

ORIGINAL

No. 63008-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BRUCE JOHNSON,

Plaintiff/Appellant,

v.

CHEVRON, U.S.A., INC. and GREG MILLER,

Defendants/Respondents,

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STATE OF WASHINGTON
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ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Julie Spector)

BRIEF OF APPELLANT

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I. INTRODUCTION

This case, which is brought under the Washington Law Against Discrimination (“WLAD”), RCW 49.60, et al., is before this Court due to the numerous serious errors committed by the trial judge, the Honorable Julie Spector, in favor of Defendants/Respondents Chevron, U.S.A., Inc. (“Chevron”) and Greg Miller (“Miller”). These errors include: dismissing at summary judgment Plaintiff/Appellant Bruce Johnson’s (“Johnson”) main claim that Johnson’s former employer, Chevron, failed to accommodate his disability; failing to permit Johnson to reintroduce the claim at trial after direct evidence of discrimination was presented; adding a shifting-burden element to the Washington Pattern Jury Instruction on disparate treatment; permitting damaging character evidence with extrinsic proof in violation of ER 608 and 403; excluding all reference to “accommodation” from the evidence, thus confusing the jury; and, awarding costs improperly.

Johnson, who is African American and suffers from the disability of chronic back pain, brought claims against Chevron and his former supervisor, Miller, under the WLAD for intentional race and disability discrimination, failure to accommodate his disability, hostile work environment because of race and disability, and retaliation in violation of RCW 49.60.180 and 49.60.210. Johnson also brought a claim against Miller, individually, for aiding, abetting, encouraging, or inciting the

commission of an unfair discriminatory practice in violation of RCW 49.60.220.

Pretrial, Chevron requested, and was granted, a summary judgment dismissal of the failure to accommodate claim despite the presence of genuine issues of material fact.¹ The trial court refused to consider the expert testimony offered by Johnson on accommodation as well as additional evidence offered after oral argument based on questions raised by the court at oral argument. Defense counsel engaged in discovery misconduct at depositions by feeding answers to a witness, arbitrarily ending another deposition, and disrupting Miller's deposition. The trial court took no action against Chevron for this misconduct. Chevron dumped thousands of documents on Johnson at the last minute in order to impede his ability to prepare for trial and summary judgment, again with no consequences.

At trial, per Chevron's request, Johnson and other witnesses were prohibited from talking about his efforts to obtain accommodation, and the trial court ordered that almost all trial exhibits be redacted wherever the word "accommodation" was mentioned. This further impeded Johnson's ability to tell his story to the jury, leaving gaps that significantly hurt his credibility.

¹ Chevron did not seek summary judgment dismissal of the other claims.

At trial, Chevron and Miller sought to portray Johnson as dishonest, and the trial court permitted them to raise any challenge to Johnson's credibility without regard to the rules of evidence. For example, the trial court permitted Chevron to argue that Johnson improperly obtained a patent for a tool he developed to accommodate his back pain, even though no such claim had ever been made. The trial court also allowed Chevron to claim Johnson lied on subsequent job applications based on vague answers to form questions related to his back pain. It permitted questioning and extrinsic evidence in the form of witness testimony and application forms in violation of ER 403 and 608(b).

At trial, the trial court granted Chevron's request to modify the Washington Pattern Jury Instructions on disparate treatment to erroneously require Johnson to prove not only that race or disability was a *substantial factor* in the discrimination, but to additionally prove that Johnson was treated *differently* than comparators. This erroneous jury instruction was added at the end of the case and Johnson had not presented significant comparator evidence, making the defense verdict an almost certainty.

Post trial, Judge Spector granted Chevron's erroneous request for over \$25,000 in costs, primarily in deposition costs, without supporting facts or law. This threatened Johnson's ability to appeal owing to the bond requirement. After Johnson filed an emergency motion with this Court

seeking a stay of enforcement of the judgment without bond, which was denied on procedural grounds, but supported in dictum, he sought reconsideration at the trial court under CR 60. In response, Chevron admitted that the original award it requested, and pursued through garnishment, was erroneous. The trial court granted the motion, leaving only \$6,000 of unsupported costs remaining for appeal. Mr. Johnson sought CR 11 sanctions, which Chevron opposed. After a delay of many weeks, the trial court denied the motion. Mr. Johnson amended the notice of appeal to include the CR 11 ruling.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it granted Defendants' Motions for Partial Summary Judgment, dismissing Johnson's failure to accommodate claims. (CP 1455, 1457, 2137)
2. The trial court erred in granting Defendants' Motion to Strike the declaration of Plaintiff's disability expert, Jacqueline Johnson. (CP 1456)
3. The trial court erred when it refused to consider excerpts from the deposition of Bruce Johnson and related Court Orders, which were properly presented by Plaintiff before a formal decision on the summary judgment motions. (CP 1459-1460)
4. The trial court erred when it included an additional element in Jury Instruction No. 11, which required Johnson to prove that he "was treated differently than non-disabled employees in the workplace." (CP 3196)
5. The trial court erred when it included an additional element in Jury Instruction No. 12, which required Johnson to prove that he "was

treated differently than other Harbor Island facility drivers who are not African-American.” (CP 3197)

6. The trial court erred when it permitted extrinsic evidence, over Plaintiff’s objection and without ruling on this aspect of Plaintiff’s second motion in limine, concerning statements Johnson made during subsequent employment applications to third parties. (RP 11/25/08 at 13, 12/9/08 at 216-223, CP 1461, 1753, 1996)
7. The trial court erred when it denied Plaintiff’s fourth motion in limine, thus allowing irrelevant testimony concerning Johnson’s patent application for his hose draining tool. (CP 1594-1604, RP 11/25/08 at 18-19, 12/3/08 at 21-22, 12/9/08 at 202-10, 1/14/09 at 137)
8. The trial court erred in denying Plaintiff’s Motion for Sanctions when, shortly before the discovery cut off and after key depositions had been taken, Defendants produced thousands of pages of documents, some of which would have influenced the depositions. (CP 1453-54, 2138)
9. The trial court erred when it denied Plaintiff’s fifth motion in limine concerning deposition misconduct at the Chris Rice and Willie Jones depositions. (CP 1611-78, 1757-63, 1985-89, RP 11/25/08 at 39-46)
10. The trial court erred when it awarded over \$6,000 in costs to Defendants, which was unsupported by facts or law. (CP 2948-2951)
11. The trial court erred in failing to award CR 11 sanctions after Chevron improperly sought and obtained \$25,000 in post-trial costs. (CP 2908, 2942, 3297, 3616)

B. Issues Pertaining to Assignments of Error

1. Whether, viewing the evidence in the light most favorable to the nonmoving party, Plaintiff raised genuine issues of material fact with regard to his failure to accommodate claim?
2. Whether the trial court should have stricken the declaration of Plaintiff’s accommodations expert at summary judgment?

3. Whether a trial court, on a motion for summary judgment, should consider all evidence presented to it before a formal order granting or denying the motion is entered, or whether this Court should consider the additional evidence?
4. Whether a trial court may require a plaintiff in a disability employment discrimination case in Washington to prove that he or she was treated differently than other non-disabled employees?
5. Whether a trial court may require a plaintiff in an employment discrimination case concerning race in Washington to prove that he or she was treated differently than other employees who are not members of the protected class?
6. Whether the trial court abused its discretion in permitting extrinsic evidence in the form of documents and additional witnesses concerning statements made to a subsequent employer, which are not made under oath, for the purpose of attacking the witness' credibility?
7. Whether it was an abuse of discretion to allow irrelevant testimony concerning a patent application to be admitted in a race and disability employment discrimination case?
8. Whether the last minute release of relevant and important documents by Defendants, after key depositions had been taken, warranted sanctions?
9. Whether coaching a witness, and making argumentative interruptions, during a deposition warrants sanctions in the form of a curative jury instruction?
10. Whether a cost award of over \$6,000 against the plaintiff in a civil rights employment discrimination case is reasonable when the defendants fail to submit evidence in support of the costs, and when the law does not support the award?
11. Whether the trial court abused its discretion in denying the CR 11 sanctions motion?

