No. 73268-4-I

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

HASSAN FARAH, ILEYS OMAR, MARIAN MUMIN, DAHIR JAMA, FOUZIA M. MOHAMUD, MARIAN ALI, ABDIAZIZ ABDULLE, SAALIM ABUKAR, MOHAMED ISMAIL, SUDI HASHI, HALI ABDULLE, MURAYAD ABDULLAHI, ZAINAB AWEIS, FARDOWSA ADEN, MARYAN MUSE, ASLI MOHAMED, SAHRA GELLE (A/K/A Hani Huseen), ASHA FARAH, ALI ADAM ABDI, MUNA MOHAMED, FARAH GEEDI, AHMED HASSAN HUSSEIN, IBRAHIM SALAH, AHMED A. HIRSI, and MOHAMUD A. HASSAN,

Plaintiffs/Petitioners,

v.

HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS,

Defendants/Respondents,

PETITION FOR REVIEW

John P. Sheridan, WSBA #21473
Mark W. Rose, WSBA # 41916
THE SHERIDAN LAW FIRM, P.S.
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
(206) 381-5949

Attorneys for Plaintiffs/Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Cases

Federal Cases

Statutes

Other Authorities

A. IDENTITY OF PETITIONERS

The Petitioners are Hassan Farah, Ileys Omar, Marian Mumin, Dahir Jama, Fouzia M. Mohamud, Marian Ali, Abdiaziz Abdulle, Saalim Abukar, Mohamed Ismail, Sudi Hashi, Hali Abdulle, Murayad Abdullahi, Zainab Aweis, Fardowsa Aden, Maryan Muse, Asli Mohamed, Sahra Gelle, Asha Farah, Ali Adam Abdi, Muna Mohamed, Farah Geedi, Ahmed Hassan Hussein, Ibrahim Salah, Ahmed A. Hirsi, and Mohamud A. Hassan (together "Farah"), the plaintiffs/appellants below, who ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Farah seeks review of the published opinion of the Court of Appeals entered on October 3, 2016 ("the Opinion" or "Op."). A copy of the Opinion is in the Appendix, attached at pages A1-A19.[1]

C. ISSUES PRESENTED FOR REVIEW

Issue No. 1 Is an issue of substantial public interest presented when the Court of Appeals, in a published opinion, resolves a federal circuit court split in Title VII cases and, for purposes of the WLAD, adopts the rule that is less protective of employees in that it does not require that the jury be informed that the law permits, but

[1] The denial of Farah's motion for reconsideration is attached at A20-A21.

does not require, the jury to infer the fact of discrimination from proof that an employer's stated reasons for its decisions are not the real reasons (*i.e.*, based on proof of pretext)?

Issue No. 2 Is the Court of Appeals statement that "instructing jurors on permissible inferences risks confusing the jury regarding the ultimate issue a plaintiff must prove" (A9) in conflict with the Supreme Court statement "that plaintiff was entitled to an instruction permitting the jury to infer negligence" in *Siegler v. Kuhlman*, 81 Wn.2d 448, 453, 502 P.2d 1181 (1972) and other cases?

D. STATEMENT OF THE CASE

1. Factual Background.

> Hassan Farah and 24 other Somali immigrants, who are practicing Muslims, worked as 'shuttlers' for Hertz Transporting at Seattle-Tacoma International Airport (Sea-Tac). 'Shuttlers' move rental vehicles around the grounds, for example, from where customers return the cars to locations for cleaning or maintenance.
>
> In September 2011, Hertz implemented a break policy for its shuttlers, requiring them to 'punch' out for all personal activities, including prayer. The parties dispute whether employees were required to punch out for prayer before this new policy. They agree that no one was disciplined for not punching out for prayer until September 2011.

Op., at A2.

Plaintiffs testified that for more than a decade, Hertz permitted its Somali Muslim employees to stop work to briefly pray during the

workday without clocking out;[2] and that the company likewise permitted employees to engage in other activities, including smoking, drinking coffee, and going to the bathroom, without clocking out.[3]

"The [new] policy went into effect on September 30, 2011," a Friday. *Id*. Mohamed Babou, the only Hertz manager who speaks Somali and who the company sometimes used to translate in Somali for the work force, does not work Fridays or Saturdays and thus was not working that day. 11/12, RP 211-12. Most of Hertz's Somali Muslim employees cannot read or write in English and understood only the few words needed to do their jobs (*e.g*., "take the dirty car").[4] Hertz did not translate its new policy memo about clocking out into Somali. *See* Exs. 1 and 2. When the company issued a prior memorandum related to taking breaks that did not mention prayer or "religious observation," Hertz deemed it necessary to translate that memo into the Somali language. *Compare id*., *with* Ex. 1735.

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[2] *See*, *e.g.*, 11/12 RP 26-27; 11/17 RP 140-41; 11/17 RP 151; *id*., at 173.
[3] *See*, *e.g*., 11/12 RP 35; 11/17 RP 143-44.
[4] *See* 12/2 RP 97 (A. Abdulle); 11/17 RP 170 (A. Abdi); 11/24 RP 82-83 (F. Aden); 11/18 RP 121-22 (S. Hashi); 12/2 RP 24 (A. Hussein); 11/20 RP 22 (D. Jama); 11/25 RP 13 (A. Mohamed); 12/1 RP 73 (F. Geedi); 12/2 RP 119 (F. Mohamud); 11/19] RP 117 (H. Abdulle); 12/1 RP 32 (I. Salah); 12/3 RP 30-31 (M. Ali); 12/3 RP 56 (M. Muse); 11/25 RP 67 (M. Abdullahi); 11/25 RP 111 (S. Abubakar); 11/24 RP 48 (H. Huseen); 12/2 RP 58 (M. Mumin). A few of the plaintiffs spoke and read English at an elementary level. *See* 11/18 RP 63 (A. Farah); 11/24 RP 111 (A. Hirsi); 11/20 RP 46- 47 (H. Farah); 11/19 RP 76 (M. Ismail); 12/1 RP 104-05 (M. Hassan); 11/13 RP 115-16 (M. Mohamed); 11/25 RP 45 (Z. Aweis). And only one of the plaintiffs spoke English fluently. *See* 11/12 RP 15 (Omar).

On September 30, 2011, "or within the first few days of October, Farah and the other plaintiffs prayed without punching out. Hertz suspended them." Op., at A2.

> Hertz managers testified that they informed their employees about the policy by posting notices, in English, about the policy in several prominent locations, discussing it at meetings, and *asking employees if they had punched out as the employees entered the prayer rooms*. … Many of the plaintiffs testified that they were not aware of the policy change at the time they were suspended.

Op., at A2-A3 (italics added).

In his deposition, Hertz Manager Matt Hoehne admitted, "I don't recall us asking anyone that was entering the prayer area if you are clocked out for break." 11/12 RP 165-169. At trial, Hoehne tried to change his testimony. *See id*. (testifying "prior to them entering the prayer area… we asked each individual 'Did you clock out for prayer?'").

