

WS 936-7

WS 936-7
JA

No. 65936-7-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1

CRAIG RICE, an individual,

Plaintiff/Appellant,

v.

OFFSHORE SYSTEMS, INC., a WASHINGTON CORPORATION,

Defendants/Appellees.

APPELLANT'S BRIEF

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I. INTRODUCTION

Appellant Craig Rice was a committed professional who dedicated seventeen years of his career to Respondent Offshore Systems Inc. (“OSI”). He was well liked within the Dutch Harbor community as someone with an outgoing personality who worked hard for customers. Despite his loyal service, Mr. Rice became the target of age discrimination in 2006 and 2007. Mr. Rice’s superior, Mr. Jared Davis, commonly referred to him as an “old goat” and commented that he was “too old to stay on the job.” Mr. Davis also undermined Mr. Rice’s authority by assigning his job responsibilities to significantly younger employees. Other employees took their cues from Mr. Davis. They snickered about Mr. Rice’s age and commented that he was “senile,” which became a commonplace refrain around the facility.

This pattern of discrimination set the stage for Mr. Rice’s termination. On December 12, 2007, Mr. Rice responded to a fire on board a fishing vessel moored at OSI’s fuel dock. While the situation was tense for a couple of hours, the fire was eventually contained by the local fire department. The following day, Mr. Rice reported the details of the emergency to OSI headquarters. Because Mr. Rice handled the situation without incident, OSI considered the matter resolved; Mr. Rice left Dutch

Harbor a few days later for vacation. Shortly before his return from vacation, Mr. Rice received a call from Mr. Davis, who informed Mr. Rice that he was being terminated for attempting to cut the lines to the burning vessel. A few weeks later, OSI changed the grounds for its decision and alleged Mr. Rice was terminated for being intoxicated and disorderly during the fire response.

Mr. Rice brought claims for age discrimination, culminating with the trial court hearing OSI's motion for summary judgment. The dispositive issue was whether Mr. Rice presented sufficient evidence of pretext to proceed to a jury trial.¹ In dismissing Mr. Rice's claims, the trial court disregarded evidence of age-related animus. The trial court also ignored reasonable inferences of pretext based on the totality of Mr. Rice's evidence. Instead, the trial court relied on inadmissible evidence and concluded there was "no question" Mr. Rice was intoxicated and disorderly. The trial court's actions in this regard constitute reversible error because they contradicted settled law, including, *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), and held Mr. Rice to an impossible standard at the summary judgment stage.

II. ASSIGNMENTS OF ERROR

Assignments of Error

¹ For purposes of its summary judgment motion, OSI did not contest that Mr. Rice satisfied the prima facie elements of his age discrimination claim. CP 35.

1. Whether the trial court erred by ignoring reasonable inferences in favor of Mr. Rice when the cumulative evidence demonstrated an ample showing of pretext.
2. Whether the trial court erred by disregarding evidence of age-related animus because OSI's discriminatory actions did not occur within the context of Mr. Rice's termination.
3. Whether the trial court erred by weighing the evidence, making credibility determinations, and resolving disputed issues of material fact.
4. Whether the trial court erred by relying on inadmissible evidence to conclude that Mr. Rice was intoxicated and disorderly.

Issues Pertaining to Assignments of Error

1. Mr. Rice's evidence of pretext must be considered in its totality.
2. Mr. Rice's burden to show pretext is one of production and not one of persuasion.
3. Mr. Rice is only required to present evidence which creates a reasonable inference that OSI's allegations are unworthy of credence.
4. The facts and reasonable inferences therefrom must be construed in a light most favorable to Mr. Rice, as the non-moving party.
5. Mr. Rice's prima facie case must be considered as part of the pretext analysis.

*

6. Mr. Rice's evidence of discrimination must be considered as part of the pretext analysis even if OSI's discriminatory actions did not occur within the direct context of Mr. Rice's termination.
7. OSI's reliance upon subjective interpretations of disputed evidence must be closely scrutinized as part of the pretext analysis.
8. Mr. Rice was not required to conclusively disprove all of OSI's allegations.
9. At the summary judgment stage, a trial court may not weigh the evidence, render credibility determinations, or resolve disputed issues of material fact.
10. OSI improperly offered unauthenticated hearsay evidence to prove the truth of its allegations against Mr. Rice.

III. STATEMENT OF THE CASE

A. The Parties

OSI is a marine service company that provides fueling and storage services to fishing vessels out of its facilities in Dutch Harbor and Kenai, Alaska. *Id.* OSI's corporate headquarters are located in Kirkland, Washington. CP 349. A large portion of OSI's employees work in labor intensive positions and perform tasks such as offloading fish product from fishing vessels and re-fueling vessels. CP 340-343.

Mr. Rice was a devoted employee at OSI for over seventeen years. Mr. Rice started his employment in 1991 as a stevedore. CP 340. During his employment, Mr. Rice worked directly with a variety of customers to address their fueling and storage needs in an efficient and capable manner. CP 340, 342, 351-352. Through hard work and commitment, Mr. Rice became a fixture at OSI's Dutch Harbor facility, and earned numerous promotions, pay raises, bonuses, and recognition. CP 340-344. Over the years, Mr. Rice was given added responsibilities and achieved the position of yard foreman in 2000. CP 340. In this capacity, Mr. Rice was responsible for directing and supervising the yard employees with the collective goal of serving OSI's customers. CP 340-344.

Mr. Rice also became certified as the safety and training officer for the Dutch Harbor facility. *Id.* To achieve this designation, Mr. Rice completed a forty hour course on fire and crisis management. *Id.* Through his training, Mr. Rice learned the importance of patience, communication, and cooperation during an emergency. *Id.* Special emphasis was placed upon having an operational command structure to coordinate an effective response. *Id.* Mr. Rice maintained his safety and training officer designation by completing annual refresher courses on emergency preparedness and response. *Id.*

Between 2005 and 2007, the upper level of Dutch Harbor's management structure included: (1) Mr. Robert Schasteen, OSI's chief officer in Dutch Harbor²; (2) Mr. Jared Davis, the operations manager and second in command; (3) Mr. Rice, in his capacity as the yard foreman; (4) Mr. Michael Reed, the night supervisor. CP 348. As the yard foreman, Mr. Rice was subordinate to only Mr. Robert Schasteen and Mr. Jared Davis. CP 28. In the event Mr. Schasteen and Mr. Davis were off-site, Mr. Rice became the lead manager for OSI's Dutch Harbor facility. CP 315.

