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NO. 55256-2-I

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

KEVIN J. LOCKE and TORI LOCKE,
husband and wife and the marital
community composed thereof,

Respondents,

v.

THE CITY OF SEATTLE, a municipal corporation,

Appellant.

BRIEF OF RESPONDENTS

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I. RESPONDENT'S STATEMENT OF ISSUES PRESENTED

Respondent ("plaintiff" or "Mr. Locke") is satisfied with most, but not all, of the Appellant's statement of "issues presented." The following constitute plaintiff's reworking of those "issues presented" with which he is not satisfied.

Section A.1: Is Kevin Locke under the facts presented in this case a "member" entitled to sue the City under RCW §41.26.281?

Section F: Was defendant entitled to a mistrial based upon plaintiff's opening statements relating to safety violations?

Section I: Was it prejudicial error to admit evidence of alleged safety violations?

Section J: Was it prejudicial error to instruct the jury on a WAC regulation regarding rest breaks.

II. PLAINTIFF'S STATEMENT OF THE CASE

Plaintiff does not so much disagree with appellant's Statement of the Case as believes that it omits a number of relevant facts. Most of those facts are laid out in the argument section of this brief. However, it is relevant to a number of the arguments to emphasize the seriousness of plaintiff's injuries from the fall and the permanent residual impairment and pain caused by the fall. For example, Mr. Locke testified on cross-examination that he has not been without pain from the accident for a

single day since it occurred (5/25/04 RP 87) and that the pain has in some ways increased over time (6/23/04 RP 202). Furthermore, both sides agreed that Mr. Locke was permanently impaired, although they differed as to the extent of the impairment. See, e.g., 6/2/04 RP 858-867. Also while defendant repeatedly challenges in this appeal Mr. Locke's status as a member under the Law Enforcement and Fire Fighters Retirement System ("LEOFF") program, defendant's own documents have conceded since Mr. Locke began working for the City that he was a fire fighter and LEOFF II member. (CP 2123-25)

III. ARGUMENT

A. The Trial Court Had Jurisdiction Over This Case, Properly Denied Defendant's Motion For Summary Judgment Based On Lack Of Jurisdiction, And Any Claim Under CR 50 Is Both Procedurally And Substantively Invalid.

1. The Trial Court Properly Denied The City's Motion For Summary Judgment Relating to Jurisdiction.

In determining whether there are material disputed issues of fact, this Court engages in the same inquiry as the trial court. Trimble v. Wash. State Univ., 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). Necessarily, that requires this Court to confine its review to the evidence that was actually presented to the trial court in the summary judgment motion. Further, in reviewing a motion for summary judgment:

[a]ll facts submitted and all reasonable inferences from them are to be considered in the light most favorable to the nonmoving party. *Clements*, 121 Wn.2d at 249. "The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion." *Clements*, 121 Wn.2d at 249 (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 656 P.2d 1030 (1982)).

Ellis v. City of Seattle, 142 Wn.2d 450, 457, 13 P.3d 1065 (2000).

The City's evidence for its motion for summary judgment was primarily contained in "File Exhibit Sub 51A [which] was transmitted to the Court of Appeals separately from the Clerk's Papers." Def. Brief, p. 12. Most of the evidence referred to at pages 12-13 of defendant's Brief, e.g., "(5/26/04) RP 118-19; 5/27/04 AM, RP 116, 126; 6/28/04 (RP 222)," post-dates the trial court's decision on summary judgment and thus could not have been presented to the trial court. Such evidence should not be considered by this Court in determining whether Defendant's Summary Judgment Motion should have been granted.

Plaintiff opposed defendant's motion for summary judgment, inter alia, by submitting a Department of Retirement Systems Enrollment Form for Mr. Locke completed by defendant which confirmed that defendant enrolled Mr. Locke as a "fire fighter" in the Law Enforcement and Fire Fighters Retirement System ("LEOFF") Plan II with a first date of employee eligibility on April 19, 2000. (CP 2123-25) April 19, 2000 was well before the accident so, according to defendant, Mr. Locke was in the

LEOFF program at the time of his accident. Plaintiff also submitted to the trial court a September 15, 2003 letter from the Seattle Fire Department which stated that “[s]ince the effective date of your appointment to Fire Fighter, April 19, 2000, you have been a LEOFF II Retirement System member.” (CP 2123-25) Defendant thus admitted in its letter that Mr. Locke was both a “fire fighter” and a LEOFF member.¹ This presents a classic situation in which there was disputed evidence of the material fact of whether Mr. Locke was a fire fighter and a LEOFF member. A summary judgment could not be properly granted.

Tucker v. Department of Retirement System, 127 Wn. App. 700, 113 P.3d 4 (2005), the primary case relied on by defendant for the argument that Mr. Locke was not a fire fighter and thus not eligible for LEOFF (Def. Brief, p. 13), actually supports plaintiff’s position. Tucker held that an employer’s understanding of whether its employee was a

¹ In Fray v. Spokane County, 134 Wn.2d 637, 655-56, 952 P.2d 601 (1998), the court held that LEOFF II members are entitled to sue their public employers for negligent injury. The court explained that:

In 1977, the Legislature amended LEOFF to create two classes of members. Benefits for Plan I members remained the same, while benefits for Plan II members were reduced. Plan II members, however, became eligible for industrial insurance benefits. The right to sue was not taken from them. The language of the provision granting eligibility for industrial insurance states that Plan II members "shall be eligible." It does not state that Plan II members are limited to those benefits.

LEOFF member was important in determining whether the employee was a LEOFF member:

DRS's [Department of Retirement System] application and interpretation of former RCW 41.26.030 relied on significant evidence that (1) neither the fire Marshall nor Fire District No. 6 considered Tucker's (ETA-funded fire fighter helper position eligible for LEOFF membership. . ."

127 Wn. App. at 709. Thus, plaintiff's evidence in this summary judgment motion that, at the time of the accident, defendant considered him a fire fighter and an eligible LEOFF member was a sound basis for denying summary judgment.

In the final paragraph of its argument relating to jurisdiction, the City only argues it "should have been granted summary judgment on this basis. CP 182-184; see CP 3217." Def. Brief, p. 11 (emphasis added.). However, defendant cites portions of trial testimony in its argument and in Assignment of Error E refers to denying "the City's CR 50 motion to dismiss based on failure to state a claim." Defendant thus may also be appealing the denial of its CR 50 motion relating to lack of jurisdiction. However, such a claim ignores defendant's actual CR 50 argument and is substantively incorrect.

2. Defendant's CR 50 Argument To The Trial Court Refutes Its Argument In This Court.

In its CR 50 motion, defendant conceded that Mr. Locke was a LEOFF II member:

Recruit Locke was a fire fighter recruit for the City of Seattle undergoing training at the State of Washington's Fire Training Academy in North Bend. As such, he is an employee of the City and is covered under Plan II of the Law Officers' and Fire Fighters' Retirement System Act (LEOFF), RCW Chapter 41.26. Pursuant to LEOFF, Plan II members are eligible for coverage for industrial insurance as provided by Title 51 RCW. RCW 41.26.480. Plain II members are also entitled to benefits based upon any permanent partial (or full) disability under Title 51.²

(CP 3845; emphasis added). That quote is difficult if not impossible to reconcile with defendant's present argument that "[p]laintiff was not a 'member' for purposes of LEOFF." Def. Brief, p. 11. Moreover, defendant may not properly fault the trial court for not accepting an argument in connection with a CR 50 motion that defendant never made in its CR 50 motion.

² Defendant's CR 50 argument was that "LEOFF members can only sue for 'excess' of benefits under LEOFF chapter – a condition precedent to suit is that plaintiff received either a death benefit or disability retirement benefit under LEOFF." CP 3846. Defendant is not raising that argument in this appeal and defendant's CR 50 motion never raised the argument it is now presenting.

3. Had Defendant Made A CR 50 Argument That There Was No Evidence That Kevin Locke Was A LEOFF Member At The Time Of His Accident, That Motion Would Have Properly Been Denied.

