

No. 48018-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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MICHAEL GILMORE, a single man,

Respondent,

v.

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

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR JEFFERSON COUNTY  
THE HONORABLE KEITH C. HARPER

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REPLY BRIEF OF APPELLANT

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## I. REPLY ARGUMENT

### A. Plaintiff's continuing, unchecked misconduct prevented Jefferson Transit from having a fair trial.

“To determine whether . . . misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect.” *State v. Jerrels*, 83 Wn. App. 503, 508, 925 P.2d 209 (1996).<sup>1</sup> Exposing the jury to inadmissible evidence and “[p]ersistently asking knowingly objection-able questions” is prejudicial misconduct “because it places opposing counsel in the position of having to make constant objections,” which, “even if sustained, leave the jury with the impression that the objecting party is hiding something important.” *Teter v. Deck*, 174 Wn.2d 207, 223, ¶30, 274 P.3d 336 (2012) (citations omitted).

Here, the trial court not only failed to keep out inadmissible evidence introduced by the plaintiff's misconduct, it prevented the defense from refuting the improper evidence based on erroneous legal rulings, and admonished defense counsel for making proper objections. In addition to crippling Jefferson Transit's ability to put on its defense, the trial court allowed the plaintiff to blatantly accuse Jefferson Transit and its counsel of fraud, request punitive damages,

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<sup>1</sup> Because “Washington law on the standard for counsel misconduct as grounds for a new trial in a civil case is scant,” the courts analogize to prosecutorial misconduct. *Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 538, 998 P.2d 856 (2000).

and ask the jurors to place themselves in his shoes during closing argument. The result was this \$1.2 million general damages verdict, unprecedented in Jefferson County, for an “accident” that did not even bend plaintiff’s fender.<sup>2</sup> This Court should order a new trial.

**1. Plaintiff improperly invoked the golden rule and asked the jury to award punitive damages.**

Urging jurors to place themselves in the position of one of the parties or to grant a recovery they would wish themselves if they were in the same position is an improper golden rule argument. *See Adkins v. Aluminum Co. of America*, 110 Wn.2d 128, 139-40, 750 P.2d 1257, 756 P.2d 142 (1988). Plaintiff’s counsel invoked the golden rule by analogizing his condition to a job advertisement, repeatedly asking the

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<sup>2</sup> The Court should not countenance plaintiff’s arguments that this Court should ignore his misconduct because any issue is not preserved. Jefferson Transit moved in limine and objected to the trial court’s evidentiary rulings throughout trial. (*See, e.g.*, RP 299, 323, 355-57, 428, 462) Rather than sustaining proper objections and remedying the misconduct, the trial court instead admonished the defense (*see* RP 356, 552, 559), making it clear that further objections were futile. Rather than risk further annoyance of the trial judge or prejudice before the jury, Jefferson Transit’s trial counsel did not object during closing argument. That does not mean that this Court should reward, rather than condemn, the outrageous behavior of plaintiff’s counsel throughout trial or during closing argument. RAP 2.5(a), RAP 1.2(a); *Warren v. Hart*, 71 Wn.2d 512, 518, 429 P.2d 873 (1967) (it is “well recognized” that a party does not waive an error on appeal for failing to object during trial “where the misconduct is so flagrant and prejudicial that no instruction to disregard it would have cured it”); *State v. Sullivan*, 69 Wn. App. 167, 171, 847 P.2d 953, *rev. denied*, 122 Wn.2d 1002 (1993) (“When the trial court has clearly and unequivocally ruled against the exclusion of evidence, the party, in order to preserve the issue on appeal, should not be required to again raise the issue in front of the jury at the risk of making comments prejudicial to his cause, as well as incurring the annoyance of the trial judge.”).

jury what compensation it would take them personally to respond to this “ad” and bear his alleged injuries. (RP 1003-04)

Plaintiff overstates the holding of *Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960), to argue that making a “per diem” argument analogizing damages to a job is “entirely proper in Washington.” (Resp. Br. 46) In *Jones*, the Court made clear that it “neither approve[d] nor disapprove[d] of the argument in general.” 56 Wn.2d at 32. Instead, the *Jones* Court held that “[e]ach case must depend upon its own circumstances,” and concluded that it was “unable to say any prejudice resulted” based on the record before it. 56 Wn.2d at 32. Viewing *this* record in its entirety, plaintiff’s argument asking what it would take for the jury to walk in his shoes was highly prejudicial to the defense. (RP 1003-04)

Contrary to plaintiff’s claims (Resp. Br. 47), Mr. Gilmore’s closing argument was not identical to the one that the Court held was not grounds for reversal in *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 105 P.3d 400 (2004). In *Cooper*, the defendant told the jury that “what it boils down to is . . . the value of a dollar,” asking the jurors what a sum of money would mean to them. 125 Wn. App. at 524, ¶28. Here, plaintiff’s counsel did not ask the jurors what the value of money meant to them, but rather what

amount of money it would take for them to stand in plaintiff's shoes and bear his claimed injuries. This was an improper golden rule argument.

