

No. 49727-1-II

---

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

---

GERHARD J. SANDER AND JANE DOE SANDER, husband and wife  
and the marital community thereof; and TENSAR INTERNATIONAL  
CORPORATION, a Georgia corporation,

Appellants/Cross-Respondents,

v.

JEFFREY AND LORI MAIN, husband and wife and the marital  
community composed thereof,

Respondents/Cross-Appellants.

---

**OPENING BRIEF OF RESPONDENTS/CROSS-APPELLANTS  
JEFFREY AND LORI MAIN**

---

Ana-Maria Popp, WSBA No. 39614  
Eric L. Christensen, WSBA No. 27934  
CAIRNCROSS & HEMPELMANN  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Telephone: (206) 587-0700  
Facsimile: (206) 587-2308

John E. D. (Jed) Powell, WSBA 12941  
JED POWELL & ASSOCIATES, PLLC  
7525 Pioneer Way, Suite 101  
Gig Harbor, WA 98335  
Telephone: 206-618-1753

Attorneys for Respondents/Cross-Appellants  
Jeffrey and Lori J. Main

TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. COUNTER-STATEMENT OF THE CASE .....	5
A. Mr. Sander Collided With Mr. Main’s Vehicle While Returning From Conducting Business On Behalf of Tensar.....	5
B. Before the Collision, Mr. Main Was A Highly Successful, Experienced, and Well-Regarded Technology Consultant Who Had Been Hired By Denali Advanced Integration To Fill A Lucrative Vice President Position. ....	5
C. The Collision Left Mr. Main “A Changed Man,” With Serious Cognitive and Emotional Impairments Disabling Him From Employment.....	8
D. Mr. Main’s Medical Providers Repeatedly Diagnosed Him With, and Treated Him For, Concussion.....	11
E. The Mains File A Lawsuit Seeking Redress for Jeffrey Main’s Injuries.....	16
III. ARGUMENT.....	18
A. Standard of Review.....	18
B. The Trial Court Correctly Concluded That Tensar Is Liable Under the Doctrine of Respondeat Superior.....	19
1. The Trial Court Properly Rejected Tensar’s CR 56(f) Motion To Conduct Discovery Regarding the Purpose of Sander’s Travel. ....	20
2. The Trial Court Properly Granted Summary Judgment to the Mains On the Issue of Tensar’s Vicarious Liability. ....	25
C. The Jury’s Verdict Finding That Mr. Main Suffered Serious Economic Losses as a Result of the Collision is Fully Supported By Substantial Evidence.....	29

D.	The Expert Evidence Documenting Mr. Main’s Concussion Diagnosis and Causation Was Admissible and Compelling.....	36
E.	The Trial Court’s Evidentiary Rulings Were Correct.....	41
1.	Counsel’s Joke Email to Mr. Main’s Expert Witness Was Properly Excluded.....	41
2.	Evidence of the Mains’ Participation in Pastoral Counselling Was Properly Admitted. ....	43
3.	Mr. Main’s Passing References To His Own Insurance Did Not Create Prejudice. ....	45
4.	Dr. Perrillo’s Passing References To His Work for Veterans Was Not Prejudicial. ....	46
IV.	CONDITIONAL CROSS-APPEAL OF PLAINTIFFS JEFFREY AND LORI MAIN. ....	47
A.	Assignment of Error.....	47
B.	Introduction.....	48
1.	The Issue Need Only Be Decided If The Court Concludes That Tensar’s Appeal Is Meritorious and That Sander’s Challenge to the Evidence of Causation Is Also Meritorious.....	48
2.	Statement of Facts.....	48
C.	Argument: The Trial Court Committed Reversible Error In Excluded Dr. Perrillo’s Testimony That The Collision Caused Mr. Main’s Concussion. ....	49
V.	CONCLUSION.....	54

## TABLE OF AUTHORITIES

### Cases

<i>Adamson v. Chiovaro</i> , 308 N.J.Super. 70, 705 A.2d 402 (App.Div.1998).....	53
<i>Aloha Lumber Corp. v. Dep't of Labor &amp; Indus.</i> , 77 Wn.2d 763, 466 P.2d 151 (1970) .....	25
<i>Anderson v. Akzo Nobel Coatings, Inc.</i> , 172 Wn.2d 593, 260 P.2d 857 (2011) .....	50
<i>Bakotich v. Swanson</i> , 91 Wn. App. 311, 957 P.2d 275 (1998).....	35
<i>Bennett v. Richmond</i> , 960 N.E.2d 782 (Ind. 2012).....	52
<i>Carson v. Fine</i> , 123 Wn.2d 206, 867 P.2d 610 (1994).....	42
<i>Chandler Exterminators, Inc. v. Morris</i> , 262 Ga. 257, 416 S.E.2d 277 (1992), <i>overruled by statute as stated in Sinkfield v. Oh</i> , 229 Ga.App. 883, 495 S.E.2d 94 (1997) .....	54
<i>Cochran Elec. Co. v. Mahoney</i> , 129 Wn.App. 687, 121 P.3d 747 (2005) .....	26
<i>Cogle v. Snow</i> , 56 Wn. App. 499, 784 P.2d 554 (1990).....	21, 24
<i>Cunningham v. Montgomery</i> , 143 Or.App. 171, 921 P.2d 1355 (1996) .....	53
<i>Dickinson v. Edwards</i> , 105 Wn.2d 457, 716 P.2d 814 (1986).....	25, 28
<i>Fabianke v. Weaver</i> , 527 So.2d 1253 (Ala.1988).....	53
<i>Frausto v. Yakima HMA, LLC</i> , 188 Wn.2d 227, 393 P.3d 776 (2017) .....	49, 50, 53, 54
<i>Grenitz v. Tomlian</i> , 858 So. 2d 999 (Fla. 2003) .....	54
<i>Gross v. Sunding</i> , 139 Wn. App. 54, 161 P.3d 380 (2007) .....	21

<i>Hogland v. Town &amp; Country Grocery of Fredricktown, Inc.</i> , 2015 WL 3843674 (E.D. Ark. 2015).....	52
<i>Howell v. Spokane &amp; Inland Empire Blood Bank</i> , 117 Wn.2d 619, 818 P.2d 1056 (1991) .....	28
<i>Howle v. PYA/Monarch, Inc.</i> , 288 S.C. 586, 344 S.E.2d 157 (Ct.App.1986).....	53
<i>Huntoon v. TCI Cablevision of Colo., Inc.</i> , 969 P.2d 681 (Colo.1998).....	52
<i>Hutchison v. Am. Family Mut. Ins. Co.</i> , 514 N.W.2d 882 (Iowa 1994).....	53
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 333 P.3d 388 (2014) .....	34, 50
<i>Katare v. Katare</i> , 175 Wn.2d 23, 283 P.3d 546 (2012).....	34
<i>Kubista v. Romaine</i> , 87 Wn.2d 62, 549 P.2d 491 (1976) .....	45
<i>Laguna v. Washington State Dep't of Transp.</i> , 146 Wn. App. 260, 192 P.3d 374 (2008) .....	28
<i>Landers v. Chrysler Corp.</i> , 963 S.W.2d 275 (Mo.Ct.App.1997), <i>overruled on other grounds by Hampton v. Big Boy Steel Erection</i> , 121 S.W.3d 220 (Mo.2003) .....	53
<i>Lewis v. Stinson Lumber Co.</i> , 145 Wn. App. 302, 189 P.3d 178 (2008) .....	51
<i>Lodis v. Corbis Holdings, Inc.</i> , 192 Wn. App. 30, 366 P.3d 1246 (2015), <i>review denied</i> , 185 Wn.2d 1038, 377 P.3d 744 (2016) .....	18
<i>Ma'ele v. Arrington</i> , 111 Wn.App. 557, 45 P.3d 557 (2002) .....	42, 50
<i>Madrid v. Univ. of Cal.</i> , 105 N.M. 715, 737 P.2d 74 (1987).....	53
<i>Mannington Carpets, Inc. v. Hazelrigg</i> , 94 Wn. App. 899, 973 P.2d 1103 (1999) .....	21

<i>Matter of Lui</i> , No. 92816-9, 2017 WL 2691802 (Wash. June 22, 2017).....	44
<i>Maytown Sand &amp; Gravel LLC v. Thurston Cty.</i> , 198 Wn. App. 560, 395 P.3d 149 (2017) .....	34
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989) .....	39
<i>McNaulty v. Snohomish School Dist. No. 201</i> , 9 Wn. App. 834, 515 P.2d 523 (1973) .....	35
<i>McNew v. Puget Sound Pulp &amp; Timber Co.</i> , 37 Wn.2d 495, 224 P.2d 627 (1950) .....	26
<i>Michael v. Laponsey</i> , 123 Wn.App. 873, 99 P.3d 1254 (2004).....	26
<i>Morris v. Dept. of Labor &amp; Indus.</i> , 179 Wn. 423, 38 P.2d 395 (1934) .....	26
<i>Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.</i> , 178 Wn. App. 702, 315 P.3d 1143 (2013) .....	43
<i>Sanchez v. Derby</i> , 230 Neb. 782, 433 N.W.2d 523 (1989).....	53
<i>Seneca Falls Greenhouse &amp; Nursery v. Layton</i> , 9 Va.App. 482, 389 S.E.2d 184 (1990).....	53
<i>State v. Emery</i> , 174 Wn.2d 741, 278 P.3d 653 (2012).....	47
<i>State v. Garland</i> , 169 Wn. App. 869, 282 P.3d 1137 (2012).....	18, 19
<i>Tellevik v. Real Prop.</i> , 120 Wn.2d 68, 838 P.2d 111 (1992), clarified on denial of reconsideration on other grounds, 845 P.2d 1325 .....	20
<i>Terrell v. Hamilton</i> , 189 Wn. App. 1041 (2015) .....	46
<i>Valiulis v. Scheffels</i> , 191 Ill.App.3d 775, 138 Ill.Dec. 668, 547 N.E.2d 1289 (1989) .....	53
<i>Volk v. DeMeerleer</i> , 187 Wn.2d 241, 386 P.3d 254 (2016) .....	34

<i>Washburn v. Beatt Equip. Co.</i> , 120 Wn.2d 246, 840 P.2d 860 (1992) .....	18
<i>Westinghouse Elec. Corp. v. Dep't of Labor &amp; Indus.</i> , 94 Wn.2d 875, 621 P.2d 147 (1980) .....	25, 26

**Rules**

ER 411 .....	45, 46
ER 610 .....	43, 44
ER 702 .....	49, 52
ER 703 .....	34

## I. INTRODUCTION

This brief raises issues that need only be addressed if the Court concludes that Appellant Tensar International Corporation's ("Tensar") appeal regarding its *respondeat superior* liability should be granted. Tensar challenges the Trial Court's conclusion that Tensar is liable for the negligence of its employee, Appellant Gerhard Sander, in causing the vehicle collision that gives rise to this case because the collision occurred while Sander was returning to his home office from a sales call made on behalf of Tensar. But Tensar does not challenge the jury's findings that Sander's negligence caused Respondent/Cross-Appellants Jeffrey and Lori Main to suffer \$900,000 in damages.

Because "[a] master and his servant are jointly and severally liable for the negligent acts of the servant in the course of his employment," *Vanderpool v. Grange Ins. Ass'n*, 110 Wn.2d 483, 496, 756 P.2d 111, 117–18 (1988) (*cit. omitted*), if the Court rejects Tensar's appeal, as it should, the remaining appeal issues are moot – Tensar is jointly and severally liable for the damages awarded by the jury and there is no reason for the Court to address Sander's appeal of the jury's verdict, as Sander's brief makes clear. Brief of Appellant Gerhard Sander As To Main at p. 4. Nor is there any reason for the Court to address the Mains' cross-appeal, which demonstrates the Trial Court's error in refusing to permit the

Mains' expert witness, Dr. Richard Perrillo, to testify on the cause of Jeffrey Main's concussion. That issue need be addressed only in the unlikely event that this Court determines that Tensar is not liable for its employee's negligence *and* agrees with Sander's argument that discretionary evidentiary rulings justify a new trial.

The Trial Court properly granted summary judgment on Tensar's vicarious liability for Sander's negligence while traveling on Tensar's business. The record is clear that Sander was traveling to his home office after a sales call made on Tensar's behalf in a vehicle for which Tensar paid expenses and insurance. Tensar is therefore vicariously liable for Sander's negligence and Tensar's evidentiary quibbles are both legally irrelevant and foreclosed by the Trial Court's proper decision to reject Tensar's CR 56(f) motion to obtain further discovery on this issue.

And while Sander challenges the jury's award of \$150,000 in economic damages, as well as several discretionary evidentiary rulings, he does not contest the jury's finding that his negligence proximately caused the Mains' substantial non-economic damages and loss of consortium.

The jury's award is fully supported by the evidence. Before the collision, Mr. Main was a successful and highly-regarded project manager in Seattle's burgeoning high-tech industry, with a long record of success over a career spanning nearly thirty years. He had been hired by Denali

Advanced Integration, a major information technology (“IT”) firm, to develop and run Denali’s newly-created customer service division at a salary of \$150,000 per year plus a bonus conservatively estimated at \$20,000 per year.

After the collision, Mr. Main was a changed man. He experienced persistent headaches, was unable to perform tasks that were routine to him before the accident, became emotionally volatile, and unable to concentrate. Because Mr. Main could no longer perform as he had prior to the accident, Denali was eventually forced to fire him, destroying the unique opportunity offered by Denali.

The physical and mental problems caused by the concussion are well documented in the record. Mr. Main was independently diagnosed with a concussion by six different medical professionals. Three different doctors conducted increasingly extensive neuropsychological testing on Mr. Main, showing that, as a result of the concussion, he suffered from cognitive and emotional difficulties, one concluding that these deficits were so severe they left him 100% disabled. These diagnoses were confirmed by Mr. Main’s wife and co-workers, as well as Mr. Main himself, all of whom observed profound losses in Mr. Main’s cognitive functioning and emotional stability after the collision.

Sander attacks the jury's finding that the Mains suffered major economic losses on two grounds. First, he asserts that Dr. Edward Tay, Mr. Main's treating neurologist and one of several medical professionals who diagnosed Mr. Main with a concussion, should not have been allowed to testify because he did not make his own diagnosis. This is simply incorrect. And, in any event, any error in this regard was harmless because, even if Dr. Tay's testimony is discounted, the jury's verdict is fully justified based on an array of evidence Sander does not challenge.

Sander also asserts that the Main's economic losses were based on mere speculation. This is also incorrect. Both Denali's President, who had hiring and firing authority, and the Vice President who was most directly involved in creating the position for which Mr. Main was hired, testified unambiguously that Mr. Main would have become a full-time Vice President at Denali if the collision and Mr. Main's resulting dysfunctions had not occurred. In any event, any error is harmless because the jury's award of economic damages is fully supported by unchallenged evidence showing that the Mains will face costs for rehabilitation far exceeding what the jury awarded for economic damages.

Finally, Sander claims certain evidence should not have been admitted. These claims are without merit. Sander falls far short of demonstrating that the Trial Court manifestly abused its discretion.

