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No. 69890-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

BRIEF OF APPELLANT CAPTAIN BRUCE NELSON

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INTRODUCTION

Nearly nine (9) months after summary judgment was entered in this case, the Board of Pilotage Commissioners (“Board”) in response to a public records request, disclosed for the first time a document tracking applicant Capt. Bruce Nelson’s age and projecting his retirement date. This document was “authored and maintained” by Board Commissioners who made recommendations, deliberated with the Board in secret, and voted on whether to license Nelson. Such evidence is the strongest and rarest king of proof in a discrimination case, “direct evidence”.

Upon learning of that wrongfully withheld evidence, Nelson filed a post-judgment motion to vacate judgment under CR 60(b)(3) and CR 60(b)(4). The motion to vacate was denied. Nelson filed this, his second, appeal. He moved to consolidate the second appeal with the earlier appeal of the underlying summary judgment order, Cause No. 68701-8-I. His motion to consolidate was denied on April 12, 2013. A motion to modify the ruling on the motion to consolidate will follow the timely filing of this opening brief in the second appeal.

Captain Bruce Nelson was a Washington State ferry captain for 20 years and was a U.S. Coast Guard certified pilot on all Puget Sound Routes, a significant level of maritime experience. CP 33; *see also* RCW 88.16.090(2)(a)(iii)(A)-(B). Nelson applied to be a Puget Sound Pilot in

2005. He passed both the written and simulator exams and was ranked 9 out of eighteen successful applicants. As a result he was accepted into the Board's pilot trainee program., the final requirement for licensing. CP 34. After Capt. Nelson successfully completed the trainee program, he was not licensed but instead the Board held him in the trainee program on continued "extensions". If Nelson had been evaluated and treated as other trainees prior to and after him were, he would have been licensed. During his "extensions", Nelson opposed the different treatment, concerned he was being set up for failure. In April 2008, the Board removed Capt. Nelson from training and in December 2008 denied him a maritime pilot's license.

Capt. Nelson sought administrative review. Over Nelson's objections, evidence and issues of different treatment, retaliation, discrimination and age bias were excluded from administrative review, which was still incomplete in 2011. During the administrative review, the Board's counsel represented to the ALJ that Board members were "unaware of Capt. Nelson's age" at the time in which he was being considered for licensing. A document showing that Pilotage Commissioners tracked Nelson's age and his expected retirement date, along with the expected retirement dates of other trainees prior to voting on whether to license them, was not disclosed to Nelson by the Board in

response to discovery requests during the administrative review.

As the statute of limitations for civil claims approached, while the administrative review remained pending before the Board, Nelson filed this lawsuit alleging civil claims primarily arising under RCW 49.60. Again, the Board withheld from discovery the document that showed Commissioners tracked Capt. Nelson's age and projected his "retirement date", along with those of other trainees. At the hearing on the Board's motion for summary judgment, the Board's counsel blatantly stated to the Court that "[n]obody knew" Capt. Nelson's age. Shortly before the scheduled trial date, citing that representation, the court the Board's motion dismissing Nelson's case. The court cited the doctrine of collateral estoppel and alternatively found that Capt. Nelson failed to create a genuine issue of fact as to his claim of discrimination based on age for the Board's failure to issue him a Washington State pilot's license. Capt. Nelson has previously appealed that dismissal to this Court. After the belated disclosure Nelson subsequently filed the motion to vacate judgment, which was denied. He appeals from that dismissal here.

ASSIGNMENTS OF ERROR

1. The trial court erred in making finding number 3, which stated "the evidence was not new and that there was no misconduct by the Board."

2. The trial court erred in denying Capt. Nelson's motion for vacation of judgment pursuant to CR 60(b).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does the Board and its counsel have a duty of candor with the tribunal, requiring honest and forthright representation of facts to the Court? Yes. (Assignments of error number one and two)

2. Did the Board engage in fraud, misrepresentation, or other misconduct by representing to the trial court that "nobody knew" Capt. Nelson's age, while the Board and its counsel withheld directly contrary evidence from discovery productions to Plaintiff, specifically "Retirement Survey 3-07", a document authored and maintained by Commissioners of the Board of Pilotage Commissioners and the Chairman of its Trainee and Evaluation Committee, containing Nelson's age, date of birth, and an "expected retirement date" for Captain Nelson, computed by and for the Board of Pilotage Commissioners? Yes. (Assignments of error number one and two)

3. Did the Board violate the rules of discovery when it failed to disclose or produce "Retirement Survey 3-07" in response to prior requests for records about Nelson considered by Commissioners, including Nelson's Request for Production No. 7, seeking "any and all Pilot retirement 'surveys' "? Yes. (Assignments of error number one and

two)

4. Was the Board's withholding of "Retirement Survey 3-07" material to Capt. Nelson's fair presentation of his case on summary judgment? Yes. (Assignments of error number one and two)

5. In the alternative, under these circumstances, was "Retirement Survey 3-07" newly discovered evidence warranting a new trial? Yes. (Assignments of error number one and two)

STATEMENT OF THE CASE

A. Nelson files an administrative appeal and a civil suit challenging the Board's termination of training and denial of a pilot's license.

