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Division I
State of Washington

NO. 72664-1-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

KATHARINE ANN SWEENEY,

Respondent,

v.

WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS

Appellant.

BOARD OF PILOTAGE COMMISSIONERS' REPLY BRIEF

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I. INTRODUCTION

The Washington Board of Pilotage Commissioners, like any other litigant, is entitled to a fair trial. It did not receive one. The Board was severely prejudiced by the procedural decisions it appeals—by release of privileged attorney work-product, by a sanction that barred it from using a key comparator defense, and by the injection of outside evidence into jury deliberations by the juror who provided the tenth vote in a 10-2 verdict on causation and damages. Captain Sweeney contends that the procedural issues identified by the Board do not overcome the jury's verdict that the Board discriminated against her based on her gender. She focuses her opposition on her substantive claim.

But the focus of this appeal is procedure. The 2014 trial failed to give the Board a fair opportunity to defend against Captain Sweeney's allegation. Unless both parties are afforded a just and equitable trial, the resulting determination is meaningless. Here Captain Sweeney's claim of gender discrimination has yet to be adjudicated in a fair and equitable proceeding. From the perspective of justice, the jury is still out.

II. ARGUMENT IN REPLY

A. **The Trial Court's Release of a Privileged Transcript and Work-Product Email Were Stark Abuses of Discretion That Require Reversal and a New Trial**

On April 9, 2009, Captain Sweeney, through her counsel Deborah

Senn, made a presentation to the Board regarding its pending decision on her license. Sweeney had by then conducted six months of document disclosure under the Public Records Act. CP 128, 1272. Sweeney's counsel began the presentation by saying: "At some point in her training, we believe the TEC . . . decided that Captain Sweeney should fail and that both directly and indirectly the TEC made that happen." Ex. 812. The Board viewed Sweeney's presentation as a threat of litigation and sought the assistance of its attorney. *See* Board's Opening Brief (Bd. Br.) 17.

In April and May 2009, seven privileged work-product email were exchanged between AAG Guy Bowman and various Board representatives. Mr. Bowman drafted a list of eighty questions designed to "assess Senn's assertions" in preparation for the legal opinion he planned to give at the Board's closed meeting on May 19, 2009. These privileged work-product email and the transcript of the privileged May 2009 closed meeting were released by Judge Shaffer just days before trial began.¹

- On June 29, 2014, prior to hearing any argument in this case, Judge Shaffer released the transcript of the Board's May 19, 2009, closed session. CP 2161-62. Judge Shaffer's subsequent statements make it clear that she released the transcript without reading it (RP 7/31/14 at 6, 132-3; Bd. Br. 32, App. C.), even though she had been informed that less than a month earlier another King County Superior Court judge found it to be both work-product and the transcript of an attorney-client privileged meeting. CP 1164-66.

¹ The Board claims unwaived attorney-client and work-product privileges in both the closed May 2009 meeting (and its transcript) and the April-May 2009 email. Both privileges were briefed before the trial court.

- On August 1, 2014, Judge Shaffer released seven privileged email without findings, including the email at issue in this appeal—80 questions drafted by AAG Bowman in order to obtain a factual basis for the opinion he gave on May 19, 2009; the color-coded responses to those questions prepared by the TEC; and the data Judy Bell provided to Bowman in support of his legal opinion. RP 8/1/14 at 35-36; CP 4333-412.

Relying on baseless argument and misrepresentation, Captain Sweeney contends that release of these privileged documents was not prejudicial error. The key fabrications Captain Sweeney has relied upon since July 2014 are outlined below.

- 1. Captain Sweeney Misrepresents the Evidentiary Record and the Circumstances Under Which This Privileged Work-Product Was Released**
 - a. Sweeney errs in claiming that the May 4, 2009, email and the May 19, 2009, meeting were not prepared in anticipation of litigation**

Captain Sweeney claims the Board has failed to establish the “threshold requirement” for protecting the work-product email and the privileged transcript because the Board has not established that either was prepared “in anticipation of litigation.” Response Brief of Sweeney (Resp’t Br.) 37-38, 40 n.30, 48, 49, 52. She suggests the email was “made in the ordinary course of business so that the Board could consider it *in deciding whether to license Captain Sweeney*, not to prepare for litigation with her.” Resp’t Br. 50. She appears to view the closed Board meeting as a chat among Board members, describing Bowman’s “few comments” as

“mostly factual, or concern[ing] an administrative timing issue about whether, if the Board voted not to license Sweeney and she appealed, her appeal could be heard with Captain Nelson’s.” Resp’t Br. 37-38.

The contemporaneous record shows this claim to be disingenuous at best. As Mr. Bowman said in his April 27, 2009, email transmitting the list of questions to the Board’s Executive Director:

Attached is a list of questions and concerns which should be addressed by the TEC in connection with our investigation of the claims made by Captain Sweeney and her counsel at the last closed session. Given the tenor of that presentation, there is little doubt that Captain Sweeney intends to file an appeal if she is not granted a license.

CP 4145 (identified as ATTORNEY/CLIENT PRIVILEGED COMMUNICATIONS) (emphasis added).

Captain Sweeney also appears to misunderstand the key legal opinion Bowman gives at the beginning of the Board meeting on the merits of the primary claim in her presentation—that her large number of interventions was the result of being required to train with less experienced pilots. Resp’t Br. 25 n.17; *see also* Exs. 812, 811² at 23. After Commissioner Hannigan’s introductory statement about the advice he had sought from Bowman on whether the allegations “held water,” AAG Bowman gives the opinion he has spent almost a month preparing—that

² Exhibit 811 was admitted at trial for illustrative purposes and was used by the jury as it listened to an edited sound recording of Sweeney’s April 2009 presentation (Ex. 812). It is not evidence.

there was no statistical significance between the number of interventions made by pilots with fewer than five years' experience and the number of interventions made by pilots with more experience.³

Okay. Well . . . Judy has been providing information. . . . And it—you know a pilot's grade is—meaning with more than five years experience versus less than five years' experience. And I mean, the difference here seems negligible . . .

Interventions, about the same; they didn't appear to be there then, specifically, you know a higher number or statistically significant . . . just from looking at this, I don't see anything along the (inaudible) statistical significance part of the bell curve. . . .

But I think generally . . . is something we're going to have to go forward and establish . . .

Dudley: Unless the Board—the decision is to license (inaudible).

Bowman: Yes. Right.

Ex. 88 at 61-62. AAG Bowman's opinion addressed the central assertion Sweeney made at the April 2009 meeting. Ex. 812.

In April 2009 Sweeney threatened litigation. The Board responded with privileged work-product email and a closed meeting held for the purpose of receiving advice from its counsel. Bowman's opinion was that

³ Captain Sweeney errs in describing this essential opinion as being about whether her own large number of interventions (17) was statistically significant and suggesting that her intervention number was no more significant than that of other trainees. Resp't Br. 25. AAG Bowman was focusing on the trainers (as the presentation had) rather than the trainees. No one representing the Board ever viewed Sweeney's number of interventions as statistically insignificant. Bd. Br., App. E (Sweeney had more interventions than any other trainee in the 2005 class).

