No. 42940-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

MUTUAL OF ENUMCLAW INSURANCE CO.,

Appellant,
v.

GREGG ROOFING, INC.,

Respondent.

AMENDED BRIEF OF APPELLANT WITH TYPOGRAPHICAL CORRECTIONS

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2. The trial court erred in denying Mutual of Enumclaw's Motion for Judgment as a Matter of Law at the close of counterclaim defendant's, Gregg Roofing, Inc.'s case, because there was no substantial evidence of the value of Gregg Roofing, Inc.'s alleged damage to its reputation.

3. The trial court erred in denying Mutual of Enumclaw's renewed Motion for Judgment as a Matter of Law after the jury returned its verdict for the same reasons described in Assignment of Error No. 1, and alternative Motion for New Trial.

4. The trial court erred in denying Mutual of Enumclaw's Motion for Remittitur because the jury's verdict against Mutual of Enumclaw was grossly in excess of the range of the evidence presented by Gregg Roofing, Inc.

5. The trial court erred in excluding evidence of Lowrie's fraud on Mutual of Enumclaw.

6. The trial court erred in allowing testimony regarding Mr. Tiffany's personal feelings about Gregg Roofing, Inc.'s alleged loss of reputation.

II. Issues Pertaining to Assignments of Error

1. Did the trial court err in determining that Gregg Roofing, Inc., a corporate entity, was entitled to general, unquantified damages for alleged harm to its business reputation? (Assignments of Error Nos. 1,2,3,4)

2. Did the trial court err in determining that evidence that Mutual of Enumclaw had been defrauded by its own employee was irrelevant to the question of whether the employee was acting within the scope of his employment? (Assignment of error No. 1,3,5)

3. Did the trial court err in allowing testimony of the emotional effect that the alleged damage to Gregg Roofing, Inc.'s alleged reputational harm had upon its president, individually?

III. Statement of the Case

Mutual of Enumclaw Insurance Company is the appellant in the case at bar, but this is not a case about an insurance policy. The insured in the claim at issue, Parkside Church, is not even a party to this lawsuit. This is a case where a jury determined that Mutual of Enumclaw was vicariously liable in the amount of $1.5 million for the fraudulent acts of one of its claims adjusters, Robert Lowrie, in interfering with contractual relations between the insured a third party. CP 309.

The genesis of the claim was a major rainstorm that damaged the interior of the Parkside Church while the Church was having its roof

replaced by Gregg Roofing, Inc. ("GRI"), the counterclaiming defendant in this case. CP 7. Parkside Church made a claim on its Mutual of Enumclaw insurance policy for the flood damage, and Lowrie was assigned to handle the claim. RP 1142. Lowrie violated Mutual of Enumclaw's standards and duties as an adjuster when he convinced Parkside Church to pull GRI off the job and replace that contractor with Charles Prescott Restoration, Inc. ("CPR"). RP 433, 328, 1386. Lowrie's motivation to recommend this replacement was a personal "relationship" he had with CPR's owner, Donald Chill. Lowrie would hire CPR to repair property casualties insured by Mutual of Enumclaw, inflating the "necessary" scope and cost of repair, and in return, Lowrie was rewarded with gifts and cash kickbacks. RP 543-544. Mutual of Enumclaw was the unknowing facilitator of CPR's largess toward Lowrie, since Lowrie used Mutual of Enumclaw's bank account to fund this fraud while purporting to "adjust" claims. Exhibits 11, 12[1].

In this case, GRI was working on the roof, and presented evidence at trial that it was in the early stages of remediating the storm water intrusion when Lowrie arrived. RP 323. To satisfy his self-interest for gifts and kickbacks, Lowrie hired CPR to repair the damage, convincing the

[1] These exhibits were not admitted by the trial court. Mutual of Enumclaw argues that this was error.

Church to dismiss GRI.

Lowrie's kickback scheme was completely antithetical to Mutual of Enumclaw's ethics and policies. RP 1386. At trial, Mutual of Enumclaw's vice-president of claims testified that if she had known what he was doing, " I would have gotten in my car, driven to Lake Oswego and fired him." *Id.* But neither she, nor anyone else at Mutual of Enumclaw knew what Lowrie was doing. *Id.* Nor was there any evidence that they should have known. Thus after paying the entire cost of repairing the property damage at the Church, Mutual of Enumclaw did what insurers typically do after paying a loss of this nature: pursued a subrogated claim against the party that was legally responsible for some or all of the damage. In this case, that party was GRI. As was presented at trial, there was evidence that GRI's acts and omissions were an important contributing factor responsible for allowing the water to enter the Church in the first place.

Thus this lawsuit began with Mutual of Enumclaw's subrogated claim against GRI for breach of its contractual obligations to protect the interior of the Church during the roofing process. GRI counterclaimed against Mutual of Enumclaw, alleging, *inter alia*, tortious interference with GRI's contractual relations with the Church based on Lowrie's unauthorized actions. CP 11 *et seq.* During the course of this lawsuit,

Mutual of Enumclaw discovered that Lowrie had been fraudulently adjusting claims, including the one at Parkside Church. However, since the subrogated breach of contract claim was based on GRI's actions (allowing water into the Church in the first place) before Lowrie even arrived at the scene, Mutual of Enumclaw proceeded with that claim. It is important to note that Mutual of Enumclaw did not seek to recover the cost of the fraudulent work from GRI, only the *objectively reasonable* cost of repairing the property damage caused by the water intrusion. CP 7.

When it discovered the fraud, Mutual of Enumclaw also brought suit against Chill and CPR, which was consolidated with this case. CP 20. On the eve of trial, the court severed the two cases, and granted GRI's motion that "no evidence or argument shall be permitted regarding any fraud. . ." CP 176. GRI's objection to "fraud" evidence was *only* relevance, suggesting that it might elicit sympathy for Mutual of Enumclaw. CP 1615. Mutual of Enumclaw, arguing that the fraud had direct relevance to the issue of whether Lowrie was acting within the scope of his agency while deceiving his employer for his own benefit, made an offer of proof at trial regarding this fraud, Mutual of Enumclaw's response to it, and the criminal prosecution of those involved; the trial court again rejected it, based on its previous Order. RP 1571-2572.

In the discovery process, Mutual of Enumclaw sought to

investigate GRI's counterclaim for tortious interference. CP 1656. GRI alleged that the community's knowledge that GRI had been involved with the Parkside Church project, which stood open and uncorrected for an extended period of time, tarnished its reputation; GRI contended that this resulted in its not being asked to bid on other projects that it would normally have worked on. CP 832. Mutual of Enumclaw particularly sought to establish the damages claimed by GRI in relation to this claim, so that it could properly prepare a defense. Mutual of Enumclaw issued interrogatories requesting that GRI identify its alleged damages relating to its counterclaims, and the method GRI used to calculate these damages. CP 1656. GRI responded in November 2009 as follows:

> Based on the discovery to date, GRI claims damages are at least $15,301.07. Further analysis of GRI's damages is ongoing. GRI reserves the right to supplement its response. GRI contracted to re-roof the Parkside Church roof for $16,212 plus the cost for replacing dry-rot. GRI performed dry-rot labor on the Parkside Church in the amount of $1,710. GRI was eventually paid $12,620.93 for its work on the Parkside Church roof. Accordingly, GRI sustained expectation interest damages in the amount of $5,301.07. ***Further, GRI contends that its business reputation and business was damaged in the amount of at least $10,000.***
>
> *Id. (emphasis added).*

Similarly, Mutual of Enumclaw issued a Request for Production to GRI requesting all documentation of its alleged damages. GRI failed to produce *any* financial documents. More than ten months after these

discovery requests were served, GRI's president, Allen Tiffany, testified at his deposition that he had not bothered to retrieve responsive tax returns from his attic, even though "[w]e save everything for ten years. It's a matter of getting up in the attic and finding them." CP 1635. His only excuse was that his secretary had been on a leave of absence. *Id.* He did, however, testify that GRI's revenue had *increased* every year from the year of the Church job (2005) until 2009, when it did decrease significantly. *Id.* "But," explained Mr. Tiffany, "that doesn't have anything to do with the Parkside Church. That's just the general economy. . ." CP 1635.

