

FILED  
February 23, 2016  
Court of Appeals  
Division I  
State of Washington

No. 73447-4-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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WANDA MONTGOMERY, personal representative of the Estate of the  
deceased, DESHAWN MILLIKEN, and DESTINY MILLIKEN, the sister  
of the deceased, DESHAWN MILLIKEN,

Plaintiffs-Respondents,

v.

BREWHAHA BELLEVUE, LLC, d/b/a MUNCHBAR, a Washington  
Limited Liability Company,

Defendant-Appellant.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

This is an appeal from a jury verdict, following a nine-day trial, in a negligence action against Brewhaha Bellevue, LLC, d/b/a Munchbar, a 21-and-over nightclub that was located in Bellevue Square Mall. On December 24, 2012, contrary to the applicable standard of care and its own written rules and regulations, Munchbar allowed *19-year-old* Jamari Jones to enter its nightclub *with a loaded gun*. Video surveillance shows Jones walking in the main Munchbar entrance, passing the general manager at the door, without being asked for identification and without being patted down for weapons. Once inside, Jones shot and killed DeShawn Milliken and shot and injured DeShawn's sister, Destiny Milliken. DeShawn suffered a horrible death, gasping for air on the nightclub floor, and left behind a six-year-old daughter named Ta'riyah Smith-Milliken.<sup>1</sup>

Shortly before trial, Munchbar conceded that it was negligent in failing to stop Jones from entering the nightclub on the night of the shooting. CP 1358. To defend the case at trial, Munchbar argued that (i) its negligence did not cause DeShawn's death and Destiny's injuries

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<sup>1</sup> For clarity, DeShawn, Destiny, and Ta'riyah will be referred to herein by their first names. Denise Gilbert, Ta'riyah's mother, will likewise be referred to as Denise.

and (ii) DeShawn and Destiny were responsible for the shooting. But if Munchbar had complied with the applicable standard of care and its own rules and regulations, Jones would not have been able to enter the nightclub with a loaded weapon. The jury nevertheless accepted Munchbar's argument *in part*: it awarded \$3,700,000 to the Estate of DeShawn Milliken (the "Estate") and \$520,000 to Destiny but allocated 20% of the fault to DeShawn and 5% of the fault to Destiny – reducing the judgment in favor of Plaintiffs from \$4,220,000 to \$3,165,000.

Rather than take responsibility for its admitted negligence and accept the jury's verdict, Munchbar claims that Ta'riyah should not have been permitted to recover damages because she was not DeShawn's "child." Contrary to Munchbar's argument, Ta'riyah's Certificate of Live Birth expressly indicates that she is DeShawn's child, as does the Acknowledgment of Paternity that DeShawn filed in Arizona, where Ta'riyah was born and has always lived. The trial court correctly afforded full faith and credit to those official state documents. While courts have recognized certain exceptions to full faith and credit principles, none of those exceptions applies where, as here, a third-party tortfeasor seeks to challenge another state's longstanding paternity determination. As the trial court ruled, such a challenge would not only violate full faith and

credit principles but would undermine this state's "compelling public interest in supporting strong families and encouraging permanency planning for all children." CP 3661.

Munchbar's remaining arguments are no better. The trial court did not abuse its discretion when it precluded Munchbar from introducing inflammatory evidence regarding DeShawn's alleged criminal activities – particularly given the parties' understanding and agreement that Plaintiffs would not present an economic loss claim or offer "role model" evidence. Nor did the trial court abuse its discretion – or otherwise err – when it formulated its jury instructions and verdict form. As a result, there is no basis to vacate the jury's verdict, nor is there any reason to "correct" the trial court's instructions and verdict form on remand. For all these reasons, and as set forth below, the trial court's judgment on the jury's verdict should be affirmed.

## **II. ISSUES PRESENTED**

1. Whether the trial court correctly concluded that the Personal Representative of DeShawn's Estate could assert a wrongful death claim under RCW 4.20.020 because the Arizona Certificate of Live Birth and Acknowledgment of Paternity – both of which identify Ta'riyah as

DeShawn's child – are entitled to full faith and credit and cannot properly be challenged in this wrongful death case.

2. Whether the trial court abused its discretion by precluding Munchbar from introducing inflammatory evidence regarding DeShawn's alleged criminal activities when (i) Munchbar agreed that the evidence could properly be excluded as long as Plaintiffs were prohibited "from eliciting testimony about DeShawn's good character," (ii) any probative value of the evidence was outweighed by the risk of undue prejudice, and (iii) Munchbar was improperly attempting to use the evidence to show "action in conformity therewith."

3. Whether there are any jury instructions or special verdict errors that "should be corrected on remand" as Munchbar asserts (Opening Br. 47) when Munchbar has not established – nor can it establish – that the trial court committed reversible error.

### **III. STATEMENT OF THE CASE**

#### **A. The Munchbar Nightclub, Munchbar's Deficient Security, And The December 24, 2012 Shooting That Killed DeShawn and Injured Destiny.**

The events at issue in this appeal took place in the very early morning of Monday, December 24, 2012, at the Munchbar nightclub. RP 278; CP 4, ¶ 3.9. The day before was no ordinary Sunday: the Seattle

Seahawks had played the San Francisco 49ers in Seattle to clinch a playoff spot and Munchbar – a regular hangout of Seahawks players – was scheduled to host the “Official Seahawks After-party.” CP 1775-76 (McLeod Dep. 32-36).<sup>2</sup> When the Seahawks won the game, the Munchbar security crew knew that there would be huge crowds trying to enter the nightclub eager to celebrate the victory. RP 255, 826-27; CP 1775-76, 1798 (McLeod Dep. 35-36, 122).

In addition to attracting a large crowd of football fans on game nights, Munchbar was an intense club with a history of violent incidents including fights, knives, and the occasional handgun. From its opening day in 2011 through December 24, 2012, nearly 400 calls had been made to police reporting incidents at Munchbar. RP 461. In addition to those police incidents, Kemper Development, Munchbar’s landlord, had logged nearly 300 incidents of violence, criminal trespass, weapons inside the club, threats, domestic violence, disorderly conduct, liquor violations, sexual assaults, and violent confrontations beginning inside the club and spilling out into the public areas. RP 185-86.

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<sup>2</sup> Because McLeod testified by deposition, his testimony is included in the Clerk’s Papers rather than the Report of Proceedings. His videotaped deposition testimony was played for the jury at RP 269, 292, and 502.

Recognizing that it was going to be a “big night” with a record crowd, Kenneth McLeod, a member of Munchbar’s security staff, told his supervisor that “we would need our full team” for security. CP 1776 (McLeod Dep. 36). Numerous witnesses testified that adequate security at the nightclub required at least one security officer for every 50 patrons. RP 303, 798, 820. According to McLeod, “[a] standard or full security team ... at Munchbar was typically 11 or 12 security staff.” CP 1773 (McLeod Dep. 23). For a capacity crowd of 700-800 patrons, Munchbar would need more than that: as many as 16 security officers (800 divided by 50). RP 303; Ex. 163.

