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NO. 311848

COURT OF APPEALS FOR DIVISION III

STATE OF WASHINGTON

DALLAS BARNES,

Appellant,

vs.

THE STATE OF WASHINGTON, through
WASHINGTON STATE UNIVERSITY,

Respondent.

APPELLANT'S BRIEF

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L. The Superior Court erred when denying Dallas Barnes the opportunity to ask WSU Vice Provost Larry James if institutional racism existed at WSU, after James testified, in response to questioning by WSU counsel, that WSU was very conscious about institutional racism and after James boasted of workshops attended by administrators about eradicating racism.

M. The Superior Court erred when denying Dallas Barnes the opportunity to ask questions of WSU Vice Provost Larry James about a committee's findings of institutional racism at WSU, after James testified, in response to questioning by WSU counsel, that WSU was very conscious about institutional racism and after James boasted of workshops attended by administrators about eradicating racism.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Should the court permit testimony from an expert witness, with decades of experience in investigating civil rights claims in academia, on the closed nature of academia, the subjective nature of hiring decisions at a university, the impact of an administrator filing a discrimination lawsuit, the forms of retaliation in an university setting, the futility of the administrator in seeking an open position, and/or the meaningless of a position entitled "Assistant Director of Special Projects?"

B. When a university, sued for employment discrimination, tells the jury that it is free of racism and that any administrator would violate comprehensive prohibitions against discrimination and retaliation communicated in myriad ways if he discriminated or retaliated against plaintiff, should the plaintiff be permitted to introduce testimony that contradicts this boast, such as testimony that an independent investigation found institutional racism at the university?

C. Should counsel for the State of Washington be free to palter before the jury, during opening statement, and then preclude testimony to contradict the false information?

D. Should counsel for the State of Washington be permitted to ask questions that imply facts that he knows to be false?

E. When a university, sued for employment discrimination because of a lack of promotion, tells the jury that the university promoted another, rather than plaintiff, to the position of Director of Student Affairs because the other is "an out-front person, someone who interacted well with people and had the background to do the job," should the plaintiff be able to introduce as evidence letters that the university notice that plaintiff held the same qualities as the other employee.

F. When the Vice Provost of Academic Affairs of a university, sued for employment discrimination, testifies that the university is very conscious about institutional racism and boasts that school administrators attend programs about eradicating racism, should plaintiff be able to ask the Vice Provost if institutional racism exists at the university and present to the Vice Provost findings of an independent investigation showing institutional racism?

G. When a university sued for employment discrimination tells the jury that its Director of Student Affairs, who participated in the discriminatory treatment, "by all accounts, did an excellent job," should the plaintiff be allowed to present evidence of the racist attitudes and comprehensive racist comments of the Director?

H. When a university sued for employment discrimination tells the jury that its Director of Student Affairs, who participated in the discriminatory treatment, "by all accounts, did an excellent job," should the plaintiff be permitted to elicit testimony about an internal investigation of the Director and the Director's resigning in disgrace?

I. When a university sued for employment discrimination tells the jury that its Director of Student Affairs, who participated in the discriminatory treatment, "by all accounts, did an excellent job," should plaintiff be permitted to answer the question: did the Director do an excellent job?

J. When a university, sued for employment discrimination, asks witnesses if its Director of Student Affairs referred to himself with Mexican slurs, should plaintiff be permitted to provide testimony of the frequent racist statements uttered by the Director?

K. When a university, sued for employment discrimination, asks a witness if any employees she supervised complained about comments by the Director of Student Affairs, should the plaintiff be allowed to ask about racist statements made by Jaime Contreras, after WSU asked a witness if any employees she supervised complained about the comments of Contreras.

L. When a university, sued for employment discrimination, asks a witness if any employees she supervised complained about comments by the Director of Student Affairs, should the plaintiff be allowed to ask the supervisor of the Director about complaints raised by university employees of racist statements made by the Director?

M. When an employee sues a university for retaliation resulting from the employee suing and settling an earlier lawsuit, should the employee be permitted to show the jury the settlement amount when the university implies that the employee received no remuneration in the settlement? Research

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O. When an employee sues a state university for retaliation and claims a form of retaliation is insisting that the employee not talk to other employees about legal rights, should the employee be permitted to testify whether an Assistant Attorney General demanded that he stop talking to someone?

III. STATEMENT OF CASE

Dallas Barnes has been employed at Washington State University (WSU) since 1969 and, for the last sixteen years, has served as an Associate Director of Student Affairs at WSU's Tri-Cities branch campus. RP 139, 173, 174. In this lawsuit, Barnes, an African-American, sued Washington State University for, among other things, failing to promote him to the position of Interim Director and Director of Student Affairs twice, removing duties from him, and assigning him meaningless tasks. CP 641. Barnes claimed these adverse employment actions resulted from racial discrimination and retaliation for bringing an earlier lawsuit, retaliation for bringing this lawsuit, and retaliation as the result of advocating and testifying for other victims of discrimination at the hands of WSU. CP 641, 2. After a nine-day trial, the jury rendered a verdict for WSU. CP 13, 4. Dallas Barnes appeals, because the Superior Court committed errors that infected the jury verdict. CP 7-9.

Dallas Barnes holds a Bachelor of Arts, Masters of Arts, and Ph.D. degrees in Sociology from Washington State University. RP 132, 3. From 1969 to 1996, Dallas Barnes served as an academic counselor, professor, and administrator at Washington State University's main campus in Pullman. RP 139 - 144. The university initially hired Dr. Barnes to

advance diversity on campus. RP 132. Some students at WSU have never spoken to or touched a black person. RP 137. Minority students have few role models at WSU. RP 136, 164.

In opening statement, WSU counsel claimed that WSU is a marketplace of ideas, a marketplace of diversity, and a marketplace of inquisitiveness. RP 111. WSU also boasted that its President is African-American. RP 433.

In 1990, WSU Pullman removed, from Dr. Barnes, duties to advise minorities. RP 164. The administration told him he expected too much academic ability from minority students. RP 165. As a result, Barnes felt powerless to advocate for minority students. RP 166. In 1993, Dr. Barnes filed suit for race discrimination against WSU. RP 166. In 1996, the suit settled. RP 167. As part of the settlement agreement, WSU transferred Dallas Barnes to the school's new Tri-Cities campus. RP 169. Barnes would serve as an Assistant Director of Student Affairs, academic advisor and guidance counselor, and teach upper division courses in minority relations, sociology, and education. RP 169, 170.

Trial Exhibit 2 is the settlement agreement from the 1994 lawsuit. RP 167. During opening statement, WSU told jurors that they would see the agreement. RP 109. Nevertheless, the court, at WSU's request, struck

the monetary settlement of $150,000, from the exhibit. RP 57, 8. The court would not even allow the jury to hear that WSU paid Dallas Barnes money as part of the settlement. RP 57, 8. But WSU's counsel elicited testimony that WSU paid Barnes $2,500 for moving expenses to the Tri-Cities. RP 438.

Dr. Barnes arrived on the WSU Tri-Cities campus, in the summer of 1997, and assumed the position of Assistant Director of Student Affairs. RP 173, 190. Barnes hoped WSU would put the lawsuit behind it, and he saw a bright future. RP 194, 5. He hoped to become Director of Student Affairs and eventually Vice Chancellor of Student Affairs, if not higher positions. RP 196. The Director of Student Affairs was absent until January 1998, and Barnes, with his leadership skills, ran the Office of Student Affairs, until the arrival of the Director. RP 173.

The WSU Tri-Cities Student Affairs Office performs the tasks of recruiting, admitting, personal counseling, career counseling, tutoring, overseeing student clubs and activities, assisting disabled students, and expelling and reinstating. RP 190, 191, 346, 347, 458, 459. The Director of Student Affairs oversees the office. RP 457, 8. The Director reports to the Vice Chancellor of Academic Affairs, who, in turn, reports to the Tri-Cities Chancellor. RP 457, 8. Employees within Student Affairs include

advisors, recruiters, counselors, student club sponsors, and student government advisors. The Office employs twenty full-time and seven part-time workers. RP 346, 7. During his many years of experience in the Office of Student Affairs, Dallas Barnes performed the office's many functions. RP 174.

