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**SUPREME COURT OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Petitioner,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF  
PILOTAGE COMMISSIONERS,

Respondent.

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**RESPONDENT'S ANSWER TO PETITION FOR REVIEW**

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## I. INTRODUCTION

The Washington State Board of Pilotage Commissioners is charged with issuing pilot licenses to trainees who, at the completion of their training program, can demonstrate to the satisfaction of the Board that they can “safely, efficiently, and consistently” pilot massive marine vessels “without supervision” on Puget Sound. Based on Captain Nelson’s poor performance in the Board’s training program, including an incident in which he nearly rammed the Pier 86 grain dock in Seattle, and after lengthy deliberations, the Board properly denied him a pilot’s license because he had not demonstrated the necessary skills and abilities to be a Puget Sound pilot.

Captain Nelson has unsuccessfully litigated the Board’s decision to deny him a license both in administrative and personal injury actions. The administrative appeals process was the first to affirm the Board’s decision. *See Nelson v. State*, No. 75559-5-I, 1 Wn. App. 2d 1039 (Dec. 11, 2017) (unpublished), *review denied*, 190 Wn.2d 1021 (2018). Captain Nelson also separately pursued a civil suit claiming he was denied a license because of his age. The trial court granted the Board summary judgment on that claim, which the Court of Appeals recently affirmed. *See Nelson v. State*, No. 68701-8-I, \_\_\_ Wn. App. 2d \_\_\_ (Oct. 28, 2019) (unpublished) (slip op.).

In affirming summary judgment in his personal injury appeal, the

Court of Appeals properly followed precedent and engaged in a highly fact-specific analysis when it determined that Captain Nelson had failed to present any direct or circumstantial evidence to support his claim of alleged age discrimination. Captain Nelson produced no evidence showing he was performing satisfactory work. He also failed to demonstrate that the Board's legitimate, non-discriminatory reason for denying him a license was pretext. The Court of Appeals' decision does not warrant review under RAP 13.4(b)(1) or (4), as it neither conflicts with a decision of this Court nor involves an issue of substantial public interest. Accordingly, this Court should deny review.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Did the Court of Appeals properly determine that Captain Nelson failed to present any direct evidence of age discrimination when none of the statements he points to reveal discriminatory animus attributable to the Board?
2. Did the Court of Appeals properly determine that Captain Nelson failed to present any circumstantial evidence of age discrimination when the evidence demonstrates his poor performance during his training program, including 17 interventions, the last of which involved a near collision with Pier 86?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Pilotage in Washington**

To protect the Puget Sound, the Board is charged with determining who is qualified to pilot the massive container and tanker ships on those

critical waters. RCW 88.16.010, .035(1)(a)-(b). To ensure that only qualified pilots are licensed, the Board established a comprehensive training program managed by a Training Evaluation Committee (TEC). RCW 88.16.035(1)(b), .090; WAC 363-116-078(4), (5), (11); slip op. at 2 n.1. The Board is statutorily responsible for determining when the demand for pilots requires entry of a new trainee into the program. RCW 88.16.090(4).

After passing a Board examination and being invited into the TEC training program, each pilot trainee completes a number of observation trips and a minimum number of trips in which the trainee navigates the ship supervised by a licensed pilot. CP 5130, 5139-40. The supervising pilots assess the trainee's skills, provide comments, and also document "interventions" – when the supervising pilot took over control of the vessel to prevent damage or stop a dangerous situation from developing. CP 5136; slip op. at 2. At the end of program, the TEC recommends to the Board whether to license the trainee. CP 5086-87; WAC 363-116-078(13).

The Board has three options at that time: (1) grant a license; (2) deny a license; or (3) extend the training. RCW 88.16.090(4); WAC 363-116-080(5). In making its determination, the Board considers, at a minimum, performance in the training program, piloting and ship handling, and general seamanship skills, local knowledge, and bridge presence and communication skills. WAC 363-116-080(5). The standard for all trainees



is whether the trainee could safely, consistently, and independently pilot. CP 5074, 5129, 5131. If the Board determines more training is necessary, the TEC devises an extension plan designed to address the Board and TEC's concerns. CP 5112. The additional training takes the form of additional trips in areas in which the trainee struggled. *See, e.g.*, CP 357, 5361.

