

No. 48018-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Respondent,

v.

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

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR JEFFERSON COUNTY
THE HONORABLE KEITH C. HARPER

BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent Michael Gilmore's plumbing truck collided with a bus owned and operated by appellant Jefferson Transit Authority in a low-speed "fender bender." With no evidence of special damages, a jury awarded Mr. Gilmore \$1.2 million after a weeklong trial fraught with misconduct that the trial court proved powerless to prevent. Because the rules governing admission of evidence, discovery violations, and proper argument of counsel should apply equally to plaintiffs and defendants, this Court must reverse and remand for a new trial or remittitur.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its Order on Motion for New Trial or Remittitur. (CP 723-25)
2. The trial court erred in entering judgment on the jury's verdict against Jefferson Transit Authority. (CP 726-28)
3. The trial court erred in granting plaintiff's motion in limine to exclude the testimony of Dr. Allan Tencer. (RP 38-39)
4. The trial court erred in denying defendant's motions in limine to exclude the testimony of Dr. Frank Marinkovich and Dr. Geoffrey Masci. (RP 32-33, 428)

5. The trial court erred in granting plaintiff's motion in limine to exclude collateral source evidence, and in excluding this evidence once plaintiff opened the door. (RP 56, 543-44, 634)

III. STATEMENT OF ISSUES

1. Washington law allows experts whose methods are generally accepted in the scientific community to base their opinions on facts not in evidence. Did the trial court err in excluding relevant and helpful testimony from a qualified expert because his opinion was partially based on facts not in evidence?

2. A party has an ongoing duty to truthfully supplement discovery responses regarding the source, subject matter, and substance of expert testimony. Did the trial court err in allowing expert witnesses to testify when the plaintiff withheld and failed to disclose reports delineating the substance and bases of that testimony until the eve of trial, severely prejudicing the defense's case in a manner that became apparent only during trial?

3. Did the trial court err in excluding collateral source evidence after plaintiff opened the door by introducing testimony of his financial status as a basis for an award of general damages, in direct violation of an order in limine plaintiff had sought?

4. Does a chiropractor exceed the scope of his expertise by testifying about neurological and surgical conditions and diagnoses and speculating about a party's credibility?

5. Did plaintiff's repeated violations of orders in limine, deliberate discovery failures and lack of candor, and allusions to the golden rule and requests for punitive damages to the jury cross the line from aggressive advocacy to misconduct that prevented the defendant from having a fair trial?

IV. STATEMENT OF FACTS

A. Plaintiff, a plumber who had VA disability benefits, claimed life-changing injuries from a "fender bender" with a Jefferson Transit bus in March 2008.

On March 31, 2008, respondent Michael Gilmore was driving a box van owned by his employer, Brothers Plumbing, in Port Townsend. (CP 2, RP 747-48) After a transit bus owned and operated by appellant Jefferson County Public Transportation Benefit Area ("Jefferson Transit") came to a stop behind the van at a stop light, the bus moved forward slightly and hit the rear of the plumbing van. (CP 6-7, RP 748) The damage to both vehicles was minimal: the cost of replacing the bike rack on the front of the bus was \$1,200, and Brothers Plumbing did not even bring a claim against Jefferson Transit for any damage to its van. (RP 578, 772)

Immediately following the collision, Mr. Gilmore went to the emergency room complaining of nausea, headache, hip, neck, and lower back pain. (RP 753) He returned several days later claiming headaches and numbness in his hands. (RP 754-55) In April 2008, Mr. Gilmore transferred his primary care to Dr. Marc Suffis, an occupational medicine physician. (RP 482-83, CP 764¹) Dr. Suffis relied on Mr. Gilmore's subjective report that he had sustained his injuries in a motor vehicle accident in a 2008 medical opinion that Mr. Gilmore's neck and back pain, headaches, and numbness in his hands were caused by the collision. (CP 743, 764, 774)

When he issued his 2008 opinion, Dr. Suffis did not recall that he had examined Mr. Gilmore in 2004 to rate his claim for service-related disabilities for the Department of Veterans Affairs ("VA"). (CP 744, 770) Dr. Suffis had given Mr. Gilmore a 60% disability rating in 2004 for symptoms including degenerative arthritis in both hips, both knees, the left elbow, and thoracolumbar spine. (CP 376-78, CP 745) When Mr. Gilmore presented to Dr. Suffis in spring 2008, Mr. Gilmore not only failed to remind Dr.

¹ Dr. Suffis' perpetuation deposition was played in court to the jury. (RP 480-83) The video disc of the deposition was admitted by agreement. (Ex. 161; RP 481) The transcript of the deposition testimony played to the jury has been designated as clerk's papers and is cited as CP 733-806 in this brief.

Suffis that he had been Dr. Suffis' patient in 2004, but claimed that he had no preexisting symptoms like those that he complained of following the collision, including neck, hip, and back pain. (CP 768-69, 774, 779-80) In addition, Dr. Suffis was unaware (because Mr. Gilmore did not tell him) that Mr. Gilmore had previously sought treatment for neck pain on several occasions from August to November 2007. (CP 756-57, 779-80)

After being made aware that he had treated Mr. Gilmore in 2004, Dr. Suffis realized that the history on which he had relied in coming to his 2008 diagnosis had been inaccurate. (CP 774-75, 779) While Dr. Suffis continued to assert that Mr. Gilmore's "symptomatology as a result of disc herniations occurred after the accident" (CP 778), he testified that the herniation itself "could have been prior to the accident." (CP 779)

Dr. Suffis was the only treating physician whose testimony was presented at trial. Although Mr. Gilmore originally claimed neck, hip, and back injuries (RP 753), at trial plaintiff sought only general damages for neck injuries that he claimed were different and unrelated to the conditions for which he had received a VA disability rating in 2004. (RP 13, 618, 979-81)

B. The trial court granted plaintiff's motion to exclude evidence critical to Jefferson Transit's defense that the March 2008 accident could not have caused the injuries claimed by plaintiff.

Jefferson Transit learned soon after the collision that Mr. Gilmore was claiming serious injuries from the minor impact. It hired a private investigator in an attempt to verify those injuries. (RP 802) On July 4-5, 2008, the investigator took video of Mr. Gilmore engaging in physical activities such as putting a boat on a trailer, jogging, and moving his head and neck with full range of motion that was inconsistent with his alleged injuries. (RP 802, 898-903; CP 63) After Mr. Gilmore filed his 2010 complaint, Jefferson Transit admitted liability for the collision, but denied causation and the nature and extent of the injuries claimed by Mr. Gilmore. (CP 6-7)

Because causation of Mr. Gilmore's claimed injuries was critical to its defense, Jefferson Transit intended to call Dr. Allan Tencer as an expert to testify to "a quantitative description of the forces experienced by the Plaintiff in the crash and a comparison of those forces to forces of common experience." (CP 366) Dr. Tencer holds a Ph.D. in Mechanical Engineering. (CP 365) He recently retired after 25 years as a Professor in the Departments of Mechanical Engineering, Orthopedic Surgery, and Sports Medicine, at the University of Washington. (CP 365) In addition to teaching

orthopedic residents and engineering graduate students and performing biomechanical research, Dr. Tencer founded the Biomechanics Laboratory at Harborview Medical Center, and was the Director of the Laboratory for 11 years. (CP 365)

To “compute the speed change and acceleration of the struck vehicle,” Dr. Tencer used the weights of the vehicles involved in the collision; the speed of the striking vehicle based on its level of damage; and the coefficient of restitution, which “describes the elasticity of the impact and breaking forces.” (CP 366) Dr. Tencer then computed the “forces acting on Plaintiff’s body during the impact” by considering the type of vehicle, data derived from the vehicle seats, the head restraint design, the position of the occupant, and Mr. Gilmore’s age, weight, and height. (CP 366) Dr. Tencer concluded that, as reflected in the damage to both vehicles, the severity of impact was low. (CP 365-67; RP 36)

On Mr. Gilmore’s motion in limine (CP 47-56), the trial court excluded Dr. Tencer’s testimony on the grounds that he “makes a number of assumptions, some of which are based on facts that are not going to be in evidence,” and that Dr. Tencer’s testimony was “intended to create an inference with some aura of authority that [the court] do[esn’t] think is reasonable or justified.” (RP 39)

C. The trial court denied Jefferson Transit’s motion to admit evidence of L&I payments even after plaintiff elicited testimony at trial of his financial situation, in violation of an order in limine.

