No. 90975-0

SUPREME COURT
OF THE STATE OF WASHINGTON

CHARLES ROSE, PETITIONER

v.

ANDERSON HAY & GRAIN CO., RESPONDENT

RESPONDENT'S ANSWER TO SECOND PETITION FOR REVIEW

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I. INTRODUCTION

Finding that the federal Commercial Motor Vehicle Act, 49 U.S.C. § 31105 ("CMVA"), adequately protects the public interest of highway safety, the trial court and the Court of Appeals properly refused to recognize a tort for wrongful termination in violation of public policy in this matter. Petitioner Charles Rose ("Mr. Rose") is requesting that this Court reverse the decisions of the trial court and Court of Appeals. To reverse the lower courts' decisions, this Court would have to overturn its prior decisions in *Korslund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 125 P.3d 119 (2005), *Cudney v. Alsco, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011), and *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). A copy of the Court of Appeal's second decision affirming the trial court's dismissal is provided in the Appendix at pages A-1 through A-10, a copy of the Court of Appeal's first decision affirming the trial court is provided in the Appendix at pages A-11 through A-17, and a copy of the trial court's memorandum opinion is provided in the Appendix at pages A-18 through A-22.

Under *Korslund*, 156 Wn.2d at 182, *Cudney*, 172 Wn.2d at 530, and *Piel*, 177 Wn.2d at 616-17, a public policy cause of action will only be recognized if another means does not adequately safeguard the public

interest at issue. In this case, the CMVA is analogous to the statutory scheme of the Energy Reorganization Act, 42 U.S.C. § 5851(b)(2)(B) ("ERA"), which this Court in *Korslund* found to adequately protect the public interest. *See Korslund*, 156 Wn.2d at 182. Not only does the CMVA track the language of the ERA in relevant parts, including a non-preemption provision, but also provides more robust remedies, i.e., punitive damages, compared to the "guidepost" remedies of the ERA. *Compare* 49 U.S.C. § 31105(b)(3), *with* 42 U.S.C. § 5851(b)(2)(B).

Since the public interest is adequately protected by the CMVA, as it is by the less robust remedies of the ERA, Mr. Rose cannot satisfy the jeopardy prong of a claim for wrongful discharge in violation of public policy. Accordingly, the lower courts' decisions should be affirmed.

II. ASSIGNMENT OF ERROR

Anderson Hay & Grain ("AHG") assigns no error to the lower court decisions. For the reasons stated herein, Mr. Rose's asserted errors are without merit.

III. 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 CMVA. (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 CMVA. (CP 114.) 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*, 180 Wn.2d at 1001. On September 25, 2014, the Court Appeals again affirmed the trial court's dismissal of Mr. Rose's claims against AHG. *Rose v. Anderson Hay and Grain*, ___ Wn. App. ___, 335 P.3d 440 (2014).

On October 24, 2014, Mr. Rose filed a Second Petition for Review with this Court. AHG herein answers Mr. Rose's Second Petition for Review.

IV. ARGUMENT

A. Standard of Review

"Grants of summary judgment are reviewed de novo, [the Supreme Court] engage[s] in the same inquiry as the trial court." *Neighborhood Alliance of Spokane County v. County of Spokane*, 172 Wn.2d 702, 715, 261 P.3d 119 (2011).

B. CMVA remedies are not supplemental to other remedies

In *Piel*, this Court expressly held that its decision "does not require retreat from" *Korslund* and *Cudney*. *Piel*, 177 Wn.2d at 616. Distinguishing *Korslund* and *Cudney* from *Piel*, this Court found that "[n]o similar language was identified under the statutory schemes in *Korslund* and *Cudney*" as was found in *Piel*; the *Piel* statutory language established that the remedies available to the Public Employment Relations Commission ("PERC") were intended to be in addition to other remedies. *Id.* at 617. No similar language is found under the CMVA here either; thus, *Korslund* and *Cudney* control this case.

Mr. Rose argues that the non-preemption provision of the CMVA creates a separate "avenue" for Mr. Rose to file a state public policy claim. (Second Petition for Review at 9.) However, Mr. Rose cannot

differentiate the non-preemption provision of the CMVA from that of the ERA in order to distinguish this case from *Korslund*. See Korslund, 156 Wn.2d at 182. The CMVA non-preemption provision is analogous to the ERA. 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 CMVA 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 CMVA 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 CMVA 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 CMVA and its remedies adequately protect the public interest. *See Korslund*, 156 Wn.2d at 183.

