Supreme Court No. 94559-4

Court of Appeals No. 42543-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Plaintiff-Petitioner

vs.

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

Defendant-Respondent

Appeal from the Superior Court of Clark County

Case No. 08-2-04895-4

COA No. 46347-4-II

AMICUS CURIAE MEMORANDUM OF THE WASHINGTON STATE LABOR COUNCIL IN SUPPORT OF PETITION FOR REVIEW

Erin C. Sperger, WSBA No. 45931
Attorney for Washington State Labor Council, AFL-CIO
Legal Wellspring, PLLC
1617 Boylston Avenue
Seattle, WA 98122
(206) 504-2655
Erin@LegalWellspring.com

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to RAP 13.4(h) and RAP10.3(e), amicus curiae describes its interest in this case as follows: The Washington State Labor Council ("WSLC") is a non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their families. According to its website, WSLC represents and provides services for hundreds of local unions and trade councils throughout Washington State. Membership is voluntary and open to all union locals and councils that are affiliated with the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO").

Currently there are more than 600 local unions affiliated with the WSLC, representing more than 400,000 rank-and-file union members working in the state. The WSLC is the largest labor organization in the state and is the only organization representing all AFL-CIO unions in the state. The WSLC is widely considered to be the "voice of labor" in Washington. WSLC has a strong interest in advocating for the liberty interests of Washington State workers. This includes a worker's right to recover damages from a third party when a worker is injured on the job.

Part of WSLC's core mission is to improve the working conditions and living standards of Washington's working families. Often, as was the case here, it takes a significant amount of time for a worker who is injured on

the job to receive payments from L&I. During that time, a worker can incur a significant amount of debt and financial stress. Also, L&I time loss payments are always less than the amount of the worker's lost wages. Thus, L&I payments do not eliminate financial stress.

WSLC and its constituent members have a direct interest in protecting a trial court's discretion in admitting or excluding evidence of collateral source benefits and of expert testimony.

II. STATEMENT OF THE CASE

The WSLC adopts the facts set out in Gilmore's Petition for Review and Appellate briefing. In support of this memorandum, the following facts are relevant:

Gilmore was injured when he was rear-ended by a bus while he was on the job. RP 650. His injuries were mostly confined to his neck, and he ultimately needed multi-level neck fusion surgery, where his surgeon implanted permanent surgical hardware to hold his spine together. RP 650.

Gilmore received L&I benefits, and he also filed a third party negligence lawsuit against the bus company, Jefferson County Public Transportation Benefit ("Jefferson Transit"). Defendant admitted liability, but denied the nature and extent of Gilmore's injuries. CP 255.

Gilmore presented testimony from two medical doctors and one chiropractor, who all testified that Gilmore's neck injury was the result of

the crash. RP 331, 360 (Dr. Masci), 649-50 (Dr. Marinkovich), 483 (Dr. Suffis's video deposition, which was played in open court). Gilmore also presented lay witnesses who testified to his health, strength, agility, and abilities before and after the collision. RP 302, 508, 522, 532-34, 566. Before trial, the court granted Gilmore's motion in limine to exclude any evidence of L&I payments under the collateral source rule. The court also excluded testimony from a biomechanical engineer, Dr. Allan Tencer.

In Tencer's declaration he stated: "My testimony is not medical, it relates to the forces of the collision and the forces experienced by the Plaintiff. It is not related to any averages, just to the forces of this collision." CP 365.

At trial, the defense presented testimony from Dr. Barbara Jessen. She admitted on direct examination that Gilmore was injured in the collision to some degree. RP 897 ("He'd made a recovery from that injury – that accident – whatever he had due to the accident..."). Further, Dr. Jessen testified that, although it was useful to know about the severity of the impact, it was only one factor in determining the severity of injuries. A person in a severe impact accident could have no injuries while a person in a less severe accident, who was more vulnerable, could have symptoms of a neck injury. RP 875.

