No. 96043-7

SUPREME COURT
OF THE STATE OF WASHINGTON

MARIA LUISA JOHNSON, CARMELIA DAVIS-RAINES, CHERYL MUSKELLY, PAULINE ROBINSON, ELAINE SEAY-DAVIS, TONI WILLIAMSON, AND LYNDA JONES, Appellants,

vs.

CITY OF SEATTLE, Respondent.

ANSWER OF RESPONDENT TO APPELLANTS' PETITION FOR REVIEW

PETER S. HOLMES
Seattle City Attorney

SARAH TILSTRA, WSBA #35706
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
(206) 684-8200

DAVIS WRIGHT TREMAINE LLP

PORTIA R. MOORE, WSBA #13354
ARTHUR SIMPSON, WSBA # 44479
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
(206) 622-3150

Attorneys for Respondent

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I. INTRODUCTION

Petitioners Maria Luisa Johnson, Carmelia Davis-Raines, Cheryl Muskelly, Pauline Robinson, Elaine Seay-Davis, Toni Williamson, and Lynda Jones ("Plaintiffs") used their employment with Seattle Public Utilities ("SPU") to make unauthorized financial transactions on their own utility accounts and the accounts of their friends or family. These transactions were a conflict of interest and violated numerous policies, including the City's Code of Ethics. Plaintiffs' conduct was discovered during a comprehensive and data-driven investigation of all 217 SPU employees who had read/write access to the Consolidated Customer Service System ("CCSS"), the utility billing system. Discipline resulting from the investigation's findings was applied systematically and was based on the employee's conduct. Nevertheless, Plaintiffs insisted that they were investigated and disciplined because of their race (six Plaintiffs are African-American and one is Filipina), their age, or their signature on a petition protesting the investigation. In the face of overwhelming evidence to the contrary, the jury was not persuaded and returned a complete defense verdict. The Court of Appeals affirmed.

Though Plaintiffs had their day in court, they claim the result is unjust because the jury panel contained few African-Americans, and the jury itself, though it included three jurors of color, did not include any African-

Americans. Plaintiffs ask this Court to abandon years of precedent in favor of a profoundly unworkable rule that would allow them to reconstitute the venire if the racial composition was not sufficiently representative. Like the trial court and the Court of Appeals, this Court should decline this request, as there was no evidence of departure from the random jury selection procedures. Far from being a "loophole," this result is mandated by the law's requirement of random panel selection, as well as the longstanding principle that a litigant is not entitled to a particular juror or jury makeup.

Plaintiffs' other claims fare no better. Plaintiffs claim the trial court's hardship excusals excluded low-income daily wage earners, but the trial court properly followed RCW 2.36.100, and Plaintiffs offer no evidence of the income level of those excused or kept on the panel. Plaintiffs also ask this Court to implement new rules for jury instructions and expert testimony, but they cannot demonstrate that the trial court abused its discretion when the instructions given allowed Plaintiffs to argue their theories of the case, and their expert was excluded because his opinions were generalized and not tied to the facts of the case. This Court should deny review.

II. COUNTERSTATEMENT OF ISSUES FOR REVIEW

1. Was the trial court's refusal to call a new venire an abuse of discretion when Plaintiffs did not show that a material departure from jury panel selection procedures occurred?

2. Did the trial court abuse its discretion in excusing, under RCW 2.36.100, jurors who claimed financial hardship, and in refusing to hold trial fewer days per week?

3. Did the trial court abuse its discretion in rejecting Plaintiffs' implicit bias instruction when the jurors were instructed not to reach their decision on sympathy, bias, or personal preference?

4. Did the trial court abuse its discretion in rejecting Plaintiffs' pretext instruction when the instruction was not required and Plaintiffs were not prejudiced?

5. Did the trial court abuse its discretion in excluding Dr. Greenwald's opinions when they were generalized opinions not tied to the facts of the case, and would confuse and mislead the jury?

