72342-1

No. 72342-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Appellants,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Appellant Steven Lodis, through this second appeal, seeks a fourth trial on his claims against Respondents Corbis Holdings, Inc., Corbis Corporation and Gary Shenk (referred to collectively herein as "Corbis"). Having pled his case to 36 jurors without success, he blames the trial judge who painstakingly and thoroughly reviewed the evidence before making the rulings that Lodis challenges here. As the discussion below and the record before the Court show, there was no abuse of discretion and no error of law committed by the trial court. Lodis' claims simply lack merit.

In 2008, Shenk, Corbis' Chief Executive Officer ("CEO"), terminated Lodis' employment after Lodis lied to him, retaliated against a subordinate in violation of Shenk's clear instructions and failed to take specified steps set forth in a Performance Improvement Plan. After his termination, Lodis filed a complaint against Corbis alleging that he was discriminated against on the basis of age and fired in retaliation for admonishing Shenk for making age-related comments. When discovery revealed that Lodis failed to report a single hour of his vacation time during the three years he was employed with Corbis, Corbis asserted counterclaims alleging that Lodis had engaged in fraud, was unjustly enriched and breached his fiduciary duty to Corbis.

Lodis' retaliation claim was dismissed on summary judgment. After a three-week trial in 2009 on the parties' remaining claims, a jury found against Lodis on his age discrimination claim. It also found that Lodis breached his fiduciary duties to Corbis but awarded no damages. The trial court ordered a new trial on Corbis' breach of fiduciary duty counterclaim, finding the jury's failure to award damages contrary to undisputed evidence. After a second trial spanning two weeks in 2011, a jury again found that Lodis breached his fiduciary duty in failing to record vacation time, this time awarding Corbis $42,389.65 in damages.

Following the second trial, Lodis appealed. This Court reversed the prior summary judgment ruling dismissing Lodis' retaliation claim and remanded that claim for trial, but affirmed the jury verdicts on the age discrimination and breach of fiduciary duty claims. Corbis asserted an after-acquired evidence defense to Lodis' retaliation claim because it would have terminated Lodis once it discovered his misconduct. After a third two-week trial in 2014, the jury found against Lodis on his retaliation claim.

Before the third trial, the Honorable Bruce Heller, who also presided over the first and second trials, granted Corbis' motion in limine to preclude evidence of alleged age discrimination admitted in the first trial but now irrelevant to Lodis' retaliation claim. Corbis had sought to limit introduction of this evidence, or in the alternative, to permit introduction of

the jury's verdict rejecting Lodis' age discrimination claim, anticipating that Lodis would try to prejudice Corbis by portraying Shenk as an "ageist." Judge Heller initially ruled that Lodis would be limited to introducing evidence of the alleged discriminatory acts that gave rise to the retaliation claim, *i.e.,* the acts about which Lodis claimed to have admonished Shenk. Judge Heller also initially ruled that the age discrimination verdict would be inadmissible. Judge Heller later allowed for its admission mid-trial, but only after Lodis surreptitiously introduced evidence of alleged age discrimination about which he did not claim to have admonished Shenk, in violation of Judge Heller's ruling, unfairly prejudicing Corbis and Shenk.

Judge Heller also granted Corbis' motion in limine precluding Lodis from attempting to re-litigate the issue of his breach of fiduciary duty, as already proven by Corbis before two separate juries. Because this breach served as the basis for Corbis' after acquired evidence defense, Corbis feared Lodis would attempt to dispute whether such breach had occurred. Judge Heller first ruled that the verdict against Lodis on that claim is the law of the case, and then in a subsequent ruling, allowed Corbis to introduce evidence of the jury's verdict in the second trial to rebut argument from Lodis regarding the severity of his misconduct.

During the third trial, Lodis filed a motion for judgment as a matter of law on Corbis' after-acquired evidence defense, which Judge Heller

denied. After the jury rendered its verdict, Lodis filed a renewed the motion, which Judge Heller similarly denied.

Judge Heller's well-reasoned evidentiary decisions were not an abuse of discretion or otherwise made in error, and caused Lodis no prejudice given the overwhelming evidence to support the jury's verdict. This Court should affirm judgment in favor of Corbis on Lodis' retaliation claim and deny his request for a fourth trial.

II. RESTATEMENT OF ISSUES

A. Did the trial court abuse its discretion by attempting to limit the admission of evidence of alleged age discrimination to acts about which Lodis claims to have admonished Shenk, or by allowing admission of the jury's verdict on Lodis' age discrimination claim only after Lodis introduced evidence and testimony irrelevant to the retaliation claim to suggest that Shenk was an aegist? No.

B. Did the trial court err in ruling that the law of the case doctrine barred Lodis from re-litigating that Lodis breached his fiduciary duty, or abuse its discretion when ruling that the jury verdict finding Lodis' breached his fiduciary duty by failing to record any vacation time was relevant to Corbis' after-acquired evidence defense? No.

C. Did the trial court err in allowing the jury to consider Corbis' after-acquired evidence defense where substantial evidence supports a

finding that Lodis would have been terminated for violating the Time Reporting policy and Code of Conduct? No.

D. Did the trial court abuse its discretion in denying Lodis' motion for a new trial where the jury had substantial evidence to conclude that Corbis did not retaliate against Lodis for allegedly admonishing Shenk for making age-related comments? No.

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This Court reviews the evidence supporting the jury's verdict in the light most favorable to Corbis as the prevailing party after a trial on the merits. ***Lian v. Stalick***, 106 Wn. App. 811, 824, 25 P.3d 467 (2001).[1]

1. CEO Gary Shenk Places his Trust in Steve Lodis as Corbis' Senior Officer for Human Resources.

Corbis is one of the world's leading suppliers of digital images and stock photography. ***Lodis v. Corbis Holdings, Inc.***, 172 Wn. App. 835, 842, 292 P.3d 779 (2013). In July 2005, Steve Davis, Corbis' then CEO, hired Lodis as Corbis' Vice President of Worldwide Human Resources. *Id.*, 172 Wn. App. at 842.

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[1] This restatement of the case cites to the evidence introduced in the third trial related to Lodis' retaliation claim, in the first trial related to Lodis' age discrimination claim, and in the second trial related to Corbis' breach of fiduciary duty counterclaims as considered by this Court in affirming the jury verdicts related to those claims in ***Lodis v. Corbis Holdings, Inc.***, 172 Wn. App. 835, 292 P.3d 779 (2013).

Shenk, Corbis' current CEO, was hired by Davis as Davis' replacement in July 2007.[2] (5/19 RP 33-34) As Shenk was transitioning to CEO, Davis expressed concerns about Lodis' performance and suggested that Shenk consider terminating Lodis. (5/19 RP 44, 48; Ex. 339). Shenk did not follow Davis' advice, choosing instead to give Lodis a second chance. (5/19 RP 44-46)

In the fall of 2007, Shenk gave Lodis a favorable performance review in which he referred to Lodis as his "trusted advisor," (5/21 RP 120-121; Ex. 47) and in early November 2007 announced his decision to promote Lodis to Senior Vice President of Human Resources, making Lodis a member of Shenk's nine-member Executive Team. (5/21 RP 146-147; Ex. 61) Shenk also increased Lodis' salary by $45,000 to a total annual salary of $260,000. *Id.* On or about December 20, 2007, Shenk issued a letter to Lodis documenting Lodis' promotion to Senior Vice President of Human Resources.[3] (5/15 RP 99-101; 5/19 RP 53-55, 72-74; Exs. 61, 366) Both before and after his promotion, Lodis was the highest ranking Human Resources Officer at Corbis. (5/19 RP 152; 5/22 RP 52)

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[2] The report of proceedings for the third trial in 2014 was not sequentially paginated. Thus, citations to the report of proceedings for the third trial are by date, *e.g.*, "3/19 RP." Exhibits are cited as "Ex.__."

[3] Although Shenk had received reports from Executive Team members expressing concerns about Lodis' performance prior to December 20, 2007, as of that date, Shenk continued to trust in Lodis and to believe in his decision to promote him. (5/15 RP 100-101; 5/19 RP 74-76; Ex. 61)

2. Lodis' Poor Performance and Violations of Trust Result in Probation and Ultimately, Termination.

When Shenk took over in 2007, his primary goal was to revitalize the company and reposition Corbis, which had previously focused on print media and stock photography, as an internet media company. (3/19 RP 34-35) Shenk hired a consultant to conduct a "360 review" and obtain anonymous upward feedback about each member of the Corbis Executive Team from their direct reports, summarizing each team member's strengths and weaknesses. (5/19 RP 76-79, 81-82; Exs. 62, 66, 79, 395) ***Lodis***, 172 Wn. App. at 84. The consultant, after extensive interviews, reported that the feedback for Lodis was "off the charts negative," and recommended placing Lodis on probation. [4] (5/19 RP 82-85, 94-95; 5/20 RP 39-40; Ex. 84); ***Lodis***, 172 Wn. App. at 84.

