72342-1

NO. 72342-1-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS,

Plaintiffs/Appellants,

v.

CORBIS HOLDINGS, INC.,

Defendant/Respondent,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Bruce E. Heller)

Case No. 08-2-20301-8

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Steven Lodis asks that the Court remand this case for a second trial on his retaliation claim. The first trial was riddled with confusing and prejudicial references to two prior trials and verdicts, and claims that Lodis was "back for a third bite of the apple." Yet, the earlier verdicts related to Lodis' claim for age discrimination and Corbis' counter-claim for breach of fiduciary duty. Neither met the standard for "issue preclusion" to apply and both were irrelevant to the issues the jury was deciding in the retaliation trial. Even if the prior verdicts had some probative value, the substantial danger of unfair prejudice and confusion of the issues warranted excluding the fact that two juries previously rendered verdicts in favor of Corbis and against Lodis, and that Lodis appealed and "lost the appeal."[1] Corbis used the fact of the verdicts favoring it to argue that Lodis was not credible and that earlier juries did not believe him,[2] which left an indelible stain no instruction could cure, even if an appropriate instruction were given. Thus, a second trial on the retaliation claim should be granted.

On remand, Lodis asks to be allowed to present evidence relevant to his "reasonable belief" that CEO Gary Shenk engaged in

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[1] RP (5/29) 161-62.

[2] See RP (5/14) 30-31; RP (5/22) 63, 109; RP (5/29) 155-56 (Corbis' closing statement: "Steve Lodis... a person who testified under oath ... in front of two separate juries and failed to convince them with his stories... Sure enough, Steve Lodis is back for a third bite").

unlawful age discrimination that Lodis opposed. The excluded evidence included age-related comments by Shenk made about older employees in the context of employment decisions, as well as evidence about other older executives who Shenk terminated and their ages.[3] As "issue preclusion" did not apply, the trial court should not have precluded Lodis from re-litigating issues regarding age discrimination. Nevertheless, the court did so.[4] The categorical exclusion of evidence of age discrimination was improper and presumptively affected the outcome of the trial. "The cumulative effect of many errors may sustain [Lodis'] motion for a new trial even if, individually, any one of them might not."[5] A new trial is warranted here, as a "feeling of prejudice [was] engendered... in the minds of the jury as to prevent [Lodis] from having a fair trial.'"[6]

II. ARGUMENT

A. Reply to Respondent's Standard of Review

In its brief, Corbis asks the Court to review the evidence in the light most favorable to the prevailing party after a trial on the merits, relying on Lian v. Stalick, 106 Wn. App. 811, 824 (2001). Yet, that standard applies only to motions for new trial based on insufficient

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[3] See e.g., RP (5/13) 55; RP (5/19) 185-87, 201; RP (5/29) 13.
[4] See RP (5/13) 54; and RP (5/22) 69.
[5] Storey v. Storey, 21 Wn. App. 370, 374 (1978).
[6] Collins v. Clark Co. Fire Dist. No. 5, 155 Wn. App. 48, 81 (2010).

evidence under CR 59(a)(7). Id. It does not apply in this case, where the motion was based on CR 59(a)(1), (8), and (9).[7]

B. The trial court's application of issue preclusion and admission of the breach of fiduciary duty verdict constituted reversible error.

1. Standard of Review

Based on the jury verdict, the trial court granted a motion to preclude re-litigation of breach of fiduciary duty, ordering Lodis was "not … permitted to re-litigate the issue," and that the jury would "hear that a prior jury found that Mr. Lodis violated his breach of fiduciary duty" [*sic*]. CP 3322, RP (5/14) 4. Corbis argues that admission of the verdict was not an "abuse of discretion. However, to the extent that Lodis was precluded from re-litigating any issue, the court reviews "the preclusive effect of a jury's verdict de novo." See State v. Stein, 140 Wn. App. 43, 62 (2007). Additionally, if "the trial court based its evidentiary ruling on an incomplete legal analysis or a misapprehension of legal issues, the ruling may be an abuse of discretion."[8]

2. Corbis no longer seeks to apply "issue preclusion" to the earlier finding on breach of fiduciary duty.[9]

Collateral estoppel (or "issue preclusion") prevents the re-

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[7] See CP 2028, 2038.
[8] State v. McComas, _Wn.App._, 345 P.3d 36, 38 (2015) (citing City of Kennewick v. Day, 142 Wn.2d 1, 15, (2000)); State v. Quismundo, 164 Wn.2d 499, 504 (2008).
[9] See Resp.'s Brief, 34-36, and n.36; cf. Resp.'s Motion, CP 282-84.

litigation of issues in the manner in which the trial court precluded Lodis from re-litigating or contesting the prior finding of breach of fiduciary duty. See Lemond v. State, Dep't of Licensing, 143 Wn. App. 797, 803-04 (2008). Yet, issue preclusion is "confined to *ultimate facts*," Seattle-First Nat. Bank v. Cannon, 26 Wn. App. 922, 928 (1980), and is "limited to situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding." Lemond, 143 Wn. App. at 805.

