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**FILED**  
COURT OF APPEALS  
DIVISION ONE  
JAN 20 2016

No. 72664-1-I  
(King County No. 11-2-36792-4 SEA)

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON DIV. I

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KATHARINE ANN SWEENEY, an individual,

Plaintiff – Respondent,

v.

WASHINGTON STATE BOARD OF PILOTAGE COMMISSIONERS,

Defendant - Appellant,

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**RESPONSE BRIEF OF RESPONDENT  
KATHARINE SWEENEY**

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## I. INTRODUCTION

The Plaintiff-Respondent, Captain Katharine Sweeney, was a highly accomplished marine captain who was recognized for her skill and record of safely piloting one of the largest ocean-going container ships at Matson. She had been the “master” of a ship for years when she applied for a Puget Sound pilot’s license in 2005. Puget Sound pilots take control of ocean-going ships when they enter the Sound and pilot them to a port where they are docked. Had she been licensed by the Defendant Board of Pilotage Commissioners (the “Board”), she would have piloted the same type of ocean-going ships she had piloted for years.

But the Board denied her a license while granting 15 male applicants out of her 2005 class a license. Captain Sweeney was the only woman to have ever been considered for a license in the exclusively male profession of Puget Sound piloting. In this lawsuit, Captain Sweeney alleged she was treated differently and less favorably because of her gender in being denied a license by the Board than male applicants who were granted a license, even though her qualifications and performance in the required training program were as good as, or better than, the men. As discussed below, the evidence at trial of a male dominant industry and disparate treatment discrimination towards her was overwhelming.

Indeed, in Appellant's 72-page Brief, the Board does not contend otherwise or that the verdict was not supported by substantial evidence. Nor does it contend there was any error in the jury instructions or that the verdict, rendered after a six-week trial and seven days of deliberation, was unsupported by substantial evidence, or that the damages awarded were outside the range of the evidence presented. Nor does it assert that any decision, ruling, or order entered by Judge Catherine Shaffer *during* the trial denied it a fair trial. Nor does it identify for this Court any specific piece of evidence that Judge Shaffer struck or barred the Board from submitting for the jury's consideration. Nor does it specify exactly how it was prejudiced by any decision Judge Shaffer made during trial.

While the Board tries to portray Judge Shaffer's handling of the case as biased against it, in fact, she "bent over backwards" to allow the Board to put on its case and any evidence it chose to submit. Over Plaintiff's objections and despite Plaintiff's persistent requests, Judge Shaffer gave the Board four weeks of the six week trial to put on its defense and refused to cut off its presentation. Over Plaintiff's objections, she let the Board call 21 witnesses, including every TEC and Board member it chose to call as well as nine pilots who had graded Captain Sweeney on her training trips. She let the Board submit as exhibits the Trip Reports, scores, training program letters and other documents relating

to all 18 of the trainees in Captain Sweeney's class. She allowed the Board to present comparisons between Captain Sweeney's scores and those of the two men denied a license, Captain Nelson and Captain Jones, as well as the 15 men who were granted a license. Judge Shaffer did so even though the Board admitted it made no such comparisons *at the time* it denied Captain Sweeney a license and the pilots who graded Sweeney admitted they had never even spoken to the TEC, the Board, or any decision-maker about Captain Sweeney's performance.

The Board's appeal does not challenge the sufficiency of the evidence to support the verdict. It only challenges four discretionary decisions made by Judge Shaffer. Of those, the only one that occurred *at the trial* was her decision to sanction the Board for its counsel's willful violation of her order regarding Captain Nelson's suit against the Board for age discrimination. Judge Shaffer had denied the Board's motion seeking permission to tell the jury that Nelson's case was over. In direct violation of that order, the Board's counsel asked its key witness, Captain Patrick Hannigan, if the Nelson case was over. Hannigan testified that it was and that "he was pleased with the results." RP 9/10/14 PM at 30.

Judge Shaffer was so concerned about the unfair prejudicial effect of Hannigan's statement that she said she would consider granting Plaintiff a mistrial. But at that point, the trial was in its fifth week,

Hannigan was the second to last witness, and Plaintiff had spent thousands of dollars putting on her case. A mistrial would only have punished her. So instead of a mistrial, Judge Shaffer issued a curative instruction and sanctioned the Board by barring it from submitting *additional* evidence on Nelson *beyond* the evidence already presented. The Board had already presented substantial witness testimony and documentary evidence comparing Nelson to Sweeney. While the Board claims in its appeal that Judge Shaffer abused her discretion by imposing the “most severe” sanction, she did not. She did not strike a single bit of testimony or any exhibit relating to Nelson. Nor did the Board preserve the issue for appeal by making an offer of proof that set out the specific evidence it would have submitted but for the sanction order. Instead, the Board’s attorney told Judge Shaffer he had “*no defense*” for his violation of her Nelson order, “it is what it is, I agree.” RP 9/10/14 PM at 41.

The Board’s appeal rests on only three other alleged errors by Judge Shaffer – all discretionary trial court decisions and none that occurred at the trial. It argues that Judge Shaffer should have granted a new trial because a single juror recalled that she had once read or heard a statement in the news about gender bias. The juror could not remember anything more than it was a news statement about gender bias. She could not recall who made the statement or what it was about. She did not bring

any article or anything else into the jury room. She only had her memory of a vague news account that occurred as much as 28 years before the trial.

At the time, the Board acknowledged that the statement was likely from the same 1986 newspaper article Sweeney had testified about *in the trial* in which a pilot said he would quit as soon as a woman was licensed. The juror's memory of that *same* article would not be *extrinsic* evidence. There was no juror misconduct. Nor was there any bias arising from the juror's vague and general recollection of something she saw or heard 28 years earlier. Judge Shaffer did not abuse her discretion in denying the Board's motion for a new trial.

The Board's other two alleged errors involve discretionary *discovery* orders entered before the trial began. The discovery involved: (1) a May 4, 2009 email that attached a questionnaire and factual compilations responsive to the April 9, 2009 presentation Sweeney's attorney, Ms. Senn, made to the Board a month before the Board's May 19, 2009 decision to deny Sweeney a license; and, (2) a transcript of the May 19 meeting that showed what the Board *actually* considered in making its decision to deny Captain Sweeney a license. The transcript rebutted the Board's claim that the Commissioners fully considered Ms. Senn's presentation and all of the information the Board had at the time of its decision concerning Sweeney.

The Board fails to explain exactly how it was prejudiced by the discovery orders. First, it cannot complain that production of the May 4 questionnaire was ordered right before trial, when it admits that it failed to even identify the questionnaire in response to Plaintiff's production requests for over two years. It never claimed any privilege applied to the document until two weeks before trial. Nor does the Board explain how the questionnaire gave Plaintiff a "road-map" to its defense. It does not say, for example, what evidence Plaintiff put on that she would not have put on but for the production of the questionnaire. Plaintiff never even offered the questionnaire as an exhibit in evidence.

Nor does the Board explain how Judge Shaffer abused her discretion in finding that the Board waived any privilege relating to the transcript of the May 19 meeting at which it made the decision to deny Sweeney a license, when the Board had placed at issue what the Commissioners *actually* considered in making the decision. The Board had repeatedly asserted in depositions of key witnesses, like TEC and Board member Hannigan and Board chair Dudley, and in pretrial motions such as its summary judgment motion, that the Commissioners made their decision during the May 19 meeting based on Captain Sweeney's entire record of performance, including new information it received after it had decided to end her training program in October 2008. But the May 19

meeting transcript showed that, *in fact*, the Commissioners did not review or consider any new information when making its decision, and explicitly concluded that it could do that “later” should it become necessary.

Judge Shaffer did not abuse her discretion by deciding that the Board could not have it both ways: it could not be free to assert how the decision was made to deny Sweeney a license at the May 19 meeting and what the Commissioners considered at the meeting, but then use the privilege to bar Plaintiff from evidence showing that the decision was not *in fact* made in the manner the Board asserted.

In sum, Judge Shaffer did not abuse her discretion in sanctioning the Board for the improper conduct of its counsel, in denying a new trial, and in ordering production of relevant discovery documents. None of her decisions had any bearing on the jury verdict itself or the outcome of the case, and the Board’s brief fails to explain in any meaningful way how they did. This Court should not substitute its judgment for that of the trial judge who presided over the case. The Board does not dispute that there was substantial evidence supporting the jury’s verdict of discrimination and the damages awarded. The verdict should be affirmed.

## **II. STATEMENT OF THE CASE**

### **A. Background Facts**

Katharine Sweeney was a marine captain who had piloted ocean-

going container ships for the Matson Company since 1999 when she applied for a Puget Sound pilot's license. RP 8/14/14 PM at 38; Trial Ex. 1. Puget Sound pilots take control of an ocean-going ship when it reaches the Sound and pilot the ship to a port where it is docked. RP 8/14/14 PM at 58. Pilot licenses are granted by the State through the Board of Pilotage Commissioners ("Board"), which is a public board of the state. RCW 88.16; WAC 363-116. The Board's licensing decisions are based on the recommendation of its subcommittee, the Trainee Evaluation Committee ("TEC"). *Id.* Captain Sweeney first applied for a pilot's license in 2005. RP 8/14/14 PM at 72. To get a license at that time, applicants had to have a federal pilot's license, sufficient experience as a ship "master" to sit for a written exam, achieve a passing score on the exam, and complete a simulator evaluation. RP 8/20/14 AM at 12-14; RP 8/14/14 PM at 72-73.

By regulation, applicants then had to satisfactorily perform in a training and evaluation program consisting of at least 130 evaluation trips over a seven month period. RP 8/19/14 AM at 92; Trial Ex. 2. Captain Sweeney met the requirements to apply for a license and sit for the written exam. Trial Ex. 2. She passed the written test and completed the simulator evaluation. She was then admitted into the TEC program in 2007. RP 8/11/14 AM at 66; Trial Ex. 2. She was the first and only woman ever to pass the tests and enter the training program. RP 8/12/14 PM at 66.

On each evaluation trip, the trainee's performance was graded by one of the 55 licensed pilots. Trial Ex. 2. Their performance was given a numeric grade in various ship-handling skills on a "Trip Report." *See e.g.* Trial Ex. 510. The trainee had to "satisfactorily perform" in their program to be licensed. RP 8/13/14 AM at 38. On the seven-point scale a grade of five was "satisfactory." 8/12/14 PM at 85.<sup>1</sup> Trainees who performed "satisfactorily" were entitled *by law* to a license. RP 8/12/14 PM at 76-78.

By October 2008, the all-male TEC had required Captain Sweeney to complete 230 evaluation trips, 100 more than legally required. On October 31, 2008, the TEC recommended to the Board that her program be ended. Trial Ex. 10. On May 19, 2009, the Board denied her a license. Trial Ex. 119, 120. Out of the 2005 class, the Board licensed 15 men. RP 8/11/14 AM at 43. It denied Sweeney a license, even though her average ship-handling scores on her Trip Reports were above a "five" and hence "satisfactory." RP 8/19/14 AM at 89; Trial Ex. 27. Her scores were the same or better than those of men who were licensed. *Id.*

**B. The Board Presented a Lengthy Case During Trial.**

The trial lasted six weeks. CP 3941-42. Over Plaintiff's repeated

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<sup>1</sup> The first ten trainees in the 2005 class were graded on a four point scale; the next eight trainees, which included Sweeney and seven men, were graded on a seven point scale. The change occurred in 2007. *Id. See also* Sweeney Trip Rpt., Trial Ex. 510 (7-pt scale); Ward Trip Report, Trial Ex. 575 (4-pt scale).

objections, Judge Shaffer gave the Board four of the six weeks to put on its case.<sup>2</sup> She permitted the Board to call 21 witnesses, including every TEC member and Commissioner it chose to call and nine training pilots who had scored Captain Sweeney on her trips, even though these pilots had never talked to the TEC or Board about Sweeney and any observations of her offered in testimony which were not documented in their trip reports could not have possibly influenced the decision.<sup>3</sup>

**C. The Facts Presented At Trial Showed Discrimination.**

After the six-week trial, the jury deliberated for seven days and returned a verdict for Sweeney. CP 3941-42. It awarded damages of \$3,615,958. CP 3941-42. The Board filed a motion for a new trial, which was denied. CP 4018-4019. Substantial evidence supported the verdict. It showed that piloting was a male dominated industry; gender biased comments were directed at Captain Sweeney; and she was treated less favorably than men by the supervising pilots and the TEC during her training program and by the Board in denying her a license.

**1. Piloting is a Male-Dominated Industry.**

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<sup>2</sup> See RP 8/20/14 PM at 29-30 (Board starts case after calling Commissioner Hulsizer out of order in Plaintiff's case) to RP 9/17/14 AM at 70-71 (Board rests). See RP 8/2/14 AM at 5-16 (discussing Plaintiff's objections and court's refusal to limit the Board's case). *Id.* at 9 ("I appreciate the plaintiff's feelings that it's not fair for the defense to go two or three times as long as the plaintiff's case, but there is no legal rule that says the defense can't, even though I cannot think of a time I've ever seen this before.")

<sup>3</sup> See *e.g.*, RP 8/26/14 PM at 66-67(Bujacich), 8/27/14 PM at 62 (Sliker), 8/28/14 AM at 18-19 (Carlson), 9/2/14 AM at 36-38 (Soriano),9/9/14 AM at 90 ( Flavel).