B. Working at OSI's Dutch Harbor Facility

Working at OSI's Dutch Harbor facility is a grueling profession. CP 340-344. The weather is extreme most of the year and OSI employees work under a great deal of stress. *Id.* OSI's customers are primarily fishing vessels, which remain at the shoreside facilities long enough to refuel and offload fish product into cold storage. *Id.* This places a substantial burden on OSI's employees to work as fast as possible to protect large quantities of valuable client assets in dangerous conditions. *Id.* Employees work long days under intense physical exertion. *Id.*

Mr. Rice was well suited to the demands of working at OSI's Dutch Harbor facility. He was well liked by customers and locals alike.

² Mr. Schasteen was also over the age of forty.*

CP 342, and 351-352. As Mr. Rice gained seniority within the company, he took steps to foster collegiality and friendship amongst his co-workers. CP 343-344. He regularly hosted OSI employees at his residence for sporting events and special occasions. *Id.* Mr. Rice also opened his kitchen during the holidays, cooking home style meals so his fellow employees would feel like family. *Id.* On other occasions, Mr. Rice brought his co-workers for fishing tours and joyrides on his boat. *Id.* OSI also recognized that Mr. Rice was a good ambassador for the company and asked him to socialize with customers. *Id.* For instance, Mr. Rice organized a fishing trip for the president of Trident Seafoods, Inc. *Id.*

C. OSI Employment Policies

Because work at OSI's Dutch Harbor is strenuous, employees take extended vacations away from the site. To ensure operations remain constant, vacations are staggered so customer needs can be met anytime of the year. CP 348. To this end, OSI always had at least two senior level managers on site at any given time. *Id.* This policy applied to Mr. Rice in his position as the yard foreman, as well as the other senior level employees at the Dutch Harbor facility, including Mr. Jared Davis, Mr. Robert Schasteen, and Mr. Michael Reed. This policy ensured that, should an emergency arise, there would be a senior manager on duty with sufficient training and experience to coordinate an appropriate response.

However, OSI did not have a policy or procedure in place that would govern the management of an emergency in the event only one manager was on site. *Id.*

OSI also attempts to retain employees by maintaining a progressive discipline policy whereby employees received lesser discipline in the first instance of misconduct. CP 349. If an employee engages in misconduct, a supervisor investigates the facts related to the conduct at issue, talks to people with knowledge of the conduct, and allows the employee a chance to explain their actions. *Id.*

D. Discrimination Against Mr. Rice

During Mr. Rice's employment at OSI he got along well with others and was known for his work ethic. At no time during his employment did any of his fellow employees or customers complain about his behavior or professionalism. To the contrary, Mr. Rice received repeated promotions, raises, and bonuses recognizing his exemplary dedication to OSI. CP 340-341. Nor was there any question about Mr. Rice's ability to perform his job. CP 318-319. He was known within the company as a demanding supervisor who expected his employees to exercise sound judgment to complete tasks efficiently and safely. CP 342. It was this pragmatic approach to management that earned Mr. Rice his increased responsibilities and multiple promotions within the company.

Customers recognized his effectiveness as a leader within the company and relied on his sound judgment to service their vessels. CP 351-352.

However, as Mr. Davis became entrenched in his position, he began to discriminate against Mr. Rice. By 2006, Mr. Davis commonly referred to Mr. Rice as an “old goat.” CP 344. Many times, these statements were made in front of other OSI employees. *Id.* Mr. Davis’s discriminatory conduct also included efforts to demean Mr. Rice’s professional capabilities. For instance, Mr. Davis made regular comments to Mr. Rice such as “you’re too old to stay on the job.” *Id.* These comments accompanied efforts to undermine Mr. Rice’s authority in the yard, where Mr. Rice performed his primary job responsibilities. *Id.* To this end, Mr. Davis attempted to split the responsibility for the yard into two parts, one to be managed by Mr. Rice and the other to be managed by a much younger OSI employee. *Id.* Such actions permeated Mr. Rice’s working environment throughout 2006 and 2007.

E. Vessel Fire at OSI’s Fuel Dock

On December 12, 2007, Mr. Rice worked the day shift. Because it was a slower part of the year, Mr. Rice left the facility around 1:30 p.m. and drove to Dutch Harbor with several co-workers. CP 344-345. Mr. Rice consumed two drinks with his dinner, as did the other OSI employees. *Id.* After dinner, they bought groceries and drove back to the

facility, which is situated a few miles outside of the town. *Id.* During the return trip, Mr. Rice received a phone call from Mr. Nick Reed, who stated a fire had broken out on the Alaska Patriot which was moored at to OSI's fuel dock. CP 345. Mr. Reed was admittedly panicked and asked for Mr. Rice's help. CP 337. Because all of OSI's senior managers, including Messrs. Schasteen, Davis, and Michael Reed were off site, Mr. Rice had no choice but to respond to the fire even though he had already completed his shift earlier in the day. CP 315.

When he arrived at the facility, Mr. Rice saw plumes of dark black smoke coming from the vessel. CP 345. He located Mr. Reed, who was in a state of distress. *Id.* Mr. Rice calmed down Mr. Reed and instructed him regarding his duties under the circumstances, which included providing assistance to local officials and obtaining updates on the status of the fire to protect OSI's interests. CP 337 and 345. Mr. Rice boosted Mr. Reed's confidence by reminding him that he was the OSI employee in charge of the facility. *Id.* When asked by local officials, Mr. Rice stated that Mr. Reed was in charge and that they needed to keep him informed about the status of the fire. CP 345-346.