III. STATEMENT OF THE CASE

A. Johnson Was A Success At Chevron Until Caucasian Greg Miller Became His Supervisor

In 1996, African American Bruce Johnson began delivering fuel as a truck driver for Chevron out of its West Seattle facility on Harbor Island. CP 6, RP 12/15/08 at 185, RP 12/4/08 at 59. Each driver was generally expected to deliver five “loads” per shift, and the work led to back injuries among employees. RP 12/16/08 at 22, RP 12/15/08 at 59.

From 1996 to 2000, under Supervisor Terry Howard, Johnson felt respected, encouraged, and appreciated at his job driving trucks and working part-time as a safety trainer for Chevron, hoping for a promotion into management. RP 12/4/08 at 60-64.

In early 2000, at the age of 34, Johnson injured his back and developed chronic back pain. CP 6. Later in 2000, Caucasian Greg Miller replaced Howard as Johnson’s supervisor. RP 12/11/08 at 62. Johnson began to feel less appreciated at work when Miller indicated to him that it would take Johnson a long time to work his way up to a management role and essentially removed Johnson from safety trainer responsibilities. RP 12/4/08 at 66-67.

In September 2003, Johnson asserted an internal EEO complaint against Miller, which Chevron rejected. Ex. 344. After Chevron rejected Johnson’s complaint, Miller removed Johnson’s access to the company

computer, which limited his ability to know of promotion opportunities. RP 12/4/08 at 64, 92-93. During this time, Miller also falsely accused Johnson of various minor company violations, and threatened discipline until senior driver Willie Jones intervened on Johnson's behalf. RP 12/4/08 at 92-99. Jones challenged Miller on his threats against Johnson, and found that, in contrast, serious oil spills and accidents caused by Caucasian drivers brought no action by Miller, who buried incriminating evidence. RP 12/10/08 at 96-115.

B. Miller And Holmes Refused To Permit Johnson To Work If He Was In Pain, And Refused To Accommodate His Disability

Manager Miller and his manager, Jerry Holmes, took the view that Johnson could not work if he was in pain. Since Johnson had chronic back pain, they sought to take him out of his job and to end his career with Chevron rather than seeking accommodations.

On August 7, 2003, Miller contacted Holmes to voice his concerns that Johnson "may not be in [a] condition to work without further injuring himself." CP 868. Also on August 7, 2003, Johnson's nurse case manager, Patricia Vodopest, contacted Miller who reported that Holmes did not want Johnson "driving the trucks anymore, as he seems too sore to be doing the work, appeared to be at risk of re-injury, and was not performing what was expected of him." CP 872, Ex. 15. Miller has no medical

training. RP 12/4/08 at 45-6. On September 8, 2003, Miller observed Johnson limping and complaining about his sore back. RP 12/16/08 at 163, CP 176. In response, Miller placed Johnson on light duty, and required him to take another Physical Capacities Evaluation (PCE). *Id.* Miller and Holmes considered terminating Johnson at this time. Ex. 16. By this time, Johnson was afraid that he was being forced out of his job. Ex. 342.

Then, in late 2003, Jones introduced Johnson to a rudimentary hose-draining tool, which allowed the user to balance the weight of the fuel hose on the tool while draining any residual fuel into the underground tank. RP 12/4/08 at 101. The initial version of the tool had been used by ConocoPhillips product delivery drivers. Johnson began to use the tool in late 2003 and early 2004 as an accommodation for his back pain disability. RP 12/4/08 at 103-06. He felt the tool alleviated some of the stress on his lower back. RP 12/4/08 at 103, 109-10. At one point, Miller rode along with Johnson to observe his use of the hose-draining tool. RP 12/4/08 at 118-119, CP 2170.

By early 2004, Johnson had developed and improved the tool, calling it the ergonomic fuel hose drainer. RP 12/4/08 at 104-05. After several months of using the tool in 2004, Miller told Johnson that he could no longer use the tool until it was certified by Chevron. CP 2170, RP 12/4/08 at 106.

Miller contacted Chevron headquarters in San Ramon, California so that Johnson could make arrangements to take his tool down to California in an attempt to have it certified by Chevron. RP 12/11/08 at 97-100, 12/4/08 at 55, 106, 115-6, 118-19, Ex. 35 (redacted by court on 12/4/08 at 136). This requirement was harassment. Chevron has no “certification” requirement for tools created to assist employees in their jobs. RP 12/11/08 at 97-100, 12/10/08 at 89-90. In fact, several tools were fabricated and used on site in Seattle without the need for certification. RP 12/10/08 at 90-94.

Johnson went down to California and demonstrated his tool on May 6, 2004. RP 12/8/08 at 74. In May and June 2004, Chevron conducted its own investigation into the tool and determined that neither Johnson, nor any other Chevron drivers, would be able to use the tool. RP 12/5/08 at 70-71. Chevron’s evaluation of the tool, however, failed to address whether or not the tool could be used by Johnson as an accommodation for his specific disability. RP 12/8/08 at 77-80. The Chevron ergonomic study of the tool did not comply, and was not intended to comply, with the duty to reasonably accommodate a disability under the WLAD, RCW 49.60.180. *Id.* The Chevron investigation focused solely on whether Johnson’s tool would be suitable for use by all Chevron product delivery drivers, not on whether the tool would assist or benefit disabled drivers or Johnson specifically. *Id.*

On May 22, 2004, shortly after Johnson returned from California, when he was not permitted to use the tool, he suffered his third industrial accident while draining a fuel hose. RP 12/9/08 at 146. He was out of work for six months. RP 12/9/08 at 150. By at least June 16, 2004, Chevron's Employee Relations Counselor, Randy Martin, was aware that Johnson had filed a charge stating that he was denied reasonable accommodation in the form of the ergonomic fuel hose drainer, which "would enable him to perform the essential functions of the job." CP 879. However, at no time did anyone from Chevron participate with Johnson's attending physician, Dr. Blair, regarding his request for a reasonable accommodation. CP 879.

On October 26, 2004, Miller emailed Chevron HR indicating that he had asked Johnson's vocational counselor to make sure Dr. Blair understood that the "return to work is without limitations or the need for a reasonable accommodation." CP 883. Miller also stated that if Dr. Blair wanted Johnson to use the fuel hose drainer, "then the doctor would have to be very specific." *Id.* On October 27, 2004, Dr. Blair released Johnson back to work with "reasonable accommodations," stating that Johnson would occasionally benefit from the use of the "handmade tool" to assist him in his job. CP 885. Also on October 27, 2004, after receiving Dr. Blair's release calling for a reasonable accommodation, Chevron's

workers' compensation representative, Kelly George, stated that she "would not allow [Johnson] back to work until it is clarified with the doctor...that this 'handmade tool' cannot be used at work." CP 887.

Miller responded that he "would assume that Crawford should make the doctor aware of our study and possibly remind him that if he recommends this tool that he may be liable if [Johnson] injures himself while using it."

Id. Crawford is the third party administrator that handles all Labor and Industry claims brought against Chevron, including workers' compensation. CP 171.

On October 28, 2004, Chevron HR sent an email to Miller and Chevron's Business Partners stating that they wanted to "make sure that everyone is aware that we have documentation from a study that deems this tool potentially unsafe...Given that, I don't think the accommodation as written is reasonable." CP 890. Chevron immediately began pressuring Dr. Blair to rescind the accommodation. RP 12/10/08 at 37, CP 1074. Chevron offered no other accommodation.

