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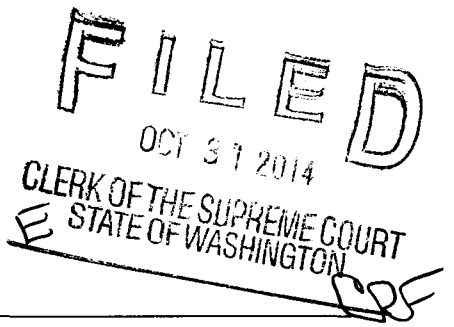

SUPREME COURT

STATE OF WASHINGTON

DALLAS BARNES,

Petitioner,

vs.

THE STATE OF WASHINGTON, through
WASHINGTON STATE UNIVERSITY,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF PETITIONER

The petitioner and plaintiff below is Dr. Dallas Barnes.

II. COURT OF APPEALS DECISION

The Court of Appeals upheld the trial court in an unpublished decision on August 11, 2014. The Court denied a motion for reconsideration on September 9, 2014. Thus, petition for review is timely.

III. ISSUES PRESENTED FOR REVIEW

Whether the decision of Division I Court of Appeals is in conflict with other decisions of the Court of Appeals.

IV. STATEMENT OF THE CASE

Dr. Dallas Barnes has been employed at Washington State University (WSU) since 1969 and, for the last seventeen years, has served as an Associate Director of Student Affairs at WSU's Tri-Cities branch campus. RP 139, 173, 174. In his 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 effectively a demotion, and assigning him meaningless tasks. CP 641. Barnes claimed these adverse employment actions resulted from racial discrimination and retaliation for bringing an earlier lawsuit in 1993 and retaliation for bringing this lawsuit. CP 641, 2. After a nine-day trial, the jury rendered a verdict for WSU.

Jurors found Dallas Barnes' failure to apply dispositive. Barnes appealed, because the Superior Court committed several errors that infected the jury verdict. CP 7-9. This petition focuses on the trial court's complete denial of Barnes' ability to call an expert witness. CP 7-9.

By way of background, 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. In 1969, some students at WSU have never spoken to or touched a black person. RP 137. Likewise, minority students had few role models at WSU. RP 136, 164.

In 1990, WSU Pullman removed, from Dr. Barnes, duties to advise minorities. RP 164. The administration told him he expected too much academically 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 paid Barnes $150,000 and transferred him to WSU's new Tri-Cities campus. RP 169. There, 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 196-170.

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 sought to become Director of Student Affairs. 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, 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. 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.

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 Richard 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 department internship Barnes supervised. RP 221-5.

WSU Tri-Cities Chancellor Larry James blamed Dallas Barnes for Wade Richard'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 his employment with WSU Tri-Cities. RP 226.

Dan Kapraun 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 'assistant' administrator in the Office that was next in line to become the Interim Director or Director of Student Affairs. RP 200. In 1999, WSU appointed Pat Wright, instead of Barnes, first as Interim Director then as Director of Student Affairs. RP 205. WSU Tri-Cities never attempted to inquire if Barnes was desirous of the position RP 205. The position was not advertised. RP 1042. Prior to Pat Wright's appointment, the position of Director of Student Affairs had been advertised with a requirement for a

Ph.D., but Wright held only a Bachelor's degree. RP 207, 201. After the appointment of Wright, Barnes continued to work as Assistant Director of Student Affairs and taught one class each semester. RP 205.

Director of Student Affairs Pat Wright told Dallas Barnes that "Pullman" made decisions concerning Barnes' employment. RP 314. In 2001 or 2002, Dr. Barnes found newspaper clippings of the 1994 lawsuit in his personnel file. RP 317.

In 2007, Pat Wright was dismissed from the position of Director of Student Affairs, without notice to Barnes. RP 339, 40. 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 because it was not advertised. RP 341. Again, administration failed to inquire if Dr. Barnes was interested in assuming position. RP 341. By then, Dallas Barnes had served in Student Affairs for 30 years and knew all of the areas of the Office. RP 342.

At trial, Chancellor Vicky Carwein stated that, in 2007, she looked for someone with a career track in Student Affairs, and she denied knowing that Dr. Barnes had such career track. RP 344. Yet the appointee, Richard Backes, lacked any experience in reinstatement, disability

services, minority recruitment, or learning support, all essential functions of Student Affairs. RP 115, 6.

