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Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAVID HOCKETT, Respondent, v. SEATTLE POLICE DEPARTMENT and CITY OF SEATTLE, Appellants.	No. 85066-1-I DIVISION ONE OPINION PUBLISHED IN PART

FELDMAN, J. — A jury found the Seattle Police Department and the City of Seattle (collectively, SPD) liable for negligently exposing their employee, Sergeant David Hockett, to car exhaust containing carbon monoxide (CO) in the workplace, failing to accommodate his disability or impairment under the Washington Law Against Discrimination, ch. 49.60 RCW (WLAD), and retaliating against him for reporting his concerns about car exhaust by creating a hostile work environment in violation of the Seattle Municipal Code (SMC) whistleblower protection provisions, SMC 4.20.800-.880. SPD appeals the jury verdict and various trial court rulings with respect to the negligence and hostile work environment claims.

In the published portion of this opinion, we conclude that Sgt. Hockett properly exhausted his hostile work environment claim with the Seattle Ethics & Elections Commission Executive Director (Director) under SMC § 4.20.860-.870

before pursuing a private cause of action in King County Superior Court. In the unpublished portion of this opinion, we address several additional assignments of error presented by SPD and conclude that only one of them merits appellate relief, namely SPD's challenge to the trial court's award of attorney fees to Sgt. Hockett for work performed by non-lawyer personnel. We remand for entry of findings and conclusions with respect to attorney fees. In all other respects, we affirm.

I

A

David Hockett is a sergeant at SPD who has worked at the West Precinct since the early 2000s. Officers in the West Precinct park their patrol vehicles in an enclosed parking garage (the West Garage). Each day, multiple vehicles at a given time are in the West Garage with their engines idling. These patrol vehicles produce car exhaust containing, among other substances harmful to human health, CO—a colorless, odorless gas that causes oxygen deprivation when inhaled. SPD officers inhale this car exhaust in the West Garage, and a hole in the wall also allowed this exhaust to flow into the sergeants' office located adjacent to the garage. Symptoms of CO poisoning include headaches, fatigue, nausea, coughing, shortness of breath, dizziness, lack of concentration, memory loss, and difficulty sleeping.

Around 2015, SPD began equipping its patrol vehicles with a technology known as "Idleright," which turns on the engine when the battery runs low in order to continue powering the in-vehicle computer. In March 2015, Assistant Chief Steven Wilske instructed officers to use Idleright "whenever you can versus leaving [a vehicle] idling for long periods," but clarified, "[Y]ou can't use [Idleright] inside,

so West [Precinct officers] . . . have to park on the street during the shift." After learning that several Idleright-equipped vehicles had been left inside the West Garage without turning off both the engine and Idleright, Lieutenant Thomas Mahaffey reminded West Precinct staff to turn off both the engine and Idleright when returning a patrol car because "[i]dling of cars unnecessarily . . . makes for excess carbon monoxide in the garage."

In May 2016, the Seattle Fire Department (SFD) detected high levels of CO in the West Garage and warned West Precinct staff that the ventilation system was not designed to handle the amount of exhaust produced by Idleright-equipped vehicles and that "it's a matter of time before [SPD] ha[s] a carbon monoxide injury to an employee." In a subsequent email exchange, Lt. Mahaffey stated that SPD needed to address the issue of officers "leav[ing] their cars running the entire shift" in the West Garage," and Assistant Chief Wilske replied that leaving vehicles "running all the time is gonna get somebody hurt." In August 2017, SFD personnel again tested the air quality in the West Garage after an SPD employee sent an anonymous complaint to the Department of Labor and Industries (L&I). The SFD Captain told an SPD officer they "became congested in the short period that we were there" and these symptoms "disappeared almost immediately after leaving the garage."

Around this time, Assistant Chief Wilske e-mailed SPD officers about a separate issue involving faulty construction of SPD patrol vehicles causing CO to leak into the passenger compartment. The e-mail listed symptoms of CO poisoning and encouraged officers to "report any issues they feel might be related." After receiving Assistant Chief Wilske's e-mail, Sgt. Hockett told Safety Officer

Steve Redmond that Sgt. Hockett's subordinate officers were experiencing symptoms of CO exposure and asking him "what they should do to be checked for long-term exposure." Ofc. Redmond responded that SPD was "taking steps to mitigate this issue." Sgt. Hockett then e-mailed his supervisor, Lt. Todd Kibbee

> I've worked in this precinct for 17 years and have medically documented ailments I see are listed as symptoms of short/long term CO exposure. My doctors have always been stumped as to the cause. I'd like to figure out if the 40+ idling patrol cars and lack of ventilation have been the culprit the whole time.

Lt. Kibbee replied, "I am sure Steve Redmond will make all of the facts known when complete."

In September 2017, an L&I inspector issued a report concluding that SPD had not violated any workplace safety laws regarding CO levels in the West Garage. But the report recommended that SPD (1) upgrade its ventilation system because it "does not appear to provide adequate air exchanges to ensure employee exposure to vehicle exhaust is kept to a minimum" and (2) prohibit officers from completing reports in their vehicles in the West Garage.

Dissatisfied with the lack of transparency from his superiors about the car exhaust issue and the lack of any meaningful solution, Sgt. Hockett placed his own CO monitors throughout the West Garage. Additionally, in October 2017, Sgt. Hockett asked an Idleright representative whether it was safe for multiple vehicles equipped with the device to be left running all day in the enclosed West Garage, to which the representative responded that the device was "not intended to be used in the manner you describe." This e-mail was eventually forwarded to Assistant Chief Wilske, who e-mailed Sgt. Hockett's supervisors commanding them to "insure that Sgt Hockett knows that he is not an authorized [SPD] representative

to be contacting a vendor and questioning them, and that any further safety concerns he has should be forwarded to his chain of command and/or Steve Redmond for action." The e-mail concludes: "**Make it clear that this is an order**. . . . I will aggressively follow up if it is violated and this continues."

After learning of Chief Wilske's order, Sgt. Hockett stopped discussing the issue of CO in the West Garage for over a year. During this time, Sgt. Hockett's direct supervisor, Lt. John Brooks, reportedly told him that SPD command staff considered him a "problem child" because of his CO reporting and that "if you ever want to go anywhere in this Department, you need to lay low." Nonetheless, the CO issue persisted. In November 2017, SPD discovered that the ventilation system in the West Garage had been malfunctioning. First, an incorrectly installed part was causing the fan to extract air from the garage less efficiently than designed. Second, the system had been manually set to low speed since 2013 to reduce noise, which prevented the system from automatically increasing the fan speeds when it detected high levels of CO. SPD fixed these mechanical problems.

Sgt. Hockett re-raised his concerns about CO in May 2019, when he e-mailed Lt. Brooks that he has "medically documented ailments consistent with daily [CO] exposure at the precinct," including "an emergency room visit . . . constant fatigue, chronic headaches, sinus issues, and difficulty concentrating or remembering simple things during or after being in the garage for extended periods of time completing required tasks." Sgt. Hockett's e-mail also reported that other SPD officers were calling him names such as "CO guy," "troublemaker," and "dead man walking" because he reported to his superiors his concerns about CO in the West Garage. Sgt. Hockett also shared that he felt threatened when an unknown

SPD employee wrote "HOCKETT" on a whistleblower protection flier and placed it in a prominent position in the office.

Upon receiving Sgt. Hockett's e-mail, Lt. Brooks called him into a disciplinary meeting and ordered him to stop monitoring CO levels in the West Garage. Lt. Brooks also suggested that Sgt. Hockett transfer to a different precinct, which Sgt. Hockett opposed because it would have hindered his career aspirations, decreased his pay, and increased his commute. Sgt. Hockett understood Lt. Brooks' insistence that he leave the West Precinct as punishment for reporting his health concerns.