Judge Heller acknowledged that the issue in the context of the after-acquired evidence defense was "*distinct*" from the issue involved in the breach of fiduciary claim.[10] Still, he precluded Lodis from "re-litigating" the breach of fiduciary duty issue and admitted the verdict on breach of fiduciary duty before opening statements were given. This was error. See Cannon, 26 Wn. App. at 925, 928 (holding that because collateral estoppel did not apply, restitution of $43,000 required by the criminal court could not be considered either as "prima facie or conclusive evidence" on issue of damages). Corbis' brief fails to address the Cannon decision. See also State v. Polo, 169 Wn. App. 750, 756-59, 763 (2012) (holding it was reversible error to

[10] RP (5/13) 16-17 (The Court: "[W]e have two distinct issues here. One is: Did he violate, breach his fiduciary duty? ... That's not the issue in the context of the after-acquired evidence defense. The issue there is: Even if it's not a breach of fiduciary duty, is the jury persuaded that had the company known about it, they would have terminated."); accord RP (5/21) 77.

admit judgment and testimony about DUI conviction in related case for possession of a stolen car, as "essential elements and facts" necessary to convict for DUI were not identical to elements and facts that must be proven to convict of possession of a stolen vehicle).

In Roper v. Mabry, 15 Wn. App. 819 (1976), a prior trial resulted in finding a breach of fiduciary duty, but the issue was "not identical" to the issue in a subsequent slander trial (i.e., whether Roper committed a criminal act). Id. at 822. As a result, the court in Roper held that "collateral estoppel [did] not allow admission of the findings" on breach of fiduciary duty. Id. at 821-822. Admission of the breach of fiduciary duty finding "would mislead the jury, confuse the issues, and work an injustice to the plaintiff." Id. at 822. The same logic applies here, barring admission of the same finding of "breach."

In spite of not meeting the standard for "issue preclusion" to apply, Corbis utilized the order on the motion in limine precluding re-litigation of the breach of fiduciary duty, along with the earlier verdict, to present as "*established facts*" that Lodis "breach[ed] his fiduciary duty almost every day that he was employed at Corbis";[11] "sought to profit at the company's expense"; "took more than 35 days of vacation beyond the amount [he] [was] allotted"; and was ordered

[11] RP (5/15) 69.

to pay back over $42,000. RP (5/22) 36-39, 50. As none of these were "ultimate facts" at issue in the retaliation trial, the court's application of issue preclusion was improper and the verdict on breach of fiduciary duty should not have been admitted as "prima facie evidence" of such facts. See Cannon, 26 Wn. App. at 928.

3. The breach of fiduciary duty finding was not relevant and far more prejudicial than probative in a case that was largely a credibility contest.

The trial court acknowledged, "Whether Lodis breached his fiduciary duty is not the issue in the context of the after-acquired evidence defense." RP (5/13) 16-17. Whatever potential relevance the earlier finding of breach might have had was dulled by the fact that the jury had no instruction on the meaning or elements of "breach of fiduciary duty."[12] Also, the first verdict was altered by a redaction, which kept secret from the jury in the retaliation trial that Lodis was "acquitted" of charges of unjust enrichment and fraud in the first trial, and that the first jury determined his breach of fiduciary duty caused Corbis no damage. See RP (5/21) 168-69; Ex. 484; RP (5/14) 6-7. The breach of fiduciary duty verdict was "evidence of scant or cumulative probative force, dragged in... for the sake of its prejudicial effect." Carson v. Fine, 123 Wn.2d 206, 223 (1994). It is unfairly

[12] Lodis requested a jury instruction on the elements of the claim, but his request was denied. RP (5/29) 93-94, 98, 100-04. See also RP (5/14) 6-7.

prejudicial, as it provoked the jury's "instinct to punish" and likely "arouse[d] an emotional response rather than a rational decision." Id.

