No. 42940-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE CO.,

Appellant,

v.

GREGG ROOFING, INC.,

Respondent.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. SUMMARY OF THE REPLY

> Q. *All right. So you're not putting any numbers, you're not bringing out any documents, you're just going to let the jury decide what that is.*
>
> A. *That's correct.* (RP 1626)

Verdict: $1,500,000.00

It is not too much to ask that a business entity defending a $1.5 million award for impairment of its corporate goodwill be able to point to evidence in the record that this is a reasonable estimate of an actual loss. Unlike the personal loss of a professional reputation, damage to corporate goodwill does not present a trier of fact an unquantifiable harm; there are at least *five* economic methodologies that Washington courts have specifically recognized as legally sufficient measurements of a business's goodwill. *Of course* measuring diminution of corporate goodwill involves projecting financial prospects into the future, and necessarily embraces significant error bars, estimates and assumptions that cannot be proven.

We are thus not reduced to estimating commercial goodwill in the same way juries translate the personal value of "being held in high esteem" into dollar awards. Washington cases have repeatedly admonished that alleged damage to business reputation be proved "***with whatever definiteness and accuracy the facts permit***, but no more." In the case at bar, the primary issue – whether there was sufficient evidence to support

the $1.5 million verdict – is an issue of law; it balances on the fulcrum of whether the facts permitted more definite and accurate proof of harm to corporate reputation than GRI offered. As will be discussed below, by the time of trial, GRI possessed all of the financial data representing ten years of business operations, *six years* of which were *post*-interference. This is the raw material from which people who know how to calculate the value of commercial goodwill do so. Instead of relying on this actual data, Mr. Tiffany testified that making such calculations was not a skill he possessed, and declined to "put any numbers" or "bring out any documents." He asked the jury to make up a number; this is not even close to the "definiteness and accuracy the facts permit" and it is insufficient to support a $1.5 million verdict as a matter of law. Additionally, the trial court committed reversable error in prohibiting Mutual of Enumclaw ("Enumclaw") from presenting evidence negating GRI's agency claim, and allowing testimony of Mr. Tiffany's personal sensibilities. For all of these reasons, this Court should reverse.

II. ARGUMENT

1. The Standard of Review

GRI argues that the standard of review for this case is abuse of discretion. GRI paints this issue with far too broad a brush, failing to recognize that different standards apply to the distinct errors assigned by

Enumclaw. For example, the primary argument asserted by Enumclaw is that the trial court erred by failing to grant the CR 50 Motion for Judgment as a Matter of Law because the verdict was not supported by substantial evidence. This ruling is subject to *de novo* review. In the case of *Faust v. Albertson*, 167 Wn. 2d 531, 537-38, 222 P.3d 1208 (2009), the court held: "In reviewing a ruling on a motion for a judgment as a matter of law, we engage in the same inquiry as the trial court." As described in *Faust*, this Court must resolve all factual doubts and questions of witness credibility in favor of GRI, but if, after doing so, there was no evidence to support the $1.5 million reputational damage award, then the Court should reverse as a matter of law. In the case at bar, the question is not whether the jury should have believed certain evidence or witnesses rather than others; it is whether there was any evidence *at all* supporting a $1.5 million award. There is no discretionary weighing involved, and this is a pure issue of law.

Second, with respect to Enumclaw's alternative Motions, for Remittitur or a New Trial, GRI is generally correct that the standard of review is abuse of discretion. However, the issue of whether the trial court's discretion was predicated on a legal error is reviewed *de novo*. "A decision is based 'on untenable grounds' or made 'for untenable reasons' if it . . . was reached by applying the wrong legal standard." *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 821-22, 225

P.3d 280 (2009). Here, Enumclaw argues that the kind of evidence submitted by GRI to support its reputational damages claim is, as a matter of law, incompetent to support a $1.5 million award for corporate reputational harm. That issue is subject to *de novo* review.

Third, the abuse of discretion standard is appropriate for the following issues. If the Court were to rule that a corporation *can* recover substantial damages on a contractual interference claim for reputational harm with no evidence of actual loss, the trial court's denial of the Motion for New Trial or Remittitur is still reversible if the trial court abused its discretion. Enumclaw argues that it did so. Finally, Enumclaw has been consistent since its opening brief that evidentiary errors are subject to the abuse of discretion standard. Here, the identified trial court rulings were outside this boundary.

