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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

BRIEF OF APPELLANT

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I. INTRODUCTION

This case is before this Court due to highly prejudicial errors committed by the trial court, including denying plaintiff Brian Long ("Long") a new trial based on juror misconduct, excluding key evidence that was per se admissible under ER 904, failing to allow Long to impeach a material witness with prior inconsistent statements, and excluding highly probative comparator information.

Defendants Brusco Tug & Barge ("BTB") and CEO Bo Brusco ("CEO Brusco")[1] fired Long – a fourteen year employee with an exemplary performance history – shortly after Long opposed the disability discrimination of a co-worker, Anthony Morgan ("Morgan"). At the time of his firing, Long served as BTB's Port Manager at the Port of Everett ("POE") and was charged with captaining tugs for ship assists, as well as coordinating tug coverage for incoming and outgoing ships.

Believing he was qualified for the job, Long selected Morgan to be a deckhand despite Morgan having a prosthetic leg. When BTB discovered Morgan's disability, Long was directed to fire Morgan. Long opposed BTB's discrimination. After Morgan initiated a lawsuit against BTB, Long was retaliated against and ultimately fired. He filed suit for

[1] This appeal is against both defendants. Because CEO Brusco was a key decision-maker in the actions leading to Long's lawsuit, throughout this brief, Long refers to defendants, collectively, as "BTB."

unlawful retaliation in violation of the Washington Law Against Discrimination ("WLAD"). This was the only claim before the jury.

At trial, BTB alleged that Long was not fired, but was removed from his position at the POE for allegedly failing to provide tug coverage for a Westwood Shipping vessel. Long attempted to introduce a Westwood Shipping document showing that the acting port manager failed to notify Long that the ship's schedule was delayed by eight hours and that Long was not at fault. The trial court erroneously excluded the document despite it being automatically admissible under ER 904. Compounding this legal error, the court then failed to allow Long to impeach a witness with a prior inconsistent statement confirming that Long had arranged for tug coverage. Exclusion of this evidence substantially prejudiced Long as it refuted BTB's alleged non-retaliatory reason for firing him.

Further preventing Long from having a fair trial, the trial court excluded critical evidence that proved that BTB treated similarly situated employees more favorably than Long despite the employees committing serious misconduct, including missing ship jobs. As the evidence provided a basis for inferring retaliatory motive and undermined BTB's purported reason for firing Long, the trial court's error was not harmless.

After a verdict was entered, Long discovered juror misconduct. A juror had tainted deliberations through the injection of extraneous

evidence and law. The juror – who purported to be an expert in maritime laws – falsely stated that "no law" would allow Morgan to work on a boat and that Long violated the law in his hiring of someone with a prosthetic leg. However, the legality of Morgan's hiring was not at issue in the case.

Notably, the seed for the juror's misconduct had been planted by BTB over Long's objections. In its opening statement, defense counsel improperly notified the jury that Morgan could not work on a tug boat under "Coast Guard regulation" and that Long's hiring of Morgan violated the law. The court failed to sustain Long's objections or provide his requested curative instructive despite the legality of Morgan's hiring not being at issue.

The extraneous evidence and law injected by the juror related directly to Long's retaliation claim and were highly prejudicial. If the jury believed Long violated the law by hiring Morgan, a jury would not be compelled to find that it was unlawful for BTB to remove Long from the POE for opposing BTB's decision to fire Morgan. Likewise, if the jury believed that Morgan could have never been a deckhand for BTB under the law, a jury would not be compelled to find that Long was reasonable in believing that BTB discriminated against Morgan.

Because the juror engaged in textbook misconduct that was highly prejudicial to Long, Long moved new trial. A new trial must be granted unless it can be concluded beyond a reasonable doubt that extrinsic

evidence did not contribute to the verdict. Yet, without concluding beyond a reasonable doubt that the verdict was not affected, the trial court ruled that the jury was unaffected by the extrinsic evidence. This, along with the trial court's other rulings discussed herein, constitutes reversible error.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred in denying Long's Motion for a Mistrial / New Trial based on jury misconduct involving the use of extraneous evidence and law during deliberations inferring that Long violated the law. *The trial court's order is attached as Appendix A.*

2. The trial court erred in denying Long the opportunity to introduce evidence (Westwood Notes) proving that Long was not informed that the ship assist resulting in his transfer / firing was rescheduled, and thus refuting BTB's alleged legitimate non-retaliatory reason for firing Long. *The Westwood Notes are attached as Appendix B.*

3. The trial court erred in denying Long the opportunity to impeach witness, J.C. Anderson, with a prior inconsistent taped statement proving that Anderson represented he was available and qualified to cover the ship assist resulting in Long's transfer / firing. *The recorded statement is attached as Appendix C.*

4. The trial court erred in denying Long the opportunity to introduce evidence of disparate treatment showing that BTB treated similarly situated employees ("comparators") more favorably than Long, who did *not* engage in protected activity, and who were accused of similar or worse offenses than what Long was accused of.

B. Issues Pertaining to Assignments of Error

1. Is it juror misconduct where a juror introduces specialized extrinsic evidence, brought from the outside, into deliberations, which was not admitted at trial and which includes outside notes, statistics, and erroneous statements of law? (*Assignment of Error 1*)

2. Did the trial court err in ruling that the extrinsic evidence that included outside notes, statistics, and erroneous statements of law did not affect the verdict when the evidence related directly to, and undermined, essential elements of Long's retaliation claim? (*Assignment of Error 1*)

3. Did the trial court err in failing to resolve any reasonable doubt that the misconduct affected the verdict against the verdict? (*Assignment of Error 1*)

4. Did the trial court err in excluding the Westwood Notes based on a waived foundation objection when BTB withdrew its only timely objections to Long's ER 904 submission and stipulated that the

document fell under the business records exception, thus creating an "expectation of admissibility"? (*Assignment of Error 2*)

5. Is it unfairly prejudicial to exclude non-cumulative, highly probative evidence that helps Long rebut BTB's alleged legitimate non-retaliatory reason for Long's firing when the Westwood Notes were authentic and admissible under ER 904? (*Assignment of Error 2*)

6. Is it unfairly prejudicial to prevent Long from impeaching a material witness with a prior inconsistent statement when the statement is proper impeachment under ER 607 and 613? (*Assignment of Error 3*)

7. Is it unfairly prejudicial to exclude comparator evidence that is powerful circumstantial evidence for inferring retaliatory motive? (*Assignment of Error 4*)

III. STATEMENT OF THE CASE

A. Brian Long Was Retaliatorily Fired from Brusco Tug & Barge.

1. Long was a 14 Year Employee with No Prior Discipline.

Defendant BTB provides cargo barging and towboat services at ports (Onshore Division) and at sea (Ocean Division). RP 313; 1298-99; 1520. Long began working for BTB in 1995 as a deckhand in the Ocean Division. RP 938-41. Long worked his way up to becoming an ocean captain. RP 940-44. After spending years out at sea, Long made it known to BTB that he could no longer be away from his family. RP 944-49; 961;

780-81. As such, in 2007, Long accepted a lesser paying position at the POE as a ship assist captain. RP 958-61; 1514-17.

Long was soon promoted to Port Manager in April 2009. RP 969-70; 1546. Ship Assist Captain John Juker was second-in-command at the POE, reporting to Long ("Captain Juker"). RP 2020. Port Captain Kevin Campbell acted as Long's direct supervisor ("Supervisor Campbell"). RP 1061; 1476-77. Long was a strong employee for BTB. RP 762-64; 845-46; 2107; 2158-83. In fourteen years of service, Long never received any discipline until after he opposed co-worker Anthony Morgan's discriminatory firing. RP 1357-58; 1660; 1971; 2107; 2158-61.

2. Long Opposed Disability Discrimination by BTB.

In September 2009, Long initiated the process to hire Morgan as a deckhand for the POE division. RP 985-90; Ex.14. Long knew Morgan had a prosthetic leg below the knee, but based on Morgan's resume and experience, believed Morgan was qualified. RP 986-88; 2170. Morgan was tried out by Long and received safety training on September 14, 2009. RP 989-92; 1041-42; Ex.13. Morgan performed well. RP 770-76; 991-92; 999-1004. Morgan then received a physical and a drug test and disclosed that he had a prosthetic leg and took Percocet as needed for leg pain. RP 988-91; 1042-43; 2176-79; Ex. 15. The report indicated that Morgan needed an additional physical. Ex. 15.

When BTB management learned of Morgan's prosthetic, it began discriminating. Long was told by Human Resources Manager Lauri Sabo ("HR Sabo") that according to Supervisor Campbell, "[BTB] can't hire someone with a prosthetic leg." Ex. 16; RP 993-94. Long was chastised for hiring a "physically impaired deckhand." Ex. 26; RP 1051-52.

Long complained to HR Sabo and others that BTB was discriminating. RP 429-34; 993-95; 1057-60; Ex. 26. CEO Brusco and HR Sabo obtained legal advice and Long was directed to keep Morgan "aboard" because "if [BTB] let[s] him go for no good reason now that he is actually working, we could open ourselves up for a lawsuit under the 'Americans with Disabilities act (sic).'" Ex. 22; RP 439-42. Accordingly, on September 15, Morgan was cleared by BTB management to work on a tug. He performed well. Ex. 22; RP 441-45; 775-76; 995-1004.

Long asked HR when Morgan would have his second physical. Ex. 33. HR relayed that CEO Brusco "just doesn't want to use him period." *Id.* Brusco's discriminatory animus was reiterated by Campbell: "I understand that we are not going use the prosthetic leg guy." Ex. 43. Long was told to fire Morgan and lie about BTB's reason. Ex. 33; RP 1054-58.

