

No. 24565-9-III  
Consolidated with No. 245659-III

DIVISION III, COURT OF APPEALS OF THE STATE OF  
WASHINGTON

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SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES, CLYDE  
KILLEN, PEDRO NICACIO, SHANE O'LEARY, RAYMOND  
RICHARDSON, JAMES STULL, RANDALL WALLI, DAVID  
FAUBION, AND CHARLES CABLE

Plaintiffs/Respondents/Cross Appellants

v.

FLUOR FEDERAL SERVICES, INC.,  
a Washington corporation,

Defendant/Appellant/Cross Respondent

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ON APPEAL FROM BENTON COUNTY SUPERIOR COURT  
(Hon. Carrie L. Runge)

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RESPONSE TO APPELLANT'S OPENING BRIEF AND  
CROSS APPEAL OPENING BRIEF

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## ASSIGNMENT OF ERROR

The trial court erred in failing to award costs to the plaintiffs below after the plaintiffs prevailed at trial. (CP 9605-07)

### COUNTER-STATEMENT OF ISSUES

1. Whether the finding by a trial court in a CR 60 ruling that the defendant admitted to the existence of the clarity and jeopardy elements of a wrongful discharge claim in a trial management report should be affirmed when the court does not abuse its discretion?
2. Whether the finding by a trial court in a CR 60 ruling that at the time of trial, a defendant was on notice that it could have challenged the jeopardy element as a question of fact in a wrongful discharge case, but chose not to, should be affirmed when the court does not abuse its discretion?
3. Whether the finding by a trial court in a CR 60 ruling that owing to defendant's admission of the clarity and jeopardy elements of a wrongful discharge claim that the plaintiffs were for the most part unable to present evidence addressing those issues should be affirmed when the court does not abuse its discretion?
4. In a wrongful discharge case, whether findings by a trial court in a CR 60 ruling that the defendant's failure to challenge the jeopardy element at trial would prejudice the plaintiffs' ability to obtain proper review of the issue after trial or on appeal because little or no evidence was presented at trial on the clarity or jeopardy elements, in part, owing to successful motions in limine filed by the defendant to exclude such evidence, should be affirmed when the court does not abuse its discretion?
5. Whether in a wrongful discharge case, once a defendant admits the jeopardy element at trial, should a defendant be barred from raising the jeopardy issue on appeal pursuant to RAP 2.5?
6. Whether imminent harm remains a viable means of proving the jeopardy element in a wrongful discharge case under Ellis v. City of Seattle, 142 Wash.2d 450, 461, 13 P.3d 1065 (2001) since Korslund v. Dycorp Tri-Cities Services, Inc., 156 Wash.2d 168, 125 P.3d 119 (2005) does not overrule Ellis?
7. Whether the jeopardy element in a wrongful discharge case may remain a question of fact since Korslund v. Dycorp Tri-Cities

Services, Inc., 156 Wash.2d 168, 125 P.3d 119 (2005) does not transform jeopardy solely into an issue of law?

8. Whether plaintiffs who bring actions for wrongful discharge may rely on the constitutions, statutes and regulations of their choice to satisfy the clarity element since the right to choose was not abrogated by Korslund v. Dycorp Tri-Cities Services, Inc., 156 Wash.2d 168, 125 P.3d 119 (2005)?
9. Whether evidentiary rulings should be affirmed when there is no abuse of discretion?
10. Whether front pay awards should be affirmed when the jury was properly instructed and the awards are within the range of the facts admitted at trial?
11. Whether the Court's holding in Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wash.2d 130, 26 P.3d 910 (2001), permits an award of costs to prevailing plaintiffs in wrongful discharge cases?
12. Whether attorney fees and costs should be awarded on appeal to the prevailing plaintiffs in a wrongful discharge case?

## I. INTRODUCTION

This case was filed in 1999 by eleven wrongfully discharged pipe fitters (“the pipe fitters”) against Fluor Federal Services, Inc.<sup>1</sup> (“Fluor”). The pipe fitters were wrongfully discharged by Fluor for either blowing the whistle on unsafe practices at the Hanford Nuclear Site or for supporting those who did.<sup>2</sup>

Working as a pipe fitter at Hanford provided a level of stability unique to the pipe fitter craft in that Hanford pipe fitters could work continuously for decades without layoffs or the need to travel. In contrast, other pipe fitter employment around the country is temporary and sporadic

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<sup>1</sup> The company changed its name from Fluor Daniel Northwest to Fluor Federal Services during the course of the litigation.

<sup>2</sup> Fluor concedes that the record contains substantial evidence to support the wrongful discharge verdicts. Fluor Opening Brief at 12.

so a typical pipe fitter has to travel from one job to another and is often away from home and subjected to periods of unemployment. RP 408-410. Working as a pipe fitter at Hanford was considered an excellent job and was actively pursued by the respondents and other pipe fitters. RP 949-951, 1027-1029, 1437-1439.

On May 27, 1997, a Fluor work crew made up of some of the pipe fitters was ordered by management to install valves for the purpose of conducting hydro tests that were rated by the valve manufacturer at a pressure level below the level at which the test was going to be performed. Trial Exhibit 21. The crew refused to install the valves owing to their concerns that the underrated valves, which were rated at 1975 pounds per square inch (“psi”), would not withstand the 2235 psi test ordered by management. The crew was concerned that if the valves were to fail during the test, nearby workers could be injured or killed. Trial Exhibit 21. The crew was additionally concerned that an accidental release of water could cause nuclear contamination of the area since the surrounding ground was known to be contaminated. Trial Exhibit 21. After discussions with management over several days, the tests were finally performed using properly rated valves. Trial Exhibit 21. The crew was laid off in June 1997. Trial Exhibit 21. Some of the crew sought a remedy through the administrative process provided by the U.S. Department of Labor under 42 U.S.C. §5851, the employee protection provisions of the Energy Reorganization Act, alleging that Fluor had

retaliated against the crew for engaging in protected whistleblowing activity. Fluor appealed the OSHA decision, which favored the crew, and requested a de novo hearing before an administrative law judge. In 1998, the case settled just before the scheduled hearing, and pursuant to the terms of the settlement, the complaining pipe fitters were reinstated with Fluor. Trial Exhibit 2. This group was referred to in the trial court pleadings as Pipe fitter I.<sup>3</sup>

A second group of pipe fitters were vocal supporters of Pipe fitter I. The second group was wrongfully discharged by Fluor in June 1998. They also filed administrative claims, and in the trial court pleadings, they are referred to as Pipe fitter II.<sup>4</sup>

Upon their reinstatement, the Pipe fitter I group experienced hostility from their foremen who signed a petition opposing the reinstatement of Pipe fitter I. Trial Exhibit 6. At trial, it was determined that every foreman who signed the petition retained their employment with Fluor through the trial date even though other pipe fitters were subjected to various rounds of layoffs. Exhibit 6, RP . Respondents Randy Walli, Clyde Killen, Pete Nicacio, Shane O’Leary, and James Stull, who had been reinstated pursuant to the settlement agreement in Pipe fitter I, were

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<sup>3</sup> This group included Respondents Randy Walli, Clyde Killen, Pete Nicacio, Shane O’Leary, and James Stull. Danny Phillips and Terry Holbrook also participated in the administrative process, but were not plaintiffs in the lawsuit. Trial Exhibit 2, 21. The Pipe fitter I claims were not a part of the wrongful discharge claims litigated here, but the activities involving the crew’s refusal to install an underrated valve in 1997 was the cause of the later wrongful discharges in 1998. CP 10277 (2005 Trial Management Report—Fluor’s Description of Disputed Issues).

<sup>4</sup> This group included Respondents Brundridge, Hodgin, Jaymes and Richardson.

all wrongfully discharged again in the fall of 1998. They again filed administrative claims owing to the second layoff, and in the pleadings below, this group is referred to as Pipe fitter III.

The Pipe fitter II and Pipe fitter III groups left the administrative forum and filed their wrongful discharge claims in state court, because they found several aspects of the administrative forum to be inadequate. CP 9693, 10033-10175. One of several examples is that the parties could not issue subpoenas to third parties, which meant that certain critical witnesses could not be compelled to testify in the administrative forum. CP 10079-1090, 10043.

Once filed in Benton County Superior Court, the case was subjected to removal, remand, and multiple pre-trial delays and appeals including one appeal filed by the plaintiffs after Pre-Assigned Judge, the Honorable Carolyn Brown, ruled in 2003 that virtually all of the evidence pertaining to Pipe fitter I would be excluded from trial. RP (May 2, 2003) 37-39, CP 4619-4621. At the hearing on defendant's motion in limine, one of plaintiffs' counsel argued:

If they [the pipefitters] are not allowed to discuss the valve, then they're just a bunch of silly men and women coming to court on a theory that makes no sense. **What possible public policy could be remedied if they can't explain this?**

....

We're going to have to present the evidence explaining why the pipefitters initially believed that this was going on, something dangerous to them and perhaps to others.

....

If they can't say that, if they can't explain their reasons, and the justification—because of course, if they're being

silly, if they're being irrational in objecting, then they don't have a claim under the law.