In the late 1990s, while Dallas Barnes was disabilities coordinator, WSU Tri-Cities student Wade Ricard filed a complaint, with the United States Department of Education Office of Civil Rights. RP 220, 1. Ricard, who is visually impaired, claimed WSU denied him a computer with large print capacity. RP 220. Barnes testified favorably for Wade Ricard during the Department of Education investigation. RP 221. Chancellor Larry James thereafter removed Barnes from the position of disability coordinator, and replaced Barnes with a student intern, whose disability internship Barnes supervised. RP 221-5.

WSU Tri-Cities Chancellor Larry James blamed Dallas Barnes for Wade Ricard's complaint. RP 1048. James refused to recognize that Barnes attempted to gain the funding for the needed equipment, but that his request was rejected. RP 1046-48. James was aware of Dallas Barnes' earlier lawsuit against WSU. RP 1055. James also offered Dallas Barnes money to leave WSU Tri-Cities. RP 226.

Dan Kapraun[1] served as WSU Tri-Cities Director of Student Affairs beginning in early 1998. RP 200. Kapraun resigned in 1999, and Dallas Barnes, who previously served as Acting Director, was the only administrator next in line to be Interim Director or Director of Student Affairs. RP 200. In 1999, WSU appointed Pat Wright, instead of Dallas Barnes, first as Interim Director and then as Director of Student Affairs, despite Wright lacking a background in Student Affairs. RP 205. WSU Tri-Cities never asked Barnes if he wanted the position and never advertised the position. RP 205, 1042. Barnes would have applied for the position, if the opening was advertised. RP 205. After the appointment of Pat Wright, Barnes continued to work as Assistant Director of Student Affairs and taught one class each semester. RP 205.

At trial, WSU emphasized that Pat Wright is African-American. RP 109. According to Dallas Barnes, appointing Pat Wright as Director of Student Affairs created a Black on Black conflict familiar in social science. RP 209. Before Pat Wright's appointment, the position of Director of Student Affairs was advertised for one with a Ph.D., but Wright held only a Bachelor's degree. RP 207, 210. Pat Wright had never

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[1] Dan Kapraun's surname is misspelled in the record as "Capraun."

filed suit against WSU. RP 210. WSU promoted the Black of choice, someone who had caused less friction. RP 211.

In its opening statement to the jury, WSU claimed that Chancellor Larry James removed Dan Kapraun and installed Pat Wright, an African-American female, because she is "an out-front person, someone who interacted well with people and had the background to do the job." RP 113. In order to show the pre-textual appointment of Pat Wright over Dallas Barnes, Barnes attempted to introduce letters from students, faculty, and Pullman administrators showing that WSU had notice that Barnes had those qualities allegedly held by Pat Wright. Exhibits 17, 18; RP 213, 8. The trial court sustained WSU's objection to introduction of the letters. RP 214, 5.

Director of Student Affairs Pat Wright told Dallas Barnes that "Pullman" made decisions concerning Barnes' employment. RP 314. Barnes' performance evaluations dipped after Wright made the comment. RP 315. A performance evaluation prepared by Wright falsely stated that Dallas Barnes undertook the function of counseling students with behavioral health issues. RP 321, 2. The evaluation also claimed that Barnes counseled faculty with respect to professional development and psychological problems, and the evaluation directed Barnes to end the

counseling. RP 321, 2. Barnes had talked to a faculty member denied tenure. RP 324. Some faculty and students came to Barnes for advice when overwhelmed with problems. RP 326. In 2001 or 2002, Dr. Barnes found news clippings of the 1994 lawsuit in his personnel file kept in Pullman. RP 317.

In 2007, WSU Tri-Cities Chancellor Vicky Carwein dismissed Pat Wright, from the position of Director of Student Affairs, without notice to Dallas Barnes. RP 339, 40. Wright was implicated in a scheme involving fraudulent reporting of enrollment numbers. RP 461. Dallas Barnes was not implicated in the scandal. RP 463.

After the termination of Pat Wright, Richard Backes, from the Pullman campus, served as part-time Interim Director of Student Affairs for six to eight months. RP 339, 40. Dr. Barnes did not seek the position of Interim Director because it was not advertised. RP 341. Chancellor Vickie Carwein never asked Barnes if he wanted to be Interim Director of Student Affairs. RP 341. By then, Dallas Barnes had served in Student Affairs for 30 years and knew all areas of the office. RP 342. He would have served as Interim Director of Student Affairs if asked. RP 342.

Chancellor Vickie Carwein stated that, in 2007, she looked for someone with a career track in Student Affairs, and she denied knowing

that Dr. Barnes had this career track. RP 344. This denial is not credible. RP 345. Appointee Richard Backes lacked any experience in reinstatement, disability services, minority recruitment, or learning support, all essential functions of Student Affairs. 1115, 6.

In 2007, Richard Backes prepared a performance evaluation of Dallas Barnes. RP 1118; Exhibit 111. The evaluation read, in part: "Dallas has responsibility to provide initial counseling for students who appear to have various behavioral health issues, i.e., depression, family issues, and personal issues." Exhibit 111; RP 1119. Backes noted that Barnes referred some students to outside counselors, and that teachers and students complimented Barnes' counseling services. RP 1119. At the request of the WSU Spokane campus administrators, Barnes provided counseling services for an entire cohort of students upset because of a suicide. RP 1120.

In 2008, the position for permanent Director of Student Affairs was advertised. RP 343. Dallas Barnes did not apply since it was his observation that the person who was given an interim position was given the permanent position. RP 343. Barnes was not told that Richard Backes would not seek the permanent position. RP 343.

Chancellor Vicky Carwein appointed Jaime Contreras as

permanent Director of Student Affairs in June 2008. RP 345. Dallas Barnes was more qualified than Contreras. RP 346, 7. Contreras lacked a Ph.D. RP 346. According to Vickie Carwein, she chose Jaime Contreras because of his "career track" for Student Affairs. RP 472, 3. She claimed a lack of knowledge of Dallas Barnes' having a "career track" in Student Affairs. RP 472, 3.

In its opening statement, WSU counsel mentioned that Jaime Contreras, rather than Dallas Barnes, was appointed Director of Student Affairs in 2008. Counsel then proclaimed: "And by all accounts, Contreras did an excellent job." RP 116.

In June 2008, when Jaime Contreras arrived on campus, Dallas Barnes worked as the reinstatement officer and campus counselor. RP 347. Contreras continued a pattern of isolation of Dr. Barnes. RP 347. Although Barnes remained involved in student reinstatement, Contreras took supervisory duties from Barnes. RP 340. On July 24, 2008, Jaime Contreras and WSU Tri-Cities Chancellor delivered a letter to Dr. Barnes that assigned him the new title of Director of Special Projects and eliminated all counseling services from him. Exhibit 112; RP 351. The term Special Projects meant Barnes did whatever his superiors, including Jaime Contreras, requested. RP 351. Chancellor Vickie Carwein did not

know of a need for an Associate Director of Student Affairs for Special Projects, nor if the title of Special Projects had been used before or since. RP 472, 3. After Barnes' assignment as Associate Director of Student Affairs for Special Projects, Jaime Contreras first directed Barnes to help with a survey of student satisfaction, a task that should have been assigned to a graduate student. RP 381, 382, 1102.

From 1995 to 2010, Dallas Barnes was a registered mental health counselor with the Washington State Department of Health. RP 334, 5; Exhibit 5. WSU advertised to students the availability of counseling and encouraged students to use the counseling office. RP 336. Dallas Barnes was the official counselor at WSU Tri-Cities from 2001 to 2008. RP 336. According to Dr. Barnes, academic counseling and personal counseling cross each other. RP 191. If one has emotional distress, one will not be a good student. RP 191. Barnes provided counseling to reduce stress caused by educational loads. RP 335. In the event a student needed a mental health counselor, Dallas Barnes referred the student to a counselor in the community. RP 337.