Washington law provides that:

A motion for a directed verdict should be granted only if there is no evidence or reasonable inferences from the evidence which would sustain a verdict in favor of the nonmoving party.

Havens v. C&D Plastics, 124 Wn.2d 158, 180, 876 P.2d 435 (1994). See also Lockwood v. AC&S, 109 Wn.2d 235, 744 P.2d 605 (1987). Mr. Locke testified at trial on June 23, 2004 as follows:

- Q. Have you ever – since you joined the Seattle Fire Department, have you ever not been a member of the Law Enforcement Fire Fighters Retirement System?
- A. No, no. I received a letter at some point that said I was a LEOFF member from the day I started on April 19th.

(6/23/04 RP 146).

Defendant's argument to this Court, based on selected trial testimony, is that (a) rather than being a fire fighter, plaintiff was a recruit and that (b) "as a result, he had no "legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires' within the meaning of WAC 415-104-225(2)." Def. Brief, pp. 12-13. The first part of that argument is inconsistent even with the testimony cited by

defendant. For example, the testimony at 5/27/04 AM, RP 126 refers to “recruit fire fighter” not “recruit.” That testimony thus supports plaintiff’s position that he was a fire fighter.³ The second part is inconsistent with Mr. Locke’s testimony quoted above. The City was presumably aware of WAC 415-104-225(2) when it admitted that Mr. Locke was a LEOFF member “from the date I started on April 19.” Thus, the City must have believed that he had the requisite legal authority and responsibility from that day on.⁴

B. RCW §4.96.010 Waived The City’s Sovereign Immunity For This Claim.

RCW §4.96.010(1) generally waives the defendant’s sovereign immunity.⁵ Defendant argues that sovereign immunity is not waived with respect to claims pursuant to RCW §41.26.281 because that statute:

... does not make the City liable for tortious conduct to “members” “to the same extent as if [it] were a private person or corporation.”

³ See also File Exhibit 51A, Exhibit I herein.

⁴ Defendant cites no portion of the record providing any evidence that Mr. Locke lacked such “legal authority and responsibility.”

⁵ The statute provides in pertinent part:

(1) All local governmental entities, whether acting in a governmental or propriety capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, to the same extent as if they were a private person or corporation ...

A private person or corporation in a situation similar to the City's – i.e., one who is sued as an employer for a job-related injury by an employee – would enjoy immunity under RCW Title 51.

Def. Brief, pp. 14-15 (emphasis added).

Defendant's interpretation of RCW §4.96.010 thus is that it does not apply unless the City is subject to identical rules of liability as apply to "private persons or corporations." That interpretation has repeatedly been rejected by the Washington Supreme Court which holds that RCW §4.96.010 permits different rules of liability for tortious conduct for government as compared with private persons. For example, RCW §4.96.010 does not:

render the State liable for all official misconduct. At some point, tort liability ends and governing begins. See *King v. Seattle*, 84 Wn.2d 239, 243, 535 P.2d 228 (1974); *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). Because judicial abstention is required where the responsibility for "basic policy decisions has been committed to coordinate branches of government," discretionary policymaking decisions remain protected from suit. *King v. Seattle*, 84 Wn.2d at 246.

Bailey v. Forks, 108 Wn.2d 262, 265, 737 P.2d 1557 (1987) (emphasis added). This limitation does not apply to private individuals who are not protected for "discretionary policy making decisions."

The difference in municipal liability compared to a private party's liability set forth in those cases quoted above does not prevent

RCW §4.96.010 from applying to municipalities. As explained in J&B Door Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), rev'd on other grounds, Taylor v. Stevens County, 111 Wn.2d 150, 759 P.2d 447 (1988):

... it is well recognized that RCW 4.96.010 was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same as with a private person.

(Emphasis added.) See also Beal v. City of Seattle, 134 Wn.2d 769, 784, 954 P.2d 237 (1998) (explaining public duty doctrine). The correct interpretation of RCW §4.96.010 is that if a government is found to have engaged in tortious conduct under the applicable substantive rules – which may or may not be different for government than for private parties – then the government will be liable for such tortious conduct “to the same extent as if they were a private person or corporation.”

This reading of RCW §4.96.010, unlike the City’s, is consistent with the principle that the legislature is not presumed to do a meaningless act. As stated in Taylor v. Redmond, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977):

. . . it is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same.

Under the City's interpretation, RCW §41.26.281 was a meaningless act by the legislature since no government could ever be sued by their police officers or fire fighters for the negligence of their governmental employer. Def. Brief, p. 15. This Court should interpret statutory provisions together rather than interpret one provision to make another provision meaningless. Silvernail v. County of Pierce, 80 Wn.2d 173, 492 P.2d 1024 (1972); Willoughby v. Labor & Industries, 147 Wn.2d 725, 731, 57 P.3d 611 (2002).

Here RCW §41.26.281 places a statutory duty on municipal corporations such as defendant not to cause injury to employee fire fighters by negligent acts or omissions. That satisfies the public duty doctrine and creates a cause of action which is in turn permitted by RCW §4.96.010. Bailey v. Forks, *supra*, 108 Wn.2d at 269; Halvorsen v. Dahl, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

C. RCW §41.26.281 Is Constitutional.

Defendant City of Seattle is a municipal corporation created by state law. It is a governmental entity not a private person or private corporation. As a governmental entity, it employs fire fighters whose duties include being ordered to run into burning buildings at great risk to themselves in order to rescue strangers. That makes the job of being a fire

fighter a lot different than being, for example, an attorney for whom being “tested by fire” is only a metaphor.

Ignoring both its status as a creation of the state and the unique features of employing people whose jobs involve taking great risks to rescue strangers, defendant argues that the LEOFF statute requiring the City to pay worker’s compensation to “members” without giving the City any corresponding immunity violates Wash. Const. Art. I §12.⁶ Defendant’s position is wrong for several separate reasons. First, Article I, §12 distinguishes between a “municipal corporation” such as defendant and other corporations and citizens. The State grants municipal corporations many privileges and immunities not shared by citizens and private corporations. For example, the City of Seattle can tax its residents to raise money for activities such as fire fighting. Nothing in §12 (expressly or by implication) prohibits the State from imposing additional requirements on its municipal corporations in connection with such activities. As held in Seattle v. State, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), “[t]he City does not itself have rights under the ‘equal protection

⁶ Art. I, §12 provides:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

clauses of the State and Federal Constitution.” See also Grant County Fire District v. Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004).⁷

Secondly, RCW §41.21.270 declares in part:

The legislature of the state of Washington hereby declares that the relationship between members of the law enforcement officers’ and fire fighters’ retirement system and their governmental employers is similar to that of workers to their employers and that the sure and certain relief granted by this chapter is desirable, and as beneficial to such law enforcement officers and fire fighters as workers’ compensation coverage is to persons covered by Title 51 RCW...

(Emphasis added.) While the City argues that “similar” means that the relationship between fire fighters and their employer is “no different” than the relationship of other employees and their employers (Def. Brief, pp. 18-19), “similar” does not mean “no different.” Instead, BLACK’S LAW DICTIONARY (6th Ed.), page 1383, defines “similar” as “[n]early corresponding; resembling in many respects; somewhat like; having a general likeness, although allowing for some degree of difference.” WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d Ed.), Unabridged,

⁷ Most of the cases cited by defendant, e.g., Zahler v. Department of Labor & Industries, 125 Wash. 410, 417-19, 217 P. 55 (1915); State ex rel. Jarvis v. Daggett, 87 Wash. 253, 258, 151 P. 648 (1915); Shaughnessy v. Northland S.S. Co., 94 Wash. 325, 330, 162 P. 546 (1917); and Manor v. Nestle Food Co., 131 Wn.2d 439, 932 P.2d 628 (1997), on this “equal protection” argument involve private employers. Epperly v. City of Seattle, 65 Wn.2d 777, 399 P.2d 591 (1965) raised a concern with this issue in the context of the City of Seattle, but did not decide the issue. Thus, the portion quoted by defendant at page 17 of its Brief was dicta.

p. 2340, also defines “similar” as “[n]early corresponding; resembling in many respects; some what like; having a general likeness.”