RP (May 2, 2003) 37-39, CP 4619-4620 (emphasis added). Judge Brown excluded the evidence of Pipe fitter I. She stated, "I'm going to grant the motion in limine. It's going to be like opening a can of worms and starting with the atomic bomb all over again." RP (May 2, 2003) 37-39, CP 4621. Judge Brown's focus was on "ramrodding the trial" and on "how long the trial is gonna take." RP (May 2, 2003) 37-39, CP 4619.

The Court of Appeals initially granted review of this issue, but after oral argument, reconsidered and remanded the case back to trial in 2004. Brundridge v. Fluor Hanford, Inc., 121 Wash.App. 1024 (2004). Judge Brown retired later that year, and the case was finally reassigned to the Honorable Carrie L. Runge.

After the case was remanded to the trial court and Judge Runge was assigned, the parties engaged in extensive litigation over the meaning and scope of Judge Brown's ruling excluding Pipe fitter I evidence. In April 2004, Fluor sought to strike all of the plaintiffs' exhibits and witnesses that pertained to the underrated valves or to the Pipe fitter I time frame. CP 3623-3529, 3520-3537. In June 2005, Fluor significantly amended a portion of the section of the Trial Management Report pertaining to undisputed issues from the version it had submitted in 2001. The 2001 version of the Trial Management Report contained only one admission:

### **Defendant's Description of Undisputed Issues**

1. Were the pipe fitters discharged from their employment? Yes. They were laid off. They did not quit.

CP 6895. In contrast, the June 2005 version of the Trial Management Report contained the following admissions:

### **Defendant's Description of Undisputed Issues**

1. Were the pipe fitters discharged from their employment? Yes. They were laid off. They did not quit.
2. **Is the raising of a safety concern the type of behavior that is protected by a clearly defined public policy? Yes. Fluor will not dispute this issue.**
3. **Would discouraging the pipe fitters from raising safety concerns jeopardize that public policy? Yes. Fluor will not dispute this issue.**
4. Is providing deposition testimony the type of behavior that is protected by a clearly defined public policy? Yes. Fluor will not dispute this issue.
5. Would discouraging plaintiff Cable from providing deposition testimony jeopardize that public policy? Yes. Fluor will not dispute this issue. (Emphasis added).

CP 10276-10277 (emphasis and underline added). Later in June 2005, Fluor submitted an amended version of the Trial Management Report and conditionally withdrew defense evidence pertaining to the Pipe fitter I time frame. CP 2253, 2251-2252. Judge Runge accepted that the plaintiffs needed to be able to give some context to the present claims by referring to the Pipe fitter I time frame, and ultimately, after the parties were unable to agree on a statement of fact covering that time frame, ruled that virtually all of the Pipe fitter I evidence would be excluded except for Trial Exhibit 21, which was an extensively redacted letter from OSHA to the parties summarizing the Pipe fitter I facts and omitting the investigator's conclusions and opinions. RP 40:22-44:12.

The case was finally brought to trial in July 2005, and in September, verdicts were rendered in favor of all eleven pipe fitters for wrongful discharge in violation of public policy and damages were awarded for back pay, front pay, and emotional harm totaling \$4,880,400.00.

Post-trial, Fluor filed a timely CR 59 motion seeking to cut off front pay or obtain a new trial. CP 11694-11708, 9605. After publication of Korslund v. Dycorp Tri-Cities Services, Inc., 156 Wash.2d 168, 125 P.3d 119 (2005) (“Korslund II”), Fluor filed a CR 60 motion arguing that Korslund II was on point and dispositive. CP 11204-11215.<sup>5</sup> Also, post-trial, the pipe fitters filed a petition for attorney fees, costs, and a fee multiplier (owing to the high risk nature of the case). CP 11191-11201. Judge Runge heard the post-trial motions in May 2006. She denied Fluor’s motions and granted the pipe fitters’ attorney fees, costs, and a multiplier totaling \$1,451,516.20. CP 9605. Judge Runge denied the pipe fitter’s request for costs pursuant to Hume v. American Disposal Co., 124 Wash.2d 656, 665-6; 880 P.2d 988 (1994) (court declined to extend costs awards to wrongful discharge claims at that time).

In its order denying defendant’s CR 60 motion, the trial court entered specific findings that Fluor could have but did not raise the jeopardy issue below and that:

[Fluor's] failure to challenge the jeopardy element at trial would prejudice the plaintiffs' ability to obtain proper

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<sup>5</sup> The Court of Appeals decision in that case, Korslund v. Dycorp Tri-Cities Services, Inc., 121 Wash.App. 295; 88 P.3d 966 (2004), is referred to in this brief as Korslund I.

review of the issue after trial or on appeal because little or no evidence was presented at trial on the clarity or jeopardy elements, in part, owing to successful motions in limine filed by defendant to exclude such evidence.

CP 9584. Fluor timely appealed all of the trial court's decisions. CP 0024-0059 and CP 9577-9607.

As will be discussed in detail below, Fluor's arguments on appeal are flawed. First, Fluor waived its right to raise the jeopardy element on appeal because it specifically waived the jeopardy element below as a strategy for excluding evidence at trial. RAP 2.5. In the trial management report, Fluor specifically waived any challenge to the adequacies of the clarity and jeopardy elements. Fluor did not indicate that it was waiving only some portion of the jeopardy element as it has claimed in its appellate brief. In motions in limine, Fluor successfully excluded much of the evidence of the pipe fitters' whistleblower activities and evidence related to the environmental import of the plaintiff's whistleblower activities. Those exclusions included most of the evidence supporting the clarity and jeopardy elements, which now prejudices the pipe fitters' ability to address the jeopardy element post-trial.<sup>6</sup>

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<sup>6</sup> After waiving the jeopardy element in the 2005 pretrial statement, Fluor did not raise the jeopardy issue in its trial brief except briefly in a footnote (“[a]rguments set forth in footnotes are ambiguous and need not be considered.” State v. N.E., 70 Wash.App. 602, 607 n.3; 854 P.2d 672 (1993)). Nor did Fluor raise the issue in its written motion for a directed verdict, except for vague statements about “protected activity” regarding some of the eleven pipe fitters who had supported the main whistleblowers. To the extent Fluor did vaguely address the “protected activity” issue, they were attempting to have it both ways—admit the jeopardy element pre-trial then argue plaintiffs' failure to prove the element after plaintiffs rested. But Fluor's attempt in its brief to give the impression that the Korslund issues they raise now were raised then does not withstand scrutiny. In Fluor's oral argument on the motion for a directed verdict, Korslund was only referred to briefly by the defense counsel as an aside pertaining to plaintiff's written response to the motion—to the same extent as in the disregarded footnote. RP 2672-3. CP 10359-10360.

Pretrial, Fluor never argued or raised the issue of whether some portion of the jeopardy element needed to be proved at summary judgment or at trial. Fluor may not benefit from that waiver nor should the pipe fitters be prejudiced by the waiver; thus, Fluor cannot raise such a defense for the first time on appeal. RAP 2.5. And as will be discussed below, jeopardy is not simply a question of law—but is usually a question of fact unless the facts are undisputed as they were in Korslund II, which is a summary judgment case in which no evidence supporting or opposing the jeopardy element was presented as part of the summary judgment motion or in opposition.

Second, Korslund II does not overrule Ellis v. City of Seattle, 142 Wash.2d 450, 461, 13 P.3d 1065 (2001), which permits a plaintiff to satisfy the jeopardy element by showing imminent harm and the plaintiff's objectively reasonable belief the law may be violated in the absence of his or her action. Here, the potential harm was imminent when the pipe fitters refused to install the underrated valves because they reasonably believed the valves could explode in the pressure test and puncture a tank filled with high-level toxins potentially causing catastrophic environmental harm and possible loss of life—thereby violating state law. To the extent the record is not fully developed in that regard, the lack of such evidence is directly attributable to Fluor's waiver of the clarity and jeopardy elements and its successful efforts to exclude related evidence as irrelevant to the remaining elements of wrongful discharge to be proved.

Third, the Korslund II decision is predicated on the Korslund plaintiffs having identified at summary judgment and on appeal the Energy Reorganization Act (ERA)<sup>7</sup> as the only statute supporting the policy underlying their wrongful discharge claims. In contrast, here, in pre-trial pleadings, the pipe fitters explicitly identified and relied on many state statutes to support their claims. CP 10276. Neither the state nor federal statutes adequately protect the clearly articulated Washington State environmental policies, which are broader in scope than the federal policies and focused on Washington State interests. Such inadequacies support both the clarity and jeopardy elements of their wrongful discharge claims.

Fourth, the Korslund II Court affirmed a summary judgment dismissal finding on the record before it, which contained no evidence of the adequacy or inadequacy of the ERA forum, that as a matter of law the Korslund plaintiffs failed to satisfy the jeopardy element of wrongful discharge because the ERA provides an adequate remedy.<sup>8</sup> The pipe fitters presented evidence in the CR 60 motion demonstrating that they left the ERA administrative forum because the ERA forum is inadequate to protect the policies involved.<sup>9</sup> This was never raised as an issue at trial because the jeopardy element was admitted.

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<sup>7</sup> 42 U.S.C. § 5851(a)(1)(A).

<sup>8</sup> 156 Wash.2d at 181-3.

<sup>9</sup> In contrast, Korslund II contains no facts as to the adequacy of the ERA forum because the parties presented no evidence on that issue. 156 Wash.2d at 192 (Chambers' Dissent).

