NO. 92510-1

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 46602-3-II
COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CSILLA MUHL,

Appellant,

v.

DAVIES PEARSON, P.C.,

Respondent.

CSILLA MUHL'S ANSWER TO THE PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

I. INTRODUCTION TO ANSWER

The Court of Appeals correctly reversed the trial court's grant of summary judgment to Davies Pearson, PLLC ("Davies"), and remanded Csilla Muhl's ("Muhl") claims of discrimination and retaliation to be resolved at trial. In its Petition for Review ("Petition"), Davies relies on three (3) allegedly legitimate reasons for termination, in addition to other supposed performance concerns left unaddressed by Davies, all of which Muhl sufficiently rebutted.[1] In doing so, Davies ignores the principle that an appellate court reviewing summary judgment must "consider the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party."[2] When the record is construed in the light most favorable to Muhl—as it must be, and as the Court of Appeals properly did—there is ample evidence creating material issues of fact on the disputed elements of Muhl's claims. Her claims must go to trial.

The Court of Appeals also correctly refused to analyze whether the trial court's conceded *Burnet* violation was harmless.[3] Davies did not properly raise this issue before the Court of Appeals. Moreover, Davies' argument for review on this point falls afoul of another established principle of Washington law: when there exist "independent grounds to vacate [a] summary judgment order," harmless error analysis of other trial

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[1] Petition at 2-9, CP 312-14; Muhl challenged the legitimacy of these earlier performance concerns by way of establishing a lack of any appreciable warning and the subsequent positive performance appraisals by Davies.

[2] *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

[3] Davies acknowledges the *Burnet* violation, Petition at p. 11 (stating that "Davies does not seek review of the holding on *Burnet*"). The citation to *Burnet* is to *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

court errors "would be extraneous."[4] Because the Court of Appeals here identified independent grounds to vacate the summary judgment order (the existence of genuine issues of material fact based on the remainder of the record), it did not err by refusing to conduct a harmless error review of the trial court's admitted *Burnet* violation.

Since the Court of Appeals decision is not erroneous, it plainly does not conflict with any binding precedent of this Court or the Court of Appeals. The case also does not involve any issue of substantial public interest. Accordingly, this Court should deny Davies' Petition, and conditionally award Muhl her reasonable attorneys' fees incurred in preparing this Answer.[5]

II. IDENTITY OF ANSWERING PARTY

Csilla Muhl, plaintiff in the trial court and appellant before the Court of Appeals, is the party submitting this Answer to the Petition for Review filed by Davies.

III. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision at issue here is its unpublished opinion in *Muhl v. Davies Pearson, P.C.*, No. 46602-3-II, dated Oct. 20, 2015 (the "Opinion")[6].

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[4] *Keck*, 357 P.3d at 1088 (Gonzalez, J., concurring).
[5] The fee award to Muhl should be contingent on her prevailing on her claim(s) on remand. *See* Opinion, at p. 23.
[6] Davies attached a copy of the Opinion to its Petition for Review.

IV. MUHL'S RESTATEMENT OF THE CASE

1. Events leading to Muhl's lawsuit.

Because the trial court granted summary judgment to Davies, the Court of Appeals properly conducted a *de novo* review and "view[ed] the evidence, and all inferences reasonably allowed by the evidence, in the light most favorable to the nonmoving party."[7] So viewed, the record on summary judgment here establishes the following facts:

Muhl began working as an attorney for Davies in 1996. She left the firm in 1997, but returned in 2006 in the capacity of a "Contract Partner" after Davies recruited her to work in its family law group. CP 317-20. In the years immediately preceding her termination on November 30, 2012, Muhl received satisfactory to favorable reviews.[8] CP 321-32, 356-58. Davies paid Muhl performance bonuses in 2009, 2010, and 2011. CP 127, 308. Davies did not place Muhl on a performance plan or warn her of impending discipline, despite the fact that Davies used these performance management tools. CP 287, 408.

In October 2010, Muhl moved in trial court to continue a client's matter (referred to in the Opinion as the "K" matter) and permit her to obtain necessary discovery. When the trial court denied the motion, Muhl had what Susan Caulkins ("Caulkins"), another Davies attorney, called a "meltdown" in front of "K" and some of the firm's staff. CP 61. The client

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[7] Opinion, at p. 8 (citing to *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013)).

