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CASE NO. 51317-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CESAR BELTRAN-SERRANO, an incapacitated person, individually,
and BIANCA BELTRAN as guardian *ad litem* of the person and estate of
CESAR BELTRAN-SERRANO,

Respondents,

v.

CITY OF TACOMA, a political subdivision of
the State of Washington,

Petitioner.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a Tacoma Police Department officer negligently shooting Cesar Beltran-Serrano four times and the substantial medical injuries he suffered as a result. The City of Tacoma's appeal is based on the narrow contention that the trial court improperly ruled on a disputed issue of material fact when it granted Beltran-Serrano's motion for partial summary judgment on the value of past medical specials incurred by Beltran-Serrano. The parties agree that there was one disputed issue of material fact before the trial court on summary judgment, whether the past medical expenses incurred by Mr. Beltran-Serrano were reasonable. On this sole disputed issue, and only after Beltran-Serrano affirmatively moved for partial summary judgment, the City of Tacoma late-produced the report of an expert witness, who had never been disclosed, to challenge the reasonableness of Beltran-Serrano's past medical specials. In response, Beltran-Serrano moved to exclude the witness, Thomas Wickizer, Ph.D., on the basis that the expert's opinions are inadmissible.

On partial summary judgment, the trial court ruled in Beltran-Serrano's favor by granting his motion. CP at 322-323. However, upon clarification of its ruling, the trial court refused to expressly exclude the opinions and testimony of Thomas Wickizer, Ph.D., commenting that such

an issue could be taken up at a later time closer to trial. Due to this unique procedural posture, Beltran-Serrano in fact agrees with the City of Tacoma; by refusing to exclude Wickizer, the trial court ruled on a disputed issue of material fact. However, in reviewing this case *de novo*, this Court should hold that the opinions of Dr. Wickizer should be excluded and affirm the trial court's ruling. The opinions of Wickizer are inadmissible pursuant to the collateral source rule, the *Frye* standard for expert testimony, ER 403, ER 702, ER 703, and public policy. In sum, the trial court reached the correct conclusion by taking an incorrect route. Because the trial court reached the correct conclusion, Beltran-Serrano asks this Court to affirm the trial court and rule that the opinions of Wickizer be excluded.

II. ISSUES PRESENTED

- A. Whether the trial court properly granted Beltran-Serrano's motion for partial summary judgment establishing past medical specials when (1) the only disputed issue on partial summary judgment was whether the past medical specials were "reasonable"; and (2) the only evidence produced by the City of Tacoma to dispute partial summary judgment was the inadmissible report of Thomas Wickizer, Ph.D.

- B. Whether Wickizer's report and opinions should be excluded pursuant to the evidentiary principles of the collateral source rule, *Frye* standard, ER 403, ER 702, ER 703, and/or public policy.

- C. If Wickizer is excluded, are there any remaining disputed issues of material fact precluding summary judgment in Beltran-Serrano's favor?

III. STATEMENT OF THE CASE

A. Officer Michel Volk Escalates a Routine Stop to a Deadly Force Situation

On June 29, 2013, Tacoma Police Officer Michel Volk was working swing shift and driving north on Portland Avenue in Tacoma. She saw a man wandering aimlessly on the corner of an intersection that was a known location for panhandling. Volk decided to park her patrol vehicle near the man and educate him about panhandling laws. She did not have reasonable suspicion or probable cause that the man was committing a crime. She approached the man, and observed him digging in a hole for no apparent reason. She also observed the man had poor hygiene and appeared

homeless. The man then lifted an old bottle out of the hole, took a swig of an orange liquid, and put the bottle back. Volk began to talk to the man. He looked at her blankly and continued to dig in the hole. Officer Volk then asked the man if he understood English, and he shook his head, indicating “no”. Volk radioed for a Spanish speaking officer, Jake Gutierrez. Gutierrez was nearby, between less than one and a half minute away with sirens on, or five minutes at a normal speed.

After determining the man did not understand her, and before Gutierrez arrived, Volk moved closer to him and interrogated him in English. The man became scared, confused, and attempted to get away from her. He started to cross the intersection of E. 28th Street and Portland Avenue. Volk chased Beltran-Serrano across the street. In an attempt to stop him, she used her taser on his back as he was moving away from her. The taser did not have its desired effect and Beltran-Serrano was still standing, able to brush the taser tags away from his body. Beltran-Serrano turned away from Volk and continued to try to get away from her. Volk panicked and immediately threw her taser to the ground, pulled out her Glock 45 and fired four shots into Beltran-Serrano’s right arm, through and through his buttocks, into his torso and across his left forearm into his upper left back. The shooting occurred within 37 seconds of Volk’s call for back-up.