Fifth, the evidence and testimony admitted by the trial court was properly admitted and not an abuse of discretion. The redacted OSHA letter, Trial Exhibit 21, was entered as a compromise balancing the plaintiffs' need for the information to give context to the claims against the defendants' desire to streamline the quantity of evidence presented to the jury. The testimony of Laurie Marquart was admissible to show bias. ER 607. It was also admissible under ER 404(b). Admission of "other wrongs" evidence proceeds as routinely as any other pre-trial ruling—based simply on offers of proof. State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002). The DOE hotline evidence admitted through the testimony of Ivan Sampson was admissible to show that manager Foucault was biased against whistleblowers and willing to break the rules to reveal the identity of whistleblowers. The trial court's decision to exclude the last-minute hotline evidence offered by the defendant was proper because the evidence was not previously disclosed in discovery, was not authentic and was not linked to Sampson's testimony. In the alternative, the admission of the evidence and testimony was harmless error.

Sixth, the front pay awards to the plaintiffs were proper since "courts will presume for the purposes of awarding relief that an illegally discharged employee would have continued working for the employer until he or she reaches normal retirement age, unless the employer provides evidence to the contrary." Xieng v. People's National Bank, 120 Wash.2d 512, 531, 844 P.2d 389 (1993). Fluor failed to provide evidence

to the contrary. Also, the amount of the front pay awards were within the jury's discretion, and no job taken by any of the pipe fitters was comparable to the long-term stability offered by Hanford employment .

Seventh, the trial court was unwilling to interpret case law since Hume to include the award of costs for prevailing plaintiffs in the wrongful discharge context. This Court should not be so cautious and should remand the case with instructions either to consider the entry of such an award, or in the alternative, the Court should simply award the amount requested by respondents below since the facts are not in dispute.

Eighth, the Court should award attorney fees and costs for this appeal pursuant to RCW 49.48.030.

## **II. STATEMENT OF THE CASE**

### **A. The Parties**

The respondents in this case are eleven pipe fitters who were wrongfully discharged by Fluor after raising safety concerns pertaining to the installation of an underrated valve, or for speaking out in support of those who did, or engaging in other whistleblowing, testifying at a deposition, or being listed as a witness in related administrative proceedings.

### **B. The Pipe fitters Were Wrongfully Discharged by Fluor in 1998<sup>10</sup>**

In 1997, Clyde Killen, Shane O'Leary, James Stull, and Randy Walli (Pipe fitter I) were terminated by Fluor Federal Services within

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<sup>10</sup> Fluor concedes that the record contains substantial evidence to support the wrongful discharge verdicts. Fluor Opening Brief at 12.

weeks after refusing to install underrated valves in a pipe system that was designed to transfer high-level waste at the Hanford site. Trial Exhibit 21. Prior to being terminated, the crew raised concerns about what might happen if the valve broke, forcing water into the highly contaminated valve pit and causing a major environmental hazard. Trial Exhibit 21.<sup>11</sup> The valves in question were next to the pit wall for high-level nuclear waste tanks SY-101 and SY-102. CP 9781-9782.<sup>12</sup> Tank SY-101 has been a particularly troublesome tank at Hanford. CP 9816 (Blush Testimony at 1) and CP 10427-10431. Most of this evidence never reached the jury owing to Fluor's successful motion in limine to exclude evidence of Pipe fitter I. CP 10215-10270; RP 41-47.

Steve Blush, a nuclear industry expert who was excluded from testifying owing to the trial court's in limine ruling, held the opinion that the pipe fitters' concerns about the valves were legitimate and that the pipe fitters had an obligation to raise them. CP 9820.

The Pipe fitter I plaintiffs filed a complaint with the U.S. Department of Labor under 42 U.S.C. §5851, under the employee

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<sup>11</sup> Many facts excluded by the trial court's ruling on the Pipe fitter I evidence are contained in the record of trial and in the pipe fitters' response to Fluor's motion for summary judgment. CP 9700-9778. CP 9781-9782.

<sup>12</sup> Also excluded from trial: there are 177 underground storage tanks at Hanford, including 149 leak-prone, single-shelled tanks. These tanks hold 53 million gallons of highly radioactive chemically-hazardous waste, representing more than 60 percent of the nation's radioactive and chemical waste. Many of these tanks have already leaked a total of approximately one million gallons of highly toxic contaminants into the ground. This radioactive and chemical contamination is moving through groundwater toward the Columbia River. As long as the radioactive waste remains in the tanks, there is a risk of continued leaking, or possibly an explosion or a tank dome collapse. This type of event could release radioactive and chemically-hazardous materials into the water, land and air, creating significant risk to the environment, agriculture, human health and the region's economy. CP 9905-9907.

protection provisions of the ERA. After an investigation determined that they had in fact been retaliated against, the company appealed and a hearing was set. CP 9714. The case settled in February 1998, and the settlement provided for reinstatement. Trial Exhibit 2.

In 1998, David Foucault, the Fluor manager in charge, held a meeting of the foremen and crew announcing the settlement. At the meeting Foucault falsely stated that the terms of a “federal mandate” contained in the settlement agreement required that seven currently employed pipe fitters be laid off to make room for the returning seven. RP 934-940, 3297-3318. At trial, Foucault denied that such a statement was made at the meeting. RP 645-647. At the meeting, General Foreman Jerry Nichols asked how long until the reinstated pipefitters could be laid off again, and was told my management, about six months. RP 2572-3. Nichols denied having made such a comment. RP 610-613.

Owing to the amount of time it takes to train and qualify a pipe fitter at Hanford, it was cost efficient to “carry” pipe fitters on the payroll between jobs for up to 90 days, longer for pipe fitter welders. RP 1550-1561, 1566-1568. Yet, Jim Holiday, Foucault’s direct report, insisted on laying off seven for seven in March 1998, even though the policy had been to carry workers between jobs, and in this case, work was found that would not have required the layoff all seven. RP 461-480. When supervisor Ivan Sampson overheard Holiday ordering Nichols to layoff seven for seven, despite the existence of other work, Holiday threatened to

“cut [Sampson’s] balls off if he told anyone..” RP 468-509. Manager Curt Larsen had previously investigated the layoff procedure of craft at Fluor and found that Holiday violated standard practices. RP 1335-1345.

After Nichols met with the foremen, they were so angered by the idea that their brother pipe fitters would return to the work and displace other pipe fitters that they signed a petition opposing the return of Pipe fitter I. Trial Exhibit 6, RP 1308-1319. The persons they selected for layoff were the vocal supporters of Pipe fitter I. Trial Exhibit 6.

Foucault denied any knowledge of retaliation by any employee or manager against another Fluor employee. RP 644-646. But Former Supervisor John Stredwick testified that after he had testified truthfully at a deposition in Pipe fitter I, his work levels decreased and he was laid off by Foucault’s chain of command. RP 2541-2579. Foucault denied any knowledge of Stredwick’s complaint. RP 2279-2285. Ivan Sampson testified that his work flow diminished as well after he testified about the “rip his balls off” threat made by Foucault’s direct report. RP 468-540. Holiday denied the exchange. RP 2972-2974. Mr. Sampson also recounted a time when he observed Fluor managers, including Foucault, attempting to identify the voice of an anonymous caller to the DOE hotline. RP 468-540. Laurie Marquardt also testified that when she tried to correct safety problems she was rebuffed by Foucault’s chain of command and told to be silent if she wanted to pursue and career. She left in disgust. RP 1934-2059.

In March 1998, plaintiffs Brundridge, Hodgin, Jaymes and Richardson (Pipe fitter II) were wrongfully discharged by Fluor. Trial Exhibits 70, 72, 73, 77. In April 1998, plaintiff David Faubion was wrongfully discharged by Fluor after carpooling with Plaintiff Randy Walli (Pipe fitter I). RP 1239-40, Trial Exhibits 26 and 27.

In October and November 1998, Clyde Killen, Shane O'Leary, James Stull, and Randy Walli ("Pipe fitter III") were wrongfully discharged only six months after being reinstated. Trial Exhibits 72, 75, 76, 78, CP 10016-10019.

In May 2000, Plaintiff Chuck Cable was wrongfully discharged by Fluor approximately one month after giving damaging testimony at a deposition called by the pipe fitters. Trial Exhibit 37, 71.

Evidence elicited at trial demonstrated that in addition to having actively and vocally supported the Pipe fitter I plaintiffs, the Pipe fitter II plaintiffs engaged in the following whistleblowing, which they alleged also led to their termination:

Brundridge:	Refused to work on W-058 owing to safety concerns. RP 1427-1429.
Hodgin:	Reported unsafe subcontractor work using C-clamp in Summer 1997. RP 1484-1487.
Richardson	Reported Pipe fitter I layoff to DOE Hotline RP 1579-1580. (Fluor admitted this conduct "arguably qualifies for protection." CP 2768)
Jaymes:	Listed as witness on Pipe fitter I witness list CP 10013-10014. (Fluor admitted this conduct "arguably qualifies for protection." CP 2768)

The pipe fitters, except Pete Nicacio, all suffered both emotional harm and lost income. RP 1123-1286, 1292-1308, 1424-1550, 1571-1655, 1662-1708, 1745-1800, 1831-1910, 2068-2430.

