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Supreme Court No. 98147-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Petitioner,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS,

Respondents.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Captain Bruce Nelson, petitioner here and appellant below, respectfully asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Captain Nelson seeks review of the unpublished decision by the Court of Appeals entered on October 28, 2019. A Motion to Publish was filed and denied on January 2, 2020. A copy of the Opinion and the Denial of the Motion to Publish are provided in Appendix A-1 and A-2.

C. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review from Division I of the Court of Appeals decision upholding the Superior Court's grant of summary judgment to the Board of Pilotage Commissioners on Capt. Bruce Nelson's claim of age discrimination under the Washington Law Against Discrimination (WLAD) because:

Issue No. 1: Pursuant to RAP 13.4(b)(1) the decision of the Court of Appeals conflicts with this Court's opinion in Scrivener v. Clark College, 181 Wn.2d 439, 450 FN 3 (2014) as to consideration of age-based stray remarks as evidence of discriminatory intent for

purposes of denying summary judgment to an employer in an age discrimination case under the WLAD; and

<u>Issue No. 2:</u> Pursuant to RAP 13.4(b)(4) the decision of the Court of Appeals is a matter of substantial public interest as to whether a Plaintiff who has evidence of satisfactory performance prior to being "set up for failure" can meet the element of "satisfactory work performance" under RCW 49.60 as outlined in Mikkelsen v. Pub. Util. Dist. No. 1, 189 Wash.2d 516, 527 (2017); and

<u>Issue No.3:</u> Pursuant to RAP 13.4(b)(1) and (4) the decision of the Court of Appeals conflicts with this Court's opinion in Young v. Key Pharm., Inc, 112 Wn.2d 216,226,770 P.2d 182 (1989) requiring consideration of all facts and reasonable inferences in the light most favorable to the non-moving party on summary judgment and is a matter of substantial public interest.

D. STATEMENT OF THE CASE

1. Factual Background

a. Captain Bruce Nelson

In 2005, Capt. Bruce Nelson applied to be a Puget Sound Pilot. He ranked #9 of 18 successful applicants on validated

(blind) scored written tests and validated (blind) scored piloting simulations, earning entry on merit into the Puget Sound Pilot Trainee Program. CP 371.

b. Deciding Officials on the Board of Pilotage Commissioners Made Adverse Age-Related Comments About "Older Pilots"

Board Commissioner Charles Davis testified about Board discussions in 2006 concerning older pilots "not [being] willing as some of the younger pilots to come back in order to do ...extra duty" and needing "extra time off" to rest and recover. CP 1367 (at 69:24-70:23-71:5) Capt. Nelson was 53 years old. CP 374.[1]

The Board of Pilotage Commissioners who license Puget Sound pilots had requested from the the Puget Sound Pilots ("PSP") information regarding setting the number of pilots. CP 1067.

In July 2006, the President of the PSP responded to the

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[1] "In an age discrimination claim, the [**1070] protected class is individuals [*447] between 40 and 70 years of age, but the employee is not required to show that he was replaced by someone outside that range; he need only show that he was replaced by someone significantly younger. Hill v. BCTI Income Fund-I, 144 Wn.2d 172, 188, 23 P.3d 440 (2001); Grimwood v. Univ. of Puget Sound, Inc., 110 Wn.2d 355, 362, 753 P.2d 517 (1988)".Griffith v. Schnitzer Steel Indus., 128 Wash. App. 438, 446-47, 115 P.3d 1065, 1069-70 (2005),rev.den'd, 156 Wn.2d 1027 (2006).

chairman of the Board of Pilotage Commissioners, *inter alia*:

> The age and health of the pilot corps indicate ... that a Safe Assignment Level is in need of change.
>
> ... [O]ur pilot corps has aged. At the end of 1995 when the current Safe Assignment Level was adopted, the average age of our pilot corps was 49. Today it is over **56**. This is a significant factor for two reasons.
>
> - Unfortunately, older pilots tend to be less able to handle the rigors of being overworked and take longer to recover.
>
> - Secondly, older pilots lose more work time to health issues. PSP's medical leave experience is worsening. ...

CP 1068, CP1070. (Emphasis added).

c. Capt. Nelson's Evidence Includes Further Remarks by Commissioner Decision Makers Directly Linking Denial of Nelson's License to Similar Age Stereotypes

Capt. Nelson as part of the trainee program was assigned and rated on training trips. After Capt. Nelson completed all assigned training trips in September 2007, the three licensed training and evaluation pilots on the Training Evaluation Committee ("TEC") recommended to the Board of Pilotage Commissioners that Capt. Nelson be licensed as "he meets the requirements to be a licensed pilot" (Capts. Hannigan and Snyder) and that he "should move on to being licensed" (Capt. Kroman). CP 1335, 1165. There

were two votes cast against Capt. Nelson by Commissioners, Craig Lee and Ole Mackey, who sat on the TEC but are not Puget Sound Pilots. CP 1340 (25:1-2); CP 1345 (72:4-7): and CP 1458 (26:1)

Despite the TEC recommendation to the Board of Pilotage Commissioners in favor of licensing Capt. Nelson, in September 2007, he was denied a license by a single vote. Three (3) votes were cast in favor of licensing, four (4) opposed. CP 1567.

When Commissioners Lee and Mackey as Board Commissioners and as members of the TEC voted against Capt. Nelson being licensed in September of 2007, both expressed similar stereotypes as testified to by Commissioner Davis, including Capt. Nelson taking time off from training. Commissioner Lee emailed about licensing Capt. Nelson, that he "[t]ook 11 days off ... without an assignment (is he stressed out as a trainee?)" CP 1140. In actuality, Capt. Nelson took "seven days off which got misrepresented to 11." CP 1495 (at 98:7-9).

Commissioner Lee summarized the stereotypic reasons by stating, in part:

> I don't feel comfortable licensing [Capt. Nelson] this month but also don't know what type of additional specific training to recommend. This could be an 'attitude' which, if so, could be difficult to correct. If stress is the problem how will he cope if licensed?

