IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 1037490
Court of Appeals No. 57052-1-II

REYNALDO VERDUZCO,
Petitioner,

v.

KING COUNTY,
Respondent.

RESPONDENT KING COUNTY'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

King County respectfully requests that this Court deny Reynaldo Verduzco's petition for discretionary review. Contrary to Verduzco's petition, this case meets none of the criteria set forth in RAP 13.4(b).

II. STATEMENT OF THE CASE

A. PROCEDURAL FACTS

Verduzco was an employee in King County's Department of Natural Resources and Parks (DNRP) Hazardous Waste Program. He brought this lawsuit against King County under the Washington Law Against Discrimination (WLAD), RCW 49.60, alleging disparate treatment discrimination on the basis of his race and disability, and retaliation. CP 482-88. At the conclusion of a vigorously litigated jury trial comprising 15 court days from opening statements to verdict, the jury rejected

Verduzco's discrimination claims but found he had proved retaliation. CP 2553.

King County appealed on several grounds: 1) erroneous jury instructions, 2) juror bias, 3) improper exclusion of its expert witness, 4) excessive emotional distress damages, and 5) cumulative error. In an unpublished decision, Division Two of the Court of Appeals reversed and remanded for a new trial because the instruction defining "adverse" (Instruction 8) was misleading and confusing for the jury. *Verduzco v. King County*, 2024 WL 3580830, *18.[1]

The Court of Appeals denied Verduzco's motion for reconsideration.

[1] King County also assigned error to the subordinate bias or "cat's paw" instruction (Instruction 9), but the Court of Appeals held that giving that instruction was not error. *Id.*

B. FACTS PRESENTED AT TRIAL

Verduzco began working for the King County DNRP-Hazardous Waste Program in 1992. 8RP 1044.[2] At all times relevant to this case, Verduzco's job title and classification was Project Program Manager (PPM) III.[3] 12RP 1529-30. Verduzco has hearing loss for which he has undergone surgery and wears hearing aids.[4] 6RP 610-11. Verduzco is a Latino male. Ex. 18.

Contrary to the jury's verdict, Verduzco's petition for review repeatedly refers to the case as one of race discrimination. However, the evidence at trial did not support his discrimination claims and the jury properly rejected them. Rather, the evidence at trial showed that

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[2] The proceedings relevant to the Petition comprise sequentially-paginated volumes numbered 1 through 19. These transcripts are cited by volume and page number(s) (*e.g.,* 1RP 23-24).

[3] Verduzco resigned from County employment in January 2023.

[4] The County conceded that Verduzco's hearing loss is a disability under the WLAD. CP 2546.

Verduzco struggled with interpersonal relationships with co-workers and supervisors. 13RP 1754-55; 14RP 1784-86. For example, Verduzco had an angry outburst when his supervisor (Galvin) tried to raise concerns about his interactions with female co-workers. 14RP 1786-87; Ex. 219. Galvin's successor (Wu) observed that Verduzco would not accept constructive feedback and chose to argue instead. 16RP 2152-53. A female colleague, who had been close friends with Verduzco early in their careers, described an incident where he blocked her in a small copy room, leaned over her, and yelled angrily, which she described as "terrifying." 14RP 1923-25. A member of Verduzco's team struggled under his supervision because of micromanagement, "constantly being sent to the supervisor's office because of a perceived slight to him," and having her job duties changed or taken away without notice. 13RP 1698-99. Verduzco's co-workers described his supervision style as

controlling rather than collaborative. 13RP 1694. Rather than accepting accountability for any of these negative interactions, Verduzco would summarily dismiss them, or assert that the interactions were racist micro-aggressions against him. *See* Exs. 18, 22, 43.

The Court of Appeals' recitation of the facts accurately describes the evidence at trial, which included three investigations of complaints by and about Verduzco. 6RP 569; Exs. 276, 277a, 278.

The first investigation concluded that Verduzco had not violated the County's policies regarding workplace violence, discrimination, and harassment. However, the investigator found that Verduzco had violated the "Values and Norms for King County's Hazardous Waste Management Unit" under the CBA, and the "Color Brave

Space Norms”[5] adopted by the Business Services Team.[6] Ex. 278.

