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NO. 72664-1

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

KATHERINE ANN SWEENEY,

Respondent,

v.

WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS,

Appellant.

BOARD OF PILOTAGE COMMISSIONER'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR2

III. STATEMENT OF ISSUES.....3

IV. STATEMENT OF THE CASE.....4

 A. Statement of Facts.....4

 1. The Board Regulates Pilotage to Protect Lives, Property, and the Puget Sound on Behalf of the People of Washington State.....4

 2. The Board’s Pilot Training Program Gives Experienced Mariners a Chance to Become Licensed as Pilots.....5

 3. After Captain Sweeney Completed Thirteen Months of Training, the Board Decided She was not Safe to be Licensed as a Puget Sound Pilot.....8

 a. Captain Sweeney Entered the Training Program.....8

 b. The Board Extended Captain Sweeney’s Training to Give Her More Time to Practice Her Piloting Skills.....11

 c. After Thirteen Months, the Board Terminated Captain Sweeney’s Training Program and Denied Her a Puget Sound Pilot’s License13

 B. Procedural Posture14

 1. Relevant Pretrial Motion Practice15

 a. First Motion to Compel Transcript of Closed Meetings (Judge Dean Lum).....16

b.	First Motion to Compel CR 30(b)(6) Depositions (Judge Dean Lum).....	18
c.	Reassignment to Department 11	19
d.	Second Motion to Compel CR 30(b)(6) Deposition (Judge Catherine Shaffer).....	19
e.	[Second] Motion to Compel Production of Transcript of Closed May 2009 Meeting or to Exclude Affirmative Defenses (Judge Catherine Shaffer).....	20
f.	First Motion to Compel Withheld Documents (Judge Catherine Shaffer)	20
g.	Summary Judgment.....	20
2.	Trial and Verdict.....	23
V.	ARGUMENT	24
A.	The Board was Prejudiced by Judge Shaffer’s Compelled Release of an Attorney-Client Privileged Work-Product Transcript and an Attorney Work-Product Email on the Eve of Trial	24
1.	Attorney-Client Privilege and Work-Product Issues, Like All Other Statutory Construction Issues, are Reviewed <i>De Novo</i> ; the Trial Court’s Application of the Law is Reviewed for Abuse of Discretion.....	25
2.	Judge Shaffer Erred When She Compelled Production of the Transcript of the May 2009 Closed Meeting.....	26
a.	Factual Basis for Motion.....	26

b.	A <i>De Novo</i> Review of the Motion to Compel Production of the Transcript Reveals no Waiver; Release of the Transcript was an Abuse of Discretion	32
c.	Release of the May 2009 Closed Session Transcript Strongly Prejudiced the Board.....	36
3.	Judge Shaffer Erred When She Compelled Production of the May 4, 2009, Attorney-Client Privileged Work-Product Email	39
a.	Factual Basis for Motion.....	39
b.	A <i>De Novo</i> Review of the May 2009 Email Reveals That it was Work-Product and the Board had not Waived the Privilege; Release of the Email was an Abuse of Discretion	45
c.	Release of the May 2009 Work-Product Email Strongly Prejudiced the Board	50
4.	This Court Should Bar Breskin, Johnson, and Senn From Representing Captain Sweeney on Retrial.....	52
B.	The Trial Court Abused its Discretion When it Sanctioned the Board by Excluding All Further Evidence and Argument on its Primary Comparator Without Making <i>Burnet</i> Findings	53
1.	Facts About the Severe Sanction Imposed on the Board	54
2.	Judge Shaffer Abused Her Discretion When, Without Making <i>Burnet</i> Findings, She Sanctioned the Board by Excluding all Further Evidence and Argument on Nelson.....	57

C.	The Trial Court Abused its Discretion When it Denied the Board a New Trial After Extrinsic Evidence Directly Relating to the Case’s Central Issue was Injected Into Deliberations	62
1.	Facts Relating to Juror One’s Introduction of Extrinsic Evidence Into the Jury’s Deliberations	63
2.	Juror One’s Injection of Extrinsic Evidence Into Deliberations was Misconduct That Warranted a New Trial—Denying a New Trial was an Abuse of Discretion	66
VI.	CONCLUSION	72

TABLE OF AUTHORITIES

Cases

<i>Blair v. Ta-Seattle E. No. 176</i> , 171 Wn.2d 342, 254 P.3d 797 (2011).....	57, 59
<i>Breckenridge v. Valley Hosp.</i> , 150 Wn.2d 197, 75 P.3d 944 (2003).....	70
<i>Brundridge v. Fluor Fed. Servs., Inc.</i> , 164 Wn.2d 432, 191 P.3d 879 (2008).....	34, 35
<i>Burnet v. Spokane Ambulance</i> , 131 Wn.2d 484, 933 P.2d 1036 (1997).....	2, 3, 4, 54
<i>Camden v. State of Maryland</i> , 910 F. Supp. 1115 (1996).....	52
<i>Cedell v. Farmers Ins. Co.</i> , 176 Wn.2d 686, 295 P.3d 239 (2013).....	25
<i>Dana v. Piper</i> , 173 Wn. App. 761, 295 P.3d 305 (2013).....	26
<i>Fellows v. Moynihan</i> , 175 Wn.2d 641, 285 P.3d 864 (2012).....	25
<i>General Acc. Ins. Co. v. Borg-Warner Acceptance Corp.</i> , 483 So. 2d 505, (Fla. Dist. Ct. App. 1986).....	52
<i>Heidelbrink v. Moriwaki</i> , 104 Wn.2d 395, 706 P.2d 212 (1985).....	49, 50
<i>Hundtofte v. Encarnacion</i> , 181 Wn.2d 1, 330 P.3d 168 (2014).....	25
<i>In re Firestorm 1991</i> , 129 Wn.2d 130, 916 P.2d 411 (1996).....	49

<i>Jane Doe v. Corp. of President of Church of Jesus Christ of Latter– Day Saints,</i> 122 Wn. App. 556, 90 P.3d 1147 (2004).....	25
<i>Jones v. City of Seattle,</i> 179 Wn.2d 322, 314 P.3d 380 (2013), <i>as corrected</i> (Feb. 5, 2014)	58
<i>Kuhn v. Schnall,</i> 155 Wn. App. 560, 228 P.3d 828 (2010).....	passim
<i>MMR/Wallace Power & Indus., Inc. v. Thames Assoc.,</i> 764 F. Supp. 712, (1991)	52
<i>Pappas v. Holloway,</i> 114 Wn.2d 198, 787 P.2d 30 (1990).....	33, 34, 36, 50
<i>Richards v. Overlake Hosp. Med. Ctr.,</i> 59 Wn. App. 266, 796 P.2d 737 (1990).....	62, 66, 68, 71
<i>Soter v. Cowles Pub. Co.</i> 131 Wn. App. 882, 130 P.2d 840 (2006).....	33, 49
<i>State v. Briggs,</i> 55 Wn. App. 44, 776 P.2d 1347 (1989).....	67
<i>State v. Depaz,</i> 165 Wn.2d 842, 204 P.3d 217 (2009).....	69
<i>State v. Irby,</i> 187 Wn. App. 183, 347 P.3d 1103, (2015).....	67
<i>Teter v. Deck,</i> 174 Wn.2d 207, 274 P.3d 336 (2012).....	61
<i>U.S. v. Nobles,</i> 422 U.S. 225, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).....	49
<i>Upjohn v. United States,</i> 449 U.S. 401, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981).....	49

<i>West v. Dep't of Natural Res.</i> , 163 Wn. App. 235, 258 P.3d 78 (2011).....	33
---	----

Statutes

RCW 05.60.060	40
RCW 5.60.060(2)(a)	25, 32, 38
RCW 88.16	5, 7
RCW 88.16.005	4, 5
RCW 88.16.010	5
RCW 88.16.035	8
RCW 88.16.070	4
RCW 88.16.090	6, 7
RCW 88.16.090(2).....	6
RCW 88.16.090(4).....	8
RCW 88.16.115	1

Rules

CR 16	57
CR 26(b)(4).....	passim
CR 30(b)(6).....	passim
CR 59	3, 65
RAP 9.3.....	43

RAP 9.4..... 43

Regulations

WAC 363-116..... 5, 7

WAC 363-116-075 (2007)..... 6

WAC 363-116-0751..... 6

WAC 363-116-076 (2007)..... 6

WAC 363-116-077 (2007)..... 6

WAC 363-116-078 (2007)..... 6

WAC 363-116-078(2)..... 6, 9

WAC 363-116-078(4) (2007)..... 6, 7

WAC 363-116-078(10)(a)..... 6

WAC 363-116-078(11)..... 6

WAC 363-116-078(13)..... 7, 8

WAC 363-116-080..... 7, 8

WAC 363-116-080(2)..... 8

WAC 363-116-080(5)..... 8

WAC 363-116-120(1)..... 5

Other Authorities

15A Karl B. Tegland & Douglas J. Ende,
Washington Practice: Handbook on Civil Procedure
§§ 57.2,(2014)..... 57, 58

I. INTRODUCTION

The Washington Board of Pilotage requests that this case be remanded for a new trial. The Board did not discriminate against Captain Katharine Sweeney—either explicitly or implicitly—because she is a woman. The Board’s Trainee Evaluation Committee, in accordance with its statutory responsibility, determined that Captain Sweeney—after thirteen months of intensive training—was not ready to pilot independently on Puget Sound. Because she was not consistently, reliably safe, the Board denied her a license in order to preserve “human life and property associated with maritime commerce.” RCW 88.16.115.

The Board requests a new trial—and is entitled to one under well-settled Washington law—because the trial court did not treat the parties equally. The trial court’s decisions—before,¹ during, and after the trial—favored Captain Sweeney and, in doing so, the trial court abused even the broad discretion that is afforded trial judges under Washington law. The trial court in this case repeatedly applied the wrong legal standard, articulated no legal standard, provided no record for appellate review, or based its ruling on an erroneous view of the law.

Specifically, the Board asserts it was prejudiced beyond salvage:

¹ This case was reassigned to Department 11 (from Department 12) on June 23, 2014. The Honorable Dean Lum is seated in Department 12. The Honorable Catherine Shaffer is seated in Department 11. The Board bases its request for a new trial entirely on the actions of Department 11.

- When—a week before trial—the trial court overturned a decision of KCSC Department 12 and released an attorney-client privileged closed meeting transcript without any material change in the underlying facts or law, and without reviewing the transcript;
- When—also a week before trial—the trial court released attorney-client privileged work-product email that provided unparalleled insight into the Board’s trial strategy and defenses, articulating no legal basis for its decision;
- When—during trial—the trial court deprived the Board of the ability to present an effective defense by excluding evidence and argument on Captain Sweeney’s primary male comparator as a sanction without making the requisite *Burnet* findings²; and
- When—during jury deliberations—the trial court denied the Board a mistrial and a new trial after extrinsic evidence directly related to the case’s central issue was injected into those deliberations.

These abuses of the trial court’s discretion—all made on untenable grounds or for untenable reasons—require a new trial in this case.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it released the transcript of the closed May 19, 2009, Board meeting where: (1) another department of the King County Superior Court had found the transcript to be both attorney-client privileged and attorney work-product fewer than five weeks before; (2) the record demonstrates the trial court did not read the transcript before releasing it; (3) the trial court made no findings on the record to support the compelled release of the transcript of this statutory Board’s consultation with counsel in anticipation of litigation; and (4) the trial court failed to articulate its reasons for overturning the contemporaneous decision of a parallel court.

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

2. The trial court erred when it released the May 4, 2009, attorney-client privileged work-product email containing the Board's trial defense strategy: (1) without protecting the appellate record by filing the documents reviewed *in camera*; (2) without entering a written order; and (3) without articulating any reason on the record for compelling production.

3. The trial court erred when it imposed on the Board the severe sanction of excluding critical evidence regarding Captain Sweeney's primary male comparator, Captain Nelson, and precluding all further argument on evidence already admitted regarding Captain Nelson without making the findings on the record required by *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

4. The trial court erred when, after Juror One introduced extrinsic evidence into jury deliberations directly related to the central disputed issue in the case, the court denied: (1) the Board's oral motion to discharge Juror One for misconduct; (2) the Board's motion for mistrial based on juror misconduct; and (3) the Board's CR 59 motion for a new trial based on juror misconduct.

5. The trial court erred in entering judgment for Plaintiff Katharine Sweeney.

6. The trial court erred in denying the Board's motion for a new trial.

III. STATEMENT OF ISSUES

1. Did the trial court abuse its discretion when it released the transcript of the closed May 19, 2009, Board meeting where: (1) another department of the King County Superior Court—on materially the same evidence—had found the transcript to be both attorney-client privileged and attorney work-product fewer than five weeks before; (2) the record demonstrates that the trial court did not read the transcript before releasing it; (3) the trial court made no findings on the record to support the compelled release of the transcript of this statutory Board's consultation with counsel in anticipation of litigation; and (4) the trial court failed to articulate its reasons for overturning the contemporaneous decision of a parallel court? (Assignments of Error #1, 2, 5, 6)

2. Did the trial court abuse its discretion when it released the May 4, 2009, attorney-client privileged work-product email: (1) without protecting the appellate record by filing the documents reviewed *in camera*; (2) without entering a written order; and (3) without articulating any reason on the record for compelling production by the Board? (Assignments of Error Nos. 1, 2, 5, 6)

3. Did the trial court abuse its discretion when it imposed on the Board the severe sanction of excluding further evidence and argument regarding Captain Sweeney's primary male comparator without making the findings on the record required by *Burnet v. Spokane Ambulance, supra*? (Assignments of Error Nos. 3, 5, 6)

4. Did the trial court abuse its discretion when it denied the Board's motions for mistrial and new trial based on juror misconduct where: (1) Juror One introduced extrinsic evidence into the jury's deliberations directly related to the central disputed issue in the case; (2) the court made a subjective inquiry into the potential effect of the extrinsic evidence on the jury's deliberations; (3) the court failed to establish that the subjective inquiry was not the basis for its decision, and that the objectively ascertainable facts were the basis of its decision, as required by Washington law; and (4) consideration of those objectively ascertainable facts leaves no reasonable doubt that the juror misconduct could have affected the verdict? (Assignments of Error Nos. 4, 5, 6)

5. Did the trial court's cumulative error deny the Board a fair trial? (Assignments of Error Nos. 1, 2, 3, 4, 5, 6)

IV. STATEMENT OF THE CASE

A. Statement of Facts

1. The Board Regulates Pilotage to Protect Lives, Property, and the Puget Sound on Behalf of the People of Washington State

Washington law requires that the massive ships moving through Puget Sound be controlled—piloted—by state-licensed Puget Sound pilots. RCW 88.16.005, .070. Pilots are specially-trained, highly-skilled

mariners whose job is to board these massive oil tankers, cargo vessels, and cruise ships and pilot them safely through Puget Sound. WAC 363-116-120(1). Each year Puget Sound pilots direct over 7,500 ships through Puget Sound carrying cargo worth over \$80 billion. CP 37, 49. Puget Sound pilots have an unparalleled safety record of more than 200,000 sailings over the last 25 years without a major incident. CP 49.

On behalf of the people of the state of Washington, the nine-member Board of Pilotage Commissioners (the Board) regulates pilotage “to ensure against the loss of lives, loss or damage to property and vessels, and to protect the marine environment.”³ RCW 88.16.005, .010. The Board does not employ or supervise the pilots—pilots are independent professionals who are hired by the ships that transit the Puget Sound. CP 720-21. Rather, the Board regulates pilotage, including the training and licensing of pilots. *See* RCW 88.16 *et seq.*; WAC 363-116 *et seq.*

2. The Board’s Pilot Training Program Gives Experienced Mariners a Chance to Become Licensed as Pilots

The Board’s pilot training program provides paid, on-the-job training in the specialized piloting skills necessary to be licensed as a

³The Board consists of nine members. RCW 88.16.010. The Board’s two *ex officio* members are the assistant secretary of marine transportation of the Department of Transportation, or designee, and the director of the Department of Ecology, or designee. *Id.* The other members are gubernatorial appointees: two must be active licensed pilots; two must be involved in deep sea shipping; one must be a marine environmentalist; and the remaining two must be persons interested in and concerned with pilotage, marine safety, and marine affairs. *Id.*

Puget Sound pilot.⁴ RCW 88.16.090. Pilot applicants must meet statutory and Board-determined prerequisites to establish they are experienced mariners. RCW 88.16.090; WAC 363-116-075 (2007); WAC 363-116-0751. Qualified applicants take screening tests. RCW 88.16.090; WAC 363-116-076 (2007) (written exam); WAC 363-116-077 (2007) (simulator exercise). Applicants who achieve passing scores are put into a pool. WAC 363-116-078 (2007). The Board then invites applicants from the pool into the training program in rank score order, based on the projected need for pilots. WAC 363-116-078(2). Pilot trainees must “successfully complete[]” the “board-specified training program” in order to be eligible for licensing by majority vote of the Board. RCW 88.16.090(2).

The Board’s training program is managed by the Trainee Evaluation Committee (the TEC), which consists of Board Commissioners and licensed Puget Sound pilots appointed by the Board. WAC 363-116-078(11). The TEC designs an individualized training program for each trainee, consisting of required and recommended trips “tailored to the ability and experience of th[at] individual.” WAC 363-116-078(4) (2007); CP 376; *see also* Pl. Ex. 2. This approach is necessary because trainees enter the program differently prepared for the close-quarters ship handling

⁴ During training, the Board pays full-time Puget Sound pilot trainees a stipend of six thousand dollars per month. WAC 363-116-078(10)(a). Captain Sweeney received this stipend during her training. Pl. Ex. 2 at 3 (Sweeney Training Program Letter).

required in piloting: for example, a trainee who captained ocean-going vessels on the vast high seas will have honed different skills than a trainee who captained the very tugs that accompany pilot-directed vessels through Puget Sound. RP 8/12/14 PM at 8-11; 8/13/14 AM at 88-89⁵; CP 376.

Each training program involves trips during which the trainee just observes and trips during which the trainee actually pilots the vessel under the supervision of a licensed Puget Sound pilot.⁶ WAC 363-116-078(4) (2007); *see, e.g.* Pl. Ex. 2. For each training trip, the supervising pilot evaluates the trainee’s performance by scoring piloting skills and writing narrative comments on a trip training report.⁷ *See, e.g.*, Pl. Ex. 91; Def. Ex. 529. The supervising pilot also indicates whether it was necessary to intervene in the trainee’s piloting of the vessel “to prevent damage or to stop a dangerous situation from developing”—this is known as an “intervention.” CP 378-79; Def. Ex. 529 at 3.

The TEC closely monitors each trainee’s developing pilot skills, meeting monthly to review trip reports and assess any concerns. RCW 88.16.090; WAC 363-116-078(13); WAC 363-116-080; CP 718; RP

⁵ There are 45 individual transcripts in this case. For clarity, the RP is identified by date and AM / PM (except on dates with a single transcript). The combined transcript is over 4900 pages.

⁶ This brief describes the program while Captain Sweeney was a trainee. The Board has since revised the program in some respects. *See* RCW 88.16; WAC 363-116.

⁷ The trip training report forms for the Class of 2005 initially used a 1-4 evaluation scale, which was later switched to a 1-7 scale in 2008. RP 8/18/14 AM at 16-17; 8/25/14 PM at 28; 9/15/14 AM at 53-54.

9/2/14 PM at 38, 45-47. The TEC chair reports on the progress of all trainees at each Board meeting. WAC 363-116-078(13); CP 718-19. As the end of a trainee's planned training program nears, the TEC recommends to the Board that the trainee is "[s]uitable for licensing; not suitable for licensing; or, in need of more training and further evaluation." WAC 363-116-080(5).

The Board makes the ultimate licensing decision whether a trainee has demonstrated the ability to safely, independently, and consistently pilot ships on Puget Sound.⁸ RCW 88.16.035; WAC 363-116-080. The Board may: (1) issue the license; (2) delay issuance of the license; (3) deny the license; or (4) extend the trainee's program for further training and evaluation. RCW 88.16.090(4), WAC 363-116-080(5).

