NO. 90946-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

GREGG BECKER,

Petitioner,

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.,

Respondents.

AMICUS CURIAE MEMORANDUM
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION AND INTEREST OF AMICUS

The Washington Employment Lawyers Association (WELA) is a chapter of the National Employment Lawyers Association. WELA is comprised of more than 150 attorneys who are admitted to practice law in the State of Washington. WELA advocates in favor of employee rights in recognition that employment with fairness is fundamental to the quality of life.

It is exceptionally unusual for WELA to encourage review from a decision in the lower court favorable to an employee. WELA does so here because the law applicable to the claim of wrongful discharge in violation of public policy exists in a state of chaos. Employees, employers, and the lower courts are unable to determine when the public policy tort applies. This Court's clarification on this extremely important cause of action is badly needed.

II. ISSUES

A. Has the Court of Appeals issued decisions on the public policy tort that are inconsistent and irreconcilable?

B. Is there overwhelming confusion in the legal community concerning the application of the public policy tort?

C. Should the Court grant review to bring clarity for employers, employees, and the lower courts?

III. ARGUMENT

A. Reasons for Granting Review.

The Court should grant review because the decision of the Court of Appeals in this case, *Becker v. Cmty. Health Sys., Inc.*, __ Wn. App. __, 332 P.3d 1085 (2014), conflicts with another decision of the Court of Appeals. RAP 13.4(b)(2). Within six weeks of issuing its opinion below, the same court decided *Rose v. Anderson Hay & Grain Co.*, __ Wn. App. __, 335 P.3d 440 (2014) (petition for review pending). Both cases directly address whether and to what extent alternative means for enforcing public policy foreclose the jeopardy element of the public policy tort. The two cases stand in stark conflict and cannot be reconciled. *Becker* also conflicts with the decision issued by Division I of the Court of Appeals in *Weiss v. Lonnquist*, 173 Wn. App. 344, 359-60, 293 P. 3d 1264 (2013), which held that the Rules of Professional Conduct provide an adequate alternative means to vindicate public policy, despite the lack of any remedy for the whistleblower. *See also Rickman v. Premera Blue Cross*, Sup. Ct. No 91040-5 (Sept. 2, 2014) (petition for review from Division I opinion holding jeopardy element negated by internal reporting system).

Review is also appropriate because the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). There exists overwhelming uncertainty concerning under what circumstances alternative means to vindicate public policy are sufficient to foreclose the jeopardy element of the public

policy tort. Employers, employees, and the lower courts are without meaningful guidance for determining when the wrongful discharge claim applies. The confusion is powerfully reflected in the Judge Fearing's concurring opinion in *Becker*, which directly addresses the incoherence of existing law. 332 P.3d at 1094-99. The public interest mandates that the Supreme Court provide much-needed clarification.

B. There Exists a Conflict Between *Becker* and *Rose*, and Confusion Reigns in the Legal Community Concerning the Application of the Public Policy Tort.

Washington State's jurisprudence concerning the application of the claim for wrongful discharge in violation of public policy has left employers, employees, and courts in a state of confusion and uncertainty. In particular, the jeopardy element of the claim has been subjected to different interpretations by different courts. As a result, it is unclear 1) when an alternative means for vindicating public policy will negate the jeopardy element; 2) which, if any, alternative *remedies* must be available to the discharged employee; 3) whether the existence of applicable criminal statutes are sufficient to foreclose the jeopardy element; and 4) the circumstances under which administrative processes and remedies are sufficient to foreclose the jeopardy element.

Nothing better reflects the confused state of the law than the conflicting decisions issued by Division III of the Court of Appeals in *Becker* and *Rose*. The Court should grant review to clarify existing law and affirm the decision of the Court of Appeals in this case.

