

80735-3

No. 24565-9-III Consolidated with No. 25187-0-III

DIVISION III, COURT OF APPEALS
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/Cross Appellants

v.

FLUOR FEDERAL SERVICES, INC.,
a Washington corporation,

Defendant/Appellant/Cross Respondent

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Carrie L. Runge)

APPELLANT'S REPLY BRIEF ON APPEAL AND
ANSWERING BRIEF ON CROSS-APPEAL

William R. Squires III
WSBA No. 04976
CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
Attorneys for Appellant
Fluor Federal Services, Inc.

Corr Cronin Michelson
Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
Telephone: (206) 625-8600
Facsimile: (206) 625-0900

Michael B. King
WSBA No. 14405
Sidney Tribe
WSBA No. 33160
TALMADGE LAW GROUP PLLC
Attorneys for Appellant
Fluor Federal Services, Inc.

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
Telephone: (206) 574-6661
Facsimile: (206) 575-1397

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iv-v
I. <u>SUMMARY INTRODUCTION</u>	1
A. <u>The Impact of the Supreme Court’s</u> <u>KORSLUND Decision</u>	1
B. <u>The Evidentiary Issues</u>	3
C. <u>The Front Pay Awards</u>	3
D. <u>The Cross-Appeal on Costs</u>	3
II. <u>ARGUMENT IN REPLY ON APPEAL AND</u> <u>IN ANSWER TO CROSS-APPEAL</u>	4
A. <u>Plaintiffs Cannot Evade the Controlling</u> <u>Authority of the Supreme Court’s Decision</u> <u>in KORSLUND v. DYNCORP TRI-CITIES</u> <u>SERVICES, which Mandates the Reversal</u> <u>of Plaintiffs’ Judgments and the Dismissal</u> <u>of Their Case with Prejudice</u>	4
1. <u>FFS Did not Waive its Right to</u> <u>Raise the Postjudgment Change in</u> <u>the Governing Law Effected by</u> <u>the Supreme Court’s</u> <u>Decision in KORSLUND</u>	4
2. <u>Plaintiffs’ Factual Submissions,</u> <u>Regarding Supposed Deficiencies</u> <u>in the ERA’s Administrative Remedies,</u> <u>as Applied to Their Claims, Are Legally</u> <u>Irrelevant Under the Supreme Court’s</u> <u>Decision in KORSLUND</u>	9

3.	<u>The Supreme Court's Decision in <i>Korslund</i> Requires that Plaintiffs' Case Be Dismissed, Regardless of the Precise Source of the Public Policies That Plaintiffs Claim Their Conduct Was Intended to Protect</u>	12
4.	<u>There is no "Imminent Harm" Exception to the Rule Laid Down in <i>KORSLUND</i>, Nor Would Such an Exception Apply In This Case</u>	13
5.	<u>The Trial Court's CR 60 "Findings" Cannot Shield Plaintiffs' Case from the Dismissal Mandated by <i>KORSLUND</i></u>	15
B.	<u>Even if the Supreme Court's Decision in <i>KORSLUND</i> Does Not Mandate the Dismissal of Plaintiffs' Case, this Court Should Still Vacate Plaintiffs' Judgments and Remand for a New Trial</u>	16
1.	<u>This Court Should Grant a New Trial on Liability Because the Trial Court's Evidentiary Errors Prejudiced FFS</u>	16
a.	<u>The October 1997 OSHA Report</u>	19
b.	<u>Marquardt's "Other Wrongs" Evidence</u>	26
c.	<u>The "Hotline" Evidence</u>	28
2.	<u>This Court Should Also Grant a New Trial on the Issue of Front Pay Because the Law and Evidence Provide No Support for the Jury's Awards of Front Pay, and the Awards Therefore Could Only Have Been Based on Passion or Prejudice</u>	29

C. No Legal or Equitable Principle Supports
Plaintiffs' Cross-Appeal for Expanded Costs,
and Granting Their Request Would
Require This Court to Ignore Directly
Controlling Supreme Court Precedent34

III. CONCLUSION37

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Washington Cases</u>	
<i>Bierlein v. Byrne</i> , 103 Wn. App. 865, 14 P.3d 823 (2000).....	24, 25
<i>Brundridge v. Fluor Federal Servs. Inc.</i> , 109 Wn. App. 347, 35 P.3d 389 (2001), <i>review denied</i> , 146 Wn.2d 1022, 92 P.3d 120 (2002).....	36
<i>Brundridge v. Fluor Hanford, Inc.</i> , 2004 WL 898279, 121 Wn. App. 1024 (2004)	37
<i>Bunch v. King County Dep't of Youth Servs.</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	29
<i>City of Tacoma v. William Rogers Co., Inc.</i> , 148 Wn.2d 169, 60 P.3d 79 (2002).....	15
<i>Ellis v. City of Seattle</i> , 142 Wn.2d 450, 13 P.3d 1065 (2000)	13
<i>ESCA Corp. v. KPMG Peat Marwick</i> , 86 Wn. App. 628, 939 P.2d 1228 (1997).....	30
<i>Goodman v. Boeing Co.</i> , 75 Wn. App. 60, 877 P.2d 703 (1994), <i>aff'd</i> , 127 Wn.2d 401, 899 P.2d 1265 (1995).....	23
<i>Hubbard v. Spokane County</i> , 146 Wn.2d 699, 50 P.3d 602 (2002).....	7, 8
<i>Hume v. American Disposal Co.</i> , 124 Wn.2d 656, 880 P.2d 988 (1994).....	3, 34, 35
<i>Jones v. Best</i> , 134 Wn.2d 232, 950 P.2d 1 (1998)	5
<i>Korslund v. Dyncorp Tri-Cities Servs., Inc.</i> , 121 Wn. App. 295, 88 P.3d 966 (2004)	<i>passim</i>
<i>Korslund v. Dyncorp Tri-Cities Servs., Inc.</i> , 156 Wn.2d 168, 125 P. 2d 168, 125 P.3d 119 (2005).....	<i>passim</i>
<i>Krivanek v. Fibreboard Corp.</i> , 72 Wn. App. 632, 865 P.2d 527 (1993).....	29-30
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2004).....	36
<i>Myers v. Smith</i> , 51 Wn.2d 700, 321 P.2d 551 (1958).....	31
<i>Olympic Steamship Co. v. Centennial Insurance Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991).....	35
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997)	30
<i>Panorama Village Condo. Owners Ass'n Board of Directors v. Allstate Ins. Co.</i> , 144 Wn.2d 130, 26 P.3d 910 (2001).....	3, 35

<i>State v. Chapman</i> , 98 Wn. App. 888, 991 P.2d 126 (2000).....	25
<i>State v. Hairston</i> , 133 Wn.2d 534, 946 P.2d 394 (1997).....	11-12
<i>State v. Hines</i> , 87 Wn. App. 98, 941 P.2d 9 (1997).....	26
<i>Steel v. Johnson</i> , 9 Wn.2d 347, 115 P.2d 145 (1941).....	25
<i>State v. Monson</i> , 113 Wn.2d 833, 784 P.2d 485 (1989).....	25
<i>Vehicle/Vessel LLC v. Whitman County</i> , 122 Wn. App. 770, 95 P.3d 394 (2004).....	5, 6

Federal Cases

<i>Bellas v. CBS, Inc.</i> , 221 F.3d 517 (3rd Cir. 2000).....	31
<i>In re Congdon</i> , ___ B.R. ___, 2007 WL 942202 (Bankr. D.Vt. March 29, 2007).....	23
<i>Obrey v. Johnson</i> , 400 F.3d 691 (9 th Cir. 2005).....	17