The United States Supreme Court has held that "what counts as the Rule 403 'probative value' of an item of evidence ... may be calculated by comparing evidentiary alternatives." Old Chief v. United States, 519 U.S. 172, 184, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).[13] Prior to trial, Lodis asked the court, if it did not dismiss the after-acquire evidence defense, to only permit Corbis to present evidence supporting the verdict, but not admit the verdict and finding on "breach of a fiduciary duty".[14] Other courts have made this type of ruling, because prior judgments are inherently prejudicial. See Engquist v. Oregon Dep't of Agric., 478 F.3d 985, 1010 (9th Cir. 2007) (holding it was not error to admit evidence supporting the prior verdict of discrimination, while excluding fact of verdict itself, as the "verdict itself did not possess such additional probative value, beyond the ... evidence, to overcome the risk of prejudice and confusion that

[13] See also id. at 182-83 ("If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk."); United States v. Sine, 493 F.3d 1021, 1033-35 (9th Cir. 2007); and State v. Johnson, 90 Wn. App. 54, 62 (1998) ("The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence.")).

[14] See RP (5/13) 25-26 ("They don't get to say breach of fiduciary duty. They do, based on your ruling and because Shenk has said so, they get to attack him on vacation and bonus. But that's it, I think.")

the verdict posed"), *aff'd*, 553 U.S. 591, 128 S. Ct. 2146, 170 L. Ed. 2d 975 (2008). Courts have disapproved of admitting verdicts because "[a] jury is likely to give a prior verdict ... more weight than it warrants," and it "creates the possibility that the jury will [simply] defer to the earlier result." Id. at 1009-10 (quoting Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1351 (3rd Cir. 1975)).

"[M]ost courts forbid the mention of verdicts or damage amounts obtained in former or related cases." Engquist, 478 F.3d at 1009-10 (citing 75A AM. JUR.2d *Trial* § 628; D.C. Barrett, *Propriety and prejudicial effect of reference by counsel in civil case to result of former trial of same case, or amount of verdict therein,* 15 A.L.R.3d 1101 (summarizing cases)). "[F]ederal circuit courts have [similarly] held that the use as evidence of facts as found in a judicial opinion can unfairly prejudice a party ... because ... 'by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice.'"[15]

The danger of unfair prejudice weighs especially heavy when a verdict is used to attack credibility.[16] In the retaliation trial, the jury

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[15] Sine, 493 F.3d at 1033-35.

[16] See Sine, 493 F.3d at 1034-35 (citing United States v. Binder, 769 F.2d 595, 602 (9th Cir.1985) (holding expert witness testimony was improper if it "in effect... asked [jury] to accept an expert's determination that... witnesses were truthful" as "[i]t is the jurors' responsibility to determine credibility.")). Accord Fettig v. Dept. of Social & Health Servs., 49 Wn. App. 466 (1987).

was given no instruction on what weight to afford the earlier jury's finding of "breach"; nor was the jury in the retaliation trial instructed on the basis for which the verdict could be properly considered.[17] Corbis told the jury that the verdict on breach of fiduciary duty was "important to understanding just how credible ... Steve Lodis is."[18]

"Because there is no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." See Thomas v. French, 99 Wn.2d 95, 105 (1983) (holding admission of hearsay evidence that is "prejudicial ... on its face," "may well have prejudiced the jury's assessment" of credibility, warranting new trial).

This Court previously reversed summary judgment in favor of Lodis, holding there were genuine issues of material fact for the jury to decide regarding the retaliation claim.[19] On remand, the trial was largely a credibility contest.[20] Shenk and Mitchell denied all claims that Lodis met with them and reported concerns about discrimination. The admission of the prior verdicts, and the arguments made by Corbis utilizing the verdicts, "could easily serve as the deciding factor" and presumptively affect the trial's outcome. See State v. Walker, 164 Wn. App. 724, 738 (2011) (holding that frequent use of

[17] See CP 1992-2012. While no instruction was given, the court intended to instruct jurors to give the verdict "whatever weight you believe is appropriate." RP (5/14) 5.
[18] RP (5/15) 56.
[19] See Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 852 (2013).
[20] See RP (5/21) 213.

improper argument, which developed into a "theme" for closing argument, resulted in prejudicial error). Corbis argues that any error in admission of the breach of fiduciary duty finding was harmless, as the jury found no liability and did not reach the issue of damages. That argument fails to consider how the breach of fiduciary duty finding affected the jury's assessment of Lodis' credibility.

