Supreme Court No. 90976-8

Court of Appeals No. 70529-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIAN LONG,
Petitioner

v.

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

PETITION FOR DISCRETIONARY REVIEW

THE BLANKENSHIP LAW FIRM, P.S.
Scott C. G. Blankenship, WSBA No. 21431
Richard E. Goldsworthy, WSBA No. 40684
1000 Second Avenue. Suite 3250
Seattle, Washington 98104
Telephone: (206) 343-2700
Attorneys for Petitioner

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I. IDENTITY OF PETITIONER

Petitioner-Plaintiff Brian Long respectfully requests this Court to accept review of the Court of Appeals decision designated in Part II of this Petition.

II. DECISION FOR REVIEW

Petitioner Long seeks review of a decision by the Court of Appeals, Division I, in the above referenced case which was filed on August 11, 2014. Reconsideration was denied on September 12, 2014. The Court of Appeals Opinion to be reviewed is reproduced in the Appendix to this Petition.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a new trial must be granted in a disability retaliation case under the Washington Law Against Discrimination (WLAD), RCW 49.60 *et seq.*, where jurors inserted outside and erroneous laws to assert that Petitioner Long's opposition to disability discrimination (hiring a deckhand with a perceived disability and opposing his termination) expressly violated Coast Guard and Maritime laws, facts and law not in evidence?

2. Whether the Court of Appeals erred when it failed to follow established Washington Supreme Court cases, which uniformly hold that jury misconduct results when jurors provide false outside law and legal

opinions during deliberations when the trial judge is the only legal expert permitted to instruct the jury on the law?

3. Whether jurors' insertion of erroneous laws and legal opinions into deliberations inheres in the verdict so long as the erroneous laws are based on the jurors' personal backgrounds and supposed knowledge of the law, even when such acts violate the judge's explicit instructions to apply only the law provided by the court?

IV. STATEMENT OF THE CASE

A. Brian Long Was Retaliatorily Fired by Defendant Brusco Tug & Barge (BTB) after He Opposed BTB's Discrimination of Anthony Morgan – an Employee with a Prosthetic Leg.

Long's former employer, Brusco Tug & Barge (BTB), provides cargo barging and towboat services. RP 313, 1298-99, 1520. Long was a 14 year employee with a spotless record who began working for BTB in 1995 as a deckhand in at sea, eventually working his way up to becoming an ocean captain. RP 938-44. Long accepted a lesser paying position that allowed him to work out of the Port of Everett (POE) to be close to his young family and so he no longer had to go out to sea. RP 944-49, 958-61, 780-81, 1514-17. He started as a ship assist captain at the POE and eventually earned a promotion to become Port Manager in April 2009. RP 780-81, 944-49, 958-61, 969-70, 1514-17, 1546.

As the Port Manager, Long hired Anthony Morgan, based on Morgan's qualifications and prior experience as a deckhand, as well as having seen him perform as a deckhand at BTB. RP 543, 985-90, 2170; Ex. 84. Morgan worked as a deckhand for BTB and performed well, and not a single witness said otherwise. RP 770-76, 991-92, 999-1004. Morgan had no limitations in performing the job, but had a prosthetic below the knee on one leg that in no way impacted his mobility or ability to do the job. RP 986-988, 2170. Given Morgan's performance and experience, Long believed he was the best candidate for the job; his prosthetic was not an issue. RP 989-92, 1041-42; Ex.13.

On September 14, 2009 Morgan had a physical examination. Ex. 15. He returned to work at the POE that day and successfully continued to work as a deckhand. At the physical, Mr. Morgan openly revealed that he had a prosthetic. When upper management learned of the prosthetic, Defendant BTB's HR Manager wrote "[BTB] can't hire someone with a prosthetic leg." Ex. 16. Managers chastised Long, verbally and in writing, for hiring a "physically impaired deckhand," even though this hiring had been approved, and Morgan performed well. RP 993-94, 1051-52; Ex. 16, 26.

Long complained that this was disability discrimination and informed BTB that Morgan performed well and had no impairment that

impacted his job, facts managers admitted at trial. Long pushed to keep Morgan employed. RP 429-34, 993-95, 1057-60; Ex. 26. On September 15, Long received an email from HR and learned that HR and Defendant-CEO Bo Brusco met with lawyers. He was sent an email telling 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).'" RP 439-42; Ex. 22. Defendants feared a discrimination lawsuit if they fired Morgan for his prosthetic leg, given that it was a discriminatory reason to fire him. Long believed Morgan would remain employed. Accordingly, on September 15, Morgan was again cleared by BTB management to work on a tug. Long put him to work and Morgan continued to perform well. RP 441-45, 775-76, 995-1004; Ex. 22.

Despite again clearing Morgan to work, BTB ordered Long to send him home pending a second physical. Long encouraged Morgan to be patient. Unfortunately, Long learned that the baseless discrimination was continuing and that BTB never intended to give Morgan another physical. BTB was busy manufacturing "a good reason" knowing that the prosthetic leg was not one. Indeed, on September 16 HR Sabo relayed that CEO Brusco "just doesn't want to use him [Morgan] period." Ex. 33. Brusco's discriminatory animus was reiterated by Long's direct supervisor, Port

Captain Kevin Campbell who stated: "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. RP 1054-58; Ex. 33.

