

67245-2

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No. 67245-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

REBECCA LAWRENCE,

Respondent,

vs.

TRUGREEN LANDCARE, LLC., a Washington Business; and
CARMELO BALTAZAR ALEJO, and JANE DOE BALTAZAR ALEJO,
As Husband and Wife and the Marital Community composed thereof,

Appellants.

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APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

APPELLANTS' REPLY BRIEF

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REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

Respondent Rebecca Lawrence's brief falls short of challenging the errors that TruGreen identified in its appeal, namely that the trial court erred in improperly instructing the jury and erred in permitting Lawrence to present inflammatory and prejudicial evidence to the jury.

Notably, Lawrence's brief fails to properly cite to the record and authorities and fails to answer the issues presented by appellants' brief. Even though Lawrence generally references TruGreen's citation to out-of-state cases, she never addresses them, never cites them, never distinguishes them and never cites any contrary authority. Indeed, the lack of citations makes her brief little more than blanket argument without any support. Accordingly, TruGreen respectfully seeks a reversal of the verdict below and a new trial.

II. SUMMARY OF REPLY

1. In violation of RAP 10.3, Lawrence's Response brief fails to cite to the record and legal authority in support of her contentions.

2. The Response does not challenge TruGreen's argument that the improper "nature and extent" jury instruction resulted in improper duplicative damages.

3. Lawrence fails to answer TruGreen's argument regarding the limiting jury instruction concerning the basis of expert testimony.

4. Lawrence misinterprets TruGreen's legal argument that the trial court should have accepted its proposed instructions on the aggravation of a previous infirm condition.

5. Lawrence misstates TruGreen's use of the police report after the trial court erroneously permitted Lawrence's witnesses to comment on its inadmissible content.

6. Lawrence's Response implies that she named and discussed the TruGreen driver merely for identity; to the contrary, this was done for no other reason than to unfairly prejudice the jury.

7. Lawrence misstates the holding and purpose of *Snyder*; the mechanics of the crash were inappropriate in an admitted liability case such as this.

8. In addressing the appropriateness of the jury verdict, Lawrence ignores TruGreen's argument that the award was improperly inflated due to the trial court's errors in improperly instructing the jury and in admitting inadmissible and inappropriate evidence.

III. REPLY

A. Lawrence's statement of the case fails to comport with RAP 10.3.

As a preliminary matter, Lawrence's Statement of the Case should be stricken because it fails to comport with RAP 10.3. Moreover,

Lawrence fails to comply with RAP 10.5 by not providing the legal authority on which she relies in the brief.

1. Lawrence fails to refer to the record for every factual statement and to present a fair statement of the case.

RAP 10.3(a)(5) directs briefing parties to cite to the record for every factual statement referenced: “A fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual statement.” (Emphasis added.) This helps the court identify the sources of all facts alleged. *See Litho Color, Inc. v. Pacific Employers Ins. Co.*, 98 Wn. App. 286, 991 P.2d 638 (1999). Failure to cite to the record for asserted facts can be critical and determine the outcome of a case.

In *Harbor Enterprises, Inc. v. Gudjonsson*, the briefing party failed to cite a single reference to the record in nine pages of asserted facts and thus did not recover fees and costs. *Harbor Enterprises*, 116 Wn.2d 283, 803 P.2d 798 (1991). This rule does not apply solely to appellants; RAP 10.3(b) requires respondent briefs to also conform to RAP 10.3(a)(5). *Newton v. Pacific Highway Transp. Co.*, 18 Wn.2d 507, 139 P.2d 725 (1943) (criticizing the failure of respondent to support its factual statements by citations to the record, as opposed to appellant’s brief). As *Newton* stated, “It would have been of great assistance to the court if the

respondent had cited the pages of the record[.]” *Id.* at 509. Thus, Lawrence’s Statement of the Case needed to have included a fair statement of the facts, without argument, and needed to have cited to the record for each fact asserted. It does neither.

