

NO. 35412-8-11

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

GLENN JOHNSON and DOLLIE JOHNSON, husband and wife,

Respondents,

v.

GOLDEN EAGLE EXPRESS, INC., a Washington corporation,

Appellant.

BRIEF OF RESPONDENTS [REVISED]

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INTRODUCTION

This case is a textbook illustration of the rescue doctrine, a rule well-established in Washington law. The doctrine makes liable one who initiates rescue efforts, but then fails to exercise reasonable care in performing that rescue; one who leads a person in peril to rely on the promised assistance and not seek further assistance on his own, but then fails to perform; and one who dissuades another in a position to rescue not to provide assistance based on an assurance of assistance, but then fails to perform.

Here, Golden Eagle Express, Inc. (Golden Eagle) offered to aid its driver, Glenn Johnson,¹ when he was in distress while driving for the company over the road. Glenn relied on those promises and did not seek aid elsewhere. Golden Eagle told three other Golden Eagle drivers not to get involved with assisting Glenn because Golden Eagle would be taking care of it. Despite those promises and assurances, Golden Eagle did nothing more after it retrieved the load Glenn was carrying. As a result of gangrene that developed while Glenn was left for days at roadside, Glenn's lost his left second toe and then his lower left leg to amputation.

¹ For clarity and brevity, Glenn Johnson is referred to as Glenn, Dollie Johnson is referred to as Dollie, Golden Eagle driver Gabriel Sanchez is referred to as Sanchez, Golden Eagle driver Jesus Mendez is referred to as Mendez, Golden Eagle driver Jose Gomez is referred to as Gomez, Golden Eagle terminal manager Vance Crofoot is referred to as Crofoot, and Golden Eagle dispatcher Chris Clohessy is referred to as Clohessy.

Despite its lengthy brief, which is nothing more than a thinly-veiled effort to retry the facts in this case to this Court, Golden Eagle assigns no error to any trial court evidentiary ruling, nor does it assign error to a single jury instruction. The jury, thus properly presented with evidence and properly instructed in the law, returned its verdict in favor of Glenn and Dollie after a five-day trial. In short, Golden Eagle received a fair trial and lost. The jury's verdict should stand.

RESPONSE TO ASSIGNMENTS OF ERROR

The Johnsons acknowledge Golden Eagle's assignments of error, but believe the issues pertaining to those assignments of error are more appropriately formulated as follows:

1. Where there is substantial evidence that a trucking carrier through its terminal manager offered to assist a truck driver in distress while the driver was operating a large semi-truck for that carrier over the road and also told other drivers not to provide aid because the company was taking care of it, but then failed to fulfill its promised assistance, did the trial court error in allowing the case to go to the jury or in refusing to overturn the subsequent jury verdict holding the carrier liable to the driver for his injuries resulting from the carrier's breach of its duty to him as a rescuer?
2. Where a trucking carrier failed to assign error to the trial court's instructions to the rescue doctrine, causation and comparative fault, did the trial court abuse its discretion in refusing to overturn the jury's verdict finding the carrier exclusively at fault where substantial evidence supported the giving of those instructions and the jury's verdict?

COUNTERSTATEMENT OF THE CASE

Golden Eagle's statement of the case does not even resemble the fair recitation of the facts contemplated by RAP 10.3(a)(5).² It skews the facts, inserts argument, and omits fundamental procedures that took place over the course of the five-day trial below and through the post-trial motions. The Johnsons offer this counterstatement of the case to more fully apprise the Court of the relevant facts and procedure below.

A. Glenn Johnson's pre-existing physical condition.

Dr. Carin Pluedeman was Glenn's primary care physician. RP 146-147. Dr. Pluedeman described Glenn as "very timid and quiet, slightly hard of hearing." RP 147. Glenn "was a very compliant patient" who followed her orders. RP 147. Dollie was committed to his care and attended to his needs. RP 147-148. During the two to three years that Dr. Pluedeman treated Glenn, Glenn had a constellation of previously diagnosed health conditions, including congestive heart failure, renal failure, rheumatoid arthritis, diverticular disease, and peripheral vascular disease (PVD). RP 151, 152, 494, 516. During that multi-year period,

² Golden Eagle's statement of the case violates the directive of RAP 10.3 (a) (5) to provide the facts and procedure in this case, without argument. Beginning with plainly argumentative captions and proceeding to opinions of its expert offered as fact, Brief of Appellant at 5; inserting argument based on a claimed lack of evidence, *id.* at 12; including an entire section interpreting the medical testimony, *id.* at 28; and offering opinions on the ambulance personnel, *id.* at 21-2, the statement is replete with argument. The brief should be stricken and sanctions imposed against Golden Eagle for filing an improper brief. RAP 10.6

however, Glenn had no symptoms or complaints related to his congestive heart condition, no cardiac problems, no renal failure, and no complaints about his PVD. RP 152-153. Glenn's PVD did not raise concerns in Dr. Wes Rippey, Chief Surgeon at Adventist Hospital in Portland, Oregon, whom Glenn saw for diverticular disease in 2001. RP 494. Glenn "hadn't complained of any symptoms in his legs that were suggestive of chronic occlusive disease" during the time Dr. Rippey treated him. *Id.*

During the summer of 2002, Glenn developed what Dr. Pluedeman described as "a plain old callus" on the bottom of his left foot. RP 150, 156. It had mild tenderness to pressure, but no discharge or redness. RP 149, 150. Because it "was nothing more than a common callus", Dr. Pluedeman "recommended that he get over-the-counter medicated callus pads." RP 150, 156. His use of the pads, however, was optional: "It didn't really matter if he used them or not." RP 151.

During the years Dr. Pluedeman treated Glenn, she never knew him to have any mobility problems. RP 153. Dr. Pluedeman last treated Glenn in July 2002. RP 152.

Weeks after Glenn last saw Dr. Pluedeman, Golden Eagle hired him as a contract driver. RP 713. When Glenn applied for the position, Golden Eagle's Vancouver terminal manager Crofoot "thought he was kind of pushing it as far as his age was concerned, but he was really spry.

His DOT physical was fine.” RP 704, 705.³ Glenn “did great on his road test”, which Crofoot administered. RP 105.

In the weeks between Glenn being hired by Golden Eagle and the beginning of Glenn’s final run, Randy Fortuna, an across-the-street neighbor of the Johnsons, saw Glenn have no problems using the clutch of his semi-truck, washing his truck, pulling open the hood on his truck, or replacing the batteries in his truck. RP 54, 55, 57. In short, he never observed any limitations in Glenn’s activities during that time. RP 58.

While Glenn was driving for Golden Eagle, Sanchez, another contract driver for Golden Eagle, saw Glenn unloading his truck with a pallet jack and could understand him when he spoke. RP 68, 107, 108. Another Golden Eagle driver, Mendez, saw Glenn “hooking up the trailer hitch. His normal job.” RP 170. Still another Golden Eagle driver, Gomez, observed Glenn needing help with a landing gear, which he attributed to Glenn’s age. RP 188.

B. The October 2002 transport to California.

Glenn picked up a load in Woodburn, Oregon, on October 29, 2002, which he delivered to Roseville, California, in the early morning hours of October 30. RP 529-530. Glenn then traveled to Oakdale, California, to get his next load. RP 531. Glenn first noticed problems

³ Glenn was licensed to drive semis, having no restrictions on his license imposed by Oregon Department of Transportation, even though ODOT has authority to impose restrictions for health reasons. OR ADC 735-074-0070.

with his left foot in Oakdale. *Id.* Glenn drove about three hours north from Oakdale to a roadside rest stop near Richfield, where he pulled over to interrupt his drive in order to lay down and rest. RP 531-532. While going to the bed in the back of his truck's cab, he fell and hit his head. RP 532. He awoke in the dark, unaware of whether it was Wednesday night or Thursday morning. *Id.* He pulled himself back up and into his sleeper. RP 533.

C. Communications with Golden Eagle.

Glenn called Crofoot at 7:41 a.m. Thursday, October 31, 2002. RP 533, 559. During the two minute call, Glenn told Crofoot "I couldn't walk, I fall down." *Id.* Glenn asked Crofoot "for help to get back to Portland." RP 546. As Glenn recalled that conversation, Crofoot said that "he would send somebody to pick up the load and he would send help down to get me back." RP 533.

Crofoot then called Sanchez to dispatch him to pick up Glenn's load, telling Sanchez that Glenn was "real sick", "can't even stand up from the bed", and would be unable to provide assistance in the transfer of the trailer. RP 69; 70, 127.