Statutes

42 U.S.C. § 5801(a).....	11
RCW 4.84.010.....	35, 37
RCW 5.44.040.....	19, 25

Rules and Regulations

20 C.F.R. § 404.948(b)(2).....	23
20 C.F.R. § 404.950(a).....	23
20 C.F.R. § 404.953(a).....	23
ER 401.....	19
ER 402.....	19
ER 403.....	19, 26
ER 404(b).....	26, 27, 28
ER 607.....	28

Other Authorities

WSTLA "Trial News," Vol. 41, No. 3 (November 2005).....	20
---	----

I. SUMMARY INTRODUCTION

A. The Impact of the Supreme Court's KORSLUND Decision

Plaintiffs do not dispute that the Supreme Court's decision in *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P. 2d 168, 125 P.3d 119 (2005) (*Korlund II*), lays down the rule of law that governs this case. Plaintiffs do claim that the decision in *Korlund II* can be distinguished on its facts, and that FFS waived its right before the trial court to the benefits of the decision, even before it was handed down by the Supreme Court.

These claims should be rejected and plaintiffs' case dismissed with prejudice under the controlling authority of *Korlund II*. To begin, the decision is not factually distinguishable. Plaintiffs make much of their contention that they were not well served by the administrative remedies provided under the Energy Reorganization Act. But the Supreme Court in *Korlund II* made clear that the issue of alternative remedies is not whether those remedies adequately serve the needs of the individual would-be wrongful discharge claimant, but whether those remedies adequately protect public policy. The Supreme Court has ruled that the administrative remedies provided by the ERA are adequate, and plaintiffs do not deny that they were eligible for those remedies. Accordingly, unless FFS is somehow barred from invoking the benefits of *Korlund II*,

plaintiffs' judgments must be reversed and their case dismissed with prejudice.

Plaintiffs make a run at establishing such a bar, claiming that FFS waived the benefits of the decision in *Korlsund II* by its conduct before the trial court. Establishing waiver, however, requires proving the intentional relinquishment of a known right. And at the time when FFS supposedly waived its rights to the benefits of *Korlsund II*, this Court's decision in *Korlsund v. Dyncorp Tri-Cities Servs., Inc.*, 121 Wn. App. 295, 88 P.3d 966 (2004) (*Korlsund I*), foreclosed the very argument that plaintiffs insist FFS should have made, and by not making should be deemed to have waived its rights under *Korlsund II*. Plaintiffs' claim of waiver is meritless -- FFS could not give up a right it did not have, when it chose not to make an argument foreclosed by the then controlling decision of this Court in *Korlsund I*.

Plaintiffs' real quarrel is with the scope of the Supreme Court's decision in *Korlsund II*, and their plea for relief from that decision should be addressed to that Court. Their judgments should be reversed, and their case dismissed with prejudice, pursuant to the rule laid down by the Supreme Court in *Korlsund II*.

B. The Evidentiary Issues

If this Court declines to dismiss plaintiffs' case, this Court should vacate the judgments and remand for a new trial on liability. In three separate evidentiary rulings, the trial court abused its discretion and each of these errors materially prejudiced FFS. Plaintiffs' cursory response on these issues fails to come to grips either with the nature of the trial court's errors, or with the material prejudice those errors caused FFS.

C. The Front Pay Awards

Any new trial should also extend to the issue of front pay. Plaintiffs simply fail to recognize the real issue -- that the jury's front pay awards are so devoid of support in the evidence that they must have been the product of passion or prejudice.

D. The Cross-Appeal on Costs

Plaintiffs' cross-appeal seeks an award of costs squarely foreclosed by the Supreme Court's decision in *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994). Neither the Supreme Court's subsequent decision in *Panorama Village Condominium Owners Ass'n Board of Directors v. Allstate Insurance Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001), nor any other ground in equity, supports setting aside the prohibition laid down in *Hume*.

II. ARGUMENT IN REPLY ON APPEAL AND IN ANSWER TO CROSS-APPEAL

A. Plaintiffs Cannot Evade the Controlling Authority of the Supreme Court's Decision in *KORSLUND v. DYNCORP TRI-CITIES SERVICES*, which Mandates the Reversal of Plaintiffs' Judgments and the Dismissal of Their Case with Prejudice

Plaintiffs make no attempt to argue that the Supreme Court's decision in *Korslund II* should not govern this case, merely because the decision was handed down after entry of their judgments on jury verdict. Plaintiffs only attempt to distinguish *Korslund II* on its facts, while also asserting FFS waived its right to relief based on *Korslund II* by its conduct before the trial court. Plaintiffs substantially repeat the arguments they made to the trial court, when opposing FFS's motion for relief under CR 60. What plaintiffs do *not* do is respond, in any meaningful way, to the refutation of these arguments set forth in FFS's Opening Brief.

1. FFS Did not Waive its Right to Raise the Postjudgment Change in the Governing Law Effected by the Supreme Court's Decision in *KORSLUND*

Plaintiffs claim that FFS "waived" its right to argue that *Korslund II* eliminated their causes of action, by its conduct before and during the trial of plaintiffs' wrongful discharge claims. *See* Plaintiffs' Brief at § III.A, pp. 23-30; Plaintiffs' Response to Defendant's CR 60 Motion ("Response") at 6-7, 13 (CP 9681-82, 9688). But as FFS noted in its

Opening Brief, establishing waiver requires establishing "the intentional relinquishment of a known right." See FFS Opening Brief at 30 n.13, citing *Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. 770, 778, 95 P.3d 394 (Div. III 2004) (citing in turn *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998)). And under the then controlling authority of this Court's decision in *Korlund I*, FFS had *no* "right" to a dismissal of plaintiffs' wrongful discharge claims based upon the availability of the ERA's administrative remedies. Moreover, nothing in FFS's conduct before the trial court fairly supports a finding that FFS intentionally relinquished any future right to such a dismissal, arising out of a Supreme Court reversal of this Court's decision in *Korlund I*:

- The Trial Management Report. Plaintiffs reiterate their claim that FFS's statement in the June 2005 Trial Management Report, that it would "not dispute" that "discouraging the Plaintiffs from raising safety concerns jeopardizes" a clearly defined public policy (CP 3092) (Report at 6), constitutes a waiver of its right to rely on the rule subsequently laid down by the Supreme Court in *Korlund II*. See Plaintiffs' Brief at 26-27; *see also*, Response at 6-7 (CP 9681-82). But as FFS pointed out in its Opening Brief, at the time the Report was submitted to the trial court, this Court's decision in *Korlund I* precluded any argument by FFS based on the ERA's administrative remedies. See FFS

Opening Brief at 29-30. FFS cannot fairly be charged with the "intentional relinquishment of a known right" (*Vehicle/Vessel LLC v. Whitman County*, 122 Wn. App. at 778) when, at the time FFS made the statement in question, FFS knew it had *no* right to dispute the jeopardy element based on the ERA's administrative remedies, given this Court's decision in *Korslund I*. Plaintiffs also urge that FFS should be deemed to have prospectively waived its right to invoke a future change in the law, because FFS did not insist on what would have then amounted to a purely subjective view of the jeopardy element's requirements. *See* Plaintiffs' Brief at 27-28. Plaintiffs make no effort, however, to reconcile this notion with the legal test for waiver, which (as stated) requires proof of an intentional relinquishment of a known right.¹

