

NO. 82304-3-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

MICHELLE EBERT and JASON BRUERS,

Appellants-Cross Respondents,

v.

DAGMAR von HEYDT,

Respondent-Cross Appellant

**REPLY BRIEF OF RESPONDENT-CROSS APPELLANT
von HEYDT**

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I. INTRODUCTION

The most telling feature about Michelle's reply brief is not its extraordinary length. It is not its continuing perseverance about why Michelle is right and Dagmar is wrong. It is not its off-putting suggestions that the jurors were gullible fools, unable to distinguish sympathy from truth. It is its complete failure to even mention *Coogan v. Borg-Warner Morse, Tec, Inc., et al.*, 197 Wn.2d 799, 490 P.3d 300 (2021). That is no surprise. For if one reads and adheres to *Coogan*---which speaks of the reverence jurors and their decisions deserve--- none of the rest of what Michelle argues should alter what the jury rightfully decided.

Trial by jury is the bedrock of our justice system. We trust juries to render verdicts based on their assessment of the evidence according to the law as instructed by the trial court. Appellate review is appropriately limited, serving as a backstop to ensure trials are conducted fairly, the law is applied correctly, and the verdict is within the bounds of justice.

Coogan, at 800.

The belittlement and scorn appellants heap on the jury ignores the stature the law grants juries.¹ It ignores the sacrifice and hard work this jury willingly gave to do its job. And it ignores the simple fact that when the jury was called upon to

¹ “The only reasonable conclusion which can be drawn from Dagmar’s and the jury’s conduct is that they do not care about truth, honesty or justice, but just about money. Dagmar wanted to get money and the jury wanted to give her money. So the jury gave her money.” RB 2-3; “A highly likely explanation for the verdicts is that the jury wanted to give the 78-year-old Dagmar a nice retirement income, despite what the facts were. While the jury has a lot of latitude, it cannot simply disregard the jury instructions and award money to an elderly claimant to provide what it considers is a decent retirement package.” RB 3; “But the jury did not care about the evidence and awarded \$150,000 in damages on the outrage claim, even though Dagmar’s attorney did not bother to mention outrage or emotional distress in his final argument.” RB 5-6; “With her life expectancy of ten plus years, that would give her an income of about \$70,000 per year, if she spent ten percent of it per year or earned ten percent per year. That would certainly ease her impecunious situation and allow her to go off food stamps. The jury probably felt good about giving Dagmar the money, too, especially at Christmas. It did not matter what the jury instructions said or whether there was substantial evidence admitted at trial to support their verdict.” RB 153; “It is clear from the foregoing that the jury was not a “careful” jury, in that its various verdicts were not logically consistent and did not give due consideration to the crucial element of proximate cause necessary to all the claims.” RB 172;

decide what was truth it decided that what Michelle offered was not truth, not worthy of reliance, and just plain not worthy. Nothing that occurred during the trial warrants undoing what the jury has done.

Coogan did not create new law. Respect for the role of the jury in our civil justice system is rooted in Washington's constitution, which grants juries “the ultimate power to weigh the evidence and determine the facts—and the amount of damages in a particular case is an ultimate fact.” *James v. Robeck*, 79 Wash.2d 864, 869, 490 P.2d 878 (1971) (citing WASH. CONST. Art. I, § 21). When not decrying the liability decisions of the jury, Michelle complains about the amounts awarded, relying on inappropriate speculation and numerical confabulation about the jury’s deliberations and decisions. We cannot invade, or know, the workings of the collective minds of this jury.

“Because the determination of the amount of damages ... is primarily and peculiarly within the province of the jury ... courts should be and are

reluctant to interfere with the conclusion of the jury when fairly made. *Bingaman v. Grays Harbor Community Hospital*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985) (citing *Baxter*, 65 Wash.2d at 438, 397 P.2d 857). We strongly presume the jury's verdict is correct. *Bunch*, 155 Wash.2d at 179, 116 P.3d 381 (citing *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 654, 771 P.2d 711 (1989)).”

Coogan, 197 Wn.2d at 810.

Where substantial evidence is introduced to support plaintiff's claims, trial court evidentiary rulings fall within the bounds of judicial discretion, and instructions relate the applicable law for use by the jury, the jury truly has the last word. Given “our declared reluctance to interfere with the decision of a jury, it should be and indeed is the rare case where [courts] should substitute our judgment for that of the jury.” *Washburn v. Beatt Equipment Company*, 120 Wn.2d 246, 278, 840 P.2d 860 (1992). This is as it should be. So much occurs during presentations to the jury at trial which is not present in the written record that appellate courts necessarily can never have the view the trial court and the jury did. For appellate courts “can review

only the written record, while the factfinder and the trial judge [a]re in the favored position of being able to evaluate the full range of evidence submitted.” *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wash.2d 15, 33, 864 P.2d 921 (1993) (citing *Washburn*, 120 Wash.2d at 268, 840 P.2d 860).

The *Coogan* court reminded of why appellate courts defer to the conclusions of trial courts in this way:

“The judge before whom the cause was tried heard the testimony, observed the appearance and bearing of the witnesses and their manner of testifying, and was much better qualified to pass upon the credibility and weight of their testimony than this court can be. *There are many comparatively trifling appearances and incidents, lights and shadows, which are not preserved in the record, which may well have affected the mind of the judge as well as the jury in forming opinions of the weight of the evidence, the character and credibility of the witnesses, and of the very right and justice of the case.* These considerations cannot be ignored in determining whether the judge exercised a reasonable discretion or abused his discretion in granting or refusing a motion for a new trial. *Coppo*, 35 Wash.2d at 124, 217 P.2d 294 (quoting *McLimans v. City of Lancaster*, 57 Wis. 297, 299, 15 N.W. 194 (1883)).”

Coogan, 197 Wn.2d at 816 (emphasis in original).

It is particularly important to recall these principles for, when reading Michelle's reply brief the words 'truth' and 'justice' and 'fairness'---sprinkled throughout---are never used to describe what the jury's decisions advanced. They are only used to suggest none of those goals were met. These attacks are not appropriate, fair, or in furtherance of justice: the jury listened, and decided. Michelle's fevered adherence to the same contentions about 'what happened'---the very contentions which precipitated this contest---although not surprising, do disregard the principles which underlie this system.

In deciding the many pretrial and trial matters, motions, evidentiary matters, in selecting jury instructions, in denying remittitur and denying a new trial, the trial court enjoys layers of protection from after-the-fact complaints. Appellate courts review trial court decisions for a manifest abuse of discretion, while deferring to the jury's constitutional role as ultimate fact finder. "Apart from answering questions of law and reviewing the trial court's discretionary rulings for any manifest abuse of

discretion, appellate courts will not substitute their own judgment for that of the trial court or jury.” *Coogan*, 197 Wn.2d at 799. Denial of a motion for a new trial further protects this verdict. *See Washburn*, 120 Wash.2d at 271, 840 P.2d 860 (“The verdict is strengthened by denial of a new trial by the trial court.” (citing *Seaboard Coast Line*, 294 Ala. at 733, 321 So.2d 202)). Months of study and multi-hundred page briefs should not result in disturbing the trial court's rulings and the jury's verdict unless “ ‘no reasonable person would take the view adopted by the trial court.’ ” *Gilmore v. Jefferson County Public Transportation Benefit Area*, 190 Wash.2d 483, 494, 415 P.3d 212 (2019)(internal quotation marks omitted) (quoting *Salgado-Mendoza*, 189 Wash.2d at 427, 403 P.3d 45).

“These compounding layers of deference effectively limit the ability of an appellate court to overturn a verdict supported by substantial evidence to one scenario: when the only reasonable view is that something other than the evidence at trial unmistakably caused the jury's verdict. More intrusive appellate review risks encroaching on the jury's prerogative to weigh the evidence and decide the facts, including the award of damages. *See Washburn*, 120 Wash.2d at 269, 840 P.2d 860 (“Given the foregoing

constitutional principle ... [that the jury is the ultimate fact finder], appellate review is most narrow and restrained—the appellate court ‘rarely exercises this power.’ ” (quoting *Bingaman*, 103 Wash.2d at 835, 699 P.2d 1230)).”

Coogan, 197 Wn.2d 815-816.

II. ARGUMENT²

A. Applicable Standards Applied Post-Trial

1. Substantial Evidence and Judicial Discretion

² A brief comment on the purported length of Michelle’s reply brief is indicated. Though this Court allowed Michelle to file an overlength brief – its order permitted a brief 258% of the length allowed under the applicable rules -- Michelle’s brief was actually 36,206 words, which is 302% of the allowable length of 12,000 words. If one adds the 8,231 words contained in the three, improper appendices (which are the subject of a separate motion to strike), the brief contained 44,437 words, which is 370% of the usual word limit for an appellant’s reply brief. In order to ascertain the true length of the brief, despite the certification filed by counsel, we converted the .pdf of Michelle’s reply brief (minus the cover page, tables, signature block, and appendices) into a .rtf file, which provides a word count, just like a normal Word document. The result was 36,206 words, which was 4,446 words greater than what was ‘certified’. To check the accuracy of this test, we took Dagmar’s .pdf reply brief (minus the cover page, tables and signature block) and converted it to a .rtf file. Dagmar certified her brief totaled 25,600 words; in the .rtf file the word count was 25,542, which is 99.77% of the word count certified by Dagmar.

Nothing has changed in the past century regarding what is required to sustain factual findings made by the jury. An appellate court will not overturn a factual determination by the jury as long as there is substantial evidence to support the verdict. *Meador v. Northwestern Gas & Elec. Co.*, 55 Wn.2d 47, 50, 103 P. 1107 (1909). “Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050 (1987).

As to each of plaintiff’s claims, the trial court found that substantial evidence supported them. Michelle suggests that a jury which worked with 66 pages of instructions, and 26 special verdict questions over 8 pages---but found against Jason on a single fraud claim, a result which Dagmar agrees should be corrected---went so far afield as to warrant a new trial; it’s work was for naught. The trial court’s post-trial rulings are precisely

the sort of matters which fully fall within the trial court's discretion. It watched and listened, and exercised its discretion and denied Michelle's post-trial motion for a new trial and/or for remittitur.