Plaintiff also impermissibly asked the jury for punitive damages to “fight the government,” because Mr. Gilmore “can’t do it alone.” (RP 989, 991, 996, 1032) Plaintiff misplaces his reliance on *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014), to argue that he did not request punitive damages. The *Miller* Court held that “[a]ppeals for a jury to act as a conscience of the community are not impermissible *unless specifically designed to inflame the jury.*” 180 Wn. App. at 816, ¶106 (emphasis added). Unlike in *Miller*, where counsel “did not appeal to juror self-interest,” 180 Wn. App. at 817, ¶109, plaintiff’s counsel here expressly appealed to the jurors’ self-interest. Plaintiff was not “reminding jurors of the[] policy goals” of improving public safety (Resp. Br. 48); counsel played on prejudices against the government to make an argument *specifically designed to inflame the jury* and encourage them to punish the defendant. Unlike the challenged remarks in *Miller*, which the court found to be aggressive advocacy, marginally acceptable when “read in the overall context of the trial,” 180 Wn. App. at 817, ¶110, plaintiff’s argument

here<sup>3</sup> was just the culmination of prejudicial misconduct that deprived the defendant of a fair trial.

**2. Plaintiff repeatedly introduced inadmissible evidence and baselessly accused Jefferson Transit and its counsel of fraud.**

Mr. Gilmore argues that the defense conceded to the introduction of his “good” character evidence prior to trial by not opposing his motion in limine to introduce character evidence of his reputation for truthfulness. (Resp. Br. 15-18) But in his motion, plaintiff acknowledged that a character for truthfulness must be attacked before reputation evidence of the same is introduced under ER 608. (CP 18) Thus, during the pretrial hearing, Jefferson Transit agreed to the introduction of good character evidence only “[i]f it’s done in the proper format.” (RP 24) (emphasis added) The trial court reiterated this understanding, granting the motion for “simply whatever complies with [ER] 608.” (RP 24) (emphasis added)

It is telling that Mr. Gilmore cites only to the hearing on the motions in limine, not to any evidence the defense submitted at trial,

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<sup>3</sup> Plaintiff claims that the defense “started his closing argument by talking about the government getting away with murder.” (Resp. Br. 49) On the contrary, the defense was highlighting how the government rightfully did *not* escape liability for incidents of misconduct caught on video (RP 1005-06) – a point that should have had particular relevance here, where plaintiff was video-taped engaged in physical activities inconsistent with his alleged injuries. (RP 898-903; Ex. 167) It was *plaintiff’s* counsel who twisted the defense’s words by using highly inflammatory language to argue that the “government murders innocent people” and “gets away with it,” further galvanizing the jury to “fight the government” by awarding him a huge money judgment. (RP 1031-32)

in arguing that the defense attacked his character for truthfulness and somehow opened the door to evidence of his character for truthfulness in his case-in-chief. (Resp. Br. 16) This hearing took place before trial, prior to the introduction of any evidence, and outside the presence of a jury that *had not yet even been empaneled*. The trial court recognized that the door had not been opened merely by the defense articulation of its theory of the case. (*See* RP 305-06) The only other support that plaintiff provides for defendant's so-called "character attack" occurred *after* the plaintiff had already introduced evidence of good reputation. (Resp. Br. 17-18) Yet Mr. Gilmore continued to improperly elicit "character" testimony throughout trial, even though his character had not been attacked, and regarding traits other than his reputation for truthfulness. (*See* RP 299, 305-06, 461-62, 555-57, 560, 640-41, 644-46)

Jefferson Transit's objections to this improper evidence (*see* RP 299, 305, 306, 462) not only caused the trial court to rebuke the defense (*see, e.g.*, RP 356, 552, 559), but were met with improper commentary by Mr. Gilmore's counsel, who went so far as to baselessly accuse Jefferson Transit and defense counsel of fraud in the jury's presence. (*See, e.g.*, RP 551, 552, 978-81, 982-83, 985) Apparently unable to control plaintiff's misconduct, the trial court

instead wrongly allowed plaintiff to attack defendant's credibility while bolstering his own, leaving Jefferson Transit unable to rebut such attacks by evidence of collateral benefits, challenges to plaintiff's credibility, or even by sustaining proper objections to the scope of expert testimony and improper character evidence. Jefferson Transit was thus denied a fair trial by plaintiff's repeated misconduct and the trial court's erroneous rulings.

