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70529-6-I

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

BRIAN LONG,
Appellant

v.

BRUSCO TUG & BARGE, INC., a Washington Corporation;
BO BRUSCO and his marital community,
Respondents

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Jury misconduct poisoned the jury's verdict. Juror 12 inserted outside law and safety statistics stating falsely and authoritatively that Long's hiring of Morgan,[1] a deckhand with a prosthetic leg, violated all of the Coast Guard and maritime laws on the books, and statistically created safety risks. It destroyed Long's credibility as a manager. The misconduct also fabricated a non-retaliatory reason to justify BTB's apparent anger at Long, justifying statements like"[Bo] is so pissed about the lawsuit [Morgan's EEOC Charge] from your recent hire," Ex. 47, and "Bo does definitely not want to use the guy with the prosthetic leg at all." Ex. 43. It would be hard to blame BTB's adverse actions if Long violated laws and put crew members' safety at risk. This misconduct impacted the verdict.

Prejudicial error denied Long the right to impeach J.C. Anderson, Long's relief captain, with a prior recorded statement. Anderson substantially changed his story at trial. The recording reflects that Anderson told Long that he could serve as a backup captain and was qualified and authorized to do so by management. Anderson denied this at trial without consequences. Hearing the recorded statement would have led the jury to conclude that Anderson's trial testimony was not truthful.

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[1] The truth is that Morgan was an experienced deckhand, and that he performed well at BTB without any limitations according to all trial witnesses.

Prejudicial error also excluded the Westwood Notes despite their admissibility under ER 904.This crucial evidence proves that acting Port Manager John Juker knew more than 24 hours in advance that the Sevilla's arrival was delayed eight hours, but failed to notify Long or relief captain Anderson. If Juker had informed Long of the delay, Long could have determined if Anderson was available for the new time. He also could have traveled to the POE to complete the assist himself. Had Jucker given proper notice to Long, the pretext for removing Long from the POE would not have existed. The jury never saw this evidence.

The court also erred by excluding comparator evidence, powerful circumstantial evidence of retaliation. It showed how BTB treated other employees who risked or actually caused delay for ship jobs. Long had a spotless performance record with no discipline. BTB's policy was first a verbal warning for a missed ship job but Long, who opposed discrimination, was removed and discharged despite having no prior discipline. Exclusion of this evidence further prevented the jury from hearing how other captains who engaged in far worse conduct were treated far better than Long, the only one who reported discrimination.

Each issue standing alone creates reversible error. Together these issues compound the prejudice. Mr. Long deserves a new trial.

II. ARGUMENT

A. The Trial Court Abused its Discretion – Severe Jury Misconduct Impacted the Verdict.

When reviewing the trial court's decision denying Long's motion for a new trial, the focus must be on whether the jury misconduct denied Long a fair trial. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.,* 140 Wn.2d 517, 537, 998 P.2d 856 (2000) ("*ALCOA*"); *see also* Const. art. 1 § 21 ("The right of trial by jury shall remain inviolate."). Although the standard of review for an order denying a motion for a new trial is an abuse of discretion, in the new trial context the criterion for testing that abuse of discretion is, "has such a feeling of prejudice been engendered or located in the minds of the jury **as to prevent a litigant from having a fair trial**?" *ALCOA*, 140 Wn.2d at 537. (emphasis added).

In cases involving the improper use of extrinsic evidence by a jury, Washington courts are unequivocal that:

> A new trial **must** be granted unless "it can be concluded **beyond a reasonable** doubt that extrinsic evidence did not contribute to the verdict."

Richards v. Overlake Hospital Medical Center 59 Wn. App. 266, 273, 796 P.2d 737 (1990) (quoting *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989)). The "beyond a reasonable doubt" standard is not simply a "talismanic incantation" that courts must recite when determining whether

jury misconduct warrants a new trial. It is the controlling legal standard that must be applied to ensure a fair trial. *See Gardner v. Malone*, 60 Wn.2d 836, 847, 376 P.2d 651 (1962) (juror misconduct established reasonable doubt that plaintiff received a fair trial).

