
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES,
CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND
RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID
FAUBION AND CHARLES CABLE,

Plaintiffs/Respondents,

vs.

FLUOR FEDERAL SERVICES, INC., a Washington corporation,

Defendant/Appellant.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
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On Behalf of
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons seeking legal redress under the civil justice system.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal was transferred from the Court of Appeals, Division III. Scott Brundridge and ten other pipefitters (Brundridge) each prevailed in a jury trial in the superior court against Fluor Federal Services, Inc. (Fluor) on claims *for* wrongful discharge in violation of public policy. The underlying facts are set forth in the briefing of the parties. See Fluor Br. at 2-21; Brundridge Br. at 2-22. The public policy underlying the claim involved blowing the whistle on unsafe work practices at the Hanford Nuclear Site or supporting those who did. See Brundridge Br. at 2, 13. At issue was the safety of certain employment practices, with the potential for nuclear contamination and catastrophic environmental damage in the balance. See Brundridge Br. at 3, 10.

On appeal, Brundridge contends that Fluor waived proof of the "jeopardy element" for establishing the tort of wrongful discharge in violation of public policy. See Brundridge Br. at 1, 8-9 & n.6. In turn,

Fluor contends that this Court's post-verdict decision in Korslund v., Dyncorp Tri-Cities Servs., 156 Wn.2d 168, 125 P.3d 119 (2005), requires dismissal of Brundridge's claims as a matter of law, and that the jeopardy element issue was not waived below, See Fluor Br. at 3, 29-32. In particular, Fluor contends that Korslund held the alternative means for promoting the public policy of the federal Energy Reorganization Act (ERA), 42 U.S.C. §5851 et seq., the same act at issue here, to be adequate as a matter of law. See Fluor Br. at 24-28. As a consequence, Fluor contends the jeopardy element cannot be met by Brundridge, and the claims for wrongful discharge predicated upon the ERA must fail as a matter of law. *Id.* at 24-35. Brundridge counters that this is a misinterpretation of Korslund, and that Brundridge would have been entitled to show the inadequacy of the ERA alternative administrative remedy as a matter of fact, if Fluor had not waived the jeopardy element. See Brundridge Br. at 18-19, 23-31.

This amicus curiae brief only addresses the question of whether, under Korslund, the adequacy of an alternative means of promoting the public policy at issue is always determined by the court as a matter of law.¹ Although Brundridge argues that other state public policies are implicated in these wrongful discharge claims, this amicus curiae brief

¹ Fluor raises other challenges to the verdict and judgment below, which are not addressed in this amicus curiae brief. See Fluor Br. at 1-2, 40-77.

assumes for purposes of argument that the predicate public policy is the ERA.²

III. ISSUE PRESENTED

Under Korslund v. Dvncorp Tri-Cities Servs., 156 Wn.2d 168, 125 P.3d 119 (2005), in resolving whether the "jeopardy element" for the tort of wrongful discharge in violation of public policy is met, is the question of the adequacy of an alternative means of promoting the public policy at issue always determined by the court as a matter of law?

IV. SUMMARY OF ARGUMENT

Under Korslund, the question of the adequacy of the alternative means of promoting the public policy at issue in the wrongful discharge claim is resolved as a matter of law when the inquiry only involves examining the remedy on its face. However, Korslund does not foreclose a challenge to whether the alternative means are adequate in fact, in protecting the public policy at stake. In these circumstances, it is a question for the jury whether the alternative means sufficiently promotes the public policy at issue, thereby rendering unnecessary the tort remedy of wrongful discharge in violation of public policy. If it is shown the alternative means is inadequate in fact to promote the public interest, this aspect of the "jeopardy element" of the wrongful discharge claim is met.

² Brundridge notes plaintiffs relied on many state statutes in their pretrial pleadings to support their claims for wrongful discharge in violation of public policy. See Brundridge Br. at 19-22, 37-38.

V. ARGUMENT

A. **Brief Overview Of The Tort Of Wrongful Discharge In Violation Of Public Policy, And The Public Interest It Safeguards.**

The common law claim of wrongful discharge in violation of public policy is unique in the civil realm because it is not grounded principally in a compensatory purpose. Instead, it is born of the deterrent function of tort law, to promote and protect "the stated public policy and the community interest it advances." Thompson v. St. Regis Paper Company, 102 Wn.2d 219, 231, 685 P.2d 1081 (1984); see Smith v. Bates Technical College, 139 Wn.2d 793, 801, 804, 991 P.2d 1135 (2000) (recognizing this tort "operates to vindicate the *public interest in* prohibiting employers from acting in a manner contrary to fundamental public policy"); James W. Hubbell, Retaliatory Discharge and the Economics of Deterrence, 60 U. Colo. L. Rev. 91, 114 (1990) (identifying private attorney general underpinnings of this tort).

