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**SUPREME COURT
OF THE STATE OF WASHINGTON**

CHARLES ROSE, PETITIONER

v.

ANDERSON HAY & GRAIN CO., RESPONDENT

**RESPONDENT'S ANSWER TO
AMICUS CURIAE BRIEFS FILED BY WASHINGTON
EMPLOYMENT LAWYERS ASSOCIATION AND WASHINGTON
STATE ASSOCIATION FOR JUSTICE FOUNDATION**

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I. INTRODUCTION

Amicus curiae briefs were filed in support of Petitioner Mr. Rose in this case by the Washington State Employment Lawyers Association and the Washington State Association for Justice Foundation (collectively “Amici”). Carbon copies of the amicus curiae briefs filed in this case by Amici were filed in the companion cases before the Court— *Becker v. Community Health Systems, Inc.*, Cause No. 90946-6, and *Rickman v. Premera Blue Cross*, Cause No. 91040-5. Respondent Anderson Hay and Grain (“AHG”) respectfully submits this single Answer to the Amici briefs.

As argued in more detail below and found twice by the Court of Appeals, this Court’s decision in *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), dictates the outcome of this case. *Korlund* effectively and correctly furthers public policy; thus, it remains good law. Amici fail to establish a basis for the Court to overrule *Korlund*. Accordingly, the Court of Appeal’s decisions in favor of AHG should be affirmed.

II. STATEMENT OF CASE

Mr. Rose worked as a commercial truck driver for AHG from March 2006 through November 13, 2009. (CP 113.) Mr. Rose was terminated from AHG on November 13, 2009. (CP 113.) On March 3, 2010, Mr. Rose filed an action in the United States District Court for the Eastern District of Washington alleging wrongful termination in violation of the federal Commercial Motor Vehicle Safety Act, 49 U.S.C. § 31105 (“CMVSA”). (CP 113-14.) AHG moved for dismissal based on lack of jurisdiction; pursuant to 49 U.S.C. § 31105(b), the Secretary of Labor has exclusive jurisdiction over initial complaints under the CMVSA. (CP 114.) Under 49 U.S.C. § 31105(b)(1), an employee has 180 days after the alleged violation occurred to file a complaint with the Secretary of Labor. Accordingly, Mr. Rose had until May 12, 2010 to file a complaint with the Secretary of Labor. Mr. Rose failed to file such complaint. On August 6, 2010, Mr. Rose’s federal complaint was dismissed based on lack of jurisdiction. (CP 114.)

In September 2010, Mr. Rose filed a complaint in the Kittitas County Superior Court claiming wrongful termination in violation of public policy arising from alleged violations of 49 U.S.C. § 31105. (CP 1-5.) On April 18, 2011, the trial court granted AHG’s Motion for

Summary Judgment and entered Judgment dismissing Mr. Rose's complaint for failure to satisfy the jeopardy element of a claim for discharge in violation of public policy. (CP 117-121.) This Court denied direct review of the trial court's decision and transferred the case to Division Three of the Court of Appeals on January 5, 2012.

On May 22, 2012, the Court of Appeals affirmed the trial court's grant of summary judgment. *Rose v. Anderson Hay and Grain Co.*, 168 Wn. App. 474, 276 P.3d 382 (2012), *rev. granted, matter remanded by* 180 Wn.2d 1001 (2014). Mr. Rose filed a Petition for Review with this Court in June 2012. By order dated April 2, 2014, this Court remanded the case back to Division Three of the Court of Appeals for reconsideration in light of this Court's decision in *Piel*. *Rose v. Anderson Hay and Grain, Co.*, 180 Wn.2d 1001 (2014). On September 25, 2014, the Court of Appeals again affirmed the trial court's dismissal of Mr. Rose's claims against AHG finding that "the remedies available under the CMVSA more than adequately protect the public interest in commercial motor vehicle safety." *Rose v. Anderson Hay and Grain*, 183 Wn. App. 785, 793, 335 P.3d 440 (2014).

On October 24, 2014, Mr. Rose filed a Second Petition for Review with this Court. On March 4, 2015, the Court granted Mr. Rose's

Petition for Review. The Court subsequently granted motions by Amici to file amicus curiae briefs. AHG herein responds to the amicus curiae briefs.