Sometime after this meeting with Lt. Brooks, an unknown SPD employee pinned a picture in Sgt. Hockett's cubicle of Morgan Freeman's incarcerated character "Red" from the film *The Shawshank Redemption* saying, "These walls are funny, first you hate them, then you get used to them. Enough time passes, you get so you depend on them. That's institutionalized." Sgt. Hockett interpreted this picture to mean that other officers viewed him as being "trapped like a prisoner" with no future career prospects at SPD because of his whistleblower conduct.

In September 2019, Sgt. Hockett e-mailed his supervisor notifying her that he had begun taking anti-depressants and was "suffering from other health conditions as a result of [CO] exposure in the [West Garage]." When the West Precinct Captain learned of this e-mail, Sgt. Hockett was placed on administrative leave for six months.

B

In June 2020, Sgt. Hockett sued SPD in King County Superior Court alleging claims for (1) negligence and (2) failure to accommodate in violation of

WLAD. In February 2021, Sgt. Hockett filed a whistleblower complaint with the Director under SMC 4.20.860(A). In April 2021, the Director dismissed the complaint as insufficient and untimely under SMC 4.20.860(A) and (B)(2). On June 1, 2021, Sgt. Hockett filed an amended complaint in his King County action adding a third claim for retaliation in violation of the SMC. The next week, Sgt. Hockett resubmitted to the Director his whistleblower complaint together with a copy of his amended superior court complaint. In July 2021, the Director found the resubmitted complaint sufficient and decided not to investigate the complaint further because Sgt. Hockett was pursuing his claims in the King County Superior Court action.

Before trial, the court granted two relevant sets of motions in limine. First, Sgt. Hockett sought to exclude any evidence that his exposure to toxic substances during his military service in the first Gulf War in the early 1990s caused the symptoms he attributes to exposure to car exhaust at the West Garage on several grounds, including hearsay and relevance. The trial court granted the motion and ruled that "[o]pinion testimony about the diagnosis of 'Gulf War Syndrome' [(GWS)] and the phrase 'Gulf War Syndrome' is excluded" and "[m]edical records must exclude and redact any diagnosis of any doctor." Second, Sgt. Hockett sought to exclude on hearsay grounds the results of the 2017 L&I report concluding that SPD had not violated occupational CO exposure standards and declining to issue a citation. The trial court granted this motion and ruled that SPD could not introduce

"[t]he results of investigations (findings, citations, non-citations, etc.)" or "opinions or conclusions of law contained in an investigation report."

At trial, Sgt. Hockett's treating physician, Dr. Nathan Parker, testified that Sgt. Hockett had suffered permanent lung damage from his exposure to car exhaust in the West Garage. Dr. Parker diagnosed Sgt. Hockett with Reactive Airway Disease (RAD), a condition similar to asthma in which a person develops breathing problems from inhaling an airborne irritant. After Dr. Parker testified, SPD sought to introduce previously undisclosed opinions of its expert toxicologist, Dr. Brent Burton, rebutting Dr. Parker's RAD diagnosis and referencing Sgt. Hockett's military-related exposures. The trial court granted Sgt. Hockett's motion to exclude this testimony.

Before submitting the case to the jury, Sgt. Hockett split his third claim under the SMC into two separate claims numbered claim 3 and claim 4. The new claim 3 alleged that SPD retaliated against him by passing him over for promotions and assignments, and the new claim 4 alleged that SPD retaliated against him by creating a hostile work environment. The jury found SPD liable on claim 1 (negligence), claim 2 (failure to accommodate under WLAD), and claim 4 (hostile work environment under SMC).[1] The jury awarded damages of $175,000 on claim 1, $150,000 on claim 2, and $1,000,000 on claim 4. Thereafter, SPD filed various post-trial motions, which the trial court largely denied. The trial court awarded

[1] As to claim 3, the verdict form further split this claim into two separate claims, the first of which related to assigning another individual to the role of Acting Lieutenant and the second of which related to assigning another individual to the role of Night Bikes Sergeant. The jury found SPD not liable under the first part of claim 3 but was hung on the second part. On appeal, neither party has assigned error to the verdict on claim 3 or any trial court ruling regarding claim 3.

attorney fees to Sgt. Hockett as the prevailing party on his statutory employment claims. *See* RCW 49.60.030(2); SMC 4.20.870(B). SPD appeals.

II

SPD argues the trial court erred in denying its CR 50(b) motion for judgment as a matter of law and its CR 59(a) motion for reconsideration seeking dismissal of Sgt. Hockett's hostile work environment claim because he did not exhaust this claim as required by SMC § 4.20.860-.870 before pursuing his SMC retaliation claim against SPD in court. We disagree.

Judgment as a matter of law under CR 50(b) is appropriate when, construing all facts and reasonable inferences in favor of the nonmoving party, "there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party." *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 848, 348 P.3d 389 (2015) (quoting *Indus. Indem. Co. of Nw. v. Kallevig*, 114 Wn.2d 907, 915-16, 792 P.2d 520 (1990)). We review rulings on motions for judgment as a matter of law de novo. *Id.* Conversely, we review rulings on CR 59 motions for an abuse of discretion, which occurs when a trial court's decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Worden v. Smith*, 178 Wn. App. 309, 322-23, 314 P.3d 1125 (2013). Also relevant here, we construe municipal ordinances according to the rules of statutory interpretation. *City of Seattle v. Swanson*, 193 Wn. App. 795, 810, 373 P.3d 342 (2016). "When the meaning of statutory language is plain on its face, we give effect to that plain meaning as an expression of legislative intent." *Id.*

The exhaustion requirement for SMC retaliation claims is set forth in SMC 4.20.860-.870. To pursue an SMC retaliation claim in court, the employee must

first file a sufficient and timely complaint with the Director. SMC 4.20.870(A)-(B). A complaint is sufficient if it "asserts facts that, if true, would show: [a] the employee is a cooperating employee;[2] [b] the employee was subjected to an adverse change or changes that occurred within the prescribed time period;[3] and [c] the employee's protected conduct reasonably appears to have been a contributing factor." SMC § 4.20.860(B)(3). A complaint is timely if it is filed "within 180 days of when [the employee] reasonably should have known that an occurrence alleged to constitute retaliation occurred." SMC 4.20.860(A). If the Director determines the complaint to be sufficient, the Director may either (a) investigate the complaint to determine if there is reasonable cause to believe that retaliation occurred or (b) "choose not to investigate a complaint if the matter is being pursued in another forum." SMC § 4.20.860(C). If the Director chooses the latter option, the employee may "pursue a private cause of action under [SMC 4.20.870] . . . to enjoin further retaliation, or to recover the actual damages sustained by the person, or both." SMC 4.20.870(A)-(B).

Sgt. Hockett properly satisfied these requirements. To be sufficient under SMC 4.20.860(B), Sgt. Hockett's whistleblower complaint had to assert facts showing that a supervisor behaved in or encouraged coworkers to behave in a hostile manner toward Sgt. Hockett as a result of his reporting of the excess levels of car exhaust in the West Garage. Sgt. Hockett's resubmitted whistleblower complaint filed with the Director in June 2021, which attached the amended

[2] It is undisputed that Sgt. Hockett was a "cooperating employee" as defined by SMC 4.20.805 because he "[i]n good faith ma[de] a report of alleged improper governmental action."
[3] "Adverse change" includes, but is not limited to, "denial of promotion" and "a supervisor or superior who behaves in, or encourages coworkers to behave in, a hostile manner toward the employee." SMC 4.20.805.

complaint from his King County Superior Court action, asserted such facts. The whistleblower complaint alleged claims for "whistleblower retaliation and *hostile work environment*." (Emphasis added.) In support of these allegations, Sgt. Hockett averred that after he reported his concerns about excessive car exhaust in the West Garage to his superiors (including Assistant Chief Wilske and Lt. Brooks), SPD personnel began mocking him by calling him names such as "problem child" and "whistleblower," writing his name on a whistleblower pamphlet, and placing a picture in his office calling him "institutionalized." Sgt. Hockett stated that these retaliatory acts caused him to feel ostracized and less reputable among his fellow SPD officers. These allegations satisfy the sufficiency requirement in SMC 4.20.860(B)(3).

