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NO. 73268-4-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

HASSAN FARAH, ILEYS OMAR, MARIAN MUMIN, DAHIR JAMA, FOUZIA M. MOHAMUD, MARIAN ALI, ABDIAZIZ ABDULLE, SAALIM ABUKAR, MOHAMED ISMAIL, SUDI HASHI, HALI ABDULLE, MURAYAD ABDULLAHI, ZAINAB AWEIS, FARDOWSA ADEN, MARYAN MUSE, ASLI MOHAMED, SAHRA GELLE (A/K/A Hani Huseen), ASHA FARAH, ALI ADAM ABDI, MUNA MOHAMED, FARAH GEEDI, AHMED HASSAN HUSSEIN, IBRAHIM SALAH, AHMED A. HIRSI, and MOHAMUD A. HASSAN,

Plaintiffs/Appellants,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS,

Defendants/Respondents,

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Mary E. Roberts)

Case No. 11-2-41759-0

REPLY BRIEF OF APPELLANTS

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I. ARGUMENT IN REPLY

With the exception of one Plaintiff (Ilyes Omar), the Plaintiffs are not fluent in English and needed translators to accurately understand and respond to the questioning at trial. *See* Br., at 10, fn. 9.[1] Many cannot read English beyond their name and address. Id.

"Up until September 30, 2011, [the Plaintiffs] had been allowed to pray without clocking out." 11/17 RP 140-41 (Test. of Manager Babou). "Right around September 30, … [Hertz] change[d] the rules." Id. at 151 (Test. of Huka (non-party witness)). *See* Ex. 1.[2]

Hertz had a "standing policy" requiring that, to terminate an employee for insubordination, the employee must refuse to follow a manager's direction three times. *See* 12/3 RP 121:3-8, 137:16-19. The "three times" policy was recorded in a training document given to the Plaintiffs for signature in February 2011. Ex. 1744. When Hertz changed the rules to require clocking out for daily prayers in September 2011, it eschewed the "three times" policy, suspending and then terminating Plaintiffs for insubordination without ensuring that each individual had multiple opportunities to understand the

[1] Hertz states Manager Babou, who speaks both English and Somali "usually" communicated with Plaintiffs in English. Br., at 4, n. 7. However, Babou testified, he spoke to Plaintiffs (generically) "[i]n Somali, in English, both." 12/3 RP 101.
[2] For non-work activities unrelated to prayer (*e.g.*, smoking), Hertz did not change the rules or enforce a policy requiring persons to clock out until after the company received negative publicity about Plaintiffs' suspensions. 11/17 RP 143-44.

direction from management. In contrast, smokers at Hertz who failed to clock out before smoking were given written warnings to correct their behavior. 12/3 RP 122. Yet, after the firings, Hertz wrote the State's Employment Security Division that Plaintiff Saalim Abubakar "was asked three times to punch out on that final day when he went to take his breaks and refused each time." Ex. 219. Abubakar had worked at Hertz since 1999, the whole time praying without clocking out and never once receiving discipline for that conduct. 11/25 RP 113. He was not told three times that he must clock out before praying before Hertz sent him home. Id. 128:13-16.

To prove their case through circumstantial evidence, Plaintiffs must be allowed "'full and fair opportunity to demonstrate,' … through cross-examination of the defendant's witnesses, 'that the proffered reason was not the true reason for the employment decision.'" St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08, 113 S.Ct. 2742, 125 L. Ed. 2d 407 (1993). However, throughout the cross-examination of critical adverse witnesses, objections were misconstrued by Hertz, with the court sustaining improper "argumentative," "foundation," "misleading," and "assumes facts not in evidence" objections. Hertz does not respond in its response to almost any of the objections Plaintiffs claim were improperly

sustained. The effect of Hertz's interference with cross-examination was magnified when the trial court refused to instruct the jury on the applicable legal principle that the jury may infer discrimination from their disbelief of Hertz's stated reasons for their actions. Jurists often struggle with this principle and its reasonable to expect juries will have the same difficulty without instruction from the court.

