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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TRINA BENGTSSON, Respondent, v. SUNNYWORLD INTERNATIONAL, INC., a Washington corporation, XIANGLING KONG, an individual, and BINGTUAN YIN, an individual, Appellants.	DIVISION ONE No. 79016-1-I PUBLISHED OPINION

DWYER, J. — This is an employment discrimination case. Trina Bengtsson filed suit against Sunnyworld International, Inc., which owns and operates a private preschool, and two of its owners, Xiangling Kong and Bingtuan Yin (collectively Sunnyworld), alleging that she was terminated from her position as the preschool's director due to pregnancy discrimination. The matter proceeded to trial, where the jury found that Sunnyworld had indeed discriminated against Bengtsson due to her pregnancy. Sunnyworld now appeals, contending that several evidentiary errors resulted in prejudice requiring a new trial. In response, Bengtsson asserts that none of the assigned errors are meritorious and requests an award of attorney fees on appeal. Because Sunnyworld's contentions are meritless, and because RCW 49.60.030(2) authorizes an award of attorney fees in discrimination cases such as this, we affirm the judgment and grant Bengtsson's request for an award of attorney fees on appeal.

I

In August 2015, Yin and Kong hired Bengtsson to work as the director of Sunnyworld's preschool. Over the course of the following year, Bengtsson received positive feedback and two raises as a result of her work performance at the preschool. This abruptly changed in January 2017 when Bengtsson informed Kong that she was pregnant and intended to take maternity leave starting in June 2017. On February 3, 2017, less than one month after Kong learned that Bengtsson was pregnant, Sunnyworld terminated Bengtsson's employment.

Sunnyworld communicated the firing to Bengtsson through its agent, Mei Lei.[1] Bengtsson testified at trial that Lei informed her that Sunnyworld's owners wanted her to "take unemployment and rest before the baby," and that "people in China rest before the baby." Lei admitted during her testimony to suggesting that Bengtsson check whether she could obtain unemployment and that she told Bengtsson that women in China usually rest before giving birth, but insisted that she only discussed these topics during idle chit-chat after informing Bengtsson of her termination.

Bengtsson protested her termination, explaining to Lei that in America pregnant women work through their pregnancies and that she personally did not need to rest. At this point, Lei informed Bengtsson that Sunnyworld's owners were not happy with her work. When pressed for specifics on what part of her performance was not satisfactory, Lei made a general reference to a concern

[1] Lei worked for Sunnyworld in several capacities, helping to interview candidates for the school director position, serving as the go between for Bengtsson and Yin and Kong during Bengtsson's employment, providing bookkeeping and payroll services, and firing employees.

about receipts, but did not elaborate as to any specifics.

Bengtsson later sought clarification as to why she was fired in a video call with Kong, during which Kong informed her that Sunnyworld's board—which Bengtsson did not know existed prior to that conversation—had decided to terminate her employment due to financial concerns with enrollment numbers. Receipts were not mentioned as an explanation for her termination during this call. However, Kong also said that she hoped Bengtsson could come back to work at Sunnyworld after the baby arrived and Bengtsson had taken about a year off. In a follow-up message to Bengtsson, Lei confirmed that Kong hoped Bengtsson would come back to Sunnyworld in the future and offered to be a reference for her in the meantime.

Bengtsson subsequently filed this lawsuit against Sunnyworld International, Inc. and Yin and Kong, alleging that they had violated the Washington Law Against Discrimination, chapter 49.60 RCW, by terminating her employment due to her pregnancy. In its answer to this lawsuit, Sunnyworld asserted an affirmative defense of unclean hands, which it later clarified during discovery was based on an accusation that Bengtsson had embezzled funds from the company for personal expenses. However, when pressed during discovery to provide the factual basis for this accusation, Sunnyworld admitted that it had no factual basis to believe that Bengtsson had embezzled funds and did not actually believe that she had done so. As a result, this affirmative defense was later dismissed on summary judgment.

