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SUPREME COURT NO. 93261-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT PIEL & JACQUELINE PIEL, husband and wife,

Petitioners,

v.

THE CITY OF FEDERAL WAY, a Municipality organized pursuant to the laws of the State of Washington,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Petitioner Robert Piel ("Piel") is a former police officer for the City of Federal Way ("the City") who was discharged for expressing a desire to "murder" fellow employees, and for dishonesty in the ensuing investigation. Piel claims that his discharge and an earlier discharge decision (modified in arbitration to a demotion) were motivated by anti-union bias. The King County Superior Court trial judge dismissed the challenge to the earlier discharge decision on collateral estoppel grounds. A jury then returned a defense verdict on all remaining claims. The Court of Appeals affirmed.

The City respectfully asks the Court to deny the Petition for Review ("Pet.") because (1) there is no conflict between the Court of Appeals' decision and decisions of this Court and other Courts of Appeals on the scope of collateral estoppel; (2) the Court of Appeals correctly concluded that the trial court acted within its discretion in excluding "comparator" and polygraph evidence; and (3) the Petition does not present an issue of substantial public interest. *See* RAP 13.4(b)(1), (2), & (4).

II. COUNTERSTATEMENT OF THE ISSUES

1. Should review be denied, where the Court of Appeals' conclusion that the issue of whether anti-union animus motivated the 2006 discharge decision was necessarily decided in the arbitration is consistent with the opinions of this Court and other Courts of Appeals?

2. Should review be denied, where the Court of Appeals' conclusion that the trial court appropriately exercised its discretion in excluding "comparator" evidence that was too remote in time and/or factually dissimilar is consistent with applicable law?

3. Should review be denied, where the Court of Appeals' decision affirming the trial court's exclusion of polygraph evidence was consistent with the opinions of this Court and other Courts of Appeals?[1]

III. COUNTERSTATEMENT OF THE CASE[2]

A. Factual Statement

1. Arbitrator finds "just cause" for discipline of Piel in 2006; but reduces discharge to demotion.

Piel worked for the City as an officer and then lieutenant. RP Vol. 6, 74:13-15, 78:23-79:2. He was terminated in 2006 by former Chief Anne Kirkpatrick for misconduct involving a firefighter suspected of drunk driving. CP 1143-55. The City found that Piel was responsible for the decision not to arrest the firefighter based on his status; and that while the incident was being investigated, Piel attempted to undermine the credibility of the main witness, a subordinate officer. Ex. 31 at 9-14.

Piel grieved the 2006 termination, and in April 2007 the matter proceeded to final and binding arbitration before Arbitrator David Gaba.

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[1] The Piels include a fourth issue for review in their list. Pet. at 4. However, as they present no argument or authority to support this issue, they presumably have decided not to pursue review on this ground.

[2] Petitioner did not provide a statement of the case. The following facts are relevant to the issues presented for review.

Id. at 1. The primary basis for Piel's challenge was that the discharge decision was motivated by anti-union animus in violation of RCW 41.56.140, such that it constituted wrongful discharge in violation of public policy. CP 260-89. In his opening statement at the arbitration, Piel's attorney (the same attorney who represents him in this case) explained this theory:

> It's our position in this matter that Bud Piel was not terminated for just cause and that the actions against Lieutenant Piel were retaliatory. There was retaliation directed against him because of union involvement, which you'll hear throughout this arbitration
> . . . .

Piel v. City of Federal Way, 2016 WL 2870674 (Wash. Ct. App. 2016) ("Unpub. Op.") at 27 (citing CP at 270). After the three-day evidentiary hearing, Piel's counsel urged the arbitrator to find no just cause because the decision was motivated by anti-union animus. CP 261-64; *see also* Unpub. Op. at 26.[3]

In evaluating the parties' evidence and arguments, the arbitrator articulated that one of the tests of "just cause" is whether the Department applied its rules "evenhandedly and without discrimination to all

[3] The Piels' assertion that the issue of anti-union motivation was "raised briefly" is wholly inconsistent with the record before the Court of Appeals. *See* Unpub. Op. at 26-27 (citing CP 263, 270).

