No. 85018-1-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

CHANNARY HOR, individually,

Petitioner,

vs.

THE CITY OF SEATTLE, et al.,

Respondent

PETITION FOR REVIEW

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I. Introduction

Our jury system's bedrock principle is that "trial is not just combat; it is also truth-seeking." *State v. Bourgeois*, 133 Wn.2d 389, 402, 945 P.2d 1120 (1997) (internal quotation omitted). Misrepresentations or misconduct by a party eviscerate that function. In such cases, rather than serving "as a vehicle for ascertainment of the truth," trial "accomplishe[s] little more than the adjudication of a hypothetical fact situation imposed by [the wrongdoer]'s selective disclosure of information." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978).

When misrepresentation or misconduct taints a trial, it is impossible to know the effect on its outcome. What is knowable is that misrepresentation or misconduct prevents the opposing party from "fully and fairly" presenting the relevant portion of their case to the jury based on the full truth rather than incomplete evidence or outright lies. *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 372, 777

P.2d 1056 (1989).

Such trials do not result in justice. Inaction by courts "continue[s] to perpetuate [that] harm." *Henderson v. Thompson*, 200 Wn.2d 417, 446, 518 P.3d 1011 (2022). That is why courts have an "affirmative duty" to remedy that harm by ordering a new trial in such cases. *Henderson*, 200 Wn.2d at 430.

This is such a case. In 2006, Petitioner Channary Hor, a young Cambodian American woman innocently riding in a car, was rendered quadriplegic after Seattle Police Department ("SPD") Officers Aaron Grant and Adam Thorp activated their patrol cars' overhead emergency lights and gave chase. She sued Respondents City of Seattle, Grant, and Thorp, alleging a negligent police pursuit.

At trial seven years later, whether there was a negligent "pursuit" in violation of SPD policy turned on whether Grant had deactivated his emergency lights during

the chase. Hor testified at trial that the officers' lights had remained activated the entire time.

Grant testified at his deposition that he could not recall deactivating his lights. At trial, however, while wearing his police uniform, Grant created a credibility contest by testifying he had recently recalled when and where he had deactivated his lights. The jury found Respondents were not negligent.

In 2017, before committing suicide, Grant admitted to multiple law enforcement colleagues that his trial testimony had been false, dishonest, and that he had betrayed his badge.

Since then, Hor twice has moved for relief from judgment and a new trial. Both times the same trial court judge—who neither observed the underlying trial nor engaged in live, post-trial fact-finding with witnesses—has denied relief. After being reversed once, that judge took the superfluous action of entering written findings and

conclusions that Grant's admissions to false trial testimony were not credible; his irreconcilable deposition and trial testimony was "consistent"; and his trial testimony on a fact Respondents told the jury was the "center piece" of Hor's negligence theory was insignificant.

Although equally positioned to review the evidence, the Court of Appeals held that finality and deference to the trial court required affirming findings and credibility determinations that one panel member questioned as being unsupported by the record. *Hor v. City of Seattle*, No. 85018-1-I (April 18, 2024), at 10 min., 2 sec. through 10 min., 17 sec., https://tvw.org/video/division-1-court-of-appeals-2024041185/?eventID=2024041185.

That included deference to the trial court's conclusion that the trial's outcome would have been no different had Grant truthfully testified—an impossibly speculative barrier to relief already rejected by Washington law. And it included Division One's own rationalization that justice is

done where a party “fairly (if not fully)” presents their case to the jury by cross-examining a falsehood and presenting the resulting false credibility contest for the jury’s determination.

Washington law has never required our appellate courts to perpetuate such harm for the sake of finality or deference to trial courts when they are equally positioned to assess the evidence under review. "[F]inality must give way to the greater value that justice be done.” *Shandola v. Henry*, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). Justice does not permit giving the benefit of doubt regarding a trial’s outcome to the party whose misrepresentations or misconduct created it. Nor does it condone the submission of cases to juries without the full truth and verdicts potentially premised on lies.

Hor pleads a final time for justice in a Temple named for it. She asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

Appendix 1-25.

II. Court of Appeals Decision

Division One's unpublished affirmed the order denying Hor's motion for relief from judgment.

First, Division One rejected de novo review despite conceding "not all" factors for deferential review were present. Appendix 7.

Second, Division One acknowledged that CR 60(b)(4) relief does not require a showing that Grant's misrepresentations or misconduct were "dispositive or could or would [have] affected the verdict." Appendix 21. It then imposed that same erroneous legal standard by holding that even if it was false, Grant's trial testimony was "immaterial" to the jury's liability determination because the jury nonetheless could have returned a verdict for Respondents based on "other evidence," including "physical and objective evidence" supporting Respondents' proximate cause arguments. *Id.* 21.

Similarly, Division One acknowledged that CR 60(b)(4) requires a new trial where misrepresentations or misconduct prevented the movant from "fully and fairly presenting its case." Appendix 10 (internal quotation omitted). But it reframed the standard as whether Hor "could fully or fairly still present her case." *Id.* 16. It then held that Hor's case "was fairly (if not fully) before the jury" where she had impeached the credibility of Grant's false testimony with his true deposition testimony. *Id.* 16, 19-29.

Finally, it rejected Hor's "invocation" of courts' inherent authority to order a new trial to ensure substantial justice because *Henderson* did not "address CR 60(b) at any level" and "systemic biases are not comparable to a single witnesses' alleged regret with his prior testimony." *Id.* 25.

III. Issues Presented for Review

1. Where the trial court's decision was not based on considerations extrinsic to the appellate record such as observations of the underlying trial, the tone and demeanor of live post-trial witness testimony, or expertise in mandatory factfinding under a statute or court rule, should appellate courts review de novo an order denying relief from judgment under CR 60(b)(4) for misrepresentation or misconduct and courts' affirmative duty to ensure substantial justice?

2. Where CR 60(b)(4) relief does not require a showing that misrepresentation or misconduct affected the trial's outcome, did the Court of Appeals err in holding that Grant's false trial testimony did not require relief because other evidence supported a defense verdict on proximate cause, an issue never reached by the jury?

3. Where CR 60(b)(4) entitles a party to relief when misrepresentations or misconduct prevent them from "fully and fairly" presenting their case to the jury and the Court of Appeals conceded Hor was "not fully" able to present her negligence theory because of Grant's false testimony, did the Court of Appeals err in holding that CR 60(b)(4) did not require relief?

4. Where Grant falsely testified at trial as a uniformed police officer regarding a fact central to Hor's negligence theory, did the Court of Appeals err in holding courts' inherent authority and affirmative duty to ensure substantial justice neither applied nor required relief?

IV. Statement of the Case

A. Hor Was Rendered Quadriplegic After Grant and Thorp Chased a Car in Which She Was Innocently Riding

Division One's opinion addresses the facts but glosses over key points. Appendix 2-3, 11-20.

In May 2006, Officer Thorp approached a parked car on foot. CP 4711; 17 VRP 42-43. Omar Tammam was its driver; Hor was sitting in the passenger seat. CP 4711-712.

After Tammam refused Thorp's order to stop and fled, Grant and Thorp activated their emergency lights and gave chase in their patrol cars. CP 3491, 4711-4712; 17 VRP (Afternoon) 19-20, 23; 23 VRP 97. Hor suffered severe injuries rendering her quadriplegic after Tammam

crashed into a rock wall. CP 4712.

B. At Trial Respondents Denied the "Center Piece" of Hor's Negligence Case—That Grant Pursued Tammam's Car with His Emergency Lights Activated in Violation of SPD Policy

Hor sued, alleging a negligent police pursuit caused her injuries. CP 3107-3108. At trial, Respondents' opening statement told the jury that the "center piece [sic] of [Hor's] case is to make this a . . . vehicle pursuit, lights . . . on. . . . " CP 3210. They also explained to the jury the importance of whether Grant's lights were activated at the time of the crash to Hor's negligence theory: "Under a vehicle pursuit, under their policy, you have to have lights on . . . ." *Id.* 3212. They told the jury that no pursuit existed at the time of the crash because the officers had deactivated their emergency lights by then. CP 3208, 3211, 3213.

The trial evidence confirmed that fact's significance. Respondents' standard of care expert testified that under

the policy an officer initiated a pursuit by continuing after a person with their lights activated. 51 VRP 104. According to the City's CR 30(b)(6) witness, an officer's excessive speed or continuous sight of a fleeing vehicle was irrelevant to whether a "pursuit" existed under the policy. 40 VRP 160; 41 VRP 18-19, 262; 2 VRP 33-34. The fact distinguishing merely "following" a car to "catch up" from a "pursuit" under the SPD policy was whether the officer had their emergency lights activated. 43 VRP 9.

In turn, Grant, Thorp, and Respondents' own standard of care expert admitted to the jury that a pursuit would have violated SPD policy or been unreasonable under the circumstances. 17 VRP 112-113; 20 VRP 70; CP 1114-1117, 3394.

Thus, one relevant fact remained regarding the existence of a negligent pursuit in violation of SPD policy: whether Grant had deactivated his emergency lights. Hor testified the officers' lights remained activated and visible

throughout the entire incident. CP 4319. Thorp could not recall. 21 VRP 140-41. Only Grant could rebut Hor's testimony.

Grant wore his police uniform while testifying. CP 3409. At his pretrial deposition, Grant had testified that he did not recall and could not testify "as a matter of fact" whether he had deactivated his lights. CP 3158. However, when asked to confirm this testimony at trial, Grant testified:

> After going back down to the park and clarifying some things in my memory, I can.

CP 3354. He unequivocally testified regarding where he had deactivated his emergency lights during the incident. CP 3450-3451.

In turn, Respondents' standard of care expert testified that Grant was following, not pursuing, at the time of the crash because he had deactivated his emergency

lights. 50 VRP 69-70, 72.

Respondents' closing arguments regarding negligence focused on whether the "officers acted in a way that no reasonable police officer" would have acted. 53 VRP 123. They emphasized "there was no pursuit." *Id.* 116. Referencing their trial distinction between mere "following" and a pursuit—whose distinguishing characteristic was whether emergency lights were activated—they argued the officers' "decision to try to follow and figure out what [wa]s going on" was not negligent. *Id.* 123-124.

The jury found Respondents were not negligent. CP 1013. It did not reach whether Respondents' negligence proximately caused Hor's injuries. CP 1014.

C. The Trial Court Denied Hor's Motion for Relief for Judgment After Grant Admitted to Testifying Falsely at Trial

In 2017 local media reported that Grant, then a Lakewood Police Department ("LPD") officer, had

committed suicide after telling four LPD officers that his trial testimony had been "untruthful" and he "believed he lied under pressure to aid" the City's defense of the lawsuit. CP 784-788.

After obtaining evidence confirming this reporting, Hor moved for relief from judgment. *Hor v. City of Seattle*, 18 Wn. App. 2d 900, 905-907, 493 P.3d 151 (2021), *review denied*, 198 Wn.2d 1038, 501 P.3d 142 (2022) ("*Hor II*"). For example, in June 2017 LPD Chief Michael Zaro testified in an unrelated matter that Grant told him he was pressured by the City's attorneys into testifying falsely in Hor's lawsuit. CP 828, 830-831.

In 2018 a trial court judge who did not preside over Hor's underlying trial heard Hor's motion. CP 4714. The trial court concluded Grant's statements were inadmissible and denied Hor's motion. *Hor II*, 18 Wn. App. 2d at 907.

In 2020, Division One reversed and remanded for consideration of "the CR 60 standards anew" and further

proceedings. *Id.* at 911, 913.

D. The Same Trial Cort Judge Denied Hor's Motion for Relief from Judgment After Subsequent Discovery Confirmed Grant's Admissions to False Trial Testimony

On remand, Hor deposed Grant's LPD colleagues. Granted had admitted to those colleagues that, contrary to his trial testimony, he had not recalled at the time of trial whether he deactivated his emergency lights. CP 3975-77 (Officer Anders Estes); CP 3905-06, 3915-18 (Sergeant Michael Wulff); CP 3650-51, 3658 (Officer Jeremy Vahle); CP 3704-10, 3726-27 (Svea Pitts).

