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Washington State Supreme Court

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No. 90975-0

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CHARLES ROSE,

Plaintiff-Petitioner,

v.

ANDERSON HAY & GRAIN CO.

Defendant-Respondent.

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**SUPPLEMENTAL BRIEF OF PLAINTIFF-PETITIONER**

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Gregory G. Staeheli, WSBA #4452  
301 W. Indiana Ave.  
Spokane, WA 99205  
(509) 326-3000

Andrea L. Schmitt, WSBA #39759  
COLUMBIA LEGAL SERVICES  
711 Capitol Way S. #304  
Olympia, WA 98501  
(360) 943-6260 x203

Attorneys for Plaintiff-Petitioner

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## I. INTRODUCTION

Anderson Hay & Grain (“Anderson”) fired Petitioner Charlie Rose for refusing to endanger himself and others on the highway by driving more than the federally mandated maximum number of hours for semi-truck drivers. The Court of Appeals ruled that Mr. Rose could not proceed under the tort of wrongful discharge in violation of public policy (“the tort”) solely because a federal administrative remedy for his discharge exists.

Mr. Rose was the only person in a position to stop unsafe conditions on the highway that day, and he stood firm. He now seeks recourse in Washington’s courts—in the tort of wrongful discharge in violation of public policy, which establishes the limits of the employment-at-will doctrine. When deciding whether Mr. Rose can move forward with his tort claim for his discharge, this Court should not look to Mr. Rose’s after-the-fact administrative remedy. Doing so undervalues the common law and ignores the central fact necessary for the tort: his actions protected the public in the first place. Diverting the tort’s analysis to focus on remedies for discharge available only after the employee has already been fired creates confusion in the doctrine by departing from the central purpose of the tort’s “jeopardy” inquiry. The Court should rule that

the mere existence of an administrative remedy does not negate the “jeopardy” element of the tort, and Mr. Rose can seek to remedy his wrongful termination under the tort.

## **II. ISSUE PRESENTED**

Did Charlie Rose satisfy the “jeopardy” element of the tort of wrongful discharge in violation of public policy when he refused to drive more hours than allowed under federal highway safety laws and refused to falsify drive-time records as his employer demanded because those acts were a direct and necessary means, at that moment, to protect a clear public policy?

## **III. STATEMENT OF THE CASE**

Anderson fired Charlie Rose from his job as a semi-truck driver when he refused to violate federal drive-time limits and to falsify his federally mandated drive-time records. (CP 35.) At the time, Mr. Rose had been a truck driver for more than 30 years and an employee of Anderson for more than three years. (CP 33.) Mr. Rose’s job was to drive loads of hay weighing 50 tons or more from Ellensburg to ports in Western Washington, where the hay would be shipped internationally. (CP 33-34.) Mr. Rose and his fellow drivers operated under federal regulations that required them to drive no more than 60 hours in a week. (CP 34-35.)

In November 2009, Mr. Rose's supervisor told him to take a load of hay to Seattle. (CP 33.) The drive to Seattle and back would have put Mr. Rose over his 60-hour limit, and put him in violation of federal law. (CP 35.) Mr. Rose knew that as he approached his 60-hour limit, his reaction time slowed, and he had to fight to stay awake behind the wheel. (CP 34.) He feared that if he took the load, he could pose a threat to people on the highway. (CP 34.) Mr. Rose's supervisor informed him that he would have to falsify his drive-time records to reflect fewer hours than he had actually driven and take the load of hay. (CP 35.) Mr. Rose refused and Anderson fired him. (CP 35.)

Mr. Rose's experience was corroborated by his co-worker Joe Peak, who gave a near-death-bed preservation deposition, testifying that he had also been told by Anderson to falsify drive-time records in order to take more loads of hay. (CP 102-103; 108-111.)

Mr. Rose filed a complaint in federal court, which was dismissed for lack of jurisdiction. (CP 35; 130-32.) By that time, the 180-day filing period for the administrative remedy under the

Commercial Motor Vehicle Safety Act (CMVSA)<sup>1</sup> had passed. *See* 49 U.S.C. § 31105(b)(1); (CP 36).

Mr. Rose filed this case in Kittitas County Superior Court. (CP 1.) The trial judge granted summary judgment for Anderson, holding that the existence of a federal administrative remedy under the CMVSA prevented Mr. Rose from satisfying the “jeopardy” element of the tort. (CP 115.) Division III of the Court of Appeals affirmed. *Rose v. Anderson Hay & Grain Co.*, 168 Wn. App. 474, 478, 276 P.3d 382 (2012). This Court accepted review, and it remanded to Division III for reconsideration in light of the recent decision in *Piel v. City of Federal Way*, 177 Wn.2d 604, 306 P.3d 879 (2013). *Rose v. Anderson Hay & Grain Co.*, 180 Wn.2d 1001, 327 P.3d 613 (2014).