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

The "wrongful discharge tort is narrow and should be 'applied cautiously.'" *Cudney*, 172 Wn.2d at 530 (quoting *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 208, 193 P.3d 128 (2008)). To establish a claim for wrongful discharge in violation of public policy, a plaintiff must prove, "(1) the existence of a clear public policy (*clarity* element); (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (*jeopardy* element); and (3) that the public-policy-linked conduct caused the dismissal (*causation* element)." *Korslund*, 156 Wn.2d at 178 (quoting *Hubbard v. Spokane County*, 146 Wn.2d 699, 707, 50 P.3d 602 (2002)). Although all elements must be proved by Plaintiff, the jeopardy element is only at issue here. To establish the jeopardy element, a plaintiff must not only prove that discouraging the conduct the plaintiff engaged in would jeopardize public policy, but also, must prove "that other means of promoting the public policy are inadequate." *Korslund*, 156 Wn.2d at 182 (citing *Hubbard*, 146 Wn.2d at 713, 50 P.3d 602; *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 945, 913 P.2d 377 (1996)). In *Cudney*, 172 Wn.2d at 530, this Court remarked

> this court has repeatedly applied this strict adequacy standard, holding that a tort of wrongful discharge in violation of public policy should be precluded unless the public policy is inadequately promoted through other means and thereby maintaining only a narrow exception to the underlying doctrine of at-will employment. *See Gardner,* 128 Wash.2d at 945, 913 P.2d 377; *Hubbard,* 146 Wash.2d at 713, 50 P.3d 602; *Korslund,* 156 Wash.2d at 181–82, 125 P.3d 119; *Danny,* 165 Wash.2d at 222, 193 P.3d 128.

Mr. Rose does not dispute that the CMVA provides protection for wrongful discharge based on a refusal to violate federal commercial motor vehicle safety regulations. 49 U.S.C. § 31105 provides, in pertinent part,

> **(a) Prohibitions.—(1)** A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—
>
> . . .
>
> **(B)** the employee refuses to operate a vehicle because—
>
> **(i)** the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety, health or security; . . .
>
> . . .
>
> **(b) Filing complaints and procedures.—**
>
> . . .
>
> **(3)(A)** If the Secretary of Labor decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary of Labor shall order the person to--

> **(i)** take affirmative action to abate the violation;
>
> **(ii)** reinstate the complainant to the former position with the same pay and terms and privileges of employment; and
>
> **(iii)** pay compensatory damages, including backpay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.
>
> **(B)** If the Secretary of Labor issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary of Labor may assess against the person against whom the order is issued the costs (including attorney fees) reasonably incurred by the complainant in bringing the complaint. The Secretary of Labor shall determine the costs that reasonably were incurred.
>
> **(C)** Relief in any action under subsection (b) may include punitive damages in an amount not to exceed $250,000.

Mr. Rose argues that the remedies provided by 49 U.S.C. § 31105 are inadequate to protect public policy because (1) they do not include emotional distress damages and (2) at the time Mr. Rose filed his state court cause of action, the remedies of 49 U.S.C. § 31105 were no longer available to him, individually.

(1) Remedies under CMVA are robust and comprehensive

The remedies available under the CMVA 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 *Korslund*, 156 Wn.2d at 182, this Court found the 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 CMVA provides all the remedies of the ERA plus the additional remedy of punitive damages. Therefore, the CMVA remedies are more comprehensive than the "guidepost" ERA remedies. *See id.*

Furthermore, federal courts have recognized emotional distress damages as compensatory damages, which are available under the CMVA, 49 U.S.C. § 31105(b)(3)(A)(iii). *See Simas v. First Citizen's Federal Credit Union*, 170 F.3d 37, 47 (1st Cir. 1999) (emotional distress damages fall within compensatory damages remedy under Federal Credit Union Act); *Calhoun v. U.S. Dept. of Labor*, 576 F.3d 201, 208 (4th Cir. 2009)

(ALJ awarded compensatory damages for emotional distress under 49 U.S.C. § 31105; the Administrative Review Board overturned on other grounds); *see also* Restatement (Second) of Torts § 905 (2010) ("Compensatory damages that may be awarded without proof of pecuniary loss include compensation . . . for emotional distress."). Accordingly, Mr. Rose's argument that emotional distress damages are not available under the CMVA is misplaced.

