72707-9

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No. 72707-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

ROBERT AND JACQUELINE PIEL, Appellants,

v.

CITY OF FEDERAL WAY, Respondent

REPLY BRIEF OF APPELLANT

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I. REPLY ARGUMENT

A. Standard of Review

The City only addresses part of the standard of review, Res.Br.13-14, failing to acknowledge that when, as here, testimony or evidence is relevant, and is not "unfairly prejudicial" the trial court abuses its discretion by excluding it. *Wilson v. Olivetti N. Am., Inc.*, 85 Wn. App. 804, 934 P.2d 1231 (1997). An erroneous evidentiary ruling requires reversal where it is prejudicial. *Brown v. Spokane County Fire Prot. Dist. No.* 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is prejudicial when it affects, *or presumptively affects*, the trial. *Id*; *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)("A reasonable probability exists when confidence in the outcome of the trial is undermined").

These requirements are easily met for all of the *numerous times* the trial court erroneously adopted the City's arguments about how evidence should be viewed, and rather than allowing the Jury to decide how the evidence should be viewed, excluded it. The impact of these errors viewed together, as this Court must do, or separately, clearly changed the outcome in a case with a non-unanimous jury verdict, during which the

Jury sent a note asking "how long we need to deliberate before we can consider ourselves hung?" CP 187 B.[1]

B. The Superior Court's evidentiary rulings were biased and one sided, prejudicing Piel's case.

1. The polygraph evidence was highly relevant information of Piel's mental state and the City not considering it was strong admissible evidence of pretext by the City.

As Piel demonstrated, substantial evidence excluded by the trial court would have shown that (1) the City and the Union approved Piel taking a polygraph, (2) the City had used polygraphs in past investigations for untruthfulness, yet (3) the City removed Commander Arbuthnot who had agreed to Piel taking the polygraph, *after* Arbuthnot had said he would clear Piel of 4 of 5 charges and received the favorable polygraph results, (4) failing to give the polygraph results to Amy Stephson despite its relevance as to Piel's mental state and the need to find "intent to deceive"[2], and (5) what Chief Wilson and the City told the jury what could be argued were lies about who prevented the polygraph from being considered, ultimately relying only on clearly inadmissible hearsay to make their argument. App.Br. 12-13, 20-34. *Subia v. Riveland*, 104

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[1] While it is unusual to have so many plain errors in a single case, Washington law requires their impact be considered together. *Storey v. Storey*, 21 Wn.App. 370, 374, 585 P.2d 183 (1978)("The cumulative effect of many errors may sustain a motion for a new trial even if, individually, any one of them might not.")

[2] Lawyer Stephson was, of course not told this, and it was plain error for the trial court to prevent full cross examination on this point. App.Br. at 41

Wn.App. 105, 15 P.3d 658 (2001) was directly on point, and compels reversal.

The City first argues that the polygraph was not legally admissible under ER403. Yet *Subia* rejected this exact argument, finding error in exclusion on ER403 grounds. The law cited by Piel, which the City ignores, shows that ER403 has no application to highly probative evidence, which showing the City's actions were pretext. App.Br. 23-24.

The City next asserts the evidence is *per se* inadmissible. Yet *Subia* again held otherwise. The cases the City cites, Res.Br. 14-16, are criminal cases which involved efforts to admit a polygraph for the truth of the matter.[3] All except one were decided before *Subia*.[4] While the City implies otherwise, the City admits the truth of the matter was not at issue, stating "the question for the jury was not whether Mr. Piel was truthful." Res.Br. 17. As Piel *repeatedly* told the trial court, it was Commander Arbuthnot's approval of the polygraph examination, the impact the polygraph had on Piel's mental state when he was questioned, the City's actions upon receiving the polygraph, and the City's demonstrably false

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[3] The one exception is *Carnation Co., Inc., v. Hill*, 115 Wn.3d 184, 186-87, 796 P.2d 416 (1990) were polygraph evidence *to prove the claimant was telling the truth* was excluded. That was not the proposed use of the evidence in this case.