CP 1140.

A third Commissioner, Vince Addington, also voted against licensing Capt. Nelson in September 2007 and adopted Lee's and Mackey's pretextual and stereotypic reasoning, that Capt. Nelson took a "break" from training, indicating "there were issues with stress that might be affecting [Capt. Nelson's] performance."

CP 1464-65 (at 95:1-97:1, 99:19).

d. Younger Trainees Who Took Time Off Did Not Receive the Same Treatment

Commissioner Mackey admitted different treatment: "I realized other people did it, but it's critical in Captain Nelson's position that taking time off may not have been appropriate." CP 1455 (at 12:13- 13:1).

Similar concerns were not expressed about younger trainees who took similar "breaks", and who struggled in training.

Capt. 1 (40 years old) took numerous breaks between trips, including one break of 10 days; another break of 13 days; and a break of seven (7) days during his "extension" -- the same length

of "break" Capt. Nelson took during his "extension."[2] Capt. Nelson was 53.

Commissioner Mackey admitted he did not have a "similar standard" for all of the trainees. CP 1329 (at 25:8-26:21). Nor did he inform Capt. Nelson of the unique rules applied to him. ("I expect you to know ... on your own what you need to succeed. ... [Y]ou shouldn't have to tell him.") CP 1457 (at 20:10-11).

Commissioner Mackey's stated standard was that Capt. Nelson was in "boot camp. You can't take time off at boot camp." CP 1328 (at 24:1-2); "I wouldn't take any time off. I'd drop.... [W]hen I couldn't get up and go anymore, then that's when I would stop." CP 1456 (at 16:5-9); "So that's the rule..... [Y]ou've got to keep pushing ahead no matter what...." CP 1456 (at 19:12-25).

As a result of the denial of a license in September of 2007, Capt. Nelson was put on repeated extension programs from September 2007 to April 2008.

After the September 13, 2007 Board meeting voting to deny

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[2] *See* Mann Decl., Exh. 24; accord id., Exh. 1 (showing Capt. 1's "extension" began 7/14/06, and he made *no* trips from 7/20/06 to 7/26/06); *and see* CP 1495 (at 98:7-9), CP 5708 (showing Nelson made trip on 7/30/07), CP 5668 (Nelson made trip on 8/08/07).

Capt. Nelson a license, the Board failed to provide Capt. Nelson with any reason for their decision not to license, nor any indication as to the skill areas upon which he needed to improve. CP 1437 (at 104:17-24). Capt. Nelson's "e-mails went unanswered." CP 1471 (at 9:22). The only feedback he received from the TEC during this period was to "[j]ust keep riding." CP 1438 (at 111:20-112:9); CP 1473 (at 19:18-19).

On September 27, 2007, after receiving a telephone call from Pilotage Commissioner Capt. Hannigan, Capt. Nelson wrote to Capt. Hannigan and the other licensed pilots on the TEC (Capts. Snyder and Kromann), in relevant part:

> [T]hinking about this morning's phone call from you in regards to a new emphasis on obtaining excess [i.e., 'extra'] training trips in lieu of specific trips has me puzzled. Since the call took place with four days left in the month and I have [already] four trips to make to get to 18, this seems like an unrealistic expectation. ... **I can't help but feel that I am being set up for failure.** CP 1168. (emphasis added)

On October 25, 2007, in an email to fellow TEC members, Captain Hannigan admitted that it appeared the TEC had "initiated the Vicious Circle of failure" and combined it with the "Heisenberg Principle" when it issued Capt. Nelson extensions, "giving him hard trips the first time and even harder trips the second time." CP 1170.

Capt. Hannigan wrote to the TEC that "we need to do something other than just pile extra difficult trips on top of very difficult trips and expect that we will have a beneficial training experience." CP 1171. Captain Kromann wrote in response, admitting Nelson was "set ... up for failure by assigning [him] the last group of very demanding, hard to get trips." CP 1170. In December 2008 the Commissioners voted to remove Capt. Nelson from the licensing program.

e. The Board Continued to Train and License Younger Trainees After Capt. Nelson Was Denied A License.

After the Board failed to license Capt. Nelson, in September 2007, the Board continued to train and license pilots, "demonstrating a continued need for the same services and skills."[3] The Board began Capt. 13 and Capt. 14 in pilot training on October 1, 2007. CP 4465. At that time, they were aged 40 and 44, respectively. CP 1971. Also, following the denial of licensing for Capt. Nelson in September 2007, the Board licensed Capt. 11, who at the time was 40 years old. See CP 4482; CP 3447.

[3] Grimwood v. Univ. of Puget Sound, 110 Wn.2d 355,363, 753 P.2d 517 (1996)

f. Evidence that Capt. Nelson was Treated Differently

Expert David Goodenough, MS, LMHC, BCPC, testified about his review of the Board's pilot trainee program and the treatment of Capt. Nelson. His opinion was that had Capt. Nelson been evaluated and treated as other trainees, before and after him, he would have been licensed in September 2007, October 2007, or January 2008. [4] Furthermore, there is evidence that Capt. Nelson was subjected to more difficult training trips than other trainees.[5]

2. Procedural Background

a. Proceedings in Superior Court and Court of Appeals

Capt. Nelson while pursuing an administrative appeal of the license denial filed suit on September 9, 2010, alleging among other claims age discrimination. On September 23, 2011, the defendants moved for summary judgment. On March 28, 2012, the trial court granted summary judgment concluding that res judicata barred Capt. Nelson's claims and collateral estoppel applied to the ALJ's findings

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[4] Mann Decl., Exh. 30.

