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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE COMPANY, INC.

Appellant,

vs.

GREGG ROOFING, INC.,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR CLARK COUNTY
THE HONORABLE DANIEL STAHNKE

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Supreme Court almost twenty years ago in *Fisons*¹ rejected Mutual of Enumclaw's argument that reputational damages cannot be supported by a business owner's subjective testimony that the defendant's actions harmed the plaintiff's business. To the contrary, one's good name can only be measured by the judgment of one's community:

Who steals my purse steals trash; 'tis something, nothing;
'Twas mine, 'tis his, and has been slave to thousands;
But he that filches from me my good name
Robs me of that which not enriches him,
And makes me poor indeed.

W. Shakespeare, *Othello* (Act. III, Scene iii). Here, the jury found that Mutual of Enumclaw tortiously interfered with Gregg Roofing's contract, and in the process damaged its business reputation. The jury exercised its constitutional duty to assess reputational damages to a business. Its decision, supported by substantial evidence, was strengthened by the trial court's denial of a new trial or remittitur.

This court should reject Mutual of Enumclaw's challenge to the jury's assessment of Gregg Roofing's damages and should

¹ *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993).

affirm the jury's verdict. This court should also reject Mutual of Enumclaw's challenges to the trial court's discretionary decisions to exclude or admit evidence.

Should this court remand for a new trial it should allow Gregg Roofing to prove an alternative negligent supervision claim against Mutual of Enumclaw and direct the trial court to instruct the jury to specifically authorize the recovery of damages for harm to business reputation.

II. RESTATEMENT OF ISSUES

1. Where a defendant's intentional interference with a contractor's roofing contract with a prominent church, widely advertised as the contractor's work, causes the roof to remain unfinished for months for all the community to see, does the business owner's testimony of unquantified reputational harm provide substantial evidence of damage to professional reputation?

2. Where a party alleges that a defendant tortiously interfered with its contract through its employee, does a trial court abuse its discretion by refusing to admit irrelevant and prejudicial hearsay evidence regarding criminal charges against a third party that does not mention the third party's actions with the defendant's employee?

3. Did the trial court abuse its discretion in admitting testimony from a business owner that he was "naturally very upset" by the defendant's actions in tortiously interfering with the business's contract where the court instructed the jury that damages could be awarded only to the business, not the individual?

III. RESTATEMENT OF FACTS

A. The Parkside Church Hired Gregg Roofing To Replace The Church's Roof And Repair Dryrot.

Respondent Gregg Roofing, Inc., based in Camas Washington, has performed industrial, commercial, and residential roofing in Camas and Clark County since 1944. (RP 1526-29) Gregg Roofing diligently built up its business reputation, using the best materials and practices and hiring the most qualified roofers. (RP 1529) Allen Tiffany has been the president and owner of the company since 1983. (RP 296, 1526)

In June 2005, the Parkside Church in Camas contracted with Gregg Roofing to repair dryrot and to replace the church's twenty year old roof. (RP 1533, 1539; Ex. 79) Gregg Roofing had successfully worked for the church during the previous ten years and had developed a good relationship with the church. (RP 1532,

1536-38) The church agreed to pay Gregg Roofing \$16,212 for the roof replacement and to pay \$45 an hour for dryrot repair. (Ex. 79)

B. After A Massive Thunderstorm Caused Water To Leak Into The Church, The Adjuster Working For Mutual Of Enumclaw Convinced The Church To Fire Gregg Roofing.

Gregg Roofing commenced work on the church roof at the end of August 2005. (RP 251; Ex. 79) Gregg Roofing had removed the existing roof and was in the process of completing the new roof when, on August 29th, a large thunderstorm damaged the replacement roof and caused water to leak into the church. (RP 251, 256-57, 986-87, 1326-27, 1597-98) Gregg Roofing's foreman brought in equipment to remove the water that had leaked into the church during the storm and called water restoration contractor ServePro the next day to assist Gregg Roofing in completing the removal of the storm water. (RP 1606, 1662)

On August 30th, the church submitted a claim to its insurer, appellant Mutual of Enumclaw Insurance Company ("MOE"), for the water damage caused by the storm. (RP 495-96) MOE assigned its claims adjuster Robert Lowrie to the claim. (RP 1142, 1351, 1371, 1376) Lowrie's duties on behalf of MOE included meeting with insureds regarding claims, examining damaged property,

taking photographs of damaged property, advising insureds about the claims, and discussing contractors with insureds. (RP 1145, 1353, 1359, 1364-65, 1375, 1378-79) MOE also authorized Lowrie to inform insureds about their coverage under the insurance contract. (RP 1353) The church pastor Darryl Elledge understood that Lowrie served as MOE's agent and that Lowrie represented MOE's interests. (RP 587, 615-16)

When Lowrie went to the church on August 30th, he told Pastor Elledge that MOE would not cover any subsequent damage to the roof or any water remediation performed by ServePro if Gregg Roofing continued to replace the roof. (RP 578-79, 597-98, 616, 631) Unbeknownst to the church, a remediation contractor, Charles Prescott Restoration ("CPR") through its principal, Don Chill, provided kickbacks and gifts to Lowrie in exchange for directing insureds to hire CPR. (RP 543-44, 617-18, 1378; *see also* CP 7, 258) Lowrie convinced the pastor to fire Gregg Roofing and to hire CPR to complete the water remediation and to finish the roof repairs. (RP 569, 593, 598, 616-18, 631, 1615, 1619; Ex. 41; CP 256-57) Gregg Roofing was not paid the remaining \$5,000 due under the church contract. (RP 1623-25; CP 256)

Prior to being terminated, Gregg Roofing had job signs at the church, as well as its signature bright yellow trucks, boldly labeled with the Gregg Roofing name and logo, advertising to the Camas community that the church was a Gregg Roofing job. (RP 1622) After Gregg Roofing was terminated, however, its successor did not finish the job, but placed a large tarp over the uncompleted roof that remained in full view of the public for months while the church remained without a roof. (RP 1620-22) This shoddy and unprofessional work, which had been advertised as a Gregg Roofing job, harmed Gregg Roofing's business reputation. (RP 1620-26) Because of the failure to complete the church's roof, Gregg Roofing was not asked to bid on contracts, including two other churches and an apartment complex – roofing work for building owners who had previously hired Gregg Roofing. (RP 1622-23, 1626) A customer referred to Gregg Roofing refused to hire the company "because of the Parkside Church fiasco." (RP 1646)

C. A Jury Rejected Mutual Of Enumclaw's Subrogated Contract Claim And Found For Gregg Roofing On Its Tortious Interference With Contract Claim Against Mutual Of Enumclaw.