Because Mr. Gilmore was on the job at the time of the collision, his medical bills were paid by the Department of Labor & Industries (“L&I”). (CP 14) Mr. Gilmore also received L&I time loss payments for five months after the collision, as well as a lump sum payment for permanent partial disability at the end of 2009. (RP 6, 518, 543) Mr. Gilmore submitted no medical bills under ER 904 or at trial.² (RP 8-13) Mr. Gilmore moved to have evidence of L&I payments excluded on the basis of the collateral source rule. (CP 14) Mr. Gilmore also moved in limine to prohibit Jefferson Transit from asking “about his current or past financial status,” arguing that his financial status was “irrelevant” to his claim for general damages. (CP 15; RP 17)

The trial court originally denied Mr. Gilmore’s motion in limine. (RP 15-16) On Mr. Gilmore’s motion for reconsideration, the trial court reversed its decision and ruled that “[t]he L&I payments will not be admissible unless the door is opened.” (RP 56) The trial court also granted Mr. Gilmore’s motion to exclude evidence of his

² Although plaintiff after trial asserted the number was “inaccurate,” the medical bills Mr. Gilmore produced in discovery totaled \$16,682.11. (CP 477-93, 657)

financial status when Jefferson Transit stipulated that it agreed with the motion “to the extent that this asks the Court to rule that [the defense] should not argue in closing that recovery for [Mr. Gilmore] would be a financial windfall.” (RP 18)

In violation of the order in limine he had requested, Mr. Gilmore introduced evidence of his financial status at trial. Mr. Gilmore and his son testified that he worked two or three jobs “80 hours a week prior to the accident” because he “needed money to support his family.” (RP 530, 532, 602, 605) Mr. Gilmore elicited further testimony regarding his inability to work after the collision, and the impact that had on him. (RP 508, 532) Mr. Gilmore’s sons testified that because “it was hard to pay the bills” and their father “didn’t feel like he was able to provide for his family,” he “went way downhill,” and turned to alcohol because “he didn’t know what to do.” (RP 508, 532) His son testified that Mr. Gilmore and his wife “didn’t exactly get along very well for . . . much longer after [the collision]” because there were “lots of financial issues causing them to argue.” (RP 508) Mr. Gilmore testified that even though his doctor had recommended surgery for “bulging discs” in April 2009, he did not have the surgery at that time because he “didn’t think [he]’d be able to support [his] family,” and that he did not have the

procedure done until January 2015 because “[he] couldn’t afford to,” claiming that he instead became increasingly reliant on opiates to dull the pain. (RP 762-63)

In order to properly rebut this evidence, Jefferson Transit moved for the admission of the L&I medical and time loss payments, as Mr. Gilmore had opened the door by introducing this evidence of his financial status in direct violation of the order in limine. (RP 536) Reversing its pretrial position that collateral source evidence could be admitted if plaintiff opened the door, the trial court ruled that a party could never open the door to collateral source evidence. (RP 543-44) Solely because the trial court “didn’t find anything specifically about . . . the idea or the concept of opening a door,” it excluded any collateral source evidence. (RP 634)

D. The trial court refused to exclude plaintiff’s medical experts or otherwise sanction plaintiff’s willful discovery violations, which were fully revealed only in the middle of trial.

Jefferson Transit had served Interrogatories and Requests for Production on Mr. Gilmore on September 8, 2010, asking for the name of each expert witness, the subject matter on which each expert witness will testify at trial, the substance of the facts and opinions to which each expert witness will testify, and a summary of the opinions reached by any expert witness. (CP 239-40, 273) This information

was critical to Jefferson Transit's defense of Mr. Gilmore's claims concerning his medical condition, and that the collision had caused any injuries he claimed.

On September 5, 2013, Mr. Gilmore disclosed that he intended to call Dr. Geoff Masci, a chiropractor, as an expert witness. (CP 240, 280-81) Dr. Masci prepared his report three weeks later, on September 28, 2013. (CP 308) But Mr. Gilmore waited another 20 months, until less than three weeks before trial, before disclosing Dr. Masci's report to Jefferson Transit, on May 20, 2015. (CP 40, 43, 240; RP 26-27) When Jefferson Transit objected and sought to exclude Dr. Masci as a witness, Mr. Gilmore claimed that the late disclosure of his report was "a simple administrative oversight." (RP 29)

On November 13, 2014, Mr. Gilmore first told Jefferson Transit that he intended to call Dr. Frank Marinkovich, a neurologist, as an expert witness. (CP 240, 288-89) Mr. Gilmore stated that "[t]he substance of the facts and opinions of Dr. Marinkovich may be found in his report. Upon receipt of Dr. Marinkovich's report, the Plaintiff will supplement this answer." (CP 288) Mr. Gilmore did not disclose Dr. Marinkovich's opinions until May 8, 2015, when he sent Jefferson Transit an undated two-page report. (CP 240, 292-93; RP 418, 420) On May 11, 2015 – 30 days before trial – Mr. Gilmore

sent Jefferson Transit a 16-page “record review” dated February 7, 2015 – three months *before* Mr. Gilmore had sent Dr. Marinkovich’s two-page report. (CP 240, 592-607; RP 420)

Jefferson Transit moved to exclude both Dr. Masci’s and Dr. Marinkovich’s testimonies as being speculative, and because plaintiff had failed to timely provide their reports in discovery under CR 26(e). (CP 261-69) The trial court denied Jefferson Transit’s motion to exclude either expert’s testimony on the grounds that no lesser sanctions had been suggested, the violations did not appear to the court to be willful or deliberate, and that the evidence would only have a limited effect on the defense experts’ opinions. (RP 32-33)

Dr. Marinkovich’s record review and short report both indicated that he had only limited access to Mr. Gilmore’s historical medical records (CP 266, 292-93, 592-607), and that Dr. Marinkovich was unaware of both the July 4, 2008 video and of Dr. Suffis’ 2004 disability report. (CP 266-67; *see* RP 413-16, 420, 433) Mr. Gilmore’s response to Jefferson Transit’s motion in limine claimed that “Dr. Marinkovich had/has access to the complete records of the Plaintiff, including the report of Dr. Jessen [Jefferson Transit’s medical expert], MRIs findings, and the secretly taped surveillance footage.” (CP 355) It was not until Dr. Marinkovich

began testifying at trial that the extent of plaintiff's discovery violations in making this claim became clear.

