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WASHINGTON STATE SUPREME COURT

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GREGG BECKER,

Plaintiff/Respondent,

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/Petitioners.

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**ROCKWOOD CLINIC'S  
SUPPLEMENTAL BRIEF**

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Keller W. Allen, WSBA # 18794  
Mary M. Palmer, WSBA # 13811  
Stephen E. Sennett WSBA # 46360  
LAW FIRM OF KELLER W. ALLEN, P.C.  
5915 S. Regal, Suite 211  
Spokane, WA 99223  
Telephone: (509) 777-2211

Attorneys for Defendant/Petitioner  
Rockwood Clinic, P.S.



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## I. INTRODUCTION

This case is squarely controlled by the decision of the Supreme Court in *Korlund v. Dyncorp Tri-Cities Servs.*, 156 Wn.2d 168, 125 P.3d 119 (2005); *see also Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011). Because there are comprehensive civil, criminal and administrative remedies available that adequately protect the public policy of honest financial reporting, a private tort cause of action for wrongful termination in violation of public policy should not be recognized. *Korlund*, 156 Wn.2d at 182; *Cudney*, 172 Wn.2d at 530.

In its decision, Division III of the Court of Appeals expressed an intent to “reform” the jeopardy analysis based upon the reasoning of *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984), *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) and *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). *Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 947, 332 P.3d 1085, 1087 (2014). In doing so, Division III misapplied *Piel* and disregarded the reasoning and decisions of the Supreme Court in *Korlund* and *Cudney*. Because *Korlund* controls the result in this case, the decision of the Court of Appeals should be reversed.

## II. ISSUES PRESENTED FOR REVIEW

1. Is a public policy of promoting honesty in business and

financial reporting adequately protected by comprehensive federal and state statutes and regulations, including the Sarbanes-Oxley Act of 2002 (SOX) and the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank”), so as to preclude a tort claim for wrongful termination in violation of public policy, as required by the Supreme Court’s decision in *Koroslund*?

2. If a federal statute provides a non-exclusive remedy, does the Supreme Court’s decision in *Piel* mandate the conclusion that the statute is inadequate to protect the public policy by itself, so that the jeopardy element of the public policy tort is met, even though the statute provides comprehensive criminal, civil and administrative enforcement mechanisms which are more than adequate to protect the public policy?

### III. STATEMENT OF THE CASE

#### A. Factual Background

Plaintiff Gregg Becker (“Becker”) alleges that Community Health Systems, Inc. (“CHSI”)<sup>1</sup> is a publicly-traded holding company that must file reports with the SEC.<sup>2</sup> (CP 728) Becker also alleges that Defendant Rockwood Clinic, P.S., (“Rockwood”) was indirectly owned by CHSI (CP

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<sup>1</sup> Community Health Systems Inc. is not a party to this action, having been dismissed by the trial court. (CP 916-920)

<sup>2</sup> The plaintiff’s factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987).

726-727) and that all reporting of Rockwood's financial results must be accurate to avoid misleading “creditors and investors about Rockwood's (and thereby CHSI's) financial health.” (CP 729)

As Rockwood's Chief Financial Officer (“CFO”), Becker alleges he submitted projections for “earnings before interest, tax, depreciation and amortization” (“EBITDA”) showing what he believed was an “accurate” projected operating loss for Rockwood in 2012 of \$12 million. (CP 733) Becker alleges that his Rockwood supervisor and personnel from Defendant Community Health Systems, PSC (“CHSPSC”) asked him to recalculate his projection to show how Rockwood could achieve a target budget EBITDA loss of \$4 million. (CP 734)

Becker reported to Rockwood’s CEO and to CHSPSC’s internal auditor, among others, his concerns that the EBITDA projection was inaccurate and could mislead investors. (CP 736, 739, 741, 744) Becker resigned his position, but alleges he was constructively discharged because he would have been required to “engage in improper accounting practices and corporate fraud” if he had continued in his job. (CP 773-774)