Mr. Rice had serious concerns regarding the vessel fire. OSI's fuel dock connected to several on shore fuel tanks which contained anywhere from three to five million[±] gallons of fuel. CP 346. Also near the fuel dock

were large 55-gallon fuel drums as well as highly flammable netting gear. *Id.* Mr. Rice knew that if the fire spread it could ignite the fuel tanks, fuel drums, and/or netting gear, which would present a serious hazard to everyone at the facility. *Id.* This could threaten all of OSI's employees because the employee camp was located on the facility. *Id.* Mr. Rice was also concerned because if an evacuation became necessary, the only way to leave the facility was to pass by OSI's on-shore fuel tanks. CP 345-346. Thus, Mr. Rice realized that the situation presented a life-threatening emergency. Mr. Rice communicated his concerns to Mr. Reed, who acknowledged the danger presented by the situation. CP 348.

Mr. Rice was also concerned because he knew the importance of communication during an emergency response. Based on Mr. Rice's training and experience as a safety officer, he knew that a command center and proper communications were critical in organizing and operating an effective response to an emergency. CP 340-342. When Mr. Rice learned local officials did not have radio communications, his concern regarding the situation increased because this inhibited their ability to relay information and make decisions based on current information. Mr. Rice took efforts to confer with police officers. CP 345-346. On several occasions, he asked direct questions about the status of the fire and demanded to know whether it had been contained. *Id.* In response, police

officers informed Mr. Rice that the fire department needed additional water hoses. CP 347. Mr. Rice acted quickly and instructed Mr. Reed to provide water hoses as requested. *Id.*

Mr. Rice also contacted Mr. Rod George at Dunlop Towing to see if a tug boat could be made available in the event fire officials lost control of the fire. CP 346. Such efforts were customary precautionary measures taken in emergency situations. *Id.* In the end, Dunlop Towing and Mr. Rice did not take any action to remove the Alaska Patriot from the fuel dock. CP 346-347. However, Mr. Rice remained concerned because Mr. Reed could not obtain any additional information from local officials regarding the status of the fire. CP 345. Instead, police officers gave Mr. Reed and Mr. Rice vague assurances that the situation would be handled. CP 345-346. Again, because of his training and experience handling such matters, Mr. Rice was seriously concerned about the safety of everyone at the facility and repeatedly demanded answers.

After about two hours, the fire chief informed Mr. Rice that the fire was contained. CP 347. Mr. Rice promptly left the scene and returned home. *Id.* The following day, Mr. Rice contacted OSI's headquarters and provided a report on the fire. CP 349. Mr. Rice talked to Mr. Jeff Savage for several minutes about the incident. *Id.* Mr. Savage listened to Mr.

Rice and concluded that he was satisfied with his report. *Id.* A few days later, Mr. Rice left Dutch Harbor for a previously scheduled vacation. *Id.*

F. Termination

In early January 2008, and a few days before Mr. Rice's scheduled return to Dutch Harbor, he received a phone call from Mr. Davis. CP 349-350. Mr. Davis informed Mr. Rice that he was being terminated. *Id.* When Mr. Rice asked for an explanation, Mr. Davis stated that the decision was made because Mr. Rice had attempted to cut the mooring lines to the Alaska Patriot. *Id.* Mr. Rice informed Mr. Davis that this would have been impossible because the mooring lines were several inches thick. *Id.* Prior to this phone call, Mr. Davis did not contact Mr. Rice or allow him a chance to explain his actions. CP 325. A few weeks later, Mr. Davis prepared a letter regarding Mr. Rice's termination. CP 85. The contents of this letter departed substantially from Mr. Rice's conversation with Mr. Davis; indeed, the letter set forth a number of entirely different explanations for the employment decision.³ *Id.*

G. Procedural History

Mr. Rice filed his complaint against OSI on June 26, 2009. CP 1-16. OSI filed its answer on July 28, 2009. CP 17-26. On June 25, 2010,

³ At about the same time, Mr. Schasteen was involuntarily transferred away from Dutch Harbor. Shortly thereafter, Mr. Davis became the chief officer at Dutch Harbor and the remaining management positions were filled by four junior managers, all in their twenties and thirties. CP 313, 328, and 333-334.

OSI moved for summary judgment to dismiss Mr. Rice's claims arguing that it had a legitimate reason to terminate Mr. Rice's employment and that there was insufficient evidence of pretext. CP 27-43. To support its argument, OSI relied heavily upon two unauthenticated police reports. CP 85-88.

Mr. Rice opposed OSI's motion and produced supporting declarations, sworn testimony, and documentary evidence to establish pretext. CP 285-352. Mr. Rice also filed a motion to strike portions of OSI's evidence, including the two police reports, because OSI failed to authenticate the police reports and because the reports were inadmissible hearsay offered to prove the truth of the allegations against Mr. Rice. CP 162-193. Mr. Rice also moved to strike portions of declaration from Mr. Davis and Mr. Reed because they contained conclusory statements, speculation, and statements made without personal knowledge. *Id.*

The trial court heard oral arguments on these matters on July 23, 2010. CP 381-382. At the end of oral argument, the trial court granted OSI's motion for summary judgment and denied Mr. Rice's motion to strike. In its oral ruling, the trial court stated in pertinent part:

...clearly Mr. Rice is in violation of at least two of the company's policies: being intoxicated while at work and engaging in disorderly, antagonistic conduct on company premises. There's just no question that that occurred...There's – the decision to terminate him clearly

followed immediately from the – from the incident. It didn't follow from any alleged discriminatory comments by anybody or any other things going on here. It followed from the incident involved. Verbatim Report of Proceedings, pp. 28-29.

Mr. Rice filed a motion for reconsideration with the trial court on July 29, 2010, arguing that the trial court had committed error by disregarding the evidence of age-related animus, by weighing the evidence, by making credibility determinations in favor of OSI, by resolving disputed issues of material fact, by ignoring evidence of pretext, and by relying on inadmissible hearsay evidence. CP 383-399. The trial court denied Mr. Rice's motion for reconsideration and the final order granting OSI's summary judgment motion and denying Mr. Rice's motion to strike was entered by the trial court on August 5, 2010. CP 400-402. Mr. Rice filed a timely notice of appeal on August 31, 2010. CP 406-415.