The second investigation, which was conducted by an independent firm, concluded that Verduzco was not “subject to any macro or microaggressions related to any protected status” such as race or disability. Instead, the investigator found that “his pattern or practice of yelling at his coworkers has resulted in their desire to avoid interacting or communicating with him.” Ex. 277a, p.4.

The third investigation focused on Verduzco’s conduct in supervisor Wu’s office and at a conference that Verduzco and Wu attended in September 2019. Ex. 276. The investigator concluded that

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[5] Available for reference at https://fakequity.com/2017/05/26/ (last accessed 2/22/2023).

[6] The report also states that “Verduzco does not acknowledge that any of his behavior is problematic even though it has greatly impacted his performance and his team members.” Ex. 278, p.7.

> Verduzco did indeed act inappropriately. This included angry, accusatory, firm and loud interactions that were inappropriate in his discussions with [his] [s]upervisors ... on September 17th and on September 18th with [his supervisor], at the GARE conference in Portland, Oregon. With Verduzco's own admission that he "dropped the F bomb a few times,["] and raised his voice. I have to conclude that Verduzco['s] behavior was inappropriate on both occasions, based on the number of witnesses reporting the same behaviors.

Ex. 276, at 7; *Verduzco*, at *5.

Verduzco was placed on paid administrative leave[7] pending investigations into allegations of "inappropriate and concerning behavior." Ex. 51. Manager Joan Lee signed a letter proposing that Verduzco be suspended for one week without pay as a disciplinary sanction for "unprofessional and inappropriate behavior at two meetings in September." Ex. 52.

[7] Under Verduzco's bargaining unit's CBA, paid administrative leave is not discipline and cannot be the basis for a union grievance process. 8RP 919-20.

Division Director Baldi made the final decision upholding the five-day suspension "after careful deliberation of the facts" and considering the investigation reports. 14RP 1831-32; Ex. 321. Before making his final decision, Baldi met with Verduzco in person to hear his perspective; Baldi was concerned by Verduzco's failure to take any responsibility or ownership for his conflicts with co-workers and supervisors.[8] 14RP 1833-34.

C. THE TRIAL COURT'S RULING ON JURY INSTRUCTIONS.

Over King County's objection, the trial court gave Verduzco's proposed instruction defining "adverse" for purposes of his disparate treatment and retaliation claims, which became Instruction 8. *See* 15RP 1999-2001; CP 2542.

Instruction 8 defined "adverse" as follows:

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[8] Verduzco's union filed a grievance on his behalf in accordance with the CBA, which was pursued through step three; the union did not take the grievance to arbitration. 8RP 926.

> The term "adverse" means unfavorable or disadvantageous. An employment action is adverse if it is harmful to the point that it would dissuade a reasonable employee from making a complaint of discrimination. Whether a particular action is adverse is judged from the perspective of a reasonable person in the [sic] Mr. Verduzco's position. *An adverse employment action is one that materially affects the terms, conditions, or privileges of employment*.

CP 2542 (emphasis added). This instruction combines WPI 330.06, which comprises the first three sentences, and WPI 330.01.02, which comprises the final, italicized sentence. However, Instruction 8 failed to explain that the former definition applied to Verduzco's retaliation claim and the latter to his disparate treatment claims.

As noted above, the jury found for Verduzco on only his retaliation claim. CP 2553-2554.

D. THE COURT OF APPEALS DECISION

In a unanimous unpublished decision, the Court of Appeals reversed the judgment of the trial court and remanded for a new trial, holding that the trial court

provided jury instructions that were confusing and misleading to the jury. *Verduzco*, at *1. The court held that the trial court erred in giving Instruction 8, which failed to distinguish "adverse" in a discrimination context from "adverse" in a retaliation context and gave no direction to the jury as to which definition applied to which claim. *Id.,* at *12. The court further held that because Instruction 8 failed to distinguish between the different definitions of "adverse" applicable in retaliation and discrimination claims, it was misleading and did not properly inform the jury of the applicable law. *Id*., at *14

III. ARGUMENT WHY REVIEW IS NOT WARRANTED

This case does not merit review under RAP 13.4(b). Contrary to Verduzco's remonstrations and misplaced policy arguments, this case does not involve a reversal of a jury verdict of race discrimination; indeed, the jury rejected Verduzco's discrimination claims. Instead, this

case involves a poorly crafted instruction, offered by Verduzco, which combined WPI 330.06 and WPI 330.01.02 without applying the notes on use, which direct combining the two definitions of "adverse" in a way that "differentiate[s] adverse employment action in disparate treatment claims from adverse employment action in retaliation claims as there are separate definitions for each." *See* WPI 330.06 and WPI 330.01.02, Notes on Use. Review should be denied.