One criticism of Lodis related to his mismanagement of the Human Resources aspects of Corbis' acquisition of a Canadian company, known as Veer. (5/19 RP 64-67) Specifically, Lodis failed to promptly provide Veer's executives with Corbis employment agreements and in a post-acquisition strategy meeting was unable to cogently present Corbis' long-term incentive program to Veer's key employees that Corbis wished to

[4] Lodis contends that the "360 review" was directed solely toward him; the consultant, however, reviewed the other Corbis Executive Team members, including Shenk, as well. (Exs. 71, 77, 380, 401, 402, 404, 409, 410)

retain. (5/19 RP 64-67, 69-72) Additionally, Lodis failed to facilitate a timely search for a new Chief Financial Officer ("CFO") after Sue McDonald, Corbis' then CFO, announced her resignation in October 2007, leaving this important position vacant for months. (5/19 RP 68-69; Ex. 360)

On March 5, 2008, Shenk placed Lodis on a Performance Improvement Plan ("PIP"), documenting the deficiencies in Lodis' performance. (5/15 RP 172-173; Ex. 98) In the PIP, Shenk advised Lodis "that [his] continued employment with Corbis [was] in jeopardy unless significant and lasting changes [were] made." (Ex. 98) Shenk specifically directed Lodis to discuss his working relationships with his peers, complete performance evaluations for Corbis employees reporting to Lodis, and to address ongoing operational issues, including the search for a new CFO. *Id.*

Shenk also instructed Lodis not to "blame" his subordinates or otherwise engage in retaliatory conduct for their comments in the 360 review. (Ex. 98) Nevertheless, on March 12, 2008, Shenk received an email from one of Lodis' subordinates, Kirsten Lawlor, Corbis' then Director of Global Recruiting and Human Resources, indicating that Lodis had indeed retaliated against her for her comments to the 360 review consultant. (5/19 RP 140-144; 5/29 RP 27; Ex. 99)

On March 24, 2008, Shenk notified Lodis that Lodis had still not completed reviews of his subordinates and had not taken steps to improve

his relationship with other members of the Executive Team. (5/19 RP 125-135; Ex. 434) Lodis responded by stating that he had, in fact, met with most of the Executive Team. *Id.* But when Shenk followed up with these individuals about their meetings with Lodis, several Executive Team members disputed the extent and the substance of their meetings as reported by Lodis to Shenk, in one case denying altogether that a meeting took place. (5/19 RP 131-135) Shenk concluded that Lodis' reports of his meetings were either deliberate fabrications or gross misrepresentations. (5/19 RP 131-135, 145)

On March 26, 2008, Shenk terminated Lodis for three reasons: (1) Lodis' ongoing performance issues; (2) an irreparable loss of trust in Lodis on the part of Shenk and other Executive Team members; and (3) Lodis' retaliatory behavior toward Lawlor. (5/15 RP 193; 5/19 RP 144-145)

3. Corbis Discovers That Lodis Violated the Code of Conduct by Failing to Follow the Time Reporting Policy.

Less than three months after his termination, Lodis filed suit against Corbis and Shenk alleging age discrimination under RCW 49.60.180 and retaliation under RCW 49.60.210. ***Lodis***, 172 Wn. App. at 841, 844. In preparing its defense, Corbis noticed that at the time of his termination, Lodis was paid out $41,555 plus a 401(k) match of $1,235 for 329 hours of unused vacation time based upon Lodis' failure to record a single hour of

vacation time during his three years at Corbis.[5] (5/19 RP 148-149, 151-155); ***Lodis***, 172 Wn. App. at 844-45.

All employees were expected to follow Corbis' Time Reporting policies as set forth in the Employee Handbook, including Lodis and all other Executive Team members. (5/19 RP 146-147; Ex. 334) Lodis, in particular, as the highest ranking Human Resources Officer, was responsible for implementing, overseeing, and ensuring compliance with those policies. (5/19 RP 149) Included in those polices is Corbis' Code of Conduct, which sets forth as examples of impermissible conduct: (1) falsification or misrepresentation of Company records, such as time reports; (2) violation of any Corbis policy; and/or (3) any activity that has an adverse effect on the Company's interests. (5/19 RP 149; Ex. 334, at 40-41) Corbis' Time Reporting policy required all employees to report time taken for vacation. (5/19 RP 146-147; Ex. 334; Ex. 336) Human Resources was the specified "owner" of the policy. (Ex. 336, at 16)

It is a terminable offense at Corbis to falsify one's time records in violation of Corbis' Time Reporting policy and Code of Conduct. (5/11 RP 111; 3/10/10 RP 63). Had Lodis still been employed with Corbis at the time

[5] Corbis additionally learned that Lodis had received double payment of a $35,000 bonus during his employment, which he had retained. ***Lodis***, 172 Wn. App. at 845.

Shenk learned of Lodis' failure to record any vacation use, Shenk would have fired him. (5/19 RP 152-155)

After learning of Lodis' violation of its Time Reporting policy and Code of Conduct, Corbis filed counterclaims against Lodis for breach of fiduciary duty, fraud and unjust enrichment.[6] (5/19 RP 155; Ex. 485); ***Lodis***, 172 Wn. App. at 845.

B. Procedural History.

1. Lodis Sues Corbis; His Claims are Dismissed by the Trial Court and Rejected by the First Jury.

Lodis' filed his Complaint against Corbis on June 16, 2008. In November 2009, the Honorable Michael Hayden granted summary judgment in favor of Corbis on Lodis' retaliation claim. ***Lodis***, 172 Wn. App. at 844. Lodis' remaining age-discrimination claim along with Corbis' counterclaims were tried to a jury before Judge Heller from February 24 to March 18, 2010. In support of his age discrimination claim, Lodis alleged, *inter alia*, that Shenk wanted to replace older members of his Executive Team with younger members and made numerous comments indicating his preference for younger workers. ***Lodis***, 172 Wn. App. at 842-843. The jury rejected these claims, finding that Corbis and Shenk had not engaged in age discrimination. (Ex. 484); ***Lodis***, 172 Wn. App. at 845. This Court

[6] Corbis additionally asserted these counterclaims against Lodis for his retention of the duplicative $35,000 bonus. ***Lodis***, 172 Wn. App. at 845.

subsequently upheld the jury's verdict. *See* ***Lodis***, 172 Wn. App. at 842, 845 (affirming the jury's finding "that Corbis [and Shenk] had not engaged in age discrimination").

The first jury also found in favor of Corbis on its counterclaim for breach of fiduciary duty, concluding that Lodis had breached his fiduciary duty to Corbis by accepting the duplicate bonus payment and failing to record his vacation usage, but awarded no damages. ***Lodis***, 172 Wn. App. at 845. Judge Heller granted a new trial on Corbis' fiduciary duty counterclaim because the finding that Lodis breached his fiduciary duty to Corbis was irreconcilable with the jury's failure to award damages. *Id.*

2. A Second Jury Finds That Lodis Breached His Fiduciary Duty and Awards Damages to Corbis.

A second trial was held from March 9-17, 2011[7] The second jury again returned a verdict in favor of Corbis on its claim that Lodis breached his fiduciary duty by failing to report his vacation time, this time awarding damages of $42,389.65.[8] (Ex. 485); *Id.,* 172 Wn. App. at 845-46. This Court upheld the second jury's verdict. *Id.*, 172 Wn. App. at 861 ("It was for the jury to find, based on the evidence, that Lodis profited at the

[7] Prior to the second trial, Corbis successfully moved for summary judgment to establish that Lodis owed Corbis' fiduciary duties as its highest ranking Human Resources Officer. ***Lodis***, 172 Wn. App. at 845.

[8] The jury in the second trial found that Lodis did not breach his fiduciary duty by retaining the duplicative $35,000 bonus payment. ***Lodis***, 172 Wn. App. at 845-46.

company's expense by not recording any vacation time, thereby breaching his fiduciary duties of undivided loyalty and care. We find no error.").

3. Following Appeal, Lodis' Retaliation Claim is Remanded for Trial Before A Third Jury.

Lodis appealed following the second trial. On January 14, 2013, this Court affirmed the prior judgments and jury verdicts regarding the age discrimination and breach of fiduciary counterclaim, but reversed Judge Hayden's order granting summary judgment on Lodis' retaliation claim. *Id.*, 172 Wn. App. at 852. As a result, the retaliation claim was remanded for what would be the third trial in this action, held before Judge Heller in May 2014. *Id.*, 172 Wn. App. at 852.

4. Lodis' Retaliation Claim is Premised Upon Five Alleged Admonishments of Shenk.

To establish a claim for retaliation under RCW 49.60.210, Lodis needed to show that he had engaged in certain protected activity and that Corbis, in turn, took adverse employment action against him for having done so. ***Lodis***, 172 Wn. App. at 846-47. Lodis alleged that his protected activity was comprised of admonishing Shenk on five (5) separate occasions for making "ageist" comments. (CP 1029-1031; 5/21 RP 107-108) Corbis and Shenk deny that any of these admonishments ever occurred. (5/15 RP 95, 167; 5/19 RP 172; 5/20 RP 53-54)

Lodis testified that the first of the five alleged admonishments took place at some time in early spring of 2007, after Shenk allegedly referred to Tim Sprake, Corbis' then Director of Compensation and Benefits, as the "old guy" on Lodis' Human Resources team.[9] (5/21 RP 22-24, 118-119) Shenk denied ever referring to Sprake in that manner, or ever being admonished by Lodis regarding Sprake. (5/15 RP 167; 5/19 RP 16-17)

Lodis next testified that in the spring or summer of 2007, he admonished Shenk for a second time after Shenk referred to his new Executive Team as a "young team," which was brought to Lodis' attention by Kate O'Brien, Corbis' then Human Resources Manager. (5/21 RP 16-18, 111-112) Lodis testified that he again admonished Shenk in August or September 2007 for referring to his Executive Team as a "young team" after Lodis allegedly discussed the issue with Sue McDonald, Corbis' then CFO.[10] (5/21 RP 19-10, 118, 137) Shenk admitted that he referred to his Executive Team in that manner but that it had nothing to do with age and was meant "to express the passion, energy, and newness, the new thinking