In *Becker*, Acting Chief Judge Brown wrote the lead opinion. After reviewing the evolution of Washington's jurisprudence regarding the public policy tort, Judge Brown came to the following conclusions: "We now realize our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct." *Becker*, 332 P.3d at 1090 (citing Henry Perritt, Jr., *Employee Dismissal Law and Practice* § 7.06[A], at 7–82.1 to .4 (Supp. 2013)). "This approach tended to foreclose private common law tort remedies for employees any time statutes or regulations provided some means of promoting public policy." *Id.* (citing *Cudney v. Alsco, Inc.*, 172 Wn.2d 524, 548, 259 P.3d 244 (2011) (Stephens J., dissenting)). "But doing so actually undermined public policy enforcement by chilling employee conduct advocating compliance with statutes and regulations. Thus, in Mr. Becker's case, we reform our jeopardy analysis under the reasoning of *Thompson, Gardner,* and *Piel*." *Id.* at 10-11.

The Court of Appeals ruled that the comprehensive remedies made available by various statutes—including section 806(a) of the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. § 1514A, and section 922(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 15 U.S.C. § 78u-6—did not negate the jeopardy element of the public policy tort: "These statutes and regulations provide comprehensive criminal, civil, and administrative enforcement mechanisms promoting the

important public policies they secure. But those means of promoting public policy do not foreclose private common law tort remedies for employees." *Becker*, 332 P.3d 1093 (citing *Cudney*, 172 Wn.2d at 549-50 (Stephens, J., dissenting)). Although unstated by the Court, these laws provide all of the remedies otherwise made available under the public policy tort. Nevertheless, the Court held that "the public policy tort may sometimes coexist with comprehensive criminal, civil, and administrative enforcement mechanisms." *Id.* (citing *Piel v. City of Federal Way*, 177 Wn.2d 604, 614-16, 306 P.3d 879 (2013)). Notably, the majority cited Justice Stephens' dissenting opinion in *Cudney* in support of its reasoning.

In *Becker*, Judge Fearing wrote a concurring opinion in which Judge Lawrence-Berry joined. Judge Fearing wrote separately because he "[could not] reconcile the teachings of *Piel* and *Cudney*."

> *The two decisions, combined with other high court opinions, create confusion amongst practitioners and lower court judges as to the nature and extent of the jeopardy element of a claim for wrongful discharge in violation of public policy.* In addition to deciding disputes between parties, appellate decisions are meant to declare and explain law and to provide guidance to lawyers, litigants, and lower courts, particularly when a busy tort is the subject matter. Pronouncements on the subject of the jeopardy element offer puzzlement, not direction. I thought, upon reading the ruling in *Cudney*, that the tort languidly lay, on life support, in the intensive care unit. *Piel* revived the tort. *But practitioners and trial courts must wonder if the next decision will return the tort to the sick bay.*

Becker, 332 P.3d at 1094-95 (Fearing, J., concurring) (emphasis added).

A return to the "sick bay" referenced by Judge Fearing was not long in coming.

In *Rose*, the plaintiff alleged he was terminated when he refused to complete his shift as a commercial truck driver because doing so would have required him to exceed the maximum allowed hours-of-service and falsify time sheets in violation of federal law. 335 P.3d at 441. The employer filed a motion for summary judgment and asserted that the Commercial Motor Vehicle Safety Act (CMVSA), 49 U.S.C. § 311, provides comprehensive remedies that serve to protect the specific public policy identified by Mr. Rose and even include punitive damages. *Rose*, 335 P.3d at 441. In light of this, the employer argued that an adequate alternative means of promoting the public policy existed and, as a matter of law, foreclosed Mr. Rose's public policy cause of action.[1] *Id.* at 441-42. The trial court agreed and granted the employer's motion for summary judgment. *Id.* at 442. The Court of Appeals affirmed. *Id.* at 444.

