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NO. 69890-7-I

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**COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON**

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CAPTAIN BRUCE NELSON,

Appellant,

v.

STATE OF WASHINGTON and WASHINGTON STATE BOARD OF  
PILOTAGE COMMISSIONERS,

Respondents.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This Court should affirm the Superior Court's decision denying Captain Nelson's motion to vacate under CR 60. First, the Superior Court's correctly found that the Excel spreadsheet named, "ManpowerProjection20070327.xls" did not constitute "new evidence" for the purpose of CR 60(b)(3). Second, the Superior Court correctly found, as a factual matter, that the Board of Pilotage Commissioners (Board) committed no discovery misconduct when it objected to a specific request for production, asked for a protective order, and signed the protective order proposed by Captain Nelson within hours of receiving the proposed motion and order. The delay in production of the requested spreadsheet resulted solely from Captain Nelson's delay in proposing a protective order. Third, the argument that the Board committed fraud is baseless, as the Board's counsel did not make any false statements in any of the proceedings. For these reasons and the reasons to follow, the Board respectfully requests that this Court affirm the decision to deny the Captain Nelson's motion to vacate.

## II. COUNTER STATEMENT OF THE ISSUES

1. **Whether the Captain Nelson is entitled to a new trial under CR 60(b)(3) when (1) the existence of the spreadsheet would not change the result at a new trial; (2) the spreadsheet is not newly discovered since summary judgment; (3) the Appellant could have received the spreadsheet months earlier if he had**

exercised due diligence; (4) the spreadsheet is not material; and (5) the spreadsheet is, at best, only cumulative or impeaching.

2. **Whether the Board committed fraud or misconduct under CR 60(b)(4) when (1) the Board did not make any false statements regarding the hiring panel's knowledge of applicants' ages; (2) fully complied with all discovery requests; and (3) absence of the spreadsheet did not materially impair the Captain Nelson's ability to prepare his case.**
3. **Whether the issue of collateral estoppel has been improperly brought before this court by the Captain Nelson when (1) there is a separate appeal pending on this issue and (2) collateral estoppel was not discussed in Appellant's original motion to vacate and is therefore not part of the record.**

### **III. STATEMENT OF THE CASE**

To provide background for this Court's review, the Board will provide some facts related to the underlying primary appeal of the summary judgment motion in the Board's favor. The only issue on this appeal, however, is whether the Superior Court erred in denying Captain Nelson's request for CR 60 relief from the judgment granted based on alleged discovery misconduct.

#### **A. The Respondent Denied Appellant's Request for a Puget Sound Pilot's License Because His Performance Was Unsatisfactory**

Captain Nelson's performance as a Puget Sound pilot trainee was

poor. His program began on January 2007.<sup>1</sup> In July 2007, the Board unanimously voted to extend his training due to inconsistent performance.<sup>2</sup> At the September 2007 Board meeting, the Board voted to extend Captain Nelson's training for a second time.<sup>3</sup> The Board split 4-3 on this extension, with the three pilots voting in favor of licensing, but was unanimous in extending his training a third time in December of 2007.<sup>4</sup> Members were concerned because of time he had taken off from training, Captain Nelson's scores, and several necessary interventions by his trainer-pilot.<sup>5</sup> On March 1, 2008, Captain Nelson piloted an exceptionally poor trip in which Captain Kromann was required to intervene to prevent Captain Nelson from colliding with a dock in Seattle.<sup>6</sup> In April 2008, the Trainee Evaluation Committee (TEC) recommended the Board deny Appellant a license.<sup>7</sup> After proceedings where Captain Nelson and his attorney made a presentation to the Board, the Board denied Captain Nelson's request for a license on December 4, 2008.<sup>8</sup>

**B. ManpowerProjection20070327.xls**

The document in question in this appeal is an Excel spreadsheet

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<sup>1</sup> CP at 171.

<sup>2</sup> CP at 171.

<sup>3</sup> CP at 171.

<sup>4</sup> CP at 171.

<sup>5</sup> CP at 171.

<sup>6</sup> CP at 171.

<sup>7</sup> CP at 171.

<sup>8</sup> CP at 172.

entitled, "ManpowerProjection20070327."<sup>9</sup> Inside this Excel spreadsheet, there are three tabs named (1) "Projection," (2) "Retirement Survey 3-07," and (3) "Trainee List."<sup>10</sup> The "Projection" tab contains no ages and is merely a projection of the numbers of pilots.<sup>11</sup> The "Retirement Survey 3-07" contains the birthdates and ages of the pilots and trainees as well as projected retirement dates based either on averages or on pilot responses to retirement survey questionnaires.<sup>12</sup>

There is no evidence in this record that this Excel spreadsheet was used by the Board for any decision making regarding the licensing of any trainee, although it was an aid to determine timing. Once someone passed the written and simulator piloting examinations, he or she was placed into a pool of trainees.<sup>13</sup> As vacancies in the existing pilot corps appeared, trainees were invited from the pool to begin training.<sup>14</sup> Because trainees must complete at least seven months of training before they are eligible to become a pilot, the Board attempted to predict vacancies in advance in order to ensure enough pilots have completed the training to fill the empty positions.<sup>15</sup>

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<sup>9</sup> CP at 232.