[8] Muhl's supervisors most recently reported her rating as *"performance of the kind the firm expects."* CP 305-06, 321-32.

allegedly demanded that another Davies attorney handle the case, but she later experienced success with Ms. Muhl. CP 56-57, 312-13.

During trial of the "K" matter, Muhl asked her expert witness a question that the trial court viewed as a possible violation of its pretrial order. The trial court wrote Muhl a letter expressing its concerns and requested that she address them. CP 313, 349. Muhl told her firm mentor, attorney Ron Coleman ("Coleman"), about the letter and asked for his help in drafting her response. Muhl responded to the trial court and justified her inquiry of the expert witness; the judge accepted her response and stated that it considered the matter closed. CP 349. Muhl informed Coleman, to which he replied that, everything "look[ed] good." CP 313, 350.

Muhl's work in the "K" trial "helped the client achieve a very favorable outcome." CP 313, 432. Despite this result, Caulkins wrote a detailed memo critiquing Muhl's performance in the case and gave the memo to Muhl, and also to Davies' shareholder, Coleman. CP 60-63, 68-69. Muhl, however, disregarded the memo as criticism from a peer who held no supervisory authority over her. CP 305.

In early 2011, Davies hired attorney Mark Nelson ("Nelson"). CP 54. The firm's shareholders believed that its family law group needed a male attorney, as the lone male attorney working in this group had just left. CP 438-49. After the firm hired Nelson, Muhl received fewer intra-firm referrals, which were critical to her practice. CP 310, 340-42, 433-34.

Nelson's hiring caused Muhl to question the treatment of female employees at Davies. CP 340. In November 2011, Muhl met with

Coleman and challenged the firm's treatment of its female attorneys. *Id.* Muhl discussed firm diversity and leadership, and noted that Davies had "[o]nly 1 woman [s]hareholder out of 11 total[ ][and] 4 female attorneys [out of] 20 total." CP 340-42. From this, Muhl inferred that "[f]emale attorneys do not appear to be recognized, promoted or retained" and inquired whether Davies had, "any interest in having female presence/partners?" *Id.* Coleman later indirectly answered this question by telling her that most of the female associates at the firm, including Muhl herself, were not on track to become shareholders. CP 307-08.

In September 2012, Muhl learned that a client desired her to refrain from appearing at an upcoming a contempt hearing. CP 57-58, 313. Muhl, feeling bound by the rules of professional conduct, acceded to the client's wishes and did not appear. Given the timing of the client's directive, Muhl did not file a notice of withdrawal until after the hearing. CP 313-14. During a routine check of the court docket, Caulkins discovered the hearing on the day it was scheduled for hearing. Neither Caulkins nor any other Davies attorney contacted Muhl regarding the alleged need to appear at this hearing. CP 313-14. Knowing Muhl was not at work, Caulkins went to the hearing and appeared on behalf of the client. Caulkins' appearance did not make any difference to alter the outcome and the client expressed no dissatisfaction with Muhl's failure to appear. CP 314, 386.

Caulkins complained about the incident to Coleman, and Davies' Board of Directors eventually recommended that the firm terminate Muhl's employment. CP 57-58 444-45. Seven of Davies' shareholders,

Coleman included, voted to accept that recommendation. Davies hadafforded younger male attorneys with lesser forms of discipline or the benefit of voluntary resignation. CP 314-15, 356-61. While she disagreed with the decision, Muhl also stated that she "wanted to be honest about this and not sugarcoat anything." CP 314-15, 560. Davies then terminated Muhl's employment as of the end of November 2012. CP 356-58.

2. The proceedings below.

Muhl filed suit against Davies on or about March 29, 2013, alleging, among other claims, that her termination resulted from gender and age discrimination and retaliation, each act a violation of the Washington Law Against Discrimination (WLAD), chapter 49.60 RCW. CP 1-6. Davies denied wrongdoing. CP 7-11.

The trial court initially ordered the disclosure of the parties' witnesses by late December 2013. CP 450. Muhl later discovered a book on gender discrimination written by Dr. Rosalind Barnett ("Dr. Barnett") and retained her as an expert. CP 588-89. Six months after the witness disclosure deadline, Muhl gave Davies a supplemental witness list that included Dr. Barnett's name and moved to extend the discovery deadline. The trial court granted that request, extending the deadline until July 25, 2013. CP 450. On July 24, Muhl produced Dr. Barnett's report, which opined that Muhl's termination was the result of gender inequities and gender discrimination at Davies. CP 592-634.

