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STATE OF WASHINGTON

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No. 49114-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONNIE LEE SHARP,
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 of Kitsap County
The Honorable Jeanette Dalton

RESPONDENT'S BRIEF

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I. INTRODUCTION

On this record, Life Care cannot show that the court manifestly abused its discretion in granting the remedy of a new trial due to numerous discovery violations. Likewise, Life Care cannot show that the court manifestly abused its discretion in granting a new trial due to defense misconduct. The Court should affirm on both grounds, although either ground fully supports the remedy of a new trial. With respect to the sanctions order, Life Care cannot show that the court clearly abused its discretion in imposing the least severe yet adequate sanction for fees and costs from the first, wasted trial. The Court should affirm the orders and allow the case to proceed to trial on the merits.

II. STATEMENT OF THE CASE

A. Life Care manages a facility in Port Townsend that must comply with state and federal safety requirements

Life Care Centers of America and Cascade Medical Investors (Life Care) are Tennessee companies that operate nursing facilities in the United States, including one in Port Townsend, Washington. CP 3221; RP 2706. Life Care's headquarters in Tennessee sets policies and procedures nationwide. RP 2722-23, 2743, 2773-74, 4798. Life Care has no written policy on staffing levels at its facilities. RP 4801-02. Its corporate witness testified that "[t]here isn't corporate decision-making in how the facility is staffed." RP 4801-02. Life Care, however, sets facility budgets and the resident census goals in Life Care facilities. RP 2749, 2727.

Life Care has an independent duty of care to its residents under state and federal regulations. CP 936; RP 3010, 4799. The duty of care includes the safety requirement that the facility must establish and maintain an effective infection control program to prevent the development and transmission of infection. CP 947. This includes adequate nursing assessments and charting of resident conditions. CP 946. The duty of care requires the facility to provide each resident with the necessary care and services to enable her to attain or maintain the highest practicable physical well-being. CP 942. A facility must be sufficiently staffed. CP 945.

Residents of facilities are “vulnerable adults.” CP 936, 950. A vulnerable adult is a person 60 years or older who has the functional, mental, or physical inability to care for herself, or is any person admitted to a facility. CP 950. Sandra Sharp was a vulnerable adult during her temporary residency at the Life Care facility between September 17 and October 17, 2012. CP 952. She arrived at the facility after a hospital stay that treated a urinary tract infection and other health issues. RP 3741.

B. Life Care’s facility staffing levels were “inadequate and dangerous” for the residents

In discovery, Life Care did not disclose available information on staffing at the facility. CP 3222-37. At trial, however, information on staffing emerged that proved discovery violations and dangerous understaffing. CP 3222-36. During Mrs. Sharp’s residency, the Life Care facility was understaffed, according to staff members who testified at trial.

Nursing directors expressed concern to Life Care regarding staffing shortages. RP 2420-21, 2730-32, 2760. Nursing director Cahill appeared overwhelmed. RP 2418. Nurses complained there were not enough staff members to care for the residents. RP 2412. Management was aware of “neglectful behavior” at the facility. RP 2418-19.

Life Care executive Raymond Thompson knew about the short-staffing issues but turned down staffing requests. RP 2760, 2869, 2997. Nursing director Cahill tried to schedule more nurses, but Thompson removed them from the schedule. RP 2130-31. Corporate culture involved “intimidation” and “an extraordinary amount of pressure that people felt in terms of reduction of staffing, reduction of nursing...” RP 2408-09.

A resident care manager testified that six nurses observed that the facility was understaffed. RP 2572. Assessments, charting, and wound care for residents suffered as a result. RP 2517-28, 2552-55. Life Care management knew of the complaints of understaffing. *Id.*, RP 2518. Life Care executive Thompson himself acknowledged that “we did not have enough staff working at and assigned to Life Care Center of Port Townsend, which is why we brought other staff in...” RP 4725-26, 4728.

Nurse Smith testified that the facility was understaffed and Mrs. Sharp was not given the nursing attention, assessments, and monitoring that she needed. RP 1736-38. Nurse Smith resigned: “My primary reason for this resignation is inadequate staffing resulting not only in poor, but unsafe

patient care... these working conditions make my own licensing vulnerable.” RP 2058, 2061 (“very inadequate and dangerous” staffing), 2062-63 (“Saundra Sharp was just kind of like the tip of the iceberg”).

Nurse Blanchard testified that management knew the facility was understaffed and, as a result, residents did not receive the care they needed. RP 1351-69, 1385-86. She testified that, in addition to other residents at the facility, Mrs. Sharp was neglected. RP 1388, 1393-95. Nurse Blanchard also resigned. RP 1350, 1357-58.

Nurse Berl testified the facility was understaffed and that Mrs. Sharp was neglected as a result. RP 1518-19, 1550-51, 1602-05. Nurse Berl testified that Mrs. Sharp was harmed for not being timely transferred to the hospital to address a spreading lower-extremity skin infection that was slowly becoming septic. RP 2594-95. Nurse Berl testified that she tried to get Mrs. Sharp transferred to the hospital, but management told her “multiple times she’s not going anywhere.” RP 2592.

C. Life Care’s understaffing and neglect of Mrs. Sharp caused her to die slowly from sepsis

The facility never filled Mrs. Sharp’s doctor’s October 6 order for a wound care consultation to address the infection. RP 1960-61; CP 3922. Even Life Care’s expert, Dr. von Preyss (a/k/a von Preyss-Friedman), agreed that Mrs. Sharp should have been moved to the hospital by October 12. RP 3512-13, 3649, 3552-54, 3958. But the facility held her for five more

days. Life Care does not challenge the court's findings on the progression of infection at the Life Care facility and that Mrs. Sharp then died from sepsis shortly after being transferred back to the hospital on October 17:

Form September 17, 2012, to October 17, 2012, Mrs. Sharp resided in Defendants' nursing facility, Life Care Center of Port Townsend. 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.

CP 3221, 3070. Due to poor assessments, monitoring, and charting for Mrs. Sharp, the nursing director and other nurses fell below the nursing standard of care, according to nursing expert Dr. Mary Shelkey. RP 1236, 1244.

The only infectious disease expert in the case, Dr. Patrick Joseph, testified that if Mrs. Sharp been transferred to the hospital five days earlier, a regimen of IV antibiotics would have successfully treated the infection. RP 1615-1632 (by October 12, "if Ms. Sharp had been transferred to Jefferson Hospital or any acute-care hospital and had been treated as inpatient, this infectious process would be treatable and curable"). By October 17, "she had reached the point of no return." RP 1632-33.

Life Care's expert, Dr. von Preyss, agreed with Dr. Joseph's opinion on treatment, that Mrs. Sharp had a "very serious infection" and should have been transferred to the hospital and given IV antibiotics five days earlier to fight the infection. RP 3512-13, 3649, 3552-54, 3958. Dr. von Preyss also

testified that IV antibiotics would have reduced Mrs. Sharp's pain. RP 3538, 3552. Life Care expert Dr. Starnes testified that Mrs. Sharp became "almost like a burn patient that has just massive open blisters" and she suffered "an ugly way to die." RP 2313-14.

D. Life Care defended its conduct by withholding discovery, attacking Mrs. Sharp's weak state of health, and exposing the jury to inadmissible evidence

After Mrs. Sharp's death from sepsis, her family brought claims for negligence, neglect under the Vulnerable Adult Statute, and punitive damages against the Tennessee defendants under Tennessee law. CP 932-33, 634-36. Life Care defended the case by withholding and concealing discovery. CP 3222-37 (twenty court findings of fact on Life Care discovery violations and defense misconduct). The evidence of neglect shown at trial, however, was soon eclipsed by Life Care's discovery violations and defense attorney misconduct, especially during Life Care's case-in-chief. *Id.*

Discovery violations, many related to staffing information, allegations of treatment, and withheld documents, were revealed for the first time at trial and in Life Care's case-in-chief. CP 3241. As a result, there is no evidence that a trial continuance would have cured Life Care's discovery violations. One of many significant discovery violations involved Life Care's concealment of its medical director's criticism of Mrs. Sharp's care, after she died from sepsis. CP 3229-30; *see below* at 37. The record supports the contested findings, as shown below.

Life Care also defended its conduct by attacking Mrs. Sharp's health and fragility based on her "multiple co-morbidities." LC Brief at 4-9. At trial, Life Care wanted to argue that Mrs. Sharp was going to die anyway at the same time regardless of the infection that became septic and killed her. RP 3941. The court excluded "last month of life" opinions on predicting life expectancy because they cannot pass muster under the *Frye* standard. RP 2218-2223; CP 884-87; RP 2198; CP 919; RP 3483, 3520, 3526-59, 3934, 3936, 3942, 3953-55, 4308-09. *Infra* at §1.

Life Care nevertheless exposed the jury to undisclosed and inadmissible testimony. Despite rulings *in limine* and repeated admonitions on the limitations of expert testimony, Dr. von Preyss testified that providing IV antibiotic treatment would have involved "futility," and that Mrs. Sharp allegedly only had a few months to live anyway. RP 3514, 3520, 3526-59, 4316, 4320-22; CP 3236-37 (FF 20). The defense expert's disregard of the rulings "were knowing and willful violations, which were prejudicial to the Plaintiff." CP 3237. "The defense misconduct unfairly and improperly exposed the jury to inadmissible evidence." CP 3241. It tainted the verdict that was later properly vacated. CP 1197, 1201, 3241-3242.

