IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

LYNN McCOY,	)	**No. 27466-7-III**
	)	
Appellant,	)	
	)	
v.	)	**Division Three**
	)	
EASTMONT SCHOOL DISTRICT NO. 206, a Washington municipal corporation,	)	
	)	
	)	**UNPUBLISHED OPINION**
Respondent.	)	

Sweeney, J. — A school district discharged a teacher. The teacher claimed that she was fired in violation of public policy because she had filed a number of grievances against the district. The jury disagreed with her and found for the school district after a trial that lasted almost three weeks. Here on appeal she challenges a number of the judge's rulings, including his refusal to recuse himself, his refusal to give a proffered instruction to the jury (on substantial factor), and his admission of certain evidence and his exclusion of other evidence. We review all of these challenges for abuse of discretion. That means that we will defer to the judge's rulings whether or not we would

have made the same ruling in the first instance, so long as the record provides tenable reasons for the ruling. We conclude there is no abuse of discretion here. And we further conclude that the teacher received a fair trial, if not a perfect trial. We, therefore, affirm the jury's verdict in favor of the school district.

FACTS

Lynn McCoy[1] was a teacher at Cascade Elementary School in the Eastmont School District (District) from 1991 until 2004. The District fired Ms. McCoy in 2004 after several complaints from students, their parents, and Ms. McCoy's fellow teachers.

Tim Lawless worked as the principal of Cascade Elementary School from 1996 until 2001. He began receiving an "extraordinary number" of complaints from parents about Ms. McCoy in his first or second year as principal. Most parents raised similar complaints, namely that their child, after being a student in Ms. McCoy's class, no longer liked school and started to fear or dread going to school. Mr. Lawless documented his concern about the parents' complaints in his year-end evaluation of Ms. McCoy. Ms. McCoy challenged the evaluation and filed a grievance with the District. The District directed Mr. Lawless to remove the critical comments from Ms. McCoy's evaluation and

[1] Ms. McCoy married after the commencement of this matter and changed her last name to "Yialelis." We will use McCoy, her last name at the time she filed the complaint at issue here, throughout this opinion for clarity.

instructed Mr. Lawless to record his comments in a letter addressed to Ms. McCoy and to place the letter in her file.

Marsha Reynolds replaced Mr. Lawless as the principal in 2001. Within the first few days of school in fall 2001, parents again complained to Ms. Reynolds about Ms. McCoy.

Assistant Superintendent Michael Brophy investigated the complaints of both parents and several staff members in 2001. Mr. Brophy later shared his general findings with Ms. McCoy and her union representative, but he did not share the names of people making the complaints. The union representative argued that the investigation was flawed because the District did not notify Ms. McCoy of the complaints or of the reason she was being investigated. Ms. McCoy and her union representative agreed not to pursue the matter further in exchange for the District's promise not to use the information to discipline Ms. McCoy or terminate her employment.

In March 2002, several students returned very upset to teacher Sandy Jeffris's fourth grade classroom after attending a reading arts class taught by Ms. McCoy. They reported that Ms. McCoy was angry at the class as a whole for being late and that she made several comments that hurt or otherwise upset them. Ms. Jeffris reported the incident to Ms. Reynolds and did not send the class to Ms. McCoy's one-hour reading

arts class for the rest of the year.

Ms. Reynolds investigated the matter and gave Ms. McCoy an unsatisfactory evaluation in June 2002. Ms. McCoy filed a grievance and appealed the evaluation to the superintendent, Joe Thaut. Mr. Thaut directed Ms. Reynolds to remove the critical statements from Ms. McCoy's evaluation and write them up instead in a memorandum.

In fall 2002, more parents complained to Ms. Jeffris and Ms. Reynolds about Ms. McCoy and requested that their children not attend Ms. McCoy's reading arts class.

In February 2003, a student complained that Ms. McCoy had grabbed her arm hard enough to leave red marks and bruises. Her parents reported the incident to local police. A detective concluded that Ms. McCoy had assaulted the student and cited her for fourth degree assault. Assistant Superintendent Brophy placed Ms. McCoy on administrative leave while he also investigated. At the conclusion of Mr. Brophy's investigation, the District reprimanded Ms. McCoy and she returned to work.