Sgt. Hockett's resubmitted whistleblower complaint was also timely because it was filed within 180 days of when he reasonably should have known that an occurrence of retaliation occurred. *See* SMC 4.20.860(A). The whistleblower complaint stated that Sgt. Hockett "has suffered discrete, separable, and *ongoing* adverse changes in his employment occurring in the past 180 days." (Emphasis added.) Likewise, the amended complaint from the King County Superior Court action alleged that Sgt. Hockett "*continues* to be ostracized by SPD officers," that he "*continues* to be mocked as a whistleblower and has been deemed not promotable," and that "[i]nstances of retaliation occur *daily*, and are *ongoing*." (Emphasis added.) Because the alleged hostile actions were "ongoing," "continu[ing]," and "occur[ring] daily" on the date Sgt. Hockett filed his complaint, it was necessarily filed within 180 days of an occurrence of retaliation and, therefore, timely under SMC 4.20.860(A).

Critical here, the Director agreed that Sgt. Hockett's resubmitted whistleblower complaint was both sufficient and timely. The Director's July 2021 e-mail states that Sgt. Hockett's resubmitted complaint is "sufficient under SMC 4.20.860, meaning that it 'asserts facts that, if true, would show: (a) [Sgt. Hockett] is a cooperating employee; (b) [Sgt. Hockett] was subjected to an adverse change or changes that occurred within the prescribed time period; and (c) [Sgt. Hockett's] protected conduct reasonably appears to have been a contributing factor.'" The Director likewise found the resubmitted complaint timely because it asserted that Sgt. Hockett "was subjected to an adverse change or changes that occurred *within the prescribed time period*," i.e. within 180 days of the filing of the resubmitted complaint. (Emphasis added.)

Notwithstanding the foregoing analysis, SPD argues that Sgt. Hockett only exhausted his retaliation claims pertaining to 11 instances when he was passed over for promotion to Acting Lieutenant in December 2020 and February 2021 because those are the only acts of retaliation alleged in Sgt. Hockett's resubmitted whistleblower complaint that were not alleged in his earlier complaint. SPD reads words into the Director's ruling that are not there; nowhere does the Director's July 2021 ruling on Sgt. Hockett's resubmitted complaint state that only *some* of the claims were sufficient. The Director's email simply states, "I find the complaint sufficient." Because the Director determined Sgt. Hockett's complaint to be sufficient and declined to investigate it because Sgt. Hockett was pursuing the matter in another forum, Sgt. Hockett was allowed to "pursue a private cause of action under [SMC 4.20.870] . . . to enjoin further retaliation, or to recover the actual damages sustained . . . or both." SMC 4.20.870(A)-(B).

As SPD recognizes in its reply brief, our unpublished decision in *Romulo v. Seattle Pub. Utils.*, No. 82790-1-I, slip op. at 39-42 (Wash. Ct. App. Nov. 28, 2022) (unpublished), https://www.courts.wa.gov/opinions/pdf/827901.pdf,[4] indicates that if a party is aggrieved by the Director's determination regarding the sufficiency of a whistleblower complaint, it must challenge that determination through an administrative appeal. In *Romulo*, we affirmed the trial court's dismissal of an employee's claims alleging retaliation in violation of the SMC because the Director had previously dismissed the employee's whistleblower complaint as insufficient and the employee "did not plead any claim for relief from or review of the [Director's] determination, much less prove that it was erroneous or arbitrary." *Id.* at 40. Here too, if SPD disagreed with the Director's determination or believed it to be unclear, it was required to plead a claim for relief from or review of the Director's determination. Instead, it waited over a year to assert its exhaustion argument as the trial was about to begin. That is not an appropriate time or manner in which to challenge the determination.[5]

Next, SPD argues that a complaint is not timely under SMC 4.20.860(A) unless the employee files it within 180 days of when the "first" act of retaliation

[4] Although *Romulo* is an unpublished opinion, we may properly cite and discuss unpublished opinions where, as here, doing so is "necessary for a reasoned decision." GR 14.1(c). We adopt the reasoning of *Romulo* as stated in the text above.

[5] SPD argues the trial court abused its discretion by not considering a declaration from the Director submitted with SPD's CR 59(a) motion for reconsideration in which the Director stated he "did not consider any allegations other than the 11 occasions of alleged retaliation detailed in Sgt. Hockett's second SEEC complaint." This argument is unconvincing because such qualifying language is not in the Director's July 2021 determination, which found Sgt. Hockett's complaint sufficient under SMC 4.20.860. SPD does not explain why it waited to produce this declaration until nearly two months after trial. The trial court did not abuse its discretion by not considering this untimely declaration. *See Wagner Dev. v. Fid. & Deposit*, 95 Wn. App. 896, 906-07, 977 P.2d 639 (1999) (trial court properly denied reconsideration because new evidence could have been discovered using due diligence before trial).

occurred. This argument is refuted by the plain language of SMC 4.20.860(A)(1), which requires only that a whistleblower complaint be filed within 180 days of "an occurrence" alleged to constitute retaliation. Indeed, in the WLAD context, Washington courts have disavowed a discovery rule for the accrual of hostile work environment claims because "the hostile work environment 'occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own . . . . Such claims are based on the cumulative effect of individual acts.'" *Antonius v. King County*, 153 Wn.2d 256, 269-70, 103 P.3d 729 (2004) (quoting *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002)).

While SPD attempts to support its timeliness argument by citing to *Swanson*, its reliance on *Swanson* is misplaced. The Administrative Law Judge (ALJ) in *Swanson* "did not consider" whether an employee's placement of a sticker on another employee's locker constituted retaliation under the SMC because the sticker was "first" placed on the employee's locker more than 30 days before the complaint was filed.[6] 193 Wn. App. at 808. On appeal, we affirmed the ALJ's separate determination that the employer had nevertheless committed retaliation in violation of the state whistleblower statute, ch. 42.41 RCW, without addressing whether the SMC complaint was timely under SMC 4.20.860(A) because neither party raised that issue on appeal. *See Swanson*, 193 Wn. App. at 815-17. Thus, the *Swanson* court's passing reference to the timeliness requirements in SMC 4.20.860(A) is dicta. Even so, *Swanson* is distinguishable because here the

[6] Under former SMC 4.20.860(A) (1994), an employee had to file a whistleblower complaint "within 30 days of the occurrence alleged to constitute retaliation." *Swanson*, 193 Wn. App. at 804.

Director—the person responsible for determining whether a complaint is timely filed under SMC 4.20.860(A)(1)—found Sgt. Hockett's complaint to be sufficient and permitted him to pursue his SMC retaliation claim against SPD in court. SPD's contrary arguments lack merit.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. *See* RCW 2.06.040.

III

SPD argues the trial court abused its discretion in denying its CR 59(h) motion to amend the judgment to reduce the $1,000,000 damages award on the hostile work environment claim to $20,000 based the following SMC provision:

> When adhering to the filing requirements of [SMC 4.20.870(A)], the Cooperating Employee injured by any retaliation in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further retaliation, or to recover the actual damages sustained by the person, or both. Remedies for damages include the cost of suit including reasonable attorneys' fees, without limitation; emotional distress damages not to exceed $20,000; and any other appropriate remedy authorized by this chapter, without limitation.