E. The new trial is the only available remedy to address multiple discovery violations and defense misconduct

The parties engaged in extensive briefing and multiple hearings to address discovery violations revealed during trial, and the defense attorney misconduct. CP 995-3005, 3241 (two thousand pages of filings). After

deliberate review, the court ordered a new trial on two separate grounds: discovery violations; and attorney misconduct. CP 3006-3066 (Opinion), 3221-42 (Order) (80 pages of findings, conclusions, and supporting material). There is no evidence the order was written from memory, as Life Care insinuates in its brief. The trial court order is based on the record.

F. Many findings are uncontested; those contested by Life Care are supported by substantial evidence

Life Care does not contest many findings and conclusions. About half of the lines in the findings are not underlined to allege error. *See* LC Brief at 2 (underlining about 80 subparts of App. B [New Trial Order], CP 3221-42, and about 16 subparts of App. C [Sanctions Order], CP 3688-94). The record supports the contested findings, as shown below.

III. LEGAL AUTHORITY AND ARGUMENT

A. The new trial order is accurate, supported, and clearly reasoned; there is no manifest abuse of discretion

The standard of review on the new trial order is for manifest abuse of discretion. *Teter v. Deck*, 174 Wn.2d 207, 215, 274 P.3d 336 (2012). “We require a much stronger showing of abuse of discretion to set aside an order granting a new trial than one denying a new trial.” *Id.* Reversing a new trial order requires showing that the court’s “decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Id.* “There is a presumption in favor of the trial court’s findings, and the party claiming error has the burden of showing that a finding of fact is not supported by

substantial evidence.” *State v. Merrill*, 183 Wn. App. 749, 755, 335 P.3d 444 (2014).

The record rejects Life Care’s attempt to show a manifest abuse of discretion. The order is grounded on a multitude of discovery violations:

- concealing Life Care executive Thompson’s knowledge (FF 1)
- concealing punch list information and documents (FF 2)
- concealing employee correction sheets (FF 3)
- concealing information and documents on staffing (FF 4)
- concealing destruction of daily staffing sheets (FF 5)
- obstructing corporate witness information (FF 6)
- testifying to undisclosed and prohibited expert opinion (FF 7)
- concealing Life Care regional director Yakimenko’s personal knowledge (FF 8)
- failing to disclose Yakimenko’s calendar (FF 9)
- concealing medical director Forbes’ work on Sharp’s death (FF 10)
- untimely disclosing venous stasis / wound care records (FF 11)
- untimely disclosing infection policy and punch list (FF 12)
- providing false and misleading information (FF 13)
- providing misleading interrogatory answers (FF 14)
- willfully failing to produce prepared corporate witness (FF 15)

In the new trial order, the court relied on *Gammon v. Clark Equipment Co.*, 38 Wn. App. 274, 686 P.2d 1102 (1984). CP 3077-79, 3237-42. A wrongful

death case, *Gammon* involved a defendant's failure to provide discovery information on notice of past injuries and related documents that were revealed during trial. *Id.* The jury rendered a defense verdict. The Court of Appeals reversed the trial court's *denial* of plaintiff's new trial motion, and rejected defendant's arguments that the plaintiff had to move for a continuance or a mistrial after trial witnesses revealed discovery violations. CP 3078; *Gammon*, 38 Wn. App. at 282.

Life Care's discovery violations are worse than those in *Gammon*. They are also worse than discovery misconduct in other decisions that granted new trials. *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004) (upholding new trial order for defendant's discovery concealment of internal affairs investigation and personnel file documents), *rev. denied*, 155 Wn.2d 1002 (2005); *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 696 P.2d 28 (1985) (reversing court's denial of motion for a new trial due on grounds of discovery abuse), *rev. denied*, 103 Wn.2d 1040 (1985).

Life Care's arguments have been rejected in these decision: "[a] new trial based upon the prevailing party's misconduct does not require a showing the new evidence would have materially affected the outcome of the first trial." *Roberson*. 123 Wn. App. at 336, quoting *Taylor*, 39 Wn. App. at 836. Like *Gammon*, the *Taylor* decision reversed denial of new trial motion following newly discovered evidence and violations. A party should not receive the benefit of its misconduct: "But, as said by the Supreme

Court, a litigant who has engaged in misconduct is not entitled to ‘the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent.’” *Taylor*, 39 Wn. App. at 837-38, quoting *Minneapolis, St. Paul & S.S. Marie Ry. Co. v. Moquin*, 283 U.S. 520, 521-22, 51 S. Ct. 501, 75 L. Ed. 1243 (1931).

Th same rule holds true here:

[Life Care] Defendants 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.

CP 3693, fn 8; *see also* CP 3076 (rejecting Life Care’s argument). The court’s new trial order due to discovery misconduct must be affirmed.

The new trial order is separately grounded in defense counsel misconduct. CP 3080-81; 3233-42. The court made several specific findings of defense attorney misconduct (Findings 15-20):

- misconduct for repeatedly producing unprepared corporate witness Mueller—the second failure to do so was willful—and for presenting misleading information (FF 15)

- misconduct for falsely stating to the court that Thompson did not have relevant information, concealing the correction sheets, concealing data, and the nature of the punch list (FF 16)
- misconduct for making false statements to the court about former Life Care officer Fletcher (FF 17)
- misconduct for concealing information and witnesses previously requested and ordered disclosed (FF 18)
- misconduct for producing undisclosed testimony that Life Care regional director Yakimenko treated Mrs. Sharp, and for failing to produce her calendar despite a previous order to do so and defense's subsequent promise to produce it (FF 19)
- misconduct for producing inadmissible expert opinion multiple times by Dr. von Preyss, despite orders *in limine*, instructions, and admonishments by the court; the violations were knowing, willful and prejudicial to Sharp (FF 20)

CP 3233-37. As shown below, the record supports these findings.

In granting a new trial based on misconduct, the court relied on *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). CP 3238-42. *Teter* affirmed the grant of a new trial in a medical malpractice case for: (1) defense counsel's repeated speaking objections, despite court prohibition; (2) attempting to put unadmitted exhibits before the jury; and (3) eliciting testimony on subjects the court ruled inadmissible or irrelevant. *Id.* at 213.

After the verdict, the court ruled that the “cumulative effect of defense counsel’s misconduct throughout the trial proceedings warrants a new trial, as it casts doubt on whether a fair trial had occurred.” *Id.* at 215. The Washington Supreme Court affirmed, stating where misconduct has occurred, “it would be onerous to require a party to also move for mistrial to preserve a claim of error based on misconduct.” *Id.* at 226. The misconduct in this case, which severely prejudiced Sharp, is worse than what occurred in *Teter*. *See below* and CP 3239-40 (court’s discussion of defense misconduct and resulting prejudice).

The Court should affirm on both grounds, and either ground independently supports the new trial order. CP 3242; *Coleman v. Dennis*, 1 Wn. App. 299, 301, 461 P.2d 552 (1969) (Court “will consider all grounds asserted since the trial court's order must be upheld if a new trial is proper on any ground raised”).

Life Care relies heavily on a case called *Clark v. Teng*, 195 Wn. App. 482, 380 P.3d 73 (2016). *Teng* was a medical malpractice case involving cerebrospinal fluid leakage after a lower back surgery. *Id.* at 484. The defense argued that someone else caused the problem. *Id.* at 487-88. During trial, the court found that defense counsel violated an *in limine* ruling excluding medical conditions “above the waist,” by referring to plaintiff’s sleep apnea and headaches. *Id.* at 486, 489. After closing arguments, the court denied plaintiff’s motion for a mistrial, finding that “both sides pushed

the boundaries” but “refus[ing] to find that either side went over those boundaries to the point where a mistrial is warranted.” *Id.* at 491. After the jury rendered a defense verdict, however, the court granted plaintiff’s motion for a new trial. *Id.* The Court of Appeals reversed, ruling that the new trial order was in essence not supported. *Id.* at 497-99.

The *Teng* case reiterates the rule that the appellate court gives “great deference to trial court findings of misconduct,” but shows that deference is not absolute when a new trial order “heavily relies on inaccurate facts.” *Id.* at 483-84. But this case is not *Teng*. This new trial order specifically enumerates a multitude of discovery violations and defense attorney misconduct that are supported by the record. On this record, Life Care cannot show that the court manifestly abused its discretion in granting a new trial due to discovery violations, and also in granting a new trial due to defense misconduct. Life Care cannot overcome the high bar of “a much stronger showing of abuse of discretion” in the grant of a new trial. *Teter*, 174 Wn.2d at 215. Life Care’s appeal must be rejected. Ruling otherwise would invite rampant discovery abuse and attorney misconduct, contrary to Washington law.

B. The record supports the new trial order; there is no manifest abuse of discretion

1. Life Care's expert Dr. von Preyss repeatedly violated rulings *in limine* and exposed the jury to inadmissible evidence, tainting the verdict

Sharp's discovery requests sought information on any causation defense asserted by Life Care. CP 3045 (lines 1-3). Life Care objected and provided no substantive response. *Id.* The parties later exchanged expert information in July of 2014, before trial started in November. CP 3560. Through reports and depositions, Life Care disclosed opinions from Dr. Starnes and Dr. von Preyss. Before trial, the court ruled that the parties cannot "introduce[e] evidence that has been excluded in a motion *in limine* without prior leave from the Court." CP 493.

