NO. 92900-9

SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 72342-1-I

STEVEN LODIS and DEBORAH LODIS, a marital community,

Petitioners,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents.

Answer to Petition for Discretionary Review

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I. INTRODUCTION

Petitioner Steven Lodis seeks a **fourth** trial on his claims against Respondents Corbis Holdings, Inc., Corbis Corporation and Gary Shenk (referred to collectively herein as "Corbis"). The appellate court properly affirmed judgment in favor of Corbis on Lodis' retaliation claim in the third trial that forms the basis of Lodis' underlying petition, holding that the trial court did not abuse its discretion in its well-reasoned evidentiary rulings admitting the two prior jury verdicts. There exists no basis for this Court's review of those evidentiary decisions, and Lodis' efforts to redefine them as something other than appropriately made discretionary rulings has no merit.

Likewise, there exists no substantial public interest in the Washington Court of Appeals' adoption in 1999 of the widely-recognized and well-established after-acquired evidence defense.[1] For nearly two decades, Washington courts have recognized the defense without undermining any of the rights and remedies to which employees are entitled under the Washington Law Against Discrimination ("WLAD"). Lodis does not—and cannot—articulate any basis for why a substantial public policy interest now exists warranting this Court's review.

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[1] As acknowledged in Lodis' Petition for Review, the after-acquired evidence defense was first adopted by the Washington State Court of Appeals in 1999. *See* ***Janson v. N. Valley Hosp.***, 93 Wn. App. 892, 971 P.2d 67 (1999) (adopting after-acquired evidence defense as articulated by the United States Supreme Court in ***McKennon v. Nashville Banner Publ'g Co.***, 513 U.S. 352, 360-63, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995)).

Finally, this Court need not consider Lodis' asserted policy argument not previously raised before the trial court that an "inconsistency" exists between the WLAD's "substantial factor" test and the after-acquired evidence defense. Even if this Court were to consider Lodis' argument, it has no merit. The after-acquired evidence defense operates solely to limit any back pay award from the date the employee's terminable action (*i.e.*, after-acquired evidence) was discovered; it, in turn, does not preclude employer liability or any other remedies to which an employee may be entitled. Thus, the after-acquired evidence defense is entirely consistent with the WLAD.

This Court should deny review.

II. RESTATEMENT OF THE CASE

A. Shenk Terminates Lodis' Employment After Lodis Violates Shenk's Trust and Retaliates against a Subordinate.

1. Lodis' Poor Performance and Violations of Trust Result in Probation and Ultimately, Termination.

In July 2005, Steve Davis, Corbis' then CEO, hired Lodis as Corbis' Vice President of Worldwide Human Resources. ***Lodis v. Corbis Holdings, Inc.***, 172 Wn. App. 835, 842, 292 P.3d 779 (2013) (***"Lodis I"***). Shenk, Corbis' current CEO, was hired by Davis as Davis' replacement in July 2007. 5/19 RP 33-34.[2] Davis expressed concerns to Shenk about Lodis' performance

[2] The report of proceedings for the third trial in 2014 was not sequentially paginated. Thus, citations to the report of proceedings for the third trial are by date, *e.g.*, "3/19 RP." Exhibits are cited as "Ex.__."

and suggested that Shenk consider terminating Lodis. 5/19 RP 44, 48; Ex. 339. Shenk did not follow Davis' advice and instead afforded Lodis a second chance. 5/19 RP 44-46.

In the fall of 2007, Shenk gave Lodis a favorable performance review in which he referred to Lodis as his "trusted advisor," (5/21 RP 120-121; Ex. 47) and in early November 2007 announced his decision to promote Lodis to Senior Vice President of Human Resources, making Lodis a member of Shenk's nine-member Executive Team.[3] 5/21 RP 146-147; Ex. 61. Both before and after his promotion, Lodis was the highest ranking Human Resources Officer at Corbis. 5/19 RP 152; 5/22 RP 52.