**C. Prior To Trial, Fluor Admitted To The Clarity And Jeopardy Elements Of Wrongful Discharge Leaving Causation As The Only Trial Issue**

In the 2005 Trial Management Report, Fluor stated the following:

1. Were the pipe fitters discharged from their employment? Yes. They were laid off. They did not quit.
2. Is the raising of a safety concern the type of behavior that is protected by a clearly defined public policy? Yes. Fluor will not dispute this issue.
3. Would discouraging the pipe fitters from raising safety concerns jeopardize that public policy? Yes. Fluor will not dispute this issue.
4. Is providing deposition testimony the type of behavior that is protected by a clearly defined public policy? Yes. Fluor will not dispute this issue.
5. Would discouraging plaintiff Cable from providing deposition testimony jeopardize that public policy? Yes. Fluor will not dispute this issue.

CP 10276-10277 (emphasis added).<sup>13</sup> As noted, Fluor specifically stated it would not dispute the existence of a clear public policy and that discouraging the pipe fitters from raising their safety concerns would jeopardize that public policy. Accordingly, those issues were not

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<sup>13</sup> A wrongful discharge in violation of public policy claim requires a plaintiff to prove 1) the existence of a clear public policy (clarity element); (2) that discouraging the conduct in which [he or she] engaged would jeopardize the public policy (jeopardy element); (3) that the public-policy-linked conduct caused the dismissal (causation element); (4) [Flour] must not be able to offer an overriding justification for the dismissal' (absence of justification element)." Korslund v. Dycorp Tri-Cities Services, Inc., 156 Wash.2d 168, 178, 125 P.3d 119 (2005) (citation omitted).

addressed at trial. At the conclusion of the pipe fitters' cases, Fluor moved to dismiss the pipe fitters Faubion, Brundridge, Hodgin, Jaymes, Cable and Richardson on the ground that they failed to show their activities were "protected" but did not specifically address clarity or jeopardy. CP 10366-10384.

**D. Fluor Successfully Excluded Most Evidence From Pipe Fitter I Including Expert Steve Blush's Report Arguing It Was Irrelevant**

Fluor filed two successful motions to exclude evidence and witnesses. A motion in limine was filed excluding Expert Steven Blush on the seriousness of the Pipe fitters' safety concerns and numerous proposed exhibits based on the argument that the Pipe fitter I facts were not relevant. CP 10177-10213, see also CP 10190, n.10. The Honorable Carolyn Brown granted Fluor's motion in that respect. CP 10215-10269. Fluor also moved to strike other related evidence and that motion was granted in part. CP 10315-10343 and CP 10215-10269. Much of the evidence and witnesses excluded by the Court pertained to the Pipe fitter I claim and the environmental and safety risks of Fluor's acts. CP 10517-11150.

**E. Conflicts Between The State And Federal Government Over DOE's Operations At Hanford Demonstrate That Washington State's Broad Policies To Protect The Environment Have Not Been Adequately Secured There**

Also not presented at trial, owing to Fluor's acquiescence on the clarity and jeopardy elements, was evidence of Washington State's active

role in enforcing state policies at Hanford. Washington State has concurrent jurisdiction over the Hanford reservation for issues pertaining to hazardous waste; the federal government explicitly recognizes this in the Tri-Party Agreement. CP 9822-9903. Moreover, the Department of Energy (DOE) entered a memorandum of understanding with Washington State outlining which agency will be the lead agency in a given situation. CP 9963-9974.

Washington has a strong interest in protecting its environment, and on June 13, 2000, the same year the pipe fitters were terminated for whistleblowing, the Department of Ecology issued a Notice of Penalty to the DOE stating:

Hanford's tank wastes are stored some 7 to 12 miles from the Columbia River. The Columbia is tremendously significant to the State of Washington, its people, and the people of the Northwest as a whole. Approximately 1.5 million people live in Washington and Oregon counties along the river from Hanford to the river's mouth. The Columbia is a major economic, natural resource, transportation, and recreational factor throughout the region. The river provides drinking water to the cities of Richland, Kennewick and Pasco. It provides hydroelectric power via four major dams below Hanford (McNary, John Day, the Dalles, and Bonneville). It passes numerous population centers and is inextricably tied to Northwest fisheries and the major agricultural role of the region.

Washington State is deeply concerned that wastes now migrating from Hanford's failing tanks will reach the Columbia. DOE's plans to address this risk by retrieval and treatment of its tank wastes have suffered repeated delays and are expected to take more than 20 additional years to complete. Additional delay in the cleanup of these wastes will risk further damage to the environment and endangerment of the public health.

CP 9981-9982. “Ecology is responsible for assuring that facilities managing hazardous wastes within the state are operated in compliance with federal and state hazardous waste law.” CP 9935-9961 and 9984.

Washington’s Hazardous Waste Management Act (HWMA) RCW 70.105 and other state laws apply to Hanford. CP 9931-9933. They all contain strong policy statements in favor of protecting the environment. For example, such policies set out in the HWMA include:

The legislature hereby finds and declares:

- (1) The health and welfare of the people of the state depend on clean and pure environmental resources unaffected by hazardous waste contamination. At the same time, the quality of life of the people of the state is in part based upon a large variety of goods produced by the economy of the state. The complex industrial processes that produce these goods also generate waste byproducts, some of which are hazardous to the public health and the environment if improperly managed.
- (2) Safe and responsible management of hazardous waste is necessary to prevent adverse effects on the environment and to protect public health and safety.
- (3) The availability of safe, effective, economical, and environmentally sound facilities for the management of hazardous waste is essential to protect public health and the environment and to preserve the economic strength of the state.
- (4) Strong and effective enforcement of federal and state hazardous waste laws and regulations is essential to protect the public health and the environment and to meet the public's concerns regarding the acceptance of needed new hazardous waste management facilities.

RCW 70.105.005 (italics and bold added).

The history of interactions between Washington State and DOE regarding operations at Hanford indicates that the DOE has repeatedly failed to meet its obligations to protect the public and the environment. CP 9909-9929, 9963-10009 and 10433-10489.

None of the Washington statutes contain remedies for Washington State citizen whistleblowers. See penalty provisions of selected statutes at CP 11151-11174.

**F. The Pipe fitters Left The ERA Administrative Forum Because It Was Inadequate To Protect The Policies Implicated By Their Actions**

Nine of the eleven the pipe fitters originally filed claims under the ERA. CP 10011-10019. Pipe fitters Faubion and Cable did not. Pipe fitter III received a favorable determination but Pipe Fitter II received an adverse determination from the investigator. CP 10021-10022. The OSHA investigators working on the Pipe fitter cases were nonlawyers without subpoena power. CP 9693.

The pipe fitters left the ERA forum because of difficulties with discovery in that they could not subpoena third party witnesses, they could not obtain sanctions for Fluor's discovery abuses (Fluor attorneys walked out of some depositions), they did not have the right to a jury, and the appeal process was often long and arbitrary in that appeals went to the Secretary, not to an appellate court. In the opinion of counsel, these deficiencies could have prevented a successful outcome. CP 9693, 10033-10175.

### III. ARGUMENT

#### A Fluor Should Be Barred From Raising The Jeopardy Issue On Appeal Pursuant To RAP 2.5

##### 1. RAP 2.5 Supports Barring Review of the Jeopardy Issue

RAP 2.5 (a) provides:

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. . . .

Although the Rule leaves room for discretion, it appears such situations would be extremely limited and that usually the appellate courts will not consider an issue raised for the first time on appeal. See State v. Scott, 110 Wash.2d 682, 685, 757 P.2d 492 (1988); Herberg v. Swartz, 89 Wash.2d 916, 925, 578 P.2d 17 (1978). Here, Fluor specifically waived the jeopardy element in the Trial Management Report and did not raise the jeopardy issue at trial. In the trial court's findings denying the defendant's CR 60 motion, the Judge Runge found waiver by Fluor and prejudice to the pipe fitters, and her findings and conclusions are reasonable and supported by the record. Under RAP 2.5, the Court should reject this aspect of Fluor's appeal.

##### 2. The Trial Court Finding of Waiver Should Be Affirmed

Defendant's CR 60 motion was filed under CR 60(b). Appellate courts traditionally apply an abuse of discretion standard of review when

examining a trial court's disposition of a CR 60(b) motion. State v. Santos, 104 Wash.2d 142, 145, 702 P.2d 1179 (1985); Vance v. Offices of Thurston County Comm'rs, 117 Wash.App. 660, 671, 71 P.3d 680 (2003), review denied, 151 Wash.2d 1013 (2004). A court abuses its discretion only when its exercise of discretion is manifestly unreasonable or based on untenable grounds. Vance, 117 Wash.App. at 671.

In its brief, Fluor attempts to ignore the trial court's findings of fact and conclusions of law entered as the direct result of Fluor's voluntary submission of its CR 60 motion. Those findings should guide this Court in affirming the trial court's finding that Fluor failed to raise the jeopardy issue below. Opening Brief at 32-33.