Concerning evidentiary rulings, the court's bounding of witness testimony, final choice of jury instructions, and rulings on motions for new trial and/or remittitur, "[T]his court will not reverse trial court rulings in these areas unless we see a clear abuse of discretion. See, e.g., *Gardner v. Malone*, 60 Wn.2d 836, 376 P.2d 651 (1962)(juror misconduct); *Braack v. Bailey*, 32 Wn.2d 60, 62, 200 P.2d 525 (1946)(cumulative testimony) *Maehren v. Seattle*, 92 Wn.2d 480, 488, 599 P.2d 1255 (1979)(admission or refusal of testimony)." *Sofie v. Fibreboard*, 112 Wn.2d 636, 668, 771 P.2d 711 (1989).

2. Decision Denying Request for New Trial

New trials may be granted when "there is no evidence or reasonable inference from the evidence to justify the verdict." *Coogan*, 197 Wn.2d at 812-813. The prevailing party at trial

retains the trial result if that result is within the range of substantial evidence in the record which the jury is entitled to believe. Inferences matter because they permit a jury to not only hear, but to interpret, evidence in the manner they see fit. That is particularly so in a case where circumstantial evidence was oft used to confront Michelle's denials. So what defendants claim was an impossible result was not one in the trial court's view. "This deference requires courts to presume that the jury resolved every conflict and drew every reasonable inference in favor of the prevailing party." *Coogan, Id.*

Although Michelle makes much of her claims of alleged evidentiary error, the trial actually centered on the testimony of Dagmar and Michelle. No other witnesses and no other evidence dominated so much as the time spent testifying by these two party witnesses. More than 70% of the total witness testimony time in trial featured either Michelle, or Dagmar, testifying. Of the 11 days during which testimony was taken, Michelle either testified on direct or cross for 4.5 days, and Dagmar testified

either on direct or cross on 3.5 days. It seems obvious from this that the jury's ultimate decisions largely came down to who it believed. It did not believe Michelle.

“[W]ith regard to remittitur, not only is this matter within the trial judge's discretion, but the judge must, under our state constitution, give great deference to the jury's finding of fact, including the determination of damages.” See, e.g., *Bingaman v. Grays Harbor Community Hospital*, 103 Wash.2d 831, 835, 699 P.2d 1230 (1985). “Because the trial judge in the present case did not come close to abusing his discretion, petitioner's arguments here are without merit.” *Sofie*, 112 Wn. 2d at 667.

3. Jury Instructions

This trial was trying for all. It was trying for a trial court which was conducting one of the first completely remote Zoom jury trials in county history. It was trying for witnesses and jurors who could not have experienced anything similar before. It was trying to simply endure the technical glitches and halts which occurred whenever a witness, one of the 16 jurors, the

judge, or counsel was temporarily lost from Zoom contact. All strived to endure and all of the witness testimony and all of the proof needed for the jury to decide was presented.

Jury instructions are sufficient if they (1) permit the party to argue his or her theory of the case; (2) are not misleading; and (3) when read as a whole, correctly inform the jury of the applicable law. *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 862 (1995).

The trial court has considerable discretion regarding the wording of the instructions and how many instructions are necessary to present each litigant's theories fairly, and review of these matters is conducted using the abuse of discretion standard. *State v. Reay*, 61 Wn.App. 141, 146-47, 810 P.2d 512, review denied, 117 Wn.2d 1012, 816 P.2d 1225 (1991). Review of claimed errors is *de novo*. *Hue*, 127 Wn.2d at 92, 896 P.2d 682.

B. Counterstatement of Facts

Despite Michelle's protestations, all parties presented the cases they wanted to present, introduced the exhibits they

wished, and obtained the jury instructions needed to argue their theory of the case. To be sure, no party was allowed to ask every question or submit every document it desired. Given the limits of the exceptions defendants made to the court's instructions, the instructional issues raised are minimal, and will be addressed further below.

At trial, and on appeal, defendants strive to silo events which, in many cases, plaintiff showed---and the jury agreed--- did not stand in isolation at all but were linked to an overall plan and scheme as Dagmar testified, "the whole thing went together – the selling of the condo, putting the liquor license in my name – it all came one after the other, yes." RP 882. Dagmar's journey with Michelle began in earnest when Dagmar allowed \$15,000.00 to be phone transferred by Michelle out of her bank account and into Michelle's personal account in February, 2014. Ex. 143, p. 7. Dagmar testified as much. RP 2280. That transfer was soon followed by \$90,000.00 Dagmar received on February 28, 2014 into a US Bank account, No. 3804, which she jointly

held with Michelle. Ex. 2, p. 4; Ex. 101, p. 11. On March 6, 2014 Dagmar moved the \$90,000.00 into a “Dagmar Only” US Bank account No. 4079. Ex. 143, p. 7.

As for why she made the transfer of the \$90,000.00, the reason was not in any way to demonstrate her ‘independence’ from Michelle, as posited by Michelle in her reply brief. Just the opposite. Rather, Dagmar testified that Michelle told her not to spend the money because “we need to show that to the WSLCB.” RP 736-737. Indeed, by the time the WSLCB investigator did his interviews and filed his report dated May 1, 2014, the \$100,000.00 cost of the bar buildout was referenced, and the source of that buildout money was in Dagmar’s US Bank account. Ex. 6, p. 35-36. On May 6, 2014, Dagmar signed a WSLCB “outline of costs” form, under penalty of perjury, verifying that cost estimate and confirming she had those funds in her US Bank account. Ex. 10, p. 68-69. As of April 14, 2014 Dagmar *did* have \$102,000.00 in her US Bank account. Ex. 1, p. 2. The account held that much *precisely because Dagmar moved*

the \$90,000.00 there at Michelle's direction to support this requirement of the WSLCB licensing process. Ex. 2, p. 6 (showing March 6, 2014 transfer of \$90,000.00 from joint account No. 3804, into a "Dagmar only" US Bank account, No. 4079).

The particulars of the above-described money transfers fully support Dagmar's narrative of how her undertakings with Michelle began. Her testimony is believable. Her testimony is corroborated by documents given to the WSLCB which were prepared by lawyers hired by Michelle. That an applicant actually must have the money in the bank they claim to have is a requirement of the WSLCB liquor licensing procedure, as is telling the WSLCB the truth, as confirmed by the WSLCB representative at trial. RP 622, 641.

Some appreciation for why a jury might disbelieve Michelle---as to many of the events she testified about in the case---can be gained by examining just how she damaged her own credibility. For example, Michelle testified that Dagmar

was 'repaying a loan,' with the \$15,000.00 February, 2014 transfer. RP 2081. The importance of this denial to Michelle, of course, was that left unchallenged the \$15,000.00 bank transfer actually represented the start of the agreed venture with Dagmar. So, to repudiate that any business plan ever existed with Dagmar at all Michelle, in Dagmar's view, simply made up the claim that the money was Dagmar's repayment of a prior loan. But other than the words from her mouth, Michelle produced no evidence that such a loan to Dagmar ever existed. There was no documentation introduced showing Michelle giving Dagmar \$15,000.00 in the past. There was no promissory note produced. And there was never any explanation given for why, allegedly, the 'loan repayment' was made by Michelle telephone transferring money from Dagmar's account into her own.

This absence of documentation stands in contrast to Michelle's introduction of an extensive trove of Dagmar's financial documents. Surely, having accessed years' worth of Dagmar's financial records Michelle could have produced

evidence to show that Dagmar had received \$15,000.00 from her in the past. One reasonable inference from the lack of such evidence is that the claimed ‘past loan’ story was just that, a story. Dagmar expressly testified that there was no loan. RP 2281.

Regarding the \$90,000.00, Michelle now argues that Dagmar’s transfer of the money from a joint account into a “Dagmar only” account was evidence that Dagmar was not susceptible to Michelle’s influence. RB 30, fn 15. A different interpretation is that Dagmar was carrying out the exact instructions she received from Michelle, in furtherance of the plan to get a liquor license while being able to show the WSLCB money in the account sufficient to pay for the bar’s build out expense. This latter interpretation had chronological credibility (the money moved on March 9, 2014; Michelle hired WSLCB counsel on March 17, 2014. Ex. 3; the application was first made in April, 2014, Ex. 6). It had the support of Dagmar’s direct testimony. And it married to *Dagmar’s* need to show funds

sufficient to support *Dagmar's* liquor license application. Of course, ultimately the money remaining from the \$90,000.00 was deposited into BOA account no. 1789, the joint account Dagmar held with Michelle where all of Dagmar's money remained until her removal of the entire \$129,000.00 balance on January 12, 2017. Ex. 29, p. 205-206; Ex. 30, p. 211; RP 772-773; RP 949-950.

Yet Michelle's trial testimony treated the \$90,000.00 like it was plutonium:

Q. Did you know that she had \$90,000 that had been loaned out and which is a loan she purchased from you and your ex-husband?.

A. That would be incorrect.

Q. You did not know that?

A. That is---that would be incorrect, what you're saying is full of that---some story that you guys concocted up after the fact.

RP 522-523.

Q. And the \$90,000, which has been branded as suspicious came in on repayment of a loan to your mother in February of 2014. Did you know about that in February of '14?

A. I did not know and we still don't know about it.

RP 211.

As seen, Michelle first challenged whether the \$90,000.00 even existed. She then claimed that documents showing her involvement with it were 'forgeries.' ("This is not my signature. That document is a forgery. I just find that all of your documents that you have here are forgeries and frauds. And that is not my signature." Ex 65; RP 2152, 2155-56. She suggested her ex-husband David Ebert had concealed an agreement—to which she was a party—from her: "I had no idea David was doing something like this." RP 2152. But the documents prove the transaction was a very real and executed assignment of loan rights. The assignment was done in furtherance of Dagmar's

purchase of the loan position from David and Michelle Ebert in 2011.