**B. Procedural Background**

On February 27, 2012, Becker filed a Complaint in Spokane County Superior Court alleging wrongful discharge in violation of public

policy and a federal SOX claim.<sup>3</sup> (CP 3-22) Two days after filing his superior court claim, Becker filed a complaint with the federal Occupational Safety and Health Administration (“OSHA”), alleging discriminatory employment practices in violation of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A (“SOX”). (CP 209-222) In his OSHA complaint, as in his state court complaint, Becker asserted that he was directed to provide misleading financial information for CHSI to use with investors and credit facilities, and was constructively discharged. (CP 216) Rockwood and CHSPSC filed a CR 12(b)(6) motion to dismiss Becker’s Superior Court Complaint because he could not satisfy the jeopardy element of his public policy claim. (CP 802-820, 1318) The Superior Court denied the motion. (CP 1024-26) Rockwood and CHSPSC appealed. (CP 958-60)

On August 14, 2014 the Court of Appeals issued its decision affirming the Superior Court’s order denying dismissal of Becker’s public policy claim. *Becker*, 182 Wn. App. 935.

While the matter was pending in the Court of Appeals, OSHA

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<sup>3</sup> Rockwood removed the case to the United States District Court for the Eastern District of Washington, based on federal question jurisdiction arising from Becker’s SOX claim. (CP 25-94) Becker filed an Amended Complaint, which is virtually identical to his original Complaint except that it removed all specific references to SOX, instead citing to “numerous financial reporting requirements by statute and by ethical codes.” (CP 724-48) In light of this revision, the U.S. District Court ordered the case remanded to Spokane County Superior Court on May 30, 2012. (CP 96-97; 749-50)

issued a determination on July 23, 2014 on Becker's SOX complaint ("SOX Decision"), confirming its jurisdiction over Becker's SOX complaint and rejecting his complaint on the merits. (Appendix to Petition for Review, A-042-043) Becker appealed the SOX Decision. (A-055-076). Becker's *de novo* administrative trial is currently set for January 19, 2016 pursuant to the comprehensive rules in 29 C.F.R. § 1980.107.<sup>4</sup>

#### IV. ARGUMENT

The decision of the Court of Appeals must be reversed pursuant to this Court's decisions in *Korlund*, *Cudney* and *Piel*, and the recognition of the tort in *Thompson v. St. Regis Paper Co.* as a narrow exception to the terminable at will doctrine. *Thompson*, 102 Wn.2d at 232.

A. **This Case is Directly Controlled by *Korlund*, but the Court of Appeals Refused to Apply *Korlund***

To satisfy the jeopardy element of a public policy wrongful discharge claim, a plaintiff must show that other means of promoting the public policy are inadequate, and that the actions the plaintiff took were *the only available adequate means to promote the public policy*. *Korlund*, 156 Wn.2d at 181-82; *Cudney*, 172 Wn.2d at 530.

If there are other adequate remedies available, or if the public policy is sufficiently promoted through means other than a private suit, the

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<sup>4</sup> The Court may take judicial notice of this adjudicative fact. ER 201 (A copy of the Notice of Hearing is attached as a Supplemental Appendix to this Brief)

public policy is not in jeopardy and a private cause of action need not be recognized. *Korlund*, 156 Wn.2d at 184.

The Court of Appeals expressly recognized that SOX and Dodd-Frank, 15 U.S.C. § 78u-6, provide comprehensive whistleblower protection. *Becker*, 182 Wn. App. at 948. This is so whether the illegal conduct has already occurred, or where an employee reasonably believes such misconduct is “about to” occur or is “likely” to occur. *Id.*

In *Korlund*, this Court concluded that the Energy Reorganization Act (“ERA”) provided comprehensive remedies that protect the specific public policy identified by the plaintiffs, thereby precluding a public policy tort claim. *Korlund* at 182-83. This Court identified the ERA 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. Here, the remedies under SOX are virtually identical to the remedies under the ERA, which *Korlund* found to be adequate to protect the public policy. A comparison of the statutory and regulatory remedies under those statutes is instructive:

	<i>SOX (Becker)</i>	<i>ERA (Korlund)</i>
<b>Complaint &amp; Investigation</b>	✓ 29 C.F.R. § 1980.104	✓ 29 C.F.R. § 24.103
<b>ALJ Hearing</b>	✓ 29 C.F.R. § 1980.107	✓ 29 C.F.R. § 24.100; 107
<b>Discovery</b>	✓ 29 C.F.R. § 18.13;	✓ 29 C.F.R. § 18.13 <i>et.</i>

