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## I. INTRODUCTION

Plaintiffs/Appellants Steven and Deborah Lodis seek a new trial. Steven Lodis' termination by his former employer (Corbis) and its CEO (Gary Shenk) has always been a story that is primarily about retaliation. Yet, Mr. Lodis has not yet had a full and fair opportunity to tell that story. His retaliation claim was dismissed based on an erroneous ruling that Mr. Lodis, the Senior VP of H.R., was unprotected from retaliation due to not having "stepped outside" his ordinary job duties to engage in opposition to discrimination. Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 292 P.3d 779 (2013).

Before such ruling could be overturned and the retaliation claim remanded for trial, there was a trial on Mr. Lodis' ancillary claim for age discrimination and two trials on counterclaims brought by Corbis. In the first trial, the jury found Mr. Lodis did not establish that Corbis or Mr. Shenk engaged in age discrimination with respect to Mr. Lodis.

In regards to Corbis' counterclaims, the first jury found that Mr. Lodis was not unjustly enriched and that Lodis had not engaged in fraud. However, the first verdict did favor Corbis on its counterclaim for breach of fiduciary duty, though no damages were awarded. As a result, a second trial was granted only on the breach of

fiduciary duty counterclaim. The second jury found that Mr. Lodis did not breach his fiduciary duty by receiving and retaining a March 2006 bonus –but did breach his fiduciary duty by failing to report vacation time he used and receiving a payout for allegedly unused vacation time after he was terminated. The second jury awarded damages to Corbis in the full amount of the vacation payout given to Mr. Lodis, which Mr. Lodis paid.

The Court of Appeals subsequently reversed the dismissal of Mr. Lodis’ claim for retaliation. In remanding for the parties’ third trial, the Court wrote, “Whether Lodis opposed Shenk’s purported discrimination is a determination we leave for the trier of fact.” Lodis, 172 Wn. App. at 851.

In advance of the third trial (*i.e.*, the first trial to include a claim for retaliation for opposing “purported discrimination”), the trial court granted two expansive motions in limine filed by Corbis, which related to the two jury verdicts from the previous trials. The motions claimed that the law of the case and collateral estoppel doctrines precluded Mr. Lodis from (1) presenting “evidence of age discrimination” and (2) “re-litigating breach of fiduciary duty.” The court granted both of Corbis’ motions.

Thus, although Lodis had the burden to prove he opposed

conduct “reasonably believed” to be age discrimination, he was only allowed to present evidence of alleged ageist behavior by CEO Gary Shenk that Mr. Lodis actually admonished Shenk about. This limited Mr. Lodis to five alleged discriminatory events or statements by Shenk.

Ultimately, the court in the retaliation trial also admitted portions of the two earlier jury verdicts, which showed: (1) Mr. Lodis previously brought an unsuccessful claim for age discrimination; and (2) as Corbis’ counsel put it, Mr. Lodis was found “guilty” of breaching his fiduciary duty and made to pay the company back for the amount of the vacation payout given to him after termination.

The trial court’s decision on issue preclusion, its failure to dismiss an unsupported and prejudicial “after-acquired evidence” defense, its admission of the two prior jury verdicts, among other evidentiary rulings, left “such a feeling of prejudice ... in the minds of the jury as to prevent [the] litigant from having a fair trial.”<sup>1</sup>

This Court, reviewing the rulings on issue preclusion de novo, should reverse the rulings and grant Mr. Lodis a new trial so that he may finally be heard (1) by a jury that is able to hear all relevant evidence on a key element of his retaliation claim -- whether he

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<sup>1</sup> Collins v. Clark County Fire Dist. No. 5, 155 Wn. App. 48, 81, 231 P.3d 1211 (2010).

opposed conduct by Shenk that Lodis “reasonably believed” was age discrimination; and (2) by a jury that is not immediately prejudiced against Mr. Lodis due to the admission of an irrelevant and overly prejudicial “breach of fiduciary duty” verdict, presented to the jury under the guise of an unsupported after-acquired evidence defense that should have been dismissed.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in granting Defendant’s motion in limine to preclude evidence of alleged age discrimination. {Dkt. # 797}.<sup>2</sup>
2. The trial court erred in admitting testimony regarding the first jury verdict and Ex. 484, the actual jury verdict against Mr. Lodis in the first trial, related to his claim of intentional age discrimination. RP (May 22, 2014) at 37.
3. The trial court erred in allowing the jury to consider an “after-acquired evidence” affirmative defense and evidence related to Mr. Lodis failure to record vacation. RP (May 13, 2014), at 10-11; RP (May 22, 2014) at 4.
4. The trial court erred in granting Defendant’s motion in limine to preclude re-litigation of Steven Lodis’ breach of fiduciary duty, and in admitting testimony regarding the second jury verdict and Ex. 485, which is the actual second jury’s verdict on Corbis’ breach of fiduciary duty counter-claim. {Dkt. #797}; RP (May 14, 2014) at 4-5; RP (May 22, 2014) at 36.

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<sup>2</sup> See *infra*, footnote 3, on pg. 6.

5. The trial erred in denying Mr. Lodis' motion for a new trial. CP 2414-15.

**B. Issues Pertaining to Assignments of Error**

1. Is the issue of whether Mr. Lodis was discriminated against based on his age identical in all respects to any matter directly at issue as a question of ultimate fact in the trial of Mr. Lodis' claim for retaliation? No.
2. Is the issue of whether Mr. Lodis breached his fiduciary duty identical in all respect to any matter directly at issue as a question of ultimate fact in the trial of Mr. Lodis' claim for retaliation? No.
3. Does the "law of the case doctrine" preclude relitigation of a prior jury's factual findings? No; or does the doctrine instead preclude relitigation of a court's earlier holdings on the application of legal principles in the case? Yes.
4. Should an after-acquired evidence defense be dismissed where it is supported only by the opposing party's opinion, which is contradicted both by company practice and by testimony of the company's current VP of HR? Yes.
5. Whether the inclusion of the two prior verdicts against Mr. Lodis and in favor of Corbis engendered such a feeling of prejudice in the minds of the jury as to prevent Mr. Lodis from having a fair trial related to his retaliation claim? Yes.

**III. STATEMENT OF THE CASE**

- A. Steven Lodis was promoted to Senior VP; opposed what he reasonably believed was age discrimination; and was subjected to a series of actions that quickly led to his termination.**

1. Overview of Lodis' Employment With Corbis

Lodis began working for Corbis in July 2005 as the Vice President of Worldwide Human Resources (“H.R.”). {CP 2412, CP 3366-67}<sup>3</sup>; RP (May 21, 2014) at 14. He had previously held positions at the level of H.R. Director or V.P. of H.R. at major corporations since 1992, and had over 34 years experience working in the field of human resources. {CP 3366-67}.

At Corbis, “[b]y all accounts, the HR function by the time Steve Lodis took the position of V.P was in somewhat of a state of disarray.” CP 1069. In the summer of 2007, C.E.O. Gary Shenk conducted a mid-year performance evaluation of Lodis. Shenk’s review was glowing, calling Lodis a “trusted advisor,” that Lodis “took a department that was in shambles, and built up a good team,” and that Lodis was “a beacon of ‘calm’ and ‘normalcy’ – ending the madness and hyperactivity of many Corbis activities.” Ex. 47.

2. In December 2007, after observing a culmination of events involving Shenk’s treatment of older employees and Lodis repeatedly admonishing Shenk, Lodis

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<sup>3</sup> Citations throughout this brief to clerk’s paper numbers stated in brackets (*i.e.*, “{CP #}” ) reference documents previously designated in the first Lodis v. Corbis appeal and assigned the numbers stated in the brackets. Citations to “{Dkt. #}” reference other documents to be designated for this appeal. On February 9, 2015, Mr. Lodis filed a supplemental designation of clerk’s papers to have all such documents, which were filed with the clerk and called to the trial court’s attention, transmitted to the Court of Appeals for its review in the present appeal. Mr. Lodis will file a praecipe that replaces the bracketed citations with new clerk’s page numbering once it is received.

reported concerns about Shenk to SVP and General Counsel, Jim Mitchell.