The change in testimony was significant, because at the time Hertz suspended the plaintiffs, the company's "Rules & Regulations" stated that an employee may be subject to "progressive discipline including verbal and/or written warning, suspension or discharge" for failing to "follow established time card procedures." Ex. 1076, ¶ 17; *accord* 11/13 RP 38 ("If we did not give a direct order … and we saw somebody in the prayer area *after the fact*, then I agree misuse of

company time would have been the correct remedy[,] … result[ing] in a first written warning, the first step of [progressive] discipline"); 12/3 RP 116 (same). Hertz did not follow progressive discipline and give each of the plaintiffs written warnings for praying without clocking out, but instead suspended all of the plaintiffs for alleged insubordination. *See* 11/17 RP 129; 11/12 RP 170. "Insubordination, the way that works, you have to say something three times. And then, at that point, you can suspend someone." 11/12 RP 234; *accord* Ex. 237; Ex. 15; and Exs. 154, 195, 219 (Hertz reports to the Employment Security Department that plaintiffs were "asked three times to punch out on that final day when [they] went to take [their] breaks and refused each time"). Plaintiffs disputed being told three times of the new policy and refusing. *See, e.g.*, 11/12 RP 131-32; 11/25 RP 128.

Hertz management also claimed that it implemented the new policy in September 2011 due to break "abuse," which it said included smoking and various breaks by "some staff." *See* 11/12 RP 189-90 ("I was aware that we had abuse. When I say abuse I mean that we had some staff that would take breaks that they wouldn't clock out for, and that wasn't just Somali Muslim shuttlers. We had people smoking and not clocking out. We had various breaks that weren't being accounted for."); *id*., at 185-86. Regarding the alleged

prayer abuse, Hertz claimed "that the prayer situation was an hour long, was what was being described." 11/17 RP 98. Again, Plaintiffs contested this, testifying that their prayer rituals typically took three to five minutes. *See* 11/13/14 RP 139; 11/12/14 RP 39.

During their suspensions, Plaintiffs made unconditional offers to return to work, despite their belief that Hertz had violated the anti-discrimination laws.[5] Rather than return the plaintiffs to work, Hertz terminated their employment *en masse* on October 20, 2011, without citing any individual abuse of a prayer break.[6]

By October 21, 2011, there was national media coverage to the effect that Hertz was applying a new break policy only against Somali Muslims who were praying and not applying the policy, for example, to employees "smoking while not clocked out." 11/12 RP 202-205. After this media coverage, managers "began documenting … anytime we saw any employee that was not doing work… if they're smoking or praying or they're in the break room or whatever

[5] *See, e.g.,* Ex. 59 (A. Abdulle); Ex. 80 (A. Abdi); Ex. 115 (F. Aden); Ex. 233 (S. Hashi); Ex. 73 (A. Hussein); Ex. 94 (A. Mohamed); Ex. 107 (F. Geedi); Ex. 122 (H. Abdulle); Ex. 142 (I. Salah); Ex. 161 (M. Ali); Ex. 178 (M. Muse); Ex. 210 (M. Abdullahi); Ex. 217 (S. Abubakar); Ex. 226 (H. Huseen, f.k.a. S. Galle); Ex. 170 (M. Mumin); Ex. 88 (A. Farah); Ex. 66 (A. Hirsi); Ex. 130 (H. Farah); Ex. 193 (M. Hassan); Ex. 202 (M. Mohamed); Ex. 243; Ex. 152 (I. Omar).

[6] *See, e.g.,* Ex. 60 (A. Abdulle); Ex. 67 (A. Hirsi); Ex. 81 (A. Abdi); Ex. 116 (F. Aden); Ex. 234 (S. Hashi); Ex. 74 (A. Hussein); Ex. 101 (D. Jama); Ex. 95 (A. Mohamed); Ex. 108 (F. Geedi); Ex. 123 (H. Abdulle); Ex. 131 (H. Farah); Ex. 186 (M. Ismail); Ex. 171 (M. Ali); Ex. 194 (M. Hassan); Ex. 203 (M. Mohamed); Ex. 218 (S. Abubakar); Ex. 227 (H. Huseen, f.k.a. S. Galle); Ex. 244 (Z. Aweis); Ex. 153 (I. Omar).

it may be…." *Id.* Employees had earlier been told they were allowed to smoke without clocking out. *See* 11/12 RP 209-210; 11/17 RP 153

On October 25, 2011, after the media coverage, Hertz observed a non-Somali employee who was smoking without being clocked out; the company did not suspend him, it issued him a "first written warning." 11/12 RP 206; Ex. 3; 11/17 RP 149. *Id*. That same day, another non-Somali employee was caught smoking while not clocked out; he was given a "verbal warning" and told "the next time he was seen smoking on the clock he will be written up." Ex. 22. In December 2011, a third non-Somali employee was caught smoking without clocking out; he was not suspended but was given a first written warning. Exs. 264-265. In March 2012, a fourth non-Somali employee was observed smoking while not clocked out and he too was given a first written warning. Ex. 7.

2. Procedural Background

The plaintiffs sued Hertz and two of its managers for discrimination based on national origin and religion. Op., at A3. "Farah requested an instruction on a permissible inference that the jury would be allowed to draw if it disbelieved Hertz's stated reasons for terminating [the plaintiffs]." Op., at A4. The court did not give the requested "pretext" instruction. *Id*. "The jury returned verdicts for the

defense." *Id*. In a published opinion, Division One of the Court of Appeals held that "it was not error for the trial court to refuse to give Farah's proposed instruction." Op., at A9

The Opinion notes that currently "Washington's pattern jury instructions ['WPI'] for employment discrimination do not include a pretext instruction" and that the comments to the WPI "indicate that 'an instruction or language on pretext is inappropriate." Op., at A6, *citing* 6A Washington Practice: Washington Pattern Jury Instructions: Civil 330.01, cmt. at 346 (6th ed. 2012) (WPI). The Opinion states Farah's requested instruction was "an accurate statement of the law" and "[w]hile the instruction would have been appropriate, it was not necessary." Op., at A4-A5. The jury was instructed, *inter alia*, that "[t]he evidence that has been presented to you may be either direct or circumstantial. … [C]ircumstantial evidence' refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in the case." 12/10 RP 52-53; CP 2279. The Opinion held that such "general instructions were sufficient for Farah to inform the jury of the applicable law and allow[ed] Farah to argue his theory of the case." *See* Op., at A9. It further held that the "court's instructions were not misleading." *Id*.

Although the Court of Appeals did not require an instruction on pretext in WLAD case, it acknowledged there is a federal circuit court split in which five circuits have endorsed requiring a pretext instruction in appropriate Title VII cases. Op., at A7 (citing cases).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. An Issue of Substantial Public Interest Is Presented by the Court of Appeals' Adoption of the Federal Court Rule Under Title VII That Gives Less Protection to Employees.

The question presented in this case could arise in virtually every Washington Law Against Discrimination ("WLAD") case tried to a jury, due to the frequency with which plaintiffs must rely on evidence of pretext to prove a WLAD claim. *See Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 184, 23 P.3d 440 (2001) ("Direct, 'smoking gun' evidence of discriminatory animus is rare, since there will seldom be 'eyewitness' testimony as to the employer's mental processes, and 'employers infrequently announce their bad motives orally or in writing. … 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.") (internal quotations and citations omitted).