[5] Nelson v. Wash. State Bd. of Pilotage Comm'rs, No. 75559-5-I, 2017 Wash. App. LEXIS 2801, at *16 n.7 (Ct. App. Dec. 11, 2017) cited by the Court of Appeals in its decision for the "underlying facts". Slip opinion at 2

in his administrative appeal case. Capt. Nelson moved for reconsideration, and on May 3, 2012 the trial court denied the motion. An appeal was filed, and the Court of Appeals stayed this case until the administrative appeal was concluded. After its conclusion in 2017, Capt. Nelson moved the Court of Appeals to supplement this civil case record with additional evidence which was denied. The resulting Appellant opinion before this Court concluded, in part, that res judicata and collateral estoppel did not apply but that nevertheless Capt. Nelson failed to establish a claim for age discrimination because he did not establish a prima facie case that he was performing satisfactory work. Slip opinion at 12-14

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

a. The Court of Appeals Decision Conflicts with this Court's Opinion in Scrivener that All Evidence Including Stray Remarks that Support Discrimination Should be Considered on Summary Judgment

A court should not overlook "stray remarks" that are discriminatory statements and are clearly admissible under the rules of evidence. Scrivener 181 Wn.2d at 450 FN 3 (2014).[6] The

[6] "An age-based remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant, circumstantial evidence of discrimination." Id. at 539. We agree. Scrivener v. Clark Coll., 181

weight of the evidence is within the province of the jury and not the Court. In this case, Commissioners' discussions about "older pilots" and the statements of decision making Commissioners Mackey, Lee and Addington as to time off and attitude, supra at 3-7, are clearly relevant and admissible but were not mentioned or considered by the Court of Appeals, despite recognized law of this Court that "all facts" are to be considered on summary judgment.

> We review a trial court's grant of summary judgment de novo. Camicia v. Howard S. Wright Constr. Co., 179 Wn.2d 684, 693, 317 P.3d 987 (2014). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). When making this determination, **we consider all facts and make all reasonable factual inferences in the light most favorable to the nonmoving party.** Young v. Key Pharm., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Scrivener 181 Wash. 2d at 439 (2014) (emphasis added)

At the time the appellate briefs were filed in this case, in 2012 and 2013,[7] this Court's decision in Scrivener did not exist. Nevertheless, that decision was provided as supplemental

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Wash. 2d 439, 450 n.3, 334 P.3d 541, 548 (2014) (citing Reid v. Google,Inc., 50 Cal.4th 512 (2010)

[7] Capt. Nelson filed a motion to supplement the record in this case which was denied by the Court of Appeals and this Court denied review of that decision. Capt. Nelson did file supplemental authorities citing Scrivener, but the Court of Appeals decision does not reflect the evidence of stray remarks that were cited to it in the original briefs in this case. See, e.g., opening brief of Appellant pgs. 12-14.

authority to the Court of Appeals prior to it rendering its decision and was mentioned in its opinion. Slip opinion at 2.

The briefs filed in the Court of Appeals in 2012 and 2013 by Capt. Nelson cited the remarks at issue. Supra at 3-7. Opening Brief of Appellant in Court of Appeals at 21-25.41-42 Response to Summary Judgment in trial court. See, e.g., CP 1004 -1007
As noted by this Court in Scrivener, even an age-based remark not made directly in an employment decision "may be relevant, circumstantial evidence of discrimination." Scrivener at 451 FN 5 citing Reid v. Google, Inc., 50 Cal. 4th 512, 539 (2010).

In this case, remarks were in the context of a licensing decision and of other adverse age-based discussions by Commissioners including Mackey, Lee, and Addington. Supra at 3-7. They applied different and pretextual standards to Capt. Nelson. The no days off, or "boot camp," rule that Mackey, Lee, and Addington applied to Capt. Nelson in September 2007, demanding "no days off" or stereotyping them as evidence of inability to handle stress may be considered as direct evidence of discrimination. See, e.g., Boyle v. Montgomery Country Club, No. 2:17-cv-282-WKW-DAB, 2018 U.S. Dist. LEXIS 192692, at *10 (M.D. Ala. Nov. 9, 2018) (Statement that plaintiff looked "old and tired" and "should

take time off" arguably direct evidence of discrimination).[8]

> "Direct...evidence' includes discriminatory statements by a decision-maker and other 'smoking gun' evidence of discriminatory motive."

Fulton v. State, Dept. of Social & Health Services, 169 Wn.App. 137, 148 n.17, 279 P.3d 500 (2012) (internal citations omitted).

The Court of Appeals not only ignored the most favorable evidence of age discrimination and pretext in contradiction to Scrivener but did discuss other stray remarks made by Commissioner Mackey, regarding "baby boomer" retirement. Slip opinion at 10-11. The Court of Appeals cited Hatfield v. Columbia Fed. Sav. Bank, 68 Wn. App. 817, 825,846 P.2d 1380 (1993) for the proposition that inquiries into retirement are not probative of discrimination. Slip opinion at 11.The plaintiff in Hatfield failed to rebut the employers non-discriminatory explanation for discharge because the court used the now disfavored "determining factor" standard, citing Stork v. International Bazaar, Inc., 54 Wn. App. 274, 284, 774 P.2d 22 (1989). Furthermore, Hatfield admitted at trial in response to a motion for a directed verdict at the close of his evidence that he

[8] Boyle v. Montgomery Country Club, 2018 U.S. Dist. LEXIS 212339 (M.D. Ala., Dec. 18 2018) (magistrate report adopted by District Court)

produced no direct, comparative, or statistical evidence of age discrimination in response to the non-discriminatory reasons given for his dismissal. Id. But in this case, direct and comparative evidence was cited to the Court of Appeals.

Due to the liberal construction of the WLAD, this court refused to follow Stork in Mackay v. Acorn Custom Cabinetry, Inc., 127 Wn.2d 302, 310, 898 P.2d 284, 288 (1995).