employees." Ex. 31 at 16.[4] Labor arbitrators recognize that they have an obligation to examine evidence with special care where anti-union animus may be involved. *Arden Farms Co.*, 45 Lab. Arb. (BNA) 1124, 1130 (Tsukiyama, 1965) ("In these cases, the arbitrator is obliged to make a thorough search and examination of the entire record to ascertain and satisfy himself that Management has not violated the collective bargaining agreement in this manner."). The arbitrator in Piel's case noted that if *any* of the tests is not satisfied, just cause will not be found. Ex. 31 at 16 (citing *Enterprise Wire Co.*, 46 Lab. Arb. (BNA) 359, 362 (1966)). Applying this standard, he concluded that the Department *did have just cause to discipline Piel.*[5]

2. After Piel is reinstated, he discloses a desire to "murder" other employees, and then lies about the statement in an investigation.

After Piel was returned to work in a demoted capacity, he commented in front of three employees that he hadn't held a gun since he had thought about "murdering" others in the City's police department. Ex. 9 at 3-4; Ex. 4, Tabs 1, 6, 9. After worrying about Piel's statement

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[4] This Court has recognized the seven-factor just cause test applied in labor arbitrations to include the requirement that the disciplinary action was not motivated by discrimination. *See, e.g., Civil Serv. Comm'n of City of Kelso v. City of Kelso,* 137 Wn.2d 166, 173-74, 969 P.2d 474, 478 (1999) ("Seven factors are considered in determining whether there was just cause for discipline, including whether the employer applied its rules even-handedly . . . .").

[5] Although the arbitrator determined that just cause supported the disciplinary decision, he concluded that the Department had not met its burden of establishing that discharge was the appropriate consequence. Ex. 31 at 21-23.

overnight, Jail Coordinator Jason Wilson returned to work the next day and reported the comment to his supervisor. RP Vol. 7, 85:25-86:9.

The investigation into Piel's comments was originally assigned to Commander Steve Arbuthnot. RP Vol. 7, 184:3-6. During Commander Arbuthnot's interview of Piel, Piel flatly and repeatedly denied making any comment about thoughts of "murdering" anyone. Ex. 4, Tab 23; Ex. 11 at 2-3, 5-6. During his interview, Piel, a trained polygrapher, offered to take a polygraph. Ex. 4, Tab 23. Later, Piel sent to Commander Arbuthnot what he purported to be the results of a successful polygraph exam. RP Vol. 7, 187:15-19. However, the collective bargaining agreement between the City and the union representing Piel provides: "Nor shall polygraph evidence of complainant be admissible in disciplinary proceedings, except by stipulation of the parties to this Agreement." Ex. 99 at 20. Commander Arbuthnot contacted the Guild President to ask if the union would stipulate to the consideration of a polygraph exam; the union said "absolutely" not. CP 1899.

Because Commander Arbuthnot had opened the email, the City was concerned that the purported polygraph results could influence the outcome of his investigation. RP Vol. 7, 187:15-19. To ensure that the investigation was not tainted by consideration of impermissible information, the City replaced Commander Arbuthnot with an independent investigator, Amy Stephson. RP Vol. 4, 191:14-23. Ms. Stephson's findings were then provided to Commander McAllester, the Professional Standards Commander, who was responsible for reviewing internal

investigations and recommending discipline to the Chief. RP Vol. 7, 128:17-129:1; 139:17-140:9. Commander McAllester concluded that the sustained findings of workplace violence (threats) and untruthfulness both warranted termination. Ex. 20. *See also* RP Vol. 7, 150:7-8. On January 31, 2008, then-Chief of Police Brian Wilson issued a letter of discharge. Ex. 27. Neither Investigator Stephson, Commander McAllester nor Chief Wilson—the person who made the final discharge decision—ever saw the purported results of the polygraph. *See* CP 1323; Exs. 9, 11-12.

B. Procedural Statement

1. Summary Judgment Motion

The City sought summary judgment on the question of whether Piel was collaterally estopped from asserting that the 2006 termination decision was motivated by anti-union animus. CP 117-339, 485-87. Because that factual issue was previously litigated and determined in the arbitration, Judge Chad Allred agreed that collateral estoppel barred any attempt to re-litigate this issue. CP 485-87.