Long told management he believed this was discrimination, and would not lie to cover it up, as he was directed. RP 1057-60, 1063-66. When Long informed Morgan that his position was no longer available, and BTB would not give him second physical, Morgan was upset and Long admitted he performed well. Morgan filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") for disability discrimination against BTB on September 21, 2009. RP 2201-02.

When BTB received Morgan's EEOC charge around October 8, 2009, it blamed Long. RP 876-77, 1960. Morgan's Charge directly referenced Long. CEO Brusco and Long's direct Supervisor Campbell were openly "angry" with Long for hiring Morgan. RP 489-90, 523-26,1375. Indeed, just weeks after receiving Morgan's EEOC charge, on October 22, Long's request for a raise was denied. Ex. 47. Long's manager admitted this was because of Morgan's hiring, writing:

> 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. RP 1071-73; Ex. 47.

CEO Brusco openly displayed his anger at Long for Morgan's hiring to the jury, testifying that he began to question Long's judgment for hiring an employee with a prosthetic leg:

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

RP 1375.

....

> A. **At that point in time I questioned the fact that that guy right over there was hired. I ask my manager to take care of that company, to take care of me, to take care of those boats, and take care of the crews on the boats, and he would subject our company to something like that.**
>
> Q. And were you pointing to Mr. Long?
>
> A. **That's exactly who I'm pointing at.**

RP 1388.

On December 21, 2009, within two months of Long learning that CEO Bo Brusco was "so pissed" about his hiring of Morgan, BTB fired Long for false reasons. RP 543, 1092-1119; Ex. 47. Long filed suit for the

sole claim of WLAD disability retaliation, and tried the case in King County Superior Court. CP 1-6, 1747-63.

B. Erroneous Extrinsic Law That Long Violated Coast Guard Regulations and Maritime Laws By Hiring Morgan, Deprived Long of His Constitutional Right to a Fair Trial.

Following a jury verdict, Long discovered jury misconduct. The jury had inserted false, and prejudicial outside law, violating WPI 1.02 that was read to the jury by the Court. CP 1748.

> It also is your duty to accept the law as I explain it to you, **regardless of what you personally believe the law is or what you personally think it should be.** CP 1748.

Four jurors, Foreman Michael Flory (Juror 6), Drew O'Hara (Juror 1), Michelle Lemire (Juror 2), and Madalyn Mincks (Juror 7), all gave sworn affidavits stating that Juror 12, David Wlaschin, and Juror 11, Robert Patterson had inserted false extrinsic law and evidence not before the jury. CP 1680, 1780-1792, 1781 ¶8 Juror 12 gave a speech, reading from notes prepared the night before, outside of the deliberation room and written on different paper than the Court provided. He refused to be interrupted, and he authoritatively included several statements about extrinsic maritime law and Coast Guard regulations. Juror 11 also opined about the law, backing him up. CP 1788 ¶ 2, 1791 ¶ 3. The speech lasted about 20-35 minutes. CP 1780-92.

The jurors' insertion of outside law also directly violated the Court's instructions to consider "anything extrinsic or extraneous" and the instruction that required that notebooks be locked in the jury room each night since Juror 12 brought in outside notes. RP 122-23, 257-58, 298-301, 304, 309, 1487.

All four **unrebutted** declarations confirm that Jurors 12 and 11 made numerous **positive statements of law,** including but not limited to stating:

- "these laws [maritime and Coast Guard laws] simply do not allow people to crew boats and act as Able Bodied Seamen with prosthetics." CP 1788 ¶4.
- "yeah, **that breaks Coast Guard law**." CP 1781 ¶8.
- "no laws exist[] that would allow a deckhand with a prosthetic leg to be on a boat." CP 1784 ¶7.

BTB could not counter these truthful declarations. CP 1821-87. The legality of Long's hiring of Morgan was not before the jury and as such – there were no Coast Guard, or Maritime laws or regulations at issue in this case. No evidence was presented on this issue. CP 1747-63; RP 377-88. These false statements of law provided Defendants with a legitimate (but grossly untrue), non-retaliatory reason for firing Long. According to these jurors, Long negligently hired a deckhand and therefore violated maritime and Coast Guard laws.

Long moved for a new trial based on jury misconduct, but the motion was denied. CP 1768-79, 1888-1904, 1945-50. The trial court, however, recognized that "a juror may have inserted into the discussions... that Coast Guard regulations would not permit a man with a prosthetic leg to work on a vessel." CP 1949. Despite this the trial court mistakenly concluded that these outside statements of law "only related to the non-issue of whether or not Mr. Morgan was actually discriminated against." The Court failed to weigh the impact on Long's ability to prove motive, causation, and reasonable belief. These were elements in the retaliation instruction that Long had the burden of proving. He also faced an instruction regarding his credibility. CP 1949.

C. The Court of Appeals Decision

Long appealed the trial court's denial of a new trial from a jury trial in King County. The case involved a single claim of WLAD disability retaliation. Long appealed to Division One of the Court of Appeals on the issue of jury misconduct, and that the injection of extrinsic and erroneous maritime laws and Coast Guard regulations into the jury deliberations prejudiced Long's right to a fair trial.

The Court of Appeals misapplied the affidavits, and wrongly stated one juror "at most" stated he was "unaware of any law that would permit a person to work as a deckhand." Opinion at 15-16. The Court incorrectly

held that because this was not a positive statement of law there was no misconduct and that the jurors' actions did not conflict with the trial court's instructions to apply only the law that was given to them. Opinion at 15-16.