Long again complained about the discrimination of Morgan (RP 1057-60), and refused to cover-up it up, as he was directed to, informing Morgan that BTB was not going to give him the extensive physical. RP

1063-66. Morgan then initiated a lawsuit, filing a charge with the Equal Employment Opportunity Commission ("EEOC") on September 21, 2009 for disability discrimination. RP 2201-02.

3. BTB Retaliated Against Long for His Protected Activity, Including Firing Him.

BTB received notice of Morgan's charge around October 8, 2009. RP 876-77; 1960. The Charge directly referenced Long. RP 2201-02. CEO Brusco and Supervisor Campbell blamed Long for Morgan's lawsuit and were "angry" with Long. RP 489-90; 523-26; 1375. Weeks later, on October 22, Long's request for a raise was denied, with Campbell stating:

> He [CEO Brusco] is so pissed about the lawsuit from your recent hire [Anthony Morgan] that I think the timing [of asking for a raise] is not right.

Ex. 47; RP 1071-73. Within two months, on December 21, 2009, BTB fired Long. RP 543; 1092-1119; Ex. 84. Long filed suit, alleging BTB unlawfully retaliated against him for opposing the discrimination of Morgan. CP 1-8. This case was tried before the Honorable William Downing in King County Superior Court. Long's WLAD retaliation claim was the only claim before the jury. CP 1747-63.

B. The Trial Court Erred in Excluding Evidence Disproving BTB's Alleged Reason for Firing Long.

As Port Manager, in addition to captaining tugs for ship assists, Long managed BTB's daily operations at the POE. RP 1513. This entailed

coordinating tug coverage for incoming and outgoing ships. *Id.* Generally, ship assists require either one or two tugs. RP 1005-06; 1484-87. Each tug requires one captain and one deckhand; thus, a one-tug ship assist requires one captain and one deckhand and a two-tug ship assist requires two captains and two deckhands. RP 769-70; 2219. Ships were scheduled in advance to require either one tug or two tugs. RP 1005-06; 1484-87. It was uncommon for a ship scheduled as a one-tug to require two tugs at the last minute. RP 1005-07.

At trial, BTB alleged that it did not fire Long, but reassigned him back to the Ocean for allegedly not being available to captain a second tug for a ship assist on December 21, 2009. RP 1344-49; 1968-69.

Although it was undisputed that the December 21 ship assist was timely completed without incident, BTB testified that Long's absence nonetheless warranted removal from the POE. *Id.*; RP 1868-69; 2104-05. Long testified that Juker was in command of the ship assist on December 21 and that Acting Port Manager Juker failed to notify Long the job was rescheduled. RP 1092-1116; 2224-25. The trial court erred in excluding the only neutral evidence proving that Juker knew that the ship assist was delayed by eight hours and failed to inform Long. RP 2139-40; CP 1701.

Specifically, Long testified that on December 21, he was on vacation visiting family in Long Beach, Washington, and had arranged for

second-in-command, Juker, to serve as Acting Port Manager. RP 1092-98. Juker confirmed he was aware of Long's vacation[2] and that Long's work phone was being forwarded to him.[3] RP 2075-76. Thus, starting on December 19, any calls from incoming ships were routed to and answered by Juker, not Long. Ex. 66 at line 83; Ex. 70 at line 102; RP 1101-02.

Only one ship was scheduled to arrive during Long's vacation – a Westwood Shipping vessel called the Sevilla. Ex. 82 at p. 5. The Sevilla was to arrive on December 21 at 4:30 a.m. and was scheduled to need only one tug to assist with its arrival. RP 1105; 1095-96; 2072-75; CP 2047. Juker would act as the captain in Long's absence. RP 1098; 2072-75.

Being cautious, Long nonetheless arranged for a backup captain in case the job changed and required two tugs. RP 1092-97; 1140-41. On December 18, Long called BTB employee J.C. Anderson.[4] RP 680-82; 1092-97. Anderson told Long he could cover the December 21, 4:30 a.m. job if another captain was needed. *Id.*; RP 2225-26; Ex. 257A.

Unbeknownst to Long, on December 20, the arrival of the Sevilla was delayed by Westwood until 12:30 p.m. on December 21, instead of 4:30 a.m. RP 1101-07; 2224-25. A Westwood document ("Westwood

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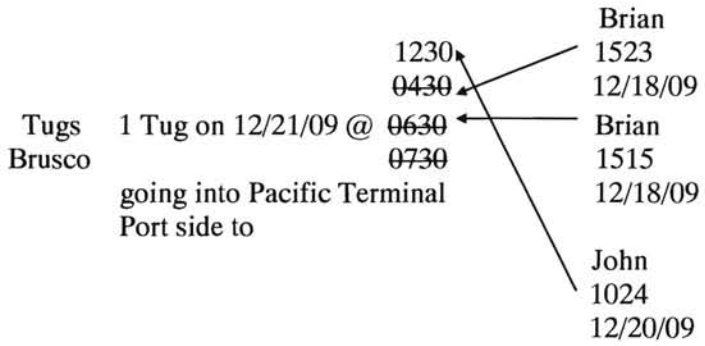
[2] Deckhand Craig Petit testified that he was aware Long was on vacation and that Juker was in charge. RP 787-88. Sabo testified she knew Long was on vacation. RP 533.
[3] The entered phone bills also show that Long's phone was forwarded to Juker beginning on December 19. Ex. 66 at line 83; Ex. 70 at line 102.

Notes") with the following notation confirms the schedule change, showing that John Juker received a call on December 20 at 10:24 a.m., postponing the job until 12:30 on December 21, an eight hour delay:



CP 2047. The phone records also show that at 10:24 a.m. on December 20, an incoming phone call from Westwood Shipping was forwarded from Long's phone to Juker's. Ex. 66 at line 93; Ex. 70 at line 117. Long called Juker on the evening of December 20 to ensure operations were ready for the upcoming 4:30 a.m. ship assist. RP 1101-05; Ex. 70 at line 133. But Juker failed to tell Long of the eight hour delay or that the ship would not arrive until 12:30 p.m. *Id.* When Long called Juker again at 8:37 a.m. on December 21 to make sure the assist had been successfully completed at 4:30 a.m., Juker did not answer his phone. RP 1105-06; Ex. 70 at line 137.

[4] Long received Anderson's name and number as a relief captain from Tom Lehto, BTB's dispatcher. RP 1760-61; 2152.

Juker did not reveal the ship's eight hour delay until Long finally reached him at 10:49 a.m. on December 21. RP 1106-07. For the first time, Juker also told Long that a second tug was needed. *Id.* Long immediately called Anderson, arranging for him to captain the second tug. RP 1109. As the job had changed from 4:30 a.m. to 12:30 p.m., Anderson was no longer available due to a dentist appointment. RP 1109-10.

Anderson confirmed that his availability changed in a voluntary taped statement provided on October 29, 2012. Ex. 257A. According to his prior statement, Anderson told Long he "would be willing to cover a second tug job if something came up, up in Everett . . .but the job got moved so [he] could no longer be available because the new time was the same time [he was] going to the dentist." *Id.* Anderson also confirmed he was "qualified to cover those tug jobs." *Id.* Anderson's tone was pleasant and cooperative in the recording. *Id.* At trial, however, Anderson changed his story, testifying that he was never available to cover for Long. RP 678. Without any specific objection from BTB, the court denied Long's attempt to use the recording to impeach Anderson or refresh his recollection by playing the taped statement. RP 673-674, RP 686; CP 1685. The trial court erroneously found that the supposed leading nature of the questions in the recording "transcript" constituted improper impeachment. RP 694-97.

After Anderson informed Long he was no longer available, Long attempted to make arrangements with another captain, Ken Wick, to cover the 12:30 p.m. job. RP 1110-11. Wick was available, but Juker informed Long that David Brusco, CEO Bo Brusco's son, had already committed to acting as the second captain. RP 1112-13. The job was completed on time and without incident. RP 1868-69; 2104-05. Nonetheless, at 12:28 p.m., at CEO Brusco's direction, Long was fired by Campbell for supposedly failing to arrange for tug coverage. RP 916-17; 1115-21; 1591-92; Ex. 101; Ex. 68 at line 150. Had Juker done his job and told Long on December 20 at 10:34 a.m. that the ship had been delayed by eight hours, Long could have arranged for a back-up captain for the correct time or even driven back to Everett to cover if needed. RP 2225-26.

At trial, through testimony and in argument, BTB argued that Long "rolled the dice" and knowingly failed to have coverage for the 12:30 p.m. job. RP 351-52; 374;1344-45; 2018-20; Ex. 97. Long attempted to use the Westwood Documents (Ex. 80), which include the Notes to prove that Juker, not Long, had been notified that the schedule changed. RP 2076-84. Long timely designated the Westwood Documents from Westwood Shipping in his ER 904 submissions, but as memorialized in the Parties' Joint Statement of Evidence, BTB objected to the documents on the grounds of "Hearsay, ER 801, 802, Authentication ER 901." CP 1230.

As such, Long subpoenaed a records custodian from Westwood to authenticate the Westwood documents.[5] CP 1723-27. BTB represented to the trial court that a records custodian was not necessary, stating that "the records of Westwood Shipping that the plaintiff sought to introduce were met with no objection on authenticity on our part," and that "the only issue" was that Long "offered not all of the documents that Westwood provided but left out an invoice." RP 1736-39. BTB also stipulated that the Westwood Documents fell under the business records exception to the hearsay rule. RP 1736-39; CP 1697. After BTB withdrew all objections to Long's ER 904 submission of the Westwood Documents, Long withdrew his subpoena to the records custodian. RP 1736-39.