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[9] Lodis testified that he asked Shenk to "stop referring to [Sprake] as 'the old man on the team.'" (5/21 RP 23-24) Lodis, not Shenk, ultimately terminated Sprake's employment in July 2007 as part of an efficiency layoff. (5/21 RP 119; 5/22 RP 33)

[10] Lodis himself admitted that he did not find Shenk's reference to his Executive Team as a "young, energetic team" to be offensive. (5/21 RP 156)

that those team members brought to the table."[11] (5/19 RP 36) But Shenk denied that Lodis ever discussed this issue with him. (5/15 RP 167; 5/19 RP 13-15)

Lodis further testified that, in approximately November 2007, he admonished Shenk for a fourth time after Shenk referred to Pam Hassel, a Corbis employee who had been identified for possible termination as part of a reduction in force, as "old." (5/21 RP 21-22, 119-120) Shenk denied ever referring to Hassel in that manner and denied that Lodis ever discussed this issue with him at any point. (5/15 RP 167; 5/19 RP 15-16, 39)

Finally, Lodis testified that in late November or early December 2007, he admonished Shenk for a fifth time after Shenk expressed that he wished to replace Mark Sherman, then Senior Vice President of Corbis' Green Light Division, with a "young Hollywood type."[12] (5/21 RP 25-26) Shenk denied that he sought to replace Sherman with a "young Hollywood type" though he acknowledged that he considered an applicant for employment who resided in the Hollywood, California area and who was

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[11] The majority of members on Shenk's Executive Team were over 40 years of age, and several members were over 50 years of age. (5/19 RP 36-37)

[12] Lodis testified that during that conversation he told Shenk: "Gary, I understand your desire to take Mark out, but there is no need to reference a 'young Hollywood type.'" (5/21 RP 26) Lodis additionally testified that it is his belief that merely referring to someone as a "young Hollywood type" would not be unlawful. (5/21 RP 160) He further admitted that Shenk did not terminate Sherman and that Sherman remained employed as the head of Corbis' Green Light Division for the duration of Lodis' employment and beyond. (5/21 RP 153; 5/22 RP 34)

looking to move to Seattle.[13] (5/19 RP 17, 39-41; 5/20 89-90; 5/21 150-153; Ex. 89). Shenk again denied Lodis ever expressed any concerns regarding this issue to him. (5/15 RP 167; 5/19 RP 15-16)

Lodis claims that in early December 2007, he reported his concerns about Shenk's comments to Jim Mitchell, Corbis' then General Counsel. (5/21 RP 26-17) Mitchell denied that this conversation ever occurred. (5/20 RP 53-54) Even if it did, Lodis admitted that he has no knowledge of whether Mitchell informed Shenk of his conversation with Lodis other than mere "speculation." (5/21 RP 160) Indeed, Lodis' allegations regarding the five alleged admonishments are based entirely upon his own testimony. He introduced no written documents or corroborating testimony during trial evidencing that any of the admonishments took place.[14] (5/29 RP 22-24)

5. The Trial Court Enters Orders In Limine Restricting the Evidentiary Scope of the Trial to Lodis' Retaliation Claim.

Prior to commencement of the third trial, Corbis filed motions in limine seeking to appropriately limit the scope of the trial to the one remaining claim at issue. Specifically, Corbis moved to preclude Lodis

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[13] The applicant was approximately the same age as Sherman. (5/20 RP 103)

[14] Lodis claims that he maintained documentation of the admonishments in his Corbis office files but that Corbis "destroyed" the documents after Lodis initiated his underlying lawsuit. (5/29 RP 22-24) At no time did Lodis seek relief through the trial court for such alleged spoliation of evidence. *Id.* Corbis produced all of Lodis' notes during discovery and vehemently denied it destroyed or withheld any documents. (5/21 RP 114-115, 142-145; Exs. 539, 540)

from attempting to use irrelevant and prejudicial evidence of alleged age discrimination, which had already been rejected by the jury in the first trial. Corbis also moved to preclude Lodis from attempting to re-litigate the issue of whether he had breached his fiduciary duty – an issue central to Corbis' after acquired evidence defense.[15] Judge Heller granted each motion and entered orders limiting the admission of evidence. (CP 3321-3322)

a. The Trial Court Orders that Evidence of Alleged Age Discrimination Be Limited to the Five Alleged Admonishments.

In its motion to preclude certain evidence of alleged age discrimination, Corbis argued that evidence and testimony of alleged age discrimination not related to Lodis' claimed admonishments was inadmissible under the legal doctrines of law of the case and collateral estoppel, as well as pursuant to the applicable rules of evidence. (CP 261-265) Judge Heller did not accept Corbis' law of the case or collateral estoppel arguments but did grant Corbis' motion based upon its evidentiary arguments, reasoning as follows:

> The issue in the first motion is whether the same evidence of age discrimination that was introduced in the first trial to prove that Lodis' termination was based on his age is now admissible to provide retaliatory discharge. Lodis cites *Brundridge*[16] for the proposition that an employer's treatment of other employees is

[15] (CP 257-267 (age discrimination); CP 275-286 (breach of fiduciary duty))

[16] The trial court's citation is to the Washington Supreme Court's decision in ***Brundridge v. Fluor Fed. Servs., Inc.***, 164 Wn.2d 432, 191 P.3d 879 (2008).

> admissible to show retaliatory discharge. That's true, but the treatment of other employees in *Brundridge* was retaliation, not any type of discriminatory behavior. Thus, *Brundridge* would allow Lodis to introduce evidence of retaliatory behavior by Shenk towards other employees. Lodis will also be permitted to introduce evidence concerning the alleged discriminatory behavior by Shenk that Lodis admonished Shenk about. But alleged ageist statements by Shenk that Lodis did not address with Shenk are inadmissible. Counsel will recall that during the first trial the court ruled that alleged sexist remarks by Shenk were not admissible to prove age discrimination. The same logic applies here with respect to the connection between ageist remarks and retaliatory motives.

(CP 3322)

b. Lodis Repeatedly and Surreptitiously Introduces Evidence Excluded by the Trial Court's Order, Requiring Admission of the First Jury Verdict.

In conjunction with his ruling that Lodis would be limited to introducing evidence of alleged "admonishments" he made to Shenk, Judge Heller initially ruled that the age discrimination verdict from the first trial would be inadmissible. (5/14 RP 3-4) But during the proceedings Lodis continued to introduce broad evidence and testimony of alleged age discrimination in violation of the trial court's order.[17] (CP 3322) For example, Lodis repeatedly testified about and referred to the ages of Executive Team members and suggested that Shenk was motivated to make age-based employment decisions, even though there was no allegation that

[17] Appendix 1 sets forth numerous instances where Lodis interjected alleged evidence of age discrimination or "ageist" conduct by Shenk, which had no relation to the alleged five admonishments at issue in this retaliation claim.

Lodis ever admonished Shenk for these decisions. (*See, e.g.*, 5/21 RP 27) Lodis also suggested that Shenk had made "ageist" comments for which Lodis did not admonish Shenk. (*See, e.g.*, 5/19 RP 173-174, 199-200)

On each occasion, Corbis objected to the admissibility of such evidence and asserted that, as a result, Lodis had "opened the door" to the admissibility of the age discrimination verdict by suggesting that Shenk was an "ageist."[18] The trial court repeatedly upheld its prior ruling excluding the admissibility of the age discrimination verdict while cautioning Lodis' counsel that "he was taking a bit of a risk [that the Court may find the prior verdict admissible] by going down th[at] road." (5/15 RP 105-106)[19]

Ultimately, on the fifth day of trial, after Lodis repeatedly elicited testimony suggesting that Shenk was biased against older workers and had engaged in age discrimination, the trial court concluded that Lodis had opened the door to admission of the age discrimination verdict as follows:

> I've spent a fair amount of time thinking about the issue of whether the prior jury verdict regarding age should come into evidence. As you know, my primary concern in ruling that it should stay out is I was concerned, as I indicated this morning, that if the jury was aware of that verdict, that they might make shortcuts and, for example, decide that if there is no basis for the age claim, then there is no basis for the retaliation claim. However, there has been evidence, quite a bit of evidence, regarding age within the context

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[18] (*See, e.g.*, 5/15 RP 105-107; 5/19 RP 200-201)

[19] (*See also* 5/19 RP 203 ("I'm not going to make any rulings at this point as to whether or not the door has been opened on the age claim. At this point, I'll hold the line on that as well as what happens tomorrow."))

> of the retaliation claim. I'm thinking particularly of the evidence that came in yesterday in the cross-examination of Mr. Shenk regarding the fact that Mr. Shenk turned to Gillett, Brotman, and whoever the third member was of the executive team who were the younger members of the team, and the argument was that they wouldn't have stood up to him. That was one inference that could be drawn from it. I think that's an example of the jury hearing evidence regarding age and not knowing what to do with it. Mr. James has persuaded me that just as Mr. Lodis needs to be protected from what I refer to as "shortcuts," I think Corbis also needs to be protected from the opposite thinking, which is, Well, we think that Mr. Shenk engaged in age discrimination by going to the younger members of the team, for example. So I think the jury needs some kind of a limiting instruction that tells them that the two issues are entirely separate . . . .