The jury heard evidence that piloting in the Puget Sound is a male-dominated industry. All licensed pilots are members of the Puget Sound Pilots Association, which is all male and has been for its 115 year history. RP 8/20/14 AM at 11. Captain Sweeney was the first woman to ever qualify as a trainee, RP 8/12/14 PM at 66, and would have been the first woman to become a Puget Sound pilot. RP 8/20/14 AM at 11. Out of the 2005 class, the Board licensed 15 of the 17 men. It denied Captain Sweeney a license. RP 8/11/14 AM at 43.

Captain Dudley, the Board's chair, testified that the industry had a history of nepotism characterized by "men looking out for other men." RP 8/12/14 PM at 63-65. Captain Mayer testified about a promotional video the Pilots Association created, in which not a single woman was shown, either as a pilot, mate, or even a deckhand. RP 8/20/14 PM at 70; RP 8/25/14 AM at 110-111.<sup>4</sup> Plaintiff's nationally renowned expert in gender bias, Dr. Barbara Reskin, testified that in male dominated trades the desire of men to continue their uniformity and dominance is common. RP 8/19/2014 PM at 32.

## **2. Sexist Comments Were Directed at Sweeney.**

Puget Sound pilots, Commissioners, TEC members, and

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<sup>4</sup> See also RP 8/11/14 PM at 70 (Ketra Anderson testifying that "the maritime industry for women is a very tough road").

supervising pilots made negative sexist comments about Captain Sweeney or about women seeking positions of authority in the piloting industry. For example, male pilots who were Pilot Association members told Captain Sweeney that “they would never lower their standards to let a woman in.” RP 8/19/14 AM at 94. Captain Hunziker, another pilot who graded Sweeney, told the Seattle Post Intelligencer that, “once there is a woman pilot, I am heading down the road.” RP 8/14/14 PM at 70. He also told Sweeney in front of a group of pilots at a sexual harassment training session: “This is all because of you.” RP 8/19/14 AM at 95.<sup>5</sup>

Captain Mayer, a TEC member, questioned if the TEC should “reward [Captain Sweeney] by “letting her in” to the all-male Pilots Association. RP 8/25/14 AM at 86; Trial Ex. 8. Ole Mackey, a TEC and Board member, told Sweeney she was “under a spotlight” and the TEC and Board had to “make doubly sure she was ready to be licensed.” RP 8/13/2014 PM at 67; RP 9/17/2014 at 21. Captain Hannigan, a key TEC and Board member, disparaged women assuming power or authority in the pilot industry in an email to other male TEC members telling them that the female Board administrator, Judy Bell, “would love to neuter us (in more ways than one).” RP 8/18/14 AM at 48; Trial Ex. 76.

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<sup>5</sup> Commissioner Hulsizer admitted that she knew about these comments from Sweeney’s counsel’s presentation to the Board, but did no investigation before voting to deny Captain Sweeney a license. RP 8/13/2014 PM at 60.

**3. Men Were Given Breaks and Treated More Favorably.**

The evidence showed the TEC and the Board gave male trainees breaks and treated them more favorably than Sweeney. For example, the Board “reinterpreted” the requirements for a license to allow Captain Pat Kelly to sit for the written entrance exam when he could not meet the basic experience requirement for a license. RP 8/13/14 AM at 33. Kelly’s father and grandfather were pilots. *Id.* Male supervising pilots were allowed to grade trainees who were their younger brother or friends.<sup>6</sup> Male pilots also mentored male trainees but not Captain Sweeney.<sup>7</sup>

**4. Captain Sweeney Was Treated Differently Than Men Who Were Licensed.**

Sweeney used Captain Larry Seymour as a comparator. Over the last two extensions of her training program that involved 19 evaluation trips, Captain Sweeney’s scores in “ship-handling” were better than Seymour’s scores and were going up, while Seymour’s scores were going down. RP 8/14/14 AM at 27-29. But the Board licensed Seymour and not Sweeney. *Id.* at 29. When asked about pilot criticism of Seymour’s performance, Commissioner Hulsizer admitted “perhaps we shouldn’t

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<sup>6</sup> Captain Joe Semler reviewed his brother, trainee Steve Semler, on multiple occasions. RP 8/28/14 PM at 3-4. Captain Hannigan testified that the Board did not have a policy protecting against favoritism in this form. RP 9/16/14 AM at 130. Hannigan had a friendship with trainee Hannuksela and graded him. Trial Ex. 42.

<sup>7</sup> The Puget Sound Pilots Association had a mentoring program. RP 9/16/14 AM at 131; RP 9/17/14 AM at 96. Captain Sweeney testified that the Association “did not in any way facilitate a mentor for me. I did not have a mentor.” RP 9/17/14 AM at 96.

have licensed him.” *Id.* Captain Sweeney’s scores in the critical area of ship-handling were also as good as or better than trainees Kelly, Sliker and Marmol.<sup>8</sup> Sweeney had the same or fewer interventions over the same number of trips during her last two extensions as Kelly and Marmol. RP 8/18/14 AM at 19-20; Trial Ex. 90. All three were licensed. *Id.*<sup>9</sup>

Captain Sweeney’s performance was as good as men who were licensed, even though the TEC forced her to do 111 more evaluation trips than legally required. Hannigan admitted that trainees are more closely scrutinized the more extensions they get, and that supervising pilots might intervene more quickly even when the trainee is performing well because the pilot knows the trainee’s program was extended. RP 8/18/14 AM at 93-94.<sup>10</sup> The TEC also gave Sweeney substantially more evaluation trips with less experienced pilots than male trainees.<sup>11</sup> Captains Hannigan and Kromann, another TEC member, admitted that newly licensed pilots intervene more quickly and grade more harshly.<sup>12</sup>

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<sup>8</sup> RP 8/18/14 AM at 17-18 (Marmol), 28-29 (Kelly) and 88-89 (Sliker).

<sup>9</sup> The Trip Reports for Sweeney and all other trainees that showed their scores and interventions were admitted into evidence, so the jury was able to make its own comparisons. RP 9/16/14 AM at 6-8; Trial Exs. 322-553, 569-587.

<sup>10</sup> Hannigan also noted that “the more you observe an object -- in this case, the trainee -- the more it changes so that your observation ceases to be accurate.” RP 8/18/14 AM at 95; RP 9/15/14 PM at 63.

<sup>11</sup> RP 9/15/14 PM at 61-62 (Hannigan admitted 27% of Sweeney’s trips were with new pilots, compared to 13% (Seymour), 11 % (Hannuksela), 7% (Kelly), and 4 % (Sliker)).

<sup>12</sup> RP 9/8/14 PM at 15-16 (“I found that there was, indeed, a trend that they [new pilots]

**5. The Board Terminated Sweeney's Program at Its October 31, 2008 Board Meeting.**

At a closed session during its October 31, 2008 meeting, the Board voted to end Sweeney's training program. It sent Captain Sweeney a November 12, 2008 letter written by TEC chair, Captain Snyder, stating that her program was being terminated because she had not progressed in the critical ship-handling areas of "heading control," "use of tugs" and "speed control" and her level of performance in these areas was not "satisfactory." Trial Ex. 14. As discussed, these assertions were false. Her scores were above a "5" which was a "satisfactory" score and were improving. RP 8/13/14 PM at 78.

**6. The Board Invited Sweeney to Make a Presentation.**

The Board decided at its October 2008 meeting it would not deny Sweeney a license until she was given the opportunity to present her comments about her performance in the training program. Trial Ex. 10 (meeting transcript). On April 9, 2009, Captain Sweeney's counsel, Deborah Senn, made a presentation to the Board in which she said Sweeney was treated unfairly by being assigned more evaluation trips by new pilots, who intervene more quickly, than male trainees. She also said pilots had made sexist comments to Captain Sweeney. Trial Ex. 18.

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were probably more quick to do an intervention...I found that they were maybe more quick to grade a little more harshly.").

**7. The Board Denied Sweeney a License at Its May 19 Meeting Without Doing an Investigation.**

At a closed session of its May 19 meeting, the Board voted to deny Captain Sweeney a license even though it had not investigated Ms. Senn's assertions that unfair treatment and gender bias had affected the evaluation of Sweeney's performance.<sup>13</sup> The Board decided it could investigate later if necessary. Trial Ex. 88. During the meeting, no Board member mentioned Sweeney's Training Trip scores, interventions, number of extensions or anything having to do with her performance.<sup>14</sup>

**D. Procedural Facts Related to Assignments of Error.**

**1. Defendant Testified About Its May 19 Closed-Door Meeting and the Data Allegedly Considered.**

At his first deposition on January 22, 2013, Captain Dudley was asked about the Board's discussion of Sweeney leading up to its decision not to license her. CP 144. He said there was "extensive discussion" but he did not recall the details, and he had no notes. *Id.* When asked if there were any other documents that would refresh his recollection of the discussions in closed session, he said: "If there are any, they should have already been turned over in your production request." CP 1077.

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<sup>13</sup> RP 8/13/14 PM at 51-52; Trial Ex. 88 (Transcript of 5/19/09 Closed-Door Board Meeting); 8/13/14 PM at 67 ("[T]here was no investigation about discrimination before this licensing decision was made, right? That's true.")

<sup>14</sup> See Trial Ex. 88 (transcript of meeting); Trial Ex. 14 (11/12/08 letter).

Captain Sweeney’s counsel then showed Captain Dudley the minutes from the Board’s open session on May 19, 2009, and asked if this showed what the Board discussed. CP 1078. Captain Dudley replied no, “because the discussion was held in closed session.” *Id.* When Sweeney’s counsel asked Dudley to state “everything you recall about that closed session,” the Board’s counsel did not object, and Dudley responded that “a fair amount of detail regarding Captain Sweeney’s performance up to that point” was discussed, along with “other issues,” but he did not recall what “specifically other than the general sense that a discussion ensued about what the TEC was going to recommend.” *Id.*<sup>15</sup>

At his second deposition 18 months later, Captain Dudley was reminded of his prior testimony about the May 2009 closed session and was asked if he recalled anything further about the meeting. The Board’s counsel objected and directed him not to answer “if it requires him to disclose *the content of any attorney communications made during any closed session.*” CP 1140 (emphasis added). Questioning continued and Dudley testified:

I’ve already told you what the specific considerations were, done by each and every Board member, that they weighed all of her training trip reports, *all of the documents they had in front of them*, and so all of those things were considered

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<sup>15</sup> Board member Hulsizer also testified, without objection from counsel, about the substance of the closed door meetings. *See* CP 239-240; *see also* CP 2648, *infra* n. 26.

by each Board member *as they decided how to vote*.

CP 1141 (emphasis added).

A few days later, Captain Hannigan, also testifying as the Board's CR 30(b)(6) representative, stated that the May 19, 2009, meeting was the "critical" meeting "when the Board denied Captain Sweeney her license."

CP 1152. He explained that up to that point, the Board had made no decision on Captain Sweeney's license, and the Board could have gone either way at that meeting.

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

At that time the Board could have renewed Captain Sweeney's training license or chosen to take—chosen her to be suitable for licensing.

CP 1152-53.

Thus, at that point, less than a month before trial, the Board made clear that it would argue and its key witnesses would testify at trial that the Board had continued to analyze, evaluate, and deliberate about Sweeney's performance and eligibility for a license all the way up to the May 19 meeting, and that meeting was the "critical" one at which the Board members discussed "all the documents they had in front of them," including information "presented to them" by Sweeney and her attorney in

April, and then the Board “decided how to vote.” CP 1141.

**2. The Board Withheld Contemporaneous Documentation Regarding Its Decision.**

Despite these assertions, the Board had not produced any contemporaneous documentation whatsoever about what it actually considered or discussed at its final, decisive meeting about Captain Sweeney’s license. CP 1153. The only documentation of the Board’s actual reasons for its decision that it had disclosed in discovery was from November 2008 (Trial Ex. 14). *See* CP 1142 (When asked whether the Board had any reasons for denying Captain Sweeney a license besides those documented in its November 12, 2008 letter to Sweeney, Captain Dudley testified “yes,” but they “just have not been documented ...”).

When Captain Hannigan was asked whether there was any subsequent documentation of the reasons for the Board’s decision, he said there “may have been a document that would be covered by attorney-client privilege.” CP 1014. Captain Hannigan explained that he thought he may have written an e-mail to Assistant Attorney General (AAG) Susan Cruise, “with my analysis of Deborah Senn’s presentation to the Board.” CP 1015. He stated that he did not believe it had been disseminated to the Board, but also could not recall if it had even been sent to anyone, even the AAG. CP 1015. He also conceded that this

would likely be the only document that would contain reasons for the Board's decision beyond what was in the Nov. 12, 2008 letter. CP 1017.

The day after this deposition, on July 10, 2014, the Board produced an updated privilege log with *six* new documents listed, consisting of emails and attachments created in April and early May 2009, concerning Captain Sweeney. CP 1067-68. In the privilege log the Board claimed it was withholding these documents based on the attorney-client privilege; it did not mention the work product doctrine. *Id.* Although the Board admits these were the emails "mentioned by Captain Hannigan" in his deposition the previous day, none of them is from Hannigan to AAG Cruise. *See* CP 1290. One in particular, dated May 4, 2009 and the only one at issue in this appeal, appeared to contain ten attachments concerning facts about Sweeney's performance, the scores she and other pilot trainees received, and the Board's training and licensing decisions with respect to her and others. CP 1067-68.

