

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	REPLY ARGUMENT	1
A.	In overturning the jury’s verdict, the trial court made inaccurate findings of erroneous procedural “facts” from a trial concluded over a year earlier.	2
B.	The trial court ignored its own prior discretionary rulings, which gave plaintiff precisely the relief he requested.....	7
C.	The trial court rewarded plaintiff for gambling on the verdict; respondent never raised many of the new trial grounds until after the jury returned a defense verdict.	12
D.	The trial court wrongly speculated about the “unknown unknown” cumulative consequences of a host of discretionary rulings; neither respondent nor the trial court has ever identified any prejudice to plaintiff’s presentation to the jury.	14
E.	The fee judgment must be reversed because it is based on the same flawed findings as the order taking away the jury’s verdict.	19
II.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Absher Constr. Co. v. Kent School Dist. No. 415</i> , 79 Wn. App. 841, 917 P.2d 1086 (1995).....	20
<i>Aluminum Co. of Am. v. Aetna Cas. & Surety Co.</i> , 140 Wn.2d 517, 998 P.2d 856 (2000).....	16
<i>Clark v. Teng</i> , 195 Wn. App. 482, 380 P.3d 73 (2016), <i>rev. denied</i> , 187 Wn.2d 1016 (2017)	<i>passim</i>
<i>Coleman v. Dennis</i> , 1 Wn. App. 299, 461 P.2d 552 (1969), <i>rev. denied</i> , 77 Wn.2d 962 (1970).....	8, 11
<i>Cox v. Gen. Motors Corp.</i> , 64 Wn. App. 823, 827 P.2d 1052 (1992).....	18
<i>Estate of Stalkup v. Vancouver Clinic, Inc., P.S.</i> , 145 Wn. App. 572, 187 P.3d 291 (2008)	12-13
<i>Hiskey v. City of Seattle</i> , 44 Wn. App. 110, 720 P.2d 867, <i>rev. denied</i> , 107 Wn.2d 1001 (1986).....	18
<i>Hollins v. Zbaraschuk</i> , ___ Wn. App. ___, ___ P.3d ___, 2017 WL 4273989 (Sep. 25, 2017).....	1, 11
<i>Hyatt v. Sellen Const. Co., Inc.</i> , 40 Wn. App. 893, 700 P.2d 1164 (1985).....	18
<i>Kimball v. Otis Elevator Co.</i> , 89 Wn. App. 169, 947 P.2d 1275 (1997).....	16
<i>Lindgren v. Lindgren</i> , 58 Wn. App. 588, 794 P.2d 526 (1990), <i>rev. denied</i> , 116 Wn.2d 1009 (1991).....	16-17

<i>Miller v. Kenny</i> , 180 Wn. App. 772, 325 P.3d 278 (2014)	16
<i>Moore v. Commercial Aircraft Interiors, LLC</i> , 168 Wn. App. 502, 278 P.3d 197, <i>rev. denied</i> , 175 Wn.2d 1027 (2012)	1
<i>Moratti ex rel. Tarutis v. Farmers Ins. Co. of Washington</i> , 162 Wn. App. 495, 254 P.3d 939 (2011), <i>rev. denied</i> , 173 Wn.2d 1022, <i>cert. denied</i> , 568 U.S. 929 (2012)	8, 11
<i>Peoples State Bank v. Hickey</i> , 55 Wn. App. 367, 777 P.2d 1056, <i>rev. denied</i> , 113 Wn.2d 1029 (1989).....	17
<i>Rafel Law Group PLLC v. Defoor</i> , 176 Wn. App. 210, 308 P.3d 767 (2013), <i>rev. denied</i> , 179 Wn.2d 1011 (2014)	18
<i>Roberson v. Perez</i> , 123 Wn. App. 320, 96 P.3d 420 (2004), <i>rev. denied</i> , 155 Wn.2d 1002 (2005)	16
<i>Scott Fetzer Co. v. Weeks</i> , 122 Wn.2d 141, 859 P.2d 1210 (1993)	19
<i>Spratt v. Davidson</i> , 1 Wn. App. 523, 463 P.2d 179 (1969).....	13-15
<i>Taylor v. Cessna Aircraft Co., Inc.</i> , 39 Wn. App. 828, 696 P.2d 28, <i>rev. denied</i> , 103 Wn.2d 1040 (1985).....	16
<i>Washington Motorsports Ltd. P'ship v. Spokane Raceway Park, Inc.</i> , 168 Wn. App. 710, 282 P.3d 1107 (2012)	20
Rules and Regulations	
CR 59.....	12
CR 60.....	17

Other Authorities

Tegland, 4 Wash. Prac.: Rules Practice CR 60 (6th ed.) 17

I. REPLY ARGUMENT

In attempting to justify the trial court's refusal to enter judgment on the jury's verdict in its order granting a new trial, respondent improperly relies on the memorandum opinion, contested findings, and briefing as factual support for events that never occurred at trial, fails to distinguish between proceedings that occurred before the jury and those occurring outside the jury's presence, and repeats the trial court's fatal error of declaring that plaintiff was prejudiced, without once explaining how.¹ Attached as Appendix A to this reply brief are pages 53-59 of the response brief, annotated to illustrate these errors and the portions of this brief and appellants' opening brief that address the absence of substantial evidence to support the trial court's contested findings.² Attached as Appendix B is the matrix from page 57 of the opening brief summarizing the errors that, individually

¹ Pleadings and argument are not evidence. *Moore v. Commercial Aircraft Interiors, LLC*, 168 Wn. App. 502, 510, ¶ 17, 278 P.3d 197 ("Pleadings are not evidence."), *rev. denied*, 175 Wn.2d 1027 (2012); *Hollins v. Zbaraschuk*, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 4273989, at *8 (Sep. 25, 2017) ("lawyers' arguments are not evidence"). Nor are the trial court's own findings or memorandum opinion "evidence" supporting other findings.