Following a *Frye* hearing, the court ruled that defense expert Dr. Starnes may not give an opinion on "any kind of prediction of the date of death or that she had within 30 days to live," or that "the infection could not have been treated successfully." RP 2220, 2218-2223; CP 884-87. Such an opinion is junk science. Admittedly, Life Care never provided services of a wound care nurse specialist—as ordered by Mrs. Sharp's doctor—or IV antibiotics, as the infection slowly worsened. Life Care, however, wished to argue to the jury that Mrs. Sharp was going to die anyway. RP 3941.

The court properly excluded Dr. Starnes' proposed testimony that Mrs. Sharp was in the "last month of her life" and was going to die regardless of Life Care's failure to treat the skin infection that became septic

and slowly killed her. CP 3221 (uncontested finding on death by sepsis); RP 2198 (ruling); RP 2220 (ruling prohibited “any kind of prediction of the date of death or that she had within 30 days to live” or “any claim that the infection could not have been treated successfully”).

The court also ruled *in limine* that defense expert Dr. von Preyss is precluded “from parroting, echoing, referencing, or repeating Dr. Starnes’ opinion regarding Mrs. Sharp’s life expectancy.” CP 919 (ruling on MIL #25). The court also ruled that “Defense expert Dr. von Preyss-Friedman may not offer cumulative testimony regarding the life expectancy of Mrs. Sharp, as defense expert Dr. Starnes already offered extensive testimony regarding his opinion on this issue.” CP 919 (ruling on MIL #30).

The court clearly instructed Life Care counsel that its expert may *not* testify “as far as how much longer she had to live.” RP 3483. Dr. von Preyss, however, proceeded to testify to an undisclosed opinion that “there’s such a thing as futility” with respect to the notion of treating Mrs. Sharp’s infection with IV antibiotics. RP 3514. The opinion was undisclosed and violated discovery rules. CR 26; RP 3520 (court finding in her deposition testimony “no discussion of antibiotics”); RP 3526-59 (argument and ruling on undisclosed opinion). The testimony also violated the ruling that applied to Starnes (RP 2220 [no claim that the infection could not have been treated successfully]) and related rulings in limine (CP 919). The court ruled that

“Dr. von Preyss will not be allowed to testify [again] as to her opinion about the survivability of the antibiotic treatment.” RP 3558-59.

Dr. von Preyss testified the following day and two other days. The court permitted her to say that, in Dr. von Preyss’ opinion, Mrs. Sharp would likely have passed away within the next six months. RP 3942. In an offer of proof, she acknowledged that predicting life expectancy is “a very difficult question to answer since we don’t have a crystal ball... I cannot distinguish whether it would have been between three and six [months] or less than three.” RP 3934, 3942. The court ordered that no specific time period shall be given, and the court reminded defense counsel about the earlier ruling on antibiotics being “futile.” RP 3946, 3953-54 (instruction to witness), 3955 (acknowledging “no specific time period and no mention of futility”).

Later, the court again reminded Dr. von Preyss on the limitations. RP 4308-09. She was permitted to testify consistent with her previous answer given to the court that, in her opinion, Mrs. Sharp’s “chance of dying within the next six months was more than 50 percent.” When asked about life expectancy before the jury, however, she deviated from her answer, stating that, no, Mrs. Sharp probably did not have three to six months to live. RP 4316 (impermissible testimony); RP 4320-22 (ruling on violation). The defense expert’s testimony again violated rulings. CP 3236-37 (FF 20); *see also* CP 3236 (FF 20, ¶A) (uncontested finding on rulings *in limine*).

The court concluded that “those violations of the Orders *in limine* by the witness were knowing and willful violations, which were prejudicial to the Plaintiff.” CP 3237 (FF 20). The court also concluded that “the violation of the order *in limine* was malicious.” CP 3228 (FF 7). “The defense misconduct unfairly and improperly exposed the jury to inadmissible evidence.” CP 3241 (¶4). “[I]t is clear that on both occasions the witness was deliberate in getting the inadmissible opinion in front of the jury, regardless of the Court’s admonitions.” CP 3241 (¶4). The trial judge is in the best position to make this determination and the impact the prohibited testimony had on the jury. The court properly exercised its discretion in making these findings.

2. Court correctly found that Life Care’s counsel misrepresented the status and knowledge of Life Care officer Fletcher

Life Care contests parts of Finding 17 regarding defense attorney misconduct. CP 3235. During trial, Life Care protested that someone in the courtroom, Todd Fletcher, had been served with a subpoena by Sharp counsel. RP 2602. The purpose of the subpoena was to authenticate Life Care documents that Life Care refused to stipulate as being authentic. RP 2604.

Life Care counsel represented to the court that Fletcher “has no working relationship,” apparently with Life Care, but that “he has an interest in Life Care matters.” RP 2602. Life Care counsel represented that Fletcher

is not “a member or owner” of either Defendant, that he “has a part ownership in land,” but “no working knowledge of the function of a skilled nursing facility.” RP 2604-05. The next court day, Life Care counsel represented that Fletcher just owned the land underneath the facility and “he has no other involvement other than that.” RP 2628.

On this basis, the record supports the court’s finding that “the defense claimed that not only did Mr. Fletcher have no relevant information, he had no connection to LCCA” and Life Care “never disclosed otherwise.” CP 3235 (FF 17, §A).

When the court questioned him, however, he acknowledged that he was Todd Fletcher, and that he had a connection to Life Care: “I was unofficially an interim division vice president while we recruited for the position.” RP 2608.

Life Care counsel claimed to be ignorant of the fact that Fletcher was a Life Care vice president, and she stated she had “no knowledge of this gentleman before he came to the courthouse.” RP 2628-29. Life Care counsel spoke with him. RP 2629. She acknowledged that Fletcher “could probably identify a management agreement.” RP 2630. Counsel also then acknowledged that Fletcher “has some association with Life Care Centers.” RP 2630.

But Fletcher was more than an unofficial interim division vice president: Life Care’s website revealed that he won a recent Life Care award

and was “senior executive director in Life Care’s Northwest Division” where he led it “to achieve several milestones including enabling physicians to serve patients on site in Washington.” RP 2630-31. The court read the information from Life Care’s website on Fletcher without protest or denial by Life Care, its counsel, or Fletcher.

On this basis, the record supports the court’s finding that Fletcher “stated that he did have a connection to LCCA and that he could potentially identify a management agreement relevant to the case.” CP 3235 (FF 17). The court admonished Life Care’s counsel regarding accuracy in her candor to the tribunal. RP 2632-34. Counsel then acknowledged that she had learned Fletcher was a division vice president. RP 2632.

The court rationally concluded that “the defense had either failed to conduct an appropriate inquiry of Mr. Fletcher before making the false factual assertions, or the defense actively misled the Court. Either way, the defense made a false statement to the Court which the Court concludes would have gone undiscovered but for the Court’s inquiry of the witness.” CP 3235 (FF 17); *see also* CP 3202-3215 (Leland Ripley concludes that with respect to Fletcher, the “misrepresentations violated counsel’s obligation under RPC 3.3(a)(1) because counsel provided knowing false statements of fact to the court” [CP 3208, ¶27; 3210, ¶37]). The misconduct reflects a pattern of discovery abuse that included “the reckless or willful

false statements to the Court, with the intent that the Court rely upon the statements,” as stated in the court’s Conclusions of Law. CP 3241 (¶3(g)).

3. Court correctly found that Life Care concealed medical records until days before trial without explanation for not identifying the records in discovery

Life Care contests part of Finding 11, which relates to discovery violations for late disclosure of medical records called venous ulcer stasis records, also known as Wound Care Book records. CP 3230-31 (FF 11). Initial discovery requests included a request for all medical records. CP 3055. Nine months later, Life Care purported to disclose all records. CP 3056, 3064. Sharp’s records from the nursing director’s “Wound Care Book,” however, were not disclosed. Sharp followed up with a specific discovery request for those records. CP 3025.

Life Care objected, stating, “Objection, plaintiff has a misunderstanding as to what has been referenced as a ‘wound care book’ at LCC PT. See deposition of Mr. Cahill [former director of nursing]. The ‘book’ is a dynamic collection of notes that changes daily given the resident population and is not ‘maintained.’” CP 3026.

In fact, the undisclosed records “included descriptions, drawings, and notes generated by Facility nurses that specifically related to Ms. Sharp’s wounds on her legs.” CP 3230 (FF 11, §D [uncontested finding]). Contrary to Life Care’s argument, these were unique and “very important” records, not mere duplicates of other records. RP 1270. Because the records

from the Wound Care Book were not disclosed in response to initial discovery, the records were unavailable for expert evaluation. The records were likewise unavailable for defense expert and corporate depositions, including the deposition of the nursing director who authored the undisclosed records. The concealment prejudiced Sharp's case preparation.

Life Care waited until "Days before trial" to disclose the records. CP 3230 (FF 11, §D [uncontested finding]). Life Care claimed the late production was a "filing error." *Id.* Of course, this production was "clearly untimely." CP 3230 (FF 11, §D). Contrary to Life Care's argument (Brief at 38), the court did not find or characterize the late production as a "filing error"—this was Life Care's excuse. *Cf.* CP 2719 and 3230 (FF 11, §E).