A. THE COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH ANY DECISIONS OF THIS COURT OR THE COURT OF APPEALS UNDER RAP 13.4(b)(1).

1. The Court of Appeals correctly held that the failure to differentiate the definitions was error.

Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law.

Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

Contrary to Verduzco's argument, the County has never argued, nor did the Court of Appeals hold, that combining WPI 330.06 and WPI 330.01.02 is prohibited. Indeed, the notes on use expressly permit it, as long as the combined instructions differentiate adverse action in disparate treatment claims from adverse action in retaliation claims. WPI 330.06, Note on Use at 343; *Verduzco*, at *13. As the Court of Appeals noted, the direction to combine the instructions while differentiating between discrimination and retaliation claims arises from the United States Supreme Court decision in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405, 165 L.Ed. 2d 345 (2006). The court further noted that Washington courts have approved jury instructions that make such a distinction. *Verduzco*,

at *10, citing *Boyd v. State*, 187 Wn. App. 1, 15, 349 P.3d 864 (2015).

Verduzco did not follow the notes on use; he simply merged the two instructions without differentiation. *Verduzco,* at *13. Verduzco's assertion that he relied on the notes on use belies the plain language of Instruction 8, which merely appends language from WPI 330.01.02 to WPI 330.06. Verduzco cites no authority to support his disregard for the notes on use, which direct parties to differentiate the definitions in the combined instruction.

Nonetheless, Verduzco argues that the jury instructions mirrored the pattern instructions, did not misstate the law, that the jury was capable of applying the appropriate definition to each claim, and that the jury must have done so, because they did not find for him on his discrimination claims. Petition at 15-16. This argument is fatally flawed because merging WPI 330.06 and WPI 330.01.02 without distinguishing language created a

single confusing instruction, unfaithful to either pattern instruction, which made it impossible for the jury to apply the correct standard to Verduzco's respective claims.

The difference between the elements instructions for the disparate treatment claims and the retaliation claim illustrate the error and resulting prejudice. The County stipulated that Verduzco's five-day suspension was an adverse action, but the evidence showed that the actions taken against Verduzco – including his suspension – were in response to his inappropriate behavior, not due to his race or hearing disability. *See* CP 2545-46 (Instructions 11 and 12 for Verduzco's disparate treatment discrimination claims). Thus, the jury need not have considered the merged "adverse" definitions for Verduzco's discrimination claims if it found no nexus between Verduzco's protected status and the County's actions.

Although the County stipulated that Verduzco's suspension was discipline and discipline was the only example of adverse action given in the jury instructions, Verduzco argued that his paid administrative leave, suspension, and reassignment were all adverse actions. 18RP 2440, 2441, 2451, 2452-53, 2462.

When combined with Verduzco's closing arguments, the erroneous Instruction 8 immediately preceding the cat's-paw and retaliation elements instructions allowed the jury to find for Verduzco on his retaliation claim without appropriately considering whether the suspension was harmful to the point that it would dissuade a reasonable person from making a complaint of discrimination versus as opposed to materially affecting the terms, conditions, or privileges of employment. Put another way, the instruction did not direct the jury to consider whether the allegedly retaliatory action was actually harmful rather than merely having an effect. The

Court of Appeals correctly held that Instruction 8 was a misstatement of the law and therefore presumptively prejudiced King County.

Nonetheless, Verduzco argues that an instruction must contain an incorrect standard to be a misstatement of the law, and therefore, that the court's decision conflicts with *Roemmich v. 3M Company*, 21 Wn. App. 939, 956, 509 P.3d 306 (2022) and *Keller v. City of Spokane*, 146 Wn.2d 237, 250-251, 44 P.3d 845 (2002). Petition at 14. However, as discussed further in the next section, the Court of Appeals held that Instruction 8 *did* contain the incorrect standard. *Verduzco*, at *13. Further, the court relied on *Roemmich* (which follows *Keller*) in concluding that King County was presumptively prejudiced because Instruction 8 misstated the law. *Id.*, at *9, *13. There is no conflict with published decisions. Review is not merited.

