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No. 90946-6
WASHINGTON STATE SUPREME COURT

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GREGG BECKER,

Plaintiff,

v.

COMMUNITY HEALTH SYSTEMS, INC. d/b/a COMMUNITY
HEALTH SYSTEMS PROFESSIONAL SERVICES CORPORATION
d/b/a COMMUNITY HEALTH SYSTEMS PSC, INC. d/b/a ROCKWOOD
CLINIC P.S.; and ROCKWOOD CLINIC, P.S.,

Defendants.

**COMMUNITY HEALTH SYSTEMS PROFESSIONAL SERVICES
CORPORATION'S RESPONSE TO BRIEF OF AMICI CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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ORIGINAL

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I. SUMMARY OF ARGUMENT

Becker is today simultaneously pursuing identical relief, based on identical facts, in two separate forums: (1) Becker is prosecuting his SOX whistleblower claim in the OSHA/Department of Labor proceeding, where he has access to every form of relief available under Washington law to a wrongful discharge tort claimant, and (2) Becker is prosecuting this court proceeding. To be clear—and there is no dispute on this point—Becker is entitled to the same relief if he prevails in his SOX whistleblower proceeding as he would be entitled to if he were to prevail on his public policy tort claim. Under these circumstances, there is no reason to allow Becker to pursue a wrongful discharge tort.

Permitting Becker to pursue a state law wrongful discharge tort claim under these narrow circumstances would be contrary to decades of uncontroversial precedent. The Washington Employment Lawyers Association (“WELA”) and the Washington State Association for Justice Foundation (“WSAJ”) (collectively, “Amici”) simply have not provided any cogent reason for why a plaintiff like Becker should be allowed to simultaneously litigate the same claim in two different forums. Nor have Amici offered any compelling reason for providing to a former employee in Becker’s shoes—a person with access to a highly respected venue (federal district court) in which to pursue his whistleblower claims—a

state law wrongful discharge tort claim even if he were not simultaneously pursuing a parallel action.

Amici argue Becker should be allowed to continue to pursue his public policy tort claim because the SOX whistleblower statute includes a non-exclusivity clause. Amici ask this Court to rule that whenever a statute that provides an alternative remedy contains a non-exclusivity clause, that remedy is *per se* inadequate. To adopt such a rule, this Court would have to overrule *Korlund v. DynCorp Tri-Cities Srvs., Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2003). *Stare decisis* strongly weighs against such a drastic disruption of settled Washington law. *Korlund* provides a far superior standard than the arbitrary bright-line proposed by Amici.

II. ARGUMENT

A. A Non-Exclusivity Clause Should Not be Used as a Bright-Line Test for the Jeopardy Element

Amici propose that this Court undercut the jeopardy element by ruling that a statutory remedy is automatically inadequate whenever the statute contains a non-exclusivity clause and regardless of whether the alternative process is as robust as a wrongful discharge tort claim. Amici's proposal is based on *Piel's* dicta that a non-exclusivity clause provides "the 'strongest possible evidence' these remedies are inadequate on their own to fully vindicate public policy." *Piel v. City of Federal Way*, 177 Wn.2d 604, 617, 306 P.3d 879 (2013). To turn *Piel's* statement into a

bright-line test for the jeopardy element would require this Court to overrule *Korslund*. Because the law established in *Korslund* is neither incorrect nor harmful, *stare decisis* strongly weighs against overruling *Korslund*.

1. ***Korslund* Would Have to be Overruled if a Non-Exclusivity Clause is Used as Bright-Line Test for the Jeopardy Element**

In order to make the presence of a non-exclusivity clause a bright-line test for the adequacy of a statutory remedy, *Korslund* would have to be overruled because the ERA at issue in *Korslund* has a provision similar to SOX's non-exclusivity clause. The non-exclusivity clause in *Korslund* states:

Nonpreemption. This section may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discriminatory action taken by the employer against the employee.

42 U.S.C. § 5851(h). The existence of this provision plainly did not deter this Court from holding in *Korslund* that the ERA provided the plaintiffs with adequate alternative remedies that precluded their pursuit of a public policy wrongful discharge claim.