	<b>SOX (Becker)</b>	<b>ERA (Korlund)</b>
	29 C.F.R. § 1980.107	<i>seq.</i>
<b>Open Public Hearing</b>	✓ 29 C.F.R. § 18.43; 29 C.F.R. § 1980.107	✓ 29 C.F.R. § 18.43
<b>Findings of Fact and Conclusions of Law by ALJ after Hearing</b>	✓ 29 C.F.R. § 1980.109	✓ 29 C.F.R. § 18.57
<b>Remedies</b>	✓ All relief to make employee whole; reinstatement with same seniority status; back pay with interest; compensation for any special damages including litigation costs, expert witness fees, and reasonable attorneys' fees, plus emotional distress. <i>Halliburton, Inc. v. Administrative Review Bd.</i> , 771 F.3d 254, 266 (5th Cir. 2014)(emotional distress); <i>Lockheed Martin Corp. v. Administrative Review Bd.</i> , 717 F.3d 1121, 1138 (10th Cir. 2013)(same); <i>Jones v. Southpeak Interactive Corp.</i> , 2015 U.S. App. LEXIS 1114, 1, 98 Empl. Prac. Dec. (CCH) ¶ 45,239 (4th Cir. 2015)(same); 29 C.F.R. § 1980.109(d)(1)	✓ Reinstatement to employment on same terms; back pay; compensatory damages; attorney and expert fees; orders to undertake affirmative action to abate violations. 42 U.S.C. § 5851(b)(2)(B)
<b>Right to have ALJ decision reviewed by Administrative Review Board</b>	✓ 29 C.F.R. § 1980.110	✓ 29 C.F.R. § 24.110

	<i>SOX (Becker)</i>	<i>ERA (Korlund)</i>
<b>Right to Judicial Review by U.S. Court of Appeals</b>	✓ 29 C.F.R. § 1980.112	✓ 29 C.F.R. § 112
<b>Right to <i>de novo</i> review in United States District Court.</b>	If the Secretary fails to issue a decision within 180 days of the filing of the complaint, the person may bring an action at law or equity for <i>de novo</i> review in United States District Court. 18 U.S.C. § 1514A(b)(1).	If the Secretary has not issued a final decision within 1 year after the filing of a complaint, such person may bring an action at law or equity for <i>de novo</i> review in United States District Court. 42 U.S.C. § 5851(b)(4)
<b>Judicial Enforcement of Decisions</b>	✓ 29 C.F.R. § 1980.113	✓ 29 C.F.R. § 24.113
<b>Non-Exclusive Nature of Statute</b>	✓ <b>(d) Rights Retained by Employee.</b> — “Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law, or under any collective bargaining agreement.” 18 U.S.C. § 1514A(d).	✓ <b>Non preemption.</b> “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).

*Korlund* is directly on point and controls this case. The remedies available to Becker under SOX mirror the “guidepost” remedies of the ERA which this Court has already determined are adequate alternative

remedies which preclude a public policy tort claim. *Korlund*, at 182-83. Given the virtually identical protections provided by SOX and the ERA, this Court cannot affirm the decision of the Court of Appeals unless it overrules *Korlund* and other cases.

Significantly, Becker is currently taking advantage of his alternative remedies by pursuing a SOX retaliation complaint before OSHA.<sup>5</sup> (CP 209-222, 724-48) OSHA 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-042-43) OSHA determined that Becker's claim lacks substantive merit, and Becker is now pursuing his appeal rights under SOX. (A-055-076) Thus, not only does SOX provide adequate alternative remedies, Becker is pursuing those remedies *at the same time* he is pursuing this public policy tort claim. A trial will be held on Becker's SOX claim before an ALJ on January 19, 2016. (Supplemental Appendix)

Becker is also entitled to file his SOX claim in U.S. District Court

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<sup>5</sup>Becker requests a full range of relief, including back pay and benefits, front pay and benefits, compensation for loss of tenure at his prior position and the financial damage from the loss of that position, emotional distress damages, loss of reputation and loss of earning capacity, as well as an order expunging an unsatisfactory evaluation and performance improvement plan from his personnel file. (CP 217-218) Becker also demands abatement of any further whistleblower violations, an order prohibiting the disclosure of any disparaging information about Becker to prospective employers or otherwise interfering with any applications he might make in the future, exemplary damages, attorney fees, costs of litigation and any other orders necessary to make him whole. (CP 218-19)

at any time, because more than 180 days have passed since he filed his SOX complaint. 18 U.S.C. § 1514A(b)(1). If he timely pursues the District Court remedy, Becker can obtain *de novo* review of his SOX claim and seek the full array of damages discussed above. *Id.*

