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Supreme Court No. 91040-5

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Court of Appeals, Division I, No. 70766-3-I

SUPREME COURT OF THE STATE OF WASHINGTON

ERICKA M. RICKMAN,

Petitioner,

v.

PREMERA BLUE CROSS,

Respondent.

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

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INTRODUCTION

In its Amicus Curiae brief, Washington State Association for Justice Foundation (WSAJ Foundation) proposes that this Court “reexamine the elements of the tort of wrongful discharge in violation of public policy” and jettison nearly two decades of precedent. WSAJ Foundation Brief of Amicus Curiae at 1. WSAJ Foundation suggests that this Court instead “return to its pre-*Gardner* precedent for wrongful discharge in violation of public policy” and “[i]n keeping with such precedent” adopt the elements of a retaliation claim under the Washington Law Against Discrimination. WSAJ Foundation Brief at 8-9.

Washington Employment Lawyers Association (WELA) also urges this Court to rewind to the pre-*Gardner* era. WELA further suggests several less sweeping, but still significant modifications to the wrongful discharge tort that would involve reversal of various precedents.

WSAJ Foundation’s and WELA’s arguments are misguided, but even if this Court abandoned the four-part “Perrit test” or reformulated the jeopardy element, the decision of the Court of Appeals should still be affirmed under this Court’s decision in *Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989).

ARGUMENT

A. WSAJ Foundation's and WELA's Approach Would Result in Rejection of Nearly 20 Years of Precedent

WSAJ Foundation and WELA advocate that this Court abandon the test adopted in its decision in *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 913 P.2d 377 (1996) and presumably dozens of decisions that followed and relied on this case and its "Perrit test". Respondent Premera Blue Cross respectfully suggests that such an approach is misguided and unduly disruptive. If this Court were writing on a *tabula rasa*, or blank slate, perhaps a different test could be constructed, but overturning years of precedent would be imprudent. In any case, WSAJ Foundation and WELA have not shown that the *Gardner* test is incorrect and harmful. Indeed, the jeopardy element of the *Gardner* test is an important feature of the wrongful discharge tort and this Court has recognized that the jeopardy element pre-dated *Gardner*. See *Gardner*, 128 Wn.2d at 941 (citing *Dicomes*).

B. Rickman's Petition For Review Did Not Seek to Modify the Elements of the Wrongful Discharge in Violation of Public Policy Tort

Amici urge this Court to radically reformulate the wrongful discharge in violation of public policy tort. Rickman's Petition For Review included no such request. This Court has previously stated that it

need not reach issues raised only by Amici. *See, e.g., State v. Hirschfelder*, 170 Wn.2d 536, 552, 242 P.3d 876 (2010) ("We need not address issues raised only by amici, and decline to do so here.").

C. Even if This Court Abandons the "Four-Part Perritt test", The Court of Appeals Decision Should Still Be Affirmed

Even if this Court were to abandon the test set forth in *Gardner*, the Court of Appeals' decision should still be affirmed. The Court of Appeals correctly applied *Dicomes* and considered the degree of alleged employer wrongdoing in combination with the reasonableness of the way in which the Rickman reported that alleged wrongdoing to determine whether an actionable public policy claim exists. Neither WSAJ Foundation nor WELA suggests that *Dicomes* be overruled or altered. Neither WSAJ Foundation nor WELA addresses the Court of Appeals' application of *Dicomes* to the undisputed facts in this case regarding the manner in which Rickman reported her concerns and the actual degree (or lack thereof) of employer wrongdoing. Based on the application of *Dicomes*, the Court of Appeals correctly concluded that no genuine issue of material fact existed as to whether discouraging Rickman's conduct would jeopardize the public policy of maintaining patient privacy interests. Nothing presented by WSAJ Foundation or WELA casts doubt on this application.

WSAJ Foundation suggests that the Court of Appeals' decision renders the wrongful discharge in violation of public policy tort "illusory" because the Court of Appeals concluded that Premera's robust internal reporting system was an available adequate alternative means of promoting the public policy. Far from it. The Court of Appeals' decision highlighted the fact that Rickman failed to offer any evidence impugning the evidence in the record of Premera's robust internal reporting system. This result encourages other employers to maintain similar robust internal reporting systems, which should be commended, not criticized. And the result appropriately encourages employees to utilize those internal reporting systems. The result does not render the wrongful discharge in violation of public policy tort illusory.

WELA argues that Premera's internal reporting system "provided no remedies for the employee" so it could not be an adequate alternative means to vindicate public policy. WELA Amicus Curiae Brief at 33-34. But WELA offers no evidence for this assertion of a lack of "remedies" and it is inconsistent with the Court of Appeals' description of Premera's internal reporting system as "robust". Remedies need not be monetary. In any case, the wrongful discharge of public policy tort does not require a

private remedy. *Weiss v. Lonnquist*, 173 Wn. App. 344, 359, 293 P.3d 1264, *review denied*, 178 Wn.2d 1025 (2013).

WELA also argues that treating internal reporting mechanisms as an adequate means of protecting public policy would be “unrealistic” and would “force” “plaintiff” to participate in and exhaust the internal complaint system. But WELA does not explain why that result would be unrealistic or unfair. And in any case, Rickman never even tried. And she offered no evidence to call into question Premera’s internal reporting system. The Court of Appeals correctly examined the record and concluded that in this case, Premera’s system was robust and provided an available adequate alternative means of reporting concerns. To be sure, the Court of Appeals’ conclusion does not mean that every employer internal reporting procedure will necessarily be an adequate alternative means of reporting concerns. But WELA points to no case where Washington courts have held that internal reporting systems cannot serve as an adequate alternative means of promoting a public policy.

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CONCLUSION

The Judgment of the Court of Appeals should be affirmed.

DATED this 21st day of May, 2015.

RIDDELL WILLIAMS P.S.

By 

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CERTIFICATE OF SERVICE

I, Jazmine Matautia, certify that:

1. I am an employee of Riddell Williams P.S., attorneys for Respondent Premera Blue Cross in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.
2. On May 21, 2015, I served a true and correct copy of the foregoing document on the following parties, via email, and addressed as follows:

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

SIGNED at Seattle, Washington, this 21st day of May, 2015.



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Erika Rickman v. Premera Blue Cross, Inc.
Supreme Court Case No. 91040-5

Filed by:
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Dear Clerk:

Attached for filing is Respondent's Answer to Briefs of Amici Curiae Washington State Association for Justice Foundation and Washington Employment Lawyers Association.

Petitioner's Attorney, counsel from Washington Employment Lawyers Association, and Washington State Association for Justice Foundation are also copied on this email.

Mr. Howie may be reached at the email above or (206) 624-3600.

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