The court committed further prejudicial error when it ruled that an email that the court recognized was "central" the issues in the case, Ex. 1929, showing Defendants conceived a plan to set Plaintiffs up for "insubordination" months before the events giving rise to their terminations occurred, was hearsay. Damaging hearsay statements offered by Hertz were admitted over Plaintiffs' objection and the company was allowed to treat hearsay evidence admitted for purposes of "notice" as substantive evidence in closing without a limiting instruction. The cumulative effect of the court's erroneous rulings denied Plaintiffs a full and fair hearing on their claims. As a result, a new trial is required.

A. Plaintiffs present on appeal the story told at trial.

Hertz observes that in some instances the Brief of Appellants cited deposition testimony instead of the Report of Proceedings and it argues that "the story Plaintiffs tell is not reflective of the evidence

presented at trial." Br., at 25-26. The vast majority of testimony cited by Plaintiffs cited to testimony at trial found in the report of proceedings. *See* Pls.' Br., at 4-16, fns. 1-18. While Plaintiffs cited deposition testimony of Hoehne and Harris in some places, the deposition testimony cited generally reflected the testimony at trial; and in many cases it was deposition testimony actually read to the jury. *See, e.g.,* Pls. Br., 7-8, *citing, e.g*, CP 1602, 1684-85, CP 1687-88; *compare* 11/12 RP 185-86; 11/13 RP 22-28. There was no material difference between Plaintiffs' story presented on appeal and the one presented at trial.

B. Improper defense objections were repeatedly sustained; Hertz cannot offer new objections on appeal.

Hertz fails to respond to nearly all of the evidentiary objections cited in Appellants' brief as improperly sustained. *See* Br. of Resp't. at 26-33; *compare* Br. of Appellant, at 40-47, 19-31. Hertz claims Plaintiffs failed to argue the basis for the cited objections, even though, owing to space constraints, Plaintiffs addressed the objections they appeal by category and quoted far more objections than were responded to by Hertz. *See*, *e.g.*, Br. at 45 (11/17 RP 96-97 (Obj. No. 56), sustaining mischaracterizes testimony objection to question, "[A]s you had testified to in your deposition, it was basically that you had been told that some of the Somali Muslims were taking an hour

to pray, right?"; *cf.* CP1688 (Harris Dep.); 11/12 RP 226:9-16 (Obj. No. 20), sustaining "mischaracterization" objection when the witness agreed with Plaintiffs' description of prior testimony; *cf*. id. at 169); Br., at 44 (12/8 RP 97 (Obj. No 106), sustaining objection of argumentative and relevancy to question, "Is it fair to say you need this job?"); Br., at 43, 27-28 (11/17 RP 89-90 (Obj. Nos. 51-53), sustaining objection when Harris was asked to identify who was told "three times to clock out before prayer," after he vaguely claimed "the Plaintiffs… [m]any were told three times"). Instead of addressing the sustained objections Plaintiffs cited, Hertz focused its argument on a number of objections not appealed. *See* Br. of Resp't. at 28, n. 42; *also* id., at 33, n. 50 (discussing 11/13 RP 50).

One of the few objections appealed that Hertz does address is Obj. No.121, the "mischaracterization" objection, made after Mr. Luchini was shown Exhibit 1744 and asked,

> Q. Well, but looking at this [1744], you would agree with me that *as of -- certainly at least as of February*, in order to get somebody for insubordination, you need to tell them three times that they have to clock out for prayer and failure to do so could result in a finding of insubordination up to -- and termination, right?
> MR. HURLEY: Object as mischaracterizing the document and apparently referring to two different occasions.
> THE COURT: Sustained.

12/9 RP 142:4-13 (italics added).

