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Court of Appeals  
Division II  
State of Washington  
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No. 52609-3

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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T.W.,  
Respondent,  
and  
BOYS AND GIRLS CLUBS OF SOUTH PUGET SOUND, a  
Washington corporation,  
Appellant.

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**REPLY BRIEF OF APPELLANT**

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## INTRODUCTION

Wagner's introduction calls the Club audacious, and its description of his sudden change of memory on the first day of trial a "tawdry tactic." Indecorous rhetoric cannot obscure the truth: Wagner repeatedly swore under oath that Gene Anderson sexually assaulted him. Although he switched (just in time) to Taylor, he never identified Taylor. And he only identified Urlacher after finding a newspaper story, and then being shown pictures labeled with Urlacher's name. Anderson suffered terribly due to Wagner's false memories. Taylor has not been given a chance to defend himself.

This was not a fair trial. The jury heard a lot of evidence about alleged negligent hiring and supervision, yet the court refused to instruct them that the Club cannot be vicariously liable for an alleged sexual assault, and cannot be negligent unless it knew or had reason to know of alleged dangerous propensities. Even Wagner seems to argue that "knew or should know" applies here. And adding ambiguous language to an unambiguous statute is legal error.

The instructions misstated the law. Excluding the sole expert on memory in a case like this is obvious legal error. The jury's quotient verdict is misconduct also requiring a new trial.

This Court should reverse and remand for a fair trial.

## REPLY RE: STATEMENT OF THE CASE

The tone of Wagner's response is unfortunate. Its *ad hominem* attacks are unworthy of reply.

Similarly, its incessant speculation – mostly in footnotes – about what the jury “likely found” is irrelevant. It inheres in the verdict.

And the frequent *arguments* in its Statement of the Case are improper. RAP 10.3(a)(5) (“A fair statement of the facts . . . without argument”). For instance, Wagner argues about the adequacy of Gonyea's 1984 sexual-abuse training, as if Wagner maintained a negligent-training claim; but he did not, so this too is irrelevant. Yet the trial court erroneously failed to tell the jury that it was irrelevant.

Wagner nowhere claims that the Club's Statement of the Case is unsupported, as he cannot do so. By contrast, his statement contains many unsupported – and insupportable – assertions. RAP 10.3(a)(5) (“Reference to the record must be included for each factual statement”). Wagner's statement is deficient.

In sum, Wagner fails to give this Court a fair statement of the facts, without argument. *Id.* His statement is thus unhelpful.

## REPLY ARGUMENT

### A. The quotient verdict invalidates the judgment.

#### 1. The standard of review is *critical* abuse of discretion review.

Wagner falsely claims that the Club “misstates” the standards of review on this issue, but then states exactly the same standards of review: *de novo* on whether the matter inheres in the verdict, and otherwise, abuse of discretion. Compare BR 45-46<sup>1</sup> with BA 15.<sup>2</sup> Again, Wagner’s aspersions are unfounded.

But Wagner denies the heightened standard for reviewing a new-trial denial. Compare BR 13 with BA 15 (citing *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App. 837, 848, 282 P.3d 1124 (2012); *State v. Taylor*, 60 Wn.2d 32, 41 n.11, 371 P.2d 617 (1962)). His argument is incorrect. This Court requires a lesser showing of abuse of discretion where, as here, the trial court denies a new trial. *Id.* There is nothing “new” about that. See, e.g., *Taylor, supra*.

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<sup>1</sup> Evidencing justified concern that the Club’s quotient-verdict argument is strong and that his response is weak, Wagner buries his response to the Club’s leading argument at the end of his response.

<sup>2</sup> Citing *Gilmore v. Jefferson Cnty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 494-95, 415 P.3d 212 (2018) (abuse of discretion); *Alum. Co. of Am. v. Aetna Cas. Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (same); *Long v. Brusco Tug & Barge, Inc.*, 185 Wn.2d 127, 131, 368 P.3d 478 (2016) (*de novo*); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768, 818 P.2d 1337 (1991) (same).