In a November 1, 2004 email exchange between George and Miller, George instructed Miller to give Crawford a copy of the report on the ergonomic assessment to give to Dr. Blair, stating "[t]he doctor really needs to see this to understand what is going on...I think that Nolan

[Thornberry] will tell you that because of that assessment that was done, we shouldn't allow [Johnson] back to work." CP 893.

In a November 9, 2004 letter, Crawford gave Dr. Blair two options: 1) Johnson could return to work without any accommodation, including the use of the tool, or 2) Johnson could return to work, but with occasional accommodation using the ergonomic tool. CP 1074. However, the letter noted that "ChevronTexaco will not allow [Johnson] to return to work with [the second] option." *Id.* Given the two choices, Dr. Blair indicated that Johnson could return to work without accommodation. *Id.*

In a November 19, 2004 email, Miller communicated to Chevron's Business Partners and George that Crawford had sent Dr. Blair the November 9, 2004 letter along with Chevron's tool assessment. CP 897. Miller indicated that Dr. Blair had "checked off" that Johnson could return to work without any accommodations and that he planned to put Johnson on the schedule. *Id.* Johnson returned to work on November 25, 2004.

Then, on December 7, 2004, Miller told Christopher Rice of Chevron's HR department that when he came into work that day, Johnson had slipped a note under his door stating he was "scared to really explain daily pain level in back and legs" for fear of being pulled off the job. CP 899. On April 20, 2005, Johnson experienced his fourth and final back injury when he suffered a flare up while lifting a hose to drain the product.

RP 12/8/08 at 152-53. Johnson was placed on light duty from approximately mid-June until he was placed on permanent disability in August 2005. *Id.*

On May 3, 2005, Holmes sent Miller an email stating that he had discussed with George his concerns about Johnson's ability to continue his career driving a truck and that they both agreed that "Johnson cannot continue to get hurt, recover and get hurt again, the liability for him and the company is too high." CP 901.

On May 8, 2005, Ian Chong, Certified Professional Ergonomist, provided Johnson with his analysis and critique of the hose draining tool, a copy of which was subsequently sent to Rice. CP 923, 933, 935. The report found that the tool would "eliminate a significant portion of the at-risk conditions observed with handling hoses by hand" and that "[w]ith the offloading of the at-risk conditions, it is apparent that the task can be performed with less risk and effort than previously performed." CP 923.

On May 19, 2005, Holmes advised Miller that if Johnson was still claiming pain, they did not want him on a truck at all. CP 907. On July 8, 2005, the Union followed up with Rice regarding Chong's ergonomic report. CP 933. The Union requested to know why Chevron determined that Johnson's request to use the ergonomic tool was unreasonable and also demanded that Johnson be returned to regular duty,

with the use of the tool, or any other reasonable job modifications or accommodations. *Id.*

On August 8, 2005, Miller told Johnson that Chevron no longer had any light duty work available to accommodate Johnson's medical restrictions. RP 12/9/08 at 173. Johnson was placed on industrial leave, and then on long-term disability on August 16, 2005. *Id.*, RP 12/16/08 at 111-12.

On September 17, 2005, Johnson began treating with primary care physician, Dr. Chirag Amin. CP 1579. Then, on November 8, 2005, after receiving Dr. Amin's release, and after Johnson contacted Chevron regarding returning to work, Chevron's HR department told Miller that Johnson should not contact local management about returning to work, but should deal directly with Crawford. CP 912.

On February 13, 2006, Dr. Amin released Johnson back to work with reasonable accommodations, including use of the ergonomic tool, in order to help prevent re-injury and to provide assistance in performing work tasks. CP 964, 3015. About a month later, on March 14, 2006, Rice sent an email to a Chevron HR distribution list requesting a review of Johnson for job opportunities. CP 618. He provided a one-week deadline, until March 20, 2006, for recipients to respond. *Id.* The email *misrepresented* Johnson's actual functional limitations by stating that he

was limited to “sedentary to light-medium work” with “minimal degree of stretching, twisting and/or lifting,” thus giving the impression that Johnson was much more disabled than in reality. *Id.* Rice did not receive any positive responses to his email. CP 619, RP 12/17/08 at 102-03.

On April 27, 2006, Crawford emailed Chevron’s payroll department stating that Johnson was cut off from workers’ compensation due to being found employable, but “not employable for his job of injury,” and that “[d]ue to his permanent restrictions, he is permanently precluded from his job of injury.” CP 920.

At trial, Holmes stated that if an employee is claiming pain, then Chevron didn’t “want him on a truck at all.” RP 12/17/08 at 59.

On cross examination he was asked: “And is it fair to say that that view that you’ve just expressed, that if Johnson had pain, you don’t want him on the truck, it’s a view that you had from 2003 forward?” RP 12/17/08 at 60. Holmes responded: “My view is if an employee is working in our operations and he is in pain, we need to stop and we need to figure out what’s causing that pain so that that employee can return to work and be productive.” *Id.*

Additionally, Johnson twice applied for the full-time office clerk position at the Harbor Island facility, which would have provided him an opportunity to continue working for Chevron, but in a less physically

demanding role. RP 12/8/08 at 156-58. Both times Johnson applied, he was told that the position hours had been cut and it was no longer a full-time position. *Id.* Then, after Johnson was informed of this, the position later returned to full-time. *Id.* During his employment with Chevron, at various times, Johnson had worked in the clerk's position, without criticism, performing the usual duties of the position including filing, paperwork, and the driver's reports. *Id.*

Neither Chevron nor Crawford worked with Dr. Blair to determine what accommodations Johnson needed to perform his job of injury. CP 1333-34. Dr. Blair's deposition testimony explained that, "at periods of time," Johnson's back injury was severe enough to substantially limit Johnson's ability to perform his job and that it is reasonable to conclude that a tool which "helps reduce a patient's pain is a good thing." CP 1327, 1335. Dr. Blair admitted in his deposition that he was not familiar with the legal definition of "disability" as it pertains to Washington law or the legal requirements to reasonably accommodate a disabled worker. CP 1332-34.

From 2007 to July 2009, Johnson was employed as a product delivery driver for Associated Petroleum Products (APP), performing similar, if not more strenuous, tasks as he performed while working for Chevron. RP 12/8/08 at 167-169. APP allowed Johnson to use the

ergonomic fuel hose drainer and Johnson did not experience any further back injuries while working for APP. *Id.*

The trial court granted Chevron's Motion for Partial Summary Judgment and Second Motion for Partial Summary Judgment on November 13, 2008, thus dismissing Johnson's WLAD failure to accommodate claims from June 2000 to mid-April 2005 and after April 20, 2005. CP 1455, 1457. On November 26, 2008, the trial court denied Plaintiff's Motion for Reconsideration of Order Granting Defendants' Second Motion for Partial Summary Judgment. CP 2137.

At several points throughout the trial, plaintiff's counsel moved to amend the complaint pursuant to CR 15(b) in order to include Johnson's failure to accommodate claims in light of the testimony. RP 12/11/08 at 130, 12/15/08 at 11, 1/7/09 at 58. The trial court denied these requests. *Id.*

C. At Summary Judgment, The Trial Court Refused to Consider Key Testimony from Plaintiff's Disability Expert, Jacqueline Johnson

The trial court refused to consider the declaration of Plaintiff's disability expert, Jacqueline Johnson, when her testimony was properly presented to the court prior to summary judgment oral argument. CP 1456. Ms. Johnson's declaration, at minimum, established issues of material fact that should have been presented to the jury. CP 840-46. Ms. Johnson is an expert on the Americans with Disabilities Act (ADA) in terms of

accommodations and disability services. *Id.* She is employed by the Boeing Company, currently as an Accommodations Services/Disability Management/ADA Specialist. CP 840. Her responsibilities include providing advice and counsel on a number of disability related issues, including reasonable accommodations, disability laws and regulations, and company policies. CP 841.

