

NO. 734474-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BREWHAHA BELLEVUE, LLC d/b/a MUNCHBAR, a Washington
limited liability company,

Appellant,

v.

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

Respondents.

**OPENING BRIEF OF APPELLANT BREWHAHA BELLEVUE,
LLC d/b/a MUNCHBAR**

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I. INTRODUCTION

In this case for wrongful death and personal injury, the trial court erroneously held that a little girl who was biologically and legally unrelated to decedent DeShawn Milliken was nonetheless his “child” within the meaning of the Washington wrongful death statute, RCW 4.20.020, and that his estate could therefore make a wrongful death claim for her benefit. (CP 3659 - 3661.)¹ This was directly contrary to long standing Washington law and this Court must reverse and remand with instructions to dismiss the wrongful death claim as a matter of law.

As is summarized in post-trial motions at CP 3191-98, 3236-48, 3324-28, the trial court also incorrectly applied ER 403 and 404 in critical and inconsistent ways, inappropriately excluding “a tremendous amount of evidence” (RP 1355) of plaintiffs’ lifestyle, including but not limited to criminal conduct, prior incarceration, use of illegal substances and other “ACE” criteria that were directly relevant to possible wrongful death damages (if any are allowed) experienced the minor child. The evidence of plaintiffs’ prior acts is also admissible under ER 404(b) to show motive, intent and existence of a plan, for the purpose of allocation of fault. (CP

¹ A copy of this summary judgment order is attached in the Appendix to this brief. Oral argument on the parentage motion is located at the Verbatim Transcript of Motions for Summary Judgment of Jan. 23, 2015 at pp. 7:4 - 22:17 (hereinafter cited as “RP January 23 at [page #]).

3240-42; CP 676-678). In direct contrast, the trial court erred in admitting unreliable, irrelevant and inadmissible testimony of “377 calls for service” to the Bellevue Police Department to an area *near* defendant’s establishment, to incorrectly imply that those calls were all related to possible violence at defendant Munchbar. (CP 3239; RP 478-482, 486-488, 1369-1370.) These errors were highly prejudicial to defendant, changed the outcome of the case, and require reversal. Defendant also objects to other trial events and to selected jury instructions as further discussed in this brief.

In closing and rebuttal argument, plaintiffs’ counsel improperly injected untrue suggestions of prejudice and bigotry on the part of defendant and its counsel, for the purpose of inflaming the jury and obtaining an inflated damage award and unbalanced allocation of fault. (CP 3355-56; CP 3328; RP 1493-95, 1496-97, 1501-02.) Taken together, the result was a trial of distorted half-truths, improper argument to the jury, and handcuffing the defendant from presenting evidence to show the jury a complete and balanced picture of events. The jury was deprived of necessary evidence and the defendant was deprived of a fair trial.

Appellant/Defendant Brewhaha Bellevue, LLC dba Munchbar (“Munchbar”) respectfully requests that this Court:

1) reverse the trial court's order on summary judgment regarding wrongful death beneficiary status, CP 3659 - 3661, and order summary judgment dismissing the wrongful death claim²; and

2) remand the remainder of this case for re-trial with evidentiary rulings and jury instructions that:

- Admit evidence of the lifestyles, personal conduct and associations of DeShawn Milliken, Destiny Milliken, and (if the wrongful death claim is allowed to proceed) Wanda Montgomery;
- Allow the jury to consider the impact of the lifestyle, personal conduct and associations of DeShawn Milliken in creating Adverse Childhood Experiences (“ACE”), that have been shown to negatively impact a child's quality of life throughout their lifetime (if the wrongful death claim is allowed to proceed);
- Correctly define “fault” and permit the jury to decide whether fault should also be attributed to non-party Louis Holmes;
- Correct the jury instructions to eliminate the trial court's undue emphasis on the conduct of Munchbar, given its admission of negligence admitted negligent conduct and challenged only proximate cause and damages; and

² This will render many other issues moot and will substantially narrow a re-trial.

- Timely provide a correct and consistent standard for wrongful death damages (if that claim is allowed to proceed) based on correct instructions and coupled with correct evidentiary rulings.

II. ASSIGNMENTS OF ERROR AND ISSUES ON APPEAL

1. **Summary judgment:** Where it was undisputed that a girl was neither the natural child, the stepchild nor the adopted child of DeShawn Milliken, and that both DeShawn and the natural mother had knowingly misrepresented to the State of Arizona under penalty of perjury that he was the girl's natural father in order to obtain an administrative "determination of parentage" under Arizona family law statutes, which is not sufficient to show a parent-child relationship under the Arizona wrongful death statute, the trial court erred as a matter of law in ruling that the young girl was the "child" of DeShawn Milliken within the meaning of RCW 4.20.020, with standing to seek wrongful death damages. (CP 3659 - 3661³) *See, e.g., Tait v. Wahl*, 97 Wn. App. 765, 987 P2d 127 (1999); *Otani v. Broudy*, 114 Wn. App. 545, 59 P3d 126 (2002) *aff'd*, 151 Wn.2d 750, 92 P.3d 192 (2004).

Issue 1.a.: It was error for the trial court to make factual determinations on summary judgment against a non-moving party;

³ A copy of the summary judgment order is attached in the Appendix to this brief. Oral argument on the cross motions on the issue of parentage is located at the Verbatim Transcript of Motions for Summary Judgment of Jan. 23, 2015 at pp. 7:4 - 22:17 (hereinafter cited as "RP Jan. 23 at pp. __").

Issue 1.b.: The trial court incorrectly interpreted the meaning of “child” in RCW 4.20.020 as a matter of law;

Issue 1.c.: It was error for the trial court to give greater effect to Arizona paternity statutes than Arizona itself gives to such statutes;

Issue 1.d.: Full faith and credit does not require a Washington court to treat an amended Arizona birth certificate as conclusive proof, for the purpose of a wrongful death statute, of facts that are known to be false.

2. “Lifestyle” evidence improperly excluded: The trial court erred in excluding the “tremendous amount of evidence” (RP 1355) of criminal activity and incarceration, among other things, in the lifestyle of DeShawn Milliken and his friends, and of dangerous associations and behaviors by his sister Destiny, thereby precluding the jury from having facts necessary to evaluate both motives and intent in the Millikens’ attack on Ja’Mari Jones as well as what wrongful death damages (if any) might be experienced by a young girl upon the death of DeShawn in light of several Adverse Childhood Experience (“ACE”) factors in the Milliken family as those factors are described in professional literature.

Issue 2.a.: These rulings deprived the jury of information it needed to evaluate what quality and amount of “guidance” DeShawn might have provided to Ta’riyah had he not died on this occasion;

Issue 2.b.: These rulings precluded the jury from seeing a full and fair picture of DeShawn and Destiny so that it could accurately evaluate their level of “fault” in starting the fight with Ja’Mari Jones;

Issue 2.c.: The trial court erroneously treated such evidence as “character” evidence excludable under ER 404, when such was not offered for the purpose of proving specific acts, but for the purpose of showing motive, intent, knowledge and character of DeShawn Milliken and conditions actually existing in the Montgomery-Milliken family, which were directly probative of wrongful death damages and comparative fault; (*see, e.g.*, RP 1341; RP 1355);

Issue 2.d.: These rulings prejudiced Munchbar by precluding it from presenting facts material to its case on liability and damages; and

Issue 2.e.: These improper rulings laid a foundation for plaintiffs’ counsel to make improper and inflammatory arguments to the jury to unfairly impugn the defendant and its counsel based on the absence of such evidence.

3. Improper allowance of undisclosed “expert” testimony by fact witness: The trial court erred in allowing Dr. Ginger Ruddy to testify in the capacity of an expert witness diagnosing Destiny Milliken as having post-traumatic stress disorder (“PTSD”) based on subsequent records of a medical health professional who did not diagnose PTSD in her treating

capacity. Dr. Ruddy had not been disclosed as an expert witness, was not qualified as an expert on the subject on which she testified, and had not seen Destiny at points in time which would have permitted her to make a diagnosis. RP 272, 630-633:10-14, 638:10-11; 644:5-8; 698:19-699:9.

4. Jury instructions and Special Verdict: The trial court erred in submitting jury instructions 7, 9, 11 and 12 to the jury, and in submitting to the jury a Special Verdict form on which Louis Holmes was not identified as a person to whom the jury could allocate fault.⁴

Issue 4.a.: “Fault” improperly defined: Jury instruction no. 12 (CP 3216) erroneously defined “fault,” contrary to RCW 4.22.015.

Issue 4.b.: Allocation of fault improperly limited: The court erred in refusing to name Louis Holmes in instruction no. 12 (CP 3216) and on the Special Verdict form (CP 3220) as an entity to whom the jury could allocate “fault” under RCW 4.22.070(1). RP 1323-1329.

Issue 4.c.: Comment on evidence: Jury instruction nos. 7 and 9 (CP 3210, 3212) together constitute an improper comment on the evidence by the trial court against Munchbar under the facts of this case.

Issue 4.d.: Improper and belated addition of “guidance” to wrongful death damages instruction, contrary to earlier order on motions in limine and while excluding any evidence of decedent’s

⁴ Copies of each of these jury instructions as well as the Special Verdict are attached in the Appendix to this brief.

criminal lifestyle: In the portion of jury instruction no. 11 regarding wrongful death damages (CP 3214-15), the trial court belatedly and improperly added “guidance” as part of what the jury should consider for wrongful death damages after having affirmatively omitted that element from its ruling on early motions in limine (CP 677; RP 1339-41), and in the interim having affirmatively excluded all of the “tremendous amount of evidence” (RP 1355) of DeShawn’s “lifestyle”, including life decisions, criminal conduct and family behaviors, that would have directly impacted DeShawn’s potential “guidance” to Ta’riyah (see assignment of error #2). (CP 677; CP 3214; 1339-1341).

5. The court improperly permitted inflammatory argument in plaintiffs’ closing rebuttal argument that was designed to, and successfully did, inappropriately incite the jury to passion and prejudice.

6. The trial court erred in denying post-trial motions for mistrial and for new trial.

All of the above errors unduly prejudiced Munchbar in its ability to present a full and fair evidentiary picture to the jury, precluded the jury from making decisions on either liability or damages based on complete, relevant information, and necessarily require reversal and remand.

III. FACTS / PROCEDURAL POSTURE

A. Facts of Underlying Event.

In the early-morning hours of December 24, 2012, 30-year-old DeShawn Milliken died from gunshot wounds he received in a fight he and his sister, Destiny, started at The Munchbar,⁵ formerly a popular sports bar at Bellevue Square.⁶ (CP 1.) Destiny provoked DeShawn to attack Ja'Mari Jones, a former friend, in retaliation for Jones allegedly having stolen a large sum of DeShawn's money (\$100,000 or more, in cash) from the Milliken home. (CP1073-1074.) Jones had previously served time in juvenile detention for participating in killing the "Tuba Man" in Seattle. (CP 1061, 2948: 16-19.) Although Destiny had confronted Jones and his alleged accomplice on prior occasions, DeShawn had told her, "Mind your business. Stay in a woman's place." (CP 1086.) She pointed out Jones to her brother at the Munchbar.