2. *Measuring Corporate Goodwill in Washington*

a. *Quantification of the static value of goodwill*

An important element of Enumclaw's argument in this case has been that corporations do not have "reputations" in the same sense that individual people do; instead, they possess corporate "goodwill." GRI does not dispute the validity of this distinction, conceding it with silence.

Instead, GRI argues that a limited liability business entity is entitled to recover for alleged damage to its corporate goodwill without

any showing at all of the value it alleges was lost. GRI is not the first to make the argument that that damage to a corporation's goodwill is unquantifiable, therefore not requiring evaluation to support a substantial award. It was exactly the argument raised by the plaintiff, and rejected by the court, in the *Experience Hendrix* case: "To the extent plaintiffs are contending that goodwill is not capable of being evaluated to a reasonable degree of certainty, Washington law contradicts them." *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, C09-285Z, 2011 WL 4402775 (W.D. Wash. Sept. 21, 2011). That case noted that the law in this State has endorsed five "major formulas" for evaluating the value of commercial goodwill, citing *In re Marriage of Hall*, 103 Wn. 2d 236, 243-45, 692 P.2d 175 (1984). While recognizing that these are not the exclusive methodologies, and specifying that the best approach will vary with the facts of any particular case, *In re Marriage of Hall* set out these five examples of the kind of "accepted methods of valuation [of goodwill] that ***must be employed***." *Id. at 243, emphasis added.*

The first three methods are recognized accounting formulas, which capitalize historical average net profits, and subtract the book value of the company's physical assets. This leaves the intangible asset: goodwill. The fourth method is based on an appraisal of the value of the company as an ongoing concern, again minus the value of its tangible assets. The fifth is

to use an actual sale price of a buy/sell transaction, minus the value of tangible assets. Of course, "[t]hese five methods are not the exclusive formulas available to trial courts in analyzing the evidence presented. Nor must only one method be used in isolation." *Id. at 245.*

b. Quantifying alleged damage to goodwill

The approaches to valuing corporate goodwill discussed above represent a snapshot of that value in time. Knowing the value of goodwill at a particular moment, however, does not measure how that value has changed as a result of an alleged tort. Where the claim in a lawsuit is that a corporation's goodwill has suffered an injury, "It is axiomatic that the measure of damage to business property, such as goodwill, is based on a measurement of the difference in value of the property before and after the injury." *Experience Hendrix*, 2011 WL 4402775 (*citation omitted*). *See also Caruso v. Local Union No. 690 of Int'l Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am.*, 33 Wn. App. 201, 208, 653 P.2d 638, (1982) *rev'd on other grounds,* 100 Wn.2d 343, 670 P.2d 240 (1983). In a case such as the one at bar, this requires using a recognized methodology to place a value on a company's goodwill before and after the alleged tortious interference. *Id.*

The *Experience Hendrix* "before and after" measurement requirement is the same that the Supreme Court previously endorsed in

Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 845 P.2d 987 (1993). In that case, the "before" value of the sod farm's goodwill was calculated by using an accounting formula where average profit streams were capitalized, and physical assets subtracted, as described in *In re Marriage of Hall*. The "after" valuation was calculated by the buy / sell method, also described in *In re Marriage of Hall*, which was appropriate because the sod business had been sold during the course of litigation. Lewis River thus put on evidence that the damage to its goodwill was the difference between those two values, namely $1.2 million. *Id.* After considering the competing estimate from the defendant's economist (who used the same methodology), the jury awarded $181,917 less than the plaintiff's estimate *Id.* The court certainly recognized that there is *always* a degree of speculation involved in this kind of calculation, but upheld this manner of estimating the value of the damage to Lewis River's reputation. The Court noted that the value of the corporate plaintiff's reputational claim must be proven "with whatever definiteness and accuracy the facts permit, but no more." *Id. at 17.*

The issue presented in *Lewis River*, what quantum of evidence is required to ascribe a value to corporate reputational harm as a consequential damage, is strikingly similar to the case at bar. Unlike Lewis River, however, GRI did not offer "before and after" estimates of

the value of its goodwill; it offered no estimate of value *at all*, specifically acknowledging on appeal that its damages claim was "unquantified." Resp. Br. 2. Because GRI's evidence falls so far below the standard enunciated in *Lewis River*, the Court should expect GRI to provide a compelling basis for distinguishing it from the case at bar. As discussed below, GRI cannot do so.