Also at his deposition, Mr. Tiffany was asked whether he had calculated the value of GRI's claim for loss of goodwill (which GRI had identified in subparagraph "b" in its interrogatory response). CP 1635. He answered that he had not. *Id.* He was then asked whether he had calculated the value of GRI's claim for lost reputation (identified in subparagraph "c"). He responded: "To me, B and C are kind of the same, so no." *Id.* In sum, pre-trial discovery established the following: 1) GRI claimed its reputation / goodwill was damaged in the amount of "at least $10,000;" 2) there were no documents to support that claim; 3) GRI's income *increased* every year for the four years following the Parkside incident, only dropping off in 2009, due to general economic conditions *not* related to

Parkside Church; and, importantly, 4) to Mr. Tiffany, GRI's reputation is *the same thing* as its goodwill.

Immediately before trial in September 2011, the trial court ruled that GRI was not entitled to rely on tax records retrieved from Mr. Tiffany's attic because GRI intentionally failed to produce them in discovery. RP 76-85. GRI assured the court that it would not rely on any financial documents to prove that it suffered damage to its reputation / goodwill, and just as it promised, GRI presented absolutely no evidence of the value of the loss it alleged to its reputation / goodwill. Mutual of Enumclaw accordingly made a Motion for Judgment as a Matter of Law at the close of GRI's case for failure of proof, which the trial court denied. RP 1850.

The jury returned a special verdict against Mutual of Enumclaw, finding that GRI had not breached the roofing contract by allowing water to enter the Church. CP 309. Without the benefit of Mutual of Enumclaw's proffered evidence pertaining to how Lowrie had departed from his employer's interests to serve his own, the jury determined that Lowrie had been acting within the scope of his employment when, motived by the opportunity for personal gain, he encouraged the Church to dismiss GRI in favor of CPR. Finally, the jury returned a verdict in favor of GRI on its tortious interference claim, finding that GRI had been damaged in the

amount of ***$1.5 million***. *Id.* Mutual of Enumclaw timely filed a renewed Motion for Judgment as a Matter of Law on the tortious interference claim, joining it with alternative motions for remittitur and a new trial. CP 318. The trial court denied all of these motions. CP 568. Mutual of Enumclaw timely appeals.

IV. ARGUMENT

1. *Standard of Review and Summary of the Argument*

a. De Novo. A primary issue in this appeal is whether GRI as a corporation is entitled to the same kind of "reputational" damages as an individual. This is a purely legal issue, reviewed *de novo*. *Mitchell v. Washington State Inst. of Pub. Policy*, 153 Wn. App. 803, 814, 225 P.3d 280 (2009). As will be discussed below, where a natural person suffers damage to his or her reputation as the result of a tort, damages can include first-person experiential harm: embarrassment, loss of enjoyment of life, loss of dignity, etc. There is a qualitative feeling of severe discomfort to enter a room and have all of your colleagues, who previously held you in high esteem, refuse to make eye contact. A fall from grace is an occurrence that jurors can comprehend, and even though there is no rational way to connect a dollar value to this first-person experience, the jury's verdict is a community consensus of fair compensation, just as it is when the jury is asked to measure pain and suffering in dollars and cents.

Even though a corporation is a fictional entity that has no first-person experiences, there is nothing inherently wrong with the proposition that a corporation's reputation can be tortiously injured. It just means something else. When a corporation's good reputation has been sullied, its customers may be less willing to buy from it. Its creditors may be less willing to lend to it. And top talent may be less willing to work for it. While these harms can be real, there is an important distinction between them and the kind of first-person experiential damage a natural person suffers from reputational harm; the corporation's injury is to its ability to make money. That harm is measured, both in the real world where people buy corporations, and in the legal world, where courts award judgments for damage to corporate reputations, in terms of the entity's goodwill. It is measured in dollars, not experiential unpleasantness. A threshold legal issue in this case, subject to *de novo* review, is whether a corporation such as GRI is entitled to an award of substantial damages for alleged reputational harm where its purposeful trial strategy was to conspicuously avoid providing the jury with any way to estimate the damage to its goodwill. By sustaining the jury's $1.5 million award, the trial court created a false equivalence between first-person experiential harm, which requires no proof of a dollar value, and an injury to corporate goodwill, which does. This was an error of law. The substantial evidence GRI was

required to present under CR 50 and CR 59 was evidence of the amount of damage to its goodwill.

b. Abuse of Discretion. Mutual of Enumclaw also challenges the trial court's denial of its Motion for Remittitur. A denial of a Motion for Remittitur is reviewed for an abuse of discretion. *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 116 P.3d 381 (2005). But like any discretionary ruling, the discretion is "abused" if exercised on the basis of an incorrect legal conclusion. *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Here, Mutual of Enumclaw simultaneously asserts that the trial court erred as a matter of law in its failure to remit by requiring no quantitative evidence of damage to goodwill, but also that the award is so great in comparison with the harm actually presented that it should shock the Court's conscience. *See, eg. Bunch, supra*. This latter, alternative proposition is reviewed for an abuse of discretion. *Id.*

Mutual of Enumclaw also presents two challenges to the trial court's evidentiary rulings. First, that the court erred in preventing Mutual of Enumclaw from introducing evidence that the way Lowrie defrauded Mutual of Enumclaw was outside the scope of his agency. This was evidence relevant to the key issue of Mutual of Enumclaw's vicarious liability for Lowrie's bad acts. Second, that the court erred in allowing Mr.

Tiffany to testify as to how the alleged harm to GRI made *him feel*. This irrelevant evidence was especially prejudicial in the context of this case, where GRI was conflating human, experiential loss with a loss in corporate earnings. These evidentiary challenges are also subject to review for abuse of discretion. *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 213, 258 P.3d 70 (2011).

2. *The measure of damages for a tortious interference claim.*

While there is no reported case in Washington that specifically defines the damages to which a successful plaintiff on a tortious interference claim is entitled, two such cases have cited with general approval the approach in the Restatement (Second) Torts, §774(A):

> (1) One who is liable to another for interference with a contract or prospective contractual relation is liable for damages for
>
> (a) the pecuniary loss of the benefits of the contract or the prospective relation;
>
> (b) consequential losses for which the interference is a legal cause; and
>
> (c) emotional distress or actual harm to reputation, if they are reasonably to be expected to result from the interference.
>
> Restatement (Second) of Torts § 774A (1979).[3]

[3] The Washington cases that mention §774A are *Lincor Contractors, Ltd. v. Hyskell*, 39 Wn. App. 317, 324, 692 P.2d 903 (1984) and *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 514, 814 P.2d 1219, *opinion corrected*, 62 Wn. App. 495, 821 P.2d 1235 (1991).

This Restatement framework does not elucidate the issue of what kind of evidence is sufficient to show that a plaintiff is entitled to each of these elements of damage – a topic addressed in more detail below.

In the case at bar, GRI amorphously asserted a paragraph (a) claim (pecuniary loss of the benefits of the contract with the Church), a paragraph (b) claim (consequential losses relating to an alleged failure to be hired for several other jobs), and a paragraph (c) claim (actual harm to reputation). Mutual of Enumclaw acknowledges that GRI offered sufficient evidence to support a verdict for lost profits on the Church job itself – approximately $500. RP 1668. The crux of this appeal is whether GRI offered sufficient evidence to support a verdict representing an additional $1,499,500.00 under (b) and (c). As will be shown below, it did not.

a. Consequential losses for which the interference was a legal cause.