<sup>10</sup> CP at 232.

<sup>11</sup> CP at 193-201.

<sup>12</sup> CP at 203.

<sup>13</sup> CP at 170.

<sup>14</sup> CP at 170.

<sup>15</sup> CP at 230.

Captain Jay Neiderhauser, a Puget Sound Pilot who was not a decision maker in this case, created the Excel spreadsheet before the events in this case.<sup>16</sup> To that end, retirement surveys were periodically conducted.<sup>17</sup> Captain William Snyder, who became the chair of the Trainee Evaluation Committee in 2007, inherited the form and used only the “Projection” spreadsheet.<sup>18</sup> The Board, in fact, did not consider the tab of the spreadsheet entitled “Retirement survey 3-07,” but only the “Projection” tab.<sup>19</sup>

The Board fully disclosed this process—inviting trainees from the pool into the training program—in discovery. Several witnesses testified regarding this practice in depositions and in the administrative hearings related to Captain’s case.<sup>20</sup> There is no evidence in this record, however, that the Excel spreadsheet was linked in any fashion to the licensing decisions regarding any trainees.

**C. Appellant’s Administrative Discovery Did Not Request the Manpower Projection Spreadsheet**

In December of 2008, Captain Nelson requested an administrative

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<sup>16</sup> CP at 304.

<sup>17</sup> CP at 227.

<sup>18</sup> CP at 304-05

<sup>19</sup> CP at 233 (“I confirmed that none of the pages (or tabs) of the Excel spreadsheet called “ManpowerProjection20070327” was contained in this meeting packet.”).

<sup>20</sup> See e.g. CP at 209, 212, 217, 227, 230

hearing to protest the decision by the Board to deny him a pilot's license,<sup>21</sup> and complains that the Board failed to disclose the spreadsheet in response to (a) a public records act request and (b) a subpoena duces tecum during the administrative challenge. In fact, the spreadsheet was responsive to neither.

Although Captain Nelson did file a public records act request, the Excel spreadsheet at issue here was not responsive to it. Captain Nelson's public records request asked for, among other things, production of Captain Nelson's "complete training file, including materials reviewed by the Training Committee and information that has been provided to the Commissioners."<sup>22</sup> There is no evidence in this record, or any other, that the Board did not fully comply with this public records request. There is no evidence to suggest that the Excel spreadsheet appeared in his training file or that it was used by the Board. The spreadsheet in question was not produced in response to this request because it was not responsive.<sup>23</sup> Nor did Captain Nelson request the spreadsheet during his administrative hearing. Captain Nelson served subpoenas duces tecum to several members of the Board, requesting,

ALL DOCUMENTS, ELECTRONIC RECORDS AND  
OTHER THINGS in your possession or control THAT

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<sup>21</sup> CP at 35.

<sup>22</sup> CP at 65.

<sup>23</sup> CP at 5, Br. Appellant at 5.

RELATE IN ANY WAY to evaluation, testing, recommending, voting about, considering, training, licensing, or denying training or licensing; in relation to trainees Klapperich, Jones, Sweeney, Bujacich, Nelson, Sliker, Kelly, Seymour, Semler, Thoreson, Hannuksela, Marmol, Grobschmit, Kalvoy, Carlson, Ward, or Wilde; including but not limited to all communications from or to any person or entity (including but not limited to any Board of Pilotage Commissioners, its agents, staff or officials, and the Puget Sound Pilots organization, members, or their agents), about each such trainee.<sup>24</sup>

Although the spreadsheet was not produced in response to these requests, it was not improperly withheld. The retirement survey and manpower spreadsheet were not responsive to this request because they were not related to the evaluation, testing, recommending, voting about, considering, training, licensing, or denial of licensing for any of the listed trainees. The Board used the spreadsheet, and only the projection tab, for the legitimate business purpose of predicting pilot vacancies in order to determine when a vacancy might occur.<sup>25</sup>

Even if the spreadsheet were responsive to the public records act requests or administrative discovery, this civil appeal is an improper forum for making such an argument. Captain Nelson's remedy for alleged misconduct in responding to a public records act request is set by statute and his remedy in the administrative process is an appeal from that administrative decision, not a collateral attack in a separate civil suit.

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<sup>24</sup> CP at 94 (emphasis in original).

<sup>25</sup> CP at 208.

**D. Appellant Did Not Request the “Manpower Projection” Spreadsheet until November 2011**

In September of 2010, before the resolution of his administrative appeal, Captain Nelson filed a civil suit against the Board, alleging, *inter alia*, discrimination based on his age,<sup>26</sup> which is the underlying case in this appeal. In September 2011, the Board filed a summary judgment motion.