Although the Court recognized that Juror 12's statements about maritime and Coast Guard laws were "highly specialized" and "uttered in the vein of being an expert" it nevertheless analogized them to cases where jurors used their life experiences to interpret evidence but did not bring in outside law. Based on this inapposite analogy, the Court concluded that the outside statements of law were this juror's "own thought process" and thus inhered in the verdict. Opinion at 16. The Court essentially held that jurors may inject outside law into jury deliberations as long as the juror has gained the legal knowledge from personal experience. Opinion at 15.

Division I denied Long's appeal on August 11, 2014. Opinion. Long's motion for reconsideration was denied on September 12, 2014. Order. This timely petition for review followed.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Court of Appeals erroneously concluded that jurors' injection of maritime and Coast Guard laws into jury deliberations were not jury misconduct. The decision conflicts with Washington Supreme Court cases

which uniformly hold that a jurors or witnesses that inject erroneous extrinsic law into a case commit misconduct requiring a new trial. RAP 13.4(b)(1). The opinion allows jurors to violate the court's instructions by inserting outside law when the source of that law is "personal experience," ignoring case law and the jury instruction approved by this Court which demand that jurors follow only the law provided by the trial judge. WPI 1.2.[1] It creates a system where jurors are free to ignore the court's instructions and "their duty to accept the law" as given by the trial judge. It gives attorneys good cause to strike every potential juror with legal experience, especially lawyers and other professionals.

Division I's decision also involves both a significant question of law under the Washington Constitution and is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(3)-(4). The Court's decision undermines the WLAD by validating the worst stereotypes against disabled employees with perceived disabilities by allowing jurors to insert erroneous law to justify this bias. It allowed jurors to inject outside maritime and Coast Guard laws into the case severely prejudicing Long and denying him his constitutional right to

[1] Washington Pattern Instruction ("WPI") 1.02 ("It also is your duty to accept the law as I explain it to you, **regardless of what you personally believe the law is or what you personally think it should be.**"); CP 1748.

a fair trial. Jurors inserted outside law allowing the jury to conclude that Long violated Coast Guard Regulations and Maritime Laws when he hired a deckhand that BTB perceived was disabled. It transformed Long's protected activity into an illegal act and manufactured a legitimate motive for BTB's retaliation. It denied a fair trial to an employee who furthered the purpose of the WLAD by opposing the stereotypes the WLAD specifically seeks to stamp out.

This Court should accept review to remedy the errors of the lower courts and remand this case for a new trial. Petitioner requests fees pursuant to RCW 49.60.030 and RAP 18.1.

A. The Court of Appeals' Decision Conflicts with This Court's Holdings that when Jurors Inject Erroneous Extrinsic Law into Deliberations and Act as Legal Experts, Jury Misconduct Results

The Washington Constitution proclaims that the "[t]he right of trial by jury shall remain inviolate." Const. art. 1 § 21. "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).When reviewing a decision denying a motion for a new trial, the focus must be on whether the jury misconduct denied the moving party a fair trial. *Aluminum Co. of America*

v. Aetna Cas. & Sur. Co., 140 Wn.2d 517, 537, 998 P.2d 856 (2000) ("*ALCOA*"). In cases involving the improper use of extrinsic evidence by a jury, "[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). Here, the Court of Appeals failed to correctly apply this clear standard ignoring Washington precedent which holds that jurors commit misconduct requiring a new trail when outside and erroneous statements of law are injected into a case.

1. When a juror injects outside law into deliberations and ignores WPI 1.02 he usurps the role of the trial court and commits misconduct

"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, 56 P.3d 550 (2002). Washington Constitution article IV, section 16, provides that the court "shall declare the law." Const. art. 4 § 16 . "For an expert to testify to the jury on the law usurps the role of the trial judge." *Clausing*, 147 Wn.2d at 628. WPI 1.02 codifies that the jury "must apply the law from my instructions" and must "accept the law as I explain it." WPI 1.02.

As such, where a juror inserts **outside law** into jury deliberations she usurps the role of the judge and commits misconduct requiring a new trial. The Court of Appeals' decision is contrary to WPI 1.02 and to

Clausing and other Washington cases because it ignores the important distinction between a juror's opinion based on personal experiences, which may help interpret admitted evidence and legal opinions introducing **extrinsic and erroneous laws which are always improper and prejudicial**. When jurors act as legal experts, they commit misconduct.

Here, jurors injected outside law that made Long's decision to let Morgan work on a tug boat illegal. Juror 12 acted as a legal expert when he stated definitively that maritime and Coast Guard laws "simply do not allow people to crew boats and act as Able Bodied Seamen with prosthetics." Juror 11 similarly acted as an expert when he echoed, "yeah, that breaks Coast Guard law." They were not simply interpreting evidence based on personal background – they were acting as a legal expert, falsely instructing fellow jurors what laws apply when hiring disabled deckhands in a disability retaliation case.

2. A juror's injection of outside law is always misconduct requiring a new trial.

Juror misconduct that inserts outside law into the jury room has always resulted in a new trial under Washington law in every reported case Petitioner has found on the issue. "Jury misconduct ... results where a juror provides the jury with erroneous statements of law." *Adkins v.*

Aluminum Co. of Am., 110 Wn.2d 128, 138, 750 P.2d 1257 (1988); *see also Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678, 684, 143 P. 146 (1914). Moreover, Washington courts have found jury misconduct can occur **regardless of whether written materials were consulted.** *Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973); *see also Loeffelholz v. C.L.E.A.N.*, 119 Wn.App. 665, 683 n.36, 82 P.3d 1199 (2004). Thus, the relevant question is not whether the juror consulted outside written material, but whether "a juror provides the jury with erroneous statements of law." *Adkins* 110 Wn.2d at 137.