¹ Plaintiffs' claim also ignores that FFS *did* point out, both in its trial brief and during the course of the argument in support of its motion for a directed verdict, that the Supreme Court had granted review in *Korslund* and the decision in that case could wipe out the legal basis for plaintiffs' claims. *See* FFS Opening Brief at 30 n.14 (citing to FFS's trial brief at 9 n.15 (CP 2766), and citing and quoting from the transcript of the hearing on the motion for directed verdict, VRP (Aug. 11, 2005) 2673:13-25). Apparently, plaintiffs would have this Court rule that FFS waived its right because FFS did not point out the fact of the pendency of *Korslund* before the Supreme Court *each time* the issue of the jeopardy element came up during the trial -- a patently absurd suggestion, given the clearly established requirements for proving waiver. (Equally meritless is plaintiffs' related suggestion that FFS should be deemed to have waived its right to rely on *Korslund II* because FFS did not bring a motion for summary judgment based on the ERA's administrative remedies *before* this Court handed down its decision in *Korslund I* -- a proposition that would require parties to anticipate future *adverse* changes in the law, and which ignores that the issuance of this Court's decision in *Korslund I* would have proven just as fatal to any summary judgment victory earned by FFS as the Supreme Court's subsequent decision in *Korslund II* must now prove for plaintiffs' judgments.)

- The HUBBARD decision. Plaintiffs also reiterate their claim that the Supreme Court's decision in *Hubbard v. Spokane County*, 146 Wn.2d 699, 50 P.3d 602 (2002), allowed FFS to raise the ERA's alternative remedies issue, even while *Korlsund I* was in effect. See Plaintiffs' Brief at 35-36; see also, VRP (May 5, 2006) 22:3-6, 24:21-26:14 (argument of plaintiffs' counsel). *Hubbard* involved a claim of wrongful discharge arising out of a dispute over the application of zoning requirements. Although the Supreme Court did find a question of fact regarding whether the dispute involved a violation of code requirements (if so, then the plaintiff would have successfully established the first part of the jeopardy element), the Supreme Court did *not* find that the adequate alternative remedy issue -- the second part of the jeopardy element -- also presented a question of fact. To the contrary: the court held that the proffered alternative remedy was inadequate as matter of law and therefore could not bar the plaintiff's wrongful discharge claim. See 146 Wn.2d at 717-18.²

² In its Opening Brief, FFS stated that "*Hubbard* held that the sufficiency of the alternative remedy at issue in that particular case could not be determined on summary judgment, and therefore should be left to the finder of fact[.]" citing pages 717 and 718 of the decision as reported at volume 146 of the Washington (Second) reports. See FFS Opening Brief at 32. Further review of the decision has persuaded FFS that this reading of *Hubbard* is too narrow. The alternative remedy at issue involved the availability of administrative challenges to zoning decisions, and the Supreme Court expressly stated that "this alternative *is insufficient* to safeguard the public policies" at issue. See *Hubbard*, 146 Wn.2d at 717 (emphasis added).

Moreover, even if *Hubbard* had treated the proffered alternate remedy in that case as presenting a question of fact, the possibility of FFS litigating the factual adequacy of the ERA's administrative remedies became moot after this Court's subsequent decision in *Korlund I*, which held that the possibility of a claimant pursuing administrative relief under the ERA did not, as a matter of law, preclude bringing a state law tort claim for wrongful discharge in violation of public policy. (Indeed, this Court expressly acknowledged the Supreme Court's decision in *Hubbard*, before going on to hold that the availability of remedies under the ERA could not bar a wrongful discharge claim. *See Korlund I*, 121 Wn. App. at 321 (citations omitted).) And when the Supreme Court reversed this Court, and held that the ERA's administrative remedies *were* an adequate alternative which *did* foreclose the bringing of a tort law wrongful discharge claim, the court also confirmed the legal irrelevance of a case-specific, fact-based exploration of the adequacy of that remedy. In short, that FFS did not choose to pursue a fact-based approach to the issue of adequate alternative remedy before the trial court can hardly be deemed to constitute a waiver of FFS's right to invoke the Supreme Court's

subsequent determination that the ERA's administrative remedies foreclose state law tort wrongful discharge claims as a matter of law.³

2. Plaintiffs' Factual Submissions, Regarding Supposed Deficiencies in the ERA's Administrative Remedies, as Applied to Their Claims, Are Legally Irrelevant Under the Supreme Court's Decision in KORSLUND

Plaintiffs assert the ERA's administrative remedies would have proven an inadequate forum in which to pursue the vindication of their claims. *See* Plaintiffs' Brief at 34-37, 38-39; *see also*, Response at 10 (CP 9685); Declaration of John P. Sheridan in Support of Plaintiffs' Opposition to CR 60 Motion at 2, ¶ 3 (CP 9693). Yet plaintiffs refuse to acknowledge that what matters to an adequacy analysis under Washington law is whether "the public policy is adequately protected" by the proffered alternative remedy. *See Korslund*, 156 Wn.2d at 183 n.2. Our Supreme Court has expressly rejected the approach of other jurisdictions, which (as the court put it) "tend to consider the adequacy of redress for the employee rather than whether the public policy is adequately protected." *See id.* (citing illustrative cases).

³ Again, plaintiffs seem to suggest that FFS should be deemed to have waived its right to invoke *Korslund II* because FFS could have but did not seek to litigate the case specific adequacy of the ERA's remedies before that possibility was rendered moot by this Court's decision in *Korslund I*. As previously discussed by FFS (see n.1, *supra*), this notion cannot reasonably support a finding of waiver, under the "intentional relinquishment of a known right" test.

Plaintiffs evidently wish that Washington law made the adequacy of redress for the individual employee the touchstone for resolving the alternative remedy issue. In this regard, their preference is the same as the *Korlund* dissenters, who criticized the majority for resolving the adequacy issue without "facts" and "evidence." See 156 Wn.2d at 192 (Chamber, J, dissenting, joined by Sanders, J.). But if one sees the issue as a question of whether the proffered alternative remedy adequately protects the public policy, rather than a question of whether the remedy adequately serves the needs of an individual claimant, the "facts" and "evidence" demanded by the dissent in *Korlund* are rendered legally irrelevant. In fact, the *Korlund* dissenters simply failed to persuade a majority of their colleagues to adopt an individualized, "as applied" approach to determining adequacy. Instead, the majority chose to analyze the legal structure of the ERA's administrative remedies, and having concluded from that analysis that the remedies adequately protected the public policy interests at issue (in *Korlund*, worker safety and preventing fraud), the majority held the availability of these remedies precluded the *Korlund* plaintiffs' wrongful discharge claims. See *Korlund*, 156 Wn.2d at 183.

