No. 35872-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

JULIE ATWOOD,

Plaintiff/Respondent,

v.

MISSION SUPPORT ALLIANCE, LLC and STEVE YOUNG,

Defendants/Appellants.

ON APPEAL FROM BENTON COUNTY SUPERIOR COURT
(Hon. Douglas L. Federspiel)

Case No. 15-2-01914-4

AMENDED BRIEF OF RESPONDENT

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INTRODUCTION

Appellants' brief improperly states "facts" in the light most favorable to MSA and Steve Young, while liberally omitting important facts needed to understand the context of each of the trial court's rulings in which the appellants claim to have found error. The appellants' arguments are built on this faulty foundation. Thus, the respondent, Julie Atwood, must correct and supplement the "facts" enthusiastically recounted by the appellants as if they were so. If they were so, the trial court would have ruled differently, but Ms. Atwood would still have won at trial.

The Court should take note of the events transpiring before and during trial that MSA and Young do not raise as issues on appeal: the court's granting of numerous motions to compel MSA's compliance with the Civil Rules (CP 10929, ¶¶13-15); the recusal of every Benton County trial judge at the request of MSA without seeking to have earlier rulings by the recused judges set aside (see id.; CP 10947, ¶25; CP 4369, 4377, 4380-81, 4385, 4388; cf. CP 11133; CP 11125**;** CP 11103; CP 11113-14; CP 4383, CP 11081, 11093-94, 11111); MSA's efforts to tactically claim attorney-client privilege at various times and then seek admission of some but not all of the privileged conversations (e.g., CP 5792-93); the entry of detailed findings of fact and the award of serious sanctions against MSA for discovery abuses accompanied by mendacious statements by counsel to the trial court (CP 11079); the creation of jury instructions on wrongful

discharge, "implicit bias," and aiding and abetting, which were all untested at the time; the ruling as a matter of law, that the "appropriate standard of proof... for admission of evidence of a prior bad(s) under ER 404(b) in civil cases is 'substantial evidence'"; multiple motions in limine mostly not appealed; attorney fees, costs and the award of a multiplier to Atwood's counsel; and a bond filed by MSA found to be deficient and increased—all issues abandoned on appeal.[1]

Nor do MSA and Mr. Young challenge the sufficiency of the evidence on any claim: not on the WLAD gender discrimination claim against MSA; not on Young's aiding and abetting MSA in the gender discrimination; not on the WLAD retaliation claim against MSA; not on Young's aiding and abetting MSA in the WLAD retaliation; and not on the common law wrongful discharge claim. The jury finding that MSA did not prove its failure to mitigate defense (CP 9819) is also unchallenged.

MSA chose not to appeal any of those meaty issues, because they were correctly and thoughtfully decided by the jury and a hard-working, diligent, and intelligent trial judge, whose well-reasoned written rulings make the case iron clad on appeal. What's left for MSA and Young to appeal are mainly evidentiary objections. When such tertiary issues are viewed in the context of the case and the overwhelming evidence

[1] See CP 11202, ¶1; CP 11068, 11057; RP 4629, 4633; CP 11056; CP 10933; CP 10968.

supporting the claims and damages, coupled with the overwhelming evidence showing that defense witnesses were consistently mendacious and were caught being mendacious in front of the jury, the merits of the appeal fall away as easily as did the substantive issues listed above.

It's noteworthy that the appellants try to keep important trial court rulings and facts relevant to the appeal secret from this Court. First, on a claim of attorney-client privilege, MSA successfully protected from discovery and from testimony at trial the statements made at a September 2013 meeting in which the CEO Frank Armijo allegedly gave instructions to terminate Plaintiff Julie Atwood.[2] Second, the trial court's ER 404(b) rulings, which are challenged in this appeal, flowed from the fact that CEO Armijo cultivated a "boys club" atmosphere at MSA, which condoned and supported tolerance for male misconduct, while supporting the harsh treatment of women (finding wrong where there was no wrong), so all of the ER 404(b) evidence is relevant and admissible under Brundridge.[3] Third, MSA and its counsel tried to hide the existence of ER 404(b) witness and former MSA Attorney Sandra Fowler, leading the trial court to sanction MSA for their improper efforts. See CP 11110-11122.

Fourth, the trial court allowed the defendants to offer evidence supporting the defense strategy at trial, which was designed to attack Ms.

[2] RP 825; CP 5332 (Def.'s MIL #9).
[3] See CP 10293.

Atwood's impeccable work record by claiming wrongly and cruelly that she "cozied up to men with power." RP 4793. Thus, the evidentiary rulings on appeal will have to be addressed in the context for which the testimony was intended. Once these secrets are out, the trial court's rulings become obviously well measured and within its discretion.

And of course, the damage instruction on appeal, which is WPI 330.82, was either correct as given or harmless error under Brundridge, and the motion for a new trial as to damages was properly denied based on the mountain of expert and lay witness testimony supporting the framework announced in Bunch v Dep't of Youth Services. This appeal has no merit and the verdict should be affirmed in all respects.

STATEMENT OF THE CASE

A. Procedural History

1. This was a long, hard-fought case

The complaint in this case was filed in August 2015, and the jury returned a verdict for the plaintiff in October 2017. CP 1, 11039. The trial court described the intensive level of the litigation: "This was a time and labor intensive case … due in large part to the extensive and aggressive motion and discovery practice employed by MSA." CP 10941. It was also a high-risk case, so much so that the court awarded a multiplier in addition to the plaintiff's attorney fees. CP 10960 ("I find that the case was high-risk from the outset owing to the fact that Ms. Atwood was terminated and

isolated, so persons who may have been expected to help were of no help, and were in fact, some of the main witnesses against her.").

2. MSA attempted to use attorney-client privilege as a sword and a shield, offering snippets of CEO Armijo's alleged statement to fire Ms. Atwood during a one-hour meeting with his direct reports, while simultaneously instructing witnesses not to answer questions about the meeting under a claim of attorney-client privilege

MSA CEO Frank Armijo was the apex manager at MSA throughout the relevant time frame, but left MSA before trial. In pre-trial proceedings and at trial, the defendants executed a strategy. First, MSA made no effort to bring Armijo back for trial. CP 5806. Second, it opposed Atwood's efforts to depose Armijo in Texas (he was never served, despite several attempts by Atwood).[4] Third, MSA's managers stated at depositions the decision to terminate Atwood occurred at one meeting held on September 19, 2013, and was made by Frank Armijo and Steve Young, with Armijo's direct reports (some of whom were his friends and classmates from Pasco High School)[5] and his attorneys in attendance; yet, in written discovery MSA alleged the decision to terminate Atwood was a "group" decision of which CEO Armijo was only made "aware." CP 1930-31 (Interrogatory No. 9). Fourth, MSA allowed Armijo's direct reports to state in depositions that at the meeting, CEO Armijo directed his

[4] CP 2314; CP 3482; CP 2357, CP 5961; CP 10767; CP 4778; CP 3284.
[5] RP 3268.

reports to terminate Atwood. CP 1952, 1957, 1962; see also CP 1943.

Fifth, MSA claimed the September 19 meeting, which according to testimony, lasted over an hour, was subject to attorney-client privilege and thus, plaintiff could not ask what was said at the meeting. CP 1957-1966, 2360. Judge Runge denied a motion to compel that argued waiver, ruling that testimony about the meeting was not accessible to Atwood owing to attorney-client privilege. CP 2550 (Order); CP 1987 (Pl.'s Mot.).

The sword and the shield issue regarding Armijo statements came up repeatedly in pre-trial motions and hearings before Trial Judge Federspiel. See e.g., CP 4994 (Pl.'s MIL 1 and 3), CP 5936 (Def.'s MIL 9), RP (9/11/17) 118-120; RP 262, 383, 637, 825. On September 12, 2017, Ms. Atwood submitted additional briefing, stating in part, "The defendants are seeking a tactical litigation advantage by not calling Armijo as a witness, and thus denying plaintiff the right to cross-examine the alleged apex decisionmaker." CP 6111. Atwood argued Armijo's statements like, "fire Atwood," were not admissible orders. They were incomplete parts of a larger set of statements offered in snippets by design and representing only a small part of a larger conversation that was not accessible to Atwood owing to the assertion of privilege, and when viewed in the context of a one-hour meeting, Armijo's statements were inadmissible when offered by MSA and Young under ER 801(d)(2). CP 6112, 1989; RP 910-22. Trial Judge Federspiel enforced Judge Runge's ruling that the

meeting was "privileged" and prohibited Atwood from discovering and MSA from admitting testimony of the meeting, owing to the assertion of privilege. RP 902, 907, 925 ("I won't allow [Armijo's statement] … made in the meeting," as "that would be using that as a sword improperly").

3. In interrogatory answers and at depositions and trial, the answer to "who terminated Atwood?" was a moving target

CEO Armijo's direct-report and Senior Director of Independent Oversight, Chris Jensen, was in the room when the direction to fire Ms. Atwood was given. CP 1957. Jensen testified at his first deposition, "The decision by the company to sever the relationship [with Atwood] was **made by Frank Armijo** and **Steve Young**." CP 1943. In contrast, MSA answered Interrogatory No. 9 by claiming that a "group determined" Ms. Atwood's employment, listing: COO Dave **Ruscitto**, Mr. **Jensen** and VP Todd **Beyers**; with VP Steve **Young** "provid[ing] background information," and CEO Frank **Armijo** made "aware." Mr. Jensen, in his deposition, testified that as to the reasons for termination, "I don't have firsthand knowledge of what Steve [Young] and/or Frank [Armijo] concluded was the threshold for the decision to let her go." CP 1943.

Counsel for Ms. Atwood sought in depositions to ask others present when the decision was made and the direction given to terminate her what was said, but counsel for the defendants claimed attorney-client privilege and directed the witnesses not to answer. For example, Mr.

Beyers, the Vice President of HR, testified in his deposition that the meeting in which CEO Armijo gave Beyers the direction to fire Atwood lasted over an hour, and when he was asked about events at the meeting, was instructed not to answer based on privilege. CP 1953, 1957-1966 (asked tell me everything Armijo told you, and instructed not to answer).

In contradiction of the testimony from Mr. Jensen's first deposition and MSA's Answer to Interrogatory No. 9, Defendant Steve Young claimed in his deposition and at trial, that he had absolutely nothing to do with Ms. Atwood's termination. It is undisputed that Mr. Young, Ms. Atwood's supervisor, did not physically attend the September 19, 2013 meeting with CEO Armijo. Mr. Young claimed he was initially unaware that Ms. Atwood had left MSA because he was traveling. CP 6350-6354; CP 6748 (ruling on Young deposition designations); RP 2586-2589.

Young claimed CEO Armijo first told him Atwood retired; and then told him she resigned in lieu of termination, and that he (Young) thought MSA made the wrong decision. CP 6350-6354 (Young said MSA made a "huge mistake"); RP 2589 (termination came as "big time" surprise—claiming "no one consulted" him before deciding to fire Atwood—"not a single person"). Young's denials that he was not consulted about the decision to fire Atwood were incredible, not just because they directly contradicted Jensen's testimony, but also because Young is a Vice President and had been Ms. Atwood's direct supervisor.