## II. COUNTER-STATEMENT OF THE CASE

Contrary to the mandate that an appellant's statement of the case constitute a fair recitation of the evidence in light of the governing standard of review, Sander presents the evidence before the jury in the light most favorable to him – the losing party. The jury based its verdict on the following evidence:

**A. Mr. Sander Collided With Mr. Main's Vehicle While Returning From Conducting Business On Behalf of Tensar.**

On April 25, 2011, while Mr. Main was stopped at a red light, his car was struck from behind by the Nissan Titan truck driven by Sander while Sander was returning to his home office from a sales call made on behalf of his employer, Tensar. CP 271. Mr. Main likely was knocked unconscious and suffered a concussion (J. Main 72:9-25, Aug. 10-11, 2016; Ferguson 83:2-4, Aug. 18, 2016; L. Main 14:22-25, Aug. 16, 2016).<sup>1</sup>

**B. Before the Collision, Mr. Main Was A Highly Successful, Experienced, and Well-Regarded Technology Consultant Who Had Been Hired By Denali Advanced Integration To Fill A Lucrative Vice President Position.**

Before the collision, Mr. Main was a "highly regarded" project manager with a "superior" reputation in the industry. (S. Updegrove 12:3-

---

<sup>1</sup> The Report of Proceedings in this appeal was not numbered sequentially. Rather, the transcript of each witness's testimony was number separately. Accordingly, references to the Report of Proceedings in this brief include the name of the witness, the page on which the cited reference appears in that witness's testimony, and the date of the testimony.

7, 29:13, Aug. 11, 2016; T. Updegrave 11:12-15, Aug. 15, 2016; Gerhardt 7:18-8:14, Aug. 15, 2016). He had the “amazing... ability to keep ... the hundred plates spinning on the end of ... the sticks without any of them dropping” (S. Updegrave 29:14-23, Aug. 11, 2016), and could “parachute into a project and take it over and make it successful.” (J. Main 17:21-22, Aug. 9, 2016).

In a career that spanned thirty years (J. Main 10:10-14:23, Aug. 9, 2016; CP Ex. 8 (Main resume)), he managed highly complex IT projects for entities ranging from the City of Philadelphia and Kentucky Utilities, to Itron Technologies, a Washington manufacturer of electrical meters. (J. Main 18:23-20:9, Aug. 9, 2016). In addition, he managed projects such as creation of a complex system to manage electronic medical records, (J. Main 25:20-27:16, Aug. 9, 2016), and highly complex software design for a biotechnology company’s medical research database. (J. Main 38:8-39:22, Aug. 9, 2016; *see also id.* at 47:7-48:2, 52:5-6, 49:6-50:25, 51:19-25, 54:1-20, Aug. 9, 2016).

The Kentucky Utilities project was so successful, it was reported on the front page of the *Wall Street Journal*. (J. Main 16:18-17:11, Aug. 9, 2016). Mr. Main turned the City of Philadelphia project, which was on the brink of failure, around so successfully that it was touted by Philadelphia’s

mayor in a press release and received commendations from the City. (J. Main 17:13-18:20, Aug. 9, 2016).

Mr. Main also managed several projects for Washington Mutual Bank (J. Main 28:9-29:10, 35:19-37:24, 44:7-18, Aug. 9, 2016), which were completed “exceptionally well” and were “successful in every measurement that you could give a project.” (S. Updegrave 11:12-15:4, Aug. 11, 2016). In 2010, Sean Updegrave, who had been Mr. Main’s supervisor at Washington Mutual and was now a senior manager at Denali Advanced Integration, a high technology firm, “specifically hired” Mr. Main to become vice president of a new Denali business unit providing IT support to businesses. (J. Main 44:7-45:3, Aug. 9, 2016; S. Updegrave 11:12-15:4, 74:21-22, Aug. 11, 2016). As was customary for Denali personnel, Main initially worked on a contract basis (Gerhardt, 9:23-10:5, Aug. 15, 2016; S. Updegrave 7:20-25, 21:2-5, 37:3-6, Aug. 11, 2016; J. Main 165:2-166:4, Aug. 10-11, 2016).

But, having proven “the viability of” the technology consulting business, Mr. Main was offered “full-time employment” by Denali with an annual base compensation of \$150,000 per year plus bonuses conservatively estimated at \$20,000 annually. (J. Main 58:20-59:7, Aug. 9, 2016, 165:12-20, Aug. 10-11, 2016; Gerhardt 15:12-16:13, Aug. 15, 2016; S. Updegrave 21:8-16, Aug. 11, 2016). Denali viewed the offer of

full-time employment with compensation in this range as the enticement for Mr. Main to join Denali (Gerhardt 16:14-24, Aug. 15, 2016), and Mr. Main understood this to be “a real offer” that “was why I was going to work” at Denali. (J. Main 171:14-20, Aug. 10-11, 2016). According to both Chris Gerhardt, Denali’s President, and Mr. Updegrove, if the collision, and the resulting loss of function, had not occurred, the full-time Vice President position would have been Mr. Main’s. (Gerhardt 23:15-17, Aug. 15, 2016; S. Updegrove 81:16-19, Aug. 11, 2016).

**C. The Collision Left Mr. Main “A Changed Man,” With Serious Cognitive and Emotional Impairments Disabling Him From Employment.**

After the collision, Mr. Main was “not the same guy.” (J. Main 118:21-22, Aug. 10-11, 2016; L. Main 16:4, Aug. 16, 2016). In the days following the collision, he experienced headache pain “like a tight band around my head,” (J. Main 83:5-6, Aug. 10-11, 2016), and began dropping things without explanation. (*Id.* at 83:7). He also had “out of body experiences” where he “felt like I wasn’t really there” and “just sort of watching myself do things.” (*Id.* at 74:15-17). Tasks as simple as writing an email became “really difficult” because “I was writing something and I would look down and it was completely different than what was in my mind.” (*Id.* at 74:10-13).

Prior to the collision, Mr. Main had an extraordinary ability to retain information, so much so that “people would make fun of the fact that I could walk out of a movie and repeat it almost verbatim all the way back.” After the accident, this ability nearly disappeared. (*Id.* at 114:5-19). Similarly, before the collision, Mr. Main could “assimilate just massive amounts of data” and then “walk up to the board and say, here’s what we need to do, boom, boom, boom,” but after the accident, “I just didn’t understand anymore,” as if he were in the “Peanuts cartoon where the teacher’s talking and all you hear is wha-wha-wha-wha.” (*Id.* at 117:20-118:15).

Mr. Main also experienced severe personality changes. These included uncontrollable emotional rages, where, for example, he “just blew up” on a cellphone conversation while shopping with his wife, “started screaming and threw the phone across the room,” then “stormed out of” the mall. (*Id.* at 116:13-21; L. Main 16:7-25, Aug. 16, 2016). He also would “lose it” and “pound[] his desk because his computer wasn’t doing something.” (*Id.* at 12:2-14). Mr. Main “just didn’t have a filter anymore,” and became “rude and completely out of character.” (J. Main 115:9-24, Aug. 10-11, 2016). He got into “scraps” with co-workers and “wrote some pretty scathing emails,” but “didn’t even realize ... it until after someone had told me.” (*Id.* at 116:2-12).

None of these problems occurred before the collision. (*Id.* at 116:22-117:1). Before the collision, he was “never rude” and “never unkind,” but afterwards became “vile,” “very angry,” and “very antagonistic.” (L. Main 17:1-18:4, Aug. 16, 2016). One of his contemporaries described the changes to Mr. Main after the collision as “night and day,” and his ability to successfully complete tasks was “completely the opposite” of what it had been before the collision. (S. Updegrove 29:24-30:5, August 11, 2016). Another stated that before the accident, he was “clear, concise, full train of thought,” but afterwards, “he couldn’t grasp the thoughts and put what we were trying to accomplish together.” (T. Updegrove 38:12-20, Aug. 15, 2016). Socially, he went from a “[g]reat conversationalist” who could “switch gears in conversations easily” and could converse on topics ranging from world events to mathematics, to someone who struggled to “put together a train of thought” and sometimes would “slur his words.” (*Id.* at 39:11-22; *Accord* L. Main 7:10-8:22, 11:10-15, Aug. 16, 2016).

These personality and cognitive changes caused Mr. Main to lose his employment at Denali. After the collision, Mr. Main “was not performing” and “offending people.” (J. Main 71:16-72:5, Aug. 10-11, 2016). He was suddenly unable to track details, exhibited “general confusion,” an “inability to answer” questions, and experienced major

lapses such as \$250,000 budget error. He failed to complete tasks, lost things, became “argumentative” and “agitated easily,” and was unable to cooperate with coworkers or clients. In short, his performance “disastrously dropped off.” (S. Updegrove 23:11-24:7, 28:16-23, Aug. 11, 2016; T. Updegrove 22:21-23:8, 24:10-25:11, 34:3-10, Aug. 15, 2016).

Denali initially attempted to help Mr. Main by taking pressure off him and reassigning some of his projects. (S. Updegrove 26:10-28:5 Aug. 11, 2016). When Mr. Main’s performance failed to improve after four to five months, Denali was forced to fire him. (*Id.* at 25:24-26:9, 81:16-19).

**D. Mr. Main’s Medical Providers Repeatedly Diagnosed Him With, and Treated Him For, Concussion.**

The collision also marked the beginning of a long medical odyssey for Mr. Main that continues to this day. In the days following the accident, Mr. Main experienced headaches and felt “strange.” (J. Main 74:18-77:22, Aug. 10-11, 2016). He consulted his chiropractor, Dr. Kirk Petheram, who noted that Mr. Main was having “difficulty performing” daily activities including driving, working, extended computer use, recreational activities, repetitive motions, sitting for extended periods of time, lifting, climbing stairs, sleeping, and carrying out household chores. (*Id.* at 77:8-22; Petheram 7:1-13, Aug. 15, 2016). Dr. Petheram diagnosed Mr. Main with symptoms consistent with a concussion, as well as various

forms of back and neck sprains, headache, and myalgia. (*Id.* at 8:3-20). Because of the severity of the symptoms Mr. Main was reporting, Dr. Petheram recommended that Mr. Main see his family physician. (*Id.* at 10:22-11:8).

On May 16, 2011, Mr. Main saw Nancy Adam, an Advanced Registered Nurse Practitioner at Group Health Association. (J. Main 77:23-78:1, Aug. 10-11, 2016). After examining and conducting tests on Mr. Main, Nurse Adam diagnosed a concussion. (*Id.* at 83:4-84:25). With his headaches (and other cognitive symptoms) failing to resolve (Petheram 26:23-30:19, Aug. 15, 2016), Mr. Main repeatedly consulted with both Nurse Adam and Dr. Petheram, consulting Nurse Adam twice more and seeing Dr. Petheram a total of thirty-three times between the date of the accident, April 25, 2011, and September 26, 2011. (*Id.* at 8:21-9:18; J. Main 78:2-19, 82:5-13, 88:11-96:12, Aug. 10-11, 2016).

On July 18, 2012, with his symptoms continuing, Mr. Main then saw Dr. Fike, a general practitioner at Group Health, who also diagnosed a concussion. (Tay 81:17-25, Aug. 16, 2016). Dr. Fike referred Mr. Main to Group Health's staff neurologist, Dr. Edward Tay. (J. Main 99:3-13, 106:7-19, Aug. 10-11, 2016). Dr. Tay examined Mr. Main, conducted a limited suite of neurological tests, and concluded that Mr. Main had suffered a concussion and was experiencing post-concussion syndrome.

(Tay 38:1-3, 48:17-49-8, Aug. 16, 2016). Dr. Tay noted symptoms including persistent headaches, memory loss, decrease in manual dexterity, a disconnect between thoughts and actions, fuzzy thinking, difficulty in concentrating, and vision changes, all of which are signs of brain injury. (*Id.* at 39:11-40:2, 41:10-25, 45:16-23). Similarly, he noted anger, irritability, depression, and anxiety, which are also consistent with a brain injury. (*Id.* at 44:24-45:14, Aug. 16, 2016). There was no evidence that Mr. Main suffered any of these symptoms before the collision and, based on a differential diagnosis, Dr. Tay concluded that Mr. Main's concussion and resulting symptoms were caused by the collision with Sander's vehicle. (*Id.* at 42:6-8, 49:9-50:6).

Dr. Tay referred Mr. Main to Group Health's staff neuropsychologist, Dr. Kyle Ferguson, for in-depth neurological testing. (*Id.* at 50:25-51:5, 106:12-19; J. Main 99:3-13, 106:7-19, Aug. 10-11, 2016). Over the course of two visits, Dr. Ferguson conducted three hours' worth of neuropsychological tests on Mr. Main. (Ferguson 22:2-17, Aug. 18, 2016). Like the other medical professionals who examined Mr. Main, Dr. Ferguson concluded that Mr. Main suffered a concussion (*Id.* at 40:5-14, 58:18-19), and that his symptoms, including headache, loss of sleep and inability to concentrate, were consistent with brain damage. (*Id.* at 17:9-21:22). Based on the neuropsychological tests he performed, Dr.

Ferguson found that Mr. Main was not malingering (*Id.* at 22:18-22) and that Mr. Main's baseline IQ – that is, before the collision – was well into the top 10% for men, but that he had lost 38 points off his IQ as a result of the concussion, a “very unusual” result. (*Id.* at 24:11-26:17). Dr. Ferguson recommended that Mr. Main consult a forensic neuropsychologist who could gather more data than a neuropsychologist in a clinical setting. (*Id.* at 52:17-54:8, 59:1-60:9; J. Main 110:4-14, Aug. 10-11, 2016).

That forensic neuropsychologist, Dr. Richard Perrillo, holds a Ph.D. in neuropsychology from the University of Utah and has 38 years of experience in neuropsychology, including forensic neuropsychology (Perrillo 8:1-10, 11:4-24, Aug. 11, 2016). Dr. Perrillo conducted an extensive battery of neuropsychological tests on Mr. Main in 2013 and again in 2016, employing widely-used and scientifically-validated differential diagnosis tools (*Id.* at 17:11-19:8, 46:7-47:17, 103:14-23). Based on the results of the differential diagnosis, Dr. Perrillo testified that, before the collision, Mr. Main had functioned at a very high level, in the range of 89% to 94% in specific cognitive skills, with an IQ of 130. (*Id.* at 52:10-59:8).

Based on a review of Mr. Main's medical records and his tests and observations of Mr. Main, Dr. Perrillo also concluded that Mr. Main

suffered a Grade 2, or possibly Grade 3, concussion, both of which would be considered severe. (*Id.* at 32:10-36:15, 59:9-60:3). As a result, Dr. Perrillo observed, Mr. Main suffered serious cognitive and emotional deficits in seven or eight measured functions (*id.* at 88:14), and there was no evidence of malingering. (*Id.* at 61:7-67:22). Dr. Perrillo found, for example, a drop in Mr. Main's mental processing speed to 7-9% of normal (*id.* at 52:17-20), that his reaction time is only 2% of normal (*id.* at 87:16-19), and that he is suffering increasing frustration and emotional outbursts (*id.* at 96:11-97:17).

These deficits did not improve between Dr. Perrillo's 2013 and 2016 examinations, and are likely to deteriorate over time. (*Id.* at 106). Based on these results, Dr. Perrillo concluded, Mr. Main is 100% disabled (*id.* at 63:18-25), and facing psychological counseling and rehabilitation costs of \$85,000 per year for at least five years. (*Id.* at 110:9-111:17). These disabilities, in Dr. Perrillo's view, are "all concussion related." (*Id.* at 87:6).

