Supreme Court No. 78421-3

SUPREME COURT OF THE STATE OF WASHINGTON

RAMONA DANNY, Appellant,

v.

LAIDLAW TRANSPORTATION SERVICES, INC., Respondent,

AMICUS CURIAE BRIEF OF THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Employment Lawyers Association ("WELA"), pursuant to RAP 10.1(e), 10.3(e), and 10.6, submits this brief to assist the Court in determining whether the tort of wrongful discharge in violation of the Washington public policy provides a civil remedy to those whose employment is terminated because of their status as victims of domestic violence.

WELA is a statewide affiliate of the National Employment Lawyers Association ("NELA"). Both are non-profit organizations whose membership is composed of attorneys whose practices emphasize the representation of individual employees in employment law matters. WELA's membership consists of over 100 members of the Washington State Bar Association who practice in this field.

WELA believes that it is critical that this Court determine that the common law protects otherwise at-will employees from termination of employment because they use civil and/or criminal remedies available to themselves when victimized by domestic violence. WELA is committed to ensuring that a civil remedy and cause of action is available to such individuals because to otherwise would contravene the clear mandate of public policy found in Washington judicial decisions and legislation to protect individuals who are the victims of acts of domestic violence.

I. ARGUMENT

A. The Certified Question Is a Matter of Common Law And thus Uniquely the Province of this Court..

The certified question is:

> Has the State of Washington established a clear mandate of public policy prohibiting an employer from discharging an at-will employee because she experienced domestic violence and took leave from work to take actions to protect herself and her family and to hold her abuser accountable?

This inquiry from the United States District Court for the Western District of Washington poses questions that are to be decided strictly as a matter of the common law of the State of Washington. To answer this question, Washington's jurisprudence that has developed in the area of this emerging tort typically would direct the Court to consider such sources as judicial decisions, constitutional provisions, regulatory schemes and legislative enactments which address Washington State public policy on the subject of domestic violence. See e.g. *Roberts v.Dudley*, 140 Wn. 2d 58, 993 P.2d 901 (2000). The Respondent misconceives the sources to which this Court must look in order to "find" the clear mandate and the nature of the quest. The Court is not constrained to look solely at whether these sources already evidence Washington State's desire to protect employees from termination due to domestic violence but whether existing

public policy regarding the evil of domestic violence, access to civil and criminal protections and cooperation with law enforcement authorities would be undermined, if not jeopardized, if employees were not given such a tort remedy.

Yet, before doing so, it is imperative to consider the context of common law jurisprudence and the development of the common law tort of wrongful discharge in this state.

B. The Doctrine of Employment At-Will Itself is a Creature of the Common Law That Was Found by the Courts Despite the Lack of Manifestation of Such a Policy Originating in Any, Constitutional, Statutory or Regulatory Provision or Scheme in Washington.

As the certified question involves the exception to the common law doctrine of employment-at-will entitled "wrongful discharge in violation of public policy," it would be helpful to understand the underpinnings of the rule itself. As our appellate courts have noted:

> The employment-at-will doctrine is a common law doctrine developed from a treatise on master and servant written in the last century.

Hayes v. Trulock, 51 Wn. App. 795, 799, 755 P.2d 830 (1988, citing *Davidson v. Mackall-Paine Veneer Company*, 149 Wash. 685, 688, 271 P. 879 (1928). In the *Mackall-Paine Veneer* case, the Washington Supreme Court quickly disposed of a claim for contract damages for breach of an employment contract on the grounds that the plaintiff had

failed to establish that there was "any usage or custom" governing the length of his employment.

The Court supplied no authority beyond a commentary by New York attorney H. G. Wood in his 1877 treatise,[1] except for two out-of state cases. All three simply affirmed the essential holding that a contract for employment without a fixed duration may be terminated at the will of either party without damages for premature termination of the contract, in absence of proof of a custom or undertaking to the contrary. None of the cases discuss public policy in detail and indeed the doctrine was first recognized in the contractual context..

Thus, adoption of the Wood treatise's rule, i.e. the the so-called "American Rule" of "at-will" employment contracts in *Mackall-Paine Veneer* was not a judicial decision that carefully or narrowly located the contours of the public policy of the State of Washington from its constitutional, statutory, or regulatory provisions or schemes. Nor did the Court even carefully scrutinize the English common law cases cited as authoritative by the Woods treatise, as they would likely have been undercut by contrary authority. *See, generally, James H. Hopkins, Jr.,*

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[1] H.G. Wood, *Master and Servant* 134 (2nd Ed. 1886), as cited in *Thompson v. St. Regis Paper Co*., 102 Wn.2d 219, 685 P.2d 1081 (1984) The Supreme Court cited his second edition of the treatise dated 1886, but the original treatise was published in 1877.