Mr. Jensen, at a second deposition, gave testimony that was more complimentary to Young's denials. See RP 3859 (claiming there was no conversation with Young in the "ten-day period" before Atwood is fired).

4. MSA Withheld ER 404(b) Evidence Of MSA Attorney Sandra Fowler In Violation Of The Trial Court's Order And Then Misrepresented Facts To The Trial Court In An Effort To Quash Plaintiff's Subpoena Of Ms. Fowler

Ms. Atwood's counsel spoke with Sandra Fowler, MSA's former General Counsel, who disclosed that she had filed an EEOC claim against MSA—a complaint MSA had not disclosed. CP 1384. Judge Runge subseequently entered an order compelling MSA to respond "without further delay" to interrogatories seeking the disclosure of other complaints involving gender discrimination. See CP 11134 (Order); and CP 880-81, 883 (Answers to Interrogatories 16-17; RFPs 94-95).[6] Four days later, the parties appeared on shortened time before Judge Spanner on MSA's motion to quash a subpoena for testimony and documents from Ms. Fowler. CP 11093, ¶ 27. MSA's counsel gave a sworn declaration to the court testifying that the requests for "claims by Ms. Fowler…, who voluntarily left MSA over two years after Ms. Atwood's employment ended, was nothing more than a fishing expedition" and "not calculated to

[6] The court later denied a motion for reconsideration and modified the order as Atwood proposed, requiring MSA to "produce all … complaints or investigation occurring between 2010 and the time of trial related to: (1) discrimination, retaliation, and misuse or governmental resources; or persons Defendant has disclosed as involved in Plaintiff's termination (Frank Armijo, Dave Ruscitto, Chris Jensen, and Todd Beyers)." CP 11128.

lead to the discovery of admissible evidence." Id., ¶ 28. Counsel kept to her declaration testimony in chambers, claiming the subpoena was "nothing more than a fishing expedition," and that Fowler's testimony would be subject to attorney-client privilege. CP 11093-94, ¶¶ 30-31. At the time these claims were made, MSA possessed Fowler's EEOC Charge, in which she "alleged she was subject to discrimination as early as August 2013" (the month before Atwood was fired); "claimed she apprised members of MSA's Board 'how Frank Armijo/Dave Ruscitto/ Todd Beyers … unlawfully treated me'"; and claimed she did not voluntarily leave, but was "constructively discharged." Id., ¶ 29. Judge Spanner issued no written ruling, but he did not quash the subpoena and allowed Fowler's deposition to go forward. Id. The next day, MSA produced records related to complaints of gender discrimination and retaliation made by Fowler. CP 11094, ¶ 32. Judge Federspiel later determined that "MSA and its counsel waited to produce the EEOC complaint and the other documents until after learning that th[e] Court would **not** quash the Fowler subpoena." Id., ¶ 33.

5. MSA was sanctioned for misleading discovery practices, which prejudiced respondent Julie Atwood before trial

In a sanctions order entered in July 2017, Judge Federspiel issued 45-pages of findings concerning MSA's withholding of documents in violation of the court order to produce documents "without further delay,"

CP 11092 (¶ 23), which should have included documents related to former MSA General Counsel Sandra Fowler. Findings include:

- "[T]he lack of disclosure in May 2016 with respect to both the external and internal complaints filed by Ms. Fowler … reveals either an incompetent investigation (i.e., a lack of a reasonable inquiry), or an intentional withholding of evidence -- if not by Ms. Ashbaugh, then by her corporate client." CP 11091 (¶22); see also CP 11097-99 (¶¶ 42-44).

- "Just like Fisons, MSA's May 23, 2016 discovery answer was 'misleading,' as it led plaintiff to believe that all 'gender discrimination, whistleblower, and/or retaliation complaints, from 2011 to the present' would be identified by MSA and produced." CP 11110 (¶80).

- "This documentation, which MSA was withholding, 'contradicted the position' taken by the company in opposing the documents release, and contradicted Ms. Ashbaugh's sworn statement to the Court." CP 11093 (¶29); cf. CP 1068-69 (Ashbaugh Dec., ¶6).

- "[M]ore than ten weeks after Judge Runge's Order, and on the same date that the parties were filing their … respective Trial Briefs—defendants produced … documents related to Ms. Fowler's complaints and allegations of gender discrimination and/or retaliation by another MSA executive, **Stanley Bensussen** (one of MSA's attorneys in this litigation), as well as top executives, **Frank Armijo** and **Dave Ruscitto**." CP 11097, ¶42.

The trial court found MSA had "prejudiced [Atwood's] ability to prepare for trial." CP 11116 (¶90). As a result of the sanctions order, Ms. Atwood conducted additional discovery before trial. CP 4773-74.

B. MSA Was Protecting an Open Secret

For most of his career, Steve Young worked as a small business owner providing consulting services in a one-person office. RP 2476. But after he became Mayor of Kennewick, he was recruited by MSA's CEO

Frank Armijo to be a Vice President reporting directly to Armijo. Id.; RP 2584. Young joined MSA in 2012. RP 2474. He was paid over $200,000 a year by U.S. taxpayers as Vice President of MSA. RP 2548-49. He billed taxpayers as though he worked a 40-hour week, but produced no time sheets supporting that contention until 2015. RP 2472, 2475. He admitted he worked 16-20 hours every week on mayor-related business. RP 2471-72. He admitted he used his DOE email account to do mayor-related business. RP 2534, 2537-44; Ex. 155, Ex. 95. He admitted he kept and displayed his mayor-related appointments on his DOE calendar. RP 2483, Ex. 185.[7] He admitted he did mayor-related business in his DOE office, on his DOE computer, during the work day. RP 2534-35. Young's use of company time to work on mayor-related business was an open secret at MSA and DOE. See RP 2472. Young testified that his being mayor advantaged MSA and DOE:

- "The biggest return on me being a mayor is the Department of Energy. I'm able to do what the Department of Energy can't do because I'm an elected official."
- "My job, one of my jobs as mayor, is the ability to go back, meet with the [U.S.] Senate, meet with the House."
- "I can actually bump a regular citizen and testify before a committee about an issue because I'm an elected official."
- "I use my vacation to go back and lobby — and I'll use the word lobby — for the local [DOE] offices for the needs that they have to try to get the money they need for the Hanford site."
- "What's good for MSA is good for the people of Kennewick."

[7] See also RP 2529, Ex. 20 at Bates 191.

RP 2478-80.

C. Young's Statements and Actions Revealed a Man Who Stereotypes and Disparages Women

Mr. Young does not respect women and tends toward discriminatory misconduct. Using his government computer and government email, Young distributed the offensive "Barbie" email to his friends during the work day. RP 2542-44; Ex. 95. The email depicted locally named "Barbie" images with offensive comments; there were no such depictions of "Ken." Ex. 95. At trial, Ms. Atwood testified to having reported Young's offensive "mean-a-pause" joke about pills he saw on Linda Delannoy's desk, which he said in Atwood's presence, RP 2863; and she testified to reporting Young's demeaning comments about DOE Manager Karen Flynn's abilities, saying the only reason she had her job was because of her "relationship" with DOE Deputy Manager Shoop and that she was incompetent (a sexualized reference to her sleeping her way to the top). RP 3240. Young made no similar comments about males. Id.

D. Young Fits Well Into The Sexist Culture Created By Armijo

Former General Counsel Fowler testified she was successful under Armijo's predecessor, CEO Figueroa, and after leaving MSA following Armijo's tenure, she was successful again as General Counsel at Bechtel. RP 3355, 3365. Fowler was verbally attacked and demeaned by Armijo, and she described the anti-women culture that permeated MSA under him.

RP 3356-58, 3361, 3376. Armijo hired Mr. Bensussen to displace Fowler, who took over most of her job duties and demeaned Fowler, stating she should "kiss the ground" Armijo walks on and calling her a "man-hater," without repercussions to Bensussen. RP 3362-65, 3274; see Exhibit 108.

Under Armijo, good performance did not matter—gender trumped performance. Armijo hired Bensussen to displace Ms. Fowler despite her good performance, while Vice President of HR, Todd Beyers, was not displaced, or even disciplined, even though he lost millions of dollars through incompetence, much of which was recovered owing to the hard work and persistence of Ms. Fowler. RP 3270-71; RP 3382-85. Armijo also recruited Mr. Jensen who displaced Sally Lampson—a CEO direct report under Figueroa. RP 3357, 3903, 3932-33. Ms. Fowler testified that under Armijo, the "third floor," which housed the MSA upper management, became a good old boys club, with only one woman remaining. RP 3376. Fowler testified that the "Friends of Frank" (as VP Todd Beyers self-identified) help each other out. CP 3358, 3267-68.

In contrast to the treatment of women like Atwood and Fowler, Armijo permitted his direct report to impose light or no discipline on men in his chain of command who committed serious misconduct. In 2010, under Armijo, Vice President Todd Beyers, MSA's HR Manager, gave a two-week disciplinary suspension to manager Michael Turner for "ongoing negative and demeaning comments that directly affected the

relationship with the DOE client and MSA employees." Ex. 140, RP 3343-45. This was a serious offense under MSA policies that's "close" to the conflicts Ms. Atwood was alleged to have, see RP 2963, but under Armijo, Mr. Turner was not fired. Ex. 140. In 2011, under Armijo, Vice President Scott Boynton put his hand on the leg (near her crotch) of the spouse of an MSA truck driver. Then he began to send her text messages, and the truck driver confronted Boynton and said, "Stop touching, texting, and talking to my wife." This was a serious offense under MSA policies, but under Armijo, Boynton was not fired. See Ex. 400, RP 3325-28. In 2015, under Armijo, an MSA manager left work without permission, taking employees out to dinner, while using a government vehicle, falsifying time card records, and billing DOE for overtime. The manager only got a two-week suspension. Ex. 83, RP 3321-23. The disparate treatment is astounding.

Of course, Atwood did nothing wrong to justify any discipline, but even if she did as MSA claimed, termination would have been inappropriate when compared to the treatment of men under Armijo.

E. Julie Atwood Brought Skill And Experience To MSA

Julie Atwood had a thirty-year career working as a manager for the Washington State Department of Ecology and later for private companies involved in waste management. RP 2678-707. She was an Ecology regulator at Hanford and had experience there going back to the days when Hanford still produced plutonium. Id. After Ecology, she worked for

Hanford and non-Hanford companies. Id. Her employment track was a record of promotions and increased responsibilities. Id. Former manager Rick Morck testified, "She was excellent…. [S]he was the best." RP 1596-98. Former manager Mike Spillane testified about her good work as a subcontractor for him and said he would hire her again if he was hiring for a position she fit. RP 1613-18, 1623. Former Bechtel President Mike Hughes testified to her "outstanding" performance and "very high quality" work product. RP 1363-72. Former manager Allen Parker testified to having Atwood as a "key person" on a bid to DOE and testified about her abilities and the "great job" she did for him. RP 2326-32.