But on the night of December 23 and early morning of December 24, rather than Munchbar employing 14-16 security officers or even the “standard or full security team” of 11-12 officers, McLeod learned that “it was going to be five or six people.” CP 1776 (McLeod Dep. 36). He was “not happy.” *Id.* Other members of the security team also were concerned. CP 1777 (McLeod Dep. 37-38). But when asked whether “complaints from staff and security” caused management to increase the number of security officers, McLeod testified: “No, it didn’t. And given the amount of patrons that we had, in my opinion, it should have.” CP 1777 (McLeod Dep. 38). Wakil Shakur, head of Munchbar security, also

told Munchbar management, “we need more people.” RP 343. Yet when asked “[w]hat actions did he [referring to Josh Varela, the nightlife manager of Munchbar] take to get more security staff,” Shakur, like McLeod, testified: “Nothing to my understanding.” *Id.*

Alternatively, Munchbar could have limited the number of patrons that it admitted that night – thereby maintaining an acceptable ratio between patrons and security officers. RP 314-15, 344, 827-28. But Munchbar did not do that either. RP 854. Instead, the club was “[c]ompletely packed.” RP 549. According to McLeod, “fairly early on in the night, earlier than midnight, we were ... anywhere between 7- to 800 patrons.” CP 1778 (McLeod Dep. 41). Referring to video of the dance floor, McLeod testified:

Well, if you look, [Assistant Security Manager Allen] Mullen was almost unable to move around because there’s that many patrons. Everybody in the video appears to be shoulder to shoulder. It’s a full house.

CP 1786 (McLeod Dep. 74). One of the patrons who was at the nightclub described the club as “packed where you can’t even walk in a straight line. You have to try and wiggle yourself through the crowd.” RP 597.

Making matters worse, Varela posted McLeod inside the nightclub and, at 1 a.m. on December 24, directed Shakur to leave his post at the door and join McLeod inside the nightclub. CP 1777 (McLeod Dep. 38);

RP 349-50. So instead of trained security officers at the door checking IDs, controlling the flow of traffic into the nightclub, and patting down patrons, “Varela, the general manager, tried to assume the front door position.” CP 1777 (McLeod Dep. 38). Shakur testified that he was “baffled with that” because “it was still crazy outside,” but he “followed ... orders” and moved inside the nightclub. RP 349-50. When asked how he felt about leaving the door, Shakur testified: “I didn’t trust it. It wasn’t something I wanted to do.” RP 350.

By all accounts, Varela was *not* a member of the Munchbar security staff, nor was he trained as a security officer. RP 193, 299. To the contrary, “[h]e didn’t work security at all.” RP 299. Shakur testified at trial that he and other members of the security team would check IDs and pat down patrons before allowing them to enter the nightclub. RP 312, 320. Shakur demonstrated a proper pat-down technique, starting from the ankles on up. RP 318-20. To ensure the safety of nightclub patrons, Munchbar security checked *everyone’s* ID to ensure that they were 21 or older, and “everybody gets touched” to ensure that they were not bringing weapons into the club, a concern that Munchbar staff and security had discussed with Bellevue police in “several conversations.” RP 312, 320, 381. Varela, in contrast, was reluctant to pat down patrons

because he believed that “the patting down of people would hurt that image of the type of club he wanted.” RP 518.

Unwilling and untrained to properly check IDs and pat down patrons, Varela allowed several individuals to enter the club without being checked for ID and without being patted down for weapons. RP 836-37. One of those individuals was *19-year-old* Jamari Jones, who entered the nightclub *with a loaded semiautomatic handgun*. *Id.* Munchbar’s counsel argued at trial that Jones “snuck” in. RP 881. But as Plaintiffs’ expert explained, Jones simply “walked” past Varela while he was talking with some young women in the disorganized mob that had formed at the Munchbar entrance. RP 841. All of this was captured on video surveillance, which was shown to the jury at trial. Ex. 7. Allowing a 19-year-old to enter the nightclub with a firearm not only violated Munchbar’s own practices and procedures, it also violated Washington law, which makes it unlawful to permit a minor to enter the nightclub with a handgun. RP 312, 836; WAC 314-11-015(3)(e); RCW 9.41.300; RCW 66.44.310.

In addition to allowing a 19-year-old to enter the nightclub with a loaded gun, the nightclub also had a skeleton security crew (5-6 security officers) inside the club. RP 263-65, 536. As one security officer

testified, fights happened “all the time” at the nightclub. RP 196; *see also* RP 466 (fights occurred “[p]retty close to at least once a weekend”). To protect its patrons in such circumstances, security officers were strategically placed throughout the nightclub. RP 211-12, 520-22. As a result, when a fight broke out, a security officer would be nearby and could arrive at an incident “in seconds.” RP 199, 526. This, according to Munchbar security, prevented fights from escalating and becoming especially violent. RP 196-97, 262, 526.

Thirty-year-old DeShawn and his twenty-one-year-old sister Destiny were inside the nightclub celebrating the Seahawks’ victory when Varela allowed Jones to enter the club with a loaded gun. RP 565-66, 704, 911. Destiny had grown up with Jones and the two used to be friends, but Destiny believed that Jones had burglarized her mother’s home and stolen \$100,000 from beneath DeShawn’s bed in April 2011, and the friendship had ended. RP 670-72, 683-84. When the Millikens and Jones saw each other, a fight broke out in the nightclub. RP 712-13. Surveillance camera footage from inside the club shows DeShawn and Jones fighting while Destiny and a friend of Jones exchange punches. Ex. 5.

Unfortunately, the five to six security guards on duty that evening were spread out throughout the packed nightclub and no Munchbar

employee intervened. CP 1776 (McLeod Dep. 36); RP 831. As a result, the fight escalated. DeShawn and Jones eventually separated, and video footage shows that DeShawn then turned toward the man who was fighting with his sister. Ex. 5. As DeShawn turned away from Jones, Jones fired his gun four or five times into the crowd shooting DeShawn in the back, the right upper arm, and the right forearm, grazing Destiny's breast, and striking Jones' friend. RP 281-84; Ex. 58.

Jones and his friend fled the scene, and Destiny watched her brother spend the last minutes of his life on the floor of the nightclub. RP 714, 1205. In a recorded 911 call, Destiny can be heard screaming hysterically as she watched her older brother die. Ex. 38. A witness for the defense who was at the Munchbar on the night of the shooting testified about hearing Destiny "grieving" for her brother and stated that Destiny's screams of sorrow still give her "nightmares." RP 1054-55. McLeod, a military veteran trained in combat first aid, attempted to resuscitate DeShawn as he came in and out of consciousness. CP 1732-34 (McLeod Dep. 52-60). McLeod described DeShawn as "scared," "gasping for air," "helpless," "struggling for air" and "in and out of consciousness" while Destiny was "horrified and going hysterical over what she'd just seen." *Id.* Despite McLeod's best efforts, DeShawn died. Ex. 58.

**B. DeShawn, His Former Girlfriend Denise, And Their Daughter Ta'riyah.**

DeShawn was survived by his six-year-old daughter Ta'riyah Smith-Milliken. RP 1019-20, 1402. Because Munchbar seeks to challenge paternity, the background facts regarding Ta'riyah are set forth below. This issue was decided on summary judgment, so the facts are supported by citations to the Clerk's Papers. Ta'riyah's close relationship with her father was then addressed again at trial in support of her claim for damages based on DeShawn's wrongful death.

DeShawn and Ta'riyah's mother, Denise Gilbert, met in 2004 while attending college in Arizona. CP 1901-02 (Gilbert Dep. 7-8). The couple eventually split up, but remained friends. CP 1906 (Gilbert Dep. 12). Near the end of 2005, DeShawn had moved to Atlanta but kept in close contact with Denise, who by then was in another relationship. *Id.* In 2006, Denise became pregnant with the man she was dating, but he tragically died before the baby was born. CP 1904 (Gilbert Dep. 10).