A jury witnessing this testimony would surely question Michelle's truthfulness: what would any jury make of a witness declaring that the most real of confirmed facts was instead evidence of forgery and fraud? The vigor of Michelle's protestations and her condemnation of Dagmar describing these events evokes Shakespeare's famous lance of a liar: "The lady doth protest too much methinks."

With scorn and fury, Michelle continued apace. In response to Dagmar's testimony that the interlinking events included selling her condo to finance the bar, and moving to a house to be built on her daughter's property, Michelle testified no such agreement had ever been made. RP 273. The lawsuit is frivolous; an extortion exercise. RP 340. Michelle took it further: she claimed to have never even thought about taking any money from her mother until Dagmar's condo sale was a *fait accompli*:

Q. So your testimony is the first time you ever had a

discussion with your mother about her investing any money in the bar is July of 2014, correct?

A. I do believe that that is correct.

RP 187. Even then, she claimed, the money she received was a loan, not an investment, or part of a larger plan. RP 239.

But that testimony required the jury to believe a 70+ plus senior simply sold her condo with no future plans about where to live. It required the jury to conclude that Dagmar's testimony about Michelle promising her a place to live as a part of the package was false. And it further meant that the testimony of Ms. Hill (Dagmar's real estate agent) corroborating that the reason Dagmar listed her condo for sale in early April, 2014 was to go into business with her daughter (RP 1240-1241), and that the similar corroborating testimony of Mr. Gish (the manager of the HOA where Dagmar's sold condo was located) (RP 2011, 2016), both third parties, was fabricated.

After Dagmar's condo was listed and before its sale, Michelle used Dagmar's money to buy the tiny house. Ex. 143,

p. 14. A jury might reasonably conclude that Michelle buying a tiny house, and trucking it to her property and moving her mother into it was in furtherance of the exact plan and agreement which Dagmar described. (Michelle both testified that she used Dagmar's money to purchase a tiny house, and that she never told Dagmar she would supply a home to Dagmar. RP 339-340; RP 528). Indeed, what *else* would explain selling and moving to Michelle's property, in that time frame? And, further corroboration of Dagmar's testimony about being assured a place to live came from Michelle pondering a waterfront house purchase in summer 2016. The house (which Dagmar has argued was proof Michelle introduced evidence about her own wealth, though Michelle complains that financial evidence about her was improperly introduced by Dagmar), featured a cabin on the property where Dagmar could live. A jury certainly could conclude that the promise of a residence in perpetuity not only was made, but that the actions Michelle took two years later were in furtherance of such a promise.

When Dagmar's condo sale house closed in July, 2014, all proceeds went into BOA no. 1789, the new joint account Dagmar held with Michelle. The money did not go into a CD. It did not go into a brokerage account. It did not go toward a new house where Dagmar lived alone. It did not go into an account which Dagmar alone controlled.

As directed by Michelle, Dagmar had the funds placed into a joint account with Michelle where, for all purposes from July, 2014 until mid-January, 2017, Michelle had unimpeded access to the money for any purpose. And, as Dagmar testified, Dagmar never got the statements from the account or had any express knowledge of what was in it. RP 800. True to the understanding she reached with Michelle, Dagmar sold, handed over the proceeds and thought she had a secure financial future by relying on the promises she had been made.

Inherent in Dagmar's actions, and reasonable inferences drawn therefrom, is that she was totally reliant upon the promises Michelle made to her, acted in furtherance of them and followed

instructions due to her total trust in Michelle, and committed to Michelle's plans and goals.

1. *de Facto* Manager Proof

When denying a defense motion for a new trial, the trial court is allowed to consider evidence and 'inferences therefrom.' One inference which could be drawn from the foregoing is that it would be senseless for an elder to begin liquidating and transferring assets to her daughter in the absence of a plan or understanding. Another inference which could be drawn is that the corroborating witnesses (Gish, and Hill) supported a timeline which preceded by months Michelle's claimed 'loan' from condo sale proceeds which were not received until late July, 2014. Those same witnesses corroborated Dagmar's testimony about what she did, why she did it, and when she did it. Another inference which could be drawn from the foregoing is that someone acted as the quarterback. Someone orchestrated these events. Someone seized on a business opportunity, planned how to make it happen, planned how to access more capital, planned

how to obtain a liquor license, and planned to have her mother at the center of it all. That someone was Michelle.

Michelle's efforts to portray Dagmar as a sophisticated businessperson are simply belied by the evidence. Dagmar's best job, ever, was her work as manager at Rick's, a job her son-in-law gave her. Her past work was as a hostess at fancy restaurants (Le Tastevin, Canlis). In fact, Dagmar's 'businessperson' experience in its entirety consisted of receiving a limited partner interest in El Gaucho as part of a divorce settlement with her former husband. Given the smothering control Michelle exercised over all of these events, another inference the jury could draw was that Michelle, not Dagmar, was the quarterback.

Such an inference could readily be drawn from the proof, and from the various witnesses called by Michelle. Those witnesses shared a single common trait: Michelle called the signals, and they did as instructed. The evidence in the trial consistently showed that things happened because Michelle

made them happen. That did not happen by chance, or by dint of plans made by Jason, or Derek, or Zack, or Dylan.

And when these witnesses hewed to a script closely mirroring Michelle's own narrative, the jury's evaluation of their credibility had to include an appreciation about one trait they also shared: they all owed Michelle, had received something of value from Michelle, or were reliant upon Michelle for something: Jason, for his ownership of half a house in Montana; Derek, Dylan and Zack, for the houses they lived in, the jobs they had, and the future benefits (in Derek's case, a house flipping business Michelle was going to open in Los Angeles with him) Michelle could provide; Michelle's commercial real estate broker, Ed Hogan; Michelle's real estate agent, Cheri Westphal; Michelle's repairman, Anthony Crawford; Michelle's second CPA, Thomas Swanson; Michelle's first CPA, Sonya Vasquez; Michelle's Stoel Rives lawyer, Stephanie Meier; Michelle's personal lawyer, Phil Tavel, and; Michelle's business lawyer, Larry Johnson. It is hard to comb this record and find evidence of

actions taken by anyone which were not first originated or orchestrated by Michelle.

Yet Michelle argues that there is ‘no evidence’ to support the claim that Michelle was the *de facto* manager of TDH, LLC, and even argues that Xten Barton was the manager. Xten was removed by Michelle within a month of the bar opening, in Fall, 2014, when she took his 10% stake and gave it to Jason Bruers. Ex. 8, RP 1336-1339. It was obvious to all that Dagmar was not the manager. She did not do or decide anything. She had no involvement with money matters at the bar, had no role in handling or accounting for money, did not receive any accounting statements, and quite literally knew nothing about the bar’s operation and its success, or not. Dagmar was shown to have no idea whether the bar was profitable. (Michelle never showed “mom” any TDH, LLC records. RP 537). There was certainly no proof Dagmar ever knew the bar was unprofitable because Michelle stripped out its profits using excessive rent

charges from MRAE, LLC, and used the bar to pay other expenses which were not appropriately taxed to the bar.

The amount of the excess rental charges MRAE, LLC imposed on TDH, LLC alone exceeded \$300,000.00. The rent called for in the 5 year lease (2014-2019) given to the WSLCB was about \$60,000.00/year, meaning the rent totaled about \$300,000.00 over the period between mid-2014 and mid-2019. Yet Michelle's CPA, Tom Swanson, testified that MRAE, LLC received \$606,000.00 in rent from TDH, LLC. RP 1982. Ex. 137, pp. 3, 5, 7, 13.

And, although Jason facilitated whatever Michelle wanted (e.g., signing a series of lease addenda which highly advantaged MRAE, LLC and disadvantaged TDH, LLC (Ex. 25)), there was no evidence he managed anything. Michelle moved the money in and out of accounts, directed her mother where to move money, decided upon the very idea of opening a bar, hired the contractor, hired the liquor lawyer, engaged her business lawyer, and had an operating agreement and a lease created.

Thereafter, Michelle worried about and handled the taxes. She hired the first CPA Sonya Vasquez (RP 1754) and, when that CPA proved unable, hired Mr. Swanson. RP 1944. She provided the bookkeeping used by the CPAs. RP 1756. Without properly terminating the original TDH, LLC lease (RP 1834-35), in 2015 Michelle just instead leased the property to In the Dog House, LLC. Ex. 24. When that operator didn't work out, she took the property back and again managed the business. Ex. 25. She substantially increased the rent to more than twice the \$5,000 per month called for in the 2014 lease. Ex. 12; Ex. 25; RP 1965-66.

Given Michelle's persistent denials that anything claimed by Dagmar was untrue, the proof of whether Michelle was the *de facto* manager largely came from circumstantial evidence. Michelle's brief seems to suggest that since she did not walk around the bar with a 'manager' name tag on she could not be found to be the manager. But by listening to Michelle's denials while hearing and seeing proof which raised grave doubt about the legitimacy of those denials, the jury could readily infer that

which Michelle would never admit. Michelle would not admit being manager but it was obvious she was the manager. The same dynamic featured prominently throughout the trial.

Few people are credulous enough to believe Michelle's claim that she was not the *de facto* manager of TDH, LLC. As for inferences, it would be reasonable for the jury to infer that Michelle was the *de facto* manager if only because no one else acted in the ways of a manager other than Michelle.

2. Other Conduct Undercutting Michelle's Credibility

One oddity about the case is that until its late stages Dagmar 'forgot' about the \$90,000.00. She had overlooked it entirely in providing information to her lawyers and in discussing the case with same. But when Michelle's counsel, during a deposition just before discovery closed questioned her about the arrival of \$90,000.00 into her joint bank account, she returned home and looked back at old tax records. RP 742-749. She then realized she had literally undersized her claim by \$90,000.00

since those funds truly were a part of what she invested in the bar. Her prior failure to include this sum in her claim initially was remedied in the course of the run up to trial. Ex. 65. Documentation supporting her receipt of the \$90,000.00 loan payoff, and tracing it into BOA account No. 1789, was introduced during the trial. Ex. 143, pp. 11, 14; Ex. 29, pp. 205-206; Ex. 65.