B. Beltran-Serrano Severely Injured by the Shooting.

Cesar Beltran-Serrano was immediately transported to the Tacoma General Hospital for life-saving treatment from the gunshot wounds. CP at 45. He was in the hospital for almost two months. *Id.* During his hospitalization and after, Beltran-Serrano received intensive care for numerous injuries, including treatment for ballistic injuries to the chest, abdomen, pelvis, spine, and bilateral upper extremities; splenic laceration; ballistic laceration to the stomach; ballistic laceration to transverse and descending colon; and multiple abdominal hernias, among many other injuries. CP at 56-67. The cost of treatment for the past medical special damages is \$712,719.99. CP at 119.

IV. PROCEDURAL HISTORY

Plaintiffs filed a claim against the City of Tacoma on August 27, 2015 arising from the negligent shooting of Beltran-Serrano. CP at 19-25. Over the course of the subsequent 23 months, the City of Tacoma did not disclose a single economic expert to opine on the reasonableness of the past medical specials incurred from Mr. Beltran-Serrano's treatment.¹ CP at 32, 178-183.

¹ On March 17, 2016 City of Tacoma served a first primary witness disclosure. Wickizer was not listed. On April 18, 2016, City of Tacoma served a supplemental witness

Beltran-Serrano affirmatively moved for partial summary judgment on the issue of the value of his past medical specials arising from injuries sustained when he was shot by Officer Volk four (4) times. The motion was filed August 2, 2017. CP 26-34. On Beltran-Serrano's motion for partial summary judgment, he made the necessary evidentiary showing that all treatment was related to the injuries that he sustained and that the amounts charged were reasonable and customary in the medical community. CP at 26-115. At the time of Beltran-Serrano's motion, the City of Tacoma had failed to come forth with a shred of evidence disputing Beltran-Serrano's past medical specials. Id. To the contrary, the City of Tacoma's own expert witness Dr. Aleksandra Zietak admitted that with regard to the costs associated with the treatment, the physician charges were reasonable, but could not comment on the hospital charges. CP at 114. Beltran-Serrano provided expert testimony through Anthony Choppa, M.Ed, CRC establishing that the charges by both the hospitals and physicians were reasonable, necessary, and customary in the medical community. CP at 116-120.

disclosure. Wickizer again was not listed. On May 3rd, 2016 City of Tacoma disclosed rebuttal witnesses. Wickizer was not listed. On June 19th, 2017 City of Tacoma disclosed supplemental rebuttal witnesses. Wickizer was not listed. On July 19, 2017, City of Tacoma disclosed a second supplemental list of primary witnesses, adding two physicians, including Dr. Zietak, On August 4, 2017, City of Tacoma disclosed a third supplemental list of primary witnesses and amended third supplemental list of primary witnesses, again no Dr. Wickizer.

Almost three weeks later, on August 21st, 2017 the City served Beltran-Serrano for the first time with a declaration and report by Thomas Wickizer, Ph.D., a self-identified “health economist”. CP at 202, 206. The City had never disclosed Wickizer as an expert in the 23 months of litigation and its multitude of witness disclosures, supplemental witness disclosures, rebuttal witness disclosures, and supplemental rebuttal witness disclosures. The discovery cutoff for disclosure of rebuttal witnesses had long since come and passed on June 19, 2017, the parties had completed discovery and depositions and were preparing the case for trial. Even to date, the City has never amended or updated any of its many witness disclosures to include Dr. Wickizer.

Dr. Wickizer’s report challenged the “reasonableness” element of medical specials, claiming that the amounts billed to Mr. Beltran-Serrano were not reasonable. CP at 203, ¶ 7, CP at 241-257. It remained undisputed that the medical charges were necessary, related, and customary, leaving the “reasonableness” prong as the sole disputed issue on summary judgment. CP at 178-179.

A. Professor Thomas Wickizer, Ph.D. Opinions on Medical Specials Using National Medicare Cost-to-Charge Data

Thomas Wickizer holds a Ph.D. in Health Services Organization and Policy from the University of Michigan. CP at 208. Other than obtaining a

Masters in Social Work in 1974, he has no medical training and is not a medical provider. CP at 208-210. Rather, he describes himself as a “health economist,” explaining, “[i]n my research and teaching over the years, I have studied and analyzed the question of what constitutes efficiency in the production and consumption of health care services.” CP at 202. He refers to this as microeconomics—the “theoretical basis for understanding the valuation of goods and services produced in a market economy.” CP at 244.

The economist’s core theory is that provider-billed charges are inherently unreasonable. CP at 244 (“billed charges are not reasonable”). Instead, the “actual cost of hospital services provides a more valid measure of the reasonable value of health care resource consumption.” CP at 249. He therefore uses Medicare federal cost reports to estimate the reasonable value of cost-to-charge services. CP at 204-205.