Here, the trial court failed to apply the "beyond a reasonable doubt" standard or even articulate any legal standard. BTB's rhetoric is false when it claims that the trial court had "no doubt" that jury misconduct did not affect the verdict. The court simply did not conclude "beyond a reasonable doubt" that misconduct did not affect the verdict anywhere in the decision. It therefore failed to apply the standard which protects Long's right to a fair trial.

The trial court failed to recognize that Juror 12's misconduct severely prejudiced Long by undermining several elements that Long had the burden to prove for his retaliation claim. When the trial court denied Long's motion for a new trial, it deprived him of a fair trial.

B. Juror 12 Acted As an Expert, Providing Outside Safety Statistics, Maritime Laws, and Coast Guard Regulations Not Admitted at Trial.

"[W]here a juror supplies the jury with evidence which was not admitted at trial, jury misconduct results." *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 137, 750 P.2d 1257 (1988). "Jury misconduct also results where a juror provides the jury with erroneous statements of law." *Id.* "In

determining whether a juror's comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial." *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 199 n.3, 75 P.3d 944 (2003).

Four **unrebutted** juror declarations detail Juror 12's misconduct and prove that he acted as an expert on safety statistics, maritime laws and Coast Guard regulations. The unrebutted evidence of juror misconduct includes:

- On Wednesday, May 8, 2013, Juror 12 entered the jury room with outside notes on paper not provided by the trial court. CP 1781 ¶5; CP 1788 ¶ 2; CP 1791 ¶3;
- Juror 12 gave a 20-35 minute prepared speech from those outside notes organized and prepared the night before. CP 1781 ¶5; CP 1785 ¶5-6; CP 1788 ¶2-3; CP 1791 ¶3.
- Juror 12 "presented himself as an expert in safety as well naval and maritime laws." CP 1784 ¶9.
- Juror 12 "cited statistics about the risks of someone with a prosthetic leg and how much more likely that person could get hurt or have it lead to the injuries of others." CP 1788 ¶4.
- During his speech, Juror 12 stated "no laws," including maritime laws or Coast Guard regulations, would allow a deckhand with a prosthetic leg, like Anthony Morgan, to work on a boat. CP 1781 ¶7; CP 1784 ¶7; CP 1788 ¶4; CP 1791 ¶4.
- Another Juror, Robert P., agreed with Juror 12 stating, "yeah, that breaks Coast Guard law." CP 1781 ¶8; CP 1791 ¶5.

- Juror 12 stated "these laws simply do not allow people to crew boats and act as Able Bodied Seamen with prosthetics." CP 1788 ¶5.

BTB failed to provide any counter declarations refuting these facts. As such, they must be taken as true. *State v. Parker*, 25 Wash. 405, 413, 65 P. 776 (1901). Moreover, BTB admits that maritime laws and Coast Guard regulations were not at issue in the case. *Adkins* held that a new trial was proper where a juror injected "legal premises **not applicable to the facts of this case**... which could well have confused or misled the jury." 110 Wn.2d at138 (emphasis added).

Juror misconduct that inserts outside **law** into the jury room has always resulted in a new trial under Washington law and in every reported case Appellant has found on the issue. Moreover, jurors cannot inject "specialized knowledge," like safety statistics, into a case. *See Breckenridge*, 150 Wn.2d at 199 n. 3. Juror 12 inserted specialized knowledge and acted as an expert, providing outside law and extrinsic safety statistics to undermine Long's decision to hire Morgan and allow him to crew a tugboat. This outside evidence and law was not subject to cross examination and ignored the court's instructions. It unfairly provided BTB with a legitimate reason (not one in evidence) to take adverse action against Long and actually made the decision to hire Morgan look illegal and dangerous. It undermined Long's claim that BTB retaliated because

Long opposed discrimination. As a matter of law, this is juror misconduct impacting the verdict.