On December 16, 2008, Capt. Nelson requested an administrative hearing to obtain a pilot's license. CP 35. In preparation for the hearing, he served a public records request seeking, *inter alia*, the Board's Trainee Evaluation Committee's "emails about Nelson and others" and "material reviewed by the Training [Evaluation] Committee and information that has been provided to the Commissioners". CP 5, ¶ 11; CP 64-65. In responding to this request, the Board failed to disclose the spreadsheet maintained by Commissioners and members of the Training Evaluation Committee ("TEC"), containing Nelson's age and projected retirement date. *See* CP 5, ¶¶ 10-11. As part of the administrative discovery, Nelson also served expansive subpoenas duces tecum to all Board Commissioners

and Training Evaluation Committee members, and again the Board withheld the spreadsheet maintained by Commissioners and TEC Members containing Nelson's age and the computation of his expected retirement date. CP 5, ¶¶ 12-13; CP 68-108. This not only denied Nelson the crucial document, but the evidence that would flow from that document through depositions and further discovery.

While Nelson's appeal was awaiting "final action" by the Board, the statute of limitations for civil claims under RCW 49.60 was nearing. *See* RP 5-6.¹ In September 2010, Nelson filed a civil lawsuit, alleging, *inter alia*, that the Board discriminated against him in 2007-2008 with respect to pilotage training and licensing decisions, in substantial part, based on his age. *See* RP 5; CP 2, ¶ 1.

In the Board's briefing during the administrative review (and later provided to the trial court in the civil suit, as part of the administrative record filed to support its motion for summary judgment), it represented that Board members were "unaware as to Capt. Nelson's age" when he was considered for licensing. *See* CP 19, lines 3-5; CP 2, ¶ 2. The Administrative Law Judge entered an "initial order" affirming the Board's denial of a license in August 2010.

¹ *Accord* Milligan v. Thompson, 90 Wn. App. 586, 597-98, 953 P.2d 112 (1998).

B. Capt. Nelson requests all “retirement surveys” in civil discovery.

On November 23, 2011, during discovery in the civil suit, Nelson served Request for Production (“RFP”) No. 7, which sought “any and all Pilot retirement ‘surveys’ ... in their original electronic form, with metadata intact.” CP 112. The Board responded to this request on December 23, 2011, and produced nineteen (19) pages of “retirement surveys” ranging in date from 2005 to 2011. CP 282-303. None of the documents produced in response to RFP No. 7 referenced Capt. Nelson, his date of birth, or his expected retirement date. CP 282, ¶ 2. Defendant’s written answer to RFP No. 7 gave no indication that any “retirement surveys” had been withheld. CP 282, ¶ 3; CP 118.

C. The Board’s motion for summary judgment is heard and granted.

On February 2, 2012, a hearing on the Board’s motion for summary judgment was heard by the Honorable Harry McCarthy. At the hearing, the Board’s counsel argued, in part, that:

[A]ge was never an issue here. The testimony in front of the ALJ was they didn’t know [Capt. Nelson’s] age. Nobody knew. None of the pilots out there knew how old they were. Nobody asked.

CP 28, lines 17-21.

Judge McCarthy adopted that argument in his order dismissing the civil suit, writing, *inter alia*, that “[t]he administrative record ...

indicates that few, if any, of the Board members or supervisory pilots actually knew plaintiff's age." CP 43, lines 20-21. Nelson presented other circumstantial evidence of age discrimination in opposition to the summary judgment motion. The withheld spreadsheet would have added "direct evidence" supported by the other circumstantial evidence in support of Captain Nelson's claims.⁴

Appeal of that summary judgment order is now pending before the Division I of the Court of Appeals as Case No. 68701-8-I. On January 4, 2013, the Board filed its brief responding to that appeal, in which it again stated, "Nothing suggested that age was a factor in the Board's decision making process. At no time during the Board's deliberations did the Board discuss Captain Nelson's age." CP 50. It is noteworthy that all deliberations about training and licensing other than the actual votes were in closed session with no notes taken and no recording. *See* RP 37:15-24.

D. After dismissal of Nelson's civil case on summary judgment, the Board belatedly discloses a March 2007 spreadsheet authored by Board Commissioners that tracked Capt. Nelson's age and projected his retirement date prior to the TEC's and Board licensing decisions.

In December 2012, in response to a renewed public records request, the Board for the first time disclosed "Retirement Survey 3-07", a

⁴ The Brief of Appellant Captain Bruce Nelson filed in Cause No. 68701-8-I describes in full the evidence Nelson filed in opposition to the Board's motion for summary judgment. Capt. Nelson moved the Court of Appeals to consolidate both of his appeals, which was initially denied by the Clerk. A motion to modify that ruling will be filed.

Microsoft Excel spreadsheet that, according to the Board’s administrator, was “authored and maintained by Puget Sound Pilots who were ... members of the Trainee Evaluation Committee (TEC)”. CP 232, ¶¶ 3-4; CP 7, ¶ 19. The metadata or “file properties” for this document confirm that “William H. Snyder”, a Board Commissioner, the chairman of the TEC, and a Puget Sound Training Pilot when licensing decisions about Nelson were made, made modifications to the Excel file. CP 56; CP 278, ¶ 3; CP 304, ¶ 1. The pilot members of the TEC (Capt. Hannigan, Capt. Snyder and Capt. Kromman) are among the “training pilots” who Nelson made training trips with and who evaluated his performance. CP 278, ¶ 3. Both Capt. Snyder and Capt. Hannigan sat on the Board as Commissioners and Capt. Snyder as TEC Chair, communicated TEC recommendations to the Board. *See* CP 61. Both Snyder and Hannigan participated in the deliberations on licensing Nelson from July 2007 through December 2008 and voted on whether to license Nelson. *See* RP 37:17-24; CP 278, ¶ 3.