The relationship between employer and employee for police and fire fighters resembles in many ways that of other employers and employees, but is not the same with respect to the dire consequences to such employees if they are ordered into dangerous situations without due care having been taken. The legislature could (and did) reasonably believe that such differences warrant creating a direct cause of action against the public employer if it is negligent. Indeed, as this Court explained in Hansen v. City of Everett, 93 Wn. App. 921, 926, 971 P.2d 111 (1999), “by exposing an employer to liability for negligent acts towards its employees the [LEOFF] statute creates a strong incentive for improved safety.” This does not violate Article I, §12. Tunstall v. Bergeson, 141 N.W.2d 201, 227 (2000); Medina v. Pub. Util. Dist. No. 1, 147 Wn.2d 303, 313, 53 P.3d 993 (2002).

Thirdly, RCW §41.26.281 does provide a limited “quid pro quo” to defendant in exchange for providing workers’ compensation. Not only are employers entitled to deduct workers’ compensation payments (Gillis v. City of Walla Walla, 94 Wn.2d 193, 61 P.2d 625 (1989)) from amounts otherwise owing in a lawsuit against the employer, but fire fighters must also at least prove that their employers acted negligently. The statute thus

protects defendant from product liability claims vis-à-vis their employees since those are not based on negligence. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d 500 (1999).

D. Plaintiff Did Not “Assume The Risk” And Defendant Never Submitted Accurate Jury Instructions Relating To Assumption Of Risk.

Defendant raises a plethora of arguments relating to assumption of risk: See Assignments of Error F, G, J, M, O, P, Q, and S, and Issues Presented C and D. None of its arguments are well taken.

Defendant first argues that “plaintiff assumed the risk as a matter of law under the Professional Rescuer doctrine.” Def. Brief, pp. 20-21. It relies on Maltman v. Sauer, 84 Wn.2d 975, 978, 530 P.2d 254 (1975) and Hamilton v. Martinelli & Associates, 110 Cal. App. 4th 1012, 1014, 2 Cal. Rptr. 3d 168, 175 (2003), which involved suits against third parties for negligence, not statutory suits against employers. In this case, RCW §41.26.281 specifically permits “professional rescuers,” e.g., fire fighters, to sue their employers for injuries caused by their employer’s negligence. The legislature has thus concluded that the “professional rescuer doctrine” does not apply to such suits even if it would otherwise apply.

Defendant’s second assumption of risk argument is that “the City was entitled to either judgment as a matter of law on implied primary assumption of the risk or at least to have the jury decide that issue.” Def.

Brief, p. 21. Both parts of defendant's argument ignore a crucial element of implied primary assumption of risk in this case, which is that the plaintiff "must have had a reasonable opportunity to act differently or proceed on an alternative course that would have avoided the damager." Zook v. Baier, 9 Wn. App. 708, 716, 514 P.2d 923 (1973).

In Home v. North Kitsap Sch. Dist., 92 Wn. App. 709, 721, 965 P.2d 1112 (1998), a case relied on by defendant, the court explained the import of an arguable lack of a reasonable alternative in the context of assumption of risk:

In this case, Home does not seriously dispute that he knew all the facts that a reasonable person would have wanted to know and consider when deciding whether to position himself or herself as Home did. He does contend, however, that a rational trier of fact could find that once he actually and subjectively discovered the hazard that later culminated in the accident, he had no reasonable alternative but to stand in front of it and protect his students. Taking the evidence and inferences in the light most favorable to Home, we think that a rational trier could so find. Accordingly, we conclude that whether Home voluntarily assumed the risk is a question of fact for the jury, and that summary judgment should not have been granted.

Id. at 723 (emphasis added). See also Tincani v. Inland Empire Zoological Soc'y, 66 Wn. App. 852, 860, 837 P.2d 640 (1992), rev'd on other grounds, 124 Wn. 2d 121, 875 P.2d 621 (1994) ("the issue of voluntariness is one of fact for the jury").

An expert testified at trial that Mr. Locke had no real alternative to participating in the drill which led to his injury if he wanted to continue to be a fire fighter:

Q. As a recruit, are these recruits allowed to say, hey, Chief, I am going to sit this one out.

....

THE WITNESS: No, not if they want to have their job.

(6/2/04 RP 37) In response to defendant's summary judgment motion, plaintiff also submitted substantial evidence that his actions were not voluntary because not completing the drill might result in his losing his job. The day before Mr. Locke fell, Chief Douce threatened to call Chief Daniels and let him know that there would only be seven or eight recruits graduating out of the fifteen candidates. Dec. of Greg Shoemake referencing the transcript of his recorded Labor and Industries interview, p. 27. (CP 2166-67) The day of the fall, Chief Douce also told the recruits that, "you guys are going to stay as long as it takes because you owe us four hours from yesterday." Dep. Of O'Brien, p. 289, line 20 through p. 291, line 7. (CP 2359)

1. The Trial Court Properly Denied Summary Judgment On The Issue Of Assumption of Risk.

The trial court properly denied summary judgment in light of the disputed material facts referred to above as to whether Mr. Locke had no

reasonable alternative to completing the drill which resulted in his injury because not to do so would risk washing out of training and potentially losing his job. Put differently, there were disputed material facts as to whether plaintiff had voluntarily assumed the risk.

2. The Trial Court Properly Denied the City's CR 50 Motion On Assumption Of Risk.

Defendant assigns error to the trial court's denial of its CR 50 motion relating to assumption of risk. However, defendant waived its right to challenge the court's ruling because it presented evidence after its motion was denied. Washington law provides that once "a defendant puts on a case, any challenge to the sufficiency of the evidence before the court at that time is waived." Hill v. Cox, 110 Wn. App. 394, 403, 41 P.3d 495 (2002); Carle v. McChord Credit Union, 65 Wash. App. 93, 97 n.3, 827 P.2d 1070 (1992), citing Goodman v. Bethel Sch. Dist. No., 403, 84 Wash. 2d 120, 123, 524 P.2d 918 (1974); Heinz v. Blagen Timber Co., 71 Wn.2d 728, 730, 431 P.2d 173 (1967).

Had defendant not waived this claim and were this Court to review the trial court's denial of defendant's CR 50 motion, the trial court should be affirmed. A trial court cannot weigh evidence on such a motion and must deny it if there is conflicting evidence. Havens, supra; Lockwood, supra. Here, the testimony that refusing to participate in this trial may well

have cost plaintiff his job (6/2/04 RP 37), provides disputed evidence on whether plaintiff's action was voluntary. See also 5/25/04 RP 99 (Mr. Deball testified that he knew that other recruits had been terminated from employment and that "[t]he atmosphere at recruit school is not one where you question the officials"; Havens, supra).

3. The Trial Court Properly Refused Defendant's Jury Instructions On Assumption Of Risk And The Instructions It Did Give Were Proper.

Defendant attacks the trial court's refusal to give defendant's proposed instructions relating to assumption of risk, i.e., Second Supplemental Proposed Instruction Nos. 42, 46 and 51, which are contained at CP 4020, 4024-25, and 4030-33. However, the trial court's decision was correct for several reasons.

First, the trial court's refusal to give defendant's proposed instructions was justified because each of those proposed instructions was legally incorrect. Washington law provides a "clear rule" that a "trial court need never give a requested instruction that is erroneous in any respect." Crossen v. Skagit County, 100 Wn.2d 355, 360-61, 669 P.2d 1244 (1983), quoting Vogel v. Alaska S.S. Co., 69 Wn.2d 497, 503, 419 P.2d 141 (1966). In Crossen, the flaw in the proposed instruction was that it referred to a "'negligent' party rather than a 'person'". Id. at 360. In Wickswat v.