If a discriminatory remark is relevant, the weight of the evidence is a question for the jury and not the court.9 In this case all Commissioners, including Mackey, Lee, Addington and Davis were decision-makers. Where "a decision maker makes a discriminatory remark against a member of the plaintiff's class, a reasonable fact finder may conclude that discriminatory animus played a role in the challenged decision." Dominguez-Curry v. Nevada Transp. Dept., 424 F.3d 1027, 1038 (9th Cir. 2009).

A jury should be allowed to weigh this relevant evidence against the Board's insistence that age played no part in the licensing

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[9] "Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. (See Reeves v. Sanderson Plumbing Products, Inc.,], supra, 530 U.S [133]. at pp. 152–153 [2000].)" Reid v. Google, Inc., 50 Cal. 4th 512, 541, 113 Cal. Rptr. 3d 327, 351, 235 P.3d 988, 1008 (2010)

decision in accordance with Scrivener. To accept the Court of Appeals' decision to overlook and to not consider the stray remarks evidence, renders this Court's decision in Scrivener meaningless and is in contradiction to this Court's standard that "all evidence" is to be considered on summary judgment. Scrivener citing Young supra at 12.

b. What Constitutes Evidence of Satisfactory Work that Creates A Material Question of Fact in A Discrimination Case

In order to make out a prima facia case of discrimination, the plaintiff must present direct evidence of discrimination[10] or show:

> ... that (1) [they were] within a statutorily protected class, (2) [that they were] discharged by the defendant, (3) [that they were] doing satisfactory work, and (4) [that] after [their] discharge, the position remained open and the employer continued to seek applicants with qualifications similar to the plaintiff. McDonnell Douglas [v. Green], 411 U.S.[792] at 802 [(1973)] *see also* Grimwood [v. Univ. of Puget Sound, Inc., 110 Wn.2d 355] at 362 [(1988)] [**471] If the plaintiff establishes a prima facie case, it creates a rebuttable presumption of discrimination. Scrivener v. Clark Coll., 181 Wn.2d 439, 446,334 P.3d 541 (2017) (2014).

[10] Alonso v. Qwest Commc'ns Co., 178 Wash. App. 734, 743-44, 315 P.3d 610, 616 (2013)

Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty., 189 Wash. 2d 516, 527, 404 P.3d 464, 470-71 (2017).

The Court of Appeals maintained that Capt. Nelson did not satisfy the third element that he was performing satisfactory work. This conclusion is rebutted by Nelson's evidence that all three TEC training pilots agreed he was ready for licensing in September of 2007, by testimony of Dr. Goodenough and because Capt. Nelson received more difficult training trips than other trainees. Supra at 10. The Court of Appeals makes no mention of the compelling evidence that Capt. Nelson was "set up for failure". Supra at 8-9.

Again, Capt. Nelson wrote to TEC Capt.s Hannigan, Snyder and Kroman on September 27, 2007 expressing concern about unrealistic expectations being placed on him and that he felt that he was **"being set up for failure".** CP 1168 (emphasis added)

The October 25, 2007 email where Capt. Hannigan described the "Vicious Circle of failure" combined with the "Heisenberg Principle" and giving Capt. Nelson "hard trips the first time and even harder trips the second time" is evidence that discrimination impacted Capt. Nelson's ability to successfully perform. CP 1170. Capt. Hannigan wrote to the TEC that "we need to do something other than just pile extra difficult trips on top of very

difficult trips and expect that we will have a beneficial training experience." CP 1171. Capt. Kromann wrote in response, admitting Nelson was "set ... up for failure by assigning [him] the last group of very demanding, hard to get trips." CP 1170.

> Because **satisfactory** performance is viewed in light of all the evidence presented, summary judgment for the employer on this basis will rarely, if ever, be appropriate.

Griffith v. Schnitzer Steel Indus., 128 Wash. App. 438, 449 n.6, 115 P.3d 1065, 1071 (2005)

> When an employer imposes unreasonable expectations on an employee, the employer may be setting up a situation where the employee cannot help but fail. The employer may be trying to create a seemingly [*4] legitimate reason for firing the employee. In this context, when the employer terminates the employee for the reason that the employee's performance is unsatisfactory, the employer's justification may be unworthy of belief. **Thus, when a question of fact exists as to whether an employer has imposed unreasonable expectations on an employee, a question of fact exists as to whether the employer's justification, the employee's unsatisfactory performance, is a mere pretext.**

Dryanski v. Sloan Valve., No. 84 C 1396, 1986 U.S. Dist. LEXIS 26718, at *3-4 (N.D. Ill. Apr. 15, 1986) (emphasis added).

Herrnreiter v. Chicago Housing Authority, 315 F.3d 742, 746 (7th Cir. 2002) states that being set up for failure "is a perfectly

good theory of discrimination".[11]

Given the above, the question as to whether Capt. Nelson met the criteria of "satisfactory performance" should be decided by a jury rather than on summary judgment.

F. CONCLUSION AND REQUEST FOR ATTORNEY FEES

The Court of Appeals opinion contradicts the standard for summary judgment enunciated by this Court by overlooking key evidence and failing to consider stray remarks.

> [S]ummary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation. See Riehl v. Foodmaker, Inc., 152 Wn.2d 138, 144, 94 P.3d 930 (2004); Sangster v. Albertson's, Inc., 99 Wn. App. 156, 160, 991 P.2d 674 (2000) ("Summary judgment should rarely be granted in employment discrimination cases."); see also Rice v. Offshore Sys., Inc., 167 Wn. App. 77, 90, 272 P.3d 865 (2012) (When the record contains reasonable but competing [***7] inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.). To overcome summary judgment, a

[11] See also Johnson v, Department of Social and Health Services, 80 Wn, App. 212, 229, 907 P.2d 1223 (1996) ("The question of an employer's intent to discriminate is "a pure question of fact,,,, .Where the evidence creates 'reasonable but competing inferences of both discrimination and nondiscrimination, ' a factual question for the jury exists"); Sellsted v. Washington Mut, Sav, Bank, 69 Wn. App, 852, 863, 851 P.2d 716 '(1993) ("Thus, by pointing to evidence which calls into question the defendant's intent, the plaintiff raises an issue of material fact which, If genuine, is sufficient to preclude summary judgment")

> plaintiff needs to show only that a reasonable jury could find that the plaintiff's protected trait was a substantial factor motivating the employer's adverse actions. Riehl, 152 Wn.2d at 149. "This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence." Id.