Around noon on that Thursday, October 31, Sanchez transferred the trailer from Glenn's truck to his own. RP 70. After he completed the transfer, Sanchez called Golden Eagle and told Crofoot "you need to get him some help, you know, to send some help to him." *Id.* Crofoot

responded, “Don’t worry, we’re going to take care of it.” *Id.* Sanchez felt comfortable after Crofoot told him not to worry because Golden Eagle was going to take care of it. RP 92.

Later that day, Gomez called Crofoot, suggesting that he could take a driver south with him so that driver could drive Glenn and his truck back to Oregon. RP 190, 191. Crofoot told Gomez “not to worry about that”, because “he was going to take care of it.” *Id.*

The next day, Friday, November 1, Mendez stopped at the rest stop to give Glenn a hamburger, fries and a soft drink. RP 120. Mendez found Glenn shaking, sick and not speaking as clearly as normal. RP 123, 171. Mendez saw that Glenn was in bad shape, but “not serious as far as life-and-death situation.” RP 126. When Mendez called to report his concern about Glenn’s condition, Crofoot was at lunch. RP 125. Mendez called again a few hours later and spoke to Crofoot, describing Glenn as being sick and suggesting that they could arrange something to bring Glenn back to Portland. RP 127. Crofoot told Mendez, “Don’t worry about it. It’s not your problem. I already took care of it.” RP 172.

On Saturday, November 2, Gomez saw Glenn’s rig still at the roadside rest stop. Gomez “was really worried about this guy. Nobody seems to help him.” RP 193. He pulled over to check on Glenn and found him in a condition such that Gomez could barely understand what Glenn was saying. RP 192. “He couldn’t talk at all. He couldn’t - - he didn’t

understand what we were saying.” RP 193. “It was poo over his bed, and urine, stink really bad.” RP 194. Gomez called over his CB radio to ask if there was any driver in the area who could drive Glenn’s truck north.

RP 193. An unknown driver appeared at the rest stop and drove Glenn’s rig north, traveling in tandem with Gomez, who was in his own truck.

RP 195, 212.

D. Events in Woodburn, Oregon.

Gomez and the other driver pulled into Woodburn, Oregon, between one and two a.m. on Sunday morning, November 3. RP 196. Gomez and the unknown driver stopped in the parking lot where Mendez and Sanchez leave their trucks. RP 74-74, 172, 196. Gomez called for an ambulance. RP 196. Woodburn Ambulance arrived on the scene around 1:33 a.m. RP 457; Ex. 26. It stayed for about eleven minutes, then departed. *Id.* The ambulance crew left Glenn behind in his truck. RP 196. Gomez then left, continuing on with his delivery without talking with Glenn again. RP 74, 196-197.

Sanchez arrived in Woodburn later on Sunday, called Gomez to ask why Glenn’s truck was still there, and then called his wife to pick him up. RP 74, 75. His wife suggested that he check inside. RP 75. Sanchez looked inside and saw Glenn “was in the bed.” *Id.* Sanchez described the scene, “Bad. He was bleeding. Stink bad. His truck was so dirty.” *Id.* He drove to what was described variously as an emergency room of a

hospital or as “a clinic, a small clinic.” RP 75-75, 77. Sanchez told the emergency personnel that he could not get Glenn out of the truck on his own. RP 77. The emergency personnel refused to provide any assistance outside of the facility. *Id.*

Through this time, Glenn was “out of it.” RP 77, 80. He could not converse. RP 80. Sanchez called Crofoot for Glenn’s home number. RP 77-78. Sanchez telephoned Dollie. RP 78. Dollie gave Sanchez directions and said, “please bring him home.” RP 79.

E. Events in Portland, Oregon.

Sanchez drove Glenn to the Johnson home. RP 81. Dollie was upset. RP 577. When Dollie looked in the cab, the inside of the cab “looked just like a slaughterhouse. Feces, urine and blood all over everything. He was just saturated in all of this.” RP 578. Dollie took Glenn some water and went back into the house to call 911. *Id.* During that call, she reported that “He fell and his leg is all swelled up and he’s got clear up to a knee. I want to get him over to the hospital. The other truck driver is trying to help him get out and he can’t get him out.” RP 614.

Portland Fire and AMR Ambulance responded. RP 347, 348, 351. Four firemen removed Glenn from his truck on a board. RP 355, 357. When Tina Beeler, the senior paramedic on the call, saw Glenn, she immediately thought that he had been the victim of abuse. RP 352, 375.

Ms. Beeler challenged Sanchez, until Dollie described Sanchez as the man who saved her husband's life. RP 358, 578-579.

The ambulance transported Glenn to Adventist Hospital, where he was admitted late Sunday night, November 4, 2002. RP 361. The second toe of his left foot was amputated on November 6. RP 505; Ex. 33. His left lower leg was amputated, with patellectomy, on November 12, 2002. RP 489; Ex. 35.

F. Lower court proceedings.

The Johnsons filed the present action in Clark County Superior Court on May 28, 2004. CP 1104. The Johnsons' operant pleading was their second amended complaint. CP 920-925. Golden Eagle answered, asserting affirmative defenses assigning fault to Glenn, Dollie, Sanchez, Gomez, Mendez, and Woodburn Ambulance. CP 447-452. The case was assigned to The Honorable Diane M. Woolard for trial. CP 1109.

The trial court proceedings included pretrial hearings on the parties' motions in limine and jury instructions that were heard on July 19 and 31, 2006. CP 432, 926, Trial began on August 7. RP 1. The jury heard evidence over four days. RP 53-724. The jury was instructed in the law. RP 755. Golden Eagle's counsel objected to several instructions, but no record of the specific objections was made because the objections were made outside the presence of the clerk. RP 736. Counsel presented argument. RP 755-816. The jury returned its verdict on the afternoon of

the fifth day. RP 818-826. Golden Eagle filed post-trial motions, which were denied by the trial court by letter ruling dated October 17, 2006. CP 1090.

SUMMARY OF ARGUMENT

The jury based its unanimous verdict as to liability on substantial evidence, thereby mandating dismissal of Golden Eagle's appeal from the trial court's denial of its motions for judgment as a matter of law in this rescue doctrine case.

Golden Eagle knew from Glenn on Thursday October 31, 2002, and heard ratified by Sanchez and Mendez, that Glenn was in trouble and needed help. Golden Eagle terminal manager Crofoot told Glenn that he would be arranging for Glenn and his truck to be brought back to Oregon, but did nothing other than arrange for the load Glenn was hauling to be picked up, thus establishing Golden Eagle's violation of one subset of the rescue doctrine, the duty to properly complete a rescue once it is begun. Crofoot's promise persuaded Glenn not to seek other aid, thus establishing Golden Eagle's breach of a second subset of the rescue doctrine, by which liability attaches to a person in position of rescue whose promise of assistance persuades the person at risk not to take further action to help himself. Crofoot told Sanchez, Mendez and Gomez that Golden Eagle was or would be providing aid and, more significantly, that the individual

drivers were not to get involved, thus establishing Golden Eagle's violation of a third subset of the rescue doctrine, by which liability attaches when a person's promise of aid or other action deters potential rescuers from acting to save the person in peril.

When on Saturday, November 2, Gomez found Glenn still abandoned at roadside, he arranged for a stranger to drive Glenn and his truck back to Oregon. By that time, Glenn's leg was unsalvageable. He was taken to the hospital late that night. His left second toe was amputated three days later and his left lower leg was cut off six days after that.

The jury was properly instructed on the law, as Golden Eagle has not objected to a single instruction. The evidence was proper, as Golden Eagle has not assigned error to any trial court evidentiary ruling.

The jury had substantial evidence to support its verdict on each of the three subsets of the rescue doctrine, any one of which would be sufficient to support the jury's unanimous verdict. Further, as to each affirmative defense of comparative fault, the jury was properly instructed and had ample evidence to find against Golden Eagle. In light of the substantial evidence supporting the jury's verdict, Golden Eagle's appeal is without merit and should be dismissed.

ARGUMENT

Golden Eagle does not assign error to any pretrial ruling, to any evidential ruling, or to any jury instruction. *See* Br. of Appellant at 2. Golden Eagle's assigns four errors, each of which attacks the trial court's denials of its various motions for judgment as a matter of law. Its brief is, therefore, an attack on the jury's verdict and an impermissible effort to retry the case.

Golden Eagle's brief is also full of contradictions. It complains at length about the nature and application of the rescue doctrine. Br. of Appellant at 30-45. The instructions on the rescue doctrine, Instruction Numbers 19-21,⁴ are a correct statement of the law and, because Golden Eagle has not assigned error to them, they are the law of the case. *Schneider v. Noel*, 23 Wn. 2d 388, 401, 160 P.2d 1002 (1945) ("In the case at bar, no error is assigned upon the instructions and, therefore, for still stronger reason, do the instructions become the law of the case."); *State v. Brown*, 94 Wn. App. 327, 345, 972 P.2d 112 (1999) ("We recognize that that instruction constitutes the law of the case because neither party challenged it on appeal.").

