watson a Seattle Columnist known for his sharp pen and humorous, fanciful columns. (53 Wn.2d 670) The column was so humorous the Court of Appeals printed a two page account of the entire column at 53 Wn.App 668, (679) 770 P.2d 203. This is a very funny parody.

No customer would be expected to hear the comments at issue as humor. Manager Ellis would not be confused with a

newspaper satirist. In the instant case, calling a married man a homosexual in front of strangers in an appliance store has no comparison to *Hoppe*, supra. Who would be expected to think that the manager of a store is joking in front of strangers. Appellant is called Big Gay Al. He weighs 300 lbs, so it is true he is big. His name is Al. This was not said in a locker room of employees who know better but done in front of unknown customers who may see Albert Davis delivering appliances into their homes. The aggressor is a manager not a “co-employee” as described by Respondent. Al Davis is on a lower level. No one would expect this to be satirical. It is mean. It is aggressive and the described looks of uncertainty and discomfort on the faces of customers are understandable and also never contested was the fact that no one laughed.

Despite the call for tolerance in this new age and the fact that homosexual acts between consenting adults is no longer a crime does not lessen the impact of this kind of slander.

Here the trial court made no mention whatsoever to slander and defamation by calling a married man with two children a homosexual in front of strangers by a bully manager who is described by the Defense as a “co-worker”.

Finally, Plaintiff worked for over a year at Fred’s in the same capacity. He was qualified to describe his duties by his own

experience and, further, identified the manager who instructed him on his duties and what store managers can order him to do. With or without the instructing manager, Appellant was qualified to testify to his job duties as directed by the store manager.

Respondent cites *Cudney v. AlSCO*, 259 P.3d 244 (2011) however, Respondent never provides a quotation or how *Cudney* relates to the facts and the law in the instant case.

The basis of the Cudney Motion for Reconsideration is well cited, well supported and argued by Attorney Keller Allen for Mr. Cudney. To the extent that *Cudney*, supra, could possibly apply Appellant adopts the written argument of Attorney Allen which was filed in the pending motion for reconsideration by the Supreme Court. Attorney Allen argued as follows:

III. GROUNDS FOR RELIEF AND ARGUMENT

A. Statement of Issues.

1. "We hold that plaintiffs may assert a wrongful discharge tort claim independently of RCW 51.48.025(2)." *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 51, 821 P.2d 18 (1991).

Based on the reliance of Mr. Cudney in 2008 on the existence of a public policy wrongful

discharge claim independent of an identical statute as in *Wilmot*, Mr. Cudney respectfully requests the court to reconsider its holding in *Cudney* and modify the decision to apply *Wilmot* to his common law wrongful discharge claim. Alternatively, if the court declines to apply *Wilmot* to Mr. Cudney's claims, it should expressly overrule *Wilmot*. If the court overrules *Wilmot*, or refuses to change its decision, the *Cudney* decision should be applied prospectively only to public policy wrongful discharge cases filed on or after the date of issuance of the *Cudney* decision to avoid unfair prejudice to Mr. Cudney and others like him who relied upon the *Wilmot* decision.

2. The court's decision has misapprehended, and lost sight of the fact, that the wrongful discharge claim in violation of public policy is an employment tort directed towards the vindication of the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy. Accordingly, the court should modify the *Cudney* decision by

ruling that Mr. Cudney's DUI-based public policy claim should be recognized in this state because the DUI laws provide no employment-related remedy of any kind to a whistleblower.

B. Stare Decisis Requires The Court's Application Of *Wilmot* To Matthew Cudney's Case.

The court overlooked the importance of the principle of stare decisis in this case. The decision of this court in *Wilmot v. Kaiser Aluminum & Chem. Com.*, 118 Wash. 2d 46, 821 P.2d 18 (1991) has been relied upon by lawyers and parties in this state for twenty (20) years, and should control the outcome of this specific case.

1. The statutes at issue in *Wilmot* and *Cudney* are nearly identical.

There is virtually no difference between RCW 51.48.025 (Appendix - 4) at issue in *Wilmot*, and RCW 49.17.160 (Appendix- 2, 3) at issue in Matthew Cudney's case, except that the statute in this case contains an even shorter time frame for a fired employee to bring a claim. The

court's analysis of the adequacy and exclusivity of remedies in *Wilmot*, should apply with equal force to Matthew Cudney's case.