3. After Captain Sweeney Completed Thirteen Months of Training, the Board Decided She was not Safe to be Licensed as a Puget Sound Pilot

a. Captain Sweeney Entered the Training Program

In 2005, Plaintiff Katharine Sweeney applied to become a Puget Sound pilot. Pl. Ex. 1. Captain Sweeney, then a captain of an ocean-going container ship, met the prerequisites for testing, passed the tests, and entered the pool ranked thirteenth out of eighteen. Pl. Exs. 1, 97. The

⁸ Board members must consider, at a minimum, the trainee's "[p]erformance in the training program; piloting and ship handling and general seamanship skills; local knowledge; and bridge presence and communication skills." WAC 363-116-080(5). The Board votes publicly in open session, majority vote prevails. WAC 363-116-080(2).

Board, following its established process, began inviting Class of 2005 pilot applicants into the training program in ranked score order. WAC 363-116-078(2). In July 2007, the Board invited Captain Sweeney and the next-ranked applicant to enter the training program on October 1, 2007. Def. Ex. 555.

The TEC designed a training program for Captain Sweeney specifying “a minimum of 130 trips with licensed Puget Sound Pilots over a minimum seven-month period,” just as it had for the twelve trainees before her. Pl. Ex. 2 at 1. Captain Sweeney attended the TEC’s standard one-day orientation session. RP 9/8/14 AM at 83-84. TEC member and Board Commissioner Patrick Hannigan testified that at orientation he and others told Captain Sweeney if she had “any issues” or “was having trouble – she could call any member of the TEC, including [him]self.” RP 9/10/14 PM at 13-15.

As initially designed, Captain Sweeney’s training program ran from October 2007 through the end of April 2008. Pl. Ex. 2. During those seven months, Captain Sweeney’s trip reports show that on many trips the supervising pilots commended her performance, while on other trips—often with the very same pilots—the pilots commented that she required

substantial coaching and sometimes even intervention.⁹ *See, e.g.*, Def. Ex. 626 at #80 - #130.

By the end of April 2008, pilots supervising Captain Sweeney had intervened on four of her trips to prevent damage or to stop a dangerous situation from developing.¹⁰ Pl. Ex. 27 at “SUM6.” On April 10th, on the TEC’s recommendation, the Board extended Captain Sweeney’s training by 20 trips and one month (through the end of May 2008) to provide her with more time to practice the skills she needed to be a safe and effective Puget Sound pilot. Pl. Ex. 118; RP 9/2/14 PM at 47-48.

Extending Captain Sweeney’s training was no different than the Board’s approach with other trainees who had multiple interventions:

- Captain Kelly had four interventions and his training program was extended by 20 trips and one month (Pl. Ex. 29 at “Interventions”; Def. Ex. 570);
- Captain Marmol had three interventions and was extended by 19 trips and one month (Pl. Ex. 28 at “SUM6”; Def. Ex. 581);
- Captain Nelson had five interventions and was extended by 15 trips and one month (Def. Exs. 579 and 690 at “SUM6”);

⁹ Beginning in 2007, the Board modified its tracking of interventions to “count” only interventions that took place at trip 80 or after. *See* Def. Ex. 781; Pl. Ex. 90. The Board follows that practice in this briefing.

¹⁰ There may have been five interventions, because Captain Sweeney’s Trip 85 “[wa]s marked both yes and no for intervention.” CP 503 (Class of 2005 summary table); Appendix (App.) E (legible copy of CP 503 without red-highlighting that obscures three rows on CP 503, and CP 503). The Class of 2005 summary table reflects Executive Director Peggy Larson’s review of the training summary worksheets of all Class of 2005 trainees. CP 469 ¶¶ 15, 16. For each trainee, the table shows: rank on 2005 exam, training program dates and total number of trips, numbers of interventions and extensions, and date of final licensing decision. CP 503, App. E.

- Captain Jones had at least seven interventions and was initially extended by one month, during which time the TEC assigned him trips on a daily basis (Def. Ex. 588 and 688 at “SUM6”); and
- Captain Seymour had five interventions and was initially extended by 18 trips and one month (Pl. Ex. 30 at “SUM6”; Def. Ex. 590).

See also CP 503, Appendix (App.) E.¹¹ Just as with Captain Sweeney, the Board gave these trainees more time and trips to practice their piloting skills.

b. The Board Extended Captain Sweeney’s Training to Give Her More Time to Practice Her Piloting Skills

During the May extension, Captain Sweeney performed well on some trips and less well on others. For example, in two trips within five days supervised by Captain Blake, she “did a fine job” on the first but required intervention on the second. Def. Ex. 626 at #143, 146. At its May meeting, the Board granted Captain Sweeney another training extension, 18 more trips to complete by the end of June. Def. Ex. 559.

Between the Board’s May and June meetings, Captain Sweeney had four more trips on which the supervising pilots made interventions, bringing her total to ten. Pl. Ex. 27 at “SUM6.” The Board granted Captain Sweeney another training extension, this time of at least 36 trips to be completed by the end of August 2008. Def. Ex. 560. Captain

¹¹ *See* footnote 10, *supra*.

Sweeney's performance continued to be variable, sometimes even within a single trip, as when a supervising pilot commented that Captain Sweeney "did a fine job on parts of this job" but "also struggled and intervention was needed on parts of this job." Def. Ex. 626 at #163.

In late August, when the TEC reviewed Captain Sweeney's trips since June, she had performed well on many but had also accumulated six more interventions, bringing her total to sixteen.¹² Def. Ex. 626 at 173-211; Pl. Ex. 27 at "SUM6." The TEC concluded that Captain Sweeney "need[ed] more training" and "would benefit greatly from seeing how our more experienced pilots operate." Def. Ex. 561 at 1. With the Board's approval, the TEC assigned Captain Sweeney observation trips during September, followed by training trips in October "assigned by a TEC pilot with experience training pilots" at "some of the less challenging docks to help you regain some confidence." Def. Ex. 561 at 1.

Captain Sweeney's performance on the trips during October continued to be variable—she had several trips on which the supervising pilots rated her "ready" to pilot but also four trips on which pilots rated her below average and her 17th intervention. Def. Ex. 626 at 212-30; Pl. Ex. 27 at "SUM6." Commissioner (and TEC member) Lee testified regarding

¹² One intervention occurred as Captain Sweeney was piloting the ship *Ever Ursula* into port. The moving ship hit a stationary pier (the nautical term is "allide"), damaging both ship and pier. Def. Ex. 529 at 4.

the October extension, “[t]he fact that we’re still having below average indicators, and especially the comments that the pilots are making about Captain Sweeney’s performance on those trips, gave me doubt that she was advancing or getting better as a trainee.” RP 9/3/14 AM at 21.

c. After Thirteen Months, the Board Terminated Captain Sweeney’s Training Program and Denied Her a Puget Sound Pilot’s License

On October 31, 2008, the full TEC met to review and discuss Captain Sweeney’s complete training program, which had been extended four times for a total program length of thirteen months, and consisted of 241 trips. Pl. Ex. 10. The TEC then met with Captain Sweeney and told her that it would be recommending to the Board that her training program not be extended. Pl. Ex. 10. The TEC told Captain Sweeney that its “decision was based upon repeated instances of behavior that the TEC felt was both an unsafe practice or behavior that she performed that was not appropriate and that she wasn’t making measurable strides to correct or solve these problems” and “that more training would not improve her performance.” Pl. Ex. 10. That afternoon, the Board convened, heard the TEC’s recommendation, and voted that Captain Sweeney’s training program not be extended. Pl. Ex. 10.

The TEC documented the basis for its recommendation in a report provided to the Board and Captain Sweeney. CP 499-500 (Letter from

TEC to Board Chair Dudley, dated Nov. 12, 2008). The report explained that in making licensing recommendations the TEC “is especially focused on the issue of safety and risk management,” described several critical elements that “contribute to the ability of a pilot to practice piloting skills safely and professionally,” and documented why Captain Sweeney’s skills demonstrated that she was “not suitable for licensing.” CP 499-500.

On November 21, the Board notified Captain Sweeney by letter that it would not be extending her training program further. CP 498. The Board’s letter advised Captain Sweeney that it planned to consider her licensure at its next meeting regular meeting on December 4, and offered her the opportunity to present to the Board “any reasonable information you want the Board to consider prior to making such a decision,” assisted by legal counsel if she so desired. CP 498-500.

On April 9, 2009, Captain Sweeney’s counsel Ms. Deborah Senn made a presentation to the Board. CP 996; Def. Ex. 812. Thereafter, the Board consulted with its counsel. CP 1015, 4922-40. Then, at its May 19, 2009, public meeting, the Board considered the licensure of Captain Sweeney and voted to deny her a Puget Sound pilot’s license. Pl. Ex. 119.

B. Procedural Posture

On October 25, 2011, Captain Sweeney filed suit against the Board in King County Superior Court (KCSC), alleging that the Board’s refusal

to issue her a pilot's license constituted "sex discrimination" in violation of the Washington Law Against Discrimination (WLAD).¹³ CP 1 ¶ 1. In its answer, the Board denied any discriminatory acts, stating that all of its actions "manifested a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of the governmental authority entrusted to them by law." CP 14, 20.

During extensive document discovery, the Board produced a 62-page privilege log for those documents over which the Board asserted privilege, primarily attorney-client/work-product privilege. CP 1288. Captain Sweeney did not request privileged documents until the trial date had been continued for the fourth time. CP 1288-89.

1. Relevant Pretrial Motion Practice

Beginning in May 2014, approximately two months before the scheduled trial, the parties filed motions daily (and sometime more often). The multiple motions discussed below are only those in which court decisions determined the course of the trial.¹⁴

¹³ Captain Sweeney also named as a defendant the Puget Sound Pilots association (PSP), but voluntarily dismissed the PSP in June 2013. CP 81-84.

¹⁴ For the court's convenience, the Board provides the KCSC docket as a chronological guide to the motions and their frequency (App. A), and a chart of the relevant motions and decisions, with their locations in the record (App. B).

a. First Motion to Compel Transcript of Closed Meetings (Judge Dean Lum)

On May 14, 2014, Captain Sweeney moved to compel production of the transcripts or recordings of Board meetings “in which Captain Sweeney and her training program and licensure . . . were discussed.”¹⁵ CP 90-150. The Board had withheld recordings of the closed portions of two meetings as attorney-client privileged because the purpose of the closed sessions was to seek privileged advice from its attorneys.¹⁶ CP 212-15.

Captain Sweeney’s motion to compel the transcripts analyzed attorney-client privilege, subject matter waiver, and the centrality of the closed session discussions to the issue in the case. CP 99-102, 227-31. Captain Sweeney argued the Board had waived any applicable privilege:

[B]y failing to direct [B]oard members not to testify about their recollection of the [B]oard meeting discussions concerning Captain Sweeney or the [B]oard’s decisions concerning her at the depositions in this case.

CP 91, 98.

In response, the Board defended the privileged nature of these closed sessions and argued that the Commissioners’ actual statements—as opposed to the argumentative assertions about them included in

¹⁵ May 14th was two months before the then-scheduled July 14, 2014, trial date and thirteen days before the original discovery cut-off. CP 153-54. On May 18, 2014, Judge Lum granted Captain Sweeney’s request to move the trial date from July 14 to August 4, 2014, and also moved the discovery cutoff from May 27 to July 1, 2014.

¹⁶ Minutes for the Board’s public meetings, including any votes related to Captain Sweeney, had been produced in prior discovery. *See, e.g.*, Pl. Exs. 10, 18, 119.

Sweeney's motion—did not constitute waiver. CP 155-62. The Board's Program Counsel, Assistant Attorney General (AAG) Guy Bowman,¹⁷ characterized the content of both the October 2008 and May 2009 closed Board sessions,¹⁸ which he described to be “the very essence of attorney client privileged communications which are not subject to disclosure under any circumstances.” CP 215.

On June 10, 2014, following *in camera* review (CP 261-62), Judge Lum granted Captain Sweeney's motion, in part. CP 263-65. Judge Lum found that both recordings “contained attorney-client privileged communications and work product and, absent waiver, neither should be produced.” CP 264. But Judge Lum compelled production of the October 2008, recording (CP 264), ruling that:

[D]efendant waived the privilege as to the October 31, 2008 meeting by allowing witnesses (particularly Elsie Hulsizer) to testify at deposition in detail without objection

¹⁷ As program counsel, Mr. Bowman defended the Board in administrative litigation related to the Board's trainee education and licensing programs, and regularly advised the Board in anticipation of litigation. In April and May 2009, Mr. Bowman was preparing the Board to defend the APA proceeding the Board expected Captain Sweeney to file concerning denial of her license. CP 4337-4412. AAG Susan Cruise had similar responsibilities in 2008 and before. CP 173-77, 192.

¹⁸ The October session is described by AAG Bowman as “discussion between myself, AAG Cruise, the Board, and the TEC” concerning “what steps the Board could legally take at that time” including required documentation and articulation of the “bases for TEC's recommendation that the plaintiff not be licensed,” and stated that “[f]or each of these items the Board requested legal advice from myself and AAG Cruise.” CP 213.

The May 2009 session is described as “held for the purpose of allowing the Board and TEC to discuss with legal counsel (AAG Bowman) plaintiff's claims of alleged gender discrimination, the alleged creation of a hostile work environment, and the potential of possible consolidation with the case of another trainee [Nelson] also denied a license by the Board.” CP 214.

about the decision-making process, and the plaintiff's perceived deficiencies at that closed meeting.

CP 202, 264. Judge Lum did not, however, compel production of the May 19, 2009, recording because he specifically found "no such waiver occurred." CP 264.

b. First Motion to Compel CR 30(b)(6) Depositions (Judge Dean Lum)

On June 20, 2014, Judge Lum granted Captain Sweeney's motion to compel one or more CR 30(b)(6) depositions from the Board.¹⁹ CP 887. Thereafter, Captain Sweeney took CR 30(b)(6) depositions of two Board representatives: Captain Dudley, the chair of the Board, on June 30, 2014, and Captain Hannigan, the TEC chair, on July 9, 2014.²⁰ CP 997. During his deposition, Captain Hannigan stated that he had drafted an email to his attorney after Ms. Senn's April 9, 2009, presentation to the Board. CP 1014-17. This email was an attorney-client privileged document previously unknown to counsel for both parties.²¹ CP 995, 1014-17, 1090-

¹⁹ The Board had previously stipulated to twenty depositions, ten more than are provided for in the King County rules. CP 87-88. The depositions of all Board members had already been taken. CP 87, 275, 828.

²⁰ Hannigan's CR 30(b)(6) deposition was taken after the discovery cutoff because his wife was ill.

²¹ In a declaration dated July 18, 2014, filed in opposition to a third deposition of Captain Hannigan, Mr. Robinson O'Neill stated that after the 7/9/14 Hannigan deposition, the AGO "looked for any email fitting Captain Hannigan's description" and located seven email identified by the AGO in 2012 as attorney-client privileged and placed in a separate folder. CP 5012-13. Mr. Robinson O'Neill declared that "documents from that folder were inadvertently left off the privilege logs created in this case." CP 5012-13.

92, 4094-95, 5012-13.

On July 10, 2014, the day after Captain Hannigan's deposition, the Board sent a new privilege log to Captain Sweeney, identifying seven email that had not been previously known to the Board's counsel or disclosed in earlier privilege logs.²² CP 4094-95, 5012-13. In the new privilege log, provided in revised form on July 14, 2014, the Board identified these newly discovered documents as attorney-client privileged. CP 5012-13.

c. Reassignment to Department 11

On June 23, 2014, this case was reassigned from Department 12 (Judge Dean Lum) to Department 11 (Judge Catherine Shaffer) "due to judicial unavailability." CP 889.

d. Second Motion to Compel CR 30(b)(6) Deposition (Judge Catherine Shaffer)

On July 29, 2014, without oral argument, Judge Shaffer granted Sweeney's motion to compel an additional CR 30(b)(6) deposition from Hannigan, but "reserve[d] as to the [compelled production of] documents until a telephonic hearing with counsel."²³ CP 2158-59.

²² The seven privileged email date from April 12, 2009 (three days after Senn's presentation to the Board) through May 4, 2009 (fifteen days before the public meeting in which the Board denied Sweeney a pilot's license). CP 5012-13.

²³ A second CR 30(b)(6) deposition of Captain Hannigan was conducted on August 8, 2014.

e. [Second] Motion to Compel Production of Transcript of Closed May 2009 Meeting or to Exclude Affirmative Defenses (Judge Catherine Shaffer)

On July 29, 2014, Judge Shaffer, without oral argument, compelled the Board to produce the transcript of the May 19, 2009, closed Board meeting. CP 2161-62; RP 7/31/14 at 132-33. Judge Shaffer's statements made two days later establish that she had not read the transcript—nor any of the email over which the Board claimed attorney-client and work-product privilege—on the date she released the transcript. RP 7/31/14 at 132. *See, infra*, Argument, Section V.A (abrogation of attorney-client and work-product privileges).

f. First Motion to Compel Withheld Documents (Judge Catherine Shaffer)

On August 1, 2014, at the end of the hearing on the parties' cross motions for summary judgment, Judge Shaffer released 75 pages of attorney work-product email, including the May 4, 2009, email and attachments. RP 8/1/14 at 35-36; CP 4799-4800. *See, infra*, Argument, Section V.A (abrogation of attorney-client and work-product privileges).

g. Summary Judgment

On June 13, 2014, the Board moved for summary judgment. CP 345-825 (except CP 687-88). The Board argued that, in accordance with its statutory obligations, it had created a facially neutral and fairly

administered process to determine whether pilot trainees are capable of safely and consistently piloting ships into Puget Sound, that Captain Sweeney had failed this program, and that Captain Sweeney could not, as a matter of law, create a material issue of fact establishing that male trainees who had performed similarly were licensed.²⁴ CP 689-713.

On July 21, 2014, Captain Sweeney responded with a cross-motion for judgment on liability.²⁵ CP 1194-1220, 1221-48 (Amended). Captain Sweeney's motion was supported by declarations from Sweeney²⁶ herself, Barbara Reskin, Ph.D.,²⁷ and David Breskin, Sweeney's counsel. CP 1173-1248.²⁸ Mr. Breskin's declaration was supported by 259 pages of exhibits. Captain Sweeney's cross-motion argues both that she was

²⁴ The Board's motion was supported by declarations from Captain Hannigan, chair of the TEC (CP 714-41); Peggy Larson, the Board's Executive Director (CP 467-607); M. Peter Scontrino, Ph.D., an organizational psychologist (CP 608-86); Norman R. Hertz, a psychologist specializing in psychometrics (CP 742-825); and Tad Robinson O'Neill, the Board's litigation counsel (CP 345-466).

²⁵ The Board objected to the untimely filing of Captain Sweeney's opposition brief (due on 7/18/14) and cross-motion on liability. CP 904, 1759, 1763. Judge Shaffer did not rule on the untimeliness of Sweeney's motion. RP 7/31/14 at 15.

²⁶ Captain Sweeney's declaration introduced two exhibits: the pilotage training requirements for California and Oregon (CP 1183-85) and a list of five male trainees in the class of 2005 who were related to other pilots. CP 1187. The basis for Captain Sweeney's knowledge of either exhibit is not identified. CP 1178-79. She does not introduce the calculations of pilot performance that were central to her testimony at trial.

²⁷ Dr. Reskin's declaration concludes that: "A male with Captain Sweeney's previous training, experience, and skills would have been licensed with few interventions and without any extensions." CP 1191. In accord with Judge Shaffer's *in limine* order, Dr. Reskin did not offer this specific testimony about Sweeney's case at trial, testifying only about implied bias in male dominated industries. RP 8/19/2014 PM at 1-123.

²⁸ The exhibits to Mr. Breskin's declaration were not filed with the KCSC at the time the motion was filed. *See* CP 1173-77 and following. They were filed by trial court order on August 7, 2015. CP 5039-42 (order), 5042-5301 (exhibits).

qualified to be licensed²⁹ and that, had she not been discriminated against because of her gender, she would have been licensed.³⁰ CP 1189, 1191.

Based on the October 31, 2008, attorney-client privileged transcript released on June 10, 2014, Captain Sweeney also made the behavior of the TEC and the Board in that closed meeting, and after—rather than her own performance—central to her theory of the case. She argued in her cross-motion for summary judgment that, at the October 2008 hearing, the Board accepted the TEC’s unanimous recommendations without “any discussion of the merits and without any effort being made to consult the [Excel] spreadsheet showing all of Captain Sweeney’s scores of her 230 trip reports.” CP 1237.