On November 23, 2011 Captain Nelson filed a number of discovery requests.<sup>27</sup> Although Captain Nelson attempts to distort the record by focusing on Request for Production (RFP) 7 from the first set of discovery, the actual relevant request is RFP 8.<sup>28</sup> RFP 7 requested copies of the retirement surveys used by the Board, and the Board fully responded.<sup>29</sup> RFP 8, by contrast, specifically requested the “ManpowerProjection20070327” document.<sup>30</sup> On December 23, 2011, the Board timely objected to the request because the spreadsheet contained dates of birth. The full request and response was as follows:

Please produce any documents related to any and all Pilot “manpower worksheets, spreadsheets, or other “manpower” documents, as such term is used in Board and TEC minutes. To the extent available, please produce such documents in the original electronic form, with metadata intact.

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<sup>26</sup> CP at 2.

<sup>27</sup> CP at 112-13.

<sup>28</sup> In the pleadings before the superior court, the Plaintiff failed to produce a full copy of the RFP 7 from the Board’s discovery responses.

<sup>29</sup> CP at 284-303

<sup>30</sup> CP at 118.

Objection, this request exceeds the scope of CR 26(b)(1) in that it can lead to no information relevant to Plaintiff's claims. Further, objection the requested information intrudes on the privacy of licensed pilots.

*Without waiving these objections, Defendant has contacted Plaintiff, and he has agreed to sign a protective order prohibiting disclosure of the dates of birth of the licensed pilots. Accordingly, Defendant will produce responsive documents upon entry of an appropriate protective order.*<sup>31</sup>

The Board called the Excel spreadsheet at issue here the "manpower spreadsheet".<sup>32</sup>

Despite the clear objection, Captain Nelson waited three months to propose a protective order. Within hours of receiving a proposed protective order, the Board signed and returned it for filing on March 26, 2012.<sup>33</sup> Although the Captain Nelson produced no reason for his delay in proposing an order, his attorney explained in oral argument that his office was busy with an administrative appeal and Captain Nelson did not realize the error until he was preparing for trial.<sup>34</sup> As a result of the delay, the protective order was not entered until after the court granted summary judgment. Once the court granted summary judgment, the Board's discovery obligation ended, and the Board properly did not produce the spreadsheets.

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<sup>31</sup> CP at 118 (emphasis added).

<sup>32</sup> CP at 233, ¶7.

<sup>33</sup> CP at 123-24 (showing receipt of the proposed order at 11:21 a.m., and the returned copy at 3:00 p.m.)

<sup>34</sup> RP at 34:25-35:14.

In December of 2012, the Captain Nelson received the spreadsheets in response to a separate public records request to the Board.<sup>35</sup> It is significant to note that Captain Nelson did not complain that the Board failed to respond to the original public records act request, but instead filed a new request specifying he wanted the “manpower spreadsheet”.

**E. The Manpower Spreadsheet Is Not New Evidence That The Board Tracked Age**

The Board has never denied in discovery, or otherwise, that the Board had files that included the birthdates of Puget Sound pilots and trainees. The summary judgment order, in fact, described the process of inviting trainees as vacancies opened,<sup>36</sup> the average age of pilots, as well as the Captain Nelson’s specific age both when he passed the written examination and when the Board denied his license.<sup>37</sup> The fact that the Board maintained files that included the ages of the pilots and trainees does not create an inference that the decision makers looked at or considered the age of any trainee. As Commissioner Dudley testified, “I have to admit that I didn’t even know how old Captain Nelson was until Friday, when I saw, for the first time, a list of the ages of all the people in

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<sup>35</sup> CP at 232.

<sup>36</sup> CP at 170, lns. 12-16.

<sup>37</sup> CP at 180.

the 2005 class.”<sup>38</sup> That testimony remains utterly unaffected by the existence of a spreadsheet or of files that contain Captain Nelson’s age.

**F. The Appellant Did Not File a CR 56(f) Motion to Continue Based on Outstanding Discovery**

Under CR 56, if a party opposing a motion cannot present essential facts to justify his position in affidavits, the court may grant a continuance in order for further discovery to take place.<sup>39</sup> Captain Nelson conceded at oral argument that he was aware of the outstanding discovery before the summary judgment was granted.<sup>40</sup> Despite that knowledge, Captain Nelson but took no steps to compel production or to delay the decision under CR 56(f).

**G. Procedural Background**

Captain Nelson’s age discrimination claim was dismissed on summary judgment,<sup>41</sup> and is the subject of a separate appeal, under No.68701-8-I. Captain Nelson subsequently filed a motion to vacate the summary judgment motion under CR 60 based on alleged discovery violations.<sup>42</sup> This motion was denied, and Captain Nelson now appeals this ruling.<sup>43</sup> Captain Nelson has continued to raise issues in his brief on

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<sup>38</sup> CP at 221-222.

<sup>39</sup> CR 56(f).

<sup>40</sup> RP at 34-35

<sup>41</sup> CP at 183.

<sup>42</sup> CP at 132.