Safeco Ins. Co., 78 Wn. App. 958, 967, 904 P.2d 767 (1995), the court explained:

... if a party is dissatisfied with an instruction, then that party has a duty to propose an appropriate instruction. If, in turn, the proposed instruction is not legally correct in every respect, then the party cannot complain about the court's failure to give it. *Hoglund v. Raymark Indus., Inc.*, 50 Wash. App. 360, 368-69, 749 P.2d 164 (1987).

(Emphasis added.) See also *State v. Jacobs*, 121 Wn. App. 669, 685, 89 P.3d 232 (2004).

In this case, defendant never proposed a legally correct implied primary assumption of risk instruction. Proposed Instruction No. 42 purported to be an unmodified “WPI 4th 13.03 – Assumption of Risk – Implied Primary.” (CP 4020) It was no such thing since, inter alia, it omitted the last bracketed paragraph of that WPI which provided:

[A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct [to avoid the harm] [or] [to exercise or protect a right or privilege] because of the defendant's negligence.]

The “Note On Use” for WPI 13.03 tells practitioners to “use bracketed last paragraph if there is an issue whether the plaintiff voluntarily accepted the risk. See Comment below.”⁸ Such an issue is present here because there

⁸ The Comment to WPI Fourth 13.03 explained that:

The last bracketed paragraph of this **instruction** has been added to meet the requirements of *Tincani v. Inland Empire Zoological Society*, 66 Wn.App. 852, 837 P.2d 640 (1992), *rev'd on other grounds*, 124

was substantial evidence that Mr. Locke's actions were not voluntary since to do other than what he did would have risked him losing his job. (6/2/04 RP 37) Without the bracketed paragraph, the jury would not have known that "in order for assumption of risk to bar recovery," the plaintiff "must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger." Erie v. White, 92 Wn. App. 297, 304-05, 966 P.2d 342 (1998), quoting Zook v. Baier, supra, 9 Wn. App. at 716; Home, supra.

Secondly, a separate and crucial flaw in defendant's proposed assumption of risk instruction is contained in defendant's Proposed Instruction No. 32 which sets forth the defendant's burden of proof on implied assumption of risk (CP 4030; see 6/7/04 RP 28) (defendant's exception to court's failure to give that proposed instruction). The last paragraph of that proposed instruction provides that the implied assumption of risk was a damage reducing defense like comparative negligence. Defendant's Proposed Instruction Nos. 42 and 46 could not properly have been given without a burden of proof instruction since defendant has the burden of proof on assumption of risk. Yet, Proposed Instruction No. 32 (the only proposed burden of proof instruction), told the

Wn.2d 121, 875 P.2d 621 (1994), and other cases which hold that the issue of voluntariness is an issue of fact for the jury.

jury that implied assumption of risk would have had the same effect as contributory negligence about which the jury was already instructed. (CP 4010) As such, there would have been no need for an assumption of risk instruction. Furthermore, Proposed Instruction No. 32 would have been inconsistent with the first question on the Special Verdict Form C, Proposed Instruction No. 51 (CP 4030) which treats assumption of risk as a complete defense rather than a damage reducing defense.

Defendant's Proposed Instruction No. 46 (CP 4024-25) was likewise legally incorrect. For example, it specifically referred to an affirmative defense – “express” assumption of risk which had no basis in fact.⁹ Since defendant provided no correct assumption of risk instruction, its Special Verdict Form C, Proposed Instruction No. 51 (CP 4030-33) likewise should not have been given.

For similar reasons, the trial court's Instruction Nos. 6, 17 and the Special Verdict Form were not defective in not referring to assumption of risk. Defendant's complaint in each instance was that these instructions did not reference assumption of risk. However, since no appropriate instructions were offered setting forth the implied primary assumption of

⁹ Defendant did not assign error to the Court's refusal to give an express assumption of risk instruction. The trial court's decision is thus binding on defendant.

risk defense, there was no reason to refer to such a defense. Crossen, supra, Wickswat, supra.

Finally, as this Court explained in Dorr v. Big Creek Wood Products, 84 Wn. App. 420, 425-26, 927 P.2d 1148 (1996).

Trial courts are rightfully wary of requests to instruct the jury on implied primary assumption of the risk. That doctrine, if not boxed in and carefully watched, has an expansive tendency to reintroduce the complete bar to recovery into territory now staked out by statute as the domain of comparative negligence. In most situations, a plaintiff who has voluntarily encountered a known specific risk has, at worst, merely failed to use ordinary care for his or her own safety, and an instruction on contributory negligence is all that is necessary and appropriate. But implied primary assumption of the risk does occupy its own narrow niche.

Defendant stated the trial court was properly concerned that it “could not find a fair way, as I recall, to include these basic tort concepts into new WPI Fourth Verdict Form.” (6/7/04 RP 28) Defendant’s proposed solution was to propose a supplemental special verdict form, which focused entirely on the short period of time on which the mannequin was on the ladder, i.e., “while attempting to rescue a mannequin from the ladder, or drop a mannequin from the ladder.” (CP 4030) However, as in Alston v. Blythe, 88 Wn. App. 26, 34-35, 943 P.2d 962 (1997), there was not substantial evidence that during that period of time Mr. Locke met all of the elements necessary to a finding that he

impliedly consented to relieve the City of its duty of care. See, e.g., 6/28/04 RP 177; 6/14/04 RP 118.

E. The Trial Court's Ruling Regarding References to L&I Citations Was Correct; No Mistrial Should Have Been Granted; Nor Was There Any Error In Denying Defendant's Proposed "Curative Instructions."

Defendant moved for reconsideration of the trial court's earlier rulings regarding reference to L&I citations. As part of its motion for reconsideration, defendant relied on Cantu v. Seattle, 51 Wn. App. 95, 752 P.2d 390 (1988), where this Court conducted an ER 403 analysis. The trial court granted reconsideration and ruled that while testimony regarding "those citations, and the allegations of violations will be admitted," the citations themselves would not be admitted. (5/19/04 RP 598) Both direct and cross examination of plaintiff's expert during trial established that there were multiple citations and a \$25,000 fine and that some of the citations "weren't directly related to Kevin Locke's fall." (6/2/04 PM P2 RP 43) See Def. Brief, p. 24.

Following Cantu, 51 Wn. App. at 99-100, as suggested by defendant, the trial court weighed the various factors and permitted some evidence regarding the agency finding, but excluded other evidence. If there were error (which plaintiff disputes), it was error invited by defendant and thus cannot properly serve as a basis for appeal by

defendant. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984); Pulich v. Dame, 99 Wn. App. 558, 563, 991 P.2d 712 (2000).

However, there was no error. In Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994), aff'd, 127 Wn.2d 401, 899 P.2d 1265 (1995), this Court allowed the submission into evidence of “a Social Security decision finding Goodman totally disabled.” 75 Wn. App. at 79. This Court pointed out that a trial court’s admissions of evidence will not be disturbed on appeal absent a showing of abuse of discretion. Id. at 80. This Court found no abuse of discretion in the trial court’s decision admitting portions of such Social Security Administrative decision and excluding other portions. The same result should apply here. See Conrad v. Alderwood Manor, supra, 119 Wn. App. at 283 (plaintiff’s expert refers to defendant’s citation by the Washington Department of Social and Health Services); see also Ryan v. Westgard, 12 Wn. App. 500, 530 P.2d 687 (1975) (plea of guilty to a traffic charge is an admission). The citations and decisions in these cases and in the present case were made after an extended deliberative process and are thus considerably different than the traffic citation at issue in Hadley v. Maxwell, 144 Wn.2d 306,

314, n.3, 27 P.3d 600 (2001). Furthermore, unlike the fine in Hadley, a \$25,000 fine is hardly a nominal amount.¹⁰

Defendant also challenges the trial court's denial of its motion for mistrial. The "abuse of discretion" standard in Washington for appellate review of denials of motions for mistrials was recently reaffirmed in State v. Rodriguez, 146 Wn.2d 260, 269-70, 45 P.3d 541 (2002), where the court stated:

This court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial. *State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). A reviewing court will find abuse of discretion only when "no reasonable judge would have reached the same conclusion." *Id.* (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). A trial court's denial of a motion for mistrial will only be overturned when there is a "substantial likelihood" that the error prompting the mistrial affected the jury's verdict. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting *State v. Crane*, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)). Further, this court has held that trial courts "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly."² *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 93 L. Ed. 2d 599, 107 S. Ct. 599 (1986), *quoted in Hopson*, 113 Wn.2d at 284.