However, the inclusion of the new \$90,000.00 in Dagmar's claims produced a problem for Michelle: she could not provide proof that she had ever paid Dagmar even the amount Dagmar had invested, much less the returns and other benefits she had promised, once the \$90,000.00 was added to the mix. An already existing problem for Michelle was that she had kept no accounting, and had no records to support what she alleged she 'repaid' Dagmar. It was all in her head. RP 555-556.

Proof at trial showed that even after Dagmar took \$129,000.00 from the joint account BOA No. 1789 in January, 2017, Dagmar never recouped all of the \$225,000.00 she

invested. Ex. 59; RP 795. Though Dagmar cannot know how Michelle's trial strategy worked, or developed, it appears Michelle sought to fill this proof gap by claiming to make large cash payments to Dagmar. This appeared to be why Michelle called a series of witnesses to testify they had witnessed Dagmar receiving large sums of cash, or using significant amounts of cash to pay for, respectively, a restaurant meal and a refrigerator. Dylan Bruers, Zack Pirak, and Derek Ebert all so testified. And Michelle testified she gave Dagmar \$80,000.00 in cash in 2015 and 2016. RP 2059.

A close observer of this testimony might wonder about the elderly plaintiff supposedly receiving large sums of cash yet no record existed, anywhere, of sizable cash deposits into Dagmar's personal bank account. If this happened, where did the cash go? And, possessed of this alleged huge trove of cash, why did Dagmar end up buying a new condo with a mortgage which was a monthly burden upon her? RP 780-783. Dagmar's own bank account never showed any significant cash deposits. It just

showed steady deposits of the same \$1,100.00 social security payment and the \$70.00 pension she got as a former restaurant employee. Ex. 2, Ex. 31, pp. 232, 234, 236, 238, 240, 242, 244, 246, 248, 250, 252, 254, 256. The jury had every reason to doubt the truth of Michelle's claims about paying Dagmar cash sums.

In concert with Jason, and just after Dagmar had unwittingly signed the 'gift letter' (thus beginning the period Jason described as when 'all hell broke loose') Michelle engaged in a series of inhuman and cruel acts, the effect of which was to chase Dagmar away from her, the business, the opportunity, the promises, and the money. By the 'gift letter' Michelle had the bar ownership transferred to Jason. Michelle's lawyer, Larry Johnson, prepared the gift letter. Ex. 14; Ex 123; RP 1780, 1839. Mr. Johnson testified Jason Bruers told him to prepare the gift letter. RP 1847. Mr. Bruers testified Michelle "always owned the bar." RP 1370. Michelle testified "it was always my bar." RP 224. "It was my bar." RP 242. "It was always my bar." RP 243. Later, in January, 2020, she gave the bar to her son Zack

and Jason's son Dylan. ("Great opportunity for the boys." RP 438).

3. Outrage Proof

Michelle portrays the actions which support Dagmar's outrage claim, understandably, as mere trifles, annoyances, and inconveniences. This ignores their *ad terrorem* flavor (No heat in winter? When the furnace is rendered unusable next the wood is burned up? No water in a house? Multiple sabotages of gates and locks? Threats of violence to instill fear?), and completely overlooks Michelle's transformation from benefactor and protector to cold, cruel, persecutor. (Michelle: "I have never stolen from my mom. . . I consider myself trustworthy not only to my mother, but that is my integrity." RP 170. Michelle absolutely did nothing to injure, harm or mistreat her mom. RP 539.)

Dagmar captured one of the mental effects of this ongoing campaign---the depravity of which did not only come from the events, but from their repetition, their escalation, and the fear

they instilled about what further harm was next coming---"*I was scared . . because I had no water; I had no heat; and now they're burning the wood. My furniture will be next.*" RP 825. Michelle blithely ignores one of the more important teachings of the cases on outrage, which considers the *relationship* between the parties. It would be no minor matter to endure these events if they came from a stranger. But they came from a once dear, loved and loving, and trusted, daughter. It only hurt more to witness that these real, cruel, and intentional acts came from such a source.

C. Evidentiary Rulings

1. Evidence of David Ebert's Conviction Was Properly Excluded

Although David Ebert is branded a significant witness by Michelle, as noted, all of the witnesses in the case combined constituted less than 30% of the total testimony. More than 70% of the testimony came from Michelle, and Dagmar, alone. The likely purpose of Michelle's efforts to introduce the conviction had little to do with its probative value: our Supreme Court has

cast doubt on that notion. *State v. Jones*, 101 Wn.2d 113, 118-119, 677 P.2d 131 (1984). It was to tarnish or diminish the person of David Ebert, in the hope he would be disbelieved. The trial court correctly excluded conviction information because the conviction in issue was more than ten years old. ER 609(b). The amended judgment which was entered nine years before trial was the product of a clerk's correction of a clerical error in the original judgment. CP 1052. Such a ministerial action does not 'restart' the ten-year clock; that makes no sense. Michelle provides no case support for the proposition that the clock 'restarts' as she contends.

Besides, the jury was well aware Mr. Ebert had been criminally prosecuted. Defense counsel's intentional reference to grand jury testimony about "Rick's being busted by the feds," and testimony about the prohibitions on Mr. Ebert's freedom to work in the strip club industry as a part of the reason for his divorce, made it obvious he had undergone a criminal prosecution. RP 1126-27, 1271-72, 1275, 1285. It would fall

within the common knowledge of the jury that one does not suffer being limited in his or her business activities as a result of a civil suit. The exclusion ruling by the court was within the exercise of its discretion.

2. Exclusion of Proposed Defense Exhibit 130, the Small Claims Court Complaint, Was Proper

This issue, raised with the same vigor as before, should be viewed mindful of the teaching, above, concerning the nuanced view of trial the judge enjoys. Although Michelle contends that her mother apparently initiating a case in small claims court for a \$5,000.00 loan is a pivotal piece of evidence, it was not. The trial judge was already witness to Dagmar's curious financial record-keeping ineptitude, including Dagmar initially 'forgetting' about \$90,000.00, an amount which represented nearly half her net worth. The proof at trial was that Dagmar never received the return of nearly \$70,000.00 in funds invested. Ex. 59, 60, 62. What meaning could the small claims action possibly have? What an uncounseled non-lawyer did to initiate

a small claims suit which was never served, never prosecuted and ultimately dismissed bore nearly nothing on the issues in the case.

Beyond that, without grounding in civil procedure, a jury could never know that a complaint can always be amended, or that the law allows amendment of a claim based upon *the proof at trial*, something most laypersons have no knowledge of or experience with. It is not as if Dagmar was found to have written a letter to a dear friend reporting that she had made a 'loan' to her daughter but would instead describe it as an 'investment' in court in order to advantage herself.

Although unable to produce even the slightest proof that a loan existed (no note, no payment schedule, no interest rate, no due date, no security, and not even a principal amount owed), Michelle, Zack, Dylan, Derek, and Jason all testified that Dagmar described the money owed her as a 'loan.' RP 1370, 1385, 1653-54, 1660, 1684-95. Thus, Michelle introduced

plentiful evidence of Dagmar allegedly describing her money transfers as a loan, and not an investment.

The trial court had to balance the potential for confusion against the probative value of a not very probative civil court filing which went nowhere. This sort of ruling by the trial court falls within its discretion. The ruling excluding Exhibit 130 was not an abuse of discretion.

3. Exclusion of Video, Defense Proposed Exhibit 170

The claim that pictures and videos are usually admissible gives way to the usual evidence tests: that it is relevant evidence, that it provides information of value, and that its probative value outweighs any unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, waste of time or needless presentation of cumulative evidence. ER 403.

The video provides nothing of value. Dagmar barely appears on it. She says nothing. No one is identified. Nothing of substance is presented, at all. In a two-week trial which ran

almost four weeks, the trial court exercised its power to regulate what could be presented. Given the minimal (if not non-existent) ‘value’ of the video its exclusion by the trial court was within its discretion, and there is nothing to suggest that that exercise was an abuse of discretion. As review of it demonstrates, the video was, really, a waste of time.

4. Evidence of Money and Wealth

The case was about money, broken promises, and the denial of money promised. One wonders how Michelle would have Dagmar put on a case involving a business, its success in the face of claims it was not, and the props that business gave to the other businesses controlled by Michelle, MRAE, LLC and K-CAB, LLC. Still, the complaints continue that the only purpose of evidence about wealth and money was to encourage the jury to engage in wealth redistribution out of pity, sympathy, or the Christmas spirit. Aside from demeaning the minds and labors of the jury which decided the case, the complaints rise from the same well of inspiration, no matter where in Michelle’s briefs

one looks: any evidence Michelle didn't like is bad evidence, and should not have been admitted.

As demonstrated already, business, tax, accounting, credit card, and banking records were introduced by both parties. Discussing whether a business claimed to be unprofitable was actually unprofitable requires talking about money, how it was earned, how it was consumed in expenses, and how it made its way to Michelle, whatever the promises made to Dagmar previously.

Michelle introduced the picture of the waterfront home she considered buying, not Dagmar. Any jury, as any adult resident of King County, would readily know that a local waterfront home would be worth seven figures. That Michelle introduced the picture of the home allowed Dagmar to point out that Michelle's purchase criteria included providing a residence on the same property for Dagmar. This 2016 conduct helped prove one of Dagmar's claims, dating to the origination of these events in 2014: that she had been promised a home to live in for the rest of

her days when Michelle induced her to sell her condo and turn over the proceeds to the bar venture.