1. Juror 12 Usurped the Role of the Trial Judge.

Contrary to the trial court's ruling, Juror 12's false and extraneous statements of law were not simply "personal belief[s], based on his experience," CP 1949, but rather quasi-expert legal opinions which clearly constitute misconduct. *See State v. Clausing*, 147 Wn.2d 620, 628, 56 P.3d 550 (2002) ("For an expert to testify to the jury on the law usurps the role of the trial judge."); *see also* Const. art. 4 § 16 ("Judges... shall declare the law."). Juror 12's application of outside law does not reflect his personal life experience, but rather demonstrates that he usurped the role of the trial judge and tainted the jury. Where the jury is exposed to outside law, the courts have uniformly found it constitutes misconduct that affected the verdict. *Adkins,* 110 Wn.2d at 138; *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 684, 143 P. 146 (1914); *see also Clausing*, 147 Wn.2d at 628.

BTB did not, and cannot cite to a single case where jurors injected outside **law** into the case that did not result in misconduct that warranted a new trial. *Adkins*, 110 Wn.2d at 138; *Bouton-Perkins* 81 Wash. At 682. In *Adkins*, the court held that a juror "injecting legal premises not applicable

to the facts of [the] case" tainted the jury and was misconduct that warranted a new trial. 110 Wn.2d at 138.

Injecting outside law is always misconduct that warrants reversing a verdict. In *Clausing*, the Supreme Court held that the professional opinion of a pharmacist regarding the validity of a prescription, based on his experience, constituted an improper legal opinion. 147 Wn.2d at 628-30. While *Clausing* did not involve jury misconduct, the court still reversed the verdict despite the trial court's limiting instruction to the jury that the pharmacist's testimony should not have been considered a legal opinion. *Id.* at 624-25. Here, no curative instruction was issued, nor was one even possible.

It is undisputed that extrinsic and unsupported law was inserted into the case by Juror 12. Juror 12's 20 to 35 minute speech regarding maritime law and Coast Guard regulations was in truth false testimony about statistical dangers and the illegality of letting Morgan crew a tugboat. This stands in stark contrast to the misconduct alleged in *Breckenridge* and *Richards*, two cases relied upon by BTB. *Breckenridge*, 150 Wn.2d at 201-02; *Richards*, 59 Wn. App. at 273-74. In *Breckenridge*, while several jurors allegedly spoke about their personal experiences with migraine headaches to evaluate evidence presented at trial, **no juror injected outside law or outside statistics into the case.** *Breckenridge*,

150 Wn.2d at 201-02. Similarly, in *Richards*, the court found it was not misconduct for a juror with medical training to interpret evidence submitted at trial. *Richards*, 59 Wn. App. at 273-74. However, as in *Breckenridge*, no juror in *Richards* injected outside **law** or outside statistics into the jury deliberations as Juror 12 did here. *Id.* By presenting on maritime laws, Coast Guard regulations and safety statistics that were not in evidence, Juror 12 went well beyond his personal life experiences. If Juror 12 was believed, Long would be a manager who ignored maritime law and Coast Guard regulations and jeopardized the safety of his crew.

2. Juror 12's Statements Alone Constitute Misconduct.

"The injection of information by a juror to fellow jurors, *which is outside the recorded evidence of the trial* and not subject to the protections and limitations of open court proceedings, constitutes jury misconduct." *Richards*, 59 Wn. App. At 270. Extrinsic evidence is "information that is outside all the evidence admitted at trial, either orally or by document." *Richards*, 59 Wn. App. At 270. Although it appears Juror 12 consulted external sources here, he did not have to do so to have committed misconduct. *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *see also Loeffelholz v. C.L.E.A.N.*, 119 Wn.App. 665, 683 n.36, 82 P.3d 1199 (2004).