IV. SUMMARY OF ARGUMENT

The trial court made numerous errors by dismissing plaintiff's age discrimination claim. First, the trial court erred by disregarding inferences favorable to Mr. Rice when the totality of evidence demonstrated a showing of pretext. In addition, the trial court's ruling directly conflicts with settled law holding that evidence of age related animus must be considered as part of the pretext analysis even if such evidence did not occur within the direct context of the termination. *Reeves v. Sanderson* ²

Plumbing Products, Inc., 530 U.S. 133 (2000). The trial court also erred by weighing the evidence, making credibility determinations in favor of OSI, and relying on unauthenticated and inadmissible hearsay evidence to resolve contested factual issues. Each of these errors of law constitutes separate and independent grounds for reversal. Mr. Rice presented ample evidence of pretext, which created competing inferences as to whether his age was a substantial factor in OSI's decision to terminate his employment. Accordingly, this matter should be remanded for a jury trial on the merits.

V. ARGUMENT

A. The Standard of Review is *De Novo*

The Court of Appeals reviews cases on a *de novo* basis, engaging in the same analysis as the trial court and viewing evidence in the light most favorable to the nonmoving party. *Roger Crane & Assoc., Inc. v. Felice*, 74 Wn. App. 769, 773 (1994). Any findings of fact entered by the trial court will be considered superfluous and will be disregarded by the appellate court. *Redding v. Virginia Mason Med. Ct.*, 75 Wn. App. 424, 426 (1994). On appeal from summary judgment, trial court rulings on the admissibility of evidence are also reviewed *de novo*. *Momah v. Bharti*, 144 Wn. App. 731, 749 (2008), citing *Folsom v. Burger King*, 135 Wn.2d

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658, 663 (1998). Accordingly, each of the issues presented by this appeal should be reviewed by the Court *de novo*.

B. The Trial Court Erred By Ignoring Inferences Favorable to Mr. Rice When the Totality of the Evidence Established a Showing of Pretext.

The dispositive issue before the trial court was whether Mr. Rice presented sufficient evidence of pretext. In ruling that Mr. Rice did not satisfy his burden, the trial court focused solely on OSI's allegation that he was drunk and disorderly. This constituted reversible error because the trial court failed to consider reasonable inferences in favor of Mr. Rice based on the totality of the evidence. Therefore, the trial court's ruling cannot stand when Mr. Rice presented ample evidence rebutting OSI's allegations and creating genuine issues of material fact regarding pretext.

i. Pretext Requires an Employee to Present Evidence Undermining an Employer's Grounds for Termination

The parties agree that the *McDonnell Douglas* burden-shifting standard governs the legal analysis in this case. For purposes of summary judgment, there was no dispute Mr. Rice established a prima facie case of discrimination. Thus, OSI was required to "articulate a legitimate, nondiscriminatory reason for termination." *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 364 (1988). The trial court ruled that OSI met this burden by producing evidence that Mr. Rice was terminated for

being intoxicated and disorderly. As a result, the burden shifted back to Mr. Rice to show OSI's "articulated reasons are a mere pretext for what, in fact, is a discriminatory purpose." *Id.*

Pretext can be established in different ways. *Griffith v. Schnitzer Steel Indus., Inc.*, 128 Wn. App. 438 (2005); *Coghlan v. Am. Seafoods Co., LLC*, 413 F.3d 1090 (9th Cir. 2005); *Johnson v. Express Rent & Own, Inc.* 113 Wn. App. 858 (2002). The *Griffith* court held that an employee must show "that the employer's stated reasons are pretextual and unworthy of belief" which can be accomplished by showing "the proffered justifications have no basis in fact, are unreasonable grounds upon which to base the termination, or were not motivating factors in employment decisions for other similarly-situated employees. *Griffith*, 128 Wn. App. at 447. Other courts have posited this standard in slightly different ways. For instance, Division Two has held that pretext was shown where the employer terminated the plaintiff in part due to the use of profanity at work but when others used as profanity just as much. *Johnson*, 113 Wn. App. at 862. Thus, inconsistencies in an employer's proffered explanation can also establish pretext.⁴

⁴ The variances in the case law and the ways by which a plaintiff can establish pretext comport with the flexibility inherent in the *McDonnell Douglas* standard. See, *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 363 (1988); ("Above all, it should not be viewed as providing a format into which all cases of discrimination must somehow fit. The Supreme Court has made it abundantly clear that *McDonnell Douglas* was intended

Ultimately, an employee need only present evidence which tends to undermine or discredit an employer's grounds for termination. *Subia v. Riveland*, 104 Wn. App. 105, 112 (2001). *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2000). For instance, the *Hill* court stated that "a showing of a prima facie case combined with sufficient evidence to disbelieve the employer's explanation is entitled to considerable weight such that a plaintiff should not be routinely required to submit evidence over and above proof of pretext." *Id.*, 144 Wn.2d at 183.

ii. Mr. Rice's Cumulative Evidence Establishes a Showing of Pretext

To determine whether a plaintiff has established pretext, both the Washington courts and the Ninth Circuit require that evidence of pretext be reviewed cumulatively, or in an aggregate manner. *Carle v. McChord Credit Union*, 65 Wn. App. 93, 104 (1992); *Renz v. Spokane Eye Clinic*, 114 Wn. App. 611, 624 (2002); *Stegall v. Citadel Broadcasting Company*, 350 F.3d 1061, 1069 (9th Cir. 2004) (interpreting Washington state law). The Ninth Circuit, interpreting WLAD and applying Washington State law, has held that considering evidence of pretext in isolation constitutes reversible error. *Stegall*, 350 F.3d at 1069.

§ to be neither 'rigid, mechanized, or ritualistic, *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 577 (1978), nor the exclusive method for proving a claim of discrimination, *Int'l Bros. of Teamsters v. U.S.*, 431 U.S. 324, 358 (1977)."

