Court of Appeals No. 76354-7-I
Supreme Court No. 97088-2

THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUSAN CARLSON,

Plaintiff/Appellant,

v.

THE BOEING COMPANY,

Defendant/Respondent.

ANSWER TO PETITION FOR REVIEW

Laurence A. Shapero, WSBA 31301
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1201 Third Avenue, Suite 5150
Seattle, WA 98101
Telephone: 206.876.5301
Facsimile: 206.693.7058
laurence.shapero@ogletree.com

Attorneys for Defendant/Respondent The Boeing Company

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

I. INTRODUCTION

After a jury verdict in favor of The Boeing Company, the Court of Appeals meticulously reviewed the evidence presented at trial and issued an unpublished decision in Boeing's favor. On appeal, Susan Purnell-Carlson (Carlson) argued primarily that "the trial court should have decided, as a matter of law, that Boeing fired her because of a disability" in violation of the Washington Law Against Discrimination (WLAD), Ch. 49.60. Court of Appeals Opinion ("Op.") 11. The Court of Appeals correctly rejected that argument, not because of any disputed question of law, but because of a simple evidentiary failure: Carlson "fail[ed] to demonstrate that Boeing had notice of her disability and therefore fail[ed] to establish a basic element" of her claims. *Id.* at 15.

Now, through this petition, Carlson tries to portray her case as having broad legal importance. But, in truth, the decision reflects nothing more than a routine application of settled law to the specific evidence in this case. As a result, the case does not remotely satisfy the criteria for this Court's discretionary review. The non-precedential decision does not conflict with any other decision. Nor does the case present any significant constitutional question or any issue of substantial public interest. Accordingly, the Court should deny the petition for review.

II. STATEMENT OF THE CASE

During a routine performance evaluation meeting in August 2013, Carlson stood up across the table from her supervisor, Richard Heckt, imitated his mannerisms, and told him that he made her "feel like she wanted to get a gun or a knife" and that she felt "a need to defend herself." Op. 4 (brackets omitted). About two hours after that meeting, Carlson doubled down on her comments in a follow-up email, stating again that the way her supervisor acted made her feel that she "needed to be armed" and "ready to combat." *Id.* at 5 (brackets omitted)

After Heckt reported the threat, Boeing investigated. During a meeting with Boeing's investigator, Carlson reviewed and signed a statement attesting that, during her performance review meeting with Heckt, she had said words to the effect that she wanted to "get a gun and shoot Heckt or stab him." *Id.* at 9 (brackets omitted). Boeing determined that Carlson had made a threat of violence directed specifically at Heckt and had thereby violated Boeing policy. Boeing convened a panel of managers and human resources representatives, known as an Employee Corrective Action Review Board (ECARB), to review the incident and determine the appropriate level of discipline. The ECARB ultimately voted 7-1 to terminate Carlson's employment in October 3, 2013, concluding that she

had made two "directed specific threats to harm" in violation of Boeing policy. *Id.* at 9-10 (brackets omitted).

More than a year later, Carlson claimed for the first time that the threats she had made were caused by a disability—Post-Traumatic Stress Disorder (PTSD)—and that Boeing's discharge decision amounted to disability discrimination under the WLAD. In the trial court, both sides were denied summary judgment because of disputed issues of material fact, and the case proceeded to an eight-day jury trial in Snohomish County Superior Court, which ended in a verdict for Boeing. Carlson then asked for judgment as a matter of law and a new trial, both of which the trial court denied.

After full briefing and argument, the Washington Court of Appeals, Division One, affirmed the trial court in all respects in an unpublished decision. As to Carlson's motion for judgment as a matter of law, the court found no basis for reversal, chiefly on the basis that Carlson "did not establish, as a matter of law, that Boeing had notice of her disability." *Id.* at 14. More specifically, having reviewed the trial evidence at length, the Court of Appeals explained:

> Carlson's conduct was first linked to a PTSD diagnosis more than a year after she was terminated. Boeing's and [the Employee Assistance Program's (EAP's)] records do not include any reported diagnosis of PTSD, do not suggest that accommodation should be made at work for Carlson's

> anxiety, and do not link PTSD or anxiety to the conduct that led to her firing …. Even if ECARB and Boeing's administration had access to all of Carlson's files when she was fired, they would still not have had any information connecting PTSD to the conduct for which it fired her.