**2. The trial court erred in failing to grant a new trial due to the quotient verdict.**

The Club explained that the jurors agreed to add their individual damages numbers together and divide by the number of jurors “to come up with the verdict amount,” \$1.53 million. BA 16 (quoting CP 1393, 1396). When one juror suggested rounding down to \$1.5 million, the other jurors refused because “we agreed beforehand that the average would be a suitable number for the verdict.” *Id.* (quoting CP 1394). Under CR 59(a)(2), and under all authorities cited by both the Club and Wagner, that is a quotient verdict. BA 16-18; BR 45-59.<sup>3</sup>

Wagner claims that the jury’s discussions “arguably” inhere in the verdict. BR 46. He fails, however, to address the Club’s point that if this were correct, CR 59(a)(2) would be dead letter. See BA 16-17 (jurors’ assent to a quotient verdict “may be proved by the affidavits

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<sup>3</sup> Citing, e.g., *Matter of Lui*, 188 Wn.2d 525, 397 P.3d 90 (2017); *Long, supra*; *Cox v. Charles Wright Acad., Inc.*, 70 Wn.2d 173, 422 P.2d 515 (1967); *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962); *United Iron Works v. Wagner*, 98 Wash. 453, 167 P. 1107 (1917); *Stanley v. Stanley*, 32 Wash. 489, 73 P. 596 (1903); *Watson v. Reed*, 15 Wash. 440, 46 P. 647 (1896); *Goodman v. Cody*, 1 Wash. Terr. 329 (1871); *Sorenson v. Raymark Indus., Inc.*, 51 Wn. App. 954, 756 P.2d 740 (1988); Karl B. Tegland, 14A WASH. PRAC., *Civil Procedure* §§ 32:26 and 38:16 (2d ed. & 2017 update); BLACK’S LAW DICTIONARY 1697 (9<sup>th</sup> Ed. 2009); see also WEBSTER’S THIRD NEW INT’L DICTIONARY 1868 (1993). Wagner also cites unpublished decisions improperly. GR 14.1(a).

of one or more of the jurors”). Wagner’s tacit concession is accepted. Descriptions of a quotient-verdict process cannot inhere in the verdict because that process would then be immune from challenge.

Wagner’s response otherwise misrepresents the record. BR 48-49. He claims that neither Juror 11 nor 12 stated the jury agreed to be bound by the quotient prior to averaging their verdicts. BR 48. Yet Juror 11 swore: “it was agreed beforehand that the average would be a suitable number for the verdict.” CP 1394. They wrote the quotient on the verdict form. CP 1229. Wagner’s assertion is false.

Wagner then notes that Jurors 11 and 12 voted against *the verdict*. BR 48. This is true, but irrelevant. See, e.g., CP 1393 (Juror 11 “was one of two jurors who did not agree with *the verdict* rendered in this case”) (emphasis added). They did not vote against the arbitrary number the jury arrived at by chance: even they accepted that coincidental quotient, which was *no one’s* verdict. But the reasons they voted against *the liability verdict* inhere in that verdict. It does prove, however, the narrowest possible verdict margin.

Wagner similarly claims that because the jurors added \$0 and *again averaged their numbers to arrive at a new quotient*, this somehow vitiates their express prior agreement not to welch on their wagered verdict. BR 49. Unlike the **Conover** case (where, after the

jurors reached a quotient verdict, they agreed to recalculate, came up with a different amount, and then *voted to accept the new amount*) these jurors refused to renege after their second round of betting. Compare CP 1394 with **Conover v. Neher-Ross Co.**, 38 Wash. 172, 178-79, 80 P. 281 (1905). That is, each of these verdicts was a quotient verdict. Two bad bets don't win the pot. **Conover** and similar cases are inapposite.

Finally, Wagner claims that because 10 jurors stood pat on their deal not to alter the quotient (actually, all 12 did that) no misconduct occurred. BR 49. No case (including **Sorenson**) reaches that self-contradictory conclusion. Rather, where (as here) a jury agrees to sum their verdicts and divide by 12, and then refuses to round the quotient down under a prior agreement to be bound, a quotient verdict has been rendered. That is jury misconduct.

This Court must reverse and remand for a fair trial.

**B. The trial court erred in failing to instruct the jury that Gonyea had no duty to protect Wagner from alleged criminal acts unless it knew or should have known that someone presented a risk to Wagner, instead imposing strict liability on the Club.**

The Club explained that the trial court failed to instruct the jury that no vicarious liability exists for Urlacher and Taylor's alleged criminal acts and that no negligence can attach unless it knew or

should have known they presented a risk to Wagner. BA 19-33. The court instead instructed (1) that the Club was liable for their criminal acts if they were foreseeable; and (2) that sexual assault is foreseeable. BA App. C (Jury Inst. 15, CP 1202). In short, it imposed strict liability. This Court should reverse and remand for trial.