(5/21 RP, 126-127; 134-135) After ruling that the jury verdict was admissible, the trial court gave the jury a limiting instruction as follows:

> Members of the jury, during this trial, you have heard that a prior jury found Mr. Lodis's termination was not the result of age discrimination. You must keep in mind that this is a retaliation case, not an age discrimination case. The issue of whether the defendants engaged in age discrimination is not before you and should not be considered by you in evaluating Mr. Lodis's retaliation claim. With respect to retaliation, the issues you must decide are, one, whether Mr. Lodis reasonably believed that Mr. Shenk made ageist comments; and, two, whether Mr. Lodis's alleged expressions of concern to Mr. Shenk about these comments was a substantial factor in his termination. That concludes the instruction. Thank you.

(5/22 RP 131)

c. The Trial Court Precludes Lodis from Re-Litigating His Proven Breach of Fiduciary Duty.

Corbis' motion in limine regarding Lodis' prior breach of fiduciary duty sought to prohibit Lodis from now denying that such breach had

occurred – a fact established in two prior trials before two prior juries. (CP 257-267) Lodis' breach of fiduciary duty was directly relevant to its after-acquired evidence defense, in that Lodis' misconduct would have otherwise led to a justified termination, thereby limiting any damages he could recover for what he was alleging to be a wrongful, retaliatory termination. In litigating this defense, Corbis argued that Lodis should be prohibited under the legal doctrines of law of the case and collateral estoppel from denying that his failure to record vacation time constituted a breach of his fiduciary duties to Corbis. (CP 280-284) Judge Heller granted Corbis' motion, reasoning as follows:

> As to the second motion, the jury's verdict against Lodis regarding the breach of fiduciary duty is that law of the case. Lodis will therefore not be permitted to re-litigate the issue by arguing, for example, that acceptance of the vacation pay-out after his termination precludes a breach of fiduciary duty claim. The focus at trial will be on whether Corbis would have terminated Lodis had it known about Lodis' failure to record vacation time.

(CP 3322)

During the proceedings, Judge Heller then ruled that the verdict from the second jury on Corbis' breach of fiduciary duty claim was relevant and admissible under the rules of evidence, reasoning as follows:

> There are some other prior jury verdicts. I am going to allow the jury to hear that a prior jury found that Mr. Lodis violated his breach of fiduciary duty by failing to record his vacation time and also that his acceptance of the double bonus was not a breach of the fiduciary duty. My reasoning for doing that is one of the issues

> in the after-acquired evidence defense that will be raised by Corbis is that they have to show that Mr. Lodis's conduct was serious. And then, of course, they have to show that if they had known about it, they would have terminated him. The fact that a prior jury found that he breached his fiduciary duty is clearly relevant to the seriousness issue.

(5/14 RP 4-5; 5/15 RP 6-7; Ex. 484)

6. The Trial Court Allows The Jury To Consider Corbis' After-Acquired Evidence Defense.

Prior to the third trial, Lodis moved for judgment as a matter of law under CR 50 on Corbis' after-acquired evidence defense.[20] (CP 1719-1729). The trial court denied Lodis' motion, reasoning as follows:[21]

> I wanted to address a number of pending motions. The first is plaintiff's motion for judgment as a matter of law on defendants' after-acquired evidence defense. And the issue that is being argued is whether or not there is any actual employment practice of terminating employees for not recording vacation. Mr. Sheridan argues that in the absence of any evidence of that, there can be no after-acquired evidence defense; it can't be based on a statement that "I would have terminated somebody." The problem that I have with that argument is that even if there has not been a termination based on this kind of conduct, the question is: Has there ever been this kind of conduct in the past that would warrant termination? I know that there are disputes between the parties as to what the

[20] Corbis had previously moved for partial summary judgment on its after acquired evidence defense, arguing that the defense had been established, as a matter of law, because there had been a finding that Lodis breached his fiduciary duty, and there was undisputed evidence that this breach was a terminable offense. (CP 27-30) The Court acknowledged the validity of Corbis' defense, yet found that there were questions of fact for a jury, explaining: "[t]he question at this stage is not whether Corbis can establish the elements of the after-acquired evidence defense at trial, but whether the evidence is so strong that no reasonable juror could find otherwise." (CP 27-28)

[21] After the jury rendered its verdict, Lodis filed a renewed CR 50 motion on Corbis' after-acquired evidence defense on identical grounds, which Judge Heller similarly denied. (CP 2015-2039; 2414-2415)

> practice has been and whether or not other employees have failed to record vacation. As I understand Corbis's argument, there is a difference between not recording an insignificant number off [sic] days, however one wants to define that, and this situation. I think that question really needs to be decided by the jury. So based on the reasons that I have already given previously, I will allow the after-acquired evidence defense to go to the jury.

(5/22 RP 2-3)

7. The Third Jury Rules in Corbis' Favor, Rejecting Lodis' Retaliation Claim; the Trial Court Denies Lodis' Motion For A New Trial.

Following an eight day trial, the third jury returned a verdict in Corbis' favor on May 30, 2014, finding that Corbis had not engaged in retaliation. (5/30 RP 3-4). Lodis filed a motion for a new trial under CR 59. (CP 2015-2039) The trial court denied Lodis' motion (CP 2414-2415) and entered judgment for Corbis. (CP 2418-2419)

IV. ARGUMENT

A. Standard of Review.

This Court reviews the trial court's evidentiary decisions for abuse of discretion. *See, e.g.,* ***State v. Quaale***, 182 Wn.2d 191, 196, 340 P.3d 213 (2014) (evidentiary rulings are reviewed for abuse of discretion). Discretion is abused when a court's decision is manifestly unreasonable or based on untenable grounds or reasons. ***Olver v. Fowler***, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). The trial judge has wide discretion in balancing the probative value of evidence against its potential prejudicial impact. ***State v.***

Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." ***Quaale***, 340 P.3d at 216.

Issues of law are reviewed *de novo*. ***State v. T.E.C.***, 122 Wn. App. 9, 25, 92 P.3d 263, *review denied*, 152 Wn.2d 1012, 106 P.3d 243 (2004). When reviewing an order denying a motion for judgment as a matter of law, an appellate court applies the same standard as the trial court. ***Grove v. PeaceHealth St. Joseph Hosp.***, 182 Wn.2d 136, 143, 341 P.3d 261 (2014); *see also* ***Sing v. John L. Scott, Inc.***, 134 Wn.2d 24, 29, 948 P.2d 816 (1997) (motion for judgment as a matter of law properly denied where there is substantial evidence to sustain a verdict for the nonmoving party).

B. The Trial Court's Rulings Regarding Evidence of Age Discrimination Were Appropriate, Reasonable, and Not an Abuse of Discretion.

As a threshold matter, Lodis identifies the incorrect standard for review of the trial court's rulings regarding evidence of age discrimination, claiming that *de novo* review is appropriate. To arrive at this result, Lodis inaccurately suggests that the trial court relied upon the law of the case and collateral estoppel doctrine when limiting such evidence. (App. Brief, at 34-40). It did not. Rather, in his letter ruling from May 5, 2014, Judge Heller limited Lodis' introduction of age discrimination allegations based

on evidentiary standards and considerations, including those articulated by the Washington State Supreme Court in ***Brundridge v. Fluor Fed. Servs., Inc.***, 164 Wn.2d 432, 191 P.3d 879 (2008). (CP 3322) Judge Heller later based his subsequent evidentiary ruling admitting the age discrimination verdict on evidentiary standards and considerations of prejudice. (5/21 RP, 126-127)

Given the reasoning of Judge Heller's rulings, an abuse of discretion standard of review applies. Lodis cannot show that those rulings were manifestly unreasonable or based on untenable grounds or reasons.

1. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence Of Alleged Age Discrimination Unrelated To Actions About Which Lodis Allegedly Admonished Shenk.

The sole claim in the most recent third trial was Lodis' allegation that Corbis retaliated against him for admonishing Shenk on five specific occasions for making ageist comments. (CP 1029-1031; 5/21 RP 107-108) Lodis' retaliation claim is separate and distinct from any broader claim of age discrimination in that it is premised upon the specific allegation that Lodis engaged in certain protected activity and that Corbis, in turn, took adverse employment action against him for having done so.[22]

[22] Lodis concedes that he introduced evidence of alleged age discrimination in the first trial evidence "for a different purpose, on a different issue, [and] in an entirely different context that [sic] in the third trial." App. Brief, at 38.