MOE brought a subrogated claim in Clark County Superior Court alleging that Gregg Roofing was responsible for the water damage, in breach of its contract with the church. (CP 6-10) In a counterclaim, Gregg Roofing asserted that MOE tortiously interfered with its contract by convincing the church to terminate Gregg Roofing and to hire a new roofing contractor, CPR. (CP 11-19) MOE then asserted claims against Chill and his company that were initially consolidated in this action. (CP 20-21)

The case was assigned to Judge Dan Stahnke for trial ("the trial court"). (RP 1) The trial court severed MOE's claims against Chill and CPR under CR 42, ordering that they be tried separately from the claims between MOE and Gregg Roofing. (CP 24-25, 176)

Before trial, the trial court denied MOE's motion to exclude all evidence regarding damage to Gregg Roofing's reputation. (RP 81; CP 1751-55) Distinguishing between loss of professional reputation and loss of income, the trial court ruled that Tiffany could testify to reputational harm based on his deposition disclosure that

Gregg Roofing could not successfully bid on of several specific jobs “because of the Parkside Church disaster.” (RP 1574) However, because he had not fully disclosed Gregg Roofing’s tax returns, the trial court ruled that Tiffany was prohibited from testifying to Gregg Roofing’s lost income. (RP 85)

Because MOE’s claim against Chill and CPR had been severed, the trial court granted Gregg Roofing’s motion in limine to prohibit evidence or argument that MOE paid \$2.4 million on fraudulent claims related to Parkside Church. (CP 176, 1615) The trial court also rejected MOE’s attempt to introduce into evidence a federal criminal information against Chill (Ex. 11), the plea agreement signed by Chill (Ex. 12), and the testimony of a MOE employee regarding “the facts of the fraud of Mr. Chill and the impact on the church and the connection between Mr. Chill and Mr. Lowr[ie] with regard to the fraud.” (RP 1571-72; CP 1615)²

Without exception, the trial court instructed the jury under the pattern instruction that an agent is acting within the scope of employment when “the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that

² As discussed below, MOE’s offer of proof regarding this employee’s testimony lacked any further specificity.

were expressly or impliedly required by the contract of employment.” (CP 302) See WPI 50.02. The trial court further instructed the jury that the tortious interference claim required proof of “damages to Gregg Roofing,” (CP 303), and that if the jury found for Gregg Roofing, it should award damages that would put Gregg Roofing in as good a position as it otherwise would have been and that the jury should be “governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.” (CP 304-05) See WPI 303.02.

In a special verdict the jury found that Gregg Roofing had not breached its contract with Parkside Church and that MOE, through its agent Lowrie, intentionally interfered with Gregg Roofing’s contract with the church, awarding Gregg Roofing \$1.5 million. (CP 309-10) The trial court denied MOE’s motion for judgment as a matter of law, a new trial, and remittitur. (CP 318-31, 568-69)

MOE has appealed the adverse damages judgment entered in Gregg Roofing’s favor. (CP 588-89) MOE has not raised any challenge to the jury’s rejection of its original subrogation claim against Gregg Roofing for breach of contract.

IV. ARGUMENT

A. This Court Must View The Evidence In The Light Most Favorable To Gregg Roofing And Is Prohibited By Article I, § 21 From Interfering With The Jury's Constitutional Rule To Assess Damages.

MOE's lengthy discourse on the nature of reputational damages misconstrues the issue on appeal and the limited standard of this court's review of a jury's assessment of damages for an intentional tort. This court's review is limited to determining whether the record, viewed in the light most favorable to Gregg Roofing, contains substantial evidence to support the jury's verdict. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 82, ¶¶76, 231 P.3d 1211 (2010) ("we will not disturb a jury's damages award unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice after viewing

the evidence in the light most favorable to the non-moving party.”) (internal quotations removed).³

Where, as here, the trial court denies a motion for a new trial and refuses to remit the verdict, the trial court’s decision strengthens the verdict on review by the appellate court. *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 330, 858 P.2d 1054 (1993). “While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, appellate review is most narrow and restrained and the appellate court rarely exercises this power.” 122 Wn.2d at 330 (quotations omitted). Thus, this court reviews the trial court’s refusal to vacate the jury’s damages award for abuse of discretion, not de novo, as argued by MOE. *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 176, ¶21, 116 P.3d 381 (2005) (“Trial court orders denying a remittitur are reviewed for abuse of discretion using the

³ See also *Nord v. Shoreline Sav. Ass’n*, 116 Wn.2d 477, 486-87, 805 P.2d 800 (1991) (“[Under] CR 59(a)(5), the damages must be so excessive as to unmistakably indicate that the verdict was the result of passion or prejudice. [Under] CR 59(a)(7), there must be no evidence or reasonable inference from the evidence to justify the award.”); *Faust v. Albertson*, 167 Wn.2d 531, 538, ¶10, 222 P.3d 1208 (2009) (“A judgment as a matter of law requires the court to conclude, as a matter of law, that there is no substantial evidence or reasonable inferences to sustain a verdict for the nonmoving party.”) (quotation omitted).

substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent.”). (See App. Br. 9-10)

Washington’s Constitution, Art. 1, § 21, guarantees the “inviolable” right to jury trial, including the determination of damages. ***Sofie v. Fibreboard Corp.***, 112 Wn.2d 636, 669, 771 P.2d 711 (1989) *amended*, 780 P.2d 260 (1989). Here, the jury properly performed its constitutional role and the judge who presided over this trial did not abuse his discretion in refusing to remit the verdict. The trial court’s decision does not call for the rare exercise of this “most narrow” of the appellate court’s power.