Dr. Marinkovich claimed in his testimony that he had reviewed Mr. Gilmore's 2004 VA disability records from Dr. Suffis when forming his opinion – materials that were not listed in his records review, and a “fact” not previously disclosed to the defense. (RP 412, 433) When Jefferson Transit renewed its objection to Dr. Marinkovich's testimony, plaintiff's counsel could not provide details or an accurate timeline of who had initially sent records to Dr. Marinkovich; when those records, including the 2004 VA report and 2008 video, had been sent to him; nor any explanation for the late disclosures of his reports to Jefferson Transit. (*See* RP 425-26)

The trial court believed that plaintiff and Dr. Marinkovich had misrepresented his reports and what he had reviewed in reaching his conclusions. (RP 433: “[W]hen you look at the record review that . . . purports to be comprehensive, that makes sense”; RP 413-14; plaintiff's counsel concedes that Dr. Marinkovich came to his conclusions “based on . . . *everything that's recited here*” in the record review – which did not include the VA report or video) (emphasis added). The trial court believed there “appears to be a lot of fishy business” and “deception that's been going on” with regard to

Dr. Marinkovich's report and testimony. (RP 432) The trial court was particularly troubled that Jefferson Transit "learned today, just this afternoon, apparently, that oh, no, [Dr. Marinkovich] had . . . a copy of the video, he had the . . . VA report," and that "his opinions are going to be based also, then, on having that stuff." (RP 433) The trial court concluded: "[*T*hat's a major part of the Defendant's case." (RP 433) (emphasis added)

Despite having found that "none of this appears to . . . be very forthcoming," the trial court refused to exclude Dr. Marinkovich's testimony or otherwise sanction plaintiff. (RP 433, 428) Instead, in the middle of trial, the court only ordered Dr. Marinkovich to provide all of the records he claimed to have reviewed, and a copy of all of his opinions and correspondence (RP 432-33) – information Jefferson Transit had been entitled to weeks earlier.

Dr. Marinkovich submitted an addendum, dated that same day, June 10, 2015, with a timeline of his involvement in the case. (CP 624-27) Despite her claim to the court the previous trial day that the case was being handled by another lawyer at the time (RP 426), the addendum confirmed plaintiff's lack of candor to the court, revealing that Mr. Gilmore's trial counsel had personally contacted Dr. Marinkovich on December 29, 2014, and sent the records listed

in the record review to him on January 15, 2015. (CP 580, 624) It became clear that Dr. Marinkovich had met with Mr. Gilmore's counsel about appearing at trial and received the 2004 VA records and 2008 video for the first time on May 19, 2015 weeks after he reached his opinion that Mr. Gilmore's claimed injuries had been caused by the 2008 accident. (CP 580, 625-26)

Despite this "deception" and "fishy business," (RP 432), the trial court did not sanction plaintiff in any way for these discovery violations or lack of candor.

E. The trial court refused to limit a chiropractor's testimony to his chiropractic expertise, allowing him as an expert to "vouch" for plaintiff.

Jefferson Transit also moved to exclude Dr. Masci's testimony because his proffered testimony exceeded the scope of his chiropractic expertise. (CP 251-52) Jefferson Transit asked that if Dr. Masci were permitted to testify, his testimony "should be limited to a reasonable chiropractic care received by plaintiff as a result of the collision." (CP 252) Mr. Gilmore represented that Dr. Masci's testimony would "be limited to his area of expertise; that is the cause, diagnosis, and treatment of musculoskeletal disorders conditions" (CP 355); the trial court ruled that Dr. Masci could only "testify to things that he's qualified to testify to." (RP 33)

At trial, however, Mr. Gilmore elicited speculative testimony from Dr. Masci that was far outside the bounds of his chiropractic expertise, including his “expert” opinion of Mr. Gilmore’s credibility. Dr. Masci continued to offer medical opinions even after the court warned that plaintiff was walking a “very fine line” with Dr. Masci’s testimony. (RP 356) Dr. Masci testified that “a herniated disc will invariably have neurological signs,” described those *neurological* symptoms and deficits in great detail, and opined whether carpal tunnel syndrome (a medical, not a chiropractic, condition) or a neck injury caused Mr. Gilmore’s symptoms extending down to his fingertips, as well as whether Mr. Gilmore’s carpal tunnel surgery was successful. (RP 343-46, 349-52)

Dr. Masci also testified that he “primarily” “allowed . . . Mr. Gilmore to provide [him] with a recitation” when coming to his diagnosis of a disc herniation. (RP 329-30) Dr. Masci testified that he “would qualify [Mr. Gilmore] as a less than stellar historian,” that “[t]here were a lot of inaccuracies in what he recited,” and that Mr. Gilmore’s medical history “was somewhat amplified.” (RP 333, 336; *see also* RP 334) But, over Jefferson Transit’s objection, Dr. Masci excused Mr. Gilmore’s “amplifications,” testifying that Mr. Gilmore had not been “fully alert” and “was utilizing pain medication” when

they met; that Dr. Masci did not think that Mr. Gilmore was trying to exaggerate his symptoms; and that it was “actually quite common” for a patient to exaggerate the speed of a vehicle in a collision, as plaintiff had done in claiming to him that the Jefferson Transit bus was traveling at the posted speed of “approximately 20 to 25 miles an hour” when the collision occurred at a stop light. (RP 335-37; CP 308)

F. While rebuking defense counsel for making proper objections, the trial court allowed plaintiff to introduce improper character evidence, in violation of orders in limine, and to excoriate Jefferson Transit and its counsel as “frauds.”

Despite acknowledging that character evidence is not admissible under ER 608 until a witness’ character has been attacked, Mr. Gilmore moved prior to trial to allow character evidence of his “reputation in the community for truthfulness, work ethic, and honesty,” claiming that the Jefferson Transit’s defense had put Mr. Gilmore’s credibility at issue by implying he was “a liar, a cheat, and a fraud.” (CP 18-19) The court held that “simply whatever complies with [ER] 608” would be admissible. (RP 24)

At trial Mr. Gilmore repeatedly elicited testimony of his character through not only Dr. Masci, but lay witnesses (*see, e.g.*, RP 299, 305-06, 461-63, 555-56, 560, 640-41, 644-46), contending that “the Defense has opened the door to Mr. Gilmore’s character and

opened the door to him being a liar, a cheat and a fraud.” (RP 305) Although the trial court recognized that “[t]he door hasn’t been opened” (RP 305; *see also* RP 560)³, it continued to allow plaintiff’s counsel to put on improper testimony and to make improper argument – concerning both the plaintiff’s and the defendant’s “character.”

Throughout trial, it was Mr. Gilmore who excoriated the defendant, and defense counsel, as “frauds”:

- “And I’m going to tell you something, that there has been a fraud perpetuated in this courtroom during this trial. There has been. There has been someone in this trial who has continually tried to mislead you.” (RP 978)
- “So I’m going to talk to you about some of the – the frauds that the Defense has tried to perpetuate.” (RP 979)
- “The fraud continues because the Defense wants you to think all this was preexisting.” (RP 981)
- “Early on, the Defense . . . set the tone for how they were going to proceed with the defense on this case, and what they were gonna do, and what they were willing to do.” (RP 982-83)
- “Defense attempt to escape liability[,] to confuse, to cover up, continues . . .” (RP 985)

The trial court did nothing to stop these unwarranted attacks. Instead, on more than one occasion, the trial court rebuked defense counsel for making proper objections. (RP 356: “If we have to hash this out between each question, I’m happy to do that and we can be

³ To the contrary, only plaintiff’s counsel used the terms “liar,” “cheat,” or “fraud” in referring to her client. (*See, e.g.*, RP 273, 276, 977, 1029, 1032)

here for a month”; RP 552: “[O]verruled. Come on, let’s . . . cut some slack here”; RP 559: “I mean, yeah, objections are appropriate and need to be made. But, I mean, we just need to use some discretion and are the objections really important or necessary or not?”) And despite the trial court’s admonishments, Mr. Gilmore’s counsel continued to comment on defense counsel’s objections in front of the jury. (RP 551: “When he objects, which he will do often . . .”; RP 552: “[L]et me ask you another question to appease Defense Counsel”; RP 557: “Let me ask another question so we don’t get an . . . objection”)

G. The jury returned an unprecedented \$1.2 million verdict after plaintiff appealed to the jury to place themselves in his shoes and award punitive damages against “the government.”