In addition to the robust remedies provided by SOX, the Court of Appeals identified an extensive list of other remedies in addition to SOX which protect the public policy of honest financial reporting. *Becker*, 182 Wn. App. at 948-951. In light of the vast array of adequate alternative remedies, Becker cannot satisfy his burden under the jeopardy analysis of showing that his public policy claim is the “*only available adequate means*” to promote the public policy. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 222, 193 P.3d 128 (2008); *Cudney*, 172 Wn.2d at 530; *Piel*, 177 Wn.2d at 625. Because the public policy is not in jeopardy, *Korlund* is clear that a private cause of action should not be recognized in this case. *Korlund*, 156 Wn.2d at 184. Based on *Korlund*, the decision of the Court of Appeals should be reversed and Becker’s public policy claim should be dismissed.

**B. Whistleblower Remedies Protect the Public Policy**

Becker has vigorously argued that he was not a whistleblower and, therefore, SOX’s whistleblower remedies and the whistleblower public policy cases do not apply to him. Becker’s position must be rejected for

two obvious reasons: (1) Becker's Amended Complaint clearly alleges that he is a whistleblower (CP 725, 736, 738, 738-739), and (2) the public policy of honest financial reporting is adequately protected by the provision of robust whistleblower remedies under SOX. *Becker*, 182 Wn. App. at 948-951.

1. Becker is a Whistleblower

Becker reported his concerns internally to his CEO, the internal auditor and to other finance personnel with whom he worked. (CP 725, 736, 738, 738-739) Such actions trigger SOX whistleblower provisions and a private cause of action. 18 U.S.C. § 1514A(a)(1). As discussed above, Becker currently has an ALJ trial scheduled for January 19, 2016 on his SOX whistleblower claim, *and* he has the additional option to file a U.S. District Court lawsuit under SOX to recover a wide range of damages for the exact same facts that support his public policy tort claim. (CP 209-222; Supplemental Appendix) Becker's inexplicable failure to pursue his claim in U.S. District Court does not negate the existence of the adequate alternative remedies available to him.

2. The Public Policy is Adequately Protected by Whistleblower Remedies

Becker claims he refused to submit a false financial report and was terminated. His refusal *alone* does nothing to protect the public policy of

honest financial reporting. Becker admits that he thought the false report would be filed even without his participation. (CP 741, ¶5.85) The public policy is *better served* by employees reporting to the SEC, OSHA and other agencies pressure from employers to commit illegal actions. In that way, the full power of criminal laws, enforcement mechanisms, and penalties can be brought into play. *Cudney*, 172 Wn.2d at 537. An employee's choice to not report his fraud concerns so that the relevant agency can take action should not give that employee a tort cause of action. *See Weiss v. Lonquist*, 173 Wn. App. 344, 359, 293 P.3d 1264, 1272, *review denied*, 178 Wn.2d 1025, 312 P.3d 652 (2013)(when an employee who is discharged in retaliation for refusing to commit an illegal act has refused to engage with a law enforcement system specifically designed to receive and address complaints about the employer, the employee cannot state a claim for wrongful termination in violation of public policy).

Thus, even if Becker was not a whistleblower as he claims,<sup>6</sup> it is clear that he could (and should) have been a whistleblower, with all the broad protections of SOX. Becker is unable to show that quitting his job, and not reporting his concerns to any law enforcement agency, was the *only available adequate means* to protect the public policy. *Danny*, at

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<sup>6</sup> Becker's position that he is not a whistleblower is belied by his SOX whistleblower claim pending before OSHA. (CP 209-22)

222; *Cudney*, at 520. Becker simply cannot show that the comprehensive whistleblower remedies of SOX and the enforcement machinery of the federal government are inadequate to protect the public policy of honest financial reporting. A tort of wrongful discharge in violation of public policy can proceed only when other remedies are inadequate. *Korlund*, at 183; *Cudney*, at 538.

C. **Division III's Focus on the Non-Exclusiveness of SOX Is Erroneous**

Division III recognized that SOX and Dodd-Frank provide *comprehensive* whistleblower protections. *Becker*, 182 Wn. App. at 948. Despite the breadth of those protections, the Court of Appeals erroneously held that the SOX remedy was inadequate, *solely* because SOX contains a non-exclusivity clause, citing *Piel*, 177 Wn.2d at 617.