**1. The standard of review is *de novo*.**

The Club explained that the “trial court’s decision to instruct the jury on a point of law is reviewed *de novo*.” BA 19 (citing ***Wilcox v. Basehore***, 187 Wn.2d 772, 782, 389 P.3d 531 (2017); ***Kappelman v. Lutz***, 167 Wn.2d 1, 6, 217 P.3d 286 (2009)). And a “clear misstatement of the law . . . is presumed to be prejudicial.” BA 19-20 (citing ***Lewis v. Simpson Timber Co.***, 145 Wn. App. 302, 318, 189 P.3d 178 (2008); ***Keller v. City of Spokane***, 146 Wn.2d 237, 249-50, 44 P.3d 845 (2002)). Wagner *admits* that “an instruction that erroneously states the law is reviewed *de novo*.” BR 20. That is the Club’s point here.

Wagner nonetheless discusses abuse of discretion review for number, language, and “specificity” of instructions. *Id.* (citing cases). That sort of review is irrelevant here.

2. **The trial court erred in failing to instruct the jury that the Club cannot be vicariously liable for an alleged intentional assault and cannot be negligent unless it knew or should have known of the alleged perpetrators' dangerous propensities.**

The Club challenged the trial court's failures to instruct the jury that it (a) cannot be vicariously liable for the alleged intentional assault; and (b) cannot be negligent unless it knew or should have known of alleged dangerous propensities. BA 23-27 (citing, *inter alia*, **Hutchins v. 1001 Fourth Ave. Assocs.**, 116 Wn.2d 217, 227, 802 P.2d 1360 (1991); **Petersen v. State**, 100 Wn.2d 421, 426, 671 P.2d 230 (1983); REST. (SECOND) OF TORTS § 315 (1965); **Evans v. Tacoma Sch. Dist. No. 10**, 195 Wn. App. 25, 38, 380 P.3d 553, *rev. denied*, 186 Wn.2d 1028 (2016) ("Washington courts uniformly have held that an employee's intentional sexual misconduct is not within the scope of employment").<sup>4</sup>

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<sup>4</sup> Citing **C.J.C. v. Corp. of Catholic Bishop of Yakima**, 138 Wn.2d 699, 719-20, 985 P.2d 262 (1999) (two priests' sexual molestation of altar boy outside scope of employment even though, from their victim's perspective, they were acting within their authority); **Niece v. Elmview Grp. Home**, 131 Wn.2d 39, 48, 929 P.2d 420 (1997) (staff member at group home sexually assaulted disabled woman); **Smith v. Sacred Heart Med. Ctr.**, 144 Wn. App. 537, 543, 184 P.3d 646 (2008) (nursing assistant at hospital sexually abused former psychiatric patients); **Bratton v. Calkins**, 73 Wn. App. 492, 500-01, 870 P.2d 981 (1994) (teacher's sexual relationship with student outside scope of employment even though position provided opportunity for wrongful conduct); **Thompson v. Everett Clinic**, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993) (staff physician sexually assaulted patient).

Wagner responds obliquely. BR 24-26. He fails to address **Hutchins** or **Evans** – anywhere in his brief. He dismisses (in a footnote) the holdings in **Kyreacos** and **Blenheim**<sup>5</sup> that the Club cannot be liable as a matter of law for the perpetrators’ alleged intentional assaults for their own nefarious purposes. BR 18 n.24. He admits this is not a *respondeat superior* case, and yet maintains that the jury need not be told that the Club could not be held vicariously liable for the perpetrators’ intentional assault as a matter of law. BR 25-26. In short, Wagner effectively fails to respond.

The prejudice from the trial court’s failures to instruct was overwhelming. The jury was told Wagner claimed that the Club “was negligent in failing to protect [him] from abuse.” BA App. C (Jury Inst. 2, CP 1189). It was told that Wagner had to prove that the Club “acted, or failed to act, in one of the ways claimed by” Wagner, and that, “in so acting, or failing to act,” the Club “was negligent.” *Id.* at Jury Inst. 9 (CP 1196). But the Club also had “a legal duty to exercise ordinary care to protect” Wagner “from reasonably foreseeable dangers during times when [he] was in the ‘custody’ of the” Club. *Id.* at Jury Inst. 15 (CP 1202). He was in the Club’s “custody” because

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<sup>5</sup> **Kyreacos v. Smith**, 89 Wn.2d 435, 572 P.2d 723 (1977); **Blenheim v. Dawson & Hall, Ltd.**, 35 Wn. App. 435, 667 P.2d 125 (1983).

he was in its “facility during programs [it] provided.” *Id.* And “Sexual contact with minors is not unforeseeable as long as the possibility of sexual contact was within the general field of danger which the [Club] should have anticipated.” *Id.* In short, if Wagner was sexually assaulted by *anyone* at Gonyea, then the Club is liable.