(Footnotes omitted.)

¹⁰ Moreover, referring to the L&I citations is not giving a legal opinion. State v. Clausing, 147 Wn.2d 620, 628-29, 56 P.3d 550 (2002) is, therefore, not on point.

Defendant ignores Rodriguez and any Washington case decided in the past 80 years and relies on cases from Idaho¹¹, Alabama, and Illinois. Its only citation to Washington law is a 1916 case – Duval v. Inland Nor. Co., 90 Wash. 149, 154, 155 P. 768 (1916) – which posed the possibility that raising irrelevant matters in opening statement and interrogating witness on a “matter which has no bearing on the issues” may not be curable by instructions. Those were not the facts here and Judge Spearman’s action, when judged by the standards enunciated in State v. Rodriguez, did not constitute an abuse of discretion. In denying the motion, Judge Spearman explained:

With regard to the motion for mistrial, to the extent that plaintiffs have not proved up those violations, the L and I violations, the jury has been instructed and will be instructed that they are to disregard any remarks, statements, or arguments that are not supported by the evidence. And I have no reason to believe that the jury will not be able to abide by that instruction. So the motion for mistrial, likewise, will be denied.

(6/2/04 RP 203) The final instructions did in fact provide such instructions. (CP 4060)

Similarly, the trial court did not err in refusing to give defendant’s proposed curative instruction which sought to strike “any and all

¹¹ Mattson v. Byron, 92 Idaho 587, 448 P.2d 201 (1968), in fact, supports plaintiff’s position.

references” to any WISHA citations.” (CP 4045) The trial court reviewed the testimony and properly denied that request, pointing out that:

Mr. Fabien made a reference on redirect to one of the L & I citations against the fire department for failure to appoint a safety officer. Since there was testimony on that, and based on my pre-trial ruling that testimony was admissible, I will not give the City’s instruction. I think it is sufficient to instruct the jury that the attorneys’ remarks are not evidence, and that they are to disregard any statements or remarks that are not supported by the evidence. I will also indicate that in closing remarks, there is to be no reference to any other L and I violations other than the ones testified to by Mr. Fabien. That’s the only evidence there is, so that’s the only one we should be commenting on.

(Emphasis added) (6/30/04 RP 121).¹²

F. The Trial Court Did Not Commit Reversible Error Or Any Error With Regard To Chief Gablehouse’s Testimony Concerning Safety Violations.

Plaintiff told the jury in opening statement that Chief Gablehouse – the Fire Department’s Safety Officer – concluded that the Seattle Fire Department violated 32 safety rules, and that only about half of those violations contributed to Mr. Locke’s fall. (5/24/04 RP 36-37) Defendant thus knew that many, but not all, of the violations were being claimed as contributors to Mr. Locke’s fall. Defendant also knew how to make objections and made many objections during Chief Gablehouse’s direct

¹² See also CP 3942-43, also proposed by defendant, which proposed to strike all evidence relating to the Department of Labor citations and the disposition of such citations. That proposed instruction is also wrong for the reasons discussed in the text.

testimony. However, defendant generally failed to object on relevance grounds to the testimony it now claim was irrelevant.

This can be seen by examining the testimony of Chief Gablehouse that defendant now claim is irrelevant. Def. Brief, p. 32, n. 6. Defendant cites 6/21/04 RP 5-6, 8-9, 11-13, 16-20, 180-81 as the portions of Chief Gablehouse's testimony in which he discusses violations which defendant now claim to be irrelevant. An examination of those transcript pages demonstrates that, while defendant raised other objections, defendant raised no relevancy objections to the testimony at RP 5-6, 11-13, 16-20, and 180-81. ER 103(a)(1) requires, inter alia, a timely objection or motion to strike before error may be predicated on a ruling which admits evidence. Thus, defendant may not properly assign error to a trial court ruling that admits such evidence as relevant when no such ruling was requested. ER 103(a)(1); Boyd v. Kulczyk, 115 Wn. App. 411, 416-17, 63 P.3d 156 (2003); State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983).

The only examples listed by defendant to which there were relevancy objections are contained at pages 6/21/04 RP 8-9. The opinions were: "No. 7, 'Training division failed to notify division of injury for investigative purposes, serious injury,'" and "No. 8, 'Training division willfully failed to submit all material and data related to the accident for

investigative purposes.” Id. at 8. Defendant’s objection was that “[t]hat opinion related to something that occurred after Kevin Locke fell, has no relevance whatever to this proceeding.” Id. at 8. That objection is not well taken substantively. Washington law provides that relevancy of evidence is a matter within the discretion of the trial court and that facts tending to establish a party’s theory or qualify or disprove the testimony of an adversary are relevant. Lamborn v. Phillips Pacific Chemical, 89 Wn.2d 701, 706, 575 P.2d 215 (1978); Bloomquist v. Buffelen Mfg. Co., 47 Wn.2d 828 (1955). The trial court could reasonably have believed that evidence of the City’s failure and willful failure to notify the appropriate division of the injury so that an investigation could begin and to submit all material and data related to the accident, tends to support plaintiff’s position that defendant was negligent, or tends to cast doubt on defendant’s contention that it was not negligent. See, e.g., State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (furtive gestures or evasive behavior are circumstantial evidence of guilt).¹³

Defendant also argues that “evidence of what a safety officer would have done during the ladder drill was irrelevant.” Def. Brief, p. 34.

¹³ Nor did the admission of this testimony affect a substantial right, which is also required by ER 103(a). Defendant was free to cross examination Chief Gablehouse to establish that some of these violations were not directly related to Mr. Locke’s fall, and defendant did so at least to some extent. (6/21/04 RP 181, 185-86)

It relies on the testimony of one of plaintiff's experts who testified that no safety officer was present during the period June 26 through June 29, 2000, and that a safety officer was required for live fire training which took place, inter alia, during the day of Mr. Locke's fall, but also testified no safety officer was required for the last drill of the day, which is the drill where Mr. Locke fell. (6/2/04 PM Pt. 1 RP 26-28) Defendant argues that it was reversible error to permit the expert to respond to the question, "Well, what good would the safety officer had done if it wasn't required during the Ozark ladder drill?" Id. at 28. The only objection made at the time was that the question "calls for speculation." Id. That objection is foreclosed by cases such as Ayers v. Johnson & Johnson, 117 Wn.2d 747, 754, 818 P.2d 1337 (1991), in which a witness testified about what she would have done had she been aware of a particular risk. Since defendant never objected on the grounds of relevance, its relevance objection is waived under ER 103(a)(1). However, the expert's answer explained the relevance: "[t]he safety officer, had there been one, could have, first of all, that late in the day not even run that drill. Said, no, they've done enough, they're dragging." Id. at 28. In other words had the safety officer been there when he or she was required to be there, which was during the live fire drills that preceded the "Ozark" drill, the safety officer could have stopped the drill which led to Mr. Locke's fall.

G. The Trial Court Committed No Reversible Error With Regard To Chief Gablehouse's Testimony Concerning The Applicability Of Certain Washington Regulations.

Defendant challenges Chief Gablehouse's testimony at 6/21/04 RP 14-15, 17-18, 23-24, 77 on the basis that it was not a proper subject for expert testimony . Def. Brief, p. 37. However, that was not the objection made at pages 14-15. Defendant raised no objections at pages 23-24, and did not raise this objection at page 77. As such, the present objections to that testimony are waived under ER 103(a)(1). The only objection corresponding to defendant's present argument was contained at page 18 where the city attorney after a question, but before an answer, relating to WAC 296-305-05501, confusingly stated "your honor, move to strike all of these opinions as expressing legal opinions."¹⁴

The motion to strike is not well taken for two reasons even if assumed to be an objection to the question. First of all, Chief Gablehouse's opinions constitute admissions pursuant to ER 801¹⁵. Chief Gablehouse testified that as part his current duties as battalion chief in the Seattle Fire Department "I oversee safety procedures for the general fire department." (6/17/04 RP 170) He also testified that he "conducted an

¹⁴ This statement is confusing because it was made after a question, but before an answer, and defendant did not indicate to which opinions this motion to strike applied.