In *Adkins*, the jury inserted outside legal definitions for "negligence" and "proximate cause." *Adkins*, 110 Wn.2d at137. The Supreme Court held that the jury had injected "**legal premises not applicable to the facts of this case... which could well have confused or misled the jury.**" 110 Wn.2d at136-38 (emphasis added). This prejudice resulted in a new trial. *Id.* Similarly, in *Bouton-Perkins Lumber* this Court affirmed that "it is the duty of the court to decide all questions of law" and that "[i]t is the duty of the jury to accept and follow the law as stated by the court" after jurors inserted forest protection laws and granted a new trial. 81 Wash. at 681-82.

Outside law, regardless of the source usurps the role of the trial court. The Court of Appeals' attempt to distinguish *Adkins* and *Bouton-*

Perkins on the premise that Juror 12 supposedly did not consult outside sources for his legal opinion ignores the impact of the prejudice and the law. Opinion at 12. In *Halverson* this Court held that a juror's mere comments relating to airline pilots' earnings, evidence outside of the record at trial, were misconduct. It did not matter that the juror had not consulted or referred to any outside written material because he had introduced extrinsic evidence. 82 Wn.2d at 752. In *Loeffelholz*, Division II analyzed *Halverson* and specifically rejected the argument that outside facts or law must be based on external sources to constitute juror misconduct. 119 Wn.App. at 683 n.36 (noting that the Washington Supreme Court cited *Halverson* with approval in *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). The court held that extrinsic statements of evidence do not inhere in the verdict even when outside sources were not consulted. *Id.* at 683.

B. Jurors' Erroneous Statements Regarding Maritime and Coast Guard Law Cannot Inhere in the Verdict, Outside Law Is Not A "Personal Experience" that Allows Jurors To Ignore Instructions and Unsurp the Role of the Trial Court

There is a bright line that separates jurors who use life experiences to interpret evidence from jurors who insert law that usurps the role of the judge. Juries specifically hear: "It also is your duty to accept the law as I explain it to you, **regardless of what you personally believe the law is or**

what you personally think it should be." WPI 1.02. CP 1748. Accordingly, extrinsic law injected by jurors and not provided by the court has always resulted in jury misconduct. Indeed, in *Clausing* a new trial was granted when an expert offered a legal opinion even though that expert was subject to cross examination and a limiting instruction. 147 Wn.2d at 624-25. Here, Long had no opportunity to challenge this outside law since Coast Guard and Maritime law was not in evidence and only injected in deliberations after trial.

Outside law is always misconduct and extrinsic and not life experience. "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*, 150 Wn.2d at 199 n.3. The Court of Appeals recognized that Juror 12's statements about maritime and Coast Guard laws were "highly specialized" and were "uttered in the vein of being an expert," but then erroneously concluded that they nevertheless inhered in the verdict because they were part of Juror 12's own thought process. Opinion at 15-16. Where a juror injects laws and legal opinions into deliberations he goes beyond personal life experience – he impermissibly usurps the role of the judge, the only permissible legal expert. It cannot inhere in the verdict.

The Appellate Court erroneously relied on *Richards*, where one of the jurors used her background as an occupational therapist to interpret medical evidence in a medical malpractice case. *Richards*, however, did not involve the introduction outside and erroneous **law**. *Richards*, 59 Wn. App. at 269. The *Richards* juror simply used her medical background to interpret medical evidence admitted at trial and proposed an alternate theory of causation. *Id.* She applied her knowledge to interpret facts in evidence and then interpreted the law she had been given by the trial judge. That is completely different than here where jurors falsely applied outside **law** to the facts of the case says in contravention of the court's explicit instructions.

Lawyers should be able to trust in voir dire that jurors will obey the court's instructions. The fact that Juror 12 disclosed that he had previously been in the navy does not give him license to usurp the judge's role and insert outside law to invent a legitimate motive for firing Long. Maritime and Coast Guard laws were not at issue, and there was no reason to inquire about them in voir dire. If jurors get a free pass to inject laws and legal opinions into deliberations based on their "personal experience," then lawyers, police officers, and countless other potential jurors should now be stricken for cause.

C. The Introduction of Extrinsic Maritime and Coast Guard Laws Denied Long a Fair Trial

Under Washington law the four unrebutted affidavits provided by the jurors in this case must be taken as true. *State v. Parker*, 25 Wash. 405, 413, 65 P. 776 (1901) ("The statements alleged to have been made in the jury room must be taken as true, for they are not denied."). As such, it must be taken as fact that, amongst other things, Juror 12 stated during jury deliberations that "these laws [maritime and Coast Guard] simply do not allow people to crew boats and act as Able Bodied Seamen with prosthetics." CP 1788 ¶4. Similarly, it must be taken as fact that Juror 11 stated "yeah, that breaks Coast Guard law" in reference to Morgan working on a boat. CP 1781 ¶8. It prejudiced Long's right to a fair trial.

Despite recognizing that "it is clear that a juror commits misconduct by bringing in extrinsic evidence of law," Opinion at 13, the Court of Appeals inexplicably concluded that Juror 12's statements here were not misconduct in part because he "at most" stated they were "unaware of any law that would permit a person with a prosthetic to work as a deckhand." This grievously ignores Jurors 11 and 12's affirmative legal statements and opinions. Under *Parker* the Court cannot ignore unrebutted facts as it did here. This sworn testimony proves that jurors injected outside, extrinsic law into this case which prejudiced Long.