6. Were there any errors to cumulate?

III. COUNTERSTATEMENT OF THE CASE

A. Plaintiffs' Employment and the CCSS Investigation

Plaintiffs were employed by SPU as Utility Account Representatives ("UARs"), and responded to SPU and City Light customers who needed help with their bills or accounts. *See* RP 433-34, 400-02, 438 (8/22 DR).[1] UARs could make changes to accounts in CCSS,

[1] SPU has put the date of the proceedings (*e.g.*, 9/1) and the initials of the court reporter (DR for Dolores Rawlins, KG for Kimberly Girgus) in parentheses after each RP cite. The motions in limine RP is abbreviated "MIL."

which was used to bill and store customer information. *See, e.g.*, Ex. 448 at 1; Ex. 155 at 4. UARs could waive fees, adjust balances, and make payment arrangements delaying payment of bills for customers. *See, e.g.*, Ex. 448.

UARs are also bound by the City's Ethics Code, which states that City employees (a) may not participate in a matter in which they, or an immediate family member, has a financial interest; (b) may not perform official duties when it could appear that the employee's judgment is impaired because of a personal or business relationship, without disclosure; and (c) may not use their jobs for a purpose that is, or has the appearance of being, primarily for the employee's own benefit. *See* Ex. 78 (SMC 4.16.070(1)(a), (1)(c), and (2)(a) (2009)); RP 953-55 (9/1 DR); RP 1031-32 (9/6 DR). SPU's policies also told UARs to ask a supervisor to provide maintenance to their own or friends/family utility accounts. Ex. 317 at 4. SPU also had policies limiting when and how fees could be waived and payment arrangements created. *See, e.g*., RP 74 (9/1 KG); Ex. 319 at 5-6; Ex. 167 at 3; RP 93-94 (8/22 KG); RP 686-87 (8/25 DR).

After discovering that some employees had worked on their own accounts (RP 862-64 (8/31 DR)), SPU did an investigation to determine if any other SPU employees were making such improper transactions. RP 867-68 (8/31 DR); RP 98 (8/17 KG). The investigation covered all 217

current SPU employees who had CCSS read/write access. RP 872, 873 (8/31 DR); RP 42 (8/25 KG). Of the 217, 77 employees had accessed their own or friends/family accounts (RP 68 (8/25 KG), and these employees were of all ages and races. *See* Exs. 496, 497, 498, 499, 502. The transactions ranged from purely administrative (ordering a missing trash can lid, RP 890-92 (8/31 DR)), to financial transactions in violation of SPU policy (making a payment arrangement without taking a down payment, Ex. 450 at 3-4).

B. Discipline Resulting from the Investigation

The investigation reports on the employees who made financial transactions on their own or friends/family accounts came to SPU's Deputy Director of Customer Service, Susan Sánchez, to review. *See* RP 117-18 (8/22 KG); RP 73 (9/1 KG). Ms. Sánchez made disciplinary recommendations to SPU's Director, Ray Hoffman (*see* RP 275-76 (8/18 DR)), who ultimately terminated 10 employees and suspended 18. *See* Exs. 496 and 497.

Each Plaintiff was found to have made financial transactions on her own or friends/family accounts. Plaintiffs do not deny the transactions. *See* Exs. 423, 433-435, 448-450*; see also* RP 917-18, 927, 935, 945, 949 (9/1 DR); RP 34, 116-17 (9/8 KG). Ms. Johnson, who made 31 financial transactions, and Ms. Williamson, who made 66, were terminated. Exs.

432, 435, 88, 92. Ms. Muskelly, who made 24 financial transactions, would have been terminated had she not retired. Exs. 449, 104. Ms. Davis-Raines, who made three financial transactions, and Ms. Jones, who made one, were each suspended for one day. Exs. 448, 433, 100, 111. Ms. Seay-Davis, who made nine financial transactions, would have been suspended had she not retired. Exs. 450, 96. Ms. Robinson, who made seven financial transactions, retired before any disciplinary recommendation was made. RP 293 (8/18 DR); Ex. 434. Plaintiffs were treated the same as other employees found to have engaged in the same level of misconduct. *See* Exs. 496, 397, 400, 497, 510, 661.