Exhibit 1744 was not mischaracterized. In seeking to show how Defendants' policies and explanations were pretextual and were shifting over time,[3] the question put to Luchini clearly stated the date of the document, Exhibit 1744. See id. ("Well, but looking at this… *as of February*…). Plaintiffs' description of Ex. 1744 was also fair. Area Manager Todd Harris was earlier asked about Ex. 1744:

Q. So that's the magic language that implicates the three-time rule, right?
MR. FILIPINI: Objection. Vague.
THE COURT: Overruled. He may answer if he can.
A. I mean, it says three times in that document.
Q. All right. Because you wanted to give the workforce notice that **if a manager gives them an order three times 'Do this, do this, do this' or it could result in termination that *that would be your definition of -- or the company's definition of insubordination*, if they failed to follow the order?**
A. That's what this particular document says, yes.

11/13 RP 59 (emphasis added).

Another of the few objections Hertz addresses is Obj. No. 3 (11/12 RP 163:11-17). The objection Hertz made there was "assumes facts not in evidence." Id. However, as Plaintiffs showed in their brief, the relevant facts were in evidence. *See* 11/12 40 -42, 131:15-19. So, Hertz attempts to supplant the objection at trial with new

[3] Ignoring established procedures is evidence of discriminatory motive. *See, e.g.,* Nicholson v. Hyannis Air Service, Inc., 580 F.3d 1116, 1127 (9th Cir. 2009).

objections on appeal: vague, compound, and argumentative.[4] "A party must specifically object to evidence presented at trial to preserve the matter for appellate review." State v. Stein, 140 Wn. App. 43, 68-69, 165 P.3d 16 (2007); RAP 2.5(a); State v. Perez–Cervantes, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). The trial court made no ruling on those objections, which should be rejected along with other objections raised for the first time on appeal.

While Hertz claims Plaintiff was not prejudiced because some questions were rephrased, it cites to no instances where prejudice from sustained objections was so mitigated.[5]

C . The refusal to give Jury Instruction No. 11 left the jury uninformed about the applicable law.

Jury instructions must "properly inform the trier of fact of the applicable law."[6] In this case, Plaintiffs were refused an evidentiary instruction that would have informed the jury of an important legal principle—that the jury may infer discriminatory animus from finding pretext alone. The "jury's confusion is likely where, as here, the law the jury should have been instructed on has proven too difficult even

[4] *See* Br. of Resp't, at 31, fn. 47. The quotation from 1 McCormick on Evidence § 7 (Kenneth S. Broun, ed., 7th ed. 2013), cited in footnote 47 relates to objecting to questions that are "argumentative" or "misleading".
[5] When Hertz claims that "[o]f the approximately 187 objections sustained during Plaintiffs' cross-examinations, counsel rephrased his questions in response to at least 102 of them," it cites only to its briefing below, CP 2962-63. Br., at 28, n. 40.
[6] Stark v. Celotex Corp., 58 Wn. App. 940, 943, 795 P.2d 1165, 1167 (1990).

for federal [and state] courts to discern without guidance from the Supreme Court."[7] "It is unreasonable, … to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal [and state] judges who had the benefit of such arguments." Townsend, 294 F.3d at 1241, n.5.

In Kastanis v. Educ. Employees Credit Union, cited by Hertz, the defendant-employer appealed the refusal to give an instruction that was materially different from the jury instruction proposed in this case.[8] The instruction proposed in Kastanis was based on the burden of proof an employee previously had to meet to overcome summary judgment.[9] 122 Wn.2d at 494-95. It would have "instructed the jury that plaintiff **had to prove** that [defendant's] claim of business necessity [or in other cases, legitimate nondiscriminatory reason] was a pretext for an intentionally discriminatory act." Id., at 489, 494-94; *cf.* Pls.' Jury Instruction No. 11.[10] The Washington State Supreme

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[7] Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241, n.5 (10th Cir. 2002), *citing* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 693 (5th Cir.1999) (reversing jury verdict in favor of plaintiff, despite finding sufficient evidence that proffered reason was "pretextual," based on lack of "additional" evidence of animus), *rev'd* 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000).

[8] Kastanis v. Educ. Employees Credit Union, 122 Wn.2d 483, 489, 859 P.2d 26 (1993), amended 865 P.2d 507 (1994).