Of the \$756,714.64 in medical bills actually sustained by Beltran-Serrano², the economist concludes that his medical special damages are “actually” \$252,954.85. CP at 205, ¶ 15. Professor Wickizer arrived at these numbers by applying the “cost-to-charge” ratio, a number calculated from big-data insurance reimbursement rates, a collateral source benefit to which

² Beltran-Serrano’s submitted that the cost of his past medical specials was \$712,719.99. CP at 119. Dr. Wickizer reached a slightly higher number. The source of the discrepancy is unknown but immaterial, as the trial court ruled using the \$712,719.00 figure. CP at 323.

Beltran-Serrano was not entitled. CP at 204-205. For example, based on market efficiency principles and care consumption averages, the economist opines that Beltran-Serrano's \$58,526 CT scan charge should have been \$2,282.51. CP at 251. Additionally, his \$75,744 operating room charge should have been \$11,285.86. *Id.* These numbers are arrived at regardless of whether or not Beltran-Serrano had the privilege of comparing market rates and collateral source benefits on his emergency medical care. CP at 247.

In Professor Wickizer's conclusion, the economist explains, "billed charges do not represent the reasonable value of economic loss arising from medical care. I provided an alternative method of estimating that value." CP at 255. He avers that "virtually nobody pays full billed charges for hospital care," and that the Tacoma General Hospital "markup," i.e. the price without collateral source benefits, is something "few, if any, informed persons would consider reasonable." CP at 256.

Professor Wickizer has appropriately been excluded many times by trial courts in Washington. *See e.g.*, CP at 275, *Gerlach v. Cove Apartments*, Cause No. 15-2-25974-1 (June 8, 2017, Sup. Ct. King County); *Brady v. McDonalds*, Cause No. 16-2-01520-7 (April 16, 2018, Sup. Ct. Skagit County) (order granting plaintiff's motion to exclude Wickizer); *Benner v. Purcell et al*, 17-2-03413-4 Cause No. (January 18, 2018, Sup. Ct. King

County) (order granting motion to strike Wickizer); *Ride the Ducks September 24, 2015 Aurora Bridge Collision*, (May 2, 2018, Sup. Ct. King County) (order granting motion to exclude Wickizer pursuant to collateral source rule and ER 403). Professor Wickizer's opinions are the same in every case, and he is an emerging disclosed expert in many cases by defendants who wish to lower an injured person's past medical specials. *Id.* For example, all of the above-quoted methodology was used in a prior report by Professor Wickizer excluded by Judge LeRoy McCullough. *Benner v. Purcell et al*, 17-2-03413-4 Cause No. (January 18, 2018, Sup. Ct. King County). The January 18, 2018 order specifically finds that although Professor Wickizer may qualify as an expert, "The proffered evidence shall be excluded per ER 403" and per collateral source case law. *Id.* Professor Wickizer's testimony was also excluded by Judge Brian Stiles on the Skagit County Superior Court on April 16, 2018. *Brady v. McDonalds*, Cause No. 16-2-01520-7 (April 16, 2018, Sup. Ct. Skagit County) (order granting plaintiff's motion to exclude Wickizer); *See also e.g., Ride the Ducks September 24, 2015 Aurora Bridge Collision*, (May 2, 2018, Sup. Ct. King County) (order granting motion to exclude Wickizer pursuant to collateral source rule and ER 403). The question for this Court is whether or not it is appropriate for a jury of 12 to consider broad public policy issues involving

medical care reimbursement rates when they are instructed only to consider the reasonable cost of care rendered to Beltran-Serrano.

B. Beltran-Serrano Moves to Exclude Dr. Wickizer at First Available Opportunity

Beltran-Serrano moved to exclude Dr. Wickizer on August 25th, 2017 in conjunction with his Reply on Partial Summary Judgment. CP at 261-271. A hearing before the Honorable Susan Serko was set for September 1, 2017- allowing the City of Tacoma ample time to respond to Beltran-Serrano's motion to exclude. PCLR 7(a)(3)(A) (2017) (providing six days' notice for motions). Counsel for City of Tacoma did not move to strike Beltran-Serrano's motion to exclude. Nor did counsel for City of Tacoma file a surreply or take any other available action to respond to Beltran-Serrano's motion to exclude Wickizer. It is standard practice and generally accepted, as memorialized in the King County Local Rules³, that if a party takes issue with a motion raised in a responsive pleading, any responsive motion is to be included in the reply and a separate pleading is not to be filed.⁴ By failing to move to strike Beltran-Serrano's motion to

³ For example, King County Local Court Rule (KCLCR) 56(e) provides that "A party objecting to the admissibility of evidence submitted by an opposing party must state the objection in writing in a responsive pleading, a separate submission shall only be filed if the objection is to materials filed in the reply."