Specifically, Officer Jeremy Vahle testified that Grant told him before trial that he did not recall a "specific," "critical" detail that the City's attorneys "want[ed]" him to remember: "[w]here the emergency lights or emergency equipment went off." CP 3658. Vahle advised him not to "testify to something you don't know" or "don't remember." CP 3666.

After trial, Grant told Vahle he had "fucked up," not followed Vahle's advice, "dishonored [his] badge," "lied during his testimony," and was "not honest during his testimony." CP 3652, 3664-3665. Vahle testified that the "crux" of this conversation about Grant's false trial testimony was "[t]he emergency equipment being shut down . . . whether or not it was shut down . . . ." *Id.* 3665-3666. Consistent with Zaro's 2017 testimony, Vahle also testified that Grant stated he had also admitted to Zaro that he had lied during his trial testimony. CP 6645.

Although lacking any present memory five years after he had last testified regarding Grant's statements, Chief Zaro confirmed previous deposition testimony that Grant told him he had testified falsely at trial. CP 3830, 3854, 3869.

Finally, Pitts testified that Grant said he felt the City had **"**led him in a way that, you know, he really should say this and this and this, and he beat himself up for caving to

what they were suggesting," that his testimony was not "completely what he should have given," and that it was "dishonest." CP 3707, 3726-3727.

Ms. Hor again moved for relief under CR 60(b)(4), CR 60(b)(11), and the trial court's inherent authority to ensure substantial justice. CP 3074, 3092. Her motion was heard by the same trial court judge who had previously denied her relief. CP 4708.

After considering the trial record, briefing, and transcripts and prerecorded videos of post-trial depositions—but no live witness testimony—the trial court entered immediately preprepared written findings and conclusions denying relief after oral argument. CP 4708-4734; RP (Feb. 3, 2023) 33. CP 4708-4734; Appendix 26-53.

In pertinent part, the trial court concluded that Hor had "not established fraud, misrepresentation, or other misconduct," CP 4732 (Conclusion of Law 3), based on its

findings that Grant's trial testimony was "consistent" with his prior deposition testimony and did "not appear . . . false or dishonest," but, instead, Grant was "a deeply troubled man" who was "irrationally fixated" on this testimony. CP 4715 (Finding of Fact 8); CP 4728-29 (Finding of Fact 53).

It also concluded that "[t]he issue of when and where – or even whether – Grant turned on or off his emergency lights was not of controlling importance as to the determination of liability in the Hor trial," CP 4732 (Conclusion of Law 4), based on a finding that "[t]he emergency lights issue was not particularly significant in light of" the "objective" and "physical" evidence presented by Respondents. CP 4730 (Finding of Fact 57).

Division One's October 7, 2024 opinion affirmed. It denied Hor's timely motion for reconsideration on November 22, 2024. Appendix 54**.**

V. Argument Why Review Should Be Accepted

A. Division One's Expansion of the Narrow Exception to De Novo Review of Trial Court Decisions Not Based on Considerations Extrinsic to the Appellate Record or Expertise in Mandatory Factfinding under Statutes or Court Rules Conflicts with Washington Appellate Decisions and Encourages Trial Courts to Insulate Such Decisions from Independent Appellate Review Through Entry of Superfluous Findings and Conclusions

In Washington, where "a trial court considers only documents" or has not "seen or heard testimony requiring it to assess the credibility of witnesses", the "general rule" is de novo review on appeal. *In re Marriage of Rideout*, 150 Wn.2d 337, 351, 77 P.3d 1174 (2003).

This makes sense. Trial courts who preside over a trial make decisions regarding post-trial relief based as much on their observations of the underlying proceedings as they do on the content of documents or transcripts. The appellate court has no opportunity to see or hear for itself proceedings that are extrinsic to the record. Deference to

that superior information is required. *Accord Halverson v. Anderson*, 82 Wn.2d 746, 752, 513 P.2d 827 (1973) (deferential review of order granting new trial based on misconduct where trial court "had observed all of the witnesses and the trial proceedings and had in mind the evidence which had been presented"); *Roberson v. Perez*, 123 Wn. App. 320, 331, 333, 96 P.3d 420 (2004) (internal quotation omitted) (deferential review of CR 60(4) order proper where "[t]he trial judge below was the same judge who heard the entire . . . case").

Likewise, when a trial court personally observes live testimony, its resolutions of conflicting testimony and determinations of weight, persuasiveness, and credibility involve assessing how witnesses said things—e.g., their tone and demeanor—as much as what they said. Typically, these factors also are unheard and unseen by an appellate court. There, too, deference is required. *Accord Duc Tan v. Le*, 177 Wn.2d 649, 670, 300 P.3d 356 (2013)

("Deference to factual determinations that turn on credibility" owed "because of the fact finder's unique opportunity to observe and weigh witness testimony"); *Van Dyke v. Seattle Elec. Co.*, 55 Wash. 687, 689, 105 P. 137 (1909) (deference owed to "trial judge" who "has the privilege of seeing the witnesses" and "observe[d] their demeanor while on the stand, their manner of testifying, their frankness or lack of frankness; in fact, the many things that tend to discover truth that is hidden in the printed pages of the record"); *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012) (where factfinder "observed the witnesses testify firsthand, we defer to the [factfinder]'s resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence").

But when an appellate court is equally positioned to review the evidence, an appellate court "stands in the same position as the trial court in looking at the facts of the

case." *Smith v. Skagit Cnty.*, 75 Wn.2d 715, 718, 453 P.2d 832, 835 (1969). They are "not bound by disputed findings of the trial court" and should "give the record an independent review." *Smith*, 75 Wn.2d at 718-19 (internal quotations omitted); *In re Estate of Nelson*, 85 Wn.2d 602, 605, 537 P.2d 765 (1975) (de novo review proper where trial court "did not have the opportunity to assess the credibility or weight of conflicting evidence by hearing live testimony"). The general rule of de novo review applies.[1]

The Court has carefully limited the general rule's

[1] Division One cited *Lindgren v. Lindgren*, 58 Wn. App. 588, 597-598, 794 P.2d 526 (1990), a case vacating a default judgment under CR 60(b)(5), to support abuse of discretion review even in the absence of live testimony. Appendix 4. But such motions are distinct because default judgments are "disfavored" and trial courts must have "liberal[]" authority to vacate them. *Lindgren*, 58 Wn. App. 595 (internal quotations omitted). Moreover, Division One subsequently has held CR 60(b)(5) orders on vacating a default judgment must be reviewed de novo. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010).

sole, "narrow exception." *Rideout*, 150 Wn.2d at 351. Because the "deference rationale" is "grounded in fact-finding expertise and conservation of judicial resources," this exception is limited to a trial court's exercise of its expertise in fact-finding mandated by a statute or court rule. *See Dolan v. King County*, 172 Wn.2d 299, 310-311, 258 P.3d 20 (2011) (deferential review appropriate where trial court weighed voluminous evidence in "issu[ing] formal findings of fact as required by CR 52(a)(1)"); *id.* at 311 (citing *Anderson v. City of Bessemer City,* 470 U.S. 564, 574–75, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (reviewing mandatory bench trial findings under Fed. R. Civ. Pr. 52(a)); *Rideout*, 150 Wn.2d at 349-351 (deferential review appropriate of statutorily mandated findings of contempt under RCW 26.09.160). That narrow exception is further limited to matters that "trial judges and court commissioners routinely hear," such as "family law matters." *Rideout*, 150 Wn.2d at 352.

No basis for deferential review existed here. The trial court's findings were based on evidence equally available for appellate review.

Nor was *Dolan*'s narrow exception to de novo review applicable. CR 60(b) does not mandate findings. *In re Marriage of Hammack*, 114 Wn. App. 805, 811-12, 60 P.3d 663 (2003). Appellate review is neither "focused on" nor "constrained by" superfluous findings. *Harder Mech., Inc. v. Tierney*, 196 Wn. App. 384, 392, 384 P.3d 241 (2016). Nor is there any evidence that trial judges routinely decide motions for relief under CR 60(b)(4) and courts' affirmative duty to ensure substantial justice when they did not observe the underlying trial.

Division One's unmooring of the deference rationale from its grounding limitations not only contravenes Washington law, it also threatens to swallow the general rule. Its expansion to any case where a trial court enters superfluous written findings and conclusions after

reviewing voluminous evidence incentivizes ***all*** trial courts to do so to limit appeals to deferential review of those findings and conclusions. That consequence undermines one of the rationale's goals—conservation of judicial resources. Review is required. RAP 13.4(b)(1), (b)(2), (b)(4).

B. Division One's Opinion Imposed an Impossible Barrier to CR 60(b)(4) Relief, Conflicts with Washington and Federal Appellate Precedent, and Undermines Courts' Authority to Ensure the Truth-Seeking Function of Trial

Second, it is impossible to know misconduct's impact on the verdict. *Gammon v. Clark Equip. Co.*, 38 Wn. App. 274, 282, 686 P.2d 1102 (1984). Thus, "a litigant who has engaged in misconduct is not entitled to the benefit of calculation, which can be little better than speculation, as to the extent of the wrong inflicted upon his opponent." *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wn. App. 828, 836, 696 P.2d 28 (1985) (internal quotations omitted).

Accordingly, Washington and federal appellate

courts reject a showing that the misrepresentations or misconduct materially affected the trial's outcome as a requirement for relief under CR 60(b)(4) and its federal analog.[2] *Taylor*, 39 Wn. App. at 836 (citing *Rozier*, 573 F.2d at 1339); *see also Mitchell v. State*, 153 Wn. App. 803, 825, 225 P.3d 280 (2009) (courts do not consider "the probable effect" of misrepresentation or misconduct "on the trial's outcome").

Rather, all they require is that the misconduct prevented the opposing party from "fully and fairly" presenting their case. *Hickey*, 55 Wn. App. at 372. It does so when it "reshaped the case [plaintiff] ultimately presented to the jury." *Rozier*, 573 F.2d at 1349. Thus, relief is required when the misconduct's absence "would

[2] CR 60(b) follows the analogous federal rule and should be interpreted using precedent interpreting that rule. *State v. Scott*, 20 Wn. App. 382, 387, 580 P.2d 1099 (1978).

have made a difference in the way plaintiff's counsel approached the case or prepared for trial." *Rozier*, 573 F.2d at 1342 (internal quotations omitted).

Improperly withholding evidence that may support a liability theory affects the case opposing counsel presents to a jury. *Taylor*, 39 Wn. App. at 835-36. So does withholding documents in a negligent police investigation case that may have been used to impeach the credibility of the investigating police detective. *Roberson*, 123 Wn. App. at 335.

Grant's false testimony distorted the case Hor presented to the jury far more than those examples. It forced her to present a credibility contest between her and a uniformed police officer rather than her unrebutted testimony on a fact central to her negligence theory. Indeed, Division One conceded that Hor's case was "not fully . . . before the jury." Appendix 19.

However, Division One imposed an impossible

barrier to relief when it concluded that any false testimony by Grant was "immaterial" to the trial's outcome given other evidence, particularly "physical and objective" evidence relevant to factual determinations of proximate cause never reached by the jury.[3] It doubled down on this impossible barrier when it held Hor's negligence theory was "was fairly (if not fully) before the jury" because the jury had other "ample evidence" with which to "accept or reject" Grant's false trial testimony, such as his earlier deposition testimony. In other words, Hor had not demonstrated the trial's outcome would have been different.[4]

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[3] Respondents' closing arguments regarding whether any negligent pursuit "was a proximate cause of Omar Tammam driving into a rock wall" relied on such evidence. 52 VRP 87-88; 53 VRP 101-102; 108; 126 (arguing if the officers were out of sight, "that's not proximate cause").