[9] Scrivener v. Clark Coll., 181 Wn.2d 439, 441-42, 334 P.3d 541 (2014) clarified that plaintiffs may survive summary judgment by creating issue of fact "*either* (1) that the employer's articulated reason for its action is pretextual *or* (2) that, although the employer's stated reason is legitimate, discrimination nevertheless was a substantial factor motivating the employer."

[10] "You ***may find*** *that* a plaintiff's religion or national origin was a substantial

Court declined to allow the instruction, holding the "shifting burdens … 'dropped from the case'" and that the employee was required only to prove to the jury "discrimination," not pretext. Id., at 492.

After Kastanis was decided, the United States Supreme Court decided Reeves, where it reversed the lower court and clarified that "the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose" with no additional evidence of animus. 530 U.S. at 147. The Washington State Supreme Court adopted that holding in Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 23 P.3d 440 (2001), *overruled on other grounds by* McClarty v. Totem Elec., 157 Wn.2d 214, 137 P.3d 844 (2006). In Hill, the Court of Appeals had set aside a jury verdict in favor of the plaintiff for insufficient evidence, applying a "pretext-**plus**" standard that required the plaintiff to "prove more than that the employer's stated reason for the employment decision is unworthy of belief." 97 Wn.App. 657, 661, 986 P.2d 137 (1999). The Supreme Court vacated the Court of Appeal's opinion, rejecting the "pretext plus" standard and holding that "it is *permissible* for the trier of fact to infer the ultimate fact of

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factor in the defendant's decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination." CP 1109.

discrimination from the falsity of the employer's explanation." 144 Wn.2d at 184 (italics in original), *quoting* Reeves, 530 U.S. at 147. The court adopted a "hybrid-pretext" standard in Hill, stating that discrediting the employer's explanation "is entitled to considerable weight, such that [a] plaintiff should not be routinely required to submit evidence over and above proof of pretext." 144 Wn.2d at 183 (quoting Reeves, 530 U.S. at 140) and 194.

The Tenth Circuit, finding "the danger too great that a jury might make the same assumption that the Fifth Circuit did in Reeves" (believing "independent evidence of discrimination" was required), held "that in cases such as this, a trial court must instruct jurors that if they disbelieve an employer's proffered explanation they may—but need not—infer that the employer's true motive was discriminatory." Townsend, 294 F.3d 1241. In reaching that decision, the court distinguished as "inapplicable" its earlier opinion in EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166 (10th Cir.1985). In Prudential, the defendant-employer sought a so-called "pretext instruction" (like the one requested by the defendant-employer in Kastanis), which the court found was "materially different" from the inference instruction requested by the plaintiff in Townsend. 294 F.3d at 1240. In Prudential, like the Supreme Court's decision in Kastanis,

the Tenth Circuit rejected the instruction that the defendant-employer requested, finding it "would have misled the jury into thinking that the [plaintiff] had to show that discrimination was the sole factor, whereas in fact the [plaintiff] only had to show that it was *one* factor, and that it had made a difference."[11] That "concern is not present in the instant case, where [Plaintiffs'] proposed [inference] instruction correctly stated the law." Townsend, 294 F.3d at 1240; *compare* CP 1109 (Jury Instruction No. 11); *see also* Ratliff v. City of Gainesville, Tex., 256 F.3d 355, 364 (5th Cir. 2001) (holding district court erred by instructing jury on "pretext plus" standard and "by failing to give an inference instruction" like the one that Plaintiffs proposed here).

Hertz claims no instruction was needed, arguing Plaintiffs' counsel was "free" to argue in closing about the inference to be drawn from the evidence of pretext. Br., at 44. However, counsel cannot instruct the jury on the "permissibility of an inference of discrimination from pretext alone." Townsend, 294 F.3d at 1241, n.5. *See, e.g.,* State v. Shelton, 71 Wn.2d 838, 843, 431 P.2d 201, 205 (1967) ("The court determines questions of law and imparts the law of the case to the jury by means of instructions.") An inference instruction like Plaintiffs' proposed Jury Instruction No. 11 "equips

[11] Townsend, 294 F.3d at 1240 (emphasis in original), *citing* Prudential, 763 F.2d at 1170.