B. The Trial Court Did Not Err In Denying MOE Judgment As A Matter Of Law, A New Trial, Or Remittitur Because The Jury Heard Substantial Evidence Of The Damage To Gregg Roofing’s Reputation And Loss Of Business.

The record contains substantial evidence to support the jury’s verdict in favor of Gregg Roofing. The company’s owner testified that Gregg Roofing’s reputation was “severely damaged” and that it lost contracts as a result of MOE’s wrongful interference with Gregg Roofing’s contract with the Parkside Church. MOE provided no contradictory evidence. This court should defer to the jury’s assessment of the evidence, and as the trial court did, refuse to substitute its judgment for that of the trier of fact.

1. **The Risk Of Uncertainty In Establishing The Amount Damages Is On The Wrongdoer, Not The Plaintiff, Because Reputational Damages Are Inherently Difficult To Establish.**

"Washington courts abide by the principle that the wrongdoer shall bear the risk of the uncertainty which [its] own wrong has created." *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 664, ¶45, 266 P.3d 229 (2011) (quotations omitted). "[T]he doctrine respecting the matter of certainty [of damages], properly applied, is concerned more with the *fact of damage than with the extent or amount of damage.*" *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (emphasis in original). "[D]amages are not precluded simply because they fail to fit some precise formula." *Massey v. Tube Art Display, Inc.*, 15 Wn. App. 782, 791, 551 P.2d 1387 (1976). Comparisons between awards in different cases are thus of limited value and the focus must be on the "particular injuries" of the case. *Fisons*, 122 Wn.2d at 331.

A plaintiff may recover all damages proximately caused by the defendants' tortious interference, including harm to reputation. *Sunland Investments, Inc. v. Graham*, 54 Wn. App. 361, 364, 773 P.2d 873 (1989); Restatement (Second) of Torts § 774A(1)(c)

(1979) (App. Br. 12). "Damages for loss of professional reputation are not the type of damages which can be proved with mathematical certainty and are usually best left as a question of fact for the jury." *Fisons*, 122 Wn.2d at 332. "Damage to business reputation and loss of goodwill have to be proved with whatever definiteness and accuracy the facts permit, but no more." *Lewis River*, 120 Wn.2d at 719.⁴

In *Fisons*, the Supreme Court affirmed the trial court's refusal to order a new trial or remit the jury's award of over \$1 million to a physician for damages to his professional reputation. Noting the limited standard of review and the trial court's refusal to overturn the jury award, the *Fisons* Court affirmed the jury's award of damages based solely on testimony from the physician that his professional reputation had been damaged in an unquantified amount, prompting him to take steps to find different work. 122 Wn.2d at 331-34. The Court distinguished reputational damages

⁴ The law of defamation, relied on heavily by MOE (App. Br. 15-21), likewise recognizes the difficulty of proving reputational damages and allows defamed parties to recover "presumed damages." *Maison de France, Ltd. v. Mais Ouil, Inc.*, 126 Wn. App. 34, 54, ¶43, 108 P.3d 787 (2005). Indeed, Washington courts have allowed awards of presumed damages to corporations. *Maison*, 126 Wn. App. at 54; ¶44; *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 683, 713 P.2d 736, rev. denied, 105 Wn.2d 1016 (1986).

from general damages for emotional harm, pain and suffering, holding that damage to professional reputation constituted injury to "business or property" or economic harm under the Consumer Protection Act. 122 Wn.2d at 317-18.

The question in *Fisons* was whether the jury's verdict for over \$1 million in reputational damages could be affirmed on the doctor's testimony of the fact of reputational harm alone; not as MOE asserts, by quantifying "how much did it hurt?" (*Compare* App. Br. 24 *with* 122 Wn.2d at 332 ("we conclude that the admitted evidence was sufficient to sustain the jury's award for damages to Dr. Klicpera's reputation.")). The *Fisons* Court expressly rejected the defendant's argument that harm to business reputation equates to general damages for emotional harm, a distinction ignored by MOE in arguing that general damages to "dignity" are the same as loss of professional reputation. 122 Wn.2d at 318. See App. Br. 23.

This case is indistinguishable from *Fisons*. Like Dr. Klicpera who testified that the drug company tarnished his professional reputation in *Fisons*, Gregg Roofing's president testified that MOE severely damaged the company's reputation. The jury, which heard Tiffany's testimony firsthand and observed his demeanor,

was entitled to base its award of damages for reputational injury on this testimony, as the jury did in *Fisons*. 122 Wn.2d at 329 ("The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury.") (quotation omitted). As other courts have acknowledged, damage to reputation can be long-lasting, if not permanent. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 n. 9, 94 S. Ct. 2997, 3009 n.9, 41 L. Ed. 2d 789 (1974) ("Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood."). And as in *Fisons*, "[t]he verdict is strengthened by denial of a new trial by the trial court." 122 Wn.2d at 330. See also, *Bunch*, 155 Wn.2d at 181-82, ¶¶26-30 (affirming trial court's denial of remittitur of emotional distress damages based solely on testimony of plaintiff).⁵

⁵ See also *Weller v. Am. Broad. Companies, Inc.*, 232 Cal. App. 3d 991, 283 Cal. Rptr. 644 (1991). The California Court of Appeals affirmed a jury's award of \$500,000 for reputational damages to an antique dealer on his defamation claim. Noting that the dealer's reputation was permanently tarnished because he could never fully rebut the defamatory broadcasts, the court relied on testimony from the dealer that he had been told customers refused to deal with him because of the defendant's defamatory broadcasts and that his projected business forecasts did not materialize. 283 Cal. Rptr. at 658.