² The strike-outs in Appendix A reflect citations to the memorandum opinion, findings, and briefing relied on by respondent as *factual* "support" for contested findings. The annotations in the left margin of Appendix A identify the new trial grounds to which each contested finding relates. The annotations in the right margin of Appendix A identify the pages at which Life Care addresses those grounds for new trial in its opening and in this reply brief.

and collectively, are fatal to the order granting a new trial, expanded to include the arguments in this reply brief.

The remainder of this reply brief discusses how the trial court 1) relied on inaccurate findings of procedural facts in a trial concluded over a year earlier; 2) ignored its own prior discretionary rulings, which gave plaintiff precisely the relief he requested; 3) rewarded plaintiff for gambling on the verdict, because he never raised many of the new trial grounds until the jury returned a defense verdict; and 4) wrongly speculated about the cumulative consequences of a host of discretionary rulings that neither respondent nor the trial court has ever explained prejudiced plaintiff in presenting his case to a jury that rejected his tort claims on the merits after a ten-week, 35-day trial.

A. In overturning the jury's verdict, the trial court made inaccurate findings of erroneous procedural "facts" from a trial concluded over a year earlier.

The opening brief explains in great detail the factual inaccuracies in the trial court's findings of misconduct and violation of discovery obligations and evidentiary rulings. Respondent's attempts to defend the trial court's inaccurate findings only demonstrate why this case is indistinguishable from *Clark v. Teng*, 195 Wn. App. 482, 380 P.3d 73 (2016), *rev. denied*, 187 Wn.2d 1016 (2017) (App. Br. 28, 30, 33, 38, 55).

In *Clark*, this Court reversed an order granting a new trial to a medical malpractice plaintiff after the jury returned a defense verdict because the trial court had relied on inaccurate and inconsistent allegations of misconduct in defense counsel's examination of the defendant's expert. The trial court concluded post-trial that defense counsel had violated a motion in limine prohibiting any suggestion of fault or causation by nonparties even though the court had authorized the defense to argue and present evidence that the defendant had not caused plaintiff's injuries, and that defense was the focus of the examination challenged in the new trial motion. Respondent's (and the trial court's) revisionist recital of how the testimony of Life Care's expert Dr. von Preyss-Friedman came in here is remarkably similar to the facts in *Clark*, and emblematic of the inaccuracies and inconsistencies plaguing the new trial order.

Having no answer to the irrefutable fact that the trial court never entered an order in limine precluding any testimony about the futility of treatment (App. Br. 34), respondent pivots to rely on the trial court's exclusion of testimony from a completely different defense expert, Dr. Starnes, about Mrs. Sharp's life expectancy. (Resp. Br. 15-16) Respondent then ignores the trial court's finding during trial that defense counsel's questions to Dr. von Preyss-Friedman regarding

antibiotics were “appropriate” and were not misconduct (RP 3538-39, 3568); the court’s express confirmations that Dr. von Preyss-Friedman could testify that Mrs. Sharp’s prognosis was “very poor” (RP 3483), that she was “at end of life stages” (RP 3483) and that her chance of dying in the next six months was “more than 50 percent” (RP 3942); and that Dr. Von Preyss-Friedman’s supposedly “malicious” testimony was in response to a juror’s question allowed and *posed by the trial court itself*.³ (RP 4316)

The record reflects the trial court had issues with Dr. von Preyss-Friedman, who is not a native English speaker; after sustaining an objection to testimony the court at one point admonished her outside the presence of the jury, saying that “I am a judicial officer, and I don’t appreciate the way that you turned to glare at me when I interrupted you.” (RP 3679) But after what the trial court later characterized as her “malicious” (FF 7, CP 3228) “51 percent” answer to the juror’s question whether “in [her] opinion, if not for the final

³ In one of the few times the court ruled against plaintiff during trial, the court overruled plaintiff’s objection to this juror question for Dr. von Preyss-Friedman and found the witness’ proffered answer “acceptable.” (RP 3942) The trial court’s subsequent post-trial finding of *defense* misconduct in asking that question (FF 20, CP 3237) is not only patently erroneous, but insufficient grounds for a new trial because it is “untenable if a trial court ignores its own prior rulings when finding misconduct.” *Clark*, 195 Wn. App. at 492, ¶ 17. *See* Arg. B, *infra*.

sepsis infection, do you feel that Sandy Sharp would have had another three to six months to live with all her co-morbidities” (RP 4316), plaintiff asked for no relief other than that the question and answer be stricken (RP 4317), and the court made no finding of malice or intent by either the witness or defense counsel. The court instead directed the jury to disregard, as plaintiff requested (RP 4323), and also *sua sponte* declined to ask another juror’s question (previously approved) whether “Ms. Sharp’s death [was] hastened in any way due to the care she received or did not receive at” Life Care as a further “remedy” for the “51 percent” answer. (RP 4332)

On appeal, respondent provides no explanation for how, or why, Dr. von Preyss-Friedman’s *acceptable* answer that Mrs. Sharp’s “chance of dying . . . within the next six months was more than 50 percent” (RP 3935, 3942) differed in any way from her “malicious” answer to a juror’s question that, “on a more probable than not basis, which means 51%,” (RP 4316), Mrs. Sharp did not have three to six months more to live. (Resp. Br. 17) Respondent cannot explain away or harmonize the trial court’s inaccurate characterization of Dr. von Preyss-Friedman’s testimony and the colloquy concerning it when, a year after trial, the trial judge took away the jury’s verdict.