[4] *Subia*, recognized the evidence was not being admitted for the truth of the matter, but for "state of mind" and to prove a common practice was followed. *Id.*at 663-4. The only post *Subia* case the City cites, *State v. Thomas*, 150 Wn2d 821, 860, 83 P.3d 970 (2004) is easily distinguishable as the evidence sought to be admitted was for the truth of the matter; that the witness in question was dishonest.

claims about who prohibited the polygraph's consideration which were relevant. App. Br. 20-25. None of these were offered to prove the truth of the matter and Piel repeatedly stated that a limiting instruction, as suggested by *Subia*, could be given. App. Br. at 22. *Subia*, in fact distinguished its holding from circumstances where the evidence was used to prove the truth or falsity of a witness, *Id.* at 663, and as such, the City's arguments about the truth of the matter are completely off point.[5]

The City does not even try to defend the trial court's ruling that *Subia* only applies to defendants, not plaintiffs. App.Br. 22. It instead argues *Subia* is distinguishable, as there the polygraph was relevant to show the State's actions did not have a "discriminatory purpose." Res.Br. 18. Yet, this argument – the City's only - simply reinforces why the trial court erred: Piel similarly sought to use the City's actions regarding the polygraph to show the City's actions were discriminatory and pretextual, which as the City's brief admits, was a grounds for admission. *Subia* required reversal because the polygraph was relevant to "whether DOC's stated nondiscriminatory reason for sending Subia home was false." *Id.* at

[5] The evidence was not that Piel *offered to take* a polygraph as the City argues. Res.Br. 18. It was that both the Union Rep Pon and Commander Arbuthnot agreed to the polygraph, and then the City's actions upon receiving it, and how the results would have impacted Piel's answers to later questions upon which he was found to have been deceitful by Amy Stephson.

663. Here, the trial court itself acknowledged that Subia was "on all fours."

The City further claims that the polygraph required testimony from an examiner. Yet, the City's authority, *State v. Renfro*, 96 Wn.2d 902, 905-6, 639 P.2d 737 (1982) involved the use of the exam for the truth of the matter; i.e., the innocence or guilt of the defendant. Here, as the City admits, that is not the issue. In fact, the actual results needed not even be introduced, nor with a limiting instruction under *Subia* having been offered, would Piel likely have even introduced the actual document. Piel himself was capable of testifying to the impact the polygraph had on his mental state in the context of his answers.[6] Ms. Stephson would have been questioned on Piel's mental state given her admission in her report that "in most investigations" she would have viewed Piel's answers "differently" as to dishonesty. App.Br. 25. Both union rep Keith Pon and Commander Arbuthnot could also testify to the agreement to take the polygraph, *which was supported by a transcript which was in evidence*, but redacted per the trial court's orders. Likewise, the unredacted documents such as the e-mail from union president Cleary[7] to Chief

[6] As The City admits, Res.Br. 16, in any event, the evidence would have shown that Piel was a certified polygraph examiner who could testify regarding a polygraph. See also RP v3:23-24 (offer of proof).

[7] Officer Cleary is the same person the City repeatedly, and falsely, told the Jury had prevented the use of "something" that Piel had "improperly submitted."

Wilson asking why the polygraph was not in the file raise no authentication issues.

Second, the City, citing to a self-serving declaration submitted by Chief Wilson, claims that it had nothing to do with the City's decision. Res.Br. 17, 19. While the trial court treated this declaration as factually conclusive, the evidence was to the contrary. Moreover, the City's actions in response to the polygraph, and its failure to consider evidence which was relevant to Piel's state of mind, showed pretext. Further, as Piel showed in his opening brief, App. Br. at 27-32, this under oath declaration by Chief Wilson was contrary to what the City's counsel had claimed, and documents showed, and would have been a substantial piece of evidence used to cross-examine Wilson on his claim he had terminated Piel for purported dishonesty. If Wilson's sworn statements about the polygraph were false, as the excluded evidence showed, then the City's entire case should be disbelieved, a reasonable jury likely would have found.