Thus, the relevant factual disputes before the jury with regard to Lodis' retaliation claim were whether Lodis engaged in protected activity (*i.e.* whether he ever admonished Shenk), and whether Corbis was motivated by such protected activity in taking any subsequent adverse employment action against Lodis. ***See Lodis***, 172 Wn. App at 846-47. Whether Shenk actually harbored any age-based bias against Lodis or any other employees was irrelevant to Lodis' retaliation claim. The trial court specifically recognized and relied upon this distinction in its ruling on Corbis' motion, illustrating the contrast by analogy in comparing the irrelevance of allegations of sex discrimination to prove age discrimination, and specifically reasoning that "[t]he same logic applies here with respect to the connection between ageist remarks and retaliatory motives." (CP 3322)

Lodis argues, and Corbis acknowledges, that to establish that he engaged in protected activity to prove his retaliation claim, the law requires Lodis to show that he had an "objectively reasonable belief" that the conduct he allegedly opposed was unlawful—not that the conduct actually was unlawful. ***See Lodis***, 172 Wn. App. at 852. Such a requirement, however, does not render alleged ageist comments about which Lodis did not see fit to admonish Shenk in any way relevant to Lodis' claim that he had a reasonable belief that the conduct he allegedly opposed was unlawful, nor does it have a tendency to make it more probable that Lodis was

retaliated against for having engaged in such opposition activity. *See* ER 401; 402. If anything, that Lodis concluded the additional information was not worth mentioning to Shenk shows it lacks probative value. *Id.*

Lodis was required to prove he reasonably believed *the activity about which he allegedly complained* was unlawful.[23] Judge Heller's ruling specifically relies upon this distinction in allowing for the admissibility of only those allegations of age discrimination that formed the basis of Lodis' claimed protected activity—that is, alleged acts forming the basis of "the conduct [Lodis] complained of." *See* ***Renz***, 114 Wn., App., at 619; (CP 3322)

To accept Lodis' assertion that he should essentially be given *carte blanche* to introduce unlimited allegations of age discrimination – regardless of their connection with the protected activity at issue with his retaliation claim – would be unfairly prejudicial to Corbis. *See* ER 403. As Corbis argued in its motion in limine, any probative value that such evidence could possibly have would be far outweighed by the risk of jury confusion as to whether this was truly an age discrimination or retaliation

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[23] (CP 2003 (Jury Instruction No. 9)); ***Renz v. Spokane Eye Clinic, P.S.***, 114 Wn. App. 611, 619, 60 P.3d 106 (2002) ("It is not necessary that the conduct complained of actually be unlawful. [A]n employee who opposes employment practices reasonably believed to be discriminatory is protected by the 'opposition clause' [under RCW 49.60] whether or not the practice is actually discriminatory.") (emphasis added) (internal quotations and citation omitted).

case, as well as the risk of unfair prejudice, given that Lodis may have presented the evidence to create the unfair impression that Shenk was an ageist. (CP 257-267) At a minimum, consideration (and rebuttal) of such age discrimination evidence would have presented undue cost, delay, and inefficiency. *Id.*

The trial court properly and reasonably weighed these factors and limited Lodis to the introduction of evidence relevant to his claim for retaliation. ER 401; 402. It is telling that when attempting to assign error to this ruling, Lodis focuses on collateral estoppel and law of the case -- reasoning not actually adopted by the trial court. Lodis offers no coherent argument as to why the trial court's rulings were so contrary to the principles of ER 401, 402, and 402–the reasoning the trial court did articulate–so as to constitute an abuse of discretion. Indeed, there was no abuse of discretion and judgment should be affirmed.

2. The Trial Court Did Not Abuse Its Discretion In Admitting The Prior Jury Verdict On Lodis' Failed Age Discrimination Claim Out Of Considerations Of Prejudice.

Judge Heller initially ruled that the age discrimination verdict was inadmissible. (5/14 RP 3-4) Corbis did not contest or otherwise object to the trial court's ruling, conceding that the verdict was irrelevant to the issue of whether Corbis retaliated against Lodis for having allegedly admonished

Shenk on five occasions for making age-based comments. (5/14 RP 7-8) At the time of the Court's initial ruling, however, Corbis simultaneously expressed its "serious concern" that Lodis would nonetheless seek to introduce evidence of alleged age discrimination that did not form the basis of any of the five admonishments in an attempt to raise the inference that Shenk is an "ageist." (5/14 RP 8) Unfortunately, Corbis' concerns became a reality when, throughout the proceedings, Lodis repeatedly introduced testimony of alleged age discrimination about which he did not allegedly admonish Shenk, in direct violation of the trial court's prior ruling, thereby "opening the door" to admission of the jury verdict.[24] (CP 3322; Appendix 1).

As a direct result of Lodis' insistence on introducing inadmissible evidence that unfairly left the jury with the inference that Shenk was biased against older workers, Judge Heller reversed his prior ruling mid-trial and allowed Corbis to introduce the age discrimination verdict in order to "protect" Corbis against any unfair conclusion that Shenk had engaged in age discrimination. (5/21 RP 126-127; 134-135) Specifically recognizing

[24] Under the "open door" rule, if one party raises a material issue, the opposing party is generally permitted to "explain, clarify, or contradict the evidence." ***State v. Berg***, 147 Wn. App. 923, 939, 198 P.3d 529 (2008) (citing ***State v. Price***, 126 Wn. App. 617, 109 P.3d 27 (2005)); *see also* 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.14-.15 (5th ed. 2007) (under the "open door" rule, a party may waive its objection to inadmissible evidence by raising the subject matter at trial).

that Lodis had introduced "quite a bit of evidence regarding age within the context of the retaliation claim," (5/21 RP 126) Judge Heller reasoned that admission of the prior jury verdict was necessary because Corbis was entitled "to be protected . . . from . . . 'shortcuts' . . . [inferring] that Shenk engaged in age discrimination." (5/21 RP 127)

Evidentiary decisions made under the "open door" rule are reviewed for abuse of discretion. ***State v. Wilson***, 20 Wn. App. 592, 594, 581 P.2d 592 (1978). Here, Judge Heller's ruling was cautiously and carefully made after much deliberation and cannot be viewed as "manifestly unreasonable or based on untenable grounds or reasons." ***Olver***, 161 Wn.2d at 663. Indeed, Judge Heller cautioned Lodis repeatedly throughout the proceedings that Lodis was "taking a bit of a risk" in continuing in his efforts to introduce evidence of alleged age discrimination but upheld his prior ruling that the age discrimination verdict was inadmissible. (*See, e.g.*, 5/15 RP 105-106; 5/19 RP 203) Ultimately, Judge Heller was left with little choice but to reverse his prior ruling and admit the jury verdict after Lodis had repeatedly "opened the door," in an effort to negate the inference Lodis had created that Shenk was an "ageist."[25] (5/21 RP 126-127; 134-135) There was no abuse of discretion and judgment should be affirmed.

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[25] *See, e.g.*, ER 403; 5 Tegland, *supra*, at 76 ("[A]dmissibility of evidence through the 'open door' often turns on Rule 403 and a balancing of the proponent's need

3. Lodis Cannot Show That He Was Prejudiced By The Trial Court's Rulings Regarding Allegations Of Age Discrimination And The Age Discrimination Verdict.

Even if Lodis could establish that Judge Heller abused his discretion with regard to his evidentiary rulings of age discrimination and the prior verdict on Lodis' age discrimination claim, Lodis cannot show prejudice.[26] There was overwhelming evidence presented in eight days of testimony that Corbis terminated Lodis for good cause, not because he engaged in any alleged protected activity.

Lodis also failed to introduce any documentation or corroborating testimony reflecting that he had, in fact, ever admonished Shenk at any time. Without such protected activity, there could be no retaliation, regardless of what other evidence of age discrimination the jury heard. Indeed, both Shenk and Mitchell denied that Lodis had ever admonished Shenk.[27] Further, Lodis admitted that he did not believe Shenk's alleged age-based comments were offensive, let alone unlawful, as he is required to show. (5/22 RP 153-158). It was this failure to establish the basic elements

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to rebut the opponent's evidence against the risk of further prejudice that may result from the introduction of otherwise inadmissible evidence to rebut the opponent's evidence."); *see also* ***United States v. Sine***, 493 F.3d 1021, 1037 (9th Cir. 2007) ("open door" rule allows a party "to introduce evidence on the same issue to rebut any false impression created by the other party").

[26] *See, e.g.*, ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1225 (2001) ("Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole.").

[27] (5/15 RP 95, 167; 5/19 RP 172; 5/20 RP 53-54; 5/29 RP 22-24)

of a retaliation claim or rebut the evidence showing he was fired for good cause, and not Judge Heller's decision to preclude irrelevant, prejudicial evidence, which resulted in the jury's verdict in Corbis' favor. This is especially true given how much of the "age discrimination evidence," which Judge Heller had ruled to be inadmissible, was nevertheless introduced by Lodis. *See* Appendix 1.

Similarly, admission of the prior verdict from the first trial did not unfairly prejudice Lodis. Judge Heller gave the jury a clear limiting instruction with regard to the age discrimination verdict.[28] (5/22 RP 131); *see also* ***State v. Roberts***, 185 Wn. App. 94, 97 339 P.3d 995 (2014) (in assessing considerations of prejudice, appellate courts "presume that juries follow all instructions given"). Moreover, Lodis cannot realistically claim prejudice when Lodis himself opened the door to the jury verdict being admitted.[29]

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[28] Lodis also seems to argue that he was prejudiced by Corbis' counsel's statements during the trial. Judge Heller specifically instructed the jury that the statements of counsel were not evidence. (5/15 RP 10) He further directed that any closing argument regarding the prior verdict must be limited to reflect the jury's finding that there was no discrimination against Lodis—not that there was a verdict regarding age discrimination against any employee other than Lodis. (5/29 RP 99)

[29] Lodis also chose to testify about the Court of Appeals' decision in *Lodis* by claiming "we won," (5/22 RP 62), thereby focusing additional attention on the jury verdict. Judge Heller initially prevented Corbis' counsel from inquiring further but ultimately allowed questioning after Lodis continued to testify about the appellate decision. (5/22 RP 62-66) Lodis' own testimony about having "won" at the appellate level invited the jury to consider the appellate decision with the prior verdict and conclude that Lodis was not credible. (5/22 RP 62)

Evidentiary "error without prejudice is not grounds for reversal and will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." ***Northington v. Sivo***, 102 Wn. App. 545, 552 n.10, 8 P.3d 1067 (2000); ***Neal***, 144 Wn.2d at 611 ("Evidentiary error is grounds for reversal only if it results in prejudice.") Here, the overwhelming weight of the evidence supports the jury's verdict. Any "prejudice" from the trial court's mid-trial evidentiary ruling allowing in the jury verdict was negligible at most. This Court should affirm the judgment below.

