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Supreme Court No. 1002319

**SUPREME COURT
OF THE STATE OF WASHINGTON**

(Court of Appeals No. 80835-4-I)

CHANNARY HOR,

Respondent,

v.

CITY OF SEATTLE, et al.,

Petitioners.

PETITIONERS' REPLY BRIEF

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A. INTRODUCTION

Review is warranted here for the reasons set forth by Petitioners. The Decision disregards a trial court's proper exercise of discretion, running counter to important principles involving finality of judgments, judicial deference, and judicial economy—jurisprudential matters of substantial impact and public interest. That the Decision conflicts with this Court's ruling in *Erickson v. Kerr* presents another clear ground for review.

In her Answer to the Petition, Hor seeks a remand for a new trial; this is an issue that was not urged by Petitioners (Hor Argument A). Hor fails to articulate how this argument for an alternate remedy meets RAP 13.4(b) criteria for granting review. Instead, Hor restates arguments made below where she believes the Court of Appeals should have arrived at a different decision; *i.e.*, committed error. Importantly, the trial court found that the evidence presented by Hor in support of her CR 60(b)(4) motion did not amount to perjury, and did not meet Hor's CR 60 burden

to present clear and convincing evidence to support the request for a new trial. VRP at 55; CP 2304. Hor has failed to demonstrate an abuse of discretion that would warrant a new trial.

Hor also seeks review of application of ER 804(b)(3) to Hor's proffered evidence. (Hor Argument C). However, the Court of Appeals Decision as amended did not address that issue, and because such does not meet a RAP 13.4(b) criteria for granting review, Hor fails to articulate any related basis to accept review. (Decision, Appendix A to *Petition*). This evidentiary issue is not ripe for this Court's review and does not provide a basis for accepting review.

B. IDENTITY OF PETITIONERS

Petitioners City of Seattle, Adam Thorp, and the Estate of Grant submit this Reply in response to Hor's Answer raising new issues.

C. COURT OF APPEALS DECISION

Hor v. Seattle, ___ Wn. App. ___, 493 P.3d 151 (2021) *as amended on reconsideration* (“Decision”). **Appendix A.**

D. STATEMENT OF THE CASE

*See Statement of the Case in Petition.*¹

E. ARGUMENT

1. Hor’s Argued Grounds Do Not Support Granting Review to Remand for a New Trial.

Hor’s repeated, circular arguments about “admitted perjury” (*passim*) overlook the abuse of discretion standard of

¹ The Petitioners’ accident reconstruction evidence based on the police radio recording, sight-distance analysis, acoustics, “black box” collision data, vehicle engine capabilities, scene measurements, and physical features of the route leading to the crash site as summarized by Division One in the first appeal is law of the case and factually a verity in this second appeal; it was unsuccessfully challenged by Hor. *City of Seattle et.al.*, 189 Wn. App. 1016, pp. 6-8 (2015, *unpublished*). *See, Petition Appendices D (CP 557-559) & E (pp. 6-7; CP 1591-1592) Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). RAP 2.5(c) (binding in subsequent proceedings once decided on appeal).

review for a CR 60 Order and its findings and conclusions. (*Petition* at 11, f.n. 4). Additionally, Hor's arguments do not meet any RAP 13.4 criteria for granting review.

The trial court concluded: "I don't find that those inconsistent statements rise to the level of perjury, and I cannot say that they are so -- so far against Officer Grant's interest that he would not have made them unless he believed them to be true." (November 30, 2018 CR 60 Hearing VRP at 55).

In its written Order, the trial court specifically highlighted the issues with Hor's proffered evidence (*Petition*, Appendix B (November 30, 2018 Order, p. 4, CP 2304)), and further concluded: "Even if the Estes, Wulff, Zaro and Pitts evidence were admitted, Plaintiff did not meet her CR 60 burden of proof by clear and convincing evidence." (*Petition*, App. B (Order, p. 4)).²

² For ease of reference, the trial court's Order is appended here. **Appendix B.**

The Answer also overlooks that statements of decedents are historically provided little weight. In a case preceding the adoption of the Rules of Evidence, this Court noted the suspect character of such out-of-court statements by a decedent:

While testimony as to such declarations is competent evidence, it should be received with caution and subjected to careful scrutiny. No class of evidence is more subject to error or abuse.

Plath v. Mullins, 87 Wash. 403, 409-10, 151 P. 811 (1915). The *Plath* court also cited with favor the following quote: “Courts of justice lend a very unwilling, ear to statements of what dead men have said.” *Id.* at 410. On appeal in *Plath*, this Court determined that the four declarants’ testimony was not sufficient to meet the estate's burden by clear and convincing evidence to prove that the Yakima property had been gifted to the wife. The judgment was reversed. *Plath*, at 411-413.³

³ Hor cites to *Plath*. *Answer* at 18. *Plath* (like the *Miller* decision) involved an action to settle an Estate; unlike Hor's case, *Plath* did not involve a third party suing a party during his lifetime and losing the lawsuit, and then later raising a CR 60(b)(4) motion seeking to vacate/obtain a new trial after the same party died, resulting in the estate being substituted in his

In Hor's case, the trial court evaluated all of the key original trial evidence considered by the jury in combination with the 2018 CR 60 hearing evidence presented by Hor; the trial court properly concluded that even if the evidence were admissible, it did not amount to perjury and it did not meet Hor's CR 60 clear and convincing burden of proof. (*Petition*, App. B, VRP 55; CP 2304). *See, Petition* at 10-18 for further supportive argument.