Division III again affirmed the trial court. *Rose v. Anderson Hay & Grain Co.*, 183 Wn. App. 785, 793, 335 P.3d 440 (2014). The Court of Appeals held that the existence of an administrative remedy under the CMVSA negated Mr. Rose’s ability to prove that his actions were directly related to the public policy or were

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<sup>1</sup> The CMVSA appears to be referred to in some places as the Surface Transportation and Assistance Act (STAA). *See Koch Foods, Inc. v. Sec’y, U.S. Dep’t of Labor*, 712 F.3d 476, 478 (11th Cir. 2013).

necessary to its preservation. *See id.* (rejecting Mr. Rose’s claim on “jeopardy” grounds). This Court again granted review. *Rose v. Anderson Hay & Grain Co.*, 182 Wn.2d 1009, 343 P.3d 759 (2015).

#### IV. ARGUMENT

##### A. Summary of Argument

To prevail in a claim under the tort, the employee must show that: (1) a clear public policy exists (the “clarity” element); (2) discouraging the employee’s conduct would jeopardize the public policy (the “jeopardy” element); (3) the employee’s conduct caused the dismissal (the “causation” element); and (4) there is no overriding justification for the dismissal (the “absence of justification” element). *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996). Whether Mr. Rose satisfies the “jeopardy” element is the only issue in this case.

The tort’s purpose is to protect clear mandates of public policy—in this case, safe operation of semi-trucks on the highway. *See Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 231-32, 685 P.2d 1081 (1984). To that end, the purpose of the “jeopardy” element is to ensure that there is a sufficient nexus between the employee’s conduct and the public policy to warrant protection against discharge. *Gardner*, 128 Wn.2d at 941-42. “To establish

jeopardy, plaintiffs must show that [their] conduct *directly relates* to public policy, or was *necessary* for the effective enforcement of the public policy.” *Id.* at 945 (emphasis in original).

Anderson does not question that Mr. Rose’s actions in refusing to violate federal drive-time regulations were the direct means to prevent a threat to highway safety. The only issue Anderson raises here is that Mr. Rose had an alternative federal administrative remedy for his discharge, after he had already been fired.

The Court should not consider after-the-fact remedies for the employee’s discharge as part of the “jeopardy” element for two reasons: the inquiry improperly diminishes the role of the common law, and it pushes the tort doctrine away from the critical focus on the employee’s actions to prevent the harm in the first place. First, the common law recognized the tort as a means to define the outer limits of the employment-at-will doctrine, and the common law yields that responsibility only where the legislature has acted to provide an exclusive statutory remedy.

Second, this case brings to light an important distinction in the “jeopardy” analysis between scrutinizing the employee’s actions to see if they were the only available adequate means to protect the

public policy in the first place and the secondary consideration of choosing to make the tort unavailable because the employee has a remedy for his discharge after he has already been fired. Although this Court has never explicitly discussed this distinction, a coherent analysis of the tort depends on it. The “jeopardy” element’s purpose is to evaluate the employee’s conduct in the first place and whether that conduct had direct power to protect public policy, rather than to evaluate attenuated “remedies” after the fact. The Court should hold that Mr. Rose’s conscientious actions to protect highway safety at the time satisfy the “jeopardy” element by themselves, and his after-the-fact remedy for discharge does not negate the “jeopardy” element.<sup>2</sup>

Such a holding would be in line with this state’s “long and proud history of being a pioneer in the protection of employee rights.” *See Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000). As noted by Judge Fearing in his

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<sup>2</sup> The Court’s pronouncements on this subject have led to directly conflicting results. *Compare Rose*, 183 Wn. App. 785 with *Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 332 P.3d 1085 (2014) *review granted*, 182 Wn.2d 1009, 343 P.3d 759 (2015) (*see especially* Fearing, J., concurring). The Court would serve litigants and lower courts well to return to the core of the tort as it was laid out in *Thompson* : 1) a clear mandate of public policy, 2) the employee’s actions directly related to the public policy, 3) those actions caused the discharge. *See* 102 Wn.2d at 232-34; *see Becker v. Community Health Systems, Inc.*, 182 Wn. App. 935, 964-65, 332 P.3d 1085 (2014) (Fearing, J., concurring).

concurrence in *Becker v. Community Health Systems, Inc.*, 182 Wn. App. 935, 964, 332 P.3d 1085 (2014), “[i]f a heroic deed benefits the community but leads to the [conscientious employee’s] firing, society prefers that the employer, not the employee, pay for the losses suffered by the employee.”