C. The Trial Court's Rulings Regarding Lodis' Established Breach of Fiduciary Duty were Appropriate, Reasonable and Not an Abuse of Discretion.

The trial court made two separate rulings with regards to Lodis' breach of fiduciary duty to Corbis, as found by the jury in the second trial. First, in granting Corbis' motion in limine, the trial court ruled that the law of the case doctrine applied to bar Lodis from re-litigating the issue of whether he breached his fiduciary duty to Corbis for failing to record any vacation time. (CP 3322) A *de novo* standard of review applies to the trial court's application of law.[30] Second, the trial court ruled that the jury verdict in the second trial finding that Lodis breached his fiduciary duty to

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[30] ***Sunnyside Valley Irrigation Dist. v. Dickie***, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Corbis by failing to record vacation time was relevant and admissible under the rules of evidence. (5/14 RP 4; 5/15 6-7) An abuse of discretion standard of review applies to the trial court's evidentiary ruling admitting the prior jury verdict.[31]

1. The Trial Court Did Not Err In Ruling That The Law Of The Case Doctrine Precluded Lodis From Re-Litigating The Breach Of Fiduciary Duty Claim.

Washington courts have long respected the law of the case doctrine, whereby an appellate court ruling "must be followed in all subsequent stages of the same litigation." ***State v. Schwab***, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008). The Washington Supreme Court has explained that the doctrine "seeks to promote finality and efficiency in the judicial process." *Id.* To that end, the law of the case doctrine applies broadly to the trial court, the parties and the appellate court. *See* ***Humphrey Industries, Ltd. v. Clay Street Associates, LLC***, 176 Wn.2d 662, 669, 295 P.3d 141 (2013).

Here, the trial court properly ruled that the law of the case is that Lodis breached his fiduciary duty to Corbis by failing to record his vacation time and is binding on both the trial court and the parties.[32] The jury verdict finding that Lodis breached his fiduciary duty to Corbis was clearly and

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[31] *See e.g.*, ***State v. Quaale***, 182 Wn.2d 191, 196, 340 P.3d 213 (2014) (evidentiary rulings are reviewed for abuse of discretion).

[32] (CP 3322 ("[T]he jury's verdict that Lodis breached his fiduciary duty to Corbis is the law of the case.")).

unambiguously upheld by this Court.[33] Thus, the trial court properly ruled that Lodis was precluded from re-litigating the issue by denying that he breached his fiduciary duty by failing to record vacation time.[34]

Lodis again appears to misunderstand the trial court's reasoning when assigning error to this ruling, seemingly arguing that the court erred by applying the doctrine of collateral estoppel. (App. Brief at 42-46) But the trial court did not base its ruling on collateral estoppel, instead clarifying that "the jury's verdict against Lodis regarding breach of fiduciary duty is the law of the case." (CP 3322)

Moreover, any argument by Lodis that the law of the case doctrine applies "only to principles of law [and] not facts" (App. Brief, at 28) is wrong. To the contrary, courts routinely apply the law of the case doctrine to both conclusions of law and findings of fact. *See, e.g.*, ***Humphrey Industries v. Clay Street Associates***, 176 Wn. 2d 662, 671, 295 P.3d 231 (2013) (Washington State Supreme Court's assessment of certain findings

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[33] *See* ***Lodis***, 172 Wn. App. at 861 ("It was for the jury to find, based on the evidence, that Lodis profited at the company's expense by not recording any vacation time, thereby breaching his fiduciary duties of undivided loyalty and care. We find no error.").

[34] Notably, there was good cause for Corbis to be concerned about Lodis' lack of respect for the jury's prior verdict. Even with the trial court's ruling, Lodis continued to argue throughout the proceedings that Lodis could not be deemed to have breached his fiduciary duty to Corbis because he did not receive payment for the vacation time until after his termination. (5/21 RP 76 (asserting that Lodis' "failure to record is not to the breach; it's getting the check and cashing it that causes the breach")) (Ex. 485)

of fact became the law of the case).[35] Thus, the trial court did not err in ruling that the law of the case doctrine applies to the fact, determined by the jury and affirmed by this Court, that Lodis breached his fiduciary duty by failing to record vacation.

2. The Trial Court Did Not Abuse Its Discretion In Admitting The Prior Verdict On Corbis' Breach Of Fiduciary Duty Claim.

The trial court properly exercised its discretion in subsequently ruling that the second jury's verdict on Corbis' breach of fiduciary duty claim was relevant and admissible under the rules of evidence. (5/14 5; 5/15 6-7)[36] Indeed, that verdict finding that Lodis breached his fiduciary duty to Corbis by failing to record any vacation time is directly relevant to Corbis' after-acquired evidence defense—specifically, whether Lodis' actions were "of such severity that [Lodis] in fact would have been terminated on those grounds alone if [Corbis] had known of it at the time of

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[35] *See also* ***Transamerica Leasing v. Institute of London Underwriters***, 430 F.3d 1326, 1331 (11th Cir. 2005) ("Under the 'law of the case' doctrine, the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal"); ***State Industries, Inc. v. Mor-Flo Industries***, 948 F.2d 1573, 1576 (Fed. Cir. 1991) ("findings of fact reviewed in and relied upon in an appellate court's decision become the law of the case and, absent certain exceptional circumstances, may not be disturbed by a trial court on remand").

[36] Again, Lodis inaccurately argues that the trial court applied the doctrine of collateral estoppel to admit the second jury's verdict, citing *Roper v. Mabry*, 15 Wn. App. 819, 551 P.2d 1381 (1976). *See* App. Brief, at 42-45. In fact, the trial court properly applied its discretion in admitting the second jury's verdict, just as the trial court in *Roper* properly applied its discretion in admitting portions of the findings of fact from the prior action. *Id.*, 15 Wn. App. at 822-23.

the discharge."[37] ***McKennon v. Nashville Banner Publ'g Co.***, 513 U.S. 352 (1995) (articulating standards of after-acquired evidence defense); ***Janson v. North Valley Hospital***, 93 Wn. App. 892, 971 P.2d 67 (1999) (adopting after-acquired evidence defense as articulated in ***McKennon***); *see also* ER 402.

Lodis' assertion that the verdict should have been excluded pursuant to ER 403 is without merit. Lodis introduced evidence that others had not recorded all of their vacation time and had not been terminated and then argued that his failure to record his vacation time likewise was not serious enough to warrant termination. Shenk testified that he would have terminated Lodis for his failure to record his vacation time because it amounted to a breach of fiduciary duty by the company's highest ranking Human Resources officer and a violation of the Code of Conduct. (5/15 PR 112-113; 5/19 RP 152-155) Had Lodis simply conceded the point, the verdict might have stayed out. Instead, he called into question the seriousness of his conduct, making it necessary to admit the verdict to rebut his allegations. (5/22 RP 50-52).

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[37] In ruling that the prior verdict on Corbis' breach of fiduciary duty claim was admissible, Judge Heller specifically reasoned that "[t]he fact that a prior jury found that [Lodis] breached his fiduciary duty is clearly relevant to the seriousness issue" underlying Corbis' after-acquired evidence defense. (5/14 RP 4)

An analogous situation was presented in ***Roper v. Mabry***, 15 Wn. App. 819, 551 P.2d 1381 (1976). There, the trial court made findings of fact in a prior civil action. In the subsequent action, the trial court did *not* apply the doctrines of res judicata or collateral estoppel, but did make evidentiary rulings as to the admission of the prior findings of fact, admitting some, but not all, of those findings. *Id.*, 15 Wn. App. at 822-23. In finding that the trial court did not abuse its discretion, the Court of Appeals noted that "[t]he trial judge has considerable latitude in ruling on the proprietary of interrogation and the admissibility of evidence" and further noted that the trial judge gave the jury an appropriate instruction regarding the use of the prior findings. *Id.* As in ***Roper***, the trial court's evidentiary ruling here with respect to the second verdict was well within its discretion and should be affirmed.

3. Lodis Cannot Show That He Was Prejudiced By The Trial Court's Rulings Regarding Lodis' Breach Of His Fiduciary Duty To Corbis.

Even if Lodis could establish that Judge Heller abused his discretion with regard to his rulings related to Lodis' breach of his fiduciary duty, Lodis cannot show that he was prejudiced by the trial court's ruling where overwhelming evidence supports the jury's finding that Corbis did not retaliate against him. *See supra*, IV.B.3. This Court should affirm the judgment below.

D. The Trial Court's Rulings Allowing the Jury to Consider Corbis' After-Acquired Evidence Defense Were Appropriate, Reasonable, and Not an Abuse of Discretion.

When reviewing an order denying a motion for judgment as a matter of law, an appellate court applies the same standard as the trial court. ***Grove v. PeaceHealth St. Joseph Hosp.***, 182 Wn.2d 136, 143, 341 P.3d 261 (2014). A trial court appropriately denies a motion for judgment as a matter of law if, viewing the evidence most favorably to the nonmoving party, it can say as a matter of law that there is substantial evidence to sustain a verdict for the nonmoving party. ***Sing v. John L. Scott, Inc.***, 134 Wn.2d 24, 29, 948 P.2d 816 (1997). A motion for judgment as a matter of law must be denied when there is competent and substantial evidence on which a verdict can rest. ***State v. Hall***, 74 Wn.2d 726, 727, 446 P.2d 323 (1968). Evidence is substantial to support a verdict if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. ***Brown v. Superior Underwriters***, 30 Wn. App. 303, 306, 632 P.2d 887 (1980).