Mr. Rose cannot show that the "robust statutory remedies" available under the CMVA are inadequate to protect the public interest in commercial motor vehicle safety. *See generally Cudney*, 172 Wn.2d at 536. Like the Plaintiff in *Cudney*, 172 Wn.2d at 530, Mr. Rose argues for "the expansion of the 'wrongful discharge against public policy' tort when he asks to proceed despite the existence of hardy statutory remedies that protect the relevant public policies." Such an expansion is not warranted and would be contrary to this Court's decisions in *Korslund, Cudney,* and *Piel.*

(2) Commercial motor vehicle safety is promoted, not Mr. Rose's individual interests

Mr. Rose argues that 49 U.S.C. § 31105 is inadequate because it was unavailable to him at the time he filed his state court cause of action.

As this 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." As the Court stated in *Cudney*, 172 Wn.2d at 538, "we must remember that it is the public policy that must be promoted, not . . . individual interests." Thus, even if the remedies under 49 U.S.C. § 31105 were never available to Mr. Rose personally, they would preclude his public policy claim under state law because the remedies adequately protect the public interest.

Mr. Rose has failed to show that the federal protections for commercial motor vehicle safety under the CMVA are inadequate to promote the public policy of commercial motor vehicle safety. Thus, Mr. Rose has failed to justify a tort of wrongful discharge in violation of public policy in this matter.

V. CONCLUSION

For the foregoing reasons, Anderson Hay and Grain Co. respectfully requests that the Court deny Mr. Rose's Second Petition for

Review and affirm the lower courts' dismissal of Mr. Rose's claim against Anderson Hay and Grain Co. with prejudice.

Dated this 24th day of November, 2014.

Respectfully submitted,

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VI. APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHARLES ROSE, Appellant, v. ANDERSON HAY AND GRAIN COMPANY, Respondent.	)	No. 30545-7-III PUBLISHED OPINION

BROWN, A.C.J. – Charles Rose sued his former employer, Anderson Hay and Grain Company (AHG), in Kittitas County Superior Court for his alleged wrongful discharge in violation of public policy after a similar suit was dismissed in federal court because he had failed to timely exhaust his federal administrative remedies. The state court dismissed his action, reasoning his federal administrative remedies would have been adequate to vindicate the public policy had he timely filed his administrative complaint. Mr. Rose appealed and this court affirmed. Our Supreme Court remanded the matter back to this court for reconsideration in light of that court's recent opinion in *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). *See Rose v. Anderson Hay and Grain Co.*, 180 Wn.2d 1001, 327 P.3d 613 (2014). On reconsideration, we again affirm the trial court.

FACTS

Mr. Rose worked as a commercial truck driver for AHG from March 2006 through November 2009. He alleges AHG terminated him for refusing to complete his shift, which he claims would have forced him to exceed the maximum allowed hours-of-service under federal regulations and would have further required him to violate federal regulations by falsifying time sheets.

On March 3, 2010, Mr. Rose sued in federal court, arguing his termination from AHG violated the Commercial Motor Vehicle Safety Act (CMVSA) (49 U.S.C. ch. 311). AHG requested dismissal based on 49 U.S.C. § 31105(b), which provides that the Secretary of Labor (secretary) has exclusive jurisdiction over initial complaints under the CMVSA. On August 6, 2010, the federal court dismissed Mr. Rose's complaint based on lack of jurisdiction. The dismissal came three months after the expiration of the time limit for filing for administrative relief. Mr. Rose did not pursue a federal appeal.

In September 2010, Mr. Rose sued in state court alleging wrongful termination in violation of public policy arising from alleged violations of 49 U.S.C. § 31105. Based partly on *Korslund v. DynCorp Tri-Cities Services*, 156 Wn.2d 168, 183, 125 P.3d 119 (2005), AHG requested summary judgment dismissal of Mr. Rose's claim, arguing he failed to satisfy the jeopardy element necessary to maintain a public policy claim. AHG further argued the CMVSA provides comprehensive remedies that serve to protect the specific public policy identified by Mr. Rose and even included punitive damages. Thus,

an adequate alternative means of promoting the public policy existed, which, as a matter of law, foreclosed Mr. Rose's public policy cause of action.

The trial court agreed and on April 18, 2011, the court granted AHG's motion for summary judgment and entered judgment dismissing Mr. Rose's complaint. The trial court partly reasoned that had Mr. Rose timely pursued his federal administrative remedies, they would have been adequate to vindicate the public policy, and concluded: "The remedies available under 49 U.S.C. § 31105(b) are adequate to protect public policy on which Mr. Rose relies as a matter of law." Clerk's Papers (CP) at 116. This court affirmed, holding "the trial court correctly dismissed Mr. Rose's claim of wrongful termination in violation of public policy in light of federal statutes protecting truck drivers who refuse to violate safety regulations." *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 478, 276 P.3d 382 (2012), *remanded*, 180 Wn.2d 1001, 327 P.3d 613 (2014). The Supreme Court remanded the matter to this court for reconsideration in light of *Piel*.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Mr. Rose's wrongful termination in violation of public policy action. He contends he presented a viable tort claim for wrongful termination in violation of public policy because the administrative remedies are inadequate.