In December 2007, Shenk hired a consultant to conduct a "360 review" and obtain anonymous upward feedback about each member of the Corbis Executive Team from their direct reports.[4] 5/19 RP 76-79, 81-82; Exs. 62, 66, 79, 395; ***Lodis***, 172 Wn. App. at 84. The consultant reported that the feedback for Lodis was "off the charts negative," and recommended placing Lodis on probation. 5/19 RP 82-85, 94-95; 5/20 RP 39-40; Ex. 84; ***Lodis***, 172 Wn. App. at 84. On March 5, 2008, Shenk placed Lodis on a Performance Improvement Plan ("PIP"), documenting the deficiencies in Lodis' performance. 5/15 RP

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[3] Shenk also increased Lodis' salary by $45,000 to a total annual salary of $260,000. (5/21 RP 146-147; Ex. 61)

[4] Lodis contends that the "360 review" was directed solely toward him; the consultant, however, reviewed the other Corbis Executive Team members, including Shenk, as well. (Exs. 71, 77, 380, 401, 402, 404, 409, 410)

172-173; Ex. 98. In the PIP, Shenk advised Lodis "that [his] continued employment with Corbis [was] in jeopardy unless significant and lasting changes [were] made." Ex. 98.

Shenk directed Lodis to, *inter alia,* discuss his working relationships with his peers and complete performance reviews of his subordinates. *Id.* Shenk also instructed Lodis not to "blame" his subordinates or retaliate against them for their comments. Ex. 98. Nevertheless, on March 12, 2008, Shenk received an email from Kirsten Lawlor indicating that Lodis had retaliated against her for her comments to the 360 review consultant. 5/19 RP 140-144; 5/29 RP 27; Ex. 99.

On March 24, 2008, Shenk notified Lodis that he had still not completed reviews of his subordinates and had not taken steps to improve his relationship with other Executive Team members. 5/19 RP 125-135; Ex. 434. Lodis responded by stating that he had met with most of the Executive Team. *Id.* But when Shenk followed up with these individuals, several members disputed the extent and the substance of their meetings as reported by Lodis to Shenk, in one case denying altogether that a meeting took place. 5/19 RP 131-135. Shenk concluded that Lodis' reports of his meetings were either deliberate fabrications or gross misrepresentations. 5/19 RP 131-135, 145.

On March 26, 2008, Shenk terminated Lodis for three reasons: (1) Lodis' ongoing performance issues; (2) an irreparable loss of trust in Lodis

on the part of Shenk and other Executive Team members; and (3) Lodis' retaliatory behavior toward Lawlor. 5/15 RP 193; 5/19 RP 144-145.

2. Corbis Learns That Lodis Violated its Code of Conduct by Failing to Follow the Time Reporting Policy.

Shortly after his termination, Lodis sued Corbis and Shenk alleging age discrimination and retaliation under the WLAD. ***Lodis***, 172 Wn. App. at 841, 844. In preparing its defense, Corbis noticed that when terminated, Lodis was paid out roughly $42,000 for 329 hours of unused vacation time based upon Lodis' failure to record a single hour of vacation time during his three years at Corbis.[5] 5/19 RP 148-149, 151-155); ***Lodis***, 172 Wn. App. at 844-45.

All employees were expected to follow Corbis' Time Reporting policies, including Lodis and all Executive Team members. 5/19 RP 146-147; Ex. 334. Lodis, in particular, as the highest ranking Human Resources Officer, was responsible for implementing, overseeing, and ensuring compliance with those policies. 5/19 RP 149. Included in those polices is Corbis' Code of Conduct, which sets forth as examples of impermissible conduct: (1) falsification or misrepresentation of Company records, such as time reports; (2) violation of any Corbis policy; and/or (3) any activity that has an adverse effect on the Company's interests. 5/19 RP 149; Ex. 334, at 40-41. Corbis' Time Reporting policy—of which Human Resources was the specified "owner"—

[5] Corbis additionally learned that Lodis had received double payment of a $35,000 bonus during his employment, which he had retained. ***Lodis***, 172 Wn. App. at 845.

required all employees to report time taken for vacation. 5/19 RP 146-147; Ex. 334; Ex. 336, at 16.

