No. 80735-3

No. 24565-9-III (Consolidated with 25187-0 III)

SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID FAUBION, AND CHARLES CABLE

Plaintiffs-Respondents
v.

FLUOR FEDERAL SERVICES, INC.,
a Washington corporation,
Defendant-Appellant

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT

(Hon. Carrie L. Runge)

CERTIFICATION TO SUPREME COURT BY COURT OF APPEALS

BRIEF OF AMICUS CURIAE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. Interest of Amicus

The Washington Employment Lawyers Association (WELA) has approximately 105 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association (NELA). WELA's members are Washington attorneys who primarily represent employees in employment law matters, including cases brought under the common law tort of wrongful discharge in violation of a clear mandate of public policy (public policy tort). WELA members frequently represent whistleblowers who seek to utilized the public policy tort as of redress for wrongful discharge and as a means of protecting public policy.

WELA has appeared as amicus curiae in numerous cases before the Washington Supreme Court, including *Korslund v. Dyncorp Tri-City Services, Inc,* 156 Wn.2d 158, 125 P.3d 119 (2005), which is central to the consideration of the issues now before this court.

II Statement of the Case[1]

Eleven plaintiffs were employed as pipe fitters at the Hanford nuclear reservation for Fluor Federal Services and its predecessor, Fluor Daniel Northwest. In 1997, five of the pipe fitters were laid off, and claimed that they were discharged in retaliation for having blown the whistle concerning a test valve that plaintiffs believed created a significant threat to public safety.

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[1] Amicus relies upon the facts recited in Plaintiff's and Defendant's briefs, and has not independently reviewed the Clerks Papers.

The original five pipe fitters sought relief under the Energy Reorganization Act (ERA), and were reinstated to their position in February, 1998. Several months later they were laid off again, allegedly as part of a broader lay off including other pipe fitters. The original pipe fitters filed another administrative complaint together with five additional pipe fitters, who alleged that they were terminated in retaliation for having supported the original five. The pipe fitters withdrew their administrative complaint because they found the administrative forum inadequate. In particular, they claim that they were unable to issue third party subpoenas. Instead, they filed a state cause of action alleging wrongful discharge in violation of a clear mandate of public policy. One more pipe fitter joined in the state cause of action, making a total of eleven.

The case came to trial in 2005. In the Trial Management Report (pre-trial order), Fluor admitted the public policy at issue was clear, and that the safety concerns raised by the pipe fitters would jeopardize that public policy. The jury awarded a verdict in favor or all plaintiffs in the amount of $4,880,400.

Fluor filed a post trial motion under CR 59, and then after the publication of *Korslund v. Dyncorp.*,156 Wn.2d 158, 125 P.3d 119 (2005)(Korslund II) filed a CR 60 motion. In its CR 60 motion, Fluor argued that the Supreme Court's decision in *Korslund* was dispositive, and that as a matter of law the administrative remedy made available under the ERA was

an adequate alternative means of vindicating public policy such that the jeopardy element was not satisfied. The plaintiffs argued that Fluor had waived the issue when it conceded in the Trial Management Report that the jeopardy element was satisfied. Flour argues that it only admitted the first prong of the jeopardy element, and did not acknowledge that other means of promoting public policy are inadequate. Def. Brief at 29. The trial court denied the post trial motions, and Fluor appealed on the *Korslund* issue and other issues as well. The plaintiffs filed a cross appeal arguing that the trial court erred in failing to award costs.

After the case was fully briefed, the Court of Appeals (Division III) certified the following question to the Supreme Court: "Whether *Korslund v. Dyncorp Tri-City Services, Inc,* 156 Wn. 2d 158, 125 P.3d 119 (2005) bars claims of wrongful discharge because the remedies under the ERA defeat public policy." The plaintiffs then filed a motion with the Supreme Court for clarification. The plaintiffs asked that the court confirm that it would consider all of the issues raised before the Court of Appeals. Other issues raised by plaintiffs in the Court of Appeals *inter alia* include: 1) Whether the defendant waived its jeopardy argument by conceding it in the Trial Management Report? 2) Whether the jeopardy element is a question of fact for the jury or a question of law for the court? and 3) Whether an employee can raise a different source of public policy for the first time on appeal? The defendant also raises issues concerning front pay and the admissibility of

evidence.