[4] Citing *Doss v. Schuller*, 47 Wn.2d 520, 526, 288 P.2d 475 (1955), Division One applied a "controlling importance" standard. But CR 60(b) superseded the statute interpreted by *Doss*. 47 Wn.2d at 526; *Scott*, 20 Wn. App. at 386. No other Washington appellate court has applied *Doss*'s superseded standard in reviewing a CR

Washington and federal appellate courts have rejected this outcome-based standard as an impossible barrier to relief from trials infected by fraud, misrepresentation, or other misconduct. Division One's holdings not only contravene this appellate precedent. They also undermine courts' ability to effectuate the truth-seeking function of trials in this state by providing relief under CR 60(b)(4). Review is required. RAP 13.4(b)(2), (b)(4)

C. Division One's Opinion Limiting Courts' Inherent Authority and Affirmative Duty to Ensure Substantial Justice is to Cases of Systemic Bias Conflicts with Washington Appellate Decisions and Further Erodes Courts' Authority to Ensure the Truth-Seeking Function of Trial

Finally, the Court has "long recognized that Washington courts have the inherent power" and "affirmative duty" "to grant a new trial on the ground that substantial justice has not been done." *Henderson*, 200

60(b)(4) order.

Wn.2d at 430 (emphasis omitted).

This authority and affirmative duty extends to all cases and is not limited potentially infected by systemic racial bias. *See Roberson*, 123 Wn. App. at 325, 333, 335, 341 (affirming trial court's invocation of inherent authority in tandem with CR 60(b) to order a new trial where improperly withheld documents were relevant to witness impeachment).

That is unsurprising. The truth-seeking principle of our jury trial system is sacrosanct. It is one of the bedrocks of the "judicial neutrality, procedural fairness, and equal treatment" on which our legal system is premised. *Henderson*, 200 Wn.2d at 445. Its weight rests on the shoulders of everyone who participates in trial: "lawyers, judges, jurors, and others." *Id.* at 446.

Those "others" include witnesses who swear at trial their testimony will be "the truth, the whole truth, and nothing but the truth." When they admit they failed to

uphold that oath, substantial justice demands a jury render a decision for or against Hor in a trial where they hear the whole truth.

That is particularly true where Grant testified as a uniformed law enforcement officer. Even improper but true trial testimony by law enforcement officers such as opining on a defendant's guilt is "especially prejudicial," *State v. King*, 167 Wn.2d 324, 331, 219 P.3d 642 (2009), because it "carries an "aura of special reliability and trustworthiness." *State v. Demery*, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001) (internal quotations omitted).

Indeed, studies and legal scholars have observed that various juror factors can result in explicit or implicit bias in favor of police testimony. *See, e.g,* Jonathan M. Warren, *Hidden in Plain View: Juries and the Implicit Credibility Given to Police Testimony*, 11 DePaul Journal for Social Justice, 5-7 (2018). The credibility contest created by Grant's false trial testimony exploited this bias. When a

trial is potentially tainted by such implicit, systemic bias, courts have an affirmative duty to correct it. *See Henderson*, 200 Wn.2d at 433

Division One's opinion holding that courts' inherent authority and affirmative duty to ensure substantial justice were inapplicable not only contravenes these decisions. It further erodes courts' authority and duty to order new trials to remedy fraud, misrepresentation, or misconduct, requiring review. RAP 13.4(b)(1), (b)(2), (b)(4).

VI. Conclusion

When our legal system fails, the affirmative duty of courts is to "bring reality into sharp focus in [their] legal analysis" through "conscious effort and honesty" and remedy those failures. *Henderson*, 200 Wn.2d at 446.

The reality here is that the critical truth-seeking function of trial was thwarted. A jury rendered a verdict rejecting Hor's negligence theory based on a uniformed police officer's admittedly false trial testimony regarding a

fact central to Hor's negligence theory. That testimony made the difference between Hor presenting an unrebutted case to the jury on that key fact and a credibility contest between a woman of color and a uniformed police officer.

Washington law gives trial courts the authority and obligation to remedy such failures in our legal system with a new trial. When they do not, appellate courts sitting in the same position have the same duty to do so. When they erroneously elevate deference above that duty, they not only perpetuate harm to Hor. They also call impugn the neutrality, fairness, and equality of our entire legal system.

Division One's legal analysis lost sight of these realities rather than bringing them into sharp focus. Worse, it narrowed the ability of litigants to obtain relief from such injustices and courts' authority to provide it. Review is warranted and critical to our legal system.

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Respectfully submitted this 23rd day of December 2024.

The undersigned certifies that this brief consists of 5,000 words in compliance with RAP 18.17.

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CERTIFICATE OF SERVICE

Katie Hedger, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 23, 2024, I delivered via Email a true and correct copy of the above document, directed to:

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DATED this 23rd day of December 2024.

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHANNARY HOR, individually, Appellant, v. THE CITY OF SEATTLE, a Washington Municipal Corporation, Respondent, AARON GRANT, ADAM THORP, and OMAR TAMMAM, Defendants.[†]	No. 85018-1-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — In 2013, a jury found that the City of Seattle (City) was not liable for injuries suffered by Channary Hor in a 2006 car accident involving the Seattle Police Department (SPD). In 2017, a newspaper reported the suicide of one of the SPD officers involved in the accident, Aaron Grant, and attributed it to his remorse over the accuracy of his trial testimony. Hor subsequently twice moved the trial court to vacate the 2013 judgment under CR 60(b)(4) and (11). In this appeal, we are asked to resolve whether the court erred in denying the second, most recent

[†] These defendants are not participating in this appeal.

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motion, which was brought after Hor conducted additional discovery. We conclude the court did not abuse its discretion when it found Hor failed to establish by clear and convincing evidence that Grant had committed misconduct or a misrepresentation, and when it found that Hor had a fair opportunity to argue her theory of liability at trial without this evidence. Thus, we affirm.

I. BACKGROUND

In May 2006, Hor was sitting in the passenger seat of Omar Tammam's car in Seward Park when SPD Officers Adam Thorp and Aaron Grant approached them. Tammam fled and, shortly after exiting the park, crashed his car into a rock wall at a high rate of speed. The crash inflicted severe injuries on Hor.

In September 2010, Hor filed suit for damages against Tammam and the City, alleging Officers Thorp and Grant engaged in a negligent pursuit of Tammam as he fled. In June 2013, a jury found Tammam alone was liable for negligence and not the City. This court affirmed the verdict in an unpublished opinion. Hor v. City of Seattle, 70761-2-I (Wash. Ct. App. Aug. 3, 2015) (unpublished), https://www.courts.wa.gov/opinions/pdf/707612.pdf ("Hor I").

In May 2017, the *Tacoma News Tribune* published an article reporting Grant's suicide. The article claimed Grant was "haunted by his testimony" given at the 2013 trial and "believed he lied under pressure to aid the city's case, according to his boss and former co-workers" at the Lakewood Police Department (LPD), where Grant had worked after the 2006 incident.

Following the publication of that article, Hor obtained sworn testimony from three of Grant's colleagues at LPD who claimed to have spoken to Grant about his

trial testimony. Hor v. City of Seattle, 18 Wn. App. 2d 900, 904-06, 493 P.3d 151 (2021) ("Hor II"). Hor then moved the court under CR 60(b)(4) to vacate the 2013 judgment. Id. at 902-03. The court denied the motion. Id. at 903. In Hor II, this court reversed and remanded the matter to the trial court, holding it was "unclear" whether the court conducted the entire CR 60(b)(4) "fraud, misrepresentation or other misconduct" analysis, or whether it only considered Hor's claim of fraud. Id. at 912-13. This court also permitted the trial court to order additional discovery, which it did and which the parties conducted. Id. at 913.

In December 2022, armed with a more comprehensive record, including six deposition transcripts, Hor renewed her motion to vacate the judgment under CR 60(b)(4) and (11). After oral argument, the court denied Hor's motion in February 2023. Hor now timely appeals.

II. ANALYSIS

1. Standard of Review

As a preliminary but important matter, Hor argues that this court should review her motion to vacate de novo, for two overarching reasons. First, Hor argues that we should not apply a more deferential standard because the judge ruling on the CR 60 motion was not the same as the trial judge who presided over the trial. Second, Hor argues that, because the court resolved the motion to vacate solely on documentary evidence (as opposed to on live testimony), the court's findings deserve no deference. We disagree.

Hor made the first argument in Hor II and, as Hor recognizes, this court expressly rejected it. Hor II, 18 Wn. App. 2d at 911. Per RAP 2.5(c)(2), we decline

to exercise our discretion to "review the propriety of an earlier decision of the appellate court in the same case." More substantively, Hor offers no further authority on point. Hor cites numerous cases that discuss the general benefits of a court observing live testimony in certain distinguishable types of cases.[1] However, none of the cases Hor offers held that no deference is due a trial court judge who resolved a motion to vacate but did not sit on the original trial. We decline the invitation to make any such rule here.

As to the second argument, we begin by noting, as Hor acknowledges, that this court generally reviews CR 60(b) motions to vacate for abuse of discretion. In re Marriage of Bresnahan, 21 Wn. App. 2d 385, 406, 505 P.3d 1218 (2022). And this court has previously considered the exact same argument Hor makes now in Lindgren v. Lindgren, 58 Wn. App. 588, 595, 794 P.2d 526 (1990). That is, the movant there argued that, because "the trial court heard no oral evidence when it decided the motion to vacate, the standard of review on appeal should be de novo." Id. We recognized the appellant "correctly asserts that no deference must be given to a trial court's finding of fact with respect to documentary evidence." Id. However, we also "note[d] that the discretionary judgment of a trial court of whether to vacate a judgment is a decision upon which reasonable minds can sometimes differ," meaning that "if the discretionary judgment of the trial court is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld."

[1] For example, Hor cites to State v. Babcock, 145 Wn. App. 157, 163, 185 P.3d 1213 (2008), which discussed the standard of review for a motion for mistrial, and to State v. Johnson, 185 Wn. App. 655, 670-71, 342 P.3d 338 (2015), which discussed the standard of review for evidence admitted under ER 403.

Id. In other words, the court still endorsed a deferential standard of review for a motion to vacate based solely on documentary evidence, where there is an exercise of discretion.

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." Dolan v. King County, 172 Wn.2d 299, 310, 258 P.3d 20 (2011). Helpfully, our Supreme Court explained that

> 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.

Id. at 311 (internal citations omitted) (emphasis added).

Here, all six of the LPD witnesses supporting Hor's motion to vacate participated in video-taped depositions, generating over four hundred pages of testimony. And the court reviewed, not only those depositions, but the record of the entire trial, numbering nearly nine thousand pages, which both provided "the context . . . at issue" and, which even Hor argues, was "require[d]" to conduct a CR 60(b) analysis. In short, the superior court below reviewed an "enormous amount of documentary evidence" from numerous witnesses. Dolan, 172 Wn.2d at 311.

The court then expressly "weighed that evidence, resolved . . . evidentiary conflicts and discrepancies," and–as Hor also acknowledges—made credibility findings about the video-taped depositions. Id. In sum, within Dolan's "sliding scale," the substantial evidence standard seems "more appropriate" in this case. 172 Wn.2d at 310-11.