WSU claims that it removed counseling duties from Dallas Barnes because he lacked qualifications. Nevertheless, upon the removal, WSU placed counseling duties under Anna Mitson, who had no counseling

background, nor a counseling license from the State of Washington. RP 381. Barbara Hammond, WSU Director of Student Counseling and Testing Center on the Pullman campus, testified to the removal of counseling duties from Dallas Barnes. RP 579, 80. In 2008, Hammond recommended to the Tri-Cities campus to hire a full-time psychologist. RP 597. 605. She expected WSU Tri-Cities to need one year to hire the psychologist, and she had no knowledge of any psychologist being hired by the time of trial. RP 619. Hammond recognized that Dr. Barnes was qualified to perform counseling and no one had complained about his performance. RP 606, 7. Contrary to WSU's position, Hammond did not conclude that all counseling services needed to be taken from Dallas Barnes. RP 611, 2. To the contrary, she expected Barnes to continue counseling in a limited role. RP 612. Taking all counseling services away from a counselor was unprecedented. RP 614.

Dallas Barnes called coworkers to testify about the discrimination imposed by WSU administrators and the impact of that discrimination upon him. Johan Curtiss worked as an Assistant Director of Student Affairs from January 2007 until April 2012. RP 260, 1. She knew Barnes to be knowledgeable in areas of the Office of Student Affairs, including admissions, registration, and financial aid. RP 274. Curtiss worked with

Dallas Barnes, but never understood the nature of the "special projects" assigned him. RP 262. Exhibit 11 is an organizational chart, within the Office of Student Affairs, for 2009. RP 262. The chart showed other Assistant Directors of Student Affairs supervised others, while Dallas Barnes supervised no one. RP 263. Curtiss noticed Dallas Barnes as "sad." RP 278.

Once Jaime Contreras became Director of Student Affairs, Johan Curtiss and other Assistant Directors attended daily lunch meetings with Contreras. RP 264, 5. The managers discussed activities in Student Affairs. RP 265. Dallas Barnes did not attend the lunch meetings. RP 265. Johan Curtiss would have expected Dallas Barnes, as a manager, to be present at the lunches. RP 265.

Johan Curtiss heard Jaime Contreras criticize the work performance of Dallas Barnes. RP 265, 6. Curtiss also heard Contreras call Dallas Barnes racial terms, such as "Kunta Kinte" and "Thurgood Marshall." RP 266. "Kunta Kinte" is a character from *Roots*, an African-American slave who tried to escape bondage. Contreras did not use "Kunta Kinte" in a joking fashion, but rather during an angry mood. RP 266, 7. Contreras called Dallas Barnes "Thurgood Marshall" when Contreras expressed ire about Barnes' talking with advocating for

students. RP 267.

Jaime Contreras asked Johan Curtiss to observe when Dallas Barnes arrived and left work. RP 268. This request made no sense to Curtiss since Dr. Barnes was an exempt employee who did not complete time sheets. RP 268. Contreras did not ask Johan Curtiss to observe the movements of any other employee. RP 268, 9.

Dallas Barnes' counsel questioned Johan Curtiss: In opening statement, WSU counsel stated that: "Jaime Contreras did an excellent job on all accounts. Is that true?" RP 274, 5. The court sustained WSU's objection to the question. RP 274, 5.

WSU was granted an order in limine preventing testimony of racist slurs made by Jaime Contreras other than about Dallas Barnes. CP 636, Paragraph 9; RP 9. WSU, in opening, however, violated its own order by stating that "Mr. Contreras referred to himself as Mr. Beaner and Taco Boy." RP 110. In response to questioning by WSU, Johan Curtiss testified that she heard Jaime Contreras refer to himself as Taco Boy and Burrito Man six or seven times. RP 283. The trial court still refused to allow Barnes the opportunity to ask Johan Curtiss and other witnesses about racial slurs uttered by Contreras, which Barnes sought to introduce to show how Contreras colored his world and conformed his behavior to

racial stereotypes. RP 126, 128, 129.

Without evidence to support the contention, WSU asked Curtiss if she heard Dallas Barnes refer to Jaime Contreras as brown man or brown fly? RP 283. She had not. RP 283.

Anna Mitson, like Johan Curtiss, served as an Assistant Director of Student Affairs and worked with Dallas Barnes. RP 292. Barnes taught classes, counseled, and oversaw the reinstatement program when Mitson started employment. RP 292. The administration took most of those duties from Dallas Barnes and he was given Special Projects. RP 293. Anna Mitson never understood what constituted "Special Projects." RP 293.

Anna Mitson heard Jaime Contreras call Dallas Barnes "Kunta Kinte" about five times when Contreras was angry. 294, 5. Mitson told Contreras to stop calling Dallas Barnes "Kunta Kinte," but Contreras refused. RP 303. Again without any evidence, WSU counsel asked Anna Mitson if she heard Dr. Barnes refer to Jaime Contreras as Brown Man or Brown Fly? RP 299. Mitson also responded in the negative. RP 299.

WSU counsel also asked Anna Mitson if any employee she supervised complained to her about Jaime Contreras uttering racially inappropriate comments in the workplace. RP 299. After she answered

the question, the court still would not allow Anna Mitson to testify as to all of the racially derogatory comments uttered by Jaime Contreras. RP 299 - 301. Despite WSU counsel being free to ask Mitson if any employee had complained to her about comments of Jaime Contreras, the court denied Barnes' counsel the opportunity to ask Vice Chancellor Dick Pratt if anyone complained to him about comments made by Jaime Contreras. RP 761, 2.

Christina Davis worked as a program coordinator, admissions counselor, financial aid officer, and an academic advisor in the Office of Student Affairs. RP 635. Stevenson heard Jaime Contreras call Dallas Barnes "Kunta Kinte" and "Thurgood Marshall." RP 638. Contreras uttered the reference to Justice Marshall when mocking Dr. Barnes. RP 639. Contreras asked Stevenson several times to record the times Barnes came and went. RP 640. Contreras told her he wanted to catch Barnes at something. RP 641. One time when Contreras saw a student enter Barnes' office, Contreras asked Stevenson if she heard anything said. RP 641.

Karla Short worked in the WSU Tri-Cities Student Affairs Office, from October 1988 until January 2010, as a recruiter. RP 360, 1. Short heard Jaime Contreras refer to Dallas Barnes at least a half dozen times as the "black man." RP 360. Contreras repeatedly told her to stay away from

the "black man" and not to speak with the "black man." RP 360. Contreras told Short that Dallas Barnes could not allege discrimination against WSU because Contreras was a Mexican and Dr. Barnes worked for him. RP 361.

Barnes' Counsel asked Dallas Barnes if an Assistant Attorney General demanded that he stop talking to someone? RP 396. The Superior Court sustained the objection, by commenting: "I do not see the relevance of the Assistant Attorney General telling him to stop counseling or telling students to bring a lawsuit against WSU." RP 396, 7.

Jaime Contreras gave Dallas Barnes very low performance ratings. RP 488, 489, 494. Contreras' reference to Dallas Barnes in racist terms caused Vice Chancellor Dick Pratt no concern about the validity of the performance evaluations. RP 794.

From 2001 to 2009, Dr. Barnes taught Diversity in Schools and Society, an Education Department course. RP 177. Unlike other administrators, Dallas Barnes was not paid for his teaching assignment. RP 203, 887. For example, administrator LoAnn Ayers received pay for teaching a class. RP 887. In 2009, Director of Education Elizabeth Nagel removed Barnes' teaching duties, because Mormon students objected to Barnes' mentioning, in the Diversity in School and Society class, that the

LDS church formerly did not view African-Americans as equal members. RP 178, 1043,4. Former Chancellor Larry James agreed he had never heard of a teacher being removed because of something taught. RP 1043, 4.