Although the primary harm identified by GRI was alleged damage to its reputation, the only inference that could have suggested such harm was Mr. Tiffany's subjective testimony that he thought GRI was not asked to bid on projects at two churches and a four-building apartment complex as a result of people being aware of GRI's involvement with the damage and dispute at the Parkside Church. At trial, GRI used this lost chance to

bid to illustrate the alleged damage to its reputation, but made *no* effort to satisfy its burden to quantify any of its allegedly consequential losses. The fundamental aspects of this sort of proof would have included some showing of the value of the missed jobs, GRI's profitability (including both labor and materials), and GRI's ability to have accepted them all concurrently. Of course, GRI would not have been required to give exact figures, but there is no reason at all why GRI could not have supplied estimates of these very basic data. Even if the jury extrapolated from Tiffany's testimony that the value of the allegedly missed jobs would have been similar to the Church job ($16,000) RP 1624, that GRI's profit margin would have been the same 10% as it was on the Church job, and that GRI would have had the ability to roof all of those buildings (6), the losses that GRI would have experienced would be on the order of $9,600. The jury awarded over *one hundred sixty times* that amount[3]. Even giving GRI the benefit of a very substantial doubt, the award still comprises $1,489,900.00 more than the sum of the first two Restatement elements: the "benefits of the contract" and the "consequential losses for which the interference was the legal cause." That leaves only one category of

[3] This same multiplier, if denominated a "punitive" judgment, would violate Due Process under *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 410, 123 S. Ct. 1513, 1516, 155 L. Ed. 2d 585 (2003). ("few awards exceeding a single-digit ratio between punitive and compensatory damages will satisfy due process.")

damages under §774A to make up the difference: actual damage to reputation. As will be shown, the "reputation" evidence in the record comes nowhere close to supporting such an award.

b. The legally protected interest of "reputation."

Far and away the most common context in which courts discuss damage to reputation as a compensable injury is defamation. While the law of defamation is, at best, a loose fit with the law of tortious interference, the nature of a reputational interest has been explored in considerable detail in that setting, and sheds light on that issue as it is presented in this case. Perhaps surprisingly, the term "reputation" is not easily defined. This is not the result of a lack jurisprudential investigation, but rather the fact that the word "reputation" is really an umbrella concept that covers at least three distinct kinds of interests: a property interest, an honor interest and a dignity interest. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 Cal. L. Rev. 691, 711 (1986). As will be discussed below, cases that discuss the protection of "reputation" fit into these categories, although with some overlap; nearly every "reputation" case nationwide can be understood to honor them and fashion relief accordingly.

i. Reputation as a property interest.

The first, and perhaps most obvious, aspect of reputation is as a

property interest. Post describes it as follows:

> This concept of reputation can be understood as a form of intangible property akin to goodwill. It is this concept of reputation that underlies our image of the merchant who works hard to become known as creditworthy or ***of the carpenter who strives to achieve a name for quality workmanship.*** Such a reputation is capable of being earned, in the sense that it can be acquired as a result of an individual's efforts and labor. Thomas Starkie well described this concept of reputation over a hundred and fifty years ago:
>
> Reputation itself, considered as the object of injury, owes its being and importance chiefly to the various artificial relations which are created as society advances.
>
> The numerous gradations of rank and authority, the honours and distinctions extended to the exertion of talent in the learned professions, the emoluments acquired by mechanical skill and ingenuity, under the numerous subdivisions of labour, the increase of commerce, and particularly the substitution of symbols for property in commercial intercourse—all, in different degrees, connect themselves with credit and character, affixing to them a value, not merely ideal, but capable of pecuniary admeasurement, and consequently recommending them as the proper objects of legal protection.
>
> *Id.* at 694 (emphasis added)

When a tortfeasor's actions cause damage to a business' "reputation" – ie, to its property interest in the intangible quality of goodwill that has been earned by a carpenter who has strived to achieve a name for quality workmanship, the carpenter's damages are quantifiable. In fact, the value of that reputation (or diminution to that reputation) is

calculated in the market place every time a business is sold[4]. A corporation's reputation is a component of the company's goodwill[5], which is a line item in the "asset" column of every company's balance sheet. As Post noted, "There are aspects of modern defamation law that can be understood only by reference to the concept of reputation as property, as, for example, the fact that corporations and other inanimate entities can sue for defamation." 74 Cal. L. Rev. at 696. This is true of reputational harm outside the context of defamation, as well. *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 845 P.2d 987 (1993). But courts also talk about two other aspects of reputation, which are not susceptible to a reduction to a "property" interest, nor of being measured in dollars: Honor and Dignity.

ii. Reputation as an Honor Interest.

The second aspect of reputation historically recognized by law is honor. A party's interest in his or her honor is very different from a property interest. Honor is the status that corresponds to the social role a person occupies, and is increasingly disregarded as a basis for damages because it embarrassingly embraces the idea that some people are inherently better than others. Post, 74 Cal. L. Rev. at 722. Nevertheless,

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[4] *See, eg. Lewis River Golf*, 120 Wn.2d 712.

[5] Washington recognizes that a corporation's reputation is a component of its goodwill, about which more shortly.

reputation as honor explains a certain amount of reputational jurisprudence, and is worth mentioning. Honor is the notion that a particular person is inherently better than others, by virtue of a title or social condition; it is threatened by insinuation that the holder of the role either does not properly occupy it, or the value of the position itself is impugned. Under English common law, the law protected the reputational "honor" of nobility, but in the United States the notion of entitlement to "honor" as holder of elected office – separate from the office itself – was dispatched in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Similarly, cases that "vindicated" the "honor" of people to whom an incorrect racial identity had been ascribed have since been soundly and universally rejected, and with them the legal recognition of inherent superiority of one person over another. *Bowen v. Indep. Pub. Co.*, 230 S.C. 509, 512, 96 S.E.2d 564, 565 (1957), Samuel Brenner, *"Negro Blood in His Veins": The Development and Disappearance of the Doctrine of Defamation Per Se by Racial Misidentification in the American South*, 50 Santa Clara L. Rev. 333, 397 (2010). It should be noted that money cannot measure (or repair) damaged "honor," any more than it can measure or repair pain and suffering. The judgment itself can serve as a kind of vindication, but the dollars associated with the judgment are, by definition, largely punitive rather than compensatory.

A potential jurisprudential vestige of reputational honor relevant to the present analysis relates to modern professional status, particularly that of medical doctors. As Post notes, "In other institutions, like the profession of medicine, we remain genuinely ambivalent whether the reputation of a doctor stems solely from her achievements, or whether it inheres in part in *the magical status of simply being a physician*." Post, 74 Cal. L. Rev. at 707. This will become relevant with respect to the applicability of *Wash. State Phys. Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, discussed below, in which the Supreme Court sustained damages in favor of a physician for his damaged reputation with no proof of economic loss.

iii. Reputation as Dignity.

Another aspect of reputation is the holder's dignity interest. Assaults on dignity, unlike honor, are frequently the basis for money damages in modern defamation jurisprudence. Dignity represents the personal internalization of social relationships within a community, which are expected to be honored by the community made up of other individuals who have also internalized those relationships. "Persons who are socially acceptable will be included within the forms of respect that constitute social dignity; persons who are stigmatized as deviants will be excluded." Post, 74 Cal. L. Rev. at 711. This is another way to think about

damage to the "reputation" of an unfairly maligned doctor; rather a recognition of a "magical status of simply being a physician", reputation as dignity suggests that the harm being compensated is the degradation in status the doctor earned, and previously enjoyed within the medical and patient community.