The jury instructions gave Long the burden to prove he "reasonably believed" Morgan had suffered discrimination and that his protected activity (hiring Morgan and opposing his discharge) caused the adverse actions. CP 1756. Jury misconduct significantly impacted the verdict by giving BTB a legitimate reason for its actions by giving it a legal basis to make Long look negligent and incompetent. Long hired Morgan, and had him working on a tugboat for BTB. If this violated Coast Guard regulations and Maritime law, BTB had a very legitimate reason to fire Long. If true, he had no reasonable belief to think BTB discriminated. BTB' animus towards Morgan's prosthetic seems reasonable, and BTB's CEO's venomous testimony toward Long, and the multiple emails showing contempt and retaliation toward Long for hiring Morgan would make sense. The case would have dismissed on summary judgment.

VI. CONCLUSION

The simple truth is that there was no evidence before the jury regarding Coast Guard regulations or Maritime law. Juror misconduct and this false law provided a pretext for discrimination, one that cut the heart out of Mr. Long's case. "A new trial **must** be granted unless it can be concluded beyond a reasonable doubt that extrinsic evidence **did not** contribute to the verdict." Here, there is no question that this outside law impacted the verdict. Mr. Long deserves a new trial.

DATED this 10th day of October, 2014.

THE BLANKENSHIP LAW FIRM, P.S.

By: _____

Scott C. G. Blankenship, WSBA No. 21431
Richard E. Goldsworthy, WSBA No. 40684
The Blankenship Law Firm, P.S.
1000 Second Avenue, Suite 3250
Seattle, WA 98104
Telephone: (206) 343-2700
Fax: (206) 343-2704
sblankenship@blankenshiplawfirm.com
rgoldsworthy@blankenshiplawfirm.com
Attorneys for Petitioner

DECLARATION OF SERVICE

I hereby declare under penalty of perjury under the laws of the State of Washington that, on the below date, I sent a true copy of this document to the following:

Via U.S. Mail:

Amanda T. Gamblin, Esq.
Joyce Wan, Esq.
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Ste. 1900
Portland, OR 97204

Attorneys for Respondents

Via Hand Delivery:

Colin Folawn, Esq.
Averil H. Rothrock, Esq.
Christopher H. Howard, Esq.
Brian K. Keeley, Esq.
Schwabe, Williamson & Wyatt
US Bank Centre
1420 Fifth Ave., Suite 3400
Seattle, WA 98101

Attorneys for Respondents

DATED this 10th day of October, 2014, at Seattle, Washington.

ERICA BRUNETTE
Paralegal

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRIAN LONG, Appellant, v. BRUSCO TUG & BARGE, INC., a Washington corporation; BO BRUSCO and his marital community, Respondents, and BRUSCO MARITIME CO., a Washington corporation, Defendant.	No. 70529-6-I DIVISION ONE UNPUBLISHED OPINION FILED: August 11, 2014

BECKER, J. — Appellant Brian Long sued his employer, alleging retaliatory termination. Long appeals from a defense verdict. We affirm the challenged evidentiary rulings and conclude Long did not establish juror misconduct that would demand a new trial.

The respondent is Long's former employer, Brusco Tug & Barge. Brusco provides cargo barging and towing services at ports and at sea. Long began working at Brusco in 1995 as a deckhand. In 2007, Long accepted a position as

a ship assist captain with Brusco at the Port of Everett. In April 2009, Long was promoted to port manager for Brusco's operations at the Port of Everett.

In September 2009, Long hired Anthony Morgan as a deckhand. Morgan has a prosthetic leg. Long believed Morgan could handle the job, but chief executive offer Bo Brusco complained about the hire. Morgan filed a disability discrimination charge against Brusco with the Equal Employment Opportunity Commission later that month.

At the end of December 2009, Brusco terminated Long from his managerial position. Long's theory at trial was that Brusco terminated him in retaliation for hiring Morgan and opposing what Long claimed was Brusco's discrimination against Morgan. Brusco claimed that Long was terminated because of his mismanagement of an incident involving the ship *Sevilla* on December 21, 2009.

As port manager for Brusco, Long was responsible for ensuring all vessels were properly manned. He was expected to act as a second ship assist captain in the event that an incoming ship requested one. Long went on vacation on December 21, 2009. The *Sevilla* was scheduled to come into the Port of Everett that day at 4:30 p.m. with a single tug assist. Long testified that he had arranged for John Juker, his second-in-command, to captain the tug that would assist the *Sevilla* into port. He also testified that he had arranged for J.C. Anderson to be available to captain a second tug if the *Sevilla* needed one.

As it turned out, the *Sevilla* was delayed eight hours and did not arrive until after midnight on December 22. A second tug assist was needed, but Anderson was not available to captain the tug. David Brusco, Bo Brusco's son, ended up acting as second captain to assist the *Sevilla* into port. Brusco was unhappy that Long did not have a second tug assist lined up for the *Sevilla*.

On November 2, 2011, Long filed this suit alleging that Brusco unlawfully retaliated against him for opposing what he reasonably believed to be Brusco's discrimination against Morgan. Long argued the *Sevilla* incident was pretext. Trial began April 22, 2013. The jury returned a defense verdict, 10-2. Long appeals.