**3. The Board Asserted New Reasons for Its Decision, Implicating the Documents and Discussions that Took Place in April and May of 2009.**

On June 14, 2014, the Board filed a summary judgment motion. It asserted that every Commissioner would likely testify at trial that the decision had been made based on a full assessment of Sweeney's scores and trip reports by each of the Commissioners. The Board also focused

intently on the number of “interventions” Captain Sweeney had, CP 697-98, particularly in comparison to other trainees. CP 712, 1761-62. By the time the Board filed its Reply brief, its motion was based *primarily* on Sweeney’s interventions. CP 1759-63. Yet, none of the contemporaneous evidence that had been produced to Plaintiff even *mentioned* interventions as part of the Board’s decision-making process. *See* Trial Exs. 12, 14. Now, in the month before trial, the Board made clear it would argue at trial that (1) it had not made its final decision until the May 2009 meeting, (2) it considered additional factors and information during that meeting, which it had not considered previously, including data provided during and collected in response to Senn’s presentation, and (3) its decision was based in substantial part on the number of interventions Sweeney had, particularly in relation to other trainees, even though the documentary evidence of its decision showed no mention of interventions.

**4. Plaintiff Moved to Compel Production of Documents.**

Plaintiff did not believe the Board had actually considered any new information at its May 19, 2009, closed session. *See* CP 1100. Plaintiff believed that, as with the October 31, 2008, closed-door meeting at which the Board accepted the recommendation of the TEC to end her training program, the Board did not discuss her performance or how she compared to other pilots, or the number or severity of her “interventions.” She

believed the transcript of the “critical” meeting at which the decision was made to deny her a pilot’s license would show that the Board did not discuss anything new, not even information that she and her attorney had offered, or that the Board itself had collected in response. She believed the Board was simply trying to portray itself as having given careful, unbiased consideration to the information and concerns she and her attorney had presented, when in fact it did no such thing and simply carried out its previous, biased decision. CP 1105-06. But unless she was able to get the documentary evidence showing what the Board *actually* considered, it would be free to present this false picture to the jury.

On July 14, 2014, Plaintiff moved to compel production of the documents withheld by the Board, including the six emails and attachments the Board had just disclosed four days earlier and the May 4, 2009, email and attachments at issue in this appeal. *See* CP 994-95. She pointed out that the privilege log itself suggested that Hannigan’s testimony about the email was wrong. CP 995, 1727. She argued that the Board had “placed at issue what was known, considered and/or discussed by the Defendant Board prior to and at the May 19 meeting concerning Captain Sweeney and specifically Ms. Senn’s April 9, 2009 presentation.” CP 996; *see also* CP 1728. The Board responded, admitting it had “overlooked” the emails until Hannigan testified about them, and claimed

all of them and their attachments were privileged. CP 1293-94. It did not offer to produce or redact any part of them.

Plaintiff also moved to compel production of the transcript of the May 19, 2009, closed meeting or, alternatively, that the Board be barred from asserting it considered new factors or information at that meeting. CP 1099-1100, 1109-10. In response, the Board refused to say that it would *not* assert that: (1) it had considered other factors and information not previously stated as a reason for the decision; (2) it had “extensive discussion” about Sweeney at the meeting; (3) it had “a month to study” the information presented by Ms. Senn before deciding; and (4) it had carefully reviewed “all the documents in front of them” before “decid[ing] how to vote.” CP 1736-41. The Board further said that “in its answers to discovery, its depositions, its summary judgment motion, its expert reports,” it had “set out a list of non-discriminatory reasons” for denying Sweeney a license, even though the reasons had not been “written down” at the time. CP 1740.

Thus, the Board confirmed again that it planned to present new facts supporting its decision which were not documented anywhere in the record except, presumably, in documents prepared for the May 19, 2009, closed meeting and in the transcript of the meeting itself, both of which the Board refused to produce. And while the Board acknowledged that

Plaintiff had a right “to impeach the Board’s witnesses with the fact that their reasons were not recorded,” what it failed to acknowledge is that if the reasons *were* recorded, Plaintiff should be allowed to use that record to impeach the Board’s self-serving testimony. CP 1740.

**5. The Court Ordered the Documents Produced and They Contradicted the Board’s Testimony.**

The trial court granted Plaintiff’s motions and ordered the Board to produce the May 4, 2009, email and attachments and the May 19, 2009, Board meeting transcript. 8/1/14 at 35-36; CP 4799-800. The May 4 email is from the Board’s administrator, Judy Bell, to AAG Guy Bowman. In it she explains that the first attachment contains answers to his questions from the TEC, and the rest of the attachments she had “prepared from the documents [she had] available to support some of the answers.” CP 4337. Nine of the ten attachments are purely factual information about Captain Sweeney, her peers, and the Board’s training program. CP 4356-412. The most important document is the second one, in which Bell had tallied from the Board’s records how many interventions each pilot trainee had. CP 4356 & 4370.<sup>16</sup>

The transcript of the May 19 meeting shows that, contrary to the

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<sup>16</sup> The two-page chart is inexplicitly split up in the document. This is the only part of the document used extensively at trial, and the Board essentially concedes it was properly disclosed and admitted into evidence. Appellant’s Brief at 44.

Board's deposition testimony, Board members had not reviewed and considered this or any other additional information.<sup>17</sup> In fact, Captain Hannigan, who *had* seen some of the information in the May 4 email, repeatedly urged the Board *not* to make a decision until it *had* considered *all* of the additional information. Trial Ex. 88 at 60-61. "I would feel much more comfortable if the entire Board, in a closed session, got to look at the information that has been developed by the TEC and by Judy before making a decision." *Id.* at 79-81. The response by Chairman Dudley was the Board could "do that later" if Captain Sweeney appealed its decision. *Id.* at 79. The Board accepted Dudley's approach and voted to deny Sweeney's license without considering the new information. *Id.* at 82.

Although the Board failed to preserve the record of the reasons Judge Shaffer gave at the time of her rulings for ordering production of the transcript and email, she expressed those reasons at the start of trial while discussing admitting the documents. She explained that she ordered the May 19 meeting transcript produced "because it looked like it was directly responsive to some of the contentions that the defendant was making." RP 7/31/14 at 132. She said she ordered the email and attachments produced

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<sup>17</sup> There was also very little if any discussion of Captain Sweeney's performance, and the only mention of her "interventions" was the AAG's report that a comparison to other pilots showed the differences were "negligible"; there "didn't appear to be a higher number or statistically significant." *Id.* at 61.

because she thought they contained information collected for the Board's May 19 meeting at which it made its decision. RP 8/11/14 PM at 88-89.<sup>18</sup> She explained that she inferred from that that Captain Hannigan had looked at the information before he went to the meeting.<sup>19</sup> "In fact, he's supposed to look at it before he went to the board meeting. That's what the whole discussion was supposed to be about." *Id.* at 90. She explained that "the important thing" about the factual information in these attachments was that "the Board apparently didn't review it.... It existed but wasn't reviewed." *Id.* at 93. And she recognized that the documents were relevant to prove whether "interventions" were actually discussed "when the ultimate decision was made." *Id.* She said that to try to shield these documents from Plaintiff "was an aggressive use of the attorney-client privilege, in other words as a sword which waived it." *Id.* at 94.

#### **6. The Court Sanctioned the Board for Violating the Nelson Litigation Order and Other Orders.**

There were two male trainees in the 2005 class who were not licensed, Captain Nelson and Captain Jones. Captain Nelson claimed he

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<sup>18</sup> The Board admitted during this discussion that the attachments consisted of factual information collected by the Board administrator, Judy Bell. *Id.* The Board also conceded that the first attachment, a questionnaire created by the AAG for the Board members to answer and the only part of the document that contains "communications" or mental impressions, was not offered by Plaintiff at trial. *Id.*

<sup>19</sup> Indeed, the May 19 transcript indicates that Hannigan had reviewed some of the information, but not all of it. Trial Ex. 88 at 59-60, 80-81.

was denied a license due to age discrimination because he was over 40.

Nelson disputed the Board's decision through an Administrative Procedure Act appeal. (The "Nelson Litigation.") CP 5217-5225. The ALJ assigned to the appeal conducted a lengthy hearing at which Captains Hannigan and Dudley testified. The ALJ affirmed the Board's decision. Nelson appealed the decision to the Superior Court, which reversed. *Id.*

A second administrative hearing was held before the same ALJ, and this litigation was ongoing when the Sweeney trial began on August 6, 2014. RP 8/11/14 AM at 97. On August 28, the ALJ again ruled in favor of the Board. CP 3272 – 3273. On September 2, the Board filed a motion in Sweeney's case for permission to tell the jury that the Nelson litigation was over. *Id.* The same day, Judge Shaffer considered the motion on the record and denied it. RP 9/2/14 PM at 101. She was concerned that raising the Nelson litigation would confuse the jury because it was irrelevant to their decision on Sweeney's claim and might unfairly prejudice Plaintiff's case. *Id.* She ordered that unless Plaintiff raised the Nelson litigation before the jury, the jury should not be told the litigation was over. *Id.* The Board does not challenge this order entered by Judge Shaffer.

On September 10, the Board called Captain Hannigan as a witness. Despite the court's order, Defense counsel directly asked him about the Nelson litigation. RP 9/10/14 PM at 30:

Q. Has the Nelson case recently resolved?

A. Yes and I am pleased with the results.

Sweeney's counsel immediately objected and Judge Shaffer struck the testimony and ordered the jury to disregard it. *Id.* at 30.

A discussion outside the jury's presence ensued. Judge Shaffer said she was so concerned about the impression left on the jury that she would consider a motion by Plaintiff for a mistrial. *Id.* at 35-36, 41. At first the Board's counsel attempted to justify his conduct claiming confusion over the Court's Nelson order. The court strongly rejected counsel's assertion:

No. I said as far as we would go is that it was in litigation at the time. I never said that you could get into whether it was successfully resolved or how Captain Hannigan felt about it, and you just went right ahead and ignored the fact that I have ruled on this, and not once but several times, because I have ruled on it at sidebar and then put it on the record and we have discussed it.<sup>20</sup>

*Id.* at 32-33. Defense counsel then admitted he had "no defense" and "agreed" with the court. *Id.* at 41:

With respect to that about the Nelson litigation, I don't have a defense. I mean if—it is what it is. I agree.

The sanction order that Judge Shaffer ultimately issued to Defense counsel for this violation was also in response to Defense counsel's many prior

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<sup>20</sup> Earlier *that same day*, the Board played for the jury the videotaped deposition of Captain Snyder, Chairman of the TEC in 2008-2009, who was out of the country during the trial. Because of Judge Shaffer's order denying the Board's motion to tell the jury that the Nelson litigation was over, Sweeney's counsel decided not to include a portion of the videotaped deposition about Nelson's litigation, which she had previously designated to include. The Board agreed and edited that section out. *See* RP 9/10/14 AM at 5.

violations of the court's orders and directives on the manner in which he was examining witnesses.

On August 13, the Board's counsel called his first witness, Commissioner Hulsizer, out of order. During that examination, he repeatedly asked leading questions. RP 8/13/14 PM at 39, 43, 45. Plaintiff's counsel was forced to object. The Court sustained the objections. *Id.* On August 20 and over the next three weeks, the Board continued its case. Its counsel repeatedly asked leading questions.<sup>21</sup> The Court sustained multiple objections. *See e.g.* RP 9/10/14 PM at 33-41.

On September 10, prior to sanctioning the Board's counsel for violating the Nelson litigation order, the trial court had admonished him for his improper examination of Plaintiff's expert witness, Dr. Barbara Reskin.<sup>22</sup> On the same day, the trial court had also admonished counsel for repeatedly asking leading questions to Captain Hannigan. RP 9/10/14 PM at 11, 12, 25. *See id.* at 28 ("Stop leading. I will impose some sanctions if this doesn't stop.") Later that afternoon, in discussing his violation of the Nelson order, Judge Shaffer noted that because Defense

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<sup>21</sup> RP 8/20/14 PM at 92. 8/25/14 AM at 18, 50, 51, 73. 8/26/14 AM at 89. 8/26/14 PM at 92. 8/28/14 PM at 48, 54. 9/2/14 AM at 33. 9/2/14 PM at 14, 27. 9/3/14 AM at 3, 14, 15.

<sup>22</sup> In challenging Reskin on her expert opinion about "in-group" dynamics in male dominated industries, Defense counsel demanded that Reskin tell him if the sole male on *the jury* would be subject to the same "in-group" dynamic. Plaintiff objected. The court sustained the objection and admonished counsel. RP 8/19/14 PM at 58-59.

counsel had not followed her orders on the use of leading questions, she had begun thinking “what remedies do I have other than striking areas of testimony” to obtain compliance. *Id.* at 37.

On September 12, Plaintiff moved for a curative instruction and sanctions relating to Defense counsel’s violation of the Nelson litigation order and improper use of leading questions. CP 3593-3599. Plaintiff argued in the motion that Defense counsel’s conduct had jeopardized the fairness of the trial and had caused Plaintiff to seriously contemplate moving for a mistrial. CP 3596. But the stark reality was that after five weeks of trial of which Defendant has consumed almost four weeks, Plaintiff could not afford a mistrial. A mistrial was not a practical remedy and would end up punishing only the Plaintiff. *Id.* In response to Plaintiff’s motion, the Board did not dispute that a curative instruction was warranted. CP 3604. The Board told Judge Shaffer that a further monetary sanction was not warranted. *Id.* Judge Shaffer agreed and denied Plaintiff’s motion for an additional monetary sanction. CP 3935-3936.