The WLAD "seeks to remedy an evil that … 'menaces the institutions and foundation of a free democratic state.'" *Reese v.*

Sears, Roebuck & Co., 107 Wn.2d 563, 569 (1987), *quoting* RCW 49.60.010. "The overarching purpose of the law is to deter and eradicate discrimination in Washington." *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 360, 20 P.3d 921 (2001). "The legislature directs us to construe the WLAD liberally." *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014).

> Washington courts … look to federal case law interpreting [Title VII] to guide our interpretation of the WLAD. Federal cases are not binding on this court, which is 'free to adopt those theories and rationale which best further the purposes and mandates of our state statute.' ... Where this court has departed from federal antidiscrimination statute precedent, however, it has almost always ruled that the WLAD provides *greater* employee protections than its federal counterparts do.

Kumar v. Gate Gourmet Inc., 180 Wn.2d 481, 491, 325 P.3d 193 (2014) (internal citation omitted; italics added).

The Opinion recognizes that in this case the "federal courts do not provide a clear answer because there is a circuit split" regarding whether the pretext instruction Farah requested is required. *See* Op., at A7-A9. Rather than adopt the rule endorsed by the Second, Third, Fourth, Fifth, and Tenth circuits, which best furthers the purpose and mandate of the WLAD by requiring a permissible inference instruction in appropriate cases; Division One of the Court of Appeals opted to follow the line of cases from the First, Seventh, Eighth,

Ninth and Eleventh Circuits, which hold that no pretext inference instruction is required—a rule that provides employees less protection by making it more difficult for them to prove their case; and thus makes it more difficult to eradicate discrimination in Washington. *See* Op., at A7-A9. The Opinion's rationale for rejecting the more protective rule under federal law is misguided.

a. The Lack of a Permissive Inference Instruction Leaves the Jury Uninformed On the Applicable Law and Is Likely To Mislead the Jury Into Believing Plaintiff Must Present Evidence Beyond Pretext.

"The court determines questions of law and imparts the law of the case to the jury by means of instructions." *State v. Shelton*, 71 Wn.2d 838, 843, 431 P.2d 201 (1967). The Court in the Opinion found that the pretext instruction Farah requested is "an accurate statement of the law" and "would have been appropriate." Op., at 2 and 5.

In *Hill v. BCTI Income Fund-I*, the Court of Appeals set aside a jury verdict in favor of the plaintiff for insufficient evidence, applying a "pretext-plus" standard that required the plaintiff to "prove more than that the employer's stated reason for the employment decision is unworthy of belief." 97 Wn. App. 657, 661, 986 P.2d 137 (1999). The Court vacated that decision, rejecting the "pretext-plus" standard and holding instead that "it is *permissible* for the trier of fact

to infer the ultimate fact of discrimination from the falsity of the employer's explanation." 144 Wn.2d 172, 184, 23 P.3d 440 (2001) (italics in original) (quoting *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133, 147, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

Under the standard adopted in *Hill*, plaintiffs' discrediting of the employer's explanation "is entitled to considerable weight, such that [a] plaintiff should not be routinely required to submit evidence over and above proof of pretext." 144 Wn.2d at 183, *quoting Reeves*, 530 U.S. at 140 and 194. Without a pretext instruction, the jury is likely to be confused like the Court of Appeals in *Hill* and to be misled into believing that the plaintiff needs to present proof of discrimination beyond the proof of pretext to be able to infer a discriminatory motive. *See Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1241 (10th Cir. 2002) (discussing Fifth Circuit Court of Appeals making the same erroneous assumption in *Reeves*).

> [T]he permissibility of an inference of discrimination from pretext alone is a matter of law .... While counsel may be relied on to ... suggest reasoning, the judge's duty to give an instruction on an applicable matter of law is clear. That is particularly true where, as here, the law goes to the heart of the matter.... It is unreasonable… to expect that jurors, aided only by the arguments of counsel, will intuitively grasp a point of law that until recently eluded federal judges who had the benefits of such arguments.

Townsend, 294 F.3d at 1241 n.5; *see also Smith v. Borough of*

Wilkinsburg, 147 F.3d 272, 280-81 (3d Cir. 1998) ("In light of the … inordinate amount of ink that has been spilled over the question of how a jury may use its finding of pretext, it would be disingenuous to argue that it is nothing more than a matter of common sense"); *Kozlowski v. Hampton Sch. Bd.*, 77 Fed. Appx. 133, 143 (4th Cir. 2003) ("Given the amount of disagreement among judges of the federal courts of appeals over whether a jury may infer discrimination simply from their disbelief of the employer's stated justifications, it seems unlikely that jurors will uniformly intuit that such an inference is permissible"); *Ratliff v. City of Gainesville*, 256 F.3d 355, 361 n.7 (5th Cir. 2001) ("It does not denigrate the intelligence of our jurors to suggest that they need some instruction in the permissibility of drawing that inference.") (quotation and citation omitted).

The Opinion cites the unpublished decision, *Kozlowski v. Hampton Sch. Bd.*, 77 Fed. Appx. 133, 144 (4th Cir. 2003), as persuasive authority endorsing the requirement of a pretext instruction. Op., at A7-A8. The facts of *Kozlowski* illustrate why an instruction on the permissible inference that can be drawn from proof of pretext is needed to avoid misleading the jury. In *Kozlowski*, the jury, during deliberations, asked the trial court, "By virtue of exclusion of defense's reasons for [the] nonrenewal, must we

conclude under the law that age discrimination has occurred?" *Id*., at 142. After the jury expressed its confusion on the law, "the court decided simply to repeat the general instruction without addressing the question specifically." *Id*. The jury returned a defense verdict. *Id*., at 135.

"An examination of circuit cases reveals that where … a jury is not informed that they are allowed to make an inference [of discrimination based on evidence of pretext], they will not make it." T. Devine, Jr., "The Critical Effect of a Pretext Jury Instruction," 80 Den.U.L.Rev. 549 (2003). Thus, not requiring the permissive inference instruction fails to "best further" the WLAD's purpose and mandate. In contrast, the more protective rule, requiring the pretext instruction that Farah proposed, "equips the jury with the tools it needs to fully assess the possible legal implications of the facts they have discerned." C. Elizabeth Belmont, "The Imperative of Instructing on Pretext: A Comment on William J. Volmer's Pretext in Employment Discrimination Litigation. Mandatory Instructions for Permissible Inferences?", 61 Wash. & Lee L. Rev. 445, 456 (2004).

b. Argument of Counsel Without a Permissive Inference Instruction is Insufficient.

The ability of counsel to make argument cannot render unnecessary an otherwise mandatory jury instruction. The United

States Supreme Court has repeatedly noted that where an otherwise mandatory instruction has been denied, "arguments of counsel cannot substitute for instructions by the court." *Carter v. Kentucky*, 450 U.S. 288, 304, 101 S. Ct. 1112,67 L. Ed. 2d 241 (1981) (argument of counsel is no substitute for instruction that inference of guilt may not be drawn from failure of defendant to testify in criminal case); *Taylor v. Kentucky*, 436 U.S. 478, 488–89, 98 S. Ct. 1930, 56 L. Ed. 2d 468 (1978) (argument of defense counsel in both opening and closing statements was no substitute for instruction on presumption of innocence). "[U]nder any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and … his lightest word or intimation is received with great deference." *Starr v. United States*, 153 U.S. 614, 626, 14 S. Ct. 919, 38 L. Ed. 841 (1894). The argument of counsel cannot have the same effect.