Lawrence’s Statement of the Case runs from page 6 to page 10 but does not cite a single reference to the record. In five pages, over the course of eleven paragraphs, she fails to give this court any sources or direction to the record at all. In addition, Lawrence’s Statement of the Case hardly presents a “fair” statement of the facts, further violating RAP 10.3. Lawrence’s Statement of the Case relates facts which were not a part of the record, including police officer Cornett’s “document[ation of] various factors, including: the violation of safety rules, the roles of TruGreen and its employee, extensive property damage.” Response page 6. A review of the record, pages 5 to 9 of the March 9 testimony, reveals that Officer Cornett said none of those things. Lawrence’s characterization of such is argumentative and flatly contradicted by what the jury itself heard. Lawrence’s Statement of the Case should be stricken.

2. Lawrence fails throughout her brief to provide authority for her legal conclusions.

RAP 10.3 requires not just references to the record, but legal authority as well. RAP 10.3(a)(6) directs the parties to include “legal

authority.” As such, contentions in briefs will be disregarded when not supported by citations to legal argument. *See Bruce v. Bruce*, 48 Wn.2d 229, 292 P.2d 1060 (1956) (failure to cite to legal authority resulted in the brief not being considered by the court). This rule implicitly requires citations to legal authority contained in the argument in support of a party’s position on appeal to support the proposition for which such authority is cited. *Litho Color*, 98 Wn.App. at 290 (imposing \$500 sanctions on party who failed to cite legal authority.)

But Lawrence – consistently – makes bald assertions without any authority to the law. Her brief is stunningly absent of legal authority; she cites only three cases, one of which, *Snyder*, was formerly cited by TruGreen and, as seen below, Lawrence misstates that case outright. The other two cases support not Lawrence but TruGreen: for example, the court in *State v. Garcia* admonished appellant for failing to supply the relevant references to the record. *Garcia*, 45 Wn.App. 132, 140, 724 P.2d 412 (1986).

Take, for example, a random paragraph from Lawrence’s brief to illustrate Lawrence’s failure to cite to legal authority:

The law in Washington State is deliberately imprecise about when a limiting instruction may be sufficient to protect a party against the dangers of evidence admitted for a limited purpose, and when it is not. Some commentators have suggested elaborate guidelines for

making the decision, but Washington cases do not appear to mandate any particular formula by which the decision is made. This approach permits the trial court to decide the question on a case-by-case basis, taking into account all the facts and circumstances presented, commonly referred to as judicial discretion.

Page 16-17. This sample is indicative of Lawrence's entire brief; she fails to cite authority, makes bald assertions concerning Washington law and cites "commentators" without any citations to the commentators.

B. Lawrence fails to meaningfully respond to TruGreen's argument that the improper jury "nature and extent" instruction confused the jury to such an extent that it erroneously awarded duplicative damages.

TruGreen's First Assignment of Error argues that the jury's consideration of the nature and extent of Lawrence's injuries, by its instruction of WPI 30.10, resulted in a duplicative award. Lawrence's Response, pages 12 and 13, fails to adequately respond, instead repeating what has not been challenged: that WPI 30.04 has been used by Washington juries in the past. Her Response is circular: she appears to claim that the instruction is valid because it has been used in the past. In doing so, Lawrence ignores the purpose and structure of the jury instruction process as well as the legal arguments in favor of abolishing this out-dated jury instruction as 47 other states have done.

Although Lawrence is correct that the Washington Supreme Court appoints members of the Washington Pattern Jury Instruction Committee,

Lawrence is wrong to imply that this somehow means that the Court has sanctioned or even reviewed the committee's instructions in advance or any time prior to publication. *Preface, Washington Pattern Civil Jury Instructions, Volume 6 and 6A of the Washington Practice Series* (Fifth Edition). As the Court has noted: "Just because an instruction is approved by the Washington Pattern Jury Instruction Committee does not necessarily mean that it is approved by this court." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

In other words, simply being published does not mean that the jury instruction cannot be reviewed. Without doubt, all across the country, appellate courts regularly review challenged jury instructions and offer guidance to practitioners who must review each jury instruction for the specifics of a jury trial. *See, e.g., State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999) (noting that criminal pattern jury instruction, WPIC 16.02, is "not the manifestly clear instruction that jurors require") (internal quotations removed); *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn.App. 35, 244 P.3d 32 (2010) (reversing because WPI 50.11.01 given in error), *review granted* 172 Wn.2d 1001, 258 P.3d 685 (2011).