Seemingly in an effort to buttress her request for a remand for a new trial, Hor cites a 1939 case to argue that Petitioners' reliance on the well-developed record below to defeat her CR 60 Motion was insufficient "because the City has submitted no contrary evidence." (*Answer* at 14, f.n. 3). *Beck v. Dye*, 200 Wash. 1, 11, 92 P.2d 1113 (1939). Hor cites *Beck* for the

stead. (*See, Decision* at 9-10, relying on *In re Estate of Miller*, 134 Wn. App. 885, 143 P.2d 315 (2006)). Notably, the outdated common law analysis found in *Plath* and *Miller* as to the *admissibility* of privity-based admissions conflicts with this Court's *Ericksen* decision. (*Petition* at Arguments 2-3.)

proposition that there has been a tacit admission. *Id.* *Beck* is inapposite and fails to support Hor's argument.

Beck involved an automobile accident where individuals at the scene did not make immediate denials of an accusation that the individuals "went through a red light." *Beck*, at 9. Even there, the court did not find a tacit admission: "Conceding that the statement, in this instance, was of a definite fact, and assuming that appellant heard and understood it, and was also possessed of knowledge concerning the matter referred to, nevertheless, in our opinion, the statement was not, under the circumstances, of such a nature as to call for a reply from appellant." *Beck*, at 11.

Hor's argument is a misstatement of the law and presents a misunderstanding of her burden as the moving party to prove CR 60(b)(4) fraud or misconduct by clear, cogent and convincing evidence. *Lindgren, Hickey et. al.* (*Petition* at 16-17). As the non-moving party below, Petitioners carried no burden of proof and were entitled to require Hor to produce admissible,

trustworthy evidence to meet her CR 60 burden of proof. As outlined in the Petition, Hor failed her burden. Contrary to Hor's arguments, purported interest of "justice" does not prevail over finality and judicial economy where the CR 60 moving party failed to meet his/her burden of proof. (*Petition* at 14-16). Though Hor cites *Shandola v. Henry*, 198 Wn. App. 889, 895-96, 396 P.3d 395 (2017) (*Answer* at 8), *Shandola* evaluated the catch-all provision of CR 60 and does not provide for a different result. Hor's many allegations based on out-of-court statements by a deceased former party were not of a nature as to call for a reply from Petitioners.

Moreover, if a party's silence can be explained by circumstances that raise an inference that the silence does not indicate the party's belief, the statement does not call for a reply and remains inadmissible. § 801.43 Admissions by silence in civil cases—Generally, 5B Wash. Prac., Evidence Law and Practice § 801.43 (6th Ed.). Here, Hor asserts that then-Officer Grant discussed with "co-workers and supervisors" about being

“pressured to perjure himself.” (*Answer* at 4, 5, 7). In this same paragraph, Hor speculates regarding the reasons why Grant committed suicide and his feelings leading to his suicide. *Id.* No inference can be drawn from Petitioners’ silence in response to these allegations and insinuations. Again, Petitioners do not carry the burden of proof. The filing of a CR 60 motion cannot be cause, in itself, for a party to engage in discovery, and the Petitioners are not required to waive attorney client privilege in order to prevail in this CR 60 proceeding.

Attorney privilege survives the death of a former client witness who is protected by the privilege. *Martin v. Shaen*, 22 Wn.2d 505, 510–11, 156 P.2d 681, 683–84 (1945). An attorney may not be examined as to privileged communications even after a former client’s death.

... ‘The following persons shall not be examined as witnesses:--‘2. An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment; * * *.’ This rule is well-nigh universal that the privilege against

examination of a witness upon matters of confidential communication is personal to the client, patient, or other person to whom the privilege is extended. 70 C.J. 456, Witnesses, § 619. Such is the rule in this state. *McCarthy v. McCarthy*, 116 Wash. 360, 199 P. 733; *Williamson v. Williamson*, 183 Wash. 71, 48 P.2d 588; *State v. McGinty*, 14 Wn.2d 71, 126 P.2d 1086.

Moreover, the privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded, and may be invoked by his personal representative or his heir. 70 C.J. 456, et seq., Witnesses, § 619; 8 Wigmore, Evidence, 3d Ed., pp. 627, 660, 830, §§ 2323, 2341, 2387.

Martin, 22 Wn. 2d at 510–11.

Based on the CR 60(b)(4) legal framework, the Petitioners' reliance on the well-developed record below to oppose Hor's Motion, coupled with objections to Hor's inadmissible evidence, provided ample grounds for the trial court to enter an Order denying the Motion. Petitioners have made no tacit admission, and are not legally permitted to waive Grant's privilege with his former legal counsel. Hor's arguments in this regard do not support grounds for a cross-petition for review for

the alternative remedy of a second trial, or an abuse of the trial court's discretion.

2. Hor's Argued Grounds Do Not Support Granting Review to Consider Application of ER 804(b)(3) to Hor's Proffered Evidence.