Alternatively, if the Court does examine the adequacy of Mr. Rose’s administrative remedy, it need look no further than Congress’s express declaration that the alternative remedy at issue is not exclusive. And because the procedures and remedies in the administrative process also parallel those found to be inadequate in *Piel*, this Court should hold that Mr. Rose has satisfied the “jeopardy” element and can proceed with his tort claim.

**B. Standard of Review.**

When reviewing a trial court’s decision on summary judgment, this Court performs the same inquiry as the trial court. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002) (citation omitted). The court takes the facts in the light most favorable to the nonmoving party; it may grant summary judgment when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.*

C. **Analysis of the Employee’s Remedies for Discharge is Inconsistent with the Tort’s Role in Defining the Limits of the Common-law Doctrine of Employment at Will.**

The focus on “adequacy” of alternative statutory remedies for the employee’s discharge undermines the role of the common law as the foundational law in this state and results in undue deference to the existence of statutory and administrative remedies. In recognizing the tort, this Court was defining the outer limits of the common-law doctrine of employment at will, *see Thompson*, 102 Wn.2d at 225, 231-32, and those boundaries exist irrespective of statutory or administrative remedies.

This Court recognized the tort on the basis that employers could not be allowed to use the common-law employment-at-will doctrine as a shield for action that frustrates public policy. *Thompson*, 102 Wn.2d at 231; *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 800-01, 804, 991 P.2d 1135, 1139 (2000) (citation omitted) (tort protects the “public interest in not permitting employers to impose a condition of employment a requirement that an employee act in a matter contrary to fundamental public policy”); *see also Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 136, 691 P.2d 190 (1984) (noting that this Court “does not hesitate” to conform the common law to “evolving standards of justice”). From

the start, the focus of the analysis was on the employee's actions, and whether they protected a clear public policy. *Thompson*, 102 Wn.2d at 232-34 (“If [employee’s] discharge was premised on *his compliance with [the law]* . . . his discharge was contrary to a clear mandate of public policy” (emphasis added)).

The tort is not some sort of stop-gap measure, useful only when statutes and regulations had nothing to say on the subject, nor should it be. The common law is the foundational law in this state unless it is inconsistent with statute. RCW 4.04.010 (cited in *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008)). Unless a legislative body plainly intends to override the common law, or a statute is irreconcilably incompatible with the common law, the common law remains unaffected. *Potter*, 165 Wn.2d at 76-77. A statute that supplements or overlaps with common law remedies does not affect the common law in any way.

This Court’s opinion in *Koroslund v. DynCorp Tri-Cities Services, Inc.*, 156 Wn. 2d 168, 182-83, 125 P.3d 119 (2005) put aside the fundamental question of whether the legislature or Congress intended to abrogate the common law. *See Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 54, 821 P.2d 18 (1991); *Wilson v. City of Monroe*, 88 Wn. App. 113, 125, 943 P.2d

1134 (1997). Instead, *Korslund* found that where a statutory or regulatory remedy for discharge exists, the tort fails, even when the statutory remedy is wholly *consistent* with the common law. *See* 156 Wn.2d at 183. Such a rule departs from the basic tenets of the common-law system and RCW 4.04.010.

A reading of the “jeopardy” element that focuses on the employee’s conduct in protecting the public policy, rather than on parsing of possible discharge remedies, does not imperil the employment-at-will doctrine because the tort has other robust requirements. *See Becker*, 182 Wn. App. at 964-65 (Fearing, J., concurring). This reading still requires a showing of *clear* public policy, which often necessitates an exhaustive analysis of state statutes, regulations, and case law (“clarity”). *See Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 207-219, 193 P.3d 128 (2008); *Gardner*, 128 Wn.2d at 942-45, 937 (recognizing that the court should cautiously define public policy so as not to broaden the tort inappropriately). It also requires the employee to prove that her public-policy-protecting actions caused her discharge (“causation”) – a challenging evidentiary showing requiring proof of the employer’s intentional state of mind. It requires a showing that no other important public policy interest asserted by the employer as a

justification for the discharge outweighs the policy the employee acted to further (“absence of justification”). *Gardner*, 128 Wn.2d at 947-48.