2. The Court of Appeals properly analyzed and identified the harm to King County.

Verduzco also argues that the Court of Appeals failed to perform a harmless error analysis; however, he is mistaken on this point as well because the court held that Instruction 8 misstated the law and allowed the jury to apply the wrong legal standard, resulting in presumptive prejudice.

As stated above, jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *Hue*, 127 Wn.2d at 92. When an instruction misstates the law, courts presume it to be prejudicial. *Roemmich*, 21 Wn. App. at 956 citing *Keller*, 146 Wn.2d at 250-251.

The Court of Appeals correctly held that:

> The meaning of "adverse," depending on the context, has completely different standards. Further, Instruction 8 was immediately followed by Instruction 9 and Instruction 10, which were both related to retaliation. Merging

> the two standards, without distinction, to be applied to either claims of retaliation or discrimination becomes a misstatement of the law.
>
> Given the lack of differentiation, the jury could well have applied the incorrect legal standard when it considered adverse actions in Verduzco's retaliation claim.
>
> *Verduzco,* at *13

Because the definitions are two distinct standards, absent additional language as directed by the notes on use, the jury could not know which standard applied to which claim, and the failure to distinguish between the two was a misstatement of the law. *Verduzco,* at *13-*14. As a misstatement of the law, Instruction 8 was presumptively prejudicial. *Roemmich, supra.*

The Court of Appeals' determination that Instruction 8 prejudiced King County is consistent with published decisions by this Court and the Court of Appeals. This Court has held that an objection because of juror confusion necessarily is concerned with prejudice to the

party. *See Owens v. Anderson*, 58 Wn.2d 448, 453, 364 P.2d 14 (1961) (presumption of prejudice from erroneous jury instruction can be overcome if record reveals jury "could not have been misled or confused"); *State v. Emery*, 174 Wn.2d 741, 764, 278 P.3d 653 (2012) (curative instruction "would have eliminated any possible confusion and cured any potential prejudice").

Washington appellate courts have also held that instructions that allow the jury to import the wrong standard are prejudicial. *See, Keller*, 146 Wn.2d at 250 (instruction that allowed jury to premise City's duties on Keller's negligence was misleading and legally erroneous); *State v. Rodriguez*, 121 Wn. App. 180, 185-87, 87 P.3d 1201 (2004) (failure to distinguish "great bodily harm" definitions allowed jury to import the wrong standard for self-defense). In failing to differentiate the definitions, Instruction 8 allowed the jury to import the

wrong standard for "adverse" actions by failing to identify the claim to which each standard applied.

Nonetheless, Verduzco argues that the Court of Appeals' holding conflicts with *Griffin* and *Anfinson.*[9] Verduzco is wrong. Those cases simply illustrate that the need to establish prejudice depends on whether an instruction misstates the law; they do not compel a different result in this case.

In *Griffin*, this Court held that an instruction involving a landlord's duty of care to its tenant was a correct statement of the law and that Griffin was not prejudiced because even if the instruction was misleading, the jury still concluded that the defendant breached its duty of care. *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 92, 18 P.3d 558 (2001). *Griffin* is inapposite because the instruction

[9] *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 18 P.3d 558 (2001); *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 281 P.3d 289 (2012).

there involved a correct statement of the law, whereas Instruction 8 did not.

In contrast, the instruction in *Anfinson*, by which the jury was to determine employee status, was based on the incorrect and previously rejected "right to control" test. This Court held that the instruction was erroneous and presumptively prejudicial because it was a misstatement of the law. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 871-72, 281 P.3d 289 (2012). This Court rejected FedEx's attempts to rebut the presumption of prejudice, as well as its argument that Anfinson was free to argue its theory of the case. *Id.* at 873.

Verduzco also argues that King County was not prejudiced because it could argue its theory of the case. Petition at 20. But this argument fails because as in *Anfinson*, the County's attorney's argument was constrained by the erroneous instruction. *See Anfinson,*174 Wn.2d at 873. Defense counsel's

discussion of the instructions in closing argument was necessarily limited to the elements instructions for discrimination and retaliation. Although defense counsel argued generally that actions other than Verduzco's suspension were not adverse and that none of the actions were discriminatory or retaliatory, the confusing and erroneous Instruction 8 prevented counsel from arguing that Verduzco's retaliation claim required the jury to find that the actions taken by the County were harmful and would dissuade a reasonable employee from making a complaint of discrimination.[10] 18RP 2499-2502; 18RP 2509-2511.