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 automatically 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 the permanent Director of Student Affairs in June 2008. Dallas Barnes was more qualified than Contreras. RP 346, 7. Contreras also lacked a Ph.D. RP 346. According to Vicky Carwein, she chose Jaime Contreras because of his "career track" for Student Affairs. RP 472, 3.

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. In July, 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. RP 351; Exhibit 112. Chancellor Vicky 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. Barnes provided counseling to reduce stress caused by educational loads. RP 335. In the event a student needed a mental health counselor, Dr. Barnes referred the student to such counselors in the community. RP 337.

WSU claims it removed counseling duties from Dr. Barnes because he lacked qualifications. Nevertheless, upon the removal, WSU placed counseling duties under Anna Mitson, who had no counseling experience nor a license from the State of Washington. RP 381. Barbra Hammond, WSU Director of Student Counseling and Testing Center on the Pullman campus, testified to the removal of counseling duties from Barnes. RP

579, 80. In 2008, Hammond recommended the Tri-Cities campus hire a full-time psychologist. RP 597, 605. She expected WSU Tri-Cities to need one year hire the psychologist, and she had no knowledge of any psychologist being hired by the time of trial in 2012. 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, Hammon 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.

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 assignments. RP 203, 887.

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 and desired the position 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 Vicky Carwein appointed Carol Wilkerson as Interim Director of Student Affairs. RP 398. Wilkerson had no experience

in Student Affairs. RP 399. Wilkerson was hired because her husband worked at WSU Prosser research station and she needed a job. RP 499.

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 for shunning Dallas Barnes. 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 which he has no background. RP 407. Barnes is now supervised by a person in a position he that he previously supervised. RP 805, 6.

Dallas Barnes sought to present testimony of Marc Brenman to explain to the jury the closed and retaliatory nature of academia, and the subjective type hiring decisions in universities. At trial, 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.

However, the trial court refused to permit any testimony of Brenman. RP 51, 2. In ruling to exclude the expert witness entirely, the Court stated:

> "[w]hat I heard plaintiff arguing is that really he is going to be able to make broad statements about academia in general. At this point, I just don't see how that would be helpful to the jury. Knowledge of the things that Dr. Brenman might be able to testify to, from the Court's perspective, would invade the province of the jury. It seems speculative at best. When you make those overall judgment calls or statements about academia, I don't know universities or colleges that Dr. Brenman has been to or what he bases those statements on. So, at this point, I don't see how Dr. Brenman would be testifying as an expert witness on broad statements of academia. I just don't see it being helpful to the jury." RP 52

As an offer of proof, Dr. Barnes called Marc Brenman to the stand. Marc Brenman testified he is a consultant, writer, and teacher in social equality, civil rights, and social justice. RP 238. 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 prestigious schools such as Harvard and MIT. RP 240, 1.

Marc Brenman also 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. PR 241. During his time with the Department of Education Office of Civil rights, Marc Brenman discovered that higher education institutions are highly bureaucratized, inward looking, clannish and cliquish particularly amongst top administrators. RP 242. He found that university administrators render subjective judgments, including arbitrary hiring decisions that buck diversity. RP 242.

Also, 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. He testified that one who claimed discrimination was almost invariably retaliated against later. RP 243. Based on his observations and experience, 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.

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. Marc Brenman was hired 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 or title. RP 228. Most importantly, he testified that it would be a fruitless exercise for Dallas Barnes to apply for open positions within the administration of WSU, since he has 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 administrators who discard a complainer from his regular job and withhold meaningful tasks. RP 248.

V. ARGUMENT

1. Dr. Barnes was denied an opportunity to provide needed expert evidence to 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**, 173 Wn.App. 857, 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 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. Id.

In the **City of Seattle v Personeus**, 63 Wn.App. 461, 819 P.2d 821 (1991), the trial court excluded an expert primarily because "anyone can understand that alcohol burns off". Division I of the Court of Appeals however, found it apparent that the proposed testimony was not limited to the fact of "burn-off" but also encompassed the rate of "burn-off" for someone of Personeus' weight. The Court held, while the former is arguably a matter of common knowledge, the latter is not.