Where in all this does the jury learn that the Club is *not* vicariously liable for the perpetrators’ intentional sexual assault? Where does it learn that neither Washington law nor “public policy favor the imposition of respondeat superior or strict liability for an employee’s intentional sexual misconduct”? ***Evans***, 195 Wn. App. at 38 (quoting ***C.J.C.***, 138 Wn.2d at 718-19). Wagner argued extensively about the Club’s alleged lack of supervision and training. See, e.g., RP 666-67, 670-72, 686-88, 821-22, 976-77, 1003-04, 1008, 1020-23, 1041-42; Ex 23; see also BR 6-7. Under the Court’s Instructions, the jury could have concluded that the Club thereby “failed to act, in one of the ways claimed by” Wagner, and (given its duty to protect him) was thus negligent, and therefore, liable. This end-run around uniform black letter law cannot be permitted.

The evidence was in the case, so the Club’s proposed instructions should have been given. Contrary to Wagner’s curt

claims, the Club could not argue law on which the jury was not instructed. The instructions misstated the law.

Wagner also claims – as he did below – that Jury Inst. 18 somehow fixed this problem. BR 26 (“Instruction 18 precluded Club vicarious liability”). This is patently false. BA 21 (citing CP 1093). Jury Inst. 18, the so-called **Rollins** instruction, is a *damages* instruction. BA App. C (CP 1205: “In calculating a damages award, you must not include . . .”). It even comes right *after* the standard instruction that it “is the duty of the court to instruct you as to the measure of damages.” *Id.* (CP 1204). No reasonable juror could read it as precluding any sort of liability, much less specifically *respondeat superior* or strict liability for negligent supervision or training.<sup>6</sup>

The Club was deprived of a fair trial. This Court should reverse and remand for a trial under correct jury instructions.

**3. The trial court erred in instructing the jury that the Club was strictly liable for alleged volunteers’ alleged sexual misconduct.**

As noted above, the Club explained that the trial court simply imposed strict liability under Jury Inst. 15. BA 27-33 (citing **N.L. v.**

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<sup>6</sup> Indeed, the jury likely did not follow Jury Inst. 18: since we know they added the individual verdicts together, divided by 12, and wrote the quotient on the verdict form, it appears that they never segregated damages solely caused by the perpetrators’ alleged acts. CP 1205, 1393-94, 1396-97.

**Bethel Sch. Dist.**, 186 Wn.2d 422, 378 P.3d 162 (2016); **N.K. v. Corp. of the Bish. of the Ch. of J.C. of L.-D. S.**, 175 Wn. App. 517, 522, 307 P.3d 730 (2013); **C.J.C.**, 138 Wn.2d at 706; **Doe v. Corp. of Pres. of Ch. of J.C. of L.-D. S.**, 141 Wn. App. 407, 445, 167 P.3d 1193 (2007); **Christensen v. Royal Sch. Dist. No. 160**, 156 Wn.2d 62, 67, 124 P.3d 283 (2005); **Niece**, 131 Wn.2d at 41; **J.N. v. Bellingham Sch. Dist. No. 501**, 74 Wn. App. 49, 58-59, 871 P.2d 1106 (1994); **McLeod v. Grant Cnty. Sch. Dist. No. 128**, 42 Wn.2d 316, 255 P.2d 360 (1953); **Boy 1 v. BSA**, 832 F. Supp. 2d 1282 (2011); **Boy 1 v. BSA**, 993 F. Supp. 2d 1367 (2014) ("**Boy 2**"). No case holds a voluntary organization like the Club liable for an alleged intentional assault by its volunteers – and certainly not where, as here, the Club did not know, and had no reason to know, of the alleged perpetrators' alleged dangerous propensities. *Id.* This Court should reverse and remand for a fair trial.