Although the distinction is not directly relevant to the case at bar, dignity differs from honor in that it does not presuppose "superiority", and that it may be rehabilitated by an authoritative judgment that the person who tarnished it, rather than the "victim", was in violation of social norms. This is why the "truth" of a statement is an absolute defense to a defamation claim. When the speaker (or publisher) *has* breached social norms by making a *per se* false, injurious statement, juries are empowered to award general damages without proof of any special (ie, actual) harm. *New York Times Co. v. Sullivan*, 376 U.S. 254. As is the case with lost honor, the value of diminished dignity cannot be measured in dollars because it represents the value of esteem in the community rather than potential profits. Again, the loss of dignity is harm like pain, suffering or distress: a first-person experiential harm. It is an organic number supported by proof of the personal severity of demotion, not damage to a

property interest that would be capable of measurement[6].

c. A corporation's reputation is a property interest, not a dignity interest.

If a driver negligently collides with a parked moving company's truck, the moving company may sue that driver for damages. While that company would no doubt be entitled to a money judgment representing the value of the damage to the truck, it would *not* be entitled to an award for pain and suffering. If a jury awarded an amount grossly in excess of the proven costs of repair and loss of use, that award would be outside the scope of the evidence, and the court would have an obvious obligation to either remit or order a new trial. CR 50. This is not because there is a different "standard of proof" that a corporation must meet when it is the victim of a tort; it is because the harm suffered by a corporation is qualitatively different from the harm suffered by an individual, flowing from *the same tort*. A natural person can recover for pain, suffering and emotional distress, but a corporation cannot. *See, eg. Trovan, Ltd. v. Pfizer, Inc.*, CV-98-0094 LGB MCX, 2000 WL 709149 (C.D. Cal. May 24, 2000).

Similarly, where a tort causes damage to "reputation", individuals and corporations suffer different kinds of harm. Below, GRI vigorously

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[6] "Undoubtedly, defamation actions cannot fully rehabilitate individual dignity; nevertheless, it is well-understood that "the jingl[e] of the guinea helps the hurt that Honor feels." *Freedlander v. Edens Broad., Inc.*, 734 F. Supp. 221, 224 (E.D. Va. 1990) *aff'd*, 923 F.2d 848 (4th Cir. 1991)

relied upon the *Fisons* case, in which a $1.085 million dollar award for harm to a doctor's reputation survived a motion to remit, both at the trial court and before the Supreme Court. 122 Wn.2d 299. In *Fisons*, a patient died as the result of taking medication prescribed by Dr. Klicpera. The patient's family sued Dr. Klicpera, and statewide news media reported the allegations, along with a comment by the drug company that the death was the result of the physician's incompetence. *Id.* It was subsequently discovered that the drug manufacturer was aware of the risk of the complication suffered by the patient, but had elected not to share that information with prescribing doctors. Dr. Klicpera brought a Consumer Protection Act claim against the drug maker, alleging, *inter alia*, resulting damage to his professional reputation. *Id.* The jury awarded him $1.085 million on that claim, and the drug company appealed on the basis that there was no evidence of any dollar value associated with the harm to the physician's reputation. *Id.*

In affirming the award, the Supreme Court cited the physician's testimony of the qualitative experiences he endured:

> The evidence the jury heard regarding reputation damage was Dr. Klicpera's own opinion as to such loss and a statement by the trial court that there had been newspaper accounts reporting Dr. Klicpera's alleged medical malpractice. Dr. Klicpera essentially testified that he thought there was certainly ***a loss to his reputation in the community, and that other physicians had been ignoring him and that he no***

> ***longer enjoyed his practice and had taken steps to find administrative work.***
>
> Damages for loss of professional reputation are not the type of damages which can be proved with mathematical certainty and are usually best left as a question of fact for the jury.
> *Id. at 331.*

Note that the Court responded to a challenge to the sufficiency of the evidence to support a particular dollar amount by reciting Dr. Klicpera's own testimony that his *dignity had been tarnished* and that he had *lost enjoyment* in his work[7]. In essence, the drug company was arguing that Dr. Klicpera should be *limited* to reputational damages based on a theory of reputation as property (income loss), where the failure to show a loss of such income should be fatal to the claim. The Court rejected that notion by shifting the frame from reputation as property to reputation as dignity, ruling that the jury was entitled to come up with a number devoid of relation to the doctor's finances. Dr. Klicpera argued that the damage to his reputation hurt *this* much, from the first-person perspective, and the drug company's answer was that he failed to show lost profits. Those arguments meet head-on only with respect to the question of whether Dr. Klicpera was limited to damage to his reputation as property, or whether he could also recover for damage to his reputation

[7] The holding in *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d at 180 that, "[N]oneconomic damages especially are within a properly instructed jury's discretion..." is good reason to believe that courts should give less deference to a jury's determination of economic damages, requiring at least an estimate or range from the plaintiff.

as dignity.

The frame shift from property to dignity also explains the Court's ruling that such damages "are not the type that can be proved with mathematical certainty and are usually best left as a question of fact for the jury." *Fisons*, 122 Wn.2d at 332. It is important to recognize that the "factual question" to which the Court referred was not which economic expert to believe, but "how much did it hurt?" For there was no evidence at all of the former, and plenty of the latter. It is no accident that the Court ruled, "The determination of the amount of damages, *particularly in actions of this nature*, is primarily and *peculiarly* within the province of the jury. . ." *Id.* at 329 (emphasis added). To be explicit, actions of "this nature" are cases where harm *is not* measurable in dollars, and the "peculiarity" is that the jury is supposed do exactly that. The Court's admonition is a recognition that the task is not just hard – it is *impossible*, and *no* such award could, even in theory, stand up to an analytical challenge. Not surprisingly, the broad limits on such awards, on appellate review, have developed in terms of "shocking the conscience." That is to say, awards for unquantifiable harm will not be modified unless they are seriously, and very obviously, out of bounds. There is no reason that quantifiable harms should be given the same deference – this is not an "action of that nature" nor is there anything "peculiar" in asking the jury

to estimate an economic injury to a corporate plaintiff, like the injury asserted in this case, in economic terms.

Mutual of Enumclaw does not advocate that GRI has a higher burden of proof on its "reputation" claim than would a natural person. Rather, Mutual of Enumclaw asserts that harm to a corporation's reputation is qualitatively different than harm to an individual's reputation, and should be measured accordingly. Unlike in *Fisons*, the question presently before the court is *not* whether an injury to a plaintiff's reputation as dignity, a first-person experiential harm, must be supported with economic evidence, but whether a corporation can even *have* a first-person experience of what it is "like" to be humiliated. As Post put it, "[T]he fact that corporations and other inanimate entities can sue for defamation is consistent with reputation as property, but not with reputation as dignity." Post, 74 Cal. L. Rev. at 717. In the case of *Martin Marietta Corp. v. Evening Star Newspaper Co.*, 417 F. Supp. 947, 955 (D.D.C. 1976), the court held:

> Although a corporation may maintain an action for libel, it has no personal reputation and may be libeled only by imputation about its financial soundness or business ethics. This traditional doctrine does no more than recognize the obvious fact that a libel action brought on behalf of a corporation does not involve "the essential dignity and worth of every human being" and, thus, is not "at the root of any decent system of ordered liberty."
>
> *Id. (citations omitted).*

This same distinction was noted and upheld in the case of *Trovan, Ltd. v. Pfizer, Inc.*, CV-98-0094 LGB MCX, 2000 WL 709149 (C.D. Cal. May 24, 2000), where the court rejected a corporate plaintiff's claim of entitlement to unproven damages for its "reputation", limiting it instead to proven harm to its goodwill (1/10th of the jury's award):

> In this case, "goodwill" and "reputation" are synonymous. "Reputation" refers to "[t]he esteem in which a *person* is held by others." Blacks Law Dictionary (7th ed.1999) (emphasis added). Plaintiffs, as business entities, do not have a "reputation" per se, but rather have "goodwill"—which is defined as a "business's reputation, patronage and other intangible assets that are considered when appraising the business." *Id.*