Here, Marc Brenman would have testified that higher education institutions exhibit inward looking behavior particularly in top positions. Based on his observations from hundreds of investigations, Brenman found that employment decisions in higher education are highly subjective and exclusionary. He found people who raised concerns about the institution were invariably retaliated against later. Brenman described the various forms of retaliation including, assignment of meaningless tasks, parking spaces, passed over for promotions, etc. Significantly, in Brenman's opinion, Dallas Barnes, given his significant time with WSU encountered acts consistent with retaliation. As a result, Brenman concluded that Barnes' application for the Director position would have been futile. Such opinions are not understandable as common knowledge.

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), where 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 form 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. However, the trial court, without explanation, completely barred the expert witness from testifying. The

Court of Appeals reversed on the ground that the tenant should have been given the opportunity to present evidence on its claim of failure to mitigate and the expert's opinions were relevant to the defense.

2. The policy in Washington is to favor testimony that may be helpful.

Expert testimony will be helpful to the jury only if its relevance has been established. **State v Petrich**, 101 Wn.2d 566, 575, 683 P.2d 173 (1984). Helpfulness and relevancy are intricately intertwined:

> "The helpfulness test subsumes a relevance analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case."

State v Riker, 123 Wn.2d 351, 364, 869 P.2d 351 (1994). Expert testimony is helpful to the jury if it concerns matters beyond the common knowledge of the average layperson and is not misleading. **State v Thomas**, 123 Wn.App. 771, 778, 98 P.3d 1258 (2004). "Courts generally interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases." **Moore v Hagge,** 158 Wn.App. 137, 155, 241 P.3d 787 (2010) (*quoting* **Miller v Likins,** 109 Wn.App. 140, 148, 34 P.3d 835 (2001)), *review denied*, 171 Wn.2d 1004, 249 P.3d 181 (2011). Since courts generally favor 'helpfulness' the trial court should have, at a minimum, limited Brenman's testimony to the extent subjects or topics could be found helpful rather than excluding his testimony entirety.

In **State v Groth**, 163 Wn.App. 548, 564,261 P.3d 183 (2011), the defendant in a murder case argued that the state's expert ('master tracker'), Joel Hardin, should have been excluded. The trial court allowed the testimony. On appeal the defendant argued that Hardin's testimony was not helpful because "the jury was just as capable of looking at the photographs with a magnifying glass as Mr. Hardin." But the expert made clear that it is difficult to discern the "sign" he identified in the photographs. Further, Hardin testified that his expertise made it possible for him to recognize and interpret what others would overlook. In affirming the trial court, the Court of Appeals found Hardin's testimony concerned matters beyond the layperson's knowledge and concluded that such that the testimony would be helpful to the jury.

Another significant case is **Taylor v Baseball Club Seattle**, 132 Wn. App. 32, 130 P.3d 835 (2006), where a spectator at a baseball game was injured by a ball errantly thrown into stands during the team's pregame warm-up. A professional baseball pitching coach was qualified to testify as an expert on athletes' preparation for games. The Court of Appeals affirmed the trial court's decision to allow the expert's testimony under ER 702 finding that the expert was highly qualified to address why and how the athletes prepare for games. Along these lines, Marc Brenman could be no more highly qualified to explain to the jury how higher

education institutions react to discrimination claims as well as the various forms retaliation has been found across the country.

In the case of **Dickerson v Chadwell**, 62 Wn.App. 426, 814 P.2d 687 (1991), a bar patron brought action against a bar owner for injuries sustained in an altercation allegedly caused by the bar's negligent over service of another customer. The trial court permitted a liquor control agent to testify about 'over service' and 'stacking'. On appeal, the defendant argued that the testimony was not helpful to the trier of fact. The appellate court affirmed the trial court noting that the defendant overlooked the rule that expert testimony which explains terms used within an industry is admissible. **State v Strandy**, 49 Wn.App. 537, 543-44, 745 P.2d 43 (1987), *review denied*, 109 Wn.2d 1027 (1988); **United States v Tutino**, 883 F.2d 1125, 1134 (2nd Cir. 1989).

Higher educational institutions are an industry. Marc Brenman's testimony would have been helpful the trier of fact in order to discern how administrators view and react to civil rights claimants in the academic arena. Marc Brenman could have provided necessary testimony describing how administrators isolate former claimants and provide an explanation to the jury as to why after 34 years of service, Dr. Barnes had gone backwards professionally. Barnes ability to present his case fully to the fact finder was greatly impacted by Brenman's exclusion. A very brief

statement supplies the court's reasoning whereby a party was denied his expert witness. Despite Washington's policy favoring the admissibility of helpful testimony, Dr. Barnes was denied Marc Brenman's opinions which would have provided context for reduction of responsibilities, removal of duties, unequal treatment, and his title as Director of Special Projects.