⁴ The Pierce County Local Rules do not specifically address the procedure for filing motions to strike evidence submitted in response to a summary judgment motion.

exclude and failing to respond in any way, the City of Tacoma chose to forfeit any opposition to said motion.

C. Trial Court Properly Granted Beltran-Serrano's Motion for Partial Summary Judgment

Beltran-Serrano argued to the trial court that Wickizer's opinions and testimony should be excluded on the following bases: (1) Dr. Wickizer's report and opinions should be rejected because he does not qualify as an expert under the *Frye* test, (2) he does not meet the requirements of ER 702 and 703, (3) his methodology impermissibly violates the well-established collateral source rule; and (4) public policy. CP at 261-271; *see also* RP pp. 4-8.

The trial court granted Beltran-Serrano's motion for partial summary judgment on September 1, 2017, concluding that Cesar Beltran-Serrano incurred \$712,719.99 in past medical specials that were reasonable and necessary and as a result of the injuries sustained by the Beltran-Serrano on June 29, 2013. CP at 322-324. The trial court, the Honorable Susan Serko, refused to rule on the admissibility of Dr. Wickizer's testimony, instead indicating that the issue could be taken up at a later time. RP at p.16:3-15.

While Beltran-Serrano believes that the trial court should have first ruled on the admissibility of Dr. Wickizer's opinions, the trial court did

reach the correct conclusion in granting Beltran-Serrano's Motion for Partial Summary Judgment. This Court should rule that Dr. Wickizer's opinions do not meet the requirements for admissibility and affirm the trial court.

V. ARGUMENT

A. Standard of Review

This Court reviews evidentiary rulings made in the context of a summary judgment on a *de novo* basis. *Momah v. Bharti*, 144 Wn. App. 731, 749, 182 P.3d 455 (2008), as amended, (July 3, 2008). *De novo* review involves this Court engaging in the same inquiry as the trial court. *Woodward v. Lopez*, 174 Wn. App. 460, 467, 300 P.3d 417 (2013). At the outset, it should be noted that the City of Tacoma has framed the issues in this appeal as involving the trial court's ruling on partial summary judgment, rather than the more specific "evidentiary ruling made in the context of a summary judgment", as Beltran-Serrano contends. For purposes of the standard of review, this is a distinction without a difference, as both are reviewed on a *de novo* basis.

Salient to the issues before this Court, a result that the appellate court deems correct will be affirmed regardless of reasons or theory expressed by the trial court. *State v. Jones*, 71 Wn. App. 798, 824, 863 P.2d 85 (1993) (appellate court justified exclusion of evidence on basis of Rule 403 even

though trial court had not mentioned the rule); *see also State v. Orick*, 129 Wn.App. 654, 657, 120 P.3d 87 (2005) (“we can affirm on any ground”).

B. The Trial Court Properly Granted Beltran-Serrano’s Motion for Partial Summary Judgment on Past Medical Specials

This Court is charged with engaging in a *de novo* review of whether the trial court came to the correct legal conclusion in granting Beltran-Serrano’s motion for partial summary judgment. This review involves a two-step analysis. First, is the evidence proffered by the City of Tacoma in response to Beltran-Serrano’s motion for partial summary judgment admissible? Second, if the evidence is admissible, does it create a disputed issue of material fact, thereby precluding summary judgment?

The only evidence the City of Tacoma produced to dispute Beltran-Serrano’s motion was the report of Professor Wickizer. This is uncontested. Appellant’s Opening Brief, p. 2; CP at 178. Therefore, if this Court finds the opinions of Dr. Wickizer are inadmissible, then there are no disputed issues of material fact and the trial court’s ruling should be upheld.

Admittedly, the trial court should have ruled on the admissibility of Professor Wickizer’s opinions before ruling on summary judgment. The refusal to do so was procedurally improper; however, the Court still reached the appropriate result.

A review of the trial court's reasoning at oral argument reveals the trial court's views on Wickizer's opinions as "not fair", RP p.14:1-5, and that "there's no need to bring Dr. Wickizer in to say it's less [the hospital charges], you know, to tell the jury it's less." RP at p.13:19-21. Despite the Court's subsequent erroneous refusal to outright exclude Wickizer, this Court has the authority to and should affirm the trial court's proper result. *State v. Jones*, 71 Wn. App. 798, 824, 863 P.2d 85 (1993) (A result that the appellate court deems correct will be affirmed regardless of reasons or theory expressed by the trial court); *see also State v. Orick*, 129 Wn.App. 654, 657, 120 P.3d 87 (2005) ("we can affirm on any ground").