The trial court specifically found and concluded as follows:

4. In the trial management report, defendant admitted to the existence of the first two elements of the claim namely the clarity and jeopardy elements.
5. The defendant now seeks to challenge whether plaintiffs met their burden of proving the jeopardy element after having waived it in the trial management report by arguing in the CR 60 motion that the defendant was "unable to argue the point" that "other means of promoting the public policy are were adequate until the Supreme Court decided Korslund II because the decision created new law and that the defendant was bound by the conflicting law of Korslund I. Defendant's reply at 3, n.2. I reject defendant's argument.
6. Defendant offers no case on point to support its claims that this Court should consider this legal issue under CR 60 as "new law." Defendant fails to distinguish cases cited by the plaintiffs' for the proposition that CR 60 "is not intended to be used as a means for the court to review or revise its own final judgments, or to correct any errors of law into which it may have fallen." In re Marriage of Alder, \_\_ Wn.App. \_\_, 129 P.3d 293, 297 (2006). Errors of

law “must be raised on appeal.” In re Marriage of Thurston, 92 Wn.App. 494, 500, 963 P.2d 947 (1998) (errors of law may not be corrected by CR 60). But even if defendant could produce legal authority to support its proposition that a trial court may consider “new law” under CR 60, a review of the case law in existence at the time of this trial shows that Korslund II contains no significant new law.

7. This case was brought to trial in July 2005. At that time, adequate case law existed to provide defendant notice of its potential defenses. First, in Korslund I, which was a summary judgment dismissal, the Court of Appeals held that “[w]hether a plaintiff has satisfied the jeopardy element is a question of fact. Korslund I at 320. Thus, Defendant Fluor was on notice that it too could have challenged the jeopardy element as a question of fact under Korslund I, but it chose instead to waive that element. Second, Hubbard v. Spokane County, 146 Wash.2d 699, 717, 50 P.3d 602 (2002) put the defendant on notice that a defendant could challenge the jeopardy element as a matter of law when no other facts are presented. In Hubbard, the Court examined the statute in question and analyzed, again at summary judgment, whether other means already existed that adequately protected the public policy in question.” Hubbard at 716-717. Instead of pursuing that argument at trial after the submission of relevant facts, the defendant here chose to admit the jeopardy element for the purposes of this trial.
8. Korslund II is a new decision but is not significantly new law as defendant contends. It simply applied the 2002 Hubbard holding to a fact pattern that is similar to, but not identical to, the fact pattern in this case. The Korslund II Court cited directly to Hubbard at 716-717 for the proposition that the ERA, under the facts presented at summary judgment, was adequate as a matter of law to protect the policies cited by the plaintiff. Korslund II at 182. As noted by the dissent, there were no facts in the record regarding the adequacy of the ERA other than the statutory provisions. Korslund II at 192-193.
9. Korslund II does not mandate that trial courts in the future only consider the jeopardy element as a question of law. The Court specifically held that “the question whether adequate alternative means for promoting the public policy

exist may [not shall] present a question of law....” Id. at 182.

10. Owing to defendant’s admission of elements one and two of wrongful discharge, plaintiff was for the most part unable to present evidence addressing those issues.
11. The defendant’s failure to challenge the jeopardy element at trial now would prejudice the plaintiffs’ ability to obtain proper review of the issue after trial or on appeal because little or no evidence was presented at trial on the clarity or jeopardy elements, in part, owing to successful motions in limine filed by the defendant to exclude such evidence.
12. In summary, the defendant could have chosen to challenge the clarity and jeopardy elements of wrongful discharge at trial, but instead, chose to admit those elements. Defendant will not now be permitted to challenge those elements post-trial in a CR 60 motion.

CP 9581-9584.

In reviewing the adequacy of findings of fact and conclusions of law, this Court “must first determine whether the findings are supported by substantial evidence in the record. If so, [the Court] must next decide whether those findings support the conclusions of law.” Willener v. Sweeting, 107 Wash.2d 388, 393; 730 P.2d 45 (1980); Landmark Development, Inc. v. City of Roy, 138 Wash.2d 561, 573; 980 P.2d 1234 (1999).

**a. There Is Substantial Evidence To Support The Finding That Fluor Admitted To The Existence Of The First Two Elements Of The Wrongful Discharge Claim Namely The Clarity And Jeopardy Elements**

Each of the eleven pipe fitters was wrongfully discharged in an unbroken chain of events that began with the crew’s 1997 refusal to install the underrated valves. In the 2005 Trial Management Report, Fluor

unconditionally stated it would not contest the clarity or jeopardy elements. Now, Fluor wants to break the jeopardy element into subparts and argue that it meant to only admit to part one of what it says is a two-part jeopardy test. Opening Brief at 29. However, if that were Fluor's intent, it should have stated its position in the report, but it did not.

If Fluor's argument on appeal were valid, one would expect that throughout the pre-trial proceedings, Fluor would have clarified that it was not waiving the "entire" jeopardy element. Yet after the 2005 Trial Management Report was filed, which indicates the opposite proposition, during oral argument in June and July 2005, Fluor's counsel either stood silent when plaintiffs' counsel repeatedly asserted that Fluor had waived two of the wrongful discharge elements so the trial issues could be narrowed, or Fluor's counsel agreed.

On June 28, 2005, during pretrial discussions, Mr. Sheridan discussed the narrowing of the evidence required to prove the wrongful discharge claims in light of Fluor's admissions and made reference to the Trial Management Report as follows:

**Well, the defendants have admitted to some of the some of the elements of the claim of wrongful discharge -- I think in an effort to take away some of our arguments as to what the jury needs to hear. But they have not admitted to causation.** And because they have not admitted to causation, we still have a lot to prove that requires that we talk about Pipe Fitter I. It doesn't require Steve Blush anymore, but it does require that we talk about Pipe Fitter I.

So if you'll turn the page to the summary of the claim of wrongful discharge [CP 10273], we have to show that there

is a clear public policy. That the conduct that they engaged in, meaning refusing to install the valve, is what caused their damage. And, of course, our position is that the intent that was formed in 1997 was then the same intent that caused their discharge in 1998. So it's our position that that intent remained the same.

And then the third element is that discouraging the conduct would jeopardize the public policy [CP 10274]. **If you'll turn over to the trial management report, this is the defense's description of undisputed issues [CP 10276].** They admit that they were discharged from their employment -- oh, yeah, and is raising the safety concern the type of behavior that is protected by clearly defined public policy. **So they admit here that there is a public policy and that that type of behavior, meaning not installing the valve, would have implicated it.**

**And then they admit that, number three, would discourage them from raising safety concerns jeopardizing the policy. Keep in mind the elements we're now discussing is also the summary judgment elements and also the elements that the Court would look at for its verdict in a motion for new trial filed by the defendants.** It's not what the jury is going to hear. The jury is just going to get an instruction saying was a substantial factor -- was retaliation a substantial factor in the decision to dismiss -- to dismiss these guys on the various dates? But the Court still, we still need to have all this in the record and the Court still needs to look at it.

RP (June 28, 2005) 35:22-37:6.

At that hearing, Mr. Sheridan explained that owing to Fluor's admissions in the Trial Management Report that the clarity and jeopardy elements would not be disputed, the body of evidence needed to prove the plaintiffs' claims, including the testimony of Expert Steve Blush, would be reduced. Thus, the only question left for the jury was whether retaliation

was a substantial factor in the decision to terminate the plaintiffs.<sup>14</sup> Mr. Squires, the attorney for Fluor, verified Mr. Sheridan's understanding:

**The trial management provisions that the plaintiffs seem to be so enamored of saying that the issue that remains to be tried is whether or not they raised a safety settlement issue, which was a given, was a substantial factor in their discharge. That's the issue.** That is the issue. Not what the details of the safety issue was. The details of the safety issue have no relevance whatsoever to the issue of whether these people were discharged because their reinstatement was a substantial factor in their lay off decision. It isn't relevant.

RP (June 28, 2005) 45:24-46:8 (emphasis and underline added). Mr. Squires' statement is an admission that substantial factor was the only question of fact left for the jury. This is consistent with Fluor's statement in the 2005 Trial Management Report waiving the "entire" clarity and jeopardy elements.

In another hearing held on July 12 2005, on the issue of whether Fluor should be granted a trial continuance and whether Fluor would need to provide witness testimony concerning the under-rated valves owing to the Court's June rulings, Mr. Sheridan stated on behalf of the plaintiffs that, "They have admitted through [sic.] all of the elements of wrongful discharge except causation. . . . But none of this has to get in front of the jury because it's no longer an issue. The only issue is causation." RP 17:25-18:21. When Mr. Squires spoke on behalf of Fluor in response, he did not contradict or otherwise disagree with Mr. Sheridan's assertion. RP (July 12, 2005) 25:6-30:13. This omission by silence is additional

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<sup>14</sup> Fluor's proposed jury instructions adopted the substantial factor test and omitted any reference to the clarity or jeopardy elements. CP 0684.

evidence that Fluor intended to waive the jeopardy element pre-trial leaving causation as the only issue for the jury. ER 801(d)(2); see State v. Israel, 113 Wn.App. 243, 54 P.3d 1218 (2002); State v. Cotton, 75 Wn.App. 669, 879 P.2d 971 (1994).

The fact that the defendant admitted the clarity and jeopardy elements in the 2005 Trial Management Report and did not raise those issues at trial, then gained an advantage at trial by successfully excluding, as irrelevant, evidence of the circumstances surrounding the original 1997 underrated valve incident, evidence of Washington State's strong interest in and concurrent jurisdiction at Hanford, and evidence of the potential environmental devastation and serious safety risks of Fluor's conduct, and the inadequacy of other forums, supports the conclusion that this Court should decline review of the jeopardy issue. See e.g., Day v. Liberty National Life Ins. Co., 122 F.3d 1012, 1016 n.5 (5<sup>th</sup> Cir. 1997) (defendant can waive a potentially viable defense by ensuring that the issue is clearly preserved in the pretrial order).