Over Plaintiff's objection, in opening statement Corbis told the jury that a prior "jury found that Lodis had breached his fiduciary duty by seeking to profit at the company's expense," and that this was "important to understanding just how credible or not Steve Lodis is." RP (5/15) 56. Judge Heller acknowledged that inquiring of Lodis on this matter "at some point, ... [would be] attacking his character for truthfulness, but frankly, ...d[id]n't know where that line [was]...." See RP (5/21) 78. The next day, Corbis used the verdict to accuse Lodis of having been found "guilty" of breaching his fiduciary duty, RP (5/22) 36; and asked him if the verdict requiring Lodis to pay Corbis over $42,000 (Ex. 485) showed Lodis was "stealing from the company." RP (5/22) 51.[21] Incredibly, despite these facts, Corbis maintains it "did not use the evidence to impermissibly attack Lodis'

[21] In its brief, Corbis notes that the court "sustained" an objection to the question about whether Lodis was "stealing from the company." Yet, the company fails to mention that, despite that objection being sustained, its counsel repeated the "stealing from the company" aspersion in closing statement. RP (5/29) 184.

character in violation of ER 404, 608 or 609 by challenging his truthfulness or otherwise characterizing Lodis as a 'criminal'"; and claims that the verdict "was not offered as extrinsic evidence of Lodis' character for truthfulness (ER 608(b))." Resp.'s Brief, 45, 47.[22]

Instead, Corbis argues that "any challenges to the truthfulness of Lodis' testimony [in prior trials] were in the vein of impeachment (e.g., 5/22 RP 63)." Resp.'s Brief, 47. However, the use of the verdict that Corbis cites as proper "impeachment" was equally improper. Lodis was asked to admit that he "steadfastly denied under oath that [he] breached [his] fiduciary duties to Corbis?"; and then Corbis repeatedly alleged that the prior juries failed to believe Lodis.[23]

More than being "in the vein of impeachment," such use of the verdicts presented improper speculation as to the "opinions" of earlier juries on Lodis' credibility.[24] "[N]o witness may give an opinion on another witness' credibility." State v. Carlson, 80 Wn. App. 116, 123 (1995). See ER 608.[25] It was prejudicial error to allow

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[22] To be clear, in advance of Corbis' questioning of Lodis, Plaintiff made repeated ER 404(a) and 608(a) objections to Corbis' proposed use of the breach of fiduciary duty finding. See RP (5/13) 23-24; RP (5/21) 75-76, 78, 212-13.

[23] See RP (5/22) 63-64; 109.

[24] See, e.g., RP (5/29) 155-56 ("Steve Lodis... a person who testified under oath ... in front of two separate juries and failed to convince them with his stories").

[25] "Under Washington's version of Rule 608, a witness... must limit his or her testimony to the reputation of the other witness. ... The rule bars opinions on credibility from both lay witnesses and experts." 5A K. Tegland, Wash. Prac., Evidence § 608.13 (5th ed. 2014). Accord State v. Maule, 35 Wn. App. 287, 297 (1983) ("ER 608 'differs from Federal Rule 608 in that it does not authorize the

Corbis to circumvent the bar on credibility opinions under the guise of presenting verdicts rendered in Corbis' favor by prior juries. Id.

As the breach of fiduciary duty verdict was not used "solely [in regards] to damages," the error in admitting it was not harmless. See Bertsch v. Brewer, 97 Wn.2d 83, 88 (1982) (remanding for new trial based on erroneous admission of personality profile offered in relation to damages, despite the fact that jury never reached issues of damages, as document was also relevant to the issue of credibility). It would be "naive and unrealistic" to assume that the jurors related the prior breach of fiduciary duty verdict solely to the issues of damages, "especially in the absence of an instruction to that effect" and after Corbis told the jury that the finding was relevant to credibility. Id.

C. Lodis should not have been precluded from presenting evidence of his "reasonable belief" of age discrimination.

1. Lodis' evidence was relevant to the retaliation trial and its use was not precluded by collateral estoppel.

Corbis attempts to trivialize Lodis' protected activities, stating "[t]he sole claim in the ... third trial was Lodis' allegation that Corbis retaliated against him for admonishing Shenk on five specific occasions for making *ageist comments*." Resp.'s Brief, 25. The scope of Lodis' admonishments was much broader, as Lodis repeatedly

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introduction of evidence of character in the form of an opinion.'").

admonished Shenk to not make employment decisions in which age was a "factor." See, e.g., RP (5/21) 21-22; accord Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 843 (2013) ("Lodis reminded Shenk that age should not be a factor in hiring or firing employees.").

Corbis' argument about the scope of evidence relevant to Lodis' "reasonable belief" of discrimination also fails to recognize that Lodis claims he was retaliated against shortly after he "went to Corporate Counsel Mitchell to report what Lodis perceived to be Shenk's age bias and desire to replace older workers with younger workers." See CP 1031; RP (5/21) 27 ("I told Jim... I was seeing a behavior and *a trend that concerned me*. First, we fired Wil Merritt. Then we fired Dave Bradley. Then we fired Sue McDonald. And now Gary was going after Mark Sherman. And his comment to me was, 'I want to replace him with a young Hollywood type.'").[26] Thus, the discrimination Lodis claims he held a "reasonable belief" about, and which he claims he was retaliated against for opposing, went well beyond believing Shenk was making "ageist comments."[27]

Nevertheless, the trial court excluded a substantial amount of

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[26] Accord Lodis, 172 Wn. App. at 843, n. 1 ("I told Mitchell of my conversations with Shenk and my concerns that he was terminating everyone (Merritt, Bradley, McDonald, and now Sherman)"); see also id., 172 Wn. App. at 852 ("Lodis told Shenk of the growing concern... about [his]... employment decisions... [and] told Mitchell ... Shenk was terminating older employees in favor of younger workers.")