The trial court's grant of partial summary judgment in Beltran-Serrano's favor should be upheld because (1) Dr. Wickizer's opinions should be excluded under long-standing evidentiary principles; and (2) in the absence of Dr. Wickizer's opinions, there are no remaining issues of disputed material fact precluding partial summary judgment in Beltran-Serrano's favor.

C. Pursuant to Well-Established Evidentiary Principles, Wickizer Should be Excluded

Professor Wickizer opines the \$756,714.64 in medical bills actually sustained by Beltran-Serrano in the course of his treatment should be reduced to \$252,954.85. CP at 205, ¶ 15. In order to arrive at this number,

Dr. Wickizer relies on collateral source data and an unsound and unscientific methodology that should be rejected by this Court. In all, the trial court properly granted Beltran-Serrano's motion because Dr. Wickizer's opinions are inadmissible pursuant to: (1) the collateral source rule; (2) the *Frye* evidentiary standard; (3) ER 403; (4) ER 702 and 703; and (4) public policy. The City of Tacoma agrees that absent Dr. Wickizer's report, there is no disputed issue of material fact precluding summary judgment in Beltran-Serrano's favor. Appellant's Opening Brief, p. 2; CP at 178. This Court should affirm the trial court's ruling.

i. Under the Collateral Source Rule Wickizer's Report Should be Excluded

The methodology used by Dr. Wickizer is flawed because he uses Medicare federal cost data, a collateral source, in order to determine what he deems to be the appropriate cost of the medical care provided. "The very essence of the collateral source rule requires exclusion of evidence of other money received by the claimant so the fact finder will not infer the claimant is receiving a windfall and nullify the defendant's responsibility." *See Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 803, 953 P.2d 800 (1998). Even when it is otherwise relevant, proof of such collateral payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff's damage award. *Boeke v. International Paint Co.*, 27 Wn.App. 611, 618, 620

P.2d 103 (1980) (quoting *Reinan v. Pacific Motor Trucking Co.*, 270 Or. 208, 213, 527 P.2d 256 (1974)). In this respect, courts generally follow a policy of strict exclusion of collateral sources.

The very nature of the testimony offered by Dr. Wickizer is designed to interject “collateral sources” into the proceedings which is forbidden. In his report, Dr. Wickizer opines regarding the reasonable value of medical bills based on an unknown and undisclosed formula based on published data submitted to Medicare by way of federal cost reports. CP at 204-205, ¶ 13. He then adjusts the amounts billed by Mr. Beltran’s health care providers to amounts to which he has no basis that any reasonable health care provider would accept for the services provided. CP at 205, ¶ 14. In short, Dr. Wickizer opines that the costs billed to the general public are not reasonable because they are not the actual amount paid by the public after third-parties, such as insurance, negotiate with the hospitals and secure a reduced rate of treatment. CP at 244 (“billed charges are not reasonable”). There is no sound basis for this type of reduction in the cost of Cesar Beltran-Serrano’s medical care, the reduction of which will be borne by Cesar Beltran-Serrano.

Consistent with the above analysis, courts have rejected similar approaches, holding it improperly violates the collateral source rule, and instead held in favor of the accident victim. For example, in *Hayes v. Weiber*

Enterprises, Inc., 105 Wn.App. 611, 616, 20 P.3d 496 (2001) the court rejected the notion that a factfinder could reduce the plaintiff's medical bills because his insurance carrier was able to pay such bills at a reduced rate. The court rejected the submission of such evidence as being violative of the collateral source rule even though as a matter of fact, no actual payment was ever made for the actual amount of bills accrued. *Id.*; *see also Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000) (extensively discussing the collateral source rule and its relationship to proof of reasonableness of medical billing).

In consideration of the precise issue of whether Professor Wickizer's opinions should be excluded pursuant to the precedent as set forth by *Cox* and *Hayes*, multiple trial courts have excluded Wickizer. *See e.g., Benner v. Purcell et al*, Cause No. 17-2-03413-4 (January 18, 2018, Sup. Ct. King County). Specifically, the *Benner* court ruled a motion to strike Wickizer "should be granted per case law" and then specifically cited the above-referenced cases, *Hayes*, *Cox*, and *Ciminsky*. *Hayes v. Weiber Enterprises, Inc.*, 105 Wn.App. 611; *Cox v. Spangler*, 141 Wn.2d 431; *Ciminsky v. SCI Corp.*, 90 Wn.2d 80, 585 P.2d 1182 (1978). In line with the well-established prohibition against collateral source evidence, Professor Wickizer's opinions should be excluded.

ii. Medicare reimbursement rates have no relationship to Beltran-Serrano’s damages under Washington law, and are therefore irrelevant and inadmissible.

