Supreme Court No. 1037236

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CHANNARY HOR, individually,

Appellant,

v.

THE CITY OF SEATTLE, et al.,

Respondents.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENTS

The City of Seattle, Adam Thorp, and the Estate of Grant ask this Court to deny review of the Court of Appeals decision terminating review designated in part II of this Answer.

II. COURT OF APPEALS DECISION

A copy of the *unpublished* decision of Division One of the Court of Appeals dated October 7, 2024 is attached as an Appendix to the Petition (pages 001-025) ("Decision").[1] The Petitioner's Motion for Reconsideration was denied on November 22, 2024. (Petition Appendix (Pet. App.) at 054).

III. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

If review were granted, the court would be asked to evaluate issues of well-established law:

1. Where it is well established that the abuse of discretion and related substantial evidence standards of review apply to CR 60(b)(4) orders and credibility findings on appeal, did the Court of Appeals err by applying those standards to the CR 60(b)(4) Order and findings of fact below?

[1] 2024 Wash. App. LEXIS 2044.

2. Where it is well established that a CR 60(b)(4) movant bears the burden of proof by clear and convincing evidence to demonstrate either the nine elements of common law fraud, detrimental reliance on misrepresentation, or actual misconduct and that any of those three grounds prevented the movant from fully and fairly presenting its theory of the case, did the trial court err by applying those legal standards to Hor's evidence below?

3. Where it is well established that CR 60(b)(11) motions are not intended to create a catchall provision where evidence otherwise fails to meet the requirements of CR 60(b)(4), did the trial court err by denying Hor's effort to convert CR 60(b)(11) into a forbidden catchall provision and create a new "substantial justice" argument merely because a credibility issue arose between a uniformed officer and Hor?

IV. STATEMENT OF THE CASE

Following a remand order from Division One of the Court of Appeals, the Honorable Michael Scott entered an Order denying Hor's second CR 60(b)(4) Motion seeking the extraordinary remedy of vacating Hor's 2013 jury trial judgment.[2] This Order was entered after reopening discovery,

[2] Pet. App. at 026–053.

conducting an *in camera* review of City of Seattle privileged written communications, and evaluating voluminous 2013 trial and post-trial evidence to include 2017 CR 60 documentary evidence and the 2022 video depositions and transcripts of six witnesses newly presented by Hor.

The trial court also entered separate Findings of Fact and Conclusions of Law.[3] The findings and conclusions explained the court's discretionary rationale, its credibility determinations, and responded to Division One's previous remand order that asserted it had been "unclear" whether the trial court had earlier considered the "full spectrum" of CR 60(b)(4) grounds as potentially supporting Hor's motion.[4] *Hor II.*

Division One of the Court of Appeals affirmed the Order after applying the correct legal standard of review and CR

[3] Pet. App. 026–052.

[4] Pet. App. 029.

60(b)(4) legal analysis.[5] *See Summary of Argument and Argument below for further statement of the case.*

As a basis to grant Hor's Petition, Hor's arguments fail to demonstrate that the Decision is in conflict with a decision of this Court, a published decision in another division of the Court of Appeals, or that the Decision presents an issue of substantial public interest outside of the unusual, complex facts at bar.

V. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Summary of Argument, and Substantive and Procedural Facts.

The *unpublished* Court of Appeals decision at issue properly (i) followed well established decisional law, (ii) applied the correct standard of review and legal analysis for CR 60(b) motions and findings, (iii) determined that the Order, findings, and conclusions were within the bounds of reasonableness, and (iv) accepted the trial court's resolution of credibility and conflicting substantial evidence and its choice of possible

[5] Pet. App. 002, 003–006.

reasonable inferences. The Decision provides no RAP 13.4 basis to grant review.

The Findings of Fact make plain that the lower court evaluated the witnesses' credibility, noted inconsistencies, resolved conflicting facts, and entered findings on the same. CP 4711-4731 (No. 1-58). (Pet. App. 026-053). The Decision correctly did not separately assess witness credibility or weigh evidence. The Decision also properly considered unchallenged findings of fact as verities.[6]

2006 Crash and 2013 Trial. Petitioner Channary Hor was tragically injured in 2006 as a passenger in a car that crashed into a rock wall at high speed. The drug intoxicated driver had fled a Seattle park after being approached by a Seattle police officer on foot in the early morning hours. The car crashed moments later.