Hor's ER 804(b)(3) arguments do not support a RAP 13.4 ground for accepting review. Substantively, Hor's arguments lack merit.

The trial court below utilized the trustworthiness test here (1) to analyze the proffered statements' ability to meet the stringent CR 60(b)(4) standard for vacating a judgment (fraud caused the entry of the judgment), and (2) to analyze whether Hor had met her burden to raise sufficient evidence to satisfy the CR 60 burden of proof (clear and convincing evidence) such that Hor would be awarded a new jury trial after all these years, based on unsworn, out-of-court statements by a decedent, unavailable for cross-examination. The trial court's analysis of the trustworthiness of the proffered unsworn, out-of-court statements allowed the court to analyze whether Hor's allegation

of CR 60(b)(4) perjury-based fraud had merit. Under this analysis, the trial court concluded that the proffered statements were not trustworthy and thus, even if admissible, they were not sufficient to allow Hor to meet her stringent burden of proof. (Petition App. B).

The trial court underscored,

- (i) the statements were internally inconsistent;
- (ii) Grant had a demonstrably poor memory;
- (iii) the meaning of the statements was unclear;
- (iv) the statements were not reliable;
- (v) Grant was deeply disturbed;
- (vi) Grant was suffering from depression;
- (vii) Lakewood personnel intrigues muddied the statements; and
- (viii) there were questions about the motivations of the Lakewood officer declarants.

(11/30/18 VRP 55-56).

Evaluating the reliability of proffered ER 804(b)(3) Statements Against Interest is a well-established task of a trial

court. *In re Parentage of J.H.*, 112 Wn. App. 486, 495-96, 49 P.3d 154, 158 (2002), *as amended on denial of reconsideration* (Aug. 23, 2002) (recorded conversations of an in-custody phone conversation that was offered against a third party in an unrelated civil lawsuit lacked sufficient indicia of reliability necessary to admit it into evidence).

As indicated in *J.H.*, indicia of reliability and trustworthiness must be considered. *In re Parentage of J.H.*, at 495-96, n.2. Similarly, in *Thor v. McDearmid*, 63 Wash. App. 193, 817 P.2d 1380 (1991), Division 3 ruled that trustworthiness must be considered under ER 804(b)(3). In *Thor*, the court upheld the exclusion of testimony as hearsay under ER 804(b)(3) on a variety of grounds, including lack of trustworthiness. *Id.* at 203-04. Tegland also indicates that trustworthiness is required: “it is helpful to remember the general overriding principle that the instant hearsay exception [ER 804(b)(3)] is intended to apply only to statements that are likely to be trustworthy, considering the surrounding circumstances and the context in which they are

made.” 5C Wash. Prac., Evidence Law and Practice § 804.29 (6th ed.).

Hor’s arguments based on constitutional confrontation clause issues is also misplaced. (*Answer* at 21-23). In Washington, the appellate courts over time developed the 9-factor trustworthiness test to fill in the gap where out-of-court statements are being offered against a criminal defendant and no firmly-rooted exception applied; *e.g.*, by a co-conspirator or other witness who may have both self-interest and make statements against interest at the time incriminating or exculpatory statements were made against the accused. *State v. Roberts*, 142 Wn.2d 471, 497-98, 14 P.3d 713 (2000); *State v. Whelchel*, 115 Wash. 2d 708, 722, 801 P.2d 948 (1990) (“The courts in this state apply a 9-point set of guidelines to determine whether the reliability required of inculpatory statements under ER 804(b)(3) and the confrontation clause is satisfied”).

The trustworthiness test was developed to assist the trial court in determining whether otherwise hearsay statement(s) had

sufficient indicia of reliability “...in terms of the declarant’s perception, memory, and credibility – a function traditionally performed by cross examination.” *State v. Whelchel*, 115 Wn.2d at 715 (outlining 9-factor trustworthiness test at pp. 722-725). “Reliability is presumed if the evidence falls within a firmly rooted hearsay exception.” *Id.* “Otherwise, the evidence must be excluded absent a showing of trustworthiness.” *Id.* “The exception for declarations against penal interest under ER 804(b)(3) is not generally regarded as firmly rooted.” *Id.*

As discussed above, trustworthiness must be demonstrated in civil cases. The trustworthiness analysis has been relaxed and is more generally applied in civil cases to test the reliability of purported statements against interest offered against third parties in civil settings. *E.g., In re Parentage of J.H.*, 112 Wn. App. at 495 (where motivation of declarant is unclear and statements are offered against a third party, they are not admissible).

Contrary to Hor’s argument (*Answer* at 21-24), that the 9-factor trustworthiness test is required in criminal matters does not

prohibit the trial court from using that test to evaluate trustworthiness here. The trial court reasonably evaluated the reliability and weight to be provided unsworn, out-of-court statements in a post-judgment CR 60(b)(4) hearing where the moving party is alleging perjury and has the burden to (1) overcome the doctrine of finality of judgments; (2) demonstrate that alleged perjury-based fraud caused the entry of the judgment, and (3) prove the CR 60(b)(4) fraud by clear and convincing evidence. Here, Hor alleges theoretical criminal misconduct by Grant: perjury.⁴

Hor's arguments as a basis for granting review, or for consideration if the Court grants review should be rejected as

⁴ As to Hor's perjury-based theory of fraud, the Court agreed with Petitioners that a mere event of perjury alone does not meet the CR 60(b)(4) burden ("Further, perjury alone does not necessarily rise to the level of fraud to warrant a vacation of judgment. *Doss v. Schuller*, 47 Wn.2d 520, 526, 288 P.2d 475 (1955). Even then, the perjury must be of "controlling importance" as to the determination of liability. *Id.*") (Resp. Br. at 41) (Decision at 16).

erroneous. The Court of Appeals properly exercised judicial restraint by not addressing an unnecessary legal issue.