The earlier discovery response certified that such records are "not maintained," while withholding disclosure that, in fact, Mrs. Sharp's venous ulcer stasis records from the Wound Care Book should—and did—exist. CP 3026. The court rationally concluded that "there is nothing in the record to explain why the defendants did not identify that these documents existed." CP 3231 (FF 11, §E). Life Care concealed during discovery the existence of Mrs. Sharp's venous ulcer stasis records that depicted the evolving wounds on her legs. CP 3230 (FF 11, §D).

4. Court correctly found defense attorney misconduct for concealing witnesses and information

Life Care contests Finding 18, arguing that it may amend its witness list near the end of Sharp's case. The argument avoids the true issue, which

relates to discovery violations revealed in trial and defense attorney misconduct for violating discovery rules and orders. CP 3235-36 (FF 11).

Sharp's initial discovery requests included interrogatories for the names, addresses, job titles, and telephone numbers for each person having personal knowledge of facts material to the case. CP 1993, 2016. After several months (*cf.* CP 2036 and CP 2065), Life Care's response did *not* disclose the identities and information for defendant employees Olga Kapitanov and Vivian Prange. CP 3042.

One month before trial, the court instructed the parties to prepare and exchange brief summaries for all witnesses. 10/07/2014 hearing, RP 121-22. These were due a few weeks before trial. *Id.* Despite being ordered to provide information about its witnesses, Life Care disclosed no information on Kapitanov and Prange. CP 846-52 (no disclosure).

During trial, Sharp learned that these witnesses had discoverable information. Nurse Cullen testified that Olga Kapitanov worked in leadership roles at the facility both before and after Mrs. Sharp's death. RP 2526-27 ("Olga was there when Sandy Sharp was there. Yes."), 2635-36, 2550-51. Nurse Berle also testified that Kapitanov was at the facility, in the chain of command, and actually prevented Nurse Berle from sending Mrs. Sharp to the hospital to treat the uncontrolled infection. RP 2591-92, 2596, 2598 (Kapitanov told Berle "point-blank, she's not going anywhere.").

At trial, Life Care's counsel and Thompson revealed information about Kapitanov and Prange indicating that Life Care knew that the witnesses were discoverable. RP 3175-81; RP 2872-73, 2908-09 (Kapitanov became interim nursing director shortly after Mrs. Sharp died from sepsis and nursing director Cahill resigned); RP 3778-79 (Life Care counsel acknowledging that Prange was a treater, that they knew that, but would not provide a discovery interview with her). Thompson's testimony also revealed that he reviewed documents to prepare to testify (RP 2873), but those documents were not disclosed, in violation of court order. CP 3229; CP 492 (order requiring defense counsel to produce all documents reviewed by defense witnesses in preparation for trial).

When Life Care added the witnesses to its amended list toward the close of Sharp's case, however, Life Care still disclosed no information (other than a claim that they would rebut testimony), despite having been previously ordered to disclose the information. CP 880 (defense witnesses 19 and 20); CP 3235 (FF 18, §A); RP 3175-84 (surprise witnesses and undisclosed documents; court ordered production; defense argues "he certainly would have everything well before anyone testifies" [CP 3181]); RP 3774-83 (argument on late disclosure of witness information). Substantial evidence supports Finding 18, §A. It is not credible for Life Care to argue that Kapitanov and Prange's relevance "could not have reasonably been anticipated prior to trial." LC Brief at 38-39.

Substantial evidence also supports Finding 18, §B. CP 3236. The court ordered that employee punch detail information for Kapitanov—which had not previously been produced—must be produced. RP 3181-84. Life Care’s conduct, as correctly found by the court, showed “an ongoing abuse of the discovery rules by the Defendants not known prior to trial because of the failure to disclose, the delayed disclosure or misleading information produced in response to interrogatories, requests for production and in depositions.” CP 3012-13.

5. Substantial evidence supports the finding of discovery violations for late disclosures of relevant documents, including the Guide to Infection Control

Sharp’s initial discovery requests asked for a description of Life Care’s policies relating to the treatment of the lower limb conditions that Mrs. Sharp developed at the facility. CP 3048. In February of 2014—nine months after the requests were served—Life Care’s response was a one word answer: “Yes.” CP 3048; 3059 (refusal to produce any policies absent entry of a protective order). Life Care also failed to identify the relevant policies. CP 3048, 3054.

In April, Sharp counsel followed up to request production of policies, procedures, and guidelines, which Life Care refused to produce despite their being subject to public disclosure under state law. Life Care continued to insist on a protective order. CP 2303.

In May, Life Care counsel agreed to produce them without a protective order. CP 2316. In response, however, Life Care objected to producing “all written policies regarding patient care... [and] treatment of infections.” CP 2321. Instead, Life Care produced a table of contents, which Sharp’s counsel agreed to receive to expedite the production. CP 2321, 2316. Sharp’s counsel then requested production of “chapters from the policies and procedures manual,” including one listed at LCC000540 (CP 2326), “Chapter 10: Infection Control, Chapter 10 contains the general infection control policy with a reference to the Life Care Centers of America A Guide to Infection Control Policy.” *Cf.* CP 2368 and 2326.

Life Care produced Chapter 10, but withheld A Guide to Infection Control Policy. CP 2371, -74. This and related documents had been requested in discovery the previous year. CP 3048, 3055. Despite knowing that the Guide to Infection Control was responsive to earlier discovery requests, Life Care would not produce it without an additional 30-day discovery request. CP 2088, 3092, -95. Accordingly, Life Care avoided production of the infection policy until shortly before trial. CP 3029, 3032. The production delays were time consuming, vexatious, and delayed Life Care corporate witness depositions regarding corporate policies.

Life Care blames Sharp for the delay. LC Brief at 40. But substantial evidence supports the finding that, “[i]n addition to the venous ulcer stasis, or Wound Care Book, records, Defendants failed to timely disclose their

‘Guide to Infection Control’ and the ‘Punch List.’” CP 3231 (FF 12); CP 3223 (FF 2, §E [uncontested finding Life Care withheld punch list in response to earlier discovery requests, but only disclosed it one month after the initial CR 30(b)(6) deposition of Mueller]). The court correctly concluded that “the defendants abused the discovery process including but not limited to: a) delayed/untimely disclosures.” CP 3241. The court correctly concluded that Life Care “engaged in willful violations of discovery and obfuscation that unfairly disadvantaged the Plaintiff in its ability to obtain all relevant information in a coherent and orderly fashion before trial.” *Id.*

6. Life Care and counsel concealed Yakimenko’s personal knowledge, sprung surprise testimony, made a late disclosure of notes, and wrongfully withheld the calendar

Sharp’s initial discovery requests included interrogatories for the names, addresses, job titles, and telephone numbers for each person having personal knowledge of facts material to the case. CP 1993, 2016. After delaying for several months (*cf.* CP 2036 and CP 2065), Life Care responded that Sharp should look in the medical records for such witnesses, although Life Care stated the names of the facility administrator, the former director of nursing, and Mrs. Sharp’s own treating physicians. CP 2043. But Life Care refused to provide contact information for its employees, instead stating that “LCC Port Townsend employees may be contacted through undersigned counsel.” CP 2043.

Obstructionism violates CR 26. *Wright v. Group Health Hospital*, 103 Wn.2d 192, 203, 691 P.2d 564 (1984) (“it was improper for Group Health to advise its employees not to speak with plaintiffs’ attorneys. An attorney’s right to interview corporate employees would be a hollow one if corporations were permitted to instruct their employees not to meet with adverse counsel.”). In addition, Life Care never disclosed the Life Care regional director of clinical services, Nataliya Yakimenko, as a fact witness claiming personal knowledge of Mrs. Sharp’s treatment. CP 2043; 3228, ¶8; 3232, ¶14B.

In discovery, Life Care designated Yakimenko as a corporate witness. LC Brief at 41. On that basis, Sharp deposed her as a corporate witness, not a fact witness. Life Care’s counsel never disclosed that Yakimenko claimed to have personal knowledge, and she did not disclose it during the corporate deposition. Nowhere in the Life Care chart is Yakimenko’s name printed, either in type or legible print. Life Care argues, however, that her signature appears on two pages of a 500-page chart (LC Brief at 40), although it is not legible. Life Care argues this is sufficient disclosure. Illegible scrawl cannot constitute disclosure under CR 26.

Life Care also concealed in discovery alleged conversations between regional director Yakimenko and Mrs. Sharp. CP 3047, 3051. Sharp had requested disclosure of conversations, but Life Care made no disclosure at all. CP 3047, 3051.

One month before trial, the court instructed the parties to prepare and exchange brief summaries for all witnesses. 10/07/2014 hearing, RP 121-22. These were due a few weeks before trial. *Id.* Life Care's witness list disclosed Yakimenko not as a fact witness having personal knowledge, but as a corporate witness along with other 30(b)(6) witnesses. CP 875.

During Life Care's case-in-chief, defense counsel produced "surprise testimony that [Yakimenko] was one of Mrs. Sharp's treating providers and that she was present at the Facility during several critical days during Mrs. Sharp's residency." CP 3228, ¶8B; CP 3076. Yakimenko claimed to remember specific conversations with Mrs. Sharp from two years earlier. RP 3262-63. The testimony may have been elicited to give the impression that Mrs. Sharp was "very happy" and "not in any distress," despite becoming septic and then slowly dying of septic shock. RP 3244, 3263. The court found that Life Care "did not disclose this testimony before their case in chief." CP 3228, ¶8B (unchallenged finding); CP 3047 3051 (no discovery disclosure); CP 875 (no disclosure on witness list); CP 3025 (Sharp request for names of all care providers to Mrs. Sharp at the facility; Life Care did not disclose Yakimenko).