<sup>43</sup> CP at 308.

this appeal in an attempt to conflate the multiple, separate proceedings related to the denial of his pilot's license.

#### IV. STANDARD OF REVIEW

The denial of a motion to vacate by a trial court is reviewed for abuse of discretion.<sup>44</sup> “Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable”.<sup>45</sup> Under the abuse of discretion standard, a ruling can only be reversed if the trial court applied the wrong legal standard, relied on unsupported facts, or reached a conclusion that “no reasonable person” would agree with.<sup>46</sup>

#### V. ARGUMENT

##### A. **The Retirement Survey Spreadsheet is Not “New” Evidence and Does Not Entitle the Appellant to a New Trial**

A court may grant relief from a judgment under CR 60(b)(3) only “upon such terms as are just” and when a party demonstrates that there is “[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)”. In order to show that “new” evidence warrants relief from a judgment under

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<sup>44</sup> *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 894, 1P.3d 587 (2000).

<sup>45</sup> *Lindgren v. Lindgren*, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). (citing *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990)).

<sup>46</sup> *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 583, 220 P.3d 191 (2009).

CR 60(b)(3), the moving party is required to show that this evidence would have materially affected the proceedings.<sup>47</sup>

In this case, the Captain Nelson must prove that the introduction of the manpower projection and retirement survey spreadsheets,

(1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching.<sup>48</sup>

A party must show all five of these factors to win a new trial under CR 60(b)(3). The failure to prove any one factor is sufficient to deny a motion for a new trial.<sup>49</sup>

**1. The Spreadsheet was not Newly Discovered After Summary Judgment was Granted**

The manpower and retirement survey spreadsheets were not new evidence “discovered” since summary judgment. Captain Nelson was aware of the spreadsheet’s existence from depositions that took place nearly two years before the request for production discovery.<sup>50</sup> The Board’s summary judgment motion, filed in September 2011, noted that the Board invited trainees based off of projected need, citing to the administrative testimony about the retirement surveys. More than a year

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<sup>47</sup> *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004).

<sup>48</sup> *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003) (citing *Holaday v. Merceri*, 49 Wn. App. 321, 742 P.2d 127 (1987)).

<sup>49</sup> *Id.* at 88.

<sup>50</sup> CP at 212, 217, 227.

after the filing of the Complaint in this case, and well after the depositions in the administrative case at which the manpower spreadsheets were discussed, Captain Nelson submitted a discovery request, for the first time, requesting the spreadsheet in November 2011. The Board timely objected to the discovery and requested a protective order. For reasons not explained in this record, Captain Nelson did not provide a protective order for its release until three months later. Captain Nelson was aware of the existence of the document for years before it was requested; it was not “newly discovered” after the summary judgment hearing.

In addition to the Court’s finding that the spreadsheet did not constitute “new” evidence, the record supports a finding that Captain Nelson did not meet the other factors required for relief under CR 60(b)(3).

**2. The Existence of the Spreadsheet Would not Change the Result if Summary Judgment was Overturned**

The outcome of the summary judgment ruling would not change based on the existence of the spreadsheets. Captain Nelson’s argument that the existence of a retirement survey establishes the Board’s knowledge of his age, and therefore discriminatory intent, is without merit.

The fact that the Board tracks retirement surveys in order to plan for future need for pilots permits no inference of discrimination.<sup>51</sup> If a company has a “legitimate business interest” in knowing the plans of its employees nearing retirement, then the inquiry does not suggest age discrimination.<sup>52</sup> For example, in *Killingsworth v. State Farm*, the court ruled that State Farm’s inquiry into the retirement of its employees was not evidence of pretext for age discrimination because the company has a legitimate interest in planning for its own future as a business.<sup>53</sup> Legislation attempting to prevent age discrimination is not a vehicle to review general business decisions.<sup>54</sup>

The Board has a legitimate business purpose for tracking the possible retirement ages of its pilots. The training program to become a pilot takes at least six to seven months to complete.<sup>55</sup> Having a general idea of how many current pilots may retire soon helps the Board decide

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<sup>51</sup> *Killingsworth v. State Farm Mut. Auto. Ins. Co.*, 254 Fed. Appx. 634 (9th Cir. 2007). See also *Hatfield v. Columbia Fed. Sav. Bank*, 68 Wn. App. 817, 825, 846 P.2d 1380 (1993) (inquiry into pension status does not give rise to inference); *Lewis v. St. Cloud State Univ.*, 467 F.3d 1133, 1137 (8th Cir. 2006); *Wallace v. OC Tanner Rec Ctr.* 299 F.2d 96, 100 (1st Cir. 2002) (certainly company officials are permitted to gather information relevant to personnel planning without raising the specter of age discrimination); *Sprenter v. Fed. Loan Bank*, 253 F.3d 1106, 1113 (8th Cir. 2001); *Debs. v. Northeastern Ill Univ.*, 153 F.3d 390, 396 (7th Cir. 1998); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611, 113 S. Ct 1701, 123 L. Ed. 2d 338 (1993) (a decision based on pension status did not violate age discrimination laws); *KY Ret. Sys. v. EEOC*, 554 U.S. 135, 143-44, 128 S. Ct. 2361, 171 L.Ed.2d 322 (2008) (explaining how pension and age, though correlated, are distinct.)