[6] Because Hor has not assigned error thereto, the following unchallenged Findings of Fact are verities on appeal: 1-7, 9-14, 16-19, 21, 23-32, 34-41, 43-52, and 54.

Seven years after the collision, Hor's 2013 4-week jury trial alleging negligence by the Seattle police department resulted in a defense verdict for the Seattle defendants, and a 17-million dollar verdict against the driver who was indigent and has been an absent party in this litigation. The driver did not attend the trial. The details of this incident and resulting litigation are summarized in the following earlier decisions.[7]

2017 News Stories. The current appeal originally stems from 2017 news stories concerning the tragic suicide of one of the involved police officers who came to Hor's aid in the immediate aftermath of the crash. The news reporters characterized out-of-court witness statements alleging that former officer and now deceased Aaron Grant lied at trial and committed suicide out of remorse. *Petition*, 3-18.

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[7] *Hor v. City of Seattle,* 18 Wn. App.2d 900, 493 P.3d 151 (2021), *rev. den'd,* 198 Wn.2d 1038, 501 P.3d 142 (2022) (*Hor II*); *Hor v. City of Seattle,* 189 Wn, App. 1016 (2015) (unpublished) (*Hor I*).

Twice the CR 60 trial court has denied Hor's CR 60(b) motion to vacate her judgment (in 2019 and 2023). Twice, Hor has asked this Court to grant review.[8] Three appellate court decisions have followed this litigation.[9]

Procedure Following 2021 Remand. Most recently, the trial court allowed Hor to reopen discovery and granted Hor's motion to provide privileged City of Seattle records to the court for *in camera* review in her search for evidence to support her motion. The trial court conducted its review and found no evidence of misconduct by Seattle.[10]

At Hor's request, six current or former Lakewood Police employee witnesses were deposed via a court certified reporter and videographer. Such transcribed and video testimony was

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[8] Each request has been denied: 185 Wn.2d 1009 (2016); 198 Wn.2d 1038 (2022).

[9] *See supra.*

[10] "There is no evidence that any defendant or their counsel engaged in willful or deliberate discovery violations or other misconduct." CP 4732 (COL, No. 5, p. 25 (Pet. App. 050)).

presented to and evaluated by the trial court – along with all of the evidence presented by Hor. Amongst all of this voluminous evidence, the court was able to watch and evaluate these witnesses' 2022 sworn video depositions to include the witnesses' memory, bias, personal interest, manner, demeanor, and body language.

The trial court was also in a position to evaluate the reasonableness of the sworn deposition testimony against all of the evidence presented by the parties to include (i) each witness' separate deposition testimony, (ii) earlier 2017 depositions and declarations, (iii) Estes' and Wulff's disciplinary record and Estes' *Brady* designation, (iv) 2013 trial testimony, (v) uncontested "black box" collision data regarding the crashed vehicle speeds, time elapsed between leaving the park and crashing into the rock wall, and distance traveled from the park to the rock wall, (vi) the 2006 police radio broadcasts to include their timing and whether or not emergency sirens could be heard, and (vii) 2013 computer animation with audio played for the jury

(Sub. 793)). The 2013 trial evidence included the 2006 Grant and Thorp officer incident reports and subsequent sworn declarations, depositions and days of cross examination.[11]

In support of her most recent CR 60 motion to vacate, Hor never sought a live witness evidentiary hearing below. Such was Hor's prerogative. CR 60(b) motions can be made upon documentary evidence alone, live witness testimony at an evidentiary hearing, deposition testimony, or a combination of these.[12] CR 60(e)(1) ("…supported by the affidavit of the applicant or the applicant's attorney…"); CR 43(e)(1) ("When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly

[11] *See, Argument Section 4 infra.*

[12] *Dalton v. State*, 130 Wn. App. 653, 667-668, 124 P.3d 305 (2005).

on oral testimony or depositions.").[13] Any belated argument criticizing the absence of live testimony below provides no grounds for relief where the appealing party failed to make a request pursuant to CR 43(e)(1).[14]

As explained above, following a lengthy motion hearing and extensive oral argument, the trial court entered Findings of Fact and Conclusions of Law, and such were supported by substantial evidence.