On the witness stand, Larry James criticized Dallas Barnes as a WSU employee. When Barnes' counsel asked James whether removing Barnes for discussing the history behind the LDS church was unfair, the court sustained WSU's objection to the question. RP 1044, 5. James' duties included determining whether or not a teacher entitled to academic freedom was correctly or incorrectly removed from a teaching assignment if there was a student complaint. RP 1045.

Jaime Contreras resigned from the position of Director of Student Affairs in 2011. RP 398. By that date, Dallas Barnes had filed suit, giving clear notice to the administration that he sought the slot of Director. RP 398, 496. Nevertheless, no opening was advertised. RP 398. Instead, before announcing the resignation of Contreras, Vice Chancellor Dick Pratt and Chancellor Vickie Carwein appointed Carol Wilkerson as Interim Director of Student Affairs. RP 398. Wilkerson had no experience in Student Affairs. RP 399. Wilkerson was first hired because her husband worked at the WSU Prosser research station and she needed a

job. RP 499. Vickie Carwein does not know if Dallas Barnes would be a good Director of Student Affairs, and Barnes' abilities were never discussed with Dick Pratt. RP 500, 1.

At trial, Vice Chancellor Dick Pratt stated he gave Carol Wilkerson, rather than Dallas Barnes, the position of Interim Director of Student Affairs, because the university needed someone with substantial administrative experience and someone who could get employees to work collaboratively. RP 797. In his deposition, Pratt failed to mention these reasons as reasons for shunning Dallas Barnes. RP 798. In his deposition, Pratt stated that Barnes' experience was limited. RP 798. In his deposition, Pratt testified he wanted someone with a broader array of experience in Student Affairs, and so he gave the position to Carol Wilkerson, who had no experience in Student Affairs. RP 800.

In January 2012, Vice Chancellor Dick Pratt changed Dallas Barnes' duties again. RP 404, 5. Pratt demoted Barnes and removed him from the Office of Student Affairs. RP 407. Barnes now assists students to write a resume and dress for an interview, tasks for which he has no background. RP 407. Barnes is now supervised by a person in a position that he previously supervised. RP 805, 6. Pratt placed Barnes in Career Services because he was not working full-time in his role in Student

Affairs, but Pratt had no knowledge of whether Barnes' lack of meaningful work was the result of duties being systematically removed from him. RP 808. Pratt placed Dallas Barnes under the supervisor of Lo Ann Ayers, despite knowing that Ayers earlier asked that he be removed from a student survey project on which she worked. RP 809.

During trial, Dallas Barnes' counsel asked him: "Did you learn that the Assistant Attorney General was demanding that you stop talking to someone?" RP 396. WSU counsel objected to the question and the court sustained the objection. The court ruled: "I do not see the relevance of the Assistant Attorney General telling him to stop counseling or telling students to bring a lawsuit against WSU." 397

Dallas Barnes sought to present testimony of Marc Brenman to explain to the jury the closed and retaliatory nature of academia, and the subjective quality of hiring decisions in universities. The trial court refused to permit any testimony of Brenman to be heard by the jury. RP 51, 2. Barnes called Brenman to testify, outside the presence of the jury, in an offer of proof.

Marc Brenman is a consultant, writer, and teacher in social equity, civil rights, and social justice. RP 238; Exhibit 9. Brenman worked for the United States Department of Education Office of Civil Rights from

1973 to 1995. RP 239. The Office of Civil Rights holds jurisdiction over all recipients of federal financial assistance for education. RP 239. Brenman began as an investigator and advanced in rank of importance to equal opportunity specialist, supervisor of investigators, program manager, program analyst, and finally division director. RP 239, 40. In his role with the Office of Civil Rights, Marc Brenman investigated claims involving race, color, national origin, sex, disability, and age discrimination in education under Title VI of the Civil Rights Act of 1964, Section 5094 of the Rehabilitation Act of 1973, and Title 9 of the Higher Education Amendments of 1972. RP 240. He investigated thousands of claims, including claims against prestigious schools such as Harvard, MIT, and University of California. RP 240, 1.

Marc Brenman served as Executive Director of the Washington State Human Rights Commission from 2004 to 2009. RP 241. The Commission enforces one of the broadest civil rights nondiscrimination statutes in the nation. RP 241.

During his time with the Department of Education Office of Civil Rights, Marc Brenman ascertained that higher education institutions are highly bureaucratized, rule bound, inward looking, clannish and cliquish, particularly amongst top administrators. RP 242. University

administrators render subjective judgments, including arbitrary hiring decisions that buck diversity. RP 242.

During his time with the Office of Civil Rights, Marc Brenman investigated many complaints of retaliation and observed the ramifications to faculty members and administrators who claimed discrimination in the academic setting. RP 243. One who claimed discrimination was almost invariably retaliated against later. RP 243. Forms of retaliation included lack of consideration for new positions, removal of job assignments, and even minor retribution such as designations of unfavorable offices and parking spaces. RP 243. A claimant would be frozen from promotions. RP 243. Although educational institutions forget the past and repeat the same errors, the institution does not forget a claim of discrimination. RP 245. The memory of a claim sticks "in the craw" of the institution. RP 245. According to Brenman, Louis Freeh's recent investigation report of events at Penn State University confirmed his observation of how an administration at a higher education institution "circles the wagon." RP 224.

Marc Brenman has insight as to whether his observations about higher education apply to Washington State University, since he co-chaired a WSU Task Force that concluded WSU lacked diversity, was

inward looking, repeated cyclic problems, lacked institutional memory of past problems, and retaliated against people who raised concerns about civil rights. RP 244, 5. Exhibit 10, not shown to the jury, is the Task Force report. RP 245.

Dallas Barnes' counsel hired Marc Brenman as an expert witness. RP 247. Brenman reviewed many case documents including depositions and interrogatories. RP 247. Based upon his review, Marc Brenman concluded that Dallas Barnes' career at WSU ended when he filed his 1994 lawsuit. RP 248. He thereafter would not advance in responsibility nor title. RP 228. It would be a fruitless exercise for Dallas Barnes to apply for open positions within the administration of WSU, since he had no chance of obtaining any of the positions. RP 248.

Counsel asked Marc Brenman to assume that Dallas Barnes was given the position of Associate Director of Student Affairs for Special Projects. RP 248. Brenman testified that "special projects" is a code phrase used by employers who discard a complainer from his regular job and withhold meaningful tasks. RP 248. Counsel asked Marc Brenman to assume that, in opening statement, WSU stated that the university is a marketplace of ideas, diversity, and inclusivity. RP 249. Brenman

responded that his committee's report found WSU is not inclusive. RP 249.

Larry James, Vice Provost of Academic Affairs at Washington State University and former WSU Tri-Cities Chancellor, testified for WSU. RP 997, 8. In response to questioning by WSU counsel, James insisted that WSU was very conscious about institutional racism. RP 1036. James boasted of workshops attended by administrators about eradicating racism. RP 1036. In questioning of Dallas Barnes, WSU counsel argued that, for a WSU administrator to discriminate or retaliate against Barnes, the administrator would act contrary to "comprehensive prohibitions against discrimination, retaliation, that are communicated in a myriad of ways." RP 442. Nevertheless, the Superior Court refused Dallas Barnes' counsel the opportunity to ask James if institutional racism existed at WSU, and, in turn, to present James the findings of the Brenman committee. RP 1038, 9

At the conclusion of testimony, Dallas Barnes submitted a proposed verdict form that listed various forms of emotional distress damages and a proposed jury instruction on the law of agency. CP 132, 138. The trial court judge had given the same verdict form and jury instruction one month earlier in an employment case, in which Dallas

Barnes' counsel played the reverse role and represented the employer. The trial judge reversed herself and refused to give the jury instruction and the verdict form in Dallas Barnes' trial. As to the verdict form the court remarked:

> THE COURT: Mr. Fearing [Dallas Barnes' counsel] told me I was *absolutely* wrong on Wellenbrock too, to break up the emotional damages. That's why I'm afraid I want to be right on at least one of these cases. So, Mr. Fearing, I don't know if you wish to -
>
> MR. FEARING: Well, then you're wrong on one of 'em.
>
> THE COURT: True.
>
> MR. FEARING: I don't know why we allow it in one case and not the other.
>
> THE COURT: I don't know why we came up with case law saying that I'm wrong on the first one and then want to propose the one that you say I'm wrong on in this case.
>
> MR. FEARING: Because it's not my role to be consistent. I'm an advocate for my clients. It's the role of the court to be consistent.
>
> THE COURT: I want to be right.
>
> MS. CLAIRE: Your Honor, it just doesn't seem fair. Mr. Fearing was the defendant in that case and had to argue on behalf of his clients that that was not appropriate, but yet the Court found it was appropriate based on the law. And so in this case here, we are plaintiff asking for the court to be

> consistent with its earlier ruling that this is apparently the law in our court that these damages are itemized....