Sweeney's core assertion was not statistically significant. Put simply, Bowman's privileged advice to the Board was that it would have a sound defense to litigation by Sweeney. Once Bowman gave his opinion, he turned to the financially prudent question of whether Sweeney's litigation could be joined with Captain Nelson's. Ex. 88 at 63. Bowman was not merely discussing "an administrative timing issue." He was discussing litigation. The Board has passed the threshold test. Its email and meeting transcript anticipated litigation.

b. There was no material change in the record between Judge Lum's decision that the May 2009 transcript was privileged work-product and Judge Shaffer's release of that transcript

On June 10, 2014, Judge Lum found the transcript of the May 2009 closed meeting contained attorney-client communication and work-product and held that "absent waiver" it should not be produced. CP 263-65. He found Captain Dudley's January 22, 2013, deposition testimony did not waive the Board's privilege. (He did not consider release of the privileged work-product email because they were not yet identified.)

Captain Sweeney argues there were three material changes in this case in the six weeks between Judge Lum denying release of the transcript and Judge Shaffer releasing it by written order on July 29, 2014,⁴ that fully

⁴ See Bd. Br., App. C, for a complete list of briefing (with CP references) for Sweeney's motions to compel. Order at CP 2161-62.

justified release of the transcript and email. First, she argues the Board's summary judgment motion (filed June 13, 2014) argued for the first time that her license was denied, in part, because she had more interventions than any other trainee in the 2005 pilotage class.⁵ Second, she argues in one or both of the CR 30(b)(6) depositions held during that period the Board expressly waived its privilege in the transcript and email by testifying about their content. Third, she argues the Board claimed that it considered "new information" at the May 2009 closed meeting and suggested it would use that new information at trial, impliedly waiving the privilege. Resp't Br. 21, 43-44. Each of these alleged changes is discussed below. None warranted release of the privileged transcript and email.

c. There was nothing new in the Board's focus on "interventions" at summary judgment

Captain Sweeney claims that the Board's emphasis on "interventions" at summary judgment was new, as the term "intervention" had not been included in the TEC's letter to her on November 12, 2008, or in the Board's letter to her on November 21, 2008. Resp't Br. 21, 43-44. But Sweeney herself, in the April 2009 presentation, had placed her high number of interventions as issue. Ex. 812. The term "intervention"—and the use of interventions as a measure of her poor performance — was not

⁵ Captain Sweeney makes this argument for the first time on appeal. It was not made before Judge Shaffer.

new to the case in June 2014, or even in May 2009. Sweeney’s interventions had been discussed at length in the 2008 email of Captain Carlson (2/1/08) and Commissioner Lee (5/16/08)⁶ and in the 2013 depositions of Commissioners Hulsizer (CP 149-50) and Addington (CP 336, discussing intervention on Sweeney training trip in which ship allided with a Tacoma dock causing \$30,000 in damages) and Captain Sweeney herself (CP 2295, 2333, 2412, 2417, 2420, 2427, 2802, 2806, 2808). Sweeney had always known the April 2009 presentation focused on “interventions.” She could not credibly have viewed this as a new theory.

d. Members of the Board never discussed what happened in the May 2009 meeting—there is no support for express waiver

Captain Sweeney argues that Captains Dudley and Hannigan expressly waived the Board’s privilege in the closed meeting and email. Resp’t Br. 40-41. She claims the Board “placed at issue what the Commissioners *actually* considered” at the closed meeting:

[R]epeatedly assert[ing] in depositions of key witnesses... and in pretrial motions... that the Commissioners made their decision during the May 19 meeting based on Captain Sweeney’s entire record of performance including new information it had received after it had decided to end her training program in October 2008

Resp’t Br. 6-7. She also states that the Board “tried to reference the

⁶ Both produced to Captain Sweeney in discovery (400943 and 400949) in September 2012. Appended as Ex. 1 to this Reply.

May 19 meeting to show that the decision-making process was thorough, considered, and fair.”⁷ Resp’t Br. 42. But there is no evidence that any Board member made this statement or described the May 2009 closed meeting at any time. Accordingly, there was no express waiver.

In its opening brief, the Board discusses, in detail, the complete inadequacy of the CR 30(b)(6) depositions of Dudley and Hannigan to establish either express or implied waiver of the Board’s privilege in its closed meeting transcript and email. Bd. Br. 26-32; 39-42; CP 1134-72. There are three potential statements at issue. Captain Dudley states in his January 22, 2013, deposition:

Other than a general recollection that a fair amount of detail regarding Captain Sweeney's performance up to that point, and there were other issues, by the way, discussed in that closed session, so I don't recall specifically other than the general sense that a discussion ensued about what the TEC was going to recommend as soon as we went back into open session.

CP 1077-78. In his June 30, 2014, deposition, Captain Dudley says (after his answer to the 2013 deposition is read aloud and his counsel directs him not to answer if that answer might implicate attorney advice):

No. I've already told you what the specific considerations were, done by each and every Board member, that they weighed all of her training trip reports, all of the documents

⁷ This statement most accurately describes the statements Commissioner Hulsizer and Captain Dudley made that Judge Lum found to have waived the Board’s privilege in the October 2008 meeting. CP 263-65. Captain Sweeney used a similar uncited statement in her motion to compel. CP 1100.

that they had in front of them, everything they had heard in front of them, and so all of those things were considered by each Board member as they decided how to vote.

CP 1140-41.⁸ Finally, Captain Hannigan testified on July 9, 2014, that after Captain Sweeney presented to the Board in April 2009, “the Board had an opportunity for a month to study the information that was provided to them.” CP 1152 (emphasis added).

De novo review of the privilege / work-product issues in this case including the factual support (CP 1134-72), as the Supreme Court conducted in *Pappas v. Holloway*, 114 Wn.2d 198, 207-08, 787 P.2d 30 (1990), will show nothing sufficient to support express (or implied) waiver of the Board’s privilege in these CR 30(b)(6) depositions. Had Judge Shaffer read the slim evidence that supported Captain Sweeney’s motions to compel production of the May 2009 closed meeting transcript and email, she would have known the Board had not placed its thoroughness, consideration, or fairness during the closed meeting at issue or expressly waived its privilege in either the email or the transcript.

⁸ The Board would argue that both of Dudley’s statements (taken in context) describe the October 2008 meeting. The 2013 deposition is taken by an attorney (Annette Messitt) who seems unfamiliar with the case and with the dates of various hearings. Mr. Breskin does not clarify the context in the 2014 deposition.

- e. **Because the Board never claimed it considered new evidence about Sweeney's performance at the May 2009 meeting, the transcript was not needed to test that claim—there was no support for implied waiver**

Captain Sweeney asserts repeatedly that she “did not believe the Board had actually considered any new information at its May 19, 2009, closed session” or had “discuss[ed] her performance or how she compared with other pilots, or the number of interventions.” Resp’t Br. 21, 47; *see also*, Resp’t Br. 6-7, 41-42, 44. Sweeney argues she needed the transcript (and email) “to disprove the Board’s claim that it fairly considered [her] qualifications and performance by reviewing all of the information that was available at the time it made its final decision.” Resp’t Br. 47.

But Captain Sweeney’s assertion of the Board’s claim is itself fiction. The alleged “Board claim” is a straw man created by Sweeney’s counsel to make it appear that the Board had impliedly waived its privilege in the email and transcript. Its sole purpose was to lead Judge Shaffer to view the Board as using its privilege as a sword rather than a shield. Had Judge Shaffer actually read the hard evidence before her she would have understood that the Board and its members never claimed to have considered any new information or Sweeney’s performance at its May 19, 2009, closed session. Captain Sweeney had not filed a training trip report since October 2008. There was no new aspect of her

qualifications and performance for the Board to consider.