The City's argument simply highlights the error below: it was for *the Jury* was to decide if Wilson's firing of Piel was based upon an honest investigation, which followed normal protocol, and was not tainted by animus, or if Wilson's actions were pretext, designed to reach a result. Yet, the trial court excluded Piel's evidence and believed Wilson's declaration, substituting itself for the fact finder. This was prejudicial

error. Both the City's actions and Piel's mental state when making the statements the City claimed were "deceptive" were highly relevant. App. Br. 24-25.

Third, the City asserts it did not agree to a polygraph, Res.Br. 19-23, or that Piel should be disbelieved because the City argues he "waited seven years to raise this theory." *Id.* at 21. The entire argument is fundamentally dishonest. As Piel has already shown, App. Br. 29-31, at trial *the City admitted* Arbuthnot had agreed to the polygraph, the City instead tried to claim that Union representative Pon, (and when that was shown to be false), Officer Cleary, had objected. In any event, these arguments fundamentally misunderstand the difference between an argument about the evidence to a Jury (which are not made before trial) and excluding evidence. For example, the City argues that Arbuthnot saying "Okay" when Piel offered to take a polygraph, and giving him the questions for that polygraph was not an "agreement." Res.Br. 21.[8] Yet, this is simply an argument (and not a very good one), upon which there was contrary, highly probative, evidence.

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[8] The City falsely argues there is no proof Piel was given the questions. Res.Br. 21. Yet Piel would have testified to this, as would have Arbuthnot and Union Representative Pon, and the records is filled with evidence to support this. App. Br. 29. Moreover, since Arbuthnot's own outline of his question is attached the actual polygraph *as the City admits in a footnote*, Res.Br. 22 fn 8, there is also documentary support for Piel's claims. If Arbuthnot did not give them to Piel, how did Piel have them to give to the polygraph examiner the next morning?

In a related argument, the city asserts Chief Wilson's declaration stating polygraphs were not used, supports the trial court exclusion of all evidence on the subject. Res.Br. 22-23. Yet, as even the City admits, Res.Br. 22, 23 fn 9, contrary evidence would have been offered by several witnesses. See also App.Br. 26. The City was free to make its current arguments to the Jury, but these arguments did not require the exclusion of highly probative evidence (including documents) that was directly contrary to what Wilson claimed.

Finally, the City argues that issues surrounding the polygraph were "attenuated" and "speculative." Opp.at 23-26. Yet, as this Court can doubtlessly see, the City telling the jury – in opening statements – a story about its actions regarding the removal of Officer Arbuthnot and the polygraph *that was not true*, would have destroyed the City's credibility. Absent admissible proof - which the City lacked - the Jury likely would have concluded that Chief Wilson was lying.

Further, given how closely balanced the issue was *for the City's chosen fact finder* Ms. Stephson, the presence of the polygraph should have been key in explaining Officer Piel's state of mind. It was a "road not taken" that showed the City was trying to get Officer Piel for improper reasons rather than reach an honest decision. The City's entire justification for firing Piel; that Officer Piel *despite having a polygraph*

saying he did not make any threats to harm someone, and did not intend to harm anyone, firmly in his mind, should have instead said "I don't know"; was untenable with the evidence in the case. App. Br. 24-25.

As the Washington Supreme Court stated, in a holding the City ignores, plaintiff must "be afforded a fair opportunity to show that [defendant's] stated reason for [the adverse action] was in fact pretext." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 182, 23 P.3d 440 (2001)(brackets in original). The excluded evidence was central to Piel's claims that Chief Wilson and the City deviated from past practice as a result of animus from Piel's protected activities. It should have been admitted, with a limiting instruction. Piel was denied a fair trial.

2. The trial court allowed the City to shield its false statements about Arbuthnot's removal from challenge, using the improper Polygraph ruling as a sword.

The City's claims about Arbuthnot's removal were central to its defense; explaining Arbuthnot's removal – when he had just said that he would clear Piel on 4 of 5 charges – *as being Piel's fault for sending improper information*. App.Br. 27-28. The City does not attempt to deny what it did, nor does it attempt to explain away the massive volume of evidence, including documents that were excluded, that showed its claims, under the cover of the exclusionary rulings, were arguable factually untrue and illogical. Res.Br. 26-29.