Golden Eagle also claims no error as to the amount of damages determined by the jury after proper instruction on damages.

Golden Eagle instead expends much effort in its brief denying any responsibility for Glenn's injuries and trying to foist onto Glenn, Dollie,

⁴ These instructions are at CP 1012-1014.

Sanchez, Gomez, Mendez, and Woodburn Ambulance responsibility for Golden Eagle's own negligent failure to perform the rescue it promised. Br. of Appellant at 46-50. Golden Eagle, however, assigns no error to the trial court's Instruction Numbers 14-16 and 19-27 on causation. RP 745-749; CP 1008-1010, 1012-1020. Golden Eagle assigns no error to Instruction Numbers 28-29 on comparative fault. RP 749-750; CP 1021-1022. Golden Eagle instead wants this Court to ignore the jury's unanimous rejection of Golden Eagle's contentions on these issues. *See* RP 820-826.⁵

Most egregiously, Golden Eagle doesn't even advise this court of the applicable standard of review, knowing full well that to do so is to concede that it faces an insurmountable burden to show that the jury's verdict was somehow improper where it concedes that the jury was properly instructed on the law and concedes further that no improper evidence was presented to the jury that could have improperly affected its deliberation.

Golden Eagle's appeal is, therefore, solely an attack on the jury's verdict.

A. The Standard of Review.

⁵ Only the amount of noneconomic damages was not unanimous, it being the product of a 10-2 vote. RP 822.

As a matter of policy, appellate courts “strongly presume the jury’s verdict is correct.” *Bunch v. King County Dept. of Youth Services*, 155 Wn. 2d 165, 179, 116 P.3d 381 (2005).

Golden Eagle’s motions for a directed verdict, for judgment as a matter of law, and for judgment notwithstanding the jury’s verdict are the same thing: a motion for judgment as a matter of law. *Litho Color Inc. v. Pacific Employer’s Ins. Co.*, 98 Wn. App 286, 298, fn. 1, 991 P.2d 638 (1999). The threshold is high for granting a motion for judgment as a matter of law and removing the case from the jury or ruling despite the jury’s verdict, and an appellate court reviewing the trial court’s denial of such a motion applies the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn. App. 668, 158 P.3d 1211 (2007).

To prevail on any of its motions for judgment as a matter of law, Golden Eagle must prove that there is “no legally sufficient evidentiary basis for a reasonable jury to find or have found for [the Johnsons] with respect to that issue.” CR 50(a)(1); *Bunch v. King County Dept. of Youth Services*, 155 Wn. 2d 165, 176, 116 P.3d 381 (2005); *Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig*, 114 Wn. 2d 907, 916, 792 P.2d 520 (1990).

Framed another way, Golden Eagle can only prevail in its appeal if the Johnsons had offered no substantial evidence to support the verdict. *Mega*, 148 P.3d at 1215. Substantial evidence means that there is more

than a mere scintilla of evidence. *McCowan v. Northeastern Siberian Co.*, 41 Wash. 675, 677, 84 P. 614 (1906) (“Unquestionably if it be true that there was no more than a scintilla of evidence in favor of the respondent, or, to state the rule in another form, no substantial evidence in his favor, then the judgment must be set aside.”). And that the evidence must be of the kind which “would convince an unprejudiced, thinking mind of the truth to which the evidence is directed.” *Arnold v. Sanstol*, 43 Wn. 2d 94, 98, 260 P.2d 327 (1953); *Industrial Indemnity*, 114 Wn. 2d at 915-916; *Hojem v. Kelly*, 93 Wn. 2d 143, 145, 606 P.2d 275 (1980). The burden is not heavy: circumstantial evidence plus an expert’s opinion can be sufficient to satisfy the evidentiary burden. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 248-249, 744 P.2d 605 (1987).

Not only is the evidentiary burden minimal, but the Court must also accept the truth of the nonmoving party’s evidence and must draw all inferences favorable to the nonmoving party that may reasonably be drawn therefrom. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wash.2d 846, 851, 586 P.2d 845 (1978); *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 29, 974 P.2d 847 (1999); *Litho Color*, 98 Wn. App. at 298-299.

Golden Eagle’s assignments of error, therefore, must be read as limited to a challenge to whether the jury was presented with evidence sufficient to sustain its verdict. *Bishop of Victoria Corporation Sole v.*

Corporate Business Park, LLC, 138 Wn. App. 453, 158 P.3d 1183, 1189 (2007). “On a challenge to the sufficiency of the evidence, this court looks to whether, after viewing the evidence in the light most favorable to the [Johnsons], any rational trier of fact could have found” the essential elements of their claim to have been proven. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d at 114 (2006).

Golden Eagle’s brief is not an analysis of whether there was any substantial evidence to support the verdict. Much of Golden Eagle’s brief is, instead, written as a plea to this Court to substitute its judgment for that of the jury and to reweigh the evidence and revisit credibility determinations. *See, e.g.*, Br. of Appellant at 41-42. Golden Eagle’s chosen path is an inappropriate avenue for review. It is the sole province of the jury to determine credibility, and its determination is not reviewable. *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990) (“Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”); *State v. Snider*, 70 Wn. 2d 326, 327, 422 P.2d 816 (1967) (“It is the function and the province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.”); *Roth*, 131 Wn. App. 561 (“When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and

decide disputed questions of fact.”); *State v. Beasley*, 126 Wn. App. 670, 690, 109 P.2d 849 (2005) (“It is in the sole province of the jury to determine credibility and its determination is not reviewable.”). Implicit within the jury’s ruling in this case was its finding of credibility in favor of plaintiffs. *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911 (1997). “Accordingly, the reviewing court will not reverse if there is substantial evidence to support the jury’s findings.” *State v. Kane*, 72 Wn. 2d 235, 239, 432 P.2d 660 (1967).

The manifest flaw in Golden Eagle’s brief is highlighted by its efforts to retry the case on its merits despite the governing principle that its appeal from the denial of its motions for judgment as a matter of law carries with it an implicit admission of the truth of all of plaintiffs’ evidence and concession of all inferences that can reasonably be drawn from that evidence. *Mega*, 138 Wn. App at 668. Golden Eagle simply cannot challenge the Johnsons’ witnesses’ credibility or even ask that it somehow be reweighed when their appeal admits its truth and concedes that all inferences to be drawn from it are drawn in favor of the Johnsons. The inquiry is not whether plaintiffs’ evidence was perfect, but is instead whether there is *any* substantial evidence sufficient to support the jury’s verdict. *See Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 531, 70 P.3d 126 (2003); *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997).

The Johnsons offered substantial evidence to support their claims under the rescue doctrine. That should be the end of this court's inquiry.

B. The Rescue Doctrine in Washington.

The roots of the rescue doctrine are in the Restatement (Second) of Torts § 324 A (1965),

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he is undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Folsom v. Burger King, 135 Wn. 2d 658, 675-676, 958 P.2d 301 (1998).

In *Folsom*, the court summarized this area of the law, stating that:

Typically, liability for attempting a voluntary rescue has been found when the defendant makes the plaintiff's situation worse by: (1) increasing the danger; (2) misleading the plaintiff into believing the danger has been removed; or (3) depriving he plaintiff of the possibility of help from other sources.

Id. at 676 (citing W. Page Keeton, *Prosser & Keeton on the Law of Torts*, § 56 (5th Ed. 1984). Any single subset of the rescue doctrine, if proven, establishes liability.

One foundation for all three subsets of the rescue doctrine is Crofoot's relationship to Golden Eagle's drivers. Crofoot admitted that he was the ultimate authority in Golden Eagle's Vancouver offices. RP 713.

Crofoot admitted that he was the lifeline to Golden Eagle's drivers out on the road. RP 721. When a Golden Eagle driver gets stuck in the middle of nowhere or gets lost, Crofoot steps in. *Id.*

1. The jury had substantial evidence that Golden Eagle failed to complete the rescue it began despite knowledge of Glenn's physical condition and his continuing need for assistance.

In *Folsom*, the court made clear that while Restatement § 324 has not been adopted in Washington, liability can arise from the negligent performance of a voluntarily assumed duty. *Folsom*, 135 Wn. 2d at 676 (citing *Webstad v. Stortini*, 84 Wn. App. 857, 874, 924 P.2d 940 (1960)).