Plaintiffs do not deny they were as entitled as the *Korlund* plaintiffs to seek relief under the ERA's administrative remedies. The

ERA expressly states that its purpose includes both "assur[ing] public health and safety" and "restoring, protecting, and enhancing environmental quality," 42 U.S.C. § 5801(a), and plaintiffs do not dispute that the ERA's administrative remedies were available to them since they were (allegedly) retaliated against for blowing the whistle, or for supporting those blowing the whistle, on actions that (purportedly) endangered worker safety and the environment. Plaintiffs continue to argue, as they did to the trial court, that the ERA's procedures would have proven inadequate as applied to them, and point to evidence they claim establishes that inadequacy. Yet plaintiffs refuse to acknowledge that -- as they virtually admitted to the trial court -- they need to persuade the Supreme Court to overrule its holding in *Korlund II*, in order for their evidence to be considered in determining whether the availability of the ERA's administrative remedies should bar their wrongful discharge claims. *See* Response at 15 n.15 ("plaintiffs here have evidence that the ERA forum was not adequate; if reviewed, this case may change the Supreme Court 's view of the ERA's adequacy"). This Court, of course, will apply the law as it is now, and leave the task of reconsideration of Supreme Court decisions to the Supreme Court. *See, e.g., State v. Hairston*, 133 Wn.2d 534, 539, 946

P.2d 394 (1997) (citation omitted) (noting that the Court of Appeals is bound by decisions of the Supreme Court).⁴

3. The Supreme Court's Decision in *Korslund* Requires that Plaintiffs' Case Be Dismissed, Regardless of the Precise Source of the Public Policies That Plaintiffs Claim Their Conduct Was Intended to Protect

Plaintiffs next attempt to distinguish *Korslund II* by asserting that the public policies they sought to protect are derived from other sources besides the ERA -- specifically, from Washington State mandates for the protection of the environment and assuring worker safety. *See* Plaintiffs' Brief at 37-38; *see also*, Response at 13-15 (CP 9688-90). Yet plaintiffs do not dispute either that the ERA's stated purposes embrace both protection of the environment and assuring worker safety, or that they could have availed themselves of the ERA's administrative remedies

⁴ Plaintiffs make several subsidiary claims regarding the alleged inadequacy of the ERA's remedies, as applied to their claims. (All of them assume the legal relevance of an "as applied" adequacy analysis, which -- as shown -- is not the case under the rule laid down in *Korslund II*.) First, plaintiffs complain they were deprived of the chance to try the issue of adequacy to the jury (*see* Plaintiffs' Brief at 30, 35), ignoring that the issue of adequacy is a question of law for the court to decide. *See Korslund*, 156 Wn.2d at 182-83 (internal citations omitted) (adequacy is determined as a matter of law "where the inquiry is limited to examining existing law to determine whether they provide adequate alternative means of promoting the public policy"). Second, plaintiffs complain they were denied the chance to make an adequate evidentiary record at trial (a point closely related to but somewhat distinct from the first, *see* Plaintiffs' Brief at 35), ignoring that they had a full and fair opportunity to develop such a record in opposition to FFS's CR 60 motion. Finally, plaintiffs object to FFS's citation to the Department of Labor's 2003 Whistleblower Investigations Manual (*see* Plaintiffs' Brief at 36), ignoring that the Manual is a public record that generally describes the established practices governing whistleblower claims, and is the kind of record that would have informed the Supreme Court's analysis of the adequacy issue in *Korslund II*.

regardless of whether they sought to vindicate state as well as federal mandates for environmental protection and worker safety at Hanford. It makes no difference to the *Korslund II* analysis in this case how many *other* statutes or regulations plaintiffs can point to as putative sources of the public policies they sought to vindicate by their actions. Those policies are *also* protected by the ERA and its administrative remedies, and the Supreme Court has declared the availability of those remedies forecloses a state law tort wrongful discharge claim as a matter of law.⁵

4. There is no "Imminent Harm" Exception to the Rule Laid Down in *KORSLUND*, Nor Would Such an Exception Apply In This Case

Plaintiffs' argument, that their case is somehow saved from dismissal by an "imminent harm" safe-harbor, begins by claiming that FFS asserts *Korslund II* "overruled" *Ellis v. City of Seattle*, 142 Wn.2d 450, 13 P.3d 1065 (2000). *See* Plaintiffs' Brief at 31. But FFS does not argue that *Korslund II* overruled *Ellis*. Rather, FFS argues that a party may not

⁵ Although plaintiffs have made much of the well known dispute between federal and state authorities over the ongoing Hanford cleanup, *see* Plaintiffs' Brief at 22, plaintiffs offered no evidence to show that the ERA's administrative remedies somehow operate to discount state environmental concerns. To the contrary: Although plaintiffs assert to this Court that Washington State environmental interests at Hanford "are broader in scope than the ERA[.]" *see* Plaintiffs' Brief at 38, their only *evidence* actually established that state law provides the measure, under the Tri-Party Agreement, by which compliance with environmental standards at Hanford shall be determined. *Compare* FFS's Opening Brief at 38-39 (discussing the Tri-Party Agreement specifically, and the interplay between federal and state law generally under the ERA as applied to Hanford) *with* Plaintiffs' Brief at 20 (acknowledging the fact of the Tri-Party Agreement and what plaintiffs' characterize as the state's "concurrent jurisdiction" over the Hanford reservation for hazardous waste issues).

pursue a wrongful discharge tort case if an adequate alternative remedy is available, merely because he or she took action to prevent an imminent harm. What plaintiffs actually are arguing for is an *exception* to the rule announced in *Korlund II*, under which a would-be wrongful discharge plaintiff could escape dismissal of his or her claim because of the availability of an adequate alternative remedy, if he or she suffered retaliation for action taken to prevent an imminent harm. But what plaintiffs continue to refuse to confront is that precisely such a limitation on the scope of *Korlund II* was unsuccessfully urged by the *Korlund* dissenters. See 156 Wn.2d at 194-95 (Chambers and Sanders, JJ., dissenting). If this limitation is to be engrafted onto the rule of *Korlund II*, the judicial reconsideration required to effect such a change is a task for the Supreme Court, not this Court.

The adoption of such an exception also cannot save plaintiffs' case. Plaintiffs go on at some length about how the evidence rulings at trial excluded evidence with which they could have established that the Spring 1997 pressure test objections of plaintiffs Killen, Nicacio, O'Leary, Stull and Walli was motivated by concern about an imminent risk of harm. See Plaintiffs' Brief at 32-33. But as plaintiffs acknowledged before the trial court, plaintiffs Killen, Nicacio, O'Leary, Stull and Walli were able to take their claims of retaliatory discharge to the administrative forum

established by the ERA, and they received relief from that forum. *See* Plaintiffs' Trial Brief at 13-14, 17-18 (CP 2618-19, 2622-23). For imminence of harm to relieve a party from having to satisfy the "no adequate alternative remedy" part of the jeopardy element, there must be proof that the imminent nature of the harm to the public policy at issue also rendered the alternative remedy inadequate. Plaintiffs' complaints about the ERA administrative process do not so much as hint at such a difficulty.

5. The Trial Court's CR 60 "Findings" Cannot Shield Plaintiffs' Case from the Dismissal Mandated by KORSLUND

Plaintiffs make a good deal of the putative authority of the trial court's "findings," set forth in the court's order denying FFS' CR 60 motion. *See* Plaintiffs' Brief at 23-26. Yet plaintiffs make no effort to come to grips with the fundamental principle that conclusions of law dressed up as findings are entitled to no deference. *See, e.g., City of Tacoma v. William Rogers Co., Inc.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002), cited in FFS's Opening Brief at 40 n.20.⁶ Thus, the trial court

⁶ FFS pointed out in its Opening Brief that it assigned error to the trial court's findings in order to avoid any claim that the findings had become "verities" on appeal. *See* FFS's Opening Brief at 2 (Assignment of Error No. 8, assigning error to the court's CR 60 findings), 40 n.20 (noting that FFS assigned error to the findings "[o]ut of an abundance of caution" and "to avoid any technical 'verity on appeal' claim by plaintiffs"). Tellingly, plaintiffs have made no attempt to assert that the trial court's so-called "findings" are verities.

presumed to find "prejudice" to plaintiffs from FFS's supposedly tardy invocation of the ERA's alternative remedies. *See* Order Denying Defendant's CR 60 Motion at 5, "Finding of Fact" No. 11 (CP 9616). Yet this putative "finding" ignores both that plaintiffs were able to make a record of their quarrel with the ERA's administrative remedy process during the course of the CR 60 proceeding, *and* that the adequacy of a remedy for an individual would-be wrongful discharge claimant is legally irrelevant under *Korlsund II*. At bottom, the trial court's extended litany of "findings" fail to come to grips with the controlling legal principle established by *Korlsund II*: because the ERA's remedies were available to protect the public policies that underlie plaintiffs' wrongful discharge claims, those claims fail as a matter of law and must now be dismissed with prejudice.