Similarly flawed is any grounds for new trial based on the presence of Todd Fletcher at trial. As in *Clark*, the trial court (and respondent) attributes to defense counsel statements she never made. 195 Wn. App. at 494, ¶ 21 (“But defense counsel made no such statements.”). Defense counsel never claimed Mr. Fletcher had no connection to LCCA (App. Br. 36-37); the reliance by respondent and the trial court on information defense counsel obtained after Mr. Fletcher’s presence in court was made known to her simply does not comport with her honest statements when plaintiff attempted to manufacture an issue from his presence, subpoenaing Mr. Fletcher midtrial, but then never calling him as a witness. (Resp. Br. 19-20; RP 2602-06) Indeed, the trial court itself at the time, over a year before it overturned the jury verdict, was concerned not that defense counsel was dissembling but that she had not received full or accurate information from her client. (RP 2632)

Respondent’s tepid claim that “this case is not” *Clark* (Resp. Br. 14), like the trial court’s inaccurate findings, is simply not supported by the facts at trial. As with the reliance on the defense’s failure to provide personnel files for Ms. Kapitanov, whose supposed involvement was first raised when one of plaintiff’s witnesses identified her (RP 2596-98) but who in fact had never been at the Life Care facility when Mrs.

Sharp was there (App. Br. 17-18, 39; RP 3257-60), these claimed failings, which wrongfully and needlessly impugn defense counsel, have no basis in fact. Instead, as in *Clark*, the trial court made and then relied on inaccurate findings of procedural facts in a trial that had been concluded over a year earlier.

B. The trial court ignored its own prior discretionary rulings, which gave plaintiff precisely the relief he requested.

Contrary to respondent's argument on appeal, the trial court's discretion in deciding a motion for new trial based on alleged violations of trial management decisions is not unfettered (Resp. Br. 15, 48); the court must act consistently with, and cannot second-guess, its own prior discretionary rulings. In addition to relying on inaccurate and inconsistent factual findings, "the court did not reconcile or even mention its prior ruling authorizing the defense to contest causation, [and] to dispute that [defendant] caused the injury" in wrongly granting a new trial to the medical malpractice plaintiffs in *Clark*, 195 Wn. App. at 496 ¶ 24 (as discussed at App. Br. 30). The trial court similarly erred here, completely ignoring its previous discretionary rulings, which gave plaintiff precisely the relief he requested during trial.

To rely on the same claimed violations a year later to instead grant a new trial was an abuse of discretion, as the Court of Appeals concluded in *Clark*. Contrary to respondent's claims (Resp. Br. 13), the Court in *Coleman v. Dennis*, 1 Wn. App. 299, 461 P.2d 552 (1969), *rev. denied*, 77 Wn.2d 962 (1970) (App. Br. 31) also reversed because the trial judge in granting a new trial reconsidered discretionary evidentiary rulings it had made during trial. Similarly, this Court reversed a new trial order premised on the trial court's reassessment of its own discretionary rulings during trial 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*, 568 U.S. 929 (2012) (App. Br. 30), a case respondent does not cite, much less discuss.

Here too, as in *Clark*, *Coleman*, and *Moratti*, the trial court wrongly ignored its prior rulings in granting a new trial. For instance, during trial, the court correctly found no defense misconduct, and found defense counsel's questions concerning antibiotics "appropriate" in connection with Dr. Von-Preyss-Friedman's testimony. (App. Br. 34) In colloquy with counsel during a hiatus in Dr. von Preyss-Friedman's testimony, the trial court told defense counsel "I think the record is clear that I haven't found any purposeful violations by the attorneys in this case If there were,

you would know about it I'm a very nice person, but if I find a violation and think it's purposeful, you would feel very differently about me as a judicial officer." (RP 3568) Contrary to respondent's patronizing suggestion that the trial court was merely "consol[ing] the junior defense attorney" (Resp. Br. 48), Life Care does not "decontextualize" this ruling, which the trial court made in addressing – and rejecting – false accusations *by plaintiff's counsel* of defense misconduct in discovery violations.⁴

During trial, the trial court also recognized that defense counsel was relaying accurate information, based on her knowledge at the time, about Mr. Fletcher's interests in LCCA. (App. Br. 37) The court similarly recognized the innocent filing error concerning the duplicative venous stasis ulcer records. (App. Br. 38; FF 11, CP 3231) During trial, the court allowed defense counsel to speak with her

⁴ Plaintiff's counsel tried to explain away his trial court briefing accusing defense counsel of misconduct that led to this colloquy as a difference in personalities, temperaments, and litigation "cultures," particularly in the Philadelphia courts. (RP 3569) In response to a request that plaintiff's counsel be directed to desist in his personal attacks (RP 3564), the (female) trial judge referred to the "derogatory" and "intentionally provocative comments" used to rattle prosecutor Marcia Clark in the O.J. Simpson murder trial (RP 3566), advised the (female) defense attorney that "[t]he issue of personal attacks is not uncommon in trials" and that "pimping" the other lawyer is a trial strategy that can "be used as a tactic" (RP 3564), suggesting that all the attorneys "do something that is relaxing" when court recessed early that day. (RP 3570) Why the trial court then rewarded plaintiff counsel's misbehavior a year later with a new trial and a six-figure fee award remains a mystery, unexplained and unjustified by the new trial findings.

30(b)(6) client representative, Ms. Yakimenko, during her testimony. (App. Br. 41) The trial court's conclusion a year later that any of those events was misconduct, or violated court orders, is simply inaccurate and not supported by the record. The trial court's post-trial "findings" cannot be reconciled with the court's rulings during trial. As in *Clark*, simply failing to mention these previous rulings in the order for new trial does not excuse the trial court's error. Nor, clearly, does respondent think it can, as his response brief does not even address this aspect of the decision in *Clark* reversing the trial court's order granting a new trial.