During closing arguments, Mr. Gilmore’s counsel analogized his claimed injuries to a job advertisement in the newspaper. (RP 1002-03) Counsel asked jurors how much money it would take for them, *personally*, to answer this ad and endure the same injuries that Mr. Gilmore alleged as a result of the collision. (RP 1003-04)

Mr. Gilmore’s counsel also repeatedly asked the jury to help “fight the government,” because Mr. Gilmore “can’t do it alone.” (RP 989, 991, 996, 1032) Plaintiff’s counsel charged the jury with awarding damages to Mr. Gilmore because “the government

murders innocent people” and “gets away with it,” and “tries to blame it on the victim.” (RP 1031)

The jury awarded \$1.2 million in general damages the largest personal injury verdict in Jefferson County history. (CP 401) The trial court denied Jefferson Transit’s CR 59 motion for a new trial or for remittitur to no more than \$150,000 pursuant to RCW 4.76.030. (CP 402-25, 723-24) Jefferson Transit appeals. (CP 720)

V. ARGUMENT

A. **The trial court erred in basing evidentiary decisions crucial to the defense on erroneous legal grounds.**

The trial court necessarily abuses its discretion when it bases the exclusion or admission of evidence on an improper legal standard. *Reese v. Stroh*, 128 Wn.2d 300, 310, 907 P.2d 282 (1995); *Fraser v. Beutel*, 56 Wn. App. 725, 734, 785 P.2d 470 (trial court abuses its discretion where reason for exclusion of evidence is contrary to law), *rev. denied*, 114 Wn.2d 1025 (1990). The trial court prevented the defense from presenting its case and receiving a fair trial by excluding relevant defense evidence on erroneous legal grounds, and (inconsistently) allowing plaintiff’s chiropractic witness to testify as an “expert” to matters far beyond his expertise – also contrary to controlling Supreme Court authority.

1. The trial court wrongly excluded Dr. Tencer's testimony not because he was unqualified, but because he relied on physics.

The trial court applied the wrong legal standard to exclude Dr. Tencer's testimony. Expert testimony is generally admissible if the expert is qualified, the testimony would be helpful to the trier of fact, and the expert relies on generally accepted theories in the scientific community. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 352, ¶10, 333 P.3d 388 (2014); *see also Marriage of Katare*, 175 Wn.2d 23, 38, ¶27, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013); ER 702. If of a type reasonably relied upon by experts in the field, the facts or data used by an expert in coming to his opinions need not be admissible in evidence. ER 703. Because ER 703 allows an expert to rely on facts not in evidence, the trial court applied the wrong legal standard in excluding Dr. Tencer's testimony on the grounds that it relied on facts not in evidence.

The trial court also excluded Dr. Tencer's testimony on the grounds that it was intended to create an inference with some unjustified or unreasonable "aura of authority." (RP 39) But the trial court made no finding that Dr. Tencer was not qualified as an expert, and did not elaborate on why his testimony or the inferences the jury might draw from it would not be reasonable or justified

given Dr. Tencer's extensive professional and academic expertise in orthopedics and biomechanical forces. (CP 365) To the contrary, Dr. Tencer's testimony met all of the legal criteria for admission, and the trial court abused its discretion in excluding this evidence, critical to Jefferson Transit's defense, on erroneous legal grounds.

a. Dr. Tencer is qualified to testify as an expert and his testimony would have been relevant and helpful to the jury.

A witness may be qualified as an expert "by knowledge, skill, experience, training, or education" if such scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue. ER 702. Washington courts "construe helpfulness to the trier of the fact broadly." *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). The trial court made no finding that Dr. Tencer was not qualified as an expert, as he clearly is.

The admissibility of Dr. Tencer's testimony, in particular, has previously come before this Court, most recently in a case remarkably similar to the one at bar. In *Johnston-Forbes*, the plaintiff claimed she suffered a herniated disc in her neck following a low-speed collision. 181 Wn.2d at 349, ¶¶2-3. The defendant admitted fault but denied the collision had caused the plaintiff's injuries. 181 Wn.2d at 349, ¶4. The

plaintiff moved to exclude Dr. Tencer's testimony on the basis that he was not qualified because he was not a licensed engineer, there was no proper foundation, and his testimony was confusing, misleading, and unfairly prejudicial. 181 Wn.2d at 350, ¶4. The trial court allowed Dr. Tencer to testify as to the biomechanical forces exchanged, the capacity for injury, and a comparison of those forces to activities of daily living. 181 Wn.2d at 350-51, ¶6-7. Both this Court and our Supreme Court affirmed. *Johnston-Forbes v. Matsunaga*, 177 Wn. App. 402, 311 P.3d 1260 (2013), *aff'd*, 181 Wn.2d 346, 333 P.3d 388 (2014).

In concluding that Dr. Tencer's testimony was properly admitted in *Johnston-Forbes*, this Court addressed the ruling in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), in which Division I affirmed a trial court's exclusion of Dr. Tencer's testimony. This Court disagreed with the *Stedman* court "that the force of impact is always irrelevant or that it is improper for a jury to infer that minimal force did not cause injury in a particular case," "especially in light of [the defendant] limiting Tencer's testimony such that he did not offer any opinion about whether the forces in the accident were or were not sufficient to cause injury." *Johnston-Forbes*, 177 Wn. App. at 410, ¶¶17-18. The Supreme Court affirmed, recognizing the relevancy of the force of impact in personal injury

cases and noting that the “trial court properly limited any testimony that would tie in Tencer’s observations about force of impact in relation to [the plaintiff’s] injuries.” 181 Wn.2d at 355, ¶¶15,16.

Dr. Tencer’s proffered testimony here was like that in *Johnston-Forbes*, and did not offer any medical opinions regarding plaintiff’s injuries. Dr. Tencer reiterated that he was “not a medical doctor,” his “testimony is not medical,” and his “opinion does not imply that Plaintiff suffered no injury.” (CP 365-66) Any “aura of authority” that Dr. Tencer’s testimony might have had was well justified and grounded in his knowledge, skill, experience, and education, as required by ER 702. *See, e.g., Johnston-Forbes*, 181 Wn.2d at 355-56, ¶18 (Dr. Tencer qualified as expert by his combined experiences); *Ma’ele v. Arrington*, 111 Wn. App. 557, 563, 45 P.3d 557 (2002) (Dr. Tencer’s education and experience qualifies him as an expert).

Dr. Tencer’s testimony was also highly relevant to the issue of causation, as he would have provided the jury a comparison of the forces of the collision and those of common daily activities. (*See* CP 7, 255, 366) Expert testimony on the computation of the forces of a collision through biomechanical engineering principles is the type of “scientific, technical, or other specialized knowledge” that is helpful to the jury as contemplated by ER 702, and this Court has repeatedly

acknowledged the usefulness of Dr. Tencer’s testimony in low-speed collision cases. *Ma’ele*, 111 Wn. App. at 563 (“testimony about the force involved in low-speed collisions and the impact on the body help[s] the jury determine whether [the plaintiff] got hurt in this accident”); *Johnston-Forbes*, 177 Wn. App. at 410, ¶17 (“[t]he force of impact – whether slight or significant – is often relevant in personal injury cases”). As our Supreme Court further elaborated:

Because fault was not at issue and because it was undisputed that [the plaintiff] had a herniated disc in her neck, the jury was charged with determining causation – i.e., whether [the defendant’s] actions were the cause of [the plaintiff’s] herniated disc. In this case, Tencer’s testimony helped the jury understand what forces might have been involved in the collision and he compared those forces to activities of daily living.

Johnston-Forbes, 181 Wn.2d at 356, ¶20.