Most importantly, this Court can best protect public policy and deter reprehensible employer behavior by refusing to withhold the tort remedy simply because other remedies may be available. Public policy is best served through a consistently available tort remedy, not a patchwork in which the existence of administrative remedies leaves the tort available to some employees who act to protect important public policies, but not to others. Consistent application of the common-law remedy comports with the common law’s role as the foundational law in this state.

**D. Analysis of Remedies for the Employee’s Discharge Element Does Not Fit within the Central Purpose of the “Jeopardy” Element and Should Not Be Considered Within that Element.**

Diverting the “jeopardy” analysis to focus on remedies for the employee’s discharge causes confusion in the doctrine by departing from the central purpose of the “jeopardy” inquiry. From the inception of the four-element analysis in *Gardner*, the purpose of the “jeopardy” element has been to insure that there was a sufficient nexus between the *employee’s conduct* and the protection

of the public policy to warrant relief. The “jeopardy” analysis is an examination of the employee’s actions to determine if they were directly related to or necessary to the effective enforcement of the public policy. *Gardner*, 128 Wn.2d at 945. Put differently, the inquiry is whether the *employee needed to do what she did* in order to stop the violation of public policy from happening in the first place, or if something else would have averted the danger.

This inquiry was the sole aim of the “jeopardy” analysis for the first nine years of the element’s existence. *See, e.g. id.* at 945-46 (holding it was necessary for plaintiff to leave his armored car to rescue a woman being chased by an armed attacker because he reasonably believed that no one else could help); *Ellis v. City of Seattle*, 142 Wn.2d 450, 463, 13 P.3d 1065 (2000), *as amended* (Jan. 8, 2001) (holding that plaintiff electrician needed to refuse to disable an important component of the fire alarm system in a public building to protect the public policy because the city did not have assurances from the fire department that such a thing was safe); *Hubbard v. Spokane Cnty.*, 146 Wn.2d 699, 716-17, 50 P.3d 602 (2002) (holding that plaintiff county zoning employee necessarily protested the illegal issuance of a building permit despite the existence of a public appeals process to challenge permits, because

plaintiff was in a much better position to recognize violations and preserve public health and safety by preventing the illegal act in the first place). It was not until this Court’s opinion in *Koroslund* that the Court inserted an inquiry into the “jeopardy” element about whether the employee’s remedy for her discharge, after the fact, was “adequate” and therefore barred the employee from using the tort.<sup>3</sup> See 156 Wn. 2d at 181-82.

Eliminating *Koroslund*’s “adequacy of remedies for discharge” analysis from the “jeopardy” element would return much-needed clarity to the tort because it would align with the central purpose of the “jeopardy” element: ensuring that the

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<sup>3</sup> The distinction between the core jeopardy inquiry—whether the employee’s actions were necessary to stop the harm—and the secondary question of whether other discharge remedies are available is critical to a clear tort analysis in another way. This distinction explains why the passage from *Hubbard*, cited by Respondent and in both *Koroslund* and *Cudney v. ALSCO, Inc.*, 172 Wn.2d 524, 259 P.3d 244 (2011) is misplaced as cited in those cases. That passage reads: “[t]he other means of promoting the public policy *need not be available to the individual* so long as the other means are adequate to safeguard the public policy.” *Hubbard*, 146 Wn.2d at 717 (emphasis added) (cited in *Koroslund*, 156 Wn.2d at 183; *Cudney*, 172 Wn.2d at 538). In *Hubbard*, the Court was engaged in the core jeopardy inquiry, asking whether the employee’s actions (internally complaining about improperly granted building permits) were necessary or if something else would have stopped the harm (like a zoning appeals process available to members of the public). *Hubbard*, 146 Wn.2d at 716-17. However, when applied to the “adequacy of discharge remedies” analysis, the idea that the remedy does not have to be available to the employee no longer makes sense. If discharge remedies matter at all, then the remedies have to be available to the discharged employees. If discharge remedies are not available to the employees, they have no deterrent or compensatory effect and thus cannot protect the public policy at issue.

employee's conduct actually protected public policy. This is all the analysis the Court needs to do regarding the "jeopardy" element because once the Court identifies the employee's actions as the effective means for preventing the harm underlying the public policy, the Court need not look at any proffered remedies for discharge.