In *Cudney*, this Court emphasized that *Korslund* held that statutory remedies were adequate to protect the public policy **even though the statute at issue in *Korslund* (ERA) was not mandatory and exclusive.**

Cudney v. ALSCO, Inc., 172 Wn.2d 524, 535, 259 P.3d 244 (2011). The text of the majority's decision in *Cudney*, in a portion of the opinion central to the holding, leaves no doubt that under *Korslund*, the non-exclusivity of a federal alternative remedy does not control determination of the jeopardy issue:

The key question in *Korslund* was, in contrast, “whether other means of protecting the public policy [were] adequate so that recognition of a tort claim in these circumstances [was] unnecessary to protect the public policy.” *Id.* In fact, *Korslund* specifically found that statutory remedies were adequate to protect the public policy, **even though the United States Supreme Court has found that the same statute was not mandatory and exclusive.** *Id.* at 182–83, 125 P.3d 119. Our analysis here should follow our reasoning in *Korslund*. Even if a similar statute is not mandatory and exclusive, as in *Wilmont*, WISHA is still adequate to protect public policy.

Cudney, 172 Wn.2d at 535 (emphasis added).

Piel did not overrule *Korslund*. To the contrary, *Piel* explicitly states that its holding “does not require retreat” from *Korslund* or *Cudney*. 177 Wn.2d at 616. So what does *Piel*'s “strongest possible evidence” language mean?

As a starting point, it is critical to appreciate that the State statutory provision at issue in *Piel* is a world apart from the federal SOX non-exclusivity clause. In *Piel*, the Court was faced with a Washington State legislative directive instructing the State's courts that the statute must be

read as additive to any other State-law rights. It is, of course, the province of our State Legislature to dictate rights under State law, and so the Legislature's directive truly was germane. Not so for the federal Congress. The U.S. Congress has no province over a state's providing, or not providing, remedies under state law (nor is it sensible to impute to Congress collectively knowledge of 50 states' laws). In the matter now before the Court, the creation of a State tort claim for certain types of employee discharges is purely a matter of State law—to be decided by the Washington Legislature and our courts. There is no reason to indulge in the fiction that the U.S. Congress was considering the effect of a non-exclusivity clause on Washington's public policy tort when including such a clause in the federal SOX statute. The U.S. Congress's stating that it does not intend to truncate state law remedies is of no import to Washington courts as they determine whether alternative enforcement mechanisms are sufficient, under State law, for purposes of the public policy tort.

The fact that *Piel's* pertinent paragraph limits itself to giving weight to what the Washington Legislature has dictated regarding remedies is especially evident from the *Piel* Court's discussion of *Korlund* and *Cudney*. Specifically, with the *Cudney* majority (172 Wn.2d at 535) having emphatically stated in September 2011 that even the U.S.

Supreme Court found the alternative remedies at issue in *Korlund* not to be mandatory and exclusive, the only way to make sense of the *Piel* Court's statement just 21 months later about *Korlund* is by accepting that *Piel* gives weight only to what the Washington Legislature has pronounced, and no weight whatsoever to the federal Congress's pronouncement regarding non-exclusivity: "No similar language was identified under the statutory schemes at issue in *Korlund* or *Cudney*." *Piel*, 177 Wn.2d at 617. Plainly the *Piel* majority did not fail to read *Cudney* (including page 535, where the federal non-exclusivity discussion of *Korlund's* ERA statute appears). Rather, it appears that the *Piel* Court appropriately meant to ascribe importance to non-exclusivity language only when it is the dictate of this Court's co-equal branch, the Washington Legislature. Given the stark choice between concluding that the *Piel* Court did not read its own decision of 21 months prior or concluding that the *Piel* Court meant to ascribe importance to non-exclusivity language only when that language comes from the Washington Legislature, the conclusion is self-evident.

In any event, the *Piel* Court appropriately also made it clear that even if a non-exclusivity provision is in place, a court must still analyze whether the alternative remedy at issue is adequate to "vindicate public

policy.” *Piel*, 177 Wn.2d at 617. *Piel* is consistent with *Korslund*, which set forth the reason for such analysis:

[T]he question is not whether the legislature intended to foreclose a tort claim but whether other means of protecting the public policy are adequate so that recognition of a tort claim in these circumstances is unnecessary to protect the public policy.