On August 1, 2014, Judge Shaffer heard the parties’ cross-motions for summary judgment and denied both motions. RP 8/1/14 at 1-36.

²⁹ The cross-motion states that Captain Sweeney’s “average score” for the ship handling categories (as calculated by the automatic Excel function in the Board spread sheets) was above 5, a score Captain Snyder, former head of the TEC, had identified as ‘satisfactory performance’; Snyder identified a score of 6 as a ‘very satisfactory performance, equivalent to a licensed pilot.’ CP 1238 n. 75.

³⁰ The only evidence said to support the assertion that “Sweeney’s scores were no different from men who were licensed” is Breskin Ex. 16, referred to at CP 1224 and 1228. It is described in the brief as based upon Sweeney and Seymour’s General Shiphandling Scores for the “final 2 sets of trips” (CP 1228 n. 28) and in Breskin’s declaration as “a chart comparing Sweeney’s scores and Seymour’s scores” (CP 5043). But that chart is, inexplicably, not included with the Breskin exhibits filed in August 2015. See CP 5210. Thus, as the Clerk’s Papers presently exist, no evidence included with the cross-motion for summary judgment supports Sweeney’s assertion that her scores, even her general shiphandling scores, were no different from Seymour’s, or from the male trainees. The correct Breskin Ex. 16 is included in KCSC Docket #333. In an effort to avoid another delay in filing the Board’s opening brief, the correct Ex. 16 is included here as Appendix D. Counsel for Captain Sweeney has been informed of this correction.

2. Trial and Verdict

Opening statements in this case began on August 11, 2014. RP 8/11/14 AM at 1-112, PM at 12-58. The jury heard testimony for twenty-two trial days. RP 8/11/14 through 9/18/14. The jury was instructed on September 17, 2014 (CP 3828-48), and closing arguments were delivered on September 18, 2014. RP 9/18/14 at 1-173. The jury deliberated for seven days and returned a divided verdict for Captain Sweeney. Minute Entry (10/1/14); CP 3941-42; RP 10/1/14 at 1-17. Polling established that there were 10 jurors voting yes on each question, but that different jurors had been in the majority on the three questions in the special verdict form (liability, proximate cause, and damages). RP 10/1/14 at 1-17. *See, infra*, Argument, Section V.C (juror misconduct).

The jury awarded damages of \$3,615,958. CP 3941-42. The Board made a timely request for a new trial, which Judge Shaffer denied. The trial court entered a supplemental judgment awarding Captain Sweeney a tax consequences award of \$339,449, \$1,508,240 in attorneys' fees (through 10/31/14), a lodestar fee enhancement of \$757,120 (through 10/31/14), and litigation expenses of \$168,071.02. CP 4561. The total judgment against the Board, effective October 31, 2014, was \$6,388,838.

V. ARGUMENT

A. **The Board was Prejudiced by Judge Shaffer's Compelled Release of an Attorney-Client Privileged Work-Product Transcript and an Attorney Work-Product Email on the Eve of Trial**³¹

Less than a week before the parties selected the jury in this case, Judge Shaffer decided two motions compelling production of attorney-client privileged and work-product discovery from the Board. One was a renewed motion to compel production of the privileged May 2009 closed meeting transcript, the same transcript Judge Lum had held attorney-client privileged and work product on 6/10/14. CP 263-65.³² The other was a motion to compel production of privileged work-product email written in April-May 2009.³³ Both motions were filed shortly after Judge Shaffer replaced Judge Lum as the trial judge in this case. Judge Shaffer's rulings on both motions were an abuse of discretion because they were based upon errors of law.³⁴

The Board was profoundly prejudiced by the release of the roadmap of its litigation defenses contained in the work-product email as well as by release of the transcript of the May 2009 closed meeting,

³¹ The Board has alleged throughout these proceedings that the transcript and the email were both attorney-client privileged and attorney work-product. Throughout this briefing it asserts both privileges for both documents.

³² The motion was not captioned a renewed motion.

³³ Only the compelled release of the May 4, 2009, email is an issue on appeal.

³⁴ Appendix C is a chart of the motions and rulings relevant to the release of the privileged transcript and email.

already held to be both attorney-client privileged and work-product by Judge Lum. Within a week of the release of these privileged documents, the Board was required to defend against a case that pinpointed the weaknesses identified in its own attorney work-product email and focused on the litigation strategy its own attorney had discussed with Board members in the closed May 2009 session.

1. Attorney-Client Privilege and Work-Product Issues, Like All Other Statutory Construction Issues, are Reviewed *De Novo*; the Trial Court's Application of the Law is Reviewed for Abuse of Discretion

In Washington, attorney-client privilege is codified in RCW 5.60.060(2)(a), and the work-product rule is set forth in CR 26(b)(4). Issues of statutory construction are questions of law that are reviewed *de novo*. *Fellows v. Moynihan*, 175 Wn.2d 641, 649, 285 P.3d 864 (2012); *Jane Doe v. Corp. of President of Church of Jesus Christ of Latter-Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004). This Court also reviews *de novo* the interpretation of court rules. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 13, 330 P.3d 168 (2014).

This Court reviews a trial court's application of the law in discovery orders for abuse of discretion. *Cedell v. Farmers Ins. Co.*, 176 Wn.2d 686, 694, 295 P.3d 239 (2013). A trial court abuses its discretion when its decision is based on untenable grounds. *Dana v. Piper*, 173 Wn.

App. 761, 769, 295 P.3d 305 (2013). A decision is necessarily based on untenable grounds when it rests on an erroneous view of the law or an incorrect legal analysis. *Id.*

Thus, after *de novo* review, if this Court finds Judge Shaffer's discovery decisions compelling release of the transcript and email to be based on sound interpretations of the statute governing attorney-client privilege and the court rule governing work-product, her decisions are "tenable." But if this Court finds Judge Shaffer's interpretation of the law to be erroneous, then those decisions are based on "untenable" legal grounds and she has abused her discretion.³⁵

2. Judge Shaffer Erred When She Compelled Production of the Transcript of the May 2009 Closed Meeting

a. Factual Basis for Motion

On July 14, 2014, Captain Sweeney filed a motion to compel or in the alternative exclude evidence. CP 1099-172. This motion requested that Judge Shaffer compel the Board to produce the "transcript of the closed-door session of May 19, 2009, meeting."³⁶ CP 1099-100. As in her first

³⁵ The transcript of the May 2009 closed meeting is available for *de novo* review by this Court (Pl. Ex. 88) as is the May 4, 2009, email and attachments (CP 4333-412). The email was made available through a ruling by this Court (5/11/15). CP 4414-20. The only evidence supporting waiver is available at CP 1134-72.

³⁶ In the alternative, Sweeney requested an order barring the Board from offering at trial any evidence (or defense) not stated in the TEC's November 2008 letter (recommending Captain Sweeney's training not be further extended) or from "arguing that it acted fairly or reasonably in denying [Captain Sweeney] a license" because she was permitted to appeal the October 2008 decision. CP 1099-100.

motion to compel this transcript, Captain Sweeney argued that the Board had expressly waived attorney-client privilege because Commissioners testified about the actions, discussions, and considerations of the Board at the closed May 2009 meeting. CP 1101. She also argued that the Board had impliedly waived attorney-client privilege because—by stating that it had considered the April 2009 Senn-Sweeney presentation “at the May 19 meeting” in support of its affirmative defense that “it acted reasonably and fairly” when it denied her license—the Board had impliedly waived its privilege in the transcript of the May 2009 closed meeting. CP 1101.

Captain Sweeney’s motion states that on June 10, 2014, Judge Lum “found that the Board had not expressly waived the privilege with respect to the May 19 meeting,” and argues that Judge Lum had not considered “implied waiver.” CP 1103 (emphasis in original), 1166. That is not an accurate portrayal of the motion Sweeney placed before Judge Lum. Although his order focuses on what was termed “subject matter” (or explicit) waiver in Sweeney’s first motion (CP 102-03), Sweeney’s motion (discussed above at pages 16-18) was well-pled; it included the same “shield and a sword” implied waiver argument presented in the second motion to compel. CP 101-02, 1108-09. Since implied waiver was discussed in the first motion to compel the transcripts, there was no new legal basis for renewing the motion.

More significantly, Captain Sweeney's motion states that "Judge Lum did not have before him the January 22, 2013 testimony of the Board's chairman, Captain Dudley, wherein Captain Dudley was asked, without objection of defense counsel, to state everything he could recall about the May 19, 2009 closed session."³⁷ CP 1103 (emphasis in original).³⁸ This misrepresents the prior motion and its evidentiary support. As the exhibits to Captain Sweeney's May 14, 2014, motion to compel the transcripts of both closed hearings, and the text of Judge Lum's order make clear, this Dudley deposition excerpt is exactly the same statement Sweeney relied upon in her May 14, 2014, motion to compel. CP 145, 263-65, 1738-39, 1751-56. On the basis of this 1/22/13 Dudley statement, Judge Lum found that "No such waiver occurred" regarding the May 2009 transcript. CP 263-65.

Captain Sweeney also states that Dudley, in his CR 30(b)(6) deposition (6/30/14) was repeatedly "asked about what was considered and discussed during the May 19, 2009 meeting and he repeatedly answered without objection from counsel characterizing what was

³⁷ Captain Dudley was asked such a question, but as Judge Lum's order explained, he "testified only that plaintiff's performance was obviously discussed in closed session, but offered no detail, pointing out that no such detail was contained in the meeting minutes because the meeting was held in closed session." CP 264, 1166.

³⁸ Page 205 from Dudley's 1/22/13 deposition is quoted but not included in support of Sweeney's 7/14/14 motion. Compare CP 1103 with CP 1160-62. It was included as support for the motion decided by Judge Lum on 6/10/14. CP 145, 263-65.

discussed and/or considered.” CP 1104. This statement does not accurately describe Dudley’s 6/30/14 testimony. CP 1140. Mr. Breskin does read the question regarding the “closed session” from his own 1/22/13 deposition to Dudley, but Mr. Robinson O’Neill immediately objects, and directs Dudley not to answer “if it requires him to disclose attorney communications made during any closed session.” CP 1140. Dudley testifies, “I do not recall,” in response to Mr. Breskin’s following question “whether you recall any further—what the discussion was.” CP 1140.

Similarly, in Captain Hannigan’s CR 30(b)(6) deposition (7/9/14), he does not testify about the content of the May 2009 closed session, but limits his testimony to the time between the April 2009 Senn-Sweeney session and the May 19, 2009, public licensing decision: “the Board had an opportunity for a month to study the information that was provided to them.” CP 1152-53; *see also* Section V.A.3. Although excerpts from the two CR 30(b)(6) depositions are included in support of Sweeney’s second motion to compel the transcript, *de novo* review establishes that neither of them supports Sweeney’s explicit waiver argument. CP 1134-59.

The deposition excerpts also do not support Captain Sweeney’s implied waiver argument. CP 1108-09. Sweeney correctly articulates the Board’s affirmative defense—“all actions of the Board manifested a reasonable exercise of judgment and discretion by authorized public

officials made in the exercise of governmental authority entrusted to them by law”—but it misapprehends Captain Hannigan’s testimony that the May 19, 2009, closed meeting was “critical.” What Hannigan says is: “I feel the critical meeting of the Board is on May 19th, 2009, when the Board denied Captain Sweeney her license.” CP 1152. This did not refer to the closed privileged meeting with AAG Bowman, but rather to the public meeting that afternoon, where the Board voted to deny Captain Sweeney a pilot’s license. Pl. Ex. 119 at 2. This information (and the minutes of the public meeting) had long been available to Captain Sweeney.

Captain Sweeney’s renewed motion afforded scant factual or legal basis for a parallel, co-equal department of the KCSC to reconsider release of the May 2009 transcript. *See also* CP 1738-39, 1751-56. There was no new law, and the few new deposition excerpts Captain Sweeney submitted in support of her motion to compel did not provide additional support for either express or implied waiver.

On July 25, 2014, the Board opposed this renewed motion to compel production of the May 2009 transcript. CP 1736-56. The Board argued the motion should be denied because it was cumulative, a renewal of the May 14, 2014, motion Judge Lum had heard without new evidence to support either express or implied waiver. The Board specifically noted

that Dudley’s statement describing the meeting as “closed” had already been ruled inadequate grounds for waiver, and articulated the reasons why the renewed motion and the CR 30(b)(6) deposition excerpts failed to establish express or implied waiver. CP 1738-39. Judge Shaffer was informed that while the CR 30(b)(6) deponents were repeatedly asked what was considered and discussed at the May 2009 meeting (CP 1104, 1135-48, 1150-59), the testimony in the excerpts did not waive the Board’s privilege in the transcript because the deponents did not “repeatedly answer[] without objection from counsel characterizing what was discussed and/or considered.” CP 1104, 1738. The excerpts do not describe the “closed session” at the May 2009 meeting or suggest in any way that the Board would rely upon the substance of the closed session as a defense. CP 1738-39.

Captain Sweeney’s assertion that the transcript was the best evidence of the Board’s decision process regarding why her license was denied was a straw man. CP 1739-40. The Board’s licensing decision was based on the TEC’s careful, thirteen month evaluation of Captain Sweeney’s 230 trip reports. CP 1739-40. That evaluation—not the substance of the May 19, 2009 closed meeting—was the Board’s defense. And while Captain Hannigan stated that the May 2009 public vote on Captain Sweeney’s licensure was “critical,” as it necessarily was under the

APA because it was the final public decision required by statute, Hannigan had not testified that the Board received “critical” (or new) information in the May 2009 closed meeting. CP 1739-40; Pl. Ex. 119 at 2.

On July 29, 2014, Judge Shaffer, without oral argument, signed an order compelling the Board to produce the transcript of the May 2009 closed Board meeting. CP 2161-62; RP 7/31/14 at 132-33. The order includes no findings and does not articulate Judge Shaffer’s grounds for overturning Judge Lum’s decision.

Two days later, on July 31, 2014, Mr. Breskin described the comment of AAG Bowman at the end of the May 2009 closed meeting (attributing it to the Board). RP 7/31/14 at 132. Judge Shaffer’s response to Mr. Breskin’s comment makes it clear that she had not read the transcript *in camera* before order its release. RP 7/31/14 at 132.³⁹

b. A *De Novo* Review of the Motion to Compel Production of the Transcript Reveals no Waiver; Release of the Transcript was an Abuse of Discretion

Washington's attorney-client privilege is set forth in RCW 5.60.060(2)(a). The purpose of this privilege is to encourage clients to

³⁹ “Mr. Breskin: “I don't know if Your Honor has read it, but the end of that transcript it is like--.” Judge Shaffer: “It awaits me . . . It is on that CD that my bailiff had to print.” RP 7/31/14 at 132. Earlier in the hearing, Judge Shaffer had complained that because the parties had required her bailiff to do “paralegal” work, including printing the documents the Board had produced on CD for *in camera* review: “I haven’t actually gotten a chance now to read everything I was supposed to read for *in camera* review because I had to wait for him to find time.” RP 7/31/14 at 6.

make full disclosure to an attorney so that the attorney can render effective legal assistance. *Pappas v. Holloway*, 114 Wn.2d 198, 203, 787 P.2d 30 (1990). The attorney-client privilege applies to any information generated by a request for legal advice, including documents created by clients with the intention of communicating with their attorneys. *West v. Dep't of Natural Res.*, 163 Wn. App. 235, 247, 258 P.3d 78 (2011). In the May 2009 closed-session transcript, Captain Hannigan, the head of the TEC, identifies the privileged legal work he asked AAG Bowman to do—specifically, to determine whether Ms. Senn’s assertions at the April 2009 presentation “held water.” Pl. Ex. 88 at 59-61. Commissioner Davis concludes the discussion of Sweeney by asking: “Any further questions of Guy [Bowman] or either TEC member on this issue.” Pl. Ex. 88 at 68.

The rule is also clear that when an attorney and client are engaged in conversation where the attorney is giving legal advice made “in the shadow of impending litigation” then the privilege applies even where a public agency is involved. *Soter v. Cowles Pub. Co.*, 131 Wn. App. 882, 905-06, 130 P.3d 840 (2006). It is, in fact, in the public interest that public agencies be allowed to consult with attorneys. *Id.* The privilege extends even where a public client has to provide sensitive information—information that in other contexts might be viewed as party admissions or statements against interest—to legal advisers. *Id.* at 903.

As noted above, like all questions of statutory interpretation, the existence of the Board's privilege in the May 2009 transcript is reviewed *de novo*. Judge Lum found the May 2009 transcript to be attorney-client privileged and work-product. CP 1164-65. Judge Shaffer was informed of that finding. CP 1164-65. Nothing in Judge Shaffer's order undercuts that finding (CP 2161), and, in fact, it appears to be uncontested by Captain Sweeney in her motion to compel, where she argues that the Board has expressly or impliedly waived the privilege, not that the transcript is not privileged. CP 1101. Thus, for purposes of appellate review, it is uncontested that the May 2009 closed session transcript is attorney-client privileged work-product. The only question for *de novo* review by this Court is whether Judge Shaffer's release of the transcript was an error that prejudiced the Board.

Whether attorney-client privilege has been waived is also a question of law. *See Pappas*, 114 Wn.2d at 204–09 (applying a *de novo* standard of review to a trial court's order determining whether attorney-client privilege has been waived); and *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008) (quoting *Advantor Capital Corp. v. Yeary*, 136 F.3d 1259, 1267 (10th Cir. 1998)) (“Whether facts on which a claim of waiver is based have been proved, is a question for the trier of the facts, but whether those facts, if proved, amount to a waiver is

a question of law.”). The Washington Supreme Court has held that where, as here, the parties present a mixed question of law and fact, but do not dispute the facts,⁴⁰ the question is one of law for the appellate court to review *de novo*. *Brundridge*, 164 Wn.2d at 441, citing *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 75, 137 P. 342 (1913).

As a matter of law, the deposition excerpts relied upon by Captain Sweeney in support of her motion to compel production of the transcript of the May 2009 closed session do not support either express or implied waiver:

- The Dudley excerpt from the 1/22/13 deposition describing the May 2009 meeting as “closed session” had already been found insufficient to support waiver by Judge Lum (CP 1103, 1162⁴¹, 1166);
- The Dudley excerpt from the 6/30/13 deposition does not support waiver because Robinson O’Neill objects on attorney-client privilege grounds when Breskin repeats the 1/22/13 “closed session” question (CP 1140). Dudley does not supplement the 1/22/13 statement;
- The Hannigan excerpt from the 2/19/13 deposition does not support either implied or express waiver because Hannigan agrees only that “the information presented [by Senn] was considered when the Board made its ultimate decision (CP 1169).” The Board’s “ultimate decision” regarding Captain Sweeney was made in the public meeting on May 19, 2009 (Pl. Ex. 119 at 2);
- The Hannigan excerpt from the 7/9/14 deposition does not support

⁴⁰ In this case, the only evidence presented by Sweeney in support of express and implied waiver is the deposition excerpts appended to Breskin’s declaration at CP 1134-72. The Board does not accept Sweeney’s argument and misstatements regarding the deposition excerpts, but does accept the excerpts as the factual basis for *de novo* review of waiver by this Court.

⁴¹ The Dudley 1/22/13 excerpt appended is page 204 of the deposition rather than 205. It does not support the argument in the brief. CP 1103, 1162.

waiver because it was the public meeting on May 19, 2009, not the closed session, that was “critical” (CP 1152; Pl. Ex. 119 at 2).