Unlike an instruction from the court, an argument of counsel is not a view the jury is obligated to accept. As in many cases, the jury here was instructed, "You should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you." 12/10/14 RP 50; *accord* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 1.02 (6th ed.). Thus, arguments by counsel, which the trial court's instructions explicitly tell the jury it

may "disregard," are no substitute for a clear and appropriate jury instruction by the court addressing the permissibility of an inference of discrimination based on pretext.

c. General Instructions Are Not Sufficient.

The Opinion states that "[t]he court's general instructions were sufficient for Farah to inform the jury of the applicable law and allow Farah to argue his theory of the case." Op., at 9. "[T]he court must instruct on all the theories to which the facts pertain." *Harris v. Fiore*, 70 Wn.2d 357, 360, 423 P.2d 63 (1967).

> The plaintiffs were… entitled to have their theories of the case presented to the jury by proper instructions, there being evidence to support them; and their right was not affected by the fact that the law was covered in a general way by the instructions given.

Dabroe v. Rhodes Co., 64 Wn.2d 431, 435, 392 P.2d 317 (1964).

2. The Opinion Conflicts with Precedent Requiring Permissive Inference Instructions In Negligence Cases.

The Opinion quotes *Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 576 (5th Cir. 2004), stating that "instructing jurors on permissible inferences risks 'confusing the jury regarding the ultimate issue a plaintiff must prove.'" *See id.*, *quoted in* Op., at A9; *accord Gehring v. Case Corp*., 43 F.3d 340, 343 (7th Cir. 1994) ("[A] judge need not deliver instructions describing all valid legal principles. Especially not when the principle in question describes a permissible,

but not an obligatory, inference."). The fact that Plaintiffs seek a jury instruction on a permissive, rather than a mandatory, inference should not affect their entitlement to a clear instruction on the applicable law and Plaintiffs' theory of the case.

"Generally, *res ipsa loquitur* provides nothing more than a permissive inference." *Zukowsky v. Brown*, 79 Wn.2d 586, 600, 488 P.2d 269 (1971). "Literally translated, the words mean 'the thing itself speaks…. express[ing] a common-sense recognition of the potential efficacy of circumstantial evidence." *Id.*, at 592. Initially, the Court held that in cases in which *res ipsa loquitor* applied, the "plaintiff is entitled to an instruction informing the jury on circumstantial evidence" and that "[r]es ipsa is properly treated the same as other circumstantial evidence in instructions to the jury"—a "'res ipsa instruction' … should not be given" because "[w]hen added to other, general instructions which inform the jury of what they may or should do with the evidence before them, such particularized instructions are unnecessary and redundant." *Id.*, at 602. That reasoning, which parallels the Opinion's reasoning for rejecting the requirement of a pretext instruction here, was later rejected. *See, e.g., Brown v. Dahl*, 41 Wn. App. 565, 583, 705 P.2d 781 (1985) (discussing *Zukowsky* and subsequent cases and stating

plaintiffs are "entitled to an instruction setting forth their theory of res ipsa loquitur"); *accord* 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 22.01 (6th ed.) (stating same), *citing Pacheco v. Ames*, 149 Wn.2d 431, 444, 69 P.3d 324 (2003); and *Siegler v. Kuhlman*, 81 Wn.2d 448, 453, 502 P.2d 1181 (1972) (holding that the refusal to give instruction was error; "plaintiff was entitled to an instruction permitting the jury to infer negligence").

"[T]he res ipsa loquitur doctrine allows the plaintiff to establish a prima facie case of negligence when he cannot prove a specific act of negligence because he is not in a situation where he would have knowledge of that specific act." *Pacheco*, 149 Wn.2d at 441. "The doctrine permits the inference of negligence on the basis that the evidence of the cause of the injury is practically accessible to the defendant but inaccessible to the injured person." *Id.*, at 436. One element of the doctrine is showing that the "injury was caused by an agency or instrumentality within the exclusive control of the defendant." *Id*. The pattern jury instruction to which the plaintiff is entitled in appropriate cases states, in part, that "in the absence of satisfactory explanation, you may infer, but you are not required to infer, that the defendant was negligent." 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 22.01 (6th ed.). To obtain this instruction, the

"plaintiff is not required to 'eliminate with certainty all other possible causes or inferences' in order for res ipsa loquitur to apply." *Pacheco*, 149 Wn.2d at 440-41.

Plaintiffs in a discrimination lawsuit find themselves in a similar situation to claimants seeking to prove negligence through *res ipsa loquitor*. The Court recognizes "the difficulty of proving a discriminatory motivation." *Scrivener v. Clark College*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). "[I]t is very difficult to prove what the state of a man's mind at a particular time is… Intent may be proved by circumstantial evidence. Indeed, in discrimination cases it will seldom be otherwise…." *deLisle v. FMC Corp*., 57 Wn. App. 79, 83, 786 P.2d 839 (1990). "[T]he employer is in the best position to put forth the actual reason for its decision." *Hill*, 144 Wn.2d at 184 (*quoting Reeves*, 530 U.S. at 148); *accord Wilmot v. Kaiser Alumin um & Chem. Corp.*, 118 Wn.2d 46, 72, 821 P.2d 18 (1991) ("[T]he employee must prove the wrongful conduct… without the benefit of the employer's own knowledge of the reason for the discharge, and generally without the access to proof which the employer has.").

Given these circumstances, Plaintiffs pursuing claims of discrimination ought to be entitled, like claimants proving a negligence claim through *res ipsa loquitor*, to have the jury instructed

on the permissive inference that may be drawn and should not be required to argue their theory of the case using only the general instruction on circumstantial evidence. Otherwise, jurors may incorrectly assume that drawing an inference of discrimination from pretext, absent "affirmative proof of discriminatory intent," is improper. *See Townsend*, 294 F.3d at 1243 (Henry, C.J.) (concur.).

> [I]t is clear that the jury must be given the legal context in which it is to find and apply the facts. It is difficult to understand what end is served by reversing the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext … if the jurors are never informed that they may do so.

Smith, 147 F.3d at 280.

F. CONCLUSION

For these reasons, the Court should grant review, adopt the rule under Title VII precedents that best furthers the purpose and mandate of the WLAD, and require that a permissive inference jury instruction on pretext be given in appropriate cases, where plaintiffs seek to prove their case at trial using such theory.

RESPECTFULLY SUBMITTED this 16th day of November, 2016.

THE SHERIDAN LAW FIRM, P.S.

By: s/John P. Sheridan

John P. Sheridan, WSBA # 21473
Mark W. Rose, WSBA # 41916
Hoge Building, Suite 1200
705 Second Avenue
Seattle, WA 98104
Tel: 206-381-5949 Fax: 206-447-9206

Attorneys for Plaintiffs/Petitioners

DECLARATION OF SERVICE

Melanie Kent states and declares as follows:

1. I make this declaration based on my personal knowledge and belief.

2. On November 16, 2016, I caused to be delivered via the Court of Appeals' e-service system to:

Mark S. Filipini
mark.filipini@klgates.com
Daniel P. Hurley
daniel.hurley@klgates.com
K&L Gates
925 Fourth Avenue, Suite 2900
Seattle, WA 98104

Attorneys for Defendants

a copy of the PETITION FOR REVIEW.

