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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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SPOKANE COUNTY, PUBLIC WORKS/DEPARTMENT  
OF ENGINEERING & ROADS, a municipal corporation, Appellant,

v.

MADELYNN TAPKEN, Cross Appellant/Respondent; CONRAD  
MALINAK, Respondent.

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CONRAD MALINAK'S ANSWERING BRIEF

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## I. INTRODUCTION

Except as otherwise provided herein, Mr. Malinak joins in and adopts the response argument at Sections IV Subparts A, B, C, and D and Section V, Subparts A, B, C, of the Madelynn Tapken's *Answering Brief*. Mr. Malinak does not join or adopt Ms. Tapken's arguments related to the absence of Ms. Tapken's negligence or the arguments and authorities set forth in Section VI of her *Opening Brief on Cross-Appeal*.

## II. ISSUES PRESENTED

### A. **Restatement of Appellant's Issues**

1. ***Remand for new trial.*** The Court of Appeals previously remanded this matter for a new trial holding that the Trial Court's grant of the Motion for Judgment as a Matter of Law pursuant to Civil Rule 50 was improper. Did the Trial Court, upon re-trial of this matter, act within its discretion in denying Spokane County's *motion in limine* regarding Mr. Malinak's claim for medical expenses and the testimony of Charles Morrison, M.D.?

2. ***Instructions to the jury regarding damages.*** The Trial Court instructed the jury regarding the nature and measure of Mr. Malinak's damages and the jury was provided a Special Verdict form proposed by Spokane County. Did the Trial Court properly instruct the jury as to Mr. Malinak's damages?

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History of the First Trial and Appeal.**

This matter was initially tried before the Honorable John Cooney in 2014. After three-weeks of trial, Judge Cooney granted the County's motion for judgment as a matter of law pursuant to Civil Rule 50, ruling that Ms. Tapken and Mr. Malinak had not presented evidence that the County breached its duty or established proximate cause. Judge Cooney dismissed all of the claims asserted by both Ms. Tapken and Mr. Malinak against the County. CP 312. In that motion, the County argued that Mr. Malinak had not submitted evidence allowing the jury to find that the medical expenses were reasonable and necessary. CP 333. Mr. Malinak filed a Notice of Appeal of the Trial Court's order granting the judgment as a matter of law and all other rulings or orders which became final upon entry of the order. This Court reversed the Trial Court's order granting Spokane County's Motion for a Judgment as Matter of law and remanded the case for a new trial. CP 38-60. At the new trial, the jury determined that all three parties were at fault and allocated that fault as follows: Spokane County (60%), Mr. Malinak (30%) and Ms. Tapken (10%). CP 2652-2654. The jury was properly instructed to consider Mr. Malinak's

economic and non-economic damages and ultimately awarded him \$35,000.00. CP 2654.

#### IV. ARGUMENT

**A. The Trial Court did not abuse its discretion in denying the County's *Motion in Limine* regarding the testimony of Charles Morrison, M.D. or Mr. Malinak's claims for damages.**

Spokane County argues that the Court erred denying its Motion in Limine (CP 1506-1507) to exclude the testimony of Charles Morrison, M.D. and his claims for damages because (1) the Trial Court "reinstated" Mr. Malinak's claims the first day of trial; (2) Mr. Malinak did not appeal the dismissal of his claim in connection with the motion for judgment as a matter of law and the "law of the case doctrine" (and Judge Plese's December, 2016 order) prevented him from asserting this claim in the new trial; and (3) its Motion in Limine should have been granted excluding Dr. Morrison's testimony based on alleged discovery violations.