3. GRI cannot distinguish Lewis River

GRI uses three lines of reasoning in its attempt to circumvent the *Lewis River* threshold. First, GRI misconstrues the *Lewis River* approach; it argues that it was unworkable in the case at bar because, unlike Lewis River, GRI's business was not sold, and there was thus no "ready metric" of its goodwill's value. Second, GRI argues that the proviso in *Lewis River* that the value of the allegedly lost goodwill must be proven "with whatever definiteness and accuracy the facts permit, *but no more*" freed it from requirement to make *any* estimate of its loss in this case. Finally, GRI argues that *Fisons* effectively overruled *Lewis River*, endorsing substantial verdicts for unquantified harm to goodwill. None of these arguments is meritorious; each will be addressed below.

a. The Lewis River *analysis does not require the actual sale of the business in order to estimate the value of allegedly diminished goodwill.*

GRI argues that *Lewis River* does not apply to this case because:

"In *Lewis River* the business was sold, providing a ready metric for the actual value of the business. Here, there was no comparable sale of Gregg Roofing to quantify the damage to its business reputation." Resp. Br. 19. (citation omitted). This distinction is without legal significance. As described above, the method of estimating lost goodwill approved in *Lewis River* (and required in *Experience Hendrix*) was to compare the pre- and post-interference approximations of the value of the corporation's goodwill. Lewis River used two of the valuation methods sanctioned by *In re Marriage of Hall*; an accounting method to estimate the pre-interference value, and the buy/sell method to estimate the post-interference value[1]. The "ready metric" of Lewis River's sale price had nothing whatsoever to do with the pre-interference estimation of its goodwill; it was only relevant to the post-interference evaluation because Lewis River chose to apply the buy/sell method to that benchmark. Lewis River could also have used any of the other four five *In re Hall* approved valuation methodologies to estimate the value of its goodwill before and after the interference; so could have GRI. There is absolutely nothing to suggest that the holding of *Lewis River* restricts the plaintiff's choice of these five. The fact that the business of GRI was not sold does not

[1] *In re Marriage of Hall* encouraged using more than one method in combination. 103 Wn. 2d at 245.

distinguish this case from *Lewis River*.

b. "[W]hatever definiteness and accuracy the facts permit, but no more..."

Paradoxically, in its effort to avoid the holdings of *Lewis River* and *Experience Hendrix*, GRI actually embraces what is perhaps *Lewis River's* most crucial holding: that the value of alleged damage to goodwill must be proven with "whatever definiteness and accuracy the facts permit, but no more." Enumclaw argues that the facts of this case permitted GRI to estimate the value of the lost goodwill it claimed, just as the plaintiff did in *Lewis River*; GRI contends that even *estimating* this loss was *impossible*, triggering the "but no more" exception. One should expect the trajectory of GRI's argument to progress to a discussion of *why* making an estimate was impossible. Surprisingly, GRI assiduously avoids that issue, as though it were simply beyond question that harm to its goodwill was unquantifiable because its goodwill was tortiously harmed. Its opponent, GRI argues, bore the risk of uncertainty[2]. This *non sequitur* explains nothing about why GRI was unable to estimate its loss.

Below, Enumclaw will reiterate why it was possible for GRI to estimate its claimed loss, and because it was *possible*, it was *necessary*.

[2] If valid, this argument would prove far too much; it would be equally applicable to all tort plaintiffs claiming damage to goodwill, and it would absolve them all of proving the amount of damages.

Enumclaw also addresses several related arguments, namely, GRI's contention that the tortfeasor "bears the risk of uncertainty", its suggestion that Enumclaw advocates a requirement of "mathematical certainty" (it does not), and GRI's assertion that expert testimony is not required to estimate the value of loss to corporate goodwill.

i. The definiteness and accuracy permitted by the facts of this *case.*

Whether evidence is sufficient to afford a reasonable basis for estimating a loss depends upon the circumstances of each case. *Jacqueline's Washington, Inc. v. Mercantile Stores Co.*, 80 Wn.2d 784, 786, 498 P.2d 870 (1972). Nonetheless, the plaintiff *must* produce the best evidence available under the circumstances. *Id.* The trier of facts should be spared "the onus of an attempt to assess damages solely by speculation and conjecture and without the benefit of probative evidence on the issue." *Id. at 786.* "Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss. Competent evidence of damages does not subject the trier of fact to speculation or conjecture." *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 663, 266 P.3d 229 (2011) (*citations omitted*).

