72707-9

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No. 72707-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERT AND JACQUELINE PIEL, Appellants,

v.

CITY OF FEDERAL WAY, Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION

On January 31, 2008, the City of Federal Way (City) discharged Police Officer Robert "Bud" Piel ("Piel") for the second time. CP 1066-72. The decision to discharge Piel was made by then police chief, now the chief of staff of Federal Way, Brian Wilson ("Chief Wilson"). The asserted grounds were that Chief Wilson had sustained allegations of workplace violence and/or dishonesty against Piel. *Id.* However, unlike the termination letter, Chief Wilson's testimony at trial, showed, the sanction - termination - was only based upon Piel's alleged "dishonesty" in answering questions during the investigation. RP 10/15/14; v4:126.[1]

Piel's second termination occurred immediately after Piel was ordered reinstated by an Arbitrator after what was called the "Otto/Stonebrenner" and firefighter incidents. CP___, Ex 31.[2] The arbitration was contentious. Chief Wilson and his brother Commander Greg Wilson's actions, and the nepotism between them, were sharply challenged by Piel. Piel tried to argue this caused Chief Wilson, who knew of Piel's charges, RP 10/16/14; v5:129, to have bias against him due

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[1] The City stated that to terminate Piel they had to have "just cause" defined by the City as "a fair and honest reason" based upon "facts that are (a) supported by substantial evidence; (b) are reasonably believed by the Appointed Authority to be true, and (c) are not for any arbitrary or capricious or illegal reason." CP____, Ex 13.

[2] Mr. Piel has filed a Supplemental Designation of Clerk's Papers, which contain Exhibits admitted during trial, which were not included in the first designation of Clerk's Papers. The exhibits has been referenced.

to his protected activity in challenging his dismissal. RP 10/15/14, v4:108-111, RP 10/17/14, v6:187-88. The City's first attempted termination occurred after Piel lead the organization of a union of lieutenants at the Federal Way Police Department ("FWPD"). Piel argued this had caused animus towards him.[3]

On his third day back at work after being reinstated, Piel was accused by a jail service worker, Jason Wilson, of having made a present tense threat to "murder" people in the FWPD *the preceding day*. Piel was further said to have made "offensive" comments to two female officers. An investigation was opened, and assigned to Commander Arbuthnot. Arbuthnot interviewed all witness, finally interviewing Piel a month after the events. Piel denied threatening to "murder" anyone, and offered to take a polygraph. Arbuthnot agreed, and gave Piel a list of his questions for the polygraph examiner. The union representative at the interview, Keith Pon, raised no issues. The polygraph – by an examiner used by the FWPD - found Piel's answers to be not deceptive. Piel sent it to Arbuthnot.

At this point, Piel argues, the investigation radically deviated from prior practice. Chief Wilson removed Arbuthnot from the investigation,

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[3] As discussed below, although the arbitrator did not reach these claims in his decision reinstating Piel, CP___, Ex 31, as he need not do to, the trial court repeatedly prohibited Piel raising any arguments he had raised in any way, even in passing without actually litigating them, in the earlier arbitration.

purportedly on the grounds that the polygraph had "tainted" his investigation. The City claimed *the Union* would not agree to its use.[4] Piel was prohibited by the trial court from showing this claim was demonstrably false, and that Arbuthnot's removal by Chief Wilson was pretext, given - Piel would have argued - that Arbuthnot told Piel that he was going to be cleared on 4 of the 5 charges.

Arbuthnot sidelined, Chief Wilson hired an "outside investigator" Amy Stephson to be his fact finder. Stephson had no law enforcement experience, and perhaps by design, was never told about the FWPD's well-established requirement for a finding of dishonesty – there had to be "intent to deceive" – nor was she provided guidance on what constituted "work place violence" which in prior cases had required a finding of "intent to harm" and an identified victim.[5]

Even without this information, and without being allowed to consider the polygraph as to Piel's state of mind by Chief Wilson, Stephson recognized that Piel's mental state was key, finding:

> "Piel could credibly be unable to recall making one of many negative comments. This could be true even regarding the murder comment, which he said in passing without particular emphasis....

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[4] As discussed below beginning at p. 21, the trial court improperly prohibited discussion of this polygraph, and the impact it had on Piel's state of mind and then, allowed the City to sanitize the record and wrongly blame Piel for Arbuthnot's removal.

[5] As discussed below, Piel's efforts to show what the actual standards were, and how they had been applied in prior cases, to show what Stepson had not considered, and that Piel was treated differently, were repeatedly stymied by the trial court.

> All of this suggest that given his mental state at the time, Piel may not have been quite aware of what he was saying at the briefing. Therefore, he could have failed in good faith to recall most of it."

CP___, Ex 11. Not told that "intent to deceive" was needed, Stephson made no such findings. Nor would a finding of intent have been compatible with the above conclusions.[6] Instead, Stephson stated that the distinctions between Piel denying he had made the statement in question and saying he "can't recall" was "insignificant." However, she concluded, since Piel was a police officer, "the City could reasonably determine that his flat denial did constitute dishonesty and untruthfulness." CP___, Ex 11.[7] Based upon this leap of logic – which falls apart when one considers that Piel agreed to take *and passed* a polygraph – Piel was terminated.[8]

Stephson was a lawyer with no mental health training. Yet, rather than a "fitness for duty" evaluation by a trained professional, as was usually done, CP 1072, RP 10/16/14, v5:79-80, Commander McAllister, who admitted "I'm not an expert" in work place violence, went to the web, and found a list of 68 "warning signs" of possible workplace violence. Ex

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[6] Stephson admitted she had no idea what "intent" was required to find dishonesty; she believed it meant "intended to say something" verses being under duress. RP 10/20/14, v7:131-32.

[7] Stephson had no training on how police were supposed to answer questions, and consulted no articles or other sources, she simply made it up. RPv7:106

[8] When Chief Wilson was asked if he agreed with this leap of logic – upon which he had terminated Piel - he said "I don't know if I agree with her or not" RR 10/15/14, v4:219. When Piel tried to inquire further, the trial court improperly cut him off. *Id.* at 220.

20[9]. As she testified; *only one "making derogatory comments" applied to Piel.* RP 10/20/14, v7:144. The web-site said a single sign could be "high levels of stress" and outside professional assistance should be sought. CP___, Ex 20. Based upon this evidence, McAllister "recommended" that Chief Wilson fire Piel. Piel requested the Chief Wilson recuse himself because Piel had filed four complaints against him for his conduct, and because the unionizing was directed in large part at Wilson. RP 10/17/14, v6:205.[10] Wilson terminated Piel.

Despite the trial court excluding the vast majority of Piel's evidence, repeatedly commenting on the evidence before the Jury, and repeatedly interfering in Piel's presentation of the evidence (which cumulatively and individually created reversible error)[11], the Jury still saw

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[9] Over hearsay objections, the trial court incorrectly admitted the article that McAllister had pulled off the web as evidence of the signs of work place violence. RPv7:142

[10] City official were required to recuse themselves when they had "an interest in the matter" RP 10/15/14, v.4:57.

[11] The trial court often expressed frustrated with Piel's Counsel. For example, when faced with a series of non-responsive and evasive answers by Chief Wilson RP 10/16/14, v5:34-65, the trial court repeatedly interrupted the examination. Rather than making Chief Wilson answer the questions he berated Piel for not accepting evasive answers and moving on:

> "If you're going to be doing more questioning of witnesses in this court, I'm asking you to – not to rephrase every question, uh, repeat answer if it doesn't come out the way you want it to come out.... I can't tell you how to try the case, but I'm not very pleased with every question being re-asked" RP 10/16/14, v5:66.

When Piel's Counsel attempted to respond, the Court cut him off saying:

> "And I'm not going to listen anymore, if – uh, to your, uh, explanations. Uh, and I've given you enough warnings about this issue, um, and I'm trying not to,

the case as close. After deliberating for a day, they sent a note asking "how long we need to deliberate before we can consider ourselves "hung." CP 1099-1100. The Jury returned a non-unanimous verdict for the City. This Appeal followed.

II. ASSIGNMENTS OF ERROR

1. Did the superior court commit prejudicial error in baring evidence of a polygraph taken by officer Piel to show state of mind and deviation from prior procedure?