F. MSA's Managers Worked To Hurt Ms. Atwood's Credibility With DOE And To Sabotage Her Career As Early As 2012

There was uncontradicted evidence that Atwood performed her job well and was a valuable asset to her customer, DOE. Exs. 5, 6, 7 (performance reviews). In an entry dated September 18, 2013—the day before MSA terminated Atwood—MSA's investigators wrote, "Atwood's performance is ***stellar*** and there is no indication of a performance or behavior issue on [her] recent performance appraisal." Ex. 24. Also, "the DOE clients love Julie." Id. For example, DOE Manager Dowell, a client assigned to Atwood, testified he "never had any worries" about the quality of her performance; she was an "always ... dependable and excellent worker." RP 1558-59, 1565; see also RP 1580 and RP 1162-66, 1172.

At trial, DOE Manager Doug Shoop was asked if MSA's COO Ruscitto told him that Ms. Atwood was being investigated for "time card fraud." RP 1551. Shoop testified he remembered a meeting with Ruscitto, but "do[es] not recall whether [Ruscitto] said Ms. Atwood was being investigated or … *an employee* was being investigated." Id. At trial, DOE Manager Greg Jones, Shoop's direct report and Mr. Young's good friend, RP 1170, 2236, 1576, admitted to hearing that Atwood was "fired… [for] timecard fraud," but denied knowing where he heard it. RP 1578-79, 1590. DOE Manager Dowell also heard the time fraud claim, and said he heard it from Shoop and that the news came from Ruscitto. RP 1559-61; RP 2857.

Mr. Ruscitto, MSA's COO, was spreading "fake news." VP Todd Beyers and Chris Jensen were informed by investigator Wendy Robbins that MSA's 2013 investigation had found "nothing" on Ms. Atwood, and specifically "no evidence of time-charging violations." RP 3625-26, 3641.

Steve Young, from the time of his hire, began secretly papering Ms. Atwood's record with false and negative allegations. No business reason existed for seeking to remove Atwood from her position, yet as was done by Armijo to Fowler and the other women on the third floor, Young sought to sabotage Atwood. He used other Armijo direct reports and his minions (Legler and Delannoy) to attack Atwood without her knowledge.

In 2012, in connection with an investigation following an anonymous complaint, "Friend of Frank" Chris Jensen wrote to DOE

managers about Ms. Atwood being investigated for time card fraud—a false allegation that would not typically be revealed to DOE unless proven. Ex. 11 (9/19/12 entry); RP 2095. Witness Allan Parker testified that Atwood had been "key personnel" on bids his company submitted to DOE and that "just the smell" on a manager of being unethical or a cheater, or "rumors that [a] person may have engaged in timecard fraud," affects whether to hire or select a person to be key personnel. RP 2336.

During that 2012 investigation, Young told Investigator Wendy Robbins that he thought Atwood threatens people, that he deals with Atwood issues on nearly a weekly basis, and that his goal is to help Atwood enjoy her job or make a change. Ex. 11 (entry on 10/2/12); RP 2489, 2493, 2500. These were false allegations. Minion Morris Legler told Robbins that Atwood was frequently not where she says she will be. Ex. 11; RP 1701-03. Ms. Atwood was vindicated by the investigation, but the effort to undermine her and to hurt her reputation is obvious. See RP 1709. Notably, Atwood ***was not told*** about the 2012 allegations so she could defend herself, nor subjected to progressive discipline, which would have been the result if any of the allegations had had merit. RP 2799, 2807, 2850-51, 1708, 1806, 1837. Ordinarily, the accused is told. RP 2059-60.

G. The 2013 Anonymous Complaint Against Steve Young

In 2013, someone (not Atwood) filed an employee concern against Young ("the real anonymous complaint"). RP 1861-64. Ms. DeVere is the

EEO investigator and she got involved at the request of HR business partner Cindy Protsman who called DeVere because the real anonymous complaint included a claim of "hostile work environment." Id.[8] At a meeting in late August, Protsman showed Young and DeVere the real anonymous complaint (Young claims he never saw it). RP 1862-64, 2454-55, 2562, 2566-67, 2606. Protsman recalls it was stamped. RP 3562-63. It only addressed one issue. RP 1861, 3568. Protsman took notes, but someone took all of her records of the meeting. RP 3565-66.

Ms. DeVere, who confirmed the real anonymous complaint just alleged a hostile work environment, began to investigate. RP 1861, 1865 2069; see also RP 1650-51; RP 2852. Meanwhile, Young "brought in … four or five" of his leads and talked to them. CP 6819, 6748. He asked if he was creating a "hostile work environment." RP 2617. Young wrote to Ms. Atwood, "**A complaint has been filed against me**." Ex. 9; RP 2230.

On September 5, 2013, Young met DeVere and Protsman. RP 1866. Young had been told not to discuss the complaint, RP 1864, but after he was confronted with the real anonymous complaint, he told DeVere and Protsman he did his own "mini investigation" and talked to two of his staff who confirmed "he was creating a hostile work environment," so "he was just going to make it easy and … retire." RP

[8] DeVere is the name used in trial exhibits, while transcripts use "Moreland." RP 1860.

1868-69. DeVere told him to wait for the investigation. Id. She asked Young to tell her by end of day, so she could tell her boss, VP Todd Beyers. Id. Young told DeVere at this meeting **he thinks Julie Atwood made the complaint**. Id. DeVere doesn't know her. Id.; RP 2079, 2860.

Young next went over DeVere's head to CEO Armijo who told VP Beyers that DeVere was harassing VP Young. VP Beyers called DeVere and told her to cease and desist. Ex. 28; RP 1871 (DeVere); cf. 3282-83, 3286-87 (Armijo "directed" Beyers); RP 2586 (Young testified he went to Armijo "extremely angry[,] … slammed [Armijo's] door and … said, if you're going to do an investigation on me, you ought to have *the balls* to confront me"); CP 6808 (Young testifies he told Ms. DeVere "if I give my resignation I would give it to the president, the **man** who hired me").

Young no longer intends to resign. From this point forward, no one sees the real anonymous complaint. Trial Exhibit 414B is the fabricated anonymous complaint. In future meetings between Ms. DeVere and management, this document is not shown to DeVere. See RP 2058, 2067.

H. The 2013 Fabricated Anonymous Complaint Against Julie Atwood and the Other Document Tampering

A reasonable inference is that MSA managers destroyed the real anonymous complaint and substituted in its place the fabricated anonymous complaint. The fabricated anonymous complaint does not mention Young and alleges three claims similar to the claims in the 2012

anonymous complaint. See Ex. 414B. Investigator Wendy Robbins testified she didn't remember who gave her the 2013 anonymous concern to investigate, suggesting that perhaps it was DeVere. RP 1634, 1639. Most of DeVere's notes from the two-hour interview of Julie Atwood are missing. Only a page or so are left in the file. RP 2071-73, 2083, 2450; Ex. 20, Bates# 179-80. Ms. Lindstrom managed the administrative files. RP 3942. She doesn't know who had DeVere's cabinet key after DeVere left MSA. See RP 3954-55. She found some of the handwritten files out of place and found some of the summaries were missing. RP 3955-57.

There are two versions of Atwood's July 2010 to June 2011 performance evaluation. The real performance evaluation, Ex. 6, was signed by Steve Young, Jim Santo, and Ms. Atwood ("real Atwood performance evaluation). RP 2775. A second version was produced in discovery that was never used ("the fabricated Atwood performance evaluation"). See Ex. 348, at Bates# 84; RP 3223-31. It was created after Atwood upset Young's predecessor by refusing to produce work outside the contract, which would have been illegal. Id. Young told Atwood he wouldn't sign the evaluation either, and did it over. RP 3259; see Ex. 6.

There are also two versions of the 2013 investigative log. Compare entry on 9/20/2013 at Ex. 24 (the "real 2013 investigative log") with Ex. 12 (the "fabricated 2013 investigative log," dated much later). Witness Cheryl Biberstine testified that they would never make changes in the

record of events after case is closed—maybe typos but never substantive changes. RP 4353-4359. The jury could properly infer that the real 2013 investigative log was tampered with a year later by Ms. Robbins to help cover up the wrongful termination of Ms. Atwood. See RP 3637-43.

I. Armijo's Direct Reports Changed The Devere Investigation—Now Ms. Atwood Is Being Investigated For Timecard Fraud While Young Meets With Armijo Managers To Strategize

At trial, Mr. Jensen testified about a meeting held on September 12 (a week before Atwood was fired) that Jensen attended with Ruscitto, Beyers, and Young to discuss Atwood. RP 3878, 3882, 3909, 4360. This version of events was consistent with Ms. Atwood's testimony that she was told by VP Beyers on the day she was fired that "Steve Young's completely aware of what we're doing." RP 2880. It was also consistent with the entry for a meeting in Ruscitto's office at 7:00 a.m. on 9/12/13 on Mr. Young's calendar. See Ex. 185, Bates# 4259 ("*Personnel Issue*").

Jensen's trial testimony and Young's calendar entry contradicted Young's sworn testimony that **no one consulted him** ("**not a single person**") and his other denials of knowledge or involvement in Atwood's termination. See RP 2589, CP 6353-54. Jensen testified that Mr. Young outlined allegations against Atwood as collected by Morris Legler. RP 3883-87, 3910-11. On rebuttal plaintiff called Legler who admitted he did whatever Young told him to do and that he documented Atwood's alleged undocumented absences as follows: when he walked by her office, if she

wasn't in her office, he would document her as absent. He did not try to call or text her, claiming he didn't have her number, and didn't try to email her either. The documentation was bogus. RP 4339-43. Legler's list of Atwood absences was entered into a chart presented at the secret meeting that was withheld from the investigators and Atwood. Ex. 221 (chart); RP 4359-61 (Biberstine typed it up). The bogus chart appeared again in Ms. Ashbaugh's letter to the EEOC without explanation as to how the data was collected and used as evidence supporting the termination. Compare Ex. 221 with Ex. 16, at 4-6.

Later in the day on September 12, after having been earlier told to cease and desist her investigation into Young's misconduct, DeVere was called to a meeting with Beyers and Jensen. RP 3905. Also, present was Wendy Robbins. Id. Beyers told DeVere that she would continue her EEO investigation of Young, but that Robbins would lead the investigation and focus on allegations of time-card fraud against Atwood. RP 2067-69, 2075, 2459, 3915, 3647, Ex. 20 at Bates# 196 (DeVere notes of the 9/12/13 meeting). The investigators were told that CEO Armijo and COO Ruscitto wanted the investigation to conclude by September 18. RP 2069. This time, ***Young was not interviewed*** by the investigators at the direction of Armijo direct reports Beyers and Jensen. RP 2076-77, 2086.

Ruscitto told DOE managers that Atwood was being investigated for time card fraud. RP 1551, 1578-79, 1559-61. DeVere testified DOE

may be informed of the fact of an investigation, but DOE is never given the specific name of persons under investigation. RP 2095.