Non-party Louis Holmes was a professional football player and former teammate of DeShawn's, who ran into DeShawn at the Munchbar. Holmes joined in the attack on Jones. (CP 2480:17-23; 3169.) Both DeShawn and Holmes weighed in at or above 260. (CP 2473:17; 2474:4; 2489:24; 2490:5.) Jones was substantially smaller, weighing approximately 148 pounds. Destiny was also grazed by one of the bullets.

⁵ Defendant Brewhaha, LLC dba The Munchbar was referred to throughout the underlying matter as "Munchbar", and we will do the same here. Munchbar closed the night of the shooting and has never reopened. CP 4.

⁶ We use first names to distinguish between the Estate of DeShawn Milliken (and DeShawn himself) and DeShawn's sister, Destiny Milliken. No disrespect is intended.

A Washington State Liquor Control Board Narrative/Evidence

Report describes key events viewed on security videotapes as follows:

Copies of the security video were obtained from both the inside of the bar and outside showing the entry area. The video . . . showing the public area outside the bar clearly show [Jones] waiting in the general admission line to enter the bar. The video also shows that at about 0100 the Munchbar's General manager, Josh Varela, relieves the door person and sends him inside to deal with the crowd.... At about 0105 Varela is dealing with two females in the VIP line and had his back to the general admission line. This is when a patron lowers the theater rope and several patrons including [Jones] entered the bar without being patted down or having their ID checked. Varela turned around a moment later only to see another patron re-hooking the theater rope back up. He had no idea that several people had entered behind his back. . . . About 6 minutes later in this same video, Jones is clearly seen running out the same door he entered carrying what appears to be a large frame semi-auto pistol in his right hand.

The video from inside obtained from the Munchbar shows [Jones] walking around inside the bar but never obtains a drink. At about 0109 Jones is tackled and knocked to the floor by [DeShawn]. [DeShawn] is seen throwing punches at Jones. At almost the same time [Louis Holmes] joins in and also throws punches at Jones, still pinned on the floor and being pummeled.

For an unknown reason both assailants stop the assault and look behind them, giving Jones an opportunity to reach for and draw his weapon. Video shows muzzle flash from the weapon.... [DeShawn] is shown dropping to the floor in pain while everyone else scattered at a very quick pace. Jones gets up from the floor in one motion as he is shooting and bolts for the front door.

CP 3547 (bracketed names substituted for clarity). *See also*, CP 1056-1126 for Destiny's unredacted interview to the Bellevue police.

B. Claims Asserted in this Lawsuit.

Plaintiff Wanda Montgomery, mother of DeShawn and Destiny Milliken, acting as personal representative of the Estate of DeShawn Milliken, sued under RCW 4.20.046 for DeShawn's pain and suffering prior to his death, and under RCW 4.20.020 for statutory wrongful death damages. (CP 1, CP 7-8). Destiny sued for her own bodily injury and emotional distress. CP 7.

Munchbar asserted affirmative defenses including, but not limited to, comparative fault of plaintiffs, intentional conduct of Ja'Mari Jones, unclean hands, and estoppel. (CP 38.) Munchbar later admitted negligence in not preventing Jones from entering the bar with a weapon, but contested causation and alleged intentional conduct of Jones and comparative fault of DeShawn, Destiny and non-party Louis Holmes.

C. DeShawn's Alleged Wrongful Death Beneficiary and the "Acknowledgement of Paternity."

A significant issue in this case is whether DeShawn had a statutory wrongful death beneficiary under RCW 4.20.020. Wrongful death damages may only be recovered on behalf of a narrow class of statutorily-prescribed beneficiaries. RCW 4.20.020.

Munchbar moved for summary judgment that DeShawn's Estate had no qualifying statutory wrongful death beneficiary. (CP 47-107, 116-

149.) Following oral argument, (RP Jan. 23, 2015 at pp. 7-22), the trial court denied Munchbar's motion (CP 3359-3361), and the court subsequently instructed the jury as a matter of law that Ta'riyah was DeShawn's "daughter". (CP 3214.) This was the equivalent of not only denying Munchbar's motion but also *granting* summary judgment in favor of the Estate that Ta'riyah was DeShawn's "child" as a matter of law.

The only person the Estate presented as a statutory wrongful death beneficiary was a little girl who lived in Phoenix, Arizona, born Ta'riyah Ajanise Smith on December 15, 2006. (CP 61 top line filled out on form). The Estate claimed that Ta'riyah had become DeShawn's "child" within the meaning of RCW 4.20.020, as the result of an "acknowledgement of paternity" signed by DeShawn and by Ta'riyah's mother, Denise Gilbert, in early August, 2012, and the resulting *amended* birth certificate.⁷

Ta'riyah's mother, Denise Gilbert, freely testified in deposition that Ta'riyah's father was Terry Smith, and that Terry Smith was murdered in June 2006, before Ta'riyah was born in December, 2006.

⁷ Plaintiff counsel, through its briefing argument and its description of exhibit 2 to the Declaration of Denise Gilbert, CP 118: 16-18; CP 136, CP 142, tries to create the impression that the "Birth Certificate" listing DeShawn as Ta'riyah's father was effective as of January 4, 2007. *Id.* However, it was Ta'riyah's birth that was "registered" on January 4, 2007. The certificate listing DeShawn as father was not "issued" until August 6, 2012. CP 142. Contrary to plaintiffs' insinuations, it was an amended birth certificate that had been requested by signature on the Acknowledgement of Paternity document. CP 139 (compare CP 79 for legibility), and CP 80, ("request that the birth certificate be amended").

(CP 70-74; CP 1904-06.)⁸ Ms. Gilbert consistently and truthfully referred to Mr. Smith as Ta'riyah's "father" until she was interrupted and specifically coached by plaintiff's counsel:

A: So I got pregnant with Ta'riyah in 2006. ... I don't know if you knew her father was murdered.

* * *

A. In June of 2006, when her father was murdered --

* * *

Q. Okay. Because who had been murdered?

A. Her father.

Q. Whose father?

MR. LUNA: I think you need to be clear on the biological father.

THE WITNESS: Okay. The biological father was murdered.

BY Mr. Donohue:

Q. The biological father of Ta'riyah?

A. Yes.

MR. LUNA: Remember, we have -- DeShawn was her father.

THE WITNESS: Right.

MR. LUNA: So we have to be clear --

THE WITNESS: Okay. Biological father.

MR. LUNA: -- to make sure the record is clear.

(CP 70:13-16; CP 71:8; CP 71:21 - 72:13; CP 1904-06.)

Ms. Gilbert readily testified in deposition that DeShawn, a friend of her cousin's whom she had also dated at one time, telephoned her from

⁸ The full deposition of Denise Gilbert is located at CP 1895 - 1970. Both parties put multiple excerpts from Ms. Gilbert's deposition into evidence prior to trial. *E.g.*, CP 70-76, 132-134, 260-63,653-54. For continuity and easy reference, we will typically quote from her full deposition located at CP 1895 - 1970. Her trial testimony (including discussions between counsel and the court) is located at RP 976 -998 and RP 1004 - 1017. Argument and rulings re permissible scope of cross-examination of Ms. Gilbert occurs at RP 1000 - 1003.

Atlanta to “reach out to see ... how [she] was doing”, following the murder of Terry Smith while she was pregnant. (CP 1907.) “So for the remainder of my pregnancy, we remained friends. Over the phone. But we never see each other, though.” *Id.*, lines 12-14. “So then I had Ta’riyah in December of 2006.” *Id.*, line 16. The first time DeShawn saw Ta’riyah was in February or March, 2007, when he was in Phoenix for a weekend staying with friends. (CP 1908.) From that point forward, DeShawn came to Phoenix every couple of months. *Id.* He stayed with other friends, but would see Denise and Ta’riyah. (CP 1908-1909) In late 2008, DeShawn moved back to Phoenix, and he and Denise then dated “up until 2009.” (RP 1010). However, at no time did they live together. (CP 76 and 1956. RP 1010.)

Denise and DeShawn broke up at the end of 2009 because DeShawn was seeing another woman. (CP 1911, 1934.) Once they broke up, Denise did not intend to get back together with DeShawn. (CP 1947.) However, DeShawn still wanted to be “in Ta’riyah’s life.” (CP 1915.) Denise said her attitude was, “Don’t come in and out of her life. If you’re going to be here, then let’s be here, let’s try to do adoption, do what we need to do.” (CP 1915:20-22.) So they came up with a schedule, beginning in 2010, where DeShawn would pick Ta’riyah up from daycare on Mondays, Wednesdays and Fridays and keep her overnight on those

days. (CP 1915-16, 1919.) DeShawn's roommate at that time kept a gun in their apartment and it was not locked away. (CP 2183, 2213.) One criminal charge against DeShawn was illegal contact with a firearm. *Id.*

In May, 2011, DeShawn was sentenced to 8 months in jail for money laundering. (CP 191.) Denise testified that at first, she would take Ta'riyah to visit DeShawn in jail, every weekend. (CP 1921.) DeShawn was first jailed at "The Tents". Visits there were by video screen. *Id.* Then he was moved to the "Towers." There he was allowed only one visit per week (total), so Denise allowed DeShawn's then-girlfriend to take Ta'riyah with her to visit DeShawn, which the girlfriend would do "sometimes." (CP 1921-22.) Visits in the Towers were "behind the glass." (CP 1922.) No direct personal contact was permitted at either facility. *Id.* The jury was not allowed to hear any of this.

DeShawn was released from jail in December 2011, but it was a condition of his parole that he move back to Seattle. (CP 304-308; 3240.) Denise testified that DeShawn talked to Ta'riyah by phone from Seattle, sometimes doing video calls via Skype. (CP 1936 and RP 992-993.) Ta'riyah went to visit him in Seattle for one week at Spring Break in 2012, and for the summer of 2012. (CP 1925.)

In August of 2012 DeShawn and Denise decided to do an Acknowledgement of Paternity for DeShawn in Arizona (CP 1928) "so he

would have his rights” to see Ta’riyah if anything happened to Denise. (RP 996.) DeShawn also wanted Ta’riyah to have his name. (RP 998.) Although Denise testified that, “in the State of Arizona, I guess you can’t do, like, a single-person adoption,” (CP 1928), the fact is that there is no such prohibition. ARS 8-102A. (“Any adult resident of this state, whether married, unmarried or legally separated is eligible to qualify to adopt children.”). However, DeShawn would have to be “certified by the court as acceptable to adopt children.” ARS 8-105.A. This required an investigation by an officer of the court or an adoption agency to evaluate his suitability to adopt. ARS 8-103, 8-105, 8-112. Not only would this process take at least several months, ARS 8-105.H. and I., but, ultimately, DeShawn would not be certified as acceptable to adopt Ta’riyah because of his recent criminal record. ARS 8-105.D. Once certified as “nonacceptable” to adopt, he could not re-apply to adopt for at least another year, ARS 8-105.L., and the criminal convictions would be problematic for at least five years. ARS 41-1758.07; ARS 8-105. The only other way to get DeShawn’s name on Ta’riyah’s birth certificate was through the “Acknowledgement of Paternity” process. *See*, ARS 25-812 (in record at CP 83-85). Even this process was not open to DeShawn, however, because only a “parent” could “acknowledge paternity.” *Id.*; (CP 80.) Denise and DeShawn solved that problem by making false

statements on the acknowledgement forms, under penalty of perjury. *Compare*, CP 61 (signed by DeShawn and Denise) with CP 78-80 (pre-printed text more legible). In electing to believe Denise's testimony that she and DeShawn believed this was a legitimate method of establishing parenthood for DeShawn, (CP 3659), the trial judge was making factual and credibility evaluations against Munchbar, as a non-moving party. The trial court's ruling that DeShawn "came to be declared Ta'riyah's father in compliance with the laws of Arizona" (CP 3660), was clearly erroneous. This is apparent from a reading of Arizona statutes. ARS 25-812.

