

No. 63008-3-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

BRUCE JOHNSON,

Plaintiff/Petitioner

v.

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

Defendants/Respondents

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

RESPONDENTS' ANSWERING BRIEF

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I. INTRODUCTION AND SUMMARY

Appellant Bruce Johnson refuses to accept that he has a bad back which ultimately prohibited him from doing the physically demanding job of a Chevron tanker truck driver. For years, Respondent Chevron U.S.A., Inc. tried to help Johnson deal with his back problem. When Johnson's doctors said he wasn't fit to do the job, Chevron put him on medical leave or gave him light duty, at full pay. When Johnson's doctors said he safely could do the job, Chevron had him drive its tanker trucks. From January 1, 2002 through August 1, 2005, Chevron paid Johnson for 319 days of time off or light duty; during that same period, Johnson worked 329 days in his regular job as a Chevron tanker truck driver. RP (12/16/09) at 43.

Even though Chevron was doing everything it could for him, and everything Johnson's doctors had ordered, Johnson did not want to believe his back was the cause of his problems, and he started to complain about every perceived slight. He began to assert that his supervisor, Greg Miller, was discriminating against him. Chevron investigated Johnson's charges, and found nothing to them. Indeed, Johnson's own union refused to pursue the many grievances he asked it to file on his behalf.

Around the same time, Johnson came across a homemade, hand-held hose lifting tool that would become the focus of this case. Although no doctor ever concluded that the tool could accommodate Johnson's back

problems, Johnson thought it helped. He liked the tool so much that he changed the design and began to market it. He particularly wanted Chevron to buy the tool for its drivers. Following expert testing, however, Chevron concluded that the tool posed a greater risk to drivers than its standard practices. Chevron declined to buy it, and informed its drivers that they could not use the tool because of the risk of injury.

In April 2005, Johnson suffered his fourth and final on-the-job back injury. Unfortunately, this final back injury precluded Johnson from returning to his Chevron tanker truck driver job. Every doctor who examined Johnson concluded that he could not perform the essential functions of the job. Indeed, Johnson was ultimately deemed permanently partially disabled, and qualified for long-term disability benefits. Unsatisfied, he brought suit against Chevron and Miller, claiming failure to accommodate, discrimination, hostile work environment and retaliation.

Johnson's appeal follows the same pattern of blind denial he exhibited at work and throughout this case. There are no grounds for reversal. The trial court's dismissal of Johnson's failure to accommodate claim was proper. Johnson had no right to accommodation prior to this final back injury because his doctors all agreed he could work without restriction; Johnson had no right to accommodation after his final back injury because his doctors all agreed he could not perform the essential

functions of the job. The court's instructions and evidentiary rulings were likewise proper. The jury reached a verdict in this case in less than one hour (after nearly three weeks of trial). That verdict should be affirmed.

II. COUNTERSTATEMENT OF THE FACTS

A. Factual Background.¹

Johnson began working as a Chevron tanker truck driver in 1996. Working out of Chevron's West Seattle facility, Johnson delivered gasoline to stations throughout Western Washington. RP (12/4/08) at 58. It was a physically demanding job which required him to lift and maneuver the heavy hoses that are used to move gasoline from the truck to a station's storage tanks. *Id.* at 58-59. Chevron's work safety experts prepared a physical requirements report for the delivery driver job. RP (12/15/08) at 84-87. Among many other things, it stated that drivers had to frequently lift up to 46 pounds, and frequently push/pull up to 50 pounds. RP (12/3/08) at 47-49, 95-96; Ex. 463. This report was used by the various medical professionals who, as discussed below, examined

¹ Johnson's failure to accommodate claim was dismissed prior to trial. Yet throughout Johnson's brief, citations to the trial proceedings are intermingled with citations to the summary judgment record, thereby confusing the record for review. To avoid exacerbating this confusion, Chevron sets forth the facts proven at trial (which Johnson does not challenge on appeal) as background, and separately describes the summary judgment record in the argument section devoted to that issue below.

Johnson over the years to determine whether he could safely work as a Chevron tanker truck driver. *Id.* at 54, 94; RP (12/15/08) at 90-91.

Johnson suffered the first of four on-the-job back injuries in July 2000, and was placed on medical leave. RP (12/9/08) at 22. While he was off, Greg Miller became supervisor of the West Seattle delivery driver office. RP (12/16/08) at 9. When Johnson returned, he worked more than a year without incident. In March 2002, however, Johnson suffered a second back injury. He underwent surgery in October 2002, followed by seven more months of medical leave. RP (12/9/08) at 22-24. Johnson's personal physician, Dr. Blair, released Johnson back to work without restriction in March 2003. *Id.* at 24; RP (12/9/08) at 19-21; RP (12/16/08) at 19-20; Ex. 326. With the exception of a couple of days off and a stint on light duty during the summer of 2003, Johnson remained on the job through May 2004. RP (12/16/08) at 24-27, 113-114. Johnson was given a physical capacity examination ("PCE") in October 2003, which confirmed that he could work without restriction. *Id.* at 27; Ex. 348.

It was around this time that Johnson started complaining about alleged unfair treatment. Among other perceived slights, Johnson thought Miller had subjected him to unnecessary PCEs; that his pay had been wrongly docked; and that Miller wanted to get rid of him because he was slow. RP (12/4/08) at 89, 92-99; RP (12/8/08) at 200-221. Johnson filed

an internal complaint with Chevron's human resource department, which promptly conducted a thorough investigation. RP (12/4/08) at 99-100; RP (12/16/08) at 52-53, 140-149; RP (12/17/08) at 32-33. Chevron found no merit to any of Johnson's complaints. RP (12/16/08) at 149-156; Ex. 344.² Johnson also thought Miller had unfairly written him up for minor incidents, but no such "write ups" exist and Miller never disciplined Johnson the entire time he was his supervisor. RP (12/11/08) at 91-93; RP (12/16/08) at 15-16, 27-30. Indeed, at the same time Johnson was accusing Miller of discrimination, Miller gave Johnson good job reviews (RP (12/10/08) at 80-81; RP (12/16/08) at 16-17), and recommended him for promotions. RP (12/11/08) at 126, 129; RP (12/16/08) at 33-35, 52.³

Johnson quickly found something else to complain about. In the fall of 2003, Johnson learned about a handmade "roller" tool that Conoco-Phillips drivers had rigged for handling hoses. RP (12/4/08) at 100-103. Johnson and several other drivers began using the tool, and they did so for

² Johnson's union filed two grievances on his behalf regarding his complaints of discrimination and unfair treatment. RP (12/4/08) at 119-121; RP (12/16/08) at 70-72. After Chevron responded to each, the union dropped both grievances. RP (12/16/08) at 72; RP (12/17/08) at 31-32.

³ Johnson's co-worker Willie Jones, an African American, testified that he had never seen or heard anything that would suggest Miller discriminated against anyone. RP (12/10/08) at 124. In fact, the one time Jones told Miller that some employees had made racially insensitive remarks about a Hispanic employee, Miller promptly reported the situation to Chevron's human resource department. RP (12/10/08) at 143.

several months without any objection from Miller. RP (12/4/08) at 105-106; RP (12/16/08) at 53. Johnson was so enamored with the tool that he created a modified version and began marketing it through a company he started with his wife. RP (12/4/2008) at 104-105, 114-115. Johnson wanted to sell his tool to Chevron and he asked Miller for support in convincing Chevron to buy the tool. With Miller's help, Johnson was able to make a sales presentation to Chevron's tool evaluation team in California. RP (12/15/08) at 53-56; RP (12/16/08) at 54. At the time, Johnson did not claim that the tool was an accommodation for his back problems. RP (12/8/08) at 9-11, 19; RP (12/15/08) at 60, 66. On the contrary, Johnson sent a promotional brochure and video of the tool to the Chevron tool evaluators, and took a tax deduction for the cost of the trip as a business expense. RP (12/8/08) at 19-21, 27-28; RP (12/9/08) at 134.

When Chevron safety specialists saw Johnson's video, they became concerned because the tool required a driver to bear the entire weight of a hose with one arm instead of two, posing a significant risk of injury. RP (12/15/08) at 63-64. Chevron promptly told all employees—not just Johnson—to stop using the tool. *Id.* at 64-65; RP (12/11/08) at 110, 186; RP (12/16/08) at 59-60. Chevron still invited Johnson to pitch the tool to its team of experts. RP (12/4/2008) at 128. Those responsible

for analyzing the tool had no knowledge of Johnson's injuries or complaints. RP (12/8/08) at 61, 77-80; RP (12/15/08) at 69, 106.