In *Piel*, this court noted language in the PERC statute that provided: “The provisions of this chapter are *intended to be additional to other remedies* and shall be liberally construed to accomplish their purpose.” *Piel*, 177 Wn.2d at 617, *citing* RCW 41.56.905 (emphasis added). *Piel* declared this language the strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy. *Id.*

Division III erroneously relied upon this language to avoid the

application of *Korlund* to Becker's claim. This was error because the non-exclusivity provisions in SOX and Dodd-Frank are not at all similar to the language in *Piel*, but instead are directly on point with the language of the ERA in *Korlund*.

Unlike the PERC statute in *Piel*, the federal statutes in *Becker* (SOX, 18 U.S.C. § 1514A; Dodd-Frank, 15 U.S.C. § 78u-6(h)(3)), *Korlund* (ERA, 42 U.S.C. § 5851(a)(1)(A)) and *Rose v. Anderson Hay & Grain Co.*, 183 Wn. App. 785, 792, 335 P.3d 440, 444 (2014)(CMVSA, 49 U.S.C. § 31105(f)), contain clear expressions by Congress that the federal statutes in those cases are not intended to diminish other remedies under any Federal or State law. None of the federal statutes contain a statement that the remedies are meant to be *additional* to other remedies. Significantly, there is no way to distinguish the non-exclusivity provisions of SOX and Dodd-Frank from the same provisions in the statutes at issue in *Korlund* and *Rose*.

The test is not solely to determine whether the alternate remedy is exclusive, "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." *Korlund*, 156 Wn.2d at 183. Following *Korlund*, this Court in *Cudney* confirmed that a non-exclusivity clause does not by itself determine the adequacy of alternative

remedies: “In fact, *Korlund* 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.” *Cudney*, 172 Wn.2d at 535 (citing *Korlund*, 156 Wn.2d at 182-83). *Piel* made it clear that even if a non-exclusivity provision is in place, a court must still analyze whether the administrative scheme at issue is adequate to “vindicate public policy.” *Piel*, 177 Wn.2d at 617. *Piel* is consistent with *Korlund* and *Cudney*.

Division III failed to conduct the required analysis. The Court of Appeals’ apparent reliance solely on the non-exclusivity of SOX, despite recognizing that comprehensive federal and state remedies exist, is contrary to the holdings in both *Korlund* and *Cudney* -- and is not supported by a fair reading of *Piel*. Division III’s decision in *Becker* is contrary to its own decision in *Rose v. Anderson Hay & Grain Co*, 183 Wn. App. at 792-93. In *Rose*, the Court noted the non-exclusivity provision in the federal Commercial Motor Vehicle Safety Act (“CMVSA”), 49 U.S.C. § 31105(f), but still concluded that the remedies available under the CMVSA were more than adequate to protect the public interest in commercial motor vehicle safety. Because the public policy was adequately protected by the

CMVSA, the public policy tort claim was properly dismissed for failure to satisfy the jeopardy element. *Rose*, 183 Wn. App. at 792-93.

*Piel* addressed the Washington Legislature's directive that Washington statutory remedies under PERC "are intended to be **additional** to other remedies and shall be liberally construed to accomplish their purpose." *Piel*, 177 Wn.2d at 617. But Congress' choice not to preempt state law is an issue of federal supremacy. It is not a directive or statement that federal law is inadequate. *See generally, Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 896 P.2d 682, 688 (1995). Thus, a non-exclusivity clause in a federal statute does not carry the same meaning as a statement by the state legislature that the remedies of a state statute are meant to be **additional** to other remedies.

The Court of Appeals' holding that SOX is inadequate to protect the public policy of honesty in financial reporting because SOX is declared to be a non-exclusive remedy conflicts with *Korslund, Cudney* and *Piel*. Because the SOX administrative procedure and remedies are as robust and equally comprehensive as the ERA administrative procedure and remedies found in *Korslund* to

be adequate, the decision of the Court of Appeals must be reversed.

**D. Becker's Claim Is Not a Compelling Case for Tort Protection**

The Court of Appeals clearly recognized the wide range of civil, criminal and administrative remedies promoting the important public policy of honest financial reporting. *Becker*, 182 Wn. App. at 947-951. Remarkably, however, in a stark departure from *Korlund* and *Cudney*, the court concluded that “those means of promoting public policy do not foreclose private common law tort remedies for employees”, citing to the dissent in *Cudney*. *Becker*, 182 Wn. App. at 951, citing *Cudney*, 172 Wn.2d at 549–50, 259 P.3d 244 (Stephens, J., dissenting).

