

IN THE SUPREME COURT OF THE STATE OF MONTANA
Case No. DA 23-0298

MIKE WINSOR,

Plaintiff/Appellee,

v.

STATE OF MONTANA, by and through the MONTANA STATE AUDITOR
AND COMMISSIONER OF SECURITIES & INSURANCE,

Defendant/Appellant.

APPELLEE'S BRIEF

On Appeal from the Montana First Judicial District Court
In and For the County of Lewis and Clark
Case No. CDV-25-2021-113, The Honorable Olivia Rieger, Presiding

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STATEMENT OF THE ISSUES

1. Whether CSI preserved its argument that Winsor's emotional distress claim was precluded by the WDEA as completely and inextricably intertwined with and based upon his termination, when the jury decided this factual issue in Winsor's favor, CSI never raised this argument at trial in a Rule 50 motion, and CSI agreed to the jury instructions on this issue.

2. Whether, even if CSI's argument were preserved, the District Court properly denied CSI's motions for summary judgment and for judgment as a matter of law because, viewing the evidence in the light most favorable to Winsor and drawing all reasonable inferences in his favor, CSI did not show a complete absence of any emotional distress that was not completely and inextricably intertwined with and based on his termination.

INTRODUCTION

After trial, Plaintiff Mike Winsor received a unanimous jury verdict finding that Defendant Office of the Commissioner of Securities and Insurance ("CSI") subjected him to serious or severe emotional distress. At the same time, the jury rejected his claims under the Wrongful Discharge from Employment Act

(“WDEA”), Mont. Code Ann. §§ 39-2-901, et seq., that he was fired without good cause or in violation of CSI’s written policies.

Winsor presented ample evidence, both at trial and in response to CSI’s motion for summary judgment, that CSI took actions prior to the termination, and unrelated to the termination, which caused him extreme emotional distress. Winsor was discharged solely because some of his time tracking reports were allegedly inaccurate. CSI’s actions that caused the emotional distress were not based upon the termination and had nothing to do with the alleged erroneous time tracking or the investigation thereof. The jury was repeatedly informed that Winsor was not claiming and could not claim emotional distress based upon the termination. CSI did not challenge the jury instructions nor did it allege in its Rule 50 motions that the emotional distress claim was inextricably intertwined with and based upon the termination, and thus precluded by the WDEA.

CSI now seeks to reverse the unanimous jury verdict, arguing that the judge should have granted its motion for summary judgment and its Rule 50 motions for judgment as a matter of law. CSI is asserting an argument that it did not make at trial and which lacks substantive merit.

STATEMENT OF THE CASE

Winsor filed an Amended Complaint alleging disability and political viewpoint discrimination, wrongful discharge under the WDEA, defamation, and infliction of serious or severe emotional distress. Doc. 3 (Amended Complaint).

The District Court granted CSI's motion for summary judgment on the discrimination claims, and on Winsor's WDEA claim that he was fired in retaliation for refusing to violate or for reporting violations of public policy. Doc. 88 (Order on Summary Judgment, p. 10-13). The Court denied summary judgment on the remaining WDEA claims (termination without good cause and in violation of employer's written policy), and on the defamation and emotional distress claims. Id. at 13-14. In responding to the summary judgment motion, Winsor presented substantial evidence, including deposition testimony, that CSI had committed acts prior to and unrelated to the termination, which caused him serious or severe emotional distress. Doc. 74 (Plaintiff's Statement of Disputed Facts). The Court determined that there was a material question of fact as to whether Winsor was subjected to serious or severe emotional distress prior to and independent of his termination. Doc. 88 at p.14.

Winsor withdrew the defamation claim and proceeded to trial on the WDEA and emotional distress claims. At the close of evidence, CSI moved for judgment

as a matter of law under Rule 50(a), Mont. R. Civ. P., on both the WDEA and emotional distress claims. As to the emotional distress claim, CSI did not argue that the claim was precluded by the WDEA because it was completely and inextricably intertwined with and arising out of the termination. Tr. at 1393. Instead, CSI argued only that there was insufficient evidence of serious or severe emotional distress. Id. The Court denied the Rule 50(a) motions. Tr. at 1396-97.

The jury returned a verdict in favor of CSI on the wrongful discharge claims, but found unanimously in favor of Winsor on the emotional distress claim, awarding him \$232,000 in emotional distress damages. Tr. at 1481-97, Doc. 170 (Verdict Sheet). CSI renewed its motion under Rule 50(b), again arguing only that there was insufficient evidence of severe or serious emotional distress. Tr. at 1499-500. The Court denied the motion. Id. Judgment was entered, and CSI appealed.

STATEMENT OF FACTS

I. Winsor's Employment and Termination

CSI hired Mike Winsor as a part-time staff attorney in 2006. Tr. at 188. In 2008, he became a full-time attorney. Id. at 189. As a staff attorney, Winsor performed a broad range of work, including assisting and protecting Montana

insurance consumers, and prosecuting fraud cases, both against insurance companies and consumers. Id. at 189-90. He lost only one case. Id. at 190. During his employment, Winsor obtained millions of dollars for the state of Montana and for Montana insurance consumers. Id. at 208.

Winsor was “far and away, leaps and bounds the most excellent, experienced, and professional attorney in that office,” according to another attorney at CSI who worked with Winsor for several years up until Winsor’s termination. Id. at 703. Numerous CSI employees testified that Winsor was knowledgeable, experienced, intelligent, thorough, responsive, professional, and kind. Id. at 639-42, 660-61, 690-94, 702-07, 736-38, 748-50, 758-61, 766-68, 784-88. Several employees testified that they would routinely seek Winsor out for advice or assistance. Id. at 639-40, 690-93, 702-03, 736, 787-88. One former employee, who is now an administrative law judge, explained that Winsor “knew the answers” when the other attorneys did not. Id. at 781, 788.

Winsor also earned praise from his supervisors. At a five-year pin ceremony, his then-supervisor Jesse Laslovich wrote that Winsor had:

worked on hundreds of cases, both large and small and both complicated and easy. Because of his work, he has established himself as the “go-to” person when it comes to the agency’s association cases. . . . None of the other lawyers want the association cases, but Mike happily accepts them But he should take the assignment of such cases as a compliment because

it's a testament to his ability in handling very complicated cases and dealing, sometimes, with very emotional and unreasonable opposing counsel and people. Mike has developed a national reputation Mike has a spine of steel and we know that with him on the case, we'll get a very good result for Montana consumers. Mike continues to be a role model for all of us in Legal. We're proud to call him our colleague and friend. And as everyone knows, he's one of the nicest, most professional people who not only works for the CSI, but one of the nicest people you'll ever meet. Id. at 191-96, 857-58; Exhibit 2.