It would be unfair to permit Fluor to remove legal issues from the case prior to trial, have plaintiffs and the court rely on Fluor's decision, have evidence excluded or omitted that pertained to those abandoned issues, then after losing at trial, seek redress based on those same abandoned issues. Such a result would not be equitable and should not be permitted.

Fluor’s tactical waiver of the clarity and jeopardy elements directly prejudiced the pipe fitters’ ability to present evidence supporting the jeopardy element by showing imminent harm or that other means of promoting the public policy are inadequate.

**b. The record supports the trial court’s conclusion that Fluor’s failure to challenge the jeopardy element at trial would prejudice the plaintiffs’ ability to obtain proper review of the issue after trial or on appeal**

**1. The pipe fitters were prejudiced in presenting evidence of imminent harm under Ellis.**

Ellis v. City of Seattle, 142 Wash.2d 450, 13 P.3d 1065 (2001)

permits a plaintiff to meet the jeopardy requirement of a wrongful discharge claim as follows:

In the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong of the Gardner test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action. This comports with our holding in Gardner emphasizing the need for swift action to protect human life.

Id. at 461. Korslund II does not overrule Ellis. In examining whether Ellis was overruled by Korslund II, as argued by Fluor, it is important to understand what evidence was presented in Korslund II and the limits of the courts’ rulings. In Korslund v. Dycorp Tri-Cities Services, Inc., 121 Wash.App. 295, 88 P.3d 966 (2004) (“Korslund I”), this Court analyzed the evidence in the summary judgment record supporting “imminent harm” but did not reach the issue. Id. at 320. Unsurprisingly, the Korslund II court did not even address imminent harm in that case, much less overrule Ellis as Fluor claims.

Here, imminent harm was not at issue at trial because Fluor waived the jeopardy element. Fluor should not be permitted to raise it now. There is substantial evidence for the trial court's finding of prejudice because significant evidence, including the Blush report and his opinion that the pipe fitters acted reasonably and responsibly when faced with the genuine risk of serious environmental hazards and serious danger to the workers nearby, which was excluded pursuant to Fluor's motions in limine.

However, even if the issue is considered by the Court, the pipe fitters must prevail because the pipe fitters reasonably believed the installation of the underrated valves would cause serious harm to the environment and the workers nearby. To the extent that plaintiffs' evidence in the trial record is sparse in this regard, it is directly attributable to defendant's having waived the clarity and jeopardy elements in their pretrial pleadings and excluded evidence of the Pipe fitter I valve incident. As such, under Ellis, plaintiffs independently met the jeopardy prong of wrongful discharge.

In its brief, Fluor argues that the pipe fitters experienced no imminent harm because they were laid off long after the valve dispute. Opening Brief at 37-38. This is a misinterpretation of Ellis. In identifying the public policy in jeopardy, what matters is that the safety complaint, at the time it was made, raised an issue of imminent harm and is related to

the termination. Fluor mistakenly argues that the termination must occur under “imminent circumstances.” Opening Brief at 38.

Regarding the issue of imminent harm, the facts here are more compelling than in Ellis. Mr. Ellis was terminated several days after he refused to alter, without written authorization, the fire alarm system at the Key Arena after it had improperly engaged during a Sonics game. Ellis, 142 Wash.2d at 455-456. The Supreme Court held, “In the context of concerns regarding public safety where imminent harm is present, we hold the jeopardy prong of the Gardner test may be established if an employee has an objectively reasonable belief the law may be violated in the absence of his or her action.” Id. at 461. There was no fire at the time, but Mr. Ellis had a reasonable belief that altering the alarm could result in danger if there were a fire. The Court noted Mr. Ellis’ “motivation was protection of the public” and that “disabling the fire alarm system so it did not work as it was designed to work would raise safety concerns in the mind of any conscientious individual.” Id. The pipe fitters were also motivated by serious safety concerns that included possible explosion and nuclear contamination. The facts here are even more compelling than in Ellis. Since Fluor management’s intent to retaliate began with the 1997 crew incident and continued through the multiple wrongful discharges in 1998, the imminent harm analysis remains the same. But much of that evidence was excluded from trial because Fluor admitted to the clarity and jeopardy elements.

As stated by the trial court, Fluor could have raised this issue below but chose not to. The trial court's conclusion is supported by the record. Under RAP 2.5, Fluor should not be able to raise it now.

**2. The pipe fitters were prejudiced in presenting evidence that other means for promoting the policy are inadequate**

Fluor never once raised the "other means are inadequate" argument below until after Korslund II was decided.<sup>15</sup> "Other means are inadequate" has been a part of the jeopardy element in Washington since 1996. In Gardner, the court stated:

To establish jeopardy, plaintiffs must show they engaged in particular conduct, and the conduct directly relates to the public policy, or was necessary for the effective enforcement of the public policy. Perritt § 3.14 at 75-76. **This burden requires a plaintiff to "argue that other means for promoting the policy ... are inadequate."** Perritt §3.14 at 77. Additionally, the plaintiff must show how the threat of dismissal will discourage others from engaging in the desirable conduct.

Gardner v. Loomis Armor, Inc., 128 Wash.2d 931, 945; 913 P.2d 377 (1996), citing, 1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice §§ 1.13-1.63 (3d ed. 1992 & Supp.1995) (emphasis added).

Because Fluor admitted to the jeopardy element of wrongful discharge, no evidence was brought before the court addressing the inadequacy of other means of promoting the public policy. The jeopardy element is usually a

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<sup>15</sup> According to Fluor, the argument was first raised briefly by Fluor's trial counsel during oral argument on Fluor's motion for a directed verdict after the plaintiffs rested, which further shows the prejudice to the plaintiffs since, even if the argument was clearly articulated, which it was not, it was too late to address from an evidentiary perspective. Opening Brief at 30.

question of fact, and had Fluor not waived the issue, the pipe fitters would have presented evidence that “discouraging the conduct in which they engaged [in refusing to install the underrated valve] would jeopardize the public policy.” Korslund, 156 Wash.2d at 178.

Fluor argues that “at the time the Trial Management Report was submitted and the trial took place, Korslund I precluded any argument by [Fluor] on the basis of the second portion of the jeopardy element.” Opening Brief at 29. At the time, Fluor knew that the jeopardy element was a question of fact. Hubbard v. Spokane County, 146 Wash.2d 699, 716-718, 50 P.3d 602 (2002); Korslund I at 320. Fluor did not have to admit to the jeopardy element, but did so because it considered the admission to be in its best interest; otherwise, it would not have done so. Korslund I notwithstanding, Fluor’s tactical decision denied the pipe fitters the opportunity to submit evidence to show that other means of promoting the policy are inadequate in that the state policies do not provide a means other than the civil forum and the ERA forum is inadequate as a matter of fact. After the trial, evidence demonstrating the inadequacy of the ERA forum was submitted in response to Fluor’s CR 60 motion (CP 9693-11693), but the evidence was never submitted to the jury owing to Fluor’s waiver of the jeopardy issue.

Fluor’s argument, that it abandoned the jeopardy element because of the Korslund I decision, would have more force if Fluor had advanced the jeopardy element as an argument prior to Korslund I and abandoned it

thereafter. In 2000, Fluor filed a motion for summary judgment and sought dismissal of the plaintiffs' claims, but failed to argue that the jeopardy element was unproven. CP 9124. Long before Korslund I was decided in 2004, at summary judgment, Fluor limited its argument to the clarity and causation elements. CP 9178-9147. Perhaps this was because Fluor realized that under state laws, no issue could be raised on alternate forums.

Seemingly in an effort to hedge its bets, Fluor also argues that the ERA is an adequate remedy and cites a 2003 investigative manual in support. Opening Brief at 7-9. Unfortunately for Fluor, the manual was not offered into evidence at the trial court or as a part of the CR 60 motion, it is not part of the clerks papers, and is not relevant to this appeal since, even if it were properly before the Court, the 2003 manual pertains to a time frame some five years after the plaintiffs were wrongfully discharged. There is no way to know what its 1998 predecessor manual, if any, looked like. In any event, the references to the manual are hearsay and the Court should not consider the manual or its content.

This Court should abide by the trial court's findings and conclusions and hold that Fluor waived its right to raise the jeopardy issue on appeal. RAP 2.5.

**B. Korslund II Does Not Mandate That Courts Consider The Jeopardy Element As A Pure Question Of Law**

Korslund II applied the 2002 Hubbard holding to a fact pattern that is similar to, but not identical to, the fact pattern in this case. The

Korslund II Court cited directly to Hubbard at 716-717 for the proposition that the ERA, under the facts presented at summary judgment, was adequate as a matter of law to protect the policies cited by the plaintiff. Korslund II at 182. As noted in the dissent, there were no facts in the record regarding the adequacy of the ERA other than the statutory provisions. Korslund II at 192-193. Korslund II does not mandate that trial courts in the future only consider the jeopardy element as a question of law. The Court specifically held that “the question whether adequate alternative means for promoting the public policy exist may [not shall] present a question of law.” Id. at 182. To convert the jeopardy element to a pure issue of law in the face the universal understanding of jeopardy as a question of fact, would require an extension (if not wholesale overturning) of wrongful discharge law which demonstrates that Fluor’s argument is flawed and should be rejected. See 1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice § 3.14 (3d ed. 1992 & Supp.1995).