F. CONCLUSION

Petitioners' grounds for review should be approved; however, Hor's separate arguments to impose an alternative remedy to remand for a second trial, and rule on the application of ER 804(b)(3) to Hor's evidence, should be denied. Neither of these two arguments satisfy RAP 13.4(b) criteria. Overall, Hor's Answer and cross-petition seeking a post-mandate second trial patently ignores her heavy CR 60 burden of proof.

While asserting her own cross-petition for review in error, Hor's Answer ignores the core basis for review set forth in the Petition. The trial court's findings and conclusions that Hor's proffered evidence was inadmissible, did not amount to perjury, and did not meet Hor's CR 60 burden to prove her motion to vacate grounds by clear and convincing evidence are subject to an abuse of discretion review; the Decision implicated the important principles of finality of judgments, deference to trial

court discretion, and preservation of scarce judicial resources— issues of substantial public interest. The clear conflict between the Decision and *Erickson v. Kerr* provides a separate basis to grant review.

This document contains 2,947 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

Respectfully submitted November 8, 2021.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHANNARY HOR, individually,)	No. 80835-4-I
)	
Appellant/Cross-)	DIVISION ONE
Respondent,)	
)	PUBLISHED OPINION
v.)	
)	
CITY OF SEATTLE, a Washington)	
Municipal Corporation, and OMAR)	
TAMMAM,)	
)	
Respondent/Cross-)	
Appellant.)	
)	

HAZELRIGG, J. — Channary Hor was seriously injured in a vehicle accident involving officers from the Seattle Police Department. Hor filed suit against the driver of the vehicle she was riding in, the City of Seattle, and the individual officers present at the time of the incident. After trial, the jury found the driver solely liable and only awarded damages as to him. One of the key issues at trial was whether the officers were in pursuit of the vehicle, which both officers denied.

Following trial, one of the officers committed suicide and a local news article attributed it to the officer's feelings of remorse over the accuracy of his trial testimony. Based on statements from individuals the officer had spoken with about his testimony, Hor brought a motion for relief from judgment under CR 60(b)(4). The defendants objected and argued the statements Hor sought to admit were

inadmissible hearsay. The trial court agreed, denying the admission of the evidence and the CR 60(b)(4) motion. Hor appeals arguing the evidence was admissible under ER 801(d)(2)(i) or ER 804(b)(3), and that the trial court erred in denying her CR 60(b)(4) motion. We agree that the evidence is admissible, and because the record does not demonstrate that the broad spectrum of CR 60(b)(4) bases were considered, we reverse and remand.

FACTS

Channary Hor was rendered quadriplegic as the result of a motor vehicle crash after an encounter with Seattle police. Hor filed suit against Omar Tammam, the driver of the vehicle she was in. She also included as defendants the individual Seattle Police Department (SPD) officers involved in the incident and the City of Seattle (City). Prior to trial, the City and officers filed an unopposed motion to remove the officers from the caption of the case based on the City's vicarious liability, which completely indemnified the officers for any fault that might be attributed to them. Hor did not oppose the motion based on the mutual understanding that the officers remained parties to the case.

One of the fundamental disputes at trial was whether the officers had engaged in a pursuit of the vehicle Hor was riding in, which the City and officers strenuously denied. Officer Arron Grant was the second officer to respond to the initial contact with Tammam, but the first to depart the scene after Tammam's vehicle. At trial, Grant provided testimony that he was not engaged in a technical pursuit, but Hor attacked his credibility on this matter. There was also expert evidence from both sides on the issue of how the crash occurred. The jury

awarded Hor \$17.4 million against Tammam and found the City not liable; the superior court entered a judgment in the City's favor. Hor appealed on multiple grounds and a panel of this court affirmed the judgment in an unpublished opinion.¹

Grant committed suicide in April 2017. In May 2017, an article was published by the Tacoma News Tribune entitled "Suicidal Lakewood Police Officer Brooded over His Testimony in Lawsuit, Colleagues Say." Hor learned of Grant's allegedly inconsistent testimony from the news article. Through counsel, Hor contacted officers to whom Grant had spoken about his trial testimony and obtained their declarations. The statements in question are as follows:

[1. The Declaration of Anders Estes (former Lakewood Police sergeant):]