Lewis River specified that this "best evidence available"

requirement was fully applicable to proving the amount by which corporate goodwill was allegedly harmed. Here, GRI assumes, without *any* supporting argument whatsoever, that "none" was an acceptably high level of proof in this case because that was all that was "permitted by the facts." GRI's own admissions eviscerate this weak position. For example, GRI acknowledged in its trial brief that it was required to offer an estimate of the "before" and "after" value of its goodwill, and affirmed that this was exactly what it was going to do.

> [Damage to GRI's reputation] may be determined from a *background of business experience* on the basis of which it is possible to estimate with some fair amount of success both *the value of what has been lost* and the likelihood that the plaintiff would have received it if the defendant had not interfered.
>
> CP 149 (*emphasis added*, *cf. Caruso*, 33 Wn. App. at 208.)

GRI also admits that it had extensive evidence of its "background of business experience." The trial in this case took place *six years after* the alleged interference, and GRI had full financials and tax records going back *ten years*[3]. CP 1635. By the time of trial, GRI thus had four years of ready metrics to establish its pre-interference finances, and six years of post-interference metrics to compare. Instead of using any of the four

[3] GRI was also barred from using these documents as a discovery sanction, for having failed to produce them to Enumclaw. RP 1574. One imagines that GRI was acutely aware that it suffered no financial harm at all, and that its financial documents reflected that fact.

legally recognized methods[4] of using that data to estimate the value of its goodwill before and after the alleged tort, it elected to leave all of it gathering dust, literally in Mr. Tiffany's attic (CP 1635). The only testimony GRI actually presented regarding the alleged damage to its goodwill was Mr. Tiffany's opinion that GRI was not asked to bid on three jobs that he would have expected GRI to perform, RP 1623, that he did not know "how to put a number" on the damage to GRI's reputation RP 1667, and that he, personally, was "very upset by it." RP 1621.

Because of its well-documented pre- and post-loss finances, GRI was in every bit as good a position as was Lewis River to present an estimate of the alleged diminution of its goodwill. GRI was just as capable as Lewis River of measuring the value of its goodwill pre-interference based on its financial records. And although GRI could not have estimated its post-interference goodwill by reference to the sale of its business, it had the four other recognized methods at its disposal. GRI does not even attempt to explain why unquantified platitudes that GRI's reputation was "severely damaged" was the "the most definite and accurate" way to estimate GRI's alleged loss "permitted by the facts." By offering none,

[4] The fifth – the buy/sell – would not have been appropriate because GRI was not sold.

GRI failed the *Lewis River* and *Experience Hendrix*[5] tests.

GRI's suggestion that it offered evidence relating to three lost jobs does not change this result. While GRI argues that this established "specific and definite pecuniary loss" (Resp. Br. 17) (presumably enough to justify a $1.5 million award), Mr. Tiffany, with 29 years of experience at the helm of GRI, offered no opinion or estimate of GRI's potential profit on those jobs. Thus even GRI's most "specific and definite" testimony failed to provide the jury with any basis to estimate GRI's alleged loss. GRI's argument would effectively shift the burden to *disprove* damages to its adversary, as soon as it presented some evidence of *liability*. This is not the law of Washington.

ii. GRI's argument regarding "the risk of uncertainty" is misplaced.

The Court should reject GRI's attempt to excuse its failure to offer an estimate of the value of the harm to its goodwill by pointing to "uncertainty" caused by the tortfeasor. Specifically, GRI argues: "Because

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[5] In *Experience Hendrix*, the Court noted the five methods of proving the value of goodwill approved in *In re Marriage of Hall*, and dismissed plaintiff's claims for failure to use any of them:

> Plaintiffs, however, presented no analytical framework for determining the worth of their goodwill, and they proffered no evidence from which the jury could have found that the value of their goodwill had been diminished in any amount. For the foregoing reasons, the Court concludes that the jury's awards for injury to reputation and injury to goodwill are contrary to the Court's instructions and unsupported by the evidence. The jury's verdict as to these items of damage can only be based on speculation, guesswork, and/or conjecture. Defendants' Rule 50(b) motion is therefore GRANTED.