Italics added. RP 1177, 1178. The court exaggerated counsel's remarks during the *Wellenbrock* trial, since counsel does not employ the word "absolutely." During the trial, the Superior Court was quick to sustain WSU's objections to questions, without the court understanding the question asked. See for example, RP 415.

As a result of losing promotions, Dallas Barnes lost wages in the amount of at least $30,000 per year. RP 417. He suffered emotional distress, which led to physical ailments. RP 419-423. As a professor, his standing is important, and he suffered humiliation and embarrassment by being relegated to meaningless tasks. RP 425, 6.

IV. ARGUMENT

A. THE SUPERIOR COURT ERRED, TO THE PREJUDICE OF DALLAS BARNES, WHEN EXCLUDING TESTIMONY OF MARC BRENMAN.

WSU boasted to the jury that the University is a marketplace of ideas that emphasizes diversity. WSU impliedly argued that no administrator would discriminate or retaliate against Dr. Barnes because to do so would violate comprehensive prohibitions communicated to the

administrator in a myriad of ways. WSU argued to jury that it could not have discriminated or retaliated against Dallas Barnes because it promoted another African-American, Pat Wright, instead of him, to the position of Director of Student Affairs, and because WSU's current President, Elson Floyd, is African-American. WSU emphasized to jurors that Dallas Barnes cannot claim retaliation because of his lack of promotion, because he never applied for the position of Director of Student Affairs. RP 116.

To counter WSU's flawed arguments, Dallas Barnes hired former Director of the Washington Human Rights Commission Marc Brenman to testify about the closed nature of academia, the subjective nature of employment decisions in universities, the pattern of discrimination at WSU, the meaninglessness of the title "Special Projects," and the futility of Dr. Barnes' applying for Director of Student Affairs. The average person or layperson has no insight into these subjects. In light of the contentions of WSU, the Superior Court committed error when excluding the testimony of Marc Brennan. Although Barnes could supply his own testimony on some of the topics, the jury would have been more impressed by testimony from an expert.

As mentioned by WSU counsel:

> I guess the last point that I'll make on that is that when someone is qualified as an expert, I think the Court is well aware of this, the jury looks at them in a way that they don't maybe look at lay witnesses. If the Court gives the stamp of approval as an expert on Dr. Brenman, then the jury is likely to give his testimony more weight than they should.

RP 15. Of course the reference to a "stamp of approval" is misplaced, because the admission of testimony of an expert is no stamp of approval. The jury is free to discount or completely ignore the testimony if it does not consider the expert witness to be credible. *Kearney v. Washington Nat. Ins. Co.*, 184 Wn. 579, 580, 52 P.2d 903 (1935); *In re Hastings' Estate*, 4 Wn.App. 649, 651, 484 P.2d 442 (1971). But Dallas Barnes should have been given a chance to explain critical factual issues with an expert witness.

Marc Brenman is knowledgeable in the area of civil rights in academia, having held employment with the Office for Civil Rights of the United States Department of Education from 1973 to 1995, during which time he held a variety of positions. The Department of Education holds jurisdiction over discrimination on the basis of race in higher education institutions and retaliation for reporting discrimination. The jury should have heard Marc Brenman's testimony because it lacked insight into the nature of academia, the subjective nature of decisions on campus, and the

forms of retaliation in a university. Even if the court prohibited Brenman from testifying about discrimination, the court should have allowed testimony concerning the nature of academia, the demeaning character of the title "Director of Special Projects," and the futility of applying for a job promotion.

An expert witness may not testify directly as to liability in a racial discrimination case, under ER 704, but an expert witness may testify and present opinion testimony even if it embraces the concept of liability. Essentially, an expert witness may present any helpful opinion so long as the expert does not instruct the trier of fact the result to reach.

ER 702 states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The "knowledge" required for admission of an opinion may be personal, or it may be scientific, technical, or specialized. *State v. Kunze* , 97 Wn.App. 832, 988 P.2d 977 (1999). An expert must have sufficient expertise in a field as well as a helpful and meaningful opinion to be able to present admissible testimony. *Sehlin v. Chicago, Milwaukee, St. Paul*

and Pacific R. Co., 38 Wn. App. 125, 686 P.2d 492 (1984). Expertise is construed broadly and specialized knowledge may apply to a variety of different subjects. *See e.g., Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn.App. 32, 32, 130 P.3d 835, 836 (2006) (finding that a baseball coach is an expert in baseball warm-ups and drills); *Dickerson v. Chadwell, Inc.*, 62 Wn.App. 426, 814 P.2d 687 (1991) (finding that a liquor industry expert qualified as an expert witness).

In an analogous federal case, applying essentially the same evidence rule, the Sixth Circuit found that experts in the field of discrimination may provide opinions. *Davis v. Combustion Engineering, Inc.*, 742 F.2d 916 (6th Cir.1984). Professor Thomas Geraghty, the expert in *Davis*, had less background in employment civil rights than Marc Brennan.

Expert opinion is admissible if the witness is qualified, the testimony relies on generally accepted principles, and the testimony is helpful. *Philippides v. Bernard*, 151 Wn.2d 376, 393 (2004). Helpfulness is construed broadly and generally favors admissibility. *Id*; *Moore v. Hage*, 158 Wn.App. 137, 241 P.3d 787 (2010). ER 702 allows for testimony that is "in the form of opinion or otherwise," thus allowing an expert witness to explain facts or principles that are relevant and helpful in

understanding and determining an issue. 5B Wash.Prac.Handbook *Wash. Evid.* § 702.59. Once the court is satisfied with a witness' expertise, the test for admissibility is whether the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986). So long as a qualified expert witness' testimony passes the low bar of helpfulness it will likely be admitted by the court. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988); *Moore v. Hage*, 158 Wn.App. 137 (2010).

ER 704 states that, "testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Although direct statements regarding conclusions of law are inadmissible, expert testimony is admissible even if it embraces an ultimate issue to be decided by the trier of fact if it will assist the trier of fact to understand the evidence or determine a fact in issue. *Hiskey v. City of Seattle*, 44 Wn.App. 110, 720 P.2d 867 (1986). Experts cannot state conclusions such as "X was negligent," or "Y is liable," but experts have been allowed to make corresponding inferential statements such as "a certain area was a hazard" or that "discrimination occurred." *Id*; *Davis v. Baugh Indus. Contractors,*

Inc., 159 Wn.2d 413, 150 P.3d 545 (2007); *Davis v. Combustion Engineering*, 742 F.2d 916 (6th Cir.1984).

In *Davis v. Combustion Engineering*, 742 F.2d 916, an employee sued for age discrimination. The trial court qualified Professor Thomas E. Geraghty as an expert witness and permitted him to opine that age discrimination had occurred. Geraghty testified, among other things, that: "in this case there was an unconscious bias and Mr. Davis was terminated because of his age." Professor Geraghty added: "Mr. Davis appears to be discriminated against and ... that age was a factor that determined his termination." "I find the fact that Mr. Davis was discharged very, very singly [sic], and the only difference between him [sic] was age." Finally, Geraghty added: "Barring any other reason given, it would appear to me to be obvious.... Mr. Clarence Davis was discharged in August, 1979, by the defendant, Combustion Engineering, as a result of unlawful age discrimination."