The Excel file that was disclosed in December 2012 contains three “tabs”, or individual “sheets”, the second of which is titled “Retirement Survey 3-07”. CP 232, ¶ 4; CP 165, ¶ 6; *accord* CP 148, lines 11-12. The second “sheet” tracks the ages of Capt. Nelson (and other trainees), which it uses to project their “expected retirement” dates. CP 201-202; *see also* CP 3, ¶ 6; CP 5, ¶ 13. The document states that Capt. Nelson’s expected

retirement date is May 2018, which is solely the Board's determination of a retirement date. Though others were "surveyed" about their expected retirement dates, Capt. Nelson was never asked when he might retire. *See* CP 54, CP 278.

Capt. Nelson's counsel took fifteen (15) depositions during his administrative appeal and another nine (9) depositions during the litigation of his civil suit. However, due to the Board's withholding of the Excel file containing Nelson's age and projected retirement date throughout both proceedings, his counsel was unable to ask any deponent about their review, consideration, or knowledge of the withheld document or its contents. CP 4, ¶ 9.

E. The Washington State Board of Pilotage Commissioners consists primarily of Commissioner "advocates" for commercial shipping related industries and the private Puget Sound Pilots Association. The Board has a long history of findings of discrimination and favoritism in awarding Puget Sound Pilot Association membership positions, which persist through the Board's ongoing refusal to adopt requirements for equality of evaluation and treatment of trainee applicants for limited, lucrative Pilot licenses.

Since the agency's inception, the Washington State Board of Pilotage Commissioners has repeatedly required political, legal, and judicial intervention to remedy unequal treatment of applicants for pilot licenses.⁵ The Washington State Supreme Court has found that members

⁵ *See State ex rel. Sater v. Bd. of Pilotage Cmsrs.*, 198 Wn. 695, 90 P.2d 238 (1939) (reviewing case in which the Board "excluded ... qualified applicants" and limited pilot

of the Board who are Puget Sound Pilots or representatives of the vessel operators who hire Pilots “cannot be expected to be impartial or disinterested. ... [T]hey ... sit on the board more as advocates than as judges.”⁶

In 1937, the Board wrote to the Attorney General for “an opinion upon the legality of ... whether or not [the Board] could fix a maximum age limit of fifty (50) years or over for all applicants seeking a State Pilots License” Ops. Att’y Gen. 1937-38, 230-31 (attached at Appendix). The Attorney General responded that the legislature had not (yet) “included a maximum age limit or an age beyond which an applicant is disqualified” *id.* at 232; and that the Board “cannot fix a maximum age limit of fifty [50] years for applicants.” *Id.* at 234.

The legislature made “sweeping” reforms to the Pilotage Act in 1977, including mandating Senate confirmation of the Governor’s appointments to the Board.⁷ The Washington State Supreme Court wrote that “[t]he comprehensiveness of the changes made [in 1977] indicate[d] a

licensing to a “selected group of favorites” and holding that a pilot licensing decision made according to “any officer or set of officers[’] ... own notions in each particular case” violates § 12, of article 1, of the Washington State Constitution); *see also* Bock v. State Bd. of Pilotage Cmsrs., 91 Wn.2d 94, 586 P.2d 1173 (1978) (indicating that the Board’s grading system for licensing examinations was “flawed by irregularities and ambiguities” and reiterating Sater’s holding that the “[t]he Board ... has a duty to compose, administer and grade its examinations [for pilotage licensing] in a fair and consistent manner”).

⁶ Application of the Puget Sound Pilots, 63 Wn.2d 142, 145, 385 P.2d 711 (1963).

⁷ Luther v. Ray, 91 Wn.2d 566, 567, 588 P.2d 1188 (1979).

dissatisfaction by the legislature with the [B]oard and its operations.”⁸

In 1981, the legislature fixed an age limit on issuing a pilot’s license to any person aged seventy (70) or older, which today remains the age limit for pilots.⁹

In April 2005, the legislature amended the Pilotage Act to require the Board to “establish a comprehensive training program to assist in the training and evaluation of pilot applicants before licensing.”¹⁰ Pursuant to this legislation, the Board created the “trainee evaluation committee (TEC)”. WAC 363-116-078(11). The five persons on the TEC include three (3) active licensed Washington state pilots. *Id.* The TEC reviews evaluations of trainees and it makes recommendations to the Board about whether trainees should be licensed. WAC 363-116-078(11); WAC 363-116-080(5); CP 278, ¶ 3. Pilot members of the Board’s TEC (who are also Board Commissioners) also “authored and maintained” a spreadsheet that among other things tracked pilot trainees’ ages and projected their “expected retirement dates”. *See* CP 53-56 (“Retirement Survey 3-07” tab of the “ManpowerProjection 20070327.xls”); CP 232, ¶ 4; CP 278, ¶ 3. During civil discovery, the Board withheld this document, which shows that Nelson’s age was not only being considered but being used to

⁸ *Id.*, at 570.

⁹ Laws of 1981, ch. 303, § 1; RCW 88.16.090(2)(a)(ii).

¹⁰ Laws of 2005, ch. 26, §§ 1-2; RCW 88.16.035(2)(b), RCW 88.16.090(2)(a)(iv).

compute his potential retirement date before and in anticipation of the recommendation and determination of whether Nelson would be licensed. *See, e.g., id.* and CP 4, ¶ 9.

In September 2007, after the “3-07 Retirement Survey” spreadsheet was in the possession of TEC Commissioners who are also Board Commissioners, the TEC was “split in its recommendation to license” Capt. Nelson, and the Board Commissioners voted 4-3 to extend training in lieu of licensing him. *See* CP 34. After further extending his training, the Board finally denied Capt. Nelson a license and discontinued his training on December 4, 2008. *See* CP 34-35.