Exclusion of comparator evidence

Long contends the court abused its discretion in excluding evidence that Brusco treated comparably situated employees less harshly.

To make a case for retaliatory termination, a former employee must show retaliatory motive for the alleged adverse employment action. Johnson v. Dep't of Social & Health Servs., 80 Wn. App. 212, 227, 907 P.2d 1223 (1996). Disparate treatment of similarly situated employees constitutes circumstantial evidence supporting a finding of retaliation. Johnson, 80 Wn. App. at 227. Individuals are similarly situated when they have similar jobs and display similar conduct. Vasquez v. County of Los Angeles, 349 F.3d 634, 640-41 (9th Cir. 2003). But the employees need not be identically situated. Earl v. Nielsen Media Research, Inc., 658 F.3d 1108, 1114 (9th Cir. 2011).

The trial court allowed comparator evidence as to Rich Nordstrom, Adam Wellenbrock, and David Brusco. Nordstrom was a tug captain who was not fired, though he failed to show up for many jobs and was once caught with alcohol on a ship in violation of Coast Guard regulations, and unable to captain. Wellenbrock was hired back after receiving several write-ups for, among other things, being absent and insubordination. David Brusco was not fired, though he was late for a ship assist while working as Brusco's port manager at the Port of Everett, resulting in a delay.

Long contends the court erred by excluding evidence as to Craig Petit, Nick Bernert, Joe Bromley, Corey Johnson, and Mark Guinn. Petit, a deckhand, was not fired, though he allegedly missed a job in September 2010 after being pulled over and questioned on suspicion of drunk driving. Bernert, an engineer, was rehired despite having previously delayed a ship run for eight hours by showing up late. Bromley, an ocean tugboat captain, was promoted to supervisor despite pleading guilty to misdemeanor assault. Johnson, a deckhand, missed a number of jobs but was not fired. Guinn, Brusco's manager in another location, was not immediately fired although his involvement in the discharge of dredged materials without a permit subjected Brusco to significant civil and criminal liability for oil spillage.

The trial court explained its rationale in a ruling made on April 22, 2013:

> When we talk generally about deckhands or engineers, I think those are not analogous and would not be appropriate. When we talk about Mr. Guinn, the bay area manager, we're talking about the oil spill and he was, in fact, fired so it really doesn't seem at all analogous as well.

The next day, the court provided further explanation:

> I have had a chance to take a look at the cases, and the cases do generally require that, for comparator evidence to be admissible, that there be a sufficient similarity in both . . . the jobs in question and the purported misconduct in question, such that the inference can be drawn if there was something more at play than simply discipline for that particular conduct.
>
> . . . it doesn't have to be an identical situation either in terms of the purported misconduct or the job. It's a relatively flexible standard. The question is whether or not the inference can be drawn.

The court thus decided to exclude Long's proposed comparators who were involved in assaults, kidnappings, and oil spills, as well as those who were deckhands or engineers, as being not sufficiently similar.

Long contends the trial court's approach to admitting comparator evidence was too narrow. He argues that the excluded comparators caused or risked significant ship delay or else engaged in criminal conduct, yet they were not treated as harshly as he was.

A showing that the employer treated similarly situated employees more favorably can be probative of pretext. However, employees in supervisory positions "are generally deemed not to be similarly situated to lower level employees." Vasquez, 349 F.3d at 641. A company that places some level of managerial and supervisory authority in one individual may hold that individual to

a higher standard than those in whom less authority is vested. Treating employees who were involved in assaults and alcohol abuse less harshly than a manager who was unprepared for a tug assist does not give rise to a strong inference of pretext.

We find no abuse of discretion in the trial court's rulings on comparator evidence.

Impeachment with prior inconsistent statement

Long contends the trial court erred by refusing to let him impeach the testimony of Anderson with a recording of a statement Long made to his investigator.

A party may attack the credibility of a witness by impeachment with a prior inconsistent statement. ER 613. The test for inconsistency is determined by the whole impression or effect of the two statements, not by individual words or phrases. The question is whether the two utterances are inconsistent—do they appear to have been produced by inconsistent beliefs? State v. Dickenson, 48 Wn. App. 457, 467, 740 P.2d 312, review denied, 109 Wn.2d 1001 (1987).

Brusco's version of the events surrounding the *Sevilla* was that Long had not adequately prepared for the possibility that while he was on vacation, an incoming ship would need a second tug assist. Long's version was that he had arranged for Anderson to be available, and Anderson would have been available if the *Sevilla* had arrived on schedule. According to Long, Juker did not tell him the *Sevilla* was delayed, and thus, Long did not have the opportunity to make

calls and find a substitute. On October 29, 2012, while preparing for trial, a member of Long's attorney's office interviewed Anderson by phone and made a recording of part of the call. In the call, Anderson confirmed that Long had called him in late 2009 to see if he would be willing to cover a second tug job "if something came up in Everett." Anderson also said that he had previously spoken with someone at Brusco "about having permission to cover" a second tug job.

Anderson was questioned on direct examination in the plaintiff's case on April 24, 2013. When asked to confirm that Brusco employee Kevin Lehto or Tom Campbell had called to ask if he could assist Long as relief captain, Anderson answered that he never received a call from them. When asked about his prior statement to the investigator, Anderson said he was busy driving a boat at the time and did not pay much attention to the call. Long asked to impeach Anderson by playing a recording of that interview. The court refused, and the examination of Anderson proceeded. Anderson testified that he had once called Lehto to ask generally about the possibility of working with Brusco, but he did not pursue it because he was not interested at the time. Anderson remembered getting a call from Long, but "I told him that I could not do the job for him, that I wasn't interested in it, that I had other things." Presented with telephone call logs showing that he and Long had spoken on the phone for seven minutes on December 18, 2009, and two minutes on December 21, 2009, Anderson said he could not remember what was discussed on those particular dates.