The trial court's evidentiary rulings throughout the proceedings on evidence and testimony introduced by Corbis in support of its after-acquired evidence defense are reviewed for an abuse of discretion. ***Quaale***, 182 Wn.2d at 191.

1. Substantial Evidence Exists To Support A Finding That Lodis Would Have Been Terminated For Violating the Time Reporting Policy and Code of Conduct.

Evidence of employee misconduct acquired by the employer after an employee's termination is relevant in a subsequent lawsuit concerning the termination and limits employer liability (the "after-acquired evidence defense").[38] An employer can rely on the after-acquired evidence defense if it establishes that the wrongdoing "was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge." ***McKennon***, 513 U.S. at 363. This may be established by testimony "corroborated both by [] company policy, which plausibly could be read to require discharge for the conduct at issue . . . and by common sense." ***O'Day v. McDonnell Douglas Helicopter Co.***, 79 F.3d 762 (9th Cir. 1996).[39]

Here, the trial court properly denied Lodis' CR 50 motion on Corbis' after-acquired evidence defense and allowed the jury to consider the defense where there existed substantial evidence on which the jury could have rendered a verdict in Corbis' favor. Shenk's testimony that he would

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[38] ***McKennon v. Nashville Banner Publ'g Co.***, 513 U.S. 352 (1995); ***Janson v. North Valley Hospital***, 93 Wn. App. 892 (1999) (adopting after-acquired evidence defense as articulated in ***McKennon***).

[39] In such a case, "the award for backpay [if any] should be calculated from the date of the unlawful discharge to the date the lawful basis for discharge was discovered." ***Janson***, 93 Wn. App. at 903. Because the jury found in favor of Corbis on liability, the jury was not required to render a verdict on Corbis' after-acquired evidence defense.

have terminated Lodis at the time he discovered Lodis' failure to record a single hour of vacation during his entire tenure with Corbis is corroborated by Corbis' policies—namely, its Time Reporting policy and Code of Conduct—as well as by common sense. ***See O'Day***, 79 F.3d at 762 (recognizing that it is "significant" when testimony that conduct would have resulted in discharge "is corroborated both by the company policy, which plausibly could be read to require discharge for the conduct at issue here, and by common sense"). The severity of Lodis' conduct is underscored by the jury's verdict in the second trial finding that Lodis breached his fiduciary duty to Corbis by failing to record his vacation time.[40] Common sense further dictates that such serious violations of Lodis' fiduciary duties and Corbis policy by the highest ranking Human Resources Officer would have resulted in termination. ***See O'Day***, 79 F.3d at 762.

Indeed, Corbis' Code of Conduct expressly "forbid[s] certain behaviors [] based on common sense guidelines" including (1) falsification or misrepresentation of Company records, such as time reports; (2) violation of any Corbis policy; and/or (3) any activity that has an adverse effect on the Company's interests. (Ex. 334, at 40-41) Shenk testified that engaging

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[40] (5/19 RP 155-156; Ex. 485); *see also* ***Lodis***, 172. Wn. App. At 861 ("It was for the jury to find, based on the evidence, that Lodis profited at the company's expense by not recording any vacation time, thereby breaching his fiduciary duties of undivided loyalty and care. We find no error.").

in any of these impermissible behaviors is grounds for termination at Corbis and, as such, that he would have terminated Lodis when he learned of his failure to record any vacation time and breach of fiduciary duties.[41] (5/19 RP 111, 152-155)

Common sense suggests that a CEO would terminate the highest ranking Human Resources Officer and member of his Executive Team upon discovering that the executive had failed to record a single day of vacation despite taking more than 89 days off, in blatant violation *of the very policies he was responsible for enforcing.* (5/15 RP 117-118; 5/19 RP 111, 152-155; Ex. 336, at 16) That a prior jury found that such conduct constituted a breach his fiduciary duties of undivided loyalty and care underscores the severity and seriousness of Lodis' actions. Surely Lodis cannot argue that the same actions that gave rise to civil liability and judgment of more than $42,000 would not have been sufficient to justify termination.

Lodis relies on selective language in the United States Ninth Circuit Court of Appeals' opinion in ***O'Day*** in asserting that Corbis cannot

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[41] In an effort to minimize the impact of Shenk's testimony, Lodis characterizes it as "opinion" testimony, citing to language in a question Lodis' counsel posed to Shenk during trial. (App. Brief, at 28, 30) In fact, Shenk was unequivocal that he would have terminated Lodis as follows:

> Q: If Mr. Lodis had still been employed by Corbis in October of 2008 at the time that you discovered these events, what would you have done?
>
> A. I would have fired him.

(5/19 RP 155)

establish an "actual practice" of terminating employees for similar behavior simply because it is unable to point to a prior termination decision for the same misconduct.[42] The Ninth Circuit in ***O'Day*** specifically recognized, however, that an employer is not foreclosed in its ability to show that the behavior would have resulted in termination simply because it had not previously been confronted with the "precise misconduct at issue." ***See O'Day***, 79 F.3d at 762 ("We could hardly require employers in these cases to come forward with proof that they discharged other employees for the precise misconduct at issue . . . as often the only proof an employer will have is that adduced in [the present] case . . . .").[43]

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[42] Lodis claims generally that other Corbis employees engaged in similar misconduct and were not terminated. But the only other example Lodis cites is the possible failure of Corbis' former CFO, Barry Allen, to record approximately 15 days of vacation, which Allen disputed during the second trial. (App. Brief, at 13; CP 27-28) Even if Allen did fail to record some vacation time, the facts surrounding him are entirely distinguishable. Lodis, unlike Allen, was in charge of the very department that owned the Time Reporting policy and was responsible for its enforcement. (Ex. 336, at 16; 5/19 RP 149) Further, Allen's failure to record 15 days of vacation pales in comparison to that of Lodis—the self-proclaimed "moral compass" of the company and highest ranking Human Resources Officer—who the jury in the second trial found failed to record a single hour of vacation throughout the duration of his employment, despite taking 89 days of vacation. (5/15 RP 117-118; 5/22 RP 49; Ex. 484); ***Lodis***, 172 Wn. App. at 845-46.

[43] The trial court similarly recognized this flaw in Lodis' argument as follows:

> Mr. Sheridan argues that in the absence of any evidence of that, there can be no after-acquired evidence defense; it can't be based on a statement that "I would have terminated somebody." The problem that I have with that argument is that even if there has not been a termination based on this kind of conduct, the question is: Has there ever been this kind of conduct in the past that would warrant termination? (5/22 RP 2-3)

Lodis misrepresents the testimony of Vivian Farris, Corbis' former Vice President of Human Resources, in an attempt to rebut Shenk's testimony that the *falsification* of an employee's time report is grounds for termination. Specifically, Lodis falsely asserts that Farris testified that it was not a terminable offense at Corbis to fail to record vacation time, though it was a violation of company policy. (App. Brief, at 47) Farris, however, testified that it was not a terminable offense to *make a mistake* in reporting vacation time (3/10 RP 63). She, in turn, testified that *ignoring* the vacation time reporting policy altogether *would* constitute a potentially terminable violation of Corbis policy. *Id.*

Lodis further misrepresents the evidence by suggesting that Corbis was aware of his misconduct at the time of his termination but still elected to pay him for his unused vacation time, thereby suggesting that his actions were not serious enough to warrant termination. That Corbis undertook a cursory review of Lodis' records at the time of his termination in no way shows that Corbis was aware at that time that Lodis had violated company policy or, if he had, the extent of any such violation.[44] (5/20 RP 48-49; Ex. 108)

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[44] To the contrary, the evidence reflects that Corbis was not aware of Lodis' violation of company policy by failing to record any vacation time until after Lodis filed his lawsuit against Corbis. *Id.*; ***Lodis***, 172 Wn. App., at 845 (recognizing that, during discovery in this matter, Corbis discovered that Lodis failed to record any vacation time but accepted a payout of $42,389.65 for 329 hours of accrued but unused vacation time).

The trial court did not err in denying Lodis' motion for judgment as a matter of law and judgment for Corbis should be affirmed.