2. The WISHA Statute is permissive --- not mandatory.

In *Wilmot*, the court recognized that use of the term "may" in the same provision in which "shall" is used is strong evidence that the legislature did not intend the discrimination statute to be an exclusive remedy. The statute provides:

Any employee who believes that he or she has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, file a complaint with the director alleging such discrimination.

RCW 49.17.160(2)(emphasis added).

In *Wilmot*, this court explicitly stated that RCW 51.48.025 is not mandatory or exclusive. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash. 2d at 66. Further, the court expressly stated:

We hold that plaintiffs may assert a wrongful discharge tort claim independently of RCW 51.48.025(2).

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wash. 2d at 51.

Moreover, in *Ellis v. City of Seattle*, 142 Wash. 2d 450, 452, 13 P.3d 1065, 1066 (2000), the court expressly allowed the plaintiff to pursue a public policy wrongful discharge claim in addition to his claim of retaliatory discharge pursuant to RCW 49.17.160. The court's decision in *Cudney* disregards the justifiable reliance of lawyers and parties in crafting claims over the past 20 years based on *Wilmot*, and as confirmed in *Ellis*.

The *Cudney* decision now (without fair warning to litigants and lawyers) abandons stare decisis principles by holding that the WISHA statutory claim is the employee's only remedy for wrongful termination. This contradiction is inequitable to Mr. Cudney, and if left to stand, will result in a serious injustice to Mr. Cudney and other plaintiffs with pending cases in this

state who relied upon the clear holdings in *Wilmot* and *Ellis*.

3. The Remedy provided by RCW 49.17.160 is not adequate.

Wilmot expressly held the nearly identical statute in RCW 51.48.025 is not an adequate remedy:

While RCW 51.48.025(4) sets forth some remedies for retaliatory discharge in violation of the statute, it does not clearly authorize all damages which would be available in a tort action It is not clear whether "all appropriate relief" authorized under the statute would include emotional distress damages The specific remedies listed, rehiring or reinstatement with back pay, appear equitable in nature, adding to the doubt about whether the Legislature intended that "all appropriate relief" under the statute means all normally available damages in a tort action, and raising the further question whether the worker is entitled to a jury trial.

* * *

The statute is unclear as to whether it allows for the possibility of a general damages award. We think such damages are necessary to constitute an adequate remedy.

Wilmot v. Kaiser Aluminum & Chem. Corp.,
118 Wn.2d at 61-62 (emphasis added).

Contrary to the decision in *Cudney*, the court in *Wilmot* did specifically address the adequacy of the remedies like those in RCW 49.17.160 and found them lacking. It is "not simply the presence or absence of a remedy which is significant; rather, the comprehensiveness, or adequacy, of the remedy provided" which must be considered. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wash. 2d at 61.

C. If the Court Overrules *Wilmot* or Refuses to Modify the Majority Opinion, the Decision in *Cudney* Should Receive Only Prospective Application

1. Matthew Cudney, and undoubtedly other fired employees, as well as the Department of Labor and Industries have justifiably relied upon the court's decision in *Wilmot*.

In Washington, stare decisis protects reliance interests by requiring a clear showing that an established rule is incorrect and harmful before it is abandoned. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash. 2d 264, 278, 208 P.3d 1092, 1099 (2009). The substantive restraints placed on courts to "not only heed the relevant judicial past in arriving at a decision, but also to arrive at it within as straight and narrow a path as possible," ordinarily produces changes in the law "with a minimum of shock to those who act in reliance upon judicial decisions." *Id.*, citing Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility*, 28 *Hastings L.J.* 533, 537 (1976).

Matthew Cudney relied on the authority of the clear rule in *Wilmot* that an employee alleging discrimination or retaliation has a common law tort claim for wrongful termination in violation of public policy independent of any statutory claim, and need not pursue a statutory remedy.

Wilmot v. Kaiser Aluminum & Chem. Corp.,

118 Wash. 2d at 53.

Likewise, in its Amicus Curiae Brief filed with the court at page 18, the Department of Labor and Industries expressed its long-term understanding that a complainant has a private right of action for wrongful discharge in violation of public policy. This reliance was strengthened by the court's decisions in *Wilmot* and *Ellis v. City of Seattle*, 142 Wash. 2d 450.