2. The 2014 Jury Trial.

Trial on the Piels' remaining claims—for wrongful termination in violation of public policy related to Piel's 2008 termination and Ms. Piel's claim for loss of consortium—began on October 8, 2014. The trial court granted the City's motion in limine to exclude evidence that Piel offered to take a polygraph, as well as the purported results of polygraph testing, as unfairly prejudicial to the City. CP 524-26; CP 609-10. The Piels argued

that they were offering the evidence to show (1) bias against Piel, as polygraphs had been used in the past; and (2) that there was no objection by the union to using the polygraph, and that Chief Wilson really switched investigators because Commander Arbuthnot was leaning toward dismissing several lesser charges against Piel. CP 996-99; RP Vol. 1, 85-8, 96; Vol. 2, 258-60. They also argued that the evidence at issue went to Piel's state of mind. RP Vol. 1, 95-96.

During the course of the eight-day trial, the Piels sought to introduce evidence of past misconduct at the City that they contend shows disparate treatment of Piel. RP Vol 4, 34-38; Vol. 5, 74-76, 85-91. The trial court excluded evidence of some past incidents as too factually dissimilar, too remote in time, and because they involved different decision-makers than those involved in Piel's situation. *Id.* At the end of the trial, the jury found that Piel had not been wrongfully terminated in violation of public policy. CP 1101-02.

IV. ARGUMENT FOR DENIAL OF PETITION FOR REVIEW

A. The Court of Appeals' Unpublished Opinion Does Not Conflict with Decisions of This Court and Other Courts of Appeals Regarding the Scope of Collateral Estoppel.

The Piels assert that the Unpublished Opinion creates a conflict with decisions of this Court, as well as published decisions of other Courts of Appeals, with respect to the scope of collateral estoppel, such that this Court should accept review under RAP 13.4(1) & (2). They further argue that in reaching the conclusion that the Piels were collaterally estopped from re-litigating the issue of whether Piel's 2006 termination was

motivated by anti-union bias, the Court of Appeals failed to adhere to summary judgment standards. The decision was fully consistent with summary judgment standards, as only "reasonable inferences" must be resolved in favor of the non-moving party. The only reasonable inference from the evidence is that the issue of whether anti-union bias motivated the termination decision *was* litigated and finally determined in the arbitration. The conclusion that the Piels were collaterally estopped from re-litigating this issue is consistent with the decisions of this Court on the scope of collateral estoppel.

When ruling on a summary judgment motion, the burden is on the moving party to demonstrate there is no dispute as to any material fact and "reasonable inferences from the evidence must be resolved against the moving party." *Folsom v. Burger King,* 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Critical to the Piels' argument is the contention that "nothing in the arbitrator's award provided any guidance as to what extent, if any, the issue of 'anti-union animus' was even considered, let alone whether it played any part in the outcome of the award." The Piels thus argue the Court of Appeals should have found that the issue of whether anti-union animus motivated the decision was *not* decided by the arbitrator. Pet. at 6-7. On the contrary, the record established that this question was squarely before the arbitrator. Based on the standards articulated by the arbitrator for determining whether "just cause" supported the decision, the only reasonable inference is that the arbitrator rejected the anti-union animus theory that was the cornerstone of the union's argument.

The Court of Appeals held that because the arbitrator necessarily decided the issue of anti-union retaliation, the trial court's decision that the Piels were collaterally estopped from litigating that issue again was correct. Unpub. Op. at 25-27. This decision is consistent with the decisions of this Court and other divisions of the Court of Appeals on collateral estoppel.

Collateral estoppel bars re-litigation of an issue in a subsequent proceeding involving the same parties. *Christensen v. Grant Cty. Hosp. Dist. No. 1,* 152 Wn.2d 299, 306, 96 P.3d 957, 960-61 (2004) (citing 14A Karl B. Tegland, Washington Practice, *Civil Procedure* § 35.32, at 475 (1st ed. 2003)). The doctrine promotes judicial economy and serves to prevent inconvenience or harassment of parties. *Id.* (citing *Reninger v. Dep't of Corr.,* 134 Wn.2d 437, 449, 951 P.2d 782 (1998)).