In response, Hor points again to the fact that some Washington courts have declined to use a deferential standard of review for proceedings based solely on documentary evidence. Br. of Appellant at 51-52 (citing Davis v. Dep't of Labor & Indus., 94 Wn.2d 119, 124, 615 P.2d 1279 (1980) (discussing an exception to applying the substantial evidence rule where findings are based on "written, graphic material and not oral testimony"); Nygaard v. Dep't of Labor & Indus., 51 Wn.2d 659, 661, 321 P.2d 257 (1958) ("Where the trial court does not have the advantage of seeing and listening to witnesses, its findings may be disregarded, provided they are based upon a written record that is before us in its entirety.")).[2]

[2] Hor submitted two Statements of Additional Authorities (SAA). In the first, Hor offers additional caselaw supporting a de novo standard of review. SAA (Apr. 1, 2024) at 1. However, this court has explained that the RAP (10.8) addressing SAAs was "intended to provide parties an opportunity to cite *authority decided after the completion of briefing*. We do not view it as being intended to permit parties to submit to the court cases that they failed to timely identify when preparing their briefs." O'Neill v. City of Shoreline, 183 Wn. App. 15, 23, 332 P.3d 1099 (2014) (emphasis added). As none of the authority Hor offers were decided after the completion of the briefing, we need not consider them. That said, we briefly address the second SAA, submitted after oral argument, as it addressed Dolan directly. Hor argues that the deferential standard of Dolan's "sliding scale" is appropriate only in matters involving statutorily mandated factual findings and, because there is no such requirement for factual findings, no deference is due. SAA (Apr. 19, 2024) at 1-3 (citing Dolan, 172 Wn.2d at 311). This argument presents an overly narrow view of Dolan, which reviewed "cases such as this where the trial court," among other potential factors, "issued statutorily mandated written findings." 172 Wn.2d at 311. In other words, Dolan presented an

Neither Davis nor Nygaard, however, involved motions to vacate. Davis, 94 Wn.2d at 122 (considering an appeal from a bench trial on a discrimination claim); Nygaard, 51 Wn.2d at 660 (considering an appeal from a superior court's review of an administrative decision). And, as Hor conceded at oral argument, there is no binding authority "directly on point" applying the de novo standard to any type of CR 60 motion. Wash. Ct. of Appeals oral argument, Hor v. City of Seattle, No. 85018-1-I (April 18, 2024), at 2 min., 30 sec. through 2 min., 52 sec. video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024041185/?eventID=2024041185.

Finally, we are wary of both reviewing appeals from motions to vacate de novo and becoming de facto fact finders, and wary of implicitly requiring courts to hold hearings with live testimony on such motions. These results would effectively move decisions on motions to vacate to the appellate courts and have unintended consequences on the operations of our trial courts, respectively. Moreover, resisting both supports the important principle that, while "circumstances can arise where finality must give way to the greater value that justice," "[f]inality of judgments is a central value in the legal system" and CR 60(b) provides a "balance between finality and fairness by listing limited circumstances under which a judgment may be vacated." Shandola v. Henry, 198 Wn. App. 889, 895, 396 P.3d 395 (2017). If our Supreme Court or our legislature wishes to create a rule

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illustrative, non-exclusive list of factors in its "sliding scale" framework, many of which are present here, even if not all.

requiring a trial court to hold an evidentiary hearing with each motion to vacate, or be subject to de novo review, it may do so. We decline to create such a rule.

For the reasons above, we will review this matter under an abuse of discretion standard, which directs that a "court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." Gildon v. Simon Prop. Grp., Inc., 158 Wn.2d 483, 494, 145 P.3d 1196 (2006). Such an abuse occurs when the court "takes a view that *no reasonable person* would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." Id. (emphasis added).

We review findings of fact for substantial evidence, defined as a "'quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.'" In re Dependency of A.M.F., 23 Wn. App. 2d 135, 141, 514 P.3d 755 (2022) (quoting Sunnyside Valley Irr. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003)). "Unchallenged findings are verities on appeal." Mueller v. Wells, 185 Wn.2d 1, 9, 367 P.3d 580 (2016). We then review de novo whether the trial court's findings of fact support its conclusions of law. Cantu v. Dep't. of Labor & Indus., 168 Wn. App. 14, 21, 277 P.3d 685 (2012).

2. CR 60(b)(4)

a. Overview of Relief under CR 60(b)(4)

Under CR 60(b)(4), a court may relieve a party from a judgment if it was procured by "[f]raud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." At a high level, "[t]he rule is aimed at judgments unfairly obtained, not factually incorrect judgments."

Sutey v. T26 Corp., 13 Wn. App. 2d 737, 756, 466 P.3d 1096 (2020). In other words, an appeal addressing CR 60(b)(4) relief is "limited to the propriety of the denial not the impropriety of the underlying judgment." Bjurstrom v. Campbell, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980).

Fraud allegations under CR 60(b)(4) are distinct from allegations of misconduct or misrepresentation, in that the party must establish the nine common law elements for fraud. In re Marriage of Maddix, 41 Wn. App. 248, 252, 703 P.2d 1062 (1985).[3] A party alleging misrepresentation or misconduct need not show the elements of fraud. Id. Still, while neither "misrepresentation" nor "misconduct" is defined by CR 60, common law "misrepresentation" requires the moving party have "reasonably relied" on the information provided. Dewar v. Smith, 185 Wn. App. 544, 562-63, 342 P.3d 328 (2015). And, "misconduct" has been defined as a "dereliction of duty; unlawful, dishonest, or improper behavior, esp. by someone in a position of authority or trust." BLACK'S LAW DICTIONARY, 1193 (12th ed. 2024).

Further, "[t]he trial court may grant relief under CR 60(b)(4) without considering the *probable effect* of the misconduct on the trial's outcome." Mitchell v. Wash. State Inst. of Pub. Policy, 153 Wn. App. 803, 825, 225 P.3d 280 (2009) (emphasis added). In other words, CR 60(b)(4) relief "does not require a showing the new evidence would have materially affected the outcome of the first trial" which would be "little better than speculation." Taylor v. Cessna Aircraft Co., Inc.,

[3] While she references the fraud prong of CR 60(b)(4) indistinctly from misrepresentation and misconduct prongs throughout her briefing, Hor does not attempt to establish the nine common law elements, and thus we will not consider this prong further.

39 Wn. App. 828, 836-37, 696 P.2d 28 (1985).

That said, a party's misrepresentations are irrelevant if "there is no connection between the [adverse party's] misrepresentation and" the case's outcome. People's State Bank v. Hickey, 55 Wn. App. 367, 372, 777 P.2d 1056 (1989). After all, reasonable reliance is an element of negligent misrepresentation. Dewar, 185 Wn. App. at 561-62. And the movant must show the offending party "obtained" an "unfair judgment" by means of misconduct or misrepresentation to receive relief under CR 60(b)(4). Sutey, 13 Wn. App. 2d at 756.

More specifically, "[t]o prevail on a CR 60(b)(4) motion, the moving party 'must establish by *clear and convincing evidence* that the fraudulent conduct or misrepresentation *caused* the entry of the judgment *such that* the losing party was prevented from *fully and fairly* presenting its case or defense.'" Bresnahan, 21 Wn. App. 2d at 406 (emphasis added) (quoting In re Vulnerable Adult Pet. for Winter, 12 Wn. App. 2d 815, 830, 460 P.3d 667 (2020)); Lindgren, 58 Wn. App. at 596 (same). "'Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be *highly probable*.'" In re Pers. Restraint of Sargent, 20 Wn. App. 2d 186, 206, 499 P.3d 241 (2021) (quoting State v. K.A.B., 14 Wn. App. 2d 677, 696, 475 P.3d 216 (2020)) (emphasis added).

Tying these principles together, the overarching question on appeal, then, is whether the trial court abused its discretion by making a mistake of law or by making a finding of fact that "no reasonable person" would make, namely: in finding that Hor failed to show it was "highly probable" that the allegedly improper testimony "caused" the unfair judgment in such a way that Hor could not "fully *or*

fairly" present her case. These overlapping standards present a series of high hurdles for Hor, indeed.

b. Discussion

Hor principally argues that (i) "substantial evidence d[id] not support the trial court's findings" in a way that is (ii) "necessary to support its CR 60(b)(4) conclusions of law," i.e., that the court misapplied the law to the facts before it in its conclusions of law.[4] We will address each argument in turn and principally address only the findings and conclusions of law Hor challenges which are necessary for our analysis.

i. Substantial evidence for the challenged findings of fact

We consider in turn the court's (a) findings of fact related to Grant's alleged misrepresentations and (b) mixed findings of fact and conclusions of law as to whether Hor could fully *or* fairly still present her case.

(a) Grant's alleged misrepresentations

With her second motion to vacate, Hor presented testimony from six LPD

[4] Hor does not flatly claim the court based its decision on an incorrect legal standard, but instead she avers that an "incorrect legal standard *infects* the trial court's findings and conclusions," in that "the trial court *inherently* couched its analysis in terms of whether other evidence potentially supported Respondents' theories of the case" when "viewed the evidence in the light most favorable" to the City. This argument is belied by the fact that, as Hor acknowledged at oral argument, the court expressly disclaimed the "incorrect" standard, and expressly applied the standard stated in Hor II, 18 Wn. App. 2d at 911-12; Hor v. City of Seattle, No. 85018-1-I (April 18, 2024), at 7 min., 20 sec. through 7 min., 35 sec. video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2024041185/?eventID=2024041185 ("the trial court applied a legally incorrect heightened standard to Ms. Hor's request for CR 60(b)(4) relief, just as it did previously in the case.").

witnesses, Anders Estes, Michael Wulff, Svea Pitts, John Unfred, Michael Zaro, and Jeremy Vahle, who—according to Hor—collectively testified to three important facts: [1] "that Grant had admitted . . . that he had been engaged in a pursuit of [the car]; [2] did not recall at the time of trial whether he had deactivated his lights; [3] lied in his trial testimony [about both facts, after being subjected to pressure by the City's attorneys]; and had betrayed his badge by doing so," i.e., in all these ways contradicted his trial testimony and, thus, committed misconduct or misrepresentation. For the reasons below, we hold that the court did not abuse its discretion in finding the evidence Hor presented fell short of presenting "clear and convincing" evidence of misrepresentation or misconduct.

As to the first two officers, Estes and Wulff testified that Grant had told them he had "lied" at trial and had used the term "pursuit" when discussing his testimony with them. Even so, the court found:

> Estes' and Wulff's testimony is suspect and less than credible. Both officers were under investigation by the Lakewood Police Department about misconduct, dishonesty, and insubordination related to a vehicle pursuit they were both involved in. They were close friends. And they had a motive to detract attention from their own misconduct by alleging and complaining that Grant had engaged in dishonesty and had not been investigated or disciplined. In a June 2017 deposition in an unrelated lawsuit filed against [LPD] in 2016, Police Chief Michael Zaro testified that Estes 'was known for making [Grant's] life miserable by walking around saying [Grant] should be fired.'

Hor now argues this finding is not supported by substantial evidence. We disagree.

When deposed, Estes conceded that he had been "investigated for making false statements" while at LPD. LPD notified Estes of this investigation in June

2016. The investigation concerned a pursuit in which Estes was involved. Specifically, LPD alleged he falsely stated over his patrol car radio that he was rammed by the suspect's vehicle. Estes retired before the investigation could be completed. Due to this investigation, LPD added Estes to a list of officers, pursuant to Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), whom they must disclose to future litigants as possibly untrustworthy.[5] Thus, there is substantial evidence that Estes had been under investigation for "misconduct and dishonesty," as the court found.

Estes also repeatedly and expressly tied his testimony on Grant to his own disciplinary issues. For example, Estes testified his investigation began "after the Grant incident and after they really wanted me gone," and that the investigation was LPD "fishing for something." Further, Estes claimed Grant was "an officer favored by the administration," which had "d[one] nothing to correct [Grant's] false testimony" despite Estes' three letters to the City of Lakewood. Estes also claimed he sent a letter "point[ing] out that the administration failed to investigate or act on the fact that Officer Grant gave false testimony in the Seattle case." Thus, there is substantial evidence that Estes' testimony on Grant was motivated by or connected to Estes' own disciplinary issues.

Wulff participated in and was investigated for the same pursuit for which

[5] "In Brady, this Court held 'that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" Strickler v. Greene, 527 U.S. 263, 280, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999) (quoting Brady, 373 U.S. at 87). "We have since held that the duty to disclose . . . encompasses impeachment evidence as well as exculpatory evidence." Id.

Estes was investigated. Specifically, Wulff pursued the suspect's vehicle alongside Estes, and Estes was acting as Wulff's supervisor. Wulff further described Estes as a "dear friend." Thus, there was substantial evidence that Wulff's testimony was similarly motivated by his own disciplinary issues or other personal bias.

Thus, we hold the court did not abuse its discretion because a reasonable person could find that these first two officers were not credible.