As Piel showed, the City's false claim it was the Union that prevented the polygraph being considered – claims contrary to what the City itself said in documents, and what things like transcripts showed, App.Br.27-31, – was ultimately *only* shown via Commander Arbuthnot testifying that Union President Cleary had *told him* "something" could not be used. This was clearly inadmissible hearsay. App. Br. 31-32. The City's only response, hidden in a footnote, Res.Br. 27, n12, is that Arbuthnot testifying as to what Cleary supposedly said went to "notice." Yet it is clear the purpose of having Arbuthnot testify to the *alleged* statement by the out of court witness Cleary (who was not on the City's witness list) was to show a fact, that it was the Union, not the City, which had objected. That is not a "notice" use, it is for the truth of the matter, and is not covered by any hearsay objection. The hearsay rule is particularly applicable here where the City told varying and changing stories about who had made the purported statement. App. Br. 29.

The authority cited by the City, *Price v. State*, 96 Wn.App. 604, 980 P.2d 302 (1999), shows how wrong the City really is. *Price* was a suit for negligence in the placement of a foster child who had severe fetal alcohol syndrome. Plaintiff sought to introduce statements by the birth-mothers sister's *made years earlier* to the State, and contained in the

State's written records, to prove "notice."[9] The State objected the statements in its own records were "hearsay" and the *Price* Court disagreed:

> But the law does not define Ketchum's 1981 out-of-court statements to DSHS as hearsay because the Prices are not offering them for the truth of the matter asserted but rather to establish that DSHS was on notice of the biological mother's possible drug and alcohol abuse and failed to disclose this information to them. ER 801(c).

Id. at 618. The law allows proof of information contained in defendant's files, as in *Price*, to show notice of the existence of a dangerous condition (usually in a product liability or premise liability case) *with a limiting instruction that the complaints are not to be taken for the truth of the matter*. But that has nothing to do with Arbuthnot's testimony, or what the City was attempting to show. The City was attempting to prove a fact – that it was the Union which nixed the polygraph and required Arbuthnot to be canned - and the trial court allowing hearsay testimony as to this central issue was clearly erroneous and prejudicial.

Moreover, as Piel showed, App.Br. 32, n.26, the trial court issued equally incorrect rulings *against Piel*, ruling that Piel could not testify to what *he* told people, as it was "hearsay." This ruling was so ridiculous

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[9] *Price* was decided at summary judgement, and did not involve in-court testimony, but instead, as does nearly every case on "notice" the introduction of reports contained in the defendant's business records.

that the City does not even attempt to defend it. Yet, the contrary rulings highlight that the trial court had a one-sided and unequal view of the law.

The remainder of the City's response does not pass the smell test. Having not denied it set about telling the Jury a false (or at best arguably untrue) set of facts, knowing that Piel could not respond, the City suggests it's all Piel's fault! According to the City, Piel should have proposed a different way for the City to try to whitewash its refusal to consider the polygraph, and its actions in removing Commander Arbuthnot! Res.Br. 26. The City's argument, that Piel should have helped them mold the record in their favor is directly contrary to *State v. Gefeller*, 76 Wn.2d at 449, 455, 458 P.2d 17 (1969) which makes clear that when an area is ruled out of evidence, a party cannot, as the City did in this case, bring up only part of the evidence, shielded from having contrary evidence presented. *Id.* When the City chose to go into the area, giving a favorable spin to its case, it opened the door to the entire subject of the Polygraph and how it was handled. App. Br. 31-34. The City has no answer to this bedrock principle of law, which requires reversal.

The City finally asserts that Piel was still free to cross examine witnesses. However, as should be readily apparent, when the trial court excluded all documents with the material for cross-examination, further cross-examination would have been a farce. For example, when

Commander Arbuthnot was allowed to testify that Officer Cleary had said the union objected to the use of "something," requiring his removal, Piel needed to explain what was at issue, and that it would have been favorable to him, and use the City's business record in which Officer Cleary himself had asked "why the polygraph information submitted by Robert Piel" was not included in what was being considered! CP1043. One need only compare the actual document sent to the City by Officer Cleary (CP1043) that the trial court ordered excluded, to the testimony given by the City's witnesses, to see that the trial of this matter was a sad farce. The inability to effectively cross-examine due to redactions was raised by Piel at length. *See e.g.* RPv4: 193-203. The trial court overruled the objections, allowing the City to say what it liked, free of challenge, requiring a new trial.