BTB fails to address key cases like *Halverson*, which specifically held that a juror's mere comments relating to airline pilots' earnings outside of the record at trial were misconduct. 82 Wn.2d at 752. *Loeffelholz*, also not addressed by BTB, analyzed *Halverson* and rejected the argument that outside facts or law must be based on external sources to constitute juror misconduct. 119 Wn.App. at 683 n.36 (noting that the Washington Supreme Court cited *Halverson* with approval in *Breckenridge*, 150 Wn.2d at 203). The *Loeffelholz* court held that extrinsic statements of fact do not necessarily inhere in the verdict just because outside sources were not consulted. *Id.* at 683.

Thus, whether Juror 12 consulted outside sources before he injected extrinsic statistics and law into jury deliberations is not dispositive. Juror 12 injected extrinsic law and facts not admitted at trial – that is misconduct.

C. Juror 12's Misconduct Prejudiced Long.

1. Misconduct Prejudiced Long's Ability to Prove Motive.

BTB does not even address Long's argument that Juror 12's misconduct severely prejudiced his ability to prove BTB's retaliatory motive. However, Long presented substantial evidence at trial that CEO Brusco and Manager Kevin Campbell were extremely angry about Long hiring someone with a prosthetic leg and about Morgan's lawsuit that

followed. Ex. 47; RP 489-90; 523-26; 1071-73; 1375. Long was a fourteen year employee with no disciplinary history or issues with management until he hired Morgan and opposed discrimination. RP 1357-58; 1660; 1971; 2107; 2158-61. The jury heard evidence that BTB was angry at Long for his hiring of Morgan and because he opposed Morgan's termination.

However, if hiring Morgan violated all maritime and Coast Guard laws and subjected his crew to physical harm, as Juror 12 erroneously stated, then BTB's anger and later adverse actions against Long would have been justified. Long's theory that BTB's adverse actions were motivated by retaliatory animus are completely undermined if the jury believed that Long's actions violated all laws and statistically jeopardized Morgan and the crew's safety. The extrinsic facts and law, not remotely supported by the record, created an insurmountable, legitimate non-retaliatory reason for firing Long. Indeed, Defense counsel planted the seed, over objection from Long's counsel, when she falsely asserted that Coast Guard regulations would not allow Morgan on a boat during her opening statement. RP at 387-88.

Moreover, CEO Brusco could not hide his anger at Long over Morgan's hiring, specifically testifying that he began to question Long's judgment as a manager at the POE after Long hired Morgan:

> Q. Okay, Isn't it true, sir, that once Mr. Morgan had a prosthetic leg and you learned about it **you began to question Mr. Long's judgment?**
>
> A. **Well, certainly I would question his judgment**.
>
> Q. You got pretty angry when I asked you about this at your deposition, didn't you?
>
> A. **Yeah. And it still bothers me, yes**.

RP at 1375.

> Q. Is it your testimony that once you learned that [Mr. Morgan] needed to take Percocet – that he took Percocet as needed for a prosthetic leg, you – that was enough, it was all you needed to know about whether or not he should be a deckhand for your company?
> ....
> A. **At that point in time I questioned the fact that that guy right over there was hired. I ask my manager to take care of that company, to take care of me, to take care of those boats, and take care of the crews on the boats, and he would subject our company to something like that.**
>
> Q. And were you pointing to Mr. Long?
>
> A. That's exactly who I'm pointing at.

RP at 1388. CEO and Defendant Brusco's anger was quite apparent. By injecting outside law and extrinsic evidence purporting to show illegality and safety hazards to BTB, Juror 12 concocted a justification for BTB's overt anger at Long that undermined Long's burden of proof.

The trial court completely failed to consider the obvious prejudicial impact the jury's potential belief that Long violated maritime

laws, Coast Guard regulations, and safety statistics had on his case. Juror 12's extrinsic law and safety statistics made BTB's anger and adverse actions appear legitimate. The impact of this misconduct undoubtedly did affect the verdict and it was an abuse of discretion to not grant a new trial.