"The Employer/Employee Relationship in the New Millennium," Washington State Bar News, November 2004, pp. 30 *et seq*. (Appendix A). Rather, the "at-will" doctrine was founded largely on the prevailing judicial philosophy of "laissez-faire constitutionalism" in the common law of the post-Civil War period. *Id.*

In the century that followed the adoption of the "employment–at-will doctrine" by the Washington Supreme Court, it became the subject of critical law review commentary as follows:

> The American rule apparently was announced … by a treatise writer who cited as authority four cases, none of which supported him.

Note, "Implied Contract Rights to Job Security," 26 Stan. L. Rev. 335, 341 (1974). *See also Protecting Employees Against Wrongful Discharge: The Duty to Terminate Only In Good Faith*, 93 Harvard Law Rev. 1816 (1980); Blades, *Employment At Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 Colum. L. Rev. 1404 (1967).

More important to this case, while blindly relying on the at-will employment doctrine to defeat claims grounded in contractual theories, the Washington Supreme Court readily found public policy reasons not to enforce the harsh applications of the at-will doctrine when express statutory enactments provided substantive rights but did not explicitly provide a remedy. *See e.g. Krystad v. Lau, 65* Wn.2d 827, 400 P.2d 72

(1965) [finding public policy contained in little Norris-LaGuardia Act provided remedy for workers discharged for forming a union.] Thus, while restricting employees' access to the courts under contractual theories, our courts have continually recognized that public policy considerations can trump the otherwise unfettered discretion of employers in applying the "at-will" doctrine.

C. Public Policy Grounded in Community Mores and Values is Properly Considered by the Judiciary in Determining the Common Law Even in Absence of Legislative Action Constitutional Provisions and/or Regulatory Schemes.

As indicated *supra***,** Respondent Laidlaw argues that this "Court must avoid stepping into the role of the Legislature by actively creating public policy." *Brief of Respondent, p. 11.* But that contention overstates the role of the legislature, and understates the role of the judiciary, in recognizing public policy. It has been the historic role of this Court to consider public policy in the determination of common law.

> **…**[I]n substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle le which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practices and traditions, the unconscious result of intuitive preferences and inarticulate

convictions, but none the less traceable to views of public policy in the last analysis.

Oliver Wendell Holmes, Jr., The Common Law, Little, Brown & Co. (© 1881, 1909, 1923) 40th Printing 1946, pp. 35-36[2]

But, as one Court asked sometime ago:

> What is the meaning of "public policy"? A correct definition, at once concise and comprehensive, of the words "public policy" has not yet been formulated by our courts. Indeed the term is as difficult to define with accuracy as the word "fraud" or the term "public welfare". In substance it may be said to be the community common sense and common conscience, extended and applied throughout the state to matters of public morals, public health, public safety, public welfare and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellowmen, having due regard to all the circumstances of each particular relation and situation.
> Sometimes such public policy is declared by constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people – in their clear consciousness and conviction of what is naturally and inherently just and right between man and man.
> …
> When a course of conduct is cruel or shocking to the average man's conception of justice, such course of conduct must be held to be obviously contrary to public policy, though such policy has never been so written in the bond, whether it be constitution, statute, or decree of court.

Pittsburgh, Cincinnati, Chicago & St. Louis Rwy Co. v. Kinney, 95 Ohio St. 64, 115 N.E. 505 (1916).

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[2] Holmes, The Common Law, has been cited in Washington appellate decisions at least a dozen times.

Thus, despite the mistaken characterization of Respondent, it is profoundly the Court's role to enunciate the common law of and to "find" public policy as the Court is directed to do in claims of wrongful termination in violation of public policy. In the absence of legislation, the courts both create and destroy common law doctrines and causes of action when necessary to provide justice.

> The [cause of action] is a judicially created doctrine in this state. The action existed at common law, and was adopted into the jurisprudence of this state. The legislature of this state has not specifically provided for [such a cause of action].
> No doubt has ever been expressed regarding the courts' power to abolish this judicially created action…
> In making a policy judgment such as [this], it is certainly preferable to have a fully developed trial record. However, trial courts and appellate courts can take notice of "legislative facts" – social, economic, and scientific facts that "simply supply premises in the process of legal reasoning.
> …
> Judicial notice of legislative facts is frequently necessary when, as in the present case, a court is asked to decide on policy grounds whether to continue or eliminate a common law rule.