I recall Officer Grant shared with me the following: He basically told me that he had responded to help another officer. At some point during that call, a car ended up leaving the scene. He went in pursuit of that car. He definitely used the word "pursuit" in the technical sense of the word. He chased the car. The car ended up wrecking. Because of that wreck, there was a large civil suit against the City of Seattle. He said that when he got subpoenaed, he had to go talk to two attorneys who worked for the City of Seattle. Those attorneys asked him a lot of questions about the pursuit. One question he had trouble with was when he turned his lights on. He told me how long ago it was and that he did not remember. He said the attorneys really pressed him about when he turned his lights on. He could not tell them. They kept giving him different reference points. They finally said: "Let's go out there." They loaded him in a car and took him out to the scene. Once they were at the scene, they pointed at different places and said: Did you turn your lights on here or here? He said he did not remember. He could not remember. Finally, they gave him a reference point and instructed him you need to say you turned your lights on here. He told me he was uncomfortable with that. He came back to the department and spoke to people about it in the department. He said there were a number of people who said they had faced the same situation with prosecutors or attorneys. He said

¹ Hor v. City of Seattle, No. 70761-2-I (Wash. Ct. App. Aug. 3, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/707612.pdf>.

these people he talked to told him to just tell the truth, if he didn't remember he didn't remember. But, he said he really felt like he was under pressure. So when it finally came time to testify, he went up and testified to what the attorneys told him to testify to, which he knew was not the truth. Once he had done that, he said that he felt bad. He said he felt he had betrayed the badge or something like that. So he went to the then Chief Farrar and Assistant Chief Zaro and told them what he had done. He said they told him "Don't worry about it."

[2. The declaration of Michael Wulff (Lakewood Police officer):]

In discussing the event that took place while he was an SPD officer, Officer Grant told me that he was a secondary car involved in an injury incident. Officer Grant told me that he and another officer had contacted a vehicle in a park. He told me that the vehicle had fled and was followed by another officer. Officer Grant stated that the attorneys for the City of Seattle told him to testify that he and the other officer involved were not pursuing any vehicle and were not in pursuit; that no Seattle officers were in pursuit of the fleeing vehicle when it crashed; and that Officer Grant did not have his emergency lights activated.

He stated the event happened a long time ago and that he couldn't remember many details. He did not remember details about where or when his lights were activated. He could remember certain details about the initial car stop, the car fleeing, going after the fleeing car and following it, and seeing it wrecked around a corner. Officer Grant also stated that he felt pressured by the attorneys for the City to testify to observations or details that would assist the City's case, but that he couldn't because he didn't remember or was not even present for some [sic] them. It was apparent from his actions and tone during this conversation that he was nervous and not looking forward to his testimony.

[3. Testimony from a deposition of Michael Zaro (Lakewood Police chief) taken for Shadow v. City of Lakewood:²]

[Examination by Defense Counsel]

Q[:] Did Arron Grant come to you and say that he had given false testimony in a case where he was asked to testify?

A[:] That he believed so, yes.

Q[:] Okay. And he believed he was dishonest because he told—or strike that. What did Arron Grant believe he was—his testimony was dishonest?

² Pierce County Superior Court No. 16-2-08405-8.

A[.] About?

Q[.] Yeah. Yeah, why did he think he had been dishonest?

[Plaintiff's Counsel]: Object to the form of the question, but you can answer it if you know.

[Zaro]: The way he portrayed it to me was that he was in a deposition or a discussion with attorneys representing Seattle, and one of the points—one of the questions was where he turned his lights off in a pursuit, related to a civil suit that was going on. And he said it was in one location. They said, [c]ould it have been here? And they went back and forth and he finally agreed that it could have been here and testified to that but still believed it could have been—or still believed it was here, but he said it could have been in this other location.

[Defense Counsel:] So how did you guide him with regard to his concerns about dishonesty in that instance?

A[.] I told him that—well, Chief Farrar and I both told him that was—that, you know, he got browbeat by a civil attorney into agreeing that, you know, something, could have happened here, that's not uncommon, and that it wasn't for him to worry about to the extent that he was worrying.

Hor retained new counsel after gathering this information. Counsel sought permission from the appellate court before seeking relief from judgment in the superior court. In superior court, Hor filed a motion for an order to show cause why relief from judgment should not be granted based on misconduct of a party under CR 60(b)(4) and (11). The court granted Hor's motion and set a show cause hearing. The trial court also granted a stipulated order to substitute Grant's estate as party to the case.

The City and Adam Thorp, the other SPD officer involved, objected to the proffered evidence of Grant's post trial statements, arguing that relief from judgment should not be granted. The administrator of Grant's estate joined the response from the City and Thorp. Hor responded by arguing that Grant's statements were non hearsay as statements by a party opponent under ER 801(d)(2)(i). Hor argued in the alternative that the statements were an exception

to hearsay exclusion under ER 804(b)(3) as statements against both Grant's pecuniary and penal interests. Following oral argument at the show cause hearing, the trial court ruled the statements were inadmissible under either of Hor's proffered theories. This evidentiary issue was dispositive and the court denied the motion for relief from judgment. The court also denied Hor's request for further discovery. Hor now appeals to this court, after denial of her petition for direct review by the Supreme Court.

ANALYSIS

I. Admissibility of Grant's Post Trial Statements

Hor first argues that the court erred in excluding statements Grant purportedly made to others prior to his death about his alleged perjury in the trial. At the trial court, Hor asserted that the statements were admissible as non hearsay under ER 801(d)(2)(i) as a statement of party opponent, or in the alternative as an exception to hearsay under ER 804(b)(3), statement against interest.