Later, Juker denied being told by Westwood on December 20 at 10:24 a.m. that the Sevilla would be rescheduled and Long tried to use the Westwood Notes for impeachment. RP 2076. The trial court admitted the full exhibit (Ex. 80). RP 2076. When Long then attempted to impeach Juker with the Notes, BTB objected, stating "there's no foundation." RP 2077. The trial court ruled that the Notes would not be admitted. RP 2076-85. Long objected and made an offer of proof. RP 2126-40; CP 1701. BTB

[5] The parties' Joint Statement of Evidence also listed records custodians for documents produced by Westwood Shipping Lines and other individuals at Westwood Shipping Lines who may have knowledge surrounding the events relating to the Sevilla's arrival from the POE on December 21, 2009 as potential witnesses. CP 1213.

falsely stated that during the stipulation, it "maintained" its "objection just to the handwritten notes." RP 2132. The trial court ruled the Notes would not be admitted and could not be used in closing. RP 2139-40.

C. The Trial Court Erred in Excluding Highly Probative Comparator Information.

BTB's defense centered on Long's conduct on December 21, 2009, with BTB arguing that Long's failure to arrange coverage on December 21 warranted immediate transferring or termination even if the ship assist was completed successfully. RP 351-52; 374; 1344-45; 2018-20; 2349.

Blaming POE personnel issues on Long, Supervisor Campbell stated that "there was a lot of drama in that port [POE]. I had more issues in that port than all the other ports put together . . . and *the other ports just ran seamlessly*." RP 1579-80. Campbell compared the POE to Grays Harbor, Stockton, Sacramento, and Port Hueneme. RP 1801-06.

Long attempted to introduce comparator evidence showing that he was treated much more harshly than other employees who engaged in worse conduct, but who had not complained of discrimination. CP 1189-93; 1371-75; 1632-34; RP 261-63; 278-83; 2126-28; 1603-16; 1801-06.

Towards that end, Long moved in limine for inclusion of evidence relating to deckhand Craig Petit, and opposed BTB's motion in limine to exclude such evidence. CP 1189-93; 1371-75; 1632-34; 1997-2045.

According to BTB, Petit missed a job in September 2010 after being pulled over and questioned about drunk driving. CP 2010. It was not his first warning. CP 2008-09. BTB stated that "the most recent issue of tardiness (missing a job) should be via a first step verbal warning." *Id.* BTB never fired or transferred Petit from the POE despite him receiving other disciplinary warnings. CP 2007. The same decision-makers involved in Long's firing / transferring handled Petit's disciplining. CP 2008-09.

Long also tried to introduce evidence relating to deckhand Nick Bernert. CP 1189-94; 1371-75; 1632-34; 1997-98. Campbell – the same decision-maker involved in Long's firing / transferring – approved the rehiring of Bernert, despite Bernert having previously "missed a crew up which delayed a [s]hip run for 8 hours" due to drinking and criminal activity. CP 1997-98. The court excluded the disciplinary history of Petit and Bernert because both were deckhands. RP 261-63; 278-83.

The trial court also excluded comparator evidence that Port Captain Joseph Bromly was promoted to Supervisor Campbell's position by CEO Brusco (same decision-maker involved in Long's firing / transferring) despite physically assaulting co-workers. CP 2013-24; RP 261-63; 281-83. Evidence that deckhand Corey Johnson missed multiple jobs and received progressive discipline by the same decision-makers (CEO Brusco, HR Sabo, and Supervisor Campbell) was also excluded. CP

1537-42; 2026-31; RP 261-63. Evidence that Mark Guinn was not immediately fired by same decision-maker CEO Brusco after Guinn subjected BTB to a criminal judgment for his illegal actions was likewise excluded by the trial court. CP 1533-35; 2033-42; RP 261-63.

D. The Trial Court Erred in Allowing Inadmissible Statements of Law Undermining Long's Protected Activity and Firing.

Although the only claim before the jury was whether BTB retaliated against Long in violation of the WLAD (CP 1747-63), BTB improperly attempted to introduce untrue evidence that Long violated laws by hiring Morgan. First, during BTB's opening statement, counsel made the following false statement:

> So this person [Morgan], who cannot pass the physical and takes Percocet, and they don't know if he's on it or not, cannot be on a tugboat. He can't -- **Coast Guard regulation is he can't be on a tugboat.** Number two, this creates all kinds of liability for Brusco Tug & Barge.

RP 377-88. No Coast Guard laws were at issue in the case and Long's counsel immediately objected to BTB's improper legal opinion. *Id.* Then, during HR Sabo's testimony, BTB used leading questions to elicit the following testimony that Long violated the Americans with Disabilities Act ("ADA"):

> Q. [By Ms. Gamblin] Would you telling us any -- going into any detail as to your conversations with Mr. Knox or Ms. Schleuning [fellow Schwabe, Williamson & Wyatt attorneys],

what was your understanding as to the consequences of Mr. Long having failed to follow the hiring policy?

MR. BLANKENSHIP: I just don't understand how they get to ask about conversations of the lawyer without waiving privilege, so . . . I would object.

THE COURT: Go -- go ahead . . .

Q. [By Ms. Gamblin] Sure. I'll just ask you a simpler question. After you spoke with the attorneys, what did you do next?

A. I -- I attempted to find a facility where Mr. Morgan could be tested further.

Q. **And did you understand that by putting the -- by putting a worker on a -- to work before giving them their physical and drug test, that that was a violation of the Americans With Disabilities Act?**

A. Yes.

RP 597-600; CP 1684. Long again objected (*Id.*), as well as making an offer of proof, seeking a curative instruction that "any inference, argument or claims that Plaintiff Brian Long violated any laws or regulations is irrelevant and immaterial." RP 623-28; CP 1707-22. The trial court declined to give the instruction. CP 1747-63.

E. The Trial Court Erred in Denying Long's Motion for New Trial Based on the Jury Misconduct.

Following a jury verdict for Bo Brusco and BTB, Long discovered jury misconduct. Four jurors, Foreman Michael Flory (Juror 6), Drew O'Hara (Juror 1), Michelle Lemire (Juror 2), and Madalyn Mincks (Juror 7), signed declarations stating that Juror 12, David Wlaschin, injected external information into jury deliberations. CP 1680, 1780-92.

According to the four jurors, at the start of deliberations on day two, Juror 12 presented a speech using notes that he had prepared the night before, outside of the deliberation room. CP 1788 ¶ 2. He stated that "he had not slept much that night because he was working on a presentation." *Id.* The notes were not on the same paper as the notebooks provided by the trial court. *Id.*; CP 1791 ¶ 3. Juror 12's speech lasted roughly 20-35 minutes. CP 1780-92. Juror 12's conduct directly violated the trial court's instructions not to consider "anything extrinsic or extraneous," not to deliberate outside the jury room, and requiring that notebooks be locked in the jury room each night. RP 122-23, 257-58, 298-301, 304, 309, 1487.

During his presentation, Juror 12 – who was retired from both the Navy and from a sales job – acted as an expert on Coast Guard, Navy, and maritime laws and regulations. RP 172, CP 1788 ¶ 4, CP 1791 ¶ 3-4, CP 1781 ¶ 7, CP 1784 ¶ 7, 9. He referred to "law[s] on the books" not at issue in the case. CP 1788 ¶ 4. He also cited statistics about the safety risks associated with someone with a prosthetic leg. CP 1788 ¶ 5. He stated that "no law" would allow someone like Morgan on a boat. CP 1788 ¶ 4, CP 1781 ¶ 7, CP 1791 ¶ 4, CP 1784 ¶ 7. He also informed the jury that placing Morgan on a tugboat not only jeopardized safety, but violated Navy, Coast Guard, and Maritime laws and regulations. *Id.* He concluded that these laws prohibited Morgan from working on a ship. *Id.*

This was not the evidence presented at trial or the laws provided in the court's instructions. Despite BTB's false and improper statements during its opening statement regarding "Coast Guard regulation" – which Long objected to – there was no Navy, Coast Guard, or Maritime laws and regulations at issue in this case, or admitted as evidence. CP 1747-63; RP 377-88. Nor were any "statistics" ever entered into evidence. RP 01-2379.

Moreover, the legality of Long's hiring of Morgan was not before the jury (CP 1747-63); and through objections, an offer of proof, and seeking a curative instructive, Long moved to ensure that the jury did not consider such irrelevant and improper argument by BTB. CP 1707-22; RP 377-88; 597-600; 623-28. However, based on the juror declarations, it is clear Juror 12 injected the legality of Morgan's hiring into deliberations. CP 1780-92. In opposing Long's motion, BTB provided no evidence challenging the information provided by the four jurors. CP 1821-87.

The jury returned a verdict in favor of defendants. CP 1764-65; 1951-56. Long moved for a mistrial / new trial based on jury misconduct, but the motion was denied. CP 1768-79; 1888-1904; 1945-50. The trial court acknowledged that "a jury may have inserted into the discussions . . . that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel," but concluded that "it only related to the non-issue of whether or not Mr. Morgan was actually discriminated against." CP 1949.

Because the extraneous evidence injected by Juror 12 directly relates to the ultimate issues before the jury (such as Long's protected activity, the legitimacy of Long's firing, his reasonable belief that discrimination occurred), this timely appeal followed. CP 2239-69; 2276-80.