3. Testimony on the ultimate issue is admissible.

The trial court inaccurately stated that the proposed testimony of Marc Brenman would invade the province of the jury. Yet, ER 704 does away with the so-called ultimate-issue objection, allowing a witness to express an opinion on an ultimate issue of fact. By its terms, Rule 704 allows both experts and lay witnesses to express opinions on ultimate issues. 5D Karl B. Tegland, Washington Practice; Evidence Law & Practice §704 (6th ed.2013).

Washington case law illustrates a wide variety of circumstances in which an opinion on an ultimate issues has been permitted. An officer was permitted to offer his opinion that the defendant in a DUI case "was obviously intoxicated and ... could not drive a motor vehicle in a safe manner" in **City of Seattle v Heatley**, 70 Wn.App. 573, 854 P.2d 658 (1993). The Court of Appeals found that the officer's testimony contained no direct opinion on Heatley's guilt or on the credibility of a witness. Id. Consequently, the court held the fact that an opinion encompassing

ultimate factual issues supports the conclusion that the defendant is guilty does not make the testimony an improper opinion on guilt. Id. Indeed, "[i]t is the very fact that such opinions imply that the defendant is guilty which makes the evidence relevant and material." **Heatley**, 70 Wn.App. at 580 (citing **State v Wilber**, 55 Wn.App. 294, 298, 777 P.2d 36 (1989). Notably, the officer's opinion was based solely upon his experience and his observation of Heatley's physical appearance and performance on the field sobriety tests. 70 Wn.App at 579. Thus, the officer's opinion that Heatley was intoxicated and impaired to the extent that he could not drive safely was "otherwise admissible" within the meaning of ER 704. Id. It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another person where the witness has had an opportunity to observe the affected person. **Heatley**, 70 Wn. App. At 580; *see, e.g.* **State v Forsyth**, 131 Wn. 611, 612 (1924).

Likewise, in **State v Dolan**, 17 Wn. 499, 50 P. 472 (1897) the trial court erred in not allowing witness to testify as to whether defendant was so intoxicated he did not know what he was doing. Of course no witness may express an opinion that is a conclusion of law or that tells the jury what result to reach. **Tortes v King County**, 119 Wn.App. 1, 12, 84 P.3d 252 (2003); 5B Karl B Tegland, Washington Practice; Evidence Law & Practice §§ 704.5, 704.6 (5th ed.2007). On any other issue, however, ER

704 explicitly provides that "[t]estimony 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." Thus, the trial court's mistaken belief should not have prevented Marc Brenman from testifying. *See* **Davis v Baugh Indus. Contractors, Inc.**, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert opinions that help establish the elements of negligence are admissible); 5B Tegland, supra §704.2 ("a witness may testify that ... the defendant in a civil case was or was not responsible for the plaintiff's injuries").

Expert opinions that help establish the elements of negligence are admissible. ER 704. Even when it is assumed that the fact finder is generally knowledgeable about a topic, expert testimony may still be of assistance to an understanding of the issue. **Swartley v Seattle Sch. Dist. No. 1**, 70 Wn.2d, 22, 421 P.2d 1009 (1966); ER 702. For these reasons, Marc Brenman's testimony was improperly excluded. Dr. Barnes should have been permitted use of his expert witness at trial.

VI. CONCLUSION

Based on the foregoing, Dr. Barnes respectfully requests this honorable Court accept his petition for review.

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RESPECTFULLY SUBMITTED this 27th day of October, 2014.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

Attorneys for Petitioner

By: _____
ANDREA J. CLARE, WSBA #37889

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on October 27 2014, I caused the original of the foregoing document to be sent for filing with the Supreme Court, State of Washington. I also caused a true and correct copy of the foregoing document to be served on the following counsel, via e-mail and U.S. mail, postage pre-paid, to:

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Attorney General's Office
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DATED this 27 day of October, 2014, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: _____
Assistant to Andrea J. Clare

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DALLAS BARNES, Appellant, v. THE STATE OF WASHINGTON, through WASHINGTON STATE UNIVERSITY, Respondent.	NO. 70801-5-I DIVISION ONE UNPUBLISHED OPINION FILED: August 11, 2014

LEACH, J. — Dallas Barnes appeals the dismissal of his lawsuit against Washington State University (WSU or University) for racial discrimination and retaliation after an adverse jury verdict. Barnes challenges a number of the trial court's evidentiary rulings and the court's rejection of his proposed special verdict form. Because the trial court did not abuse its discretion when making the challenged evidentiary rulings and properly instructed the jury, we affirm.