As TruGreen argued in its appeal, WPI 30.04 fundamentally encourages a jury to award duplicative damages when the jury considers the nature, extent, and duration of an injury as separate and compensable

elements of damage. But the jury's role is not (nor should be) to award duplicative damages. Instead, the jury should be tasked only with determining the damages which will reasonably and fairly compensate the plaintiff. Lawrence's attempt to push that issue to the side, and in essence blame the members of the Washington Pattern Jury Instruction Committee for any errors inherent in WPI 30.04, illustrates yet another flaw in her Response.

Lawrence fails to provide any response or counter-authority to TruGreen's citation to cases which have recognized the inherent prejudice of a duplicative recovery. Although the cases are outside of Washington, their logic is sound and persuasive here. This court should review the disparate goal and effect of this jury instruction and hold, like the majority of other jurisdictions around the country, that WPI 30.04 erroneously encourages duplicative verdicts. *See Anfinson*, 159 Wn.App. at 55 (noting that the court will presume error was prejudicial, and therefore reverse, where the instructional error given on behalf of party in whose favor the verdict was returned).

C. Lawrence's Response to TruGreen's limiting instruction argument relies solely on practice manuals but does not cite any legal authority.

As TruGreen argued in its Second Assignment of Error, a jury should be properly instructed how to limit the purposes of non-admitted

evidence upon which Lawrence's experts relied. For experts to rely on facts and data is appropriate. For the jury to not understand how to weigh such evidence is not. Lawrence's Response appears to argue only that experts can and should rely on data. See pages 13 – 17. Of course they should. TruGreen did not argue that the experts should not be able to do so; instead, TruGreen's Assignment of Error (entirely unaddressed by Lawrence) focuses on how a jury should weigh an expert's bases of his opinions and what level of weight the jury should accord those facts and data.

Lawrence's reliance on ER 703 and Washington state practice manuals such as *Tegland on Evidence* have nothing to do with the argument before this court. Response page 16. TruGreen argued nothing about hearsay or on what an expert may or cannot opine from the witness box. Instead, TruGreen argued that the trial court should have properly instructed the jury on how to weigh the testimony of Lawrence's lifecare planner and economist. Neither ER 703 nor *Tegland* offers any support to this court to help resolve the issue before it, namely how to properly ensure that a jury is instructed in weighing expert testimony.

Unaided by Lawrence's Response, the court should nonetheless look at persuasive authority cited by TruGreen's underlying appeal and hold that when facts or data are not admissible but used to explain the

basis of the expert's opinion, those inadmissible facts should not be weighed at the same level as the admissible facts. *See People v. Anderson*, 495 N.E.2d 485, 490 (Ill. 1986).¹ Such a procedure allows the jury to hear this information, while eliminating the risk that there is confusion in assessing the evidence heard from the mouths of the experts. *Brown Mechanical Contractors, Inc. v. Centennial Insurance Co.*, 431 So.2d 932, 944 n.7 (2011) (noting that, in jury cases, the trial court should consider excluding hearsay evidence offered to show the basis of expert opinion as unduly prejudicial, or at least consider "adding a cautionary instruction").

D. Lawrence misinterprets the legal argument regarding TruGreen's argument that the trial court should have accepted its proposed instructions on the aggravation of a previous infirm condition.

Lawrence's Response to TruGreen's Third Assignment of Error misstates the purpose behind the various permutations of WPI 30.17, 30.18, and 30.18.01. She appears to conclude that the WPI operate in isolation from each other. She is wrong. As the Note on Use to WPI 30.17 directs, "Use this instruction if the pre-existing condition was causing pain or disability. If the pre-existing condition was merely an

¹ The court in *Anderson* noted: "It is true that an uninformed jury could misuse this type of information as substantive proof of insanity. We do not believe that this possibility is a sufficient reason to deny the jury an adequate basis for assessing the weight and credibility of expert opinion. A limiting instruction, advising the jury to consider the underlying statements only to evaluate the basis of the expert's opinion, should forestall any such misuse." *Anderson*, 495 N.E.2d at 490.

infirmity that was not causing pain or disability, use WPI 30.18 or 30.18.01. If the evidence is in dispute as to the existence of such pre-existing pain or disability, use both instructions.” Washington Pattern Civil Jury Instructions, Volume 6 and 6A of the Washington Practice Series (Fifth Edition) (emphasis added). Nothing in the Note on Use suggest that all three instructions cannot be combined together.