2. Misconduct Prejudiced Long's Reasonable Belief.

The burden of proof in retaliation cases remains always with the Plaintiff. *Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 93, 821 P.2d 34 (1991). Part of Long's burden was to prove he opposed conduct that he reasonably believed constituted discrimination against Morgan. BTB never conceded to the jury that Long's belief that BTB discriminated against Morgan was reasonable. Indeed, defense counsel emphasized Long's burden of proof in closing argument, stating, "Mr. Long has to prove by a preponderance of the evidence three elements. **He has to prove that the plaintiff opposed what he reasonably believed to be discrimination**." RP at 2328-29.

If the jury believed that Long knew or should have known that hiring Morgan was unsafe and illegal, then it would not find it credible for Long to reasonably believe that BTB's opposition to Morgan's employment was discriminatory. Under that scenario, Long should have known better. Juror 12's injection of outside law and safety statistics into the case severely prejudiced Long's credibility in general. It certainly

crippled his ability to prove he had a reasonable belief that BTB discriminated against Morgan, an element he had to prove at trial. The trial court abused its discretion by not considering the significant impact this had on Long's ability to prove he reasonably believed he was opposing discrimination when he opposed Morgan's firing.

D. The Court Improperly Excluded Impeachment Evidence.

The court erred by precluding Long from impeaching witness J.C. Anderson. Long spoke to Anderson on December 18, and asked if he could provide coverage at the POE for a ship assist at 4:30 a.m. on December 21. RP 680-82; 1092-97. Anderson told Long he could cover the December 21 job at 4:30 a.m. if a captain was needed. *Id.*; RP 2225-26; Ex. 257A.

Prior to trial, Anderson confirmed in a voluntary taped statement that he had told Long that he was qualified to cover a second tug job if something came up in the POE while Long was on vacation and had agreed to do so before Long left. Exh. 257A . Anderson also confirmed that he had spoken with either Tom Lehto or Kevin Campbell about having permission to cover those jobs.[2] Exh. 257A. During trial Anderson

[2] It is clear from both the transcript and the recording of Anderson's voluntary taped statement that Anderson was discussing his qualifications for jobs at the Port of Everett and not his qualifications as an ocean captain as BTB erroneously claims. Exh. 257A. The context of the conversation was clearly relating to his

completely changed his story claiming he never said he was qualified to cover the POE, and never agreed to cover for Long. RP 677; 691.

Anderson's tone at trial was also hostile, a substantial shift from his amicable tone in his recorded pretrial taped statement, creating further basis for impeachment of this crucial testimony. Anderson was Long's relief captain. Proof that he agreed to cover the job and was qualified was an essential part of Long's case.

As conceded by BTB, Washington's test for determining whether a witness' prior out of court statement is inconsistent:

> Is to be determined not by the individual words or phrases alone, **but by the whole impression of what has been said or done.** On a comparison of the two utterances are they in effect inconsistent? Do the two expressions appear to have been produced by inconsistent beliefs?

5A Wash. Prac., Evidence Law and Practice § 613.5 (5th ed.)(citing *Sterling v. Radford,* 126 Wash. 372 (1923)) (emphasis added).

Anderson testified at trial that he was "trying to get those folks off the phone" in reference to his voluntary taped statement, yet his tone in the recording is actually very agreeable and cooperative. RP 673; Ex. 257A. Thus, the whole manner and tone of the recording, and its voluntary nature, was impeaching but improperly kept from the jury. *See Sterling*,

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ability to cover jobs at the POE, and while the fact that he was an ocean captain was briefly mentioned, it is clear the entire statement related to jobs at the POE.

126 Wash. at 375.The content and tone of the statement is dramatically different than Anderson's trial testimony.

Moreover, when a party calls an adverse witness, he may interrogate the witness by leading questions. ER 611(c). Here, the trial court's only basis for preventing Long from impeaching Anderson was its opinion that the questions directed at this BTB employee were too leading and therefore not "effective." RP 694-95. This, however, is not a basis to prevent a party from using a witness's prior statement to impeach. It goes to the weight of the evidence, not whether it may be offered.