Importantly, Hor's CR 60(b)(4) briefing here (or below), does not attempt to argue proof of the required nine elements of common law fraud, evidence of detrimental reliance on alleged misrepresentation,[15] how the alleged misconduct prevented Hor from fully and fairly presenting her theory of the case, or discuss

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[13] *In re Marriage of Irwin,* 64 Wn. App. 38, 61, 822 P.2d 797 (1992) (analyzing whether or not to allow live testimony at a CR 60(b) hearing is discretionary).

[14] *E.g., In re Marriage of Rideout,* at 352.

[15] "Misrepresentation" requires proof of "a false statement of an existing fact." *Landstar Inway, Inc. v. Samrow,* 181 Wn. App. 109, 124, 325 P.3d 327 (2014).

at all Hor's CR 60 burden of proof by clear and convincing evidence. *See Petition*.

Hor simply failed her burden to demonstrate the CR 60(b)(4) legal standards and her ultimate burden of proof to demonstrate with clear and convincing evidence that fraud, misrepresentation, or misconduct caused the entry of the judgment such that Hor was prevented from fully and fairly presenting her theory of the case. Contrary to Hor's repeated arguments, this analysis illuminates Hor's CR 60 burden and not proximate cause. *Petition* at 6, 8, *passim.* In sum, the doctrine of finality of judgments is properly applied here.

B. Argument.

1. The Abuse of Discretion Standard was Properly Applied and There is No Conflict Between the Decision and a Decision of This Court or a Published Decision of Another Division of the Court of Appeals.

Petitioner's legal analysis of CR 60(b)(4) caselaw and its application to Hor's post-trial, factually complex case is contrary to well established Washington precedent. *Petition* at 19–28.

This Court applies the abuse of discretion standard to orders denying a CR 60(b)(4) motion to vacate: "A trial court's denial of a motion to vacate under CR 60(b) will not be overturned on appeal unless the court manifestly abused its discretion." *Coogan v. Borg-Warner Morse Tec Inc.,* 197 Wn.2d 790, 820-821, 490 P.3d 200 (2021) (citing *Haley v. Highland*, 142 Wn.2d 135, 156, 12 P.3d 119 (2000) (citing *In re Guardianship of Adamec*, 100 Wn.2d 166, 173, 667 P.2d 1085 (1983)). The *Coogan* court further explained, "In our review for abuse of discretion, we may affirm the trial court on any basis that the record supports." *Coogan*, 197 Wn.2d at 820 (citing *State v. Arndt*, 194 Wn.2d 784, 799, 453 P.3d 696 (2019) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989)).

This Court approves of the *Lindgren* analysis and its progeny: "Relief under CR 60(b)(4) is appropriate when the party challenging the judgment "establish[es] … by clear and convincing evidence" that it "was prevented from fully and fairly presenting its case or defense" due to "fraud, misrepresentation,

or other misconduct of an adverse party." *Coogan,* 197 Wn.2d at 821 (citing *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990 Div. 1) (citing *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989)).

Division One correctly followed this established Washington precedent. The trial court's denial of CR 60 relief will ordinarily not be disturbed unless it clearly appears that it abused its discretion. Decision at 4; *Hor II*, 912–13 (citing *Lindgren v. Lindgren*, 58 Wn. App. 588, 595). *See also In re Vulnerable Adult Pet. for Winter v. Dep't of Soc. and Health Servs.,* 12 Wn. App. 2d 815, 829, 460 P.3d 667 (2020) (using abuse of discretion standard); *In re Marriage of Schneiderman,* 189 Wn. App. 1036, 2015 Wash. App. LEXIS 1977 *16 (2015) (unpublished) (cited pursuant to GR 14.1) ("Therefore, we review CR 60(b) orders for abuse of discretion;" analyzing trial record, post-trial analysis of declarations, transcripts, and extensive documentary evidence by a new trial court).