Korslund, 156 Wn.2d at 183. Here, given SOX’s robust administrative and judicial processes (including *de novo* review in U.S. District Court) and forms of relief (coextensive with every form of relief articulated to a wrongful discharge tort claimant under State law), it is patent that Becker has an adequate alternative remedy, and so recognition of a tort claim in these circumstances is unnecessary to protect the public policy. The obvious adequacy of that alternative process is not rendered inadequate merely because SOX includes a non-exclusivity clause! Such a rule-bound approach would elevate labels over substantive analysis, which this Court routinely decries.

Amici’s proposal would wipe out this traditional adequacy analysis whenever the pertinent statute contains a non-exclusivity clause. To adopt Amici’s proposal would require this Court both to overrule *Korslund* and substitute a meritless standard for analysis.

2. *Stare Decisis* Strongly Weighs Against Overruling *Korslund*

Stare decisis requires a clear showing that an established rule is “incorrect and harmful” before it is abandoned. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The Court does not “overturn its precedents lightly,” because *stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 2036 (2014); *City of Fed. Way v. Koenig*, 167 Wn. 2d 341, 346–47, 217 P.3d 1172 (2009). Overturning well-settled precedent simply because it is deemed “no longer ‘right’” can “prove harmful,” because it “would inevitably reflect a willingness to reconsider others. And that willingness could itself threaten to substitute disruption, confusion, and uncertainty for necessary legal stability.” *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). Especially given the extremely high-profile and critically important public policy matters currently on this Court’s docket, the Court is well aware that its need for impeccable integrity is at an all-time high. Adherence to precedent, and consequent avoidance of the misperception that the Court is a semi-legislature, are the signal features of *stare decisis*.

Amici have not shown that *Korlund* should be overruled. “Before overturning a long-settled precedent,” the Court “require[s] ‘special justification,’ not just an argument that the precedent was wrongly decided.” *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2407 (2014) (quoting *Dickerson v. United States*, 530 U.S. 428, 443 (2000)). “Making the same arguments that the original court thoroughly considered and decided does not constitute a showing of ‘incorrect and harmful.’” *City of Fed. Way*, 167 Wn. 2d at 347.

Rather than adopting the presence of a non-exclusivity clause as a bright-line test for determining adequacy of an administrative proceeding, *Korlund* requires courts to look at the procedural protections and remedies available under the statute. This approach is far more likely to accurately determine the adequacy of an alternative statutory remedy. Reasoned analysis is rarely inferior to seizing on labels or mantras to adjudicate important claims and rights, as Amici advocate. This case is not an exception.

Equally important, to establish that *Korlund* should be overruled, Amici would have had to show that *Korlund's* approach is incorrect and harmful. Amici have not met their burden. *Korlund* should not be overruled, and this Court should not adopt a bright-line rule that the mere existence of a non-exclusivity clause in a federal statute renders a robust

statutory remedy inadequate to protect the public policy, regardless of the robustness of the alternative process.

B. Giving Becker a Tort Cause of Action Would Undermine the Congressional Scheme Designed to Protect the Public Policy of Honesty in Financial Reporting by Public Companies

Amicus WSJA does not mask its goal of increasing the number of tort claims. WSJA's focus is not on refining the at-issue doctrine in order to protect the various public policies; its focus is on securing individual claims, contrary to the bedrock underlying creation of the public policy wrongful discharge tort: "[I]t is the public policy that must be promoted, not [the employee's] individual interests." *Cudney*, 172 Wn.2d at 538. The sole purpose of the public policy wrongful discharge tort is to further the various public policies, such as honesty in financial reporting by public companies. WSJA has lost sight of the doctrine and its purpose.

At least amicus WELA forthrightly accepts that "the purpose of the public policy tort is the protection of employees' interests as the vehicle for protecting public policy." WELA Brief at 27 (emphasis added). Yet neither WELA nor WSJA addresses the explanation in Community Health Systems Professional Services Corporation's ("CHSPSC") Supplemental Brief for why allowing an employee like Becker to pursue a public policy tort does not further the public policy, and instead would undermine

Congress's effort to induce public company CFOs and other public company employees to act as whistleblowers. Specifically, allowing public company employees like Becker to seek relief through a wrongful discharge tort, and not inducing them to act as whistleblowers,¹ would undermine a primary incentive Congress created to encourage public company employees to **report** suspected fraud: If an employee can seek relief through the wrongful discharge tort without having reported the suspected financial fraud, then why go through the trouble of whistleblowing and obtain the same relief through the SOX administrative and federal court procedures?