2. Did the superior court commit prejudicial error in then allowing the City to claim, and then prove with only hearsay, that Officer Piel had inappropriately submitted "something" to Arbuthnot, requiring his removal, while barring any evidence contrary to this claim?

3. Did the superior court commit prejudicial error in prohibiting Piel from cross-examining the one witness supporting the termination as to bias and untruthful answers he gave when questioned by the City's investigator, thereby further limiting questions regarding the second investigator's failure to follow up on the complaining witnesses' s untruthful answers and bias?

4. Did the superior court commit prejudicial error in barring evidence of different standards and punishment applied by the City to prior similar events to show the asserted grounds for termination were pretext?

5. Did the superior court commit prejudicial error erred in repeatedly allowing testimony by witnesses who were "offended" at comments by Piel which were unrelated to his termination?

6. Did the superior court err in granting partial summary judgment, finding Piel's filing a tort claim for damages and filing complaints to the City's HR department were not protected activities?

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um, appear too one-sided – and especially to the jury – but I'm coming to a very, um, uh, uh – a point where I -- don't have a lot left, uh, in my tank." *Id.*

7. Did the superior court err in concluding Piel was collaterally estopped from asserting the 2006 discharge decision was substantially motivated by retaliatory animus?

III. STATEMENT OF THE CASE

A. Pretrial proceedings.

This matter was filed in 2008, and in October 2009, the trial court granted Summary Judgement to the City. The Washington Supreme Court on direct review held, over a dissent by one justice, that RCW 41.56 was not an adequate remedy, and that Piel could assert a claim for "wrongful discharge in violation of public policy." *Piel v. Federal Way*, 177 Wn.2d 604, 606, 306 P.3d 879 (2013).

The Supreme Court's description of the facts is a guide to some of the issues which *should have been* relevant to the trial of this matter. Plaintiffs quote the Supreme Court's statement of the facts, providing references to the current record where relevant and then breaking out their evidence based arguments (errors 1-5) below.

B. Events before Piel's 2007 suspension.

At the time of his termination, Robert "Bud" Piel was a 25-year veteran of law enforcement, who had been a member of the FWPD for nearly 11 years. He was promoted to lieutenant in 1998. From 1998 till 2006 all of his ratings were *positive*, he received no negative ratings. CP___, Ex 91; 117 Wn.2d at 607.

In late 2002, the 12 lieutenants in the FWPD decided to form a union. Nepotism between Chief Wilson and his brother Greg was part of motivation for unionization. RP 10/17/14, v6:108. Piel was chosen by the other lieutenants to manage its formation. "Although the Department's administration was initially supportive of the union activity, according to Piel the administration's attitude toward the efforts later soured. Shortly thereafter, Piel began experiencing a marked increase in his duties and responsibilities without commensurate support." 177 Wn.2d at 607-8; RP 10/17/14, v6:156-159. "By 2004, Piel began to feel his unit was the target of unusual and obstreperous internal affairs investigations." *Id.* at 608. Greg Wilson initiated these investigations. RP 10/17/14, v6:177.

"In January 2005, the lieutenant's guild was officially certified." 177 Wn.2d at 608. "That same month, Piel received his yearly evaluation, albeit late. The evaluation rated Piel as performing poorly in his job functions." *Id.* Piel later learned the only negative scores and comments were not from his supervisors but were added by the Chief Wilson, outside the normal procedure for performance reviews. *Id.* at 608; CP___, Ex90, 92, RP 10/16/14, v5:119-121. Chief Wilson did not add his name to the review, nor indicate he was the source of the negative comments. *Id.* Ordered by HR to remove the unauthorized and improper review, Wilson

told Piel he was still going to staple the improper comments in his file. RP 10/16/14, v5:124.

"Meanwhile, his requests for assignments were denied and his unit continued to be the target of investigations from internal affairs." 177 Wn.2d at 608. These increased investigations directed at Piel's unit – initiated by Chief Wilson's brother - frustrated those working under Piel's command. RP 10/14/14, v3:235-36. As one officer working under Piel described the experience, "it's like some body's watching...somebody's after you." *Id.* at 236. The volume of issues had not risen, only the investigations. *Id.* at 237-8.

"In May 2005, Piel was injured on the job and had to take three months of leave to recover from corrective knee surgery. During his medical leave and upon his return, Piel was told he would be demoted and was relieved of some of his responsibilities based on allegedly poor performance. Similar incidents continued into 2006." 177 Wn.2d at 608. Piel was removed from *all of the special duties*, some with extra pay, he had previously been assigned to. RP 10/17/14, v6:159-161.

"In March 2006, Piel advised an officer over the phone about the officer's options after the officer stopped a fireman on suspicion of driving while under the influence. The Department alleged that Piel's advice and involvement in the matter violated Department standards ... He was

terminated in July 2006." 177 Wn.2d at 608; CP___, Ex31. The City accused Piel in the first termination of "throwing Officer Otto under the bus." RP 10/16/14, v5: 131. The arbitrator rejected these claims. CP___, Ex31.

"Piel successfully grieved his termination and was reinstated 14 months later. The City was ordered to pay all back pay and benefits." *Id.* During Piel's grievance arbitration Chief Wilson discouraged officers from testifying for then Lieutenant Piel. RP 10/14/14, v3:239.

"Upon returning to his job, Piel was discouraged by the reception from his fellow officers. The City had not yet paid him his award of back pay and benefits. He was nervous and had not been sleeping well. His first two days back at work were stressful and tense." 177 Wn.2d at 608, RP 10/17/14, v6:190-193. Despite Piel's request for a written plan for his return, little had been done to prepare for his return, and the City had failed to save his equipment. *Id.* at 191-196.

On his second day back at work, Piel attended an afternoon briefing. The *next day*, a jail worker Jason Wilson, told Chief Wilson that during the briefing Piel had "actually threatened to murder someone at the department". RP 10/15/14, v4:40-41, 72. According to Chief Wilson, Jason Wilson was "visibly upset" when he made the complaint. RP 10/16/14, v5:188. Notably this report *was nearly a day after the*

purported threat. The then deputy chief (now Chief of Police) Andy Hwang reported this allegation to Piel, and "he immediately, uh, denied making any such statement." PRv4:42. Hwang said Piel "looked surprised" when Hwang mentioned he was alleged to have threatened to murder someone. *Id.* at 43.

Both of the police officers who actually heard the statements in question by Piel (Officers Bassage and Ellis) were trained to detect signs of violence or danger; neither understood a threat to have been made, or reported a threat by Piel. Both testified they were required to report threats, and could be terminated for failing to do so. RP 10/14/14, v3:155-158, 198-99. Both testified they would have reported a threat of violence by Piel, *if they had heard one*. *Id.* at 199. Both said Piel's comments were joking, with no change in demeanor indicating a threat. *Id.* at 161, 165, 205-206. As Officer Ellis said "Bud made some odd comments, but, um, I think that was his way of dealing with potentially uncomfortable situation." *Id.* at 207. Officer Ellis, *who has been assigned to train Piel*, further expected to patrol with Piel the next day, something he would not have done if he felt Piel was a danger. *Id.* at 209.

Although he denied it under oath to Arbuthnot, Wilson had a major ax to grind with Piel. The Jury was not allowed to fully hear about this, or Wilson's dishonest answers when questioned about his bias by Arbuthnot,

or about the City's second investigator Stephson's failure to follow up on the dishonesty of the only complaining witness against Piel.[12] Piel was placed on leave due to Wilson's allegations. RP 10/15/14, v4:41.

C. Commander Arbuthnot's investigation, his removal by Chief Wilson, and Amy Stepson's investigation and conclusions.

Deputy Chief Hwang, not Chief Wilson, picked Arbuthnot to do the investigation. RP 10/15/14, v4:73. Arbuthnot proceeded to interview witnesses to determine if Piel had violated any departmental policies in what he was alleged to have said in the briefing. Arbuthnot interviewed Piel last, a month after the alleged statements had taken place. CP___, Ex 4 tab23.

Arbuthnot first told Piel that he would not ask any questions about separate allegations by two female officers (Scholl and Barker) about allegedly "offensive" comments during the briefing, *as he had found those allegations to be unfounded.* CP___, Ex 29.[13] While not telling Piel who had made the allegations, Arbuthnot asked Piel if he had made statements "about coming back here and murdering a couple of people" and asked

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[12] As discussed below, the trial court also inappropriately prohibited examination on the subject of the City's handling of the dishonesty of the City's central witnesses (Officer Otto) in the prior case against Piel.