During discovery, Sunnyworld asserted that its board was comprised of

three owners, Kong, Yin, and a 51 percent majority shareholder Guagzhi Wu. Because Bengtsson had never met or even heard of Wu before this lawsuit, Bengtsson's counsel attempted to schedule a deposition of Wu on multiple occasions. Sunnyworld never presented him for deposition. Sunnyworld's counsel informed Bengtsson's counsel that Wu was suffering from the mental illness of severe depression, was living in China, and was too ill to travel or be deposed. However, Sunnyworld never substantiated these assertions by providing evidence, such as a sworn declaration or affidavit from Wu or a care provider, detailing Wu's asserted malady, prognosis, or restrictions. It is undisputed that Wu was never seen or questioned by Bengtsson or her attorneys prior to, during, or after the end of the discovery period.

Despite failing to produce Wu for deposition, Sunnyworld planned to offer, through Yin and Kong, testimony at trial regarding out of court statements Wu allegedly made regarding the decision to terminate Bengtsson's employment. Given that neither Bengtsson nor her attorneys had ever had the opportunity to meet Wu, let alone question him, Bengtsson moved in limine to exclude any evidence of Wu's alleged out of court statements. After hearing argument from both parties, the trial court ruled that Wu's alleged out of court statements were inadmissible because they were hearsay and were more prejudicial than probative under ER 403. However, the trial court also ruled that Sunnyworld would be permitted to introduce evidence that Sunnyworld's board consisted of

three people,[2] that the board met in September 2016 and February 2017, that at both meetings the board discussed terminating Bengtsson, that the board voted unanimously in February 2017 to terminate Bengtsson, and that the reasons for that decision were related to financial concerns such as low enrollment.

During trial, Bengtsson testified to her experience working at Sunnyworld, her firing by Sunnyworld, and also that Sunnyworld falsely accused her of embezzlement after she filed her lawsuit. Yin and Kong also testified at trial, asserting that they fired Bengtsson due to financial mismanagement concerns, including concerns regarding enrollment and concerns regarding 20 transactions on the company debit card for which, they asserted, Bengtsson did not provide receipts. Sunnyworld also attempted to elicit testimony that Kong had found an additional 110 missing receipts after terminating Bengtsson, but the trial court barred the admission of this testimony because it was not relevant to the termination decision.[3] Wu did not appear or testify at trial.

Following the presentation of evidence, each side presented its theory of the case to the jury, with Bengtsson arguing that her termination was motivated by discrimination against her due to her pregnancy and Sunnyworld arguing that her termination was premised solely on financial mismanagement. The jury then returned a verdict for Bengtsson, awarding her $400,000 in emotional harm damages and $66,430 in past and future earnings.

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[2] Although it permitted Sunnyworld to enter into evidence testimony that there were three board members, the court explicitly barred Sunnyworld from introducing the relative ownership percentage of each board member. Sunnyworld does not assign error to this ruling on appeal.

[3] Sunnyworld did not plead an after-acquired evidence defense, and Sunnyworld does not challenge the judge's ruling that the additional 110 receipts discovered after termination were not relevant to the termination decision at issue in the case.

Thereafter, Sunnyworld unsuccessfully moved for a new trial. After the trial court denied the motion, Bengtsson successfully sought an award of attorney fees.

Sunnyworld appeals.

II

Sunnyworld contends that the trial court erred by: (1) excluding testimony regarding Wu's alleged statements to Sunnyworld's board about terminating Bengtsson's employment, (2) excluding evidence that Sunnyworld had, after firing Bengtsson, discovered that she had failed to provide receipts for 110 transactions on the company debit card, and (3) denying Sunnyworld's motion for a new trial because those evidentiary errors individually or cumulatively prejudiced Sunnyworld. We disagree.

A

"'The standard of review for evidentiary rulings made by the trial court is abuse of discretion.'" Peralta v. State, 187 Wn.2d 888, 894, 389 P.3d 596 (2017) (quoting City of Spokane v. Neff, 152 Wn.2d 85, 91, 93 P.3d 158 (2004)). Trial judges have "wide discretion in balancing the probative value of evidence against its potential prejudicial impact." Cole v. Harveyland, LLC, 163 Wn. App. 199, 213, 258 P.3d 70 (2011) (citing State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984)). A trial court abuses that discretion when its ruling is "'manifestly unreasonable or based upon untenable grounds or reasons.'" Veit v. Burlington N. Santa Fe Corp., 171 Wn.2d 88, 99, 249 P.3d 607 (2011) (internal quotation marks omitted) (quoting Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 668-69, 230

P.3d 583 (2010)). However, "[e]videntiary error is grounds for reversal only if it results in prejudice." City of Seattle v. Pearson, 192 Wn. App. 802, 817, 369 P.3d 194 (2016) (citing State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). "An error is prejudicial if 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.'" City of Seattle, 192 Wn. App. at 817 (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)).