**B. The trial court erred in basing evidentiary decisions crucial to the defense on the wrong legal standards.**

An evidentiary decision based on an error of law is necessarily an abuse of discretion. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995). The trial court excluded relevant defense evidence on erroneous legal grounds, and allowed plaintiff's chiropractic witness to testify as an "expert" to speculative matters far beyond his expertise, also contrary to authority, preventing Jefferson Transit from presenting its defense and having a fair trial.

**1. The trial court failed to apply the analytical framework required by the ERs when excluding Dr. Tencer's testimony.**

Expert testimony is generally admissible if the expert is qualified and relies on generally accepted theories in the scientific community, and the testimony would be helpful to the trier of fact. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, ¶10, 333 P.3d

388 (2014); ER 702. A trial court must apply this analytical framework in deciding whether to admit expert testimony. *Johnston-Forbes*, 181 Wn.2d at 354, ¶16 (no abuse of discretion where trial court “followed the analytical framework required under the ERs”). Here, the trial court did not use the proper analytical framework in excluding Dr. Tencer’s testimony on the grounds it was “intended to create an inference with some aura of authority” that the court did not think was “reasonable or justified.” (RP 39)

An “aura of authority” is the whole point of expert testimony. The trial court never found that Dr. Tencer was not qualified as an expert – the proper standard under ER 702 – nor gave any other reason why an “aura of authority” would not be reasonable or justified given his extensive education and experience in biomechanics. (CP 365) The trial court also erroneously based its decision on its belief that Dr. Tencer “makes a number of assumptions, some of which are based on facts that are not going to be in evidence.” (RP 39) But under ER 703, an expert may base opinions on facts not in evidence that are “reasonably relied upon by experts in the particular field.” Dr. Tencer reached his conclusions calculating the forces of the collision “based on fundamental engineering principles such as the conservation of energy,

momentum, and restitution.” (CP 366) Fundamental engineering principles, based on irrefutable laws of physics, are exactly the type of facts reasonably relied upon by biomechanical engineers.

The trial court’s conclusion that Dr. Tencer’s testimony would be “confusing” or “misleading” (RP 39) likewise was premised on an erroneous application of the analytical framework. Dr. Tencer’s testimony would have been helpful to the jury in determining causation. By plaintiff’s own admission, Dr. Tencer’s testimony “might be admissible on the issue of whether Mr. Gilmore was injured **at all**.”<sup>4</sup> (Resp. Br. 30) (emphasis in original) Because that *was* the issue before the jury, Dr. Tencer’s testimony was both relevant and helpful, and met all of the criteria for admissibility under ER 702.

The plaintiff relies on *Johnston-Forbes, Ma’ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), and *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), to argue that “[t]he one consistent holding in these three cases is that the admission or rejection of

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<sup>4</sup> The issue at trial was whether the collision caused *any* injury to Mr. Gilmore. Plaintiff’s claim that “even the defense admitted – through its own medical expert, Dr. Jessen – that the collision injured Mr. Gilmore’s neck” and that the issue before the jury was “whether the admitted-liability collision and the admitted collision-caused injuries were a proximate cause of the need for the neck surgery” (Resp. Br. 30) (emphasis removed), is false. Dr. Jessen never admitted that the collision caused injury. (RP 891: “You really can’t say when [the bulging discs in the 2008 MRI] happened . . . . It may have been present for months or weeks or years”; RP 891: testifying that plaintiff’s 2008 MRI results showed bulging that “usually would not be due to an injury”; RP 895-96: “I don’t accept that the diffuse bulging he had was attributed to the accident . . . . [T]hat’s a picture of degeneration. That’s not a picture of injury.”)

Tencer's testimony is a matter addressed to the sound discretion of the trial court." (Resp. Br. 29) (emphasis removed) However, unlike the trial court here, the lower court in each of these cases actually used the proper analytic framework and applied the correct legal standard when determining the admissibility of Dr. Tencer's testimony.