Financial fraud in a public company can be difficult to discover—so difficult that the only effective mode of discovery, whistleblowing, is now part and parcel of the public policy of honest financial reporting. Congress determined that an effective way to uncover financial fraud in public companies is to extend comprehensive protection to whistleblowers. *See Day v. Staples, Inc.*, 555 F.3d 42, 52 (1st Cir. 2009) (Congress enacted SOX whistleblower protection in response to the “corporate code of silence” that “not only hampers investigations, but also

¹ Recall that Becker protests that he is not a whistleblower even though he is today prosecuting a whistleblower retaliation claim before the Department of Labor. (CP 209–222)

creates a climate where ongoing wrongdoing can occur with virtual impunity.”) (quoting S. Rep. No. 107-146, at 5 (2002)). Amicus WELA concurs that whistleblowing is essential for the public policy of honest financial reporting by public companies: “Law enforcement authorities are powerless to enforce public policy unless they become aware that it is being violated. In the absence of employees willing to expose violations of public policy, law enforcement often has no opportunity to discover or prevent public policy violations.” WELA Brief at 13–14.

How best to further the public policy? Congress has already answered that question for us by strongly promoting whistleblowing, as the First Circuit noted in *Day*, and by choosing not to extend protections to those who merely refuse to participate in the fraud, but do not whistleblow, because such silent non-offenders perpetuate the “corporate code of silence.” *Day*, 555 F.3d at 52. If employees like Becker (accepting his self-contradicted contention that he did not whistleblow) are given the same protection as whistleblowers, there will be no incentive for public company CFOs and other SOX-governed employees to step forward and report suspected securities fraud. *See* CHSPSC’s Supplemental Brief at 17–20.

Becker (disingenuously) asserts he is not a whistleblower, yet he demands a public policy wrongful discharge tort claim. Even amicus

WELA acknowledges that Becker thereby takes himself out of the core group whom the doctrine sees as needing protections in order to promote public policy: “The public policy tort was created to provide sufficient protection to employees exposing violations of public policy.” WELA Brief at 14 (emphasis added); *see also* WELA Brief at 2 (the purpose of the public policy tort is “the protection of employees who expose the violation of public policy”). Becker would like to skip over the congressionally-declared critical element of the public policy of promoting honesty in financial reporting by publicly-traded companies: whistleblowing. Whistleblowing isn’t just a frill for employees in Becker’s position; whistleblowing is at the heart of the public policy of promoting honesty in financial reporting by public companies.

If Becker truly was not a whistleblower (he was, as he candidly admits in his SOX whistleblower Complaint), then he simply is not deserving of a claim. If Becker was a whistleblower, then he has the full panoply of SOX whistleblower rights, he has an adequate federal process and access to broad remedies, and there is no reason to modify the public policy tort to give him a parallel action.

C. There is No Reason Why Becker Should be Allowed to Pursue the Same Relief in Two Forums

Becker has an adequate alternative remedy. He is currently litigating his SOX whistleblower claim through the SOX administrative proceeding designed by Congress to address whistleblower complaints. (CP 209–222) OSHA has conducted an investigation and found that Becker’s claim is covered under SOX and that the SOX administrative procedure is the correct avenue for Becker to seek relief. (A-042–043) After considering all of the evidence, OSHA then determined that Becker’s claim lacks substantive merit. Becker is pursuing his appeal rights under SOX. (A-055–076) The parties are currently engaged in discovery, and a trial will be held on Becker’s SOX claim before an ALJ on January 19, 2016. (Supplemental Appendix to Rockwood’s Supplemental Brief) Moreover, because more than 180 days have passed since Becker filed his SOX complaint, Becker can file his SOX claim in federal court today, and his claim would receive *de novo* review. 18 U.S.C. § 1514A(b)(1)(B). If he prevails, Becker will be entitled to “all relief necessary to make the employee whole,” including reinstatement with same seniority status, back pay with interest, and compensation for any special damages, including litigation costs. *See* 18 U.S.C. § 1514A(c). Amici have provided no reason why Becker should also be

able to simultaneously pursue the same relief, based on the same facts, in the state court forum. Though Amici are using this case to advocate a radical change in the law, Amici fail to say anything about why Becker should supposedly be permitted a parallel, redundant state-law proceeding. He shouldn't.