The first unchallenged section of Instruction Number 21 regarding the rescue doctrine set the standard for Golden Eagle's liability to Glenn for its failure to perform the rescue as promised, described the first subset of the rescue doctrine, and thus established the law of the case, as follows:

Where a person knows, or reasonably should know, that a person is injured and takes steps to aid that individual, the person making an effort to provide aid is required to use reasonable care in his or her efforts. If the rescuer fails to use reasonable care in his or her efforts, then the rescuer is liable to the injured person for his worsened condition proximately caused by the rescuer's failure.

RP 746-747; CP 1014.

Glenn told Crofoot in the initial Thursday morning telephone call that he was unable to complete the delivery because he had hit his head and "there was something wrong". RP 533. Crofoot responded that

Golden Eagle “would send somebody to pick up the load *and* he would send down help to get me back.” RP 533 (emphasis added).

Crofoot called Glenn mornings, about which Glenn recalled, “All he would say, he called me up and asked me how I felt and kept telling me help is on the way.” RP 548.

Golden Eagle began the rescue as promised when Crofoot dispatched Sanchez to pick up Glenn’s load, telling Sanchez that he would have to transfer Glenn’s trailer without assistance from Glenn because Glenn was so sick that he couldn’t get out of bed. RP 69-70. Once Crofoot initiated the rescue for Golden Eagle, he was required by Washington law to exercise reasonable care in his efforts. *Brown v. MacPherson’s, Inc.*, 86 Wn. 2d 293, 299, 545 P.2d 13 (1975). Crofoot, however, did nothing more for Glenn.

Crofoot got updates on Glenn’s condition from other drivers. After Sanchez transferred the trailer from Glenn’s truck to his own, Sanchez called Golden Eagle and told Crofoot “you need to get him some help, you know, to send some help to him.” RP 70. Crofoot reaffirmed what he had told Glenn about the promised rescue, “Don’t worry, we’re going to take care of it.” *Id.* But Crofoot did nothing.

On Friday, Mendez called and told Crofoot that Glenn was sick, and he too suggested that they could arrange something to bring Glenn back to Portland. RP 127. Crofoot told Mendez, “Don’t worry about it.

It's not your problem. I already took care of it." RP 172. But Crofoot did nothing.

Golden Eagle apparently wants to make an issue of the distance between Golden Eagle's managerial personnel in Vancouver and Glenn in his truck at roadside in California. Br. of Appellant at 18, 37. Crofoot testified that as terminal manager he was the ultimate authority and was a lifeline to drivers out on the road. RP 713, 721. Dispatcher Clohessy testified that as a dispatcher, he, too, makes decisions for drivers up and down the I-5 corridor, from Southern California to Washington. RP 698. Golden Eagle supervisors Crofoot and Clohessy thus reinforced trucking expert Gary Nash's testimony that trucking company supervisory personnel regularly make long range decisions for their drivers and that the drivers they supervise have the near total reliance on them. *See* RP 286.

Crofoot began the rescue by sending Sanchez, which confirmed to Glenn that the rescue was underway. He reaffirmed the same message to Sanchez, Gomez and Mendez when he told them to do nothing, because he was taking care of it. But all Crofoot took care of was the nonperishable load that Glenn was hauling. Ex. 24, 25.⁶ By taking those first steps, but failing to complete the rescue, Crofoot, and therefore Golden Eagle,

⁶ Exhibit 24 is a photocopy of the bill of lading for the load Glenn was hauling. Exhibit 25 is a translation of that list. The load was canned goods and other non-perishable food items.

breached the duty it assumed and, thus, breached the first subset of the rescue doctrine.

The jury was entitled to credit the testimony of the Johnsons' witnesses. The jury thus had substantial evidence to find that Golden Eagle began a rescue, but did not complete the effort, thereby establishing the Johnsons' claim under the first subset of the rescue doctrine. This is enough for this court to affirm the trial court's rulings and deny Golden Eagle's appeal.

2. The jury had substantial evidence that Glenn Johnson was unable to make decisions for himself and that he relied on Golden Eagle's promise of assistance.

The second unchallenged section of Instruction Number 21 regarding the rescue doctrine set the standard for Golden Eagle's liability to Glenn for his reliance on Crofoot's promise of aid. It described the second subset of the rescue doctrine, and thus established the law of the case, as follows:

Where a person's promise to render aid leads an injured person not to seek aid elsewhere and the promise results in the injured individual not obtaining aid that would otherwise have been available, thereby worsening the injured person's condition, the person who promised aid is liable to the injured person for his worsened condition proximately caused by the rescuer's failure.

RP 747; CP 1014.

This instruction echoes *Brown* by providing that a person who voluntarily promises to perform a service for another in need has a duty to

exercise reasonable care when the promise of aid induces reliance and causes the promisee not to seek help elsewhere. *Brown*, 86 Wn. 2d at 300, 545 P.2d 13; *Folsom v. Burger King*, 135 Wn. 2d 658, 676, 958 P.2d 301 (1998); *see also Chambers-Castanes v. King County*, 100 Wn. 2d 275, 287, 669 P.2d 451, 39 A.L.R. 4th 671 (1983) (911 operator’s statement that police were on their way to a scene induced reliance).

The jury knew that Glenn had fallen and hit his head. RP 532. The jury knew that he had been unconscious. *Id.* The jury also knew that Glenn told Crofoot that he had fallen, that he couldn’t walk, and that something was wrong. RP 533. From just this, the jury could reasonably infer that Glenn was in an impaired condition, perhaps having suffered a concussion, that left him unable to make decisions for himself and dependent on Golden Eagle. Golden Eagle, however, would have this Court believe that they did not know about Glenn’s need. Br. of Appellant at 46-47.

Golden Eagle’s position is further undermined by Crofoot’s statement to Glenn that first morning, when Crofoot promised “he would send help down to get me back.” RP 533. Glenn also recalled Crofoot “kept telling me help is on the way.” RP 548. Dollie testified about Glenn telling her that Golden Eagle “is sending somebody to pick [me] up and the truck up.” RP 576. Glenn continued to believe Crofoot’s promises into the next day. RP 120 (Mendez: “he said he had already

talked to and they – they had already arranged something”). With Glenn having suffered a head injury that rendered him unconscious, confusion in Glenn would be readily understandable for the jury. RP 532.

The jury heard the testimony of Kent Wadsworth⁷, a pre-hospital care expert called by the Johnsons, who explained:

“It’s not uncommon to find a geriatric patient who’s been down for a period of time to lose track of how long they’ve been actually been down. They may have been down for several days and they think they’ve only been down for maybe a few hours or more. But there is obviously disconnect in most of those cases. They might even lose mentation and orientation as to where they’re at that particular time.”

RP 471. Further, Mr. Wadsworth testified that the laceration and head injury would contribute to impairing Glenn’s decision-making. RP 473.

Tina Beeler, the paramedic who was first on the scene in Portland and who saw Glenn as he was being taken out of his truck, testified that she found “this gentleman had urinated all over himself and he had also defecated all over himself. He was in his t-shirt and his underwear, and he had feces and urine all over his body. It was underneath his fingernails and his toenails and, you know, streaking down his legs.” RP 354. The fecal matter was on the bottom of his feet, near an open sore. RP 367. He

⁷ Mr. Wadsworth, the Johnsons’ expert, had approximately 50,000 transports, of which at least half involved geriatrics, in his 27 years as a paramedic. RP 447, 448. He instructs paramedics and lectures nationally and internationally. RP 452. He has taught pre-hospital care to thousands of students, including hundreds of nurses and doctors. RP 459. At the time of trial, he was regional faculty for Advanced Cardiac Life Support and Advanced Pediatric Life Support, on the American Heart Association’s Northern Area Task Force, and on the Multnomah County Medical Advisory Board (only paramedic member). RP 450-451. Among other honors, he was the 2005 Oregon Paramedic of the Year. RP 433.

was covered with sores and lacerations, had a laceration on his forehead, and his ribs were sore. RP 356. Glenn did not know why his skin was covered with lacerations. RP 368. His skin was cold, he had poor skin turgor, and he was not talking clearly. RP 354-355. When he was able to talk, most of it was unreliable, in a weak voice, and not clearly enunciated. RP 356-357.

Ms. Beeler testified further that the different urine colors on Glenn's clothing told her that there had been a passage of time between his urinations, and that the fecal stains, color, texture and dryness told her that he had a mix of fresh and old feces, some of which were older than a day. RP 371, 372. From this, she inferred that he had been in an altered mental state for at least 24 hours. RP 379.

Golden Eagle's central argument with regard to this first subset of the rescuer doctrine, however, is that "the alleged rescuer had no knowledge or reason to believe any danger was imminent." Br. of Respondent at 37. That argument is both irrelevant to this appeal and factually flawed. The argument is irrelevant because an appeal from a denied motion for judgment as a matter of law does not revisit witness credibility or the quantity of evidence, but looks only to see if there was *any* substantial evidence to support the jury's verdict. *Roth, 131 Wn. App.* at 561.