It is a terminable offense at Corbis to falsify one's time records in violation of Corbis' Time Reporting policy and Code of Conduct. 3/3/10 RP 63.[6] Had Lodis still been employed when Shenk learned of Lodis' failure to record any vacation use, Shenk would have fired him. 5/19 RP 152-155. After learning of Lodis' violation of its Time Reporting policy and Code of Conduct, Corbis filed counterclaims against Lodis for breach of fiduciary duty, fraud and unjust enrichment.[7] 5/19 RP 155; Ex. 485; ***Lodis***, 172 Wn. App. at 845.

B. Procedural History.

1. Lodis Sues Corbis; His Claims are Dismissed by the Trial Court and Rejected by the First Jury.

In November 2009, the Honorable Michael Hayden granted summary judgment in favor of Corbis on Lodis' retaliation claim. ***Lodis***, 172 Wn. App. at 844. Lodis' remaining age-discrimination claim along with Corbis'

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[6] Lodis misrepresents the testimony of Vivian Farris, Corbis' former Vice President of Human Resources, in an attempt to rebut Shenk's testimony that the falsification of an employee's time report is grounds for termination. *See* Petition, at 10. Specifically, Lodis asserts that Farris testified that it was not a terminable offense at Corbis to fail to record vacation time, though it was a violation of company policy. *Id.* Farris, however, testified that it was not a terminable offense to make a *mistake* in reporting vacation time (3/10 RP 63). She, in turn, testified that ignoring the vacation time reporting policy altogether would constitute a potentially terminable violation of Corbis policy. *Id.* Regardless, due to Lodis' failure to properly perfect the record with Farris' testimony, the appellate court did not consider Farris' testimony on appeal. *See* February 16, 2016 Opinion Denying Lodis' Motion for Reconsideration, at 1 n.1 (Appendix to Petition, at A-31).

[7] Corbis additionally asserted these counterclaims against Lodis for his retention of the duplicative $35,000 bonus. ***Lodis***, 172 Wn. App. at 845.

counterclaims were tried to a jury before the Honorable Bruce Heller from February 24 to March 18, 2010. In support of his age discrimination claim, Lodis alleged, *inter alia*, that Shenk wanted to replace older members of his Executive Team with younger members and made numerous comments indicating his preference for younger workers. ***Lodis***, 172 Wn. App. at 842-843. The jury rejected these claims, finding that Corbis and Shenk had not engaged in age discrimination. Ex. 484; ***Lodis***, 172 Wn. App. at 845.

The first jury also found that Lodis had breached his fiduciary duty to Corbis by failing to record his vacation usage, but awarded no damages. [8] ***Lodis***, 172 Wn. App. at 845. Judge Heller granted a new trial on Corbis' fiduciary duty counterclaim because the finding that Lodis breached his fiduciary duty was irreconcilable with the jury's failure to award damages. *Id.*

2. A Second Jury Finds That Lodis Breached His Fiduciary Duty and Awards Damages to Corbis.

A second trial was held from March 9-17, 2011.[9] The second jury again returned a verdict in favor of Corbis on its claim that Lodis breached his fiduciary duty by failing to report his vacation time, this time awarding

[8] The jury additionally found that Lodis breached his fiduciary duty by accepting the $35,000 duplicative bonus but similarly awarded no damages. *Id.*

[9] Prior to the second trial, Corbis successfully moved for summary judgment to establish that Lodis owed Corbis' fiduciary duties as its highest ranking Human Resources Officer. ***Lodis***, 172 Wn. App. at 845.

damages of $42,389.65.[10] Ex. 485); ***Id.,*** 172 Wn. App. at 845-46.

3. Following Appeal, Lodis' Retaliation Claim is Remanded for Trial Before A Third Jury.

Lodis appealed following the second trial. On January 14, 2013, the appellate court affirmed the prior judgments and jury verdicts regarding the age discrimination claim and breach of fiduciary counterclaim, but reversed the order granting summary judgment on Lodis' retaliation claim. ***Id.,*** 172 Wn. App. at 852, 861. As a result, the retaliation claim was remanded for what would be the third trial in this action, held before Judge Heller in May 2014. ***Id.***, 172 Wn. App. at 852.