The proposition that corporate reputation is property - a financial asset and aspect of goodwill - is entirely consonant with Washington law, *and Tiffany's personal understanding*. CP 1635. As noted very recently by Judge Zilly of the Federal District Court for Western Washington:

> Washington courts have consistently defined reputation as merely one component of a business's goodwill. *See, e.g., In re Marriage of Zeigler*, 69 Wn.App. 602, 607, 849 P.2d 695 (1993) ("Goodwill represents the expectation of continued patronage based upon such intangibles as location, trade name, reputation, organization and established clients."); *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 54, 113 P.2d 845 (1941) (goodwill "comprises those advantages which may inure to the purchaser from holding himself out to the public as succeeding in an enterprise which had been conducted in the past with the name and repute of his predecessor"). Similarly, Washington's Department of Labor and Industries has explained by way of regulation that goodwill is "the value of a trade or business based on expected continued customer

> patronage due to its name, reputation, or any other factor." WAC 296–17–31030(3); *see also Orca Logistics, Inc. v. Dep't of Labor & Indus.*, 152 Wn.App. 457, 216 P.3d 412 (2009) (relying on *inter alia* WAC 296–17–31030(3) in concluding that trucking company was liable for workers' compensation insurance premiums that had not been paid by its predecessor, from which it had acquired tangible assets, goodwill, customer lists, and personnel).
>
> *Experience Hendrix, L.L.C. v. Hendrixlicensing.com, Ltd.*, C09-285Z, 2011 WL 4402775 (W.D. Wash. Sept. 21, 2011)

In the *Experience Hendrix* case, Experience Hendrix, LLC owned certain Jimi Hendrix related trademarks that it alleged were being infringed by the defendant. *Id.* Among its other allegations, Experience Hendrix, LLC alleged that the defendant's misuse of the trademarked material damaged the plaintiff's reputation *and* its goodwill. Reputation and goodwill appeared as two separate line items on the special verdict form. While deliberating, the jury requested definitions of the terms "injury to reputation" and "injury to goodwill." *Id.* After consulting with counsel, the court explained to the jury that, "reputation and goodwill are essentially the same thing and are collectively a business's reputation, patronage, and other intangible assets that are considered when appraising a business." *Id.* The jury returned a verdict with $750,000 for injury to reputation and $300,000 for damage to goodwill. *Id.* The defendant moved for judgment notwithstanding the verdict on the basis that there was no

evidence to support any such judgment at all[8]. The court agreed, granting judgment notwithstanding the verdict on that claim:

> Plaintiffs proffered no estimate, by way of expert testimony or otherwise, of the value of their goodwill either before or after defendants' wrongful conduct. *See Stewart & Stevenson Servs., Inc. v. Pickard*, 749 F.2d 635, 649 (11th Cir.1984) ("It is axiomatic that the measure of damage to business property, such as goodwill, is based on a measurement of the difference in value of the property before and after the injury.")
>
> *Id.*

The same is true in the case at bar. While GRI was not required to prove its actual damages with absolute certainty, it presented *no* evidence "by way of expert testimony or otherwise" of the value of its goodwill before or after the Church episode. On the contrary, Mr. Tiffany himself testified that the harm to GRI's reputation was not only unknown to him, it was *unknowable*. RP 1667. When forced to actually make an estimate in answering interrogatories, GRI responded that the damage to its goodwill was "in excess of $10,000." CP 1656. While Mr. Tiffany attempted to distance himself from that number at trial by testifying that he had complained to GRI's lawyer, at the time, that the number was too low, he never presented anything to replace it. RP 1670. He asked the jury to make up a number, and it did – 150 times higher. There was no evidence *at all*

[8] The defendant also pointed out that different values for goodwill and reputation were incompatible with the court's instruction. *Id.*

from which the jury could estimate the alleged damage to GRI's goodwill, and the trial court's legal determination that there need be none was error.

3. *Regardless of whether a corporation can legally recover unquantified general damages for injury to its dignity under Washington law, GRI was required to prove* ***the amount*** *of its alleged reputational harm under the law of this case.*

There are many good reasons for which the Court should refuse to allow a corporation to recover general (unquantified) damages for reputational harm to its "dignity" under Washington law. No Washington court has ever allowed such a result, and the federal district court, applying Washington, specifically rejected it, requiring actual proof of the *amount* of harm to the corporation's goodwill. *Experience Hendrix*, 2011 WL 4402775. But there can be no doubt that in the case at bar, GRI was required to prove the *amount* of its alleged damages. The only instruction given by the trial court on damages (No. 16) stated:

> In order for either party to recover actual damages, that party has the burden of proving that the other party breached a contract with it, that the party incurred actual damages as a result of the other party's breach, **and the amount of those damages**.
>
> . . . .
>
> **If your verdict is for the defendant on defendant's tortious interference claim**, and if you find that defendant has proved that defendant incurred actual damages **and the amount of those actual damages**, then you shall award actual damages to the defendant.

> Actual damages are those losses that were reasonably foreseeable at the time the contract was made. A loss may be foreseeable as a probable result of a breach because it follows from the breach either
>
> a) in the ordinary course of events, or
>
> b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
>
> In calculating a party's actual damages, you should determine the sum of money that will put that party in as good a position as that party would have been in if both parties had performed all of their promises under the contract.
>
> The burden of proving damages rests with the party claiming them and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence. **In determining an award of damages to either party, you must be governed by your own judgment, by the evidence in the case, and by these instructions, rather than by speculation, guess, or conjecture.**
>
> CP 304-305.

This instruction is WPI 303.02, intended for use in breach of contract cases. There can be no doubt that it required GRI to produce actual evidence of the *amount* of damages it claimed to have suffered before the jury was entitled to award it actual damages for its tortious interference cause of action. At some point prior to the trial, GRI apparently recognized that this instruction would not allow it prove its case without proof of actual financial loss; one of its proposed instructions (No. 20) read:

> Damages for tortious interference may include economic loss

> as well as damages for mental distress, discomfort, inconvenience, injury to reputation, humiliation and consequential damages. Certainty of proof as to future opportunities and profits is not required.
>
> CP 172.

Perhaps recognizing that these harms related to dignitary interests which a corporation cannot suffer, GRI abandoned this instruction without objection. GRI took no exception to the fact that it was not given. RP 1839-1840.

With no exception taken, Instruction No. 16 became the law of this case regarding damages. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 918, 32 P.3d 250 (2001) ("Instructions to which no exceptions are taken become the law of the case.") *Hudson v. United Parcel Serv., Inc.*, 163 Wn. App. 254, 269, 258 P.3d 87 (2011). ("Failure to object to jury instructions waives the issue on appeal.") A similar situation was before the Supreme Court in the case of the *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). There, the defendant was charged with insurance fraud. Although the venue of the fraud is *not* an element of the crime, the prosecutor agreed to a "to convict" instruction that required proof that the act occurred in Snohomish County. *Id.* Nevertheless, the prosecutor failed to offer any proof of this "extra element." The jury convicted anyway, but the Supreme Court reversed, holding that:

By acquiescing to jury instructions which included venue as a

> necessary element to convict, even though it really is not an element, the State assumed the burden of proving venue; it however failed to do so. The conviction is reversed and the charges are dismissed with prejudice.
>
> . . .
>
> On appeal, a defendant may assign error to elements added under the law of the case doctrine.
>
> *Id.* at 99.