IV. ARGUMENT

A. Standard of Review

A trial court's denial of a motion for a mistrial or new trial based on jury misconduct is reviewed for abuse of discretion, as is a trial court's exclusion of evidence. *State v. Balisok,* 123 Wn.2d 114, 117, 866 P.2d 631 (1994); *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 138, 750 P.2d 1257 (1988); *Hizey v. Carpenter*, 119 Wn. 2d 251, 268, 830 P.2d 646 (1992). However, when reviewing an order denying a motion for new trial, "[t]he criterion for testing abuse of discretion is: '[H]as 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?'" *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.,* 140 Wn.2d 517, 537, 998 P.2d 856 (2000). A trial court's denial of a new trial is reviewed more critically than its grant of a new trial because a decision denying a new trial ends a party's rights. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997).

This rule of abuse of discretion is specific to motions seeking a new trial. It is distinguished from the general test for abuse of discretion –

which applies to the trial court's inclusion or exclusion of evidence – and examines whether a decision is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll* v. *Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). If the trial court abuses its discretion, the error will not be reversible unless the appellant demonstrates prejudice. *Portch v. Sommerville,* 113 Wn. App. 807, 810, 55 P.3d 661 (2002), *review denied,* 149 Wn.2d 1018 (2003).

B. The Trial Court Erred in Denying Long a New Trial Based on the Jury's Use of Extraneous Evidence.

"Juror misconduct involving the use of extraneous evidence during deliberations will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced." *Richards v. Overlake Hosp. Medical Center*, 59 Wn. App. 266, 273, 796 P.2d 737, 742 (1990).[7]

While there is a policy favoring upholding stable verdicts, this policy is trumped and a new trial is warranted if: (1) the declarations of the jurors allege facts showing misconduct, and (2) those facts are sufficient to justify making a determination that the misconduct affected the verdict. *Id.* at 271-272. "Any doubt that the misconduct affected the verdict ***must*** be resolved against the verdict." *Id.* at 273 (*emphasis added*). Indeed:

[7] "Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document." *Richards,* 59 Wn. App. at 270–71.

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

Id. (quoting *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989)). *See also Kuhn* v. *Schnall,* 155 Wn. App. 560, 575, 228 P.3d 828 (2010).

Here, the trial court not only conceded that a juror inserted extrinsic evidence into deliberations, but also acknowledged that the outside information involved erroneous statements of the law: "The one thing that potentially stands out is the assertion that a juror may have inserted into the discussion a personal belief, based on his experience, *that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel.*" CP 1949.

The extreme prejudice this extrinsic evidence caused is self-evident. As discussed below, if a jury believed Long violated the law in his hiring of Morgan, then certainly BTB had a legitimate non-retaliatory reason for firing Long. If hiring Morgan broke the law, Long's complaints about BTB's refusal to hire Morgan would also appear unreasonable, severely undermining Long's protected activity, which requires "reasonable belief." Yet, without concluding "beyond a reasonable doubt" that the verdict was not affected, the trial court nonetheless denied Long's request for a new trial, ruling that the jury was "not impacted by the

introduction of extrinsic information into the deliberation process." CP 1948-1950. This constitutes reversible error.

1. Jury Misconduct Occurred.

"Where a juror supplies the jury with evidence which was not admitted at trial, jury misconduct results." *Adkins*, 110 Wn.2d at 137. "Jury misconduct also results where a juror provides the jury with erroneous statements of law." *Id.* Introduction of such evidence is improper as it will not have been subject to objection, cross examination, explanation, or rebuttal by either party. *Richards,* 59 Wn. App. at 270.

Here, acting as an expert, Juror 12 prepared a 25-35 minute speech and brought his written, external notes from outside the court into deliberations, reading from his notes. *Supra* p. 20. Adopting the improper comments (not evidence) made by BTB's counsel that "Coast Guard regulation is [Morgan] can't be on a tug boat" and that by putting Morgan to work, Long violated the ADA, Juror 12 injected extraneous law into the case. Not only did Juror 12 misinform the jury about purported maritime laws, but he also concluded that "no law" would allow Morgan on a boat and that his hiring violated the law. *Id.* Juror 12's conduct violated the court's instructions. RP 122-23, 257-58, 298-301, 304, 309, 1487.

While it is not clear what external sources of information Juror 12 relied on in preparing his speech (internet, books, etc.), this was not

evidence or the laws before the jury. No Coast Guard, Navy, or Maritime laws or regulations were at issue in this case or admitted as evidence. CP 1747-63. Nor did any witnesses provide "statistics" relating to prosthetic legs. Injection of this type of information – "information that is outside all the evidence admitted at trial, either orally or by document" – is a textbook example of jury misconduct. *Richards,* 59 Wn. App. at 270–71.

Adkins is instructive. 110 Wn.2d at 136-138. While deliberating on a personal injury suit, the jury looked up definitions of "negligence" and "proximate cause" in a *Black's Law Dictionary* supplied by the court bailiff. *Id.* at 137. In reviewing the trial court's decision to grant a mistrial, the Supreme Court noted that while the dictionary definitions did not amount to new evidence as such, they constituted extrinsic information that was not admitted as evidence at trial or provided by the trial court. *Id.* at 136-138. The Supreme Court affirmed the trial court's granting of a new trial, holding that the jury's "consideration of matters not admitted at trial nor provided to the jury by the trial court" was misconduct. *Id.* at 137.

Similarly, in *Bouton-Perkins Lumber Co. v. Huston*, a juror introduced a pamphlet purporting to contain forest protection laws that were not part of the jury instructions. 81 Wash. 678, 682; 143 P. 146 (1914). On appeal, a new trial was granted based on juror misconduct:

> [W]e know of no method that could be adopted which would more effectually tend to confuse the minds of jurors and to mislead them in the proper discharge of their duty than to permit them to read or refer to law books during their consultations.

Id. Thus, by reading notes prepared outside the court and interjecting laws and regulations not before the jury, Juror 12 engaged in misconduct. *Adkins*, 110 Wn.2d 128; *Bouton-Perkins*, 81 Wash. at 682.

Moreover, while jurors may rely on their life experience to evaluate the evidence presented at trial, jurors cannot inject specialized knowledge into a case which is not at issue or was not fully disclosed during voir dire. *Richards,* 59 Wn. App. at 274. "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).

Here, even if Juror 12 did not research Coast Guard, Navy, and Maritime laws and his 25-35 minute speech was based purely on his time in the Navy, Juror 12's statements did not merely make references to common sense and everyday life experiences. Laws and regulations, by there very nature, constitute "specialized knowledge." *See e.g. Bouton-Perkins*, 81 Wash. at 682. Indeed, it is for this very reason that Washington Courts disallow witnesses to provide legal opinions:

> For an expert to testify to the jury on the law usurps the role of the trial judge. Each courtroom comes equipped with a 'legal expert,' called a judge, and it is his or her province alone to instruct the jury on the relevant legal standards . . .
>
> *State v. Clausing*, 147 Wn.2d 620, 628-630, 56 P.3d 550 (2002)

(internal citations omitted). In *Clausing*, the defendant physician was convicted of possession with intent to deliver prescription-only drugs. *Id.* at 623-624. Clausing's defense was that he delivered the drugs pursuant to a physician's prescription—including prescriptions issued by him before his license was revoked. *Id.* at 630. At trial, the Board of Pharmacy's director testified that a prescription is no longer valid after the revocation of the physician's license. *Id.* at 624-625. Although the trial court instructed the jury that this statement was opinion based on the "practical perspective of a pharmacist," and not a "legal opinion," the Supreme Court found the curative instructive to be insufficient. *Id.* at 629-630. The Supreme Court reversed the appellate court and the conviction because the testimony was a legal opinion, and an erroneous one at that, the trial court improperly admitted testimony setting forth legal opinion. *Id.*

While *Clausing* is not a jury misconduct case, the same logic applies. By allowing Juror 12 to provide un-rebutted recitations of maritime laws – laws not at issue in Long's case – Juror 12 invaded the exclusive province of the trial court and not only introduced a statement of

the law not given to the jury by the court, but prejudiced the jury with an erroneous legal conclusion. This misconduct is not negated by Juror 12 disclosing he was retired from the Navy.[8] *In re Stankewitz*, 40 Cal.3d 391, 399-400 (1985)(finding jury misconduct where a juror, who "advised the other jurors that he had been a police officer for over 20 years," "violated the court's instructions and 'consulted' his own outside experience as a police officer on a question of law.")

The introduction of this type of external information, infringing on expert testimony, constitutes juror misconduct regardless of whether it is also based on the juror's life experiences. In *Fritsch v. J.J. Newberry's, Inc.,* the court held that it was misconduct for a juror to introduce statements regarding the value of damages in a slip and fall case based on his own his own experience consulting with an attorney after injuring his foot. 43 Wn. App. 904, 905, 720 P.2d 845 (1986). Despite the information being based on the juror's own life experience, the court noted that such statements "are in the nature of expert testimony. It is akin to a jury bringing a book or text into the jury room which was never admitted in evidence but is relied upon by the jury in arriving at its verdict . . . such

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[8] By comparison, certainly if a lawyer disclosed he practiced law and was selected to serve as a juror, his statements advising the jury of the law – usurping the court's instructions – would not be pardoned simply because he had disclosed he was a lawyer. *Bouton-Perkins Lumber*, 81 Wash. at 682.

statements are not subject to objection, cross examination, explanation or rebuttal." *Id.* at 907 (internal citations omitted). Reversing the trial court, the appellate court ordered a new trial. *Id.* at 907-908.