Here, the trial court did not consider whether, taken as a whole, the totality of Mr. Rice's evidence established a showing of pretext. The holdings in *Carle*, *Renz*, and *Stegall* demonstrate the trial court's error in this regard resulted in a fundamentally flawed ruling that must be reversed. When analyzed in the aggregate, Mr. Rice's evidence establishes ample grounds upon which a jury could find pretext including: (a) Mr. Rice's strong and undisputed prima facie case of age discrimination, (b) Mr. Rice reasonable actions during the fire response, (c) OSI's shifting explanations for its decision to terminate Mr. Rice as well as its failure to adhere to its own policies, (d) the lack of facts to support OSI's allegations, and (e) OSI's discrimination against Mr. Rice.

a. The Undisputed Facts Establish a Strong Prima Facie Case of Age Discrimination

The evidence in the record demonstrates a strong prima facie case of discrimination. The undisputed facts document that Mr. Rice was: (1) within the statutorily-protected age group; (2) was discharged; (3) was doing satisfactory work; and (4) was replaced by a younger person. *Grimwood*, 110 Wn.2d at 362. There is no dispute that, at the time of Mr. Rice's termination in January 2008, he was fifty-nine years old, performing satisfactory work, and was replaced by Mr. Nicholas Reed, who was twenty-six years old at the time. CP 332-333. Accordingly, the

record conclusively establishes a strong prima facie case of discrimination in favor of Mr. Rice. Under *Reeves*, this factor must be taken into account when analyzing the issue of pretext. *Reeves*, 530 U.S. at 143.

b. Mr. Rice Acted Reasonably During the Fire Response

OSI argued that Mr. Rice was terminated for being intoxicated and disorderly. However, Mr. Rice produced evidence demonstrating that his actions during the fire response were reasonable and appropriate. These facts support a showing of pretext because they create a reasonable inference that OSI's allegations against Mr. Rice were false and unworthy of credence.

The parties' respective versions of the relevant events stand in stark contrast to one another. Mr. Rice has consistently maintained that he had dinner and purchased groceries with a number of co-workers before the vessel fire. When Mr. Rice learned about the vessel fire, he was forced to respond because *OSI violated its own policy* by allowing the other senior managers to leave Dutch Harbor. Had Mr. Schasteen, Mr. Davis, or Mr. Michael Reed been on site, Mr. Rice would have gone home with the knowledge that a senior manager could handle the emergency. However, because Mr. Rice was left at the facility with inexperienced and junior employees, he had no choice but to respond. The need to act was

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heightened because the person in charge of the facility, Mr. Nicholas Reed, told Mr. Rice he was panicking and did not know what to do. CP 337.

The evidence also shows that the fire on board the Alaska Patriot was a dangerous situation that required immediate action. Mr. Rice understood the circumstances posed a serious threat to OSI's employees based on the fact that: (1) fire officials requested assistance, (2) radio communications were not working, thereby precluding an effective command structure, (3) the Alaska Patriot was moored at the fuel dock which was in turn connected to million gallon fuel tanks, (4) the vessel fire was nearby flammable netting gear and numerous 55 gallon fuel drums, and (5) police officials had little information about the status of the fire.

Based on Mr. Rice's training and experience, he assessed these facts and responded to the emergency because it presented a danger to OSI employees. Mr. Reed agreed that Mr. Rice's assessment of the danger posed by the proximity of the fuel tanks was "a common sense concern." CP 338. As a result, Mr. Rice was direct in his demands to obtain information from police officers. However, Mr. Rice adamantly rejects OSI's contentions that he was intoxicated at this time, that he spat at an officer, or that he used bigoted language towards a female officer. CP 347-348. To the contrary, he cooperated and provided assistance as requested from police officers and left as soon as the fire chief gave the all

clear. CP 347. These facts demonstrate that Mr. Rice's conduct was reasonable under the circumstances because they were intended to protect OSI's interests during a hazardous emergency.

c. OSI's Offered Shifting Explanations for the Decision to Terminate Mr. Rice and Failed to Adhere to its Own Policies

Washington Courts hold that pretext may be demonstrated when an employer substantially changes its rationale for terminating an employee. *Dumont v. City of Seattle*, 148 Wn. App. 850, 869 (2009), citing *Kobrin v. Univ. of Minn.*, 34 F.3d 698, 703 (8th Cir. 1994) ("substantial changes over time in the employer's proffered reason for its employment decision support a finding of pretext."). Inconsistencies in an employer's conduct can also demonstrate pretext. *Johnson v. Express Rent & Own, Inc.* 113 Wn. App. 858, 862 (2002). Here, the evidence supports a finding of pretext because OSI substantially altered its explanation for terminating Mr. Rice after learning that the grounds for its initial decision were impractical. In addition, OSI failed to follow its own policies and procedures when it evaluated Mr. Rice's conduct.

In early January 2008, Mr. Davis told Mr. Rice that he was terminated because he had tried to cut the mooring lines to the Alaska Patriot. CP 349-350. During this conversation, Mr. Davis did not give Mr. Rice any other explanation for his termination. *Id.* In response, Mr.

Rice informed Mr. Davis that his explanation was ridiculous as it would have required a chainsaw to sever the mooring lines, which were several inches thick. *Id.* However, Mr. Davis stubbornly concluded the conversation and stuck to his implausible explanation. *Id.* Approximately two weeks later, after realizing his initial explanation was unfounded, Mr. Davis prepared a letter significantly altering the grounds for Mr. Rice's termination. CP 85. Gone was the assertion that Mr. Rice was terminated for trying to sever the mooring lines. Instead, Mr. Davis inserted a laundry list of new explanations to support the termination. A reasonable jury could conclude Mr. Davis took these steps to conceal discriminatory motives.

Furthermore, OSI violated its own policies regarding employee discipline in connection with Mr. Rice termination. Mr. Davis testified that instances of employee misconduct are investigated and, as part of that process, the employee is allowed a chance to explain his version of the relevant events. However, Mr. Rice produced evidence that he was not afforded such an opportunity before being terminated. Whereas Mr. Rice unequivocally stated that he had no chance to explain his actions, Mr. Davis was unsure whether he gave Mr. Rice such an opportunity. CP 321.⁵ Mr. Davis admitted that he did not consider other, less severe forms of

⁵ Mr. Davis admitted that he did not inform Mr. Rice that OSI was considering termination as an option. CP 326.

discipline, and there is evidence that other employees were afforded second chances. CP 325 and 349. This evidence supports a finding of pretext because a reasonable person could conclude OSI made the decision to terminate Mr. Rice regardless of his input and contrary to its own policies and practices governing employee discipline.

d. OSI's Allegations Have No Basis in Fact

An employee can also demonstrate pretext by showing that an employer's allegations have no basis in fact. Here, OSI presented a number of reasons for terminating Mr. Rice, including: (1) attempting to sever the lines to the Alaska Patriot, (2) being intoxicated while on the job, (3) harassing Police and Fire officials while responding to an emergency, (4) creating bad relations with OSI customers and local officials, and (5) "the extremely poor treatment of employees that has been happening for many years..." CP 85. However, these contentions do not withstand scrutiny for summary judgment purposes because the record contains competing inferences as to whether OSI's allegations are false.