In October 2018, Winsor received a performance evaluation from his then-supervisor Kristen Hansen that she described as "very positive." Tr. at 202; Exhibit 3; Hansen Depo. at 69.¹ Among other things, the evaluation praised Winsor for his sound judgment, broad legal knowledge, attention to detail, ability to work with others, and composure in the face of adversity. The evaluation noted that Winsor had accomplished numerous significant substantive achievements. Winsor was recommended for a bonus based on his performance. Tr. 203-08; 224-25; Exhibit 3.

Hansen's evaluation concluded:

Mike is an asset to the agency. Mike works well with all bureaus and has been able to develop relationships throughout the agency to make sure the legal staff and the bureaus are on the same page. He works well with opposing counsel, has a large amount of institutional knowledge, and is

¹Because Ms. Hansen passed away before trial, portions of her videotaped deposition were introduced at trial, including this excerpt. Tr. at 780. This excerpt can be found in the record as Exhibit 4 to Plaintiff's Statement of Disputed Facts. Doc. 74.

reasonable when faced with opinions different from his own. Mike spots legal issues quickly and problem solves in creative ways so as not to be an overbearing regulator. He is also patient with me when he spots an issue that I don't immediately grasp the significance of. He is willing to hash the issue though more than once so that I can both understand it and make decisions regarding it. I greatly appreciate Mike's willingness to try to be open with me and allow me to bounce ideas off of him that require his institutional knowledge and experience. I sincerely hope that Mike recognizes his value to both me and the agency. I hope he understands that I have his back, even on the tough things. It has been a pleasure working with him these past two years. Tr. at 225-26; Exhibit 3.

Although he no longer does, Winsor used to drink alcohol. Tr. at 226-27.

During the periods when he was drinking, Plaintiff would drink in the evenings and on weekends but not at work, and he was never impaired at work. Id. at 227.

In May 2019, Winsor underwent a week-long medically supervised alcohol detoxification program. Id. at 228, 266. From the completion of detox through the termination of his employment in February 2020, Winsor did not consume alcohol. Id. at 267.

Shortly after Winsor's return from detox, Michelle Dietrich became his new supervisor. Id. at 267. Dietrich emailed Winsor to provide notice of a meeting on July 3, 2019, but did not tell him what the meeting was about. Id. at 267-68. On July 3, 2019, Winsor reported to Dietrich's office for the meeting, and both Dietrich and Hansen were present. Id. at 268-69.

At the July 3, 2019, Dietrich presented Winsor with a work agreement in the form of a letter. Id. at 269-70, 1403-04; Exhibit 7. Dietrich falsely accused Winsor of drinking alcohol since returning from detox. Tr. at 269-70, 1137; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts). In fact, Dietrich’s letter falsely claimed, “Since returning to work [after detox], I observed on one occasion that you smelled of alcohol,” and that Winsor had been impaired at work since returning from detox. Tr. at 276; Exhibit 7 at 2. Dietrich admitted, however, that she could have been wrong about Winsor drinking, and she did not in fact know whether he had been drinking. Tr. at 1137-38; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts). Winsor protested that he had not been drinking since detox. Tr. at 270; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts).

Winsor did not want to sign the letter because it contained false allegations, and he did not want his signature to be construed as an admission that these allegations were true. Tr. at 270. He told Dietrich he did not want to sign the letter. Id. She responded by insisting that he sign. Id. at 270-71. Winsor asked if he would be fired if he did not sign, and Dietrich responded that she “could do a lot worse to [him] than firing [him] if [he] didn’t sign the letter.” Id. at 271; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts). At one point, Winsor tried to get up and leave Dietrich’s office. Tr. at 271. Dietrich stood in the doorway blocking his

exit. Id.; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts). She told him, “you’d be surprised what I could do to you if you don’t sign the document.” Tr. at 271-72; Doc. 74 at ¶ 67 (Plaintiff’s Statement of Disputed Facts). She said that she had been given orders not to let him leave her office until he signed. Tr. at 271. The meeting lasted about four hours. Id. at 272. The meeting ended when Dietrich handed Winsor a pen and said, “sign it and you can go.” Id. Winsor signed the letter and the meeting ended. Id.

When Dietrich threatened Winsor by saying she could do worse than firing him and that he would be surprised at what she could do to him, he was terrified. Id. at 272-73. Even Dietrich admitted that Winsor was extremely distressed during the four-hour meeting, describing him as “panicked,” “agitated,” and “flushed.” Id. at 1138-39. She could tell he was experiencing anxiety. Id. at 1139. Nonetheless, he agreed to comply with the terms of the work agreement, and he did comply with its terms. Id. at 279-81, 284.

Following the July 3, 2019, meeting, Dietrich embarked on a campaign to torment, belittle, and undermine Winsor. For example, a coworker heard Dietrich tell another attorney that she did not need to listen to Winsor. Id. at 792. A coworker saw Dietrich roll her eyes when Winsor was discussing a case with Dietrich and another attorney. Id. at 793. This coworker also observed Dietrich

aggressively push past Winsor at a meeting, to show everyone she was annoyed at him. Id. at 794. This coworker, who has worked for several state agencies and is now an administrative law judge, testified that she has never seen another supervisor act the way Dietrich did with Winsor. Id. at 794-95.

If Winsor was in his office with the door open, Dietrich would claim he was talking too loudly and make him close his door. Id. at 378. Then, she would criticize him if his door was closed, telling him he needed to keep it open so that she could know what he was doing and if he was in his office. Id. She would act normally around him in public spaces, but would then go into his office, close the door, and “be just plain mean.” Id. at 1354.

On August 16, 2019, Winsor met with Dietrich to explain to her how to hire outside attorneys without violating the Montana Procurement Act. Id. at 341-42. He told her that he believed a CSI contract was illegal because it exceeded the permissible contract value and did not include necessary documentation. Id. at 342. He advised Dietrich that he believed that CSI should proceed “according to the book.” Id. Dietrich became furious at Winsor. Id.