Findings of fact addressing all nine elements of common law fraud are required if fraud is relied upon to grant a CR(b)(4) motion. *Schneiderman,* 189 Wn. App. 1036 at *15*,* (citing *In re Marriage of Maddix,* 41 Wn. App. 248, 252, 703 P.2d 1062 (1985)). Such is otherwise helpful to the appellate courts to assess the trial court's discretionary decision-making. Though not required, findings can also be entered to analyze CR 60(b)(4) misrepresentation and misconduct to explain the court's discretionary decision making. *See, e.g., In re Marriage of Bresnahan*, 21 Wn. App. 2d 385, 406, 505 P.3d 1218 (2022) (internal citations omitted). "A trial court may vacate a judgment based on fraud and enter findings and conclusions establishing the nine elements of common law fraud." *Id.* It can also vacate based on misrepresentations or other misconduct with or without entering such findings. *Id.*

Related to the abuse of discretion standard, the deferential substantial evidence analysis applies to CR 60(b)(4) findings. "When the trial court makes [CR 60(b)(4)] findings of fact and

credibility determinations based on affidavits alone, we must determine whether substantial evidence supports those findings…" *Schneiderman,* 189 Wn. App. 1036 at *17 (citing *In re Marriage of Rideout,* 150 Wn.2d 337, 350-51, 77 P.3d 1174 (2003) (in contempt proceeding considered solely on written submissions, including declarations and affidavits, substantial evidence standard applied to findings)).[16] Further, any misrepresentation or misconduct must have been relied upon by the moving party. *Id.* at *15.[17]

The Decision is in accord with this well-established precedent:

> The trial court's [CR 60(b)] factual findings [regarding misrepresentation and misconduct] are

[16] "Substantial evidence" is "a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true." *Sutey v. T26 Corp.*, 13 Wn. App. 2d 737, 750 (2020) (discussing CR 60(b) findings of fact) (citation omitted).

[17] Findings in support of an Order *granting* a CR 60(b)(4) motion must be supported by substantial evidence that is "highly probable" due to the moving party's clear and convincing burden of proof. *Schneiderman,* 189 Wn. App. 1036 at *17 (italics added).

> reviewed for substantial evidence, meaning evidence "'sufficient to persuade a rational fair-minded person the premise is true.'" *Winter*, 12 Wn. App. 2d at 829-3 (quoting *Sunnyside Valley Irrig. Dist. v. Dickie,* 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). Unchallenged findings are verities on appeal. *In re Est. of Little*, 9 Wn. App. 2d 262, 274, 444 P.3d 23 (2019). We review conclusions of law de novo. *Id.* at 275. We do not assess credibility or weigh evidence. *Dalton*, 130 Wn. App. at 656.

In re Marriage of Bresnahan, 21 Wn. App. 2d 385, 406-407 (written findings of fact entered on a CR 60(b)(4) motion after reviewing voluminous declarations and documentary evidence; order and findings affirmed on abuse of discretion and substantial evidence standards); *accord, In re Vulnerable Adult Pet. for Winter,* 12 Wn. App. 2d 815, 829 ("The superior court's [CR 60(b)] factual findings are reviewed for substantial evidence.")

Contrary to Hor's arguments, no controlling Washington caselaw supports applying a less deferential standard in a CR 60(b)(4) context. *E.g., In re Marriage of Maddix,* 41 Wn. App. 248 (1985 Div. 3); *People's Bank v. Hickey*, 55 Wn. App. 367, 777 P.2d 1056 (1989 Div. 1); *Dalton v. State,* 130 Wn. App. 653,

124 P.3d 305 (2005 Div. 3); *Sutey v. T26 Corp.*, 13 Wn. App. 2d 737, 466 P.3d 1096 (2020 Div. 1); *In re Marriage of Bresnahan*, 21 Wn. App.2d 385, 406 (2022 Div. 2).

This Court is well versed with the abuse of discretion standard as it applies to a CR 60(b)(4) motion. *See Coogan, supra.* The Decision does not conflict with a decision of this Court or a published decision of another division of the Court of Appeals.

Even where the appellate court may disagree with the lower court's denial of a CR 60(b) motion, the order "must be upheld if it 'is within the bounds of reasonableness.'" *Lindgren*, 58 Wn. App. at 595. Even where the trial court rejects several witnesses' conflicting CR 60(b)(4) testimony in favor of one witness, the appellate court is precluded from rejecting the lower court's discretion that is based on a credibility assessment. *Dalton v. State*, 130 Wn. App. 653, 667-668, 124 P.3d 305 (2005).

Where the movant was not prevented from presenting its theory of the case at trial, the motion is properly denied.

> …there must be some connection between the misrepresentation and obtaining the judgment. *See Hickey*, 55 Wn. App. at 372. The rule is aimed at judgments that were unfairly obtained. *Dalton*, 130 Wn. App. at 668. Therefore, the wrongful conduct must have "prevented a full and fair presentation" of the moving party's case. *Id.* at 665, 668. Fraud or misconduct that is harmless will not support a motion to vacate. 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE § 8, at 613 (6th ed. 2013).