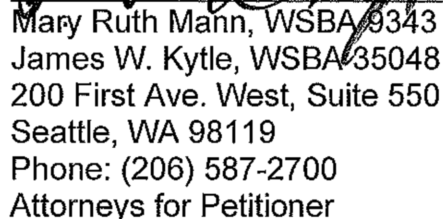
Scrivener v. Clark Coll., 181 Wash. 2d 439, 445, 334 P.3d 541, 545 (2014)

The evidence in this record supports a claim of pretext, age discrimination, such that summary judgment should have been denied. The Court of Appeals' rulings are clear error, and dramatically raise the bar for a plaintiff to survive summary judgment in a WLAD age discrimination case.

This Court should grant review. RAP 13.4(b)(1) and (4). The Court should reverse the Court of Appeals and send the case back to the trial court. Costs and attorney's fees on appeal, should be awarded to Capt. Nelson, pursuant to RAP 18.1,RCW 49.60.030(2).

RESPECTFULLY SUBMITTED this 3rd day of February, 2020.

MANN & KYTLE, PLLC

BY: 

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Stacy Hughes

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SUPREME COURT
STATE OF WASHINGTON
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BY SUSAN L. CARLSON
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APPENDIX A-1

FILED
10/28/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON, Appellant, v. STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS, Respondents.	No. 68701-8-I DIVISION ONE UNPUBLISHED OPINION FILED: October 28, 2019

CHUN, J. — After the Washington State Board of Pilotage Commissioners (Board) denied Captain Bruce Nelson a pilot's license, he contested the decision in an administrative proceeding. An administrative law judge (ALJ) upheld the decision. Nelson then filed this civil suit under the Washington Law Against Discrimination, chapter 49.60 RCW (WLAD). The trial court granted summary judgment for the State of Washington and the Board determining that (1) res judicata and collateral estoppel barred Nelson's WLAD claims, (2) the Administrative Procedure Act, chapter 34.05 RCW (APA) barred any challenges to the administrative proceeding, (3) Nelson did not establish a prima facie case of age, gender, or disability discrimination, and (4) the administrative record did not support his emotional distress claims. Though the court erred by determining that res judicata and collateral estoppel applied, we affirm because Nelson fails to raise a genuine issue of material fact on his age discrimination claim and he abandoned his other claims.

I. BACKGROUND

After the Board denied Nelson a pilot's license, he pursued both administrative and civil relief. Previously, we addressed Nelson's appeal of the administrative case and affirmed the superior court order upholding the Board's final order denying Nelson a license. Nelson v. Wash. Bd. of Pilotage Comm'rs, No. 75559-5-I, (Wash. Ct. App. Dec. 11, 2017) (unpublished) http://www.courts.wa.gov/opinions/pdf/755595.pdf ("Administrative Appeal"). The opinion from the Administrative Appeal contains a recitation of the underlying facts. This opinion presents a general overview and provides additional facts as necessary.

A. Nelson's Training

Nelson began his pilot training with the Board in January 2007. After seven months and over 100 training trips under the supervision of licensed pilots, the Training Evaluation Committee (TEC)[1] reviewed Nelson's performance. During these first seven months, Nelson had eight documented interventions. An "intervention" is when a supervising pilot must take over the ship to prevent damage or stop a dangerous situation from developing. The Board voted to extend Nelson's training program by two months.

Nelson's first extension occurred from July to September 2007. During this extension, Nelson had three interventions. The Board again voted to extend Nelson's training.

Nelson's second extension lasted until October 2007. In this extension, Nelson had three interventions and the Board again extended his training until December 2007.

[1] The TEC is a committee that the Board designated to manage the training program.

In this third extension, Nelson had two interventions. After this extension, Nelson contracted an illness and the Board extended his training program again in January 2008.

In January 2008, the Board decided to extend Nelson's training for four more months. During this extension, Nelson participated in a trip involving the Pier 86 grain terminal. On this trip, "a senior supervising pilot—and member of the [TEC]—was forced to intervene in Nelson's tugging of the grain ship in order to avoid substantial damage to the grain terminal and to the ship."

After Nelson's fifth extension, the TEC unanimously recommended that the Board not license Nelson.

B. The Civil Action

On September 9, 2010, while Nelson pursued administrative relief, he filed a civil action against the defendants. In his complaint, Nelson alleged the defendants (1) violated WLAD by discriminating against him based on age, perceived disability, and possibly gender, and by retaliating against him, (2) violated the APA, and (3) negligently and/or intentionally inflicted emotional distress.

The defendants moved for summary judgment on September 23, 2011. The defendants argued (1) res judicata barred Nelson's claims that the defendants failed to comply with the APA, (2) collateral estoppel applied to the administrative decision to prevent relitigation of the facts, (3) Nelson did not establish a prima facie case for any of his discrimination claims, and (4) the remaining tort claims lacked merit. Nelson opposed the motion.

On January 13, 2012, the court held a hearing where it determined that a certified administrative record should be a part of the court file; it requested the parties reach an agreement on the contents. The court heard oral argument on February 3, 2012.

On March 28, 2012, the trial court granted summary judgment in favor of the defendants. The court concluded that res judicata barred Nelson's claims[2] and collateral estoppel applied to the ALJ's findings and conclusions. Relying on the ALJ's findings, the trial court held Nelson did not establish a prima facie case of age, gender, or disability discrimination. Finally, the court dismissed Nelson's emotional distress claim as unsupported by the administrative record.