The grant or denial of a motion in limine is within the discretion of the trial court subject to review for abuse of discretion. *Gammon v. Clark Equipment Co.*, 38 Wn.App. 274, 286-287, 686 P.2d 1102 (1984). The trial court's decision on a motion in limine will only be reversed in the event of an abuse of that discretion—when the trial court's ruling is manifestly unreasonable or based on untenable grounds. *Garcia v.*

*Providence Medical Center*, 60 Wn.App. 635, 642, 806 P.2d 266 (1991). A motion in limine should only be granted if it describes evidence objected to with sufficient specificity (1) to enable the trial court to determine that it is *clearly inadmissible*; (2) that the evidence is so prejudicial that the movant should be spared the necessity of calling attention to it when offered; and (3) the trial court is given a memorandum of authorities showing that the evidence is inadmissible. *Id.* Even if the appellant establishes abuse of discretion, the trial court's decision in regard to a motion in limine is not reversible error unless the appellant demonstrates actual prejudice. *Maytown Sand and Gravel, LLC v. Thurston County*, 198 Wn.App. 560, 590, 395 P.3d 149 (2017). A reviewing court may not find abuse of discretion of a trial court's evidentiary ruling simply because it would have decided the case differently, it must be convinced that no reasonable person would take the view adopted by the trial court. *Gilmore v. Jefferson County Public Transportation Benefit Area*, (Supreme Court of Washington Slip Op. No. 94559-4 April 19, 2018) quoting *State v. Salgado-Mendoza*, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

**1. The Trial Court did not “reinstate” Mr. Malinak’s claims, the Trial Court properly conducted a new trial as directed by the Court of Appeals.**

Spokane County argues that the trial court improperly “reinstated” Mr. Malinak’s claim for medical expenses because his claim was dismissed at the first trial pursuant to Civil Rule 50 and he was therefore barred from submitting the claim to the jury based on the “law of the case” doctrine. This mischaracterizes the prior proceedings in this case and the Trial Court’s role upon remand for a new trial.

At the initial trial, the County moved to dismiss both Mr. Tapken’s claims and Mr. Malinak’s cross-claim (including medical expenses) pursuant to Civil Rule 50 at the first trial before Judge Cooney. RP 312; 333. Spokane County argued that Mr. Malinak presented no testimony that the medical expenses sustained the day of the accident were reasonable and necessary and, therefore, a jury could not award damages and Civil Rule 50 warranted dismissal CP 334-335. Mr. Malinak timely filed a Notice of Appeal to the Court of Appeals granting the Motion for Judgment as a Matter of Law. This Court reversed Judge Cooney’s decision and remanded for a new trial. CP 57. The Court of Appeals’ opinion and the mandate issued with that opinion did not provide that Mr. Malinak was precluded from proceeding with his Cross-Claim against the

County. Instead, the Court of Appeals held that Judge Cooney had improperly dismissed Mr. Malinak's claims under Civil Rule 50 and remanded the entire matter for a new trial. An appellate decision providing, "we remand for further proceedings" signals the Court of Appeal's expectation that the trial court will exercise its discretion to decide any issue necessary to resolve the case. *In re Marriage of Rockwell*, 157 Wn.App. 449, 453, 238 P.3d 1184 (2010). In this case, the Court of Appeals decision in the first appeal reversed the trial court's order granting of the County's motion for judgment as a matter of law and remanded the case for trial. CP 41, 57.

Once this case was remanded for a new trial, Judge Fennessey was assigned to hear the case and was charged with presiding over a jury trial to decide the claims asserted by Ms. Tapken and Mr. Malinak's cross-claim against the County. The trial judge has discretionary authority to manage his or her court to achieve an orderly and expeditious disposition of cases, and to assure compliance with its rulings during trial. *Peluso v. Barton Auto Dealerships, Inc.*, 138 Wn.App. 65, 71, 155 P.3d 978 (2007). The trial court must be given wide latitude in conducting the trial. *Turner v. Wenatchee Vinegar Company*, 162 Wash. 313, 318, 298 P. 683 (1931). The admission of testimony is a discretionary decision vested in the trial

court responsible for trying the case. *Acord v. Pettit*, 174 Wn.App. 95, 104, 302 P.3d 1265 (2013). In conducting the trial, the trial judge also has broad discretion in ruling on evidentiary matters and will not be overturned absent a manifest abuse of discretion. *City of Bellevue v. Raum*, 171 Wn.App. 124, 149, 286 P.3d 695 (2012) quoting *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-663, 935 P.2d 555 (1997).