Collateral estoppel may be applied to preclude only those issues that have actually been litigated and necessarily and finally determined in the earlier proceeding. *Shoemaker v. City of Bremerton,* 109 Wn.2d 504, 507, 745 P.2d 858 (1987). Further, the party against whom the doctrine is asserted must have had a full and fair *opportunity* to litigate the issue in the earlier proceeding. *Nielson v. Spanaway Gen. Med. Clinic, Inc.,* 135 Wn.2d 255, 264–65, 956 P.2d 312 (1998). As the Court of Appeals correctly set forth, for collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits,

(3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. Unpub. Op. at 25 (citing *Pederson v. Potter,* 103 Wn. App. 62, 69, 813 P.2d 171 (1991)); *accord Reninger,* 134 Wn.2d at 449, 951 P.2d 782; *State v. Williams,* 132 Wn.2d 248, 254, 937 P.2d 1052 (1997).

The Piels argue that the Court of Appeals' conclusion that the issue decided by the arbitrator was identical to the issue presented in this proceeding (*i.e.,* whether anti-union animus motivated the discharge decision) is contrary to decisions of this Court and other Divisions of the Court of Appeals. Division Two of the Court of Appeals noted that

> [c]ollateral estoppel . . . is confined to ultimate facts – facts directly at issue in the first controversy on which the claim rests – but does not extend to evidentiary facts, facts which may be in controversy in the first action and are proven but which are merely collateral to the claim asserted.

Beagles v. Seattle-First National Bank, 25 Wn. App. 925, 931, 610 P.2d 962 (1980) (*citing Seattle-First Nat'l Bank v. Kawachi,* 91 Wn.2d 223, 229, 588 P.2d 725 (1978)). In other words, a court should look to whether the prior action required a resolution of the issue. *Id.* at 931-932; *see also Williams,* 132 Wn.2d at 256 ("The Court of Appeals correctly rejected this argument after determining that 'both proceedings required resolution of whether Williams acted intentionally.'") (citation omitted). As Division Three of the Court of Appeals observed: "If the issue was essential to the first judgment, it most likely received the attention of the parties and the

court. This justifies giving it preclusive effect." *State Farm Mut. Auto. Ins. Co. v. Avery,* 114 Wn. App. 299, 305, 114 Wn. App. 299 (2002) (applying collateral estoppel where the opponent "does not offer any suggestion as to how the court could have avoided considering [the issue]").

Consistent with these standards, the Court of Appeals found that the arbitrator did decide the issue of whether anti-union retaliation motivated the 2006 discharge decision, as the arbitrator concluded that there was just cause for the discipline, and "[a] finding that Piel's termination was motivated by anti-union animus precluded a finding of just cause." Unpub. Op. at 27. In other words, because the just-cause standard required finding no discrimination, and Piel argued that the decision was motivated by anti-union animus, the just-cause conclusion necessarily required resolution of the issue of anti-union animus. Collateral estoppel was thus properly applied to exclude re-litigation of that issue in this case. *See, e.g., Williams,* 132 Wn.2d at 256.

B. The Unpublished Opinion Correctly Held That the Trial Court Did Not Abuse its Discretion by Excluding Dissimilar Evidence of Prior Disciplinary Actions.

The Piels argue that by concluding that the trial court did not abuse its discretion in excluding evidence of prior disciplinary actions, the trial court "created two new evidentiary rules," which they contend conflict with decisions of other Courts of Appeals and impact the public interest. Pet. at 2. The Piels misstate the Court of Appeals' opinion. A careful

review of the Unpublished Opinion shows that the Court of Appeals applied settled precedent in affirming the court's exclusion of evidence.