J. On September 16, 2013, Ms. Atwood Is Interviewed And Reports Young's Misconduct To The Investigators

Ms. Robbins was asked whether Ms. DeVere "was investigating Steve Young in a hostile work environment claim?" She did not deny this, but instead testified, "I do not know." RP 1635. On September 16, 2013, Ms. Atwood was interviewed by DeVere and Robbins. Atwood told the investigators she was afraid of what Young would do if he saw her complaints. RP 3237-40. She reported, "the workplace was a hostile work environment based on gender and that Mr. Young had targeted me and discriminated against me as a woman." Id.; accord RP 2083 (DeVere). She reported being "excluded from activities and meetings" (including the meeting where Young told leads about the complaint); Young's offensive "mean-a-pause" joke; and his demeaning comments about Karen Flynn's abilities, saying she only had her job because of her "relationship" with DOE Deputy Manager Shoop and was incompetent (a reference to her sleeping her way to the top). RP 2863, 2865, 3240, 3243. Atwood also told the investigators that if they were asking about her time, she expected them to look at others too, stating "Steve Young is doing City of Kennewick work on government time," which "wasn't a secret," RP 2867-68; and that another man in Portfolio Management, Mr. Winters,

"routinely left in the middle of the workday to play basketball for a couple of hours … with Frank Armijo." RP 3242. Atwood reported that people were afraid to complain since it was Armijo. Id.

K. On September 17, 2013, Young's Direct Report Claims Atwood Is Sleeping With A DOE Manager And Investigators Meet And Report Atwood's Statements To Beyers And Jensen

On September 17, 2013, DeVere and Robbins interviewed Young direct report Delannoy who attacked Atwood and alleged she was having an affair with Jon Peschong. RP 2164, 2234-35. There was no affair. RP 2263. Delannoy also disclosed that Young had turned off his calendar after learning DOE had inquired about his mayor-related calendar entries. RP 2242; Ex. 20 at Bates# 191. A reasonable inference is that Young suspected Atwood was behind the DOE inquiry, just like he suspected she was behind the real anonymous complaint against him. See RP 1869.

On September 17, 2013, DeVere and Robbins briefed VP Beyers and Mr. Jensen. RP 2087, 2669. DeVere testified to briefing them on the fact that Atwood was the only witness to verify that Young discriminated "because she was a woman." RP 2089. DeVere also testified that Beyers and Jensen were told how Atwood suggested that MSA should "look at Steve Young's calendar and his work … that may possibly have been City of Kennewick work on MSA time." Id. Robbins' notes of the September 17 meeting confirm she reported to Beyers and Jensen "conclusions and recommendations" that day, including that there was "no time card fraud"

and "no time charging violations" by Atwood, and that she recommended MSA "help [Young] utilize Atwood." Ex. 39E at Bates# 1954; RP 1682.

L. On September 19, 2013, Armijo, Ruscitto, Beyers, Jensen, Cherry And Fowler Meet, And After That "Privileged" Meeting, Beyers And Cherry Force Atwood To Resign

On September 19, 2013, CEO Armijo met with COO Ruscitto, VP Beyers, Mr. Jensen, Steve Cherry and Sandra Fowler concerning Ms. Atwood's employment. CP 1957-60, 1974, 1983. Fowler testified she only "listened" and that she and Cherry did not give legal advice at the meeting. CP 1983. Nevertheless, the meeting was ruled "privileged." CP 2550. It is undisputed the meeting lasted over an hour and that in the meeting Beyers was given the instruction by Armijo to terminate Atwood. CP 1957-60.

About the same time, Ms. Robbins advised Atwood that she was vindicated of the time card fraud allegations. See RP 2873; Ex. 24 (entry on 9/20/13). Still, Atwood was directed to meet with Beyers. RP 2874-75.

M. The Resignation In Lieu of Termination Caused Serious Emotional Harm And Lost Income

Atwood's trial testimony showed that her damages began at the termination meeting with Beyers and Cherry. On her last day of work, she was told by Robbins she was cleared of the charges against her, but then directed to meet with Beyers and Cherry, who told her she was being terminated. See RP 2876-80. No explanation was given. She could not understand why and began to sob. She told them it was a mistake. Id.

Beyers was unfeeling and bullying; he proposed she resign in lieu of termination. Id. Atwood worried about retirement, re-employment, and benefits, and thought resignation might preserve them. She was so upset she could not physically write the few lines that would become her resignation. Id. Beyers had a letter drafted and gave it to her to sign. Id. She was broken. She believed she could not walk away from the resignation without losing benefits and having her record reflect a termination, which would impair future employment. RP 2887. Then, she was made to publicly push her belongings out to her car in a wheelchair, three times, crying all the way. RP 2880-81. Mr. Silko testified she was sobbing uncontrollably and looked "absolutely broken." RP 1096. Driving home that night, Atwood thought about driving into an oncoming truck, but decided not to, as she might harm the truck driver. RP 2884-85. She has been depressed and suffered PTSD-like symptoms ever since. She thoroughly documented her non-medical damages through testimony and charts detailing by month and year the level of damages suffered on a scale of 1 to 10. Ex. 280 (does not include all charts; some demonstrative charts were created at trial); RP 2902-15, 2938-41, 2890-92.

Nationally renowned psychologist Dr. Laura Brown testified that Atwood suffered from a mental illness that was like PTSD without the life-endangering event, and that the mental illness was proximately caused by the events of her final days of work, and that it may take several years

before she would be cured. RP 1908-63. Dr. Brown noted that Atwood suffers from intrusive thoughts—images of the last day—nightmares like being run over by a car, and intense emotional distress when she has to think about or talk about what happened on the last day at MSA, distress which the jury saw with their own eyes as Ms. Atwood testified. RP 1930. Dr. Brown also discussed her marked physiological reaction, which means that Ms. Atwood gets so upset her gut gets hyperactive, affecting "both ends." RP 1931. Dr. Brown testified that when they were meeting, Ms. Atwood had to stop and run to the bathroom in the middle of talking about the events. Id. Dr. Brown testified that Ms. Atwood tries to avoid having thoughts or being around anything that reminds her of what happened. Id. She testified that avoidance has turned out to be one of the hallmarks of the post-traumatic response, as when something bad happens to people, they try to stay away from it. Id. Dr. Brown testified that Atwood avoids people and places and things that remind her of, not only what happened, but of her life and her work prior to that, because it's so painful. Id. Dr. Brown testified that Ms. Atwood has negative beliefs, and that she believes that she has been broken, and that the world that she used to believe to be a just and fair place turns out not to be so predictably just and fair. RP 1932-33. Dr. Brown testified she has persistent shame. Id. She feels badly about herself, has difficulties with concentration and difficulties sleeping. Id. All of these symptoms are proximately caused by

the defendants' misconduct. RP 1938. They are life altering, not bumps in the road: instead of enjoying the fruits of her hard work in her later life, Atwood has to fight nightmares and intrusive thoughts, and accept she is out of the work environment and will never get back to the level she had achieved before the discrimination and retaliation. RP 2904, 2938.

In rebuttal, the defense offered the testimony of Dr. Biebeault, a psychiatrist without comparable specialized knowledge. Compare Dr. Brown's resume (Ex. 429) with Dr. Biebeault (Ex. 428). Unlike Dr. Brown, Dr. Biebeault testified without stating her opinions be on a more likely than not basis. Cf. RP 1926 with RP 3460. Dr. Biebeault did not examine Atwood or opine on her condition. RP 3466-67, 3511, 3547. Instead, she claimed Dr. Brown's methodology was suspect. RP 3464. In fact, Dr. Biebeault's testimony was weak and ineffective.

N. Ms. Atwood Suffered Lost Wages And Retirement

Ms. Atwood testified that she intended to stay working on the contract at Hanford and inside the same benefit plan through retirement (age 70), and then planned to work as a consultant. RP 2937-38; see also RP 3962 (Dru Butler testifying how at Hanford, "when a [company's] contract ends… the people who worked [for the company], most of them would get what they called mapped … over to the new contract. … It [is] the same workers, just working for a different company.")

At trial, Harvard-trained Labor Economist Paul Torelli, Ph.D.,

testified to Ms. Atwood's economic damages, which varied, depending on the scenario, but included a scenario totaling $2.1 million, RP 2109, 2113, 2120-21, 2124, which is the amount the jury awarded. CP 11043. MSA produced Ms. Barrick, a CPA, who disagreed with Dr. Torelli, but lacked the stature and analysis to counter his opinions. RP 3723, 3763- 66.

O. In Discovery And At Trial, MSA Claimed The Reasons For Terminating Atwood Were Set Out In A Letter To The EEOC

Neither MSA nor Young gave contemporaneous reasons for Ms. Atwood's 2013 termination. See RP 2878-79. As the jury heard, in pre-trial discovery, when asked the reasons for her termination, MSA directly stated they were set out in 2015 letter by its attorney, Ms. Ashbaugh, to the EEOC. RP 2943-46. The letter to the EEOC identified three reasons:

1. Ms. Atwood repeatedly failed to abide by requests of her supervisor regarding her whereabouts during work hours;

2. Ms. Atwood failed to provide advance notice of leave

3. Ms. Atwood had a practice of using her relationship with a DOE client to avoid and/or circumvent her supervisors' plans and/or directives.

Ex. 16 at Bates# 40. At trial, each of the 2015 justifications were rebutted, but even if one were to assume they were true, the evidence showed men who engaged in serious misconduct were not terminated, and that Atwood, who engaged in no misconduct, was terminated without progressive discipline or even notice of what she did wrong (a courtesy provided to the men disciplined under Armijo). See Ex. 43 (serious misconduct defined).

The letter to the EEOC was deceptive in that it alleged Ms. Atwood was previously "counseled about her lack of communication concerning her whereabouts," citing to the fabricated Atwood performance evaluation (discussed *supra*), which MSA gave to the EEOC. Ex. 16 at Bates# 40-41; and RP 3221-31; Ex. 348 at Bates# 84. MSA also gave the EEOC the fabricated 2013 investigative log (discussed *supra*). Cf. Ex. 348 at Bates# 168 with Ex. 24 (entry dated 9/20/13).

P. At Trial, Ms. Atwood's Female Friends And Coworkers Working Under The Supervision Of Steve Young At The Time Of Trial, Attacked Ms. Atwood Rather Than Lose Their Jobs

The defendants called women witnesses to attack Ms. Atwood. Marisa Renevitz was called to testify that Atwood didn't keep her abreast of her location, and that she ran into Atwood after the litigation began and felt uncomfortable. RP 4289. She reported to Young at the time of her testimony. RP 4292. She did her best not to compliment Atwood and was impeached on a prior inconsistent statement in which she told the investigator Ms. Atwood always keeps employees abreast of her whereabouts, and that she likes Atwood's management style better than Ms. Delannoy's management style. RP 4297-98, 4294-95, 4299-4302.

Dru Butler was a long-time coworker of Ms. Atwood's who at the time of her testimony was an MSA employee who had been a direct report to Steve Young in 2012 and 2013, and at the time of trial was 61 years old and known to be a friend of Ms. Atwood. RP 3960-61, 3966, 4113. She

testified she could not find Ms. Atwood during the work day. RP 3975-76. She also testified that in 2013 it was not fun to work at MSA anymore. RP 3999. On cross-examination, Butler testified that "people were afraid that their jobs would be eliminated if they talked to Ms. Atwood," and that Butler herself was afraid she was going to lose her job. RP 4105, 4113.

Ms. Ollero was also called by MSA. She testified that Ms. Atwood was a terrible employee at M&EC. RP 3394-409. Ollero worked there as a subordinate of Ms. Atwood after previously working with her at Bechtel, where Ollero was a low-level employee. RP 3392-93. What she apparently didn't know was that Mr. Hughes, who was Bechtel president at the time, had already testified as to Ms. Atwood's excellent work. Id.; RP 1364-72.