Captain Hannigan did correctly testify that the “critical meeting” of the Board “is on May 19th 2009, when the Board denied Captain Sweeney her license.” CP 1152. But the Board denied Sweeney’s license at its public meeting that day. CP 207. Because all of Sweeney’s appeal rights accrued at the time of that final vote, under Washington law the public meeting was “critical.” RCW 42.30110(g).

As noted above, Captain Hannigan also testified that “the Board had an opportunity for a month to study the information that was provided to them” after Sweeney’s presentation. CP 1152 (emphasis added). But Hannigan’s testimony was limited—he stated only that Board members had the “opportunity” to study the information; he did not testify that the Board members took the opportunity, nor did he state they discussed the information in the May 2009 closed meeting. Hannigan’s statement preserved the privilege in the transcript. Only misquotations of the statement in which the word “opportunity” is omitted—to Judge Shaffer and now to this Court—support Sweeney’s implied waiver argument.

Contrary to Captain Sweeney’s allegation, the Board also did not claim that it considered the May 4, 2009, attorney-client privileged / work-

product⁹ email before (or during) the closed meeting. Sweeney supports this alleged Board claim—as she did in the trial court—with an inaccurate paraphrasing of the testimony of the Board’s CR 30(b)(6) witnesses, particularly Captain Hannigan. It misstates Hannigan’s testimony to say, as Sweeney does here:

And [Hannigan] suggested that the Board had spent the month before the meeting “study[ing] the information that was provided to them” during and after Senn’s presentation.

Resp’t Br. 50. Captain Hannigan’s actual statement is substantively different, and does not waive the privilege in the transcript or email:

The Board did not make a final determination with regard to her suitability for licensure until after she and her attorney made a full presentation to the Board and all the facts as they chose to present them were made public to the Board, and then the Board had an opportunity for a month to study the information that was provided to them.

CP 1152 (emphasis added). Captain Sweeney’s version might be adequate to waive the privilege, but it is not what Captain Hannigan said.

Captain Sweeney’s argument also manipulates the ambiguity in the term “information.” In the context of the original CR 30(b)(6) question to Hannigan, it is clear that by “information” counsel was referring to the presentation. But in Respondent’s Brief, the term “information” is

⁹ Both parties’ written pleadings considered the May 4, 2009, email to be work-product for which express or implied waiver was required. It is the law of the case.

inexplicably expanded to include the May 4, 2009, email, though the use of the phrase “during and after Senn’s presentation.”¹⁰ Resp’t Br. 50.

As for the Board’s response to Captain Sweeney’s motion to compel production of the transcript, the Board’s actual statement about the May 2009 meeting was precise and excluded any possibility that a Commissioner would testify about the substance of the May 2009 closed meeting. The Board stated it anticipated “that each Board member will testify that [he/she] considered Captain Sweeney’s presentation in arriving at [his/her] vote,” but that it did not “anticipate (a) that any of the Board members remembers the content of the May 19, 2009 [closed] meeting, or (b) will testify about what legal advice [the Board’s] attorney gave.” CP 1737. This statement goes to the evaluation process conducted by each member of the Board prior to his or her public vote on Captain Sweeney’s license and explicitly disavows any possibility that a Board member would testify regarding the content of the May 2009 closed meeting. This clear

¹⁰ The terms “information” and “document” have no clear definition in this case, particularly in the depositions. They are the chameleons at the heart of Captain Sweeney’s waiver argument. She leverages these terms throughout the Respondent’s Brief as she did in the pretrial depositions and at trial. Resp’t Br. 5, 6, 7, 18, 21, 22, 23, 25, 26, 33, 41, 43, 44, 45, 47, and 50. At times she uses the term “information” to refer to the “information” she provided to the Board in the April presentation (Hannigan, CP 1152). At other times she more ambiguously uses the term to apply to her trip reports and program information, and the privileged April-May 2009 email. She also adapts and rewrites Hannigan’s statement about “information” (CP 1152) and Dudley’s statement about “all the documents” they had in front of them at the October 2008 meeting (CP 1140-41) to suit the needs of her waiver arguments. Resp’t Br. 18, 23, 41.

statement should have been sufficient to inform Judge Shaffer that the Board did not intend to use the transcript or email as a “sword” at trial.

2. Well-Settled Washington Law, When Accurately Stated, Confirms That Compelled Release of the Transcript and Email Was an Abuse of Discretion Requiring Reversal

Judge Shaffer appears to have accepted the implied waiver argument,¹¹ saying the Board made “aggressive use of the attorney-client privilege, in other words, as a sword which waived it.” RP 8/11/14 PM at 94. But neither the law nor the facts support implied waiver.

Captain Sweeney misrepresents the controlling law governing implied waiver. Sweeney’s initial assertion is that the law relied upon by the Board regarding standard of review is convoluted. It is not. In *Dana v. Piper*, 173 Wn. App. 761, 769, 295 P.3d 305 (2013), Division II noted:

Washington cases have not directly analyzed the standard of review of a trial court’s discovery order determining whether an attorney-client privilege has been waived. Though the *Pappas v. Holloway* court did not discuss the standard of review, it reviewed the trial court’s decision de novo . . . Federal courts have determined that waiver of the attorney-client privilege in this circumstance is a mixed question of law and fact . . .

(internal citations omitted). More recently, in *Doehne v. EmpRes Healthcare Mgmt, LLC*, 190 Wn. App. 274, 290, 360 P.3d 34 (2015), the

¹¹ In the interest of economy, the Board rests upon the express waiver argument in its opening brief and focuses here on implied waiver since that was the basis for the trial court’s decision.

court affirmed that “A court necessarily abuses its discretion when basing its decision on an erroneous view of the law or applying an incorrect legal analysis.” But whether this Court reviews Judge Shaffer’s decisions *de novo* or for abuse of discretion, it is clear that the actual facts before her were insufficient to establish implied (or express) waiver.

Judge Shaffer has made no record of her decision to release the privileged May 2009 transcript. CP 2161-62. The order stands alone. It reverses Judge Lum’s discovery order (CP 263-65) without findings that this Court could review in assessing the basis for the decision. One reason there may be no findings is that Judge Shaffer did not read the transcript before she compelled its release. RP 7/31/14 at 6, 132-33. The sole record available to this Court for review of the trial court’s decision to release the May 4, 2009, email is at RP 8/11/14 PM at 88-94.

On the merits, Captain Sweeney, seemingly relying upon *Pappas v. Holloway*, 114 Wn.2d 198, 207-08, 787 P.2d 30 (1990), and *Hearn v. Rhay*, 68 F.R.D. 574 (Wash. 1975), recites an implied waiver test that is considerably weaker than the test set forth in those cases. She says:

Implied waiver occurs where (1) assertion of the privilege arises from some affirmative act by the party asserting it; (2) through that affirmative act the party has put the protected communication at issue; and (3) application of the privilege would deny the opposing party access to information that is vital to its case. *Pappas*, 114 Wn.2d at 207-08 (citing *Hearn*, 68 F.R.D. at 581).

Resp't Br. 42-43. The actual test identified by the Washington Supreme Court in *Pappas* is much stronger. It is a test crafted for an unusual case, where attorney-client privilege was truly—and not merely rhetorically—being used as a sword:

[W]here the following three conditions are satisfied, an implied waiver of the attorney-client privilege should be found: (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense.

Pappas, 114 Wn.2d at 207-08 (citing *Hearn*, 68 F.R.D. at 581).