Wyman v. Wallace, 94 Wn.2d 99, 100-103, 615 P.2d 452 (1980).[3] Thus, the Legislature is not the only authoritative souce of public policy.

Justice Robert Brachtenbach's scholarly law review article summarized the history and use of public policy consideration in making appellate decisions as follows:

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[3] Abolishing the domestic relations cause of action for alienation of affections.

> A doctrine called public policy is a pervasive element in the rationale of appellate decisions. Indeed, often its assertion is the sole underpinning of a decision. For centuries, the principle of public policy has played a vital role in dispute resolution.

Robert F. Brachtenbach, "Public Policy in Judicial Decisions," 21 Gonz. L. Rev. 1 (1985/86). The Courts have an intrinsic, historic, powerful and continuing role to play in determining public policy and common law.

D. The Development of the Common Law Tort of Wrongful Discharge in Violation of Public Policy is Based Upon Protection of Community Interests, And Is Not Dependent Upon a Legislatively Created Remedy for the Plaintiff.

In fact, in 1984, it was the same Justice Brachtenbach who wrote for a unanimous Washington Supreme Court in modifying the common law doctrine of employment-at-will to create the tort of wrongful discharge in violation of public policy. In *Thompson v. St. Regis Paper Co.,* 102 Wn.2d 219, 685 P.2d 1081 (1984), Justice Brachtenbach directly explained:

> The [public policy] exception has been utilized in instances where application of the terminable at will doctrine would have led to a result clearly inconsistent with a **stated public policy and the community interest it advances**. *Roberts v. ARCO, 88 Wn. 2d 887, 897, 568 P.2d 764 (1977).* The policy underlying the exception is that the common law doctrine cannot be used to shield an employer's action which otherwise frustrates a clear manifestation of public policy.

102 Wn.2d 219, 231 , 685 P.2d 1081 (1984, emphasis added).

In the Brief of Respondent, Laidlaw surveys the Washington statutes and claims that none of them "mandate a clear public policy in the employment arena." *Brief of Respondent, pp. 16 et seq.* But this is not the proper inquiry. The "frustration" of "community interests" by the "employer's action" is the focus of the public policy exception – i.e., the availability of a remedy for the plaintiff is precisely necessary to avoid the frustration of public policy concerns and is explicitly not dependent upon any statutory scheme to provide a particular remedy for any particular plaintiff in any particular workplace.

Indeed that first case is illustrative of this principle. The case of *Thompson v. St. Regis Paper Co.* recognized a public policy that "bribery of foreign officials is contrary to the public interest," and that, the Foreign Corrupt Practices Act ("FCPA") was a "clear expression of public policy." *Id.* But a review of the FCPA, which is a statutory scheme governing regulation of international commercial conduct, doesn't contain any direct policy statement and does not expressly provide any protection of employees. *See,* 15 U.S.C.A §78 dd-1 et seq. Yet the unanimous court had no difficulty in finding that Mr. Thompson was protected by public policy when he acted as he did to oppose his employer's misconduct. This is so even though the FCPA has expressly provided methods for the

vindication of that public policy including injunctions, extraordinarily large fines, and stiff criminal penalties.

More recently than the seminal *Thompson* case, the Court has continually enunciated clear mandates of public policy found in the penumbra of various schemes including community values and mores. For example, there was no previous constitutional, statutory or regulatory provision or scheme that specifically applied to the circumstances presented when Kevin Gardner left his armored truck, in violation of strongly worded company policy, to save the life of a hostage in an armed robbery situation. Despite this, the Washington Supreme Court found that the "public policy encouraging citizens to save human lives from life threatening situations" was presented in Mr. Gardner's case. Thus, Mr. Gardner was protected against arbitrary discharge as an at-will employee because of his undisputed rule violation. *Gardner v. Loomis,* 128 Wn.2d. 931, 913 P.2d 377 (1996).

Similarly, in *Roberts v. Dudley,* the Supreme Court was presented with evidence of sex discrimination by a small employer that was legislatively exempted from a remedy by the definition of "employer" within the body of the Washington Law Against Discrimination (hereinafter "WLAD"). In finding a strong public policy against sex

discrimination, one not solely confined to the employment context, the Court explained:

> We do not construe the statute (i.e. RCW 49.60 or WLAD) to discover a statutory remedy – clearly there is not one; rather we read the statute to understand its purpose in policy.

140 Wn.2d 58, 73, 993 P.2d 901 (2000). The Court had no problem determining the common law provided a remedy where the Legislature had not.