**C. This Case Is Factually Distinguishable From Korslund II Because The Pipe Fitters Did Not Rely Solely On The ERA**

The Korslund II decision is predicated on the Korslund plaintiffs having identified at summary judgment and on appeal the Energy Reorganization Act (ERA)<sup>16</sup> as the only statute supporting the policy underlying their wrongful discharge claims. In contrast, here, in pre-trial pleadings, the pipe fitters explicitly identified and relied on many state statutes to support their claims. CP 10276. Neither the state nor federal

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<sup>16</sup> 42 U.S.C. § 5851(a)(1)(A).

statutes adequately protect the clearly articulated Washington State environmental policies, which focus on Washington State interests, and which are broader in scope than the ERA. Fluor seeks to extend the Korslund II holding to mean that a court can pick and choose any policy that may support a finding that a particular forum is adequate for the purposes of the jeopardy prong. Nowhere in the opinion does the Korslund II court provide guidance as to when a court may pick and choose which policy will be relied on for analyzing the jeopardy element. Under Ellis, it appears that the plaintiffs are the ones who choose the policy for evaluation, and that choice can be made as late as on appeal. Ellis at 460 (statute is not evidence; it is law and may be relied upon at any time). For appellate purposes, the pipe fitters will focus on the state laws cited in the trial court. Fluor's argument should be rejected.

**D. Korslund II Is Factually Distinguishable Since The Pipe Fitters Left The ERA Forum Because It Was Inadequate**

As discussed in detail above, the Supreme Court specifically held that “the question whether adequate alternative means for promoting the public policy exist may [not shall] present a question of law.” Korslund II at 182.

This case is quite different from Korslund II. Here, the pipe fitters had no reason to present evidence showing that the ERA forum was inadequate so that a jury could decide that question of fact because Fluor waived the issue. In Korslund II, at the summary judgment stage, no evidence was offered on the inadequacy of other forums, although such

evidence could conceivably have been offered by a party because the employer there had not waived the jeopardy issue.

**E. The Evidence And Testimony Admitted By The Trial Court Was Properly Admitted And Not An Abuse Of Discretion.**

Fluor fruitlessly argues for an altered standard of review for evidentiary issues. Opening Brief at 21. The standard of review is abuse of discretion. State v. Stenson, 132 Wash.2d 668, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998); State v. DeVincentis, 150 Wash.2d 11, 74 P.3d 119 (2003).

The Court did not abuse its discretion in admitting the testimony of Laurie Marquardt. ER 404(b) permits evidence of other crimes, wrongs, or acts to show “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b). The admissibility of such evidence lies within “the sound discretion of the court.” State v. Laureano, 101 Wash.2d 745, 682 P.2d 889 (1984). The two-part test is whether the evidence is relevant and necessary to prove an essential element of the crime, and whether its probative value must be shown to outweigh its potential for prejudice. State v. Robtoy, 98 Wash.2d 30, 42-3, 653 P.2d 284 (1982). Plaintiffs must show the connection to the defendant by a preponderance of the evidence. State v. Norlin, 134 Wash.2d 570, 577-9, 951 P.2d 1131 (1998). Here, the parties are exactly the same. Cf. Lords v. Northern Automotive Corp., 75 Wash.App. 589, 881 P.2d 256 (1994)(evidence of an employer's other discriminatory acts is admissible in appropriate circumstances, but

different parties and facts not sufficiently similar), overturned on other grounds, Mackay v. Acorn Custom Cabinetry, Inc., 127 Wash.2d 302, 306, 898 P.2d 284, 286 (1995). Such evidence has been admitted in other employment discrimination cases and was properly admitted here because it is relevant to whether retaliation was a substantial factor in the decision to layoff the plaintiffs. Hume v. American Disposal Co., 124 Wash.2d 656, 666, 880 P.2d 988 (1994)(trial court correctly found that the testimony of the former employees regarding their experiences with the defendants was relevant to the issue of the defendants' intent, plan, and pattern regarding the alleged harassment).

Admission of “other wrongs” evidence proceeds as routinely as any other pre-trial ruling—based simply on offers of proof. State v. Kilgore, 147 Wash.2d 288, 53 P.3d 974 (2002). In Kilgore, the Supreme Court considered the process required for admission of other wrongs evidence. Kilgore was charged with “four counts of child molestation and three counts of rape of a child.” Id. at 289. The prosecutor sought to admit evidence that “Kilgore's step-niece would testify about five or six other incidents in which she was molested by Kilgore [which were not charged].” Id. at 290. In an oral offer of proof, the prosecutor gave a brief description of the facts that would be revealed in the testimony. Id. at 290-1. Kilgore made no counter-offer of proof. Id. Based on the offer of proof alone, the trial court, “after considering the offer of proof and balancing the probative value of the evidence contained in the offer

against its prejudicial effect, concluded that the evidence was admissible to show ‘motive, opportunity, [and] lustful disposition.’” Id. at 291. The appellant complained that an evidentiary hearing was necessary for the admission of such evidence. The Supreme Court disagreed.

The Court reaffirmed the standard for admission of ER 404(b) evidence:

the trial court must (1) find by a preponderance of the evidence that the uncharged acts probably occurred before admitting the evidence; (2) identify the purpose for which the evidence will be admitted; (3) find the evidence materially relevant to that purpose; and (4) balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder.

Id. at 292. But the court went on to reject the argument that an evidentiary hearing is required. The Court reasoned:

Requiring an evidentiary hearing in any case where the defendant contests a prior bad act would serve no useful purpose and would undoubtedly cause unnecessary delay in the trial process. In our view, these hearings would most likely degenerate into a court-supervised discovery process for defendants. As the Court of Appeals observed, the defendant will always have the right to confront the witnesses who testify against him at trial.

Id. at 294-5.

Plaintiffs’ counsel provided the appropriate offer of proof, which in the context of the case, demonstrates that Ms. Marquardt’s testimony showed the bias of Manager David Foucault against persons who “stood up for safety” and gave another example of how he retaliated against those persons. RP 1916-1919. Her testimony also showed intent, knowledge, and absence of mistake. ER 607, ER 404(b). Foucault had denied that he

retaliated in this case and that he would allow retaliation. Ms. Marquardt's testimony showed his bias against her after she stood up for safety and showed how Foucault and other Fluor managers dealt with her on safety issues during the same time period Foucault and his subordinates were retaliating against the Pipe fitters. This testimony was relevant and admissible.

The OSHA letter, Trial Exhibit 21, was properly admitted. The October 6, 1997 OSHA letter provides a concise, unbiased presentation of the facts of Pipe fitter I. By presenting the facts portion of the letter to the jury in lieu of allowing the pipe fitters to present that evidence through testimony ensured that both fairness and minimal judicial resources were expended in order to appraise the factfinder as to the most relevant facts of Pipe fitter I.

The admission of the OSHA letter is governed by RCW 5.44.040 which provides:

Copies of all records and documents on record or on file in the offices of the various departments of the United States . . . shall be admitted in evidence in the courts of this state.

Washington's Supreme Court stated that in order to be admissible under RCW 5.44.040, a public document must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion. The subject matter must relate to facts which are of a public nature, it must be retained for the benefit of the public and there must be express statutory authority to compile the report. State v.

Monson, 113 Wash.2d 833, 839, 784 P.2d 485 (1989), quoting Steel v. Johnson, 9 Wash.2d 347, 358, 115 P.2d 145 (1941).

Following an investigation into the issues surrounding Pipe fitter I, OSHA issued a determination letter on October 6, 1997. The letter contained both facts and conclusions. The facts concerned matters of a public nature. Trial Exhibit 21. The letter was retained for the benefit of the public and there is express statutory authority for its compilation. CP 2210-2223, Trial Exhibit 21. Trial Exhibit 21 was redacted to omit opinions.

In 1994, the Division I Court of Appeals affirmed a trial court's admission of a redacted Social Security decision finding the plaintiff was totally disabled. Goodman v. Boeing, 75 Wash.App. 60, 80-81, 877 P.2d 703 (1994), aff'd, 127 Wash.2d 401 (1995). The employer argued that the decision should not have been admitted because it did not contain solely facts. Id. at 80. The Goodman Court pointed out that other courts have allowed conclusions so long as they are "factually based and trustworthy under the Federal Rules of Evidence (FRE) 803." Id. Accordingly, the trial court carefully reviewed the decision and found it trustworthy under 803. Id. at 80-81. Moreover, the trial court suggested redactions and allowed Boeing to redact other statements. Id. at 81. Thus, the Goodman Court found no error with the trial court's decision to allow the decision into evidence.

Here, Trial Exhibit 21 omitted all opinions, and in that form, it

may have been reversible error to exclude the exhibit. Bierlein v. Byrne, 103 Wash.App. 865, 868, 14 P.3d 823 (2000). The Bierlein's court's reasoning hinged on the following:

The EEOC letters here are such 'conclusions involving the exercise of judgment or discretion or the expression of opinion.' They merely recite the director's conclusory opinion that probable cause existed to conclude that Title VII violations had occurred. They contain no factual findings or references to specific evidence or documents the EEOC considered in reaching its conclusions.