Similarly, we review the decision to deny a motion for a new trial, brought on the basis of asserted evidentiary error, for an abuse of discretion. Hollins v. Zbaraschuk, 200 Wn. App. 578, 582, 402 P.3d 907 (2017) (quoting Clark v. Teng, 195 Wn. App. 482, 491, 380 P.3d 73 (2016)). To determine whether the trial court has abused its discretion in denying a motion for a new trial, we determine whether "'such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.'" Alum. Co. of Am. v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (internal quotation marks omitted) (quoting Moore v. Smith, 89 Wn.2d 932, 942, 578 P.2d 26 (1978)).

B

Sunnyworld contends that the trial court committed reversible error by barring, pursuant to ER 802 and ER 403, the admission of Wu's alleged statements asserting that the school was losing money and needed to take action and telling Yin and Kong to either fire Bengtsson or shut down the school. This is so, Sunnyworld asserts, because the evidence was admissible for a

nonhearsay purpose (evidence of Yin and Kong's state of mind immediately before the board voted to terminate Bengtsson), the evidence was not more prejudicial than probative, and the exclusion of the evidence was prejudicial.[4]

Generally, relevant evidence—evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence—is admissible unless otherwise limited by the rules of evidence. ER 401; ER 402. One such limitation imposed by our evidentiary rules provides for the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. Another provides for the general exclusion of hearsay, ER 802, which "is a statement, other than one made by the declarant while testifying at the trial or hearing, *offered in evidence to prove the truth of the matter asserted*." ER 801(c) (emphasis added).

Sunnyworld asserts that the trial judge improperly applied ER 802 and ER 403 to bar the admission of two of Wu's alleged statements to Kong and Yin "that immediately preceded and caused the termination" of Bengtsson. Reply Br. of Appellant at 22. The specific alleged statements sought to be admitted were set

[4] Despite their use of the term "state of mind," Sunnyworld's briefing does not present any ER 803(a)(3) argument. They do not argue that Wu's statements constitute admissible hearsay because they reveal his state of mind. Instead, Sunnyworld asserts that the statements are admissible for the nonhearsay purpose of establishing their effect on Yin and Kong, who heard the statements. Because the exception for state of mind is explicitly applicable only when seeking to introduce hearsay statements to establish "***the declarant's*** then existing state of mind, emotion, sensation, or physical condition," Wu's hearsay statements would not be admissible for their truth to establish the state of mind of Yin or Kong. ER 803(a)(3) (emphasis added).

forth solely in an offer of proof by defense counsel at trial: "Mr. Wu [says], 'Look, we're losing money. You have to do something about this, or we're going to have to close the company down.' . . . [H]e [also] says, 'Either shut the company down or replace the director.'" In its ruling excluding these statements, the trial court stated:

> I don't even know—and I'm sure this isn't the case, but I don't even know if there is a Mr. Wu. I mean, we don't know. It sounds like he's never been deposed. The plaintiff said they never heard of a board before. I mean, I'm sure that—I'm sure there is, you know, but in terms of reliability, I don't know.
>
> You can't have someone who's never been deposed and never been seen be attributed to have done—be the decision maker and say, it just goes to state of mind. It is clearly offered for the truth of the matter.
>
> So, I mean, I think it's kind of rank hearsay. I understand the argument about state of mind, but I don't think it—I don't think it really applies here. I think it's much more prejudicial than probative when it's your main person that you're saying was the reason for this decision, and that person's never been seen or been questioned.

1

Sunnyworld first asserts that the trial court incorrectly concluded that Wu's alleged statements were offered for their truth despite defense counsel's protestations that Sunnyworld wanted to admit them to show the effect they had on Yin's and Kong's states of mind. We disagree.