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment when no genuine

issue of material fact remains and the moving party is entitled to judgment as a matter of law. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)).

In a summary judgment motion, the burden is on the moving party to demonstrate that summary judgment is proper. *Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Id.* And we resolve any doubts about the existence of a genuine issue of material fact against the party moving for summary judgment. *Id.* "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

To establish a common law claim of wrongful discharge in violation of public policy, the plaintiff must prove there exists a clear public policy (clarity element), discouraging the conduct in which the employee engaged would jeopardize the public policy (jeopardy element), and the policy-linked conduct caused the dismissal (causation element). *Korslund*, 156 Wn.2d at 178. At issue here is the jeopardy element. In order to establish the jeopardy element, the plaintiff must show that other means of promoting the public policy are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011). Protecting the public is the policy that must be promoted, not protecting the employee's individual interests. *Id.* at 538. In other words,

the test of whether a tort claim for wrongful termination in violation of public policy is viable is if means, other than a civil lawsuit, are inadequate to promote the public policy.

The federal CMVSA prohibits an employer from discharging an employee who refuses to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. 49 U.S.C. § 31105(a)(1)(B). An employee alleging discharge in violation of this statute can file a complaint with the secretary no later than 180 days after the alleged violation occurred. 49 U.S.C. § 31105(b)(1). If the secretary determines that an employer violated the statute, the secretary can take affirmative action to abate the violation, reinstate the employee to the former position with the same pay and terms, and require the employer to pay compensatory damages, including back pay with interest and compensation for special damages sustained by the wrongful termination, including litigation costs, expert witness fees, and reasonable attorney fees. 49 U.S.C. § 31105(b)(3)(A). By its terms nothing in the statute 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). The Supreme Court cases of *Korslund*, *Cudney*, and *Piel* are instructive.

The plaintiffs in *Korslund* claimed they were wrongfully terminated for reporting safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. The court held that because the federal Energy Reorganization Act (ERA), provided an administrative process for adjudicating whistleblower claims and provided for

reinstatement, back pay, and other compensatory damages, an adequate remedy existed that protected the public interest. *Korslund*, 156 Wn.2d at 182-83.

In *Cudney*, the plaintiff claimed he was discharged after reporting that his supervisor was drinking on the job and had driven a company vehicle while intoxicated. The court held the Washington Industrial Safety and Health Act (WISHA) provided a sufficient administrative remedy, and that state laws on driving while intoxicated also adequately protected the public. *Cudney*, 172 Wn.2d at 527.

But, in *Piel*, the court held the administrative remedies available through the Public Employment Relations Commission (PERC) under chapter 41.56 RCW were inadequate, on their own, to fully vindicate public policy when a public employer discharges a public employee for asserting collective bargaining rights.

Unlike *Korslund* and *Cudney*, *Piel* involved a prior case holding PERC remedies failed to fully address the broader public interests involved because it protected personal contractual rights solely. 177 Wn.2d at 616-17 (quoting *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 805, 809, 991 P.2d 1135 (2000)). And unlike *Korslund* and *Cudney*, *Piel* involved a statute declaring PERC remedies supplement others and must be liberally construed to accomplish their purpose. *Id.* at 617 (quoting RCW 41.56.905). In those circumstances, the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy. *Id.* The *Piel* decision analyzed a single issue, "[a]re the remedies available to a public employee under chapter 41.56 RCW adequate as a matter of law, such that the employee may not assert a tort claim

for wrongful discharge in violation of public policy?" 177 Wn.2d at 609. The *Piel* court found that the "limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge." *Id.* at 616.