Mr. Rose meets the "jeopardy" test as it was originally intended. In *Gardner*, the court said that to satisfy "jeopardy," the employee must show that his "conduct *directly relates* to public policy or was *necessary* for the effective enforcement of the public policy." 128 Wn.2d at 945 (emphasis in original). The Court must only consider whether Mr. Rose's act of refusing to drive over the hour limits stopped something against public policy from happening. The answer is "yes." If he drove over the time limit, he could fall asleep at the wheel, potentially maiming or killing other drivers. Mr. Rose was the one who had the knowledge and the power to prevent unsafe highway conditions, and he did. His refusal to drive was both directly related to and the only effective means to prevent the harm underlying the public policy. There is no reason to inquire about remedies for his discharge because those remedies could do

nothing to address the actual threat to highway safety at the moment when Anderson ordered Mr. Rose to drive in violation of the law.<sup>4</sup>

**E. Even if the Court Examines the Alternative Remedy for Discharge Here, Mr. Rose’s Tort Claim Survives Because the Alternative Remedy Is Expressly Not Exclusive and Is Otherwise Inadequate.**

If this Court does examine the administrative remedy for Mr. Rose’s discharge, it need only look to the non-exclusivity language in the CMVSA to determine that its remedy does not negate Mr. Rose’s tort claim. The statute provides:

Nothing 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. . . .

Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law. . .

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<sup>4</sup> There are a number of other jurisdictions that do examine adequacy of remedies for discharge. This analysis is contrary to tort’s purpose for the reasons stated in this brief, and has not been adopted in several states. *See Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 355-56, 416 S.E.2d 166 (1992) (rejecting “adequacy” analysis of alternative discharge remedy because that analysis misapprehends role of common law); *Gandy v. Wal-Mart Stores, Inc.*, 117 N.M. 441, 444-45, 872 P.2d 859 (1994) (rejecting argument that tort cannot be based on statute that provides its own remedial scheme); *Bliss v. Stow Mills, Inc.*, 146 N.H. 550, 556, 786 A.2d 815 (2001) (allowing tort claim where plaintiff had CMVSA retaliation remedy) (cited in *Faulkner v. Mary Hitchcock Mem’l Hosp.*, No. 12-CV-482-SM, 2013 WL 6019318, at \*1 (D.N.H. Nov. 13, 2013) (recognizing that “[t]he critical issue . . . is not whether there exists a statutory alternative, but whether the legislature intended to substitute [that] statutory remedy for the common law wrongful discharge cause of action.” (internal quotations omitted))).

49 U.S.C. § 31105(f) & (g). Congress amended the CMVSA in 2007 specifically to make clear that rights to be free of retaliation arising under that federal statute were in addition to any other claims an employee may have concerning retaliation.<sup>5</sup>

This Court's opinions in *Piel* and *Wilmot* together establish that the language of the statute itself is a paramount consideration when deciding whether the tort claim can stand despite the existence of an administrative remedy. In *Piel*, this Court recognized that express non-exclusivity language in the statute that establishes the public policy is "[t]he strongest possible evidence that the statutory remedies are not adequate to vindicate a violation of public policy," holding that the administrative remedy did not negate the "jeopardy" element. 177 Wn.2d at 617.<sup>6</sup> There, the remedial statute stated: "[t]he provisions of this chapter are intended to be additional to other remedies and shall be liberally construed to

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<sup>5</sup> Compare Implementing Recommendations of the 9/11 Commission Act of 2007, Pub.L. 110-53, Title XV, § 1536, 121 Stat. 464 with 49 U.S.C. § 31105 (2006). Prior to the amendments, a number of courts had held that the remedy contained in the statute preempted other state-law remedies. See, e.g., *Davis v. Customized Transp., Inc.*, 854 F.Supp. 513, 518 (N.D. Ohio 1994); *Watson v. Cleveland Chair Co.*, 789 S.W.2d 538, 544 (Tenn. 1989).

<sup>6</sup> The Court in *Piel* correctly limited the holding of *Korslund* on this point because *Korslund* wrongly rejected the relevance of legislative entreaties to preserve other remedies by declaring that the legislature's pronouncements on exclusivity had no bearing on whether the remedy "adequately" protected the public policy. See *Korslund*, 156 Wn.2d at 183.

accomplish their purpose.” *Id.* While the statutes here and in *Piel* use different language, the message is the same: vitally important public policy is at issue, and the employees who safeguard that policy should have more than one means of protection. *See id.*

*Piel* was a continuation of this Court’s reasoning in *Wilmot*,<sup>7</sup> where the Court examined the statutory language of the Industrial Insurance Act and concluded that the Act did not have any language precluding court remedies as to retaliatory discharge. *Wilmot*, 118 Wn.2d at 57. The court then went on to find further evidence that the remedy was not intended to be exclusive by examining the content and procedure of the remedy and concluding its adequacy was “uncertain.” *Id.* at 61.<sup>8</sup> The Court concluded that the remedy was not exclusive, and allowed the plaintiff to proceed with his tort claim. *Id.* at 65.