Similarly, in *Halverson v. Anderson*, the Supreme Court held that it was misconduct for a juror to tell fellow jurors the salary of airline pilots in a personal injury case where the plaintiff desired to become a pilot but failed to introduce evidence regarding earning potential of pilots. 82 Wn.2d 746, 747-752, 513 P.2d 827 (1973). A new trial was granted. *Id.*

Examining what constitutes juror misconduct, the court in *Loeffelholz v. C.L.E.A.N.* looked to *Fritsch* and *Halverson* and found that misconduct occurs where a juror "injects unsupported information" regardless of whether that information comes from an "extrinsic source":

> Notably, the Supreme Court did not distinguish between information from an extrinsic source— *e.g.,* a newspaper article or an attorney not involved in the case—***and information from the juror's own speculation***.

119 Wn. App. 665, 679-80, *review denied,* 152 Wash.2d 1023 (2004) (*emphasis added*) (upholding a new trial based on juror misconduct where a juror introduced evidence regarding the salary of plaintiff's profession where loss of earning capacity was not before jury).

As such, because Juror 12's extraneous discussion of erroneous maritime and Coast Guard laws and statistics extended beyond common

knowledge into specialized expertise – expertise which usurped the judge's role to instruct on the law – Juror 12 engaged in misconduct.

2. The Misconduct Affected the Jury's Determination.

Where extrinsic evidence has been introduced during deliberations, the trial court must make "an objective inquiry into whether the extrinsic evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence on the jury." *Kuhn,* 155 Wn. App. at 575. While it is not for the juror to say what affect the remarks may have had upon the verdict, he may state facts, and from them the court will determine what the probable effect was upon the verdict. *Gardner v. Malone*, 60 Wn.2d 836, 840, 376 P.2d 651 (1962).

Again, "[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*, 59 Wn. App. at 273 (*emphasis added*). *See also Fritsch, 43* Wn. App. at 907-08 ("any doubt that the misconduct affected the verdict, the court is obliged to resolve that doubt in favor of granting a new trial."); *Kuhn,* 155 Wn. App. at 575.

Failing to apply this standard, the trial court erred in assuming that the jury was "not impacted" by Juror 12's misconduct and finding that the extraneous evidence "only related to the non-issue of whether or not Mr. Morgan was actually discriminated against and not to those matters that

were at issue." CP 1949. At no time did the trial court recognize that under the law any doubt that the misconduct occurred must be resolved against the verdict. CP 1948-1950; *Richards*, 59 Wn. App. at 273. Thus, based on the language of its order, it appears that the trial court applied a less stringent standard to the evaluation of the potential impact of the extrinsic evidence on the verdict than is mandated under Washington law. *Id.*

Applying the correct standard, it cannot be said "beyond a reasonable doubt" that the interjection of evidence that it was unlawful for Morgan to work for BTB did not have an impact on the jury's determination of whether it was lawful for BTB to fire Long for opposing the discrimination of Morgan. Certainly, it was error for the trial court to find that this extraneous evidence "only related to the non-issue of whether or not Morgan was actually discriminated against and not to those matters that were at issue." CP 1949.

Under Jury Instruction No. 7, to establish his claim of unlawful retaliation as to a defendant, Long had the burden of proving each one of the following elements by a preponderance of the evidence:

> (1) That the plaintiff was opposing what he reasonably believed to be discrimination on the basis of disability;
> (2) That the plaintiff was subjected to an adverse employment action by the employer; and
> (3) That the plaintiff's opposition to discrimination was a substantial factor in the defendant's decision-making in taking the adverse action . . . .

CP 1756. As stated by the trial court, all three of these elements "were close and hotly contested." CP 1950.

The extraneous evidence and law injected by Juror 12 – namely, that Long violated the law in allowing Morgan to work on a tugboat – relates directly to prongs one and three of Long's retaliation claim. Moreover, because Juror 12's information was outside all the evidence admitted at trial, it was not subject to "to objection, cross examination, explanation, or rebuttal." *Richards,* 59 Wn. App. at 270.

These are highly prejudicial allegations, as they would justify BTB's anger and adverse acts against Long and undermine essential elements of his WLAD claim. If the jury believed that Long violated every "law on the books" in his hiring of Morgan, then a jury could reasonably find BTB had a legitimate reason to take adverse actions against Long, including removing him from the POE. This directly relates to element three of Long's WLAD retaliation claim. CP 1756.

Likewise, if the jury believed that Long knew or should have known that Morgan could have *never* legally and safely been a deckhand, a jury would not be compelled to find that Long "reasonably believed" that BTB discriminated against Morgan. This directly relates to element one of Long's WLAD claim. Without proving these elements, Long loses.

The significance of Juror 12's legal opinion was only compounded by BTB's improper statement to the jury that "Coast Guard regulation is [Morgan] can't be on a tugboat" (RP 377-88) and counsel eliciting the following testimony through leading questioning of HR Sabo:

> Q. [By Ms. Gamblin] Sure. I'll just ask you a simpler question. **After you spoke with the attorneys, what did you do next?**
>
> A. I -- I attempted to find a facility where Mr. Morgan could be tested further.
>
> Q. **And did you understand that by putting the -- by putting a worker on a -- to work before giving them their physical and drug test, that that was a violation of the Americans With Disabilities Act?**
>
> A. Yes.

RP at 597-600. Thus, not only did defense counsel elicit testimony that Long violated the ADA by placing Morgan to work, but she actually attributed this opinion to legal advice she received from defense counsel. *Id.*

Although Long objected to defense counsel's statements, the court did not sustain his objections or provide his requested curative instruction. RP 377-88; 597-600; 623-28, CP 1707-2l; 1747-63. Juror 12's misstatements of the law, thus, only served to bolster defense counsel's prior improper statements without giving Long the opportunity to respond.

This misconduct significantly tainted the jury. Not only did the jury hear that BTB consulted with counsel and were told that Long violated the ADA in putting Morgan to work, but a purported "expert in

safety as well as naval and marine laws" confirmed that Morgan's hiring violated the law. CP 1780-92. The legality of his hiring was not at issue.

While the jurors are not allowed to opine on how the external evidence affected deliberations, from the evidence presented, it is clear that the information impacted the jury's determinations. *Gardner*, 60 Wn.2d at 840. Indeed, two of the jurors presenting declarations found for BTB and CEO Brusco. RP 1705. Moreover, prior to Juror 12's prepared speech, the jury was seven for Long and five for defendants. CP 1784. After Juror 12's speech, a defense verdict was entered. CP 1764-65.

Given the nature of this evidence and the undeniable fact that Juror 12's misconduct supported BTB, the trial court abused its discretion in finding that this extrinsic evidence did not contribute to the verdict, and in failing resolve any doubt that misconduct occurred against the verdict. Since issues "were hotly contested," the trial court could not objectively conclude *beyond a reasonable doubt* that the jury might not have reached a different conclusion had extrinsic law not been introduced. CP 1950.

The law demands that Long get a new trial. *See e.g.*, *Adkins*, 110 Wn.2d at 138 (despite "negligence" being part of the jury instructions, the court held that the improper introduction of the *Black's Law Dictionary* definition by the jury "alone could have well affected the verdict as it contained "legal premises not applicable to the facts of this case, and

which could well have confused or misled the jury."); *Bouton–Perkins*, 81 Wash. at 678 (granting a new trial where the interjection of extraneous law was prejudicial to appellant, and favorable to respondent); *Fritsch*, 43 Wn. App. at 906-907 (reversing the trial court and remanding for a new trial because there was doubt whether the extrinsic evidence impacted the verdict); *State v. Cummings*, 31 Wn. App. 427, 430-431(1982)(holding that "the doubt must be, in the absence of findings to the contrary, resolved in [defendant's] favor"); *Halverson,* 82 Wn.2d at 746; *Loeffelholz*, 119 Wn. App. at 665.

3. The Juror Declarations Do Not Inhere in the Verdict.

A jury verdict will not be set aside based on evidence that 'inheres in the verdict.' *Gardner*, 60 Wn.2d at 841. Evidence inheres in the verdict to the extent that it discloses juror thought processes. *Richards*, 59 Wn. App. at 272. In *Gardner*, the court laid out two tests to help determine whether evidence in a juror affidavit inheres in the verdict:

> One test is whether the facts alleged are linked to the juror's motive, intent, or belief, or describe their effect upon him; if so, the statements cannot be considered for they inhere in the verdict and impeach it .... Another test is whether that to which the juror testifies can be rebutted by other testimony without probing a juror's mental processes.

60 Wn.2d at 841. Testimony as to the fact of misconduct is properly considered; testimony as to the effect of misconduct is not. *Id.* at 842–43.

See also Halverson, 82 Wn.2d at 752 ("Where jury misconduct can be demonstrated by objective proof without probing the jurors' mental processes, the effect the improper information may have had upon the jury is a question properly determined" by trial court).

A review of cases applying *Gardner* make it clear that the four declarations at issue do not inhere in the verdict. In *Fritsch*, among making other statements, the affidavit alleging misconduct stated:

> we had difficulty in arriving at a figure . . . MR. SAUSER stated he had consulted an attorney and was told a reasonable sum for the pain and suffering he endured for that particular month would be $1,000.00. We then multiplied that figure by the number of months MRS. FRITSCH had lived since the accident . . .

43 Wn.App. at 906. Concluding that the "affidavit contains facts which are not linked to the juror's motive, intent, or belief or describe the effect upon him," the court held that under *Gardner,* the declarations did not inhere in the verdict." *Id.* at 907.

Similarly, in *Loeffelholz*, the juror alleging misconduct stated the following in response to being asked how the jury calculated damages:

> [One] juror estimated Mr. Loeffelholz's average salary at $30,000 . . . another juror suggested basing damages on the two years the case has been pending times his average salary. They multiplied that average salary by the number of years the suit has been on-going (2) then by the number of defendants (4) to arrive at a total of $240,000.