By signing and filing the notarized, but untruthful, statement with the State of Arizona, Denise and DeShawn triggered a purely administrative process that resulted in issuance of an amended birth certificate for Ta'riyah that falsely described DeShawn as Ta'riyah's father. ARS 25-812; (CP 83.)

The trial court described the reasons for its ruling as follows:

Statutes and cases need not be cited in support of the proposition that Washington, in 2015, holds a compelling public interest in supporting strong families and encouraging permanency planning for all children. This public interest is served by giving full faith and credit to Arizona's determination of Ta'riyah Smith-Milliken's parentage and allowing a claim to be pursued on her behalf arising from the death of her father. The defense motion for summary judgment, seeking dismissal of such claim, is DENIED.

CP 3661. Notably, Judge Downing himself identified the parentage issue as “certainly ripe for appeal”:

Really, the only challenging issue in the case is whether DeShawn's being named as "father" on Ta'riyah's Arizona birth certificate confers upon her standing as a statutory beneficiary in a Washington wrongful death action. As a matter of law, this Court held that, giving full faith and credit to Arizona law, it did. Whether this was right or wrong, it is not an argument for a new trial. Rather, it is an issue that is certainly ripe for appeal.

CP 3369. Munchbar is appealing the trial court’s determination of beneficiary status.⁹

D. Evidence Excluded at Trial.

Prior to and during trial, the trial court ruled on numerous motions in limine and other objections to evidence. (CP 676-678; CP 1689-1693; CP 766-767.) These rulings heavily favored the plaintiffs.

1. Evidence of criminal activities, incarceration, gang associations and other “lifestyle” choices by DeShawn.

A significant number of plaintiffs’ motions in limine sought to exclude evidence of the “lifestyle” of DeShawn and specific conduct of Destiny Milliken. (CP 181-196; 676-678; 989-1013; 1689-1693.) The “lifestyle” evidence included evidence of, without limitation, DeShawn’s prior criminal behavior, prior criminal convictions, his incarceration in

⁹ Whereas Munchbar appeals numerous other issues related to the wrongful death claim, discussed elsewhere in this brief, summary judgment dismissing the wrongful death claim for lack of a beneficiary would moot the vast majority of those other issues.

Arizona from June to December, 2011, that his “weekly visits” with Ta’riyah in Arizona in 2011 consisted of her visiting him *in jail* via video and/or through a glass separator only (no direct contact allowed), that DeShawn was required by terms of his probation to move back to Washington, and of 81 police visits¹⁰ to the Montgomery/Milliken home in Seattle. (CP 676-677.)¹¹ See also, CP 1056-1126. The judge specifically stated:

. . . [T]he trial will begin with the expectation that if there is no attempt to suggest either economic losses (“good provider”) or general good character (“role model”) of the deceased, then the potential prejudice of these matters outweighs their probative value. The focus should stay on the “love, care and companionship” he provided, and would have provided, to his child; how he related to others, friends or enemies, should be avoided. . . .

CP 677.

To take advantage of this ruling, the Estate dropped its claim for economic damages shortly before trial, leaving intact its claims for DeShawn’s pain and suffering prior to death and the Estate’s claim for damages on behalf of Ta’riyah. On that basis, the Court continued its insistence on excluding any evidence of criminality on the part of

¹⁰ CP 194; CP 205-220 at 217. (Police visits to Montgomery/Milliken home.).

¹¹ A copy of this Order on Plaintiffs’ Early Motions in Limine (CP 676-678) is attached hereto in the Appendix.

DeShawn. The defense was even prohibited from raising DeShawn's lifetime lack of employment:

THE COURT: . . . But the things we are going to avoid are, as we have from the start, anything that suggests the lack of a W-2 form and documented employment suggests criminality. That's the number one thing we are avoiding. And, number two we are wanting to avoid mention of the custodial status during the second part of 2012.

MR. DONOHUE: Yes.

MR. LUNA: Okay. Do they get to do, you don't know what he did for a living?

THE COURT: No. No. Because that, that is not necessary to examine the scope of the relationship. And in this case, there is no economic damage being sought on behalf of Ta'riyah.

MR. LUNA: That's correct.

RP 936-37.

This evidence is relevant beyond Deshawn's future economic viability. These factors affect the household that DeShawn could have provided for a child, what a child would have been exposed to in that household and what guidance that DeShawn would have been able to provide to a child.

2. Proffered "character evidence" regarding Munchbar, should have been excluded.

Over Munchbar's objection, the Court allowed plaintiff's witnesses to testify that there were "377 service calls" to Bellevue Police which plaintiff identified as related to Munchbar. The vast majority of these

calls, however, were either 1) unrelated to Munchbar, or 2) were incidents with no similarity to the Millikens/Jones incident. (CP 1689-1693, at 1692.) The incidents were taken from service call reporting records produced by Kemper Security, the security company for Bellevue Square. Kemper produced all reports of any service calls in which Munchbar was mentioned in any way. (RP 162:11 – RP 163:7.) The calls could involve anything from a water leak to a medical emergency, and did not necessarily involve violence. (RP 162:8 – RP 163:7.) The Court noted this disparity during Munchbar’s objection to the testimony:

THE COURT:

.....

There was this 377 number obviously included a lot of things that involved public urination or overservice, or man, many things other than the potential for violence, which is what we are here concerned about. And I assume that will be responded to as well and quickly dealt with.

.....

MR. DONOHUE: I didn’t realize when the court had granted an order prohibiting the comments that I would have to object. The 377 incidents, I had no idea this was coming out.

RP 479:3 – 480:7.

Despite the Court’s rulings on motions in limine, the Court allowed plaintiff’s witness to testify relating 377 incidents to Munchbar, a number that the Court had already identified as containing many reports that were not related or admissible. (CP 1689-1693, at 1692; RP 479:3 –

480:7.) The mere number “377” was grounds for inflammatory argument by plaintiffs’ counsel.

E. Use of fact witnesses to provide previously undisclosed expert testimony at trial.

Plaintiffs used Dr. Ginger Ruddy, a treating physician who saw Destiny four days after the incident on December 28, 2012, and not thereafter, to improperly act as an undisclosed expert to “diagnose” Destiny with PTSD without factual foundation. (RP 272, 624:10-14, 633:9-14, 638:10-11, 698:19 – 699:9.) Such a diagnosis could not be made until at least 30 days had passed. (RP 639:23 – 640:1.) Dr. Ruddy acknowledged that records from another physician in her clinic, Dr. Patel, did not provide sufficient symptoms over the appropriate time period to support a diagnosis of PTSD. She therefore relied on the records of an entirely unrelated facility, even though the health care professional at that facility, Harborview Sexual Assault & Trauma Center, declined to diagnose PTSD. (RP 662:15 – 663:2.) This constituted using Dr. Ruddy as an “expert” critical of the subsequent treating professional, Kayla Clark, without foundation or prior notice. (RP 698:19 – 700:19.) The trial court brushed off defendant’s concerns stating he did not think the diagnosis was critical. *Id.* Munchbar disagrees.

F. Jury Instructions.

1. Undue emphasis in instructions on conduct of Munchbar.

The court gave jury instructions described in Section II. above. The above descriptions and objections are incorporated herein by reference. Objections were made both orally and in writing.

Despite Munchbar's admission of negligence, the Court insisted on giving instruction 9, which purported to impose a statutory duty on Munchbar to search patrons. (CP 3212.) The instruction was hotly contested. (*E.g.*, RP 1305-06, 1317-1319.) In fact, the statute imposed no such duty; Munchbar had created its own duty by voluntarily patting down customers, and it admitted breach of that self-created duty. Munchbar offered an alternate instruction. (RP 1320.) Taken together, instructions 9 and 7 (CP 3210; CP 1342-43) constituted an impermissible comment on the evidence. The effect was to encourage the jury to assign a heavy percentage of "fault" to Munchbar.

2. The Court refused to name Louis Holmes as a person to whom "fault" could be allocated.

Munchbar sought to establish what percentages of "fault" should be allocated to others¹² -- Destiny for pointing out Ja'Mari, and for "throwing the first punch"; DeShawn for attacking Jones when Jones was

¹² The aspect of the trial court's instruction regarding the intentional conduct of shooter Ja'Mari Jones (the "Tegman" issue) is not being appealed.

trying to leave the bar; and Louis Holmes, for joining in DeShawn's attack on Ja'Mari. (CP 2821-2840) The trial judge, however, refused to refer to Mr. Holmes in its allocation instruction, (CP 3216), and refused to include Mr. Holmes on the verdict form as an entity to whom fault could be allocated. (CP 3220.) Munchbar repeatedly objected.

3. Belated addition of "guidance" to wrongful death jury instruction, contrary to earlier ruling.

The parties conducted motion practice regarding the admissibility of evidence in this matter. (CP 181-196; 205-220; 625-640.) Throughout the briefing on these issues, the parties correctly cited the standard for Ta'riyah Smith-Milliken's claim for damages for "loss of love, care, companionship and guidance," and specifically referenced "guidance" as a factor in their arguments regarding the admissibility of this evidence. (CP 211; CP 632-633.) That standard was also contained in plaintiff's Complaint. (CP 1-8 at p. 7, ¶5.7.)

After considering the parties briefing and argument, including significant discussion of the claim for "loss of love, care, companionship and guidance" and what evidence was relevant and admissible based on that claim, the Court ruled that all of plaintiff's early motions in limine to exclude evidence were "presumptively granted" and would remain granted if "there is no attempt to suggest either economic losses ("good provider")

or general good character (“role model”)...” (CP 677.) The Court further held that “The focus should stay on the “love, care and companionship” he provided...” (CP 677). The absence of “guidance” in this order appears clearly connected to the element of good character, which the Court noted should not be raised. *Id.*

Despite this ruling, the ultimate jury instruction on wrongful death damages did include, over the strenuous objection of Munchbar, (CP 2821-2840; 3168-3190 at 3171-3173; 3214), the element of “guidance,” despite exclusion of the volumes of lifestyle and life-choices evidence relevant to that very issue. CP676-678; *see also*, CP 1056-1126.

The Court precluded Munchbar from presenting evidence which would have shown the quality of “guidance” DeShawn would have provided to the little girl, including active drug trade, misuse of weapons, physical attacks on other people in the community, his views on “a woman’s place”, and the documented negative outcomes for children who live with these behaviors. *Journal of Preventative Medicine*, Vol. 14, #4.