After Johnson's demo and further testing, the experts prepared a detailed ergonomic report on the tool. RP (12/8/08) at 29-38, 43. They concluded that the tool posed a greater risk to drivers than Chevron's existing practices. *Id.* at 53-61; RP (12/15/08) at 69-72, 77-78; Ex. 369. Not surprisingly, Chevron chose not to introduce the tool to its workforce. *Id.* at 71. A year later, Johnson hired his own ergonomic expert, Ian Chong, to prepare a report on the tool, but at trial Mr. Chong admitted that his report was incomplete because he never actually saw the tool in use, never examined Chevron's approved method for draining hoses, nor had he reviewed Chevron's ergonomic study. RP (12/9/08) at 98-106, 110. In fact, when shown pictures of Johnson demonstrating the tool for Chevron, he admitted that Johnson's use of the tool was improper, putting him at greater risk of shoulder, wrist and arm injuries. *Id.* at 107-108.

Shortly after Johnson demonstrated his tool to Chevron, Johnson hurt his back for a third time in late May 2004, which led to another six month medical leave. RP (12/16/08) at 60. In October 2004, Dr. Blair released Johnson back to work without restriction, but he wrote that Johnson would occasionally benefit from use of his handmade tool. RP (12/11/08) at 111-112. Because Dr. Blair was not aware that Chevron's

testing had shown the tool to be unsafe, Chevron sent Blair a copy of its study, and notified him that Johnson could not use the tool at work. *Id.* at 203-204; RP (12/15/08) at 74-76. Dr. Blair expressly concluded that Johnson could return to his tanker truck driver job without using the tool as an accommodation. RP (12/11/08) at 214; RP (12/15/08) at 76.

Johnson suffered his fourth back injury in April 2005, and was put on light duty. During an exam later that month, he told Dr. Blair his pain was so bad at times that he sometimes had to crawl to get around. He asked Dr. Blair to restrict his work to light duty, which he did. RP (12/11/08) at 117; RP (12/17/08) at 128-135; Ex. 410. Johnson saw Dr. Blair the following month, and reported that his condition had worsened. RP (12/17/08) at 136-37. Just a few days later, on May 24, 2005, Johnson saw a specialist, Dr. Becker, for a PCE. Dr. Becker concluded that Johnson should be restricted to sedentary to light-medium work, and could not resume work as a tanker truck driver. RP (12/11/08) at 18-23; Ex. 417. By August 2005, there was no more light duty work for Johnson; Chevron asked him to stay home and apply for disability. RP (12/11/08) at 135; RP (12/16/08) at 67-69, 217-218; RP (12/17/08) at 84, 109.

Johnson's back did not improve. Dr. Becker performed another PCE in February 2006. RP (12/11/08) at 24; Ex. 446. He concluded that Johnson could not return to work as a Chevron tanker truck driver. *Id.* at

28-29; Ex. 463. Indeed, Dr. Becker tests showed that Johnson was “a 42 year old with about a hundred year old back.” *Id.* at 34. In March 2006, Johnson was given an independent medical exam (“IME”) by an orthopedic surgeon and neurologist. In their IME report, these doctors also found that Johnson should be permanently restricted to sedentary to light-medium work. RP (12/11/08) at 209-212; Ex. 449. Later that month, Johnson’s new personal physician, Dr. Amin, reviewed the February PCE and March IME reports, and agreed that Johnson could not meet the physical requirements of his job. RP (12/3/08) at 90-98, 98; RP (12/11/08) at 213-215; RP (12/15/08) at 34-36; Exs. 453 & 463. Although Dr. Amin authored a slew of progress reports, none of them showed that Johnson satisfied the requirements of the job. RP (12/15/08) at 37-38; RP (12/17/08) at 116-17, 142-44. In fact, by October 2006, Dr. Amin concluded that Johnson’s back had worsened. RP (12/17/08) at 144.

Chevron looked for an open position in the company for Johnson, but could not find one given his limited skills. RP (12/11/08) at 122-23; RP (12/17/08) at 103-104. Johnson’s application for disability benefits was approved in November 2006. RP (12/17/08) at 111, 145-148. Several months later, Johnson took a truck driver job at a company called Praxair, and after that, as a tanker truck driver with Associated Petroleum Products (“APP”). RP (12/8/08) at 166-67. Although Johnson claimed his jobs

with Praxair and APP showed he was still capable of working as a Chevron tanker truck driver (*id.* at 168-69), he never told Praxair or APP that he suffered from chronic back pain, was on long-term disability, and had previously been restricted to sedentary to light-medium work. RP (12/3/08) at 35-38; RP (12/9/08) at 218-222; RP (12/16/08) at 184-188.

B. Summary Judgment Proceedings.

In June 2007, Johnson filed a complaint against Chevron and Miller alleging race and disability discrimination, failure to accommodate, hostile work environment and retaliation. CP 5-10. Shortly before trial, Chevron brought two motions for partial summary judgment on Johnson's failure to accommodate claim. In the first, covering the time period of June 2000 through April 19, 2005, Chevron argued that it satisfied its duty to accommodate Johnson by giving him time off from work when ordered to do so by doctors, and that it otherwise followed those doctors' orders by returning Johnson to work without accommodation during this period.⁴ Chevron's second motion covered April 20, 2005 onward, and argued that Johnson's fourth back injury rendered him physically unable to perform the essential functions of a Chevron tanker truck driver job.

⁴ Chevron also argued that the portion of Johnson's accommodation claim arising prior to May 2002 was untimely. As reflected in the trial court's order, Johnson conceded at oral argument that he was not seeking damages for this claim prior to 2003. CP 1458.

The trial court granted both of Chevron's motions, effectively dismissing Johnson's failure to accommodate claim. CP 1455-58. In its ruling, the court also struck the purported expert declaration submitted by Johnson's wife Jacqueline Johnson (CP 1455-56), and denied Johnson's request to belatedly file untimely and immaterial evidence in opposition to Chevron's motions. CP 1459-60. The trial court subsequently denied Johnson's motion for reconsideration of its ruling on Chevron's second motion for partial summary. CP 2137.

C. Trial.

Johnson's remaining claims for discrimination, hostile work environment and retaliation were tried between December 3 and 17, 2008. Due to weather-related delays in the proceedings and the holidays, the jury was instructed and closing arguments were held over until January 14, 2009. CP 3183-3218. Although Johnson originally claimed that Miller had discriminated and retaliated against him, after all the evidence was in, Johnson abandoned those claims and only asserted that Miller was liable for aiding and abetting unnamed others. CP 3189; RP (1/14/09) at 83-84. After approximately one hour of deliberation, the jury unanimously found in favor of Chevron and Miller on all counts. CP 2844-47. Judgment was entered on the jury's verdict. CP 2898-99.

D. Post-Judgment Proceedings.

Chevron sought approximately \$37,000 in costs. CP 2905-2912. In addition to statutory “costs,” Chevron requested “disbursements” for deposition expenses under RCW 4.84.090. CP 2911-12. Johnson opposed the cost bill, but did not cite any specific authority holding that deposition costs could not be awarded as “disbursements” under RCW 4.84.090. CP 2935-41. The court awarded Chevron those costs, and refused to award certain others. CP 2948-51. The total award was slightly less than \$26,000. *Id.* Johnson did not post a supersedeas bond, but instead asked this Court for a stay, which Commissioner Neel denied. CP 3230-33. Nearly four weeks after the commissioner ruled, Chevron began garnishment proceedings. CP 3219-22.

Only then did Johnson bring a CR 60 motion for relief in the trial court, citing new case law authority for the proposition that deposition costs could not be awarded as “disbursements” under RCW 4.84.090. CP 3236-40. Chevron reviewed Johnson’s authority, and agreed that the cost award should be reduced to eliminate the deposition costs. CP 3297-3300; *Id.* There being no substantial remaining dispute, trial court entered a revised cost award in the amount of \$6,450, and an amended judgment. CP 3537-40; CP 3541-43. Even though Chevron had moved quickly to correct the cost bill upon learning that its understanding of RCW 4.84.090

was mistaken, Johnson moved for CR 11 sanctions. CP 3368-3513. Chevron filed an opposition with several declarations (CP 3514-22; CP 3523-26; CP 3527-29), and the trial court denied the motion. CP 3616.