4. Lodis' Retaliation Claim is Premised Upon Five Alleged Admonishments of Shenk.

In support of his retaliation claim, Lodis alleged that he was terminated for having admonished Shenk on five (5) separate occasions for making "ageist" comments.[11] CP 1029-1031; 5/21 RP 107-108. Corbis and Shenk deny that any of these admonishments ever occurred. 5/15 RP 95,

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[10] The jury in the second trial found that Lodis did not breach his fiduciary duty by retaining the duplicative $35,000 bonus payment. ***Lodis***, 172 Wn. App. at 845-46.

[11] *See* Opinion, at 4-6 (summarizing alleged admonishments). In his Petition, Lodis disingenuously cites as "facts" additional ageist comments allegedly made by Shenk recited in ***Lodis I*** about which he does not claim to have admonished Shenk. *See* Petition, at 3. As the appellate court aptly notes in its Opinion, at issue in ***Lodis I*** was the trial court's dismissal of Lodis' retaliation claim on summary judgment grounds; thus, the facts considered by the appellate court in ***Lodis I*** were necessarily viewed in the light most favorable to Lodis. *See* Opinion, at 2 n.2. In other words, those "facts" upon which Lodis now relies are nothing more than allegations that he asserted in opposition to Corbis' motion for summary judgment. *See id.* There has been no factual finding, for example, that Shenk talked about an older worker as being "out of touch," as Lodis suggests. *See* Petition, at 3.

167; 5/19 RP 172; 5/20 RP 53-54. Lodis' allegations regarding the five admonishments are based entirely upon his own testimony. He introduced no written documents or corroborating testimony during trial evidencing that any of the admonishments took place.[12] 5/29 RP 22-24.

5. The Trial Court Enters Orders In Limine Restricting the Evidentiary Scope of the Trial to Lodis' Retaliation Claim.

Prior to the third trial, Corbis filed motions in limine seeking to limit the scope of the trial to the sole retaliation claim at issue. Specifically, Corbis moved to preclude Lodis from using irrelevant and prejudicial evidence of alleged age discrimination that had been rejected by the jury in the first trial. Corbis also moved to preclude Lodis from re-litigating his fiduciary breach--an issue central to Corbis' after- acquired evidence defense.[13] The trial court granted each motion and limited the admission of evidence. CP 3321-3322.

a. The Trial Court Orders that Evidence of Alleged Age Discrimination Be Limited to the Five Alleged Admonishments.

In its motion to limit evidence of alleged age discrimination, Corbis argued that evidence of alleged age discrimination not related to Lodis' claimed admonishments was inadmissible under the legal doctrines of law of

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[12] Lodis claims that he maintained documentation of the admonishments in his Corbis office files but that Corbis "destroyed" the documents after he initiated his underlying lawsuit. 5/29 RP 22-24. At no time did Lodis seek relief through the trial court for such alleged spoliation of evidence. *Id.* Corbis produced all of Lodis' notes during discovery and denied destroying or withholding any documents. 5/21 RP 114-115, 142-145; Exs. 539, 540.

[13] CP 257-267 (age discrimination); CP 275-286 (breach of fiduciary duty).

the case and collateral estoppel, as well as under the applicable rules of evidence. CP 261-265. The trial court did not accept Corbis' law of the case or collateral estoppel arguments but granted Corbis' motion based upon its evidentiary arguments. CP 3322; Opinion, at 7.

b. Lodis Repeatedly Introduces Evidence Excluded by the Trial Court's Order, Requiring Admission of the First Jury Verdict.

The trial court initially ruled that the age discrimination verdict from the first trial would be inadmissible. 5/14 RP 3-4. But during the proceedings Lodis continued to introduce broad evidence and testimony of alleged age discrimination in violation of the trial court's order.[14] CP 3322. On each occasion, Corbis objected to the admissibility of such evidence and asserted that, as a result, Lodis had "opened the door" to the admissibility of the age discrimination verdict by suggesting that Shenk was an "ageist." The trial court repeatedly upheld its prior ruling excluding the admissibility of the age discrimination verdict while cautioning Lodis' counsel that "he was taking a bit of a risk by going down th[at] road." 5/15 RP 105-106. Ultimately, on the fifth day of trial, after Lodis repeatedly elicited testimony suggesting that Shenk was biased against older workers and had engaged in age

[14] For example, Lodis repeatedly testified about and referred to the ages of Executive Team members and suggested that Shenk was motivated to make age-based employment decisions, even though there was no allegation that Lodis ever admonished Shenk for these decisions. *See, e.g.*, 5/21 RP 27. Lodis also suggested that Shenk had made "ageist" comments for which Lodis did not admonish Shenk. *See, e.g.*, 5/19 RP 173-174, 199-200.

discrimination, the trial court concluded that Lodis had opened the door to admission of the age discrimination verdict.[15] 5/21 RP, 126-127; 134-135.

c. The Trial Court Prohibits Lodis from Re-Litigating His Proven Breach of Fiduciary Duty.