The Pattern Jury Instruction on an award of medical expenses provides that a plaintiff is entitled to “reasonable value of necessary medical care, treatment, and services received to the present time.” WPI 30.07.01. This is based on RCW 4.56.250(1)(a), which provides, “Economic damages” means objectively verifiable monetary losses, including medical expenses.” The issue, and the core function of a jury trial, is to determine a particular plaintiff’s reasonable medical expenses. A jury is not asked to calculate the medical expenses of a hypothetical person who has the benefit of Medicare in a hypothetical medical circumstance of ideal economic leverage. Nor is the jury called to court to evaluate the efficiency of Professor Wickizer’s proposed billing model in the American healthcare system.

The trial court accurately homed in on this problem, remarking at oral argument:

I’m more concerned about if there’s an individual doctor who will say, this amount of care was outrageous for this individual and the hospital should not be reimbursed this rate. But that’s not what he [Wickizer] does. He has this very broad-based generalized opinion about – in lots of different cases and over lots of statistics, as opposed to focusing on Mr. Beltran and what was incurred in this case.

RP at p.10:17-23.

For this reason, Professor Wickizer’s testimony is irrelevant and unhelpful, and is likely to confuse and mislead a jury, and should be excluded under ER 401 and ER 403.

iii. Wickizer Fails to Meet the *Frye* Standard and Should be Excluded

In Washington courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984) (relying on *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923)). Having satisfied *Frye*, the evidence must still meet the other significant standards of admissibility. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011). As explained in *Anderson*, the primary goal of the *Frye* analysis is to determine “whether the evidence offered is based on established scientific methodology.” 172 Wn.2d at 603 (quoting *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001)). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. *Id.* “If there is a significant dispute among qualified scientists in the relevant scientific community, then the evidence may not be admitted,” but scientific opinion need not be unanimous. *Id.* The *Frye* test is not implicated

if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community. *Id.*

Dr. Wickizer's opinions are inadmissible under *Frye* because he fails to follow the generally accepted protocols and methods that appraisers of goods and services follow in determining the reasonable value of a good or service. Dr. Wickizer readily admits this fact, declaring that instead of following standard valuation practices, "I provided an alternative method of estimating that value [reasonable economic value of economic loss arising from medical care]." CP at 255.

Professor Wickizer has also admitted that his methodology, reduction of the actual cost of medical bills, is solely designed for litigation – with the purpose of reducing the price of medical bills.

Q: And wouldn't you agree that the methodology that you've used in this report for your calculations is specifically geared towards determining the reasonable value of medical services as it relates to a litigation context."

A: Yes.

CP at 306:11-16.

Professor Wickizer's new-fangled approach, created for purposes of litigation, is contrary to Washington's laws regarding determination of a fair market value. Under Washington law, "fair market value is what a willing

buyer not under duress is willing to pay a willing seller also not under duress when both have adequate information.” See *Coast to Coast Stores, Inc. v. Gruschus*, 100 Wn.2d 147, 163, 667 P.2d 619 (1983); see also *Premera v. Kreidler*, 133 Wn. App. 23, 45 n. 12, 131 P.3d 930 (2006).

Dr. Wickizer’s report is based entirely on the Medicare federal cost reports, big-data which he perceives to be the cost of creating the medical service, not what a willing consumer and a willing health care provider are willing to exchange for the service. Dr. Wickizer applies a group discount (the reimbursement rates for Medicare and large insurance companies) to a consumer not eligible for such rate and is ignoring established principles of fair market value. Beltran-Serrano, like virtually every other consumer of medical services, lacks the purchasing power of Medicare or large insurance companies. Because individuals like Beltran-Serrano lack such purchasing power, the wholesale rate that Medicare and other large insurance entities reimburse should not dictate the “reasonable value” of those medical services to individuals who are not similarly situated. For example, Medicare is a government agency, with not only unparalleled purchasing power, but also the power and laws of the federal government to coerce hospitals and medical providers to accept its reimbursement rates. Such rate has no relationship to what a free market buyer and seller would exchange for such services.