- a. **The direct reports under Shenk became younger as he replaced older workers with younger ones.**

Before Gary Shenk's tenure as Corbis C.E.O., the average age of the direct reports for the CEO was 52. At the time that Shenk terminated Lodis, the average age of Shenk's direct reports was 40. {CP 3789, 3791}.

- b. **CEO Shenk and corporate counsel Jim Mitchell made numerous ageist comments.**

After becoming CEO, Shenk repeatedly expressed his preference for younger workers over older workers. In Executive Team meetings, at least 10 to 15 times Shenk talked about his "young" E-Team. {CP 3369, CP 3350}, CP 1572, {CP 8001}. At Global Operating Team meetings Shenk made reference again to the age of the executive team. {CP 3369-70}. He made reference to age at the all-employee meetings at either the end of 2007 or early 2008. *Id.* Shenk stated how "excited and pumped up [he was] about the young team, the energy. Look around the table. Look at Stephen Gillett, barely 30. Look at Ivan Purdie. Look at the people here that we have. It's a young, exciting new time and new team." *Id.*

When Shenk made reference to his former executive coach,

Glo Harris, Shenk referenced her age and said she was “grandmotherly” as an explanation for why he was not going to use her anymore. {CP 3373}; RP (May 29, 2014) at 9. During 2007, Shenk repeatedly referred to Tim Sprake, the Director of Compensation and Benefits who was a Lodis direct report, as “the old man on your staff” or words to that effect; Sprake was over 40 years old. {CP 3372}; RP (May 21, 2014) at 23. Shenk referred to Vice President Rick Wysocki, who is over-40, as “an old-timer.” {CP 3606}. Shenk made the statement to VP Ross Sutherland, who told Lodis, that “We are not running a retirement home,” or words to that effect, when speaking about VP Wysocki. {CP 3372}. Wysocki was terminated in July 2007. {CP 3372}.

Shenk also told VP Sutherland that Patrick Donahue, the “eldest statesman of photography at Corbis,” was “old school” and “out of touch.” CP 1731-34; {CP 3350-51}; {CP 8003, 8081}. On three occasions, Shenk told Sutherland to terminate Donahue. {CP 3350-51}, CP 1731; {CP 8003-04}. Sutherland refused to do it. CP 1732. V.P. Sutherland was then terminated. CP 1732.<sup>4</sup> Shenk described the person who would be replacing Sutherland as “a young, good looking movie star type.” {CP 3351}.

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<sup>4</sup> {CP 8007}.

**c. Lodis opposed ageist conduct by admonishing Shenk and speaking to corporate counsel Jim Mitchell about Shenk in December 2007.**

Mr. Lodis testified that there were at least five occasions where he admonished Gary Shenk for making purportedly ageist comments about his “young team” and about certain older workers (*i.e.*, Beate Chellette, Tim Sprake, and Mark Sherman); none of whom were Steven Lodis. *See* {CP 2562-75}, {CP 3370-74}. Mr. Shenk, for his part, denied that Lodis ever admonished him about any alleged ageist comments or conduct.<sup>5</sup>

On November 7, 2007, Shenk announced Lodis’ promotion to “SVP, Human Resources.” Ex. 53. At that time, Shenk “believed Lodis was the man for the job.” RP (May 15, 2014) at 133. Shenk testified that when he signed a letter to Lodis on December 20, 2007, congratulating him on his promotion, Shenk “still believed [Lodis] was the man for the job.” RP (May 15, 2014) at 101, 134.

Mr. Lodis testified that sometime in December 2007, Lodis went to Senior V.P. and General Counsel Jim Mitchell to report his concerns about Shenk’s comments and his terminations of Mark Sherman, Wil Merritt, David Bradley, and Sue McDonald, and Mark Sherman. RP (May 21, 2014) at 26-27; {CP 3374}. Mitchell denied

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<sup>5</sup> *See* RP (May 15, 2014) at 167; RP (May 19, 2014) at 13-17.

this conversation occurred.<sup>6</sup> Also in December 2007 or January 2008, Mr. Lodis reminded Sherk that age should not be a factor in the decision to terminate older V.P. Mark Sherman. *See* {CP 3373}.

**d. In January, February, and March 2008, Lodis is subjected to a quick series of adverse actions, concluding with his termination.**

On December 26, 2007, Sherk contacted consultant Dawn McNab to do a “360” evaluation of his executive team, but in a violation of convention, he wanted the evaluation done to create data for a performance review. RP (May 15, 2014) at 93-95; RP (February 25, 2010) at 46. McNab opposed this idea because a 360, where information is provided anonymously, is supposed to provide a safe environment for constructive input. {CP 3617}; RP (February 25, 2010) at 19-20; RP (May 15, 2014) at 137-38, 190. Waldron and Company, for whom McNab worked as a consultant, later disavowed her work on this 360. Ex. 118.

Sherk focused on Lodis and Sherman. Ex. 88. In another break from procedure, Sherk selected which members of his executive team would be interviewed for the 360 evaluation of Mr. Lodis. Ex. 71; {CP 3375}. Sherk picked Kirsten Lawlor and Jim

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<sup>6</sup> *See* RP(May 20, 2014) at 53.

Mitchell, both of whom were Lodis detractors.<sup>7</sup> Shenk ignored the positive evaluations and asked McNab to make a list of Lodis' "weaknesses," which she did, and again which was not a part of a normal practice. {CP 3620-24}.

Again, in a departure of usual procedures, Shenk asked for and obtained Ms. McNab's notes, which are not usually shared with management, of her interviews with Kirsten Lawlor and others. CP 3625-31. Shenk only asked McNab for the interview notes regarding one person: Steven Lodis. RP (February 25, 2010) at 46-47.

This was in January 2008 timeframe -- the month after Shenk signed the letter congratulating Lodis on his promotion to Senior Vice President. *Id.* at 48. Although Shenk formulated a theory based on the notes that some employees thought Lodis was hard to reach, Shenk admitted he never had difficulties reaching Lodis. {CP 3491-93}. Allegedly based on the 360 evaluation results, Shenk put Lodis on a Performance Improvement Plan ("PIP"). {CP 3375-77, CP 3620}. When Shenk told McNab that he wanted to use the material generated in the 360 evaluation to put Mr. Lodis on a PIP, she again told Shenk that "360's were normally not used in that way." RP (February 25, 2010) at 49.

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<sup>7</sup> Ex. 71; RP (May 15, 2014) at 83-84; {CP 3375}; Ex. 367.

Shenk gave Mr. Lodis his PIP on March 6, 2008. {CP 3375}. The PIP contained numerous inaccurate statements and findings with which Lodis disagreed. {CP 3377-3413}. Mr. Lodis systematically rebuts all of the allegations in the PIP. *Id.* As part of the PIP, Shenk directed Lodis to meet with his subordinates regarding his PIP. RP (May 15, 2014) at 190-91; {CP 3390}. Shenk never told Lodis the procedures for the meetings, so Lodis spent a few minutes with each peer and reported what happened. {CP 3376-77}. On March 26, 2008, Shenk terminated Lodis for-cause, allegedly for lying about the content of the meetings with Lodis' direct reports. {CP 402}, {CP 3376-77, CP 3407-13}.

**e. After Lodis is terminated, Corbis calculates his unrecorded vacation and gives him a payout.**

On March 26, 2008, Corbis terminated Lodis, allegedly for lying about the content of the meetings with Lodis' direct reports. {Dkt. #680, Ex. 1 (CP 402, CP 3376-77)}. Subsequently, on or before April 2, 2008, Corbis reviewed Mr. Lodis' vacation recordation, and his Outlook "calendar" and determined that Lodis had failed to report vacation he used, but had 34 days, or 272 hours, visible on his calendar. *See* Ex. 108.

“Another executive of the company, Barry Allen, failed to document 15 days of vacation and has not been terminated or even reprimanded.” Order, CP 27. The executive assistant to Mr. Allen, who had knowledge of his work calendar, including vacation entries, as well as his vacation schedule, testified that she reported his vacation usage into the vacation reporting system. {Dkt. #680, at 2 and Ex. 4}.

Although Corbis had discovered Lodis had not documented any of his vacation usage, the company paid him a gross vacation time payout of \$41,555 on April 11, 2008. *See* Ex. 108; {Dkt. #680, Ex. 1 (CP 2422)}.