2. Substantial Evidence Supports The Jury's Verdict That MOE's Tortious Interference Damaged Gregg Roofing's Professional Reputation, A Verdict Fully Consistent With The Trial Court's Damages Instruction.

The jury's verdict for harm to Gregg Roofing's professional reputation was supported by substantial evidence and proper instructions. After Gregg Roofing proudly advertised to the entire community that it was installing the new roof for the church, MOE required the church to pull Gregg Roofing off the job, resulting in a large tarp covering the unfinished roof for all to see for months on end. Tiffany testified that this slipshod and unprofessional work undermined and "severely damaged" the professional reputation that he had spent years building up and caused Gregg Roofing to lose contracts it would have otherwise obtained, including contracts with customers with whom it had standing relationships – specific and definite pecuniary loss. (RP 1620-26, 1646)⁶

To the extent MOE argues that Tiffany, as owner and president of Gregg Roofing for 29 years, was not qualified to testify to the reputational damages Gregg Roofing suffered, its argument

⁶ "I believe there were several jobs, both residential and commercial nature, that we did not get to bid on that we would have normally been asked to bid on because we'd already worked for these people previously." (RP 1622)

is without merit. See *Lamphiear v. Skagit Corp.*, 6 Wn. App. 350, 360, 493 P.2d 1018 (1972) ("owner actively engaged in his business" may testify regarding damage to business). To the extent that MOE argues that expert testimony quantifying loss of professional goodwill is required to prove reputational harm, the Supreme Court specifically foreclosed its argument in *Fisons* and rejected MOE's reasoning in *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 845 P.2d 987 (1993).

In affirming an award for reputational harm, the *Lewis River* Court acknowledged the "principle that the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage*" and thus "recovery will not be denied because damages are difficult to ascertain." 120 Wn.2d at 717-18 (emphasis in original). As MOE concedes (App. Br. 36), "Damage to business reputation and loss of goodwill have to be proved with whatever definiteness and accuracy the facts permit, *but no more*." 120 Wn.2d at 719 (emphasis added). While *Lewis River* involved expert testimony regarding the hypothetical value of the business absent defendant's malfeasance, nothing in that case suggests that expert testimony is

required, 120 Wn.2d at 720-21, and the *Fisons* Court specifically rejected that proposition two years later. 122 Wn.2d at 332.

As in *Lewis River*, MOE has conceded the fact of damage, failing to produce any evidence contradicting Tiffany's testimony. As in *Lewis River*, Gregg Roofing then proved its damages with the "definiteness and accuracy the facts permit." 120 Wn.2d at 719. In *Lewis River* the business was sold, providing a ready metric for the actual value of the business. 120 Wn.2d at 721; App. Br. 37. Here, there was no comparable sale of Gregg Roofing to quantify the damage to its business reputation. Instead, Gregg Roofing's owner and president testified that Gregg Roofing lost specific contracts and believed that there was other long lasting damage that defied quantification. (RP 1620-26, 1646; see also *Weller*, 283 Cal. Rptr. at 658) Because Gregg Roofing established with certainty the fact of damage, MOE bore the risk of any uncertainty in establishing damages caused by its own tortious conduct. *Spradlin Rock Products*, 164 Wn. App. at 664, ¶145.

Gregg Roofing was not required to base its reputational damages on financial records. (App. Br. 38-40) The jury fully understood, based on MOE's cross-examination of Tiffany, that Gregg Roofing was not seeking its lost profits or income, but was

claiming injury to its professional reputation. (RP 1667) The jury weighed this evidence just as it considered Tiffany's testimony that Gregg Roofing's reputation was severely damaged. MOE, which could have examined Tiffany about Gregg Roofing's profits as it did in his deposition, cannot complain of testimony that it did not put before the jury.

MOE's argument that the jury was precluded from awarding reputational damages under the court's instructions is also without merit. In its special verdict the jury found that Gregg Roofing had not breached the contract and that MOE had tortiously interfered with Gregg Roofing's contract with Parkside Church. (CP 309-10) The jury was asked to determine the amount of damages that would put Gregg Roofing in as good a position as it would have been had MOE not tortiously interfered with its contract. (CP 305)⁷ The jury awarded damages consistent with the trial court's

⁷ Neither Tiffany's testimony that he could not place an exact dollar value on reputational damage nor Gregg Roofing's pre-trial estimation of \$10,000 in reputational damages (App. Br. 28, 33) undermine the verdict. To the contrary, the evidence cited by MOE simply confirms what the Supreme Court has previously acknowledged: reputational damages are inherently difficult to prove and their assessment is peculiarly within the province of the jury. *Fisons*, 122 Wn.2d at 329-34. Moreover, Tiffany testified that the \$10,000 estimate given by his attorney in 2009 for reputational damages was too low, even at the time it was made, two years before trial. (RP 1673)

unchallenged instruction to use its "own judgment" and "the evidence in the case," which was uncontroverted by MOE. (CP 304-05)⁶

Finding the jury's award for harm to Gregg Roofing's reputation was supported by substantial evidence, the trial court refused to set it aside. On review of that decision this court must defer to the trial court's "favored position" because the "trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents." *Fisons*, 122 Wn.2d at 329. The trial court's refusal to overturn the verdict has strengthened it for review before this court. 122 Wn.2d at 330.