1. The Error Was Prejudicial.

If the jury believed that Anderson was lying, it would have to conclude that BTB was lying too. In his voluntary taped statement, Anderson confirmed he was available and qualified to be Long's relief captain for Long's December 2009 vacation, rebutting BTB's argument that Long "rolled the dice" and risked delaying or missing a ship assist. If the jury believed that Long had responsibly arranged for coverage for the then scheduled 4:30 a.m. ship assist, then it would not believe BTB's contention that Long had impermissibly risked missing a ship job. Since Long was deprived of the opportunity to impeach Anderson's conflicting testimony, the jury was left with the erroneous belief that Long took a gamble by leaving the POE without a backup, justifying his termination.

Moreover, if the jury believed that Anderson changed his story and lied to protect BTB, it would significantly harm BTB's credibility. However, Anderson was allowed to back his employer without consequence and contradict Long's testimony, undermining Long's credibility.

2. Error Was Preserved.

Plaintiff's counsel twice attempted to play witness Anderson's impeaching taped statement during his examination and was precluded from doing so by the trial court. RP 674; 686. "The substance of an offer of proof need not be made known in detail." *In re Detention of McGary*, 175 Wn.App. 328, 337, 306 P.3d 1005 (2013). "Rather, the substance of the evidence may be made apparent from the questions asked or **from the context in which they were asked**." *Id.* (emphasis added); *see also* ER 103(a)(2).

Here, Long's counsel clearly stated that he intended to use the prior inconsistent statement to impeach Anderson. RP 686. The trial court was reviewing the actual transcript of the impeaching taped statement during the direct examination of Anderson. RP 666-67. As such, the substance of the evidence Long was attempting to offer was apparent from the context in which the questions were asked. The error was properly preserved during the examination, in addition to the offer of proof.

E. Exclusion of the Westwood Notes Was an Abuse of Discretion.

The trial court's exclusion of the Westwood Notes substantially prejudiced Long, preventing a fair trial. The Notes are objective facts (not opinions) containing notations showing that acting Port Manager John Juker learned at 10:24 a.m. on December 20 that the Sevilla had been delayed by eight hours. CP 2047; Ex. 66 at line 93; Ex. 70 at line 117. Juker, however, did not inform Long or Anderson of the substantial delay until December 21 at 10:49, shortly before the new arrival time. RP 1106-07. The Notes prove that Juker had direct contact with the shipping agent while Long was on vacation. He knew that the arrival time changed and took no action. Had Juker done his job and told Long on December 20 at 10:24 a.m. that the ship had been delayed by eight hours, Long could have arranged for a back-up captain for the correct time (if Anderson had a dentist appointment) or even driven back to Everett to cover if needed. RP 2225-26. The Notes prove that Juker, not Long, caused the lack of coverage by failing to notify Long or the scheduled backup captain of the delay. Prompt notice from Juker would have avoided any issues entirely.

BTB used Long's alleged failure to provide coverage for a second tug as a supposed legitimate, non-retaliatory reason to transfer/terminate him. RP 1344-49; 1968-69. The jury, however, was prevented from seeing the Westwood Notes – powerful evidence that directly rebutted BTB's

claim that Long failed to provide coverage since he provided coverage and only Juker knew the times had changed. The Notes completely undermine BTB's pretext and their exclusion was severely prejudicial. Moreover, the Notes also impeach Juker's credibility, who denied any knowledge of the time change. RP 2076. Without the Notes, Juker could just deny he had notice (which he did) and unjustifiably blame Long. Juker never had to face any examination with the Notes published to the jury.

The trial court denied Long the ability to use the only neutral evidence on this subject. Long could not admit it, cross examine Juker with it, publish it to the jury, or show it to the jury during closing argument. This exclusion was devastating to Long, who was precluded from showing the jury the very document that proved the veracity of his testimony and disprove BTB's pretext.