During this period, Mr. Main also consulted his personal physician, Dr. Charles Power, seeking relief for persistent headaches. (Power 10:19-11:2, Aug. 16, 2016). Like the other medical professionals Mr. Main had seen, Dr. Power also diagnosed Mr. Main with post-concussion syndrome (*Id.* at 11:6-14), and concluded that Mr. Main's headaches are a chronic,

uncurable condition (*Id.* at 21:24-25, 28:22-29:18). Dr. Power also concluded that the concussions and ensuing symptoms were caused by the collision with Sander's vehicle on April 25, 2011. (*Id.* at 29:19-30:11).

**E. The Mains File A Lawsuit Seeking Redress for Jeffrey Main's Injuries.**

The Mains sued Sander in Kitsap County Superior Court, and upon learning that, at the time of the accident, Mr. Sander was returning to his home office from a call on a Tensar customer, amended their complaint to add Tensar. CP 18-23. The Honorable Jay Roof ("the Trial Court") determined on summary judgment based on undisputed evidence that Sander was engaged in Tensar business when the collision occurred, and that additional discovery by Tensar could not change this outcome. CP 437-40.

Sander and Tensar conceded that Sander's negligence was the proximate cause of the accident and the case was tried to a jury on the issue of damages only.

In addition to presenting the evidence of his work history, his prospects for future employment, and the impact of his injury on his work performance, discussed in § 2, *supra*, the Mains called Dr. David Knowles, an economist with a Ph.D. from Washington State University and a four-decade career as an academic economist and forensic

economist (Knowles 4:1-7:25, Aug. 18, 2016). Dr. Knowles testified that, as a result of losing his employability, Mr. Main suffered economic losses totaling \$515,210. (*Id.* at 15:12-16:8). If Mr. Main is unable to work in the future, Dr. Knowles conservatively estimated Mr. Main's losses at \$723,168, noting these could be as much as \$1,040,775, depending on the assumptions used about Mr. Main's remaining work life. (*Id.* at 20:16-23:1).

The Mains also called forensic neuropsychologist Dr. Perrillo who testified, consistent with his observations and neurological testing results described above, that Mr. Main suffered severe cognitive deficits and emotional disturbances as a result of suffering a Grade 2 or Grade 3 concussion. The trial court, however, refused to allow Dr. Perrillo to testify to his conclusion, based on standard differential diagnosis tools and a review of Mr. Main's medical records, that the crash with Mr. Sander's vehicle is the cause of Mr. Main's concussion and the resulting cognitive and emotional impairments. (Att. A at 14:17-15:17, 22:24-23:3.)<sup>2</sup>

The jury found that Defendants' conduct proximately caused injury to the Mains and awarded the Mains \$900,000 in damages, including \$150,000 in economic damages, \$550,000 in non-economic damages, and

---

<sup>2</sup> The Trial Court's decision to exclude this aspect of Dr. Perrillo's testimony was made while Dr. Perrillo was on the stand and therefore should have been included in the transcript of Dr. Perrillo's testimony. It was omitted. We have therefore attached a transcript of the relevant pages as Attachment A.

\$200,000 for loss of consortium. CP 464-65. Tensar does not challenge the jury's verdict at all and Sander challenges only the \$150,000 economic damages component.

### III. ARGUMENT

#### A. Standard of Review

Sander's appeal is almost entirely directed to the trial court's discretionary decisions concerning the admission of evidence, all of which are reviewed for manifest abuse of discretion found only in the exceptional circumstance. *E.g., Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 48, 366 P.3d 1246, 1255–56 (2015), *review denied*, 185 Wn.2d 1038, 377 P.3d 744 (2016). The Trial Court's decisions violate this standard only if it adopts a view "that no reasonable person would take," and arrives at a decision "outside the range of acceptable choices." *State v. Garland*, 169 Wn. App. 869, 876, 282 P.3d 1137, 1140 (2012) (citations omitted).

Sander also challenges the sufficiency of the evidence to support the jury's award of economic damages. A reviewing court will not overturn a jury verdict if substantial evidence exists to support it. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 261, 840 P.2d 860, 869 (1992). To prevail, Sander therefore must demonstrate that the record does not contain "a sufficient quantity of evidence to persuade a rational,

fair-minded person of the truth of the premise in question,” interpreting the evidence “most strongly against” Mr. Sander and “in the light most favorable” to Mr. Main, and assuming the “truth of [Plaintiffs’] evidence and all inferences that can be reasonably drawn therefrom.” *Id.*, 169 Wn. App. at 606.

**B. The Trial Court Correctly Concluded That Tensar Is Liable Under the Doctrine of *Respondeat Superior*.**

Tensar concedes (Tensar Br. 3-4) it has employed Sander since 1994. Sander operates an office located in his home for which Tensar pays him a monthly reimbursement. CP 103-04. Tensar also provides Sander a monthly allowance of \$500 for the use of Mr. Sander’s private vehicle for Tensar’s purposes, reimburses Sander for 80% of his gasoline and maintenance costs and provides liability insurance to Sander to cover its liability arising from the business use of that vehicle. CP 307.

Because Tensar has provided Mr. Sander with a vehicle to accomplish Tensar’s purposes, Tensar is liable for Sander’s negligence in operating the vehicle throughout the course of any trip made on Tensar’s behalf. The Trial Court correctly concluded that Mr. Sander was, as a matter of law, carrying out Tensar’s purposes because he was returning from a Tensar sales call. Further, under Washington’s “dual purpose” rule, Tensar’s attempt to create an issue where none exists fails because

the employer is liable for the employee's negligence throughout the trip, even if the employee engages in recreational pursuits during the trip. More importantly, the Trial Court properly rejected Tensar's motion under CR 56(f).

The Mains hereby adopt the brief of Sander on this issue, RAP 10.1(g), and add the following:

**1. The Trial Court Properly Rejected Tensar's CR 56(f) Motion To Conduct Discovery Regarding the Purpose of Sander's Travel.**

Tensar can obtain a remand for trial on its vicarious liability only if the Court determines that the Trial Court abused its discretion in refusing to accept Tensar's motion for a continuance under CR 56(f) to pursue further discovery regarding the purpose of Sander's travel on the day he struck Mr. Main's vehicle. Tensar's motion did not meet basic requirements of CR 56(f) and, in any event, was properly rejected because of Tensar's inexcusable delay in seeking discovery on this issue. For this reason, the Court should conclude that Tensar's claim fails, which puts an end to this appeal without need to address any other issue.

Under CR 56(f), a court may "order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had." *Tellevik v. Real Prop.*, 120 Wn.2d 68, 90, 838 P.2d 111, 122 (1992), *clarified on denial of reconsideration on other grounds*, 845 P.2d 1325.

The Trial Court's denial of a continuance will be upheld absent a manifest abuse of discretion. *Gross v. Sunding*, 139 Wn. App. 54, 67–68, 161 P.3d 380, 387 (2007). The Trial Court's denial of Tensar's CR 56(f) motion was fully justified on at least two independent grounds.

First, as both the plain language of CR 56(f) and the authorities cited by Tensar (Br. 21) make clear, Tensar was required to support its CR 56(f) motion with affidavits demonstrating that it “cannot present by affidavit facts essential to justify [the party’s] opposition” and that additional discovery is therefore necessary. CR 56(f). *See Mannington Carpets, Inc. v. Hazelrigg*, 94 Wn. App. 899, 902, 973 P.2d 1103 (1999); *Coggle v. Snow*, 56 Wn. App. 499, 502, 784 P.2d 554, 557 (1990). But Tensar did not do so, instead presenting its motion orally without supporting affidavits.

Second, Tensar's delay in seeking discovery from its own employee, Mr. Sander, concerning its vicarious liability for Mr. Sander's negligence fully justifies the Trial Court's denial of its CR 56(f) motion. It should have been clear to Tensar on or shortly after the collision on April 25, 2011, that its liability for its employee's negligence was likely to become an issue in this case. Any doubt about that was erased on October 28, 2013, when the Mains filed their amended complaint naming Tensar as a defendant and asserting that, at the time of the collision, “Mr. Sander

was acting within the course and scope of his employment with Tensar” and that, as a result, Tensar is liable “for the conduct of Mr. Sander under the doctrine of *respondeat superior*,” CP 18-21, which Tensar denied on December 5, 2013, “for lack of information.” CP 27.

On December 19, 2013, the parties entered into a stipulation continuing the trial date from May 6, 2014, to September 30, 2014, to allow additional time for Tensar to conduct discovery. CP 69-71. On February 21, 2014, Tensar filed a motion for summary judgment seeking to escape its vicarious liability. CP 31-42. On March 14, 2014, Sander filed a response, attaching an affidavit in which Mr. Sander stated that he was “returning to my home office after completing a Tensar customer sales call” when the collision occurred, and that “the only purpose” for Mr. Sander’s travel was to “fulfill my employment duties.” CP 105.

In their March 17, 2014, opposition to Tensar’s summary judgment motion, the Mains asserted that Mr. Sander’s opposition “resolves all material issues of fact relevant to vicarious liability,” and that summary judgment should be granted to the Mains on the vicarious liability issue. CP 116. In response, on March 21, 2014, Tensar filed both a motion to strike the various affidavits supporting the pleadings that had been filed by Mr. Sander and the Mains, CP 166-73--even though most of the documents Tensar challenged had been produced by Tensar itself in

discovery -- and a reply arguing that neither Mr. Sander nor the Mains had set forth material facts sufficient to prevent summary judgment in Tensar's favor. CP 175-96. On March 28, 2014, the Trial Court denied Tensar's motion for summary judgment and its motion to strike. CP 285-86.

Thereafter, on April 3, 2104, the Mains filed a motion for summary judgment, arguing that "the undisputed facts" require a determination that Tensar is vicariously liable. CP 288-94. Tensar answered the motion for summary judgment on April 18, 2014, claiming that genuine issues of fact precluded summary judgment. CP 380-92.

Tensar therefore knew that its vicarious liability was a central issue in this case at least as early as October 28, 2013, when it was named in the Mains' amended complaint explicitly asserting *respondeat superior* liability against Tensar. Over the course of the ensuing six months, with multiple competing summary judgment motions and affidavits filed on this issue, it was increasingly obvious the question whether or not Mr. Sander was acting within the scope of his employment when the collision occurred was the issue that would make or break Tensar's liability. Yet Tensar did not serve any discovery on this issue until April 24, 2014, just eight days before the hearing on the Mains' summary judgment motion, the last of the motions submitted on the vicarious liability issue. Nor did

they seek to depose Mr. Sander until the oral motion at the May 2, 2014, hearing.<sup>3</sup>

Accordingly, the Trial Court was fully justified in denying Tensar's CR 56(f) motion because of Tensar's inexcusable delay in seeking discovery on this issue. The only case Tensar cites where a trial court's decision on a CR 56(f) motion was overturned, *Coggle v. Snow*, is plainly distinguishable because the plaintiff had retained new counsel a week after the motion for summary judgment was filed, and the plaintiff therefore should not have been "penalized for the apparently dilatory conduct of his first attorney," where there was no indication that the other party would be prejudiced. 56 Wn. App. at 508.

None of those factors are present here. On the contrary, allowing Tensar to seek additional discovery at this late date threatens serious injustice for the Mains. They are still waiting for compensation for damages they suffered from the April 25, 2011, collision, now more than six years ago. The trial date, originally set for May 6, 2014, was repeatedly continued, in many cases to accommodate Tensar's counsel, and ultimately was delayed for more than two years, to August 2016. Granting the continuance to Tensar to rescue it from its failure to diligently pursue discovery would likely have delayed the trial further.

---

<sup>3</sup> Indeed, Mr. Sander never responded to the April 24 discovery requests and Tensar neither requested a response nor moved to compel discovery. CP 427-435.

And granting Tensar's claim now will likely add years to the delay the Mains have experienced in receiving compensation for their injuries.

Because justice delayed is justice denied, Tensar's claim regarding CR 56(f) should be rejected. In any event, as we now demonstrate, the Trial Court properly rejected the 56(f) motion because it would not have led to the discovery of any material evidence.

**2. The Trial Court Properly Granted Summary Judgment to the Mains On the Issue of Tensar's Vicarious Liability.**

Because Mr. Sander was traveling on Tensar business in a vehicle provided by Tensar, Tensar is vicariously liable for Sander's negligence while operating the vehicle.

Under Washington law, an employee generally is not considered to be acting within the scope of employment when commuting to or from work. *Dickinson v. Edwards*, 105 Wn.2d 457, 467, 716 P.2d 814, 819 (1986) (*cit. omitted*). But Washington has for decades recognized an exception to this general rule: where, as here, the employee is traveling in a vehicle furnished by his employer as an incident to his employment, the employer is liable for the employee's negligence in operating the vehicle. *Westinghouse Elec. Corp. v. Dep't of Labor & Indus.*, 94 Wn.2d 875, 880, 621 P.2d 147, 150 (1980) (*en banc*); *Aloha Lumber Corp. v. Dep't of Labor & Indus.*, 77 Wn.2d 763, 766, 466 P.2d 151, 153 (1970). Under

this rule, it does not matter whether the employer supplies its employees with the vehicles or reimburses its employees for the use of their own vehicles. *Westinghouse*, 94 Wn.2d at 880 (citing *Aloha Lumber*). Here, Tensar concedes that it provides a monthly allowance and insurance for Mr. Sander's use of a vehicle for Tensar's business purposes. Tensar Br. 3-4. This exception therefore applies as a matter of law. *Michael v. Laponsey*, 123 Wn.App. 873, 99 P.3d 1254 (2004).

Further, under Washington's "dual purpose" doctrine, "[i]f the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own," and the employer is not liable only if "the work has had *no part* in creating the necessity for travel." *Cochran Elec. Co. v. Mahoney*, 129 Wn.App. 687, 696, 121 P.3d 747, 752 (2005) (*cit. omitted*). *See also McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 499, 224 P.2d 627, 630 (1950). This is true even if, during the work-related trip, the employee sees a movie. *Morris v. Dept. of Labor & Indus.*, 179 Wn. 423, 38 P.2d 395 (1934). Such a "recreational deviation" is "immaterial" to the employer's liability. *Cochran*, 129 Wn. App. at 695.

Accordingly, Tensar's primary claim (Br. 17-19) -- that it should be allowed to conduct discovery as to whether Mr. Sander saw a movie while traveling on the sales call for Tensar -- would not change Tensar's

liability, even if true, which is far from certain. *See* Sander Br. as to Tensar at 21-22.<sup>4</sup>

Tensar's claim (Br. 16) that it should be permitted to conduct discovery because of Sander's supposedly inconsistent statements in discovery is equally without merit. As a factual matter, there is no contradiction. At deposition, Mr. Sander was asked, "Were you going home because you were off work? Had you worked that day," to which he answered, "Yes." CP 94. In response to an interrogatory, Mr. Sander stated he "was on his way home when the accident occurred, but does not recall where he was coming from." CP 77. Tensar claims these statements contradict Mr. Sander's later declaration that he was "returning to my home office after completing a Tensar customer sales call" and that "[t]he only purpose I had for driving my vehicle at the time of the accident was to fulfill my employment duties." CP 105.