III. ARGUMENT

A. The Trial Court Properly Granted Chevron's Motions For Summary Judgment On Johnson's Accommodation Claim.

This Court reviews summary judgment orders *de novo*, engaging in the same inquiry as the trial court. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 830, 92 P.3d 243 (2004). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; CR 56(c). Courts regularly grant summary judgment in accommodation cases where the plaintiff fails to raise a genuine issue of fact on one or more *prima facie* elements. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 94 P.3d 930 (2004); *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 112 P.3d 522 (2005); *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 84 P.3d 1231 (2004).

1. Chevron Was Entitled To Judgment As A Matter Of Law On Johnson's Failure To Accommodate Claim.

To survive summary judgment on a failure to accommodate claim, Johnson must satisfy the following *prima facie* elements: (1) he had a sensory, mental, or physical disability that substantially limited his ability to perform the job; (2) he was qualified to perform the essential functions

of the job; (3) he gave Chevron notice of the disability and its substantial limitations; and (4) upon notice, Chevron failed to adopt measures that were available and medically necessary to accommodate the disability. *Riehl*, 152 Wn.2d at 145; *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 532, 70 P.3d 126 (2003). The trial court properly granted Chevron’s motions for summary judgment because (a) prior to April 20, 2005, Johnson had no “substantially limiting” disability, nor was accommodation “medically necessary,” and (b) after April 20, 2005, Johnson was not qualified to perform the “essential functions” of a Chevron tanker truck driver.

a. Prior to April 20, 2005.

For the period prior to April 20, 2005—the date of Johnson’s fourth and final back injury—Johnson had to show that his back pain “substantially limited” his ability to perform the job, or that he gave Chevron “medical documentation” demonstrating “a reasonable likelihood that engaging in job functions without an accommodation would aggravate” his back problems. *Riehl*, 152 Wn.2d at 145; RCW 49.60.040(25)(d). Johnson failed to set forth specific facts showing either. The undisputed facts demonstrated that, when Johnson returned to work in March 2003, and at all times until April 20, 2005, he did so without substantial limitation or a single piece of medical documentation showing that accommodation was needed to avoid further aggravating his back.

When Dr. Blair released Johnson back to work after back surgery in March 2003, he did so—at Johnson’s insistence—“without any restriction.” CP 193-95 (Daniels Decl., Exs. C & D). When Johnson’s back flared up over the summer of 2003, after a few days off, Dr. Blair allowed Johnson to return so long as Johnson’s truck had an air-ride seat. CP 197 (*Id.*, Ex. E).⁵ There is no dispute that Chevron’s trucks were equipped with such seats. CP 176 (Miller Decl., ¶ 11). When Johnson had a follow-up exam in October 2003, he again passed “with no restriction.” CP 199 (Daniels, Ex. F). Dr. Blair was so sure of the prognosis that he wrote “permanent” on the form. *Id.* Indeed, in testimony to the Board of Industrial Insurance Appeals (“BIIA”), Johnson admitted he was able to perform all his job duties without accommodation. CP 1259 (Johnson BIIA Dep. at 6:13–24). Critically, during this period, Johnson had not even begun using the tool that would later become the focus of his accommodation claim. CP 1262 (Johnson Dep. at 27:11–19).

For the next seven months, Johnson worked without incident. It wasn’t until May 2004—at the same time Johnson was marketing his tool

⁵ Improperly citing trial testimony, Johnson argues that Chevron knew that Johnson’s capabilities were substantially limited from his Tacoma road-side request for help. Op. Br. 33. Johnson ignores, however, that Johnson was given several days off work with pay to recuperate (CP 1251 (Supp. Daniels Decl., Ex. N)), and then released back to work by Dr. Blair without limitation. As noted, the only condition Dr. Blair set was air-ride seats, which Chevron provided.

to the Chevron tool purchasing group—that Johnson contacted Dr. Blair again. But instead of making an appointment about his back, he simply left a message asking Dr. Blair to “endorse” the tool. CP 205 (Daniels Decl., Ex. I). Without seeing Johnson or the tool, Dr. Blair wrote Johnson a prescription stating “Mr. Johnson would benefit from use of ergonomic tool for his job to help him lift and carry.” *Id.* At his deposition, Dr. Blair made it clear that—whatever the “benefit” of the tool—Johnson still had no condition that substantially limited his ability to perform his job:

Q. In your professional medical opinion as of May of 2004, at the time you wrote this prescription, were you treating Mr. Johnson for any conditions that had a substantially limiting effect on his ability to do his job at Chevron?

A. No.

Dkt. No. 104, p. 9 (quoting Blair Dep. at 54:18-22).⁶ Shortly thereafter, Johnson would hurt his back for a third time, and was placed on medical leave with pay for nearly six months. CP 177 (Miller Decl., ¶ 15).

⁶ This testimony was quoted verbatim in Chevron’s motion for partial summary judgment, and was supposed to be attached to the Daniels declaration filed in support thereof. CP 189 (Daniels Decl., ¶ 14). It appears, however, that the deposition excerpts were inadvertently omitted from the declaration, and they are not included in the Clerk’s Papers. Johnson did not object to this oversight in his opposition (CP 808-835) or on appeal, nor did he dispute the accuracy of the quoted testimony. Respondents have supplemented the Clerk’s Papers with this motion and other pleadings referred to herein by trial court docket number.

When he returned to work in November 2004, it was without limitation. In an October 2004 medical release, Dr. Blair wrote that Johnson “[g]enerally can perform job on a daily basis without any accommodation. He will occasionally benefit from use of ‘handmade tool’ to assist with job.” CP 207 (Daniels Decl., Ex. J (emphasis in original)). As before, Dr. Blair testified that he included reference to the tool at the request of either Johnson or his vocational counselor, but neither the tool nor any other accommodation was necessary for Johnson to do his job:

Q. Did the vocational counselor ever tell you that without the tool, Mr. Johnson couldn’t perform his job?

A. No.

* * *

Q. But at the time that you said he could go back to work, did you believe it substantially limited him in his ability to perform his job?

A. No, not necessarily.

CP 1327-28 (Blair Dep. at 63:1-3; 63:24-64:2). When Chevron asked Dr. Blair to clarify the release in light of its ergonomic testing of the tool—*i.e.*, was Johnson able to perform his job without the tool—Dr. Blair was unambiguous. In a November 9, 2004 letter, he wrote that Johnson could return to work “without any accommodation, including the use of the handmade tool.” CP 223 (Daniels Decl., Ex. L). During deposition, Dr. Blair explained that Johnson specifically told him that he did not need the

tool to do his job. CP 1347 (Blair Dep. at 118:2-9).⁷ Johnson returned to work, and continued to work as a tanker truck driver until April 20, 2005, when he suffered his fourth back injury. CP 177 (Miller Decl., ¶ 15).

In short, when Johnson's back impaired his ability to do the job, he was given time off with pay. Johnson was later medically released to return to his job *without restriction* and *without accommodation*. When Johnson was working, his ability to do the job was not substantially limited, nor did he give Chevron any "medical documentation" showing he needed an accommodation to avoid aggravating his back. RCW 49.60.040(25)(d). On the contrary, Dr. Blair testified:

Q. During each of the times that you returned him to work, at the time that you returned him to work, was there ever any condition that he had at the time you returned to work where you felt that he had something that had a substantially limiting effect on his ability to do his job?

(Objection)

A. Nothing that limited his ability to do his work, no.

CP 1349 (Blair Dep. at 120:23 - 121:5). Not only did Johnson's doctors confirm that he could do the job without substantial limitation, Johnson

⁷ Johnson claims that Chevron somehow pressured Dr. Blair to reach this conclusion by sending him a copy of their ergonomic assessment of Johnson's tool. CP 209-221. See Op. Br. 12-13 (citing CP 887, 890 & 893). Critically, however, even *before* Dr. Blair learned that Chevron could not approve use of the tool for safety reasons, he had concluded that Johnson could return to work "without accommodation" (CP 207)—something he confirmed at his deposition. CP 1327-28.

never told Chevron otherwise. Johnson argues that he told Chevron he was “scared to really explain daily pain level” for fear of being pulled off the job. CP 899. But Chevron informed Johnson that he didn’t have to report pain, “just if he cannot perform his job or is injured as a result of his job.” *Id.* The record is undisputed that Johnson did neither.

Nor did Johnson set forth specific facts on the essential element of medical necessity. *Riehl*, 152 Wn.2d at 145 (accommodation must be medically necessary). This rule “prevents employees from requesting accommodations based upon their own perception ... where there is no medical confirmation that such need exists.” *Id.* at n. 5. There is not a single letter, report or notation from any medical professional prior to April 20, 2005, stating that Johnson needed a medically necessary accommodation. At most, Dr. Blair wrote that Johnson would “benefit” from occasional use of his handmade tool. CP 207. But that is not the standard and, in any event, even that document states clearly that Johnson “can perform job on a daily basis without any accommodation.” *Id.* On this issue, Dr. Blair’s testimony was unambiguous:

Q. Okay. You say here on Exhibit No. 27 that Mr. Johnson will “occasionally benefit from use of a handmade tool.” At the time you wrote that statement in October of 2004, was it your professional, medical opinion that the tool was medically necessary in order for Mr. Johnson to perform, his job?