Put simply, the unfairness that is at the heart of the *Pappas* case and that is central to the use of the *Hearn* implied waiver test in *Pappas* is not present here. The Board had taken no “affirmative act” comparable to that which was at issue in *Pappas*—filing suit against its own lawyer and then attempting to use attorney-client privilege to conceal information.¹² The Board did not sue Captain Sweeney. It explicitly disavowed any possibility that Board members would testify about the May 19, 2009, closed meeting. By contrast with the Holloways (in *Pappas*), there is no

¹² “In this instance, the Holloways cannot counterclaim against Pappas for malpractice and at the same time conceal from him communications which have a direct bearing on this issue simply because the attorney-client privilege protects them. To do so would in effect enable them to use as a sword the protection which the Legislature awarded them as a shield.” *Pappas*, 114 Wn.2d at 208.

evidence that the Board was attempting to manipulate attorney-client privilege. It sought to receive privileged advice at a privileged meeting after a well-known Washington attorney threatened litigation.¹³

The Board of Pilotage is a state board, but even a state board is entitled to protect the advice of its counsel under the circumstances here. *Soter v. Cowles Publ'g Co*, 162 Wn.2d 716, 747, 174 P.3d 60 (2007). Like *EmpRes Healthcare Management* (in *Doehne*) and the Spokane School District (in *Soter*), the Board's privileged pre-litigation consultation with its attorney and the opinion work-product he prepared before that closed session were entitled to fierce protection. The Board requests that this Court order a retrial, before a different judge and with different counsel, in order to preserve the privilege so recklessly discarded by Judge Shaffer.

3. Erroneous Release of the May 2009 Email and Transcript Prejudiced the Fairness of the Trial

Captain Sweeney argues that the Board has failed to establish that release of the privileged work-product email was prejudicial because it does not contain "an attorney's 'mental impression' or opinion about any issue in the case" and fails to show "how Captain Sweeney made any use

¹³ The *Pappas / Hearn* test itself is controversial, perceived by appellate courts, particularly the federal courts, to weaken attorney client privilege. In *Dana v. Piper*, 173 Wn. App. at 773-74, the court discussed the sharp criticism the *Hearn* test has received: *Hearn* appears to rest on a conclusion that if the information sought is relevant, it should be disclosed. As it did in this case, use of the *Pappas / Hearn* test subjects a large majority of privilege claims to waiver simply because the moving party alleges it to be vital. Captain Sweeney espouses that very position here.

of the questionnaire during trial, much less an unfairly prejudicial use of it.” Resp’t Br. 53-54. But AAG Bowman’s eighty questions were the road-map for the litigation he expected Sweeney to bring, based on her April 2009 presentation.¹⁴

At trial in 2014, Captain Sweeney did not assert (at least until closing argument) the theory that she argued in April 2009—that her large number of interventions was the result of the insecurity of the inexperienced pilots who trained her. In part this may have been because that theory was “gender neutral”—it arguably affected any pilot who began training after the first members of the 2005 class were licensed. But Sweeney’s trial strategy was also informed by the answers to Bowman’s questions and the data provided by Bell, which demonstrated that the

¹⁴ It should be noted that one attachment to the May 4, 2009, email (Ex. 90) was used to great prejudicial effect by Sweeney. This exhibit should not have been admitted during Hannigan’s testimony because he had not been a party to the email with which it was transmitted. RP 8/11/14 PM at 88-94. Even though Judge Shaffer admitted Ex. 90 without authentication, Captain Sweeney used Ex. 90 to demonstrate that the number of interventions (4) that she received on her last extension was comparable to those received by Captains Marmol and Kelly. She referred to it extensively during her own testimony as a means of minimizing her own interventions (during her last extension) and maximizing those of the pilots she chose as comparators. Ex. 90 was included at Tab N in the notebooks she distributed to the jury and was used throughout the trial, including opening. During Captain Sweeney’s closing argument, Ex. 90 was key to both her comparator argument and to the original argument that Captain Sweeney received interventions from pilots with less experience. RP 9/18/14 at 30-34. However, Captain Sweeney successfully fought the one time the Board attempted to use Ex. 90 to compare her performance with Captain Nelson’s. Sweeney’s objection to Commissioner Lee’s lack of personal knowledge regarding the document was sustained by Judge Shaffer. RP 9/3/14 PM at 83-84. This despite Sweeney’s own use of Ex. 90 to cross examine Lee (RP 9/3/14 at 40-41) an hour earlier. This is the best evidence in the record that Judge Shaffer considered the email and its attachments as a “party admission.”

Board could effectively defend against those April 2009 assertions. Release of the email showed Sweeney that there was no statistically significant difference in the frequency of interventions by newly licensed pilots. Not surprisingly, when she made this argument in closing, she relied (as she had throughout the trial) on raw numbers rather than statistical significance. Because of the release of the May 2009 email, Sweeney knew this argument could be made only after the Board had no opportunity to introduce the evidence that eviscerated it.

Captain Sweeney also argues that even if Judge Shaffer “erroneously ordered production of the May 2009 transcript” the error was harmless and did not prejudice the Board. Resp’t Br. 46. She states that she “rarely even referred to the AAG or his comments.” Captain Sweeney must have a peculiar understanding of the term “rarely.” Captain Sweeney’s counsel made the transcript of the closed meeting and, often, the exact words¹⁵ of AAG Bowman’s privileged client advice to the Board the core of his trial presentation.¹⁶

¹⁵ For example, in opening Captain Sweeney’s counsel walks the jury through the transcript of the closed meeting and concludes the tour by quoting AAG Bowman:

Then the attorney says, “As the evidence develops during the course of the hearing, in the litigation, there is nothing that would prevent us from just saying, oh, see, there’s this huge problem here. Let’s go talk to Captain Sweeney and see if we can work something out.”

RP 8/11/14 AM at 99 (quoting Ex. 88 at 81-82; CP 4092-93). Counsel then says:

They voted to deny her license. The only woman ever to get that far, to do 230 trips, to qualify, to perform satisfactorily, without even

Sweeney's counsel attributed AAG Bowman's legal advice to the Board and characterized it in his closing as displaying a "total lack of regard for the discrimination laws, a total lack of regard for bias, a total inability to even see what's in front of them." RP 9/17/14 at 185-87. It is difficult to imagine how such repeated use of AAG Bowman's legal advice could not have adversely affected the jury's view of the Board and the jury's verdict. Release of this attorney-client privileged advice tainted the jury's perception of every aspect of the Board's 2008 training decisions regarding Captain Sweeney. It was not harmless error.

By releasing the transcript of the May meeting, Judge Shaffer allowed AAG Bowman's seemingly callous trial strategy to become the theme of Captain Sweeney's case. Without it, this case would have focused on 2007-2008—on Sweeney's training program, performance, and extensions, and about whether evaluation of her performance by more

looking at the information they had gathered, without even caring. The evidence before you, in this transcript, of what they actually said and what they actually did, they went ahead and denied her a license, even though Captain Hannigan, the most powerful member says, "I just don't feel comfortable doing that."

So what are the defendants going to say to all of this? Good question.

RP 8/11/14 AM at 97-100.

¹⁶ Excerpts from the transcript, and most often AAG Bowman's privileged client advice was included in Sweeney's opening statement (RP 8/11/14 AM at 97-100), cross examination of Dudley (RP 8/13/14 AM at 72), cross examination of Hulsizer (RP 8/14/14 AM at 24), direct examination of Sweeney (RP 8/18/14 AM at 96) and closing argument (RP 9/17/14 at 185-87). *See also* Bd. Br. 36-9. Sweeney was also allowed to place the transcript (Ex. 88) into a tabbed binder that was given to the jury and used throughout the trial. *See* RP 8/14/14 AM at 24 (Tab V).

than fifty individual pilots accurately described her lack of skill, or was affected by her gender. It would have been the gender discrimination case the Board was entitled to fairly defend.