SMC 4.20.870(B). In response, Sgt. Hockett argues SPD has waived this argument by failing to object to wording of a jury instruction and the verdict form. We conclude that SPD has waived this argument, and we also reject its argument on the merits.

A

We may "refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). Before reading jury instructions to the jury, the trial court shall afford each party "an opportunity . . . to make objections to the giving of any

instruction and the refusal to give a requested instruction." CR 51(f). "The objector shall state distinctly the matter to which counsel objects and the grounds of counsel's objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." *Id.* A party who fails to object to jury instructions waives the issue on appeal. *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 268-69, 258 P.3d 87 (2011). As to the verdict form, "[w]here there is no request by either party during the course of the trial to segregate items in a verdict, the court is without a basis to thereafter dissect the general verdict to determine what part represented what items." *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 641-42, 880 P.2d 29 (1994).

Here, SPD failed to make two critical objections at trial to preserve this argument for appeal. First, SPD failed to object to the following jury instruction (instruction no. 30) regarding claims 2, 3 and 4:

> If your verdict is for Sgt. Hockett for one, some or all of the employment claims, you must determine the amount of money that will reasonably and fairly compensate him for such damages as you find were proximately caused by the acts of [SPD]. You should consider the following elements:
>
> . . . .
>
> (3) The emotional harm to Sgt. Hockett caused by [SPD's] wrongful conduct, including emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish experienced and with reasonable probability to be experienced by Sgt. Hockett in the future.
>
> . . . .
>
> . . . The law has not furnished us with any fixed standards by which to measure emotional distress[,] loss of enjoyment of life[,] humiliation[,] pain and suffering[,] personal indignity, embarrassment[,] fear, anxiety, and/or anguish. With reference to

> these matters, you must be governed by your own judgment, by the evidence in the case, and by these instructions.

This instruction tells the jury there are nine categories of "emotional harm" damages, including but not limited to "emotional distress" damages, and that there are no "fixed standards by which to measure" these damages. By failing to object to this instruction, SPD effectively waived its argument that Sgt. Hockett's recovery for emotional distress damages—one of the nine categories of emotional harm damages—cannot exceed $20,000.

Second, SPD failed to object to the wording of the Special Verdict Form with respect to Sgt. Hockett's fourth claim for hostile work environment, which only asked two questions: (1) whether Sgt. Hockett "prove[d] his Hostile Work Environment Claim" and (2) if yes, "what is the amount of the damages suffered by Sgt. Hockett?" The answer line for the second question simply asked the jury to determine "Damages." This language does not comport with SPD's reading of SMC 4.20.870(B) because it does not advise the jury that (1) it must segregate damages for "emotional distress" from the eight other categories of non-economic damages and (2) any award of "emotional distress damages" cannot exceed $20,000.

The combination of this instruction and verdict form also makes it unclear whether and to what extent the jury's award of $1 million on Hockett's hostile work environment claim consisted of damages for "emotional distress" as opposed to damages for the eight other categories of non-economic damages. The trial court similarly recognized the impossibility of imposing a $20,000 cap on the "emotional distress" damages awarded by the jury given its undifferentiated verdict. The court

also noted that Sgt. Hockett produced enough evidence for the jury to award him $1 million based on the other categories of "emotional harm," such as humiliation, personal indignity, and loss of enjoyment of life. In light of SPD's failure to object to the jury instruction and verdict form and propose a clarifying special verdict form that separated out "emotional distress damages," SPD's corresponding argument is waived. *Collings v. City First Mort. Servs., LLC*, 177 Wn. App. 908, 924, 317 P.3d 1047 (2013) ("remand for a new trial is required only if the defendant objected to the use of a general verdict and proposed a clarifying special verdict form").

SPD's arguments against waiver are unpersuasive. Although SPD submitted a proposed instruction no. 34 which read, "If your verdict is in favor of Plaintiff on the claim of whistleblower retaliation, non-economic damages (emotional distress damages) may not exceed $20,000," SPD voluntarily withdrew this instruction before the trial court read the final instructions to the jury. Moreover, SPD concedes on appeal that it "does not assign error to Instruction No. 30." Thus, we find waiver and decline to grant substantive relief (such as a remand to determine "emotional distress damages") on this basis.

B

Waiver notwithstanding, the trial court did not abuse its discretion in denying SPD's motion because the damages cap in SMC 4.20.870(B) did not require the trial court to reduce the damages award on claim 4 to $20,000. The plain language of the ordinance states that (1) a prevailing plaintiff may recover their "actual damages" and (2) the "[r]emedies for damages" include "emotional distress damages not to exceed $20,000[] *and* any other appropriate remedy authorized by this chapter, *without limitation*." SMC 4.20.870(B) (emphasis added). Read

together, the provisions of SMC 4.20.870 allow a plaintiff to recover an unlimited amount of actual damages, which may include up to $20,000 in damages for emotional distress. *Id.* This interpretation of SMC 4.20.870 is supported by Washington precedent interpreting WLAD's damages provision under RCW 49.60.030(2), which defines "actual damages" as synonymous with compensatory damages and exclusive of only "nominal, exemplary or punitive" damages. *Martini v. Boeing Co.*, 137 Wn.2d 357, 367-68, 971 P.2d 45 (1999) (citing BLACK'S LAW DICTIONARY 35 (6th ed. 1990)).

Notwithstanding the plain language of SMC 4.20.870(B), SPD urges us to "follow *Woodbury*'s holding that damages not referenced in the SMC, like 'emotional harm' damages, are unavailable to [Sgt.] Hockett." (Citing *Woodbury v. City of Seattle*, 172 Wn. App. 747, 292 P.3d 134 (2013)). In *Woodbury*, we held that emotional distress damages were not an available remedy under the former versions of RCW 42.41.040 and SMC 4.20.860, which enumerated several forms of relief for a successful whistleblower retaliation claim (such as reinstatement, injunctive relief, costs, and attorney fees), but did not include any type of damages except for back pay. *Id.* at 754. The critical flaw in SPD's argument is that following *Woodbury*, the City amended the SMC to add a new ordinance, SMC 4.20.870(B), that includes the aforementioned provisions allowing for recovery of an unlimited amount of actual damages, including up to $20,000 in damages for emotional distress. *See* Ord. 124362, § 10, (2013).[7]

[7] While SPD supports its interpretation of SMC 4.20.870(B) by citing to *Washington State Human Rights Commission v. Cheney School District No. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982), this case further bolsters our conclusion. In *Cheney*, our Supreme Court held that an administrative tribunal had no authority to award damages for mental suffering or humiliation to employees who experienced discrimination because the governing statute, RCW 49.60.250, did not expressly or

In short, if the City of Seattle intended that the damages cap under SMC 4.20.870(B) encompass all types of non-economic damages, rather than just "emotional distress damages," it should have drafted its ordinance accordingly. *See State v. Nelson*, 195 Wn. App. 261, 266, 381 P.3d 84 (2016) ("We recognize that the legislature intends to use the words it uses and intends *not* to use the words it does not use."). Accordingly, the trial court did not abuse its discretion in denying SPD's motion to amend the judgment under CR 59(h).

IV

SPD argues the trial court committed three errors relating to the exclusion of evidence that Sgt. Hockett's symptoms were caused by his exposure to toxic substances during his military service before he was employed by SPD. We disagree.