Despite Lawrence’s unsupported statements to the contrary, there was evidence before the jury as to the existence of pre-existing disability (that is, Lawrence’s back pain and psychological condition). The Pattern Jury Instructions anticipate that when such evidence is before a jury, the jury should be instructed with a combination of the instructions. The trial court erred in failing to instruct the jury using a combination of the three WPI (30.17, 30.18, and 30.18.01).

E. Lawrence misstates TruGreen’s use of the police report.

TruGreen’s Assignment of Error No. 4 argued that the trial court erred in permitting Lawrence to make repeated allusions to inadmissible evidence. Lawrence’s Response asserts – again without any citations to the record – that the trial court permitted the testimony only after the parties had “thoroughly discussed” the issue during pre-trial motions. Response page 19. This is only partially accurate. Although it is true that it was discussed in pre-trial motions, it was because TruGreen had

anticipated the issue and moved in limine to preclude the police report and all references to it. The trial court was thus aware that the police report should not have been alluded to before the jury. But Lawrence omits to mention that the trial court had, in open court (but unfortunately not recorded), directed Lawrence to not bootstrap the testimony through the police officer.

Lawrence's Response sidesteps answering the tenor of TruGreen's Fourth Assignment of Error. She ignores all of TruGreen's arguments regarding the preclusion of the police report under RCW 46.52.080 and the evidence code. Instead, she tries to redirect the issue by pointing out how TruGreen used or did not use the police report. First, Lawrence implies that TruGreen's decision to not give the police report to the CR 35 examiners was to "obscure and obstruct." Response page 20. But to the contrary, it is to TruGreen's benefit that it chose not to muddy any waters by giving the CR 35 examiners an inadmissible document, which it knew would be precluded in limine. Second, Lawrence seems to suggest that TruGreen's later references to the report during the trial should somehow negate the error done by the trial court's inclusion of the report. Once the Court allowed Lawrence to ring the bell, TruGreen could not unring it – it had to muffle the sound and mitigate as much of the damage done as possible. The testimony quoted in TruGreen's brief shows that TruGreen

was trying to repair the damage with the experts rather than using it to its own advantage.

F. Washington law did not permit Lawrence to have referred to the name of the TruGreen driver, which was done for no other reason than to unfairly prejudice the jury.

Lawrence's Response regarding the driver identity issue misstates the application of *Snyder v. General Electric*, 47 Wn.2d 60, 287 P.2d 108 (1955). She argues that *Snyder* "imposes some discretionary limitations on the scope of evidence in admitted liability cases." Response at page 21. *Snyder*, however, does more than that: it restrains plaintiffs from being able to present a dog-and-pony show and introduce any unfairly prejudicial fact it can find in order to alienate the defendant from the jury. *Snyder*, 47 Wn.2d at 68. The *Snyder* court held that in a trial based solely on the question of damages (as here), the defendant "is entitled to have excluded from the testimony all references to the manner in which the accident occurred except such as are relevant to the question of damages." *Snyder*, 47 Wn.2d at 68.

There can be *nothing* relevant to the question of damages to repeat the name of the driver and imply in a closing argument that he did not know how to drive. Lawrence's closing argument and the court's colloquy, quoted in TruGreen's brief, reveal Lawrence's attempts to

unfairly prejudice the jury. As the Washington Supreme Court said this year, “Not all appeals to racial prejudice are blatant. Perhaps more effective but just as insidious are subtle references. Like wolves in sheep’s clothing, a careful word here and there can trigger racial bias.” *State v. Monday*, 171 Wn.2d 667, 678, 257 P.3d 551 (2011). The repeated phrase “they don’t know how to drive” and repeating the TruGreen driver’s Hispanic full name (including the Hispanic practice of using maternal and paternal surnames) could only be attributed to foster unfair prejudice to the jury.