3. The Court inappropriately prohibited cross-examination of Jason Wilson regarding his untruthful answers regarding his "deviant behavior" and of Amy Stephson regarding her failure to follow up on Jason Wilson's dishonesty, instead finding him "credible."

The City does not even attempt to claim that Jason Wilson was honest in answering (under oath) Commander Arbuthnot's questions about bias. Nor does the City deny that the facts were not exactly a secret in the department; Piel's union representative Keith Pon confirmed Piel's account of Jason Wilson's bias when Amy Stephson finally asked Piel about Wilson's bias in her final interview.

Nor does the City defend the trial court's ruling. It simply asserts that the Court found "prejudice," citing no argument it made below or law supporting the ruling. Res.Br. 29. As Piel previously showed, a *balancing* is required, and "the ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case." *Carson v. Fine*, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). Here, the only "prejudice" to the City was that Jason Wilson *would not have been* believed by the Jury. Piel could have then argued that City could not have legitimately based its termination of Piel *solely* on a witness who lied. Neither are "unfair prejudice" which fits within an ER403 analysis.

In any event, the only issue presented by the evidence, apart from its clear relevance, was embarrassment to Jason Wilson. Yet, under ER403 "the balancing process should focus not on the potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truth finding process itself." *State v. Hudlow*, 99 Wn.2d 1, 13, 659 P.2d 514 (1983).

The City's claim that Piel sought to use the "prejudicial value of the evidence, because he said that the nature of the "conduct burns it in people's mind" Res.Br. 29-30, badly misconstrues the evidence's relevance. Jason Wilson *denied any bias*. Yet the very nature of his

conduct and his interactions with Piel – as Piel pointed out to the trial court in argument the City does not completely quote in its brief[10] – made it highly unlikely Jurors would believe Jason Wilson had simply "forgotten" about them when questioned. Nor were his answers as to bias ones that the Jury would likely have believed that Chief Wilson, Commander McAllister, and Amy Stephson, would have overlooked, and chosen to turn away from, without further investigation. A reasonable Jury could easily find the City's entire investigation was a sham when it ignored Jason Wilson's dishonesty, since he was the *only* witness to support the City's conclusions. Instead, the trial court's exclusion made the City's denials of any bias by Wilson plausible, which they would not have been if the Jury were allowed to see the actual evidence.

Amazingly, the City tries to claim there was no prejudice, asserting that Jason Wilson was not an "essential" witness, and that others provided the same testimony. Res.Br. 30. Both clams are false. As Piel showed, App. Br. 34, 10-12, Jason Wilson was the *only witness* who reported that

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[10] As Piel told the trial court:

> We have to argue that Jason Wilson is dishonest. The actual facts of what he said are highly relevant because, I think, the jury is gonna believe, if we tell then what the statements were, that there's no way that Jason Wilson, when asked [readings question asked by Arbuthnot] and what he said was about masturbating in public and masturbating in bathrooms and masturbating in front of some woman's house, and that he said this to Bud Piel and then Bud Piel recommended he not become a police officer. That no honest witness would have ever responded, "nothing outside of the regular disagreements that are common when working with someone on patrol". RPv1:107-108.

Piel had made a "threat," the two police officers with Piel *did not understood there to be a threat, or report a threat*. Piel quoted the actual testimony in his brief, which is directly contrary to the City's assertions. Moreover, as Piel showed, the City's eventual fact finder found Jason Wilson to be credible, and based her findings *on his account* of what had happened. App. Br. 37. The City's attempt to distinguish *State v. Darden*, 45 Wn.2d 612, 624, 41 P.3d 1189 (2002) on the purported grounds that Jason Wilson was not essential to the City's asserted grounds for terminating Piel, utterly fails. As *Darden* shows, where the exclusion of evidence allowed the City to avoid effective cross-examination of Wilson's bias, a new trial is required. App. Br. 37.