We review a trial court's interpretation of evidentiary rules de novo. *Matter of Welfare of M.R.*, 200 Wn.2d 363, 376, 518 P.3d 214 (2022). Where the trial court correctly interprets an evidentiary rule, we review its decisions under that rule for an abuse of discretion. *Id.* If a trial court abuses its discretion, we review for prejudice and only reverse if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Further, "an

implicitly give tribunals power to award such damages. *Id.* at 120-21. But the court clarified that the employee "who suffer[s] damages by humiliation and mental suffering caused by age discrimination[] is not without remedy" because a companion statute, RCW 49.60.030, "specifically grants a civil remedy for anyone injured by an act of discrimination" by allowing them to "recover the *actual damages* sustained." *Id.* at 124 (emphasis added). Similarly here, SMC 4.20.870(B) allows Sgt. Hockett to recover his "actual damages," which is inclusive of all non-economic damages including but not limited to $20,000 in emotional distress damages.

appellate court may affirm a trial court's ruling on any grounds the record supports." *Hendrickson v. King County*, 101 Wn. App. 258, 266, 2 P.3d 1006 (2000).

A

SPD claims the trial court erred by preventing it from cross-examining Sgt. Hockett on his prior statements attributing his chronic fatigue to his military service and redacting similar statements from his medical records. Specifically, SPD sought to impeach Sgt. Hockett using three pieces of evidence: (a) Sgt. Hockett's deposition testimony that he started experiencing chronic fatigue following his military service and, when asked if he was exposed to toxins during deployment, that he "sucked a lot of the burning oil wells . . . , but beyond that, it's still a mystery;" (b) a note from a U.S. Department of Veterans Affairs (VA) doctor in 2014 stating that Sgt. Hockett claimed his chronic fatigue is due to "exposure to environmental hazards during [the] Gulf War," which included "smoke from oil wells, depleted uranium . . ., diesel fumes from vehicles[,] . . . [and] secondary smoking[,] and insecticides;" and (c) a note from Sgt. Hockett's treating physician in 2013 stating that Sgt. Hockett has had chronic fatigue for 20 years and knows of "multiple chemical exposures."

The trial court here correctly concluded these statements were irrelevant. To be admissible, evidence must be relevant, meaning it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401, 402. Notably, SPD does not assign error to the trial court's pretrial ruling that "[o]pinion testimony about the diagnosis of [GWS] and the phrase 'Gulf War Syndrome' is excluded." This concession is well taken because no medical

provider or expert has diagnosed Sgt. Hockett with GWS. Indeed, SPD's own expert, Dr. Burton, conceded that GWS "does not constitute a definable medical condition." By framing this issue as a battle over "alternate causes," SPD is attempting to circumvent the trial court's order excluding evidence relating to GWS. The trial court acknowledged as much when it told defense counsel, "[W]ith your saying that somebody was in the first Gulf War, they're going by 'burning oil,' everybody knows, frankly, common knowledge that this is Gulf War syndrome. It's been in the paper for years." Because all evidence regarding GWS was properly excluded, Sgt. Hockett's prior statements could not, and did not, make the existence of any fact of consequence to the determination of the action more or less probable.

SPD's causation arguments also fail because Washington courts generally require expert testimony from a physician on matters "involving medical science," such as the "nature of the harm which may result and the probability of its occurrence." *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187, 198, 399 P.3d 1156 (2017) (quoting *Smith v. Shannon*, 100 Wn.2d 26, 33, 666 P.2d 351 (1983)); *see also Berger v. Sonneland*, 144 Wn.2d 91, 110-11, 26 P.3d 257 (2001) ("Medical facts must be proved by expert testimony unless they are observable by laypersons and describable without medical training."). While the defense may attack the plaintiff's theory of causation, it must do so using evidence that is "relevant and probative" and expert testimony that is "based on facts in the record." *Needham v. Dreyer*, 11 Wn. App. 2d 479, 494-95, 454 P.3d 136 (2019) (citing *Colley v. Peacehealth*, 177 Wn. App. 717, 721-29, 312 P.3d 989 (2013)). Dr. Burton, the only expert who opined on Sgt. Hockett's military exposures, dismissed

them as a potential cause of his symptoms and instead attributed the cause to sleep apnea. Sgt. Hockett himself was not qualified to opine on whether his military exposures caused his chronic fatigue because this fact is not observable by a layperson and not describable without medical training. *See* ER 701 (a non-expert witness may only offer opinions or inferences which are "not based on scientific, technical, or other specialized knowledge within the scope of [ER 702]"). Without an expert to testify to diagnosis and medical causation, Sgt. Hockett's statements had no tendency to prove that the symptoms for which he was seeking recovery were caused by his military exposures and, thus, were irrelevant.

But even if these prior statements were relevant, the trial court properly excluded them under ER 403, which allows trial courts to exclude relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." The probative value was minimal because Sgt. Hockett's statements were his own lay opinions speculating on the source of his chronic fatigue rather than a diagnosis from a qualified medical provider. Conversely, this evidence posed a substantial risk of confusing the issues or misleading the jury because it would have presented visceral imagery of Sgt. Hockett's combat experience (such as burning oil fields, uranium, diesel fumes, and insecticides) without connecting these environmental exposures to his current symptoms. Further, the exclusion of this evidence did not change the outcome of trial because SPD was still allowed to use these redacted statements to impeach Sgt. Hockett and argue in closing that he began

experiencing chronic fatigue before he started working at SPD. Therefore, the trial court did not abuse its discretion in excluding this evidence.[8]

Lastly, SPD claims the trial court was required to admit this evidence because it was included in its ER 904 notice, to which Sgt. Hockett did not timely object. This argument fails because although ER 904(a) generally provides that certain documents proposed as exhibits before trial in accordance with the rule "shall be deemed admissible unless objection is made under [ER 904(c)]," the plain language of ER 904(c)(2) allows the receiving party to wait until trial to raise a relevancy objection. *See Hendrickson*, 101 Wn. App. at 268 (noting that "ER 904 reserves relevance objections for trial"). Therefore, Sgt. Hockett did not need to object to SPD's ER 904 notice within 14 days for the trial court to exclude the evidence on relevancy grounds.

B

SPD argues the trial court erred by sustaining an objection for lack of foundation when SPD attempted to question Sgt. Hockett's treating physician, Dr. Parker, about whether Sgt. Hockett's service-related exposures could have caused his RAD. Because SPD did not show that Dr. Parker had sufficient personal knowledge to testify about Sgt. Hockett's military-related exposures, we do not find an abuse of discretion.

[8] SPD argues that Sgt. Hockett opened the door to being questioned about his service-related exposures based on his and others' testimony that he served in the military and did not experience chronic fatigue until he began working at SPD. This argument is unconvincing because even if a party opens the door, the evidence sought to be admitted must still be admissible under ER 402 and ER 403. *Taylor v. Intuitive Surgical, Inc.*, 187 Wn.2d 743, 766, 389 P.3d 517 (2017). Assuming Sgt. Hockett did open the door, this evidence would still be irrelevant and unfairly prejudicial, confusing, or misleading.

We typically construe objections for lack of foundation as objections under ER 602, which provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." *See State v. Broussard*, 25 Wn. App. 2d 781, 788-89, 525 P.3d 615 (2023) (citing *State v. Vaughn*, 101 Wn.2d 604, 611-12, 682 P.2d 878 (1984)). The proponent of testimony bears the burden of "laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies." *Vaughn*, 101 Wn.2d at 611. The trial court should exclude testimony if "no trier of fact could reasonably find that the witness had firsthand knowledge." *Id.*

At trial, Dr. Parker testified that Sgt. Hockett told him in December 2021 that he had been experiencing breathing trouble for "some time." At a follow-up visit in March 2022, Dr. Parker determined the cause of Sgt. Hockett's shortness of breath by questioning Sgt. Hockett about his symptoms, examining an X-ray of Sgt. Hockett's chest, and performing a pulmonary function test. Based on the information gathered from these sources, Dr. Parker diagnosed Sgt. Hockett with RAD. Dr. Parker concluded that Sgt. Hockett developed RAD as a result of long-term exposure to car exhaust while working in the West Garage.