A. My professional opinion was that it was not medically necessary for him to perform his job.

CP 1327 (Blair Dep. at 63:4-11). Johnson was unable to point to any evidence of medical necessity below, and he points to none on appeal. Summary judgment on Chevron's motion for partial summary judgment for the period up to April 20, 2005 was proper on this basis as well.

b. After April 20, 2005.

The trial court also properly granted Chevron's second motion for partial summary judgment, covering the period after April 20, 2005, albeit for different reasons. An employer has no duty to accommodate an employee who cannot perform the essential functions of the job. *Davis*, 149 Wn.2d at 532-33; *also Clarke v. Shoreline Sch. Dist. No. 412*, 106 Wn.2d 102, 119, 720 P.2d 793 (1986) ("an employer may discharge a handicapped employee who is unable to perform an essential function of the job, without attempting to accommodate that deficiency"). As discussed below, the essential functions of a Chevron tanker truck driver include frequent physical lifting of up to 46 pounds and push/pulling of up to 50 pounds. Following Johnson's fourth back injury, a litany of doctors concluded that Johnson could not perform those essential functions.

The undisputed facts show that after Johnson hurt his back on April 20, 2005, he was placed on essentially make-work light duty, with full pay, for about three months. CP 605-606 (Miller Decl., ¶¶ 2, 5). In

May 2005, Johnson was given a PCE by Dr. Becker, who concluded that Johnson's work activities had to be limited to the "sedentary to light-medium category." CP 627-29 (Daniels Decl., Ex. A). Dr. Becker did not find that Johnson could continue work as a Chevron tanker truck driver using his handmade hose draining tool. In a section of his report titled "Suggested Accommodations to Work Environment," Dr. Becker wrote:

No recommended equipment pending vocational evaluation of work station and work environment.

Id. (emphasis added). After the three months of light duty, Chevron placed Johnson on disability leave with pay. CP 606 (Miller Decl., ¶ 5).⁸

In February 2006, some nine months after he first concluded that Johnson was restricted to "sedentary to light-medium" work, Dr. Becker performed a second PCE on Johnson. CP 631-33 (Daniels Decl., Ex. B). Dr. Becker concluded that Johnson was restricted to frequently lifting only 25 pounds, only *occasionally* lifting 46 pounds, and only *occasionally* push/pulling 40 pounds. *Id.* Those conclusions meant that Johnson could not work as Chevron tanker truck driver because the essential functions of that job require *frequently* lifting 46 pounds and *frequently* push/pulling

⁸ As discussed below, because Chevron was unsuccessful in locating any open positions for Johnson by the end of March 2006, he was encouraged to apply for long-term disability benefits. Johnson did apply for long-term disability and was awarded such benefits, retroactive to September 2006. CP 615-16 (Rice Decl., ¶ 5).

50 pounds in order to safely deliver gasoline. CP 609-13 (Miller Decl., Ex. C). Dr. Becker reached that conclusion after seeing Chevron's physical requirements document. CP 1219-22 (Supp. Daniels Decl., Ex. K). As a result, Dr. Becker concluded Johnson could not work as a tanker truck driver (CP 671 (Daniels Decl., Ex. F)) and approved Johnson only for the less strenuous job of a general truck driver. CP 635-36 (*id.*, Ex. D).

Around the same time, a separate panel of physicians performed an IME on Johnson. CP 638-69 (Daniels Decl., Ex. E). In their March 7, 2006 IME report, these doctors concluded that Johnson was permanently restricted to sedentary to light-medium work. *Id.* In reaching that conclusion, the doctors stated:

We do not feel that he would be able to work without restrictions. We note that he had a performance-based physical capacities evaluation as recently as February 15, 2006, which determined that he could work in a sedentary to light-medium category. Certainly, given his prior surgery and history of multiple lumbar exacerbations, we think it is unlikely that he would be able to return to work without restrictions. The only realistic question would not be if he is able to continue working, but for how long he can work prior to his next exacerbation.

* * *

We do concur with the physical capacities evaluation restricting him to sedentary to light-medium work. These restrictions would be considered permanent.

Id. (emphasis added). Shortly thereafter, Johnson fired Dr. Blair and began to see Dr. Amin. Dr. Amin reviewed Dr. Becker's February PCE report and the March IME panel report, and expressly agreed that Johnson

was permanently restricted to light-medium work and could not fulfill the duties of tanker truck driver. CP 671-73 (Daniels Decl., Exs. F & G).⁹

Thus, five different doctors, including Dr. Amin, examined Johnson in light of the physical requirements for a Chevron tanker truck driver, and all concluded that Johnson could not perform the essential functions of the job. In response to this undisputed evidence, Johnson relied primarily on the inadmissible conclusions of his wife, which the court struck (*see below*), and a two-page declaration from Amin, which stated perfunctorily that Johnson could perform the essential functions of the job. CP 838-39. Amin completely ignored the inconsistencies between that statement and his earlier concurrence with Becker's diagnosis and the IME report. *McCormick v. Lake Wash. Sch. Dist.*, 99 Wn. App. 107, 112, 992 P.2d 511 (1999) (contradictory affidavit cannot defeat summary judgment). His 2008 declaration is irrelevant in any event because Chevron's actions in 2006 were based on Dr. Amin's *contemporaneous* opinion that Johnson could not perform the essential

⁹ In January 2008, after his employment with Chevron ended, Johnson underwent yet another IME as part of his ongoing workers compensation claim. Like the prior IME, the January 2008 IME found that Johnson was capable of working only with permanent restrictions relating to "heavy lifting and repetitive bending." CP 675-700.

functions of a tanker truck driver.¹⁰ Amin's *post hoc* opinion, rendered years later, cannot create a genuine issue of fact regarding Chevron's conduct in 2006 and 2007.¹¹

The court also properly concluded that—given Johnson's inability to perform the essential functions of the job—Chevron satisfied whatever duty of accommodation it owed him. An employer is not required to create a new position or eliminate essential functions in order to accommodate a disabled employee. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 644, 9 P.3d 787 (2000). Rather, the employer's responsibility is limited to making a "good faith" effort to locate a job opening for which the employee is qualified. *Havilina v. Wash. State Dep't of Transp.*, 142

¹⁰ In an effort to find contemporaneous support for Amin's *post hoc* opinion, Johnson claims that Amin released Johnson back to work with reasonable accommodations in a March 13, 2006 progress report. Op. Br. 34. The document says no such thing. It states that Johnson is restricted to "occasional lifting" of up to 46 pounds; it says nothing about push/pull or other physical requirements. CP 964. Indeed, that very same day, Amin expressly concurred with Dr. Becker's opinion that Johnson was "[n]ot approved" as a tank truck driver because: "1) Frequent 46 [lbs.] requirement exceeds tolerance. 2) Occasional 120 [lbs.] lift contra-indicated. 3) Frequent push/pull 50 [lbs.] force contra-indicated." CP 671.

¹¹ Even though the summary judgment record was completed by November 2008 (and trial over by December 2008), Johnson points to his 2007 to **July 2009** employment with APP as evidence that he could perform the essential functions of the job. Op. Br. 34. But there is no evidence that the job requirements at APP were the same as those for a Chevron tank truck driver and, indeed, Johnson lied about his back problems when he was medically examined as part of the application process. CP 707 (Fewell Dep. at 20:17-20)

Wn. App. 510, 517, 178 P.3d 354 (2007); *Dedman v. Wash. Personnel Appeals Bd.*, 98 Wn. App. 471, 486, 989 P.2d 1214 (1999).

Chevron did just that. When Chevron learned that Johnson was unable to perform the essential functions of tanker truck driver, it conducted a search within the western U.S. to locate an open position for him. Chris Rice, a Chevron human resources manager, sent an email to his counterparts in Washington, Oregon, Northern California, Salt Lake City and Vancouver. CP 614 (Rice Decl., ¶ 2); CP 618. Consistent with Dr. Becker's diagnosis (and Dr. Amin's approval), the email noted that Johnson was limited to "sedentary to light-medium" work. *Id.* Recipients included personnel responsible for staffing Chevron gas stations, marketing and sales, refineries and lubricant plant. CP 615 (¶ 3). Rice also went into Chevron's computer job search system to look for any jobs for which Johnson might be qualified in the Pacific Northwest. *Id.* (¶ 4). Given Johnson's limited skills, there were none. *Id.* Chevron conducted a similar search in May 2007, also to no avail. CP 616 (¶ 6) & CP 621.