Further, the trial court's order fails to mention, or reconcile, its rulings during trial that gave plaintiff precisely the relief he requested for any supposed violations of discovery obligations or evidentiary rulings. Immediately after Dr. von Preyss-Friedman's response to the juror question about Mrs. Sharp's prognosis, the trial court instructed the jury to disregard the doctor's answer. (App. Br. 35-36; RP 4323) Although the trial court gave plaintiff the opportunity to call Mr. Fletcher, who was not identified on either side's witness list, the plaintiff did not do so – undoubtedly because plaintiff confirmed, just as defense counsel represented, that Mr. Fletcher had absolutely no knowledge about this case. (App. Br. 37)

Plaintiff thoroughly cross-examined Ms. Yakimenko about her treatment of Mrs. Sharp, and deposed and cross-examined Mr. Thompson repeatedly, including about the punch list – the only relief respondent ever sought below. (App. Br. 42-44, 51) The trial court also granted plaintiff’s motion to bind Life Care’s corporate witness Ms. Mueller to her deposition testimony. (App. Br. 53-54)

In short, the trial court granted all the relief respondent requested for any discovery or evidentiary violation that respondent now alleges justified a new trial. (App. Br. 16-25, 55-56) As *Clark*, *Moratti*, and *Coleman* teach, the trial court could not second-guess its earlier discretionary rulings to support an order granting a new trial because it was unhappy with the jury’s verdict.⁵ For this reason

⁵ As a recent decision makes clear, this Court’s inquiry on an order granting a new trial is whether the trial court’s initial evidentiary decisions were an abuse of discretion and thus an “error of law occurring at trial,” CR 59(a)(8), and whether that error prevented the moving party from having a fair trial. *Hollins v. Zbaraschuk*, ___ Wn. App. ___, ___ P.3d ___, 2017 WL 4273989, at **2, 7 (Sep. 25, 2017). In *Hollins*, the trial court believed it was bound by a motion judge’s order in limine excluding defense evidence limiting damages even after plaintiff opened the door to the evidence at trial. After the jury returned a substantial verdict for plaintiff, the trial court concluded that it had abused its discretion in excluding the evidence, and granted defendant’s motion for a new trial. Division One affirmed, agreeing that the trial court’s evidentiary ruling during trial was an abuse of discretion that had deprived defendant of a fair trial. Here, respondent *never* argued (and the trial court never found) that any of the trial court’s underlying decisions prior to and during trial were an abuse of discretion. As Judge Dwyer noted in *Hollins*, where discretionary “rulings made were affirmable,” the trial court errs “by concluding otherwise in the posttrial ruling.” 2017 WL 4273989, at *10 (Dwyer, J., dissenting).

as well the trial court erred in granting a new trial based on supposed discovery violations and misconduct that it had thoroughly dealt with, in precisely the manner requested by plaintiff, during trial.

C. The trial court rewarded plaintiff for gambling on the verdict; respondent never raised many of the new trial grounds until after the jury returned a defense verdict.

The trial court contemporaneously and thoroughly addressed any supposed discovery and evidentiary violations plaintiff actually complained of at the time of trial; they cannot now be a basis for a new trial. The trial court also erred, however, in relying on complaints post-verdict that respondent never made during trial to grant a new trial a year after the jury had returned its verdict. See CR 59(a)(8) (requiring an “error of law occurring at the trial *and objected to at the time* by the party making the application”) (emphasis added).

In another case that respondent does not cite or address, *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 187 P.3d 291 (2008) (App. Br. 27, 31) the appellate 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,” this Court held that the

“trial court cannot base its decision to order a new trial on that ground.” *Estate of Stalkup*, 145 Wn. App. at 584-85, ¶ 29. *See also Spratt v. Davidson*, 1 Wn. App. 523, 526-27, 463 P.2d 179 (1969) (App. Br. 28-29, 32, 54) (also not cited or discussed by respondents), in which the appellate court noted that any “prejudice that might have occurred by reason of the occurrence of the two incidents above described might have been obviated had plaintiff requested a precautionary instruction or even moved for a mistrial.”

Here too, plaintiff never objected at trial to many of the grounds relied upon as a basis for new trial at year later. At trial, respondent did not object to the supposed late disclosure of the “wound care book” (App. Br. 38), the “punch detail,” which was timely produced (App. Br. 46-51), the Guide to Infection Control (App. Br. 39-40), staffing ratios (which the defense at any rate “overproduced,” by giving plaintiff Life Care’s work product analysis of staffing in the facility during Mrs. Sharp’s stay) (App. Br. 13, 19, 50, 52-53), or Dr. Forbes’ meeting notes. (App. Br. 44-45) Respondent never moved for a mistrial on any grounds, and the trial court granted plaintiff all the relief requested because of any supposed misconduct or evidentiary or discovery violations during trial. The law is clear these are not, in retrospect, grounds for new trial. *Clark*, 195 Wn. App. at 492, ¶ 17.

D. The trial court wrongly speculated about the “unknown unknown” cumulative consequences of a host of discretionary rulings; neither respondent nor the trial court has ever identified any prejudice to plaintiff’s presentation to the jury.

Respondent does not attempt to defend the trial court’s Rumsfeldian admission that it did not know what, if any, effect the supposed misconduct and violations relied upon in granting a new trial could have had on the jury’s defense verdict. Not surprisingly, then, respondent also does not cite, much less discuss, *Spratt v. Davidson*, 1 Wn. App. 523, 463 P.2d 179 (1969) (App. Br. 28-29, 32, 54), which compels reversal of the new trial order because the court failed to explain why or how the jury’s verdict was affected by the claimed misconduct and evidentiary and discovery violations.

In *Spratt*, this Court reversed an order granting a new trial because the trial court’s speculation that there was a “possibility” that a juror’s temporary indisposition during plaintiff’s closing, and defense counsel’s need for a recess during closing, may have affected the jury’s verdict for the defendant:

The existence of a mere possibility or remote possibility of prejudice is not enough. This is especially true if we are confined to the reasons stated in the order granting the new trial because of the absence of sufficient detail raising a reasonable doubt that the plaintiff received a fair trial. Even 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 Court returned to this principle in *Clark*, noting (as in this case), that plaintiff could “cite[] no authority that prejudice exists when the same testimony alleged to be defense misconduct is also before the jury in the form of” evidence submitted by the plaintiff. 195 Wn. App. at 497, ¶ 26 (as discussed at App. Br. 32-34). Also bereft here from respondent’s briefing, or the trial court’s orders, is any explanation of how respondent was prejudiced by claimed misconduct or violation of discovery obligations or evidentiary rulings.