[13] As discussed below, over Piel's objections the trial court allowed Scholl and Baker to testify. Their testimony was designed to make Piel look bad before the Jury.

him "have you considered coming to the FWPD and murdering any members since all of this has been going on?" CP___, Ex 4 tab23.[14]

Piel denied making the statements or having those feelings, and offered to take a polygraph. Arbuthnot agreed, *and the union representative at the interview, Keith Pon, did not object.* CP___, Ex 4 tab23. Arbuthnot gave Piel his outline of questions (so the examiner could ask the same questions) and Piel took and passed the polygraph. Chief Wilson then removed Arbuthnot from the investigation, and hired Amy Stephson. Ms. Stephson, (as discussed above), reached conclusions, that Piel argued, were not supported by the facts, and in particular were not supported by the facts that Chief Wilson did not let her consider and the city's prior decisions on what constituted "cause" for termination.

D. The trial of this matter; the trial court's rulings.

The first witness for Piel, Officer Miguel Monico (who had left the FWPD in 2006) testified that he spoke with Chief Wilson before Piel's return to work. RP 10/13/14, v2:251. In that conversation, Chief Wilson said that recently "a lot of good people have been thrown under the bus." *Id.* at 254. Monico knew that Chief Wilson was talking about his younger

[14] Piel had requested copies of the statements against him under the Union contract before he was questioned. Although Chief Wilson admitted the union contract had been changed to require the City to "provide, those, uh, copies of statements to the person – the witness and the subject" RP 10/15/14, v4:185 (Piel being the subject of the investigation), he refused to provide them to Piel, which Piel argued showed bias and pretext. *Id.* at 220. The trial court improperly cut off questioning on this subject. *Id.* at 221.

brother Commander Greg Wilson. As Monico explained, Piel had challenged Chief Wilson's brother being in charge of internal affairs as a conflict of interest in the recently concluded arbitration. *Id.* at 255-256. Monico testified he knew that "Piel was being harassed by the Wilsons." *Id.* at 257.

At this point, Monico told Wilson "you know if you're referring to Bud Piel, uh, or Greg Wilson, Uh, I'm gonna tell you that Robert Piel – Bud Piel – is a very good lieutenant." *Id.* at 258. Monico's comment, as he testified, "instantly it triggered (demonstrated snapping) this sense of, uh, I mean, physical anger in him. He popped up on his head and leaned forward and put his hand onto the desk and he said that 'Bud Piel will never set foot in this station again.' I was shocked by his reaction." *Id.*[15]

Plaintiff's Counsel then asked Monico a series of questions about prior dishonesty in department investigations, RP 10/13/14, v2:258-260, to show the reasons for the union contract requiring the provision of statements to those under investigation, a point in dispute. Sua sponte, the court interrupted the questioning to ask "Counsel, what is the involvement of Stan McCall from the, uh allegations in the Plaintiff's case?" *Id.* at 260.

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[15] The trial court repeatedly and improperly cut off Piel's efforts to ask Chief Wilson about his knowledge about the allegations Piel made about him and his brother in the arbitration, which was designed to show bias, and match up with Monico's testimony about his brother being "thrown under the bus". RP 10/15/14, v4:109-11, 114-114, 173-75.

The testimony related to reasons for the requirement to provide statements made in department investigations, something Piel was denied by Chief Wilson. *Supra*, at fn 13. The court cut off the questioning saying "well I feel like we're getting into an extraneous materials that, um, I don't see the relevance of it." RP 10/13/14, v2:261. The trial court's interjections and objections on behalf of the City were a common occurrence during the remainder of the trial, a pattern that only went one way, in the City's favor. See e.g. RP 10/14/14, v3:71.

Piel called as his third witness a lawyer who Chief Wilson – *uninvited* – had called in response to a news article and told that "the City of Federal Way is not gonna do any business with Bud Piel" RP 10/14/14, v3:87, 89. The trial court sua sponte asked the City "was the defense aware of this witnesses' testimony?", to which the City responded "Yes, your honor." *Id.* at 90. Sue sponte, having stopped Piel's questioning of the witnesses, the trial court stated – in front of the jury – "well I don't see the relevance between what occurred in 2012 and, um, his termination." The court sua sponte then stated "I'm not going to allow further testimony on the issue" and struck the testimony. *Id.* at 90-91.

The next witness called by Piel, Commander Sumpter, was Piel's supervisor when Piel was forming the Lieutenant's Union. Sumpter admitted that Greg Wilson was kicking Piel's reports, and further admitted

Sumpter was not able to identify a valid reason for the higher rate of "kick-backs." RP 10/14/14, v3:105. These kickbacks, and the extra work they required – *which he could identify no legitimate reason for* – affected the moral of Piel's squad, and was a disincentive to work with Piel. *Id.* at 107. The court then incorrectly, under ER803(c)(3), prohibited Sumpter from testifying as to what Piel had told him *at the time* he believed was occurring, sustaining an objection that it was "hearsay." *Id.* at 105-6.[16]

The trial court then interrupted again when Piel was attempting to illicit that when Sumpter was Piel's supervisor, Piel's reviews were prepared differently than other reviews. RP 10/14/14, v3:110-117. The trial court ruled that while Piel's performance reviews were business records, that Sumpter could not be asked about them, *as he had not prepared them*! *Id.* at 112-13. In 2004, Piel was transferred off Sumpter's shift, to "graveyard", Sumpter said Bud was not happy about this. *Id.* at 139-140.

Officer Eric Davis testified regarding the same shift. On cross-examination the City asked a series of questions to elicit information on Union members who it claimed had been promoted – to show the absence of bias. RP 10/14/14, v3:240-241. On re-direct Piel inquired into the

[16] As Piel's counsel correctly noted, since Sumpter was in Court, his testimony was not hearsay under ER801(c) and he could relay what Piel had told him at the time of the events in question under ER803(a)(1) and (3).

same matters, including those who had been active in forming the Union who had been forced out. The City objected due to "lack of foundation." *Id.* at 246. The trial court, rather than allowing a foundation to be laid, sue sponte stated that "Um, goes beyond the scope of, uh, the cross-examination also." *Id.* When Piel's counsel noted that a few minutes before the City had elicited similar testimony on promoted union members, the trial court stated that "if it was important I think you shoulda brought it out in the first direct. I – I still think it goes beyond the scope. So, that's my ruling." *Id.* at 246-47.[17]

The City's representative at the trial, Chief Hwang, who had replaced Chief Wilson, then testified. RP 10/14/14, v3:250. Piel inquired about events that had occurred between Chief Wilson, Hwang, and Piel involving a prior incident. The City objected to "relevance," and the trial court immediately asked "what is the relevance?" Told that it involved the prior pattern and practice in the FWPD, and the "course of conduct" between Chief Wilson and Piel - which explained the later animus by Chief Wilson to Piel over the formation of the Union – the Court asked the

[17] To respond to the City's claims, Piel would have shown that numerous people active in forming the lieutenant's Union were also forced out. RP 10/14/14, v3:264. The court's response was that "unless you can show me a direct correlation between that and his termination...I don't think they're germane." *Id.* at 265. Obviously evidence to be admissible need not be "directly correlated" to Piel's firing, ER401. More troubling the same overly restrictive principles were not applied to the City, which was allowed to ask similar questions.

time frame, and was told this had occurred in 1998-99. *Id.* at 252-53. Without hearing more, the trial court ruled that it was not relevant, and prohibited further questioning of Hwang. *Id.* at 254.[18]

Piel then tried to question Hwang regarding discussions in the FWPD command staff about requiring Piel to come back as a trainee or losing his seniority – discussions which would undercut the City's claim to have welcomed him back. The trial court repeatedly sustained objections on the grounds of "hearsay" and "foundation" and then prohibited questions to establish the foundation, when the City's counsel

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[18] Piel made an offer of proof. RP 10/14/14, v3:264-65. The court's response was that it would – contrary to ER401 – require a "direct correlation between [the evidence] and his termination" or it would not be admitted. *Id.* at 265. The court, perhaps realizing it was on shaky grounds, returned the next morning to say that "although I said I would accept a summary offer of proof, I think, you'll need to establish a better record." RP 10/15/14, v4:23-24. The Court then stated that it would give time to make a better offer or "you can put it in writing." *Id.* Piel noted that Chief Wilson and Andy Hwang were hostile witnesses, and offered to do the cross-examination for the offer of proof. *Id.* at 25-26. The City objected, and the trial court stated it would consider the matter, or "find out another way." *Id.* at 28. The trial court by now had shown repeated signs of extreme annoyance with Piel's counsel and his case (e.g. RP 10/15/14, v4:28).