Based on her background and experience, Johnson determined that “an employer cannot refuse to return to work an employee with a disability-related occupational injury simply because it assumes that the employee poses some increased risk of reinjury and increased workers compensation costs.” CP 848.

In her declaration, Ms. Johnson opined that, when a disabled employee is returned to work without any medical restrictions, this “does not remove an employer’s obligation to consider an employee’s request for a reasonable accommodation” and that “[u]nder ADA/WLAD an employer must engage in the interactive process with the employee in order to carefully evaluate the request and why it is needed.” CP 851. Based on her experience, Ms. Johnson felt that “Chevron did not engage in this interactive process with Mr. Johnson.” *Id.* Additionally, Ms. Johnson found that “[w]hen a qualified individual with a disability requests a specific accommodation, the employer should engage in an interactive

discussion with the employee in order to determine if the suggested accommodation can be provided, and if the suggested accommodation cannot be provided, to suggest equally effective alternative accommodations.” CP 852. Ms. Johnson stated that the decision not to accommodate a specific request must be based on undue hardship on the part of the employer. *Id.*

Expert Jacqueline Johnson felt that Chevron’s alternative job search for Johnson was inadequate. CP 856. She determined that “Chevron’s 6-day job search did not meet WLAD/ADA requirements for meeting obligations for the review of vacant jobs as the accommodation of last resort (reassignment).” *Id.*

D. The Trial Court Refused to Consider Additional Evidence Properly Presented to The Court Prior to the Decision Granting Partial Summary Judgment

On November 14, 2008, the trial court denied Plaintiff’s Second Request to Consider Additional Evidence, which concerned excerpts from Johnson’s deposition and two related court orders. CP 1400, 1459. The court found that the request was untimely because it was made after oral argument on the motions for summary judgment. CP 1460. Oral argument was held on November 7, 2008. CP 1400. Plaintiff’s counsel submitted his second request for the court to consider additional evidence on November

10, 2008. *Id.* The court issued its formal rulings granting the defendants' motions for summary judgment on November 13, 2008. CP 1455-58.

If the trial court had considered Johnson's deposition testimony, it would have shown that the reason Johnson switched his treating physician from Dr. Blair to Dr. Amin was because of Dr. Blair's statement to Johnson that his case was becoming too legal and Dr. Blair did not wish to get involved in the legal aspect of the case. CP 1408-10. Johnson also testified that Dr. Blair told him he was being pressured by Chevron and that Dr. Blair knew "what they [were] doing" to Johnson. *Id.* This testimony was offered under ER 613 as a prior inconsistent statement to show that Dr. Blair testified differently in his deposition. CP 1401.

The two court orders that Johnson submitted with his Second Request to Consider Additional Evidence sought to counter Chevron's representation that Johnson was unable to perform the essential functions of his job as a product delivery driver. *Id.* The court orders concern Johnson's disability claims against Chevron before the Board of Industrial Insurance Appeals. *Id.* The second order, a Stipulated Order on Agreement of Parties, from July 2008 King County Superior Court, Case No. 07-2-393888-9SEA, concerns claim numbers W-913810 and W-913825. CP 1420. Claim number W-913810 deals with Johnson's April 20, 2005 on-the-job injury while working for Chevron. *Id.* In the order, Dr. Lance

Brigham finds that Johnson “is capable of reasonably continuous and gainful employment, on a more probable than not basis,” that Johnson “does not need further curative treatment for his April 20, 2005 injury, on a more probable than not basis,” and that Johnson “has no permanent impairment as a proximate cause of the April 20, 2005 industrial injury, on a more probable than not basis.” CP 1421. Claim number W-913825 reaches the same conclusions with regard to Johnson’s May 22, 2004 industrial injury while working for Chevron. *Id.*

E. The Trial Court’s Decision to Include an Additional Element in Jury Instruction No. 11, Improperly Required Johnson to Show That He Was Treated Differently Than Non-Disabled Employees

Jury Instruction No. 11 dealt with Johnson’s disability discrimination claim under the WLAD, RCW 49.60, et al. CP 3196. The trial court’s approved instruction, submitted by Chevron, and objected to by Plaintiff, required Johnson to prove that he was treated differently than other non-disabled employees. CP 3196, RP 1/14/09 at 4-10. In rejecting the proposed Washington Pattern Jury Instructions (WPI), the trial court found that the law in Washington had evolved since *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817 (1973), and that it was appropriate to require Johnson to prove the existence of comparators. RP 1/14/09 at 7-8. Jury Instruction No. 11 stated, in part:

To establish his claim of discrimination on the basis of disability, Johnson bears the burden of proving each of the following propositions: 1. That he has a disability; and 2. That he is able to perform the essential functions of the job in question; and 3. That his disability was a substantial factor in the adverse employment action against Johnson, committed by Chevron, [and], 4. *That Johnson was treated differently than non-disabled employees in the workplace.*

CP 3196 (emphasis added).

Johnson proposed a modified version of WPI 330.01, which stated, in part:

To establish his claim of discrimination on the basis of disability, Bruce Johnson has the burden of proving each of the following propositions: (1) That he has a disability; (2) That he is able to perform the essential functions of the job in question with the ergonomic draining tool; and (3) That Chevron denied him use of an ergonomic hose draining tool, required its certification, assigned him less favorable routes, failed to hire him into a clerk position in 2005 and/or into another position in 2006, OR failed to provide him with additional light duty in 2005 AND that Bruce Johnson's disability was a substantial factor in any of these decisions by Chevron.

CP 2807.

F. The Trial Court's Decision to Include an Additional Element in Jury Instruction No. 12, Improperly Required Johnson to Show That He Was Treated Differently Than Non-African American Employees

Jury Instruction No. 12 concerned Johnson's claim of race discrimination in employment under the WLAD. CP 3197. Like the disability discrimination jury instruction, Johnson was also required to prove

that he was treated differently than other non-African-American drivers at the Harbor Island Chevron facility. *Id.* This instruction was also objected to by Plaintiff at trial. RP 1/14/09 at 4-10. The jury instruction stated, in part:

To establish his “disparate treatment claim” against Chevron based on his race, Johnson has the burden of proving the following propositions by a preponderance of the evidence: 1. That Chevron denied him use of an ergonomic hose draining tool, required its approved use, assigned him less favorable routes, failed to hire him in a clerk position in 2005 and/or into another position in 2006, OR failed to provide him with additional light duty in 2005; and 2. That he was treated differently than other Harbor Island facility drivers who are not African-American and; 3. That Johnson’s race was a substantial factor in any of Chevron’s decisions as set forth above.

Id.

Like his disparate treatment disability claim, Johnson proposed a modified version of WPI 330.01 for the jury instruction concerning his disparate treatment race claim. CP 2081.

G. The Trial Court’s Admission of Extrinsic Evidence Concerning Statements Made by Johnson to Subsequent Employers and False Accusations of Patent Fraud

At trial, Judge Spector allowed testimony, over Plaintiff’s counsel’s ER 401, 403, and ER 608(b) objections, concerning statements that Johnson made to subsequent employers. RP 12/9/08 at 216-223, CP 1461, 1753, 1996. The trial court stated that it was allowing the testimony for the purposes of impeachment. RP 12/9/08 at 218. The admitted testimony and evidence concerned a post-offer medical examination form Johnson filled

out prior to his employment with Praxair in 2007. RP 12/9/08 at 216-223. On the medical form, Johnson checked “no” to questions asking whether he was experiencing any upper or lower back pain or kidney or bladder trouble. RP 12/9/08 at 220, CP 1472. During his testimony, Johnson indicated that he was not experiencing any such pains at the time the form was filled out. RP 12/9/08 at 220.