Meanwhile, parents asked to meet with the school board to discuss their concerns about Ms. McCoy. After a spring meeting, the school board asked the superintendent, Harry Vanikiotis, to investigate the parents' complaints. The District hired an independent investigator to investigate the complaints. And the District reinstated Ms. McCoy's administrative leave. Shortly thereafter, a different student complained that Ms.

McCoy had pulled her ponytail in the classroom. The police did not investigate that claim at the request of the student's parents. But the investigator interviewed people about the incident.

The investigator reported his findings to the District. Some colleagues spoke positively of Ms. McCoy. But the majority reported impatient, harsh, and demeaning behavior toward students. Assistant Superintendent Brophy reviewed the report and met with Ms. McCoy and her union representatives. Ms. McCoy first denied the accusations but later expanded on two of them with more detail. Assistant Superintendent Brophy recommended to Superintendent Vanikiotis that the District terminate Ms. McCoy.

Mr. Vanikiotis issued a notice of probable cause to discharge Ms. McCoy in March 2004. The notice meant that he identified a violation of the professional code of conduct, a statute, or school board policy that would eventually lead to either discipline or discharge. Ms. McCoy appealed the notice of probable cause and filed a grievance challenging the notice. She elected to resolve her appeal and grievance through arbitration. The arbitrator consolidated her grievance challenging the notice of probable cause with several of Ms. McCoy's other grievances. Ms. McCoy later withdrew from the arbitration. The District terminated her employment in September 2004 for mistreating students.

Ms. McCoy sued the District in April 2005 for damages. She claimed wrongful discharge in violation of public policy. She claimed that the District had terminated her in retaliation for grievances and other actions she had pursued under the collective

bargaining agreement. Ms. McCoy claimed that the District's stated reason for her termination was pretextual and that the District instead "solicited parents and law enforcement agents to pursue complaints against [Ms.] McCoy . . . in an effort to manufacture a basis for discharging [her]." Clerk's Papers (CP) at 2-3.

The case proceeded to trial. The trial judge told the parties in October 2005 that his wife was an employee of the District but he was confident that he could fairly hear the case. He invited the parties to tell him immediately of any concerns. No one objected until December of 2006 when Ms. McCoy asked the judge to recuse himself. The District objected that the affidavit was untimely. And the judge refused to recuse himself.

Before trial, Ms. McCoy moved to exclude as hearsay evidence related to Assistant Superintendent Brophy's 2001 investigation. The trial court denied the motion. Ms. McCoy moved to exclude the findings and conclusions from a post-termination investigation and hearing held by the Office of Superintendent of Public Instruction (OSPI) in 2007. It had resulted in a reprimand of Ms. McCoy. The trial court agreed to exclude the OSPI's findings, conclusions, and order, but ruled that it would allow limited inquiry into how the reprimand affects Ms. McCoy's teaching licenses and future employability. The District also moved to exclude certain testimony that Ms. McCoy planned to show that her colleagues disliked her and her discharge was pretextual. The

trial court excluded the testimony as hearsay.

A jury returned a verdict for the District.

DISCUSSION

All of the assignments of error here are to decisions of the trial judge that clearly fell within his discretionary authority. The perfect trial may not have been tried here. But the perfect trial has not been and never will be tried. The parties here are not entitled to a perfect trial. *Freeman v. Intalco Aluminum Corp.*, 15 Wn. App. 677, 686, 552 P.2d 214 (1976). The integrity of every jury verdict is important, not just those verdicts we approve of. *Kappelman v. Lutz*, 141 Wn. App. 580, 591, 170 P.3d 1189 (2007), *aff'd*, 167 Wn.2d 1, 217 P.3d 286 (2009). Our task is first to determine if there was error (an abuse of discretion). And, second, if there was error, we must determine whether that error so corrupted the process here that the trial must be repeated. *See Burks v. United States*, 437 U.S. 1, 15, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

Recusal

Ms. McCoy first contends that the trial judge should have entertained her argument that he recuse himself. Recusal for cause lies within the sound discretion of the trial judge, and we will not disturb that decision absent a clear showing of abuse of discretion. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 840, 14 P.3d

877 (2000). The judge must, of course, act and appear to act impartial. *State v. Madry*, 8 Wn. App. 61, 70, 504 P.2d 1156 (1972).

Here, the trial judge told the parties at the outset that his wife worked for the District. And he asked that the parties tell him immediately if they were concerned. Ms. McCoy expressed no concerns until over one year later when she moved to have the judge recuse himself. The judge refused.