As to the remaining four witnesses—Pitts, Unfred, Zaro, and Vahle—the court additionally first found their testimony "describes a deeply troubled man" in that "Grant's anxiety and depression had roots in the Tammam/Hor incident and his testimony in the Hor trial," but "it does not appear that Grant's testimony was false or dishonest. . . . His subsequent tortured ruminations about that testimony do not show that he had been dishonest." The court additionally found their testimony "about Grant's use of the term 'pursuit' in his conversations with them about the Tammam/Hor incident is not reliable evidence" as these "references to 'pursuit' are inconsistent, vague, and – as plaintiff uses them in her briefing – conclusory" Lastly, the court found that "the totality of all the facts and circumstances found in the trial record is much more important than a loose use of the term 'pursuit.'" Hor also challenges each of these findings for substantial evidence. We again disagree.

Pitts answered "[n]o" when asked if she "recall[ed] anything about emergency lights in [her] discussions with Officer Grant." Further, Pitts' testified Grant "never said that he lied." She also could not remember whether Grant used

the word "pursuit." Instead, Grant "never said he was told to answer a certain way . . . [j]ust that he didn't feel like he got to express himself fully" at trial.

Unfred's testimony repeatedly indicated he was not confident in his memory regarding Grant. Instead, Unfred generally stated that "I know Officer Grant told me he was troubled by his testimony at some point in the original case, about his truthfulness" but "[t]hat's about as much as [he] recall[ed]" and he "d[idn't] recall specifics or wording."

Similarly, Zaro's testimony similarly flagged potential memory issues. Initially, Zaro acknowledged his previous testimony where he was asked whether "'Grant c[a]me to [him] and sa[id] that he had given false testimony in a case where he was asked to testify?'" and he responded "'he believed so, yes.'" However, Zaro then testified he could not remember the first time he discussed Hor's case with Grant, or how many times he discussed the subject with Grant. More notably, Zaro also testified he didn't remember anything about Grant being "browbeat by a civil attorney" and had testified "I don't know that" when asked if Grant committed suicide because he felt pressured to lie at Hor's trial. Further, when pressed to quote specific words Grant used, he responded, "I can't answer that. You're asking me to quote him, and I can't do that." Instead, Zaro testified he "do[esn't] remember it being specifically about [Hor] all the time. There was – just the general topic of his anxiety."

Vahle initially testified that Grant "thought and felt that he was not honest during his testimony." Further, he stated Hor's incident "turned into a pursuit" in a general sense, adding he "d[idn't] remember where [Grant] got into the pursuit at,

but he wasn't the primary officer." He also answered affirmatively when asked if "Grant had talked to you about his lack of memory about certain details of the pursuit." Vahle later added the caveats that "I don't remember [Grant] complaining about being pressured," and that "I don't remember him saying [he] lied," and instead likened Grant's conversation to "word vomit."

From the above, we hold the court did not abuse its discretion in finding that Hor had not established by clear and convincing evidence, based on these four officers' testimony, that Grant [1] stated he had been "in pursuit," [2] stated that he did not recall at the time of trial whether he had deactivated his lights; and [3] stated that he lied in his trial testimony about both facts. That is, a reasonable person could conclude, as the court did, that Grant's statements to these four unbiased officers were the musings of a "a deeply troubled man." And, there was otherwise no corroborating evidence of the City's alleged pressure. In turn, there is insufficient evidence, on our standard of review, to conclude that Grant or the City engaged in misconduct or made misrepresentations at the time of trial.

(b) Whether Hor could fully or fairly still present her case.

Even if the foregoing conclusion is incorrect—i.e., "no reasonable person" would conclude that none of the witnesses' testimony established that Grant committed misconduct or misrepresentations—Hor still fails to show it was "highly probable" that his arguendo improper testimony "caused" the unfair judgment in the sense that Hor could not "fully or fairly" present her case.

Here, the court found that Grant's trial "testimony was consistent with the declaration[s]" and that "Grant's imperfect memories were thoroughly explored in

plaintiff's attorney's examination of Grant." Hor now challenges both of these findings as lacking substantial evidence. We again disagree.

As Hor acknowledges, the parties "argued early and often" about whether SPD Officers Grant and Thorp engaged in an unlawful pursuit preceding the 2006 crash. Hor does not challenge the court's findings (and thus it is a verity) that the jury considered all of Grant's various sworn statements and testimony as to when he turned off his emergency lights. Mueller, 185 Wn.2d at 9. As Hor also acknowledges, the parties disputed at trial when the lights were deactivated as part of a broader dispute on whether Tammam could have even seen Grant's vehicle after leaving the park.

More specifically, Grant's testimony included a 2011 sworn declaration, a 2012 deposition, and his 2013 trial testimony.

In his 2011 declaration, Grant stated "[t]he vehicle accelerated out of the park, in my direction. I activated my emergency lights, but had to swerve and break in order to avoid being hit by the vehicle . . . I had to make a three point turn in order to turn around, then proceeded out of the park westbound on South Juneau, in the direction that I had seen the vehicle go" but he "did not see the vehicle on S. Juneau." As such, "[b]ecause [he] had lost a visual (sight) of the vehicle . . . I was not going to be operating in emergency (pursuit) mode" and, "*to the best of my recollection*, I turned off my emergency equipment (lights) at this point." (Emphasis added).

In his 2012 deposition, Grant was asked if he "had an opportunity to turn on [his] emergency roller lights?" Grant responded that "*I cannot recall* if I did at that

point or not." (Emphasis added). Further, Grant was asked if he had "any impression at all as to whether or not in the circumstances that is something you would normally do as a routine habit?" Grant responded that "[i]t all depends on the situation. *I just can't recall* in this situation. It's been too long." (Emphasis added).

At trial—again acknowledged by Hor—Grant testified that he had since recalled when he turned on his lights, but he also admitted "that he had previously testified at his deposition that he could not recall whether and when he deactivated his emergency lights." Hor argues that, because Grant's trial testimony was inconsistent with his later statements to colleagues, she was unable to fully present her case. We hold it was not an abuse of discretion for the trial court to find the record is more complicated.

As the court found, at the 2013 trial, Hor's counsel spent two days questioning Grant and made no secret of her suspicion of Grant's memory in light of Grant's previous sworn declaration and deposition. For instance, Hor's counsel asked Grant whether he could "say, as a matter of fact, that [he] turned off [his] emergency equipment lights; can you sir?" Grant responded that "[a]fter going back down to the park and clarifying some things in my memory, I can." Grant elaborated that, roughly a month prior to the trial, he had gone "down and redrove the park in the area and it brought back some memories of what had happened."

Hor's counsel persisted, repeatedly quoting from Grant's past deposition testimony, including the numerous times Grant said he could not "recall" specifically when he activated his lights or other aspects of the incident. In the

face of these inconsistencies, Grant himself acknowledged that the incident "was seven years ago" and that there were "some things that I can remember, and some things that I can't."

In sum, the jury heard Grant's deposition testimony directly quoted and compared with his trial testimony repeatedly and methodically. The jury had ample evidence to look askance at his testimony and was free to accept or reject Grant's explanation that "redr[iving]" the area refreshed his memory. Westby v. Gorsuch, 112 Wn. App. 558, 570, 50 P.3d 284 ("it is the jury's role to make credibility determinations"). Even if we were to credit one of the LPD's officers' testimony that he told them he in fact did not know, e.g., when he turned off his lights, it is not an abuse of discretion for the court to find that Hor's defense was fairly (if not fully) before the jury, where the defense is broadly that Grant was not credible on that possibly important point.

In other words, Hor has not shown that it was manifestly unreasonable to conclude that it was highly improbable that the absence of one additional way to question Grant's memory "caused" the judgment such that she was unable to fairly present her case to the jury. We also cannot conclude that it was manifestly unreasonable to conclude that Grant's various statements were internally consistent as he explained the evolution of his memory overtime.

In response, Hor relies heavily on Taylor, which held that 60(b)(4) relief "does not require a showing the new evidence would have materially affected the outcome of the first trial." Taylor, 39 Wn. App. at 836. We agree, but Taylor, nonetheless, is distinguishable as the defendant there entirely withheld

discoverable information such that the plaintiff "could not litigate issues he did not know existed" meaning the defendant's actions "deprived [the plaintiff] of an alternate theory upon which to argue liability." Taylor, 39 Wn. App. at 837. The present appeal is different in kind; a reasonable person could find that Hor explored the credibility of Grant's memory in depth, even if arguendo the jury was unaware that Grant may have felt personally motivated to testify in a certain way. This singular piece of evidence does not amount to an "alternate theory" of liability. The theory is the same, namely, that two SPD officers engaged in a negligent pursuit by, inter alia, turning on their lights at a certain time and not turning the lights off at a certain time, causing the car to speed. It is not unreasonable to contextualize Grant's motivation for stating he remembered turning off the lights as simply one data point in the same theory of the case.

For these reasons, we cannot hold that the omission of this arguendo evidence "caused" the judgment such that she was unable to fairly present her case to the jury.

ii. Conclusions of law

Hor also challenges numerous conclusions of law, including non-duplicatively the court's conclusion that, whether "Grant turned on or off his emergency lights was not of controlling importance as to the determination of liability in the Hor trial."[6]

[6] Hor additionally challenges the court's conclusions that failed to establish fraud, misrepresentation, or other misconduct by clear and convincing evidence or that "Hor was not prevented from fully and fairly presenting her case." We have addressed this mixed issue of law and fact above.

Hor first challenges the conceptualization of the standard as requiring the misconduct be of "controlling importance." However, this court has already stated in this very matter, "perjury alone does not necessarily rise to the level of fraud to warrant vacation of a judgment . . . Even then, the perjury must be of "'controlling importance.'" Hor II, 18 Wn. App. 2d at 912 (quoting Doss v. Schuller, 47 Wn.2d 520, 526, 288 P.2d 475 (1955)). We again to decline, under RAP 2.5(a), to revisit this decision. More substantively, Hor recognizes that the "controlling importance" cannot "impose a requirement that a CR 60(b)(4) movant must prove that fraud, misrepresentations, or misconduct were *dispositive* or could or would [have] affected the verdict. Rather, all the movant must show is that it was *material* to *their* liability arguments, rather than an immaterial incorrect fact." We likewise do not interpret Hor II to impose a new requirement on a movant, and will address her claim as she presents it.

Even assuming arguendo that Grant's trial testimony amounted to misconduct, the jury had numerous other pieces of evidence to consider in the nearly month long and multifaceted trial. Notably, this evidence included the physical and objective evidence (e.g. the car's "black box," vehicle specifications, and topography measurements), which supported the accident reconstructionist's conclusion that, regardless of whether Grant turned his lights on or off and when, Tammam could not see them. This evidence also provides a tenable basis for the court's finding that Grant's motivation for testifying as he did was not material to Hor's theory of liability.

Finally, it is also notable that Hor did not challenge various important

findings on appeal. Mueller, 185 Wn.2d at 9 ("Unchallenged findings are verities on appeal."). For example, she did not challenge the trial court's finding that Grant witnessed Hor's severe injuries, which could lead a reasonable person to believe Grant was traumatized or otherwise emotionally affected by the scene. After all, numerous witnesses alleged Grant was distressed and conflicted when discussing the trial in some form. As stated by Zaro, "a 16-year-old girl was paralyzed. That's a lot to – that's a lot to deal with." Further, Zaro testified that Grant appeared to "internalize[]" his experience with the 2006 incident and subsequent trial in a way that seemed "irrational." Further, Pitts described Grant's broader mental health outside of the context of Hor's trial, including that it was "not like it was a secret that he battled depression." These facts, again, undermine the materiality to Hor's liability arguments of Grant's later "tortured ruminations" about his testimony. We cannot say it is unreasonable for the trial court to give little credit to a person tragically struggling in this way.

Hor also did not challenge the court's finding that the "six witnesses recently deposed offered no testimony suggesting that Grant was conflicted about his trial testimony about several key facts." These facts included Grant needing to completely turn around to leave Seward Park, Grant stopping at a stop sign before leaving the park, where Grant last saw Tammam's car before the collision, Grant driving slowly enough to look down side streets, that Grant did not see the crash, or what Grant later relayed over the radio to SPD dispatch. In other words, there were numerous facts, beyond Grant's testimony about the lights, for the jury to consider when gauging his role in the incident and the effect on Hor's theory of

liability.