As the Court of Appeals correctly noted, evidentiary rulings are only subject to reversal if the court abuses its discretion in that its decision is manifestly unreasonable or based on untenable grounds or reasons. Unpub. Op. at 7 (*citing Subia v. Riveland,* 104 Wn. App 105, 113-14, 15 P.3d 658 (2001) and *In re Marriage of Littlefield,* 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)). Even if a trial court's evidentiary rulings were erroneous, the ruling will not be reversed unless it is prejudicial. *Id.* (citing *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1,* 100 Wn.2d 188, 196, 668 P.2d 571 (1983)).

Applying these well-established standards, the Court of Appeals concluded that "trial court did not abuse its discretion when it excluded evidence of those actions as irrelevant on the grounds the proffered actions are factually dissimilar, too remote in time, and involve different decision makers." Unpub. Op. at 15. Piel ignores the Court's stated rationale, recasting it as a decree that "a different decision maker, by itself, requires exclusion." Pet. at 11. On the contrary, the Court of Appeals observed that "[g]enerally, when a prior employment decision is admitted to show the plaintiff was treated differently than other employees, that prior decision was made by the same decision maker as the one responsible for the action giving rise to the lawsuit." Unpub. Op. at 19 (*citing Sellsted v. Washington Mut. Sav. Bank,* 69 Wn. App. 852, 861, 851 P.2d 716 (1993); *abrogated on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.,*

127 Wn.2d 302, 898 P.2d 284 (1995)). The Court of Appeals correctly noted "that the trial court has broad discretion appropriate" to introduce the different or inconsistent treatment of other employees when deciding a wrongful termination case. *Id.* (citing *Lords v. N. Auto. Corp.*, 75 Wn. App. 589, 610, 881 P.2d 256, 268 (1994), *as amended on denial of reconsideration* (Sept. 1, 1994), *overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 898 P.2d 284 (1995)). The Court of Appeals considered the facts involved in each of the proffered situations and the trial court's reasons for excluding them. Unpub. Op. at 15-17. The Court correctly held that the "trial court did not abuse its discretion when it prohibited Piel from introducing dissimilar evidence of previous disciplinary actions." Unpub. Op. at 19 (citing *Lords,* 75 Wn. App. at 610).

The Piels argue that a trial court has *no discretion* to exclude evidence of alleged disparate treatment, even if it "involved different investigators and decision makers," or was remote in time from the actions involving the plaintiff. *See* Pet. at 12. They cite no opinions of this Court or other Courts of Appeals for this proposition. Such a proposition would be wholly inconsistent with the authority cited by the Court of Appeals in the Unpublished Opinion, which recognizes that a trial judge must be afforded "broad discretion" to determine when evidence of alleged different or inconsistent treatment is appropriately admitted. Unpub. Op. at 17-18 (citing *Lords,* 75 Wn. App. at 610); *see also Roberts v. Atl. Richfield Co.,* 88 Wn.2d 887, 893, 568 P.2d 764, 768 (1977) (factors

appropriately considered by trial court in exercising that discretion include "whether the testimony would have a tendency to mislead, distract, waste time, confuse or impede the trial, or be too remote either as to issues or in point of time"). The conclusion that the trial court did not abuse its discretion in excluding evidence that it considered too dissimilar and remote in time is consistent with applicable authority, and provides no grounds for discretionary review. There is no public policy impact, as the Unpublished Opinion affirms that "an employer's different or inconsistent treatment of other employees may be relevant and admissible in a wrongful termination case under appropriate circumstances." Unpub. Op. at 17-18 (*citing Fulton v. Dep't of Soc. & Health Servs.*, 169 Wn. App. 137, 161-62, 279 P.3d 500 (2012)).

C. The Court of Appeals' Decision Regarding the Admissibility of Polygraph Evidence Was Consistent with Opinions of this Court and Other Courts of Appeals Regarding the Application of ER 403.

1. The Court of Appeals followed standards established by this Court in evaluating evidence under ER 403.

The Piels suggest that the Court of Appeals Decision is contrary to the standards governing ER 403 as set forth by this Court. Pet. at 18. On the contrary, the Court of Appeals properly applied the standards set forth in *Carson v. Fine,* 123 Wn.2d 206, 867 P.2d 610 (1994).