Johnson also argues that Chevron improperly refused to consider him for an office clerk position in Seattle. Op. Br. 37. But the undisputed evidence showed that, when Johnson applied for the job, that full-time position had already been eliminated by the company. CP 1041-42 (Miller Dep. at 149:15-150:15). There was no full-time office clerk until the

summer of 2008—nearly a year after Johnson had taken a new job with Praxair—when Chevron decided to create a new position to fulfill some of the duties formerly performed by the office clerk. CP 1043-44 (*id.* at 151:18-152:12). Moreover, while Chevron had allowed Johnson to temporarily help the office clerk for a few hours a day when he was on light-duty, he was unqualified for the position himself. When Johnson was asked to document his skills as part of a job placement assessment, he could not identify a *single* administrative or office skill that he was capable of performing. CP 1226-32 (Supp. Daniels Decl., Ex. M).

Finally, there is no merit to Johnson’s claim that he could perform the essential functions of the Chevron tanker truck driver job if he were permitted to use his hose tool. Op. Br. 35-36. An employer does not need to give an employee the accommodation he or she wants, only one that is reasonable. *Doe v. Boeing Co.*, 121 Wn.2d 8, 20-21, 846 P.2d 531 (1993). It is undisputed that none of Johnson’s doctors found that he could satisfy all the physical requirements of a Chevron tanker truck driver if he used the tool. Johnson himself admitted that, even though the job required him to frequently lift 46 pounds, the tool was not “catered” to help with that aspect of the job. CP 1242 (Johnson Dep. at 50:9-11). Indeed, Chevron’s ergonomic study revealed that “there is a greater chance of a healthy individual being injured while using the [tool] as opposed to the current

method” CP 209-221 (p. 8). Using the tool actually put *more* pressure on a user’s back than the accepted procedure. *Id.* Certainly, Chevron had no duty to accommodate Johnson by allowing him to use a tool that posed an even greater risk of injury. The trial court properly dismissed the failure to accommodate claim for the period following April 20, 2005.

2. The Trial Court Did Not Abuse Its Discretion When It Stuck Johnson’s Improper Expert Declaration.

Johnson filed the declaration of Jacqueline Johnson, his wife and purported expert, in opposition to Chevron’s second motion for partial summary judgment. CP 840-58. The court granted Chevron’s motion to strike the declaration (Dkt. No. 195) at the same time it granted Chevron’s motions for summary judgment. CP 1455-56. Johnson never opposed Chevron’s motion to strike—either when it was filed, with his untimely summary judgment materials (*see below*), or with his unsuccessful motion for reconsideration. *See* CP 1325; CP 1400-01; CP 1528-35. Because Johnson failed to oppose the motion below, he should not be permitted to raise the issue for the first time on appeal. *See* RAP 2.5(a).

Even if Johnson had properly preserved the issue, there was no error. This Court reviews motions to strike expert declarations for abuse of discretion. *Tortes v. King County*, 119 Wn. App. 1, 12, 84 P.3d 252 (2003); *Miller v. Likins*, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). “Experts may not offer opinions of law in the guise of expert testimony.”

Tortes, 119 Wn. App. at 12 (citation omitted). An expert opinion may be stricken if it contains pure legal conclusions. *Id.* Similarly, “[i]t is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Miller*, 109 Wn. App. at 148 (citation omitted); also *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) (“An opinion of an expert that is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury.”).

Johnson summarily argues that the trial court abused its discretion, but he offers no substantive defense of Ms. Johnson’s opinions (Op. Br. 38)—nor could he. Her declaration is replete with pure legal conclusions on ultimate issues and therefore improper. CP 842-46, ¶ 7 (“Chevron has not established that Bruce Johnson was not qualified to perform his job”); ¶ 11 (“Chevron is not correct in their assertion that Bruce is unable to meet this job requirement”); ¶ 12 (“Chevron did not meet it’s requirement to determine whether there was an accommodation”); ¶ 16 (“The essential job function is fuel deliver to the service stations not holding a hose.”). Further, as Chevron explained below, many of Ms. Johnson’s statements were disguised medical opinions, for which she had no experience, education or expertise. Indeed, she admitted that she had not read her husband’s medical records in reaching her “opinion,” most of which were

directly contrary to her assumptions. CP 1239 (J. Johnson Dep. at 270:16-20). The trial court did not abuse its discretion.

3. The Trial Court Did Not Abuse Its Discretion When It Refused To Consider Johnson's Untimely Summary Judgment Materials.

In opposition to Chevron's motions for partial summary judgment, Johnson asked the trial court to consider certain additional materials *after* the deadline for filing opposing affidavits, *after* oral argument, and a mere three days before the court issued its decision. CP 1400-23; CP 1455-58. The trial court denied Johnson's request. CP 1459-60. Johnson concedes that the court's ruling is reviewed for abuse of discretion only. Op. Br. 38-39. When considering this very issue, this Court held:

Although the trial court may accept affidavits anytime prior to issuing its final order on summary judgment, whether to accept or reject untimely filed affidavits lies within the trial court's discretion. In *Jobe [v. Weyerhouser]*, 37 Wn. App. 718, 684 P.2d 217 (1984) the trial court declined to consider an affidavit submitted after an oral ruling on summary judgment, but prior to entry of a formal order. In affirming, the appellate court held that would consider only the record considered by the trial court. The inference that may be drawn from *Jobe*, therefore, is that a trial court has discretion to reject an affidavit submitted after the motion has been heard.

We find no abuse of discretion in the trial court's rejection of Brown's untimely affidavit. All the occurrences to which Brown testified in his supplemental affidavit occurred well before the suit was originally brought. Therefore, Brown had no excuse for failing to address the issues in prior materials submitted to the trial court. ...

Brown v. Peoples Mort. Co., 48 Wn. App. 554, 559-60, 739 P.2d 1188 (1987) (citations omitted).¹² Following *Brown*, courts routinely reject tardy efforts to submit materials opposing summary judgment. *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 125 P.3d 134 (2004); *Garza v. McCain Foods, Inc.*, 124 Wn. App. 908, 103 P.3d 848 (2004).

There was no abuse of discretion here. Johnson made no effort to explain why he did not timely file these materials if he believed they created triable issues of fact. Rather, he purported to offer them “to respond to issues raised during ... oral argument.” CP 1400. These issues were not new. Johnson claimed he needed to submit his own deposition testimony to refute Dr. Blair’s testimony (CP 1401), but—as discussed above—Blair’s testimony, opinions and records were featured prominently in Chevron’s motion filed weeks earlier. CP 187-223 (Daniels Decl., ¶ 14 & Exs. B-F, I, J, & L). Indeed, in his *timely* response to Chevron’s motion, Johnson had attacked Dr. Blair’s opinion as being the product of Chevron pressure. CP 812. Johnson’s untimely deposition excerpts were

¹² Notably, the *Brown* court expressly distinguished *Cofer v. Pierce Co.*, 8 Wn. App. 258, 505 P.2d 476 (1973)—the case Johnson relies upon—on the grounds that “the affidavit in *Cofer* was submitted for the purpose of obtaining a continuance” under CR 56(f). *Brown*, 48 Wn. App. at 560 n. 3. Johnson did not submit these materials in an effort to gain another continuance, but rather to forestall defeat on the merits.

offered to make the same point. Thus, not only could he have offered this evidence earlier, it would not have affected the outcome of the motion.¹³

The same is true for the workers compensation materials. Johnson claimed these materials showed that he was able to perform the essential functions of the job after April 20, 2005. CP 1401. But that issue was the entire focus of Chevron's second motion for partial summary judgment. If Johnson believed these materials created a genuine issue of fact, he should have submitted them earlier. Presumably, Johnson did not do so because he understood this argument was a red-herring; the workers compensation proceedings determined that Johnson would no longer receive disability benefits because he was capable of "gainful employment." CP 1421. That proceeding had nothing to do with whether Johnson was capable of performing the essential functions of a Chevron tanker truck driver job. The court acted well within its discretion in rejecting Johnson's untimely

¹³ Johnson argues, as he did below, that his own deposition testimony—which contained hearsay statements attributed to Dr. Blair—was admissible to show "prior inconsistent statements made by Dr. Blair." Op. Br. 39. Dr. Blair's purported statements were not inconsistent, but even if they were, it would not be substantive evidence that could create a genuine issue of fact. A prior inconsistent statement may be admitted as substantive evidence only if made under oath at a trial, hearing, other proceeding or deposition. ER 801(d)(1).

summary judgment materials, none of which would have changed the result anyway.¹⁴

4. The Trial Court Properly Rejected Johnson’s Efforts To Revive The Accommodation Claim At Trial.

Although not raised as an assignment of error, Johnson argues that the trial court “committed reversible error” in refusing Johnson’s efforts to revive his dismissed accommodation claim during trial. Op. Br. 37. CR 15(b) allows issues “tried by express or implied consent of the parties” to be treated as though raised in the pleadings “to conform to the evidence.” Chevron did not expressly or implicitly consent to revival of Johnson’s accommodation claim, nor did it “conform to the evidence.” To the contrary, the trial court expressly and repeatedly ruled that Johnson could introduce evidence regarding the hose draining tool only if it was relevant to his discrimination claims, but not as a “back-door” means to resurrect an accommodation claim. RP (11/25/08) at 28-33; RP (12/2/08) at 7-8; RP (12/4/08) at 11-34; RP (12/8/08) at 130; RP (1/7/09) at 56.