**B. Lodis filed suit for retaliation, but his claim was not tried until after verdicts were reached on an ancillary age discrimination claim and Corbis’ counterclaim for breach of fiduciary duty.**

Mr. Lodis filed a claim for retaliation under RCW 49.60.210. Lodis, 172 Wn. App. at 844. His lawsuit also included a claim for age-based discrimination directed at Mr. Lodis. *Id.* Judge Hayden granted Corbis’ motion for summary judgment on Lodis’ RCW 49.60.210 retaliation claim, “conclud[ing] that Lodis was not engaged in statutorily protected activity under RCW 49.60.210, because he was simply performing his job duties by warning Shenk about the potential age discrimination. At trial, Judge Bruce Heller denied, on

the same basis as Judge Hayden, Lodis's requests to ... reinstate his retaliation claim." *Id.* The Court of Appeals disagreed, restating the broad scope of the WLAD's protections, while declining to strip Corbis' Senior Vice President of Human Resources, and other workers whose job duties include "ensuring ... compliance with federal and state employment laws," of the protections afforded by RCW 49.60.210. *Id.* at 850-52.

Before such decision was reached, two trials occurred in which the juries rendered verdicts on Mr. Lodis' claim of age discrimination, as well as Corbis' counterclaims. *Id.* at 842, 845.

In the first trial, the jury found that Corbis and Mr. Shenk did not engage in age discrimination with respect to Mr. Lodis. Ex. 484. In regards to Corbis' counterclaims, the first jury found that Mr. Lodis was not unjustly enriched and that Lodis had not engaged in fraud. *Id.* However, the first verdict did favor Corbis on its counterclaim for breach of fiduciary duty, though no damages were awarded. *Id.* As a result, a second trial was granted only on the breach of fiduciary duty counterclaim. Lodis, 172 Wn. App. at 845. The second jury found that Mr. Lodis did not breach his fiduciary duty by receiving and retaining a March 2006 bonus –but did breach his fiduciary duty by failing to report vacation time he used and receiving

a payout for allegedly unused vacation time after he was terminated. *Id.*, at 845-46. The second jury awarded damages to Corbis in the full amount of the vacation payout: \$42,389. *Id.*

**C. On remand, the court in the trial of the retaliation claim granted a motion in limine precluding Lodis from “retrying the age issues” beyond evidence of five occurrences in which Lodis “admonished” Shenk for alleged ageist behavior. Initially, the court excluded the prior verdict on age discrimination, viewing it as irrelevant and prejudicial.**

On April 15, 2014, Corbis filed a motion to preclude evidence of age discrimination. CP 257. The motion was primarily based on the “the law of the case doctrine and the doctrine of collateral estoppel.” CP 258. It asked that “should any evidence of age discrimination be admitted” in the trial of the retaliation claim, then “the prior jury verdict rejecting Plaintiffs’ [age] discrimination claim must be admitted also.” CP 258.

Mr. Lodis opposed the motion. He argued that the third would be instructed that Lodis had the burden of proving that he “oppos[ed] what he **reasonably believed** to be discrimination on the basis of age,” CP 2003 (Jury Instruction No. 9) (emphasis added), CP 361; and that “evidence of Shenk and Mitchell’s ageist comments and conduct are necessary to provide that Lodis’ opposition was reasonable.” CP 361, *citing* Lodis, 172 Wn. App. at 852.

On May 5, 2014, the Court issued a letter decision, granting Corbis' motions in limine to preclude evidence of age discrimination. {Dkt. #797}. In its letter and at the hearing on the motion, the Court stated it did not "believe that there is a logical connection between ageist comments and retaliation." RP (May 9, 2014) at 16. Consequently, it ruled that "alleged ageist statements by Shenk that Lodis did not address with Shenk are inadmissible." {Dkt. #797} "[Q]uestions regarding alleged ageist comments or events outside of the ... five occurrences where Mr. Lodis says he admonished Mr. Shank, ... questions outside of those five occurrences [were] ... off limits." RP (May 9, 2014) at 15-16.

Initially, the court also ruled that the prior verdict on age discrimination was inadmissible. RP (May 14, 2014) at 3. The Court said:

[T]he fact that a prior jury found that Mr. Shenk had not discriminated against Mr. Lodis [based on age] really doesn't inform the question of whether or not Mr. Lodis had reason to believe that [Shenk] was engaging in improper conduct with respect to other employees.

*Id.*, at 3-4.

Corbis separately filed a motion in limine to exclude evidence of termination and/or lay-off decisions of employees other than Mr. Lodis and the ages of such employees, arguing the "question of

whether [Corbis] engaged in unlawful age discrimination has already been considered and decided in a prior trial....” CP 589-90. Mr. Lodis opposed the motion, arguing that evidence Shenk was terminating older direct reports in favor of younger direct reports was relevant to proving that Lodis opposed what he “reasonably believed” was age discrimination. {Dkt. 799 at 9}

At the pre-trial hearing on the motion, the Court reiterated Lodis was precluded from “retry[ing] the age issues.” RP (May 13, 2014) at 54 (“We have had a trial. We had a jury verdict. We are not going to go over that ground again.”) The Court reasoned, “[E]ven if we assume, contrary to the jury’s verdict in the first trial, that Mr. Shenk had it in for older people, it doesn’t make it more probable than not that he would retaliate against somebody for raising complaints about him.” *Id.* at 54-55. It held:

[T]he issue of the retaliation has to be limited to the five instances when Mr. Lodis brought his problems or at least his perception of problems to the attention of Mr. Shenk. So to some extent, we will have to go through the same testimony as we did in the first trial regarding Mr. Shenk’s reasons for termination, and I think that’s inevitable. We have to go through that again.

We are not going to do it based on age. We will do it based on retaliation. In light of that, I don’t see the relevance of layoffs of other employees and their ages. ... [W]e went through that during the last trial. That’s no longer relevant to the retaliation claim.

RP (May 13, 2014) at 55.

The Court's ruling concerning age discrimination against others excluded witness Lynn Hallenberg. Counsel made this offer of proof:

So Lynn Hallenberg is one of the people that Shenk says to Lodis that she is old, and she doesn't fit his brand. But [Lodis] doesn't confront him on it. It's the list of things accumulating that causes him to start confronting Shenk. So [s]he doesn't fit neatly into the Court's rulings, but there is a couple of situations like this where Lodis hears Shenk say it and doesn't confront him that sort of adds up to a situation where he decides, I better start confronting him. It is part of his mental process, but it is not one of the five.

RP (May 13, 2014) at 106-107. In excluding Hallenberg, the trial court reasoned, "if I were to accept that argument that this is what's going on in Mr. Lodis's mind, I think we pretty much open the door on all of this age stuff, and I have already made my ruling on that issue." *Id.* at 107.

Lodis' counsel responded, "There is probably about four or five others that would fit in ... if you open that door," *id.*, mentioning Rick Wysocki as one who "Shenk tells Lodis, 'We are not running a retirement home,' but [Lodis] doesn't say anything.... He doesn't confront [Shenk]." <sup>8</sup>

**1. Corbis' counsel concluded opening statement telling the jury that Shenk had members on his**

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<sup>8</sup> RP (May 13, 2014) at 111.

**executive team “over age 55” and “never made any ageist comments;” then persisted in asking to admit the verdict on Lodis’ claim of age discrimination.**

As soon as trial began, Corbis’ counsel told the jury, at the end of opening statements, “The evidence will show that Gary [Shenk] never made any ageist comments.” RP (May 15, 2014) at 70.

He continued:

Though Gary may have referred to his new team as a ‘young team full of fresh thinking and energy’ when he first rolled out his new team, ... the reference was to the entire team, and persons on the team were over age 55. Steve Lodis was over 50. There were some members on the team that were under 40.

*Id.*

As Corbis’ counsel was seated, Mr. Lodis’ counsel called the first witness, Gary Shenk, to the stand. Mr. Shenk was immediately asked, “Is it your testimony that you have never made ageist comments?” RP (May 15, 2014) at 72. After a sidebar, Mr. Lodis’ counsel was permitted to ask Mr. Shenk if he ever made a comment to V.P. Ross Sutherland that he was going to replace him with a “young Hollywood type.” *Id.*, at 73-74, 105.