Although DeShawn had moved to Atlanta, he was a constant source of support for Denise throughout this difficult time, and shortly after Ta'riyah was born, DeShawn moved back to Arizona and he and Denise became a couple again. CP 1907-09 (Gilbert Dep. 13-15). By the time Ta'riyah was two years old, she called DeShawn "Dad" and

DeShawn committed himself to fulfilling that role. CP 1915 (Gilbert Dep. 21). Even after he and Denise split up a second time, DeShawn never ceased to fulfill his role as father: he would pick Ta'riyah up after school every Monday, Wednesday, and Friday, and she would stay with him overnight. CP 1916 (Gilbert Dep. 22).

In 2012, DeShawn and Denise recognized that DeShawn was the only father Ta'riyah had ever known: until his death he was present for every major event in her life, he brought her to visit his family in Seattle on numerous occasions, and when DeShawn was in Arizona Ta'riyah divided her time between Denise's home and DeShawn's. CP 135 (Gilbert Decl. ¶ 2). Given the stability and significance of that parental relationship, DeShawn and Denise discussed his desire to move to Seattle to be closer to his family and agreed that Denise and Ta'riyah would join him in January of 2013. CP 1916-1918 (Gilbert Dep. 22-24).

Before moving, DeShawn and Denise contacted the Arizona Department of Health Services Office of Vital Records to discuss DeShawn's desire to adopt Ta'riyah. CP 1928-1929 (Gilbert Dep. 34-35). Denise explained that Ta'riyah's biological father had died before Ta'riyah was born and that DeShawn was, for all intents and purposes, her father. CP 136 (Gilbert Decl. ¶ 3). The Arizona Department of Health

Services informed Denise that both she and DeShawn would have to appear and sign under oath an Acknowledgment of Paternity stating that DeShawn was the father and that this acknowledgment would also place DeShawn's name on Ta'riyah's birth certificate. *Id.*

On August 3, 2012, following the direction of Arizona's Department of Health Services, DeShawn and Denise signed the acknowledgment of paternity before a witness at the Office of Vital Records. CP 136, 139 (Gilbert Decl. ¶ 4, Ex. 1). This acknowledgment added Milliken to Ta'riyah's last name and listed Denise and DeShawn as "Mother" and "Father" of Ta'riyah, respectively. CP 139 (Gilbert Decl. Ex. 1). In accordance with that official acknowledgment, Ta'riyah's Birth Certificate, registered on January 4, 2007 and issued by the State of Arizona's Department of Health Services Office of Vital Records, names DeShawn as Ta'riyah's father. CP 142 (Gilbert Decl. Ex. 2). No one ever attempted to rescind this acknowledgment, and it was acknowledged by all who knew DeShawn and Denise that Ta'riyah was DeShawn's daughter. CP 136 (Gilbert Decl. ¶ 5).

Several witnesses confirmed these facts at trial. In addition to describing again how she and DeShawn met and how DeShawn became Ta'riyah's father (RP 976-96), Denise testified that DeShawn and Ta'riyah

“were inseparable... She loved him and he was there for her.” RP 983. When asked how Ta’riyah referred to DeShawn, Denise answered “As dad.” RP 984. DeShawn’s mother reinforced this testimony when she described how DeShawn brought Ta’riyah to Seattle to meet her family and how the Millikens welcomed Ta’riyah into the family:

Her first trip to Seattle DeShawn brought her home and he said he had talk to me, and he said, mom, I want you -- I am going to bring my daughter home and I am going to adopt her and I want you to love Ta’riyah because Ta’riyah is not going anywhere. So I want you to accept her. And from that day on, Ta’riyah was my granddaughter. And I immediately when she, I knew she was coming, I called the family and the immediate family, and I told them Ta’riyah was moving to Seattle and we were having a party. And it was at my house. And me and my sister and my mom, we all cooked. And everybody came over and welcomed Ta’riyah into the family. And from that day on, yeah, she was part of our family.

RP 953. One of DeShawn’s friends similarly testified that DeShawn “loved Ta’riyah.... This was his daughter.” RP 919. Photographic evidence confirms this testimony: the jury was given numerous photographs of DeShawn and Ta’riyah over the years, capturing them together as father and daughter. Ex. 48.

Ta’riyah, who was eight years old at the time of trial, testified to the same effect:

Q. Who is your dad?  
A. DeShawn.

Q. Did you call him DeShawn or did you call him dad?

A. Dad.

RP 1020. When asked if DeShawn went to school with her, Ta'riyah answered "Every day to pick me up." RP 1021. And when asked if she misses her father, Ta'riyah testified unequivocally, "Yes." *Id.*

Indeed, even since DeShawn was killed, Ta'riyah continues to spend time with his family. RP 717, 965-66. She looks forward to seeing the Millikens and continues to refer to DeShawn's mother as "GG," short for "Gorgeous grandma." RP 1008. This testimony and photographic evidence confirm that since Ta'riyah's birth and until DeShawn's untimely death at the Munchbar nightclub, DeShawn's relationship with Ta'riyah can only be described in one way: both legally and factually, DeShawn was Ta'riyah's father.

**C. Plaintiffs' Negligence Claims, Munchbar's Concession That It Was Negligent In Failing To Stop Jones From Entering The Nightclub, And The Jury's Corresponding Verdict In Favor Of Plaintiffs.**

Following DeShawn's death, Plaintiffs filed a lawsuit against Munchbar alleging that it breached a duty under Washington law to protect its patrons from the foreseeable criminal acts of third parties. CP 1-8. DeShawn's Estate sought damages for the destruction of the parent-child relationship and for DeShawn's pre-death pain and suffering. CP 7

¶¶ 5.1-5.3. Destiny, in turn, sought damages for the physical and emotional injuries she suffered as a result of being shot and for the emotional injuries she has suffered and continues to suffer as a result of having witnessed her brother's death. CP 7 ¶¶ 5.4-5.5.

Just before trial, Munchbar admitted that it was negligent. CP 1466. Nonetheless, because Munchbar asserted comparative fault, it was necessary for Plaintiffs to show the nature and extent of Munchbar's negligence. Plaintiffs did that through Munchbar's own documents and the testimony of its security officers (as discussed above), the testimony of a Bellevue police detective familiar with the nightclub's constant security issues, and the expert testimony of Chris McGoey, a nightclub security expert. When asked to explain why he gave Munchbar a failing grade for its security on the night of the shooting, McGoey testified:

Grossly understaffed. Made poor decisions at key times when it was highly foreseeable that there is going to be a large traffic count, to continue to admit one customer after another after another after another. That is an F. They created a dangerous condition that didn't have to be. It was totally in their control. Every single person that came in, they made the decision to let that person in.

RP 897. Addressing causation, McGoey added that if Munchbar security had patted down Jones for weapons as required, doing so not only "would have prevented him from entering the club," it also "would have

stimulated a call to the police.” RP 816 (adding that Jones “would have been denied admission and probably worse”).