In late August 2019, Dietrich met with Winsor and another attorney, who was his co-counsel on a case. Id. at 303. Winsor informed Dietrich that he had dropped criminal charges in the case, which involved both criminal and civil

charges. Id. at 303-04. Dietrich criticized him, saying that he should have used the criminal charges as leverage to negotiate a civil settlement. Id. When Winsor explained that using criminal charges as leverage would be unethical and contrary to CSI policy, Dietrich became very angry. Id. at 304-05. Dietrich raised her voice, ranted that Winsor did not know how to negotiate, and berated him in front of the other attorney. Id. at 305-06. After the meeting, Dietrich came to Winsor's office, and was furious with him for disagreeing with her in front of his co-counsel. Id. at 309. She told him that Matt Rosendale (the state auditor at the time) was in charge and that "[Winsor] didn't have a right to an opinion, and that [Dietrich] was [Rosendale's] conduit or representative and [Winsor] had no authority to question her on anything and [Winsor] basically had to give her blind obedience." Id. at 309-10. Winsor felt, however, that he had a duty as an attorney to inform Dietrich that leveraging criminal charges was unethical. Id. at 310-11.

Following the meeting, Dietrich informed Winsor that he was to write a memorandum for her regarding the case, and that he should write the memorandum himself rather than with his co-counsel. Id. at 302-03, 306. Dietrich did not tell Winsor that he could not consult with his co-counsel about the memo, or have her review it. Id. at 307, 317. Winsor wrote the memo himself, but asked his co-counsel to spend five minutes reviewing it to ensure its quality before

submitting it to Dietrich; co-counsel was more familiar with the case and with health law. Id. at 313-14, 319. Winsor did not intend to be insubordinate by asking his co-counsel to review the memo. Id. at 318. Winsor's co-counsel informed Dietrich about Winsor's request, and Dietrich instructed her to prepare a memorandum regarding her interaction with Winsor. Id. at 1291-92.

Dietrich scheduled another meeting on August 29, 2019, to discuss Winsor's alleged insubordination. Id. at 311; Exhibit 25. Winsor requested that a coworker, Bryan Stanley, be allowed to attend. Tr. at 311-12, 643-44. Stanley observed that Winsor appeared very stressed, he was red in the face, and nervous. Id. Stanley testified that Dietrich was "very aggressive" with Winsor at the meeting, and was trying to provoke him. Id. at 644-45. She was "raising her voice, getting more animated, and acting very angry with [Winsor]." Id. It appeared that she was "trying to start a fight." Id. at 646. Stanley found Dietrich's behavior to be "extremely unprofessional." Id. at 645. In fact, during his lengthy career, Stanley had never seen any other supervisor act this way. Id. at 646. Stanley also noted that he found Dietrich's allegations to be "laughable" and that the way she was acting was "absurd." Id. at 645. Dietrich accused Winsor of insubordination for disagreeing with her in front of his co-counsel and challenging her authority in so doing. Id. at 312. Winsor found her behavior to be "hostile, aggressive,

demeaning, [and] disrespectful.” Id. at 316.

At a second follow up meeting, Stanley observed that Dietrich was again acting aggressively towards Winsor. Id. at 647-48. She raised her voice and appeared angry. Id. at 648. By contrast, Winsor was simply trying to cooperate and answer Dietrich’s questions. Id. at 649.

Dietrich provided Winsor a formal written warning, claiming he was insubordinate by asking his co-counsel to assist in writing the memo. Id. at 311, 1403-04; Exhibit 25. Although Dietrich had prepared a draft warning accusing Winsor of insubordination for disagreeing with her in front of his co-counsel, this allegation was not included in the final write-up. Id. at 315-16; Exhibit 25.

It was common practice at CSI for attorneys to refer cases to county attorneys. Tr. at 337. When Winsor did so, however, Dietrich demanded in a November 2019 email that he explain the reasons for the referral. Id. at 333-36, 798-99; Exhibit 42. Dietrich’s actions were so unusual that a coworker observed, “Different rules apply to different people here, Mike. Everything you do is wrong. Everything [another attorney] does is right.” Tr. 333-34, 798-80; Exhibit 42; Doc. 74 at ¶ 71 (Plaintiff’s Statement of Disputed Facts). The coworker testified that other attorneys referred cases to county attorneys all the time, but when Winsor did it, he got in trouble. Tr. at 802-03.

In November 2019, Dietrich accused Winsor of not following appropriate protocol for filing charging documents. Tr. 337-41; Doc. 74 at ¶ 70 (Plaintiff's Statement of Disputed Facts). In fact, he had followed the appropriate procedure. Tr. at 340; Doc. 74 at ¶ 67 (Plaintiff's Statement of Disputed Facts).

On December 23, 2019, Plaintiff was involved in an incident with another attorney, Derek Oestreicher. Tr. at 342-51. Oestreicher, who is almost seven feet tall, approached Winsor in the hallway while talking on his cell phone and asked Winsor about the status of a legal memorandum. Id. at 344-45, 348. When Winsor asked who was on the phone, Oestreicher said it was Dietrich on the phone, stepped very close to Winsor in an aggressive manner, and raised his voice at Winsor. Id. at 345-46, 354-55. Surveillance video of the incident confirmed that Oestreicher stepped very close to Winsor, and that Winsor backed away. Id. at 346-51; Exhibit 64. In addition, another attorney who was in the area confirmed that Oestreicher was speaking in a loud voice, but Winsor was speaking softly enough that the attorney could not hear Winsor. Tr. at 707-13. The attorney also observed that Oestreicher was standing close to Winsor. Id. at 713. Winsor felt intimidated by Oestreicher's behavior and told him, "you're intimidating me" as he backed away and returned to his office. Id. at 345-51.

Winsor sent a text message to Staci Litschauer, the head of human resources at CSI, explaining that the incident was uncomfortable and intimidating. Id. at 352-53; Exhibit 43. They also spoke on the phone. Tr. at 352, 665. Litschauer told Winsor he needed to document the incident, and he reluctantly complied even though he was afraid it would lead to him getting fired. Id. at 353-54, 671; Exhibit 45. When speaking to Winsor on the phone, Litschauer could tell that he was not lying or exaggerating, and that he was nervous and shaken up by the incident. Tr. at 665-66.

Litschauer followed up by emailing Dietrich that evening, and suggesting that she talk to Oestreicher. Id. at 666-70; Exhibit 44. She noted, “Derek is very tall and stepping this close to anyone could be considered deliberate intimidation.” Tr. at 668-69; Exhibit 44.

The next day, December 24, 2019, Winsor mistakenly believed that he saw Oestreicher’s car pulling in to the parking lot. Tr. at 355-56. Winsor was surprised because Oestreicher was not scheduled to be in that day. Id. at 672. Still shaken up from the incident the day before, Winsor asked Litschauer for permission to close and lock his office door. Id. at 356. The reason he believed he needed permission was that Dietrich had told him he was not permitted to shut or lock his office door. Id. at 356, 672-73. There is no agency policy prohibiting employees from locking

their office doors. Id. at 1175. Litschauer told him that he could lock his door so that he would feel more comfortable, and that she would inform Dietrich that she had given him permission to do so. Id. at 356, 672. Litschauer informed Dietrich that she had given Winsor permission to lock his office door. Id. at 673. Litschauer did not believe it was improper or inappropriate for Winsor to ask her for permission to lock his door. Id. at 675.