Dr. Wickizer has admitted that his methodology does not consider specific consumers and specific healthcare providers, rather he relies on big-data. CP at 292:14 through CP 297. Without expertise and knowledge in what medical consumers *actually pay* in relation to the amount billed for health care services and treatments, Dr. Wickizer is not qualified to opine as an expert witness regarding the “reasonable value” of such services and treatments. Furthermore, his opinions rely on a methodology based entirely on speculation and conjecture regarding *the cost to produce the service*, not its reasonable value or fair market value. In fact, after reducing the value of the services to that which is published in Medicare federal cost reports, Dr. Wickizer then arbitrarily decides what profit margin the hospital should be allowed. CP at 205, ¶14. Dr. Wickizer does not conduct a survey of what area hospitals charge for similar services. Instead, he injects his own *ipsa dixit* as to what he believes the cost should be with his own 5% profit margin. Accordingly, Dr. Wickizer must be excluded as an expert witness in this case because he does not meet the criteria of *Frye*.

iv. Wickizer’s Report is Properly Excluded Pursuant to ER 702 and ER 703

“Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to

testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” *Id.* (citing *State v. Gregory*, 158 Wn.2d 829–30, (2006)). Specifically, our courts consider “(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community.” *Id.* (citing *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994)).

In this case, Dr. Wickizer fails to satisfy either prong of ER 702. First, the methodology used by Professor Wickizer is self-ascribed novel in the context of valuation of reasonable medical expenses incurred by an individual. CP at 255. Second, Dr. Wickizer’s testimony will not be helpful to the jury because he has no experience as to what specific consumers pay for medical services. CP at 292:14 through CP 297; *generally* CP 201-260. Nor has he surveyed what area hospitals charge for the same treatment. *Id.* Because he lacks experience in the amounts that medical consumers pay for health care services and treatments, Dr. Wickizer’s testimony will not be helpful to jurors in determining the “reasonable value” of such services and treatments.

In addition, under ER 703, the factual basis for the expert’s opinion must be based on the expert’s first-hand knowledge or on information

generally relied on in the field of expertise. *See* ER 703. As discussed under the *Frye* analysis, Dr. Wickizer relies on what the Medicare reimbursement rate is rather than what patients or even health insurers pay for medical goods and services. His opinion should be excluded because it is based on a public policy analysis as to the cost of producing goods as opposed the what is actually charged for them.

v. Public Policy Requires Exclusion of Wickizer

Dr. Wickizer's opinions should be excluded based on public policy. In any personal injury claim, the plaintiff has no control as to what healthcare providers charge. In this case, Beltran-Serrano was shot four times and was emergently taken to Tacoma General Hospital for life-saving treatment. The charges incurred for that care simply is what it is. Professor Wickizer's "theories" are nothing more than a poorly disguised effort to shift the collateral source rule to the defendant's benefit by indirectly seeking to discount a plaintiff's medical bills because entities such as Medicare and health insurers ultimately can pay less. The defendant should not be allowed to do indirectly what it cannot do directly.

It is the public policy of the State of Washington that innocent victims of tortfeasors should be fully and adequately compensated for their losses. *See Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 219-220, 588 P.2d 191 (1978); *Brown v. Snohomish County Physicians Corp.*, 120

Wn.2d 747, (1993) (rule in *Thiringer* applies outside subrogation issues). Yet, despite this rule, according to the City of Tacoma, Mr. Beltran should be only partially compensated for his medical bills which he accrued as a direct result of the City's negligence. The City's attempt to reduce the cost of the care provided by Beltran-Serrano's medical providers should be rejected.

Another problem with Professor Wickizer's approach for determining the reasonableness of medical charges is the impact it would have on various types of medical insurers and their reimbursements from claims like Beltran-Serrano's. Professor Wickizer would have plaintiffs compensated at the lowest level available by example—Medicare—regardless of whether or not his actual insurer (e.g. group health plan, ERISA plan, Department of Labor and Industries) paid rates higher than what Medicare pays. In responding to Dr. Wickizer's opinions a plaintiff would have no choice but to introduce evidence of collateral sources in order to show that his own insurer paid more than what Dr. Wickizer deems to be the reasonable cost of medical services.

In *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998), our Supreme Court defined and explained subrogation rights in detail:

Subrogation is an equitable doctrine the essential purpose of which is to provide for a proper allocation of payment responsibility. It seeks to impose ultimate responsibility for

a wrong or loss on the party who, in equity and good conscience, ought to bear it. RONALD C. HORN, SUBROGATION IN INSURANCE THEORY AND PRACTICE 3 (1964). ...

Subrogation in the personal injury context may take the form of a health insurance plan, PIP insurance under an auto policy, ERISA plans, DSHS administration of Medicaid benefits, Medicare, or any other plan that pays the medical expenses of a tort victim. *See e.g.*, 35 Wa. Prac., Washington Insurance Law and Litigation § 25:1 (2017-2018 ed.) (cases cited therein); *see also* 27 Wash. Prac., Creditors' Remedies - Debtors' Relief § 4.175. The subrogation rights may arise from the common law, from applicable legislation, or from contract. *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998). These rights differ depending on the type and form of subrogation claimant and the particular legal obligations that apply. *Id.* In motor vehicle crashes, usually one or more auto policies have PIP coverage which applies. *Id.* The industry standard is that PIP carriers pay 100% of the medical bills up to the limits of the policy coverage by contract. *Id.* The PIP carrier then has a right of subrogation to be reimbursed for these payments under the terms of the insurance policy. *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012)

If the tort victim is on the job at the time of injury, a completely different calculation for subrogation rights is employed. RCW

51.24.060(1)(c) provides a subrogation right to the Department of Labor & Industries from any third-party tort recovery. The calculation of that subrogation right is determined by a statutory formula set forth in RCW 51.24.060(1). *See Tobin v. Department of Labor & Industries*, 165 Wn.2d 1016, 199 P.3d 411 (2009).