the jury with the tools it needs to fully assess the possible legal implications of the facts they have discerned." C. Elizabeth Belmont, "The Imperative of Instructing on Pretext: A Comment on William J. Volmer's Pretext in Employment Discrimination Litigation. Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L. Rev. 445, 456 (2004). "An examination of circuit cases reveals that where … a jury is not informed that they are allowed to make an inference [of discrimination based on evidence of pretext], they will not make it." T. Devine, Jr., "The Critical Effect of a Pretext Jury Instruction," 80 Den.U.L.Rev. 549 (2003). "While counsel may be relied on to point out facts and suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear." Townsend, 294 F.3d at 1241, n.5; Brown, 100 Wn.2d at 194. Such duty was not met here.

D. Exhibit 1929 was erroneously excluded as hearsay.

Hertz argues that the Exhibit 1929 is unimportant because Manager Jeff Wilson wrote the email six months before the suspensions and terminations. Br. of Resp't, at 36. The timing makes the email most relevant, because it shows that the September suspensions and terminations were planned. Wilson is part of a team working on discrimination. He begins the email, "Hey Team," and

sends it to all the top Hertz managers on site who are a part of the team, including Defendant Matt Hoehne, Mohamed Babou, Tony Luchin, and others with a copy to Defendant Todd Harris. CP 2666. The email outlines a plan—essentially the same plan implemented six months later—that gives those who pray three options, all of which result in discipline. CP 2667. Moreover, Wilson writes to his team, "Here's the thing – we DON'T need to be and really can't be consistent [implementing the plan] every day." Id. The email foreshadows the discriminatory misconduct, predicts the outcome, and the defense raised that the "new policy" was not consistently applied. As the defendants jumped on the bandwagon of the trial court's misapplication of the "argumentative" objection, the defendants jumped on the court's misapplication of the business records exception to hearsay related to business emails,[12] and have continued that argument on appeal. "Whether or not the statement here was hearsay is a question of law … review[ed] de novo." State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631, 632 (2006). The defendants make six arguments against admission of Exhibit 1929.

First, the defendants argue violation of a local rule, an argument that was waived having not being raised below. The joint

[12] The court stated, "almost none of the exhibits are business records," 12/8 RP 34.

statement of evidence ("JSE") shows that Plaintiffs listed 282 exhibits numbered from 1 to 282, and Defendants listed 885 exhibits numbered 1001 to 1885. CP 679-864. Then, at trial Defendants offered all but a few of the exhibits numbered 1886 through 1933, none of which were listed in the JSE. CP 2463-66. Yet, Defendants argue for the first time on appeal that Exhibit 1929 should be excluded because it was not listed on the JSE as required by local rules. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011), quoting State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) (internal quotation marks omitted) (quoting State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). The defendants have waived this argument by failing to make the objection at trial. Second, the defendants make this argument in bad faith and with unclean hands, after having offered more than 30 exhibits at trial not listed on the JSE, which the court admitted. *Compare* CP 864 *with* CP 2463-66.

Second, the respondents argue that owing to his level in the company, Manager Wilson was not a party-opponent. Manager Wilson was authorized to speak to all recipients in the email string

about the subject matter of the email, and in the email he laid out a plan and gave opinions. If he was not so authorized, the email string would have contained a follow up admonishment that he overstepped his bounds. There was no such email or testimony. *See* CP 2666 (Harris responds: "If the meeting happened today, sorry I missed it."). There is other evidence of Wilson's status in the company. While Hertz claims "there is no evidence to show that [Wilson] had any authority to, or ever did, … make or change any material policies," Br., at 37, Wilson testified that, as Location Manager, he wrote the February 2011 memo to the Shuttlers, "basically announcing polices." *See* 12/8 RP 24:6-8, 22:2-24:9. As Manager, Wilson also signed disciplinary letters issued to some of the female Plaintiffs in February 2011, which allegedly did not involve or require consultation with his boss, Matt Hoehne. Ex. 1746; 11/12 RP 152. Manager Wilson also testified that he drafted—with assistance from "no one"—the September 27, 2011 memo that is Exhibit 1. 12/4 RP 244-45; *accord* 11/12 RP 190-92.