G. Inflammatory Closing Argument by Plaintiffs’ Counsel.

Plaintiff’s closing arguments, especially in rebuttal, used the dearth of evidence Munchbar had been allowed to present, a condition plaintiffs had themselves intentionally created, to mislead and prejudice the jury, to make personal attacks on counsel, and to inflame the jury’s emotions to

generate a decision fueled by passion and prejudice. Mr. Luna argued that the defense (referring specifically to Mr. Meade) wanted the jury to remove Destiny and DeShawn from protection of the law, insinuating that Munchbar, and particularly defense counsel, regarded the Millikens as unworthy because they were “people who speak or swear or act differently than us.” RP 1495:6-7. Mr. Luna stated, “He [Mr. Meade] wants you to be afraid to follow this law because he thinks that the Millikens are not the type of people, because they according to him, even though not a single witness said that on the stand, *they are not the type of people that deserve protection of the law.*” RP 1495:10-15. This type of inflammatory rhetoric debases our legal system and reflects poorly on those who engage in it.

The plaintiff’s rebuttal argument specifically used lack of witness testimony (testimony and evidence that plaintiffs know were excluded at their express request), to argue to the jury that defense counsel is encouraging them to improperly nullify the law. Plaintiff’s argument took improper advantage of rulings excluding evidence to imply to the jury that the lack of testimony implies the absence of fact. Plaintiff’s closing argument was improper both in its manipulation of the outcome of judicial rulings and in its clear suggestion of bias, prejudice and improper motives.

Unfortunately, repeated erroneous rulings by the trial court helped create the opportunity for such misuse of the trial process.

The many erroneous legal rulings in this case, the improper exclusion evidence, and unfortunate use of those by plaintiffs' counsel require reversal and remand of this case for a new trial.

H. Jury Verdict and Post-Trial Motions.

The jury returned its verdict on March 30, 2015, finding that DeShawn's Estate incurred total non-economic damages of \$3,700,000 and that Destiny Milliken incurred non-economic damages of \$520,000. (CP 3218-3220.) Although the Special Verdict form did not segregate damages between the Estate's two claims for wrongful death damages and for DeShawn's own personal damages, CP 3219, the trial judge acknowledged in his order denying a new trial that, "It is pretty easy (and, the Court would add, sensible) to . . . conclude the jury valued the child's loss at '\$3.2M.'" CP 3370.

The trial court denied defense motions for a directed verdict, for a mistrial, and for a new trial. (CP 3368-70.) All of the above issues, and more, were raised by Munchbar. Descriptions of errors and the arguments therein, with the exception of arguments about the Tegman instruction, are incorporated into this brief by reference.

Judgment was entered on April 10, 2015. This appeal was timely filed on May 9, 2015. CP 3374-3382.

IV. ARGUMENT AND AUTHORITY

A. Ta'riyah Smith-Milliken Was Not the "Child" of DeShawn Milliken Within the Meaning of RCW 4.20.020.

1. Summary judgment rulings and statutory interpretation are both reviewed *de novo*.

An appellate court reviews summary judgment rulings *de novo*. *Vernon v. Acres Allvest, LLC*, 183 Wn. App. 422, 427, 333 P.3d 534 (2014); *Estate of Otani v. Broudy*, 151 Wn.2d 750, 753-54, 92 P.3d 192 (2004). Questions of statutory interpretation are also subject to *de novo* review. *Estate of Otani v. Broudy, supra*, 151 Wn.2d at 753. On these cross-motions for summary judgment there were no disputed facts.

2. The Washington legislature precisely describes wrongful death beneficiaries in RCW 4.20.020.

Washington's wrongful death statutes create a cause of action that is not available in the common law, for specific surviving beneficiaries of a deceased. *Otani v. Broudy*, 114 Wn. App. 545, 547, 59 P.3d 126 (2002), *affirmed*, *Estate of Otani v. Broudy, supra*, 151 Wn.2d at 755. *Accord*, *Vernon v. Acres Allvest, LLC*, 183 Wn. App. 422, 428, 333 P.3d 534 (2014). RCW 4.20.020 precisely describes eligible beneficiaries:

Every such action [for wrongful death] shall be for the benefit of the wife, husband, state registered domestic partner, **child or children, including stepchildren**, of the person whose death shall have been so caused. . . .

(Bracketed language supplied for clarity; emphasis supplied.) There can be no suggestion that the legislature is not aware of the statutory

beneficiary categories or that they are not current. The Legislature amended this statute as recently as 2011, and prior to that in 2007. Laws 2011, ch. 336 (inserting gender-neutral language); Laws 2007 Ch. 156, § 29 (adding “state registered domestic partner”).

3. Washington courts strictly construe who is a beneficiary under RCW 4.20.020.

Washington courts strictly construe who is a beneficiary under the wrongful death statutes, expressly leaving questions of public policy for the legislature. *E.g.*, *Vernon v. Acres Allvest, LLC, supra*; *Philippides v. Bernard*, 151 Wn.2d 376, 385, 88 P.3d 939 (2004); *Tait v. Wahl*, 97 Wn. App. 765,771, 987 P.2d 127 (1999), *rev. denied*, 140 Wn.2d 1015 (2000).

In *Tait v. Wahl, supra*, this Court found no wrongful death beneficiary status where plaintiff asserted a “parent-child like” relationship with the decedent on a much stronger factual basis than is presented here. There, the decedent “raised her niece as if she were her own child, and then helped [the niece] raise her children . . . with financial and personal support.” 97 Wn.App. at 768. When the aunt was killed in an auto accident, the niece sued the tortfeasor for wrongful death. This Court affirmed dismissal of the wrongful death claim, holding that the niece was not a “child” of the decedent within the meaning of RCW 4.20.020, and she therefore lacked standing as a wrongful death

beneficiary. The niece argued that the list of beneficiaries enumerated in RCW 4.20.020 “should be liberally construed to include her ‘parent-child like’ relationship with the decedent and her children’s ‘familial’ relationship with the decedent[.]” This Court declined to expand the definition of “child” under the statute, recognizing that “courts in this state have extended the literal scope of such statutes only to protect beneficiaries ‘clearly contemplated by the statute’” and that “liberal construction of wrongful death statutes is appropriate only after the proper beneficiaries have been determined.” 97 Wn. App. at 770 (some internal quotation marks omitted), citing *Masunaga v. Gapasin*, 57 Wn. App. 624, 631, 790 P.2d 171 (1990) and *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 819, 732 P.2d 1021 (1987). While the concurring judge felt the outcome in *Tait* was “an injustice,” she “reluctantly agreed” that it was a correct interpretation of the statute and urged the legislature to reexamine the statutory beneficiary scheme. *Id.* at 775-76. Legislative amendments as recent as 2011, however, have not expanded the statute in that way. Laws 2011, ch. 336 (inserting gender-neutral language); Laws 2007 Ch. 156, § 29 (adding “state registered domestic partner”).

In 2004, the Washington Supreme Court agreed with the analysis in *Tait* and strictly construed a similar parental loss of consortium statute:

The “courts of this state have long and repeatedly held, causes of action for wrongful death are strictly a matter of legislative grace and are not recognized in the common law.” *Tait*, 97 Wn. App. at 771. The Legislature has created a comprehensive set of statutes governing who may recover for wrongful death and survival, and there is no room for this court to act in that area. *Windust v. Dep’t of Labor & Indus.*, 52 Wn.2d 33, 36, 323 P.2d 241 (1958). “It is neither the function nor the prerogative of courts to modify legislative enactments.” *Anderson v. City of Seattle*, 78 Wn.2d 201, 202, 471 P.2d 87 (1970).

Philippides v. Bernard, 151 Wn.2d 376, 390, 88 P.3d 939 (2004) (underlines supplied). *Accord, Triplett v. Wash. State Dept. of Soc. and Health Svces*, 166 Wn.App. 423, 268 P.3d 1027 (2012).

As recently as 2014, Division Two dismissed a wrongful death claim because the plaintiff, brother of the decedent, was not financially dependent on the decedent and thus was not a statutory beneficiary. *Vernon, supra*. That court, relying in part on *Phillipides*, refused a request to expand who can be a beneficiary, because “doing so would conflict with the existing statutory framework and it is not the function of courts to modify legislative enactments.” 183 Wn.App. at 430. *See also, Rentz v. Spokane County*, 438 F. Supp. 2d 1252 (E.D. Wash. 2006).

In *Roe v. Ludtke Trucking, Inc.*, 46 Wn. App. 816, 732 P.2d 1021 (1987), this Court refused to recognize the decedent’s 13-year romantic cohabitant as a wrongful death beneficiary even though it was undisputed that the couple “shared a long-term, stable and marital-like relationship.”

Id. at 817. This Court adhered to the rule that RCW 4.20.020 must be strictly construed in determining who is a beneficiary:

It is undisputed that Roe is not legally Tibbetts' wife. Roe argues, however, that under a liberal construction of the statute, she fits within the statutory category of "wife" because of the nature of her relationship with Tibbetts. Respondents dispute Roe's construction of the statute. They argue that the wrongful death statute should be strictly construed when determining the beneficiaries of an action and then liberally construed only when applying the statute in favor of those beneficiaries.

Respondents cite the correct rule of construction, i.e., a liberal construction of the statute is appropriate only after the beneficiaries have been determined. . . . To include Roe within the statutory category of "wife" would require this court to read into the statute something clearly not intended by the Legislature.

Id. at 818-819 (underlines supplied). The court also declined to create a common law exception to the statute. *Id.* at 821-22.

Even the one Washington case relied upon by Judge Downing for his "public interest" analysis, *Armijo v. Wesselius*, 73 Wn.2d 716, 440 P.2d 471 (1968), was merely interpreting the word "child" as used in the wrongful death statute. 73 Wn.2d at 718. The court held only that the ordinary meaning of "child" as used in RCW 4.20.020 included a child born out of wedlock. That did no violence to the statutory limitation on wrongful death beneficiaries, nor did it challenge the Legislature's right to define who can be a wrongful death beneficiary. In contrast, here Judge Downing recognized that correct legal procedures had *not* been followed

to establish DeShawn as Ta'riyah's "father," even under Arizona law. Judge Downing relied on his "2015" interpretation of Washington "public interest," (CP 3661), to overcome the undisputed fact that DeShawn had not adopted Ta'riyah and that therefore Ta'riyah did not qualify as his "child" under the plain meaning of RCW 4.20.020. *See, Tait, supra.*

Plaintiffs convinced the trial court to do exactly what every appellate court considering the issue has expressly refused to do -- expand the word "child" beyond its ordinary meaning,¹³ or create a common law cause of action for a non-related person. (CP 3661.) The trial court's ruling infringed on the authority of the Legislature and must be reversed, with instructions to dismiss the wrongful death claim.

4. Full Faith and Credit.

a. Overview and standard of review.