119 Wn.App. at 679. The court held that "this information did not inhere in the verdict." *Id.* at 683.

Here, the juror declarations provided in support of Long's request for a new trial provide the Court with facts without commenting on how the misconduct affected deliberations.[9] CP 1780-92. All four jurors were silent on the affect Juror 12's statements had upon the jury. *Id.* Moreover, although BTB did not rebut the facts presented in the juror declarations with other juror testimony, this is *not* because rebuttal would require "probing a juror's mental processes." CP 1821-87. Thus, under the *Gardner* tests, the statements do not inhere in the verdict.

Based on the above, Long respectfully requests that the Court of Appeals conclude that the trial court abused its discretion and order that Long is entitled to a new trial on the basis of juror misconduct.

C. The Trial Court Erred in Not Admitting the Westwood Notes and In Refusing to Allow Long to Use Impeachment Evidence.

1. Under ER 904, the Westwood Notes were Automatically Admissible.

Under ER 904, a document is per se admissible if the party seeking its admission has timely served the document on the opposing party and the opposing party fails to object to its admission or by extension, later

[9] While the four juror declarations are silent on jury's thought processes, to the extent the Court in finds that portions of the declarations inhere the verdict, such portions can be disregarded. *State v. Reynoldson*, 168 Wn. App. 543, 544, 277 P.3d 700 (2012).

withdraws its objection. *Miller v. Arctic Alaska Fisheries, Corp.,* 133 Wn.2d 255, 260, 944 P.2d 1005 (1997) ("*Miller II*"). Specifically, ER 904 provides, in pertinent part:

> (a) Certain Documents Admissible. In a civil case, any of the following documents proposed as exhibits in accordance with section (b) of this rule **shall be deemed admissible unless objection is made under section (c) of this rule**:

In *Miller v. Alaska Fisheries,* 83 Wn. App. 255, 921 P.2d 585 (1996) ("*Miller I*"), *overruled in part on other grounds*, the court held that not only must a party make timely and proper objections for purposes of authentication, but must also object to other evidentiary objections, or any such objections are waived:

> We conclude that the objection provision relates not only to authentication, but to all evidentiary objections. The question then becomes whether substantive evidentiary objections are waived if not made within the time provided. We hold that generally they are . . .

Id. Under this approach, the *Miller I* appellate court found that the defendant's failure to make its hearsay objection to the letters submitted by the plaintiff within the ER 904 time limits resulted in a waiver of any objection and the automatic admission of the letters. *Id.* at 262.

In *Miller II*, the Washington Supreme Court upheld the appellate court's ruling as to the admissibility of the letters:

> as the Court of Appeals points out, where documents are timely offered under ER 904, the rule creates an 'expectation of admission' in the absence of a timely

> objection. This approach is in accord with the 'presumption of admissibility' under the rule.

133 Wn.2d at 260 (*emphasis added*)(internal citations omitted).

Here, Long timely designated the Westwood Notes. Although BTB initially objected on the grounds of "Hearsay, ER 801, 802, Authentication ER 901," at trial, BTB withdrew all its objections, representing that the records were "met with no objection on authenticity" and stipulating that the Westwood Documents (which included the Notes) fell under the business exception to the hearsay rule. RP 1736-39.

Under ER 904, once BTB withdrew its only objections under ER 904 – notifying the court that Long's subpoena of the records custodian was unnecessary – the Westwood Documents were deemed authentic and admissible. *Miller II,* 133 Wn.2d at 260. Any later objection to their introduction was waived. *Id.* As such, the trial court erred in sustaining BTB's untimely "lack of foundation" objection and excluding the Notes during Long's examination of Juker. RP 2076-85, 2139-40.

Moreover, even if BTB timely objected to the Westwood Notes on the grounds of "foundation" under ER 904 – which it failed to do – a general objection to admission of evidence on grounds of foundation is insufficient to rebut the "expectation of admissibility" created by Long's ER 904 designation. *Hendrickson v. King County*, 101 Wn.App. 258, 268-

269, 2 P.3d 1006 (2000). In *Hendrickson,* the plaintiff designated medical records pursuant to ER 904. *Id.* at 262. In its timely objections to plaintiff's ER 904 submission, defendant stated that under *Miller*, it was "mak[ing] every objection it could anticipate, and was therefore objecting to foundation because it was unclear whether "proper foundation will be laid by plaintiffs." *Id.* at 263. In the parties Joint Statement of Evidence, defendant reiterated this objection stating: "[d]efendant reserves admissibility decision pending foundation . . . determinations at trial." *Id.*

At trial, the defendant attempted to introduce the medical records listed in plaintiff's ER 904 notice. *Id.* at 264. Plaintiff objected on the ground that defendant had failed to provide notice of its intention to enter the documents into evidence and the trial court excluded the records. *Id.*

Reversing the trial court, the appellate court held plaintiff's own designation of the documents created an "expectation of admission" under ER 904 and the plaintiff could not rely on defendant's *insufficient* foundation objection to prevent admission of the documents. *Id.* at 268-269. Because "[a]n objection claiming a lack of foundation is a general objection" and "ER 904 requires any other objections to be specifically set forth, the foundation objection also did not comply with ER 904," *Id.* at 268-269 (internal citations omitted). The appellate court, therefore, held that the trial court erred in refusing admit the medical records. *Id.*

Here, BTB never raised a "lack of foundation" objection – general or specific – in response to Long's ER 904 designation of the Westwood Documents. Thus, under *Hendrickson*, because BTB failed to "specifically set forth" its lack of foundation objection in its ER 904 objections, its general objection at trial on grounds of foundation was insufficient to rebut the "expectation of admissibility" created by Long's ER 904 designation. *Id.* The trial court erred in excluding the Westwood Notes, and in not allowing Long to use the notes to examine Juker, during Long's rebuttal, or in closing. *Id.*; *Miller II,* 133 Wn.2d at 260.

2. The Error Was Unfairly Prejudicial to Long.

Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Thomas v. French,* 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). However, when "there is no way to know what value the jury placed upon the improperly admitted [or excluded] evidence, a new trial is necessary." *Id.* at 105.

The exclusion of the Westwood Notes was prejudicial to Long and far from harmless. The Notes relate directly to whether Long's firing / transfer was warranted or retaliatory, an issue vigorously contested at trial. CP 1950. Indeed, after hearing testimony from Long and Juker, the jury was left with two conflicting stories: According to BTB, Long abandoned his post at the POE and Juker was left to scramble to find coverage for the

ship assist. RP 2018-30; According to Long, Juker was directly notified by Westwood that the ship was postponed by eight hours and failed to inform Long or the relief captain of this significant delay. RP 2224-26.

The Westwood Notes serve as the only neutral evidence reconciling the competing testimony and proving that Juker, not Long, knew that the ship had been delayed by eight hours. As discussed above, coupled with the phone records, the Westwood Notes confirm that Long was diligent in arranging for coverage. *Supra* at p. 9-16. The Notes support Long's testimony that had he been notified by Juker that the ship had been rescheduled, he could have arranged for a back-up captain for the correct time or even returned to Everett if needed for coverage. RP 2225-26. Moreover, the Notes impeach Juker, who provided damning evidence against Long and whose credibility was at issue. RP 2018-30.

Thus, the Westwood Notes were central to vindicating Long and establishing that BTB's reason for firing Long was pretextual. While there was other evidence refuting BTB's alleged reason for firing Long, the Notes were the only such evidence from a neutral, third party (Westwood Shipping) that proved Juker, not Long, was notified about the schedule change of the ship assist leading to Long's firing. The Notes, therefore, cannot properly be dismissed as being merely cumulative. *See e.g. Brown v. Spokane County Fire Protection Dist. No. 1,* 100 Wn.2d 188, 668 P.2d

571 (1983) (an evidentiary error may comfortably be deemed harmless where the evidence excluded was merely cumulative.)

In short, because the Westwood Notes related to a hotly contested issue, were not cumulative, and undermined the jury's verdict, it cannot be inferred that the jury would not have been aided by the inclusion of this evidence. Accordingly, the trial court's exclusion of the Westwood Notes constitutes reversible error.

3. Disallowing Long to Impeach Anderson With a Prior Inconsistent Statement Constituted Prejudicial Error.

As discussed above, although Anderson confirmed he was available and qualified to be Long's relief captain for Long's December 2009 vacation in a voluntary taped statement, at trial, he provided conflicting testimony. *Supra* at p. 13. The inconsistencies included testifying that: (1) he would not have been able to run a harbor tug at the POE for a ship assist; (2) he had no authorization from BTB to act as a relief captain; and (3) he would never have been available to cover for Long as a relief captain since he had a dental appointment. *Id.*, RP 667-692. When led by his employer's counsel, Anderson provided additional inconsistent reasons why he never would have agreed to serve as a relief captain in December 2009 for Long at the POE. *Id.*

Under ER 607, Long had the right to impeach Anderson to reveal his (a) bias, (b) mental or sensory deficiencies (Anderson forgot things said five months earlier), (c) contradiction (since he changed his position on key points), and (e) prior inconsistent statements. Overall, the recording painted a powerful picture of inconsistency, and under ER 613 should have been admitted as a prior inconsistent statement. As stated by Karl B. Tegland:

> The Washington Courts have often said that the test for inconsistency is as follows: 'Inconsistency 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)).

Overall, comparing Anderson's prior statement with his testimony reveals inconsistent beliefs, as well as specific inconsistencies. Anderson's conflicting statement at trial that "I know that I told [Long] that I could not do the job for him," would have had a very different impact on a jury than his prior statement that he "would be willing to cover a second tug job if something came up, up in Everett." RP 680; Ex. 257A.