First, Mr. Rice presented evidence to rebut OSI's allegation that he was intoxicated and disorderly. While Mr. Rice consumed two drinks with his meal, as did other OSI employees, Mr. Rice specifically rejected the allegation that he was intoxicated at any time on December 12, 2007. CP 347-348. Similarly, Mr. Rice refuted OSI's allegation that he spat at

and/or he made bigoted statements towards a female police officer. CP 347. The only source for these allegations comes from the OSI employee who replaced Mr. Rice; the unauthenticated police reports offered by OSI contain no statement that Mr. Rice was intoxicated, that he used gender based language, or that he spat at an officer. As a biased and interested party in this matter, the trial court should have afforded little, if any, weight to Mr. Reed's statements on this issue because they only functioned to create a disputed issue of material fact.

OSI also argued that Mr. Rice interfered with fire officials but offered no factual support for this allegation. Mr. Rice flatly denied this allegation numerous times. Mr. Reed was unable to support or corroborate this allegation, and Mr. Davis admitted that he failed to interview any of the fire officers. CP 317. These facts show that OSI's allegation that Mr. Rice interfered with fire officials has no basis in fact.⁶ Similarly, Mr. Rice denied any attempts to approach the vessel or to sever its mooring lines. CP 347-348. In fact, the only time Mr. Rice interacted with any fire officials on December 12, 2007, was when the fire chief gave him the all clear. CP 347-348.

⁶ Even if there was a factual basis for this allegation, it is refuted by Mr. Rice who is adamant that he did not approach or interfere with fire officials at any time during the fire response. CP 347.

Mr. Rice further undermined OSI's allegations by producing a declaration from an OSI customer, Mr. Andrew Murphy. Mr. Murphy stated that, in his experience, Mr. Rice was "friendly," "funny," and "always willing to provide whatever services he could so that we could get our job done as efficiently as possible." CP 351. Mr. Rice also produced evidence that OSI asked him to take customer executives on boating and fishing tours. *Id.* Conversely, OSI did not produce any evidence from a customer or employee to support its allegations. When asked during deposition, neither Mr. Davis nor Mr. Reed were able to identify a specific employee or customer who had complained about Mr. Rice. Nor was OSI able to produce any document, such as a written complaint or report, which complained about Mr. Rice. Thus, the un-refuted evidence shows that Mr. Rice was well liked and respected by customers and co-workers. These facts, as well as OSI's failure to produce documents supporting its allegations, constitutes evidence of pretext. *Jones v. Kitsap County Sanitary Landfill, Inc.*, 60 Wn. App. 369, 373 (1991).

In sum, the totality of the evidence demonstrates a substantial showing of pretext. This evidence includes: (1) an strong and undisputed prima facie case of discrimination, (2) a reasonable inference that Mr. Rice acted reasonably in responding to the vessel fire, (3) a showing that OSI's produced inconsistent and shifting explanations for its decision to

terminate Mr. Rice, (4) OSI explanations had no basis in fact, and (5) OSI engaged in a pattern of discrimination against Mr. Rice.⁷ When viewed in a light most favorable to Mr. Rice, the cumulative evidence establishes a finding of pretext. Thus, Mr. Rice was entitled to present his case to a jury because “an employee who produces evidence of pretext is entitled to a jury decision as to whether the employer discriminated.” *Johnson*, 113 Wn. App. at 860.

C. Trial Court Erred By Disregarding Evidence of Age-Related Animus.

In its oral ruling, the trial court disregarded evidence of age-related animus because Mr. Davis’s discriminatory actions did not take place within the context of Mr. Rice’s termination. However, this reasoning was rejected by the U.S. Supreme Court in *Reeves*, 530 U.S. at 152-153. Thus, the trial court was required to consider evidence of OSI’s discrimination when analyzing the issue of pretext.

There are numerous corollaries between *Reeves* and the present case. Both involved older employees in their late 50’s who reported to and were terminated by substantially younger superiors. In both instances, the younger superior made numerous comments disparaging the older employee’s age. In fact, Mr. Davis’ discriminatory statements bear an

⁷ As explained in detail in section V(C), the Court must consider evidence of age related animus when determining whether Mr. Rice has presented sufficient evidence of pretext.

uncanny resemblance to those in *Reeves*. Mr. Davis derided Mr. Rice for being an “old goat” and told him he “was too old to stay on the job.” CP 343.⁸ The supervisor in *Reeves* joked that Reeves “was so old [he] must have come over the Mayflower” and that he “was too damn old to do [his] job.” *Reeves*, 530 U.S. at 151.

In *Reeves*, the Fifth Circuit disregarded these statements because they “were not made in the direct context of Reeves’s termination.” *Id.*, at 152. Here, the trial court discounted the importance of Mr. Davis’ discriminatory statements when it ruled “There’s – the decision to terminate him clearly followed immediately from the – from the incident. ***It didn’t follow from any alleged discriminatory comments by anybody...***” Verbatim Report of Proceedings, pp. 28-29. This passage demonstrates that the trial court discarded evidence of discriminatory conduct simply because the offensive actions did not have a direct temporal connection to the adverse employment action.⁹

The U.S. Supreme Court rejected this reasoning when it held that by disregarding evidence of age-related animus, the Fifth Circuit was

⁸ Mr. Davis also sought to undermine Mr. Rice by assigned his job duties to younger employees.