The record before the trial court on summary judgment included evidence of Nelson’s “comparators ... [who were] younger and performing as well or worse than Captain Nelson, and yet [were] licensed” while Nelson was not. RP 11:14-19. There are also “stereotypes ... documented in writings from the Puget Sound Pilots that indicated that older pilots tend to be less able to handle the rigors of being overworked; that they suffer more from the stress of the job.” *Id.* When the Board denied Capt. Nelson a pilot license in December 2008, Nelson was 54 years old. *See* CP 54.

In 2011-2012, after Capt. Nelson had challenged different treatment and discrimination in his training extensions, evaluations and

denial of his license, the Board adopted new regulations formally enacting and approving Commissioners' unfettered discretion to use different treatment and disparate criteria in evaluation and licensing of applicant trainees, effectively prohibiting trainee applicants from contesting discriminatory treatment in award or denial of a Pilot's license. *See, e.g.*, WAC 363-116-086(3)(b) (barring "[a]ny documentation or testimony concerning the performance of other pilot trainees ... during any proceeding involved in the review process"); WAC 363-11-280(a) (barring any "inquiry into the mental processes of a board or committee member concerning their decision making processes once a decision has been made and a written explanation has been provided").

STANDARD OF REVIEW

The Court reviews a trial court's disposition of a CR 60(b) motion for abuse of discretion.¹¹ The Court similarly "reviews the trial court decision whether to impose sanctions for discovery violations for an abuse of discretion."¹² A court abuses its discretion "when its exercise of discretion is manifestly unreasonable or based on untenable grounds or reasons."¹³ "A discretionary decision rests on 'untenable grounds' or is

¹¹ DeYoung v. Cenex Ltd., 100 Wn. App. 885, 894, 1 P.3d 587 (2000).

¹² Johnson v. Jones, 91 Wn. App. 127, 133, 955 P.2d 826 (1998).

¹³ State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

based on ‘untenable reasons’ if the trial court relies on unsupported facts or applies the wrong legal standard.”¹⁴ “If a trial court’s findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion.”¹⁵

ARGUMENT

A. The trial court abused its discretion in finding that the Board did not engage in “misconduct” in discovery or in representations to the Court.

CR 60(b)(4) provides that the superior court may relieve a party from a final judgment for “misconduct of an adverse party.” *Id.* A motion for “[a] new trial based upon the prevailing party’s *misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial.*”¹⁶ “[A] litigant who has engaged in misconduct is not entitled to ‘the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.’”¹⁷

For purposes of CR 60(b)(4), a discovery violation is sufficiently “substantial” if “the withheld files were ‘material to the Plaintiffs’ fair presentation of their case” on summary judgment. *See Roberson*, 123 Wn. App. at 336-37 (holding that files withheld by Defendant were material to

¹⁴ *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009).

¹⁵ *Id.*

¹⁶ *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004) (emphasis in original), quoting *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985) (citing CR 60(b)(4)).

¹⁷ *Roberson*, 123 Wn. App. at 336, quoting *Taylor*, 39 Wn. App. at 836-37.

the “fair presentation of [Plaintiffs’] case at time of trial” and vacating two jury verdicts in case where order in limine barred admission of the evidence, but court recognized the fact that evidence sought ‘would otherwise be inadmissible at trial is not an impediment to discovery’). “[A]ll information reasonably calculated to lead to admissible evidence is discoverable.” Taylor, 39 Wn. App. at 836, citing CR 26(b)(1).

“The rules are clear that a party must *fully* answer ... all requests for production, unless a specific and clear objection is made. If the [Board] did not agree with the scope of production or did not want to respond, then it was required to move for a protective order.” Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp., 122 Wn.2d 299, 353-54, 858 P.2d 1054 (1993), citing CR 34(b). The Board “cannot withhold discoverable materials.” Johnson v. Jones, 91 Wn. App. 127, 133, 955 P.2d 826 (1998), citing Fisons, 122 Wn.2d at 354. “[A]n evasive or misleading answer is to be treated as a failure to answer.” CR 37(d).

Capt. Nelson’s RFP No. 7, seeking “any and all Pilot retirement ‘surveys’ ... in their original electronic form, with metadata intact”, CP 112, “clearly identified the subject document[.]” that the Board withheld and “plainly asked for [it] in the discovery request[.]”. See Roberson, 123 Wn. App. at 335. Compare RFP No. 7, CP 112, with e.g., CP 232, ¶ 4; CP 165, ¶ 6; CP 148, lines 11-12.

The Board's answer to RFP No. 7 was evasive or misleading and violated its discovery duties. On December 23, 2011, in response to RFP No. 7, the Board produced nineteen (19) pages of "retirement surveys" ranging in date from 2005 to 2011. *See* CP 118 ("Attachment C Pilot Retirement Surveys, numbered 95010001-019"); and CP 282-303. None of the documents the Board produced made any reference to Capt. Nelson, his date of birth, or his expected retirement date. CP 282, ¶ 2.