Id. As a separate basis for affirmance on the disparate treatment theory, the Court of Appeals found that Carlson did not show that her disability was a "substantial factor" in Boeing's discharge decision, as "substantial evidence" presented by Boeing showing that her conduct "was the result of her ongoing anger at Heckt and not her PTSD." *Id.* at 16. And on the reasonable accommodation theory, the Court of Appeals reiterated that Boeing had no notice of Carlson's PTSD that would trigger a duty to accommodate: "[S]ubstantial evidence supports a conclusion that Boeing did not have direct or constructive notice of her PTSD and that it affected her work." *Id.* at 19.

The Court of Appeals also correctly rejected Carlson's other arguments for reversal—challenges to certain of the trial court's jury instructions and a few evidentiary rulings. Those aspects of the Court of Appeals' decision turned on evidentiary shortcomings in Carlson's presentation at trial, or her failure to demonstrate any prejudice from the trial court's allegedly improper rulings in any event. The Court of Appeals correctly made those case-specific determinations based on a straightforward application of settled Washington law.

III. ARGUMENT

Under RAP 13.4, "[a] petition for review will be accepted by the Supreme Court only: (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b). None of these criteria is satisfied here, and the Court should deny Carlson's petition for review.

A. The Court Of Appeals' Decision Does Not Conflict With Any Existing Case Law.

Carlson's primary argument for review rests on a purported conflict between the Court of Appeals' resolution of her "imputed knowledge" argument and two prior cases: *Goodman v. Boeing*, 75 Wn. App. 60 (1994), and *Kimbro v. Atl. Richfield*, 889 F.2d 869 (9th Cir. 1989). Invoking *Goodman* and *Kimbro*, Carlson asserts that because some Boeing employees purportedly had knowledge of her PTSD and its alleged connection to the threats she made to her manager, that knowledge necessarily was imputed to Boeing's ECARB at the time it made the decision to terminate Carlson for making those threats. There are several independent reasons to reject this argument for review.

First, this issue simply is not presented on the facts of this case. In arguing otherwise, Carlson mischaracterizes the evidentiary record (which of course is construed deferentially in Boeing's favor after a jury verdict) and ignores the Court of Appeals' reasoning.

The Court of Appeals repeatedly explained that Carlson's "imputed knowledge" theory was irrelevant because "substantial evidence" developed at trial "supports a conclusion that Boeing did not have direct or constructive notice of her PTSD." Op. 19. Even if one imputed *all* of Boeing's knowledge to the ultimate decision-makers who voted to terminate Carlson's employment—or, in the words of the Court of Appeals, "[e]ven if ECARB and Boeing's administration had access to all of Carlson's files"—it would make no difference because "they would still not have had any information connecting PTSD to the conduct for which it fired her." *Id.* at 14.

As a result of that assessment of the evidentiary record, the Court of Appeals never reached the legal issues that Carlson presses in her petition. The Court of Appeals never decided whether, in evaluating Carlson's disparate treatment claim, knowledge of other Boeing actors should be imputed to the ECARB. Carlson failed to establish that there was any relevant knowledge to impute to the ECARB to begin with, as the Court of Appeals stressed throughout its decision. *See id.* at 15 ("Carlson fails to

demonstrate that Boeing had notice of her disability[.]"); *id.* at 17 ("The record includes substantial evidence supporting the conclusion that Boeing did not have notice of her disability[.]"); *id.* at 19 ("Carlson did not show that Heckt or EAP knew she had PTSD and that it affected her ability to work.."); *id.* at 20-21 ("Neither Heckt nor ECARB knew about Carlson's disability when Boeing fired her."); *id.* at 23 ("Carlson does not establish that Boeing or EAP had information linking her conduct to PTSD at the time Boeing fired her."); *id.* ("Carlson did not show that any of the information possessed by EAP and by Boeing at the time of termination … established that Carlson had PTSD or that it caused her conduct."); *id.* at 24 ("Carlson did not establish a prima facie case for discrimination because she did not establish that Boeing had notice."); *id.* at 25 ("[Carlson] failed to demonstrate that Boeing knew about her disability and its connection to her behavior."); *id.* at 27 ("Carlson needed to show that Boeing had notice of her disability and fired her because of it. As indicated above, she failed to do this.").