Plaintiff’s fourth motion in limine sought to exclude evidence pertaining to Johnson’s patent application process for the ergonomic fuel hose drainer. CP 1594-1604. This request included both testimony by Johnson’s former patent attorney, David Tingey, and related evidence concerning the patent application. *Id.* Judge Spector’s ruling on the issue was somewhat unclear; she stated: “Obviously let me just tell you where I am by plaintiff’s motion to exclude testimony by his former patent attorney, Tingey, T-I-N-G-E-Y. I would never want to invade the attorney-client privilege, and I can’t imagine either counsel would want to get in there.” RP 11/25/08 at 19. Later, at trial, Chevron’s counsel informed Judge Spector that she had denied Plaintiff’s fourth motion in limine. RP 12/3/08 at 21-22.

During trial there were multiple references made to Johnson’s patent application process. RP 12/9/08 at 202-10, 1/14/09 at 137. The trial court permitted Chevron to question Johnson as to whether or not he was the original, sole inventor of the tool and admitted the patent application into

evidence. RP 12/9/08 at 202-10, Ex. 306. Then, during Chevron's closing argument, counsel again called into question Johnson's right to the patent for the ergonomic fuel hose drainer. RP 1/14/09 at 137. Counsel stated:

We saw Johnson's willingness to say whatever he needed to regardless of whether the statement was accurate or not when he sought to get a patent on the tool he now claims to have invented. He signed a document under penalty of perjury saying that he was the sole inventor of this tool, despite having sat on the stand, telling you that he got this tool from Willie Jones. He knew he did not invent this tool.

Id.

H. The Trial Court's Failure to Grant Sanctions When Defendants' Released Tens of Thousands of Documents Shortly Before the Discovery Cut-Off and After Key Depositions Were Taken

On November 13, 2008, the same day that she granted Chevron and Miller's motions for partial summary judgment, Judge Spector denied Johnson's request for sanctions regarding the last minute release of key documents during discovery. CP 1453-54. Plaintiff's Motion for Sanctions described that shortly before the discovery cut-off date, and after Plaintiff's counsel had deposed key witnesses, including several witnesses in California, Chevron produced over ten thousand pages of documents. CP 1094-1104. New documents were interspersed with previously produced documents and key documents were broken up and hidden within irrelevant or previously produced documents. *Id.* Plaintiff's motion went on to describe in detail, by date, description, and Bates stamp number, the documents that

Plaintiff felt were improperly produced and which would have been relevant to a previously taken deposition. *Id.* Additionally, Plaintiff attached the relevant documents to his motion as exhibits. CP 1094-1143.

The trial court found that “Plaintiffs [sic] vaguely referred to duplicative pages being provided on October 9, 2008 without any specificity as to what documents those were. It remains unclear what documents would trigger re-deposing the witnesses as a result of the alleged late disclosures.” CP 1453-54. Plaintiff filed a motion to reconsider on November 19, 2008. CP 1764-1768. This motion was denied on December 2, 2008. CP 2138.

I. Defendants’ Counsel’s Misconduct at the California Depositions

In Plaintiff’s fifth motion in limine, he objected to Chevron’s misconduct at the Chris Rice and Willie Jones depositions under CR 30(h) and CR 30(d). CP 1611-16. Plaintiff requested that the trial court provide a jury instruction stating that: “the jury is to presume Mr. Rice would have provided favorable testimony to plaintiff, but did not do so because counsel for the defendants improperly interfered with the taking of his deposition; and (2) that defendants are precluded from using the Willie Jones deposition at trial for any purpose.” CP 1616. The trial court denied Plaintiff’s fifth motion in limine, stating that Johnson should have taken up his discovery issues with the special master and finding that a CR 43 manager’s status is

determined at the time relevant to the plaintiff's claims, not at the time of deposition notice. RP 11/25/08 at 39-46.

During Rice's deposition, Chevron coached the witness and repeatedly told him "not to guess." CP 1612. At one point, when Rice was asked a question about whether a document refreshed his recollection, Chevron's counsel stated "[t]he document speaks for itself." CP 1629. Rice then responded "[y]eah. Document – okay. Those words, the document does speak for itself." *Id.* At Willie Jones' deposition, Chevron's counsel refused to let Plaintiff's counsel fully question the witness and ended the deposition early. CP 1613-14.

J. The Trial Court's Decision to Award \$25,923.02 in Costs to Defendants and Refusal to Grant CR 11 Sanctions

The trial court erroneously awarded Chevron costs of \$25,923.02, of which \$22,333.63 was for deposition expenses. CP 2948-2951. Chevron's basis for these expenses shifted over time. CP 2911, 2943. Chevron did not itemize or identify its alleged costs. CP 2905, 2908-2912, 2942-2946. After months of opposing Johnson's efforts for reconsideration and expedited review of this issue, Chevron finally admitted that its position was erroneous. CP 3297. The trial court denied CR 11 sanctions even after it was shown that Chevron sought to use the erroneous ruling as a lever to force Johnson to settle his case prior to appeal. CP 3368, 3616.

IV. ARGUMENT

A. The Trial Court Erred When It Granted Defendants' Motions for Partial Summary Judgment on Johnson's Failure to Accommodate Claims.

An appellate court reviews “a summary judgment order de novo, engaging in the same inquiry as the trial court and viewing the facts and all reasonable inferences in the light most favorable to the nonmoving party.” *King v. Rice*, 146 Wn. App. 662, 668, 191 P.3d 946 (2008).

“Summary judgment in favor of the employer in a discrimination case is often inappropriate because the evidence will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury.” *Davis v. West One Automotive Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007). The WLAD “mandates liberal construction.” *Martini v. Boeing Co.*, 137 Wn.2d 357, 364, 971 P.2d 45 (1999), RCW 49.60.020 (“The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.”).

“An employer’s failure to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee constitutes *discrimination* unless the employer can demonstrate that such accommodation would result in an undue hardship to the employer’s business.” *Pulcino v. Federal Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d

787 (2000). “Generally, whether an employer made reasonable accommodation or whether the employee’s request placed an undue burden on the employer are questions of fact for the jury.” *Id.* at 644.

The Court in *Pulcino* set forth a two-prong test that an accommodation claimant must satisfy in order to meet the “handicap” element of his or her claim. The employee must prove that “(1) he or she has/had a sensory, mental, or physical abnormality and (2) such abnormality has/had a substantially limiting effect upon the individual’s ability to perform his or her job.” *Id.* at 641. The sensory, mental, or physical abnormality can be shown through an existing record or history or by showing a “condition that is medically cognizable or diagnosable.” *Id.*

The Washington State Legislature codified the standard for qualifying for a reasonable accommodation in employment, thus rejecting the Washington Supreme Court’s decision in *McClarty v. Totem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006), stating that *McClarty* “failed to recognize that the law against discrimination affords to state residents protections that are wholly independent of those afforded by the federal Americans with disabilities act of 1990, and that the law against discrimination has provided such protections for many years prior to passage of the federal act.” Laws of 2007, ch. 317, § 1. The 2007 changes

to RCW 49.60.040 were made retroactive and apply “to all causes of action occurring before July 6, 2006, and to all causes of action occurring on or after July 22, 2007.” Laws of 2007, ch. 317, § 3.

RCW 49.60.040(25)(d) states:

Only for the purposes of *qualifying for reasonable accommodation in employment*, an impairment² must be known or shown through an *interactive process to exist in fact* **and:**

(i) The impairment must have a *substantially limiting effect* upon the individual’s ability to perform his or her job, the individual’s ability to apply or be considered for a job, or the individual’s access to equal benefits, privileges, or terms or conditions of employment; **or**

(ii) The employee must have put the employer on notice of the existence of an impairment, and medical documentation must establish a reasonable likelihood that engaging in job functions without an accommodation would aggravate the impairment to the extent that it would create a substantially limiting effect.