WELA advocates that the Court use a five-factor test to determine adequacy when the pertinent statute does not contain a non-exclusivity clause. WELA Brief at 27. The list of factors sheds some light on the purported rationale for parallel actions generally, but, again, WELA says not one word about how Becker, with his redundant SOX whistleblower action, fits into the five factors. Of the five factors that WELA lists, only the last factor could possibly weigh against finding that SOX provides an adequate alternative forum and a full panoply of remedies: (1) The SOX procedures and remedies are equivalent to a state law tort claim for wrongful discharge. *See* Community Health Systems Professional Services Corporation's Supplemental Brief, § IV(C). (2) The statute of limitation under SOX is 180 days "after the date on which the employee became aware of the violation" (18 U.S.C. § 1514A(b)(2)(D)), which provides sufficient time after the employee is wrongfully discharged to file a complaint. Becker had no difficulty filing his SOX Complaint timely. And given the incessant press regarding SOX whistleblower proceedings

in financial periodicals that are the staple of public company employees (Wall Street Journal, Bloomberg, New York Times, etc.), the possibilities of a public company whistleblower not being aware of her rights is nil. (3) While OSHA will perform an investigation under SOX, the aggrieved employee has the right to conduct discovery and to present his case to the ALJ. 29 C.F.R. § 18.13; 29 C.F.R. § 1980.107. The ALJ proceeding is a full-blown trial following discovery under the Federal Rules of Civil Procedure. (4) Even after the OSHA investigation yields an adverse result for the employee, the employee gets *de novo* review in U.S. District Court. See 18 U.S.C. § 1514A(b)(1). The only factor WELA advocates that does not clearly weigh in favor of finding SOX procedures to be adequate, is whether the wrongful discharge tort predates the statute. Why the temporal sequence matters is left unexplained.

Examined through either the lens of WELA's posited five-factor test or the lens of common sense, there cannot be legitimate doubt that SOX provides an adequate process and robust remedies.

The public policy tort was intended to be a **narrow exception** to the terminable-at-will doctrine. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 935, 913 P.2d 377 (1996). To ensure that the tort remains a narrow exception, the jeopardy element does not open the door to state court to claimants who cannot show that a public policy is genuinely

threatened. *Id.* at 941–42. (“The jeopardy element guarantees an employer’s personnel management decisions will not be challenged unless a public policy is genuinely threatened.”). If this tort is to remain a narrow exception to the terminable-at-will doctrine, the Court cannot permit a plaintiff to establish the jeopardy element when that plaintiff personally has an adequate alternative remedy. If an employee has an adequate alternative remedy, the absence of a wrongful-discharge tort does not threaten the public policy. *Korlund*, 156 Wn.2d at 184 (holding that if there are other adequate remedies available or if the public policy is sufficiently promoted through means other than a private suit, the public policy is not in jeopardy).

Amici have not provided a good reason for abandoning the jeopardy element. Where an employee has an adequate alternative remedy, the public policy is already protected. And where all relief available under a tort claim can be provided through the alternative, as is the case here, there is no additional benefit to allowing the employee to pursue two causes of action instead of one.

III. CONCLUSION

Amici do not address the effect on the Becker case of their proposed revision to the wrongful discharge tort. There is no reason to allow Becker to pursue a public policy tort claim because the SOX

administrative and federal court proceeding provides an adequate alternative for Becker.

Amici's only argument for why SOX supposedly is not adequate is that the SOX statute includes a non-exclusivity clause. The jeopardy element should not be turned into a bright-line rule that looks only to the existence of a non-exclusivity clause to determine whether a statutory remedy is adequate.

For the foregoing reasons, *Becker* should be reversed.

Respectfully submitted this 21st day of May, 2015.

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s/Stellman Keehnel

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was served on the following:

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

Executed at Seattle, Washington, this 21st day of May, 2015.

s/Patsy Howson
Patsy Howson

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Attached for filing is the following document:

- Community Health Systems Professional Services Corporation's Response to Brief of Amici Curiae Washington Employment Lawyers Association and Washington State Association for Justice Foundation

This brief is being submitted for filing in *Becker v. Community Health Systems, Inc.*, No. 90946-6, on behalf of:

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