III. ARGUMENT

A. Summary

Disregarding *stare decisis*, Amici argue for the reversal of case precedent and rule of law established by this Court over the last 19 years. This Court's precedent surrounding the tort of wrongful termination in violation of public policy has met the objective of protecting employees while providing employers an opportunity to manage their business without the debilitating threat of frivolous lawsuits based on an amorphous tort. The four element analytical framework utilized by the Court to assess an employee's right to recover for wrongful termination in violation of public policy properly meets the Court's objective and remains the correct standard.

The only issue before the Court in this case is whether the remedies available to employees in similar circumstances as Mr. Rose are adequate as a matter of law to satisfy the jeopardy element of the analytical framework for assessing wrongful termination of in violation of

public policy. The jeopardy element serves to preserve public policy by preventing an employer from escaping liability for dismissing employees engaging in protected conduct. If adequate remedies exist to prevent an employer from escaping such liability, a public policy tort is not necessary to further the public policy. This Court's decision in *Korslund* established a guidepost for what constitutes adequate remedies to protect the public policy at issue. *Cudney v. AlSCO, Inc.*, 172 Wn.2d 524, 532, 259 P.3d 244 (2011). Unlike the statutory scheme in *Pie v. City of Federal Way I*, 177 Wn.2d 604, 617, 306 P.3d 879 (2013), the statutory scheme at issue here is virtually identical to the statutory scheme in *Korslund*; therefore, *Korslund* dictates the outcome here.

Amici requests that the Court overrule *Korslund*. As this Court recently did in *Piel*, it should “refuse to disregard the body of law [it has] developed addressing wrongful termination claims in the context of statutory schemes providing for administrative remedies.” *Piel*, 177 Wn.2d at 616. Nothing argued by Amici requires this Court to “retreat from [its] recent cases” or those cases the Court has decided over the last 19 years since its decision in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). See *Piel*, 177 Wn.2d at 616 (Court finding no reason to retreat from *Korslund* and *Cudney*). Amici has failed to demonstrate that the *Korslund* case is harmful and incorrect, as is

required to overrule *stare decisis*. Accordingly, the Court of Appeal's decisions in favor of AHG should be affirmed.

B. Adequacy of other available remedies controls jeopardy element

In *Gardner*, this Court adopted the Perritt Test, a four element analytical framework for assessing all public policy wrongful discharge torts. *Gardner*, 128 Wn.2d at 941. The Perritt Test consists of a clarity element, a jeopardy element, a causation element, and an absence of justification element. *Id.* The four elements of the Perritt Test listed by the Court in *Gardner*, were gathered and paraphrased from various sections of Henry H. Perritt Jr.'s book, *Workplace Torts: Rights and Liabilities* (1991) ("Perritt"). *Gardner*, 128 Wn.2d at 941. The Court described Professor Perritt as "one of the country's foremost scholars on labor and employment law." *Id.* The "Overview" of Professor Perritt's chapter on Public Policy Tort clearly and succinctly sets forth the Perritt Test. Perritt § 3.1 at p. 60-61. There, Professor Perritt, states

To win a public policy tort case for wrongful discharge, the employee must show:

1. Existence of a clear and substantial public policy (the *clarity* element)
2. Which would be jeopardized if employers were allowed to escape liability for terminating employees in circumstances like that involving the plaintiff (the *jeopardy* element)

3. A causal relationship between the public-policy-linked conduct and the dismissal (the *causation* element), and
4. Lack of legitimate employer interest (other than the employment-at-will rule) justifying the dismissal (the *overriding justification* element).

The only element at issue here is the jeopardy element. The key component of the jeopardy element of the Perritt Test, for our purposes, is the phrase “if employers were allowed to escape liability.” Perritt § 3.1 at p. 60. It is this phrase that mandates analysis of other remedies to determine if the employer could escape liability without the tort. If the employer is subject to liability via other adequate remedies, the public policy is not jeopardized; accordingly, the public policy tort is not necessary.

Amici argue that the following sentence from the *Gardner* Court somehow negates the need to analyze other adequate remedies if the employee’s conduct directly relates to the public policy at issue:

To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct *directly relates* to the public policy, or was *necessary* for the effective enforcement of the public policy.