There is no contradiction. The deposition question was compound, and his "yes" response can be understood to answer whether he had "worked that day." Nor is there any inconsistency with interrogatory response. That he was returning "home" does not say anything about whether he was returning from a business or purely personal trip,

---

<sup>4</sup> One additional possibility not raised by Sander for the fact that an entry for a movie theater showed up on Mr. Sander's checking ledger on the day of the accident, which was a Monday: it is generally the case that debit card purchases made on a Saturday or Sunday do not show up on one's checking account ledger until the following Monday.

especially given the undisputed fact that he conducted Tensar's business from a home office. The subsequent statements in his declaration merely fill in these missing details. Hence, the Trial Court properly concluded that these statements are not "polar opposites," but that when read together, "clarification was accomplished." CP 412.

As our Supreme Court has observed, a party opposing summary judgment "must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion," and it is insufficient to avoid summary judgment, as Tensar has done here, to "recite the incantation, 'Credibility,' and have a trial on the hope that a jury may disbelieve factually uncontested proof." *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 627, 818 P.2d 1056, 1060 (1991); *Laguna v. Washington State Dep't of Transp.*, 146 Wn. App. 260, 266-67, 192 P.3d 374, 377 (2008).

The Trial Court therefore properly granted summary judgment on the issue of Tensar's vicarious liability for Sander's negligence in operating his vehicle while traveling on Tensar's behalf. *See Dickinson*, 105 Wn.2d at 466-67 (summary judgment on vicarious liability of employer is proper where affidavits demonstrate no issue of material fact).

**C. The Jury's Verdict Finding That Mr. Main Suffered Serious Economic Losses as a Result of the Collision is Fully Supported By Substantial Evidence.**

The jury awarded Main \$150,000, a fraction of the economic damages established by substantial lay and expert testimony. The record evidence overwhelmingly supports the conclusion that the Mains suffered at least the \$150,000 in economic loss awarded by the jury because his concussion, suffered in the collision with Mr. Sander, caused severe functional deficits that forced Denali to fire Mr. Main and that have prevented him from the resuming his career. In addition, unchallenged evidence shows the Mains face future rehabilitation costs of \$425,000, which independently justifies the \$125,000 award of economic damages even if the evidence of lost employment is disregarded.

According to Sean Updegrave, the Denali Vice President who played a key role in Mr. Main's hiring, Mr. Main was "specifically hired" to become vice president of Denali's new business unit to provide IT support to businesses. (S. Updegrave 11:12-15:4, 74:21-22 Aug. 11, 2016). Because of Mr. Main's ability to successfully complete "very critical and very complex projects," "his reputation in the industry," and the "breadth of his clients," Denali viewed Mr. Main's hiring as "a no-brainer," (S. Updegrave 20:16-19, Aug. 11, 2016), and considered only Main to lead Denali's new division (Gerhardt 15:10-11, Aug. 15, 2016).

Mr. Updegrove, Mr. Main, and Chris Gerhardt, the President of Denali, all testified that Mr. Main was offered "full-time employment" by Denali with an annual base compensation of \$150,000 per year plus bonuses conservatively estimated at \$20,000 annually. (J. Main 58:20-59:7, Aug. 9, 2016, 165.12-20, Aug. 10-11, 2016; Gerhardt 15:12-16:13, Aug. 15, 2016; S. Updegrove 21:8-16, Aug. 11, 2016).

Mr. Gerhardt testified that if Mr. Main had not been fired because of his inability to perform after the collision, the full-time W-2 position as Vice President would have been his:

Q. If Sean [Updegrove] had not decided to let Jeff [Main] go, would the full-time W-2 position have been Jeff's if he wanted it?

A. Yes.

(Gerhardt 23:15-17, Aug. 15, 2016). Mr. Updegrove's testimony was substantially identical:

Q. Mr. Updegrove, would the W-2 job at Denali been Jeff's if he had wanted it, but for the accident?

A. Yes.

(S. Updegrove 81:16-19, Aug. 11, 2016).

Mr. Main's lost earning capacity was at least \$515,210, and could be as much as \$1,040,775, depending on the assumptions used about Mr. Main's remaining work life and his degree of disability. (Knowles 15:12-16:8, 20:16-23:1, 25:14-25, Aug. 18, 2016). Yet the jury awarded the

Mains only \$150,000 in economic damages. CP 465. Because the jury's verdict was well within the range of this evidence, Sander's substantial evidence challenge to that verdict must be rejected.

Further, Jury Instruction No. 9 directed the jury to consider two elements of economic damages: future earnings and employment capacity *and* "[t]he reasonable value of necessary medical care, treatment, and services with reasonable probability to be required in the future." CP 453. Dr. Perrillo testified that, because of the concussion, Mr. Main will require psychological counseling and rehabilitation costs of \$85,000 per year for at least five years, (Perrillo 110:14-111:6, Aug. 11, 2016), a total of \$425,000. Accordingly, even if Sander is correct that Mr. Main did not adequately prove his claim of lost future earnings, the jury's award of economic damages is independently justified (and if anything far lower than it should be) by the documented costs of Mr. Main's future treatments. Sander does not challenge this evidence and there is, therefore, no reason to address his claims regarding Mr. Main's future employment prospects.

In any event, Sander's claim (Br. 6-7) that, because Mr. Main was a Denali contract employee at the time of the accident, Dr. Knowles based his testimony on impermissible speculation, is without merit. Dr. Knowles based his testimony on Mr. Main's entire work history, not just the full-

time position at Denali, and testified that the \$170,000 figure he used from the Denali job “definitely fits with [Mr. Main’s] history,” (Knowles 25:8-25, Aug. 18, 2016), and even if he had continued as a contract employee rather than a full-time employee, the \$170,000 figure represented a good estimate of what Mr. Main would have earned and, in fact, he “would have made maybe more than” \$170,000. (Knowles 28:8-18, Aug. 18, 2016).

Sander also asserts (Br. 7) that this evidence was based “solely” on the testimony of Sean Updegrave, and should be rejected because Mr. Updegrave did not have hiring authority. Neither assertion is true. At trial, Mr. Gerhardt, the President of Denali, Mr. Updegrave, a Denali Vice President, and Mr. Main each testified that the full-time position for Mr. Main would have become a reality if the collision had not forced Mr. Main’s firing. Mr. Gerhardt testified that, consistent with Denali’s usual practice of initially bringing on full-time hires as consultants, it was “the plan” to convert Mr. Main to a full-time W-2 Vice President position. (Gerhardt 46:6-12, Aug. 15, 2016), and that he “pretty much handle[d] hiring and firing” for Denali (*Id.* at 11:11-15; 45:4-46:10, Aug. 15, 2016).

Mr. Updegrave testified based on his personal knowledge from his direct role in creating the position that Mr. Main would have filled (S. Updegrave 19:17-20:11, Aug. 11, 2016), that Mr. Main’s hiring as a full-

time employee was “definite,” “something that was going to happen,” and, “more than implied.” (S. Updegrove 52:12-13, 53:13, Aug. 11, 2016).

Sander also argues (Br. 7-8) that Denali’s owner, Majdi Daher, had final authority to make the hiring decision. But both Mr. Gerhardt and Mr. Updegrove testified that Mr. Main’s position had already been discussed with and approved by Mr. Daher. (Gerhardt 11:16-12:8, 14:12-24, Aug. 15, 2016; S. Updegrove 19:17-20:11, 21:6-11, Aug. 11, 2016).

Sander also argues (Br. 8) that a person named Nathan Appleton had been offered the position rather than Mr. Main. But Mr. Gerhardt specifically testified that Mr. Appleton’s presence at Denali would have made no difference to Mr. Main’s hiring:

Q. ... you had some ... questions asked on cross-examination about Nathan Appleton. Do you remember that.

A. Yes.

Q. Regardless of what happened with Nathan Appleton after Jeff [Main] was fired, if Sean [Updegrove] did not decide to let Jeff go, would the full-time W-2 position have been Jeff[’s] if he wanted it?

A. Yes.

(Gerhardt 58:20-59:3, Aug. 15, 2016).

In any event, neither Daher nor Appleton testified at trial and the Defendants offered no evidence to contradict the definitive proof offered by Plaintiffs that Mr. Main would have become a full-time Vice President at Denali but for the collision. And, given the unequivocal statements

from Msrs. Gerhardt and Updegrove on this issue, had Defendants offered testimony from either Mr. Appleton or Mr. Daher, it could at most only serve to challenge the credibility of those witnesses who actually testified. The credibility and weight to be accorded the evidence is, of course, “within the exclusive province of the jury.” *Maytown Sand & Gravel LLC v. Thurston Cty.*, 198 Wn. App. 560, 585, 395 P.3d 149, 162 (2017).

In addition, Sander argues (Br. 8-9) that Dr. Knowles should not have been permitted to testify based on the statement provided by Mr. Updegrove regarding Mr. Main’s employment opportunities at Denali. But, for the reasons specified above, Mr. Updegrove’s testimony was not speculative and, in any event, ER 703 authorizes expert witnesses to testify based upon written information they have been provided rather than upon direct personal knowledge. *Volk v. DeMeerleer*, 187 Wn.2d 241, 278, 386 P.3d 254, 263 (2016); *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, 333 P.3d 388, 392 (2014); *Katare v. Katare*, 175 Wn.2d 23, 39, 283 P.3d 546, 554 (2012). Whether the evidence is sufficient to support their expert opinion is a credibility issue for the jury and does not provide any basis for the jury’s verdict to be overturned. *Katare*, 175 Wn.2d at 39.

Finally, Sander (Br. 11-12) cites a pair of cases involving breach of employment contracts, *Bakotich v. Swanson*, 91 Wn. App. 311, 957 P.2d 275 (1998), and *McNaulty v. Snohomish School Dist. No. 201*, 9 Wn. App. 834, 515 P.2d 523 (1973), to support the claim that Mr. Main's employment prospects were speculative. Both cases involve claims for contract damages under contracts where the employee was terminated and the contract provided for termination at the will of the employer. By contrast, this case involves a tort claim for lost employment opportunities, and Mr. Main's obligation was to demonstrate on a more-probable-than-not basis that Sander's negligence caused loss of employment opportunities. Mr. Main did so, demonstrating that he would have secured a non-terminable employment contract with Denali with a salary of \$150,000 per year plus a \$20,000 per annum bonus but for the effects of the collision. And, even if he had not, Dr. Knowles testified that, based on Mr. Main's employment history, he would have continued to obtain employment as a contractor with remuneration at the \$170,000 level or better.

The jury found that Mr. Main met his burden of demonstrating substantial economic losses arising from the collision. Based on the evidence in the record, no rational jury could have concluded that the

accident did not deprive Mr. Main of significant employment opportunities.

**D. The Expert Evidence Documenting Mr. Main's Concussion Diagnosis and Causation Was Admissible and Compelling.**

The trial court's discretionary determination that the jury could consider Dr. Tay's differential diagnosis of concussion was similarly not a manifest abuse of discretion. Dr. Tay, an expert neurologist, testified that, based on his own examination of Mr. Main, Mr. Main suffered a concussion as a result of the collision with Mr. Sander, and that Mr. Main's cognitive declines and personality changes were attributable to the concussion. (Tay 38:1-3, 48:17-49-8, Aug. 16, 2016). Dr. Tay's diagnosis was repeatedly confirmed by other medical professionals who examined Mr. Main.

Shortly after the collision, Dr. Kirk Petheram, Mr. Main's chiropractor, noted that Mr. Main was suffering from a variety of symptoms consistent with concussion. (Petheram 7:1-13, 8:3-20, Aug. 15, 2016). Nancy Adams, an Advanced Registered Nurse Practitioner, who also examined Mr. Main shortly after the collision and also diagnosed Mr. Main's concussion. (J. Main 83:4-84:25, Aug. 10-11, 2016). The concussion was also independently diagnosed by Drs. Fike (Tay 81:17-25, Aug. 16, 2016) and Ferguson of Group Health (Ferguson 40:5-14, 58:18-19, Aug. 18, 2016), and again by Dr. Perrillo, who concluded that Mr.

Main suffered a Grade 2, or possibly Grade 3, concussion. (Perrillo 32:10-36:15, Aug. 11, 2016). Finally, the concussion diagnosis was confirmed by Dr. Power. (Power 11:6-14, Aug. 16, 2016).

Apparently believing all these medical professionals were delusional, Sander claims (Br. 12-16) that Dr. Tay's testimony should not have been admitted because neither Dr. Tay nor Nurse Adams directly diagnosed Mr. Main with a concussion.

This is wrong. As the Trial Court noted, it was "quite clear" that Dr. Tay "made his own diagnosis" and did not "merely adopt[] a diagnosis as presented by ARNP Adams." (Tay 29:5-14, Aug. 16, 2016). Dr. Tay's testimony fully supports the Trial Court's conclusion:

- Q. Did you make an independent diagnosis of concussion based in part on the larger battery of data [from Dr. Tay's neurological testing]?
- A. Yes.
- Q. And it is your independent opinion, not Nancy Adams', not something that was said by a chiropractor... It's your own independent decision or determination and diagnosis that Jeff [Main] suffered a concussion, correct?
- A. It is, yes.

(Tay 78:23-79:6, Aug. 16, 2016).

Sander similarly claims (Br. 15-16) that Nurse Adams did not independently diagnose Mr. Main's concussion. Again this is simply incorrect. Nurse Adams made her diagnosis after independently examining Mr. Main and Dr. Tay testified that, as an Advanced Registered

Nurse Practitioner, Nurse Adams was fully qualified to make this diagnosis, and that he agreed with the diagnosis. (Tay 36:19-38:3, Aug. 16, 2016; CP Ex. 2 (Group Health medical records)).

Even if Sander were correct that there was some flaw in the diagnoses made by Dr. Tay and Nurse Adams, any error was harmless because the diagnosis was, as noted above, independently confirmed by Drs. Fike, Ferguson, Perrillo, and Power. CP Exs. 1, 3, 4 & 6 (medical records).

In addition, Mr. Main himself reported that, after the collision, he was “not the same guy” (J. Main 118:21-22, Aug. 10-11, 2016), his wife testified that “he wasn’t the same guy” and “something was seriously wrong” (L. Main 16:4, 17:14, Aug. 16, 2016), and his closest work colleagues testified that they observed changes in Mr. Main after the collision that were a “night and day” difference and that his ability to complete tasks was “completely the opposite” of what it had been before the collision. (S. Updegrave 29:24-30:5, Aug. 11, 2016). As the Trial Court properly observed, even in the absence of direct expert testimony that the collision caused Mr. Main’s concussion, the jury could draw a “reasonable inference” from this evidence that the collision caused Mr. Main’s concussion and produced the fallout of consequences arising from the concussion. (Att. A at 20:20-21). Accordingly, even if the Court

concludes that Dr. Tay's evidence should be excluded, the jury's award should be affirmed because there remains an abundance of unchallenged evidence to support the jury's conclusions. *See, e.g., McLaughlin v. Cooke*, 112 Wn.2d 829, 839, 774 P.2d 1171 (1989) ("If, from the facts and circumstances and the medical testimony given, a reasonable person can infer the causal connection exists, the evidence is sufficient.")