In *Johnston-Forbes*, the trial court admitted Dr. Tencer's testimony, with some limitations. In affirming the trial court's ruling, our Supreme Court emphasized that the trial court must apply the correct legal test in exercising its discretion. See 181 Wn.2d at 354-55, ¶16 ("The trial court in this case followed the analytical framework required under the ERs"; "*Because* the trial court performed its *proper* gatekeeping function, we affirm."), 355, ¶17 ("*When applying this test*, trial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal *absent an abuse of such discretion.*"), 357, ¶22 ("*Under the ERs*, we find no abuse of discretion for the trial court here to allow Tencer to testify"; "The trial court . . . *properly applied the required framework under the rules.*") (emphases added). Similarly, in *Ma'ele*, this Court held that the trial court did not abuse its discretion in admitting Dr. Tencer's testimony because it had applied the proper legal framework. 111 Wn. App. at 562-64.

The trial court in *Stedman*, on the other hand, excluded Dr. Tencer’s testimony as irrelevant and cumulative. 172 Wn. App. at 18, ¶21. Division I rejected the trial court’s conclusion that the testimony was cumulative; the “closer question” was whether the testimony was “logically irrelevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident.” *Stedman*, 172 Wn. App. at 18-19, ¶21 (internal quotations omitted). Relying on out-of-state case law, the court affirmed the trial court’s exclusion. *Stedman*, 172 Wn. App. at 20-21, ¶25.

*Stedman* is either distinguishable or not controlling in this Division. First, unlike here, the appellant in *Stedman* did not argue that the trial court had applied the wrong framework in its ER 702 analysis, only that the *decision* it reached was erroneous. Second, the issue in *Stedman* was the *extent* of the plaintiffs’ injuries from a car accident; the issue here was whether the accident caused Mr. Gilmore’s injuries *at all*. See 172 Wn. App. at 18-19, ¶21. Finally, *Stedman* relied heavily on the premise that it was improper for a jury to infer that the force of impact did not cause injury, thus making Dr. Tencer’s testimony “irrelevant” to the issue of causation. See 172 Wn. App. at 20, ¶24. However, as this Court noted in *Johnston-Forbes*, such evidence is relevant in car accidents. See *Johnston-Forbes v.*

*Matsunaga*, 177 Wn. App. 402, 410, ¶17, 311 P.3d 1260 (2013) (disagreeing “that the force of impact is always irrelevant or that it is improper for a jury to infer that minimal force did not cause injury in a particular case”), *aff’d*, 181 Wn.2d 346, 333 P.3d 38 (2014).

**2. The trial court erred in allowing plaintiff to elicit speculative testimony outside the scope of a chiropractor’s expertise that lent the “aura of an expert” to plaintiff’s credibility.**

While excluding defense expert Dr. Tencer without employing the analytical framework of ER 702, the trial court allowed plaintiff to take advantage of the “aura of an expert” by eliciting speculative testimony on matters not only beyond the scope of Dr. Masci’s expertise as a chiropractor, but regarding Mr. Gilmore’s credibility.<sup>5</sup> Speculative expert testimony is prejudicial because of the “danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Moore v. Hagge*, 158 Wn. App. 137, 155, ¶39, 241 P.3d 787 (2010), *rev. denied*, 171 Wn.2d 1004 (2011) (internal quotation marks and quoted source omitted). As a consequence,

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<sup>5</sup> Mr. Gilmore falsely claims the defense did not object to Dr. Masci’s improper vouching of his credibility. (Resp. Br. 34) To the contrary, Jefferson Transit objected multiple times on the grounds of speculation and improper commentary (*see* RP 334, 335, 337), after bringing a motion in limine to exclude Dr. Masci’s testimony as based on “rank speculation.” (CP 267-69) Dr. Masci’s testimony also is properly before this Court on review under *Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, ¶7, 160 P.3d 1089 (“[I]f an issue raised for the first time on appeal is ‘arguably related’ to issues raised in the trial court, a court may exercise its discretion to consider newly-articulated theories for the first time on appeal.”), *aff’d*, 166 Wn.2d 264, 208 P.3d 1092 (2009).

prior to allowing an expert to testify on a particular topic, the court should ensure that “the issue is of such a nature that an expert could express ‘a reasonable probability rather than mere conjecture or speculation.’” *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 571, 719 P.2d 569 (1986), *rev. denied*, 106 Wn.2d 1009 (1986) (quoted source omitted).