2. Corbis Was Entitled to Offer Evidence in Support of its Valid After-Acquired Evidence Defense.

Given the questions of fact that remained regarding the after-acquired evidence defense (CP 27-28), Corbis was entitled, and indeed required, to offer evidence of this defense at trial for it to be sustained. Indeed, prohibiting Corbis from offering any evidence as to the nature, severity, and impact of Lodis' misconduct would have been tantamount to precluding Corbis from asserting the after-acquired evidence defense at all. The mere fact that this evidence did not cast Lodis in a favorable light does not justify its exclusion. Thus, Lodis' assertion that Corbis was improperly allowed to attack Lodis' character at trial with evidence relevant to its after-acquired evidence defense is without merit. (App. Brief, at 46-50)

To be clear, Corbis did not use this evidence to impermissibly attack Lodis' character in violation of ER 404, 608 or 609 by challenging his truthfulness or otherwise characterizing Lodis as a "criminal." On the contrary, Corbis presented no testimony or argument beyond the specific factual finding as rendered by the jury in the second trial and upheld by this Court. As the trial court properly ruled, the jury's finding in the second trial is directly relevant to establishing that Lodis' acts and omissions were of

such a magnitude as to warrant termination once discovered. (5/14 RP 4; 5/15 RP 5-7)

Lodis erroneously asserts that Corbis held Lodis out as a "criminal" and used the breach of fiduciary duty verdict as one would use a criminal conviction under ER 609. Lodis is unable to point to any place in the record where Corbis was permitted over Lodis' objection to assert, or otherwise suggest, that Lodis had engaged in any criminal behavior.[45] On the one occasion where Corbis' counsel questioned Lodis as to whether his failure to record vacation time constituted "stealing from the company," the Court sustained Lodis' counsel's objection. (5/22 RP 51). Lodis did not object on the other single occasion when Shenk testified that he equated Lodis' failure to record vacation as "stealing time." (5/19 RP 153)

Lodis' argument that Corbis improperly used evidence of Lodis' failure to record vacation and breach of fiduciary duties by impermissibly attacking his character for truthfulness in violation of ER 404 and 608 is equally without merit. (App. Brief, at 48-49) As an initial matter, Lodis either made no objection—or no objection under either ER 404(a) or

[45] In notable contrast, Lodis repeatedly accused Corbis of "stealing" his files. *See, e.g.*, 5/21 RP 114 (testifying that his files were "stolen" by Corbis); 116 ("It's kind of hard to back up when you stole my documents."); 117 ("I know that they stole my documents because when I went back, my documents were gone.").

608(a)—to each of the cited instances in which Lodis claims Corbis engaged in impermissible character attacks.[46]

Corbis never offered evidence regarding Lodis' failure to record vacation time and related breach of his fiduciary duties to prove that Lodis acted "in conformity therewith on a particular occasion" *See* ER 404(a). The jury's verdict in the second trial was not offered as extrinsic evidence of Lodis' character for truthfulness (ER 608(b)), nor can it be construed as such. To the contrary, any challenges to the truthfulness of Lodis' testimony were in the vein of impeachment (*e.g.*, 5/22 RP 63), much like Lodis' counsel repeatedly questioned the "truthfulness" of Corbis' witness, including by calling Shenk a liar.[47] (5/22 RP 117).

Corbis' introduction of evidence and testimony of Lodis' violation of its Time Reporting policy and Code of Conduct was for the purpose of establishing whether Lodis' failure to record any vacation was serious enough to warrant termination. The trial court did not abuse its discretion in allowing evidence and testimony relevant to that inquiry.

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[46] (5/22 RP 63 (objection asserted under ER 403), RP 64 (no objection asserted); 5/29 RP 155-56 (no objection asserted).

[47] Lodis additionally accused Mitchell of lying under oath. (5/20 RP 99 "You are not telling the truth as you sit there under oath today as a lawyer, are you?"); 5/29 RP 119 ("Mitchell was caught lying when he took the stand.")

3. Lodis Cannot Claim Prejudice Given the Evidence Supporting the Jury's Verdict and When the Jury Never Reached The Issue Of Damages.

Lodis cannot show that he was prejudiced by any error in the trial court's decision to permit the jury to consider Corbis' after-acquired evidence defense where there is sufficient evidence supporting the jury's verdict. *See supra*, IV.B.3. Additionally, where a jury finds against a plaintiff on the issue of liability, a trial court's decision regarding the admission or exclusion of evidence that relates solely to damages cannot, as a matter of law, be reversible error. Any "error relating solely to the issue of damages is harmless when a proper verdict reflects nonliability." ***Hizey v. Carpenter***, 119 Wn.2d 251, 270, 830 P.2d 646, 656 (1992).[48] Here, the jury found for Corbis on liability, and Corbis' after-acquired evidence defense is applicable to the calculation of Lodis' claim for backpay damages.[49] Thus, Lodis can show no harm warranting reversal as a matter of law. This Court should affirm the judgment below.

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[48] *See also* ***American Oil Co. v. Columbia Oil Co., Inc.***, 88 Wn.2d 835, 841-42, 567 P.2d 637 (1977) (error in excluding evidence of damages harmless, as it "could have no effect upon the jury's conclusion" that defendant was not liable).

[49] ***See Janson v. North Valley Hospital***, 93 Wn. App. 892, 903 (where after-acquired evidence defense is proven, any "award of backpay should be calculated from the date of the unlawful discharge to the date the lawful basis for discharge was discovered").

E. The Trial Court Properly Denied Lodis' Motion For A New Trial.

In reviewing Lodis' challenge to the jury's finding that Corbis did not engage in retaliation, this Court must "view the evidence in the record in the light most favorable to the nonmoving party." ***Lian v. Stalick***, 106 Wn. App. 811, 824, 25 P.3d 467 (2001). A trial court's decision to deny a new trial is reviewed for an abuse of discretion. ***Bunch v. King County Dept. of Youth Services***, 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

The jury had ample evidence to conclude that Corbis did not retaliate against Lodis. Lodis introduced no evidence supporting his own self-serving testimony that he admonished Shenk, and Mitchell and Shenk contradicted Lodis' allegations. Corbis introduced substantial evidence showing that Shenk terminated Lodis after Lodis lied to him, retaliated against a subordinate and failed to comply with the PIP. There was no abuse of discretion and judgment should be affirmed.

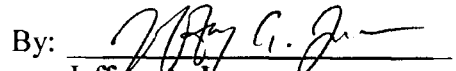
V. CONCLUSION

The trial court carefully and properly considered the issues in this third trial, and neither abused its discretion nor erred as a matter of law.

This Court should affirm judgment and deny Lodis' request for a fourth trial.[50]

Dated this 20th day of April, 2015.

SEBRIS BUSTO JAMES

By: 

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Attorneys for Respondents

[50] Lodis fails to show that he is entitled under any applicable law to attorney fees on review. *See* RAP 18.1(a). Thus, his request for an award of attorney fees should additionally be denied.

APPENDIX 1

RECORD CITATION	DESCRIPTION OF EVIDENCE
5/15 RP 19 (Lodis' Opening Statement)	"Steve Lodis, he was 56 years old at the time of his termination in March of 2008 . . . . Gary Shenk is the CEO. He was born in 1970. He was age 37 at the time Mr. Lodis was terminated in 2008."
5/15 RP 36 (Lodis' Opening Statement)	"They go to court before we do . . . . Remember, we filed our retaliation claim first, but they were in court first."
5/15 RP 73-74 (Testimony of Gary Shenk)	Questions posed to Gary Shenk regarding Ross Sutherland's age and Shenk's alleged intent to terminate Sutherland and "one of his subordinates who was older."
5/15 RP 86-87 (Testimony of Gary Shenk)	Testimony that Jim Mitchell and Vivian Farris took over Corbis' Human Resources function after Lodis was terminated, inferring that younger employees replaced Lodis.
5/15 RP 105-110 (Colloquy)	Colloquy and argument regarding introduction of evidence of age discrimination related to Sutherland.
5/19 RP 173-174 (Testimony of Gary Shenk)	Question posed to Shenk: "Let me ask you this: You had been warned -- other HR managers had warned you not to make ageist comments, right?"
5/19 RP 183-185 (Testimony of Gary Shenk)	Questions posed to Shenk regarding the ages of employees on his Executive Team and inferring that Shenk only solicited/relied on their feedback of Lodis' meetings with them in terminating Lodis because they were the youngest members of the Executive Team.
5/19 RP 186-188 (Testimony of Gary Shenk)	Evidence of the exact ages of members of Shenk's Executive Team and Vivan Farris, Lodis' replacement.
5/19 RP 190-193 (Testimony of Gary Shenk)	Testimony regarding employees Shenk terminated and the suggestion that termination decisions were based on the employees' ages.
5/19 199-203 (Colloquy)	Colloquy and argument regarding introduction of evidence of age discrimination.
5/20 RP 10-11 (Colloquy)	Colloquy regarding introduction of evidence of age on May 19, 2014 regarding Executive Team members' ages and age of Vivian Farris.
5/20 RP 41-42 (Testimony of Gary Shenk)	Question posed to Shenk about his age ("You were born in 1970, weren't you?")
5/21 RP 5-10 (Colloquy)	Colloquy and argument on age discrimination evidence and prior verdict.
5/21 RP 12 (Testimony of Steven Lodis)	Testimony of Lodis' age.
5/21 RP 27 (Testimony of Steven Lodis)	Testimony suggesting that Shenk made age-based termination decisions related to Will Merritt, Dave Bradley and Sue McDonald.
5/21 RP 79-80 (Colloquy)	Colloquy and argument regarding introduction of evidence of age discrimination.
5/21 RP 126-135 (Colloquy)	Colloquy, argument and Court's ruling admitting the prior age discrimination verdict.

No. 72342-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STEVEN LODIS and DEBORAH LODIS, a marital community,

Appellants,

v.

CORBIS HOLDINGS, INC., a Washington corporation,
CORBIS CORPORATION, a Nevada corporation,
and GARY SHENK, an individual,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BRUCE HELLER

CERTIFICATE OF SERVICE

I, Holly J. Holman, certify under penalty of perjury under the laws of the United States that on April 20, 2015, I served the following document to the parties listed below in the manner shown below their name:

1. Respondents' Brief

ATTORNEY FOR PLAINTIFF:
Jack Sheridan
Sheridan Law Firm, P.S.
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[ ] By United States Mail
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/s/ Holly J. Holman
Holly J. Holman