III. Summary of Argument

The adequacy of the alternative means for protecting public policy can not be separated from the adequacy of the remedies made available to the individual whistleblower. The public policy tort envisions that public policy will be protected by employees of conscience who either refuse to violate public policy or who object to the employer's violation of public policy. To actualize that purpose, employees must be protected from retaliation when they engage in this type of protected conduct. But if the remedy for individual employee is not adequate, employees will not engage in protected conduct.

Numerous criminal statutes reflect the strongest public policy, yet provide no remedies for individual employees who either report their employer's criminal conduct or who refuse to engage in criminal conduct at the instruction of their employer. The potential for criminal prosecution is simply not an adequate alternative means of protecting public policy. Unless an adequate remedy is provided for employees who report criminal conduct, employees will decline to report it to prosecutors or even object to it. It was to encourage such reporting that the public policy tort was created.

WELA has nothing to add to the briefing about whether the remedies made available by the Energy Restoration Act (ERA) are adequate to vindicate public policy. It is essential that the Court to consider whether the

ERA's remedies, including the statute of limitations, discovery, and damages, are adequate to protect the individual employee.

III Argument

A. Whether There Exists an Adequate Alternative Means of Vindicating Public Policy Depends Upon the Remedies Available to the Individual Whistleblower.

The Washington Court of Appeals has certified to the Washington Supreme Court the following issue: "Whether *Korslund v. Dyncorp Tri-City Services, Inc,* 156 Wn.2d 158, 125 P.3d 119 (2005) bars claims of wrongful discharge because the remedies under the ERA defeat public policy." Central to the interpretation of *Korslund* is the meaning of footnote number 2, which states: "Other jurisdictions addressing the adequacy of remedies under the ERA split on the issue of whether they are adequate, but they tend to consider the adequacy of redress for the employee rather than whether the public policy is adequately protected." *Korslund* at 183 n2.[2] The defendant in this

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[2] In *Korslund II*, the Court addressed two federal decisions which it asserted addressed the adequacy of the remedies made available to the individual whistleblower. In *Masters v. Daniel, International Corp.*, 917 F.2d 455 (10th Cir. 1990), the Court ruled against the availability of a claim for retaliatory discharge because the remedies made available under the ERA were adequate. Interpreting Kansas law, the Court acknowledged that "the Kansas Supreme Court focused on the inadequacy of the alternative remedy available to the employee in finding that a cause of action for retaliatory discharge would be available." *Id.* at 457 *citing Coleman v. Safeway Stores, Inc.,* 242 Kan. 804, 752 P.2d 645 (1988). It was only because the Court concluded that the remedies made available for the employee were adequate under the ERA that the employee failed to state a claim for retaliatory discharge. *Id.* In *Norris v. Lumbermen's Mutual*, 881 F.2d 1144 (1st Cir. 1989), the Court considered a claim by an inspector of nuclear power plants. He alleged that his termination from employment was in retaliation for

case argues that footnote number 2 in *Korslund* made clear that whether the alternative means of vindicating public policy are available to the person bringing the wrongful discharge claim is irrelevant, so long as the alternative means are otherwise sufficient to vindicate public policy. Def. Brief at 33-34. If the Court accepts that interpretation or adheres to that understanding of the jeopardy element of the public policy tort, the Court will effectively eviscerate the cause of action.

Whistleblowers are usually ordinary people, often longstanding employees and experts in their field, who take huge professional and personal risks to blow the whistle on corporate and governmental wrongdoing. They are often a lesser-known but vitally important part of government and industry regulatory and advisory systems. They are often harassed, vilified, and fired or forced to resign. Without a sufficient remedy, employers will be able to retaliate against whistleblowers with impunity. Without a sufficient remedy, employees will refrain from the protected activity that the cause of action was intended to encourage.