(emphasis added).

RCW 49.60.040(25)(b) notes that: “A disability exists whether it is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within

² Under RCW 49.60.040(25)(c), an “impairment” includes, but is not limited to:

(i) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or

(ii) Any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

the scope of this chapter.” Back pain is a disability. *Turner v. Hershey Chocolate USA*, 440 F.3d 604, 611 (3rd Cir. 2006).

Miller, as Johnson’s supervisor, can be held individually liable for his discriminatory behavior under the WLAD. RCW 49.60.040(3), RCW 49.60.220, *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 357-60, 20 P.3d 921 (2001) (noting “the Legislature’s intent to hold supervisors personally liable” through RCW 49.60.220).

Summary judgment on Johnson’s failure to accommodate claims was improper. First, Johnson was able to establish that he was disabled, or that he met the “handicap” element of his claim. Johnson had a physical abnormality – his, at times, significant back pain. This back pain was well documented in the record through PCEs, Independent Medical Examinations (IMEs), by Johnson’s two treating physicians, Dr. Blair and Dr. Amin, in emails to and from his supervisor, Miller, and amongst the Chevron HR department, Miller, Holmes, and Crawford. Although Johnson’s back pain was, at times, more or less severe, it qualifies as a disability under RCW 49.60.040(25)(b). Johnson alleged Chevron’s failure to accommodate from summer 2003 until he was formally terminated in 2007. CP 1400.

Johnson was able to show that his physical abnormality had a substantially limiting effect on his ability to perform his job. His supervisor, Miller, was aware of this limiting effect by at least mid-2003 when Johnson

called him from Tacoma complaining of back pain and indicating that he planned to call 911. RP 12/16/08 at 66-67. Miller knew Johnson's back pain was substantially limiting Johnson's ability to perform his job because Johnson was not able to complete his remaining deliveries that day. *Id.* On several occasions Miller observed Johnson limping and complaining of back pain. Furthermore, on December 7, 2004, Johnson slipped a note under Miller's door at work indicating that he was afraid to explain the daily level of pain in his back for fear that he would be taken off the job. CP 899. Dr. Blair's testimony, submitted prior to summary judgment, provided further evidence that, at times, Johnson's back injury substantially limited his ability to perform his job. CP 1327.

In order to establish a material fact to support the next element of his *prima facie* case, Johnson had to show that he was qualified to perform the essential functions of his job. Johnson was able to show this in several ways. First, although he experienced back injuries, painful flare-ups, and varying degrees of back pain, Johnson was still able to perform the essential functions of his job while he was working as a product delivery driver for Chevron – inspecting the truck, loading the truck with fuel, delivering the fuel to the gas stations, unloading the fuel into an underground tank, and a final inspection of the truck. He was able to complete the average of five loads per shift while not on disability or light-duty assignment. After his

final back injury on April 20, 2005, Johnson was placed on light-duty assignment for several months before being placed on industrial leave, and then long-term disability. However, on February 13, 2006, Dr. Amin released Johnson back to work with reasonable accommodations. CP 964, 3015. Chevron refused to allow Johnson to return to his job as a product delivery driver.

Additionally, from 2007 to July 2009, Johnson worked for APP, performing substantially the same job that he performed for Chevron. Johnson was permitted to use the ergonomic fuel hose drainer and did not experience any further back injuries. Given that for the past two years Johnson has performed essentially the same job functions he performed while working for Chevron, it is at least a question of fact as to whether Johnson was qualified to perform the essential functions of his job as a product delivery driver for Chevron.

The third element that Johnson must establish is that he gave Chevron notice of his disability and his accompanying substantial limitations. Again, Johnson can easily prove the notice requirement. There is substantial documentation in the record, which was before the trial court at summary judgment, that Chevron knew of Johnson's back pain and his request for the reasonable accommodation of using the ergonomic fuel hose drainer. Chevron knew Johnson injured his back in early 2000.

Chevron knew Johnson injured his back for a second time in mid-2003 when Miller drove down to Tacoma to pick Johnson up and Johnson was subsequently placed on light duty. Chevron knew that as of late 2003, early 2004, Johnson began using and developing the hose drainer tool as an accommodation for his disability. Chevron knew of the substantial limitations of Johnson's injury. For example, Chevron knew that, as a result of his back injuries, Johnson experienced problems lifting and sitting for long periods of time. On October 27, 2004, Dr. Blair released Johnson back to work with "reasonable accommodations," stating that Johnson would occasionally benefit from the use of the "handmade tool" to assist him in his job. CP 885. On February 13, 2006, Dr. Amin also released Johnson back to work with reasonable accommodations, including use of the ergonomic tool, in order to help prevent re-injury and to provide assistance in performing work tasks. CP 964, 3015.

Lastly, Johnson must show that, upon notice, Chevron failed to affirmatively adopt measures that were available to it and medically necessary to accommodate Johnson's disability. Johnson gave Chevron notice of his desire to use the ergonomic fuel hose drainer as an accommodation for his disability as early as late 2003, early 2004. Miller even rode along with Johnson to observe his use of the hose draining tool. RP 12/4/08 at 118-119, CP 2170. Miller told Johnson that he could no longer

use the tool until it was certified by Chevron. CP 1033-34. Johnson's union sent Chevron several letters requesting that Johnson be allowed to use the tool as an accommodation for his disability. CP 933, 1033-34, 2170. Chevron failed to adopt a measure that it had available to it when it refused to allow Johnson to use the tool as an accommodation. Furthermore, once Chevron determined that Johnson could not use the tool, it failed to look into any alternative accommodations that might accommodate Johnson's disability. Additionally, Chevron's evaluation of the tool failed to take into account that it was intended for use as an accommodation for a disability. Chevron evaluated the tool to see whether it should be used by healthy product delivery drivers and whether Chevron should consider changing the standard procedure for draining fuel hoses by using the tool. Lastly, Chevron failed to address Chong's ergonomic study of the tool, which found that it alleviated "a significant portion of the at-risk conditions" of draining the fuel hoses, when the report was submitted to Chevron. CP 923.

There are questions of fact as to whether Chevron adequately evaluated the tool as an accommodation for a disability, whether Chevron should have taken additional steps to provide Johnson with an alternative accommodation, and whether Chevron or Crawford should have engaged in an interactive process with Dr. Blair to determine if the tool was medically necessary. Furthermore, Chevron's one-week job search,

describing Johnson as much more disabled than he was in reality, was inadequate, or is at least a question of fact as to its adequacy. Chevron's refusal to consider Johnson for the Harbor Island office clerk position as an accommodation for his disability is also a question of fact for the jury. For these reasons, summary judgment was improper with regard to Johnson's WLAD failure to accommodate claims.

B. The Trial Court Committed Reversible Error When It Failed to Permit Plaintiff to Revive the Accommodation Claim During Trial.

CR 15(a) states that, after an Answer is served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." During trial, Dr. Amin's testimony and supporting exhibits showed that he had consistently opined that Johnson could drive trucks for Chevron with accommodation. RP 12/10/08 at 160-61, CP 2618. Additionally, at trial, Manager Holmes testified that if an employee is claiming pain, then Chevron didn't "want him on a truck at all." RP 12/17/08 at 59. This compelling evidence showed that Johnson was qualified to drive Chevron trucks despite his disability and that Chevron's intent was to discriminate. Yet the trial court repeatedly denied Johnson's requests to permit the accommodation claim to be heard. This was an abuse of discretion.

C. The Trial Court Abused Its Discretion When It Summarily Excluded The Testimony of Plaintiff's Accommodations Expert, Jacqueline Johnson, at Summary Judgment.