The necessary issues, evidence, and testimony to be resolved at the re-trial of this matter included Mr. Malinak's cross claims for injuries, medical expenses, and general damages caused by the accident. CP 22-27, CP 38 & CP 57.

The County's reliance on *Hubbard v. Scroggin*, 68 Wn.App. 883, 846 P.2d 580 (1993) and *Green v. Hopper*, 149 Wn.App. 627, 205 P.3d 134 (2009) are misguided because they deal with the amendment of a claim pursuant to CR 15(b) during the course of trial. In *Hubbard*, the Plaintiff sued the Defendant to recover a \$2,000.00 down-payment on a house. *Hubbard* at 884. The trial court awarded the Plaintiff \$2,000.00, statutory attorney fees and costs. *Id.* at 884-885. The Plaintiff had voluntarily dismissed the claim during her case, then asked the Court to reinstate that claim pursuant to CR 15(b) which was granted. *Id.* at 885-886. The Court of Appeals ruled that reinstating the claim pursuant to CR

15(b) after the Plaintiff's voluntary dismissal was improper and prejudicial. *Id.* at 889.

In *Green*, the Plaintiff brought an action for ejectment and quiet title by adverse possession. While the trial court rejected the adverse possession claim during trial, it granted complete relief based on its equitable discretion. *Green* at 631. After trial, the trial court submitted its proposed findings, conclusions and ruling and granted the Plaintiff's claims bas on mutual recognition and acquiescence, a claim that had never been pled. *Id.* at 631. The trial court concluded that under CR 15(b), the doctrine of mutual recognition and acquiescence supplemented the doctrine of adverse possession and was supported by the evidence at trial and allowed an amendment of the Complaint under 15(b). *Id.* at 631. The Court of Appeals held that the trial court abused its discretion allowing an amendment of the pleadings pursuant to CR 15(b) because no notice of the unpleaded issues had been given and had not been litigated with the consent of the parties. *Id.* at 636-638.

Neither of these cases apply in this matter and CR 15(b) has no application. Mr. Malinak did not voluntarily dismiss his claims at trial and did not ask the Trial Court to amend his pleadings during the course of trial to add a new claim that had never been pled. Mr. Malinak's original

Cross-Claim asserted that the County owed a duty to maintain a roadway safe for ordinary travel, that the County breached this duty, that the breach of the duty was a proximate cause of Mr. Malinak's injuries, and Mr. Malinak sustained general and special damages. CP 22-25 Mr. Malinak's claims were not a new theory presented for the first time in the re-trial of this case. The trial court did not amend the pleadings under CR 15(b) during the course of the new trial or add an entirely new cause of action. Mr. Malinak asserted a claim for medical expenses in his original cross-claim, that claim was dismissed pursuant to Civil Rule 50 at the first trial, and this Court ordered a re-trial of Mr. Malinak's claims asserted against the County.

**2. The "law of the case" doctrine and Judge Plese's December 12, 2016 order have no application.**

The County insists that Mr. Malinak was precluded from pursuing his Cross-Claim at the new trial because he did not appeal the Court's ruling granting the Motion for Judgment as a Matter of Law pursuant to Civil Rule 50 and the "law of the case" prevented a full re-trial of his claims.

Mr. Malinak did appeal Judge Cooney's order granting the Motion for Judgment as a matter of Law including other rulings or orders that became final upon entry of that judgment. As discussed above, once the case was remanded for a new trial, the Trial Court had the discretion and duty to re-

try the entire matter including Mr. Malinak's cross-claims for general and special damages.