This court reviews interpretation of an evidence rule de novo. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). Once a reviewing court has determined that the trial court properly interpreted an evidence rule, the standard of review shifts for the question of how the rule was applied. "Admissibility of evidence is within the broad discretion of the trial court and will not be reversed on appeal absent a showing of manifest abuse of discretion." In re Parentage of J.H., 112 Wn. App. 486, 495, 49 P.3d 154 (2002). "Discretion is abused if it is based on untenable grounds or for untenable reasons." Id. ER 102 states:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

While ER 102 does not directly address the hearsay questions before us, this rule serves as a guiding principle for our review of evidentiary rulings. See State v. Butler, 53 Wn. App. 214, 223, 766 P.2d 505 (1989); see also Bengtsson v. Sunnyworld Int'l, Inc., 14 Wn. App. 2d 91, 106 n.8, 469 P.3d 339 (2020).

ER 801(d)(2)(i) states in relevant parts: “(d) Statements Which Are Not Hearsay. A statement is not hearsay if . . . (2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party’s own statement, in either an individual or a representative capacity.” Washington case law on ER 801(d)(2)(i) under the particular posture presented here is not extensively developed.

The issue before us is whether, due to his death, Grant’s statements still constitute those of a party-opponent for purposes of ER 801(d). Hor first argues that the statement is admissible based on numerous cases decided prior to Washington’s adoption of the Federal Rules of Evidence in 1979. See Plath v. Mullins, 87 Wash. 403, 151 P. 811 (1915); Loungry v. Lillie, 149 Wash. 316, 270 P. 1029 (1928). These cases do not guide our inquiry as they focus on common law evidentiary rules that no longer represent our starting point since the adoption of formal evidentiary rules. Further, federal courts are split on this issue and neither party offers compelling argument as to why we should follow one side of

that split over the other.³ We are, however, properly guided in our analysis by state precedent.

There are two Washington cases identified by the parties as helping to illuminate the issue. Erickson v. Robert F. Keer, MD, PS involved a medical malpractice action brought by the son, husband, and estate of a patient who had committed suicide. 125 Wn.2d 183, 185, 883 P.2d 313 (1994). The defendant doctors sought to introduce statements by the deceased to a friend that her husband was abusive, was tight with money, and should be the prime suspect if anything happened to her. Id. at 192. The trial court originally admitted the statements, this court reversed, and the Supreme Court affirmed the Court of Appeals. Id. The Supreme Court stated, “Mrs. Erickson’s statements were not an admission of a party-opponent as to the wrongful death action brought by Andrew and Craig Erickson in their individual capacities.”⁴ Id. However, the court then “decline[d] to rule on the estate’s cause of action because no objection was made or preserved on its behalf.” Id.

This court’s opinion in the first phase of the appeal process provided similar language: “Mrs. Erickson’s statements to Delaurenti are not admissions against the interest of the claim for damages recoverable by her estate, and thus are not admissible under ER 801(d)(2).” Erickson v. Robert F. Kerr, MD, PS, 69 Wn. App. 891, 902, 851 P.2d 703 (1993), rev’d in part on other grounds, 125 Wn.2d 183. In Erickson, the testimony was being offered to prove damages, which distinguishes

³ See Huff v. White Motor Corp., 609 F.2d 286 (7th Cir. 1979); Estate of Shafer v. Comm’r, 749 F.2d 1216 (6th Cir. 1984); In re Cornfield, 365 F. Supp. 2d 271 (N.Y. E.D. 2004).

⁴ The decedent’s husband and son, respectively.

it from the facts of the case before us. Erickson's statements would have been used by the defense for mitigation as to an award for damages in favor of the husband by attempting to prove the marriage was less than ideal and could have thereby justified a smaller award. In Erickson, the court acknowledged the decedent's testimony was not going to have bearing against the estate, since it went to the calculation of damages for the husband as to quality of the marriage. Id. at 903.

The parties also separately address In re Estate of Miller, 134 Wn. App. 885, 143 P.3d 315 (2006). Miller involved an estate dispute as to whether payments made to the deceased were loans or a gift. Id. at 888–89. Division Three's analysis of the statements made by the deceased includes a direct quote from the Washington Practice series on evidence, which states, "The death of a party-opponent does not affect the admissibility of that party's admissions under Rule 801, but under some circumstances the admissions may be barred by the dead man statute." Id. at 895 (quoting 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 801.34, at 336 (4th ed. 1999)). The court then held that "[t]he deceased is a party to this lawsuit and his admissions are not inadmissible hearsay pursuant to ER 801(d)(2)." Id.

In the case before us, the trial court was disinclined to rely on Miller because, as the City pointed out in its argument, that opinion primarily quotes the 4th edition of the Washington Practice series on evidence from 1999. Subsequent updates abandon the analysis adopted in Miller, instead stating:

Prior to the adoption of the Federal Rules of Evidence and their state counterparts, a statement by a person in privity with a party was considered an admission by party-opponent, and such statements were often admissible on that theory. The drafters of the current rules, however, deliberately chose to change the law in this regard, and statements by persons in privity with a party are no longer admissible as admissions by a party-opponent.