Ms. McCoy argues that the judge's failure to entertain further argument on the question of recusal showed partiality, as did his rulings on the evidence. In the course of this opinion we will conclude that the trial judge did not abuse his discretion when ruling on the various issues, including the admission of evidence. We cannot then conclude on the basis of this record that the judge was partial to the District.

And the motion came over one year into the proceedings. That comes too late. The lawyer cannot decline an invitation to request recusal and then see how the case proceeds before changing his mind. *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992). Here, the judge made the offer. The judge did not abuse his discretion by refusing to recuse himself and to not entertain further argument from Ms. McCoy about why he should recuse himself over one year into the proceedings.

Rulings on Evidence

Ms. McCoy also challenges several of the trial court's evidentiary rulings. Again, we review each of these rulings for abuse of discretion. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). A court abuses its discretion when no tenable grounds for the decision exist. *Kappelman*, 141 Wn. App. at 590.

The question is not whether we would have made different decisions. The question is whether the verdict here should be set aside based on our assessment of the impact of these rulings. But if deference to a trial judge by application of the abuse of discretion standard means anything, it means that we will not revisit every ruling a trial judge made on the admission of evidence, here over the course of an almost three-week trial. This is not de novo review. And that would be our approach no matter what the outcome of this trial.

Evidence—Contractual and Administrative Remedies

Ms. McCoy contends that the court abused its discretion by allowing the District to introduce evidence that she withdrew from the arbitration of her grievances. She argues, correctly, that she had the right to proceed with her suit without first exhausting her administrative remedies. *Smith v. Bates Technical Coll.*, 139 Wn.2d 793, 816, 991 P.2d 1135 (2000). It is true that Ms. McCoy's lawsuit is not barred. *Id.* And the trial court told the jury as much: "A Plaintiff may bring a civil action . . . for wrongful

discharge for threatening to or filing grievances without being required to exhaust contractual or administrative remedies." Report of Proceedings (RP) at 3039.

But whether her suit was foreclosed by her decision is not the issue here. The question is whether the evidence was properly admitted to bolster the District's position that Ms. McCoy's grievances were weak and the reason for her discharge was her conduct. And we conclude that the evidence was properly admitted on these factual issues. Ms. McCoy's withdrawal from the arbitration proceedings was relevant to the wrongful discharge in violation of public policy action because it supports the District's argument that she considered her claim too weak to prevail in arbitration. *See Korslund v. DynCorp Tri-Cities Servs., Inc.*, 156 Wn.2d 168, 181-82, 125 P.3d 119 (2005). Evidence that she elected not to proceed with the administrative process is relevant and admissible on the question of the District's motives here. *Binkley v. City of Tacoma*, 114 Wn.2d 373, 388, 787 P.2d 1366 (1990).

Hearsay—Independent Investigator's Reports

Ms. McCoy next contends that the trial court improperly admitted reports by the independent investigator because the reports included hearsay. Ms. McCoy also objects to the way the court allowed the District to present the reports. She argues again that the judge abused his discretion by allowing the District's witnesses to read the independent

investigator's reports of their statements and then testify to the accuracy of the report according to their recollection.

First "[h]earsay" is "a statement, other than one made by the declarant while testifying at the trial . . . , offered in evidence to prove the truth of the matter asserted." ER 801(c). The documents Ms. McCoy takes issue with were not offered to prove that Ms. McCoy actually mistreated the students. The trial court admitted them to show what the District considered before it terminated Ms. McCoy's employment. This was not hearsay then by definition. *See Henderson v. Tyrrell*, 80 Wn. App. 592, 620, 910 P.2d 522 (1996). Again, the District's position was that it did not terminate Ms. McCoy because she filed grievances but rather because the District had numerous reports that she was abusive to students. These documents tend to prove the District's theory, whether or not the incidents and reports set out in them are true. They are not, then, hearsay. ER 801(c); *Patterson v. Kennewick Pub. Hosp. Dist. No. 1*, 57 Wn. App. 739, 744, 790 P.2d 195 (1990).

And we will rarely revisit decisions on the scope of examination, method of examination, or time for examination, especially absent some showing of prejudice. *Trotzer v. Vig*, 149 Wn. App. 594, 603-04, 203 P.3d 1056 (2009).