G. Under *Snyder*, Lawrence should not have been permitted to allude to the mechanics of the crash.

Lawrence against misstates *Snyder* when she argues, on pages 21-22, that it “specifically authorizes evidence of the physics, angles and mechanics of damage in personal injury cases.” Lawrence is wrong. Nothing in *Snyder* authorizes such evidence, nor did the facts of that case suggest so. The permissible admissible testimony under *Snyder* was limited to allow the jury to understand the nature of the plaintiff’s injury. *Snyder*, 47 Wn.2d at 67-68. The *Snyder* court allowed the very minor testimony showing the force and direction of the impact of the vehicles only to meet a defense that the force and impact couldn’t have created such an injury. *Snyder*, 47 Wn.2d at 69. For Lawrence to expand this

holding beyond its limited purpose renders the point of admitted liability cases moot. That there was an accident in which Lawrence was injured was undisputed at trial; accordingly, the jury needed only to know facts necessary to determine the proper amount of damages. The mechanics of the accident were improper and her repeated allusions thereto served only to inflame the jury.

H. Lawrence's Response fails to meaningfully address how the verdict was improperly inflamed.

In addressing the appropriateness of the jury verdict, Lawrence ignores TruGreen's argument that the award was improperly inflated due to the trial court's errors in improperly instructing the jury and in admitting inadmissible and inappropriate evidence. She states that the verdict was a "community effort." Response page 24. Indeed, the jury must have felt sympathy for Lawrence, but it could come to the excessive verdict only as a result of the pile-on of improper evidence.

The jury also must have been confused that TruGreen did not have the opportunity to present anyone to refute Lawrence's future damages. Lawrence fails to grasp that the size of the verdict is itself proof of the cumulative effects of the improper evidence admitted by the trial court. Naturally, the jury, given free rein, would be sympathetic towards Rebecca Lawrence. But the trial court, as gatekeeper of evidence, should

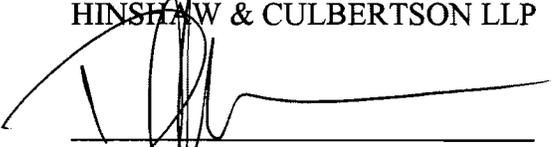
have ensured a level playing field for both parties so that the jury would have awarded a reasonable compensation to Lawrence rather than the excessive, inflated \$1,383,265 it awarded. CP 42.

IV. CONCLUSION

The purpose of a response brief is to “answer the brief of the appellant.” RAP 10.3(b). Lawrence’s Response fails to meaningfully answer TruGreen’s brief; she also fails to supply the court with factual and legal authority throughout her brief. Moreover, Lawrence neglects to respond to the specific legal challenges raised by TruGreen in outlining the trial court’s errors of failing to properly instruct the jury and admitting impermissible evidence and testimony. Because TruGreen was prejudiced as a result of these compounded errors, as seen in the excessive verdict, the only appropriate outcome is a reversal of the verdict and a new trial.

DATED this 16th day of March, 2012.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

REBECCA LAWRENCE,)	
)	
Respondent,)	
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vs.)	
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TRUGREEN LANDCARE, LLC., a Washington)	No. 67245-2-I
Business; and)	
CARMELO BALTAZAR ALEJO, and JANE DOE)	
BALTAZAR ALEJO, As Husband and Wife and the)	
Marital Community composed thereof,)	
)	
Appellants.)	

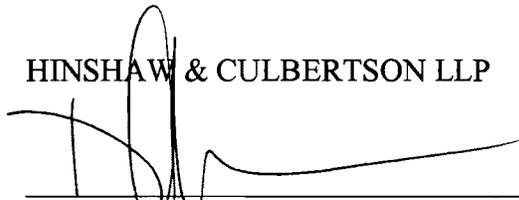
DECLARATION OF DOCUMENT FILING AND SERVICE

I, David J. Elkanich, state that on the 16th day of March, 2012, I caused the original **APPELLANT’S REPLY BRIEF** and a copy to be filed in the **Court of Appeals – Division One** and a true copy of the same to be served on the following via overnight UPS delivery:

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Signed in Portland, Oregon this 16th day of March, 2012.

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