B. Even if the Supreme Court's Decision in *KORSLUND* Does Not Mandate the Dismissal of Plaintiffs' Case, this Court Should Still Vacate Plaintiffs' Judgments and Remand for a New Trial

1. This Court Should Grant a New Trial on Liability Because the Trial Court's Evidentiary Errors Prejudiced FFS

Plaintiffs open their defense of the trial court's evidentiary rulings by answering an argument FFS has not made. Plaintiffs assert FFS has argued for an "altered" standard of review. *See* Plaintiffs' Brief at 39,

citing FFS Opening Brief at 21. But as a check of the cited portion of FFS's brief will quickly confirm, FFS agrees with plaintiffs that the standard of review is abuse of discretion. What FFS *has* argued for is the adoption of a presumption of prejudice once evidentiary error has been found, *see* FFS Opening Brief at 22-23 (citing and discussing *Obrey v. Johnson*, 400 F.3d 691 (9th Cir. 2005) and related case authorities), and plaintiffs make no response whatsoever to this analysis.

Before turning to its discussion of the specific evidentiary issues, FFS will underscore a point vital to the prejudice analysis that cuts across all of the issues -- the centrality of credibility to the jury's liability determinations. Plaintiffs assert that, even if error were found in the admission of all of the challenged evidence, these errors should be deemed harmless "given the body of evidence showing causation." *See* Plaintiffs' Brief at 45. Besides failing to offer any authority for their presumed "body of evidence" test for harmless error, plaintiffs also ignore that -- as FFS discussed in its Opening Brief -- the resolution of the central issues in the case turned on whose witnesses the jury believed. *See* FFS Opening Brief at 12-19 (§ II.D, outlining the contending theories of the case), 40-41 n.21 (identifying the testimonial evidence introduced by FFS in support of each of its key contentions).

FFS demonstrated, for each of the evidence decisions at issue, how the challenged evidence cast direct doubt on the credibility of key FFS witnesses. *See* FFS Opening Brief at 56 (discussing how the court's ruling on Exhibit 21, the 1997 OSHA report, "[a]llowed plaintiffs to introduce a government report seeming at odds with the actions of FFS's management team"), 63 (discussing how the court's ruling on the "other wrongs" evidence of witness Lauri Marquardt "invited the jury to reject the credibility of FFS's witnesses"), 66 (discussing how the court's ruling on the "hotline" evidence allowed plaintiffs to "argue...for the rejection of FFS's version of events, based on the 'bad character' of...FFS's principal on-site manager"). In a case such as this, where the resolution of the issues turned principally on whose witnesses the jury ultimately chose to believe, harmless error cannot be established simply by pointing to the quantity – or as plaintiffs put it, "the body" -- of evidence introduced in support of the winning side's case. What matters is the weight the jury ultimately gave to *each* side's evidence, and if the fairness of that weighing process was tainted by the erroneous introduction of evidence that undercut the believability of the losing side's witnesses, that error cannot fairly be deemed harmless.

a. The October 1997 OSHA Report

Incredibly, plaintiffs offer *no answer whatsoever* to FFS's ER 403 challenge to the introduction of the 1997 OSHA report. Plaintiffs argue as if the only issues concern (1) whether the report qualified as a public record under RCW 5.44.040 (and therefore was not inadmissible hearsay), and (2) whether its contents were relevant (i.e., whether its contents tended to establish the truth of plaintiffs' theory of the case, and therefore qualified as admissible under ER 401 and ER 402). Yet as the plain language of ER 403 states, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury" (emphasis added).

Here, the problems arising under ER 403 were manifold. First and foremost was the unique persuasive power of what the trial court itself labeled the results of an "independent" government investigation. *See* VRP (July 8, 2005) 66:13-14 (court's rationale for ruling) (commenting that "[t]his was apparently an independent investigator" who prepared the report). Second was the centrality of the report's contents to plaintiffs' case. FFS has described how plaintiffs put the contents of the report at the heart of their case, *see* FFS Opening Brief at 56 (describing the role of the report in plaintiffs' opening statement and closing argument), and

plaintiffs' brief on appeal only underscores the report's importance -- both in plaintiffs' summary introduction and their statement of the case, the report (trial exhibit 21) is repeatedly cited, and often as the only evidence from the trial record supporting plaintiffs' statements of fact. *See* Plaintiffs' Brief at 5 (five solo citations), 14 (two solo citations). To be sure, plaintiffs complain that they were not allowed to introduce other evidence that (they assert) would have confirmed their version of the 1997 pressure test incident, as set forth in the OSHA report. *See* Plaintiffs' Brief at 19 (discussing the granting of FFS's motion in limine to bar testimony by Steven Blush as well as various exhibits). But this complaint ignores the impact of the evidence they *were* allowed to introduce -- the results of an ostensibly "independent" government investigation that appeared to validate plaintiffs' claims of a serious threat to worker safety and the environment, and which plaintiffs proceeded to put at the very center of their presentation.⁷

Plaintiffs also ignore that the trial court's decision to admit the report constituted an eleventh-hour about-face, which left FFS in no position to rebut the report's contents. As FFS has demonstrated, from

⁷ Perhaps plaintiffs have chosen not to dispute the importance of the report to their trial proof given that their counsel, in a post-judgment article in the Washington State Trial Lawyers newsletter, expressly emphasized the significance of the report to plaintiffs' ability to put "the context of the case...in place from the outset" of the trial. *See* WSTLA "Trial News," Vol. 41, No. 3 at 20 (November 2005).

Judge Brown's May 2003 ruling excluding the report up until the very eve of the trial presided over by Judge Runge, FFS had every reason to expect that it would not have to be ready to try the events surrounding the 1997 pressure test incident. *See* FFS Opening Brief at 42-47. Judge Runge's about-face left FFS in no position to muster the witnesses and documentary evidence necessary to deconstruct -- and discredit -- the report's findings. *See* VRP (June 28, 2005) 57:10-23 (comments of FFS's counsel, cautioning that allowing plaintiffs to offer any witness on the facts underlying the 1997 pressure test would be "a major change" in the scope of the trial and FFS would require additional time to prepare for it) (also cited and quoted in FFS Opening Brief at p. 50).