5B KARL B. TEGLAND, WASHINGTON PRACTICE EVIDENCE LAW AND PRACTICE: § 801.51 (6th ed. 2016) (footnote omitted). While much of the parties' briefing on appeal centers on this shift between versions of the practice series, this argument misses the mark. Miller is a published opinion, and as such it is elevated above secondary sources in the established hierarchy of legal authority. Miller has not been overruled; thus, for purposes of ER 801(d)(2), the death of a party-opponent does not bar the admissibility of their statements as non hearsay under the evidentiary rule.

Miller is binding case law in our state. "[T]rial courts are bound by published decisions of the Court of Appeals." In re Marriage of Snider, 6 Wn. App. 2d 310, 315, 430 P.3d 726 (2018); RCW 2.06.040. Here, though the trial court was presented with two alternatives, each discussed above, it is clear that Miller controls. Based on this misapplication of the law, the trial court abused its discretion by ruling that the declarations provided by Hor were inadmissible as statements of a party opponent. Because we have identified that the statements were admissible under this rule, we need not reach Hor's alternate argument that they were also admissible as statements against interest under ER 804(b)(3).

II. Relief from Judgment

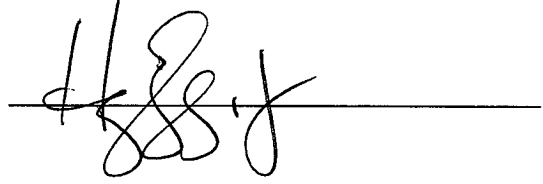
“On appeal, a trial court’s disposition of a motion to vacate will not be disturbed unless it clearly appears that it abused its discretion.” Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). “Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable.” Id. We are unpersuaded by Hor’s argument on appeal that this court should apply a less deferential standard of review because the judge who ruled on the CR 60(b)(4) motion was not the same judge who heard the trial. Neither are we moved by the assertion of the parties at oral argument that this court could, or should, rule on the merits of the CR 60(b)(4) motion.

Under CR 60(b)(4), a trial court may vacate a judgment entered that was procured by fraud, misrepresentation, or misconduct. “The rule is aimed at judgments unfairly obtained, not factually incorrect judgments.” Sutey v. T26 Corp., 13 Wn. App. 2d 737, 756, 466 P.3d 1096 (2020). “[T]he fraudulent conduct or misrepresentation must cause the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense.” Lindgren, 58 Wn. App. at 596 (emphasis omitted). The party attacking the judgment under CR 60(b)(4) “must establish the fraud, misrepresentation, or other misconduct by clear and convincing evidence.” Id. Further, perjury alone does not necessarily rise to the level of fraud to warrant a vacation of judgment. Doss v. Schuller, 47 Wn.2d 520, 526, 288 P.2d 475 (1955). Even then, the perjury must be of “controlling importance” as to the determination of liability. Id.

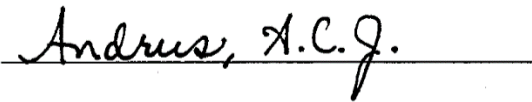
However, it was error to solely focus on perjury in ruling on whether Hor met her burden under the CR 60(b)(4) standard. Perjury is just one means by which “fraud, misrepresentation, or other misconduct” might occur. See In re Marriage of Maddix, 41 Wn. App. 248, 252–53, 703 P.2d 1062 (1985); CR 60(b)(4). Further, such misconduct or misrepresentation need not be intentional, but may merely be careless. See Peoples State Bank v. Hickey, 55 Wn. App. 367, 371, 777 P.2d 1056 (1989) (“The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate.”). The statements here are admissible, and if deemed to be credible, they could rise to the level of misconduct of an adverse party under CR 60(b)(4).

The court indicated that it denied the motion for relief from judgment based on the fact that, absent Grant’s excluded post trial statements, Hor had no evidence to meet the standard for a CR 60 motion. The court’s oral ruling expressly stated “I don’t think [the statements are] sufficient to establish perjury by clear and convincing evidence.” Because it is unclear from the record whether the correct standard was applied, specifically whether the full spectrum of “fraud, misrepresentation or other misconduct” under CR 60(b)(4) was considered, and in light of our reversal of the trial court’s ruling on the admissibility of those statements, we reverse and remand for the court to consider the CR 60 standards anew. It may, at its discretion, order further discovery to provide a more comprehensive record upon which to base its ruling.

Reversed and remanded for proceedings consistent with this opinion.



WE CONCUR:



APPENDIX B

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FILED
2018 NOV 30
KING COUNTY
SUPERIOR COURT CLERK

The Honorable Michael Scott
Time: November 30, 2018, 9:00 a.m.
With Oral Argument

CASE #: 10-2-34403-9 SEA

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

CHANNARY HOR, individually,

Plaintiff,

No. 10-2-34403-9 SEA

v.

THE CITY OF SEATTLE, a Washington
Municipal Corporation, and OMAR
TAMMAM,

~~[PROPOSED] ORDER DENYING
PLAINTIFF'S MOTION FOR ORDER
TO SHOW CAUSE WHY RELIEF
FROM JUDGMENT SHOULD NOT BE
GRANTED~~

Defendants.