Several witnesses also addressed damages. Ta’riyah, for her part, described her close relationship with DeShawn and testified, as noted previously, that she misses her father. RP 1020-21. As to Destiny’s damages, her counselor at Harborview testified that she suffers from adjustment disorder and has symptoms of post-traumatic stress disorder, including anxiety and depression. RP 431-33. A physician who saw Destiny shortly after she witnessed her brother die similarly testified that she experienced “nightmares and being afraid to sleep because every time she did she re-experienced the trauma.” RP 635. As of trial, Destiny still “can’t sleep at night.” RP 960. She “has nightmares” and often ends up in her mother’s bed.” *Id.*

Following deliberations, the jury found in favor of Plaintiffs. The jury found that Munchbar’s negligence was a proximate cause of injury and damage to Plaintiffs and awarded \$3.7 million to DeShawn’s Estate and \$520,000 to Destiny. CP 3218-19. The jury then found that the negligent conduct or willful misconduct of Destiny and DeShawn also was a proximate cause of Plaintiffs’ injury and damage and allocated 20% of

the fault to DeShawn and 5% of the fault to Destiny – reducing the amount of recoverable damages to \$3,165,000. CP 3219-20, 3233-35.

Munchbar filed a motion for a new trial, in which it argued (among other things) that Plaintiffs’ counsel had improperly attempted to “inflame the passion of the jury” in his closing argument. CP 3264-65. Munchbar repeats this point in its statement of facts (though not in its argument) without acknowledging the closing argument that precipitated Plaintiffs’ response. For example, Munchbar’s counsel argued:

Ladies and gentlemen, do people come in with this kind of a history all the time? How many of us have friends or acquaintances where somebody has ripped off somebody for \$100,000, doesn’t tell the police about it, and decides we are going to take it into our own hands?

RP 1467. Munchbar’s counsel also argued: “the whole truth about this case is that this was street justice, plain and simple.” RP 1492.

Given counsel’s comparison between the Millikens and the jury’s “friends or acquaintances” and his argument that “this was street justice,” Plaintiffs’ counsel responded by arguing that the jury should “follow the law” (RP 1503) and apply the law equally to everyone, even “[p]eople who speak or swear or act differently than us” (RP 1495). According to Munchbar, “[t]his type of inflammatory rhetoric debases our legal system and reflects poorly on those who engage in it.” Opening Br. 26. Yet

Munchbar *never objected* to these comments during closing argument, did not request a curative instruction, and still has not explained how a lawyer can be criticized for asking a jury to “follow the law.” It is Munchbar’s argument, not Plaintiffs’ response, that debases our legal system and reflects poorly on those who engage in it.

The trial court, of course, heard these arguments and witnessed the jury’s reaction. The court likewise saw Munchbar’s efforts *throughout the trial* to portray the Millikens as thugs who did not deserve the benefits or protections of the law. *See* CP 3280-81. Based on that record and the parties’ arguments, the trial court denied Munchbar’s motion for a new trial. CP 3368-70. This timely appeal followed. CP 3374-82.

#### IV. ARGUMENT

**A. The Trial Court Correctly Held That The Personal Representative Of DeShawn’s Estate Could Assert A Wrongful Death Claim Under RCW 4.20.020 Based On The Arizona Certificate Of Live Birth And Acknowledgment Of Paternity Identifying Ta’riyah as DeShawn’s Child.**

**1. Ta’riyah’s Birth Certificate Expressly States That She Is DeShawn’s Child, As Does The Arizona Acknowledgment Of Paternity, And The Trial Court Correctly Afforded Full Faith And Credit To Those Official State Documents.**

As Munchbar notes, Washington’s wrongful death statute “describes eligible beneficiaries,” and that list includes a decedent’s “child.” Opening Br. 28 (quoting RCW 4.20.020). As Munchbar also

notes, the trial court ruled on summary judgment that the Personal Representative of DeShawn's Estate could pursue a wrongful death claim against Munchbar because Ta'riyah is his "child" and therefore denied Munchbar's motion seeking dismissal of this claim. CP 3661. The parties agree that this ruling is reviewed de novo. Opening Br. 28.

Contrary to Munchbar's argument, the trial court did not err in deciding this issue in Plaintiffs' favor. Plaintiffs recognized that the Estate could pursue a wrongful death claim only if Ta'riyah was DeShawn's child, and they established that relationship in the simplest way possible: by giving the trial court a copy of Ta'riyah's Certificate of Live Birth and the Acknowledgement of Paternity that DeShawn and Denise signed before a witness at the Arizona Office of Vital Records and filed with the Arizona Department of Economic Security. CP 135-36, 139, 142. Both of these documents expressly indicated that the "child's name" is Ta'riyah Ajanise Smith-Milliken and that the father is DeShawn Eugene Milliken. CP 139, 142. There is no dispute regarding authenticity, nor is there any dispute that these documents plainly state that Ta'riyah is DeShawn's child. In addition, under Arizona law, this document "is a determination of paternity and has *the same force and effect as a superior court judgment.*" A.R.S. § 25-812(D) (emphasis added).

It is equally clear that the Arizona paternity determination is entitled to full faith and credit in Washington courts as the trial court ruled. CP 3661. Addressing this issue *generally* – in a case that did not involve a paternity determination – the Washington Supreme Court recently confirmed that “[u]nder full faith and credit principles, states are obligated to recognize judgments of sister states.” *Onewest Bank, FSB v. Erickson*, \_\_ P.3d \_\_, 2016 WL 455940, at \*5 (Wash. Feb. 4, 2016) (internal quotation marks omitted). The court also explained that while Washington courts can examine whether another state had jurisdiction, once it recognizes such jurisdiction “[f]ull faith and credit requires us to accept those determinations by the [out-of-state] court.” *Id.* at \*9. Munchbar cannot establish that Arizona lacked jurisdiction given that both Ta’riyah and Denise lived there at the time of the paternity determination. *See id.* at \*5 (“party disputing a foreign order has the burden of establishing lack of jurisdiction”); A.R.S. § 25-801 & 802 (addressing jurisdiction and venue). Nor does it so argue.

Plaintiffs recognize that courts have identified certain exceptions to full faith and credit principles, but none of those exceptions applies where, as here, a third-party tortfeasor seeks to challenge another state’s paternity determination. The Uniform Parentage Act, RCW Chapter 26.26,

squarely governs that issue. Under RCW 26.26.031, “superior courts of this state are authorized to adjudicate parentage under this chapter.” RCW 26.26.031. But while the statute gives superior courts jurisdiction to adjudicate this issue, it *also* states who has standing to do so. The list is:

- (1) The child;
- (2) The person who has established a parent-child relationship with the child;
- (3) A person whose parentage of the child is to be adjudicated;
- (4) The division of child support;
- (5) An authorized adoption agency or licensed child-placing agency;
- (6) A representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor; or
- (7) An intended parent under a surrogate parentage contract, as provided in RCW 26.26.210 through 26.26.260.

*Id.* Munchbar is none of these things; instead, it is a defunct nightclub seeking to avoid liability for its admitted negligence. It therefore lacks standing to challenge paternity under RCW 26.26.031.

Washington case law supports this conclusion. In *In re Parentage of C.S.*, 134 Wn. App. 141, 139 P.3d 366 (2006), this Court upheld a trial court’s dismissal of a parentage action in similar circumstances. In that case, Dean (the presumed parent) “was present at the birth, was named as the father on the birth certificate, and the child was given Dean as his

middle name.” *Id.* at 144. Several years later, a DNA test revealed that another man was the father, so Dean brought a petition – which the mother joined – to disestablish himself as the child’s father and establish as the child’s father the man who was confirmed by DNA testing to be the child’s biological father. *Id.* at 145-46. But Dean did not *timely* file that petition, so the trial court dismissed it. This Court affirmed, noting in support of its holding that “the legislature established specific rules and processes for adjudicating paternity.” *Id.* at 148.