FACTS

Dallas Barnes received a BA, MA, and PhD in sociology from Washington State University in Pullman, Washington. In 1969, he began working at the WSU Pullman campus. In the early 1980s he became the coordinator of the Academic Development Program, which focused on the recruitment, advising, and retention of provisionally admitted and nontraditional students. In 1986, the University reorganized all the student advising programs, merging several programs and

creating the Student Advising and Learning Center (SALC). Barnes applied for the position of SALC director twice but did not receive an interview. In 1992, Barnes filed complaints of employment discrimination and retaliation with the Equal Employment Opportunity Office and Office of Human Development and Human Rights at WSU, as well as the Equal Employment Opportunity Commission (EEOC) in Seattle. In June 1994, the EEOC determined insufficient evidence existed to support Barnes's allegations.

In September 1994, Barnes filed a lawsuit against the University, alleging race and age discrimination and retaliation. In December 1996, the parties settled the lawsuit. As part of the settlement, Barnes received $150,000 and a position as assistant branch campus director of student affairs at the Tri-Cities campus of WSU.

Barnes began working at the Tri-Cities branch campus in 1997. In 1999, WSU appointed Pat Wright as interim director and then as director of the Office of Student Affairs. The University did not advertise the position. Barnes believed he was more qualified than Wright to serve as director.

In 2000, Chancellor Larry James relieved Barnes of certain duties as disability coordinator, following an unsatisfactorily resolved accommodation complaint by a visually impaired student. Beginning in 2006, Barnes received a series of marginal or poor performance reviews from several different supervisors.

In 2007, WSU Tri-Cities became a four-year institution. As part of this transition, the campus formalized counseling services, and Barnes's supervisors instructed him to stop personally counseling students and staff. A 2004 performance review had noted that Barnes "works well with students" and that Barnes "spends a great deal of time working with students that need counseling or someone to be an advocate for them." Barnes had a license as a registered counselor from the Washington State Department of Health from 1995 until 2010.

In 2007, the University dismissed Pat Wright and three others for fraudulently reporting enrollment numbers. Barnes was not implicated in the wrongdoing. Following Wright's dismissal, the University appointed an interim director, who served for six to eight months. In 2008, the University advertised the permanent director position, but Barnes did not apply. In June 2008, Jaime Contreras began work as director.

In July 2008, Contreras and Tri-Cities Chancellor Vicky Carwein sent Barnes a letter advising him of his assignment to the position of associate director of student services and special projects. His new duties mainly consisted of academic advising for student retention, reinstatement, and community outreach liaison work. The letter explicitly instructed Barnes to stop providing mental health, behavioral, or personal counseling services to any person.

On June 11, 2010, Barnes filed this lawsuit against the University for racial discrimination and retaliation.

In December 2010, Anna Mitson, another employee in the Office of Student Affairs, complained to the University's Office for Equal Opportunity (OEO) that Contreras, her supervisor, made racial and ethnic references toward her and others. Mitson alleged that Contreras referred to an African American employee as "Kunta Kinte" and "Thurgood Marshall" and to himself using several derogatory racial or ethnic names.[1] An OEO report in March 2011 concluded that Contreras's derogatory references to Mitson, himself, and others violated University policy prohibiting discrimination and sexual harassment.[2] Contreras resigned from his position shortly thereafter, and the University replaced him with an interim director. University administrators did not speak to Barnes about the interim director position.

In September 2011, Mitson and two other Office of Student Affairs employees filed suit against the University and Contreras, alleging a hostile work environment, racial and sexual discrimination, and retaliation.[3] The parties later settled the lawsuit.

In spring 2012, Vice Chancellor Richard Pratt transferred Barnes from the Office of Student Affairs to the Career Development Center. Barnes told Pratt that he considered this to be a demotion.

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[1] The "Kunta Kinte" and "Thurgood Marshall" comments referred to Barnes, though Contreras never made such a reference in Barnes's presence. Barnes was not aware of Contreras's racial comments about him until he read the 2011 OEO report.

[2] OEO investigators did not interview Barnes or mention him in the report.