The County also misapplies the "law of the case doctrine" in an attempt to preclude a full re-trial as ordered by this Court. The law of the case doctrine requires a trial court after remand of a case to abide by the *legal rulings* made by the appellate court. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). This general proposition, however, does not prevent a trial court on remand of the case from revisiting prior, unappealed rulings. *State v. Barberio*, 121 Wn.2d 48, 50, 846 P.2d 519 (1993) ("The trial court may exercise independent judgment as to decisions to which error was not assigned in the prior review and those decisions are subject to later review by the appellate court." Quoting RAP 2.5(c)(1). See also *State v. Kilgore*, 167 Wn.2d 28, 38-39, 216 P.3d 393 (2009) (RAP 2.5(c)(1) allows the trial court in its discretion to revisit an issue on remand that was not subject of the earlier appeal and if the trial court exercises this discretion, its decision may be the subject of a later appeal.) The law of the case doctrine provides that if there has been a determination of applicable law in a prior appeal, it cannot be considered in a subsequent appeal on the same case. *Roberson v. Perez*, 119 Wn.App. 928, 931, 83 P.3d 1026 (2004). The doctrine only applies to legal

principles actually decided by the appellate court. *Fluke Capital Mgmt. Servs. Co. v. Richmond*, 106 Wn.2d. 614, 620, 724 P.2d 356 (1986). In this case, the Court of Appeals remanded this case for a full trial. The Court of Appeals did not rule that Mr. Malinak was precluded from pursuing his cross-claims against the County and, instead, ordered a new trial.

The County's reliance *Bailie Communications, Ltd. v. Trend Business Systems, Inc.*, 61 Wn.App. 151, 810 P.2d 12 (1991) is based on a partial quote (taken entirely out of context) and concerns a situation which has no application in this case. The Court in *Bailie* held that "A decision by the appellate court on appeal as to every question that was determined on appeal and as to every question which might have been determined becomes the law of the case and supersedes the trial court's findings." *Bailie* at 160. *Bailie* has no application as the Court of Appeals did not make a legal determination of Mr. Malinak's cross-claims for general and special damages other than to order that the Superior Court conduct a new trial. The proposition stated in *Bailie* only applies to questions that might have been determined upon a second appeal of the same action. *Morehouse v. City of Everett*, 141 Wash. 399, 404 P. 157 (1926). The "law of the case doctrine" does not apply to a complete re-trial of the case and

has no application here. The Trial Court had complete discretion to exercise independent judgment regarding all prior unappealed decisions in the re-trial of this case.

Undeterred, the County argues that Judge Plese's December 12, 2016 order precluded Judge Fennessey from allowing the jury to hear Mr. Malinak's cross-claim at the new trial. Judge Plese was not the trial judge ultimately assigned to conduct the re-trial of this matter. Judge Plese did not review pleadings submitted by the parties in regard to motions in limine, did not hear the argument of counsel regarding the motions in limine and was not the trial judge that presided over this trial. Judge Fennessey, as discussed above, was charged with hearing this matter, had the discretion to make evidentiary decisions and to grant or deny motions in limine prior to trial and was not bound by Judge Plese's pre-trial order. See RCW 4.44.080 (All questions of law including the admissibility of testimony, the facts preliminary to such admission, other rules of evidence, and all discussions of law are to be decided and addressed by the Court.) The "law of the case" does not apply to a case where one judge makes a pre-trial ruling denying a party relief and a second judge provides a different ruling. *MGIC Financial Corp. v. H.A. Briggs Co.*, 24 Wn.App. 1, 8, 600 P.2d 573 (1979) ("Law of the case doctrine" applies to parties