De novo review establishes that none of the evidence presented by Captain Sweeney supports either express or implied waiver. Judge Shaffer abused her discretion when she released the May 2009 transcript. It was particularly concerning that her decision to do so was also a decision to overturn the recent order of a parallel department of the same court (Judge Lum) without reading the transcript, and that it was made without findings (or a record) that might afford this court some opportunity for review. CP 2161-62; RP 7/31/14 at 6, 132-33.

c. Release of the May 2009 Closed Session Transcript Strongly Prejudiced the Board

The prejudice to the Board that resulted from release of the May 2009 closed-session transcript is presaged in *Pappas*, 114 Wn.2d at 210:

An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

In this case, during the privileged May 2009 meeting, AAG Bowman provided the Board with a candid investigation, evaluation, and assessment of the Senn-Sweeney assertions and the Board’s litigation posture and the Board and TEC frankly discussed whether or not Ms. Senn’s allegations “held water.” Pl. Ex. 88; CP 4333-412. The

recording (and transcript) were attorney-client privileged work-product, not admissions of a party opponent. They should not have been available for use—as a sword—by Captain Sweeney at trial. Her counsel used the transcript of the May closed meeting, particularly AAG Bowman’s advice to the Board, throughout the trial to shape the jury’s view of the Board and its actions. In opening, Mr. Breskin read several pages of the May 19, 2009, transcript to the jury and concluded:

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."

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 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.

During trial, Captain Sweeney used the May 2009 closed session transcript to scathingly cross-examine Captain Dudley (RP 8/13/14 AM at 69-74); Commissioner Hulsizer (RP 8/14/2014 AM at 19-25); Captain Hannigan (RP 8/20/14 AM at 85-87, RP 9/16/14 at 126-27); Commissioner Davis (RP 8/28/14 AM at 83-95); and Commissioner Lee

(RP 9/2/14 AM at 78-80). In closing argument, Mr. Breskin again read several pages of the May 2009 closed session transcript to the jury. RP 9/17/14 at 185-87. He concluded his reading of the transcript by saying:

They sat there, they made a decision to change the course of this woman's career, knowing that they didn't have the full facts, knowing they could do an investigation, probably should, knowing they should make comparisons, and they didn't. They didn't do any of that.

This case is about a total lack of regard for the discrimination laws, a total lack of regard for bias, a total inability to even see it when it's in front of them.

RP 9/17/14 at 185-87.

The Board was prejudiced by this use of the May 2009 closed-session transcript. In violation of RCW 5.60.060(2)(a), AAG Bowman's counsel to the Board was made a weapon against his client in this trial. As *Pappas* predicts, the interests of justice have been poorly served. The contrast between Captain Sweeney's summary judgment motion and the trial is stark. On summary judgment Captain Sweeney focused on her competence as a pilot, and only the Board's non-examination of her Excel spreadsheet scores during the October 2008 meeting served as a basis for attacking the Board itself. But, at trial, after compelled release of the transcript, every Board and TEC member's questions and comments during the May 2009 meeting were used with rapier precision on cross-

examination. The Board voted unanimously⁴² in the May 2009 public meeting to deny Captain Sweeney a license on the basis of a thirteen month evaluation of her performance as a pilot. Yet release of the May 2009 transcript allowed Captain Sweeney to portray the Board at trial as Mr. Breskin does in closing—as “knowing that they didn't have the full facts, knowing they could do an investigation,⁴³ probably should, knowing they should make comparisons, and they didn't.” RP 9/17/14 at 185-87.

The Board requests a retrial in which any use of this attorney-client privileged work-product document is barred. The Board was entitled to the advice of counsel, and entitled to a trial in which that advice did not become a vehicle of attack.

3. Judge Shaffer Erred When She Compelled Production of the May 4, 2009, Attorney-Client Privileged Work-Product Email

a. Factual Basis for Motion

On July 17, 2014, Captain Sweeney filed a motion to compel withheld documents.⁴⁴ CP 994-1085. In it, Captain Sweeney requested

⁴² With Commissioner Thompson abstaining.

⁴³ Captain Sweeney’s counsel uses the ambiguity of the term “investigation” as it appears in the transcript to great advantage. Bowman investigated the actual assertions Senn made in her April 2009 presentation. Since Senn did not allege gender discrimination in the way Dr. Reskin defined it (Def. Ex. 812), Hannigan’s request is that the full Board see the information developed by Bowman, Judy Bell, and the TEC. Pl. Ex. 88 at 79-81. This “investigation” is the May 4, 2009, work product email; Judge Shaffer determines on the last day of trial that release of the investigatory portion of that email would not be “helpful” to the jury. RP 9/17/14 at 3, 8-12; Def. Ex. 783A, 783B.

⁴⁴ The Board’s final privilege log was served on Sweeney’s counsel on 7/14/14.

compelled production of the seven attorney-client privileged email, generated in April and May 2009, primarily because the privilege had been waived in deposition. CP 998, 1004, 1067-68.⁴⁵ (Although the motion requested release of seven email, only the compelled production of the May 4, 2009, email is at issue on appeal. CP 4333-409.) She stated that Captain Hannigan waived⁴⁶ attorney-client privilege because he “had placed at issue what was known, considered, and/or discussed by the . . . Board prior to and at the May 19 [2009] meeting concerning Captain Sweeney and specifically Ms. Senn’s April 9, 2009, presentation.” CP 996. The motion is supported by an excerpt of the Hannigan deposition (CP 1012-17) but does not identify a particular statement from Captain Hannigan that constituted either an express or implied waiver of the privilege. CP 995-96, 1004.

On July 23, 2014, the Board filed its opposition to Captain Sweeney’s motion to compel withheld documents, focusing particularly

⁴⁵ Clerks Papers at 1067-68 are the Board’s 7/10/14 privilege log for the seven email, marked by Ms. Senn on an entry-by-entry basis with numbers corresponding to her arguments for disclosure.

⁴⁶ Although the motion appears to suggest Hannigan’s 7/9/14 deposition includes statements that satisfy the criteria for express and implied waiver, the argument in the brief (after identifying RCW 5.60.060) focuses primarily upon disclosure under the model regulation on Public Disclosure (which Sweeney argues is “wholly applicable to the AG’s privilege log” at CP 1001); case law and argument on express and implied waiver of litigation discovery is not included in the brief. CP 1000-04

on the attorney-client privileged email of April-May 2009.⁴⁷ CP 1288-98. The Board's opposition is supported by the declarations of Mr. Robinson O'Neill and AGO paralegal Jennifer Ostwald.⁴⁸ CP 1299-324, 4094-95. The opposition maintains that the April-May 2009 email, produced by Mr. Bowman, are both attorney-client privileged and work-product prepared in anticipation of litigation, an exemption that "covers both the factual information gathered by an attorney and their mental impressions, research, legal theories, opinions, and conclusions." CP 1294. In particular, the Board's opposition states these email:

[A]re email communications between Guy Bowman, Pat Hannigan, and members of the TEC between April 12, 2009 and May 19, 2009. Following a presentation in which plaintiff's counsel asserted that the Board had violated the WLAD, the client contacted its attorney, Guy Bowman, to seek legal advice. The attorney collected information from the client via a written questionnaire and then made a presentation to the Board giving a legal opinion at the May 19, 2009 meeting. They are, in fact, classic attorney-client communication and work product.

CP 1293-94.

⁴⁷ The April email bear Bates Nos. 4001156-4001188; the May 4, 2009, email and attachments are Bates Nos. 4001189-4001264. CP 4333-420. Bates Nos. 4001189-4001264 were produced to Sweeney by order of Judge Shaffer on August 2, 2014. CP 4571,4574.

⁴⁸ Ostwald's declaration explains that she stored the April-May 2009 email (Bates Nos. 4001156-4001264) as privileged email in a file identified as "BowmanAttyClient" in November 2011, shortly after this case was filed. The documents had been sent from Bowman to Robinson O'Neill. Ostwald "overlooked" and did not identify the documents in privilege logs until 7/10/14, the day after Robinson O'Neill identified the error during Hannigan's deposition on 7/9/14.

The Board's opposition also made clear that Captain Sweeney's argument that it had waived its attorney-client and work-product privilege in the email was not supported by appropriate legal authority, since she relied on analogy to the public records act (CP 1292-93) and did not give an applicable legal basis for waiver of privileged documents in litigation (CP 1294). The Board maintained that the excerpt of Hannigan's deposition⁴⁹ did not waive either the attorney-client or work-product privilege because he did nothing more than state that "he may have sent an email to the Board attorney" but that, prior to trial, neither Hannigan nor the Board relied on that email as basis for an affirmative defense. CP 1293-95.⁵⁰

On July 30, 2014, Judge Shaffer conducted a telephonic hearing on Captain Sweeney's motion to compel production of the documents the

⁴⁹ The two Dudley deposition excerpts included as exhibits by Sweeney are also insufficient to constitute waiver: the statement from Dudley's 6/30/14 deposition (CP 1074) is not relevant, and the general statement from Captain Dudley's 1/22/13 deposition regarding the "closed session" (CP 1077-78) had already been considered and dismissed as an inadequate basis for waiver of the attorney-client and work product privileges by Judge Lum. CP 145, 263-64, 1077-78, 1294. A copy of Judge Lum's order was included as supporting documentation for the Board's opposition. CP 1304-05.

⁵⁰ Sweeney combined her reply in this motion with her reply for an additional CR 30(b)(6) deposition from Hannigan. CP 1274-80. She relied upon Hannigan's statement in his CR 30(b)(6) deposition: "the Board had an opportunity for a month to study the information that was provided to them" before it made its "critical" public licensing decision. CP 1276-77, 1276-77 n. 5 does not accurately identify the source of Hannigan's statement. The relevant Hannigan excerpt was filed only in support of the motion to compel production of the May 2009 transcript (decided 7/29/14). CP 1152-53. It does not support express or implied waiver, as discussed above at p. 29. Unlike the original motion, the reply brief does include argument based upon litigation privilege case law, not public records act case law.

Board identified as attorney-client privileged; the hearing was not reported. Statement of Arrangements, 12/8/14; Am. Statement of Arrangements, 1/22/15. Later the same day, at the Board's request, Judge Shaffer had the opportunity to review *in camera* the work-product email Captain Sweeney was seeking. Judge Shaffer did not file a sealed copy of the email—either those she reviewed, or those she released—with KCSC.⁵¹

On August 1, 2014, at the end of the hearing on the parties' cross motions for summary judgment, the following exchange occurred:

MR. BRESKIN: One question. I don't know if Your Honor had a chance to look at the emails that are still out there. The April –

THE COURT: Didn't Matt give them to you? I made a determination. I'm giving you redacted copies. Captain Hannigan's communications are coming pretty much in full. I redacted some of what the assistant attorney general had to say in those emails. We're getting them right now.

RP 8/1/14 at 35-36; CP 4799-800.

Although this brief statement released 75 pages of attorney-client privileged work-product email and attachments in this case, Judge Shaffer

⁵¹ In preparing this appeal, the Board drafted both a narrative (RAP 9.3) and an agreed (RAP 9.4) report of proceedings for the 7/30/14 telephonic hearing, but neither was approved for filing by Judge Shaffer or Captain Sweeney and, consequently, no record of this hearing is available for review. The attorney-client privileged documents which Judge Shaffer compelled the Board to produce are in the record (CP 4333-412) because this Court granted the Board's RAP 9.13 motion and allowed the Board to provide this Court with the attorney-client privileged /work-product email at issue in the appeal. CP 4414-20.

neither stated the reason for her decision nor entered oral findings. RP 8/1/14 at 35-36.

On the first day of trial testimony, counsel discussed these email (and a chart of interventions appended to the 5/4/09 email) with the court. *See* CP 4370 (chart). Judge Shaffer stated that she viewed the email as a “party admission” (RP 8/11/14 PM at 90) and describes the attempt to protect the email as “an aggressive use of the attorney-client privilege, in other words, as a sword which waived it” (RP 8/11/14 PM at 94). RP 8/11/14 PM at 88-94. She did not view the email as work-product: “The thing is, it's not the attorney's work product. As I understood it, this is something that Captain Hannigan and the attorney were sort of batting back and forth before the meeting as something that was going to be discussed at the meeting.” RP 8/11/14 PM at 88-89.

This is the only statement Judge Shaffer makes regarding the compelled release of the May 4, 2009, email and attachments. Although this may serve as a basis for admission of the intervention chart (with foundation), it does not provide a rationale for releasing the eighteen pages of color-coded TEC, Kromann, and Bell answers to AAG Bowman’s litigation defense questions (CP 4337-55) to which the chart was appended. If a trial court were to employ a “party admission” standard during an *in camera* review of allegedly privileged documents, no

attorney-client privileged document or work-product could ever be protected from compelled release. A client's admissions to its counsel are the heart of the privilege. And if Judge Shaffer found that the Board's "aggressive" use of the privilege waived it, the Board was entitled to findings and an articulated legal basis for such a waiver.

b. A *De Novo* Review of the May 2009 Email Reveals That it was Work-Product and the Board had not Waived the Privilege; Release of the Email was an Abuse of Discretion

This Court conducts a *de novo* review of Judge Shaffer's decision to release the May 4, 2009, email. In doing so, it determines whether or not the May 2009 email was work-product and whether, as Captain Sweeney argued in her motion to compel production (CP 994-1085), the Board waived its privilege in the email through Captain Hannigan's July 9, 2014, CR 30(b)(6) testimony.⁵² Under CR 26(b)(4), Captain Sweeney was entitled to discover the factual information Bowman learned only upon a showing of substantial need, but there is no evidence in the record that Captain Sweeney argued substantial need or that Judge Shaffer took any notice of CR 26(b)(4) and its requirements. On *de novo* review of this record, the Board requests that this Court find that the May 2009 email was work-product, that the privilege in the email was not waived by the

⁵² Captain Sweeney does not contest that the email was privileged work product. CP 994-1085. Her motion focuses on waiver.

Board,⁵³ and that, because the Board was severely prejudiced by release of its litigation strategy and affirmative defenses, the Board is entitled to a retrial in which the May 2009 email (and all questions reflecting an understanding of its substance) are excluded.

The April-May 2009 email were identified as attorney-client privileged when they were included for the first time in the Board's privilege log on July 10, 2014.⁵⁴ The April-May 2009 email were written after Senn addressed the Board at its April 2009 meeting. CP 1067, 1293-94. In the May 4, 2009, email (CP 4337-412), Judy Bell (acting as a Board administrator and on behalf of the TEC) provided AAG Bowman with answers to a lengthy questionnaire he had prepared after Senn's presentation. RP 8/11/14 PM at 88-94. The answers came from the TEC, Captain Kromann (a pilot member of TEC), and Judy Bell herself. CP 4338; RP 8/11/14 PM at 88-94. Bowman's mental impressions and analysis of Senn's presentation shape his eighty questions. CP 4337-55. He gathered information from these individuals as the basis for a legal opinion which he intended to give at the Board's closed meeting before

⁵³ Either on the grounds articulated in Sweeney's briefing or because of some unstated "aggressive" use of the privilege by the Board.

⁵⁴ The internal AGO error related to the late identification of these email is described above. Captain Sweeney did not request release of the email as a severe sanction for the Board identifying them after the discovery cutoff. Judge Shaffer did no *Burnet* analysis on the record; no order compelled production as a sanction. RP 8/1/14 at 35-36; CP 4333-420, 4799-800.

the Board's public vote on Captain Sweeney's licensure as a pilot by the Board. Pl. Ex. 88 at 59-63; RP 8/11/14 PM at 88-94. The resulting document is eighteen color-coded pages that ask for facts, comparisons, and opinions in response to each of the allegations and "assertions" Senn made in her April 2009 presentation to the Board. CP 4337-55.⁵⁵

In her motion to compel (CP 994-1085), Captain Sweeney accepts that the email is privileged work-product, but argues that Captain Hannigan's statements in his July 9, 2014, deposition waived the Board's privilege. A close examination of the Hannigan deposition excerpt does not support this claim. CP 1012-17. Hannigan states that: "there may have been an email I wrote to Susan [Cruise], the attorney general representative with an analysis of the Deborah Senn's presentation to the Board." CP at 1015. He states that he did not destroy it (CP 1016) and that he thought he had produced it with all of his other email (CP 1016). Although it appears AAG Bowman rather than AAG Cruise participated in the email exchange, the email would have been privileged and the AAG answer would have been attorney-client privileged work-product. Nothing Hannigan says waives—either expressly or impliedly—the privilege, since it is clear he did not bring the email with him to the CR 30(b)(6)

⁵⁵ Since Captain Nelson sued the Board under the APA after it denied him a license, Mr. Bowman's fact-gathering is unambiguously done in order to prepare the Board for litigation. Pl. Ex. 88 at 62.

deposition and the Board (at that stage in the proceedings) would not be relying upon it as a defense.

An examination of the email itself demonstrates that it is attorney-client privileged work-product. Bowman framed eighty questions on the basis of “Senn’s Assertions” (CP 4338-55), and received color-coded responses to them from his client. Bowman first outlined the Senn assertions (CP 4338-39), then asked the TEC specific questions based upon the assertions (CP 4339-47). He concluded with “Statistical Analysis Questions” that compared Captain Sweeney’s performance with that of male pilots, analyzed the experience-level of the pilots she trained with, and examined Captain Sweeney’s shiphandling and intervention scores in comparison with male pilots. CP 4348-55. The attachments to the email, primarily created by the Board (through Judy Bell) provide factual and statistical support for the answers to all questions. CP at 4356-412. Included in that support is a chart of interventions (CP 4356), and a complete compilation of the training comments regarding Captain Sweeney (CP 4358-61).⁵⁶

⁵⁶ Although Captain Sweeney used the email and its attachments throughout trial to guide her case, she did not offer the color-coded document as an exhibit. CP 2190, 3952. During the Board’s rebuttal case, it sought to admit a redacted version of the document (Def. Ex. 783A and 783B) (over Captain Sweeney’s objection) through the rebuttal testimony of Captain Hannigan. RP 9/10/14 PM at 10-12; 9/16/14 at 19-25; 9/17/14 at 8-12. Mr. Robinson O’Neill states that he offers it “in contradistinction to Mr. Breskin’s questions” rather than for the “truth of the matter asserted.” RP 9/16/14 at 20. Just before Mr. Breskin’s closing argument, Judge Shaffer admitted a ten-page redacted

Under *Upjohn v. United States*, 449 U.S. 401, 399, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981); and *In re Firestorm 1991*, 129 Wn.2d 130, 159, 916 P.2d 411 (1996) (Madsen, J. concurring), notes for litigation are categorized as mental impressions in the “opinion” work-product category. Opinion work-product enjoys nearly absolute immunity. *Upjohn*, 449 U.S. at 401. Work-product protection, in this case, would belong to Mr. Bowman as well as the Board. *U.S. v. Nobles*, 422 U.S. 225, 238-9, 95 S. Ct. 2160, 45 L. Ed. 2d 141 (1975); *Soter v. Cowles Pub. Co.* 131 Wn. App. 882, 894, 130 P.2d 840 (2006).

But even if the eighteen page color-coded document the Board was compelled to produce is considered “factual information” rather than an attorney’s mental impressions or opinions, it was still “work-product” entitled to protection by Judge Shaffer. *Heidelbrink v. Moriwaki*, 104 Wn.2d 395, 400, 706 P.2d 212 (1985). Under *Heidelbrink* and CR 26(b)(4), Captain Sweeney was entitled to discover the factual information Bowman learned from his client only upon a showing by Sweeney of

version of the exhibit (783A) that included only the responses of the TEC (because Hannigan was present when the answers were composed) “to show the TEC did something or other in response to Ms. Senn’s presentation.” RP 9/16/14 at 25. Judge Shaffer did not admit the final eight pages of the document, the Statistical Analysis, because she determined those questions, although not hearsay, “were not useful here.” Def. Ex. 783A, 783B; RP 9/17/14 at 3, 8-12. Def. Ex. 783A went to the jury. Def. Ex. 783B was admitted to facilitate appellate review (“to show what it is that I [Robinson O’Neill] have offered”). RP 9/17/14 at 11. The Breskin questions Robinson O’Neill sought to balance (or “contradistinguish”) were those based upon Hannigan’s statements in the May 2009 closed session transcript regarding investigation.

substantial need for the information in preparing her case and an inability to obtain the substantial equivalent without undue hardship. *Heidelbrink* at 395; CP 1096. Were Captain Sweeney to have made such a showing, CR 26(b)(4) required Judge Shaffer to act affirmatively to “protect against disclosure of Bowman’s “mental impressions . . . opinions, or legal theories.” *See also Pappas*, 114 Wn.2d at 209-10 (the effect of releasing an attorney’s work-product without a substantial showing of necessity poorly serves the cause of justice or the client, quoted above at p. 36); *Soter*, 131 Wn. App. at 893-94.

c. Release of the May 2009 Work-Product Email Strongly Prejudiced the Board

Judge Shaffer, who appears to have viewed the May 2009 email as a “party admission” (RP 8/11/14 PM at 90), did nothing to protect Bowman’s “mental impressions” as she was required to do under CR 26(b)(4). Six days before trial, Judge Shaffer released a document that guided Captain Sweeney to the Board’s defenses, its weaknesses, its blind spots, and its internal disagreement about whether or not additional “investigation” of Senn’s assertions was required and about whether or not Sweeney might benefit from receiving a final decision to facilitate appeal. At no time before, during, or after the trial did Judge Shaffer enter a written order compelling the release of the May 4, 2009, email; she did not

enter oral or written findings establishing the basis for her decision, nor did she file a copy of the documents she released to Captain Sweeney with the KCSC.