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." Resp. Br. 19. GRI cites *Spradlin Rock Products, Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor County*, 164 Wn. App. 641, 266 P.3d 229 (2011) for this proposition. This case, however, does not suggest that a plaintiff may substitute testimony of "unquantified" harm for the extensive documentation in the attic just because the harm was caused by a tort. In fact, *Spradlin Rock* consciously did not lower the bar anywhere near as far as GRI suggests; instead, it reaffirms the requirement that a plaintiff must produce the best evidence estimating the value of its loss:

> Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss. Competent evidence of damages does not subject the trier of fact to speculation or conjecture.
>
> *Id. at 663.*

The context of *Spradlin Rock* makes this clear. Spradlin was a contractor that had regularly been hired by the Snohomish County PUD to build roads, and was on the PUD's "small works roster." *Id.* Spradlin and the PUD got into a dispute about how much the PUD owed Spradlin for work that had already been performed, and for lost profits on a job that Sprandlin argued would probably have been awarded to it absent the dispute. The jury determined that PUD owed Spradlin over $4 million, of

which the lost profits component summed to $15,000[6]. *Id.* On appeal, the PUD argued there was uncertainty regarding whether Spradlin would even have been awarded the job on which the lost profits claim was based. This Court rejected that argument, noting that Spradlin had a reasonable basis to believe it would have been awarded the contract, and that uncertainty was the result of the PUD's breach of contract. *Id.* Despite GRI's claim, *Spradlin* has nothing to do with the quantification of the alleged damage. This Court should decline GRI's invitation to read its pronouncement that "Evidence of damage is sufficient if it is the best evidence available and affords a reasonable basis for estimating the loss" to mean "Evidence of damage is sufficient *even if it is not* the best evidence available and provides the jury with *no basis* for estimating the loss."

iii. "Mathematical certainty"

Because GRI accuses Enumclaw of demanding that it prove its goodwill damages with "mathematical certainty" (Resp. Br. 14, 21 fn. 8), Enumclaw is compelled to briefly point out the use of the various *In re Marriage of Hall* mechanisms, including those used in *Lewis River*, to calculate the value of goodwill does involve a certain amount of math. Requiring the use of such formulas is *not* the same thing as requiring

[6] There was no dispute that the plaintiff had presented adequate evidence that its profit on this job, if it had been awarded, would have been $15,000.

"mathematical certainty." An estimate with factual support, based on GRI's choice of mechanisms, would have been enough. As *Lewis River* itself noted, in the process of approving a "mathematical" approach, "it is well recognized that the type of damages here involved are not subject to proof of mathematical certainty." The rejection of a requirement of "mathematical certainty" is nothing more than a recognition that estimates and informed judgment necessarily play a large role in estimating the long-term financial impact of alleged harm to goodwill. Enumclaw has never advocated that the Court adopt any bar higher than the "reasonable proof under the circumstances" established by the case law.

c. Use of experts

Contrary to GRI's suggestion, Enumclaw is not arguing that expert testimony is absolutely required to prove damage to corporate goodwill. There may well be instances where a corporate CFO witness is well-versed in finance and can present an estimate, consistent with the *In re Marriage of Hall* methodologies, that the business' goodwill has been diminished in some amount. Conversely, Enumclaw *is* suggesting that where the corporate witness testifies that, despite having ten years of financial records, he has no idea how to quantify the goodwill he alleges the corporation lost, the corporation has not presented substantial evidence to support the value of its damages. As *Lewis River* recognized:

> [E]xpert testimony of accountants and economists will prove invaluable to the [plaintiff] in presenting his claim for loss of goodwill.
>
> *Lewis River at 718.*

Ultimately, the issue is not whether GRI was required to present expert testimony; it is whether GRI was required to present an estimate, from competent evidence, of the value of its lost goodwill. GRI certainly had the option of presenting expert testimony on this issue, but its choice to refrain from doing so does not change the basic requirement that it present sufficient evidence to justify a substantial award.

d. Fisons *did not change the* Lewis River *requirement that a corporate plaintiff must provide evidence to estimate the loss it claims to its goodwill.*

GRI continues to rely heavily on the *Fisons* case to support its contention that testimony of unquantified harm to "reputation" was sufficient evidence to support the $1.5 million award. *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). *Fisons* is an interesting contrast to *Lewis River* because they are both Supreme Court cases, and they came out within seven months of each other[7]. They are very nearly companion cases that address the distinction between harm to a personal, professional reputation (*Fisons*), and harm to corporate goodwill (*Lewis River*); the Court required proof of a different

[7] GRI erroneously states that *Lewis River* predated *Fisons* by two years. Br. Resp. 19.

nature in each of these cases.