As noted by Appellant, most recently, the Court of Appeals for Division III recently recognized a clear mandate of public policy in favor of assisting law enforcement in the apprehension of criminals, a public policy presented in the case at bar as well. Despite less than directly applicable statutes, in declaring such a policy "fundamental," the Court adopted the reasoning of the *Gardner* opinion, and quoted extensively from the 1980 opinion of the Illinois Supreme Court as follows:

> There is no public policy more basic, nothing more implicit in the concept of ordered liberty, than the enforcement of the State's criminal code. There is no public policy more important or fundamental than the one favoring the effective protection of the lives and property of citizens.

Gaspar v. Peshastin Hi-Up Growers, 131 Wn.App. 630, 128 P.3d, (2006)(citing *Palmateer v. International Harvester Co.,* 8 Il. 2d 124 , 421 N.E.2d 876 (1981). The reasoning of that court is instructive here.

> Here, based on the facts presented as part of the Certified

Question, it is clear that Ramona Danny acted to prevent domestic violence in furtherance of the community's interest in protecting its citizenry from acts of violence, as well as her personal interest in preventing violence to herself and members of her immediate family. It is undisputed that following her exercise of these obligations and/or actions in furtherance of this public policy, Laidlaw terminated her employment. While fact questions remain as to whether she can ultimately prove her wrongful discharge claim to a jury, this Court need not struggle to find that public policy supports the prevention of domestic violence as a matter of common law. This is so even in absence of a particular statute applying to any particular workplace or providing a remedy to any particular employee, so long as there is reason to believe that protecting the employee from loss of employment would advance the community interest.

E. Common Law and Public Policy Change Over Time, and the Courts Should Provide Due Consideration in the Light of Current Conditions.

Respondent's brief also contends that "none of the statutes identified by Danny facially proscribe an employer from terminating an at-will employee because she was a victim of domestic violence and took leave for domestic violence-related reasons." *Brief of Respondent, p. 23* Respondent also contends that the Legislature's failure to act affirmatively

to protect the victims of domestic violence proves that no public policy exists to protect victims of domestic violence from being terminated for taking leave. But saying it to be so does not make it so.

Even within complex and repeatedly modified statutory schemes, the courts are free to act to vindicate public policy. When determining and enunciating public policy considerations in the face of an evolving common law, the courts properly must consider the public policy implications for the common law in the light of current conditions.

Indeed, Washington's appellate courts have been applying and developing common law since prior to statehood, and the common law has been the rule of decision in all the courts of the state consistently since at least 1891. RCW 4.04.010. This statute, which defines the extent to which the common law prevails in Washington, expressly requires flexibility. The mandates of three other general sources of authority, specifically (1) the Constitution and laws of the United States, or (2) of the state of Washington, [or] (3) *the institutions and condition of society in this state; each* are recognized as authoritative. RCW 4.04.010 (*emphasis added).* Thus it is necessary to not only consider the scope and viability of the common law doctrine of employment at will in the narrower context of its compatibility with statutory and constitutional provisions, schemes and

prior judicial decisions, but also to assess its compatibility with current institutions and conditions in the natural evolution of our society

As an example, in a recent case, this Court renewed its historical willingness and duty to expand definitions and adopt new notions of common law authority to protect families and children.

> Washington courts have consistently invoked their equity powers and common law responsibility to respond to the needs of children and families in the face of changing realities. We have often done so in spite of legislative enactments that may have spoken to the area of law, but did so incompletely. With these common law principles in mind, we turn to whether Washington's common law recognizes *de facto* parents.

In re L.B., Carvin v. Britain, 155 Wn.2d 679, 122 P.2d 161 (2005). The Court examined the extensive statutory scheme pertaining to familial relations, and held that

> [It] reflects the unsurprising fact that statutes often fail to contemplate all potential scenarios which may arise in the ever changing and evolving notions of familial relations. Yet simply because a statute fails to speak to a specific situation should not, and does not in our common law system, operate to preclude the availability of potential redress.
> … While the legislature may eventually chose to enact differing standards than those recognized here today, and to do so would be within its province, until that time, it is the duty of this court to "endeavor to administer justice according to the promptings of reason and common sense."

Id., citations omitted. Accordingly, the courts have a duty to act in furtherance of Washington notions of public policy as part of its mission

to "administer justice according to the promptings of reason and common sense" as presented by an evolving society.