From the above, we hold that the court's conclusions of law were supported by its findings of fact, i.e., they were not manifestly unreasonably applied. As such, the court did not abuse its discretion in denying Hor's CR 60(b)(4) motion to vacate.

3. CR 60(b)(11)

A court can relieve a party from a judgment for "[a]ny other reason justifying relief from the operation of the judgment." CR 60(b)(11). However, CR 60(b)(11) is "not a blanket provision authorizing reconsideration for all conceivable reasons. State v. Keller, 32 Wn. App. 135, 141, 647 P.2d 35 (1982). Instead, it is narrowly "intended to serve the ends of justice in extreme, unexpected situations" or in other words "'extraordinary circumstances,' which constitute irregularities extraneous to the proceeding." In re Det. of Ward, 125 Wn. App. 374, 380, 104 P.3d 751 (2005) (quoting In re Marriage of Knies, 96 Wn. App. 243, 248, 979 P.2d 482 (1999)).

For example, this court has granted CR 60(b)(11) "[i]n rare circumstances" when there is "a change in the law." Id. at 380; Shandola, 198 Wn. App. at 892 (this case addressed "a subsequent court decision invalidating the statutory basis of the judgment"). Another example includes correcting the "fundamental[] wrong" of allowing the "voluntary relinquishment of parental rights" in a termination proceeding. In re Marriage of Furrow, 115 Wn. App. 661, 664, 63 P.3d 821 (2003).

In other words, "'[i]rregularities justify vacation [under CR 60(b)(11)] whereas errors of law do not. For the latter the only remedy is by appeal from the judgment.'" Id. at 674 (quoting Philip A. Trautman, Vacation and Correction of Judgments in Washington, 35 WASH. L. REV. 505, 515 (1960)). In short,

Washington courts have held that mere "unfairness" does not rise to the level of CR 60(b)(11). In re Marriage of Yearout, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985).

Here, Hor argues that CR 60(b)(11) relief is warranted as "the evidence does not support that Grant's trial testimony was a routine matter of imperfect memory" and that one "cannot imagine a more fundamental wrong or irregularity in the proceedings than the key witness recanting his testimony on the trial's key issue." This argument fails for two reasons.

First, CR 60(b)(11) relief applies *only* when no other section of CR 60(b) is applicable. Shandola, 198 Wn. App. at 895. In other words, CR 60(b)(11) is not a second chance for arguments presented under another CR 60(b) subsection. As discussed above, Hor has already argued her misconduct and misrepresentation claims at length, which squarely fit under CR 60(b)(4).

Second, it is not apparent how the irregularity here is similar to those enumerated above: there is no substantial change in the law; there is no fundamental right being implicated; and nothing here is "extraneous" to the proceeding, such as an unqualified fact finder. Indeed, at trial, Hor did ask Grant whether he had spoken with the City's counsel prior to his testimony. This line of inquiry was not extraneous to the suit, and perhaps could have revealed alleged bias or lack of credibility, had this line of questioning been further explored.

Finally, Hor's invocation of Henderson v. Thompson, 200 Wn.2d 417, 518 P.3d 1011 (2022), is also unpersuasive. This case held that if "racial bias is a factor in the decision of a judge or jury, that decision does not achieve substantial

justice, and it must be reversed." Id. at 421-22. However, Henderson did not discuss CR 60(b)(11) or even mention CR 60. Even if Henderson addressed CR 60 at any level, systemic biases are not comparable to a single witnesses' alleged regret with his prior testimony, in a trial comprised of numerous other witnesses and voluminous evidence.

For these reasons, we hold CR 60(b)(11) relief is inapplicable.

III. CONCLUSION

We affirm the court's denial of Hor's motion to vacate.

Díaz, J.

WE CONCUR:

Feldman, J.

Coburn, J.

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR KING COUNTY

CHANNARY HOR,

Plaintiff,

v.

CITY OF SEATTLE, *et al*,

Defendants.

No. 10-2-34403-9 SEA

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

THIS MATTER came before the Court on Plaintiff Channary Hor's ("Plaintiff") CR 60 Motion to Vacate Judgment and Order New Trial ("Motion to Vacate"). The Court, having considered all the materials filed by the parties:

1. Plaintiff's CR 60 Motion to Vacate;

2. The Declaration of Colleen Durkin Peterson in Support of Plaintiff's Motion to Vacate, containing these exhibits:

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A. Exhibit A, a true and correct copy of the Declaration of Colleen Durkin Peterson, dated April 5, 2018, with exhibits 1-46 attached.

B. Exhibit B, a true and correct copy of the court transcript from the November 30, 2018, hearing.

C. Exhibit C, a true and correct copy of the deposition of Anders Estes, dated October 26, 2022, and the video recorded of the deposition;

D. Exhibit D, a true and correct copy of the deposition of Michael Wulff, dated October 11, 2022, and the video recorded of the deposition.

E. Exhibit E, a true and correct copy of the deposition of Svea Pitts, dated September 26, 2022, and the video recorded of the deposition;

F. Exhibit F, a true and correct copy of the deposition of Jeremy Vahle, dated September 23, 2022, and the video recorded of the deposition;

G. Exhibit G, a true and correct copy of the deposition of Michael Zaro, dated October 5, 2022, and the video recorded of the deposition;

H. Exhibit H, a true and correct copy of the deposition of John Unfred, dated September 26, 2022, and the video recorded of the deposition;

I. Exhibit I, a true and correct copy of a flash drive containing the videotaped deposition of Anders Estes, Michael Wulff, Svea Pitts, Jeremy Vahle, Michael Zaro and John Unfred.

3. Defendants' Opposition to Plaintiff's Motion to Vacate and Appendix;

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4. The Declaration of Brenda L. Bannon in Support of Defendants' Opposition to Plaintiff's Motion to Vacate, containing these exhibits:

A. Exhibit A, Animation of May 18, 2006 SPD vehicles following Hor vehicle;

B. Exhibit B, September 23, 2022 marked deposition transcript Vahle;

C. Exhibit C, Video clips September 23, 2022 video deposition Vahle;

D. Exhibit D, September 26, 2022 marked deposition transcript Pitts;

E. Exhibit E, Video clips September 26, 2022 video deposition Pitts;

F. Exhibit F, September 26, 2022 marked deposition transcript Unfred;

G. Exhibit G, video clips September 26, 2022 video deposition Unfred;

H. Exhibit H, October 5, 2022 marked deposition transcript Zaro;

I. Exhibit I, video clips October 5, 2022 video deposition Zaro;

J. Exhibit J, October 11, 2022 marked deposition transcript Wulff;

K. Exhibit K, video clips October 11, 2022 video deposition Wulff;

L. Exhibit L, November 3, 2022 marked deposition transcript Estes;

M. Exhibit M, video clips November 3, 2022 video deposition Estes;

N. Exhibit N, Pierce County Record, re: Anders ("Andy") Estes as "Brady Officer";

O. Exhibit O, City of Lakewood Record, re) Michael Wulff's discipline pre-resignation;

P. Exhibit P, Hor's complete trial testimony transcript;

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Q. Exhibit Q, Van Blaricom's cross examination excerpt;

R. Exhibit R, Hor's attorney's Opening statement;

S. Exhibit S, November 30, 2018 CR 60 Hearing Transcript;

T. Exhibit T, November 30, 2018 CR 60 Hearing Order;

U. Exhibit U, 2019 Declaration Estes, Vahle matter;

V. Exhibit V, miscellaneous testimony Grant, Van Blaricom, Thorp;

W. Defendant's CR 60 Opposition Brief filed November 2, 2018 (Docket No. 653);

X. Declaration of Brenda L. Bannon filed November 2, 2018 and accompanying Exhibits (Docket No. 651); and

Y. Appendices to Defendant's CR 60 Opposition brief filed November 2, 2018 (Docket No. 652).

5. Plaintiff's Reply in Support of her Motion to Vacate, with supporting declaration(s) and exhibit(s), if any.

IT IS NOW HEREBY ORDERED:

The court has considered the entire record and the full spectrum of CR 60(b)(4) and 60(b)(11) grounds anew, and enters the following Findings of Fact and Conclusions of Law:

I. FINDINGS OF FACT

1. The motor vehicle collision that underpins this case occurred on May 18, 2006. The collision occurred after the driver of the vehicle, defendant Omar

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Tammam, fled Seward Park at a high speed following an encounter with Seattle Police Officer Adam Thorp. Seattle Police Officer Aaron Grant observed the encounter and followed Tammam's car. Thorp followed Grant in his patrol vehicle. When Grant found Tammam's vehicle, it had crashed into a rock wall.

2. Plaintiff Channary Hor, a passenger in Tammam's vehicle, was rendered quadriplegic as the result of the crash. Hor filed suit on September 29, 2010, against Tammam, Thorp, Grant, and the City of Seattle. Hor alleged that Grant and Thorp negligently pursued Tammam and caused the crash.

3. Grant signed a declaration dated December 5, 2011, in which he described the circumstances leading to the collision. He testified that after Tammam's vehicle accelerated out of the park, in Grant's direction, he activated his emergency lights, then had to swerve and brake to avoid being hit by Tammam. He then made a three-point turn to leave the park westbound on South Juneau, in the direction he had seen the vehicle go. He lost sight of the vehicle early on but continued to look for it in the neighborhood to the west of Seward Park. He stopped briefly to clear traffic at the intersection of South Juneau and Seward Park Avenue South. He testified that "to the best of [his] recollection" he turned off his emergency lights as he turned left onto Seward Park Avenue South. As he turned, he saw taillights disappearing in the distance, around a bend in the road. He did not know whether they belonged to the suspect vehicle but thought they might. In

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the declaration, Grant denied that he was in "pursuit" (in the technical or "hot pursuit" sense), but rather was continuing his investigation.

4. In the declaration, Grant testified that after he turned to travel southbound on Seward Park Avenue, he did not know where the suspect vehicle had gone. Because he had lost sight of the vehicle, he assumed the driver could not see him. He stated that as a driver approaches South Wilson Street on Seward Park Avenue, the avenue slopes upwards, such that the intersection is obscured from view until it nearly crests the rise, north of the intersection. He stated that as he approached the rise and gained sight of the intersection, he saw a vehicle, which he assumed and later confirmed was the suspect vehicle, that had crashed into a rock retaining wall near the southwest corner of the intersection. He did not see the crash happen. To keep traffic clear from the crash scene and reach the crash site quickly, Grant activated his emergency equipment (lights and siren) and radioed to get a Fire Department medical response. When he reached the vehicle, he found Tammam had somehow extricated himself from the mangled vehicle and fled, leaving Hor, who was severely injured.

5. Grant's deposition in this case was taken by plaintiff's counsel on November 20, 2012. Early in the deposition Grant testified he could not recall whether he turned on his emergency lights or siren. Later, when shown his prior declaration by plaintiff's counsel, he acknowledged he had previously testified that he activated his emergency lights and confirmed that since he wrote the declaration

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a year earlier it would be correct. He further testified, consistent with his declaration, that he had lost sight of Tammam's vehicle. He was "pretty sure [he] didn't see it until [he] actually got up onto Seward Avenue from Juneau." He estimated the vehicle would have been 600 or 700 feet away from that intersection, if not more. Grant's deposition testimony regarding turning off his vehicle's emergency lights was equivocal. He acknowledged stating in his declaration that "to the best of his recollection" he turned off his emergency equipment, but at the time of the deposition he couldn't "testify to that as a matter of fact under oath." He pointed to the passage of time as the reason for his imperfect memory. In the deposition, Grant again denied that he was in "pursuit" of Tammam's vehicle.

6. The jury trial in this case began on June 3, 2013, before Judge Jeffrey Ramsdell. The trial continued until June 27, 2013, when the jury returned its verdict, finding no negligence on the part of the City and its police officers.