The *Piel* court specifically reasoned its decision "does not require retreat from [*Korslund* or *Cudney*]." 177 Wn.2d at 616. The *Piel* court noted that the administrative schemes at issue in *Korslund* and *Cudney* were not previously found to be inadequate to protect public policy and, unlike PERC, did not include a provision stating that the "'provisions of this chapter are intended to be additional to other remedies and shall be liberally construed.'" *Id.* at 617 (quoting RCW 41.56.905). The *Piel* court recognized that *Korslund* found the ERA to have "comprehensive remedies," including back pay, compensatory damages, and attorney and expert witness fees. *Id.* at 613 (citing *Korslund*, 156 Wn.2d at 182). The ERA also contains a provision, similar to the CMVSA, that the ERA was not intended to affect "any right otherwise available to an employee under Federal or State law"; there is no similar safeguard for common law claims. 42 U.S.C. § 5851(h). *Piel* further recognized that *Cudney* found the remedies available under WISHA to be "more comprehensive than the ERA and . . . more than adequate." *Id.* (citing *Cudney*, 172 Wn.2d at 533). Accordingly, if a statutory scheme has language and remedies analogous to those at issue in *Korslund* or *Cudney*, the scheme is distinguished from *Piel* and has comprehensive remedies to protect the public interest.

In contrast, this court recently affirmed a trial court's denial of a defendant's request to dismiss a wrongful termination in violation of public policy claim, finding the plaintiff's case was "'the most compelling case for protection' under a public policy tort" because Mr. Becker would be personally responsible if he committed the crime that his employer requested. *Becker v. Comty. Health Systems, Inc.*, 2014 WL 3973083 at *9 (quoting Janie F. Schulman & Nancy M. Modesitt, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE ch. 5.II.A.1, at 101 (2d ed. 2004). There, the employer ordered its chief financial officer, Gregg Becker, to submit false information to the U.S. Securities and Exchange Commission of a $4 million operating loss in 2012 while Mr. Becker projected a $12 million operating loss. *Becker*, 2014 WL 3973083 at *1. He resigned. *Id.* This court held that the jeopardy element of Mr. Becker's wrongful discharge claim was satisfied because there was no other means for promoting the public policy of honesty in corporate financial reporting. *Id.* at *10.

Here, the CMVSA "undisputedly" protects the public interest of "highway safety." *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1483 (D.C. 1994). The CMVSA further prohibits an employer from discharging an employee who refuses to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. Further, if it is determined an employer violated the statute, the Secretary of Labor can take affirmative action to abate the violation, reinstate the employee to the former position with the same pay and terms, and require the employer to pay compensatory damages, including back pay with interest and compensation for special damages

sustained by the wrongful termination, including litigation costs, expert witness fees, and reasonable attorney fees. 49 U.S.C. § 31105(b)(3)(A). By its terms, nothing in the statute 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).

Similar to the statute at issue in *Korslund*, the remedies that could have been available here under the CMVSA include reinstatement, compensatory damages, back pay with interest, litigation costs, witness fees, and attorney fees. 49 U.S.C. § 31105(b)(3)(A). The CMVSA provides for punitive damages, making its remedies more comprehensive than the ERA. 49 U.S.C. § 31105(b)(3)(C); *see Cudney*, 172 Wn.2d at 532 (WISHA remedies more comprehensive than the "guidepost" remedies of ERA and, therefore, more than adequately protect the public policy of protection of workers who report safety violations). Accordingly, the remedies available under the CMVSA more than adequately protect the public interest in commercial motor vehicle safety. Without satisfying the jeopardy element, the trial court correctly dismissed Mr. Rose's claim of wrongful termination in violation of public policy.

Affirmed.

Brown, A.C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.

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In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CHARLES ROSE, Appellant, v. ANDERSON HAY AND GRAIN COMPANY, Respondent.	)	No. 30545-7-III PUBLISHED OPINION

Brown, J. • Charles Rose sued his former employer, Anderson Hay and Grain Company (AHG), in the Kittitas County trial court for his alleged unlawful employment termination after a similar suit was dismissed in federal court for his failure to exhaust administrative remedies as set forth in 49 U.S.C. § 31105(b)(1). The trial court similarly dismissed his action. Mr. Rose appeals, contending he had the option to file his claim in federal court, state court, or with the Secretary of Labor. Mainly Mr. Rose urges us to reject or modify *Korslund v. DynCorp Tri-Cities Services*, 156 Wn.2d 168, 183, 125 P.3d

119 (2005), which precludes his claim. We decline and affirm.

FACTS

Mr. Rose worked as a commercial truck driver for AHG from March 2006 through November 2009. He alleges AHG terminated him for refusing to violate certain federal work regulations. On March 3, 2010, Mr. Rose sued in federal court, alleging his AHG termination violated the Commercial Motor Vehicle Safety Act (CMVSA) (49 U.S.C. chapter 311). AHG requested dismissal based on 49 U.S.C. § 31105(b)(1), providing that the Secretary of Labor has exclusive jurisdiction over initial complaints under the CMVSA. On August 6, 2010, the federal court dismissed Mr. Rose's complaint for lack of jurisdiction, three months after the expiration of the time limit for filing for administrative relief. Apparently, Mr. Rose chose not to pursue a federal appeal.