¹⁴ Citing *Bremmeyer v. Peter Kiewit Sons Co.*, 90 Wn.2d 787, 789-90, 585 P.2d 1174 (1978), Johnson asks this Court to consider these materials for the first time on appeal. Op. Br. 39-40. *Bremmeyer* does not give this Court that discretion. In *Bremmeyer*, the court considered “the trial court’s refusal to consider the additional factual and legal matters *submitted with his motion to reconsider.*” *Id.* (emphasis added). Here, Johnson did not submit these materials with his motion for reconsideration, nor did he appeal from the court’s denial of that motion. RAP 9.12 expressly limits this Court’s review of the trial court’s summary judgment ruling to only those materials considered by the trial court.

The court diligently enforced that ruling—sustaining Chevron’s objections and requiring redaction of exhibits relating to accommodation. RP (12/2/08) at 8-13; RP (12/3/08) at 85-87; RP (12/4/08) at 30, 55, 121-22; RP (12/8/08) at 124, 127-31; RP (12/11/08) at 61, 74-75, 118; RP (12/16/08) at 107; RP (1/7/09) at 51-56. The court repeatedly refused Johnson’s requests for reconsideration (RP (12/2/08) at 9; RP (12/4/08) at 26-27; RP (12/15/08) at 14), and admonished him when he tried to “back-door” his defunct accommodation claim. RP (12/2/08) at 9 (“you’re essentially violating the ruling on summary judgment ... I’m not going to backtrack on a ruling that this Court’s already made as a matter of law”); RP (12/4/08) at 18 (“you’re sneaking in accommodation under disparate treatment claims, and I’m not going to allow it”). Indeed, the court was forced to issue a curative instruction to inform the jury that Chevron had satisfied its duty to accommodate Johnson. RP (12/4/08) at 50-51.

Trial courts routinely prevent parties from relitigating issues that have been dismissed on summary judgment. *Barrett v. Friese*, 119 Wn. App. 823, 850-51, 82 P.3d 1179 (2004) (“petitioners were not entitled to relitigate the facts and issues decided on summary judgment”). That is precisely what the court did here. To the extent the jury heard evidence related to Johnson’s accommodation claim, it did so only in the narrow context of his disparate treatment claims. Johnson cannot bootstrap that

evidence into a “revived” accommodation claim under the guise of CR 15. The trial court properly denied Johnson’s request to “amend.”

B. The Trial Court’s Jury Instructions Were Proper.

This Court reviews a claimed error of law in a jury instruction *de novo*. *Hue v. Farmboy Spray Co., Inc.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002). A jury instruction that erroneously states the law is reversible error only if it prejudices a party. *Hue*, 127 Wn.2d at 92. The trial court’s jury instructions correctly stated the law and, even if there was error, it was harmless.

1. The Trial Court Properly Instructed The Jury On The Elements Of A Disparate Treatment Claim.

Johnson raises the same objection with respect to Jury Instructions Nos. 11 and 12, the instructions on disability and race discrimination respectively. Op. Br. 40-43. Both instructions required Johnson to prove that he was “treated differently” than employees who were not disabled (CP 3196) or African American (CP 3197). Johnson argues that this aspect of the instructions was erroneous because he was not required to show the existence of so-called “comparators” in order to prevail on a disparate treatment claim. Op. Br. 42-43. Johnson is wrong.

To establish a *prima facie* case of disparate treatment, an employee must show that “(1) he belongs to a protected class, (2) he was treated less favorably in the terms or conditions of his employment (3) than a similarly situated, nonprotected employee, and (4) he and the nonprotected ‘comparator’ were doing substantially the same work.” *Washington v. Boeing Co.*, 105 Wn. App. 1, 13, 19 P.3d 1041 (2000) (quoting *Johnson v. Department of Social & Health Servs.*, 80 Wn. App. 212, 227, 907 P.2d 1223 (1996)); also *Domingo v. Boeing Employees’ Credit Union*, 124 Wn. App. 71, 81, 98 P.3d 1222 (2004); *Kirby v. City of Tacoma*, 124 Wn. App. 454, 468, 98 P.3d 454 (2004). Although, as Johnson notes, courts often apply these *prima facie* elements in the context of “*McDonnell Douglas*” burden shifting prior to trial, the same courts recognize that the ultimate burden of proving disparate treatment remains on the plaintiff throughout. *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 186-87, 23 P.3d 440 (2001).

If Johnson was required to prove up “comparator” evidence to survive a motion for judgment as a matter of law prior to trial, then it cannot be error for the trial court to require him to prove this same element at trial. Indeed, no Washington decision has found it improper for a trial court to instruct a jury regarding the *prima facie* elements of a disparate treatment claim generally, or the comparator element specifically. To the contrary, Washington courts have upheld instructions that set out the

entire *McDonnell Douglas* framework. See *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993); *Pannell v. Food Services of America*, 61 Wn. App. 418, 810 P.2d 952, 815 P.2d 812 (1991).¹⁵ Jury Instructions Nos. 11 and 12 were far more modest; they did not include any statements regarding the various burdens under *McDonnell Douglas*. They include only a single element of the *prima facie* test. Johnson does not and cannot claim that the instructions misstate that element in any way. Compare CP 3196 (Johnson “was treated differently than non-disabled employees”) with *Kirby*, 124 Wn. App. at 468 (plaintiff “was treated differently than someone not in the protected class”).

Johnson suggests that he did not need to show the existence of comparators because “there is direct evidence of discrimination.” Op. Br. 42. But the trial court found otherwise. When denying Chevron’s motion for directed verdict on the disparate treatment claims, the trial court agreed to allow the case to go the jury solely based upon Johnson’s comparator

¹⁵ Johnson’s reliance on *Johnson v. DSHS* is misguided. *Johnson* was decided on summary judgment, and had nothing to do with jury instructions. Moreover, *Johnson* squarely holds a disparate treatment claim requires comparator evidence. 80 Wn. App. at 226-27. The court merely recognized that the *prima facie* element of comparator evidence did not require an additional showing of intent; that is, because disparate treatment creates an inference of discrimination, the plaintiff did not need to prove that he was treated differently “due to his race.” *Id.* at n. 20. Neither of the jury instructions at issue here required Johnson to prove he was treated differently because of his disability or race. CP 3196-97.

evidence. RP (1/7/09) at 31-33. Later, after carefully weighing the parties' arguments regarding the inclusion of a comparator evidence element in Jury Instructions Nos. 11 and 12, the court stated:

I understand the distinction and the issue of burden shifting after a case is going to the jury, as far as making a *prima facie* showing, but the facts of this case allow the Court some discretion because ... the same analysis that plaintiff's counsel indicates ... would be the same for any case, I would submit on the record for any reviewing court, that means anybody could make a claim that they were treated unfairly under the law, and in order to make that comparison, there has to be some evidence that others were treated differently in comparison to the allegations by plaintiff ... and I think the development of case law under this analysis gives the Court some latitude. I do not believe that is a comment. I think it is a statement of the law.

RP (1/14/09) at 7-8. In other words, based on the evidence, the trial court found that Johnson's case rested entirely on whether the jury ultimately accepted his argument that "others were treated differently." *Id.* Given the dispositive nature of this issue, Chevron was entitled to ask for a legally correct instruction on the *prima facie* comparator element, and the trial court had the discretion to give it. *See Hizey v. Carpenter*, 119 Wn.2d 251, 266, 830 P.2d 646 (1992) (a party is entitled to have jury instructed on its theory of the case as long as there is evidence to support it).