This was exactly what was at issue in the present case whether Jefferson Transit’s actions were the cause of Mr. Gilmore’s herniated disc. (See CP 7, 255, 655) Dr. Tencer’s testimony would have helped the jury understand the forces involved in the collision compared to those of daily activities, and the jury would have been entitled to draw inferences in determining whether Mr. Gilmore’s injuries were a result of the accident. *Ma’ele*, 111 Wn. App. at 564 (Dr. Tencer “did not say that Ma’ele was uninjured in the crash, *although the jury was entitled to infer that from his testimony.*”) (emphasis

added); *Johnston-Forbes*, 177 Wn. App. at 410, ¶17 (“[T]here is nothing improper about allowing the jury to draw inferences from evidence explaining force of impact, as well as from other evidence, in determining proximate cause.”). Because Dr. Tencer was qualified as an expert and his testimony would have been helpful to the jury under ER 702, the trial court erred in excluding his testimony out of fear that the jury would draw “unjustified” or “unreasonable” inferences.

b. Dr. Tencer’s opinions were not speculative or conjecture, but had an irrefutable foundation in fundamental engineering principles.

“Before allowing an expert to render an opinion, the trial court must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading.” *Johnston-Forbes*, 181 Wn.2d at 357, ¶21. But “an expert is not always required to personally perceive the subject of his or her analysis.” *Katara*, 175 Wn.2d at 39, ¶29; *see also Johnston-Forbes*, 181 Wn.2d at 357, ¶21. An expert may “base his or her opinion on evidence not admissible in evidence and . . . on facts or data perceived by or made known to the expert at or before the hearing.” *Johnston-Forbes*, 181 Wn.2d at 352, ¶12; *see also* ER 703. Expert testimony “not based on a personal evaluation of the subject goes to the testimony’s weight, not its admissibility.” *Katara*, 175 Wn.2d at 39, ¶29.

Here, the trial court excluded Dr. Tencer's testimony on the grounds that he "makes a number of assumptions, some of which are based on facts that are not going to be in evidence." (RP 39) But the "facts not in evidence" on which Dr. Tencer relied are irrefutable physical facts – to deny their consequence is to defy Newton's laws.

In coming to his conclusions, Dr. Tencer used the weights of the vehicles involved in the collision; determined the speed of the striking vehicle based on its level of damage; and considered factors such as the type of vehicle and head restraint design. (CP 366) Although the data underlying Dr. Tencer's computations might not have been admitted into evidence, they are irrefutable. "If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence.*" ER 703 (emphasis added). Dr. Tencer did not make "assumptions" that were mere speculation or conjecture. He calculated the forces operating on Mr. Gilmore "based on fundamental engineering principles such as the conservation of energy, momentum, and restitution." (CP 366)

The methodology and facts Dr. Tencer used here are similar to those in *Johnston-Forbes*. The Supreme Court agreed with this Court that Dr. Tencer had the necessary foundation to testify about

the forces involved in the collision even though he did not physically examine the vehicle or even have a description of the repair work done, and used photographs of a vehicle taken three years after the collision. *Johnston-Forbes*, 181 Wn.2d at 356-57, ¶21. As here, Dr. Tencer employed a methodology grounded in fundamental engineering principles, which the court found to be an adequate foundation. The trial court erred in excluding Dr. Tencer's testimony for being based on facts not in evidence, and for lending an "aura of authority" that Dr. Tencer was eminently qualified to provide.

2. The trial court erred in allowing plaintiff to elicit testimony from a chiropractor that was outside the scope of his expertise, speculative, and lent an "aura of authority" to plaintiff's injury claims.

While preventing Dr. Tencer from testifying to matters clearly within his expertise, the trial court allowed plaintiff to put on evidence though his "expert" chiropractor that far exceeded his expertise, and that lent an "aura of authority" to Mr. Gilmore's (admittedly) "amplified" characterization of the collision that led to his supposedly life-changing injuries. This too was based on legal error requiring reversal.

a. Dr. Masci exceeded the scope of his chiropractic expertise by opining on surgical and neurological issues.

Although "doctors with unlimited licenses are competent to give expert testimony in the entire medical field," "[c]hiropractors . . .

are limited in their testimony to their special field.” *Kelly v. Carroll*, 36 Wn.2d 482, 491, 219 P.2d 79, cert. denied, 340 U.S. 892 (1950); *Brannan v. Dep’t of Labor & Indus.*, 104 Wn.2d 55, 63, 700 P.2d 1139 (1985) (“[A] chiropractor is competent to testify as an expert or medical witness on matters *within the scope of the profession and practice of chiropractic.*”) (emphasis added).

Chiropractic is the practice of health care dealing with the diagnosis or analysis and care or treatment of “the vertebral subluxation complex and its effects, articular dysfunction, and musculoskeletal disorders.” RCW 18.25.005(1). Chiropractic treatment includes “the use of procedures involving spinal adjustments and extremity manipulation,” and a chiropractor may use diagnostic x-rays to determine whether to refer a patient to other health care providers. RCW 18.25.005(2), (3). Chiropractic care does not include the prescription or dispensing of any medicine or drug or the practice of surgery. RCW 18.25.005(4)

Dr. Masci far exceeded the bounds of chiropractic expertise when he was allowed to testify about the neurological deficits that “invariably” accompany a herniated disc, and what constitutes such neurological signs. (RP 343-45) Dr. Masci, a chiropractor, testified that because Mr. Gilmore suffered no *neurological* symptoms prior

to the accident, the herniated disc must have been caused by the collision. (RP 344-45, 328) Dr. Masci went on to testify that Mr. Gilmore's carpal tunnel surgery was successful in relieving pain in his hands, although it still left him with cervical issues. (RP 351)

Plaintiff knew that these opinions were outside the scope of Dr. Masci's expertise. (CP 356: "As a chiropractic, Dr. Masci is qualified to opine on all *non-surgical* issues related to the musculoskeletal system") (emphasis added) Nevertheless, plaintiff improperly elicited the testimony in violation of the order in limine, and despite the trial court's warning that Dr. Masci could not testify to non-chiropractic matters. (See RP 33: Dr. Masci is "only a chiropractor, not a medical doctor"; RP 356: "There's a very fine line here," as Dr. Masci is "not a neurologist or a neurosurgeon") The trial court erred in allowing Dr. Masci's testimony on these surgical and neurological issues in violation of the order in limine and over multiple defense objections (RP 323, 345-46, 349, 351, 355-57), further rewarding plaintiff for discovery violations in deliberately withholding Dr. Masci's report. (See Arg. § V.B, *infra*)

b. Dr. Masci's opinions on plaintiff's injuries and credibility were speculative and based on unreliable information.

Having been wrongly allowed to testify to neurological and surgical matters far outside his area of expertise, Dr. Masci also was

allowed to give an “aura of authority” to his opinions of Mr. Gilmore’s credibility. In allowing an expert to testify, the court should consider “whether the issue is of such a nature that an expert could express ‘a reasonable probability rather than mere conjecture or speculation.’” *Davidson v. Municipality of Metropolitan Seattle*, 43 Wn. App. 569, 571, 719 P.2d 569 (1986) (quoting 5A K. Tegland, Wash. Prac. § 291 (1982)), *rev. denied*, 106 Wn.2d 1009 (1986). Speculative expert testimony is particularly prejudicial because of the “danger that the jury may be overly impressed with a witness possessing the aura of an expert.” *Davidson*, 43 Wn. App. at 572.