⁹ In *Reeves*, the Fifth Circuit also discounted the import of the age-related statements because other supervisors involved in the decision making process were themselves in the protected age class. If there is a distinction between this matter and *Reeves*, it is that Mr. Davis was the sole decision maker and as a substantially younger employee, there was no evidence to qualify Mr. Davis’ age related animus, as was present in *Reeves*. *

“impermissibly substitut[ing] its judgment concerning the weight of the evidence for the jury’s.” *Id.*, at 153. Therefore, the trial court erred, as a matter of law, by disregarding the evidence of age related animus in this case. This result is also improper under Washington law because courts in this state have adopted the hybrid pretext analysis as announced in *Reeves*. *Sheikh v. Choe*, 156 Wn.2d 441, 447 (2006); *Antonius v. King County*, 153 Wn.2d 256, 266 (2004); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 185 (2000)¹⁰. *Dumont v. City of Seattle*, 148 Wn. App. 850, 866 (2009); *Johnson v. Express Rent & Own, Inc.*, 113 Wn. App. 858, 860 (2002); *Subia v. Riveland*, 104 Wn. App. 105, 112 (2001). Therefore, the trial court committed reversible error when it disregarded evidence of age-related animus because it created a reasonable inference that defendant discriminated against Mr. Rice.

D. The Trial Court Erred by Weighing the Evidence, Making Credibility Determinations, and Resolving Disputed Issues of Material Fact.

Despite Mr. Rice’s ample showing of pretext the trial court granted OSI’s motion for summary judgment. The trial court’s decision rested

¹⁰ The *Hill* decision was overturned in 2006, on grounds unrelated to the *Hill* court’s adoption of the hybrid pretext analysis used in the *Reeves* decision. *McClarty v. Tottem Electric*, 157 Wn.2d 214, 137 P.3d 844 (2006). The *McClarty* court overruled *Hill* with respect to the definition of “disability” by adopting the definition found in the federal ADA and with respect to the use of that definition within the WLAD. *McClarty v. Tottem Electric*, 157 Wn.2d 214, 228, 37 P.3d 844 (2006). The legislature overruled *McClarty* with respect to the definition of “disability” a year later. S.S.B. 5340; LAWS OF 2007, ch. 317, § 1; RCW 49.60.040(25)(a); *Hale v. Wellpinit School District No. 49*, 165 Wn.2d 494, 498, 198 P.3d 1021 (2009). 3

upon the flawed conclusion that Mr. Rice was intoxicated and disorderly. The trial court reached this conclusion by weighing the evidence, making credibility determinations, and viewing competing inferences in favor of OSI to resolve disputed issues of fact. These actions constitute reversible error because they held Mr. Rice to an impossible legal standard at summary judgment.

It is settled that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Reasonable inferences must be construed in a light most favorable to the nonmoving party; and summary judgment cannot be granted if reasonable persons could reach more than one conclusion from the evidence presented. *Korlund v. Dyncorp Tri-Cities Services, Inc.*, 156 Wn.2d 168, 177 (2005). Here, the trial court ruled that: “Mr. Rice is in violation of at least two of the company’s policies: being intoxicated while at work and engaging in disorderly, antagonistic conduct on company premises. There’s just no question that that occurred.” Verbatim Report of Proceedings, p. 28. This passage demonstrates the trial court improperly resolved disputed issues of material fact.

Under *Anderson* and *Korlund*, the trial court’s factual findings were improper because Mr. Rice presented evidence upon which

reasonable minds could differ regarding material facts. Because Mr. Rice presented evidence creating a dispute of fact regarding his conduct, the trial court was required to accept the reasonable inference that he was not intoxicated or disorderly. Simply put, the trial court ignored the legal standard on summary judgment and invaded the province of the jury. By concluding there was “no question” Mr. Rice was intoxicated and disorderly the trial court rejected inferences favorable to Mr. Rice, weighed the evidence, and determined that OSI was more credible.

This constituted error because Mr. Rice’s burden to establish pretext is one of production, not one of persuasion. *Jones*, 60 Wn. App. at 372. Mr. Rice was not required to conclusively prove that OSI’s allegations had no basis in fact. To the contrary, he was only required to create a reasonable inference that he was not intoxicated or disorderly. The trial court also erred because Washington courts have long held that evidence regarding a person’s alleged intoxication is a question of fact for the jury. *Amrine v. Murray*, 28 Wn. App. 650, 657 (1981); *Bohnsack v. Kirkham*, 72 Wn. 2d 183, 192-193 (1967). *McKay v. Seattle Electric Co.*, 76 Wash. 257, 260-261 (1913). Because Mr. Rice presented evidence that he was not intoxicated, it was improper for the trial court to conclude otherwise.

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Similarly, numerous federal Courts have held that an employer's reliance on subjective criteria, such as personality issues, supports an inference of discrimination. *Fischbach v. D.C. Dep't of Corrections*, 86 F.3d 1180, 1184 (D.C.Cir.1996). *Perfetti v. First Nat. Bank of Chicago*, 950 F.2d 449, 457 (7th Cir.1991) (discussing "the ease with which employers may use subjective factors to camouflage discrimination"); *Lilly v. Harris-Teeter Supermarket*, 842 F.2d 1496, 1506 (4th Cir.1988); Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERK. J. EMP. LAB. L. 183, 218-24 (1997). Here, OSI's allegation that Mr. Rice was disorderly was a subjective conclusion which should have been closely scrutinized by the trial court. This is especially so where the parties sharply dispute the facts regarding Mr. Rice's behavior during the fire response. Therefore, it was error for the trial court to reach factual findings because reasonable minds could differ regarding the subjective interpretation of Mr. Rice's conduct.

Finally, the trial court failed to consider much of Mr. Rice's evidence of pretext. For instance, Mr. Rice presented evidence showing the lack of a factual basis for OSI's allegations that, *inter alia*, Mr. Rice interfered with fire officials or that customers and employees had complained about Mr. Rice. *See*, Section V(B)(d), *supra*. The trial court

ignored the evidence discrediting OSI's allegations and instead focused solely on the allegation that Mr. Rice was intoxicated and disorderly. However, and as noted above, Mr. Rice was only obligated to meet a burden of production and he was not required to reject or disprove every allegation offered by OSI. *Jaramillo v. Colorado Judicial Dept.*, 427 F.3d 1303, 1310 (10th Cir. 2005);¹¹ *Aka v. Wash. Hosp. Ct.*, 156 F.3d 1284, 1298-1299 (D.C. Cir. 1998); *Tomasso v. Boeing Co.*, 445 F.3d 702, 707 (3rd Cir. 2006); *Chapman v. AI Transport*, 229 F.3d 1012, 1050 (11th Cir. 2000); *Tyler v. RE/MAX Mountain States, Inc.*, 232 F.3d 808, 814 (10th Cir. 2000). In *Tyler*, the Tenth Circuit cited decisions from the Sixth and Seventh Circuit when it stated that "when the plaintiff casts substantial doubt on many of the employer's multiple reasons, the jury could reasonably find the employer lacks credibility" *Id.*, citing, *Chapman*, 229 F.3d at 1049-1051 and *Wilson v. AM General Corp.*, 167 F.3d 1114, 1120 (7th Cir. 1999); *see also, Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998) ("[a]n employer's strategy of simply tossing out a number of reasons ... in the hope that one of them will 'stick' could easily backfire.... [A] multitude of suspicious explanations may itself suggest that the employer's investigatory process was so questionable that any application