1. The Westwood Notes Were Automatically Admissible.

The Westwood Notes were automatically admissible when BTB withdrew its objections based on authenticity and hearsay at trial – **the only objections it had timely raised to Long's ER 904 submissions**. CP 1230; RP 1736-39. "ER 904 is ... clear that the **automatic admissibility** provision applies when the opposing party does not properly object to the evidence." *Hendrickson v. King County*, 101 Wn.App. 258, 268, 2 P.3d 1006 (2000) (emphasis added). Here, BTB waived any objection to

foundation at trial by not timely objecting on that basis to Plaintiff's ER 904 disclosure, and wholly failed to object to relevance at any point in trial. *Id.*; *see also Miller v. Arctic Alaska Fisheries, Corp.*, 133 Wn.2d 250, 260, 944 P.2d 1005 (1997).

Hendrickson makes clear that relevance and foundation are separate objections and that foundation objections must be specifically set forth pursuant to ER 904, before trial:

> As ER 904 reserves relevance objections for trial, this objection had no significance at this point. And as ER 904 requires any other objections to be specifically set forth, the foundation objections also did not comply with ER 904.

Id. at 268.

BTB failed to object to foundation within the 14 day time frame of ER 904 and never objected to relevance at all. *See* ER 904(c). Thus, the Notes were automatically admissible when the timely objections were withdrawn. The Notes are clearly relevant going to the heart of the case, but BTB never made even the frivolous objection to relevance, so the issue was not reached by the trial court.

BTB's reliance on *Lutz Tile, Inc. v. Krech* is misplaced. 136 Wn.App. 899, 151 P.3d 219 (2007). In *Lutz*, the court excluded an expert opinion contained in documents under ER 904 holding that "documents that contain subjective facts, opinions, and conclusions are not properly

admitted under ER 904." *Id.* at 904. However, *Lutz* emphasized that ER 904 is "designed to expedite the admission of documentary evidence that is objective" and applies to "documents containing facts." *Id* at 905. Here, the Westwood Notes contain only objective facts, not a single opinion. Thus, *Lutz* actually supports Long's position.

Moreover, the fact that the Notes are handwritten instead of typewritten has no bearing on whether the content of the record reflects subjective opinion or objective facts. The Westwood Notes are objective facts relating to when Juker received notice that the Sevilla was delayed. No subjective facts, opinions, or conclusions exist in the Notes.

The Court erred in excluding the Westwood Notes, which were automatically admissible, and highly relevant to Long's case.

F. The Court Erred By Excluding Comparator Evidence.

It was manifestly unreasonable for the trial court to exclude Long's comparator evidence, especially here where Long was a fourteen year employee with no discipline prior to his hiring of Morgan. Much of BTB's defense at trial was that Long's alleged misconduct was so egregious that it warranted immediate removal from the POE because it risked delaying a ship – supposedly a cardinal sin that BTB just could not tolerate. Indeed, BBT falsely claimed that if a ship is delayed due to BTB's failure to provide timely tug coverage, BTB risks losing business

and can supposedly be fined up to $250,000. RP 1345; 1483-84. However, the trial court prevented Long from offering evidence related to several employees who, (1) created the exact same risk of missing or delaying a ship job but were not fired or transferred and, (2) engaged in worse conduct but were treated more favorably than Long.

Without the context of how BTB actually treated other employees, BTB was allowed to apply rules to Long in a vacuum, untested by how those rules were applied to employees who did not complain about discrimination. Without the context of how rules were really applied at BTB, it could justify severe discipline for breaking a rule while hiding its failure to similarly discipline other employees for the exact same or worse conduct. Actions speak louder than words, and the jury never heard how BTB applied these rules to several employees who did not oppose discrimination, but missed or delayed jobs.