At the next break in testimony, Mr. Lodis’ counsel argued that the door was opened to presenting evidence of age discrimination based on Corbis’ counsel stating in opening that Shenk “never made any ageist comments” and referencing “various ages, older and

younger” on Shenk’s executive team. *Id.*, at 106. Corbis’ counsel responded by again asking that the Court admit the verdict rejecting Lodis’ claim for age discrimination. *Id.*, at 105-106. The Court concluded no line was “crossed” and declined to admit the verdict against Lodis. *Id.*, at 109-10.

Mr. Lodis subsequently filed a written motion to admit evidence of ageist comments and contradictory testimony by other witnesses, arguing that the statement in opening that Mr. Shenk “never made any ageist comments” opened the door. CP 1570-82. Before Lodis’ motion could be ruled on, Mr. Shenk was asked on cross-examination by his own counsel, “Do you know what the ages of your executive team members were back in 2007.” RP (May 19, 2014) at 36-37.

Shenk testified, “[T]here were two that were over the age of 50. The majority were over 40. And then there were a few that were under 40.” *Id.* Shenk’s counsel then asked, “[D]o you know the ages of your current executive team?” *Id.* After an objection based on relevance and a sidebar, the second question was withdrawn. *Id.*, at 37, 58. Following Shenk’s testimony, the Court ruled that Lodis’ written motion to admit evidence of age discrimination was denied.<sup>9</sup>

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<sup>9</sup> RP (May 19, 2014) at 111-113.

As the trial continued, Corbis persisted in seeking admission of the prior jury verdict on Lodis' claim of age discrimination. RP (May 21, 2014) at 5-7. Lodis opposed admission of the verdict, arguing that it was irrelevant, prejudicial and confusing, as the jury's "only determination had to do with [if] ... there was age discrimination directed against [Lodis]." <sup>10</sup>

Lodis argued that the third trial, the first concerning retaliation, had nothing to do with alleged discrimination directed at Mr. Lodis -- but instead "only to do with what is going [on] out ... in the workplace that is coming to Mr. Lodis that he is then reporting to Shenk and then being terminated for." RP (May 21, 2014) at 8. In the first trial, "there was no special verdict form that addressed any other comments that Shenk made...." RP (May 15, 2014), at 108. Corbis' counsel responded, asking to be able to tell the jury, "Lodis has argued about all [this age discrimination evidence], and that argument didn't win the day." RP (May 21, 2014) at 9. The court agreed at that time only "to think about it." <sup>11</sup>

During Mr. Lodis' direct examination by his counsel in the retaliation trial, Lodis was asked what he said to Corbis' General Counsel, Jim Mitchell, about his concerns related to Shenk. Mr. Lodis

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<sup>10</sup> RP (May 21, 2014) at 8; *see also* RP (May 15, 2014), at 107-108.

<sup>11</sup> *Id.*, 10.

testified:

[W]hat I told Jim, that ... I was seeing a behavior and a trend that concerned me. First, we fired Wil Merritt. Then we fired Dave Bradley. Then we fired Sue McDonald. And now Gary [Shenk] was going after Mark Sherman. And his comment to me was, 'I want to replace him with a young Hollywood type.'

*Id.*, at 27.

At the next break in testimony, Corbis' counsel again argued the door was opened to asking Lodis about the first jury verdict, based on his testimony that he told General Counsel Mitchell how "Merritt was fired, Bradley was fired, McDonald was forced out, Sherman was fired or was going to be fired." *Id.*, at 79. Lodis' counsel responded that the door was not opened, as the testimony was "the report to Mitchell." "It is nothing new. It is not independent of the report. It has been in the record since 2009: 'This is what I told Mitchell.'" *Id.*, at 80.

**2. The court ultimately admitted the age discrimination verdict, but did not reconsider its decision precluding Lodis' circumstantial evidence of age discrimination.**

After lunch on May 21st, the court decided that the prior verdict against Lodis on his age discrimination claim would be admitted:

[M]y primary concern in ruling that it should stay out is I was concerned that if the jury was aware of that verdict, that **they**

**might make shortcuts and... decide that if there is no basis for the age claim, then there is no basis for the retaliation claim.**

However, there has been evidence, quite a bit of evidence, regarding age within the context of the retaliation claim. I'm thinking particularly of the evidence that came in yesterday [sic] in the cross-examination of Mr. Shenk regarding the fact that Mr. Shenk turned to Gillett, Brotman, and whoever the third member was of the executive team who were the younger members of the team, and the argument was that they wouldn't have stood up to him. That was one inference that could be drawn from it. I think that's an example of the jury hearing evidence regarding age and not knowing what to do with it.

RP (May 21, 2014) at 126. Two days earlier, on May 19<sup>th</sup>, the Court discussed the aforementioned testimony following a related sidebar:

We ... had a sidebar regarding [Lodis'] questions to Mr. Shenk about ages of executive team people. And Mr. Shenk, I believe, on cross in answer to [his counsel's] questions, .. indicated that there was an age range between 30, 40, and 50 on the executive board.

And the Court decided that enough questions had been asked about that topic and, in particular, [Lodis] had been allowed to make the point that the three individuals on the executive board that [Shenk] spoke to about interactions with Mr. Lodis were on the younger side. And the Court felt that [Lodis] was certainly permitted to make the argument that these were, in the Court's words, perhaps more callow individuals who would be more under Mr. Shenk's sway. So I allowed him to do that.

*See* RP (May 19, 2014) at 199-200. *See also id.*, 36- 37, 182-87.

Corbis' counsel responded by again asking to present evidence that "[t]here has been a whole trial about this, and there is a verdict in my

favor.” *Id.* at 201-02. The court said it would “hold the line” on the age discrimination verdict, *id.*, at 203, even when he revisited the issue the next morning:

I was satisfied, looking at [the transcript of the redirect of Shenk], that the reference to age was as the Court characterized it at the end of the day. And I’m going to read ... -- ‘Mr. Brotman was another one of the young folks, is that right? He was at the younger range of executive team.’ This was after the same question was asked of Mr. Gillett and Mr. Purdie. The question was: ‘Those are the three people, members of the E-team, that you interviewed to make your decision about whether Mr. Lodis was lying; right?’ So I think that at least with respect to this line of questioning, I am satisfied that the line wasn’t crossed. ...

RP (May 20, 2014) at 10.

Yet, the next day, May 21st, the court revisited the issue for an apparent third time; and for the first concluded that it would admit the prior verdict on age discrimination and allow Corbis’ counsel to “ask Mr. Lodis a question about the jury verdict. He is going to say yes, that happened, and then we’ll move on.” RP (May 21, 2014) at 126, 134-36.

The court instructed Lodis that “[w]hen ... asked: ‘... isn’t it true ... a jury already heard your case on age and decided against you,” he could say something like “the reason we are here today is because I didn’t get my retaliation claim heard because the prior judge made a mistake.” RP (May 21, 2014) 135-36. The next day,

Corbis counsel asked Lodis:

Q. Now, you had sued for two claims: You sued for age and retaliation, right?

A. That's correct.

Q. But the judge dismissed the retaliation case before trial?

A. Yes. The initial judge, not Judge Heller, rejected our claim of retaliation. This has been a retaliation claim from the beginning. And this is our first opportunity -- after a long process, this is our first opportunity, and this is the first time a jury is hearing the retaliation case.

Q. Well, you didn't accept this jury's verdict, though, did you, sir? You appealed this?

RP (May 22, 2014) at 38.

Mr. Lodis was peppered with questions about the prior case:

“Everything that you have just testified about regarding alleged age discrimination was stuff that you brought out in that [prior] case?

MR. SHERIDAN: Objection. 402.” *Id.*, at 109, 135. “You have been litigating this case for six years with nothing to show for it other than you had to write a check to Corbis.” *Id.*, at 39.

After the age discrimination verdict was admitted, Lodis' counsel stated the “cat is out of the bag” and asked the Court to reconsider its decision precluding age discrimination evidence.<sup>12</sup> The Court responded:

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<sup>12</sup> RP (May 22, 2014) at 67.