¹¹ ("a successful attack on part of the employer's legitimate, non-discriminatory explanation is enough to survive summary judgment even if one or more of the proffered reasons has not been discredited.").

of the ‘honest belief’ rule is inappropriate.”).¹² In sum, the trial court’s failure to consider all of Mr. Rice’s evidence constitutes reversible error because courts must analyze the totality of a plaintiff’s evidence when deciding the issue of pretext. *Carle*, 65 Wn. App. at 104; *Renz*, 114 Wn. App. 624; *Stegall*, 350 F.3d at 1069.

E. The Trial Court Erred by Relying on Unauthenticated and Inadmissible Hearsay Evidence.

Mr. Rice moved to strike evidence offered by OSI that was not authenticated, contained conclusory and speculative assertions, and constituted inadmissible hearsay. The trial court denied Mr. Rice’s motion on the grounds that, even though OSI’s evidence was unauthenticated and inadmissible to prove underlying facts, it showed Mr. Davis’ state of mind when terminating Mr. Rice. Verbatim Report of Proceedings, pp. 27-28.¹³ This ruling was in error because OSI offered the evidence to prove the truth of material facts in dispute which the trial court then relied on to reach factual conclusions.

¹² Because RCW 49.60 substantially parallels Title VII, federal cases interpreting Title VII are “persuasive authority for the construction of RCW 49.60.” *Estevez v. Faculty Club of University of Washington*, 129 Wn. App. 774, 793 (2005) citing, *Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wn.2d 675, 678 (1986).

¹³ Mr. Davis’ state of mind is inapplicable in this instance because the issue before the court focused on pretext. As such, it was Mr. Rice’s burden to show that OSI’s explanation was unworthy of credence. This analysis focuses solely on the evidence produced by Mr. Rice. By considering Mr. Davis’ state of mind as part of the pretext analysis the trial court conflated the parties’ respective burdens on summary judgment.

There is no dispute that the police reports were offered by OSI without proper authentication. Instead, OSI attempted to admit the police reports through the declaration of its counsel. Division Two has held that this is not a proper method to admit evidence on summary judgment. *Burnmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365 (1998). As a result, OSI did not satisfy the threshold requirements of Evidence Rule 901(a) or Civil Rule 56(e) when offering the police reports as part of its summary judgment submission.

The police reports were also inadmissible because they constitute hearsay, double hearsay, and because Washington law expressly states that police reports are not admissible in court. RCW 46.52.080. ER 801(c). OSI also offered declarations from Mr. Davis and Mr. Reed which contained numerous speculative, conclusory, self-serving statements that were not based on personal knowledge and were therefore inadmissible. *Roger Crane & Assoc., Inc. v. Felice*, 74 Wn. App. 769, 778-779 (1994).¹⁴ OSI offered these declarations, as well as the police reports, to prove that Mr. Rice was intoxicated and disorderly. OSI's briefing to the trial court

¹⁴ Affidavits submitted in support of, or in response to, a summary judgment motion must set forth facts that would be admissible in evidence. CR 56(e). Unless an affidavit sets forth facts, evidentiary in nature, that is, information as to "what took place, an act, an incident, a reality as distinguished from supposition or opinion", the affidavit does not raise a genuine issue for trial. Ultimate facts, conclusions of fact, or conclusory statements are insufficient to raise a question of fact. *Roger Crane & Assoc.*, 74 Wn. App. at 779 citing *Grimwood*, 110 Wn. 2d at 359-60. (internal citations omitted).

repeatedly asserted that this evidence, and especially the police reports, established that Mr. Rice was intoxicated and that he acted inappropriately. CP 39, 41, and 394. Moreover, the record shows that the trial court relied on this evidence, including the police reports, to reach the factual conclusion that Mr. Rice was intoxicated and disorderly. Accordingly, it was error for the trial court to deny Mr. Rice's motion to strike.

VI. CONCLUSION

On December 12, 2007, Mr. Rice was required to handle the crisis on board the Alaska Patriot because OSI violated its own policies and procedures. Instead of applauding Mr. Rice's initiative and leadership, OSI choose to second guess his actions, even though the matter was resolved without incident. In the end, OSI relied on subjective interpretations of questionable evidence to terminate Mr. Rice.

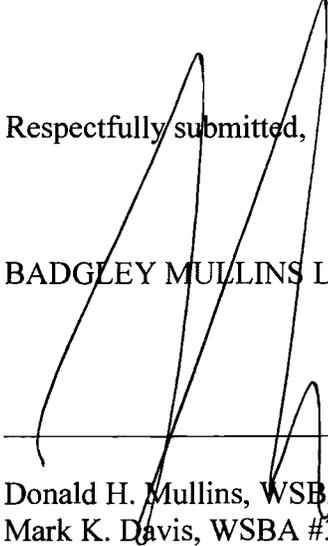
The backdrop to these events included an ongoing pattern of discrimination against Mr. Rice based on his age and seniority. After Mr. Rice's termination, OSI implemented a significant change whereby the top management positions were filled by substantially younger employees. The trial court disregarded these critical facts and focused only on one aspect of the case. However, the law requires the trial court to consider all of the facts, including evidence of discriminatory animus, when analyzing

the issue of pretext. This error was compounded by the trial court's decision to weigh the evidence, render credibility determinations, and view inferences in a manner favorable to the *moving* party while resolving issue of fact. Therefore, this Court should reverse the trial court's ruling and remand this matter for a jury trial.

Dated this February 14, 2011

Respectfully submitted,

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