OSPI's Findings, Conclusions, and Order

Ms. McCoy next contends that the trial court erred by admitting the OSPI's findings, conclusions, and order. She argues that the document allowed the jury to substitute those findings for its own.

Ms. McCoy explained her understanding of the effect of the reprimand on employment, during her redirect examination. The District then moved to admit the OSPI document during cross-examination because, it argued, Ms. McCoy had opened the door to further inquiry. RP at 2112-13.

Again, whether, in the context this trial, Ms. McCoy opened the door to further inquiry about the OSPI report and to what extent it became admissible is a question vested in the sound discretion of the judge presiding over the trial. *State v. Neal*, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). The same is true for his decision balancing the probative value of the report against its potential prejudice. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000).

The OSPI document was relevant. It helped the jury resolve Ms. McCoy's claims for back and future pay. The trial judge apparently concluded that Ms. McCoy went on a bit more than necessary and by doing so opened the door to further inquiry by the District based on the report. The trial judge acted within his discretion by admitting the OSPI document. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001); ER 403.

Hearsay—Statements Suggesting Pretext

Ms. McCoy next contends that the trial court erred by excluding evidence that she says would have shown that the District's stated reason for firing her was pretextual. Ms. McCoy wanted to offer the testimony of Micki Clugston, the school counselor, and Rosemary Hevly, a "para-educator." They apparently would have testified that they overheard conversations of others who disliked Ms. McCoy and wanted to force her to leave the school. Ms. McCoy also wanted to present a union representative's testimony of a conversation with the father whose daughter claimed Ms. McCoy pulled her hair. Apparently the father expressed doubt about his daughter's veracity.

But, unlike the reports received by the District of Ms. McCoy's alleged abuse, these reports would have been offered to prove the truth of the matters asserted—that the District or others were out to get Ms. McCoy. They are then hearsay statements. ER 801(c); *Kaye v. Dep't of Licensing*, 34 Wn. App. 132, 133, 659 P.2d 548 (1983). And Ms. McCoy does not suggest an exception to the prohibition against hearsay that might apply. There is no abuse of discretion.

Retaliatory Animus

Ms. McCoy contends that the trial court erred by refusing to allow her to ask Mr. Brophy (1) about his willingness to violate their agreement about his 2001 investigation

and (2) whether it is unusual for a school administrator to encourage police to prosecute a teacher. On the first point, we will conclude that the agreement was not violated, as a matter of law. *See* page 16 of this opinion. On the second point, the judge sustained objections to questions regarding whether it was unusual for a school district official to call the police about a matter that the school district had "already handled to closure." RP at 529. The trial court sustained objections to the questions on both points on the ground that they were argumentative and/or irrelevant. Again, that is a discretionary call. *Neal*, 144 Wn.2d at 609. Moreover, Ms. McCoy was able to ask very similar questions with less argumentative wording. Ms. McCoy later asked Mr. Brophy whether he agreed that "it's unusual for a school district administration to encourage law enforcement to criminally investigate and prosecute one of its teachers." RP at 544.

The trial court acted within its discretion by disallowing Ms. McCoy's first question because Assistant Superintendent Brophy's response would not have made any fact of consequence to the determination of the action more or less probable. ER 401. As the court reasoned, Ms. McCoy could ask whether Mr. Brophy used information he had developed in his 2001 investigation. RP at 525-26. But whether Mr. Brophy knew when he used that information that he was not supposed to is not relevant to Ms. McCoy's claim that the District retaliated against her for grievances. And even if the

court erred by sustaining the District's objections to Ms. McCoy's original two questions about whether a school district commonly refers matters to law enforcement, Ms. McCoy later asked Mr. Brophy a nearly identical question. Because no constitutional right is implicated by the admission of irrelevant evidence, the applicable harmless error test is whether, within reasonable probabilities, the trial's outcome would have been materially affected had the error not occurred. *Cobb v. Snohomish County*, 86 Wn. App. 223, 236, 935 P.2d 1384 (1997). Any error was harmless here. *Id.*

Notes by Assistant Superintendent Brophy

Ms. McCoy next argues that the trial court erred by refusing to admit notes Assistant Superintendent Brophy took during a meeting with the District's attorney. She maintains that the District waived its attorney-client privilege by sharing the notes with her during discovery and the notes were made in anticipation of the meeting with the lawyer not contemporaneous with the meeting. The trial court disagreed.