If I were to accept your argument, aren't we essentially retrying large swaths of the age case? Perhaps it's not the age case with respect to Mr. Lodis, but in the previous trial, we spent numerous days on all this other circumstantial evidence, and I don't want to do that.

*Id.* at 69.

On the final day of testimony, Mr. Lodis' counsel made an additional offer of proof related to the evidence of age discrimination by Sherk that Lodis did not confront Sherk about, but which was a part of the culmination of things that caused Lodis to speak with Corbis' General Counsel Jim Mitchell about Sherk in December 2007. RP (May 29, 2014) at 8-10. In response to Lodis' final offer of proof, the Court stated that it was "going to adhere to the pretrial ruling that age, as it relates to what Mr. Lodis conveyed to Mr. Sherk, is what is admissible in this case. ... I'm not going to vary from that." *Id.*, at 10-11.

Later that day, Corbis' counsel asked Lodis to agree that a deposition video of Ross Sutherland was "used ... in your age discrimination case against Corbis?" RP (May 29, 2014) at 21, 88. After objection and a sidebar, the court ruled the question could not be asked, but Corbis' counsel "can certainly argue that to the jury," which it did. *See id.*, at 21, 88, and 178 ("All the testimony you heard in this trial ... about alleged ageist comments, that's all been thrown

out there, all the mud they could throw at Gary, and none of it stuck.” After the closing statement by Corbis’ counsel, the Court addressed the jury: “During [counsel’s] argument, there were a number of objections raised regarding references to a prior jury verdict with respect to age discrimination. I’m instructing you that the prior jury verdict related to age discrimination against Mr. Lodis is no longer an issue.” *Id.*, at 187.

**D. The trial court granted a motion to preclude re-litigation of breach of fiduciary duty and denied Lodis’ motion to exclude evidence related to Lodis’ vacation time and motion to dismiss Corbis’ after-acquired evidence affirmative defense.**

On remand, Corbis asserted an after-acquired evidence affirmative defense. *See* CP 27-28. Shortly before the third trial, Corbis moved for summary judgment on the defense. *Id.* In denying Corbis’ motion, the trial court wrote, in part, that “it has already been established that Lodis’ failure to record any vacation time constituted a breach of fiduciary duty. Lodis v. Corbis Holdings, 172 Wn. App. 835, 861 (2013) (‘ ... Lodis profited at the company’s expense by not recording any vacation time, thereby breaching his fiduciary duties of undivided loyalty and care.’).” Order, CP 27. The court wrote, “however, no jury has ruled on the question of whether Corbis would have terminated Lodis had it known of his failure to report any

vacation time.” CP 28. The court acknowledged, “There is of course no requirement that the company establish breach of fiduciary duty in order to prevail on an after-acquired evidence theory.” *Id.*

On April 15, 2014, Corbis filed a motion in limine to preclude re-litigation of Lodis' breach of fiduciary duty. CP 275-86. It sought to introduce evidence of the verdict. CP 275. Corbis argued that the “law of the case” doctrine and “collateral estoppel” barred re-litigation of the “fact that Steven Lodis breached his fiduciary duty to Corbis.” CP 280-82.

On April 23, 2014, Mr. Lodis filed his opposition to the motion, arguing the law of the case doctrine applied to principles of law, not facts, and that collateral estoppel did not apply. CP 348-49. In his brief, Lodis “object[ed] to admission of any evidence related to the vacation issue” due to its irrelevance and prejudice. CP 348, *citing* ER 402, 403. Lodis reiterated these objections in his own motion in limine to exclude evidence related to Mr. Lodis’ vacation time. CP 789-99. In Lodis’ motion, filed on May 2, 2014, he argued, *inter alia*, that “Corbis cannot show any ‘practice’ of terminating employees for not recording vacation”; that testimony by Corbis V.P. of H.R., Vivian Farris, was that it was not a terminable offense to fail to record vacation time; and that opinion testimony by C.E.O. Sherk that he

would have fired Lodis simply for not recording vacation, without more, could not support the after-acquired evidence defense. CP 794; {RP (May 3, 2010) at 63, 35, 40}.

On, May 5, 2014, the Court issued a letter order, granting Defendant's motion in limine "to preclude re-litigation of breach of fiduciary duty." {Dkt. 797} The letter order stated that "the jury's verdict against Lodis regarding breach of fiduciary duty is the law of the case. Lodis will therefore not be permitted to re-litigate the issue by arguing, for example, that the acceptance of the vacation pay-out after his termination precludes a breach of fiduciary duty claim. The focus at trial will be on whether Corbis would have terminated Lodis had it known about Lodis' failure to record vacation time." {Dkt. # 797}.

At the subsequent hearing on pre-trial motions, Lodis' counsel argued that evidence of the jury's finding that Lodis breached his fiduciary duty required an ER 608 analysis and that the jury's finding did not meet the standard for admitting character evidence. RP (May 13, 2014) at 23. Lodis' counsel asked that Corbis not be allowed "to say breach of fiduciary duty." *Id.*, at 26. He argued that "it's not the breach that's relevant," it is only the underlying conduct, "the failure to record" vacation time that had any relevancy. *Id.*

The trial court denied Mr. Lodis' motion in limine to exclude evidence regarding vacation time. RP (May 13, 2014) at 10-11. The court decided that the jury would be allowed "to hear that a prior jury found that Mr. Lodis violated his breach of fiduciary duty [sic] by failing to record his vacation time." RP (May 14, 2014) at 4. The court reasoned "[O]ne of the issues in the after-acquired evidence defense ... will be ... that Mr. Lodis's conduct was serious. ... The fact that a prior jury found that he breached his fiduciary duty is clearly relevant to the seriousness issue."<sup>13</sup>

During Gary Shenk's trial testimony, Mr. Shenk testified that it was his "opinion that had [he] known that Mr. Lodis had not recorded his vacation, [he] would have fired him." RP (May 15, 2014) at 110.

Mr. Shenk was then asked, "[I]f somebody fails to record vacation, that's, to you, grounds for firing?" He answered, "I think the issue is that he breaches his fiduciary duty." *Id.* at 110-111. Mr. Shenk testified that he knows of "not one person" ever terminated for not recording their vacation. *Id.* at 114, 116-17. Nor does he know any time besides the case of Mr. Lodis where Corbis assessed an

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<sup>13</sup> *Id.*, 4.

employee to determine if they should be terminated because they failed to report vacation. *Id.*, at 116.

Counsel first published the jury verdict for breach of fiduciary duty during Mr. Shenk's testimony. Ex. 485, RP (May 19, 2014) at 155, 158. Lodis' counsel subsequently objected to questions to Mr. Lodis regarding the failure to report vacation days as improper character evidence under ER 404. RP (May 21, 2014) at 212. Later, during the cross-examination of Lodis, the verdict was published again. RP (May 22, 2014) at 35. Corbis' counsel described Lodis as having been found "guilty" and asked Mr. Lodis, "That's embarrassing, isn't it, sir?" RP (May 22, 2014) at 36. Counsel also asked Lodis, "We have already been here, right, and it resulted in a verdict against you? ...[T]he justifications you just offered? You made those in the second trial regarding your vacation and breach of fiduciary duty." *Id.*, at 109.

On May 20, 2014, Mr. Lodis filed a motion for judgment as a matter of law on Corbis' after-acquired evidence defense. CP 1627. Lodis' motion was denied and the defense was allowed to go to the jury. RP (May 22, 2014) at 3-4. Mr. Lodis then asked that the Court instruct the jury on the "elements" of the prior breach of fiduciary

duty claim, which the Court declined to do. RP (May 29, 2014) at 94, 104.

In closing Corbis told the jury, *inter alia*, that Lodis “appealed both verdicts and paid back the money, but only after he lost the appeal. Is that accepting the jury’s verdict, or is that, again, denial?” RP (May 29, 2014) at 159-160. On June 9, 2014, Mr. Lodis filed a CR 50 motion for judgment as a matter law on the affirmative defense and CR 59 motion for new trial. CP 2015. This appeal followed that motion’s denial.

