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No. 90975-0

SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES ROSE,

Plaintiff-Petitioner,

v.

ANDERSON HAY & GRAIN CO.

Defendant-Respondent.

**PETITIONER'S ANSWER TO BRIEFS OF AMICI CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION &
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION**

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I. INTRODUCTION

Anderson Hay & Grain fired Petitioner Charlie Rose when he refused to endanger himself and others on the highway by driving in excess of the federally mandated maximum number of hours for truck drivers. (CP 35.) The Court of Appeals held that Mr. Rose was unable to satisfy the “jeopardy” element of the tort of wrongful discharge in violation of public policy because he once had an administrative remedy for his discharge. *Rose v. Anderson Hay & Grain Co.*, 183 Wn. App. 785, 793, 335 P.3d 440 (2014).

Washington Employment Lawyers Association (WELA) and the Washington State Association for Justice Foundation (WSAJF) both filed amicus briefs in this case. In addition to the arguments set forth in his supplemental brief, Mr. Rose answers here in order to emphasize his agreement with certain points made by amici. Specifically, Mr. Rose supports WELA’s argument that the tort should exist regardless of whether the public policy protected by the employee-plaintiff’s actions could possibly be enforced by another means.¹ Mr. Rose also supports WSAJF’s

¹ Consistent with Mr. Rose’s supplemental brief, he also support’s WELA’s analysis that alternative remedies for the employee’s discharge that are not expressly exclusive are “inadequate” for the purposes of “jeopardy.” *See* Supp. Br. of Pet’r at 16-19.

argument that the Court should reformulate the tort in line with *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984) and the Washington Law Against Discrimination (WLAD).²

II. ANSWER TO AMICUS WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

A. Mr. Rose supports WELA's argument that the tort should exist regardless of whether the public policy could possibly be enforced by another means.

Amicus WELA argues that the tort should be available to employees whose actions "directly relate" to public policy, regardless of whether there is theoretically some other means by which the policy could be enforced. Mr. Rose agrees.

The purpose of the tort is to protect public policy. *Thompson*, 102 Wn.2d at 231-32. Common sense and experience suggest that we can best accomplish this by providing a consistent remedy for those employees who come forward to prevent harm or mitigate

² As shown in Mr. Rose's Supplemental Brief, he should prevail whether or not the court adopts WSAJF's formulation of the tort. First, Mr. Rose satisfies the existing "jeopardy" element under *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013) because Congress expressly made his remedy non-exclusive of other remedies, and that is the "strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy." 177 Wn.2d at 617; see Supp. Br. of Pet'r at 16-19. Second, Mr. Rose prevails if the Court reforms the "jeopardy" element, rather than eliminating it completely. The Court can return the "jeopardy" element to a more workable form by eliminating the analysis of whether an employee's remedy for his discharge is "adequate," and focusing instead on whether the *employee's actions* served to protect public policy. Supp. Br. of Pet'r at 5-16.

danger. Public policy is imperiled when witnesses to dangerous actions must deliberate before coming forward about whether something or someone else will avert the danger. We should encourage conscientious employees who can take direct action to protect public policy to do so, without hesitation. WELA's formulation of the "jeopardy" element accomplishes this goal.³

III. ANSWER TO AMICUS WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

A. Mr. Rose supports WSAJF's argument that the Court should reformulate the tort in line with *Thompson* and the WLAD.

Amicus Curiae WSAJF argues that the current formulation of the tort is incorrect and harmful, and that the tort should return to a workable configuration based on *Thompson* and retaliation claims under the WLAD. Petitioner agrees.

The original formulation of the tort under *Thompson* was straightforward and understandable, requiring that the employee show that her discharge contravened a clear mandate of public policy. 102 Wn.2d at 232-33. Implicit in that formulation were

³ As noted in his briefing, Mr. Rose's actions were both "directly related to public policy" and "necessary to enforce public policy" under the current "jeopardy" element. Supp. Br. of Pet'r at 15. Mr. Rose argues that, regardless of the difference between "directly related" and "necessary to enforce," neither analysis should take into account the "adequacy" of alternative *remedies for the employee's discharge*. *Id.* at 9-16.

requirements that the employee prove that she acted in furtherance of public policy, and that action caused her discharge. *Id.* This version of the tort adequately protected both employees and the legitimate interests of employers from *Thompson* in 1984 until 1996, when this Court decided *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996).

In *Gardner*, the Court appeared to be searching for a structure that would address the unusual situation in which both parties had “offered legitimate and valid reasons in defense of their actions,” a situation that matched the “absence of justification” element proposed in Professor Henry Perritt’s formulation of the tort. 128 Wn.2d at 938, 941. In adopting the Perritt test, the Court also adopted the problematic “jeopardy” element. *See id.* at 941, 945.

The “jeopardy” element of the current tort – the purpose of which was not clear in Perritt’s formulation – is the root of the confusion and discord in the doctrine. The application of the element has led to nearly irreconcilable holdings by this Court. *Compare Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013) with *Korlund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn. 2d 168, 182-83, 125 P.3d 119 (2005) and *Cudney v. ALSCO*,

Inc., 172 Wn.2d 524, 259 P.3d 244 (2011). It has also left appellate judges to make conflicting decisions, *compare Rose v. Anderson Hay & Grain Co.*, 183 Wn. App. 785, 335 P.3d 440 (2014) *with Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 332 P.3d 1085 (2014), and to conclude that the doctrine as a whole requires a thoughtful reconsideration, *id.* at 954-964 (Fearing, J., concurring).

WSAJF's suggested structure eliminates the confusion caused by the "jeopardy" element by returning the tort to its pre-*Gardner* origins. At the same time, WSAJF's proposal lays a stable foundation for the future of the tort by giving it structure based on retaliation claims under the Washington Law Against Discrimination, a well-developed legal doctrine.

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IV. CONCLUSION

For the foregoing reasons, Mr. Rose supports the arguments of amici curiae WSAJF and WELA.

DATED this 21st day of May, 2015.

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CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 2015, I caused a true and correct copy of Petitioner's Answer to Briefs of Amici Curiae Washington State Association for Justice Foundation & Washington Employment Lawyers Association to be served on the following persons by electronic mail, according to agreement:

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Dear Supreme Court Clerk:

Attached please find for filing the Petitioner's Answer to Briefs of Amici Curiae WELA & Washington State Association for Justice Foundation. Thank you,

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