Davies moved to strike Dr. Barnett's report for a number of reasons, including a failure to comply with the local rules, specifically

Pierce County Local Rule 26 governing discovery. CP 449-68. Muhl argued against the motion to strike Dr. Barnett's report because she had "disclosed the expert's identity at or very near the time it became known." CP 637. She argued that her disclosure of Dr. Barnett as soon as possible foreclosed a finding of willfulness under *Burnet* and that lesser sanctions would vindicate the purposes of discovery. CP 635-39.[9]

The trial court determined that Muhl had hired Dr. Barnett "very, very, very late in the game," and ordered that "[t]he expert witness report of Dr. Rosalind Barnett is stricken." VRP (Aug. 8, 2013) 7–8. When Muhl's attorney raised the necessity of analyzing the *Burnet* factors on the record and asked about a lesser sanction, the trial court summarily stated, "[T]here is no lesser sanction," based on the late disclosure and a perceived inability to conduct discovery before trial. VRP 8-9.

Davies also moved for summary judgment on Muhl's claims. CP 12-52. The firm contended that Muhl could not show that her termination was motivated by discriminatory or retaliatory animus and that it had permissible reasons for the termination. CP 43-47. Muhl opposed summary judgment on the wrongful termination claim by contending that her employment record, which contained satisfactory to favorable reviews and an absence of documentation that would have served as a precursor to termination, allowed the inference that Davies' articulated reasons for replacing her with Nelson, a male, were pretextual. CP 285-303. Muhl

[9] Citing to *Burnet* 131 Wn.2d at 496-97, CP 637.

opposed summary judgment on the retaliation claim by arguing that she had proven a *prima facie* case of retaliation, which precluded summary judgment. CP 301-02.

The trial court held that Muhl failed to show a *prima facie* case of employment discrimination and retaliation. It determined that no reasonable juror could conclude that Davies' articulated reasons for Muhl's termination were pretextual, thereby disposing of both her discrimination and retaliation claims. CP 660-62, VRP 28-34.

Muhl filed a timely notice of appeal, seeking review of both the order striking Dr. Barnett's testimony and the grant of summary judgment on her claims for discrimination and retaliation. CP 665-71. In its unpublished Opinion, the Court of Appeals reversed the trial court on both points. First, it held that the trial court had violated *Burnet* by excluding Dr. Barnett's testimony without making findings regarding the willfulness of the late disclosure or prejudice to Davies.[10] It rejected Davies' request to uphold the exclusion of Dr. Barnett on alternative grounds, noting that Davies had not properly argued this issue on appeal.[11] Then, without considering the contents of Dr. Barnett's testimony, the Court of Appeals also concluded that there were genuine issues of material fact that barred summary judgment for Davies.[12]

Davies timely filed its Petition for Review on November 19, 2015.

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[10] Opinion, at p. 6-8.
[11] *Id.*
[12] Opinion, at p. 8-21.

V. ARGUMENT AGAINST ACCEPTING REVIEW

1. The standards governing acceptance of review.

According to RAP 13.4(b), this Court accepts a petition for review *only*:

> (1) If the decision of the Court of Appeals conflicts with a decision of the Supreme Court; or
> (2) If the decision of the Court of Appeals conflicts with another decision of the Court of Appeals; or
> (3) If a significant question of constitutional law of the State of Washington or of the United States is involved; or
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.[13]

Davies argues for review based on factors (1), (2), and (4).[14] As demonstrated below, none of these considerations actually supports granting discretionary review of the Opinion.

2. The Court of Appeals properly reversed the trial court's grant of summary judgment to Davies.

Davies presents three issues for review, two of which concern the propriety of reversing summary judgment for Davies on Muhl's claims of discrimination and retaliation.[15] Unfortunately for Davies, its arguments regarding summary judgment all rely on ignoring, if not obfuscating, the well-known principle that the reviewing court "must consider all evidence in favor of the non-moving party."[16] When this principle is given proper consideration, there are clearly material questions of fact on all of the

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[13] RAP 13.4(b).
[14] Petition, at p. 11-13, 19. Davies does not claim that this case raises "a significant question of law under the Constitution of the State of Washington or of the United States," and it plainly does not. RAP 13.4(b)(3).
[15] Petition at p. 2 (Davies issues 2 and 3).
[16] *Keck*, 357 P.3d at 1085 (citing to *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989)).

disputed elements of Muhl's claims. The Court of Appeals did not err in reversing the trial court's grant of summary judgment.

a. Muhl carried her burden of production regarding her *prima facie* case of gender and age discrimination.