Sander also claims (Br. 13-14, 17) that Dr. Tay's tests of Mr. Main all came back "normal." But this is misleading. Dr. Tay testified that he administered only a "shortended" neurological exam, and patients can test "normal" even though they have experienced traumatic brain injury. (Tay 47:23-28:11, Aug. 10, 2017). Similarly, Dr. Tay testified that the other tests conducted on Mr. Main, including MRI and CT scan, can detect only major damage, such as bleeding on the brain, and not the microscopic brain damage that often occurs because of concussion. In fact, Dr. Tay testified, "I would say a majority of brain injury and concussion show no abnormality on our standard CT or MRI," and even if the MRI shows "axonal shear injury, ... it still doesn't tell you anything about the clinical picture of what the patient looks like." (*Id.* at Tay 104:3-17). Similarly, Dr. Perrillo testified that CT scans and similar diagnostic tools are inadequate for diagnosing concussion because concussion often occurs "at the microscopic level" and "those other scans cannot go into your brain on

a microscopic level,” so a normal CT scan is expected in cases of traumatic brain injury like the one suffered by Mr. Main. (Perrillo 99:17-101:11, Aug. 11, 2016).

That is why, based on the fact that Mr. Main was exhibiting symptoms of concussion, Dr. Tay referred Mr. Main to “a neuropsychologist for a deeper insight into executive function and cognitive ability.” (Tay 48:2-8, Aug. 10, 2016). These deeper insights, provided by Dr. Ferguson and, to a greater extent, by Dr. Perrillo, confirmed that Mr. Main suffered a concussion that caused severe cognitive and emotional deficits. And, as Dr. Perrillo testified, neuropsychological testing can reveal damage to higher cortical functions that are not revealed by standard medical testing. (Perrillo 182:6-185:12, Aug. 17, 2016).

Even Dr. Duane Green, a neuropsychologist who testified for Defendant Tensar, agreed that Mr. Main suffers from neurocognitive difficulties that are, on a more probably than not basis, the result of the concussion. (Green, 103:2-5, Aug. 22, 2106). He also testified, based on his differential analysis and his testing, that Mr. Main was not impaired pre-accident, (*Id.* at 118:22-25), and that there was no evidence to suggest that Mr. Main’s concussion symptoms -- headaches, fatigue and anxiety-related issues – existed prior to the accident. (*Id.* at 119:8-22.)

Finally, the Trial Court correctly ruled that these issues go to the weight and credibility of Dr. Tay's testimony, not its admissibility. (Tay 29:13-21, Aug. 16, 2016). Defendants were permitted to cross-examine Dr. Tay extensively on both the results of CT scans and related tests (Tay 57:21-60:18, Aug. 16, 2016), and the extent to which Dr. Tay relied on the results obtained by other medical professionals and Mr. Main's self-reports. (Tay 59:8-64:24, Aug. 16, 2016). As noted above, these issues of credibility are the exclusive province of the jury and provide no basis for overturning the jury's verdict. Further, the jury's verdict is fully supported by the evidence, and Sander fails to demonstrate any element of the jury's verdict that was unsupported by substantial evidence, even if Dr. Tay's testimony is disregarded.

**E. The Trial Court's Evidentiary Rulings Were Correct.**

Sander claims (Br. 20-23) that the jury's verdict was improperly influenced by other alleged evidentiary errors. But Sander fails to demonstrate any error on the part of the Trial Court or any prejudice.

**1. Counsel's Joke Email to Mr. Main's Expert Witness Was Properly Excluded.**

Sander argues (Br. 16) that, to support Defendants' theory that the Main's case was "orchestrated" by counsel, the Trial Court was required to admit an email from Mr. Main's counsel, Jed Powell, to Mr. Main's

forensic economics expert, Dr. Knowles, which read, “Please delete this email.” (Br. 16). But the email was clearly intended as a joke, as evidenced by the fact that the quoted sentence was followed by a “smiley face” emoji, CP 675, and Dr. Knowles clearly understood the email to be a joke, CP 676, a fact which Defense Counsel conceded. RP 78:8-9 (Jan. 26, 2016).

The Trial Court was entitled to rule that the prejudicial value of admitting that statement from the email outweighed its evidentiary value, concluding “there may be some marginal, minimal relevance” as to Dr. Knowles’ bias, but “I think it is far outweighed by the prejudicial value because of the actual statement within that email, which clearly was not a statement made with any seriousness about destroying the record.” RP 204:5-11. Evidentiary rulings of this type are reversed “only in the exceptional circumstance of a manifest abuse of discretion.” *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610, 621 (1994); *Ma’ele v. Arrington*, 111 Wn.App. 557, 564-65, 45 P.3d 557, 561 (2002) (“the trial court has discretion about the scope and extent” of cross-examination).

As the Trial Court’s ruling makes clear, the evidence created a real danger of prejudice by implying that Dr. Knowles had destroyed evidence when this was manifestly untrue. RP 204:5-11. Further, Defendants used every piece of evidence Sander cites (Br. 17-19) for his “orchestrated by

counsel” theory to attack Plaintiffs’ witnesses on cross-examination -- all but two of Sander’s citations to the record are from cross-examination of Plaintiffs’ witness, although they did not use the email to attack Dr. Knowles in cross-examination (Knowles 49:1-101:23, 105:17-111:1, Aug. 18, 2016), even though the Trial Court permitted them to use a redacted version of the email. RP 205:1-14.

In short, this is simply another issue of witness credibility committed to the jury, and nothing to suggest Sander was prejudiced because the evidence was entirely cumulative. *Mutual of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, 178 Wn. App. 702, 729, 315 P.3d 1143, 1156 (2013) (“[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole” (cit. omitted)).

**2. Evidence of the Mains’ Participation in Pastoral Counselling Was Properly Admitted.**

Relying on ER 610, Sander claims (Br. 20-21) that the Court erred in failing to bar Lori Main from testifying about the Mains’ participation in pastoral counseling. But ER 610 on its face bars admission of evidence of “the beliefs or opinions of a witness on matters of religion” to show that “the witness’ credibility is impaired or enhanced.” Neither test is met here.

After Defendant's counsel asked Mrs. Main about whether she sought counseling after the collision (L. Main 66:19-25, Aug. 16, 2016), Mrs. Main testified that she sought counseling individually with her pastor, weekly with a "small group" (without referencing the fact that the group was church-based), and that she "very much rel[ied] on her faith" to get her through the difficult times after the collision. (*Id.* at 67:1-3, 69:25). On its face, this is not testimony about Mr. Main's religious "beliefs or opinions," but testimony that he sought counselling and solace in religion, which is material evidence that collision caused personal suffering and marital trauma.

Further, contrary to Sander's claim, ER 610 is not a blanket prohibition against admission of evidence regarding religious affiliation. It only bars such evidence if used to show that a "witness' credibility is impaired or enhanced." The evidence was not admitted to bolster Mrs. Main's credibility as a witness. Rather, it was admitted to demonstrate that Mrs. Main had, in fact, suffered marital problems and loss of consortium after the collision, resulting in her seeking relief in counseling and religious experience. ER 610 therefore does not apply and Sander's claim is wrong on its face. *See Matter of Lui*, No. 92816-9, 2017 WL 2691802, at \*16 (Wash. June 22, 2017) (no violation of ER 610 where "questioning was calculated to provide foundation for permissible

arguments and not meant to impermissibly affect the weight or credibility” of testimony). In any event, Sander offers not even a suggestion of how these two isolated references to religion were in any way prejudicial.

**3. Mr. Main’s Passing References To His Own Insurance Did Not Create Prejudice.**

Sander claims (Br. 21-23) that Mr. Main’s four passing references to insurance violated ER 411, which provides that evidence of insurance is “not admissible upon the issue whether the person acted negligently or otherwise wrongfully.” But Sander’s claim fails on its face because whether Sander “acted negligently or otherwise wrongfully” was not an issue in this trial. Sander’s negligence was admitted before the trial began.

In any event, there is nothing to indicate prejudice from this testimony. On the contrary, Defendants did not object to any of the four references Mr. Main made to insurance and, in each case, Mr. Main was referring to *his own* insurance. (J. Main, 73:6-9, 82:17-22, 97:10-13, 265:2-3, Aug. 10 & 11, 2016). This could not possibly affect how the jury viewed *Sander’s* negligence because it had nothing to do with Sander. If anything, references to the *Main’s* insurance were likely beneficial to Sander because the jury might infer that the Mains were protected even if no damages were awarded. *See, e.g., Kubista v. Romaine*, 87 Wn.2d 62, 68, 549 P.2d 491 (1976) (“even when the issue of liability is present, rules

of evidence which prohibit the ... existence of liability insurance do not prevent such evidence being introduced if admissible for another proper purpose”); *Terrell v. Hamilton*, 189 Wn. App. 1041 (2015) (under ER 411, “evidence of insurance is prohibited only ‘upon the issue whether the person acted negligently’” (citation omitted)) (unpublished opinion cited under GR 14.1(a)).

**4. Dr. Perrillo’s Passing References To His Work for Veterans Was Not Prejudicial.**

Sander claims that two passing references to working with veterans, the first to which there was no objection (Perillo 8:17-9:1, Aug. 11, 2016), and the second of which was in direct answer to Defense Counsel’s question about Dr. Perrillo’s work history (Perillo 162:25-163.5, Aug. 17, 2016),<sup>5</sup> should have been excluded. But Sander offers no evidence that these two references, which constitute only about ten words out of Dr. Perrillo’s 214 pages of testimony, prejudiced the jury.

In fact, the record demonstrates that there was no prejudice. The Trial Court struck the answer to which Defendants objected (Perillo 167:19-20, 175:19, 179:12-18), and instructed the jury to disregard evidence that has been stricken. CP 442 (Jury Instruction No. 1). This instruction cured

---

<sup>5</sup> Dr. Perrillo testified outside the presence of the jury that performing neuropsychological evaluations on veterans is part of his employment (Perrillo 170:18-25). Accordingly, defense counsel’s questions about Dr. Perrillo’s employment history clearly opened the door to this evidence.

any error. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653, 661 (2012) (juries are presumed to follow judge's curative instructions).

In any event, Sander offers nothing to substantiate the claim that Kitsap County jurors would be unfairly swayed by an expert who works with veterans. In fact, it is just as likely that Kitsap jurors would assume anyone with an expertise in diagnosis and treating traumatic brain injuries would, in light of our country's long involvement in the wars in Iraq and Afghanistan, work with veterans in the ordinary course of his practice.

#### **IV. CONDITIONAL CROSS-APPEAL OF PLAINTIFFS JEFFREY AND LORI MAIN.**

In the unlikely event that this Court remands for a new trial, the Mains cross-appeal the Trial Court's improper decision to exclude Dr. Perrillo's testimony that, based on a differential diagnosis arising from his examination of Mr. Main's medical records and the battery of neuropsychological tests conducted by Dr. Perrillo, Dr. Perrillo concluded that the concussion suffered by Mr. Main was caused by the April 25, 2011, collision with Sander.

##### **A. Assignment of Error**

The Trial Court erred by prohibiting Dr. Richard Perrillo, a qualified expert in neuropsychology, from testifying that the collision with Gerhard Sander caused Jeffrey Main to suffer a concussion.

**B. Introduction.**

**1. The Issue Need Only Be Decided If The Court Concludes That Tensar's Appeal Is Meritorious and That Sander's Challenge to the Evidence of Causation Is Also Meritorious.**

For the reasons noted at the outset of this brief, the Court need not address this cross-appeal if the Court determines, as it should, that Tensar is liable as a matter of law for Sander's negligence in operate a vehicle supplied by Tensar that Sander was using at the time of the accident for Tensar company business. Further, this cross-appeal involves a single issue, whether Dr. Perrillo should have been permitted to testify, based on his differential diagnosis, that Mr. Main's concussion was caused by the collision with Mr. Sander's vehicle on April 25, 2011. There is already an abundance of causation evidence in the record, and this cross-appeal need be addressed only if the Court concludes that this evidence was insufficient to support the jury's verdict.

**2. Statement of Facts.**

Dr. Perrillo, a highly-trained neuropsychologist with nearly four decades of experience, testified as an expert witness at trial. The bulk of his testimony, in which he described the extensive battery of neuropsychological tests administered to Mr. Main and the severe cognitive and emotional deficits those tests showed, was admitted.

However, Dr. Perrillo was also prepared to testify that, through use of standard differential diagnosis tools and a review of Mr. Main's medical records, the crash with Mr. Sander's vehicle is the cause of Mr. Main's concussion and the resulting cognitive and emotional impairments. Att. A at 14:17-15:17. The Trial Court, however, barred Dr. Perrillo from testifying to causation, ruling that "[h]e can certainly testify to all of his tests and so forth, but to make that final connection that ... the accident was the cause, I don't believe he's qualified to do that. And that's my ruling." *Id.* at 22:24-23:3.

**C. Argument: The Trial Court Committed Reversible Error In Excluding Dr. Perrillo's Testimony That The Collision Caused Mr. Main's Concussion.**

The Trial Court committed an error of law in holding that a neuropsychologist is not qualified to offer an opinion regarding the effect of an accident on his patient's cognitive functions. This legal error is reviewed *de novo*. *Frausto v. Yakima HMA, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776, 778 (2017).

Dr. Perrillo was qualified to testify as to the cause of Mr. Main's concussion under ER 702 by virtue of the "length and range" of his experience, including his educational background, background in academia, and years of experience in treating people with concussions and other forms of traumatic brain injury. The relevant question is "[t]he scope

of the expert's knowledge, not his or her professional title." *Frausto*, 118 Wn.2d at 234 (citation omitted). Hence, there is no requirement that an expert witness hold a specific degree, training certificate, or membership in a specific professional organization in order to testify on a particular issue, *Johnston-Forbes v. Matsunaga*, 181 Wn.2d at 355, and our courts have specifically rejected the proposition that only a medical expert may testify as to the cause of physical injuries in a vehicle collision. *Ma'ele v. Arrington*, 111 Wn. App. 557, 563-64, 45 P.3d 557, 560-61 (2002).

And it is well established under Washington law that an expert witness may use differential diagnosis, as Dr. Perrillo was prepared to do here, to testify as to the cause of an individual's medical condition. As our Supreme Court has stated:

Many medical opinions on causation are based upon differential diagnoses. A physician *or other medical expert* may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms.

*Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 610, 260 P.2d 857, 866 (2011) (emph. added). Further, the Supreme Court has ruled that expert testimony on causation is admissible if the expert's opinion on "the cause of the claimant's disease" is "based on reasonable medical certainty even though the doctor cannot rule out all other possible causes without resort to delicate brain surgery," and is "sufficient to prove causation if,

from the facts and circumstances given and the medical testimony given, a reasonable person can infer that a causal connection exists.” *Lewis v. Stinson Lumber Co.*, 145 Wn. App. 302, 319-20, 189 P.3d 178, 188-89 (2008).

Dr. Perrillo’s testimony easily meets this standard. The standardized neuropsychological testing Dr. Perrillo conducted on Mr. Main is objective, reliable, uses quantitative results, has been validated by decades of scientific testing, and is widely used across the world (Perrillo 18:25-19:8, 42:11-46:15, 103:14-15, Aug. 11, 2016, 210:20-214:17, Aug. 17, 2016). Further, Dr. Perrillo’s differential diagnosis was based on both a review of Mr. Main’s extensive medical records and on a battery of neurological tests, (Perrillo 17:11-17, Aug. 11, 2016), which found no evidence of dysfunction or brain injury prior to the collision. (Perrillo 17:11-17, Aug. 11, 2016).