Dr. Masci’s “diagnoses” were speculative because they were based “primarily” on Mr. Gilmore’s recitation of his medical history (RP 330, 362), which Dr. Masci admitted was unreliable, inaccurate, and incomplete. (RP 333-34) Dr. Masci’s unquestioning reliance on plaintiff’s (“amplified”) recitation of his medical history in coming to his conclusions is reflected in his opinion that plaintiff had required orthopedic reconstructive surgery and bilateral carpal tunnel releases as a result of the collision, based *entirely* on Mr. Gilmore telling him so, when in fact plaintiff failed to mention that he had preexisting carpal tunnel syndrome – information that Dr. Masci did not learn prior to issuing his report. (RP 363-64)

Nevertheless, relying on Dr. Masci's authority as an expert, plaintiff intentionally elicited improper credibility testimony from Dr. Masci. (RP 335-37) Testimony by an expert on witness credibility is inadmissible because it is the sole province of the trier of fact to determine credibility, and the jury may be "overly impressed" with an expert's testimony on the subject. *Saldivar v. Momah*, 145 Wn. App. 365, 398, ¶63, 186 P.3d 1117 (2008), *rev. denied*, 165 Wn.2d 1049 (2009); *State v. Alexander*, 64 Wn. App. 147, 154, 822 P.2d 1250 (1992). Dr. Masci not only speculated that plaintiff had been inaccurate in providing his medical history because he was on pain medications, but that he did not think Mr. Gilmore intended to exaggerate the speed of impact or his symptoms, going so far as to assure the jury it was "common in this type of situation." (RP 336-37)

Causation, and plaintiff's medical history, were the central issues in this trial. Having a medical expert impermissibly testify favorably on Mr. Gilmore's credibility, which the plaintiff repeatedly bolstered through the improper introduction of character evidence before the defense had ever attacked his credibility, severely prejudiced the jury against Jefferson Transit.

3. The trial court erred in excluding evidence of L&I payments based on an erroneous application of the law.

The trial court also relied on erroneous legal principles in denying Jefferson Transit the ability to rebut plaintiff's assertion that he should be awarded general damages for his supposed inability to obtain medical treatment or support himself and his family.

a. The collateral source rule is inapplicable when the plaintiff seeks only general damages.

The trial court erred in applying the collateral source rule because the plaintiff deliberately did not seek special damages, yet relied on his supposed financial difficulties in seeking general damages. None of the underlying policy reasons for the collateral source rule exist in a claim solely for general damages. If, as here, a plaintiff attempts to prove that noneconomic damages were caused by financial hardship resulting from the injury, the jury is entitled to know that the plaintiff was receiving collateral benefits that reduced those financial repercussions when determining just how severe the alleged pain and suffering was. Otherwise, the defendant is being held liable for *more* than the damages it actually caused.

The collateral source rule is “designed to prevent the wrongdoer from benefitting from third-party payments.” *Cox v. Lewiston Grain Growers, Inc.*, 86 Wn. App. 357, 375, 936 P.2d 1191,

rev. denied, 133 Wn.2d 1020 (1997). Under the rule, the trier of fact may not consider payments the plaintiff received from a collateral source for the injury caused by the defendant. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2001); *Stone v. City of Seattle*, 64 Wn.2d 166, 172, 391 P.2d 179 (1964). The defendant is thus “prevented from deducting the independent compensation from the damages that the plaintiff would otherwise collect from that defendant.” *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wn.2d 634, 640, 880 P.2d 29 (1994).

The collateral source rule stems in part from the fact that the third party often retains a lien for the amount of benefits paid against any recovery that the plaintiff obtains from the defendant. *See, e.g., Spangler*, 141 Wn.2d at 440 (Department of Labor and Industries “would be entitled to claim a lien for the amount of benefits it paid to Cox against any recovery Cox obtained from Spangler”); *Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 424, 869 P.2d 14 (1994) (“If the employee or beneficiary prevails in a third party action, the Department is entitled to a large portion of the recovery.”). Absent the collateral source rule, a jury taking into account collateral benefits to reduce an award would allow the defendant to escape paying those damages while leaving the plaintiff undercompensated after

reimbursing the Department. “This is a circumstance the collateral source rule is designed to prevent.” *Spangler*, 141 Wn.2d at 440.

But the plaintiff seeking only general damages is not at risk for being undercompensated by having to repay the third party for the benefits received. *See Tobin v. Dep’t of Labor & Indus.*, 145 Wn. App. 607, 614-15, ¶17, 187 P.3d 780 (2008) (“Because L&I did not, and will not, pay pain and suffering damages, it cannot recover from that portion of [the plaintiff’s] third party recovery compensating him for his pain and suffering.”) *aff’d*, 169 Wn.2d 396, 239 P.3d 544 (2010). Mr. Gilmore received a lump sum disability payout and time loss payments from L&I. (RP 543) He did not receive any payments for his pain and suffering. Therefore, there was no risk that the plaintiff would be left undercompensated.

Here, Mr. Gilmore elicited testimony that the collision left him unable to work and in dire financial straits, resulting in substance abuse, change in personality, strained relationships, and overall “suffering” – stress and frustration all allegedly caused by Jefferson Transit’s negligence. (*See* RP 508, 530, 532-34, 538) This testimony, left un rebutted, left the jury with a false impression of poverty it was urged to “correct” through an award of general damages. (*See* RP 539: “[I]t’s a ploy for sympathy – the implication is that there was no

income coming into the family. And that's what . . . the Plaintiff would like the jury to believe. That's the kind of testimony they elicited and it's not true. The jury's left with a false impression.")

b. Even if the rule applies, the trial court erred by excluding evidence on the grounds that plaintiff could not "open the door" to collateral source evidence.

"Injured parties may . . . waive the protections of the collateral source rule by opening the door to evidence of collateral damages." *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 804, 953 P.2d 800 (1998); *see also Marler v. Dep't of Ret. Sys.*, 100 Wn. App. 494, 505, 997 P.2d 966, *rev. denied*, 141 Wn.2d 1012 (2000). In violation of his own motion in limine, granted by the court, Mr. Gilmore elicited testimony from multiple witnesses regarding his financial status that was highly relevant to the issue of his alleged pain and suffering from not being able to work, pay his bills, or obtain medical treatment. (*See* RP 508, 530, 532, 762-63) Jefferson Transit properly sought only to introduce evidence of the L&I payments for the purpose of rebutting Mr. Gilmore's contention that his lack of income had significantly contributed to his pain and suffering. (RP 517, 536, 539-40, 542-43) Thus, the evidence was relevant and not unfairly prejudicial.

The trial court clearly erred in excluding the evidence *solely* because it believed the door could not be opened to collateral source

evidence. (See RP 543) Because our Supreme Court in *Johnson* clearly held that the door to collateral benefits *can* be opened, the trial court abused its discretion by applying the wrong legal standard.

B. The trial court improperly allowed plaintiff to present expert medical evidence after numerous discovery violations.

The trial court allowed plaintiff to impermissibly benefit from willful and deliberate discovery violations, in direct violation of the spirit and rules of discovery. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993) (sanctions “should insure that the wrongdoer does not profit from the wrong”). Here, Mr. Gilmore failed to supplement his interrogatory responses and did not provide Dr. Masci’s or Dr. Marinkovich’s expert reports until the eve of trial, in violation of CR 26(e). (CP 40, 43, 240; RP 26-29) Even more egregiously, plaintiff did not fully disclose the substance or bases of Dr. Marinkovich’s reports and testimony until trial had already begun. (See RP 433) But despite recognizing these violations, the trial court did nothing, allowing the plaintiff to benefit from his wrongdoing.

A trial court must consider three factors when excluding a witness: (1) whether a lesser sanction would suffice; (2) whether the violation at issue was willful or deliberate; and (3) whether the

violation substantially prejudiced the opponent's ability to prepare. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). Each of these factors compelled exclusion of plaintiff's medical evidence, critical to his causation claims, here.

a. No lesser sanction would have sufficed.