An appellate court reviews a trial court's decision to admit or exclude expert testimony on an abuse of discretion standard. *Aubin v. Barton*, 123 Wn. App. 592, 608, 98 P.3d 126 (2004). "A court abuses its discretion in admitting or excluding expert testimony when its decision is manifestly unreasonable or based on untenable grounds or reasons." *Id.* In the instant case, the trial court abused its discretion in striking the declaration and report of Plaintiff's accommodations expert, Jacqueline Johnson without citing any reason whatsoever. CP 1455-56. In contrast, Johnson sought to strike improper testimony by Miller and others, which violated the Rules of Evidence, but the trial court apparently considered that admissible evidence. CP 808-811.

D. The Trial Court Erred When It Refused To Consider Additional Evidence Presented By Plaintiff Before The Court's Ruling Granting Partial Summary Judgment.

In *Cofer v. Pierce County*, 8 Wn. App. 258, 261, 505 P.2d 476 (1973), Division II addressed the issue of whether or not an affidavit submitted by plaintiff's counsel after summary judgment oral argument was properly considered by the trial court. The court found that it was; it stated:

Under normal circumstances it is not desirable to file affidavits after argument is heard on the motion, but it is a party's right to do so. Until a formal order granting or denying the motion for summary judgment is entered, a party

may file affidavits to assist the court in determining the existence of an issue of material fact.

Id. (citing *Felsman v. Kessler*, 2 Wn. App. 493, 468 P.2d 691 (1970) and *Nicacio v. Yakima Chief Ranches, Inc.*, 63 Wn.2d 945, 389 P.2d 888 (1964)). See also *Shellenbarger v. Brigman*, 101 Wn. App. 339, 346, 3 P.3d 211 (2000) (holding that the “trial court may consider additional evidence ‘after a decision on summary judgment has been rendered, but before a formal order has been entered.’”).

In the instant case, the trial court erred when it refused to consider the additional evidence properly presented to the court before the formal order had been entered. This evidence consisted of several pages of Johnson’s deposition, which was offered to show prior inconsistent statements made by Dr. Blair during his deposition, and two stipulated court orders, which were offered to show that Johnson was able to meet the second element of his *prima facie* case – that he was qualified to perform the essential functions of his job. Even if this Court finds that the trial court properly excluded the additional evidence submitted after oral argument, it should consider the evidence on appeal. The plaintiff’s claims in *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 789-90, 585 P.2d 1174 (1978), were dismissed on summary judgment and the plaintiff thereafter submitted

additional evidence with his motion to reconsider, which was considered by the appellate court.

E. The Trial Court Committed Reversible Error When It Included an Additional Element in Jury Instruction No. 11.

Jury instructions are reviewed in their entirety by an appellate court.

Easley v. Sea-Land Service, Inc., 99 Wn. App. 459, 467, 994 P.2d 271 (2000) (citing *Dean v. Municipality of Metro, Seattle-Metro*, 104 Wn.2d 627, 634, 708 P.2d 393 (1985)). They are not considered erroneous if: “(1) they permit both parties to argue their theory of the case; (2) they are not misleading; and (3) when read as a whole, they properly inform the trier of fact of the applicable law.” *Id.* (citing *Dean*, 104 Wn.2d at 634 and *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994), *aff’d*, 127 Wn.2d 401, 899 P.2d 1265 (1995)). However, an appellate court “will not reverse an erroneous instruction unless prejudice is shown.” *Id.* “Unless the error affects or presumptively affects the outcome of the trial, it is not prejudicial.” *Id.*

In *Johnson v. Dept. of Soc. and Health Servs.*, 80 Wn. App. 212, 907 P.2d 1223 (1996), Division II discussed whether an employee claiming race discrimination under the WLAD must prove both discrimination based on race and that he was treated differently than similarly situated Caucasian employees. The court’s reasoning in *Johnson* should apply equally to

WLAD disparate treatment claims concerning race and disability discrimination. The court stated:

DSHS argues Johnson must show “he was intentionally treated differently, due to his race, from a similarly situated non-black employee whose conduct was of comparable seriousness,” citing generally, “*McDonnell Douglas, supra.*” This is incorrect. The purpose of showing disparate treatment is to create an inference of discriminatory animus because direct evidence of discrimination is rarely available. Therefore, Johnson is not required to show *both* that he was treated differently than a similarly situated Caucasian *and* that the different treatment was based on race; if he could show negative treatment based on race, he would not need to show how other persons were treated.

Id. at 227, n.20 (internal citations omitted) (emphasis in original).

Additionally, the WPI do not contain an element requiring the plaintiff to prove the existence of comparators.³

It appears the trial court sought to insert a part of the *McDonnell Douglas* shifting burden analysis into the jury instruction. Yet, that analysis

³ WPI 330.01 (2005) states:

Discrimination in employment on the basis of [age] [creed] [disability] [marital status] [national origin] [race] [religion] [sex] is prohibited.

To establish [his] [her] “disparate treatment claim”, _____ has the burden of proving the following propositions:

(1) That _____ [terminated] [did not promote] [did not hire] [laid off] _____; and

(2) That _____ [age] [creed] [disability] [marital status] [national origin] [race] [religion] [sex] was a substantial factor in _____ decision [to terminate] [not to promote] [not to hire] [to lay off].

If you find from your consideration of all the evidence that each of the propositions stated above has been proved, your verdict should be for _____ [on this claim]. On the other hand, if either of the propositions has not been proved, your verdict should be for _____ [on this claim].

is not for the jury to hear; it is simply a means of proof at summary judgment. *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 490, 859 P.2d 26 (1994).

Johnson should not have been required to show the existence of comparators in order to prove his WLAD claim for disability disparate treatment. In fact, the goal is to show discriminatory intent, and such intent may be shown in multiple ways. *Hasan v. Foley & Lardner LLP*, 552 F.3d 520, 529 (7th Cir. 2008). Such a position is not supported by Washington case law when there is direct evidence of discrimination or the Washington Pattern Jury Instructions. In this case, the trial court committed reversible error when it added the element of comparators to Johnson's disability discrimination claim. This error prejudiced Johnson because it created an additional, unsupported, barrier to his claims that affected the outcome of the trial.

F. The Trial Court Committed Reversible Error When It Included an Additional Element in Jury Instruction No. 12.

For the reasons stated in the preceding section, Section IV(E), Johnson also appeals regarding the additional element that was added to his WLAD claim for employment discrimination, disparate treatment based on race. It was prejudicial error to require Johnson to prove, in

addition to discrimination based on race, that he was treated differently than other Harbor Island facility drivers who were not African-American.

G. The Trial Court Abused Its Discretion When It Admitted Extrinsic Evidence Concerning Statements Johnson Made to Subsequent Employers.

The admission or exclusion of evidence by the trial court is reviewed using an abuse of discretion standard. *State v. Smith*, 30 Wn. App. 251, 257-58, 633 P.2d 137 (1981). ER 608(b) states:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, *may not be proved by extrinsic evidence*. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, *be inquired into* on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(emphasis added). See also *State v. Wilson*, 60 Wn. App. 887, 891-93, 808 P.2d 754 (1991) (discussing the application of ER 608(b) and noting that the trial court “should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury)”), Tegland, 5A Wash. Prac., Evidence Law and Practice § 608.11 (5th ed. 2008) (stating that “if the witness denies the specific misconduct or incident on cross-examination, the inquiry is at an end. The cross-examiner must ‘take the answer’...of

the witness and may not call a second witness to contradict the first witness”). No ER 403 balancing was done on the record by the court.

The trial court abused its discretion when it admitted extrinsic evidence concerning statements Johnson made in a post-offer medical examination for his subsequent employer, Praxair. Ex. 512, CP 1472, RP 12/9/08 at 216-223. These statements were not made under oath and, as extrinsic evidence, should not have been admitted to show a specific instance of conduct for the purpose of attacking Johnson’s credibility. The trial court further abused its discretion by allowing the testimony of Stephen Fewell, the physician’s assistant that performed the medical examination on Johnson. RP 12/16/08 at 179. This testimony sought to attack Johnson’s credibility through another witness, which is in violation of the Rule.