The court found that Life Care's failure to disclose Yakimenko "as a fact witness due to her alleged treatment of Mrs. Sharp" was a discovery violation. CP 3070-71; CP 3228, ¶8; CP 3232, ¶14B; *see also* CP 3208 (Ripley concludes that this misconduct constitutes ethical violations).

During trial, the court ordered that counsel not speak with witnesses during breaks in their testimony. RP 3279. During a break in Yakimenko's testimony, Life Care's counsel objected to the order and stated that she represented Yakimenko. RP 3280. The court warned counsel not to coach the witness, but did not prohibit counsel from speaking with her. RP 3280-81. The court noted that the incident was "curious," but did not make a finding of misconduct. CP 3236. Life Care's argument to the contrary (LC Brief at 41) is unsupported.

The court had ordered that all witnesses must produce documents reviewed before testifying. CP 3229 (uncontested that the court "ordered prior to trial that witnesses must produce documents they reviewed in preparation for trial testimony"); CP 492 (order requiring defense counsel to produce all documents reviewed by defense witnesses in preparation for trial); 10/07/14 hearing at RP 57-58 (oral order and Life Care counsel's acknowledgement of it). Life Care violated this order by withholding Yakimenko's notes until after she was examined. RP 3309-3311. Counsel acknowledged she had the notes but did not disclose them beforehand. RP 3310. Life Care and its counsel also violated this order by withholding Yakimenko's calendar.

Yakimenko remembered treating Mrs. Sharp based in part on a review of a calendar. RP 3349 ("that's from my calendar and my notes that I have saved"). Life Care counsel represented to the court that Yakimenko

said, “I reviewed my calendar”; counsel further stated that “I asked her [Yakimenko] to review her calendar... she can tell that from looking at her calendar... she knows from looking at her calendar what days she was there.” RP 3311. Life Care counsel represented that “Yakimenko made it very clear that she reviewed her calendar.” RP 3402. Counsel would have been authorized by her client, Yakimenko, to make these representations.

Consequently, the court found that “Yakimenko claimed to have a calendar that she reviewed before she testified which refreshed her memory.” CP 3236. This finding is correct. After the surprise testimony that Yakimenko treated Mrs. Sharp, Life Care counsel stipulated to disclosing, belatedly, Yakimenko’s calendar and notes. RP 3402; RP 3413; CP 3236. Life Care admits it never disclosed the calendar. CP 3236. As a result, the court found that Life Care willfully violated the court order and the discovery rules. CP 3228, ¶8; 3229, ¶9B; 3232, ¶14. The court also found this constituted attorney misconduct. CP 3236; *see also* CP 3211, ¶42.

Life Care’s counsel proposed a finding to the court that “Defense witness Nataliya Yakimenko failed to produce her ‘calendar.’ This document should have been produced during trial, or in response to Interrogatories No. 8 and 18.” CP 3173, ¶3; CP 3211-12, ¶¶42-43 (Ripley noting misrepresentation of the Opinion and conflict of interest in counsel’s “attempt to blame the clients for counsels’ misconduct”). It is unbelievable that Life Care now claims there is no calendar.

This is important: Life Care counsel told the court that “Yakimenko made it very clear that she reviewed her calendar and reviewed her notes for me.” RP 3402; RP 3311 (Life Care counsel’s multiple representations regarding her client’s review of a calendar). Now Life Care counsel tells the Court that the calendar is “nonexistent.” LC Brief at 42-43. Maybe appellate counsel confirmed the calendar’s “nonexistence” consistent with CR 11—despite the record that cannot support that claim. If appellate counsel is correct, then trial counsel repeatedly lied to the court about the existence of the calendar. Perjury and the subornation of perjury would be serious matters. CP 3208 (Ripley analysis), 3236 (FF 19), 3241 (¶3). But Life Care cannot have it both ways.

7. Life Care stated, falsely, that Thompson did not have relevant information; this obfuscation prejudiced Sharp by concealing information until Life Care’s case-in-chief

Life Care contests Findings 13 and 16. CP 3231, 3234. In the complaint, Sharp charged negligence in part based on Life Care’s prioritizing Tennessee corporate profit over patient safety at the Port Townsend facility. CP 29. Sharp sought discovery on staffing and scheduling for the facility. CP 3088, 3093.

In the summer before trial, Life Care obstructed the deposition of witness Raymond Thompson, Division Vice President of Operations. CP 180-81. Through counsel, Life Care moved for a protective order and represented to the court that “Thompson has no discoverable information

related to this lawsuit.” CP 180-81. Counsel further represented that Thompson “has *absolutely no information* as to the facts giving rise to this case.” CP 259 (emphasis in original).

Although the court denied Life Care’s motion for a protective order and allowed the deposition to proceed, Life Care delayed the deposition until October, weeks before trial. CP 265-66 (order denying defense motion); CP 1997 (argument that Life Care’s obstructionism wasted time and interfered with trial preparation). Thompson was deposed once as a fact witness and twice as a corporate witness; the court later found that he withheld evidence. CP 3222-26, 3234-35.

During trial, Thompson testified to facts and Life Care documents on roughly ten occasions. On November 5, he testified for the defense argument that a Resident Care Manager cannot be a “speaking agent” for Life Care. RP 645-651. He testified again the next day. RP 657-700; RP 732 (court ruling based on his testimony); RP 749 (he researched ex-employee for argument to exclude testimony); RP 816 (defense proposed to offer his trial testimony on data). He testified again on November. RP 1761, 1765 (defense offered his testimony that medical director cannot be a speaking agent); RP 1773-86 (same, regarding Ex 179); RP 1790-91 (ruling based on his testimony, overruling defense objection to Ex 179).

Thompson’s involvement arose again a week later. RP 2363 (defense proposed he make an offer of proof); RP 2374, 2396 (ex-

admissions/marketing director testified that facility must admit all new residents unless Thompson gave permission not to); RP 2408-09 (his management created a culture of “intimidation” involving “an extraordinary amount of pressure that people felt in terms of reduction of staffing”); RP 2438 (Life Care counsel insinuates he acted as executive director near the time of Mrs. Sharp’s admission, present on a daily basis); RP 2479.

Thompson testified a week later, this time on Life Care’s different employment positions, policies, procedures, and budget process. RP 2694-2784; RP 2679 (Thompson on defense’s witness list). Thompson violated rulings *in limine*: the court then warned Life Care counsel to properly reinstruct him because “[t]wice he mentioned something that’s been previously ruled not admissible.” RP 2785.

Thompson testified again the next day. RP 2799 (Life Care counsel suggested he testify on data); RP 2801-22 (Life Care counsel offers him on data); RP 2823-54, 2863-73, 2901-27 (he testifies on management); RP 2861 (court bases ruling on his testimony about budget process).

He testified again on the next day. RP 2936-67, 2986-3004, 3009-12. He violated another ruling, this one not to discuss per-patient-day data at the facility. RP 2982 (ruling), 3004 (prohibited testimony), 3005-3007(ruling that Thompson violated the order).

Sharp rested his case on December 8, 2014. RP 3192.

On December 12, Thompson's testimony figured in argument and court observations. RP 3807-12. In Life Care's case-in-chief, he testified on January 5. RP 4441, 4445, 4473 (Life Care counsel offered him to identify exhibits); RP 4476-88 (he testified on scheduling data). He testified again the next day. RP 4607-29 (on facility management). He testified again the following day on similar issues. RP 4650-4721, 4724-34, 4743-47; *see also* RP 4786 (Life Care counsel proposed calling Thompson in sur-rebuttal).

Clearly, Life Care's discovery representations to the court—that Thompson “has *absolutely no information* as to the facts giving rise to this case”—were false statements to the court. CP 259 (emphasis in original). The statements were inconsistent with the Rules of Professional Conduct and the Civil Rules. CR 26(g); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (“spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials”); CP 3208, 3210 (Ripley on Life Care counsel misconduct).

The court found that information possessed by Thompson was discoverable and responsive to discovery requests, and that “defendants knew Mr. Thompson possessed relevant information and failed to disclose it.” CP 3234-35. Life Care's “defense falsely stated that Mr. Thompson did not have relevant information... The court concludes that Plaintiffs were clearly prejudiced by this obfuscation.” CP 3234-35. Because much of the

documents and information regarding scheduling and staffing, as shown above, “was only discovered through the Court’s own inquiry of Mr. Thompson—late in the Defendants’ case-in-chief—this Court easily concludes that but for the Court’s inquiry, this relevant information would never have been discovered nor disclosed.” CP 3235.

8. Life Care concealed discoverable information on the medical director’s handout and post-death meeting; the concealment prejudiced Sharp

Federal law requires skilled nursing facilities to designate a medical director to implement and coordinate patient care. 42 CFR 483.70(h). The medical director also participates in implementing plans of action to correct quality deficiencies. 42 CFR 483.75(g); RP 1758-59 (Life Care’s medical director’s job description); RP 1777 (Thompson testified that Life Care is required by federal regulation to have a medical director).

In discovery, Sharp requested identification of persons with knowledge of relevant facts; all documents related to any internal investigation of Mrs. Sharp’s care; and documents related to remedial measures taken to improve wound care or infection control at Life Care facilities, including any taken in response to this case. CP 3229, 3024, 3042.