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<sup>7</sup> The *Cudney* Court said that *Wilmot* was not on point because *Wilmot* was deciding only the question of whether the alternative remedy was “mandatory and exclusive.” 172 Wn.2d at 535. The *Cudney* Court said this as it extended the *Korslund* analysis, which did not recognize the importance of statutory pronouncements about exclusivity in deciding whether an alternative remedy could completely prevent access to the common law tort. *See id.* This analysis is contrary to *Piel*’s recent pronouncement that non-exclusivity language in a statute is the “strongest possible evidence” that the remedy is not adequate for “jeopardy” purposes. 177 Wn.2d at 617.

<sup>8</sup> The Court also considered whether the common-law cause of action preceded the statutory remedy. *Wilmot*, 118 Wn.2d at 62-63. In this case, the alternative statutory remedy was amended in 2007 to make it expressly non-exclusive, *see supra* n.5, many years after the establishment of the tort in Washington State, *see Thompson*, 102 Wn.2d 219 (1984).

The inquiry is even simpler as applied to Mr. Rose. First, the statutory language plainly states that Congress' intention was that the remedy be non-exclusive. The inquiry should end there, as there is no need to look at the adequacy of the remedy as a mechanism for deciding whether Congress intended the remedy to be exclusive. Mr. Rose's tort claim survives because Congress explicitly stated that the remedy it created for Mr. Rose's discharge should not stand alone.

If the Court does further examine the adequacy of the CMVSA remedy, the structure of the remedy is inadequate to protect the public policy under *Piel*. *Piel* recognized that the tort can exist alongside comprehensive alternative remedies,<sup>9</sup> and found the remedy there to be inadequate, 177 Wn. 2d at 616. Mr. Rose's CMVSA administrative remedy is comparable to the remedy in *Piel*.

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<sup>9</sup> *Piel*, 177 Wn.2d at 614-15 (allowing tort despite administrative remedy through the Public Employees Relations Committee (RCW 41.56.160)); see also *Bennett v. Hardy*, 113 Wn.2d 912, 922 & 925, 784 P.2d 1258 (1990) (allowing tort claim alongside implied cause of action under RCW 49.44.090); *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 756-57, 888 P.2d 147 (1995) (allowing tort claim alongside implied cause of action under the Little Norris LaGuardia Act, RCW 49.32.030); *Wilmot*, 118 Wn.2d at 51 (allowing tort claim despite existence of remedy under workers' compensation law, RCW 51.48.025(2)). Division III, relying on *Piel*, allowed the plaintiff in *Becker* to go forward with his tort claim despite its determination that the available federal remedies under the Sarbanes-Oxley Act and the Dodd-Frank Act "provide[d] comprehensive whistleblower protections." *Becker*, 182 Wn. App. at 948.

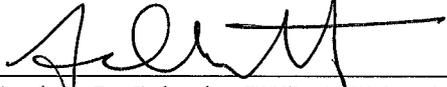
Both provide the basic elements of an employment-discharge remedy: monetary damages and injunctive relief including reinstatement, and both have limitations periods of approximately 180 days. *Compare* RCW 41.56.160(1) & (2) *with* U.S.C. § 31105(b)(1) & (b)(3)(A). Under *Piel*, the CMVSA remedy does not bar Mr. Rose's tort claim.

#### V. CONCLUSION

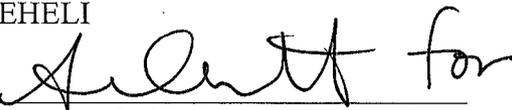
This Court should clarify that the purpose of the "jeopardy" element continues to be evaluating whether the employee's conduct stopped the harm to public policy, and hold that Mr. Rose satisfies that element. The Court should reverse the Court of Appeals determination to the contrary and remand for Mr. Rose to present the facts of his discharge to a jury.

DATED this 20th day of April, 2015.

COLUMBIA LEGAL SERVICES

By:   
Andrea L. Schmitt, WSBA #39759

LAW OFFICES OF GREGORY  
STAEHELI

By:   
Gregory G. Staeheli, WSBA #4452

Attorneys for Plaintiff-Petitioner Charles Rose

## VI. APPENDIX

### 49 U.S.C. § 31105

**(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--

**(A)(i)** the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or  
**(ii)** the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

**(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; or

**(ii)** the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

**(C)** the employee accurately reports hours on duty pursuant to chapter 315;

**(D)** the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

**(E)** the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

**(2)** Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought

from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

**(b) Filing complaints and procedures.--(1)** An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b). On receiving the complaint, the Secretary of Labor shall notify, in writing, the person alleged to have committed the violation of the filing of the complaint.