The Board does not employ the pilots it licenses. CP 362. Rather, the pilots formed an association, the Puget Sound Pilots (PSP), which "administers the collection of pilotage fees and disbursement to its members." CP 362; slip op. at 10. The Board, not PSP, is legislatively authorized to issue licenses. RCW 88.16.035(1)(a)-(b); slip op. at 10.

**B. The 2005 Pilotage Shortage and Board Examination**

In summer 2005, the PSP President notified the Board that there was an exacerbated pilot shortage. CP 2893. The PSP President reported that many factors contributed to the crisis, including the aging of the pilot corps causing retirements and unanticipated medical problems. CP 2894. PSP asked the Board to hold an emergency examination to increase the number of pilot trainees in the training pool. CP 2897. The Board did so.

Commissioner Charles Davis explained that the Board was "extremely anxious . . . to get this program, this 2005 program into effect so we could get enough pilots into the system that we wouldn't run into an extreme shortage of pilots." CP 1366-67. According to him, the issue was

not the age of the pilots but, rather, the matter of projected retirements. CP 5318. Commissioner Ole Mackey similarly related that the “baby boomers, us kids, were coming through . . . [and] we’ve got to get new pilots into the system.” CP 1458; slip op. 11. Commissioner Davis also recalled that some PSP pilots over age 60 reported that they could not cover for the pilotage shortage on their weeks off as they used to do. CP 1367; slip op. at 11.

In November 2005, 18 applicants passed the Board’s examination and were added to the training pool. CP 370. Captain Nelson placed ninth; he was in his early 50s. CP 1971 (attached as Appendix 1). All 18 applicants were older than age 40 at the time of the Board’s respective licensing decisions. CP 1971.

In summer 2006, the PSP President wrote the Board to advocate for a reduction in the number of jobs performed annually by each pilot. CP 1069. The PSP President focused on safety and the role of rested pilots, noting also that “our pilot corps has aged.” CP 1070. He stated that “older pilots tend to be less able to handle the rigors of being overworked and take longer to recover” and that “older pilots lose more work time to health issues.” CP 1070; slip op. at 10. The PSP President, Captain Richard F. McCurdy,<sup>1</sup> was not a member of the Board.

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<sup>1</sup> The opinion refers to this individual as “President Nor.” Slip op. at 10. The Board, however, is unaware of any such letter in the record authored by a “President Nor,” and the letter cited by Captain Nelson on appeal was signed by President McCurdy.

**C. Captain Nelson Performed Poorly in the Training Program, Requiring Five Extensions and Accruing Seventeen Interventions**

In January 2007, Captain Nelson began his training program. CP 5137; slip op. 2. During his initial, seven-month program, he had eight interventions. CP 1971; slip op. at 2. Thereafter, the Board unanimously voted to extend his training. CP 5143; slip op. at 2.

In his first extension, Captain Nelson had an additional three interventions. CP 1971; slip op. at 2. The TEC's September 2007 recommendation to the Board was split, with three committee members recommending licensure and two recommending more training. CP 5147. During the TEC conference call, Commissioners Pat Hannigan and William Snyder, who were members of the TEC, indicated that "Captain Nelson is ready for licensing. Evaluation reports from senior pilots have indicated that Capt. Nelson is ready. Even though Capt. Nelson may not be a *superstar* he is doing what we require of him. In our opinion he meets the requirements to be a licensed pilot." CP 1335; slip op. at 13. After extensive discussion at the September 2007 Board meeting, however, the Board voted to extend Captain Nelson's training by a four-to-three vote. CP 5088.

Commissioner Vince Addington, who voted to extend the training, testified that the fact that Captain Nelson had taken a "break" from training concerned him to some extent because stress might have been affecting

Captain Nelson's performance. CP 1464-65. Commissioner Addington was also concerned with the three interventions in the extension. CP 119. Commissioner Craig Lee similarly voted for more training after Captain Nelson's three additional interventions showed inconsistency. CP 5382. Commissioner Lee also thought Captain Nelson had poor scores, had taken time off during an extension raising a concern about stress, and had done the bare minimum of assignments. CP 5382. Commissioner Mackey concluded that the Board had given Captain Nelson enough time. CP 5355. The interventions were also a serious factor to Commissioner Mackey. CP 5356. Commissioner Norm Davis was concerned that the TEC was split and wanted to err on the side of caution. CP 110-11. Commissioners Snyder, Hannigan, and Charles Davis voted in favor of licensing. CP 5359.