Michelle seizes upon and criticizes Dagmar's submission of the checks written to MRAE, LLC and to Michelle, personally, in 2020 by Dylan Bruers and Zack Pirak and by the new operator of Kittens, after Michelle took the bar and gave it to her son and Jason's son. Ex. 27, 28. First, that Michelle simply took the bar from Jason and gave it away helped prove Dagmar's overarching point during the trial, which was that Michelle controlled, and managed, virtually every significant event in the case. Second, the checks show that the very bar Michelle loudly claimed was unprofitable, and essentially worthless, was in her mind certainly worth taking and giving to her son and Dylan Bruers, at no cost to them. In fact, Michelle described the bar ending up in the hands of Dylan and Zack as "a great opportunity" for the boys. RP 438. The inference Dagmar invited the jury to draw from this was that Michelle was not likely to give Dylan and Zack something which she either

thought had no value, on its own, or thought had no value in terms of how it contributed to the success of Kittens. This dovetailed with the testimony of Mr. Beail, Dagmar's accounting expert, who discussed why a claimed to be unprofitable bar was, in fact, profitable. It also supported his testimony that opening a bar near a strip club was a smart business move given the synergy of the side-by-side businesses. RP 1399, 1403-06. Having shoved Dagmar aside, Michelle still certainly appreciated the value of keeping an operating and successful bar steps away from the entrance to Kittens.

As these examples show, Dagmar introduced evidence of money and business activity to prove her case, not to create sentiment favoring Dagmar. By miscasting this as improper evidence of wealth, introduced for only that purpose, Michelle overlooks its actual evidentiary purpose: undercutting the claim the bar was valueless, and showing the bias of Michelle's witnesses, Zack and Dylan, who were dependent upon her

beneficence. These are entirely proper evidentiary purposes.

The court acted within its discretion in allowing the evidence.

D. Remaining Legal Issues

1. Summary Introduction

It is not necessary or desirable to replicate the length of Michelle's brief in order to debunk its content. In this section of her reply brief Dagmar addresses the complaints about the LLC Manager breach of fiduciary duty claim, the statutory LLC breach of fiduciary duty claim, the claimed need to file a 'derivative' action in lieu of a suit against Michelle, the solidity of the claim for outrage, and the reason why all of Michelle's efforts to recompute and apportion the jury's damage decisions constitute improper attempts to impeach the verdict.

2. *de facto* Manager Claim Stands

Michelle's attack on this claim addresses the alleged lack of evidence to support it. As discussed above, the trial presentation included a tidal wave of evidence—not only from Dagmar, but from Michelle---concerning the manner and

methods Michelle used to control people, entities, events and money to accomplish her goals. Everyone, Dagmar included, was shown to have acted in accord with directions given by Michelle.

Michelle never argued in her opening brief that a *de facto* manager is not bound by the same principles of law as an official manager. She may not do so now. *In re Kalinowski*, 482 B.R. 334, 337, 342-342 (10 Cir. 2012) involved conduct very similar to Michelle's. There, defendant was significantly involved in decisions of the LLC, including how to direct money it received, and told others he was its *de facto* manager. Michelle, her family members, and her husband, as well as Dagmar, in their obeisance to Michelle acknowledged her status and stature as *de facto* manager of the LLC. The contention that Michelle's claimed 'ownership' of the LLC is not synonymous with her position as its true *de facto* manager requires turning a blind eye to the vast evidence which demonstrated her control over the bar at every

level of its operation. The law, and the substantial evidence presented, fully supports this jury decision.

3. As de facto Manager Michelle Owed Duties to Dagmar

In raising and arguing a defense never raised during trial---that Dagmar had to file a derivative action on behalf of TDH, LLC in order to address Michelle's conduct---Michelle ignores the plain language of RCW 25.15.038(1)(a):³

(1)(a) The only *fiduciary duties that....a manager has to the* limited liability company and its *members are the duties of loyalty and care* under subsections (2) and (3) of this section. (emphasis supplied).

The duties of loyalty and care prohibit the sort of self-dealing in which Michelle engaged: overcharging rent to extract

³ Of course, appellate courts generally refuse to consider arguments like this one which was first raised on appeal. RAP 2.5(a). *Brower v. Pierce County*, 96 Wn.App. 559, 566-67, 984 P.2d 1036 (1999). None of the exceptions to the rule apply here: the court clearly had jurisdiction, ample facts were supplied to support the claim, and there is no basis for a claim that the court committed 'manifest error affecting a constitutional right.' *Id.* Nothing in this case implicated a constitutional right of any party to it.

value from TDH, LLC and divert it to MRAE, LLC, which she alone owned, was only one of the variety of actions Michelle took which violated her statutory duty to Dagmar. She not only wrongfully failed to account for the financial performance of TDH, LLC, she wrongfully diverted its profits to herself. Dagmar had no need to bring a derivative action. Though that defense was tardily asserted by Michelle, it does not matter. The duty was owed to the LLC's members, and Dagmar was an LLC member.

Further, Michelle was proscribed "from engaging in.... intentional misconduct....in the conduct of the limited liability company's activities." Her conduct violated RCW 25.15.038(1)(a) & (3)(a), and the jury was well-based in so concluding. Put more bluntly, over the course of its entire history Michelle treated TDH, LLC as if it were her sole proprietorship, to do with as she pleased, which is exactly how she behaved with regard to the bar, its operations, its profits, its transfer to first Jason and, later, to Dylan Bruers and Zack Pirak. There was

never *any* evidence presented by Michelle that she properly discharged her duties to Dagmar. There couldn't be, because there wasn't any. As far as Michelle was concerned, Dagmar's status as an LLC member was completely ignored.

Michelle persists in arguing a manager's duties are owed only to the LLC, despite the clear statutory language barring her argument, relying on an unpublished court of appeals decision, *Goldberg Family Investment Corp. v. Quigg*, 184 Wn. App. 1019 (#44915-3-II, October 28, 2014). Not only does this reliance run afoul of GR 14.1(a), but the legislature's subsequent amendment of the Limited Partnership Act (upon which *Goldberg* relied) further withers Michelle's argument.

If one compares the 2014 version of the Act, RCW 25.15.370, .375, and .380, with RCW 25.15.386, .391 .396 and .401, the current version of the Act, the legislature both preserved the right of a member to bring a derivative action and, most significantly, *did not preclude* direct action by a member. Thus, the legislature made a deliberate decision *not to adopt* the

language from the Limited Partnership Act on which the *Goldberg* court relied. Under the LLC Act, Dagmar was entitled to bring her direct action against Michelle.

Finally, Michelle's argument that MRAE, LLC's gain from the improperly diverted profits of TDH, LLC did not mean Michelle realized any improper enrichment ignores her duty as a fiduciary; of course, a trustee is a fiduciary:

Thus, a trustee violates his duty if he sells trust property to a firm of which he is a member or to a corporation in which he has a controlling or substantial interest.

Restatement (2d) of Trusts, §170, comment c (emphasis supplied). Michelle solely owned MRAE, LLC. When MRAE, LLC unilaterally increased the rent it charged TDH, LLC, Michelle was the one beneficiary of that action.

4. Dagmar's Common Law Fiduciary Duty Claim Is Proper

Although the trial court relied upon the leading Washington case regarding common law fiduciary duty to make its decisions in response to Michelle's summary judgment

motion, motion for reconsideration, motion for dismissal mid-trial, and motion for new trial and for remittitur, Michelle appears to argue for an interpretation of the law not found in any case since *Liebergesell v. Evans*, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980) was decided. Michelle argued that Dagmar did not have a fiduciary relationship with her and the jury disagreed. This is especially curious since Michelle agreed that she had a very close relationship with Dagmar, previously, and that she was entirely deserving of Dagmar's trust in her. When instructing the jury the court was on solid ground in its reliance on *Liebergesell*:

Fiduciary Relationship. In some circumstances a fiduciary relationship which allows an individual to relax his guard and repose his trust in another may develop. *Moon v. Phipps*, 67 Wash.2d 948, 954, 411 P.2d 157 (1966). The *Restatement of Contracts* describes such a fiduciary relationship as one in which one party "occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for. . . ." *Restatement Contracts* § 472(1)(c); see also *id.* at Comment C (describing the circumstances under which such a "fiduciary position" may arise). Such a fiduciary relationship creating justifiable reliance could be thought to have developed between plaintiff and defendant Kotowski if plaintiff's allegations

regarding the source and extent of her trust in Mr. Kotowski were confirmed at trial.

93 Wn.2d at 889-890.

Deciding if such a relationship exists is quintessentially a jury decision, based upon the facts presented. “Whether such a fiduciary relationship existed in fact in this case depends on the development of factual proof.” 93 Wn.2d at 891. Despite the lack of any supreme court modification of the rule in *Liebergesell*, Michelle labors to argue that Dagmar had an additional proof burden: dependence. Nothing in *Liebergesell* says that is part of the applicable test:

A fiduciary relationship arises as a matter of law between an attorney and his client or a doctor and his patient, for example. But a fiduciary relationship can also arise in fact regardless of the relationship in law between the parties. *Salter v. Heiser*, 36 Wash.2d 536, 550-55, 219 P.2d 574 (1950).

A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered fiduciary in character; e. g., trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient,

attorney and client; or the confidential relationship between persons involved may exist in fact.

McCutcheon v. Brownfield, 2 Wash.App. 348, 356-57, 467 P.2d 868, 874 (1970). See also *Restatement Contracts* § 472 Comment C (“A fiduciary position . . . includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, trusted business adviser, and indeed any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former”).

93 Wn.2d at 890-891. Of note among the examples the court gives of the sorts of relationships which are considered typically fiduciary in nature are doctor/patient, attorney/client, wife/husband, and trustee/beneficiary. All of the examples the court provides reference close relationships and none *require dependence* to exist. None of the cases decided which rely upon *Liebergessell* require a finding of dependence, nor do the jury instructions, nor does the most prominent Washington treatise.

The burden of proof instruction does not require a showing of dependence. 6 *Wash.Prac.*, WPI 107.10 (7th ed.). The elements instruction does not require any proof of ‘dependence.’

29 *Wash.Prac.*, WPI 12:1 (2021-2022 ed.). The verdict form requires no such language. 29 *Wash.Prac.*, WPI 12:3 (2021-2022 ed.). And the treatise's sample set of instructions, involving a corporate officer's alleged abuse of the corporation, does not include any language requiring a finding of dependence upon the officer by the corporation. 29 *Wash.Prac.* WPI 12:13 (2021-2022 ed.).