Even if it was error to instruct the jury on comparators, it was harmless. The jury was instructed that, apart from the comparator element, it could find for Johnson only if he proved that race or disability

was a “substantial factor” in an adverse employment decision and, separately, that such a decision was not “made for credible and legitimate, non-discriminatory reasons.” CP 3196-97; 3199. Johnson does not challenge either instruction. There was no evidence that Johnson’s race or disability played any role in Chevron’s decisions, much less was a “substantial factor.” Chevron did everything it could for Johnson and literally paid him a year’s worth of salary as he recuperated from his repeated back problems. In the end, Johnson’s fourth back injury simply left him unable to fulfill the essential functions of the job, something all of his doctors agreed upon. To be sure, Chevron’s refusal to allow Johnson to use his handmade tool was legitimate and non-discriminatory; Chevron did not allow *any* of its employees to use the tool once its study showed that the tool posed a greater risk of injury than its accepted methods. Simply put, this case does not present a close call, something the jury confirmed when it returned a verdict in less than an hour.

2. The Trial Court Did Not Abuse Its Discretion In Refusing To Give An Adverse Inference Instruction Regarding The Rice Deposition.

Through a motion in limine, Johnson sought—as a sanction for Chevron’s alleged violation of CR 30(h)—a jury instruction to the effect that Chevron employee Chris Rice “would have provided favorable testimony to plaintiff” CP 1615. The court denied Johnson’s motion

(RP (11/25/08) at 44-46), and Johnson never proposed an instruction on the issue. CP 2065-2105; CP 2202-2245. Rice did not testify at trial, nor was his deposition played. The court's decision regarding sanctions for an alleged discovery violation is reviewed for abuse of discretion, as its refusal to give a requested instruction. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). There was no abuse of discretion here.

To begin with, the trial court properly found that Chevron did not violate CR 30(h) in the first place. RP (11/25/08) at 44 (“I don’t find there to have been misconduct.”). As Chevron pointed out to the trial court, even a cursory examination of the deposition transcript revealed that the alleged violation was nothing more than a handful of instances where Chevron’s counsel reminded Mr. Rice to testify only as to his personal knowledge, and his answers show that he did so. CP 1847; CP 1618-40. At no point in the deposition did anything said by Chevron’s counsel have any bearing on Mr. Rice’s testimony. *Id.* There was no “coaching.”

The trial court also found that, apart from its lack of merit, Johnson’s motion was untimely and procedurally improper:

This is something that should have gone to Special Master Alsdorf, and this is not something I can do anything about at the time. This is not a proper motion in limine, and I’m sorry for that interpretation.

All of the discovery disputes up until trial were to be handled by the special master. To have this show up as a motion in limine, I was kind of confused when I saw this, and all I can say to you, Mr. Sheridan, is that's a misapprehension, because discovery disputes, that's why I made the scope of that order appointing former Judge Alsdorf as the special master, that would deal with all discovery disputes.

RP (11/25/08) at 45. There was no abuse of discretion here either. Rice was deposed on September 25, 2008. CP 1618. Johnson had two months to raise this issue with the trial court or Special Master Alsdorf—who was appointed to address precisely these kinds of disputes (CP 795-96)—but he failed to do so. It was proper for the trial court to deny Johnson's request on this basis as well. *Nieshe v. Concrete Sch. Dist.*, 129 Wn. App. 632, 647-48, 127 P.3d 713 (2005) (no abuse of discretion to deny CR 37 sanctions where party fails to make motion to compel); *Chen v. State Farm Mut. Auto. Ins. Co.*, 123 Wn. App. 150, 94 P.3d 326 (2004) (same).

C. The Court's Evidentiary Rulings Were Proper.

Johnson challenges three separate trial evidentiary rulings. Op. Br. 5 (Assignments of Error 6, 7 & 9). This Court reviews evidentiary rulings for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. *Id.* A trial court's evidentiary ruling will not be disturbed if it is sustainable on any alternative ground. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d

1097 (1983). The trial court's evidentiary rulings were entirely proper and, in any event, would not have changed the outcome of the trial.

1. The Trial Court Did Not Err In Admitting Evidence Of Johnson's Statements To Subsequent Employers.

Johnson complains that the trial court erred when it allowed Chevron to cross-examine Johnson about certain statements he made on an application form he filled out for his subsequent employer, Praxair. Op. Br. 43-44. Johnson lied on that application form; he reported that he was not suffering chronic back pain, and he did not disclose the back injuries he suffered in May 2004 and April 2005. RP (12/9/08) at 213-214, 216-224; Ex. 512. As a result, Johnson was able to obtain medical clearance to drive for Praxair and, later, APP. *Id.* Chevron was permitted to introduce this form during Johnson's cross-examination. *Id.* at 218.

The trial court properly found that the admissibility of the Praxair form did not turn on whether it was made under oath. RP (11/25/08) at 13. Johnson filled out the form and, thus, it is an admission under ER 801(d)(2). *Id.* The court recognized that its admissibility ultimately turned on ER 403. *Id.* The form meets that standard easily. It was Johnson who first raised the issue of employment with Praxair. During direct examination, Johnson pointed to his success at securing subsequent jobs as evidence that, despite his disability, he still could perform the essential functions of a tanker truck driver. RP (12/8/08) at 166-69.

Johnson makes the same argument on appeal. Op. Br. 17. Having argued that post-Chevron employment supported his claim, that issue became highly relevant. Chevron was entitled to substantively refute that claim by showing that Johnson's employment with Praxair was based on his false representations regarding his medical history. Johnson cannot explain how this highly relevant evidence violated ER 403. It didn't.¹⁶

Nor did the trial court err in allowing Mr. Fewell to testify about the statements Johnson made during his Praxair medical exam. RP (12/16/08) at 176-178. Fewell testified that, as he had on the form, Johnson told him that he had experienced no back pain following his 2002 surgery. *Id.* at 186-188. ER 608(b) prevents a party from using extrinsic evidence of misconduct to attack a witness' credibility. But the rule does not bar evidence offered for other purposes, such as "to contradict the witness on a material fact." 5A Wash. Prac.: Evidence Law and Practice § 608.11 (5th ed. 2009); *State v. Harris*, 97 Wn. App. 865, 989 P.2d 553 (1999) ("[e]vidence tending to ... disprove the testimony of an adversary,

¹⁶ Johnson did not preserve a ER 608 challenge to the admissibility of Praxair form because he failed to make a timely objection on that basis. RP (12/9/08) at 218 ("Objection. 401, 403."). That objection therefore is waived on appeal. *City of Seattle v. Carnell*, 79 Wn. App. 400, 403, 902 P.2d 186 (1995); ER 103(a)(1). Johnson's counsel conceded at trial that he waived the objection. RP (12/16/08) at 177 ("I've only waived my objection to the document, not the witness."). For the reasons stated above, the form would be admissible under ER 608 in any event.

is always relevant and admissible”). Chevron did not offer Fewell’s testimony as extrinsic evidence of Johnson’s character (although it had that effect), it offered it to refute Johnson’s claim that he was medically cleared to perform his job. RP (12/16/08) at 177. Fewell testified:

Q. And he had not told you, if I’m correct, that he had ongoing lower back pain, chronic lower back pain?

A. No, he did not. Otherwise I would have acted on that information.

Q. Why would that information have been important for you to know as part of this examination, if it was important?

A. Well, that’s the whole gist of this examination. It’s incumbent on me, as working or doing this for the employer, to find out if there’s any condition or disability or any treatment ongoing or anything that a person has that may preclude them from safely performing the critical functions of the job they’re being considered for. If there is, then I investigate further to make that evaluation, to make that determination.

Id. at 187. Because Johnson did not truthfully tell Fewell about his medical problems, Fewell could not make an accurate assessment regarding Johnson’s qualifications for the Praxair job. This evidence was independently relevant and admissible, and falls outside ER 608(b).