Division III declared Becker’s case “[t]he most compelling case for protection” under a public policy tort because Becker could be personally liable for a crime if he participated in fraudulent reporting. The Court then cited several non-Washington decisions to support its position. *Becker*, 182 Wn. App. at 952-53, citing *McGarrity v. Berlin Metals, Inc.*, 774 N.E.2d 71, 75–79 (Ind. Ct. App. 2002); *Gossett v. Tractor Supply Co.*, 320 S.W.3d 777, 779–80 (Tenn. 2010). However, those cases do not involve analysis of the jeopardy element and do not support disregarding adequate alternative remedies.

In a complete departure from *Korlund* and other Supreme Court

precedent, Division III declared that the jeopardy element can be satisfied *even when there are comprehensive criminal, civil, and administrative enforcement mechanisms promoting the important public policies*, due to Becker's "special responsibilities or expertise" which would render other enforcement mechanisms less likely to succeed because they depend upon his individual "pro-compliance" efforts. *Becker*, 182 Wn. App. at 953. Division III concluded that the threat of constructive discharge would jeopardize the public policy of honesty in corporate financial reporting by discouraging a CFO like Becker from refusing to submit a false report. *Id.* But Division III failed to address why the comprehensive alternative remedies like SOX are not sufficient to address this concern. No public policy remedy is adequate without pro-compliance efforts from somebody. Thus, Becker's alleged situation is not unique. Division III expressly noted that a corporation is responsible for the crimes of its CFO if it aids or abets, and that SOX criminalizes retaliation for cooperating with law enforcement. *Becker*, at 949. Division III did not articulate a valid justification for making a special exception to the *Korslund* jeopardy analysis for Becker.

It is because of Becker's corporate responsibilities that he had an obligation to report his alleged fraud concerns. 18 U.S.C. § 1514A. The provisions of SOX that encourage employees to report suspected fraud are

a central feature of the SOX enforcement mechanism. But the decision of the Court of Appeals encourages employees to remain quiet and not “blow the whistle” about suspected fraud, and to pursue a public policy tort claim. This does not protect the public policy of honesty in business and financial reporting.<sup>7</sup> Becker cannot show that having law enforcement do its job and enforce applicable laws is an inadequate means of promoting the public policy. *Cudney*, 172 Wn.2d at 537. His public policy claim must be dismissed.

E. **SOX Adequately Protects the Public Policy Even if Becker's SOX Claim Fails on the Merits**

Becker has regularly argued that his remedy under SOX is “uncertain” because Rockwood and CHSPSC have opposed his administrative claim on the merits and he may not succeed on that claim. Because he may not personally recover a remedy under SOX, Becker argues that he should be permitted to pursue a public policy tort claim. Becker's position does not comport with longstanding Washington authority rejecting the very argument he is asserting here.

The rule is clear: "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." *Hubbard v. Spokane County*,

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<sup>7</sup> Rockwood adopts the argument of CHSPSC in its Supplemental Brief on this topic.

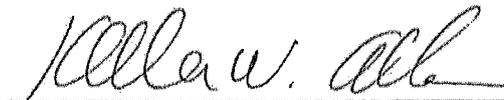
146 Wn.2d 699, 717, 50 P.3d 602 (2002). *Accord, Korslund*, 156 Wn.2d at 178; *Cudney*, 172 Wn.2d at 534, n.3. Whether Becker may ultimately succeed on the merits of his SOX claim is irrelevant to this appeal. The question is whether the public policy of honesty in business and honest financial reporting to the SEC is adequately protected through adequate alternative enforcement mechanisms. It is.

#### V. CONCLUSION

The Court of Appeal's broad application of the public policy tort in this case undermines this Court's recognition of a narrow exception to the employment at will doctrine in *Thompson v. St. Regis Paper Co.*, and reiterated in *Gardner, Danny* and *Cudney*. Division III's decision is a stark and unsupported departure from Supreme Court authority established in *Korslund*. Because *Korslund* controls the result in this case, the decision below should be reversed.

Respectfully submitted this 10<sup>th</sup> day of April, 2015.