The Court of Appeals' ruling conflicts with neither *Griffin* nor *Anfinson*. The court correctly held that Instruction 8 was a misstatement of the law, which

[10] Thus, if properly instructed, the jury would also have had to consider whether Verduzco was a reasonable employee.

presumptively prejudiced King County. Verduzco fails to rebut the presumption.

Finally, to the extent that a single conclusory statement in his Response Brief constituted an argument, the Court of Appeals properly rejected Verduzco's argument that the instruction placed an additional burden on him. *See* Response Brief at 29; *Verduzco,* at *13. Aside from the conclusory nature of the argument, it strains credibility that Verduzco would offer and argue for an instruction that increased his burden given the contentiousness of the trial.

This Court should deny review.

B. THIS CASE DOES NOT INVOLVE A SUBSTANTIAL ISSUE OF PUBLIC IMPORTANCE THAT SHOULD BE DETERMINED BY THIS COURT UNDER RAP 13.4(b)(4).

Contrary to Verduzco's lengthy discussion of the WLAD and policy against reversing jury verdicts, this case presents no compelling public policy issues. Instead, it

involves an instructional error caused by Verduzco's own failure to follow the notes on use for combining two instructions in a way that would correctly state the law and not confuse the jury.

Verduzco argues that the liberal construction of the WLAD required the Court of Appeals to "view with caution any actions as to the WLAD that would *narrow* the coverage of the law." Petition at 7-8 (emphasis in original). None of the cases that Verduzco cites for this proposition have any bearing on the issue in this case, nor do those cases or the Court's open letter to the Bar suggest that appellate courts should ignore prejudicially erroneous jury instructions to affirm jury verdicts in WLAD cases. Further, the Court of Appeals did not view Instruction 8 hyper-technically "to upend the jury's verdict," as Verduzco argues. Verduzco offered and the trial court gave a patently erroneous instruction that ignored the notes on use, resulting in a misstatement of

the WLAD legal standards and prejudicing the County. The Court of Appeals ruled accordingly. Review is not warranted.

IV. ADDITIONAL REASONS TO REVERSE WERE RAISED BY KING COUNTY BUT NOT DECIDED BY THE COURT OF APPEALS.

The unpublished decision of the Court of Appeals reversed the judgment entered in the trial court and remanded for a new trial based solely on instructional error. As appellant, King County raised multiple additional assignments of error that were not reached by the Court of Appeals, but which provide additional bases for a new trial. King County maintains that review of the Court of Appeals decision is not warranted. But if review is granted, review of these additional issues may be required under RAP 13.4(d).

Specifically, if this Court were to accept review and reverse the Court of Appeals' decision as to instructional

error, these additional issues, set forth in the Brief of Appellant, will need to be addressed either by this Court or on remand to the Court of Appeals. The issues raised by King County but not reached by the Court of Appeals include the following substantial issues, which are reversible either standing alone or cumulatively: 1) the exclusion of King County's economic damages expert without consideration of the factors set forth in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997); 2) the seating of a biased juror; 3) denial of King County's motion for a new trial; and 4) the excessive non-economic damages award.

V. CONCLUSION

This case does not meet the standards for review by this Court set forth in RAP 13.4(b). Review should be denied.

VI. CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 18.17, I hereby certify that this document contains 3,655 words, exclusive of words contained in the title sheet, the table of contents, the certificate of compliance, the certificate of service, and signature blocks.

Respectfully submitted this 3rd day of February, 2025.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen (18) years, not a party to or interested in the above-entitled action, and competent to be a witness herein. On the date below, I caused to be served *electronically via clerk's e-portal website* a copy of this RESPONDENT KING COUNTY'S ANSWER TO A PETITION FOR REVIEW upon the following parties and their respective counsel at the e-mail addresses as shown below:

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

SIGNED this 3rd day of February, 2025 at King County, Washington.

/s/Rodrigo Fernandez
Rodrigo Fernandez, Paralegal

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