Citing to State v. Gonzalez-Gonzalez, Sunnyworld correctly asserts in its reply brief that when determining whether an out of court statement is offered to prove its truth, instead of for a nonhearsay purpose, "we examine whether the benign purpose was relevant." 193 Wn. App. 683, 690, 370 P.3d 989 (2016) (citing State v. Hudlow, 182 Wn. App. 266, 278-80, 331 P.3d 90 (2014)). To properly analyze whether Wu's statements were relevant for a nonhearsay

purpose, it is first necessary to review the context in which Wu's statements were offered.

This matter is an employment discrimination case in which Sunnyworld's defense at trial was that "lost profit was the only substantial factor the board of directors used in their decision to terminate Ms. Bengtsson." Both Yin and Kong testified at trial that the Sunnyworld board voted to terminate Bengtsson's employment because of her failure to make the business profitable. They further testified that the board considered terminating Bengtsson's employment six months prior to her actual termination due to financial concerns, but that they decided to give her one more chance before terminating her. Defense counsel also informed the trial judge of his intent to proffer this testimony during the pretrial proceedings in which the court first considered whether to allow the admission of any of Wu's alleged statements. Thus, it is plain from the record that Sunnyworld's theory of the case, expressed to the trial judge both before and during trial, was that Bengtsson was fired because of her failure to make the school profitable.

Given this context, if Wu's alleged out of court statements had been admitted for their truth, they would have been relevant to, and entirely supportive of, Sunnyworld's expressed theory of the case—that the school was losing money and that they had no choice but to fire Bengtsson to avoid financial ruin. However, if the statements were not admitted for their truth but, rather, were admitted *solely to show that at the February board meeting Wu's statements caused Kong and Yin to fire Bengtsson*—which is the argument Sunnyworld now

presents on appeal—that would not have supported Sunnyworld's expressed theory of the case before and at trial.[5] Instead, it would have supported an alternative defense theory.

In many typical civil cases, presenting multiple alternative theories of the case may prove advantageous to the presenting party. However, the opposite is true in employment discrimination cases: presenting multiple alternative conflicting explanations for why an employee was terminated may be used against an employer as evidence that the employer's expressed reasons for the termination are pretextual. See, e.g., Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611, 623, 60 P.3d 106 (2002) (noting that when an employer provides several incompatible reasons for an adverse employment action it "may support an inference that none of the reasons given is the real reason" (citing Sellsted v. Wash. Mut. Sav. Bank, 69 Wn. App. 852, 861, 851 P.2d 716 (1993), overruled on other grounds by Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 898 P.2d 284 (1995))). In this case, presenting alternative theories—that Yin and Kong either (1) were forced by Wu to fire Bengtsson during one board meeting, or (2) decided to fire her over a period of six months due to financial concerns—would have actively harmed Sunnyworld's case. Thus, absent any statement from defense counsel that Sunnyworld intended to present two alternative

[5] Although Sunnyworld does not present this argument on appeal, Wu's alleged hearsay statements could also have been relevant to Sunnyworld's expressed theory at trial if offered to show Wu's state of mind, i.e., that he, as a board member, wanted to fire Bengtsson. However, as will be discussed during our analysis of the parties' arguments regarding the applicability of ER 403 and prejudice, such evidence would have been cumulative of the evidence the trial court admitted establishing that Sunnyworld's board voted unanimously to fire Bengtsson. Additionally, the record does not establish that defense counsel ever sought the admission of Wu's statements for this purpose, and Sunnyworld does not assert that the evidence should have been admitted for such a purpose in its briefing on appeal.

theories of the case, it was plainly reasonable for the trial court to view the admission of Wu's alleged hearsay statements as evidence intended to support Sunnyworld's expressed theory that Bengtsson was terminated due to financial concerns. Because the record does not establish that Sunnyworld ever informed the trial judge that it sought, despite the resulting harm to its case, to present multiple inconsistent alternative defense theories to explain why it fired Bengtsson,[6] we conclude that the trial court did not abuse its discretion by excluding Wu's alleged out of court statements as hearsay.