**LAW FIRM OF KELLER W. ALLEN, P.C.**



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Keller W. Allen, WSBA No. 18794  
Mary M. Palmer, WSBA No. 13811  
Stephen E. Sennett, WSBA No. 46360  
Attorneys for Defendant/Petitioner  
Rockwood Clinic P.S.

**CERTIFICATE OF SERVICE**

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

Mary Schultz MARY SCHULTZ LAW, P.S. 2111 E. Red Barn Lane Spangle, WA 99031  Attorney for Respondent/Plaintiff	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email  <i>mary@mschultz.com</i>
Stellman Keehnel Katherine Heaton DLA PIPER LLP (US) 701 Fifth Avenue, Suite 7000 Seattle, WA 98104  Attorneys for Defendant/Petitioner Community Health Systems Professional Services Corporation	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Via U.S. Mail <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email  <i>stellman.keehnel@dlapiper.com</i> <i>katherine.heaton@dlapiper.com</i>

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

Executed at Spokane, Washington, this 10<sup>th</sup> day of April, 2015.

  
Pamela R. Mengel

**Supplemental Appendix**

U.S. Department of Labor Order Modifying Notice of Hearing, *Gregg  
Becker v. Community Health Systems, Inc., and Rockwood Clinic, P.S.*,  
Case No. 2014-SOX-00044

**U.S. Department of Labor**

Office of Administrative Law Judges  
90 Seventh Street, Suite 4-800  
San Francisco, CA 94103-1516

(415) 625-2200  
(415) 625-2201 (FAX)



Issue Date: 13 January 2015

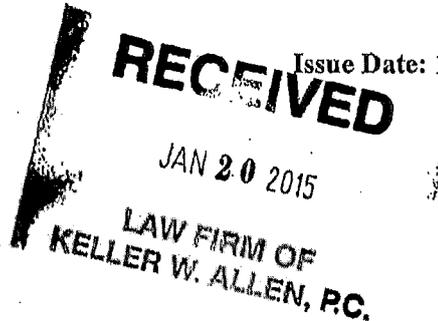
CASE NO.: 2014-SOX-00044

*In the Matter of:*

**GREGG BECKER,**  
*Complainant,*

vs.

**COMMUNITY HEALTH SYSTEMS, INC. and  
ROCKWOOD CLINIC, P.S.,**  
*Respondents.*



**ORDER MODIFYING NOTICE OF HEARING**

This is a claim under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002 (the "Sarbanes-Oxley Act") and regulations at 29 C.F.R. Part 1980. By Notice of Hearing dated October 27, 2014, it is set for hearing in Spokane, Washington, on April 16, 2015.

The parties jointly move for a continuance of the hearing and modification of certain of the deadlines. Counsel for all parties participated in a telephone conference on January 13, 2015, to discuss the pending motion. The parties agree Community Health Systems, Inc., is involved in an acquisition which limits its ability to respond to discovery at this time. The parties agree that some number of depositions will be taken in Tennessee. The parties are currently litigating in the courts of the State of Washington in a matter that may (if Claimant is to be believed) or may not (if Respondents are to be believed) be relevant to the determination of this matter. Claimant's counsel is currently responding to a family emergency in the Montana. Although the parties request the continuance for various reasons, all agree that it is essential for a fair result for each of them.

Good cause therefor appearing, the court modifies the Notice of Hearing dated October 27, 2014, as follows:

1. The hearing in this matter is continued until January 19, 2016, at 9:00 a.m., at a place to be determined in Spokane, Washington.
2. A telephonic pre-hearing conference will take place on January 5, 2016, at 10:00 a.m. No later than January 3, 2016, the parties must provide the court with the telephone numbers at which they can be reached for the pre-hearing conference.

3. The parties must make their Initial Disclosures under paragraph I.B. of the Notice of Hearing no later than February 15, 2015, except

a. the parties must disclose expert witness information on or before February 28, 2015; and

b. the parties must produce documents between February 28, 2015, and April 30, 2015, inclusive.

4. The parties may take depositions after May 1, 2015, except that the parties may take depositions of expert witnesses only after September 1, 2015.

5. The parties must complete all discovery under Paragraphs IV.1. and IV.2. no later than October 1, 2015.

6. Motions for Summary Decision under paragraph II.B. of the Notice of Hearing must be filed no later than October 15, 2015.

Except as set forth above, the Notice of Hearing dated October 27, 2014, is unmodified.