Thus, Manager Wilson's job duties, which included speaking on behalf of Hertz about the company's policies Wilson wrote, are not comparable to the "limited … work as a bartender" of Mr. Pitcher in Ensley v. Mollmann, 155 Wn. App. 744, 230 P.3d 599 (2010).

Unlike this case, in Ensley there was "no evidence … in the record that Pitcher was expressly authorized to speak on behalf of Red Onion," and the "overall nature of [the bartender's] authority to act for the [Red Onion tavern] was … extremely limited." Id., at 752-53. Here, it is "entirely reasonable to infer that [Manager Wilson's] duties encompassed"[13] writing other managers to set a meeting and agenda "to discuss how we will be proceeding with enforcing the new [Shuttler] contract." CP 2666-67. Thus, under ER 801(d)(2), Ex. 1929 was not hearsay, and it was error to exclude the statement as hearsay.

The claim that "it would be untenable to conclude that Wilson had authority to speak not only on behalf of Hertz, but also on behalf of defendants Harris and Hoehne," Br. of Resp't at 38, was not raised below. Regardless, Wilson's statements fall outside the definition of hearsay and are admissible against Hertz under ER 801(d)(2) regardless of whether all defendants authorized his statements. *See* Feldmiller v. Olson, 75 Wn.2d 322, 323-24, 450 P.2d 816 (1969) (holding trial court did not error by admitting and failing to strike testimony admissible against only one defendant).

Third, Wilson's opinions and his plan are also admissible. "[A]n agent's admission is not inadmissible under ER 801(d)(2)

[13] Savage v. State, 72 Wn. App. 483, 497, 864 P.2d 1009 (1994), aff'd in part, rev'd in part on other grounds, 127 Wn.2d 434 (1995).

solely because the statement is an opinion rather than a factual statement." Pannell v. Food Servs. of Am., 61 Wn. App. 418, 429, 810 P.2d 952, *amended*, 815 P.2d 812 (1991), *review denied,* 118 Wn.2d 1008, 824 P.2d 490 (1992) (*overruled on other grounds by* Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 306-11, 898 P.2d 284 (1995)). In Pannell, Zone Manager "Friedrichsen testified that he could see no legitimate reasons for the termination decisions that were made, and he believed that [President] Stewart's plan was to obtain young, aggressive managers. Friedrichsen testified that the Managers were terminated because of their age, and in Miller's case, because of his age and health." 61 Wn. App. at 424. Wilson's statements were similarly admissible. Respondents argue that plaintiffs suffered no prejudice because plaintiffs could cross-examine Wilson about underlying facts. This solution was inadequate because he wiggled. For there to be no prejudice Wilson would have had to essentially admit all facts showing his improper purpose and he did not. The prejudice is apparent.

Fourth, respondents argue that Exhibit 1929 is not a business record because it is not a "routine notation." Br. of Resp't at 39. The email is a recording of the plan being considered and later implemented by Hertz management. The email shows those business

activities all of which are relevant and admissible. In Pannell, "the trial court did not err in ruling that his statements regarding the reasons for those terminations, that is, his statements regarding age discrimination, were admissible under ER 801(d)(2). Id., at 430. This plan was written down and stored in the usual course of business, and was admissible.

Fifth, the respondents argue, again for the first time on appeal, that the email should have been excluded under ER 403, because it was prejudicial. RAP 2.5(a). It was. It showed the two individual defendants and upper management discussing a discriminatory plan, but in this case, it was especially crucial circumstantial evidence of discrimination, because in discrimination cases, "[d]irect, "smoking gun" evidence of discriminatory animus is rare, since there will seldom be 'eyewitness' testimony as to the employer's mental processes." Hill, 144 Wn.2d at 179 (internal quotation marks and citations omitted). The trial court, addressing "the type of information that's in Exhibit 1929," observed that "the question about how and whether the prayer breaks fit within or without the lunch and rest breaks [was] **central** to the case and **central** to the plaintiff's theory of a change that was discriminatory as opposed to not discriminatory." 12/8 RP 35-36. Thus, the court found

Ex. 1929 was clearly relevant. If Hertz objected to Ex. 1929 based on ER 403 at trial, the appellate court would review for abuse of discretion the court's decision balancing the probative value against the prejudicial effect.[14] However, as no ER 403 objection was made, there is no such determination to review.