2

Even had the trial court been told that Sunnyworld wished to present inconsistent defenses, the trial court's ruling excluding the statements pursuant to ER 403 was sound. Sunnyworld asserts to the contrary, averring that (1) Wu's statements had substantial probative value because they were directly relevant to whether Yin and Kong acted with a discriminatory motive, and (2) admitting the statements would not have resulted in any unfair prejudice because the statements would not arouse an emotional response from the jury that would cloud the jurors' ability to make a rational and impartial decision.[7] Sunnyworld's

[6] The party proffering the evidence always has the burden of informing the trial court as to its materiality. Error cannot be assigned to a trial court's decision to exclude evidence unless the trial court was informed of the purpose for which it was offered. A claim of error on appeal cannot be predicated on a theory of admissibility not presented to the trial court. State v Eaton, 30 Wn. App. 288, 293 n.7, 633 P.2d 921 (1981); accord Allen v. Asbestos Corp., 138 Wn. App. 564, 578, 157 P.3d 406 (2007). A proper offer of proof, as required by ER 103(a)(2), "should explain why the evidence is admissible." 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.19, at 86 (6th ed. 2016) (citing Blood v. Allied Stores Corp., 62 Wn.2d 187, 381 P.2d 742 (1963)).

[7] Sunnyworld also asserts, in its reply brief, that the exclusion of Wu's alleged statements under ER 403 was improper because it was unsupported by an analysis of the Burnet factors. See Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997). Because this argument was raised for the first time in a reply brief, it has been waived. See Cowiche Canyon

contentions are unpersuasive.

Prior to weighing the admissibility of evidence under ER 403, a trial judge must be convinced that evidence is relevant, meaning that it must be both probative—tending to prove or disprove some fact—and material—of consequence to the ultimate outcome of the case. Davidson v. Municipality of Metropolitan Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986) (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 82 (2d ed. 1982)). However, after the initial relevancy determination is reached, ER 403 dispenses with concerns about materiality, focusing on the "probative value" of evidence. The rule requires a trial court to determine whether the proffered evidence's probative value "is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

Sunnyworld asserts that the probative value of Wu's alleged out of court statements was high because the statements were material to a critical element of Bengtsson's case: Sunnyworld's motive when terminating her. This is not the proper analysis—ER 403 is concerned with probative value, not with whether evidence is material. As to probative value, Sunnyworld does not present any argument in its briefing disputing that Bengtsson and the trial court had no means

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Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration."). Furthermore, the Burnet analysis concerns the imposition of severe discovery sanctions, "such as witness exclusion." Blair v. Ta-Seattle E. No. 176, 171 Wn.2d 342, 348, 254 P.3d 797 (2011). The ER 403 ruling regarding Wu's alleged out of court statements was not a discovery sanction, nor did it exclude any witness from testifying. Burnet simply does not apply here.

of verifying that Wu even existed, let alone that he had ever made the statements attributed to him. Given that Wu (unlike all of the witnesses who testified at trial) did not testify at trial, was not subject to cross-examination, was never available to be deposed, and was never even seen by Bengtsson, her attorneys, or the court, the probative value of any alleged out of court statements made by Wu was minimal at best.

Sunnyworld next asserts that the dangers presented by the admission of Wu's alleged statements were minimal because ER 403 only concerns itself with prejudice arising from evidence that would arouse the emotions of the jury such that it could not make a rational and impartial decision. Once again, Sunnyworld is mistaken; ER 403 is not so limited. The text of the rule itself indicates a far broader range of applicability, with the rule explicitly addressing unfair prejudice, confusion of the issues, misleading the jury, considerations of undue delay, waste of time, and needless presentation of cumulative evidence. ER 403. Furthermore, courts have long noted that the ultimate goal of the evidence rules is to afford litigants a fair trial, and that ER 403 pursues that goal by permitting evidence which is trustworthy, reliable, and not unreasonably prejudicial.[8] State v. Bartholomew, 101 Wn.2d 631, 640, 683 P.2d 1079 (1984) (citing ER 102; ER 403). We therefore decline to limit our consideration of the trial court's ruling to

[8] The parties dispute the applicability of ER 102 to the admissibility of Wu's alleged out of court statements under ER 403. While it does not, on its own, provide a basis for the exclusion of evidence, ER 102 directs that the evidence rules "be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Thus, ER 102 directs trial judges to determine, when considering excluding evidence under ER 403 and in making any other evidentiary ruling, how to best ensure that the truth may be ascertained and proceedings justly determined.

determining whether Wu's statements would have aroused the emotions of the jurors.