The court will consider further requests for continuance of the hearing only under the most extraordinary circumstances.

SO ORDERED.



Digitally signed by John C. Larsen  
DN: CN=John C. Larsen,  
OU=Administrative Law Judges, O=Office  
of Administrative Law Judges, L=San  
Francisco, S=CA, C=US  
Location: San Francisco CA

CHRISTOPHER LARSEN  
Administrative Law Judge

**SERVICE SHEET**

Case Name: **BECKER\_GREGG\_v\_CHS-ROCKWOOD\_CLINIC\_\_**

Case Number: **2014SOX00044**

Document Title: **Order Modifying Notice of Hearing**

I hereby certify that a copy of the above-referenced document was sent to the following this 13th day of January, 2015:



Digitally signed by VIVIAN CHAN  
DN: CN=VIVIAN CHAN, OU=LEGAL  
ASSISTANT, O=Office of Administrative Law  
Judges, L=San Francisco, S=CA, C=US  
Location: San Francisco CA

**VIVIAN CHAN**  
LEGAL ASSISTANT

Mary Schultz, Esq.  
Attorney for Complainant  
2111 E. Red Barn Lane  
SPANGLE WA 99031  
*{Hard Copy - Regular Mail}*

Community Health Systems, Inc.  
4000 Meridian Blvd.  
FRANKLIN TN 37067  
*{Hard Copy - Regular Mail}*

Stellman Keehnel, Esq.  
Attorney for Community Health Systems  
DLA Piper, LLP  
701 Fifth Avenue, Suite 7000  
SEATTLE WA 98104  
*{Hard Copy - Regular Mail}*

Rockwood Clinic, P.S.  
400 E. 5th Avenue  
SPOKANE WA 99202  
*{Hard Copy - Regular Mail}*

Keller Allen, Esq.  
Attorney for Rockwood Clinic, P.S.  
Law Firm of Keller Allen, P.C.  
5915 S. Regal Street, Suite 211  
SPOKANE WA 99223  
*{Hard Copy - Regular Mail}*

Acting Regional Administrator  
Region 10  
U. S. Department of Labor, OSHA  
Suite 1280  
300 Fifth Avenue  
SEATTLE WA 98104-2397  
*{Hard Copy - Regular Mail}*

Associate Regional Solicitor  
U. S. Department of Labor  
300 Fifth Ave., #1120  
SEATTLE WA 98104  
*{Hard Copy - Regular Mail}*

**SERVICE SHEET** continued (2014SOX00044 Hearing Reschedul) Page: 2

Director

Directorate of Whistleblower Protection Programs

U S Department of Labor, OSHA

Room N 3112 FPB

200 CONSTITUTION AVE NW

WASHINGTON DC 20210

*{Hard Copy - Regular Mail}*

Associate Solicitor

Division of Fair Labor Standards

U. S. Department of Labor

Room N-2716, FPB

200 Constitution Ave., N.W.

WASHINGTON DC 20210

*{Hard Copy - Regular Mail}*

Jackson Reporting Service, Inc

Suite B

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**To:** Pam Mengel  
**Cc:** Mary Schultz; Diana Nelson-Falkner; Tina Ingram; Stellman Keehnel; Katherine Heaton; Patsy Howson; Keller Allen; Mary Palmer  
**Subject:** RE: Gregg Becker v. CHSPSC and Rockwood Clinic, Supreme Court No. 90946-6

Rec'd 4/10/15

**From:** Pam Mengel [mailto:prm@kellerallen.com]  
**Sent:** Friday, April 10, 2015 4:31 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** Mary Schultz; Diana Nelson-Falkner; Tina Ingram; Stellman Keehnel; Katherine Heaton; Patsy Howson; Keller Allen; Mary Palmer  
**Subject:** Gregg Becker v. CHSPSC and Rockwood Clinic, Supreme Court No. 90946-6

To the Clerk:

Attached for filing is *Rockwood Clinic's Supplemental Brief* in the above-referenced case. All parties have agreed to accept email service and they are being provided a copy of the Supplemental Brief with this email.

Thank you.

Pam Mengel  
Assistant to Keller W. Allen  
Law Firm of Keller W. Allen, P.C.  
Ben Burr Building  
5915 S. Regal, Suite 211  
Spokane, WA 99223  
Phone: 509-777-2211  
Fax: 509-777-2215