Gardner, 128 Wn.2d at 945. This sentence derives from Perritt § 3.14 at pp. 75-76, in which Professor Perritt states that proving the jeopardy element requires proving the conduct at issue

further the public policy asserted, either because the public policy directly promotes the conduct (as in the public policy in favor of jury service), or because the conduct is necessary to effective enforcement of the public policy (as in a public policy against excess consumer loan charges, which depends on vigilance by bank employees). The conduct, of course, must relate to the asserted public policy.

Perritt lists this as a “subordinate factual proposition” involved in proving jeopardy. Perritt § 3.14 at 75. In no way does it negate the need to analyze other adequate remedies. It simply stands for the fact that the conduct at issue has to further public policy. As noted by the *Gardner* Court, its progeny, and Professor Perritt, the employee must still demonstrate that other means of promoting the policy are inadequate. *Gardner*, 128 Wn.2d at 945 (citing Perritt § 31.4 at 77); *see also Korslund*, 156 Wn.2d at 181-82 (citing *Hubbard v. Spokane County*, 146 Wn.2d 699, 713, 50 P.3d 602 (2002); *Gardner*, 128 Wn.2d at 945) (“And, of particular importance here, the plaintiff must also show that other means of promoting the public policy are inadequate.”).

C. Amici’s proposal would decimate the employment-at-will rule

Amici champion removal of the entire Perritt Test from the analysis of wrongful discharge in violation of public policy. Removing the jeopardy element alone would eliminate the “guarantee[] an employer’s personnel management decisions will not be challenged unless a public policy is

genuinely threatened.” *Gardner*, 128 Wn.2d at 941-42. Without the Perritt test, employers could not rely on statutory and administrative enforcement mechanisms to lend confidence to their management decisions. An amorphous tort prevents meritorious management decisions because of uncertainty and unpredictability. It effectively negates the employment-at-will rule because employers will be hesitant to terminate an employee for anything but clear cause. Maintaining the integrity of the terminable-at-will rule is why the public policy tort is, and must continue to be, narrowly construed. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 232, 685 P.2d 1081 (1984) (public tort should be narrowly construed to prevent frivolous lawsuits and to allow employers to make personnel decisions without fear of being sued); *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008) (“wrongful discharge tort is narrow and should be ‘applied cautiously’”); *see also* Amicus Curiae Brief filed in this matter by the Pacific Legal Foundation.

Amici’s suggestion to change the elements of the public policy tort to allow an employee to bring a claim based on a reasonable belief that the employee was acting in furtherance of a public policy converts the tort into one with no boundaries. An employee would not have to prove a public policy, only a reasonable belief that a public policy existed and the employee’s acts were in furtherance of the policy. The narrow exception

to the at-will doctrine established by this Court would be obliterated. Employers would be left with a constant threat of frivolous lawsuits based on unfounded allegations of threats to public policy. This is antithetical to the Court's basis for adopting the exception in the first place. *Thompson*, 102 Wn.2d at 232.

D. No basis to overrule *stare decisis*

As this Court declared as recently as May 7, 2015, it will “abandon precedent only if it is clearly shown to be incorrect and harmful.” *State v. Glasman*, No. 88913-9, 2015 WL 2145735, at *4 (May 7, 2015) (citing *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). Amici has failed to demonstrate that the Court's adoption of the Perritt Test and its application over the last 19 years, and in *Korslund* in particular, was incorrect and harmful.

Amici's arguments are rendered meritless by the application of the same test throughout other jurisdictions. See *Caspar v. Lucent Techs., Inc.*, 280 F.Supp.2d 1246, 1249 (D. Colo. 2003) (“the Colorado courts have expressly disallowed [the] application [of a public policy wrongful discharge claim] where a statute provides a wrongful discharge remedy”); *Lopez v. Burris Logistics Co.*, 952 F. Supp. 2d 396, 405 (D. Conn. 2013) (wherein court found plaintiff's claim for wrongful termination was