On cross-examination, when asked whether patients typically develop RAD due to an acute exposure event, Dr. Parker answered that the "classic example of this would be . . . veterans who served in the most recent . . . Iraq wars with a lot of exposure to burn pits where there were . . . persistent smoking . . . exposure. Then they've come back and had sort of ongoing respiratory symptoms on a persistent basis." Sgt. Hockett objected during this answer, and after a sidebar the

trial court told defense counsel that "further foundation would need to be laid. Ask an additional question. I can clarify, if you wish . . . [but] at this time the objection . . . is sustained." Several questions later, defense counsel asked Dr. Parker whether he was "equally confident about the cause" of Sgt. Hockett's RAD, to which Dr. Parker replied, "I don't have any history of anything else. I think there was no other history that I obtained from him that would have led to that, that I know of." Defense counsel then stopped questioning Dr. Parker about his RAD diagnosis.

On this record, SPD failed to elicit sufficient testimony—both before and after its lawyer initially asked about RAD—to establish a proper foundation for Dr. Parker to testify regarding whether Sgt. Hockett's military-related exposures could have caused his RAD. Contrary to SPD's assertion, Dr. Parker testified as a fact witness—not an expert witness—meaning his testimony about facts and medical opinions was "limited to 'the medical judgments and opinions *which were derived from the treatment*.'" *See Smith v. Orthopedics Int'l, Ltd.*, 170 Wn.2d 659, 672-73, 244 P.3d 939 (2010) (quoting *Carson v. Fine*, 123 Wn.2d 206, 216, 867 P.2d 610 (1994)). SPD largely declined the trial court's suggestion that it ask further questions to establish a sufficient foundation for Dr. Parker to testify on this topic. Moreover, additional questioning of Dr. Parker on this issue would likely have run afoul of the trial court's pretrial order prohibiting reference to GWS. Lastly, SPD has not shown prejudice because another witness opined that Sgt. Hockett's

symptoms are "entirely consistent with low grade, chronic, constant" exposure to CO at the West Garage. Therefore, we find no abuse of discretion.[9]

C

SPD argues the trial court erred by not considering the *Burnet*[10] factors on the record before granting Sgt. Hockett's motion to exclude portions of Dr. Burton's anticipated testimony relating to Dr. Parker's RAD diagnosis and Sgt. Hockett's military exposures as a sanction for SPD's discovery violation.[11] We disagree.

If a trial court excludes witness testimony as a sanction for a discovery violation, it must first consider the so-called *Burnet* factors on the record. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006) (citing *Burnet*, 131 Wn.2d at 494). Specifically, "the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed." *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009) (citing *Burnet*, 131 Wn.2d at 494). A trial court may make the *Burnet* findings on the record orally. *Teter v. Deck*, 174 Wn.2d 207, 217, 274 P.3d 336 (2012). "[T]he mere fact that a trial court does not cite *Burnet* before excluding witnesses is not dispositive; a colloquy might satisfy *Burnet* in substance even if the judge fails to invoke that

[9] SPD's related arguments likewise fail. SPD contends the trial court erred in declining to read a juror question asking, "Dr. Parker mentioned that some of the [e]xposure in Iraq could be related to the condition; is that correct?" This argument is waived under RAP 2.5(a) because SPD did not object to the trial court's refusal to ask this juror question. Lastly, we reject SPD's argument based on the cumulative error doctrine because none of the trial court's evidentiary rulings were erroneous.

[10] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

[11] SPD does not dispute on appeal that it committed a discovery violation or that the exclusion of Dr. Burton's testimony was objectively justified under *Burnet*.

case by name." *Jones v. City of Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380 (2013)). A trial court exercises broad discretion in imposing discovery sanctions, and we review these sanctions for abuse of discretion. *Magaña*, 167 Wn.2d at 582. "An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record." *Id.*

Here, the record shows the trial court considered all three *Burnet* factors. First, SPD does not dispute that the trial court correctly found SPD's discovery violation to be "willful," meaning that it was "without reasonable excuse or justification." *Id.* at 584. SPD initially disclosed that Dr. Burton would opine that Sgt. Hockett's symptoms were caused by sleep apnea. When Sgt. Hockett later informed SPD in March 2022 that Dr. Parker would testify that he diagnosed Sgt. Hockett with RAD, SPD did not supplement its prior disclosure to notify Sgt. Hockett that Dr. Burton would opine on Dr. Burton's RAD diagnosis.[12] Nor did SPD depose Dr. Parker. Instead, SPD waited until after Dr. Parker testified at trial in September 2022 to finally disclose Dr. Burton's new opinions.[13] The trial court found that SPD's failure to disclose these new opinions was the result of a "tactical choice." Thus, the record shows that the trial court considered the first *Burnet* factor and correctly found SPD's discovery violation to be willful.

[12] Local discovery rules required SPD to disclose "[a] summary of [its] expert's opinions and the basis therefore. KCLCR 26(k)(3)(C). Additionally, CR 26 imposes an ongoing duty on a party to seasonably supplement a prior discovery response regarding the subject matter on which an expert witness is expected to testify and the substance of the expert's testimony. CR 29(e)(1).

[13] These new opinions were (1) Sgt. Hockett's symptoms are not consistent with RAD, (2) any RAD symptoms cannot be caused by workplace car exhaust in the West Garage, (3) Dr. Parker's results show no RAD at all, (4) Dr. Parker is correct that exposure to burn pits in the recent Iraq wars is a classic example of a cause of RAD, and (5) for Dr. Parker to perform a competent differential diagnosis, he should have been provided with Sgt. Hockett's complete service-related exposure history.

Second, the trial court considered whether Sgt. Hockett suffered prejudice, which occurs when a party is "ambushed" by the sudden introduction of surprise evidence after the start of trial. *See Jones*, 179 Wn.2d at 344-45; *see also Burnet*, 131 Wn.2d at 496-97 (conduct is more prejudicial if it occurs on the "eve of trial"). At trial, Sgt. Hockett argued he was prejudiced by SPD's late disclosure, which occurred during the second week of trial, because he had no opportunity to depose Dr. Burton on his new causation theories and would need to spend time and resources preparing and re-calling his expert witnesses. After the trial court conducted a lengthy colloquy with the parties and reviewed their motions and the record—including trial exhibits, witness disclosures, and Dr. Parker's trial testimony—the court concluded "it's way too late for the plaintiff to have additional discovery on [Dr. Burton]." The substance of the trial court's ruling indicates it considered the second *Burnet* factor on the record and correctly found that SPD's discovery violation substantially prejudiced Sgt. Hockett's ability to prepare for trial.

Third, the trial court considered whether a lesser sanction would suffice. "[T]he court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d at 495-96. The *Burnet* court further explained "the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong." *Id*. at 496. The trial court explicitly considered this factor on the record by stating, "[t]here's really no remedy short of exclusion." The trial court's awareness of lesser sanctions is indicated by its prior statement during trial that it "typically order[s] a deposition as a remedy for a late-disclosed witness." Because the trial

court's analysis complies with *Burnet* and is supported by the record, we find no abuse of discretion.