Once again, the respondent does not address in any way this aspect of the decision in *Clark* reversing the trial court’s new trial order. Instead, respondent claims (for the first time on appeal) that if misconduct is proved, prejudice is irrelevant. (Resp. Br. 10-11) This remarkable claim has no support. Although the cases sometimes use different language, the extraordinary remedy of reversing a verdict and ordering a new trial requires some proof that the losing party was harmed by claimed misconduct.

A new trial may be granted only if the moving party establishes both that counsel’s actions constitute misconduct, as distinct from mere aggressive advocacy, 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) (App. Br. 29-30; not cited in Resp. Br.), citing *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000). This is no different than the “prejudice” standard that applies when a party seeks a mistrial due to misconduct or other irregularities. A trial court “should grant a mistrial only when nothing the court can say or do would remedy the harm caused by the irregularity, or in other words, when the harmed party has been so prejudiced that only a new trial can remedy the error.” *Kimball v. Otis Elevator Co.*, 89 Wn. App. 169, 178, 947 P.2d 1275 (1997).

Respondent’s suggestion that a new trial is compelled whenever the trial court makes a finding (however flawed) of misconduct is based on cases, pre-dating *Clark*, where the prejudicial consequence of the misconduct was irrefutable. See *Roberson v. Perez*, 123 Wn. App. 320, 336, 96 P.3d 420 (2004), *rev. denied*, 155 Wn.2d 1002 (2005), citing *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 836, 696 P.2d 28, *rev. denied*, 103 Wn.2d 1040 (1985) (both cited Resp. Br. 10-11). But this Court has long held that wrongful conduct must cause entry of judgment to justify relief. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990)

(to justify relief under CR 60(b)(4), fraudulent conduct must cause entry of judgment), *rev. denied*, 116 Wn.2d 1009 (1991); Tegland, 4 Wash. Prac.: Rules Practice CR 60 (6th ed.) (fraud or misconduct that is harmless will not support motion to vacate), citing *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056, *rev. denied*, 113 Wn.2d 1029 (1989). The complaining party must establish that the adverse party's fraudulent conduct or misrepresentation prevented the losing party from "fully and fairly presenting its case or defense." *Lindgren*, 58 Wn. App. at 596.

Further, the moving party must prove the claimed misconduct by clear and convincing evidence, *Lindgren*, 58 Wn. App. at 596, a standard that respondent in this case does not even purport to reach. The trial court's questionable findings of misconduct, however reached (and clearly under no heightened burden of proof) provide no basis for a new trial. The trial court never provided, and respondent on appeal does not now provide, any explanation how plaintiff was prejudiced in his presentation of the case to the jury.

Respondent also does not address the consequence of reversing even one of the claimed discovery and evidentiary violations or findings of misconduct because the trial court relied

solely on their claimed cumulative effect in granting a new trial.⁶ As the Court recognized in *Clark*, the appellate court “is generally limited to the trial court’s reasons for granting a new trial” in reviewing the order. 195 Wn. App. at 492 ¶ 17, quoting *Cox v. Gen. Motors Corp.*, 64 Wn. App. 823, 826, 827 P.2d 1052 (1992) (as discussed at App. Br. 27-28, 32-34). As the trial court relied on the cumulative effect of claimed misconduct and violations, respondent cannot rely on a single, or even multiple claimed violations to justify the order. *Clark*, 195 Wn. App. at 496-97 ¶ 24 (because “the trial court did not identify the references [by other witnesses to supposedly prohibited evidence] . . . as independent acts of misconduct that alone would support a new trial,” they were not “tenable reasons” for granting a new trial).

⁶ In particular, this Court should ignore respondent’s reliance to justify the grant of new trial on the belatedly submitted opinions of Leland Ripley as an “ethics expert” on whether defense counsel had violated the Rules of Professional Conduct. (Resp. Br. 20, 29, 31-32, 35) The trial court expressly disavowed any reliance on Mr. Ripley’s opinions in granting a new trial. (8/5/16 RP 35: “that isn’t a part of the record that was the reason for the grant of the new trial.”) In any event, “[w]hether an attorney’s conduct violated the RPC is a question of law.” *Rafel Law Group PLLC v. Defoor*, 176 Wn. App. 210, 219, ¶ 20, 308 P.3d 767 (2013), *rev. denied*, 179 Wn.2d 1011 (2014)); *see also Hiskey v. City of Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (“experts are not to state opinions of law or mixed fact and law”), *rev. denied*, 107 Wn.2d 1001 (1986); *Hyatt v. Sellen Const. Co., Inc.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985) (“A determination of the applicable law is within the province of the trial judge, not that of an expert witness.”).

Neither respondent nor the trial court has ever explained how he was prejudiced in presenting his case to the jury. To the contrary, the trial court in effect admitted plaintiff was not, by instead wrongly speculating about the “unknown unknown” consequences of a host of its own previous discretionary rulings. The new trial order based on that speculation must be reversed.

E. The fee judgment must be reversed because it is based on the same flawed findings as the order taking away the jury’s verdict.

Appellant rests on the opening brief; respondent has not effectively justified either the award of all fees incurred in a trial that the trial court at the time recognized had been significantly prolonged by plaintiff’s own multiple failures to properly pursue discovery (App. Br. 10-12, 16) nor the \$650/hour rate, far above any reasonable local rate, at which lead plaintiff counsel’s time was calculated.⁷ By characterizing the \$175/hour charge for time of a

⁷ Particularly unpersuasive is the argument made below in support of the \$650/hour rate adopted by the trial court, that respondent’s law firm could not control lead counsel’s rate because he was not a partner, but one of “the different of counsel that Rick [Friedman] has gathered to him almost like a tribal family.” (9/30/16 RP 84) Attorney fee awards are to be calculated using “a *reasonable* hourly rate” that is “grounded specifically in the market value” of the lawyer’s services, *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-50, 859 P.2d 1210 (1993) (emphasis in original) (App. Br. 59-60), not on the claimed worth a particular attorney believes he brings to his “tribal family.”