Upon such consideration, it is apparent that Wu's alleged statements would have presented many of the dangers ER 403 is designed to avoid. As the trial court noted, it would be patently unfair to allow Sunnyworld to present Wu's statements and contend that he was the person who decided to fire Bengtsson when Sunnyworld never presented Wu for deposition, failed to present him at trial, and failed to even establish that Wu exists. This last point presents another danger of admitting Wu's statements: if the statements were admitted, the court would need to account for this unfairness by permitting Bengtsson to present evidence showing that Sunnyworld failed to present Wu for deposition and at trial. Bengtsson, in fairness, would have to have been allowed to contest whether Wu even exists and, if so, whether he actually said the words attributed to him. Thus, if Wu's statements were admitted there would be a potent possibility that the parties would find themselves embroiled in a "side trial" to determine these matters, thus leading to a confusion of the issues for the jury.

Additionally, Wu's statements, on their own, would have presented only evidence cumulative of that which was admitted at trial. Sunnyworld asserts that Wu's statements would have established that Kong and Yin had no choice but to fire Bengtsson because Wu, as majority shareholder, had ordered it. Wu's alleged statements, however, do not, by themselves, actually support that inference. Nothing in Wu's statements—that the company was losing money and needed to fire the director or close—establish that Wu was the majority

shareholder on the board. Therefore, if Wu's statements were admitted for the purpose of showing their effect on Yin and Kong's state of mind, all that would be established is that they knew that a third board member wanted to fire Bengtsson. This inference was already established without admitting Wu's statements because the trial court allowed Sunnyworld to admit into evidence the fact that Sunnyworld's board had three members, that all three discussed firing Bengtsson, and that they voted unanimously to do so.

In determining whether evidence should be excluded under ER 403, trial courts are afforded broad discretion "in balancing the prejudicial impact of evidence against its probative value." Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 559, 815 P.2d 798 (1991). Herein, given the extremely minimal probative value of Wu's alleged statements, and the fact that their admission would have been unfair, raised the potential for confusing the jury with a side trial to establish Wu's existence or nonexistence and whether he actually uttered the words attributed to him, and presented only cumulative evidence, we conclude that the trial court did not abuse its discretion by excluding the statements.[9]

3

Even if we concluded that the trial court's rulings were erroneous, we would nevertheless decline to reverse the trial court on the ground that it

[9] Bengtsson also asserts that Wu's statements could have been excluded under ER 602 because there was insufficient foundation to admit the statements. We disagree. ER 602 requires that a witness have personal knowledge of a matter before testifying to it and permits evidence to prove personal knowledge to come from the witness's own testimony. There is no dispute that Yin and Kong testified to meeting with and discussing the termination of Bengtsson with Wu as a member of the Sunnyworld board. Whether or not such testimony was truthful may have been in question, but the foundational requirements of ER 602 were plainly satisfied.

excluded the Wu statements because Sunnyworld does not establish that it was prejudiced by the exclusion.

Once again, Sunnyworld's main argument on appeal is that Wu's statements would have supported an inference that Yin and Kong were forced to fire Bengtsson because Yu, a majority shareholder, ordered it. Wu's alleged hearsay statements, however, do not identify him as a controlling board member or majority shareholder. Wu's alleged statements, without the addition of other evidence establishing that Wu was a majority shareholder, support only an inference that Yin and Kong knew that the third board member wanted to fire Bengtsson. The trial court ruled that evidence regarding the size of Wu's ownership interest was not admissible, and Sunnyworld did not assign error to the exclusion of this evidence. Therefore, because the fact that a third board member wanted to fire Bengtsson was already admitted into evidence—again, the trial court allowed testimony that the board discussed firing Bengtsson and that all three board members decided to, and voted to, fire Bengtsson—Sunnyworld cannot establish prejudice from the exclusion of Wu's alleged statements.

C

Sunnyworld next contends that the trial court committed reversible error when it barred the admission of testimony that, after termination, Sunnyworld determined that Bengtsson had failed to provide receipts for 110 transactions in which she used the company debit card. This is so, Sunnyworld asserts, because Bengtsson opened the door to the admission of this testimony by

testifying that Sunnyworld had falsely accused her of embezzlement. This contention fails because defense counsel at trial conceded that the testimony relating to the 110 allegedly missing receipts had nothing to do with Sunnyworld's embezzlement accusation and the trial court may reasonably have interpreted Bengtsson's embezzlement accusation testimony as responsive to other evidence.