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

DATED this 16th day of November, 2016 at Seattle, King County, Washington.

s/Melanie Kent
Melanie Kent, Legal Assistant

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

HASSAN FARAH, an individual, ILEYS OMAR, an individual, MARIAN MUMIN, an individual, DAHIR JAMA, an individual, FOUZIA M. MOHAMUD, an individual, MARIAN ALI, an individual, ABDIZIZ ABDULLE, an individual, SAALIM ABUBKAR, an individual, MOHAMED ISMAIL, an individual, SUDI HASHI, an individual, HALI ABDULLE, an individual, MURAYAD ABDULLAHI, an individual, ZAINAB AWEIS, an individual, FARDOWSA ADEN, an individual, MARYAN MUSE, an individual, ASLI MOHAMED, an individual, SAHRA GELLE (a/k/a Hani Huseen), an individual, ASHA FARAH, an individual, ALI ADAM ABDI, an individual, MUNA MOHAMED, an individual, FARAH GEEDI, an individual, AHMED HASSAN HUSSEIN, an individual, IBRAHIM SALAH, an individual, AHMED A. HIRSI, an individual, and MOHAMUD A. HASSAN, an individual, Appellants, v. HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS, Respondents.	No. 73268-4-I DIVISION ONE PUBLISHED OPINION FILED: October 3, 2016

TRICKEY, J. — Hassan Farah and other plaintiffs sued Hertz Transporting, Inc. for employment discrimination. The jury returned a defense verdict. Farah moved for a new trial, which the court denied. On appeal, Farah argues that the trial court should have instructed the jury on pretext. We hold that this instruction

would have been appropriate but was not necessary. Farah's other claims do not require reversal. We affirm the trial court.

FACTS

Hassan Farah and 24 other Somali immigrants, who are practicing Muslims, worked as "shuttlers" for Hertz Transporting at Seattle-Tacoma International Airport (Sea-Tac). "Shuttlers" move rental vehicles around the grounds, for example, from where customers return the cars to locations for cleaning or maintenance.

In September 2011, Hertz implemented a break policy for its shuttlers, requiring them to "punch" out for all personal activities, including prayer. The parties dispute whether employees were required to punch out for prayer before this new policy. They agree that no one was disciplined for not punching out for prayer until September 2011.

The policy went into effect on September 30, 2011. On that day or within the first few days of October, Farah and the other plaintiffs prayed without punching out. Hertz suspended them. Then, on October 13, 2011, one of the Hertz managers sent letters to Farah and the other suspended employees, informing them that they could return to work if they would acknowledge that they had to punch out for prayer. Eight of the suspended employees signed the acknowledgment form and returned to work. When the plaintiffs did not sign the acknowledgment form, Hertz terminated their employment.

Around the time of the suspension and eventual terminations, roughly half of the shuttlers were practicing Muslims. The shuttler workforce remains about 50

percent Muslim.

Farah and the other plaintiffs (together Farah) sued Hertz and two of the Hertz managers for discrimination based on national origin and religion. The case proceeded to a jury trial.

Jeffrey Wilson, Hertz's manager for the Sea-Tac location in 2010 to 2011, testified at trial. Farah sought to introduce an e-mail Wilson had written to other managers about the break policies. The trial court excluded the e-mail. Other Hertz managers testified that they informed their employees about the policy by posting notices, in English, about the policy in several prominent locations, discussing it at meetings, and asking employees if they had punched out as the employees entered the prayer rooms. Many of the plaintiffs testified that they were not aware of the policy change at the time they were suspended.

During the trial, Hertz frequently objected to Farah's manner of questioning witnesses, asserting that Farah was being argumentative, repetitive, and misleading. The court sustained many of these objections. When Farah asked, outside the presence of the jury, for the court to explain its rulings, the court articulated its concern that Farah was needlessly consuming time:

> [Y]ou are focusing too much on one portion of the testimony and being redundant. And you are being theatrical in a way that is a waste of time and is inappropriately argumentative.
>
> . . . .
>
> And if we do the more theatrical approach, and redundant and argumentative approach, it's both inappropriate and takes about five times longer.[1]

The court gave the pattern jury instructions for employment discrimination

[1] Report of Proceedings (RP) (Nov. 12, 2014) at 187.

cases where the plaintiff alleges disparate treatment. Farah requested an instruction on a permissible inference that the jury would be allowed to draw if it disbelieved Hertz's stated reasons for terminating Farah. The court did not give the instruction. We, along with the parties, refer to this as a "pretext instruction."[2]

The jury returned verdicts for the defense. Farah moved for a new trial. The court denied his motion. Farah appeals.

ANALYSIS

Pretext Instruction

Farah argues that the trial court erred by refusing to instruct the jury on pretext. He contends that, without the instruction, the jury was not fully informed of the applicable law. Hertz responds that the instructions were adequate and that pretext instructions are inappropriate under Washington law. While the instruction would have been appropriate, it was not necessary. Thus, refusing to give the instruction was not error.

Jury instructions are sufficient when they allow parties to argue their theory of the case, are not misleading, and, when taken as a whole, inform the jury of the applicable law. City of Bellevue v. Raum, 171 Wn. App. 124, 142, 286 P.3d 695 (2012), review denied, 176 Wn.2d 1024, 301 P.3d 1047 (2013). If the trial court's jury instructions are otherwise sufficient, the court does not need to give a party's proposed instruction, though that instruction may be an accurate statement of the law. City of Seattle v. Pearson, 192 Wn. App. 802, 821, 369 P.3d 194 (2016). The trial court may decide which instructions are necessary to "guard against

[2] Br. of Appellants at 52; Br. of Resp'ts at 43.

misleading the jury." Gammon v. Clark Equip. Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

We review a trial court's decision whether to give a particular jury instruction for an abuse of discretion. Clark Cty. v. McManus, 185 Wn.2d 466, 474, 372 P.3d 764 (2016). That includes, "a trial court's rejection of a party's jury instruction." Pearson, 192 Wn. App. at 820.

Here, Farah requested the following jury instruction, taken from the Eighth Circuit's model jury instructions:

> You may find that a plaintiff's religion or national origin was a substantial factor in the defendant's [sic] decision to suspend or terminate a plaintiff if it has been proved that the defendants' stated reasons for either of the decisions are not the real reasons, but are a pretext to hide religious or national origin discrimination.[3]

This instruction is an accurate statement of the law. The Supreme Court held in Reeves v. Sanderson Plumbing Products, Inc. that this inference was permissible in employment discrimination cases that rely on the McDonnell Douglas[4] burden-shifting framework. 530 U.S. 133, 142-43, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).[5] Washington adopted this standard for Washington's Law Against Discrimination (WLAD), chapter 49.60 RCW, cases soon after the Supreme Court announced it in Reeves. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 178-79, 23

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[3] Clerk's Papers (CP) at 1109; see Eighth Cir. Civil Jury Inst. § 5.20 (2014).
[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973) (developing a burden-shifting framework for claims brought under Title VII of the Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. 2000e-2(a)(1)).
[5] Reeves dealt with an action brought under the Age Discrimination in Employment Act of 1967, § 4(a)(1), 29 U.S.C.A. § 623(a)(1), but the Supreme Court explained that it was assuming that the McDonnell Douglas framework would apply. 530 U.S. at 142.