C. Trial and Appeal

At trial the jury heard Plaintiffs' race and age disparate treatment claims, and five Plaintiffs' retaliation claims.[2] *See* CP 5872-74. Plaintiffs had ample opportunity to argue their theory of the case: that the CCSS investigation and discipline discriminatorily targeted SPU's older workers and workers of color. Plaintiffs presented little evidence, however, to support these claims. Instead, the jury was presented with extensive evidence that SPU employees of all ages and races, regardless of whether

[2] Five Plaintiffs signed a petition protesting the CCSS investigation's impact on African-American employees (Ex. 46), and claimed that their later discipline was retaliatory. However, employees who signed the petition received no worse discipline than employees who did not sign but engaged in similar transaction activity. *See* Ex. 497 (compare Ms. Davis-Raines, Ms. Jones, and Mr. Lea).

they signed the petition, were treated identically with respect to both the investigation and any resulting discipline. The jury accordingly found for SPU. Plaintiffs appealed, and the Court of Appeals affirmed on all issues.[3]

IV. ARGUMENT

A. The Trial Court Did Not Abuse Its Discretion in Refusing to Call a New Jury Panel.

Below, Plaintiffs claimed the panel was primarily Caucasian[4] and asked the trial court to call a new panel. RP 2-3 (8/15 DR). The Court of Appeals found that the trial court did not abuse its discretion[5] in declining to reconstitute the venire because Plaintiffs did not identify any deliberate exclusion or material departure from the selection procedures for jury panels. Op. at 6. Plaintiffs claim that this standard is inadequate, and ask this Court to accept review in order to formulate a new rule. Petition for Review ("PFR") at 16. Far from being inadequate, the Court of Appeals' analysis flows from two fundamental tenets of our jury system: that members of the jury panel must be randomly selected, and that a litigant is not entitled to a particular juror or jury composition. Plaintiffs' request that this Court create

[3] Plaintiffs have abandoned before this Court several of the issues they raised in the Court of Appeals. *See generally* Court of Appeals Opinion ("Op.").

[4] According to Plaintiffs, the 100-person panel, prior to hardship excusals, contained two African-Americans. *See* CP 5662.

[5] A trial court's ruling regarding challenges to the venire process is reviewed for abuse of discretion. *State v. Marsh*, 106 Wn. App. 801, 806, 24 P.3d 1127 (2001).

a new rule allowing them to reconstitute the venire to achieve a particular racial composition violates those tenets and should be rejected.

Washington law requires that the members of the jury panel be randomly selected. *See, e.g.*, RCW 2.36.080(1) (state policy is "that all persons selected for jury service be selected at random from a fair cross section of the population of the area served by the court"); *Brady v. Fibreboard Corp*., 71 Wn. App. 280, 282, 857 P.2d 1094 (1993) ("statutes repeatedly mandate that the members of a jury panel be randomly selected"). The random selection process is largely governed by statute,[6] and parties challenging the makeup of a jury panel must show a material departure from those statutes. *See State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991) ("[w]here the selection process is in substantial compliance with the statutes, the defendant must show prejudice. If there has been a material departure from the statutes, prejudice will be presumed."). In fact, CrR 6.4(a) mandates that "[c]hallenges to the entire panel shall only be sustained for a material departure from the procedures prescribed by law for their selection."[7] The decisions of the trial court and the Court of Appeals are thus squarely in line with case law and the

[6] *See, e.g.*, RCW 2.36.054 and .055 (creation of a jury source list).

[7] Though CrR 6.4(a) is a criminal rule, Plaintiffs can offer no reason why they should be given more grounds to challenge a jury panel than criminal defendants.

statutory requirement of random selection of the panel.