A party may open the door for the admission of otherwise inadmissible testimony. Ang v. Martin, 118 Wn. App. 553, 561-62, 76 P.3d 787 (2003) (citing State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)), aff'd, 154 Wn.2d 477, 114 P.3d 637 (2005). As our Supreme Court has explained:

> It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969).

"The trial court has considerable discretion in administering this open-door rule." Ang, 118 Wn. App. at 562 (citing 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 103.14 (4th ed. 1999)).

Sunnyworld asserts that testimony regarding 110 missing receipts tallied after Bengtsson was fired was vital to counteract testimony from Bengtsson that Sunnyworld had falsely accused her of embezzlement.[10] Specifically,

[10] Sunnyworld does not assign error to the trial court's pretrial ruling that such evidence was inadmissible after-acquired evidence. Instead, it asserts that such evidence should have been admitted because Bengtsson opened the door.

Sunnyworld contends that Bengtsson opened the door to the testimony about the 110 receipts by discussing Sunnyworld's embezzlement accusation and that it was unfair to not allow them to present evidence to show that the accusation had "any basis in fact." Br. of Appellant at 23. However, before the trial court, defense counsel explicitly argued that the purpose of admitting this evidence was "not claiming embezzlement, we're just saying we're missing receipts."[11] Indeed, when the trial court noted that the "receipts have nothing to do with" the embezzlement accusation, defense counsel presented no argument to the contrary. Because Sunnyworld explicitly declined to present any argument that this evidence related to the embezzlement accusation, we decline to consider that argument on appeal. See Modumetal, Inc. v. Xtalic Corp., 4 Wn. App. 2d 810, 829 n.4, 425 P.3d 871 (2018) (refusing to consider argument presented on appeal that was never presented to the trial judge (citing RAP 2.5(a); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001))), review denied, 192 Wn.2d 1011 (2019).

Furthermore, even if defense counsel had not specifically waived this argument, we would still reject the assignment of error because Sunnyworld does

[11] In its reply brief, Sunnyworld asserts that defense counsel's statement that he did not wish to claim embezzlement meant only that he was not seeking to support an affirmative defense of unclean hands by proving embezzlement. Obviously, this is not what defense counsel said.

Furthermore, Sunnyworld asserts that defense counsel did wish to present the receipt evidence to show that the embezzlement accusation had a basis in fact. Admitting evidence to show that the embezzlement accusation was supported by facts, thereby rebutting Bengtsson's testimony that the accusation was false, is the same thing as admitting it to show that it was true that Bengtsson embezzled from Sunnyworld. By disclaiming any intent to support the embezzlement claim, Sunnyworld disclaimed any argument that it sought the evidence to counter Bengtsson's testimony that she was falsely accused of embezzlement.

not establish that the trial court abused its discretion by refusing to admit the testimony regarding 110 allegedly missing receipts. This is so because the trial judge could have reasonably considered the testimony of the embezzlement accusation as responsive to, or presented in anticipation of, evidence Sunnyworld had, and presented at trial, that Sunnyworld discovered that 20 transactions on the company debit card were missing receipts *before* firing Bengtsson. Indeed, absent an explanation from Bengtsson, a reasonable juror might well conclude that the testimony Sunnyworld was permitted to present regarding the 20 missing receipts supported Sunnyworld's theory that Bengtsson was fired due to her financial mismanagement of the company. Therefore, Sunnyworld has failed to establish that the trial court abused its discretion by excluding testimony regarding the 110 missing receipts tallied after firing Bengtsson.

D

Sunnyworld next contends that the trial court erred by declining Sunnyworld's motion for a new trial under CR 59(a)(8). This is so, Sunnyworld asserts, because it suffered prejudice as a result of the evidentiary rulings it has challenged on appeal. We disagree.

> On the motion of the party aggrieved, a verdict may be vacated and a new trial granted to all or any of the parties, and on all issues, or on some of the issues when such issues are clearly and fairly separable and distinct, or any other decision or order may be vacated and reconsideration granted.

CR 59(a).

We review a trial court's decision on a motion for a new trial for an abuse

of discretion unless the granting of a new trial is based on an error of law. Hollins, 200 Wn. App. at 582. Thus, when reviewing a decision on a motion for a new trial premised on alleged evidentiary errors, matters within the discretion of the trial court, the proper standard of review is abuse of discretion. Hollins, 200 Wn. App. at 582-83.