In addition to his view of "public policy in 2015," Judge Downing stated that he was "giving full faith and credit to Arizona's determination of Ta'riyah['s] parentage" (CP 3661.) Full faith and credit, however, never requires acceptance of a birth certificate as conclusive proof of information stated thereon, nor does it require Washington to give more

¹³ When not otherwise defined, words in a statute should be given their ordinary meaning. *HomeStreet, Inc. v. State, Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297, 300 (2009). Webster's *Third New International Dictionary Unabridged* (2002) gives as the most relevant definition of "child": "4. a. a son or a daughter : a male or a female descendant in the first degree : the immediate progeny of human parents b. : an adopted child"

weight to the Arizona family law “acknowledgement of paternity” process than Arizona itself would give.¹⁴ Here, Arizona would not give the factually incorrect Acknowledgement of Paternity, or the amended birth certificate preclusive effect in a wrongful death action under Arizona law. *See, Aranda v. Cardenas*, 215 Ariz. 210, 159 P.3d 76 (Ariz. Ct. App. 2007) (Paternity procedures not controlling AZ wrongful death statute.). Judge Downing’s interpretation of full faith & credit was incorrect.

Whether another state’s judgment should be given full faith and credit in a particular instance is an issue of law reviewed de novo. *In re parentage of Infant Child F.*, 178 Wn. App. 1, 7, 313 P.3d 451 (2013).

b. Grounds for full faith and credit.

Two possible sources set forth the requirement for full faith and credit in this case: RCW 26.26.350¹⁵ and Article IV, § 1 of the United States Constitution.¹⁶

Article IV, section 1, of the United States Constitution requires states to give full faith and credit to the “public Acts, Records, and judicial

¹⁴ See discussion below.

¹⁵ “A court of this state shall give full faith and credit to an acknowledgment or denial of paternity effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state.” RCW 26.26.350 (underline supplied).

¹⁶ “Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. Const. Art. IV § 1.

Proceedings of every other State.” A recent decision from Division Three explains the Constitutional requirement:

The full faith and credit clause of the United States Constitution, U.S. Const. art. IV, § 1, generally requires a state to give a foreign judgment at least the res judicata effect which would be accorded in the state which rendered it. *Durfee v. Duke*, 375 U.S. 106, 109, 84 S.Ct. 242, 11 L.Ed.2d 186 (1963). Full faith and credit requires that once an action is pursued to a final judgment, that judgment is conclusive in every other court as it is in the court which rendered the judgment. *State v. Berry*, 141 Wn.2d 121, 127–28, 5 P.3d 658 (2000). “The Full Faith and Credit Clause provides a means for ending litigation by putting to rest matters previously decided between adverse parties in any state or territory of the United States.’ ” *Id.* at 127, 5 P.3d 658 (quoting *In re Estate of Tolson*, 89 Wn.App. 21, 29, 947 P.2d 1242 (1997)).

In re Parentage of F., 178 Wn. App. 1, 7-8, 313 P.3d 451, 454 (2013) (underlines supplied). The U.S. Supreme Court has stated that where a matter has been litigated on the merits between adverse parties, Article IV, § 1 imports “the local doctrines of res judicata” into national jurisprudence. *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 86 L. Ed. 885 (1942). “Phrased somewhat differently, if the effect of a probate decree in Georgia *in personam* was to bar a stranger to the decree from later asserting his rights, such a holding would deny procedural due process.” *Id.* at 353-354 (underline supplied). The latter point was specifically raised by Munchbar, *e.g.*, RP January 23, 2015, p. 9,

CP 144-48, but was discounted by plaintiffs and the trial court. The U.S. Supreme Court clearly disagrees.

Washington Supreme Court Justice Barbara Madsen, writing as a *pro tem* justice of the Washington Court of Appeals, has followed *Riley, supra*, in linking full faith and credit to the effect of the foreign judgment in the state where the judgment was rendered:

The full faith and credit provision requires that “where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered.” [Citing *Riley v. New York Trust Co.*, 315 U.S. 343, 349, 62 S.Ct. 608, 612, 86 L.Ed. 885 (1942).]

In re Estate of Tolson, 89 Wn. App. 21, 30, 947 P.2d 1242 (1997) (quoted in *In re Parentage of F., supra*) (emphasis supplied). The Washington Supreme Court is likely to follow *Riley* on its due process analysis as well.

More specifically, RCW 26.26.350 provides a full faith and credit requirement expressly premised on compliance with the law of the state in which paternity was acknowledged:

A court of this state shall give full faith and credit to an acknowledgment or denial of paternity effective in another state if the acknowledgment or denial has been signed and is otherwise in compliance with the law of the other state.

RCW 26.26.350¹⁷ (underline supplied).

¹⁷ RCW chapter 26.26, the Uniform Parentage Act as enacted in Washington, “does not create, enlarge, or diminish parental rights or duties under other laws of this state.” RCW 26.26.021(3).

In this case, full faith and credit can be considered at two different points in the Arizona proceedings: administrative effectiveness of the “acknowledgement of paternity” form signed under penalty of perjury by DeShawn Milliken and Denise Gilbert; and the amended birth certificate issued as a result of that acknowledgement. At neither of these points does full faith and credit require Washington to treat Ta’riyah as DeShawn’s “child” under the Washington wrongful death statute.

Administratively, it is undisputed that neither DeShawn nor Denise complied with Arizona law in “acknowledging” DeShawn’s “paternity.” First, under the express terms of Arizona law, only “this state or the parent of a child born out of wedlock” may execute an acknowledgement of paternity in the first instance. ARS § 25-812A; *see*, CP 83. Whereas Denise Gilbert did have standing to execute the acknowledgement documents, DeShawn Milliken did not. Furthermore, the representations made by both DeShawn and Denise were factually false. (CP 52.) Thus, the acknowledgement was not executed “in compliance with the law of [Arizona]” and RCW 26.26.350 does not require full faith and credit.

Furthermore, under established precedent, the record of an instrument which the law requires to be recorded (specifically including birth certificates) is ordinarily only *prima facie* evidence of the validity of the instrument, it is not conclusive evidence of the information set forth

therein. *E.g.*, *United States v. Casares-Moreno*, 122 F.Supp. 375, 376-77, (S.D. Calif. 1954); *Ex parte Lee Fong Fook*, 74 F. Supp. 68 (N.D. Cal. 1948), remanded on other grounds, *Lee Fong Fook v. Wixon*, 170 F.2d 245 (9th Cir. 1948). In *Lee Fong Fook*, the trial court considered whether full faith and credit required the court to treat the birth certificate held by the petitioner as conclusive of the fact that he had been born in the United States. The birth certificate had been issued by the State of California.

The trial court stated:

In my opinion the decree of the state court [*i.e.*, the birth certificate] is evidence of petitioner's birthplace but not conclusive proof of his citizenship. The United States has the full right to inquire into the facts upon which American citizenship is claimed, when entry into the United States is sought; and the burden of proving that citizenship is upon the person seeking entry.

74 F. Supp at 71. *Accord*, *e.g.*, cases cited in *In Re Francisco Cruz Alvarez*, 2011 WL 899600 (BIA 2011) (citing numerous cases and decisions) (court-ordered delayed birth registration was not conclusive evidence that respondent's birth had occurred in the U.S.).¹⁸

On a substantive basis, Arizona itself has held that the paternity acknowledgement procedures in ARS 25-812 and 25-814 do not control definition of the parent-child relationship for the purpose of the Arizona

¹⁸ We are not citing this Board of Immigration Appeals decision as precedential itself; it is provided as a useful source of precedential rulings on this specific issue, including summaries of the holdings of the cases cited therein.

wrongful death statute. *Aranda v. Cardenas*, 215 Ariz. 210 159 P.3d 76 (Ariz. Ct. App. 2007). In *Aranda*, an unmarried couple was living together, expecting a child. The father took the expectant mother to the hospital for treatment, but the expectant mother and the unborn child both died during treatment. The father sued the hospital and the physician for wrongful death of the unborn child. Defendants moved to dismiss his wrongful death claim as a matter of law, arguing that he was not a statutory wrongful death beneficiary because he could not prove his paternity of the unborn child in the manner prescribed by ARS 25-814 and 15-812 (the “paternity statutes”). The Arizona appellate court found that the “paternity statutes” and the Arizona wrongful death statutes were enacted for different reasons and that procedures and determinations under the paternity statutes were not controlling for purposes of the wrongful death statute: “The different purposes of the statutes suggest no legislative intent that the paternity statutes apply to paternity determinations in wrongful death cases.” 215 Ariz. at ¶ 11. The court followed cases holding that the determination of paternity in a wrongful death suit is a factual question to be decided by a fact-finder in each case. 215 Ariz. at ¶¶ 14, 15. Problems with privity and binding effect of a paternity determination on non-parties to a paternity proceeding were also points of concern, as they are here, and as mentioned in *Riley v. New York Trust*

Co., supra. Given that Arizona does not consider its own paternity statutes to be binding under the Arizona wrongful death statute, a paternity determination under Arizona law can have no greater effect in Washington.¹⁹ *Accord, see generally, In re Estate of Blessing*, 174 Wn.2d 228, 238, 273 P.3d 975 (2012) (“The support of dependent children act and community property act are unrelated to the [Washington] wrongful death statute”).

In this case there is no dispute as to any material fact. DeShawn loved Ta’riyah and sometimes took care of her, but he did not establish any legal relationship with her that would make Ta’riyah a beneficiary. Under the basic requirements of CR 56(c), judgment dismissing the wrongful death claim should be entered immediately upon remand.

B. The Trial Court Improperly Excluded “Lifestyle” Evidence.

Plaintiffs consistently urged the trial court to exclude any evidence of DeShawn Milliken’s lifestyle, and of certain conduct by Destiny Milliken,²⁰ on the grounds that this was impermissible “character evidence” under ER 404 (CP 181-196); that Munchbar wanted to engage in “character assassination” (CP 182:3-4); and that, in the absence of a

¹⁹ Plaintiffs may argue that *Aranda, supra* is distinguishable from the instant case because no birth certificate was issued in *Aranda*. That argument is addressed above. Birth certificates have no factual preclusive effect in and of themselves, and certainly not under the facts of this case.

²⁰ Plaintiffs sought to exclude Destiny’s prior exposure to violence, her prior acts of violence, her association with gang members and her use of foul language.

claim for economic loss such evidence served no proper purpose. (CP 190-193; RP 937:7-10.) Munchbar made its objections well-known but the trial court consistently excluded any evidence of criminality or incarceration in DeShawn's life. (E.g., RP 936-37.) This was error.

The evidence was not only relevant, it was essential to show what damages (or lack thereof) Ta'riyah might have experienced on account of DeShawn's death. The erroneous exclusion of this evidence was an abuse of discretion.

1. Standard of review.

An appellate court reviews a trial court's evidentiary rulings for abuse of discretion. *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 463, 232 P.3d 591 (2010). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Id.*

2. ER 404 did not require exclusion of evidence of the Millikens' lifestyle.

Character evidence is not admissible to prove conduct in conformity therewith, ER 404(a), but evidence of prior bad acts may be admissible for other purposes, such as proof of motive, intent, plan and knowledge. ER 404(b); *Brundridge v. Fluor Federal Services*, 164 Wn.2d 432, 444, 191 P.3d 879 (2008). Noted Washington evidence expert Karl Tegland expressly notes that, "In a civil case in which a party's character

is actually at issue, character is relevant and admissible. . . . The classic example is a custody dispute in which the court must decide which party should be the custodial parent.” K. Tegland, “Courtroom Handbook on Washington Evidence” §404:2 at 165 (2015-2016) (emphasis supplied).