[27] See, e.g., RP (5/27) 72-73.

evidence Lodis presented in the age discrimination trial to demonstrate age bias. The evidence was relevant in the retaliation trial to show that Lodis opposed conduct that he "reasonably believed" was unlawful discrimination. This was Lodis' ***primary*** argument in opposing Corbis' motion to preclude evidence of alleged age discrimination (CP 257) and motion to exclude "evidence of the termination and layoff decisions of other employees and the ages of those employees" (CP 585) – that the evidence Corbis sought to exclude was relevant to Lodis' "reasonable belief" that the conduct he opposed was unlawful. See CP 361, 3331.[28] Yet, when the trial court granted Corbis' motions, it did not discuss or evaluate the evidence's relevance to the "reasonable belief" issue Lodis raised. Instead the court's order addressed a straw man, a tertiary, alternative argument Lodis made based on Brundridge and 404(b). See CP 3322, 361-63.

The court's "fail[ure] to recognize" the primary relevance of the age discrimination evidence that Lodis identified (the issue whether he had an "objectively reasonable belief" that the conduct he opposed was unlawful age discrimination) rendered the court's evidentiary determination "based on an incomplete analysis of the

[28] CP 361 ("For the jury to understand that Mr. Lodis 'reasonably believed' that he was opposing age discrimination, the jury must hear the evidence supporting age discrimination. Otherwise, his retaliation claim will fail before it begins.").

law, its decision ... based on untenable grounds and constituted an abuse of discretion." See City of Kennewick v. Day, 142 Wn.2d 1, 8 (2000) (holding that trial court abused its discretion by excluding relevant evidence when it failed to analyze proffered evidence in light of defendant's unwitting possession defense).

With some exceptions,[29] none of which apply here, "[*a*]*ll* relevant evidence is admissible." ER 402. It was error to exclude a substantial amount of evidence supporting Lodis' "reasonable belief" that age discrimination was occurring for allegedly being irrelevant. See, e.g., RP (5/13) 54-55 (finding layoffs of other Corbis employees and their ages were irrelevant to the retaliation claim).[30]

However, the court's exclusion of age discrimination evidence was not based solely on the evidence's alleged irrelevance, but also on the fact that there was an earlier trial and verdict against Lodis on the age discrimination claim, which the court gave preclusive effect to through the exclusion of age discrimination evidence offered in the first trial.[31] Lodis relies on the authorities cited in his opening brief for why such issue preclusion with respect to age discrimination was

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[29] E.g., ER 402 (if prohibited by rule, statute, constitution, etc.); ER 403.
[30] See also CP 3322; RP (5/9) 16.
[31] See RP (5/13) 54-55 (precluding Lodis from "retry[ing] the age issues... We had a trial. We had a jury verdict. We are not going to go over that ground again."); see also RP (5/22) 69 ("If I were to accept your argument, aren't we... retrying large swaths of the age case?... [I]n the previous trial, we spent numerous days on all this other circumstantial evidence, and I don't want to do that" again); and RP (5/29) 13.

improper. See Brief, 37-41. It suffices to say that the ultimate issue in the age discrimination trial was not "identical" to the issue in the retaliation trial. Id.; see RP (5/14) 3-4. As collateral estoppel was inapplicable, the court should not have precluded Lodis from using evidence simply because it was also presented in the trial of his unsuccessful age discrimination claim. See State v. Eggleston, 129 Wn. App. 418, 428-29 (2005) (holding that defendant's acquittal in murder trial did not preclude prosecution from using evidence relied upon in the acquittal trial in later criminal action, as "ultimate fact issues" in the cases were not the same), aff'd, 164 Wn.2d 61 (2008).[32]

2. The categorical exclusion of age discrimination evidence likely affected the trial's outcome.

"In a discrimination case, the ultimate issue is the employer's motive."[33] For an employer's action to violate the WLAD prohibition on age discrimination, the plaintiff has the burden to prove that age was a "substantial factor" in the employer's adverse action.[34] "A factor ... is 'substantial' if it so much as tips the scales one way or the other."[35] As "'smoking gun' evidence of discriminatory animus is rare,"[36] and discriminatory motive is "difficult[] [to] prov[e],"[37] "wide