Captain Nelson's performance continued to deteriorate until both the TEC and Board were unanimous in denying him a license. Commissioner Hannigan, who had voted in his favor in September 2007, explained that Captain Nelson was not improving, but was getting worse and having more problems. CP 313, 366-69, 5150. In October, Captain Nelson had three more interventions, and, both the Board and TEC unanimously recommended a third extension. CP 312, 5148; slip op. at 2. Aware that Captain Nelson was struggling, and as a way to give him a fresh start, the Board's third extension included a number of easy trips followed

by trips in areas in which he had struggled. CP 5149. In December 2007, given that Captain Nelson had accrued two additional interventions, the TEC and Board again unanimously decided to extend his program for a fourth time. CP 5150; slip op. at 3. Captain Nelson then became ill, and the Board granted a fifth extension in January 2008. CP 5150; slip op. at 3.

Throughout his multiple extensions, the TEC found that Captain Nelson performed inconsistently. Slip op. at 13. The TEC identified Captain Nelson's deficiencies as "significant and repeated difficulty in mastering . . . shiphandling skills with respect to situational awareness during docking, undocking, and waterway transits; and speed control" and "difficulty using tugboats." *Id.* Captain Nelson's inadequate performance reached a head on March 1, 2008, during his fifth extension, when Captain Robert Kromann supervised Captain Nelson on an exceptionally poor trip. CP 5377; slip op. at 3, 13. During that trip, Captain Nelson "came very close to destroying the dock" at Pier 86 and the supervising pilot had to intervene to avoid substantial damage to the grain terminal and the ship; this was Captain Nelson's seventeenth intervention. CP 1971, 5153; slip op. at 3, 13.

Thereafter, the TEC members believed that Captain Nelson would "do a dangerous job" and that there was significant risk to the public. CP 5153. Commissioner Mackey testified that the interventions were a serious factor, and that he considered both the number of interventions and when

they took place; interventions towards the end of a trainee's program were especially concerning. Slip op. at 13. The TEC unanimously recommended that the Board not license Captain Nelson. *Id.*

The Board deferred its licensing decision in order to allow Captain Nelson and his attorney to defend his performance. CP 314. Following voluminous document requests, Captain Nelson made a presentation to the Board in October 2008. CP 314. In December 2008, the Board unanimously voted to deny him a license. CP 314.

**D. Performance, Not Age, Dictated the Board's Licensure Decisions**

At no time during the Board's deliberations did the Board discuss Captain Nelson's age. CP 5092. Board Chairman Harry Dudley did not even know Captain Nelson's age until during his administrative appeal. CP 5093. Rather, as with the other trainees with six or more initial interventions, Captain Nelson's program was extended, and, as with other trainees with more than eight total interventions, the Board denied Captain Nelson a license. CP 1971; slip op. at 13.

Of note, Captain Nelson had an almost identical age comparator among the 2005 training class. Captain 10 was only about seven months younger than Captain Nelson. CP 1971. Captain 10, like Captain Nelson, had eight interventions in his original training program. CP 1971. And like

Captain Nelson, Captain 10's program was extended. In that first extension, however, Captain 10 had no further interventions and was licensed. CP 1971. Several other trainees in their 50s also did very well. Captain 15 (aged 56), Captain 5 (aged 55), and Captain 12 (aged 51) were all licensed after their initial programs. CP 1971.

**E. Procedural History of Captain Nelson's Civil Suit**

While Captain Nelson pursued his administrative remedies for the licensure denial, he also filed the instant civil suit alleging age discrimination under the Washington Law Against Discrimination (WLAD). CP 8-10; slip op. at 3.<sup>2</sup> The Board moved for summary judgment asking the trial court to dismiss the age discrimination claim on collateral estoppel grounds and because there was no evidence to support it. The Board argued that Captain Nelson could not establish a prima facie case of age discrimination, the Board's decision was based on a legitimate, non-discriminatory reason, and Captain Nelson could not create a genuine issue of material fact that that reason was pretext. CP 21-22, 28-33; slip op. at 3.