III. ARGUMENT

A. Gilmore's Petition for Review Involves Issues of Substantial Public Interest.

According to the Department of Labor & Industries, in 2016 there were 2,362 L&I claims filed in relation to a highway accident and 439 claims filed in relation to a nonhighway accident, except rail, air or water. Wash. State Dep't of Labor & Indus., Injury Data, Accident Type. Available at http://www.lni.wa.gov/ClaimsIns/Insurance/dataStatistics/-WorkersCompdata/default.asp.

It is unknown precisely how many 2016 third party claims were filed directly, or on behalf of injured workers by the Department, but clearly many such claims are filed, and Division Two's decision will impact every one of them. Third party claims are important to all workers, not just to those injured in these cases, because third party recoveries support the Department's budget and help keep L&I rates low.

B. Division Two's decision erodes a trial court's discretion in admitting evidence of collateral source benefits. This is in direct conflict with this court's decision in *Johnson v. Weyerhaeuser Co*.

Contrary to Division Two's suggestion, the trial court did not hold that a plaintiff could never open the door to evidence of L&I payments. Instead, the trial court found that the specific evidence elicited by Gilmore's witnesses did not open the door. This was well within the its discretionary

authority. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 804, 953 P.2d 800 (1998) (Although a party may waive the protections of the collateral source rule by opening the door to evidence of collateral benefits, this Court left that determination to the trial court).

In Division Two's opinion, it acknowledged that L&I payments are protected by the collateral source rule, codified at RCW 51.24.100, but nonetheless found that:

> the trial court erred by excluding the evidence when Gilmore opened the door. Gilmore elicited testimony from his witnesses about Gilmore's stress over his finances due to the accident. Gilmore waived the protections of the collateral source rule when he opened the door by introducing such testimony. Because Gilmore opened the door and the trial court relied on an incorrect legal standard in excluding the evidence, its decision was exercised on untenable grounds. *Gilmore v. Jefferson Cnty. Pub. Trans. Benefit Area*, No. 48018-2-II, April 25, 2017 (Slip Opinion, at 20) (hereafter, "*Gilmore*").

But, the Court of Appeals did not cite to any legal standard that the trial court incorrectly applied.

The very essence of the collateral source rule is to protect the claimant from an inference by the factfinder that he is receiving a windfall and that therefore the factfinder should nullify the defendant's responsibility. *Johnson*, 134 Wn.2d at 804. "If evidence of collateral benefits is admitted, the message received by the factfinder is that the claimant already has enough money and, therefore, is not disabled." *Id*.

In this case, the defense continually sought to nullify the collateral source rule under the guise of an "opening the door" argument. Pain and suffering was part of the plaintiff's claim. And the plaintiff argued that part of the pain and suffering was financial stress, and that the stress of being unable to work changed plaintiff's personality and caused him to drink. RP 538.

After careful consideration, the trial court determined that Alex Gilmore's testimony about how the family felt about losing their money and that his dad could not work anymore, did not open the door to evidence of collateral source income. RP 517. Neither did testimony from Gilmore's son about their financial status after the accident or how that affected the plaintiff. RP 538-44.

This discretionary decision was not untenable, given the fact that Gilmore did not receive a lump sum payment from L&I until the end of 2009 or 2010 (at least one year after the crash), no testimony was elicited about Gilmore's sources of income, reduction in income, or whether Gilmore had any income at all; this testimony also supported Gilmore's claim for pain and suffering. RP 517-18, 537.

Although the court recognized that collateral source benefits could be relevant for another purpose, it did not think it should be applied to the facts of this case based on the testimony about financial stress, RP 634-35,

especially, absent any case law showing that that particular line of questioning "opened the door". RP 538-544.

If injured workers can open the door simply by eliciting testimony in support of their pain and suffering claim, it will invite the factfinder to conclude that the injured worker already received enough money and that he is not disabled, or worse, that he is exaggerating or falsifying his pain and suffering. The exception will swallow the rule. This is exactly why the *Johnson* court left this fact-intensive determination to the trial court.