raising identical issues on successive appeals of the same case and does not apply where trial court grants a motion for summary judgment several days after another trial judge had denied a similar motion.); *Central Puget Sound Regional Transit Authority v. Heirs and Devisees of Eastey*, 135 Wn.App. 446, 465, 144 P.3d 332 (2006) (concurring opinion) (The trial judge assigned to hear the case was entitled to reconsider the earlier ruling of another trial judge granting a pre-trial motion in limine excluding evidence. The law of the case doctrine has no application and did not prohibit reexamination of the matter.); and *In re Estate of Jones*, 170 Wn.App. 594, 605-606, 287 P.3d 610 (2012) (Law of the case doctrine does not apply to identical issues repeatedly raised before the trial court and does not prevent a second judge from reconsidering a prior ruling or correct a prior mistake.) In this case, Judge Fennessey was the judicial officer assigned to preside over the trial of this case. He had the authority and discretion as to all matters of evidence and the conduct of that trial. The “law of the case” doctrine relied on by the County has no application.

**3. The Trial Court had discretion to review and determine alleged discovery violations.**

The County argues that the Trial Court should have granted its motion in limine excluding Dr. Morrison’s testimony because of alleged “discovery violations”. As set forth above, the Trial Court had discretion

to hear, and dispose of motions in limine brought prior to trial. As set forth below, the Trial Court also has the discretion to hear, and dispose of the County's argument regarding alleged discovery violations.

Assuming a discovery violation is even found to exist, the Trial Court has broad discretion to impose sanctions for violation of a discovery order. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Assuming a discovery violation is even present, the Trial Court's decision will not be disturbed on appeal absent a showing of a clear abuse of that discretion. *Id.* If the Trial Court chooses one of the harsher remedies available under Civil Rule 37(b), including the exclusion of evidence, it must consider whether lesser sanctions would have sufficed, and whether there is a finding that the refusal to obey a discovery order was willful, deliberate, and substantially prejudiced the opponent's ability to prepare for trial. *Id.* It is an abuse of discretion to exclude testimony absent a showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct. *Id.* See also *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn.2d 693, 706-707, 732 P.2d 974 (1987) and *In re Estate of Foster*, 55 Wn.App. 545, 548-549, 779 P.2d 272 (1989) (In the absence of a court order, the party seeking exclusion must demonstrate actual prejudice.)

In this case, the Court considered the County's motion in limine, the extensive documents attached to those motions in limine, the argument of counsel prior regarding alleged "discovery violations", and the County's motion to exclude Dr. Morrison as a witness. CP 1460; 1507; RP 249-251. The evidence presented to the Trial Court on this specific issue included the following: (1) Mr. Malinak supplemented his witness list identifying Dr. Morrison as an expert witness "available for deposition" on May 5, 2017 prior to the discovery cutoff date of May 23, 2017. CP 1910.; (2) on May 8, 2017, before the discovery cutoff, Mr. Malinak supplemented his responses to the County's Interrogatories and Requests for Production of Documents identifying Dr. Morrison as an expert witness. Those responses stated that Dr. Morrison would testify at trial regarding the injuries sustained by Mr. Malinak, that the injuries sustained were caused by the accident on a more probable than not basis, that the expenses for that treatment were reasonable and necessary, and provided a full recitation of Mr. Malinak's subjective complaints, objective findings and medical care. CP 1914-1916; (3) on May 8, 2017, Mr. Malinak's attorney e-mailed Spokane County's attorney the day these supplemental responses were provided, invited counsel to depose Dr. Morrison, asked counsel to contact him if they wanted to depose Dr. Morrison, and

suggested that he could be deposed in Spokane around May 23, 2017 because other depositions had already been set in Spokane on that date. CP 1913. The County provided no response.