In the case at bar, *even if* a corporation were entitled to general, unquantified damages to its "dignity" under Washington law, that issue was waived by GRI when it failed to take exception to Instruction No. 16, which is now the law of this case. By failing to object or take exception, GRI assumed the burden of presenting evidence sufficient to establish the amount of the damage its reputation allegedly suffered. This rule applies with equal force in the civil setting:

> It is the approved rule in this state that the parties are bound by the law laid down by the court in its instructions where, as here, the charge is approved by counsel for each party, no objections or exceptions thereto having been made at any stage. In such case, the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions....
>
> *Tonkovich v. Department of Labor & Indus.*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

GRI had financial documents, including *six years* of post-interference revenue history by the time of trial. CP 1634. Mr. Tiffany was well aware that GRI was making more money during the four years after the interference than it was before. CP 1635. But rather than make any attempt to *meet* the burden of proving the amount of its reputational

damages, as required both by Washington law, and the law of this case, Mr. Tiffany specifically told the jury that it was impossible to estimate the value of the harm to GRI's reputation, and expressly invited the jury to make up a number out of whole cloth.

> Q. There are no documents that support any claim of financial loss for damage to your reputation; correct?
>
> A. ***That's correct. How do you put a number on that?*** (RP 1667)
>
> . . . .
>
> Q. All right. ***So you're not putting any numbers, you're not bringing out any documents, you're just going to let the jury decide what that is.***
>
> A. ***That's correct.*** (RP 1626)
>
> . . . .
>
> Q. Okay. ***And you didn't put a number on the damage to reputation today, did you***?
>
> A. ***No.***
>
> Q. Are you asking the jury to make up their mind based upon the evidence that they've heard if they conclude that your contract was interfered with by Mutual of Enumclaw's agent, Mr. Lowry, and that contract was breached because of that –
>
> A. Yes.
>
> Q. -- are you asking them to use their own good judgment to figure out how much that's worth to your business?
>
> ***A. I'm praying that.*** (RP 1673).

These exchanges demonstrate that GRI did not meet its burden to prove the amount by which is reputation – its goodwill - was harmed. The trial court erred by allowing this cause of action for damage to reputation to go to the jury, as well as by allowing the $1.5 million verdict to stand.

*4. It is **not** impossible to estimate the harm to a business's goodwill.*

Mr. Tiffany did not know how much GRI's goodwill suffered as a result of the alleged interference. But his testimony on this issue shows only that *he* did not know how to measure his company's goodwill. While this may be understandable, one would expect testimony regarding the value of a company's goodwill to come from someone qualified to give such an opinion – namely an accountant or an economist. In fact, it is not unusual for corporate parties to claim damage to their goodwill, and to offer estimates of the value of that damage. This issue was discussed at length in the *Lewis River Golf* case, *supra*, 120 Wn.2d 712. There, Lewis River Golf owned a sod farm, and purchased seed from Scott. Scott convinced Lewis River to purchase seed for, and plant, Kentucky Bluegrass. *Id.* Kentucky Bluegrass is an excellent product in places where there are hard freezes in the winter, killing a kind of weed that otherwise flourishes in that type of grass. As Lewis River unfortunately learned, however, in the temperate Pacific Northwest, the weeds overtake the grass quickly and lead to a defective sod product. Lewis River sued Scott,

alleging, among other things, that the poor quality of the grass had damaged its reputation -- it lost most of its commercial customers, and was sued by two of them. *Id.*

The Court did not dispute that damage for harm to Lewis River's reputation was recoverable:

> There is substantial authority that damages are recoverable for damage to a business reputation or goodwill and resulting loss in the value of the business. "As a general rule, loss in the value of a business as a going concern, or loss in the value of its good will, may be recovered as an element of consequential damages."
> [R]ecognizing methods for calculation of goodwill by economists and accountants, goodwill has become more widely accepted as a recoverable item of consequential loss.
> *Id.* at 716.

The Court then went on to discuss specifically what is at issue in this appeal: when a party has the burden of proving the amount of "damage to business reputation and loss of goodwill," what counts as sufficient proof to sustain a verdict on that basis? The Court held that damages must be proved with reasonable certainty, within the context of several underlying principles which are equally applicable to the case at bar. First, the damages should be sufficient to put the aggrieved party in as good a position as it would have been but for the defendant's malfeasance. *Id.* at 717. In *Lewis River* this was a matter of UCC statutory law (RCW 62A.1-106) and here it is the law of the case under Instruction No. 16.

Second, the Court noted that the UCC "rejects any doctrine of certainty which requires almost mathematical precision in the proof of loss. Loss may be determined in any manner which is reasonable under the circumstances." *Id.* Mutual of Enumclaw does not dispute that the same standard applies to the common law tort in this case. Finally, "the established principle that the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage." Id. (ital. in original).* Summing these principles up in the context of damage to a business's reputation and goodwill, the Court stated:

> Further, it is well recognized that the type of damages here involved are not subject to proof of mathematical certainty. " 'Compensatory damages are often at best approximate: they have to be proved with whatever definiteness and accuracy the facts permit, but no more.'
>
> With respect to loss of goodwill, proving damages with reasonable certainty should track the generally expansive recent history of lost profits. However, unlike lost profits, *goodwill relates to the future* and, thus, no actual profit base will exist for use at trial. Accordingly, the expert testimony of accountants and economists will prove invaluable to the aggrieved buyer in presenting his claim for loss of goodwill. *Such testimony will generally be accepted by the courts in assessing goodwill claims.*
>
> *Id.* at 718 (*citations omitted, ital. in original*).

Mutual of Enumclaw does not contend that this Court should hold GRI to an exacting standard of proof with respect proving the precise amount of its alleged damages for harm to its reputation[9]. But GRI was required to prove the amount of its damages with the definitiveness and accuracy that the facts permitted. And regardless of the methodology or the identity of the witness offering the testimony, the measure of harm for the damage alleged to GRI's reputation is the difference in value of GRI's goodwill before and after the Church incident. There was no evidence of that at all.

In *Lewis River*, the plaintiff's expert, calculating the damage to the plaintiff's business reputation:

> assumed a sod farm of 195 acres, a certain marketable amount of sod per acre, the ability to sell that sod, and a certain profit margin. He then calculated the net earnings, after taxes, and applied a price earnings ratio to arrive at his opinion of the value of the business. From that value he deducted the price realized when the business was sold, resulting in his opinion of the loss sustained upon sale of the business.
>
> *Id.* at 721.

It was *this* analysis, from a Harvard economist who was a

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[9] In *Trovan, Ltd. v. Pfizer, Inc.*, CV-98-0094 LGB MCX, 2000 WL 709149 (C.D. Cal. May 24, 2000), the court observed that, "Although plaintiffs are correct in their assertion [that damages need not be proven with exactness], the courts have also held that "people who want damages have to prove them, using methodologies that need not be intellectually sophisticated but must not insult the intelligence." *Schiller & Schmidt, Inc. v.. Nordisco Corp.*, 969 F.2d 410, 415 (7th Cir.1992). "Allowance for certainty is one thing ... and rank speculation is another." *Zazu Designs*, 979 F.2d at 505."

professor of finance at the University of Washington, that the defendant in *Lewis River* contended was "too speculative" to even be presented to a jury. The Court had no trouble rejecting that challenge, because although predictions of the future are, *by definition*, uncertain, it was a reasonable estimate of the loss under the circumstances of that case. There is little doubt that *Lewis River* would have come out the other way if, in lieu of expert testimony regarding the value of its reputation, the plaintiff corporation had simply asserted that it lost four customers and that its owner, Mr. Stading, was very upset by it.

In this case, GRI consciously and purposefully made no attempt to prove the amount in which its reputation was allegedly injured, instead baldly asserting that even making such an estimate was impossible. *Lewis River* is just one example of proof that it is not. Instead, Mr. Tiffany simply asked the jury to come up with a number untethered from the evidence, which it did. However, the Court should keep in mind that nothing hindered GRI's ability to present an analysis of its financial documents before and after the interference, other than the fact that Mr. Tiffany could not be troubled to go up to his attic and retrieve the records. CP 1634. That election was entirely within GRI's control, and it should not relieve GRI of proving, with certainty reasonable under the circumstances, the amount of its alleged loss.