Although custody itself was not in dispute here, the analysis of wrongful death damages in this case was the mirror image of a custody dispute. The gist of noneconomic wrongful death damages awardable to a child beneficiary is, what personal experience did the child *lose* by *not* having the decedent available as a parent. Instruction 11 put DeShawn’s lifestyle and character directly at issue.

The evidence excluded by the court included the facts that DeShawn was in prison during some of his time in Arizona (while allegedly acting as a “father figure” to Ta’riyah); that he sold marijuana as a source of income; that he associated with known gang members; that he had no known legal employment during his adult life. None of this was “conduct” that Munchbar was attempting to show DeShawn had engaged in on December 23/24, 2012. Rather, it was evidence that would have been offered to show the jury what kind of living environment and “guidance” Ta’riyah lost through DeShawn’s death.

- a. The excluded evidence was not offered to prove action in a particular instance.**

Ultimately, exclusion of some of the evidence allowed plaintiffs to paint a misleading picture of the nature of Ta'riyah's relationship with DeShawn. Plaintiffs successfully kept out evidence that any visits with DeShawn from June 2011 until he returned to Seattle occurred exclusively at prison facilities, and then only through glass or video -- no personal contact was allowed; no hugs, no kisses; no braiding of hair; no sitting on a lap -- no direct care by DeShawn of Ta'riyah at all. (CP 1916.) The picture plaintiffs painted was affirmatively false, prevented the jury from correctly understanding even the past relationship of DeShawn and Ta'riyah. Denise Gilbert testified that when Ta'riyah's contact with DeShawn was only over Skype, not "in person," Ta'riyah felt his absence more keenly. In fact, that very circumstance existed even while DeShawn was in Arizona, with prison visits conducted via Skype and through glass. (CP 1922)

The trial court precluded Munchbar from providing the jury with a full and balanced picture of who DeShawn was when Ta'riyah knew him, how he interacted with her, how he lived his life and what choices he made that might affect a young girl in his life. This limitation of evidence was so fundamentally prejudicial to the jury's factual understanding that these evidentiary rulings alone require remand for a new trial.

b. It was an abuse of discretion for the trial court to exclude lifestyle evidence under ER 403.

A trial court has a duty to balance the probative value of evidence against its potential for prejudice. ER 403; *Brundridge v. Fluor Federal Services, supra*, 164 Wn.2d at 444-445. In this case the trial judge failed to evaluate these factors with due consideration. By precluding Munchbar from presenting the extensive available evidence of DeShawn's actual lifestyle and life choices, the trial court allowed plaintiffs to argue the restricted evidence for the proposition that DeShawn was a present and responsible adult figure available to Ta'riyah at all times, when in fact that was not true. By end of May, 2011, he was in jail and his only contact with Ta'riyah was by video chat or through security glass. (CP 1916, 1920-1922.) When he was released from incarceration in December 2011, the terms of his parole required him to move to Seattle. Therefore, while he did have Ta'riyah in Seattle for a week in the spring of 2012 and for the summer of 2012 (when she also went to Rotary Boys & Girls Club summer camp), his other contact with her was by phone and Skype. These facts were kept from the jury.

In fact, some factors present in DeShawn's life, and the life of his extended family, qualify as indicators of a "dysfunctional" family, as categorized by psychological studies of family traits that significantly

affect child development. The Adverse Childhood Exposure (“ACE”) Study is a well-recognized study performed by an ongoing collaboration between investigators at Kaiser Permanente and the Centers for Disease Control and Prevention (“CDC”). This study examines 7 categories of childhood exposures to abuse and household dysfunction and how those exposures affected later outcomes for the exposed children. *American Journal of Preventative Medicine*, Vol. 14, # 4, p. 248.²¹ The exposures studied include, but were not limited to, a household where at least one household member uses street drugs and a household where a member is incarcerated. *Id* at p. 248, table 1. The study found that prevalence and risk for smoking, severe obesity, physical inactivity, depression and suicide attempts increased as the number of “ACE factors” increased in the household. *Id* at 249-250. The Washington State Department of Health noted in its recently-released 2015 Suicide Prevention Plan that exposure to seven or more ACE risk factors “increased childhood-adolescent suicide attempts 51-fold and adult suicide attempts 30-fold.” Washington State Suicide Prevention Plan, Washington State Department of Health, DOH 631-058 January 2016.²²

²¹ A courtesy copy of this article is provided under separate cover.

²² A courtesy copy of the recently-released plan is provided under separate cover.

The Milliken household has some ACE risk factors present, including, at least, incarceration and use of illegal drugs. Parental incarceration was found to be as detrimental to the health of the child as other types of adverse experiences examined in the ACE study. *Journal of Preventative Medicine*, Vol. 14, # 4, p. 314. Notably, parental incarceration has been found to be more detrimental to a child and more likely to lead to behavioral problems and developmental delays in the child than divorce or separation of parents and other types of parental absence. *Id.* The trial court's rulings did not allow mention either of those ACE risk factors.

The relationship between DeShawn Milliken and Ta'riyah Smith-Milliken cannot be analyzed in a vacuum, with only the positive aspects of that relationship brought to view. The exclusion of evidence in this matter was erroneous and extremely material, preventing the jury from accurately assessing the relationship between Ta'riyah and DeShawn and all impacts, both positive and negative, of that relationship on her life.

In *Brundridge v. Fluor Federal Services, supra*, the Washington Supreme Court stated, "Where the trial court has not balanced probative value versus prejudice on the record, the error is harmless unless the failure to do the balancing, 'within reasonable probably, materially affected the outcome of the trial.'" 164 Wn.2d at 446 (underline supplied).

Especially given the inflammatory rebuttal closing remarks by plaintiff counsel to the jury, RP 1493-1495:19, and the heavy reliance in that argument on the “absence” of negative evidence about DeShawn, RP 1493:22 - 1494:2, it is clear that the incorrect evidentiary rulings and failure to balance probative versus prejudicial effect, “within reasonable probability, materially affected the outcome of the trial.” This is one of the rare cases where the evidentiary rulings at trial, especially in concert with other errors, do justify reversal and remand.

C. Jury Instructions and Special Verdict Form Errors Should Be Corrected on Remand.

1. Definition of “Fault”.

Instruction 12 defined “fault,” for the purpose of allocation of fault, as “negligence . . . as well as willful misconduct”, and stated that before a percentage of fault could be attributed to any entity other than Munchbar, Munchbar had the burden of proving “that the entity was negligent or engaged in willful misconduct”. (CP 3216.)

However, RCW 4.22.015 sets forth the correct definition of “fault” in a tort case such as this:

"Fault" includes acts or omissions . . . that are in any measure *negligent or reckless* toward the person or property of the actor or others The term also includes . . . *unreasonable assumption of risk, and unreasonable failure to avoid an injury* or to mitigate damages. Legal

requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

(Italics supplied for emphasis.) A person is reckless or acts recklessly when he knows of and disregards a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable man would exercise in the same situation. *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999). This almost perfectly describes the conduct of DeShawn in tackling Jones. He was acting with more intent than required for negligence, but arguably short of willfully or wantonly. “Reckless” conduct is disregard of a “substantial risk”, but does not require the “intentional doing” of an act which one has “a duty to refrain from doing” when the actor “has actual knowledge of the harm being done to another” and “intentionally fails to avert injury or actually intends to cause harm”, as required by instruction 12. CP 3216.

Because this statute clearly sets forth a standard directly applicable to determine fault, it should be the standard definition used in jury instructions absent compelling reasons to the contrary.

2. Allocation of “Fault” - Refusal to Allow Jury to Even Consider Louis Holmes.

RCW 4.22.070 entitles a defendant to seek to apportion fault “attributable to every entity which caused the claimant’s damages,” whether or not such entities are party to the action. Munchbar was entitled

to argue that Louis Holmes' participation in the fight was at least reckless and that it caused injury. (E.g., CP 3654.) It proposed jury instructions and a verdict form that did include Louis Holmes as a potential at-fault entity. (CP 3184, 3186-87.) Judge Downing refused to even allow the jury to consider any involvement of Holmes. This was error.

3. Instructions 7 and 9, taken together, constitute an improper comment on the evidence.

Instruction 7 misleads the jury because it states that plaintiffs have the burden of proving that the defendant was negligent, which was already admitted. RP 1303-1306:10; RP 1313. Instruction 9 should not have been given at all. It gives a false impression to the jury and constituted an improper comment on the evidence, which facilitated a disproportionate jury response. *See*, argument of Mr. Donohue at RP 1303 - 1306:10, incorporated herein by reference. Taken together, these instructions constitute an inappropriate comment on the evidence.

4. Belated addition of "guidance" to instruction 11 as an element of wrongful death damages, contrary to earlier motion in limine order.

In jury instruction no. 11 (CP 3214-15), the trial court belatedly and improperly added "guidance" as part of what the jury should consider for wrongful death damages after having affirmatively omitted that element from its ruling on early motions in limine (CP 677; RP 1339-41),

and in the interim having affirmatively excluded all of the “tremendous amount of evidence” (RP 1355) of DeShawn’s “lifestyle”, including life decisions, criminal conduct and family behaviors, that would have directly impacted DeShawn’s potential “guidance” to Ta’riyah (see assignment of error #2). (CP 677; CP 3214; RP 1339-1341). This was extremely prejudicial to Munchbar.

V. CONCLUSION

Munchbar respectfully requests that this Court: 1) reverse the trial court’s summary judgment ruling that Ta’riyah is DeShawn’s “child” within the meaning of RCW 4.20.020 and order that the wrongful death claim be dismissed with prejudice, for lack of a statutory beneficiary under RCW 4.20.020; 2) disapprove jury instruction nos. 7, 9, 11 and 12, and the failure of the special verdict form to include reference to Louis Holmes; and 3) remand for a new trial with instructions that the trial court use jury instructions consistent with this Court’s rulings and that the trial court permit Munchbar to present evidence of DeShawn’s and Destiny’s lifestyles, including but not limited to their gang affiliations, quotation of language used by them and DeShawn’s history of selling drugs and DeShawn’s criminal record.

DATED this 13th day of January, 2016.

SOHA & LANG, P.S.

By:


~~Karen Southworth Weaver, WSBA # 11979~~

Jennifer P. Dinning, WSBA 38236

Attorneys for Appellant Brewhaha Bellevue,
LLC, d/b/a Munchbar

CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of 18 and not a party to the within action; my business address is SOHA & LANG, PS, 1325 Fourth Avenue, Suite 2000, Seattle, WA 98101.

I hereby certify that on January 13, 2016, I caused to be served a true and correct copy of the foregoing Appellant's Opening Brief on the following named person(s) via E-mail and Hand Delivery to Plaintiff's Counsel only:

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Attorney for Plaintiffs

Dated January 13, 2016.



Angela Murray
Legal Secretary to Karen Southworth
Weaver

2016 JAN 13 PM 12:11
COUNTY OF KING
CLERK OF COURT
JAMES B. MEADE
JAMES B. MEADE
JAMES B. MEADE

APPENDIX 1

FILED
KING COUNTY, WASHINGTON

MAR 30 2015

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

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

Defendant.

NO. 13-2-40536-9 SEA

SPECIAL VERDICT FORM

We, the jury, make the following answers to the questions submitted by
the court:

QUESTION NO. 1: Was the defendant negligent?