When a plaintiff alleges discrimination under WLAD, but lacks direct evidence of discriminatory intent, Washington courts apply the burden-shifting framework first elaborated by the U.S. Supreme Court in *McDonnell Douglas v. Green.*[17] Under this framework, the plaintiff bears the initial burden of production in making out a *prima facie* case of employment discrimination.[18] To carry this initial burden of production, a plaintiff must demonstrate that she "(1) is a member of a protected class; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a person ... outside the protected group."[19] Discriminatory motive need not be the sole basis for the employer's termination decision, but it must be found ultimately to be a substantial factor.[20]

Davies argues that Muhl failed to establish the third element of her *prima facie* case—doing satisfactory work—and asserts that the Opinion "ignores the vast evidence of Muhl's many failings."[21] Davies' argument here exemplifies its failure to apply the proper summary judgment

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[17] *See Hill v. BCTI Income Fund–I,* 144 Wn.2d 172, 180, 23 P.3d 440 (2001), *overruled on other grounds, McClarty v. Totem Elec.,* 157 Wn.2d 214, 137 P.3d 844 (2006) (citing to *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817 (1973)).

[18] , 144 Wn.2d at 181; *Kastanis v. Educ. Emp.Credit Union,* 122 Wn.2d 483, 490-91, 859 P.2d 26 (1993).

[19] *Kastanis,* 122 Wn.2d at 490-91.

[20] *Kastanis,* 122 Wn.2d at 491; *Mackay v. Acorn Custom Cabinetry,* 127 Wn.2d 302, 311-12, 898 P.2d 284 (1995).

[21] Petition, at p. 14.

standard. The possibility that some evidence supports Davies' position is simply irrelevant to the task of the Court of Appeals in conducting *de novo* review of the summary judgment order entered against Muhl. When the record is construed in the light most favorable to Muhl—as it must be—there is ample evidence to create material issues of fact in regard to her satisfactory performance.

As the Opinion notes (yet Davies ignores), the record shows the following about Muhl's performance:

> (1) she received satisfactory or better performance reviews [CP 321-32], (2) Davies Pearson never required Muhl to carry out a performance improvement plan or imposed performance related discipline on her, despite apparently using these devices [CP 287, 408], (3) she qualified for performance bonuses in 2009, 2010, and 2011 [CP 127, 308], (4) the client involved in the October 20, 2010 incident where Muhl allegedly lost her composure allowed Muhl to try the case and Muhl obtained a satisfactory outcome for her [CP 312-13, 432], (5) the October 20, 2010 incident occurred more than two years before her termination [CP 56-57, 357-58], (6) she addressed the trial court's concerns in the "K" trial and the court accepted her explanations [CP 313, 349], (7) Coleman stated that the trial court's response to Muhl "look[ed] good," [CP 350], (8) the trial court's acceptance of Muhl's explanation occurred in July 2011, more than a year before her termination [CP 349, 357-58] (9) the client informed her that he did not want her to show up at the contempt hearing in September 2012 [CP 313], and (10) the client did not express any dissatisfaction with her failure to appear at the contempt hearing [CP314, 386. 431].[22]

It is a blatant distortion of this record to maintain that "Muhl's unsatisfactory performance is an undisputed objective fact."[23] The

[22] Opinion, at p. 12 (CP cites in brackets added). As explained in detail below in Section 3, it is important that none of the evidence relied on by the Court of Appeals here traces back to Dr. Barnett's report or declaration. *Cf.* CP 592-634.
[23] Petition, at p. 15.

Opinion holds correctly that "a reasonable fact finder could determine [from the record] that Muhl was performing satisfactorily," and that "Muhl made out the third element of [her] prima facie case of sex discrimination."[24] Davies' claim that the Opinion on this point somehow contradicts *White*, *Wash. Fed'n of State Emp.*, or *Grimwood*, is based on nothing more than fantasy.[25] None of these cases, and no other valid Washington precedent, requires a trial court to view on summary judgment the evidence in the light most favorable to the moving party.