7. Grant was called to testify during plaintiff's case on June 17 and 18, 2013. Early in his testimony, under examination by plaintiff's counsel, Grant stated that, "because it was seven years ago, it is hard to remember some things. I remember some things and some things I don't." He testified that when Tammam's car sped by him, he turned his emergency lights on. His siren was not on. At a later point in his testimony, he stated that, about a month earlier, to prepare for trial, he drove through the Seward Park area, and it brought back memories.

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8. Grant was asked by plaintiff's counsel, "You don't have a recollection one way or the other you maintained your lights and sirens on after turning up Seward Park Avenue, correct?" He replied: "After I had, to the best of my recollection, I turned my lights off at that point." This testimony was consistent with the declaration he had signed two and a half years earlier, and with his deposition testimony a year and a half earlier.

9. At the trial, Grant continued to deny he had been in "pursuit" of Tammam's vehicle. He stated: "Yes, I – again, this wasn't a pursuit. This was the car just disappeared. The car was gone. It [sic] was trying to find the darn thing." Grant also testified that, having lost sight of Tammam's car, he drove slowly enough to look down side streets, looking to see if anything had been thrown from a car or had anyone been dropped off.

10. Grant testified that when he reached the scene where Tammam's car had crashed into a rock wall, grievously injuring Hor, he was scared "because of what he saw." Grant thought Hor's injuries were life-threatening. She was crunched up in the front and "mangled," and he saw bones sticking out. She was unable to respond to him. Multiple times he got on the radio and told the fire medics to get there more quickly.

11. During his testimony on direct examination by plaintiff's counsel, Grant was questioned extensively about his prior deposition and declaration

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testimony. Plaintiff's counsel repeatedly challenged Grant's recollection of the circumstances leading to Tammam's collision.

12. When asked whether he could say, "as a matter of fact, that [he] turned off [his] emergency equipment lights," Grant testified: "After going back down to the park and clarifying some things in my memory, I can." When confronted by plaintiff's counsel with his deposition testimony, Grant acknowledged that he had previously testified that he could not recall that "as a matter of fact under oath."

13. In his trial testimony, on cross-examination by counsel for the City of Seattle, Grant essentially confirmed the testimony in his declaration.

14. In his re-direct testimony, plaintiff's counsel asked Grant: "After he turned left on Juneau up Seward Park Avenue, wouldn't you agree sir, that if there is a vehicle ahead of you on that road, before you get to Morgan, they are more likely than not to know that you are coming behind them?" Grant responded: "Yes." In response to subsequent questions, he clarified that whether a vehicle ahead could see or hear a following police vehicle would depend on a variety of factors, including where the first car is, where the driver is looking, and perhaps whether the lead car's radio is on. He also acknowledged that if the driver of the car in front was trying to get away from the following police car, and saw emergency lights and heard a siren, they would likely go faster.

15. Grant's imperfect memories were thoroughly explored in plaintiff's attorney's examination of Grant.

16. The jury asked one question of Grant: "Based on your training and experience with the Seattle Police Department, how is an attempt to locate or an area search different from a vehicle pursuit?" Grant responded: "A pursuit is a chase. An area check is just driving around and looking for a vehicle."

17. The record before this Court shows that plaintiff supported and vigorously argued her claim that Grant had negligently engaged in a technical or hot pursuit of Tammam's vehicle, causing the crash and her severe injuries. Hor testified that the officers engaged in a high-speed chase, causing Tammam to go faster and faster and ultimately to crash. She testified she could see Grant's patrol car's emergency lights and hear its siren as he pursued Tammam, driving close behind. Hor was allowed to testify, over hearsay objections, that Tammam repeatedly muttered words to the effect of "I will stop if they will stop."

18. At trial, the City of Seattle presented testimony from two accident reconstruction experts. *Hor v. City of Seattle*, 189 Wn. App. 1016 (2015) ("*Hor 1*"). Nathan Rose testified he reconstructed the accident to determine the distance between the Cadillac Tammam was driving and the police officers' Crown Victoria patrol cars during the period before the accident. He and his partner, William Neale, measured the roads where the alleged pursuit happened. They also performed detailed tests on the car models involved, including their acceleration

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capacities based on vehicle weights and engine horsepower ((Crown Victoria, 250 hp, 4,800 lbs. & Cadillac, 300 hp, 4,400 lbs.). Rose used data recovered from the Cadillac's "black box" to determine how fast the Cadillac was going in the five seconds before impact.

19. Using this data, Rose and Neale created a computer model to evaluate the witnesses' different versions of events. With the model, Rose varied the speed to determine how it affected the separation distance. Based on the simulations, he concluded "the officers' description is physically possible and reasonable. Ms. Hor's is not." Rose testified the Cadillac's "black box" revealed that it was going 86 miles per hour five seconds before the crash. He testified that given the speed of the Cadillac before impact, the location of the alleged pursuit, and the physical capabilities of the cars, it was "physically impossible for the officers to keep up with the Cadillac."

20. Neale's role in the accident reconstruction involved visualization. He testified that he studied the scene of the accident, taking "a lot of data points[,] photographs, video and a survey of the area." He also compared the scene to photographs from the time of the accident to make sure there were no significant differences. Based on this data, Neale calculated the lines of sight on the roads. Neale then used Rose's simulations to determine the separation between the vehicles during the alleged pursuit. Neale testified that Tammam would not have

been able to see the officers after he turned from Juneau Street to Seward Park Avenue South.

21. Other evidence introduced by the City of Seattle related to Tammam's state of mind – that he was under the influence of the drugs ecstasy and marijuana while driving; that there were warrants out for his arrest; and that he was driving a car reported as stolen. Tammam told an arresting officer he ran from the police because he "had warrants."

22. In his closing arguments[1], counsel for the City of Seattle told the jury "What is unclear are all of the fine details in some respects because memories fade over time…. If someone tells you a perfectly clear story, you should be suspect of it." He said: "We don't know exactly when lights and sirens were on." His closing argument did not mention Grant's testimony regarding when or where he turned on or off his lights and sirens, nor did it focus on Grant's testimony regarding whether he had been in "pursuit" or not. Rather, the City's closing argument focused on the objective evidence (Tammam's car's black box data, measurements of distances, and the physical and performance characteristics of Tammam's vehicle and Grant's and Thorps' police vehicles) and expert opinions based on that data. The City's closing arguments also focused on an objective, contemporaneous record of the incident:

[1] The transcript of the City's closing argument was submitted to the Court by the plaintiff in support of her renewed motion to vacate.

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Officer Thorp's dispatch tape recorded live. On the recording there is no audible siren, no noise suggesting heavy acceleration, no mention of pursuit.

23. On June 28, 2013, the jury returned a verdict finding Tammam responsible for the crash. The jury found no negligence on the part of the City of Seattle.

24. On May 3, 2017, the *Tacoma News Tribune* published an article entitled "Suicidal Lakewood police officer brooded over his testimony in lawsuit, colleagues say." The article reported that Grant committed suicide on April 25, 2017. It stated that Grant had talked with Lakewood Police Chief Mike Zaro and former Lakewood Police Chief Bret Farrar about his job-related stress and about seeking treatment for it. The article further reported that he had told one named Lakewood Police Department officer, Anders Estes, and three unnamed officers that the City's attorneys pressured him into testifying; that his testimony was "untruthful" and that he "believed he lied under pressure to aid" the City's defense and "was troubled by it"; and that this was common knowledge among the department. Hor engaged counsel to further investigate.

25. Hor eventually brought a motion for relief from judgment under CR 60(b)(4) and 60(b)(11). This court denied the admissibility of Grant's post-trial statements offered by Hor and denied the motion, and Hor appealed. The Court of Appeals reversed the decision, and remanded "for the court to consider the CR 60 standards anew," as well as the testimony of witnesses regarding Grant's post-trial

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statements. *Hor v. City of Seattle*, 18 Wash.App.2d 900 (2021) ("*Hor II*"). The appellate decision stated that the court "may, at its discretion, order further discovery to provide a more comprehensive record upon which to base its ruling."

26. On remand, this court granted in part plaintiff's motion for discovery, allowing limited depositions of Anders Estes, Svea Pitts, John Unfred, Michael Zaro, Michael Wulff, and Jeremy Vahle. Those depositions were recorded on video, and the court has reviewed both the videos and the transcripts.

27. Este, formerly a patrol sergeant in the Lakewood Police Department during the time Grant served in the Department, testified in his deposition he first talked with Grant about his testimony in the Hor trial "at least a year" after the trial, during which time a "rumor mill" had been active in the Department about Grant.

28. In his recent deposition, Estes testified that Grant came up to him when they were both on a call; that Grant knew Estes had written to the administration about what he had told others about his testimony in the Hor trial; and that Grant described having been "pressured" by lawyers for the City of Seattle into testifying that he remembered where he turned his lights on during Tammam/Hor incident, and not that he could not remember. Estes also testified that Grant used the term "pursuit" in describing his actions on the night of the incident. Estes described Grant as "very distraught." He was "very concerned about the grievous injuries that happened at the end." Este was the only witness who

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testified that Grant's testimony related to turning his patrol lights on, rather than off.

29. Michael Wulff served with Grant as an officer in the Lakewood Police Department. He testified that he talked with Grant about his testimony in the Hor case before the trial, while they were both on a call. According to Wulff:

> [Grant] did not get into the many details at all about the incident itself. It was just that he was stressed out and nervous about testifying, about going to the trial and going through that. And then he also expressed that he was having some major misgivings and some struggles because he felt like he was being pressured to testify that he didn't have his lights on and he wasn't in pursuit, when he -- his words to me were, "I don't -- I don't remember exact details of when I did what."

30. Wulff testified he told Grant it would be all right to testify that he did not remember. He further testified that after the Hor trial, when he was again on a call with Grant:

> [Grant] initiated another conversation about what occurred, and basically told me that he didn't listen to what we had -- or he didn't listen, or – or it was, "I didn't do the thing that we talked about," and -- and told me that he had allowed himself to be swayed and testified that he was absolutely not in pursuit in any fashion.

31. Like Estes, Wulff testified that Grant was very emotional. He testified that Grant used "language like, I – I betrayed my oath, or the badge, something to that effect."

32. Wulff testified that Grant did not give him any details about the Tammam/Hor incident, and that Wulff did not ask for details. Grant "kept telling

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[Wulff], like, 'There's a lot I don't remember.' Wulff could not recall any discussion with Grant about his patrol lights. He did recall that Grant was "upset when he saw the crash."

33. Estes' and Wulff's testimony is suspect and less than credible. Both officers were under investigation by the Lakewood Police Department about misconduct, dishonesty, and insubordination related to a vehicle pursuit they were both involved in. They were close friends. And they had a motive to detract attention from their own misconduct by alleging and complaining that Grant had engaged in dishonesty and had not been investigated or disciplined. In a June 2017 deposition in an unrelated lawsuit filed against the Lakewood Police Department in 2016, Police Chief Michael Zaro testified that Estes "was known for making Aaron's [Grant's] life miserable by walking around saying Aaron should be fired."

34. Svea Pitts has been Administrative Assistant in the Professional Standards Section of the Lakewood Police Department for 11 years. She testified in her deposition that at some point after the Hor trial, Grant came into her office and told her he "had depression issues, and he said it started after the Seattle case." Grant "just said something about the Seattle prosecutors, and kind of the way they asked the questions, he didn't like the way he answered them. And then [Pitts and Grant] spoke more about just his depression and working through that."

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35. Pitts further testified: "Grant never said that he lied. I think he didn't like the way the questions were phrased to him, to make him answer in a certain way." Grant did not discuss the specifics of his testimony with Pitts.

36. Pitts testified that after his testimony in the Seattle case, "he criticized anything he did that he didn't feel was completely pure of heart and mind. He really just beat himself up about anything. If he walked away with somebody's pen, it was almost -- you know, it wasn't on the up-and-up, so he would beat himself up about it."

37. Pitts had several subsequent discussions with Grant about his depression and what he was doing for his mental health.