Employer Combustion Engineering argued on appeal that Professor Geraghty was unqualified to testify as an expert and that testimony as to his conclusions usurped the function of the court and irreparably influenced the jury's decision. Interpreting an essentially verbatim Federal Rule of Evidence in *Davis v. Combustion Engineering,* the Sixth Circuit

held that the trial court committed no error in allowing Professor Geraghty's testimony, except that allowing Geraghty to refer to "unlawful" discrimination may have been harmless error.

In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 104 L.Ed.2d 268 (1989), the trial court considered expert psychological testimony on stereotyping in a gender discrimination case. The Supreme Court ruled that reliance on the testimony when determining whether plaintiff was discriminated against was proper. In *Butler v. Home Depot, Inc.*, 984 F.Supp. 1257 (N.D.Cal.1997), the court permitted expert testimony, in a gender discrimination case, as to how subjective, ambiguous and unvalidated employment practices could lead to discrimination against women. Dallas Barnes sought to introduce testimony as to the subjective nature of WSU hiring decisions. Finally in *Walker v. Pettit Construction Co., Inc.*, 605 F.2d 128 (4th Cir.1979), the appeals court found no error in the district court's admission of plaintiff's expert's testimony that the odds were 97 to 3 that age was a factor in plaintiff's demotion.

A court of appeals reviews the trial court's decision to admit or exclude evidence for abuse of discretion. *Diaz v. State of Washington*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). Nevertheless, discretion does not mean immunity from accountability. *Carson v. Fine*, 123 Wn.2d 206,

226, 867 P.2d 610 (1994). Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *In the Matter of the Detention of Kevin Coe*, 175 Wn.2d 482, 492, 286 P.3d 29 (2012). A trial court also abuses its discretion by misinterpreting a statute or rule. *Diaz v. State of Washington*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). A trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling contrary to law. *Lakey v. Puget Sound Energy*, __ Wn.2d __, __, 296 P.3d 860, 865 (2013).

The Superior Court ruled Marc Brennan's testimony inadmissible because she believed an expert should not testify on issues to be decided by the jury. The trial court misinterpreted, if not ignored, the law. The court's ruling was untenable and outside its discretion.

B. THE SUPERIOR COURT ERRED WHEN DENYING ADMISSION OF LETTERS THAT GAVE WSU NOTICE THAT DALLAS BARNES HAD THE SAME QUALITIES AS PAT WRIGHT, WHEN WSU, DURING OPENING, CLAIMED WSU PROMOTED WRIGHT TO THE POSITION OF DIRECTOR OF STUDENT AFFAIRS BECAUSE SHE IS "AN OUT-FRONT PERSON, SOMEONE WHO INTERACTED WELL WITH PEOPLE AND HAD THE BACKGROUND TO DO THE JOB."

WSU repeatedly, during counsel remarks and testimony, painted Dallas Barnes with a false brush and then, with the aid of the Superior Court, precluded Barnes from correcting the University's delusions. For example, WSU claimed, during opening, that Pat Wright, with no experience in Student Affairs, obtained the position of Director of Student Affairs over Dallas Barnes, since she interacted better with people. In response, Dallas Barnes sought to introduce letters of reference, placed in his personnel file and available to the WSU administration, showing him to be personable and beloved by others.

The Superior Court did not rule Dallas Barnes evidence irrelevant to the State of Washington's contention, but instead ruled that counsel's remarks during an opening statement do "not open the door." In so ruling, the court agreed with WSU's representation that *State v. Whelchel,* 115 Wn.2d 708 (1990), and *Corson v. Corson*, 46 Wn.2d 611 (1955) support the proposition that statements of counsel do not open the door. RP 214. Neither case supports the proposition. The *Whelchel* court held there was no invited error rather than holding that statements of counsel did not open the door. *Corson* was not a jury trial.

A Washington decision on point is *State v. Rivers*, 129 Wn.2d 697, 921 P.2d 495 (1996). In opening statement, criminal defense counsel

remarked that "every lawyer dreams of getting a case like this, based on a shaky ID." The trial court allowed the prosecution to cross-examine the defendant about his counsel's statement. The defendant admitted, in the presence of the jury, that identification was not at issue. On appeal, the defense argued that the prosecution should not have been permitted to question him on the subject since statements made by counsel are not evidence. The Supreme Court affirmed the trial court, ruling that the lower court had not abused its discretion.

In the case at bar, the Superior Court summarily rejected Barnes' attempt to counter the misrepresentation uttered during opening statement, on the erroneous ground that an opening statement could never open the door. The Superior Court refused to exercise any discretion.

In *State v. Dault*, 19 Wn.App. 709, 578 P.2d 43 (1978), the court upheld the trial court's permitting the prosecution to question the defendant concerning the nature of the defense stated by counsel during an omnibus hearing. In two federal cases, the court allowed a party to cross-examine parties concerning remarks made by counsel in opening statements. *United States v. Gaind*, 31 F.3d 73 (2nd Cir.1994); *United States v. Acosta-Cazares*, 878 F.2d 945 (6th Cir.1989).

C. THE SUPERIOR COURT ERRED WHEN PROHIBITING DALLAS BARNES FROM ELICITING TESTIMONY CONCERNING THE RACIST ATTITUDES AND COMPREHENSIVE RACIST COMMENTS OF BARNES' SUPERVISOR, JAIME CONTRERAS, AFTER WSU CLAIMED IN OPENING: "AND BY ALL ACCOUNTS, CONTRERAS DID AN EXCELLENT JOB."

Director of Student Affairs Jaime Contreras instigated or participated in many of the adverse employment actions against Dallas Barnes. Contreras removed counseling duties from Barnes, appointed Barnes to the nothing position of Assistant Director for Special Projects, barred Barnes from lunch meetings where managers discussed Student Affairs business, assigned Barnes to engage in a project worthy of a graduate student, and barred Barnes from speaking to employees and students. Contreras assigned Barnes terrible job performance ratings that impacted Barnes' potential for advancement. Since Dallas Barnes accused his manager Jaime Contreras of discriminatory and retaliatory conduct that harmed him, Contreras' motivation was at the heart of the case. The mindset and practices of Jaime Contreras became a critical issue.

WSU contended that Jaime Contreras' adverse decisions impacting Dallas Barnes were not motivated by racism. WSU argued that racist

statements by Contreras about Barnes were isolated and not of any importance since Contreras did not utter the slurs in Barnes' presence. WSU even, without any evidence, asked questions of witnesses that implied that Barnes, not Contreras, was the one uttering racist slurs. After the court, before trial, barred Dallas Barnes from introducing testimony of Contreras' comprehensive racist comments and practices, WSU took advantage of the court's protection by claiming in opening: "And by all accounts, Contreras did an excellent job." When taken to task by Dallas Barnes for this falsehood, WSU even denied making such a statement. RP 128, 275. In turn, the court refused to allow Barnes to correct the statement by presenting testimony of witnesses to Jaime Contreras' horrible performance as a Director of Student Affairs and racist, sexist, and religiously arrogant world view.

Dallas Barnes claimed that his manager, Jaime Contreras, harmed his employment because of racism. WSU defended the claim by, in part, arguing Jaime Contreras was an excellent manager incapable of discriminatory employment practices. This defense opened the door for Dallas Barnes to present all evidence regarding the management skills and practices of Contreras. WSU should not be free to assert a defense without any opportunity for the defense to be rebutted. Barnes' evidence was

relevant, because it helped to disprove the claims of WSU.