The City further tries to claim that Jason Wilson's bias was irrelevant, as "he was not the decision maker." Res.Br. 31. Yet, the City's own investigators asking about bias shows its importance, and the interviews showing Jason Wilson's denial of any bias, and Piel's rather emphatic statements that Wilson had an ax to grind, were in the record that both Chief Wilson and Commander McAllester testified *they carefully reviewed*. Rather than insulating the decision maker, the failure of not only Amy Stepson to further investigate the very clear issues with Jason Wilson's honesty, and *for Chief Wilson and Commander McAllester to ignore it as well*, made the evidence more relevant. This was more

excluded evidence that would have shown that the City's investigation was a farce, and its asserted grounds for firing Piel, pretext. [11]

The law – which the City entirely ignores in its opposition – is clear: "[f]acts which tend to show the bias, prejudice...and to show hostility towards the party against whom he is called, may be elicited on cross-examination as a matter of right, and the denial of this right is grounds for reversal." *Dods v. Harrison*, 51 Wn.2d 446, 448, 319 P.2d 558 (1957). Piel had a right to challenge Wilson's credibility, and show the City ignored the issue. A new trial is required. *Dods*, 51 Wn.2d at 448.

4. The trial court improperly barred evidence of the City's very different responses to prior similar events hindering Piel in proving he was terminated for improper reasons.

The City's response entirely ignores that its own witnesses admitted to a *consistent and unchanging* policy as it related to both "dishonesty" and "work place violence."[12] Each of the examples of

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[11] The excluded evidence would have significantly strengthened the other evidence that Jason Wilson was not a believable witness, App.Br. 36 n.29 and 10-1, evidence that the City ignores entirely, and which *likely would have lead* a Jury to believe that the City could not reasonably have relied upon his testimony to fire Piel.

[12] For example, Chief Hwang admitted that the "work place violence" employee guidelines which Piel was alleged to have violated, CP187, Ex 27 predated his employment with the City and been in effect "since I can remember being employed with the city." RPv4:76; Ex56. These same "work place violence" policy had been in existence as long as the FWPD. RPv3:250-51. Documents and Chief Wilson's own testimony showed, the policy requiring an "intent to deceive" had been in place at least since 2001. CP187, Ex 27, RPv.4:126.

different treatment Piel sought to introduce were decided under the same constant set of standards. App.Br. 40-44.

The City makes no effort to argue that a Jury would not have found highly relevant the vastly different treatment that Chief Wilson and his brother personally received for similar events, nor that the City handling other alleged dishonesty issues differently would not have had an impact on the verdict. Under any reasonable view of the evidence, it would have entirely undercut the City's *express* claims (1) that it had treated Piel similarly to others, and (2) as it told the Jury, it had searched its records and found no inconstant punishments. App. Br. 41. These statements *were false*, yet the City was allowed to peddle them to the Jury unchecked due to the trial court's improper exclusionary rulings.

As Piel showed, the Courts of this State have long recognized that in retaliatory and wrongful termination cases the *employer's* different or inconsistent treatment of other employees is highly probative and admissible to show the alleged reasons for the termination were pretext. App. Br. 39. The City does not deny this is the law; it instead asserts these cases do not apply as it was a "different decision maker" so that any difference in treatment is irrelevant. Res.Br. 32-33. This argument, accepted by the trial court, is entirely wrong.

First, this is a suit against the City, not Chief Wilson. The City has an obligation to see that its policies are fairly implemented. The City's argument that a consistent policy does not matter, that it's all within the discretion of the decision maker, which cannot be challenged, is not the law. This argument is particularly illogical where the decision maker – Chief Wilson - knows of the prior decisions, and the standards, because they involved him and his brother!