Golden Eagle's argument is built on a fallacy because Crofoot knew from his first October 31, 2002 Thursday morning telephone conversation with Glenn that Glenn was in trouble. *See* RP 69-70. Crofoot knew enough that he told Sanchez, "you're going to have to do everything by yourself, unhook Glenn's truck and hook it up to your truck because he can't even stand up from the bed." RP 69. Crofoot also told Sanchez that Glenn "was real sick and that's why he can't move anymore from the rest area." RP 70.

With just that information from Glenn and Sanchez about what Crofoot knew and said that first morning, the jury had substantial evidence from which it could determine that Glenn reasonably relied on Crofoot's promises.

Golden Eagle, however, kept getting information about Glenn's condition. After Sanchez transferred Glenn's trailer from Johnson's truck to his own that Thursday afternoon, Sanchez called Crofoot, telling him that "you might need to—you need to get him some help, you know, to send some help to him. But he [Crofoot] said, don't worry, we're going to take care of it. I said okay." RP 70.

Mendez, the driver who took a hamburger, fries and a soft drink to Glenn at mid-day on Friday, November 1, reported seeing Glenn looking bad, shaking and sick, but with "no defecation" in the truck. RP 120, 123, 124. He saw urine in cups on a shelf, and he saw that Glenn's shorts were

urine soaked. RP 126. Mendez called Crofoot as soon as he got back into his truck. RP 125. Crofoot was at lunch. *Id.* Mendez was sufficiently concerned that he again called Crofoot a few hours later and “told him that Johnson looked sick”. RP 127.

In support of Mendez’ testimony, Sanchez recalled a conversation with Mendez from about the same time, “he told me later on, not the same day, I think it was some other day, he told me he called and told Vance [Crofoot], hey, this driver is so bad, he’s sick. And Vance told Jesus [Mendez] the same thing, don’t worry, we’re going to take care of it.” RP 71.

Golden Eagle supervisory personnel admitted to much of what Sanchez and Mendez testified about. Golden Eagle’s dispatcher Clohessy testified that there were a number of drivers who had gone through the area and that they had talked to each other. RP 697. While he did not know how many calls were made to Golden Eagle by its drivers regarding Glenn, there were conversations back and forth, and Clohessy recalled generally handing them over to Crofoot. RP 697. Clohessy recalled that “after Vance had spoken with another of our drivers, the one that had gone down and picked up the load, the driver suggested that Vance go ahead and contact Johnson because he didn’t think he looked good, thought he needed some help.” RP 695. Clohessy also testified that there had been talk around the office that Glenn wasn’t necessarily looking all that good.

RP 701. He had also heard about a driver who had taken Glenn something to eat, a little bit of food and water. RP 701. Clohessy testified about Crofoot telling him that, according to one of the drivers who had seen Glenn, Glenn didn't seem like he was in very good shape. RP 702.

Crofoot admitted that he only started getting involved once he found out that Johnson was ill. RP 715. Crofoot admitted that the drivers were feeding him information. RP 708-09. Crofoot admitted further that Glenn, Sanchez and Mendez were honest, reliable drivers with whom he had a good relationship. RP 721. He went so far as to describe Mendez and Sanchez as "go-getters, they were awesome guys." RP 722. He also credited Gomez with being generally reliable, honest and "pretty good for the most part". RP 721. Despite hearing from honest, reliable drivers that Glenn was in trouble, Crofoot did nothing more than tell them to do nothing because he was taking care of it.

Clohessy gave the jury the key to Golden Eagle's lack of response to Glenn's health crisis when he explained that once Sanchez picked up Glenn's trailer, Glenn was "officially what they call bobtail, which means he no longer was at work with Golden Eagle at that time. He was now pretty much another motorist out on the road, you know, he was no longer actually hauling freight for us at that time." RP 696. Clohessy did not misspeak; he later reiterated that when Glenn was in need after Sanchez

picked up his trailer, Glenn was essentially just another motorist to Golden Eagle. RP 699.

From all of this, the jury had substantial evidence that Golden Eagle knew about Glenn's continuing physical decline, but negligently failed to address it once it got his load transferred to Sanchez' truck. Moreover, this case did not involve only a single call as in many rescue doctrine cases, but instead involved a series of calls over days. Golden Eagle knew what was happening, Golden Eagle kept telling the drivers that it would be providing the needed aid, and Glenn kept believing in the promise that had been made to him.

The jury thus had substantial evidence to find that Golden Eagle knew of Glenn's declined condition and that Glenn reasonably relied on those promises from his "lifeline", thereby establishing the Johnsons' claim under the second subset of the rescue doctrine. This, too, is enough for this Court to affirm the trial court's rulings and deny Golden Eagle's appeal.

3. The jury had substantial evidence that the three drivers reasonably relied on Golden Eagle's promises and assurances that it would be providing aid to Glenn.

The third part of Instruction Number 21 on the rescue doctrine set the standard for Golden Eagle's liability to Glenn based on the other drivers' reliance on Crofoot's promise of aid and on Golden Eagle not

then acting on that rescue. The jury instruction described the third subset of the rescue doctrine, and thus established the law of the case, as follows:

Where a person's promise to another person in a position to provide aid to an injured individual leads that other potential rescuer not to provide aid and the injured individual's condition is thereby worsened, the person who made the promise is liable to the injured person for his worsened condition proximately caused by the rescuer's failure. However, a rescuer/promissory is only liable under the above circumstances when others have reasonably relied on the promise or the efforts.

RP 747; CP 1014.

Three drivers were in position to rescue Glenn before he was exposed to fecal-based infection: Sanchez on Thursday, Gomez later that day, and Mendez on Friday. RP 70, 120, 190-191.

On Thursday, after he completed the transfer, Sanchez called Golden Eagle and told Crofoot "you need to get him some help, you know, to send some help to him." RP 70. Crofoot responded, "Don't worry, we're going to take care of it." *Id.* Sanchez felt comfortable after Crofoot told him not to worry because Golden Eagle was going to take care of it. RP 92.

Later that day, after Gomez suggested to Crofoot that he could take a driver south with him so that driver could drive Glenn and his truck back to Oregon, Crofoot told Gomez "not to worry about that" because "he was going to take care of it." RP 190, 191.

The next day, Mendez told Crofoot that Glenn was sick and suggested that they could arrange something to bring Glenn back to Portland. RP 127. Crofoot told Mendez, “Don’t worry about it. It’s not your problem. I already took care of it.” RP 172.

The jury thus knew from the testimony of three drivers who Crofoot and Clohessy described as honest, who each told Golden Eagle of Glenn’s need for help, who each told Golden Eagle of their willingness to help, and who each was in a position to provide that help that they would rescue Glenn but for Crofoot telling him to do nothing because Crofoot was taking care of it.

When Golden Eagle asked Mendez why he didn’t just offer to drive Glenn back to Oregon, Mendez explained, “I didn’t offer that because he [Glenn] mentioned that he had already talked to Vance and they had arranged something. I called Vance because I didn’t feel comfortable leaving him there, and then Vance--and that’s why I called because he’s the boss. You can’t just do things just because.” RP 127. Crofoot told Mendez, “Don’t worry about it. It’s not your problem. I already took care of it.” RP 172.

Another reason that Mendez did not act is that Crofoot was a strict manager. RP 185. As the trial court instructed the jury, drivers were punished for not making deliveries on time. RP 182. Golden Eagle does not assign error to that instruction, and it is now the law of the case. *See*

Schneider, 23 Wn. 2d at 401; *Brown*, 94 Wn. App. at 345. Such testimony about a witness' fear of sanction guiding his action is consonant with *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 126, 847 P.2d 945 (1993), in which two lay witnesses were permitted to express their opinion that a laborer who refused to perform an assigned task at a construction site is more likely to be fired, finding that such testimony would help the jury understand why a laborer might agree to perform a hazardous task. Mendez' testimony helped the jury understand that these drivers realized they were dealing with their boss (translated from the Spanish original, "jefe"), the man who controlled their financial destiny. *See* RP 127.

Finally, on Saturday, Gomez acted on his own and effected a rescue despite Crofoot's repeated instructions to him not to get involved. RP 190-196. Curiously, it was Gomez alone among Golden Eagle's drivers about whom Crofoot testified that he had a couple of issues. RP 721. Even Gomez yielded to the pressure of deadlines and sanction when he left Glenn in Woodburn on Sunday morning. *See* RP 196-197; 217.

From all of this, the jury had substantial evidence that the drivers followed Crofoot's order not to do more. The jury could also reasonably infer that the drivers would have done more and sooner, but for Crofoot's assurances that aid was being or would be provided coupled with his express orders that they not do anything themselves.