Long contends the court abused its discretion. However, as the court explained, the answers Anderson gave in the recorded interview were not inconsistent with the answers he gave at trial. In the recorded interview, Anderson remembered having a conversation with Lehto, Long, or Campbell about getting authorized to cover a second tug job, but he did not say that Lehto or Campbell initiated the call. He remembered getting a call from Long, but he did not say he agreed to serve as a tug captain. The trial court properly exercised its discretion to refuse impeachment.

Admissibility of the "Westwood notes" under ER 904

Long obtained a few pages of handwritten notes in production from Westwood Shipping, the *Sevilla's* owner. The notes obviously concern the *Sevilla* incident on December 21, 2009, but they are not self-explanatory. In a joint statement of evidence proposed under ER 904, Long offered the notes into evidence. ER 904, "Admissibility of Documents," provides that certain documents proposed as exhibits after appropriate notice "shall be deemed admissible" unless an objection is timely made. ER 904(b). Brusco timely objected.

The court refused to admit the notes. Long argues the evidence was "per se admissible" under ER 904.

During trial, Long filed a motion for a trial subpoena for a records custodian from Westwood Shipping. Brusco complained that the records custodian was unnecessary because authenticity of the documents was not in

dispute. Long noted that Brusco had also raised a hearsay objection and said the subpoena would be withdrawn "if they will stipulate that they're business records kept in the ordinary course of business." Brusco stipulated that the documents were business records.

Later, during the testimony of Juker, Long offered the notes into evidence as proof of the timeline of the *Sevilla* incident. He wanted to argue to the jury, based on the notes, that Juker failed to let him know about the *Sevilla*'s delay in time for him to call Anderson or make alternative plans for a substitute. According to Long, Brusco's stipulation removed any objection to the notes on the basis of authenticity or hearsay. Brusco responded that the stipulation was not to admissibility, and it only relieved Long of the responsibility of producing a custodian to prove the notes were business records. "Even if those handwritten notations were a business record for purposes of overcoming a hearsay issue, a records custodian still would not be able to describe what was meant by those notations."

Agreeing with Brusco, the trial court excluded the notes: "It takes an awful lot of explanation to try to see what the significance of the document might be. I think there's—I don't think a custodian could lay the foundation for it. It would have taken a witness to explain it in order to get that interpretation before the jury."

To support his argument that documents offered under ER 904 are "per se admissible," Long cites Miller v. Arctic Alaska Fisheries Corp., 133 Wn.2d 250,

259, 944 P.2d 1005 (1997). Miller explains that there is a presumption of admissibility under ER 904. Where documents are timely offered in accordance with the rule, the rule creates an expectation of admission in the absence of a timely objection. Miller, 133 Wn.2d at 260. It is error to exclude documents on the basis of an objection that is untimely.

What Long overlooks is that objections to relevancy of a document need not be made until trial. ER 904(c)(2). At trial, Brusco objected to admission of the handwritten notes on the ground that they were meaningless without a witness who could explain them. While Brusco and the trial court did not explicitly use the word "irrelevant" to explain why the notes should not be admitted, lack of relevance was the problem. A meaningless document cannot be relevant. Long's plan to have counsel explain the notes in argument to the jury would not have been a fair or adequate substitute for some testimony providing a foundation for interpreting the meaning of the notes.

The trial court appropriately exercised its discretion to exclude the Westwood notes.

Motion for a new trial

After the defense verdict, Long moved for a new trial, alleging juror misconduct. Long obtained affidavits from jurors indicating that during deliberations one of the jurors made extensive comments based on his naval experience. The comments were to the effect that there was no way any maritime organization would have allowed a person with a prosthetic leg to work

as a deckhand and the juror was aware of the law and no law would permit it because of the safety risk. Long contends the trial court erred by denying his motion.

Appellate courts will generally not examine how the jury collectively or as individuals goes about reaching its verdict. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991). An exception to this rule exists where a juror injects novel evidence into the deliberations. Verdicts are upheld unless (1) the affidavits of the jurors allege facts showing misconduct and (2) those facts support a determination that the misconduct affected the verdict. Richards, 59 Wn. App. at 271. Juror affidavits may be considered only to the extent that they do not attest to matters inhering in the verdict. Richards, 59 Wn. App. at 272. The individual or collective thought process leading to a verdict inheres in that verdict and cannot be used to impeach it. Richards, 59 Wn. App. at 272.

A trial court has discretion to grant or deny a new trial for juror misconduct, which will not be overturned absent an abuse of discretion. Richards, 59 Wn. App. at 271. A trial court abuses its discretion when its decision is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. Richards, 59 Wn. App. at 271. "'A strong, affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank and free discussion of the evidence by the jury.'"