Corbis' motion in limine regarding Lodis' breach of fiduciary duty sought to prohibit Lodis from denying that his failure to record vacation time constituted a breach of his fiduciary duties to Corbis—as established before two prior juries—under the doctrines of law of the case and collateral estoppel. CP 257-267; 280-284. The trial court granted Corbis' motion, reasoning that the jury's verdict against Lodis regarding his breach of fiduciary duty is the law of the case. CP 3322. During trial, the trial court then ruled that the verdict on Corbis' breach of fiduciary duty claim was admissible under the rules of evidence, reasoning that the verdict is "clearly relevant" to the "seriousness" of Lodis' behavior such that Corbis would have terminated Lodis if discovered during his employment. 5/14 RP 4-5; 5/15 RP 6-7; Ex. 484.

d. The Trial Court Allows The Jury To Consider Corbis' After-Acquired Evidence Defense.

Before the third trial, Lodis moved for judgment as a matter of law on Corbis' after-acquired evidence defense. CP 1719-1729. The trial court

[15] After ruling that the jury verdict was admissible, the trial court gave the jury a limiting instruction. 5/22 RP 131.

denied Lodis' motion, reasoning that the issue of whether Lodis' conduct would have resulted in termination is a jury question.[16] 5/22 RP 2-3.

e. The Third Jury Rules in Corbis' Favor, Rejecting Lodis' Retaliation Claim; the Trial Court Denies Lodis' Motion For A New Trial; the Appellate Court Upholds the Verdict.

Following an eight day trial, the third jury returned a verdict in Corbis' favor on May 30, 2014, finding that Corbis had not engaged in retaliation. 5/30 RP 3-4. Lodis filed a motion for a new trial under CR 59, which the trial court denied and entered judgment for Corbis. CP 2015-2039, 2414-2415, 2418-2419. Lodis appealed. The appellate court denied Lodis' appeal, holding that the trial court did not abuse its discretion in rendering any of its evidentiary decisions. *See* Opinion, at 16, 18 and 26.

III. ARGUMENT SUPPORTING DENIAL OF REVIEW

A. The Appellate Court's Opinion Affirming the Trial Court's Evidentiary Rulings is Consistent with *Roper, MCIC, Fin.* and *Pouncy.*

The appellate court correctly held that the trial court did not abuse its discretion in ruling on the admissibility of the prior jury verdicts on evidentiary grounds. *See* Opinion, at 18 (age discrimination verdict) and 26 (breach of fiduciary duty verdict). There is no basis for this Court to review

[16] After the jury rendered its verdict, Lodis filed a renewed CR 50 motion on Corbis's after-acquired evidence defense on identical grounds, which the trial Court similarly denied. (CP 2015-2039; 2414-2415)

those evidentiary rulings[17] In an effort to avoid this result, Lodis mischaracterizes the trial court's rulings as rulings made under the doctrine collateral estoppel. A review of the record makes abundantly clear that they were not, as the appellate court properly held. *See* Opinion, at 19 and 26.

The trial court initially ruled that the age discrimination verdict was inadmissible, a ruling that Corbis did not contest. CP 3322. Thereafter, the trial court exercised its discretion under evidentiary principles and reversed its prior ruling out of concerns of unfair prejudice after Lodis repeatedly introduced inadmissible evidence that unfairly allowed the jury to infer that Shenk was biased against older workers. 5/21 RP 126-127, 134-135. The appellate court properly held that the trial court's ruling was consistent with evidentiary principals and not an abuse of discretion. Opinion, at 26.