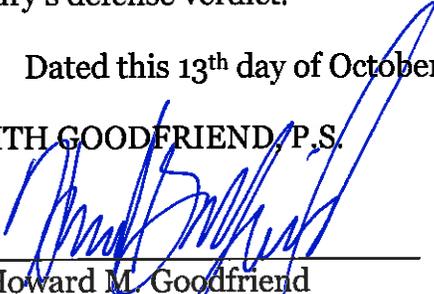
non-lawyer “trial technician” as an award of costs, not fees, respondent admits the award is contrary to *Absher Constr. Co. v. Kent School Dist. No. 415*, 79 Wn. App. 841, 845, 917 P.2d 1086 (1995). Appellant does wish to point out that the monetary sanction at issue was \$8,624 in *Washington Motorsports Ltd. P’ship v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 714, ¶ 9, 282 P.3d 1107 (2012), not \$341,000 as set out in the headnote relied upon by respondent. (Resp. Br. 51)

II. CONCLUSION

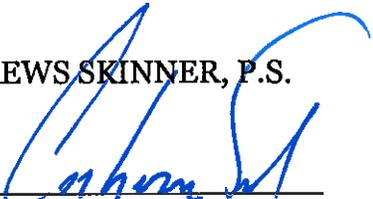
For the reasons set out in this and the opening brief, this Court should reverse the trial court’s order vacating the jury’s verdict, granting a new trial, and awarding fees as sanctions, and reinstate the jury’s defense verdict.

Dated this 13th day of October, 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 October 13, 2017, I arranged for service of the foregoing Reply Brief of Appellants, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 13th day of October, 2017.



Peyush Soni

NEW TRIAL ORDER¹

<u>Issue</u>	<u>LC APP. B</u>	<u>SUBSTANTIAL EVIDENCE</u>	<u>Addressed In Briefs</u>
Punch Detail as Raw Data	CP 3222, lines 26-27	RP 2717-19; RP 2800-21	App. Br. 48-51 Reply Br. 11
	CP 3223, line 2	CP 512, line 5; RP 804; RP 3800; RP 3801-04	
	CP 3223, lines 4-5	RP 4477-81	
	CP 3223, lines 7-9	RP 4477-81; RP 4776-77	
Production of Punch Detail	CP 3223, lines 14-17	RP 4492; CP 3010 , 3052-53, 3030	App. Br. 46-48 Reply Br. 13
Punch Detail as Raw Data	CP 3223, lines 18-22	RP 2800; RP 2802; RP 2807-08	App. Br. 48-51 Reply Br. 11
Production of Punch Detail	CP 3223, lines 26-27	CP 998-999 , 1084-99; RP 4337-53	App. Br. 46-48 Reply Br. 13
Punch Detail as Raw Data	CP 3224, lines 10-12	CP 3224, lines 12-21 (uncontested findings); CP 5085-5162 (Ex 244)	App. Br. 48-51 Reply Br. 11
	CP 3224, lines 23-25	CP 3224, lines 22-26 (uncontested findings); RP 4477-81	
	CP 3225, lines 3-4	CP 3225 (uncontested), CP 3010 , 3030, 3052- 53, 3060-61, 3030	
Discovery Re Staffing Ratios	CP 3225, lines 19-20	CP 3025	App. Br. 52-53 Reply Br. 13
	CP 3226, lines 1-3	RP 2130-31; RP 4573-74; RP 4707-08; RP 2798; RP 2716-19	
	CP 3226, lines 4-5	RP 4856-57	

¹ The strike-outs reflect citations to the memorandum opinion, findings, and briefing relied on by respondent as *factual* "support" for contested findings. The annotations in the left margin identify the new trial grounds to which each contested finding relates. The annotations in the right margin identify the pages at which Life Care addresses those grounds for new trial in its opening and in this reply brief.

Resp. Br. P. 53.

App. A

Discovery Re Staffing Ratios	CP 3226, lines 8-11	CP 3025; RP 2130-31, 2716-19, 2798, 4573-74, 4707-08	App. Br. 52-53 Reply Br. 13
	CP 3226, lines 13-15	CP 3025; RP 4708	
	CP 3226, line 16	CP 3025; RP 4706-08	
Binding 30(B)(6) Testimony	CP 3226, lines 22-23	CP 268-77, CP 342-44, CP 320-23	App. Br. 53-54 Reply Br. 11
	CP 3227, lines 8-11	CP 575-79; Sharp's CR-37 Mtn for Sanctions	
Punch Detail as Raw Data	CP 3227, lines 12-14	CP 579	App. Br. 48-51 Reply Br. 11
Binding 30(B)(6) Testimony	CP 3227, lines 15-18	CP 268-76, CP 348-50; 10/09/14 hrng at RP 29	App. Br. 53-54 Reply Br. 11
	CP 3227, lines 19-20	CP 579 ; CP 3025	
	CP 3227, lines 21-24	10/09/14 hearing at RP 17-29; Sharp's CR-37 Motion; Sharp's Opposition to Life Care's Motion to Reconsider Sanctions	
Von Preyss Friedman	CP 3228, lines 8-11	CP 919; RP 2218-23, 3483, 3514, 3520, 3526-59	App. Br. 34-36 Reply Br. 3-5, 8, 10
	CP 3228, lines 13-14	RP 3934, 3942, 3946, 3953-55, 4308-09, 4316-22; CP 3236-37	
	CP 3228, line 15	RP 3483, 3934, 3942-46, 3953-55, 4308-09, 4316-22; CP 3236-37	
Yakimenko	CP 3228, lines 17-18	CP 875, 2043, 3228, 3232 , 3051	App. Br. 40-43 Reply Br. 9-11
	CP 3228, lines 21-24	CP 3228, 3076 ; RP 3349, 3311, 3402; CP 3236	
	CP 3228, line 26	RP 3402, 3413; CP 3236	