Plaintiffs do not dispute that they cannot meet the "material departure" standard, as "there is no claim that there was a failure to randomly select members of the venire." Op. at 5. Instead, Plaintiffs seek a new standard, claiming that an African-American plaintiff must have "fair representation" in order to have a fair trial in a race discrimination case, and that the lack of such representation violates the constitutional rights of trial by jury and equal protection. PFR at 16. Plaintiffs offer very little analysis of their constitutional claims. Regardless, this Court has held that "an individual does not have a right to a particular juror or jury." *City of Tukwila v. Garrett*, 165 Wn.2d 152, 161, 196 P.3d 681 (2008); *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d 1105 (1995) (same); *see also Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S. Ct. 692, 702, 42 L. Ed. 2d 690 (1975) (defendants not entitled to a jury of any particular composition); *State v. Hilliard*, 89 Wn.2d 430, 442, 573 P.2d 22 (1977) (defendant not entitled to exact cross-representation in jury pool). Similarly, a party is not entitled to have members of her race on a panel or jury. *State v. Davis*, 141 Wn.2d 798, 837, 10 P.3d 977 (2000) (that there were no individuals of defendant's race on the jury insufficient to establish prejudice); *State v. Rogers*, 44 Wn. App. 510, 517, 722 P.2d 1349 (1985) (same); *State v. Aleck*, 10 Wn. App. 796, 799, 520 P.2d 645 (1974) (that jury contained no non-Caucasians insufficient in

itself to show discrimination). Plaintiffs' claim amounts to an assertion that they are entitled to a jury of a particular racial makeup, and the claim should therefore be rejected.

Plaintiffs cite to a survey showing that African-Americans (and other racial minority groups) are generally underrepresented in our state's jury panels.[8] Yet, though Plaintiffs state that "[t]he problems in increasing diversity on our juror rolls are significant and difficult to solve through either court decisions or legislative action," they go on to claim that these issues are "not our problem" for the purposes of this appeal. PFR at 2.

Instead, Plaintiffs seek a rule that would allow the trial court to alter the randomly-selected panel after it is called. Below, Plaintiffs asked the trial court to pick a new panel "that has something more representative of the group." RP 3 (8/15 DR).[9] Then, during oral argument before the Court of Appeals, Plaintiffs suggested that, if, for example, there were three African-Americans out of a pool of 100, the court could "make them jurors one, two,

[8] Plaintiffs' citation to *State v. Evans*, 100 Wn. App. 757, 998 P.2d 373 (2000), is puzzling. In *Evans*, the trial court rejected a defendant's peremptory challenge of a "juror of apparent color," and, in support of its rejection, the trial court noted that jury venires are not representative of jurors of color. *Id*. at 761-63. The Court of Appeals found that, on the record before it, the demographics cited by the trial court did not support its conclusion of purposeful discrimination. *Id*. at 771-72.

[9] Though the seated jury did not have anyone who identified as African-American, it did include three jurors of color, who identified as Vietnamese (Juror 57), Mexican-American (Juror 63), and East Indian (Juror 65). *See* RP 33-34 (8/15 DR) (race); RP 130-33 (8/16 DR) (final seating).

and three."[10]

Both proposals are deeply unworkable. If this Court instituted a rule allowing a party to request a new panel based on racial makeup, what would be the parameters of such a rule? Would it only apply in race discrimination cases, or in any case it was requested? Would any party be able to request a new venire based on underrepresentation, or only plaintiffs? Would it only apply with respect to African-Americans in the venire, or would underrepresentation of other racial groups be cause for a new venire? What would be the standard to determine sufficient underrepresentation so as to justify a new venire – would any deviation from the percentage of the voting-age population in the county be enough, or would the deviation need to meet a certain threshold, and, if so, what would that threshold be? Could a party keep requesting new venires until that threshold was met? If faced with African-Americans with unreachably high juror numbers, should the trial court put all such potential jurors in the jury box, or only in accordance with their percentage of the population within the county? When determining whether to call a new venire or alter juror numbers, should the trial court rely on its own (or counsel's) visual assessment of race, or would the venire be

[10] The audio of oral argument is available at the Washington Courts website, http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20180228 (last visited Aug. 5, 2018), and the pertinent portion begins at approximately 8:48 on the recording of oral argument for this matter.

asked how they identify? Finally, and perhaps most importantly, if the underlying issue is underrepresentation of African-Americans in the venire, how would calling a new venire guarantee that the same underrepresentation issues would not recur?

The proposals are also legally untenable. Changing the randomly-assigned number of a panel member due to that person's race, or discarding a randomly-selected panel because its racial composition did not meet a certain threshold, would violate our state's legislated policy of random jury panel selection. Such proposals would also run directly counter to established law holding that an individual is not entitled to a particular jury or jury composition. This Court should reject Plaintiffs' invitation to abandon the fundamentals of our state's jury system and deny review.