What Michelle's arguments about the need to show 'dependence' devolve to is her effort to graft a form of proof upon the existing law which does not include any such proof requirement. The court did not err in its multiple decisions denying Michelle's efforts to dismiss the claim, or to overturn the jury's decision regarding this claim.

Finally, this argument was never raised below, and no jury instruction requiring proof of "dependence" was proposed by Michelle. Consideration of this contention should, accordingly, be foreclosed on appeal. *Brower v. Pierce County*, 96 WnApp. 559, 566-67, 984 P.2d 1036 (1999).

5. The Jury Properly Considered and Decided Dagmar's Outrage Claim

In a series of wanton, needless and cruel acts, during the period after January 15, 2017 which Jason Bruers describes as “when all hell broke loose,” Michelle and Jason terrorized and mentally beat down Dagmar. She was alone, fearful, and sad. Her fear did not confine itself to the immediate harm being imposed. It extended to whatever defendants planned to do to her in the future: “I was scared. . . because I had no water; I had no head; and now they are burning the wood. *My furniture will be next.*” RP 825. She suffered from these events up to and including the time of trial, when she referred to the ongoing need to seek support from her friends. “I have two really good friends and they come over and – and calmed me down and say things are going to get better.” RP 1124. Yet defendants argue that not enough tears were shed, and not enough distress was felt, and the awfulness of it all was just not awful enough.

Michelle then sets about comparing the harm done to other plaintiffs in other appellate cases discussing outrage, then applies minimization language to the events in this case (‘name calling’, ‘insults’, ‘indignities’, ‘annoyances’, and ‘petty oppressions’, RB 97), then relies upon a *Restatement* section never adopted in Washington to argue the jury never should have received the outrage case. The trial court properly allowed the outrage claim to be jury decided, and the jury performed its fact-finding function in determining that the conduct of defendants met the legal requirements for outrage.

Viewing Michelle’s mix and match of her carefully culled collection of prior outrage cases brings to mind the teaching of the Supreme Court in *Washburn*, 120 Wn.2d 246, 840 P.2d 860 (1993). Defendant there first argued that the jury’s multi-million dollar award could not be sustained because since 1987 “general damage awards in excess of \$1 million have almost exclusively been awarded to infants or young adults who suffer catastrophic injuries so terrible that their ability to function in this world will

be severely and permanently compromised.” 120 Wn.2d at 266.

The *Washburn* court ably demolishes this line of reasoning, in language applicable here:

“[T]his theory is inimical to the foundation of particularized justice. Defendant would consign damages for personal injuries to the cold world of accounting balance sheets. In effect, defendant argues that a verdict can never exceed what has historically been awarded for what defendant conceives to be comparable injuries---so much for a particular injury and no more, ever. That notion is repugnant to a fundamental principle so well stated by Justice Hale in *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971):

To the jury is consigned under the constitution the ultimate power to weigh the evidence and determine the facts---and the amount of damages in a particular case is an ultimate fact. This court has, we think, consistently followed this principle.”

120 Wn.2d at 266-67. Defendants do not confine their complaints about the scale of the jury awards to Dagmar’s

outrage claim, only, but the *Washburn* court made clear the illogic of the argument and the wrongheadedness of appellate courts ‘comparing’ results in different cases involving different parties and different conduct in different times when evaluating claims of alleged excess:

Defendant cites *no authority* for the validity of a comparison of verdicts as the appellate standard to evaluate a claim of excessiveness. However, there is a considerable body of law which rejects such a comparison. We find it persuasive.

...

“The vast variety of and disparity between awards in other cases demonstrates that injuries can seldom be measured on the same scale.... For a reviewing court to upset a jury's factual determination [of damages] on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of factfinding. [Citations.]” (*Bertero v. National General Corp.*, *supra*, 13 Cal.3d [43] at p. 65, fn. 12 [529 P.2d 608, 118 Cal.Rptr. 184, 65 A.L.R.3d 878 (1974)]; *Rodriguez v. McDonnell Douglas Corp.* (1978) 87 Cal.App.3d 626, 654–655 [151 Cal.Rptr. 399].)

Fortman v. Hemco, Inc., 211 Cal.App.3d 241, 261, 259 Cal.Rptr. 311 (1989); *see also Birgel v. Heintz*, 163 Conn. 23, 34, 301 A.2d 249 (1972).

Further, “[i]n considering whether a verdict is excessive, a comparison with previous verdicts is not justified because of the variations in facts and changes in the economy.” *Moteberg v. Johnson*, 297 Minn. 28, 34, 210 N.W.2d 27 (1973).

...

We conclude that it is improper to assess the amount of a verdict based upon comparisons with verdicts in other cases.

120 Wn.2d at 267-268.

Given the prior relationship between Dagmar and Michelle, it was particularly offensive and particularly shocking and frightening that Michelle would perform her own Jekyll and Hyde turn and behave so loathsomely toward her mother. That this conduct came from what a previously loyal and loving daughter visited upon her elderly mother invokes the language of the Court in *Contreras v. Crown Zellerbach Corporation*, 88 Wn.2d 735, 741, 565 P.2d 1173 (1977):

The relationship between the parties is a significant factor in determining whether liability should be imposed. *Alcorn v. Anbro Engineering, Inc., supra*, 2 Cal.3d at 498 n. 2, 86 Cal.Rptr. 88, 468 P.2d 216. See *Dawson v. Associates Financial Services Co. of Kansas, Inc.*, 215 Kan. 814, 529 P.2d 104 (1974); *Golden v. Dungan*, 20 Cal.App.3d 295, 97 Cal.Rptr. 577 (1971).

88 Wn.2d at 741. With their repeated, abusive, escalating behavior defendants did not turn upon an evil doer, an enemy, a business foe, or some other who might, somehow, be a more understandable target of their conduct. They turned upon Michelle's mother, and Jason's mother-in-law, about whom not a lick of evidence ever suggested she deserved or brought upon herself this abuse.

In evaluating this evidence the jury could also have concluded that both defendants lied about these events. Jason claimed to have never had an encounter with Dagmar wherein he 'turned on' the theretofore turned off water in the house, so he could wash his clothes. Dagmar testified to exactly the opposite; it is common for defendants to deny or hide their wrongdoing,

else they support the plaintiff's claims. To like effect were the claims of Michelle and Jason that 'septic system' problems were what really caused the water outage. Yet Jason could use the washing machine when he chose. Neither defendant addressed the fact that Mark Hatch testified Michelle had called him to the house (he is a plumber) to clean out and repair the water supply and he 'fixed it.' RP 1707. And Michelle's litany of denials included never taking and reading her mother's diary (it didn't exist), never taking her mother's mementoes, never locking gates and losing keys, and never breaking a key off in the front door lock so Dagmar could not enter in the middle of the night. Jason testified Dagmar, inexplicably, broke the key off in the lock herself. RP 1377. Since the jury concluded these events occurred, it was only more detriment to the defendants that the jury likely concluded they fabricated their claims of innocence.

Finally, Michelle discusses at some length the provisions of *Restatement (Third) of Torts*, § 46. It is not clear why she does so: "No Washington court has applied the *Restatement (Third) of*

Torts, § 46...” *Spicer v. Patnode*, 9 Wn.App. 2nd 293, 300 (2019). Michelle further suggests that the proof here lies outside the legitimate bounds of outrage claims since, otherwise, such claims could impinge on the exercise of legal rights, deter socially useful conduct, impinge on free speech, or target conduct which is different rather than particularly reprehensible. RB 104, fn 35. Nothing which occurred in this case bears upon any of those alleged policy goals, even if the referenced *Restatement* had been applied in a Washington appellate court.

6. Jury Instructions Were Proper

As discussed previously, only a scant few of the instructions were the subject of objections after the court settled upon the final jury instructions. Jury instructions are reviewed *de novo* as a question of law. *Hall v. Sacred Heart Medical Center*, 100 Wn.App. 53, 61, 995 P.2d 621 (2000). They are sufficient if they 1) allow each party to argue its theory of the case; 2) are not misleading; and 3) when read as a whole properly inform the trier of fact of the applicable law. *Caruso*

v. Local 690 Teamsters, 107 Wn.2d 524, 529, 750 P.2d 1299 (1987).

Instruction 22 was discussed at length in Dagmar's opening brief. The instruction given by the court did not include a sentence telling the jury that being a family member does not, alone, constitute a fiduciary relationship. Instead, the court gave a completely satisfactory instruction which starts with the proposition that 'ordinarily' participants to a business transaction deal with each other at arm's length. CP 1997. From that beginning, the instruction contained everything Michelle needed to argue her defense to the fiduciary duty claims. There is no error in the form the court used to instruct this jury.

As for Michelle's new complaints, her comparisons of decisions among the claims, and her now claim that the jury's decision provided 'irrefutable' proof that the jury did not act in accord with the instructions (RB 6), she neglects to read the instructions given to the jury. She overlooks the fact that she

never proposed, and the court never gave, any instructions applying her contract defenses to all of plaintiff's other claims. Thus, the jury's decision does not provide "irrefutable proof" of anything other than that they decided the case. That Michelle neglected to propose instructions she now wants to rely upon gives her no grounds for relief here.

Michelle is correct that the court's Instruction No. 7 (CP 1979-80), the 'elements' instruction regarding Dagmar's breach of contract claim, includes three affirmative defenses: plaintiff is responsible for her own damage; plaintiff's claims are barred by waiver or estoppel; and plaintiff failed to exercise ordinary care. Each of those defenses is further defined in Instructions 13, 14, and 15. (CP 1986-88).