Davies also asserts that Muhl failed to carry her burden of production on the fourth element.[26] Again, Davies' argument for review relies on ignoring evidence in the record. Viewed "[i]n the light most favorable to Muhl, the record shows that Davies Pearson hired Nelson to put a male attorney in its family law group [CP 438-39] and that Nelson's hiring resulted in him receiving the work that used to go to Muhl [CP 340-42, 424-26, 433-34]."[27] The Court of Appeals concluded properly that, "[f]rom this evidence, a reasonable fact finder could determine that Nelson replaced Muhl."[28]

Finally, Davies contests the Court of Appeals' refusal to rule as a matter of law that Nelson could not have replaced Muhl because his hiring

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[24] Opinion, at p. 12.
[25] *Cf.* Petition, at p. 15 (citing to *White v. State*, 131 Wn.2d 1, 929 P.2d 396 (1997); *Wash. Fed'n of State Emp. v. State Personnel Bd.*, 29 Wn.App, 818, 630 P.2d 951 (1981); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 364-65, 753 P.2d 517 (1988) (unlike the facts at bar, the employer in *Grimwood* provided written notice of performance deficiencies and expressed willingness to help the employee improve.)).
[26] Petition, at p. 16-18.
[27] Opinion, at p. 13 (CP cites in brackets added).
[28] *Id.*

pre-dated her firing.[29] Davies cites to *no* authority in support of its asserted bright-line rule of immunity for employers who hire a replacement prior to terminating a victim of discrimination.[30] In contrast, the Court of Appeals properly noted that WLAD "contains a sweeping policy statement strongly condemning many forms of discrimination ... [and it] requires that '[it] be construed liberally for the accomplishment of the purposes thereof.'"[31] The Opinion concludes correctly that "[a] jury should determine the factual question of whether Nelson replaced Muhl."[32]

b. Muhl produced sufficient evidence to raise genuine issues of material fact regarding whether Davies' proffered explanation for the termination was pretextual.

Since Muhl discharged her burden of making out a *prima facie* case of discrimination, the burden shifted to Davies to "articulate a legitimate, nondiscriminatory reason for termination."[33] The Court of Appeals found that Davies carried this burden by presenting evidence that it had terminated Muhl because of her emotional display in front of "K," the letter from the trial judge in the "K" trial, and her failure to appear at the contempt hearing.[34] However, the Court of Appeals also held that Muhl presented evidence raising material questions of fact as to whether

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[29] Petition, at p. 15-16. *See also* Brief of Respondent, at p. 28 (asserting that "as a matter of law, Muhl cannot establish that she was replaced by Nelson when Nelson's hire preceded Muhl's termination by eighteen months.").
[30] Petition, at p. 15-16.
[31] Opinion, at p. 13 (citing to *Allison v. Hous. Auth. of Seattle,* 118 Wn.2d 79, 85–86, 821 P.2d 34 (1991)).
[32] Opinion, at p. 13.
[33] *See, e.g., Grimwood,* 110 Wn.2d at 363-64.
[34] Opinion, at p. 14-15.

Davies' explanations were pretextual.[35]

To show pretext, Muhl needed to create a genuine issue of material fact as to whether Davies' justifications for terminating her were "unworthy of belief."[36] A plaintiff can raise a material question of fact about pretext in a variety of ways: by producing evidence, "for example, that the reason has no basis in fact, it was not really a motivating factor for the decision, it lacks a temporal connection to the decision or was not a motivating factor in employment decisions for other employees in the same circumstances.'"[37] The Court of Appeals properly held that Muhl carried her burden on the issue of pretext by: 1) producing evidence of performance that meets employer expectations; and 2) producing evidence that Davies desired to have a male employee in its family law group.[38]

Davies raises two objections to this conclusion. First, it recycles its claim that "undisputed, objective evidence [proves] that Muhl was not a satisfactory attorney," while remaining blind to the lack of remedial action and Muhl's receipt of performance ratings at a level that Davies' expects.[39] As explained in detail above, it strains credulity to rely upon Davies' representation of Muhl's performance.[40] The law required the

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[35] Opinion, at p. 15-17 (Div. II presumably did not address the third reason due to the passage of time since resolution of the issue and Coleman's admitted satisfaction with the result; CP 350, 357-58)).