Second, as a matter of policy, the City's argument, *were it accepted*, would undercut this State's public policy. In discrimination cases disparate or different treatment is relied upon because, as numerous decisions have said, bias and prejudice is usually hidden, and must be shown via indirect evidence. App.Br. 21-22, 26. This vindicates important public policy interests, *interests found by the Supreme Court of Washington to apply in this case*. Were the rule as the City claims; that a different decision maker, applying the same policy or rule, cuts off evidence of prior inconsistent decisions, there would be no way to prove discrimination in many cases. As here, if the City wanted to unlawfully fire someone, they could simply have the firing done by someone (as is the case with Chief Wilson) who was newly on the job and who had never fired anyone before. This is not the law.

Third, arguing the law requires *the same decision maker* for admissibility, Res.Br. 33-34, the City conflates the facts of cases with the court's holding and reasoning. The City first claims the holding in *Sellsted v. Washington Mutual Savings Bank*, 69 Wn.App. 852, 861, 851 P.2d 716 (1993) was *based upon* it being the same decision maker. The case says no such thing; it happened to be the facts of the case (both the hiring and firing were by the same boss) but it was not the basis of the Court's decision. The City further asserts that *Lords v. N. Auto Corp.*, 75 Wn.App. 589, 610, 881 P.2d 256 (1994) was the basis of the trial court's decision [no citation for this is provided by the City] and that *Lords* affirmatively held that the "decisions made by different supervisors" were properly excluded as "such evidence was irrelevant." Res.Br. 34. *Lords* also says no such thing! *Lords* upheld a plaintiff verdict for discrimination. 75 Wn.App. at 611. After upholding the verdict, the *Lords* court addressed a cross-appeal issue where plaintiff argued that he should have been allowed to introduce evidence of "other discriminatory acts." *Id.* at 610. Having upheld the verdict, the court's further discussion was dicta. In any event, the court did not reach the holding the City now claims, instead it found no abuse of discretion where: "the trial court excluded Mr. Hibb's testimony primarily because he was an assistant manager and the issue was whether Northern discriminated in its selection

of managers, not assistant managers." *Id.* The case nowhere establishes a rule of exclusion for different decision makers. The City can cite no case, anywhere, despite a nationwide search for support for its position, which has ever excluded evidence on the grounds advanced by the City or adopted by the trial court. Such a rule would simply insulate wrongful conduct from remedy.

Piel was terminated *soley* for alleged dishonesty. CP187 Ex 27. The City's failure to apply the same standards as in prior cases to Piel, was key evidence in the case.[13] Further, that Chief Wilson's own incident - where he actually *threatened* a fellow officer – had been dismissed as "a statement about my frustration at the time" where no "intent to harm" existed – was directly contrary to the asserted grounds for Piel's firing and would have caused any reasonable Jury to ask why Wilson was applying new, and hypocritical, standards to Piel. App.Br. 4-5. The City attempts to argue why the Jury might not have found the evidence persuasive, Res.Br. 34-36, but that was an issue for the Jury to decide, not the trial court. The trial court badly erred in excluding all evidence of prior handling of alleged dishonesty and "work place violence" under the same consistent policies. Reversal for a new trial is required.

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[13] Chief Wilson admitted that, absent the "dishonesty" finding, Piel would not have been terminated, instead he would be sent for fitness for duty evaluation. RPv5:79-80, 81-82

5. The Court erred in allowing irrelevant testimony by witnesses who were "offended" by Piel.

The City's claims, Res.Br.38, that Piel waived any objections, given the actual record, is ridiculous. Piel *filed a motion in limine* CP161 on the purported statements that Piel made that "offended" two female officers. RPv1:60-65. This preserved the issue. Piel objected four times, RPv3:260, v4:254, v6:250-01, v7:200-01, and renewed his objections to Officer Barker's testimony before she testified. RPv7:181-182. The trial court then criticized Piel's counsel saying "well, you had an opportunity to earlier object, and I think that would have been a motion." RPv7:182. Shown this was wrong, the trial court wrongly asserted "this didn't come up during Motions in Limine" and admitted the testimony. *Id.*

The City's only other response is the statements were "part of the record that the City considered." Res.Br. 36-37. This is not an argument for admissibility, and certainly not for live testimony by Barker. Moreover, if things "being in the file" made them admissable, then the trial court should not have excluded evidence in the file favorable to Piel! See issues 1-4 above. The evidence was irrelevant and prejudicial and cumulative under ER401 and ER 403. The testimony, designed to put a female face before the Jury to try to make Piel look bad, was only "likely to arouse an emotional response rather than a rational decision among the

jurors." *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994). The evidence should have been excluded; its admission prejudiced Piel.