<sup>52</sup> *Id.* at 638.

<sup>53</sup> *Id.* at 638.

<sup>54</sup> *Steckl v. Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983).

<sup>55</sup> CP at 208.

how many open positions will need to be filled and if more trainees should be invited into the pool. This practice ensures that when a pilot retires, someone will have already completed most of the training and can become licensed when needed.

Furthermore, as can be seen from the Superior Court's order on summary judgment,<sup>56</sup> in the context of the other evidence presented in this case, these spreadsheets would not change the outcome. The Superior Court properly noted that "few, if any, of the Board members or supervisory pilots actually knew plaintiff's age."<sup>57</sup> The existence of one tab of an Excel spreadsheet with Appellant's age listed does not undermine this reasoning, particularly where there is no evidence that the Board ever saw that tab.<sup>58</sup> Moreover, the substance of the Superior Court's ruling arose from other undisputed facts. For example, the plaintiff was 51 when he passed his written examinations and 54 when the Board denied him a license.<sup>59</sup> The average age of licensed pilots when plaintiff began his training was 55.79 years of age, and all of the pilot candidates were more than 40 years old.<sup>60</sup> The plaintiff's performance was inconsistent, "particularly with the critical ship handling elements of

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<sup>56</sup> CP at 180.

<sup>57</sup> CP at 180.

<sup>58</sup> CP at 233.

<sup>59</sup> CP at 180.

<sup>60</sup> CP at 180.

speed control, heading control and the use of tugboats.”<sup>61</sup> It was “significant” that a supervising pilot had to intervene “when plaintiff came dangerously close to colliding with a dock at Pier 86 near the Seattle grain terminal”.<sup>62</sup> At 17 interventions, Captain Nelson had significantly more interventions than other trainees.<sup>63</sup> The Board’s legitimate, non-discriminatory reason—“plaintiff’s increasingly deficient trip performance” was not pre-textual.<sup>64</sup>

Captain Nelson attempts to analogize his case with *Shelley v. Geren*.<sup>65</sup> In *Shelley*, the court reasoned that inquiries about retirement surveys may be evidence of age bias.<sup>66</sup> However, the fact that the Corps maintained retirement surveys was not evidence of bias; it was an inquiry by members of a hiring committee during the hiring decision process that permitted such an inference.<sup>67</sup> Specifically, two influential members of the hiring committee requested information about retirement ages during the interview process.<sup>68</sup> Furthermore, the court also found that there was a factual dispute as to whether the plaintiff was better qualified for the

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<sup>61</sup> CP at 180.

<sup>62</sup> CP at 181.

<sup>63</sup> CP at 181.

<sup>64</sup> CP at 180.

<sup>65</sup> *Shelley*, 666 F.3d 599 (9th Cir. 2012).

<sup>66</sup> *Shelley v. Geren*, 666 F.3d 599 (9th Cir. 2012).

<sup>67</sup> *Shelley*, 666 F.3d at 610.

<sup>68</sup> *Shelley*, 666 F.3d at 610 (“Although Scanlan and Brice did not make the hiring decision alone, evidence of their inquiry and of their influence over the process supports an inference that the Corps’ proffered explanation... was a pretext...”)

position than the person hired, which, along with the other evidence in the case, may have been sufficient for a jury to find pretext.<sup>69</sup> The plaintiff in *Shelley* arguably had more experience in the field and was educationally superior to the employee who was given the position.

This case is distinguishable from *Shelley*. Initially, there is no evidence that any decision maker requested information about the retirement ages at any point in the decision making. Furthermore, Captain Nelson's performance was wholly and objectively unsatisfactory. Captain Nelson had more than twice the interventions than the next successful candidate. There was also a twelve-year age difference between the two employees in *Shelley*.<sup>70</sup> No such factors exist in the Captain Nelson's case. He was neither more qualified nor significantly older than those other trainees who received a pilot's license.

The existence of the spreadsheets would not change the result of this case. Captain Nelson was denied a license after his performance continued to decline to a point at which he nearly destroyed a dock. Further, the fact that Tab 2 of the Manpower Projection file exists (and *even if* the Board knew of its existence and the contents), it does not then follow that the Board used that information in the licensing process for individual pilots. Tab 1, the manpower survey, was used for planning

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 604.

purposes; it helped the Board decide when and how many trainees to invite out of the hiring pool into the training program in order for them to complete the training in time to fill a vacancy.<sup>71</sup> It was not used during the decision-making for any particular candidate for licensing, including Captain Nelson.