Instead, in September 2010, Mr. Rose sued in the Kittitas County Superior Court alleging wrongful termination in violation of state public policy arising from alleged violations of 49 U.S.C. § 31105. Based partly on *Korslund*, AHG requested summary judgment dismissal of Mr. Rose's claim, arguing he failed to satisfy the jeopardy element necessary to maintain a public policy claim. AHG reasoned the CMVSA provides comprehensive remedies protecting the specific public policy identified by Mr. Rose.

Thus, it argued an adequate alternative means of promoting the public policy exists, that, as a matter of law, forecloses Mr. Rose's public policy cause of action.

The trial court agreed and on April 18, 2011, it summarily dismissed Mr. Rose's complaint. On transfer from our Supreme Court, we now consider his appeal.

ANALYSIS

The issue is whether the trial court erred in summarily dismissing Mr. Rose's wrongful termination action in violation of public policy. While acknowledging *Korslund*, Mr. Rose nevertheless contends he should not be required to exhaust his administrative remedies before suing in state court.

We review summary judgment orders de novo, performing the same inquiry as the superior court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). The superior court properly grants summary judgment when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Morin v. Harrell*, 161 Wn.2d 226, 230, 164 P.3d 495 (2007) (citing CR 56(c)). In a summary judgment motion, the burden is on the moving party to demonstrate summary judgment is proper. *Atherton Condo. Apartment-Owners Assoc. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We consider all the facts submitted and the reasonable inferences from them in the light most favorable to the nonmoving party. *Id.* We resolve any doubts about the existence of a genuine issue of material fact

against the party moving for summary judgment. *Id.* "Summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion." *Lilly v. Lynch*, 88 Wn. App. 306, 312, 945 P.2d 727 (1997).

To establish a claim for wrongful discharge in violation of public policy, the plaintiff must prove a clear public policy exists (clarity element), discouraging the conduct in which the employee engaged would jeopardize the public policy (jeopardy element), and the policy-linked conduct caused the dismissal (causation element). *Korslund*, 156 Wn.2d at 178. To establish the jeopardy element, the plaintiff must show other means of promoting public policy are inadequate. *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 530, 259 P.3d 244 (2011). Protecting the public is the policy that must be promoted, not protecting the employee's individual interests. *Id.* at 538.

The jeopardy element alone is disputed. Federal law prohibits an employer from discharging an employee who refuses to operate a vehicle in violation of federal regulations or standards related to commercial vehicle safety. 49 U.S.C. § 31105(a)(1)(B). An employee alleging discharge in violation of this statute may file a complaint with the Secretary of Labor no later than 180 days after the alleged violation occurred. 49 U.S.C. § 31105(b)(1). If the secretary determines an employer has violated the statute, the secretary can take affirmative action to abate the violation, reinstate the employee to the former position with the same pay and terms, and require the employer to

pay compensatory damages, including back pay with interest and compensation for special damages sustained by the wrongful termination, including litigation costs, expert witness fees, and reasonable attorney fees. 49 U.S.C. § 31105(b)(3)(A)(i)-(iii). By its terms, nothing in the statute 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).

As can be seen, the federal statute provides an adequate remedy. *Korslund* is instructive. The plaintiffs there claimed they were wrongfully terminated for reporting safety violations, mismanagement, and fraud at the Hanford Nuclear Reservation. The *Korslund* court held that because the federal Energy Reorganization Act, 42 U.S.C. § 5851, provided an administrative process for adjudicating whistleblower claims and provided for reinstatement, back pay, and other compensatory damages, an adequate remedy existed that protected the public interest. *Korslund*, 156 Wn.2d at 182-83.

And, in *Cudney*, the plaintiff claimed he was discharged after reporting his supervisor was drinking on the job and had driven a company vehicle while intoxicated. The *Cudney* court held that the Washington Industrial Safety and Health Act, RCW 49.17.160, provided a sufficient administrative remedy, and that state laws on driving while intoxicated adequately protected the public. *Cudney*, 172 Wn.2d at 527.