[36] *Id.* (citing to *Kuyper v. Dep't of Wildlife,* 79 Wn.App. 732, 738, 904 P.2d 793 (1995); and *Sellsted v. Wash. Mut. Sav. Bank,* 69 Wn.App. 852, 859-60, 851 P.2d 716 (1993)).

[37] *Scrivener v. Clark Coll.,* 181 Wn.2d 439, 447-48, 334 P.3d 541 (2014) (quoting *Kuyper,* 79 Wn.App. at 738-39).

[38] Opinion, at p. 15-17; CP 305-06, 321-32.

[39] Petition, at p. 17; CP 321-32.

[40] *See supra,* at p. 11-12.

Court of Appeals to view the evidence in the light most favorable to Muhl, not in a manner favorable to the party seeking a summary determination. So viewed, the evidence clearly creates at least material questions of fact as to the quality of Muhl's performance as an attorney and, accordingly, bars summary judgment on the issue of pretext.

Secondly, Davies contends that "a reasonable juror may not infer discrimination where shareholders wanted to add a male to an all-female law group."[41] Davies offers no legal support for this contention, which is contrary to substantial authority holding that sex is a *bona fide* occupational qualification *only if* "excluding members of a particular protected status group is 'essential to . . . the purposes of the job.'"[42] The Court of Appeals did not err by holding that Muhl established genuine issues of material fact regarding pretext that must be resolved by a jury.[43]

c. Genuine issues of fact also bar summary judgment on Muhl's retaliation claim.

In addition to claiming that Davies discriminated against her, Muhl also alleged that Davies retaliated against her on the basis of her opposition to unlawful discrimination on the basis of gender. CP 1-7, 340-42. To establish a *prima facie* case of retaliation, Muhl must show "(1) . . . she engaged in statutorily protected activity; (2) an adverse employment action was taken; and (3) there was a causal link between the employee's

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[41] Petition, at p. 18.

[42] *See Hegwine v. Longview Fibre Co.,* 162 Wn.2d 340, 358, 172 P.3d 688 (2007) (quoting WAC 162-16-240). *See also Franklin Co. Sheriff's Office v. Sellers,* 97 Wn.2d 317, 646 P2d 113 (1982) (holding that client preference does not establish a *bona fide* occupational qualification).

[43] Opinion, at p. 15-17.

activity and the employer's adverse action."[44] Davies challenges only the sufficiency of Muhl's evidence on the causality element.[45]

Davies' assertion that a conflict exists with the decision in *Wilmot*[46] is unpersuasive. The Court of Appeals, in fact, relied on *Wilmot* and aligned its decision in accordance with the liberal construction of WLAD retaliation jurisprudence.[47] In *Wilmot*, this Court "agree[d] in general" with allowing plaintiff to show causality by establishing that she participated in opposition activity, that the employer knew of the opposition activity, and that she was discharged.[48] Davies acknowledges that the Opinion follows this approach.[49] The Court of Appeals did not err by following an approach generally approved of by this Court.

Further, because WLAD's retaliation provision closely parallels the language of Title VII, the Court of Appeals may reference and adopt the persuasive analyses within federal cases, thereby promoting the mandates of state retaliation law.[50] The U.S. Supreme Court viewed the retaliation provision of Title VII broader than its substantive

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[44] *Id.* at p. 17 (quoting *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn.App. 774, 797, 120 P.3d 579 (2005)). *See also* WPI 330.05.

[45] Petition, at p. 19. Davies has thus abandoned its challenge to the first element, which it raised in the Court of Appeals. *See* Opinion, at p. 17-18.

[46] Petition, at p. 19; *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18, 29 (1991).

[47] Opinion, at p. 17-20; *Wilmot,* 118 Wn.2d at 69.

[48] *Id.*

[49] Petition, at p. 19.

