No. 94559-4

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man, Petitioner, vs. JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation, Respondent.	RESPONDENT'S ANSWER TO AMICUS CURIAE MEMORANDUM OF WASHINGTON STATE LABOR COUNCIL

A. Introduction.

Division Two's decision is premised on a fundamental tenet of Washington law: that a trial court necessarily abuses its discretion when it applies the incorrect legal standard in making evidentiary rulings. In its amicus memorandum, Washington State Labor Council ("WSLC") distorts both the record and Division Two's Opinion, offering no reason for further review of that unpublished decision.

B. Argument.

1. Division Two's conclusion that the trial court applied the incorrect legal standard in ruling that the door to collateral source evidence could never be opened is consistent with this Court's decision in *Johnson v. Weyerhaeuser*.

WSLC concedes that *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998) recognizes that a worker can open the door to the admission of collateral source evidence, undermining its own contention that Division Two's unpublished decision conflicts with *Johnson*. (Mem. 4-5, citing *Johnson*, 134 Wn.2d at 804) Paradoxically, WSLC claims that the "Court of Appeals did not cite to any legal standard that the trial court incorrectly applied," yet WSLC itself addresses the very legal standard upon which Division Two relied in reaching its decision – that "a party may waive the protections of the collateral source rule by opening the door to evidence of collateral benefits." *Compare* Mem. 5 (citing *Johnson*, 134 Wn.2d at 804) *with* Op. 20 (citing *Johnson*, 134 Wn.2d at 804).

Because it must concede that *Johnson* allows a party to open the door to collateral source evidence, WSLC rewrites the record to contend that the trial court merely determined that Gilmore had not opened the door. (Mem. 4, 6-7) There is nothing in the record to suggest that the trial court engaged in any sort of "careful consideration" (Mem. 6) to find that the door had not been opened.

Instead, the Court of Appeals correctly concluded that the trial court excluded evidence of L&I payments based on an incorrect legal conclusion that a party cannot, as a matter of law, open the door to this type of evidence:

> [A] lot of evidentiary issues a lot of times a party opens the door to otherwise inadmissible evidence . . . . *I don't have authority to show me that that concept applies to the collateral source rule.*
>
> . . .
>
> So, I'm not going to just leap up and say, "Oh, door's open" like it would be on a lot of other things maybe without some authority.

(RP 543-44) (emphasis added)

WSLC cites only to Gilmore's own argument that he "didn't open the door" in support of this assertion. (Mem. 6, citing RP 517) While the trial court declined "for now" to change its ruling when Jefferson Transit first raised this issue (RP 518), the court did not at any time consider whether the door had been opened. On the contrary, when Gilmore's sons testified "how hard it was financially for the Plaintiff because he didn't have any money" (RP 536), Jefferson Transit renewed its motion to admit evidence of collateral source benefits. The trial court acknowledged that, if there was authority that the door *could* be opened to collateral source evidence, then such evidence would "*probably come in.*" (RP 543) (emphasis added) But

(inexplicably, in light of this Court's holding in *Johnson*), the trial court then refused to admit this evidence.[1]

The Court of Appeals properly concluded that the trial court excluded the evidence because it erroneously believed that a party could never open the door to collateral source evidence. (Op. 19-20) The Court of Appeals relied on settled law in holding that the trial court *necessarily* abused its discretion by applying the incorrect legal standard in *reaching* that conclusion. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). (Op. 14-15, citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, ¶ 14, 132 P.3d 115 (2006))

The Court of Appeals did not remove from the trial court its discretion to determine, upon proper application of the law, if and when the door was opened. (Mem. 4, 6-7) Rather, Division Two held that "excluding the L&I payments after Gilmore opened the door to its

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[1] Even ignoring that the record overwhelming supports Division Two's conclusion that Gilmore opened the door, the "evidence" WSLC relies on to argue the contrary only highlights WSLC's unfamiliarity with the record. WSLC cites no evidence that "Gilmore did not receive a lump sum payment" from the Department of Labor & Industries ("L&I") for "at least one year after the crash." (Mem. 6) Instead, it cites to conflicting representations by both parties' counsel as to when Gilmore received payment. (*See* RP 517-18) Additionally, plaintiff repeatedly elicited testimony "about Gilmore's sources of income, reduction in income, or whether Gilmore had any income at all." (Mem. 6) (*See, e.g.*, RP 530, 532: Gilmore worked "80 hours a week prior to the accident," but was unable to work after the collision; RP 508: "it was hard to pay the bills" without Gilmore working)

admission was error" *only* "*[t]o the extent* that the trial court ruled that such evidence could *never* come in." (Op. 20) (emphasis added)

Division Two never concluded – or even implied – that the trial court would have abused its discretion had it excluded the evidence under the proper legal standard. Nor does Division Two's decision *require* the trial court to admit the evidence on remand. It simply clarified for the trial court on remand that the door *can* be opened, and left the issue to the trial court's discretion on retrial. Division Two's decision that a trial court has discretion to determine whether the door to collateral source evidence has been opened – which WSLC agrees is the correct law (Mem. 4-5) – is not an issue of "substantial public interest," RAP 13.4(b)(4), and it will not "swallow" the collateral source rule. (Mem. 7)

WSLC's only possible interest in this case is the application of the collateral source rule to L&I benefits – an issue that Division Two did not find necessary to resolve this case. Further, this is not the typical third party action contemplated by RCW 51.24.030. Instead, Gilmore tactically abandoned his claims for special damages on the eve of trial, effectively preventing the Department of Labor and Industries from timely intervening to protect its statutory interest in recovery. RCW 51.24.030. By pursuing only general damages,

Gilmore ensured that L&I would never be reimbursed from Gilmore's recovery against Jefferson Transit. *See Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 402, ¶¶ 19-20, 239 P.3d 544 (2010) (L&I cannot subject pain and suffering damages to its reimbursement calculation under RCW 51.24.060). WSLC's purported interest in this case – to protect "third party recoveries [which] support the Department's budget and help keep L&I rates low" (Mem. 4) – entirely ignores that plaintiffs who prevent the Department from recovering on third party actions, as Gilmore did here, *deplete* the Department's budget, and *raise* L&I rates for injured workers.