P.3d 440 (2001).[6]

Washington's pattern jury instructions for employment discrimination do not include a pretext instruction. 6A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 330.01 (6th ed. 2012) (WPI). In fact, the comments to the instruction indicate that "an instruction or language on pretext is inappropriate." WPI 330.01 cmt. at 346. That comment cites the Washington State Supreme Court case Kastanis v. Educational Employees Credit Union, 122 Wn.2d 483, 496, 859 P.2d 26, 865 P.2d 507 (1994).

In Kastanis, the employer requested an instruction that the plaintiff had to prove that its stated reasons for firing the plaintiff were a pretext. 122 Wn.2d at 494. The court held that, while proof of pretext was necessary for the plaintiff's case to survive summary judgment, a jury instruction on pretext was unnecessary because, at trial, the plaintiff needed to meet only his ultimate burden of proving that the employer intentionally discriminated. 122 Wn.2d at 494-95. Division One of the Court of Appeals also rejected an argument that employment discrimination cases required complex burden shifting and pretext instructions. Burnside v. Simpson Paper Co., 66 Wn. App. 510, 524, 832 P.2d 537 (1992), aff'd, 123 Wn.2d 93, 864 P.2d 937 (1994). It held that, "[i]ssues of the plaintiff's prima facie case, the employer's burden to rebut with a legitimate nondiscriminatory reason, and the employee's showing of pretext are irrelevant once all the evidence is in." Burnside, 66 Wn. App. at 524. Instructions on pretext or shifting burdens would create

[6] Washington courts consider cases interpreting Title VII persuasive authority because the WLAD is modeled after Title VII. Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 849, 292 P.3d 779 (2013).

"needless confusion." Burnside, 66 Wn. App. at 524.

Burnside and Kastanis are not dispositive because the instructions at issue in those cases dealt with shifting burdens of proof rather than permissible inferences. In Kastanis, the employer asked the court to instruct the jury that the employee had to prove that the employer's offered business necessity explanation was a pretext. 122 Wn.2d at 493-94. In Burnside, the court did not specify what the proposed instructions at issue were but compared them to the one offered in Pannell v. Food Services of America, 61 Wn. App. 418, 431-32, 810 P.2d 952 (1991). Burnside, 66 Wn. App. at 523. The proposed instruction in Pannell included a lengthy explanation of prima facie cases, legitimate, nondiscriminatory reasons, and pretext. 61 Wn. App. at 431-32. These instructions were much more likely to confuse the jury than the one Farah requested.

No Washington cases have addressed whether a pretext instruction on permissible inferences, rather than burden shifting, is required, in light of Reeves. In the absence of controlling Washington law, this court looks to federal cases interpreting Title VII. Lodis v. Corbis Holdings, Inc., 172 Wn. App. 835, 849, 292 P.3d 779 (2013). The federal courts do not provide a clear answer because there is a circuit split on this issue.

The Second, Third, Fourth, Fifth, and Tenth Circuits have endorsed the requirement, although some of the circuits have required that the plaintiff satisfy certain conditions before the court would be required to give the instruction. Cabrera v. Jakabovitz, 24 F.3d 372, 382 (2d Cir. 1994); Smith v. Borough of Wilkinsburg, 147 F.3d 272, 280 (3d Cir. 1998); Kozlowski v. Hampton Sch. Bd., 77

Fed. Appx. 133, 144 (4th Cir. 2003);[7] Kanida v. Gulf Coast Med. Pers. LP, 363 F.3d 568, 578 (5th Cir. 2004); Townsend v. Lumbermens Mut. Cas. Co., 294 F.3d 1232, 1241-42 (10th Cir. 2002).

In Townsend, the court expressed its concern that, considering that many federal judges did not understand how a showing of pretext operated before the Supreme Court's decision in Reeves, it was unlikely that a jury would "intuitively grasp" this point of law. 294 F.3d 1241 n.5. The Fourth and Third Circuits also cited that previous confusion in the courts as proof that the permissible inference was not a matter of "common sense." Smith, 147 F.3d at 280-81; Kozlowski, 77 Fed. Appx. at 143-44.

Conversely, the First, Seventh, Eighth, Ninth, and Eleventh Circuits have explicitly held that the instruction is not required or indicated that they would be unlikely to require it. Fite v. Digital Equip. Corp., 232 F.3d 3, 7 (1st Cir. 2000); Gehring v. Case Corp., 43 F.3d 340, 343 (7th Cir. 1994); Moore v. Robertson Fire Prot. Dist., 249 F.3d 786, 789-90 (8th Cir. 2001); Browning v. United States, 567 F.3d 1038, 1040 (9th Cir. 2009), cert. denied, 559 U.S. 1067, 130 S. Ct. 2090, 176 L. Ed. 2d 722 (2010); Conroy v. Abraham Chevrolet–Tampa, Inc., 375 F.3d 1228, 1234-35 (11th Cir. 2004).

In Gehring, Judge Frank Easterbrook wrote that the instruction was unnecessary and pointed out that the plaintiff's attorney asked the jury to draw the permissible inference and "neither judge nor defense counsel so much as hinted that any legal obstacle stood in the way" of that argument. 43 F.3d at 343. Even

[7] This case was not published in the Federal Reporter, but may be cited for persuasive authority. GR 14.1(b); Fourth Circuit Rule 32.1.

in Kanida, a case within a circuit requiring the instruction, the court urged *en banc* reconsideration of its opinion so it could overrule an earlier panel's decision requiring the instruction. 363 F.3d at 577-78. That court pointed out that the pattern jury instruction permitted "jurors to draw the reasonable inferences" they felt the evidence justified and that instructing jurors on permissible inferences risks "confusing the jury regarding the ultimate issue a plaintiff must prove." Kanida, 363 F.3d at 576-77.

We agree with the circuits that have held the instruction is not required. While the instruction might be appropriate, the arguments in its favor are not compelling enough to hold that it is an abuse of discretion to refuse to give the instruction. The court's general instructions were sufficient for Farah to inform the jury of the applicable law and allow Farah to argue his theory of the case. The court's instructions were not misleading. Therefore, we hold that it was not error for the trial court to refuse to give Farah's proposed instruction.

Exhibit 1929

Farah contends that the trial court erred by excluding exhibit 1929, an e-mail thread between Jeffrey Wilson and other Hertz managers. Farah argues it was admissible (1) as the admission of a party opponent or (2) under the business records exception to hearsay. Because we determine that it was an admission by a party opponent, we do not address whether it was also a business record.

This court reviews a trial court's evidentiary decisions for an abuse of discretion. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). A trial court abuses its discretion when it exercises it on untenable grounds or for

untenable reasons. Burnside, 123 Wn.2d at 107.

Admission of a Party Opponent

Farah claims that, because exhibit 1929 was an admission by Hertz's manager of the Sea-Tac location, Jeffrey Wilson, the trial court erred by excluding it. We agree.

A statement is not hearsay if it is an admission by a party opponent. ER 801(d)(2). To qualify as a statement of a party opponent, it must be "offered against a party and [be] . . . a statement by a person authorized by the party to make a statement concerning the subject, or . . . a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party." ER 801(d)(2)(iii), (iv). The court may determine if a party is authorized to speak on a matter by examining "the overall nature of his authority to act for the party." Lockwood v. AC&S, Inc., 109 Wn.2d 235, 262, 744 P.2d 605 (1987).