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[32] Accord State v. Stein, 140 Wn. App. 43, 62-63 (2007).
[33] deLisle v. FMC Corp., 57 Wn. App. 79, 82 (1990).
[34] Scrivener v. Clark College, 181 Wn. 2d 439, 444 (2014).
[35] Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 621 (2002).
[36] Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 179 (2001), overruled in part on

evidentiary latitude must be granted to those attempting to prove discriminatory intent."[38] "[C]ircumstantial, indirect and inferential evidence [] suffice[s] to discharge the plaintiff's burden."[39]

Circumstantial evidence of age-based animus includes the fact of other discriminatory acts by the employer (i.e., ER 404(b) evidence of "prior bad acts").[40] Additionally, ageist statements, e.g., about desiring job candidates with "funk" and "youthfulness," even when made outside of a decisional process, "are circumstantial evidence probative of discriminatory intent." Scrivener v. Clark College, 181 Wn. 2d 439, 443, 450, n.3 (2014) (rejecting "stray remarks" doctrine, as its "unnecessary and categorical exclusion of evidence might lead to unfair results"); see also RP (5/29/14) 14.

While it is true that in his retaliation case, Lodis "need only show that he had an objectively reasonable belief that his employer violated the law, *not that the employer did in fact violate the law*";[41] this lowered standard of proof for the case-within-a-case portion of

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other grounds by McClarty v. Totem Elec., 157 Wn.2d 214 (2006).
[37] Scrivener, 181 Wn. 2d at 545.
[38] Demers v. Adams Homes, 321 Fed. Appx. 847, 853 (11th Cir. 2009).
[39] Hill, 144 Wn.2d at 180.
[40] See Brundridge v. Fluor Federal Services, Inc., 164 Wn.2d 432, 444-46 (2008) (citing Spulak v. K Mart Corp., 894 F.2d 1150, 1156 (10th Cir. 1990)); see also Sprint/United Management Co. v. Mendelsohn, 552 U.S. 379, 387-88, 128 S.Ct. 1140, 170 L. Ed. 2d 1 (2008) (recognizing in age discrimination case that it is error to exclude evidence of discrimination by other supervisors not involved in actions of which employee-complained if applying a "*per se*" rule of inadmissibility).
[41] Lodis, 172 Wn. App. at 852.

his retaliation claim does not render the forms of circumstantial evidence commonly used to prove age-based animus (e.g., the perceived "trend" of older employees terminated) irrelevant to the analysis. All of Lodis' proof of Shenk's (reasonably perceived) discriminatory intent remained at the core of the retaliation case.

Corbis claims that the exclusion of Lodis' circumstantial evidence of intent was harmless as it presented "overwhelming evidence ... that Corbis terminated Lodis for good cause." Resp.'s Brief, 31. Assuming *arguendo* that were true, it must be remembered that to prevail on his retaliation claim, Lodis does "not need to disprove each of [Corbis'] articulated reasons" for his discharge, as "[a]n employer may be motivated by multiple purposes, both legitimate and illegitimate, ... and still be liable under the WLAD."[42]

The evidence excluded by the court was relevant to Lodis proving that he opposed what he "reasonably believed to be discrimination on the basis of age," an issue so important the court stated it in both elements of the retaliation jury instruction. CP 2003.

The evidence of age bias excluded by the court includes, *inter alia*, statements that Shenk made in the context of employment decisions about VP Rick Wysocki ("we're not running a retirement

[42] Scrivener, 181 Wn.2d at 447.

home"); about executive coach Glo Harris (referencing her age and how she was "grandmotherly" when discussing why he did not use her anymore); about former Corbis executive assistant Lynn Hallenberg (who Shenk said he would not hire as his assistant because she was "old," hiring instead a person under 30)[43], and about candidates for a new CFO (Shenk told Lodis he "wanted to recruit a young woman"). RP (5/29) 9-10. Also excluded was evidence that a candidate for the CFO position "after having spoken to Shenk ... said she felt that she was not ... the age that he was looking for. And there is actually an e-mail to that effect." Id. All of these statements, as well as the excluded evidence about other older executives Shenk terminated and their ages,[44] were relevant and admissible as "circumstantial evidence probative of discriminatory intent."[45] ER 402. The court's exclusionary ruling, purportedly based on the evidence's lack of "relevance," was prejudicial error that had the effect of "prevent[ing] [Lodis] from presenting to the jury a crucial link in his proof"[46] and thus likely affected the trial's outcome.