Medicaid benefits are administered by the Department of Social and Health Services (DSHS). DSHS is given a statutory subrogation lien against any third-party tort recovery. RCW 74.09.180. But federal funds are involved in these payments, so federal law also applies. 42 U.S.C. 1396a(a)(25)(B).

Regence, Blue Cross and other health insurance carriers often provide medical benefits to Washington residents who are tort victims. Their subrogation rights are governed by Washington law. Each policy has different co-pays, deductibles and reimbursement obligations. In contrast, employer-funded health plans are governed by federal law under the Employee Retirement Income Security Act (ERISA). 29 U.S.C. 18 *et seq.* Sorting out such differences in a given tort case would require the injection of insurance issues to the jury. Each of these coverages has different reimbursement rates for medical providers. The largest of all coverage programs with the most clout and thus the lowest reimbursement rates is Medicare. And that is, of course, the program suggested by the City of

Tacoma as the rate that should be used to measure the reasonableness of charges. But if Medicare rates were adopted as the reasonable rate for medical charges, anyone whose bills were paid out of their own pocket or by a PIP carrier, a health insurance plan, an ERISA plan, or Labor and Industries would not recover the full amount paid for the bills, leaving a shortfall between the amount recovered for medical expenses in the tort action and the amount owed to PIP insurers or medical insurance companies for their subrogation claims.

Professor Wickizer's methodology is inconsistent with decades of Washington law on the rights of insurers and governmental agencies to recover from at-fault third parties. Collateral sources are inadmissible in part because the collateral sources are also entitled to reimbursement. The City of Tacoma's theory contravenes Washington law and public policy and Professor Wickizer's testimony should be excluded.

D. Absent Wickizer's Report, there are No Disputed Issues of Material Fact

The City of Tacoma admits that the only fact which it disputed in response to Beltran-Serrano's motion for partial summary judgment was the "reasonableness" of the medical bills as supported by Thomas Wickizer, Ph.D.. Appellant's Opening Brief, p. 2; CP at 178. In his motion for partial summary judgment, Beltran-Serrano made a more-than-sufficient showing

that his past medical specials were reasonable, necessary, and related to the negligent shooting. CP at 26-115. When a plaintiff presents sufficient evidence establishing the reasonableness and necessity of his or her medical treatment and expenses, and the defendant elicits no controverting evidence, the reasonableness and necessity of plaintiff's medical expenses are not a matter of legitimate dispute. *Palmer v. Jensen*, 132 Wn.2d 193, 199-200, 937 P.2d 597 (1997) ; *Ide v. Stoltenow*, 47 Wn.2d 847, 851, 289 P.2d 1007 (1955).

For the multitude of reasons described above, Wickizer's report is properly excluded. As a result, the City of Tacoma has failed to meet its burden to overcome partial summary judgment by not producing admissible evidence to rebut Beltran-Serrano's motion for partial summary judgment. Beltran-Serrano requests this Court affirm the trial court's ruling granting partial summary judgment.

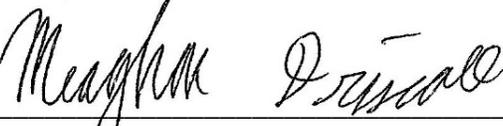
VI. CONCLUSION

The trial court's order granting Beltran-Serrano's partial summary judgment on past medical specials should be affirmed. The only disputed issue of material fact before the trial court was the reasonable value of Beltran-Serrano's medical bills. The City of Tacoma failed to produce any admissible evidence to rebut Beltran-Serrano's motion for partial summary

judgment. As such, in the absence of any disputed issues of material fact, the partial summary judgment for Beltran-Serrano should be upheld.

DATED this 10th day of October, 2018.

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DECLARATION OF SERVICE

On the date stated below, I electronically e-filed the foregoing Brief of Respondents, under Case No. 51317-0-II with the Clerk of the court for the Court of Appeals, Division II, for the State of WA and electronically served the same on the following parties:

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 10th day of October, 2018 at Tacoma, Washington.



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October 10, 2018 - 4:16 PM

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