In addition to the documentary evidence provided by the County in connection with its motion in limine, the Trial Court heard the following argument at the motion: (1) Mr. Malinak's counsel noted that he had previously sent Requests for Admissions regarding Mr. Malinak's medical records on April 5, 2017 and provided a copy of them to the Trial Court at the hearing on the motion in limine. RP 242-243; (2) Spokane County admitted the authenticity of the medical records. RP 242; (3) at the hearing for the motions in limine, Mr. Malinak's attorney read from a letter sent to Spokane County's attorney on April 26, 2017 stating that, depending on the County's responses to the Requests for Admissions, Mr. Malinak may need to call a physician to testify on his behalf at trial, the sooner the responses were provided by the County, the sooner a determination could be made on this issue to amend the disclosure of expert witnesses; and (4) counsel made Dr. Morrison available for deposition well in advance of trial. RP 243-244; RP 1221. The Trial Court properly exercised its discretion in denying the motion in limine.

Finally, the County has not shown actual prejudice is the denial of its motion in limine regarding Dr. Morrison's testimony. Not only did the County have the opportunity to depose Dr. Morrison prior to trial, it had a full and fair opportunity to cross examine Dr. Morrison at trial. In fact, the County argues that they were able to effectively impeach Dr. Morrison's testimony showing bias and lack of relevant knowledge. *Opening Brief of Spokane County*, ppg. 17-18; 40; RP 1233-1235. From 2012 to 2016, the County had ample opportunity to retain a physician in an independent medical exam and the testimony of its own expert witness at trial regarding Mr. Malinak's injuries and medical expenses.

**B. The Trial Court properly instructed the jury regarding Mr. Malinak's damages.**

The County's argument that the jury's award of \$35,000.00 to Mr. Malinak must be reversed because Dr. Morrison's testimony was impeached at trial, Instruction No. 31 was an unconstitutional comment on the evidence, and Instruction No. 31 conflicted with Instruction No. 5 are without merit.

**1. The Trial Court properly instructed the jury to consider Mr. Malinak's economic and non-economic damages.**

Jury Instructions are sufficient if they are readily understood, not misleading, permit a party to argue its theory of the case to the jury, and,

when read as a whole, properly inform the trier of fact of the applicable law. *City of Bellevue v. Raum*, 171 Wn.App. 124, 142, 286 P.3d 695 (2012). An appellate court presumes that the jury followed the instructions given at trial. *Levea v. G.A. Gray Corp.*, 17 Wn.App. 214, 222, 562 P.2d 1276 (1977).

Instruction No. 30, a pattern instruction, properly instructed the jury as to the measure of Mr. Malinak's damages. Instruction No. 30 advised the jury that, by providing the instruction, the Trial Court was not suggesting the party for which the verdict should be rendered. CP 2642. As to Mr. Malinak's claim against the County, Instruction No. 31 properly instructed that if the jury found for Mr. Malinak on his cross claim, it should *consider* his economic and non-economic damage elements as follows: (1) medical expenses of \$21,395.58; (2) the fair market cash value considering the measure of damages; (3) the fair market cash value of any damage property; (4) non-economic damages of the nature and extent of Mr. Malinak's injuries; (5) the loss of enjoyment of life experienced and with reasonable probability to be experienced in the future; and (6) mental and physical pain and suffering. CP 2643. The jury was not instructed, as the County suggests, that if they found for Mr. Malinak, they were required to award damages for past medical expenses.

Instead, the jury was properly instructed as to the measure of economic and non-economic damages and, in the case of non-economic damages, the jury was governed by its own judgment, the evidence in the case, and the Court's instructions. CP 2643.

Dr. Morrison testified at trial regarding Mr. Malinak's injuries, treatment and medical damages incurred the day of the accident at Sacred Heart Medical Center. RP 1222-1233. The jury also heard testimony from Mr. Malinak regarding his non-economic damages including his severe depression, problems with completing assignments at school and the overall emotional impact the collision had on his life. RP 1251-1256. The jury was properly instructed that if their verdict was for Mr. Malinak, they should consider both Mr. Malinak's economic damages and non-economic damages presented at trial. CP 2643 The jury was not instructed that they had to award Mr. Malinak's medical expenses if they found the County was negligent.