Later that day, Dietrich came to Winsor's office and accused him of being the aggressor rather than Oestreicher. Id. at 356-57; Doc. 74 at ¶ 73 (Plaintiff's Statement of Disputed Facts). She claimed Winsor had acted unprofessionally. Tr. at 357. At this meeting, Dietrich was very angry, and her tone was hostile and aggressive. Id.

Winsor was suspended without pay for a week based primarily on the incident with Oestreicher. Id. at 357-58, 667, 1074-75; Exhibit 46. The suspension notice falsely claimed that Winsor had been "verbally aggressive" with Oestreicher. Exhibit 46. The suspension notice also faulted Winsor for locking his office door, even though he had obtained permission to do so. Id. The suspension notice contained other allegations that were not true. Id. at 358-65. Litschauer observed that when presented with the suspension notice, Winsor appeared surprised and shaken up, although he did not get angry or raise his voice. Id. at

676-77. Even as Litschauer escorted Winsor out of the building, she described him as “Very polite, very nice, you know, always.” Id. at 678. Nonetheless, Winsor was devastated, and felt that he was being walked out of the building like a criminal in front of all his coworkers. Id. at 365.

Dietrich’s treatment of Winsor during the period of time prior to his termination caused him extreme emotional distress. Id. at 368-84. He was monitoring his blood pressure, and noticed that it would spike when he had to meet with Dietrich. Id. at 369-71. He would vomit every day before going to work. Id. at 369, 372. He had frequent abdominal pains and diarrhea. Id. at 373. He lost weight. Id. at 377. He experienced panic attacks in the office two to three times a week when he would experience shortness of breath and chest pains, and fear that he was going to have a heart attack. Id. at 369, 371. He experienced severe headaches, pains in his eyes and vision disturbances. Id. at 369-70. He also had trouble sleeping most nights, and experienced nightmares. Id. at 370, 372. Sometimes he could not sleep at all. Id. at 372. He found himself overly alert and jumpy. Id. at 375. His self-confidence was destroyed. Id. Winsor talked to his doctor about these issues, and his doctor was very concerned. Id. at 382-83. Even years later, Winsor still had a lot of anxiety. Id. at 379. He still had insomnia and nightmares about being back in the office. Id. at 381.

Winsor's emotional distress was apparent to his coworkers as well. For example, Stanley observed that during the time after Dietrich became his supervisor and before his termination, Winsor appeared red in the face and panicked. Id. at 650-52. Winsor's appearance contrasted with his previously carefree demeanor. Id. at 652. Another attorney in the office observed that Winsor was "always upset and he seemed nervous, and worried, and fearful. He was obviously not healthy." Id. at 713-14. Winsor became less friendly and outgoing, and was sometimes red in the face and shaking. Id. at 714. These symptoms were at their worst right after Winsor met with Dietrich. Id. at 714-15. Another coworker noted that in the summer of 2019 she noticed that Winsor was very different, he was "sad and distraught and not his happy self." Id. at 738-39. Another coworker noticed that toward the end of his employment, Winsor appeared very unhappy; he used to smile often but he became quiet and reserved. Id. at 749.

Shanni Barry, Winsor's coworker, testified about an interaction with Winsor in or about December 2019. Id. at 795-96. She recalled Winsor entering her office: "He was really, really upset. And he was shaking, and he was crying, and his face was red, and he was having difficulty talking to me. I was trying to understand what he was saying and he was having a hard time." Id. at 795. She further

observed, “He was just so upset. He was like sobbing and, yeah, shaking. He was just very – I don’t think I’ve ever witnessed somebody that upset ever before.” Id. at 796.

Barry testified that on another occasion between May and December 2019, Winsor came in to her office “and his face was very red, and he was shaking, and he was upset.” Id. at 797. Another time, she observed Winsor “desperately taking his blood pressure because of an interaction he had just had. He was upset. He was – his blood pressure was really high.” Id. She also saw that his face was red and he may have been crying. Id. at 797-98. Indeed, toward the end of Winsor’s employment, he appeared upset or stressed on a daily basis. Id. at 798. She saw he had “just declined a lot” in that he appeared “very afraid,” she saw him shake, his face was often red, and he did not “interact with people like he used to.” Id.

Winsor’s coworker Susan Brown testified that on December 24, 2019, she saw that he appeared lonely and forlorn. Id. at 769. She started a conversation with him and observed: “What concerned me most is I had known him for three years, and he had – he looked very, very frail. But as we began to talk, he started to tear up and I gosh, my gosh, this man is broken. My heart went out – and I’m sorry, because it still upsets me. Sorry. But we had a good conversation.” Id. at 770. He appeared to be under a lot of stress. Id. at 771. She explained, “Again, [the

conversation with Winsor] left me, and still does, highly emotional because you don't often see your coworkers emotionally collapse in front of you, and it was very hard." Id. at 774.

On January 6, 2020, the day Winsor returned to work after his unpaid suspension, Dietrich suspended him with pay, alleging that the agency was conducting an investigation into alleged discrepancies between his time tracking reports (which were required under the July 2019 work agreement) and his apparent activities in the office. Id. at 384-86; Exhibit 49. On January 27, 2020, Dietrich provided Winsor a due process letter indicating that alleged discrepancies between his time tracking reports and office surveillance videos for a thirteen work-day period in November and December 2019 was sufficient to justify termination. Tr. at 536-39; Exhibit 638. After Winsor provided a written response, CSI terminated his employment by notice dated February 12, 2020. Tr. at 1105-17; Exhibit 61. The reason given for the termination was that from the period from November 26 through December 13, 2019, Winsor's time sheets did not match the video surveillance recordings of his whereabouts. Exhibit 61.

In fact, Winsor was performing work duties when he was allegedly not working, although he may have left early for lunch or arrived slightly late in the morning. Tr. at 1354-82.

II. The Summary Judgment Motion

CSI moved for summary judgment on all claims in Winsor's amended complaint. Doc. 88 (Order on Summary Judgment). The district court granted the motion as to Winsor's claims that he had been discriminated against on the basis of his disability (alcohol use disorder) and his political views. Id. at 10-12. The district court also granted the motion as to Winsor's claim that he was terminated for refusing to violate public policy under Mont. Code Ann. 39-2-904(1)(a). Id. at 12-13. The court otherwise denied CSI's motion. Id. at 13-14.