Q. MSA Whitewashed Its Investigation Into Young's Time Cards

MSA called Ms. Robbins to testify that Mr. Young's time-charging was reviewed in 2015 and that MSA found no time-charging violations for Young, RP 3628-29. However, Ms. Atwood testified at trial how the later investigation into Young's timekeeping habits had a handwritten note on it claiming there were "no previous concerns re: timekeeping while conducting mayor duties," which Ms. Atwood testified was false given the concern she reported to Robbins and DeVere in 2013 before MSA terminated her. RP 3241; accord RP 2867; Ex. 24 (9/19 entry).

R. Ms. Atwood Mitigated Her Damages

Atwood testified that she applied for about 60 jobs with no luck.

RP 2893. Her personnel file says, "would not rehire." RP 2895-900. She explained that she believed she could not find work at Hanford due to blacklisting. Id.; RP 2982-87. DOE managers testified they heard she was investigated for time card fraud and Greg Jones testified he thought time card fraud was the basis for her termination. RP 1551, 1559-61, RP 1578-79, 1590, 2857. Atwood had applied for and was in the running for one Hanford job, but Jones killed the program. RP 1289; cf. RP 1584-87 with RP 1568; RP 2972-73; RP 2982-84. Alan Parker, who had worked with Ms. Atwood, testified that time card fraud allegations were deadly to employment at Hanford based on his years working there. He testified that "[o]nce you get that smell of fraud…, it's over," and said that if he were selecting Key Personnel today in connection with a DOE bid and there were rumors of fraud, it would "absolutely" affect his decision. RP 2336. In an effort to prove its affirmative defense, MSA called John Fountaine as an expert witness on mitigation. He provided no comparable positions—not even one—for which Atwood could have and should have applied. RP 3077, 3093. He testified Atwood "should have taken the kind of job that the law says is **not** required," working minimum wage. CP 109877-88, quoting RP 3089. He knew nothing about her mental illness and the effects they would have on her job search. RP 3097. He also knew nothing about Hanford and about the importance of not being tied to time card fraud. RP 3085, 3092; see RP 2937 ("when you have unanswered

questions on applications, it creates questions"). Fountaine's opinions were not stated on a more likely than not basis, and the jury rejected his opinions, finding MSA failed to prove "that Plaintiff failed to use reasonable efforts to mitigate her economic damages." CP 11042. The jury's finding that MSA failed to prove its affirmative defense goes unmentioned in appellants' brief, which does not challenge the finding or explain how they conclusively proved the elements of the defense. See Instruction No. 18 (CP 11064). In denying the motion for a new trial, the trial court concluded Atwood, "much like the plaintiff in Henningsen … worked at other jobs for one or two years in an effort to make money" and saw a comparable job withdrawn after she had applied for it. CP 10988.

ARGUMENT

A. Standard of Review

The trial court's "[u]nchallenged findings are verities on appeal,"[9] and the "evidence must be viewed in the light most favorable to [Ms. Atwood], since [s]he prevailed before the jury."[10] This Court can affirm on any basis supported by the record and the law.[11] Most of the trial court decisions that the appellants claim are objectionable are reviewed for abuse of discretion. See Jones v. City of Seattle, 179 Wn.2d 322, 337

[9] Robel v. Roundup Corp., 148 Wn.2d 35, 42 (2002).
[10] Bennett v. Dep't of Labor & Indus., 95 Wn.2d 531, 534 (1981).
[11] State v. Avery, 103 Wn. App. 527, 537 (2000).

(2013) (exclusion of witnesses will not be disturbed absent "clear abuse of discretion"); State v. Swan, 114 Wn.2d 613, 658 (1990) ("The admission and exclusion of relevant evidence is within the sound discretion of the trial court" and such "decision will not be reversed absent a manifest abuse of discretion"); State v. Mason, 160 Wn.2d 910, 933-34 (2007) ("A trial court's ruling under ER 404(b) will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the trial court did."). The denial of a motion for new trial or remittitur is also reviewed for abuse of discretion. Collins v. Clark Cty. Fire Dist. No. 5, 155 Wn. App. 48, 85 (2010) (denial of motion for remittitur "strengthens the jury verdict," and "we strongly presume the jury's verdict is correct"); and Adcox v. Children's Orthopedic Hosp. & Med. Ctr., 123 Wn.2d 15, 33 (1993) ("heavy presumption in favor of jury awards").

Even if appellants could establish error or abuse of discretion, to prevail in their appeal, they must also show that any error likely affected the outcome of trial. See, Lutz Tile, Inc. v. Krech, 136 Wn. App. 899, 905 (2007) (reversal due to evidentiary error only required if "it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred"); Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d432, 446, 453 (2008) (error in failing to balance the probative value versus prejudice on the record is harmless, "unless the failure to do the balancing, 'within reasonable probability,' materially affected the outcome

of the trial"); Terrell v. Hamilton, 190 Wn. App. 489, 502 (2015) ("An erroneous instruction is harmless if it did not affect the outcome.").

B. The Trial Court's Evidentiary Rulings Were Sound And Not An Abuse of Discretion, But Even if a Ruling Were Found To Be Error, Any Such Error Would Be Harmless, Since The Law Permits the Jury to Infer Discrimination and Retaliation From Evidence of Pretext

"An evidentiary error requires reversal only if it results in prejudice; only if it is reasonable to conclude that the trial outcome would have been materially affected had the error not occurred." Lutz, 136 Wn. App. 905; see also State v. Bourgeois, 133 Wn.2d 389, 403 (1997) ("The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."). Thus, if the trial court fails to balance probative value versus prejudice on the record, "the error is harmless unless the failure to do the balancing, within reasonable probability, materially affected the outcome of the trial." Brundridge, 164 Wn.2d at 446. None of the rulings here can be said with reasonable probability to have materially affected the outcome of the trial in view of the evidence as a whole.

While "comparator evidence is relevant and admissible," it was "not required" for Atwood to prevail. Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33 (2010). Like Brundridge, there was "other evidence" supporting Atwood's claims of discrimination and retaliation. See id., 164 Wn.2d at 447. For example, the jury heard about "Young's 'Barbie email'

and his alleged off-color gender-based comments," CP 10979, which were "circumstantial evidence probative of discriminatory intent." See Scrivener v. Clark College, 181 Wn.2d 439, 450, n.3 (2014) (rejecting "stray remarks" doctrine). The jury also heard Young's mendacious denials of any knowledge or involvement in Atwood's termination, contradicting Chris Jensen's testimony. RP 2589, 3909-11; CP 6354.

"[I]t is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 184 (2001). "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive." Id. at 179. "[T]he trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose," just like it may "consider a party's dishonesty about a material fact as affirmative evidence of guilt." Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 147 (2000).

The idea that—putting aside any direct evidence or other forms of circumstantial evidence that Atwood relied on to prove her case—the jury can infer the ultimate fact of discrimination and retaliation from the falsity of MSA's explanation, is not intuitive. See Farah v. Hertz Transporting, Inc., 196 Wn. App. 171, 176–77 (2016) (pretext instruction was "an accurate statement of the law").

The Court should find that Atwood presented clear evidence of pretext from which the jury could infer the ultimate fact of discrimination and retaliation. Thus, while all of the trial court's ruling were sound and not an abuse of discretion, the Court should hold that even if there had been error in evidentiary rulings, such error would be harmless. In view of the pretext evidence, the evidence that MSA takes issue with is of minor significance. Two days before MSA terminated Atwood through VP Beyers, Investigator Robbins told Beyers there was no misconduct or policy violation by Atwood and recommended that MSA "help [Young] utilize Atwood" (see Ex. 39E, at Bates# 1954, RP 2087, 2669), noting her "stellar" performance, the lack of "a performance or behavior issue on [her] recent performance appraisal," and how "DOE clients love Julie." Ex. 24 (9/18 entry). Young testified that Atwood "was doing exactly what she was hired to do," RP 2491-92; yet, MSA fired Atwood based on Young's input, which Young denied. See, e.g., RP 2589; cf. RP 3909-11. It was reasonable for the jury to conclude that Young was "dissembling to cover up a discriminatory purpose." Hill, 144 Wn.2d at 184.

C. Alleged Errors Would Also Be Harmless Given the Closeness In Time Between Atwood's Protected Activity and Discharge

"Proximity in time between the protected activity and the discharge, as well as satisfactory work performance and evaluations before the discharge, are [also] factors suggesting retaliation." Currier v.

Northland Servs., Inc., 182 Wn. App. 733, 747 (2014); accord Cornwell v. Microsoft Corp., 430 P.3d 229, 236 (Wash. 2018) (retaliation is a "reasonable inference" when termination follows shortly after protected activity). Here, Atwood reported allegations of gender discrimination and conduct by Young contravening the public policy of the False Claims Act shortly before she was terminated. See RP 3237-43, 2863-67, 3242; RP 2083-85 (DeVere); CP 11057 (Instruction No. 12). Ms. DeVere testified that VP Beyers and Jensen were informed of Atwood's claims against Young before MSA terminated Ms. Atwood. RP 2089.

Even if Beyers hadn't been given such report before he notified Atwood of her termination, Ms. DeVere also testified that Steve Young told her that Young suspected Atwood of filing a hostile work environment complaint against him. RP 1869. Thus, MSA's managers both knew *and* suspected that Ms. Atwood had engaged in protected activities before the decision was made to fire her. See Cornwell, 430 P.3d at 238 (adopting "knew or suspected test" to protect employees from retaliation to the fullest extent possible).

> It would be a strange rule… that … would not protect an employee discharged because the employer merely believed or suspected … she had engaged in protected activity. … Employers are not limited to retaliation decisions based on information they actually know to be true. ... Instead, 'common sense and experience establish that employers also make employment decisions on what they suspect or believe to be true.' ... Thus construing WLAD 'to protect employees from adverse employment actions because they are *suspected* of having engaged in protected activity is consistent

> with the general purposes of the Act and the specific purposes of the antiretaliation provisions.'

430 P.3d at 238 (internal citations omitted; italics in original).

With respect to the jury's consideration of proof of retaliation based on VP Beyer's receipt of Ms. Atwood's complaints and Mr. Young's statement of suspicion of Atwood close in time to her protected reporting and termination, it bears emphasizing that Ms. Atwood "does ***not*** ... need to disprove" any of MSA's stated reasons for discharge. CP 10976 (Order on Post-Trial Mots.), quoting Scrivener, 181 Wn.2d at 447. Put another away, "Substantial factor does ***not*** mean the only factor or the main factor." CP 11055 (Instruction No. 10).

All of the trial court's rulings on evidence were sound and were not an abuse of discretion, but even if a particular ruling was found to be error, any such error would be harmless given the close proximity in time between Young's comment, Beyers' receipt of information and Atwood's firing.

D. The Hearsay Rulings Were Not Erroneous

The defendants repeatedly sought to admit hearsay statements by Armijo through his various direct reports. "The hearsay prohibition serves to prevent the jury from hearing statements without giving the opposing party a chance to challenge the declarants' assertions." Brundridge, 164 Wn.2d at 451–52. The statements identified in appellants' brief are

hearsay. In every case, the appellants are trying to admit testimony by third parties and deny Ms. Atwood the opportunity to cross-examine.