“embodied and protected by statute” thus plaintiff was precluded from bringing a cause of action); *Cambron v. Starwood Vacation Ownership, Inc.*, 945 F. Supp.2d 1133, 1142 (D. Hi. 2013) (court found wrongful discharge in violation of public policy claim barred due to available administrative remedies); *McWilliam v. Latah Sanitation, Inc.*, 554 F. Supp.2d 1165, 1185 (D. Id. 2008) (plaintiff’s wrongful discharge in violation of public policy claim dismissed because adequate statutory remedies existed); *Younger v. District of Columbia Public Schools*, No. 13-1296 (RMC), 2014 WL 3699776, (D.C. Cir. 2014) (availability of statutory remedies precluded suit alleging wrongful discharge in violation of public policy); *Pierce v. Zoetis, Inc.*, No. 14-CV-84-TLS, 2015 WL 789773 (N.D. Ind. Feb. 25, 2015) (court has consistently failed to recognize wrongful discharge in violation of public policy claim where statutory remedies are available); *Grubba v. Bay State Abreavises, Div. of Dresser Industries, Inc.*, 803 F.2d 746 (1st Cir. 1986) (court found that wrongful discharge action was barred due to other adequate procedures for recovery); *Sands Regent v. Valgardson*, 105 Nev. 436, 777 P.2d 989 (1989) (court would not create a new cause of action due to adequate statutory remedies covering same wrongful conduct); *Lawrence v. Nat’l Westminster Bank New Jersey*, 98 F.3d 61, 73 (3d Cir. 1996) (when a plaintiff has separate statutory remedies available a claim for wrongful

discharge in violation of public policy cannot be advanced); *Hulsmeyer v. Hospice of Southwest Ohio*, --- N.E.3d ----, 142 Ohio St.3d 236 (2014) (wrongful discharge claim precluded based upon statutory available remedies); *Shepard v. CompSource Oklahoma*, 209 P.3d 288, 292 (Ok. Supreme Ct. 2009) (court dismissed claim alleging wrongful discharge in violation of public policy because adequate statutory remedies existed); *Larmanger v. Kaiser Foundation Health Plan of the Northwest*, 895 F.Supp.2d 1033, 1046 (D. Oregon 2012) (wherein the court found no cause of action existed because plaintiff failed to pursue statutory right); *Murray v. Commercial Union Ins. Co.*, 782 F.2d 432, 436 (3d Cir. 1986) (wherein the court found administrative remedies exclusive and common law cause of action for wrongful discharge not recognized); *Gleaton v. Monumental Life Ins. Co.*, 719 F.Supp.2d 623, 633 (D.S.C. 2010) (because plaintiff had a statutory remedy available for her claim she was precluded from bringing a separate state law cause of action).

Of course, the legislature has the ability to pass laws protecting employees. In addition, as we know from *Piel*, the legislature has the ability to expressly designate remedies as being additional to other non-exclusive remedies. *Piel*, 177 Wn.2d at 617 (under RCW 41.56.905 the remedies are additional to other remedies and to be liberally construed to

accomplish their purpose). *Korlund* has been “on the books” since 2005. If the legislature believed the Court got it wrong or, more significantly, believed its decision was harmful to Washington employees, it could certainly have passed legislation providing additional protections to employees. The legislature has not done so. *See generally Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004) (legislature is presumed to be aware of judicial interpretations and failure to act suggests acquiescence).

E. Mr. Rose cannot establish the jeopardy element for wrongful discharge in violation of public policy

Mr. Rose does not dispute that the CMVSA provides protection for wrongful discharge based on a refusal to violate federal commercial motor vehicle safety regulations. 49 U.S.C. § 31105 The remedies available under the CMVSA include, in part, reinstatement, compensatory damages, backpay with interest, litigation costs, witness fees, attorney fees, and punitive damages up to \$250,000. 49 U.S.C. § 31105(b)(3). In *Korlund*, 156 Wn.2d at 182, the Court found the Energy Reorganization Act (“ERA”) “provides comprehensive remedies that serve to protect the specific public policy identified by the plaintiffs.” This Court found in *Cudney* that the “ERA serves as a guidepost by which” the Court can measure whether other statutory schemes adequately protect the public

policy at issue. *Cudney*, 172 Wn.2d at 532. Significantly, the CMVSA provides all the remedies of the ERA plus the additional remedy of punitive damages. Therefore, the CMVSA remedies are more comprehensive than the “guidepost” ERA remedies. *See id.* As found by the Court of Appeals in affirming summary judgment in this case, “the remedies available under the CMVSA more than adequately protect the public interest in commercial motor vehicle safety.” *Rose v. Anderson Hay and Grain*, 183 Wn. App. 785, 793, 335 P.3d 440 (2014).