In its opening Brief, Enumclaw described the framework supporting these two approaches in terms of measuring different kinds of harm. On one hand, *Fisons* measured reputational harm to a person's dignity, whereas on the other, *Lewis River* measured the harm to a corporation's property interest in its goodwill. Enumclaw argued that proof of financial harm was not required in *Fisons* because the jury was measuring a first-person experiential loss, more akin to a personal injury than to property damage. In that vein, Enumclaw suggested that the jury determined the value of the reputational loss in *Fisons* by asking, "How much did it hurt?" GRI correctly points out that the reputational injury in *Fisons* was specifically not an award for emotional distress, because that had been foreclosed by the Court's ruling that the CPA did not allow such damages. But GRI loses the forest for the trees in failing to recognize that the *Fisons* reputational injury was fundamentally different from the injury in the case at bar. Perhaps a more precise way of stating the *Fisons* question would have been, "How much was Dr. Klicpera's lost reputation worth *to him*?"

In fact, this is exactly how Dr. Klicpera's reputational loss was presented to the jury in closing argument:

> Professional reputation. Well, you know, we all live by our

> reputation. We all want to be known for our reputation for honesty, for truthfulness, for kindness. But perhaps only in the context of a physician's professional reputation can you really understand what it means, what it's worth, because physicians are their reputations; there is their source of professional consultation, their source of new clients. And without that reputation, what do they have in their professional practice? How much money would Richard Nixon pay today to regain *his* reputation; what amount of money would Gary Hart pay to regain the respect of his professional reputation?
>
> In this community, Dr. Jim Klicpera will always be known as a physician who was sued for malpractice as a result of an injury that caused permanent and severe brain damage to a young child. He'll always be known for that, whether it was his fault or not. In an era when Jose Canseco gets paid $23 million for five years of playing baseball, which is a man's life work, what is a professional worth? You'll need to make that assessment.
>
> *Klicpera Supp. Brief*, 122 Wn. 2d Briefs Vol. 6, p. 67-68 (attached at Appendix A).

When the harm is to corporate goodwill rather than personal professional reputation, however, the question of how much a "reputation" was worth involves nothing more and nothing less than a valuation of the corporation's goodwill asset. And *Lewis River* speaks to how a plaintiff adduces substantial evidence of that estimated valuation.

In reliance on *Fisons*, GRI asserts that it "was not required to base its reputational damages on financial records." Resp. Br. 19. While that may have been true of Dr. Klicpera's reputational claim, it was not true of Lewis River's, and it is not true of GRI's. One simply cannot read *Lewis River* consistently with the proposition that a corporation seeking damages

for harm to its goodwill is entitled to a substantial award without proffering any evidence at all about the value of its goodwill. This is especially true where the corporation *has* the financial records from which goodwill is calculated, and elects to keep them in the attic. This represents GRI's failure to prove its case with the "definiteness and accuracy the facts permit." The Court should reverse the trial court's determination that the jury's award was supported by substantial evidence.

4. Jury Instruction No. 16 required GRI to prove the amount *of harm.*

GRI does not contest Enumclaw's argument that the unchallenged Jury Instruction No. 16 is now the law of this case. Contrary to GRI's assertion (Resp. Br. 20), Enumclaw *does not* suggest that Jury Instruction No. 16 on damages precluded the jury from awarding damages for reputational harm. In fact, it plainly empowered the jury to award all proven damages to put GRI in as good a position as if there had been no interference[8]. Enumclaw's actual argument is that this jury instruction required GRI to provide a factual basis for estimating the *amount* of such an award. GRI's free admission that it failed to meet this requirement,

[8] In light of the fact that both parties agree that Instruction No. 16 allowed GRI to recover for proven damages to its reputation (Resp. Br. 16, Heading No. 2), there seems to be no need for the new instruction that GRI requests in its cross appeal. However, GRI requests that this Court approve the use of the damages instruction it proposed at the trial court, which would explicitly permits recovery for mental distress, discomfort, inconvenience, and humiliation. CP 172. Again, GRI confuses remedies available to human beings from those available to corporations. This instruction, as proposed, is grossly inappropriate.

acknowledging that its only evidence was of "unquantified" damage, cannot be squared with Instruction No. 16. CP 304.