The third subset of the rescue doctrine was thus established. It, too, standing alone and without the other subsets, would be enough to sustain the verdict and warrant this Court's dismissal of Golden Eagle's appeal.

4. Conclusion Regarding the Rescue Doctrine.

The Johnsons presented substantial evidence to support each of the three subsets of the rescue doctrine under Instruction Number 21. The Johnsons presented substantial evidence that Golden Eagle began a rescue but did not follow through on it as promised, that Golden Eagle's promises persuaded Glenn not to do more, and that Golden Eagle's promises of aid and direct instructions to the three drivers not to provide further assistance together led those three drivers who were in a position of rescue not to do more. Proof of any one of the three subsets of the rescue doctrine is enough to support the verdict and mandate dismissal of Golden Eagle's appeal.

C. Golden Eagle's arguments about comparative fault are groundless.

Golden Eagle had the burden of proof to establish its affirmative defenses of comparative fault. *Johnson v. Mobile Crane Co.*, 1 Wn. App. 642, 645, 463 P.2d 250 (1970). Clearly, it failed, as the jury rejected its defenses. The bases for the jury's rejections of those affirmative defenses were multiple.

1. The jury had substantial evidence to find no comparative fault where Glenn supposedly refused medical assistance after hitting his head in his truck.

To have found in Golden Eagle's favor on its comparative fault defenses, the jury would have had to believe Crofoot's testimony, but the jury was equally entitled to find his testimony incredible. *Camarillo*, 115 Wn. 2d at 71 ("The jury was free to believe the victim, disbelieve the defendant and give no weight whatsoever to the seemingly irrelevant testimony"). Mendez testified to difficulty understanding Glenn on Friday. RP 171. Gomez testified that Glenn was "out of it" Saturday and unable to carry on a conversation. RP 197-198. Paramedic Beeler testified that Glenn was in such an altered mental state Sunday evening that she concluded he had likely been in an altered mental state for more than a day. RP 379-380.

Crofoot, nonetheless, testified that on that Saturday Glenn called him from a moving vehicle and said, "I'm doing great, I'm feeling good, I'm on my way back, and I will call you when I get back to Portland to let you know when I am ready to go again." 709-710, 720-721. Crofoot embellished this by saying that on that Saturday, November 2, when Glenn was described by Gomez as barely understandable and a 3 on a scale of 10, Glenn talked to him from the road and said, "I am on my way home and everything is cool, and he said he would talk to his wife and he would let us know when he was ready to go again." RP 198, 709-710.

Crofoot continued, telling the jury “he didn’t sound sick. He sounded completely normal, completely in character, and, yeh, I’m on my way back.” RP 710. Crofoot even testified that in that remarkable call during the drive back, Glenn was sounding chipper. RP 717, 718. Crofoot testified further that Glenn was responding meaningfully to questions. RP 720-721. When compared to the medical and lay testimony to the contrary, Crofoot’s fanciful description of Glenn’s condition likely did not garner juror confidence in his credibility. Neither did Crofoot’s comment that, with that imagined call from Glenn, he was done babysitting him. RP 711.

To have found that Glenn was at fault, the jury had to believe that he had capacity to make informed decisions throughout the three days from Thursday morning at roadside near Richfield through early Sunday morning when he was left in Woodburn. *Hunt v. King County*, 4 Wn. App. 14, 26, 481 P.2d 594 (1971) (a person’s “capacity to exercise reasonable care, *i.e.*, capacity to be contributorily negligent” is a question for the jury; affirming denial of motion for j.n.o.v. in negligence action against county for failure to safeguard plaintiff’s 20-year-old-son from self-inflicted injuries while a patient at a county hospital). The three drivers’ testimony presented a picture of Glenn’s declining mental condition from Thursday midday (Sanchez: “you need to get him some help”, RP 70) to Friday midday (Mendez: “shaking and sick”, RP 124;

not speaking normally, RP 171) to Saturday afternoon (Gomez: “he couldn’t talk at all”, RP 192). With Crofoot’s testimony that he was in continuing contact with Glenn, the jury could reasonably infer that Crofoot knew of, or should have perceived, Glenn’s impaired capacity. RP 707, 710-720.

Dr. Moneta testified that Sanchez’s description of Glenn being “out of it” is a layperson’s description of an altered mental state. RP 664. He explained further that an altered mental status could mean that the person is not necessarily aware of the environment or what’s going on, and that it could arise as a consequence of being sick. RP 665. Dr. Moneta’s testimony, coupled with Sanchez’ testimony, would support the jury inferring that Glenn was incapable of making decisions for himself.

While Golden Eagle references Glenn’s cell phone activity, Br. of Appellant at 7, 8, 14, 24, as if it indicates more capacity in Glenn than the three drivers observed, Mr. Wadsworth testified that answering a cell phone would not be indicative of function; that the phone could be one that flips on, and that he would need to know the context, how altered Glenn’s voice was, and whether it was appropriate or inappropriate conversation to determine whether Glenn could make decisions regarding his own care. RP 475-76. Mr. Wadsworth further explained that it would not be uncommon for a geriatric who has been down for a period of days to lose track of how much time has passed, based on his experience with

geriatrics who had been on the ground for several days but thought they had only been down for a few hours. RP 471. He testified that under the circumstances there could be an altered mental state and some reduced motor function. RP 472.

The jury was well based to conclude that Glenn was not at fault.

2. The jury had substantial evidence to find no fault in Dollie when she heard nothing from Glenn for a period of days, but did nothing.

Golden Eagle contends that although the jury was properly instructed on comparative fault, it was not entitled to find Dollie without fault for Glenn's injuries. Br. of Appellant at 47. It is wrong. Its argument is nothing more than an attempt to find blame for Glenn's injuries everywhere but at its own doorstep. It is not even clear how Dollie owed any duty to Glenn here under these facts.

Dollie talked with Glenn on Thursday morning. RP 575-76. He told her that Golden Eagle was taking care of it. RP 576. There was no testimony that Glenn asked her for help. There was no testimony that she volunteered help. There was only the testimony that he told her Golden Eagle was taking care of it. RP 576. Dollie testified that she called Glenn a couple of times between the Wednesday and Sunday, but couldn't get through. RP 598.

There is no evidence that Dollie initiated a rescue. In fact, there was evidence that her getting involved with his work would have ben out

of character with the practices of their long marriage. RP 573-574, 603-604. Instead, Dollie trusted when Glenn said that Golden Eagle was taking care of it. RP 602.

Golden Eagle's argument is one of inference that Dollie should have done more than trust when Glenn said that Golden Eagle was bringing him and his truck home, but that is argument, not evidence. Golden Eagle had the burden of proving its affirmative defenses. *Boyle v. Lewis*, 30 Wn. 2d 665, 676-677, 193 P.2d 332 (1948) ("Contributory negligence must be set up as an affirmative defense, and the burden of proving it by a preponderance of the evidence is on the defendant."). Contributory negligence cannot be established on evidence akin to speculation and conjecture. *Pidduck v. Henson*, 2 Wn. App. 204, 207, 467 P.2d 322 (1970). Moreover, because for purposes of its arguments Golden Eagle must admit the truth of the Johnsons' evidence and all inferences from that evidence must be viewed in the Johnsons' favor, it cannot prevail in those arguments. *See Goodman v. Goodman*, 128 Wn. 2d 366, 371, 907 P.2d 290 (1995).

3. **The jury had substantial evidence to find no comparative fault in Gomez when he drove away after driving Glenn from Richfield, California, to Woodburn, Oregon, then called emergency services, stood by while the ambulance worker checked on Glenn but left Glenn behind in his truck.**

Golden Eagle also contends the jury should have found Gomez negligent. Br. of Appellant at 48. Again, the jury was properly instructed on the law and was entitled to find no fault in Gomez' actions.

Only Gomez actually acted on bringing Johnson back to Oregon. Golden Eagle repeatedly instructed its drivers in a position of rescue not to provide assistance because the company would be doing so. RP 70, 127, 172, 190-191, 198. Gomez, however, finally lost faith in Golden Eagle when he found Glenn still in his truck on Saturday, and he called out on his CB radio from the roadside rest stop in California to try to get help. RP 193-194. In the early hours of Sunday morning, after calling Woodburn Ambulance, Gomez still needed to timely make his delivery or be penalized. RP 196-197. As Gomez explained, all Crofoot "was worried about was to get the load on time to the customers." RP 217.