COMES NOW the Court on Plaintiff's Show Cause Motion to vacate the 2013 judgment and order a new trial, having considered the pleadings and evidence herein, and the arguments of all parties in open court; the Court has considered the following pleadings and Declarations:

1. Ex Parte Motion for Order to Show Cause Why Relief from Judgment Should Not be Granted;
2. Declaration of Colleen Durkin Peterson, with attached Exhibits;
3. Stipulation and Order Setting Hearing and Briefing Schedule;
4. City of Seattle's Motion for Overlength Brief Responding to Order to Show Cause Why Relief From Judgment Should Not Be Granted;
5. Partial Objection to Motion for Overlength Brief;
6. City of Seattle's Reply to Plaintiff's Partial Objection to Motion for

~~[PROP.] ORDER DENYING PLTF'S MOTION
FOR OSC WHY RELIEF FROM JUDGMENT
SHOULD NOT BE GRANTED - 1~~
10-2-34403-9 SEA
1317-00003/385712

KEATING, BUCKLIN & MCCORMACK, INC., P.S.
ATTORNEYS AT LAW
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PHONE: (206) 623-8861
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1 Overlength Brief;

2 7. Order Granting City of Seattle's Leave to File Overlength Brief in Response
3 to Order to Show Cause Why Relief from Judgment Should Not Be Granted;

4 8. City of Seattle's Motion for Issuance of Modified Order to Show Cause Why
5 Relief from Judgment Should not be Granted and to Continue Show Cause Hearing;

6 9. Declaration of Susan MacMenamin in Support of City of Seattle's Motion for
7 Issuance of Modified Order to Show Cause Why Relief from Judgment Should not be
8 Granted and to Continue Hearing;

9 10. Plaintiff's Response to City of Seattle's Motion for Issuance of Modified
10 Order to Show Cause;

11 11. Declaration of George M. Ahrend Re: City of Seattle's Motion for Issuance of
12 Modified Order to Show Cause;

13 12. Defendants City of Seattle and Adam Thorp's Opposition to Plaintiff's
14 Motion to Vacate Judgment, with attached Appendices;

15 13. Declaration of Brenda L. Bannon In Support of Defendants City of Seattle
16 and Adam Thorp's Opposition to Plaintiff's Motion For Relief From Judgment, with
17 attached Exhibits;

18 14. Defendants City of Seattle and Adam Thorp's Evidentiary Objection;

19 15. Plaintiff's Reply Re, Ex Parte Motion for Order to Show Cause Why Relief
20 from Judgment Should Not be Granted;

21 16. Plaintiff's Response to Evidentiary Objections;

22 17. Defendants City of Seattle and Adam Thorp's Motion to Strike;

23 18. Defendants City of Seattle and Adam Thorp's Surreply;

24 19. Plaintiff's pleadings Re, overlength Reply;

25 20. Plaintiff's Response Re, Motion to Strike;

26 21. Defendants City of Seattle and Adam Thorp's Reply Re, Motion to Strike
27

[PROP.] ORDER DENYING PLTF'S MOTION
FOR OSC WHY RELIEF FROM JUDGMENT
SHOULD NOT BE GRANTED - 2

10-2-34403-9 SEA
1317-00003/385712

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1 **The Court hereby enters the following findings of fact and conclusions of law as**
2 **to the admissibility of the new evidence proffered by Plaintiff Hor:**

3 1. Estes Declaration:

4 is inadmissible _____

5 is admissible because _____

8 2. Wulff Declaration:

9 is inadmissible _____

10 is admissible because _____

13 3. Zaro Deposition:

14 is inadmissible _____

15 is admissible because _____

4. Pitts Deposition:
 is inadmissible

17 **As to CR 60 timeliness, the Court hereby finds as follows:**

18 Hor did not file her Show Cause Motion within a reasonable time.

19 Hor did file her Show Cause Motion within a reasonable time.

21 Other: _____

24 **THEREFORE, THE COURT HEREBY ORDERS AS FOLLOWS:**

25 **Plaintiff's Show Cause Motion is:** denied.

26 granted.

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Other: Plaintiff's request for a
discovery hearing is denied.

Even if the Estes, Wulff, Zaro and
Pitts evidence were admitted, Plaintiff did not meet
her C.R. 60 burden by clear and convincing evidence.



DONE IN OPEN COURT this 30th day of November 2018.


The Honorable Michael Scott
King County Superior Court Judge

Presented by:
KEATING, BUCKLIN & McCORMACK, INC., P.S.


By: /s/ Brenda L. Bannon
Brenda L. Bannon, WSBA #17962
Attorneys for Defendants THE CITY OF SEATTLE
and ADAM THORP

Approved as to form; Notice of presentation waived:

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4 George M. Ahrend, WSBA #25160
5 Attorneys for Plaintiff

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7 ~~STEPHEN W. FISHER, PLLC~~

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9 Stephen Fisher, WSBA #7822
10 Attorneys for Estate of Arron Grant

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[PROP.] ORDER DENYING PLTF'S MOTION
FOR OSC WHY RELIEF FROM JUDGMENT
SHOULD NOT BE GRANTED - 5
10-2-34403-9 SEA
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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk on the following parties:

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DATED November 8, 2021 at Seattle, Washington.

/s/ Abigail D. Belscher
Abigail D. Belscher, Practice Assistant

OGLETREE DEAKINS

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