The trial court did not abuse its discretion in deferring to the jury's determination of damages. Its verdict for reputational harm was supporting by substantial evidence, by proper instructions and

⁶ Even if the law provided some support for MOE's argument that reputational damages be calculated with mathematical certainty, MOE waived any objection to the jury's calculation of damages when it failed to take exception to the trial court's supplemental instruction to the jury that it was not required to show how it calculated damages. (CP 308) Had MOE desired the exacting computation of damages it now claims was necessary, it should have excepted to this jury instruction and proposed an alternative instruction. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001) (App. Br. 31).

by the law. However, in the unlikely event that this court deems the evidence of damages insufficient, it should limit any new trial to the issue of damages given the overwhelming evidence of MOE's liability for tortious interference with contract. See *Curtiss v. Young Men's Christian Association*, 7 Wn. App. 98, 106, 498 P.2d 330 (1972), *aff'd*, 82 Wn.2d 455, 511 P.2d 991 (1973); *Lanegan v. Crauford*, 49 Wn.2d 562, 568, 304 P.2d 953 (1956) (limiting retrial to damages where issue of liability is clear.).

C. The Trial Court Did Not Abuse Its Discretion In Excluding Evidence About Criminal Proceedings Against Chill, The Contractor Who Took Over Repairs To The Roof.

MOE makes no argument that insufficient evidence supports the jury's finding that Lowrie was acting within the scope of his employment, or that the instructions incorrectly guided the jury's determination of Lowrie's scope of authority.⁹ MOE instead limits its argument to an evidentiary challenge to the trial court's exclusion of evidence of a third party's criminal wrongdoing. The trial court did not abuse its discretion in prohibiting the jury from considering criminal pleadings against Chill, the contractor who

⁹ MOE has not assigned or argued error to the trial court's pattern agency instruction (CP 302) nor the denial of its CR 50 motion on the issue of agency. (CP 568-69; App. Br. 1-2)

provided kickbacks to Lowrie, or in excluding the testimony of a MOE employee regarding "the connection between Mr. Chill and Mr. Lowr[ie] with regard to the fraud." (App. Br. 41-47; RP 1572)

Under the abuse of discretion standard, this court may reverse only if the trial court's exclusion of evidence was outside the range of reasonable choices *and* the exclusion prejudiced MOE. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 213, ¶¶33, 258 P.3d 70 (2011); *In re Detention of Mines*, 165 Wn. App. 112, 128, ¶¶31, 266 P.3d 242 (2011), *rev. denied*, 173 Wn.2d 1032 (2012). By contrast, this court may affirm the trial court's evidentiary decision on any ground supported by the record. *Fulton v. State, Dept. of Soc. & Health Services*, ___ Wn. App. ___, ¶¶15, 279 P.3d 500 (2012).

1. MOE Is Liable For The Tortious Conduct of Its Agent Lowrie Because That Conduct Occurred Within The Scope Of The Authority Bestowed On Lowrie By MOE.

MOE's argument that a third party's criminal misconduct is relevant to the scope of its agent's authority takes an overly narrow view of the law of agency. "It is the general rule that a master may be held liable for the tortious acts of his servant, although he may not know or approve of them, if such acts are done within the scope

of the employment.” *Titus v. Tacoma Smelters Union Local No. 25*, 62 Wn.2d 461, 469, 383 P.2d 504 (1963); see also *Deep Water Brewing, LLC v. Fairway Resources Ltd.*, 152 Wn. App. 229, 215 P.3d 990 (2009) (affirming vicarious liability of homeowner’s association for president’s actions despite fact that president acted for his own benefit), *rev. denied*, 168 Wn.2d 1024 (2010).¹⁰

The law imposes vicarious liability on employers for the actions of their employee when the employee is “acting within the scope of employment,” i.e.; is “performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control.” Restatement (Third) Of Agency § 7.07 (2006); *Robel v. Roundup Corp.*, 148 Wn.2d 35, 52-53, 49 P.3d 611 (2002); WPI 50.02; CP 302. Whether an employee was acting within the scope of his employment is a question of fact. *Mason v. Kenyon Zero Storage*, 71 Wn. App. 5, 12, 856 P.2d 410 (1993);

¹⁰ See also *Inter Mountain Mortg., Inc. v. Sulimen*, 78 Cal. App. 4th 1434, 1442, 93 Cal. Rptr. 2d 790, 795 (2000) (genuine issue of material fact existed whether employee acted within the scope of employment by processing a fraudulent loan; employer “placed him in the position of being able to submit fraudulent loan applications”); *Smith v. Jenkins*, 626 F.Supp.2d 155, 166 (D. Mass. 2009) (whether law firm was vicariously responsible for fraudulent actions of employee could not be determined as a matter of law).

Smith v. Leber, 34 Wn.2d 611, 624, 209 P.2d 297 (1949) (“Whether a servant was acting within the scope of his employment at the time he caused an injury to a third person is a question for the jury to determine, where the evidence is conflicting and more than one inference can reasonably be drawn therefrom.”).

“The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.” *Carmin v. Port of Seattle*, 10 Wn.2d 139, 154, 116 P.2d 338 (1941); *Robel v. Roundup Corp.*, 148 Wn.2d at 52 (view that “an employer is generally not, as a matter of law, liable for an intentional tort committed by an employee . . . gravely distorts the law of the vicarious liability in this state.”). Nor does the fact that Lowrie’s actions were contrary to MOE policy absolve MOE from liability. *Smith*, 34 Wn.2d at 623. (“Also, as a general rule, an employer is liable for acts of his employee within the scope of the latter’s employment notwithstanding such acts are done in violation of rules, orders, or instructions of the employer.”); Restatement (Third) Of Agency § 7.07 comment c (“conduct is not outside the scope of employment merely because an employee disregards the employer’s

instructions.”).¹¹ The trial court's evidentiary decisions allowed the jury to properly resolve the agency issue under unchallenged instructions.