Judge Shaffer did not determine, on the basis of Sweeney's motion to compel production of the email, that the Board had expressly or impliedly waived its privilege in its work-product.⁵⁷ Assuming the Board did not waive its work-product privilege in the email, Judge Shaffer also did not make the mandatory determination, under CR 26(b)(4), that Sweeney showed it would be undue hardship for her to obtain a substantive equivalent of the "factual information" (contained in CP 4337-55) by other means.

A de novo examination of Judge Shaffer's application of the law to these facts demonstrates that she violated every substantive U.S. and Washington case on release of attorney work-product when she released these email. In doing so, she abused her discretion and prejudiced the Board in a manner that requires retrial by new counsel, untainted by knowledge of the "mental impressions" of the Board's attorney.

⁵⁷ Judge Shaffer regularly advised the parties that it was their responsibility to maintain the record. Arguably Captain Sweeney had the obligation to prepare a written order and the Board had an obligation to file the *in camera* review documents, but Judge Shaffer's responsibility for articulating the factual and legal basis for her decision to compel production of the email (on the record) and responsibility for articulating the basis for an undue hardship decision under CR 26(b)(4) could not be passed to either party.

4. This Court Should Bar Breskin, Johnson, and Senn From Representing Captain Sweeney on Retrial

Because the taint of the advantage they have gained through the compelled production of attorney-client work-product cannot be expunged by ordinary means, the Board requests that David Breskin, Daniel Johnson and Deborah Senn be barred from acting as Captain Sweeney's counsel should retrial be ordered in this case. The Board acknowledges that disqualification of a party's chosen counsel is an extraordinary remedy, rarely imposed. *Camden v. State of Maryland*, 910 F. Supp. 1115 (1996) (disqualification of a party's chosen counsel held an appropriate remedy where the defendant was acknowledged to be prejudiced by an *ex parte* contact made by plaintiff's counsel). In *MMR/Wallace Power & Indus., Inc. v. Thames Assoc.*, 764 F. Supp. 712, 718 (1991) (citing *Papanicolaou v. Chase Manhattan Bank, N.A.*, 720 F. Supp. 1080, 1083 (1989); and *Emle Indus., Inc. v. Patentex, Inc.*, 478 F.2d 562, 565 (2nd Cir. 1973)) the court considered disqualification as an appropriate remedial measure to eliminate "taint" and protect the "integrity of the adversarial process." See also *General Acc. Ins. Co. v. Borg-Warner Acceptance Corp.*, 483 So. 2d 505, 506 (Fla. Dist. Ct. App. 1986) (on discretionary review, the Florida Court of Appeals disqualified plaintiff's counsel—on the grounds counsel had acquired an unfair advantage—after defense work-product sent to the

trial court for *in camera* review was inadvertently released in full to plaintiff's counsel).

This is a case that requires an extraordinary remedy to protect the integrity of the adversarial process. The public agency tasked by statute with protecting life and property in Puget Sound did not receive the fair trial it was entitled to on a serious allegation of gender discrimination. The Board was prejudiced by the untenable release of the May 2009 transcript and email.

The powerful knowledge of the Board and its defenses that Sweeney's counsel obtained less than a week before trial cannot be forgotten (or unlearned) on retrial. Finding that Judge Shaffer abused her discretion would be meaningless to the Board, unless Captain Sweeney were required to employ new, untainted counsel at retrial.

B. The Trial Court Abused its Discretion When it Sanctioned the Board by Excluding All Further Evidence and Argument on its Primary Comparator Without Making *Burnet* Findings

In its defense, the Board intended to rely significantly on comparator evidence—evidence that the Board had denied licenses to male trainees who performed as Captain Sweeney had—to show that gender discrimination was not a proximate cause of it denying Captain Sweeney a license. In week five of trial, Judge Shaffer sanctioned the Board by excluding all further evidence and argument regarding the

Board's primary comparator, including at closing. In so doing, Judge Shaffer eviscerated this aspect of the Board's defense.

When a judge imposes a severe sanction that affects a party's ability to present its case, *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1039 (1997), requires findings on the record that the violation was willful or deliberate, that it substantially prejudiced the opposing party, and that the court explicitly considered less severe sanctions. Judge Shaffer did not make these *Burnet* findings when she imposed this sanction, an abuse of her discretion that requires reversal and a new trial.

1. Facts About the Severe Sanction Imposed on the Board

The Board's primary comparator, Captain Nelson, was litigating an age discrimination case against the Board while this case proceeded to trial. Judge Shaffer acknowledged Captain Nelson's relevance as a Board comparator, but regarding Nelson's lawsuit she ordered the parties to go no further than "[t]here's a litigation with regard to the denial of license[,] period." RP 8/05/14 at 33-34. The ruling was not reduced to writing.⁵⁸

⁵⁸By the start of the Board's case in chief, in seeming contradiction to her earlier ruling, Judge Shaffer began rejecting Board exhibits relevant to the Board's use of Captain Nelson as a comparator. *See, e.g.* RP 8/28/14 PM at 39. Stating her ruling was unchanged, Judge Shaffer said the Board using Nelson as a comparator would violate her *in limine* ruling and open the door for Captain Sweeney to respond with specifics on Nelson's case: "And now we're opening up the door to Nelson, which I ruled on *in limine*, and I have not changed my *in limine* ruling. . . . [I]f [the Board] really want[s] to get into Nelson as a comparator, then we are going to get into Nelson's allegations in this lawsuit." RP 8/28/14 PM at 41 (emphasis added).

When the Nelson case resolved during trial in the Board's favor, Judge Shaffer revised her oral order *in limine* to permit reference to the Nelson case in the past tense, "in the sense that next time Captain Nelson and his litigation get mentioned again in my court, it will be in the past tense." CP 3271-74; RP 9/2/14 PM at 95-102.

A week later, during the Board's direct examination of Captain Hannigan, the following exchange occurred:

(Counsel) Q: Has the Nelson case recently resolved?

(Hannigan) A: Yes, and I am pleased with the results.

RP 9/10/14 PM at 30. Judge Shaffer struck the answer and gave an immediate curative instruction. RP 9/10/14 PM at 30. With the jury excused, Judge Shaffer chastised the Board's counsel:

(Court): Do not flout my rulings. Okay? I ruled very clearly on Nelson that as far as we would go –

(Board Counsel): We said there was no more – it was resolved.

(Court): No. *I said as far as we would go is that it was in litigation at the time.*

RP 9/10/14 PM at 32-33 (emphasis added). When Captain Sweeney's counsel indicated he might move for mistrial, Judge Shaffer replied "if the plaintiff moves, I might grant it, okay? The Court is that upset about the violation of my rulings, which I do not view as minor." RP 9/10/14 at 35-

36. Plaintiff did not request a mistrial, but did ask for a general curative instruction and monetary sanctions.⁵⁹ CP 3593-601, 3602-05, 3644-55.

Over the next two trial days, the Board's attempts to admit evidence of Nelson as a comparator were denied. RP 9/15/14 AM at 66, 73-75; 9/16/14 at 6-7. Judge Shaffer then announced she was imposing a severe sanction on the Board *sua sponte*—Captain Nelson was “off limits” in all respects, including as a comparator, from that point forward:

(Court): . . . Had plaintiff requested, I would have granted a mistrial. And therefore, the 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.

I am not going to get the jury hearing after – comparing Nelson or looking at Nelson's [trip] reports, because that takes us right into the issue about the litigation, what the litigation was about, and how it resolved, which are all off limits and all were broached over the Court's – in violation of the Court's rulings.

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.

(Board Counsel): I assume that's going to carry into the closing?

⁵⁹ In that motion, Captain Sweeney claimed that Judge Shaffer “had made clear that if the Plaintiff again raised the fact of the Nelson litigation, then the Court, not the litigants, would advise the jury that the Nelson litigation was over.” CP 3595. Captain Sweeney's characterization does not accord with the Board's understanding—then or now—of the court's Nelson ruling as of September 10th. Captain Sweeney's motion did not provide any specific citation to the record to substantiate the characterization. Nor is Captain Sweeney's characterization consistent with the non-specific record citation she did provide. Cf CP 3595 with RP 9/10/14 AM at 5-6 (Judge Shaffer on the Nelson litigation “if it does get out [while playing the video deposition excerpt], which I hope it won't, I'll tell the jury it's irrelevant.”)

(Court): Yes. That's the Court's remedy here, because, frankly, the Court has to take serious action, given how serious the violation of the Court's *in limine* ruling was and how extremely prejudicial it is.

RP 9/17/14 at 17-18 (emphasis added).⁶⁰

2. Judge Shaffer Abused Her Discretion When, Without Making *Burnet* Findings, She Sanctioned the Board by Excluding all Further Evidence and Argument on Nelson

A trial court has broad authority to enter orders *in limine* and to impose sanctions when those orders are violated. CR 16; 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Handbook on Civil Procedure* §§ 57.2; 57.9 (2014). The court “should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines [that] purpose.” *Blair v. Ta-Seattle E. No. 176*, 171 Wn.2d 342, 348, 254 P.3d 797 (2011) (quoting *Burnet*, 131 Wn.2d at 495-96). When the court imposes a severe sanction—one “that affect[s] a party’s ability to present its case”—the court must “set forth the reason for its sanction on the record, as required by *Burnet*.” *Blair*, 171 Wn.2d at 348 (first quote, internal citation omitted); 344 (second quote). The appellate court may not “consider the

⁶⁰ In addition to imposing the severe sanction of excluding all further evidence and argument on Captain Nelson—a sanction not requested by plaintiff—Judge Shaffer granted Sweeney’s requested sanction of a general curative instruction, but denied monetary sanctions. RP 9/18/14 at 169; CP 3835 (curative instruction). Judge Shaffer later denied Captain Sweeney’s renewed motion for monetary sanctions. CP 3935.

facts in the first instance as a substitute for the trial court findings.” *Id.* at 351. Imposing a sanction that requires *Burnet* findings without making the requisite findings on the record constitutes an abuse of discretion. *Id.*

The Supreme Court has made it abundantly clear that “*excluding testimony or evidence as a sanction*” is subject to *Burnet* findings. 15A Teglund § 57.9 (citing *Burnet* and listing progeny cases) (emphasis added). Thus, the sanction of excluding all further evidence and argument on Nelson—the Board’s primary comparator—required *Burnet* findings.⁶¹ Judge Shaffer was well aware of the requirements of *Burnet*—she referenced the case to counsel repeatedly during trial. *See, e.g.*, RP 7/31/14 at 134; 8/18/14 PM at 5; 8/26/14 PM at 9; 9/8/14 AM at 5; 9/9/14 PM at 6; 9/16/14 at 148. By not making *Burnet* findings on the record, Judge Shaffer abused her discretion.

First, regarding the willfulness finding, “a party's failure to comply with a court order will be deemed willful if it occurs without reasonable justification.” *Jones v. City of Seattle*, 179 Wn.2d 322, 345, 314 P.3d 380 (2013), *as corrected* (Feb. 5, 2014). However, “*Burnet*’s willfulness prong

⁶¹ Had it been permitted to do so, the Board could have argued that it denied Captain Nelson a license based on 11 interventions during 16 months of training, while by comparison, Captain Sweeney had 17 interventions during only 13 months of training. CP 503, App. E. And while the Supreme Court has applied harmless error analysis to a trial court’s failure to make required *Burnet* findings, *see Jones v. City of Seattle*, 179 Wn.2d 322, 356, 314 P.3d 380 (2013), because the Board’s Captain Nelson evidence was critical to its defense, excluding it was not harmless error.

would serve no purpose ‘if willfulness follows necessarily from the violation of a discovery order.’ ***Something more is needed.***” *Id.* (quoting *Blair*, 171 Wn.2d at 350 n.3) (emphasis added).

Not only did Judge Shaffer make no explicit finding, but the requisite “something more” did not exist to be found. The Board’s counsel admitted that the intent of his question (“Has the Nelson case recently resolved?”) was “to elicit that the Nelson litigation was done,” which he understood to be allowed by the court’s order. RP 9/10/14 PM at 36. The court and counsel had just that morning discussed that if the Nelson litigation came up during the playback of a video deposition, “we were going to stop and say the litigation is resolved.” RP 9/10/14 PM at 36. Judge Shaffer accepted counsel’s explanation, saying “I am not telling you that I see evil intent.” RP 9/10/14 PM at 36. The “something more” required by *Burnet* should not be deemed satisfied by a witness adding six non-responsive words—“I am pleased with the result”—to an unobjectionable question designed to elicit a yes or no answer.

Second, regarding the prejudice finding, *Burnet* requires the court to “set forth the reason for [the] sanction on the record.” *Blair*, 171 Wn.2d at 344. Judge Shaffer stated that the sanction was necessary “given how serious the violation of the Court’s *in limine* ruling was and how extremely prejudicial it is.” RP 9/17/14 at 17-18. As a finding this is

insufficient because it does not explain the reasons she found the statement—“I am pleased with the result”—to be extremely prejudicial.

And it is difficult to see how the statement could have produced substantial prejudice. After all, before the Nelson case resolved, Judge Shaffer had been willing to let Captain Sweeney get into the details of Nelson’s discrimination allegations, saying that the Board had opened the door. *See, supra* n. 57. But because Captain Sweeney had not done so, the jury remained unaware of the nature of Nelson’s allegations when the Board’s witness said he was “pleased with the results” in the case. RP 9/10/14 PM at 30. Thus, the jury could only speculate as to what “results” “pleased” the witness, which they were immediately instructed not to do. This was reinforced by a general curative instruction, expressly directing the jury to disregard the Nelson litigation. CP 3835; App. F. And as Judge Shaffer herself had said earlier in trial, “I have to believe, and the appellate courts tell me I should believe, that juries follow my limiting instructions.” RP 8/26/14 at 9. Even Captain Sweeney, the ostensibly prejudiced party, sought no more than the general curative instruction to cure that prejudice.

Third, the court must explicitly consider lesser sanctions, which Judge Shaffer did not. She gave a limiting instruction (RP 9/10/14 PM at 30), then questioned whether that instruction worked, saying:

Nelson's been brought into this case enough that the way that came out, I am not sure the Court's instruction worked, okay.

I am normally very confident about jurors following instructions. . . . This time, I am not sure. I am really not sure.

RP 9/10/14 PM at 36. But "I am not sure" is not a finding—uncertainty about whether something worked is not a determination that it did not. And giving a curative instruction does not substitute for the on-the-record consideration of lesser sanctions required by *Burnet* when a severe sanction is imposed. *Teter v. Deck*, 174 Wn.2d 207, 219, 274 P.3d 336 (2012). Likewise, considering and rejecting a greater sanction, as when Judge Shaffer said she would have granted a mistrial if Captain Sweeney had requested one, is not the same as considering whether a lesser sanction would suffice.

Judge Shaffer did not make the *Burnet* findings required for her to impose the severe sanction of excluding all further evidence and argument on Captain Nelson, the Board's primary comparator in this licensing discrimination case. "Where [*Burnet* findings have not been made and] a case has been decided on the merits, either by jury trial or on summary judgment, we [the Supreme Court] have remanded for a new trial." *Teter*, 174 Wn.2d at 221 (citing *Blair*, 171 Wn.2d at 352; *Burnet*, 131 Wn.2d at 498-99). Likewise, here the appropriate remedy is remand for a new trial.

C. The Trial Court Abused its Discretion When it Denied the Board a New Trial After Extrinsic Evidence Directly Relating to the Case's Central Issue was Injected Into Deliberations

On the first day of deliberations, Juror One told the jury about a gender-biased statement related to the case that she remembered hearing on the news, but that had not been introduced into evidence. The next day, Judge Shaffer inquired about the injection of the extrinsic evidence, and all jurors agreed they thought they could put it aside and be fair. When the verdict was returned many deliberation days later, Juror One had abstained on whether the Board discriminated but cast the deciding tenth vote on proximate cause and awarding damages. Judge Shaffer denied the Board's motions for mistrial and new trial based on juror misconduct.

“It is misconduct for a juror to introduce extrinsic evidence into deliberations.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 270, 796 P.2d 737 (1990). Such misconduct entitles a party to a new trial if, based on an objective inquiry, “the extrinsic evidence could have affected the jury's determination.” *Kuhn v. Schnall*, 155 Wn. App. 560, 575, 228 P.3d 828 (2010) (emphasis added). “Any doubt that the misconduct affected the verdict must be resolved against the verdict.” *Richards*, 59 Wn. App. at 273. Here, the only reasonable conclusion—discounting the jurors' subjective opinions that they could be fair and considering solely the objective evidence—is that the misconduct could

have affected the verdict. Judge Shaffer's decisions to the contrary were abuse of discretion.

1. Facts Relating to Juror One's Introduction of Extrinsic Evidence Into the Jury's Deliberations

When the case closed, the jury of twelve with no alternate began deliberations. Minute Entry (09/18/2014). On day two, Juror One informed the court that the day before she had told the other jurors something outside the evidence that she remembered about the case. RP 9/23/14 at 2. With counsel present, Judge Shaffer questioned first Juror One and then the rest of the jury. RP 9/23/14 at 5-22.

Juror One first revealed that she had actually recalled the extrinsic information during trial when "there was something mentioned about the newspaper or the news." RP 9/23/14 at 5. At that point, she had remembered hearing the outside statement "on the news; there was something about bias, gender bias." RP 9/23/14 at 5-6. She agreed with the court that she probably heard the statement "during the time Captain Sweeney was applying to be a licensed pilot," "a long time ago whenever all of that stuff . . . was on the news." RP 9/23/14 at 7.

Juror One then said that the day before, when the jury had been discussing trial evidence about something somebody had said in the newspaper, she had told them "I think I heard that on the news." RP

9/23/14 at 9. The jurors asked whether she “remember[ed] that exact statement,” and she told them she “wasn’t really sure what the statement was exactly but that it was biased.” RP 9/23/14 at 10. More discussion followed, but “not a lot, really – not a lot of discussion about it.” RP 9/23/14 at 10. Judge Shaffer asked, and Juror One agreed that she could put the memory aside and was not “worried at all about [her] ability to be fair to either side because of this memory.” RP 9/23/14 at 12-13.

Judge Shaffer then questioned the jury, saying:

I have just been talking to [Juror One], okay, and I gather that yesterday afternoon, she believes, there was a discussion about evidence that the jury was reviewing in this case concerning statements made by one or more people in this case, and that [Juror One] volunteered to you that she actually recalled reading about or hearing about whatever it was you were discussing, somewhere in the media, either via radio or newspaper, and that her perception was that whatever she heard or read, she felt was gender biased. Okay?

Is that what happened yesterday afternoon?

RP 9/23/14 at 18-19. The jurors generally agreed, but one clarified “the story was something [Juror One] read like 25 years ago” and “it was a big deal” to her, while another said it was a “big deal . . . at the time” and that “the media thought it was a big deal.” RP 9/23/14 at 19.

As with Juror One, Judge Shaffer asked and the jurors agreed that they were not “concern[ed] about putting aside” what Juror One had told them and were not “worried about [their] ability to be fair and impartial

because of this incident.” RP 9/23/14 at 22. Judge Shaffer instructed them not to consider it at all, and sent the entire jury back to continue deliberations. RP 9/23/14 at 22.

The Board immediately moved to exclude Juror One from further deliberations, which Judge Shaffer “noted and denied.” RP 9/23/14 at 23-24. Later that day, the Board moved for a mistrial based on juror misconduct. CP 3858, 3914, 3929. Judge Shaffer summarily denied the motion on day six of deliberations. CP 3937. Also that day, the jury asked “Is it okay for [a] juror to abstain from a vote?” to which the court replied “Ten jurors must agree for you to return a response to any question on the verdict form.” Minute Entry (09/30/2014).