38. Pitts gave the following testimony in her deposition:

> Q. Okay. Based upon your discussions with him, why did he feel he was dishonest in the King County case?
>
> A. The way he explained it to me is that he would be asked questions, and when it came to answering them, I don't know if he was told to -- you know, he never said he was told to answer a certain way or that they asked the question in a certain way that made him only reply in a way that he wanted to be more forthcoming. He never said exactly why in that kind of arena. Just that he didn't feel like he got to express himself fully, was more of my understanding of it.

39. Pitts had several subsequent discussions with Grant about his depression and what he was doing for his mental health.

40. Pitts further testified:

> He just really was a -- a good guy. He was -- I hate to say it, but he was -- he was such a good guy that almost so much that he just beat

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himself up about any little thing. And I don't know if he was like that, you know, prior to that or not. It just -- he just beat himself up a lot.

41. Officer Jeremy Vahle also served in the Lakewood Police Department with Grant. Vahle testified as follows in his deposition:

Q. Okay. Tell us, if you would, please, what Aaron Grant said about issues related to the trial Channary Hor versus the City of Seattle that he testified in.

A. So I don't know the specifics of that incident because I wasn't there. It got documented. Time went by. Aaron got hired. It went to the civil case that this is still part of or is, I guess, and during the lead-up to the trial, Aaron didn't have a good memory of that night. Like, I don't specifically remember exact facts, but the prosecution wanted him to say that he remembered exactly where he turned his lights off at.

He then talked to tons of people about it for advice, went to the trial, testified that he remembered whatever it was that he testified to remembering, but then afterwards, he said he remembered something he didn't remember. He felt that that was lying, that he perjured himself on the stand -- dishonored his badge.

He told a lot of people that. He told the administration that. Whatever that conversation was, I don't know, because I was not privy to it. He took some time off to get himself sorted out. Came back to work, and then for the rest of his career, and unfortunately his life, he had problems with it.

42. Vahle's recollection of what Grant told him is inconsistent with some facts of the Tammam/Hor incident. He testified:

Q. And so tell us about what you remember of that conversation with Officer Grant.

A. There was a car, and I think it was right near a park. An officer tried to stop it. It turned into a pursuit, then there was a huge wreck. And I don't remember where Aaron got into the pursuit at, but he

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wasn't the primary officer. Because he said, "Thank goodness I wasn't." And then the wreck, driver got killed; passenger seriously injured.

43. Vahle also testified that: "Aaron thought and felt that he was not honest during his testimony." Vahle further testified: "I don't remember him saying he was pressured, like, somebody made him do it under threat of termination or whatever. But 'I messed up.' He made the choice he made and did something that he wished he hadn't done."

44. Later in his deposition Officer Vahle testified that the "crux" of the issue Grant agonized over regarding his testimony was: "The emergency equipment being shut down -- or not whether or not it was shut down, exactly where it was shut down."

45. Michael Zaro was the Assistant Chief of the Lakewood Police Department when Grant testified in the Hor trial and in the years that followed. In his recent deposition he testified that he could not remember his conversations with Grant about his testimony. However, Zaro had been deposed in 2017 in the unrelated case mentioned above, and in response to questions in that deposition about his interactions with Grant, he testified that Grant had told him he believed he had given false testimony in the Hor trial. However, Zaro did not agree Grant had been dishonest. He testified: "[Grant] not remembering at one point and then remembering later would be – it doesn't mean he lied the first time."

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46. In the same 2017 deposition, Zaro testified he told Grant: "[W]ell, Chief Farrar and I both told him that was -- that, you know, he got browbeat by a civil attorney into agreeing that, you know, something could have happened here, that's not uncommon, and that it wasn't for him to worry about to the extent that he was worrying."

47. In his deposition Zaro was also asked about 2017 deposition testimony regarding his decision (after he became Chief of the Department) to treat Grant's suicide as a line of duty death. He testified in that 2017 deposition:

> I believe there is a lot of things related to that incident that could have contributed beyond just his interactions with the attorneys. There is the pursuit to begin with, where a 16-year-old girl was paralyzed. That's a lot to -- that's a lot to deal with…. [H]is internalizing of that was – seemed irrational, which is why I think there was more to it than what -- than just that interaction with the attorneys.

48. Zaro testified at his recent deposition he had several conversations with Grant about Grant's anxiety and how he was dealing with it. The anxiety was generalized; it was not limited to anxiety over his testimony in the Hor trial. However, he acknowledged that he had not testified to such generalized anxiety in 2017.

49. John Unfred was a sergeant with the Lakewood Department in the timeframe of Grant's testimony in the Hor case. In his recent deposition, he testified that "What [he] recalled is that Grant was a Seattle police officer, attempted to stop a vehicle. It fled. He either terminated or didn't pursue. The vehicle crashed. The

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driver was injured, and there was a lawsuit." Unfred had no recollection of when he talked with Grant about the case.

50. Unfred talked with Grant on more than one occasion about Grant's testimony in the Hor trial, but he could not recall the dates or details of those conversations. He recalled this much: "I know Officer Grant told me he was troubled by his testimony at some point in the original case, about his truthfulness."

51. In his recent deposition, Unfred was questioned about testimony he gave in 2018 deposition in a case brought by Vahle against the City of Lakewood. He reviewed and avowed that testimony. The testimony was read as follows:

> Question: "Did he say that he felt like he was not honest and forthcoming?" Answer from you: "He said he was conflicted about it." Question: "What did he say to you?" Answer from you: "I don't recall exactly. Conversations in passing. I don't know all the details of the case. I know he felt bad because a young man had died in a pursuit, and then he had given testimony, and he was kind of second-guessing himself on whether he testified accurately or not."

52. In his 2018 deposition testimony in the Vahle's case, Unfred testified that Grant "never said that he lied." He was "conflicted" about the truthfulness of his testimony and "was second guessing himself." Unfred could not recall Grant's words, but his recollection of the event Grant described was that he "either terminated or didn't pursue."

53. The testimony of these six of Grant's former colleagues describes a deeply troubled man. Grant's anxiety and depression had roots in the Tammam/Hor incident and his testimony in the Hor trial. However, it does not appear that

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Grant's testimony at the trial was false or dishonest. Grant seems to have been irrationally fixated on his testimony about when and where he turned his emergency lights off. His trial testimony had revealed that his memory on that issue was unclear. His subsequent tortured ruminations about that testimony do not show that he had been dishonest.

54. The six witnesses recently deposed offered no testimony suggesting that Grant was conflicted about his trial testimony about several key facts:

- the need to turn his car completely around before he could leave Seward Park;
- briefly stopping at the STOP sign at Seward Park Avenue before turning left;
- where he last saw Tammam's Cadillac leaving the park;
- where he last saw taillights in the distance;
- that he drove slowly enough to look down side streets;
- that he did not see the crash occur; or
- what he later relayed over the radio to SPD dispatch.

55. Whether or not Grant and Thorp engaged in a negligent pursuit was the ultimate issue for the jury to decide, based on all the facts and circumstances. The issue of whether Grant and Thorp engaged in a negligent "hot pursuit" was complex and multifaceted – it encompassed many facts and circumstances, such as the physical characteristics and performance capabilities of the respective vehicles,

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relative speeds of the vehicles, whether lights and sirens were activated, and whether emergency lights would have been visible given the topography and layout of the streets and the distance between cars.

56. The testimony of some of the six witnesses about Grant's use of the term "pursuit" in his conversations with them about the Tammam/Hor incident is not reliable evidence to support plaintiff's motion to vacate. The references to "pursuit" are inconsistent, vague, and – as plaintiff uses them in her briefing – conclusory. The witnesses' testimony about Grant's "pursuit" cannot reliably support plaintiff's contention that Grant lied or committed perjury at the Hor trial. Here again, the totality of all the facts and circumstances found in the trial record is much more important than a loose use of the term "pursuit."

57. The emergency lights issue was not particularly significant in light of all the other facts and circumstances of the entire incident, especially the facts and circumstances that the jury could check against contemporaneous, objective, physical, and undisputed evidence, such as the recording of Thorp's dispatch call; the topography of the hill and layout of the streets traversed by Tammam's, Grant's, and Thorp's vehicles; the data extracted from the "black box" in Tammam's vehicle; the physical characteristics and performance capabilities of the respective vehicles; the undisputed evidence that Grant did not see the collision occur; and the uncontroverted evidence that Tammam had extricated himself from his mangled car and flee on foot before Grant arrived, which would have taken some time.

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58. Hor's grievous injury as a result of the Tammam incident was tragic. Grant's suicide, eleven years after the incident, and four years after the Hor trial, was also tragic. The evidence shows that Grant was traumatized by the horrific scene of the collision and the gruesome injuries Hor suffered. It is likely that Grant's testimony at the trial retraumatized him, and that trauma, and likely other demons, haunted Grant to his death.

II. CONCLUSIONS OF LAW

1. "Under CR 60(b)(4), a trial court may vacate a judgment that was procured by fraud, misrepresentation, or misconduct." *Hor II*, 18 Wn. App. 2d at 911-12. "Perjury is just one means by which 'fraud, misrepresentation, or other misconduct' might occur." *Id.* at 912 (quoting CR 60(b)(4)). Perjury, "misconduct or misrepresentation need not be intentional" to warrant relief from judgment, "but may be merely careless." *Id.* (citing and quoting *Peoples State Bank v. Hickey*, 55 Wn. App. 367, 371 (1989) ("The effect is the same whether the misrepresentation was innocent, the result of carelessness, or deliberate.").

2. There are two requirements for relief under CR 60(b)(4). The movant "'must establish the fraud, misrepresentation, or other misconduct' by clear and convincing evidence." Id. "Clear and convincing evidence" is evidence showing that a fact is "highly probable." *In re Vulnerable Adult Prot. Order for Winter*, 12 Wn. App. 2d 815, 830 (2020). Because "'[t]he rule is aimed at judgments unfairly obtained, not factually incorrect judgments," *Hor II*, 18 Wn. App. 2d at 912 (internal

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quotations omitted), the movant also must establish that "[t]he fraudulent conduct or misrepresentation . . . cause[d] the entry of the judgment such that the losing party was prevented from fully and fairly presenting its case or defense" in that the perjury, fraud, or other misconduct was "of controlling importance as to the determination of liability." *Id.* (alteration in original) (internal quotations omitted).

3. Hor has not established fraud, misrepresentation, or other misconduct by clear and convincing evidence.

4. The issue of when and where – or even whether – Grant turned on or off his emergency lights was not of controlling importance as to the determination of liability in the Hor trial.

5. There is no evidence that any defendant or their counsel engaged in willful or deliberate discovery violations or other misconduct.

6. Hor was not prevented from fully and fairly presenting her case.

7. Plaintiff also seeks relief under CR 60(b)(11). CR 60(b)(11) is a "catchall provision intended to serve the ends of justice in extraordinary circumstances that are not covered by other sections of CR 60(b)." *Union Bank, N.A. v. Vanderhoek Associates, LLC*, 191 Wn. App. 836, 844 (2015).

8. Plaintiff has not shown "extraordinary circumstances" that would justify relief from judgment. Grant did not "recant" his testimony, as contended by plaintiff. Rather, he was conflicted and irrationally beat himself up over his memory of the details of the incident. The vulnerability of Grant's memory was thoroughly

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explored in his trial testimony. That his memory was imperfect was hardly extraordinary, since the trial occurred seven years after the incident at issue.

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III. ORDER

Plaintiff's Motion to Vacate is DENIED.

DATED this 3rd day of February, 2023.

Electronic signature appended.

_____

Michael R. Scott
King County Superior Court Judge

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Document Title:	ORDER RE MOTION TO VACATE
Signed By:	Michael R. Scott
Date:	February 03, 2023

Judge: Michael R. Scott

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APPENDIX 053

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHANNARY HOR, individually, Appellant, v. THE CITY OF SEATTLE, a Washington Municipal Corporation, Respondent, AARON GRANT, ADAM THORP, and OMAR TAMMAM, Defendants.	No. 85018-1-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Channary Hor, filed a motion for reconsideration of the opinion filed on October 7, 2024, in the above case. A majority of the panel has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Díaz, J.

Judge

PFAU COCHRAN VERTETIS AMALA, PLLC

December 23, 2024 - 2:23 PM

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