### **3. Captain Nelson did not act With Diligence in Obtaining the Spreadsheet**

Captain Nelson also failed to meet the third factor required to prevail under CR 60(b)(3): that the evidence “could not have been discovered before trial by the exercise of due diligence”.<sup>72</sup> Captain Nelson did not act diligently to obtain the manpower projection spreadsheets prior to summary judgment, despite knowing of its existence.

For example, in *Go2Net*, the defendant moved to reverse summary judgment in a contract interpretation case.<sup>73</sup> The defendant claimed new evidence had been discovered since trial, including a new declaration from a witness who claims his signature was forged on a previous declaration submitted to the court. The appellate court rejected this argument, stating that if the defendant was suspicious a signature had been forged; it could have moved to address the issue prior to the summary judgment hearing.<sup>74</sup>

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<sup>71</sup> CP at 148.

<sup>72</sup> *Go2Net*, 115 Wn. App. at 88.

<sup>73</sup> *Go2Net*, 115 Wn. App. at 82.

<sup>74</sup> *Id.* at 89.

Other claimed “new” evidence included emails produced the day before the summary judgment hearing. The court also ruled these were not new evidence.<sup>75</sup> While the timing of their production was inconvenient, the defendant could have filed a motion to extend the summary judgment hearing but did not do so.<sup>76</sup>

Similarly in this case, the failure to request the spreadsheet even once Captain Nelson learned of its existence fails to meet the level of diligence the court describes in *Go2Net*.<sup>77</sup> Evidence is not “new” if it could have been discovered before trial with due diligence of the party.<sup>78</sup> A small amount of diligence on the Captain Nelson’s part in this case would have led to him receiving the survey months and possibly years sooner. Additionally, the Captain Nelson did not ask the court under CR 56(f) of any other avenue to continue the summary judgment proceedings based on this alleged outstanding discovery.

#### **4. The Evidence is Irrelevant to Captain Nelson’s Case**

Tab 2 of the manpower projection file, the results of the retirement surveys, is not material to the case. Captain Nelson now argues that the existence of the spreadsheet is evidence the members of the Board knew his age. Even if they were aware, there is no evidence the decision to

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<sup>75</sup> *Id.* at 89.

<sup>76</sup> *Id.* at 89-90.

<sup>77</sup> *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003).

<sup>78</sup> *Go2Net*, 115 Wn. App at 336.

deny Captain Nelson a license was based in any way on his age. In fact, substantial evidence exists to support the opposite contention; two pilots from the group of applicants who took the same exam as Captain Nelson were older than him when they were licensed.<sup>79</sup> The spreadsheet was used for planning for future need, not to determine whether an applicant is granted a license, and thus is irrelevant to the issue of age discrimination in this case.

**5. At Most, the Spreadsheet Would be Used in an Attempt to Impeach**

Fifth and finally, the spreadsheet is, at best, only impeachment evidence. Evidence must provide more than impeachment value to meet the CR 60(b)(3) standard.<sup>80</sup> While Tab 2's existence still does not show the Board was aware of or considered Captain Nelson's age when making the decision regarding whether to grant a license to him, it is clear that Captain Nelson is attempting to use the spreadsheet solely in an attempt to impeach the existing testimony of the members of the Board.

**B. The Superior Court Did Not Err In Denying Captain Nelson's Request To Vacate The Judgment Under CR 60(b)(4) Because There Is No Evidence Of Fraud, Misrepresentation, Misconduct, Or Discovery Violations By The Respondents**

Captain Nelson claims the Board engaged in misconduct. Specifically, he alleges the Board knowingly made false statements

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<sup>79</sup> CP at 19.

<sup>80</sup> Go2Net, 115 Wn. App. at 88.

regarding the Board's knowledge of Captain Nelson's age, thus violating RPC 3.3 (Candor toward the Tribunal) and warranting a new trial under CR 60(b)(4) (fraud).<sup>81</sup> He further asserts that the Board violated the discovery rules by not producing the spreadsheet sooner.<sup>82</sup> Captain Nelson's arguments should be rejected, as all statements made regarding the Board's knowledge were supported by the record. The Superior Court did not abuse its discretion when it found that "there was no misconduct by the Board".<sup>83</sup> Additionally, the sole reason for Captain Nelson not receiving the spreadsheet before summary judgment was because he did not request it sooner, and when informed that a protective order was needed to disclose the spreadsheet, Captain Nelson delayed providing a proposed protective order.

In order to vacate a judgment for misconduct under CR 60(b)(4), the moving party must meet two requirements. First, the party must establish misconduct by providing clear and convincing evidence.<sup>84</sup> If such evidence is produced, the losing party must further show this misconduct prevented its ability to fully and fairly present its case.<sup>85</sup> Further,

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<sup>81</sup> Br. Appellant at 18-20.

<sup>82</sup> Br. Appellant at 19.

<sup>83</sup> CP at 309.

<sup>84</sup> *Lindgren*, 58 Wn. App. at 596.

<sup>85</sup> *Lindgren*, 58 Wn. App. at 596.