As for the emotional distress claim, CSI argued that summary judgment was appropriate because the claim was barred by the WDEA. Doc. 67 at 18-19 (CSI's Brief in Support of Summary Judgment). CSI claimed that the emotional distress claim was completely and inextricably intertwined with and based upon the termination. Id. In support of its argument, CSI relied only upon Winsor's response to an interrogatory seeking information regarding the emotional distress claim. Doc. 74 at ¶ 55 (CSI Statement of Undisputed Facts) & Exhibit G thereto. Winsor's response to that interrogatory was as follows:

INTERROGATORY NO. 18: Please describe the "extreme and outrageous conduct" alleged in Paragraph 40 of your Amended Complaint, including but not limited to the individual(s) who engaged in such conduct; the date of the conduct; a specific description of the conduct; and other individuals who witnessed the conduct.

ANSWER: Objection. This Interrogatory is overbroad and unduly burdensome, and improperly requires Plaintiff to provide a detailed narrative account of his case. Without waiving this objection, Plaintiff states as follows:

During the time of Plaintiff's employment Defendants subjected Plaintiff to prolonged extreme and outrageous conduct which escalated dramatically after he sought treatment for his alcohol abuse disorder. Defendants subjected Plaintiff to a hostile work environment, using mobbing (group bullying), bullying, and harassing conduct toward the Plaintiff. For example, such conduct included verbal abuse, acrimonious hostility, threats, intimidation, invasion of privacy, work interference and sabotage, ambush meetings, gaslighting, harsh and unfair criticism, false allegations, imposition of random rules specific to Plaintiff, spreading or enabling destructive rumors, assigning work as punishment and piling on work from other attorneys, retaliation, personal marginalization and labeling, psychological assaults to plaintiff's ethics, morals and experience, and dignity, and isolation. Plaintiff was also subjected to: marginalization from work activities, excessive monitoring, unnecessarily interrupting and disrupting work activities and interaction with staff, abusive language, non-verbal intimidation and physical aggressive behavior, false allegations from anonymous unnamed witnesses, pretextual discipline letters, sham investigation, defamation, stalking, and retaliation.

Defendants also took actions such as: removing job responsibilities, encouraging resignation; setting up Plaintiff for failure, unreasonable work presence and meeting attendance requirements, email barrages on Sunday nights, incessant scolding, sabotaging individual contribution, favoritism, publishing discipline meetings on group calendar, exposing disability information by leaving a file on Plaintiff spread out over Dietrich's desk for a week or more, discussing discipline with paralegal; false disciplinary letters, to include insubordination, retaliation for standing up for co-workers who were being mobbed, bullied and harassed into quitting, home trespassing incident.

The extreme and outrageous conduct culminated in Defendants subjecting Plaintiff to an open-ended discipline plan and then terminating his employment. Id.

CSI wrongly claimed that the final paragraph of Winsor's response was somehow an acknowledgment that the emotional distress claim was completely and inextricably intertwined with and based upon the discharge. Doc 67 at 19.

In response to the summary judgment motion, Winsor noted that he had been subjected to a campaign of abuse and harassment before his termination, which was completely separate and independent from the termination, and would have existed regardless whether he was terminated. Doc. 73 at 17-18 (Plaintiff's Response to Motion for Summary Judgment). Specifically, Winsor referred to deposition testimony that Dietrich had falsely accused him of drinking alcohol, threatened that she could do a lot more than fire him, stated that he would be surprised at what she could do to him, and physically blocked him from leaving her office. Id. at 5. Winsor also cited evidence that Dietrich had falsely accused him of insubordination, singled him out for adverse treatment, and falsely accused him of being aggressive when in fact he had been the victim of aggression. Id. at 5-6. Winsor's Statement of Disputed Facts contained ample specific evidence for all of these allegations. Doc 74 at ¶¶ 22-23, 67-68, 70-73.

The court determined that there was a genuine issue of material fact as to whether Winsor was subjected to emotional distress prior to and independent of his termination. Doc. 88 at 14.

III. The Trial

Throughout the trial, both parties made clear to the jury that Winsor was seeking emotional distress based only on facts that occurred before his termination, and that he was not entitled to any emotional distress damages arising out of the termination. For example, during jury selection, CSI's attorney noted, "If you are selected as a juror, there's essentially two things that you're going to have to decide. One is if CSI discharged Mike Winsor with good cause or just cause, and the other is whether he – whether CSI inflicted emotional distress **before he was terminated.**" Tr. at 106 (emphasis added). In closing argument, counsel for Winsor made very clear, "First, we're suing because the defendant intentionally or at least negligently inflicted severe emotional distress on the plaintiff, Mike Winsor, **before his termination.** As you heard from the judge's instructions, **we are not entitled to and we're not claiming emotional distress damages resulting from the termination itself.**" Id. at 1413 (emphasis added). Counsel further noted that the emotional distress claim was "totally separate" from the wrongful discharge claim, and that the two claims were "separate and independent." Id. at 1441. Counsel for CSI made a similar point to the jury in her closing argument: "When you go in there to think about the emotional distress claim, **you can only think about what happened before the termination, not**

award damages because of the termination as it relates to emotional distress.”

Id. at 1446 (emphasis added).

At the close of evidence, counsel for CSI moved for judgment as a matter of law pursuant to Montana Rule of Civil Procedure 50(a) on both the wrongful discharge claim and the emotional distress claim, and the court denied the motion. Id. at 1393-97. With respect to the emotional distress claim, counsel for CSI did not argue that the emotional distress was precluded by the Wrongful Discharge Act because it was intertwined with the discharge. Instead, her entire argument was as follows: “We do not believe that evidence has been offered that supports serious and severe emotional distress as a reasonably foreseeable consequence of the defendant’s negligent or intentional act.” Id. at 1393. In denying the motion, the court reasoned that “The jury is capable of determining whether emotional distress claimed by Mr. Winsor is serious or severe. They are, the jurors, the best situated individuals to determine whether and to what extent the defendant’s conduct, if any caused emotional distress” Id. at 1396. The court gave no indication that she believed there was any issue as to whether the emotional distress was intertwined with the termination.