Moreover, Judge Runge put FFS in this position only because of a basic misapprehension about the scope of her authority to instruct the jury, both as to the parties' contentions and as to facts not in genuine dispute. *See* FFS Opening Brief at 53 n.31 (including citations to cases approving "orientation" instructions and instructions on undisputed facts). If Judge Runge had properly apprehended the scope of her authority, she presumably would have chosen instead to give one of FFS's proposed orientation statements, either one of which would have fully informed the jury about the context of the Pipefitter I settlement (*see* (CP 2148-53) (proposed statement based on OSHA report narrative); (CP 2155-56)

(alternative statement)), and without running the very risk the judge herself expressly acknowledged: that "a letter by this investigator signed by the acting regional administrator...*looks like it bolsters or lends credibility to the facts that are contained therein.*" VRP (July 8, 2005) 31:1-4 (emphasis added).

In sum, the 1997 OSHA report is a classic example of the kind of evidence that ER 403 was intended to address: a document whose contents are relevant, but whose nature (here, a factual narrative stamped with the imprimatur of being the result of an "independent" government investigation) runs too great a risk of being given too much weight by the jury. Judge Runge herself recognized this risk, and admitted the report only because she thought she had no alternative -- a clear misapprehension of the scope of her authority as trial judge to establish context for the jury through the device of an orientation instruction. Nor can the resulting abuse of discretion be deemed harmless, given the substantial possibility that the report's contents prejudiced the jury against FFS, by undercutting the credibility of FFS's key witnesses.

Plaintiffs' response to FFS's separate hearsay challenge only manages to underscore the magnitude of the trial court's error in admitting the OSHA report. The legal centerpiece of plaintiffs' defense is the implicit equation of the investigator's report at issue here to the Social

Security Administration decision at issue in *Goodman v. Boeing Co.*, 75 Wn. App. 60, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401, 899 P.2d 1265 (1995). *See* Plaintiffs' Brief at 43 (discussing *Goodman*). The equation is entirely unjustified. A Social Security Administration disability benefits decision of the kind at issue in *Goodman* represents the end result of an administrative process in which the claimant "has a right to appear and present competent evidence, and the ALJ is required to make findings of fact based on substantial evidence found in the record." *In re Congdon*, ___ B.R. ___, 2007 WL 942202, *9 (Bankr. D.Vt. March 29, 2007) (citing 20 C.F.R. §§ 404.948(b)(2), 404.950(a), 404.953(a) (admitting decision over hearsay objection). Moreover, "[t]here are extensive regulations governing the admission of evidence in Social Security disability proceedings and the manner by which an ALJ is required to arrive at a determination." *Id.* at *10. Here, the trial court admitted the putative "findings" of an investigator, not the findings of an ALJ. No rules of evidence governed what matters the investigator could take into account in making his determinations, and FFS had no opportunity to subject the investigator to cross-examination and thereby test the basis for his "findings."⁸

⁸ Although the Court of Appeals upheld the admission of the Social Security decision in *Goodman*, the court underscored both the extent to which the trial court limited the scope of the admission (including the redaction of some of the decisions'

Plaintiffs' reading of *Goodman* and other Washington cases ignores the stringent limitations placed by Washington law on the admissibility of mere investigative reports, under our state's public records hearsay exception. As Judge Robin Hunt explained, in her opinion for Division Two of the Court of Appeals in *Bierlein v. Byrne*, 103 Wn. App. 865, 14 P.3d 823 (2000) (in which the court upheld the exclusion of an EEOC determination letter as impermissible hearsay), our state has declined to follow the federal lead and make investigative reports generally admissible under an exception to the hearsay rule. *See* 103 Wn. App. at 868-69 (discussing how Washington declined to adopt Federal Rule of Evidence 803(8), and specifically declined to endorse subsection (C) of that rule under which "factual findings resulting from an investigation made pursuant to authority granted by law" are admissible unless "the sources of information or other circumstances indicate lack of trustworthiness").

Plaintiffs attempt to limit the import of *Bierlein* to the absence either of any factual findings, or any references to specific evidence, in the EEOC determination letter at issue in that case. *See* Plaintiffs' Brief at 44,

factual statements), and the fact that all of the facts set forth in the statements admitted were *already* part of the trial record (through other evidence, both testimonial and documentary). *See* 75 Wn. App. at 81 n.12. Here, the trial court admitted *all* of the factual findings (redacting only the ultimate conclusions and recommendations), and the report was the *only* basis for these asserted facts.

quoting *Bierlin*, 103 Wn. App. at 870). But this crabbed reading ignores the broader point made by Judge Hunt, when she quoted our state Supreme Court's decision in *State v. Monson*, 113 Wn.2d 833, 784 P.2d 485 (1989), and with the following emphasis:

[N]ot every public record is automatically admissible under [this] statute [i.e., under RCW 5.44.040]....In order to be admissible, a report or document prepared by a public official must contain *facts* and *not conclusions involving the exercise of judgment or discretion or the expression of opinion*.

Bierlin, 103 Wn. App at 869, citing and quoting *State v. Monson*, 113 Wn.2d at 839 (in turn quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)) (edit's Judge Hunt's, in part).

Plaintiffs simply refuse to come to grips with the vital distinction repeatedly recognized by our Supreme Court, and applied by the Court of Appeals in *Bierlin*, between facts, on the one hand, and conclusions involving the exercise of judgment or discretion or the expression of opinion, on the other. The author of the 1997 OSHA report was setting down his conclusions about the pressure test incident, based on his exercise of judgment as to whose version of events to credit. These are not the kind of "neutral facts" (*State v. Chapman*, 98 Wn. App. 888, 892, 991 P.2d 126 (2000)) set forth in public records, whose admissibility is contemplated by RCW 5.44.040. To the contrary: These were evaluative

determinations, and a report containing such determinations should not be admitted when the author of the report is not available for cross-examination by the party against whom the report is offered. *State v. Hines*, 87 Wn. App. 98, 101, 941 P.2d 9 (1997) (error to admit a patrolman's report setting forth the results of an investigation, when the defendant had no opportunity to test the accuracy of the patrolman's statements by cross-examination).

In sum, the admission of the 1997 OSHA report also violated the prohibition against hearsay. And the reasons why the report did not qualify for admission under our state's public records exception underscore why the admission of the report also violated ER 403, and to FFS's material prejudice.

b. Marquardt's "Other Wrongs" Evidence

Plaintiffs' defense of the Marquardt "other wrongs" evidence opens with a general discussion of ER 404(b) case law. *See* Plaintiffs' Brief at 39-41. Plaintiffs then assert that their offer of proof established Ms. Marquardt's testimony "showed the bias of Manager David Foucault against persons who 'stood up for safety' and gave another example of how he retaliated against those persons[.]" citing to VRP pages 1616 through 1919 (which appear at the beginning of the volume of the trial transcript for the proceedings held on August 4, 2005). *See* Plaintiffs' Brief at 41.

Yet this citation only manages to underscore FFS's fundamental point -- that plaintiffs wanted to introduce the Marquardt evidence so they could then point to that evidence, and (effectively) urge the jury to find against FFS on the basis of the "bad character" of the company's managers.

Incredibly, plaintiffs do not offer *one single word* defending how either of the two "other wrongs" episodes testified to by Ms. Marquardt *specifically* satisfied the requirements for admissibility under the "common plan or scheme" exception to ER 404(b)'s general prohibition against "other wrongs" evidence. *See* FFS Opening Brief at 49-62 (discussing the inadmissibility of Marquardt's testimony concerning the January 1998 fumes incident, the Summer 1998 hydrogen gas incident, and her subsequent resignation). Instead, plaintiffs simply reiterate that the episodes involving Marquardt took place "during the same time period Foucault and his subordinates were retaliating against the Pipefitters" (*see* Plaintiffs' Brief at 42), making no attempt to come to grips with FFS's detailed reasons why such a connection is legally insufficient to establish the similarity required for admissibility under the common plan or scheme exception. Plaintiffs do assert that Marquardt's testimony "also showed intent, knowledge, and absence of mistake[,]" *see* Plaintiffs' Brief at 41, apparently attempting to suggest that the Marquardt evidence satisfied these other exceptions to the prohibition against "other wrongs" evidence.