Mr. Rose argues the federal statutory scheme does not preempt state remedies. But the question is not whether the federal act preempts state tort claims generally but whether a state tort claim for wrongful discharge in violation of public policy exists given that the federal act provides adequate protection of the public interest. *See Korslund*, 156 Wn.2d at 183. Recognizing that *Korslund* precludes him from establishing a claim, Mr. Rose urges us to reject *Korslund* or modify it. We decline. We are bound to follow *Korslund.* Moreover, the *Korslund* analysis was reaffirmed in *Cudney.* As to modifying *Korslund*, Mr. Rose argues the federal administrative remedy is not available to him because the federal statute of limitations expired before he filed his state suit. But the *Korslund* court foreclosed this argument when it reasoned the other means of protecting the public policy need not be available specifically to the plaintiff so long as the other means are adequate to protect the public policy. *Korslund*, 156 Wn.2d at 183.

In sum, we conclude the trial court correctly dismissed Mr. Rose's claim of wrongful termination in violation of public policy in light of federal statutes protecting truck drivers who refuse to violate safety regulations.

Affirmed.

Brown, J.

WE CONCUR:

Korsmo, C.J.

Kulik, J.

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

CHARLES ROSE, Plaintiff, vs. ANDERSON HAY AND GRAIN COMPANY, Defendant.	No. 10 2 00441 9 MEMORANDUM DECISION

INTRODUCTION

The court heard Anderson Hay and Grain Company's motion for summary judgment of dismissal on March 25, 2011. Ronald Van Wert appeared and argued for Anderson Hay and Grain and Gregory Staeheli appeared and argued against the motion on behalf of Charles Rose. The court took the matter under advisement to consider the arguments.

DISCUSSION

1. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727,

729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

Although the moving party bears the initial burden of showing the absence of an issue of material fact, once this initial showing is met, the burden shifts to the non-moving party, who must set forth specific, admissible facts showing that there is a genuine issue of material fact for trial. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226 (1989). The moving party can satisfy its initial burden in either of two ways: (1) it can set forth its version of the facts, and allege there is no genuine issue as to those facts; or (2) it can simply point out to the court that no evidence exists to support the non-moving party's case. Howell v. Blood Bank, 117 Wn.2d 619, 624 (1991); Guile v. Ballard Community Hospital, 70 Wn.App. 18, 21 (1993).

2. Undisputed Facts. The plaintiff Charles Rose drove a commercial truck for Anderson Hay and Grain (Anderson) from March 2006 to and including November 13, 2009. Because he drove in interstate commerce Charles Rose was subject to the Federal Motor Carrier Safety Administration's hours of service regulations. See 49 C.F.R. 395.1. Mr. Rose was terminated from Anderson on November 13, 2009. He alleges he was terminated for refusing to complete his shift which he claims, if completed, would have forced him to exceed the maximum allowed hours of service under the federal regulations and would require him to falsify time sheets in violation of federal regulations. Mr. Rose alleges that Anderson's actions violate the Federal Motor Carrier Regulations and the Commercial Motor Vehicle Act (49 U.S.C. § 31105).

On or about March 3, 2010 Mr. Rose filed an action in the United States District Court for the Eastern District of Washington making the same allegations he claims in

this lawsuit. Anderson moved for dismissal based on lack of jurisdiction, which it contended lied exclusively with the Secretary of Labor for initial complaints under the Commercial Motor Vehicle Act. On August 6, 2010 the federal complaint was dismissed based on the lack of jurisdiction. It was determined Mr. Rose should have initiated his federal claim administratively with the Secretary of Labor pursuant to 49 U.S.C. § 31105(b).

Mr. Rose filed this action on September 26, 2010 based upon his claim of wrongful termination in violation of public policy arising out of the alleged violations of 49 U.S.C. § 31105.

3. Decision. Mr. Rose does not dispute that his allegations of wrongful discharge arising out of his alleged refusal to violate federal regulations fit squarely within the protections offered him under 49 U.S.C. § 31105. Rather, he contends the remedies provided by that federal law are inadequate.

The claim for wrongful discharge in violation of public policy may arise when an employer discharges an employee for reasons that contravene a clear mandate of public policy. *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936 (1996). The cause of action was first recognized in this state as an exception to the rule that employment contracts that are indefinite in duration may be terminated at will by either the employer or employee. *Thompson v. St. Regis Paper Company*, 102 Wn.2d 219, 231-33 (1984). The claim of wrongful discharge in violation of public policy is a claim of an intentional tort; the plaintiff must establish wrongful intent to discharge in violation of public policy. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 177 (1994). To satisfy the elements of the cause of action, plaintiff must prove (1) the existence of a clear public policy, (the clarity element); and (2) that discouraging the conduct in which he or she engaged would jeopardize public policy (the jeopardy element); and (3) that the public policy linked conduct caused the dismissal (causation element). *Hubbard v. Spokane County*, 146 Wn.2d 699, 707 (2002).