The rule does not...permit a party to assert an underlying cause of action for fraud that does not relate to the procurement of the judgment. Thus, the fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.<sup>86</sup>

A party moving for a new trial must show the specific act of fraud alleged was *directly* related to the unfavorable verdict.<sup>87</sup>

Captain Nelson cannot meet the first requirement by providing evidence of any misconduct on the part of the Board. First, briefings and oral arguments produced by the Board accurately reflected the record, despite Captain Nelson's attempt to misconstrue the context for those statements. Second, the Board complied with the discovery rules, timely responding to all requests and requesting a protective order to protect privileged information. Further, even if the Captain Nelson were to produce evidence of fraud, this alleged misconduct would not have affected his ability to present his case nor would it be directly related to the entry of summary judgment.

**1. The Board's Counsel's Statements in Argument Did Not Misstate the Evidence; the Superior Court's Finding That There Was No Misconduct Should be Upheld**

Captain Nelson alleges the retirement survey tab proves the Board was aware of his age, thus the Board's arguments to the contrary were

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<sup>86</sup> *Lindgren*, 58 Wn. App. at 596.

<sup>87</sup> *Id.*

fraudulent. This argument must fail. The fact Captain Nelson's age, along with other pilots and applicants, was listed in a spreadsheet does not establish the Board members were aware of his (or any other trainee's) age. There is no evidence the Board looked or considered tab 2, the results of the retirement surveys. The only evidence is that Board heard a report regarding the "manpower spreadsheet" (i.e. tab 1) during a board meeting.<sup>88</sup> This "manpower spreadsheet" does not include dates of birth.<sup>89</sup> Further, even if the Board had seen the retirement survey spreadsheet, it does not follow that they would remember the ages of the trainees, considering there are dozens of people on the list.

**2. There Was No Misconduct in the Board's Response to Discovery Requesting a Protective Order Prior to Production of the Spreadsheets Containing Private Information**

The Board's obligation to respond to discovery ended when the summary judgment motion was granted, the same day the protective order was signed. Once the summary judgment order was signed, the case against the Board was over, and they no longer had an obligation to produce the manpower spreadsheet or participate in further discovery.

There is no evidence in this record, let alone clear and convincing evidence, to support a finding that the Board improperly withheld

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<sup>88</sup> CP at 148.

<sup>89</sup> CP at 148.

documents in discovery. Captain Nelson requested an electronic spreadsheet in its original format, the Board timely objected and requested a protective order, and the Board promptly signed a proposed protective order.

Although Captain Nelson includes a public record act request and subpoenas from the administrative hearing as evidence of misconduct in the civil case, that argument does not avail. Initially, violations of the public records act have their own enforcement provisions.<sup>90</sup> Similarly, if Captain Nelson believes that there was misconduct in the administrative proceeding, the remedy is to raise that in an appeal from the administrative order. But even if the Court were to allow a collateral attack on the discovery conduct in a proceeding not before it or in a public records case, the spreadsheet was not responsive to either the public records act request or the administrative subpoenas.

The *Roberson* case does not avail the Appellant. In *Roberson*, the defendant failed to produce an entire file after the trial court granted a motion to compel and directed the defendant to produce, “all records”.<sup>91</sup> The defendant’s excuse for non-production was that the defendant’s counsel did not know of the file and the HR director did not tell him of

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<sup>90</sup> See RCW 42.56.550.

<sup>91</sup> *Roberson*, 123 Wn. App. at 332.

it.<sup>92</sup> Where the trial court determined that the withholding was willful, intentional, and without reasonable excuse, the challenging party need only show prejudice to their ability to prepare for trial.<sup>93</sup>

Here, not only did the Superior Court decline to find intentional misconduct, it found that there was no discovery misconduct at all. The Board did not hide or deny the existence of the spreadsheet and timely responded to a discovery request for it with a proper objection.<sup>94</sup> In fact, in the administrative depositions and hearings, the Board's witnesses testified about the spreadsheets and Captain Nelson did not follow up. The fact that Captain Nelson knew to request the specific spreadsheet, and he considered it separate enough to warrant a specific request for production, is ample evidence to support the court's finding of no misconduct. Once it was requested, Captain Nelson was aware a protective order was necessary to receive the spreadsheets, yet took no steps to finalize a protective order for three months. Captain Nelson also did not request additional time for the summary judgment motion based on outstanding discovery, or file a motion to compel. It is no fault of the Board nor a violation of the discovery rules that the Captain Nelson did

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<sup>92</sup> *Roberson*, 123 Wn. App. at 328.

<sup>93</sup> *Roberson*, 123 Wn. App. at 333-34, Br. Appellant at 18-19.

<sup>94</sup> CP at 118.

not provide this order until three months later. The Superior Court did not abuse its discretion in finding that there was no discovery misconduct.

**3. Even if the Respondent had Violated the Discovery Rules, the Violation Would Not Have Materially Affected the Appellant's Ability to Prepare for Trial**

Captain Nelson argues that evidence of this spreadsheet would have refuted the Board's counsel's statements that the Board's decision makers did not know Capt. Nelson's age. He further asserts that by not producing the spreadsheet, he was unable to question witnesses about it during depositions.<sup>95</sup> These arguments must fail.