¹⁵ An admission, e.g., "I admit I'm guilty of killing my wife" is not objectionable as expressing a legal opinion.

investigation regarding Kevin Locke's fall, and had previously conducted other such investigations." Id. at 174. He later submitted a report of his investigation to Chief Sewell of the Seattle Fire Department. Id. at 179. Chief Gablehouse's position with defendant is very similar to the position of the defendant's Director of Environmental affairs in Lockwood v. AC&S, 109 Wn. 2d at 261-62, and his statements thus qualify as admissions. Secondly, Chief Gablehouse was not expressing a legal opinion.

H. Giving Instruction No. 13 Did Not Constitute Error Or Reversible Error.

Defendant's exception to Instruction 13¹⁶ had nothing to do with its current argument that the instruction was based on a WAC (296-126-092), which does not apply to the City of Seattle. Def. Brief, pp. 37-38. The first part of the exception – "that the vertical standard didn't apply in this circumstance" – applies only to Instruction 12 and has nothing to do with Instruction 13. The second sentence of the exception, makes no

¹⁶ I'm preserving my objection on the Court's instructions 11 and 12, and let's see, 13 with respect to our basic position that the vertical standard didn't apply in this circumstance. It is improper for the court to determine, as a matter of law, that no administrative rule was violated.

sense since the court was not determining that “no administrative rule was violated.”¹⁷

Moreover, rather than raising to the trial court the argument that the City was exempt from WAC 296-126-092, defendant confronted plaintiff’s expert Chief Gablehouse with that WAC on cross-examination. (6/21/04 RP 93) Defendant did not suggest that the WAC did not apply to Seattle. Indeed, defendant excepted to the trial court’s not giving an instruction that gave “the entire administrative rule” of WAC 296-126-092. (6/7/04 RP 39) It would defeat both the language and purpose of CR 51(f) for a party to be able to hide its actual argument from the trial court, wait to see if it lost the trial, and then raise its actual argument for the first time on appeal.¹⁸

¹⁷ Even if the “no” were a mistake, the court was not determining that an administrative rule was being violated; such a determination was left to the jury.

¹⁸ Plaintiff surmises that defendant’s experienced appellate counsel was well aware that defendant failed to preserve error in the trial court on a number of occasions and, without acknowledging any such error, tried to pave the way for asserting in its Reply Brief that this Court should nevertheless hear claims raised for the first time in this Court. See Def. Brief, p. 10 stating:

The duty of this court is to determine the rights of the parties. This is true even if the attorneys representing the parties were unable or unwilling to argue applicable law. *Maynard Investment Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

RAP 2.5(a) deals with this issue by providing that the appellate court may refuse to review any claim of error which was not raised in the trial court. Sometimes, the appellate courts choose to review issues not raised in the trial court. Falk v. Keene Corp., 113 Wn.2d 645, 658-59, 782 P.2d 974 (1989). However, “[c]entral to RAP 2.5 is the traditional rule that an appellate court will ordinarily refuse to review issues that were not

Defendant's exception to Instruction 13 thus not only failed to comply with CR 51(f), but failed to apprise the trial judge of the points of law raised in this appeal about that instruction. See Def. Brief, pp. 37-38. As such, defendant's arguments on appeal relating to Instruction 13 should not be considered by this Court. Walker v. State, 121 Wn.2d 214, 217, 848 P.2d 721 (1993), holds that if an exception is inadequate to apprise the judge of certain points of law, such points will not be considered on appeal. See also Van Hout v. Celotex Corp., 121 Wn.2d 697, 698, 853 P.2d 908 (1993) ("an appellate court may consider a claimed error in a jury instruction only if the appellant raised the specific issue by exception at trial").

The requirement imposed by CR 51(f):

is more than just an idle, legal technicality. The object in this process is to avoid trying a case twice. The trial judge must then be given the opportunity, in the first instance, to properly instruct the jury. Trueax v. Ernst Home Ctr., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). So, if a lawyer thinks the court is about to commit error, he or she must speak up and allow the court to revisit the point at a time when the trial judge can do something about it. See Lahmann v. Sisters of St. Francis, 55 Wn. App. 716, 723, 780 P.2d 868 (1989).

raised at the trial court level." Wash. Prac. Series Vol. 2A, Rules Practice, K. Teglund, RAP 2.5, p. 192 (6th Ed. 2004); Barnett v. Hicks, 119 Wn.2d 151, 829 P.2d 1087 (1992); Wingert v. Yellow Freight, 146 Wn.2d 841, 50 P.3d 256 (2003). Defendant's failures do not meet any of the exceptions recognized in RAP 2.5 and it would defeat the values of efficiency and finality to consider such issues for the first time on appeal.

Conrad v. Alderwood Manor, 119 Wn. App. 275, 290, 78 P.3d 177 (2003).

Conrad was reiterating in more colorful language the holding of cases such as Schmidt v. Cornerstone Invest., Inc., 115 Wn.2d 148, 163, 795 P.2d 1143 (1990) and Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986), which also rejected challenges to instructions which had not been presented to the trial judge.

Had defendant's present argument been raised to the trial court, the plaintiff could have decided to withdraw the proposed instruction. Had the plaintiff maintained the issue, the court would have been presented with an interesting question. RCW §49.12.005(3)(a), the statutory language relied on by defendant at page 37 of its Brief did not exist when this accident occurred.¹⁹ When Chief Gablehouse contacted DLI and was informed that WAC 296-126-092 applied to the City (6/21/04 RP 14-15), that portion of the statute did not exist. This testimony was properly before the jury.

Defendant acknowledges that an expert may rely on hearsay, but incorrectly characterizes Chief Gablehouse as a lay witness. Id. at 38. However, Chief Gablehouse was not only an expert witness, but was an authorized safety official for the Seattle Fire Department. His testimony

¹⁹ It was adopted in 2003. See history to RCW §49.12.005.

was thus proper under ER 703 and Bellevue v. Kravik, 109 Wn. App. 735, 742, 850 P.2d 559 (1993), where the court held:

Bellevue also argues the court erred in allowing testimony of an expert based upon evidence which was itself inadmissible. Expert opinion may be given even where the underlying factual material would otherwise be inadmissible. ER 703; *see Group Health Coop. of Puget Sound, Inc. v. Department of Rev.*, 106 Wn.2d 391, 400, 722 P.2d 787 (1986).

It was also admissible as an admission. ER 801.

The legal issue thus would have been whether a regulation (which the issuing agency believed applied to and which Fire Department's safety officers admitted applied) does not apply because the legislature retroactivity amends the statute.²⁰ Under the evidence and argument presented by defendant to the trial court (which did not argue that the regulation was inapplicable), the trial court's decision was correct.

I. The Trial Court's Burden of Proof Instructions Were Correct.

Defendant agrees that Instruction No.18 was correct in its statement of the burden of proof, but argues that that instruction was inconsistent with Instruction No. 20, which stated that "[t]he burden of proving the benefits received and receivable rests upon the defendant City." (CP 4080) Defendant further argues that Instruction No. 20 was

²⁰ As noted above, the City's position at trial was not that the regulation did not apply to public employees.

incorrect because the “burden of proving the amount received and receivable should have been placed on plaintiff.” Def. Brief, p. 40. Addressing the latter argument first, defendant fails to point out that defendant raised the issue of such credit/offset as an affirmative defense.

In its Answer and Affirmative Defense, the City stated:

6. Defendant City is entitled to a credit and/or offset of any and all funds, payments, and reimbursements, paid in the past or to be paid in the future, for benefits under workers compensation laws or otherwise for Plaintiffs Locke including but not limited to medical and other health care expenses, or wage and income reimbursements.