Although Carlson may prefer to ignore this significant evidentiary gap in her trial presentation, it was the basis for much of the Court of Appeals' decision, and it dispels any alleged conflict with existing case law.

Indeed, Carlson's second major problem is that the Court of Appeals' opinion is fully consistent with the two precedents Carlson cites—

as the Court of Appeals itself explained. *Id.* at 18. In *Goodman*, unlike this case, the plaintiff presented substantial evidence demonstrating that her supervisors knew about her disability (tennis elbow and osteoarthritis) and its impact on her work performance (increased difficulty microfilming airplane manuals) at the time of the challenged employment decision (a failure to accommodate), yet failed to accommodate her regardless. 75 Wn. App. at 64-65; *see also id.* at 74-75 (stressing that the plaintiff's supervisor "was well acquainted with Goodman's medical problems"). Similarly, in *Kimbro*, the record before the federal court showed that the plaintiff's supervisor was "fully aware of the fact that [his] headaches were a manifestation of a serious medical condition" and caused the plaintiff's violations of the employer's attendance policy that led a different group of managers to discharge his employment. 889 F.2d at 875.[1]

In both cases, the supervisors' knowledge of the plaintiffs' disabilities supported the inference that the employers as a whole had such knowledge when they allegedly failed to accommodate the plaintiffs'

[1] In fact, the employer in *Kimbro* did not even dispute that its supervisor's knowledge of the plaintiff's medical condition was imputable to the company; instead, the employer argued that the supervisor's imputed knowledge did not create liability because the supervisor did not know the medical condition constituted a "handicap" within the meaning of the statute. *Kimbro*, 889 F.2d at 877 n.6 ("ARCO neither disputes the fact that Jackson knew Kimbro suffered from a severe migraine condition nor that such knowledge is imputable to ARCO."). The Ninth Circuit rejected that theory as being "clearly frivolous." *Id.*

disabilities. As the Court of Appeals stressed time and again, the facts here were the opposite: "substantial evidence supports a conclusion that Boeing did not have direct or constructive notice of her PTSD and that it affected her work." Op. 19. There simply is no tension at all—let alone any conflict—between the decision here and *Goodman* and *Kimbro*, as the Court of Appeals explained. *Id.* at 18-19. Carlson never grapples with the appellate court's sound reasoning on this score.[2]

B. Carlson's Secondary Arguments Similarly Provide No Basis For This Court's Review.

Carlson's remaining arguments are similarly unsound, and certainly do not satisfy the criteria for review under RAP 13.4(b)—nor does Carlson try to argue otherwise.

First, Carlson's claimed instructional errors—to jury instruction 21 (which Carlson calls instruction 22) and jury instruction 14—were appropriately resolved by the Court of Appeals, which turned aside

[2] *Goodman* also considered an imputed-knowledge theory concerning Boeing's third-party workers' compensation claims agent, holding that the trial court appropriately instructed that the agent's undisputed notice of the plaintiff's disability and its effects on the plaintiff's work could be imputed to Boeing. 75 Wn. App. at 85-86. Carlson's petition stresses this aspect of *Goodman*, but she again misses the point. After all, there was no dispute that the claims agent had notice of the disability in the first instance, which was susceptible to imputation to Boeing. *Id.* at 86. Here, by contrast, Carlson failed to persuade the jury that Boeing or any of its agents (neither Heckt, nor EAP, nor anyone else) was aware of her PTSD or that it caused her to make threats to Heckt, a foundational shortcoming that dispels any imputed-knowledge theory from the start.