B. The Trial Court Did Not Abuse Its Discretion in Excusing Jurors for Financial Hardship and Refusing to Limit Trial to Two Days Per Week.

Plaintiffs claim that the excusal of "daily wage earners," based on those individuals' claimed financial hardship, violated both the Constitution and RCW 2.36.080's prohibition on exclusion from jury service on account of economic status. PFR at 17. Plaintiffs further claim that the trial court's refusal of their request to hold court fewer days per week (*see* RP 4-5 (8/15 DR)) was an abuse of discretion. Again, Plaintiffs provide little in the way of analysis or supporting facts, and what analysis they do provide is flawed.

Plaintiffs' argument rests on a number of unsupported assumptions about the economic status of panel members. There is no evidence that the jurors excused for financial hardship had different "economic status" than those who were not excused, or that they were excused on account of that status. The evidence shows only that the excused jurors represented that the absence of income for all or a portion[11] of the trial would be a hardship. Similarly, though Plaintiffs claim the jury was made up of "elites," there is no evidence as to the chosen jury's economic status.[12] Even an assumption that all the chosen jurors' employers paid for their jury service (and there is no evidence even to support this assumption) sheds no light on those jurors' income level, economic status, or whether they are paid hourly or salary.[13]

Moreover, excusal on the basis of hardship is explicitly permitted. RCW 2.36.100(1) prohibits excusal from jury service "except upon a showing of undue hardship, extreme inconvenience, public necessity, or any reason deemed sufficient by the court . . . ." The trial court excused jurors who represented that jury service would make them unable to pay

[11] Some of the jurors excused for hardship had employers who would pay for some, but not all, of their jury service. *See* RP 26, 31-32, 35, 37 (8/15 KG); RP 18-19 (8/15 DR).

[12] At least one juror selected (Juror 61) was unemployed. RP 96-97; 130-33 (8/16 DR).

[13] For example, the State of Washington and the City of Seattle both pay their employees for jury duty, regardless of the length of the trial or the employee's wage. *See* WAC 357-31-310; SMC 4.20.220.

their primary bills. *See* RP 20-22, 24-29, 31-33, 35, 37-38 (8/15 KG); RP 7-9, 12-13, 15, 18-22 (8/15 DR). Far from the wholesale exclusion of daily wage earners from jury pools that was rejected in *Thiel v. S. Pac. Co.*, 328 U.S. 217, 225, 66 S. Ct. 984, 988, 90 L. Ed. 1181 (1946), this was a lawful, individualized application of RCW 2.36.100.

Plaintiffs offer two solutions to address this issue: pay jurors minimum wage, or hold trial fewer days per week so hourly workers can still work. But Plaintiffs offer no evidence that these solutions would eliminate the allegedly unconstitutional financial hardship excusals here. There is no evidence that, if the juror compensation statute[14] had provided for minimum wage, venire members who requested financial hardship excusal in this case would not have done so. And Plaintiffs offer no evidence that holding trial two days per week would have allowed the jurors excused for financial hardship in this case to participate. The trial court here followed the law, did not abuse its discretion, and this Court should deny review.

C. The Trial Court Did Not Abuse Its Discretion in Refusing to Give Plaintiffs' Requested Jury Instructions.

Plaintiffs claim that the failure to give their requested instructions on implicit bias and pretext violated their constitutional rights and was an abuse of discretion. However, a party is not entitled to an instruction

[14] As the Court of Appeals noted, remedying issues presented by the juror compensation statute "is best resolved by the legislature." Op. at 9.

simply because it may accurately state the law; instead, the test is whether the instructions, read as a whole, sufficiently inform the jury of applicable law, are not misleading, and allow each party to argue its theory of the case. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr*., 123 Wn.2d 15, 36, 864 P.2d 921 (1993). Here, the trial court's exercise of its discretion[15] did not implicate any constitutional or substantial public interest issues, as the instructions given were sufficient and no prejudice was shown.