But plaintiffs offer nothing in the record to show that they in fact laid a foundation for admission of the evidence under these exceptions, citing only to ER 404(b) itself and ER 607 (the general rule allowing the impeachment of a witness by any party).

Finally, plaintiffs offer no specific rebuttal to FFS's demonstration that error in the admission of the Marquardt "other wrongs" evidence was prejudicial to FFS. Indeed, how could they? Their closing argument was an open appeal to the jury to find against FFS based on the "bad character" of the company's managers, as established by the Marquardt evidence. *See* VRP (Aug. 24, 2005) 3873:8-11 (FFS "is a company where Lauri Marquardt looked to go outside the chain of command to find some kind of resolution for the fact that nobody would listen to her...[and was told] don't put your ethics ahead of your career. *That's the kind of company you're dealing with*" (emphasis added)). And in the context of a case like this, where the credibility of witnesses was central to the outcome, the substantial possibility that the jury would draw precisely such a conclusion from the Marquardt evidence cannot plausibly be gainsaid.

c. The "Hotline" Evidence

Plaintiffs' defense of the Samson "hotline" incident evidence is so summary as to amount to no defense at all. Plaintiffs' argument boils down to saying, "the Sampson evidence showed an intent to retaliate

against whistleblowers generally, therefore it was properly admitted." *See* Plaintiffs' Brief at 45. No attempt whatsoever is made to address FFS's analysis of plaintiffs' failure to establish (1) that the alleged bad act even took place, or (2) its substantial similarity to plaintiffs' case. *See* FFS Opening Brief at 64-65. Nor do plaintiffs offer any rebuttal to FFS's separate point, that the trial court erred in denying FFS the chance to rebut Sampson's testimony by impeaching him with the results of a DOE investigation that debunked the foundation for Sampson's claim. *See* FFS Opening Brief at 65-66. Finally, plaintiffs offer no rebuttal to FFS's demonstration that the admission of the Sampson evidence materially prejudiced FFS, by giving plaintiffs a way to attack the credibility of a key FFS witness. *See* FFS Opening Brief at 66-67.

2. This Court Should Also Grant a New Trial on the Issue of Front Pay Because the Law and Evidence Provide No Support for the Jury's Awards of Front Pay, and the Awards Therefore Could Only Have Been Based on Passion or Prejudice

When evaluating a trial court's denial of a motion for a new trial, the verdict must have the support of substantial evidence that would convince an unprejudiced, thinking mind. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005). Also, this Court is entitled to accept as fact those items that are conceded, undisputed, or beyond legitimate controversy. *Krivanek v. Fibreboard Corp.*, 72 Wn.

App. 632, 636, 865 P.2d 527 (1993). If the evidence does not support the verdict, denial of a motion for a new trial is an abuse of discretion. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

Plaintiffs assert that the evidence to support damages need not be mathematically exact, citing *ESCA Corp. v. KPMG Peat Marwick*, 86 Wn. App. 628, 639, 939 P.2d 1228 (1997). However, plaintiffs ignore the complete context of the cited sentence. The entire quotation reveals that *ESCA* actually supports FFS's position:

Sufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record.

Id. FFS does not claim that the jury was mathematically imprecise in awarding front pay, it argues that the award had no basis in the record whatsoever. Because the front pay award was not supported by competent evidence, it was erroneously rendered. The court should have granted FFS's new trial motion.

Plaintiffs apparently concede that front pay for Nicacio was inappropriate. They also make no reply to the argument that the award to Nicacio was unmistakable evidence that the jury award was based on passion or prejudice. *See* Plaintiffs' Brief at 45-48. Plaintiffs also do not respond to the argument that the clear evidence of passion or prejudice in

Nicacio's award calls every plaintiff's front pay award into question. *Myers v. Smith*, 51 Wn.2d 700, 706-07, 321 P.2d 551 (1958) (when passion or prejudice taints one part of jury verdict, retrial required on every issue that is "inseparably connected" to tainted issue). If Nicacio's front pay award was clearly erroneous and tainted by passion or prejudice, FFS is entitled to a retrial on front pay awards for every plaintiff. *Id.*

Plaintiffs' response regarding the front pay award to Hodgin is without merit. An employee can only receive front pay from the time of trial forward, and the jury was so instructed. CP 530. Plaintiffs concede that the jury should have followed the *Xieng* rule and awarded front pay from the time of trial until normal retirement age, unless FFS proved that an earlier cutoff date was appropriate. Plaintiffs' Brief at 45. The normal retirement age for workers such as the pipe fitters is 65. *See, e.g., Bellas v. CBS, Inc.*, 221 F.3d 517, 525 (3rd Cir. 2000). Hodgin turned 65 in 1999, six years before the trial. VRP (Aug. 1, 2005) 1496-97. The jury's front pay award to Hodgin was clear error.

Nevertheless, plaintiffs suggest that front pay for Hodgin was appropriate because Hodgin testified that, had he stayed with FFS, he would have worked beyond age 65. Plaintiffs' Brief at 47. But Hodgin clarified that even if he had continued working at Hanford, he would have retired at least one year before the trial, in 2003 or 2004. (VRP (Aug. 1,

2005) 1537:9-16). In any event, plaintiffs provide no support for the proposition that an employee can receive a front pay award beyond normal retirement age simply by testifying that he would have worked longer. They also offer no explanation for the jury's apparent decision to award front pay for years prior to the trial, in direct violation of the jury instructions.

There is no legal or factual support in the record for any award of front pay to Hodgin. Like the award to Nicacio, the Hodgin front pay award was erroneous – in clear contradiction of the facts, the law, and the jury instructions. It could only have been based on the jury's passion or prejudice, and necessitates a new front pay trial with respect to all plaintiffs.

Plaintiffs also do not directly address the error in the jury's front pay award to Cable, simply claiming that the evidence supported a front pay award to Cable through the end of 2006, one year after the trial. *See* Plaintiffs' Brief at 47. But according to the plaintiffs' own expert, that would entitle Cable to, at most, front pay of \$76,665. Plaintiffs do not address or explain how Cable's front pay award of \$230,000 is justified by any evidence in the record.

Finally, plaintiffs do not substantively respond to FFS's argument that plaintiffs received comparable employment and were not entitled to

front pay. They seemingly begin to respond to the comparable employment argument, but in the next sentence launch into a discussion about FFS's general reductions in workforce, which is a distinct argument. *See* Plaintiffs' Brief at 45-46. Plaintiffs then apparently return to the comparable employment argument three sentences later, stating that "the plaintiffs showed lost wages over time." Plaintiffs' Brief at 46. But unlike FFS, plaintiffs do not point to specific evidence in the record in relation to the jury's awards of front pay. FFS provided the trial court, and provides this court by reference, detailed support for its claim that all of the plaintiffs obtained comparable employment, earning as much if not more than they earned at Hanford. CP 460-62. Based on the record, the jury should not have awarded front pay to any plaintiff.