"Relevant evidence" is any evidence which tends to show a disputed issue is more or less probable and encompasses elements of both probative value and materiality. ER 401; *Davidson v. Muni. of Metro. Seattle,* 43 Wn.App. 569, 573, 719 P.2d 569 (1986). Evidence is probative if it tends to prove or disprove some fact and is material if that fact is of consequence to the ultimate outcome. *Moore v. Harley-Davidson Motor Co. Grp., Inc.*, 158 Wn.App. 407, 425, 241 P.3d 808 (2010). Under our modern rules of evidence, the threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *Kappelman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009). As a general rule, the trial court must admit evidence that tends to make the existence of a material fact more or less probable. ER 401, 402; *Janson v. N. Valley Hosp.*, 93 Wn.App. 892, 902, 971 P.2d 67 (1999). All facts are admissible in evidence which afford reasonable inferences or throw any light upon contested matter. *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 475, 403 P.2d 351 (1965). Evidence that either directly or circumstantially tends to establish any element of a claim or defense is generally relevant. *State v. Rice,* 48 Wn.App. 7, 12, 737 P.2d 726 (1987).

The Superior Court never addressed the relevance of Barnes' evidence, but dismissed the evidence since Barnes wished to introduce the evidence in reply to a comment made by WSU in its opening statement. Barnes has previously shown that WSU opened the door with its opening statement.

This reviewing court should also recognize that the party uttering prevarications in an opening statement is not an ordinary party. Rather the State of Washington is the party misleading the jury. The Evergreen Supreme Court has written:

> We ordinarily look to the action of the state to be characterized by a more scrupulous regard to justice than belongs to the ordinary person. The state is formed for the purpose of securing for its citizens impartial justice, and it must not be heard to repudiate its solemn agreement, relied on by another to his detriment, nor to perpetrate upon its citizens wrongs which it would promptly condemn if practiced by one of them upon another.

Board of Regents of University of Washington v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). Mr. Justice Brandeis echoed this sentiment in his famous dissenting passage from *United States v. Olmstead*, 277 U.S. 438, 485 (1928), in which he preached that government should be scrupulous in its conduct, for government teaches by its example.

D. THE SUPERIOR COURT ERRED WHEN BARRING TESTIMONY OF AN INTERNAL INVESTIGATION OF JAIME CONTRERAS, OF CONTRERAS RESIGNING IN DISGRACE, AND THE SUPERIOR COURT ERRED IN PROHIBITING JOHAN CURTISS AND DALLAS BARNES FROM TESTIFYING TO WHETHER JAIME CONTRERAS PERFORMED AN EXCELLENT JOB AS A SUPERVISOR AFTER WSU STATED IN ITS OPENING THAT: "BY ALL ACCOUNTS, CONTRERAS DID AN EXCELLENT JOB."

Evidence of an internal investigation that concluded Jaime Contreras was a poor supervisor and a dishonest man was relevant to disprove WSU's claim that Contreras was an excellent Director of Student Affairs. The trial court should have allowed Dallas Barnes to testify of Contreras' performance as a Director. The trial court allowed WSU to mislead the jury, without affording Barnes an opportunity to correct the false impressions.

E. WSU OPENED THE DOOR WITH REGARD TO ALL OF JAIME CONTRERAS' RACIST STATEMENTS WHEN IT ASKED WITNESSES IF CONTRERAS CALLED HIMSELF MEXICAN SLURS.

WSU sought to exclude all racist statements of Jaime Contreras, while characterizing the offensive slurs as "stray remarks." CP 636,

Paragraph 9; RP 9. The court granted the motion in limine to the extent that Contreras did not make a racist comments about Dallas Barnes. WSU violated its own order by commenting, in opening statement, that "Mr. Contreras referred to himself as Mr. Beaner and Taco Boy." The court's ruling in limine made no exception for names that Contreras called himself. WSU repeated the error by asking witness Johan Curtiss if Contreras called himself names, to which Curtiss responded that he called himself "Taco Boy and Burrito Man." RP 283. WSU wished to portray to the jury that Contreras was a harmless duffer who, in humility, lovingly denigrated himself. WSU repeatedly used its orders in limine as swords instead of shields, by opening the door to the extent the opening gave a narrow, favorable view of the inside, but then gaining assistance from the court to slam the door so that the jury could not see the entire soiled inside. Rules of evidence are designed to aid in establishing the truth. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969). To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. *State v. Gefeller*, 76 Wn.2d 449, 455 (1969). Thus, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit

cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced. *State v. Gefeller*, 76 Wn.2d 449, 455 (1969). Fairness dictates that the rules of evidence will allow the opponent to question a witness about a subject matter that the proponent first introduced through the witness. *State v. Gallagher*, 112 Wn.App. 601, 610, 51 P.3d 100 (2002). One party should not be free to paint a false picture. *State v. Gallagher*, 112 Wn.App. 601, 610, 51 P.3d 100 (2002).

F. THE SUPERIOR COURT ERRED WHEN IT REFUSED DALLAS BARNES THE OPPORTUNITY TO ASK A WITNESS IF SHE COMPLAINED TO WSU ABOUT RACIST SLURS UTTERED BY JAIME CONTRERAS AND REFUSED DALLAS BARNES THE CHANCE TO ASK A WSU ADMINISTRATOR IF EMPLOYEES COMPLAINED ABOUT JAIME CONTRERAS, AFTER WSU ASKED THE FIRST WITNESS IF ANY OF HER EMPLOYEES COMPLAINED TO HER.

WSU obtained an order in limine precluding testimony that it investigated complaints about racial slurs uttered by and other misconduct of Jaime Contreras. WSU then used the order to paint a false picture that no one complained about the outrageous behavior of Jaime Contreras, and

to mislead the jury into concluding that WSU had no reason to suspect Contreras allowed racial animus to harm Dallas Barnes. WSU counsel asked Anna Mitson if any employee she supervised complained to her about Jaime Contreras uttering racially inappropriate comments in the workplace. When Dallas Barnes sought to show that Anna Mitson complained about Contreras' conduct and when Barnes sought to question Vice Chancellor Dick Pratt if anyone complained to him the court locked the door shut.

G. THE AMOUNT OF THE EARLIER LAWSUIT SETTLEMENT WAS RELEVANT AND, ASSUMING PREJUDICIAL, WSU OPENED THE DOOR TO TESTIMONY OF THE AMOUNT.

The Superior Court admitted, as Exhibit 2, the agreement that settled Dallas Barnes' 1994 suit, but, at WSU's request, struck the language: "in consideration for the sum of $150,000, paid as unspecified general damages." With the redaction, the jury could reason that Dallas Barnes received no money, and, therefore, WSU had either no reason to retaliate against Barnes or less reason to retaliate. RP 55-7. Thus, Dallas Barnes should have been afforded the opportunity to testify to the amount, or at least testify that some money was paid, to show motivation. "Relevant evidence" is any evidence which tends to show a disputed issue

is more or less probable and encompasses elements of both probative value and materiality. ER 401; *Davidson v. Muni. of Metro. Seattle,* 43 Wn.App. 569, 573, 719 P.2d 569 (1986). Under our modern rules of evidence, the threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. *Kappelman v. Lutz*, 167 Wn.2d 1, 9, 217 P.3d 286 (2009); *State v. Gregory,* 158 Wn.2d 759, 835, 147 P.3d 1201 (2006). As a general rule, the trial court must admit evidence that tends to make the existence of a material fact more or less probable. ER 401, 402; *Janson v. N. Valley Hosp.*, 93 Wn.App. 892, 902, 971 P.2d 67 (1999).

WSU also opened the door to evidence of the amount of the settlement. Its counsel told the jury, in opening, that it would see the settlement agreement, without any indication that the agreement would be redacted. Counsel stated: "You will see the agreement that they reached." RP 109.

WSU violated its own order in limine by asking Dallas Barnes if he was paid $2,500 for moving expenses. WSU wanted the jury to perceive that Barnes received only a nominal amount to move, and so WSU would lack any motive to retaliate. Dallas Barnes asks this reviewing court to grant him another trial to tell the jury the whole story.

H. THE SUPERIOR COURT ERRED WHEN PRECLUDING DALLAS BARNES FROM TESTIFYING THAT AN ASSISTANT ATTORNEY GENERAL DEMANDED THAT HE STOP TALKING TO SOMEONE.