In response to Mutual of Enumclaw's Motion for Judgment as a Matter of Law, GRI addressed the weakness of its proof regarding the amount of damage it had suffered, claiming that evidence of the number of GRI's employees, combined with their hourly rates and GRI's profit margin on the Parkside Church job was sufficient to sustain a $1.5 million verdict. GRI claimed:

> For example, the evidence at trial established the number of GRI employees, 8-12 in the winter and over 20 in the summer, their gross billed hourly rate ($45 hour), and the average profit GRI made on a roofing project (10 percent). The jury, which included among its members one or more owners of small businesses (Leedom Decl.114) could easily have calculated an average annual income, and based its award on an estimated amount of lost income over a period of years.
>
> CP 377.

Perhaps the most striking thing about this statement is that GRI is arguing that the jury could have "correctly" used this evidence to infer a downward trend in GRI's revenues, whereas GRI is actually aware that this is *false*. CP 1635. All that this analysis reveals is that jury could have come up with a rough approximation GRI's labor revenue. The idea that GRI's *profits* could be computed by multiplying labor revenue by ten percent is absurd; it ignores material costs and all of the business's overhead. Just as crucially, even if this meager evidence were sufficient to allow the jury to guesstimate GRI's profits (and it was not), this is still a single data point, where evidence of harm must compare a "before" and

"after" state. That is to say, even if using GRI's labor revenue as a proxy for profits were appropriate, the record is *devoid* of evidence as to whether GRI employed more or fewer people after the alleged interference than before. And Mr. Tiffany testified as to the number of GRI's employees in the present tense at trial, five *years* after the alleged interference:

> Normally in the summer times of the year we get up into the teens and low twenties, and in the winter we get down as low as eight, sometimes we maintain ten, twelve during the winter, depend on how many storms and what the general economy is.
>
> RP 1527.

Whatever these labor estimates show, it is *not* that GRI's reputation suffered *at all*, much less in the amount of $1.5 million. To meet its burden to prove the amount of damage to its reputation with reasonable certainty, GRI was required to show an amount with the "definitiveness and accuracy the facts permit." *Lewis River Golf, supra,* 120 Wn.2d 712. This requirement is not simply to preserve the integrity of the judicial process (although that is an important aspect of it). It is also to allow the defendant a reasonable opportunity to challenge the plaintiff's claim. As the Court noted in *Fenimore v. Donald M. Drake Const. Co.*, 87 Wn.2d 85, 88-89, 549 P.2d 483, 486 (1976), "While the burden was upon the appellant to show these facts, it was at the same time the respondent's *right* to show [the opposite]." (*emphasis added*). Here, Mutual of

Enumclaw was deprived of its right to make any meaningful challenge to the amount of GRI's claim for economic injury because GRI refused to even suggest such an amount or a basis for estimating one. The facts here permitted much more accuracy than GRI was willing to admit. As GRI *itself* noted in its pre-trial brief, a loss to reputation:

> may be determined from a *background of business experience* on the basis of which it is possible to estimate with some fair amount of success both *the value of what has been lost* and the likelihood that the plaintiff would have received it if the defendant had not interfered.
>
> CP 149 (emphasis added).

GRI keeps ten years of financial records. CP 1635. This means that by the time of trial in September 2011, it possessed records dating back to 2001 – four years before the interference, and six years after. This was a wealth of information regarding the "background of business experience" from which it would have been possible to make a reasonable estimate of what had been lost. By offering none of these records, and *no* other evidence to establish *even an inference or estimate* of an amount of harm to its business reputation, GRI failed to meet its burden under Instruction No. 16 and Washington law. The Court should reverse the judgment entered on that verdict.

5. *The trial court improperly excluded evidence of the relationship between Lowrie's self-serving fraud and his role as an employee of Mutual of Enumclaw.*

If Lowrie was not acting as Mutual of Enumclaw's agent while interfering with GRI's relationship with Parkside Church, then Mutual of Enumclaw was not liable for Lowrie's actions. Thus the issue of this agency relationship was crucial to this case. By summary judgment order in August 2011, the trial court made the following determination as a matter of law:

> This is a case where MOE was defrauded by its own employee, who therefore was not, in that instance, acting within the scope of his authority.
>
> CP 694

Despite this Order, GRI was allowed to present evidence at trial that Lowrie *was* acting within his authority, as a general matter, while adjusting the Parkside Church claim. The law regarding an employer's liability for its employee's tortious acts is well established:

> [T]he principal is not liable when the agent steps aside from the principal's purposes in order to pursue a personal objective of the agent.
>
> *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 269, 215 P.3d 990 (2009). (*citation omitted*).

This has long been the law in Washington. In *Hein v. Chrysler Corp.*, 45 Wn.2d 586, 277 P.2d 708 (1954), Hein had been operated a Chrysler dealership, and claimed contractual rights to receive a certain number of cars from the manufacture for resale. Chrysler used a subsidiary company, DeSoto, to handle the distribution of its inventory of cars. An

employee of DeSoto, Harrison, saw that Hein's dealership was doing very well, and secretly planned to strip Hein of his dealer rights so that Hein's own son-in-law could take them over as dealer. *Id.* To further this scheme, Harrison, and his co-worker, Watts, falsely reported damaging facts about Hein to Chrysler (that he was hoarding inventory, etc), and simultaneously "required" Hein to purchase expensive sales promotional material and equipment on pain of being denied new inventory of cars. *Id.* Chrysler did, on Harrison's advice, divert inventory intended for Hein to other dealerships, and Hein's inability to obtain and resell cars forced him out of business. When Hein discovered the nature of Harrison's and Watts's involvement, he sued DeSoto for interference with his contractual rights with Chrysler. *Id.*

The Washington Supreme Court dismissed DeSoto, holding that it could not be liable for the actions of its employee, Harrison, under these circumstances:

> Harrison deliberately set out to destroy appellant's business *for his own purposes*, though appellant was one of Chrysler's ten best dealers in the northwest. This fraud against Chrysler, which had as its purpose the depriving of Chrysler of one of its best dealers, was accomplished through DeSoto, the agent of Chrysler. Both Chrysler and DeSoto were victimized by what the trial court correctly characterized as 'utterly disloyal conduct' on the part of Harrison and Watts, DeSoto's employees.
>
> The wrongful conduct attributed to Harrison and Watts by

> appellant's evidence could not bind their employer, DeSoto, because the two men were definitely serving their own ends and were willfully acting contrary to, and not in furtherance of, the best interests of their employer. . .
>
> [O]ne is responsible not only for his own acts, but for the acts of his employee when the acts are done in the scope of the employment and in furtherance of the business that is intrusted to the employee; and *so long as the thing the servant is doing is in the furtherance of the master's business* the master must answer for the unlawful manner in which the act is done.'
>
> *Id.* at 600.

The distinction upon which the imposition of vicarious liability thus turns is whether the wrongful act engaged in by the employee was in furtherance of the employer's interest, *or actively contrary to it*. This concept is included in WPI 50.02, the agency instruction given in this case as Instruction No. 14:

> One of the issues for you to decide is whether Bob Lowrie was acting within the scope of authority.
>
> An agent is acting within the scope of authority if the agent is performing duties that were expressly or impliedly assigned to the agent by the principal or that were expressly or impliedly required by the contract of employment. Likewise, an agent is acting within the scope of authority if the agent is engaged in the furtherance of the principals' interests.
>
> CP 302.