**7. The Court Denied the Board’s Motion for a New Trial Based on Alleged “Juror Misconduct.”**

On September 19, the jury received jury instructions before beginning deliberations. Jury Instruction 14 instructed that ten jurors had to agree upon an answer to each of the questions on the special jury

verdict form submitted to the jury, but the same ten jurors did not have to agree upon all of the questions. CP 3848. The trial court also provided the jury with the parties' agreed upon special verdict form containing three questions: liability, proximate cause, and damages. CP 3941-3942. The Board does not take issue with the instruction or special jury form.

On the second day of deliberations, Juror No. 1 informed the bailiff that "she suddenly remembered something she had read about—some newspaper article in this case." RP 9/23/14 at 2.

During the trial, Captain Sweeney had testified about a newspaper article she had read in which one of her training pilots, Captain Hunziker, was quoted as having said that there were no women pilots, and "he would quit when the first one came." RP 8/14/14 PM at 70. The article had been published in approximately 1986. RP 9/23/14 at 15.

After being informed about the juror's statement to the bailiff during deliberations, the Court called counsel into the courtroom and questioned the juror. The juror seemed to say that after the newspaper article was mentioned during the trial, she had a vague recollection of having heard about it herself. *Id.* at 6. She had apparently recalled seeing it some 25 years earlier, i.e., in the late 1980s. *Id.* at 19. When the article came up in deliberations, she mentioned having seen it, and then brought that to the attention of the bailiff. *Id.* at 8. She did not have any recall of

who said what, when, or how she had seen it. *Id.* at 9-10. The court instructed her and all other jurors to set it aside and not discuss or consider it further in deliberations. *Id.* at 12-13, 22.

Eight days later, the jury returned a verdict for the Plaintiff. CP 3941-42. Polling showed that ten or more jurors voted for the verdict on liability, causation, and damages, but that they were not the same jurors on each question. RP 10/1/14 at 9-12. Juror No. 1 abstained on liability and voted in favor on causation and damages. *Id.* at 8-9. Juror No. 6 voted against liability and causation but in favor of damages. *Id.* at 12. Juror No. 8 voted in favor of liability but against causation and damages. *Id.*

### **III. ARGUMENT**

Despite the six week trial that saw 31 witnesses, the Board only argues in this appeal that Judge Shaffer erred in making four discrete, discretionary decisions. Only one of these decisions was during trial. Judge Shaffer did not abuse her discretion regarding any of these four decisions and the verdict should be affirmed.

#### **A. The Trial Court Did Not Abuse Its Discretion in Ordering the 5/19 Meeting Transcript Produced.**

The Board contends the trial court erred when it ordered the Board to produce the transcript of its final meeting about Captain Sweeney's license, in which it made the ultimate decision at issue in the case. The

Board claims the transcript was protected from disclosure by the attorney-client privilege and the work product doctrine. The vast majority of the meeting consisted of discussions *among Board members*, not with any attorney, yet the Board did not try to redact or ask to redact any part of the transcript that involved the attorney. *See* Trial Ex. 88. Even so, the Board waived the privilege as to this meeting by testifying about it in its own defense and by asserting that it considered new information during the meeting in making its final decision. Even when faced with a motion to compel production of the transcript on these bases, the Board refused to withdraw this testimony or limit itself from making assertions about that May 19 Board meeting at trial. The trial court did not abuse its discretion in ordering the transcript produced. Even if it had, the Board fails to show how it was prejudiced.

**1. The Standard of Review Is Abuse of Discretion.**

The Board makes a somewhat contorted effort to cast the issue before this Court as one of de novo review. While it may be true that the Court should review *legal* questions de novo, the trial court's application of the law is reviewed for abuse of discretion, particularly in the context of a discovery order. *Doehne v. EmpRes Healthcare Mgmt., LLC*, 190 Wn. App. 274, 280 (2015) (citing *Cedell v. Farmers Ins. Co. of Wash.*, 176 Wn.2d 686, 694 (2013)); *see also Heidebrink v. Moriwaki*, 104 Wn.2d

392, 401 (1985) (whether work product is discoverable “is vested within the sound discretion of the trial judge”).<sup>23</sup>

For example, in *Pappas v. Holloway*, 114 Wn.2d 198 (1990), the Supreme Court applied de novo review to legal questions such as “[w]hether waiver of the attorney-client privilege should extend to third party defendants,” and whether to adopt a specific test for implied waiver. *Pappas*, 114 Wn.2d at 204, 208. The Board raises no such legal issues in this appeal. At issue here is only whether the trial judge properly applied undisputed legal standards to the facts of this case, and those questions are reviewed for abuse of discretion.<sup>24</sup>

## **2. The Order Was Based on the Record at the Time.**

The Board also spends a great deal of energy attacking Judge Shaffer for alleged procedural improprieties, apparently in an effort to bolster its assertion of judicial bias. First, it complains that Judge Shaffer ordered production of the meeting minutes and email attachments “on the eve of trial.” Appellant’s Brief at 24; *id.* at 15 (“Captain Sweeney did not request privileged documents until the trial date had been continued for the fourth time”). But the email and attachments were clearly responsive

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<sup>23</sup> The Board also relies on *Brundridge v. Fluor Fed. Servs.*, 164 Wn.2d 432 (2008). That case involved waiver of the right to appeal an issue not preserved below, not privilege.

<sup>24</sup> As discussed below, it is not true that the trial judge failed to explain her decisions, and the lack of a better record of those explanations is due to the appellant’s failure to preserve the record.

to Plaintiff's *first* discovery requests from two years earlier and the Board had not produced them or even disclosed that these documents existed until "the eve of trial." Further, it did so only after its CR 30(b)(6) representative, Captain Hannigan, testified about them less than three weeks days before trial. *See* Appellant's Brief at 18 n. 21; CP 1014-16; *see also* CP 1290 (claiming the Board's counsel "simply overlooked" the documents). Only then did Captain Sweeney's counsel know the documents existed and they could seek to have them produced by Court order. The Board itself, not Judge Shaffer, is responsible for the timing of the disclosure, and any prejudice from that timing harmed the Plaintiff, not the Defendant.

Second, with respect to Judge Shaffer's order compelling production of the closed meeting transcript, the Board chastises Judge Shaffer for "overturning" a decision of the prior trial judge, Judge Dean Lum. Appellant's Brief at 2, 16-20, 26-32. But the Board does not and cannot deny that the record before Judge Shaffer was very different than the record before Judge Lum. At the time of the first order, the CR 30(b)(6) depositions of Captains Dudley and Hannigan had not yet been taken, and the Board had not yet moved for summary judgment. As shown above, in multiple contexts as the case progressed, the Board made clear that it was going to assert at trial that it had carefully considered all

of the information available to it anew at the May 19 closed meeting, including new considerations that had never been documented anywhere. At the time Judge Shaffer considered the Plaintiff's motion, it had become much clearer that the Board would make these assertions and only the transcript could confirm or disconfirm their veracity.<sup>25</sup>

The Board also fails to acknowledge that discovery orders are interlocutory and subject to alteration. Trial judges have discretion to manage discovery and trial in the manner they see fit, within the confines of the law. *See O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001) (the trial judge has broad discretion to manage discovery so as to ensure full disclosure of relevant information while protecting the litigants against harmful side effects of disclosure). The Board cites no law or rule that prevents a trial judge from changing his or her ruling on a discovery motion, nor one that prevents a subsequent judge from doing so. By definition, discretionary decisions may come out differently and still be within the range of reasonable.<sup>26</sup> It was within

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<sup>25</sup> The Board says Judge Shaffer indicated she had not actually read the meeting transcript before ordering it produced. Appellant's Brief at 20, 32. But even if that were the case, given the rationale of her ruling it does not matter what was said at the meeting. Even assuming the meeting involved attorney-client communications, if the Board made affirmative contentions in this case about what was said and done at the meeting, it waived the privilege. *See infra* subsection D5.

<sup>26</sup> In fact, Judge Lum's previous ruling is difficult to make sense of, because while he did not find waiver as to the May 19, 2009, meeting transcript, he found the Board *did* waive privilege as to the October 31, 2008, transcript. CP 264. First, the earlier transcript

Judge Shaffer's discretion to decide the issues presented to her, and Judge Lum's ruling has no bearing on whether she abused that discretion.

**3. The Board Has Not Established the Transcript is Protected by Attorney-Client Privilege.**

The Board has the burden of making a factual showing that a privileged communication exists. *Dietz v. Doe*, 131 Wn.2d 835, 844 (1997). Although AAG Bowman asserted by declaration that "the Board and TEC requested legal advice from me" at the May 19 meeting concerning "plaintiff's claims of gender discrimination [and] the alleged creation of a hostile working environment," the transcript of the meeting contradicts this assertion. CP 214. There are a number of questions asked, but mostly by and between Board members Hannigan and Dudley, and none of Bowman. Trial Ex. 88 at 64-65, 76-77, 80. Bowman's few comments are mostly factual, or concern an administrative, timing issue about whether, if the Board voted not to license Sweeney and she appealed, her appeal could be heard with Captain Nelson's. *Id.* at 61-63. The transcript itself contains very little if any communications with the

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contains far more attorney advice than the May 19, 2009, transcript. *Compare* Trial Ex. 88 *with* CP 1117-31. Second, Judge Lum said the Board had waived the privilege as to the earlier meeting because the Board had "allow[ed] witnesses (particularly Elsie Hulsizer) to testify at deposition in detail without objection about the decision-making process, and the plaintiff's perceived deficiencies at the closed meeting." CP 264. However, in the Hulsizer deposition excerpt that was before the court, she testified about discussions *at the May 19 meeting*, as a basis for her vote "against licensure of Captain Sweeney." CP 239-40. This testimony supports waiver as to the May 19 meeting at least as much as to the October 31 meeting.

attorney, much less advice from him.

In contrast, the Board, through Captain Dudley, testified that the reason for holding a closed session was to protect Captain Sweeney's privacy, not to get legal advice. CP 5789-5790.<sup>27</sup> Chairman Dudley was well aware of the legal constructs, such as privilege, applicable to the Board's work. *See* Trial Ex. 88 at 76-77. And again, the Board chair and members testified about the meeting without objection from counsel. *See* RP 8/13/14 AM at 67-69 (Dudley); RP 8/20/14 AM at 55-56, 64 (Hannigan). The Board has not proven that the attorney-client privilege applies to the May 19 meeting.<sup>28</sup>

#### **4. The Attorney-Client Privilege Can Be Waived.**

The attorney-client privilege "exists in order to allow the client to communicate freely with an attorney without fear of compulsory discovery." *Dietz*, 131 Wn.2d at 842 (citations omitted). The privilege applies to "communications and advice between an attorney and client." *Id.* Because the privilege results in exclusion of otherwise relevant evidence, which is "contrary to the philosophy" of full disclosure, the privilege is not absolute, and "must be strictly limited to the purpose for

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<sup>27</sup> Plaintiff filed a Designation of Clerk's Papers on January 15, 2016 which designates this deposition. Plaintiff anticipates the Clerks Papers page numbers to be those cited.

<sup>28</sup> Moreover, the fact that the court and counsel assumed it did during arguments in the trial court reaffirms the imbalance of knowledge in the situation, where only the Board knew what was actually said at the meeting.

which it exists.” *Pappas*, 114 Wn.2d at 203-04 (citation omitted).

For more than three centuries it has now been recognized as a fundamental maxim that the public ... has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.

*Dietz*, 131 Wn.2d at 843. Application of the privilege “must be balanced against the benefits to the administration of justice stemming from the general duty to ‘give what testimony one is capable of giving.’” *Id.* (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)).

**5. The Board Expressly Waived Any Privilege by Testifying About the May 19 Meeting.**

A party may not use the attorney-client privilege “as a shield from critical inquiry into matters he has raised in his own behalf.” *Seafirst Corp. v. Jenkins*, 1985 U.S. Dist. LEXIS 16683, \*4 (W.D. Wash. Aug. 20, 1985). The so-called “fairness doctrine” aims to prevent one party’s selective disclosure of otherwise privileged information. “[I]t has been established law for a hundred years” that if a client testifies about what transpired between her and her attorney, “she cannot thereafter insist that the mouth of the attorney be shut.” *In re von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987) (citing *Hunt v. Blackburn*, 128 U.S. 464, 470-71(1888)). “From that has grown the rule that testimony as to part of a privileged

communication, in fairness, requires production of the remainder.” *Id.* at 102 (citing McCormick on Evidence § 93, at 194-95 (2d ed. 1972)).<sup>29</sup>

Washington has long followed this rule. When a party elects to testify about an allegedly privileged communication, he waives the privilege “as to the whole of that communication.” *State v. Vandenberg*, 19 Wn.App. 182, 186 (1978) (quoting *Martin v. Shaen*, 22 Wn.2d 505, 513 (1945)). Here, the Board repeatedly testified about the substance of the May 19 closed meeting, and therefore cannot shield the remainder on the basis of attorney-client privilege.<sup>30</sup>

First, Captain Dudley, the chair of the defendant Board, testified in deposition without objection that the Board had an “extensive discussion” about licensing Captain Sweeney at the May 2009 closed meeting, including “a fair amount of detail” regarding her performance. CP 1078.