Similarly, the County's argument that the jury was instructed to award Mr. Malinak's medical expenses is in conflict with the Special Verdict form provided to the jury. The Special Verdict form directed the jury to determine whether the negligence of any of the parties was a proximate cause of injury to Mr. Malinak. CP 2651. The Special Verdict

form provided that if they found that the County was liable to Mr. Malinak, they were to determine the total amount of Mr. Malinak's damages without considering the issue of contributory negligence. CP 2651. The jury found Mr. Malinak's damages to be \$35,000.00. CP 2654. The Special Verdict Form did not ask the jury to award an amount for special damages and a separate amount in general damages. CP 2651. The Special Verdict form did not direct the jury to automatically award Mr. Malinak his medical expenses should they find the County liable for his injuries. The Special Verdict Form proposed by Spokane County mirrors the one ultimately provided to the jury in its deliberations. CP 2592-2594. If a party is dissatisfied with a special verdict form, that party has a duty to propose an appropriate alternative or properly object. *City of Bellevue v. Raum*, 171 Wn.App. 124, 145, 286 P.3d 695 (2012). A special verdict form is sufficient if it allows the parties to argue their theories of the case, does not mislead the jury, and properly informs the jury of the law to be applied. *Id.* Spokane County did not object to the Special Verdict submitted to the jury and, in fact, proposed the identical form ultimately provided to the jury.

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**2. Instruction No. 31 was not an unconstitutional comment on the evidence.**

The County's argument that Instruction No. 31's reference to Mr. Malinak's medical damages of \$21,395.58 as undisputed was an unconstitutional comment on the evidence is also incorrect.

A jury should be instructed in accordance with the facts and the instructions given to the jury are governed by the facts proved in each particular case. *Allison v. Department of Labor and Industries*, 66 Wn.2d 263, 267, 401 P.2d 982 (1965) citing *Jackson v. Department of Labor & Industries*, 54 Wn.2d 643, 648, 343 P.2d 1033 (1959). A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. *State v. Miller*, 179 Wn.App. 91, 107, 316 P.3d 1143 (2014). The prohibition against commenting on the evidence does not apply to facts about which there is no dispute or are admitted. *Case v. Peterson*, 17 Wn.2d 523, 531, 136 P.2d 192 (1943) and *James v. Ellis*, 44 Wn.2d 599, 577, 269 P.2d 573 (1954).

In this case, there is no dispute that Mr. Malinak alleged that he sustained injuries as a result of Spokane County's negligence since 2013. CP 18-27. Furthermore, there is no dispute that Mr. Malinak was treated at the hospital for injuries the day of the collision. The County admitted the

records from Sacred Heart Medical Center Emergency Room from the date of the accident stating that Mr. Malinak had been involved in a motor vehicle crash, ejected, and complained of mid back and shin pain. *Defense Exhibit 553*. A summary of Mr. Malinak's medical expenses submitted to the jury all date from the date of the accident and the treatment he received at Sacred Heart. *Defense Exhibit No. 702*. Dr. Morrison testified that the medical expenses for the treatment Mr. Malinak received at Sacred Heart Medical Center the night of the accident (except for a charge of \$136.00 for an x-ray) were reasonable and necessary. RP 1230-1232 When questioned by the County, Dr. Morrison again testified that the billings were reasonable and necessary for the services provided. RP 1234. The County admitted the authenticity of Mr. Malinak's medical records in Requests for Admissions sent by Mr. Malinak's attorney prior to trial. RP 242. The only question asked by the County during trial concerning Mr. Malinak's medical expenses was whether Dr. Morrison consulted surveys of hospital billings in a specific geographic area. RP 1234-1235. The County did not introduce any evidence at trial disputing that Mr. Malinak received treatment on the day of the collision, the reasonableness and necessity of the medical charges that were incurred, or the amount that

was incurred. Instruction No. 31 was not an improper comment on the evidence because the amount of those expenses were not disputed at trial.