> In order for either party to recover actual damages, that party has the burden of proving . . . **the amount of those damages**. **If your verdict is for the defendant on defendant's tortious interference claim**, and if you find that defendant has proved . . . **the amount of those actual damages**, then you shall award actual damages to the defendant.

GRI's reliance on *Fisons* for the proposition that it was entitled to substantial damages without putting on any evidence of the amount of its alleged loss is fatally undermined, independently of *Lewis River*, by the law of *this case*. This instruction allowed GRI to claim and prove a reputational injury, but to do so, it was required to present substantial *Lewis River* evidence of amount. GRI failed to clear this legal hurdle; the Court should rule that GRI failed to present substantial evidence to support its damages claim and reverse the $1.5 million judgment.

5. *The trial court abused its discretion by allowing Mr. Tiffany to testify about the impact that the alleged reputational harm to GRI had on him, personally.*

GRI does not dispute the legal irrelevance of the effect on Mr. Tiffany of the alleged reputational injury to GRI. Instead, GRI claims that Enumclaw is "dramatically overstating" the effect of allowing this inadmissible testimony. In the context of this case, however, this testimony was crucial; GRI claims that the award represents the jury's

quantification of an injury to professional dignity, and that GRI was Mr. Tiffany's life's work. The trial court itself blurred the distinction while ruling on the admissibility of such testimony *in limine*:

> Gregg Roofing will be allowed to testify as to his opinion, whether it's expert or lay. He's -- this is his -- this is his business. He can testify as to the effect of this discharge has on him." RP 85.

GRI is *not* a sole proprietorship. "Gregg Roofing" is not a "he." And GRI was not entitled to prove harm to its reputation by presenting Mr. Tiffany's testimony regarding "the effect this discharge has had on him." When Enumclaw renewed its objection to this question during Mr. Tiffany's testimony, the trial court overruled its relevance objection in front of the jury (RP 1621), sending it a clear signal that this *was* relevant. GRI's contention that the jury instruction on damages only mentioned GRI, not Mr. Tiffany personally, is not dispositive; if the trial court judge did not recognize the legal distinction between the person and the corporation, it is unrealistic to assume the jury did so on its own. In the context of this case, and these alleged damages, allowing Mr. Tiffany to testify as to the effect the injury to GRI's reputation had on him, personally, was reversible error.

6. *The trial court abused its discretion by preventing Enumclaw from presenting evidence that Lowrie's discharge of GRI was* solely *for his benefit, not his employer's.*

Excluding evidence that prevents a party from presenting a crucial

element of its case constitutes reversible error. *See Grigsby v. City of Seattle*, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975). GRI does not challenge the legal proposition that "[T]he principal is not liable when the agent steps aside from the principal's purposes in order to pursue a personal objective of the agent." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 269, 215 P.3d 990 (2009). *(citation omitted)*. The scope of employment is a question of fact. "An employer can defeat a claim of vicarious liability by showing that the employee's conduct was . . . *outside the scope of employment*." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002). Here, Lowrie's conduct was *criminal*, comparable to picking pockets while walking to work.

GRI was permitted to present testimony that "adjusting claims" was within the scope of Lowrie's authority, but Enumclaw was prevented from presenting Mr. Michlitsch's testimony of how Lowrie "stepped aside from Enumclaw's purposes" in the act of dismissing GRI, defrauding Enumclaw, picking pockets, *purely* for *his own* purposes. This was relevant evidence on a factual question, and the trial court's erroneous failure to admit it was reversible error[9].

GRI's contention that Enumclaw did not make an adequate offer of

[9] GRI asserts, by way of cross-appeal, that if the Court remands for a new trial on the issue of liability, it should be permitted to amend its Complaint to include an alternative claim for negligent supervision. The elements of agency and negligent supervision being different. Mutual of Enumclaw does not oppose this request.