Unlike “doctors with unlimited licenses [who] are competent to give expert testimony in the entire medical field,” “[c]hiropractors . . . are limited in their testimony to their special field.” *Kelly v. Carroll*, 36 Wn.2d 482, 491, 219 P.2d 79, *cert. denied*, 340 U.S. 892 (1950). Dr. Masci’s *medical* testimony was speculative because it exceeded the bounds of chiropractic expertise and was based on unreliable and inaccurate information. Dr. Masci testified, over multiple defense objections, to Mr. Gilmore’s claimed *neurological* symptoms and whether his carpal tunnel *surgery* had left him with herniated disc issues. (See RP 323, 345-46, 349, 351, 355-57) Dr. Masci relied “primarily” on Mr. Gilmore’s recitation of his medical history, which Dr. Masci admitted was inaccurate and incomplete, in his “expert” testimony. (See RP 330, 333-34, 362)

When the inaccuracies of Mr. Gilmore’s subjective medical history were brought to light, plaintiff “doubled down,” using Dr. Masci’s

“aura of expertise” to elicit his favorable opinion of Mr. Gilmore’s credibility – a topic on which *no* expert testimony was proper. (RP 335-37) *Saldivar v. Momah*, 145 Wn. App. 365, 398, ¶163, 186 P.3d 1117 (2008) (“An expert witness may not state an opinion about a party’s credibility.”), *rev. denied*, 165 Wn.2d 1049 (2009); *State v. Fitzgerald*, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985) (“An expert may not go so far as to usurp the exclusive function of the jury to weigh the evidence and determine credibility.”) (quoted source omitted); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992) (expert’s “vouching” testimony invaded jury’s exclusive role to determine credibility). Dr. Masci speculated that he did not think Mr. Gilmore intended to exaggerate the speed of impact or his symptoms, assuring the jury it was “common in this type of situation,” and theorizing that Mr. Gilmore was unintentionally inaccurate due to his pain medications. (RP 335-37) In doing so, Dr. Masci impermissibly infringed on the jury’s exclusive role in determining the credibility of a witness.

**C. The trial court erred in excluding evidence of L&I payments based on the wrong legal standard.**

**1. The collateral source rule is inapplicable when the plaintiff seeks only general damages.**

Where, as here, the plaintiff seeks only general damages, the collateral source rule is inapplicable. The rule is designed to prevent the jury from considering a plaintiff’s collateral payments and

“deducting the independent compensation from the damages that the plaintiff would otherwise collect from th[e] defendant,” as the collateral source retains a lien on any recovery the plaintiff obtains in a third party action, and the plaintiff thus may be left undercompensated after repayment. *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 640, 880 P.2d 29 (1994); *Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265, 22 P.3d 791 (2001); see RCW 51.24.060. Mr. Gilmore was never at risk for having to repay his time loss payments or lump sum disability award because he sought solely noneconomic damages, which the Department of Labor & Industries (“L&I”) cannot lien.<sup>6</sup> *Tobin v. Dep’t of Labor & Indus.*, 145 Wn. App. 607,

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<sup>6</sup> L&I paid Mr. Gilmore’s medical bills because he was on the job at the time of the “fender bender” – which did *no* damage to his plumbing truck, and \$1,200 damage to the bike rack on the front of the Jefferson Transit bus. (CP 14; RP 578, 772) Although plaintiff asserted after trial that the number was “inaccurate,” the medical bills Mr. Gilmore produced in discovery totaled \$16,682.11. (CP 477-93, 657) In addition, Mr. Gilmore received L&I time loss payments, as well as a lump sum payment for permanent partial disability at the end of 2009. (RP 6, 518, 543) Had he sought special damages at trial, Mr. Gilmore would have had to reimburse L&I for all of these benefits from any recovery obtained from Jefferson Transit. RCW 51.24.060. Because RCW ch. 51.24 “does not authorize the Department to subject pain and suffering damages to its reimbursement calculation,” *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 404, ¶26, 239 P.3d 544 (2010), plaintiff was able to circumvent repayment to L&I while still recovering an unprecedented \$1.2 million general damages award, completely unmoored from any special damages that could remotely justify it. See *Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 140, 856 P.2d 746 (1993) (using economic award to assess the reasonableness of the jury’s award of noneconomic damages and whether the damages are proportional to the injury sustained); *Bunch v. King County Dep’t of Youth Servs.*, 155 Wn.2d 165, 181, ¶29, 116 P.3d 381 (2005) (same); *Hoskins v. Reich*, 142 Wn. App. 557, 572, ¶36, 174 P.3d 1250 (same), *rev. denied*, 164 Wn.2d 1014 (2008).