The "jeopardy" element is at issue here. In order to establish jeopardy, "a plaintiff must show that he or she engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy. This requires the plaintiff to argue that other means for promoting the

policy are inadequate." *Hubbard, supra* at 945. In other words, the plaintiff has to prove that discouraging the conduct that he or she engaged in would jeopardize public policy and that he or she has no other adequate means of promoting the public policy. While the question of whether the jeopardy element is satisfied generally involves a question of fact, *Hubbard, supra* at 715, the question of whether adequate alternative means for promoting the public policy exists may present a question of law; in other words, where the inquiry is limited to examining existing laws to determine whether they provide adequate alternative means of promoting public policy. *Korslund v. Dyncorp. Tri-Cities Services*, 156 Wn.2d 168, 182 (2005), the "other means of promoting the public policy need not be available" to the person seeking to bring the tort claim "so long as the other means are adequate to safeguard the public policy." *Korslund, supra* at 183, *quoting Hubbard, supra at 717.*

Here, Mr. Rose argues that the remedies afforded to him under 49 U.S.C. § 31105 are not currently available to him so they do not adequately protect his interest. However, when his cause of action arose he did have available to him the full gamut of remedies provided in 49 U.S.C. § 31105(b)(1). He could have made application to the Secretary of Labor to conduct an investigation within 60 days. If the Secretary of Labor found that it was reasonable to believe a violation occurred the Secretary of Labor could have ordered the employer to take affirmative action to abate the violation, reinstate the plaintiff to the former position with pay and terms and order the payment of compensatory damages including back pay with interest and compensation for any special damages sustained, including litigation costs, expert witness fees and reasonable attorney's fees. See 49 U.S.C. § 31105(b)(3)(A)(i), (ii) and (iii). The Secretary of Labor could also have imposed punitive damages of $350,000. These remedies adequately protect the public policy that prohibits the retaliation and discharge of an employer for refusing to violate federal safety regulations. The fact the plaintiff Mr. Rose failed to take advantage of the alternative remedies available to him does not now make those other means of promoting public policy inadequate. The available alternative remedies under 49 U.S.C. § 31105(b) are available generally to adequately safeguard the public policy, were available to Mr. Rose at the time his cause of action

occurred and the fact that they are no longer available does not now satisfy the jeopardy element to bootstrap Mr. Rose's cause of action in state court.

CONCLUSION

The remedies available under 49 U.S.C. § 31105(b) are adequate to protect public policy on which Mr. Rose relies as a matter of law. His claim of wrongful discharge in violation of the public policy enunciated in 49 U.S.C. § 31105 must fail. The defendant's motion for summary judgment of dismissal, therefore, should be granted. Please prepare the appropriate order and present it by either agreement or note it for presentation.

DATED: April 4, 2011

JUDGE

SUPREME COURT OF THE STATE OF WASHINGTON

CHARLES ROSE, Appellant, v. ANDERSON HAY & GRAIN CO., Respondent.	NO. 90975-0 CERTIFICATE OF SERVICE OF RESPONDENT'S ANWER TO SECOND PETITION FOR REVIEW

I, Jody L. Eckel, certify under penalty of perjury under the laws of the State of Washington that on the 24th day of November, 2014, I caused a true and correct copy of the Respondent's Answer to Second Petition for Review to be served upon Petitioner's counsel by electronic mail and U.S. Mail, postage prepaid, to the following addresses:

Gregory Staeheli
Attorney at Law
301 W. Indiana Avenue
Spokane, WA 99205
gs@staehelilaw.com

Dated this 24th day of November, 2014, signed at Spokane, Washington.

Jody L. Eckel

OFFICE RECEPTIONIST, CLERK

To: Jody Eckel
Subject: RE: Case No. 90975-0, Rose v. Anderson Hay & Grain Co.

Received 11-24-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jody Eckel [mailto:Jody@ettermcmahon.com]
Sent: Monday, November 24, 2014 3:58 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Re: Case No. 90975-0, Rose v. Anderson Hay & Grain Co.
Importance: High

Dear Clerk of Court: Attached for filing with the Court please find the following:

1. Respondent's Answer to Second Petition for Review; and
2. Certificate of Service of Respondent's Answer to Second Petition for Review.

Please acknowledge receipt of this email. Thank you.

JODY ECKEL
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