The Board's spreadsheet recorded age and computed an "expected retirement date" for a pilot trainee who had not yet been hired/licensed. Nelson had not been selected nor started working as a pilot, thus no retirement benefits or eligibility to "retire" existed. The actions of recording and computing such data during an evaluation and application process is direct evidence of age discrimination. This is analogous to a hiring discrimination case where during the prehire interview an employer asks the applicants age and estimates his or her retirement age and date before deciding whether to hire the person. There would be no question of that being direct evidence of age discrimination. *See Shelley v. Geren*, 666 F.3d 599, 609-10 (9th Cir. 2012) (holding, in case where managers inquired about job applicants projected retirement dates during the pre-hiring period, that this was direct evidence of age discrimination from which "fact-finder could infer ... that they considered age and projected

retirement relevant to the hiring decision”). An employer considering projected retirement dates during its hiring process raises an inference that its proffered explanation for failing to hire an applicant is a pretext for age discrimination, even if the managers considering the retirement information “did not make the hiring decisions alone”. See *id.*

The Board failed to produce in discovery this, the most relevant responsive document, containing new and different evidence, entitled “Retirement Survey 3-07”. CP 282, ¶ 2. The document withheld was the one responsive document that contained direct evidence that Capt. Nelson’s age and potential retirement date were computed and considered by TEC members and Commissioners at the exact time, July 2007, when Nelson was first coming up for consideration for licensing. See CP 4, ¶¶ 7-8; CP 56; CP 61; CP 304. Capt. Snyder, the author/modifier of the document, was the Commissioner who brought up Capt. Nelson to the Pilotage Commissioner Board for licensing related extension decisions in July 2007 contemporaneous with the document. CP 61.

Thus, the trial court’s finding that the “evidence was not new” is unsupported by the record. See also *Roberson*, 123 Wn. App. 320, 334 96 P.3d 420 (2004) (stating that “[d]iligence is not a consideration in determining whether a new trial is an appropriate remedy for a discovery violation”; and that “even in newly discovered evidence cases, where

diligence is a factor, ... “[w]here a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence.”)

In stark contrast to the nineteen (19) pages of retirement surveys the Board produced in response to RFP No. 7, only “Retirement Survey 3-07”, which was not produced, contained reference to Nelson (and other pilot trainees)’ ages and expected retirement dates. CP 202; CP 52-55; CP 5, ¶ 13.

The Board’s written response to RFP No. 7 failed to indicate that any “retirement surveys” were withheld. CP 282, ¶ 3; *accord* CP 118. Withholding such discovery precludes not only presentation of that evidence but the opportunity to develop the web of knowledge and evidence to which it may lead.

If the evidence had been disclosed it would have been investigated and further evidence would have been developed by the plaintiff... Plaintiff would have had the opportunity to contact witnesses [about it] and would have done so.

See Magaña v. Hyundai Motor America, 167 Wn.2d 570, 588, 220 P.3d 191 (2009).

When counsel for the Board in writing and in oral argument specifically and falsely denied that Commissioners knew Capt. Nelson’s age or discussed it, there was further misconduct harmful to justice and in

violation of RPC 3.3, “Candor Toward the Tribunal”. This rule specifically provides that in representations to the Court

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

...

(4) offer evidence that the lawyer knows to be false.

The Board’s counsel made specific representations contrary to the existence and content of the “Retirement Survey 3-07” document. *See* CP 2-3, ¶¶ 3, 5; CP 28; CP 50. By the time these false statements were made to the trial and appellate courts, in February 2012 and January 2013 respectively, Nelson had made at least three (3) document requests that should have produced the “Retirement Survey 3-07” document, including one that specifically called for it to be produced. *See* CP 65 (public records request in 2008); CP 94(subpoena duces tecum to Capt. Snyder in November 2009); and CP 112 (RFP No. 7 seeking “retirement surveys” in November 2011); *see also* CP 130 (“Public Records Request dated 3-29-2012”). Whether the Board’s counsel had personal knowledge of that evidence, or whether the Board stood by and allowed their representative to present false evidence to the tribunal, this Court should not allow that

lack of candor to this or prior courts, by either counsel or the party to go unremedied. The fact that the trial court relied on the Board's misrepresentation is undisputed as the order on summary judgment affirmatively repeats the Board's misrepresentations. CP 43.

B. The Board's failure to produce "Retirement Survey 3-07" was prejudicial to Capt. Nelson "in preparing for trial".

The document withheld by the Board was "material to [Nelson's] fair presentation of [his] case" on summary judgment. Roberson, 123 Wn. App. at 336-37; *accord* Magaña, 167 Wn.2d at at 590. The information sought was discoverable, as it was reasonably calculated to lead to the discovery of admissible evidence. Roberson, 123 Wn. App. at 336-37. Nelson was prejudiced by not being able to develop further evidence and testimony through use of the document at depositions, in investigation, impeachment of witnesses, or otherwise. *See* Magaña, 167 Wn.2d at 588.

At the hearing on the motion to vacate, the trial court acknowledged that the evidence withheld by the Board "[a]rguably... would affect ... whether [Capt. Nelson] [r]eached the prima facie [discrimination] case" and it might "also undermine the decision in the administrative proceeding." RP 18:8-11. On summary judgment, a court would have to view even inferences created by the evidence the Board withheld (and evidence developed using that knowledge and document) in

the light most favorable to Capt. Nelson, the nonmoving party.¹⁸

The withheld evidence showed that the Board actually computed projections prior to evaluation and licensing decisions, about when Capt. Nelson and other trainees would retire based on “expectations” or “averages” about when pilots retire. CP 53-55. These “presumptions” were made “before [the Board even] decided to hire [trainees] or license them”. RP 14:4-7. Capt. Nelson was never even asked when he might retire. CP 54, CP 278.

“Retirement Survey 3-07” and the testimony Nelson could have developed with it would have been used to impeach or prevent the Board’s misrepresentation to the Court at the summary judgment hearing (*i.e.*, “[A]ge was never an issue here”; and “Nobody knew [Nelson’s age].” CP 28). Unaware of the withheld evidence, Nelson could not correct that false representation, and the trial court in its order dismissing the case accepted as a verity the Board’s assertion that Board Commissioners and pilots lacked knowledge of Nelson’s age. *See* CP 43.