The trial court agreed with the Board and granted summary judgment on the age discrimination claim. CP 2687. The court noted that the goal of the Board's training program was to produce pilots who could

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<sup>2</sup> Captain Nelson's complaint included a number of other claims, which were also dismissed on summary judgment. Captain Nelson does not seek this Court's review of the Court of Appeals' decision as to those claims. *See generally* Petition.

“safely, efficiently, and consistently” pilot ships in Puget Sound “without supervision.” CP 2674. The court also determined that Captain Nelson was collaterally estopped from re-litigating the issue of age discrimination and, separately, that he had failed to establish a prima facie case of age discrimination in his civil suit. CP 2687.

The Court of Appeals affirmed the trial court’s decision on the latter basis. Slip op. at 8-14. Captain Nelson now seeks review of that decision.

#### **IV. ARGUMENT WHY REVIEW SHOULD BE DENIED**

The Court of Appeals, in its unpublished opinion, followed this Court’s precedent and comprehensively analyzed the evidence in the record in the light most favorable to Captain Nelson before correctly concluding that he had failed to produce sufficient evidence to survive summary judgment on his age discrimination claim. *See* slip op. at 8-9, 12. As the Court of Appeals determined, the record is devoid of direct or circumstantial evidence of age discrimination so as to create a question of fact for trial. *See* slip op. at 12, 14. Having correctly applied settled law to the unique facts before the court, the unpublished opinion, which is not precedent and is not binding on any court under GR 14.1(a), does not raise any reviewable issue of substantial public interest. For these reasons, the opinion does not meet the criteria necessary for discretionary review by this Court under RAP 13.4(b)(1) or (4).



**A. The Opinion Properly Followed Controlling Precedent and Determined, Under the Facts of This Case, That There was No Direct Evidence of Age Discrimination in the Record**

The Court of Appeals properly recognized its role in this appeal was to review the summary judgment record for a genuine issue of material fact by engaging “in the same inquiry as the trial court, with questions of law reviewed de novo and the facts and all reasonable inferences from the facts viewed in the light most favorable to the nonmoving party.” Slip op. at 8-9 (citing CR 56(c), and quoting *Billings v. Town of Steilacoom*, 2 Wn. App. 2d 1, 14, 408 P.3d 1123 (2017)); see also *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989) (stating same). The court relied on this Court’s precedent to explain that, for a WLAD age discrimination claim to survive summary judgment,

a plaintiff must demonstrate “a reasonable jury could find that the plaintiff’s protected trait was a substantial factor motivating the employer’s adverse actions.” *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445, 334 P.3d 541 (2014). To demonstrate the protected characteristic served as a substantial factor, the plaintiff needs to show “that the protected characteristic was a significant motivating factor bringing about the employer’s decision.” *Scrivener*, 181 Wn.2d at 445. The plaintiff has a burden of production, not persuasion, and may prove discrimination through direct or circumstantial evidence. *Scrivener*, 181 Wn.2d at 444.

Slip op. at 9.

The Court of Appeals then clearly addressed, and rejected, the substance of Captain Nelson’s argument that the record contained direct

evidence of age discrimination based on certain remarks made by various witnesses. *See* slip op. at 9-12; Appellant’s Br. at 41-42; Pet. at 11-16. As the Court of Appeals explained, and as Captain Nelson acknowledges, “[d]irect evidence ‘includes discriminatory statements by a decision maker and other ‘smoking gun’ evidence of discriminatory motive.’” Slip op. at 9-10 (quoting *Fulton v. Dep’t of Soc. & Health Servs.*, 169 Wn. App 137, 148 n.17, 279 P.3d 500 (2012)); Pet. at 14 (quoting same). The underlying record does not contain any such evidence of age discrimination, and the Court of Appeals correctly determined as much. *See* slip op. at 10-12.