First, the statements of Armijo made at the September meeting held to be subject to attorney-client privilege are inadmissible, because the privilege cannot be used as both a sword and shield. RP 925 (excluding Armijo's statements made in the meeting, as "that would be using that as a sword improperly"). Second, all of Armijo's statements would be hearsay nonetheless under ER 802, because they are recounting substantive facts offered for the truth of the matter asserted by the apex manager. Third, MSA's reliance on Domingo and other such cases is misplaced. Those cases pertain to facts taken in and testimony given by the person who makes the decision to terminate. In Domingo, for example, Supervisor "***Walsh*'s testimony** [about the video she viewed] was not offered for the truth of the matter asserted. Rather, it was offered to show ***Walsh*'s motivation** for the decision to reprimand and eventually terminate Domingo's employment." Domingo v. Boeing Employees' Credit Union, 124 Wn. App. 71, 79, n.20 (2004). In contrast, here Jensen, Beyer and any other manager seeking to quote Armijo or Young are not the decision-makers who took in evidence to make the decision. As Mr. Jensen testified at his deposition, during the motion practice on the issue of attorney-client privilege, "The decision by the company to sever the relationship [with Atwood] was made by Frank Armijo and Steve Young." CP 1989. As to

their reasons, Jensen admitted, "I don't have firsthand knowledge of what Steve [Young] and/or Frank [Armijo] concluded was the threshold for the decision to let her go." Id.; see also CP 1953, 1957 (Beyers received "direction" from Armijo); RP 3313 (Beyers pointed to "the individual at highest level of the company," CEO Armijo, as the source of the firing).

Only the actual decision-makers, Armijo and Young, with personal knowledge of the basis for their decision can stand in Ms. Walsh's shoes. Thus, the appellants' fact pattern is one step removed from Domingo and the other cases appellants cite. See Rice v. Offshore, 167 Wn. App. 77, 84, 87 (2012) ("***Davis*** fired Rice" after Davis reviewed police reports; thus "reports were… were offered to show ***Davis's motivation*** for the decision to terminate Rice's employment").[12]

As to the claim that Jensen should have been permitted to state "MSA's reasons for terminating Atwood's employment," first, his only knowledge of the reasons flowed from the hearsay statements made by Armijo during the attorney-client privileged September meeting. Second, at the pages cited in the record, even defense counsel understood that Jensen was simply reciting what others had said in violation of ER 802:

> Q. (By Ms. Aragon) Don't say what anyone told you. Let me move on and ask you the next question.

[12] See also Henein v. Saudi Arabian Parsons Ltd., 818 F.2d 1508, 1511–12 (9th Cir. 1987) (evidence offered to prove "fact that a statement was made" is not hearsay"; thus managers' testimony about "act[s] performed by the Saudi government" based on the managers' personal receipt of information from the Saudi government was admissible).

RP 3842 (after court sustained objection to testimony about what Beyers or Bence told Jensen after HR had already initiated its investigation). Third, the court ultimately ruled Jensen could testify as to what he understood was the basis for the termination, as long as it was "outside of the shell" of the 9/19 privileged meeting. See RP 3854, 3862, 3865.

E. Limiting Instructions Were Proper

"When evidence which is admissible … for one purpose but not … for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105. "[A]n appropriate limiting instruction is available as a matter of right." State v. Lui, 153 Wn. App. 304, 323 (2009). Again, Jensen was not the person who decided to terminate Atwood, so his statements purporting to state the reasons for termination could only parrot the alleged thoughts and opinions of Armijo and Young. The Court should be reminded that in response to interrogatories, MSA claimed the reasons for the termination were set out in the letter to the EEOC (Ex. 16). See RP 2946; CP 206. So, the evidence was admitted. There was no need for Jensen to recite hearsay.

Nevertheless, the court agreed to allow Jensen's hearsay testimony to the extent alleged concerns about Atwood came to him from "outside of the shell" of the September 19, privileged meeting, ruling as follows:

> [M]y ruling is Mr. Jensen can testify that his understanding of the concerns of the company, as they pertain to Ms. Atwood, if they are learned from other people you can introduce those discussions,

> even though they come from MSA employees, with an **instruction** from the court that explains that the jury is to consider it as the basis of Mr. Jensen's knowledge and **not a substantive evidence**.
>
> [COUNSEL FOR MSA] MS. ARAGON: **Correct**.

R 3854; see also RP 3862; RP 3865. This decision was magnanimous and unnecessary, but in allowing Jensen to testify about the hearsay statements (which MSA's counsel admits were not offered "for the truth," but allegedly to show notice or state of mind, RP 3853); the use of the limiting instruction was appropriate as a matter of right. MSA never objected, and instead appeared pleased to have the hearsay evidence admitted at all, asking the trial court to admit the evidence with the "***same limiting instruction***." See id.; and CP 3879-82. The fact that counsel responded to the proposed instruction at trial by saying "correct," RP 3854, and then requested the "same limiting instruction," "suggest[s] the [alleged 'comment'] was considered inconsequential." See State v. Hansen, 46 Wn. App. 292, 301 (1986); see also State v. Alger, 31 Wn. App. 244, 248-49 (1982) (that counsel waited through several witnesses' testimony before objecting to court's use of phrase "the victim" bordered on invited error and "strongly suggests that the comment was insignificant"). The record reflects that the use of the phrase "substantive evidence" in the court's limiting instruction was equally insignificant and caused no prejudice to the defense. MSA concedes the testimony was "not 'substantive evidence' of Atwood's behavior," Br., at 20, and the instruction to that effect did

nothing to reveal the judge's view on the merits of the defense. The jury was instructed that it could consider the evidence for a limited purpose.

F. Armijo's Testimony And Others Were Hearsay Or Improper Owing To MSA's Assertion of Privilege

Keeping out the Armijo's testimony on hearsay grounds was proper as outlined above, and owing to the assertion of privilege. As to Butler, Cherry, and Beyers (Br., at 20-22), again, the trial court's rulings were proper. MSA claims it was prejudiced and that the court's rulings "prevent[ed] Beyers from divulging who told him to stop [DeVere's] 2013 investigation." Br., at 20-21. Yet, the testimony being elicited was cumulative, as the jury heard Beyers testify he was "directed by our chief operating officer" [CEO Armijo] to have DeVere "stand … down on the investigation." RP 3286-87. This fact was favorable to Atwood, not MSA, so there can be no prejudice from the jury not hearing the testimony again.

Butler's testimony was properly stricken on hearsay grounds as she sought to tell the jury what DOE was thinking and feeling: "DOE was feeling like we weren't doing our jobs very well." RP 3998. How can this not be hearsay? As to Cherry, he improperly sought to tell the jury what Beyers allegedly said at the meeting, which was offered for the truth of the matter and was hearsay. See RP 4128-129; ER 801. As to the "emotional reaction" testimony, Cherry was free to say what he did and what Atwood did and said, but not to say what Beyers said. As to Bensussen, he was

asked why Armijo gave him Fowler's job, which addressed Armijo's motive or intent—not Bensussen's. RP 4199. Again, this is pure hearsay.

G. Qualheim's Exclusion Was Proper

MSA claims Ms. Qualheim is a "true rebuttal witness," and that it had no duty to disclose her in discovery. Br., at 25. Yet, MSA always anticipated Atwood would put on evidence of her "good performance" and "good work history," and knew Qualheim had relevant knowledge. CP 1229-30; CP 6570-71; see also RP 3585 (trial court stating, if MSA had not communicated with Qualheim, "I'm perplexed as to how MSA would know that [she] would be capable of taking the stand and testifying negatively about Ms. Atwood."). Even if she were properly considered a rebuttal witness, exclusion of this evidence "rests largely on the trial court's discretion, and error in denying … it can be predicated only upon a *manifest* abuse of that discretion."[13] There was no manifest abuse of discretion. MSA does not claim Qualheim reported her alleged concerns about Atwood, or that it relied on Qualheim's alleged observations as a basis for termination. "Facts unknown at the time of the [discharge] do not make the alleged unlawful practice more or less probable and are completely irrelevant."[14] Qualheim's testimony was also inadmissible evidence of "other wrongs" under ER 404(b).

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[13] State v. White, 74 Wn.2d 386, 395 (1968).
[14] See Hollingsworth v. Washington Mut. Sav. Bank, 37 Wn. App. 386, 394 (1984).

MSA's failure to disclose Qualheim was willful or without reasonable excuse. In Jones v. City of Seattle, the defendant, like MSA, proposed calling a witness for a completely different reason than the plaintiff did, and the trial court faulted it for not doing an investigation pre-trial "if this was a line of questioning [it] wanted to develop." 179 Wn.2d at 347. The Supreme Court agreed. "The trial judge was correct that the City had an obligation to investigate and disclose the substance of … Powell's testimony." Id. Similarly, if MSA wished to present testimony from Qualheim of alleged misconduct by the plaintiff, it had a duty to investigate and disclose the substance of her testimony in discovery. See id. It is undisputed the parties could depose DOE witnesses pre-trial by seeking *Touhy* authorization from DOE. See CP 3202 (Peschong Dep.).

No claim is made that Qualheim was a newly discovered witness. MSA always knew she had relevant knowledge. CP 6569-71. Yet, MSA declined to depose her, failed to list her as a lay or rebuttal witness, and never disclosed any subject matter on which she would testify at trial, despite a Court Order and local rule requiring such disclosure. CP 6569-70, 6574 (Order); and LCR 4(h). The trial court found substantial prejudice to Atwood, since she first heard Qualheim's inflammatory allegations in "week four of the trial and … [with] only a few hours left of trial time and no … meaningful opportunity, to depose [her]." CP 3586. The trial court weighed lesser sanctions on the record, but found them

inadequate. Id. As for the claimed error in the Burnet analysis, any such error would be harmless here, as "the excluded testimony was irrelevant or unfairly prejudicial." See Jones, 179 Wn.2d at 356. Qualheim's slanderous claim that she observed Atwood engaging in unprofessional, "flirtatious behavior" with male managers, sitting very close to them and whispering in their ears, was not a stated basis for Atwood's termination; nor were such allegations disclosed in discovery in response to requests seeking the disclosure of her misconduct. See RP 2946 (Interrog. Nos. 1-2, citing only MSA's response to EEOC); accord CP 206.[15] The ruling was not an abuse of discretion. The evidence was irrelevant, would have confused the jury and required additional rebuttal, resulting in a waste of time. ER 402, 403.

H. The ER 404(b) Rulings Were Correct Under Brundridge

The trial court entered a preliminary order on the admission of evidence offered by Plaintiff under ER 404(b), making clear it was only a starting point and that the court was "open to the possibility that [he] can reconsider any of the rulings." See CP 11201-07 (Order); RP 1208-1211. "A trial court's ruling under ER 404(b) will not be disturbed absent a *manifest* abuse of discretion such that no reasonable judge would have ruled as the trial court did." Mason, 160 Wn.2d at 933-34. "Trial courts have considerable discretion to consider the relevancy of evidence and to

[15] The jury was informed Atwood has a partner of over 25 years. RP 4716; RP 3217.

balance 'the probative value of the evidence against its possible prejudicial impact.'" State v. Barry, 184 Wn. App. 790, 801–02 (2014). Admission of the ER 404(b) evidence was not a manifest abuse of discretion.