In fact, neuropsychologists are better equipped to testify as to the cause of concussions and other forms of closed-head traumatic brain injury because “the predictive validity” of standard medical tests such as MRIs and CT “are not as good as neuropsychological tests” because those scans “cannot look at” the micro-scale damage to the brain often associated with concussion. (Perrillo 180:6-14, Aug. 17, 2016; *see also id.* at 99:17-101:6 (MRIs and CAT scans may not uncover micro-scale brain

damage from concussion); *Tay* 39:1-10, Aug. 16, 2016 (a normal CAT scan does not rule out brain damage or concussion)). Accordingly, as the Supreme Court of Indiana has held, as a neuropsychologist, Dr. Perrillo was “uniquely qualified” to testify regarding “the existence and evaluation of a brain injury,” because brain injuries like concussions “often go undiagnosed by medical professionals for various reasons.” Neuropsychologists should therefore be permitted to testify as to causation where, as here, “the possible causes” of traumatic brain injury can be “narrowed down” through differential diagnosis. *Bennett v. Richmond*, 960 N.E.2d 782, 789 (Ind. 2012).

Although the specific question of whether a neuropsychologist is qualified to testify on the causation of a traumatic brain injury is an issue of first impression in Washington, the Trial Court’s decision is contrary to great weight of authority from other jurisdictions where the question has been addressed specifically.

Those courts have concluded that, under analogues to ER 702, neuropsychologists are experts on the causation of traumatic brain injury and, therefore, may properly provide expert testimony on the cause of concussions and related brain trauma. *Hogland v. Town & Country Grocery of Fredricktown, Inc.*, 2015 WL 3843674 at \*20-22 (E.D. Ark. 2015); *Bennett v. Richmond*, 960 N.E.2d at 789-93; *Huntoon v. TCI*

*Cablevision of Colo., Inc.*, 969 P.2d 681, 690–91 (Colo.1998) (en banc);  
*Adamson v. Chiovaro*, 308 N.J.Super. 70, 705 A.2d 402, 405–06  
(App.Div.1998); *Landers v. Chrysler Corp.*, 963 S.W.2d 275, 281-82  
(Mo.Ct.App.1997), *overruled on other grounds by Hampton v. Big Boy  
Steel Erection*, 121 S.W.3d 220, 223, 226 (Mo.2003) (en banc);  
*Cunningham v. Montgomery*, 143 Or.App. 171, 921 P.2d 1355, 1358–60  
(1996) (en banc); *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d  
882, 886–87 (Iowa 1994); *Seneca Falls Greenhouse & Nursery v. Layton*,  
9 Va.App. 482, 389 S.E.2d 184, 186–87 (1990); *Valiulis v. Scheffels*, 191  
Ill.App.3d 775, 138 Ill.Dec. 668, 547 N.E.2d 1289, 1296–97 (1989);  
*Sanchez v. Derby*, 230 Neb. 782, 433 N.W.2d 523, 525 (1989) (per  
curiam); *Fabianke v. Weaver*, 527 So.2d 1253, 1257 (Ala.1988); *Madrid  
v. Univ. of Cal.*, 105 N.M. 715, 737 P.2d 74, 76–78 (1987); *Howle v.  
PYA/Monarch, Inc.*, 288 S.C. 586, 344 S.E.2d 157, 160–61 (Ct.App.1986).  
Because the states generally use evidentiary rules similar to Washington’s,  
they may be relied upon as valid authority on the question of the  
admissibility of neuropsychological testimony. *See Frausto*, 188 Wn.2d at  
239-41 (adopting holdings from states regarding admissibility of causation  
testimony from Advanced Register Nurse Practitioners where “the common  
thread” among cases is “reasoning based on ... their rules of evidence”).

By contrast, the states that have rejected expert testimony on causation of brain injuries from neuropsychologists have generally done so on the the basis of state statutes defining specific roles for psychologists. *See, e.g., Grenitz v. Tomlian*, 858 So. 2d 999, 1002 (Fla. 2003); *Chandler Exterminators, Inc. v. Morris*, 262 Ga. 257, 258, 416 S.E.2d 277, 278 (1992), *overruled by statute as stated in Sinkfield v. Oh*, 229 Ga.App. 883, 495 S.E.2d 94, 97 (1997). Our Supreme Court has rejected reliance on authority from other states in determining the admissibility of expert medical testimony where those courts rely on “explicit limitations and exclusions in their state statutes” regarding the permissible scope of practice. *Frausto*, 188 Wn.2d 235-39. Accordingly, the Court should disregard authorities from the minority of states that do not allow neuropsychologists to testify as to the cause of brain injuries.

The Trial Court’s conclusion that neuropsychologists are categorically barred from testifying as to the cause of traumatic brain injury is therefore clear legal error.

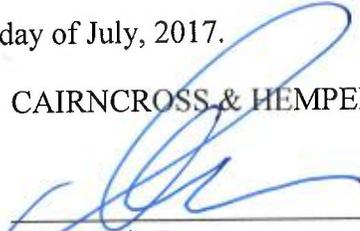
## V. CONCLUSION

For the reasons stated herein, the Trial Court’s conclusion that Tensar is liable under *respondeat superior* and the jury’s conclusion that Mr. Sander’s negligence in causing the collision with Mr. Main’s vehicle caused Mr. Main’s injuries and damages should be sustained. If they are

not sustained, the Court should reverse and remand the Trial Court's decision to refuse to allow Dr. Perrillo's expert testimony that the collision with Mr. Sander's vehicle was the cause of Mr. Main's concussion.

DATED this 14<sup>th</sup> day of July, 2017.

CAIRNCROSS & HEMPELMANN



---

Ana-Maria Popp  
Eric L. Christensen

524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Telephone: (206) 587-0700  
Facsimile: (206) 587-2308

John E. D. (Jed) Powell, WSBA 12941  
JED POWELL & ASSOCIATES, PLLC  
7525 Pioneer Way, Suite 101  
Gig Harbor, WA 98335  
Telephone: 206-618-1753

Attorneys for Jeffrey and Lori J. Main

**Certificate of Service**

I, Sue E. Den, certify under penalty of perjury of the laws of the State of Washington that on July 14, 2017, I caused a copy of the document to which this is attached to be served via email on the following individual(s) :

Michael Scruggs Colleen Lovejoy Lacey Georgeson Schlemlein Goetz, Fick & Scruggs PLLC SODO Commerce Center 66 S. Hanford Street, Suite 300 Seattle, WA 98134 mps@soslaw.com ljg@soslaw.com c.lovejoy@sgfslaw.com	Pamela M. Andrews Ramona Hunter Andrews Skinner, P.S. 645 Elliott Ave. W., Suite 350 Seattle, WA 98119 pamela.andrews@andrews- skinner.com ramona.hunter@andrews- skinner.com jane.johnson@andrews- skinner.com conor.mccauley@andrews- skinner.com
Tim Malarchick Malarchick Law Office 4423 Pt. Fosdick Dr. NW, Ste. 302 Gig Harbor, WA 98335 tim@malarchicklaw.com	Mark J. Dynan Dynan & Associates, P.S. 2102 North Pearl Street, Suite 400, Building D Tacoma, WA 98406-2550 mdynan@dynanassociates.com kmarkovich@dynanassociates.com
Jed Powell & Associates, PLLC 7525 Pioneer Way, Suite 101 Gig Harbor, WA 98335 jed@jedpowell.com	Howard M. Goodfriend Catherine W. Smith 1619 8 <sup>th</sup> Ave. N. Seattle, WA 98109 howard@washingtonappeals.com cate@washingtonappeals.com

DATED this 14<sup>th</sup> day of July, 2017, at Seattle, Washington.

*Sue E. Den*

---

Sue E. Den, Legal Assistant  
CAIRNCROSS & HEMPELMANN, P.S.  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
Telephone: (206) 587-0700  
Facsimile: (206) 587-2308  
E-mail: [sden@cairncross.com](mailto:sden@cairncross.com)

# **Attachment A**

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

---

JEFFREY and LORI MAIN,	)	
husband and wife and the	)	
marital community composed	)	
thereof,	)	
	)	
Respondents,	)	No. 12-2-01704-4
	)	COA No. 49727-1-II
vs.	)	
	)	
GERHARD J. SANDER and JANE	)	
DOE SANDER, husband and wife	)	
and the marital community	)	
thereof; and TENSAR	)	
INTERNATIONAL CORPORATION, a	)	
Georgia corporation,	)	
	)	
Appellants.	)	

---

EXCERPT VERBATIM REPORT OF PROCEEDINGS  
Excerpt of Argument

---

11 August 2016

Honorable Leila Mills  
Department No. 2  
Kitsap County Superior Court

Gloria C. Bell, Certified Court Reporter  
Certificate No. 3261  
614 Division Street, MS-24  
Port Orchard, Washington 98366  
360.337.7177  
gbell@co.kitsap.wa.us

APPEARANCES

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

For the Respondents:

JED POWELL  
ANA-MARIA POPP  
Cairncross & Hempelmann, P.S.

For the Appellant Sander:

MICHAEL P. SCRUGGS  
COLLEEN A. LOVEJOY  
Schlemlein Goetz Fick & Scruggs, PLLC

For the Appellant Tensar:

PAMELA M . ANDREWS  
RAMONA HUNTER  
Andres Skinner, P.S.

1 Honorable Leila Mills  
2 Main vs. Sander  
3 12-2-01704-4

4 ---ooOoo---

5 (Whereupon other court proceedings  
6 were had.)

7 (Jury not present.)

8 THE COURT: Have a seat.

9 MR. POWELL: Your Honor, with the  
10 preliminaries --

11 THE COURT: Yes.

12 MR. POWELL: -- that will take place with  
13 Dr. Perrillo using that 20 minutes of him maybe addressing  
14 the small issues that they have after the lunch break  
15 before the jury comes back?

16 THE COURT: Well, what is the small issue?  
17 Why don't we just see -- hear what it is at least, and if  
18 it's fairly summary, maybe we'll be able to take care of  
19 it. But I'm not sure how involved it's going to be, so  
20 what's the issue?

21 MS. ANDREWS: Simply, Your Honor, the motions  
22 in limine prevent any discussion of "force" as "varying  
23 force." And one of the areas --

24 THE COURT: I'm sorry.

25 MS. LOVEJOY: That's the witness.

THE COURT: That was the witness?

1 MR. POWELL: Yes. Sorry, Your Honor.

2 THE COURT: Thank you. Do we have -- I can't  
3 see through that screen. I'm sorry. I can't see who's  
4 coming and going.

5 MR. POWELL: Dr. Perrillo, you need to stay  
6 outside just for this argument. Sorry. Thanks.

7 THE COURT: So we were talking about force of  
8 the incident.

9 MS. ANDREWS: Right. One of the topics that  
10 he talks about is axonal damage that leads to this -- his  
11 conclusion that there is white matter changes in the  
12 brain. And one phrase he uses is "axonal damage." One  
13 phrase he uses is "axonal shearing" caused by acceleration  
14 and deceleration. Are those the words he uses?

15 MS. LOVEJOY: Yes.

16 MS. ANDREWS: Acceleration and deceleration of  
17 the head and the turning of the head. And the Court's  
18 ruling is he can't talk about acceleration or  
19 deceleration. So we would just like Dr. Perrillo to be  
20 limited to saying axonal damage, not shearing. Because  
21 shearing does imply the force.

22 MS. POPP: And, Your Honor --

23 THE COURT: I'm just going to go back to my  
24 notes momentarily, and I'll hear from the plaintiffs.  
25 Just one second.

1                   Okay. Go ahead. Response?

2                   MS. POPP: So I have the record of the  
3 proceedings from that hearing, and what I'm saying is that  
4 he can testify to his testing and the results of that.

5                   If the testing suggests axonal shearing, fine.  
6 And Dr. Perrillo is going to testify that his testing  
7 shows axonal shearing. He's not going to testify about  
8 the turned head or any of that.

9                   So you allowed in -- and axonal shearing is  
10 the term, so calling it axonal damage, I mean, that's his  
11 testing, it's assigned to determine, and that's what his  
12 testing shows, and it's already ruled on. That is what  
13 you said in your order.

14                   And then you also said that, as a general  
15 principal he can talk about what a concussion is, that the  
16 inside of the brain was bruised or whatever the right  
17 technical word is. So -- so you said we could talk about  
18 axonal shearing if his test results support it, and his  
19 test results are going to show that.

20                   THE COURT: Okay. So is the concern that he  
21 might then reference acceleration-deceleration or is the  
22 concern that he may actually use the word shearing or  
23 damage.

24                   MS. ANDREWS: Shearing.

25                   THE COURT: Okay.

1 MS. ANDREWS: So what he said in page 78 of  
2 his deposition is axonal shearing due to some sort of  
3 acceleration-deceleration force and the way his head is  
4 turned. So axonal shearing is acceleration-deceleration  
5 force. He cannot say that. And shearing implies the  
6 cutting damage.

7 I'm not saying he can't reach his conclusions,  
8 but he should not be saying "shearing." It implies that  
9 there was something -- it implies a force. Axonal damage  
10 gets you to the same location without there being a force.

11 We've already had one question from the jurors  
12 speculating as to whether his head hit a head rest, which  
13 there's no testimony of. There's no testimony of  
14 acceleration-deceleration shearing. It is damage, axonal  
15 damage.

16 THE COURT: Well, is axonal shearing a term of  
17 art that's used to diagnose or to --

18 MS. ANDREWS: I guess we'd have to voir dire  
19 the witness. Because axonal damage -- he also used that  
20 word, that there was axonal damage. I don't have any  
21 problem with axonal damage. A concussion caused axonal  
22 damage.

23 I think everyone in the room would agree,  
24 there's a significant visual image between axonal damage  
25 is caused by a concussion versus there was axonal shearing

1 in his head. It implies acceleration-deceleration, which  
2 is exactly what he testified to.

3 MS. POPP: Your Honor, first of all, it's  
4 undisputed that he has a concussion. And, as I just read  
5 from the transcript, we are able to talk about what a  
6 concussion is. Axonal shearing, that is what his testing  
7 reflects, and he should be entitled to tell the jury what  
8 axonal shearing is, because that is what his testing  
9 supports.

10 THE COURT: And what would he say it is?

11 MS. POPP: Axonal shearing is -- and we can  
12 get the witness up here. But it's basically a  
13 demyelination of the axons in the brain. And it is what  
14 happens -- it is -- when a patient indicates loss of  
15 reaction time, which is what Jeff Main indicated on his  
16 testing, that tells Dr. Perrillo that Jeff Main has axonal  
17 shearing. And axonal shearing is the demyelination of  
18 the -- of the axon.

19 THE COURT: What's demyelination.

20 MS. POPP: It's the sheathe of the axon  
21 becomes either stretched or there's been some type of  
22 white matter changes.

23 THE COURT: Okay. But that's not --

24 MS. POPP: But that's based on testing. It's  
25 not based on how fast anybody was going. It's not based

1 on any biomechanical principle. It's undisputed that Jeff  
2 Main has a concussion. And the way they figure out if  
3 people have axonal shearing is through the testing.

4 THE COURT: Okay. And so when you -- when he  
5 is using the word "shearing," is that a term of art that's  
6 necessary to describe what's going on here. Because I  
7 tend to agree that the word itself, shearing, does sound  
8 as though something's actually been sliced or cut. And so  
9 that's part of the question I have.