In short, there was no legitimate basis to deprive Long the opportunity to impeach Anderson. Contrary to the trial court's ruling, the

form of the questions asked to Anderson in the recording goes to weight, not admissibility. Anderson tarnished Long's credibility, untested by Anderson's prior inconsistent statements on an issue that went to the heart of this case. This is not harmless error.

D. The Trial Court Erred in Excluding Highly Probative Comparator Evidence.

A plaintiff may rely on either direct or circumstantial evidence to show retaliatory intent. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68-69, 821 P.2d 18 (1991). This is because an "employer is not apt to announce retaliation as his motive." *Id.* at 69. Different treatment of similarly situated employees ("comparators") constitutes circumstantial evidence supporting a finding of retaliation. *Johnson v. D.S.H.S*, 80 Wn.App. 212, 227, 907 P.2d 1223 (1996) (different treatment creates an inference of intent); *Winarto v. Toshiba America Electronics Components, Inc.*, 274 F.3d 1276 (9th Cir. 2001); *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 444-445, 191 P.3d 879 (2008).

Washington courts have not clearly identified the test for determining what comparator evidence is permissible, but because our courts look to federal law for guidance when construing the WLAD and "will adopt those theories and rationales which best further the purposes

and mandates of our state statute," federal cases are instructive. *Fulton v. D.S.H.S.*, 169 Wn.App. 137, 152, 279 P.3d 500 (2012).

Although the Ninth Circuit has stated that "individuals are similarly situated when they have similar jobs and display similar conduct," this is not to say that to be similarly situated an employee must be nearly identical. *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003). Rather, the critical question is "whether there is a basis for inferring discriminatory [or retaliatory] motive . . ." *Bowden v. Potter*, 308 F. Supp. 2d 1108, 1117 (N.D. Cal. 2004).

In reaching its holding, *Bowden* relied heavily on Second Circuit case, *McGuinness v. Lincoln Hall,* 263 F.3d 49 (2nd Cir.2001), which rejected that "another employee cannot be similarly situated to a plaintiff unless the employee had the same supervisor, worked under the same standards, and engaged in the same conduct." *Id.* at 53-55.

Ninth Circuit courts have consistently cited to *McGuinness* with approval, as "explaining [the] minimal showing necessary to establish co-workers were similarly situated." *Aragon v. Republic Silver State Disposal, Inc.*, 292 F.3d 654 (9th Cir. 2002). In *Bowden,* the court rejected reading *Vasquez* too rigidly:

> Similarly situated does not require that the employees be *identically* situated. The employees need not necessarily have the same supervisor, be subject to the same standards, and engage in the same conduct. The relevance of such factors depends on the circumstances and nature of the case . . . *The*

> *ultimate question that is informed by the similarly situated analysis is whether there is a basis for inferring discriminatory motive* . . . The issue . . . is therefore fact specific and defies a mechanical or formulaic approach.

Bowden, 308 F. Supp. 2d at 1117 (*emphasis added*). *See also Hawn v. Exec. Jet Mgmt., Inc.,* 615 F.3d 1151, 1157-58 (9th Cir.2010) (whether an employee is similarly situated depends on the context and is a question of fact that "cannot be mechanically resolved."). As emphasized by the Ninth Circuit:

> [it is] important not to lose sight of the common-sense aspect' of the similarly situated inquiry. It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees' because one can always find distinctions in 'performance histories or the nature of the alleged transgressions.

Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114 (9th Cir. 2011)(quoting *Humphries v. CBOCS West, Inc.,* 474 F.3d 387, 405 (7th Cir.2007)) (*internal citations omitted*).

Here, BTB – through CEO Brusco, Campbell and other members of BTB management – allegedly removed Long from his position as Port Manager for failing to provide tug coverage. As such, evidence showing that other employees, also working under this core management group, engaged in similar *or worse* conduct but were not disciplined or fired is highly probative and admissible, even if their conduct was not identical to Long or the employee held a different position.

Among other evidence discussed above, Long attempted to introduce evidence that employees were not fired for multiple missed and/or late jobs (Petit, Bernet), even when coupled with multiple warnings of insubordination (Petit) or "drinking on the tug" (Bernet). *See supra* at p. 16-17. In contrast, Long – a fourteen year BTB employee with no prior performance problems – was fired for allegedly failing to ensure proper tug coverage, despite Long having a compelling explanation (*see supra* at p. 10-14) and the job being completed on time and without incident. RP 1868-69; 2104-05.

The trial court erred in excluding the offered comparator evidence, erroneously finding that the employees were not similarly situated because they were deckhands. *See supra* at p. 16-18. This is the exact inflexible approach to *Vasquez* the Ninth Circuit warns against. *Earl*, 658 F.3d at 1114 -1115. *See also Bowden*, 308 F.Supp.2d at 1116 ("an employee on an assembly line who physically assaults a co-worker is similarly situated to a supervisor who engages in similar conduct.").

The evidence Long attempted to introduce is especially probative given that the heart of BTB's case was that Long's alleged misconduct warranted removal from the POE because it risked delaying a ship. Indeed, according to BTB, 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; 1517-18.

As deckhands' presence are also required to complete a ship assist (each tug requires at a minimum, one captain and one deckhand), a missed or late job by a deckhand also risks delaying a ship assist; the identical risk BTB alleges it was exposed to by Long's alleged conduct. Evidence that deckhands missed jobs but were not disciplined therefore proves that (1) Long was retaliatorily singled out; and (2) that BTB did not consider Long's alleged conduct on the December 21 to be as egregious as purported.

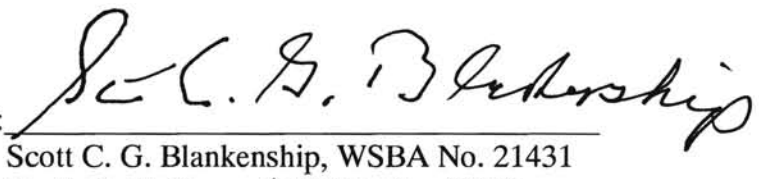
Because such powerful evidence provides "a basis for inferring discriminatory motive," it was prejudicial error for the trial court to exclude its admission. *Bowden*, 308 F.Supp.2d at 1117.

V. CONCLUSION

Substantial justice has not been done. Extraneous evidence and erroneous statements of law tainted the jury. Highly probative evidence refuting BTB's alleged reason for firing Long was excluded. Long was denied the ability to impeach material witnesses. Long was deprived of a fair trial. This Court should reverse the trial court's judgment and remand the case for a new trial. Costs and fees on appeal should be awarded to appellant.

DATED this 16th day of December, 2013.

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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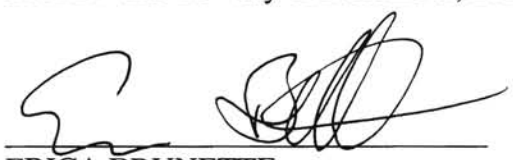
DATED this 16th day of December, 2013, at Seattle, Washington.



ERICA BRUNETTE
Paralegal

Appendix A

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

BRIAN LONG, Plaintiff, v. BRUSCO TUG & BARGE, INC., et al., Defendants.	NO. 11-2-37996-5 SEA ORDER ON MOTION FOR MISTRIAL

Following return of a jury verdict for the defense but before entry of judgment on that verdict, the plaintiff has brought what he has labeled a "motion for a mistrial based on prejudicial juror and counsel misconduct." The relief sought is a new trial. The Court will address, in turn, the arguments about the conduct of counsel and the jurors.

Conduct of Counsel

Having spent much of the trial correctly objecting to plaintiff's counsel's comments putting before the jury matters not in evidence, defense counsel should know they are not in a strong position in arguing that it was OK to do just

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516 Third Ave
Seattle, WA 98104

that in closing argument. Display of the unadmitted photograph (which *counsel testified* showed her client on his wedding day) was improper and that mistake would be better acknowledged. This is not to say that it tainted the trial; it did not. Likely because its impact was so inconsequential, plaintiff's counsel tactically elected not to lodge a contemporaneous objection. Had there been a timely objection, it would without doubt have prompted an admonition from the court and one more in a series of oral reminders to the jury of what is and is not proper evidence for their consideration. Any objection (along with the opportunity for corrective action) was waived.

Owing to a number of contributing factors, the trial testimony of Lauri Sabo was muddled to an epic degree. Her ability to form impressions at the time of the events in question may well have been compromised. Her memory was foggy in the courtroom, a setting in which both her emotions and the lawyers were strong forces tugging her in multiple, conflicting directions. The lawyers' self-serving leading questions helped neither her, the jury nor the search for truth. The use made of her prior statements was hopelessly confusing to all in the room. Not a lot was clear after Ms. Sabo's testimony but what did come through to the jury was that, despite her past and present loyalty to the defendants, she had reasonably perceived discrimination in their treatment of Anthony Morgan.

In a series of emails written as events were unfolding, she expressed herself with greater clarity than in her testimony. In them, she stated first "I'm afraid that it would be considered discrimination if we don't at least send him [Anthony Morgan] for this more intensive physical." Then, after speaking with a

corporate attorney, she said "if we let him go for no good reason now that he is actually working, we could open up ourselves for a lawsuit under the Americans with Disabilities Act." Finally, once the decision had been made to do just that, she wrote: "I personally feel bad for the guy, but our attorney says he is afraid of him getting hurt and filing a Jones Act claim."