Sixth, the respondents claim that the failure to admit Exhibit 1929 was harmless, but given the difficulty of proof in discrimination cases as articulated in Hill, and the outline of the very plan used six months later by the very same management team, the harm from excluding Manager Wilson's written plan is obvious. *See* Savage, 72 Wn. App. at 497 (holding improperly excluded memorandum by parole officer's supervisor was "not cumulative because, while there was some testimony on the subject, the jury could find the written document far more persuasive").

E. It was error to admit hearsay testimony that a union manager admitted the CBA required clocking out for prayer.

"Whether or not the statement here was hearsay is a question of law … review[ed] de novo." Edwards, 131 Wn. App. at 614. Cetris Tucker alleged statement was hearsay, as Hertz presented it to show the truth of what Harris testified Tucker said (*i.e.*, "that prayer was to

[14] Burchfiel v. Boeing Corp., 149 Wn. App. 468, 489, 205 P.3d 145 (2009).

be done … during the paid rest period"). *See* 11/17 RP 18:23-19:5. "The 'to prove the truth of the matter asserted' rule is 'sometimes phrased in terms of relevance. Thus, an out of court statement is hearsay if it is the *content* of the statement that is relevant to the case at hand. In this situation, the relevance of the statement hinges on the credibility of the out-of-court declarant (the statement is relevant only if true), thus triggering the restrictions of the hearsay rule.'"[15]

Hertz made no claim at trial that the statement was offered to show "notice" or Harris' motive for his actions, so the jury was given no limiting instruction to that effect. 11/17 RP 18-19; *see* Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (holding that hearsay evidence offered for a limited purpose under ER 803(a)(3) is not properly admitted unless accompanied by limiting instruction).

Moreover, Tucker's alleged statement is not like the police report admitted for a limited purpose in Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 272 P.3d 865 (2012). In that case, the employer received a police report that an employee was drunk and disorderly at the company's port facility, which caused the company to fire the employee. Id., at 84. The police report was thus admissible for the limited purpose of showing the "motive for firing," but not to show

[15] Ensley, 155 Wn. App. at 754, *quoting* Karl B. Tegland, Courtroom Handbook on Washington Evidence 391 (2009–2010 ed.).

that the employee was in fact drunk or disorderly. Id., at n.4 and 87. Rice would be comparable to this case if, for example, Harris testified that Tucker notified him that she had observed the Plaintiffs violating company policy, causing Harris to terminate the Plaintiffs. Instead, Tucker's alleged statement was used to prove "that prayer was to be done … during the paid rest period," triggering the restrictions of the hearsay rule.

Hertz's claim on appeal that Tucker's statement is not hearsay because she individually held "speaking agent" authority for the twenty-five plaintiffs as to a statement made regarding a condition of their employment that the Union did not agree to incorporate into the collective bargaining agreement ("CBA"), *see* Ex. 24 at 6, was not an argument presented to the trial court. *See* 11/17 RP 18-19. Teamster's Local 117 had a "negotiating team" (*i.e.*, the "collective bargaining committee"). 11/12 RP 59-60; 12/9 RP 190. When the committee reached agreement with Hertz as to the terms of the CBA, the agreement was signed not by "business agent" Tucker (nor by Mr. Harris), but instead it was signed by Teamsters Local Union No. 117's Secretary-Treasurer, Tracey Thompson, and Hertz's Labor Relations manager Jeff Nayda. Ex. 24, at 11. No evidence was presented to establish that Tucker, as an individual, was authorized to

speak on behalf of the Plaintiffs or to agree on their behalf that "prayer was to be done … during the paid rest period." That language and specific limitation on the terms and conditions of employment was not incorporated into the CBA. *See* Ex. 24, at ¶ 3.06. When James Kidd, one of Ms. Tucker's fellow collective bargaining committee members, was asked about proposals the union made concerning prayer breaks and mini-breaks that were not incorporated into the CBA, the court sustained the objections as hearsay. *See* 12/9 RP 193:10-12, 195:2-5. The court should have similarly excluded the hearsay statements of committee member Tucker concerning language that was not incorporated into the CBA.