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[43] See RP (5/13) 106-07
[44] See RP (5/13) 55; CP 2936; and RP May (19, 2014) 185-87, 201 (stating chart with ages "is not coming in").
[45] See Scrivener, 181 Wn.2d at 450.
[46] See Grigsby v. City of Seattle, 12 Wn. App. 453 (1975).

D. The admission of the prior age discrimination verdict, which was irrelevant, resulted in incurable prejudice.

It cannot be disputed that the trial court gave preclusive effect to the verdict on age discrimination.[47] "[T]he preclusive effect of a jury's verdict [is reviewed] de novo."[48] Additionally, an evidentiary ruling based on "an incomplete legal analysis or a misapprehension of legal issues" is an abuse of discretion.[49] Under either standard of review, it was error to admit the prior verdict on age discrimination.

In the retaliation trial, the verdict in favor of Corbis on age discrimination had no probative value, as the relevant issue -- whether Lodis "*reasonably believed*" discrimination was taking place -- did ***not*** require him to "show that, in fact, age discrimination even was taking place," or that Corbis "in fact violate[d] the law." See Oral Ruling, RP (5/14) 3-4; Lodis, 172 Wn. App. at 852. As this issue is not "identical" to the issue decided in the verdict in favor of Corbis on Lodis' age discrimination claim, the verdict should not have been admitted in the retaliation trial as "prima facie or conclusive evidence" on any issue.[50]

Even if the verdict were relevant, ER 403 authorizes exclusion of relevant evidence based on "the danger of unfair prejudice,

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[47] See RP (5/13) 54-55; and RP (5/22) 69.
[48] See Stein, 140 Wn. App. at 62.
[49] McComas, 345 P.3d at 38, *citing* City of Kennewick, 142 Wn.2d at 15.
[50] See, e.g., Cannon, 26 Wn. App. at 928; Roper, 15 Wn. App. at 821-822; Polo, 169 Wn. App. at 756-59; and ER 402.

confusion of the issues, or misleading the jury." Presenting a finding that Corbis "did not violate the law" (at least with respect to Steven Lodis), where that was not the issue that the jury in the retaliation trial was to decide, only confused the issues.[51] Moreover, there was a substantial danger of unfair prejudice resulting from the verdict's admission. RP (5/21) 126 ("[T]hey might make shortcuts, and... decide that if there is no basis for the age claim, then there is no basis for the retaliation claim."); see also id. at 8-9. Accord Engquist, 478 F.3d at 1009-10 ("A jury is likely to give a prior verdict ... more weight than it warrants" and simply "defer to the earlier result.") (quoting Coleman, 525 F.2d at 1351).

Judge Heller acknowledged that he "d[id]n't know how [to] prevent the jury from engaging in [that] kind of logic." RP (5/21) 8-9. Corbis suggested that a limiting instruction would suffice. Id. The company claims that a "clear limiting instruction with regard to the age discrimination verdict" was given. Resp.'s Brief, 32, *citing* RP (5/22) 131. Yet, the instructions given offered no guidance for what permissible purpose, if any, the jury might consider the prior verdict. The instructions were akin to curative instructions to disregard

[51] See RP (5/21) 8-9.

inadmissible evidence that had been improperly presented to the jury.[52]

The trial court's failure to instruct the jury on the verdict's admissible purpose begs the question why it was admitted in the first place. Without an instruction on the purpose for the earlier verdict's admission, Corbis should not have been allowed to continually inject the verdict on age discrimination into the retaliation trial.[53]

No instruction to disregard evidence could "remove the prejudicial impression created where the evidence ... is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." State v. Miles, 73 Wn.2d 67, 71 (1968). That is the case where, as here, "although not legally relevant, [the evidence] appears to be logically relevant," such that "it would be extremely difficult, if not impossible, ... for the jury to ignore this seemingly relevant fact." See State v. Escalona, 49 Wn. App. 251, 255-56 (1987).

The prejudice to Lodis was insuperable. Just as Corbis did with the verdict on breach of fiduciary duty, it used the verdict on age discrimination to argue that it was the opinion of an earlier jury that

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[52] RP (5/22) 131 ("[W]hether... defendants engaged in age discrimination is not before you and should not be considered by you in evaluating Mr. Lodis's retaliation claim."); RP (5/29) 187 ("I'm instructing you... the prior jury verdict related to age discrimination against Mr. Lodis is no longer an issue.").

[53] See State v. Scherner, 173 Wn.2d 405, 424 (2012) (holding in the context of ER 404(b) limiting instructions that court should "should state to the jury whatever it determines is the purpose ... for which the evidence is admissible; and ... that such evidence is to be considered for no other purpose or purposes.").