The jury could find, in light of Golden Eagle's strict rules about delivery and instruction not to get involved, that Gomez behaved reasonably under the circumstances that then existed. The jury was instructed through Instruction Number 22 on liability for additional harm caused by third-party rescuers:

If the negligent actor is liable for another's bodily injury, he is also subject to liability for any additional bodily harm resulting from normal efforts of third persons in rendering aid which the other's injury reasonably requires, irrespective of whether such acts are done in a proper or a negligent manner.

RP 747; CP 1015.

The jury saw Gomez testify, heard the sincerity of his voice, experienced his genuine concern for Johnson, and compared it to the callous disregard expressed by Clohessy and Crofoot. The jury heard Clohessy talk, very tellingly, about how once the rig was picked up, Johnson was no more than just another motorist by the side of the road to Golden Eagle. RP 696. The jury heard Crofoot spinning fanciful tales of Johnson sounding chipper and describing himself as feeling good and sounding normal during a Saturday drive north. RP 709-710. The jury could assess Crofoot and Clohessy next to Gomez, whom it heard describe Johnson as barely audible and unable to communicate. RP 197-198. That testimony, coupled with how Glenn was found by Sanchez in the early evening on Sunday, November 3, and how Beehler extrapolated his earlier condition based on what she observed late that night, together undercut any credibility that Crofoot may have had. RP 75, 354-357, 379-380. Such credibility determinations are for the jury, and they are not reviewable on appeal. *Roth*, 131 Wn. App. at 561; *Camarillo*, 115 Wn. 2d at 713.

The reasonable inference, to which the Johnsons are entitled, *Mega*, 138 Wn. App. a 668, is that if Gomez had not gotten Glenn to Woodburn, Glenn likely would have died on the side of the road in California. That logical inference is given great weight in that it is

reasonably drawn from the testimony, and it cannot be challenged now by Golden Eagle. *See Dewey*, 95 Wn. App. at 29.

The relevant question is whether the jury had substantial evidence to support its decision that Gomez did not breach any duty to Glenn. It did.

4. The jury had substantial evidence to find Woodburn Ambulance negligent but not a proximate cause of Glenn’s amputation.

Golden Eagle also asserts that Woodburn Ambulance was negligent. Br. of Appellant at 48. The Johnsons agree. The Johnsons offered the testimony of Mr. Wadsworth, who described in detail what the dispatch records revealed about Woodburn Ambulance’s time on site in Woodburn with Glenn, what the minimal standards for such care are, and how Woodburn Ambulance fell below those standards. RP 456-466. When asked whether Woodburn Ambulance’s treatment of Glenn was below the standard of care for pre-hospital care in Oregon, he responded, “Very below.” RP 467. Woodburn Ambulance was negligent.

Negligence, however, does not equal proximate cause. *Maltman v. Sauer*, 84 Wash. 2d 975, 981, 530 P.2d 254 (1975) (“A finding of proximate cause is premised upon proof of cause in fact, as well as the legal determination that liability should attach.”); *Blasick v. City of Yakima*, 45 Wash. 2d 309, 314, 274 P.2d 122 (1954) (“It is because there are so many situations where negligence which materially contributes to

an injury might not be a proximate cause thereof.”) The jury was properly instructed on proximate cause. RP 748-749. That instruction became the law of the case. *Schneider*, 23 Wn. 2d at 401; *Brown*, 94 Wn. App. at 345.

The jury heard testimony from Mendez and Gomez, from which it knew that fecal matter was not present until sometime between Friday afternoon and Saturday mid-day. *Compare* RP 119, 123-124 with 194. Dr. Moneta, Golden Eagle’s expert, testified about the sterile quality of urine compared to the highly infectious nature of feces. RP 663. Dr. Moneta testified that urine entering into an open sore in the bottom of Glenn’s foot would not contribute to gangrene in any way. RP 663. He explained further that:

“[i]f there’s an open wound, feces obviously are contaminated and they can deliver more bacteria to the wound. Urine on the other hand is generally sterile and so it doesn’t—it shouldn’t—although it’s not a pretty thought to have a bunch—to have urine on a wound, it’s probably not going to be a major problem for it”,

even for an extended period of time, because urine should be sterile.

RP 663. Dr. Moneta testified further that “a foot infection can go from not much to bad within just a few hours”. RP 658. He testified that it would be almost impossible to know precisely when the infection in Glenn’s foot went from being sound to being unsalvageable. *Id.* Dr. Moneta’s testimony thus ratified the testimony of plaintiffs’ witnesses who had gone before.

Dr. Pluedeman, Glenn's family care physician, testified that gangrene was typically caused by a bacterium, *clostridium defecal*, most commonly found in stool. RP 154-155. She also testified that a person with PVD has no greater problems with a callus than a normal person. RP 151.

Dr. Rippey, the surgeon who cut off Glenn's leg, testified that the scenario was "one of progressive deterioration and function and uncleanliness of the environment, certainly the description of stool being smeared on the patient would increase the risk of infection enormously if there were an open wound." RP 503-504. He made clear that the passage of days was more than a 50 percent contributing cause to the loss of Johnson's left second toe and then his leg below his knee. RP 504-506.

Mr. Wadsworth, the prehospital care expert, testified that urine is generally not a concern for infection because it is sterile, but that there is concern with cuts and abrasions when feces are present. RP 454-456. The primary concern with stool is that of timing. RP 467.

From that evidence, the jury had every right to find that Glenn had been in feces for a day from Friday afternoon, after Mendez left him urine soaked but without feces present, until Saturday, when Gomez found him in the bed in his truck covered in "poo". RP 120, 123, 194. The jury had every right to determine that Glenn's leg was unsalvageable before Gomez appeared on Saturday, let alone when Woodburn Ambulance arrived on

the scene early Sunday morning. See RP 503-504, 658. The jury thus had every right to find that Woodburn Ambulance was negligent, but not “the proximate cause ‘of pecuniary loss to plaintiffs’”. *Gammon v. Clark Equipment Company*, 104 Wash. 2d 613, 615, 707 P.2d 685 (1985). The evidence may have been circumstantial, but circumstantial evidence plus an expert’s opinion can be sufficient to satisfy a plaintiff’s evidentiary burden. *Lockwood*, 109 Wn. 2d at 249.

To prevail in its affirmative defense of comparative fault in Woodburn Ambulance, Golden Eagle had the burden to establish both that Woodburn Ambulance was negligent and that Woodburn Ambulance’s negligence was a proximate cause of Glenn’s damages. *Mobile Crane Co.*, 1 Wn App. at 645. Part of that proof would be proving that Glenn’s left leg was still salvageable by the time Woodburn Ambulance appeared that Sunday morning. Golden Eagle could not satisfy that burden where all evidence in favor of the Johnsons is deemed to be true and all inferences that can be drawn from it are to be drawn in favor of the Johnsons. *Mega*, 138 Wn. App 668. It was not Glenn’s burden at trial to prove that Glenn’s leg was salvageable at 1:33 a.m. on Sunday morning, and it is certainly not an appropriate inquiry in this appeal.⁸

⁸ Moreover, the jury had been instructed that any subsequent medical malpractice that arose as a result of Golden Eagle’s initial negligence would be chargeable to Golden Eagle. See Instruction No. 23; RP 747-748.

CONCLUSION

The Johnsons offered substantial evidence to support a verdict on all three subsets of the rescue doctrine; any one would have been enough.

The jury here was properly instructed on the law. Golden Eagle assigns no error to the evidence admitted. The verdict should stand. Golden Eagle cannot overturn the jury's unanimous finding of negligence, proximate cause and liability in Golden Eagle. This was not a jury swept up in passion or prejudice, and Golden Eagle only makes that argument as an afterthought in its brief. Br. of Appellant at 49. It does so because it knows that the argument is without merit. The jury, while unanimous on liability and the undisputed medical expenses, voted 10-2 on the measure of noneconomic damages. CP 1023; RP 822.

In short, the jury listened to the Johnsons' evidence that Golden Eagle ignored the many offers of help that it received, choosing instead to do nothing beyond saving its nonperishable load and leaving Glenn in his truck to rot.

The judgment on the verdict of the jury should be affirmed. Costs on appeal should be awarded to the Johnsons.

DATED this 14th day of September, 2007.



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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **BRIEF OF RESPONDENTS [REVISED]** on the following named person(s) on the date and time indicated below by:

- mailing with postage prepaid
- hand delivery
- facsimile transmission
- overnight delivery

07 SEP 19 11:29 AM
 STATE OF OREGON
 BY _____
 COURT OF APPEALS

on September 14, 2007 to said person(s) a true copy thereof, addressed to said person(s) at their last-known address(es) indicated below.

Kenneth W. Masters
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 241 Madison Ave.
 N. Bainbridge Island, WA 98110

DATED: September 14, 2007



Emily J. Smith, Legal Assistant to
 Thomas S. Boothe, Attorney for
 Respondent, WSBA No. 21759

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Ms. Beeler challenged Sanchez, until Dollie described Sanchez as the man who saved her husband's life. RP 358, 578-579.

The ambulance transported Glenn to Adventist Hospital, where he was admitted late Sunday night, November 4, 2002. RP 361. The second toe of his left foot was amputated on November 6. RP 505; Ex. 33. His left lower leg was amputated, with patellectomy, on November 12, 2002. RP 489; Ex. 35.

F. Lower court proceedings.

The Johnsons filed the present action in Clark County Superior Court on May 28, 2004. **CP 1104**. The Johnsons' operant pleading was their second amended complaint. CP 920-925. Golden Eagle answered, asserting affirmative defenses assigning fault to Glenn, Dollie, Sanchez, Gomez, Mendez, and Woodburn Ambulance. CP 447-452. The case was assigned to The Honorable Diane M. Woolard for trial. **CP 1109**.

The trial court proceedings included pretrial hearings on the parties' motions in limine and jury instructions that were heard on July 19 and 31, 2006. CP 432, 926, Trial began on August 7. RP 1. The jury heard evidence over four days. RP 53-724. The jury was instructed in the law. RP 755. Golden Eagle's counsel objected to several instructions, but no record of the specific objections was made because the objections were made outside the presence of the clerk. RP 736. Counsel presented argument. RP 755-816. The jury returned its verdict on the afternoon of

As a matter of policy, appellate courts “strongly presume the jury’s verdict is correct.” *Bunch v. King County Dept. of Youth Services*, 155 Wn. 2d 165, 179, 116 P.3d 381 (2005).

Golden Eagle’s motions for a directed verdict, for judgment as a matter of law, and for judgment notwithstanding the jury’s verdict are the same thing: a motion for judgment as a matter of law. *Litho Color Inc. v. Pacific Employer’s Ins. Co.*, 98 Wn. App 286, 298, fn. 1, 991 P.2d 638 (1999). The threshold is high for granting a motion for judgment as a matter of law and removing the case from the jury or ruling despite the jury’s verdict, and an appellate court reviewing the trial court’s denial of such a motion applies the same standard as the trial court. *Mega v. Whitworth College*, 138 Wn. App. 668, 158 P.3d 1211 (2007).

To prevail on any of its motions for judgment as a matter of law, Golden Eagle must prove that there is “no legally sufficient evidentiary basis for a reasonable jury to find or have found for [the Johnsons] with respect to that issue.” CR 50(a)(1); *Bunch v. King County Dept. of Youth Services*, 155 Wn. 2d 165, 176, 116 P.3d 381 (2005); *Industrial Indemnity Co. of the Northwest, Inc. v. Kallevig*, 114 Wn. 2d 907, 916, 792 P.2d 520 (1990).

Framed another way, Golden Eagle can only prevail in its appeal if the Johnsons had offered no substantial evidence to support the verdict. *Mega*, 148 P.3d at 1215. Substantial evidence means that there is more

than a mere scintilla of evidence. *McCowan v. Northeastern Siberian Co.*, 41 Wash. 675, 677, 84 P. 614 (1906) (“Unquestionably if it be true that there was no more than a scintilla of evidence in favor of the respondent, or, to state the rule in another form, no substantial evidence in his favor, then the judgment must be set aside.”). And that the evidence must be of the kind which “would convince an unprejudiced, thinking mind of the truth to which the evidence is directed.” *Arnold v. Sanstol*, 43 Wn. 2d 94, 98, 260 P.2d 327 (1953); *Industrial Indemnity*, 114 Wn. 2d at 915-916; *Hojem v. Kelly*, 93 Wn. 2d 143, 145, 606 P.2d 275 (1980). The burden is not heavy: circumstantial evidence plus an expert’s opinion can be sufficient to satisfy the evidentiary burden. *Lockwood v. AC&S, Inc.*, 109 Wn. 2d 235, 248-249, 744 P.2d 605 (1987).

Not only is the evidentiary burden minimal, but the Court must also accept the truth of the nonmoving party’s evidence and must draw all inferences favorable to the nonmoving party that may reasonably be drawn therefrom. *Levy v. North Am. Co. for Life and Health Ins.*, 90 Wash.2d 846, 851, 586 P.2d 845 (1978); *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 29, 974 P.2d 847 (1999); *Litho Color*, 98 Wn. App. at 298-299.

Golden Eagle’s assignments of error, therefore, must be read as limited to a challenge to whether the jury was presented with evidence sufficient to sustain its verdict. *Bishop of Victoria Corporation Sole v.*

Corporate Business Park, LLC, 138 Wn. App. 453, 158 P.3d 1183, 1189 (2007). “On a challenge to the sufficiency of the evidence, this court looks to whether, after viewing the evidence in the light most favorable to the [Johnsons], any rational trier of fact could have found” the essential elements of their claim to have been proven. *State v. Roth*, 131 Wn. App. 556, 561, 128 P.3d at 114 (2006).

Golden Eagle’s brief is not an analysis of whether there was any substantial evidence to support the verdict. Much of Golden Eagle’s brief is, instead, written as a plea to this Court to substitute its judgment for that of the jury and to reweigh the evidence and revisit credibility determinations. *See, e.g.*, Br. of Appellant at 41-42. Golden Eagle’s chosen path is an inappropriate avenue for review. It is the sole province of the jury to determine credibility, and its determination is not reviewable. *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990) (“Credibility determinations are for the trier of fact and cannot be reviewed on appeal.”); *State v. Snider*, 70 Wn. 2d 326, 327, 422 P.2d 816 (1967) (“It is the function and the province of the jury to weigh the evidence, to determine the credibility of the witnesses, and to decide the disputed questions of fact.”); *Roth*, 131 Wn. App. 561 (“When there is substantial evidence, and when the evidence is of such a character that reasonable minds may differ, it is the function and the province of the jury to weigh the evidence, determine the credibility of the witnesses, and

decide disputed questions of fact.”); *State v. Beasley*, 126 Wn. App. 670, 690, 109 P.2d 849 (2005) (“It is in the sole province of the jury to determine credibility and its determination is not reviewable.”). Implicit within the jury’s ruling in this case was its finding of credibility in favor of plaintiffs. *Kohfeld v. United Pacific Ins. Co.*, 85 Wn. App. 34, 42, 931 P.2d 911 (1997). “Accordingly, the reviewing court will not reverse if there is substantial evidence to support the jury’s findings.” *State v. Kane*, 72 Wn. 2d 235, 239, 432 P.2d 660 (1967).

The manifest flaw in Golden Eagle’s brief is highlighted by its efforts to retry the case on its merits despite the governing principle that its appeal from the denial of its motions for judgment as a matter of law carries with it an implicit admission of the truth of all of plaintiffs’ evidence and concession of all inferences that can reasonably be drawn from that evidence. ***Mega*, 138 Wn. App at 668**. Golden Eagle simply cannot challenge the Johnsons’ witnesses’ credibility or even ask that it somehow be reweighed when their appeal admits its truth and concedes that all inferences to be drawn from it are drawn in favor of the Johnsons. The inquiry is not whether plaintiffs’ evidence was perfect, but is instead whether there is *any* substantial evidence sufficient to support the jury’s verdict. *See Davis v. Microsoft Corp.*, 149 Wn. 2d 521, 531, 70 P.3d 126 (2003); *Sing v. John L. Scott, Inc.*, 134 Wash.2d 24, 29, 948 P.2d 816 (1997).

The jury saw Gomez testify, heard the sincerity of his voice, experienced his genuine concern for Johnson, and compared it to the callous disregard expressed by Clohessy and Crofoot. The jury heard Clohessy talk, very tellingly, about how once the rig was picked up, Johnson was no more than just another motorist by the side of the road to Golden Eagle. RP 696. The jury heard Crofoot spinning fanciful tales of Johnson sounding chipper and describing himself as feeling good and sounding normal during a Saturday drive north. RP 709-710. The jury could assess Crofoot and Clohessy next to Gomez, whom it heard describe Johnson as barely audible and unable to communicate. RP 197-198. That testimony, coupled with how Glenn was found by Sanchez in the early evening on Sunday, November 3, and how Beehler extrapolated his earlier condition based on what she observed late that night, together undercut any credibility that Crofoot may have had. RP 75, 354-357, 379-380. Such credibility determinations are for the jury, and they are not reviewable on appeal. *Roth*, 131 Wn. App. at 561; *Camarillo*, 115 Wn. 2d at 713.

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⁸ Moreover, the jury had been instructed that any subsequent medical malpractice that arose as a result of Golden Eagle’s initial negligence would be chargeable to Golden Eagle. See Instruction No. 23; RP 747-748.