V

SPD argues the trial court erred by reading an instruction (instruction no. 9) to the jury regarding SPD's standard of care on the negligence claim that stated the following:

> The Defendant the City of Seattle, acting through the Seattle Police Department, is held to the general duty of care of a reasonable person under the circumstances. This duty requires the Defendant to maintain a safe work environment for its employees. This duty extends beyond complying with laws and regulations. Compliance [with] applicable statutes and regulations may be evidence that a municipality met its duty of care. However, a municipality can violate its duty of care even when it complies with statutes and regulations. In determining whether the Defendant the City of Seattle met its duty to maintain a safe working environment, you shall consider all of the evidence in this case and the totality of the circumstances.

SPD claims this instruction misstates the law set forth in *Fite v. Mudd*, 19 Wn. App. 2d 917, 498 P.3d 538 (2021), by stating that SPD's compliance with regulations "may be," rather than "is," evidence SPD met its duty of care. We disagree.

We review de novo whether a jury instruction correctly states the law. *Id.* at 930. But the "specific language of the instructions [is a] matter[] left to the trial court's discretion." *Douglas v. Freeman*, 117 Wn.2d 242, 256-57, 814 P.2d 1160 (1991). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Even if misleading, the instruction must be prejudicial to be reversible. *Fite*, 19 Wn. App. 2d at 930.

Both parties rely on *Fite* in support of their jury instruction arguments. There, a skateboarder was hit by a truck while traveling through a crosswalk and successfully sued the driver and the municipality for negligence. *Id.* at 921. At trial, the court read the following instruction to the jury:

> Whether a roadway or crosswalk is reasonably safe for ordinary travel must be determined based on the "totality of the circumstances." A roadway or crosswalk can be unsafe for ordinary travel even when there is no violation of statutes, regulations or guidelines concerning roadways and crosswalks.

Id. at 925. On appeal, the court reiterated that "[u]nder common law, municipalities are held to the general duty of care of a reasonable person under the circumstances." *Id.* at 931. Although the court noted that "compliance with applicable statutes and regulations may be used to show a municipality met its duty of care," it also recognized that "a municipality can violate its duty of care even when it complies with statutes and regulations." *Id.* at 933. The ultimate question is whether the municipality breached its duty of care "based on the totality of the circumstances." *Id.* at 931 (quoting *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 894, 223 P.3d 1230 (2009)). The court ultimately held that the trial court abused its discretion because, while the instruction accurately stated the law, it improperly emphasized the plaintiff's theory of the case by omitting that "compliance with statutes, regulations, and guidelines may be evidence that the crosswalk was safe." *Id.* at 929.

Contrary to SPD's assertions, instruction no. 9 clearly and correctly recited the applicable legal principles as set forth in *Fite.* Most important here, the instruction stated that "[c]ompliance [with] applicable statutes and regulations may be evidence that a municipality met its duty of care." Thus, the crucial language

favorable to the municipality that was missing in *Fite* was included here. SPD's argument that the instruction should have used "is" instead of "may be" runs counter to the overarching principle that a municipality's compliance with statutes and regulations is not a complete defense to a negligence action. *Fite*, 19 Wn. App. 2d at 933. Indeed, multiple expert witnesses for both Sgt. Hockett and SPD testified that a workplace can be unsafe for human health even if CO levels are below the regulatory exposure limits.

But even if the instruction misstated the law, SPD was not prejudiced because it was able to introduce extensive evidence that L&I and other governmental agencies measured the CO levels in the West Garage on numerous occasions and these measurements all fell below the permissible regulatory exposure limits. Relying on this evidence, SPD argued in closing that it was not negligent because "[w]e have complied with L&I standards and every other occupational standard that has been shown to you." The jury nevertheless found SPD liable. Thus, revising the language of instruction no. 9 as SPD advocated below would not have changed the outcome of trial.[14] For these reasons, we find no abuse of discretion regarding instruction no. 9.

[14] SPD also argues that the trial court unduly emphasized Sgt. Hockett's theory of the case by reading the instruction to the jury multiple times during the trial. SPD relies on *Cornejo v. State*, 57 Wn. App. 314, 319-21, 788 P.2d 554 (1990), which held that a trial court erred in reading a contributory negligence instruction multiple times during the trial because its repetition "unfairly turned the jury's attention away from the clear evidence of the State's negligence, toward the question of Mrs. Cornejo's contributory negligence." *Cornejo* is distinguishable because the instruction in that case stated a single legal principle that was favorable to the party that prevailed at trial. That did not occur here.

VI

SPD argues the trial court erred in granting Sgt. Hockett's motion in limine to exclude portions of an L&I report stating that SPD did not violate occupational CO exposure standards at the West Garage in August 2017 and declining to issue a citation. We disagree.

"Out-of-court statements offered in court to prove the truth of the matter asserted are hearsay, which is generally not admissible." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008) (citing ER 801, 802). Hearsay can still be admissible under the public records exception codified in RCW 5.44.040, which provides, "Copies of all records and documents on record or on file in the offices of the various departments . . . of this state . . . when duly certified . . . must be admitted in evidence in the courts of this state." However, "not every public record is automatically admissible under [RCW 5.44.040]." *State v. Monson*, 113 Wn.2d 833, 839, 784 P.2d 485 (1989). To be admissible under RCW 5.44.040, "a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion." *Brundridge*, 164 Wn.2d at 451 (quoting *Steel v. Johnson*, 9 Wn.2d 347, 358, 115 P.2d 145 (1941)). The purpose of barring such conclusions is to avoid substituting a government agency's conclusions for those of the jury. *See Bierlein v. Byrne*, 103 Wn. App. 865, 870, 14 P.3d 823 (2000).

Applying these legal principles here, the L&I investigator's statement that "No violations were cited" and "No penalties were assessed" is a judgment on whether SPD violated the law, which is akin to the jury's role of determining whether SPD was negligent. While SPD argues this statement is not conclusory

because it "merely stated that the CO readings [in the West Garage] did not exceed L&I standards," SPD conflates a fact (the readings did not exceed L&I standards) with a conclusion (no violations or penalties were issued). Even if the trial court erred in excluding this evidence, SPD was not prejudiced because, as stated above, it was able to argue that it complied with L&I regulations and was, thus, not negligent.[15] Therefore, the trial court did not err in excluding the L&I report's conclusions.

VII

Finally, SPD challenges the trial court's award of attorney fees and costs to Sgt. Hockett totaling $1,622,356.20 based on RCW 49.60.030(2) and SMC 4.20.870, which entitle a prevailing party to recover reasonable attorney fees for bringing successful claims for failure to accommodate and whistleblower retaliation. SPD argues the trial court's award was excessive because it (A) utilized unreasonable market rates, (B) erroneously applied a 1.2 multiplier, and (C) included fees for clerical tasks performed by non-lawyers. We review a trial court's award of attorney fees for abuse of discretion. *Univ. of Wash. v. Gov't Emps. Ins. Co.*, 200 Wn. App. 455, 482, 404 P.3d 559 (2017). We reject SPD's first and second arguments. With respect to its third argument, we remand for entry of proper findings of fact and conclusions of law.

[15] SPD contends that by not also excluding the L&I report's recommendations that SPD upgrade its ventilation system and prohibit officers from completing reports in their vehicles, the trial court "misled the jury to assume that a violation occurred." SPD fails to sufficiently cite to the record to show that it was prejudiced by the introduction of these recommendations without the accompanying conclusion. SPD only cites to a single instance where Sgt. Hockett testified that SPD did not post the L&I report until he contacted the L&I investigator. But SPD did not object to this testimony, and Sgt. Hockett then testified that the report was posted "shortly [there]after."