(Emphasis added.)

Generally the burden of proof is placed upon the party asserting affirmative defense. See Gleason v. Metropolitan Mortgage Co., 15 Wn. App. 481, 551 P.2d 147 (1976) (accord and satisfaction); Tacoma Commercial Bank v. Elmore, 18 Wn. App. 775, 573 P.2d 798 (1977); Manufacturers Acceptance Corp. v. Irving Gelb Wholesale Jewelers, Inc., 17 Wn. App. 886, 565 P.2d 1235 (1977); 3A Orland and Teglund, Wash. Prac., CR 8, p. 138 (4th Ed. 1992). In Tacoma Commercial Bank v. Elmore, supra, 18 Wn. App. at 778, the court held:

Usury is an affirmative defense, and the burden of proof is upon the party who asserts it. *Malotte v. Gorton*, 75 Wn.2d 306, 450 P.2d 820 (1969).

Similarly, in Brougham v. Swarva, 34 Wn. App. 68, 74, 661 P.2d 138(1983), the court held:

[p]leading the statute of limitations is an affirmative defense and each of its elements must be proved by the party asserting it.

Not only is the general rule that the party raising an affirmative defense has the burden of proof, but defendant, who is keeping the books and thus knows exactly how much it has paid on plaintiff's behalf to medical providers, is in the better position than plaintiff to supply such information. Thus, the trial court correctly placed the burden on defendant.²¹

Nor is defendant correct in arguing that Instruction Nos. 18 and 20 are inconsistent. The plaintiff under Instruction No. 18 had the burden of proving damages such as pain and suffering and future economic damages. Defendant's burden was simply to prove what benefits it had or would provide Mr. Locke. The burden as to past benefits was resolved by stipulation. As to future benefits, defendant provided evidence including the testimony of Mary Tannehill.

²¹ Indeed, defendant initially proposed an instruction placing the burden of proof on itself (CP 3953), though it later withdrew the proposed instruction.

J. The Jury’s Failure To Understand An Ambiguous Question On The Special Verdict Form Has Already Been Corrected In The Way Proposed By Defendant, And Does Not Require A New Trial.

Question No. 4 on the Special Verdict Form refers to “Chapter 41.26 RCW”. (CP 4090) That was never defined or explained to the jury and may have led to the jury’s confusion in not including in its answer “the stipulated amount of \$138,980.” Id. Defendant’s “MOTION FOR A NEW TRIAL OR FOR REMITTITUR” stated as one of the five issues presented by that motion:

4. Should the judgment based on the verdict be reduced by a setoff of \$163,113.00?³²

³² \$138,980.00 (the stipulated past offset) + \$24,133.00 (the answer to Question 4) = \$163,113.00.

(CP 4496) That is precisely what the court did. The Judgment On Jury Verdict listed:

3.	Net Verdict Amount after reduction of LEOFF off-set and 10% comparative fault:	\$1,511.718.00
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(CP 4505). The jury awarded \$1,842,800. (CP 4090) The first step the court did was to reduce the judgment by \$163,113.00 as requested by defendant. Subtracting \$163,113.00 from \$1,842,800 equals \$1,679,687. The court then reduced that amount by 10% for comparative fault. Ten percent of \$1,679,687.00 is \$167,969.00. Subtracting \$1,679,969.00 from

\$1,679,687.00 leaves a remainder of \$1,511,718.00, which is the net verdict at CP 4505 after rounding. Defendant thus achieved precisely what it asked for, suffered no prejudice, and has no basis for appealing the judgment on this issue.²²

K. Substantial Evidence Supported the Jury's Award for Economic Damages.

The jury awarded \$514,000 in economic damages. (CP 4090) Defendant does not dispute that plaintiff was entitled to "\$49,000 in lost future business." Def. Brief, p. 43. According to defendant, however, there was no substantial evidence to support a verdict of about \$465,000 for the "reasonable value of necessary medical care, treatment and services with reasonable probability to be experienced in the future" as set forth in Instruction 18 (CP 4077). Def. Brief, pp. 43-44.²³ Defendant's

²² This case is thus distinguishable from Nichols v. Lackie, 58 Wn. App. 904, 795 P.2d 722 (1990) and Tuthill v. Palermo, 14 Wn. App. 781, 545 P.2d 588 (1976), since defendant here received the relief it sought in the trial court.

²³ Appellant would have this Court believe that plaintiff's counsel admitted that plaintiff's need for future medical treatment was speculative by taking his colloquy with the Court out of context (Def. Brief, pp. 44-45). By starting the colloquy with the Court at its beginning, rather than using the snippet cited by the appellant, the true discussion can be ascertained (6/23/04 RP 11, LL 22-25, RP 16). In reality, counsel successfully limited the City from speculating what the City may pay to the plaintiff for his future medical needs.

The City answered plaintiff's set-off interrogatory, stating their entire medical expense and wage payment set-off totaled \$138,978.28 (6/23/04 RP 12, LL 10-25, RP page 13, LL 1-3). Lt. Keith Wyatt, disability officer with the City, testified that Mr. Locke had not applied for, nor was he eligible, for a disability pension from the City (6/16/04 RP 118). Mary Tannehill, Personnel Director for the City, had stopped paying the plaintiff's medical bills as of December, 2003, six months before trial, because his

analysis is inconsistent both with Washington law and evidence such as the parties' stipulation as to medical expenses as well as the testimony of both Mr. Locke and his physical therapist, Karen Colara.

Turning first to Washington law, the cost of future medical care or treatment is allowed when evidence indicates that such care or treatment will be necessitated by the plaintiff's injury. Leak v. United States Rubber Co., 9 Wn. App. 98, 103-104, 511 P.2d 88 (1973); Webster v. Seattle R & S Ry., 42 Wash. 364, 365, 85 Pac 2 (1906); Erdman v. B.P.O.E., 41 Wn. App. 197, 208-209, 704 P.2d 150 (1985). That evidence may consist of past medical bills since "[t]he medical records and bills were admissible, however, without a showing of reasonableness and necessity, to prove costs of future treatment." Patterson v. Horton, 84 Wn. App. 531, 544, 902 P.2d 1125 (1997). Once liability for damages is established, a more liberal rule is applied when allowing assessment of the damage amount. Erdman, *supra*. Moore v. Smith, 89 Wn.2d 932, 943, 578 P.2d 26 (1978). As explained in Erdman, 41 Wn. App. at 209-210.

condition had reached "maximum medical improvement" and further treatment would not be curative (6/29/04 RP 125, 6/29/04 RP 138-139). The City is only required to pay for medical treatment that is curative, as opposed to palliative or transient that may alleviate the plaintiff's discomfort temporarily, such as chiropractic, massage or rolfing and other physical therapy-like treatments. (6/29/04 RP 115, 135-36) Maximum medical improvement is equivalent to fixed and stable (WAC 296-20-01002(3)). Faced with the interrogatory answer and actions by the Personnel department, the Court rightfully restricted the City from speculating, in front of the jury, what it might pay to the plaintiff in the future.

Since Mr. Erdman's impairments were present at the time of trial and he had received medical attention for the impairments, there can be no doubt from the evidence that future treatment is essential for his existence; the jury was entitled to award damages. Thus, we find the court erred in denying that portion of the verdict relating to future medically related expenses.

(Emphasis added.) See also Kwapien v. Starr, 400 N.W.2d 179, 184 (1987).

Given this Washington law, there was substantial evidence of Mr. Locke's need for future medical treatment and the cost of such treatment. First, the parties stipulated to past medical expenses of about \$100,000. (6/7/04 RP 13) This was sufficient, standing alone, to show future treatment costs. Patterson, supra, Erdman, supra. Furthermore, Mr. Locke testified that, as of the time of trial, he was still having treatments and paying for massage and rolfing treatments. K. Locke Transcript (6/23/04 RP 203). He also discussed his physical therapy, including massage therapy:

A. . . . well, the three next people, Vicki Rosano, Kay Wagner, and Malaya Peck are licensed massage therapists that I have seen over the years to try to increase the mobility in the joints, and I get massage work there.