Courts in other states have rejected similar attempts to improperly challenge paternity. In *In re Estate of Murray*, 344 P.3d 419, 420-21 (Nev. 2015), for example, the decedent’s siblings attempted to argue that the decedent’s daughter had no legitimate filial relationship with the decedent and therefore could not be an heir to his estate. A probate commissioner rejected the argument and held that the daughter’s Arkansas birth certificate was entitled to full faith and credit in Nevada. *Id.* at 421. The Nevada Supreme Court affirmed. It recognized, at the outset, that “to determine parentage in Nevada, courts must look to the Nevada Parentage Act, which is modeled after the Uniform Parentage Act.” *Id.* (internal quotation marks omitted). It then held that the decedent’s siblings “lack standing” to challenge paternity because they “do not seek to assert

paternity and have asserted no other personal interest in determining the nonexistence of Joyce and Robert's filial relationship. They seek to illegitimatize her solely to make themselves eligible to inherit Robert's estate." *Id.* at 424. The court also noted that this result is consistent with cases in other states that have likewise held that "third parties should not be allowed to challenge presumptive legitimacy" and that "this proposition is supported by the policies underlying parentage acts." *Id.*

As the Nevada Supreme Court recognized in *Murray*, courts in other states agree. In *In re Dallas Group of America, Inc.*, 434 S.W.3d 647, 655 (Tex. App. 2014), the court noted that while Texas law (like Washington law here) allows certain parties to challenge paternity "[n]one of these procedures grants third-party, non-family defendants in a wrongful death action standing to challenge ... paternity." In *In re Trust Created by Agreement Dated December 20, 1961*, 765 A.2d 746, 756, 759 (N.J. 2001) (hereinafter "*Trust 1961*"), the court held that "no third party may collaterally attack Jenia's parentage as previously determined" and added that "courts in other jurisdictions" agree with this holding. And in *Lucas v. Estate of Stavos*, 609 N.E.2d 1114, 1120-21 (Ind. Ct. App. 1993), the court held, based in part on interstate "comity," that a Louisiana paternity determination was entitled to full faith and credit in Indiana.

Addressing “[p]olicy considerations,” the court added that its “primary concern” was allowing a dependent child “to participate in a wrongful death action concerning the child’s parent.” *Id.* at 1020.

These cases, and the cases cited therein, confirm what the plain language of the Uniform Parentage Act says. While *certain* third parties can challenge paternity in Washington, that list does not include tortfeasors whose only interest, similar to the alleged heirs in *Murray*, is pecuniary. As this Court noted in *Parentage of C.S.* (134 Wn. App. at 148), “the legislature established specific rules and processes for adjudicating paternity.” Munchbar did not, and cannot, satisfy those rules and processes because it is not one of the parties that has standing to challenge paternity under the statute. As a result, it could not challenge the Arizona Certificate of Live Birth (CP 142) or Acknowledgment of Paternity (CP 139-40). Those documents are therefore entitled to full faith and credit – as the trial court *correctly* held. CP 3661.

Finally, as the trial court also noted, its full faith and credit ruling is supported by strong policy considerations. The trial court referred to the “compelling public interest in supporting strong families and encourage permanency planning for all children.” *Id.* As the court correctly noted, the Supreme Court recognized that interest in extending

the definition of “child” in the wrongful death statute to include illegitimate as well as legitimate children in *Armijo v. Wesselius*, 73 Wn.2d 716, 719-20, 440 P.2d 471 (1968). In *Parentage of C.S.*, this Court likewise relied on “the value of stability” in parentage determinations. 134 Wn. App. at 148. The Indiana opinion cited above also referenced comity considerations and the strong interest in allowing dependents to recover from tortfeasors in wrongful death actions (*Lucas*, 609 N.E.2d at 1120-21), which further support the trial court’s ruling. Conversely, there is *no state interest whatsoever* in allowing guilty tortfeasors to challenge the parentage determinations of other states. For all these reasons, the trial court’s summary judgment ruling should be affirmed.

**2. Munchbar’s Arguments Regarding Paternity Fail On Multiple Grounds.**

Munchbar begins its discussion of the paternity issue by emphasizing – at length – that Washington courts strictly construe who is a beneficiary for purposes of RCW 4.20.020. Opening Br. 29-33. That entire discussion is irrelevant because it is undisputed that one of the individuals who can assert a claim under RCW 4.20.020 is a “child.” *Id.* at 28. Moreover, Plaintiffs have never asserted that a “parent-child like” relationship is sufficient under RCW 4.20.020. Instead, their argument is that Ta’riyah’s Arizona Birth Certificate and the Acknowledgment of

Paternity that Denise and DeShawn filed in Arizona establish *as a matter of law* that she is DeShawn’s “child.” Washington case law rejecting efforts to expand the class of persons eligible to be beneficiaries under the Wrongful Death Statute is therefore irrelevant.

Munchbar’s full faith and credit argument (Opening Br. 33-38) is similarly misguided. Addressing the full faith and credit provision in RCW 26.26.350, Munchbar claims that the Arizona Acknowledgment of Paternity is not entitled to full faith and credit because it was not executed in compliance with Arizona law. *Id.* at 36-37. The principal flaw in that argument is that Munchbar lacks standing to assert that argument under RCW 26.26.031. *See supra* at 23. Nor does it have standing under Arizona law. Like the Washington statute, Arizona’s acknowledgment of paternity statute limits the parties who “may challenge a voluntary acknowledgment of paternity” to “the mother, father or child, or a party to the [paternity] proceeding.” A.R.S. § 25-812(E). Under both Washington and Arizona law, a tortfeasor such as Munchbar lacks standing to challenge paternity.

Nor would it matter if “the representations made by both DeShawn and Denise were factually false,” as Munchbar erroneously claims. Opening Br. 37. First, the above list of parties with standing – mother,

father, child, etc. – applies equally where a party seeks to challenge an acknowledgment of paternity “on the basis of fraud, duress or material mistake of fact.” A.R.S. § 25-812(E). And second, even where a party *with standing* seeks to challenge parentage based on fraud or mistake, Arizona law requires that any such action “shall be filed ... not more than six months after” the acknowledgment of paternity was executed. *Andrew R. v. Arizona Dept. of Economic Sec.*, 224 P.3d 950, 954-55 (Ariz. Ct. App. 2010). As the court noted in *Andrew R.*, that strict time limit is consistent with Arizona’s “strong public intent to advance a child’s best interest by providing that child with permanency.” *Id.* at 957. So not only does Munchbar lack standing to challenge the Arizona Acknowledgment of Paternity based on mistake or fraud, any such challenge is time-barred.