On day seven, the jury returned the verdict for Captain Sweeney. On the first question, “Did the Board of Pilotage Commissioners discriminate against Plaintiff?” Juror One had abstained from voting, yielding a vote of 10:1. RP 10/1/14 at 8. However, Juror One had voted on the other two questions—proximate cause and damages—and provided the deciding tenth yes vote on each, in 10:2 votes. RP 10/1/14 at 9. The jury would have hung on proximate cause and damages without her vote.

The Board’s CR 59 motion for a new trial based on juror misconduct was denied. CP 3994, 4002, 4013, 4018.

2. Juror One’s Injection of Extrinsic Evidence Into Deliberations was Misconduct That Warranted a New Trial—Denying a New Trial was an Abuse of Discretion

“It is misconduct for a juror to introduce extrinsic evidence into deliberations.” *Richards*, 59 Wn. App. at 270. To determine whether a new trial is warranted due to this type of juror misconduct, a court must ask “first whether the alleged information actually constituted misconduct and, second, if misconduct did occur whether it affected the verdict.” *Id.*

On the first question, “the injection of information by a juror to fellow jurors, *which is outside the recorded evidence of the trial* and not subject to the protections and limitations of open court proceedings, constitutes juror misconduct.” *Richards*, 59 Wn. App. at 270 (citing, generally, *Halverson v. Anderson*, 82 Wn.2d 746, 513 P.2d 827 (1973)). Here, there can be no dispute that Juror One injected into deliberations information that was outside of the recorded evidence. As Judge Shaffer acknowledged to counsel, Juror One “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. Plainly “something outside got imported” into jury deliberations. RP 9/23/14 at 16. This constituted actual juror misconduct.

Turning to the second question, whether the juror misconduct affected the verdict, the trial court must make “an objective inquiry into

whether the extrinsic evidence could have affected the jury's determination, not a subjective inquiry into the actual effect of the evidence on the jury.” *Kuhn*, 155 Wn. App at 575 (emphasis added) (holding introduction of extrinsic evidence from media reports into deliberations required new trial). An objective inquiry is necessary “because the actual effect of the evidence inheres in the verdict.” *State v. Briggs*, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

Judge Shaffer made a “subjective inquiry” when she asked the jury whether they believed they could put aside the extrinsic evidence and be fair in their deliberations. RP 9/23/14 at 12-13, 22. Because the jurors’ answers spoke to the potential “actual effect” of the extrinsic evidence on the verdict, those answers inhere in the verdict. Juror rehabilitation of this sort is appropriate, indeed encouraged, *before* trial when screening the venire to select a jury. *See State v. Irby*, 187 Wn. App. 183, 347 P.3d 1103 (2015) (discussing juror rehabilitation process).

But when a judge is determining whether introduction of extrinsic evidence into jury deliberations requires a mistrial, the opinions of seated jurors as to whether that extrinsic evidence may affect their verdict cannot appropriately be considered. “It is not for the juror[s] to say what effect the [extrinsic evidence] may have had upon [their] verdict, but [they] may state facts, and from them the court will determine what was the probable

effect upon the verdict.” *Richards*, 59 Wn. App at 742 (quoting *State v. Parker*, 25 Wn. 405, 415, 65 P. 776 (1901)). To the extent that Judge Shaffer based her decisions denying the Board’s motions for mistrial and new trial on her subjective inquiry “rehabilitating” the jurors, the decisions were based on untenable reasons and constitute abuse of discretion.

Instead, in making her decision, Judge Shaffer was required to engage in “an objective inquiry into whether the extrinsic evidence could have affected the jury’s determination.” *Kuhn*, 155 Wn. App. at 575. The objective facts available for consideration consisted of the following:

- Juror One injected extrinsic evidence into the jury’s deliberations that went to the central, disputed issue of whether the Board discriminated against Captain Sweeney based upon her gender.
- Jurors said the extrinsic evidence was a “big deal” to Juror One and “big deal” to the media at the time. In this regard, Juror One’s account to the court, which downplayed the significance of the statement, was inconsistent with that of the other jurors.
- The extrinsic evidence came in on the first day of deliberations, and there was some discussion of it by the jury. Not until the next day was the jury directed to disregard it and discuss it no further.
- The jury deliberated for five more days, for a total of seven days, before returning its verdict. On the sixth day, the jury asked whether a juror could abstain from a vote.
- Jury polling revealed that Juror One did abstain on the question of whether the Board discriminated against Captain Sweeney. But Juror One did not abstain, and was the deciding tenth vote on proximate cause and awarding damages.

Objective consideration of these facts supports only one reasonable conclusion—that Juror One’s misconduct *could* have affected the verdict.

Notably, while Judge Shaffer was required to engage in “an objective inquiry,” there is nothing in the trial record that establishes Judge Shaffer did, in fact, do so. Judge Shaffer’s rulings on the Board’s motions on juror misconduct are devoid of explanation. RP 9/23/14 at 23-24; CP 3937, 4018. What little the record does offer as to how Judge Shaffer evaluated the juror misconduct issue supports the conclusion that she planned to rely on her subjective rehabilitation of the jury. After questioning Juror One and before questioning the rest of the jury, Judge Shaffer told counsel she was “going to ask the jurors basically if their memory is the same as what [Juror One] just told us” and “whether anybody is concerned about their ability to put that to one side and not consider it or to be fair because of hearing it.” RP 9/23/14 at 17. Failure to apply the proper legal standard when making a discretionary decision is an abuse of discretion. Here, because it is impossible to determine whether Judge Shaffer applied the proper legal standard, the resulting doubt “must be resolved against the verdict.” *Kuhn*, 155 Wn. App at 575.

Basing a decision on erroneous facts not supported by the record is also an abuse of discretion. *State v. Depaz*, 165 Wn.2d 842, 858-59, 204 P.3d 217 (2009). The other jurors’ memories of what Juror One had told them were not the same as what Juror One had told the court, but Judge Shaffer did not clarify with Juror One the discrepancies about whether

what she remembered had occurred 25 years ago or contemporaneously with Captain Sweeney's licensure process, or whether it was actually a big deal to her. RP 9/23/14 at 17-19, 22-23. As well, there was a striking disconnect between Judge Shaffer's questions and Juror One's answers. Judge Shaffer repeatedly asked what Juror One had remembered "about the *newspaper*" and had "*read* about," while Juror One repeatedly answered by describing "a statement *on the news*." *See, e.g.*, RP 9/23/14 at 6 (emphasis added). To the extent Judge Shaffer's decisions rested on unsupported facts, those are untenable grounds and an abuse of discretion.

"Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and will not be reversed on appeal unless the court abused its discretion." *Breckenridge v. Valley Hosp.*, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). But juror misconduct involving the introduction of extrinsic evidence into deliberations "will entitle a party to a new trial if there are reasonable grounds to believe the party has been prejudiced." *Kuhn*, 155 Wn. App. at 575. Here, there are ample grounds to believe the Board was prejudiced. The extrinsic evidence went directly to the central, disputed issue in the case—whether the Board discriminated against Captain Sweeney because of her gender. The jury discussed the extrinsic evidence on the first day of deliberations and were not directed until the second day to put it aside.

The jury then deliberated for six more days before reaching a verdict that the Board had discriminated, in a 10-1 vote from which Juror One abstained. But Juror One participated in and was the deciding tenth vote on the questions of proximate cause and damages. There can be no reasonable doubt that the extrinsic evidence could have affected the verdict in a manner prejudicial to the Board.

“If misconduct is found, great deference is due the trial court’s determination that no prejudice occurred.” *Richards*, 59 Wn. App at 271. But “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 presented here, it cannot be concluded beyond reasonable doubt that the extrinsic evidence did not contribute to the verdict. Judge Shaffer’s decision to the contrary constitutes an abuse of discretion and should be reversed.⁶²

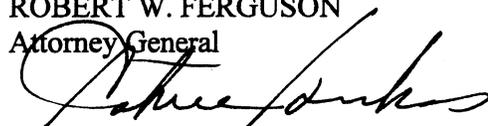
⁶² This is yet another independent basis in which Juror One’s misconduct warrants a new trial. Juror One failed to inform the court when during trial she remembered that she did have previous knowledge of the case, a memory of hearing a news account about a gender-biased statement that was, reportedly, a “big deal” to her and a “big deal” at the time to the media. A juror may be excused for actual or implied bias, which is a state of mind on the part of the juror that satisfies the court that the person cannot act impartially. *Kuhn*, 155 Wn. App. at 574. The only trial testimony touching on media accounts occurred during the first week of trial. CP 3861. Juror One apparently kept quiet about her remembered knowledge for six weeks before disclosing it, and then did so not to the court but to the jury during deliberations. The reasonable objective inference from this fact is that Juror One was not acting impartially and was, in fact, seeking to influence the jury. CP 3861-61.

VI. CONCLUSION

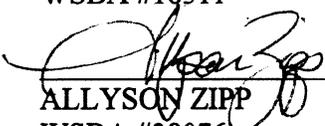
Captain Sweeney charged the Washington Board of Pilotage with gender discrimination. The Board was entitled to receive a trial on a level playing field. The prejudice that resulted from the trial court's abuses of discretion ensured that it did not. The Board requests retrial in this matter before a new department of the KCSC with Captain Sweeney's present counsel barred from participating.

RESPECTFULLY SUBMITTED this 14th day of September, 2015.

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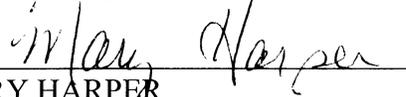
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 14 day of September at Seattle, Washington



MARY HARPER
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SEP 14 2014 PM 2:29

APPENDIX A



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Superior Court Case Summary

About Dockets

Court: King Co Superior Ct
Case Number: 11-2-36792-4

About Dockets

Sub	Docket Date	Docket Code	Docket Description	Misc Info
1	10-25-2011	COMPLAINT	Complaint	
2	10-25-2011	SET CASE SCHEDULE JDG0013	Set Case Schedule Judge Theresa B. Doyle, Dept 13	04-15-2013ST
3	10-25-2011	CASE INFORMATION COVER SHEET LOCS	Case Information Cover Sheet Original Location - Seattle	
4	10-25-2011	SUMMONS	Summons	
5	10-25-2011	SUMMONS	Summons	
6	10-25-2011	JURY DEMAND RECEIVED - TWELVE	Jury Demand Received - Twelve	250.00
7	11-01-2011	NOTICE OF APPEARANCE	Notice Of Appearance /defts	
7A	11-01-2011	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
7B	11-01-2011	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
8	11-02-2011	NOTICE OF APPEARANCE	Notice Of Appearance /puget Sound	
9	11-23-2011	ANSWER	Answer /bord	
10	12-01-2011	NOTICE OF APPEARANCE	Notice Of Appearance/wa State Board Of Pilotage Commissioners/amended	
11	12-06-2011	ANSWER	Answer /puget Sound Pilots	
12	12-09-2011	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
13	12-14-2011	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
14	12-29-2011	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
15	05-30-2012	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
16	12-14-2012	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
17	12-20-2012	JURY DEMAND RECEIVED - TWELVE	Jury Demand Received - Twelve	250.00
18	01-04-2013	STIPULATION	Stipulation /joint	

You are viewing the case docket or case summary. Each Court level uses different terminology for this information, but for all court levels, it is a list of activities or documents related to the case. District and municipal court dockets tend to include many case details, while superior court dockets limit themselves to official documents and orders related to the case.

If you are viewing a district municipal, or appellate court docket, you may be able to see future court appearances or calendar dates if there are any. Since superior courts generally calendar their caseloads on local systems, this search tool cannot display superior court calendaring information.

Directions

King Co Superior Ct
 516 3rd Ave, Rm C-203
 Seattle, WA 98104-2361
Map & Directions
 206-296-9100[Phone]
 206-296-0986[Fax]
Visit Website

Disclaimer

What is this website? It is a search engine of cases filed in the municipal, district, superior, and appellate

19	01-04-2013	MOTION TO CHANGE TRIAL DATE	Motion To Change Trial Date /joint		courts of the state of Washington. The search results can point you to the official or complete court record.
20	01-08-2013	ORDER AMENDING CASE SCHEDULE	Order Amending Case Schedule	08-09-2013ST	
21	04-16-2013	PROTECTIVE ORDER	Protective Order /stip		
22	04-30-2013	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability		How can I obtain the complete court record?
23	05-03-2013	MOTION TO CONTINUE	Motion To Continue /pla		You can contact the court in which the case was filed to view the court record or to order copies of court records.
24	05-03-2013	DECLARATION	Declaration Of Daniel Johnson		
25	05-03-2013	NOTICE OF HEARING	Notice Of Hearing /continue Trial	05-13-2013	
26	05-09-2013	RESPONSE	Response /puget Sound		
27	05-09-2013	DECLARATION	Declaration Of Sheryl Willert		How can I contact the court?
28	05-09-2013	RESPONSE	Response /wa State Pilotage		Click here for a court directory with information on how to contact every court in the state.
29	05-09-2013	DECLARATION	Declaration Of Tad R. O'neill		
30	05-10-2013	REPLY	Reply /pla		Can I find the outcome of a case on this website?
31	05-10-2013	DECLARATION	Declaration Of Deborah Senn		No. You must consult the local or appeals court record.
32	05-20-2013	ORD FOR CONTINUANCE OF TRIAL DATE	Ord For Continuance Of Trial Date	02-04-2014ST	
33	05-23-2013	NOTICE OF HEARING	Notice Of Hearing /summ Jdgmt	06-21-2013	
34	05-23-2013	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment / Pilot		How do I verify the information contained in the search results?
35	05-23-2013	DECLARATION	Declaration Of Walter Tabler		You must consult the court record to verify all information.
36	06-10-2013	NOTICE OF HEARING	Notice Of Hearing /vol Dismiss	06-18-2013	
37	06-10-2013	MOTION TO DISMISS	Motion To Dismiss /pla		
38	06-10-2013	DECLARATION	Declaration Of David Breskin		Can I use the search results to find out someone's criminal record?
39	06-18-2013	ORDER DISMISSING LITIGANT	Order Dismiss Puget Sound Pilots		No. The Washington State Patrol (WSP) maintains state criminal history record information. Click here to order criminal history information.
40	07-17-2013	NOTICE OF ASSOCIATION OF COUNSEL	Notice Of Association Of Counsel		
41	09-03-2013	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability		
42	09-16-2013	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability		
43	10-30-2013	PROTECTIVE ORDER	Protective Order Re Pilots/trainees		Where does the information come from?
44	12-10-2013	NOTICE OF ATTY CHANGE OF ADDRESS	Notice Of Atty Change Of Address		Clerks at the municipal, district, superior, and appellate courts across the state enter information on the cases filed in their courts. The search engine will update approximately twenty-four hours from the time the clerks enter the information. This website is maintained by the Administrative Office of the Court for the State of Washington.
45	12-10-2013	ORDER FOR CHANGE OF JUDGE JDG0027	Order For Change Of Judge Judge Joan Dubuque, Dept 27		
46	12-12-2013	MOTION TO CHANGE TRIAL DATE	Motion To Change Trial Date /stip		
47	12-23-2013	ORD FOR CONTINUANCE OF TRIAL DATE	Ord For Continuance Of Trial Date	07-14-2014ST	
48	03-20-2014	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability		

49	04-07-2014	NOTICE OF HEARING	Notice Of Hearing /quash	04-15-2014
50	04-07-2014	MOTION	Motion /puget Sound Pilot	
51	04-07-2014	DECLARATION	Declaration Of Jon Morrone	
52	04-07-2014	DECLARATION	Declaration Of Walter S. Tabler	
53	04-11-2014	RESPONSE	Response /pla	
54	04-11-2014	DECLARATION	Declaration Of David Breskin	
55	04-14-2014	REPLY	Reply /puget Sound Pilots	
56	04-14-2014	DECLARATION	Declaration Of Sheryl Willert	
57	04-14-2014	DECLARATION	Declaration Of Jon Morrone	
58	04-14-2014	DECLARATION	Declaration Of Walter S. Tabler	
59	04-16-2014	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
60	05-02-2014	NOTICE OF HEARING	Notice Of Hearing /continue Trial	05-12-2014
61	05-02-2014	NOTICE OF HEARING	Notice Of Hearing /continue Trial	05-12-2014
62	05-02-2014	MOTION TO CONTINUE	Motion To Continue /pla	
63	05-02-2014	DECLARATION	Declaration Of David Breskin	
64	05-08-2014	RESPONSE	Response /wa Board Of Pilotage	
65	05-08-2014	DECLARATION	Declaration Tad Robinson Oneill	
66	05-09-2014	REPLY	Reply /pla	
67	05-09-2014	ORDER EXTENDING	Order Extending Deposition Limit /stip	
68	05-14-2014	NOTICE OF HEARING	Notice Of Hearing /compel Recording	05-23-2014
69	05-14-2014	MOTION TO COMPEL	Motion To Compel	
70	05-14-2014	DECLARATION	Declaration Of David Breskin	
71	05-14-2014	DECLARATION	Declaration Of Deborah Senn	
72	05-14-2014	RECUSAL OF JUDGE	Recusal Of Judge /thorp	
73	05-14-2014	ORDER ON ASSIGNMENT/REASSIGNMENT JDG0012	Order On Assignment/reassignment Judge Dean S Lum, Dept 12	
74	05-16-2014	ORD FOR CONTINUANCE OF TRIAL DATE	Ord For Continuance Of Trial Date	08-04-2014ST
75	05-16-2014	ORDER AMENDING CASE SCHEDULE	Order Amending Case Schedule	08-04-2014
76	05-21-2014	RESPONSE	Response /wa State Board	
77	05-21-2014	DECLARATION	Declaration Of Tad O'neill	
78	05-21-2014	DECLARATION	Declaration Of Guy M. Bowman	
79	05-22-2014	REPLY	Reply /pla	

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- ▶ **Guarantee that the information is accurate or complete?**
NO
- ▶ **Guarantee that the information is in its most current form?**
NO
- ▶ **Guarantee the identity of any person whose name appears on these pages?**
NO
- ▶ **Assume any liability resulting from the release or use of the information?**
NO

80	05-22-2014	DECLARATION	Declaration Of Daniel Johnson	
81	05-22-2014	PRAECIPE	Praecipe Re Pltf Reply	
82	05-22-2014	PRAECIPE	Praecipe Re Pltf Reply	
83	05-27-2014	ORDER	Order Requesting Dcm For In Camera Rvw	
84	06-10-2014	MOTION TO COMPEL	Motion To Compel /plt	
85	06-10-2014	DECLARATION	Declaration Of David Breskin	
85A	06-10-2014	ORDER TO COMPEL	Order To Compel In Part	
86	06-11-2014	NOTICE OF HEARING	Notice Of Hearing /compel Depo	06-19-2014
87	06-11-2014	MOTION TO COMPEL	Motion To Compel /plt	
88	06-11-2014	DECLARATION	Declaration Of David Breskin	
89	06-13-2014	DECLARATION	Declaration Of Tad Oneill	
90	06-13-2014	DECLARATION	Declaration Of Tad Oneill	
91	06-13-2014	DECLARATION	Declaration Of Tad Oneill	
92	06-13-2014	DECLARATION	Declaration Of Peggy Larson	
93	06-13-2014	DECLARATION	Declaration Of M Peter Scontrino	
94	06-13-2014	ORDER SEALING DOCUMENT	Order Sealing Document (sub 95) /attorney-client Privilege & Work Product Docs	
95	06-13-2014	ATTACHMENT	Attachment /attorney-client /sealed Per Sub 94 Privilege & Work Product Documents	
96	06-13-2014	NOTICE OF HEARING	Notice Of Hearing /summ Jdgt	07-11-2014
97	06-13-2014	MOTION FOR SUMMARY JUDGMENT	Motion For Summary Judgment/defs	
98	06-13-2014	DECLARATION	Declaration Of Patrick Hannigan	
99	06-13-2014	DECLARATION	Declaration Of Dr Norman Hertz	
99A	06-13-2014	NOTICE	Notice Re: Unscannable Document Converted To File Exhibit	
100	06-17-2014	REPLY	Reply /def Board	
101	06-17-2014	DECLARATION	Declaration Of Tad Robinson Oneill	
102	06-18-2014	MOTION TO COMPEL	Motion To Compel	
103	06-18-2014	DECLARATION	Declaration Of David Breskin	
104	06-18-2014	PRAECIPE	Praecipe	
105	06-20-2014	NOTICE OF HEARING	Notice Of Hearing /extension Time	06-24-2014
106	06-20-2014	MOTION	Motion /pla	
107	06-20-2014	AFFIDAVIT IN SUPPORT	Affidavit In Support/david Breskin	