The parties agreed to certain jury instructions on the emotional distress claim. Id. at 1250-52. These included the following instruction, which was

provided to the jury:

INSTRUCTION NO. 25: Plaintiff alleges that **during the period of time prior to his termination**, defendant subjected him to emotional distress. A party suffering harm as a result of the negligent or intentional infliction of serious or severe emotional distress by another party is entitled to recover damages from that party for such harm. **Plaintiff is not entitled to emotional distress damages arising out of his discharge from employment.**” Doc. 197 (Jury Instructions) (Emphasis added)

In addition, the following instruction was given to the jury over Winsor’s objection that it was redundant (id. at 1253-57):

INSTRUCTION NO. 24: **Under Montana’s Wrongful Discharge from Employment Act, there is no right under any legal theory for damages for pain and suffering, emotional distress, or punitive damages (damages meant to punish a defendant and to deter others from engaging in unlawful conduct), and no claim is being made in this case for these damages.** As such, your award, if any, must not include such items of damages. Doc. 197 (Jury Instructions) (Emphasis added).

Additionally, the parties conferred and agreed to a proposed verdict sheet.

Id. at 1391. The question related to liability for infliction of emotional distress (question number 4) read as follows: “Do you find that the Plaintiff has proved by a preponderance of the evidence that the Defendant negligently or intentionally inflicted serious or severe emotional distress on the Plaintiff **not arising out of the Plaintiff’s termination from employment?**” (Doc. 166, Agreed Upon Amended Verdict Sheet) (emphasis added).

The jury rendered a verdict in CSI's favor on the wrongful discharge claims. As to whether Winsor was discharged without good cause the jury found ten to two in CSI's favor. Tr. at 1483-85. As to whether Winsor was discharged without just cause, in violation of CSI's written policies, the jury found eight to four in CSI's favor. Id. at 1485-90, 1493-97. On the emotional distress claim, the jury reached a unanimous verdict in Winsor's favor, awarding \$232,000 in damages. Id. at 1490-93.

Following the verdict, counsel for CSI renewed her Rule 50 motion. Id. at 1499-500. Counsel did not mention anything about the emotional distress being intertwined with the termination or being barred by the WDEA. Instead, her argument was as follows:

We do not believe that there was sufficient evidence to support the jury's verdict on the emotional distress claim because there was not evidence that there was emotional distress so serious or severe from holding an employee accountable for appropriate work performance that no reasonable person could have endured that or that serious and severe emotional distress was a reasonably foreseeable consequence of holding him accountable for work performance. Id. at 1500.

The court denied the motion.

On April 3, 2023, the court issued a judgment in Winsor's favor in the amount of the jury's verdict (\$232,000) and Winsor's costs (\$4,271.97).

STANDARD OF REVIEW

A district court should grant a motion for judgment as a matter of law only if there is a complete absence of any evidence which would justify submitting an issue to a jury. See Johnson v. Costco Wholesale, 2007 MT 43, ¶13, 336 Mont. 105, 152 P.3d 727. The district court must consider the evidence and any legitimate inferences that might be drawn therefrom in the light most favorable to the non-movant. See id. This Court reviews the denial of a motion for judgment as a matter of law under a de novo standard. See id. at ¶18.

Summary judgment is an extreme remedy which should never be substituted for trial if a material controversy of fact exists. Tonner v. Cirian, 2012 MT 314, ¶9, 367 Mont. 487, 291 P.3d 1182. Summary judgment should be granted only if the moving party establishes the complete absence of any genuine issues of material fact. See Lorang v. Fortis Ins. Co., 2008 MT 252, ¶37, 345 Mont. 12, 192 P.3d 186. The district court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inference in favor of the non-moving party. See id. at ¶ 38. This Court's review of the denial of summary judgment is de novo. See id. at ¶ 36.

SUMMARY OF ARGUMENT

This Court need not even consider the substance of CSI's argument because it is not preserved for appeal. CSI never argued at trial that the emotional distress claim should not go to the jury because it was inextricably intertwined with and based upon the termination, and thus precluded by the WDEA exclusivity provisions. Instead, CSI argued only that there was insufficient evidence of serious or severe emotional distress. Moreover, the comments of both counsel, the jury instructions, and the verdict sheet made clear to the jury that Winsor was not seeking and was not entitled to emotional distress damages arising out of the termination. CSI did not object to these instructions. Having failed to preserve the issue at trial, CSI is also barred from challenging the denial of summary judgment on this issue. When a disputed issue of fact is presented to and decided by a jury, the denial of summary judgment on that same issue should not be reviewable. Instead, review should be available only of the Rule 50 motions at trial, which in this case were not sufficient to preserve the WDEA exclusivity issue. Thus, the Court should simply affirm the judgment without addressing the merits of CSI's argument.

In any event, even if this Court were to address the merits of CSI's argument, that argument should be rejected because Winsor produced ample

evidence, both at trial and in response to CSI's summary judgment motion, of the infliction of emotional distress prior to and completely independent of the termination, and that would have occurred regardless whether Winsor was later terminated. Winsor was terminated for only one reason – his time tracking reports in November and December 2019 were allegedly inaccurate. Not only did Winsor present substantial evidence of emotional distress which would have occurred regardless of whether he was ultimately terminated, but this distress was based on events that occurred before he was even notified of the alleged time tracking issues, and was unrelated to the alleged time tracking issues that led to his termination or to the investigation of such issues. Winsor made clear to the jury that he was not seeking emotional distress damages arising from the termination. The WDEA does not prevent an employee from bringing tort claims simply because they relate to his employment or alleged problems with his employment. Instead, such claims are barred only if they are “completely and inextricably intertwined with” and “based upon” the termination. CSI has not shown that Winsor's emotional distress claim was completely and inextricably intertwined with and based upon his termination.

ARGUMENT

I. CSI did not preserve its argument that Winsor's emotional distress claim was precluded by the WDEA as completely and inextricably intertwined with and based upon his termination, when the jury decided this factual issue in Winsor's favor, CSI never raised this argument at trial in a Rule 50 motion, and CSI agreed to the jury instructions on this issue.

A. The Trial

At trial, CSI did not preserve the argument that the emotional distress claim was intertwined with the wrongful discharge claim and thus precluded by the WDEA. At the close of evidence, CSI made a motion for judgment as a matter of law under Rule 50(a) of the Montana Rules of Civil Procedure. Pursuant to Rule 50(b), CSI renewed the motion after the jury verdict. In each instance, however, CSI argued only that the emotional distress was not sufficiently serious or severe. Rule 50 requires the movant to specify "the law and facts that entitle the movant to the judgment." Rule 50(a)(2). CSI did not mention the legal principal of WDEA preclusion, nor did it present any facts that would support such an argument, or even hint that the emotional distress claim was somehow intertwined with the termination. Because CSI is now raising a completely different theory that was not presented to the district court at trial, it has not preserved this argument for appeal. See Walton v. City of Whitefish, 2009 MT 360, ¶14 (defendant may not assert respondeat superior argument not presented in Rule 50(a) motion); In re M.A.L.,

2006 MT 299, ¶57, 334 Mont. 436, 148 P.3d 606 (party cannot raise equal protection argument not asserted via Rule 50(a) motion).