Lodis was not believable. See RP (5/22) 109 ("Everything that you have just testified about regarding alleged age discrimination was stuff that you brought out in that [prior] case? ... [W]e have already been here, right, and it resulted in a verdict against you?); id. at 63 ("[I]sn't it the bottom line here that you want this jury to, just like the two other juries, to believe you?"); RP (5/29) 158 ("He tells you that Gary Shenk is an ageist who makes ageist comments and fires people because of their age. A jury said otherwise. Every single bit of evidence that you heard, the other jury heard first."); id. at 170-71 ("Everything Ross Sutherland has to say, he already said in the other case in which the jury ruled for Gary and Corbis"); id. at 178 ("Look at the jury's verdict in the first trial. ... All the testimony you heard in this trial ... about alleged ageist comments, that's all been thrown out there... and none of it stuck."); and id. at 180 ("A jury of his peers ... reviewed all the evidence of age discrimination -- [O]bjection... Sustained.").

"An error may be of such serious character that an instruction will not cure it." Phillips v. Thomas, 70 Wn. 533, 536 (1912). "[I]mpressions once made are not easily erased, in spite of all the caution jurors may receive from the court."[54] While the court instructed the jury that "the prior jury verdict ... is no longer an

[54] McKahan v. Baltimore & O. R. Co., 223 Pa. 1, 6, 72 A. 251, 253 (1909).

issue,"[55] "the virus could not have ... been removed."[56] "There comes a time... when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error." State v. Case, 49 Wn.2d 66, 73 (1956). The verdict presumptively affected the trial's outcome, as the jury could not disregard the impression used to attack Lodis' credibility, which could easily serve as "the deciding factor."[57]

E. There was no "door" to open such that the verdict on the age discrimination claim might become relevant, and Lodis' presentation of evidence was proper in any case.

For the reasons already stated, in the context of the retaliation trial, the prior verdict showing Corbis "did not actually" engage in age discrimination with respect to Stephen Lodis was wholly irrelevant. See sections "D." and "C.1.," supra. The principles of "issue preclusion" did not permit the verdict to be admitted as "prima facie or conclusive evidence" on any issue. Id. Moreover, there was a substantial "danger of unfair prejudice, confusion of the issues, [and] misleading the jury" if were admitted. Id.; ER 403. Nevertheless, Corbis claims Lodis raised issues justifying the verdict's admission.

The arguments Corbis offers in its appendix as proof that

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[55] RP (5/29) 187.
[56] State v. Navone, 186 Wn. 532, 58 P.2d 1208 (1936).
[57] See Walker, 164 Wn. App. at 738.

Lodis "opened the door" to admission of the age discrimination verdict show nothing of the sort. Questions to Shenk about the fact that Jim Mitchell and Vivian Harris took over HR when Lodis left did not imply age was a factor in the decision.[58] Shenk's age was noted in opening statement to inform the jury he was a young CEO, a fact that was key to understanding his intent to discriminate against older workers.[59] Lodis' age was admissible exposition, relevant if nothing else to calculating his damages.[60] It was Corbis who first raised the issue regarding the age of Shenk's executive team members.[61] It then raised the issue a second time during the direct examination of Shenk.[62] Only after Corbis raised the issue did Lodis follow-up on it, with Judge Heller's permission to "ask about ... age."[63] Showing that Shenk asked younger team members about Lodis, implying they were "callow" and "wouldn't have stood up to him," created no issue as to whether Shenk discriminated against Lodis based on age, such that the verdict might be relevant.[64] The report to Mitchell about concerns of a "trend" was the *protected activity* alleged to have caused Lodis' discharge. See RP (5/14) 29-30; CP 1031; RP (5/21) 27; and fn. 26.

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[58] See RP (5/15) 86-87 (cited in Resp.'s Appendix).
[59] See RP (5/15) 19 (cited in Resp.'s Appendix).
[60] See id.; and RP (5/ 22) 135-36.
[61] RP (5/15) 70.
[62] RP (5/19) 36-37.
[63] See RP (5/19) 185-88.
[64] See RP (5/21) 126-27; RP (5/19) 199-200; RP (5/20) 10.

RESPECTFULLY SUBMITTED this 20th day of May, 2015.

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DECLARATION OF SERVICE

Patti Lane states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, I am a legal assistant employed by the Sheridan Law Firm, P.S., and I make this declaration based on my personal knowledge and belief.

2. On May 20, 2015, I caused to be delivered via email addressed to:

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Jennifer Ann Prada
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a copy of the foregoing REPLY BRIEF OF APPELLANT.

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

DATED this 20th day of May, 2015 at Seattle, King County, Washington.

s/Patti Lane
Patti Lane
Legal Assistant