10 MS. POPP: If his testing indicates that  
11 that's what has happened in Jeff Main's brain --

12 THE COURT: I thought stretching and not  
13 cutting.

14 MS. POPP: Well, it's stretching or, I  
15 believe, tearing. I -- it --

16 THE COURT: Okay.

17 MS. POPP: And that's what his testing shows.

18 MS. ANDREWS: I --

19 MS. POPP: It's not based on how fast anybody  
20 was going or biomechanical principles.

21 MS. ANDREWS: I just want it to be clear that  
22 the testing shows the processing speed being slower. And  
23 then from processing speed being slower, Dr. Perrillo says  
24 that there are -- what we look at -- why would that be?  
25 One of the explanations for processing speed being slower

1 is that you have white matter changes. And white matter  
2 changes can occur if there has been axonal damage.

3 But it is very clear, and he will testify, he  
4 has done no tests to determine if, in fact, there have  
5 been white matter changes or axonal shearing. And there  
6 is a test that could be done, and it has not been  
7 performed.

8 This is his process of elimination based upon  
9 slowed processing speed test results. That's the test is  
10 that his processing speed is slow. So then the question  
11 is why is it slow? One explanation is an axonal shearing  
12 or axonal damage causing white matter changes in the  
13 brain.

14 THE COURT: Okay. And before I hear from  
15 Mr. Scruggs, I think we can just go ahead and let the  
16 jurors go for lunch and ask them to come back at the same  
17 time.

18 THE BAILIFF: Okay.

19 THE COURT: Thank you.

20 MR. SCRUGGS: Finally, I don't know if I'll  
21 handle the technical stuff, but I am far from stipulating  
22 that there was -- everybody agrees that there was a  
23 concussion. I'm --

24 THE COURT: Okay.

25 MR. SCRUGGS: I mean I -- I think the record

1 shows that -- I'm sorry. I think the record shows that a  
2 chiropractor suggested to a nurse that there was a  
3 concussion, and somehow a nurse wrote it down. And then  
4 from there on it -- it took over the records. But at any  
5 rate, that's not the gravamen of this particular motion.

6 But I just think the comment that everybody  
7 agreed that there's a concussion is not entirely accurate.

8 MS. POPP: Your Honor, if we can streamline  
9 this by just agreeing that it's axonal damage as opposed  
10 to axonal shearing, then that's fine. Dr. Perrillo is  
11 here today to testify and we want to try to get him done  
12 today.

13 MS. ANDREWS: Absolutely.

14 THE COURT: So if there's a stipulation, I  
15 don't need to rule on that.

16 MS. ANDREWS: Right. That was my offer to  
17 begin with.

18 MS. POPP: Just to be clear, he can talk about  
19 axonal damage. He can talk about what that is.

20 THE COURT: Of course.

21 MS. POPP: And he can talk about the testing.

22 MS. ANDREWS: Yes. But he can't talk about  
23 the acceleration-deceleration force; right? Are we in  
24 agreement on that? Because that's what he testified to in  
25 his deposition.

1 MR. POWELL: How does he -- sorry. How does  
2 he describe, "You had axonal damage? Yes.

3 What causes axonal damage? It's when the  
4 brain moves back and forth inside the head, and you have a  
5 bruising on the brain, and that's a concussion."

6 That's a force movement by the head, so he  
7 doesn't say acceleration-deceleration, but he gets to  
8 describe how the brain moves inside the head and how it  
9 bruises and how it does the axonal damage. I mean, he has  
10 to be able to -- that's common sense too, but he has to be  
11 able to tell that.

12 THE COURT: Well, it seems to me that he does  
13 need to get into the physiology of how this damage occurs.  
14 Not that he has direct knowledge of this incident. So he  
15 can't speak to acceleration or deceleration of the vehicle  
16 which causes this. What he can speak to is that this type  
17 of damage is caused by the movement in the brain.

18 MR. POWELL: Thank you.

19 MS. ANDREWS: Well --

20 THE COURT: But I don't believe that means he  
21 then talks about this comes about because of acceleration  
22 or deceleration of the vehicle.

23 MS. ANDREWS: Right.

24 MR. POWELL: Agreed.

25 MS. POPP: Yeah.

1 THE COURT: So long as we're clear about that,  
2 that's the scope within which this is appropriate.

3 MS. ANDREWS: And I don't want to have to  
4 interrupt once he gets started since we just have a couple  
5 minutes.

6 THE COURT: Sure.

7 MS. ANDREWS: If he takes the stand and is  
8 asked, "Mr. Main was diagnosed with a concussion? Yes.  
9 What is a concussion?" He can say, "a concussion is  
10 XYZ" -- inflammation, a swelling of the brain -- but he  
11 cannot say it's caused by the head moving or anything of  
12 that nature.

13 MR. POWELL: Why?

14 MS. ANDREWS: Because that is not in the  
15 record. We have -- Mr. Main doesn't remember what  
16 happened. And there is no testimony that his head hit a  
17 headrest. We don't even know if the headrest was up.  
18 There is no testimony about anything. He can only -- he  
19 can't make that connection.

20 He can only say what is a concussion and that  
21 Mr. Main has been diagnosed with a concussion. So he  
22 can't then connect how in this instance that occurred.

23 THE COURT: He can speak in generalities of  
24 how a concussion occurs. And that would mean that the  
25 brain is moving inside the head.

1 MS. ANDREWS: Right.

2 THE COURT: So a description of the brain  
3 inside of the skull moving and hitting the inside of the  
4 skull is allowed to describe how a concussion occurs.

5 MS. ANDREWS: Right.

6 THE COURT: He obviously cannot say, and I  
7 think I just said this. He can't say in this instance  
8 there was a moving of the head.

9 MS. ANDREWS: That's my point.

10 MS. POPP: Your Honor, if I may, in the Group  
11 Health records -- and these are the records that Tensar  
12 and Sanders wanted in, and we all agreed to jointly submit  
13 this exhibit -- there's a summary of what a concussion is,  
14 and it says, "A concussion is an injury that changes how  
15 the cells in your brain normally work. A concussion is  
16 caused by a blow to the head or body that causes the brain  
17 to move rapidly inside the skull. Even a ding or getting  
18 your bell rung or what seems to be a mild bump or blow to  
19 the head can be serious" -- in all caps. This is what's  
20 in the Group Health records.

21 THE COURT: How is that different from what  
22 I'm saying?

23 MS. POPP: Exactly. So I just want to make  
24 sure he can testify about the fact that it can be caused  
25 by a bump or blow to the head, because that's what's in

1 the records, and that's what causes a concussion.

2 MR. SCRUGGS: I just want to be -- I'm sorry.  
3 I just want to be clear. I understood Dr. Perrillo was  
4 going to give neuro -- testimony as to his  
5 neuropsychological findings in this case and not  
6 causation. Why does he need to talk about how this  
7 concussion occurred at all?

8 If there is a concussion, he says this is what  
9 my study reveals, this is what damage has occurred. He  
10 doesn't need to talk about movement in the head or  
11 anything else -- whether it was a land mine or an NFL hit  
12 to the head. It's -- I mean, for his testimony, it lacks  
13 any foundation. It's irrelevant. Why does he need to  
14 talk about that at all?

15 THE COURT: Well, that's taking a different  
16 tact on this same question.

17 MS. POPP: That is a different tact, and  
18 Dr. Perrillo's opinions are that this was caused by the  
19 accident. That's been in his report -- it's been in his  
20 report from the very beginning. It is not the subject of  
21 any motion in limine. It hasn't been briefed to this  
22 court, and Dr. Perrillo's -- I mean, I can read you the  
23 opinions in his report that they've had since 2014.

24 THE COURT: Well, that's a whole different  
25 area, which may completely hold up what we're going to do

1 this afternoon.

2 MR. POWELL: Your Honor --

3 THE COURT: If we are now saying -- if I'm  
4 hearing from one side that Dr. Perrillo cannot speak to  
5 causation at all, and all he's doing is -- is his  
6 neuropsychological evaluation. And if you're intending to  
7 bring in causation through Dr. Perrillo, I think we have  
8 something to talk about.

9 MR. POWELL: That was the subject of his  
10 report. That was the subject of his deposition testimony.  
11 And there's never been a motion in limine on this. And  
12 what his testimony is, is that there -- what happened to  
13 Jeff Main? Well, he had the automobile accident. He had  
14 a concussion in the automobile accident, as has been  
15 diagnosed through all of the medical records. And I  
16 tested him for the concussion and what was the resulting  
17 brain injury from that accident.

18 How is that now something that's novel and  
19 presented four days into trial just before the witness is  
20 testifying?

21 MS. POPP: And if I may, Your Honor, I can  
22 read you Dr. Perrillo's --

23 THE COURT: No.

24 MS. POPP: -- opinions in his report.

25 THE COURT: I'm sure he has opinions. That's

1 not my question. I'm trying to figure out where we go  
2 with Dr. Perrillo generally in his testimony.

3 MR. SCRUGGS: My point is that he's assumed a  
4 concussion on the 25th -- April 25th, 2011. He needs no  
5 more than that, and anything else is not relevant to his  
6 scope of testimony.

7 His scope of testimony is to how this  
8 concussion, however it occurred and whenever it -- well,  
9 that occurred, has impacted him from a neuropsychological  
10 standpoint. He cannot testify to causation.

11 He's never -- we've never suggested he could  
12 testify as -- that the sum forces in the automobile  
13 accident caused the concussion. That goes right -- it  
14 goes right back to the biomechanical testimony that we've  
15 excluded, I thought.

16 MS. ANDREWS: And I think that was -- that was  
17 the biomechanical aspect of it was, he's not a  
18 biomechanical engineer. He can't say what force did or  
19 didn't cause the concussion.

20 He can speak, as a neuropsychologist, that an  
21 individual came to him, diagnosis of concussion. How is  
22 that impacted by the tests that I give him? His  
23 processing speed is slower, his ability -- his verbal  
24 recollection is not, his verbal -- or his memory is not.

25 He gave a list in his most recent deposition,

1 and said -- and I can hand it to the Court if you'd like,  
2 but he said that he was -- his opinions were that he  
3 had -- he said -- the question was: "I want to go through  
4 your findings in a minute, but the question was, and what  
5 I want a list of first are what is the summary of your  
6 opinions that you will offer at the time of trial?" He  
7 said -- sorry, I have to put my glasses on.

8 MS. POPP: Can you tell me which one you're --

9 MS. ANDREWS: Sure. This is the second  
10 deposition, at page 11 through 12.

11 He said, "The individual sustained a mild  
12 traumatic brain injury, uncomplicated." The -- he said,  
13 "because he -- because it happened later in his life, he  
14 has residual impairments consistently since that time that  
15 I tested him and the impairments seem to be centered  
16 around the white matter issues affecting his simple,  
17 complex, and procedural reaction time.

18 He has some attentional difficulties. He has  
19 some prefrontal difficulties. He does not have memory  
20 impairment. Okay? I don't know where people got this  
21 from, but even though he may complain of some memory  
22 irregularities, he doesn't have any memory impairment.

23 So this is, you know, creating some work  
24 issues for him. He's not able to integrate information  
25 like he used to be able to do."

1                   That's what he summarized his opinions to be.

2                   THE COURT: Okay. So --

3                   MS. POPP: And --

4                   THE COURT: Yes?

5                   MS. POPP: Your Honor.

6                   THE COURT: Yes?

7                   MS. POPP: If I may, Dr. Perrillo did not  
8 assume that Jeff Main had a concussion. Dr. Perrillo  
9 diagnosed Jeff Main with a concussion.

10                   And again, it has nothing to do with speed of  
11 the accident. It has everything to do with the symptoms  
12 that Jeff Main exhibited after the accident. It has  
13 everything to do with the testing that also shows that --  
14 that Jeff Main has a concussion.

15                   And he specifically said in his report -- the  
16 excerpt that Ms. Andrews was reading to you was from  
17 Dr. Perrillo's redeposition --

18                   THE COURT: Okay.

19                   MS. POPP: -- limited to his testing. If I  
20 just may --

21                   THE COURT: No. I'm ready to go back to what  
22 my notes indicate I ruled when we had these issues about  
23 Perrillo. And I said, "there will be no evidence  
24 regarding biomechanical principles." That's the first  
25 point. "Perrillo can testify that he did testing and that

1 his tests were consistent with axonal shearing."

2           So that has already been ruled upon. But  
3 we've already stipulated today that it will be axonal  
4 damage or brain damage.

5           "However he can't testify that this damage was  
6 a result of Main's head being turned a certain way and  
7 that acceleration and deceleration caused this damage in  
8 the brain. He can't say that the biomechanical forces  
9 created the damage.

10           He can, however, testify as to generally what  
11 is a concussion in the brain; that is, bruising of the  
12 brain on the skull as a result of some type of force."

13           And I believe my reason for ruling that was to  
14 give a context to the jurors when he's speaking about the  
15 damage to the brain it is, in fact, a concussion. So he  
16 can speak generally what is a concussion to give a  
17 context.

18           "Perrillo cannot say biomechanically what kind  
19 of force occurred here, but that his testing would be  
20 consistent with the axonal damage. He cannot give  
21 testimony, argument, reference, or suggestion or  
22 illustrations of biomechanical principles."

23           That's where I left it. And I thought that  
24 was pretty clear.

25           MS. POPP: So I don't know why we're talking

1 about causation then.

2 THE COURT: Well, I think you wanted to bring  
3 in causation.

4 MS. POPP: No. Well, causation --  
5 Dr. Perrillo's opinion is that Mr. Main suffered a  
6 concussion as a result of the accident.

7 THE COURT: He --

8 MS. POPP: Can he not say the "as a result of  
9 the accident" part? He diagnosed him with a concussion,  
10 not based on biomechanical principles but because  
11 neuropsychologists can diagnose a concussion. And he  
12 looked at the symptoms that Mr. Main had. He didn't  
13 assume he had a concussion, he made the diagnosis. And he  
14 should be able to talk about that.

15 THE COURT: He can make a diagnosis and he can  
16 say that there's these symptoms or testing results. But  
17 then to then say "and it's because of this accident," I  
18 think that goes one step further than is -- that he can  
19 do, because he doesn't have that information.

20 I mean, I think that's a reasonable inference  
21 the jurors can draw. And you can make that argument.

22 MS. POPP: Your Honor --

23 THE COURT: There is a concussion that you are  
24 presenting.

25 MS. POPP: This is a really important point.

1 THE COURT: I agree it's an important point.

2 MS. POPP: I just want to make sure we're  
3 clear on it.

4 Say that you're involved in a -- not you --  
5 say that a person is involved in a bike accident and they  
6 go to a doctor and they have a fractured leg and the  
7 doctor looks at it and knows that that bike accident  
8 happened and says, you know, I diagnose you with a  
9 fractured leg as a result of the bike accident.

10 How -- how is -- is this different than that?  
11 There's no other -- Dr. Perrillo is going to say that he  
12 looked a Jeff Main's records. There's no other cause for  
13 this concussion.

14 THE COURT: Why is causation important for  
15 Dr. Perrillo?

16 MS. POPP: Because that is the diagnosis that  
17 he made. And even Dr. Green opines that the problems that  
18 Jeff is having are not as a result of the accident.  
19 Dr. Green opines that maybe Jeff Main is depressed.  
20 Dr. Green opines that maybe Jeff Main is sleep deprived.

21 And so Dr. Perrillo needs to be able to say  
22 look I -- I looked at this concussion and the problems  
23 that he's having are as a result of the accident.  
24 Otherwise why was --

25 THE COURT: Mr. Scruggs.

1 MS. POPP: Why can't Dr. Green talk about  
2 that?

3 MR. SCRUGGS: First of all, one, to have  
4 the -- the only neuropsychologist that should be able to  
5 testify to that was the one that actually saw him very  
6 much more proximally or chronologically close to the  
7 incident, which was Dr. Furguson. But even Dr. Furguson  
8 says likely caused by work stress and sleep problems.