Breckenridge v. Valley Gen. Hosp., 150 Wn.2d 197, 203, 75 P.3d 944 (2003), quoting State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

Long cites six cases to support his argument that the juror committed misconduct. The first case is Adkins v. Aluminum Co. of America, 110 Wn.2d 128, 138, 750 P.2d 1257 (1988). In Adkins, jurors in a personal injury case looked up "negligence" and "proximate cause" in *Black's Law Dictionary*. The Supreme Court affirmed the trial court's decision to grant the motion for a new trial because *Black's Law Dictionary* definitions were extrinsic information not admitted into evidence at trial and the trial court did not abuse its discretion when it found that the extrinsic evidence affected the verdict. Adkins, 110 Wn.2d at 137.

The second case is Bouton-Perkins Lumber Co. v. Huston, 81 Wash. 678, 143 P. 146 (1914). In Bouton-Perkins, jurors consulted a pamphlet purporting to contain relevant Washington law during deliberation. The trial court denied a motion for new trial. The Supreme Court reversed and remanded with instructions to grant the motion for new trial because the pamphlet was extrinsic evidence.

This case is not like Adkins or Bouton-Perkins. The juror did not bring in any written material like a dictionary or a legal pamphlet. Although he spoke from notes, there is no evidence that he compiled the notes by consulting extrinsic evidence.

The third case is State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002). In Clausing, the Supreme Court reversed a criminal conviction after finding that an expert improperly testified on law, usurping the role of the trial judge. This case is not on point as it deals with trial court error in controlling the testimony of a witness, not an allegation that a juror brought in extrinsic evidence of law. As Adkins demonstrates, it is clear that a juror commits misconduct by bringing in extrinsic evidence of law. The question remains: did the juror in this case bring in extrinsic evidence of law? Clausing does not help to answer that question.

The fourth case is Fritsch v. J.J. Newberry's, Inc., 43 Wn. App. 904, 720 P.2d 845, review denied, 107 Wn.2d 1006 (1986). In Fritsch, a juror in a personal injury case told the other jurors that after he injured his foot and was unable to jog for a month, an attorney told him a reasonable sum for his pain and suffering was $1,000. The Supreme Court found juror misconduct because the juror injected evidence from outside the record and it affected a material issue in the case. Fritsch, 43 Wn. App. at 907.

The fifth case is Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973). In Halverson, a teenager sued for personal injuries suffered in an auto accident. Only the question of damages was submitted to the jury. There was no evidence that the boy's earning capacity had been impaired, but the jury heard that he had an ambition to be a pilot and was studying to be a surveyor. During deliberations, one juror told the others that pilots generally make $2,000 per month and retire at age 40 and civil surveyors earn $1,500 per month. The

trial court granted a defense motion for new trial. The Supreme Court agreed that the juror had committed misconduct by bringing in extrinsic evidence and held that the trial court did not err in concluding that it influenced the jury's decision to award substantial damages.

The sixth case is Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 82 P.3d 1199, review denied, 152 Wn.2d 1023 (2004). In Loeffelholz, a sheriff's deputy and county sued a variety of defendants, including a citizen's group, for defamation and malicious prosecution. The jury found for the plaintiff deputy as to the defamation claim and awarded $240,000 ($60,000 per defendant). Juror affidavits showed that the basis for the damage award was one juror's statement that "'he could figure out how much public servants earned and estimated Mr. Loeffelholz's average salary at $30,000.'" Loeffelholz, 119 Wn. App. at 679. The trial court granted a new trial as to damages. This court affirmed the ruling, relying on Halverson. The jury had not been instructed to consider loss of earning capacity, and the salary and retirement information placed by the juror before his fellow jurors "was wholly outside the evidence and not subject to scrutiny by either party." Loeffelholz, 119 Wn. App. at 683.

In Fritsch, Halverson, and Loeffelholz, evidence was deemed extrinsic because it was outside the scope of what had been discussed in court. In each case, a juror urged other jurors to consider assertions of fact that the disfavored party had no opportunity to rebut. That is not the case here. The juror's discussion echoed Bo Brusco's testimony about the liability the company would

be exposed to as the result of hiring Morgan to work on a boat when he had not passed a physical. The juror used his personal experience, not extrinsic evidence, to evaluate information received in court about Brusco's treatment of Morgan and Long's reaction to it.

This case is most like Richards, in which parents brought a medical malpractice action against the doctors who delivered their baby. The parents alleged the delivery team was negligent in the care of their newborn, resulting in severe neurological deficits. The defendants claimed the newborn's deficits were caused before the birth. During voir dire, a juror disclosed that she had medical training and worked with developmentally disabled children as an occupational therapist. The jury returned a 10-2 defense verdict. After the verdict, the plaintiffs brought a motion for new trial based on affidavits that the juror opined during deliberations that the mother's illness at 20 weeks could explain the infant's condition. The motion was denied. This court affirmed, concluding that the affidavits did not establish that the juror brought extrinsic evidence into deliberations. The court discounted the Richards' allegation that "the information imparted by juror Geisler was highly specialized and was uttered in the vein of being an expert." Richards, 59 Wn. App. at 274. What was more significant was that "on voir dire juror Geisler's background was fully disclosed and the Richards did not remove her from the jury." Richards, 59 Wn. App. at 274.

Here, as in Richards, the juror's background was disclosed in voir dire. At most, he stated in deliberations that he was unaware of any law that would

permit a person with a prosthetic leg to work as a deckhand. This was not a positive statement about the law, and it did not conflict with instructions given to the jury by the court. Even though the information the juror imparted may have been highly specialized and uttered in the vein of being an expert, it was his own thought process and it inhered in the verdict.

We conclude the trial court acted within its discretion by denying the motion for a new trial.

Affirmed.

Becker, J.

WE CONCUR: