

No. 49114-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONNIE LEE SHARP, as Administrator of the Estate of Sandra
Sharp, deceased,

Respondent,

v.

LIFE CARE CENTERS OF AMERICA, INC., a Tennessee
corporation; CASCADE MEDICAL INVESTORS LIMITED
PARTNERSHIP, a Tennessee entity d/b/a LIFE CARE CENTER OF
PORT TOWNSEND,

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE JEANETTE DALTON

BRIEF OF APPELLANTS

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I. INTRODUCTION

Saundra Sharp was in “end-life status” when she was transferred from Jefferson County Hospital to Life Care Center Port Townsend (“Life Care PT”) in September 2012, after her family refused to consider hospice care. After Mrs. Sharp developed an infection and passed away from organ failure in October 2012, the Sharp family sued appellants Life Care PT, its parent company Life Care Centers of America (collectively, “Life Care”), Jefferson County Hospital, and Dr. Todd Carlson, Mrs. Sharp’s treating physician. The Sharps settled with the hospital and Dr. Carlson, leaving only claims against Life Care for negligence, neglect under the Vulnerable Adult Statute, and medical malpractice. After a ten-week, 35-day trial in Kitsap County, the jury returned a defense verdict.

Well over a year later, and without identifying how plaintiffs had been deprived of a fair trial, the trial court granted the Sharps’ motion for new trial under CR 59(a)(2). Two years after the defense verdict, the trial court awarded the Sharps all the fees and costs they claimed they had incurred in trying the case, nearly \$300,000.

Having gambled on the verdict in a trial that they insisted go forward despite ongoing discovery by both parties, the Sharps are not entitled to a new trial or to sanctions because the trial court thought

it was “unknowable” how the jury had been affected by claimed misconduct that is flatly refuted by the uncontroverted record and the court’s rulings during trial. The trial court’s findings, individually or cumulatively, do not support the orders granting a new trial and awarding fees and costs, and this Court should reverse and reinstate the jury’s verdict.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Memorandum Opinion on Plaintiff’s Motion for New Trial. (CP 3069-3128) (Appendix A)

2. The trial court erred in entering the underlined findings in the Findings of Fact and Conclusions of Law re Order Granting Motion for New Trial in Appendix B. (CP 3221-42) The particular nature of the trial court’s errors is also summarized at page 57 of this brief.

3. The trial court erred in entering the underlined findings in the Findings of Fact, Conclusions of Law and Order on Plaintiff’s Petition for Attorney Fees and Costs in Appendix C. (CP 3688-94)

4. The trial court erred in entering its Judgment on Order awarding fees. (CP 3703-05) (Appendix D)

III. STATEMENT OF ISSUES

1. Did the trial court err in granting a new trial over a year after the jury's verdict based on inaccurate findings of misconduct that are refuted by the record and that contradict the court's prior contemporaneous rulings at trial?

2. Did the trial court err in granting a new trial under CR 59(a)(2) where the plaintiffs 1) opposed defense efforts to continue trial until discovery was completed, 2) either failed to seek or were granted the remedies they requested from the court during trial, and 3) raised many of their allegations of defense misconduct and discovery violations only after the jury returned an unfavorable verdict?

3. Did the trial court err in granting a new trial based on its conclusion that it was "unknowable" what cumulative effect claimed misconduct and discovery violations had on the jury?

4. Did the trial court err by awarding plaintiffs all the fees and costs claimed for trying this case?

IV. STATEMENT OF THE CASE

A. Statement of Facts.

“The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.” *State v. Williams*, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). In “considering the issues raised by a motion for new trial the evidence of the nonmoving party must be accepted as true and, together with all reasonable inferences that may be drawn therefrom, be interpreted in a light most favorable to that party.” *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966). This statement of facts therefore recites the evidence supporting the jury’s verdict for defendants Life Care after a 10-week, 35-day trial.

1. Saundra Sharp was hospitalized in September 2012 suffering from significant chronic health problems.

Saundra Sharp, age 66, was admitted to the emergency room at Jefferson County Hospital on September 10, 2012, after she passed out at home. (RP 3073-74; Ex. 16 at 23) Mrs. Sharp suffered many severe health problems, including respiratory failure, restrictive lung disease, hyperventilation, obstructive sleep apnea, steroid-dependent chronic obstructive pulmonary disease (“COPD”), and severe pulmonary hypertension. (RP 2236) Having smoked two packs of cigarettes a day for nearly 50 years, Mrs. Sharp’s COPD was

at the most advanced stage. (RP 2236, 3578) Her degree of pulmonary dysfunction made it difficult for her heart to circulate blood, resulting in congestive heart failure and renal failure. (RP 2237) Mrs. Sharp also had a urinary tract infection and pneumonia. (RP 2238)

Mrs. Sharp also was severely obese, putting “tremendous” strain on her entire body. (RP 3581-82) Before her hospitalization, she rejected medical advice to lose weight, and told nursing staff that she subsisted on Vienna sausages and Pringles. (Ex. 202 at 156, 467) In August 2012, she weighed 254 pounds and had a body mass index (“BMI”) of 48. (RP 3582) When Mrs. Sharp was admitted to Jefferson County Hospital on September 10, she weighed 290 pounds. (RP 3583) Her physicians increased Mrs. Sharp’s fluid intake to help her kidney function; she accumulated 29 pounds of fluid and her weight increased to 320 pounds while she remained in a coma for the next three days, exacerbating her preexisting edema and causing her skin to blister. (RP 2326, 2239-40, 3583-84, 3599-3600)

2. Mrs. Sharp was transferred to Life Care PT after her family rejected hospice care.

Because of Mrs. Sharp’s significant health problems, Jefferson County Hospital could not discharge her to return home; her organs were failing and she was considered in “end-life status.” (RP 2241,

2250, 3610-11) Hospital staff discussed hospice with Mrs. Sharp and her family, but the family believed it was “too early” to discuss hospice, and chose instead to attempt rehabilitation.¹ (RP 3079, 3169, 2278) After a week in the hospital, Mrs. Sharp was transferred to Life Care PT on September 17, 2012. (RP 1624; Ex. 16 at 23)

During Mrs. Sharp’s stay at Life Care PT, the facility had 75 to 90 employees to meet the needs of approximately 45 residents. (RP 2728, 2993) Life Care PT did not have an in-house physician and consulted with a resident’s primary care provider regarding treatment and care. (RP 2734-35) Mrs. Sharp’s attending physician was Dr. Todd Carlson (RP 2735), who testified that given her condition when she was discharged to Life Care PT, it would have been “very difficult” for Mrs. Sharp to have survived. (RP 2006)

3. After a month at Life Care PT, Mrs. Sharp was hospitalized again and died of multiple organ failure.

Mrs. Sharp’s preexisting edema in her legs continued to cause significant blistering while she was at Life Care PT. (RP 3575, 3598-3600) The blisters ruptured, breaking down the protective skin barrier and acting as a portal of entry for infection. (RP 3575, 1675)

¹ If a family refuses hospice during the last three to six months of life, when a patient is terminally ill, the only other option is physical and occupational therapy in the hopes of rehabilitating the patient. (RP 2289, 2278)

Life Care PT nursing staff monitored and cleaned the blisters and wounds as they changed Mrs. Sharp's dressings and followed her care plan. (RP 1098, 1848, 1850, 4081, 4087-88, 4157-58)

On October 6, 2012, Life Care PT nursing staff saw a change in Mrs. Sharp's condition, including increased redness and warmth in her left leg. (RP 1650) Recognizing this as a possible sign of infection, the nurses immediately contacted Dr. Carlson's office. (RP 1951, 1650-51, 1864-65) His on-call partner, Dr. Bickling, diagnosed Mrs. Sharp with cellulitis, an infection of the skin tissue. (RP 1951-52, 1885) Dr. Bickling started Mrs. Sharp on Keflex, an oral antibiotic, that same day. (RP 1091-92, 1181, 1865)

The nursing staff followed doctor's orders and continued to care for and monitor Mrs. Sharp's wounds while administering the prescribed antibiotics. (RP 1093, 2007, 1233, 1254) On October 8, 2012, a nurse called and faxed Dr. Carlson after noticing that the blisters were growing and producing yellow rather than clear fluid. (RP 1095-97, 1953; Ex. 31) Life Care PT nursing staff asked Dr. Carlson to visit Mrs. Sharp in person due to her change in condition. (RP 1104, 1965; Ex. 31)

Dr. Carlson visited Mrs. Sharp at Life Care PT three days later, late on October 11, 2012, and examined her legs. (RP 1885, 2011,

1950; Ex. 200 at 106-07) Relying on verbal input from Life Care PT staff, his physical examination, and lab work, Dr. Carlson's "global impression" was that Mrs. Sharp had some improvement on the antibiotics, and that her vitals were consistent with the infection being localized. (RP 1893, 1955-56, 1969-70, 1895) Dr. Carlson did not order a change in medication or administration of intravenous ("IV") antibiotics. (RP 1965) The nurses continued to follow doctor's orders and maintained the cleanliness of the wounds to avoid introducing bacteria into the open wounds when changing Mrs. Sharp's dressings. (RP 4080-81, 4094) Dr. Carlson did not visit his patient Mrs. Sharp at Life Care PT again. (RP 2014-15)

The Sharps' infectious disease expert testified that October 12, 2012, the day after Dr. Carlson saw Mrs. Sharp, was the last day that she could have potentially beaten the infection, and then only by the administration of IV antibiotics. (RP 1632, 1644-45) Life Care PT nursing staff had the ability to administer IV antibiotics, but only if ordered by a physician. (RP 1673-74, 3513) Dr. Carlson testified that it would have been "very difficult" for Mrs. Sharp to fight the infection regardless when IV antibiotics were started. (RP 2004)

After Dr. Carlson's October 11 visit, Life Care PT Director of Nursing Michael Cahill personally monitored and charted Mrs.

Sharp's condition. (RP 1598; Ex. 222) On October 16 and 17, 2012, Mr. Cahill spoke with Dr. Carlson's office after noticing increased cellulitis up Mrs. Sharp's right leg. (RP 1916-17, 3734; Ex. 14 at 4-5) Mrs. Sharp's infection had progressed into the bloodstream, requiring aggressive clinical care that a nursing home could not provide. (RP 1644, 1926) The next day, October 17, Mrs. Sharp was transferred back to Jefferson County Hospital. (RP 1135; Ex. 35; Ex. 200 at 159)

The admitting doctor at the hospital determined that Mrs. Sharp had sepsis, an infection in the bloodstream that can cause blood pressure to go down, resulting in problems with various organs. (RP 1926, 1631) On October 21, 2012, Mrs. Sharp passed away from multiple organ system failure, in particular acute renal failure. (RP 1926; Ex. 202 at 2)

B. Procedural History.

- 1. After initiating suit in May 2013, the Sharps sought and obtained discovery only on the eve of trial, resisting all efforts to continue trial until discovery was completed.**

In May 2013, Mrs. Sharp's family sued Life Care PT, Life Care, Jefferson County Hospital, and Dr. Carlson for wrongful death in Jefferson County Superior Court. (CP 1-16) The case was assigned to visiting Kitsap County Superior Court Judge Jeanette Dalton ("the trial court"). A second amended complaint filed November 26, 2013,

asserted claims against Life Care for negligence resulting from insufficient staffing; neglect under the Vulnerable Adult Statute, RCW ch. 74.34; and medical malpractice for violating the standard of care for pressure sores, WAC 388-97-1080(1). (CP 18-34)

Life Care responded to the Sharps' initial discovery requests on February 27, 2014, objecting in part that a request for records and data "relative to the occurrence or the issue of damages" was vague, and referencing "Ms. Sharp's medical chart from LCC Port Townsend, previously produced." (CP 3108, 3127) After receiving Life Care's discovery responses, the Sharps did not serve any further discovery or request any depositions of Life Care staff until late summer 2014. (See CP 2238-48) Instead, they focused their efforts on several depositions of Jefferson County Hospital staff, including defendant Dr. Carlson. (CP 2241, 2328-66)

Although Jefferson County's local rules do not impose a discovery cutoff date, and none was imposed on the parties here, the parties agreed to and did disclose expert witnesses by July 14, 2014, two months before the scheduled trial date of October 13. (CP 2389-90, 2396-97, 2403-10) The Sharps waited until July 30 to first note CR 30(b)(6) depositions, originally providing Life Care with a list of 16 proposed topics covering a variety of corporate policies and

budgetary and census questions involving residents and staffing. (CP 2450-51; *see also* 2162-64 (subsequent notice amended to 15 topics))

On August 20, 2014, Life Care produced for deposition the two highest ranking representatives of Life Care PT: Executive Director Brooke Mueller and Director of Nursing Marcella Torres. (CP 2504, 2499-2500) The Sharps terminated Ms. Mueller's deposition after two hours, claiming that she was unprepared because she could not address staffing questions without analyzing census, licensure, and detailed time ("punch") data that she had brought to her deposition but that the Sharps had not requested in discovery. (CP 2499-2500)

On August 22, 2014, the Sharps settled with Jefferson County Hospital and Dr. Carlson. (CP 2245, 2478-80) Plaintiffs' liability expert Mary Shelkey, whose September 2013 report the Sharps first produced on July 14, 2014 (CP 2397, 2413-18), was deposed on Saturday, August 23, the first date she was available. (CP 2482, 2420-22) Ms. Shelkey testified in her deposition that she did not need any other data to render her opinions on staffing. (CP 2482-91) On August 28, however, the Sharps' counsel sent an email informally requesting employee time cards, turnover reports, a labor analysis, and a list of all employees who worked at Life Care PT during Mrs.

Sharp's residency. (CP 2502) On August 29, six weeks before the scheduled trial, the Sharps served Life Care with new CR 30(b)(6) deposition notices designating 45 additional topics (for a total of 60), and 44 new requests for production. (CP 2081-91, 2526-30)

The Sharps filed a motion to compel a prepared 30(b)(6) witness, citing Ms. Mueller's inability to address the number of RNs, LPNs, CNAs, and other staff scheduled and actually on duty during every shift of Mrs. Sharp's month-long stay at Life Care PT, as well as each of those individuals' qualifications and training, on September 5, 2014, five weeks before trial. (CP 2524-25, 268-76) On September 12, over Life Care's objection that it had insufficient time to synthesize the information required to address all 45 topics before trial, the trial court ordered Life Care to "produce a prepared CR 30(b)(6) witness" to address the 45 topics listed in the August 29 notice. (CP 296, 2560-61, 2215, 2549-53; 9/12 RP 9-12)

In their August 29 discovery requests, the Sharps had sought Life Care's "A Guide to Infection Control," "the Wound Care Book for 2012," and "time cards" for September and October 2012, "as testified to having been reviewed by Ms. Mueller at her suspended August 20th deposition." (CP 3088, 3092) On September 29, 2014, Life Care responded that "[n]o 'employee time cards' are maintained" and timely

produced documents including its “punch detail” – a computer generated payroll report that identified when an employee digitally “punches” in and out on a computer. (CP 3092, 3095; *see* RP 2802; Ex. 224) Life Care also produced the infection control “Guide” (CP 3092), and explained that the “wound care book” was “a dynamic collection of notes that changes daily given the resident population and is not ‘maintained’” as a separate “book.” (CP 3088-89)

On October 1, 2014, the Sharps took the deposition of Life Care’s Northwest Divisional Vice President Raymond Thompson, both in his capacity as a CR 30(b)(6) witness and individually. (CP 2610, 5172) On October 6, a week before the scheduled trial, the Sharps took the renewed CR 30(b)(6) deposition of Ms. Mueller, who brought with her a list of caregivers, by licensure, who had cared for Mrs. Sharp. (CP 2638-41) This list was work product the defense had synthesized by examining business records and Mrs. Sharp’s chart that had already been produced to the Sharps. (CP 2641, 5423-24)

On October 9, 2014, at a hearing on the Sharps’ motion to compel the production of documents, the trial court *sua sponte* found that Life Care had violated the September 12 order by failing to properly prepare Ms. Mueller for her second 30(b)(6) deposition on

October 6, ordered another 30(b)(6) deposition, and sua sponte sanctioned Life Care by requiring it to pay the Sharps' attorney fees and costs in bringing the motion to compel and conducting the deposition. (10/9 RP 21-22, 29-30, 43-44) Despite having multiple opportunities to do so, and as the trial court repeatedly acknowledged, the Sharps declined to seek any harsher sanction, such as witness exclusion. (10/9 RP 30; RP 4352; CP 2698-2703)

Life Care continued to work on the Sharps' late discovery requests, and both sides continued to update and disclose witnesses in the days before trial. For instance, the Sharps disclosed four witnesses never before identified in discovery in an October 6, 2014 witness list. (CP 2651-52, 651) On October 20, Life Care sought to continue trial until April or May 2015, citing the burden of the Sharps' late discovery requests and responses. (CP 2685-87, 5163-65; 10/23 RP 5, 13, 31) The Sharps opposed a continuance, insisting they were ready for trial, which should commence at the earliest possible date. (CP 2690-95, 5173-78; 10/23 RP 15-16, 18; RP 785)

Life Care's counsel learned on Sunday, October 26, 2014, while preparing Regional Director of Nursing Nataliya Yakimenko for her 30(b)(6) deposition, that even though the same information was included in nursing notes that were part of a patient's chart,

“venous stasis” records related to Mrs. Sharp’s wounds had inadvertently been excluded from the medical charts previously produced to the Sharps. (RP 1327; CP 2257, 2719) Life Care’s counsel immediately provided the records to plaintiffs that same day (CP 2719), four days before Ms. Yakimenko’s deposition. The trial court later invited the Sharps to seek relief for the inadvertent late disclosure, but told them “if you seek relief as a result of that disclosure . . . you need to prepare something for me to rule on. I’m not going to do it ad hoc.” (RP 1328) The Sharps did not move to exclude the records, nor did they seek any other remedy during trial. The trial court found the late disclosure to be the result of an inadvertent “filing error.” (FF 11(E), CP 3231)

On October 29, the trial court transferred the matter to Kitsap County and set the case for trial on November 3, 2014. (10/23 RP 31, 33; CP 501) The Sharps first provided contact information for its witnesses, and named three additional witnesses for the first time, on November 1, the Saturday before trial. (CP 2254, 2651-52, 2258, 2672-75, 2250, 2966-69) On November 6, the Sharps once again opposed Life Care’s renewed motion for a continuance to complete discovery. (RP 770, 778-81, 785) After a jury of 12 and three

alternates was impaneled beginning November 3, trial began on November 10. (RP 849)

2. The trial court gave the Sharps all the relief they requested to address ongoing discovery they sought and were given during trial.

The trial court recognized on multiple occasions that it was “clearly evident” that “discovery was ongoing” when trial started, characterizing the process as a “difficulty for both parties.” (RP 2606, 1323; *see also* RP 1330: trial court noting that ongoing discovery is “like you’re building the plane while you’re flying it, which is difficult to do,” but “we’re just going to move forward as best we can”) The trial court consistently rejected the Sharps’ allegations of misconduct by defense counsel in each instance in which they complained about a disclosure of information during trial. (*See, e.g.*, RP 3568: “I think the record is clear that I haven’t found any purposeful violations by the attorneys in this case. So the record is devoid of any such findings. If there were, you would know about it”; RP 3183: “I believe that you are getting information and doing your best to cull through it. It’s behind you.”) The resolution of these discovery disputes, largely occasioned by the Sharps’ ongoing discovery requests, are relevant on appeal:

a. Disputes about witnesses.

The Sharps conducted a second CR 30(b)(6) deposition of Mr. Thompson on Tuesday, November 11, 2014, the day after opening statements. (CP 2260-61, 2796-97) The court offered to recess for a day to allow both parties to conduct additional discovery. (CP 2870) The Sharps did not ask for a continuance. (See RP 1422-25)

Two weeks into trial, on November 17, 2014, the Sharps' counsel apparently noticed for the first time² that Ms. Yakimenko's initials appeared as a caregiver in Mrs. Sharp's charting. (CP 2879) The Sharps then requested, and Life Care produced, Ms. Yakimenko's personnel file two days later, on November 19. (CP 2879, 2885) The Sharps sought no further relief.

One of the witnesses identified in the Sharps' October 6 witness list was former Life Care PT employee Basha Berl. (CP 2651) When Ms. Berl testified on November 26, 2014, to conversations with former acting Nursing Director Olga Kapitanov, Life Care asked

² In addition to identifying and producing Ms. Yakimenko as a CR 30(b)(6) deponent on October 3 and 30, 2014 (CP 2714, 2634-35, 5172), Life Care had previously identified Ms. Yakimenko in every one of its witness lists. (CP 3248, 3255, 3265, 2261, 847) Because the Sharps did not ask Ms. Yakimenko any questions regarding Mrs. Sharp's care in her CR 30(b)(6) deposition, Life Care counsel also asked Ms. Yakimenko to review the medical data on the record during her deposition so there would be no confusion. (10/31 RP 57)

if Ms. Berl had confused Ms. Kapitanov with Ms. Yakimenko, and amended its witness list to include Ms. Kapitanov as a rebuttal witness. (RP 2592-93, 2596-98, 2600-01; CP 880) Ms. Kapitanov was not called as a witness after Life Care produced records proving she was not employed at Life Care PT during Mrs. Sharp's stay there. (CP 2903, 2905, 2907-08; RP 3257-60)

The Sharps also served a trial subpoena on trial spectator Todd Fletcher on November 26, 2014. (RP 2602) Mr. Fletcher was on no one's witness list. The Sharps' counsel claimed Mr. Fletcher was an "owner of . . . several of the [Life Care] units here in the state of Washington," and sought "foundation testimony" regarding unidentified documents. (RP 2604) Defense counsel, who had "never met him before he came to this trial," told the trial court her understanding that Mr. Fletcher had an ownership interest in the land that housed certain Life Care facilities and had an association with Life Care, but that he was not an owner of Life Care or any associated entity named in this lawsuit. (RP 2604-05, 2628-30)

Outside the presence of the jury, the trial court then questioned Mr. Fletcher, who testified that he had no ownership interest in Life Care PT and no current position with Life Care, but had previously served "unofficially [as] an interim division vice

president” while the Northwest Division of Life Care recruited for that position. (RP 2608, 2628-32) The trial court accepted defense counsel’s representation that she was unaware that Mr. Fletcher had any management position with Life Care, but ordered that Mr. Fletcher remain under subpoena “outside of the courtroom until this issue can be sorted out.” (RP 2628-34) The Sharps made no attempt to have Mr. Fletcher testify during the remaining weeks of trial, and asked for no further relief.

b. Disputes about documents.

Life Care also provided the Sharps with its own work product analyzing staffing levels during Mrs. Sharp’s stay at Life Care PT. Two days before Mr. Thompson’s renewed CR 30(b)(6) deposition on November 11, 2014, Life Care produced an ER 1006 staffing summary that it had created by cross-referencing the punch detail, Mrs. Sharp’s chart, and an employee roster, to determine the licensure of each employee working each shift during Mrs. Sharp’s stay at Life Care PT. (CP 2769, 2807-68)

Only after Mr. Thompson’s second deposition did the Sharps seek Life Care PT’s “daily staffing sheets,” incorrectly believing them to be “the underlying documents that inform” the data for Life Care’s labor analysis report. (RP 2791-92, 2794-98) The daily staffing

sheets were informal working documents that listed the room numbers to which staff members were assigned, but did not identify particular residents or the hours staff actually worked. The nursing staff was required to initial the staffing sheets when they came into work, but the sheets did not show the time that an employee's shift began or ended, and Life Care never retained these sheets in the ordinary course of business. (RP 2797-98, 2821-22, 2716-17, 4815, 4652-53, 2815-16) Life Care confirmed that the staffing sheets no longer existed and the trial court denied the Sharps' proposed jury instruction on spoliation. (RP 4964-67, 5023)

On December 2, 2014, in the fourth week of trial, the Sharps first complained that the staffing "punch detail" Life Care had timely produced over two months earlier, in response to a request for documents Ms. Mueller reviewed prior to her deposition, was a "summary," rather than raw data. (RP 2794) On December 17, the Sharps again complained about "the late delivery of the documents" when Life Care sought to admit the ER 1006 staffing summary that it had prepared and disclosed four weeks earlier. (RP 4286-88)

The Sharps claimed prejudice because Ms. Mueller at her October 6 deposition could not fully identify every staff member working at Life Care PT during each individual shift of Mrs. Sharp's

five week stay without consulting documents. (RP 4287-91) Insisting that this sanction would suffice to ensure that Life Care was not unfairly advantaged at trial (CP 580), the Sharps requested “an Order that Defendants are bound to the twice-repeated answers given by their CR 30(b)(6) corporate witness that Defendants don’t know about training or staffing levels . . . during Mrs. Sharp’s residency in September and October of 2012.” (CP 2699; RP 4285)

The trial court granted the Sharps the relief they requested on December 18, 2014. (RP 4349-53) The court then recessed trial for a two week break. (RP 4414) When trial resumed on January 5, 2015, the trial court denied the Sharps’ motion to exclude the punch detail. (RP 4489; Ex. 224) After additional voir dire of Mr. Thompson,³ the trial court found that Life Care disclosed the punch detail in discovery (RP 4459), that it was admissible as “a business record that is generated in the normal course of business and kept within the normal course of business,” and “relevant, as it does show

³ Mr. Thompson explained to the court on voir dire on December 2, 2014, and January 5, 2015, that when employees log in digitally, software generates an automatic report for payroll reflecting the time each employee “punched” in and out. At the end of each shift, the employee has the opportunity to verify that the times reported to payroll are accurate, and can report any discrepancies by filling out “time clock exception sheets,” also known as “correction sheets.” (RP 2802-03; 4477-80; Ex. 244) The Sharps did not request the correction sheets in formal discovery or when made aware of their existence on December 2.

the times and dates that the computer recorded individuals working during the time period that Ms. Sharp was there.” (RP 4489)

The trial court ordered Life Care to provide the Sharps the “error sheets, the ones that the employees created,” “because it was intended that all of the data that underlies any of the reports that were generated be provided so that Counsel could have an opportunity to check the accuracy of the data.” (RP 4489) Notably, the Court did not find that Life Care was obligated to produce these documents in response to any earlier discovery request. The next morning, Life Care produced all correction sheets reflecting those instances “where people indicated that they either punched in incorrectly, forgot a punch, [or] some other modification was made because they made an error in their punch.” (RP 4598)

The trial court also recessed for the day, to allow plaintiffs’ counsel to review the correction slips. (RP 4599, 4605) In doing so, the Court explicitly allowed the Sharps “the rest of the day today and *whatever time you need*,” directing counsel to “[j]ust let us know.” (RP 4605) (emphasis added) The Sharps never sought additional time. Instead, they sought to, and did, recall Life Care’s Ms. Mueller and their expert Ms. Shelkey in rebuttal to address the time clock correction slips. (RP 4775-77, 4789, 4817)

3. The trial court instructed the jury to disregard Life Care’s expert answer to a juror question that the court had previously approved.

In an order in limine, the trial court initially ordered Life Care’s causation expert Dr. Sabine von Preyss-Friedman to refrain from expressing an “opinion regarding Mrs. Sharp’s life expectancy,” on the grounds that a specific prediction of life expectancy was not generally accepted science. (CP 919) Prior to Dr. von Preyss-Friedman’s testimony, the trial court clarified that she could testify that Mrs. Sharp’s prognosis “was very poor,” and that is exactly what the doctor said in her direct testimony. (RP 3483) When defense counsel followed up by asking why Mrs. Sharp’s “prognosis would be poor even if she were on IV antibiotics,” the doctor answered “there’s such a thing as futility and so on.” (RP 3514)⁴

The trial court did not find that Dr. von Preyss-Friedman violated a motion in limine, observing that “‘futility’ of treatment came up . . . *in response to what I consider to be an appropriate question.*” (RP 3538-39) (emphasis added) The trial court refused

⁴ Notably, when the Sharps had earlier called Dr. Carlson to the stand, he without objection offered similar testimony – that regardless when IV antibiotics were started, Mrs. Sharp would have had a difficult time recovering from this infection (RP 2004-05), and that she would have had a difficult time surviving given her condition when she was initially admitted to Life Care PT. (RP 2006)

to find “any purposeful violations by the attorneys” (RP 3568), but at the Sharps’ request gave a curative instruction. (RP 3559, 3574)

Following cross-examination of Dr. von Preyss-Friedman, the trial court voir dired the doctor to determine whether she could answer juror questions, one of which asked: “[I]f not for the final sepsis infection, do you feel that Sandy Sharp would have had another three to six months to live with all of her co-morbidities?” (RP 3934) Dr. von Preyss-Friedman’s answered “that her chance of dying . . . within the next six months was more than 50 percent.” (RP 3935) The trial court found the doctor’s answer “acceptable” and within the bounds of the orders in limines (RP 3942, 4309), but ordered Dr. von Preyss-Friedman not to say “whether antibiotics would have been futile,”⁵ and “not to give the jury a specific time

⁵ The trial court had ruled that the doctor could not testify about the “survivability of the antibiotic treatment that was given to Ms. Sharp” on the grounds that Life Care’s disclosure did not put the Sharps on notice that Dr. von Preyss-Friedman would testify whether aggressive use of antibiotics would have been effective treatment. (RP 3542, 3556, 3558) Dr. von Preyss-Friedman’s opinion on antibiotic treatment was offered in rebuttal to testimony by the Sharps’ causation expert Dr. Joseph that was not disclosed until July 14, 2014, the same day Dr. von Preyss-Friedman’s disclosure was made. (CP 2396-2401; RP 3560-63) Although Dr. von Preyss-Friedman was deposed after she issued a report indicating she would rebut opinions by Dr. Joseph, the Sharps’ counsel did not ask her specific questions about any rebuttal opinions. (RP 3521-22)

period for Ms. Sharp's death such as 120 days, 90 days. . ." (RP 3953-54; *see also* RP 4309)

When the doctor again testified (remotely) to the jury three days later, the trial court asked Dr. von Preyss-Friedman the juror's question whether Mrs. Sharp "would have had another three to six months to live." (RP 4316) Dr. von Preyss-Friedman answered consistently with her voir dire testimony and with the court's order: "On a more probable than not basis, which means 51 percent chance, no." (RP 4316) The trial court excused the jury, ruled that the doctor's answer differed from her previous answer on voir dire because "[n]ow she's saying categorically three to six months," and directed the jury "to disregard the last answer." (RP 4321, 4323)

- 4. After a 10-week trial, the jury returned a defense verdict. Eighteen months later, the trial court granted a new trial. A year after that, the trial court awarded the Sharps nearly \$300,000 in fees and costs.**

On January 16, 2015, after two days of deliberation, the jury returned a defense verdict on all of the Sharps' claims against Life Care. (1/16/15 RP 2-3; CP 967-71) The trial court entered judgment on the verdict on January 30. (CP 992-94)

The Sharps moved for a new trial under CR 59(a)(1), (2), (5), (7), and (9), alleging the jury's verdict was contrary to the evidence

and tainted by alleged discovery violations and other “misconduct.” (CP 995-1023, 1991-2006) After hearing argument on March 23, 2015, the trial court requested additional briefing on the issue of discovery violations. (CP 1991-92, 2220) Thereafter, it took no action on the motion for new trial for more than a year.

In a memorandum opinion filed almost 18 months after the verdict, the trial court granted plaintiffs’ motion for a new trial under CR 59(a)(2), on June 6, 2016, quoting Donald Rumsfeld in asserting that “unknown unknowns” about the consequences of discovery violations and witness misconduct justified a new trial. (CP 3069-3128) The trial court then invited the Sharps to submit proposed findings of fact and conclusions of law. (CP 3180) During additional oral argument on the Sharps’ proposed findings and conclusions on August 15, the trial court affirmed that without access to a transcript it relied on clerk’s notes and the court’s own notes in its memorandum opinion. (8/5/16 RP 28-30) Three months later, on October 6, 2016, the court entered the supplemental findings prepared by the Sharps in support of its memorandum order. (CP 3221-42)

The Sharps then sought \$244,451 in attorney fees and \$49,949 for litigation expenses incurred in the first trial, seeking fees

at rates up to \$650 an hour – more than one and a half times the rate a named partner in plaintiffs’ firm testified “reasonably reflects the rate charged in this area for locals of similar skill and experience” – and for a non-attorney “courtroom technician” at \$175 an hour – more than the hourly rate of Life Care’s “second chair” attorney. (CP 3375-79) The trial court granted the Sharps’ petition for fees and costs without reduction, entering judgment for \$294,401 on March 13, 2017. (CP 3688-94, 3703-05)

Life Care has timely appealed the order granting a new trial as well as the trial court’s subsequent judgment for fees and expenses. (CP 3067-3129, 3685-95, 3700-05)

V. ARGUMENT

A. **The trial court abused its discretion in granting a new trial based on unsupported, inaccurate findings that contradict its prior rulings, and because the Sharps chose to gamble on the verdict received in a fair trial.**

The law gives a strong presumption of finality to a jury’s verdict. *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 584, ¶ 29, 187 P.3d 291 (2008) (“trial court may not substitute its judgment of the weight of the evidence for the jury’s”); *State v. Williams*, 96 Wn.2d 215, 221-22, 634 P.2d 868 (1981) (“In this state a trial judge is not deemed a ‘thirteen juror.’”). A trial court’s discretion in granting a new trial “is not without limits.”

Thompson v. Grays Harbor Community Hosp., 36 Wn. App. 300, 307, 675 P.2d 239 (1983). A trial court's reasons for granting a new trial "must adequately support its order." *Clark v. Teng*, 195 Wn. App. 482, 492, ¶ 17, 380 P.3d 73 (2016), *rev. denied*, 187 Wn.2d 1016 (2017) (internal quotations omitted).

The trial court necessarily abuses its discretion if it "relies on unsupported facts or a clearly erroneous assessment of the evidence." *Teng*, 195 Wn. App. at 492, ¶ 17 (internal quotations omitted). "It is also untenable if a trial court ignores its own prior rulings when finding misconduct." *Teng*, 195 Wn. App. at 492, ¶ 17. Further, the party seeking a new trial "must request appropriate court action to obviate the prejudice before the case is submitted to the jury." *Spratt v. Davidson*, 1 Wn. App. 523, 526, 463 P.2d 179 (1969).

The "movant must ordinarily have properly objected to the misconduct at trial," and "the misconduct must not have been cured by court instructions" or other remedial action. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539-40, 998 P.2d 856 (2000) (quoted source omitted); *see Dybdahl v. Genesco, Inc.*, 42 Wn. App. 486, 490-91, 713 P.2d 113 (1986) (curative instruction alleviated any prejudice). A "timely objection gives the trial court certain alternatives, including a continuance to allow the surprised

party to meet the surprise testimony and to prepare for cross-examination of the surprise witness, refusal to permit the surprise witness to testify, or the striking of his testimony before resorting to the drastic and costly remedy” of a new trial. *Sather v. Lindahl*, 43 Wn.2d 463, 466, 261 P.2d 682 (1953).

A party “is not permitted to speculate upon the verdict by awaiting the result of the trial and then complain of the irregularity or misconduct in case the verdict is adverse.” *Spratt*, 1 Wn. App. at 526; *Casey v. Williams*, 47 Wn.2d 255, 257, 287 P.2d 343 (1955) (party “cannot gamble on the verdict of the jury and seek relief thereafter in the event the verdict is unfavorable to him”). So too, the trial court’s discretion in considering a motion for new trial “does not constitute a license for the trial court to weigh the evidence and substitute its judgment for that of the jury, simply because the trial court disagrees with the verdict.” *Bunnell v. Barr*, 68 Wn.2d 771, 775, 415 P.2d 640 (1966); *Knecht v. Marzano*, 65 Wn.2d 290, 292-93, 396 P.2d 782 (1964); *State v. Williams*, 96 Wn.2d at 221. A new trial may be granted for misconduct only if “the moving party establishes that the conduct complained of constitutes misconduct, . . . and that the misconduct is prejudicial in the context of the entire

record.” *Miller v. Kenny*, 180 Wn. App. 772, 814, ¶ 100, 325 P.3d 278 (2014).

The trial court’s new trial order here is contrary to all this established precedent. **First**, the order is based on inaccurate findings of procedural facts occurring in a jury trial concluded over a year earlier, by which time the trial court had either forgotten or ignored its earlier rulings on claimed discovery violations and misconduct. The trial court erred as in *Teng*, in which the Court of Appeals reversed an order for new trial and reinstated the jury’s defense verdict in a medical malpractice action when the trial court relied on “inaccurate facts,” concluding that “[b]ecause core examples of misconduct identified by the trial court are fatally flawed, . . . the trial court abused its discretion.” 195 Wn. App. at 484, ¶ 1.

Second, because the trial court’s original trial management decisions concerning evidence and discovery were not an abuse of discretion, the court’s subsequent order granting a new trial based on those rulings is erroneous. The Court of Appeals also reversed in *Teng* because the trial court ignored its own prior rulings when finding misconduct. 195 Wn. App. at 492, ¶ 17. Likewise, in *Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington*, 162 Wn. App. 495, 254 P.3d 939 (2011), *rev. denied*, 173 Wn.2d 1022, *cert. denied*, 133 S.Ct. 198,

184 L.Ed.2d 235 (2012), the Court of Appeals reversed the trial court's order granting a new trial based on rulings during trial that themselves had not been legal error or an abuse of discretion. *See also Coleman v. Dennis*, 1 Wn. App. 299, 301-02, 461 P.2d 552 (1969) (error to grant new trial based on discretionary rulings during trial in which the court had not abused its discretion), *rev. denied*, 77 Wn.2d 962 (1970).

Third, in granting a new trial after the jury returned a defense verdict, the trial court ignored that the Sharps failed to seek additional "appropriate court action" to address any purported prejudice until after the jury returned an unfavorable verdict. This is like *Estate of Stalkup*, in which this Court reversed an order granting a new trial following a defense verdict where the plaintiff failed to timely object at trial. Because the "trial court was belatedly ruling on an objection never made or preserved for review and, in effect, substituting its judgment of the weight to be given [to witness'] testimony for the jury's judgment," the "trial court cannot base its decision to order a new trial on that ground." *Estate of Stalkup*, 145 Wn. App. at 584, ¶ 29.

Finally, rather than identifying with particularity any prejudice that the Sharps may have suffered, the trial court relied only on the Rumsfeldian "unknown unknowns" of the speculative,

cumulative consequences of a host of discretionary rulings. In *Spratt*, the Court of Appeals reversed the trial court's order granting a new trial because the "existence of a mere possibility or remote possibility of prejudice is not enough" to warrant a new trial. 1 Wn. App. at 526. "This is especially true" when there is an "absence of sufficient detail raising a reasonable doubt that the plaintiff received a fair trial," and "[e]ven after amplification of the order by recourse to the record, it is apparent that the trial court was thinking in terms of possibilities rather than reasonable doubt that plaintiff received a fair trial." *Spratt*, 1 Wn. App. at 526. The trial court here similarly engaged in improper speculation about the "unknown" effects on a jury's verdict, after 35 days of testimony and unchallenged jury instructions, of claimed misconduct.

The next section of this brief addresses each of the findings that the trial court relied upon in light of these four legal principles governing the grant of a new trial.

B. The trial court's findings are unsupported by the record, contradict prior rulings, and, individually or collectively, do not justify rejecting the jury's verdict after a 10-week trial.

The trial court improperly granted a new trial based on allegations of misconduct and discovery violations that it either rejected or addressed through a proper exercise of its discretion 18

months earlier during trial. While none of the trial court’s findings in support of its new trial order can be sustained, because the trial court found that the Sharps were entitled to a new trial not because of any single act of “misconduct” but because of their unknown cumulative effect, this Court should reverse if any of the “core examples of misconduct identified by the trial court are fatally flawed.” *Teng*, 195 Wn. App. at 483, ¶ 1.

In granting a new trial, the trial court quoted Donald Rumsfeld in summarizing the “gravamen” of the motion for new trial:

... [a]s we know there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns – the ones we don’t know we don’t know.

(CP 3006) The trial court’s reliance on the “unknowable” consequence of claimed misconduct and discovery violations was itself error. A new trial should not be granted based on such speculation; “a concrete showing of actual prejudice is necessary” “to justify a new trial.” *Collings v. City First Mortgage Services, LLC*, 177 Wn. App. 908, 922, ¶ 40, 317 P.3d 1047 (2013), *rev. denied*, 179 Wn.2d 1028, 320 P.3d 718 (2014). And because the trial court relied on the *cumulative* effect of the claimed misconduct and discovery

violations, striking down any one of the reasons for the trial court's new trial order should result in reversal even if "cumulative error" can be the basis for rejecting a jury's verdict in a civil case. In any event, the misconduct claimed here does not, individually or collectively, justify a new trial.

1. Life Care's expert did not violate the trial court's order in limine and any inadvertent reference to inadmissible evidence was immediately cured.

The trial court erroneously found that Life Care's expert Dr. von Preyss-Friedman "maliciously" violated an order in limine precluding "any opinion on the futility of treatment for Mrs. Sharp's infection or her life expectancy," "despite repeated clarification." (FF 7, CP 3228; FF 20, CP 3236-37) Nothing in the trial court's order in limine precluded any testimony about the "futility" of treatment (CP 919, 490-500); the issue first arose during Dr. von Preyss-Friedman's trial testimony, at which point the trial court ruled for the first time that the witness could not testify "whether the antibiotics would have been futile." (RP 3558-59) During trial, the trial court correctly found no defense misconduct and found counsel's question referencing antibiotics "appropriate." (RP 3538-39, 3568)

The trial court also erroneously found that Dr. von Preyss-Friedman made a "knowing and willful" or "malicious" violation of

the court's order in response to a juror's question whether "Sandy Sharp would have had another three to six months to live with all of her co-morbidities" "within minutes" of the court's admonition. (FF 20(D), (E), CP 3237; FF 7(C), CP 3228; RP 3934) Before allowing Dr. von Preyss-Friedman to respond to the juror's question, the court after voir dire of the doctor observed "[s]he does say that within the next six months, the chance that the patient would have died is more than 50 percent, and I think that's acceptable." (RP 3942) The doctor's testimony was consistent with this instruction: "On a more probable than not basis, which means 51 percent chance, no." (RP 4316) The doctor's answer was also consistent with the court's reminder to 1) refrain from stating that "antibiotics would not have helped her," 2) "stay away from insurance coverage," and 3) "not to predict the number of days of life left." (RP 4308-09)

There were no grounds for finding defense misconduct (FF 20, CP 3236-37) when the trial court – not defense counsel – asked Dr. von Preyss-Friedman the juror question leading to the second objectionable answer after the court itself reminded the witness of its order. (RP 3953-54, 4309, 4316) Regardless, immediately after Dr. von Preyss-Friedman's response, the trial court instructed the jury to disregard the doctor's answer – an instruction the jurors were

presumed to follow. *Wuth v. Lab. Corp. of Am.*, 189 Wn. App. 660, 710, ¶ 106, 359 P.3d 841 (2015), *rev. denied*, 185 Wn.2d 1009 (2016). The trial court failed to explain how its instruction to the jury to disregard the answer (RP 4321, 4323) did not cure any prejudice to the Sharps. (FF 20(E), CP 3237) In any event, Dr. von Preyss-Friedman’s testimony was consistent with testimony by Dr. Carlson, Mrs. Sharp’s treating physician, which came into evidence without objection during the Sharps’ case-in-chief, well before Dr. von Preyss-Friedman testified. (RP 2004-05)

2. The Sharps did not avail themselves of the opportunity to call a trial observer who had no testimonial knowledge.

The trial court also inaccurately remembered the facts at trial in finding that defense counsel made “false factual assertions” that Todd Fletcher “had no connection to LCCA.” (FF 17, CP 3235) Defense counsel’s assertions were not “false,” the trial court was not misled, and the Sharps suffered no prejudice.

Defense counsel never “actively misled” the trial court (FF 17(C), CP 3235), but honestly explained that she had never previously met or spoke with Mr. Fletcher. (RP 2629: “I literally have no knowledge of this gentleman before he came to the courthouse”) Defense counsel did not claim that Mr. Fletcher “had no connection

to LCCA” (FF 17(A), CP 3235); on the contrary, counsel expressly acknowledged that Mr. Fletcher had “an interest in Life Care matters” and in the land where Life Care PT operated, but that he was neither a member nor owner of the Life Care PT license holder or Life Care itself. (RP 2602-06) The trial court voir dired Mr. Fletcher and confirmed he previously served as an unofficial “interim division vice president” of Life Care. (RP 2608) This information was not known to counsel, as the court recognized. (RP 2628)

Counsel made no inaccurate statements regarding Mr. Fletcher. The trial court during trial expressed its “concern” that defense counsel was not receiving accurate information from her clients. (RP 2632-33) But that contemporaneous “concern” does not support a finding, over a year later, that counsel made intentional misrepresentations to the court or failed to conduct an appropriate inquiry when confronted with plaintiffs’ mid-trial subpoena of a trial observer as a previously undisclosed witness. (FF 17(C), CP 3235) Regardless, the Sharps did not call Mr. Fletcher to testify after placing him under subpoena for the remaining four weeks of trial, and there is no finding (and not even a possibility) of prejudice.

3. The trial court correctly found the late disclosure of duplicative venous stasis ulcer records was “a filing error.”

The Sharps also suffered no prejudice from Life Care’s inadvertent late disclosure, over a week before trial, of venous stasis records. (FF 11, CP 3230-31) Life Care immediately produced the venous stasis records as soon as they were located. Those records did not contain “new” information, but rather were “another source of the same information . . . previously produced.” (CP 2719; *compare* Ex. 200 at 159, 166, 180 *with* Ex. 222) The trial court found no prejudice from what it correctly characterized as an inadvertent “filing error.” (FF 11(E), CP 3231) And as the court noted, the Sharps did not seek any relief when the records were produced. (RP 1328: “no one has asked for relief, and they didn’t at the time”; “if you seek relief as a result of that [late] disclosure . . . you need to prepare something for me to rule on. I’m not going to do it ad hoc.”)

4. Life Care had the right to amend its witness list to include rebuttal witnesses that could not have reasonably been anticipated prior to trial.

The trial court’s post-trial finding of defense misconduct because Life Care failed “to include information previously requested of a testifying witness” in its fifth amended witness list (FF 18, CP 3235-26) is “fatally flawed.” *Teng*, 195 Wn. App. at 483, ¶ 1, 492, ¶

17. First, Life Care could not reasonably anticipate the potential need or relevance of nurses Olga Kapitanov or Vivian Prange as rebuttal witnesses until the Sharps called nurses Basha Berl and Annie Cullen (both first identified as witnesses in their case-in-chief). (RP 3179, 3777-78) Second, the trial court's finding that Life Care failed to produce "previously requested" information (FF 18(A), CP 3235-36) regarding these witnesses is entirely without merit. The Sharps requested "personnel files for all staff members who provided any kind of care for Mrs. Sharp during her residency at LCC PT." (CP 3090) Ms. Kapitanov "was never a care provider" for Mrs. Sharp (CP 2903); indeed she never set foot in the building when Mrs. Sharp was there. (RP 3257-59) Finally, the trial court recognized that Life Care produced Ms. Kapitanov's personnel file (RP 3179-81), neither Ms. Kapitanov nor Ms. Prange testified in rebuttal, and no possible prejudice befell the Sharps.

5. The Sharps were not prejudiced by Life Care's timely disclosure of its "Guide to Infection Control."

The trial court's finding that Life Care "failed to timely disclose its 'Guide to Infection Control'" also is patently erroneous. (FF 12, CP 3231) The Sharps agreed in "the interest of efficiency" that Life Care could produce the "table of contents" to its internal

policy manual in lieu of the entire manual itself, after which “Plaintiff will request specific policies.” (CP 2240-41, 2316) Life Care timely produced the manual, which contained references to Life Care’s separate “Guide to Infection Control,” on May 16, 2014. (CP 2321-23, 2325-26) The Sharps then waited over three months to request the “Guide” itself, serving a request for production on August 29. (CP 2510-11, 2088) Life Care timely produced the Guide on September 29, within 30 days of the Sharps’ request and well over a month before trial began. (CP 3092) CR 33(a), 34(b).

6. Life Care timely disclosed Ms. Yakimenko and properly asserted counsel’s discussions with this CR 30(b)(6) witness were privileged. Her “undisclosed calendar” does not exist.

Life Care also did not fail to “identify Ms. Yakimenko [Life Care’s Regional Nursing Director] as a treating nurse.” (FF 14(B), CP 3232; FF 8, CP 3228; FF 19, CP 3236; CP 3238) Life Care properly identified *all* of Mrs. Sharp’s caregivers by reference to her medical chart, because the burden of culling through those records to determine each provider was the same for the Sharps as it was for Life Care. CR 33(c). (CP 3105) Ms. Yakimenko’s signature appeared on treatment records that the Sharps possessed for over eight months prior to trial. (Ex. 200 at 212, 216) Life Care offered to “assist” the Sharps in “decipher[ing] the names of Ms. Sharp’s

caregivers” (CP 3105), but the Sharps never asked. And although Ms. Yakimenko testified twice as a CR 30(b)(6) witness on multiple topics, including Mrs. Sharp’s medical care, the Sharps never asked if she provided care to Mrs. Sharp. (10/31 RP 57) The Sharps could not claim “surprise” because they failed to identify Ms. Yakimenko as one of Mrs. Sharp’s providers from the charting notes.

The trial court also erroneously found misconduct because defense counsel claimed a right to communicate privately with Ms. Yakimenko, a supervisor and CR 30(b)(6) corporate witnesses. (FF 19(A) n.1, CP 3236; RP 3279)⁶ The attorney-client privilege protects corporate counsel’s communications with current employees. *See Newman v. Highland Sch. Dist. No. 203*, 186 Wn.2d 769, 779-80, ¶ 14, 381 P.3d 1188 (2016). During trial, the court allowed Life Care’s counsel to speak with Ms. Yakimenko during a break as “an LCCA 30(b)(6) representative,” provided counsel did not “coach” the witness, stating that the court would “revisit it if there’s an allegation later.” (RP 3279-81) No subsequent allegation of misconduct on the part of Life Care’s counsel was (or could have been) ever made.

⁶ The trial court refers in its findings to an unidentified order in limine. (FF 19(A) n.1, CP 3236) No one mentioned any order in limine preventing counsel from conferring with a client during trial, and none exists. (RP 3279-81; CP 490-500, 918-21)

The trial court also inaccurately remembered the facts in finding that Life Care had a duty to produce Ms. Yakimenko's nonexistent "calendar." (FF 9, CP 3229; FF 14, CP 3232) Ms. Yakimenko did not refer to an actual "calendar," but to notes she maintained on her laptop relating to meetings she attended during her visits to Life Care PT. (CP 2915, 1210; RP 3258) After Ms. Yakimenko testified on direct that she had "notes" of a meeting at Life Care PT (RP 3258), Life Care's counsel obtained Ms. Yakimenko's October 23 "note" and provided it to the Sharps' counsel in accordance with ER 612 and the trial court's order in limine, which "requir[ed] that any document a witness used to prepare for their testimony be produced before the witness testified." (RP 57, 3310, 3312; CP 492)

When the Sharps' counsel on cross-examination cast doubt on Ms. Yakimenko's recollection of seeing Mrs. Sharp on occasions other than those reflected in Mrs. Sharp's chart, Ms. Yakimenko again referred to having reviewed "my notes" "before trial." (RP 3370) Defense counsel then offered to produce "anything else in that time period" that Ms. Yakimenko reviewed (RP 3402), and produced Ms. Yakimenko's visit reports to Life Care PT during Mrs. Sharp's stay there, explaining that those notes (which made no reference to

Mrs. Sharp) “constitute her calendar of events.” (CP 2915-19) The only other documents the witness reviewed were Mrs. Sharp’s nursing notes. (CP 2915; RP 3349, 3369-70)

The trial court wrongly granted a new trial based in part on the failure to produce Ms. Yakimenko’s nonexistent “calendar.” Ms. Yakimenko’s visit notes, which do not contain any reference to Mrs. Sharp, were not responsive to any discovery request. (FF 8(B), CP 3228; FF 9, CP 3229) Nor did the Sharps demonstrate any prejudice from Ms. Yakimenko’s testimony. The defense promptly produced her notes, the Sharps thoroughly cross-examined Ms. Yakimenko to cast doubt on her recollection of treating Mrs. Sharp on days that were not reflected in the chart notes (RP 3368-83), and the trial court waited to excuse Ms. Yakimenko as a witness in case the Sharps wanted to recall her to the stand. (RP 3413-14) The Sharps ultimately declined to do so and sought no additional relief. The trial court could not grant a new trial over a year after it properly exercised its discretion concerning Ms. Yakimenko’s testimony at trial. *Coleman*, 1 Wn. App. at 301-02.

7. The Sharps had a full opportunity to depose Mr. Thompson, without limitation.

Life Care moved for a protective order to prevent Mr. Thompson’s testimony as a fact witness because as a divisional vice

president he was not familiar with Mrs. Sharp's care. (CP 2244-45, 2455-56, 180-87) The trial court *denied* that motion, and Mr. Thompson was deposed weeks before trial, as a fact witness, without limitation. (CP 262-63, 2253, 2610-12) Mr. Thompson was also twice deposed as a CR 30(b)(6) representative, before trial and again during trial on November 11. (CP 5274-76, 2796) The Sharps had the full opportunity to question Mr. Thompson and were in no way prejudiced by Life Care's accurate representations of the limitations on his knowledge. (FF 13(B), CP 3231; FF 16, CP 3234-35)

8. The Sharps were not prejudiced because Life Care did not produce a handout created by an independent contractor.

The Sharps introduced during trial Exhibit 179, a handout of excerpts of nursing notes used by independent contractor Dr. Forbes at a Life Care PT staff meeting. (RP 1795-96) Exhibit 179 also contained handwritten notes of one of the Sharps' witnesses regarding her impressions from that meeting. (RP 1795) The Sharps did not provide Exhibit 179 to Life Care before presenting it during their case-in-chief. (*See* CP 2658, 2750: Ex. 179 not listed on plaintiffs' exhibit lists) The trial court could not grant a new trial in part on the grounds *Life Care* should have produced Exhibit 179 in response to discovery requests, particularly when the Sharps had and

used the document and there was no evidence Life Care even had it in its files.

Exhibit 179 was not an internal investigation into Mrs. Sharp's care, nor was it made by a staff member or employee at Life Care PT.⁷ Exhibit 179 contained excerpts of nursing progress notes in Mrs. Sharp's medical records that Life Care timely produced. (RP 1331, 2074) It was not responsive to any discovery request, and the trial court made no finding that the Sharps suffered any prejudice from the timing of its production — nor could it on this record. (CP 3094; *see* FF 14, CP 3232-33; FF 10, CP 3229-30) The Sharps had and used Exhibit 179 to support their contention that the purpose of the meeting was to remedy charting deficiencies in Mrs. Sharp's case, eliciting testimony (over Life Care's objection that it concerned a subsequent remedial measure) that Life Care PT's staff failed to properly document the deterioration in Mrs. Sharp's condition. (RP 1796-1803, 1768, 1760-61, 1337-38)

⁷ Dr. Forbes was never an employee or a CR 30(b)(6) agent of Life Care, as reflected in the fact that the Sharps noted her deposition by a third-party subpoena and instructed Life Care not to have any ex parte contact with her. (CP 2496-97, 2513) At that deposition, Dr. Forbes was defended by her employer, Jefferson County Hospital. (CP 2252, 2599)

9. Life Care did not engage in misconduct or provide intentionally evasive or misleading discovery responses regarding staffing levels.

Finally, the trial court's conclusions that Life Care "abused the discovery process" – that it failed to disclose relevant information and that it was "intentionally evasive and misleading" in responding to discovery and providing CR 30(b)(6) witnesses concerning staffing (CL 3, CP 3241; FF 4-5, CP 3225-26; FF 13-16, CP 3232-35) – are also erroneous. Life Care timely produced its "punch detail" payroll records, as well as personnel files and licensure data related to staffing, as well as the records that identified the staff members treating Mrs. Sharp. (CP 3092, 3095, 3116) Life Care had no additional obligation, under CR 30(b)(6), CR 33, or CR 34, to synthesize and analyze that data, yet it also provided the Sharps with defense attorney work product analyzing this data. The trial court erroneously sanctioned Life Care for conduct that in fact went above and beyond its obligations under the discovery rules.

a. The Sharps were not prejudiced by Life Care's timely production of its "punch detail" as specifically requested in discovery.

The trial court erred in finding that Exhibit 224, the "punch detail," should have been produced earlier in the litigation. (FF 2, CP 3223-24) Exhibit 224 was a summary of times that employees

punched in and out of the facility during Mrs. Sharp's residency. The punch detail first came up during Ms. Mueller's August 2014 CR 30(b)(6) deposition. (CP 325) The week after the deposition, the Sharps requested "the LCC PT and LCCA employee time cards for September and October 2012 at the LCC PT location, as testified to having been reviewed by Ms. Mueller at her suspended August 20th deposition." (CP 2088, 2105; Ex. 224) Under CR 34, a party is obligated to produce within 30 days "designated documents, electronically stored information, or things . . . in a reasonably usable form." CR 34(a). Life Care complied with this rule, producing the "punch detail" within 30 days.

The trial court found that the punch detail was "highly responsive" to earlier interrogatories, and sanctioned Life Care for producing the punch list "late" (FF 2(C), CP 3223; *see also* FF 14, CP 3233), but failed to identify any "earlier discovery requests" to which the punch detail was responsive. (FF 2(E), CP 3223) If the trial court was referring to January 2014 requests for production, in which the Sharps asked Life Care to identify and produce anything "relative to the occurrence or the issue of damages" (CP 3045), no reasonable defendant could have interpreted that request to encompass documents concerning when staff members punched in or out of the

facility during Mrs. Sharp's stay. *See* Tegland, 3A Wash. Practice: Rules Practice 772 (6th Ed. 2013) (“[t]he responding party may object if lack of clarity inherent in the question renders the subject to numerous reasonable interpretations”). Without any additional specificity, Life Care properly referenced “Ms. Sharp’s medical chart” in response to this request. (CP 3045)

The January 2014 discovery also included Interrogatory No. 31, which asked “[o]ver the course of the last five years, what staffing reductions or increases have been made?” (CP 3115) The interrogatory did not request documents, did not ask Life Care to identify documents, and did not request information regarding Life Care’s computer system. Life Care responded to this Interrogatory appropriately by stating that “staffing levels vary, but no significant increases or decreases have occurred in the past five years.” (CP 3053) Both of these responses were correct and appropriate, and the court erred in finding that defendants had the duty to disclose the existence of staffing reports in response to this interrogatory.

b. Life Care did not misrepresent the “punch detail” or whether it was “raw data.”

Life Care also at no point “misled” the Sharps about the punch detail or corrections to it. (FF 2, CP 3223) Life Care produced the

punch detail on September 29, and during their CR 30(b)(6) depositions neither Ms. Mueller nor Mr. Thompson represented that the punch detail was raw data unaffected by employee “corrections.” (CP 5228-85, 5414-21)

The trial court’s findings are belied by the punch detail itself. The very first page shows a notation for “Missed Punch,” with a subsequently added time entry. (Ex. 224 at 1) In explaining the labor analysis at his second deposition, Mr. Thompson testified that the punch detail was “a representation of the hours where people actually clock in and clock out for work, *and the payroll would also do misspunches, things of this nature.*” (Sub. No. 46, Supp. CP ___) Although they had this information, and despite Life Care’s corporate witnesses expressly offering to assist in interpreting the data, the Sharps chose not to question Life Care’s corporate witnesses on what such notations indicated or how the punch list was generated.

The trial court erred in finding that Ms. Mueller “was unprepared to discuss” the punch detail (FF 6, CP 3226); she expressly testified in her deposition that she “could assist someone in interpreting” the data. (CP 5414) Yet the Sharps chose only to ask whether or not the punch detail showed “who was assigned to which

unit and which rooms on which days.” (CP 5414) Ms. Mueller correctly clarified that there was “not a piece of paper that says [that].” (CP 5414) Moreover, the trial court ignored that Life Care’s counsel and expert first created any synthesis of this staffing information in advance of Mr. Thompson’s November 11 deposition, and provided that work product to the Sharps. (FF 1(D), CP 3222; CP 2807-68, 2769; *see also* CP 2641, 5423-24)

The Sharps could have fully explored prior to trial the issue of individual employees making changes to their punch data before the data was reported to payroll. They never requested such clarification or requested the correction sheets in discovery. That is perhaps why the trial court made no *contemporaneous* finding of misconduct or discovery violation regarding the disclosure of the correction sheets. On the contrary, the court expressly stated that it believed the defense was “getting information and doing [its] best to cull through it,” informing defense counsel that “[i]t’s behind you.” (RP 3183)

Further, the trial court misremembered when the issue of “backup data” and “correction sheets” arose. The trial court found that this information “was only revealed through questions of Mr. Thompson *after* Plaintiff rested.” (FF 2(C), CP 3223) (emphasis in original) But in fact it was disclosed December 2, 2014, after the

Sharps for the first time moved to strike the punch detail by arguing that it constituted a “summary” document, and the trial court questioned how it was created. (RP 2795-2823) The Sharps did not rest until nearly a week later, on December 8, 2014. (RP 3192)

Finally, the trial court did not identify any prejudice to the Sharps related to the punch detail or correction sheets (FF 3, CP 3224-25; FF 13(C), CP 3231), and any concern was fully remedied at trial. The trial court allowed the Sharps as much time as they “actually need” to review the documents and prepare to meet the evidence. (RP 4605) Despite this, the Sharps did not request any additional time to review the correction sheets. The Sharps’ counsel instead told the court he would “be prepared to cross-examine” Mr. Thompson on the punch detail the next morning after the court recessed. (RP 4600) The Sharps thoroughly cross-examined Mr. Thompson on the reliability of the punch detail, as well as the employee explanations on the correction sheets why they had missed a punch or were working overtime, which the Sharps claimed related to their staffing claims. (RP 4654-55, 4666-67, 4670-82) The trial court further allowed the Sharps to call two rebuttal witnesses, including their expert, to address the correction sheets. (RP 4771, 4775-77) These discretionary rulings at trial ensured a fair trial.

c. Life Care provided timely information on staffing.

Life Care accurately reported the “patient-to-staff ratios at the facility,” even though the Sharps’ interrogatory gave no time frame. (FF 4, CP 3225-26; CP 3116) Life Care timely and fully answered: “the nursing caregiver to patient ratio for the four weeks of Ms. Sharp’s residency, PPD for nursing care was 3.56, 3.43, 3.15, and 3.23 PDD.” (CP 3116) This response was precise, not evasive, as “PPD,” or “per patient day,” is a common term in the industry, one with which plaintiff counsel was familiar, representing nursing hours per patient allocated to staff in the course of a day. (RP 2795-96, 2980, 3004) The Sharps never pursued a motion pertaining to Life Care’s objection to providing its HIPPA-protected patient census data until the court directed it be produced, with patient names redacted, at trial. (RP 2804-06, 2818) Moreover, the Sharps successfully argued against admission of Exhibit 223, the 2012 labor analysis for Life Care PT (RP 2789-92, 4458-59), and the trial court granted their motion to prevent Life Care from offering evidence of specific patient ratios at its Port Townsend facility. (RP 2980-81)

The trial court also erred in finding that Life Care failed to “disclose the existence of the daily staffing sheets” and provide “all documents relating to LCCA’s evaluation of staffing levels at LCC PT

as well as all LCCA facilities for the years 2009-2013.” (CP 3093; FF 5, CP 3226; FF 4, CP 3225-26; FF 14, CP 3232-34) Life Care accurately answered that it was “not aware of any such written documents” evaluating its staffing levels (CP 3093), and that “[t]here is not a written policy and procedure from Life Care Centers of America because ultimately [Life Care] defer[s] to the federal guidelines for staffing.” (RP 4802, 4000, 4004) That accurate answer is not sanctionable, and basing its order for a new trial on these grounds is inconsistent with the trial court’s ruling declining a spoliation instruction for the daily staffing sheets at trial. (RP 5023)

d. The trial court ignored that it had bound Life Care to its “unprepared 30(b)(6)” witness deposition testimony regarding staffing.

The trial court exercised its discretion at trial to bind Life Care to its 30(b)(6) witness deposition answers denying knowledge of staffing at the Port Townsend facility. (FF 6, CP 3226-28; FF 15, CP 3233-34) The trial court failed to explain why granting the Sharps the relief they requested during trial was an inadequate sanction for Ms. Mueller’s alleged lack of preparation to testify in deposition on staffing issues. (RP 801, 4337-38, 4349-53) In addition, the trial court allowed the Sharps to call Ms. Mueller as a rebuttal witness and rejected Life Care’s argument that Ms. Mueller’s rebuttal testimony

could “open the door” for cross-examination on topics beyond her deposition testimony. (RP 4647)

The trial court’s findings over a year later do not identify any prejudice that was not addressed and cured by the trial court’s rulings. The record is devoid of support for the trial court’s finding that “the sanction it imposed at trial . . . denied the Plaintiff’s an opportunity to discover and produce for the jury information relevant to the pre-defined 30(b)(6) topics from the corporate witnesses.” (FF 6(I), CP 3228) Had the Sharps felt that the trial court’s sanction – the *only* remedy they sought – was insufficient to cure any alleged prejudice, the Sharps could and should have requested a more severe sanction such as exclusion, which the trial court indicated it would have been willing to grant. (RP 4352-53) *See Spratt*, 1 Wn. App. at 526 (party cannot “speculate upon the verdict” and then “complain of the irregularity or misconduct in case the verdict is adverse”). The Sharps cannot now claim that they were deprived a fair trial when they made a tactical decision to not seek a harsher sanction – despite the trial court finding it would have been “well within the bounds of the Court” to impose one. (RP 4352)

10. The new trial order rests on untenable grounds; neither individual nor cumulative error justifies vacating the jury's verdict after a 10-week trial.

The trial court relied upon the speculative, “unknowable” cumulative effect of this claimed misconduct and discovery violations in support of the grant of new trial. The trial court’s order is untenable because it is based “on unsupported facts or a clearly erroneous assessment of the evidence,” and “ignores its own prior rulings when finding misconduct.” *Teng*, 195 Wn. App. at 492, ¶ 17 (internal quotations omitted). In addition to finding non-existent discovery violations, (§§ B.4, 5, 6, 7, 8, 9, *supra*), the trial court’s year-long delay before granting a new trial resulted in a decision based on an inaccurate recollection of the testimony, documentary evidence and counsel’s representations. (§§ B.1, 2, 3, 7, *supra*)⁸ And the trial court’s conjecture concerning prejudice not only fails to account for its own discretionary remedies imposed during trial, but also the trial court’s accurate assessment when it invited and granted

⁸ The trial court’s statement that she did not have the prior discovery requests until she received supplemental briefing on the motion for new trial, so could not have known what alleged violations occurred in discovery, is not accurate. (8/5/15 RP 31) The court reviewed the Sharps’ First Interrogatories and Requests for Production and Life Care’s responses in July, 2014, five months before trial. (CP 94-125) The court reviewed the Sharps’ August 29 Interrogatories and Requests for Production, and defendants’ responses thereto, on October 6, 2014. (CP 432-50)

the Sharps the relief they sought during trial. (§§ B.1, 2, 4, 6, 9, *supra*)

At trial, the trial court consistently rejected the very claims of attorney misconduct that it relied on in granting a new trial over a year later, after the jury returned a defense verdict: “the record is clear that I haven’t found any purposeful violations by the attorneys in this case,” “the record is devoid of any such findings,” and “[i]f there were, you would know about it.” (RP 3568) Instead, the court, like counsel, expressed frustration “that Jefferson County’s court rules don’t require an exchange of witnesses until five days before trial,” and do not impose case schedules with a discovery cutoff, as do “many courts around the state.” (RP 1322-23)

The particular errors in each of the court’s findings are summarized in the matrix on the following page:

	INACCURATE FACTS	INCONSISTENT WITH TRIAL MANAGEMENT DECISIONS	WAIVER/FAILURE TO OBJECT AT TRIAL	PREJUDICE	FINDINGS
§B.1 Dr. von Preyss- Friedman	X	X		X	7, 20
§B.2 Mr. Fletcher	X	X		X	17
§B.3 Late disclosure of wound care book			X	X	11
§B.4 Amended witness list	X	X		X	18
§B.5 Guide to Infection Control	X			X	12
§B.6 Ms. Yakimenko	X	X	X	X	8, 9, 14, 19
§B.7 Mr. Thompson	X			X	13(B), 16
§B.8 Dr. Forbes' meeting notes	X			X	10, 14
§B.9.a Production of punch detail	X			X	2, 14
§B.9.b Punch detail as raw data	X	X	X	X	1(D), 2, 3, 6, 13(C)
§B.9.c Discovery re staffing ratios	X		X	X	4, 5, 14
§B.9.d Binding 30(b)(6) testimony		X	X	X	6, 15

To the extent any of the trial court's findings survive this court's review, the conduct at issue here is nothing like the cases the court relied upon to grant a new trial. (CP 3237) In *Gammon v.*

Clark Equipment Co., 38 Wn. App. 274, 686 P.2d 1102, *rev. granted*, 103 Wn.2d 1004 (1984), a product liability case involving the rollover of a backhoe, the defendant refused to provide accident reports of its backhoes involved in similar accidents. *See also Magana v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2010) (default order against manufacturer who withheld evidence of similar accidents). And in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012), the only misconduct under CR 59(a)(2) concerned counsel's improper reliance on exhibits not admitted into evidence and speaking objections. The trial court in *Teter* relied not on CR 59(a)(2) but on CR 59(a)(8) in holding that its discovery sanction of striking an expert witness was an error of law because it was *too severe*. 174 Wn.2d at 215-16, ¶ 15. By contrast, any alleged misconduct or discovery violations here were wholly addressed and remedied by the trial court's proper exercise of discretion. As the grounds for a new trial cannot be sustained, this Court should reinstate the judgment on the jury's verdict.

C. The judgment for fees should be reversed because it is based on flawed findings.

This Court reviews a fee award for abuse of discretion. *Berryman v. Metcalf*, 177 Wn. App. 644, 656-57, ¶ 25, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014). "Discretion is abused

when the trial court exercises it on untenable grounds or for untenable reasons.” *Berryman*, 177 Wn. App. at 657, ¶ 25. “Courts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought.” *Berryman*, 177 Wn. App. at 657, ¶ 27 (emphasis added) (quoted source omitted).

The trial court’s fee award of nearly \$300,000 gave the Sharps all of their proposed lodestar fees, including fees at \$650 per hour for lead counsel and at \$175 per hour for a non-attorney “court technician.” (CP 3581, 5587) In doing so, the trial court failed to acknowledge the burdens faced at trial were largely the result of the Sharps insisting on proceeding to trial while discovery was ongoing, and “building the plane while you’re flying it,” not a result of Life Care’s actions. (RP 1330) The fee award, which “incorporates by reference” the court’s findings of fact and conclusions of law on the order granting a new trial (CP 3691, 3703-05), must be reversed upon reversal of that order.

Further, “[a] lodestar award is arrived at by multiplying a *reasonable* hourly rate by the number of hours *reasonably* expended on the matter.” *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993) (emphasis in original). “In principle, it is

grounded specifically in the market value of the property in question – the lawyer’s services.” *Fetzer*, 122 Wn.2d at 150 (quoting Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 Duke. L.J. 435, 467 (1986)); see also RPC 1.5(a)(3) (factor in “determining the reasonableness of a fee include[s] . . . the fee customarily charged in the locality for similar legal services”). “The burden of demonstrating that a fee is reasonable is upon the fee applicant.” *Berryman*, 177 Wn. App. at 657, ¶ 25. The Sharps failed to meet this burden by providing no evidence that \$650 is a reasonable hourly market rate in Washington, let alone in other localities. (CP 5583) Instead, its lead counsel merely claimed that he has “been offered higher hourly rates to work on particular matters.” (CP 3383)

The trial court also abused its discretion by awarding nearly \$33,000 in fees for the Sharps’ investigators and “trial technicians.” (CP 5584) Non-lawyer personnel can recover fees only for “services performed” that are “legal in nature.” *Absher Const. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995). The services performed by a technician operating a PowerPoint presentation during trial are not “legal in nature.” Further, the “amount charged must reflect reasonable community standards for

charges by that category of personnel.” *Absher*, 79 Wn. App. at 845. Although Dee Taylor claimed that he “spoke with other trial technicians” and “found the average rate for in-court technical assistance” to be \$225 per hour, neither he nor the Sharps presented any specific evidence demonstrating that either \$175 or \$225 is a reasonable rate. (CP 3473-74) Rather, the Sharps cited two orders (one from a district court and the other from a superior court) approving a \$100 hourly rate for “legal assistant fees” and a \$135 hourly rate for Cameron Taylor’s services. (CP 3588-3618, 3585)

Finally, even if this Court affirms some of the trial court’s findings, to the extent the trial court’s individualized assessment of CR 37 violations or other misconduct are erroneous, there is no basis for an award of all the Sharps’ fees for a 10-week trial. Just as the trial court abused its discretion in granting a new trial based on allegations of misconduct that do not survive appellate review, its fee award based on non-existent “misconduct” should be reversed. At a minimum, the court must remand for a segregation of reasonable fees directly related to any findings of misconduct that are sustained on appeal.

VI. CONCLUSION

The Sharps received a fair trial. This Court should reverse the trial court's order granting a new trial and awarding attorney fees, and reinstate the jury verdict.

Dated this 15th day of May, 2017.

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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 May 15, 2017, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division II 950 Broadway # 300 Tacoma, WA 98402	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
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DATED at Seattle, Washington this 15th day of May, 2017.



Patricia Miller

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JUN - 7 2016

DAVID W. PETERSON

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

RONNIE LEE SHARP, as Administrator of
the Estate of Sandra Sharp, deceased,

Plaintiff,

v.

LIFE CARE CENTERS OF AMERICA,
INC., a Tennessee corporation; and
CASCADE MEDICAL INVESTORS
LIMITED PARTNERSHIP, a Tennessee
entity d/b/a LIFE CARE CENTER OF
PORT TOWNSEND,

Defendants.

No. 14-2-02125-1

MEMORANDUM OPINION ON
PLAINTIFF'S MOTION FOR NEW
TRIAL

...[a]s we know there are known knowns; there are things we know we know.
We also know there are known unknowns; that is to say we know there are
some things we do not know. But there are also unknown unknowns—the
ones we don't know we don't know.¹

This quote aptly summarizes the gravamen of the Plaintiff's Motion for New Trial following a jury verdict for the Defense. In considering this Motion, the Court heard oral argument, reviewed the court file, including Clerk's minute entries and exhibits, the briefs/memoranda filed by the attorneys, along with all attachments and legal research provided.

¹ Donald Rumsfeld, Feb. 12, 2002, Department of Defense news briefing, available at <http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>.

MEMORANDUM OPINION ON
PLAINTIFF'S MOTION FOR NEW
TRIAL

.. 1 ..
App. A

JUDGE JEANETTE DALTON
Kitsap County Superior Court
614 Division Street, MS-24
Port Orchard, WA 98366
(360) 337-7140

1 Being now fully informed in both the underlying facts and the law, the Court, by its
2 memorandum subsumed herein, hereby GRANTS Plaintiff's Motion for a New Trial.

3 **FACTS**

4 Sandra Sharp died from sepsis on October 21, 2012. She had spent September 17,
5 2012 to October 17, 2012 in Defendants' nursing facility, Life Care Centers of America in
6 Port Townsend, Washington ("Facility"), having transferred there from Jefferson County
7 Hospital ("Hospital").

8 While at the Facility she developed cellulitis, an infection, in her lower legs. The
9 infection noticeably progressed up her legs. Ultimately, she was transferred back to the
10 Hospital, but the infection had advanced such that successful treatment was no longer
11 possible. Mrs. Sharp died at the Hospital. Her estate brought this action, claiming that the
12 owners of the Facility were negligent: (1) in their failure to treat Mrs. Sharp while the
13 infection was survivable; and (2) by understaffing the Facility. The Defendants denied these
14 claims, and a jury determined that the Defendants were not negligent. The Plaintiff then filed
15 this Motion for a New Trial.

16 **ISSUES PRESENTED**

17 Is Plaintiff entitled to a new trial where several willful violations of the discovery
18 rules by the Defendants were exposed during trial, revealing that the Defendants:

- 19 1) did not disclose or produce relevant information to Plaintiff which should have
20 been disclosed/produced in response to interrogatories/requests for production;
21 2) delayed the production of highly relevant information, previously not identified
22 nor disclosed to the Plaintiff until close to the start of trial and during trial;
23 3) provided misleading or false information throughout the case, preventing
24 Plaintiff's access to relevant information; and
25 4) willfully violated one of the Court's rulings *in limine*.

26 **IDENTIFIED DISCOVERY VIOLATIONS**

27 This ruling necessarily includes the following facts of those discovery violations
28 found meritorious:
29

30 MEMORANDUM OPINION ON
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- 1 1. The production of Raymond Thompson ("Mr. Thompson") for deposition.
2 Defendants argued that Mr. Thompson had no relevant information, and therefore
3 opposed his availability for deposition during discovery. During trial it was revealed
4 that Mr. Thompson was a fact witness and had personal knowledge of staffing levels
5 at the facility. It was also discovered during the Defendants' case in chief that Mr.
6 Thompson knew how relevant data was kept and retrieved and that he failed to
7 disclose relevant staffing reports prior to trial.
- 8 2. Production of Corporate Witness (CR 30(b)(6)) for deposition. Before trial, the Court
9 granted the Plaintiff's motion to compel the deposition of a corporate witness under
10 CR 30(b)(6). The Court also found the subsequent failure by Defendants to produce
11 a prepared witness was willful because the Defendants' attorneys were aware of their
12 obligation under the court rules to provide a prepared corporate witness and failed to
13 do so. As a result, relevant information maintained by the Defendants was not
14 disclosed.
- 15 3. Expert witness Dr. Sabine von Preyss-Friedman's direct violation of the Court's
16 ruling on Motions in Limine #25 and #30—prohibiting testimony as to life
17 expectancy—despite repeated clarification of the ruling to Defendants' counsel and
18 the witness.
- 19 4. The failure by Defendants to disclose Nataliya Yakimenko ("Ms. Yakimenko") as a
20 fact witness due to her alleged treatment of Mrs. Sharp. Failure to produce the
21 "Calendar," upon which Ms. Yakimenko relied during her testimony.
- 22 5. The Failure to disclose (a) that the "punch list"²—relied upon by Defendants as raw
23 data showing all employees on staff during Mrs. Sharp's care—was an edited report,
24 not raw data; and (b) that the edits were corrections made after receiving handwritten
25 explanations by staff as to anomalies in their shift, such as why they missed breaks
26 and/or lunch. These relevant documents were not mentioned in response to
27 interrogatories and discovered after Plaintiff rested. Defendants repeatedly mislead
28

29 ² Only at Ms. Mueller's deposition was the "punch list" disclosed, but she was unprepared to use it and to
30 answer questions about staffing.

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1 Plaintiff as to the nature of the punch list as digital evidence of the staff working at
2 the facility during Mrs. Sharp's care.

- 3 6. Defendants' late disclosure of relevant documents, including the "Guide to Infection
4 Control" and "Punch List."
- 5 7. Defendants' failure to disclose the existence of "daily staffing sheets," which detailed
6 employee assignments for the day, and the destruction thereof.
- 7 8. False and misleading information given to the Plaintiff and the Court by the Defense
8 that: "Mr. Thompson has no discoverable information related to this lawsuit" when
9 Defendants argued to prevent Plaintiff from taking his deposition, arguing that Mr.
10 Thompson had no relevant information to provide, thus the Plaintiff's request to
11 depose him was harassment. In fact, it was Mr. Thompson's testimony during the
12 trial that led to the discovery (a) that the punch list was an edited report, contrary to
13 Defendants' previous repeated assertions; (b) employees were required to fill out and
14 submit "correction sheets" to explain why they didn't take breaks or lunches; and (c)
15 that these handwritten correction sheets existed in the corporate archives.
- 16 9. Defendants' failure to disclose the Corporation's remedial efforts following Mrs.
17 Sharp's death³—when their own medical director convened a post-death meeting at
18 the Facility to identify for the staff members those corrections deemed necessary by
19 the director.
- 20 10. Defendants' failure to timely disclose the existence of "venous ulcer stasis" records
21 of Mrs. Sharp's leg wounds. These records contained descriptions and drawings of
22 the condition of Mrs. Sharp's legs.⁴
- 23 11. The misleading answer given to interrogatory No. 32 regarding staffing levels and
24 the subsequent discovery during trial that reports were produced showing that Mr.
25

26 ³ Interrogatories 8 and 10, from February 2014 Interrogatories, attached hereto as Attachment B; Requests for
27 Production 11 and 43, from September 2014 Interrogatories, attached hereto as Attachment A.

28 ⁴ Interrogatory "Request for Production of all medical records" RFP No. 3 (Attachment A)—purportedly
29 produced 9 months later. Plaintiff through their own discovery learned that the facility maintained a "wound
30 care book records." Defendants objected indicating that there was no book, rather this was a "dynamic
collection of notes ... and did not disclose the relevant records until after their director who generated the
records was deposed. Days before trial, Defendants disclosed the record citing a "filing error."

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1 Thompson was aware of the staffing levels during Mrs. Sharp's care. No documents
2 were disclosed until after trial had begun.⁵

3 It is notable that none of the information described above was produced by
4 Defendants in discovery (with the exception of the late disclosure of venous stasis records).
5 Rather, the information was discovered during trial when a witness referred to its existence.
6 The Plaintiff clearly asked for this information in their interrogatories and requests for
7 production. See Plaintiff's February 27, 2014 Interrogatories and Defendants' Objections,
8 Answers, and Responses thereto (Attachment B):

9 Interrogatory No. 14: The Defendants here should have identified and produced
10 venous stasis records, Dr. Forbes' notes, the existence of data on staffing levels, and the
11 existence of correction sheets by employees, all of which were responsive to this
12 interrogatory.

13 Interrogatory Nos. 8 and 18: Defendants failed to produce venous stasis records,
14 identify Ms. Yakimenko as a treating nurse, and failed to disclose her "calendar."

15 Interrogatory Nos. 9 and 27: Defendants failed to disclose Doctor Forbes' notes from
16 her investigation of Sandra Sharp's infection and death and the training occurring as a result.

17 Interrogatory No. 31: Defendants failed to disclose the existence of staffing reports
18 generated easily by Mr. Thompson upon a data inquiry. Instead, Defendants gave the
19 misleading answer that "staffing levels vary but no significant increases and decreases."

20 Request for Production No. 10: This Request for Production asked Defendants to
21 produce records responsive to Interrogatory No. 14, however, Defendants failed to produce
22 relevant electronic data as well as responsive documents they possessed.

23 Request for Production No. 12 and Interrogatory No. 16: Defendants failed to
24 disclose the nature of, and inter-relationships of the three entities involved in the care of Mrs.
25 Sharp.

26 Interrogatory No. 33 and Request for Production No. 20: Defendants answered the
27 interrogatories without the documentation that existed showing their calculations.

28
29
30 ⁵ See Interrogatory No. 14; Interrogatory No. 18 (Attachment B).

1 See also, Plaintiff's September 29, 2014 Request for Production of Documents and
2 Defendants' Objections and Responses thereto (Attachment A):

3 Request for Production No. 41: Relating to the internal investigation of Mrs. Sharp's
4 care, Defendants failed to disclose that their medical director investigated the Facility's care
5 of Mrs. Sharp—or lack thereof—and then held a meeting to correct what the director
6 identified as deficiencies; Defendants also failed to produce the director's notes.

7 **DEFENSE ATTORNEY'S MISCONDUCT**

8 CR 30(b)(6) Witness Brooke Mueller:

9 Before trial, the Court ruled that Defendants' failure to produce a CR 30(b)(6) witness
10 despite the Court's order directing Defendants to do so was a willful discovery violation. At
11 the second deposition Defendants produced Ms. Mueller who brought with her a "punch
12 list." She testified this document contained all the responsive information possessed by the
13 Defendants about staffing and the identity of all staff who were present during Mrs. Sharp's
14 stay at the Facility. It was clear at the time of the deposition that Ms. Mueller was not a
15 prepared corporate witness. Additionally, she presented misleading information about the
16 "punch list." The extent of the willful violation was not fully revealed until late in the trial,
17 after Mr. Thompson's testimony.

18 At his deposition, Mr. Thompson was unable to respond to questions about staffing
19 levels other than to refer to the newly produced punch list. At trial, after Mr. Thompson
20 testified about the punch list, it was clear Ms. Mueller misled the Plaintiff's attorneys about
21 how the punch list was created.

22 Executive/Regional VP Mr. Thompson

23 The Defense misled both the Plaintiff and the Court when it stated that not only did
24 Mr. Thompson not have relevant information, but that Plaintiff's attempts to depose him
25 were harassment. These misleading representations were relied upon by the Court when it
26 ruled on Defendants' motion.

27 Mr. Thompson's deposition was taken but neither he nor Defendants' attorney
28 disclosed the existence of "absence slips corrections," the type of data kept in the facility's
29 computers, his knowledge of that data, how to extract data in specified reports, or how the
30

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1 punch list was created. All of this information was discoverable and was responsive to
2 Plaintiff's interrogatories and requests for production. Defendants actively misled the court
3 and Plaintiff's attorney about the extent of the relevant information Mr. Thompson
4 possessed, which they never disclosed. That there was this relevant information was
5 discovered only during trial.

6 It is notable that the existence of the information was disclosed only after the Court
7 inquired of Mr. Thompson on January 5, 2015. Mr. Thompson knew this information existed
8 yet withheld all of it during discovery. Plaintiff argued they were clearly prejudiced by this
9 obfuscation.

10 It is clear to this Court there was a willful failure to disclose highly relevant
11 information by the Defendants. The Defendants hid what Mr. Thompson actually knew. They
12 never identified nor disclosed the extent of his knowledge. It was only through the Court's
13 inquiry late in the Defendants' case in chief that it was discovered. This Court easily
14 concludes that but for the Court's inquiry this relevant information would never have been
15 discovered nor disclosed.

16 Mr. Fletcher

17 On November 26, 2014 the defense interrupted Plaintiff's case to accuse Plaintiff
18 again of harassment when they served a subpoena on Mr. Fletcher, a member of the public
19 who had been observing the trial and who, claimed the attorney, had no connection to LCCA.

20 The next court day, the Court inquired of Mr. Fletcher. He stated that he did have a
21 connection to LCCA and that he could potentially identify a management agreement relevant
22 to the case. Clearly, the defense had either failed to conduct an inquiry before making its
23 factual assertions or they actively misled the Court. Either way, the defense failed to abide
24 by their obligations.

25 Amended Witness List

26 An Amended Defendants' Witness List was provided to Plaintiff toward the close of
27 Plaintiff's case on December 2, 2014. It contained new witnesses not previously disclosed.
28 It additionally failed to include information previously requested of a testifying witness (See
29 Clerk's Minute entry for Dec. 4, 2014) despite prior motions to and orders to compel
30

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1 discovery. The Defendants merely argued "the information would be provided before anyone
2 testifies." The Court ruled once again that relevant information the Court was now aware
3 existed and was in the Defendants' possession must be produced.

4 This reveals an ongoing abuse of the discovery rules by the Defendants not known
5 prior to trial because of the failure to disclose, the delayed disclosure or misleading
6 information produced in response to interrogatories, requests for production and in
7 depositions.

8 The pattern continued in Defendants' case in chief when it produced testimony from
9 Ms. Yakimenko that, for the first time, revealed Ms. Yakimenko treated Mrs. Sharp.

10 On December 8, 2015, Defendants' attorney, who represented the LCCA, told the
11 Court she also represented Ms. Yakimenko. She asserted that since Yakimenko was her client
12 she had a right to speak with her privately despite the ruling in *Limine* preventing either
13 attorney from private "sidebars" with any witness during that witness' testimony.

14 As she testified, Ms. Yakimenko claimed to have a calendar which she consulted
15 prior to her testimony which refreshed her memory that she had been one of Mrs. Sharp's
16 nurses. Despite the promise to produce, the calendar was never disclosed and the surprise
17 testimony could not fairly be investigated by the Plaintiff for its truthfulness or lack of
18 truthfulness.

19 Dr. von Preyss-Friedman

20 The Court ruled that expert witness Dr. Benjamin W. Starnes could not give his opinion as
21 to Mrs. Sharp's anticipated date of death. The Court previously prohibited the same and
22 similar opinions by Dr. von Preyss-Friedman.⁶ When Dr. von Preyss-Friedman was called to
23 testify, the defense asked to "clarify" that order in *Limine*. The Court admonished the defense
24 that Dr. von Preyss-Friedman could only testify that Mrs. Sharp's prognosis was poor.⁷

25 Later that day, the Court further admonished that Dr. von Preyss-Friedman could not
26 testify about antibiotics. Outside the jury's presence, the Defendants' attorney stated the
27 question and the witness answered. The Court ruled only that question and the answer given
28

29 ⁶ See Rulings in *Limine* 25 & 30.

30 ⁷ See Clerk's minute entry, Dec. 10, 2014.

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1 could be heard by the jury, as long as they were verbatim to the offer of proof provided
2 outside the jury's presence.

3 Despite these clear restrictions on the expert's testimony, Dr. von Preyss-Friedman
4 directly violated the Order in Limine and the two directives given to her the previous day.⁸
5 By violating the rulings the impermissible opinion was heard by the jury. This occurred again
6 with Dr. von Preyss-Friedman when she testified on December 18, 2014. Again, the witness
7 was admonished just before the jury came in and again the witness rendered an inadmissible
8 opinion, "ringing the bell" a second time.

9 The Court, on both occasions, took time with the witness and the defense attorneys
10 to ensure both were aware of the limitations on the expert's opinion. On both occasions the
11 defense and the witness acknowledged their understanding of the ruling. Yet, within minutes
12 of the clarifications, the witness twice violated the Order in Limine. This Court finds those
13 violations of the Orders *in limine* were knowing and willful violations, which were
14 prejudicial to the Plaintiff.

15 DISCUSSION

16 This court is informed by the decisions in *Gammon v. Clark Equipment Co.*,
17 38 Wn. App. 274, 686 P.2d 1102 (1984) and *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336
18 (2012).

19 Discovery Violations: Gammon

20 In *Gammon*, a man was killed when operating a loader that fell on its side.⁹ His wife
21 ("Gammon") brought a wrongful death action against the manufacturer, distributor, and
22 lessor, (collectively referred to as "Clark" herein).¹⁰ After a jury was selected, Gammon's
23 counsel raised the issue of Clark's repeated noncompliance with an interrogatory asking
24 whether Clark had notice of any personal injuries arising out of the use of similar products.¹¹
25 To resolve the issue, Clark's employees who maintained the reports testified and indicated
26

27
28 ⁸ See Clerk's minute entry on Dec. 11, 2014.

29 ⁹ *Gammon*, 38 Wn. App. at 276.

30 ¹⁰ *Id.*

¹¹ *Id.* at 278-79.

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1 that Clark maintained two accident "books" where the accident reports were kept.¹² The court
 2 ordered the immediate production of these books, which contained undisclosed information
 3 responsive to the interrogatory inquiring about notice of injuries from previous accidents.¹³

4 Gammon suggested that the accident reports were deliberately withheld, and
 5 requested terms from the court.¹⁴ The court found that Clark was "unilaterally determining
 6 what reports were relevant," but reserved awarding sanctions until after trial.¹⁵ Gammon's
 7 counsel did not object but moved for a new trial following the jury verdict, which the court
 8 denied.¹⁶

9 On appeal, Clark maintained that Gammon should not be awarded a new trial because
 10 he failed to request a continuance during trial or move for a mistrial before it went to the
 11 jury.¹⁷ The Court of Appeals found this argument lacked merit and reversed and remanded
 12 for a new trial. In so holding, the court stated:

13 It may very well be that timely answers to the interrogatories and production
 14 of the accident reports would have made no difference. That is not for us to
 15 decide. *It is precisely because we cannot know what impact full compliance*
 16 *would have had, that we must grant a new trial.* [...] An award of \$2,500 is
 17 cheap at twice the price in the context of a \$4.5 million wrongful death case.
 18 Approval of such a de minimis sanction in a case such as this would plainly
 19 undermine the purpose of discovery. Far from insuring that a wrongdoer not
 20 profit from his wrong, minimal terms would simply encourage litigants to
 21 embrace tactics of evasion and delay. This we cannot do. [...] It was Clark's
 22 responsibility to timely answer interrogatory 20 and produce the accident
 23 reports. Requiring Gammon to disrupt her trial presentation to accommodate
 Clark would reward noncompliance. A new trial is the only practical remedy
 at this stage.¹⁸

24 ¹² *Id.* at 279. This is nearly identical to what happened in this case, when both Mr. Thompson and Ms.
 25 Yakimenko testified.

26 ¹³ *Id.* Similarly, this Court ordered immediate discovery and production of documents when their existence
 27 became known.

28 ¹⁴ *Id.* Similarly, discovery was ongoing during this Court's trial, which ultimately revealed relevant information
 29 had been deliberately withheld.

30 ¹⁵ *Id.* at 279-80. Here, the Court has stated that it appeared that Defendants' client was withholding information
 from Plaintiff.

¹⁶ *Id.* at 281. The Court did award \$2,500 in terms against Clark's counsel.

¹⁷ *Id.* at 282.

¹⁸ *Id.* (internal citations omitted, emphasis added).

MEMORANDUM OPINION ON
 PLAINTIFF'S MOTION FOR NEW
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1 The case of *Gammon* is very similar to the facts of this case. Here, the venous stasis
 2 records were disclosed on the eve of trial, the staffing reports were turned over after the
 3 Plaintiff had rested, and depositions were still being conducted during jury selection. Dr.
 4 Forbes' notes detailing the corrections she instructed the staff to use after her review of Mrs.
 5 Sharp's care were never disclosed by Defendants. Ms. Yakimenko's calendar was never
 6 turned over and the fact that she provided Mrs. Sharp treatment was not disclosed until she
 7 testified. Lastly, "correction sheets" to the punch list were not disclosed. Within the
 8 correction sheets it was discovered that some employees stated they were too busy, or the
 9 ward so understaffed, that they could not take a break or lunch.

10 As in *Gammon*, it was Defendants' responsibility to timely answer all the relevant
 11 interrogatories and produce the information. Unlike the single interrogatory at issue in
 12 *Gammon*, this case had a number of documents and an abundance of information neither
 13 identified nor produced by the Defendants in a timely manner. This information was
 14 obviously relevant to the central issue of whether there was insufficient staff to care for Mrs.
 15 Sharp—such that her infection went unnoticed and untreated to the point that the sepsis
 16 caused a cascade of organ failures—eventually resulting in her death. Comparing *Gammon*
 17 to this case, there are clearly more discovery violations existing in this case.

18 Misconduct: Teter

19 Granting a new trial under CR 59(a)(2) based on misconduct of a prevailing party
 20 requires a showing that (1) the conduct complained of is misconduct; (2) the misconduct is
 21 prejudicial; (3) the moving party objected to the misconduct at trial; and (4) the misconduct
 22 was not cured by the court's curative instructions.¹⁹

23 Ron Teter was diagnosed with a kidney tumor and his urologist performed surgery to
 24 remove the kidney, during which Teter's abdominal aorta was lacerated.²⁰ A vascular surgeon
 25 was called to repair the aorta. Immediately after surgery, Teter developed a condition causing
 26 pain in his left leg, and a lawsuit followed.²¹

27
 28 ¹⁹ *Teter*, 174 Wn.2d at 226.

29 ²⁰ *Id.* at 210-11.

30 ²¹ *Id.*

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 TRIAL

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1 In that case, during trial, defense counsel (1) continued to make speaking objections
 2 after reminders from the trial court of its prohibition; (2) attempted to put exhibits before the
 3 jury that had not been admitted and; (3) elicited testimony regarding subjects the court had
 4 ruled inadmissible or irrelevant.²² The judge made his concerns concerning defense counsel's
 5 conduct known on the record, outside the presence of the jury.²³ After the verdict, the trial
 6 court granted a new trial as the "cumulative effect of defense counsel's misconduct
 7 throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial
 8 had occurred."²⁴ The Washington Supreme Court upheld the trial court's ruling, stating
 9 where misconduct has occurred, "it would be onerous to require a party to also move for
 10 mistrial to preserve a claim for error based on misconduct."²⁵

11 In this case, as in *Teter*, this Court twice expressed its concern the Defendants were
 12 withholding information. In this case, as in *Teter*, there were late disclosures of information:
 13 that Ms. Yakimenko was one of Sharp's caretakers; that the daily staff assignments not only
 14 existed, but had been destroyed; that the punch list was not raw data, but an edited report;
 15 that edits or corrections to the data in the punch list were based upon handwritten correction
 16 slips from employees as to why they missed a break, or lunch, etc.; that some correction slips
 17 existed in archives and were not identified before trial; that none of the written notes
 18 identified by Ms. Yakimenko (reviewed to refresh her recollection) were produced and were
 19 not identified until her surprise testimony that she took care of Mrs. Sharp; that the
 20 Defendants withheld the extent of Mr. Thompson's knowledge of the business processes,
 21 data, collection of data, staff level reports, retention policies and other relevant information.

22 As in *Teter*, the Court twice admonished the Defendants and their expert witness
 23 against testifying that antibiotics were futile or that Mrs. Sharp was going to die soon—
 24 within 30 days—but the witness gave the admonished testimony in front the jury regardless.²⁶
 25 As in *Teter*, there were late disclosures of witnesses and inaccurate representations about the
 26 information the witness had. As violations occurred the Plaintiff objected, and as information

27 ²² *Id.* at 213.

28 ²³ *Id.*

29 ²⁴ *Id.* at 215.

²⁵ *Id.* at 226.

30 MEMORANDUM OPINION ON
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 TRIAL

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1 was discovered the Court ordered its production and the Defendants made their record as to
2 its adverse impact on their ability to continue.

3 Lastly, the Defendants twice made representations in open court that were simply not
4 true: that Mr. Thompson had no relevant information and that Mr. Fletcher had no connection
5 to LCCA. Had the Court itself not inquired of both individuals, the relevant information
6 likely would not have been disclosed.

7 CONCLUSION

8 Due to these discovery violations and misconduct, the Court finds the Plaintiff was
9 disadvantaged in its ability to present all relevant information in a coherent and orderly
10 fashion. The Court concludes the jury was unfairly and improperly exposed to inadmissible
11 evidence. The Defendants engaged in willful violations of discovery and obfuscation such
12 that a new trial is the only available remedy to enable the Plaintiff to have a fair trial.

13
14 DATED: This 6 day of June, 2016

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16 _____
17 JUDGE DALTON

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OCT - 5 2016

DAVID W. PETERSON

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

RONNIE LEE SHARP, as Administrator of the Estate
of Saundra Sharp, deceased,

Plaintiff,

v.

LIFE CARE CENTERS OF AMERICA, INC., a
Tennessee corporation; and CASCADE MEDICAL
INVESTORS LIMITED PARTNERSHIP, a Tennessee
entity d/b/a LIFE CARE CENTER OF PORT
TOWNSEND,

Defendants.

No. 14-2-02125-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW RE
ORDER GRANTING MOTION FOR
NEW TRIAL

Defendants are Life Care Centers of America, Inc. ("LCCA"), and Cascade Medical Investors Limited Partnership ("Cascade Medical Investors"). The case was brought by Ronnie Sharp ("Plaintiff") on behalf of the Estate of his deceased mother, Saundra Sharp; her husband, Frank Sharp; and their two sons.

From September 17, 2012, to October 17, 2012, Mrs. Sharp resided in Defendants' nursing facility, Life Care Center of Port Townsend, Washington ("Facility"). While at the Facility, she developed cellulitis, an infection, in her lower legs. The infection noticeably progressed up her legs. Ultimately, she was transferred to the Jefferson County Hospital, but the infection had advanced such that successful treatment was no longer possible. Mrs. Sharp died from sepsis, which caused multi-organ failure, on October 21, 2012.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ORDER GRANTING
MOTION FOR NEW TRIAL

App. B

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1 Plaintiff's case included claims that the owners of the Facility were negligent: (1) in their
 2 failure to treat Mrs. Sharp while the infection was survivable; and (2) by understaffing the Facility.
 3 The Defendants denied these claims. *See* Memorandum Opinion ("Order"), dated June 7, 2016,
 4 page 2. Trial commenced on November 3, 2014, against LCCA and Cascade Medical Investors.
 5 Trial included 35 court days that revealed multiple discovery violations by the defense. Trial also
 6 involved defense attorney misconduct. At the end of trial, a non-unanimous jury verdict was for
 7 the Defendants.

8 Following the verdict, Plaintiff filed a Motion for a New Trial, which this Court granted in
 9 a 13-page Opinion. In granting Plaintiff's Motion for a New Trial, and in determining these
 10 Findings of Fact and Conclusions of Law, the Court conducted trial on this case, heard oral
 11 argument on the issue for a new trial, reviewed the Court file, including the Clerk's minute entries
 12 and exhibits, and the briefs and memoranda filed by the attorneys, along with all attachments and
 13 legal research provided. *See* Order at 1. Being now fully informed in both the underlying facts and
 14 the law, the Court makes these Findings of Fact and Conclusions of Law. The Court incorporates
 15 by reference its memorandum opinion as if fully set forth herein. The Court's ruling necessarily
 16 includes the following:

17 FINDINGS OF FACT

18 1. Discovery Violations Regarding Witness Thompson's Deposition

19 A. During discovery, Plaintiff sought the deposition of LCCA regional vice president
 20 Raymond Thompson. Defendants objected to the deposition of Mr. Thompson,
 21 arguing that he had no discoverable information, and therefore opposed his
 22 availability for deposition.

23 B. During trial, it was revealed that Mr. Thompson was a fact witness and had personal
 24 knowledge of staffing levels at the Facility. *See* Order at 3.

25 C. It was also discovered during the Defendants' case-in-chief that Mr. Thompson
 26 knew how Life Care Center's data was kept and retrieved.

27 D. Also discovered during trial was the fact that Mr. Thompson failed to disclose
 28 relevant staffing reports prior to trial. *Id.*

FINDINGS OF FACT AND CONCLUSIONS
 OF LAW RE ORDER GRANTING
 MOTION FOR NEW TRIAL

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1 **2. Discovery Violations Regarding the Punch List**

2 **A. Before trial, Defendants had repeatedly represented that the punch list was raw data**
3 showing which employees entered and left the buildings during the days Ms. Sharp
4 was a resident at the facility. Mr. Thompson's trial testimony revealed that the
5 punch list was not raw data but was, in fact, an edited report. See Order at 3.

6 **B. Thompson's trial testimony showed that the Defendants edited the punch list after**
7 receiving hand-written "correction sheet" documents. These "correction sheets"
8 were requested from employees whose raw data showed an anomaly in the time
9 they were at the facility. These correction sheets are also known as Time Clock
10 Exception Slips. See Trial Exhibit 244. The correction sheets are handwritten
11 explanations from Facility staff members explaining the time anomalies in the raw
12 data, such as why they were late in punching out from their shifts, or why they
13 missed breaks and lunches. See below.

14 **C. None of the information in paragraphs A or B above, nor the time sheet documents**
15 were referenced, identified or disclosed by Defendants during discovery. This
16 information was highly responsive to a number of interrogatories, but was only
17 revealed through questions of Mr. Thompson after Plaintiff rested. Id. at 3.

18 **D. Defendants repeatedly misled Plaintiff as to the nature of the punch list by stating**
19 the punch list was the unchanged digital evidence showing the staff identities who
20 were working at the Facility during Mrs. Sharp's stay and when those employees
21 were in the building. Id. at 3-4. The defendants explained that this data was created
22 each time an employee entered and left the building, since the employee was
23 required to use a "key card" when going through an exit/entry door.

24 **E. Defendants did not disclose the punch list when responding to earlier discovery**
25 requests, but instead only disclosed it one month *after* the initial CR 30(b)(6)
26 deposition by Ms. Brooke Mueller. At the second deposition, Ms. Mueller brought
27 the punch list as an exhibit, but she was unprepared to discuss it or to answer
28 questions about staffing, despite being court ordered to be so prepared. See Order

1 at 3, fn 2; see also Order, Attachment A, page 10 (“Request No. 32: Produce the
 2 LCC PT and LCCA employee time cards for September and October 2012 at the
 3 LCC PT location, as testified to having been reviewed by Ms. Mueller at her
 4 suspended August 20th deposition. Response: No ‘employee time cards’ are
 5 maintained. Assuming this Request seeks the employee punch detail, see
 6 attached.”).

7 **3. Discovery Violations Regarding Correction Sheets**

8 A. The “correction sheet” documents included statements from staff members to
 9 explain time anomalies noted by the computer in their shifts, such as why the
 10 employee missed breaks and/or lunches. See Order at 3. The correction sheets
 11 contained, inter alia, explanations that, due to staffing issues, the employees were
 12 too busy trying to provide patient care to take a scheduled break. For example, one
 13 caregiver noted on a correction sheet (dated contemporaneously with Mrs. Sharp’s
 14 stay at the Facility) that the caregiver was “unable to take lunch, resident needs.”
 15 See Trial Exhibit 244, page 2 of 77. Another noted, “Resident Needs—Admits x3.
 16 No lunch no time to [sic] busy.” *Id.* at 5. Another noted, “Resident Needs, Too
 17 busy.” *Id.* at 11; see also 21 (same). Another noted the reason for interrupted meal
 18 break, “staffing, call lites [sic] challenge.” *Id.* at 14; see also 15 (same). Another
 19 noted, “no lunch (2 aides only on C), too many residents needs, call lights.” *Id.* at
 20 19; see also 36, 37, 43-47, 49, 53, 55, 57, 58, 61-63. One staff member wrote an
 21 additional message that “C-side is unable to get lunch [with] only two aides—these
 22 are strong aides.” *Id.* at 73.

23 B. This information was clearly relevant to Plaintiff’s claim that understaffing at the
 24 Facility deprived Mrs. Sharp of needed attention by the facility’s staff. Defendants
 25 and Mr. Thompson were aware that this information existed, but withheld the
 26 information during discovery. Defendants did not identify nor disclose the
 27 existence of these relevant documents during any of their discovery responses. Mr.
 28 Thompson’s testimony at trial (in Defendants’ case-in-chief) revealed the existence

1 these correction sheets and that they were maintained in the corporate archives and
2 easily retrieved.

3 C. Plaintiff had requested identification and production of such documents in
4 discovery. See Order, Attachment B, page 8 (interrogatory) and page 21 (request
5 for production); see also *infra*, Discovery Violations Regarding Staffing Levels,
6 and Discovery Violations on CR 30(b)(6) Deposition (on staffing).

7 **4. Discovery Violations Regarding Staffing Levels**

8 A. Plaintiff requested information regarding patient-to-staff ratios at the facility. See
9 Order, Attachment B, page 16.

10 B. Plaintiff also requested all documents that related to LCCA's evaluation of staffing
11 levels at the facility. See Order, Attachment A, page 11.

12 C. Plaintiff also requested all documents reflecting staffing levels and other
13 information in Mrs. Sharp's unit. *Id.* at page 6.

14 D. Defendants response to discovery requests seeking documents related to staffing
15 levels as follows: Plaintiff requested "all documents reflecting which LCC PT unit
16 Mrs. Sharp was assigned to, how many residents were in that unit during the time
17 Mrs. Sharp was there, how many staffing shifts were assigned to that unit, the
18 names of each staff member assigned to that unit, and the names of the staff
19 members who actually worked each shift for that unit." *Id.* Defendants produced
20 no documents in response, stating in their answer to this interrogatory: "No such
21 documents are designated by 'unit.'"

22 E. Defendants did not amend the answer to the staffing interrogatory noted above at
23 any time prior to or during trial.

24 F. At trial, former employee Nurse Berl testified that the Facility was divided into the
25 "A side" the "B side" and the "C side."

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1 G. Other former facility employees testified that documents entitled "daily staffing
 2 sheets" designated what employees worked in which units (A, B, or C) and were
 3 responsible for a particular resident's chart notes.

4 H. Daily staffing sheets were relevant to the Plaintiff's interrogatories and to their
 5 claims.

6 I. Mr. Thompson testified at trial that the three sides A, B and C referred to the
 7 Facility's different "wings."

8 J. As a result, the court concludes that defendants' discovery response "No such
 9 documents are designated by 'unit.' was intentionally evasive and misleading.
 10 Defendants had an ongoing affirmative obligation to identify the documents and to
 11 disclose the documents pursuant to the intent of the discovery rules.

12 **5. Discovery Violations Regarding Daily Staffing Sheets**

13 A. In discovery, Defendants failed to disclose the existence of the daily staffing sheets,
 14 which detailed employee assignments by unit for each shift of each day. See Order,
 15 page 4.

16 B. Defendants also failed to disclose their destruction of the daily staffing sheets. Id.

17 **6. Discovery Violations Regarding Corporate Witness Depositions**

18 A. In discovery, Plaintiff requested a CR 30(b)(6) corporate witness on certain topics,
 19 including the number of nurses and staff members on duty for each shift during
 20 Mrs. Sharp's residency. LCCA designated Ms. Brooke Mueller to speak on the
 21 topics. At the first deposition (August 20, 2014), Ms. Mueller was unprepared to
 22 answer many questions, and was instructed by counsel for LCCA not to answer
 23 many questions that were within the scope of the 30(b)(6) notice.

24 B. Plaintiff suspended the CR 30(b)(6) deposition and moved to compel the deposition
 25 of a prepared CR 30(b)(6) corporate witness. The Court granted Plaintiff's motion
 26 to compel a prepared CR 30(b)(6) witness in an Order dated September 12, 2014.
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1 C. In that Order, the Court instructed defense counsel not to interfere with the
2 deposition by making speaking objections or interposing relevancy objections. The
3 Court also specifically noted that the CR 30(b)(6) topics noted by Plaintiff were
4 "relevant and not unduly burdensome." The rule requires that defendants produce
5 a witness prepared to testify on the approved topics.

6 D. Defendants produced Ms. Mueller a second time as their CR 30(b)(6) witness on
7 October 6, 2014. She brought with her a "punch list" that she testified she could
8 interpret to determine who was working at a given time. During the deposition,
9 however, Ms. Mueller continued to be unable to answer basic questions, including
10 which nurses were on duty during particular shifts, or which level of training each
11 nurse's possessed. Ms. Mueller was once again not prepared to answer questions as
12 a CR 30(b)(6) corporate witness.

13 E. Ms. Mueller stated that the "punch list" contained all the responsive information
14 possessed by the Defendants about staffing and the identity of all staff who were
15 present during Mrs. Sharp's stay at the facility.

16 F. At that time, the court ruled that the failure by Defendants to produce a prepared
17 witness was willful because the Defendants' attorneys were aware of their
18 obligation under the court rules to provide a prepared corporate witness and failed
19 to do so.

20 G. As a result of the defendants' willful violation of CR 30(b)(6), relevant information
21 maintained by the Defendants was not disclosed. See Order, page 3.

22 H. Ms. Mueller's lack of preparation to testify as a corporate witness was not an
23 outlier. Other executives (including Dinh, Yakimenko, and Thompson) produced
24 by Defendants to testify on corporate witness topics were not prepared to testify on
25 all of the identified topics. See Plaintiff's Motion for CR 37 Sanctions and
26 supporting materials and Plaintiff's Opposition to Defendants' Motion to
27 Reconsider Sanctions and supporting materials.

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1 I. As a result, the court affirms its earlier conclusions that the defendants' failure to
 2 produce prepared corporate witnesses was willful and deliberate. Further, the court
 3 concludes that the sanction it imposed at trial: to limit Ms. Mueller's testimony to
 4 her deposition testimony, denied the Plaintiff's an opportunity to discover and
 5 produce for the jury information relevant to the pre-defined 30(b)(6) topics from
 6 the corporate witnesses.

7 **7. Discovery Violation Related to Expert Opinion**

8 A. During pretrial limiting motions, the Court ordered that Dr. Sabine von Preyss-
 9 Friedman was prohibited from rendering any opinion on the futility of treatment for
 10 Mrs. Sharp's infection or her life expectancy. See Order, page 3; see also Order on
 11 Plaintiff's Motions in Limine Nos. 25 and 30, dated December 10, 2014.

12 B. This order was repeated and clarified to Defendants' counsel and the witness out of
 13 the jury's presence shortly before the witness testified. This witness directly
 14 violated the Court's rulings despite the repeated clarification. See Order, page 3.

15 C. The court concludes that the violation of the order in limine was malicious.

16 **8. Discovery Violation for Failure to Disclose Yakimenko as a Fact Witness**

17 A. Defendants did not disclose Nataliya Yakimenko as a fact witness prior to trial (see
 18 Order, page 3) despite their discovery obligation. See Order, Attachment B, pages
 19 5, 10. (Ms. Yakimenko's title was Regional Director of Clinical Services for
 20 LCCA; she oversaw a number of LCCA facilities in the region).

21 B. At trial and during Defendants' case-in-chief, Ms. Yakimenko offered surprise
 22 testimony that she was one of Ms. Sharp's treating providers and that she was
 23 present at the Facility during several critical days during Mrs. Sharp's residency.
 24 Yakimenko testified that she had reviewed her "calendar" before testifying to
 25 refresh her memory. The defendants did not disclose this testimony before their
 26 case in chief. The defendants also stated they would produce the calendar but did
 27 not.

1 **9. Discovery Violation for Failing to Disclose Ms. Yakimenko's "Calendar"**

2 A. In discovery, Plaintiff requested documents and information related to Mrs. Sharp's
3 care and treatment at the Facility. *See* Order, Attachment A, page 6 (RFPs Nos. 12
4 and 14); Attachment B, page 5 (Interrogatory No. 8). The Court also ordered prior
5 to trial that witnesses must produce documents they reviewed in preparation for
6 trial testimony. *See* Order *in limine* No. 12 (requiring defense counsel to produce
7 all documents reviewed by defense witnesses in preparation for trial). Despite the
8 Order *in limine* and the previous discovery requests, Defendants failed to produce
9 the calendar upon which Ms. Yakimenko relied during her testimony nor did they
10 describe in advance any of the surprise testimony. See Order, page 3.

11 B. The court concludes that the defendants failure to disclose Ms. Yakimenko's
12 surprise testimony and to produce her calendar was a breach of their duty under the
13 discovery rules to amend any answers to interrogatories or requests for production
14 upon discovery of new information, and was a willful violation of the ruling in
15 limine requiring that any document a witness used to prepare for their testimony be
16 produced before the witness testified.

17 **10. Discovery Violations for Defendants' Failure to Disclose Medical Director's Work**
18 **Regarding Mrs. Sharp**

19 A. In discovery, Plaintiff requested identification of all persons who had knowledge
20 of facts relevant to the case. *See* Order, Attachment B, page 5 (Interrogatory No. 8).
21 Plaintiff also requested all documents related to any internal investigation of Mrs.
22 Sharp's care. *See* Order, Attachment A, page 12 (RFP No. No. 41). Plaintiff also
23 requested all documents related to remedial measures taken to improve wound care
24 or infection control at LCCA facilities, including those related to Mrs. Sharp's case.
25 *See* Order, Attachment A, page 5 (RFP No. 11), and 12 (RFP No. 43). The
26 defendants answered that none existed.

27 B. At trial, a former nurse at the Facility testified that the Defendants' medical director,
28 Dr. Karen Forbes, shortly after Mrs. Sharp's death, convened a post-death meeting

1 at the facility with all staff members. The purpose of the meeting was to identify
 2 deficiencies in Mrs. Sharp's care and/or deficiencies in charting that Dr. Forbes
 3 identified along with corrections deemed necessary by Dr. Forbes. According to
 4 the nurse's recollection, Dr. Forbes prepared a packet of her own notes and selected
 5 chart notes from Mrs. Sharp's medical file and then used those as a hand-out to
 6 point out deficiencies in the assessment, identification, and charting of Mrs. Sharp's
 7 wounds and spreading infection. See Trial Exhibit 179.

8 C. The court concludes that Plaintiff's discovery requests noted in paragraph A above
 9 were inclusive enough such that Defendants were required disclose the existence
 10 of the meeting, the identities of persons present at the meeting, nor the documents
 11 related to the meeting, including Dr. Forbes' notes and documents which she
 12 discussed with the nurses. See Order, page 4.

13 **11. Discovery Violations for Failure to Timely Disclose the "Venous Ulcer Stasis"**
Records

- 14 A. In discovery, Plaintiff requested all medical records related to Mrs. Sharp's care.
 15 See Order, Attachment B, page 18.
- 16 B. Plaintiffs discovered that Defendants' Director of Nursing maintained a "Wound
 17 Care Book" that contained records Plaintiff had not received in discovery, even
 18 though defendants had not disclosed nor identified this information in early
 19 discovery.
- 20 C. Plaintiff then requested the Wound Care Book. See Order, Attachment A, page 6
 21 (RFP No. 15). Defendants, however, objected to its production without seeking a
 22 protective order, and did not produce any of the information. *Id.* at 7.
- 23 D. Days before trial, which was clearly untimely, Defendants disclosed the records,
 24 citing a "filing error." See Order, page 4, ¶ 10, fn 4. The "Wound Care Book"
 25 records included descriptions, drawings, and notes generated by Facility nurses that
 26 specifically related to Ms. Sharp's wounds on her legs. They were titled "venous
 27 arterial / stasis ulcer" records. *Id.*; see also Trial Ex. 222.

1 E. The court concludes that the records from the "wound care book" were relevant
 2 medical records to the issues in this case, and responsive to Plaintiff's earliest
 3 requests for production of medical records. Even though a filing error apparently
 4 precluded their timely disclosure, there is nothing in the record to explain why the
 5 defendants did not identify that these documents existed.

6 **12. Discovery Violations for Late Disclosure of Relevant Documents**

7 A. In addition to the venous ulcer stasis, or Wound Care Book, records, Defendants
 8 failed to timely disclose their "Guide to Infection Control" and the "Punch List".
 9 See Order, page 4.

10 **13. Discovery Violations for False and Misleading Information**

11 A. Defendants stated to the court that "Mr. Thompson has no discoverable information
 12 related to this lawsuit" when they objected that the Plaintiff's request to depose
 13 Thompson was harassment. *See Order, page 4.*

14 B. During trial, the court discovered that Mr. Thompson possessed relevant factual
 15 information such as: (a) contrary to Defendants' previous repeated assertions, the
 16 "punch list" was not a printout of raw data, but rather was an edited report, (b)
 17 employees were required to fill out and submit "correction sheets" to explain why
 18 they didn't take breaks or lunches when the computer noted an anomaly in the time
 19 stamps from their key cards; and (c) that these handwritten correction sheets existed
 20 in the corporate archives. *Id.*

21 C. The court concludes that the defendants were aware that the punch list was a report
 22 produced after entry of corrections from employees and that correction slips existed
 23 which explained why some employees missed breaks or lunches at the facility. The
 24 failure to identify these records or produce them was willful and likely the existence
 25 of the documents would have gone undiscovered but for questions posed to Mr.
 26 Thompson out of the jury's presence.

1 **14. Discovery Violations for Misleading Answers to Interrogatories**

2 **A. None of the information described above was produced by Defendants in discovery**
 3 **(except the late disclosed venous stasis records described above). See Order, page 5.**
 4 **Instead, the information and/or documentation was "accidentally" discovered**
 5 **during trial when the item or subject was identified during questioning of witnesses.**

6 **Id.**

7 B. The Plaintiff interrogatories and requests for production, included the information
 8 described above as indicated herein:

- 9 • **In response to Interrogatory No. 14, Defendants should have identified and**
 10 **produced the venous stasis records, Dr. Forbes' notes, the existence of data the**
 11 **employer produced on staffing levels, and the existence of correction sheets**
 12 **written by employees. Id.**
- 13 • **In response to Interrogatories Nos. 8 and 18, Defendants failed to produce**
 14 **venous stasis records, did not identify Ms. Yakimenko as a treating nurse, and**
 15 **failed to disclose her "calendar." Id.**
- 16 • **In response to Interrogatories No. 9 and 27, Defendants failed to disclose Dr.**
 17 **Forbes' notes from her investigation of Mrs. Sharp's medical file following**
 18 **her death and Dr. Forbes conducting a meeting to highlight some of the issues**
 19 **the Dr. discovered in the records about Mrs. Sharp's care and/or the charting**
 20 **of her condition. Id.**
- 21 • **In response to Interrogatory No. 31, Defendants failed to disclose the existence**
 22 **of staffing reports that had been generated through data queries by Mr.**
 23 **Thompson relevant to the issues presented in this case. (Staffing reports are**
 24 **not to be confused with the daily staffing sheets, which Defendants destroyed.)**
 25 **The court concludes that instead, in discovery responses Defendants gave the**
 26 **misleading answer that "staffing levels vary but no significant increases or**
 27 **decreases." With no disclosure that their computer system could generate**
 28 **different types of staffing reports upon a query. Id.**

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- 1 • In response to Interrogatory No. 32, the court concludes that defendants gave
 2 a misleading and evasive answer regarding staffing, education, and licensing
 3 levels for caregivers based upon the following: During trial, Defendants
 4 produced reports showing that Mr. Thompson was aware of staffing levels
 5 during Mrs. Sharp's care, that he had looked at and knew that different reports
 6 relevant to the discovery requests either existed or could be generated again by
 7 the computer system and that the defendants failed to identify them previously
 8 Id. at 4-5.
- 9 • Request for Production No. 10 asked Defendants to produce records
 10 responsive to Interrogatory No. 14, but Defendants failed to produce relevant
 11 electronic data as well as responsive documents they possessed. Id. at 5.
- 12 • In response to Request for Production No. 12 and Interrogatory No. 16,
 13 Defendants failed to disclose the nature of, and inter-relationships of the two
 14 Defendants and their Facility that were involved in the care of Mrs. Sharp. Id.
- 15 • In response to Interrogatory No. 33 and Request for Production No. 20,
 16 Defendants answered but failed to provide the documentation that existed
 17 showing their calculations. Id.
- 18 • In response to Request for Production No. 41 (relating to the internal
 19 investigation of Mrs. Sharp's care), Defendants failed to disclose that their
 20 medical director investigated the Facility's care of Mrs. Sharp—or lack
 21 thereof—and then that the Director held a meeting to correct what the director
 22 identified as deficiencies; Defendants also failed to produce the director's
 23 notes. Id. at 6.

24 **15. Defense Attorney Misconduct for the CR 30(b)(6) Corporate Witness**

- 25 A. Before trial, the Court ruled that Defendants' failure to produce a CR 30(b)(6)
 26 witness was a willful discovery violation. At the second deposition, Defendants
 27 produced Ms. Mueller who brought with her to the deposition a document she
 28

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1 identified as a "punch list." She testified that this document contained all the
 2 responsive information possessed by the Defendants about staffing and the identity
 3 of all staff who were present during Mrs. Sharp's stay at the Facility. It was clear
 4 at the time of the deposition that Ms. Mueller was not a prepared corporate witness.
 5 Additionally, the court concludes that she presented misleading information about
 6 the punch list. The extent of the failure to produce a prepared corporate witness was
 7 not fully revealed until late in the trial, after Mr. Thompson's testimony. See Order,
 8 page 6.

9 B. Mr. Thompson was unable to respond to questions about staffing levels at his
 10 deposition other than to refer to the newly produced punch list. At trial, after Mr.
 11 Thompson testified about the punch list, it was clear that Ms. Mueller misled the
 12 Plaintiff's attorneys about how the punch list was created. Id.

13 C. The Court concludes that the second failure to produce a prepared corporate witness
 14 was willful.

15 **16. Defense Attorney Misconduct Regarding VP Mr. Thompson.**

16 A. The defense falsely stated that Mr. Thompson did not have relevant information,
 17 when defendant was objecting to Plaintiff's attempts to depose him as harassment.
 18 These false representations were relied upon by the Court when it ruled on
 19 Defendants' motion. See Order, page 6.

20 B. Mr. Thompson's deposition was taken, but neither he nor defense counsel disclosed
 21 the existence of "absence slips corrections" (a/k/a correction sheets or time clock
 22 exception slips); the type of data kept in the Facility's computers; his knowledge of
 23 the data; how to extract data in specified reports; or how the punch list was created.
 24 Id. at 6-7.

25 C. The defendants knew Mr. Thompson possessed relevant information and failed to
 26 disclose it, Id. at 7. The statements that Mr. Thompson had no relevant information
 27 hid what Mr. Thompson actually knew. Thereafter, the defendants never identified
 28 nor disclosed the extent of Mr. Thompson's knowledge.

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1 D. All of the information described herein was discoverable, known to the defendants
 2 and responsive to Plaintiff's interrogatories and requests for production.

3 E. The court concludes that Plaintiffs were clearly prejudiced by this obfuscation. *Id.*

4 F. Because the discovery of this relevant information was only discovered through the
 5 Court's own inquiry of Mr. Thompson - late in the Defendants' case-in-chief - this
 6 Court easily concludes that but for the Court's inquiry, this relevant information
 7 would never have been discovered nor disclosed. *Id.*

8 **17. Defense Attorney Misconduct Regarding Mr. Fletcher.**

9 A. On November 26, 2014, the defense interrupted Plaintiff's case to accuse Plaintiff
 10 of harassment because their attorneys served a subpoena upon a person named
 11 Fletcher. This person was a member of the public who had been in the courtroom
 12 during the trial and who appeared to be interested in the Plaintiff's case. The
 13 defense claimed that not only did Mr. Fletcher have no relevant information, he had
 14 no connection to LCCA. See Order, page 7. The defendant's never disclosed,
 15 otherwise.

16 B. The next court day, the Court inquired of Mr. Fletcher outside the jurors' presence.
 17 Mr. Fletcher stated that he did have a connection to LCCA and that he could
 18 potentially identify a management agreement relevant to the case.

19 C. The Court infers that the defense had either failed to conduct an appropriate inquiry
 20 of Mr. Fletcher before making the false factual assertions, or the defense actively
 21 misled the Court. Either way, the defense made a false statement to the Court which
 22 the court concludes would have gone undiscovered but for the court's inquiry of
 23 the witness. *Id.*

24 **18. Defense Attorney Misconduct Regarding Amended Witness List.**

25 A. An Amended Defendants' Witness List was provided to Plaintiff toward the close
 26 of Plaintiff's case on December 2, 2014. It contained new witnesses not previously
 27 disclosed. It additionally failed to include information previously requested of a
 28

1 testifying witness (see Clerk's Minute Entry for Dec. 4, 2014), despite prior
 2 motions to and order to compel discovery. See Order, pages 7-8. The Defendants
 3 argued that "the information would be provided before anyone testifies."

4 B. The Court ruled that all relevant information which the Court was now aware
 5 existed and was in the Defendants' possession, must be produced. Id. at 8.

6 **19. Defense Attorney Misconduct Regarding Ms. Yakimenko.**

7 A. The pattern continued in Defendants' case-in-chief when the defense produced for
 8 the first time, testimony that revealed Ms. Yakimenko treated Mrs. Sharp. Id.¹

9 B. As she testified, Ms. Yakimenko claimed to have a calendar that she reviewed
 10 before she testified which refreshed her memory. Ms. Yakimenko suddenly
 11 remembered during the defendant's case in chief, that she had been one of Mrs.
 12 Sharp's nurses.

13 C. Despite the Order *in limine* requirement and the defense's subsequent promise to
 14 produce the calendar, as well as plenty of time to produce the calendar, it was never
 15 disclosed.

16 **20. Defense Attorney Misconduct for Testimony of Dr. von Preyss-Friedman.**

17 A. The Court ruled that expert witness Dr. Benjamin W. Starnes could not give his
 18 opinion as to Mrs. Sharp's anticipated date of death. The Court previously
 19 prohibited the same and similar opinions by Dr. von Preyss-Friedman. When Dr.
 20 von Preyss-Friedman was called to testify, the defense asked to "clarify" that Order
 21 *in limine*. The Court admonished the defense that Dr. von Preyss-Friedman could
 22 only testify that Mrs. Sharp's prognosis was poor. See Order, page 8.

23
 24
 25 ¹ On December 8, 2015, Defendants' attorney told the Court that she also represented Ms. Yakimenko. This is curious
 26 because Ms. Yakimenko was an employee of the company which the defense attorney was defending in the suit. The
 27 defense attorney asserted that since Ms. Yakimenko was her client, she had a right to speak with her privately despite
 28 the ruling in limine preventing either side's attorneys from private sidebars with any witness during that witness'
testimony. Id.

- 1 B. Later that day, the Court further admonished that Dr. von Preyssh-Friedman could
 2 not testify about antibiotics. Outside the jury's presence, the Defendants' attorney
 3 stated the question and the witness answered. The Court ruled only that question
 4 and the answer given could be heard by the jury, as long as they were verbatim to
 5 the offer of proof provided outside the jury's presence, *Id.* at 8-9.
- 6 C. Despite these clear restrictions on the expert's testimony, Dr. von Preyssh-Friedman
 7 directly violated the Order *in limine* and the two directives given to her the previous
 8 day. See Clerk's Minute Entry on Dec. 11, 2014. By violating the rulings, the
 9 impermissible opinion was heard by the jury. This occurred again with Dr. von
 10 Preyssh-Friedman when she testified on December 18, 2014. Again, the witness was
 11 admonished just before the jury came in and again the witness rendered an
 12 inadmissible opinion, "ringing the bell" a second time. *Id.* at 9.
- 13 D. The Court, on both occasions, took time with the witness and the defense attorneys
 14 to ensure both were aware of the limitations on the expert's opinion. On both
 15 occasions, the defense and the witness acknowledged their understanding of the
 16 ruling. Yet, within minutes of the clarifications, the witness twice violated the Order
 17 *in limine.*
- 18 E. This Court finds those violations of the Orders *in limine* by the witness were
 19 knowing and willful violations, which were prejudicial to the Plaintiff. *Id.*

CONCLUSIONS OF LAW

20 DISCUSSION: The Court is informed by *Gammon v. Clark Equipment Co.*, 38 Wn. App.
 21 274, 686 P.2d 1102 (1984); *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). See Order, page
 22 9. The Court concludes *Gammon* is very similar on its facts to the case at bar and is guided by the
 23 decision in *Gammon*. Here, the venous stasis records were disclosed on the eve of trial; the staffing
 24 reports were turned over after the Plaintiff had rested; and depositions were still being conducted
 25 during jury selection. Dr. Forbes' notes detailing the corrections she instructed the staff to use after
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1 her review of Mrs. Sharp's care were never disclosed by Defendants. Ms. Yakimenko's calendar
2 was never turned over and the fact that she provided Mrs. Sharp treatment was not disclosed until
3 she testified in Defendants' case-in-chief. Lastly, "correction sheets" to the punch list were not
4 disclosed. Within the correction sheets it was discovered that some employees stated they were
5 too busy, or the Facility so understaffed, that they could not take breaks or lunches. As in *Gammon*,
6 it was Defendants' responsibility to timely answer all the relevant interrogatories and produce the
7 information. Unlike the single interrogatory at issue in *Gammon*, this case had a number of
8 documents and an abundance of information neither identified nor produced by the Defendants in
9 a timely manner. This information was obviously relevant to the central issue of whether there was
10 insufficient staff to care for Mrs. Sharp—such that her infection went unnoticed and untreated to
11 the point that sepsis caused a cascade of organ failures—eventually resulting in her death.
12 Comparing *Gammon* to this case, there are clearly more discovery violations existing in this case.
13
14

15 As to the defendant's misconduct, the Court is guided by the discussion in *Teter*. Granting
16 a new trial under CR 59(a)(2) based on misconduct of a prevailing party requires a showing that
17 (1) the conduct complained of is misconduct; (2) the misconduct is prejudicial; (3) the moving
18 party objected to the misconduct at trial; and (4) the misconduct was not cured by the court's
19 curative instructions.²
20

21 Ron Teter was diagnosed with a kidney tumor and his urologist performed surgery to
22 remove the kidney, during which Teter's abdominal aorta was lacerated.³ A vascular surgeon was
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27 ² *Teter*, 174 Wn.2d at 226.

³ *Id.* at 210-11.

28
FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ORDER GRANTING
MOTION FOR NEW TRIAL

JUDGE JEANETTE DALTON
Kitsap County Superior Court
614 Division Street
Port Orchard, WA 98366
(360) 337-7140

1 called to repair the aorta. Immediately after surgery, Teter developed a condition causing pain in
2 his left leg, and a lawsuit followed.⁴

3 In that case, during trial, defense counsel (1) continued to make speaking objections after
4 reminders from the trial court of its prohibition; (2) attempted to put exhibits before the jury that
5 had not been admitted and; (3) elicited testimony regarding subjects the court had ruled
6 inadmissible or irrelevant.⁵ The judge made his concerns concerning defense counsel's conduct
7 known on the record, outside the presence of the jury.⁶ After the verdict, the trial court granted a
8 new trial as the "cumulative effect of defense counsel's misconduct throughout the trial
9 proceedings warrants a new trial, as it casts doubt on whether a fair trial had occurred."⁷ The
10 Washington Supreme Court upheld the trial court's ruling, stating where misconduct has occurred,
11 "it would be onerous to require a party to also move for mistrial to preserve a claim for error based
12 on misconduct."⁸

13 In this case, as in *Teter*, this Court expressed its concerns the Defendants were withholding
14 information. In this case, as in *Teter*, there were late disclosures of information: 1) that Ms.
15 Yakimenko was one of Sharp's caretakers; 2) that none of the written notes identified by Ms.
16 Yakimenko (reviewed to refresh her recollection) were not identified until her surprise testimony
17 that she took care of Mrs. Sharp; 3) that Ms. Yakimenko's calendar was never produced; 4) that
18 the daily staff assignments in the form of daily staffing sheets had not only existed, but had been
19 destroyed; 5) that Medical Director Dr. Forbes' notes on deficiencies she identified in Mrs. Sharp's
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25 ⁴ *Id.*

26 ⁵ *Id.* at 213.

27 ⁶ *Id.*

28 ⁷ *Id.* at 215.

⁸ *Id.* at 226.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ORDER GRANTING
MOTION FOR NEW TRIAL

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1 care were never produced; 6) that the punch list was not raw data, but an edited report; 7) that edits
2 or corrections to the data in the punch list were based upon handwritten correction slips from
3 employees as to why they missed a break, or lunch, etc.; 8) that some correction slips existed in
4 archives and were not identified and produced before trial; 9) that the Defendants withheld the
5 extent of Mr. Thompson's knowledge of the business processes, data, collection of data, staff level
6 reports, retention policies and other relevant information.
7

8 As in *Teter*, the Court twice admonished the Defendants and their expert witness against
9 testifying that antibiotics were futile or that Mrs. Sharp was going to die soon within 30 days—but
10 the defense witness gave the impermissible testimony in front the jury regardless. As in *Teter*,
11 there were late disclosures of witnesses and inaccurate representations about the information the
12 witness had. As violations occurred the Plaintiff objected, and as information was discovered the
13 Court ordered its production and the Defendants made their record as to its adverse impact on their
14 ability to continue. Lastly, the Defendants twice made false representations in open court: that Mr.
15 Thompson had no relevant information; and that Mr. Fletcher had no connection to LCCA. The
16 defendants knew those representations were false. At the very least, the defense attorneys failed to
17 conduct a preliminary inquiry of their client before the attorneys made these statements to the
18 Court, which the Court relied upon. Had the Court itself not inquired of both individuals, the
19 relevant information likely would not have been disclosed.
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23 Therefore, based on the factual findings and the discussion above, the court concludes:

24 1. The Court concludes that, when all the recitations of fact contained herein reviewed
25 as a whole within the context of the pretrial discovery documents and evidence produced at trial,
26 there is revealed a clear pattern of ongoing abuse of the discovery rules by the Defendants.
27
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FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ORDER GRANTING
MOTION FOR NEW TRIAL

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1 2. Prior to trial and during trial, the extent of the discovery abuses could not be
2 discerned until a complete record was produced. This record necessarily included all documents
3 produced in discovery, the interrogatories, and the requests for production. Then those documents
4 needed to be examined as a whole, and compared to the information that was ultimately disclosed
5 by witnesses by the court's own questions, the witness's "accidental" disclosure, argument of
6 counsel, and documents produced by the defense throughout the trial as exhibits.

7 3. The Court concludes that the defendants abused the discovery process including
8 but not limited to: a) delayed/ untimely disclosures, b) the misleading information produced in
9 response to interrogatories, requests for production, c) the failure to produce prepared corporate
10 witnesses, d) the lack of diligence in responding to discovery either by producing relevant
11 information, asking for clarification or identifying relevant records, e) by obfuscating interrogatory
12 answers: stating, for example, that the defendants had no responsive or relevant documents to
13 questions in which the plaintiffs used a word "units" as a descriptive word for patient facilities.
14 Since the facility used the words "wings" or "sides" instead of "units." The defense chose to
15 withhold relevant documents and did not disclose its own descriptive words for the same facility,
16 nor did they attempt to clarify whether the word "units" meant a patient facility, as it is clear in
17 context that the word "units" was synonymous with patients' rooms/ areas of rooms. f) the failure
18 to responsibly prepare and supervise the defense expert witness—given that the witness had once
19 violated the Court's opinion restricting order in limine and g) the reckless or willful false
20 statements to the Court, with the intent that the Court rely upon the statements. The Defendants
21 engaged in willful violations of discovery and obfuscation that unfairly disadvantaged the Plaintiff
22 in its ability to obtain all relevant information in a coherent and orderly fashion before trial the
23 Court concludes unfairly prejudiced the Plaintiff and prevented a fair trial.

24 4. The defense misconduct unfairly and improperly exposed the jury to inadmissible
25 evidence. *See* Order, page 13, [The second occasion the Court instructed the jury to disregard the
26 statement by the witness, but it is clear that on both occasions the witness was deliberate in getting
27 the inadmissible opinion in front of the jury, regardless of the Court's admonitions].
28

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE ORDER GRANTING
MOTION FOR NEW TRIAL

JUDGE JEANETTE DALTON
Kitsap County Superior Court
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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITSAP COUNTY

RONNIE LEE SHARP, as Administrator of
the Estate of Sandra Sharp, deceased,

No. 14-2-02125-1

Plaintiff,

vs.

LIFE CARE CENTERS OF AMERICA,
INC., a Tennessee corporation; and
CASCADE MEDICAL INVESTORS
LIMITED PARTNERSHIP, a Tennessee
entity d/b/a LIFE CARE CENTER OF PORT
TOWNSEND,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER ON
PLAINTIFF'S PETITION FOR
ATTORNEY FEES AND COSTS

THIS MATTER is before the Court upon Plaintiff's Petition for Attorney Fees and Costs ("Petition"). The Petition has been filed pursuant to this Court's Memorandum Opinion on Plaintiff's Motion for New Trial ("Memorandum Opinion"), entered June 7, 2016; and the Court's Findings of Fact and Conclusions of Law re Order Granting Motion for New Trial ("Court's Findings"), entered October 5, 2016. In the Court's Findings, the Court stated that "Plaintiff may petition the Court for reasonable fees and costs incurred as the result of time and expense lost due to Defendants' violations of discovery obligations, obfuscation, and/or defense counsel misconduct, including time lost to trial."¹

¹ Court's Findings, at 22.

ORDER

- 1 -
App. C

JUDGE JEANETTE DALTON
Kitsap County Superior Court
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Port Orchard, WA 98366
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1 Plaintiff now seeks those hours and costs related to time spent in trial while Court
2 was in session, in addition to some of the briefing done during trial. Plaintiff requests
3 \$294,401.24 in costs and attorney's fees, and also suggests a multiplier may be appropriate.
4 Defendant Life Care Centers of America ("LCCA") ask that the Court refrain from awarding
5 fees and costs from the first trial, as LCCA has already been sanctioned in the award of a
6 new trial. In the alternative, Defendant asks that should fees be granted, that Plaintiff's stated
7 rates are unreasonable, the rates should be lowered, and some costs and fees, that would be
8 accrued anyway, should be denied.

9 The matter came on for hearing on September 30, 2016. The Court requested
10 supplemental briefing on the issues, which both parties provided on October 14, 2016.

11 In ruling on the Petition, the Court has reviewed and considered the following:

- 12 1. Plaintiff's Petition for Attorney Fees and Costs;
- 13 2. Declaration of Harry ("Dee") Taylor in Support of Plaintiff's Petition for Attorney Fees
14 and Costs;
- 15 3. Declaration of David P. Roosa in Support of Plaintiff's Petition for Attorney Fees and
16 Costs, and attached exhibits;
- 17 4. Declaration of Cameron Taylor in Support of Plaintiff's Petition for Attorney Fees and
18 Costs;
- 19 5. Declaration of Sean J. Gamble in Support of Plaintiff's Petition for Attorney Fees and
20 Costs, and attached exhibits;
- 21 6. Declaration of Don C. Banermeister in Support of Plaintiff's Petition for Attorney Fees
22 and Costs, and attached exhibits;
- 23 7. Defendants' Opposition to Plaintiff's Motion for Fees and Costs;
- 24 8. Declaration of Pamela Andrews in Support of Defendants' Response to Plaintiff's
25 Motion for Fees;
- 26 9. Plaintiff's Reply in Support of Petition for Attorney Fees and Costs;
- 27 10. Supplemental Declaration of Sean J. Gamble in Support of Plaintiff's Petition for
28 Attorney Fees and Costs, and attached exhibits;
- 29 11. Declaration of Harish Bharti in Support of Plaintiff's Petition for Attorney Fees and
30 Costs;
12. Declaration of James A. Hertz in Support of Plaintiff's Petition for Attorney Fees and
Costs;

ORDER

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JUDGE JEANETTE DALTON
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- 1 13. Defendants' Surreply in Opposition to Plaintiff's Motion for Fees and Costs and Motion
to Strike;
- 2 14. Second Declaration of Pamela Andrews in Support of Defendants' Response to
- 3 Plaintiff's Motion for Fees;
- 4 15. Oral arguments of the parties at the September 30, 2016 hearing;
- 5 16. Plaintiff's Supplemental Brief in Support of Plaintiff's Petition for Attorney Fees and
- 6 Costs;
- 7 17. Second Supplemental Declaration of Sean J. Gamble in Support of Plaintiff's Petition for
- 8 Attorney Fees and Costs, and attached exhibits;
- 9 18. Defendants' Supplemental Briefing on Fees and Costs; and
19. The pleadings and filings of the parties in this case.

10 Having considered the foregoing material, the Court makes the following:

11 FINDINGS OF FACT

- 12 1. A jury trial in this case was conducted from November 3, 2014 to January 14, 2015. On
- 13 January 16, 2015, the jury returned a verdict in favor of the Defendants.
- 14 2. On June 7, 2016, this Court issued a Memorandum Opinion, in which the Court granted
- 15 Plaintiff's motion for a new trial based upon Defendants' discovery violations and
- 16 attorney misconduct.
- 17 3. On October 5, 2016, the Court issued Findings of Fact and Conclusions of Law re Order
- 18 Granting Motion for New Trial, in which the Court stated that "Plaintiff may petition the
- 19 Court for reasonable fees and costs incurred as the result of time and expense lost due to
- 20 Defendants' violations of discovery obligations, obfuscation, and/or defense counsel
- 21 misconduct, including time lost to trial."²
- 22 4. The Court incorporates by reference this Court's Findings of Fact and Conclusions of
- 23 Law re Order Granting Motion for New Trial, entered October 5, 2016, as to the findings
- 24 of fact concerning Defendants' intentional discovery violations and attorney misconduct
- 25 committed before and during the first trial, which resulted in this Court granting
- 26 Plaintiff's motion for a new trial.³
- 27 5. On September 26, 2016, Plaintiff filed a Petition for Attorney Fees and Costs, in which
- 28 Plaintiff sought \$294,401.24 in fees and costs.
- 29 6. For the work of attorney Don Bauermeister, Plaintiff seeks an award of 216.5 hours at a
- 30 rate of \$650 an hour, for a total award of \$140,562.50. The Court finds the hours sought

² Court's Findings, at 22.

³ Defendants argue that the grant of a new trial is a sanction. This Court disagrees. The grant of a new trial is the remedy ordered by the Court as a result of Defendants' discovery violations.

ORDER

- 3 -

JUDGE JEANETTE DALTON
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1 accurately reflect the time attorney Bauermeister spent at the trial and briefing matters
2 during trial, as supported by his declaration. The Court further finds that the hourly rate
3 requested is reasonable for his over 35 years of experience, his education, training, skill
4 and quality of legal services provided in this litigation, and is consistent with his current
5 hourly rate.

6 7. For the work of associate attorney David Roosa, Plaintiff seeks compensation for 72.5
7 hours at an hourly rate of \$250. Attorney Roosa's hours consist of 35.5 hours of court
8 time and 37 hours spent researching and writing motions and submissions to the Court
9 during the course of the trial, as documented by his declaration. The Court finds the hours
10 and hourly rate to be reasonable and consistent with the quality and nature of the work
11 performed by attorney Roosa.

12 8. For the work of attorney Sean Gamble, Plaintiff seeks compensation for 182 hours at a
13 rate of \$290 per hour, for a total award of \$52,780. The Court finds the hours sought to
14 be reasonable, which only include time attorney Gamble spent in trial while Court was
15 in session. The Court also finds that the hourly rate is reasonable as it was attorney
16 Gamble's rate at the time of trial, and it is also reasonable given his experience and the
17 work that was performed.

18 9. For the work of Harry ("Dee") Taylor, the Trial Manager and Senior Investigator at
19 Friedman/Rubin, Plaintiff seeks compensation for 94.75 hours, for his time spent at trial,
20 at a rate of \$175 an hour, for a total cost of \$16,581.25. The Court finds the hours sought
21 to be reasonable and the estimated rate to be reasonable, given Mr. Taylor's 27 years of
22 experience, and the average rate for in-court technical assistance of \$225 per hour.

23 10. For the work of Cameron Taylor, an Investigator/Trial Technician at Friedman/Rubin,
24 Plaintiff seeks compensation for 121.5 hours for her time spent in court during trial, at a
25 rate of \$135 per hour, for a total award sought of \$16,402.50. The Court finds these hours
26 to be proper and the hourly rate to be reasonable, given Ms. Taylor's four years of
27 experience and duties which included the organization and upkeep of documentary
28 evidence, electronic presentation of evidence to the jury, and maintenance of trial
29 technology.

30 11. Plaintiff seeks \$49,949.99 in costs, which are itemized in the Bauermeister Declaration,
Exhibit A, at 4. The costs include the costs for transcripts obtained during trial, filing
fees, hotel accommodations, and expert witness fees. The Court finds the costs
reasonable.

12. In sum, the Court finds that the costs and fees submitted by Plaintiff are a fair reflection
of the work performed and time spent during the first trial.

ORDER

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JUDGE JEANETTE DALTON
Kitsap County Superior Court
614 Division Street, MS-24
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CONCLUSIONS OF LAW

1. "A trial court must enter findings of fact and conclusions of law supporting an award of attorney fees."⁴
2. In awarding reasonable attorney fees, the Court must sufficiently explain its objective basis for the award.⁵
3. When considering whether to sanction a party, the Court must consider certain principles:

First, the least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong. The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a "cottage industry" for lawyers. To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds. In the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.⁶

4. The Court finds that awarding Plaintiff the reasonable fees and costs of conducting the first trial is the least severe⁷ yet adequate sanction to address the number and severity of Defendant's intentional discovery violations and instances of defense counsel misconduct, which were of such seriousness that Plaintiff was denied a fair trial. To force Plaintiff to bear the fees and costs of the trial, which was rendered unfair by Defendants' intentional conduct, would be to allow Defendants to profit from their discovery

⁴ *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009).

⁵ *Highland Sch. Dist. No. 203 v. Racy*, 149 Wn. App. 307, 316, 202 P.3d 1024 (2009) (internal citations omitted).

⁶ *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054, (1993) (internal citations omitted).

⁷ Defendants were sanctioned during trial for their discovery violations, as they became known to the Court, but this did not prevent Defendants from continuing to commit the violations and from committing numerous acts of defense counsel misconduct (including false statements to the Court), which culminated to such a degree that Plaintiff was denied the right to a fair trial. Therefore, the Court is not persuaded by Defendants' argument that the sanctions during trial, and the remedy of awarding Plaintiff a new trial, are adequate sanctions such as to deter Defendant from committing future discovery violations and attorney misconduct so willful and numerous in nature in the future.

ORDER

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JUDGE JEANETTE DALTON
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1 violations and misconduct. Therefore, the Court finds that this sanction is necessary to
2 compensate Plaintiff for the intentional wrongdoing done against them, and to deter such
3 future conduct by Defendant.⁸

- 4 5. To determine reasonable attorney fees in this matter, the Court employs the lodestar
5 method. In using this method, the Court must determine the number of hours reasonably
6 expended in the litigation, based upon reasonable documentation of the work performed.

7 This documentation need not be exhaustive or in minute detail, but must
8 inform the court, in addition to the number of hours worked, of the type of
9 work performed and the category of attorney who performed the work (i.e.,
10 senior partner, associate, etc.). The court must limit the lodestar to hours
11 reasonably expended, and should therefore discount hours spent on
12 unsuccessful claims, duplicated effort, or otherwise unproductive time. The
13 total number of hours reasonably expended is multiplied by the reasonable
14 hourly rate of compensation. Where the attorneys in question have an
15 established rate for billing clients, that rate will likely be a reasonable rate.
16 The attorney's usual fee is not, however, conclusively a reasonable fee and
17 other factors may necessitate an adjustment. In addition to the usual billing
18 rate, the court may consider the level of skill required by the litigation, time
19 limitations imposed on the litigation, the amount of the potential recovery, the
20 attorney's reputation, and the undesirability of the case. The reasonable hourly
21 rate should be computed for each attorney, and each attorney's hourly rate
22 may well vary with each type of work involved in the litigation.⁹

- 23 6. As discussed above in the Court's Findings of Fact, the Court finds that the hours worked,
24 as requested for each individual, are reasonable. Where an award was sought for work
25 on briefing during the trial, such as for attorney Roosa, the hours worked on each filing
26 was provided to the Court. As to the hours sought for time spent by each individual
27 physically in trial, while court was in session, the Court finds that the conservative
28 estimates given by the individuals in their declarations, based upon the Court's "blue
29 notes" is adequate.

30 ⁸ Defendants argue that "[e]ven if Plaintiff were entitled to a new trial under the circumstances, there is no case authority suggesting that the calculated risk taken by plaintiffs, to go to verdict, should be taken at the expense of the defendants." Defendants' Supplemental Briefing on Fees and Costs, at 3. Defendant's intentionally committed numerous discovery violations, some of which did not become known to Plaintiff until during the trial, committed numerous acts of attorney misconduct, and made misrepresentations in open Court in two instances. The full extent of Defense counsel's actions and the impact those actions had on the trial could not be fully known until the trial was over. If any "calculated risk" was taken, it was Defendants, when they chose to intentionally and repeatedly violate the discovery rules, apparently in the hope that the violations and misconduct would not be discovered. This calculated risk taken by Defendants should not be at the expense of the Plaintiff.

⁹ *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983) (internal citation omitted).

ORDER

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JUDGE JEANETTE DALTON
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- 1 7. As discussed above, in the Court's Findings of Fact, the Court finds that the rates
 2 requested are reasonable, given the individual's experience, position, the going rate for
 3 the work performed, and the quality and nature of the work.
- 4 8. The Court declines to apply a lodestar multiplier to this case, as it does not find the quality
 5 of work or complexity of this case to be such that applying the multiplier would be
 6 appropriate. To the extent that the complexity of the case was high, that has been
 7 adequately reflected in the hours expended, and as to the quality of the work, that is
 8 appropriately reflected in the hourly rate of the attorneys. Therefore, the Court limits the
 9 award to the time spent in trial, while court was in session, and the briefing performed
 10 during trial.
- 11 9. Accordingly, Plaintiff's counsel is entitled to an award of attorneys' fees as follows:

	Hours	Rate	Total
Don C. Bauermeister	216.25	\$650	\$140,562.50
Sean J. Gamble	182	\$290	\$52,780.00
David P. Roosa	72.5	\$250	\$18,125.00
H. Dee Taylor	94.75	\$175	\$16,581.25
Cameron Taylor	121.5	\$135	\$16,402.50
Costs of Trial			\$49,949.99
TOTAL AWARD			\$294,401.24

17 **ORDER**

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 19 Based on the foregoing, it is hereby ORDERED that Plaintiff's Petition for Attorney
 20 Fees and Costs is GRANTED in the amount of \$294,401.24.

21 DATED: This 13 day of March, 2017.

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 25 JUDGE DALTON

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 ORDER

- 7 -

JUDGE JEANETTE DALTON
 Kitsap County Superior Court
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The Honorable Jeanette Dalton

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

RONNIE LEE SHARP, as Administrator of the Estate
of Sandra Sharp, deceased,

Plaintiff,

v.

LIFE CARE CENTERS OF AMERICA, INC., a
Tennessee corporation; and CASCADE MEDICAL
INVESTORS LIMITED PARTNERSHIP, a Tennessee
entity d/b/a LIFE CARE CENTER OF PORT
TOWNSEND,

Defendants.

No. 14-2-02125-1

[PROPOSED]

JUDGMENT ON ORDER

Judgment Creditor

Ronnie Lee Sharp, as Administrator of the
Estate of Sandra Sharp, deceased.

Don C. Bauermeister
FRIEDMAN | RUBIN
1126 Highland Avenue
Bremerton WA 98337

Sean J. Gamble
David P. Roosa
FRIEDMAN | RUBIN
51 University Street, Suite 201
Seattle, WA 98101

Harish Bharti
Bharti Law Group, PLLC
6701 37th Ave NW
Seattle, WA 98117

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Life Care Centers of America, Inc., Cascade
Medical Investors Limited Partnership d/b/a
Life Care Center of Port Townsend

Pamela M. Andrews
Andrews Skinner
645 Elliott Avenue West, Suite 350
Seattle WA 98119

\$294,401.24

5.75%

On March 13, 2017, the Court entered Findings of Fact, Conclusions of Law and Order on Plaintiff's Petition for Attorney Fees and Costs. The Court ruled that the Plaintiff is entitled to an award of \$294,401.24 in attorney fees and costs to compensate Plaintiff for the Defendants' intentional wrongdoing committed during litigation and trial, and to deter such future conduct by the Defendants. Order at 6-7. This award is final and separate and apart from Plaintiff's statutory and/or common law claims against Defendants, which await retrial. As a result, there is no just reason for delay of entry of the Judgment on the Order.

ORDER

Based on the foregoing, Judgment on the March 13, 2017 Findings of Fact, Conclusions of Law and Order on Plaintiff's Petition for Attorney Fees and Costs, in favor of Plaintiff against Defendants, is hereby entered in the amount of \$294,401.24

This amount shall bear interest at the statutory rate of 5.75 percent per annum. Interest shall accrue from the date of this Judgment until paid in full. This Judgment is enforceable up to the principle amount in addition to accrued interest.

The Court retains jurisdiction to enter any supplemental enforcement or other orders related to this matter should this become necessary.

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This Judgment is final and shall be deemed effective upon entry and filing of the same.

2017

Presented by:

FRIEDMAN | RUBIN



By: _____
Don C. Bauermeister, WSBA #45857
Sean J. Gamble, WSBA #41733
David P. Roosa, WSBA #45266

Attorneys for Plaintiffs

SMITH GOODFRIEND, PS

May 15, 2017 - 4:08 PM

Transmittal Information

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Appellate Court Case Title: Ronnie L. Sharp, Respondent v. Life Care Centers of America, et al., Appellants
Superior Court Case Number: 14-2-02125-1

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