[3] Curtiss v. State of Washington, No. 11-2-02187-1 (Benton County Super. Ct., Wash.).

Barnes's lawsuit went to trial on August 1, 2012. The University moved to exclude (1) testimony from Barnes's expert witness, Marc Brenman; (2) a 2005 report coauthored by Brenman on racially charged incidents at the Pullman campus; (3) the OEO report addressing Mitson's complaint against Contreras; (4) evidence concerning Mitson's lawsuit against the University; and (5) the monetary sum of Barnes's 1996 settlement agreement with the University. The trial court granted the motions. On August 13, 2012, the jury returned a verdict for the University on both of Barnes's claims.

Barnes appeals.

STANDARD OF REVIEW

We review the trial court's evidentiary decisions for abuse of discretion.[4] A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons.[5] We review de novo alleged errors of law in a trial court's jury instructions.[6]

ANALYSIS

Expert Testimony

Barnes argues that the trial court erred by excluding the testimony of Marc Brenman. Brenman is a former director of the Washington Human Rights Commission and cochair of a 2005 task force that investigated and reported on

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[4] Philippides v. Bernard, 151 Wn.2d 376, 393, 88 P.3d 939 (2004); State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999); Reese v. Stroh, 128 Wn.2d 300, 310, 907 P.2d 282 (1995).

[5] Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

[6] State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004).

racially charged incidents among students at the WSU Pullman campus. The court excluded Brenman's testimony as overly speculative, not helpful, and invading the province of the jury. Barnes made an offer of proof that Brenman would testify to "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's applying for Director of Student Affairs." Barnes argues that although he "could supply his own testimony on some of the topics, the jury would have been more impressed by testimony from an expert."

Under ER 702 and 703, expert testimony is admissible if the witness's expertise is supported by the evidence, his opinion is based on facts or data reasonably relied on by the professional community, and his testimony is helpful to the trier of fact.[7] "'Courts generally interpret possible helpfulness to the trier of fact broadly and will favor admissibility in doubtful cases.'"[8] However, a court may in its discretion exclude expert testimony that concerns concepts within the commonsense understanding of jurors.[9] Trial courts have broad discretion in

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[7] Deep Water Brewing, LLC v. Fairway Res. Ltd., 152 Wn. App. 229, 271, 215 P.3d 990 (2009).

[8] State v. Groth, 163 Wn. App. 548, 564, 261 P.3d 183 (2011) (internal quotation marks omitted) (quoting Moore v. Hagge, 158 Wn. App. 137, 155, 241 P.3d 787 (2010)).

[9] State v. Rafay, 168 Wn. App. 734, 782-83, 790, 285 P.3d 83 (2012) (affirming trial court's exclusion of expert opinion on psychology of false confessions as invading the province of the jury and well within the commonsense understanding of jurors; court's determination "at least debatable" and therefore not abuse of discretion), review denied, 176 Wn.2d 1023 (2013), cert. denied, 134 S. Ct. 170 (2013).

determining the admissibility of expert testimony under ER 702, and absent abuse of that discretion, a reviewing court does not disturb the trial court's ruling.[10]

Barnes relies heavily on a Sixth Circuit case, Davis v. Combustion Engineering, Inc.,[11] in which the court held that the trial court did not abuse its discretion in admitting expert testimony to support the plaintiff's claim of age discrimination. He also cites other cases affirming a trial court's decision to admit expert testimony but cites no case disapproving a trial court's exclusion of expert testimony. The University cites other state and federal cases affirming a trial court's decision to limit or exclude expert testimony in areas "readily within the comprehension and ability of the jury."[12]

Barnes contends that "[t]he average person or layperson has no insight" into subjects such as the closed nature of academia, subjective employment decisions, and patterns of discrimination. But he concedes that he was able to testify about these issues. Also, he does not demonstrate that they fall outside

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[10] Philippides, 151 Wn.2d at 393.

[11] 742 F.2d 916, 919-20 (6th Cir. 1984).