2. Trial Court's Ruling Prohibited Only Evidence Of A Third Party's Criminal Actions, Which Were Of Marginal Relevance To Whether Lowrie's Acts Went Beyond The Scope Of His Authority As MOE's Agent.

The trial court's ruling barred the jury from considering that Chill, a third party who was not MOE's employee, engaged in criminal misconduct directed toward MOE, not that Lowrie was acting outside the scope of his employment when he advised the pastor about the scope of MOE's coverage and recommended termination of Gregg Roofing. MOE authorized Lowrie to meet with the insured, to investigate the damage to the church property, to advise the church on its claim, and to help the church choose a contractor. (RP 1145, 1353, 1359, 1364-65, 1375, 1378-79) Pastor Elledge discharged Gregg Roofing on Lowrie's instruction and for fear of being denied coverage after Lowrie told him that his

¹¹ In *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 277 P.2d 708 (1954) (App. Br. 42-44), the appellant challenged the sufficiency of the evidence to establish the employee was acting within the scope of his employment when he set out to destroy one of his employer's best dealerships. Here, by contrast, MOE makes no challenge to the sufficiency of the evidence and challenges only the trial court's exclusion of evidence regarding a third party's criminal conduct.

own "insurance company's people could do a better job." (RP 593, 598, 615-18, 631-32, 1619)

MOE's employees testified with complete consistency that Lowrie was authorized to direct the church to fire Gregg Roofing.

Jeannie Fleming, MOE's Vice-President of Claims:

Q. Would you agree that he was acting within the scope of his employment . . . and his agency in dealing with the insured, in this case representatives of the Parkside church?

A. Yes.

(RP 1376-77) Robert Klie, MOE's Claims Director:

Q. Okay. He was acting within the scope of his employment to go out to the Parkside church.

A. Yes.

Q. He was acting within the scope of his employment to meet with the pastor.

A. In connection with the claim, certainly.

(RP 1145) Lisa Dubose-Day, MOE's Subrogation Examiner:

Q. Was he representing MOE when he dealt with the insured, the church, Parkside church?

A. (Inaudible), yes.

Q. And was he acting within the course and scope of his employment when he was dealing with the church at the site?

A. Yes.

Q. Okay. And so when he was advising the pastor on what to do, was he not acting within the course and scope of his employment for [MOE]?

A. Yes.

(RP 1364-65; *see also* RP 1353).

In discharging Gregg Roofing, Lowrie was "performing duties that were expressly or impliedly assigned to" Lowrie by Mutual of Enumclaw. (Instruction 14, CP 302) Indeed, MOE never disavowed Lowrie's conduct. MOE did not even fire Lowrie once it learned that he had recommended the termination of Gregg Roofing on the Parkside Church claim. (RP 1380, 1386)

Judge Bennett's order in limine (CP 691), entered *before* the trial court severed MOE's fraud claims against Chill and his company CPR, did not require the trial court to admit evidence of Chill's criminal misconduct. (See App Br. 41-47) Judge Bennett's order provided that "[e]vidence of CPR/Chill's fraud has to be admissible because recovery is sought from those entities as well. MOE is not vicariously liable for the fraud of CPR/Chill." (CP 694) In ruling that evidence of Chill's criminal misconduct was relevant to MOE's claims against Chill, Judge Bennett expressly refused to make any "findings on genuine issues of fact" and held that "Lowrie may have been acting within the scope of his authority to induce

the Parkside Church to fire/exclude Gregg Roofing.” (CP 691-92) Moreover, Judge Bennett recognized that MOE in fact “afforded [Lowrie] wide latitude in determining the proper course to follow in assisting the church through the crisis authoriz[ing], ratify[ing], or approv[ing] Mr. Lowrie’s involvement with the firing of ServePro and Gregg Roofing.” (CP 608)

Moreover, MOE’s offer of proof that its employee would testify regarding “the facts of the fraud of Mr. Chill” (RP 1572) failed to provide sufficient specificity to allow the trial court to determine the relevance of Chill’s criminal misconduct to a claim against MOE based on the conduct of Lowrie. See *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 618, 762 P.2d 1156 (1988) (offer of proof must be sufficient to “advise [the trial court] of the specific testimony to be offered and the reasons supporting its admissibility.”) The trial court could not make any determination of relevance based on the conclusory and summary nature of MOE’s offer of proof.

MOE stresses that Gregg Roofing’s only objection to evidence was relevance (App. Br. 5), but the trial court did not base its ruling on any particular ground. (CP 176) As a result, this court may affirm on any ground supported by the record. *Fulton v.*

State, Dept. of Soc. & Health Services, ___ Wn. App. ___, ¶15, 279 P.3d 500 (2012); *State v. Swan*, 114 Wn.2d 613, 659, 790 P.2d 610 (1990) (citing Tegland, 5 *Washington Practice, Evidence* § 10 at 32 (3rd ed. 1989)), *cert denied*, 498 U.S. 1046 (1991).

The trial court did not abuse its discretion in excluding evidence of Chill's criminal charge on the ground it was irrelevant. Once MOE's claims against Chill were severed – an order which MOE has *not* appealed – evidence of Chill's criminal acts were of marginal relevance to whether Lowrie was acting within the scope of his employment. ER 401.

The issue here was whether *Lowrie* acted within the scope of his employment when he convinced the church to fire Gregg Roofing, not what Chill did or did not do. The exhibits that MOE sought to introduce do not specifically mention the Parkside Church contract. (Exs. 11-12) Thus, whether Chill acted criminally in his relationship with Lowrie has no probative value to whether MOE authorized Lowrie to direct its insureds to hire and fire roofing contractors to perform work paid for by MOE.