Similarly, CSI made no objection to the jury instructions or the verdict sheet which addressed this issue. Indeed, counsel for CSI specifically agreed to them. At trial it appeared that the parties and the court were all in agreement that Winsor could seek emotional distress damages based upon facts that occurred prior to the termination, provided such emotional distress was serious or severe.

B. The Summary Judgment Motion

Although CSI presented the WDEA preclusion argument in its summary judgment motion, the denial of that argument on summary judgment is not appealable. When a disputed factual issue is decided by a jury the denial of summary judgment on that issue should not be reviewed on appeal. Instead, the issue is reviewable only upon a properly filed Rule 50 motion, and CSI failed to make the WDEA preclusion argument in its Rule 50 motion.

In general, the denial of a motion for summary judgment is appealable after a final judgment is entered. See Brown v. Midland National Bank, 150 Mont. 422, 435 P.2d 878 (1967) (after trial, reviewing denial of summary judgment on the ground that the claim against an estate had not first been presented in a creditor's

claim against the estate). When, however, a disputed factual issue decided on the summary judgment motion is presented to a jury for a full trial on the merits, the denial of summary judgment is no longer appealable. See Ortiz v. Jordan, 562 U.S. 180 (2011). Instead, the issue can be reviewed only upon a properly filed Rule 50 motion. See id.; see, e.g., S&P Brake Supply, Inc. v. STEMCO LP, 2016 MT 324, ¶25, ¶¶35-39, 385 Mont. 488, 385 P.3d 567 (because claim on which summary judgment was denied was permitted to go to jury, Court reviews denial of motion for judgment as a matter of law rather than underlying denial of summary judgment). Indeed, once an issue is presented to a jury for a trial on the merits, it would be a “pointless academic exercise” to review the denial of summary judgment on that same issue. See Lum v. City & County of Honolulu, 963 F.2d 1167, 1170 (9th Cir. 1992).

The rule set forth in Ortiz v. Jordan does not apply when the issue presented at the summary judgment stage is a purely legal issue rather than a factual issue to be addressed by the jury. Thus most courts have held that the denial of summary judgment on a purely legal issue is appealable after a full trial on the merits. See American Builders Ins. Co. v. Southern-Owners Ins. Co., 56 F.4th 938, 950-51 & n.2 (11th Cir. 2023) (collecting cases); see, e.g., Pavon v. Swift Transp. Co., Inc., 192 F.3d 902, 906-07 (9th Cir. 1999) (denial of summary judgment on issue of

claim preclusion was reviewable because it “was not a disputed factual issue that went to the jury, but was a ruling by the district court on an issue of law”).

In this case, the issue of whether the emotional distress claim was inextricably intertwined and based upon the termination was not a purely legal issue. It was a disputed factual issue that was presented to the jury. For example, the jury instructions and verdict sheet made clear that the emotional distress had to be separate from the termination and Winsor was seeking emotional distress damages only for events that occurred prior to the termination. Counsel for both parties made clear to the jury that emotional distress damages arising out of the termination were not permitted. In returning its verdict, the jury concluded that the emotional distress was inflicted prior to the termination and did not arise out of the termination.

For these reasons, if CSI believed there was not sufficient evidence submitted to the jury of emotional distress separate from the termination, it should have made this argument in a Rule 50 motion. Because CSI failed to do so, this issue is not reviewable on appeal.

II. Even if CSI's argument were preserved, the District Court properly denied CSI's motions for summary judgment and for judgment as a matter of law because, viewing the evidence in the light most favorable to Winsor and drawing all reasonable inferences in his favor, CSI did not show a complete absence of any emotional distress that was not completely and inextricably intertwined with and based on his termination.

Winsor's emotional distress claim was not precluded by the WDEA. The WDEA preclusion provisions bar only those tort claims that are completely and inextricably intertwined with and based on the termination. Winsor presented ample evidence of emotional distress that did not arise from his termination and was unrelated to the termination.

The WDEA, with certain exceptions not applicable here, "provides the exclusive remedy for a wrongful discharge from employment." Mont. Code Ann. § 39-2-902. Similarly, "no claim for discharge may arise from tort or express or implied contract." Mont. Code Ann. §39-2-913. Although the WDEA provides for lost wages, it does not permit damages for "pain and suffering, emotional distress, [or] compensatory damages." Mont. Code Ann. §39-2-905(4).

Given these provisions, it is manifestly clear that an employee cannot circumvent the WDEA by asserting a tort theory to challenge a termination or claim damages arising from a termination. On the other hand, the WDEA "does not bar all tort or contract claims arising in the employment context. See Kulm v.

Mont. State Univ.-Bozeman, 295 Mont. 328, 331, 948 P.2d 243, 245 (1997); see also Beasley v. Semitool, Inc., 258 Mont. 258, 261, 853 P.2d 84, 86 (1993); Kneeland v. Luzenac Am., Inc., 1998 MT 136, ¶ 27, 289 Mont. 201, 961 P.2d 725 (WDEA bars only those tort and contract claims which are “for discharge”). To determine whether a tort claim is precluded, this Court must decide whether the tort claim is both “completely and inextricably intertwined with” and “based upon” the termination. See Kulm at 333; Beasley at 263. Thus, the significant question is whether the tort claim could have been brought in the absence of the termination. See Kulm at 333.

For example, an employee may not pursue claims of fraud and negligent misrepresentation based upon an employer’s alleged breach of its promise of continued employment. See Kulm, 295 Mont. 328. Such a claim is based upon the termination and an improper attempt to circumvent the WDEA. Similarly, an employee may not bring a claim for emotional distress damages based upon the same facts that caused a constructive discharge. See Dagel v. City of Great Falls, 250 Mont. 224, 819 P.2d 186 (1991). Such a claim is essentially based upon the termination itself. Likewise, an employee may not bring a defamation or negligence claim related to an employer’s handling of an investigation when the resulting damages stem from his termination. See Daniels v. YRC Inc., 2013 U.S.

Dist. LEXIS 15732, at *8 (D. Mont. Feb. 5, 2013). CSI also cites Eaton v. Mont. Silversmiths, 2020 U.S. Dist. LEXIS 250866 (D. Mont. Aug. 3, 2020) as an example of a claim being barred by WDEA exclusivity. That decision, however was recently reversed. See Eaton v. Mont. Silversmiths, No. 22-35480 (9th Cir. Oct. 31, 2023) (claim that employee was discouraged from taking FMLA leave not inextricably intertwined with WDEA claim).