F. Commercial motor vehicle safety is promoted, not Mr. Rose’s individual interests

As the Court established in *Hubbard*, 146 Wn.2d at 717, and reiterated in *Korslund*, 156 Wn.2d at 183, and *Cudney*, 172 Wn.2d at 538, the “other means of promoting the public policy need not be available to a particular individual so long as the other means are adequate to safeguard the public policy.” Nevertheless, Amici re-raise the issue for this Court’s determination. Again, Amici have not demonstrated a valid basis for the Court to overrule precedent.

Despite being a non-issue, a clarification is in order in regard to the remedies available to Mr. Rose in particular. Amici suggest by their general arguments that Mr. Rose did not have the robust remedies of the

CMVSA available to him personally; Amici are incorrect. Mr. Rose was terminated on November 13, 2009. Under the CMVSA, he had 180 days to file a complaint with the Secretary of Labor regarding his termination. 49 U.S.C. § 31105(b)(1). Therefore, Mr. Rose had until May 12, 2010 to file a complaint with the Secretary of Labor. On March 3, 2010, two months prior to the deadline to file with the Secretary of Labor, Mr. Rose filed a complaint in the United States District Court alleging wrongful discharge in violation of the CMVSA. Mr. Rose could have easily converted his complaint filed in District Court into a complaint filed with the Secretary of Labor. He did not do so. If he had done so and ultimately did not like the decision of the Secretary of Labor, the District Court would obtain jurisdiction to hear his case. 49 U.S.C. § 31105(c) & (d). Mr. Rose should not be allowed to now create a state cause of action by failing to take advantage of other adequate and available remedies.

G. CMVSA remedies are not supplemental to other remedies

The CMVSA non-preemption provision is analogous to the same ERA provision in *Korlund*. The ERA non-preemption provision states that the ERA “may not be construed to expand, diminish, or otherwise affect any right otherwise available to an employee under Federal or State law.” 42 U.S.C. § 5851(h). Similarly, the CMVSA non-preemption

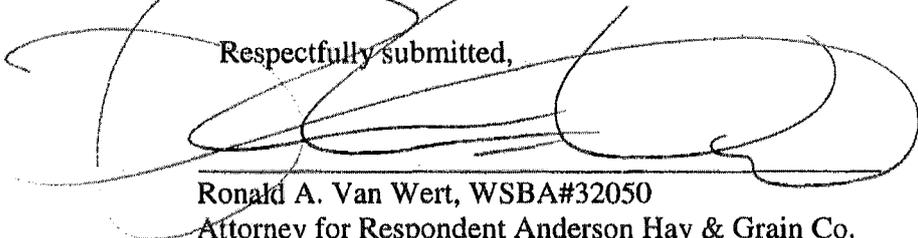
provision provides that “[n]othing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.” 49 U.S.C. § 31105(f). Like the ERA in *Korslund*, the CMVSA here does not have similar language as that identified under the PERC statutory scheme in *Piel*. See *Piel*, 177 Wn.2d at 617; see also 49 U.S.C. § 31105. Like the ERA in *Korslund*, there is no expressed congressional intent that the remedies of the CMVSA are in addition to other remedies. See 42 U.S.C. § 5851; see also 49 U.S.C. § 31105. Like the ERA in *Korslund*, the CMVSA and its remedies adequately protect the public interest. See *Korslund*, 156 Wn.2d at 183.

IV. CONCLUSION

For the foregoing reasons, Anderson Hay and Grain Co. respectfully requests that the Court affirm the Court Appeal’s decision in this matter.

Dated this 21st day of May, 2015.

Respectfully submitted,



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Please find attached for filing with the Supreme Court Clerk's Office, Respondent's Answer to Amicus Curiae Briefs Filed by Washington Employment Lawyers Association and Washington State Association for Justice Foundation, along with our Certificate of Service. All parties have previously agreed to email service. Please acknowledge receipt. Thank you.

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