Nelson moved for reconsideration on April 9, 2012. On May 3, 2012, the court denied the motion. Nelson appeals.[3]

II. ANALYSIS

A. Res Judicata

Nelson argues the trial court erred by deciding res judicata bars his WLAD claims. The defendants do not present any argument on this issue. We agree with Nelson.

We review de novo the legal question of whether res judicata applies. Atl. Cas. Ins. Co. v. Or. Mut. Ins. Co., 137 Wn. App. 296, 302, 153 P.3d 211 (2007). Res judicata prevents a party from relitigating claims from prior actions. Civil Serv. Comm'n v. City of

[2] Though the defendants argued that res judicata applied to Nelson's APA claims, the trial court's order appears to apply the doctrine to all of Nelson's claims, including those under WLAD.

[3] We stayed this matter until the parties resolved the administrative case on June 29, 2018. Our Supreme Court further stayed this case in connection with Nelson's motion to supplement the record, which stay was lifted on March 6, 2019.

Kelso, 137 Wn.2d 166, 171, 969 P.2d 474 (1999). When determining whether two causes of action are identical such that res judicata bars the second action, courts generally consider:

> (1) [w]hether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Rains v. State, 100 Wn.2d 660, 664, 674 P.2d 165 (1983). The party arguing that res judicata applies bears the burden of proof. Ensley v. Pitcher, 152 Wn. App. 891, 902, 222 P.3d 99 (2009). "[R]es judicata will not operate if . . . evidence needed to establish a necessary fact would not have been admissible in the prior proceeding." Kelly-Hansen v. Kelly-Hansen, 87 Wn. App. 320, 331, 941 P.2d 1108 (1997).

A plaintiff overcomes a motion for summary judgment in a discrimination case if they show "that a reasonable jury could find that discrimination was a substantial factor in the employer's adverse employment action." Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas County, 189 Wn.2d 516, 528, 404 P.3d 464 (2017). A plaintiff establishes a rebuttable presumption that precludes summary judgment in retaliation cases if they establish that they participated in statutorily protected opposition activity, the employer knew about that opposition activity, and the employer then discharged the plaintiff. Currier v. Northland Servs., Inc., 182 Wn. App. 733, 747, 332 P.3d 1006 (2014). "Proof of different treatment by way of comparator evidence is relevant and admissible" in WLAD cases. Johnson v. Chevron U.S.A., Inc., 159 Wn. App. 18, 33, 244 P.3d 438 (2010).

Here, the ALJ ruled the performance of other pilots was not sufficiently probative and excluded witnesses "being called solely for or questioned regarding the performance of other pilots." The ALJ stated, "[T]he issue before me is Captain Nelson's pilotage training and I'm convinced that that case can be made with the record that we have, without the other pilots, because the issue that I have to decide is whether it was arbitrary and capricious and not whether it was different."

The ALJ excluded comparator evidence that Nelson offered. This category of evidence is relevant and admissible in WLAD cases. Thus, evidence needed to establish a necessary fact in Nelson's WLAD case was not admitted in the administrative proceeding. Because the ALJ did not allow Nelson to present this evidence, res judicata does not bar his WLAD claims. See Kelly-Hansen, 87 Wn. App. at 331.

B. Collateral Estoppel

Nelson asserts the trial court erred by determining collateral estoppel applies to the ALJ's factual findings because there is no identity of issues and such an application would work an injustice. The defendants respond that the trial court correctly applied collateral estoppel. We decide collateral estoppel does not apply because its application would work an injustice.

We review de novo whether collateral estoppel bars relitigation of an issue. Billings v. Town of Steilacoom, 2 Wn. App. 2d 1, 14, 408 P.3d 1123 (2017).

Collateral estoppel prevents parties from relitigating issues that a prior proceeding addressed and finally decided. Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). Collateral estoppel may apply to actions

brought under Washington's antidiscrimination laws. Billings, 2 Wn. App. 2d at 23. Additionally, under Washington law, administrative decisions may have preclusive effect. Reninger v. Dep't of Corrs., 134 Wn.2d 437, 449, 951 P.2d 782 (1998).[4]

A party asserting collateral estoppel bears the burden of proving:

> (1) the issue decided in the prior adjudication is identical with the one presented in the second action; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with the party to the prior adjudication; and (4) application of the doctrine does not work an injustice.

Thompson v. Dep't of Licensing, 138 Wn.2d 783, 790, 982 P.2d 601 (1999); State v. Williams, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997) ("The party asserting collateral estoppel bears the burden of proof.").

The injustice prong primarily concerns procedural inequality. Christensen, 152 Wn.2d at 309. The "party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding." Christensen, 152 Wn.2d at 307. Thus, even if a court makes an error of law, collateral estoppel may apply so long as a party fully litigated the issue and "did not attempt to overturn [the] adverse outcome." Thompson, 138 Wn.2d at 799-800.

Courts consider four factors when deciding whether collateral estoppel would work an injustice, namely whether:

1. The plaintiff had the incentive to adopt a "wait and see" attitude in the hope that the first action by another plaintiff would result in a favorable judgment that might then be used against the losing defendant;

[4] We note that for collateral estoppel to apply, an administrative decision must satisfy three additional elements: "(1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations." Christensen, 152 Wn.2d at 308. But because we determine Nelson demonstrates that the administrative proceeding does not satisfy the initial elements for collateral estoppel, we do not address these.

2. The defendant had the incentive to defend the first suit with full vigor, especially when future suits are not foreseeable;
3. One or more judgments entered before the one invoked as preclusive are inconsistent with the latter or each other, suggesting that reliance on a single adverse judgment would be unfair; and,
4. The defendant might be afforded procedural opportunities in the later action that were unavailable in the first and that could readily cause a different result.

State Farm Fire & Cas. Co. v. Ford Motor Co., 186 Wn. App. 715, 725, 346 P.3d 771 (2015). Under the fourth factor, "the opportunity to introduce evidence not before the fact finder in the prior action is a new procedural opportunity that precludes application of collateral estoppel." State Farm, 186 Wn. App. at 725-26.