Answer: Yes ("yes" or "no")

Based on the admission of the defendant, you should answer Question
No. 1 "yes", and then answer Question No. 2.

ORIGINAL

QUESTION NO. 2: Was the defendant's negligence a proximate cause of injury and damage to the plaintiffs?

Answer: Yes ("yes" or "no")

If you answer Question No. 2 "no", sign and return this verdict. If you answer Question No. 2 "yes", then answer Question No. 3.

QUESTION NO. 3: What do you find to be the plaintiffs' total amount of damages proximately caused by the negligent acts of defendant?

(a) for plaintiff Estate of DeShawn Milliken:

non-economic damages: \$ 3,700,000

(b) for plaintiff Destiny Milliken:

non-economic damages: \$ 520,000

QUESTION NO. 4: Was negligent conduct or willful misconduct of any of the following also a proximate cause of injury and damage to the plaintiffs?

ANSWER: (Indicate with a "yes" or "no" on the line provided.)

Destiny Milliken Yes

DeShawn Milliken Yes

If you answer "no" as to both, sign and return this verdict. If you answer "yes" as to one or both, answer Question No. 5 as to such entity.

ORIGINAL

QUESTION NO. 5: Assume that 100% represents the total combined fault that proximately caused the plaintiffs' injury and damage. What portion of this is attributable to each party or non-party whose fault has been found by you to have been a proximate cause of the plaintiffs' injury and damage? (Your total must equal 100%.)

ANSWER:

Defendant Munchbar	<u>75</u>	%
Destiny Milliken	<u>5</u> 10 error	%
DeShawn Milliken	<u>20</u> 15 error	%
TOTAL:	<u>100</u>	%

Sign and return this verdict.

Michael Song (Michael Song)
Presiding Juror

ORIGINAL

APPENDIX 2

FILED
KING COUNTY, WASHINGTON

MAR 30 2015

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiffs,

v.

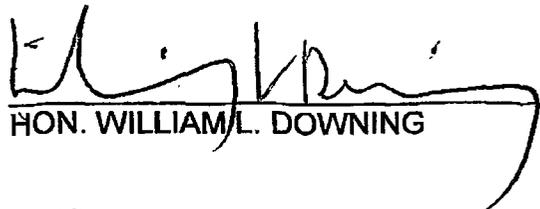
BREWHAHA BELLEVUE, LLC, d/b/a
MUNCHBAR, a Washington Limited
Liability Company,

Defendant.

NO. 13-2-40536-9 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 30 day of March, 2015.


HON. WILLIAM L. DOWNING

ORIGINAL

INSTRUCTION NO. 7

As to their claim of negligence, the plaintiffs have the burden of proving each of the following propositions:

First, that the defendant was negligent;

Second, that the plaintiffs were injured; and

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiffs.

If you find from your consideration of all the evidence that each of these propositions has been proved, your verdict should be for the plaintiffs. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 9

The operator of a nightclub owes a duty to its patrons to exercise ordinary care to protect them from reasonably foreseeable criminal conduct of third parties. Breach of this duty is negligence.

The violation, if any, of Washington law is not necessarily negligence, but may be considered by you as evidence in determining negligence.

Washington laws provide that liquor licensees such as the defendant Munchbar may not permit any patron in possession of a firearm to enter the portion of the business that is classified as off-limits to persons under twenty-one years of age.

INSTRUCTION NO. 11

It is the duty of the court to instruct you as to the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If your verdict is for more than one plaintiff, you should determine the damages of each plaintiff separately.

If your verdict is for the plaintiffs, then you must first determine the amount of money required to reasonably and fairly compensate the plaintiffs for such injury and damage as you find to have been proximately caused by the defendant's negligence, apart from any consideration of allocation of fault.

In calculating a damage award, you must not include any damages that were caused by intentional acts of a non-party assailant and that were not proximately caused by negligence of the defendant. Any damages caused solely by the non-party assailant and not proximately caused by negligence of the defendant must be segregated from and not made a part of any damage award against this defendant.

If you find for the plaintiffs, you should consider the following elements of damages:

For the plaintiff Estate of DeShawn Milliken:

1. The pain and suffering, both mental and physical, anxiety, and emotional distress experienced by DeShawn Milliken prior to his death; and
2. The value of what DeShawn Milliken reasonably would have been expected to contribute to his daughter Ta'riyah Smith-Milliken in the way of love, care, companionship and guidance.

For the plaintiff Destiny Milliken:

- 1. The disability and loss of enjoyment of life and pain and suffering, both mental and physical, anxiety, experienced and with reasonable probability to be experienced in the future as a result of any personal injuries she suffered; and**
- 2. The emotional pain and suffering, anxiety and emotional distress experienced and with reasonable probability to be experienced in the future as a result of witnessing the death of her brother.**

The burden of proving damages rests upon the plaintiffs and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess or conjecture.

The law does not furnish us with any fixed standards by which to measure non-economic damages such as pain and suffering. With reference to these matters, you must be governed by your own judgment, by the evidence in the case and by these instructions.

INSTRUCTION NO. 12

In an action involving possible fault of more than one entity, you must determine what percentage of the total fault is attributable to each entity which proximately caused the injury to the plaintiff. The Court will provide you with a special verdict form for this purpose.

The term "fault" includes negligence, as defined in these instructions, as well as willful misconduct. Willful misconduct is the intentional doing of an act which one has a duty to refrain from doing when he or she has actual knowledge of the harm being done to another and intentionally fails to avert injury or actually intends to cause harm.

Entities may include the parties and entities not party to this action, such as DeShawn Milliken. Your answers to the questions in the special verdict form will furnish the basis by which the Court will apportion damages, if any, to the defendant.

Before a percentage of fault may be attributed to any other entity, the defendant has the burden of proving each of the following propositions:

First, that the entity was negligent or engaged in willful misconduct; and

Second, that the entity's fault was a proximate cause of the injury to the plaintiffs.

APPENDIX 3

FILED
KING COUNTY, WASHINGTON

JAN 26 2015

SUPERIOR COURT CLERK
BY Gary Povick
DEPUTY

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

WANDA MONTGOMERY, personal)	
representative of the Estate of the)	
deceased DESHAWN MILLIKEN, and)	No. 13-2-40536-9 SEA
DESTINY MILLIKEN, the sister of the)	
deceased, DESHAWN MILLIKEN,)	ORDER ON MOTIONS FOR
)	SUMMARY JUDGMENT
Plaintiffs,)	
)	
v.)	
)	
BREWHAHA BELLEVUE, LLC, d/b/a)	
MUNCHBAR, a Washington Limited)	
Liability Company, and KEMPER)	
DEVELOPMENT COMPANY, a)	
Washington corporation,)	
)	
Defendants.)	
)	
)	
)	

This matter has come before the Court on summary judgment motions brought by each of the parties to the action. Specifically, the Court has considered the briefing and oral argument with respect to the following motions:

ORDER ON MOTIONS
FOR SUMMARY JUDGMENT

1

HON. WILLIAM L. DOWNING
King County Superior Court
516 Third Avenue
Seattle, WA 98104

- Defendant Kemper's motion for summary judgment dismissal of plaintiffs' claims against it;
- Both defendants' motions for summary judgment seeking dismissal of claims on behalf of the minor child Ta'riyahSmith-Milliken;
- All parties' motions seeking rulings concerning how principles of "segregation of damages" and "allocation of fault" will be applied in this upcoming jury trial.

In connection with these motions, the Court has given consideration to all documents numbered from 26 through 57 on the court clerk's docket sheet, all filed in support of or opposition to the motions that are now before the Court. If a more precise catalogue is required for appellate review purposes, counsel shall prepare an agreed supplemental order that accomplishes this. Having considered all of the foregoing, the Court now intends to order as follows.

At the time of the events in question, defendant Kemper Development Company was the landlord and defendant Brewhaha (d/b/a Munchbar) was its tenant. By their lease, the tenant was the sole possessor and occupier of the premises on which the incident occurred. Along with causation and damages, whether or not Munchbar was negligent with respect to its security procedures is a central inquiry in this case. In its motion for dismissal, Kemper asserts that it – as landlord – owed no legal duty to its tenant's business invitees.

The existence of a legal duty is question of law for the court. A duty to maintain reasonably safe premises is generally the duty of the possessor and occupier of those premises. In this case, that was not Kemper. The plaintiffs

would argue that because the landlord retained certain contractual rights and remedies, it therefore had potential control over the premises that should be held to give rise to a duty owed to the tenant's business invitees. However, there is no basis upon which the general public could be found to be intended third party beneficiaries under the terms of the lease.

It is further argued that, owing either to business or personal relationships, the landlord continued to exercise sufficient control over the leased premises such that a duty to invitees should be found. It is natural that a commercial landlord like Kemper would maintain an interest in protecting its "brand" and its common areas by keeping an eye on its tenants' business operations. That Kemper did so to a limited degree in this case is insufficient, as a matter of law, to give rise to a duty of care owed to the tenant's business invitees.

Accordingly, Kemper's motion for summary judgment is GRANTED and the claims against it dismissed.

The State of Arizona's Department of Health Services has issued a "Certificate of Live Birth" for a Ta'riyah Ajanise Smith-Milliken on which her father is identified as Deshawn Eugene Milliken. Although her biological father had, in fact, died before her birth, it was consistent with the intentions and expectations of all involved that Mr. Milliken and she would have a lifelong father-daughter relationship. The evidence is that both parents had been led to believe that the acknowledgement of paternity was the equivalent of a full adoption. There were entirely laudable motives and nothing at all fraudulent involved in the way in

which Mr. Milliken came to be declared Ta'riyah's father in compliance with the laws of Arizona.

There is no question that that parental determination is binding as between the parents and in the state of Arizona but the question remains whether it can be challenged in this Washington wrongful death case. The defendants argue that Ta'riyah, since she is neither the "biological," "step" nor "adopted" child of Mr. Milliken, should be held to be outside of the statutory class of beneficiaries listed in RCW 4.20.020.

In looking to discern Washington's public policy interest in this regard, the Court would note the discussion in the 1968 case in which the Supreme Court considered whether an illegitimate child should be considered outside of that class. The Court analyzed the policy aspects as follows:

In our judgment, the words 'child or children' in RCW 4.20.020 should be construed to include illegitimate as well as legitimate children of deceased parents. No overtones of Victorian or other notions of provincial morality have been noted or implied by legislative enactment and revision of the wrongful death act, and it is but commonsense humanity to conclude that a statute which provides the 'child or children' of a decedent with a remedy for lost support encompasses all natural or adopted children of the decedent who were dependent upon him regardless of their legitimacy.

...