H. The Trial Court Abused Its Discretion When It Allowed Irrelevant, Prejudicial Testimony and Evidence Concerning Johnson’s Patent Application.

An appellate court applies an abuse of discretion standard of review to the trial court’s refusal to strike evidence. *Deschamps v. Mason County Sheriff’s Office*, 123 Wn. App. 551, 563-64, 96 P.3d 413 (2004). ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “Evidence which is not relevant is not admissible.” ER 402. Additionally,

even if evidence is relevant, it “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....” ER 403.

The patent application is extrinsic evidence which was used for the purpose of attacking Johnson’s credibility and should not have been allowed in under ER 608(b), *supra* at 42-43.

Judge Spector’s ruling was unclear, but appears to have granted Johnson’s fourth motion in limine concerning the patent. She stated: “Obviously let me just tell you where I am by plaintiff’s motion to exclude testimony by his former patent attorney...I would never want to invade the attorney-client privilege, and I can’t imagine either counsel would want to get in there.” RP 11/25/08 at 19. Judge Spector did not comment on Johnson’s request to exclude related evidence concerning the patent application. Then, at trial, Chevron improperly told Judge Spector that she had denied Johnson’s fourth motion in limine. RP 12/3/08 at 21-22.

The trial court abused its discretion by allowing Chevron to repeatedly assert and imply that Johnson did not deserve the patent he obtained for his ergonomic fuel hose drainer. RP 12/9/08 at 202-10, 1/14/09 at 137. Information pertaining to Johnson’s patent application process was irrelevant to the current litigation. The legitimacy of the patent in no way made “the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence” and Chevron should not have been permitted to imply that Johnson improperly obtained the patent. ER 401. Furthermore, even if this court finds the patent application process relevant, the evidence should have been excluded under ER 403 as unfairly prejudicial, confusing, and misleading to the jury. Johnson brought claims under the WLAD against his former employer and former supervisor for race and disability discrimination. No counterclaims were asserted. The patent application was irrelevant and unfairly prejudicial.

I. The Trial Court Abused Its Discretion When It Refused To Grant Sanctions for Chevron’s Deposition Misconduct and Document Dump.

In *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993), the Washington Supreme Court determined that an abuse of discretion standard applies to the trial court’s decision of whether or not to impose sanctions for discovery abuses. The *Fisons* court found that “Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37.” *Id.* at 342. “Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.” *Id.* at 355.

CR 30(h) controls the conduct of depositions. CR 30(h)(2) states:

Only objections which are not reserved for time of trial by these rules or which are based on privileges or raised to questions seeking information beyond the scope of discovery may be made during the course of the deposition. All objections shall be concise and must not suggest or coach answers from the deponent. Argumentative interruptions by counsel shall not be permitted.

In addition, CR 30(h)(6) requires that “[a]ll counsel and parties shall conduct themselves in depositions with the same courtesy and respect for the rules that are required in the courtroom during trial.”

At the deposition of Christopher Rice, defense counsel made numerous objections in violation of CR 30(h)(2). By “instructing” the witness not to guess, counsel in effect suggested to Rice that he did not know the answer. Chevron’s interjection of “if you know,” coached Rice into responding that he did not know the answer. CP 1618.

Chevron’s most egregious disregard for CR 30(h)(2) related to questions concerning the essential functions of the job of product truck delivery driver. Chevron told Rice that there was a list of the essential job functions, which had the effect of notifying him that his statements should be consistent with that list. Rice refused to answer the question after these comments by Chevron, even though Rice had previously answered four questions about the essential functions of the job without hesitation. CP 1631-1636. Obviously, once a witness has been coached on the record,

there is no way to undo the coaching. At that point, the witness is aware of both the questions to be asked and the desired response.

Chevron unilaterally terminated the deposition of Willie Jones in violation of CR 30(d), which provides the appropriate procedure to terminate a deposition. The Rule requires a motion to the court and a “showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party.” CR 30(d). In this case, Chevron terminated the deposition early, while plaintiff’s counsel was cross-examining the witness, and did not file a motion under CR 30(d). CP 1677.

The trial court abused its discretion under *Fisons* because Chevron’s deposition misconduct was a clear violation of the discovery rules. Chevron acted in a way that was inconsistent with the spirit and purpose of Rule 30 and to let its conduct go unsanctioned is to encourage similar behavior in the future. It is essentially condoning the actions of defense counsel and a complete disregard for the clearly established policy and procedures set out in Rule 30.

Chevron’s document dump should also have produced sanctions. The *Fisons* court stated that “*Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.*” *Fisons*, 122 Wn.2d at 342 (citations omitted by the Court) (emphasis in original).

Chevron violated CR 26(g) because its last minute discovery responses were produced long after they were requested, were not consistent with the spirit and purposes of the discovery rules, and were not organized as required by CR 34(b) (documents must be produced as they are kept in the usual course of business or shall be organized and labeled). The ten thousand pages of documents were produced after key depositions had been taken, including several California depositions, and were unduly burdensome, unreasonable, and interposed for an improper purpose.

The trial court abused its discretion in not granting Johnson's request for sanctions because it failed to comply with the Rule's stated purpose, i.e. that of *curbing discovery abuses* through the imposition of sanctions. "Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found." *Fisons*, 122 Wn.2d at 355.

Johnson identified the specific documents and actions that violated the rule by listing the date, description, and Bates stamp number of the documents and attaching them to the motion, and the trial court erred in finding that Johnson was "unclear" and that he "vaguely" referred to the documents. CP 1453.

J. The Trial Court Abused its Discretion in Awarding Unsupported Costs and in Denying CR 11 Sanctions.

Chevron failed to justify its \$6,000 in general costs in the same way it failed to justify \$23,000 in deposition costs. The costs should be denied. CR 11 imposes sanctions for attorneys and parties who file documents, which are unsupported in law or fact. “The principal concern of [CR 11] is whether the attorney acted reasonably in taking the action.” *Doe v. Spokane and Inland Empire, 5 Blood Bank*, 55 Wn. App. 106, 111, 780 P.2d 853 (1989). Attorney Portia Moore submitted no declaration explaining her conduct in pursuing unsubstantiated costs at trial, and in using the erroneous judgment as a lever to settle the case without appeal. CP 3416-3433. This Court should conclude that her actions were intentional. Sanctions were appropriate and the trial court abused its discretion in failing to impose those sanctions.

V. CONCLUSION

For the reasons stated above, Plaintiff/Appellant Bruce Johnson respectfully requests that this Court find reversible error in the trial court’s decision to grant partial summary judgment on his Washington Law Against Discrimination failure to accommodate claims, the cost bill, jury instructions, deposition misconduct, and the discovery and evidentiary rulings discussed above.

Respectfully submitted this 30th day of September, 2009.

The Sheridan Law Firm, P.S.

By: 

John P. Sheridan, WSBA # 21473
Attorneys for Plaintiffs

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DECLARATION OF SERVICE

Courtney Jordt states and declares as follows:

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

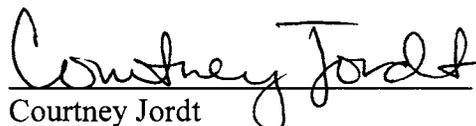
2. On September 30, 2009, I caused to be delivered via legal messenger to the following attorney:

Portia R. Moore
Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101-2338
Attorney for Chevron, U.S.A., Inc. and Greg Miller

a copy of the BRIEF OF APPELLANT.

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

DATED this 30th day of September, 2009, at Seattle, King County, Washington.


Courtney Jordt
Legal Assistant