Exhibit 1929 is an e-mail thread between several Hertz managers that begins with a message from Jeffrey Wilson, a Hertz local manager. Wilson testified that his duties included being "responsible for the efficiency of the group [of shuttlers] and sort of the day-to-day operations. Just making sure that scheduling was taken care of and that the policies and procedures were understood and enforced."[8] Wilson's e-mail explained to other Hertz managers how to make sure the shuttlers understood the policies and how those managers should enforce them. This e-mail falls squarely within his authority. The trial court held it was not the admission of a party opponent because of "Mr. Wilson's level in

[8] RP (Dec. 4, 2014) at 191.

the company."[9] This was an abuse of discretion.

Other Bases for Exclusion

Hertz argues that, even if exhibit 1929 is admissible as an admission of a party opponent, the trial court was right to exclude it because it was not disclosed by the discovery deadline or was unduly prejudicial under ER 403. Hertz also argues that it should be excluded because Wilson is not an agent for Hoehne or Harris. These arguments are without merit.

First, excluding exhibit 1929 because of a discovery violation would amount to a severe sanction. Before imposing that sanction, the trial court would have had to consider, on the record, whether the discovery violation was willful, if Hertz would suffer substantial prejudice because of the violation, and if a lesser sanction would suffice. Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); Jones v. City of Seattle, 179 Wn.2d 322, 343, 314 P.3d 380 (2013) (extending the Burnet analysis to discovery violations that arise during trial). The trial court did not consider those factors. Thus, we cannot uphold the exclusion of exhibit 1929 on the basis that Farah disclosed it late.

Second, Farah's theory of the case was that Hertz designed the break policy as a way to discipline or terminate its Somali Muslim employees. Evidence of who was involved in designing and implementing the break policy was relevant to that theory. As discussed below, Wilson testified to the contents of the e-mail thread on cross-examination. His testimony drew no objections on grounds of relevancy or ER 403.

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[9] RP (Dec. 9, 2014) at 6.

Finally, Hertz is correct that Wilson is not Harris's or Hoehne's agent. Wilson had no authority to speak for these two individual defendants, so they are not bound by his admissions. See Feldmiller v. Olson, 75 Wn.2d 322, 323-24, 450 P.2d 816 (1969). But that does not justify excluding Wilson's e-mail. The trial court, if it had admitted Exhibit 1929, could have instructed the jury that the exhibit was admitted only against Hertz and was not evidence against Hoehne or Harris. See Feldmiller, 75 Wn.2d at 323-24. It would still have been proper to admit it on that limited basis.

Prejudice

Although it was error to exclude exhibit 1929, that error does not require reversal because it was not prejudicial. Diaz v. State, 175 Wn.2d 457, 472, 285 P.3d 873 (2012). "An error is not prejudicial unless it affects, or presumptively affects, the outcome of the trial." Diaz, 175 Wn.2d at 472. There is no prejudicial error in the exclusion of an exhibit when the substance of the exhibit comes out in trial. Moore v. Smith, 89 Wn.2d 932, 941-42, 578 P.2d 26 (1978). "The exclusion of evidence which is cumulative . . . is not reversible error." Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).

Here, the exhibit itself would have been the same as Wilson's testimony. Farah cross-examined Wilson in detail about the e-mail thread. Farah argues that Wilson's oral testimony was not an adequate substitute for the written exhibit because Farah could not confront Wilson with his exact words. We disagree. Farah was able to tell the jury what Wilson wrote, who he said it to, and when he said it. Wilson even used the same language he had employed in the e-mail; for

example, he referred to his "end game" of having shuttlers "punching out for up to 15 minutes of prayer."[10]

Limiting Instruction

Farah asserts that the trial court erred by refusing to instruct the jury on the limited permissible use of testimony by James Kidd, a Hertz lead shuttler. We conclude that the trial court did not abuse its discretion by refusing to give that limiting instruction when requested.

When evidence is admitted for a limited purpose, the trial court "upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105. "Where a party fails to ask for a limiting instruction, however, he waives any argument on appeal that the trial court should have given the instruction." State v. Dow, 162 Wn. App. 324, 333, 253 P.3d 476 (2011). A party may request instructions based on unanticipated developments in the evidence "at any time before the court has instructed the jury." CR 51(a). The trial court has the discretion to give additional jury instructions once the jury has begun deliberating. CR 51(i); Daly v. Lynch, 24 Wn. App. 69, 74-75, 600 P.2d 592 (1979).

Here, the trial court admitted testimony from Kidd about union meetings over whether to ratify a new collective bargaining agreement. Hertz asked him if Tracey Thompson, a union official, said anything about the "new contract's break policy" at the ratification meeting.[11] Farah objected on hearsay grounds. Hertz responded that Thompson's remarks would go to notice. The court overruled the objection. Hertz also asked what Thompson had said regarding prayer during the

[10] RP (Dec. 8, 2014) at 41.
[11] RP (Dec. 9, 2014) at 197.

ratification meeting. Again, Farah objected on the grounds of hearsay but was overruled. Kidd testified that Thompson said that "if they were to elect to take mini-breaks, they could schedule their prayer time at one mini-break, maybe have a cup of tea at the next mini-break or whatever, to give them time to do both."[12]

Farah did not request a limiting instruction at any time during Kidd's testimony. He also did not request a limiting instruction when the court finalized the jury instructions the day of closing arguments.

During its closing statement, Hertz argued that Farah had notice of the new break policy:

> [HERTZ]: And again, confirming that the parties did discuss this. The expectation coming out of the negotiations is that prayer would now be part of break time, rather than in addition. We made an additional accommodation to allow that to happen.
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> The union explains at the ratification meeting that prayer is part of and not in addition to break time.
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> Mr. Kidd came in. He's a member of the union bargaining committee. We subpoenaed him to get him here. He came in and told you, "Yes, it was explained at the ratification meeting."
>
> [FARAH]: I'm sorry to object, your Honor, but I think counsel is making reference to things not in the record with Kidd.
>
> THE COURT: Overruled.
>
> [HERTZ]: He testified that Mohamed Hassan, one of the plaintiffs, was actually the interpreter at the ratification meeting.[13]

Farah did not request a limiting instruction after the court overruled his objection. But, on the morning of December 12, 2014, after the jury had deliberated for a full day, Farah requested a mistrial or, in the alternative, a curative

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[12] RP (Dec. 9, 2014) at 203.
[13] RP (Dec. 10, 2014) at 125.

instruction, explaining that Kidd's testimony about Thompson's statements was only to be used for a limited purpose. The trial court denied the motion.

Farah could have requested a limiting instruction from the court before the trial court instructed the jury and deliberations began. Although Farah would have been entitled to the limiting instruction if he had made a timely request, the court was within its discretion to refuse the request when it came after a full day of deliberations. Denying Farah's belated request for an instruction was not an abuse of the trial court's discretion.

Cross-Examination Objections

Farah assigns error to numerous trial court rulings sustaining Hertz's objections to Farah's manner of examining witnesses on the grounds that they were argumentative, repetitive, lacked a foundation, or mischaracterized other testimony. He argues that the cumulative effect of these erroneously sustained objections resulted in substantial prejudice. Because very few of these rulings were abuses of discretion, we disagree.