In response, Life Care did not identify or disclose the medical director’s knowledge, or existence of any meeting regarding Mrs. Sharp’s treatment, and Life Care did not identify or disclose related documents. CP 3105-06 (neither disclosing the medical director nor her knowledge of

treatment failures); CP 3094 (neither disclosing documents or producing a privilege log); CP 3087-88 (denying the existence of any remedial measure documents; in response to discoverable documents being revealed at trial, defense counsel took the opposite position, that the non-disclosed discovery involved remedial measures. RP 1337-8). Life Care admits that it did not disclose a “handout created by an independent contractor.” LC Brief at 44.

The “independent contractor” was Dr. Karen Forbes, the facility’s federally-mandated medical director. RP 1795; RP 2737; RP 3697. Due to trial testimony by a nurse, it is now known that the handout related to the medical director’s criticism of the lack of treatment for Mrs. Sharp. RP 1795-1803. The trial court found that the handout constituted “a packet of her [medical director Forbes’] notes and selected chart notes from Mrs. Sharp’s medical file.” CP 3230; 5622-5626 (Ex. 179). Following the death from sepsis, the medical director convened a meeting with facility staff (uncontested finding at CP 3229-30), and used the handout to criticize the care Mrs. Sharp received. CP 3230; RP 1744, 1795, 1798-1803.

The court’s findings on this issue (CP 3229-30) are supported by un rebutted trial testimony (RP 1744, 1795-1803) and the exhibit (CP 5622-5626). The court correctly found that purpose of the meeting was “to point out deficiencies in the assessment, identification, and charting of Mrs. Sharp’s wounds and spreading infection.” CP 3230.

Life Care concealed this important information in discovery, violating discovery rules. CR 26; *Magana v. Hyundai Motor America*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009) (a “party cannot simply ignore or fail to respond to the request. An evasive or misleading answer is to be treated as a failure to answer.”). The court’s conclusion was supported by substantial evidence, that the discovery requests

were inclusive enough such that Defendants were required to disclose the existence of the meeting, the identities of persons present at the meeting, [and] the documents related to the meeting, including Dr. Forbes’ notes and documents which she discussed with the nurses.

CP 3230. Discovery of this information and the medical director’s handout was not barred by a statutory quality assurance privilege. RP 1334 (Life Care counsel arguing that “[t]his meeting with staff wouldn’t have been a quality assurance meeting as that’s defined under the statute.”). The handout came to light because the nurse brought it with her to trial.¹ The handout was admissible. RP 1791.

The information was highly relevant to proving Sharp’s claims that the facility was neglectful and negligent. Life Care’s concealment of the medical director information deprived Sharp of important discovery for the depositions of the medical director, nursing director, corporate witnesses, and experts, as well as the formation of Sharp’s nursing expert’s opinion

¹ Life Care insinuates that Sharp should be faulted for not listing the document on his exhibit list, and for not providing the medical director’s handout to Life Care in discovery. LC Brief at 44. Life Care and its personnel possessed the handout, not Sharp.

and testimony. The concealment was prejudicial to the Sharp's ability to prepare and present the case.

9. Life Care provided intentionally evasive or misleading discovery responses on staffing levels

a. Court correctly found discovery violations regarding the punch list and staffing documents

Life Care contests roughly half of Finding 2, which relates to Life Care discovery violations for the “punch list” or “punch detail.” CP 3223-24. Section A relates to Life Care's concealment of the true nature of the punch list. CP 3223. The punch list was not “raw data,” as Life Care represented in discovery and to the court during trial. CP 512 (line 5); RP 804; RP 3800-04 (counsel's repeated representations that it was raw data); *infra* at §b. In fact, the punch list was “finished data.” RP 4776-77, 4477-81. This significant because the underlying raw data that altered the punch detail contained highly probative documents—the “correction sheets”—that Life Care concealed in discovery and did not produce until the court ordered their production close to the end of trial. CP 3132 (FF 13).

Section B is uncontested, except for the fact that the ““correction sheets’ were requested [by Life Care] from employees, whose raw data showed an anomaly in the time they were at the facility.” CP 3223 (FF 2, §B). This finding is correct. RP 4477-81 (Thompson's testimony); RP 4776-77 (court finding).

Section C found that “[n]one of the information in paragraphs A or B above, nor the time sheet documents, were referenced, identified or disclosed by Defendants during discovery.” RP 4492 (error sheets not produced in discovery); RP 4477-81 (Thompson testimony); CP 3223 (FF 2, § C). This finding is correct.

Life Care’s argument (p. 47) attempts to confuse the set of findings by arguing instead about the “punch list,” which is a separate document that was disclosed very late in discovery. CP 3223 (FF 2, §E [uncontested finding]). Life Care argues that the undisclosed documents were not responsive to earlier discovery requests. LC Brief at 47. But Life Care is wrong. The court found that the punch list and correction sheets were responsive to earlier discovery requests, but not disclosed. CP 3223-3224.

The court found that Life Care failed to identify and produce “the existence of data on staffing levels,” and Life Care “failed to disclose the existence of staffing reports generated easily upon a data inquiry. Instead, Defendants gave the misleading answer that ‘staffing levels vary but no significant increases or decreases.’” CP 3010, 3052-53 (requesting information on staffing numbers, changes, and resident census), 3060-61 (requesting related documents); RP 2800-21 (Thompson’s trial testimony revealed existence of staffing data and reports).

Life Care also responded, falsely, that it was “not aware of any such written documents” responsive to the request for “all documents relating to

[Life Care's] evaluation of staffing levels at LCC PT as well as all [Life Care] facility for the years 2009-2013." CP 3030. The correction sheets (a/k/a time clock exception slips) were responsive to this request for documents relating to evaluation of staffing levels. CP 3223-24. During Life Care's case-in-chief, Thompson testified to the sheets, that they "help[] us monitor whether or not there is an internal system that we need to look at" and "this would be something that we are reviewing every single day." RP 4666-75. Sharp was prejudiced by Life Care's concealment of staffing documents, including the correction sheets.

b. Court correctly found that Life Care misrepresented the punch detail while concealing documents

Life Care challenges parts of Findings 1, 2, 3, 6, and 13. Life Care argues that it "did not misrepresent the 'punch detail' or whether it was 'raw data.'" LC Brief at 48. Substantial evidence supports the court's finding that "Defendants had repeatedly represented that the punch list was raw data," when it was, in fact, not. *Supra*; CP 3223 (FF 2), 3231 (FF 13). The actual raw data included "correction sheets," which Life Care concealed and withheld in discovery. *Id.*

In discovery, Life Care represented that the 177-page "punch detail" document was "raw data." CP 512, line 5 (defense argument that "Mueller could not provide information contained in over 177 pages of raw data from memory"). Life Care counsel also argued that "Mueller had the information, all of the raw data, which is punch card data." RP 804. During Life Care's

case-in-chief, counsel represented that Sharp's counsel "have had the punch card detail for months... They have had all of the raw data..." RP 3800; *see also* RP 3801-04 (Life Care counsel again repeatedly representing this as "raw data").

As revealed in Life Care's case-in-chief, however, the punch detail or punch list "purported to be raw data [but] turned out not to be actually raw data. It is finished data." RP 4776 (court finding). It "was manipulated by the people at the payroll department after having received the correction sheets from the various employees." RP 4776. "Thompson's trial testimony showed that the Defendants edited the punch list after receiving hand-written 'correction sheet' documents." CP 3223 (FF 2, §B); RP 4477-81 (Thompson testified that payroll manipulates data after receiving correction sheets). Thompson's testimony occurred after Sharp rested and supports the court finding. *Id.*; CP 3223 (FF 2, §§A-C).²

The correction sheets were not produced in discovery, but only upon their being revealed during Life Care's case-in-chief. RP 4492; RP 4598-99

² Inaccuracies in Life Care's argument include misquoting Finding No. 6 (LC Brief at 49). Life Care also misquotes the court (LC Brief at 50), because the court's statement (RP 3183) related to an order compelling production of documents (RP 3175-84), which included borrowed employee time sheets (RP 3182), not the correction sheets that remained concealed. Life Care also inaccurately states that it disclosed the correction sheets before its case-in-chief (LC Brief at 50-51). Contrary to Life Care's argument, RP 2795-2823 contain no discussion or disclosure of correction sheets. Disclosure did not occur until January 6, nearly a month after Sharp rested. RP 4598 (Life Care counsel statement to the court). The court did not "misremember" this issue. LC Brief at 50.

(production of the documents); RP 4776-77. The documents “turned out to be very relevant to the plaintiff’s claims... the Court finds that the Plaintiff had been surprised by subsequent information produced during this trial they couldn’t possibly have known about.” RP 4777. The court found that “Plaintiff had requested identification and production of such documents in discovery.” CP 3225 (FF 3, §C); CP 3030, 3045, 3058. The documents were highly relevant: staff completed “correction sheets” for management, correcting the time clock and documenting understaffing and staff difficulty in meeting resident needs. CP 3224 (FF 3, §§A-B).