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exposing policies, practices and procedures of Defendant which impact upon the safe construction and operation of nuclear power plants. *Id.* at 1146. Applying Massachusetts law, the Court upheld the common law retaliation claim. The Court agreed that "[t]he protection of the lives and property of citizens from the hazards of radioactive material is as important and fundamental as protecting them from crimes of violence, and by the enactment of the legislation cited, Congress has effectively declared a clearly mandated public policy to that effect"), *quoting Wheeler v. Caterpillar Tractor Co.,* 108 Ill. 2d 502, 485 N.E.2d 372, 377, 92 Ill. Dec. 561 (1985), cert. denied, 475 U.S. 1122, 90 L. Ed. 2d 187, 106 S. Ct. 1641 (1986).

Public policy reflected in criminal statutes are routinely and for the most part adequately protected by public prosecutors. If the adequacy of alternative means to protect public policy is unrelated to the adequacy of the remedy for the individual employee, a criminal statute would be adequate to protect public policy even though it provides no individual remedy for the whistleblower at all. If the law affords an employee an inadequate remedy for work place retaliation, the employee will have little incentive to expose criminal misconduct. While the principal purpose of the common law retaliation is not to protect whistleblowers, whistleblowers are undeniably contemplated as a principal means through which public policy is protected. It was for that reason that the cause of action was first recognized.

Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 685 P.2d 1081 (1984) is the landmark case which first recognized the common law cause of action for wrongful discharge in violation of a clear mandate of public policy. In *Thompson*, the plaintiff alleged "that he was fired because he instituted accurate accounting procedures in compliance with the Foreign Corrupt Practices Act of 1977, 91 Stat. 1494, and his summary discharge without approval of the corporate controller was intended to be a warning to all the divisional controllers." *Id.* at 222-223. In *Thompson*, the Court had no trouble ruling that The Foreign Corrupt Practices Act was a clear expression of public policy, and if plaintiff's "discharge was premised upon his compliance with the accounting requirements of the Foreign Corrupt

Practices Act and intended as a warning to other St. Regis controllers, . . . then his discharge was contrary to a clear mandate of public policy and, thus, tortious." *Id.* at 234. The Foreign Corrupt Practices Act is a criminal statute. Although it provides for fines and penalties, it provides no remedy for any individual who is terminated in retaliation for refusing to violate the act. *See* 15 U.S.C. 78DD. If the Foreign Corrupt Practices Act had been an adequate alternative means for vindicating public policy the Court would have found that it foreclosed the jeopardy element, and the Plaintiff in *Thompson* would have no claim and the public policy reflected in the statute would have gone unprotected.

RCW 49.46.090 creates employer liability in favor of any employee who receives less than the minimum wages authorized by law. RCW 49.46.100(2) penalizes as a gross misdemeanor retaliation against any employee who "has made any complaint to his employer, to the director, or his authorized representatives that he has not been paid wages in accordance with the provisions of this chapter, or that the employer has violated any provision of this chapter, ..." The statute, however, provides no direct remedy to the individual who complains about the employer's failure to pay. Instead, Washington Courts recognize RCW 49.46.100 as a source of public policy sufficient to state a claim under the public policy tort. *See Hume v. American Disposal Co.,* 124 Wn.2d 656, 662, 880 P.2d 988 (1994)("RCW 49.46.100 prohibits employer retaliation against employees who assert wage

claims, and we have held employers who engage in such retaliation liable in tort for violation of public policy under this provision"). But in theory the public policy reflected in this statute can be vindicated by criminal prosecution. If criminal prosecution is a sufficient alternative means of vindicating public policy, then the availability of a public policy tort recognized by the Court in *Hume* is overruled. It is common knowledge, however, that prosecutors do not make such crimes a priority. Consequently, the public policy reflected in many such criminal statutes go unenforced. For different reasons, such as lack of resources or competing priorities, local prosecutors may not even investigate let alone prosecute complex allegations of fraud or public safety violations. The vindication of those public policies often rely upon litigation initiated by whistleblowers exactly like the pipe fitters in the case at bar.