108	06-20-2014	ORDER TO COMPEL	Order To Compel Deposition	
109	06-23-2014	ORDER ON ASSIGNMENT/REASSIGNMENT JDG0011	Order On Assignment/reassignment Judge Catherine Shaffer, Dept 11	
110	06-24-2014	NOTICE OF HEARING	Notice Of Hearing /protective Ord	07-02-2014
111	06-24-2014	MOTION	Motion For Protective Ord /board	
112	06-24-2014	DECLARATION	Declaration Of Tad Robinson O'neill	
113	06-25-2014	NOTICE	Notice Of Conversion Of Filing	
114	06-25-2014	ORDER OF CONTINUANCE	Order Of Continuance /summ Jdgt /set Brief Schedule	08-01-2014
115	07-03-2014	NOTICE RE: EVIDENTIARY RULE	Notice Re: Evidentiary Rule	
116	07-07-2014	ORDER DENYING MOTION/PETITION	Order Denying Mtn For Protective Order As Moot	
117	07-08-2014	ORD REQUIRING JOINT PRETRIAL REPORT	Ord Requiring Joint Pretrial Report	
118	07-14-2014	MOTION TO COMPEL	Motion To Compel /pla	
119	07-14-2014	DECLARATION	Declaration Of David E Breskin	
120	07-14-2014	NOTICE OF HEARING	Notice Of Hearing /compel Dep	07-22-2014
121	07-14-2014	WITNESS LIST	Witness & Exhibit List /def	
122	07-14-2014	PRE-TRIAL REPORT	Pre-trial Report/joint Confirmation	
122A	07-17-2014	MOTION TO COMPEL	Motion To Compel / Pla	
122B	07-17-2014	NOTICE OF HEARING	Notice Of Hearing /compel	07-25-2014
122C	07-17-2014	DECLARATION	Declaration Of Deborah Senn	
123	07-18-2014	OBJECTION / OPPOSITION	Opposition /def	
124	07-18-2014	DECLARATION	Declaration Of Tad Robinson O'neill	
124A	07-18-2014	NOTICE OF HEARING	Notice Of Hearing /compel	07-29-2014
124B	07-18-2014	MOTION TO COMPEL	Motion To Compel	
124C	07-18-2014	DECLARATION	Declaration Of David Breskin	
125	07-21-2014	DECLARATION	Declaration Of David Breskin	
126	07-21-2014	DECLARATION	Declaration Of Katharine Sweeney	
127	07-21-2014	DECLARATION	Declaration Of Barbara Reskin	
128	07-21-2014	RESPONSE	Response To Def Mt/pla	
129	07-21-2014	RESPONSE	Response To Def Mt/ Pla	
130	07-21-2014	DECLARATION	Declaration Of David Breskin	
131	07-21-2014	REPLY	Reply /pla	

132	07-21-2014	OBJECTION / OPPOSITION	Objection / Opposition /defs	
133	07-21-2014	NOTICE	Notice For Attendance At Trial	
134	07-23-2014	OBJECTION / OPPOSITION	Objection / Opposition /def	
135	07-23-2014	DECLARATION	Declaration Of Tad O'neill	
136	07-23-2014	DECLARATION	Declaration Of Jennifer Ostwald	
137	07-23-2014	NOTICE OF HEARING	Notice Of Hearing /limine	07-31- 2014
138	07-23-2014	MOTION IN LIMINE	Motion In Limine /pla	
139	07-23-2014	DECLARATION	Declaration Of David Breskin	
140	07-23-2014	NOTICE OF HEARING	Notice Of Hearing /limine	07-31- 2014
141	07-23-2014	MOTION IN LIMINE	Motion In Limine /def	
142	07-23-2014	NOTICE OF HEARING ACTION	Notice Of Hearing Shaffer/mt To Overrule Object/pla	07-31- 2014
143	07-23-2014	MOTION	Motion /pla	
144	07-23-2014	DECLARATION	Declaration Of David Breskin	
145	07-24-2014	REPLY	Reply /pla	
146	07-24-2014	OBJECTION / OPPOSITION	Objection / Opposition/pla	
147	07-25-2014	OBJECTION / OPPOSITION	Objection / Opposition /def	
148	07-25-2014	DECLARATION	Declaration Of Tad O'neill	
149	07-28-2014	REPLY	Reply/defendant	
150	07-28-2014	DECLARATION	Declaration Of Tad Robinson O'neill	
151	07-28-2014	REPLY	Reply/plaintiff	
152	07-28-2014	DECLARATION	Declaration Of David E Breskin	
153	07-28-2014	TRIAL BRIEF	Trial Brief/defendant	
154	07-28-2014	JOINT STATEMENT OF EVIDENCE	Joint Statement Of Evidence	
154A	07-28-2014	DEFENDANT'S PROPOSED INSTRUCTIONS	Defendant's Proposed Instructions	
154B	07-28-2014	INTERROGATORIES	Interrogatories /voir Dire Quests	
155	07-29-2014	TRIAL BRIEF	Trial Brief/plaintiff	
156	07-29-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
157	07-29-2014	OBJECTION / OPPOSITION	Objection / Opposition Def	
158	07-29-2014	OBJECTION / OPPOSITION	Objection / Opposition /def	
159	07-29-2014	DECLARATION	Declaration Of Tad O'neill	
160	07-29-2014	DECLARATION	Declaration Of David Breskin	
161	07-29-2014	RESPONSE	Response /pla	
162	07-29-2014	JOINT STATEMENT OF EVIDENCE	Joint Statement Of Evidence/amended	

162A	07-29-2014	PLAINTIFF'S PROPOSED INSTRUCTIONS	Plaintiff's Proposed Instructions
162B	07-29-2014	PLAINTIFF'S PROPOSED INSTRUCTIONS	Plaintiff's Proposed Instructions
162C	07-29-2014	ORDER TO COMPEL	Order To Compel
162D	07-29-2014	ORDER TO COMPEL	Order To Compel
163	07-30-2014	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service
164	07-30-2014	REPLY	Reply To Motion /pla
165	07-30-2014	DECLARATION	Declaration Of David Breskin
166	07-30-2014	REPLY	Reply Of Defendant
167	07-30-2014	REPLY	Reply Of Plaintiff
168	07-30-2014	DECLARATION	Declaration Of Daniel Johnson
-	07-31-2014	AUDIO LOG	Audio Log W829
169	08-01-2014	SUMMARY JUDGMENT HEARING	Summary Judgment Hearing Cr Jodi Dean
		JDG0011	Judge Catherine Shaffer, Dept 11
170	08-01-2014	ORDER DENYING MOTION/PETITION	Order Denying Mtn For Summary Jdgt
171	08-04-2014	MOTION HEARING JDG0011	Motion Hearing Judge Catherine Shaffer, Dept 11
-	08-04-2014	AUDIO LOG	Audio Log Dr W829
172	08-05-2014	RESPONSE	Response /pla
173	08-05-2014	MOTION HEARING JDG0011	Motion Hearing Judge Catherine Shaffer, Dept 11
173A	08-05-2014	ORDER	Order On Motions In Limine
173B	08-06-2014	JURY TRIAL	Jury Trial Cr Kevin Moll/joanne Leatiota
		JDG0011	Judge Catherine Shaffer, Dept 11
-	08-06-2014	AUDIO LOG	Audio Log W829
-	08-06-2014	JURY FEE ASSESSED	Jury Fee Assessed /12
174	08-07-2014	BRIEF	Brief /board Of Pilotage
175	08-11-2014	JOINT STATEMENT OF EVIDENCE	Joint Statement Of Evidence/amended
176	08-11-2014	ORDER GRANTING MOTION/PETITION	Order Granting Motion In Limine In Part
177	08-11-2014	NOTICE	Notice Juror Question For Witness
178	08-11-2014	DECLARATION	Declaration Of M Peter Scontrino
179	08-12-2014	INTERROGATORIES	Interrogatories /juror Inquiry
179A	08-12-2014	DEPOSITION OF	Deposition Of Captain Harry Dudley
179B	08-12-2014	DEPOSITION OF	Deposition Of Harry Dudley

180	08-13-2014	INTERROGATORIES	Interrogatories/juror Question	
181	08-13-2014	DEPOSITION OF	Deposition Of Elsie Hulsizer	
182	08-14-2014	INTERROGATORIES	Interrogatories/juror Question	
183	08-14-2014	INTERROGATORIES	Interrogatories/juror Question	
184	08-15-2014	NOTICE OF HEARING	Notice Of Hearing /limine	08-18-2014
185	08-15-2014	MOTION IN LIMINE	Motion In Limine /pla	
185A	08-18-2014	TRANSCRIPT	Transcript	
185B	08-18-2014	TRANSCRIPT	Transcript	
186	08-19-2014	INTERROGATORIES	Interrogatories /juror Question	
187	08-19-2014	DECLARATION	Declaration Of Courtney Amidon	
188	08-19-2014	INTERROGATORIES	Interrogatories /juror Question	
189	08-20-2014	MOTION	Motion /def	
190	08-20-2014	INTERROGATORIES	Interrogatories /juror Questions	
191	08-20-2014	RESPONSE	Response /pla	
192	08-20-2014	DECLARATION	Declaration Of Daniel Johnson	
192A	08-20-2014	DEPOSITION OF	Deposition Of Patrick Hannigan	
192B	08-20-2014	DEPOSITION OF	Deposition Of Patrick Hannigan	
192C	08-20-2014	DEPOSITION OF	Deposition Of Patrick Hannigan	
193	08-25-2014	MOTION AND AFFIDAVIT/DECLARATION	Motion And Affidavit/decl/ Pla	
194	08-25-2014	DECLARATION	Declaration Of David Breskin	
195	08-25-2014	NOTICE OF HEARING	Notice Of Hearing /sanctions	08-25-2014
195A	08-25-2014	DECLARATION	Declaration Of Tad Robinson O'neill	
195B	08-25-2014	DECLARATION	Declaration Of M Peter Scontrino	
195C	08-25-2014	MOTION TO DISMISS	Motion To Dismiss /def	
195D	08-25-2014	INTERROGATORIES	Interrogatories /jury Quest	
195E	08-25-2014	MOTION	Motion /def	
195F	08-25-2014	DECLARATION	Declaration Of Shawna Erickson	
195G	08-25-2014	DECLARATION	Declaration Of Jana Hartman	
195H	08-25-2014	DEPOSITION OF	Deposition Of Captain Don Mayer	
196	08-26-2014	MOTION	Motion /pla	
197	08-26-2014	DECLARATION	Declaration Of Jennifer Ostwald	
198	08-26-2014	DECLARATION	Declaration Of Tad Robinson	

199	08-26-2014	RESPONSE	Response /def	
200	08-26-2014	INTERROGATORIES	Interrogatories /juror Question	
201	08-26-2014	OBJECTION / OPPOSITION	Objection /def	
202	08-26-2014	INTERROGATORIES	Interrogatories /juror Question	
203	08-26-2014	RESPONSE	Response /def	
204	08-27-2014	INTERROGATORIES	Interrogatories /juror Question	
205	08-27-2014	INTERROGATORIES	Interrogatories /juror Question	
206	08-27-2014	INTERROGATORIES	Interrogatories /juror Question	
206A	08-28-2014	INTERROGATORIES	Interrogatories /juror Question	
206B	08-28-2014	INTERROGATORIES	Interrogatories /juror Question	
206C	08-28-2014	MOTION	Motion/limit Crossexamination/def	
206D	08-28-2014	DEPOSITION OF	Deposition Of Charles Davis	
207	08-29-2014	RESPONSE	Response To Def Mt/pla	
208	08-29-2014	MOTION IN LIMINE	Motion In Limine /plft	
209	09-02-2014	RESPONSE	Response /pla	
210	09-02-2014	DECLARATION	Declaration Of David E Breskin	
211	09-02-2014	BRIEF	Brief /plft	
211A	09-02-2014	NOTICE OF HEARING	Notice Of Hearing /re Nelson	09-02-2014
211B	09-02-2014	DECLARATION	Declaration Of Tad Robinson	
211C	09-02-2014	JURY NOTE	Jury Note	
211D	09-02-2014	JURY NOTE	Jury Note	
211E	09-02-2014	MOTION	Motion Of Board Of Pilotage	
211F	09-02-2014	OBJECTION / OPPOSITION	Objection / Opposition	
211G	09-02-2014	RESPONSE	Response To Mt Limit Case/def Board	
211H	09-02-2014	REPORT	Report To Response /defendant Board	
211I	09-02-2014	INTERROGATORIES	Interrogatories/juror Question	
211J	09-02-2014	DECLARATION	Declaration Of David E Breskin	
211K	09-02-2014	RESPONSE	Response /plft	
212	09-03-2014	REPLY	Reply Of Deft	
212A	09-03-2014	DEPOSITION OF	Deposition Of Craig Lee	
213	09-04-2014	INTERROGATORIES	Interrogatories /jury Quest For Wit	
214	09-04-2014	INTERROGATORIES	Interrogatories /jury Quest For Wit	
215	09-05-2014	MOTION AND AFFIDAVIT/DECLARATION	Motion And Affidavit/declaration	
216	09-05-2014	NOTICE OF HEARING		

			Notice Of Hearing /limit Defense	09-08- 2014
217	09-05-2014	ORDER DENYING MOTION/PETITION	Order Denying Motion For Sanctions	
218	09-08-2014	DECLARATION	Declaration Of Jennifer Ostwald	
219	09-08-2014	JURY NOTE	Jury Note /commissioner Davis	
219A	09-08-2014	DEPOSITION OF	Deposition Of Robert Kromann	
220	09-09-2014	INTERROGATORIES	Interrogatories /jury Quest To Wit	
220A	09-09-2014	INTERROGATORIES	Interrogatories /jury Quest To Wit	
220B	09-09-2014	BRIEF	Brief /defs	
220C	09-09-2014	INTERROGATORIES	Interrogatories /jury Quest To Wit	
221	09-10-2014	BRIEF	Brief /pla	
222	09-10-2014	RESPONSE	Response To Def Brief/pla	
223	09-11-2014	DECLARATION	Declaration Of William Partin	
224	09-11-2014	STATEMENT	Statement /def	
225	09-11-2014	REPLY	Reply /def	
226	09-12-2014	REPLY	Reply / Pltf	
227	09-12-2014	RESPONSE	Response /pla	
228	09-12-2014	RESPONSE	Response /amended /pla	
229	09-12-2014	DECLARATION	Declaration Of Deborah Senn	
230	09-12-2014	DECLARATION	Declaration Of Deborah Senn	
231	09-12-2014	NOTICE OF HEARING	Notice Of Hearing /curative	09-15- 2014
232	09-12-2014	MOTION	Motion For Curative Instruction /pl	
233	09-15-2014	RESPONSE	Response To Sanctions/def	
234	09-15-2014	ORDER GRANTING MOTION/PETITION	Order Granting Motion For Sanctions	
235	09-15-2014	DECLARATION	Declaration Of Jennifer Ostwald	
236	09-15-2014	AFFIDAVIT IN SUPPORT	Affidavit In Support/tad Oneill	
236A	09-16-2014	INTERROGATORIES	Interrogatories /jury Quest For Wit	
236B	09-16-2014	MOTION	Motion /def	
236C	09-16-2014	OBJECTION / OPPOSITION	Objection / Opposition /def	
237	09-17-2014	INTERROGATORIES	Juror Question For Witness	
238	09-17-2014	INTERROGATORIES	Juror Question For Witness	
239	09-17-2014	DECLARATION	Defts Offer Of Proof Re Testimony	
239A	09-17-2014	COURT'S INSTRUCTIONS TO JURY	Court's Instructions To Jury	
240	09-19-2014	NOTICE OF HEARING		

			Notice Of Hearing /reconsideration	09-29-2014
241	09-19-2014	MOTION FOR RECONSIDERATION	Motion For Reconsideration /pla	
242	09-19-2014	DECLARATION	Declaration Of David Breskin	
242A	09-23-2014	NOTICE OF HEARING	Notice Of Hearing /mtn For Mistrial	10-01-2014
242B	09-23-2014	MOTION	Motion For Mistrial /def	
243	09-24-2014	RESPONSE	Response /def	
244	09-26-2014	REPLY	Reply /pla	
245	09-26-2014	DECLARATION	Declaration Of Daniel F. Johnson	
246	09-29-2014	RESPONSE	Response /pla	
247	09-29-2014	DECLARATION	Declaration Of Daniel Johnson	
248	09-29-2014	REPLY	Reply	
249	09-29-2014	ORDER ON MTN FOR RECONSIDERATION	Order On Mtn For Reconsideration /denied	
250	09-30-2014	ORDER DENYING MOTION/PETITION	Order Denying Motion For Mistrial	
250A	09-30-2014	JURY NOTE	Jury Note	
251	10-01-2014	SPECIAL VERDICT	Special Verdict	
252	10-01-2014	STIP&OR RET EXHBTS UNOPNED DEPOSTNS	Stip&or Ret Exhbts Unopned Depostns	
253	10-03-2014	WITNESS RECORD	Witness Record	
254	10-03-2014	NOTICE OF PRESENTATION	Notice Of Presentation	
255	10-09-2014	EXHIBIT LIST	Exhibit List	
256	10-14-2014	JUDGMENT	Judgment	
257	10-16-2014	MOTION TO DISMISS	Motion To Dismiss /def	
258	10-16-2014	NOTICE OF HEARING	Notice Of Hearing /new Trial	10-23-2014
259	10-17-2014	NOTICE OF HEARING	Notice Of Hearing /dismissal	10-27-2014
260	10-20-2014	NOTICE OF HEARING	Notice Of Hearing /dismissal	10-27-2014
261	10-23-2014	RESPONSE	Response /pla	
261A	10-23-2014	AGREED ORDER	Agreed Order To Waive Oral Argument	
262	10-24-2014	REPLY	Reply /def	
263	10-28-2014	ORDER DENYING MOTION/PETITION	Order Denying Motion For Dismissal	
263A	10-31-2014	NOTICE OF HEARING	Notice Of Hearing /suppl Jdgt Award	11-10-2014
263B	10-31-2014	DECLARATION	Declaration Of Deborah Senn	
263C	10-31-2014	DECLARATION	Dclr/palmer Morrel-samuels, Ph.d.	
263D	10-31-2014	DECLARATION	Declaration Of Scott Minnig, Cpa	
263E	10-31-2014	MOTION AND AFFIDAVIT/DECLARATION	Motion And Affidavit/declaration	
264	11-03-2014	DECLARATION	Declaration Of Cynthia Heidelberg	