**3. The County's perception that Dr. Morrison was impeached at trial is not a basis for reversing the jury's verdict.**

The County argues that the jury's verdict must be reversed because Dr. Morrison's testimony was impeached demonstrating his "bias" and "lack of relevant knowledge". The County confuses the role of the jury in assessing the testimony of a witness. Assessing the credibility of expert testimony and what weight to give that testimony is for the jury to decide. *Grove v. PeaceHealth*, 182 Wn.2d 136, 146, 341 P.3d 261 (2014) citing *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989) (deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of material evidence.) See also *Kohfeld v. United States Pacific Ins. Co.*, 85 Wn.App. 34, 42, 931 P.2d 911 (1997) (It is within the province of the jury to accept or reject, in whole or in part, an expert's opinion and the Court of Appeals will not second-guess the jury's credibility determination.)

The County cites no authority that the Court of Appeals must reverse a jury's determination because it is subjectively satisfied that Dr. Morrison's testimony was not believable. While Spokane County may be satisfied that

it impeached Dr. Morrison's trial testimony for, as it characterizes, bias and lack of relevant knowledge, it was for the jury to determine whether or not his testimony was credible and whether they believed that testimony in its deliberations.

The jury was properly instructed as how they should evaluate Dr. Morrison and every other expert or witness called in the case. Instruction No. 5 instructed the jury that they were not required to accept the opinion of the expert, that they could consider the education, training, experience, knowledge, and ability of a witness, the reasons given for the opinion, the sources of his information, and other factors provided to the jury for evaluating the testimony of any other witness to determine the credibility and weight given to the expert's testimony. CP 2615. Instruction No. 1 separately instructed the jury that they were the sole judges of the credibility of each witness, the sole judges of the value or weight to be given to the testimony of each witness. CP 2609. The jury was specifically charged that, in considering the testimony of each witness, they could consider (1) the manner of the witness while testifying; (2) any personal interest the witness may have in the outcome of the issues; (3) any bias that the witness may have shown; (4) the reasonableness of the witness's

statements and; (5) any other factors that affect their evaluation or belief of a witness. CP 2609.

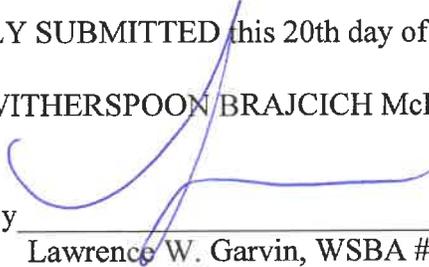
Whether testimony at trial should be discounted or not discounted as credible is an issue for the trier of fact which the appellate court does not review. *Watson v. Department of Labor and Industries*, 133 Wn.App. 903, 910, 138 P.3d 177 (2006). See also *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 769, 260 P.3d 967 (2011); *In re A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015) (“The reviewing court should not decide the credibility of witnesses or weigh the evidence.”); and *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn.App. 457, 464, 232 P.3d 591 (2010) (“Credibility determinations are peculiarly matters for the trier-of-fact and may not be second-guessed by an appellate court.”) Reversal of the jury verdict based on the County’s subjective believe that it impeached Dr. Morrison’s trial testimony and the jury verdict was in error on this basis is without merit.

## V. CONCLUSION

Based on the foregoing, this Court should uphold the verdict of the jury in favor of Mr. Malinak.

RESPECTFULLY SUBMITTED this 20th day of April, 2018

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**CERTIFICATE OF SERVICE**

I, Lawrence W. Garvin, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 20<sup>th</sup> day of April, 2018.

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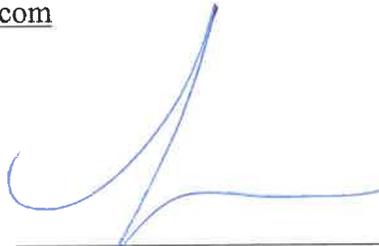
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