First, the 2006 letter from PSP President McCurdy is not attributable to the Board because President McCurdy, a non-decision-maker, was not a Board commissioner. *See* slip op. at 10. Nor does his letter concern any licensing decision whatsoever. In addition, Commissioner Mackey’s statement about “baby boomer” retirement and Commissioner Charles Davis’s testimony that some pilots over age 60 were no longer willing to cover on their weeks off did not demonstrate any discriminatory animus, but rather explained why the Board approved the emergency examination in 2005 to address the then-existing and future-projected pilot shortage. *See id.* at 11 (citing *Hatfield v. Columbia Fed. Sav. Bank*, 68 Wn. App. 817, 825, 846 P.2d 1380 (1993)); RCW 88.16.090(4). Further, while the testimony of Commissioners Addington and Lee indicated their concerns

that Captain Nelson may have been feeling stressed, nowhere in the record is there evidence that they connected his perceived stress to his age. *See slip op.* at 11-12. And, in fact, Captain Nelson testified that piloting can sometimes be a high stress job and agreed that the ability to handle stress should be considered by the Board when issuing a license. CP 5410-11.

Captain Nelson's petition identifies no other allegedly direct evidence in the record for which a different analysis would apply. *See Pet.* at 11-16. Rather, Captain Nelson appears dissatisfied with the Court of Appeals' opinion because he believes that the court did not consider the foregoing remarks to be *circumstantial* evidence of discrimination. *See Pet.* at 11 n.6, 13 (citing *Scrivener*, 181 Wn.2d 439, 451 n.3)). The analysis in *Scrivener*, however, focused solely on the pretext prong of the burden-shifting framework in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Scrivener*, 181 Wn.2d at 446 ("Today's review focuses on the pretext prong of the *McDonnell Douglas* framework."). As explained below, the Court of Appeals in this case did not reach that third prong of the analysis because it concluded Captain Nelson had failed to make a prima facie case of discrimination under the analysis' first prong. *See slip op.* at 12-14. Thus, the court had no reason to further discuss the import, if any, of the statements that Captain Nelson now claims are circumstantial evidence of discrimination.

Because the Court of Appeals correctly followed precedent in analyzing whether direct evidence of age discrimination existed to create a question of material fact, review is not warranted under RAP 13.4(b)(1).

**B. The Opinion Properly Followed Controlling Precedent and Determined, Under the Facts of This Case, That There was No Circumstantial Evidence of Age Discrimination in the Record**

The Court of Appeals next analyzed whether circumstantial evidence created a question of fact and, in doing so, properly invoked the *McDonnell Douglas* burden-shifting framework, as described in *Mikkelsen v. Pub. Util. Dist. 1 of Kittitas Cty.*, 189 Wn.2d 516, 527-28, 404 P.3d 464 (2017). Slip op. at 12. The court correctly disposed of Captain Nelson’s appeal under the first prong of that analysis regarding whether he could establish a prima facie case of discrimination. *See id.* at 12-14. In addition, his claim also ultimately fails under the pretext prong, as the Board has argued throughout this litigation. CP 28-33; Resp’t Br. at 41-46. Both prongs are discussed below.

**1. There is no evidence in the record that Captain Nelson was performing satisfactory work so as to establish a prima facie case of discrimination**

In *Mikkelsen*, this Court clarified that, in order to establish a prima facie case of discrimination in a wrongful discharge case, a plaintiff must show “(1) [they were] within a statutorily protected class, (2) [they were] discharged by the defendant, (3) [they were] doing satisfactory work, and

(4) after [their] discharge, the position remained open and the employer continued to seek applicants with qualifications similar to the plaintiff.” 189 Wn.2d at 527. Relying on that formulation of the prima facie case, the Court of Appeals held that Captain Nelson did not demonstrate the third element, *i.e.*, that he was performing satisfactory work. *See slip op.* at 12-14.

As he did below, Captain Nelson in his petition argues that he was qualified for licensing because three members of the TEC, two whom were also commissioners, recommended licensing in September 2007. *See Pet.* at 17; Appellant’s Br. at 42-43. But the Board, not the TEC, is charged with licensing authority. *See RCW 88.16.035(1)(a)-(b)*. And at no time did a majority of *the Board* believe he was performing satisfactorily in the training program. By the end of his nearly disastrous fifth training extension involving the intervention at Pier 86, the TEC believed that Captain Nelson would “do a dangerous job” and that there was significant risk to the public. CP 5153. Unsurprisingly, *none* of the commissioners, including the two who had previously recommended licensure, believed Captain Nelson qualified for a pilot’s license. *See slip op.* at 13. Captain Nelson failed to demonstrate that he could “safely, efficiently, and consistently” pilot “without supervision.”