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<sup>29</sup> See also *Malco Manufacturing Co.*, 307 F. Supp. 1177, 1178 (E.D. Pa. 1979) (“the client may voluntarily waive the privilege by “testifying or otherwise alluding to the substance or content of the privileged communication.”) (citing *Hunt v. Blackburn*, 128 U.S. 464 (1888)); *Gebbie v. Cadle Co.*, 49 Conn. App. 265, 274 (Conn. App. Ct. 1998) (“If the holder of the privilege fails to claim his privilege by objecting to disclosure by himself or another witness when he has an opportunity to do so, he waives his privilege as to communications so disclosed.”); Cal. Evid. Code § 912(a) (privilege is waived if the holder, “without coercion, has disclosed a significant part of the communication or has consented to disclosure ... including failure to claim the privilege in any proceeding in which the holder has legal standing and the opportunity to claim the privilege.”).

<sup>30</sup> The Board also claims the transcript was protected by the work product doctrine, Appellant’s Brief at 24 n. 31, but has never asserted any factual basis to find the transcript was prepared “in anticipation of litigation” rather than simply as a normal business practice. *Lacy v. Villeneuve*, 2005 U.S. Dist. LEXIS 31639 (W.D. Wash. Nov. 21, 2005)(party claiming work-product protection bears burden of establishing that privilege applies).

Then, testifying as the Board's Rule 30(b)(6) representative, Dudley contended that the Board members at that meeting reviewed and considered "all the documents they had in front of them ... as they decided how to vote." CP 1141.<sup>31</sup> Finally, Captain Hannigan, also testifying as the Board's representative, insisted that the Board considered everything anew prior to and at that meeting, after taking "a month to study the [new] information that was provided to them." CP 1152-53.<sup>32</sup> In each of these instances, the Board's representatives made substantive assertions about the May 19 meeting, thereby waiving any privilege that may have applied.

*Martin v. Shaen, supra*, presented similar circumstances. That case was brought by the estate of a deceased wife against her ex-husband to obtain title to some land. The plaintiff executor testified that he had received from his deceased client a quitclaim deed signed by the defendant husband, but the executor (also the deceased's attorney) refused to disclose how his client had received it because that would disclose an

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<sup>31</sup> It does not matter that the Board's counsel attempted to object, partially, to the questioning in this instance, because the Board's counsel still allowed the testimony. See *Perrignon v. Bergen Brunswick Corp.*, 77 F.R.D. 455, 460 (N.D. Cal. 1978) (holding that company waived privilege when its attorney objected at former president's deposition but took no action to prevent him from testifying about privileged communications).

<sup>32</sup> The Board contends that when Hannigan asserted that the Board "had an opportunity for a month to study the information," he was "limit[ing] his testimony to the time between the April 2009 Senn-Sweeney session and the May 19, 2009, public licensing decision." Appellant's Brief at 29. That is not the only reading, or apparently Judge Shaffer's reading, of the testimony, but even if it were, this still gives rise to an *implied* waiver, as discussed below, because it affirmatively suggests that the Board members *did* study the information, and the meeting transcript affirmatively shows they did not.

attorney-client communication. 22 Wn.2d at 513. Because delivery of the deed by the defendant to the plaintiff was an essential element of the estate's claim, the Court deemed any privilege to have been waived. "Having testified to a specific fact" about the transaction between attorney and client, the plaintiff "could not, by invoking the principle of privileged communication ... be permitted to disclose so much of the transaction as he saw fit and then withhold the remainder." *Id.*

Here the Board's representatives made substantive assertions about the May 19 meeting at which the Board made the decision at issue. It tried to reference the May 19 meeting to show that the decision-making process was thorough, considered, and fair.<sup>33</sup> It cannot then shield the remainder of that conversation by stating that it was privileged. By testifying about it, the Board expressly waived any privilege that may have applied to the May 19 closed meeting.

**6. The Board Impliedly Waived Any Privilege By Asserting That It Considered New Information in Making Its Decision.**

Even if the Board did not expressly waive any privilege over the May 19 meeting by testifying about it, it impliedly did so by raising new reasons for its final decision that clearly called into question the substance

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<sup>33</sup> Needless to say, it only compounds the matter that the Board's characterization of the meeting was inaccurate. *United States v. Mendelsohn*, 896 F.2d 1183, 1188-89 (9th Cir. 1990) ("An inaccurate statement of a privileged communication waives the privilege with respect to that communication.").

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

As set forth above, the Board made it clear that it would testify and argue that it had thoroughly considered all of the information available at the time it made its final decision about Captain Sweeney on May 19, 2009. First, it increasingly relied upon Captain Sweeney's "interventions" as a major basis for its decision, when it had never even mentioned them in the documentation about her performance. It did not mention interventions in its October 2008 meeting at which it decided to end her training program, and it did not mention them in its November 2008 letter outlining the bases for its decision. Trial Ex. 12, 14. But in its testimony leading up to trial and in its summary judgment motion, it emphasized her interventions above all else. CP 1760-63.

Second, the Board insisted that it thoroughly considered Captain Sweeney's April 2009 presentation, through her attorney, and the information and data it collected as a result. It testified through Captain Hannigan that its "final determination" was not made "until after she and

her attorney made a full presentation to the Board,” and “the Board had an opportunity for a month to study the information that was provided to them.” CP 1152. Its privilege log showed that, during that period, it had collected and circulated multiple documents regarding its training program and Sweeney’s performance and that of other pilots, including Excel spreadsheets on “Interventions after Trip 80”; “Average Scores by Pilot experience”; “Trainees and Pilot experience”; and Sweeney’s “PrePost Ever Ursula scores.” CP 1067-68.<sup>34</sup> This is information that quite apparently, as Judge Shaffer noted, Captain Hannigan was “supposed to look at it before he went to the board meeting. That’s what the whole discussion was supposed to be about.” RP 8/11/2014 PM at 90.

Both of these are affirmative acts by the Board that placed its allegedly privileged discussion in the closed meeting at issue, satisfying the first two prongs of the implied waiver test. *Pappas*, 114 Wn.2d at 207-08. The Board cannot on the one hand say that it considered all of this new information, which it never before discussed or considered, and on the other hand withhold the only evidence of what it *actually* considered in the meeting. Indeed, the transcript of the meeting shows that Captain Hannigan’s testimony suggesting the Board actually considered

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<sup>34</sup> The Ever Ursula was a vessel on which Captain Sweeney had an allegedly serious intervention during her training.

all of the information presented to it was false; he stated as much himself during that very meeting, multiple times. Trial Ex. 88 at 79 (“I would feel much more comfortable if the entire Board, in a closed session, got to look at the information that has been developed by the TEC and by Judy before making a decision.”); *see also id.* at 60-61, 80-81.

Shielding the actual transcript of the discussion from Plaintiff would deprive her of information vital to her case, which is the third prong of the implied waiver test. *Dana v. Piper*, 173 Wn. App. 761, 776 (2013) (“Protected communications are vital to a party’s case when they contain information about a disputed issue that is not available from any other nonprivileged source.”). The only way that Captain Sweeney could verify, test, and challenge the Board’s self-serving assertions of having actually taken the “opportunity for a month to study the information that was provided to them,” and considered “all of the documents they had in front of them” before voting to deny her license at the May 19 meeting, was to see what was actually said at the meeting. CP 1141, 1153.

The Board took affirmative acts in discovery to put its final decisive meeting at issue. The transcript of that meeting was vital to Plaintiff’s ability to make her case and respond to the Board’s defenses. She therefore established all of the elements of an implied waiver, and the trial judge was well within her discretion to order the transcript produced.

**7. The Board Has Not Shown that Disclosure of the Meeting Transcript Caused It Any Prejudice.**

Even if the Board were correct that the trial judge erroneously ordered the production of the May 2009 transcript, it must also show that the error was prejudicial and not harmless, i.e., that it likely affected the verdict. *See Tagupa v. Board of Directors*, 633 F.2d 1309, 1312 (1980) (the harmless error doctrine applies to discovery orders). It contends it was “strongly prejudiced” by disclosure of the transcript because Sweeney used it, “particularly AAG Bowman’s advice to the Board,” to “shape the jury’s view of the Board and its actions.” Appellant’s Brief at 37.

In fact, Sweeney rarely even referred to the AAG or his comments. She relied on and used the Board members’ own comments, particularly those of Captain Hannigan, to disprove the Board’s own claims about its decision-making process.<sup>35</sup> The Board claims Sweeney used the transcript “to scathingly cross-examine” its members. Appellant’s Brief at 37. Yet in the examples it cites, Plaintiff’s counsel simply confirmed that no new substantive information was discussed at the final, “critical,” decisive May

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<sup>35</sup> The Board later claims that before receiving the May transcript, in her summary judgment briefing, Plaintiff had “focused on her competence as a pilot,” but later, once it had the transcript, it used the Board members’ questions and comments during that meeting against them. Appellant’s Brief at 38. Yet elsewhere, it claims Plaintiff’s summary judgment brief used the October transcript (which had been ordered disclosed by Judge Lum and is unchallenged on appeal) to “ma[ke] the behavior of the TEC and the Board during that closed meeting, and after—rather than her own performance—central to her theory of the case.” *Id.* at 22.

19 meeting, and that Captain Hannigan had warned the Board that there was new information available which he thought the Board ought to consider before making a decision, but it did not do so.<sup>36</sup> The main point that Captain Sweeney made with the transcript was precisely the point for which it was admitted: to disprove the Board's claim that it fairly considered Captain Sweeney's qualifications and performance by reviewing all of the information that was available to it at the time it made its final decision. There was no unfair prejudice.

**B. The Trial Court Did Not Abuse Its Discretion by Ordering Production of the May 4 Email/Attachments.**

The Board contends the trial court erred by compelling it to disclose Judy Bell's May 4, 2009, email to AAG Guy Bowman, with ten attachments, a total of 76 pages. CP 4337-412. It claims the entire document was protected by the attorney-client privilege and the work product doctrine. The Board did not even identify this document to Plaintiff until July 10, 2014, after she uncovered it in a late-scheduled deposition the previous day, well after the discovery cutoff and less than one month before trial. Even then, the Board did not claim work product protection, only attorney-client privilege. CP 1067. The majority of the

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<sup>36</sup> See, e.g., RP 8/13/14 AM at 69, 72, 74 (Dudley); RP 8/14/14 AM at 19-24 (Hulsizer); RP 8/28/14 AM at 92-95 (Davis); RP 9/3/14 AM at 77-81 (Lee); RP 9/17/14 at 126-28 (Hannigan).

document consists of factual information which is not protected simply by having been communicated to an attorney. The remainder was not prepared in anticipation of litigation, and as with the May 19 meeting transcript, any applicable privilege was waived by the Board's own assertions that it considered the information prior to making its final decision about Sweeney's license. Furthermore, what little of the document that could be said to be protected by any privilege was clearly harmless to the Board and had no impact on the trial or outcome.

**1. The Standard of Review Is Abuse of Discretion.**

The Board again improperly asserts de novo review applies to this discovery order. Appellant's Brief at 45, 51. It cites no legal authority for this and admits that the issue is whether "Judge Shaffer's application of law to these facts" was correct. Application of law in a discovery order is reviewed for abuse of discretion. *Doehne*, 190 Wn. App. at 280 (citing *Cedell*, 176 Wn.2d at 694); *see also Pappas*, 114 Wn.2d at 210 (whether a party has shown a substantial need to overcome work product privilege "is ordinarily vested in the sound discretion of the trial court"). The standard of review is abuse of discretion.

**2. The Board Failed to Make a Record of the Decision.**

The Board takes issue with the trial judge for the poor state of the record on appeal of this issue. It chastises Judge Shaffer for not

“protecting the appellate record” by filing the May 4 email when it initially provided it to her; for not putting her reasons for compelling its production on the record; and for not filing a written order on her decision. Appellant’s Brief at 4, 44, 51. It is the Appellant’s responsibility, not the trial court’s, to preserve the record for its appeal. The Board could have ordered a court reporter for the hearing on the motion to compel, but chose not to. It could have filed the May 4 email itself, with a motion to seal, if it wanted it in the court file, but chose not to. It could have asked the court for a written order if it wanted one, but chose not to. The Board’s effort to blame Judge Shaffer for its own failure to properly preserve the record is unfounded and misplaced.

**3. The Board Did Not Establish the Document Was Subject to the Work Product Doctrine.**

As a threshold matter, the Board has not established that the May 4 email was prepared in anticipation of litigation and hence “work product.” CR 26(b)(4). “The work product doctrine does not shield records created during the ordinary course of business.” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 754 (2009) (citing *Heidebrink*, 104 Wn.2d at 396-97). The test is whether the document “can fairly be said to have been prepared or obtained because of the prospect of litigation.” *In re Det. of West*, 171 Wn.2d 383, 405-406 (2011) (citation omitted).