But even putting that aside, Munchbar’s fraud and mistake argument fails. The Acknowledgement of Paternity form asks only for “Father’s Information,” which DeShawn provided. CP 64. Nothing in the form or the instructions expressly states – especially to a layperson – that it can only be executed by a child’s *biological* father. CP 64-65. Nor is that how the Arizona Department of Health Services interpreted the form. The record shows, without dispute, that Denise explained to the Arizona Department of Health Services that “Ta’riyah’s biological father had been

murdered” and that “DeShawn was, for all intents and purposes, [Ta’riyah’s] father.” CP 136 (Gilbert Decl. ¶ 3). After Denise provided that information, she and DeShawn were “informed by the Department of Health Services that the best way to secure [DeShawn’s] legal paternity over Ta’riyah” was to “sign an Acknowledgment of Paternity.” *Id.* Far from showing fraud or mistake, unrefuted evidence shows that DeShawn and Denise completed the Acknowledgment of Paternity in accordance with the instructions that they received from the Arizona Department of Health Services. As a result, even if Munchbar had standing to assert this argument and had timely done so, its assertion that the Arizona Acknowledgment of Paternity is false or fraudulent (Opening Br. 37) is not supported by the record.<sup>3</sup>

Munchbar’s due process argument similarly fails. Munchbar claims that because it was not a party to any proceeding in Arizona to determine parentage, a holding that it is bound by Ta’riyah’s Certificate of Birth or the Arizona Acknowledgment of Paternity would violate its due

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<sup>3</sup> Munchbar also argues that had DeShawn pursued adoption rather than acknowledging paternity he “would not be certified as acceptable to adopt Ta’riyah because of his recent criminal record.” Opening Br. 16. This accusation is irrelevant and wrong. Plaintiffs have never argued that DeShawn adopted Ta’riyah, so his ability to do so is irrelevant. But had he pursued adoption, the statute cited by Munchbar (A.R.S. § 8-105D) requires only that an individual certify “whether” he has been convicted of certain criminal offenses. Contrary to Munchbar’s irrelevant argument, the statute does not prevent individuals who have been convicted of a nonviolent crime from adopting.

process rights. Opening Br. 35-36. Critically, Munchbar does not cite a single case in which a court reached such a result. Nor is that surprising, because if Munchbar’s argument were correct an adjudication of parentage would not be binding on employers that provide benefits for their employees’ children, insurers that are required to pay benefits to their insureds’ children, individuals whose inheritance turns on filial relationships, and *numerous* other third parties who, if permitted to do so, would seek to challenge parentage for pecuniary reasons. Such a result would also vitiate a central purpose of parentage laws, which is to determine parentage “for all purposes.” Uniform Parentage Act § 203.<sup>4</sup>

The New Jersey Supreme Court recognized the absurdity of this argument – and rejected it – in *Trust 1961*. There, as here, two parties with an economic motive to challenge paternity argued that a previous acknowledgement of paternity was “false.” 765 A.2d at 758. As noted on pages 25-26 above, the court refused to consider that argument and expressly held that “no third party may collaterally attack Jenia’s parentage.” *Id.* at 759. In so holding, the court addressed and rejected the litigants’ argument that “because they were not parties to” the previous parentage determination “their right to due process would be violated if

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<sup>4</sup> Available at <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act>.

they were denied the opportunity to contest ... parentage.” *Id.* at 758. The court explained that due process “is not a fixed concept,” but rather “a flexible one that depends on the particular circumstances.” *Id.* The court then balanced the parties’ competing interests and concluded that “the purported economic right to become eligible for an unspecified share of trust proceeds occupies a lower place in the hierarchy of rights as compared to a putative father’s right to the parent-child relationship.” *Id.* at 759. Based on this balancing, the court concluded that there is “no violation of due process in foreclosing a third-party collateral attack on a longstanding paternity judgment.” *Id.* at 758.

Although *Trust 1961* was decided by the New Jersey Supreme Court, the court’s reasoning is equally applicable in Washington. First, Washington courts apply the same legal standards. *See, e.g., State v. Beaver*, 184 Wn. App. 235, 246, 336 P.3d 654 (2014) (applying balancing test and recognizing that “due process is flexible and calls for such procedural protections as the particular situation demands”); *Parentage of C.S.*, 134 Wn. App. at 148 (recognizing “value of stability” in parentage determinations). Second, the court’s due process holding is based on Supreme Court authority, including a case in which the Court rejected a due process claim asserted by a putative father and another case in which

the Court recognized that parental rights are “far more precious than any property right.” 765 A.2d at 759 (discussing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), and *Santosky v. Karmar*, 455 U.S. 745, 758-59 (1982)). Third, courts in other states have followed *Trust 1961*.<sup>5</sup> Fourth, as noted previously, Munchbar has not cited *a single case* that allows a tortfeasor to challenge a parentage determination on due process grounds.

Instead of citing cases that involve collateral attacks on parentage determinations, Munchbar relies on a hodgepodge of inapposite cases. Its Supreme Court authority was decided over 70 years ago, and involves a “probate decree.” *Riley v. New York Trust Co.*, 315 U.S. 343 (1942) (emphasis added) (Opening Br. 35-36, 39-40). It also cites a Division Three case, but overlooks the court’s holding that the trial court in that case “properly conferred full faith and credit to Utah’s ruling. *In re Parentage of F*, 178 Wn. App. 1, 9, 313 P.3d 451 (2013) (emphasis added) (Opening Br. 35). The Division Two case cited by Munchbar also involved a “probate proceeding” and likewise held that “the California order is entitled to full faith and credit in Washington.” *In re Estate of*

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<sup>5</sup> See, e.g., *Matter of Charles H. Stix Testamentary Trust dated August 7, 1945*, \_\_\_ S.W.3d \_\_\_, WL 1915279, at \*4 (Mo. Ct. App. Apr. 28, 2015) (finding reasoning of *Trust 1961* “to be persuasive” and rejecting due process claim); *In re Estate of Jotham*, 722 N.W.2d 447, 453-54 (Minn. 2006) (expressly agreeing with reasoning of *Trust 1961*); *Murray*, 344 P.3d at 424 (following *Trust 1961*).

*Tolson*, 89 Wn. App. 21, 25, 33, 947 P.2d 1242 (1997) (Opening Br. 36). Munchbar’s reliance on *immigration* cases (Opening Br. 38) is absurd and – if anything – confirms that its due process argument is legally insupportable.

Lastly, Munchbar’s reliance on *Aranda v. Cardenas*, 159 P.3d 76 (Ariz. Ct. App. 2007) (Opening Br. 36, 38, 39), is also misplaced. In *Aranda*, the alleged father filed a wrongful death action against the physicians and hospital responsible for the death of his unborn child and her mother. Because the child died before it was born, there was no Certificate of Live Birth, nor had the plaintiff completed and filed an Acknowledgment of Paternity. The defendant therefore took the position that the plaintiff could not bring a wrongful death action because he had not established paternity in compliance with Arizona’s paternity statutes. *Id.* at 81. The court rejected that argument, and “decline[d] to apply the requirements of the paternity statutes in a wrongful death proceeding where the legislature has not explicitly done so.” *Id.*

*Aranda* is inapposite for at least the following reasons. First, as noted, there was no Certificate of Live Birth or Acknowledgment of Paternity in *Aranda*. As a result, the court was not asked to decide – nor did it decide – whether compliance with the Arizona paternity statutes

would have been *sufficient* to establish paternity in a wrongful death action. Instead, the court merely reiterated that “a separate paternity action is *not necessary* to establish paternity in a wrongful death case.” *Id.* (citing *Hurt v. Superior Court*, 601 P.2d 1329, 1333 (Ariz. 1979)) (emphasis added). Indeed, if the court had held that compliance with the paternity statutes was irrelevant – as Munchbar here advocates – its holding would be flatly inconsistent with the Arizona parentage statutes, which recognize the authority of Arizona courts “to establish maternity or paternity.” A.R.S. § 25-801.