Piel eventually attempted to put on his offer of proof with Chief Hwang. The trial court allowed the City to repeatedly interrupt this offer of proof with speaking objections to try to coach the witness, and then begin to rule on the objections, disallowing questions, and cutting off the offer. The City repeatedly objected to Hwang being asked questions about FWPD business records, and in total took up at least half of the time with objections. RP 10/15/14, v4:85-93. The few times the City did not object, the trial court on its own impeded the offer of proof. e.g. RP 10/15/14, v4:91-92. The court then cut off the offer of proof. *Id.* at 93. The City then argued for a full page of transcript, and when Piel attempted to respond, the court again cut him off. *Id.* at 95.

asserted that "I'm not aware of evidence, you know, what was said at these meetings." RP 10/15/14, v4:49-51.[19]

Similarly, as discussed below, the transcript of the examinations of Chief Wilson and subsequent witnesses were filled with lengthy speaking objections, and interjections by the trial court, and much of the evidence Piel attempted to elicit was ruled out by the trial court. By the time Piel was able to testify, the Court was concerned about time, as it wanted to allow witnesses for the City such as Scholl, (see below beginning at p. 45), to testify, and restricted the examination of Piel substantially. RP 10/17/14, v6:179, 189-90.

IV. ARGUMENT

A. Standard of Review

A trial court abuses its discretion on the admission of evidence when its decision is manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons. *Gorman v. Pierce County*, 176 Wn. App. 63, 84, 307 P.3d 795 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 495 (2014). Where testimony is relevant, and is not "unfairly prejudicial" the trial court abuses its discretion by excluding it. *Wilson v.*

[19] Notably, when the City then asked Hwang what Chief Wilson had said in a meeting, the trial court issued the opposite ruling saying that it went to "notice." Compare RP 10/15/14, v4:71-72 with 49-50.

Olivetti N. Am., Inc., 85 Wn. App. 804, 934 P.2d 1231, review denied, 133 Wn.2d 1017, 948 P.2d 388 (1997).

An erroneous evidentiary ruling is grounds for reversal where it is prejudicial. *Brown v. Spokane County Fire Prot. Dist. No.* 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is considered prejudicial, requiring a new trial, when it affects, or presumptively affects, the outcome of the trial. *Id.*

B. The Superior Court's evidentiary rulings were biased and one sided, and repeatedly deprived Piel of highly relevant and admissible evidence and arguments, prejudicing his case.

1. The polygraph was highly relevant information of Piel's mental state and its execution was evidence of pretext by the City.

The City moved to exclude the fact that Officer Piel had taken and passed a polygraph. The issue was extensively argued, RP 10/8/14, v1:83-97, with Plaintiffs filing three supplemental briefs on the point. See, CP 603-08). Chief Wilson's reaction to the results, and refusal to allow it to be considered when it was beneficial to Piel - was central to Piel's claims that his termination was motivated by improper bias. Piel argued the City's asserted basis for its failure to consider the polygraph was pretexual, and really designed to insure that he was, unlike prior people in his situation, terminated. RP 10/8/14, v1:96.

As Piel would have shown, lie detectors were routinely used, and had been used by the department in the past in similar investigations as to honesty. CP 996. Piel had passed a lie detector test but this was not considered by the City's second investigator Stephson, *despite it explaining his mental state when questioned later*. Instead, that he had sent the polygraph to Arbuthnot was then used as a pretext to end the City's internal investigation, after Arbuthnot had stated he was going to clear Piel of certain charges. As Piel would have shown if allowed, Chief Wilson's explanation for ending Arbuthnot's investigation - that the Union had refused to allow the polygraph to be considered - was not true. This evidence would have caused the jury to question Chief Wilson's veracity and motivation in taking actions contrary to past practice. This is, of course, the heart and soul of a retaliatory termination where when an allegedly non-discriminatory reason for termination is shown, the employee "can attempt to prove that the employer's reason is pretextual." *Estevez v. Faculty Club of Univ. of Wa.*, 129 Wn.App. 774, 798, 120 P.3d 579 (2005). The trial court's exclusionary ruling was highly prejudicial and was legally incorrect.

Piel repeatedly cited the case of *Subia v. Riveland*, 104 Wn.App. 105, 15 P.3d 658 (2001) which had reversed a judgement due to the exclusion of polygraph results in an employment case. The trial court

admitted that *Subia* was nearly "on all fours." RP 10/8/14, v1:92. Piel made clear that, consistent with *Subia*, he was not seeking to admit the polygraph for the truth of the matter (if statements were actually made) but rather Mr. Piel's state of mind, the failure to follow prior procedure, and to challenge Chief Wilson's story, and his basic veracity in having concocted a story. Piel made clear he would accept an appropriate limiting instruction. *Id.* at 95-96.

The trial court failed to follow *Subia* because it claimed: "unlike *Subia v. Riveland*, cited by Plaintiffs, it is the Plaintiffs in this case who want to introduce evidence relating to taking the Polygraph test." CP 609. This was the only distinction raised by the trial court in its ruling. The rules of evidence do not change based upon who introduces the evidence, and *Subia*, where it was argued that "admission of Tsim's polygraph exam results were critical to rebut Subia's impression that Tsim's accusations were untrustworthy" *Id.* at 662, was directly on point and should have been followed.

As the *Subia* Court noted "Tsim's having passed the polygraph was highly probative, especially because her credibility was critical." *Id.*

at 662. It therefore held "Tsim's polygraph was relevant and admissible to prove DOC's "state of mind." *Id.*[20]

Nor, given Plaintiffs' offer for a limiting instruction, if necessary, was ER403 an appropriate basis to bar the evidence. *Subia*, infact, rejected the exact argument that the trial court appears to have adopted in its ruling, noting that "When the trial court excluded this evidence to prevent unfair prejudice to Subia's case, it unintentionally prejudiced DOC's case by withholding a critical piece of evidence. ... DOC is entitled to a new trial with Tsim's polygraph for this limited purpose." *Id.*

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[20] The trial court further stated in its exclusion order that the key issue in the case was "Mr. Piel's veracity on the issue of whether or not he made the key statement." This was entirely wrong. The actual issue – as defined by the City's investigator Amy Stephson in her report, was not if Piel had made statements, it was Piel's *state of mind* on the day in question, and later when questioned regarding those statements. As Ms. Stephson, without the benefit of the polygraph exam stated in her report:

> " it appears that Piel made a variant of inappropriate, offensive and negative comments that day. In such circumstances, Piel could credibly be unable to recall making one of many negative comments. This could be true even regarding the murder comment, which he said in passing without particular emphasis....All of this suggest that given his mental state at the time, Piel may not have been quite aware of what he was saying at the briefing. Therefore, he could have failed in good faith to recall most of it."

CP___, Ex 11. As Plaintiff argued (CP 603-9), Piel's offer to take a polygraph - accepted by Commander Arbuthnot, as shown by CP___, Ex 4, at FW004986 - was highly probative of his state of mind when making the statements alleged to have been knowingly false. The interview excluded by the Court showed the issue was Piel's state of mind:

> [Piel]: I can't think of a reason why they would say that and I, I would have no problem at all taking a polygraph with them to confirm that.
> [Commander Arbuthnot]: Okay."

Id. The trial court improperly ignored Piel's state of mind. Having passed a polygraph, a reasonable Jury would have been free to conclude that Piel had good reason to deny making the comments, apart from "intent to deceive."

(underlining added). As the Supreme Court has said: "the 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 v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).[21] Here, the evidence was highly probative and ER403 was improperly applied. The trial court improperly conflated the required standard of "unfair prejudice" with what the courts of this State have called "ordinary prejudice" noting that "various types of evidence and witnesses prejudice one party or the other; prejudicial evidence and credible witnesses make lawsuits." *Id.* at 224. Here, the evidence was detrimental to the City, but not due to "unfair prejudice" so as to implicate ER403, but because it was highly relevant on several issues at the heart of this case.