Thus, the common law, both in the absence of legislative action and where the legislature has acted, has not always anticipated nor provided redress for every wrong that is presented to the Court. In enunciating and determining the common law, changed societal conditions are a factor which must be considered.[4] For an ironic example at the time that attorney H. G. Wood crafted his now famous treatise on Master & Servant that is the foundation of our "at will" doctrine, it was probably legal for a master to use corporal discipline on both his servant and his wife. Public policy would clearly reject that concept today.

F. Even Examining This Matter from A Historical Perspective Reveals Washington Public Policy Has Favored Removing Arbitrary Barriers to Employment of Women.

Public policy considerations can also be grounded in the history of our State as well. The methodology for determining what constitutes a clear mandate of public policy is settled law and has not changed

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[4] See, also, *Pierce v. Yakima Valley Memorial Hospital Association*, 43 Wn. 2d 162, 260 P.2d 765 (1953)(abrogating a judicially-created immunity for charitable hospital); *Lundgren v. Whitney's Inc.,* 94 Wn. 2d 91, 614 P.2d 1272 (1980)(abrogating the common law rule on loss of consortium, rejecting the argument that any such change should come from the legislature); *Wyman v. Wallace*, 94 Wn.2d 99, 615 P.2d 452 (1980)(abolishing the cause of action for alienation of affections, taking judicial notice of changed societal conditions).

significantly since *Thompson v. St. Regis Paper.* The phrasing "contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme"[5] has a broad scope. It is the compendium of constitutional, statutory, regulatory and judicial authority that establishes the clear mandate of public policy that protects women like Ms. Danny from termination in the present circumstances. For example, this State has historically been at the forefront of removing barriers that prevented women from fully participating in the labor force. For example, in 1890, the year after Washington became a state and at a time in history when many occupations were expressly prohibited for women, "every avenue of employment" was opened to women by clear statutory mandate. *RCW 49.12.200*. Similarly, in 1913, progressive legislation was passed to protect women from "pernicious" conditions in sweatshops. *RCW 49.12.010*. In 1943, eight years before the federal Equal Pay Act, Washington prohibited wage discrimination on the basis of sex. *RCW 49.12.175*. Likewise, iIn 1971, the Washington was in the vanguard when its legislature prohibited sex discrimination in its Law Against Discrimination in order to achieve the "practical realization of equality of

[5] A LEXIS search on that phrase finds 28 cases, some unpublished, which apply that standard.

opportunity between the sexes." *Laws of 1971, Ex. Sess. Ch. 81, §3(3) now codified at RCW 49.60.180*

G. The Methodology for Determining What Constitutes a Clear Mandate of Public Policy Requires an Assessment of the "Letter or Purpose" of a "Constitutional, Statutory, or Regulatory Provision or Scheme" and Does Not Require Proof of a Particular Violation.

While recognizing that public policy often is stated directly in legislative enactments, this Court also has noted that in many cases, public policy must be gleaned from various sources. Appellant Danny contends,

> The State of Washington has a well-defined and judicially recognized public policy to treat domestic violence as a serious crime, to protect victims, and to hold abusers accountable by encouraging victims of domestic violence to take actions to protect themselves and their families by seeking alternative living arrangements, social services and by utilizing the state's legal system to obtain protection and to hold abusers accountable.

Brief of Appellant, p. 7 This is well-supported by the citations to the legislative enactments and judicial decisions in this state on the subject of domestic violence. *Brief of Appellant, pp. 7-15.* The Washington Employment Lawyers Association concurs with this statement and the underlying citation to authority supporting it, and will not repeat that or similar briefing herein.

The sweep of the common law exception is also borne out by judicial developments since its adoption in 1984. For example, an employee need not establish an actual violation of law in order to have

protection from wrongful discharge in violation of public policy; an objectively reasonable belief is sufficient in the context of potential imminent harm. *Ellis v. City of Seattle,* 142 Wn.2d 450, 13 P.3d 1065 (2000). This court would not have protected an employee's reasonable and good faith belief that a public policy was being jeopardized if it intended to restrict or limit its search for the "clear mandate of public policy" to only the express language of statutory enactments in Chapter 49 of the Revised Code of Washington.

II. CONCLUSION

Despite the admonitions of Respondent, it is this Court's role is to "find" and "declare" the sources of public policy when analyzing03 the clarity element of the tort of wrongful discharge in violation of public policy. For these reasons, as well as the reasons articulated by Ms. Danny, this Court should hold that a clear mandate of public policy prohibits an employer from discharging an at-will employee because she experienced domestic violence and took leave from work to take actions to protect herself and her family and to hold her abuser accountable.

DATED this 15th day of October, 2008.

Respectfully submitted,

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