The withheld document and the evidence that would have been developed from it was only part of “the circumstantial evidence that [Nelson] would have used to prove the case.” RP 37:16-17. The record before the trial court on summary judgment also included evidence of

¹⁸ Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 352-53, 588 P.2d 1346 (1979).

Nelson’s “comparators ... [who were] younger and performing as well or worse than Captain Nelson, and yet [were] licensed” while he was not; as well as “stereotypes ... documented in writings from the Puget Sound Pilots that indicated that older pilots tend to be less able to handle the rigors of being overworked; that they suffer more from the stress of the job.” RP 11:14-19.¹⁹ Still, though legally and factually this evidence makes a significant difference, to prevail under CR 60(b)(4), Nelson does not have to show that the withheld evidence “would have materially affected the outcome of the first trial”.

C. The Board’s withholding of evidence also prejudiced Nelson’s “fair presentation of [his] case” against the Board’s alleged “collateral estoppel” affirmative defense.

The trial court on summary judgment found in favor of the Board that Nelson was “collaterally estopped”, another basis for the trial court’s summary judgment order. Nelson unsuccessfully argued to the trial court that “the issue of discrimination ... was not fully and fairly litigated [in the prior administrative proceeding], which is one of the requirements for collateral estoppel...” RP 34:4-8. *See, e.g., Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 307, 96 P.3d 957 (2004). The Board’s representation to its own administrative tribunal, which was contrary to

¹⁹ The motion to vacate judgment was not heard by Judge Harry McCarthy, who entered the summary judgment order in the case, as he had since retired. *See* CP 138:7-10; CP 144. Pursuant to King County Local Civil Rule 60(e)(2), the motion to vacate judgment was instead noted for hearing by the Chief Civil Department.

the evidence it was withholding, makes collateral estoppel unthinkable. In the briefing the Board filed in the administrative review case, it stated that Board members were “unaware as to Capt. Nelson’s age” when he was considered for licensing. *See* CP 19, lines 3-5. These representations were never withdrawn or amended by the Board, but instead were even more strongly presented to the trial court in support of the Board’s motion for summary judgment. *See* CP 28:17-21.

Prior to the administrative proceeding, Nelson served a public records request seeking, *inter alia*, “materials reviewed by the Training Committee and information that has been provided to the Commissioners.” CP 65. The Board did not disclose “Retirement Survey 3-07” in response to this request. CP 5, ¶ 11.

Later in the administrative review process, Nelson served expansive subpoenas duces tecum to all of the Board’s Commissioners, Training Evaluation Committee Members, and one of its Administrative staff. *See* CP 5, ¶ 12; CP 68-108. Again, the Board did not produce “Retirement Survey 3-07” with Nelson’s name on it, in response to the document requests. CP 5, ¶ 13. Although Nelson took fifteen (15) depositions during his administrative appeal, he was unable to ask any of the deponents about their review or consideration of the data in “Retirement Survey 3-07” concerning Nelson’s age and expected

retirement date, due to the Board's withholding of the document. *See* CP 4, ¶ 9.

The appropriateness of the trial court granting summary judgment based on collateral estoppel in this civil litigation “is on appeal currently.” RP 34:2-3. Capt. Nelson has moved to consolidate this appeal, which also addresses that issue, with his previously filed appeal of the summary judgment order.

In summary, “Retirement Survey 3-07” was “material to Plaintiff[s'] fair presentation of [his] case” on summary judgment. Roberson, 123 Wn. App. at 336-37. Nelson could have developed further evidence and testimony from the document, which would have been pivotal legally and factually on summary judgment, first in showing a prima facie case of age discrimination on summary judgment, and second, in showing the misconduct and lack of procedural fairness in the prior administrative process, a fact that if shown might have avoided application of collateral estoppel. *See, e.g.*, RP 18:8-11 (comments by Judge North acknowledging the evidence's potential relevance).

Where the Board engaged in discovery misconduct and a lack of candor with the tribunal, Plaintiff is not required to prove “the extent of

the wrong inflicted”.²⁰ The Board’s wrongful withholding in response to repeated requests including RFP No. 7 “did not come to light until *after* [entry of] judgment. At that point, no sanction other than a new trial was available.” Roberson, 123 Wn. App. at 338. For these reasons, the trial court abused its discretion in failing to grant Capt. Nelson relief from judgment under CR 60(b)(4).

B. In the alternative, the trial court abused its discretion in finding that “Retirement Survey 3-07” was “not new evidence” for purposes of CR 60(b)(3).

Given three lawful document requests and repeated denials on the record as to the evidence’s contents by both counsel and Board Commissioners, the Board should be estopped from arguing that “Retirement Survey 3-07” is “not new” evidence. *See* CP 309, ¶ 3

Even if, *arguendo*, sufficient misconduct by the Board were not acknowledged, Capt. Nelson should also be granted relief under CR 60(b)(3). In order to obtain a new hearing under CR 60(b)(3), Nelson shows that the newly discovered evidence (1) will probably change the result of the trial; (2) was discovered since trial; (3) could not have been discovered before the trial by exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching. Go2Net, Inc. v. C.I. Host, Inc., 115 Wn.App. 73, 88, 60 P.3d 1245 (2003).

²⁰ Roberson, 123 Wn. App. at 336, *quoting Taylor*, 39 Wn. App. at 836-37.