Given how closely balanced the issue was, *for the City's chosen fact finder Ms. Stephson*, the presence of the polygraph should have been key in explaining Officer Piel's state of mind, and was a "road not taken".

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[21] Nor was any reasonable argument made that the evidence would cause "unfair prejudice" which is required for exclusion under ER403. This would require that the evidence would "likely arouse an emotional response rather than a rational decision among the jurors." *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). No such showing was made.

Piel's termination turned entirely on his alleged dishonesty. Ms. Stephson based her finding that Mr. Piel was dishonest on the following "logic":

> "it clearly would have been more accurate for Piel to say he couldn't recall making the comment, didn't know if he said it, it was not the type of thing he would say, or something along those lines. Instead he denied it. In most investigations, one might view the distinction between the former type of response and a denial as insignificant. However, given that Piel is an experience police officer, who presumably understands the difference between the two, the City could reasonably determine that his flat denial did constitute dishonesty and untruthfulness."

CP___, Ex11 at FW004903. Given that the polygraph was an insight into Piel's mind during his interviews, it was highly relevant to explain his state of mind, and it should have been admitted under *Subia*, supra.

The City's position; that Officer Piel *despite having a polygraph saying he did not make any threats, and did not lie*, <u>firmly in his mind</u>, should have instead said "I don't know"; was in fact untenable. The evidence if admitted would have been a central point of examination of witnesses as to the City's alleged non-retaliatory justification.

Moreover, the City and the Union Representative who was representing Officer Piel *consented* to the polygraph. Yet, the City then used the *agreed to* polygraph to remove Arbuthnot, refusing to consider it when it was favorable to Piel. Both were highly relevant to the question

of retaliation. A failure to follow past practice as to polygraphs, that multiple witnesses would have testified to if allowed, CP 996-97, when it favored Officer Piel, was highly relevant evidence which undermined the claimed reasons for the termination.

As noted by this Court in *Estevez*, "[b]ecause employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." 129 Wn.App. at 799. An employee can do this "indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.*, 129 Wn.App at 800-01 (quoting *Godwin v. Hunt Wesson, Inc.,* 150 F.3d 1217, 1220, 80 Fair Empl. Prac. Cas. (BNA) 890 (9th Cir.1998)). As the Washington Supreme Court has stated, Plaintiff must "be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001)(brackets in original, quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804, 93 S.Ct. 1817 (1973)).

The evidence was central to Piel's claims that Brian Wilson deviated from past practice to get the results that he wanted as a result of his animus from Piel's protected activities, and should have been admitted, with a limiting instruction.

2. The trial court allowed the City to shield its false statements about Arbuthnot's removal from challenge, using the improper Polygraph ruling as a sword.

Chief Wilson had repeatedly claimed the submission of the Polygraph – *which Piel had passed* – to Commander Arbuthnot, caused him to remove Arbuthnot from the investigation. CP___,Ex 4, tab 24; CP 1012. Piel claimed it was pretext to remove Arbuthnot, who had said was about to clear Piel on 5 of 6 charges, and had agreed to Piel taking the polygraph! By turning the Court's ruling on the polygraph into a sword, the City sought to take away Piel's pretext argument. The approach was simply for the City's counsel to *invent* facts to try to defuse the issue, which was at the heart of Piel's claims. This starting in opening statements, where the City told the Jury:

> There wasn't anything nefarious about the switch away from Commander Arbuthnot. He received an email from Officer Piel and it contained some information that Officer Piel had decided to send to him. When, uh Commander Arbuthnot opened that e-mail he realized that it was something that under the contract – the collective bargaining agreement – with Officer Piel's union, he's not allowed to look at that information unless the union stipulates or agrees to that. Commander Arbuthnot had a conversation with John Clary, who's the president of the union, who said, "no way. You can't use that." ...
>
> So the City is now left with this question, uh, question of, "Okay, the person doing the investigation has seen information...we can't see. What do we do?

RP 10/13/14, v2:234. As the City told the Jury they therefore had to remove Commander Arbuthnot, and hire Amy Stephson, as a result of the Union. *Id.* Chief Wilson mirroring the City's "its Piel's fault" argument, *interjected* at the end of an answer that, "there was information that was provided by Mr. Piel that, uh, compromised the integrity of the investigation." RP 10/16/14, v5:63.[22]

Plaintiff repeatedly objected to the City's incorrect factual assertions to the Court, and that redactions made to remove mention of the polygraph presented a one sided, and unfairly and incorrectly unfavorable to Piel, view of what had happened. The trial court overruled the objections and would not allow questions to either Chief Wilson or Ms. Stephson on the subject. RP 10/15/14, v4:195-203.

Yet, what the City's counsel told the Jury, and the trial court allowed the City to present as *uncontrovertible facts*, was directly contrary to the actual documentary record. Arbuthnot had *agreed*, and the Union had not objected! Chief Wilson's credibility – having made this claim, CP 1068– was on the line.

[22] Plaintiff moved to strike as non-responsive and in violation of the polygraph ruling, and the trial court told the jury "I think the answer was responsive. So, we need to move on to the next question." *Id.*

The City admitted its *authorized investigator* Arbuthnot said "okay" to Piel taking a polygraph (RP 10/8/14, v1: 91:17)[23]. In fact, Commander Arbuthnot gave Piel a list of his questions so that he could be asked the same questions by the polygraph examiner! (*Id.* at 94:17-95:5; CP___,Ex 86). So why (as the City repeatedly told the Jury) did he suddenly remember –presumably out of the blue - that he was not to look at something [the polygraph] that he had agreed to? Why had the City and Chief Wilson invented a story that made no sense in light of the actual written record?

In fact the City's story changed each time it was told to the court. The City's counsel first said that *Officer Keith Pon* had said the polygraph could not be allowed. RP 10/8/14, v1: 91:22. But Pon was Officer Piel's representative at the interview where Commander Arbuthnot said "okay" to the polygraph, *and no objection was made*, as shown in the transcript. *Id.* at 83-85; CP___,Ex 4 at FW4986; CP 604. Moreover, why would the Union – whose representative Officer Pon did not object in the interview – object once it found the polygraph was *exculpatory* information for its' member?

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[23] As noted below, two days later, the City told a different, and conflicting story, to the Court, that Arbuthnot knew when he said "Okay" that the Polygraph would not be allowed. Were this true – it was not – it would of course raise a whole host of new questions about the City's actions.

The City next claimed in opening statements that the *Union President Cleary* had denied the use of a polygraph [calling it "something"].[24] Cleary was not on the City's witness list. Further, as Piel repeatedly showed the trial court, documents produced by the City contradicted what the City had told the Jury. Union President Cleary, had actually asked the City in an e-mail on December 19, 2007, why the polygraph was not included in the investigation materials in Piel's file! As Officer Cleary wrote the file for the Loudermill hearing: "I believe there may be some information that was not included:... the polygraph information submitted by Robert Piel." CP 1043. Notably, this e-mail was then forwarded on to Chief Wilson and no one from the City on the e-mail chain responded as one would expect, such as "why is Cleary asking" or "why the change in position" if what the City claimed – it was Cleary who had prevented the use of the polygraph - were actually true.

The City having "opened the door", Plaintiffs informed the court of the law prohibiting using evidentiary rulings as a "sword", CP___; RP 10/14/14, v3:23-30. The trial court was angry that Piel had raised the issue again, stating "I hope we don't have to hear about it again" adding that

[24] Had he been allowed, Piel would have challenged this story as a matter of basic logic. Why would the Union deny one of its members the use of evidence that was exculpatory when the City had already consented to its use? Yet the trial court would not even let Piel say that the evidence was favorable to him, let alone that it had been used by the City on prior occasions.

"Uh, frankly you know, I'm getting a little tired of hearing about the polygraph issue." *Id.* at 35. Risking the trial court's displeasure, Piel asked if this meant that he could not challenge what the City had said in opening and it was "deemed to be the factual record" and the Court replied that it was, adding "I hope I made that very clear." *Id.* at 36.

Officer Pon – Piel's Union Representative – the very person who the City claimed had first said no to using the polygraph, was in fact the next witness to testify, but Piel was prohibited from asking him about the City's false assertions, and instead made an offer of proof. RP 10/14/14, v3:39.