First, the spreadsheets were mentioned several times in more than one deposition.<sup>96</sup> Captain Nelson knew of their existence for as long as two years before they were requested in discovery. Second, even if they had questioned about the surveys further in depositions, there would have been no difference in the case. The attendees of meetings only considered the "projection" portion of the spreadsheet, and did not discuss the retirement survey information.<sup>97</sup> Asking witnesses during depositions about the spreadsheets would have yielded only this information. Finally, the Captain Nelson did not request "manpower spreadsheets" and retirement surveys in discovery until after all depositions had taken place,

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<sup>95</sup> Br. Appellant at 21-23.

<sup>96</sup> CP at 211, 217.

<sup>97</sup> CP at 233.

so he would not have been able to question those deposed about the documents.

**4. The Alleged Violation of the Discovery Rules or Other Misconduct Would Not Have Directly Related to the Entry of Judgment Against the Appellant**

Even if Captain Nelson were to produce some evidence of fraud or misconduct, he cannot state the reason for his case's dismissal was based on this misconduct. *Lindgren* provides that a party cannot "assert an underlying cause of action for fraud that does not relate to the procurement of the judgment".<sup>98</sup> Captain Nelson is unable to show the alleged misconduct during discovery or oral argument was directly related to the entry of summary judgment against him. The Board's summary judgment motion was granted because there was insufficient evidence that the Board's decision was based on discriminatory animus of Captain Nelson's age, as opposed to the overwhelming evidence Captain Nelson's skills were not at the level necessary to obtain a license.

In deciding summary judgment in favor of the Board, the Superior Court observed that although there was evidence of stray comments, the record failed to establish prima facie case of age discrimination, or that the proffered legitimate reason was pretext for age discrimination. Rather, the evidence showed that "Plaintiff was 51 when he passed his written

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<sup>98</sup> *Lindren*, 58 Wn. App. at 526.

examinations and 54 when the Board denied him a license. The average age of licensed Puget Sound pilots when plaintiff began his training was 55.79 years of age. All of the pilot candidates in plaintiff's 'class' were more than 40 years old.<sup>99</sup> The Superior Court did not rely on the fact that there was no evidence that the decision-makers were aware of Captain Nelson's age, finding that "few, if any, of the Board members or supervisory pilots actually knew plaintiff's age". That statement remains accurate regardless of the manpower spreadsheet. Further, the Superior Court did not hold that "if any" of the Board members knew of Captain Nelson's age, it would have held differently, but rather that "there is substantial evidence that the license denial was based on plaintiff's increasingly deficient trip performance". Further, Captain Nelson "came dangerously close to colliding with a dock at Pier 86" and "plaintiff had 17 interventions, significantly more than the other trainees in his class."<sup>100</sup> Even if the existence of tab 2 could establish that the Board members knew of Respondent's age, which it does not, mere knowledge of an applicant's age is not direct, or even circumstantial, evidence to support a prima facie case, let alone support a finding that the proffered legitimate reason for the decision was pretext for age discrimination.

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<sup>99</sup> CP at 180.

<sup>100</sup> CP at 180-181.

**C. The Appellant Raises Arguments Related to Collateral Estoppel Not Properly Before This Court**

Captain Nelson asserts that the spreadsheet's existence undermines the validity of the administrative hearing as a final judgment and therefore nullifies the doctrine of collateral estoppel. He argues the administrative hearing was not fairly litigated because the Board was withholding evidence refuting their statements that members were unaware of Captain Nelson's age.

This argument should be dismissed outright. First, Captain Nelson did not raise the issue of collateral estoppel in his original motion to vacate. "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court."<sup>101</sup> The argument regarding collateral estoppel is not part of the record and is therefore improperly before this Court.

Second, the issues in the instant appeal are whether the Respondent violated the discovery rules and whether the spreadsheets are considered "new" evidence as to warrant a new trial. The question of whether the case was improperly dismissed on collateral estoppel grounds is already pending in a different appeal (No. 68701-8-I). The doctrine of collateral

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<sup>101</sup> RAP 9.12.

estoppel has no bearing on whether or not discovery misconduct exists. Thus, the Court need not consider the issue of collateral estoppel in deciding whether to affirm the denial of the motion to vacate. It should be considered abandoned and irrelevant.

## VI. CONCLUSION

For the reasons set out above, the Respondent respectfully requests that this Court find that the Superior Court did not abuse its discretion and affirm the denial of the Appellant's motion for new trial under CR 60(b).

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2013.

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**DECLARATION OF SERVICE**

I hereby declare that on this 27th day of June, 2013, I caused the foregoing document to be filed, and a copy served on all parties or their counsel of record, on the date below as follows:

**ABC Legal Messenger to:**

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

DATED this 27th day of June, 2013, at Seattle, WA.

  
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VALERIE TUCKER  
Legal Assistant