Likewise, if the Defendants' position is accepted, the Court effectively overrules *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 936, 913 P.2d 377 (1996). Gardner was an armored truck driver. His employer maintained a strict policy prohibiting its drivers from exiting their vehicle between scheduled stops to prevent robbery of the valuable contents of the truck and likely injury to their employees in the process. As Gardner was driving, he witnessed a man threaten a bank manager with a knife so Gardner ran from his truck and saved the woman's life. Loomis fired him. Citing a series of court decisions enforcing criminal statutes as *the* sources of public

policy, this Court held that Loomis violated the public policy tort. *Id.* at 944. Implicitly, *Gardner* recognizes that prosecuting the man wielding the knife after he murders the bank manager would not be an adequate alternative to affording Gardner protection under the public policy tort.

In *Shaw v. Housing Authority of City of Walla Walla,* 75 Wn.App. 755, 880 P.2d 1006 (1994), the plaintiff was hired as executive director of the Walla Walla Housing Authority. *Id.* at 756. During Ms. Shaw's probationary period she raised conflict of interest questions concerning almost every member of the Board of Directors, and complained directly to the Attorney General and City Attorney. *Id.* at 758. The plaintiff was terminated from employment and alleged *inter alia* that she was terminated in violation of a clear mandate of public policy. *Id.* The plaintiff claimed RCW 35.82.050 as a source of public policy, which "provides that no commissioner or employee of a housing authority may acquire a direct or indirect interest in any property involved in a housing project or in any contract for materials or services in connection with a housing project." *Id.* at 762 n3. The Court ruled that plaintiff had established a prima facie case. *Id.* But the statutory scheme does not provide any remedy for an employee who reports a violation of the statute. Instead, it provides that the mayor may remove a Commission for misconduct after ten days notice and an opportunity to be heard. RCW 35.82.060. If removal by the Mayor is an adequate alternative means for vindicating public policy, contrary to the Court's ruling in *Shaw* the plaintiff

would have no claim.

B. The Adequacy of Remedies Is Part of the Framework To Determine Whether a Statute's Remedies Forecloses a Public Policy Tort.

The framework for determining whether a cause of action exists for wrongful discharge in contravention of public policy when the declaration of public policy is made in a statute already providing a remedy is set out by this Court in *Wilmot v. Kaiser Aluminum & Chemical Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991). In *Wilmot*, the Court considered "whether an employee who alleges that he or she was wrongfully discharged in retaliation for filing a workers' compensation claim has a cause of action independent from that set out in RCW 51.48.025(2)." *Id.* at 51. In *Wilmot*, the Plaintiff had not filed a claim under RCW 51.48.025(2). *Id.* at 52. Nevertheless, the Court held "that RCW 51.48.025 is not mandatory and exclusive; a worker may file a tort claim for wrongful discharge based upon allegations that the employer discharged the worker in retaliation for having filed or expressed an intent to file a workers' compensation claim, independent of the statute." *Id.* at 53.

To determine whether a statute with a remedy can be a source of public policy, the Court in *Wilmot* concluded that "the answer depends upon the particular statute's language and provisions, and may, under appropriate circumstances, depend in part upon other manifestations of legislative intent." *Id.* at 54. The Court also specifically acknowledged that "the fact that the statute sets forth certain remedies is relevant to the exclusivity inquiry." *Id.*

at 60-61, relying upon *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 753 P.2d 517 (1988) and *Bennett v. Hardy*, 113 Wash.2d 912, 784 P.2d 1258 (1990). "[I]t is not simply the presence or absence of a remedy which is significant; rather, the *comprehensiveness, or adequacy*, of the remedy provided is a factor which courts and commentators have considered in deciding whether a statute provides the exclusive remedies for retaliatory discharge in violation of public policy." *Id.* at 61 (emphasis added). The Court allowed the common law retaliation claim to go forward because RCW 51.48.025(4) did "not clearly authorize all damages which would be available in a tort action." *Id.* at 61. The Court explained that the common law claim provided for emotional distress damages, whereas those important damages were uncertain under the statutory remedy. *Id.* Thus, it is very clear that the Court in *Wilmot* explicitly relied upon the adequacy of the remedies made available to the individual whistleblower to determine whether there was an adequate alternative means for vindicating public policy.