Respondents cite *Whittlesey v. City of Seattle*, 94 Wash. 645, 163 P. 193, (1917), for the rule that remedial statutes which are in derogation of the common law are to be strictly construed as to their classes of beneficiaries. It is contended that this rule forecloses Toni Marie's chances of becoming a beneficiary under RCW 4.20.020, presumably on the theory that a strict construction of the words 'child or children' would not include illegitimates. Respondents' contention, however, is not persuasive. Whether done liberally or strictly, judicial interpretation is necessary even under respondents' rule; illegitimate children are not *necessarily* excluded under the terms of RCW 4.20.020. This being so, we

must still engage in a process of weighing and balancing competing values, and, it appears to us that social policy considerations favoring inclusion of illegitimate children as beneficiaries should be given effect. As stated in 3 J. Sutherland, *Statutory Construction* 421 (3d ed. 1943):

(M)any of the decisions in the past (construing wrongful death statutes), and a few of the later ones, as well, have crippled the operation of this legislation by employing a narrow construction on the basis that these statutes are in derogation of the common law. However, it may now safely be asserted that the better and modern authorities are in agreement that the objectives and spirit of this legislation should not be thwarted by a technical application.

Armijo v. Wesselius, 73 Wash.2d 716, 719-720, 440 P.2d 471, 472 - 473 (1968).

Statutes and cases need not be cited in support of the proposition that Washington, in 2015, holds a compelling public interest in supporting strong families and encouraging permanency planning for all children. This public interest is served by giving full faith and credit to Arizona's determination of Ta'riyah Smith-Milliken's parentage and allowing a claim to be pursued on her behalf arising from the death of her father. The defense motion for summary judgment, seeking dismissal of such claim, is DENIED.

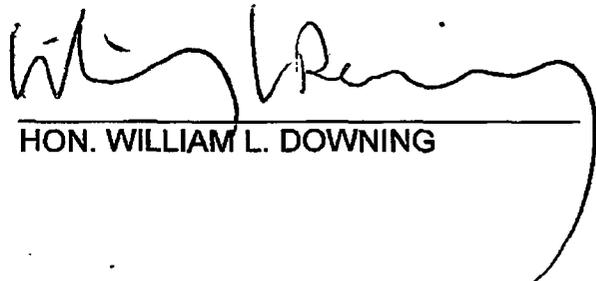
(None of the above should be taken to mean that the nature of the relationship between Ta'riyah and her legal father may not be explored at trial in connection with an inquiry into appropriate damages. Any issues as to the scope of such evidence are reserved for trial.)

In the final motions that were discussed, the Court was essentially being asked to address how it would intend to apply certain principles of the Tort Reform Act that have retained some elusiveness over the years. In a regrettably

lengthy disquisition from the bench, the Court shared its views and experiences on the subject of the Welch-Tegman-Aba Sheikh-Rollins line of cases. In essence, the Court indicated that in its jury instructions, it would intend to further the TRA goal of "assuring adequate and appropriate compensation" for anyone injured through fault of others (as statutorily defined) while not holding a merely negligent tortfeasor responsible for damages that were caused *solely* by the intentional acts of others. This could either be accomplished through crafting of the verdict form (as was done in the Aba Sheikh case - King County Cause No. 02-2-05199-5) or through the damages instruction (as was done in the Rollins & Hendershott case - King County Cause No. 06-2-19357-1) or a combination.

Any motion seeking the striking of a claim or defense in this regard is DENIED; as to allocation of fault as between party and non-party entities, all such issues are reserved pending the presentation of evidence at trial.

DATED this 26th day of January, 2015.



HON. WILLIAM L. DOWNING

APPENDIX 4

Honorable William Downing
KING COUNTY WASHINGTON

FEB 18 2015

SUPERIOR COURT OF
BY DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiff(s),

v.

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

Defendant(s).

NO. 13-2-40536-9 SEA

~~PROPOSED~~ ORDER ON
PLAINTIFFS' EARLY MOTIONS IN
LIMINE

THIS MATTER came before the Court on Plaintiffs' Early Motions *in Limine*. The
Court has reviewed the materials submitted by the parties.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

		Denied	Granted	Reserved
1	Exclude evidence that DeShawn Milliken sold marijuana at the time of his death			
2	Exclude evidence that DeShawn Milliken stored "drug money" at his mother's house			
3	Exclude evidence that DeShawn Milliken was involved in a drive-by shooting as an adult			

~~PROPOSED~~ ORDER ON PLAINTIFFS'
EARLY MOTIONS IN LIMINE - 1
! Milliken - Proposed Order

ORIGINAL

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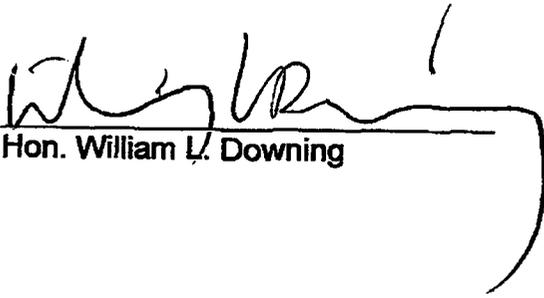
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		Denied	Granted	Reserved
4	Exclude evidence that DeShawn Milliken violated the terms of his Arizona probation on the night of the shooting			
5	Exclude evidence that DeShawn Milliken had never been employed during his adult life			
6	Exclude evidence that DeShawn Milliken successfully completed a deferred prosecution for a misdemeanor assault as a juvenile			
7	Exclude evidence that DeShawn Milliken's criminal history included adult criminal convictions from the state of Arizona			
8	Exclude evidence that DeShawn Milliken was on probation at the time of his murder			
9	Exclude evidence that Destiny Milliken was treated for sexually transmitted diseases			
10	Exclude evidence that Destiny Milliken voluntarily terminated a pregnancy			
11	Exclude evidence of police contacts with 2501 S. Norman Street			

Each of the motions is presumptively granted. That is to say, the trial will begin with the expectation that if there is no attempt to suggest either economic losses ("good provider") or general good character ("role model") of the deceased, then the potential prejudice of these matters outweighs their probative value. The focus should stay on the "love, care and companionship" he provided, and would have provided, to his child; how he related to others, friends or enemies, should be avoided. Depending on how plaintiffs' case is presented at trial, these issues may certainly need to be revisited out of the jury's presence.

1 The Court would make two qualifications to the above. First, there is
2 relevance to the nature of the disagreement that sparked the confrontation
3 between the Millikens and Mr. Jones. This can likely be presented without
4 specifying the amount of cash believed stolen and its likely source. Second,
5 there is relevance to Destiny Milliken's being sexually active during a period
6 when she is seeking damages for emotional distress. Assuming this fact is
7 acknowledged, there need be no mention of the consequences of such
8 activity. (A denial, of course, could raise the probative value of this evidence
9 to a level exceeding the prejudicial impact.)

10 Dated this 18th day of February, 2015

11 
12 Hon. William L. Downing

APPENDIX 5

Honorable William Downing
FILED
KING COUNTY, WASHINGTON

MAR 20 2015

SUPERIOR COURT CLERK
BY DEBRA BAILEY TRAIL
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

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

Plaintiff(s),

v.

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

Defendant(s).

NO. 13-2-40536-9 SEA

ORDER ON MOTIONS IN LIMINE

THIS MATTER came before the Court on Plaintiffs' Early Motions *in Limine*. The Court has reviewed the materials submitted by the parties and heard the argument of counsel. In addition to the Order on plaintiffs' early motions in limine entered on 2/18/2015, the court hereby rules on the additional motions in limine filed by the parties.

It is hereby ORDERED, ADJUDGED and DECREED as follows:

I. Plaintiffs' Motions in Limine noted for 3/16/2015:

		Denied	Granted	Comment
1	The filing of motions in limine		X (agreed)	
2	Expressions of apology or remorse		X	Sympathy ploys or emotional pitches are not permitted
3	Impact of taxation		X	

ORDER ON MOTIONS IN LIMINE - 1
Milliken MILs

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Rosato | Luna | Knopp
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SEATTLE, WASHINGTON 98101-1609
PHONE: (206) 624-6800
FAX: (206) 682-1415

		Denied	Granted (agreed)	Comment
1				
2	4		X (agreed)	
3				
4	5		X	Prior afternoon is sufficient; more if possible
5				
6	6		X	
7				
8	7		X (agreed)	
9				
10	8		X (agreed)	
11				
12	9	X		
13				
14	10		X	
15				
16	11		X (agreed)	
17				
18	12		X	
19				
20	13			Reserved
21				
22	14	X		
23				
24	15		X (agreed)	
25				
26	16		X (agreed)	
	17		X	
	18			Statements actually made by a party-opponent are admissible but not "rumor or innuendo" conveyed by another.
	19		X (agreed)	
	20		X (as to "lifestyle")	If no agreement as to phrasing, Plaintiff will be expected to testify to her

		Denied	Granted	Comment
				belief of the amount at the time and she can be questioned re: prior stnts she may have made.
21	Attorneys or law firms representing each party		X (agreed)	
22	Vouching and speculation		X (agreed)	
23	"Taxpayers" or "society" will have to pay any judgment		X (agreed)	
24	Evidence requested in discovery		X (agreed)	
25	Dr. Rosen's testimony		X (as to low income housing, dyslexia, sexual history, etc.)	Reserved as to matters relevant to damages and not unduly prejudicial
26	Character evidence		See 25	See 25
27	Scope of cross		X (agreed)	
28	Reference to Kemper		X (agreed)	
29	Wanda Montgomery's alleged marijuana use		X (agreed)	
30	DeShawn's alleged threats to Jamari Jones		X (purportedly in telephone call)	
31	Destiny's prior fights or out-of-control behavior		X	
32	A 12/24/12 confrontation in the parking lot supposedly involving Destiny		X	
33	Ta'riyah's biological father was murdered		X	
34	Destiny's basis for suspecting Jones of burglary	X		

1 **II. Defendant's Motions in Limine #1:**

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		Denied	Granted	Reserved
1	Prior "violence" or incident reports re Munchbar	X		Must be relevant to issues still in the case (degree of negligence re: staffing needs, weapons screening, etc.)
2	Previous warnings by WSLCB		X	
3	Previous police reports, investigation documents, materials and citations	X		
4	Josh Varela's character or previous conduct		X (agreed)	
5	Munchbar closed because it was negligent		X (agreed)	
6	Aston Manor			OK as to security manual, only as relevant to policies/practices at Munchbar.
7	Post-shooting, rioting or mayhem at Munchbar	X		
8	Communications among Kemper employees		X (agreed)	
9	Destiny/DeShawn relationship or Destiny's grief at losing her brother			
10	Plaintiffs' photos not related to the claims in this matter			Reserved (exhibits will not be cumulative)
11	McGoey opinions not disclosed		X (agreed)	
12	McGoey's involvement in <i>Tolenoa v. Denny's</i> or other case		X	

21 **II. Defendant's Motions in Limine #2:**

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		Denied	Granted	Reserved
1	Reference to insurance		X (agreed)	
2	Reference to settlement negotiations		X (agreed)	
3	Undisclosed evidence		X (agreed)	
4	Parties' financial status		X (agreed)	

		Denied	Granted	Reserved
5	Argument that jury should "send a message"		X (agreed)	
6	Cost of litigation		X (agreed)	
7	Filing and rulings on motions in limine		X (agreed)	
8	"Golden rule" argument		X (agreed)	
9	Non-party witnesses		X (agreed)	
1	Require 48-hour notice of witnesses	X		See p. 2, #5
2	Exclude "rebuttal" witnesses relating to plaintiffs' burden of proof			Reserved

DONE IN OPEN COURT this 17 day of March, 2015.


 Judge William Downing