Wagner argues that although he voluntarily attended the Club, *ipso facto*, the Club held him in an involuntary protective-custody relationship like a prison, a school, or a nursing home. BR 21-24. He relies on **C.J.C.**, which held that two priests' sexual molestation of an altar boy was *outside the scope of their employment*, even if (from the child's perspective) they were acting within their authority. *Id.* He

cites **Niece**, which involved a vulnerable nursing home patient. *Id.* He cites **McLeod** and **N.L.**, which involved schools that children are legally required to attend. *Id.* He cites **N.K.**, which held that the Boy Scouts did *not* owe a protective duty. *Id.* He cites **H.B.H. v. State**, which involves foster parents, who again have involuntary protective custody over foster children. 192 Wn.2d 154, 429 P.3d 484 (2018).

In sum, Wagner cites not a single case imposing strict liability – or even a protective-custody “special relationship” – on a voluntary organization like the Club. And the **Boy 1** cases wisely counsel to the contrary. There is no basis to extend such liability here.

Indeed, Wagner claims several times that RESTATEMENT (SECOND) OF TORTS § 320 applies here. BR 15-16 & n.20, 24. While Wagner did not argue this below, § 320 only proves the Club’s point:

One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty of exercising reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor

(a) knows or has reason to know that he has the ability to control the conduct of the third persons, and

(b) knows or should know of the necessity and opportunity for exercising such control. [Emphases added.]

There is no evidence in this record that the Club took protective custody of Wagner “under circumstances such as to deprive him of his normal power of self-protection” (e.g., prisoners), or subjected Wagner “to association with persons likely to harm” him, over whom the Club knew or should have known there was a necessity of exercising such control. Simply put, the Club had no idea of the alleged perpetrators’ alleged propensities before they allegedly assaulted Wagner.<sup>7</sup>

More importantly, the court gave no instruction regarding “knows or should know” to this jury: precisely the error discussed *supra*. Where Wagner even argues that § 320 applies, the trial court’s failures to so instruct the jury are clear legal error.<sup>8</sup> BR 15-16, 24. This alone justifies reversal and remand for a new trial.

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<sup>7</sup> As he did below, Wagner insinuates that some publicity may have existed about Urlacher in 1984 (when Wagner claims to have been abused) because he was “investigated” in 1984. See, e.g., BR 2. But no evidence that anyone at Gonyea knew about that investigation exists. And as for Taylor – who likely had nothing to do with this situation – as soon as Anderson learned of a mere allegation, he terminated his practicum.

<sup>8</sup> Wagner’s insistent allusions to physical custody are a red herring. The Club has never argued that a “special relationship” arises only in such circumstances. Rather, as in § 320, the entity voluntarily accepting protective custody has to know, or there must be circumstances showing that it should have known, about the third party’s dangerous propensities. The trial court refused to instruct the jury on these crucial elements, preventing the Club from arguing its theory of the case.

But § 320 applies to situations of “dependence” and “helplessness.” *H.B.H.*, 192 Wn.2d at 173 (citing § 320 **cmt. b**).

Indeed, § 320 **Comment a**. decisively limits § 320:

The rule stated in this Section is applicable to a sheriff or peace officer, a jailer or warden of a penal institution, officials in charge of a state asylum or hospital for the criminally insane, or to teachers or other persons in charge of a public school. It is also applicable to persons conducting a private hospital or asylum, a private school, and to lessees of convict labor.

Nothing there, or anywhere else, mentions a child who voluntarily attends a Boys & Girls Club.<sup>9</sup> No law supports Wagner.

In sum, Wagner presented no evidence that the Club deprived him of his freedom to protect himself, for instance by telling his mother, and then staying away from the Club after he was allegedly assaulted in Urlacher’s home. Nor did he establish that the Club knew or should have known of any alleged dangerous propensities of either of the alleged perpetrators before he was allegedly assaulted.

A new trial under correct instructions is required.

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<sup>9</sup> Indeed, § 320 cites *Eberhart v. Murphy*, 110 Wash. 158, 188 P. 17, *rev’d in part on rehearing, aff’d on the relevant ground*, 113 Wash. 449, 194 P. 415 (1920), which involved an inmate subjected to a “Kangaroo Court” and assaulted by other inmates, a practice that was well known to their jailer. A Boys & Girls Club is nothing like a jail, and Gonyea knew nothing of the perpetrators’ alleged conduct before it happened.

**C. The trial court erred in instructing the jury beyond the special statute of limitations, RCW 4.16.340(1)(b).**

The trial court improperly added vague and ambiguous language to an otherwise clear statute, confusing the jury. BA 33-40. This legal error too requires reversal and remand for a fair trial.