The purpose of discovery is "to enable the opposing party to prepare for trial and to avoid surprise." *Lampard v. Roth*, 38 Wn. App. 198, 201, 684 P.2d 1353 (1984). In order to not undermine a party's ability to prepare for trial, exclusion of expert testimony is an appropriate sanction for failure to seasonably supplement interrogatory responses. *Rupert v. Gunter*, 31 Wn. App. 27, 32, 640 P.2d 36 (1982). Given the extent of Mr. Gilmore's willful discovery violations, which fully came to light only during trial, no other sanction would have been a sufficient remedy for the extreme prejudice suffered by Jefferson Transit. Discovery sanctions should "not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d at 495-96 (emphasis added). Allowing defense counsel a weekend to prepare for Dr. Marinkovich's testimony was insufficient, as it placed the burden on the innocent defendant to prepare to meet expert testimony while in the middle of trial. *Lampard*, 38 Wn. App. at 201 (requiring the innocent party to

conduct their investigation of the case while simultaneously involved in trial is not a satisfactory sanction).

b. The violation was willful and deliberate; plaintiff could provide no explanation for failing to timely produce the reports.

The failure to supplement interrogatories or a violation of a discovery order without reasonable excuse must be deemed willful. *Lampard*, 38 Wn. App. at 202 (because “[n]o reason was given for failure to respond and to supplement the interrogatories,” the court was “forced to conclude that these actions and omissions constitute a willful failure to comply with the discovery rules”); *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 769, 82 P.3d 1223 (2004) (“A violation of the discovery rules is willful if done without reasonable excuse.”).

Prior to trial, the court held plaintiff’s failure to supplement his responses and provide either expert’s report earlier was an “oversight.” (RP 32) But “oversight” is not a reasonable excuse. *Falk v. Keene Corp.*, 53 Wn. App. 238, 251, 767 P.2d 576 (absent reasonable excuse for noncompliance, an inadvertent mistake is a willful violation), *aff’d*, 113 Wn.2d 645, 782 P.2d 974 (1989). The court should have recognized that plaintiff’s withholding of expert reports was willful under the proper standard.

Regardless, it became apparent *to the court* during trial that the discovery violation was not inadvertent. Plaintiff's counsel offered incomplete and evasive answers on the timeline of Dr. Marinkovich's discovery, and could provide *no* explanation for the late disclosures; the trial court explicitly found that plaintiff's counsel had not been "forthcoming" with the court. (RP 433) Despite finding that plaintiff's counsel had engaged in "fishy business" and "deception," the trial court failed to exclude expert medical testimony or otherwise penalize the plaintiff for the violations and lack of candor. (RP 432)

c. Jefferson Transit was substantially prejudiced in preparing to meet the testimony of plaintiff's medical experts.

In addressing the testimony of both witnesses during the motions in limine, the trial court held that there appeared to be a "limited effect that this evidence might have on the Defense's experts." (RP 32) But it was highly prejudicial for defense counsel to prepare to meet expert testimony three weeks before trial on a several-long year case; even more egregious was that Jefferson Transit still did not know all of the claimed bases for Dr. Marinkovich's testimony *until he began testifying at trial*. (See CP 40, 240; RP 26-29, 433) *See also Lampard*, 38 Wn. App. at 201 ("failure to respond promptly to interrogatories concerning experts is

particularly grievous") (emphasis added). Because of plaintiff's willful discovery violations, Jefferson Transit was substantially prejudiced in its ability to prepare for trial and to meet plaintiffs' medical experts on short (and changing) notice, allowing plaintiff to benefit from its abuse of the discovery process.

Causation was *the* issue at trial; the defense's theory was that Mr. Gilmore's condition was preexisting. Whether or not his medical expert had reviewed the 2004 VA disability report and the 2008 video, both of which went to the argument that he was not severely injured in the collision, was, in the words of the trial court, "*a major part of the Defendant's case.*" (RP 433) (emphasis added) Forcing Jefferson Transit to confront unknown expert testimony that went directly towards the ultimate fact in issue in the middle of trial was devastatingly prejudicial.

The trial court's refusal to exclude the experts' surprise testimony not only severely prejudiced Jefferson Transit from putting on its defense, but allowed Mr. Gilmore to impermissibly benefit from his tactical and willful non-disclosures and discovery violations. *Fisons*, 122 Wn.2d at 356 (discovery "sanction[s] should insure that the wrongdoer does not profit from the wrong"). The trial court should have excluded plaintiff's expert medical testimony or

granted a new trial when no lesser sanctions would have sufficed, the violations were deliberate and substantially prejudiced the defendant, and for not otherwise penalizing plaintiff for deliberate tactics of trial by ambush.

C. Plaintiff's prejudicial misconduct prevented Jefferson Transit from having a fair trial.

A new trial should be granted if the “misconduct of the prevailing party materially affects the substantial rights of the losing party.” *Teter v. Deck*, 174 Wn.2d 207, 222, ¶28, 274 P.3d 336 (2012). The denial of a new trial is subject to greater scrutiny than the grant of new trial. *Teter*, 174 Wn.2d at 215, ¶14. Here, plaintiff engaged in the same type of misconduct that our courts have found warrants a new trial.

In *Teter*, the trial court properly granted a new trial based on the cumulative effect of counsel's misconduct in repeatedly “elicit[ing] testimony regarding subjects that the court had ruled inadmissible or irrelevant,” attempting to introduce improper exhibits, and violating orders in limine, even after warnings by the trial court. 174 Wn.2d at 223-25, ¶¶ 32-34. The Supreme Court in *Teter* cited with approval *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), which reversed judgment on a verdict and remanded for a new trial where the losing party had been deprived of a fair trial by opposing counsel's argument to the jury.

The defendant in *Warren* was counter-claiming for damages arising from a rear-end collision; during closing argument, opposing counsel urged the jury to base their verdict on the fact that a police officer at the accident scene had not cited the plaintiff for a traffic violation, thereby indicating that she had not been negligent. 71 Wn.2d at 516-17. Counsel inflamed the jury, improperly encouraging them to base their decision on the officer's determination of no fault, which "could save us an awful lot of time," rather than "look[ing] at five days of interrupted evidence" from trial. *Warren*, 71 Wn.2d at 517. Although the defendant did not object at the time, the Court readily found on review that such flagrant misconduct was so prejudicial that no instruction could have cured it. *Warren*, 71 Wn.2d at 517-18.

The record in this case is replete with far more egregious misconduct. Counsel violated discovery orders and orders in limine; introduced inadmissible evidence, forcing defense counsel to repeatedly object before the jury; and excoriated the defendant and defense counsel. The unprecedented seven-figure general verdict, unmoored by any special damages that could remotely justify such an award, compels reversal of this verdict that was indisputably based on passion and prejudice engendered by plaintiff's misconduct.

1. Plaintiff's repeated violations of orders in limine and discovery violations led to the introduction of inadmissible evidence that severely prejudiced the defense case.

Exposing the jury to inadmissible evidence is misconduct. *Teter*, 174 Wn.2d at 223, ¶30 (“The Rules of Evidence impose a duty on counsel to keep inadmissible evidence from the jury”); *State v. Evans*, 96 Wn.2d 119, 123-24, 634 P.2d 845 (1981) (“purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation”). “Persistently asking knowingly objectionable questions is misconduct;” even when objections are sustained, “the misconduct is prejudicial because it places opposing counsel in the position of having to make constant objections. . . . These repeated objections, even if sustained, leave the jury with the impression that the objecting party is hiding something important. Misconduct that continues after warnings can give rise to a conclusive implication of prejudice.” *Teter*, 174 Wn.2d at 223, ¶30 (citations omitted). Here, in addition to willful discovery violations and violations of orders in limine, plaintiff introduced improper character evidence and made improper comments regarding Jefferson Transit and defense counsel, forcing defense counsel to

repeatedly object and prejudice the jury. The principles expressed in *Teter* compel reversal and a new trial here.

After the trial court granted his motion in limine to admit character evidence of his reputation in the community for truthfulness *only* if it “complies with [ER] 608” (RP 24), Mr. Gilmore’s counsel clearly understood that a witness’ character for truthfulness must be attacked before reputation evidence of the same can be introduced. (CP 18) *See also* ER 608. Plaintiff nonetheless improperly elicited “character” testimony before Mr. Gilmore’s character had been attacked, and regarding traits other than his reputation for truthfulness. (*See* RP 299, 305-06, 461-62, 555-56, 560, 640-41, 644-46) As a result, defense counsel was forced to object many times, in front of the jury. (*See* RP 299, 305, 306, 462) Mr. Gilmore falsely contended that “the Defense has opened the door to Mr. Gilmore’s character and opened the door to him being a liar, a cheat and a fraud,” and although the trial court properly sustained the objection because “[t]he door hasn’t been opened” (RP 305), Mr. Gilmore’s counsel continued to ask objectionable questions even after being warned by the court.

Defense counsel’s subsequent objections were met with rebuke by the court (RP 356, 552, 559) and continued improper

commentary by Mr. Gilmore’s counsel. (See, e.g., RP 551: “When he objects, *which he will do often*; RP 552: “[L]et me ask you another question *to appease Defense Counsel*”) (emphasis added) Plaintiff was improperly allowed to attack defendant’s credibility, while bolstering his own. Jefferson Transit was prevented from rebutting such attacks by evidence of collateral benefits, introducing character evidence to challenge Mr. Gilmore’s own credibility, or even sustaining proper objections. Just as in *Teter*, 174 Wn.2d at 223, ¶30, the jury was likely left with the impression that the defense was “hiding something important.”

2. Plaintiff improperly accused Jefferson Transit and defense counsel of fraud.

A lawyer shall not “state personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant.” RPC 3.4(d). Referring to counsel’s closing argument or presentation of a case as being a “crook,” “bogus,” or involving “sleight of hand” implies “wrongful deception or even dishonesty in the context of a court proceeding.” *State v. Lindsay*, 180 Wn.2d 423, 433, ¶20, 326 P.3d 125 (2014) (quoting *State v. Thorgerson*, 172 Wn.2d 438, 452, ¶30, 258 P.3d 43 (2011)) (internal citations and quotation marks omitted). In *Lindsay*, for instance, referring to the State’s theory of the case as “a crook” impugned defense counsel and

was “plainly an expression of personal opinion as to credibility,” 180 Wn.2d at 438, ¶35-36; misconduct which caused the court to reverse and remand for a new trial. 180 Wn.2d at 443-44, ¶¶47-48.

Here, plaintiff went far beyond labeling Jefferson Transit’s theory of the case as a “crock” or “bogus.” Counsel did not merely imply wrongful deception or dishonesty in the court proceeding, but rather *explicitly* accused the defendant of fraud – telling the jury “there has been a fraud perpetuated in this courtroom during this trial”; “[t]here has been someone in this trial who has continually tried to mislead you”; “the frauds that the Defense has tried to perpetuate”; and “the fraud continues” (RP 978-81). Additionally, Counsel implied impropriety in the way that Jefferson Transit handled the case, telling the jury that the defense had “set the tone” for “what they were willing to do” to “cover up” their liability. (RP 982-83, 985) In doing so, plaintiff crossed the line from mere aggressive advocacy to prejudicial and reversible misconduct.

3. Plaintiff improperly invoked the golden rule and asked the jury to award punitive damages.

Plaintiff made allusions to the impermissible golden rule argument and improperly asked the jury to award punitive damages to “send a message” to Jefferson Transit – inflammatory arguments that

incited the prejudice and passion of the jury and led to its excessive verdict.

“[U]rging the jurors to place themselves in the position of one of the parties, . . . or to grant a party the recovery they would wish themselves if they were in the same position constitutes an improper ‘golden rule’ argument.” *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139-40, 750 P.2d 1257, 756 P.2d 142 (1988) (quoted source omitted). Plaintiff’s counsel invoked the golden rule by telling the jury to determine damages by analogizing his condition to a job advertisement, repeatedly asking the jurors what it would take for *them*, personally, to respond to this ad of all of his alleged injuries - in other words, what would it be worth to them, *standing in Mr. Gilmore’s shoes*, to bear the burden of his claimed damages? (RP 1003-04) By asking the jury “to decide the case based upon what they would then want under the circumstances,” a tactic explicitly forbidden by *Adkins*, Mr. Gilmore’s counsel impermissibly alluded to the golden rule.

Plaintiff’s counsel also charged the jury with awarding punitive damages, asking them to “send a message” to Jefferson Transit as a governmental entity. Although Washington law prohibits punitive damages, *Dailey v. North Coast Life Ins. Co.*, 129 Wn.2d 572, 575, 919 P.2d 589 (1996), and a governmental entity is only liable in tort to the

same extent as a “private person,” RCW 4.96.010(1), this jury was improperly encouraged to (and apparently did) award general damages to punish Jefferson Transit rather than compensate the plaintiff.

Jury verdicts in tort cases must be compensatory of a pecuniary loss. *Walters v. Spokane Intern. Ry. Co.*, 58 Wash. 293, 301-02, 108 P. 593 (1910). The purpose of punitive damages, on the other hand, “is to punish the defendant and deter similar conduct.” *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, ¶18, 272 P.3d 827, cert. denied, 133 S. Ct. 199 (2012); see also *Hickman v. Desimone*, 188 Wash. 499, 501-02, 62 P.2d 1338 (1936) (reversing verdict in tort action and remanding for new trial because admission of improper evidence of malice may have caused jury to award damages as punishment); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 47, 25 P. 1072 (1891) (reversing tort verdict and remanding for new trial because jury had been told it could award damages to deter defendant “from being wanton and reckless of the rights of others.”). Counsel here, however, repeatedly asked the jury to “deter” Jefferson Transit and “hold the government accountable”:

“[I]f you don’t hold the government accountable, . . . they will just keep doing what they’re doing [T]hey will feel like they can run into anybody in this community and just walk away.”

(RP 1032) Counsel persistently called on the jurors to help Mr. Gilmore “fight the government,” because he “can’t do it alone.” (RP 989, 991, 996, 1032) Using extraordinarily inflammatory language, plaintiff’s counsel charged the jury with awarding damages because “the government murders innocent people,” “gets away with it,” and “tries to . . . blame it on the victim.” (RP 1031)

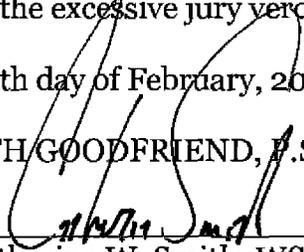
Plaintiff thus wrongly urged the jury to punish “the government” with its damage award. The strategy worked, leading a jury inflamed with the notion that the government always wins at the expense of the little guy to award the largest tort verdict in the County’s history – not because it was just, but because the jury was overcome with emotion and passion.

VI. CONCLUSION

A new trial is the only proper remedy for plaintiff’s repeated misconduct and the trial court’s cumulative errors. This Court should reverse and remand for a new trial or, alternatively, grant remittitur to reduce the excessive jury verdict.

Dated this 26th day of February, 2016.

SMITH/GOODFRIEND, P.S.

By: 
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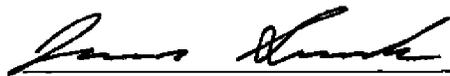
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The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 26, 2016, I arranged for service of the foregoing Brief of Appellant, to the court and to the parties to this action as follows:

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Jenna L. Sanders

SMITH GOODFRIEND PS

February 26, 2016 - 11:08 AM

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