While this instruction is a correct statement of the law, giving it presupposes that both litigants had a full and fair opportunity to present evidence that the purported "agent" was acting in furtherance of the principal's interests *or directly in opposition to those interests and for his*

own gain. In the case at bar, the trial court allowed GRI to present evidence that Lowrie's job at Mutual of Enumclaw did include adjusting claims (which was, as a general matter, in furtherance of Mutual of Enumclaw's interests) and evidence that during the process of adjusting claims, Lowrie tortiously interfered with GRI's contract for his own benefit. The crucial missing piece is whether the actual act of discharging GRI was in furtherance of Mutual of Enumclaw's interests, or contrary to them.

Mutual of Enumclaw attempted to introduce evidence that Lowrie's actions were not just in furtherance of his own interests (a well-proven fact in this case), but that he was "willfully acting contrary to" the best interests of Mutual of Enumclaw. The trial court wrongly excluded this evidence in response to GRI's objection that it was irrelevant under ER 401, and unduly prejudicial under ER 403. CP 1615. The trial court's error in this regard stems from the fact that this case was severed from Mutual of Enumclaw's fraud case against Chill and CPR on the eve of trial, with the express purpose of separating the issues of Mutual of Enumclaw's subrogated breach of contract claim against GRI from the related, but distinct, damages against Chill and CPR (so as not to "generate sympathy for MOE"). CP 21. This led the trial court to ban any evidence that Lowrie had defrauded Mutual of Enumclaw. RP 24, *et seq.*,

1572. While the trial court's goal in severing the cases is understandable, its Orders prohibiting Mutual of Enumclaw from presenting evidence that Mutual of Enumclaw was a *victim* of Lowrie's fraud went too far. They were a deprivation of Mutual of Enumclaw's substantive right to challenge the application of the law expressed in *Hein* and Instruction No. 14 to the facts of this case. By banning evidence of Lowrie's fraud on Mutual of Enumclaw, it was impossible for Mutual of Enumclaw to submit evidence that Lowrie's interference was performed to wrongfully divert his employer's money to his own pocket, through Donald Chill.

Because the fact that an employee is engaged in defrauding his employer destroys vicarious liability under Washington law, there can be no doubt that the testimony and evidence offered by Mutual of Enumclaw was relevant to its defenses against vicarious liability for Lowrie's deceit in this case. Mutual of Enumclaw offered the testimony of David Michlitsch, a claims supervisor at Mutual of Enumclaw who had knowledge of Lowrie's fraud against Mutual of Enumclaw. RP 1572. Mutual of Enumclaw also offered documentary evidence of the federal Information against Chill and his subsequent plea agreement detailing his involvement in stealing money from Mutual of Enumclaw. *Id., Exs. 11, 12.*

This evidence was relevant. "Relevant evidence" is any evidence that tends to make a material fact more or less probable than it would be

without the evidence. ER 401. A trial court's decision to admit or refuse evidence for an abuse of discretion. *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons. *Davidson v. Mun. of Metro. Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569 (1986). Facts that tend to disprove an opponent's evidence are relevant and should be admitted. *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89, 549 P.2d 483 (1976). Excluding evidence that prevents a party from presenting a crucial element of its case constitutes reversible error. *See Grigsby v. City of Seattle*, 12 Wn. App. 453, 457, 529 P.2d 1167 (1975). The issue of unfair prejudice to GRI as a result of potential sympathy toward Mutual of Enumclaw is exactly the same as Mutual of Enumclaw's substantive defense to GRI's agency arguments: that Mutual of Enumclaw was defrauded by Lowrie. The Court must not allow the exclusion of exculpatory evidence as "prejudicial" under ER 403 simply because that evidence may also engender sympathy. In this case, the probative value of the proffered evidence significantly outweighed the threat of unfair prejudice to GRI, and the Court should rule that the trial court abused its discretion in excluding it.

6. *The trial court improperly allowed evidence of damages for Tiffany's hurt feelings.*

Over Mutual of Enumclaw's objection, the trial court erroneously allowed Mr. Tiffany to testify as to how he "felt" about driving by the water damaged church:

> Q. Okay. How did you feel about that? . . .
>
> MR. HITT: Your Honor, I – . . . I have an objection to the feeling. There's no claim for . . . emotional distress type damages or personal injuries in this case, this is a business case. So I'm objecting to the "how you felt about that" type question.
>
> THE COURT: Overruled.
>
> BY MR. LEEDOM: (Continuing)
> Q. So the question is how did you feel about the fact that you'd drive by for a period of time and see that the roof was not yet on the Parkside Church, how do you feel about that? . . .
>
> A. We -- we knew that this was a very negative effect on our business and we were naturally very upset by it.
>
> *RP 1621.*

This was irrelevant and inadmissible under ER 401 and 402 (respectively) because the only party to the case, GRI, was a corporation that cannot recover for damage to its "feelings." The only possible reason for GRI to offer such testimony was to support the theory of its proposed Instruction No. 20, that it was entitled to damages for mental distress, discomfort, inconvenience, and humiliation[18]. These reputation-as-dignity

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[18] This trial court understood this point explicitly. In pre-trial argument, the court stated, "Gregg Roofing will be allowed to testify as to his opinion, whether it's expert or lay. He's -- this is his -- this is his business. He can testify as to the effect of this discharge has on him." RP 85.

elements specifically invited the jury to award damages *to GRI* for an alleged harm *to Mr. Tiffany*'s sensibilities in an unproven amount. Failing to sustain Mutual of Enumclaw's objection was error, and in this case where such unquantifiable damage was the *only* evidence of damage from which a jury could arrive at a $1.5 million verdict without other proof, it was reversible error.

7. The question from the jury is irrelevant.

Finally, below, GRI argued that Mutual of Enumclaw had waived any argument that GRI was required to prove the amount of harm to its reputation. The basis for this argument was a question from the jury, which asked, "Do we have to show how we calculated damages to the defendant?" CP 532. After consulting with both attorneys, the trial court answered, "No." *Id.* GRI thus argued that "the court instructed the jury that it did not have to identify its method for calculating damages, and MOE did not preserve any objection to this instruction." CP 376. This is a red herring. Whether the jury was required to explain its award is an entirely different issue than whether there was any evidence to support a $1.5 million verdict. The responsive instruction to the jury was correct; juries are not required to explain their awards. But that does not mean they are free to ignore the fact that a party has presented no evidence on a crucial aspect of its case.

V. CONCLUSION

For the reasons provided above, Mutual of Enumclaw requests the following relief from this Court:

1. Determination as a matter of law that GRI was required to present the best evidence available of the value of the alleged harm to its goodwill before it was entitled to present a claim to the jury that its reputation had been tortiously injured, and that GRI failed to do so. This implies a reversal of, in the alternative, the trial court's denial of Mutual of Enumclaw's Motion for Judgment as a Matter of Law, Mutual of Enumclaw's Motion for New Trial, or Mutual of Enumclaw's Motion for Remittitur. Mutual of Enumclaw respectfully requests this alternative relief in that order. In the event that this Court determines that remittitur was the appropriate remedy, Mutual of Enumclaw requests that the Court remit the award to the amount of GRI's damages for which GRI offered substantial evidence, namely its lost profits for Parkside Church, and on six other buildings job in the amount of $10,100, as described on page 14.

2. Determination that the trial court erred in excluding evidence of Lowrie's fraud on Mutual of Enumclaw, and / or in allowing Mr. Tiffany to testify as to how the alleged damage to GRI's reputation made him feel. This relief implies remanding the case for a new trial with appropriate, corresponding evidentiary instructions to the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify and declare under penalty of perjury of the laws of the state of Washington, that on June 22, 2012, a copy of the Amended Brief of Appellant with Typographical Corrections was delivered via ABC Legal Services to:

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and original and one copy sent via U.S. Mail, postage prepaid on June 21, 2012 to:

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Signed in Seattle, Washington this 21st day of June 2012.

Linda Voss

Linda Voss