Ms. McCoy claims that the test adopted in *Sitterson v. Evergreen School District No. 114*,[2] compels the conclusion that the District waived any attorney-client privilege that may have attached to Mr. Brophy's notes. It does not.

Here, the District inadvertently included those notes in material it turned over to Ms. McCoy during discovery. The notes are not clearly marked as a record of Mr. Brophy's conversation with his attorney, so they could easily have been included with the hundreds of other pages of material given to Ms. McCoy's counsel. And the extent of the disclosure was minimal when compared to the facts in *Sitterson*. There, the court found that the disclosure of four confidential letters between a school district and its attorney supported waiver. *Sitterson*, 147 Wn. App. at 580, 588-89. Finally, the issue of fairness favors neither party. And whether the notes were made in anticipation of a conference

[2] *Sitterson v. Evergreen Sch. Dist. No. 114*, 147 Wn. App. 576, 588, 196 P.3d 735 (2008).

with counsel or as part of the meeting is not determinative. *See Soter v. Cowles Publ'g Co.*, 162 Wn.2d 716, 747, 174 P.3d 60 (2007) (documents protected even if prepared in anticipation of litigation). The trial judge did not abuse his discretion in excluding the notes from evidence.

Equitable Estoppel—Complaints from 2001 Investigation

Ms. McCoy next claims that the trial court erred by denying her request to exclude complaints that Assistant Superintendent Brophy investigated in 2001. She says the District should have been equitably estopped from introducing the complaints at trial because it had agreed not to use the information from the investigation against her.

Whether the doctrine of equitable estoppel applies is a question of law that we review de novo. *Bank of Am., NA v. Prestance Corp.*, 160 Wn.2d 560, 564, 160 P.3d 17 (2007).

An equitable estoppel claim requires: "(1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on the faith of such admission, statement, or act; and (3) an injury to the other party if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act." *Liebergesell v. Evans*, 93 Wn.2d 881, 888-89, 613 P.2d 1170 (1980).

The doctrine does not apply here. First, the District conducted a second

investigation in February 2003 and a third investigation in summer 2003. During the third investigation, Mr. Prescott interviewed parents who had complained about Ms. McCoy's treatment of children in her classes, apparently including parents whose complaints originated before Mr. Brophy's 2001 investigation. So we are not sure what testimony Ms. McCoy objects to. Second, Ms. McCoy does not satisfy the first and third elements of equitable estoppel. The District agreed not to use the information gathered in the course of Mr. Brophy's November 2001 investigation to discipline Ms. McCoy or terminate her employment. And it did not. The trial court's admission of the evidence here is not then inconsistent with the District's agreement. Moreover, the District could have produced evidence of subsequent investigations during which District administrators and an independent investigator again questioned parents of Ms. McCoy's students.

The trial court did not abuse its discretion by admitting the evidence related to the parents' complaints.

Jury Instruction

Finally, Ms. McCoy argues that the trial court erred by refusing to give the jury her proposed instruction defining the term "substantial factor": "A factor is substantial if it so much as tips the scales one way or the other." CP at 452.

The trial court, instead, defined the term for the jury as follows: "'Substantial factor' means a significant motivating factor in bringing about the employer's decision." CP at 404 (Jury Instruction 12).

We review de novo whether a challenged jury instruction correctly states the law. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

A trial court commits reversible error when its instruction contains an erroneous statement of the applicable law and prejudices a party. *Id.* Prejudicial error is error that affects or presumptively affects the outcome of the trial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)).

The court took the jury instruction from 6A *Washington Practice: Washington Pattern Jury Instructions: Civil* 330.01.01 (5th ed. 2005). The cases that Ms. McCoy

cites to do not support the conclusion that the trial court's instruction or the pattern instruction misstates the law. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 72, 821 P.2d 18 (1991) (using "tips the scales" language only in a parenthetical following an illustrative citation to an Iowa case); *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wn. App. 268, 277, 996 P.2d 1103 (2000) (citing *Wilmot*). Ms. McCoy, then, has failed to show that the trial court abused its discretion by rejecting her proposed instruction and submitting Jury Instruction 12 to the jury. She could and did argue her theory of the case from this instruction. *See* RP at 3131-39.

We affirm the jury's verdict for the District.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, J.

WE CONCUR:

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Schultheis, C.J.

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Korsmo, J.