B. The Nelson Sanction Deprived the Board of a Key Defense Theory — Without a *Burnet* Analysis the Sanction Cannot Be Meaningfully Reviewed — A New Trial Is Required

One of the Board's key defense theories was its primary comparator, Captain Nelson. Nelson was male, the Board denied him a license, and he performed better than Captain Sweeney — he had higher average scores and fewer interventions over more training trips. Captain Nelson had an overall average of 5.5 (on trips scored on 1-7 scale) and 11 interventions over 242 trips. Ex. 690. Captain Sweeney had an overall average of 5.3 (all trips scored on 1-7 scale) and 17 interventions over 230 trips. Ex. 27; *see also* Bd. Br. 58 n.61 (explaining what Board would have argued regarding Nelson but for the sanction and how the Nelson evidence was critical to its defense). In week five of trial, Judge Shaffer sanctioned the Board by excluding all further evidence and argument regarding Nelson, eviscerating this key defense.¹⁷ Because Judge Shaffer did not

¹⁷ Sweeney's argument that the Board "made no offer of proof" and did not preserve this issue (Resp't Br. 56) is inapposite and baseless. The argument is inapposite because, as the pretrial conference demonstrates, the trial court knew how significant Nelson was to the Board's defense as a comparator. RP 8/05/14 at 33. And what the comparator evidence would be was self-evident—all trainees were evaluated based on their trip reports, showing scores and comments. The argument is baseless because, after the sanction was imposed, the Board's counsel made an offer of proof regarding Nelson

make *Burnet*¹⁸ findings, this severe sanction is effectively—and unfairly—insulated from appellate review.

1. Captain Sweeney Misrepresents the Nelson *In Limine* Order, the Evidentiary Record, and the Nelson Sanction

First, the record flatly contradicts Captain Sweeney’s contention that the Nelson *in limine* order “denied” the Board’s motion “to tell the jury the litigation was over.” Resp’t Br. 57 (citing RP 9/2/14 PM at 101); *see also* Resp’t Br. 54 n.40. Judge Shaffer did reject the Board’s request to tell the jury the litigation was resolved against Nelson. RP 9/2/14 PM at 97-101. But she “grant[ed] [the motion] in a teeny-weeny way in the sense that next time the Nelson litigation is mentioned, it will be in the past tense, as in it was litigated.” RP 9/2/14 PM at 101. Thus she granted, not denied, the Board’s request to tell the jury the Nelson litigation was over.

The Nelson “violation” occurred one week later, when the Board’s counsel asked a witness “Has the Nelson case recently resolved?” and the witness replied “Yes, and I am pleased with the results.” RP 9/10/14 PM at 30. Given that the jury knew only that Nelson was litigating the denial of his license, but not the basis of his claims or why the witness was pleased, the answer was highly ambiguous. Judge Shaffer immediately struck the answer as a “violation of an express court ruling,” saying she

evidence that should be admitted for purposes of comparing his performance with that of Captain Sweeney. RP 9/17/14 at 17-18.

¹⁸ *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

had ruled “as far as we would go is that [the Nelson case] was in litigation at the time.” RP 9/10/14 PM at 30, 32. After a recess, the Board’s counsel explained “I clearly misunderstood the Court’s ruling, and I intended to elicit that the Nelson litigation was done. That was the intent of the question.” RP 9/10/14 PM at 36.

Second, the record flatly contradicts Captain Sweeney’s contentions that the sanction “did not actually exclude any evidence” and “there was already substantial evidence of record comparing Nelson and Sweeney” before the sanction was imposed. Resp’t Br. 55, 62. Of the evidence Sweeney touts as “seen” by the jury (Resp’t Br. 57-58), most was not admitted—it was refused because of the sanction. The trial court refused Nelson’s trip reports (Ex. 578), training program (Ex. 591), and program extensions (Ex. 579). CP 3976; RP 9/16/14 at 6-7. The trial court refused the cumulative comments on Nelson’s training trips (Ex. 623). CP 3978; RP 9/17/14 at 17. TEC email mentioning Nelson (Exs. 81-84) were returned to Captain Sweeney.¹⁹ CP 3951-52.

Similarly flawed is Captain Sweeney’s support for Nelson’s performance having been “discussed multiple times” before the sanction. Resp’t Br. 58. Sweeney offers four “examples” but only Captain Dudley’s

¹⁹ Of the “substantial documentary evidence on Nelson” Sweeney claims was admitted (Resp’t Br. 57-58), the only evidence actually admitted consisted of Nelson’s trip score spreadsheet, two charts showing information about the Class of 2005 generally, and two TEC email. CP 3982 (Ex. 690); 3952 (Exs. 86, 90, 97); 3947 (Ex. 8).

testimony actually addressed Nelson's performance. *Cf.* Resp't Br. 58 with RP 9/10/14 AM at 18 (AM is Certificate; PM is Hannigan testimony on post-Nelson changes to method of supervising trips); RP 9/18/14 PM at 18-19 (no AM/PM; identified as Kromann testimony, but is Sweeney's closing argument); RP 8/18/14 AM at 89-90 (Sweeney testimony about events before she entered training).

Third, the record flatly contradicts Captain Sweeney's representations regarding the sanction itself. She contends the sanction "was not overly severe" because "[i]t simply instructed the jury to disregard the Nelson *litigation*, not his performance or the evidence comparing him to Captain Sweeney." Resp't Br. 55. But it was the curative instruction that told the jury not to "consider or discuss" the Nelson lawsuit. CP 3835. The sanction imposed a complete bar on Nelson. Judge Shaffer said "I'm saying no with comparing with Nelson" (RP 9/15/14 AM at 74) and "Nelson's off limits at this point" (RP 9/17/14 at 18). Plainly, the Nelson sanction barred all further evidence and argument about Nelson in any capacity, including as a comparator.

Nor did the Board say Judge Shaffer had "acted appropriately in the sanction she imposed" or "argue[] only that no *further* sanction of attorney fees was warranted." Resp't Br. 55, 63 (both citing only CP 3865). Sweeney cites to the Board's post-trial briefing in response to her

renewed motion for monetary sanctions on the *in limine* order violation. CP 3865-66. That pleading did oppose Sweeney's renewed request for monetary sanctions. It also described the sanction itself as "extraordinarily severe" and "an extreme remedy." CP 3865-66.

Finally, the trial court did not impose the Nelson sanction because the Board's counsel "violat[ed] the court's orders not to ask leading questions." Resp't Br. 60, 62-63. Captain Sweeney creates the impression that Judge Shaffer considered a "pattern of improper conduct [leading questions] in imposing the sanction" (Resp't Br. 62) by conflating her remarks on the Nelson violation with her separate, distinct remarks regarding leading. *Cf.* Resp't Br. 60-62 with RP 9/10/14 PM at 28-37. However, the basis for the Nelson sanction — violation of the Nelson order *in limine* — is perfectly clear:

[T]he Court is taking some strong remedial action to make sure that the taint of the violation of the Court's *in limine* rulings is as reduced as possible. . . . So that's why Nelson's off limits at this point. It wouldn't have been if we hadn't had problems with the *in limine* ruling, but we did.