The court found that Thompson was aware of these documents and additional information in Life Care computer databases. RP 3812, 4477-81, 4666-67, 4675 (Thompson testifying that “this would be something that we are reviewing every single day”). Life Care does not contest that now. CP 3224 (FF 3, §B). Life Care acknowledges that “Defendants did not identify nor disclose the existence of these relevant documents during any of their discovery responses. CP 3224 (FF 3, §B).³ The concealment prejudiced Sharp: “[t]his information was clearly relevant to Plaintiff’s claim that understaffing at the Facility deprived Mrs. Sharp of needed attention by the

³ Life Care argues (LC Brief at 49) that Thompson referenced in deposition that “payroll would also do mispunches,” but Thompson did not disclose the correction sheets. When asked about underlying data, he concealed them. He was asked, “Where would the underlying data for this summary report be found?” He answered, “It would be in the detailed punch list that you were provided.” CP 5697. He did not disclose the correction sheets that were part of the underlying data on the punch list staffing report.

facility's staff." CP 3224 (FF 3, §B). Substantial evidence supports the court's findings and conclusions regarding discovery violations. CP 3222-28 (FF 1-3, 6), 3231 (FF 13).

c. Court correctly found discovery violations on staffing levels, daily staffing sheets, and misleading responses

Life Care contests Findings 4, 5, and 14, but fails to address the Findings. Instead, Life Care argues that "per patient day" ratios were disclosed, but that is irrelevant. *Cf.* LC Brief at 52-53 and CP 3225 (FF 4), 3226 (FF 5), and 3232 (FF 14). Life Care denies the finding that "Defendants produced no documents in response" to document requests on staffing information regarding Mrs. Sharp's unit at the facility. CP 3225. But Life Care neither identified nor produced responsive documents. CP 3025 (Response to RFP No. 12, only stating that "No such documents are designated by 'unit.'"). In discovery and at trial, Life Care corporate witness Mueller testified that "there is not a piece of paper that says who was assigned to which unit and which rooms on which days." RP 4804-05; CP 5414. That was not true.

As the court found, at trial "former facility employees testified that documents entitled 'daily staffing sheets' designated what employees worked in which units (A, B, or C) and were responsible for a particular resident's chart notes." CP 3226 (FF 4, §G). This was correct. RP 4706-07. Employees testified that such documents reflected facility staffing and units. Nurse Smith testified to the difficulty faced by the head nurse, who

said “I did try to have one nurse on each unit. And then what happens at the end of the month, Raymond [Thompson] comes around and slashes... So now we’re back to just two nurses for three units.” RP 2130-31; *see also* RP 4573-74 (another employee testifying on daily staffing sheets); RP 2798 (Life Care counsel represented that a staffing sheet “assigns location.”).

At trial, Thompson testified that the daily staffing sheets have the three daily shifts and the staff assignments to “A, B, or C unit on that day for that shift.” *Id.* The sheets show what employees were scheduled “to come to work and [who] would be working on those units for those room numbers.” RP 4707. The document shows “who is working or who is supposed to be there” and “where they were supposed to be working.” RP 4708; RP 2716 (Thompson testifying that the staffing sheets “would have each unit, A, B, and C, and they would have the nurse that was assigned to work in those areas”); RP 2717 and 2719 (referring to A and B as units).

The documents were relevant to Sharp’s negligence claims on understaffing and they were relevant to understanding why there were gaps in the charting as her infection slowly spread and became septic. RP 4848, 4856-57. The finding of relevance is supported. CP 3226 (FF 4, §H). In discovery, Life Care did not disclose the existence of the daily staffing sheets and related documents responsive to the discovery requests. CP 3025.

The court correctly found that Life Care’s “discovery response that ‘No such documents are designated by unit’ was intentionally evasive and

misleading.” CP 3226 (FF 4, §J). Life Care “had an ongoing affirmative obligation to identify the documents and to disclose the documents pursuant to the intent of the discovery rules.” CP 3226 (FF 4, §J); CR 26. Instead of identifying and disclosing the staffing sheets in discovery, Life Care destroyed them. CP 3025, 3226 (FF 5), 3232 (FF 14, §B). At trial, Thompson testified that Life Care is not required to preserve them. RP 4708.

d. The court recognized that Life Care was sanctioned for discovery violations on staffing

Life Care contests Findings 6 and 15. Life Care argues that the trial court’s new trial order ignored that it bound Life Care to its corporate witness testimony. LC Brief at 53. In fact, the order recognized—not ignored—the court’s earlier sanction. CP 3228 (§6, ¶ I). The court correctly found that the earlier sanction was insufficient due to prejudice to Sharp as revealed later in trial:

The court affirms its earlier conclusions that the defendants’ failure to produce prepared corporate witnesses was willful and deliberate. Further, the court concludes that the sanction it imposed at trial: to limit Ms. Mueller’s testimony to her deposition testimony, denied the Plaintiffs an opportunity to discover and produce for the jury information relevant to the pre-defined 30(b)(6) topics from the corporate witnesses.

CP 3228 (§6, ¶ I). The earlier sanction occurred before additional misconduct was revealed at trial. CP 3227-3228.

Findings 6 and 15 relate to discovery violations and attorney misconduct. Life Care does not contest that, in discovery, corporate witness “Mueller was unprepared to answer many questions” that related to “the

number of nurses and staff members on duty for each shift during Mrs. Sharp's residency." CP 3226 (FF 6, §A); RP 4294 (court finding that the first Mueller deposition "contained non-answers to questions and which revealed that this person was not adequately prepared to be a 30(b)(6) witness"). Likewise, Life Care does not contest that "Thompson was unable to respond to questions about staffing levels at his deposition other than refer to the newly produced punch list." CP 3234 (FF 15, §B).

Sharp's counsel suspended Mueller's first deposition to allow her time to prepare to answer questions on staffing topics. CP 3226 (FF 6, §B). When Life Care refused to resume the deposition, the court granted Sharp's motion to compel a deposition of a prepared corporate witness. *Id.* At the second deposition, corporate witness Mueller was still unprepared to provide basic answers on staffing levels during Mrs. Sharp's stay. CP 579 (Q: "So you don't know much more about who was on these shifts than you did the last time we took your deposition?"; A: "Going through this, no... I do not know and cannot know who was on each unit").

With respect to this witness (FF 6, §F) and other Life Care corporate witnesses (FF 6, §H), the court ruled that "the failure by Defendants to produce a prepared witness was willful because the Defendants' attorneys were aware of their obligation under the court rules to provide a prepared corporate witness and failed to do so." CP 3227; RP at 10/09/14, pp. 9-29; CP 1084-99 (court review of substantial evidence supporting this finding).

In addition to failing to answer questions at the second deposition, Mueller provided misleading information. CP 3234 (FF 15, §A); RP 4296-4304, 4337-53. “She testified that this document [the “punch list”] contained all the responsive information possessed by the Defendants about staffing and the identity of all staff who were present during Mrs. Sharp’s stay at the Facility.” CP 3234 (FF 15, §A). But this was not true, as became clear during Life Care’s case-in-chief. CP 3234 (FF15, §B). And she did not disclose the other available staffing information at the depositions. CP 1096-97; RP 4337-53; CP 685-86.

Finding 6, §H, is also supported by records omitted from the appellate record by Life Care: Sharp’s CR 37 Motion & Supporting Declaration and Exhibits (2014-10-23) and Sharp’s Opposition to Defendants’ Motion to Reconsider Sanctions (2014-10-28) (Sharp supplement to CP). Finding 15, §B, is also supported by Sharp’s Motion to Exclude LC’s ER 1006 Summaries (2014-12-01) (supplement to CP).

10. On this record, Life Care cannot show that the court manifestly abused its discretion

Life Care decontextualizes a comment at RP 3568, where the trial judge consoled the junior defense attorney. The background to the comment related to Dr. von Preyss’ testimony that “there’s such a thing as futility and so on” with IV antibiotic use. RP 3514. Sharp objected that this opinion was undisclosed. RP 3515-16. Life Care counsel argued to the court, however, that the defense expert testified in deposition that “even aggressive

treatment of her infection would not have saved her life.” RP 3517-20. The court ordered that the parties recess and then deliver Dr. von Preyss’ discovery disclosures to the court. RP 3523.

After argument and review of the materials, the court ruled that the opinion was, in fact, undisclosed, and the court excluded the opinion. RP 3525- 59. Defense counsel then became upset for this alleged reason: Sharp’s counsel had objected to the “futility” testimony and argued that Life Care’s counsel misrepresented Dr. von Preyss’ expert opinion disclosure. RP 3563-64, 3567-68. The court led a discussion on professionalism. RP 3564-70. The court’s comments were interrupted at one point, so it can only be imagined what else the court would have said. RP 3568. The court’s comments should also be read in context that many discovery violations had not yet been revealed (CP 3223-33), and that some defense misconduct had not yet occurred (CP 3234-37).

C. Court exercised its broad discretion in imposing discovery sanctions of fees and costs, awarded without a multiplier

“A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The standard of review “recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question.” *Fisons*, 122 Wn.2d at 339. “The purposes of sanctions orders are to deter, to punish, to compensate, and to

educate.” *Mayer*, 156 Wn. 2d at 691, quoting *Fisons*, 122 Wn.2d at 356. The imposition of a sanction following a new trial order can serve, in part, “to compensate [the plaintiff] for the wasted effort form the first trial.” *Mayer*, 156 Wn.2d at 682, 691.

Life Care cannot show that the court clearly abused its discretion. The court imposed “the least severe 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.” CP 3692. The court reasoned that “[t]o 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 violations and misconduct.” CP 3692-93. This “is necessary to compensate Plaintiff for the intentional wrongdoing done against them, and to deter such future conduct by Defendants.” CP 3693.