"A much stronger showing of abuse of discretion is required to set aside an order granting a new trial than one denying a new trial." Hollins, 200 Wn. App. at 582. A court abuses its discretion when it bases a decision on untenable grounds or untenable reasons. Wade's Eastside Gun Shop, Inc. v. Dep't of Labor & Indus., 185 Wn.2d 270, 277, 372 P.3d 97 (2016).

In its briefing to this court, Sunnyworld asserts that a new trial was warranted under CR 59(a)(8) because the trial court committed an error of law. Under CR 59(a)(8), a new trial may be granted if an aggrieved party shows that its rights were materially affected by an "[e]rror in law occurring at the trial and objected to at the time by the party making the application." However, in support of this assertion, Sunnyworld alleges only that the trial court erred in its evidentiary rulings regarding Wu's alleged statements and evidence of 110 missing receipts, and that such errors, either individually or cumulatively, denied Sunnyworld a fair trial. Therefore, we review the trial court's decision denying the motion for a new trial under an abuse of discretion standard.[12] Hollins, 200 Wn. App. at 582-83. Because we have concluded that the trial court did not abuse its

[12] CR 59(a)(8) is not the proper ground upon which to seek a new trial premised upon a claim of evidentiary error. Instead, the proper ground is CR 59(a)(1) ("abuse of discretion" "by which such party was prevented from having a fair trial"). Hollins, 200 Wn. App. at 582.

discretion in making the challenged evidentiary rulings, we also reject Sunnyworld's challenge to the trial court's ruling denying its motion for a new trial.

III

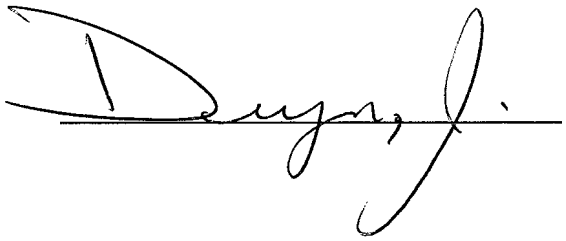
Bengtsson requests an award of attorney fees on appeal, contending that she is entitled to an award of fees under RCW 49.60.030(2).[13] Because Bengtsson is the prevailing party, and RCW 49.60.030(2) authorizes prevailing plaintiffs in civil rights cases to recover reasonable attorney fees, we grant Bengtsson's request for such an award.

"Washington follows the American rule 'that attorney fees are not recoverable by the prevailing party as costs of litigation unless the recovery of such fees is permitted by contract, statute, or some recognized ground in equity.'" Panorama Vill. Condo. Owners Ass'n Bd. of Dirs. v. Allstate Ins. Co., 144 Wn.2d 130, 143, 26 P.3d 910 (2001) (quoting McGreevy v. Or. Mut. Ins. Co., 128 Wn.2d 26, 35 n.8, 904 P.2d 731 (1995)). RCW 49.60.030(2) authorizes successful plaintiffs in discrimination lawsuits to recover attorney fees. Thus, because Bengtsson is a prevailing plaintiff in this employment discrimination appeal, an award of fees is authorized. See Blackburn v. Dep't of Soc. & Health Servs., 186 Wn.2d 250, 261, 375 P.3d 1076 (2016) (awarding fees under RCW 49.60.030(2) for employees successfully bringing discrimination case against

[13] RCW 49.60.030 was amended in 2020, after Bengtsson filed her lawsuit. See LAWS OF 2020, ch. 52, § 4 (effective date June 11, 2020). However, the provision authorizing the award of attorney fees to prevailing plaintiffs, RCW 49.60.030(2), was not altered by this amendment. See former RCW 49.60.030 (LAWS OF 2009, ch. 164, § 1). Both the former and current version of the statute authorizes prevailing plaintiffs to recover "the cost of suit including reasonable attorneys' fees." RCW 49.60.030(2); former RCW 49.60.030(2) (LAWS OF 2009, ch. 164, § 1).

employer). Upon Bengtsson's compliance with RAP 18.1, a commissioner of our court will enter an appropriate order awarding fees and costs.

Affirmed.



WE CONCUR: