Supreme Court No. 94559-4

COA No. 48018-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Plaintiff-Petitioner,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation,

Defendant-Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Michael Gilmore asks the Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Mr. Gilmore seeks review of and reversal of the Court of Appeals decision filed on April 25, 2017, and requests reinstatement of the jury verdict in his favor. A copy of the Court of Appeals decision is reproduced in Appendix A and is cited hereafter as "Opinion".

III. ISSUES PRESENTED FOR REVIEW

The Opinion reversed the jury's verdict in favor of the plaintiff, and raises the following issues for review:

1. Is excluding the testimony of proffered defense witness Alan Tencer in a motor vehicle tort case always an abuse of discretion?

2. Does a trial court always abuse its discretion when it declines to admit evidence of L&I benefits in a third party tort case, when a witness testifies to the injured worker's financial stress due to his injuries?

3. Does a trial court abuse its discretion when, in a civil case, it finds that an allegedly improper closing argument that was never object-

ed to was not, in the context of the entire record, a valid reason to overturn the jury verdict?

IV. STATEMENT OF THE CASE

The underlying facts are described in more detail in Mr. Gilmore's Respondent's Brief filed in the Court of Appeals. *See* Gilmore Br., at 5-19, attached hereto as Appendix B.

In brief, Michael Gilmore suffered serious injuries to his neck when defendant's bus rear-ended him while Mr. Gilmore was on the job. He ultimately needed multi-level neck fusion surgery, and his surgeon had to implant permanent surgical hardware to hold Mr. Gilmore's spine together. RP 650. Even after the surgery, Mr. Gilmore is only 70% recovered; he is doing better than he was before the surgery, but he still has pain and disability. RP 768.

Mr. Gilmore received L&I benefits, and he also filed a third party negligence lawsuit against the bus company. Defendant bus company admitted liability for causing the crash, and admitted that Mr. Gilmore was injured, but denied the crash had caused Mr. Gilmore significant harm.

Plaintiff presented testimony from Dr. Frank Marinkovich, MD, Dr. Marc Suffis, MD, and Dr. Geoffrey Masci, DC. Their testimony

provided evidence regarding his injuries and the fact that the crash ultimately made the surgery necessary. RP 650. At least four different "before and after" lay witnesses testified to Mr. Gilmore's health, strength, agility, and abilities before the collision, and to the changes they observed in him after the collision: pain, disability, and loss of function. RP 302, 508, 522, 532-34, 566.

Defendant's trial strategy was an attempt to convince the jury that Mr. Gilmore was faking his injuries and their connection to the collision, in order to get money from the bus company.[1] To that end, the defense

[1]The Opinion states, at p. 11 fn. 2 that "Gilmore does not cite to any part of the record to support its position that Jefferson Transit made these statements. Our review of the record does not indicate that Jefferson Transit ever called Gilmore a liar, cheat or a fraud before the jury." Counsel is baffled by this. During pretrial motions, defense counsel repeatedly emphasized that the defense would attack Mr. Gilmore for "milking the system", RP 8; for his "motivation for 'secondary gain'", RP 8-9; and for fraud: "He was trying to commit a fraud. And I can prove it. And the jury needs to know about it." RP 50. The trial court certainly got the message: "This defendant's theory [is] that Mr. Gilmore is either a fraud or a malingerer..." RP 56. During the presentation of evidence, defendant repeatedly claimed Mr. Gilmore lied. "Falsehoods", RP 471; "Failed to tell his treatment providers that he was on a 60 percent disability", RP 469; "testified under oath in a deposition that he never had prior neck pain when, in fact, there are medical records that indicate he had neck pain in 2007", RP 471; "Is there any number of falsehoods I could give you...?", RP 471; "Mr. Gilmore is not truthful with his doctors...", RP 475; "that's [what Mr. Gilmore told his doctor] not true, is it?, RP 722; "each of those medical providers had false information for Mr. Gilmore, didn't they?", RP 731. Defendant even called a "character witness", to testify to his opinion that Mr. Gilmore was dishonest. RP 832. Respondent's Brief in the Court of Appeals pointed out, pp. 15-18, that the defense called Mr. Gilmore a liar or fraud **16 times** during closing argument, using phrases such as "he lied to you", RP 1019, "did not tell the truth", RP 1018, "not being truthful", RP 1018, "until the lies started surfacing", RP 1022, "a bunch of untruths", RP 1023, "hid the facts", RP 1025; "...goes in and claims disability they don't have just so they can get an additional government check..." RP 1023-24.

presented to the jury a surveillance video which purported to show Mr. Gilmore behaving in an uninjured manner; testimony from defense doctor Barbara Jessen, MD, who denied that Mr. Gilmore's surgery was related to the bus crash, RP 925; testimony from a "bad character witness" who opined that Mr. Gilmore was dishonest, RP 832; and entries from Mr. Gilmore's medical records which the defense claimed proved that Mr. Gilmore had lied about his pre-crash medical condition.

The jury heard all this evidence and found that Mr. Gilmore's witnesses and evidence were more credible than the defense's witnesses and evidence. It returned a $1.2 million verdict in Mr. Gilmore's favor. The defense then made a CR 59 motion for a new trial or remittitur, claiming that the verdict was excessive, that there was discovery misconduct, and that Mr. Gilmore's trial counsel had misbehaved in her closing argument, though defendant never once objected to that argument while it was being made.

The trial court denied the motion for new trial, holding in part (CP 723-24, emphasis added, *see* Appendix F):

> This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, **in the context of the entire record**, that there was any event, misconduct, or discovery

violation sufficient to justify a new trial or a remittitur; the Court does not find a basis to overturn the verdict.

Defendant appealed. On appeal, the defense continued to claim the verdict was excessive, calling it "unprecedented"[2]. Defendant also raised new issues, arguing that the trial court had committed reversible error by excluding the testimony of the frequently proffered defense witness Alan Tencer[3], by allowing Dr. Masci to testify, by excluding evidence that Mr. Gilmore had received L&I benefits, and by denying a new trial after Mr. Gilmore's trial counsel had made a closing argument the defense claimed was so improper that the failure to object to it was unimportant.

Despite holdings from this Court and from Division I that the decision to exclude Tencer is a discretionary one; despite RCW 51.24.100 and precedent from this Court and Division I that evidence of L&I benefits is inadmissible; and despite holdings from this Court and from Division I that it is the trial court that decides the effect of alleged misconduct

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[2]A $1.2 million verdict is hardly "unprecedented". Plaintiff's counsel has had larger verdicts, comparable verdicts, and smaller verdicts in cases with similar injuries. More to the point, this Court has held it improper to compare a verdict to those in other cases to determine whether the verdict is excessive. To do so is "is inimical to the foundation of particularized justice." *Washburn v. Beatt Equipment Co.*, 120 Wn.2d 246, 266, 840 P.2d 860 (1992). Here, the trial court denied the motion for remittitur, which "strengthens the verdict". *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 180, 116 P.3d 381 (2005); *Terrell v. Hamilton*, 190 Wn.2d 489, 510, 358 P.3d 453 (2015).

[3]"Dr. Tencer has been retained frequently as an expert defense witness in similar cases." *Berryman v. Metcalf*, 177 Wn. App. 644, 654, 312 P.3d 745 (2013).

upon the jury, the Court of Appeals reversed the trial judge and the jury's verdict, and ordered a new trial.

In reaching these holdings, the Court of Appeals erred, and if the Opinion is permitted to stand, it will cause substantial damage to Washington law, in ways that will affect every motor vehicle tort case, every L&I third party case, and every civil case.

V. WHY THIS COURT SHOULD GRANT REVIEW

A. Standard for Review.

Of the four criteria for review set forth in RAP 13.4, three apply to this case: the Opinion is in conflict with decisions of the Supreme Court, RAP 13.4(b)(1); it is in conflict with published decisions of the Court of Appeals, RAP 13.4(b)(2); and this petition involves issues of substantial public interest that should be determined by the Supreme Court, RAP 13.4(b)(4).

B. This Court held in *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014), that the decision to admit or exclude defense witness Alan Tencer's testimony in a motor vehicle tort case is a discretionary decision for the trial court, to be made on a case-by-case basis. The effect of Division II's ruling in this case is that a trial court has no discretion to exclude Tencer's testimony in a motor vehicle tort case. That is inconsistent *Johnston-Forbes*, *supra*. It also conflicts with Division I's decisions in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) and *Berryman v.*

Metcalf, 177 Wn. App. 644, 312 P.3d 745 (2013), and it raises issues of substantial public interest. RAP 13.4(b)(1), (2), and (4).

Until this case, no Washington trial court had ever been reversed for admitting or for excluding Alan Tencer. Yet the Opinion, at p. 18, holds it was an abuse of discretion to exclude Tencer because "a disputed issue existed as to the cause and nature and extent of Gilmore's injury", and therefore "Tencer's testimony would have allowed the jurors to make a more informed decision, especially given the contradictory evidence that the collision was not significant enough to cause injury." Opinion, at pp. 17-18.[4]

"A trial court has 'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.'" *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997). "[E]ven if we disagree with the trial court, we will not reverse its decision unless that decision is 'manifestly unreasonable or based on untenable grounds or untenable reasons.'" *State v. Dye*, 178 Wn.2d 541, 547-48, 309 P.3d 1192 (2013). Trial court discretion regarding evidence extends to rulings on expert witnesses. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283

[4]There is an enormous difference between a holding that a trial court may admit certain evidence, and a holding that the trial court must admit that evidence and that it lacks discretion to exclude it. It is that difference which makes the Opinion's Tencer decision so damaging to the law of evidence, expert witnesses, and trial court discretion.

P.3d 546 (2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 889, 184 L.Ed.2d 661 (2013) (emphasis added) (trial court's decision regarding a proffered expert will not be disturbed by an appellate court except for "**a very plain abuse**" of discretion).

In this case, the trial court's **complete** oral decision on the motion in limine to exclude Tencer makes it clear that the trial judge read the parties' pleadings and declarations, heard both sides' oral arguments regarding him, and ultimately decided that **in this case** Tencer's testimony was not sufficiently reliable, and would violate ER 403. RP 38-39. Tencer did not know how fast the bus was traveling, RP 35, he did not review the depositions of the bus driver or the collision witnesses to determine that speed, RP 35, he did not know Mr. Gilmore's height or weight, RP 35, and he did not measure the damage to the bus, RP 38. The trial court stated, RP 38-39 (emphasis added):

> As far as what I can tell from what I read, and the way I understand it, um, **he makes a number of assumptions**, some of which are based on facts that are not going to be in evidence. And it does – and he does create, um – he does – he does – well, it's – to me, it's intended to create an inference, um, of – well, I don't know, it's create – it's intended to create an inference with **some aura of authority that I don't think is reasonable or justified.** And I think that – I think **it will be confusing to the jury. I think that it will be misleading to the jury.**

Taken as a whole, the trial court's decision was within its discretion, as outlined in *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357, 333 P.3d 388 (2014), in both the lead opinion and the concurrence. In the lead opinion, the Court held (emphasis added, citations omitted):

> [T]rial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion. **If the basis for admission of the evidence is 'fairly debatable,' we will not disturb the trial court's ruling.**
> ...
> Before allowing an expert to render an opinion, **the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading.** It is the proper function of the trial court **to scrutinize the expert's underlying information** and determine whether it is sufficient to form an opinion on the relevant issue.

Justice Yu's four-justice concurrence, at 358, stated:

> [I] write to caution that our decision is not an endorsement of Tencer or the use of biomedical engineers in cases concerning soft tissue injuries caused by car accidents. Moreover, our decision in this case does not overrule *Stedman* and *Berryman* [citations omitted], or the sound analysis provided by the Court of Appeals, Division One, on the question of whether such testimony is helpful. *See, e.g., Stedman*....
> ...
> The case-by-case nature of this inquiry stands for the proposition that an expert permitted to testify in a particular case does not bind future courts to automatically admit the same expert, even in a relatively analogous case.

Yet the Opinion, p. 17, focused on only a few words the trial judge mentioned in his oral ruling: "[Tencer] makes **a number of assumptions**, some of which [were] based on facts that [were] not going to be in evidence." In doing this, the Court of Appeals overparsed a single phrase, seemingly viewing the trial court's decision "in the light least favorable to the trial court", and failing to apply the principle that a trial court can be affirmed on any basis that appears in the record. *LaMon v. Butler*, 112 Wn.2d 193, 200-201, 770 P.2d 1027 (1989); *State v. Mitchell*, 190 Wn. App. 919, 924, 361 P.3d 205 (2015).

The Court of Appeals did correctly observe that experts sometimes can rely on information not admissible in evidence. Opinion, p. 17. But the Court of Appeals failed to appreciate that experts cannot base their opinions on "assumptions". *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986). Indeed, the Court of Appeals expressly overruled the trial court's discretionary decision that in this case Tencer's opinion was speculative.[5] Opinion, at 17.

In holding that excluding Tencer was an abuse of discretion, Division II relied on the improper, self-serving "legal argument" in

[5]Speculative or unreliable testimony does not assist the trier of fact and is inadmissible. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011).

Tencer's declaration that **Tencer** believed his testimony "would assist the jury in understanding and assessing the differing opinions offered at trial." Opinion, p. 6.[6]

> Worst of all, the Court of Appeals held at p. 17-18:
>
> > Because a disputed issue existed as to the cause and nature and extent of Gilmore's injury, Tencer's testimony would have allowed the jurors to make a more informed decision, especially given the contradictory evidence that the collision was not significant enough to cause injury.

The effect of this ruling extends far beyond this one case. If Division II were correct, then trial courts would be **required** to admit Tencer's testimony in **every** motor vehicle tort case, because **every** motor vehicle tort case involves a dispute as to the cause and/or the nature and extent of the plaintiff's injury. Trial courts would have no discretion to exclude Tencer's testimony.[7] That is directly contrary to both this Court's holding and to the concurrence in *Johnston-Forbes*, *supra*. It also contradicts this

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[6]Defendant had available to it plenty of other evidence regarding the nature of the impact, including testimony from its own bus driver employee (who for some reason **defendant chose not to call at trial**) and at least one bus passenger, RP 34.

[7]Counsel are aware that the Opinion is "unpublished". But we also are aware of the September 2016 change to GR 14.1, permitting citation of unpublished Court of Appeals decisions "as nonbinding authorities". Whether technically "binding" or not, surely all trial courts in Division II, and perhaps throughout the State, would be hard pressed to ever exclude Tencer's testimony, when Division II has made it clear that it believes trial courts lack the discretion to do so.

Court's decisions cited at pp. 7-8, *supra*, providing trial courts with extensive discretion regarding the admissibility of expert testimony.

The Opinion also brings Division II into direct conflict with at least two published decisions from Division I: *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) and *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). Indeed, defendant admitted this inter-divisional conflict, and argued it to Division II, in connection with Division II's intended administrative transfer of this case to Division I.[8]

There is now an irreconcilable conflict between Divisions regarding Tencer. The Opinion cannot be reconciled with Division I's decisions in *Stedman* and *Berryman*, *supra*, which upheld trial courts that exercised their discretion and excluded Tencer. Because the testimony of Tencer and similar witnesses is offered frequently, *Berryman v. Metcalf*, 177 Wn.

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[8]On August 10, 2016, Division II notified the parties it intended to administratively transfer this case to Division I. The parties were given the opportunity to move to "opt out" of the transfer. Defendant so moved on August 15, 2015, **on the ground that there were conflicting decisions between Division I and Division II regarding Tencer's testimony.** *See*, Appendix C (Notice of Transfer, Appellant's Motion to Opt Out, Order Granting Motion, and Clerk's Ruling). The Court of Appeals granted defendant's opt-out motion and retained this case, without even considering Mr. Gilmore's response. *Id.* Mr. Gilmore had argued to no avail that the apparent conflict between the divisions could be harmonized IF one interpreted all the cases as holding that the decision to admit or exclude Tencer was to be made on a case-by-case basis relying upon the trial court's discretion. That harmonizing principle has now been rejected by Division II, via its holding that the exclusion of Tencer is an abuse of discretion.

App. 644, 654, 312 P.3d 745 (2013), the prompt resolution of this conflict is important to the smooth functioning of our court system.

The Opinion on Tencer also implicates substantial public interests. It impacts judicial economy, by significantly impairing the discretion with which our trial courts have traditionally been entrusted. It impacts the State's interest in the full compensation of tort victims.[9] And as explained below, it has the potential to do damage to the worker's compensation system.[10]

C. **This Court held in *Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000) that evidence of L&I benefit payments is inadmissible, "even when it is otherwise relevant", even when it offered is to show malingering or to attack credibility. Division II in this case held that trial courts have no discretion to exclude evidence of L&I benefits where there was evidence the injured worker had financial stress after the injury. That ruling is inconsistent with *Cox*, *supra*, with *Boeke v. International Paint Co.*, 27 Wn. App. 611, 620 P.2d 103 (1980), and with RCW 51.24.100, and it raises issues of substantial public interest. RAP 13.4(b)(1), (2), and (4).**

Contrary to RCW 51.24.100, the defense sought to introduce collateral source evidence that Mr. Gilmore had received L&I benefits, to support its claim that he was malingering and to impeach some testimony that

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[9]"The cornerstone of tort law is the assurance of full compensation to the injured party." *Seattle First Nat. Bank v. Shoreline Concrete,* 91 Wn.2d 230, 236, 588 P.2d 1308 (1978).

[10]Because injured workers' third party cases often involve motor vehicle torts, the Opinion's decision allowing Tencer and his ilk to testify in every motor vehicle tort case also will harm injured workers and the Department.

he had had financial stress after the crash. The trial court balanced the evidentiary value and the prejudicial effect of such evidence, ER 403, cited *Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (2000), and excluded the evidence. RP 56. Defendant later argued that plaintiff had "opened the door" to the L&I evidence when a witness testified that Mr. Gilmore was having financial stress as a result of his injuries. The trial court invited defendant to show any authority that evidence of financial stress can "open the door" to collateral sources, RP 543-44, but the defense never supplied any authority until after the trial.

In support of its holding that it was error for the trial judge to exclude evidence of L&I benefits, the Court of Appeals relied upon *Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 796, 953 P.2d 800 (1998). Opinion, p. 20. In *Johnson*, Division II had held the collateral source rule did not apply in L&I cases. This Court reversed, holding that the rule **does** apply and that such evidence must be excluded. In doing so, this Court rejected the argument that collateral source benefits could be used to support a claim of malingering, or to impeach the injured worker's claim that he had "barely enough money to get by". *Id.*, at 803-04.

There is dicta at the end of the *Johnson* opinion regarding an injured worker "opening the door" to collateral source benefits for his spouse: "Injured parties may, however, waive the protections of the collateral source rule by opening the door to evidence of collateral benefits." This statement was made in the context of disability benefits being received by the injured worker's **wife**, not the injured worker **himself**, and its application, if any, to the injured worker was unclear.

Any possible confusion should have been cleared up 2 years later in *Cox v. Spangler, 141 Wn.2d 431, 441, 5 P.3d 1265* (2000), where this Court held (citations omitted, emphasis added):

> Although the fact that Cox received industrial insurance benefits might have some marginal relevance regarding the apportionment of Cox's damages, **to show malingering**, or to attack her experts' **credibility**, we believe such relevance is outweighed by the unfair influence this evidence would likely have had upon the jury.

Moreover, this Court recently held in *Entila v. Cook*, 187 Wn.2d 480, 489, 386 P.3d 1099 (2017) (emphasis added), that RCW 51.24.100 "**is unambiguous that an employees' receipt of benefits is inadmissible in a third party action**." *Entila* held it was error for the trial court to admit evidence the worker had received L&I benefits, even when the very issue was whether the worker was on the job at the time of the injury.

The Opinion also conflicts with this Court's holdings that statutes are to be construed in accordance with their plain language. *See, e.g., State v. Larson,* 184 Wn. 2d 843, 848, 365 P.3d 740 (2015) (court must give effect to plain meaning of statutory language). RCW 51.24.100 plainly states (emphasis added), "The fact that the injured worker or beneficiary is entitled to compensation under this title **shall not be pleaded or admissible in evidence in any third party action** under this chapter." The Opinion is contrary to *Larson, supra*, and to this statute.

This Court has held that statutes in Title 51 must be construed in favor of the injured worker:

> The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve is purpose of providing compensation to covered employees injured in their employment, with doubts resolved in favor of the worker.

Cockle v. Department of Labor & Industries, 142 Wn.2d 801, 811, 16 P.3d 583 (2001). *See also*, RCW 51.12.010.

Finally, the Opinion is contrary to this Court's policy favoring L&I third party actions. "The Legislature evidences a strong policy in favor of actions against third parties....These legislative declarations mandate policy decisions by the courts..." *Evans v. Thompson*, 124 Wn.2d 435, 437, 879

P.2d 938 (1994). "[W]e will, in all doubtful cases, sustain the right of the injured workman against the third party wrongdoer." *Michaels v. CH2M Hill, Inc.*, 171 Wn.2d 587, 599, 257 P.3d 532 (2011).

As with Tencer, this is not a situation where the Court of Appeals held that evidence of L&I benefits may be admitted; it held that such evidence must be admitted, and that the trial court lacked discretion to exclude it. The Opinion holds that where there is evidence of financial stress to an injured worker, "the door is opened" and it is error not to admit L&I benefits. Opinion, p. 20.

As with Tencer, the effect of this ruling extends far beyond this one case. L&I time loss benefits never fully replace the injured worker's pay, providing the lesser of a fraction of pre-loss earnings or a cap. RCW 51.32.060 and .090. Virtually every injured worker, and thus every third party plaintiff, has financial loss. The effect of the Opinion therefore is to require the admission of L&I benefits in every third party case. This is contrary to the cases cited above, to RCW 51.24.100, and to the broad discretion in evidentiary matters which this Court's decisions confer upon our trial courts.

In the case of L&I benefits, the general collateral source rule is strengthened by a special statute which does not apply to other collateral sources. Despite that statute, the Opinion requires the admission of L&I benefits in third party cases of financial stress. How much more so then does the Opinion require the admission of non-L&I collateral sources in other tort cases?

This evisceration of the collateral source rule would radically change the law of evidence, and result in an enormous reduction in trial court discretion. It is contrary to longstanding Supreme Court and published Court of Appeals precedents regarding collateral sources, including but not limited to *Ciminski v. CSI*, 90 Wn.2d 802, 585 P.2d 1182 (1978); *Stone v. City of Seattle*, 64 Wn.2d 166, 391 P.2d 179 (1964); *Heath v. Seattle Taxicab Co.*, 73 Wash. 177, 131 P. 843 (1913); and *Boeke v. International Paint Co.*, 27 Wn. App. 611, 620 P.2d 103 (1980).

The Opinion on admissibility of L&I benefits also raises issues of substantial public interest. One reason for the collateral source rule, and for RCW 51.24.100, is that jurors who learn what the injured worker has or will receive in benefits may reduce their verdict accordingly. *Cox*, *supra*, at 440. The Opinion's holding that L&I benefits **must** be admitted

will therefore harm those who bring L&I third party actions. It also will harm the Department's Accident and Medical Aid funds, which depend in part upon third party recoveries for solvency. *See, e.g.*, RCW 51.16.035(1) and (3); RCW 51.24.060; *Cox, supra*, at 440. Court decisions which impair L&I third party actions have a deleterious effect upon the Department and its solvency, and upon taxpayers, employers, and injured workers.

D. This Court held in *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012) that an appellate court will not substitute its judgment for the trial court's in evaluating the effect of alleged misconduct upon the jury. Division I held in *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 814 P.2d 687 (1991) that a trial court is entitled to "great deference" when determining the impact of trial events upon the jury. Division II in this case substituted its judgment for that of the trial court, and held the trial court abused its discretion when, considering its own observations of the trial and in the context of the entire record, it denied defendant's motion for new trial on the basis of a closing argument to which defendant never objected. That is inconsistent with *Teter* and *Dickerson* and raises issues of substantial public interest. RAP 13.4(b)(1), (2), and (4).

The Court of Appeals' criticism of plaintiff's closing argument seems to be based primarily upon its misreading of the record. *Compare, e.g.*, Opinion, p. 14 *with* fn 1, *supra* for discussion of the record's actual content. More to the point, this Court holds that in these matters appellate courts should defer to that trial court discretion which is essential to our court system. "The trial court is in the best position to most effectively

determine if [counsel's] misconduct prejudiced a [party's] right to a fair trial." *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991). "[W]e will not substitute our own judgment for the trial court's judgment in evaluating the scope and effect of that misconduct." *Teter v. Deck*, 174 Wn.2d 207, 226, 274 P.3d 336 (2012). But that is precisely what the Court of Appeals did here, Opinion, p. 24, directly contradicting the trial court's discretionary decision, which the trial court specifically stated was based upon its personal observation of the pretrial proceedings and of the jury trial, considered in the context of the entire record. CP 723-24. *See*, Appendix F.[11]

VI. CONCLUSION

Mr. Gilmore asks this Court to grant review, reverse the Court of Appeals decision, and reinstate the jury verdict herein.

Respectfully submitted this 24th day of May, 2017.

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[11]The lack of defense objection during plaintiff's closing argument further bolsters the trial court's discretionary conclusion that any technically improper argument was harmless. "[T]he lack of a clear and prompt objection is strong evidence that counsel perceived no error." *In re Black*, 187 Wn.2d 148, 154, 385 P.3d 765 (2016).

DECLARATION OF FILING AND SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on May 24, 2017, I arranged for filing and service of the accompanying Respondent's Petition for Review, With Appendices, by emailed PDF to coa2filings@courts.wa.gov and to all counsel, as follows:

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and by messenger delivery to opposing counsel at 1619 8th Ave N, Seattle, WA 98109

Dated this 24th day of May, 2017, at Burien, WA.

David S. Heller

Court of Appeals Opinion in
Gilmore v. Jefferson County Public Transportation Benefit Area
Court of Appeals No. 48018-2-II

Filed
Washington State
Court of Appeals
Division Two

April 25, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL GILMORE, a single man, Respondent, v. JEFFERSON COUNTY PUBLIC TRANSPORATION BENEFIT AREA, dba Jefferson Authority, a municipal corporation,, Appellant.	No. 48018-2-II UNPUBLISHED OPINION

MELNICK, J. — Jefferson County Public Transportation Benefit Area (Jefferson Transit) appeals the jury verdict awarding Michael Gilmore $1.2 million in general damages and the trial court's denial of Jefferson Transit's motion for new trial. We conclude that the trial court's exclusion of Jefferson Transit's expert witness's testimony constituted reversible error. Because some issues are likely to arise on retrial, we address them. We conclude that Gilmore's expert witness's testimony did not exceed the scope of his expertise, the trial court improperly excluded evidence about Gilmore receiving Department of Labor and Industries (L&I) payments, and that Gilmore's lawyer made improper and prejudicial comments in closing argument. We reverse and remand.

FACTS

On March 31, 2008, Gilmore drove his employer's van. While stopped at a stop light, a transit bus owned by Jefferson Transit either followed Gilmore's van too closely, failed to stop, and rear-ended Gilmore; or it stopped, idled forward several feet, and bumped into Gilmore's van.

The vehicles had minimal damage. Gilmore's employer did not bring a claim against Jefferson Transit for any damage to its van.

As a result of the accident, Gilmore received monthly L&I payments in the form of wage and time loss. He subsequently received a $40,000 lump sum permanent partial disability payment.

Gilmore described the collision as a "heavy duty jolt" that felt "devastating." 5 Report of Proceedings (RP) at 748-49. He went to the emergency room immediately following the collision complaining of nausea, headache, and pain in his hips, lower back, and neck. He returned to the emergency room several days later complaining of headaches and numbness in his hands. An examination showed that he had bulging discs.

At the time of the collision, Gilmore was receiving compensation from the Department of Veterans Affairs (VA). Since 2004, Gilmore had a 60 percent disability rating based on an evaluation of a number of conditions, including numbness in his hands and degenerative arthritis in his hips, elbows, knees, and spine. In 2007, he also sought care for neck pain. When Gilmore consulted with physicians in the months following the collision, he failed to tell them that he had experienced similar symptoms in the past.

Approximately one month after the collision, Dr. Marc Suffis, one of Gilmore's treating physicians, conducted an initial medical assessment on Gilmore. Suffis did not have records of Gilmore's medical history on file and relied on Gilmore to provide accurate information. Gilmore complained of numbness in his hands, headaches, and pain in his back and neck. Suffis opined that, due to the accident, Gilmore sustained a cervical or neck injury. A subsequent magnetic resonance imaging (MRI) showed disc herniation and lumbar strain.

Approximately three months after the collision, Jefferson Transit's private investigator took video surveillance of Gilmore engaging in physical activities. The video showed Gilmore jogging across the street, putting a boat on a trailer with his son, and moving his head and neck with a full range of motion.

Gilmore received a carpal tunnel syndrome diagnosis, unrelated to the accident, and had surgery on both hands in July and September 2008. At that time, he was also receiving lumbar injections, chiropractic care, and physical therapy for his neck. While healing from carpal tunnel surgery, he still had some neck pain.

In January 2009, Gilmore opened his own plumbing business, but shortly thereafter began feeling significant pain in his neck. One of his treating physicians recommended surgery, but Gilmore declined it because he would not be able to support his family if he closed his business. The physician prescribed opiates so he could work. In 2010, his treating physician again recommended surgery, but Gilmore stated that he could not afford it.

In August 2010, Gilmore sued Jefferson Transit. Jefferson Transit admitted liability for the collision, but denied causing the injuries and denied the nature and extent of the injuries. The ensuing trial solely determined the amount of Gilmore's general damages.

From 2010 to 2015, Gilmore continued to work but his sons helped with heavier jobs. He had neck surgery in 2015, but still had some headaches and lumbar pain. Gilmore eventually shut down his plumbing business.

I. MOTIONS IN LIMINE

A. Golden Rule Arguments

Pretrial, Jefferson Transit moved to exclude golden rule arguments that encouraged jurors to put themselves in Gilmore's place when deciding the case. Gilmore did not object and the court granted the motion.

B. Other Income

Gilmore moved to exclude evidence of benefits from collateral sources, including L&I payments and VA disability compensation. The court denied Gilmore's motion, ruling that the collateral source rule did not apply to the payments in this case. Gilmore also moved to exclude evidence of his past and current financial status. The court granted Gilmore's motion to exclude the evidence, stating that it would not conflict with its ruling on the L&I and VA payments.

Gilmore filed a motion for reconsideration regarding the L&I and VA payments. As to the L&I payments, Gilmore argued that even if the evidence was relevant, it was too prejudicial to be used to impeach. Jefferson Transit argued that because Gilmore was being untruthful to his treating doctors regarding past symptoms, the evidence could prove he tried to commit fraud. It only intended to admit the $40,000 lump sum payment he received around the same time he opened his plumbing business. Because Gilmore was not requesting reimbursement for medical damages or loss of future earnings, Jefferson Transit argued, the evidence was not prejudicial.

The court reversed its previous ruling, stating that the L&I lump sum payment was a collateral source related to the injury. It found the evidence was more prejudicial than probative, but ruled that the evidence could come in if the door was opened at trial. It affirmed its ruling as to the VA payments.

C. Character Evidence

Gilmore also moved to admit character evidence of his reputation in the community for truthfulness, work ethic, and honesty. Jefferson Transit did not object, stating that Gilmore was entitled to the evidence if presented in proper form. The court ruled that evidence in compliance with ER 608 would be admissible.

D. Expert Witness Testimony

1. Dr. Geoff Masci

Gilmore moved to admit Masci's testimony. Masci, a chiropractor Gilmore retained, conducted a records review and a physical examination of Gilmore. His report included his opinion that Gilmore had a herniated disc in his neck due to the collision. In his motion, Gilmore admitted that he did not timely disclose Masci's report because of an "administrative oversight," but offered to make him available for deposition. 1 RP at 29.

Jefferson Transit moved to exclude the testimony because Gilmore failed to supplement its interrogatories when Gilmore received Masci's report which he completed in 2013. It did not receive the report until weeks before trial and it did not want to depose Masci. After reviewing the *Burnet*[1] factors, the court granted Gilmore's motion. It reasoned that nobody suggested a lesser sanction, the discovery violation did not appear to be willful or deliberate, and Masci's testimony did not substantially prejudice Jefferson Transit, and Jefferson Transit chose not to depose Masci after being given the opportunity.

2. Dr. Frank Marinkovich

Jefferson Transit moved to exclude Marinkovich's testimony, arguing that his opinion was speculative. Marinkovich, an expert Gilmore retained, conducted a review of Gilmore's medical

[1] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

records, but did not meet or physically examine Gilmore. In his May 2015 report, Marinkovich opined that Gilmore sustained a "very serious" two-level disc injury in his neck as a result of the collision, which led to Gilmore's neck surgery. 5 RP at 650.

Marinkovich's record review, however, showed that he did not receive or review Suffis' 2004 disability assessment, Suffis's deposition testimony, or the surveillance video even though Gilmore disclosed that the additional records were made available to Marinkovich. After reviewing the *Burnet* factors, the court denied the motion because exclusion of evidence was an extraordinary remedy that it was not inclined to order as to Marinkovich's testimony.

3. Allen Tencer, Ph.D.

Gilmore moved to exclude Tencer's testimony. Tencer, an expert Jefferson Transit retained, had a Ph.D. in Mechanical Engineering. He performed research and published peer reviewed literature in the field of biomechanics related to injury prevention. He also taught orthopedic residents and engineering graduate students. He intended to testify to the severity of the impact and the forces produced on Gilmore during the collision.

In arriving at his opinion, Tencer relied on the weights of the vehicles involved in the collision, determined the speed of the striking vehicle based on the level of damage, and considered other factors such as head restraint design. He calculated the forces operating on Gilmore "based on fundamental engineering principles such as the conservation of energy, momentum, and restitution." Clerk's Papers (CP) at 366. He did not have a medical opinion whether Gilmore sustained injuries; however, he believed his testimony would assist the jury in understanding and assessing the differing opinions offered at trial. He previously testified in several Washington cases where courts found impact severity in car collisions to be relevant and helpful for the jury.

Gilmore argued that Tencer's testimony did not provide a medical opinion and would confuse the jury. Jefferson Transit argued that there existed conflicting deposition testimony regarding the impact of the collision, and Tencer's testimony would assist the jury in determining whether or not the accident was, as Gilmore described it, "devastating." 1 RP at 36. The court granted Gilmore's motion. It found that Tencer's testimony "makes a number of assumptions, some of which are based on facts that are not going to be in evidence." 1 RP at 39. The testimony was "intended to create an inference with some aura of authority" that was unreasonable and unjustified, and would confuse and mislead the jury. 1 RP at 39.

II. TRIAL

A. Dr. Suffis's Testimony

The trial court admitted Suffis's video deposition and the surveillance footage of Gilmore, and the jury reviewed both. Suffis testified regarding his medical examination of Gilmore and his opinion that Gilmore sustained a neck injury due to the collision. In August 2009, Gilmore did not want further treatment and wanted his claim closed.

Suffis later learned that during the initial assessment, Gilmore did not disclose that he had prior symptoms or that he had a 60 percent VA disability rating. Nor did he disclose that he previously sought care for neck pain in 2007. Suffis had no records on file of Gilmore's medical history and relied on Gilmore to give accurate information; Suffis, therefore, believed that the information he relied on for his diagnosis was inaccurate.

B. Dr. Masci's Testimony

Masci testified that he physically examined Gilmore and reviewed his medical records, but relied primarily on Gilmore's recitation of his medical history and what happened at the accident.

Gilmore told him that the impact threw him forward and back within the confines of his seatbelt while his vehicle was stopped.

Masci opined that Gilmore had cervical subluxation, cervical degenerative disc disease and degenerative joint disease, muscle inflammation, and a cervical disc herniation related to the collision. He opined that because of Gilmore's preexisting disc degeneration, the disc herniation was severe. While he noted that Gilmore was a "less than stellar historian" as to his medical history, it did not change his opinion. 3 RP at 333.

When Masci recalled that Gilmore was not fully alert during the exam and was vague about matters because he was using pain medication, Jefferson Transit objected. The court sustained the objection. When asked whether he thought Gilmore was trying to exaggerate his symptoms, Masci stated that while there were some omissions and discrepancies between the record and what Gilmore told him, it was "actually quite common in this type of situation." 3 RP at 336-37. Jefferson Transit objected to the commentary, and the court sustained the objection.

As Masci explained how to differentiate where nerves were being pinched, Jefferson County objected, arguing that Masci was testifying outside the scope of his chiropractic expertise. The court overruled the objection. Masci explained that he had training to diagnose neurological conditions for referrals.

When Masci began to explain how Gilmore's carpal tunnel syndrome complicated the neck injury, Jefferson Transit again objected, arguing that he was talking about neurological issues and that he was not qualified to treat carpal tunnel syndrome. The court sustained the objection. When asked about deficits in the distribution of nerves as it was related to shoulder pain, Jefferson Transit again objected as to the testimony's scope. The court overruled the objection.

C. Dr. Marinkovich's Testimony

When Marinkovich testified that his records review included the 2004 VA assessment, Jefferson Transit objected. Outside the presence of the jury, Jefferson Transit argued that Marinkovich's report was received four weeks before trial and nowhere in his report did he mention the 2004 VA assessment. Marinkovich also represented that he reviewed the surveillance video, but his report did not indicate that he did.

Marinkovich stated that he was asked to conduct a records review in December 2014. He explained that in May 2015, additional records including the 2004 VA assessment were supplied to him and he reviewed them. His undated report was written after he received the full set of records, around May 19, 2015. Jefferson Transit stated that it received the report on May 8, 2015 and the records review on May 11, 2015. If Marinkovich received the additional records on May 19, 2015, he could not have reviewed the additional information when he wrote his report.

Marinkovich explained he was unsure May 19, 2015 was the actual date and did not know why his report was undated. The court stated that the issue was addressed in the parties' motions in limine and nothing it heard at trial contradicted it. However, it acknowledged that the situation did not make sense given that he "unequivocally said . . . that he received" the additional records, but the report was written after they were received. 3 RP at 424-25.

The court declined to exclude Marinkovich's testimony. However, it gave Jefferson Transit additional time to prepare for cross-examination. When Gilmore asked why there needed to be a remedy, the court stated:

> [I]t's a remedy for what appears to be a lot of fishy business and potentially fishy business and deception that's been going on ... I was going to allow this witness to testify even though his report was late. Then, it turns out—and [Jefferson Transit] thought that his report was not based on Dr. Suffis' VA exam and not based on the video . . . [I]t was suggested that . . . he had everything, including these depositions. Well, now he's saying that he did not . . . listen to or read the . . . deposition of Dr.

> Suffis . . . [N]one of this appears to me to be very forthcoming to me is what it appears. . . . I want to give [Jefferson Transit] an adequate time to figure out exactly what the doctor did review and an adequate time now to formulate his questioning of the doctor.

3 RP at 432-33.

The trial court directed Gilmore to send copies to Jefferson Transit of everything Marinkovich reviewed before he resumed his testimony. The parties agreed that Gilmore would provide the documents to Jefferson Transit by the end of the week.

When Marinkovich resumed his testimony the following week, he testified that although Gilmore did not provide his treating doctors with an accurate medical history, it was not "false information" because Gilmore's account of his history was subjective and based on memory. 5 RP at 732. Marinkovich opined that Gilmore sustained a neck injury as a result of the collision which led to surgery.

D. Dr. Barbra Jessen's Testimony

Jessen, a neurologist retained by Jefferson Transit, evaluated and interviewed Gilmore in December 2012 and reviewed his medical records. As part of her records review, she reviewed Gilmore's deposition and the 2004 VA disability assessment. She opined that the injuries at issue manifested in early 2009 and were not related to the collision.

E. Character & Financial Status Evidence

In opening argument, Gilmore's lawyer stated that the only major issue was whether Gilmore was "a liar, a cheat, and a fraud." 3 RP at 273. She stated that Jefferson Transit, after admitting it caused the collision, "[came] up with a plan" to say "[Gilmore] is a liar, a cheat and a

fraud" and hired a private investigator to hide and videotape him. 3 RP at 274. Jefferson Transit's lawyer argued that it was not calling Gilmore a liar, cheat, or a fraud.[2]

Gilmore's first witness testified on direct examination that Gilmore "seemed liked a reasonably good guy and [they] got along great." 3 RP at 299. The court sustained Jefferson Transit's objection on the basis that the testimony consisted of inadmissible character evidence. Jefferson Transit later objected for relevance when Gilmore asked the witness whether he worried about having Gilmore come to his house to fix plumbing issues if he was not at home. Gilmore argued that Jefferson Transit opened the door to Gilmore's character of being "a liar, a cheat and a fraud." 3 RP at 305. The court sustained the objection and ruled that Jefferson Transit did not open the door. Another witness testified on direct examination that Gilmore was the hardest worker he had known. The court again sustained Jefferson Transit's objection.

One of Gilmore's sons testified, stating that Gilmore worked three jobs to keep food on the table, and that after the accident "things, kind of, hit the fan." 4 RP at 508. Outside the presence of the jury, Jefferson Transit argued that Gilmore opened the door to admitting the L&I payments. Jefferson Transit argued that Gilmore's lawyer asked Gilmore's son about his father's job, how they felt about losing money and his father's inability to work, and how it caused stress on the family. It argued that the jury should know Gilmore was receiving payments from L&I and that he received a $40,000 lump sum after the accident. Gilmore argued that the lump sum was received months after Gilmore opened his business and the payments fell within the collateral source rule. The court did not change its previous ruling.

[2] Gilmore does not cite to any part of the record to support its position that Jefferson Transit made these statements. Our review of the record does not indicate that Jefferson Transit ever called Gilmore a liar, cheat or a fraud before the jury.

Another one of Gilmore's sons testified that Gilmore worked multiple jobs to support the family, and that being unable to work after the accident led to his depression and alcohol addiction. Jefferson Transit objected and argued that per the court's order, Gilmore could not mention his financial status. Jefferson Transit also argued that the testimony about Gilmore's financial difficulty after the collision opened the door to questioning regarding the L&I payments. It argued the testimony was a ploy to gain the jury's sympathy, the implication being that the family had no income during this time. Gilmore argued that the testimony went to his mental pain and suffering as a result of the accident, not to sources of income. The court overruled the objection, absent it receiving authority on opening the door as to the collateral source rule.

F. Closing Arguments

Gilmore's lawyer opened her closing argument by stating that the "issue is whether [Gilmore] is a liar, a cheat and a fraud." 7 RP at 977. She argued that Jefferson Transit "set the tone for how they were going to proceed" early on in the case about "what they were willing to do" to "cover up" their liability. 7 RP at 982-83, 985. She argued that Jefferson Transit was trying to perpetrate fraud and was attempting to escape liability by confusing the jury. Gilmore's lawyer also stated:

> Do we let the government win? Do we just roll over because we know that this is how they're gonna fight? . . . [Gilmore] can't fight the government alone. . . . We certainly can't fight the government in this case without you.

7 RP at 989, 991, 996.

Gilmore's lawyer proceeded to analogize Gilmore's condition and current situation to a job advertisement, asking the jury what it would take for them to respond to the ad:

> How much is that worth? If we saw this job ad, what would we think? . . . What's it worth in our community? . . . Maybe for that amount of money, I'd respond to that ad.

7 RP at 1003-04.

Jefferson Transit's lawyer began his closing argument by analogizing wrongful police shootings caught on video to the case because the surveillance footage of Gilmore "brought to light things that we wouldn't have known otherwise." 7 RP at 1006. He clarified that he never called Gilmore a liar, cheat or a fraud; the only person calling him that was Gilmore's own lawyer. Jefferson Transit's lawyer further argued that a $1.8 million verdict was "ridiculous," stating, "[I]t's not a lottery . . . [i]t's not an opportunity to retire." 7 RP at 1008, 1023.

In her rebuttal, Gilmore's lawyer seemed to mischaracterize Jefferson Transit's analogy to police shootings, stating that the lawyer talked about the government and "how [it] murders innocent people . . . [and] gets away with it." 7 RP at 1031. She continued, stating:

> But that's what the government does . . . no one holds them accountable . . . [W]hen you fight the government, they impugn your credibility. They call you a liar . . . a cheat . . . a fraud. . . .
>
> But [Gilmore] isn't willing to roll over . . . [If] you don't hold the government accountable . . . they will just keep doing what they're doing. That they will feel like they can run into anybody in this community and just walk away.

7 RP at 1031-32.

Gilmore's lawyer argued that the jurors were people of the community and urged them to ask themselves what this was worth in their community. She sought $1.8 million in damages. Jefferson Transit did not object to Gilmore's closing arguments.

III. VERDICT & MOTION FOR NEW TRIAL

The jury returned a verdict in Gilmore's favor and awarded $1.2 million for past and future non-economic damages. Jefferson County moved for a new trial or remittitur. It argued that numerous irregularities and party misconduct justified relief, and that the excessive verdict was a result of Gilmore's misconduct. It had three main bases for its motion.

First, Jefferson Transit argued that Gilmore violated court rulings by presenting testimony that he lost his job and had worries about his ability to work and how to provide for his family. It argued that but for the court's rulings, Jefferson Transit could have shown that Gilmore had income from L&I time loss and a large permanent partial disability award.

Second, Jefferson Transit asserted that Gilmore put on impermissible character evidence in violation of the court's order after claiming that Jefferson Transit called him "a liar, a cheat and a fraud" in violation of the order in limine. CP at 407. Gilmore's false attribution of the pejorative to Jefferson Transit throughout trial was designed solely to arouse the passion of the jury.

Third, Jefferson Transit argued that Gilmore intentionally inflamed the jury by improperly seeking punitive damages to "fight the government," a strategy that caused the jury to reach an excessive verdict. CP at 423.

The trial court denied Jefferson Transit's motion. It acknowledged that while the case was "hard-fought" and "characterized by aggressive advocacy," it could not find party misconduct or violations sufficient to justify a new trial, nor could it find a basis to overturn the verdict. CP at 724.

Jefferson Transit appeals.

ANALYSIS

I. EVIDENTIARY ERRORS

A. Standard of Review

We review a trial court's evidentiary rulings for an abuse of discretion. *City of Spokane v. Neff*, 152 Wn.2d 85, 91, 93 P.3d 158 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *Mayer v.*

Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006). The same standard applies when we review the admissibility of expert evidence. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388 (2014).

When a trial court relies on unsupported facts or applies the wrong legal standard, its decision is exercised on untenable grounds. *Mayer*, 156 Wn.2d at 684. If the trial court applies the correct legal standard to the supported facts, but adopts a view no reasonable person would take, its decision is manifestly unreasonable. *Mayer*, 156 Wn.2d at 684.

B. Excluding Tencer's Testimony

Jefferson Transit argues that the trial court improperly excluded Dr. Tencer's testimony because it relied on the wrong legal standard. It argues that Tencer was allowed to rely on facts not in evidence and that he met the legal criteria for admission of his testimony. We conclude that the trial court's exclusion of Tencer's testimony constitutes reversible error.

"[E]xpert testimony is admissible if (1) the expert is qualified, (2) the expert relies on generally accepted theories in the scientific community, and (3) the testimony would be helpful to the trier of fact." *Johnston-Forbes*, 181 Wn.2d at 352. In applying this test, trial courts are afforded wide discretion. *Johnston-Forbes*, 181 Wn.2d at 352. The court's rulings on expert opinions will not be disturbed absent abuse of discretion.[3] *Johnston-Forbes*, 181 Wn.2d at 352.

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[3] Both parties cite to *Johnston-Forbes*, a case where admitting Tencer's biomechanical engineering testimony was at issue. In that case, our Supreme Court acknowledged that some courts allowed Tencer's testimony and some excluded it. *Johnston-Forbes*, 181 Wn.2d at 353 (citing to *Ma'ele v. Arrington*, 111 Wn. App. 557, 560, 45 P.3d 557 (2002), and *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012)).

Johnston-Forbes involved a low-speed collision where fault was not at issue and it was undisputed that the plaintiff had a herniated disc in her neck. 181 Wn.2d at 349-50, 356. As in this case, the jury was charged with determining whether the defendant's actions were the cause of the plaintiff's herniated disc. *Johnston-Forbes*, 181 Wn.2d at 356. Tencer's testimony helped the jury understand what forces might have been involved in the collision and he compared those

If the basis for admission of evidence is "'fairly debatable,'" we do not disturb the trial court's ruling. *Johnston-Forbes*, 181 Wn.2d at 352 (quoting *Grp. Health Coop. of Puget Sound, Inc., v. Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986)) (internal quotation marks omitted). Exclusion of evidence which is cumulative or has speculative probative value is not reversible error. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 169-70, 876 P.2d 435 (1994).

An expert may testify regarding scientific, technical, or other specialized knowledge if it will assist the trier of fact in understanding the evidence or determining a fact at issue. ER 702. The expert must base his or her opinion or inference on facts or data in the case perceived by or made known to the expert at or before the hearing. ER 703. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." ER 703.

In this case, Tencer was clearly a "qualified" expert whose testimony relied on "generally accepted theories in the scientific community." *Johnston-Forbes*, 181 Wn.2d at 352. Tencer had a Ph.D. in Mechanical Engineering along with professional and academic expertise in orthopedics and biomechanical forces. He planned to testify to the severity of the impact and the forces produced on Gilmore using calculations based on "fundamental engineering principles such as the conservation of energy, momentum, and restitution." CP at 366. Given that issues on causation of the injury and the nature and extent of the injury existed, his testimony could have been helpful to the jury in understanding and assessing the differing opinions offered at trial. He had previously testified on similar subjects in Washington.

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forces to activities of daily living. *Johnston-Forbes*, 181 Wn.2d at 356. Our Supreme Court found that the trial court acted within its discretion in allowing Tencer's testimony and affirmed. *Johnston-Forbes*, 181 Wn.2d at 357. It emphasized that, admitting expert testimony is based on a case-by-case, fact-specific inquiry. *Johnston-Forbes*, 181 Wn.2d at 358 (Yu, J., concurring).

The court excluded the proffered testimony because Tencer made "a number of assumptions, some of which [were] based on facts that [were] not going to be in evidence." 1 RP at 39. The court also excluded the testimony because the testimony was "intended to create an inference with some aura of authority" that it did not believe was "reasonable or justified." 1 RP at 39.

These rulings were erroneous. Experts are permitted 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 forming opinions or inferences on the subject. ER 703. By relying on the wrong legal standard, the trial court excluded Tencer's testimony based on an untenable reason.

Tencer had extensive education and experience in biomechanics related to injury prevention, and testified in several cases involving similar issues. In formulating his opinion, Tencer relied on the disparate weights of the vehicles involved in the collision, determined the speed of the striking vehicle based on the level of damage, and considered other facts such as the head restraint design. He calculated the forces operating on Gilmore based on fundamental engineering principles. While the data underlying his calculations were not in evidence, it was of a type reasonably relied on by experts in his field in forming opinions on the subject. ER 703.

The trial court also found that Tencer's testimony would be confusing or misleading to the jury. The court did not elaborate on this finding, but seemed to agree with Gilmore's argument that the information was irrelevant since the jury will "figure out" from testimony and photographs that "a bus going slow that hits another vehicle [does] not result[ ] in a catastrophic collision." 1 RP at 37.

Tencer's testimony, however, was neither cumulative nor speculative. Because a disputed issue existed as to the cause and nature and extent of Gilmore's injury, Tencer's testimony would

have allowed the jurors to make a more informed decision, especially given the contradictory evidence that the collision was not significant enough to cause injury. His testimony would have been subject to cross-examination and the weight of his testimony would have been determined by the jury. By erroneously excluding Tencer's testimony, Jefferson Transit could not present its theory of the case. The trial court, therefore, abused its discretion when it excluded the testimony by applying the wrong legal standard. We, therefore, conclude that excluding Tencer's testimony constitutes reversible error requiring remand.

Given our conclusion above, we need not decide the remaining issues. However, because some are likely to reoccur at trial, we choose to briefly address them.

C. Admitting Masci's Testimony

Jefferson Transit argues that Masci's testimony exceeded the scope of his chiropractic expertise because he gave opinions on surgical and neurological issues. It also argues that his opinions regarding Gilmore's injuries and credibility were speculative and based on unreliable information. We disagree.

A chiropractor is competent to testify as an expert on matters within the scope of his or her profession. *Brannan v. Dep't of Labor & Indus.*, 104 Wn.2d 55, 63, 700 P.2d 1139 (1985). "The practice of chiropractic in Washington includes 'diagnosis or analysis and care or treatment of the vertebral subluxation complex and its effects, articular dysfunction, and musculoskeletal disorders.'" *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 119, 924 P.2d 953 (1996) (quoting RCW 18.25.005(1)). As part of a chiropractic differential diagnosis, chiropractors perform physical examinations and take x-rays to determine the need for chiropractic care or the need for referral to other health care providers. RCW 18.25.005(3). Chiropractic care does not include prescribing or dispensing of drugs or performing surgery. RCW 18.25.005(4).

At trial, Masci explained that "a herniated disc will invariably have neurological signs" and elaborated on the effect of pinched nerves. 3 RP at 343. He had training to diagnose neurological conditions for the purpose of referring patients to specialists.

Although part of Masci's opinion relied on the inaccurate medical history Gilmore provided him, Masci also reviewed Gilmore's medical records and conducted a physical exam. His expertise included explaining issues related to nerves and neurological symptoms. Further, Masci did not give a medical opinion on Gilmore's carpal tunnel surgery. He only explained what the records showed regarding the surgery. We, therefore, conclude that the trial court did not abuse its discretion in admitting Masci's testimony.

D. Excluding Gilmore's L&I Payments

Jefferson Transit argues that the trial court erroneously excluded Gilmore's L&I payments. It argues that the collateral source rule was inapplicable because Gilmore only sought general damages and was not receiving payments for his pain and suffering. For these reasons, Gilmore was not at risk of being undercompensated by admitting the evidence. Alternatively, Jefferson Transit argues that if the L&I payments should have been excluded, the trial court erred by ruling that Gilmore could not open the door to collateral source evidence. We agree that Gilmore opened the door to evidence of the L&I payments.

The collateral source rule states that payments received by the injured party from a source independent of the tortfeasor will not reduce recoverable damages from the tortfeasor. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). A trial court generally excludes evidence that the plaintiff received compensation from a third party for an injury for which the defendant has liability. *Cox*, 141 Wn.2d at 439. "The 'rule is designed to prevent the wrongdoer from benefitting

from third-party payments.'" *Cox*, 141 Wn.2d at 439 (quoting *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App 357, 375, 936 P.2d 1191 (1997)).

"Injured parties may, however, waive the protections of the collateral source rule by opening the door to evidence of collateral benefits." *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 804, 953 P.2d 800 (1998). In *Johnson*, the court held that evidence of collateral benefits received by the petitioner's wife was only admissible if the petitioner "opened the door" by testifying, for example, that due to the wife's injuries, the petitioner's "family did not have as much money as [it] used to." *Johnson*, 134 Wn.2d at 804 (internal quotations omitted).

At trial, Jefferson Transit argued that Gilmore did not seek reimbursement for medical damages or loss of future earnings; therefore, the evidence was not prejudicial. The court ruled that it would not admit the L&I payments unless the door was opened. When Gilmore's lawyer continued to elicit testimony that Gilmore was financially suffering because of his injury from the accident, Jefferson Transit argued that the L&I payments should be admissible to rebut the testimony.

Here, the L&I payments were protected by the collateral source rule; however, the trial court erred by excluding the evidence when Gilmore opened the door. Gilmore elicited testimony from his witnesses about Gilmore's stress over his finances due to the accident. Gilmore waived the protections of the collateral source rule when he opened the door by introducing such testimony. Because Gilmore opened the door and the trial court relied on an incorrect legal standard in excluding the evidence, its decision was exercised on untenable grounds.

To the extent that the trial court ruled that such evidence could never come in, we conclude that excluding the L&I payments after Gilmore opened the door to its admission was error.

III. MOTION FOR NEW TRIAL

A. Standard of Review

We review an order denying a motion for a new trial for an abuse of discretion. *Aluminum Co. of Am. v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000). "[A] trial court abuses its discretion in denying a motion for a new trial 'if such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial.'" *Mears v. Bethel Sch. Dist. No. 403*, 182 Wn. App. 919, 926, 332 P.3d 1077 (2014) (quoting *Alum. Co. of Am.*, 140 Wn.2d at 537) (internal quotation marks omitted), *review denied*, 182 Wn.2d 1021 (2015). "[D]eference usually shown to a trial court's denial of a new trial does not apply when the court based the decision on an issue of law." *Mears*, 182 Wn. App. at 927. Denial of a new trial based on an issue of law is reviewed de novo. *Mears*, 182 Wn. App. at 927.

B. Party Misconduct

A new trial may be granted if the misconduct of the prevailing party materially affected the substantial rights of the losing party. *Teter v. Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012). The moving party must establish that the conduct complained of constituted misconduct, as distinct from mere aggressive advocacy, and the misconduct was prejudicial in the context of the entire record. *Miller v. Kenny*, 180 Wn. App. 772, 814, 325 P.3d 278 (2014). "'The trial court is in the best position to most effectively determine if [a lawyer's] misconduct prejudiced a [party's] right to a fair trial.'" *Teter*, 174 Wn.2d at 223 (quoting *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991)). "[A] party may not 'wait and gamble on a favorable verdict' before claiming error." *Teter*, 174 Wn.2d at 225 (quoting *Nelson v. Martinson*, 52 Wn.2d 684, 689, 328 P.2d 703 (1958)).

An appeal to the passions and prejudices of the jury rather than argument based on inferences gleaned from the evidence is improper. *M.R.B. v. Puyallup Sch. Dist.*, 169 Wn. App.

837, 859, 282 P.3d 1124 (2012). Therefore, it is improper for a lawyer to invite the jury to decide a case based on anything other than the evidence and the law, including appeals to sympathy, prejudice, and bias. *M.R.B.*, 169 Wn. App. at 858. Although a lawyer is given wide latitude in arguing the evidence to the jury in his or her closing argument, "'a case should be argued upon the facts without an appeal to prejudice.'" *M.R.B.*, 169 Wn. App. at 858 (quoting *Day v. Goodwin*, 3 Wn. App. 940, 944, 478 P.2d 774 (1970)) (internal quotation marks omitted).

We may refuse to review any claim of error which was not raised at trial. RAP 2.5(a). To preserve an error relating to lawyer misconduct, a party must object to the statement, seek a curative instruction, and move for a mistrial or new trial. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 743, 850 P.2d 559 (1993). However, the issue of misconduct may be raised on appeal absent an objection if "the misconduct is so flagrant and ill intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *Kravik*, 69 Wn. App. at 743.

1. Inflaming the Jury's Passion and Prejudice

Jefferson Transit argues that Gilmore's lawyer in her closing argument improperly asked the jury to award punitive damages to "send a message," and incited the jury's passion and prejudice by making inflammatory arguments which led to an excessive verdict. Br. of Appellant at 47. Gilmore argues that Jefferson Transit waived any error because it did not object during closing arguments. We conclude that Gilmore's closing arguments inflamed the jury by appealing to the passion of the jurors, which lead to an arguably excessive damages award.

Gilmore's lawyer's inflammatory arguments appealed to the passion of the jurors when she repeatedly called upon the jurors to help Gilmore "fight the government" and "hold the government accountable." 7 RP at 991, 1032. The lawyer argued that Jefferson Transit was attempting to "cover up" liability. 7 RP at 985. She mischaracterized Jefferson Transit's analogy

to police shootings caught on video by stating that the lawyer talked about "how the government murders innocent people . . . [and] gets away with it . . . [b]ut that's what the government does . . . no one holds them accountable." 7 RP at 1031.

Although Jefferson Transit did not object to the inflammatory arguments, we conclude that the misconduct was so flagrant and ill-intentioned that no curative instruction could have "obviated the prejudice engendered by the misconduct." *Kravik*, 69 Wn. App. at 743. Here, the lawyer's arguments were flagrant and ill-intentioned because it encouraged the jury to punish Jefferson Transit for what it was trying to "get[ ] away with." 7 RP at 1031. A curative instruction ordering the jury to disregard the arguments could not have removed the prejudice engendered by the arguments. We, therefore, conclude that the inflammatory remarks led to an arguably excessive damages award because it incited the passion and prejudice of the jurors.

2. Accusations of Fraud

Jefferson Transit argues that Gilmore improperly accused it of fraud and, in doing so, Gilmore "crossed the line from mere aggressive advocacy to prejudicial and reversible misconduct." Br. of Appellant at 47. Jefferson Transit cites only to accusations of fraud in Gilmore's closing arguments. We agree that the lawyer's accusations of fraud was improper.

During opening and closing arguments, Gilmore's lawyer accused Jefferson Transit of fraud on numerous occasions and implied impropriety in the way it handled their defense. At the outset of trial, Gilmore's lawyer told the jury that Jefferson Transit planned to depict Gilmore as "a liar, a cheat and a fraud." 3 RP at 274. During closing arguments, Gilmore's lawyer stated, "[T]here has been a fraud perpetrated in this courtroom. . . . There has been someone in this trial who has continually tried to mislead you. . . . I'm going to talk to you about some of the . . . frauds that [Jefferson Transit] has tried to perpetuate." 7RP at 978-79.

Although Jefferson Transit did not object to these remarks, the issue can still be raised on appeal because the lawyer's misconduct was so flagrant and ill-intentioned that no curative instruction could have obviated the prejudice engendered by the misconduct. Here, Gilmore's lawyer's remarks were clearly inflammatory and improper, and her conduct went beyond aggressive advocacy. In the context of the entire record, it was highly prejudicial to Jefferson Transit's case. We, therefore, conclude that the lawyer's accusations of fraud was misconduct that, viewed in the context of the entire record, prejudiced Jefferson Transit's case.

We reverse and remand.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We conclude:

Johanson, J.

Bjorgen, C.J.

Respondent's Brief to the Court of Appeals, plus
Statement of Additional Authorities
Gilmore v. Jefferson County Public Transportation Benefit Area
Court of Appeals No. 48018-2-II

NO. 48018-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL GILMORE,
Respondent

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA,
Appellant

APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT
Honorable Keith C. Harper

BRIEF OF RESPONDENT

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I. INTRODUCTION

"That's the whole idea of an adversary system. You have people advocating different points of view through cross-examination of witnesses, and different interpretation of the evidence. The jury sees all sides and they come up with the right – right decision."

– Defense counsel's closing argument, RP 1007.

"This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur; the Court does not find a basis to overturn the verdict."

– Hon. Keith Harper, Jefferson County Superior Court. CP 724.[1]

Michael Gilmore sustained severe and life-altering injuries when his vehicle was hit by a Jefferson County Transit Authority bus. It is undisputed that the collision injured his neck – even the defense's medical witness, Dr. Barbara Jessen, MD, acknowledged this. RP 887; CP 49. It also is undisputed that Mr. Gilmore underwent multi-level neck fusion surgery after this collision, and that his surgeon had to permanently implant surgical hardware into Mr. Gilmore to hold his spine together. Even after the surgery, Mr. Gilmore is only 70% recovered; he is doing better than he was before the surgery, but he still has pain and disability. RP 768.

Mr. Gilmore presented more than substantial evidence that the surgery he underwent, and his past and future pain and disability, were

[1]Plaintiff is not cross-appealing, but when balancing whatever equities there may be regarding alleged discovery violations and alleged misconduct, this Court should be aware that the defense engaged in conduct more egregious than the things it alleges plaintiff's counsel did. *See, e.g.*, fn. 24 and fn. 28, *infra*.

the result of this collision.[2] Dr. Frank Marinkovich, MD, Dr. Marc Suffis, MD, and Dr. Geoffrey Masci, DC, all testified that the collision caused the injuries which ultimately made the surgery necessary. Five "before and after" lay witnesses testified to Mr. Gilmore's health, strength, agility, and abilities before the collision, and to the changes in him after the collision: pain, disability, and loss of function.

Defendant invoked its Constitutional right to trial by jury. The jury, duly empanelled and properly instructed[3], and based upon the substantial evidence that Mr. Gilmore offered at trial, found in his favor and awarded appropriate damages. Dissatisfied with the verdict, the defense made a CR 59 motion for a new trial, citing a collection of after-the-fact rationalizations and new complaints. CP 475. The trial court quite properly denied that motion. CP 723-24; Appendix A. Unwilling to accept the decisions of the jury and the trial judge, the defense now has appealed to this Court.

In every trial, counsel must make tactical and strategic decisions. These decisions are made based upon a party's or lawyer's perception of the evidence. If these perceptions of the evidence are flawed, then counsel's tactical and strategic decisions are likely to be flawed as well. Here, the defense egregiously misjudged the evidence. Despite the medi-

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[2]The defense offered only one expert witness, Dr. Barbara Jessen, MD, who testified that the surgery was not the result of the collision. But even Dr. Jessen agreed that the collision had injured Mr. Gilmore. RP 887.

[3]Defendant proposed most of the jury instructions, and took no exceptions whatsoever to the instructions the court gave to the jury. RP 966.

cal and lay evidence that this collision caused Mr. Gilmore serious and lasting injuries, the defense refused to take responsibility for the consequences of the collision. It tried to convince the jurors that Mr. Gilmore's injuries were only minor, and that he was attempting to commit fraud by lying about his condition and its causes. The yawning chasm between the defense perception of the case and that of plaintiff was made clear not only from their presentations during trial, but in their respective closing arguments, where plaintiff asked the jurors to award $1.8 million, RP 1005, while the defense asked them to award "nothing or $1,000". RP 1028.

The defense has now shifted some of its attacks from Mr. Gilmore to his trial counsel, and to the trial judge. It continues to deny any responsibility for what happened to Mr. Gilmore. Instead, the defense wants this Court to give it a free "do-over". There is neither a legal nor factual basis for this. The appeal should be denied and the verdict affirmed.

II. MISSTATEMENTS IN DEFENDANT'S OPENING BRIEF.

At p. 5 of its brief, the defense incorrectly claims that Mr. Gilmore was Dr. Suffis' patient in 2004, and then implies that Mr. Gilmore had some duty to remind Dr. Suffis of this when he saw Mr. Gilmore again in 2008.[4] In fact, Mr. Gilmore was <u>not</u> Dr. Suffis' patient in 2004 – rather, Dr. Suffis happened to have conducted an independent medical

[4]This is but one example of how the defense attributes evil intent to everything Mr. Gilmore said or did. Why the defense believes that Dr. Suffis and Mr. Gilmore both forgetting one another is somehow important is difficult to fathom.

exam of Mr. Gilmore for the Navy, as part of Mr. Gilmore's retirement process.

On p. 4 of appellant's Opening Brief, it incorrectly states that in 2004, 4 years before this collision, Dr. Marc Suffis gave Mr. Gilmore a 60% disability rating. In fact, Dr. Suffis testified that he **did not** give Mr. Gilmore any disability rating at all. Testimony of Dr. Marc Suffis, MD, hereafter "Ex 161", p. 36[5] (emphasis added):

Q: Well, you found a disability, didn't you?

A: ***No, I found conditions***. The VA does their own disability rating.

On p. 18 of defendant's Opening Brief, it falsely claims that plaintiff's counsel "excoriated the defendant throughout the trial as frauds". In fact, none of the statements about which defendant now complains were made "throughout the trial" – all were made in closing argument, and the defense made no objection to them whatsoever.

On p. 30 of defendant's Opening Brief, it claims that Dr. Masci violated an Order in Limine. Not so. The trial court simply ordered that Dr. Masci could testify "to things that **he's qualified to testify to**". RP 33. The trial court correctly overruled defense objections during Dr. Masci's testimony because the doctor **was** qualified, and the issues defense counsel raised went to weight, not admissibility. RP 356. There never

[5]Dr. Suffis' video deposition was played for the jury at RP 481, and the transcript of that deposition was made Exhibit 161 below. Defendant made a supplemental designation of that Exhibit to this court on February 17, 2016.

was a violation of the Order in Limine, and for that reason, the trial court never made any finding of a violation.

III. COUNTERSTATEMENT OF THE CASE

A. Plaintiff Michael Gilmore sustained serious injuries when a Jefferson County Transit bus rear-ended him.

On March 31, 2008, Plaintiff Michael Gilmore was stopped at a traffic light on Haines Avenue at State Route 20, in Port Townsend, Washington. CP 002. Defendant's employee was driving a Jefferson County Transit Bus immediately behind Mr. Gilmore, failed to stop, and rear-ended Mr. Gilmore. CP 003. Mr. Gilmore described the impact as a "heavy-duty jolt."[6] RP 748.

1. There was more than substantial expert evidence that the collision injured and profoundly affected Mr. Gilmore.

Dr. Frank Marinkovich is a board-certified medical doctor. RP 407. He is certified by the Department of Labor & Industries to conduct Independent Medical Exams. RP 407. Dr. Marinkovich reviewed Mr. Gilmore's medical records. RP 648. He also reviewed the report of defense medical examiner Dr. Barbara Jessen, and the video surveillance footage the defense took of Mr. Gilmore. RP 649. Based on all of this information, Dr. Marinkovich summarized for the jurors Mr. Gilmore's treatment, his condition, his symptoms, and his prognosis.

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[6]The defense keeps calling this collision a "minor accident" or a "fender bender". Perhaps it was minor for the bus, which was not severely damaged. But the bus is not the plaintiff here – Mr. Gilmore is. And the collision was not minor for him or for his neck, which ultimately needed surgical repair.

Mr. Gilmore was taken from the collision scene to the emergency room by paramedics. RP 753. At the ER, he was having neck pain, right hip pain, low back pain, nausea, and a headache. RP 753. Over the next few days, Mr. Gilmore's headaches became so intense that he returned to the emergency room. RP 755.

On April 3, 2008, Mr. Gilmore went to the Harrison Medical Center ER, where a cervical (neck) MRI was performed. RP 665. That first MRI showed disc bulges at C3-C4, C4-5, C5-6, C6-7; two of these levels are the same ones where Mr. Gilmore eventually needed surgery, a 2-level anterior cervical fusion and discectomy. RP 664-65.

Complicating Mr. Gilmore's medical situation was the fact that in May of 2008 he was diagnosed with carpal tunnel syndrome, which required carpal tunnel release surgery. RP 668. During the time Mr. Gilmore was undergoing and recovering from the carpal tunnel surgery, he was essentially incapacitated. Ex 161, p. 14. Significantly, during this time, when he was not engaging in strenuous activity, his collision-caused pain subsided, but as soon as he returned to his usual work as a plumber in early 2009, the pain in his neck, shoulder region, and upper back returned. RP 669; Exhibit 161 p. 28. Mr. Gilmore also developed radiculopathy (radiating pain). RP 669. All of these symptoms linked up with what the 2008 MRI of Mr. Gilmore's neck had revealed. RP 669.

On April 16, 2009, Mr. Gilmore underwent another neck MRI. RP 669. The 2009 MRI revealed progression (worsening) of the injury

that had initially been documented in the 2008 MRI; the disc bulges at Mr. Gilmore's C5-6 and C6-7 had expanded in size. RP 670.

Based on the 2009 MRI findings, and the worsening since 2008, Mr. Gilmore was referred to neurosurgeon Dr. Christopher Kain. Dr. Kain opined that Mr. Gilmore would require neck surgery at C5-6 and C6-7 to help his symptoms. RP 672. Unfortunately, Mr. Gilmore could not get surgery at that time because he had just started his own plumbing business and could not afford to take the time away from work. RP 730.

When Mr. Gilmore's symptoms failed to improve, he was put on a "high risk" pain management program. Opioids were prescribed to help control Mr. Gilmore's pain so he could continue to work. RP 675.

In September 2010, Mr. Gilmore saw Dr. Enayat Niakan, a neurologist. RP 673. Dr. Niakan agreed with the prior doctors; he found that Mr. Gilmore had left cervical radiculopathy (pain radiating from the left side of his neck), and a left sided C5-6 disc bulge, which was impinging on Mr. Gilmore's left C6 nerve root. RP 674. Dr. Niakan also agreed with the prior opinions that these problems had originated with this collision. RP 674. However, Mr. Gilmore still wanted to avoid surgery if possible, and so he continued on with conservative care. RP 674.

On September 28, 2013, Mr. Gilmore saw Dr. Geoffrey Masci, DC. RP 322. Dr. Masci is a chiropractor with 41 years of experience; he is certified by the Department of Labor & Industries as an approved chi-

ropractic examiner, and he has been doing forensic chiropractic examinations on and off for 35 years. RP 317.

Dr. Masci spent almost four hours with Mr. Gilmore. RP 364. He reviewed extensive records and performed a physical examination of Mr. Gilmore. RP 322. Based on his record review, his physical examination, and the history, Dr. Masci came to the opinion that Mr. Gilmore had sustained the following injuries as a result of this collision: cervical subluxation, aggravation or exacerbation of cervical degenerative disc disease and degenerative joint disease, cervical disc herniation, and myositis (muscle inflammation). RP 324-25, 328, 357. Dr. Masci also testified that Mr. Gilmore's pain was "chronic", *i.e.*, it lasted longer than the early "acute" phase of several months. RP 360.

Dr. Masci testified that at least in Mr. Gilmore's case, cervical subluxation meant that the joints in Mr. Gilmore's neck did not move properly. RP 327. Dr. Masci also explained that Mr. Gilmore's herniated discs would have, and did, present with certain neurological symptoms. RP 343. Those symptoms included pain, sensory deficits, motor dysfunction (the muscles not working properly), weakness, and wasting of the muscles. RP 343-44.

Mr. Gilmore did not have these neurological symptoms before the collision, but they were present almost immediately after the collision. RP 345. Some of these symptoms can be similar to symptoms associated with carpal tunnel syndrome; however in this case Dr. Masci testified that

he attributed the symptoms to Mr. Gilmore's collision-caused neck injuries and not to his carpal tunnel, because even after the successful carpal tunnel release procedure, Mr. Gilmore continued to experience weakness, loss of sensation, reduced strength, and pain. RP 352.

Dr. Masci also reviewed both the 2008 MRI and the 2009 MRI, and opined that the initial MRI showed disc bulges at C3-C4, C4-C5, C5-C6, and C6-C7, and that the 2009 MRI was consistent with progression (worsening) of those injuries. RP 354. This worsening had caused Mr. Gilmore's pain to become more and more constant and chronic over time. RP 403.

Dr. Marc Suffis, MD, an Occupational Medicine doctor, Board Certified in Emergency Medicine, Independent Medical Examinations, and Disability Evaluations, Ex. 161, p. 5-6, testified by video preservation deposition. Dr. Suffis testified that the collision caused Mr. Gilmore's cervical disc herniation with spinal stenosis and pain radiating into his left arm – an acute injury which was still causing pain over a year later. Ex. 161, p. 28. Dr. Suffis also agreed with Dr. Masci that Mr. Gilmore's pain lessened when he was resting, but became worse when he worked at his normal job activities. *Id.*

In late 2014, Mr. Gilmore was able to close his business for a time and schedule the neck surgery he needed. RP 767. That surgery, a two-level anterior (front entry) cervical discectomy and fusion, took place on January 28, 2015. RP 767. The surgeon, Dr. Jeffrey Roh, went in

through the front of Mr. Gilmore's neck, which is a risky approach. RP 660. Dr. Roh cut through Mr. Gilmore's skin and muscles, and other multiple layers of tissue, and moved aside his carotid artery and jugular vein in order to get to one of the discs. RP 660-61. After getting to the disc, Dr. Roh used a "Rogers", a big chopper-pliers type tool, to remove the disc. RP 661. He placed a graft, made of bone taken from Mr. Gilmore's hip, in the place of the removed disc. RP 661. Dr. Roh then went in with a router-type blade and routed out any rough spots of bone; he also routed out the canals that the nerves travel through in order to make the openings bigger. RP 662. This entire procedure was done twice, once at each of the two disc levels. RP 662. The surgeon then screwed surgical plates and screws into place within Mr. Gilmore's neck. RP 650. Fortunately for Mr. Gilmore, the surgery was a success and he had partial relief from his pain and symptoms. RP 767-68.

In summary, Dr. Marinkovich testified that the collision caused injuries to Mr. Gilmore's neck that necessitated the two-level laminectomy, foraminotomy, and fusion surgery that Mr. Gilmore underwent. RP 650.

Dr. Marinkovich also testified to some of the future medical problems that Mr. Gilmore faces: the risk that the fusion will not work and he would need to have the operation redone, RP 678; and the 25% risk that, due to the permanent changes the collision and surgery caused

in Mr. Gilmore's neck, Mr. Gilmore will need even more surgical repairs on new levels of his neck. RP 677.[7]

2. *There was more than substantial evidence of changes in Mr. Gilmore's condition from before to after this collision, which also proved the collision had profoundly affected his life.*

Before the collision, Mr. Gilmore had spent 20 years in the United States Navy before he retired in 2004. RP 595. At the time of his retirement, Mr. Gilmore had a complete physical examination, during which veterans are encouraged to tell the evaluating doctor every condition, problem, or injury they had while on active duty. Ex 161, p 11. Mr. Gilmore told the examiner about conditions that he had developed during his many years of service – issues with his hips, left elbow, low back, knees, etc. were all evaluated. Ex 161, p. 10. But this 2004 complete medical evaluation neither reported nor even mentioned any neck pain, neck injuries, or neck-related complaints. RP 874.

In the four years between his retirement from the military and this collision, Mr. Gilmore worked as a service plumber. RP 747. He was physically capable of doing all aspects of service plumbing, including installing water heaters, digging trenches, and replacing main water lines. RP 562, 747. Mr. Gilmore had no problems completing his work, and in fact he routinely would work 80+ hour weeks, becoming the standard by which other employees were measured. RP 461.

[7]A person who faces a less than 50% risk of future medical complications still can recover for the mental anguish that risk causes. *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 810, 701 P.2d 518 (1985).

Jonathan Coon was Mr. Gilmore's former co-worker, RP 458, who had worked as an apprentice with Mr. Gilmore. He testified to the very physical nature of the work that he and Mr. Gilmore did before the collision. RP 460. Jobs included digging every day, replacing water heaters, and crawling under people's homes. RP 460. Before the collision, Mr. Gilmore completed all these jobs without any problems. RP 461. Mr. Coon testified that Mr. Gilmore was the hardest worker he had ever known, and though Mr. Gilmore was "old enough to be my father," he still routinely worked 80 hours a week. RP 461.

Richard Schneider was one of Mr. Gilmore's customers, RP 296, who first met him during a major plumbing project at his home in 2005 or 2006, 2-3 years before the collision. A main water line was leaking, and Mr. Gilmore had to dig a ditch to access it. RP 297. Mr. Schneider testified that Mr. Gilmore called the shop for help, but no one was available, so Mr. Gilmore just started digging on his own. RP 297. He had no problem digging a wide muddy wet ditch, "three or four foot deep and just as wide". RP 299.

After the collision, though, things were very different. When Mr. Gilmore went to Mr. Schneider's house to complete plumbing jobs, he brought someone with him to do the heavy work. Mr. Gilmore was able to do very little of the actual work himself. RP 302-03.

Mr. Gilmore's former neighbor Dana Neely-DuBose testified that before the collision, she never noticed Mr. Gilmore having any physical

limitations. RP 556. He collected large amounts of fire wood. RP 563. He did significant plumbing work at her house before the collision; he replaced both of her toilets, her hot water heater, bathroom sinks, and faucets, without difficulty or assistance from anyone else. RP 561-62. Mr. Gilmore also was very active with Ms. Neely-Dubose's son, playing basketball with him and serving as a positive adult male role model. RP 555. He also helped her son move to Bremerton. RP 567.

After the collision, however, there was a tremendous difference. RP 564. Mr. Gilmore was not outside as much, was not on his boat with his kids as much, and was physically unable to complete basic plumbing tasks. RP 564. Ms. Neely-Dubose testified that there was a very clear "line in the sand" between Mr. Gilmore before the collision and Mr. Gilmore after. RP 566. After the collision there was no more activity, fun, or play, and Mr. Gilmore's mood was "somber". RP 566.

Mr. Gilmore's son Alex testified that before the collision, his dad was the strongest person he knew, RP 505, that he had never known his dad not to have a job, and that Mr. Gilmore usually had more than one job. RP 503. Even while on active duty in the Navy, Mr. Gilmore worked multiple jobs. RP 503. When he retired from the Navy, Mr. Gilmore went right back to plumbing. RP 505. He instilled a strong work ethic in all of his sons early on. RP 505.

Before the collision, Alex would sometimes accompany his father to job sites, carrying the tools, but Mr. Gilmore was the one completing

the hard physical labor. RP 506-7. Alex described how one time, before the collision, he and his father were at a job that lasted more than 10 hours, but his dad was adamant about getting it done. RP 507.

After the collision, Alex wound up doing most of the physical labor, such as digging ditches. RP 521. It took Alex a while to realize it, but after the collision Mr. Gilmore had lost his ability to complete heavy physical tasks; when he did attempt to do more physical work, the next day he would be unable to work at all due to the increase in his pain. RP 522. Alex recalled one project that required running a 600-foot water service line, and Mr. Gilmore had to bring in his other son Chris to help Alex do the digging, because if Mr. Gilmore had done the digging, he would have been unable to work at all the next day. RP 523.

Mr. Gilmore's son Matthew testified that after the collision his father became hunched over and had a lot of neck and shoulder pain. RP 533. Before the collision, they used to hunt and fish together regularly. RP 527. After the collision, Mr. Gilmore just could not do the things he used to do. RP 533. For example, after the collision, Matthew was ready to go on his first elk hunt. He invited his dad to come along so they could share the experience of Matthew bagging his first elk. RP 534. Unfortunately, Mr. Gilmore could not go elk hunting due to his pain. RP 534.

The collision did not just limit Mr. Gilmore physically. The pain and the treatment caused personality changes. RP 532-34. Matthew testified that before the collision he had never seen his father drink, had ne-

ver seen his father cry, and had never seen his father depressed. RP 532. After the collision, Mr. Gilmore started drinking. Matthew realized that his father had turned to alcohol to deal with his injuries and his physical pain, and Matthew could see the sadness and pain in his father's eyes. RP 532. Matthew believed his father had become an alcoholic after the collision, and this seriously affected their relationship. RP 532. Mr. Gilmore had become a completely different person, and it got so bad that Matthew cut off contact with his father for a time because he could not handle being around his father when Mr. Gilmore was drinking and taking pain medicine. RP 534.

B. The defense attacked Mr. Gilmore's character from before the beginning of the trial to its very end.

Before the trial even began, defense counsel Andrew Becker told plaintiff's counsel Richard McMcnamin that Mr. Gilmore was a liar who was bringing a "frivolous claim", and that an associate would try this case because it was "beneath [Mr. Becker's] dignity" to try it. CP 705.

Because plaintiff's trial counsel knew before trial that the defense would attack Mr. Gilmore's character, she filed Motion in Limine #13, seeking permission to introduce positive character evidence in plaintiff's case in chief. CP 18. Even before the Court heard argument on that motion, the defense had very clearly laid out its theory of the case:

> [T]he Defendant's, uh, witnesses that will say that any injuries he received were very minor and should have resolved quickly, that allows – that – in light of, uh, the Defendant's theory of the case,

that is very probative to Mr. Gilmore's motive for secondary gain.[8] RP 9 (emphasis added).

Defense counsel repeated the allegations that Mr. Gilmore was lying to get money, that he was a disability cheat, and that he was committing fraud, at least 5 more times during pretrial hearings (emphasis added):

- "And that is relevant to **motive for secondary gain.**" RP 8.
- "[H]e was frankly **milking the system.**" RP 8.
- "So the fact of previous disability is certainly admissible because **it affects Mr. Gilmore's credibility.**" RP 10.
- "So the fact that Mr. Gilmore was, uh, a poor historian to all his providers is certainly **relevant to his credibility in causation of his injuries.**" RP 11.
- "In this case, we're offering it as, uh – to show, uh, **motive,** uh, inaccurate reporting by, uh – by the Plaintiff that he had these preexisting issues; that **he knew he had these preexisting issues. He had to have known. And he was getting monthly checks.**" RP 15.

The trial court got the message. "This defendant's theory [is] that Mr. Gilmore is either a fraud or a malingerer..." RP 56.

When the Court heard argument on Plaintiff's Motion in Limine #13 – Character Evidence, **defendant offered no objection.** Defense counsel recognized that plaintiff's counsel was "entitled to present it" and "[s]he can present it if she likes." CP 18-19, RP 24.

[8]"Secondary gain" is of course a common defense lawyer euphemism for "lying to get money".

The defense continued its mudslinging during the trial. It cross-examined witnesses about Mr. Gilmore's reputation in the community for truthfulness, emphasized alleged errors or inconsistencies in the medical records, and **even brought in a "bad character witness"**, Melvin Eidsmoe, to testify that Mr. Gilmore had a "bad" reputation in the community. RP 832, CP 661.[9]

Defense counsel called Mr. Gilmore a liar approximately **sixteen times** during his closing argument (emphasis added):

- "The significance is that he was **not truthful** with any of his care providers." RP 1018.
- "He was **not truthful** with Dr. Suffis." RP 1018.
- "He was **not truthful** with Dr. Cain." RP 1018 (emphasis added).
- "He was **not truthful** with the neurologist, Dr. Niakan." RP 1018.
- "And as a result of him **not being truthful**, they, uh, had a determination of causation relating to the motor vehicle accident, okay." RP 1018.
- "Unfortunately, you know, Mr. Gilmore was – was **less than accurate**." RP 1018.
- "They had a neurologist, Dr. Niakan, to whom Mr. Gilmore **did not tell the truth**." RP 1018.
- "When Dr. Suffis found out that he **hadn't been told the truth**..." RP 1019.
- "What would Dr. Niakan say if somebody told him, '**Mr. Gilmore lied to you** about everything'?" RP 1019.

[9]The defense now seems to be arguing that plaintiff should not have introduced good character evidence until after defendant attacked his character. But the Court allowed it when defendant conceded the point during pretrial motions in limine. Moreover, issues regarding the order in which testimony is to be presented are very much within the trial court's discretion.

- Why didn't they call Dr. Cain and tell Dr. Cain, "**He lied to you...**" RP 1019.

- "Everything was on board, **until the lies started surfacing.**" RP 1022.

- "**He intentionally did not reveal** to his doctors that he had previously low back pain." RP 1022.[10]

- **"Uh, so anyway, the 60 percent,** we bring it up because **a bunch of untruths.**" RP 1023.

- "Because **Mr. Gilmore hid the facts.**" RP 1025.

- "You know he was saying – he was saying something else to his providers all along **until he got caught...**" RP 1025.

- **"It all boils down to credibility of the Plaintiff. How can you believe anything he says?"** RP 027-28.

The defense in closing also expressly accused Mr. Gilmore of committing disability fraud upon the VA and the Federal government:

- "Not everybody that gets out of the military goes in and **claims disability they don't have** just so they can get an additional government check..." RP 1023-24 (emphasis added).

To summarize, the defense made the strategic decision to present as its theory of the case that the collision caused only minor, transient injuries to Mr. Gilmore and that he was a liar trying to get money he was not owed – that he deliberately lied to his doctors, that he was a cheat who sought money for injuries that he did not have, and that even before this collision he was committing fraud by collecting government benefits for disabilities he did not have.

[10]At trial, Mr. Gilmore did not claim damages for his low back nor for his carpal tunnel.

Unfortunately for the defense, the jurors did not accept this theory. They weighed the evidence, and by their verdict – which was supported by substantial evidence – the jurors recognized the degree to which Mr. Gilmore was injured as a result of this collision. It is bizarre, to say the least, that after calling Mr. Gilmore a liar a score or more times before and during the trial, defendant now complains that plaintiff's counsel succinctly and accurately described the defense theory as one of calling Mr. Gilmore a liar.

IV. THE STANDARD OF REVIEW & PRESERVATION OF ERROR.

A. Almost all the alleged errors about which defendant now complains were not preserved; defendant neither objected nor sought a remedy to mitigate the alleged harm.

It has long been the law in Washington that an appellate court will not consider an argument or theory not timely raised by objection in the trial court. *See, e.g., Seth v. Dept. of Labor & Indus*, 21 Wn.2d 691, 693 152 P.2d 976 (1944); RAP 2.5(a). In addition to objecting, if a party believes an error has occurred, its counsel must exercise due diligence in seeking a remedy that would mitigate or ameliorate the alleged harm. *State v. Jackman* 113 Wn.2d 772, 781-82, 783 P.2d 580 (1989). In *Jackman*, counsel failed to seek a continuance that might have remedied the problem with which he was faced, and that failure precluded appellate relief. "[Jackman] cannot contend that the court erred in denying him any relief, as he asked for none." *Id.*

In this case, defendant failed to preserve the errors it now complains of – it did not move to strike nor request curative instructions. *State v. Neukom*, 17 Wn. App. 1, 4, 560 P.2d 1169 (1977). "Failure to request an appropriately worded limiting instruction waives the right to the instruction and fails to preserve the error for appeal." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988).[11]

In the very recent case *State v. Jones*, No. 89321-7 (April 21, 2016), the Supreme Court addressed failure to object as a waiver of the alleged error: "A motion for new trial is not a substitute for raising a timely objection that could have completely cured the error." *State v. Jones*, Slip Opinion at 16. "Indeed, the failure to raise a timely objection strongly indicates that the party **did not perceive any prejudicial error until after receiving an unfavorable verdict.**" *Id.* (emphasis added) citing *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981).

> Based on the record presented, we must conclude that "[t]he defense made a tactical decision to proceed, 'gambled on the verdict', lost, and thereafter asserted the previously available ground as a reason for a new trial. This is impermissible."

Id., at 17.

This Court should come to the same conclusion. Defendant gambled on the verdict, lost, and should not now be heard to complain.

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[11]For example, the defense now complains that one of the lay witnesses, Ms. Neely-DuBose, said something contrary to the orders in limine. If it were a violation, it would have been well within the trial court's discretion to strike or allow the testimony, had the defense raised a proper objection and requested an appropriate remedy, such as an instruction to disregard. The defense failure to do this waived any alleged error.

B. Whether preserved for appeal or not, every trial court decision about which appellant now complains was discretionary, and must be upheld unless appellant proves abuse of that discretion.

Regarding those few alleged errors which defendant properly preserved, the verdict still should be affirmed because the decisions complained of were well within the range of the trial court's discretion. Nothing in this record supports, much less proves, that any abuse of discretion occurred.

> An abuse of discretion standard often is appropriate when (1) the trial court is generally in a better position than the appellate court to make a given determination; (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which "no rule of general applicability could be effectively constructed,"; and/or (5) there is a strong interest in finality and avoiding appeals....

State v. Sisouvanh, 175 Wn.2d 607, 621-22, 290 P.3d 942 (2012) (numerous citations omitted).

In *State ex rel Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971), the Court held:

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

In Re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (substantive family law holding superseded on other grounds by Legislature; *see*, *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 24 n. 3, 1 P.3d 600 (2000)).

A trial court's decision "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). This Court should not substitute its judgment for that of the trial court. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). If the issue is "fairly debatable", a trial court's decision will not be disturbed. *Group Health v. Department of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986).

Finally, even if the trial court's reasoning were both incorrect and outside the range of its discretion, reversal still is inappropriate unless there exists **no basis** upon which to uphold the decision. For example, "[a] trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds." *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

1. The standard of review on evidentiary rulings is abuse of discretion.

Defendant complains about the trial court's rulings on objections and on motions in limine, such as decisions excluding proposed defense witness Alan Tencer, regarding the permissible scope of Dr. Geoffrey Masci's testimony, and regarding the inadmissibility of collateral sources. Plaintiff will respond to these claims on the merits below. But note that all such rulings were within the trial court's discretion and may be reversed **only** if there were abuse of that discretion.

> [A] trial court has broad discretion to make a variety of trial management decisions, ranging from "the **mode and order of interrogating witnesses and presenting evidence," to the admissi-**

> **bility of evidence**, to provisions for the order and security of the courtroom. In order to effectuate the trial court's discretion, we grant the trial court broad discretion: even if we disagree with the trial court, we will not reverse its decision unless that decision is "manifestly unreasonable or based on untenable grounds or untenable reasons."

State v. Dye, 178 Wn.2d 541, 547-48 (2013) (emphasis added, footnotes omitted). Rulings on motions in limine also are discretionary. *Clark v. Gunter*, 112 Wn. App. 805, 808, 51 P.3d 135 (2002). So are rulings on the admission or exclusion of evidence. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

2. The standard of review regarding allegations of discovery violations and attorney misconduct also is abuse of discretion.

A trial court's rulings regarding discovery, witness disclosure, and sanctions, are reversed only for abuse of discretion. *Mayer v. Sto Industries Inc.*, 156 Wn.2d 677, 684-90, 132 P.3d 115 (2006). Furthermore, any errors that do occur in this arena are subject to a harmless error analysis. *Jones v. Seattle*, 179 Wn.2d 322, 355-56, 314 P.3d 380 (2013) (affirming verdict despite erroneous witness exclusion as "harmless error"); *Thornton v. Annest*, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978).

There may be no decision-making arena in which the trial court is entitled to more deference than this one. "When a trial court evaluates occurrences during trial and their impact on the jury, **great deference** is afforded the trial court's decision." *Dickerson v. Chadwell*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992) (emphasis added). The Court of Appeals "must accord considerable def-

erence" to the trial court's assessment of the effect on the jury of events occurring during the trial. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 831, 696 P.2d 28, *review denied,* 103 Wn.2d 1040 (1985). Similarly, a trial court's decision regarding the imposition of sanctions, if any, is reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

As the Court held in *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991) *cert. denied*, 506 U.S. 856, 113 S. Ct. 164, 121 L.Ed.2d 112 (1992), "The trial court is in the best position to most effectively determine if [counsel's] misconduct prejudiced a [party's] right to a fair trial." *Lord* was a criminal case, but it was cited with approval in *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012). *Teter* is the centerpiece of defendant's argument on this issue, but as will be shown below, it does not support defendant's arguments.

3. *The standard of review upon denial of a motion for new trial is abuse of discretion, defendant fails to show abuse of discretion, and defendant failed to preserve any alleged error. The trial court also was correct to deny a new trial on the grounds of "misconduct".*

The defense repeatedly cites and heavily relies upon *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). *Teter* is not merely distinguishable from the instant case – it is inapposite. In *Teter*, the trial court exercised its discretion and **granted** a new trial; here, the trial court exercised its discretion and **denied** a new trial. In fact, the ultimate Supreme Court holding in *Teter* was quite succinct: "We hold that the trial judge

was well within his discretion in granting the new trial." *Id.* at 210 (emphasis added). That holding in no way suggests that the trial court here abused its discretion in denying a new trial.

In *Teter*, the aggrieved party (the plaintiff) repeatedly objected to improper comments and arguments by defense counsel. The objections were repeatedly sustained, and the trial court repeatedly admonished defense counsel. In this case, the allegedly aggrieved party (the defendant) did not even object to most of what it now complains of. In particular, the defense did not object ***even once*** during plaintiff's closing argument.

In *Teter*, the trial court made specific factual findings of misconduct, and the Supreme Court affirmed those findings. "Applying the **deferential review** appropriate to misconduct findings **in civil cases**...we conclude that the record supports Judge González's findings of misconduct." *Teter*, at 223. (emphasis added) The trial court here made no finding of misconduct.

The *Teter* Court set forth the standard for when a trial court ***may*** grant a new trial:

> [A] court properly grants a new trial where (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions.

Teter, *supra* at 226. Addressing these factors in the present case:

(1) The trial court found there was no "event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur..." CP 724.

(2) The conduct complained of here was not prejudicial, and here

the trial court made no finding of prejudice.

(3) and (4) The defense did not object at trial to the arguments it now claims were "misconduct", and therefore the trial court had no opportunity to cure any alleged misconduct in its instructions.

As the Court held in *Dickerson v. Chadwell* and in *Taylor v. Cessna*, *supra*, the trial judge who heard and saw the trial **in context and in its entirety** deserves and receives **great deference** in determinations regarding the effect of behavior upon the jury. The trial court's decision on a motion for new trial is reviewed only for abuse of discretion. *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002).

This result is consistent with sound public policy. When a defendant "lies in the weeds" and makes no objection, it denies the trial judge the opportunity to do his job; it deprives the parties the opportunity to correct matters and proceed through a fair trial to a valid verdict; and it deprives the jurors of their right and opportunity to meaningfully participate in what Jefferson called "the anchor of all our liberties".[12]

Even if this Court were to find error, it did not affect the outcome of the trial, because the jury was properly instructed and this Court must "firmly presume" that the jury followed the court's instructions. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). In *Diaz*, the trial court erroneously interpreted a statute and admitted evidence of a settlement. The Supreme Court held that the error was harmless because the jury

[12]"I consider it [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861).

"was specifically instructed not to consider settlement evidence in determining liability". *Id.*

Similarly, in *Rowe v. Dixon*, 31 Wn.2d 173, 187-88, 196 P.2d 327 (1948), the trial court admitted into evidence a contract that made reference to liability insurance. The trial court instructed the jury to disregard the insurance information, and the Supreme Court affirmed, holding "The portion of the instruction relating to the matter of insurance was direct and positive, and it should be assumed that the jury regarded the same and followed the court's directions contained therein." *Id.* at 188.

Here, the trial court instructed the jury orally and in writing that the remarks, statements, and arguments of counsel are not evidence, and "you should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you." RP 969. This Court should follow the Supreme Court's lead and presume the jurors followed that instruction. So long as the jurors did so, the alleged misconduct could not possibly have caused any harm to the defense.

This Court also should note that defendant's failure to complain about alleged misconduct until weeks after the trial is further evidence that whatever happened was insufficiently prejudicial to be the basis for a new trial. *Mulka v. Keyes,* 41 Wn.2d 427, 437, 249 P.2d 972 (1952).

C. The decision to exclude Alan Tencer was well within the trial court's discretion and was correct given the facts in this case.

It seems that as long as certain defendants offer the testimony of Alan Tencer, plaintiffs will object to it, and trial judges will have to decide whether to admit or exclude his testimony **on a case by case basis**. In *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), Tencer's testimony was **admitted** by the trial court. This Court affirmed, holding, "The trial court **did not abuse its discretion** by allowing Tencer to testify." *Id.*, at 565 (emphasis added). In *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), Tencer's testimony was **excluded** by the trial court. The Court of Appeals affirmed, holding "we conclude that excluding Tencer's testimony was **not an abuse of discretion**..." *Id.*, at 21 (emphasis added). And in the case upon which appellant herein relies so heavily, *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014), Tencer's testimony was allowed by the trial judge and affirmed by the Supreme Court, which held "we find **no abuse of discretion** for the trial court here to allow Tencer to testify." *Johnston-Forbes*, *supra*, at 357 (emphasis added). *Johnston-Forbes* reiterated that "trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." *Id.*, at 352.[13]

[13]Similarly, when *Johnston-Forbes* was in Division II before it went up to the Supreme Court, this Court held, "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." 177 Wn. App. 402, 406, 311 P.3d 1260 (2013).

Rather than supporting appellant's position herein, the authorities appellant cites **actually refute it.** The one consistent holding in these three cases is that **the admission or rejection of Tencer's testimony is a matter addressed to the sound discretion of the trial court.** A decision finding no abuse of discretion in admitting evidence is a far cry from **requiring** admission of that evidence. Appellant is asking this Court to do what none of the cited cases ever did – reverse a trial judge's discretionary ruling regarding the admissibility of Tencer's testimony.

All nine Justices concurred in the result in *Johnston-Forbes*; four justices signed a concurrence authored by Justice Yu, who further clarified the law with respect to experts such as Tencer:

> The case-by-case nature of this inquiry stands for the proposition that **an expert permitted to testify in a particular case does not bind future courts to automatically admit the same expert, even in a relatively analogous case.** Rather, in the exercise of discretion, **the trial court must perform a new fact-specific inquiry concerning the admissibility of an expert in every given case.** Before allowing an expert to render an opinion, trial courts must scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue to ensure that the opinion is not mere speculation, conjecture, or misleading to the trier of fact.

Johnston-Forbes at 358 (concurrence) (emphasis added).[14]

Turning to the instant case: **If** there were a dispute over whether Mr. Gilmore was injured **at all** by the collision, and **if** a defense doctor were prepared to testify that the forces Mr. Gilmore underwent (as calcu-

[14]Since *Johnston-Forbes* was decided in August of 2014, the trial courts of this state are indeed admitting or excluding Tencer's evidence on a case-by-case basis. *See*, Appendix B.

lated by Tencer) were insufficient to injure **any** human being in **any** way, then **perhaps** Tencer's testimony might be admissible on the issue of whether Mr. Gilmore was injured **at all.** But in this case, even the defense admitted – through its own medical expert, Dr. Jessen – that the collision injured Mr. Gilmore's neck. CP 49, RP 887. Nor was there any dispute that Mr. Gilmore did indeed require surgery on his neck.

The medical-legal issue therefore was whether the **admitted-liability collision** and the **admitted collision-caused injuries** were **a** proximate cause of the need for the neck surgery. That is a question for expert health care providers to answer, and four of them did so: three for plaintiff and one for defendant.[15] In reaching their answers, none of the medical experts on either side of the issue cited or relied upon Tencer or his calculations in any way.

So what exactly was Tencer's evidence offered to prove? How was it relevant? Tencer might be able to testify that the forces in this collision were not huge, but Washington adheres to the ancient and honorable tort principle of the "eggshell plaintiff"[16]. Even if this collision would not have injured most people as severely as it injured Mr. Gilmore,

[15]Plaintiff also offered lay witnesses to prove the before and after changes in Mr. Gilmore's health and activities, and the extent of his disability. This evidence was consistent with the opinions of Drs. Marinkovich, Masci, and Suffis that the collision caused the injuries that led to Mr. Gilmore's surgery and associated pain and disability.

[16]The "eggshell plaintiff" has been the law in Washington since at least 1902. "The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby." *Jordan v. Seattle*, 30 Wash. 298, 70 P. 743 (1902). *See also* WPI 30.18.

that is no defense to his claim. Whatever slight probative value Tencer's evidence had here, it was substantially outweighed by the danger of unfair prejudice and confusion. ER 403. Without any medical evidence linking Tencer's calculations to Mr. Gilmore's body, his testimony could only be used by lay jurors if they improperly speculated about how much force it **might** take to set in motion the medical chain of events that ultimately required surgical neck repair.

Under the facts of this case, the trial court was correct to exclude Tencer. More to the point, the trial court was **well within its discretion** to exclude him. The defense has not pointed to one single case where a trial court was reversed for excluding Tencer. This case certainly should not be the first.

D. The decisions regarding Dr. Masci's testimony were well within the trial court's discretion and were correct given Dr. Masci's qualifications.

"Under [ER 702], the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact." *State v. Russell*, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). Once that happens, debates over expert qualifications go to weight, not to admissibility. "Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony." *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 360-61, 364 P.3d 129, 149 (2015).

Furthermore, ER 702 says nothing about formal licensure. Thus, "[p]er se limitations on the testimony of otherwise qualified non-physicians are not in accord with the general trend in the law of evidence, which is away from reliance on formal titles or degrees." *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 118-120, 924 P.2d 953 (1996). "Training in a related field or academic background alone may also be sufficient." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 81, 877 P.2d 703 (1994), *aff'd on other grounds*, 127 Wn.2d 401, 899 P.2d 1265 (1995). An expert can qualify by experience alone. *State v. Rodriguez*, 163 Wn. App. 215, 259 P.3d 1145 (2011). Expertise in a related field also can qualify an expert. *Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 995 P.2d 621 (2000) (though not a nurse, physician can testify to nursing standard of care).

1. Dr. Masci was well qualified by his education, training, experience, and license to express the opinions he expressed.

Dr. Masci testified to his extensive qualifications, education, and experience, to the scope of chiropractic medicine in general, and to his specific examination of both Mr. Gilmore and his records. RP 317-323. With this evidence before the trial court, issues with Dr. Masci's testimony clearly went to weight, not to admissibility. Defendant made this very point in closing, arguing that Dr. Masci's opinion should not be given weight because he had not testified exclusively about chiropractic treatment but about other things. RP 1018-19. It was for the jurors to

give that argument, and Dr. Masci's testimony, such weight as they believed each deserved.

RCW 18.25.005(1) defines chiropractic to include "the diagnosis or analysis and care or treatment of ... articular dysfunction and musculoskeletal disorders." RCW 18.25.006(7) states: "'Musculoskeletal disorders' means abnormalities of the muscles, bones, and connective tissue." The intervertebral discs in the neck and back are connective tissues. Therefore, a chiropractor's scope of practice includes diagnosis and treatment of disc bulges and herniations, and the nerves those herniations impinge upon. These were the injuries Mr. Gilmore sustained in this collision.

Moreover, chiropractors are expected to perform a differential diagnosis and to refer patients to other health care providers when appropriate. RCW 18.25.005(3); 18.25.006(8). Chiropractors routinely coordinate with other medical professionals, including medical doctors, to ensure that patients receive appropriate care. The law thus recognizes that doctors of chiropractic will interact with other health care providers and, inevitably, with their records and reports as well.[17]

The defense argues that Dr. Masci went beyond his expertise in testifying about disc diseases, disc herniation, MRI findings, and neurological symptomology. All of these subjects fall squarely within what

[17]Indeed, RCW 18.25.005 states that "[a]s part of a chiropractic differential diagnosis, a chiropractor shall perform a physical examination, which may include diagnostic x-rays, to determine the appropriateness of chiropractic care **or the need for referral to other health care providers.**" (emphasis added).

chiropractors are statutorily authorized to deal with. They also fall within the realm of matters that chiropractors in general and Dr. Masci in particular do deal with. *See*, Declaration of Dr. Masci, DC, CP 707-08.

The defense took inconsistent positions at trial on this issue, initially withdrawing its objection to Dr. Masci's testimony, but later renewing it. Defense counsel voir dired Dr. Masci about the scope of his expertise and **then withdrew this objection**, at RP 325:

> Mr. Rovang: Doctor, excuse me. Is – is, uh, degenerative disc disease a condition that's within your scope of specialty and licensing in the State of Washington?
>
> A: Certainly.
>
> Mr. Rovang: Okay. No objection.

It was not until Dr. Masci began to give damaging testimony that the defense suddenly began to object repeatedly to his testimony.

> 2. *Defendant never objected to Dr. Masci's testimony as "vouching" and therefore waived the issue.*[18] *Dr. Masci did not improperly "vouch" for Mr. Gilmore – he used information reasonably relied upon by experts in his field, including his physical examination, patient history, and patient records.*

Defendant failed to make any objection during Dr. Masci's testimony that he was "improperly vouching" for Mr. Gilmore. Had defense counsel done so, and had the trial court agreed with this characterization, it would have been easy for the trial court to limit Dr. Masci's testimony and/or to give a corrective or limiting instruction. As with so many other

[18]The defense eventually did object to Dr. Masci's testimony as being outside the scope of his license. *See, e.g.*, RP 345-46, 349, 351, 355. The trial court dealt with that issue outside the jury's presence, exercising discretion to move the trial forward by acknowledging this objection and exercising discretion to overrule it. RP 356-57.

issues, the defense's failure to timely raise this issue or to request a corrective instruction waives it. It was not preserved for appeal.

As for the merits of this issue, experts can rely upon types of information "reasonably relied upon by experts in the particular field", even if that information is not itself admissible. ER 703. Doctors of medicine and of chiropractic reasonably rely upon records, tests, and other information, together with the patient's history, in reaching their conclusions. Dr. Masci did that here. RP 322. There was nothing improper about it.

The defense claims Mr. Gilmore's history was "unreliable". But it would have been improper for any court to accept that partisan opinion as a matter of law and to therefore exclude Dr. Masci's testimony. Rather, the usual remedy for an adversary when an expert testifies based in part upon allegedly unreliable information is to highlight that issue for the jurors. The jury instructions told the jurors that they could consider an expert's information sources in weighing the expert's testimony. RP 972. The defense argued in closing argument that Mr. Gilmore was "not truthful" with his doctors. RP 1018. The fact that the defense argument didn't work is not a basis for appeal.[19]

[19]The case defendant cites, *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986), involved an accident reconstructionist who based his opinions **solely** on "facts" about the collision which were contradicted by all witnesses. Here, Dr. Masci's opinions were based upon records and test results, not solely upon what Mr. Gilmore told him. RP 323.

E. The trial court's decisions pertaining to alleged discovery violations regarding Dr. Marinkovich were both correct and well within the trial court's discretion.[20]

At one time, it was common for trial courts to exclude witnesses because of discovery violations.[21] But in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), the Supreme Court announced a far more stringent standard: before the "harsher" remedies of CR 37(b) can be imposed, a trial court must find **on the record** that (1) the offending party's action was willful or deliberate; (2) the offense substantially prejudiced the opponent's ability to prepare for trial; and (3) no lesser sanction would suffice.

In *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006), the *Burnet* doctrine was extended to witness exclusion for discovery violations. And in *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 344, 254 P.3d 797 (2011), the Supreme Court reversed the trial court's exclusion of witnesses, holding it was an **abuse of discretion** to exclude a witness without conducting the required "*Burnet* analysis" **on the record**.

In *Jones v. Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380 (2013), the Supreme Court went even further. In *Jones,* the Court held that even when a witness was first disclosed **during trial** – the most egregious pos-

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[20]In denying defendant's CR 59 motion, the trial court expressly held, "The issues regarding Dr. Marinkovich do not warrant a new trial or remittitur." CP 724-25.

[21]The cases defendant cites in support of its argument that the issues regarding Dr. Marinkovich mandated a new trial are no longer good law after *Burnet v. Spokane Ambulance* and its progeny, especially *Jones v. Seattle.*

sible discovery violation – the trial court nevertheless was required to conduct an **on the record *Burnet* analysis before it could properly bar the late-disclosed witness from testifying.** *Jones*, at 340.[22]

The defense here complains that some details about what Dr. Marinkovich reviewed and when he reviewed it, in forming his opinions, were not timely disclosed. But **defense counsel already got the remedy he asked for below**. He stated on Thursday, April 11, 2015 (RP 431-32):

> I think what I'd like as a remedy, Judge, is an order from the Court requiring the plaintiff to give me a copy of everything the doctor has reviewed, and a copy of all his opinions...a copy of everything that's in his notes, the correspondence and so forth. Uh, if I could have that before Monday that would give me an opportunity to review. I don't think I'm going to gain anything significant by questioning the doctor here today. But if I could have the materials, uh, before he testifies on Monday, **that would give me an opportunity to prepare.** (emphasis added)

A few moments later, defense counsel stated: "Counsel can give me all of [Dr. Marinkovich's] opinions based on everything that he's reviewed. That – and I'll **be prepared Monday.**" RP 434 (emphasis added).

The trial court ordered that the materials defense counsel requested be provided to him by Friday, April 12, at 4 pm. RP 432. If defense counsel had wanted a trial continuance or recess, he could have asked for it. He did not. Instead, he obtained the relief he sought, and he represented to the trial court that that relief was sufficient – that he would be

[22]The Supreme Court ultimately found that the improper exclusion was harmless error and affirmed the verdict. *Jones* at 355-56.

prepared to cross examine Dr. Marinkovich the following Monday.[23]

Defense counsel's concession that this remedy would be sufficient for him to be ready to cross examine Dr. Marinkovich precluded the trial court from finding that defendant's ability to prepare for trial had been "substantially prejudiced", and indeed the trial court made no such finding. And obviously there existed a sufficient remedy short of excluding Dr. Marinkovich. The trial court granted that remedy – the very remedy defendant sought. Far from it being reversible error for the trial court to allow Dr. Marinkovich to testify, **it would have been error to exclude him.**[24] *Burnet, supra*; *Blair, supra.*

Furthermore, this Court should be aware that there also were issues about what information the defense provided to its own medical witness, Dr. Jessen. Dr. Jessen did not have a number of important medical records when she completed her own report; she saw them for the first time at trial. RP 921.[25] This information is provided for two reasons.

---

[23]Dr. Marinkovich did return on Monday to be cross examined, **at plaintiff's expense.** This was in an additional *de facto* sanction upon plaintiff's counsel.

[24]Appellant focuses on the trial court's offhand comment that something was "fishy", RP 432, as "proof" that the court found "willful misconduct". "Fishy" is a far cry from an affirmative finding of willful misconduct. But the point is moot because, in the clear absence of the other two *Burnet* findings, witness exclusion on discovery grounds would have been error, even if there had been an express finding on the record of willful misconduct.

[25]Specifically missing from the records Dr. Jessen was provided by the defense were the June 25, 2009 record from West Sound Orthopedics, in which a Dr. Kane opined that Mr. Gilmore would require surgery to treat the injuries he sustained in the motor vehicle collision, RP 927-928; a July 27, 2009 record from Dr. Suffis noting his opinion that, on a more probable than not basis, Mr. Gilmore's on-going symptoms were related to the motor vehicle collision, RP 925; and the September 10, 2010 assessment from Dr. Niakan in which he opined that Mr. Gilmore's symptoms began after this collision, RP 927.

First, since appellant has challenged the validity of the jury's deliberations and verdict, this Court should be aware that the trial evidence provided the jurors with at least one very good reason for rejecting Dr. Jessen's conclusion that the surgery was unrelated to the collision: that her opinion was based upon incomplete information. Second, it shows that inadvertent errors in communications with experts do occur in the realm of real-world litigation, and that such common errors are not in and of themselves proof of "willful misconduct". The defense now complains bitterly about when plaintiff's witness received certain information. Do they claim it also was "willful misconduct" when the defense did essentially the same thing with its own witness?

F. The exclusion of evidence of collateral source benefits was both correct and well within the trial court's discretion.

The defense complains that the trial judge kept out evidence of L&I payments as a "collateral source". Appellant's Opening Brief, p. 10. Defendant now argues on appeal that plaintiff "opened the door" when some lay witnesses testified about financial issues in Mr. Gilmore's life. But in *Boeke v. International Paint, Inc.*, 27 Wn. App. 611, 617-18, 620 P.2d 103 (1980), the Court of Appeals specifically forbade admission of L&I payments under the collateral source rule, even where, as here, they were offered to show plaintiff's alleged lack of motivation to return to work.

The *Boeke* rule was repeated and reinforced in *Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (2000) (emphasis added), where the Supreme Court held:

> Thus, **even when it is otherwise relevant**, proof of such collateral payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff's damage award. *Boeke v. International Paint Co.*, 27 Wn. App. 611, 618, 620 P.2d 103 (1980) (quoting *Reinan v. Pacific Motor Trucking Co.*, 270 Or. 208, 213, 527 P.2d 256 (1974)). **In this respect, courts generally follow a policy of strict exclusion.** Although the fact that Cox received industrial insurance benefits **might have some marginal relevance regarding the apportionment of Cox's damages, to show malingering, or to attack her experts' credibility, we believe such relevance is outweighed by the unfair influence this evidence would likely have had upon the jury.**

In this case, the trial judge noted that he knew of no authority that collateral source evidence in a personal injury case is even subject to "opening the door". RP 543. The trial court offered the defense the opportunity to cite such authority, RP 541, but it never tried to do so until this appeal, thereby depriving the trial court of the opportunity to deal with the issue below. "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009); *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013); RAP 2.5(a). By declining the trial court's invitation to brief the "opening the door" issue, defendant waived the issue for appeal.

Moreover, even now defendant has failed to cite to any authority that actually supports its position. The cases defendant cites that tacitly

allowed a trial court to find "opening the door" to collateral sources were not civil cases for personal injury, but a worker's compensation proceeding and a PERS pension hearing.[26] *See, Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 953 P.2d 800 (1998) and *Marler v. Dept. of Ret. Sys.*, 100 Wn. App. 494, 997 P.2d 966 (2000). *Cox v. Spangler, supra*, is the Supreme Court's last word on collateral sources in personal injury lawsuits, and it calls for a "policy of strict exclusion" of collateral sources. *Cox*, at 441.

The defense also attempts to distinguish the many cases that exclude L&I payments as a collateral source by claiming without citation to authority that, where plaintiff seeks no special damages, the long-standing, well-established collateral source rule somehow suddenly becomes inapplicable. This unsupported assertion makes no sense, and should be rejected.

Even if the cases defendant cites did stand for the proposition that one **can** open the door to collateral source evidence in a personal injury case, the trial court's decision remains discretionary. In light of the unfairly prejudicial effect collateral source evidence has, compared with its slight probative value, the trial court correctly exercised its discretion and found as an independent alternative ground for exclusion, that its preju-

[26]Lest the distinction we are making between a civil lawsuit for personal injury and a worker's compensation proceeding be seen as "nitpicking", this Court should note that the sole issue upon which review was granted in *Johnson v. Weyerhaeuser* was whether the collateral source rule applied **at all** in L&I cases. The Court held it did. *Id.*, at 804.

dicial effect outweighed its probative value, pursuant to ER 403. RP 56. This conclusion was well within the trial court's discretion.

G. The amount of damages awarded was both reasonable and well within the range of the evidence presented at trial.

The verdict in Mr. Gilmore's favor is not evidence of passion or prejudice, but rather is evidence the jurors were paying attention to the evidence and the law. It was a reasonable verdict for a man who has irreparable injury to his spine, who had to undergo multi-level spine fusion surgery, and who, despite improvement following the surgery, still faces a lifetime of pain and disability. The defense has offered no evidence for its claim of an excessive verdict, except defense counsel's personal opinion that the verdict was somehow "too large" or some kind of "record".[27] That is not evidence, and this Court should not disturb the jury's decision.

A new trial is not a matter of right. *Getzendaner v. United Pac. Ins. Co.,* 52 Wn.2d 61, 322 P.2d 1089 (1958). The trial court has wide discretion in granting or denying motion for new trial, and an appellate court will not interfere unless there has been a manifest abuse of that discretion. *Coats v. Lee & Eastes Inc.*, 51 Wn 2d 542, 320 P.2d 292 (1958). The Court presumes the jury's verdict is correct, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989), and is obliged to presume that the damages awarded by the jury are correct and "***shall prevail***" unless the damages are so excessive as to indicate the verdict, not "may have been", but "***must have been***" the result of passion

[27]Comparing awards in other cases to determine appropriateness of a damage verdict is "improper". *Washburn v. Beatt Equipment*, 120 Wn.2d 246, 248, 840 P.2d 860 (1992).

or prejudice. RCW 4.76.030 (emphasis added).

The jury has the constitutional role of determining questions of fact, and the amount of damages is a question of fact. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). If substantial evidence is presented on both sides of an issue, the jury's finding is final. *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 675 P.2d 239 (1983).

In *James*, the Supreme Court reversed a trial court's remittitur (which had been upheld by the Court of Appeals), stating: "Whether substantial justice was done depends in a large degree on whether the verdict was so excessive or inadequate as ***unmistakably*** **to indicate passion and prejudice.**" (emphasis added). The trial judge is in a "favored position" on motions for remittitur because the trial judge saw the evidence and heard the witnesses and counsel. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (reversing the Court of Appeals, which had overruled the trial court and ordered remittitur).

An appellate court should not disturb an award of damages made by a jury "unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005). "Passion and prejudice must be 'unmistakable' before they [can be presumed to] affect the jury's award." *Id.* "The determination of the amount of damages, particularly in actions of this nature, is primarily and peculi-

arly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made." *Bingaman, supra.* Moreover, verdict size alone cannot be a basis to overturn a verdict. *Bingaman*, at 838.

Damages need not be proven with mathematical certainty, but only need be supported by competent evidence. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530-31, 544 P.2d 1041 (1976). Here, the verdict reflected the doctors' testimony that Mr. Gilmore's injuries and surgery were caused by the collision, and who opined that he faced life-long pain, and a worsening condition as he aged, plus extensive lay witness evidence that Mr. Gilmore's life had been severely affected by his injuries.

The jury did not give plaintiff more than he asked for, or even the amount that he asked for in damages. Obviously, the jurors weighed the evidence and chose which parts to believe and which to disbelieve, as was their right and duty. The trial judge held that the verdict was within the range of the evidence when he denied the motion for remittitur. This Court should give great deference to the jury and to the trial court on damages issues, and should uphold the verdict.

The defense makes the strange argument that medical bills which were neither offered nor admitted into evidence at trial should somehow, in the post-trial world, prove that the verdict was "excessive". The defense submitted copies of certain medical bills in connection with its CR 59 motion for a new trial. CP 477-493, 628-629. However, these bills

are inadmissible,[28] and should be stricken by this Court. Plaintiff has filed a separate Motion to Strike.

Even if this Court declines to strike the bills for lack of proper foundation, the bills still are irrelevant. How much a surgery costs tells us nothing about how painful it was, how risky it was, how prolonged its recovery period was, nor its result. And since the jurors never saw the bills, the bills could not possibly have caused them to violate their oaths and return an excessive verdict. These bills are irrelevant to this appeal. If the defense had wanted the bills in evidence at trial, it could have offered them. For defendant to make the tactical decision not to offer the bills, and then to appeal a verdict not to its liking, is yet another example of its improper "gambling on the verdict".

H. Plaintiff's closing argument was proper, and any impropriety was waived because defendant never objected to any part of it.[29]

---

[28]In submitting the medical bills, defendant failed to lay a foundation that would make them admissible as business records. They are thus inadmissible hearsay. Nor did the defense offer any evidence that these bills were reasonable, necessary, or related to the injuries caused by the collision. Plaintiff made a motion to strike the medical bills from the trial court's consideration when they were submitted by the defendant as part of its CR 59 motion, but the trial court did not rule on the motion to strike.

[29]In balancing any "equities" regarding this issue, the Court should be aware that **defendant** violated the trial court's orders in limine during its own closing. Plaintiff's Motion No. 4 requested that there be no argument that a plaintiff verdict would be a "windfall". CP 15. The intent of the motion was clear – that the defense could not characterize a requested verdict as "jackpot justice" or argue a verdict for plaintiff would be a windfall for him. RP 17. The Court granted the motion when defense counsel conceded the point, stating "I'm not going to argue that any recovery would be a windfall for the plaintiff, which I think is what this motion goes to." RP 18. The defense even stated "**that would be improper**." RP 18 (emphasis added).

Yet the defense repeatedly violated this order, arguing in closing, "[t]hey're hoping you know, you're gonna go for $1.8 million for a minor collision. It's ridiculous. This is not a lottery." RP 1008. The defense later said it again: "It's not a lottery" and "it's not an opportunity to retire." RP 1023.

Although the defense now complains about plaintiff's closing argument, the defense neither objected nor sought any curative instruction during plaintiff's entire closing argument. Any alleged error therefore was waived.[30]

1. Plaintiff made no "golden rule" argument and defendant never objected to the argument plaintiff did make.

The defense falsely claims, at p. 47-48 of its Opening Brief, that plaintiff's counsel made an improper "golden rule" argument. The Court should note that the defense does not actually quote the allegedly offending language. That is because there is none.

The jurors needed to decide how to measure the monetary value of time lived in pain and disability, so they could fairly determine the amount of money needed to compensate for it. Because most people's jobs involve being paid for their time, our society's trade-off of time for money is one familiar to most jurors. For this reason, plaintiff's counsel sometimes make a damages argument by analogizing to a job. This is one of many variations of the "per diem" argument, which is entirely proper in Washington. *Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960) (per diem argument proper so long as jury is instructed that arguments of counsel are not evidence, which they were here via standard WPI instructions, RP 969). The defense claims that plaintiff's counsel was "repeatedly asking the jurors what it would take for *them*, person-

[30]Defendant's argument rests on criminal cases of prosecutorial misconduct, which are inapplicable in a civil case because of the accused's constitutional rights and the uniquely ultra-high standard to which prosecutors are held. *See, e.g.*, RPC 3.8, comment [1].

ally" to be in Mr. Gilmore's shoes, to take this "job". Counsel did no such thing. She described the "job" and asked the jurors to consider different "wage rates", some being too high, some being too low, and some being, in counsel's argument, "fair and reasonable". RP 1004.

Directly on point is *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 524, 105 P.3d 400 (2004). In *A.C.*, the complained-of argument was analogous to that given in the instant case, talking about wages as a means of expressing the value of money. But unlike in the instant case, in *A.C.* counsel **did** ask the jurors to think about what an amount of money would mean **to them** (emphasis added):

> The number that I want to give you for all of the damages in the case is half of a year of an average worker's pay. If you think that's fifteen thousand or twenty thousand, that's an appropriate number. That's a lot that you go through. **If you had that amount of money, what would it mean to you? Would it be a lot of money to you?** That's an issue for the jury to decide.

The Court nevertheless held "this was not an improper 'golden rule' argument". *A.C.*, *supra*, at 524. The Court also held that appellant "did not object to the argument she now characterizes as an improper 'golden rule' statement. **For this reason alone, A.C. is not entitled to relief on appeal on this point.**" *Id.* (emphasis added). Nor is defendant here entitled to any relief, both because the argument was proper and because the defense never objected.

2. *Plaintiff did not ask for punitive damages and defendant never objected to the argument plaintiff did make.*

Defendant also claims, at p. 47-48 of its Opening Brief, that plain-

tiff's counsel asked the jury for "punitive damages" by asking the jury to "send a message". Not true. Counsel never said "send a message". What counsel did was, again, quite common and entirely proper in a personal injury case – she asked the jurors to hold the tortfeasor accountable for the harm done. RP 1032. Compensation is, after all, a purpose of tort law. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 238, 588 P.2d 1308 (1978). Improvement of public safety is another purpose of tort law. *See, Jackson v. City of Seattle*, 158 Wn. App. 647, 657, 244 P.3d 425 (2010); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 884 n. 5, 866 P.2d 1272 (1994). There is nothing improper about reminding jurors of these policy goals.

Miller v. Kenny, 180 Wn. App. 772, 816, 325 P.3d 278 (2014), is analogous. There, as here, the defense complained that plaintiff's counsel had made an improper argument when he appealed to the jurors to "reflect the 'conscience of the community' and serve as a protector and guardian for the community." The Court held that this speech was not a golden rule argument, nor otherwise improper. *Miller*, *supra*, at 816-17: The Court also noted (citations omitted, emphasis added):

> The effect of a golden rule argument on a jury is 'difficult to ascertain,' and in most cases, **any prejudicial effect can be removed, if there is a timely objection**, by the trial court instructing the jury to disregard the argument.... Safeco did not make a timely objection. And the challenged remarks when read in the overall context of the trial are **more properly characterized as aggressive advocacy than as misconduct**. We therefore conclude the argument of counsel did not furnish a basis for ordering a new trial.

In the instant case, as in *Miller*, *supra*, there was no objection. The argument was proper, and no alleged error was preserved.

Finally, the defense complains about what it calls plaintiff's use of "extraordinarily inflammatory language" about the government murdering people and getting away with it. What the defense omits from its brief is that it was **defense counsel** who started his closing argument by talking about the government getting away with murder – the police shooting a child holding a toy gun; the police shooting a Walmart customer holding an empty BB gun picked up from the store shelf, and then pressuring his widow to blame the victim; the police shooting a man in the back and then planting a taser on his body. RP 1005-06.

Was this a plea for sympathy for the government? An attempt to make what the government did to Mr. Gilmore seem unimportant by contrast? An indirect argument that the government cannot afford to pay Mr. Gilmore because it has to pay for its other, more serious misdeeds? Whatever the purpose of this defense argument, plaintiff's counsel had the right and the duty to respond in rebuttal, and so she did at RP 1031:

> I think it's funny that the defense started his closing argument talking about the government and how the government murders innocent people. And how the government gets away with it. And how the government brings in the widows of those innocent people and tries to get them to blame it on the victim. That's how he started his closing statement.
>
> But that's what the government does. Why do they do that? They do that because no one holds them accountable.

Plaintiff's counsel then went on to encourage the jury to hold defendant

accountable for injuring Mr. Gilmore.

The defense never objected. Indeed, had it done so, one hopes the trial court would have overruled the objection on the ground that it was proper rebuttal to the **subject matter defendant had raised.** In any event, if the defense is now unhappy that the specter of government misconduct entered the courtroom, it has only itself to blame. That specter was brought in by defense counsel, not by plaintiff.

V. CONCLUSION

In this case, defense counsel took a "high risk" approach to the case. If he had succeeded, there would have been either a small damage award or a complete defense verdict. But the high risk approach failed. What the defense really wants now is a do-over, another bite of the apple, in which to try the case again in a different manner and perhaps obtain a result more to the defense's liking. The trial court rejected this request, and so should this honorable Court.

DATED this 21 day of May, 2016.

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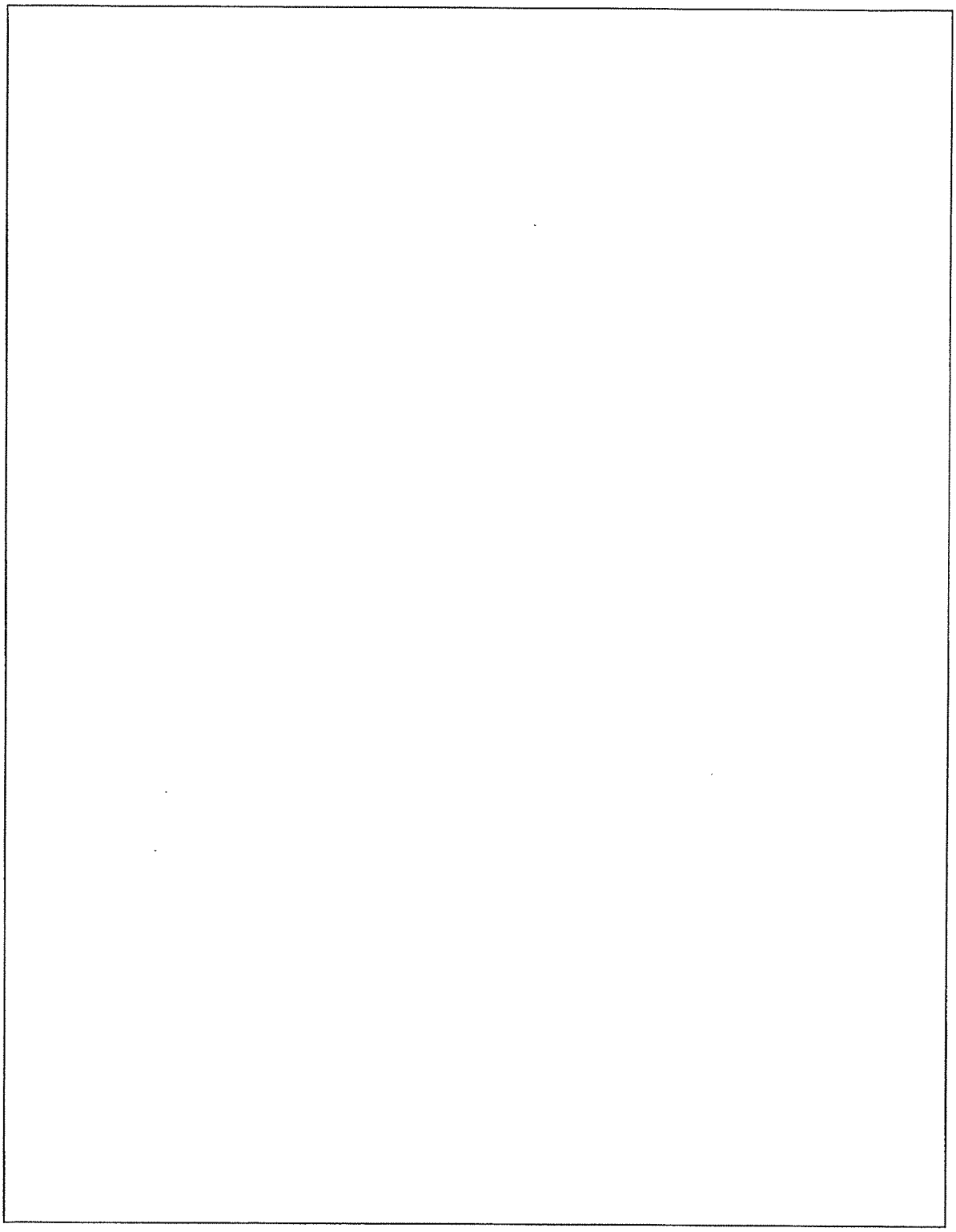

Honorable Keith Harper
Oral Argument: August 14, 2015

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JEFFERSON COUNTY
RUTH GORDON CLERK

SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

MICHAEL GILMORE, an individual,

Plaintiff,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a/, Jefferson Transit Authority,

Defendant.

No. 10-2-00390-7

ORDER ON MOTION FOR NEW TRIAL OR REMITTITUR

THIS MATTER having come before the undersigned upon the defendant's Motion for New Trial or Remittitur, the Court has reviewed the following items, except for such items, if any, that the Court struck pursuant to the Court's ruling on Plaintiff's Motion to Strike:

1. Defendant's Memorandum in Support of New Trial or Remittitur;
2. Declaration of Counsel Rovang, and the Exhibits thereto;
3. Declaration of Julie DuChene, and the Exhibits thereto;
4. Declaration of Victoria Vigoren, and the Exhibits thereto;
5. Plaintiff's Response to Defendant's Motion for New Trial or Remittitur;

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6. Declaration of Counsel Bradshaw, and the Exhibits thereto;

7. Declaration of Dr. Geoff Masci, DC;

8. Declaration of Counsel Richard McMenamin;

9. [illegible]

The Court heard the oral arguments of both parties. The Court also considered its own observations while presiding over both the pretrial matters and the jury trial of this case. The Court now makes the following Findings of Fact:

1. A sufficient foundation was laid for the admission of the testimony of Dr. Masci, and any issues regarding his credentials went only to the weight of his testimony;

1.a The issues regarding Dr. Marinkovich do not warrant a new trial or remittitur

2. This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur;

The Court does not find a basis to overturn the verdict.

~~3. The jury's verdict was within the range of the evidence presented at trial, and was supported by substantial competent evidence.~~

WHEREFORE, defendant's Motion for Remittitur or New Trial is DENIED.

Dated this 14 day of August, 2015.

SUPERIOR COURT JUDGE

Presented by:

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APPENDIX **B**

SUPERIOR COURT OF WASHINGTON FOR
COUNTY OF KING

KEVIN FOLEY,
Plaintiff,
vs.
BRANDIE D. DEAL,
Defendant

No. 13-2-23557-9 SEA

ORDER RE: MOTION TO EXCLUDE ALLAN F. TENCER PHD

This matter comes before the court on Plaintiff's Motion for an order to exclude the proffered testimony of Allan F. Tencer, PhD. The Court has considered the following:

- Plaintiff's motion and Declaration,
- Defendant's Response and Declaration with exhibits;
- Supplemental Response and Declaration;
- Plaintiff's Reply and Declaration;
- Pertinent legal authority, including *Johnston-Forbes v. Matsunaga,* 333 P.3d 388; 177 Wn. App. 402 (Div. 2, 2013), *Berryman v. Metcalf,* 177 Wn.App. 644 (Div. I, 2013), *Stedman v. Cooper,* 172 Wn.App (Div. I, 2012), *Schultz v. Wells, 13 P.3d 846* (Colo.App. 2000).

The facts at bar involve: a) admitted liability for the collision, b) conceded causation for immediate injuries, and c) the plaintiff's preexisting susceptibility to injury. Here, non-medical, biomechanical expert testimony would not assist a trier of fact to understand the evidence or to determine a fact in issue, pursuant

ER 702. Such testimony is additionally inadmissible since any relevance is substantially outweighed by the danger of confusion of the issues and misleading the jury, pursuant ER 403. Accordingly, the motion is GRANTED. The Court, however, defers to the trial court whether such limited expert testimony would, on balance, become sufficiently relevant and hence admissible in rebuttal should plaintiff offer (as the defendant here presumes) specific testimony regarding the transferability of forces peculiar to the specific trailer hitch and resulting injuries here.

SO ORDERED this 04th day of December, 2014.

Judge Timothy A. Bradshaw

HONORABLE CATHERINE SHAFFER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANTHONY W. HOPKINS, Plaintiff, v. MICHAEL J. TEETER, Defendant.	NO. 13-2-25739-4 SEA ~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY OF ALLAN TENCER, Ph.D.

This matter, having come before the Court on plaintiff's Motion to Exclude Testimony of Allan Tencer, Ph.D., and the court having reviewed the records and files herein, and being fully advised, finds Allan Tencer, Ph.D.'s testimony in this case not helpful to the trier of fact, unfairly prejudicial, and likely to confuse the jury.

Dr. Tencer is not a medical professional and may not testify to causation of injury. There is no logical inference from Dr. Tencer's testimony in this case other than that plaintiff could not have been injured from the collision because the force of impact was too small. This inference, this opinion, and this conclusion of the testimony of Dr. Tencer constitute "causation of injury" evidence not permitted. Beyond this improper inference, Dr. Tencer's testimony is not relevant to ~~any issues material to this case~~ the material issue in this case: the degree to which plaintiff was injured by this particular automobile collision. ~~Furthermore, Dr. Tencer's opinions are unreliable and based~~ on

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speculation using methods and information that is outside his area of expertise and not generally accepted within the scientific community.

The Court adopts the reasoning of the Court of Appeals in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), and finds that the facts are analogous in the case before this Court and the purpose of Dr. Tencer's testimony is for the same purpose as in *Stedman*. This Court also finds pursuant and adopts Judge Nora's reasoning in his decision of June 9, 2009 attached.

Now, therefore, it is ORDERED that plaintiff's Motion to Exclude Testimony of Allan Tencer, Ph.D. is GRANTED on the basis that Dr. Tencer's testimony is more likely to be misleading than helpful to a jury.

Dated this ____ day of April, 2015.

HONORABLE CATHERINE SHAFFER

Presented by:

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Arbitrator: Honorable Sean O'Donnell

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LISA WALKER,

Plaintiff,

v.

RONNIE L. BARNES,

Defendant.

NO. 14-2-15848-3

~~[PROPOSED]~~ **ORDER GRANTING MOTION TO EXLCUDE TESTIMONY OF ALLAN F. TENCER, PHD.**

THIS MATTER came on before the Court on Motion to Exclude Testimony of Allan F. Tencer, PhD. The Court considered the following papers filed in this matter:

1. Motion to Change Exclude Testimony of Allan F. Tencer, Ph.D
2. Declaration of James W. Kytle;
3. Defendant's opposition
4. Decl. of Ryan Volkers
5. Plaintiff's Reply
6. _____

Having considered the foregoing materials, and being fully informed by the arguments of counsel, the Court hereby ORDERS as follows: the Motion to Exclude Testimony of Allan F.

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Tencer, PhD. is GRANTED:

It is hereby duly ORDERED this 12th day of April 2016.

The Honorable Sean O'Donnell

Presented by:
MANN & KYTLE, PLLC

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Approved as to form
Notice of presentation waived

Ryan Vollans WSBA #45302

There is a conundrum in the defendant's position regarding Dr. Tencer. on the one hand, 'Defendant does not dispute that Dr. Tencer cannot offer medical causation testimony' and assures the court no such testimony will be offered. Response at 8. on the other hand, Dr. Tencer's testimony would be offered to help the jury determine 'whether or not plaintiff's ongoing complaints can be attributable to the subject collision.' Defendant further states that 'the forces involved in the subject crash are directly relevant to the issues in this case.' Response at 7.

The purpose of Dr Tencer's testimony would be to link the force of the crash to plaintiff's 'ongoing complaints.' Yet the only 'complaints' plaintiff expresses are resulting from the plaintiff's (alleged) injuries. Defendant urges the proposed testimony as helping the jury understand the forces involved in the crash and whether those forces can be attributable to plaintiff's injuries. This posture is distinguishable from Johnston-Forbes v. Matsunaga, where the proffered testimony examined force of collision to supposedly similar forces experienced in daily living. Johnston-Forbes, 181 Wn 2d at 874.

Additionally, based on the evidence proffer submitted, the court finds that Dr Tencer's testimony would not be helpful to the jury and, therefore, irrelevant.

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CERTIFICATE OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing document to be served via email and messenger on the following attorney:

Ryan Vollans
Betts, Patterson & Mines
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927

DATED this ____ day of _____, 2016 in Seattle, WASHINGTON.

_____
JAMES W. KYTLE

CONT for his opinions

Dr. Tencer cannot testify that the force involved in this crash caused plaintiff's alleged injuries. He has also relied on an . . experiment that shows little, if any, similarity to the accident at issue in this case. Moreover, the sample size of his experiment is too small, in this court's estimation, to provide a statistically significant inference. [NOTE: In opposing the motion to exclude, defendant provided little, if any, documentation supporting the basis for Dr. Tencer's opinion. The court has reviewed and relied upon exhibits 3 and 5 to Mr. Kytle's declaration.

For all these reason, the court is granting plaintiff's motion.

See also, Anderson v. Akzo Nobel Coatings, 172 Wn2d 593, 606 (2011); Steedman v. Cooper, 172 Wn App 9 (2012) and ER 702.

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL GILMORE, a single man, Respondent, vs. JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation, Appellant.	No. 48018-2-II RESPONDENT'S STATEMENT OF ADDITIONAL AUTHORITIES

COMES NOW respondent herein and, pursuant to RAP 10.8, offers this statement of additional authorities, primarily though not exclusively in response to statements made by defendant/appellant during rebuttal argument, when plaintiff/respondent could not then respond:

Issue for Which Authority is Offered: Whether appellant's failure to object below is evidence that there was no error, or that any error which did occur, was harmless.

"We stress that defense counsel did not object on the record.... [T]he lack of a clear and prompt objection is strong evidence that counsel perceived no error...."

– *In re the Det. of Black*, No. 92332-9 (Supreme Court, December 15, 2016), at pp. 7-8.

Issue for Which Authority is Offered: Whether the correct standard of review on a trial court's decision to admit or exclude evidence, such as collateral source evidence, is "abuse of discretion", and what "abuse of discretion" means.

"Trial court decisions on the admission of evidence are reviewed for abuse of discretion."

– *State v. Giles*, No. 72726-5-1, (Court of Appeals, November 28, 2016), p. 12.

"A court abuses its discretion only when no reasonable person would take the view adopted by the trial court."

– *State v. Chambers*, No. 72093-7-1, (Court of Appeals, December 19, 2016), p. 41 (unpublished portion of published opinion, cited as non-binding but persuasive pursuant to GR 14.1(a)).

Issue for Which Authority is Offered: Whether the trial court's decisions to exclude Tencer and to admit Dr. Marinkovich are subject to both an "abuse of discretion" standard and to a "harmless error" analysis.

"We review a trial court's decision to exclude witness testimony for an abuse of discretion.... The erroneous exclusion of witnesses without performing the analysis required by *Jones* and *Burnet v. Spokane Ambulance* [citation omitted] has been held to be subject to harmless error analysis. *Jones*, 179 Wn.2d at 338. An error is harmless, and therefore not grounds for reversal, if it does not affect the outcome of the case. *Blaney v. International Association of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004).

– *Hamrick, et al, v. State*, No. 47438-7-II (Court of Appeals, December 13, 2016) at p. 21.

Issue for Which Authority is Offered: What is the appropriate degree of deference to be accorded to the trial court when reviewing trial court decisions to admit or to exclude evidence, or to deny a new trial based upon allegations of improper rulings or events during the trial?

"[W]here the claimed grounds for a new trial involve the assessment of occurrences during the trial and their potential effect on the jury, we will accord great deference to the considered judgment of the trial court in ruling on such a motion."

– *Levea v. G.A. Gray Corp.*, 17 Wn. App. 214, 226, 562 P.2d 1276 (1977).

Issue for Which Authority is Offered: Whether evidence of L&I payments is admissible.

"Right to compensation not pleadable or admissible – Challenge to right to bring action.

"The fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or admissible in evidence in any third party action under this chapter...."

-- RCW 51.24.100 (some emphasis added, some original).

Respectfully submitted this 20th day of December, 2016.

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Administrative Transfer Documentation

Gilmore v. Jefferson County Public Transportation Benefit Area

Court of Appeals No. 48018-2-II

From: Ponzoha, David [mailto:David.Ponzoha@courts.wa.gov]
Sent: Wednesday, August 10, 2016 8:54 AM
To: Catherine Smith <cate@washingtonappeals.com>; Howard Goodfriend <howard@washingtonappeals.com>; Tori Ainsworth <tori@washingtonappeals.com>; david@heldar.com; sunshine@premierlawgroup.com; shari@mcmenaminlaw.com
Cc: Moreno, Cheryl <Cheryl.Moreno@courts.wa.gov>
Subject: Transfer of COA No. 48018-2-II, Gilmore v. Jefferson County Public Transportation, to Division 1
Importance: High

Counsel – Division 1 has offered its assistance in reducing the backlog of cases in this division. This court has accepted Division 1's offer to transfer cases to Seattle for setting in an upcoming Term. This court has set its October cycle and the next set of cases have been considered for transfer. The court screened the cases for transfer and I am notifying you that the above case was selected. The court realizes that the transfer to Seattle may place a burden on counsel and the parties. To minimize the burden, Division 1 will accommodate travel considerations and, in limited circumstances, allow the parties to appear at oral argument via video conferencing from the Administrative Office for the Courts in Olympia or Division 2's courtroom. If counsel requires accommodation or would like to appear by video conference, a motion should be filed at Division 1 requesting permission to do so after receiving the order transferring the appeal.

Counsel may file a motion to opt out of the transfer. The reasons, however, for allowing a party to opt out are extremely limited. You may request that your case not be transferred to Division 1 if

- there are conflicting decisions between the two divisions or
- the transfer would be burdensome due to health or some other significant hardship.

The request should be made by motion and the motion should be filed with this office NO LATER THAN noon, **Friday, August 12th.** The motion should be accompanied by an affidavit setting forth the nature of the conflict and/or the burden. You may e-mail the motion to this court by sending the motion and affidavit to coa2filings@courts.wa.gov or, if you have a JIS USERID, you may submit the motion via the attorney portal. The link to the portal is http://www.courts.wa.gov/coa2efiling. If you have any other questions or concerns you may call me at 253 593 2970 or respond to this e-mail.

Thank you for your assistance. dp

No. 48018-2-II

COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man, Respondent, vs. JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a Jefferson Transit Authority, a municipal corporation, Appellant.	APPELLANT'S MOTION TO OPT OUT OF TRANSFER TO DIVISION I

A. Relief Requested.

Appellant Jefferson County Public Transportation Benefit Area ("Jefferson Transit") objects to the proposed transfer of this case to Division I and requests that Division II retain this case for setting in an upcoming term due to conflicting decisions between the two divisions.

B. Facts Relevant to Motion.

Appellant filed its reply brief on June 23, 2016. All briefing in this case is complete and the case is ready to be set for oral argument. This case has now been selected for transfer from this Court to Division I. (Exhibit A) Jefferson Transit objects to the proposed transfer.

C. Grounds for Relief and Argument.

In its notice of transfer, this Court gives a party the opportunity to opt out of a transfer where "there are conflicting decisions between the two divisions." Jefferson Transit spent substantial portions of its opening and reply briefs distinguishing this Division's decision in *Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 311 P.3d 1260 (2013), *aff'd*, 181 Wn.2d 346, 333 P.3d 388 (2014), from Division I's decision in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), regarding the admissibility of Dr. Allan Tencer's expert testimony on biomechanical forces involved in soft-tissue auto collisions. (Opening 21-28; Reply 7-12)

In addition to *Johnston-Forbes* and *Stedman*, Dr. Tencer's proffered testimony has been the subject of other appellate decisions with conflicting holdings in these two divisions. *See Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002); *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013). In *Stedman* and

Berryman, Division I found Dr. Tencer's testimony to be inadmissible, while this Court held the opposite in both *Johnston-Forbes* and *Ma'ele*. In *Johnston-Forbes*, this Court discussed *Stedman* extensively and disagreed with Division I on the very issues that the admissibility of Tencer's testimony turns on in the present case. Jefferson Transit specifically argues in its reply that "*Stedman* is either distinguishable or not controlling in this Division." (Reply 11)

D. Conclusion.

This Court should not transfer this case to Division I given the conflicting decisions between the two divisions regarding this highly contested issue on appeal. This Court should grant appellant's motion to opt out of the transfer and set this case for oral argument in this Division.

DATED this 11th day of August, 2016.

SMITH GOODFRIEND, P.S.

By: _____

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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MICHAEL GILMORE, Respondent, v. JEFFERSON COUNTY PUBLIC TRANSPORTATION, Appellant.	No. 48018-2-II ORDER GRANTING MOTION TO OPT OUT OF TRANSFER TO DIVISION I

APPELLANT moves to opt out of the transfer to Division I of the Court of Appeals.

The Court, upon consideration, has decided to grant the relief requested. Accordingly, it is

ORDERED that the appeal will remain in Division II of the Court of Appeals.

DATED this 5th day of August, 2016.

FOR THE COURT:

Bjorgen, C.J.
CHIEF JUDGE

FILED
COURT OF APPEALS
DIVISION II
2016 AUG 15 AM 8:47
STATE OF WASHINGTON
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Washington State Court of Appeals
Division Two

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August 17, 2016

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CASE #: 48018-2-II
Michael Gilmore, Respondent v. Jefferson County Public Transportation, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY THE CLERK:

Respondent has filed a motion to reconsider this court's order granting appellant's motion to opt out of transferring the above referenced case to Division 1. First, there is no provision for requesting reconsideration of this decision. See RAP 12.4(a). Moreover, the court's decision to transfer a case is exclusively an administrative decision. As such, the court will ordinarily decide any request to opt out in favor of keeping a case in the division where the notice of appeal was filed. RAP 4.1(b). Finally, decisions to transfer cases must be made expeditiously given the administrative challenges of transferring and setting cases. For these reasons, the motion has been placed in the case file without further action.

Very truly yours,

David C. Ponzoha
Court Clerk

Complete Text of All Statutes Cited Herein

RCW 51.12.010

Employments included—Declaration of policy.

There is a hazard in all employment and it is the purpose of this title to embrace all employments which are within the legislative jurisdiction of the state.

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.

RCW 51.16.035

Classifications—Premiums—Rules—Workers' compensation advisory committee recommendations.

(1) The department shall classify all occupations or industries in accordance with their degree of hazard and fix therefor basic rates of premium which shall be:

(a) The lowest necessary to maintain actuarial solvency of the accident and medical aid funds in accordance with recognized insurance principles; and

(b) Designed to attempt to limit fluctuations in premium rates.

(2) The department shall formulate and adopt rules governing the method of premium calculation and collection and providing for a rating system consistent with recognized principles of workers' compensation insurance which shall be designed to stimulate and encourage accident prevention and to facilitate collection. The department may annually, or at such other times as it deems necessary to achieve the objectives under this section, readjust rates in accordance with the rating system to become effective on such dates as the department may designate.

(3)(a) After the first report is issued by the state auditor under RCW 51.44.115, the workers' compensation advisory committee shall review the report and, as the committee deems appropriate, may make recommendations to the department concerning:

(i) The level or levels of a contingency reserve that are appropriate to maintain actuarial solvency of the accident and medical aid funds, limit premium rate fluctuations, and account for economic conditions; and

(ii) When surplus funds exist in the trust funds, the circumstances under which the department should give premium dividends, or similar measures, or temporarily reduce rates below the rates fixed under subsection (1) of this section, including any recommendations regarding notifications that should be given before taking the action.

(b) Following subsequent reports issued by the state auditor under RCW 51.44.115, the workers' compensation advisory committee may, as it deems appropriate, update its recommendations to the department on the matters covered under (a) of this subsection.

(4) In providing a retrospective rating plan under RCW 51.18.010, the department may consider each individual retrospective rating group as a single employing entity for purposes of dividends or premium discounts.

RCW 51.24.100

Right to compensation not pleadable or admissible—Challenge to right to bring action.

The fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or admissible in evidence in any third party action under this chapter. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law.

RCW 51.32.060

Permanent total disability compensation—Personal attendant.

(1) When the supervisor of industrial insurance shall determine that permanent total disability results from the injury, the worker shall receive monthly during the period of such disability:
(a) If married at the time of injury, sixty-five percent of his or her wages.
(b) If married with one child at the time of injury, sixty-seven percent of his or her wages.
(c) If married with two children at the time of injury, sixty-nine percent of his or her wages.
(d) If married with three children at the time of injury, seventy-one percent of his or her wages.
(e) If married with four children at the time of injury, seventy-three percent of his or her wages.
(f) If married with five or more children at the time of injury, seventy-five percent of his or her wages.
(g) If unmarried at the time of the injury, sixty percent of his or her wages.
(h) If unmarried with one child at the time of injury, sixty-two percent of his or her wages.
(i) If unmarried with two children at the time of injury, sixty-four percent of his or her wages.
(j) If unmarried with three children at the time of injury, sixty-six percent of his or her wages.
(k) If unmarried with four children at the time of injury, sixty-eight percent of his or her wages.
(l) If unmarried with five or more children at the time of injury, seventy percent of his or her wages.

(2) For any period of time where both husband and wife are entitled to compensation as temporarily or totally disabled workers, only that spouse having the higher wages of the two shall be entitled to claim their child or children for compensation purposes.

(3) In case of permanent total disability, if the character of the injury is such as to render the worker so physically helpless as to require the hiring of the services of an attendant, the department shall make monthly payments to such attendant for such services as long as such requirement continues, but such payments shall not obtain or be operative while the worker is receiving care under or pursuant to the provisions of chapter 51.36 RCW and RCW 51.04.105.

(4) Should any further accident result in the permanent total disability of an injured worker, he or she shall receive the pension to which he or she would be entitled, notwithstanding the payment of a lump sum for his or her prior injury.

(5) In no event shall the monthly payments provided in this section:
(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if a worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (5)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008. The limitations under this subsection shall not apply to the payments provided for in subsection (3) of this section.

(6) In the case of new or reopened claims, if the supervisor of industrial insurance determines that, at the time of filing or reopening, the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(7) The benefits provided by this section are subject to modification under RCW 51.32.067.

RCW 51.32.090

Temporary total disability—Partial restoration of earning power—Return to available work—When employer continues wages—Limitations—Finding—Rules.

(1) When the total disability is only temporary, the schedule of payments contained in RCW 51.32.060 (1) and (2) shall apply, so long as the total disability continues.

(2) Any compensation payable under this section for children not in the custody of the injured worker as of the date of injury shall be payable only to such person as actually is providing the support for such child or children pursuant to the order of a court of record providing for support of such child or children.

(3)(a) As soon as recovery is so complete that the present earning power of the worker, at any kind of work, is restored to that existing at the time of the occurrence of the injury, the payments shall cease. If and so long as the present earning power is only partially restored, the payments shall:

(i) For claims for injuries that occurred before May 7, 1993, continue in the proportion which the new earning power shall bear to the old; or

(ii) For claims for injuries occurring on or after May 7, 1993, equal eighty percent of the actual difference between the worker's present wages and earning power at the time of injury, but: (A) The total of these payments and the worker's present wages may not exceed one hundred fifty percent of the average monthly wage in the state as computed under RCW 51.08.018; (B) the

payments may not exceed one hundred percent of the entitlement as computed under subsection (1) of this section; and (C) the payments may not be less than the worker would have received if (a)(i) of this subsection had been applicable to the worker's claim.
(b) No compensation shall be payable under this subsection (3) unless the loss of earning power shall exceed five percent.
(c) The prior closure of the claim or the receipt of permanent partial disability benefits shall not affect the rate at which loss of earning power benefits are calculated upon reopening the claim.

(4)(a) The legislature finds that long-term disability and the cost of injuries is significantly reduced when injured workers remain at work following their injury. To encourage employers at the time of injury to provide light duty or transitional work for their workers, wage subsidies and other incentives are made available to employers insured with the department.
(b) Whenever the employer of injury requests that a worker who is entitled to temporary total disability under this chapter be certified by a physician or licensed advanced registered nurse practitioner as able to perform available work other than his or her usual work, the employer shall furnish to the physician or licensed advanced registered nurse practitioner, with a copy to the worker, a statement describing the work available with the employer of injury in terms that will enable the physician or licensed advanced registered nurse practitioner to relate the physical activities of the job to the worker's disability. The physician or licensed advanced registered nurse practitioner shall then determine whether the worker is physically able to perform the work described. The worker's temporary total disability payments shall continue until the worker is released by his or her physician or licensed advanced registered nurse practitioner for the work, and begins the work with the employer of injury. If the work thereafter comes to an end before the worker's recovery is sufficient in the judgment of his or her physician or licensed advanced registered nurse practitioner to permit him or her to return to his or her usual job, or to perform other available work offered by the employer of injury, the worker's temporary total disability payments shall be resumed. Should the available work described, once undertaken by the worker, impede his or her recovery to the extent that in the judgment of his or her physician or licensed advanced registered nurse practitioner he or she should not continue to work, the worker's temporary total disability payments shall be resumed when the worker ceases such work.
(c) To further encourage employers to maintain the employment of their injured workers, an employer insured with the department and that offers work to a worker pursuant to this subsection (4) shall be eligible for reimbursement of the injured worker's wages for light duty or transitional work equal to fifty percent of the basic, gross wages paid for that work, for a maximum of sixty-six workdays within a consecutive twenty-four month period. In no event may the wage subsidies paid to an employer on a claim exceed ten thousand dollars. Wage subsidies shall be calculated using the worker's basic hourly wages or basic salary, and no subsidy shall be paid for any other form of compensation or payment to the worker such as tips, commissions, bonuses, board, housing, fuel, health care, dental care, vision care, per diem, reimbursements for work-related expenses, or any other payments. An employer may not, under any circumstances, receive a wage subsidy for a day in which the worker did not actually perform any work, regardless of whether or not the employer paid the worker wages for that day.

(d) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with training or instruction to be qualified to perform the offered work, the employer shall be eligible for a reimbursement from the department for any tuition, books, fees, and materials required for that training or instruction, up to a maximum of one thousand dollars. Reimbursing an employer for the costs of such training or instruction does not constitute a determination by the department that the worker is eligible for vocational services authorized by RCW 51.32.095 and 51.32.099.
(e) If an employer insured with the department offers a worker work pursuant to this subsection (4), and the employer provides the worker with clothing that is necessary to allow the worker to perform the offered work, the employer shall be eligible for reimbursement for such clothing from the department, up to a maximum of four hundred dollars. However, an employer shall not receive reimbursement for any clothing it provided to the worker that it normally provides to its workers. The clothing purchased for the worker shall become the worker's property once the work comes to an end.
(f) If an employer insured with the department offers a worker work pursuant to this subsection (4) and the worker must be provided with tools or equipment to perform the offered work, the employer shall be eligible for a reimbursement from the department for such tools and equipment and related costs as determined by department rule, up to a maximum of two thousand five hundred dollars. An employer shall not be reimbursed for any tools or equipment purchased prior to offering the work to the worker pursuant to this subsection (4). An employer shall not be reimbursed for any tools or equipment that it normally provides to its workers. The tools and equipment shall be the property of the employer.
(g) An employer may offer work to a worker pursuant to this subsection (4) more than once, but in no event may the employer receive wage subsidies for more than sixty-six days of work in a consecutive twenty-four month period under one claim. An employer may continue to offer work pursuant to this subsection (4) after the worker has performed sixty-six days of work, but the employer shall not be eligible to receive wage subsidies for such work.
(h) An employer shall not receive any wage subsidies or reimbursement of any expenses pursuant to this subsection (4) unless the employer has completed and submitted the reimbursement request on forms developed by the department, along with all related information required by department rules. No wage subsidy or reimbursement shall be paid to an employer who fails to submit a form for such payment within one year of the date the work was performed. In no event shall an employer receive wage subsidy payments or reimbursements of any expenses pursuant to this subsection (4) unless the worker's physician or licensed advanced registered nurse practitioner has restricted him or her from performing his or her usual work and the worker's physician or licensed advanced registered nurse practitioner has released him or her to perform the work offered.
(i) Payments made under (b) through (g) of this subsection are subject to penalties under RCW 51.32.240(5) in cases where the funds were obtained through willful misrepresentation.
(j) Once the worker returns to work under the terms of this subsection (4), he or she shall not be assigned by the employer to work other than the available work described without the worker's written consent, or without prior review and approval by the worker's physician or licensed advanced registered nurse practitioner. An employer who directs a claimant to perform work

other than that approved by the attending physician and without the approval of the worker's physician or licensed advanced registered nurse practitioner shall not receive any wage subsidy or other reimbursements for such work.
(k) If the worker returns to work under this subsection (4), any employee health and welfare benefits that the worker was receiving at the time of injury shall continue or be resumed at the level provided at the time of injury. Such benefits shall not be continued or resumed if to do so is inconsistent with the terms of the benefit program, or with the terms of the collective bargaining agreement currently in force.
(l) In the event of any dispute as to the validity of the work offered or as to the worker's ability to perform the available work offered by the employer, the department shall make the final determination pursuant to an order that contains the notice required by RCW 51.52.060 and that is subject to appeal subject to RCW 51.52.050.

(5) An employer's experience rating shall not be affected by the employer's request for or receipt of wage subsidies.

(6) The department shall create a Washington stay-at-work account which shall be funded by assessments of employers insured through the state fund for the costs of the payments authorized by subsection (4) of this section and for the cost of creating a reserve for anticipated liabilities. Employers may collect up to one-half the fund assessment from workers.

(7) No worker shall receive compensation for or during the day on which injury was received or the three days following the same, unless his or her disability shall continue for a period of fourteen consecutive calendar days from date of injury: PROVIDED, That attempts to return to work in the first fourteen days following the injury shall not serve to break the continuity of the period of disability if the disability continues fourteen days after the injury occurs.

(8) Should a worker suffer a temporary total disability and should his or her employer at the time of the injury continue to pay him or her the wages which he or she was earning at the time of such injury, such injured worker shall not receive any payment provided in subsection (1) of this section during the period his or her employer shall so pay such wages: PROVIDED, That holiday pay, vacation pay, sick leave, or other similar benefits shall not be deemed to be payments by the employer for the purposes of this subsection.

(9) In no event shall the monthly payments provided in this section:
(a) Exceed the applicable percentage of the average monthly wage in the state as computed under the provisions of RCW 51.08.018 as follows:

AFTER	PERCENTAGE
June 30, 1993	105%
June 30, 1994	110%
June 30, 1995	115%
June 30, 1996	120%

(b) For dates of injury or disease manifestation after July 1, 2008, be less than fifteen percent of the average monthly wage in the state as computed under RCW 51.08.018 plus an additional ten dollars per month if the worker is married and an additional ten dollars per month for each child of the worker up to a maximum of five children. However, if the monthly payment computed under this subsection (9)(b) is greater than one hundred percent of the wages of the worker as determined under RCW 51.08.178, the monthly payment due to the worker shall be equal to the greater of the monthly wages of the worker or the minimum benefit set forth in this section on June 30, 2008.

(10) If the supervisor of industrial insurance determines that the worker is voluntarily retired and is no longer attached to the workforce, benefits shall not be paid under this section.

(11) The department shall adopt rules as necessary to implement this section.

Excerpts from Report of Proceedings Cited Herein

I've been told there are no bills submitted by the Plaintiff in their 904 submissions. And, uh, Counsel has told me they are not going to ask for reimbursement for their special, uh -- uh, damages. They're not gonna ask for the bills. They're not gonna approve any billings. And so there's no prejudice whatsoever to the Plaintiff if evidence of some sort of payments are admissible for some other purpose.

And that's really the crux of any ruling on evidence is number one, is it relevant or material. And number two, if it's relevant or material, uh, is it too prejudicial? Does the prejudicial effect outweigh the, uh -- the probative value of that evidence? Well, we're in a positon here where Plaintiff is not gonna claim reimbursement for any of those bills, so there's no prejudice.

And then the question is, uh, so, okay, what's the relevance? Well, as it turns out, uh, Mr. Gilmore, as far as the, uh -- uh, Labor and Industries claim is concerned, received a lump sum of cash -- a large lump sum of cash right at the exact same time that he started his plumbing business. And that is relevant to motive of secondary gain.

So, uh, he was frankly milking the system. And I think the fact that he, uh, received that lump sum of cash in light of the other testimony in this case, that it was a

minor collision. Uh, the Defendant's, uh, witnesses that will say that any injuries he received were very minor and should have resolved quickly, that allows -- that -- in light of, uh, the Defendant's theory of the case, this is very probative to Mr. Gilmore's motive for secondary gain.

He also asked his doctor -- right after he received this lump sum and opened his plumbing business, he asked his doctor to release him to go back to work from his -- from his L&I claim. So it apparently is -- his request to be released back to go to work had nothing to do with how he was feeling because he continued to treat for years. In fact, now he's claiming that a surgery that he had in 2015 is somehow related to this accident that happened seven years ago. So that -- that evidence is admissible.

The benefits by the Veteran's Administration, uh, is also admissible for a number of reasons. He was evaluated in this case by a Dr. Suffis. Dr. Suffis was the, uh -- uh, the L&I doctor that was following his case for the Department of Labor and Industries. And -- and at the beginning, Dr. Suffis had him diagnosed with a low back injury with, um, either carpal tunnel or thoracic outlet syndrome, based on the tingling up and down his arms and numbness in his hands. Uh, and cervical strain. And I don't recall -- oh, and -- and hip issues, uh, shooting down his legs and so forth.

injured. Certainly, she said not very much so. Um, but I'm sure that's what their -- Dr. Jessen will say on the stand.

Um, second, so he's not qualified to provide that opinion. Second, it's completely irrelevant. What Dr. Tencer says in his declaration is, how can the jury decide which version we want to believe? How big was this impact? How can we possibly decide? Well, they can decide because the Defense could have called the bus driver who was driving to explain what the impact was like.

The Defense does have the testimony of Mr. Saatchi (phonetic), who was a passenger on the bus, who does describe what the impact was like to him. The Defense could have called Mr. Saatchi's wife, who was also on the bus. I don't know why they chose not to call her. There was another additional passenger on the bus. However, I'm not sure if she's still alive. Um, we tried to contact the additional passenger and haven't had any luck.

But there's at least three other people aside from Mr. Gilmore who will testify or could testify to what the impact felt like to them. Um, Mr. Gilmore in his deposition said what it felt like to him, but he also said, "The bus couldn't have been going very fast. It only had about 100 feet when it left the stop sign before it hit me." This isn't a question where someone says, "This was a

huge impact. The bus was going 100 miles an hour." And someone else says, "No, it was only going two miles an hour." Mr. Gilmore's testimony is going to be very consistent what it felt like to him, which Dr. Tencer cannot predict, does not know what the impact felt like to Mr. Gilmore.

Finally, Dr. Tencer's opinion are based on rank speculation and conjecture. His own report says, "I assume the speed of the bus was this." He doesn't -- doesn't, did not review the deposition testimony of the driver of the bus, which he talks about, you know, what the impact felt like to him, and what maybe he thought the speed was. Probably because the bus driver claims that my client backed into him.

He didn't review the deposition testimony of Mr. Saatchi, who was a passenger on the bus. Dr. Tencer simply says, "You know what, I'm gonna guess. And I'm gonna guess the bus was going less than four miles an hour based on these photographs alone."

And the judges in King County have consistently ruled that where there's no question that an injury occurred, Dr. Tencer's testimony is irrelevant. And they have consistently excluded him on that regard. Additional judges of which opinions I believe were provided, have also concluded that his, uh -- the scientific -- scientific

driver, if they elect to call him. What they want to add is this air of scientific reality that's based on speculation and guess. And that's what Dr. Tencer adds. He adds this sort of scientific authority. But it's based on his guess at the speed of the bus, his guess at the height and the weight of Mr. Gilmore, his guess to the damage that was done to the vehicles.

It's simply not reliable, and it is overly prejudicial in that it gives an air of superiority to testimony that's -- that's based on simply Dr. Tencer guessing as to the factors that would be involved.

MR. ROVANG: Your Honor, the -- the speculation and guess argument is made every time Dr. Tencer tries to testify. The admissibility of his testimony, the judges make decisions about his testimony based on whether it'll help the jury. And Counsel is perfectly capable of cross examining him on whether his testimony is speculation or a guess. So her arguments go to the weight. And, uh -- uh, I think it's material, and relevant, and we should be allowed to present our defense. Thank you.

THE COURT: I read through most of the material in connection with Dr. Tencer. And I mean, well, based on what's presented -- based on what's been presented, um -- based on what's been presented, um, I have to agree with the -- the Plaintiff.

As far as what I can tell from what I read, and the way I understand it, um, he makes a number of assumptions, some of which are based on facts that are not going to be in evidence. And it does -- and he does create, um -- he does -- he does -- well, it's -- to me, it's intended to create an inference, um, of -- well, I don't know, it's create -- it's intended to create an inference with some aura of authority that I don't think is reasonable or justified. And I think that -- I think it will be confusing to the jury. I think that it will be misleading to the jury.

And, um, so I'm going to grant the motion to exclude Dr. Tencer, based on -- based on what I -- what I read. So okay. Does that cover all the motions today?

MS. BRADSHAW: Yes, Your Honor.

MR. ROVANG: I -- I believe so.

THE COURT: Okay. Um, so as I understand it, you can check with the administrator. We were scheduled to start on Monday, but I think we're starting on Tuesday --

MR. ROVANG: Right.

THE COURT: -- because we have another trial on Monday. And, uh, okay. I'm sorry, anything else today then?

MS. BRADSHAW: No, Your Honor. We have nothing else.

THE COURT: Okay, thank --

He was trying to commit a fraud. And I can prove it. And the jury needs to know about it. He's changed his story as he goes along to fit the facts that we have found out.

And so, his -- his VA disability is certainly relevant. It's relevant to his preexisting, uh, issues. Uh, and we should be allowed to talk about that.

Then, there's the question of, uh -- I'm not quite done, Counsel. That's all right. -- then, there's the question of, uh, Labor and Industry payments that he received on a monthly basis, uh, after he was injured on this case. And I don't intend to inquire about those because it's not relevant. I don't care. It has nothing to do with, uh, his -- it -- it has no value as far as impeachment is concerned. Uh, and I'm not going to bring it up.

And then, there's the issue of $40,000 he got as a lump sum payment at the very time that he opened up his plumbing business and asked the doctor to release him to go back to work. And so, that's relevant to a, uh -- to not only impeach him, but, uh, as a motive for -- for his whole scheme, uh, if you will.

Um, *Cox v. Spangler*, uh, and -- and the other case Counsel cited are -- are not anything new. They're not different than the cases that you considered last week when

Um, I just give you that as a -- as a heads up that, you know, I don't want to have the wool pulled over my eyes and all that kind of stuff. I'm genuinely trying to make the right decisions on this stuff every time I do it.

So, as I read through this I'm not sure what I was thinking of when I said, "L&I was -- the collateral source did not apply to it." Um, I think it does. And the *Cox* case is, I think, um, very, very similar.

And even if I was to balance it and not follow an exclusive exclusion rule, um, I would -- with respect to the L&I I would find that the evidence of that is more prejudicial than it's probative for anything. Because there's -- uh, sounds like there's going to be other evidence of this Defendant's theory that, um, Mr. Gilmore is either a fraud or a malingerer or whatever it is that you're going to claim. Um, and I understand that that's the Defense's theory here and I understand that the Defense wants to get in anything and everything they possibly can to support that theory.

But -- so anyway, I'm going to change my decision on the L&I. The L&I payments will not be admissible unless the door is opened or something like that. But they won't be admissible because they're a collateral source related to this injury.

My decision about the VA benefits remains the same.

needs. But one day I was just driving around town and I saw Gilmore Plumbing, um, on the -- you know, on the side of a truck. Well, I -- you know, it's possible that there's more than one Gilmore, but I decided to chase him down, get the phone number and I called him up. And it was the same guy. And he was in business for himself. So, I called him to give me a hand on other projects.

Q: And so, after the collision when Mike opened up his own business and came out to work on you and other projects, what's one of the bigger projects he worked on you -- worked with for you?

A: Well, we remodeled a rental unit and, uh, bathrooms needed to be put it, plumbing, water, etcetera. Um, we, uh -- I -- I mentioned to you built a barn. We had to put in plumbing for that, hot and cold running water. Um, and, um, I called Mike.

Q: And so, Mike having been able to come out before this accident and do those big projects by himself, dig the ditch, fix your water to your home by himself; was it the same after this accident?

A: Uh, no. Well, uh, no. He had somebody with him, um, and that person did most of the heavy work.

Q: So, when we're talking about Mike coming out to your farm and doing some plumbing out -- out to the barn, um, how much of the actual physical digging and laying of pipe

that's the -- okay.

THE COURT: Overruled. Go ahead.

Q: Did you know he failed to tell his, uh, treatment providers that he was on a 60 percent disability?

A: When was he that? Is he -- when he was working at Brother's or what?

Q: Well, either you know about it or you don't.

A: I don't.

Q: Okay.

A: Because if he was at 60 percent at Brother's, I mean, the guy is obviously a -- a superman because, I mean, 60 percent -- that's only 40 percent there. So, I mean, the man, uh, obviously walked -- if he was 60 percent capable, I mean, I've told you the example of the 80 hours, so. I mean, I don't think that's a good example, in my opinion.