Similarly, the trial court properly exercised its discretion in ruling that the jury's verdict on Corbis' breach of fiduciary duty claim was relevant and admissible under the rules of evidence. 5/14 RP 4-5; 5/15 RP 6-7. The trial court specifically reasoned that "[t]he fact that a prior jury found that [Lodis] breached his fiduciary duty is clearly relevant to the seriousness issue" underlying Corbis' after-acquired evidence defense. 5/14 RP 4. The trial court's decision to not allow re-litigation of the fact of Lodis' breach of

[17] RAP 13.4(b).

fiduciary duty was appropriate under ER 403. The trial court's rulings are entirely consistent with ***Roper v. Mabry***, 15 Wn. App. 819, 551 P.2d 1381 (1976), in which the court also exercised its discretion in admitting portions of the findings of fact from the prior action.[18] *See id., at 822-23.*

The law of the case doctrine, although not determinative in the admission of the prior breach of fiduciary duty verdict, was properly applied. This Court's opinion in ***MGIC Fin. Corp. v. H. A. Briggs Co.***, 24 Wn. App. 1, 8, 600 P.2d 573, 577-78 (1979) provides that the law of the case "generally" applies to identical issues raised on successive appeals. *See* Petition, at 8. In subsequent opinions, however, this Court has specifically recognized that the law of the case doctrine "means different things in different circumstances,"[19] and has held that under the doctrine the parties and the trial court are bound by the holdings of an appellate court on a prior appeal until such time as they are overruled. ***Humphrey Indus., Ltd. v. Clay St. Assocs.***, 176 Wn.2d 662, 669, 295 P.3d 231 (2013).

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[18] In the analogous situation presented in ***Roper,*** the trial court made findings of fact in a prior civil action. In the subsequent action, the trial court did not apply the doctrines of res judicata or collateral estoppel, but did make evidentiary rulings as to the admission of the prior findings of fact, admitting some, but not all, of those findings. *Id.*, 15 Wn. App. at 822-23. In finding that the trial court did not abuse its discretion, the Court of Appeals noted that "[t]he trial judge has considerable latitude in ruling on the propriety of interrogation and the admissibility of evidence" and further noted that the trial judge gave the jury an appropriate instruction regarding the use of the prior findings. ***Id.*** As in ***Roper***, the trial court's evidentiary ruling here with respect to the second verdict was well within its discretion and was properly affirmed by the appellate court. *See* Opinion, at 26.

[19] ***Roberson v. Perez***, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The appellate court's Opinion is consistent with this principal, recognizing that the law of the case doctrine is incorporated into the Rules of Appellate Procedure requiring that "the decision of the appellate court establishes the law of the case and it must be followed by the trial court on remand." Opinion, at 23 (internal quotations and citations omitted). Thus, as the appellate court properly concluded, the doctrine prohibited Lodis from relitigating the fact of his breach. *Id.*, at 24. Accordingly, the trial court did not abuse its discretion by "declin[ing] Lodis's invitation to undermine both the jury's verdict and the appellate court's mandate in contravention of the law of the case doctrine" (Opinion, at 24) and by admitting the prior breach of fiduciary duty verdict as relevant to Corbis' after-acquired evidence defense. Opinion, at 26.

This Court's decision in ***In re Det. of Pouncy***, 168 Wn.2d 382, 393, 229 P.3d 678 (2010), upon which Lodis relies, addresses the admission of factual findings entered by a different court in an unrelated proceeding concluding that the scientific methodology employed by the defendant's expert witness failed to satisfy the "*Frye* test."[20] *See* ***Pouncy***, at 393-94. This Court held that the factual findings were inadmissible under ER 402 and 403 because a *Frye* hearing had not been requested in ***Pouncy***. *Id.*, at 393.

[20] *See* ***Frye v. United States***, 54 App. D.C. 46, 293 F. 1013 (1923).

Thus, admission of the prior factual findings had no relevance and served only as an impermissible method of impeaching the defendant's expert witness.[21] *Id.* Thus, ***Pouncy*** is inapposite to the trial court's admission of the breach of fiduciary duty jury verdict here, which was decided by a jury and later upheld by the appellate court in these same proceedings and is directly relevant to Corbis' after-acquired evidence defense.