A

The starting point for all attorney fee determinations is the "lodestar" method, which multiplies the hours reasonably expended in the litigation by the reasonable hourly rate of compensation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). In determining the reasonableness of an attorney's hourly rate, the court considers factors such as "the [attorney's] usual billing rate, . . . the level of skill required by the litigation, time limitations imposed on the litigation, the amount of potential recovery, the attorney's reputation, and the undesirability of the case." *Id.* "Whether or not a fee is reasonable is an independent determination to be made by the awarding court" based on "circumstances of each individual case." *Absher Const. Co. v. Kent Sch. Dist. No. 415*, 79 Wn. App. 841, 847, 917 P.2d 1086 (1995). Appellate courts must be "mindful that it is the trial judge who watches a case unfold and who is in the best position to determine the proper lodestar amount." *Morgan v. Kingen*, 141 Wn. App. 143, 163, 169 P.3d 487 (2007).

The trial court here did not abuse its discretion in determining reasonable hourly rates for Sgt. Hockett's attorneys. Sgt. Hockett's motion for attorney fees was supported by declarations from his counsel as to the basis for their rates and declarations from other local practitioners regarding the reasonableness of these rates in the market for this type of case. After scrutinizing these filings, the trial court issued findings of fact and conclusions of law in which it determined that the hourly rates requested by Sgt. Hockett were "within reasonable rates this Court sees." Because the record amply supports the trial court's determination, the trial

court did not abuse its discretion when it utilized the hourly rates provided by Sgt. Hockett's counsel.

SPD largely ignores the trial court's findings and supporting declarations. Instead, it claims the hourly rates were unreasonable simply because they exceeded the contracted rates that Sgt. Hockett's counsel had disclosed during discovery, the rates of SPD's counsel, and the rates reported in federal decisions awarding prevailing party attorney fees in employment cases. But these rates are not decisive here. "The attorney's usual fee is not . . . conclusively a reasonable fee and other factors may necessitate an adjustment." *Bowers*, 100 Wn.2d at 597. And while opposing counsel's rates are "probative of the reasonableness of a request for attorney fees by prevailing counsel," *Fiore v. PPG Indus., Inc.*, 169 Wn. App. 325, 351-54, 279 P.3d 972 (2012) (quoting *Heng v. Rotech Med. Corp.*, 720 N.W. 2d 54, 65 (N.D. 2006)), we have never held that such rates are dispositive. As the trial court correctly noted and as Washington law confirms, "there are many reasons why counsel negotiate specific rates" and "[t]he question here [is] the appropriate market rate." The trial court did not abuse its discretion when it rejected SPD's attempt to impose an external limit on the hourly rates of Sgt. Hockett's counsel.[16]

[16] For similar reasons, SPD's insistence that the trial court erred by awarding higher rates than those found in its survey of federal cases is unconvincing because, while many courts have considered market data in determining the reasonableness of an attorney's proposed hourly rates, *see In re Oglesby* 13-32362, 2015 WL 5145571, *2 (Bankr. N.D. Ohio Aug. 28, 2015), SPD does not cite to a single case holding that the surveyed rates are dispositive on the market rate or constitute a cap on recoverable fees, *see State v. Loos*, 14 Wn. App. 2d 748, 758, 473 P.3d 1229 (2020) ("When a party provides no citation to support an argument, this court will assume that counsel, after diligent search, has found none.").

B

After calculating the lodestar, the court may adjust it upward based on the contingent nature of success and the quality of work performed. *Bowers*, 100 Wn.2d at 598. Washington courts recognize that an upward multiplier is an important tool in encouraging litigation in contingency cases. *Wash. State Commc'n Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 221, 293 P.3d 413 (2013). This is especially true in the context of WLAD, which "places a premium on encouraging private enforcement." *Id.* (quoting *Chuong Van Pham v. City of Seattle*, 159 Wn.2d 529, 542, 151 P.3d 976 (2007)).

In this case, the trial court's findings and conclusions support a 1.2 multiplier. Sgt. Hockett's counsel represented him on a contingency fee basis, which posed a risk that they would not be paid for their work. The trial court observed Sgt. Hockett's counsel throughout the litigation and commended them for their "high quality" work that "led to extraordinary results in a high-risk, complex case with contested facts and an uncertain outcome." The trial court also noted that to obtain relief, Sgt. Hockett had to endure years of discovery and a "complex trial against an excellent opponent with great resources." Lastly, the court noted that this case was brought under "remedial statutes and ordinances instilled with public interest." *See* RCW 49.60.010; SMC 4.20.800. These findings are supported by the record and amply support the trial court's multiplier.

C

SPD argues the trial court abused its discretion in awarding fees for the work performed by Sgt. Hockett's legal assistant, Tony Dondero, and trial

technician, Nick Sacco, because that work was "purely clerical or IT-related." We remand on this point.

A trial court may include the time of non-lawyer personnel in an attorney fee award after considering six criteria:

> (1) the services performed by the non-lawyer personnel must be legal in nature; (2) the performance of these services must be supervised by an attorney; (3) the qualifications of the person performing the services must be specified in the request for fees in sufficient detail to demonstrate that the person is qualified by virtue of education, training, or work experience to perform substantive legal work; (4) the nature of the services performed must be specified in the request for fees in order to allow the reviewing court to determine that the services performed were legal rather than clerical; (5) as with attorney time, the amount of time expended must be set forth and must be reasonable; and (6) the amount charged must reflect reasonable community standards for charges by that category of personnel.

Absher, 79 Wn. App. at 844-45. "For the recovery of fees of nonlawyers, the court *must* consider [the] six factors identified in *Absher*." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 531, 398 P.3d 1271 (2017) (emphasis added).

Here, the trial court did not adequately explain the basis for its award of fees for Dondero's and Sacco's work. For any award of attorney fees, the general rule is that the trial court must "supply findings of fact and conclusion of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." *White v. Clark County*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015) (quoting *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014)). Absent such a record, the preferred remedy is to remand for entry of proper findings and conclusions. *Id.* Although the trial court's findings of fact and conclusion of law recited the six *Absher* factors, the court did not analyze whether Dondero's or Sacco's time entries satisfied these criteria. Instead, it simply

concluded, "[T]hese factors are satisfied with respect to paralegal, trial technician and legal assistant timekeepers." Because the trial court failed to articulate the grounds for its award of these fees as required to establish a record sufficient for meaningful review, we remand for entry of proper findings of fact and conclusions of law on the issue of whether to award attorney fees to Sgt. Hockett for work performed by Dondero and Sacco.

VIII

Sgt. Hockett requests attorney fees on appeal on the same statutory basis as his award of attorney fees at trial. If attorney fees are allowable below, the prevailing party may recover those fees on appeal. *Aiken v. Aiken*, 187 Wn.2d 491, 506, 387 P.3d 680 (2017) (citing RAP 18.1). As the prevailing party, Sgt. Hockett's appellate fees are awardable to him, with the *possible* exception of fees relating to whether the trial court abused its discretion by awarding fees for the work performed by Dondero and Sacco. On that issue, Sgt. Hockett has not yet succeeded on the merits of his request, though he may still prevail on remand. In *Morgan*, this court remanded the issue of the amount of recoverable attorney fees on appeal under RAP 18.1(i) because a portion of the trial court's fee award was not supported by adequate findings and conclusions, thus necessitating remand for entry of such findings and conclusions. 141 Wn. App. at 164-68. Because the circumstances here are analogous, we remand under RAP 18.1(i) for the trial court to determine the amount of appellate fees Sgt. Hockett may recover after issuing

findings and conclusions determining whether Sgt. Hockett is entitled to recover fees for Dondero's and Sacco's work.

In sum, we remand to the trial court for entry of findings and conclusions to determine whether Sgt. Hockett is entitled to attorney fees for work performed by Dondero and Sacco and to determine the amount of appellate attorney fees to which Sgt. Hockett is entitled. In all other respects, we affirm.

Feldman, J.

WE CONCUR:

Coleman, J.

Smith, C.J.