[50] *Lodis v. Corbis Holdings, Inc.*, 172 Wn.App. 835, 849-51, 292 P.3d 779 (2013)(citing *Oliver v. Pac. Nw. Bell Tel. Co.*, 106 Wn.2d 675, 678, 724 P.2d 1003 (1986)); *Antonius v. King Cty.*, 153 Wn.2d 256, 266, 103 P.3d 729 (2004).

discrimination provision.[51] Given that WLAD is broader than Title VII and is to be more liberally construed, Muhl's retaliation claim is *a fortiori* to *Burlington Northern.*[52] More directly, Muhl is not required to prove an element of "temporal proximity."[53] Courts consider proximity of events when analyzing the causation element; the mere fact that alleged events appear close in time does not, without more, establish a retaliation claim.[54] Courts also consider whether the employer knew of the opposition activity before termination, which Muhl sufficiently established.[55]

Davies also asserts, without supporting its argument, a substantial issue of public interest related to an allowable "outer limit of temporal proximity" between the protected activity and retaliatory action.[56] This question is of interest only if one assumes there must be a strict limit that can be applied in all cases. The Court of Appeals reasonably adopted the reasoning in *Coszalter* when noting that "a specified time period [between protected activity and retaliation] cannot be a mechanically applied criterion. A rule that any period over a certain time is per se too long [ ]

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[51] *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405 (2006).
[52] *Burlington Northern*, 548 U.S. at 68; *Martini v. Boeing Co.*, 137 Wn.2d 357, 372-75, 971 P.2d 25 (1999).
[53] *See* WPI 330.05; *see also* Ninth Cir. Model Nos. 10.4A, 10.4A.1.
[54] *Tyner v. DSHS*, 137 Wn.App. 545, 565-66, 154 P.3d 920 (2007); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970-71 (9th Ninth. 2001).
[55] *Currier v. Northland Svcs., Inc.*, 182 Wn.App. 733, 746-49, 332 P.3d 1006 (2014) (referencing the employer's knowledge of opposition activity and inconsistencies in the non-retaliatory explanation); CP 309-11, 340-42; *Renz v. Spokane Eye Clinic., P.S.*, 114 Wn.App. 611, 623-24, 60 P.3d 106 (2002) (inconsistent explanations cannot be resolved on summary judgment).
[56] *Id.* at 19-20.

would be unrealistically simplistic."[57] Whether an adverse employment action followed Muhl's complaints is a question of fact that must be decided in light of the totality of surrounding circumstances.[58] There is no "substantial public interest" in forcing lower courts to use an inflexible, inherently arbitrary rule rather than their informed judgment based on the facts of each case.[59] Davies thus again fails to identify a proper basis for this Court to grant review.

3. Because the Court of Appeals had an independent basis for reversing the trial court, it did not err by refusing to conduct harmless error analysis of the conceded *Burnet* violation.

Davies now concedes that the trial court violated *Burnet* when it struck the testimony of Dr. Barnett due to untimely disclosure, without first finding that Muhl's failure to timely disclose Dr. Barnett as a witness was (1) willful and (2) incapable of remedy with a lesser sanction.[60] This concession is wise, since this Court recently held in *Keck* held that "*Burnet* analysis . . . is . . . appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion."[61] Even if it were not conceded, this Court recognized a goal to promote a just determination in every case and refused to differentiate the application of applying *Burnet* to various circumstances of evidentiary

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[57] Opinion, at p. 20; *Coszalter v. City of Salem*, 320 F.3d 968, 977-78 (9th Cir. 2003).
[58] Opinion, at p. 20-21; *France v. Johnson*, 795 F.3d 1170, 1176-77 (9th Cir. 2015); *Kahn v. Salerno*, 90 Wn.App. 110, 130-32 (1998); *Barker v. Advanced Silicon*, 131 Wn.App. 616, 629, 128 P.3d 633 (2006) (establishing the existence of a discrimination complaint creates an issue of fact).
[59] RAP 13.4(b)(4).
[60] Petition, at p. 11 (stating that "Davies does not seek review of the holding on *Burnet*").
[61] *Keck,* 184 Wn.2d at 369.

exclusion.[62] Nonetheless, Davies alleges that the Court of Appeals "erroneously fail[ed] to apply a harmless error analysis" to the trial court's *Burnet* violation.[63]

This argument fails for two distinct reasons. First, Davies failed to argue properly harmless error to the Court of Appeals. As the Opinion notes, Davies' cursory argument on this point "appears to be an attempt to incorporate its trial briefing into its appellate brief."[64] Davies further fails to establish that its argument could possibly support Supreme Court discretionary review.[65] It plainly does not.