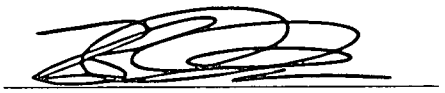
proof is without merit. Enumclaw informed the court that Mr. Michlitsch would testify regarding the facts of Mr. Lowrie's fraud. RP 1572. But the trial court was well aware of this issue. As the court held in *Himango v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 680 P.2d 432 (1984), a formal offer of proof is not necessary where the issue was fully argued in a motion *in limine* and the court was aware of the basis for the proffered evidence. Here, the issue of whether Enumclaw would be allowed to present evidence of Lowrie's fraud was argued in detail before the trial (RP 24 *et seq.*), and when it excluded Mr. Michlitsch's testimony, the trial court specifically referenced that earlier determination. RP 1572. Excluding this evidence was reversible error, and Enumclaw preserved its objection to that ruling[10]. This ruling prevented Enumclaw from adequately arguing its defense to GRI's agency claim; the Court should reverse the judgment against Enumclaw on this basis, independently.

III. CONCLUSION

For the foregoing reasons, Enumclaw respectfully requests the Court grant it the relief requested in its opening brief.

[10] The issue of the admissibility the Information and plea agreement is logically subsequent to the issue of the exclusion of Mr. Michlitsch's testimony; GRI does not contest that the Information and plea were relevant (the basis on which they were excluded), and Mutual of Enumclaw did not have an opportunity to meet a hearsay objection. If the Court remands for a new trial, Mutual of Enumclaw should be given an opportunity to rebut the hearsay argument, with arguments including that they were being offered as "state of mind" evidence relative to Mutual of Enumclaw's investigation of Lowrie, and that the plea agreement was a "legal act", not a "statement."

Respectfully submitted,



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Appendix A

122
WASHINGTON
2D
BRIEFS

VOL. 6
299-396

NO. 57696-3

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE & ASSOCIATION d/b/a PHYSICIANS INSURANCE,

Respondent/Cross-Appellant,

and

JAMES A. KLICPERA, M.D.,

Respondent/Cross-Appellant,

v.

FISONS CORPORATION,

Appellant/Cross-Respondent.

BRIEF OF RESPONDENT/CROSS-APPELLANT JAMES A. KLICPERA, M.D.

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factually incorrect, notwithstanding Dr. Hendeles' testimony, the jury was instructed to disregard any remark, statement or argument not supported by the evidence. CP 113. The jury is presumed to have followed the court's instructions. Shea v. Spokane, 17 Wn. App. 236, 245, 562 P.2d 264 (1977), aff'd, 90 Wn.2d 43 (1978).

d. The Other Alleged Misconduct.

Without argument or citation to authority, Fisons asserts that Dr. Klicpera's counsel made other "inappropriate" arguments. See App. Br. at 72-73, n. 56, 58. First, Fisons complains of the argument regarding professional reputation:

> Professional reputation. Well, you know, we all live by our reputation. We all want to be known for our reputation for honesty, for truthfulness, for kindness. But perhaps only in the context of a physician's professional reputation can you really understand what it means, what it's worth, because physicians are their reputations; there is their source of professional consultation, their source of new clients. And without that reputation, what do they have in their professional practice? How much money would Richard Nixon pay today to regain his reputation; what amount of money would Gary Hart pay to regain the respect of his professional reputation?
>
> In this community, Dr. Jim Klicpera will always be known as a physician who was

> sued for malpractice as a result of an injury that caused permanent and severe brain damage to a young child. He'll always be known for that, whether it was his fault or not. In an era when José Canseco gets paid $23 million for five years of playing baseball, which is a man's life work, what is a professional worth? You'll need to make that assessment. [RP 3969-70.]

This argument was not improper. These comments reflect upon the value of professional reputation which is by its nature extremely difficult to quantify. See Rasor, 87 Wn.2d at 531. Professional reputation is critical to a professional. See RP 2353-54; Oksenholt, 656 P.2d at 296. If this argument had so inflamed the jury to passion or prejudice, they would have awarded Dr. Klicpera more.

Second, Fisons objects to Mr. Sheldon's "make a difference" statement, although it did not object during closing, request a curative instruction, or base a mistrial motion upon it, and has thus waived any claim of error with respect thereto. See Nelson, supra, at 689. This was not improper argument. It echoed Dr. Klicpera's theme of the case: how an international corporation makes decisions about how to sell and

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 October 30, 2012, I arranged for service of the foregoing Reply Brief of the Appellant, to the court and to the parties to the action as follows:

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DATED at Seattle, Washington this 30th day of October 2012.

Nancy Boyd