2. The Trial Court Did Not Err In Admitting Evidence Regarding Johnson’s Patent Application.

For similar reasons, the trial court did not abuse its discretion when it allowed Chevron to cross-examine Johnson with his patent application

for the hose draining tool. RP (12/9/08) at 203.¹⁷ On direct, Johnson touted the commercial success of the tool; he testified that he had sold hundreds of them beginning in 2004. RP (12/4/08) at 115; RP (12/8/08) at 147-148. Johnson also touted the ergonomic report of the tool Mr. Chong prepared in 2005. RP (12/8/08) at 149-151. This testimony was designed to bolster the tool's validity in an effort to prove that Chevron's actions were pretextual. Chevron therefore was entitled to introduce contradictory evidence to show that the purported commercial success of the tool was based, at least in part, on a patent obtained by fraud. The patent application showed just that: Johnson listed himself as the tool's "sole inventor" even though he obtained the tool from an employee of Conoco-Phillips. RP (12/4/08) at 101-102; RP (12/9/08) at 208-209.¹⁸ The evidence was both relevant and permissible under ER 608.

¹⁷ Johnson did not properly preserve his objection to this testimony generally. The patent issue was subject to a motion in limine which the trial court granted in part. RP (11/25/08) at 18-19. When Chevron sought to introduce evidence covered by the motion, but not clearly or finally resolved by the court's earlier ruling, it was incumbent upon Johnson to renew his objection at trial. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 742, 850 P.2d 559 (1993); *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 623, 762 P.2d 1156 (1988). At trial, Johnson did not object to Chevron's cross-examination of Johnson on the patent issue generally, but only objected to the introduction of patent application itself. RP (12/09/08) at 204-206. Only that limited and unfounded objection was preserved.

¹⁸ The application was also admissible as a prior inconsistent statement under ER 613. As noted, Johnson testified at trial that he
(continued . . .)

Even if it was an abuse of discretion to allow introduction of the patent application (or the statements Johnson made to Praxair, *above*), it was harmless. Error in admitting evidence is not grounds for reversal in the absence of prejudice. *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). To be prejudicial, Johnson must show that it affected the outcome of the trial. *Id.* Johnson makes no effort to demonstrate prejudice, nor could he. Johnson did not challenge the authenticity of the evidence, and his Praxair application, patent application and statements to Fewell were all admissions under ER 801(d)(2). Even if they were irrelevant, at most these false statements simply undermined Johnson's credibility and, on that issue, they were merely cumulative. *See Brown*, 100 Wn.2d at 196 (cumulative evidence not prejudicial).

3. Johnson's Complaints Regarding The Jones Deposition Are Unfounded And Moot.

In connection with his motions in limine, Johnson asked the trial court to preclude Chevron from using Willie Jones's deposition at trial as a sanction for purportedly ending the deposition prematurely. Johnson did not ask for any other sanction. CP 1615-16. As Chevron explained

(. . . continued)

modified a version of the tool obtained from Conoco-Phillips, which was inconsistent with the statement of inventorship on the patent application.

below, it did nothing improper at the Jones deposition. CP 1847-48. The trial court agreed. Moreover, as with Johnson's complaints about the Rice deposition (*see above*), the court properly concluded that he should have earlier raised the issue with Special Master Alsdorf as a discovery dispute, not in the context of a motion in limine. RP (11/25/08) at 44-45. The ruling was harmless in any event. Jones testified at trial, and Chevron did not use his deposition testimony. RP (12/10/08) at 119-137; 142-144. There were no evidentiary errors.

D. The Trial Court Did Not Abuse Its Discretion In Denying Sanctions For Chevron's Alleged Late Document Production.

Johnson challenges the trial court's refusal to grant his pre-trial motion for sanctions based on Chevron's allegedly late production of documents. CP 1453-54. Johnson did not seek monetary sanctions or the exclusion of any particular evidence or witness at trial; he sought only permission to re-depose certain Chevron employees. CP 1094. As with his other discovery-related arguments, Johnson appeals the denial of his motion in the abstract. He does not argue that the ruling affected his ability to oppose Chevron's motions for summary judgment, nor does he claim that it caused prejudice at trial. Op. Br. 48-49. Because the ruling was concededly harmless, there are no grounds for reversal. *Thomas*, 99 Wn.2d at 104 (reversal requires showing of prejudicial error).

Regardless, there was no error. A sanctions ruling will not be disturbed on appeal absent a clear showing that the trial court's discretion was manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). In its detailed submissions to the trial court, Chevron demonstrated that there had been no discovery violation. CP 1313-24; CP 1266-1290; CP 1291-99; CP 1300-12; Dkt. No. 204. Chevron produced thousands of pages in response to Johnson's initial discovery request in February 2008; the documents Johnson accused Chevron of producing "late" were actually a separate batch of documents timely produced in response to over *one hundred* new document requests Johnson served on Chevron more than six months after its initial production. CP 1266-67 (Daniels Decl., ¶ 2); Dkt. No. 204 (Beighle Decl., ¶ 3). In response to these new requests, Chevron extensively searched its databases, making reasonable efforts to capture responsive documents without duplication. *Id.* (Beighle Decl., ¶¶ 4-7).

To the extent Johnson did not have all of these documents when he deposed Chevron's employees, he has only himself to blame. Johnson received the documents when he did because Johnson himself had delayed propounding his discovery. Moreover, as Chevron pointed out to the trial court, Johnson never explained why Chevron's production of these

documents required a second bite at the deposition apple. CP 1321-23; CP 1267-68 (Daniels Decl., ¶¶ 4-6). He still offers no explanation. The trial court was in the best position to assess Chevron's good faith compliance with the discovery rules; its findings should not be disturbed on appeal. *See Miller v. Badgley*, 51 Wn. App. 285, 300, 753 P.2d 530 (1988) (trial court "tasted the flavor of the litigation and is in the best position to make these kinds of determinations").

E. The Trial Court Properly Denied Johnson's Motion For Sanctions In Connection With The Cost Bill.

Johnson assigns error to the trial court's award of approximately \$6,000 in costs. Johnson devotes no argument to this issue, conclusorily stating that "Chevron failed to justify" the award. Op. Br. 50. Because Johnson provides only passing argument and no authority to support this assigned error, it is waived on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). There was no error in any event. As explained above, Chevron filed a verified cost bill which sought statutory costs and, incorrectly as it turned out, deposition expenses as "disbursements." CP 2905-2912. When Johnson's CR 60(b) motion revealed that deposition expenses cannot be recovered as costs, Chevron recalculated the costs to which it was entitled, reduced its request by approximately \$19,000, and tendered a reduced cost bill in the correct

amount. CP 3297-3308. That award certainly was justified, and the court properly entered an amended judgment in that amount. CP 3541-43.

Johnson's claim that the court should have awarded him sanctions in connection with the initial cost bill is equally baseless. This Court reviews a denial of CR 11 sanctions under an abuse of discretion standard. *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 930, 10 P.3d 506 (2000). There was no abuse of discretion. Chevron's position was based on a reasonable inquiry. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 829 P.2d 1099 (1992) (CR 11 sanctions improper unless attorney failed to conduct a reasonable inquiry). Chevron showed that it submitted its cost bill and began collection efforts based on a good faith, albeit incorrect, legal analysis. RCW 4.84.030 entitles a prevailing party to both "costs" and "disbursements." RCW 4.84.090, in turn, defines disbursements to include "the necessary expenses of taking depositions." In her declaration, the attorney responsible for preparing the cost bill explained that not only did the plain language of RCW 4.84.090 support a reimbursement argument, but neither the statute's annotations nor a key-word case law search revealed contrary authority. CP 3523-26.

Nor did Chevron knowingly use the initial cost bill "as a lever to settle the case without appeal," as Johnson suggests. Op. Br. 50. Chevron had a valid judgment, which both it and the trial court believed was legally

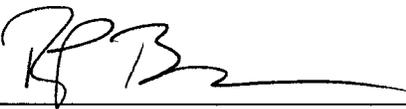
justified. Even so, Chevron did not initially pursue collection. It waited in good faith while Johnson moved this Court for a stay without supersedeas bond and, even after Commissioner Neel ruled in Chevron's favor, it waited another *four* weeks before filing a writ of garnishment. CP 3219-22; CP 3230-33. When Johnson sought relief from the trial court, showing there was no distinction between RCW 4.84.010's "transcript costs" and RCW 4.84.090's "costs of taking depositions," Chevron did exactly what CR 11 contemplates: it promptly rectified the mistake, and submitted a revised cost bill to eliminate deposition expenses. CP 3297-3307; *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994) (must give notice of contemplated CR 11 motion to give offending party an "opportunity to mitigate the sanction by amending or withdrawing the offending paper"). The trial court properly refused Johnson's motion for sanctions.

IV. CONCLUSION

For the foregoing reasons, Chevron respectfully requests this Court to affirm the judgment below.

RESPECTFULLY SUBMITTED on November 25, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2009, I caused to be served a copy of the foregoing document on the following person(s) in the manner indicated below at the following address(es):

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