1. Implicit Bias Instructions

The trial court did not give Plaintiffs' requested implicit bias instructions (CP 709-11), but did give Instruction No. 1, based on Washington Pattern Instruction ("WPI") 1.02,[16] which included the following language:

> You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To ensure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

CP 5588-89. Noting the presence of Instruction No. 1, the Court of Appeals found no abuse of discretion, finding that Plaintiffs did "not

[15] A trial court's decision not to give a proposed instruction is reviewed for abuse of discretion. *See Terrell v. Hamilton*, 190 Wn. App. 489, 505, 358 P.3d 453 (2015).

[16] As Plaintiffs note, WPI 1.02 has since been modified to include a sentence telling jurors that, in assessing credibility, they must avoid bias, "conscious or unconscious, including bias based on religion, ethnicity, race, sexual orientation, gender or disability."

explain why this instruction was insufficient." Op. at 32-33.

Plaintiffs claim that, because African-Americans were underrepresented and unreachable in this venire, the failure to give implicit bias instructions was either a constitutional violation or an abuse of discretion. Plaintiffs offer no analysis of this claim. Moreover, they have failed to address the applicable standard: whether the instructions given allowed them to argue their theory of the case, were not misleading, and as a whole informed the jury of applicable law. *Adcox*, 123 Wn.2d at 36. Nor do Plaintiffs show that they were prejudiced, as the jurors were instructed that they could not reach their decision based on sympathy, bias, or personal preference.[17] The trial court was well within its discretion to decline Plaintiffs' implicit bias instructions, and the instructions given were sufficient to allow Plaintiffs to argue their theory of the case.

Plaintiffs argue that this Court should accept review to implement a bright line rule requiring an implicit bias instruction in every case requested. Plaintiffs offer no compelling rationale for so curtailing the discretion of the trial court in instructing the jury, and certainly do not demonstrate that the Constitution requires adopting such a bright line rule.

[17] The lack of prejudice is further demonstrated by the extensive conversation Plaintiffs had with the venire about implicit racial bias and whether an all-Caucasian jury could be fair to people of color (RP 34-42 (8/15 DR)); indeed, Plaintiffs admitted that, despite not reading from *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013), "[i]t turned out we got them going anyway." RP 75 (8/15 DR).

This Court should deny review on this issue.

2. Pretext Instruction

Plaintiffs claim that, due to the lack of African-Americans in the venire, it was "at least" an abuse of discretion to decline to give Plaintiffs' requested pretext instruction. Again, Plaintiffs do not offer any analysis of this claim. Nor do Plaintiffs explain how the trial court's refusal to give the instruction implicates a significant question of law under the Constitution, or involves a significant issue of public interest, particularly since this Court has declined a prior invitation from Plaintiffs' counsel to review this issue.

As Plaintiffs note, Division I of the Court of Appeals was presented with the same issue in *Farah v. Hertz Transp., Inc*., 196 Wn. App. 171, 177, 383 P.3d 552 (2016), *rev. denied*, 187 Wn.2d 1023, 390 P.3d 332 (2017): whether the trial court's refusal to give a virtually identical pretext instruction was an abuse of discretion. The Court of Appeals held that although the pretext instruction "might be appropriate, the arguments in its favor are not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction." *Id*. at 181. Counsel for the *Farah* plaintiffs (also counsel for Plaintiffs here) petitioned this Court for review of *Farah*, and on March 7, 2017, this Court denied review. 187 Wn.2d 1023. Plaintiffs do not explain how this case is different from *Farah* such that the standard for accepting review is now met.

Moreover, Plaintiffs utterly fail to address prejudice. An error in refusing to give a jury instruction is harmless if it did not affect the outcome of the case (*Terrell*, 190 Wn. App. at 499, 502), and Plaintiffs bear the burden of showing prejudice. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 91, 18 P.3d 558 (2001). Plaintiffs cannot meet this burden because they were able to argue pretext: they urged the jury to assess the credibility of SPU's witnesses (RP 41-42, 44-45, 48-50, 109 (9/12 KG)), as well as questioned the veracity of SPU's stated rationale for its actions and argued the stated explanations were untrue. RP 42-43, 51-53, 55, 57-58, 61, 63, 110 (9/12 KG). No prejudice can therefore be shown. *See Farah,* 196 Wn. App. at 181 (pattern instructions are sufficient to allow a plaintiff who wishes to argue relevant pretext to do so); *McDonald v. Dept. of Labor & Indus*., 104 Wn. App. 617, 625-26, 17 P.3d 1195 (2001) (affirming because plaintiff did not show how he was precluded from arguing his theory of the case). Because Plaintiffs have presented no reason for this Court to reconsider its decision to deny review in *Farah*, nor shown that constitutional or public interest issues are implicated by the trial court's decision here, this Court should deny review on this issue.