Q: Well, uh, did you know that, uh, when specifically asked if he had ever had low back problems he told his doctors, "No, I've never had low back problems?"

A: Uh huh. I have it every day. I mean, it's plumbing. I -- I'm -- I'm sure everybody -- all the plumbers have low back problems. I mean, that's pretty common.

Q: Do you understand what my question was, Sir?

A: Uh, no.

Q: Okay. My question was did you know that Mr. Gilmore told his doctor that he had never had low back problems

Q: Well, uh, how about when he told his doctor that he had never had migraine headaches when, in fact, he complained to his military discharge, uh, doctor that he had excruciating migraine headaches for a -- a -- for a period of time.
A: Uh huh.
Q: Did you know about that?
A: No, I didn't.
Q: Does that affect your opinion about, uh, Mr. Gilmore's truth and veracity?
A: It does not.
Q: Okay. Um, how about the fact that he, uh, testified under oath in a deposition that he had never had prior neck pain when, in fact, there are medical records that indicate he had neck pain in 2007, the year before this accident; does that -- did you know about that?
A: No. I didn't know.
Q: Does that affect your opinion about his truth and veracity?
A: It does not.
Q: Is there any number falsehoods I could give you that would shake your belief in his --
A: Even if there was, in my opinion, in 2007, um, that he got -- before prior getting hit by the bus, if he even had neck pain then, I mean, getting hit by a, what, a two ton

happened, more than likely.
Q: You don't think it's important for Mr. Gilmore to be truthful with his doctors?
A: As truthful as he can be. Yes.
Q: It is important?
A: I felt maybe at 25 is what I would assume here. Maybe it felt that much.
Q: I -- I'm not -- I'm not quite understanding. Are you saying it's okay for him to be truthful or okay for him to be untruthful with his doctors or --
A: Truthful.
Q: -- are --
MS. BRADSHAW: This question has been asked and answered, Your Honor. And again, we're getting fairly argumentative with the witness.
MR. ROVANG: No, I'm just --
THE COURT: Overruled. Go ahead.
Q: It's important for him to be truthful. I just want to understand.
A: Yes. Everybody should be very truthful, as much as you can be.
Q: Okay. But if Mr. Gilmore is not truthful with his doctors that still doesn't affect your opinion about his truth and veracity?
A: How would I know, though? Like, it's not -- it's not

A: I was homeschooled.
Q: -- was the -- the main person actually doing your homeschooling?
A: Uh, the main person was actually, uh, my -- I had a tutor. Her name was Marcy VanCleeve (phonetic). And, uh, she was -- she was the main, uh -- my -- basically my teacher all the way through high school.
Q: And did your dad help you out as well?
A: He helped me out when he could, when he was home.
Q: Okay. Let's talk about after this collision happened.
A: Okay.
Q: Tell the jury what your dad was like in the first month or six weeks after this collision happened?
A: Um, well, it was -- it was such a long time ago, but I do my best here, uh. He, well, wasn't able to work as soon as the collision happened. He had to stop working, uh. And he, pretty much, at -- things, kind of, hit the fan when, uh, he wasn't able to work. And, uh, it was hard to pay the bills.

He -- he and my mom didn't exactly get along very well for -- for much longer after that happened. Uh, lots of financial issues causing them to argue. And my dad and I, at one point, ended up, uh, moving out into a travel trailer, uh, with some friends and -- because of the arguments between them -- between my parents.

And I didn't -- it took me a few months to realize that the reason I -- he -- that I was doing all the work is he couldn't -- he couldn't do it. Every once in a while -- it was a few months after we started up and I was -- I was sore; digging lots of holes, lifting water heaters and everything. And, uh, there was a couple times where he would, uh -- he would help me dig the hole. The next day we couldn't go to work because he was in too much pain. And, uh, so, that's -- that's, pretty much, how that went.

Q: I think, um, Mr. Schneider was in here yesterday morning and talked about a job that, uh, you came and did doing some irrigation work for him with --

A: Uh huh.

Q: -- with Gilmore Plumbing; do you remember that job?

A: Yeah, I do.

Q: Okay.

A: I remember. We ran a 600 foot water service. And me and my brothers did all the digging -- well, me and my older brother Chris. I mean, we did all the digging and --

Q: When -- when you say 600 foot water service that means nothing to me. Tell the jury what you mean. What -- tell them about this job that you guys did.

A: Well, we, uh -- we basically dug a trench 600 feet around an orchard and -- into a, uh -- into a barn to -- uh, they were building a -- Dick Schneider was building a

A: Well, prior to the collision I had never seen my father drink, I had never seen my father cry, I'd never -- never seen him depressed. Um, he was always, you know, hardworking, always wanting to be there with us, for us every chance that he could.

Um, after the collision he started drinking. Uh, he, I guess, didn't feel like he was able to provide for his family the way he should and wasn't able to work. You know, he -- he was working 80 hours a week prior to the accident. Uh, sat records with Brother's Plumbing for, uh, installs on water heaters and all sorts of stuff.

Um, and to go from that to nothing he didn't know what to do. He went way downhill, uh, you know. You could see the sadness in his eyes. You could see the pain. Um, and he started drinking and eventually became addicted to it. I -- I guess he was addicted to it years and years and years ago. Uh, well before I was ever born, he quit and, uh, picked it back up. And that's when our relationship started going way downhill.

Q: So, what changed about him? And what -- what sort of changes -- I mean, people go and have a beer or two and it doesn't really affect their relationship with their kids that much.

A: It's -- with Dad I was hoping that it was -- he would be able to have a beer or two and everything'd be great.

You know, I had just turned 21 and he -- he warned me, you know, "Gilmore men cannot drink. We can't do it. We cannot do it." So, I was hoping that he was wrong, but he can't even have one beer. He can't have just a mixed drink or a glass of wine because the next day he's going to want two, the next day he's going to want three. And it always comes back to the addiction and he can't control it.

Q: And so, before this collision happened, uh, you had never really seen your dad drink?

A: I had never seen him drink.

Q: What else was different?

A: Um --

Q: You said you noticed he was in pain. Tell us how you know that.

A: His posture, um -- he -- at first, it -- it never really set in and the longer and longer he was in pain the more hunched he'd become. Um, I know he had a lot of neck pain and shoulder pain. And he -- he couldn't do the same things that he used to do with us. Uh, pretty much all of his back was messed up.

Um, his wrists were messed up. He -- he hasn't gone hunting since then. Uh, if he has I didn't know about it and I was his hunting partner. So, um, he's -- I don't know.

There's a lot of pain that you could see in his face,

um. He -- he was trying not to, I guess, get addicted to the pills that he was on for the pain. And that's why he started drinking, uh.

Q: Have there been times since this collision happened when you would give him a call and say, "Hey Dad, let's -- let's go hunting." And he'd say, "No, I can't."

A: Yeah. Yep. He'd say, "I can't. I wish I could. I can't." Uh, we've, you know, tried to set up times for going off elk hunting. I've never hunted elk; I know he has. So, I -- I wanted -- you know, I learned all of my hunting techniques and shooting and everything from him. So, I wanted him to be there when I got my first elk. But he still can't do anything. He can't go hunting.

Q: Has your relationship gotten better?

A: Um, over the past probably couple -- probably about a month and a half it's started coming back. Um, I don't believe he's drinking anymore. I'm not 100 percent. I haven't straight up ask him if he's drinking. Um, but he doesn't seem like he is.

Um, I cut off all contact with him, um, about six or eight months ago, uh, because I -- I couldn't handle hearing -- even hearing him drunk, let alone seeing him drunk or, um, taking his medications -- uh, he was a completely different person.

He was angry, extremely judgmental. You know, he went

financial issues on her motion. Uh, I want to point out there's two different kinds of L&I payments here. One would be the -- uh, the time loss, which he was getting for the five months right afterwards. The other one is the lump sum payment, which evidently Counsel tells me happened sometime later.

What's relevant to this testimony, uh, is the time loss that he was getting the summer that he was injured. And I can leave the other stuff alone. I admit that, you -- you know, the 40 whatever it was, uh, doesn't really go to the testimony that -- that these kids have given.

But for -- for Plaintiff to make the motion let's not talk about financial stuff and then bring out financial stuff is -- is just a slap in the face to the Court's order and to her -- to the whole proceeding.

THE COURT: Okay. I -- I'm -- for now, I'm going to deny the -- deny the request, um --

MR. ROVANG: Okay.

THE COURT: -- absent some case and authority on opening the door on the collateral source rule. Um, if there's a case out there that suggests to me that she's opened the door and this L&I stuff can come in, then it'll probably come in. But as of right now, I haven't seen that case or anything so I'm not going to go down that road.

MR. ROVANG: Very well.

THE COURT: I mean, a lot of -- a lot of evidentiary issues a lot of times a party opens the door to otherwise inadmissible evidence. I'm -- I -- I'm -- I don't have authority to show me that that concept applies to the collateral source rule, which I take to be, sort of, a, you know, a -- an, uh -- extraordinary is too strong a word, but it's -- it's a special rule of evidence in personal injury cases.

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. So -- and there'll probably be other witnesses you can bring that out --

MR. ROVANG: Very well.

THE COURT: -- on. So, for now I'm going to --

MR. ROVANG: I understand, Judge.

THE COURT: -- for now I'm going to deny it. And if we come -- uh, depending on how long we go today and/or come back on Monday, if there's some cases or something I should look at, I'll look at them. Or if I have a chance to look at it I might. But anyway.

MR. ROVANG: Thank you for hearing me out.

THE COURT: Okay. Ready to -- okay. Let's have Mr. Gilmore come back in. Um, first, let's have him come in. Yeah, go ahead and come on back up and have a seat. Okay. Thank you. Go ahead and bring the jury in. We'll probably

unraveled. And that's, sort of, the pain works. When one area's quieted the other area starts to -- to present. And, um, honestly, it didn't surprise me too much to see, you know, further presentation of his arms going numb and -- and the headaches and the tension and everything that was going on with him. He would --

Q: What about his personality? Mike's personality change after this collision?

A: He became much more somber. I mean, it was -- it -- it was like watching someone who lost their -- their -- he was on top of the world when he got out of the service and was working for Brother's. That man was the happiest man I had ever seen. He had time for his family, he was doing stuff with them, he was on the boat, he was always going and doing. And it was so -- to me it was like a line in the sand, before and after, very, very clearly living right next door to him.

There was no more work. There was no more activity. There was no more fun. There was no more play. And his mood was somber. But, you know, there -- the joking around and the fun, you know, it -- it -- he wasn't fun. And he was just Mike, you know. It -- I'm sorry, Mike. I hate to say that, but, I mean, that's -- it changed his demeanor. It changed him.

Q: Are there any things physically that you've either

A: Yes, I did.
Q: Okay. And what is that opinion?
A: Well, for the purpose of -- of this, uh, trial, um, it's my opinion that -- that I can really stand behind is that Mr. -- as a result of this collision Mr. Gilmore had the injury to his neck. And specifically a -- a -- a cervical straining. But as probably the jury knows by now, uh, really a very serious, uh, two level disc injury, uh, that led to a two level, uh, fusion.

Um, so, basically it was a -- a -- a laminectomy, a foraminotomy (phonetic) and a fusion where they take out part of the disc in two levels. Uh, they had to open up a canal (phonetic) opening so the nerve would be freed up. And then, finally to help support, uh, the cervical spine after that, they had to put a plate and some screws in.
Q: Well, let's back up just a little bit and just talk about some basic anatomy of the neck. Um, and I'm wondering if you -- you have anything with you that might help to demonstrate and educate the jury about the anatomy of the neck?
A: Yes, Ma'am. May I -- Your Honor, may --
Q: (Inaudible) --
A: -- I use the easel and --
Q: Give to me what you have.
A: -- what have you?

Q: -- "headaches" --
A: Okay. Right. I got it. Yes.
Q: That's what he tells the doctor?
A: Yes.
Q: He states, "All of his symptoms started after the accident."
A: Right.
Q: Correct?
A: Yep.
Q: And that's not true; is it?
A: In 0 -- I think in was in '07 -- might have been '04 -- um, but '07 he had, um, about a six week stretch, I think it was, of -- of headaches that I saw in the past record.
Q: Did you re -- you reviewed the, uh, uh -- the record from 2004; correct?
A: Yes, Sir.
Q: And that was the, uh, evaluation by Dr. Suffis?
A: I did.
Q: And in that, uh, evaluation by Dr. Suffis, which is marked, I believe, Plaintiff's Number Two --
A: Uh huh.
Q: -- can you look at -- do you have that in front of you?
A: Um --
Q: Exhibit Number Two.
A: Number Two.

narcotics.

Q: He was on narcotics actually before this accident ever happened; wasn't he?

A: Well, at least periodically he was. I don't know if he was on it continuously. But he was --

Q: For neck and back pain?

A: Yeah. I mean --

Q: Neck spasms.

A: That -- that's right.

Q: Yeah. Okay. You testified that a lot of the different, uh, medical providers reached the same conclusions that you did; is that true?

A: True.

Q: But each of those medical providers had false information for Mr. Gilmore; didn't they?

A: Uh, what do you mean false information?

Q: Well, he didn't tell them about his prior history; did he?

A: Well, I -- I -- personally I wouldn't call that false information. I think the patient --

Q: Well, it wasn't true information; was it?

A: -- well, the patient gave his history. I mean, you know --

Q: He did?

A: I mean, that's subjective; right? As even you said,

still have some headaches, I still have lumbar pain. Um, but the shoulder pain is gone. And my lumbar I'm working on right now to get MRIs and stuff. But overall, I'm doing much better.

Q: Okay. And, um, do you know if -- if the fusion is -- if the bone graph is completely fused yet or are you still waiting to hear?

A: I do not. I have a follow up in July with Dr. Rowe and they'll do x-rays to see how the bone -- the fusion is taking.

Q: Okay. But if we had to, uh, say right now, as you sit here, you're about 70 percent back to where you were?

A: Yes.

Q: That's all the questions I have for you. Thank you.

THE COURT: Uh, cross exam, Mr. Rovang.

CROSS EXAMINATION

BY MR. ROVANG:

Q: Uh, yeah. Yes, thank you, Your Honor. Uh, Mr. Gilmore, you pointed out some damage to the back of the, uh -- the plumbing van.

A: Yes.

Q: And is your testimony that that dent in the middle was all caused by the collision?

A: Yes.

Q: That was a used plumbing van; wasn't it?

Q: Okay. And the next question is was the reputation good or bad?
A: Not good.
Q: Okay. Um, did, uh -- did you have any conversations with Mr. Gilmore about, uh, his job, uh, shortly after the, uh -- the accident?
A: Uh, yeah. Um --
Q: He was afraid of --
A: We -- we would cross paths when I'd get the mail or whatever like that. He'd get home and stuff. And he'd had the -- I think he worked for Brother's Plumbing.
Q: Right.
A: But yeah, we'd talked after that. Um, he said his boss wasn't too happy with him because he couldn't work. His doctor told him that he shouldn't work.
Q: Okay. And, uh, did he tell you --
A: That he'd get fired.
Q: -- did he tell you, uh, anything that his lawyer told him?
MS. BRADSHAW: Objection, Your Honor. That's subject to privilege. It's also a leading question.
MR. ROVANG: You know, I'm going to withdraw that question, uh --
A: He did.
MR. ROVANG: -- for different reason --

'whiplash injury.'"

Q: Okay. And so, at least as of July 27th, 2009 his treating doctor, Dr. Suffis, had an opinion on a more probable than not basis that his ongoing pain complaints were related to the motor vehicle collision?

A: That's correct.

Q: Does that change your opinion in any way?

A: Not in any way.

Q: Okay.

A: Doesn't fit the facts in evidence.

Q: Take that one back and that one, so you don't steal it. Uh, the binder; perfect. Thanks.

A: You're wonderful with your terminology.

Q: Don't want the court reporter to yell me. So, Dr. Suffis was wrong?

A: I just didn't agree with him.

Q: Okay.

A: As a causation. I won't necessarily disagree with the need for surgery, but I disagree with his causation based on what I've testified.

Q: And so, the June 2009 cervical injection, um, was not necessary; correct?

A: I didn't say that.

Q: Okay. What -- what was it related to, then?

A: It was the -- because the doctor wanted to give him an

anybody care that he was 60 percent disabled or what it was for? It has some significance. Uh, it doesn't really matter what it was for. The significance is that he was not truthful with any of his care providers. He was not truthful with Dr. Suffis. He was not truthful with Dr. Cain. He was not truthful with the neurologist, Dr. Niacon. And as a result of him not being truthful, they, uh, had a determination of causation relating to the motor vehicle accident, okay.

As -- as their own doctor said, Dr. Marankovich, 90 percent of the causation diagnosis is based on the history, so we need an accurate history. And their chiropractor said the same thing. He said he spent a lot of time trying to verify the history. Unfortunately, you know, Mr. Gilmore was -- was less than accurate. But it didn't change his opinion, did it?

And by the way, why didn't Dr. -- Dr. Masci, as I made the point during trial, the chiropractor, I kind of expected him to talk about chiropractic treatment, you know. Not one word did he ever talk about chiropractic treatment, and whether it was reasonable or necessary, or how it helped. Didn't say anything about that. Nothing.

Instead, he talked about progressive neurological diseases. They had a neurologist, Dr. Niacon, to whom Mr. Gilmore did not tell the truth. Repeatedly stated by Dr.

Niacon in his report, Mr. Gilmore kept telling him, "I had no prior symptoms. No prior symptoms. No prior symptoms." When Dr. Suffis found out that he hadn't been told the truth, he changed his opinions on all of the, uh -- the neck strain. And -- and he was mistaken about the MRI.

What would Dr. Niacon say if somebody told him, "Mr. Gilmore lied to you about everything"? Why didn't the Plaintiff call the treating physician? I heard her say in the closing that they didn't, uh, talk to Dr. Niacon or bring him in because he moved out of state. Uh uh. You can take depositions by telephone, by Skype. You can have him testify by telephone in the courtroom. You can travel to the other state and take their deposition. Why didn't they call the treating providers?

Why didn't they call Dr. Cain and tell Dr. Cain, "He lied to you about all of his symptoms and whether they were preexisting. Would that change your opinion? They didn't call him. They called in all courtroom doctors to come in and, you know, say what they said.

Dr. Marankovich, his diagnosis about a month before trial started, mind you. And then we found out that he was given a whole sheet of new stuff between the time his opinions came out and the time he testified.

And by the way, you may recall, uh, when he testified last week, and I so rudely interrupted his testimony with

They were asking for everything. They were asking for low back. They were asking for leg. They were asking for carpal tunnel. Everything was on the board, until the lies started surfacing. And then all of a sudden, they give it up. And they come in and they say, "Well, we're trying to be reasonable. You know, if we're not 100 percent sure, we're not gonna claim it", you know. The only thing they have left is neck strain, barely. And that's because Dr. Suffis didn't know about the earlier MRI. That's all they've got left. $1.8 million.

The reason the 60 percent disability is brought up is because when you go back and you look at that, and you look at all the complaints he was making that he didn't tell his doctors about, that he's getting a government check for for the last how many years every single month. It's not like he forgot about it. He intentionally did not reveal to his doctors that he had previously low back pain. He had neck pain in 2007. He had broken elbow. He had headaches. He had migraines, he said, for years.

When you come into court, a court of equity requires the person asking for relief come in with clean hands. And if you don't have clean hands, you walk out with nothing. The Court leaves you where it finds you. You can't come in and -- you know, the system that we have, it -- a lot of people have trouble giving money for injuries. I

understand that. It's actually -- there's no better system. It just naturally goes back to 4,000 years ago. Uh -- uh, the Talmud, as a matter of fact, talks about money for injuries and damages. So this is not a new thing. But -- and it's appropriate in circumstances where somebody is (Inaudible) hurt by somebody else's negligence.

But it's not a lottery. It's not a (Inaudible). It's not an opportunity to retire. It's not something that people are supposed to take advantage of and try and milk it. That's what gives the court system a bad name, when something like that happens.

Uh, so anyway, the 60 percent, we bring it up because a bunch of untruths. He's telling the government he's -- he's disabled. He's got a bad back, he's got all this wrong, that wrong. First witness they call in, very nice man, uh, Dick Schneider, says, "This guy's worked harder than anybody I ever saw." You know, this is after he's on -- he's getting a government check every month for disability. Works harder than anybody Mr. Schneider ever saw. He can dig a hole through mud, work 'til ten o'clock at night, 80 hours a week no problem. I thought disability meant that you couldn't do something, you know. It's not a freebie. It's not a government handout. Not everybody that gets out of the military goes in and claims disability that they don't have just so they can get an additional

government check. And to imply that they do is an insult to anybody who has served honorably and gets out without claiming disabilities they don't have.

Preexisting, who knows? Who cares. I don't know if it's preexisting or not. The reason we talk about the neck in 2007 is it's one more thing he didn't tell his doctors about. Now he's trying to claim it.

A no-win situation. Here's another strong man argument. Strong man argument. You know, putting your argument on somebody else, you can take it apart. "If he had sat at home, the Defense would come in and say he isn't still trying -- he didn't try." I didn't say that. That's a strong man argument.

Jessen didn't have all the records. I don't know if she did or not. Um, it's very possible in two-thousand -- well, I know she didn't have anything past 2012, um, because that's when she made her evaluation. And what she had after that point was what the Defense -- or what the Plaintiff had given us, so.

The Plaintiff says that Dr. Jessen, uh, disagreed with all the other doctors; they don't change her opinion. What she said was, "My opinion doesn't change because the facts support my opinion. The facts do not support what I see in the records." And as we now know, the doctors who had opinions that are in the records did not have the facts,

did they? Because Mr. Gilmore hid the facts. I don't think that's unreasonable.

They're trying to say that Mike, uh, said "low velocity" right afterwards. And on the stand, he admitted, you know, whatever. You know, he was saying -- he was saying something else to his providers all along until he got caught and, you know, (Inaudible) told Masci it's 25 miles an hour. Dr. Masci says, "Oh, everybody exaggerates", you know. "Oh, I treat people (Inaudible)", you know. Uh, "He -- he exaggerated and says he was on drugs." And at the deposition, "Oh, he didn't do -- he couldn't tell the truth because he wasn't on drugs." You know, which is it? You can't have it both ways. An argument of convenience.

Uh, so Dr. Jessen compared the drugs from 2007 to 2008. She noted that, uh, there were a lot more in 2007. Not very many in 2008. And then I heard Plaintiff in closing get up and say, "Well, he started becoming addicted to drugs in 2009." That -- that all makes sense now. In 2009, after he injured his arm in February or March -- or injured his neck in February or March, he started taking a lot of drugs. In 2008, he didn't need very many. Said he wasn't hurt. If he took any, it was for his back. It wasn't for his neck.

Marankovich says the herniation causes pain, and then

Superior Court Order Denying Defendant's Motion for New Trial or Remittitur

Gilmore v. Jefferson County Public Transportation Benefit Area

Jefferson Cy. Superior Court No. 10-2-00390-7

Honorable Keith Harper
Oral Argument: August 14, 2015

FILED

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JEFFERSON COUNTY
RUTH GORDON CLERK

SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

MICHAEL GILMORE, an individual,

Plaintiff,

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a/, Jefferson Transit Authority,

Defendant.

No. 10-2-00390-7

ORDER ON MOTION FOR NEW TRIAL OR REMITTITUR

THIS MATTER having come before the undersigned upon the defendant's Motion for New Trial or Remittitur, the Court has reviewed the following items, except for such items, if any, that the Court struck pursuant to the Court's ruling on Plaintiff's Motion to Strike:

1. Defendant's Memorandum in Support of New Trial or Remittitur;
2. Declaration of Counsel Rovang, and the Exhibits thereto;
3. Declaration of Julie DuChene, and the Exhibits thereto;
4. Declaration of Victoria Vigoren, and the Exhibits thereto;
5. Plaintiff's Response to Defendant's Motion for New Trial or Remittitur;

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6. Declaration of Counsel Bradshaw, and the Exhibits thereto;

7. Declaration of Dr. Geoff Masci, DC;

8. Declaration of Counsel Richard McMenamin;

9. _____

The Court heard the oral arguments of both parties. The Court also considered its own observations while presiding over both the pretrial matters and the jury trial of this case. The Court now makes the following Findings of Fact:

1. A sufficient foundation was laid for the admission of the testimony of Dr. Masci, and any issues regarding his credentials went only to the weight of his testimony; (except)

1.a The issues regarding Dr. Marinkovich do not warrant a new trial or remittitur (see CW)

2. This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur;

The court does not find a basis to overturn the verdict. (see CW)

~~3. The jury's verdict was within the range of the evidence presented at trial, and was supported by substantial competent evidence.~~

WHEREFORE, defendant's Motion for Remittitur or New Trial is DENIED.

Dated this 14 day of August, 2015.

Clem Doyen

SUPERIOR COURT JUDGE

Presented by:

HELLER LAW FIRM, PLLC

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