In court, the pliable Ms. Sabo tended to answer everyone's questions in the manner it seemed the questioner wanted.[1] Consistent with this, she evidently murmured a "Yes" to this odd question from defense counsel: "And did you understand that by putting the – by putting a worker on a – to work before giving them their physical and drug test, that that was a violation of the Americans With Disabilities Act?" Plaintiff's counsel then interjected "I don't – that didn't make any sense", a proposition with which the Court agreed. Being of the view that the jury also made no sense of it (i.e., the idea that offering paid employment to a disabled worker would violate rights protected under the ADA), the Court simply instructed counsel to move on. When defense counsel thereafter seemed to return to the topic, the Court sustained the objection of plaintiff's counsel and that was the last heard on the subject.

The remaining concerns raised about counsel's conduct either lack support in the record or relate only to damages issues not reached by the jury.

The Court cannot find any prejudicial misconduct by counsel to have impacted the deliberative process.

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[1] It was a different witness who was asked on cross "And you took an oath before your deposition just as you took an oath this morning, didn't you?" to which he readily assented. This gave the Court an opportunity to caution the jury (and counsel) about the danger of leading questions. In fact, the witness had only been sworn on the previous afternoon when his testimony began and not that morning.

Conduct of Jurors

Before trial, this Court was asked to grant summary judgment in the defendants' favor and dismiss plaintiff's claims. The Court declined to do so since it was apparent the case hinged upon resolution of disputed issues of material fact. A jury of twelve was empanelled to resolve those factual disputes and it has. Having submitted those questions to the jury and having (it is believed) provided them with appropriate legal guidance, the Court is reluctant to lightly set aside both the product of their hard work and also the strong systemic interest in finality.

From the beginning of trial proceedings, it was orally stressed to the jurors that this was not a trial of Anthony Morgan's discrimination claim but rather of Brian Long's retaliation claim which is quite different. In its written instructions, the Court deemed it necessary to re-emphasize this point by stating: "The case before you does not involve a claim of direct discrimination and you are not being asked to make any findings in this regard."

It was repeatedly conveyed to the jury that whether or not, *in hindsight*, Mr. Morgan was discriminated against was not their concern; rather, their focus should begin with the question of whether or not Mr. Long, *at that time*, had a *reasonable belief that Mr. Morgan was being discriminated against. This element* of plaintiff's claim ultimately was not strongly disputed. Mr. Long's *contemporaneous statements demonstrated his belief and Ms. Sabo's* contemporaneous emails substantiated its reasonableness. Further confirmation (of the reasonableness of a perception of discrimination against Mr. Morgan)

came in the defense evidence that the company responded to the EEOC charges by practically begging Mr. Morgan to come to work for them.

The elements that developed as constituting the crux of the jury's work were (a) whether the plaintiff engaged in opposition conduct (or did his support for Mr. Morgan cease once the discriminatory act was done?), (b) whether the plaintiff suffered an adverse employment action (or was he given a lateral transfer to a higher paying position?), and (c) whether any such adverse employment action was taken with a retaliatory motive (or was it because of his missing a ship assist job?). All three of these were close and hotly contested issues that were rightly the focus of the trial. The challenge for the plaintiff was that in order to establish his claim, he had to prevail on all three.

The above is well known to counsel and the parties. The Court states it simply to provide context for examination of the purported juror misconduct. Most of what has been put before the Court concerns the jury's deliberative process behind closed doors and a proper respect for the jurors and for the jury system precludes the Court from considering it. The one thing that potentially stands out is the assertion that a juror may have inserted into the discussions a personal belief, based on his experience, that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel. Regardless of whether one stretches to call this an insertion of outside facts or law into the deliberations, it is clear it only related to the non-issue of whether or not Mr. Morgan was actually discriminated against and not to those matters that were in issue.

The Court does not know (and should not know) which one or more of those above-stated hotly disputed essential elements of plaintiff's claim was deemed to fall short in the mind of each of ten jurors when the final tally was taken at the end of their second day of deliberations. The Court can say, objectively, that their determinations were not impacted by the introduction of extrinsic information into the deliberative process.

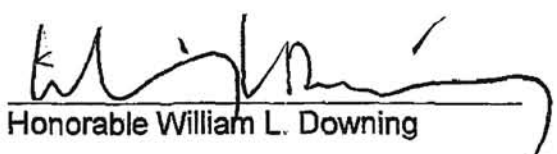
Once the jury had determined that the plaintiff had failed to establish the defendants' liability to him, they did not reach the question of damages. Accordingly, the Court does not need to consider the assertion that a juror committed misconduct by discussing his expectation for what the plaintiff will earn as a firefighter.

The Court concludes that there was no jury misconduct resulting in outside information being put before the jury and affecting the verdict.

Conclusion

The perfect trial is a rarity and this trial was not perfect. It should be beyond dispute that it was a fascinating trial and a well-tried case. No doubt there are things that each of the players – judge, counsel, jurors – could have done better but, ultimately, it was a fair trial. The jury's verdict will stand. The Motion for Mistrial is DENIED.

Dated this 24th day of May 2013.



Honorable William L. Downing

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Appendix B

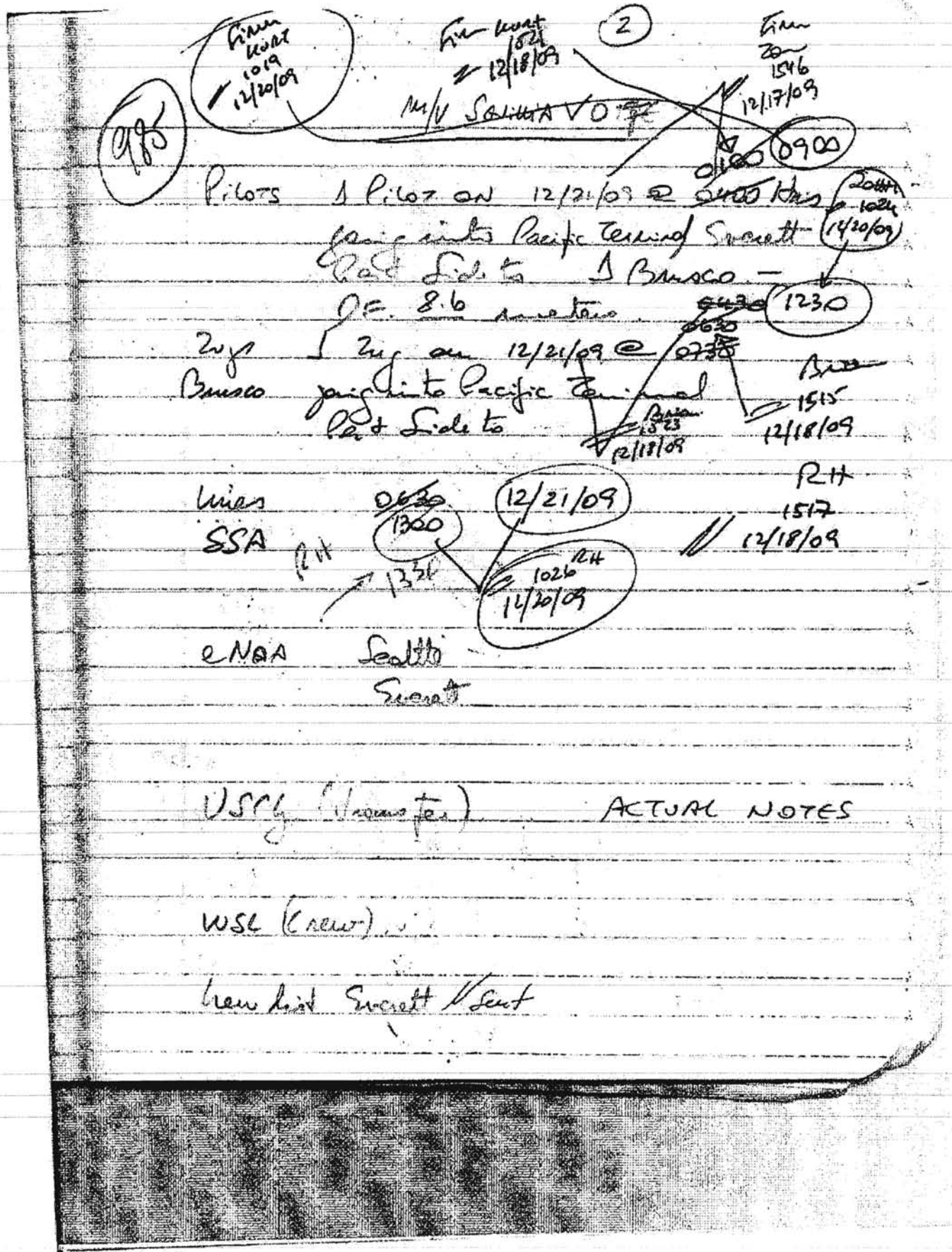
M/V SEVILLIA V176

Pilots 1 PILOT ON 12/21/09 @ ~~0900~~ 0900 HRS
GOING into PACIFIC TERMINAL
EVERETT Port Side to 1 BRUSCO
Dg OF 8.6 METERS

Tugs Brusco 1 Tug ON 12/21/09 @ ~~1230~~ 1230 ~~0730~~ 0730
GOING INTO PACIFIC TERMINAL
Port Side to

LINES ~~0630~~ 1300 12/21/09

Firm Kurt 1019 12/20/09
Firm Kurt 1521 12/18/09
Firm Tom 1546 12/17/09
Brian 1523 12/18/09
Brian 1515 12/18/09
John 1024 12/20/09
RH 1517 12/18/09
RH 1026 12/20/09


Pilots
2 yr Brusco
Liners
SSA
eNOA
USCG (Vancouver)
ACTUAL NOTES
WSL (Crew)
Crew list Everett Sent

Appendix C