At the time this document was created on May 4, 2009, the Board had not even made a decision about Captain Sweeney’s license. Hannigan, testifying as the Defendant’s CR 30(b)(6) representative, said the decision was made on May 19. “At that time the Board could have renewed Captain Sweeney’s training license or chosen to take—chosen her to be suitable for licensing.” CP 1152-53. And he suggested that the Board had spent the month before the meeting “study[ing] the information that was provided to them” during and after Senn’s presentation. *Id.* Thus, the evidence of record is that Judy Bell compiled the information she sent to AAG Bowman on May 4 in the ordinary course of business so that the Board could consider it *in deciding whether to license Captain Sweeney*, not to prepare for litigation with her.<sup>37</sup> That is what Judge Shaffer concluded, and the reason she ordered the document produced. “That’s what the whole discussion [on May 19] was supposed to be about.” RP 8/11/14 at 90. The fact that the Board did not even mention work product in its privilege log when identifying the document is further evidence that the doctrine does not apply. CP 1067.

**4. The Factual Information in the Attachments Is Not Protected.**

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<sup>37</sup> The Board states in a footnote that the AAG was simultaneously “preparing the Board to defend the APA proceeding the Board expected Captain Sweeney to file concerning denial of her license.” Brief at 17. There is no evidence to support this. The evidence it cites is simply the May 4 email and attachments, which do not support its assertion.

The attorney-client privilege protects only information that is related to obtaining advice; it does not protect facts from discovery, nor documents prepared for a purpose “other than or in addition to obtaining legal advice.” *Mechling v. City of Monroe*, 152 Wn. App. 830, 853 (2009). If only a portion of a document is covered by the attorney-client privilege, the remainder must be disclosed. *Id.* As noted, the document at issue, which the Board withheld wholesale, consists mostly of compilations of facts. *See* CP 4356-4411.<sup>38</sup> All of the charts, tables, and summaries are taken directly from the trainees’ spreadsheets and trip reports. *See* Trial Ex. 302-364, 569-587. In light of the Board’s assertion that it considered this information before making its decision whether to license Captain Sweeney, the Board cannot claim the documents were created solely to obtain legal advice.

The work product doctrine also does not protect such factual information. First, “the mere presence of an attorney somewhere in the causal chain who generated the document is not sufficient” to protect it from disclosure. *Dreiling v. Jain*, 151 Wn.2d 900, 917 (2004). There is no dispute that these documents were not compiled by an attorney but by the Board’s administrator, apparently on her own initiative. *See* CP 4337

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<sup>38</sup> The Board admits all the attachments, with the exception of the first one, “provide factual and statistical support” for the Board’s responses to questions about Ms. Senn’s presentation in April. Appellant’s Brief at 48.

(“I have prepared attachments from the documents that I have available to support some of the answers.”). Second, even if the attachments had been prepared at an attorney’s direction, the work product doctrine generally distinguishes factual information from an attorney’s mental impressions. *Soter v. Cowles Publishing Co.*, 131 Wn. App. 882, 893 (2006). Factual information is discoverable, even if prepared “in anticipation of litigation,” on a showing of “substantial need” for the materials and “that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” CR 26(b)(4).

“The clearest case for ordering production is when crucial information is in the exclusive control of the opposing party.” *Heidebrink*, 104 Wn.2d at 401. Here, it was crucial for Captain Sweeney to know what the Board considered in deciding not to grant her a license. Again, in light of the Board’s insistence that it delayed its final licensing decision until after it heard her counsel’s presentation and had “an opportunity for a month to study the information that was provided to them,” and the Board claims that it actually considered “all of the documents they had in front of them” before voting to deny her license, Captain Sweeney had a substantial need to obtain that “information” and could not discover what the Board relied upon by any other means. CP 1141, 1152-53. Without seeing the documents and the transcript, she had no way to verify, test, or

challenge the Board’s self-serving assertions about when, why, and how it decided to deny her license, which was the ultimate issue in her case. *Id.*

**5. The Board Cannot Show Any Prejudice from Disclosure of the Email Itself or the Questionnaire.**

Even assuming that the email and the first attachment—the questionnaire on Senn’s presentation—were privileged, the Board cannot show any prejudice from their disclosure. In its brief to this Court, it claims Captain Sweeney used the email to “pinpoint the weaknesses identified by its own attorney” and to identify its “defenses, its weaknesses, its blind spots, and its internal disagreement about whether or not additional ‘investigation’ of Senn’s assertions was required.”

Appellant’s Brief at 25, 50. Yet, the Board makes no effort to substantiate these assertions. In fact, while it is true that Captain Sweeney pointed out to the jury that Captain Hannigan repeatedly urged the Board *not* to make a final decision until the new information it had gathered on her and other trainees, *see supra* p. 42 and n. 36, that was simply to rebut the Board’s own false assertion—in part through Hannigan himself—that it *had* considered all of that information before making a decision.

The questionnaire does not contain an attorney’s “mental impression” or opinion about any issue in the case.<sup>39</sup> It contains Ms.

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<sup>39</sup> The email, as distinguished from the questionnaire, also does not contain any mental impressions or opinions of an attorney or other privileged information.

Senn's assertions followed by *the TEC's* denials. CP 4338-55. It does not reveal any "defenses, weaknesses," or "blind spots," that had not already been revealed to Sweeney by the Board in deposition testimony, motions and documents. Indeed, the Board fails to show when or how Captain Sweeney made any use of the questionnaire during trial, much less an unfairly prejudicial use of it. It admits that she did not seek to admit it into evidence and that *the Board itself* did so. Appellant's Brief at 48 n. 56. The Board has not and cannot show that its disclosure caused it any prejudice, and this Court should find that any error was harmless.

**C. The Trial Court Did Not Err in Sanctioning the Board for Violating the Nelson Litigation Order.**

In its third claimed error, the Board asserts that Judge Shaffer erred by sanctioning it for violating previous orders by forbidding it to refer to Captain Nelson in the last days of the trial or in closing argument. CP 3935-36; RP 9/18/14 at 168-170.<sup>40</sup> The Board fails to identify any new or different evidence about Nelson it would have offered but for the court's order. Indeed, as a threshold matter, the Board failed to properly preserve the issue for appeal by making an offer of proof that set out with specificity the new evidence.

The Board claims the sanction order was erroneous because 1) the

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<sup>40</sup> The Board does not challenge the underlying order that its counsel violated, in which Judge Shaffer forbade it to tell the jury that the Nelson litigation was over.

court did not go through the *Burnet* factors; and 2) the court imposed the “most severe” sanction of excluding evidence.<sup>41</sup> Yet, the court was not required to apply *Burnet* in this context. As this Court recently held, *Burnet* only applies to sanctions imposed under CR 37 for a party’s failure to provide discovery, and even then, a trial court is not required to go through the *Burnet* factors every time a sanction is imposed. *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 195 (2015).

Further, the trial court’s sanction was appropriate, was not overly severe, and was not an abuse of discretion. First, the trial court did not actually exclude any evidence. Indeed, in the prior five weeks of the trial, the Board had already presented both testimonial and documentary evidence on Nelson and comparing his performance to Captain Sweeney’s performance. The trial court did not strike any of the previously introduced evidence or testimony, nor did it direct the jury to disregard this evidence. It simply instructed the jury to disregard the Nelson *litigation*, not his performance or the evidence comparing him to Captain Sweeney.

Second, the Board’s attorney admitted he violated the court’s Nelson litigation order, RP 9/10/14 PM at 41, and essentially conceded that the sanction was appropriate. At the time of her ruling, the Board did

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<sup>41</sup> *Burnet v. Spokane Ambulance*, 131 Wn.2d 484 (1997).

*not* argue to Judge Shaffer that the sanction she imposed was too severe or propose a lesser sanction. Instead, the Board told Judge Shaffer that she had acted appropriately in the sanction she imposed and argued only that the monetary sanction sought by the Plaintiff was unwarranted. CP 3865.

**1. The Board Did Not Preserve the Issue for Appeal.**

A party must make an offer of proof to allow the trial court to properly exercise its discretion when reviewing, reevaluating, and revising its rulings if necessary and to permit appellate review. *State v. Ray*, 116 Wn.2d 531, 538-539 (1991). “An offer of proof must be sufficiently definite and comprehensive fairly to advise the trial court whether or not the proposed evidence is admissible. An additional purpose of such an offer of proof is to inform the appellate court whether appellant was prejudiced by the exclusion of the evidence.” *Sutton v. Mathews*, 41 Wn. 2d 64, 67 (1952) (citation omitted). If the party fails to make such an offer, then the appellate court will not make assumptions in favor of the rejected offer. *Smith v. Seibly*, 72 Wn.2d 16, 18 (1967).

The Board made no such offer of proof to the trial court on what additional Nelson evidence, beyond the substantial evidence already in the record, it wanted to submit that was “sufficiently definite and comprehensive.” It even fails to do so in its Opening Brief. It has not properly preserved for appeal the issue of the trial court’s alleged error in

limiting additional Nelson evidence. This failure prevents this Court from reviewing the Board's claimed error. *Ray*, 116 Wn.2d at 538-539.

**2. The Standard of Review is Abuse its Discretion.**

The trial court's choice of a sanction is reviewed by this Court for abuse of discretion, not de novo. *See, e.g. T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423 (2006). A trial court has great discretion in the admission or exclusion of evidence. *Diaz v. State*, 175 Wn.2d 457, 462 (2012). It has broad authority to manage the trial and impose sanctions for misconduct. *See State v. Gassman*, 175 Wn.2d 208, 212 (2012).

**3. The Court Did Not Strike Any Evidence.**

As previously noted, on September 2, 2014, after the Nelson litigation had concluded, the Board moved for permission to tell the jury the litigation was over. CP 3272. Judge Shaffer denied the motion because it was irrelevant, the jury could be confused by bringing up the Nelson litigation again, and it would be prejudicial to Plaintiff. RP 9/2/14 PM at 101. Nonetheless, a week later on September 10, the Board called Captain Hannigan as a witness and directly asked him whether "the Nelson case recently resolved." RP 9/10/14 PM at 30. He replied "Yes and I am pleased with the results." *Id.* The court's sanction followed.

By this time, the jury had already seen substantial documentary evidence on Nelson, including: his trip reports and those for other trainees,

Trial Exs. 270-553 and 569-589; the spreadsheets showing the scores for male trainees who were not licensed, Trial Exs. 27-41, 688 (Jones) and 690 (Nelson); a trial exhibit comparing Sweeney's interventions with Nelson, Jones and other trainees who were licensed, Trial Ex. 90; TEC emails about Nelson, Trial Exs. 8, 81-84, 86; Nelson's training program letter and those of the other trainees, Trial Exs. 591-613, 555-561; and charts prepared by Judy Bell listing the trainees in the order of their results on the written entrance exam and simulator test, and the number of interventions that each trainee had. Trial Exs. 90, 97.

In addition to documentary evidence on Nelson, there was also five weeks of trial testimony in which Nelson's performance in his training program was discussed multiple times. TEC members and Board members were asked to compare Nelson and Sweeney. For example, the Board's counsel asked Captain Dudley to review Nelson's scores, and the jury was shown an exhibit setting out a comparison of Nelson's scores. RP 8/13/14 at 110-113; Trial Ex. 690. After reviewing Nelson's scores, Dudley told the jury that Nelson did not get a license. *Id.*; *see also* RP 9/10/14 AM at 18 (Hannigan testimony); RP 9/18/14 PM at 18-19 (Kromann testimony). Captain Sweeney was also aggressively cross-examined by the Board's counsel about how her scores and performance compared to Nelson. RP 8/18/14 AM at 89-90.

Judge Shaffer did not strike *any* of the above evidence, and did not instruct the jury to disregard any of this evidence. The court's curative instruction did not tell the jury to disregard Nelson or Nelson as a comparator to Sweeney. It instructed the jury only that the Nelson *litigation* was not relevant. CP 3835.

**4. The Court Did Not Have to Document a *Burnet* Test**

The Board asserts that Judge Shaffer abused her discretion by not going through the *Burnet* factors before sanctioning the Board for its counsel's violation of her order. This Court has held that *Burnet* only applies to consideration of discovery sanctions available under CR 37. *Foss Mar. Co. v. Brandewiede*, 190 Wn. App. 186, 195 (2015), stating:

But nothing in *Burnet* suggests that trial courts must go through the *Burnet* factors every time they impose sanctions for discovery abuses." And no case law suggests that a trial court must apply *Burnet* for discovery sanctions based on a CR 26(b) violation. *Burnet* is limited to CR 37(b) sanctions. Although some similar concerns apply to a disqualification of counsel, we conclude that *Burnet* does not apply here.

A recent decision by the Washington Supreme Court also confirms that the *Burnet* test was unnecessary here. The Court recently held that the *Burnet* factors should be considered when the court strikes a previously undisclosed expert's affidavit submitted pre-trial in opposition to a motion for summary judgment. *Keck v. Collins*, 184 Wn.2d 358 (2015). The court's rationale was that the *Burnet* factors should be applied to sanctions

imposed by the trial court for “undisclosed evidence,” whether in discovery or on a motion for summary judgment before the undisclosed evidence is stricken as a sanction. *Id.*

In contrast, neither *Burnet* nor any other case requires that the trial court go through the *Burnet* test when considering the appropriate sanction for violating a court’s order in limine *during trial* or violating the court’s orders not to ask leading questions of the parties’ key witnesses. Nor does the rationale for the *Burnet* rule apply here. *Burnett* would apply if the sanction addressed the Board’s failure to disclose evidence in a timely manner. But the sanction here was to cure the violation by the Board’s counsel of the Court’s order limiting reference to the Nelson litigation given the likely impression that Hannigan’s testimony left with the jury and its potential unfair and prejudicial effect on the Plaintiff’s case. The order arose within the context of the numerous and repeated violations by Defense counsel of the court’s orders about the examination of its key defense witnesses. RP 9/10/14 PM at 37.