**(2)(A)** Not later than 60 days after receiving a complaint, the Secretary of Labor shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify, in writing, the complainant and the person alleged to have committed the violation of the findings. If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

**(B)** Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

**(C)** A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary of Labor shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

**(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.

**(c) De novo review.**--With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

**(d) Judicial review and venue.**--A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. Review shall conform to chapter 7 of title 5. The review shall be heard and decided expeditiously. An order of the Secretary of Labor subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

**(e) Civil actions to enforce.**--If a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

**(f) No preemption.**--Nothing 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.

**(g) Rights retained by employee.--**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. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

**(h) Disclosure of identity.--**

**(1)** Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee who has provided information about an alleged violation of this part, or a regulation prescribed or order issued under any of those provisions.

**(2)** The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) of this subsection if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosure shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

**(i) Process for reporting security problems to the Department of Homeland Security.--**

**(1) Establishment of process.--**The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding motor carrier vehicle security problems, deficiencies, or vulnerabilities.

**(2) Acknowledgment of receipt.--**If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

**(3) Steps to address problem.--**The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

**(j) Definition.--**In this section, "employee" means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a

mechanic, a freight handler, or an individual not an employer, who-

- 
- (1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and
- (2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.

**49 U.S.C.A. § 31105 (West 2006)**

**(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—

**(A)** the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or

**(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 or health; or

**(ii)** the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's unsafe condition.

**(2)** Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the unsafe condition establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.

**(b) Filing complaints and procedures.—(1)** An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. On receiving the complaint, the Secretary shall notify the person alleged to have committed the violation of the filing of the complaint.

**(2)(A)** Not later than 60 days after receiving a complaint, the Secretary shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify the complainant and the person alleged to have committed the violation of the findings. If the Secretary decides it is reasonable to believe a violation occurred, the Secretary shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

**(B)** Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have

committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

**(C)** A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary, the complainant, and the person alleged to have committed the violation.

**(3)(A)** If the Secretary decides, on the basis of a complaint, a person violated subsection (a) of this section, the Secretary 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 back pay.

**(B)** If the Secretary issues an order under subparagraph (A) of this paragraph and the complainant requests, the Secretary may assess against the person against whom the order is issued the costs (including attorney's fees) reasonably incurred by the complainant in bringing the complaint. The Secretary shall determine the costs that reasonably were incurred.

**(c) Judicial review and venue.**—A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. The review shall be heard and decided expeditiously. An order of the Secretary subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

**(d) Civil actions to enforce.**—If a person fails to comply with an order issued under subsection (b) of this section, the Secretary shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

**Implementing Recommendations of the 9/11 Commission Act of 2007, Pub.L. 110–53, Title XV, § 1536, 121 Stat. 464**

**SEC. 1536. MOTOR CARRIER EMPLOYEE PROTECTIONS.**

Section 31105 of title 49, United States Code, is amended to read:

“(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—

“(A)(i) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order, or has testified or will testify in such a proceeding; or

“(ii) the person perceives that the employee has filed or is about to file a complaint or has begun or is about to begin a proceeding related to a violation of a commercial motor vehicle safety or security regulation, standard, or order;

“(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; or

“(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicle's hazardous safety or security condition;

“(C) the employee accurately reports hours on duty pursuant to chapter 315;

“(D) the employee cooperates, or the person perceives that the employee is about to cooperate, with a safety or security investigation by the Secretary of Transportation, the Secretary of Homeland Security, or the National Transportation Safety Board; or

“(E) the employee furnishes, or the person perceives that the employee is or is about to furnish, information to the Secretary of Transportation, the Secretary of Homeland Security, the National Transportation Safety Board, or any Federal, State, or local regulatory or law enforcement agency as to the facts relating to any accident or incident resulting in injury or death to an individual or damage to property occurring in connection with commercial motor vehicle transportation.

“(2) Under paragraph (1)(B)(ii) of this subsection, an employee's apprehension of serious injury is reasonable only if a reasonable individual in the circumstances then confronting the employee would conclude that the hazardous safety or security condition

establishes a real danger of accident, injury, or serious impairment to health. To qualify for protection, the employee must have sought from the employer, and been unable to obtain, correction of the hazardous safety or security condition.