1. The Comparator Evidence is Relevant.

In retaliation cases, plaintiffs may offer evidence that they were treated worse than other similarly situated employees who did not engage in protected activity in order to prove the employer's proffered reasons for taking adverse actions were mere pretext. *See Johnson v. Dept. of Social & Health Servs.*, 80 Wn.App. 212, 227, 907 P.2d 1223 (1996). Different treatment of similarly situated employees constitutes circumstantial

evidence supporting a finding of retaliation. *Johnson*, 80 Wn.App. at 227; *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276, 1297 (9th Cir. 2001); *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 444-445, 191 P.3d 879 (2008). As BTB concedes, determining whether employees are similarly situated "is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees." *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1115 (9th Cir. 2011). "The ultimate question that is informed by the similarly situated analysis is whether there is a basis for inferring discriminatory motive." *Bowden v. Potter*, 308 F.Supp. 2d 1108, 1117 (N.D.Cal. 2004).

Here, BTB claimed that by risking the delay of a shipping assist at the POE, Long's conduct was so egregious that it warranted immediate removal from the POE. Yet the trial court tied Long's hands, preventing the admission of evidence relating to employees Craig Petit, Nick Bernert, and Corey Johnson, all of whom actually delayed or missed jobs but were not fired or transferred. Indeed, Long was precluded from presenting evidence that: (1) Bernert "missed a crew up which delayed a [s]hip run for 8 hours" due to drinking and criminal activity, but was later rehired by Kevin Campbell, CP 1997-98; (2) Johnson missed multiple jobs yet received progressive discipline and was not fired, CP 1537-42; 2026-31;

and, (3) Petit missed a job after supposedly being pulled over for drunk driving, but was given a "first step" verbal warning that reflected BTB's policies. CP 2007-2010. This exclusion substantially prejudiced Long from showing he was treated worse because he had hired Morgan and opposed his discriminatory termination.

These comparators risked delaying or missing a ship jobs – the exact same risk Long supposedly created. It does not matter that Long was a manager and Bernert, Johnson and Petit were deckhands because deckhands were needed to complete a ship assist; the risk was exactly the same. Indeed, Bernert's conduct, unlike Long's supposed conduct, actually resulted in an 8 hour delay in bringing in a ship. These comparators offer highly probative circumstantial evidence of retaliatory motive, evidence that the jury never heard.

2. Comparators Engaged in Much Worse Conduct.

The trial court also erred by excluding comparator evidence that demonstrated other employees who engaged in much **worse** conduct than Long were also treated more favorably. Indeed, Port Captain Joseph Bromly ultimately received a promotion to Manager Campbell's position from CEO Brusco despite physically assaulting co-workers, CP 2013-24, and Captain Mark Guinn was not immediately fired after Guinn subjected BTB to a criminal judgment and a seven figure civil fine for his illegal

actions. CP 1533-35; 2033-42; RP 261-63. Bromly and Guinn held positions similar to that of Long, and evidence that BTB treated them more favorably despite this egregious misconduct was highly relevant to proving BTB's retaliatory motive.

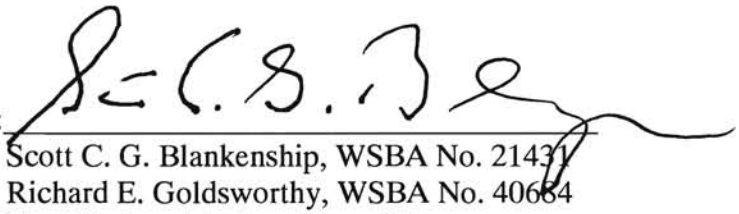
By excluding this highly probative comparator evidence, the trial court denied Long the ability to effectively rebut BTB's proffered reasons for his termination. Without seeing how BTB actually treated employees who did not engage in protected activity, the jury was left with only BTB's version of how it applied its rules. As such, Long was irreparably harmed and the court's error was prejudicial and not harmless.

III. CONCLUSION

For the foregoing reasons, Long should be granted a new trial. The trial court committed reversible error excluding highly relevant evidence that prejudiced Long. The jury misconduct in this case was extreme, involving outside statistics and law that under Washington law impacted the verdict and denied Long a fair trial.

DATED this 20th day of February, 2014.

THE BLANKENSHIP LAW FIRM, P.S.

By: 

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DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that, on the below date, I placed in the U.S. Mail a true copy of this document addressed to the following:

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