It is recognized that proving a discriminatory motivation is difficult.[16] Courts have "repeatedly stressed that circumstantial, indirect and inferential evidence will suffice.... Indeed, in discrimination cases it will seldom be otherwise." Hill, 144 Wn.2d at 179-80. In the seminal case of McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973), the Supreme Court said that relevant evidence may include the employer's "general policy and practice with respect to minority employment." See also Heyne v. Caruso, 69 F.3d 1475, 1481 (9th Cir. 1995) (reversing jury verdict based on holding that exclusion of pattern and practice evidence of sexual harassment was especially damaging in a discrimination case "in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives"). Washington cases are in accord with the federal precedents. See Johnson, 159 Wn. App. At 33 ("Proof of different treatment by way of comparator evidence is relevant and admissible"); Johnson v. DSHS, 80 Wn. App. 212, 227, n.20, (1996) ("Proof of discriminatory motive … can in some situations be inferred from the mere fact of differences in treatment."); Brundridge, 164

[16] Scrivener, 181 Wn.2d at 445.

Wn.2d at 444-46 ("in the civil employment context, evidence of employer treatment of other employees is not impermissible character evidence; rather it may be admissible to show motive or intent for …discharge").

There is no "*per se* rule" that makes evidence of an employer's treatment of other employees occurring under a different supervisor inadmissible. Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388 (2008). "The question whether evidence of discrimination by other supervisors is relevant in an individual … case is fact based and depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case. Applying Rule 403 to determine if evidence is prejudicial also requires a fact-intensive, context-specific inquiry." Id., at 388. Thus, evidence of discrimination or retaliation by different supervisors against another MSA employee "is neither *per se* admissible nor *per se* inadmissible." Id., at 381. The "questions of relevance and prejudice are for the [Trial] Court," which is "virtually always is in the better position to assess the admissibility of the evidence in the context of the particular case before it." Id., at 387

The Brundridge case provides guidance on how to analyze ER 404(b) evidence in the civil context. There, "five of the pipe fitters, refused to install valves that were rated at 1,975 pounds per square inch (psi) in a system of pipes that was to be tested at 2,235 psi. The crew was concerned that the underrated valves could cause nuclear contamination

and injury to workers. Fluor laid off the crew as a whole [twice].” 164 Wn.2d at 438. “Fluor laid off another group of pipe fitters” who “alleged at trial that their [wrongful] discharge was in retaliation for their support of the [first group].” Id. At trial, the pipe fitters offered the testimony of other witnesses under ER 404(b) who had suffered retaliation to show motive and intent. The testimony was admitted and affirmed by the Supreme Court. 164 Wn.2d at 458–59.

“When a trial court admits bad acts evidence, it must first identify the purpose for which the evidence is to be admitted. The court must then, on the record, balance the probative value of the evidence against its potential for prejudice.” Id. at 444–45. The procedure is begun with an offer of proof. Id. at 445, n.4, citing State v. Kilgore, 147 Wn.2d 288, 294-95 (2002) (stating court may admit bad acts based only on offer of proof, and that “trial court is in the best position to determine whether it can fairly decide … that a prior bad act or acts probably occurred.”). It appears that the preponderance of the evidence standard is not required for admission of ER 404(b) testimony in the civil context, as the Brundridge court called into question its applicability in the civil context. See 164 Wn.2d at 448 (“the preponderance standard … may be too stringent in the civil context, where the ultimate standard itself is preponderance”)

The trial court ruled that “the appropriate standard of proof … for admission of evidence of a prior bad act(s) under ER 404(b) in civil cases

is 'substantial evidence,' … an evidentiary burden lower than a 'preponderance of the evidence.'" CP 11202. MSA does not appeal this.

The Court in Brundridge provided an example of the process for determining if there is adequate evidence for admission under the preponderance standard.

> Regardless, the pipe fitters' evidence would meet the preponderance standard if it applied. The evidence that Fluor managers tried to identify a caller to a safety hotline was presented in the testimony of Ivan Sampson, Fluor construction manager. He testified that he interrupted a meeting of managers and that someone told him that the people in the meeting were trying to identify the caller. Sampson testified that he did not hear the tape, but he provided substantial detail about the persons who were in the meeting. Assuming that Sampson's testimony was credible, the testimony provided substantial circumstantial evidence of the bad act in question. Any doubts about the witness's credibility would have gone to the weight of the evidence, rather than to its admissibility.

Id. at 448–49.

The purpose of this evidence is to show motive or intent. Id. at 445-46. The trial court must "evaluate whether the probative value of the evidence outweighed its potential for prejudice." Id. at 446. If it has "not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, 'within reasonable probability, materially affected the outcome of the trial.'" Id. Facts in which the balancing results in admission of 404(b) evidence are recited.

> With regard to the 'paint fumes' testimony, Marquardt testified that she made specific safety complaints to the same chain of command that was involved in the pipe fitters' discharges at the

> same time the pipe fitters raised their safety concerns. She further testified that her supervisors treated her disrespectfully and eventually passed her up for a promotion based on her safety complaints. This evidence is highly probative of Fluor's intent to retaliate against those who raised safety concerns.
>
> . . . .
>
> The 'Jacobs ethics' comment is similarly probative. Marquardt testified that she met with Jacobs to address the fact that the paint fumes concern had not been resolved, and he told her 'not to sacrifice [her] career for [her] ethics.' … This statement tends to prove that raising safety concerns would jeopardize her employment. Had the trial court weighed the 'paint fumes' and 'Jacobs ethics' evidence, it would have concluded that the evidence was more probative than prejudicial. The trial court's failure to do the balancing was therefore harmless error.

164 Wn.2d at 446.

I. Fowler's Testimony was Admissible

Though not required under Brundridge, Judge Federspiel held an evidentiary hearing before ruling on the admission of Ms. Fowler's testimony. See RP 660, 675-717. The court found her to be a credible witness based on observing her. RP 773; CP 11073. The court also found that Fowler's testimony about complaints of gender discrimination and retaliation were proven by "substantial evidence." CP 11203-04. In the Order and Findings on the ER 404(b) evidence, the court found the probative value for purposes of showing "motive, plan, intent and/or a pretext for discrimination" outweighed any prejudice, as the managers involved "were roughly the same high-level MSA core management team … as were present in the adverse actions allegedly taken against the plaintiff." CP 11204. See RP 11093, ¶29 (Armijo, Ruscitto and Beyers).

This Court may affirm on any basis and should hold that the admission of Sandra Fowler's ER 404(b) testimony was also not an abuse of discretion owing, in part, to MSA's "withholding [of] records related to the gender bias and retaliation complaints of Sandra Fowler," which the trial court described as "egregious and in violation of CR 26(g)." CP 11110. Appellant's improper efforts at hiding Fowler's complaints reveal the importance of her testimony. It is hard to imagine how facts about CEO Armijo and COO Ruscitto calling a female subordinate a "man-hater," leading her to report the matter to VP Todd Beyers, who "failed to adequately address Fowler's complaint of 'gender-bias' when reported to him," would not be at least relevant to a gender discrimination claim against the same managers. See CP 11097, 11084, CP 11098. Fowler's experience was also relevant because General Counsel Bensussen admits to hearing Fowler "saying things … about gender-bias in the Company, particularly about Frank [Armijo] and Dave [Ruscitto]," and there is no record Bensussen took any action on the complaints. CP 11098.

J. Admission of Other Comparator Testimony Was Proper

> There are at least two different circumstances in which the failure to weigh prejudice on the record under ER 404(b) is harmless error. The first is when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. … The second circumstance is when, considering the untainted evidence, ... the result would have been the same even if the trial court had not admitted the evidence.

State v. Carleton, 82 Wn. App. 680, 686–87 (1996).

Both circumstances apply here. The first circumstance applies, because in advance of ruling on MSA's motion in limine concerning 85 exhibits, the parties brief the court on what ER 404(b) requires and the judge indicated he would review each exhibit to determine if he found them relevant to proving motive. RP 943-44; accord CP 11076 ("The Court took several days to read each and rule on every identified exhibit" in response to ER 404(b) objections.). The court spoke to some of the exhibits cited by MSA and noted, for example, that showing male employees received disparate discipline related to their absences was relevant, and while the court was "not sure that [ER] 404(b) is the accurate analysis" for considering MSA's more favorable treatment of men, the evidence would not be excluded under ER 404(b). RP 979-80.

Other exhibits the trial court ruled were "other bad acts too remotely situated from Ms. Atwood's claim." RP 981. The court continued with its ruling, "even if they were—the prejudicial value of those would out strip the relevance and just being offered for painting MSA as a bad actor." RP 981. It is clear that had the trial considered the probative value and weight of all the contested exhibits individually on the record, the court still would have admitted the evidence. The rulings were well within the trial court's discretion and should be given deference, since the trial court is best situated "to assess the admissibility of the evidence in the

context of the particular case before it". Sprint/United Mgmt. Co., 552 U.S. at 387. For example, Mr. Boynton was a Vice President who engaged in serious misconduct under MSA policies, but under Armijo, Boynton as not fired. See Ex. 400, RP 3325-28. Another manager, Mr. Turner, was given a two-week disciplinary suspension for "ongoing negative and demeaning comments that directly affected the relationship with the DOE client and MSA employees." Ex. 140, RP 3343-45. The allegations were similar to the claims made against Ms. Atwood, see RP 2963, but under Armijo, Mr. Turner was not fired. Ex. 140. The trial court did not manifestly abuse its discretion in admitting Exhibits 400 and 140. Thus, there is no error regarding the comparators, and even if there were, the error would be harmless under the first scenario in Carleton, 82 Wn. App. at 686-87. The alleged errors are also harmless, since exclusion of the comparator evidence is unlikely to have affected the outcome, considering "the untainted evidence" of pretext and temporal proximity between Young's comment to DeVere and Atwood's firing. Id.

Appellants' string citation and limited discussion of "exhibits 68, 69, 73, 82, 84, 86-90" at page 40 of their brief should be disregarded. MSA cites no instance where the evidence was shown to the jury, and MSA's counsel affirmed that she was "satisfied" with the court's proposal to admit the exhibits for "illustrative" purposes. See RP 3178-80. Moreover, the ruling was not an abuse of discretion. MSA's arguments

went to the weight of the evidence, not admissibility. MSA could still argue that a particular employee's more favorable treatment may have been distinguishable owing to union contract rights, if such rights applied.

MSA's objection to Ex. 163 is unclear since it acknowledges the exhibit's "obvious purpose." Br., at 44 ("purpose of this inquiry was to demonstrate that MSA used progressive discipline for non-union members [like Ms. Robertson], but not for Atwood."); accord RP 3340-42 (showing that others who engaged in "serious misconduct" could receive letters of reprimand at the discretion of management). In Johnson v. Dep't of Soc. & Health Servs., 80 Wn. App. 212, 227 (1996), the Court of Appeals stated, "[o]ne test for pretext is whether (1) an employee outside the protected class (2) committed acts of comparable seriousness (3) but was not demoted or similarly disciplined." Here, although the better treated person was a woman, Ms. Robertson was a useful comparator since Atwood alleged retaliation and there was no evidence that Ms. Robertson engaged in protected activities like Ms. Atwood.