Second, even if Davies had properly raised the issue, the Court of Appeals would not have erred by refusing to conduct a harmless error analysis. This is because the Court of Appeals had "an independent grounds to vacate the summary judgment order," so that harmless error analysis of other trial court errors such as the *Burnet* violation "would [have been] extraneous."[66] It is a well-established principle of law that an appellate court which reverses and remands due to a specific trial court error need not consider whether other, independent trial court errors were harmless.[67] Here, Davies concedes, and in fact emphasizes, that "Muhl

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[62] *Id.*
[63] Petition, at p. 2 and pp. 11-12.
[64] Opinion, at p. 8 (citing to *Habitat Watch v. Skagit County,* 155 Wn.2d 397, 416, 120 P.3d 56 (2005) for the proposition that appellate courts generally decline to address issues given passing treatment, and to *Holland v. City of Tacoma,* 90 Wn. App. 533, 538, 954 P.2d 290 (1988) for the proposition that parties are forbidden to argue issues by incorporating trial briefs).
[65] Petition for Review, at p. 12-13.
[66] *Keck,* 184 Wn.2d at 375 (Gonzalez, J., concurring).
[67] *See, e.g., State v. Walker,* 182 Wn.2d 463, 475, 341 P.3d 976, 984 *cert. denied,* 135 S. Ct. 2844 (2015) (noting that "[w]e need not determine whether [error in the prosecutor's

did not argue that Barnett's report created a material question of fact *and the appellate court did not address that issue.*"[68] Since the Court of Appeals' decision to reverse the grant of summary judgment in no way depended on the contents of Dr. Barnett's report, there was no need for it to conduct a harmless error analysis of the conceded *Burnet* violation.

VI. MUHL IS CONDITIONALLY ENTITLED TO AN AWARD OF HER REASONABLE ATTORNEYS' FEES FOR ANSWERING THE PETITION

RCW 49.60.030(2) authorizes a prevailing plaintiff to recover attorney fees, including those on appeal.[69] This Court should direct the trial court that, should receive a verdict on her WLAD claims, she is entitled to the reasonable fees incurred in answering the Petition.[70]

VII. CONCLUSION

For the foregoing reasons, this Court should deny Davies' Petition, and conditionally award Muhl her reasonable fees incurred herein.

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opening statement] was reversible error because the impropriety of the prosecutor's closing was so egregious"); *State v. Redmond*, 150 Wn.2d 489, 496, 78 P.3d 1001, 1005 (2003) (holding that "[b]ecause we reverse and remand this case based on the trial court's failure to provide a no duty to retreat instruction, we need not consider whether the trial court's error in failing to provide a limiting instruction constitutes a harmless or reversible error"); and *State v. Matthews*, 6 Wn.App. 201, 204-05, 492 P.2d 1076 (1971) (holding that "[h]aving decided the appeal on the other grounds we need not determine whether [use of a racial slur in closing] was reversible error. Since it could occur upon retrial we must express our disapproval").

[68] Petition, at p. 12 (emphasis added).

[69] Opinion, at p. 23.

[70] *Id. See also* RAP 18.1(j) (stating in pertinent part that "[i]f attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review").

RESPECTFULLY SUBMITTED this 22nd day of December, 2015.

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CERTIFICATE OF SERVICE

I, Linsey M., Teppner, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on the date below, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
Lori M. Bemis McGavick Graves P.S. 1102 Broadway, Suite 500 Tacoma, Washington 98402	☐ Hand Delivery ☐ Legal Messenger ☐ Regular Mail ☐ Facsimile ☒ E-Mail
Dave Luxenberg McGavick Graves P.S. 1102 Broadway, Suite 500 Tacoma, Washington 98402	☐ Hand Delivery ☐ Legal Messenger ☐ Regular Mail ☐ Facsimile ☒ E-Mail
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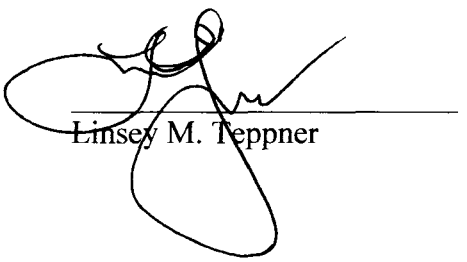
Dated: December 22, 2015



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