One of Dallas Barnes' claims was that WSU silenced him, not only because of his advocacy of his own legal rights, but his advocacy of students and other faculty members. CP 642 But the trial court would not allow him to present this claim. The court sustained an objection to counsel asking Barnes: Did the Assistant Attorney General tell you to stop talking to others? The court responded: "I do not see the relevance of the Assistant Attorney General telling him to stop counseling or telling students to bring a lawsuit against WSU." The law as presented above compelled the admission of such testimony as relevant to one of Barnes' claims.

I. WSU, WITH THE AID OF THE SUPERIOR COURT, PAINTED A FALSE PORTRAIT OF WSU BEING RACIALLY SENSITIVE, AND THE SUPERIOR COURT ERRED BY REFUSING DALLAS BARNES THE OPPORTUNITY TO REFUTE THE FAUX IMPRESSION.

To repeat, WSU repeatedly provided dishonest information to the jury and then prevailed upon the trial court to preclude Dallas Barnes from correcting the fraud. WSU flaunted the fact that its current President is African-American and that it has a gaggle of policies to prevent racism. Upon questioning by WSU, the school's Vice Provost Larry James claimed WSU was very conscious about institutional racism. James boasted of workshops attended by administrators about eradicating racism. A commissioned report from the State of Washington Human Rights Commission Chair found otherwise, but the trial court refused Barnes the opportunity to present testimony about the report.

In its opening, WSU counsel stated that "WSU is a marketplace of ideas, diversity, and inclusivity." Once again the trial court allowed WSU to give a false impression and them precluded Dallas Barnes from exploring and cross-examining witnesses to get rid of the false impression. The court refused Barnes the opportunity to call Marc Brenman to testify about his committee's findings or Brenman's knowledge that higher education is not a place of inclusivity, particularly when it responds to attacks upon its ivory tower.

J. THE TRIAL COURT DID NOT UNDERSTAND HER ROLE AS A NEUTRAL JUDGE.

rendering decisions based upon the identity of a party's lawyer. See Cannon 1; CJC 1.2; Cannon 2; CJC 2.2.

K. THE SUPERIOR COURT'S CUMULATIVE ERRORS PREJUDICED THE OUTCOME OF THE TRIAL.

The reviewing court does not reverse a verdict based on an evidentiary error unless the error was prejudicial. *Diaz v. State of Washington*, 175 Wn.2d 457, 472, 285 P.3d 873 (2012). The test of prejudice has been inconsistently postulated by Washington courts. Under one test an error is not prejudicial unless it affects, or presumptively effects, the outcome of the trial. *Diaz v. State of Washington*, 175 Wn.2d 457, 472, 285 P.3d 873 (2012). Stated differently, a trial court's ruling on an evidentiary issue is harmless unless it was reasonably probable that it changed the outcome of the case. *In the Matter of the Bond Issuance of Greater Wenatchee Regional Events Center Public Facilities District*, 175 Wn.2d 788, 808, 287 P.3d 567 (2012).

Under a second test, an error is harmless if it is "trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case." *Mackay v. Acorn Custom Cabinetry, Inc.* 127 Wn.2d 302, 311, 898 P.2d 284, 288 (1995); *State v. Wanrow,* 88 Wn.2d 221, 237, 559 P.2d 548

(1977); *Veit, ex rel. Nelson v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, 249 P.3d 607, 612 (2011). This second standard is less onerous for an appellant and seems to shift the burden to the respondent to prove the lack of harm. Dallas Barnes wonders how an appellate court can gauge whether a trial court error was harmful, since the court cannot ask jurors as to the impact of evidence or the lack of evidence on their decision. Nevertheless, under either standard, Barnes wins.

Dallas Barnes argues that exclusion of Marc Brennan's testimony alone is prejudicial error. He was not permitted to provide needed expert evidence to, among other things, explain the futility of applying for an open job position. In several cases, Washington courts have held that the trial court's refusal to allow a party's expert witness to testify to be reversible error. In *Advanced Health Care, Inc. v. Guscott*, __ Wn.App. __, 295 P.3d 816 (2013), the trial court barred testimony of a physician who would have attributed defendant's medical problems to a fall from a wheelchair. The lower court ruled that the opinions expressed did not meet the *Frye* test. The appeals court disagreed and granted a new trial, based upon defendant's argument that the expert testimony was needed to support his counterclaim.

The Superior Court did not rule that Marc Brennan was not an expert. There could be no more qualified expert. She ruled that the questions to which Brennan intended to address was for the jury, not an expert. This was an error of law. The court misinterpreted case decisions. The most analogous Washington decision may be *Max L. Wells Trust v. Grand Central Sauna and Hot Tub Company of Seattle*, 62 Wn.App. 593, 815 P.2d 284 (1991), a landlord sued a former tenant for lost rents when the tenant prematurely abandoned the leasehold. In a bench trial, the tenant sought to introduce testimony from a commercial realtor that the landlord did not exert reasonable efforts to find a new tenant. The testimony supported the tenant's argument that the landlord failed to mitigate its damages. The trial court, without explanation, barred the expert witness from testifying. The Court of Appeals reversed on the ground that the tenant should have been give the opportunity to present evidence on its claim of failure to mitigate and the expert's opinions were relevant to the defense. There was no indication that the court rejected the witness as an expert. Thus, the trial court exercised its discretion on untenable grounds.

Many foreign decisions illustrate the importance of a party being able to present expert testimony. In *Easterby v. Clark*, 171 Cal.App.4th

772, 90 Cal.Rptr.3d 81 (2009), the trial court erroneously excluded plaintiff's only expert on causation. The Supreme Court granted plaintiff a new trial. In *Sims v. Brackett*, 885 S.W.2d 450 (Tex.Civ.App. 1994), the trial court precluded two of plaintiff's experts for untenable grounds. The Court of Appeals reversed and remanded for a new trial. *In Castaneda* v. Bornstein, 36 Cal.App.4th 1818, 43 Cal.Rptr.2d 10 (1995), the trial court excluded an entire class of expert testimony on the causation of injuries. The court ruled that exclusion of the testimony was error and its exclusion prejudicial.

The Superior Court committed many other errors, some of which on their own might not constitute prejudice, but when combined created an unfair trial to Dallas Barnes. Washington recognizes the concept of cumulative error. Courts apply the rule of cumulative error when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); *State v. Coe,* 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda,* 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander,* 64 Wn.App. 147, 158, 822 P.2d 1250 (1992); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390, 399-400 (2000).

No Washington decision addresses cumulative error in the civil context. The doctrine of cumulative error has been extended into the civil realm by other courts. *Kline v. City of Kansas City*, 334 S.W.2d 632, 649 (Mo.Ct.App. 2011); *Menchaca v. Helms Bakeries, Inc.*, 68 Cal.2d 535, 67 Cal.Rptr. 775, 781 (1968); *Palmer v. Volkswagen of America, Inc.*, 905 So.2d 564, 603 (Miss.Ct.App.2003); *Pellicier v. St. Barnabas Hospital*, 200 N.J. 22, 974 A.2d 1070 (2009). In the latter case, the court observed that the court did not treat the parties evenhandedly, but limited the defendant to its proofs, an observation made in this case on appeal. In *Du Jardin v. City of Oxnard*, 38 Cal.App.4th 174, 45 Cal.Rptr.2d 48 (1995), the California Court of Appeals recognized the doctrine of cumulative error. The court reversed a jury verdict for the plaintiff on the ground that several errors could have impacted the jury verdict.

V. CONCLUSIONS

The Superior Court committed numerous errors that alone or cumulatively prejudiced Dallas Barnes. Dr. Barnes respectively requests that this reviewing court reverse the trial court and grant him a new trial.

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DATED this 16 day of May, 2013.

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CERTIFICATE OF SERVICE

I, Kristi Flyg, hereby certify that on the 16th of May, 2013, caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

☐	Hand-delivered	PAUL TRIESCH
☒	First-Class Mail	**ATTORNEY GENERAL'S**
☐	Overnight Mail	**OFFICE**
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