This cause of action is specifically designed to further "the strong state interest" in fostering "the employer's duty to conduct its affairs in compliance with public policy." Smith, 139 Wn.2d at 803, 804. While this public policy tort was initially cast as an exception to the employment at will doctrine, vindication of public policy has been deemed sufficiently important to recognize the claim even when the employee has other contractual or statutory remedies. See Thompson, 102 Wn.2d at 231 (involving at-will employment context); Smith, 139 Wn.2d at 803-07

(involving contractual/statutory remedies, where discharged employee has contract grievance procedure and administrative remedy).

Regardless of whether the wrongful discharge claim arises in an employment at will context, or is one where the employee has contractual or statutory remedies available, the same four basic elements must be established, including the so-called "jeopardy element." See Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 933, 941, 913 P.2d 377 (1996). Whether the jeopardy element is met generally is a question of fact. See Korslund v. Dyncorp Tri-Cities Servs., 156 Wn.2d at 182. When other means of promoting the public policy at issue are available, this Court has held that in order to meet the jeopardy element the plaintiff must argue that the alternative means are insufficient to safeguard the public policy. See Hubbard v. Spokane County, 146 Wn.2d 699, 713, 716-17, 50 P.3d 602 (2002).³ Fluor contends that under Korslund this is a question of law for the court. This issue is addressed in §B., below.

B. The Adequacy Of The Alternative Means For Promoting The Public Policy May Be A Question Of Law Or Fact, Depending On The Circumstances.

The question implicated in this appeal is whether the adequacy of the alternative means in promoting the public policy at issue is always a question of law for the court. This Court has touched upon this issue in two cases. In Hubbard, it concluded, in reversing a summary judgment of

In Hubbard, the Court held that the alternative means of promoting the public policy involved need not be available to the particular plaintiff, so long as the other means adequately protects the public policy. 146 Wn.2d at 717.

dismissal and remanding for trial, that a zoning code appeal procedure was inadequate to protect the public interest, given the relatively short time frame available for appeal. 146 Wn.2d at 717.⁴ In so doing, the Court compared the alternative means available with the wrongful discharge remedy, and its deterrent effect:

In contrast, it would be more efficient to allow county employees to prevent these types of violations before they occurred.⁵

Id.⁵

More recently, in Korslund the Court examined whether the ERA provided an alternative means that adequately promoted the public policy of the act. The Court described the inquiry as follows:

While the question whether the jeopardy element is satisfied generally involves a question of fact, *Hubbard*, 146 Wn.2d at 715, the question whether adequate alternative means for promoting the public policy exist may present a question of law, i.e., where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy. *See id.* at 716-17.

Korslund at 182. The Court upheld a summary judgment of dismissal of the wrongful discharge claim because it found the federal ERA administrative process for adjudicating whistleblower complaints to be an

Fluor suggests that the adequacy of the alternative means was not resolved as a matter of law in Hubbard, and that the issue was remanded for trial on the merits. Fluor Br. at 31-32. WSTLA Foundation reads Hubbard as ruling on this aspect of the jeopardy element as a matter of law. Compare 146 Wn.2d at 716 (recognizing "Hubbard's actions would arguably have been necessary to enforce the public policy") with *id.* at 717 (concluding "this alternative is insufficient to safeguard the public policies"). On the other hand, if Fluor is correct, this supports the view that the adequacy of the alternative means may be an issue for the jury.

⁵ Footnote 23 in Hubbard reads:

Despite the dissent's assertion, the efficiency in allowing county employees to prevent these types of violations before they occur stems from the employees' ability to speak out against the violations without fear of discharge.

146 Wn.2d at 717 ii.23.

adequate alternative means for promoting the public policy of the act. Id. at 181⁶

Fluor contends Korslund requires that the alternative means issue be resolved as a matter of law in this case. This is incorrect. The Court is very clear that this question *may* present an issue of law, particularly when "the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting the public policy." Id. at 182. Korslund only resolves the issue as a matter of law in the course of reviewing the ERA on its face in a summary judgment context. The Court does not foreclose a challenge to the adequacy of the law *in fact*, which is in keeping with its recognition that generally the jeopardy element presents a question of fact. Id.