As the Shelley case establishes, the existence of “Retirement Survey 3-07” (1) is material; (2) is not merely cumulative or impeaching; and (3) will probably change the result of the trial court’s grant of summary judgment; as the document is “direct evidence” of discrimination, which precludes summary judgment. *See Shelley*, 666 F.3d at 609-10; *and Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 491-92, 859 P.2d 26 (1993).

With regard to Capt. Nelson’s exercise of “due diligence” in attempting to discover the withheld evidence prior to dismissal of his case, “in newly discovered evidence cases, where diligence is a factor, ... ‘[w]here a party has resorted to pretrial discovery procedures and the opposing party fails to comply in good faith therewith, such procedure constitutes the exercise of appropriate diligence.’” Roberson, 123 Wn. App. 320, 334 96 P.3d 420 (2004). Capt. Nelson references the Court to his prior argument regarding the Board’s affirmative denial in response to three lawful document requests and affirmative misrepresentations related to the evidence contained therein.

CONCLUSION

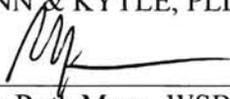
For the reasons stated herein, the trial court’s order granting summary judgment should be vacated and the case should be remanded for trial.

APPELLANT REQUESTS ATTORNEYS FEES AND COSTS

Pursuant to RAP 18.1 and RCW 49.60, *et seq.*, Capt. Nelson hereby requests an award of attorney's fees and costs for this appeal.²¹

RESPECTFULLY SUBMITTED this 26 day of April, 2013.

MANN & KYTLE, PLLC

By: 

Mary Ruth Mann, WSBA 9343
James W. Kytle, WSBA 35048
Mark W. Rose WSBA 41916

²¹ Reninger v. Dep't of Corr., 134 Wn.2d 437, 449, 951 P.2d 782 (1998).

APPENDIX:
ATTORNEY GENERAL OPINIONS 1937-38,
pages 230-234

high school districts highly uncertain and unenforceable. *State ex rel. Bell v. Thaanum*, 74 Wash. 58.

No such situation arises when districts within the same union high school district decide to consolidate and we are of the opinion that two or more districts within the same union high school district may consolidate and that unless all of them consolidate, the organization of the union high school district will not be substantially affected.

You ask also the following question:

"School districts A and B are districts of the third class. For the past eight years, school district A has been assessed for taxes, and those taxes when paid were by error in the County Treasurer's office set over to the credit of school district B. There now remains in the fund of school district B a good deal of unused money. Can B district legally pay this to A district?"

This case presents a clear case of misapplication of funds by the county treasurer. No particular harm has been done inasmuch as the district B seems not to have used the money, but this mistake is a mistake in bookkeeping in the treasurer's office and he should correct it.

We can see no particular objection to district B paying this money to district A, but there is no necessity for any payment by the districts, for it is a county treasurer's duty to keep these funds separate and to credit them properly on his books, and if he makes a mistake it is his business to correct it.

G. W. HAMILTON, *Attorney General*.
By W. A. TONER, *Asst. Attorney General*.

Board of Pilotage Commissioners—Qualifications of Applicants for Licenses

Olympia, Wash., November 17, 1937.

Board of Pilotage Commissioners, Smith Tower, Seattle, Washington.

Dear Sirs: We have a communication from Mr. Katona, your secretary, requesting an opinion from this office relative to the right of your board to impose certain age restrictions on applicants for pilot's license. In his letter, Mr. Katona says:

"The Board of Pilotage Commissioners of the State of Washington would like an opinion upon the legality of the Board as to whether or not they

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could fix a maximum age limit of fifty (50) years or over for all applicants seeking a State Pilots License and making this requirement.

"The reason this opinion is requested is of the possibility of fixing a pension system for state licensed pilots."

Primarily the question of pilotage regulation is one of the government of the United States. When the pilotage field is embraced by the navigable waters of the United States, the federal government has original jurisdiction in determining all questions affecting the regulation of pilots. Article 1, section 8 of the federal constitution grants to congress the power:

"To regulate commerce with foreign nations and among the several states and with the Indian tribes."

Any law limiting and restricting the rights of vessel owners to employ and pay pilots is a burden on interstate or foreign commerce as the case may be. On numerous occasions it has been held by the courts that any such action is a regulation of commerce as provided for under section 8.

However, congress has been slow to preempt this field and assume absolute authority therein. When the federal government was first inaugurated by the several states, these states then had pilotage laws and local laws governing the movement of vessels to and from their harbors. Congress recognized the existence of these regulations as legitimate and valid and at the first session of the federal congress an act was passed providing that:

"Until further provision is made by Congress, all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for that purpose." (R. S. 4235—U. S. C. A., Title 46, sec. 211.)

Under authority of this provision our state has enacted pilotage laws. Chapter 18 of the Laws of 1935 makes provision for the creation of a board of pilotage commissioners of the state of Washington and delegates to this board the right to license all pilots operating on Puget sound and adjacent inland waters as defined and bounded therein. Section 8 of this chapter sets out the qualifications required of applicants for pilot's license, to-wit: Such an applicant shall be,

A citizen of the United States,—
Over the age of twenty-five years,

A resident of the state for three years before date of application,

Must possess practicable knowledge of navigation of vessels,—

Knowledge of the conditions of navigation in the waters in which he wishes to pilot,

Good moral character,

Temperate in habits,

Must possess skill and ability necessary to discharge the duties of a pilot, and

Must hold a first class United States license to pilot a vessel on the said waters.