It is correct that the jury applied one of those defenses, for it found that a contract was formed (Question No. 1), it found that the contract was breached by Ebert (Question No. 2), and it found that Dagmar failed to exercise ordinary care in minimizing or avoiding her damages (Question No. 3), and it awarded her

nothing on that claim (Question No. 4). (CP 2036-2044). However, those same defenses are never included for consideration by the jury with regard to the balance of plaintiff's claims, as review of the entire instruction set reveals. (CP 1969-2025). Michelle did not propose instructions which included the language she now claims should have been included. (CP 1917-1964). And Michelle did not except to the court's instructions on the basis that they did not include the same defenses as to all claims, as they included as to the contract claim. (RP 2360-2387).

The law is clear regarding what outcome results when a party, post-trial, complains about the jury's use of instructions which did not contain what the party wishes they had after the complaining party neither proposed such instructions nor objected to the ones given. "Under the law of the case doctrine, 'jury instructions not objected to become the law of the case.'" *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Were the rule otherwise, an entire trial result would be undone

by a party wittingly, or even unwittingly, omitting instructions it wanted the jury to receive and then being allowed to complain afterwards about harm stemming from an omission the party brought about. Permitting such complaints would create diseconomies and delays completely unacceptable in a civil justice system:

In addition, law of the case also refers to the principle that jury instructions that are not objected to are treated as the properly applicable law for purposes of appeal. *Hickman*, 135 Wn.2d at 101-102, 954 P.2d 900. In all of its various formulations the doctrine seeks to promote finality and efficiency in the judicial process. See 5 Am.Jur. 2d *Appellate Review* § 605 (1995).

Roberson v. Perez, 156 Wn.2d 33, 38, 123 P.3d 844 (2016).

These rules are extremely well established, for good reason: “Unless there is a proper objection, jury instructions become the law of the case. *State v. Leohner*, 69 Wn.2d 131, 134, 417 P.2d 368 (1966)(citing *Crippen v. Pulliam*, 61 Wn. 2d 725, 380 P.2d 745 (1963).” *Millies v. Landamerica Transnation*, 185 Wn.2d 302, 372 P.3d 111 (2016). The sufficiency of the

evidence is thus not reviewed based upon what instructions a party *intended* to request but only in light of the instructions given. *Tonkovich v. Department of Labor & Industries*, 31 Wn.2d 220, 225, 195 P.2d 638 (1948). There is nothing here to support the contention that it would be a manifest injustice to apply the law of the case doctrine. *Greene v. Rothschild*, 68 Wn.2d 1, 8, 414 P.2d 1013 (1966).

There is nothing ‘irrefutably’ improper about the jury’s decision, or the basis for it. Michelle is foreclosed---for lack of proposing the instructions she now says she required, and for lack of objecting to the court’s final instructions on the basis now asserted---from any consideration on appeal of the claimed instructional issues.

7. Defendants Are Barred From Impeaching the Verdict

In Dagmar’s damage summary, which did not include her claims for outrage, plaintiff’s expert Dr. Ruble outlined the manner in which plaintiff computed her damages. The figures

suggested to the jury for various harms suffered by plaintiff were set forth in Exhibit 62. Dr. Ruble computed her losses on the sale of her condo in a low market, and her purchase of a condo on a rising market, at \$97,521.07. Id. He computed the value of her loss of the housing benefit not received at \$309,600.00. Id. He computed her loss of income from being denied profits from TDH, LLC at \$1,779,911.29 (this was for the period from 2014 to the statistical end of Dagmar's life). Id. And he computed that her unreturned capital loss was \$69,000.00. Id. Dr. Ruble's non-outrage damage summary totaled \$2,256,032.36. Id. Inclusive of outrage damages, and totaling the verdicts against both defendants, the jury awarded \$764,000.00.

Comparing the figures proposed to the jury by Dagmar, with the amounts actually awarded, makes clear that the jury did its own analysis, did its own allocation of damages, did its own 'non-duplication' calculations, and rendered its verdict. None of the amounts awarded tie readily to any of the figures supplied by Dr. Ruble. That is as it should be: juries decide cases, experts

don't. It is surely the most common jury trial result that the amounts proposed for damages by counsel are only rarely the amounts awarded.

In her brief, Michelle sets off on a journey comparing and contrasting figures, and adding and subtracting amounts, all of which presumes she knows how the jury categorized damages. In truth, trying to determine *what the jury thought* is nothing more than a journey to the land of the unknown. We keep it unknown for the best and most important reasons. The jury had no obligation to adopt plaintiff's---or defendants'---view of the evidence, and it clearly adopted neither. *Bunch v. King County Department of Youth Services*, 155 Wn.2d 165, 179, 116 P3d 381 (2005) (“We strongly presume the jury's verdict is correct.”). Because the determination of damages is within the province of the jury, courts are reluctant to interfere with a jury award if it is fairly made. *Washington State Physicians Ins. Exchg. & Association v. Fison's Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993). We keep in mind that “courts are reluctant to

interfere with a jury's damage award when fairly made” because determination of damages is the duty of the jury. *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). Accord, *Bingaman*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)(when reinstating the jury verdict after the court of appeals reversed the jury award on the basis it was excessive,”.....the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.”).

The court denied a motion for new trial, and denied a motion for remittitur. Yet defendants set off on arguments interwoven throughout their brief which seek to compare, analyze, compute, compartmentalize, decipher, and interpret what the jury decided: “The jury used the same methodology....”, RB 69; “...it calculated....lost profits...caused by Dagmar’s signing...and allocated them equally...”, Id; “Therefore, the total verdict....consists entirely of lost profits, which were essentially split between Michelle and Jason...”, RB 70; “It follows under this analysis....that had to consist of lost

profits....”, RB 109; “Similarly, the \$373,678 jury verdict...had to consist of.....lost profits...”, RB 109; “The loss of part of the money.....could not have been more than.....”, RB 183; “The loss of value could not have been more than.....”, RB 183; “The remainder of the duplicated damages therefore must come from.....”, RB 191. The discussion closes with defendants’ conclusion that this result “the jury instructions and logic do not permit.” RB 191.

There is much errant about the foregoing. It incorrectly presumes that the jury was instructed in a fashion it was not. As discussed above, the jury was never instructed regarding any affirmative defenses on claims other than contract. From that initial false premise defendants launch their ‘analysis’ which ignores the law prohibiting same, is completely speculative, purports to read the minds of the jurors and, mind reading accomplished, calls out the jury for making what defendants claim are analytical and computational errors. None of this is permitted.

Most of the cases discussing the prohibition on examining how a jury performed its function involve cases where, post-verdict, affidavits of jurors are submitted to the trial court for the purpose of raising improper jury conduct as a basis for a new trial. Actual juror misconduct, on the rare occasions when it occurs, is not governed by the “inheres in the verdict” rule. This case is. But such cases explicitly discuss why what is attempted here is prohibited: “Neither parties nor judges may inquire into the internal processes through which the jury reaches its verdict,” *State v. Linton*, 156 Wn.2d 777, 786, 132 P.3d 127 (2006), citing *Breckenridge v. Valley General Hospital*, 150 Wn.2d 197, 204, 75 P.3d 944 (2003). In overturning the grant of a new trial made after a trial court improperly granted a new trial on the basis of alleged juror misconduct, and after restating the strong policy of favoring stable and certain verdicts, while protecting the jury’s secret, frank and free discussions of the evidence, the court in *State v. Reynoldson*, 168 Wn.2d 543, 548-

549, 277 P.3d 700 (2012) borrowed from our supreme court, as follows:

The mental processes by which individual jurors reached their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the jurors' intentions and beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself.

State v. Reynoldson, 168 Wn.App. 543, 548-549, citing *Cox v. Charles Wright Academy, Inc.*, 70 Wn.2d 173, 179-80, 422 P.2d 515 (1967); *see also Gardner*, 60 Wn.2d at 841-842, 376 P.2d 651, 379 P.2d 918 (holding that allegation that jurors “‘had omitted to consider important evidence or issues....or had by any other motive or belief been led to their decision’” is insufficient to support a motion for a new trial)(quoting 8 *Wigmore*, Evidence, § 2349, at 681 (McNaughton rev. ed. 1961). *Id.*

These are among the most broadly accepted principles in the law of jury trials. See, also *State v. Ng*, 110 Wn.2d 32, 43, 750 P.2d 632 (1988)(“The individual or collective thought processes leading to a verdict ‘inhere in the verdict’ and cannot

be used to impeach a jury verdict.”(quoting *State v. Crowell*, 92 Wn.2d 143, 146, 594 P.2d 905 (1979)). Considerations which “inhere” in the jury’s verdict may not be considered by the court or the parties. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 768-70, 818 P.2d 1337 (1991); *State v. Marks*, 90 Wn.App. 980, 986, 955 P.2d 406 (1998)(“matters that inhere in the verdict are beyond inquiry.”). Indeed, though not applicable here, even jury defiance of the law or evidence is beyond inquiry:

Where the duty and authority to prevent defiant disregard of the law or evidence comes into conflict with the principle of secret jury deliberations, we are compelled to err in favor of the lesser of two evils—protecting the secrecy of jury deliberations at the expense of possibly allowing irresponsible juror activity. Achieving a more perfect system for monitoring the conduct of jurors in the intense environment of a jury deliberation room entails an unacceptable breach of the secrecy that is essential to the work of juries in the American system of justice. To open the door to the deliberation room any more widely and provide opportunities for broad-ranging judicial inquisitions into the thought processes of jurors would, in our view, destroy the jury system itself.

United States v. Thomas, 116 F.3d 606, 623 (2d Cir. 1997). In upholding the same principle, the US Supreme Court in *United States v. Powell*, 105 S.Ct. 471, 477-478 (1984) borrowed from the court's 1915 decision on this point: "But with few exceptions (citations omitted), once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgement. Courts have always resisted inquiring into a jury's thought processes, see *McDonald v. Pless*, 238 U.S. 264, 35 S.Ct. 783, 59 L.Ed. 1300 (1915)(Fed.Rule Evid. 606(b))."