Chief Wilson, over objection, was allowed to reinforce the City's story. RP 10/16/14, v5:63. Cleary never testified. Instead, the City asked Arbuthnot who began to say that he had "talked" to John Cleary. Piel immediately objected that what Cleary purportedly said would be hearsay, and moreover would be a statement Piel could not contest under the trial court's prior rulings. RP 10/20/14, v7: 188, 190.

The Court sue sponte responded "it goes to notice" and Arbuthnot then told the jury that *Officer Cleary had objected* to the use of what Piel had submitted. RP 10/20/14, v7:190. Self-evidently, the testimony was hearsay, not subject to any exception, and was being admitted solely to support the truth of the matter, i.e. that it was the Cleary, not the City that

required the removal of Arbuthnot. ER801(a) & (c) and 802. There is no exception for "notice" in Washington, and in any event, the alleged statement by Cleary (an assertion of his position on the use of the polygraph) was at issue, which is hearsay under ER 801.[25] As shown above, the hearsay statement was likely entirely false, but Piel was prohibited from responding. RP 10/20/14, v7:198.[26] Neither was Piel allowed to introduce the transcript where Piel's union representative Pon had not objected to Piel taking the polygraph.

As Piel repeatedly showed the trial court, Washington law does not allow a party to shape the facts (let alone present false facts) under the cover of a motion in limine as the City did here. As the Supreme Court noted in an often quoted passage regarding "opening the door":

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[25] The closest exception to the situation is that for "state of mind" ER803(a)(3) yet the alleged declarant (Cleary) was available, and the statement was not regarding his "state of mind" but the content of what he had said, and the position he allegedly stated. Moreover, as *State v. Terrovona*, 105 Wn.2d 632, 639, 716 P.2d 295 (1986) makes clear this exception applies to "statements of intent that implicate a third party's conduct" and this exception is most often applied when the declarant is dead. Neither of these are present. Moreover, the hearsay statement lacked any indication of reliability, and was on a hotly contested issue. The court allowed hearsay to displace actual written and clearly admissible evidence to the contrary.

[26] It is notable that the trial court had already issued an equally incorrect, and inconsistent ruling against Piel. Piel was testifying about what he *personally told* members of the command staff about unionization (to shown knowledge), the City objected that it was hearsay. The trial court sustained the objection, and barred such testimony. RP 10/17/14, v6:113. Piel was in court, and subject to cross-examination, and testifying to what he said, so that it was not hearsay. The court however disagreed, stating that "if you're simply offering what did you say in 2004, about him – him unionizing that does constitute hearsay." *Id.* at 114, see also 115. This clearly incorrect ruling, inhibited Piel's ability to prove that the decision makers in the department knew of his role in the unionization. These conflicting rulings were part of a long pattern of what were clearly biased and incorrect rulings in favor of the City.

> "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths."

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). If the word "untruths" – which is what the trial court allowed the City to tell – is substituted for "half-truths" *Gefeller* is directly on point for what happened in this case.

Furthermore, when – as the City did here - actions are claimed to be for an "appropriate" reason, it "opens the door" to counter the impression created. See e.g. *State v. Kendrick*, 47 Wn.App. 620, 631, 736 P.2d 1079 (1987)(discussing "cooperation" opened the door to inquires about post arrest silence). As *State v. York*, 28 Wn.App. 33, 37, 621 P.2d 784 (1980) held, when an issue has been raised in a positive manner by a party, it opens the door to that, and it is reversible error to – as the trial court did in this case - exclude the response. *Id.* (citing *Gefeller*, Supra). As the Supreme Court held in *State v. Russell*, "Once the defense brought up the issue…the court properly ruled that the State could ask [questions on the same subject]" 125 Wn.2d 24, 73, 882 P.2d 747 (1994).

The multiple rulings by the trial court subverted the trial of this matter. Had the Jury been allowed to see the actual evidence – which showed the City's claimed reason ending Arbuthnot's investigation was likely a lie – it would have entirely undercut the City's asserted justification for firing Piel as reasonable. The Jury likely would have believed that Chief Wilson ended Arbuthnot's investigation because he believed Arbuthnot would likely clear Piel, and then made up a false story to try to cover up his actions. A new trial is required.

3. The Court inappropriately prohibited cross-examination of Jason Wilson regarding his untruthful answers regarding his "deviant behavior" and of Amy Stephson regarding her failure to follow up on Jason Wilson's dishonesty, instead finding him "credible."

As detailed above, Jason Wilson was the only witness who reported, *it must be stressed the next day,* that Piel had made a "threat." CP___,Ex4, tab 1, 3, 9. The two police officers with Officer Piel did not understand there to be a threat, or report a threat. CP___,Ex4, tab 6, 9, 7, 10.[27]

Not surprisingly, Commander Arbuthnot asked Wilson about any "disagreements or problems" he might have had with Piel. Wilson's under

[27] Officer Bassage stated in his interview that "He said it with a straight face…I know Bud to have a dry sense of humor and his comments and demeanor were consistent throughout the briefing…I'm not convinced the comment was serious." CP___,Ex 4, tab 7. Officer Ellis said "I don't believe [Bud] means anything bad or is trying to degrade anyone by his comments…I don't remember him saying "murder." …I wasn't really considering the comment as a problem as the time. I did not dwell on the comment or feel it was directed at anyone." CP___,Ex. 4, tab 10

oath response was that there was "nothing outside the regular disagreements that are common when working with someone on patrol." RP 10/8/14, v1:102. Officer Piel was not given his accuser's name, and as such there was no follow up by Arbuthnot.

After Arbuthnot was removed, Piel was eventually told in his third and last (10/9/07) interview by Amy Stephson that the person claiming he made a threat was Jason Wilson. Piel was then asked if Wilson might "lie" or "if there is anything that causes you or that would should cause anyone to doubt his credibility." CP 1020. Piel's immediate response was that Wilson had an ax to grind. As he told Stephson:

> "um, Jason uh boy looking back I've been here for eleven years uh I was in recruiting and hiring for uh quite a long time. Uh Jason applied for an officers position many times and may time failed. **Uh when he did that I was the one uh not recommending him for an officer position**.... [H]e had some questionable background issues uh ... **He admitted uh to uh lude acts**. We'll just leave it at that and uh **we weren't gonna put him on the streets as an officer.** If he is holding a grudge because of that I don't know."

CP 1021. Stephson asked Piel again if he had interviewed Jason Wilson regarding employment and Piel responded, "I would have to say that I've had intimate conversations with him because of his background that cause concern." *Id.* Stephson then asked when these events had occurred and Officer Keith Pon, who was the union representative in the interview,

interjected that they had occurred four or five years earlier and added for the benefit of Stephson that "He [Jason Wilson]'s never applied again." CP 1023.[28] As the City admitted to the trial court Jason Wilson had in fact admitted - to Piel, who was the departments hiring officer - "deviant behavior, to, you know, masturbating in a car during the application process." RP 10/8/14, v1:101.

The City's hired investigator (hired by Chief Wilson after he removed Arbuthnot) had now heard not just from Piel, but also Officer Pon, that there was reasonable ground to suspect bias, *and in fact doubt the veracity of the only complaining witness against Piel.* The question for the Jury was whether a *reasonable and unbiased* investigator would have believed that Wilson had simply forgotten something that given its nature (masturbating in public, causing Piel to prevent him becoming a police officer) he was not likely to have forgotten?[29] More directly, would the City then reasonably rely *solely* on such a witness or did it show that its claimed basis to terminate Piel were pretext.[30]

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[28] That this had actually occurred was not contested by the City: "Court: Was the fact that he was masturbating – would – was that part of the application that he'd said that in the polygraph, or? Ms. Terwilliger [Counsel for City]: My understanding is that is exactly right." RP 10/8/14, v1: 105:23-106:2.

[29] During the trial, Wilson changed his story as to when he decided to make the report, and then when confronted by documents, changed it again, casting further doubt on his veracity. RP 10/20/14, v7:83, 88, 93, 99, 105-7.

[30] The trial court also incorrectly prohibited cross-examination of Chief Hwang on similar veracity questions about the City's only complaining witness against Piel (Officer Otto) in the prior Arbitration proceeding. RP 10/15/14, v4:34-38. That the City turning a

Piel was not allowed to tell the jury that Stephson did not follow up. Instead she simply found in her report – upon which Officer Piel was terminated – that "Jail Coordinator Jason Wilson, who initially reported the comment, had no reason to lie." CP 1013.