The only issue addressed on appeal concerned the "jeopardy" element of the public policy tort. In that regard, the Court of Appeals in *Rose* held: "Protecting the public is the policy that must be promoted, not protecting the employee's individual interests." *Rose*, 335 P.3d at 442; *but see Becker*, 332 P.3d at 1090 ("Our recent cases faithfully analyzed the

[1] Mr. Rose had previously sued in federal court and alleged a violation of the CMVSA, but that suit was dismissed for failure to exhaust administrative remedies.

jeopardy element in a manner we thought the reasoning of *Korslund* and *Cudney* required. We now realize our jeopardy analysis overemphasized the abstract adequacy of statutes and regulations while forgetting the concrete public policy impact of chilling protected employee conduct."). Relying on *Cudney* and *Korslund,* the Court concluded that because the remedies available under the CMVSA "include reinstatement, compensatory damages, back pay with interest, litigation costs, witness fees, and attorney fees . . . [those remedies] more than adequately protect the public interest in commercial motor vehicle safety." *Rose*, 335 P.3d at 444; *but see Becker,* 332 P.3d at 1093 ("[T]he public policy tort may sometimes coexist with comprehensive criminal, civil, and administrative enforcement mechanisms.").

Thus, just weeks after concluding in *Becker* that it was necessary to "reform [the court's] jeopardy analysis" in light of *Piel*, Judge Brown chose in *Rose* to narrowly interpret *Piel*. *Rose*, 335 P.3d at 443. Specifically, he distinguished the Supreme Court's decision on the ground that it relied on a prior case holding PERC remedies only protect personal contractual rights and fail to fully address broader public interests. *Id.* Judge Brown concluded that *Piel* is limited to claims asserting PERC as the source of public policy. *Id.*; *but see Becker*, 332 P.3d at 1094 (Fearing, J., concurring) ("I write separately, however, because I cannot reconcile the teachings of *Piel* and *Cudney.* Yes, one may find distinguishing features between the two decisions, but those differences

pale in importance when considering principles upon which the jeopardy element is based."). A petition for review is pending in *Rose*.

It is impossible to reconcile *Becker* and *Rose*. Judge Fearing's concurring opinion in *Becker* powerfully demonstrates that confusion in the legal community mandates the Court's review and clarification. Lawyers for both employees and employers should no longer have to guess as to the circumstances under which the public policy tort will or will not apply.

The uncertainty that exists in the legal community concerning the application of the public policy tort is a product of the following cases. ***Compare*** *Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 125 P. 3d 119 (2005) (ERA provided comprehensive non-exclusive remedies which foreclosed the jeopardy element of the public policy tort), *Cudney*, 172 Wn.2d 524 (remedies available under WISHA and criminal penalties for DUI negated jeopardy element), and *Weiss*, 173 Wn. App. 344 (WSBA enforcement of the Rules of Professional Conduct are an adequate alternative means to vindicate public policy, despite the lack of any remedy for the whistleblower), ***with*** *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P. 2d 1081 (1984) (the Foreign Corrupt Practices Act provides a source of public policy adequate to state a claim for wrongful discharge), *Gardner v. Loomis Armored Inc.*, 128 Wn.2d 931, 913 P. 2d 377 (1996) (the public policy reflected in favor of protecting human life in a variety of statutes was sufficient to sustain a claim of wrongful

discharge), *Ellis v. City of Seattle,* 142 Wn.2d 450, 13 P. 3d 1065 (2000) (refusal to violate the Seattle Fire Code was sufficient to sustain claim for wrongful discharge), and *Piel,* 177 Wn.2d 604 (remedies available under PERC are inadequate and thus do not foreclose public policy tort).

IV. CONCLUSION

This Court should grant review to clarify when alternative means of vindicating public policy are sufficient to foreclose the jeopardy element for claims of wrongful discharge in violation of public policy, and to affirm the Court of Appeals in this case.

Dated this 19th day of December, 2014.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

By, _____
Jeffrey Needle, WSBA #6346
Toby Marshall, WSBA #32726

OFFICE RECEPTIONIST, CLERK

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Dear Clerk:

Attached hereto please find a copy of an Amicus Curiae Memorandum and Motion to Appear on behalf of the Washington Employment Lawyers Association (WELA). As reflected above, a copy is being served on the Petitioner and Respondent.

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