As mentioned above, the ALJ excluded certain comparator evidence. The comparator evidence was potentially critical to Nelson's WLAD claims because it could establish that the Board treated Nelson differently than trainees outside his protected categories. For this reason, the trial court erred in ruling collateral estoppel applied to the ALJ's factual findings.

C. Age Discrimination

Nelson asserts the trial court erred by granting summary judgment for the defendants on his age discrimination claim. The defendants contend Nelson failed to establish a genuine issue that his age played a role in the Board's decision to not license him. We agree with the defendants.

A trial court properly grants summary judgment when a party fails to present a genuine issue of material fact. CR 56(c); Billings, 2 Wn. App. 2d at 14. "The appellate court engages 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." Billings, 2 Wn. App. 2d at 14.

Because of the difficulty a plaintiff faces to prove discriminatory motive, courts should rarely grant summary judgment for an employer in employment discrimination cases. Mikkelsen, 189 Wn.2d at 527-28.

WLAD prohibits employers from taking an adverse employment action on the basis of a protected characteristic, such as age. RCW 49.60.180(2); see also Mikkelsen, 189 Wn.2d at 526. 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.

1. Direct Evidence

To establish a prima face case of discrimination under the direct evidence test, the plaintiff must provide direct evidence establishing "(1) the defendant employer acted with a discriminatory motive and (2) the discriminatory motivation was a significant or substantial factor in an employment decision." Alonso v. Qwest Commc'ns Co., 178 Wn. App. 734, 744, 315 P.3d 610 (2013). Direct evidence "includes discriminatory statements by a decision maker and other 'smoking gun' evidence of discriminatory

motive." Fulton v. Dep't of Soc. & Health Servs., 169 Wn. App 137, 148 n.17, 279 P.3d 500 (2012).

Nelson claims that several items of direct evidence of age discrimination exist in the record. Specifically, he cites (1) a letter written by Puget Sound Pilots (PSP) to the Board, (2) Commissioner Mackey's testimony that the "baby boomers" would retire soon, (3) Commissioner Davis's testimony that a pilot shortage existed, in part, because pilots over 60-years-old were less willing to work on their days off, and (4) Commissioner Addington's concerns of Nelson being stressed.

First, the PSP letter expressed concern over the increased average age because "older pilots tend to be less able to handle the rigors of being overworked and take longer to recover." The letter also states that "older pilots lose more work time to health issues." But neither PSP nor the author of the letter, President Nor, was a decision-maker with respect to Nelson. Licensed pilots formed the PSP, a private association, which "administers the collection of pilotage fees and disbursement to its members." Apparently, some of the Board members also belonged to PSP. But the association does not have regulatory authority to issue licenses. See RCW 88.16.035 (l)(a)-(b) (charging the Board with determining who qualifies for a pilot's license). Because neither PSP nor President Nor engages in any decision-making as to whether a pilot should be licensed, the PSP letter does not constitute direct evidence of age discrimination.

Second, Commissioner Mackey's statement regarding "baby boomer" retirement is not direct evidence of discriminatory animus. Commissioner Mackey made the statement when Nelson's counsel asked, while deposing him, whether he remembered

discussions about the increase in the average age of pilots, as it related to how many new pilots the Board needed. Commissioner Mackey responded "Yes. The baby boomers, us kids, were coming through and we're going to have to get—that's why we had the test. We've got to get new pilots coming into the system, and that was the reason why, because us kids are getting old."

Given this context, Commissioner Mackey's statement does not reflect any animus towards older workers. Instead, he merely explained that the Board needed new pilots because it expected a number of pilots to retire soon. This falls short of evidence of discriminatory motive. See Hatfield v. Columbia Fed. Sav. Bank, 68 Wn. App. 817, 825, 846 P.2d 1380 (1993) (stating that inquiries into retirement is not probative of age discrimination).

Third, Commissioner Davis's testimony does not reflect discriminatory intent. His testimony indicated that in the past, pilots were called in on their days off several times because there were too many jobs for the number of pilots on duty. Commissioner Davis explained that "some of the [older] pilots have said, you know, that they used to be able to do that, but because of their being of somewhat advanced age, that — and by 'advanced' I mean anything over 60 or so, that they really need that two weeks off." Again, this testimony does not demonstrate any animus towards older pilots. Instead, the testimony merely explains why the Board feared a pilot shortage and therefore aimed to license new pilots.

Lastly, Commissioner Addington testified that, because Nelson took a break from training, he may have been feeling stressed. But Nelson does not point to anywhere in the record where Commissioner Addington connected Nelson's perceived stress to his

age. Accordingly, Nelson fails to present any direct evidence of age discrimination.

2. Circumstantial Evidence

Where a plaintiff produces only circumstantial evidence, Washington applies the McDonnell Douglas[5] evidentiary burden-shifting framework to determine whether discrimination occurred. Mikkelsen, 189 Wn.2d at 527-28. Under this framework, the plaintiff first has the burden to demonstrate a prima facie case of discrimination. Mikkelsen, 189 Wn.2d at 527. If the plaintiff establishes a prima facie case, the defendant then has the burden to give a legitimate, nondiscriminatory reason for its decision. Mikkelsen, 189 Wn.2d at 527. If the defendant does so, the burden shifts back to the plaintiff who must show the defendant's stated reason was pretext. Mikkelsen, 189 Wn.2d at 527.

In Mikkelsen, a wrongful discharge case, the Supreme Court held that to establish a prima facie case of discrimination, 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."[6] 189 Wn.2d at 527.

The defendants argue Nelson did not establish a prima facie case of age discrimination because he cannot demonstrate the third element, i.e., that he was performing satisfactory work.