Further, MOE's proffered evidence of Chill's criminal misconduct would have been extremely prejudicial to Gregg Roofing. The evidence rules repeatedly recognize the unfairly

prejudicial impact of evidence of criminal misconduct. See, e.g., ER 404(b), ER 609. Washington courts frequently require exclusion of criminal conduct as unfairly prejudicial. **State v. Wilson**, 144 Wn. App. 166, 177-78, ¶¶29-32, 181 P.3d 887 (2008); **State v. Trickler**, 106 Wn. App. 727, 733, 25 P.3d 445 (2001). Allowing a jury to consider that the federal government, after investigating Chill's conduct, found probable cause that he engaged in a scheme to defraud MOE of millions of dollars would have engendered an unfair emotional bias in favor of MOE that far outweighed any probative value on the issue whether *Lowrie* acted in the scope of his employment by directing the church to terminate Gregg Roofing. **Salas v. Hi-Tech Erectors**, 168 Wn.2d 664, 671, ¶17, 230 P.3d 583 (2010) ("When evidence is likely to stimulate an emotional response rather than a rational decision, a danger of unfair prejudice exists.").

The criminal pleadings against Chill would have also been hearsay because MOE offered them to establish the truth of the facts contained in those pleadings. Chill's plea acknowledgment of fraud was an admission admissible only against Chill, not against MOE and its agent Lowrie. The only possible hearsay exception, the public records exception (RCW 5.44.040), could not apply here

because the documents offered by MOE had not been certified by the federal court. See also *State v. James*, 104 Wn. App. 25, 33, 15 P.3d 1041 (2000) (prosecutor's declaration did not meet public records exception to hearsay but admission was harmless error). Because Chill's indictment and plea agreement were offered for the truth of the matter asserted – Chill's criminal misconduct – the trial court did not abuse its discretion in preventing the jury from considering evidence that MOE, which had clothed Lowrie with the authority to recommend contractors to the church, had already suffered enough as a result of Chill's criminal scheme.

3. The Trial Court's Evidentiary Decision Did Not Hamper MOE From Arguing Its Theory, Rejected By The Jury, That Lowrie Acted Outside The Scope Of His Employment.

The exclusion of evidence of Chill's criminal misconduct was not reversible error because it did not prejudice MOE in asserting its theory that Lowrie acted outside the scope of employment. "The exclusion of evidence which is cumulative or has speculative probative value is not reversible error." *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994). "The evidence need not be identical to that which is admitted; instead, harmless error, if error at all, results where evidence is excluded which is, in

substance, the same as other evidence which is admitted.” 124 Wn.2d at 170. See also *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 262, 944 P.2d 1005 (1997); *Hendrickson v. King County*, 101 Wn. App. 258, 269, 2 P.3d 1006 (2000); see generally Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 Gonz. L. Rev. 277 (1996).

Both parties elicited testimony that Lowrie directed insureds to hire CPR in exchange for kickbacks. (RP 543-44, 617-18, 1356, 1360, 1367, 1378, 1386, 1614) This evidence included the fact that Chill was giving Lowrie “gifts and favors” in return for MOE work. (RP 543) Indeed, MOE was allowed to “introduce evidence that Lowrie[] . . . was ‘willfully acting contrary to’ the best interests of MOE. (App. Br. 45) (RP 1370 (“Is there any rule as to whether the agent is supposed to be taking money for themselves? A. They should never do that.”), 1386 (Lowrie’s conduct violated company policy) Likewise, the jury heard evidence concerning how “during the process of adjudicating claims, Lowrie tortiously interfered with [Gregg Roofing’s] contract for his own benefit.” (App. Br. 45) (RP 543-44, 617-18, 1356, 1370)

The criminal pleadings against Chill did not prevent MOE from arguing that Lowrie acted to fulfill his own interests rather than

those of his principal MOE, which clothed Lowrie with authority to terminate Gregg Roofing. The trial court did not abuse its discretion by excluding this evidence.

D. The Trial Court Did Not Abuse Its Discretion In Allowing Tiffany To Testify That He Was Upset By Termination Of The Church Contract.

MOE dramatically overstates the import of Tiffany's testimony regarding how he "felt" after the church contract was terminated and cannot show that it was prejudiced by the admission of this testimony. (App. Br. 47-49) Tiffany answered that the church fiasco had a "very negative effect on our business and we were naturally very upset by it." (RP 1621; see also RP 1620) Tiffany did not provide any testimony regarding hospitalization or treatment for emotional "harm." Tiffany simply stated the obvious – that the damage to his business's reputation upset him.

The trial court's jury instructions which required Gregg Roofing to prove as a necessary element of the tortious interference claim "damages to *Gregg Roofing*," refute MOE's assertion that the jury awarded damages for emotional harm to Tiffany. (CP 303) Likewise, the contract instruction provided no direction to the jury to award emotional distress damages. (CP

304-05) Juries are presumed to follow instructions. *A.C. ex rel. Cooper v. Bellingham Sch. Dist.*, 125 Wn. App. 511, 521-22, 105 P.3d 400 (2004). MOE can establish no abuse of discretion or reversible error here.

V. CONDITIONAL CROSS-APPEAL

Gregg Roofing asserts the following assignments of error, issues and argument on cross-appeal conditionally, and asks that the court address them only if it remands for a new trial:

A. Assignments of Error On Conditional Cross-Appeal.

1. The trial court erred in refusing to allow Gregg Roofing to amend its complaint to state a cause of action for negligent supervision. (CP 35-40; RP 23, 1846-49; CP 1840-44)

2. The trial court erred by not giving Gregg Roofing's proposed instruction 20 (CP 172) authorizing damages for injury to reputation on its intentional tortious interference with contract claim.

B. Issues Related To Conditional Cross-Appeal.

1. Did the trial court err in refusing to allow Gregg Roofing to amend its complaint to state a claim for negligent supervision based on MOE's approval of Lowrie's fraudulent adjustments and MOE's failure to verify that Lowrie's reports were accurate or that

the damages to the church warranted keeping the claim open for two years?