On the other hand, an employee fired for alleged misconduct was permitted to assert tort claims that her employer inflicted emotional distress by misrepresenting the nature of a meeting to discuss the allegations against her, which led to her to be criminally prosecuted. See Klein v. State, 2008 MT 189, ¶¶ 3, 12, 24, 39, 343 Mont. 520, 185 P.3d 986. Even though these tort claims arose out of the employer’s investigation that led to her termination, they were “wholly independent from any rights or remedies related to her discharge.” Id. at ¶ 39. The employee was not seeking damages from the termination which resulted from the investigation but from the emotional distress resulting from the employer’s conduct of the investigation, which would have occurred regardless of the ultimate termination.

Similarly, an employee may pursue contract claims challenging an employer’s failure to provide certain benefits, even if he later resigns because of

the employer's failure to provide such benefits. See Beasley, 258 Mont. 258. The contract claims are independent of, and occurred prior to, his resignation. See id.

The United States District Court for the District of Montana has held that an employee is not precluded from bringing a claim alleging her former employer wrongly filed a report to the Board of Nursing, even though the report contained the same allegations that led to her termination. See Ruzicka v. First Healthcare Corp., 35 F.Supp.2d 809 (D. Mont. 1997). That Court later made clear that a Montana employee may bring a claim for intentional infliction of emotional distress against an employer as long as the claim "relates to events occurring before her termination." See Wilhite v. United States, 2020 WL 5105434 (D. Mont. Aug. 31, 2020) (adopting magistrate's findings and recommendations).

In this case, there was ample evidence of emotional distress based on events that preceded the termination, and which would have occurred whether or not he was later terminated. Moreover, this emotional distress was separate and apart from, and unrelated to, the reasons for the termination, or the termination itself.

Preliminarily, Winsor was terminated for only one reason: the alleged inaccuracies in his time tracking reports for a period of time in November and December, 2019. See Exhibit 61 (termination letter). This court has recently made clear that in WDEA cases, an employer may defend a termination solely for the

reasons stated in the termination letter. See Smith v. Charter Communications, Inc., 2023 MT 92, ¶¶ 8-24. Thus, any emotional distress stemming from events other than the termination or from the alleged time tracking discrepancies has nothing to do with the termination, and is certainly not completely and inextricably intertwined with and based upon the termination.

In both his summary judgment response and at trial, Winsor presented ample evidence of actions taken by Dietrich that caused him severe emotional distress that did not arise from the termination and had nothing to do with his alleged time tracking discrepancies. For example, Dietrich falsely accused him of drinking alcohol since attending detox. Winsor's alcohol use had nothing to do with his termination, and was not even mentioned in the discharge letter. Dietrich falsely accused Winsor of acting aggressively in his confrontation with Oestreicher. This confrontation had nothing to do with the termination, and was not even mentioned in the termination letter. Indeed, the termination letter said nothing about Winsor allegedly acting aggressively with anyone. Dietrich falsely accused Winsor of being insubordinate by asking his co-counsel to review his work. The termination letter did not mention this incident or even mention any issues with alleged insubordination. Dietrich became angry and abusive when Winsor urged her that the agency should comply with the law and ethical rules.

Dietrich repeatedly belittled and ridiculed Winsor, scrutinized his work in a way that she did not with other attorneys and treated him aggressively. None of these things had anything to do with the termination or the reasons for the termination.

Similarly, Dietrich threatened and intimidated Winsor at the July 2019 meeting, causing him severe emotional distress. At this meeting, Winsor was presented with the work agreement which contained the time tracking requirements which later gave rise to the supposed discrepancies which then caused his termination. Even if Dietrich's conduct occurred during a meeting that was part of a chain of events that ultimately ended in his termination, that does not mean that the emotional distress resulting therefrom is precluded by the WDEA. The emotional distress Winsor suffered as a result of this meeting did not depend on the termination, and would have occurred regardless whether he was ultimately terminated. In fact, even when an employer causes emotional distress while investigating employee wrongdoing that leads to termination, that does not mean that such distress is precluded by the WDEA. See Klein v. State, 2008 MT 189, ¶ 39.

CSI notes that in pre-trial submissions, Winsor wrote that Dietrich's abusive behavior "culminated" in his termination. To say Dietrich's abuse "culminated" in termination is not the same as saying the abuse was completely and inextricably

intertwined with and based upon the termination. Otherwise an employer would be free to abuse and mistreat an employee, but would be able to escape any tort liability as long as they eventually fired the employee. This is not the law.

Not only was there ample evidence of emotional distress not related to or arising from the termination, but Winsor clearly separated this distress from any emotional distress that may have arisen from the termination. Indeed, counsel for Winsor prefaced his questions regarding emotional distress with the following:

Mike, in just a minute, we'll talk about your termination and the reasons for that. Before I get there though, I wanted to follow up on the emotional distress component. Now, you've been testifying about various interactions with Michelle Dietrich and how they affected you. I wanted to ask from the period when she became your supervisor, June 1st 2019 up until you were terminated in February 2020, did you ever experience[] any kind of physical signs of emotional distress resulting from how she treated you? Tr. at 368-69.

CSI also notes that Winsor testified in connection with the WDEA claim that his emotional distress impaired his ability to mitigate his damages under the WDEA. The WDEA exclusivity provision, however, does not bar a tort claim merely because it may be related to an issue regarding WDEA damages. Instead, a tort claim is barred only if it is completely and inextricably intertwined with and based upon the termination itself, and is thus an improper attempt to circumvent the WDEA exclusivity provisions.

For these reasons, there was ample evidence of emotional distress that occurred before the termination and would have occurred regardless whether Winsor was eventually terminated. Therefore the emotional distress claim was not barred by the WDEA. Indeed, this emotional distress was completely unrelated to the termination or the alleged reasons for the termination.

CONCLUSION

For the reasons stated herein, Mike Winsor respectfully requests that the judgment of the District Court be affirmed.

Dated this 27th day of November, 2023

/s/ Philip A. Hohenlohe
PHILIP A. HOHENLOHE
Attorney for Plaintiff/Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(e) of the Montana Rules of Appellate Procedure, I certify that this brief is proportionately spaced using 14-point Times New Roman font; is double-spaced, and contains 9,844 words, calculated by WordPerfect's word count, excluding the brief's cover, table of contents, table of authorities, certificate of service, and certificate of compliance.

Dated this 27th day of November, 2023

/s/ Philip A. Hohenlohe
PHILIP A. HOHENLOHE

CERTIFICATE OF SERVICE

I, Philip A. Hohenlohe, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 11-27-2023:

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