Schneiderman, 189 Wn. App. 1036 at *15-16*; see also In re Marriage of Lehmann*, 26 Wn. App. 2d 1003, 2023 LEXIS 585 *7, *11 (2023) (unpublished) (analyzing trial record and extensive CR 60(b) evidence and alleged false trial testimony).

2. The Voluminous Record Was Properly Evaluated Under the 2011 *Dolan* Decision Parameters and There is No Conflict Between the Decision and a Decision of This Court, or a Published Decision of Another Division of the Court of Appeals.

Petitioner's analysis of this Court's 2011 *Dolan* decision[18]

[18] *Dolan v. King County,* 172 Wn.2d 299, 258 P.3d 20 (2011).

misconstrues the holding and its application to Hor's case. *Petition* at 19–28. The Decision correctly followed this Court's *Dolan* decision when it applied the abuse of discretion standard to the trial court's CR 60 discretionary decisions and the substantial evidence standard to the trial court's findings:

> Most importantly, this approach is consistent with our Supreme Court's later important holding that, "where competing documentary evidence must be weighed and issues of credibility resolved, the substantial evidence standard is appropriate."

Decision at 5 (citing *Dolan v. King County,* 172 Wn.2d 299, 310).

The Decision further highlighted this Court's explanatory precedent as follows:

> Appellate courts give deference to trial courts on a *sliding scale* based on how much assessment of credibility is required; the less the outcome depends on credibility, the less deference is given to the trial court. Washington has thus applied a de novo standard in the context of a purely written record where the trial court made no determination of witness credibility. However, substantial evidence is *more appropriate*, even if the credibility of witnesses is not specifically at issue, in cases such as this

> where the trial court *reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies*, and issued statutorily mandated written findings.

Decision at 5 (citing *Dolan* at 311) (internal citations omitted) (emphasis added).

This Court has explained that generally, (i) deference to credibility determinations and factfinding expertise and (ii) conservation of judicial resources support using the substantial evidence standard where trial courts weighed evidence, assessed credibility, and resolved conflicting evidence on an extensive documentary record. *Dolan,* 172 Wn.2d 299, 310-11; *accord, Lehmann*, 26 Wn. App. 2d 1003 at *6 (analyzing trial record under CR 60(b)(4) and abuse of discretion standard, post-trial analysis of declarations, transcripts, documentary evidence and credibility); *J.K. v. Bellevue Sch. Dist. No. 405,* 20 Wn. App. 2d 291, 30*2,* 500 P.3d 138 (2021) (using substantial evidence standard to review findings in discovery sanctions setting, "there was no live witness testimony, but the trial court looked at an

extensive record, weighed documentary evidence, and resolved evidentiary conflicts to issue its written findings.")

Even before deciding *Dolan,* over twenty years ago this Court determined that "where credibility is very much at issue," Washington trial courts are provided deference to their credibility determinations, weighing of evidence, and resolution of conflicting evidence on a voluminous documentary record. *E.g., Rideout,* 150 Wn.2d at 350-351 ("The substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved.") (contempt proceeding); *see also Parentage of Jannot,* 149 Wn.2d 123, 128, 65 P.3d 664 (2003) (determining abuse of discretion standard applies in routine disputed, fact-intensive domestic relations cases, and trial judges are in a good position to weigh credibility issues based on affidavits alone) (parenting plan modification proceeding). In its holding, the *Rideout* court emphasized that "[t]he procedural safeguards of our court system

strongly support the application of the substantial evidence standard of review." *Rideout,* 150 Wn.2d at 352.

In Hor's case, assessing credibility amongst the fact-intensive analysis of voluminous 2013 trial evidence, 2017 media coverage and CR 60 evidence, 2022 additional six witnesses' video deposition and other CR 60 documentary evidence, and 2022 in camera review of privileged documents, amply supported applying the *Dolan* court's abuse of discretion and related substantial evidence standard of review to analyze the trial court's findings of facts. "Trial courts are better equipped than multijudge appellate courts to resolve conflicts and draw inferences from the evidence." *Rideout,* 150 Wn.2d at 350-352 (the substantial evidence standard applies where credibility is at issue; trial court's findings based on documentary evidence alone are affirmed).