[12] See, e.g., Curtis v. Okla. City Pub. Sch. Bd. of Educ., 147 F.3d 1200, 1219 (10th Cir. 1998) (concluding jury could determine for itself whether recruitment plan was evidence of retaliation); Barfield v. Orange County, 911 F.2d 644, 651 n.8 (11th Cir. 1990) (holding that opinion about whether plaintiff was victim of discrimination was properly excluded as not helpful to trier of fact); Kotla v. Regents of Univ. of Cal., 115 Cal. App. 4th 283, 293, 8 Cal. Rptr. 3d 898 (2004) (holding testimony of industrial psychologist on employment retaliation did not assist the jury in fact-finding and "created an unacceptable risk that the jury paid unwarranted deference to [the expert's] purported expertise when in reality he was in no better position than they were to evaluate the evidence concerning retaliation").

the commonsense understanding of jurors. Barnes points to the holding in Davis that the trial court's admission of the expert testimony was "not clearly erroneous"[13] but does not demonstrate that a court's decision to exclude similar expert testimony is an abuse of discretion. The trial court did not abuse its discretion by excluding Brenman's testimony.

Defense Opening Statement and the Open Door Doctrine

In its opening statement, the State referred several times to Chancellor Larry James's appointment of Pat Wright as director of student services and said James appointed Wright because she "was an out-front person. Someone who interacted well with people and had the background to do the job." Barnes contends that this created the false impression that Wright was more qualified than he for the director position and that the court should have permitted him to correct this "misrepresentation" by introducing letters of reference "available to the WSU administration, showing him to be personable and beloved by others."

In its opening statement, the State also referred to Contreras's hiring the year after the transition of WSU Tri-Cities to a four-year university: "And the freshman class came in. And by all accounts, Contreras did an excellent job." Barnes contends that this statement also opened the door to his rebuttal evidence and that the trial court erred by refusing 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

[13] Davis, 742 F.2d at 919.

arrogant world view." Specifically, Barnes assigns error to the trial court's decision to exclude testimony about Mitson's lawsuit and the internal investigation that preceded Contreras's resignation.

"It is well settled that any party may, in opening statement, refer to admissible evidence expected to be presented at trial."[14] Under the open door doctrine, evidence a party introduces may open the door for the other party to present evidence that would not otherwise be admissible.[15] Once a party has raised a material issue, the opposing party is generally permitted to explain, clarify, or contradict the evidence.[16]

Though the trial court did not admit Barnes's letters of recommendation as exhibits, Barnes responded to the State's opening statement by testifying about the letters and his other accomplishments. The jury heard testimony and weighed evidence of his qualifications, experience, and employment record. Barnes fails to show that the exclusion of the two letters prejudiced him.

The State's narrow comment about Contreras referred to the transition of the campus to a four-year institution and did not open the door to any and all evidence of Contreras's behavior as a supervisor.[17] Moreover, Mitson's hostile work environment lawsuit was not relevant and potentially confusing because it

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[14] State v. Whelchel, 115 Wn.2d 708, 727, 801 P.2d 948 (1990).

[15] State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008), abrogated on other grounds by State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011).

[16] Berg, 147 Wn. App. at 939.

[17] The State's counsel asserted in colloquy that the purpose of his statement was to show "that [Contreras] advanced student services by all accounts, not that he was a model person or perfect in his supervision."

required proof of different elements than Barnes's disparate treatment action, which did not name Contreras.

The court concluded that "the jurors have already been told that the arguments and the statements of counsel are not evidence, so it does not open the door," and "it's not appropriate for this case to include a minitrial regarding Anna Mitson and the others who have filed a lawsuit against WSU." The court did, however, exercise its discretion to allow testimony, over the State's objection, about Contreras's racial speech targeted at himself and Barnes.[18] The trial court did not abuse its discretion.

Money Damages Sum from 1996 Settlement

At trial, the court admitted the 1996 settlement agreement resolving Barnes's earlier lawsuit against the University but granted WSU's motion to strike the words "in consideration for the sum of $150,000, paid as unspecified general damages." The court stated in a letter to the parties, "I don't believe the monetary amount of the 1996 settlement would be relevant to the current case." At trial, the court reiterated, "I don't see how whether money was paid is appropriate for the jury." The court did permit references to WSU's payment of transportation and moving costs as part of the settlement.

Under ER 402, "[e]vidence which is not relevant is not admissible." Even where evidence is relevant, "[t]he trial court has broad discretion in balancing the

[18] In colloquy, the court emphasized to counsel that it "was trying to balance what would be appropriate for this jury to hear to [sic] and to balance the testimony for both sides."

probative value of evidence against the potentially harmful consequences that might result from its admission."[19] Barnes does not cite any authority to support his contention that the court erred in admitting the settlement but not the amount of money damages paid. In addition, he does not demonstrate how the redaction prejudiced him. Once again, the trial court did not abuse its discretion.