Id. at 870 (internal citation omitted); see also Cantu v. City of Seattle, 51 Wash.App. 95, 98-99, 752 P.2d 390 (1988). Obviously, the bare recitation of facts in the OSHA letter here bears no resemblance to the mere recitation of conclusory opinion in the EEOC letters. Thus, a redacted version of a certified copy of the OSHA letter was properly admitted according to RCW 5.44.040. In any event, Fluor did not object to the letter in the Trial Management Report on authenticity grounds—only on hearsay and relevance grounds. CP 10288.

As stated by the Washington State Supreme Court:

[N]ot every public record is automatically admissible under [this] statute.... In order to be admissible, a report or document prepared by a public official must contain facts and not conclusions involving the exercise of judgment or discretion or the expression of opinion.

State v. Monson, 113 Wash.2d 833, 839 (1989) (quoting Steel v.

Johnson, 9 Wash.2d 347, 358 (1941) (emphasis added). All

statutory conditions were met and the letter was properly admitted under the plain language of the statute.

The hotline evidence was properly addressed by the trial court.

Foucault denied retaliation against the pipe fitters and other persons who

stood up for safety. Ivan Sampson's testimony rebutted Foucault's denials and showed his bias against those who stood for safety. Foucault's presence at the manager's meeting where they sought to identify an anonymous whistleblower, shows Foucault's bias and his intent to retaliate against whistleblowers. ER 607, ER 404(b). In any event, even if Fluor were correct, the admission of all of this evidence would be harmless error given the body of evidence showing causation.

**F. The Front Pay Awards Were Proper**

In analyzing a front pay award from a jury, "courts will presume for the purposes of awarding relief that an illegally discharged employee would have continued working for the employer until he or she reaches normal retirement age, unless the employer provides evidence to the contrary." Xieng v. People's National Bank, 120 Wash.2d 512, 531, 844 P.2d 389 (1993). In any challenges to back or front pay, it is the employer's burden to prove that plaintiff should not receive the damage award. Xieng at 531-532.

Defendant claims that plaintiffs obtained "comparable employment and thus their front pay should be cut off. This argument is not supported by Washington law. In Xieng, the Court looked at a similar argument by an employer who claimed that the job plaintiff had was subsequently eliminated, and viewed defendant's claims as a mitigation argument.

Because this argument represents another attempt by the Bank to reduce its damages, it is analogous to a mitigation of damages issue, and we agree with the federal courts that the employer should bear the burden to demonstrate that

the plaintiff would not have been shifted to another position after the elimination of the position for which the plaintiff applied.

Id. at 532. The Court noted that generally, such claims by employers fail such as when there is a “general reduction in the workforce” and even when the company is sold off so long as the position remains with the subsequent employer. Id. at 531. In those situations, the front pay awards were affirmed. Id. The plaintiffs showed lost wages over time and compared their wages against other pipe fitters who had “cooperated” with the company and retained their jobs through the years. The jury was properly instructed and since defendant must admit the truth of the pipe fitters’ evidence and any inference drawn therefrom, and when the evidence is viewed in a light most favorable to the pipe fitters, and when the Court applies the standard asking whether there is no evidence or inference derived therefrom by which this verdict can be sustained, there can be only one result—the verdict must be affirmed.

Reasonable certainty in proving damages goes more to the fact of damages than to the amount of damages, and “mathematical exactness” is not required. ESCA Corp. v. KPMG Peat Marwick, 86 Wash.App. 628, 639 (1997), aff’d, 135 Wash.2d 820 (1998), citing Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wash.2d 712, 717-18 (1993), 845 P.2d 987, and Mason v. Mortgage America, 114 Wash.2d 842, 849-850, 792 P.2d 142 (1990). The jury’s awards were well within their discretion even though the awards were different from the amounts calculated by

plaintiffs' expert, and the trial court was well within its discretion in affirming those damages.

Plaintiff Don Hodgkin testified that but for his termination, he would have worked until he retired. R1492-93. He stated he liked working at Hanford, and at one point he stated, "my wife worked there and I like working there. Who knows how many years I would have worked there." R1497. Mr. Hodgkin also indicated his wife was forced out of her job, and that the pipe fitter case was a factor in her leaving. R1498-1500, 1502, 1536. Mr. Hodgkin also testified he would have kept working beyond age 65. RP 1501-02. Mr. Hodgkin also explained why he retired after becoming hired at the "gas burner." He said he left that job because it is a normal construction job and it is tough. RP 1535-36.

Plaintiff Chuck Cable testified that he would have continue working at least until the end of 2006. RP 1675. He retired in the end of 2003. RP 1675. He could have continued working as a pipe fitter foreman at Hanford despite problems with his shoulders that caused him to retire with a disability pension. RP 1674, 1694. If he had continued at Hanford as a foreman, he would have had other workers do the tough jobs. RP 1675, 1704. He was working as a foreman until two weeks before his layoff. RP 1710.

For Mr. Hodgkin and Mr. Cable, there is sufficient evidence to overcome defendant's arguments. The jury was properly instructed and since defendant must admit the truth of the pipe fitters' evidence and any

inference drawn therefrom, and when the evidence is viewed in a light most favorable to those pipe fitters, and when the Court applies the standard asking whether there is no evidence or inference derived therefrom by which this verdict can be sustained, there can be only one result—the verdict must be affirmed. The trial court properly denied Fluor’s post-trial CR 59 and CR 60 motions.

**G. The Court Erred in Denying the Pipe fitters’ Costs**

In the 1990s, it appeared that plaintiffs who prevailed in wrongful discharge cases could obtain attorney fees but not costs. See Hume v. American Disposal Co., 124 Wash.2d 656, 674-5, 880 P.2d 988 (1994). However, since then, our Supreme Court has decided Panorama Village Condominium Owners Ass'n Bd. of Directors v. Allstate Ins. Co., 144 Wash.2d 130, 26 P.3d 910 (2001), which permits a plaintiff to recover such costs in equity pursuant to Olympic S.S. Co. v. Centennial Ins. Co., 117 Wash.2d 37, 53, 811 P.2d 673 (1991). There, the Court permitted a plaintiff to recover expert and other costs associated with holding that “[f]ailure to reimburse expenses would often eat up whatever benefits the litigation might produce and additionally impose a backbreaking burden upon the small, but justified, litigants.” Panorama Village at 144.

The Court held:

When insureds are forced to file suit to obtain the benefit of their insurance contract, they are entitled to attorneys' fees. (quotation marks and citations omitted) The entitlement to necessary expenses as part of a reasonable attorney fee award also fulfills the rationale behind this equitable ground.

Panorama Village at 143. The same rationale applies here and requires that the Court use its equity powers to ensure justice. Otherwise, the costs could become so exorbitant that they make such public interest litigation impossible. Here, costs soared to in excess of \$150,000, which is almost half of any plaintiff's verdict. This defendant delayed the litigation through appeals and motions, and the costs reflect those delays. They should be compensated.

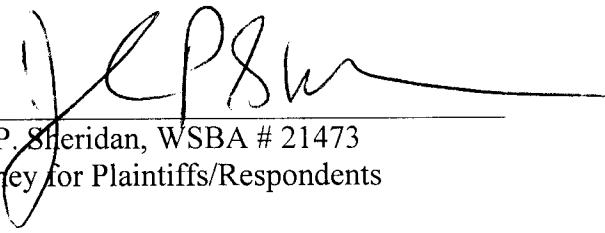
**H. Request For Attorney Fees**

Pursuant to RCW 49.48.030, the pipe fitters respectfully request that the Court order Fluor to pay attorneys' fees and costs on appeal since each of plaintiffs recovered damages for lost wages. Brundridge v. Fluor Federal Services Inc., 109 Wash.App. 347, 361, 35 P.3d 389 (2001); review denied, 146 Wash.2d 1022, 52 P.3d 520 (2002), cert. denied, 538 U.S. 906, 123 S.Ct. 1484, 155 L.Ed.2d 226 (2003).

DATE this 18th day of April, 2007.

THE SHERIDAN LAW FIRM, P.S.

By: \_\_\_\_\_

  
John P. Sheridan, WSBA # 21473  
Attorney for Plaintiffs/Respondents

**DECLARATION OF SERVICE**

Aileen Luppert states and declares as follows:

1. I am over the age of 18, I am competent to testify in this matter, and am the paralegal for plaintiffs' the attorney of record. I make this declaration based on my personal knowledge and belief.

2. On May 10, 2007, I caused to be delivered via legal messenger to the following attorneys:

Lawrence Locker  
Summit Law Group PLLC  
315 Fifth Ave. S., Suite 1000  
Seattle, WA 98104

Michael King  
Talmadge Law Group PLLC  
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Tukwila, WA 98188-4630

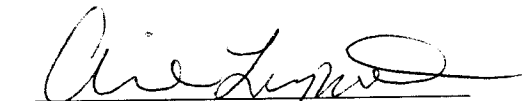
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Corr Cronin Michelson  
1001 4th Ave Ste 3900  
Seattle, WA 98154-1051

a copy of the RESPONSE TO APPELLANT'S OPENING BRIEF AND  
CROSS APPEAL OPENING BRIEF

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

DATED this 10th day of May, 2007, at Seattle, King County,  
Washington.

  
Aileen Luppert