In any event, contrary to the Board’s argument on appeal, Judge Shaffer *did* consider what remedies she had “other than striking areas of testimony,” *id.*, before selecting the sanction of barring the submission of additional evidence about Nelson beyond what had already been admitted. The court stated:

And I just don't know what to say about the leading, because when the Court's ruled a lot and has warned you a lot and I can't get you to stop doing it on key questions, then I start thinking about, well, what remedies do I have, you know, other than striking areas of testimony or not letting you explore areas that you were trying to lay a foundation for.

RP 9/10/14 PM at 37.

Indeed, the sanction imposed on the Board for its counsel's deliberate violation of the Nelson litigation order is very different from the sanction imposed by the trial court in *Keck, supra*. In *Keck*, a medical malpractice case, the plaintiff submitted the affidavit of her expert on the defendant's negligence for the first time in opposition to the defendant's summary judgment motion. She did so late and only shortly before the hearing on the motion. As a sanction, the trial court struck the affidavit and granted the defendant's motion. It dismissed the malpractice claim, finding that the plaintiff had failed to present expert opinion and sufficient evidence on the defendant's negligence. *Keck*, 184 Wn.2d at 367.

The Washington Supreme Court reversed, holding that the trial court abused its discretion by not continuing the hearing and permitting defendant reasonable discovery of the late filed expert opinion. Applying *Burnet*, the Supreme Court found that the court had chosen the most severe sanction of excluding *entirely* the plaintiff's *only* evidence that could prove a critical element of her claim based on a minor infraction that

could be easily remedied in less severe ways. *Id.* at 369.

Here, the trial had gone on for five weeks; there was already substantial evidence of record comparing Nelson and Sweeney; the Board could point to another male comparator, Jones, who also was denied a license; and the sanction selected was not one of the most severe sanctions available. The sanction did not involve striking any evidence, let alone striking the only evidence the Board could use to make the point that men were also denied a license. The court's curative instruction also only prohibited the jury from considering the Nelson *litigation*; it did not prohibit the jury from considering Nelson as a comparator.<sup>42</sup> CP 3835.

**5. The Sanction Was Imposed After a Series of Warnings.**

At the time of the court's sanction order, the Board's counsel had engaged in a pattern of improper questioning of witnesses beyond his violation of the Nelson litigation order, *supra* at p. 25-26. The trial court had warned counsel that she would impose sanctions "if this [improper questioning] doesn't stop." RP 9/10/14 PM at 28. Judge Shaffer properly considered this pattern of improper conduct in imposing the sanction she

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<sup>42</sup> Indeed, prior to trial, the Board had asserted that the court should exclude all comparisons between the trainees as irrelevant because the Board never compared trainees or their scores in determining if they should be licensed. CP 1582-83. Defense counsel told the jury that such comparisons were unfair because the training trips were so different. RP 9/18/14 at 103. Captain Hannigan admitted at trial that no comparison of scores had been made between Captain Sweeney and other trainees, *including Nelson*, prior to denying her a license. RP 9/15/14 AM at 46-47.

did.<sup>43</sup> She was in the best position to determine if Defense counsel's misconduct had prejudiced Plaintiff's right to a fair trial. *Teter v. Deck*, 174 Wn. 2d 207, 223 (2012).

A pattern of improper questioning of witnesses is "misconduct" and prejudicial. *See Teter*, 174 Wn. 2d at 222-223 (citations omitted):

The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury. ER 103(c). Persistently asking knowingly objectionable questions is misconduct...Even where objections are sustained, the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. *Id.* These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important.

Notably, the Board did not tell Judge Shaffer that the curative instruction she gave was in error or the sanction she imposed was unreasonable. It argued only that no *further* sanction of attorney fees was warranted.<sup>44</sup> *See CP* at 3865:

That sanction (exclusion of additional evidence or argument about Nelson), in combination with the curative instruction, accomplishes every possible goal of the sanction – it deters, punishes, and compensates the plaintiff and ensures that the misconduct causes no profit. Adding monetary sanctions on top is simply excessive and will add no deterrent.

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<sup>43</sup> *See In re Disciplinary Proceeding Against Kamb*, 177 Wn.2d 851, 861 (2013) ("Where a series of acts of misconduct are alleged in one complaint, and when an attorney is sanctioned multiple times for similar misconduct, such misconduct constitutes a pattern.").

<sup>44</sup> The Board objected to *Plaintiff's* proposed instruction in its Opposition to Plaintiff's motion for sanctions. The court gave its own instruction. The Board did not object to the wording of that instruction.

The remedy Judge Shaffer chose was reasonable and not an abuse of discretion.

**6. The Board Was Not Unfairly Prejudiced by the Sanction.**

At trial, the Board's primary defense to Captain Sweeney's claim that she was treated unfairly compared to male trainees was that the Board did *not* compare trainees when making licensing decisions. It said each trainee had to be evaluated on their own record. RP 9/16/14 AM at 156.

Yet, the Board presented testimony that both Nelson and Jones were denied licenses, and the Board submitted their trip reports and spreadsheets showing their scores.<sup>45</sup> And, even *after* the trial court's September 10 order finding Defense counsel in contempt of the order barring discussion of the Nelson *litigation*, the Board's counsel again asked Hannigan to compare Nelson to Sweeney. *See* RP 9/15/14 at 50-51:

- Q. Who is [Ex. 803] comparing?  
A. Captain Sweeney and Captain Nelson.  
Q. Who had the higher scores overall on shiphandling?  
A. Captain Nelson.

Judge Shaffer did not bar this testimony or strike any evidence relating to Nelson.

Beyond comparing Nelson to Sweeney, the Board also freely

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<sup>45</sup> *See, e.g.* Dudley testimony, RP 8/13/14 AM at 110-112; *See*, spreadsheets showing scores, Trial Exs. 688, 690.

compared Captain Jones to Sweeney. Jones was also denied a license. Indeed, *long before* the Court's sanction order, the Board's counsel made the point in questioning Board Chairman Dudley that Nelson was *not* a good comparator for Sweeney because "Nelson's a bit unusual, because [the TEC's] scoring changes right in the middle of his program" from a 4-point scale to a 7-point scale. RP 8/13/14 at 110. In contrast, both Captain Sweeney and Captain Jones were on a 7-point scale the entire time. In closing argument, the Board's counsel told the jury that Jones was the proper comparator to Sweeney. RP 9/18/14 PM at 115:

Now, the actual comparator is Captain Jones also on a seven-point scale. Captain Jones had a lot of trips where he had moderate difficulty or worse. And they are, as they were with Captain Sweeney, throughout his training program. And if you look at the fours, he had a lot of difficulty in ship handling. And if you look at the interventions, he had a lot of interventions.

The Board was not prejudiced by the Nelson sanction order. It freely used the other male trainee denied a license, Captain Jones, as the "actual comparator" to Captain Sweeney. Moreover, Judge Shaffer did not strike or prohibit the jury from considering any of the substantial testimonial and documentary evidence regarding Nelson that had been submitted in the first five weeks of trial.<sup>46</sup>

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<sup>46</sup> See *Drumm-Flato Commission Co. v. Edmisson*, 208 U.S. 534, 538, 28 S.Ct. 367, 52 (1908) (exclusion of books of account regarding the number of cattle received and sold

**7. This Court Should Not Substitute Its Judgment for the Trial Court's Judgment**

This Court has noted that “the trial court is in the best position to most effectively determine if counsel’s misconduct prejudiced a party’s right to a fair trial.” *Miller v. Kenny*, 180 Wn. App. 772, 815 (2014). When the Board’s counsel violated the court’s order and informed the jury through Hannigan that the Nelson litigation was over and Hannigan was “pleased with the results,” the trial court was able to observe the reaction of the jury. At that point, Judge Shaffer had presided over the trial and observed the jury for five weeks. She was in a unique position to assess the impact of Hannigan’s testimony and the impression left on the jury – it was “really troubling” to her. RP 9/10/14 PM at 36-37. She was seriously considering a mistrial:

Because I have to tell the parties if the plaintiff moves, I might grant it, okay? The Court is that upset about the violation of my ruling, which I do not view as minor.

*Id.* at 35-36. Based on what Judge Shaffer observed of the jury’s reaction, she also questioned whether her curative instruction was enough to overcome the prejudice to Plaintiff’s case of Hannigan telling the jury, in effect, that Nelson sued the Board and lost, so your verdict should be the same on Sweeney’s claim.

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was not prejudicial where the people who received the cattle, sold the cattle, and from whose report the books were made up were all permitted to testify).

I normally am very confident about jurors following instructions. ... This time I am not sure. I am really not sure. So that alone is really troubling.

*Id.* at 35-37.

Because Defense counsel's violation occurred at the very end of the case with the second to last defense witness, Judge Shaffer was properly concerned that mentioning Nelson again would remind the jury of Hannigan's statement. She was properly concerned that the jury would believe from what Hannigan said, the way he said it, and the jury's reaction, that the jury would carry into its deliberations the belief that Nelson sued over being denied a license and lost, and that the decision to deny Sweeney a license was also valid and she should also lose.

The situation confronting Judge Shaffer presents a classic example of why appellate courts are loath to substitute their judgment for that of the trial court that had the opportunity to observe what occurred in the context of the trial.<sup>47</sup> This Court should not substitute its judgment for that of Judge Shaffer in the selection of the appropriate sanction for Defense counsel's violation of her order.

Judge Shaffer did not abuse her discretion in dealing with a difficult situation of Defense counsel's own making that created a serious

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<sup>47</sup> See, *Hilstad v. Seattle*, 149 Wash. 483 (1928), *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119 (1980); *State v. Cross*, 156 Wn.2d 580 (2006); *Hoover v. Warner*, 189 Wn. App. 509, 531 (2015).

danger of unfair prejudice to Plaintiff and her case.<sup>48</sup>

**D. The Court Did Not Abuse Its Discretion in Denying a New Trial Based on Alleged Jury Misconduct.**

Finally, the Board appeals the trial court's decision not to grant a new trial based on juror misconduct. The alleged "juror misconduct" was that Juror No. 1 told other members of the jury that she recalled reading a newspaper article or hearing a news account of gender bias. RP 9/23/14 at 2. The juror could not recall who said what, or what was said, in the article or news account. The juror had no definite or specific recollection that the article or account involved the Board. *Id.* 9-10. The Board asserted in its motion for a new trial that the article may have been the article Captain Sweeney testified about at trial and triggered the juror's memory of having read the article.

The trial court did not abuse its discretion in denying a new trial, whether the juror's memory was of a vague recollection of either gender bias or a vague recollection of the same article Sweeney testified about at trial. In either case, the juror's recollection is not the type of "extrinsic

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<sup>48</sup> The Board also asserts vaguely that it was unfairly limited in its closing argument, but cites no authority that would support vacating the verdict on that ground. The argument of counsel is not evidence and the jury was free to consider all of the evidence submitted. WPI 1.02. It was free to compare Sweeney's trip reports, scores, interventions and other aspects of her performance to that of Nelson and Jones, the men denied a license, and the other trainees, the men granted a license. Indeed, in his closing argument, the Board's attorney told the jury it should not make such comparisons because the Board did not compare trainees and each trainee's trips were different. RP 9/18/14 at 138.

evidence” that results in juror misconduct and her communication of her vague recollection would not warrant a new trial.

### **1. Standards of Review and Decision**

Where a trial court denies a motion to set aside a jury’s verdict, its decision is reviewed only for abuse of discretion. *Bunch v. King County Dept. of Youth Servs.*, 155 Wn.2d 165, 176 (2005); *Pendergrast v. Matichuk*, 189 Wn.App. 854, 868-689 (2015) (“We review a trial court’s denial of a new trial...for abuse of discretion...the reviewing court strongly presumes the jury’s verdict is correct.”) Courts are cautious about setting aside a jury’s verdict.

A strong, affirmative showing of misconduct is required to impeach a verdict in order to overcome the policy favoring stable and certain verdicts and the secret, fair, and frank and free discussion of the evidence by the jury.

*Breckenridge v. Valley Gen. Hosp.*, 150 Wn.2d 197, 203 (2003).

When a trial court evaluates whether juror misconduct involving extrinsic evidence exists, the court must be careful not to consider juror testimony about the alleged misconduct that “inheres in the verdict.” *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 272 (1990). The content of the juror’s deliberations and “the actual effect of the evidence” inheres in the verdict. *State v. Briggs*, 55 Wn. App. 44, 55 (1989). Information that is within the realm of personal experience or common sense known to any average juror also inheres in the verdict.

*Breckenridge*, 150 Wn.2d at 204-05.

**2. The Juror’s Recollection Was Not Extrinsic Evidence.**

In its appeal, the Board cannot show that there was “extrinsic” information introduced in deliberations in this case. *See State v. Earl*, 142 Wn.App. 768, 774 (2008) (“The party alleging juror misconduct has the burden to show that misconduct occurred.”). The courts have defined “extrinsic” evidence as “information that is outside all the evidence admitted at trial, either orally or by document.” *Breckenridge*, 150 Wn.2d at 198 n. 3 (quoting *Richards*, 59 Wn. App. at 270).