Section 9 in fixing the authority of the board gives it power to make rules and regulations not in conflict with the act and further authorizes the board (subdivision (a)) to establish the qualification of pilots and provide for their examination for licensing; in section (b) the board is directed to provide for the maintenance of efficient and competent pilotage service; section (c) provides for fixing the rates payable to pilots; then section (d) supplements the foregoing with an inclusive clause, to-wit:

"To do such other things as are reasonable, necessary and expedient to insure proper and safe pilotage upon the waters covered by this act
* * *"

The question then arises, are the powers herein delegated broad enough to authorize the establishment of an age limit for pilots,—especially those set out in section (d), to-wit: To do such other things as are reasonable and necessary to insure proper and safe pilotage upon the waters covered.

We note the legislature has named certain qualifications that an applicant must possess. One of these qualifications is that he must be over twenty-five years of age. But the legislature has not included a maximum age limit or an age beyond which an applicant is disqualified. Section 13 of this chapter says that the board shall have power to suspend, withhold or revoke the license of any pilot for certain causes and reasons therein set out. However, this section does not authorize the board to withhold a license or to refuse a license on the ground that the applicant or pilot has passed beyond any certain age.

The pilotage board is a creature of the legislature and can exercise only the powers delegated to it by the legislature. In exercising these powers and in administering its duties as fixed

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by the legislature, the board must comply strictly with the statute. In gauging the authority, the board may exercise in making rules and regulations, Cyc. says that:

"* * * They need not be general or uniform through the state but may be regulated according to local needs. However, the public has no interest in the government of pilots or their boats except so far as it is conducive to the public good, and any rule or set of rules which shall have any other purpose than this, even though they may be made for the benefit of some of the pilots themselves, unless expressly authorized by the provision of the act creating the commission, are without its scope and void." Vol. 30, p. 1611.

Corpus Juris sets out the law governing in such a case as follows:

"Where so empowered by legislative enactment, pilot boards or commissioners may make reasonable and enforceable pilotage regulations not in excess of their statutory authority, which may be effective and binding in respect of acts and conduct of pilots outside of the territorial waters of the promulgating authority." Corpus Juris, Vol. 48, p. 1187.

The board of pilotage cannot extend its regulations beyond the act even to determine the pilot's qualifications. It must determine in each case if the applicant has sufficient knowledge of the movement of the tides, of the signals, of the buoys, and the lights that may be met and encountered in the waters covered by his license and also determine his knowledge of the shoals and bars and other obstructions to navigation. But the statute specifically points out the qualifications required. In these specific qualifications as above set out, we find most of them to constitute facts of which the board must find proof. Then the board is given no further discretion than the determining of these facts. There is the one qualification at least though wherein the board must exercise its discretion. We refer to the requirements that the applicant possesses sufficient skill and ability to discharge his duties as a pilot. We are not able to say, however, that in settling that question, the board may place an age limit beyond which the applicant is barred. Such an arbitrary rule, we think, would be by the courts held invalid. It may be argued that the establishing of an age limit and thereby assuring a pension system would be of great benefit to the state. However, the answer to this argument is indicated in the citation from Cyc. above quoted. The pilotage board is not authorized to make any requirements or regulations except

those that point to the safety of passengers on boats and the crew operating such boats together with their cargoes.

For the reasons above set out, we are of the opinion that your board cannot fix a maximum age limit of fifty years for applicants, or in fact, any maximum age limit.

We have reached this opinion from an analysis of our own pilotage act and the rules of law bearing on such acts. We think we should add, also, that there is another grave objection to the anticipated action of the board in fixing such an age limit. Congress has passed some laws of a general character intended to cover the actions of pilots and the movements of ships within the navigable waters of the United States.

Section 4442 of the revised statutes of United States was first enacted on May 29, 1896, and has been re-enacted several times since. It is now designated as section 214 of title 46, U. S. C. A. It provides for the licensing of pilots by the United States government, as follows:

"Whenever any person claiming to be a skillful pilot of steam vessel offers himself for a license, the inspectors shall make diligent inquiry * * * and if satisfied * * * that he possesses the requisite knowledge and skill, and is trustworthy and faithful, they shall grant him a license * * *."

It will be noted that no age limit is specified.

Section 215 of title 46 further provides that no state shall impose upon pilots any obligation to procure a state license in addition to the requirements imposed by the United States or any other regulation which will impede pilots in the performance of their duties as required by the federal act. After a careful reading of these federal statutes, we admit that they may be lacking in sufficient definiteness to cover all questions arising under local pilotage conditions. Still we are inclined to believe that a maximum age limit would be an infringement on the field covered by the federal statute. It sets out a few definite qualifications that an applicant must have but it does not bar any one by reason of the fact that he is past any particular age.

We are inclined to hold and we do so hold such an age limit would be invalid under our state law and also would be a violation of the acts of congress above cited.

G. W. HAMILTON, *Attorney General.*

By BROWDER BROWN, *Asst. Attorney General.*

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Hon. Harry C

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

CAPTAIN BRUCE NELSON,

Plaintiff/Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE
BOARD OF PILOTAGE COMMISSIONERS,

Defendants/Respondents.

DECLARATION OF SERVICE

Mary Ruth Mann, WSBA # 9343
James W. Kytle, WSBA # 35048
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Seattle, WA 98119
(206) 587-2700

Attorneys for Appellant
Captain Bruce Nelson

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STATE OF WASHINGTON
2013 APR 26 PM 3:33

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the Brief of Appellant Captain Bruce Nelson and this Declaration of Service to be served via messenger on the following attorneys:

Counsel for Respondents
Tad Robinson O'Neill
John R. Morrone
Assistant Attorneys General
Office of the Attorney General
Torts Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

Dated at Seattle, Washington this 26th day of April 2013.

MANN & KYTLE, PLLC



MARK W. ROSE