#### IV. ARGUMENT

##### A. Standard of Review

All questions of law are reviewed de novo. Mountain Park Homeowners Ass’n, Inc. v. Tydings, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). Thus, whether collateral estoppel or the law of the case doctrine applies to bar relitigation of an issue is reviewed de novo.<sup>14</sup>

The standard of review for evidentiary rulings is abuse of discretion.<sup>15</sup> A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 572, 719 P.2d 569

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<sup>14</sup> See, e.g., Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 305, 96 P.3d 957 (2004).

<sup>15</sup> State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001).

(1986). A trial court’s denial of a motion for a new trial is also reviewed for abuse of discretion.<sup>16</sup> “The test for determining such an abuse of discretion is whether such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent [the] litigant from having a fair trial.”<sup>17</sup>

**B. The trial court erred in precluding Mr. Lodis from presenting evidence of his “reasonable belief” of age discrimination, and in admitting the verdict against Mr. Lodis related to his own claim of age discrimination.**

Facts that tend to establish a party’s theory or disprove an opponent’s evidence are relevant and should be admitted. Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976). Excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *See* Grigsby v. City of Seattle, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975).

Relevant, circumstantial evidence of age discrimination includes “remarks” about an employee’s protected status, even if “not made directly in the context of an employment decision *or* uttered by a non-decision-maker.” *See* Scrivener v. Clark College, \_\_ Wn.2d \_\_, 334 P.3d at 548, n. 3 (2014). Yet, in the third Lodis trial, the trial

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<sup>16</sup> Hickok-Knight v. Wal-Mart Stores, Inc., 170 Wn. App. 279, 324, 284 P.3d 749 (2012), *review denied*, 176 Wn.2d 1014 (2013).

<sup>17</sup> Collins, 155 Wn. App. at 81, *quoting* Aluminum Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

court precluded Mr. Lodis from “retry[ing] the age issues.” RP (May 13, 2014) at 54 (“We have had a trial. We had a jury verdict. We are not going to go over that ground again.”). RP (May 22, 2014) at 69 (“[I]n the previous trial we spent numerous days on all this other circumstantial evidence, and I don’t want to do that” again.)

The court so streamlined Mr. Lodis’ presentation of the age discrimination evidence, limiting Lodis to only five actions by Shenk that Lodis brought to Shenk’s attention,<sup>18</sup> as to trivialize Shenk’s conduct and make Mr. Lodis’ claim that he opposed conduct “reasonably believed” to be age discrimination seem less believable to the jury. There were many additional instances in which Mr. Lodis heard Mr. Shenk make ageist remarks, or received reports of him making such remarks, with regard to older workers that Shenk and Corbis terminated. Such facts added to Lodis’ reasonable belief, but Lodis was prohibited from bringing them to the jury’s attention.

- 1. The law of the case doctrine does not preclude evidence of age discrimination presented in the first trial from being presented again in the parties’ third trial.**

“The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.”

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<sup>18</sup> {Dkt. # 797}; RP (May 9, 2014) at 15-16.

Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).<sup>19</sup> The doctrine may also be applied “to refuse ... to address issues that could have been raised in a prior appeal.” State v. Elmore, 154 Wn. App. 885, 896, 228 P.3d 760 (2010). “[T]he law of the case doctrine is discretionary.... This rule has been codified as RAP 2.5(c)(2).”<sup>20</sup>

Thus, properly applied the “law of the case” doctrine precludes relitigation of issues of law (*e.g.*, whether Mr. Lodis must “step outside” his job duties to be protected from retaliation); it is not used to preclude issues of fact, such as whether Lodis breached his fiduciary duty or was discriminated against based on age. Only in appropriate cases, the relitigation of factual issues is precluded not by the law of the case doctrine, but by collateral estoppel. Neither doctrine applies in this case.

**2. Collateral estoppel does not apply, since the issue in the trial of Mr. Lodis’ age discrimination case is not “identical” to the issue presented by his retaliation case.**

“Collateral estoppel is an affirmative defense. The party asserting it has the burden of proof.” State Farm Mut. Auto. Ins. Co. v. Avery, 114 Wn. App. 299, 304, 57 P.3d 300 (2002). Collateral

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<sup>19</sup> Accord Folsom v. Cnty. of Spokane, 111 Wn.2d 256, 263, 759 P.2d 1196, 1200 (1988) (under the law of the case doctrine “a determination of the applicable law in a prior appeal... precludes re-deciding the same legal issues in a subsequent appeal.”); State v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).

<sup>20</sup> Folsom, 111 Wn.2d at 264.

estoppel, also known as “issue preclusion,” “prevents relitigation of an issue after the party estopped has had a full and fair opportunity to present its case.” Barr v. Day, 124 Wn.2d 318, 324–25, 879 P.2d 912 (1994). It is “the applicable preclusive principle when a ‘subsequent suit involves a different claim but the **same issue.**’” Lemond v. State, Dep’t of Licensing, 143 Wn. App. 797, 804, 180 P.3d 829 (2008).

However, the doctrine’s “desire for finality” is subordinate to the court’s concern with “reaching a just result”.<sup>21</sup> The purpose of collateral estoppel is to be “balanced against the important competing interest of not depriving a litigant of the opportunity to adequately argue the case in court.” Lemond, 143 Wn. App. at 804. Thus, for the doctrine to apply:

Collateral estoppel requires that the issue decided in the prior adjudication is **identical** with the one at hand. Luisi Truck Lines, Inc. v. State Utils. & Transp. Comm’n, 72 Wn.2d 887, 894, 435 P.2d 654 (1967). Where an issue arises in two entirely different contexts, this requirement is not met. Luisi, [72 Wn.2d] at 895....

McDaniels v. Carlson, 108 Wn.2d 299, 305, 738 P.2d 254 (1987).

“If there is uncertainty whether a matter was previously litigated, collateral estoppel is inappropriate. ... [I]t must be clear the same issues were litigated in the prior action.” Mead v. Park Place Properties, 37 Wn. App. 403, 407, 681 P.2d 256 (1984). “[I]f the

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<sup>21</sup> Petcu v. State, 121 Wn. App. 36, 72, 86 P.3d 1234 (2004).

**issues are not identical** or there is an ambiguity, **the [prior judgment] should not be admitted.**” Seattle-First Nat. Bank v. Cannon, 26 Wn. App. 922, 925, 615 P.2d 1316, 1321 (1980).

[T]he issue presented in the second proceeding [must be] **identical in all respects** to an issue decided in the prior proceeding, and ‘... the controlling facts and applicable legal rules remain unchanged.’ Further, issue preclusion is only appropriate if the issue raised in the second case ‘involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment,’ even if the facts and the issue are identical.

Lemond, 143 Wn. App. at 805 (citations omitted) (emphasis added), quoting Standlee v. Smith, 83 Wn.2d 405, 408, 518 P.2d 721 (1974).

In McDaniels v. Carlson, the Supreme Court held that the trial court erred in applying collateral estoppel to dismiss an action to establish the paternity of a child. 108 Wn.2d, at 302. The Court stated that “there was no identity of issues between the paternity finding in the prior dissolution case and the present [action to establish paternity].” *Id.*, at 306. Although there was an earlier dissolution proceeding, in that case “paternity was only *collateral* to the real issues in controversy: custody, support, and visitation rights” with regard to the child. *Id.* (emphasis added). The court emphasized, “[C]ollateral estoppel extends only to ‘ultimate facts’, *i.e.*, those facts directly at issue in the first controversy upon which the claim rests,

and not to ‘evidentiary facts’ which are merely collateral to the original claim.” *Id.*, at 305-06.

The trial court erred in interpreting the earlier Lodis age discrimination verdict as precluding Mr. Lodis’ presentation of evidence concerning age discrimination against other older employees, in the subsequent trial about retaliation. The “age issues” in the two trials are anything but “identical in all respects.” Standlee, 83 Wn.2d at 408.

In the first Lodis trial, evidence showing that Shenk made ageist comments and terminated other older workers was offered for a different purpose, on a different issue, in an “entirely different context” than the third trial. *See* McDaniels, 108 Wn.2d at 305, *citing* Luisi, 72 Wn.2d at 895; Cannon, 26 Wn. App. at 925. In the first trial, evidence that Shenk discriminated against other older employees was circumstantial evidence offered to prove the alleged “ultimate fact”, *i.e.*, that Shenk unlawfully discriminated against Mr. Lodis based on his age. *See, e.g.*, RP (May 22, 2014), at 69; {Dkt. #797}.

“[T]here was no special verdict form that addressed any ... comments that Shenk made [about other employees] or asked the jury to interpret” them. *Id.*, *see also* Ex. 484 (Verdict). “[T]he prior case was not a class action. [Ultimately, the verdict] had nothing to do

with whether [Corbis] discriminated against other people; only against Lodis.” RP (May 21, 2014) at 133. “[T]he fact that a prior jury found that Mr. Shenk had not discriminated against Mr. Lodis [based on age] really doesn’t inform the question of whether or not Mr. Lodis had reason to believe that [Shenk] was engaging in improper conduct with respect to other employees.” Initial Oral Ruling, RP (May 14, 2014) at 3-4. The first jury did not consider any matter “directly at issue” with respect to Mr. Lodis’ retaliation claim, because it had been erroneously dismissed before trial.

When the retaliation case was subsequently remanded for trial, the verdict from the first trial should have been excluded, as Mr. Lodis presented similar evidence of discrimination against others to prove -- not that Corbis “*did in fact violate the law*” -- only that it was “reasonable to believe” Corbis discriminated against others based on age. Lodis, 172 Wn. App. at 852. In contrast to the first trial, the ultimate facts at issue in the retaliation case did not require that Mr. Lodis prove that he or anyone else was discriminated against based on age, or that the law was “actually violated.” *Id.*; CP 2003 (Jury Instruction No. 9).

Since issues in the first and third Lodis trials are not “identical,” such that there is “a difference in the degree of the burden

of proof’ in the two proceedings and a lesser burden of proof for Mr. Lodis in the later retaliation case; issue preclusion was inappropriate. *See* Beckett v. Dep’t of Social & Health Servs., 87 Wn.2d 184, 550 P.2d 529 (1976) (holding that lesser burden of proof in later civil action for fraud – based on same facts for which jury had already criminally acquitted party for fraudulent overpayment – barred application of collateral estoppel doctrine), *overruled on other grounds by* Dunner v. McLaughlin, 100 Wn.2d 832, 843, 676 P.2d 444 (1984). *See also* Standlee, 83 Wn.2d at 407, *discussed in* Beckett, 87 Wn.2d at 187-88.

**3. It is an injustice to preclude age discrimination evidence from the trial of Mr. Lodis’ remanded retaliation case.**

But for the erroneous dismissal of his retaliation claim before the first trial, Mr. Lodis could have established at that trial that he opposed conduct “reasonably believed” to be age discrimination based on ageist comments and conduct of Gary Shenk well beyond the five (5) occurrences when Lodis “admonished” Shenk. Mr. Lodis should not be denied a full hearing on the evidence that supports his retaliation claim, solely because his case was erroneously dismissed before it could be tried. Such preclusion of issues would “work an

injustice” on Mr. Lodis,<sup>22</sup> who has yet to have a “full and fair opportunity to present [his] case.” Barr, 124 Wn.2d at 324–25.

**4. It was error to admit the verdict on age discrimination.**

As collateral estoppel does not apply, the prior verdict on age discrimination should not have been admitted. *See, e.g., Cannon*, 26 Wn. App. at 928 (reversing collateral estoppel as to damages and holding that on remand prior criminal judgment cannot be considered as either “prima facie or conclusive evidence” – rather, issue of damages “must be proven anew”).

The prior verdict on age discrimination does not have “any tendency to make the existence of any fact that is of consequence to the determination of the [retaliation] action more probable or less probable than it would be without the evidence.” ER 401. *See Oral Ruling, RP (May 14, 2014) at 3-4 (“[T]he fact that a prior jury found that Mr. Shenk had not discriminated against Mr. Lodis [based on age] really doesn’t inform the question of whether or not Mr. Lodis had reason to believe that he was engaging in improper conduct with respect to other employees.”)*

To inject the first jury’s failure to find age discrimination against Mr. Lodis into his retaliation case, without allowing Lodis to

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<sup>22</sup> *See Christensen v. Grant Co. Hosp.*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004).

present evidence to oppose those findings, created the impression that the underlying rulings were relevant—without explaining the differing legal standards. ER 402, 403. This mixing of legal standards and conclusions, when only the conclusions were brought to the attention of the jury, and important facts that would have given a balance to the presentation were omitted over objection, created confusion and prejudice. ER 402, 403. For example, during closing statement, Corbis’ counsel told the jury, “All the testimony you heard in this trial ... about alleged ageist comments, that's all been thrown out there, all the mud they could throw at Gary, and none of it stuck because there was no basis for finding that Gary had done anything wrong.” RP (May 29, 2014) at 178.

**C. The trial court erred in granting Defendant’s motion in limine to preclude re-litigation of Steven Lodis’ breach of fiduciary duty, and in admitting Ex. 485, the second jury’s verdict on Corbis’ breach of fiduciary duty counter-claim.<sup>23</sup>**

In the last Lodis trial, the issue presented by the after-acquired evidence affirmative defense was “whether Corbis would have terminated Lodis had it known of his failure to report any vacation time.”<sup>24</sup> “There [was] of course no requirement that the company establish breach of fiduciary duty in order to prevail on [its] after-

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<sup>23</sup> {Dkt. #797}; RP (May 14, 2014) at 4-5; RP (May 22, 2014) at 36.

<sup>24</sup> CP 27-28 (Order dated February 25, 2014), CP 2013 (Special Verdict Form).

acquired evidence theory.” CP 28 (Order dated February 25, 2014);  
*see also* RP (May 21, 2014)(“The Court: ... The fact that somebody  
breached fiduciary duty doesn't necessarily mean that they will be  
terminated...”)

In admitting the verdict on Mr. Lodis’ breach of fiduciary  
duty, the court stated that the evidence went to the “seriousness of  
what occurred.”<sup>25</sup>

My reasoning is [that] one of the issues in the after-acquired  
evidence defense that will be raised by Corbis is that they  
have to show that Mr. Lodis’s conduct was serious. And then,  
of course, they have to show that if they had known about it,  
they would have terminated him. The fact that a prior jury  
found that he breached his fiduciary duty is clearly *relevant* to  
the seriousness issue.

RP (May 14, 2014) at 4.

“Seriousness” is not an element of the after-acquired evidence  
defense.<sup>26</sup> To the extent the seriousness of Mr. Lodis’ conduct was at  
issue in the third trial, it was a collateral or evidentiary fact -- not an  
“ultimate fact” to which estoppel could apply. *See McDaniels*, 108  
Wn.2d at 305-06.<sup>27</sup> The ultimate fact to be determined was “whether

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<sup>25</sup> RP (May 13, 2014) at 22.

<sup>26</sup> *See* CP 2007 (Jury Instruction No. 12).

<sup>27</sup> *See also* Black’s Law Dictionary (9th ed. 2009), defining “*evidentiary fact*”  
 (“1. A fact that is necessary for or leads to the determination of an ultimate fact. —  
 Also termed *predicate fact*. 2. A fact that furnishes evidence of the existence of  
 some other fact. — Also termed *evidential fact*. 3. *See fact in evidence*. [‘A fact that  
 a tribunal considers in reaching a conclusion; a fact that has been admitted into

Corbis would have terminated Lodis had it known of his failure to report any vacation time.”<sup>28</sup> Because collateral estoppel is inapplicable to evidentiary facts, the breach of fiduciary duty verdict should not have been admitted as “prima facie evidence” of the conduct’s seriousness or any other matter. Cannon, 26 Wn. App. at 928. The fact of seriousness must “proven anew.” *See id.*

Moreover, the fact that the breach of fiduciary duty verdict was “relevant” to the issue of seriousness is not the same as being “identical in all respects” to the issue. *See Standlee*, 83 Wn.2d at 408. As the issues are not identical, it was error to give preclusive effect to the prior verdict. *Id.*

In Roper v. Mabry, 15 Wn. App. 819, 551 P.2d 1381 (1976), “Mr. Mabry made statements to others that Mr. Roper was a ‘thief’ who ‘stole’ and ‘embezzled’ corporate money, ... giving rise to [an] action [by Mr. Roper] for slander.” *Id.*, at 820. “[I]n a prior civil judgment..., the court found that Mr. Roper had wrongfully taken money, **breached his fiduciary duty**, and committed fraud.” *Id.* Mr. Mabry asked the court in the action for slander admit these ultimate findings of fact as evidence. *Id.*, at 820-21. The trial court refused to

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evidence in a trial or hearing. ]”) and “ultimate fact” (“A fact essential to the claim or the defense. — Also termed *elemental fact*; *principal fact*.”)

<sup>28</sup> CP 27-28 (Order dated February 25, 2014), CP 2013 (Special Verdict Form).

admit the findings and the Court of Appeals affirmed that decision, holding that “collateral estoppel [did] not allow admission of [such] findings.” *Id.* at 822. The Court of Appeals wrote that “the defense to this defamation action is proof of the truth of the statements that Mr. Roper is a ‘thief’ or ‘embezzler’, and not proof that he breached a fiduciary duty.” *Id.*, at 823.

The elements, proof, and nature of civil fraud [and] breach of a fiduciary duty are not identical to those of larceny, theft, or embezzlement. .... Thus, the issues decided in the prior action are not identical to those in the present action. Moreover, ... [the] findings would mislead the jury, confuse the issues and work an injustice to the plaintiff.... Consequently, the requisites for application of collateral estoppel have not been met.

*Id.* at 822.

Like the prior judgment in Roper, issues decided in the second Lodis trial were not identical to issues in the third trial. “There [was] of course no requirement that the company establish breach of fiduciary duty in order to prevail on [its] after-acquired evidence theory.” CP 28 (Order dated February 25, 2014); *accord* RP (May 21, 2014) at 77. Thus, the verdict on breach of fiduciary duty should have been excluded from the trial of such defense. *See Roper*, 15 Wn. App. at 822.

Additionally, the trial on the after-acquired evidence defense poses no question of ultimate fact regarding the amount of

“damages,” if any, Mr. Lodis caused to Corbis based on not reporting his vacation. Because the retaliation case lacks an identical issue regarding “damages,” the second jury’s award of \$42,389 damages should have been excluded. *See Cannon*, 26 Wn. App. at 928-29 (reversing collateral estoppel as to “damages,” including prior restitution required by district court, recited in Ninth Circuit opinion to be \$43,000, as the fact was “evidentiary” and collateral to the claim asserted, conspiracy and aiding and abetting embezzlement; holding that prior judgment could not be considered as either “prima facie or conclusive evidence” – rather, issue of damages “must be proven anew”).

**D. Corbis presented insufficient evidence for the after-acquired evidence defense and prejudicial character evidence regarding Lodis’ failure to report vacation to be presented to the jury.**

To prevail on an after-acquired evidence defense, *McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 362-63, 115 S.Ct. 879, 130 L. Ed. 2d 852 (1995) “places the burden of proof ... on the employer, carefully articulating that the employer must establish not only that it *could* have fired an employee for the later-discovered misconduct, but that it *would* in fact have done so.” *O’Day v. McDonnell Douglas Helicopter Co.*, 79 F.3d 756, 759 (9th Cir. 1996) (emphasis in original). Thus, Corbis has the burden of proving that it

“discovered” information after the fact and must also “prove by a preponderance of the evidence that it would have fired the employee for [the] misconduct.” Rivera v. NIBCO, Inc., 364 F.3d 1057, 1070-71 (9th Cir. 2004), *quoting O’Day*, 79 F.3d at 761.<sup>29</sup>

“The inquiry focuses on the employer's actual employment practices, not just the standards established in its employee manuals, and reflects a recognition that employers often say they will discharge employees for certain misconduct while in practice they do not.”<sup>30</sup>

Corbis cannot show any “practice” of terminating employees for not recording vacation. Indeed, Corbis’ own witness, Vivian Farris, the Senior Vice President of Human Resources (and Mr. Lodis’ replacement) testified on direct that it was **not** “a terminable offense” to fail to record vacation time, even though it was a violation of company policy. RP (May 3, 2010) at 63, 35, 40.

The other evidence presented showed that Corbis most certainly would not have terminated Lodis. The evidence showed that Corbis knew not only that Lodis was not recording his vacation time,

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<sup>29</sup> “RCW 49.60 substantially parallels federal law, and thus in construing the Washington statute, Washington courts may look to interpretations of the federal law.” Hollingsworth v. Washington Mutual Sav. Bank, 37 Wn. App. 386, 681 P.2d 845 (1984). Although federal discrimination cases are not binding on this court, they are persuasive and their analyses may be adopted “where they further the purposes and mandates of state law.” Antonius v. King County, 153 Wn.2d 256, 266, 103 P.3d 729 (2004).

<sup>30</sup> O’Day, 79 F.3d at 759.

and that it did not mention that as a basis for his termination or withhold his vacation payout, *see* Ex. 108; but also that others in similar positions did the same thing. Order, CP 27. Corbis has not required any other executives or employees to repay any of that, and Corbis has terminated none of them. *See* RP (May 15, 2014) at 114, 116-17. Corbis cannot prevail on an after-acquired evidence defense “based only on bald assertions that an employee would have been discharged for the later-discovered misconduct,” where its actual practices do not support such a statement.<sup>31</sup>

The truth is that Corbis’ after-acquired evidence defense and its evidence that Mr. Lodis failed to report his vacation days was offered primarily to “attack [Lodis’] character for truthfulness” in violation of ER 404 and 608, *see* RP (May 21, 2014) at 78; and to characterize Lodis as a criminal for “stealing time” (Shenk Test., RP (May 19, 2014) at 153) when such evidence would require a criminal conviction under ER 609.

The jury should not have been permitted to hear the after-acquired evidence defense. Under the pretext of the defense, extremely prejudicial evidence and argument was presented to the jury. Mr. Lodis was asked “You have every reason to fabricate your

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<sup>31</sup> *Id.*, at 762.

testimony in front of this jury in the hope of finally scoring a win, don't you, Mr. Lodi?" Lodi answered, "I don't fabricate my testimony." and was then asked "You don't misrepresent on your time reports either, right?" RP (May 22, 2014) at 64. Lodi was also asked, "You steadfastly denied under oath that you breached your fiduciary duties to Corbis?" RP (May 22, 2014) at 63. "[Y]ou want this jury ... just like the two other juries, to believe you?" *Id.*, at 63. In closing, counsel described Lodi as "a person who testified under oath in front of you and in front of two separate juries and failed to convince them with his stories; that he still thinks somehow he can win. Sure enough, Steve Lodi is back for a third bite of the apple. I told you he would ask this Court and you for millions of dollars based on his excuses and lies. Sure enough, that's what he is asking you to do, just as he asked two juries before you unsuccessfully."<sup>32</sup>

Corbis' counsel also blatantly confused the issues and misstated the evidence in opening argument, claiming that "Shenk waited until he couldn't wait any longer to finally terminate Mr. Lodi for breaching his fiduciary duties and his duties of loyalty." RP (May 15, 2014) at 44. Counsel claimed, "Lodi had been breaching

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<sup>32</sup> RP (May 29, 2014) at 155-56.

his fiduciary duty almost every day that he was employed at Corbis.”

*Id.* at 69.

#### **V. ATTORNEY FEES AND COSTS**

Recognizing that the case will have to be re-tried assuming remand, appellant respectfully requests that attorney fees for this appeal be awarded at that time, and that costs of this appeal be awarded in accordance with the Rules of Appellate Procedure.

#### **VI. CONCLUSION**

For all of the foregoing reasons, a new trial should be granted.

RESPECTFULLY SUBMITTED this 17th day of February, 2015.

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**DECLARATION OF SERVICE**

Patti Lane states and declares as follows:

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

2. On February 17, 2015, I caused to be delivered via email addressed to:

Jennifer Ann Prada  
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a copy of BRIEF OF APPELLANTS

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

DATED this 17th day of February, 2015 at Seattle, King County, Washington.

s/Patti Lane  
Patti Lane, Legal Assistant

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