**1. The standard of review is *de novo*.**

At the end of his response to this argument (BR 27-31), Wagner again mentions an abuse of discretion. BR 31. Statutory instructions are reviewed *de novo*. BA 33-34. Wagner does not argue otherwise, and the existence of a new trial motion does not entitle legally erroneous instructions to abuse of discretion review.

**2. Court's Inst. 11 misstated the law, overemphasized Wagner's theory, and prejudiced the Club.**

The trial court improperly imported the amorphous phrase "qualitatively different" into the otherwise unambiguous special statute of limitations, RCW 4.16.340. BA 34-40. That is, it modified the statutory phrase (correctly stated in Jury Inst. 10, BA App. C, CP 1197) "injury for which the claim is brought," making it instead, injury for which the claim is brought, including all of the qualitatively different and/or distinct harms one can devise. BA 35. ***Carollo v. Dahl*** instead holds that where, as here, precisely the same sexual dysfunction allegedly caused by abuse that has manifested itself for

decades simply gets worse, that is a *quantitative* change that does not evoke the special statute of limitations. 157 Wn. App. 796, 802, 240 P.3d 1172 (2010). But the trial court's decision to graft vague and ambiguous language onto the statute confused the jury, permitting Wagner to claim that the consequences of the alleged abuse that he never repressed, but allegedly *tried* to forget, was somehow "qualitatively" different than the same symptoms earlier.

Wagner first responds by again proving the Club's point: in arguing that Jury Inst. 11 is "consistent with" the Legislature's intent "that the earlier discovery of less serious injuries should not affect the statute of limitations for *injuries that are discovered later*," Wagner proves both that there is a clear way to state that intent, and also that the later injuries cannot be *the same* injuries as the earlier injuries. BR 28 (quoting Laws of 1991, ch. 212, § 1) (emphasis added). But here, the evidence is that Wagner had the same sexual dysfunction for many years. The amendment is just confusing.

Wagner also misstates the record in claiming that "the Club's objection to the instruction was not so much that the language of the instruction was wrong as much as it was its assertion that there was no evidence in the record of quantitatively [*sic*] different or distinct harm." *Id.* (citing RP 1103-04). Rather, the Club unequivocally

objected that the statute (stated in Jury Inst. 10) was clear, that there is no evidence of *qualitatively* different or distinct harm, and “I do not believe that’s a correct statement of the law.” RP 1104. It is not.

The rest of Wagner’s arguments miss the point. BR 29-31. Whether the cases talk about qualitatively different harms or not, the statute does not include that vague language, and Wagner did not prove any qualitatively different harms: *he* claimed that the same sexual dysfunctions existed for decades. But regardless of the Club’s attempts to explain this to the jury, the confusing Jury Inst. 11 permitted Wagner to cloud the issue. It misstates the law. Reversal and remand for a fair trial under correct instructions is required.

**D. The trial court erred in excluding evidence from the Club’s expert witness, Dr. Elizabeth Loftus.**

The trial court improperly excluded the lone expert on memory in a trial that centered on the reliability of Wagner’s 11<sup>th</sup>-hour “certainty” about Taylor, a young student practicum (*not* a “person of authority” at Gonyea) who lacked the necessary keys to enter the locked room where the assault allegedly occurred. BA 40-46. As a volunteer, Urlacher had no keys either. And Wagner never identified Taylor in any way. Whether Wagner’s claims were based on suggestion or other error is the central issue in this case. The trial

court badly prejudiced the Club's defense by excluding Dr. Loftus based on its own mistaken notion that jurors must know how memory works because they all "have memories." RP 905.

**1. The standard of review for exclusion of experts under *Frye* is *de novo*.**

While Wagner again fails to confront the controlling authority holding that review of the trial court's *Frye* ruling is *de novo*, he again implies that it is subject to abuse of discretion review. BR 31-44. It is not. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

**2. The trial court erred in excluding Dr. Loftus's badly needed testimony.**

Wagner's lengthy response presents a mélange of fact arguments going to the weight of Dr. Loftus's testimony, not its admissibility. BR 31-44. Dr. Loftus simply did not focus on "repressed memories." On the contrary, she testified that there is no such thing – contrary to many people's common beliefs.