Any other interpretation of Korslund would seriously undermine the deterrent purpose of this public policy tort. If an alternative means of promoting the public policy, seemingly adequate on its face, is in fact toothless, then the public policy is jeopardized because employers can thwart it without fear of consequences. If a plaintiff presents evidence on the issue, a jury, as the conscience of the community, can assess the adequacy-in-fact of an alternative means and determine whether the public

⁶ Brundridge has not called for a re-examination of the alternative means component of the jeopardy element, as set forth in Hubbard and Korslund. WSTLA Foundation argued unsuccessfully in its amicus curiae brief in Korslund that imposition of an alternative means component should be rejected as inconsistent with the analysis in Smith v. Bates Technical College, 139 Wn.2d at 803-11 (extending wrongful discharge claim to cases where employee has other contractual or statutory remedies available, and rejecting an exhaustion of remedies argument). See Korslund "BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION" at 10-16.

policy is jeopardized to such a degree as to require the wrongful discharge remedy. Cf. Hubbard at 717-18 (indicating, in a facial challenge context, it is appropriate to contrast the efficiency of the alternative means with the deterrent effect of a wrongful discharge claim).

Korslund involved a facial challenge to the alternative means, in a summary judgment context. It should not be controlling here, where in response to the CR 60 motion Brundridge apparently presented evidence of inadequacy-in-fact, as bearing upon their claim of prejudice resulting from Fluor's alleged waiver of the jeopardy element, See Brundridge Br. at 10, 22.

The need for an adequacy-in-fact challenge seems particularly acute in cases such as this one, where the public policy at issue involves nuclear safety practices, with the potential for an enormous toll on human lives, property and the environment. The public policy at stake is of the highest order, and presents a vivid example of why, upon submission of proper evidence, the jury must be allowed to examine the adequacy-in-fact of the alternative means for protecting the public interest.

Lastly, it remains to ask what factors may be relevant in examining the adequacy-in-fact of an alternative remedy. This issue is *sui generis*, and there appears to be no clearly analogous template to guide this

Brundridge also argues that even if Korslund is interpreted as Fluor suggests, that the jeopardy element may nonetheless be met when "imminent harm" to the public is involved, relying upon Ellis v. City of Seattle, 142 Wn.2d 450, 461, 13 P.3d 1065 (2000). See Brundridge Br. at I, 10, 31-34. While this issue is not specifically addressed in this brief, Ellis supports the notion that a trier of fact determining the adequacy of an alternative means of promoting the public policy should be permitted to take into account the potential magnitude of the harm where the public policy at issue is not honored.

inquiry.⁸ At minimum, a jury should consider whether the process for obtaining relief under the alternative means is 1) unduly burdensome, 2) inordinately costly, given the relief available, and 3) otherwise so lacking in fundamental fairness as to render the alternative means an insufficient deterrent for protecting the public interest.⁹

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve the issue addressed accordingly.

DATED this 18th day of December, 2007.


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by J. A. Layton, Jr.
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On Behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

⁸ In other contexts this Court has examined the adequacy of alternative relief, and on occasion undertaken a fact-based analysis. See e.g., Orion Corporation v. State, 103 Wn.2d 441, 458, 693 P.2d 1369 (1985) (involving exhaustion of administrative remedies doctrine, and claim of fact-based futility); Kucera v. Dep't of Transp., 140 Wn.2d 200, 210-11, 995 P.2d 63 (2000) (involving prayer for injunctive relief, and evaluation of adequacy of remedy at law due to continuing nature of injury). While these contexts are somewhat apropos, they are not helpful in providing a template for examining adequacy-in-fact with regard to the tort of wrongful discharge in violation of public policy. - The above-referenced contexts involve policy considerations that demand an onerous standard for inadequacy. The same is not true with respect to wrongful discharge claims. For example, in this context, the tort is recognized regardless of the existence of contractual or administrative remedies. See Smith, 139 Wn.2d at 808-11. Nonetheless, these other contexts are relevant in demonstrating the Court's willingness to examine adequacy from a factual standpoint in appropriate circumstances.

⁹ It may be argued that the trier of fact should also consider the visibility or transparency of the alternative means; that is, the extent to which the allegations the public policy has been violated are resolved in a forum accessible to the public and subject to its scrutiny. Cf. Rufer v. Abbott Labs., 154 Wn.2d 530, 114 P.3d 1182 (2005) (extolling constitutionally-mandated transparency of court proceedings). On the other hand, this factor may be more relevant in assessing a facial challenge to the alternative means.