Hertz argues that Plaintiffs "opened the door" to the statement of what Tucker allegedly said "when Plaintiff Omar testified regarding her understanding of the new break language as part of the Union's negotiating team. 11/12 RP 59:14-65:8." Br., 42-43. Again, that argument was not raised below, and furthermore it does not apply to this record. Plaintiff Omar did not raise the topic or voluntarily give testimony on it; it was *Hertz* who asked Omar about the topic on cross-examination. Id. The rules of evidence would be a farce if a party could open the door for itself to otherwise inadmissible evidence simply by asking the opposing party about a subject on

cross-examination. *Cf., e.g.,* State v. O'Neal, 126 Wn. App. 395, 409-10, 109 P.3d 429 (2005) *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007) ('It would be a curious rule of evidence which allowed **one party to bring up a subject**, … and then bar the ***other*** **party** from all further inquiries about it.'")

F. The jury should have been instructed on the limited purpose for Mr. Kidd's testimony.

When James Kidd testified, Defendants repeatedly sought to obtain testimony of what Secretary-Treasurer Tracey Thompson said in union meetings. The court sustained Plaintiffs' hearsay objection each time, until Hertz stated that the information was offered for notice. CP 2268, ¶ 1; 12/9/14 RP 196:9-197:19; 202:15-203:21. Plaintiffs timely objected to the misuse of Kidd's testimony in closing, and the court overruled the objection. 12/10 RP 125:8-21.

Hearsay evidence offered for a limited purpose is not properly admitted unless accompanied by a limiting instruction. Thomas, 99 Wn.2d at 104. In Thomas, the Washington Supreme Court reversed and remanded for a new trial based on the trial court's admission of hearsay evidence without a proper limiting instruction. Id., at 105. The fact that the objecting party had failed to make a request for a limiting instruction did not alter the case's outcome. Id.

In this case, Plaintiffs provided the trial court a proposed limiting instruction, CP 2257, one day after jury deliberations began. While it is "[g]enerally accepted … that a trial judge has discretion whether to give further instructions to the jury after deliberations have started," State v. Ransom, 56 Wn. App. 712, 714, 785 P.2d 469, 469 (1990), when evidence is admitted for a limited purpose, "the court, upon request, ***shall*** restrict the evidence to its proper scope and instruct the jury accordingly." State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (emphasis added); *see also* Thomas, 99 Wn.2d at 104. Plaintiffs have found no prior case deciding if a limiting instruction remains mandatory when requested after deliberations have started and believes this may be an issue of first impression for the Court.

G. The trial erred in failing to grant Plaintiffs a new trial.

"The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not." Storey v. Storey, 21 Wn. App. 370, 374, 585 P.2d 183 (1978), State v. Simmons, 59 Wn.2d 381, 368 P.2d 378 (1962). Plaintiffs agree with Hertz that the claim that the trial court erred in denying Plaintiffs' motion for a new trial is "duplicative of Plaintiffs' other claims of

error in this appeal." Br. of Resp't. at 48. The cumulative effect of the errors made by the trial court warrants a new trial.

II. CONCLUSION

For all of the foregoing reasons and those stated in the opening Brief of Appellants, a new trial should be granted.

Respectfully submitted this 10th day of February, 2016.

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DECLARATION OF SERVICE

Mark Rose states and declares as follows:

1. I make this declaration based on my personal knowledge and belief.

2. On February 10, 2016, I caused to be delivered via the Court of Appeals' e-service system to:

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a copy of the REPLY BRIEF OF APPELLANTS

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

DATED this 10th day of February, 2016 at Seattle, King County, Washington.

s/Mark Rose_____
Mark Rose, Attorney