If the court does not apply *Wilmot* to Matthew Cudney's case, it should expressly overrule *Wilmot* so that other employees do not rely upon it to their detriment, and to eliminate the clear and irreconcilable conflict between *Wilmot* and *Cudney*.

2. Because of the reliance on *Wilmot* by Matthew Cudney, the Department of Labor & Industries and other fired employees, if the Court refuses to modify its decision in this case, the *Cudney* decision should receive only prospective application.

While *stare decisis* limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash. 2d at 278 (2009). Where changes in the law cannot be made without undue hardship, the court has discretion to apply a new rule of law prospectively only to all litigants whose claims arise after the decision. *Id.*, citing *Robinson v. City of Seattle*, 119 Wash.2d 34, 77, 830 P.2d 318 (1992). The *Cudney* decision establishes a new rule of law that overrules clear precedent upon which Mr. Cudney and his lawyers justifiably relied. A retroactive application of *Cudney* to Mr. Cudney's case filed in 2008, and other cases filed by plaintiffs prior to the *Cudney* decision, will impede the public policy expressed in RCW 49.17.160, and the public interest protected by the public policy wrongful discharge tort, and will produce substantially inequitable and unjust results. Accordingly, Mr. Cudney requests that the court modify the

Cudney decision by giving it prospective application only to cases filed after the decision date of September 1, 2011. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wash. 2d at 278.

Nothing in *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wash.2d 168, 125 P.3d 119 (2005) requires the overruling of *Wilmot*, and indeed, does not foreshadow this result. The remedies for a complainant under the ERA (Appendix - 5, 6) at issue in *Korlund* cannot fairly be likened to the limited administrative review and potential remedies under WISHA.

D. The Majority Decision Lost Sight of the Fact that the Public Policy Wrongful Termination Claim is an Employment Tort

The policy underlying the wrongful termination in violation of public policy tort is that the common law terminable at will doctrine "cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy." *Thompson v. St. Regis Paper*

Co., 102 Wash. 2d 219, 231, 685 P.2d 1081, 1088 (1984).

In the *Cudney* decision, the court misapprehended the nature of the public policy wrongful discharge tort, and its holdings in prior cases.

We keep in mind that the critical inquiry in the four-part wrongful discharge test is not whether the employer's actions directly contravene public policy, but whether the employer fired the employee because the employee took necessary action to comply with public policy.

Danny v. Laidlaw Transit Services, Inc., 165 Wash. 2d 200, 226, 193 P.3d 128, 141 (2008), citing *Gardner v. Loomis Armored, Inc.*, 128 Wash.2d 931, 941, 913 P.2d 377 (1996).

The court in *Cudney* erroneously focused on whether the DUI laws adequately protect the public from drunk drivers. The focus of the tort claim is not Mr. Bartich driving the company-provided car on the public roads while intoxicated, but ALSCO's termination of

Matthew Cudney for taking steps to report that illegal behavior.

The tort of wrongful discharge "operates to vindicate the public interest in prohibiting employers from acting in a manner contrary to fundamental public policy." *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 313, 96 P.3d 957 (2004)(Emphasis added). The tort isn't meant to enforce the DUI laws or WISHA, but to prevent employers from violating the public policy expressed in those laws by firing employees who report violations of law.

In Matthew Cudney's case, the DUI laws provide no remedies to protect employees who report and expose illegal conduct. There are no adequate alternative remedies if an employer terminates an employee for reporting a DUI (or presumably any other serious crime) being committed by a supervisor at or during work. The court's decision in *Cudney* places an employee at peril for reporting crimes that his

employer is in a better position to address. That does not advance important public policies.

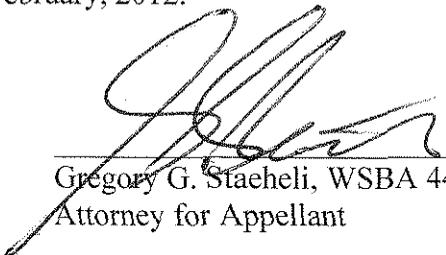
IV. CONCLUSION

For the reasons stated, the court should grant Mr. Cudney's Motion for Reconsideration.

CONCLUSION

The Summary Judgment granted in favor of the non-moving party should be reversed. The application of *Cudney*, supra, should be applied prospectively only if this 5-4 decision is not reversed.

Dated this 29th day of February, 2012.



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Attorney for Appellant