B. The Appellate Court's Decision Affirming the Trial Court's Discretionary Evidentiary Rulings Limiting the Admission of Alleged Age Discrimination is Consistent with *Brundridge.*

To support his retaliation claim, Lodis had to prove he reasonably believed the activity about which he allegedly complained was unlawful.[22] The trial court's pretrial ruling relies on this distinction in admitting only those allegations of age discrimination that formed the basis of "the conduct [Lodis] complained of." *See* ***Renz***, 114 Wn. App., at 619; CP 3322.

The trial court's discretionary ruling in this regarding—limiting Lodis' admission of evidence of alleged age discrimination to those alleged acts about which Lodis claimed to have admonished Shenk—is entirely consistent with this Court's opinion in ***Brundridge v. Fluor Fed. Servs., Inc.***, 164 Wn.2d 432, 191 P.3d 879 (2008). (CP 3322). In ***Brundridge***, this Court

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[21] The prior factual findings additionally constituted inadmissible hearsay. *Id.*, at 394-95.
[22] *See* CP 2003 (Jury Instruction No. 9); ***Renz v. Spokane Eye Clinic, P.S.***, 114 Wn. App. 611, 619, 60 P.3d 106 (2002).

held that evidence of an employer's retaliatory treatment of other employees is admissible to show retaliatory discharge. ***Brundridge***, 164 Wn. at 445-46. Here, in its pretrial ruling limiting the admission of alleged age discrimination, the trial court specifically noted that evidence of prior acts of *retaliation* by Shenk would be relevant and admissible to Lodis' retaliation claim, citing ***Brundridge.***[23]

Contrary to his assertion, the mere fact that Lodis was required to establish his "reasonable belief" does not mean any alleged ageist comments automatically became relevant, especially when Lodis did not see fit to admonish Shenk about such alleged comments, as the trial court specifically recognized.[24] If anything, that Lodis concluded the additional information was not worth mentioning shows it lacks probative value. As such, the trial court acted well within its discretion and consistent with ***Brundridge*** in its rulings regarding the admissibility of evidence of alleged age discrimination.

C. No Substantial Public Interest Requires This Court to Eliminate the After-Acquired Evidence Defense.

The after-acquired evidence rule is well established and widely recognized as providing employers with a possible defense to employee

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[23] CP 3322 ("*Brundridge* would allow Lodis to introduce evidence of retaliatory behavior by Shenk towards other employees.").

[24] CP 3322 (recognizing no relevant connection between alleged ageist remarks and retaliatory motives); 5/13 RP 54-55 ("[E]ven if we assume . . . that Mr. Shenk had it in for older people, it does not make it more probable than not that he would retaliate against someone for raising complaints about him."); *see also* ER 401; 402.

claims of wrongful discharge brought under federal or state discrimination laws.[25] Despite Lodis' assertion that "[s]everal commentators have called for the defense to be abolished," research has uncovered not a single opinion in any jurisdiction in which the after-acquired evidence defense has been rejected or its adoption reversed.[26] Instead, the defense continues to be widely recognized and applied in courts across the country, including in Washington since 1999. *See* ***Janson v. N. Valley Hosp.***, 93 Wn. App. 892, 971 P.2d 67 (1999) (adopting after-acquired evidence defense as articulated in by the United States Supreme Court in ***McKennon***). In the nearly 20 years that have followed, this Court has not seen fit to review or reject the defense, and Lodis offers no compelling reason why the Court should do so now. Indeed, the very law review articles upon which Lodis relies recognize that public policy is furthered by the defense's application where an employee's misconduct is sufficiently egregious, including "willful or malicious attempts to undermine an employer's business, or other outrageous conduct designed to injure staff, customers or supervisors."[27] *Cf., Lodis I,* 172 Wn. App. at 861

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[25] *See* ***McKennon v. Nashville Banner Publ'g Co.***, 513 U.S. 352, 361-62, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995). Research reflects that ***McKennon*** has been followed by each of the United States Courts of Appeal in all 11 circuits as well as by state courts in 40 states.

[26] Notably, Lodis cites to no such opinion in his Petition and, instead, relies solely on three law review articles in support of his position.