Second, *Aranda* also did not involve any interstate comity or full faith and credit issues. As noted previously, Arizona allows certain parties to challenge a paternity determination including on the basis of alleged fraud or mistake. *See supra* at 28-29. But critical here, Munchbar did not file any sort of paternity action in Arizona so that an *Arizona court* could decide whether relief is warranted under that state’s specific rules and processes for adjudicating such issues. A Washington court, in contrast, cannot grant that relief without offending notions of comity and full faith and credit. *See Olivine Corp. v. United Capitol Ins. Co.*, 122 Wn. App. 374, 382, 92 P.3d 273 (2004) (“Notions of judicial comity and full faith and credit direct us to respect the Illinois court’s order by dismissing the

case.”). For this reason too, the trial court *correctly* determined that the Arizona paternity determination is controlling in this wrongful death action.

**B. The Trial Court Did Not Abuse Its Discretion When It Precluded Munchbar From Introducing Inflammatory Evidence Regarding DeShawn’s Alleged Criminal Activities.**

Munchbar next claims that the trial court abused its discretion by excluding evidence that DeShawn previously spent time in jail, sold marijuana, and had no known legal employment – which it refers to as “lifestyle evidence” – when, according to Munchbar, such evidence was relevant and admissible to show “what kind of living environment and ‘guidance’ Ta’riyah lost through DeShawn’s death.” Opening Br. 42. Munchbar concedes, as it must, that this issue is reviewed for abuse of discretion. Opening Br. 41. As set forth below, Munchbar’s argument that the trial court abused its discretion fails on several grounds.

First, the trial court’s ruling is consistent with the parties’ briefing. In response to Plaintiffs’ motion in limine to preclude Munchbar from introducing evidence regarding DeShawn’s alleged criminal activities, Munchbar agreed that evidence of bad character could properly “be excluded if the Court prohibits the estate from presenting conflicting evidence of DeShawn’s overall good character.” CP 206. Munchbar also

agreed that it would not seek to introduce evidence regarding DeShawn's convictions, his contacts with the criminal justice system, or the source of the money under his bed *unless* Plaintiffs opened the door to such evidence. CP 212-17. The parties, in other words, effectively agreed that as long as Plaintiffs did not argue or elicit testimony that DeShawn was a role model, Munchbar would not seek to portray him as a thug.

Based on that briefing, the trial court “presumptively granted” Plaintiffs’ motion in limine and expressly held that as long as Plaintiffs did not “attempt to suggest economic losses (‘good provider’) or general good character (‘role model’) of the deceased, then the potential prejudice of these matters outweighs their probative value.” CP 667. Plaintiffs complied fully with the Court’s directive and the parties’ understanding: they did not present an economic loss claim and they did not argue that DeShawn was a “role model” or otherwise present evidence of his “general good character.” Munchbar does not claim in its appellate brief that Plaintiffs ever presented such a claim or such evidence.<sup>6</sup> On this

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<sup>6</sup> At trial, the only instance in which Munchbar claimed that Plaintiffs presented such evidence was when Destiny’s counselor, Kayla Clark, testified that Destiny “was having a hard time accepting the reality of the situation” and sometimes believes that DeShawn “is just at work.” RP 429, 505-06. The trial court dispensed with Munchbar’s argument easily: he observed that Destiny’s remark was “a common expression of the grieving process” and did not suggest that DeShawn “had a steady job that he always would go to or anything like that.” RP 506. Indeed, Plaintiffs’ counsel meticulously  
(continued . . .)

record, the trial court did not err – let alone abuse its discretion – in excluding evidence in accordance with the parties’ previous briefing.

Second, the evidence is inadmissible under both ER 403 and 404. The jury’s consideration of Ta’riyah’s claim was limited to the “value of what DeShawn Milliken reasonably would have been expected to contribute ... in the way of love, care, companionship and guidance.” CP 3214 (Instruction 11). Munchbar provided no support in the trial court for its contention that a man whose past includes some criminal history is somehow incapable of love, care, companionship, and guidance or that Ta’riyah’s loss is somehow alleviated because DeShawn previously sold marijuana (a drug that is now legal in Washington). Munchbar now recognizes that shortcoming and attempts to address it by submitting with its brief and discussing at length in its brief an “Adverse Childhood Exposure Study.” Opening Br. 14-15. But Munchbar never presented that evidence in the trial court – so the argument is waived – and the study does not in any event require courts to admit inflammatory evidence

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(. . . continued)

complied with the trial court’s order in limine, going so far as to seek *advance* confirmation from both the trial court and Munchbar’s counsel that the presentation of evidence would comply with the court’s ruling. *See, e.g.*, RP 935-36; 1002-03.

regarding alleged criminal activities in wrongful death actions – especially ones that do not involve economic claims or role model evidence.

Because evidence regarding DeShawn’s alleged criminal activities was inadmissible under ER 403, this Court does not need to consider Munchbar’s arguments regarding ER 404. Opening Br. 41-43. If the Court reaches ER 404, the evidence also is inadmissible under both ER 404(a) and (b). Both provisions expressly state that character evidence and evidence of a party’s other crimes or bad acts is “not admissible” to show “action in conformity therewith.” ER 404(a) & (b). The only way in which this evidence could show “what kind of living environment and ‘guidance’ Ta’riyah lost through DeShawn’s death,” as Munchbar claims (Opening Br. 42), is if DeShawn subsequently engaged in “action in conformity therewith.” That is impermissible under ER 404(a) and (b).

Munchbar attempts to rely on exceptions to these rules, but its arguments easily fail. Starting with “character evidence,” which is governed by ER 404(a), Munchbar argues that such evidence is relevant and admissible in custody disputes. Opening Br. 41-42. That rule is found nowhere in ER 404(a) and is instead a product of case law. *See, e.g., Gibson v. Von Olnhausen*, 43 Wn.2d 803, 804, 263 P.2d 954 (1953) (“[w]here the custody of a child is before the court, it may receive and

consider competent evidence having probative value as to the character and fitness of the parties”). There is no custody issue here, and no court has ever created a similar exception to ER 404(a) in wrongful death cases.

Turning to evidence of prior bad acts, Munchbar claims that under ER 404(b) such evidence “may be admissible for other purposes, such as proof of motive, intent, plan or knowledge.” Opening Br. 41. But there were no issues in this case related to motive, intent, plan, knowledge, or any other permissible topic under ER 404(b). Instead, as noted, Munchbar was attempting to use this evidence to show character and action in conformity therewith – which is expressly prohibited by ER 404(b). Nor should this Court create a new exception that would permit guilty tortfeasors to elicit testimony and argument that the deceased would have been an unfit parent. Accordingly, evidence regarding DeShawn’s alleged criminal activities was inadmissible under ER 404(a) and (b) as well as under ER 403.

Finally, even if the trial court erred (which it did not), the error was harmless. Munchbar was able to elicit evidence that Destiny believed that Jones had “stolen \$100,000 from underneath DeShawn Milliken’s bed” (RP 854-55) and that DeShawn did not have a job. RP 926-27. Munchbar’s counsel also asked the jury: “How many of us have friends or

acquaintances where somebody has ripped off somebody for \$100,000, doesn't tell the police about it, and decides we are going to take it into our own hands?" RP 1467. And they also elicited testimony that, for several months in 2011 (when DeShawn was in jail), Ta'Riyah would "visit" DeShawn "one to three times per week," then "one day a week," for "[a] few hours." RP 1010-11.

In its closing argument, Munchbar expressly connected these issues with Ta'riyah's corresponding loss:

Guidance? What do we know about Deshawn Milliken? There is so little that we know. We don't know what [he did] for a living. He has a safe under his bed. A hundred thousand dollars in it.