614-15, ¶17, 187 P.3d 780 (2008), *aff'd*, 169 Wn.2d 396, 239 P.3d 544 (2010) (“Because L&I did not, and will not, pay pain and suffering damages, it cannot recover from that portion of [the plaintiff’s] third party recovery compensating him for his pain and suffering.”). Instead, Jefferson Transit was severely prejudiced by being unable to use collateral source evidence to refute the plaintiff’s contentions that his pain and suffering was the result of severe financial distress. (*See* RP 508, 530-31, 532-34, 539, 762-63)

**2. The door can be opened to collateral source evidence in personal injury cases.**

A plaintiff can open the door to collateral source evidence, as Mr. Gilmore did here by repeatedly introducing evidence of his financial situation to support his claims of alleged pain and suffering. (RP 508, 530-31, 532, 602, 605, 762-63) In *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 804, 953 P.2d 800 (1998), our Supreme Court unequivocally held that “[i]njured parties may . . . waive the protections of the collateral source rule by opening the door to evidence of collateral benefits.”

Mr. Gilmore contends that under *Johnson* a party can only open the door to collateral source evidence in a worker’s compensation proceeding, and not a personal injury case. (Resp. Br. 41) But in determining whether the collateral source rule applied at

all to worker's compensation proceedings, the *Johnson* Court held that "[t]he *same rationale* we have relied upon for 85 years to bar evidence of collateral source payments in personal injury cases applies *with equal force* in workers' compensation proceedings." 134 Wn.2d at 804 (emphasis added). If the door can be opened in one type of case, it follows that it can also be opened in the other.

Our Supreme Court made clear in *Johnson* that both personal injury and worker's compensation cases share the *same rule*; this Court should not now draw an arbitrary distinction between the two. The statutory scheme under RCW ch. 51.24 demonstrates why this must be the case, given L&I's statutory right to subrogation. Under RCW 51.24.030, an injured party may elect to seek damages from a third party who is or may become liable to pay damages for the worker's injury. If the injured party elects to do so, L&I may file a notice of statutory interest and intervene as a party to protect that interest. RCW 51.24.030(2). Alternatively, the injured worker's election *not* to proceed against the third party operates as an assignment of the cause of action to L&I. RCW 51.24.050(1).

Mr. Gilmore elected to bring a third party claim against Jefferson Transit – an action in which L&I had a statutory interest. At the start of trial (RP 12-13), however, he limited his claim solely to

general damages – which L&I could not recover under *Tobin*. 169 Wn.2d at 404, ¶26. By doing so, Mr. Gilmore not only prevented L&I from seeking its statutory right to recovery under RCW 51.24.050, but wrongly exploited the collateral source rule to prevent Jefferson Transit from refuting the claims of financial harm he contended were the basis of his alleged pain and suffering. As a result of this shell game, Mr. Gilmore obtained an excessive award, unjustified by the evidence and with no relation to his actual harm suffered.

If a party can circumvent the statutory scheme enacted to protect L&I's right to recompensation in a third party action in this way, he should not then also be allowed to use the collateral source rule to hold the third party defendant liable for more damages than the harm caused. In both personal injury and worker's compensation cases, the defendant should be able to introduce evidence of collateral benefits to ensure that the plaintiff is compensated only for the injuries actually suffered.

*Johnson's* holding that the door to collateral source evidence can be opened is in accord with the analysis in *Cox v. Spangler*, a case from 2000 that Mr. Gilmore asserts is "the Supreme Court's last word on collateral sources in personal injury lawsuits." (Resp. Br. 41) *Spangler* notes that "courts generally follow a policy of strict

exclusion,” and otherwise relevant evidence of collateral payments “is *usually* excluded.” 141 Wn.2d at 441 (emphasis added). However, the trial court in *Spangler* did not automatically exclude evidence of industrial insurance benefits; rather, it engaged in an ER 403 inquiry. The Supreme Court affirmed the trial court’s decision to “exclude *only* that evidence that would have been unfairly prejudicial,” but only *after* concluding that its “relevance [wa]s outweighed by the unfair influence . . . [it] would likely have had upon the jury,” in addition to being satisfied that the excluded evidence “did not harm [defendant] in any significant way.” *Spangler*, 141 Wn.2d at 441 (emphasis added). Here, contrary to *Spangler*, the trial court summarily decreed that the door could *never* be opened. (RP 543, 634)

Mr. Gilmore thus misplaces his reliance on *Boeke v. International Paint Co., Inc.*, 27 Wn. App. 611, 617-18, 620 P.2d 103 (1980), *rev. denied*, 95 Wn.2d 1004 (1981), to argue that collateral source evidence is never admissible in a personal injury case “to show plaintiff’s alleged lack of motivation to return to work.” (Resp. Br. 39) Jefferson Transit sought to admit evidence of time loss payments not for that purpose, but to show the jury that even though Mr. Gilmore was not working due to his *alleged* injuries, his finances

were not as hurtful as he claimed because he was receiving income from L&I. (See RP 539, 543) As both *Johnson* and *Spangler* make clear, collateral source evidence may be admissible when the door has been opened, or even when it has not been, subject to ER 403.

The trial court failed to engage in the correct legal inquiry when it refused to admit evidence of Mr. Gilmore’s time loss payments even after plaintiff had opened the door, solely because the court “didn’t find anything specifically about . . . the idea or the concept of opening a door.”<sup>7</sup> (RP 543, 634) Because Mr. Gilmore asserted that his financial situation was the catalyst for his alleged pain and suffering – the *only* damages at issue before the jury – through strained relationships, changed personality, substance abuse, and his claimed inability to afford medical care, Jefferson Transit was severely prejudiced by its inability to rebut this claim with collateral source evidence.

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<sup>7</sup> Mr. Gilmore’s argument that Jefferson Transit waived this issue by failing to further brief it before the trial court (Resp. Br. 40) is without merit. A party need not brief an evidentiary issue during trial after objecting to and arguing the basic reasoning for admission, as the defense did here. (RP 536-37, 539-40, 542-43) See *Walla Walla County Fire Protection Dist. No. 5 v. Washington Auto. Carriage, Inc.*, 50 Wn. App. 355, 357 n.1, 745 P.2d 1332 (1987) (“There is no rule preventing an appellate court from considering case law not presented at the trial court level.”); *State Farm Mut. Auto. Ins. Co. v. Amirpanahi*, 50 Wn. App. 869, 872 n.1, 751 P.2d 329 (issue preserved for appeal where appellants “argue[d] the basic reasoning” before the trial court; “[t]his court can review these issues despite lack of citation to the crucial case law”), *rev. denied*, 111 Wn.2d 1013 (1988). In any event, the trial court *was* directed to the crucial case law, *Johnson v. Weyerhaeuser*, in pretrial briefs. (See CP 370)

**D. The trial court improperly allowed plaintiff to present expert medical evidence after numerous discovery violations.**

**1. The trial court found plaintiff's violation was willful and deliberate.**

“[A] party’s failure to comply with a court order will be deemed willful if it occurs without reasonable justification.” *Jones v. City of Seattle*, 179 Wn.2d 322, 345, ¶50, 314 P.3d 380 (2013). A trial court may make an implicit finding of willfulness. *Jones*, 179 Wn.2d at 348, ¶57 (refusing to find willfulness on appeal where trial court “did not explicitly (or implicitly) conduct a willfulness inquiry”). But here, the trial court went beyond that, expressly finding during trial that the discovery violation was not inadvertent after plaintiff’s counsel could not offer *any* reasonable excuse (and instead offered several inconsistent, implausible excuses) for noncompliance.

Mr. Gilmore argues that the trial court’s description of the conduct of plaintiff’s counsel and medical expert as “fishy” was an “offhand comment” that “is a far cry from an affirmative finding of willful misconduct.” (Resp. Br. 38 n.24) But the trial court not only described the late disclosure of Dr. Marinkovich’s discovery as “fishy business”; it explicitly found that “none of this appears to . . . be very forthcoming” (RP 433), and that there was “deception that’s been

going on.” (RP 432) These are express findings of willfulness. At the very least, they constitute an implicit finding of willfulness.<sup>8</sup>

**2. Given the substantial prejudice Jefferson Transit suffered, no lesser sanction would have sufficed.**

No lesser sanction than exclusion would have been sufficient to remedy the substantial prejudice Jefferson Transit suffered as a result of Mr. Gilmore’s discovery violations. Three weeks prior to trial, the trial court held that there appeared to be a “limited effect that this evidence might have on the Defense’s experts.” (RP 32) However, Jefferson Transit did not know all of the medical records and evidence that Dr. Marinkovich claimed to rely on in coming to his conclusions *until the middle of trial*. (See RP 411-33) Because causation was the only issue at trial, whether or not Mr. Gilmore’s medical expert had reviewed the 2004 VA disability report and the 2008 video, both of which went to the defense’s theory that his condition was preexisting, was crucial to Jefferson Transit. The court itself acknowledged during