RP 9/17/14 at 18. Captain Sweeney ignores this plain statement.

2. A *Burnet* Analysis Was Required Because the Sanction Stripped the Board of a Key Defense Theory, its Primary Comparator Captain Nelson

In late 2015, the Supreme Court announced that use of the *Burnet* analysis is not limited to sanctions imposed for discovery violations. *Keck*

v. Collins, 184 Wn.2d 358, 369, 357 P.3d 1080 (2015). “While our cases have required the *Burnet* analysis only when severe sanctions are imposed for discovery violations, we conclude that the analysis is equally appropriate when the trial court excludes untimely evidence submitted in response to a summary judgment motion.”²⁰ *Id.* (emphasis added). *Keck* confirms the law as stated in *Washington Practice*, “before excluding testimony or evidence as a sanction, the trial court must explicitly consider [the *Burnet* factors].” 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Handbook on Civil Procedure* § 57.9 (2015).

In *Keck*, the trial court had struck an untimely affidavit submitted in response on summary judgment, then granted summary judgment for lack of the evidence the affidavit would have supplied. The *Keck* Court reversed, holding “the trial court abused its discretion by not considering the *Burnet* factors before striking” the affidavit. *Id.* at 369. The Court explained “the decision to exclude evidence that would affect a party’s ability to present its case amounts to a severe sanction. . . . And before imposing a severe sanction, the court must consider the three *Burnet* factors on the record[.]” *Id.* at 368-69 (citation omitted). The Court reasoned that its “overriding responsibility is to interpret the rules in a

²⁰ *Keck v. Collins* supersedes *Foss Maritime Company v. Brandewiede*, 190 Wn. App. 186, 359 P.3d 905 (2015), on which Captain Sweeney relies for the proposition “*Burnet* only applies to consideration of discovery sanctions under CR 37.” Resp’t Br. 59.

way that advances the underlying purpose . . . to reach a just determination in every action.” *Id.* at 369 (quoting *Burnet*, 131 Wn.2d at 498). That purpose was advanced by requiring a *Burnet* analysis where excluding evidence “[e]ssentially . . . dismissed the plaintiffs’ claim.” *Id.* at 369.

Here the *Keck* Court’s reasoning is equally compelling: in the fifth week of a six-week trial, the Nelson sanction excluded evidence and expressly prohibited the Board from arguing a key defense theory. From the start of trial, the Board made sure Judge Shaffer knew how important Captain Nelson was to its case. Nelson was the “male comparator who had higher scores and fewer interventions than Captain Sweeney, and was, nonetheless, denied a license.” RP 8/5/14 at 33.²¹ Five weeks later, when Judge Shaffer imposed the Nelson sanction, she knew she was dismissing the Board’s key comparator defense. RP 9/15/14 AM at 74.

Judge Shaffer also knew that such severe sanctions require a *Burnet* analysis. *See, e.g.* RP 8/26/14 PM at 9 (refusing to exclude witness because “[t]here is no showing under Burnett [sic] that would allow that kind of extreme sanction”). Had she conducted a *Burnet* analysis, it would have shown that the extreme Nelson sanction was not allowed either. *See Bd. Br.* 58-61. But since she did not conduct a *Burnet* analysis, her

²¹ The Board preserved the issue for appellate review by arguing Captain Nelson’s significance as a comparator again in its CR 50(a) motion (CP 3109-19 (motion); 3209-23 (response); 3297-3303 (reply)), and in its post-trial CR 50(b) motion (CP 3995, incorporating these arguments by reference).

decision to sanction the Board by gutting its comparator defense cannot be reviewed. As in *Keck*, that decision should be reversed.

3. The Sanction Unfairly Prejudiced the Board and Without a *Burnet* Analysis Stands Incapable of Review — A New Trial is Required

The Nelson sanction deprived the Board of a key defense theory in the fifth week of a six week trial. Comparing Captain Nelson to Captain Sweeney was crucial to the Board's defense. Nelson performed better than Sweeney—he had higher average scores and fewer interventions over more training trips—and the Board did not license him either.²² Being deprived of its Nelson comparator defense was extremely prejudicial.²³

The Nelson sanction was also extremely unfair, imposing prejudice on the Board that vastly exceeded any possible prejudice to Captain Sweeney from the violation. All the jury learned from the witness's answer was that the Nelson litigation had resolved and the Board's witness was "pleased with the results." RP 9/10/14 PM at 30. All the jury knew before the answer was that Nelson was litigating the denial of his license. It did not know the nature of his litigation claims or why the witness was pleased. Prejudice to Sweeney would have required the jury to speculate

²² See *supra* at 22.

²³ Captain Sweeney claims the Board's counsel "made the point" that "Nelson was *not* a good comparator for Sweeney." Resp't Br. 65. Counsel did no such thing. He merely pointed out that due to the mid-program scoring change, "Nelson's a bit unusual." RP 8/13/14 AM at 110.

that Nelson had claimed discrimination, had lost, and somehow that loss was relevant to Sweeney's case. (Conversely, until the answer, the jury could have been speculating to the Board's potential prejudice about why Nelson was litigating the denial of his license.) Any prejudice to Sweeney was cured by Judge Shaffer immediately instructing the jury to disregard the answer (RP 9/10/14 PM at 30) and expressly instructing it not to engage in such speculation (CP 3835). The sanction was excessive.

Inexplicably, although Captain Sweeney relied heavily on comparator evidence at trial (and argues it again on appeal (Resp't Br. 13-14)), she contends that depriving the Board of its primary comparator was not prejudicial.²⁴ Resp't Br. 64-65. She makes the disingenuous claim that the Nelson sanction was not unfairly prejudicial because it "did not strike or prohibit the jury from considering any of the substantial testimonial and documentary evidence regarding Nelson that had been submitted in the first five weeks of trial." Resp't Br. 65. As shown above (*supra* 24-25), there was no such substantial evidence admitted. Even if the jury would have made such a comparison on its own without closing argument to frame the issue, it did not have the evidence before it to compare.

²⁴ The Board did not compare trainees when it made licensing decisions because it judged trainees on their individual performances. *See* Resp't Br. 62 n.42. But in this licensing discrimination case, once Sweeney started arguing comparators to prove her claim of alleged gender discrimination, the Board had little choice but to use its own comparator evidence to rebut her allegations.

Sweeney also contends the Board was not prejudiced because it “freely used” Captain Jones as an example of another trainee who was denied a license and told the jury in closing “that Jones was the proper comparator to Sweeney.” Resp’t Br. 65. Obviously, once the Nelson sanction was imposed, the Board had no choice but to argue the only other comparator it had. That does not negate the extreme prejudice of losing Nelson.

Ultimately Captain Sweeney argues that Judge Shaffer was “properly concerned” about the effect of the violation on the jury. Resp’t Br. 66-67. Sweeney’s opinion regarding Judge Shaffer’s “concerns” is pure speculation. In fact, neither Captain Sweeney nor this Court can know what Judge Shaffer’s actual concerns may have been, because she did not put them on the record. That is precisely why a *Burnet* analysis was required. The failure to make a *Burnet* analysis before imposing this severe sanction was an abuse of discretion that demands reversal.