Appellants at page 34 of their brief cite "Coletti v. Cudd Pressure Control, 165 F.3d 767, 777 (1999)," which they repeatedly reference as an opinion by the "Ninth Circuit." See id. Coletti is in fact a Tenth Circuit decision, and it should be considered bad law following the Supreme Court's landmark decision in Sprint, 552 U.S. 379, discussed *supra*.

K. No Cumulative Effect Argument Applies

The trial court did not err. Even if it had, the outcome would be no different owing to the strong evidence of pretext and temporal proximity between Mr. Young's comment to DeVere and Ms. Atwood's firing.

L. The Use Of WPI 330.82 Was Proper

"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." Blaney v. Int'l Ass'n of Machinists And Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 210 (2004). Appellants allege WPI 330.82 was improperly given. It provides:

> In calculating damages for future wage loss [front pay], you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to [retire] [fully recover from the continuing effects of the discrimination], decreased by any projected future earnings [from another employer].

This is Jury Instruction No. 17, which was properly given to the jury. See Appendix. The note on use states, "Use of the term 'retire' may not be appropriate in all cases. This instruction may have to be modified if there is proof in the case that the business was or will be sold."

Here, Atwood was 58 at the time of termination, and almost 63 at the time of trial. See Ex. 348 at Bates# 5; RP 2115. MSA argues, "Expert testimony proved that it is common for project managers like Atwood to change jobs when the project is up and going and that Atwood could find

comparable employment in six months, eliminating future wage loss." Br., at 48. This statement is hardly conclusive evidence, and the jury necessarily rejected Mr. Fountaine's opinions when it found MSA did not prove Atwood failed to mitigate her damages after she was unable to find comparable employment **four years** after her termination. Cf. CP 11042 (Verdict - Question No. 7); and CP 11064 (Instruction No. 18, requiring that "there were openings in comparable positions available for Ms. Atwood" and "Ms. Atwood failed to use reasonable diligence in seeking those openings"). Atwood testified that she intended to stay working into the future on the contract at Hanford so that she could stay on the same benefit plan, RP 2937, and there was testimony that typically "the same workers" working on a contract at Hanford will be "mapped over" to the new contract whenever a new company wins the contract. RP 3962.

The jury instruction given by the trial court parallels the language of the instruction given in Brundridge—not Blaney. Compare Brundridge 164 Wn.2d at 454-55 ("trial court instructed the jury that it should calculate front pay from the day of its decision 'until the time the plaintiff may reasonably be expected **to retire *or* fully recover from the continuing effects** of the wrongful discharge."), with Instruction No. 17 (Appendix, at CP 11063). In contrast, the Blaney instruction left the jury without "any substantive discretion in arriving at its front pay award." 114 Wn. App. 80, 89 (2002), aff'd in relevant part, 151 Wn.2d 203 (2004).

As in Brundridge, the trial court did not abuse its discretion in giving Instruction No. 17.

> Fluor argues that the [front pay] award was improper because Hodgin would have retired by the time of the 2005 trial. Hodgin testified, 'Who knows how many years I would have worked [at Fluor]?' …. He later testified, 'If I would have stayed at Hanford, no telling how long I would have stayed working. That was a very nice, easy job for an old man like me.' ... He then stated that he thought he would have worked until 2003 or 2004 if his wife had also stayed on at Fluor. ... The jury could have reasonably inferred [he] might work beyond his 2004 estimate.

164 Wn.2d at 455.

> Fluor contends that Cable is entitled to only one year of front pay…. Cable was retired at the time of trial, but he testified that he would have continued to work at Hanford 'until *at least* [age] 62.' …. In quick succession, [he] answered the question, 'So you would have gone through 2006?' by saying, 'The end of 2006.' ... The jury could have reasonably believed that 'the end of 2006' referred to the time he would turn 62, but that it was still modified by 'at least' from his first answer. The jury's award was equivalent to three years' salary and more than $100,000 less than the pipe fitters' expert's figure. It was within the range of the evidence under this interpretation. The trial court did not abuse its discretion in denying the CR 59 motion with regard to Cable.

164 Wn.2d at 455–56. Dr. Torelli made his calculations based on the assumption Ms. Atwood would stay until retirement. RP 2113-14, 2121. This was a proper approach. "[C]ourts will presume for the purposes of awarding relief that an illegally discharged employee would have continued working for the employer until he or she reached normal retirement age, unless the employer provides evidence to the contrary." Brundridge, 164 Wn.2d at 456, citing, Xieng v. Peoples Nat'l Bank of

Wash., 120 Wn.2d 512, 531 (1993). "The employer bears the burden of showing that the employee would not have been retained." Id. at 456. MSA and Young have failed in their burden.

Even if the giving of Instruction No. 17 was found to be error, it was harmless. The Court of Appeals in Blaney held that the giving of the front pay instruction was harmless, which the Supreme Court affirmed. See 114 Wn. App. at 91, aff'd in relevant part, 151 Wn.2d at 212. The Court of Appeals stated that whether the plaintiff "would have either resigned or been terminated before retirement [was] purely speculative" and "there [was] no evidence of any steps being taken to terminate her employment." Id. The same is true here. The expert in Blaney calculated lost future wages using an assumption the plaintiff would have worked for a period nearly twice the length of time that Dr. Torelli used for his calculation of Ms. Atwood's lost future wages. See Blaney, 114 Wn. App. at 89–90 (stating expert calculated future wages based on "age at the time of trial (50) until the estimated retirement age of 62.8").

M. The motion for a new trial on damages was properly decided

Appellants' brief addresses the motion for new trial only as it relates to the verdict on damages, having abandoned the arguments made below claiming there was insufficient evidence to support liability. Denial of a new trial on damages or remittitur was not an abuse of discretion

First, as the trial court found, counsel's closing arguments were not

improper; and had MSA believed it was an improper closing, "counsel should have interposed an objection," which "counsel admittedly did not." CP 10983. Thus, MSA failed to preserve the issue for appeal. CP 10983-85 (citing, e.g., Joyce v. State, Dep't of Corr., 116 Wn. App. 569, 603 (2003) (in appeal arguing $22 million verdict was excessive, court declined to review allegedly improper closing owing to failure to object), aff'd in part, rev'd on other grounds, 155 Wn.2d 306 (2005)); see also Collins, 155 Wn. App. at 96-97 ("Defendants … argue[d], based on [counsel's] comments during closing argument, that the jury based its verdict on passion and prejudice," but failed to "properly preserve this issue for review by timely objection and request for curative instruction").

Second, the defendants claim that the size of the verdict is a basis for remittitur or a new trial, which would contravene Washington State Constitutional requirements; those requirements are clearly stated in Bunch v. King Cty. Dep't of Youth Servs., 155 Wn.2d 165, 183 (2005) (verdict of a jury does not carry its own death warrant solely by reason of its size). MSA's comparison to the verdict in Brundridge is of no use, since "it is improper to assess the amount of a verdict based upon comparisons with verdicts in other cases." Adcox, 123 Wn.2d at 33. The emotional harm damages were not outside the scope of the evidence, particularly given Dr. Brown and Ms. Atwood's testimony concerning the severe and ongoing damage to Ms. Atwood caused by MSA.

MSA's failure to make a reasoned argument about the jury's finding that it failed to prevail on its affirmative defense should be treated as an abandonment of the issue on appeal.[17] Having found that Atwood did not fail to mitigate her damages—despite having failed to find comparable employment four (4) years after her termination—the jury could reasonably infer that the "continuing effects of the discrimination and/or retaliation" would last seven (7) more years until age 70.

The trial court did not abuse its discretion in denying the motion for new trial on damages. See CP 10990. The Court "will not disturb a jury's verdict on damages if it is within the range of the evidence." Burnside v. Simpson Paper Co., 66 Wn. App. 510, 530–31 (1992), aff'd, 123 Wn.2d 93 (1994); accord Wooldridge v. Woolett, 96 Wn.2d 659, 668, (1981) ("If the damages are within the range of evidence they will not be found to have been motivated by passion or prejudice."). The damages were consistent with the figures given by Atwood's expert. CP 10990. "The jury was entitled to accept his testimony, and those amounts are therefore supported by the evidence." Burnside, 66 Wn. App. at 530-31.

ATTORNEY FEES AND COSTS

Respondent requests attorney fees and costs for this appeal under

[17] Holland v. City of Tacoma, 90 Wn. App. 533, 538 (1998); see also Oberg v. Dep't of Nat. Res., 114 Wn.2d 278, 280 (1990) ("DNR does not challenge the sufficiency of the evidence to support the specific findings of negligence…. We necessarily assume, because it is now beyond challenge, that there was sufficient evidence that DNR was negligent…").

RCW 49.48.030 and RCW 49.60.030(2). See Bunch, 155 Wn.2d at 184, n.10; Gaglidari v. Denny's Restaurants, Inc., 117 Wn.2d 426, 451 (1991).

CONCLUSION

For the reasons stated, the Court should find that all of the trial court's rulings at issue in the appeal were sound and were not an abuse of discretion, but even if a particular ruling was found to be error, the Court should hold it was harmless and unlikely, within reasonable probability, to have materially affected the outcome.

The verdict of the jury and judgment of the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 11th day of February, 2019.

THE SHERIDAN LAW FIRM, P.S.

By:
s/ John P. Sheridan
John P. Sheridan, WSBA # 21473
Mark W. Rose, WSBA # 41916

DECLARATION OF SERVICE

Mark Rose state and declares as follows:

On February 11, 2019 I served the foregoing pleading on the following attorneys via the Court's electronic filing application:

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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.

DATED this 11th day of February, 2019.

s/ Mark Rose
Mark Rose, WSBA # 41916

APPENDIX

SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

JULIE M. ATWOOD,

Plaintiff,

vs.

MISSION SUPPORT ALLIANCE, LLC, and STEVE YOUNG, an individual,

Defendants.

Case No.: 15-2-01914-4

COURT'S INSTRUCTIONS TO THE JURY

Dated this 9th day of October, 2017.

Douglas L. Federspiel

The Honorable Douglas L. Federspiel

INSTRUCTION NO. 17

In calculating damages for future wage loss you should determine the present cash value of salary, pension, and other fringe benefits from today until the time the plaintiff may reasonably be expected to retire or recover from the continuing effects of the discrimination and/or retaliation, decreased by any projected future earnings from another employer.

Noneconomic damages such as emotional distress, loss of enjoyment of life, humiliation, pain and suffering, personal indignity, embarrassment, fear, anxiety, and/or anguish are not reduced to present cash value.

"Present cash value" means the sum of money needed now which, if invested at a reasonable rate of return, would equal the amount of loss at the time in the future when the earnings and/or benefits would have been received.

The rate of interest to be applied in determining present cash value should be that rate which in your judgment is reasonable under all the circumstances. In this regard, you should take into consideration the prevailing rates of interest in the area that can reasonably be expected from safe investments that a person of ordinary prudence, but without particular financial experience or skill, can make in this locality.

In determining present cash value, you may also consider decreases in value of money that may be caused by future inflation.