Captain Nelson also argues that he was treated differently than other trainees and was being “set up for failure.” Pet. 17-19. The Court of Appeals

rejected the substance of that argument when it explained that “[t]he Board extended the training program for every trainee with six or more interventions in the initial period and did not license any trainee with more than eight total interventions.” Slip op. at 13. Captain Nelson had 17 total interventions and interventions continued throughout his extensions. *Id.* at 13-14. In addition, the Board’s third extension purposefully included a number of easy trips, followed by trips in areas in which he had struggled, in order to give him a fresh start. CP 5149. Contrary to setting him up for failure, the Board was invested in his performance and provided him with multiple opportunities to succeed. He simply failed to do so.

Because the Court of Appeals correctly followed precedent in analyzing whether circumstantial evidence of age discrimination existed to create a question of material fact, review is not warranted under RAP 13.4(b)(1).

**2. There is no evidence in the record that the Board’s legitimate, nondiscriminatory reason for denying Captain Nelson a pilot’s license was pretext**

In addition, while neither the Court of Appeals nor the trial court reached the third prong of the *McDonnell Douglas* burden-shifting analysis, the Board has consistently argued that Captain Nelson has not shown that the Board’s legitimate, non-discriminatory reason for denying him a license – his poor performance – was pretext. *See* CP 28-33; Resp’t Br. at 41-46.

This is therefore an alternative basis for affirming the decisions of the Court of Appeals and the trial court, should this Court be otherwise inclined to grant review on Captain Nelson's petition.

In *Mikkelsen*, this Court affirmed summary judgment for the defendant on a claim of age discrimination under the pretext prong because the plaintiff presented "almost no evidence of age discrimination." 189 Wn.2d at 536. In that case, the plaintiff testified that her supervisor once referred to long term employees as "old and stale" and that he had a "fixation" on a 72-year-old employee. *Id.* Her testimony suggested that her supervisor "was simply marveling that some employees had worked for the same employer for so long." *Id.* Thus, this Court concluded that the plaintiff "presents no evidence that [her supervisor] treated older employees differently or that her age played a role in [her supervisor's] decision to fire her." *Id.* Accordingly, this Court held that age discrimination was not a substantial factor in the decision to fire the plaintiff. *Id.*

In this case, there is no evidence that the Board considered age at all, let alone made it a substantial factor, in deciding to deny Captain Nelson a pilot's license. Rather, the evidence shows that (1) all trainees were experienced mariners, older than age 40 at the time of the Board's respective licensing decisions; (2) at no time during the Board's deliberations did the Board discuss Captain Nelson's age; (3) the Board Chairman did not even

know Captain Nelson's age until during his administrative appeal; (4) Captain 10, who was only about seven months younger than Captain Nelson, also had eight initial interventions, was extended, and was then licensed after completing his extension without accruing additional interventions; (5) trainees older than Captain Nelson who performed well were licensed (Captains 5 and 15); (6) some commissioners considered retirement projections, the fact that some pilots over age 60 were unwilling to make extra trips, and the effect of stress on trainees; and (7) the Board is statutorily required to plan for pilot shortages. None of that evidence establishes that Captain Nelson's age was a substantial factor in denying him a license so as to create a question of material fact as to whether the Board used Captain Nelson's poor performance as pretext for discrimination.

Because this alternative basis for affirmance would obviate any need for this Court to reverse summary judgment in favor of the Board, discretionary review should be denied.

**C. Because the Opinion Rests on Settled Law and Unique Facts, the Petition Does Not Present an Issue of Substantial Public Interest**

Finally, to the extent that Captain Nelson seeks review under RAP 13.4(b)(4) because he claims that the Court of Appeals' opinion "dramatically raise[s] the bar for a plaintiff to survive summary judgment



in a WLAD age discrimination case[,]” Captain Nelson is mistaken. While a decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest, *see State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005), this is not such a case. Here, the opinion at issue applies settled law to unique and particular facts that are unlikely to recur. Indeed, not one of the tests and standards outlined in the Court of Appeals’ opinion, when addressing the merits of Captain Nelson’s age discrimination claim, is novel or new. *See slip op.* at 8-10, 12 (discussing applicable law). Given the particularized nature of the facts and the unpublished status of the opinion, the Court of Appeals’ analysis under those standards does not present an issue of substantial public interest that this Court needs to address.