Q. Compon rolfing?

A. Jamie Compon is a rolfer. Rolfing is a deeper form of tissue maculation.

Id. at 192. He pays for those treatments because “I am able to function better both with the massage and rolfing than before I get the treatments.

Id. at 193. Significantly, he went on to explain that his pain was increasing over time:

. . . I seem to have more symptoms for pain, and so now I try to coordinate those, like I – if I know I’m coming up close to getting a massage or rolfed, I might go out and do that activity, because I know that I can go in the next day or the day after that and get a little bit more treatment for it.

Id. at 202.

These ongoing treatments are necessitated by Mr. Locke’s permanent injuries. For example, Karen Colara, a licensed physical therapist, testified that Mr. Locke will never have a normal gait (6/7/04 PM RP 42) and that his injuries are permanent (id. at 43). The jury learned from Ms. Colara that Mr. Locke tends to overextend himself physically because of his personality. (6/7/04 PM RP 114-115)

Ms. Colara testified that Mr. Locke was “seeing a rolfer, a massage therapist and a chiropractor” (id. at 34), and explained that a rolfer is a “highly trained massage therapist”. Rolfers “do not just deal with muscles, but also with facie or connective tissue” Id. at 34. She further testified that, in this context, it is not unusual “to see your patient treating with different providers or multiple providers.” Id. Ms. Colara also testified on cross examination that Biosports, the physical therapy provider

at which she worked while treating Mr. Locke, also provided massage. Id. at 66. She also testified that Biosports charged Mr. Locke \$160 per visit (id. at 51), and that Biosports had charged Mr. Locke more than \$10,000 for his treatment between August 14, 2002 and May, 2004 – the time of the treatment. (6/7/04 RP 50-51, 123) The jury also was told in Instruction 19 that “the average life expectancy of a male aged forty three years is 32.43 years.” (CP 4079)

Putting this evidence together, the jury thus could reasonably have concluded, given Mr. Locke’s permanent injuries and increasing pain (which were temporarily addressed by massage, rolfing and chiropractic care), that he would need such treatments over the next approximately 32 or 33 years at a cost of \$160 per treatment, and would need such treatment frequently, e.g., more than once a week. An annual expense of \$14,000 a year for such treatment over the next 33 years would total about \$460,000 even without inflation.

L. The Trial Court Did Not Err In Rejecting Defendant’s Motion For Periodic Payment Of Future Economic Damages.

Defendant waited until after the verdict to file its motion for periodic payments. The trial court properly denied the motion based on Esparza v. Skyreach Equip., Inc., 103 Wn. App. 916, 944, 15 P.3d 188 (2000), in which this Court:

ruled that a trial court did not abuse its discretion in refusing to convert a future economic damages award to periodic payments where the defendant failed to notify the plaintiff of its intention to request periodic payments until after the jury returned its verdict.

Def. Brief, p. 47.

None of defendant's three arguments for not applying Esparza are persuasive. The fact that the plaintiff's economic expert testified after plaintiff's provider is irrelevant. As discussed above, the testimony of Mr. Locke and his physical therapist as well as the parties' stipulation as to past medical bills provided the jury with a basis for awarding damages for future medical care and treatment. Had defendant's motion been filed before the economic expert testified, plaintiff could have provided relevant testimony. As explained by the court in Esparza:

Each element of future damages accumulates at a different rate, and a single lump sum figure makes it difficult for a trial court to ascertain how much the jury intended to be for future medical care and how much for future earnings, and what duration of payments the jury found to be appropriate for each kind of future damages. A trial court would have no way of knowing the answers to these questions, absent an appropriate special verdict form, so that any attempt to apply a periodic payment schedule would require arbitrary determinations by the court that could result in under-compensation of the plaintiff or overpayment by the defendant. The trial court's ruling was sensible and we affirm it.

Id. at 944.

Defendant's argument that it could not have anticipated that plaintiff would seek more than \$100,000 in future economic damages also misses the mark. Not only did plaintiff claim damages for future medical treatment in his interrogatory answers, defendant knew through discovery of the series permanent nature of his injuries, knew of the high past medical costs, and knew of other future economic damages. It would have been reasonable to anticipate the possibility of future damages in excess of \$100,000. Finally, Esparza is well reasoned, sensible and published. Green v. Franklin, 190 Cal. App. 3d 93, 235 Cal. Rptr. 312 (1987) was published when Esparza was decided. Its subsequent de-publication is irrelevant.

M. The Last Four Of Defendant's Arguments, Even If Correct, Would Only Call For Reversal Of The Economic Damages Component Of The Judgment.

Defendant's arguments discussed in Sections I, J, K, and L above all relate only to the issue of economic damages. None deal with the \$1,320,000 verdict relating to non-economic damages. (CP 4090) Thus, even were defendant correct in one or more of these arguments, the appropriate relief would relate only to a re-trial on the issue of economic damages.

It is well settled under Washington law that when an error requires reversal on one issue before the court it is not necessary to retry other

issues that were fairly resolved and unaffected by such error. Havens v. C&D Plastics, supra, 68 Wn. App. at 176. Similarly in Olds-Olympic, Inc. v. Commercial Union Ins. Co., 129 Wn.2d 464, 918 P.2d 923 (1996), the court reversed a judgment of the King County Superior Court and remanded the case for a new trial limited to the issue of Olds-Olympic's legal liability to the State, and any damages. The court noted that at page 482, n. 22:

A remand for new trial confined to particular issues is merited where the error pertains to a particular issue only and justice does not require resubmission of the entire case to the jury. *Mina v. Boise Cascade Corp.*, 104 Wash. 2d 696, 707, 710 P.2d 184 (1985); *McCurdy v. Union Pac. R.R.*, 68 Wash. 2d 457, 471, 413 P.2d 617 (1966); *Godefroy v. Reilly*, 140 Wash. 650, 657, 250 P. 59 (1926). The jury decided the factual questions here separately in answer to special interrogatories. Trial on remand is properly confined to the questions of legal liability and damages, if any.

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IV. CONCLUSION

For the foregoing reasons, the trial court's judgment should be affirmed.

RESPECTFULLY SUBMITTED this 15th day of **August, 2005**.



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THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KEVIN J. LOCKE and TORI LOCKE,
husband and wife and the marital community
composed thereof,

Respondents,

v.

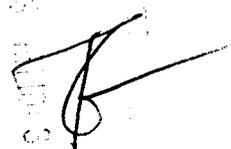
THE CITY OF SEATTLE, a municipal
corporation; and THE CITY OF SEATTLE
FIRE DEPARTMENT,

Appellants.

No. 55256-2-I

DECLARATION OF SERVICE

2005 AUG 15 11:00 AM '05



The undersigned declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am an employee of Schroeter Goldmark & Bender, over the age of 18, not a party to this action and competent to make the following statements:

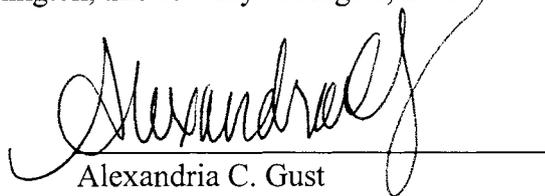
2. On August 15, 2005, Respondents' Appeal Brief was served upon the attorneys of record for appellants by having said copy delivered via U.S. Postal Service, postage prepaid, to them at the office address below:

David Wieck/John O'Brien O'BRIEN & ASSOCIATES O'Brien Professional Bldg. 175 NE Gilman Blvd. Issaquah, WA 98027	Eric Mentzer Assistant Attorney General Attorney General Office, Torts Div. P.O. Box 40126 Olympia, WA 98504-0126
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Gregory Fuller Seattle City Attorney's Office P.O. Box 94769 Seattle, WA 98124	Pamela Okano/William Hickman REED McCLURE Two Union Street, Suite 1500 Seattle, WA 98101-1363
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED at Seattle, Washington, this 15th day of August, 2005.


Alexandria C. Gust