“(b) FILING COMPLAINTS AND PROCEDURES.—(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121(b). On receiving the complaint, the Secretary of Labor shall notify, in writing, the person alleged to have committed the violation of the filing of the complaint.

“(2)(A) Not later than 60 days after receiving a complaint, the Secretary of Labor shall conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify, in writing, the complainant and the person alleged to have committed the violation of the findings. If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor shall include with the decision findings and a preliminary order for the relief provided under paragraph (3) of this subsection.

“(B) Not later than 30 days after the notice under subparagraph (A) of this paragraph, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of objections does not stay a reinstatement ordered in the preliminary order. If a hearing is not requested within the 30 days, the preliminary order is final and not subject to judicial review.

“(C) A hearing shall be conducted expeditiously. Not later than 120 days after the end of the hearing, the Secretary of Labor shall issue a final order. Before the final order is issued, the proceeding may be ended by a settlement agreement made by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

“(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.

“(c) DE NOVO REVIEW.—With respect to a complaint under paragraph (1), if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee, the employee may bring an original action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.

“(d) JUDICIAL REVIEW AND VENUE.—A person adversely affected by an order issued after a hearing under subsection (b) of this section may file a petition for review, not later than 60 days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation. Review shall conform to chapter 7 of title 5. The review shall be heard and decided expeditiously. An order of the Secretary of Labor subject to review under this subsection is not subject to judicial review in a criminal or other civil proceeding.

“(e) CIVIL ACTIONS TO ENFORCE.—If a person fails to comply with an order issued under subsection (b) of this section, the Secretary of Labor shall bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

“(f) NO PREEMPTION.—Nothing 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.

“(g) RIGHTS RETAINED BY EMPLOYEE.—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. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

“(h) DISCLOSURE OF IDENTITY.—

“(1) Except as provided in paragraph (2) of this subsection, or with the written consent of the employee, the Secretary of Transportation or the Secretary of Homeland Security may not disclose the name of an employee who has provided information about an alleged violation of this part, or a regulation prescribed or order issued under any of those provisions.

“(2) The Secretary of Transportation or the Secretary of Homeland Security shall disclose to the Attorney General the name of an employee described in paragraph (1) of this subsection if the matter is referred to the Attorney General for enforcement. The Secretary making such disclosure shall provide reasonable advance notice to the affected employee if disclosure of that person's identity or identifying information is to occur.

“(i) PROCESS FOR REPORTING SECURITY PROBLEMS TO THE DEPARTMENT OF HOMELAND SECURITY.—

“(1) ESTABLISHMENT OF PROCESS.—The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding motor carrier vehicle security problems, deficiencies, or vulnerabilities.

“(2) ACKNOWLEDGMENT OF RECEIPT.—If a report submitted under paragraph (1) identifies the person making the report, the Secretary of Homeland Security shall respond promptly to such person and acknowledge receipt of the report.

“(3) STEPS TO ADDRESS PROBLEM.—The Secretary of Homeland Security shall review and consider the information provided in any report submitted under paragraph (1) and shall take appropriate steps to address any problems or deficiencies identified.

“(j) DEFINITION.—In this section, ‘employee’ means a driver of a commercial motor vehicle (including an independent contractor when personally operating a commercial motor vehicle), a mechanic, a freight handler, or an individual not an employer, who—

“(1) directly affects commercial motor vehicle safety or security in the course of employment by a commercial motor carrier; and

“(2) is not an employee of the United States Government, a State, or a political subdivision of a State acting in the course of employment.”.

## CERTIFICATE OF SERVICE

I certify that on the 20th day of April, 2015, I caused a true and correct copy of the Supplemental Brief of Plaintiffs-Appellants to be served on the following persons by electronic mail, pursuant to agreement:

**Counsel for Respondent Anderson Hay & Grain:**

ETTER, MCMAHON, LAMBERSON, VAN WERT &  
ORESKOVICH

Ronald Van Wert: [rvw@ettermcmahon.com](mailto:rvw@ettermcmahon.com)

Jody Eckel: [Jody@ettermcmahon.com](mailto:Jody@ettermcmahon.com)

**Counsel for *Amicus Curiae*:**

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

Jeffrey Needle [jneedle@wolfenet.com](mailto:jneedle@wolfenet.com)

WASHINGTON STATE ASSOCIATION FOR JUSTICE

George Ahrend: [gahrend@ahrendlaw.com](mailto:gahrend@ahrendlaw.com)

Bryan Harnetiaux: [amicuswsajf@wsajf.org](mailto:amicuswsajf@wsajf.org)



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Fanny Cordero, Legal Assistant  
Columbia Legal Services