Division Two's decision does not "leave L&I to pay for the wrongful acts of a third party" (Mem. 7); on the contrary, it rightfully discourages plaintiffs from circumventing L&I's statutory right to a lien on recovery under RCW 51.24.060 by allowing evidence of L&I benefits when a plaintiff does not seek economic *damages*, but relies on economic *circumstances* to bolster purely noneconomic claims. Division Two's decision leaves "this fact-intensive determination" (Mem. 7) whether the door has been opened to the trial court, just as this Court did in *Johnson*. *See Johnson*, 134 Wn.2d at 804 ("trier of fact is free to make this determination upon remand"). Review is not warranted under RAP 13.4(b)(1), (2), or (4).

2. Division Two's decision that a trial court necessarily abuses its discretion when it applies an incorrect legal standard in determining the admissibility of expert testimony is consistent with the decisions of this Court and the Court of Appeals.

WSLC similarly fails to demonstrate that it has any actual interest in this case regarding the admissibility of Tencer's testimony. Although its claimed interest in this issue is hard to credit, WSLC's "concern" that injured workers will not bring third party claims (Mem. 8) if the trial court retains discretion to admit or exclude Tencer's testimony is illogical, and its argument that Division Two's unpublished decision is in conflict with decisions of this Court and the Court of Appeals (Mem. 7-10) is based on a fundamental misunderstanding and mischaracterization of Division Two's ruling.

Division Two did not "overturn[] the trial court's discretionary decision by substituting its own opinion for that of the trial court." (Mem. 8) Rather, Division Two concluded that the trial court abused its discretion by improperly applying the Rules of Evidence in determining the admissibility of Tencer's expert testimony. In so holding, Division Two adhered to the rule this Court recently articulated in *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 354, ¶ 16, 333 P.3d 388 (2014): a trial court *must* apply the "analytical framework required under the ERs" in determining the admissibility of

any expert's testimony. That framework directs the trial court to admit expert testimony if the "expert is qualified and relies on generally accepted theories and the testimony would be helpful to the trier of fact." *Johnston-Forbes*, 181 Wn.2d at 355, ¶ 17; ER 702, 703. Where the trial court fails to follow "the required framework under the rules," it does not perform its "proper gatekeeping function" and abuses its discretion. *Johnston-Forbes*, 181 Wn.2d at 354-55, ¶ 16, 357, ¶ 22.

The record supports Division Two's holding that the trial court failed to properly perform its "gatekeeping function" when it excluded Tencer's testimony as based on facts not in evidence. (Op. 17) Division Two correctly recognized that the trial court misapplied ER 703, which allows experts to "rely on facts not in evidence if the information or data is of the type reasonably relied on by experts in the particular field," in reaching its ruling. (Op. 17)

Contrary to WSLC's contentions (Mem. 9), the trial court's reasoning in excluding Tencer was not "identical" to that of the trial court in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012). The issue on appeal in *Stedman* was not, as it was here, whether the trial court had applied the wrong analytic framework in reaching its decision; rather, it was whether the trial court's decision itself was erroneous. Additionally, the issue in *Stedman* was the extent of the

plaintiffs' injuries from a car accident. That was not the "only" issue to be decided in this case. (Mem. 9) Here, the issue was whether the accident caused Gilmore's injuries at all. (*See* Reply Br. 9 n.4, citing evidence at trial disputing causation)

Again, Division Two's holding that a trial court necessarily abuses its discretion when it applies an incorrect legal standard is neither remarkable nor in conflict with any decision of this Court or the Court of Appeals. *See, e.g.*, *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995) (trial court abuses discretion if exercised on untenable grounds; "the court has acted for untenable reasons if it has used an incorrect standard, or the facts do not meet the requirements of the correct standard"), *rev. denied*, 129 Wn.2d 1003 (1996); *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7, ¶ 9, 330 P.3d 168 (2014) ("A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record in the record or was reached by apply-ing the wrong legal standard") (internal quotation marks omitted); *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494, ¶ 17, 145 P.3d 1196 (2006) (trial court abuses its discretion if it "bases its ruling on an erroneous view of the law.").

Nor is this an issue of "substantial public interest" under RAP 13.4(b)(4). (Mem. 4) Division Two's unpublished decision does not

have "broad implications for all future plaintiffs and all workers," as it does not make Tencer's testimony "admissible in every case." (Mem. 8) On the contrary, Division Two expressly recognized and affirmed the trial court's broad discretion in admitting expert testimony under the correct legal standard. (Op. 14-16) WSLC's hyperbolic claim that the Court of Appeals is now "free to disregard the trial court's discretionary rulings" (Mem. 8) has no basis in reality and is nothing more than a feeble attempt to create a "conflict" where one does not exist. Holding that a trial court's discretion is predicated on its proper application of the law does not conflict with *any* case law in this state or raise any issue of "substantial public interest," and cannot be grounds for review under RAP 13.4(b)(1), (2), or (4).

C. Conclusion.

This Court should deny review of the Court of Appeals' unpublished decision.

Dated this 17th day of August, 2017.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 17, 2017, I arranged for service of the foregoing Respondent's Answer to Amicus Curiae Memorandum of Washington State Labor Council, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 17th day of August, 2017.

Peyush Soni

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