265	11-03-2014	DECLARATION	Declaration Of David Breskin	
266	11-03-2014	NOTICE OF HEARING	Notice Of Hearing /shorten Time	11-04-2014
267	11-03-2014	MOTION	Motion /def	
268	11-03-2014	DECLARATION	Declaration Of Tad O'neill	
269	11-03-2014	NOTICE OF HEARING	Notice Of Hearing /continue	11-05-2014
270	11-03-2014	MOTION TO CONTINUE	Motion To Continue	
271	11-03-2014	DECLARATION	Declaration Of Tad O'neill	
272	11-03-2014	DECLARATION	Declaration Of Jana Hartman	
273	11-04-2014	RESPONSE	Response /pla	
274	11-04-2014	DECLARATION	Declaration Of David Breskin	
275	11-04-2014	DECLARATION	Declaration Of Scott Minnig	
276	11-05-2014	MOTION	Motion /pla's Errata	
277	11-05-2014	ORDER OF CONTINUANCE	Order Of Continuance	12-10-2014
278	11-07-2014	NOTICE OF APPEAL TO COURT OF APPEAL	Notice Of Appeal To Court Of Appeal	
-	11-07-2014	APPELLATE FILING FEE	Appellate Filing Fee	290.00
279	11-18-2014	ORDER	Order Re Briefing Schedule	
280	12-08-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers/amend 72664-1-i / O'neill Did Not Prepare/ Duplicate	
281	12-09-2014	RESPONSE	Response /def	
282	12-09-2014	DECLARATION	Declaration Of Tad Robinson O'neill	
283	12-09-2014	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers/amend Ex Rm Notified 02-10-15 72664-1 / O'neill Pgs 1-4052 /pgs 4053-4093 Sealed Trans To Coa 02-10-15 & Exh	
284	12-17-2014	INDEX	Index Clks Pprs Pgs 1-4052	
285	12-17-2014	INDEX	Index Clks Pprs Pg 4053-4093 Sealed	
285A	12-17-2014	NOTICE	Notice Of Errata /pla	
285B	12-17-2014	DECLARATION	Declaration Of David E Breskin	
286	12-18-2014	DECLARATION	Declaration Of David Breskin	
287	12-18-2014	DECLARATION	Declaration Of Melissa Vizzare	
288	12-18-2014	DECLARATION	Declaration Of Deborah Senn	
289	12-18-2014	REPLY	Reply /pla	

290	12-18-2014	OBJECTION / OPPOSITION	Objection / Opposition /def	
291	12-18-2014	RESPONSE	Response /pla	
292	12-22-2014	ORDER	Order Granting Ptf Motion	
293	12-26-2014	PERFECTION NOTICE FROM CT OF APPLS	Perfection Notice From Ct Of Appls Coa #726641	
294	12-29-2014	NOTICE OF PRESENTATION	Notice Of Presentation Of Judgment	01-07- 2015
-	12-31-2014	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 07-31-14	
-	12-31-2014	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-23-14	
295	12-31-2014	MOTION FOR RECONSIDERATION	Motion For Reconsideration /def	
296	12-31-2014	DECLARATION	Declaration/jana Hartman	
297	01-02-2015	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
298	01-08-2015	AGREED ORDER	Agreed Order Re Amend Suppl Jdgmt	
299	01-08-2015	ORDER	Order Award Attys Fees & Costs	
300	01-08-2015	JUDGMENT	Judgment Awarding Fees/costs	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-05-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-08-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-11-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-12-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-13-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-14-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-18-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-19-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-20-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-25-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-26-14	

-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-27-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 08-28-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-02-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-03-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-04-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-08-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-09-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-10-14	
-	01-09-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 01-14-15 Hrg Of 09-15-14	
301	02-04-2015	TRANSCRIPT	Transcript	
302	02-05-2015	NOTICE OF HEARING	Notice Of Hearing /complete Record	02-13- 2015
303	02-05-2015	MOTION AND AFFIDAVIT/DECLARATION	Motion And Affidavit/declaration	
304	02-05-2015	DECLARATION	Declaration /jennifer Ostwald	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-11-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-12-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-13-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-14-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-18-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-19-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-25-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-26-2014	
-	02-05-2015	VERBATIM RPT TRANSMITTED		

			Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-27-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 08-28-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-03-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-04-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-08-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-09-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-10-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-15-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-16-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-17-2014
-	02-05-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 02-11-2015 Hrg Of 09-18-2014
305	02-09-2015	CORRESPONDENCE	Correspondence From Coa
306	02-09-2015	COMMENT ENTRY	Clks Pprs Pgs 1-4052
307	02-09-2015	COMMENT ENTRY	Clks Pprs Pgs 4053-4093
307A	02-10-2015	LTR OF TRNSMTTAL/XHIBTS TO APP CRT	Ltr Of Trnsmttal/xhibts To App Crt
308	02-11-2015	RESPONSE	Response /pla
309	02-12-2015	REPLY	Reply /def
310	02-12-2015	REPORT	Report Of Proceedings /narrative
311	02-13-2015	JUDGMENT	Supplemental Judgment For Pltf
-	02-17-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 2-25-2015 Hrg Of 8-20-14
-	02-17-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 2-25-2015 Hrg Of 9-02-14
-	02-19-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 2-25-15 Hrg Of 8-7-2014
312	02-20-2015	ORDER DENYING MOTION/PETITION	Order Denying Motion To Certify Records Reviewed
313	03-05-2015	NOTICE OF ASSOCIATION OF COUNSEL	Notice Of Association Of Counsel

-	03-20-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 3/25/2015 Hrg Of 8/1/2014	
313A	03-25-2015	NOTICE OF HEARING	Notice Of Hearing /cert Record	04-01- 2015
313B	03-25-2015	MOTION	Motion /def	
313C	03-25-2015	DECLARATION	Declaration Of Catherine Hendricks	
313D	03-25-2015	DECLARATION	Declaration Of Jennifer Ostwald	
314	03-26-2015	NOTICE OF HEARING ACTION	Notice Of Hearing Shaffer/complete & Certify Recod	04-03- 2015
315	04-01-2015	RESPONSE	Response /pla	
316	04-02-2015	REPLY	Reply /board Of Pilotage	
317	04-03-2015	INDEX	Index Clks Pprs Pgs 4094-4096	
318	04-03-2015	COMMENT ENTRY	Clks Pprs Pgs 4094-4096	
-	04-07-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 4-8-15 Hrg Of 08-1-14	
319	04-07-2015	ORDER DENYING MOTION/PETITION	Order Denying Motion Re Record On Review	
320	05-07-2015	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
321	05-12-2015	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
322	05-21-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 72664-1-i/hendricks Pgs 4097-4332	
323	05-21-2015	ATTACHMENT	Attachment /file & Designate To Coa	
324	05-28-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 72664-1-i/ Hendricks Pgs 4333-4420	
325	06-01-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers /supp 72664-1/ Hendricks Pgs 4421-5000 Trans Coa 6/24/15	
326	06-04-2015	INDEX	Index Clks Pprs Pgs 4333-4420	
-	06-08-2015	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted 6-10-15 Hrg Of 10-01-14	
327	06-08-2015	INDEX	Index Clks Pprs Pgs 4421-5000	
328	06-18-2015	COMMENT ENTRY	Clks Pprs Pgs 4421-5007	
328A	06-30-2015	INDEX	Index Clks Pprs Pgs 4097-4332	
329	06-30-2015	COMMENT ENTRY	Clks Pprs Pgs 4097-4332	
330	06-30-2015	COMMENT ENTRY	Clks Pprs Pgs 4333-4420	
331	07-13-2015	NOTICE OF HEARING		07-23- 2015

			Notice Of Hearing /complete Record	
332	07-13-2015	NOTICE OF HEARING	Notice Of Hearing /complete Record	07-23- 2015
333	07-13-2015	MOTION	Motion /pla	
334	07-16-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp Trans Coa 8/21/15 72664-1-i/hendricks Pgs 5008-5038	
335	07-22-2015	INDEX	Index Clks Pprs Pgs 5008-5038	
336	07-24-2015	ORDER GRANTING MOTION/PETITION	Order Granting Motion To Complete The Record	
337	08-07-2015	DECLARATION	Declaration Of David Breskin	
338	08-07-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 72664-1-i/hendricks Pgs 5039-5301 Trans Coa 8/17/15	
339	08-11-2015	INDEX	Index Clks Pprs Pgs 5039-5301	
340	08-12-2015	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers Supp 72664-1-i/hendricks-exh Only Exh Rm Notified 8/26/15	
341	08-16-2015	COMMENT ENTRY	Clks Pprs Pgs 5039-5301	
342	08-21-2015	COMMENT ENTRY	Clks Pprs Pgs 5008-5038	
343	08-26-2015	LTR OF TRNSMTTAL/XHIBTS TO APP CRT	Ltr Of Trnsmttal/xhibts To App Crt	

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APPENDIX B

Relevant Motions—Procedural Posture	Result / Order /Location
<p>Sweeney Motion to Compel Production of Transcripts of October 31, 2008 and May 19, 2009 hearing. Supported by deposition excerpts from Commissioners Snyder (3/14/13), Dudley (1/22/13), and Hulsizer (10/21/13).</p> <p>May 14, 2014 CP 90-150 (motion), 155-226 (opposition), 227-33 (reply)</p>	<p>Judge Lum requested in camera review of transcripts, found both transcripts to be attorney-client privileged and work product. Released 10/31/08 transcript on waiver grounds. Hulsizer (10/21/13) deposition. In camera Order: CP 261-62. Specifically found Dudley 1/22/13 deposition inadequate to waive privilege for 5/19/09 transcript. June 10, 2014 CP 263-65 (Order), 687-88 (Sealed)</p>
<p>First Motion to Compel 30(b)(6) Depositions</p>	<p>Order (June 20, 2014): CP 887</p>
<p>Board's Motion for Summary Judgment June 13, 2014 CP 345-825</p>	<p>Denied August 1, 2014, RP 8/1/14 at 1-36.</p>
<p>Case reassigned from Judge Lum to Judge Shaffer June 23, 2014, CP 889.</p>	
<p>Second Motion to Compel 30(b)(6) Deposition</p>	<p>Granted July 29, 2014 Order: CP 2158-59</p>
<p>[Second] Sweeney motion to compel 5/19/09 transcript or in the alternative exclude (in limine) all evidence Board acted reasonably in response to Senn presentation.</p> <p>Again supported by Dudley (1/22/13), as well as Dudley (6/30/14); Hannigan (7/9/14); Hannigan (2/19/13) July 14, 2014 CP 1099-1172 (motion), 1736-56 (opposition).</p>	<p>Transcript for 5/19/09 hearing released by Judge Shaffer without oral argument.</p> <p>Transcript not read by Judge Shaffer prior to release. RP (7/31/14) at 6, 132-3.</p> <p>July 29, 2014: CP 2161-62 (Order).</p>
<p>Sweeney motion to compel withheld documents (Email and attachments from April-May 2009).</p> <p>July 17, 2014 CP 994-1085 (motion), 1288-98 (opposition), 1299-1324, 4094-95 (declarations), 1274-80 (reply)</p>	<p>Judge Shaffer grants Sweeney's motion to compel additional CR 30(b)(6) deposition from Captain Hannigan (without oral argument) but "reserve[d] as to the [compelled production of] documents until a telephonic hearing with counsel." CP 2158-59 (July 29, 2014) Unreported telephonic hearing; Documents produced by Board for in camera review. CP 4805 (July 30, 2014) Attorney Work Product Email released by Judge Shaffer-- CP 4333-4412 Oral ruling: RP 8/1/14 at 35-36 Reason not stated, no findings, but see RP 8/11/14 PM at 88-94.</p>
<p>Captain Sweeney's Motion for Summary Judgment CP 1221-48 (Amended)</p>	<p>Denied August 1, 2014, RP 8/1/14 at 1-36.</p>

Appendix B—Relevant Motions

APPENDIX C

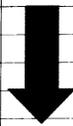
Attorney-Client / Work Product Motions	Result / Order /Location
<p>Sweeney Motion to Compel Production of Transcripts of October 31, 2008 and May 19, 2009 hearing. Supported by deposition excerpts from Commissioners Snyder (3/14/13), Dudley (1/22/13), and Hulsizer (10/21/13).</p> <p>May 14, 2014 CP 90-150 (motion), 155-226 (opposition), 227-33 (reply)</p>	<p>Judge Lum requested in camera review of transcripts, found both transcripts to be attorney-client privileged and work product. Released 10/31/08 transcript on waiver grounds. Hulsizer (10/21/13) deposition.</p> <p>In camera Order: CP 261-62. Specifically found Dudley 1/22/13 deposition inadequate to waive privilege for 5/19/09 transcript.</p> <p>June 10, 2014 CP 263-65 (Order), 687-88 (Sealed)</p>
<p>Case reassigned from Judge Lum to Judge Shaffer</p> <p>June 23, 2014, CP 889.</p>	
<p>[Second] Sweeney motion to compel 5/19/09 transcript or in the alternative exclude (in limine) all evidence Board acted reasonably in response to Senn presentation.</p> <p>Again supported by Dudley (1/22/13), as well as Dudley (6/30/14); Hannigan (7/9/14); Hannigan (2/19/13)</p> <p>July 14, 2014 CP 1099-1172 (motion), 1736-56 (opposition).</p>	<p>Transcript for 5/19/09 hearing released by Judge Shaffer without oral argument.</p> <p>Transcript not read by Judge Shaffer prior to release. RP (7/31/14) at 6, 132-3.</p> <p>July 29, 2014: CP 2161-62 (Order).</p>
<p>Sweeney motion to compel withheld documents (Email and attachments from April-May 2009).</p> <p>July 17, 2014</p> <p>CP 994-1085 (motion), 1288-98 (opposition), 1299-1324, 4094-95 (declarations), 1274-80 (reply)</p>	<p>Judge Shaffer grants Sweeney’s motion to compel additional CR 30(b)(6) deposition from Captain Hannigan (without oral argument) but “reserve[d] as to the [compelled production of] documents until a telephonic hearing with counsel.”</p> <p>CP 2158-59 (July 29, 2014) Unreported telephonic hearing; Documents produced by Board for in camera review.</p> <p>CP 4805 (July 30, 2014) Attorney Work Product Email released by Judge Shaffer-- CP 4333-4412 Oral ruling: RP 8/1/14 at 35-36 Reason not stated, no findings, but see RP 8/11/14 PM at 88-94.</p>

Appendix C—Attorney-Client / Work-Product Motions

APPENDIX D

Section 3 - General Shiphandling *

	S1	S2	S3	S4	S5	S6	S7	S8		<u>SWEENEY Average</u>
TRIPS 151-211	5.1	5.2	5.3	4.8	4.9	5	5	5.2		5.0625
TRIPS 212-230	5.421	5.316	5.472	5.111	5.237	5.167	5.438	5.125		5.285875
	S1	S2	S3	S4	S5	S6	S7	S8		<u>SEYMOUR Average</u>
TRIPS 151-180	5.7	5.6	5.7	5.6	5.6	5.7	5.6	5.6		5.6375
TRIPS 181-210	5.333	5.5	5.364	5	5.208	5.667	5.455	5.364		5.361375



*Scores taken from Defendant's Excel Trip Report Summary spreadsheets for Sweeney and Seymour's final 2 sets of trips in category 3 - "General Shiphandling."

APPENDIX E

CLASS OF 2005

Name	Rank 2005 exam	Training Program	Interventions After Trip 80	License date
Captain Kelly	#1	Dec 05 - Aug 06 (174 total trips)	5 1 extension	Aug 2006
Captain Blake	#2	Dec 05 - July 06 (142 total trips)	0	July 2006
Captain Bujacich	#3	Dec 05 - July 06 (150 total trips)	0	July 2006
Captain Carlson	#4	Dec 05 - July 06 (142 total trips)	0	July 2006
Captain Sliker	#6	Dec 05 - July 06 (141 total trips)	0	July 2006
Captain Ward	#5	Feb 06 - Sept 06 (171 total trips)	1	Sept. 2006
Captain Grobschmit	#7	Oct 06 - April 07 (154 total trips)	1	May 2007
Captain Kalvoy	#8	Oct 06 - April 07 (168 total trips)	3 ¹	May 2007
Captain Marmol	#10	Jan 07 - Aug 07 (188 total trips)	3 1 extension	Sept 2007
Captain Klapperich	#11	July 07 - Feb 08 (160 total trips)	0	Feb 2008
Captain Wildes	#12	July 07 - Feb 08 (155 total trips)	0	Feb 2008
Captain Semler	#14	Oct 07 - April 08 (169 total trips)	0	May 2008 ³
Captain Hannuksela	#15	May 08 - Dec 08 (155 total trips)	0	Dec 2008
Captain Thoreson	#16	May 08 - Dec 08 (165 total trips)	0	Dec 2008
Captain Seymour	#18	July 08 - July 09 (215 total trips)	7 2 extensions	July 2009

¹ Trip 129 is not marked as an intervention on the spreadsheet or trip form, but is instead marked with an asterisk. If this intervention is omitted because of the ambiguity, then this number is 2.

² Trip 85 is marked both yes and no and Trip 208 is marked "see comments" with the comments reflecting an intervention. If these interventions are omitted because of the ambiguity, then this number is 15.

³ Captain Semler's program was continued one week due to lack of hard-to-get trips.

⁴ Trip 126 and Trip 144 are marked both yes and no. If omitted because of the ambiguity, then this number is 14.

⁵ Captain Jones was continued, but not extended an extra month to June.

CLASS OF 2005

Name	Rank 2005 exam	Training Program	Interventions After Trip 80	License date
Captain Kelly	#1	Dec 05 - Aug 06 (174 total trips)	5 1 extension	Aug 2006
Captain Blake	#2	Dec 05 - July 06 (142 total trips)	0	July 2006
Captain Bujacich	#3	Dec 05 - July 06 (150 total trips)	0	July 2006
Captain Carlson	#4	Dec 05 - July 06 (142 total trips)	0	July 2006
Captain Sliker	#6	Dec 05 - July 06 (141 total trips)	0	July 2006
Captain Ward	#5	Feb 06 - Sept 06 (171 total trips)	1	Sept. 2006
Captain Grobschmit	#7	Oct 06 - April 07 (154 total trips)	1	May 2007
Captain Kalvoy	#8	Oct 06 - April 07 (168 total trips)	3 ¹	May 2007
Captain Nelson	#9	Jan 07 - April 08 (284 total trips)	11 5 extensions	Denied Dec 2008
Captain Marmol	#10	Jan 07 - Aug 07 (188 total trips)	3 1 extension	Sept 2007
Captain Klapperich	#11	July 07 - Feb 08 (160 total trips)	0	Feb 2008
Captain Wildes	#12	July 07 - Feb 08 (155 total trips)	0	Feb 2008
Captain Sweeney	#13	Oct 07 - Oct 08 (281 total trips)	17 ² 4 extensions	Denied May 2009
Captain Semler	#14	Oct 07 - April 08 (169 total trips)	0	May 2008 ³
Captain Hannuksela	#15	May 08 - Dec 08 (155 total trips)	0	Dec 2008
Captain Thoreson	#16	May 08 - Dec 08 (165 total trips)	0	Dec 2008
Captain Jones	#17	Aug 08 - May 09 (213 total trips)	16 ⁴ 1 extension ⁵	Denied June 2009
Captain Seymour	#18	July 08 - July 09 (215 total trips)	7 ⁶ 2 extensions	July 2009

¹ Trip 129 is not marked as an intervention on the spreadsheet or trip form, but is instead marked with an asterisk. If this intervention is omitted because of the ambiguity, then this number is 2.

² Trip 85 is marked both yes and no and Trip 208 is marked "see comments" with the comments reflecting an intervention. If these interventions are omitted because of the ambiguity, then this number is 15.

³ Captain Semler's program was continued one week due to lack of hard-to-get trips.

⁴ Trip 126 and Trip 144 are marked both yes and no. If omitted because of the ambiguity, then this number is 14.

⁵ Captain Jones was continued, but not extended an extra month to June.

⁶ Trip 94 is marked, "see comments." If this intervention is omitted because of the ambiguity, then the number is 6.

APPENDIX F

FILED
KING COUNTY, WASHINGTON

SEP 17 2014

SUPERIOR COURT CLERK
BY Ed Gucco
DEPUTY

**IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY**

KATHARINE ANN SWEENEY, an
individual,

Plaintiff,

vs.

WASHINGTON STATE BOARD OF
PILOTAGE COMMISSIONERS,

Defendant.

NO. 11-2-36792-4 SEA

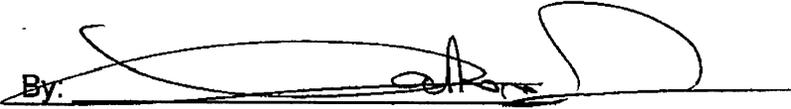
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COURT OF APPEALS
STATE OF WASHINGTON

COURT'S INSTRUCTIONS TO THE JURY

DATED:

Sept 17, 2014

By: 

HONORABLE CATHERINE SHAFFER
SUPERIOR COURT JUDGE

INSTRUCTION 3B

You have heard and seen references to the Nelson lawsuit. Because of these references, I am instructing you that the Nelson lawsuit against the Board is not relevant to any issue in this case. You should not consider or discuss it.