C. Extrinsic Evidence Going to the Central Disputed Issue Was Injected Into Jury Deliberations — A New Trial Is Required

1. Captain Sweeney Misrepresents the Information That Was Injected, the Board’s Position Regarding It, and the Jury’s Ultimate Vote

First, describing the information Juror One injected into deliberations, Captain Sweeney claims both that “[t]here is absolutely no basis to find it [the information] was ‘related to the case,’” (Resp’t Br. 73

(quoting Bd. Br. 62)) and that “it was a matter discussed at trial” and therefore not extrinsic evidence (Resp’t Br. 70-71). Obviously these contradictory descriptions cannot both be accurate. In fact, neither is. The injected information *was* related to the case but was not discussed at trial.

That the information was related to the case is clear from the start of Judge Shaffer’s colloquy with Juror One. Judge Shaffer’s very first question was “What did you recall during deliberations about outside information about this case?” RP 9/23/14 at 5. Juror One answered that during voir dire “as far as [she] knew [she] didn’t know anything about the case, or remember anything about the case, but then as the case was going on” she heard testimony that caused her to recall something about the case. RP 9/23/14 at 5-6.

The full colloquy shows that the injected information was not discussed at trial, it was outside the evidence. The colloquy is at odds with Sweeney’s claim that Juror One had either “a generalized recollection of an article about gender bias in one or more trades or professions” or “a more particular, yet still vague, recollection of the same article that Captain Sweeney testified about at the trial.” Resp’t Br. 70. Juror One said nothing about an article. She remembered “a statement on the news; there was something about bias, gender bias” that she “heard on the news.” RP 9/23/14 at 6-7, 9. Juror One also said nothing about other trades or

professions. And Juror One dated her recollection to “[d]uring the time that Capt. Sweeney was applying to be a licensed pilot” (RP 9/23/14 at 7), not the “decades-old article” that Captain Sweeney testified about (Resp’t Br. 73). As Judge Shaffer summarized, Juror One “is saying in the time that Capt. Sweeney was seeking a license that she recalls hearing something or seeing something in the news.” RP 9/23/14 at 14.

Second, the Board’s position regarding the injected information is not as Captain Sweeney portrays. The Board’s counsel did not “concede[]” that the injected information had to be the news story Sweeney testified about at trial. Resp’t Br. 70. Counsel said “I gather it may be . . . that what [Juror One] thinks she remembers is the same as what she thinks we all heard,” an open question that he expected the court “to try to figure out.” RP 9/23/14 at 16-17. With that expectation, he agreed to Judge Shaffer’s proposed approach “to ask the jurors basically if their memory [wa]s the same as what” Juror One had just relayed. RP 9/23/14 at 14, 17. But when the other jurors’ account differed, Judge Shaffer did not return to Juror One to reconcile the discrepancies.

Finally, there were just ten votes for damages, not “11 votes for damages” as Captain Sweeney claims. Resp’t Br. 75 n.54. Sweeney is incorrect that Juror Six voted “in favor of damages.” Resp’t Br. 75 n.54. Juror Six, Ms. Dabrowski, voted “no” on liability, “no” on causation, and

“for zero” on damages. RP 10/01/14 at 13; at 10 (court asked Juror Six “are these your verdicts?” and Juror Six answered “No”). A vote “for zero” on damages is not a vote “in favor of damages.” Juror One was the tenth and deciding vote on both causation and damages.

2. Settled Washington Law Governing Juror Misconduct by Injecting Extrinsic Evidence Requires a New Trial

a. Juror One injected extrinsic evidence into deliberations, committing juror misconduct

“Extrinsic evidence is ‘information that is outside all the evidence admitted at trial, either orally or by document.’” *Breckenridge v. Valley General Hosp.*, 150 Wn.2d 197, 199 n.3, 75 P.3d 944 (2003) (quoting *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990)). Because extrinsic evidence is “not subject to objection, cross examination, explanation, or rebuttal,” injecting it into deliberations constitutes juror misconduct. *Breckenridge*, 150 Wn.2d at 199 n.3. The information injected by Juror One, which was plainly outside the recorded evidence of trial, was extrinsic evidence.

What Juror One told the court contradicts Captain Sweeney’s claim that she injected “no information” that was “new, different or novel” from the evidence presented at trial. Resp’t Br. 71. Juror One said she remembered hearing on the news something related to the case about gender bias “[d]uring the time that Capt. Sweeney was applying to be a

licensed pilot.” RP 9/23/14 at 7. But the only evidence about news accounts was “the decades-old article that Captain Sweeney had testified about.” Resp’t Br. 73. There was no testimony or documentary evidence about contemporaneous accounts on the news. Captain Sweeney’s counsel even told the court that during her ten years on the case there had “never been any news coverage.” RP 9/23/14 at 14. Certainly, the report of a news account was not subject to the Board’s cross-examination or rebuttal. Judge Shaffer recognized as much, saying “Ms. S[enn], you seem to be missing the point, which is the juror[] remember[ed] something that was outside the evidence. Okay? And that’s what she shared with the other jurors.” RP 9/23/14 at 15. The information was extrinsic evidence.

b. The injected information did not inhere in the verdict, but Judge Shaffer’s attempt to rehabilitate the jury did

A trial court may not consider “juror statements that inhere in the verdict when ruling on a new trial motion.” *Breckenridge*, 150 Wn.2d at 204. Statements that inhere include those “‘linked to the juror’s motive, intent, or belief, or [that] describe their effect upon [the juror].”’ *Id.* at 205 (quoting *Gardner v. Malone*, 60 Wn.2d 836, 841, 376 P.2d 651 (1962)). By contrast, objective facts — ones “to which the juror testifies [that] can be rebutted by other [juror] testimony without probing the juror’s mental processes” — can be considered. *Id.* Whether something inheres in the

verdict is a question of law reviewed *de novo*. *Long v. Brusco Tug & Barge, Inc.*, No. 90976-8, slip op. at 3-4 (Wash. Feb. 25, 2016).

Captain Sweeney misunderstands what does and does not inhere in a verdict. For example, Judge Shaffer's attempt to rehabilitate Juror One and the other jurors inheres. Judge Shaffer asked the jurors whether they would "have any trouble putting [the information] to one side" and whether they were "worried at all about [their] ability to be fair to either side." RP 9/23/14 at 12-13 (Juror One); 22 (other jurors). The jurors' answers, which described how the information would affect them, inhere.

Likewise, whether Juror One *thought* the news account was "a big deal," as other jurors reported, inheres. But whether Juror One's account of what she told the jurors *matched* the other jurors' account of what she told them does not inhere because it is an objective fact.²⁵ Similarly, why Juror One abstained from voting on liability inheres in the verdict. But that she abstained, and that she was the deciding tenth vote on causation and damages are objective facts that do not inhere.

²⁵ Regarding the other jurors' account, Captain Sweeney misleadingly relies on an incomplete quote to support her contention that the "jurors seemed surprised to even be asked" about what Juror One told them. Resp't Br. 73. The record clearly shows the quoted juror was not expressing surprise. After Judge Shaffer summarized what Juror One had said, she asked the jurors to "let [her] know if that's not what happened." The first juror responded, "**It is what happened, but the story was something she read like 25 years ago.**" RP 9/23/14 at 19; *cf.* Resp't Br. 73 (omitting bolded text from quote of RP 9/23/14 at 19).

Notably, another juror's concern about the injection of outside information is why Juror One told the bailiff what had happened in the first place. RP 9/23/14 at 11.