Yakimenko	CP 3229, lines 7-9	10/07/14 hearing at RP 57-58; CP 492; RP 3402, 3413; CP 3228, 3229, 3232, 3236 ; CP 3211; CP 2043, 3228, 3232 ; CP 3051; 10/07/2014 hearing at RP 121-22; CP 875	App. Br. 40-43 Reply Br. 9-11
	CP 3229, lines 10-15	CP 3070-71; CP 3228, ¶8, CP 3232, ¶14D ; CP 3208; 10/07/14 hearing at RP 57-58; CP 492; RP 3309-3311; RP 3310; CP 3236	
Forbes' Meeting Notes	CP 3229, lines 24-25	CP 3024, 3042, 3031	App. Br. 44-45 Reply Br. 13
	CP 3230, lines 1-3	CP 3229-30 ; RP 1744; RP 1795-1803	
	CP 3230, line 4	CP 5622-26 (Ex. 179); RP 1744-45, 1794-95	
	CP 3230, lines 5-7	RP 1797-1803	
	CP 3230, lines 8-11	CP 3024; CP 3042; CP 3031; CP 3031	
Wound Care Book	CP 3230, lines 17-19	CP 3055-56, 3064; CP 3025-26	App. Br. 38 Reply Br. 9, 12
	CP 3230, line 22	CP 3055-56, 3064; CP 3025-26	
	CP 3230, line 23	CP 2719	
	CP 3231, lines 4-5	CP 3055-56, 3064; CP 3025-26; CP 2719; RP 1270	
Guide to Infection Control	CP 3231, lines 7-9	CP 3048, 3054-55, 3059, 2298, 2303, 2316, 2321, 2368, 2326, 2371, 2374, 2088, 3092, 3095, 3029, 3032, 3223 (FF 2, §E [uncontested finding])	App. Br. 39-40 Reply Br. 13

Thompson, Punch Detail as Raw Data	CP 3231, lines 14-18 CP 3231, lines 22-25	CP 512, ln 5; RP 804, 3800-04, 4473-75, 4477-81; RP 4463, -73; RP 4489-90; RP 4776-77 RP 4489-90, 4492; RP 4598-99; RP 4666-67; RP 4675; RP 4776-77	App. Br. 43-44, 48-51 Reply Br. 11
Yakimenko, Forbes, Production of Punch Detail, Staffing Ratios	CP 3232, lines 2-6	RP 4400s - 4800s occurred in Life Care's case; not during discovery	App. Br. 40-48, 52-53 Reply Br. 9-11, 13
Wound Care, Forbes, Production of Punch Detail, Staffing Ratios	CP 3232, lines 9-11	CP 3045	App. Br. 38, 44-48 52-53 Reply Br. 9, 12-13
Wound Care Book, Yakimenko	CP 3232, lines 13-14	CP 3042, 3047, 2043, 3055-56, 3025-26, 3230 (FF 11, §D [uncontested]) ; CP 3025, 3229 , CP 492; 10/07/14 hearing at RP 57-58; CP 875; RP 3311, 3349, 3402, 3413; CP 3236	App. Br. 38, 40-43 Reply Br. 9-12
Forbes' Meeting Notes	CP 3232, lines 15-19 CP 3232, lines 21-26	CP 3042-43; CP 3028; CP 3024-25 CP 3052 (Inter. No. 31); CP 3060 (RFP No. 18); CP 3052, 3060; CP 3030; RP 2800-21	App. Br. 44-45 Reply Br. 13
Discovery Re Staffing Ratios	CP 3233, lines 1-7	CP 3072-73 (Order at 4-5) ; CP 3053 (Inter. No. 32 response); RP 2799; 2801-22, 2823-54, 2863-73, 2901-27, 2936-67, 2986-3004, 3009-12, 4441, 4445, 4473, 4476-88, 4607-29, 4650-4721, 4724-34, 4743-47	App. Br. 52-53 Reply Br. 13
Cumulative Effect of all Discovery "Violations"	CP 3233, lines 9-10	CP 3073 (Order at 5) ; CP 3058 (RFP No. 10 response); CP 3045 (Inter. No. 14 response)	App. Br. 27-32 Reply Br. 14-19

Fletcher	CP 3233, lines 12-13	CP 3073 (Order at 5); CP 3068 (RFP No. 12), 3046-47 (Inter. No. 16 response)	App. Br. 36-37 Reply Br. 5, 9-10
Discovery Re Staffing Ratios	CP 3233, lines 15-16	CP 3073 (Order at 5); CP 3053 (response to Inter. No. 33 response), 3061 (RFP No. 20)	App. Br. 52-53 Reply Br. 13
Forbes' Meeting Notes	CP 3233, lines 19-22	CP 3073-74 (Order at 5-6); CP 3031 (RFP No. 41 response); RP 1334	App. Br. 44-45 Reply Br. 13
Binding 30(B)(6) Testimony	CP 3234, lines 4-7	CP 3074 (Order, page 6); RP 4294-4304	App. Br. 53-54 Reply Br. 11
	CP 3234, lines 10-11	CP 3074 (Order at page 6); CP 512; RP 804; RP 3800-04; RP 4804-05; RP 4294; CP 3227, 10/09/14 hearing at RP 9-29, CP 1084-99; RP 4296-4304, 4337-53; CP 579, CP 3223, RP 4477-81, 4776-77; RP 4776-77, 4477-81	
	CP 3234, lines 12-13	10/09/14 hearing at RP 9-29; CP 1084-99; CP 577-79	
Thompson	CP 3234, lines 15-19	CP 259; CP 180-81; CP 265-66	App. Br. 43-44 Reply Br. 11
	CP 3234, lines 20-23	RP 645-651, 657-700, 732, 749, 816, 1761, 1765, 1773-86, 1790-91, 2363, 2374, 2396, 2408-09, 2438, 2479, 2694-2784, 2679, 2785, 2799, 2801-22; 2823-54, 2863-73, 2901-27, 2861, 2936-67, 2986-3012, 3807-12, 4441, 4445, 4473, 4476-4488, 4607-29, 4650-4721, 4724-34, 4743-4747, 4786	