The danger in eroding the collateral source rule is that it will leave L&I to pay for the wrongful acts of a third party. And that, in turn, will increase L&I rates. It may also deter injured workers from bringing a suit against the real party at fault, which is the evil the collateral source rule was designed to combat.

C. **Division Two's decision erodes a trial court's discretion in admitting or excluding expert testimony, which is in direct conflict with decisions of both Division One and of this Court**.

To be clear, up to this point, the conflict between Divisions One and Two has not been whether each division will admit Tencer's testimony. Division One's decisions in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) and *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), Division Two's decision in *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), and this Court's decision in *Johnston-Forbes v.*

Matsunaga, 181 Wn.2d 346, 333 P.3d 388 (2014) are all consistent in that the reviewing court upheld the trial court's discretionary decision. This Court has recognized that in some cases, Tencer's testimony might be relevant and helpful to the jury, but it also left that determination to the trial court. See *Johnston-Forbes*, 181 Wn.2d at 353-57.

The conflict is that Division Two, for the first time, has overturned the trial court's discretionary decision by substituting its own opinion for that of the trial court. This has broad implications for all future plaintiffs and all workers. As the law stands now, a trial court in Division One will likely exclude Tencer's testimony where the only reasonable inference is that "plaintiff could not be injured." If Tencer's testimony is admissible in every case, then in some cases juries will infer that "plaintiff could not be injured" and will return low or defense verdicts.

The WSLC is concerned that this will impede injured workers from bringing third party claims because it will become ever more difficult to find attorneys willing to take on these cases. Furthermore, attorneys will not be able to assess the strength of their cases and verdicts will be at risk when the appellate court is free to disregard the trial court's discretionary rulings. Because Tencer always testifies for the defense, against the injured worker, this decision will harm injured workers without any concomitant benefit to them.

When the oral argument on excluding Tencer's testimony is reviewed in its entirety, the main issue was clearly whether it would be relevant and helpful to the jury. The trial court's decision to exclude Tencer's testimony was based upon those concerns and not on any impermissible reason under ER 703 (An expert may base an opinion on information not admissible in evidence). RP 533-39. Instead, the issues in this case, and the trial court's reason for excluding Tencer's testimony, are identical to the issues and reasoning of the trial court affirmed in *Stedman,* 172 Wn. App. 9. In *Stedman*, Tencer declared that he had "never described any threshold for injury" in his opinions and he "disavowed any intention of giving an opinion about whether Stedman got hurt in the accident." *Id.* at 20. However, Division One pointed out that despite this claim by Tencer, "his clear message was that Stedman could not have been injured in the accident because the force of the impact was too small." *Stedman,* 172 Wn. App. at 20.

In this case, the only issues to be decided at trial were: (1) to what extent Gilmore was injured, and (2) the amount of the damages. CP 50. Here, Tencer made essentially the same declaration as in *Steadman*, when he stated he has no "cutoff point" for how much force it would take to cause an injury. See CP 367. Tencer claimed his testimony would "assist the jury in assessing the differing opinions that will likely be offered in

this matter," thus disavowing any intention of giving an opinion about whether Gilmore was injured in the accident. CP 367. But, his message is as clear in this case as it was in *Stedman*, that Gilmore could not have been injured in the accident because the force of the impact was too small. Division Two did not even attempt to distinguish the two cases. It simply ignored *Stedman*.

IV. CONCLUSION

Division Two's decisions herein involve a substantial public interest. They harm injured workers and the L&I system. They erode the discretion of the trial court on evidentiary matters, both with respect to "opening the door" and with respect to expert testimony. They are in direct conflict with at least two decisions in Division One and this Court. Therefore, this Court should grant Gilmore's Petition for Review.

Respectfully submitted this 26th day of July, 2017.

s/ Erin C. Sperger
Erin C. Sperger, WSBA No. 45931
Attorney for the Washington State Labor Council

ERIN SPERGER PLLC

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Comments:

Sender Name: Erin Sperger - Email: erin@legalwellspring.com
Address:
1617 BOYLSTON AVE
SEATTLE, WA, 98122-6729
Phone: 206-504-2655

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