In *Carson,* this Court described the how courts should apply ER 403 as follows: "Under ER 403, the relevance of the evidence sought to be admitted is assumed. The only question is whether its probative value

is outweighed by its prejudicial effect." *Id.* at 222. *Accord, In re Det. of Halgren,* 156 Wn.2d 795, 802, 132 P.3d 714, 717 (2006). This Court looked to federal case law for guidance regarding what constitutes inadmissible "unfair prejudice," noting that one court defined it as "prejudice caused by evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' " *Carson,* 123 Wn.2d at 223 (citations omitted). Such *unfair* prejudice is distinguishable from "prejudicial evidence" generally, as "nearly all evidence will prejudice one side or the other in a lawsuit." *Id.* at 224.

The evidence in *Carson* was the testimony of a physician that the defendant's treatment was within the standard of care. *Id.* The Court evaluated the strength of the probative value, concluding that the testimony "was undeniably probative of the central issue: whether the defendant's care of the plaintiff fell below the applicable standard of care." *Id.* Accordingly, the Court observed, "We do not see this as evidence 'dragged in' for the sake of its prejudicial effect . . . ." *Id.*

In contrast, the Court of Appeals recognized that the polygraph evidence offered by the Piels was of scant probative value at best. First, the evidence did not meet minimum standards of admissibility because the Piels failed to designate an expert to lay the foundation for the testing circumstances and results, and because the probative value of polygraph testing is inherently suspect given the lack of scientific consensus as to its validity. Unpub. Op. at 7-8.

The Court of Appeals then addressed the Piels' assertion that they were not offering the polygraph evidence to prove that Piel was truthful; rather, they were offering it (1) as evidence of Piel's state of mind; and (2) to prove that the City's assertion that it switched investigators because it was not allowed by a labor agreement to consider the results absent a stipulation from the union was pretext, and the real reason was because the first investigator was leaning toward clearing Piel of some charges against him. The Court of Appeals concluded the evidence was of little probative value. First, in a wrongful discharge case, it is *the employer's* state of mind that is relevant. *Id.* at 9-10; *cf., Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 190 n.14, 23 P.3d 440 (2001) ("It is not unlawful for an at-will employee to be discharged because he or she is perceived to have misbehaved.") (citations omitted; emphasis in original). The Court of Appeals further concluded that the polygraph evidence was of little value in establishing pretext, as the Piels failed to present any evidence of a stipulation that would allow consideration of the evidence, as required by the labor agreement. Unpub. Op. at 10-11 (Ex. 4 at 2). *See also* CP 1322-23. Contrary to the Piels' argument that the failure by the City to consider his polygraph results was inconsistent with past practice, the union had consistently refused to allow the use of a polygraph. *See* CP 1898-1901. In sum, the Court of Appeals concluded that the evidence was "of limited probative value," and not central to Piel's claims of anti-union bias. Unpub. Op. at 12.

The Court of Appeals then considered the possibility of unfair prejudice, noting that "[g]enerally, courts exclude polygraph evidence due to its unreliability and the powerful effect it can have on juries." Unpub. Op. at 8 (citing *State v. Justesen*, 121 Wn. App. 83, 86, 86 P.3d 1259 (2004)). The Court of Appeals concluded: "Given the polygraph evidence's limited probative value and its potential for prejudice, the trial court did not abuse its discretion when it excluded the evidence." Unpub. Op. at 12. In other words, this is the type of evidence this Court has recognized as inadmissible under ER 403: "evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.' " *Carson*, 123 Wn.2d at 223-24.

This Court's evaluation of the exclusion of polygraph evidence in *Industrial Indemnity Company of the Northwest v. Kallevig*, 114 Wn.2d 907, 792 P.2d 520 (1990), supports the ER 403 balancing in this case. In *Kallevig,* this Court affirmed the Court of Appeals' exclusion of evidence that the insured refused to submit to a polygraph examination, when the evidence was offered by the insurer to demonstrate a good-faith basis for denying the claim, explaining:

> While the polygraph information may have been probative of [Industrial Indemnity's] state of mind in denying the Kallevigs' claim, the risk of the jury considering it as evidence that Mr. Kallevig committed arson was so great that the trial court properly excluded it. . . .