Dr. Loftus primarily was there to help the jury understand how people's memories are affected by suggestion, whether from newspaper articles (like the one Wagner claimed he recently saw), from suggestive photos with people's names on them (like Wagner was recently shown), or from other things (like the letter Anderson

wrote in 1984, which was disclosed long before trial, but apparently was only shown to Wagner shortly before trial, perhaps explaining his 11<sup>th</sup> hour conversion from Anderson – a physically imposing man possessing substantial authority at Gonyea – to Taylor (a young college student with no authority and no keys). Dr. Loftus’s point is that even if we possess “memories” of events allegedly occurring 35 years ago, and even if we maintain our certainty after blatantly misremembering things (like Anderson), we can easily be mistaken because our memories may be affected by intervening suggestion.

Contrary to the trial court’s supposition, Dr. Loftus explained that jurors do *not* have expert knowledge of how their own memories work, or of how easily memories are altered. This is of course true for many of the inner workings of our minds. Mountains of scholarly works have been written about our blind spots regarding those inner workings. Arguably, they are the basis of the entire field of psychology. Jurors – like all of us – have common misperceptions regarding memory and other mental processes. The trial court’s contrary assumptions are unsupported by anything in the record: no expert testified that Dr. Loftus’s opinions are not generally accepted in the relevant scientific community.

Wagner quotes the trial court's fear that testimony about how suggestion generally affects memory is a comment on Wagner's credibility. BR 33. This is again an incorrect supposition. Dr. Loftus wished to explain how suggestion generally affects memory, not how any particular document or photograph affected Wagner's memory. Without expert guidance on the inner workings of such mental processes, people often fall into the same erroneous presumptions that the trial court expressed (RP 905):

I mean, all of these jurors have memories. They all know how memory works because they live it every day. I don't think they need an expert to tell them that.

This is an untenable and unfounded **Frye** analysis.

Rather, **Frye** intends to leave the science to the scientists: "If there is a *significant dispute among qualified scientists* in the relevant scientific community, then the evidence may not be admitted,' but scientific opinion need not be unanimous." **Anderson**, 172 Wn.2d at 603 (emphasis altered). "Only after novel scientific evidence is found admissible under **Frye** does the court turn to whether it is admissible under ER 702." *Id.* at 603 (citing **State v. Cauthron**, 120 Wn.2d 879, 889-90, 846 P.2d 502 (1993)) (emphasis added).

But here, without any expert testimony contradicting Dr. Loftus, the trial court elevated its "common sense" notion of how

memory works over that of a highly trained and qualified expert. Wagner attempts to do the same thing, arguing Dr. Loftus's own work somehow shows itself to be unreliable, but those arguments simply go to the weight the jury might afford to her testimony, not its admissibility under *Frye*, which is a question of law. *Id.* at 600 (citations omitted).

Indeed, the trial court's reasoning – like Wagner's – is self-contradictory. If “everybody knows” how memory works, expert testimony about it cannot be a novel scientific theory. The “*Frye* test is implicated only where the opinion offered is based upon novel science.” *Id.* at 611 (citation omitted). In fact, the inner workings of memory are neither novel science nor obvious. Dr. Loftus – whom Wagner *admits* is a highly qualified and distinguished professor – has dedicated her professional career to its study. Dismissing her expertise as “unscientific” or mundane was not only legal error, it was based on untenable grounds and reasons, meeting the abuse of discretion standard of review Wagner incorrectly argues.

This was the last straw. The trial court gave legally incorrect jury instructions that gutted the Club's legitimate legal defenses. It did so at the last minute, on untenable grounds. It then excluded from rebuttal the sole expert on memory, where the plaintiff had

maintained under oath for 18 months that Anderson was the *active* perpetrator at Gonyea, and then suddenly, on the first day of trial, discovered a “new” memory about a very different allegedly active perpetrator who was never found and who had no opportunity to defend himself from Wagner’s infamous allegations.

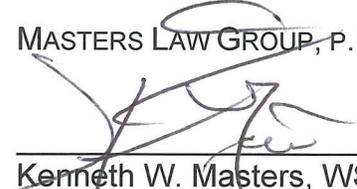
There was nothing fair about this trial.

### CONCLUSION

Legally incorrect and untenable jury instructions and rulings invalidate this trial. And then the jury practically cast lots to reach an insupportable damages guesstimate that *no juror* arrived at independently of its illegal quotient verdict. This Court should reverse and remand for a fair trial.

Respectfully submitted this 27<sup>th</sup> day of September 2019.

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