Yet, the Jury never was allowed to hear any of this evidence – and make decisions as these key issues - because the Court barred discussion of the entire subject ordering that: "I'm ruling that the evidence regarding his deviant behavior will not come in. I don't think it's uh, relevant." RP 10/8/14, v1: 111. The Court further ordered that all documents be scrubbed of any reference to Wilson's conduct. RP 10/8/14, v1:112. Plaintiffs made an offer of proof. CP 997. The impact of the Court's ruling is shown by Chief Wilson who when shown the scrubbed documents, simply said (since the documents had nothing left in them which would be notable) that he did not find any claim of bias credible. RP 10/16/14, v5:111. The impact of the event, and that should have raised concerns due to its nature, had been entirely sanitized by the trial court's improper ruling.

As noted in *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002): "the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements

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blind eye toward issues with the veracity of both witnesses it used to testify against Piel was a pattern that a reasonable Jury could have found suggested pretext.

such as motive, bias, credibility, or foundational matters." While cases establishing the right to full and complete cross examination to show bias and veracity usually arise in the criminal context, the same rules apply to civil actions. "Facts which tend to show the bias, prejudice...and to show hostility towards the party against whom he is called, may be elicited on cross-examination as a matter of right, and the denial of this right is grounds for reversal." *Dods v. Harrison*, 51 Wn.2d 446, 448, 319 P.2d 558 (1957); accord *Alston v. Blythe*, 88 Wn.App. 26, 41, 943 P.2d 692 (1997) ("Evidence is relevant for a proper purpose if it tends to show a witness's bias"). Piel also had a right to challenge Wilson's credibility. ER607.

Jason Wilson was at the center of the City's case, and the Court's restrictions on cross-examination of him on the purported grounds of "relevance" prejudiced Piel, requiring a new trial. *Dods,* 51 Wn.2d at 448.

4. The trial court improperly barred evidence of the City's very different responses to prior similar events hindering Piel in proving he was terminated for improper reasons.

Chief Hwang admitted that the "work place violence" employee guidelines which Piel was alleged to have violated, CP1070, predated his employment with the City and been in effect "since I can remember being employed with the city." RP 10/15/14, v4:76; CP___Ex56. Hwang was

hired at the formation of the FWPD in 1996, so the same "work place violence" policy had been in existence *as long as the FWPD*. RP 10/14/14, v3:250-51. As the documents and Chief Wilson's testimony showed, the policy regarding what constituted "dishonesty" (established by then Chief Kirkpatrick) had been in place *at least* since 2001. CP 1071; RP 10/15/14, v4:126.

Multiple decisions of the Courts of this State have recognized that in retaliatory and wrongful termination cases, the employer's different or inconsistent treatment of other employees is highly probative and admissible to show the alleged reasons for the termination are pretext. *Fulton v. DSHS*, 169 Wn.App. 137, 161- 162, 279 P.3d 500 (2012); *Kuyper v. Dep't of Wildlife*, 79 Wn.App.732, 738-39, 904 P.2d 793 (1995); see e.g. *Sellsted v. Washington Mut. Sav. Bank*, 69 Wn.App. 852, 860-61, 851 P.2d 716 (1993)("direct ("smoking gun") evidence is not required" and "the reasons given by the employer for discharging the employee are unworthy of belief or that they are a mere pretext" which can be shown with evidence that similarly situation individuals were treated differently). As such, evidence of disparate treatment of Piel would show that the grounds for his termination were pretext. Any prior example of work place violence or threats during the entire history of the FWPD, or any prior allegations of dishonesty, *and how the City handled*

them were thus directly relevant to Piel's claims. Since Piel was terminated *soley* for alleged dishonesty, CP1072, this was the key evidence in the case.[31]

Plaintiff first attempted to illicit information on the standards and how they were applied from then Police Chief Andy Hwang. Yet, the trial court simply adopted the City's assertions that anything that preceded Chief Wilson was irrelevant, repeatedly barred questions on the actual standards or how they had been applied by Hwang himself in the 2006 Otto/Stonebrenner incident, and other prior incidents. RP 10/15/14, v4:34-38.[32] Piel's counsel pointing out that Chief Wilson himself had admitted that there was only one standard, and therefore that information as to prior actions as to "dishonesty" and the standards applied therein were directly relevant. *Id.* at 158-162. The court still refused to allow evidence regarding how "dishonesty" had been interpreted, including in Piel's first arbitration. *Id.* at 164.

The standard set by Chief Kirkpatrick back in 2001 was, in fact, that for dishonesty to be found the statement must be "rooted in deceit" RP 10/15/14, v4:227 or as Chief Wilson further admitted a finding of

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[31] Chief Wilson admitted that, absent the "dishonesty" claim, Piel would not have been terminated, instead he would be sent for fitness for duty evaluation. RP 10/16/14, v5:79-80, 81-82

[32] Piel stated he would make an offer of proof, RP 10/15/14, v4:39. As noted above, that offer of proof was impeded by the City and the trial court.

"untruthfulness requires intent to be dishonest and then dishonesty" *Id.* at 231 and "dishonesty and – untruthfulness has an intent component to it." RP 10/16/14, v5:69. The trial court, however, repeatedly cut off Piel's efforts to show that Stephson had made no such findings, and that she had *not* been told this was the standard to find dishonesty. RP 10/15/14, v4:234-240; RP 10/20/14, v7:159. The trial court's further refusal to allow full questioning of Chief Wilson as to whether his termination of Piel met the standard *he himself had testified to* is hard to fathom, as the evidence's relevance should have been readily apparent to any non-biased decision maker. The trial court cut off questioning, and repeatedly made clear to the Jury its (incorrect) view that the entire point was irrelevant, improperly commenting on the evidence. RP 10/15/14, v4:238.

In addition, the City told the Jury that *it had searched its records* and that there had been no inconsistent cases to the punishment it had imposed. RP 10/20/14, v7:163. As Chief Wilson stated, "you don't have just cause to terminate someone if you haven't applied the rules and regulations in a consistent fashion without discrimination" RP 10/16/14, v5:71. This of course is the conclusion of the cases discussed above involving the admissibility of evidence to show pretext.

But when Piel tried to ask Chief Wilson about the City's reaction to prior similar events, the trial court repeatedly prohibited the evidence

from being heard. Piel first tried to ask Chief Wilson about testimony he had given in his deposition (CP 705) about his brother, Greg Wilson, and a prior *sustained* finding that he had been dishonest, which did not result in termination (Greg was in fact promoted). Few things could be more relevant than very different treatment afforded to Chief Wilson's little brother *for what Piel was alleged to have done*. Yet, the trial court prohibited the testimony on "relevance" grounds when the city objected. RP 10/16/14, v5:74.

The facts were not in dispute, a banner had been placed on a computer monitor saying "what Federal Way needs is a little more chlorine in the gene pool." Chief Wilson's brother Greg denied having put the banner on the screen saver. Then, forensic work in an investigation by then Commander Columbe found *it was Greg Wilson* who had put up the banner. Greg Wilson "corrected" his prior denials and was neither demoted nor terminated for his dishonesty. CP1087. This was obviously highly relevant, yet it was excluded.

The City told the Jury that there has never been an example of work violence, Piel was the first. CP 1039. Chief Wilson admitted, as had Chief Hwang earlier, that the work place violence policy was unchanged since he joined the department. RP 10/16/14, v5:84-85. Any prior event was clearly relevant.

Again, the facts were not in dispute, *they had been testified to by Chief Wilson in his deposition.* CP 711-12, see also CP 1079-94. Wilson had a disagreement with Commander Coulombe – the same person who had investigated his brother's earlier dishonesty about the racist banner – and when Coulombe tried to meet, he told Coulombe "Listen, Dan. I don't want to meet with you. If I did, I might end up with my hands around your neck." CP 711. An investigation was opened and as Chief Wilson testified in his deposition:

> The finding was that, you know, I didn't have an intent to assault him. It was a statement about my frustration at the time, that I didn't want to meet with him and I made the analogy of that, and – that it was reiterated that it's important in the workplace, you know, not to – to make statements such as that.

CP 711-12. This testimony – by Chief Wilson himself - established that there was an "intent to harm requirement" for a finding of workplace violence and moreover that statements that lacked this intent – such as Chief Wilson's then "frustration" - would not result in discipline, let alone termination.