As application of the *Dolan* substantial evidence standard has developed over the last fourteen years, appellate courts reasonably focus on the "sliding scale" of discretion used, the

volume of conflicting documentary evidence to be weighed and resolved, and the credibility determination(s) to be made. Contrary to Hor's overarching arguments (*Petition* at 19-25), neither the voluntary nature of the findings nor the specific nature of the trial court proceeding provide the overriding rationale for applying the substantial evidence standard to findings of fact derived from competing documentary evidence.[19]

In Hor's case, given the abundance of objective, scientific and physical evidence as explained by the defense experts, and Thorp's live, sworn trial testimony concerning "lights" and "pursuit,"[20] Hor's proffered CR 60 new evidence describing

[19] *E.g., In re Guardianship of Mesler,* 21 Wn. App. 2d 682, 700-01, 507 P.3d 864 (2022) (guardianship fee proceedings); *Robinson v. Am. Legion Dep't of Wash., Inc.,* 11 Wn. App. 2d 274, 286, 452 P.3d 1254 (2019) (corporate record inspection proceedings); *State v. Kipp,* 179 Wn. 2d 718, 727, 317 P.3d 1029 (2014) (criminal matter (discussed "general rule" and application of *Dolan*)); and *In re Determination of Rights to Use Surface Waters of Yakima River Drainage Basin,* 177 Wn.2d 299, 340, 296 P.3d 835 (2013) (water rights proceedings).

[20] CP 4254-56; 4461-4518; RP Vol. 18, 44 [138] - 81 [160].

deceased Grant's alleged unsworn, out-of-court statements—as alleged misconduct—were properly considered to be (i) not reliable, (ii) in part not credible, (iii) not arising to clear and convincing evidence, and (iv) not of a character to overcome the jury verdict and vacate the judgment.

As mentioned above, Grant prepared his 2006 police statement years before the City was sued, and before the attorneys became involved. His poor memory was illustrated throughout the history of the case and during extensive, technical cross-examination at trial. Grant's subsequent sworn Declaration with affirmative statements was used in front of the 2013 jury repeatedly, and paragraph six was directly read to the jury without objection as substantive evidence; there, Grant described that he had turned off his lights as he began to progress up Seward Park Ave. because he could not see the Cadillac, and he slowed down enough to look down side streets along Seward Park Avenue for the fleeing vehicle. CP 4243-44.

Given the inconsistences and all of the maneuvering surrounding new witnesses Estes' and Wulff's discipline and threatened employment at the Lakewood Police Department the proffered new CR 60 evidence is not reliable or credible. Hor's central witness was a "Brady Officer" due to official dishonesty. Wulff does not recall (i) Grant talking about his lights or (ii) talking to Estes about Grant's Seattle testimony. Grant's angst-ridden, seemingly irrational discussions with colleagues about his anxiety and depression prior to his suicide cast doubt on his out-of-court statements. *E.g., Plath v. Mullins,* 87 Wash. 403, 151 P. 811 (1915) (four witnesses' testimony regarding alleged unsworn, out-of-court statements by deceased party not clear and convincing evidence). Testimony regarding a decedent's alleged unsworn, out-of-court statements must be reviewed "with caution and subjected to careful scrutiny." *Id.* "No class of evidence is more subject to error or abuse." *Id.* Hor failed her burden to prove any CR 60(b)(4) misconduct.

In short, the Decision affirming the trial court was proper because Hor's evidence did not support a conclusion of law that CR 60 fraud, perjury, misrepresentation or other misconduct occurred. No basis to grant the Petition exists.

3. There is no "Substantial Public Interest" Basis to Grant Hor's Petition.

The Decision correctly agreed with the trial court's determination that Hor failed her burden to prove by clear and convincing evidence all nine elements of common law fraud, detrimental reliance on proven misrepresentation, or proven misconduct that caused the entry of the judgment such that Hor was prevented from fully and fairly presenting her theory of the case. Decision at 8–19.