6. The Trial Court Erred in Ruling That Piel's Tort Claim for Damages and Complaints to the City's Human Resource Department Were Not Protected Activities.

The "clarity element" is met by Piel's actions made (1) pursuant to the Employee Guidelines and (2) that are mandated by statute. Summary judgment against him was improper.

Initiating complaints about inaccurate performance evaluations and improper evaluation procedures under the employee guidelines are protected activities within the context of public employment, where Washington has a clear public policy of encouraging a

> system of personnel administration based on merit principles and scientific methods governing the transfer, layoff,...classification and pay plan, removal, discipline, and welfare of its civil employees."

RCW 41.06.010. When Piel attempted to hold his supervisors to the standards in the Employee Guidelines, he was clearly engaged in protected activity upholding the policies espoused in RCW 41.06.

Likewise, initiating complaints pursuant to RCW 4.96.020 is a protected activity, akin to performing a public duty or legal obligation such as serving on the jury. See, *Lins v. Children's Discovery Centers of America, Inc.*, 95 Wn.App. 486, 976 P.2d 168 (1999). Compliance with

RCW 4.96.020 is, as the City's counsel stated "for the benefit of the public entity that is potentially subject to a lawsuit." Rep.Br. 42. Piel fulfilled a legal obligation and statutory duty under the statute. The grant of summary judgment allows a public employer to react with impunity in response. Accordingly, the Court's decision that filing a claim pursuant to RCW 4.96.020 did not establish the clarity element was error.

7. The Trial Court Erred in Finding Piel Was Collaterally Estopped From Asserting the 2006 Discharge Decision Was Motivated By Retaliatory Animus.

The trial court erred in finding that Piel's claim for violation of public policy based upon his 2006 termination was identical to the issues in the 2007 arbitration, where only two issues were addressed: "Was the Grievant discharged for cause for"... (1) "The March 10, 2006-Stop of Firefighter" incident and (2) the "March 16, 2006-Abuse of Discretion" incident. CP 147, Ex. A. Collateral estoppel is confined to ultimate facts, i.e., facts directly at issue in the first controversy upon which the claim rests, it does not extend to evidentiary facts, facts which may be in controversy in the first action and are proven but which are merely collateral to the claim asserted. *Beagles v. Seattle-First Nat'l Bank*, 25 Wn. App. 925 (1980). When collateral estoppel is asserted, the record of the prior action must be before the trial court so that it may determine if the doctrine precludes relitigation of the issue in question. *Id.* at 932.

Here, Arbitrator Gaba found just cause only to *discipline* Piel, not to terminate him. Res.Br. 46. This does not foreclose evidence the termination was wrongful. In *Christensen*, the union's amended complaint for wrongful termination for employee's involvement with the union was properly precluded because "the factual issue in the administrative proceeding was whether Christensen's union activity was protected conduct and whether that conduct was a substantial or motivating factor for his discharge." *Christensen v. Grant County Hosp. Dist.*152 Wn.2d 299, fn. 5, 96 P.3d 957 (2004).

That was not the case here. The City asserts *Piel I* determined the preclusive effect of the arbitration hearing. It did not. The Court merely noted the possibility of collateral estoppel, while maintaining that "in the particular context of PERC, *Smith* and later cases recognize that the limited statutory remedies under chapter 41.56 RCW do not foreclose more complete tort remedies for wrongful discharge." 177 Wn.2d 604, 616 (2013). Reversal is required.

II. CONCLUSION

For the foregoing reasons this Court should reverse and remand for a new trial before a different judge.

RESPECTFULLY SUBMITTED this 5th day of October, 2015.

STEPHEN M. HANSEN, WSBA#15642

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the 5th day of October, 2015, I [X] e-mailed [ ] mailed via regular U.S. mail [ ] faxed [ ] delivered by legal messenger a true and correct copy of this document to:

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