These rules of non-intrusion into the deliberations and thought processes of juries are broadly applied, and universally accepted. As a policy matter, doing what Michelle suggests should be done here violates every tenet underlying the use of juries to decide contests:

The mental processes of a deliberating juror with respect to the merits of the case at hand must remain largely beyond examination and second-guessing, shielded from scrutiny by the court as much as from the eyes and ears of the parties and the public. Were a district judge permitted to conduct intrusive inquiries into---and make extensive findings of fact

concerning---the reasoning behind a juror's view of the case, or the particulars of a juror's (likely imperfect) understanding or interpretation of the law.....this would not only seriously breach the principle of the secrecy of jury deliberations, but it would invite trial judges to second-guess and influence the work of the jury.

State v. Elmore, 121 Wn.App. 747, 753-754, 90 P.3d 1110 (2004), citing *United States v. Thomas*, 116 F.3d 606, 620 (2nd Cir. 1997).

The defendants' surmise about what particular awards mean, what dollar amounts added together equal, what comparing awards across claims cause counsel to think, all represent prohibited attacks on the verdict. How the jury approached its tasks and how it discharged its duty is knowable only from its decisions. It only compounds defendants' errors of reason and law to contend that the jury 'inconsistently' decided the claims when the instructions defendants claim would foreclose the jury's decisions were never given to the jury.

These contentions warrant no serious consideration from this Court. Riddled with surmise, the worst kind of conjecture, computational gymnastics and attributions of motive and intention when same are unknowable---*as they must be*---does not alter that such claims are not allowed. The attempt should be rejected.

8. Fraud Finding and Unjust Enrichment Finding and Non Duplication

Michelle uses the jury's finding of fraud against Jason as a platform to argue the entire trial was infused with error, and only a new trial will solve that. The matter is much simpler and, due to the existence of the non duplication damages instruction, the solution is the one originally proposed by Dagmar: vacate the fraud finding against Jason and let the damage verdict stand.

This proposal is not radical, beyond the law, or anything other than logical and prudent. As argued above, no party and no court has any idea how the jury decided the case, allocated damages, assessed the evidence, or did any of the rest of its

work. Although Michelle regularly declares that the jury awarded about \$64,000 in lost profits, nothing on the verdict form indicates that such figures stem from ‘lost profits.’ Certainly, when Dagmar’s expert testified to more than \$1.7 million in ‘lost profits’ denied to Dagmar, a figure like \$64,000.00 does not to Dagmar appear to be lost profits. But her ignorance on that point will be perpetual.

The only thing one can glean from the jury verdict, which is certain, is that the jury awarded the same amount, against Jason, for fraud as for unjust enrichment. No one knows what conduct by Jason produced this result but, obviously, the jury awarded the same amount for both causes of action. And, when assessing whether those two awards contained duplicative damages, it concluded that they did, and awarded the sum a total of one time. It is complete speculation to wonder what conduct of Jason’s the jury thought produced liability under one cause it was properly permitted to award damages under (unjust enrichment) and what conduct produced a fraud liability

finding. But the non-duplication damage feature of the verdict form simplified the task of remedying the finding of fraud liability against Mr. Bruers. By excising that finding from the judgment, the error in submitting the fraud case against Mr. Bruers is cured, the monetary amount of the total judgment remains the same, and a final result obtains. Dagmar asks that this Court so decide.

III. REPLY IN SUPPORT OF CLAIM FOR AN AWARD OF ATTORNEY'S FEES

Dagmar is well aware of the limited circumstances in which a prevailing party---in the absence of a contract, statutory, or court rule driven basis---may seek attorney's fees against the losing party. She is also well aware that even when the proper circumstances for making an award under the authority she cites are present, whether such an award can be made is entirely a matter of the trial court's discretion.

Dagmar's complaint here is that the court never properly exercised its discretion. As stated in its written order it declined

to consider the request because Dagmar's case was not a 'partnership' case, and because Dagmar's was not a 'constructive fraud' case. Neither rationale disposes of the issue. The correctly framed issue is whether, when a defendant has been found liable for fraud and for breach of fiduciary duty, the rule in *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 567 P.2d 342 (1976) requires that the trial court at least exercise its discretion properly. A simple refusal to consider the request, on the wrong legal basis, is not a proper exercise of discretion. Discretion exercised on an untenable or improper legal basis is an abuse of discretion which the court committed by using the wrong legal standard when denying Dagmar's request for fees. *Mayer v. STO Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

As discussed previously, the court's incongruous ruling meant that that denial was made in the face of a finding of actual fraud, not merely constructive fraud. Fraud is harder to prove. It requires proof to the clear, cogent and convincing standard. It requires proof of the nine elements of fraud. Such a finding is

the civil equivalent of proof beyond a reasonable doubt. Such fraud was found by the jury in the setting where the jury found that Michelle breached her fiduciary duties to Dagmar in two entirely separate ways. The duties owed by the liable partner in *Hsu* and those owed by Michelle to Dagmar are nearly identical. In *Hsu*, the liable partner concealed the books and records of the partnership, concealed the existence of profits from his partner, and commingled partnership and personal assets. Michelle's conduct in this case constituted the exact same conduct: she admits never sharing any financial or other business operation information with Dagmar, the evidence of the steps she took to assure TDH, LLC was unprofitable (by stripping out monies improperly, and illegally) was compelling, and she commingled assets between herself and TDH, LLC. The duties which run between a manager of an LLC and a member are almost identical to the duties which run between members of a partnership.

One of these duties (in the setting of a fiduciary relationship) is the duty of loyalty, which requires the fiduciary to avoid “Secret profits, self-dealing, and conflicts of interest.” *Horn v. Aune*, 130 Wn.App. 183, 200, 121 P.3d 1227 (2005); RCW 25.10.441(2); see RCW 25.15.040(1). It is not possible to view the decisions of the jury in this case and conclude that Michelle *did not* violate her duty of loyalty to Dagmar. It seems apparent that the historic antipathy toward awards of attorney’s fees (the “American Rule”) stems from concern about the punitive potential of such awards. Surely, in traditional negligence cases there are often contests about fault and, even when fault is found it is based upon a failure to exercise reasonable care, and very rarely upon intentional misconduct.

Further, in terms of risk management much highly sanctionable conduct can produce fee awards since statutes and court rules are built to constrain certain kinds of outlier behavior. The same is true when parties conduct litigation in ‘bad faith.’ *State v. S.H.*, 102 Wn.App. 468 (2000)(citing with

approval to *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980):”[A] specific finding as to whether counsel’s conduct.....constituted or was tantamount to bad faith....[has] to precede any sanction under the court’s inherent powers.” The various rules applicable to a prevailing party fee award, then, shrink down to apply to very few cases wherein a court must exercise its discretion to either make, or not make one. By making an incorrect legal determination about the availability of an award, the trial court here simply failed to properly exercise its discretion because it applied an ‘improper legal basis’ in declining the invitation to so act.

The Washington Supreme Court has never repudiated, weakened, or overruled the decision in *Hsu*. Although *Asarco v. Air Quality Coalition*, 92 Wn.2d 685, 601 P.2d 501 (1979) is said to have limited the *Hsu* rule to ‘common fund’ cases, that is not a proper reading of *Asarco*. Appellants there sought fees under five different theories, none of which produced a decision in their favor from the court. In rejecting the fifth of the appellant’s

arguments, addressing whether a fee award is possible when bad faith or wantonness was perpetrated by the opposing party, the court first rejects the claim and then claims the “nearest case in point” is *Hsu*, which it describes as ‘superficially based on proof of constructive fraud,’ stating that the ‘actual award’ stemmed from preservation of a common fund. 92 Wn.2d at 716. That is not even a correct reading of *Hsu*. The award in *Hsu* was not actually based upon the ‘common fund’ rule: that rule requires *providing benefit to others as well as the litigant*. *Hsu*, 87 Wn.2d at 799. *Hsu* was not obtaining benefit for anyone other than himself. The *Hsu* court summarily stated, in supporting the rule allowing an award, that “Respondent has breached his fiduciary duty to petitioner.” 87 Wn.2d at 800. Accordingly, there are two problems with the statements about *Hsu* in *Asarco*: the court misreads its own prior case to incorrectly state that the award in *Hsu* was based upon creation of a ‘common fund,’ which was incorrect; and its statements about *Hsu* are *dicta* since *Asarco* never remotely involved a breach of fiduciary, or fraud,

claim. And, as noted, the *Asarco* court volunteered its analysis of *Hsu* in a discussion about whether fees are awardable in the ‘bad faith and wantonness’ setting. At no time has Dagmar based her claim for fees upon any claim that her opponent engaged in ‘bad faith or wanton’ conduct in this litigation.

Dagmar’s point is a simple one: *Hsu* supported her right to make a claim for fees since Michelle was found liable for three different claims, fraud, and two forms of breach of fiduciary duty, which support *consideration of an award of fees under Hsu*. Nothing can dictate to this trial court that it must award fees, but its decision to deny them, and the basis for it, was an abuse of discretion because the court relied upon an improper legal basis.

IV. CONCLUSION

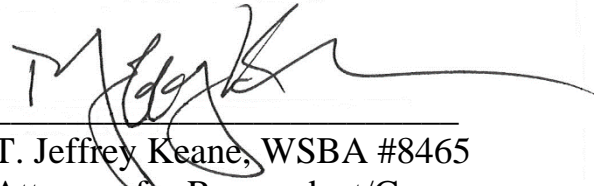
Ms. von Heydt respectfully requests that the Court reverse the decision of the trial court regarding denial of her motion for fees, and require that it exercise its discretion on a proper legal basis. She further requests that the Court affirm all aspects of the

judgment against defendants, after vacating the fraud finding against Mr. Bruers, while leaving the dollar amount of the judgment against Mr. Bruers intact.

I certify that this pleading contains 15,301 words.

Submitted this 13th day of January, 2022.

Keane Law Offices

A handwritten signature in black ink, appearing to read 'T. Jeffrey Keane', is written over a horizontal line.

T. Jeffrey Keane, WSBA #8465
Attorney for Respondent/Cross-
Appellant, Dagmar von Heydt

KEANE LAW OFFICES

January 13, 2022 - 4:56 PM

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