Based on what Juror No. 1 told the trial court, she either had a generalized recollection of an article about gender bias in one or more trades or professions, which may or may not have included piloting, or had a more particular, yet still vague, recollection of the same article that Captain Sweeney testified about at the trial. RP 9/23/14 at 2, 8-9.

In its motion for a new trial, the Board conceded there was no other news story it could be. CP 3861. Indeed, the Board’s counsel admitted at the time that “what [Juror No. 1] thinks she remembers is the same as what she thinks we all heard.” RP 9/23/14 at 16. This puts the matter out of the zone of extrinsic evidence: it was a matter discussed at

trial.<sup>49</sup> But whether the Juror’s recollection was about the article Sweeney testified about or a more generalized recollection of gender bias in the piloting trade, there was no information the Juror supplied that was new, different or novel from the evidence presented at the trial to which the Board had an opportunity to respond.

The “evidence” alleged to be extrinsic in this case does not resemble the kinds of extrinsic evidence that has been found to require a new trial in other cases. Generally, extrinsic evidence is something “new or novel” in relation to what was presented at trial and “wholly outside the evidence.” *See Richards*, 59 Wn. App. at 270; *Loeffelholz v. C.L.E.A.N.*, 119 Wn. App. 665, 683 (2004). It usually involves specific factual information, such as dollar figures related to the plaintiff’s damages. *See, e.g., Fritsch v. J.J. Newberry’s Inc.*, 43 Wn. App. 904, 907 (1986) (juror shared that an attorney had valued his own comparable case at \$1,000); *Halverson v. Anderson*, 82 Wn.2d 746, 747 (1973) (juror shared average salary information in plaintiff’s prospective career path); *Loeffelholz*, 119 Wn. App. at 679 (same). The information is often physically brought into the jury room. *See Kuhn v. Schnall*, 155 Wn. App. 567-68 (2010)

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<sup>49</sup> Clearly, jurors may rely on their personal life experience in the course of deliberations. “In determining whether a juror’s comments constitute extrinsic evidence rather than personal life experience, courts examine whether the comments impart the kind of specialized knowledge that is provided by experts at trial.” *Breckenridge*, 150 Wn.2d at 198 n. 3 (citing *State v. Carlson*, 61 Wn.App. 865, 878 (1991)).

(newspaper article); *Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 138 (1988) (dictionary); *Bouton-Perkins Lumber Co. v. Huston*, 81 Wash. 678 (1914) (pamphlet). This case involved neither. The “evidence” alleged to be extrinsic is not clear or specific, nor even factual, and it is certainly within the scope of information that was presented at trial.<sup>50</sup>

Accordingly, the information was not “outside all the evidence admitted at trial,” and therefore not extrinsic evidence amounting to juror misconduct.<sup>51</sup>

### **3. The Juror’s Recollection Did Not Have Any Effect on the Verdict.**

Second, if the evidence is deemed extrinsic and misconduct is found to have occurred, the court must decide whether the evidence presented shows that the extrinsic evidence “probably affected the verdict.” *Halverson v. Anderson*, 82 Wn.2d 746, 749 (1973). “The mere possibility or remote possibility of prejudice, without more, is not enough

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<sup>50</sup> Furthermore, the reason that the consideration of extrinsic evidence is grounds for a new trial is that such evidence is not “subject to cross examination, explanation, or rebuttal by either party.” *Richards*, 59 Wn. App. at 270. But the information at issue here was subject to the Board’s response; it could have called Captain Hunziker to respond to Captain Sweeney’s allegation that he was quoted as saying something biased against women in the Pilot’s Association. There is nothing further the Board could have done in response to Juror No. 1’s vague recollection of hearing the same or similar statement.

<sup>51</sup> Perhaps recognizing this problem, the Board suggests, albeit only in a footnote, that Juror No. 1 likely “remembered” an article that did not exist, conjured out of her bias against the Board rather than any real memory. Appellant’s Brief at 71 n. 62. However, it utterly fails to even attempt to meet the standard for showing actual or implied bias, and instead simply speculates.

to set aside the verdict.” *DeYoung v. Cenex Ltd.*, 100 Wn. App. 885, 897 (2000). The inquiry is “whether the remarks made by the juror in this case probably had a prejudicial effect upon the minds of other jurors.” *Richards*, 59 Wn. App. at 272.<sup>52</sup>

There is quite frankly no way Juror No. 1’s hazy recollection of “something about gender bias” could have affected the verdict. The jurors seemed surprised to even be asked. *See* RP 9/23/14 at 19 (Juror’s first response: “but the story was something she read like 25 years ago.”). Juror No. 1 did not even recall what the news story was about, nor who said what to whom about what. RP 9/23/14 at 6-7. There is absolutely no basis to find it was “related to the case,” or to Captain Sweeney in any meaningful way. *See* Appellant’s Brief at 62. Indeed, it is not even clear it had anything to do with the Defendant or the Puget Sound Pilots. Alternatively, the Board does not and cannot dispute that, if it was about the Puget Sound Pilots, it had to be a recollection of the decades-old article that Captain Sweeney had testified about during the trial, which was not extrinsic evidence. *See* CP 3861 (Board says it found no articles about Puget Sound pilots in the last 10 years).

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<sup>52</sup> The Board misunderstands and misapplies this standard. While it is true that courts have said that “any doubt” about whether extrinsic information affected the verdict “must be resolved against the verdict,” *id.* at 273, the court must still find that effect is “probable” or “likely.” *See also Kuhn v. Schnall*, 155 Wn. App. 560, 575 (2010) (requiring “reasonable grounds” to believe the misconduct prejudiced a party).

The Board focuses its argument, again, on how Judge Shaffer handled the matter procedurally. It faults her for asking the jurors not only about what they discussed but whether they felt they could ignore it in deciding the case. Appellant’s Brief at 69. Yet at the time, the Board agreed with Judge Shaffer’s approach. *See* RP 9/23/14 at 14 (The Court after questioning: “Everybody okay with that?” Mr. Robinson O’Neill: “Yes.”); *id.* at 17 (same). Counsel never asked to be permitted to ask other questions, or suggested the court should have asked other questions. And Judge Shaffer instructed jurors *not* to consider the information, RP 9/23/14 at 22, which they all presumably followed. *DeYoung*, 100 Wn.App. at 898.

The Board is correct that it is improper for a court to probe “the internal thought process” of the jurors in assessing the potential effect of extrinsic information. *See Breckenridge*, 150 Wn.2d at 204. This prohibition is expansive, and prohibits juror testimony that is “linked to the juror’s motive, intent, or belief, or describe[s] their effect upon him.” *Id.* However, that is exactly what the Board does in its brief to this Court. It emphasizes the comments of two other jurors, who stated that the news Juror No. 1 recalled was “a big deal” to her, which the Board says is in conflict with Juror No. 1’s own characterization. Appellant’s Brief at 64, 68-70. This is precisely the type of juror testimony (not to

mention hearsay testimony) that courts cannot consider in deciding the likely impact of extrinsic information on a jury's verdict.<sup>53</sup>

The Board also points to the post-verdict polling results showing that Juror No. 1 abstained from the liability decision yet joined in the proximate cause and damages decisions. This improperly probes the juror's thought processes. It also mischaracterizes the facts and ignores the law. First, three jurors split their votes, so there is nothing particularly concerning about Juror 1 having done so.<sup>54</sup> And, there is nothing improper about this. *See* CP 3848, Jury Instruction No. 14 (stating that the same ten jurors do not need to agree on the same questions); *see also* WPI 1.11 ("It is not necessary that the jurors who agreed on the answer be the same jurors who agreed in answer to any other question, so long as (ten) (five) jurors agreed to each answer.").

Because appellate courts are reluctant to vacate a jury's verdict, Washington case law authority instructs that for a new trial to be warranted based on jury misconduct related to "extrinsic" evidence at least four conditions must be present: (1) the information supplied by the juror

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<sup>53</sup> The Board also attempts to make something of the timing of the disclosure, noting that it occurred on the first day of deliberations and the jury deliberated for six more days before reaching a verdict; this would seem to support the conclusion it had no impact.

<sup>54</sup> Juror No. 6 voted against liability and causation but in favor of damages. RP 10/1/14 at 12. Juror No. 8 voted in favor of liability but against causation and damages. *Id.* The other nine jurors voted yes on all three questions. *Id.* at 9-12. Thus there were 10 votes for liability and causation and 11 votes for damages, including Juror No. 1.

must be highly particularized or specialized (e.g. a definition from Black's Law Dictionary; the average annual compensation of pilots); (2) it must be information that was unlike the information presented at trial. *Compare Richards*, 59 Wn. App. at 272 (holding that juror's opinion as a nurse that other factors explained the plaintiff's medical condition was not extrinsic evidence because it was similar to opinion of defendant's expert offered at trial) *with Halverson*, 82 Wn.2d at 752 (jury misconduct based on extrinsic evidence was found where juror told other jurors that average salary of pilots was \$30,000 and no such evidence was presented at trial); (3) the information supplies, from an objective standpoint, a fact vital or important to the verdict, *see e.g. Halverson*, 82 Wn.2d at 752 (juror who told the jury that a pilot's average annual salary was \$30,000 engaged in misconduct because information was clearly used to calculate plaintiff's future economic loss in the absence of any evidence at trial on that issue); and, (4) the information unfairly prejudiced the party moving for a new trial because the party was unable to present rebuttal or responding information at trial. *Richards*, 59 Wn. App. at 270.

Here, the alleged juror misconduct fails in each respect: (1) the juror's memory that she once saw or heard a news account of gender bias was general and not particularized; (2) the information was the same or similar to the evidence presented at trial; (3) the information did not, from

an objective standpoint, supply a fact vital or important to the verdict; and (4) the Board was given a full opportunity to rebut the fact of gender bias in the piloting profession or, alternatively, if the juror's memory was of the same article Sweeney testified about, to call supervising pilot, Captain Hunsiker, to deny he made the comment attributed to him that he would quit as soon as a woman was licensed. The Board chose not to do so, while calling nine other supervising pilots.

In sum, the information Juror No. 1 recalled was almost certainly the same information that was admitted during the trial. Regardless, the objective evidence shows that it was extraordinarily vague and insignificant and could not possibly have impacted the jury's verdict reached after six additional days of deliberations.

**E. Plaintiff Should Be Awarded Her Attorney Fees on Appeal**

In an employment discrimination case, the prevailing plaintiff is entitled to recover reasonable attorney fees and costs from the defendant, including fees and costs incurred on appeal. RCW 49.60.030(2); *Xieng v. Peoples Nat'l Bank*, 120 Wn.2d 512, 532 (1993).

**IV. CONCLUSION**

The Washington Law Against Discrimination embraces the fundamental public policy of the State. Captain Sweeney and the jury in

her case, after a grueling six week trial, vindicated the protections and guarantees of the law and ensured that the benefits bestowed by a public Board would be free of gender bias. The Appellant Board asks this Court to vacate that important verdict by substituting its judgment for that of the trial court in the exercise of her discretion in making four, relatively minor, decisions that had no bearing on the outcome of the case. The trial court decisions raised by the Appellant in this appeal did not affect the quantum of proof or the quality of the evidence of discrimination presented at trial. They did not affect the conclusion from the overwhelming evidence presented that Captain Sweeney had been treated differently and less favorably in the male dominated industry of piloting because of her gender when she was denied a pilot's license. The Appellant Board does not say otherwise.

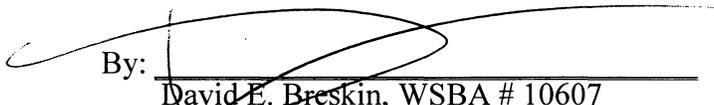
The trial court's orders compelling production of documents – that did not mitigate the evidence showing discrimination in how the decision to deny Captain Sweeney a license was made, but rather illuminated that decision – were not in error. The trial court's order sanctioning the Board for the willful violation of its Nelson order properly ensured that the Board would not benefit from its violation by leaving a false, unfair, and prejudicial impression on the jury. It was not based on unreasonable or untenable grounds, but on the trial court's firsthand assessment of the

effect of counsel's violation on the jury. The trial court's order denying the Board's motion for a new trial, a motion which was premised on the slim reed of a juror's vague recollection of a news account of gender bias that supplied no new or different information than what the jury had heard at the trial, was not an abuse of discretion. It was a well-reasoned exercise of discretion in light of both the content of the juror's communication, the quality of the vague and non-specific information supplied, and its obvious meaninglessness to the jury's consideration of Captain Sweeney's specific claim in the lawsuit.

As to all four of the Board's claimed errors, Judge Shaffer exercised her discretion properly and reasonably to ensure a fair trial for both parties. The Board does not prove otherwise in this appeal. The verdict should be affirmed.

DATED this 20th day of January, 2016.

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**CERTIFICATE OF SERVICE**

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on January 20, 2016, I caused the foregoing to be filed via legal messenger with:

Clerk of the Court  
Court of Appeals, Division I  
600 University Street  
One Union Square  
Seattle, WA 98101-1176

and a true and correct copy of the same to be delivered via email with hard copy to follow to:

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Jamie Telegin, Legal Assistant

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2016 JAN 20 PM 8:19