As Farah notes, effective cross-examination is integral to due process. Baxter v. Jones, 34 Wn. App. 1, 3, 658 P.2d 1274 (1983). "'[C]ounsel are entitled to ask any questions which tend to test the accuracy, veracity or credibility of the witness.'" Levine v. Barry, 114 Wash. 623, 628, 195 P. 1003 (1921) (quoting Rogers on Expert Testimony § 33 (2d ed.)).

But attorneys do not have free reign during cross-examination:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect

witnesses from harassment or undue embarrassment.

ER 611(a). "Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative." State v. Darden, 145 Wn.2d 612, 620-21, 41 P.3d 1189 (2002). A question is argumentative if it "seeks no facts and instead seeks agreement with the examiner's inferences, assumptions, or reasons." 5A KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 611.19, at 552 (5th ed. 2007).

It is proper for a court to forbid questions that are misleading; for example, if they are "based upon a hypothesis that is not justified by the evidence," or are "based upon facts that are not in evidence." 5A TEGLAND § 611.19, at 552. And the court has "ample authority to curtail" repetitive questioning. 5A TEGLAND § 611.14, at 541.

Farah challenges approximately 90 allegedly erroneously sustained objections.[14] Rather than addressing each ruling, we discuss representative samples. Most of these rulings were well within the trial court's discretion.

For example, Farah repeatedly posed questions to Hertz's witnesses that would have required them to admit that there was a "plan" to treat "Somali Muslims" differently or to "get" them.[15] Farah asked:

> All right. Well, it's true, is it not, that during the March 2011 time frame you were basically working with Mr. Hoehne and Mr. Harris to

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[14] In this assignment of error, Farah refers to an appendix of objections, which he submitted to the trial court with his motion for a new trial. Br. of Appellant at 3. Farah cannot incorporate another 55 pages of argument into his brief. Holland v. City of Tacoma, 90 Wn. App. 533, 538, 954 P.2d 290 (1998), as amended (May 22, 1998) ("[T]rial court briefs cannot be incorporated into appellate briefs by reference."). We review only the alleged errors Farah mentions in his brief.

[15] See, e.g., RP (Nov. 12, 2014) at 192-93; RP (Nov. 13, 2014) at 37, 49; RP (Dec. 4, 2014) at 55-56; RP (Dec. 8, 2014) at 28-29.

> come up with a plan in order to both put the Somalis in a position where they would be written up for insubordination or put them in a position where they would basically use too much time and get written up anyway?[16]

The court properly sustained objections to this and similar questions on the grounds that they were argumentative or mischaracterized the evidence.

The trial court also sustained Hertz's objections to Farah's attempts to have witnesses point out, in the gallery, which plaintiffs had been insubordinate. Farah argues that this was a necessary part of cross-examination because it "would show that these managers were not close to [the] [p]laintiffs, did not know them as well as they claimed, and . . . would challenge each manager's credibility."[17] While the trial court allowed Farah to ask Hertz's managers for names of individuals, it sustained Hertz's objections to Farah's attempts to have them identify the individuals in the courtroom. These were not genuine attempts to elicit evidence. Forbidding them was well within the court's discretion under ER 611(a).

Farah also argues that the court improperly sustained objections on cross-examination as "asked and answered" when the subject was covered on direct examination, but he had not questioned the witness about it. In the example cited by Farah, *he* covered the subject during direct examination, when he called that Hertz employee as an adverse witness.[18] Hertz argued to the trial court that it had not raised the subject on *its* direct examination and objected to Farah revisiting the subject during his cross-examination. The court sustained the objection.

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[16] RP (Dec. 8, 2014) at 29-30.
[17] Br. of Appellants at 43-44.
[18] C.f. Farah's direct examination of Mohamed Babou with Farah's cross-examination of Babou. RP (Nov. 17, 2014) at 142-43; RP (Dec. 3, 2014) at 123-25.

Requiring Farah to move on was within the trial court's discretion under ER 611(a)(2). The court also properly sustained "asked and answered" objections when Farah asked a witness the same question twice.

A thorough review of all the challenged rulings reveals that few were erroneous. Additionally, in nearly every instance, Farah was able to rephrase the question and receive an answer. Or he was able to read the deposition testimony in question into the record. Therefore, these erroneously sustained objections did not, individually, result in prejudice.

Nor did an accumulation of errors result in prejudice. There were 14 days of testimony in this case, with hundreds of objections by both sides, some sustained and some overruled. Any scattered errors did not meaningfully impact Farah's ability to cross-examine Hertz's witnesses.

Farah's reliance on Baxter v. Jones is misplaced. 34 Wn. App. at 3-4. There, the trial court cut short the plaintiff's cross-examination of the defendant based on time constraints. Baxter, 34 Wn. App. at 2-3. Division Three of the Court of Appeals recognized that "the court is given considerable latitude in limiting the scope of cross[-]examination" but, nevertheless, held that it was error to terminate "cross[-]examination based on a predetermined time to complete trial." Baxter, 34 Wn. App. at 4-5. Here, the erroneously sustained objections do not approach a total denial of the opportunity to cross-examine crucial witnesses.

Waived Assignments of Error

We do not consider Farah's third and sixth assigned errors, that the court erred by admitting hearsay testimony about a union manager's declarations, and

that the trial court erred in denying his motion for a new trial. Farah failed to argue the merits of either in his opening brief. Under Cowiche Canyon Conservancy v. Bosley, he has waived those assignments of error. 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Farah included argument on these issues in his reply brief. This was "too late to warrant consideration." Cowiche, 118 Wn.2d at 809.

Attorney Fees

Finally, Farah requests attorney fees. He is not entitled to fees because he is not the prevailing party.

We affirm the judgment for Hertz Transporting, Inc., Matt Hoehne, and Todd Harris, and the trial court's denial of Farah's motion for a new trial.

Trickey, J

WE CONCUR:

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

HASSAN FARAH, an individual, ILEYS OMAR, an individual, MARIAN MUMIN, an individual, DAHIR JAMA, an individual, FOUZIA M. MOHAMUD, an individual, MARIAN ALI, an individual, ABDIZIZ ABDULLE, an individual, SAALIM ABUBKAR, an individual, MOHAMED ISMAIL, an individual, SUDI HASHI, an individual, HALI ABDULLE, an individual, MURAYAD ABDULLAHI, an individual, ZAINAB AWEIS, an individual, FARDOWSA ADEN, an individual, MARYAN MUSE, an individual, ASLI MOHAMED, an individual, SAHRA GELLE (a/k/a Hani Huseen), an individual, ASHA FARAH, an individual, ALI ADAM ABDI, an individual, MUNA MOHAMED, an individual, FARAH GEEDI, an individual, AHMED HASSAN HUSSEIN, an individual, IBRAHIM SALAH, an individual, AHMED A. HIRSI, an individual, and MOHAMUD A. HASSAN, an individual, Appellants, v. HERTZ TRANSPORTING, INC., MATT HOEHNE, and TODD HARRIS, Respondents.	No. 73268-4-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants have filed a motion for reconsideration. The court has taken the matter under consideration and has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 4th day of November, 2016.

FOR THE COURT:

ACJ