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[5] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[6] Because Nelson's case concerns a failure to license, he would presumably satisfy the second element by showing that the Board did not license him and meet the fourth element by showing the Board continued to license applicants with similar qualifications. Nelson may pursue a WLAD claim against the Board regardless of whether it employed him. See Galbraith v. TAPCO Credit Union, 88 Wn. App. 939, 949-51, 946 P.2d 1242 (1997) (noting that WLAD cases are not limited to the employment context).

The only evidence Nelson highlights to argue that he was qualified for licensing is that two commissioners felt Nelson was qualified in 2007. According to conference call minutes from September 6, 2007, Commissioners Hannigan and Snyder indicated, "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." Notably, however, these minutes were recorded after Nelson's first training extension (in which he had three interventions). By the end of his fifth training extension and after the intervention involving Pier 86, none of the commissioners, including Hannigan and Snyder, felt Nelson qualified for licensing.

Throughout his extensions, the TEC found that Nelson performed inconsistently. Specifically, the TEC stated Nelson "had significant and repeated difficulty in mastering . . . shiphandling skills with respect to situational awareness during docking, undocking, and waterway transits; and speed control." Nelson also demonstrated difficulty using tugboats. The inconsistencies in these skills did not improve throughout the training program extensions. At the end of Nelson's fifth extension, the supervising pilot intervened because Nelson almost crashed into the dock at Pier 86. Commissioner Mackey testified in the administrative case 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. The 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.

Nelson had 17 total interventions and interventions continued throughout his

extensions. Other than the statements of Hannigan and Snyder, Nelson points to no evidence that he was performing at a satisfactory level. Nelson does not demonstrate an issue of fact on this point. As such, he fails to establish the third element required for a prima facie case of discrimination. Accordingly, the trial court did not err in granting summary judgment for the defendants.

D. Gender Discrimination, Disability Discrimination, and Retaliation

Though Nelson assigns error to the trial court dismissing his gender and disability discrimination claims and retaliation claim,[7] he does not adequately brief these issues. A party abandons assignments of error that they do not argue in their brief. Greensun Grp., LLC v. City of Bellevue, 7 Wn. App. 2d 754, 780 n.11, 436 P.3d 397 (2019); RAP 10.3(a)(5). Accordingly, Nelson abandoned these issues.[8]

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[7] Though Nelson fails to sufficiently argue his retaliation claim in his opening brief, he does address it in his reply. Appellate courts generally do not address arguments raised for the first time in a reply brief, even if they are of constitutional magnitude, because the other party does not have a fair opportunity to respond. State v. Peerson, 62 Wn. App. 755, 778, 816 P.2d 43 (1991). Though Nelson technically may have raised the claim in his opening brief because he assigned error to the trial court dismissing his retaliation claim, his failure to sufficiently argue the issue until his reply nevertheless denied the defendant's a fair opportunity to respond to his claim.

But even if Nelson raised the issue, he failed to raise an issue of material fact. WLAD protects a person engaging in statutorily protected activity from retaliation by an employer or "other person." RCW 49.60.210(1). But "[a] general complaint about an employer's unfair conduct does not rise to the level of protected activity in a discrimination action under WLAD absent some reference to the plaintiff's protected status." Alonso, 178 Wn. App. at 754.

Here, Nelson fails to show that either his e-mail or his presentation to the Board referenced his protected status. The e-mail does not mention age discrimination, Nelson's protected status as a person over 40, or any other protected category. See RCW 49.44.090 (providing that it is an unfair practice for "an employer or licensing agency, because an individual is forty years of age or older, to refuse to hire or employ or license or to bar or to terminate from employment such individual"). As to the presentation, Nelson does not claim that he ever alleged age discrimination or referenced his protected status in the presentation. Thus, Nelson did not raise an issue of fact as to his engagement in protected conduct.

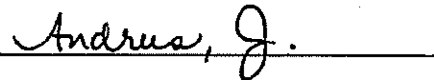
[8] Nelson additionally assigned error to the court's order denying his motion for reconsideration, but does not otherwise discuss the motion in his briefing. We deem abandoned, and will not consider, assignments of error that the appellant does not argue or discuss in their brief. Greensun, 7 Wn. App. 2d at 780 n.11. Accordingly, we decline to address this issue.

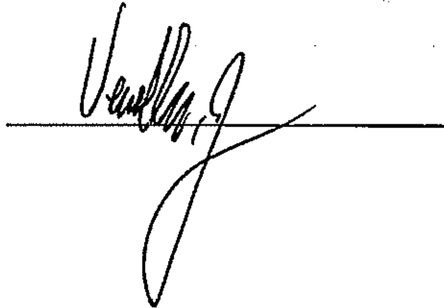
E. Attorney Fees

Nelson requests attorney fees pursuant to RAP 18.1. The entirety of his request provides, "Pursuant to RAP 18.1, Capt. Nelson hereby requests an award of attorney's fees and costs for this appeal, assuming he prevails at trial" (citing RCW 49.60.030(2)[9]). Because we affirm the trial court's summary judgment order in favor of the defendants, we deny Nelson's request for attorney fees.

Affirmed.

WE CONCUR:





[9] RCW 49.60.030(2) states:

Any person deeming [themselves] injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

APPENDIX A-2

FILED
1/2/2020
Court of Appeals
Division I
State of Washington

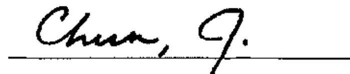
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON, Appellant, v. STATE OF WASHINGTON and WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS, Respondents.	No. 69890-7-I DIVISION ONE ORDER DENYING MOTION TO PUBLISH

Appellant Captain Bruce Nelson filed a motion to publish the court's opinion filed on October 28, 2019. Respondent Washington State Board of Pilotage Commissioners filed a response. A panel of the court has considered its prior determination and has found that the opinion will not be of precedential value; now, therefore it is hereby

ORDERED, that the unpublished opinion filed on October 28, 2019, shall remain unpublished.

FOR THE COURT:



Judge

MANN & KYTLE

February 03, 2020 - 11:34 AM

Filing Petition for Review

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