Yet, Chief Wilson wrote in his termination letter to Piel the exact opposite, saying "the policy does not distinguish between whether you intended to make a threat." CP 1070. Chief Wilson clearly knew what had happened to him – and his own very different treatment for a similar

issue – calling into question his honesty and whether the asserted grounds for Piel's firing were pretext.

Piel tried to ask about this incident, and Chief Wilson admitted that he had been investigated for "threatening a fellow officer." RP 10/16/14, v5:85. The City objected and Piel made a detailed explanation of the evidence's relevance, reading the deposition to the trial court, *Id.* at 85-90 Chief Wilson admitted this occurred in January 2001. *Id.* at 88. By now the trial court's ruling will not come as a surprise: "I'm goanna disallow the evidence." *Id.* at 91. Plaintiff made an offer of proof. *Id.* at 92-94. Chief Wilson then used the trial court's exclusionary ruling to cover a lie, telling the Jury that there was no intent to harm requirement! *Id.* at 95.

That Chief Wilson's own incident - *where he actually threatened a specific person* – had been dismissed as "a statement about my frustration at the time" where no "intent to harm" existed, was directly applicable to Piel's firing. Piel would have argued, if allowed, that it was irrational to dismiss him for what Amy Stephson found *he could reasonably not have recalled even saying*, while the very man who fired him had suffered no punishment for an actual threat of harm. The trial court badly erred in excluding the evidence and reversal for a new trial is required. [33]

[33] The trial court also excluded questioning about a 30 day suspension being given to a commander in the FWPD for a DUI arrest and his efforts to hide it, which Piel would

5. The Court erred in allowing irrelevant testimony by witnesses who were "offended" by Piel.

Plaintiffs filed a motion in Limine, CP 511, to prohibit testimony as to purportedly statements that Officer Piel made in the break room that "offended" two female officers (Scholl and Barker). RP 10/8/14, v1:60-65. The city admitted that the statements were not found to violate department standards. *Id.* at 62. They were not grounds for Piel's termination. CP 1067-72. The court did not rule but indicated that "I invite you to bring it up" again. *Id.* at 65.

During the trial the City elicited testimony about these irrelevant "offensive" statements, from Officer Bassage and Ellis. RP 10/14/14, v.3:174-177; 217-18. Piel renewed his motion *four times*, noting that any further testimony on the subject, or testimony by Scholl or Barker to try to highlight the issue, and give it a female face, was not only irrelevant and prejudicial under ER401 and 403 but cumulative. *Id.* at 260; RP10/15/14, v4:254; RP 10/17/14, v6:250-01; RP 10/20/14, v7:200-01.

Chief Wilson confirmed that allegations made by these witnesses were not sustained, and as such Piel's termination was not related to them, RP 10/16/14, v5:51. Chief Wilson admitted Arbuthnot had told Piel the

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have show, if allowed, was very different than the punishment he received for far less serious actions. RP 10/16/14, v5:75-76

same thing. *Id.* at 55. Despite this, the trial court then admitted, over objection, the statements by Barker and Scholl. RP 10/20/14, v7:181-182. When Piel attempted to object, the trial court amazingly criticized counsel saying "well, you had an opportunity to earlier object, and I think that would have been a motion." *Id.* at 182. When told that Piel *had filed* a motion and then raised the issue *four times,* the trial court wrongly said "this didn't come up during Motions in Limine" and therefore admitted it. *Id.* Over Piel's repeated objections, Barker was allowed to testify as to how she *and others* were "offended" by Piel's comments. RP 10/21/14, v8:66-76.

The testimony from Barker, and the written complaints from her and Scholl, were irrelevant to Piel's termination, and should have been excluded under ER401. Instead, the City was allowed to present evidence they found statements "offensive" and waive around their prior statements. Such testimony was only "likely to arouse an emotional response rather than a rational decision among the jurors." *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). Accordingly, this required exclusion under ER403. *Id.*

6. The Trial Court Erred in its Determination That Piel's Filing a Tort Claim for Damages and Filing Complaints to the City's Human Resource Department Were Not Protected Activities.

The Trial Court erred when it ruled before trial that Piel filing a tort claim with the City of Federal Way, as required by RCW 4.96.020, was not a "protected activity" and that Piel's various complaints filed with the City's Human Resource Department, as authorized by the *Employee Guidelines Manual* for Employees of the City of Federal Way, were not protected activities.

The *Becker* Court recognized that in the context of *Piel, 177 Wn.2d at 617,* where the statute declared that PERC remedies were intended to supplement other remedies, "the *Piel* court recognized a private common law tort remedy as necessary to fully vindicate public policy." *Becker v. Cmty. Health Sys., Inc.*, 182 Wn. App. 935, 948, 332 P.3d 1085 (2014).

RCW 4.96.010 provides that "[a]ll local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct . . ." A prerequisite for any suit for such damages is the requirement of a pre-filing claim for damages under RCW 4.96.020. *Campbell v. Thunderbird Trucking & Constr., Inc.*, 30 Wn. App. 496, 497, 636 P.2d 494 (1981). Since a claim for damages is a mandatory prerequisite to a private common law tort remedy, the act of an employee, such as Piel, filing a claim for damages against a governmental employer, such as the City of Federal Way must

necessarily be protected activity in order to fully vindicate the public policy created by the statute.

The trial court's order denial of partial summary judgment means that a public employer may terminate or discipline an employee who files a claim for damages, in contravention of the express policy of RCW 4.96 *et seq*. This was error. The resulting chilling affect is obvious. *Becker*, 182 Wn. App. At 946.

The same holds true for the Trial Court's ruling in this order concerning the various complaints lodged by Piel with the City's Human Resource Department in accordance with the City's *Employee Guidelines Manual.* The Trial Court's refusal to recognize that Piel's use of the procedures set forth in *Employee Guidelines Manual* were protected was error, as it is clear that the contravention of a clear mandate of public policy exists "where the termination results from the employee exercising a legal right or privilege." *Bravo v. Dolsen Companies,* 125 Wn.2d 745, 758-759, 888 P.2d 147 (1995).

7. The Trial Court Erred in Finding Piel Was Collaterally Estopped From Asserting the 2006 Discharge Decision Was Motivated by Retaliatory Animus.

The standard for reviewing summary judgments is well established: An order granting summary judgment is reviewed de novo. "We view the facts and all reasonable inferences from those facts in the

light most favorable to the nonmoving party. Summary judgment is proper only where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of establishing the absence of an issue of material fact." *Alhadeff v. Meridian on Bainbridge Island, LLC*, 167 Wn.2d 601, 610-11,220 P.3d 1214 (2009) (cites omitted).

The City's summary judgment motion argued that the Arbitrator's finding that there was "just cause" to discipline Piel, necessarily implied that the decision to terminate Piel *could not be* based on anti-union animus, and therefore, Piel was precluded from arguing at trial that his termination was motivated by "anti-union animus." CP117-137.

Despite the absence of any actual factual findings, or even any discussion of the issue, by the Arbitrator concerning "anti-union animus," the City then argued that collateral estoppel barred any attempt to raise issues presented in the 2006 termination at trial. *Id.* The trial court granted the motion. *Id.*

Reasonable inferences from the evidence must be resolved against the moving party, and the motion should have been granted only if, from all the evidence, a reasonable fact finder could reach but one conclusion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)(emphasis added). However, Summary judgment must be denied if

the record shows even a reasonable hypothesis that would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wn.App. 158, 162, 607 P.2d 864 (1980).

Here, there was a reasonable hypothesis that the issues were not identical for collateral estoppel purposes because the Arbitrator *excluded* any consideration of Piel's claim of wrongful termination as a violation of public policy from his decision. Rather, the analysis was limited solely to whether the City had "just cause" to terminate Mr. Piel's employment for 1) "The March 10, 2006-Stop of Firefighter" incident and 2) the "March 16, 2006-Abuse of Discretion" incident. The trial court therefore erred, and in doing so repeatedly prohibited discussion of what had occurred in the 2006 arbitration proceeding, limiting Piel's ability to shown anti-union and other animus with numerous witnesses, and in specific as to Chief Wilson. See e.g. RP 10/16/14, v5:208, RP 10/17/14, v6:179-180, 185-89.

V. CONCLUSION

This Court should reverse and remand for a new trial.

RESPECTFULLY SUBMITTED June 15, 2015.

WSBA # 47350 for
STEPHEN M. HANSEN, WSBA #15642