[27] *See, e.g.,* Joseph Spadola, An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense, 102 Cal. L. Rev. 691 (2014), at 75 (recognizing that "[f]from a moral and policy perspective, some forms of employee misconduct are sufficiently egregious" such that the after-acquired evidence defense "seems less problematic.")

("It was for the jury to find, based on the evidence, that Lodis profited at the company's expense by not recording any vacation time, thereby breaching his fiduciary duties of undivided loyalty and care.")

Here, as the appellate court correctly held, the trial court did not abuse its discretion admitting evidence relevant to Corbis' after-acquired evidence defense. *See* Opinion, at 24, 26. That Lodis is not happy with that outcome does not support a conclusion that there is a substantial public interest in eliminating the after-acquired evidence defense adopted in ***Janson***. On the contrary, this case exemplifies the proper application of the defense.

D. Lodis' New Policy Argument that the After-Acquired Evidence Defense Conflicts with the WLAD's "Substantial Factor" Test Should not be Considered by This Court and Fails Regardless.

As Lodis concedes, in his Petition he raises a "policy argument" that he did not raise before the trial court, namely, that an "inconsistency" exists between Washington's "substantial factor" test and the after-acquired evidence defense. *See* Petition, at 16-18 and n.5. Because Lodis failed to previously raise this issue with the trial court, it need not be considered by this Court.[28] *See, e.g.,* RAP 2.5(a) (court may decline to consider new issues raised by an appellant that were not raised to the trial court); *Brown v.*

[28] In an effort to avoid this outcome, Lodis asserts that this Court "is warranted" in considering the issue because it "raises serious public policy questions." *See* Petition, at 18, n.5. As described above, the co-existence of the after-acquired evidence defense and anti-discrimination laws and remedies is well established under federal and state law. No "serious public policy" questions warrant this Court's review of Lodis' argument.

Safeway Stores, 94 Wn.2d 359, 369 (1980) ("Issues not raised before the trial court will not be considered for the first time on appeal.").

Regardless, Lodis' assertion has no merit. The after-acquired evidence defense in no way impacts employer liability under the WLAD's "substantial factor" test, under which liability is imposed when discrimination substantially motivates an employer's termination decision.[29] Instead, it serves to limit damages for wages that the employee might have earned after the time the dischargeable offense was discovered "only if [the employer] can prove by a preponderance of the evidence that it would have fired the employee for that misconduct." ***O'Day v. McDonnell Douglas Helicopter Co.***, 79 F.3d 756, 761 (9th Cir. 1996). Thus, as articulated by the Ninth Circuit Court of Appeals in ***O'Day***, the after-acquired evidence defense is consistent with a mixed-motive criterion, insofar as it operates only to limit an employee's ability to collect wages to which the employee otherwise would not be entitled as a direct result of his or her terminable actions.

IV. CONCLUSION

For each of the above reasons, this Court should deny review.

RESPECTFULLY SUBMITTED this 18th day of April, 2016.

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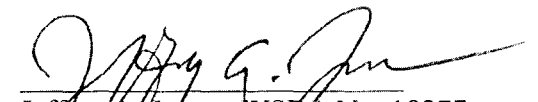
[29] *See, e.g.*, ***Scrivener v. Clark College***, 181 Wn.2d 439, 441, 334 P.3d 541 (2014).

SEBRIS BUSTO JAMES



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DECLARATION OF SERVICE

Holly Holman 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 Sebris Busto James and I make this declaration based on my personal knowledge and belief.

2. On April 18, 2016, I caused to be delivered via email addressed to:

John P. Sheridan
Mark Rose
The Sheridan Law Firm, P.S.
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Seattle, WA 98104-1745
jack@sheridanlawfirm.com
mark@sheridanlawfirm.com

a copy of RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW.

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

DATED this 18th Day of April, 2016 at Bellevue, Washington.

s/Holly Holman
Holly Holman

OFFICE RECEPTIONIST, CLERK

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Subject: Lodis v. Corbis Holdings, Inc. et al. - Case No. 92900-9 RESPONDENTS' ANSWER TO PETITION FOR DISCRETIONARY REVIEW

Good afternoon,

Please see attached for filing Respondents' Answer to Petition for Discretionary Review. Thank you.

Best regards,

Holly Holman, Legal Assistant

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