Thompson	<p>CP 3234, lines 25-27</p> <p>CP 3235, lines 1-7</p>	<p>CP 180-81; CP 3010, 3052-53, 3060-61</p> <p>CP 3088, 3093; RP 4441, 4445, 4473, 4476-88, 4607-29, 4650-4721, 4724-34, 4743-47;</p> <p>CP 3234-35; CP 3208, 3210</p>	<p>App. Br. 43-44</p> <p>Reply Br. 11</p>
Fletcher	<p>CP 3235, lines 13-15</p> <p>CP 3235, lines 17-18</p> <p>CP 3235, lines 19-23</p>	<p>RP 2602-05, 2628</p> <p>RP 2608, 2630</p> <p>RP 2629, 2632-34; CP 3208, 3210; CP 3241</p> <p>(conclusion of law)</p>	<p>App. Br. 36-37</p> <p>Reply Br. 5, 9-10</p>
Amended Witness List	<p>CP 3235, line 27 through</p> <p>CP 3236, lines 1-3</p> <p>CP 3236, lines 4-5</p>	<p>CP 3075-76 (Order at 7-8); CP 3329-30; CP 3042; 10/07/2014 hearing, RP 121-22; CP 880; RP 3175-84; RP 3181-84; RP 3774-83</p> <p>CP 3076 (Order at 8); RP 2817-21</p>	<p>App. Br. 38-39</p> <p>Reply Br. 6-7</p>
Yakimenko	<p>CP 3236, lines 7-8</p> <p>CP 3236, lines 9/10</p>	<p>CP 3076 (Order at 8), CP 1992, 2016, 2036, 2065, 2043; CP 2043, 3228, 3232; CP 3051; CP 875; CP 3228, 3076; RP 3262-63; CP 3228; CP 3070-71, 3228, 3232; CP 3208</p> <p>CP 3076 (Order at 8); CP 3229; 10/07/14 hearing at RP 57-58; RP 3309-11; RP 3310; RP 3349; RP 3311; RP 3402; CP 3236</p>	<p>App. Br. 40-43</p> <p>Reply Br. 9-11</p>

Yakimenko	CP 3236, lines 11-22	CP 1993 , 2016, 2036, 2065, 2043, 3228, 3232 , 3051; CP 875; CP 3076 ; RP 3262-63; CP 3228 ; CP 3070-71, 3228, 3232 ; CP 3208	App. Br. 40-43 Reply Br. 9-11
	CP 3236, lines 13-14	RP 3402, 3413; CP 3228, 3229, 3232, 3236 ; CP 3211	
	CP 3236, fn 1, lines 25-26	RP 3279; RP 3280	
	CP 3237, lines 2-5	RP 3942; RP 3934, 3942; RP 3946, 3953-54; RP 3955; RP 4308-09	
Von Preyss Friedman	CP 3237, lines 6-11	CP 3339-40; CP 3077 ; RP 3483; RP 3514 (undisclosed opinion violates rulings <i>in limine</i> at RP 2220 and CP 919); RP 3520, 3558-59, 3574, 3679-80, 4308-09, 4316, 4320-22	App. Br. 34-36 Reply Br. 3-5, 8, 10
	CP 3227, lines 15-16	RP 3483, 3514, 3520, 3558-59, 3574, 4308-09, 4316, 4320-22	
	CP 3237, lines 17-18	Finding of fact based on evidence cited above, that Life Care counsel and expert witness were repeatedly instructed on limitations of opinion testimony, but proceeded to disregard court instructions on the limitations to put inadmissible evidence before the jury.	

NEW TRIAL GROUNDS	ADDRESSED IN BRIEFS	INACCURATE FACTS	INCONSISTENT WITH TRIAL MANAGEMENT DECISIONS	WAIVER/FAILURE TO OBJECT AT TRIAL	PREJUDICE	FINDINGS
Dr. von Preyss Friedman	App. Br. 34-36 Reply Br. 3-5, 8-10	X	X		X	FF 7, 20 (CP 3228, 3237)
Mr. Fletcher	App. Br. 36-37 Reply Br. 5, 9-10	X	X		X	FF 17 (CP 3235)
Late disclosure of wound care book	App. Br. 38 Reply Br. 9, 12			X	X	FF 11 (CP 3230-31)
Amended witness list	App. Br. 38-39 Reply Br. 6-7	X	X		X	FF 18 (CP 3235-36)
Guide to Infection Control	App. Br. 39-40 Reply Br. 13	X			X	FF 12 (CP 3231)
Ms. Yakimenko	App. Br. 40-43 Reply Br. 9-11	X	X	X	X	FF 8, 9, 14, 19 (CP 3228-89, 3232-33, 3236)
Mr. Thompson	App. Br. 43-44 Reply Br. 11	X			X	FF 13(B), 16 (CP 3231, 3234-35)
Dr. Forbes' meeting notes	App. Br. 44-45 Reply Br. 13	X			X	FF 10, 14 (CP 3229-33)
Production of punch detail	App. Br. 46-48 Reply Br. 13	X			X	FF 2, 14 (CP 3223, 3232-33)
Punch detail as raw data	App. Br. 48-51 Reply Br. 11	X	X	X	X	FF 1(D), 2, 3, 6, 13(C) (CP 3222-25, 3226-28, 3231)
Discovery re staffing ratios	App. Br. 52-53 Reply Br. 13	X		X	X	FF 4, 5, 14 (CP 3225-26, 3232-33)
Binding 30(b)(6) testimony	App. Br. 53-54 Reply Br. 11		X	X	X	FF 6, 15 (CP 3226-28, 3234)

SMITH GOODFRIEND, PS

October 13, 2017 - 11:28 AM

Transmittal Information

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