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<sup>8</sup> Mr. Gilmore asserts that defense expert Dr. Jessen “did not have a number of important medical records when she completed her own report” and “saw them for the first time at trial,” to argue that “inadvertent errors in communications with experts do occur in the realm of real-world litigation” and “are not in and of themselves proof of ‘willful misconduct.’” (Resp. Br. 38-39) However, plaintiff (unlike Jefferson Transit) was provided with Dr. Jessen’s defense report, including a complete list of the records reviewed, well ahead of trial. (See CP 30, 40) Nor could there be any claim that the defense withheld expert discovery or that plaintiff was prejudiced by Dr. Jessen’s failure to review any particular medical record.

trial that the violations affected “*a major part of the Defendant’s case.*” (RP 433) (emphasis added)

Ignoring the serious nature of this violation, Mr. Gilmore now argues that “defense counsel already got the remedy he asked for below” in having the weekend to prepare meet Dr. Marinkovich’s testimony. (Resp. Br. 37) (emphasis removed) But this defense ‘request’ must be viewed within the context of the whole colloquy with the trial court. When the true extent of plaintiff’s discovery violations came to light during trial, Jefferson Transit renewed its objection to Dr. Marinkovich’s testimony, telling the court that “the least appropriate sanction would be exclusion of the doctor’s testimony,” while “[t]he most severe would be dismissal of the Plaintiff’s case.” (RP 428) While the trial court engaged in a *Burnet* analysis at the pretrial hearing (RP 32), it failed to do so again when the true extent of plaintiff’s discovery violations became apparent during trial. Instead, the trial court, without engaging in another *Burnet* analysis, announced that it was “not inclined to exclude Dr. Marinkovich’s testimony.” (RP 428)

After making its ruling on exclusion clear, the trial court told defense counsel that it “would be inclined to give [him] additional time to deal with this and prepare for [the] testimony. For example, call it a day and *resume tomorrow morning* and have Dr.

Marinkovich come back then.” (RP 428) (emphasis added) It was *plaintiff’s* counsel that told the court that it was “impossible” for Dr. Marinkovich to come back the next day, offering that “he can come back on Monday.” (RP 429) In doing so, *plaintiff* was given control over the timeframe in which defense counsel would have to prepare to overcome *plaintiff’s* discovery violation.

Mr. Gilmore contends that “[i]f defense counsel had wanted a trial continuance or recess, he could have asked for it.” (Resp. Br. 37) But the “additional time” that the trial court was willing to give defense counsel was one day – calling a recess midafternoon on Wednesday and resuming *the very next day*. It was not until plaintiff’s counsel told the court that Dr. Marinkovich would not be available until Monday that defense counsel told the court, if “you’re not inclined to exclude his testimony, Judge, then having him come back Monday? *Um, perhaps that’ll be enough.*” (RP 429) (emphasis added)

Defense counsel was attempting to make do with the only remedy that was being offered by the court, and was not obligated to continue to ask for a remedy that he knew would not be – and in fact expressly had *not* been – granted. *See Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498-99, 933 P.2d 1036 (1997) (where trial court’s prior rulings make clear that motion would not have been granted, “a

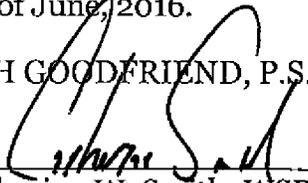
party cannot be reasonably held to have waived the right to assert the error on appeal merely by declining to engage in the useless act of repeating their arguments in a motion to amend the trial court's order"); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 753-54, 875 P.2d 1228 (1994) (where the trial court ruled before trial that the jury would only consider certain matters, plaintiff "was not required to propose an instruction that he knew would not be given"). This does not mean that this was a sufficient remedy, or that the defense case was not substantially prejudiced by plaintiff's willful discovery violations. Jefferson Transit should not be punished for trying not to delay trial over *plaintiff's* discovery violations that prejudiced the defendant's ability to have a fair trial.

## II. CONCLUSION

A new trial is the only proper remedy for plaintiff's repeated misconduct and the trial court's errors. This Court should reverse and remand for a new trial or, alternatively, grant remittitur as set out in the opening brief.

Dated this 23<sup>rd</sup> day of June, 2016.

SMITH GOODFRIEND, P.S.

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DECLARATION OF SERVICE

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

That on June 23, 2016, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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\_\_\_\_\_  
Jenna L. Sanders

# SMITH GOODFRIEND

**June 23, 2016 - 3:10 PM**

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