Id. at 925-26 (citation omitted). The balancing test weighs even more heavily against admissibility in this case, as it was not even considered by

Commander McAllister, who recommended Piel' discharge, or Chief Brian Wilson, who made the final decision. *See* RP Vol. 7, 139:17-140:9; Exs. 7, 9, 12; CP 1322-23. As the Court of Appeals' decision in this case was consistent with this Court's opinions regarding the ER 403 balancing test, RAP 13.4(b)(1) is not satisfied.

2. The decision that the polygraph evidence was inadmissible does not conflict with *Subia.*

The Unpublished Opinion does not conflict with the published opinion of Division Two of the Court of Appeals in *Subia v. Riveland,* 104 Wn. App. 105, 15 P.3d 658 (2001). The Piels' argument relies on a misstatement of the holding and reasoning in *Subia,* as well as an inaccurate description of the Court of Appeals' decision in this case.

Subia did not reject the ER 403 balancing of probative value versus danger of unfair prejudice. *See* Pet. at 14. Rather, it disagreed with the trial court's conclusion that the danger of unfair prejudice "tremendously outweigh[ed]" any probative value. *Subia*, 104 Wn. App. at 114-16. It was because the evidence was so highly probative that Division Two ordered it admitted for a limited purpose. *Id.* Nor does *Subia* stand for the proposition that a limiting instruction "must be considered if possible." *See* Pet. at 17. This Court has observed that where prejudicial evidence is not excluded, limiting instructions and other tools may be used "to direct the jury to a proper consideration of the evidence." *Carson,* 123 Wn.2d at 225. This Court further advised, "[W]e see no need or justification for extending the requirement of a balancing

on the record to evidentiary objections and claims of error based on ER 403 alone." *Id.* at 226 (citations omitted). The Piels cite no authority from this Court that would require a trial court to demonstrate on the record consideration of a limiting instruction before excluding evidence, and such a requirement would be inconsistent with the reasoning in *Carson.*

Finally, the different outcome of the balancing in *Subia* does not establish a conflict. In *Subia,* the polygraph evidence was "highly probative" to the employer's state of mind, *as the employer had relied on the polygraph evidence* to decide that a complaint against a corrections officer was credible, such that the officer should be placed on paid administrative leave pending an investigation. *Subia*, 104 Wn. App. at 115. The officer claimed that the decision to place him on leave was motivated by racial bias. *Id.* at 114. In that context, Division Two concluded that the polygraph evidence was "highly probative, especially because her credibility was critical to the DOC's decision to investigate her complaint." *Id.* at 115. Consistent with this Court's opinion in *Carson v. Fine,* the evidence was properly admitted, as "[t]he ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case." *Carson*, 123 Wn.2d at 224 (citation omitted).

The Court of Appeals' opinion in this matter is not inconsistent with the *Subia* court's approach. In *Subia,* the polygraph evidence was "highly relevant," as it bore directly on the employer's motive for its

disciplinary action because the polygraph motivated the employer to put the employee on administrative leave, the decision the employee challenged as discriminatory. *Subia*, 104 Wn. App. at 114-115 (emphasis added). In contrast, as the Court of Appeals recognized, the polygraph evidence here "offered no direct evidence on a central claim or defense." Unpub. Op. at 9. The polygraph results were not a basis for management's decision to terminate Piel's employment; and they do not prove Piel's claim that the decision was motivated by anti-union bias. These differences in the relevance of the evidence justify inadmissibility in this case.

3. No substantial public interest is implicated by the rejection of the Piels' incompetent and marginally relevant polygraph evidence.

The Piels do not explain how the Court of Appeals' decision that the polygraph evidence was inadmissible under ER 403 involves a substantial public interest, such that this Court should accept review per RAP 13.4(b)(4). The review of the ER 403 balancing in an unpublished case is unlikely to be of interest to anyone other than the parties involved, given the unique circumstances in which the evidence was considered.

V. CONCLUSION

The Petition has not established grounds for review by this Court.

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DATED this 15th day of July, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this day I caused the foregoing to be served, as indicated, upon the following:

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DATED this 15th day of July, 2016.

Kim Welsh, Legal Assistant