D. The Trial Court Did Not Abuse Its Discretion in Excluding Dr. Anthony Greenwald's Testimony.

Under ER 702, the trial court must decide whether an expert's

testimony will assist the trier of fact. The trial court must also determine, under ER 403, whether the testimony's probative value is substantially outweighed by the danger of confusing or misleading the jury, and this determination can be reversed only for abuse of discretion. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984) (noting trial court's obligation to conduct ER 403 analysis before admitting expert testimony, reviewing for abuse of discretion), *overruled on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). Courts consistently find expert testimony inadmissible when the expert fails to ground his or her opinions on facts in the record. *See Volk v. DeMeerleer*, 187 Wn.2d 241, 277, 386 P.3d 254 (2016).

SPU moved pretrial to exclude the testimony of Dr. Anthony Greenwald, Plaintiffs' expert on implicit bias. CP 3-90. Dr. Greenwald offered no opinion on whether any SPU manager displayed implicit bias, and conducted no analysis on whether implicit bias played a role in the CCSS investigation or in any disciplinary decision. *See* CP 44-50, 52-60. He did not know what criteria were used in the CCSS investigation, and his knowledge of SPU, Plaintiffs, and the CCSS investigation came solely from the allegations in Plaintiffs' complaint. *Id*.; CP 322-23, 335 (¶¶ 11-12, 32). The trial court accordingly excluded his testimony because his opinions were "generalized opinions that are not tied to the specific facts of this

case," and would thus "confus[e] and mislead[]" the jury. RP 6 (MIL).

The Court of Appeals affirmed. While noting federal court opinions that admitted and excluded Dr. Greenwald's testimony, the Court of Appeals nevertheless concluded that federal case law was not binding on the trial court, and that the trial court's application of ER 702 and ER 403 was done on a "perfectly permissible basis." Op. at 20-21.

Plaintiffs disagree with this analysis, and apparently would have this Court eliminate a trial court's broad discretion regarding the admission of expert testimony in favor of a bright-line rule wherein expert testimony on implicit bias must be permitted in certain circumstances. Plaintiffs offer no rationale for curtailing the trial court's discretion in such a significant way; they do not show that the rejection of implicit bias expert testimony implicates a significant constitutional question, nor do they show that the trial court's ordinary exercise of its discretion involves an issue of substantial public interest. This Court should therefore deny review.

E. There Were No Errors to Cumulate.

Given that the trial court did not abuse its discretion in any of the ways claimed by Plaintiffs, there is no cumulation of errors.

V. CONCLUSION

For all of the foregoing reasons, review should be denied.

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DATED this 6th day of August, 2018.

PETER S. HOLMES
Seattle City Attorney

By: s/ Sarah Tilstra

SARAH TILSTRA, WSBA #35706
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7097
Ph: (206) 684-8230 / sarah.tilstra@seattle.gov

PORTIA R. MOORE, WSBA #13354
ARTHUR SIMPSON, WSBA #44479
Davis Wright Tremaine LLP
1201 Third Ave., Suite 2200
Seattle, WA 98101
Ph: (206) 757-8089 / portiamoore@dwt.com
Ph: (206) 757-8288 / arthursimpson@dwt.com

Attorneys for Respondent City of Seattle

CERTIFICATE OF E-FILING AND E-SERVICE

I certify that on this date I electronically filed the foregoing document with the Clerk of the Court via the Washington State Appellate Courts' Portal, which will send notice of filing to all counsel of record.

DATED this 6th day of August, 2018.

s/ Kim Fabel
KIM FABEL
Legal Assistant

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