RP 1479. Counsel also argued that "this was street justice, plain and simple." RP 1492. As a result, the so-called "lifestyle evidence" was presented by Munchbar despite the trial court's ruling in limine excluding it, and the jury was able to consider that evidence both in determining damages and allocating fault. If the trial court abused its discretion when it "presumptively granted" Plaintiffs' motion in limine (CP 667), any such error was harmless.

**C. It Is Not Necessary For This Court To “Correct” Any Jury Instructions Or The Verdict Form “On Remand.”**

In the final section of its brief, Munchbar argues – in largely shotgun fashion – that certain “jury instructions and special verdict form errors should be corrected *on remand*.” Opening Br. 47 (emphasis added). Munchbar devotes a paragraph or so to each of these issues. Opening Br. at 47-50. It appears that these are issues that Munchbar wants this Court to address if *and only if* the Court remands the case to the trial court based on the statutory beneficiary issue that Munchbar addresses in Section IV.A of its brief or the ER 403/404 issue that Munchbar addresses in Section VI.B of its brief. Because remand is not warranted here (as discussed in Sections IV.A and B above), the Court does not need to reach these last few issues. If it does reach the issues, there is no error (or abuse of discretion) for this Court to “correct.”<sup>7</sup>

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<sup>7</sup> In its “assignments of error and issues on appeal,” Munchbar also references issues relating to Plaintiffs’ closing argument (issues 2.e and 5) and expert testimony (issue 3). Opening Br. 6-8. Munchbar does not argue those issues in its brief, so the issues are waived. See *Emerick v. Cardiac Study Ctr., Inc., P.S.*, 189 Wn. App. 711, 730, 357 P.3d 696 (2015) (“A party waives an assignment of error not adequately argued in its brief.”). Additionally, “[e]ven when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative instruction.” *Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 333-34, 858 P.2d 1054 (1993). There was no such objection here. Munchbar also refers in its introduction to an alleged trial court error in admitting evidence regarding previous calls to the police regarding violent confrontations that began inside the club and sometimes spilled out into the public areas. Opening Br. 2. There is no corresponding assignment of error or argument, so this issue is also waived. See *Conrad ex rel. Conrad v.* (continued . . .)

### **1. The Trial Court Correctly Defined “Fault.”**

Munchbar claims that the jury should be instructed on remand that, for purposes of allocating fault under RCW 4.22.015, the term “fault” includes “negligent or reckless” conduct rather than “negligence ... as well as willful misconduct.” Opening Br. 47. The trial court instructed the jury that “fault includes negligence” and that negligence “is the failure to exercise ordinary care.” CP 3211 (internal quotation marks omitted). Because the definition of negligence is broad enough to include recklessness as described in Munchbar’s brief (Opening Br. 48), it allowed Munchbar to argue its theory of the case. The trial court’s instruction is therefore “sufficient” and does not need to be “corrected” on remand. *See Payne v. Paugh*, 190 Wn. App. 383, 403, 360 P.3d 39 (2015) (“instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law”).

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(. . . continued)

*Alderwood Manor*, 119 Wn. App. 275, 297, 78 P.3d 177 (2003) (“Alderwood did not assign error to the admission of any of the above evidence, nor did it argue the points in its opening brief. The arguments are thus waived.”). Plaintiffs’ prior briefing regarding these issues can be found at CP 3270-81.

**2. The Trial Court Correctly Rejected Munchbar's Argument That The Jury Should Be Required To Allocate Fault To Louis Holmes.**

Munchbar claims that the trial court erred when it did not identify Louis Holmes as a potential at-fault entity in the jury instructions and require the jury to allocate fault to him in the verdict form. Opening Br. 49-50. In *Diaz v. State*, 175 Wn.2d 457, 285 P.3d 873 (2012), the Supreme Court reiterated that “[w]ithout a claim that more than one party is at fault, *and sufficient evidence to support that claim*, the trial judge cannot submit the issue of allocation to the jury.” *Id.* at 468 (emphasis added, internal quotation marks omitted). As the trial court noted, the evidence showed that Mr. Holmes played no causal role in starting the fight with Jones because he joined the altercation *after* it had already started. RP 1328. Nor did Mr. Holmes owe any duty to DeShawn or Destiny that was breached, as necessary to find fault under the trial court’s instruction (CP 3216) and as required by RCW 4.22.015 (defining “fault”). For these reasons, the trial court correctly rejected Munchbar’s request to identify Mr. Holmes in the jury instructions and verdict form.

**3. The Trial Court’s Instructions 7 And 9 Are Not “An Improper Comment On The Evidence.”**

Munchbar claims that instructions 7 and 9, taken together, constituted an improper comment on the evidence because they both

mention “negligence” even though Munchbar had already admitted that it was negligent. Opening Br. 49. This issue is also reviewed for abuse of discretion. *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145 (2009) (court “review[s] wording, choice, or the number of instructions for abuse of discretion”). Munchbar cannot establish an abuse of discretion (or error) because the trial court’s instructions merely told the jury that *Plaintiffs* were required to establish negligence and that the violation of Washington law is “*not necessarily negligence.*” CP 3210, 3212 (emphasis added). As a result, the instructions were arguably detrimental to Plaintiffs and beneficial to Munchbar.

Nor is there any reason to think that these instructions “facilitated a disproportionate jury response.” Opening Br. 49. First, there is nothing improper about giving these instructions – even in a case where negligence is admitted – because the instructions *are correct*. Second, the jury presumably gave little if any consideration to these references to negligence because, as Munchbar’s counsel noted in closing argument, Munchbar admitted negligence “from the first day you [the jurors] took your oath.” RP 1441. Lastly, because Munchbar asserted comparative fault, the jury was required to carefully consider the nature and extent of Munchbar’s negligence – separate and apart from Instructions 7 and 9 – in

order to “*compare* the respective fault of the claimant and defendant.” *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005) (emphasis added). For that reason too, instructions 7 and 9 could not have caused a “disproportionate” response.

**4. The Trial Court Did Not Err – Let Alone Abuse Its Discretion – By Including “Guidance” In Instruction 11.**

Munchbar’s final argument is that the trial court somehow erred when it “belatedly and improperly added ‘guidance’ as part of what the jury should consider for wrongful death damages.” Opening Br. 49. There was nothing “belated” about the “guidance” issue: Munchbar’s counsel acknowledged well before closing arguments and jury instructions that Plaintiffs were “asking to award money for guidance, for Deshawn’s guidance of Ta’riyah.” RP 934. Moreover, as the trial court noted (RP 1341), the term “guidance” is mandated by the wrongful death statute. *See* WPI 31.03.01 (requiring jury to consider “love, care, companionship, and guidance”); *Ueland v. Reynolds Metals Co.*, 103 Wn.2d 131, 140, 691 P.2d 190 (1984) (“child has an independent cause of action for loss of the love, care, companionship and guidance of a parent tortiously injured by a third party”). The trial court’s formulation of its damages instruction was therefore neither “belated” nor “improper.”

**V. CONCLUSION**

For the foregoing reasons, the trial court's judgment on the jury's verdict should be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of February, 2016.

PETERSON | WAMPOLD | ROSATO | LUNA | KNOPP



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CERTIFICATE OF SERVICE

I certify that on the 23rd day of February, 2016, a copy of this document was sent as stated below.

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