In reply to FFS's mitigation argument that at least five workers would have been laid off regardless of any alleged bad acts by FFS, plaintiffs argue that it is the employer's burden to prove that those workers would not have been shifted to other positions. *See* Plaintiffs' Brief at 46-47. But that is precisely what FFS *did* prove: the 135 pipe fitters that were laid off between 1998 and the time of trial were not shifted to other positions. CP 460-62. Plaintiffs do not address this issue at all. FFS met the legal standard cited by the plaintiffs for proving mitigation, and any award

of front pay for at least five of the plaintiffs was improper on that basis alone.

The jury was clearly motivated by passion or prejudice, not reason, when it awarded front pay to the plaintiffs. The trial court abused its discretion when it denied FFS's motion for a new trial on the issue of front pay.

C. No Legal or Equitable Principle Supports Plaintiffs' Cross-Appeal for Expanded Costs, and Granting Their Request Would Require This Court to Ignore Directly Controlling Supreme Court Precedent

On cross-appeal, Plaintiffs ask this Court to ignore controlling Washington Supreme Court precedent and award them costs beyond those authorized in RCW 4.84.010. In *Hume v. American Disposal Co.*, 124 Wn.2d 656, 880 P.2d 988 (1994), workers who prevailed in their claim for wrongful discharge in violation of public policy argued that an award of expanded costs against employers was an important incentive to enforce the public policy. The Supreme Court expressly rejected identical arguments, and expressly disallowed identical expanded cost claims, that plaintiffs seek here:

Absent a statute that expressly allows expanded cost recovery . . . plaintiffs are not entitled to such generous cost awards.

. . . Plaintiffs who prevail under the narrow tort of retaliatory discharge in violation of public policy based on

RCW 49.46.100 are limited to recovering the narrow statutory costs authorized in RCW 4.84.010.

Id. at 674.

Plaintiffs do not claim that any statute entitles them the expanded costs that they request. Instead, they invite this Court to follow the reasoning in *Panorama Village Condominium Owners Ass'n Board Of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 26 P.3d 910 (2001). The Supreme Court in *Panorama* did recognize that expanded costs can sometimes be warranted based upon equitable principles, citing *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991). But *Panorama* and *Olympic Steamship* both involved an insured's equitable right to recover certain litigation expenses, after being forced to sue an insurer to obtain the benefit of wrongly denied coverage. *Panorama*, 144 Wn.2d at 143; *Olympic Steamship*, 117 Wn.2d at 53. Neither is factually applicable here, and neither overruled *Hume* directly or *sub silentio*. *Panorama* cites *Hume* approvingly for the proposition that "costs" are normally limited to those costs recoverable under RCW 4.84.010. *Panorama*, 144 Wn.2d at 142.

The equitable considerations that plaintiffs claim warrant this court's departure from the clear edict of *Hume* are: (1) "exorbitant" costs of \$150,000 might discourage such public interest litigation; and (2) FFS

“delayed the litigation through appeals and motions.” *See* Plaintiffs’ Brief at 48-49.

Neither rationale warrants expanded costs here. The rationale of encouraging public interest litigation was expressly rejected in *Hume*. Also, the costs incurred by the plaintiffs were not prohibitive. The eleven plaintiffs were awarded almost \$5 million in this case, plus their attorney fees for the entire litigation. No plaintiff received less than \$170,000 in general damages alone.⁹ If costs are evenly divided among the plaintiffs, each is only responsible for \$13,636.00. Considering the size of the verdict and that this was complex litigation lasting over 6 years, that amount is not exorbitant, nor discouraging to future wrongful termination plaintiffs when compared with the verdict.

The second reason that plaintiffs cite to invoke this Court’s equitable powers is the most extraordinary: the delay of litigation “through appeals and motions.” The first two appeals in this case were taken *by the plaintiffs*. In *Brundridge v. Fluor Federal Services Inc.*, 109 Wn. App. 347, 351-52, 35 P.3d 389 (2001), *review denied*, 146 Wn.2d 1022, 92 P.3d 120 (2002), plaintiffs appealed seeking to *avoid* the less costly and faster track of arbitration. *See, e.g., Mendez v. Palm Harbor Homes*, 111 Wn. App. 446, 45 P.3d 594 (2004) (although arbitration may

⁹ Except for Nicacio, who did not request general damages.

sometimes involve higher entry costs than litigation, arbitration avoids “the formalities, expense, and delays inherent in the court system”). In 2003, plaintiffs sought discretionary review of interlocutory trial court evidentiary decisions. In an unpublished opinion this Court dismissed the discretionary appeal as improvidently granted. *See Brundridge v. Fluor Hanford, Inc.*, 2004 WL 898279, 121 Wn. App. 1024 (2004). It also is fair to say that plaintiffs made their share of motions during the course of the trial. *See, e.g.*, (CP 5751, 6395, 6555, 7174, 7714, 7729, 8977). If justice and equity demand an expanded award of costs to every party who must respond to motions during litigation, then RCW 4.84.010 is judicially repealed.

There is no legal or equitable basis to allow expanded costs to the plaintiffs here. To do so would flatly contradict the express holding of *Hume*, which has not been overruled or modified by the Supreme Court. Plaintiffs’ cross-appeal should be denied.

III. CONCLUSION

This Court should apply *Korshund II*, reverse plaintiffs’ judgments and dismiss their case with prejudice. In the alternative, this Court should vacate the judgment, and remand for a new trial on the issues of liability and front pay, while affirming the trial court’s refusal to award costs foreclosed by *Hume*.

RESPECTFULLY SUBMITTED this 26th day of June, 2007.

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP

TALMADGE LAW GROUP PLLC

By MBK for #14405
William R. Squires III
WSBA No. 04976
CORR CRONIN MICHELSON
BAUMGARDNER &
PREECE LLP
Attorneys for Appellant
Fluor Federal Services, Inc.

By Michael B. King
Michael B. King
WSBA No. 14405
Sidney Tribe
WSBA No. 33160
TALMADGE LAW GROUP PLLC
Attorneys for Appellant
Fluor Federal Services, Inc.

Corr Cronin Michelson
Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154
Telephone: (206) 625-8600
Facsimile: (206) 625-0900

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188-4630
Telephone: (206) 574-6661
Facsimile: (206) 575-1397

DECLARATION OF SERVICE

On said day below I deposited in the U. S. mail a true and accurate copy of the following document: Appellant's Reply Brief on Appeal and Answering Brief on Cross-Appeal in Cause No. 24565-9-III, to the following:

John P. Sheridan, Esq.
Law Offices of John P. Sheridan, P.S.
705 2nd Avenue, Suite 1200
Seattle, WA 98104-1798

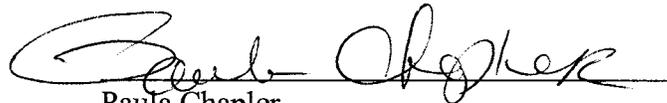
Randy Squires, III, Esq.
Carr Cronin Michelson Baumgardner & Preece LLP
1001 Fourth Avenue, Suite 3900
Seattle, WA 98154-1051

Larry C. Locker, Esq.
Summit Law Group
315 Fifth Avenue South, Suite 1000
Seattle, WA 98104

Original sent by Federal Express for filing with:
Court of Appeals, Division III
Clerk's Office
500 N. Cedar Street
Spokane, WA 98210

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

DATED: June 26, 2007, at Tukwila, Washington.



Paula Chapler
Legal Assistant
Talmadge Law Group PLLC