Finally, Captain Sweeney suggests that the injected information was merely Juror One's personal life experience, upon which a juror may rely in the course of deliberations. Resp't Br. 71 n.49. The Board disagrees that "personal life experience" includes a juror's knowledge of a news account related to the case at hand. But even if it did, as the Supreme Court recently confirmed, a juror may rely only on "personal knowledge and experience [that is] *known to the parties*" because the juror disclosed it during voir dire. *Long*, slip op. at 7-8. In voir dire Juror One said she knew nothing about the case. RP 9/23/14 at 5.

c. When extrinsic evidence could have affected the verdict a new trial is required

The test is long-settled for when a new trial will be required due to the injection of extrinsic evidence into deliberations. A party is entitled to a new trial "if there are reasonable grounds to believe the party has been prejudiced." *Richards*, 59 Wn. App at 273. The court must determine whether the extrinsic evidence probably had a prejudicial effect on the verdict. *Id.* at 270-71 (citing *Gardner*, 60 Wn.2d at 841-43 (citing *State v. Parker*, 25 Wash. 405, 65 P. 776 (1901))). "[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 (quoting *State v. Briggs*, 55 Wn. App. 44, 56, 776 P.2d 1347 (1989)).

Perhaps recognizing that the Board is entitled to a new trial under well-settled Washington law, Captain Sweeney concocts a new four-part test of her own devising under which, to no surprise, “the alleged misconduct fails in each respect.” Resp’t Br. 75-76. Sweeney’s test consists of cherry-picked illustrations from various decisions, in derogation of express statements of the actual test by Washington courts:

It is misconduct for a juror to introduce extrinsic evidence into deliberations. Such misconduct will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced. The court must make an objective inquiry into whether the extrinsic evidence could have affected the jury’s determination, and not a subjective inquiry into the actual effect of the evidence on the jury. Any doubt that the misconduct affected the verdict must be resolved against the verdict.

Kuhn v. Schall, 155 Wn. App 560, 575, 228 P.3d 828 (2010) (internal citations omitted). Under the real test, a new trial was required.

3. On the Objective Facts, the Extrinsic Evidence Injected by Juror One Could Have Affected the Verdict — The Board Was Prejudiced and a New Trial Is Required

The objective facts refute Captain Sweeney’s conclusion that the misconduct “could not possibly have impacted the jury’s verdict.” Resp’t Br. 77. Juror One told the jury about her memory of a news account about gender bias related to the case. RP 9/23/14 at 6-7. That memory went to the central disputed issue—whether the Board discriminated against Captain Sweeney based upon her gender. The potential for prejudice was

particularly heightened because a “news account” carries the weight of an objective analysis rendered by an impartial authority. Juror One injected the extrinsic evidence on the first day of deliberations. The next morning another juror was so concerned about it that she had Juror One tell the court. RP 9/23/14 at 11. While Juror One’s account to the court downplayed its significance, the other jurors said it was a “big deal” to her (RP 9/23/14 at 19), and in that respect the accounts did not match. In light of these facts, Judge Shaffer erred in not excusing Juror One then.²⁶

After six more days of deliberation, the jury returned a verdict for Captain Sweeney in which Juror One abstained on liability, but was the deciding tenth vote for causation and damages. Thus, when Judge Shaffer considered the Board’s motion for a new trial based on juror misconduct, she did so with one more objective fact before her—Juror One provided the swing vote on causation and damages, without which the jury would have hung. Adding that fact, there can be no doubt that Juror One’s

²⁶ Captain Sweeney misconstrues the Board’s argument in the alternative about the timing of Juror One’s recollection, stating “the Board suggests . . . that Juror No. 1 likely ‘remembered’ an article that did not exist . . . rather than any real memory.” Resp’t Br. 72 n.51 (citing Bd. Br. 71 n.62). The Board’s argument is not that Juror One conjured up a false memory — it is that the facts support excusing Juror One for actual bias. Juror One stated in voir dire that she knew nothing about the case. RP 9/23/14 at 5. When she “remembered” information about the case during the first week of trial, she didn’t tell the court. She kept quiet about it for six weeks, then disclosed it to the other jurors during the first day of deliberations. Bd. Br. 71 n.62. A reasonable conclusion would be that Juror One was not acting impartially and without prejudice towards the Board.

injection of extrinsic evidence “could have affected the jury’s determination.” *Kuhn*, 155 Wn. App at 575.

“[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 (quoting *Briggs*, 55 Wn. App. at 56). On the objective facts here, it is impossible to conclude beyond a reasonable doubt that the extrinsic evidence injected by Juror One did not contribute to the verdict. A new trial is required.

III. CONCLUSION

The judgment below should be reversed and the case remanded to a judge who will provide the Board with the same fair and equitable application of the law to which all parties are entitled.

RESPECTFULLY SUBMITTED this 21ST day of March, 2016.

ROBERT W. FERGUSON
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DECLARATION OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the state of Washington, declares that I sent for service, Washington State Board of Pilotage Commissioner’s Response and this Declaration of Service, to all parties or their counsel of record on the date below as follows:

Electronically filed:

Court Of Appeals of Washington, Division I
600 University Street
One Union Square
Seattle, Washington 98101-1176

Email and hand delivered by Jenn Eng to:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 21 day of March at Seattle, Washington

Mary Harper
MARY HARPER, Legal Assistant
Legal Assistant
206 389-3884

EXHIBIT 1

Emails 4000943 and 4000999 were produced September 2012

In the 2nd Supplement to Plaintiff's 1st Discovery.

From the Tracking Log:

4000806-1155	Emails mentioning Sweeney produced Sept. 2012		2 nd Supplement to Plt's 1 st discovery...9/12
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From: Ivan Carlson
To: Rob Kromann; Pat Hannigan; Bill Snyder
Subject: FW:
Date: Wednesday, May 07, 2008 3:46:10 PM

Pat, here is the email you requested, I sent it 2-1-08
Ivan

From: Ivan Carlson
Sent: Fri 2/1/2008 8:27 AM
To: Rob Kromann; Pat Hannigan; Bill Snyder
Subject:

Gentlemen, I had Captain Sweeney on a training trip to intalco yesterday. Intervention was needed (more than once). This will be included in my evaluation. What I am disturbed about though is, the trip went bad, so she offered me a observation trip sheet or then sheepishly said if I wanted I could have an evaluation trip sheet.

Is this what she does if she has a bad trip? Is it ok for the trainees to ask for a pass on a poor trip? I would suppose this is not an accepted practice. Just be aware, that if Captain Sweeney turns in an observation trip sheet, it might just be that she has just had a bad trip. Please feel free to call if you have any questions.

Ivan

SWEENEY
4000943

From: [Lee, Craig W](#)
To: [Bell, Judy \(WSF- Pilotage\) \(Consultant\)](#); [Hannigan](#); [Kromann](#); [Mackey](#); [Snyder](#)
Subject: RE: Sweeney training summary
Date: Friday, May 16, 2008 10:31:11 AM

Pat,

Any chances of getting Capt Soriano to give us a better explanation for this intervention ? Also, I don't see the intervention pdf file from trip 139.

I'm really concerned with the fact that Capt Sweeney has three interventions in a two week period. This is not good, especially so late in her training.

Craig

From: Bell, Judy (WSF- Pilotage) (Consultant) [mailto:BelJud@consultant.wsdot.wa.gov]
Sent: Tuesday, May 13, 2008 10:12 AM
To: [Hannigan](#); [Kromann](#); [Lee, Craig W](#); [Mackey](#); [Snyder](#)
Subject: Sweeney training summary

Pat, The Soriano trip that you were looking for is attached. Minimal comments to explain intervention.

SWEENEY
4000999