9 But this -- if they're allowed to have  
10 Dr. Perrillo say this concussion was caused by, and,  
11 therefore, this damage was caused by this automobile  
12 accident that happened two-plus years before that, is  
13 absolutely -- it brings all the packaging of biomechanics,  
14 did he hit his head? How fast? All the collision aspects  
15 of it right back into the mix.

16 And that's -- I thought it was pretty clear  
17 from your previous rulings that Dr. Perrillo was to  
18 testify based on the diagnosis that apparently was made  
19 sometime previously closer to the accident, and testify as  
20 to the damages that he tested for, not as to the  
21 causation. He cannot testify as to causation.

22 THE COURT: Anything else, Ms. Andrews?

23 MS. ANDREWS: No, Your Honor.

24 THE COURT: Okay. That's my ruling. He can  
25 certainly testify to all of his tests and so forth, but to

1 make that final connection that this was -- the accident  
2 was the cause, I don't believe he's qualified to do that.  
3 And that's my ruling.

4 MR. POWELL: That's good.

5 THE COURT: Okay.

6 MR. POWELL: And can we have also the ruling  
7 then that Dr. Green cannot testify of what he thinks  
8 caused it.

9 MS. ANDREWS: He won't say anything if he  
10 thinks that he has any opinion as to what caused the  
11 concussion.

12 The question, I think, that they're referring  
13 to is Dr. Green was asked, There was this long gap between  
14 complaints of headaches and then the start of headaches.  
15 And Dr. Green said, When you have a gap that long, you  
16 look to what's causing these kinds of headaches. Are  
17 these tension headaches? Are they work-stress headaches?  
18 What kind of headaches are you talking about if there's  
19 been a gap when there's been no complaint of headaches of  
20 17 months? You look for an explanation. I think that's  
21 what they're talking about.

22 THE COURT: So is he going to say that these  
23 headaches were not caused by the accident?

24 MS. ANDREWS: She's going to say that the  
25 initial headaches were caused by the accident, then when

1 they stopped for a period of 17 months, you don't go back  
2 to something that happened two years prior. You look for  
3 what happened to cause new headaches to occur 17 months  
4 after you haven't had any complaints of a headache.

5 MS. POPP: And, Your Honor, this is --

6 MR. SCRUGGS: And --

7 THE COURT: Just a second.

8 MR. SCRUGGS: And you can do that without  
9 getting into causation.

10 MS. ANDREWS: That's right.

11 MR. SCRUGGS: You go back and you say,  
12 somebody said there was a concussion on April 25th, 2011,  
13 and if -- I think what Dr. Furguson and Dr. Green will  
14 testify to is that, assuming somebody had a concussion on  
15 April 25th, 2011, regardless of what caused it, that in  
16 two and a half years later, you can't -- you can't connect  
17 the dots, regardless of whether it was an NFL injury --

18 MS. ANDREWS: Right.

19 MR. SCRUGGS: -- or a blast or a car accident.  
20 So it's not only not relevant to the scope of this  
21 witness's testimony, it's not what Mr. Green and  
22 Dr. Furguson are expected to testify to.

23 THE COURT: So they will not be saying --

24 MR. SCRUGGS: They will not be saying that the  
25 concussion was or was not caused by an automobile

1 accident.

2 MS. ANDREWS: No.

3 MR. SCRUGGS: I think both Dr. Green and  
4 Dr. Furguson just assumed the concussion based on the  
5 previous medical record.

6 MS. ANDREWS: Right. There's --

7 MR. SCRUGGS: And based on the subjective  
8 statements.

9 THE COURT: So they're not going to testify  
10 that the -- that what caused -- the causation for the  
11 headaches?

12 MS. ANDREWS: Well, there's --

13 THE COURT: They're going to say there's  
14 headaches. And they're going to raise the issue of --

15 MR. POWELL: What caused them.

16 THE COURT: Well, I don't know if that's  
17 exactly correct.

18 MR. SCRUGGS: The date that the concussion  
19 occurred and whether or not there was concussion, they're  
20 going to testify that two and a half years out you can  
21 link certain things to something that happened on  
22 April 25th, 2011 -- correct me if I'm wrong, Pam. And you  
23 can't link certain things that happened that far back.

24 MS. ANDREWS: I --

25 MR. SCRUGGS: Assuming a concussion. I mean,

1 they -- I think --

2 THE COURT: Well, why then can't Perrillo say  
3 that we can link it or based upon the accident occurring  
4 or him getting information about an accident occurring  
5 without concluding that it was because of the accident?

6 MR. SCRUGGS: He can link it to the date of --  
7 yes. I think the date of the accident, but he's --

8 THE COURT: He can't say "causation."

9 MS. HUNTER: He can. He just can't say it was  
10 caused by this automobile collision, that his -- what he  
11 reveals in his testing was caused by this automobile  
12 accident. He can say there's a concussion in the records.  
13 Assuming that concussion, my findings are, you know.

14 MS. ANDREWS: This is the impact.

15 MR. SCRUGGS: Yeah. This is the impact.

16 MS. ANDREWS: What he just said in his  
17 deposition. Here are my opinions: That there was a  
18 mild -- what he said was there is was a mild traumatic  
19 brain injury, which is a concussion. And that because of  
20 a concussion, in his opinion, he said that the testing  
21 shows -- I'm sorry.

22 First, he says there's a mild traumatic brain  
23 injury, second, he says the testing shows an impact on  
24 Jeff's processing speed. What I look at is why does he  
25 have an impact on his processing speed. And the

1 conclusion I've reached is that there is white matter  
2 changes in the brain, that that is caused by axonal  
3 damage, and, therefore, he needs to have neuro exercise,  
4 rehabilitation, and psychological counseling to help him  
5 cope with those changes.

6 THE COURT: Well, that's fine.

7 MS. ANDREWS: Right.

8 THE COURT: And we've already gone through  
9 that. But then it does beg the question, to what extent  
10 can the other doctors speak to causation.

11 MS. ANDREWS: I think the other doctors who  
12 are coming, Dr. Furguson is going to testify only -- he's  
13 a treating doctor, so he's -- it's really kind of not --  
14 he's not rendering opinions for one side or the other.

15 Dr. Green is coming in. Dr. Green will say  
16 I've been given records. He was diagnosed with a  
17 concussion. From a concussion, one expects to have  
18 headaches or impairments for a period of time.

19 The records reflect that he did get treatment  
20 for his orthopedic issues through chiropractic and  
21 massage, and that also helps somewhat with his headaches.  
22 That he was also in treatment and then stopped complaints  
23 about headaches. Then there were no complaints about  
24 headaches for 17 months. Then he complains about -- of  
25 headaches again.

1           And you can't connect that kind of headache  
2           from a concussion. He says, yes, the headaches he had in  
3           the beginning you would connect, but when there's a big  
4           gap, then you would have to take another look at why are  
5           you complaining of headaches 17 months later.

6           THE COURT: So if he's saying you can't  
7           connect it to a concussion, he is not going to say you  
8           can't connect it to the motor vehicle accident?

9           MS. ANDREWS: I think he's -- I'm not sure.  
10          He doesn't even get into --

11          THE COURT: I guess that's -- I'm just  
12          clarifying.

13          MS. ANDREWS: Right.

14          THE COURT: So if he says you can't connect it  
15          to a concussion, will he -- does it follow, then, that  
16          Green will not say that the headaches were not connected  
17          to the motor vehicle accident?

18          MS. ANDREWS: I'm struggling with under -- I'm  
19          just trying to understand your question.

20          THE COURT: Well, I'm trying to understand all  
21          of this, but --

22          MS. ANDREWS: I know.

23          THE COURT: But what I'm hearing is that --  
24          well, what I've already ruled so far is that there won't  
25          be -- there's no ability of Perrillo to say that the

1 concussion was caused by the accident.

2 MS. ANDREWS: Right.

3 THE COURT: And I'm hearing also that you're  
4 saying when we get to Green, he'll say, well, there were  
5 these headaches, a long period of time elapsed, and,  
6 therefore, you can't connect the headaches with a  
7 concussion.

8 MS. ANDREWS: Right.

9 THE COURT: Will he similarly say you  
10 cannot -- will you be offering that the headaches were  
11 connected -- were not connected to a motor vehicle  
12 accident?

13 MS. ANDREWS: He's not going to speak about  
14 whether a motor vehicle accident -- I can't process that,  
15 so if you want to say it, go ahead.

16 MS. HUNTER: I think we're missing what the  
17 experts are saying in terms of whether it's the same  
18 headache or whether it's a different headache. And that  
19 becomes the issue.

20 MR. POWELL: That's if --

21 THE COURT: Just a minute.

22 MS. HUNTER: But it's not -- the causation  
23 isn't related to the accident. The issue is, when  
24 Mr. Main is -- close in time of the accident, is having  
25 post-concussive symptoms, he's reporting this. Then

1 there's a period of no headache reports. And then there's  
2 a whole bunch of reports, much more detailed, with a  
3 different type of headache.

4           And the question becomes, from a clinical  
5 standpoint, are the headache symptoms described over here  
6 actually relating all the way back clinically to the  
7 concussion and the concussion symptoms? Or this may be a  
8 new onset headache that may be more attributable to  
9 something that's happened in the intervening time period.

10           So the issue becomes the headache itself and  
11 the symptoms and how the symptoms have changed over time,  
12 how the reports of headaches have changed over time, how  
13 the intensity is different, and how there was a gap where  
14 there doesn't appear to have been any headaches.

15           So it's not an issue of whether the accident  
16 caused a concussion and whether there were post-concussive  
17 headaches.

18           The question becomes, are the type of headache  
19 symptoms being described that appear five years later, are  
20 those all attributable to the initial concussion? Or  
21 could there be something else going on? And when those  
22 symptoms change, many years after the accident, more than  
23 24 months post-accident when there was a referral to a  
24 neurologist, did there need to be a complete neurological  
25 workup to determine whether there was something else going

1 on, and to treat whatever headache pain existed at that  
2 point in time.

3 That's what Dr. Robin and Dr. Green -- and  
4 actually, that's really what Dr. Robin will testify to.  
5 Dr. Green will talk about the fact that the mere existence  
6 of headache pain, regardless of the cause -- so will defer  
7 to Dr. Robin on the cause -- that the mere existence of  
8 headache pain can impact processing speed and the areas in  
9 which Mr. Main has shown deficits on all of the objective  
10 neuropsychological testing.

11 MS. ANDREWS: But we're not going to call  
12 anyone to say he did or didn't sustain a concussion in the  
13 accident. We're not calling anyone to say how he got his  
14 concussion and what the accident did or didn't cause. Our  
15 experts take the records as they find them. He was  
16 diagnosed with a concussion.

17 THE COURT: Well, your experts say that  
18 headaches later on in time were not caused by the motor  
19 vehicle accident?

20 MR. SCRUGGS: Just to clarify, no, they're  
21 saying that they're not caused by the concussion.

22 THE COURT: Okay. That's my point.

23 MS. ANDREWS: Yes.

24 THE COURT: Yes. That's my point.

25 MS. ANDREWS: I'm sorry.

1 MR. SCRUGGS: And he's instructed to clarify  
2 that they all assumed -- they all three of them assumed  
3 based on the medical records, that there were -- I don't  
4 necessarily agree with this, but they all assumed based on  
5 the medical records that it was a concussion on  
6 April 25th, 2011.

7 THE COURT: They're not going to get into the  
8 cause of that concussion?

9 MR. SCRUGGS: We will make -- I think we all  
10 need to make sure that we instruct our experts to not  
11 discuss -- discuss April 25th, 2011, but not discuss the  
12 cause --

13 MR. POWELL: Your Honor.

14 THE COURT: Yes.

15 MR. POWELL: We have the burden of proof on  
16 proximal cause.

17 THE COURT: Uh-huh.

18 MR. POWELL: Our witnesses need to be able to  
19 testify within the scope of their expertise as to those  
20 things that are in the scope of their expertise.

21 Dr. Tay is the treating neurologist. Dr. Tay  
22 will testify that he diagnosed a concussion, and that it  
23 was the result of that automobile accident.

24 THE COURT: That's different for a treating  
25 physician.

1 MR. POWELL: Okay.

2 THE COURT: Do we agree?

3 MR. SCRUGGS: I agree. He can do that and  
4 keep score on that --

5 THE COURT: That's fine for the treat --

6 MR. POWELL: Okay. Okay. Then we'll carry  
7 our burden.

8 THE COURT: So the treating physician can do  
9 that, but so far as the experts are concerned, they can  
10 all speak to there being a concussion. I'm not hearing  
11 that any of them are qualified to say the cause of the  
12 concussion.

13 I think the jurors can draw a reasonable  
14 inference based upon the timing of the accident, when  
15 there was a report of headaches and so forth as to whether  
16 or not that concussion grew out of the accident. But I  
17 don't see how Perrillo or Green, quite frankly, can say  
18 that the concussion was due to the accident, other than  
19 there was a concussion at what period of time.

20 MR. POWELL: Nor then can Dr. Green say that  
21 the symptoms that he's suffering today are not the result  
22 of the automobile accident.

23 THE COURT: They can't say the causation of  
24 the headaches. They can speak to how headaches today  
25 don't relate to earlier headaches related to the

1 concussion, but they can't say headaches today are not  
2 related to the accident.

3 MR. POWELL: Thank you, Your Honor.

4 THE COURT: Is that clear enough?

5 MS. POPP: I think so.

6 THE COURT: Okay. So the poor staff have been  
7 here into their lunchtime. We're going to take a  
8 lunchtime and back normal time. Thank you.

9 MR. SCRUGGS: Thank you, Your Honor.

10 THE CLERK: All rise.

11 (Whereupon a luncheon recess was had.)

12

13

14

15

16

17

18

19

20

21

22

23

24

25



**CAIRNCROSS & HEMPELMANN**

**July 14, 2017 - 4:22 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49727-1  
**Appellate Court Case Title:** Jeffrey and Lori Main, Respondents v Gerhard J. Sander and Tensar Int'l Corp,  
Appellants  
**Superior Court Case Number:** 12-2-01704-4

**The following documents have been uploaded:**

- 6-497271\_Briefs\_20170714133835D2512622\_7054.pdf  
This File Contains:  
Briefs - Respondents/Cross Appellants  
*The Original File Name was Brief.pdf*
- 6-497271\_Motion\_20170714133835D2512622\_5167.pdf  
This File Contains:  
Motion 1 - Waive - Page Limitation  
*The Original File Name was Motion.pdf*

**A copy of the uploaded files will be sent to:**

- C.Lovejoy@soslaw.com
- MPS@SOSlaw.com
- cate@washingtonappeals.com
- howard@washingtonappeals.com
- jed@jedpowell.com
- mdynan@dynanassociates.com
- tim@malarchicklaw.com

**Comments:**

---

Sender Name: Jana Schiewe - Email: jschiewe@cairncross.com

**Filing on Behalf of:** Ana-Maria Popp - Email: apopp@cairncross.com (Alternate Email: jschiewe@cairncross.com)

Address:  
524 Second Ave.  
Suite 500  
Seattle, WA, 98104  
Phone: (206) 254-4434

**Note: The Filing Id is 20170714133835D2512622**