Testimony about Assistant Attorney General's Instructions

At trial, after eliciting Barnes's testimony about Contreras's treatment of him, Barnes's counsel asked him, "Did you learn that the Assistant Attorney General was demanding that you stop talking to someone?" The State objected on hearsay and relevance grounds. At a sidebar, Barnes's counsel argued that this testimony would demonstrate that the University retaliated against Barnes for his advocacy for others. The trial court sustained the State's objection, explaining, "I don't see the relevance to asking your client about this statement by the Assistant Attorney General telling him to stop counseling or telling students to bring a lawsuit against WSU." Barnes argues that WSU "silenced him" because of his advocacy for others and that the trial court erred in not allowing him to pursue this claim. However, Barnes presents no argument or authority showing this testimony's relevance or its admissibility under a hearsay exception. The trial court did not abuse its discretion in excluding it.

[19] Lockwood v. AC&S, Inc., 109 Wn.2d 235, 256, 744 P.2d 605 (1987); ER 403.

Special Verdict Form

Barnes proposed a special verdict form containing lines for the jury to itemize front pay, back pay, and seven subcategories of emotional damages. The court rejected Barnes's form and gave the jury a special verdict form with lines for three categories: back pay, front pay, and emotional damages. The court also gave the jury separate instructions defining the pay categories and types of damages Barnes could recover, including "emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish." The court noted during the jury instruction conference that Barnes could argue the subcategories of damages: "the court is not precluding plaintiff from arguing those and even setting it out on their Power Point or on the board. You can separate those out and talk about each and every one of those."

During the jury instruction conference, the trial court pointed out to Barnes's counsel that at a previous trial over which the trial court presided and counsel appeared, counsel had argued exactly the opposite position regarding itemizing emotional damages. Barnes contends that the trial court refused to give the jury his special verdict form because his counsel previously argued against exactly this form in a different case. Barnes argues that "the court must not punish Dallas Barnes for arguments made by his counsel in another case."

"'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform

the trier of fact of the applicable law. Even if an instruction is misleading, it will not be reversed unless prejudice is shown.'"[20] We review de novo alleged errors of law in a trial court's jury instructions,[21] but we review a trial court's decision whether to give a particular instruction to the jury for abuse of discretion.[22] This standard also applies to questions about the number of instructions and the specific wording of instructions.[23]

The court's instruction was consistent with Washington pattern jury instructions.[24] The instructions as a whole properly informed the jury of the applicable law, and Barnes had the opportunity to argue his damage theory of the case. The trial court did not err or abuse its discretion in refusing Barnes's proposed special verdict form. And because the jury returned a verdict for the University, it did not need to calculate damages. Barnes makes no showing that the court's refusal to give his proposed damage instruction affected the liability verdict. Thus, he shows no prejudice.

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[20] Singh v. Edwards Lifesciences Corp., 151 Wn. App. 137, 150-51, 210 P.3d 337 (2009) (internal quotation marks omitted) (quoting Keller v. City of Spokane, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)).

[21] Porter, 150 Wn.2d at 735.

[22] Stiley v. Block, 130 Wn.2d 486, 498, 925 P.2d 194 (1996).

[23] Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

[24] 6B DAVID K. WOLFE, WASHINGTON PRACTICE: CIVIL JURY INSTRUCTION HANDBOOK § 10.4, at 855, § 10.6 at 880 (2013).

Cumulative Error

Finally, Barnes argues that "[t]he Superior Court's cumulative errors prejudiced the outcome of the trial." Because Barnes has failed to show any error, his claim of cumulative error fails.[25]

Attorney Fees

The University has requested an award of attorney fees and costs on appeal under RAP 18.1. At trial, the court awarded the University statutory fees and costs. As the prevailing party, the University is entitled to recover its statutory costs as provided in RCW 4.84.080(2) and RAP 14.3. We award statutory fees and costs upon the University's compliance with RAP 14.4.

CONCLUSION

Because the trial court did not abuse its discretion when making its evidentiary rulings and properly instructed the jury, we affirm. We award the University its statutory fees and costs upon compliance with RAP 14.4.

Leach, J.

WE CONCUR:

Appelwick, J.

Becker, J.

[25] See State v. Price, 126 Wn. App. 617, 655, 109 P.3d 27 (2005); State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990).