## V. CONCLUSION

For the reasons explained above, discretionary review of the Court of Appeals’ unpublished opinion affirming summary judgment in favor of the Board on Captain Nelson’s age discrimination claim is not warranted. The decision neither conflicts with this Court’s precedent nor presents an issue of substantial public interest. Review should be denied.<sup>3</sup>

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<sup>3</sup> Because Captain Nelson has not yet prevailed, he is not entitled to any award of fees against the Board in this case. *See Wascisin v. Olsen*, 90 Wn. App. 440, 445, 953 P.2d 467 (1997) (under RAP 18.1, a prevailing party is one who receives judgment in that party’s favor); Pet. at 20 (requesting attorney fees on appeal).

RESPECTFULLY SUBMITTED this 4<sup>th</sup> day of March, 2020.

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## DECLARATION OF FILING AND SERVICE

I declare under penalty of perjury in accordance with the laws of the State of Washington that on the below date the original of the preceding “RESPONDENT'S ANSWER TO PETITION FOR REVIEW” was filed in the Supreme Court of the State of Washington, and electronically served on the following parties, according to the Court’s protocols for electronic filing and service.

Mary Ruth Mann  
[mrmann@mannkytle.com](mailto:mrmann@mannkytle.com)

James W. Kytle  
[jkytle@mannkytle.com](mailto:jkytle@mannkytle.com)

DATED this 4<sup>th</sup> day of March, 2020 at Tumwater, Washington.

*s/ Tina M. Sroor*  
\_\_\_\_\_  
TINA M. SROOR  
Legal Assistant

## **Appendix 1**

Class of 2005 Age Data

Name	Age on Sept 15 2007	Training Program	Interventions	Licensed / Age at licensing decision
Captain #1	41.3 years old	Original Program First extension	5 (Total-6) 1	Yes / 40.2
Captain #2	50.8 years old	Original Program	3	Yes / 49.6
Captain #3	50.1 years old	Original Program	1	Yes / 48.9
Captain #4	47.5 years old	Original Program	0	Yes / 46.3
Captain #5	56.4 years old	Original Program	5	Yes / 55.4
Captain #6	46.2 years old	Original Program	1	Yes / 45.0
Captain #7	47.7 years old	Original Program	2	Yes / 47.3
Captain #8	44.7 years old	Original Program	5	Yes / 44.4
Nelson (#9)	53.0 years old	Jan-July 2007 July-Sept 07 ext. Sept-Oct. 07 ext. Oct.-Dec 07 ext. Dec 07-Jan 08 ext. Jan-April 08 ext.	8 (Total-17) 3 3 2 0 1	Denied Dec 2008 / 54.2
Captain #10	52.3 years old	Original Program First Extension	8 (Total-8) 0	Yes / 52.3
Captain #11	39.7 years old	Original Program	0	Yes / 40.2
Captain #12	51.1 years old	Original Program	0	Yes / 51.5
Captain #13	40.5 years old	Original Program First Extension Second Extension Third Extension Fourth Extension	5 (Total-16) 1 5 5 1	No / 41.6
Captain #14	44.8 years old	Original Program First Extension	0 (Total-0) 0	Yes / 45.4
Captain #15	55.1 years old	Original Program	0	Yes / 56.3
Captain #16	47.5 years old	Original Program	0	Yes / 48.7
Captain #17	58.5 years old	Original Program First Extension Second Extension	11 (Total-18) 6 1	No / 60.3
Captain #18	46.0 years old	Original Program First Extension Second Extension	6 (Total-7) 0 1	Yes / 47.8

**ATTORNEY GENERAL'S OFFICE, TORTS DIVISION**

**March 04, 2020 - 11:41 AM**

**Transmittal Information**

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**Appellate Court Case Number:** 98147-7  
**Appellate Court Case Title:** Captain Bruce Nelson v. State of WA and Board of Pilotage Commissioners

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