Carlson's challenge for failure to show prejudice on the facts of this case. These rulings were closely connected to Carlson's failure to establish that Boeing had notice of her disability. Op. 20-22. In other words, the Court of Appeals did not venture any novel interpretation of Washington law in resolving these instructional challenges. It simply found no basis to address the broader legal questions given Carlson's case-specific, evidentiary shortcomings before the jury.

Second, Carlson's continued disagreement with the trial court's exclusion of cumulative comparator evidence under ER 403 provides no basis for review. This discretionary evidentiary ruling was well within the trial court's purview, and Carlson offers no meaningful argument to the contrary. Furthermore, as the Court of Appeals observed, even if more of this evidence had been admitted, it "would not have cured Carlson's proof problem" because she failed to establish that "Boeing had notice of her disability and fired her because of it." Op. 27.

Third, Carlson fails to establish that the trial court's decision allowing the introduction of evidence from her past performance reviews and journal entries was error. This evidentiary ruling, too, was decidedly within the trial court's discretion. And the Court of Appeals once again found that the claimed error did not prejudice Carlson since she "did not

establish notice." *Id.* at 26. In all events, routine evidentiary rulings are hardly grounds for this Court's review.

Finally, the Court should swiftly reject Carlson's request that it evaluate the Court of Appeals's refusal to review the denial of her motion for summary judgment. It is black-letter law that "[a] summary judgment denial cannot be appealed following a trial if the denial was based upon a determination that material facts are disputed." *Canfield v. Clark*, 196 Wn. App. 191, 194 (2016) (citation omitted). Because the trial court found that disputed issues of fact made summary judgment inappropriate, that ruling was unreviewable by the Court of Appeals, and it remains unreviewable here. Similarly, the Court of Appeals correctly rejected Carlson's arguments for judgment as a matter of law for the reasons already discussed. Substantial evidence refuted Carlson's assertions that Boeing discriminated against her based on the alleged disability.

IV. CONCLUSION

For all these reasons, the Court should deny Carlson's petition for review.

DATED this 28th day of May 2019.

By: _____

Laurence A. Shapero, WSBA #31301
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1201 Third Avenue, Suite 5150
Seattle, WA 98101
Telephone: 206.876.5301
Facsimile: 206.693.7058
laurence.shapero@ogletree.com

Attorneys for Defendant/Respondent The Boeing Company

CERTIFICATE OF SERVICE

I, Ashley Rogers, certify that:

1. I am an employee of Ogletree, Deakins, Nash, Smoak & Stewart, P.C., attorneys for Respondent The Boeing Company in this matter. I am over 18 years of age, not a party hereto, and competent to testify if called upon.

2. On May 28, 2019, I served a true and correct copy of the foregoing document on the following party, attorney for Petitioner, via the court's efiling portal and addressed as follows:

Dan'L Wayne Bridges
McGaughey Bridges Dunlap, PLLC
3131 Western Ave., Ste. 410
Seattle, WA 98121
T. (425) 462-4000
Dan@mcbdlaw.com

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

SIGNED at Seattle, Washington, this 28th day of May, 2019.

Ashley M Rogers
Ashley Rogers

38690845.1

OGLETREE DEAKINS NASH SMOAK STEWART, P.C

May 28, 2019 - 12:21 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	97088-2
Appellate Court Case Title:	Susan Purnell-Carlson v. The Boeing Company, Inc.
Superior Court Case Number:	15-2-02243-0

The following documents have been uploaded:

- 970882_Answer_Reply_20190528121700SC502564_2374.pdf
  This File Contains:
  Answer/Reply - Answer to Petition for Review
  The Original File Name was Carlson v. Boeing - Answer to Petition for WSC Review.pdf

A copy of the uploaded files will be sent to:

- Dan@mcbdlaw.com
- SEADocketing@ogletreedeakins.com
- matthew.sharbaugh@morganlewis.com
- michael.kenneally@morganlewis.com
- reception@mcbdlaw.com
- thomas.peterson@morganlewis.com

Comments:

Sender Name: Laurence Shapero - Email: laurence.shapero@ogletree.com
Address:
1201 3RD AVE STE 5150
SEATTLE, WA, 98101-3066
Phone: 206-876-5301

Note: The Filing Id is 20190528121700SC502564