In *Wilson v. City of Monroe*, 88 Wn.App. 113, 943 P.2d 1134 (1997), the Court considered *inter alia* whether the City of Monroe policy # 92-39, and the Washington Industrial Safety and Health Act, RCW 49.17.160 (WISHA) could be relied upon as a source of public policy for the common law public policy tort. The City of Monroe policy addressed the reporting of improper governmental action and protects employees against retaliation.

WISHA prohibits discrimination against employees who file complaints. In order to determine whether City policy and state statute could be used as sources of public policy, the Court explicitly considered whether remedies were mandatory and exclusive, and the comprehensiveness or adequacy of the statutory remedy.

> We next examine the provisions of the remedies available to Wilson, RCW 49.17.160 and Policy # 92-39, to determine whether they provide mandatory and exclusive remedies, thereby precluding Wilson's common law wrongful discharge claims. Among the factors to be considered are whether the statute contains language of exclusivity, either express or suggestive, and the comprehensiveness or adequacy of the statutory remedy.

Id. at 123-124, *citing Wilmot*, 118 Wn.2d at 56-63, 821 P.2d 18. Because neither Policy # 92-39 nor RCW 49.17.160(2) expressed an intent to provide an exclusive remedy, and because it was uncertain that either provided an adequate remedy, the Court concluded that "Wilson may bring a cause of action for wrongful discharge in contravention of public policy." *Id.* at 126-127.

In *Korslund II*, the Court distinguished *Wilmot* as follows:

> However, the Court of Appeals relied on *Wilmot v. Kaiser Aluminum & Chemical Corporation,* 118 Wash.2d 46, 821 P.2d 18 (1991), and confused two distinct legal issues. Wilmot addressed the issue whether a provision in the Industrial Insurance Act (Title 51 RCW) precluded a tort cause of action for retaliation for filing a workers' compensation claim. We examined the relevant statute to determine whether the legislature intended that the statute, including its remedies, was mandatory and exclusive, and thus precluded the public policy tort cause of action. *Id.* at

> 53-66, 821 P.2d 18. Here, however, the question is not whether the legislature intended to foreclose a tort claim, 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. Moreover, the Court of Appeals' analysis conflicts with Hubbard, where we said that the "other means of promoting the public policy need not be available" to the person seeking to bring the tort claim "so long as the other means are adequate to safeguard the public policy." *Hubbard*, 146 Wash.2d at 717, 50 P.3d 602.

Id. at 183. The Court reasons that even though the remedies made available by the Industrial Insurance Act are inadequate to foreclose a tort claim, they are not inadequate for the purpose of protecting public policy. This reasoning assumes that protecting public policy is unrelated to the remedies made available to the whistleblower. But as explained above, the common law retaliation claim contemplates whistleblowers as a principal vehicle to vindicate core public policies. Indeed, employees are encouraged to report improper governmental activities, defined as "action taken by a public official that (1) violates state law, (2) is an abuse of authority, (3) is a substantial and specific danger to the public health or safety, or (4) is a gross waste of public funds." *Dicomes v. State,* 113 Wn.2d 612, 619, 782 P.2d 1002 (1989).

Twenty-three years ago, this Court recognized in *Thompson* the signal importance of enlisting ordinary employees to protect both state and federal public policies. Its progeny has reinforced and developed that principle, which is no less important today. Defendants' position, however, threatens to gut this basic notion by telling an employee that in innumerable

circumstances speaking up may cost them dearly, with little or no recourse - and that they cannot know whether they will be protected until a lawsuit ferrets out whether an alternative mechanism to protect public policy exists. When put in such an untenable bind, too many employees are likely to remain silent and acquiesce to the violation of public policy, rather than act to protect it. The weaker the remedies made available to the whistleblower, the less likely that she will assume the extraordinary risks associated with complaining about illegal governmental or corporate activities. The remedies made available to the individual whistleblower are therefore inextricably tied to the adequacy of alternative means of vindicating public policy.

V. Conclusion

The adequacy of the alternative means for protecting public policy can not be separated from the adequacy of the remedies made available to the individual whistleblower.

Respectfully submitted this 18th day of December, 2007.

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