Here, the court only awarded “those hours and costs related to time spent in trial while Court was in session, in addition to some of the briefing done during trial.” CP 3689. The trial included roughly 35 court days. CP 3222. The court found “that the costs and fees submitted by Plaintiff are a fair reflection of the work performed and time spent during the first trial.” CP 3691, ¶12. Declarations support the finding. CP 3689-90; 3375-3477. The total amount for attorney time and costs is \$294,401.24. CP 3694.

In its discretion, the court refused to apply a lodestar multiplier to any hourly rates. CP 3694. The court approved the rate of \$650 for the lead attorney based on “his over 35 years of experience, his education, training, skill and quality of legal services provided in this litigation, and is consistent with his current hourly rate.” CP 3691; 3381-3440. It is consistent with similar rates in the area. *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322, 1326 (W.D. Wash. 2009) (reasonable hourly rates between \$415 and \$760 for attorneys of similar skill, experience, and reputation). The court approved hourly rates of \$175 and \$125 for trial support, which is below “the average rate for in-court technical assistance.” CP 3691. These are not fees per se so much as trial costs. The associate attorney’s hourly rate of \$290 per hour is not contested. CP 3691.

The sanction is consistent with case law. CP 3692-93. *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677 (upholding sanction of \$744,880.04 for discovery violation); *Roberson v. Perez*, 123 Wn. App. 320, 96 P.3d 420 (2004) (upholding sanction of \$606,761 for discovery violations in prior trial); *Wash. Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012) (upholding \$341,000 sanction for discovery violation); *Haeger v. Goodyear*, 813 F.3d 1233 (9th Cir. 2016) (upholding \$2.7M sanction for discovery violations) (Ninth Circuit case at CP 3446-66).

D. Sharp should be compensated for fees and expenses

Under RAP 18.1(a), CR 26 and 37, and *Magana*, 167 Wn.2d 570, Sharp respectfully requests leave to petition the Court for fees and expenses incurred in defending the appeal of the court's orders. *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn. App. 710, 282 P.3d 1107 (2012) (awarding fees on appeal that upheld trial court discovery sanctions); *Cruz v. Chavez*, 186 Wn. App. 913, 347 P.3d 912 (2015) ("because we affirm the trial court's discovery sanctions... we find it appropriate to award attorney fees to the plaintiffs for responding to this issue on appeal"). Fees and expenses should be awarded for responding to Life Care's appeal.

E. Index of the support in the record for the contested findings

Life Care alleges error in nearly 100 subparts of the court's findings in the New Trial Order and the Order on Sanctions. But Life Care only argues some of those subparts, and the arguments are not supported by the facts. The following pages index substantial evidence in the record supporting the findings underlined by Life Care in its appendices.

Life Care cannot carry its burden of showing the findings of fact are not supported by substantial evidence. *Supra* at 8. Life Care cannot make "a much stronger showing of abuse of discretion to set aside an order granting a new trial." *Id.* The court properly exercised its discretion in ordering a new trial grounded on discovery violations, and separately grounded on defense attorney misconduct. In addition, the court properly

exercised its broad discretion in imposing the sanctions. The orders should be affirmed.

NEW TRIAL ORDER

LC APP. B

SUBSTANTIAL EVIDENCE

CP 3222, lines 26-27	RP 2717-19; RP 2800-21
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
CP 3223, lines 14-17	RP 4492; CP 3010, 3052-53, 3030
CP 3223, lines 18-22	RP 2800; RP 2802; RP 2807-08
CP 3223, lines 26-27	CP 998-999, 1084-99; RP 4337-53
CP 3224, lines 10-12	CP 3224, lines 12-21 (uncontested finding); CP 5085-5162 (Ex 244)
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
CP 3225, lines 19-20	CP 3025
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

CP 3226, lines 8-11	CP 3025; RP 2130-31, 2716-19, 2798, 4573-74, 4707-08
CP 3226, lines 13-15	CP 3025; RP 4708
CP 3226, line 16	CP 3025; RP 4706-08
CP 3226, lines 22-23	CP 268-77; CP 342-44; CP 320-23
CP 3227, lines 8-11	CP 575-79; Sharp's CR 37 Mtn for Sanctions
CP 3227, lines 12-14	CP 579
CP 3227, lines 15-18	CP 268-76; CP 348-50; 10/09/14 hrng at RP 29
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
CP 3228, lines 8-11	CP 919; RP 2218-23, 3483, 3514, 3520, 3526-59
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
CP 3228, lines 17-18	CP 875, 2043, 3228, 3232, 3051
CP 3228, lines 21-24	CP 3228, 3076; RP 3349, 3311, 3402; CP 3236
CP 3228, line 26	RP 3402, 3413; CP 3236

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
CP 3229, lines 10-15	CP 3070-71; CP 3228, ¶8; CP 3232, ¶14B; CP 3208; 10/07/14 hearing at RP 57-58; CP 492; RP 3309-3311; RP 3310; CP 3236
CP 3229, lines 24-25	CP 3024, 3042, 3031
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
CP 3230, lines 17-19	CP 3055-56, 3064; CP 3025-26
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
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])

CP 3231, lines 14-18	CP 512, ln 5; RP 804, 3800-04, 4473-75, 4477-81; RP 4463, -73; RP 4489-90; RP 4776-77
CP 3231, lines 22-25	RP 4489-90, 4492; RP 4598-99; RP 4666-67; RP 4675; RP 4776-77
CP 3232, lines 2-6	RP 4400s - 4800s occurred in Life Care's case; not during discovery
CP 3232, lines 9-11	CP 3045
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
CP 3232, lines 15-19	CP 3042-43; CP 3028; CP 3024-25
CP 3232, lines 21-26	CP 3052 (Inter. No. 31); CP 3060 (RFP No. 18); CP 3052, 3060; CP 3030; RP 2800-21
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
CP 3233, lines 9-10	CP 3073 (Order at 5); CP 3058 (RFP No. 10 response); CP 3045 (Inter. No. 14 response)

CP 3233, lines 12-13	CP 3073 (Order at 5); CP 3068 (RFP No. 12), 3046-47 (Inter. No. 16 response)
CP 3233, lines 15-16	CP 3073 (Order at 5); CP 3053 (response to Inter. No. 33 response), 3061 (RFP No. 20)
CP 3233, lines 19-22	CP 3073-74 (Order at 5-6); CP 3031 (RFP No. 41 response); RP 1334
CP 3234, lines 4-7	CP 3074 (Order, page 6); RP 4294-4304
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
CP 3234, lines 15-19	CP 259; CP 180-81; CP 265-66
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

CP 3234, lines 25-27	CP 180-81; CP 3010, 3052-53, 3060-61
CP 3235, lines 1-7	CP 3088, 3093; RP 4441, 4445, 4473, 4476-88, 4607-29, 4650-4721, 4724-34, 4743-47; CP 3234-35; CP 3208, 3210
CP 3235, lines 13-15	RP 2602-05, 2628
CP 3235, lines 17-18	RP 2608, 2630
CP 3235, lines 19-23	RP 2629, 2632-34; CP 3208, 3210; CP 3241 (conclusion of law)
CP 3235, line 27 through	
CP 3236, lines 1-3	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
CP 3236, lines 4-5	CP 3076 (Order at 8); RP 2817-21
CP 3236, lines 7-8	CP 3076 (Order at 8); CP 1993, 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
CP 3236, lines 9/10	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

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
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
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
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.

ORDER ON PETITION

LC APP. C

SUBSTANTIAL EVIDENCE

CP 3690, lines 20-23	CP 3221-42
CP 3691, lines 2-4	CP 3381-83
CP 3691, lines 7-9	CP3467-72
CP 3691, lines 10-12	CP 3441-43
CP 3691, lines 15-17	CP 3473-74
CP 3691, lines 19-22	CP 3473-74; CP 3476-77
CP 3691, lines 24-25	CP 3381-3440
CP 3691, lines 26-27	CP 3375-3477; CP 3274-3373
CP 3692, line 17, through	
CP 3693, line 3	Legal conclusion based on CP 3688-3690 (Order on Petition incorporates New Trial Findings and Conclusions; it also references the pleadings filed concerning the Petition)
CP 3692, fn 7, lines 27-30	Legal conclusion based on CP 3688 (Order on Petition incorporating and referencing the Memorandum Opinion and New Trial Order Findings of Fact and Conclusions of Law).
CP 3693, lines 16-18	CP 3375-3477; CP 3274-3373; CP 3467-72
CP 3693, fn 8, lines 25-29	CP 3221-42 (New Trial Findings of Fact and Conclusions of Law)

CP 3694, lines 1-3 CP 3375-3477
CP 3694, line 11 CP 3378; CP 3382-83; the math is correct
CP 3694, line 13/14 CP 3378; CP 3382-83; the math is correct
CP 3694, line 14/15 CP 3378; CP 3382-83; the math is correct

IV. CONCLUSION

The record supports the court's orders. The Court should affirm on the grounds of discovery violations. The Court should also affirm on the grounds of defense attorney misconduct. Either ground supports the order for the remedy of a new trial. The Court should also uphold the sanction order and allow Sharp to petition for appellate fees and expenses. Failing to uphold the orders would condone the violations and the misconduct, which is not contemplated by the rules or the orderly administration of the law.

DATED this 30th day of August, 2017.

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CERTIFICATE OF SERVICE STATE OF WASHINGTON

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