Further, the Decision correctly agreed that when asserting relief for fraud, misrepresentation or other misconduct, the "catch-all" provision of CR 60(b)(11) is inapplicable. Decision at 23–25. Crucially, "[t]he use of CR 60(b)(11) should be confined to situations involving extraordinary circumstances not covered by any other section of [CR 60]." *Tamosaitis v. Bechtel*

Nat., Inc., 182 Wn. App. 241, 254, 327 P.3d 1309 (2014); *see, e.g.*, *Guardado v. Guardado*, 200 Wn. App. 237, 242, 402 P.3d 357 (2017) (same); *Hannigan v. Novak*, 197 Wn. App. 1017 (2016) (unpublished) (concluding CR 60(b)(4) is appropriate avenue for asserting perjury). No "catch-all" applies here.

The Decision also properly concluded that Hor's citation to this Court's *Henderson* decision as a basis for granting her motion should be disregarded. *Id.*[21] Decision at 24–25. *Henderson* is inapposite. At the trial court, Hor did not submit a basis for finding that racial bias was a factor in the verdict.

The Decision thoroughly examined the trial court's findings, credibility determinations, the record as a whole, and the presence or absence of substantial evidence to support the findings. Decision at 8–25. Grant's memory lapses and anxiety regarding the same during and after a trial that was initiated seven years after the tragic collision occurred do not create any

[21] *Henderson v. Thompson,* 200 Wn.2d 417, 518 P.3d 1011 (2022).

grounds for granting Hor's Petition. The Decision is not inconsistent with the *Henderson* case (i) that described patent racial bias, (ii) was not decided in a CR 60(b) context, and (iii) is inapplicable to the legal analysis at bar.

4. Hor Presented Her Theory of the Case; No RAP 13.4 Grounds Exist.

Hor's citation to inapposite federal authority and discovery violation caselaw does not provide RAP 13.4(b) grounds. *Petition* at 25–27, *passim*. Moreover, Ms. Hor presented her theory of the case to the jury.

Hor testified at trial that Tammam was fleeing because he encountered the police in the park, "panicked and he put his car in reverse and sped out." CP 4079 (7:2-6, 7:11-18). Hor testified that the police then began to follow Tammam from the park. CP 4079-81. Per Hor, two police cars followed Tammam with activated lights and sirens from the park to the crash. CP 4083. Tammam muttered words to the effect that he would stop if they would stop. CP 4107.

Hor's accident reconstruction expert testified that he was told by Hor's counsel where to place the vehicles in his analysis rather than separately conducting an objective reconstruction or analysis. CP 4391-92. Hor's liability expert testified that if Tammam could not see emergency lights, could not hear a siren, and could not see a police vehicle, then his driving was not influenced by Grant's police vehicle. CP 4120, 4124, 4251-52 (pages 90:17-25; 111:7-13).

No expert witness rebutted the objective physical evidence presented by the defense (derived from the Cadillac's "black box," roadway measurements, vehicle specifications, engine acceleration capabilities, police radio broadcasts, measured decibel levels of police siren and 86 m.p.h. Cadillac engine) regarding the travelled speed of Tammam's Cadillac; the 50-second window of time from fleeing the park to crashing into the rock wall; the Cadillac's faster acceleration rate as compared to the Crown Victoria; the separation distance between Grant's car and Tammam's car; the distance from the park's parking lot to

the rock wall; the absence of a siren during the Thorp radio broadcast; and the reconstruction showing that even at 65 m.p.h. Grant could never have gotten within sight or sound distance in the short time from the stop sign at Seward Park Avenue to the crash site. CP 3594, 4663-64, 4520-4611, 4612-4707, 4599-01, 4520-4707.

Neither at trial nor at the CR 60 motion did any evidence rebut Grant's trial testimony that after Tammam fled the park, Grant lost sight of the Cadillac (CP 4244-45, 4241-42, CP 4240-43 (139:15-19; 165:6-7)); had to completely turn his car around (CP 3595, 4236, 4455); stopped at the STOP sign at Seward Park Avenue before turning left (CP 4471-72, 4243-45); last saw tail lights in the distance while at the STOP sign (CP 4421, 4248, 4244-45); and announced over the SPD radio seeing a wreck at Seward Park and Morgan (CP 4243, 4663-64 (computer animation with audio (Sub. 793)).

Hor failed her CR 60(b)(4) burden.

VI. CONCLUSION

Because no RAP 13.4(b) grounds support it, the Petition should be denied.

This document contains 4,998 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted January 22, 2025.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that today I filed this document via the Clerk's electronic portal filing system, which should cause it to be served by the Clerk, and sent courtesy copies to the below parties

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January 22, 2025 - 12:20 PM

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