2. Should the jury be instructed in the event of a remand that Gregg Roofing may recover damages for injury to reputation?

C. Argument On Conditional Cross-Appeal.

1. The Trial Court Erred By Refusing To Allow Gregg Roofing To Amend Its Complaint To State A Claim For Negligent Supervision Against MOE.

Should this court remand for a new trial, it should direct the trial court to allow Gregg Roofing to pursue a negligent supervision claim against MOE. Prior to the court setting a trial date, Gregg Roofing moved to amend its answer to add a cross-claim for negligent supervision. (CP 36, 1808-16) Gregg Roofing's negligent supervision claim alleged that MOE failed to exercise due care in supervising Lowrie's handling of the Parkside Church claim. (CP 35-40) Judge Bennett denied the motion to amend on the ground that the amended complaint "simply restates the wrongful interference with contract claims which I have left in place." (CP 693, 1844)

To establish a claim of negligent supervision of an employee, a plaintiff must prove that "(1) the employee presented a risk of harm to others; (2) the employer knew, or in the exercise of

reasonable care, should have known, that the employee presented such a risk; and (3) the employer's failure to adequately supervise the employee was the proximate cause of plaintiff's injury." *Steinbock v. Ferry County Pub. Util. Dist. No. 1*, 165 Wn. App. 479, 490, ¶¶22, 269 P.3d 275 (2011). A negligent supervision claim thus imposes liability against an employer even when the employee acts outside the scope of his authority. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997). The claim is typically reviewed as an alternate to a claim to liability under the theory of respondeat superior. 131 Wn.2d at 48.

Under CR 15(a), leave to amend a pleading "shall be freely given when justice so requires." "Leave to amend should be freely given unless it would result in prejudice to the nonmoving party." *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001). A motion for leave to amend is addressed to the discretion of the trial court, but a trial court abuses that discretion by denying leave to amend without proper justification such as undue delay or prejudice to the opposing party. *Tagliani v. Colwell*, 10 Wn. App. 227, 233, 517 P.2d 207 (1973).

As Gregg Roofing established in its offer of proof, there was substantial evidence that MOE and its supervisor Gloria Carlson

made no effort to supervise Lowrie's exercise of the authority granted him by MOE. MOE took no efforts to comply with its policy requiring extra attention to "Claims of Special Interest" or its Anti-Fraud plan requiring audits of its employees on an "ongoing basis." (Exs. 120-22)¹² Carlson rubber-stamped Lowrie's decision to convince the pastor to fire Gregg Roofing. (CP 1409) Carlson simply took Lowrie at his word regarding Gregg Roofing's actions and the severity of the storm. (CP 1412-13) Nor did Carlson verify that the church actually chose Chill's company as its contractor. (CP 1420)

MOE continued its lack of supervision after Gregg Roofing's termination. MOE took no steps to verify Lowrie's reports that the church had incurred millions in damages were accurate and never suspected that this claim could have been inflated. (CP 36-38, 1408, 1412-13, 1423) Robert Klie, Moe's Claims Director, reviewed the claim on several occasions and approved payments each time. (CP 45; RP 1142) Pastor Elledge called Klie to inform him of his frustrations with MOE's contractor's failure to repair the roof, but Klie still failed to take any action. (CP 46) No one at MOE

¹² Portions of these exhibits were included in Gregg Roofing's offer of proof. (CP 36-37)

questioned why the roof repair claim stayed open for two years.
(CP 1385)

In the event of a remand, there would be no prejudice to MOE in allowing Gregg Roofing to prove a negligent supervision claim as an alternate to its claim for respondeat superior liability. The jury heard substantial evidence that MOE should have known that Lowrie was fraudulently handling claims and that it failed to exercise reasonable care in supervising Lowrie.

The tort of negligent supervision provides an independent basis for MOE's liability if Lowrie was acting outside the scope of his employment as MOE argued below and argues again on appeal. *Niece*, 131 Wn.2d at 48. In the event of a remand, the jury should consider the negligent supervision claim, along with the vicarious liability claim against MOE.

2. The Trial Court Erred By Refusing To Give Gregg Roofing's Instruction Encompassing A Broader Range Of Recoverable Damages.

In the event this court remands for a new trial on damages, it should instruct the jury that Gregg Roofing is entitled to recover damages for injury to reputation, as Gregg Roofing proposed. (CP 172) Respondent raises this issue conditionally, in response to MOE's argument that the instructions given by the trial court

establish the law of the case. (App. Br. 29-34) Under RAP 2.4(a), this court will, "at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent." The jury should receive proper instructions in the event of a remand regardless whether respondent properly preserved error regarding the instructions given below.

A plaintiff may recover all damages proximately caused by the defendants' tortious interference, including harm to reputation. *Sunland Investments, Inc. v. Graham*, 54 Wn. App. 361, 364, 773 P.2d 873 (1989); Restatement (Second) of Torts § 774A(1)(c) (1979). In the event this court remands for a new trial on damages, the jury should be given proper guidance that it may award damages for injury to reputation in connection with Gregg Roofing's tortious interference claim.

VI. CONCLUSION

The trial court did not err in affirming the jury's verdict and denying MOE's motion for a new trial and remittitur. Nor did the trial court abuse its discretion in refusing evidence regarding the criminal proceedings against Chill or in admitting testimony from

Tiffany regarding how the termination of the contract impacted him.

This court should affirm.

Should this court remand for a new trial, it should reverse the trial court's dismissal of Gregg Roofing's action for negligent supervision and instruct the trial court to allow Gregg Roofing to assert a negligent supervision claim and authorize recovery of damages for reputational harm in its action for tortious interference.

Dated this 27th day of August, 2012.

SMITH GOODFRIEND, P.S.

By: 

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STATE OF WASHINGTON

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 27, 2012, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway, Suite 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
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DATED at Seattle, Washington this 27th day of August, 2012.


Mia M. Porteous