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Supreme Court No. 94559-4

Court of Appeals No. 48018-2-II

SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Plaintiff-Petitioner

vs.

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

Defendant-Respondent

Appeal from the Superior Court of Jefferson County

Case No. 10-2-00390-7

COA No. 48018-2-II

**AMICUS CURIAE BRIEF OF WASHINGTON STATE LABOR
COUNCIL**

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to RAP 10.6 amicus curiae describes its interest in this case as follows: The Washington State Labor Council (“WSLC”) is a non-profit organization dedicated to protecting and strengthening the rights and conditions of working people and their families. WSLC represents and provides services for hundreds of local unions and trade councils throughout Washington State. Membership is voluntary and open to all union locals and councils that are affiliated with the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”).

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

Part of WSLC’s core mission is to improve the working conditions and living standards of Washington’s working families. Often, as was the case here, it takes a significant amount of time for a worker who is injured on the job to receive payments from L&I. During that time, a worker can

incur a significant amount of debt and financial stress. Also, L&I time loss payments are always less than the amount of the worker's lost wages.

Thus, L&I payments do not eliminate financial stress.

WSLC and its constituent members have a direct interest in protecting injured workers from having L&I collateral source evidence admitted in L&I third party cases, and in upholding a trial court's discretion in excluding evidence of such collateral source benefits.

II. STATEMENT OF THE CASE

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

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

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

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

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

During Alex Gilmore's testimony, Plaintiff's counsel asked him to tell the jury what his father was like in the first month or six weeks after the collision. As part of his response, Alex Gilmore answered that his father was unable to work and it was hard to pay the bills. RP 508. A few minutes later, Plaintiff's counsel asked him to tell the jury what sort of changes he saw in his father after the collision. RP 531. Alex Gilmore testified that his father started drinking, and surmised that the reason for the drinking was that Mr. Gilmore "didn't feel like he was able to provide for his family the way he should and wasn't able to work." RP 532. As a comparison, Alex Gilmore testified that his father worked 80 hours a week prior to the accident. RP 532.

Mr. Gilmore testified that he could not afford the surgery that was recommended in April 2009 because he had just started his business and if he shut it down right after it started he did not think he could support his family and did not think the business would recover. RP 762. Plaintiff's

counsel asked Mr. Gilmore if there was something in 2014 that allowed him to take time off to get the surgery done and Mr. Gilmore said yes. RP 764.

The defense argued this testimony opened the door to admitting evidence of L&I benefits. RP 536. The trial court denied this request. RP 544. After careful consideration, the trial court determined that Alex Gilmore's testimony about how the family felt about Mr. Gilmore's loss of his ability to work as he had before the crash, did not open the door to evidence of collateral source income. RP 517. Neither did testimony from Gilmore's son about their financial status after the accident or how that affected the plaintiff. RP 538-44.

III. ARGUMENT

A. **The admissibility of evidence, including whether a party opened the door to collateral source evidence, is within the sound discretion of the trial court.**

Admissibility of evidence is within the trial court's sound discretion. *State v. Hall*, 112 Wn. App. 164, 169, 48 P.3d 350, (Div. 2 2002). However, RCW 51.24.100 states: "The fact that the injured worker or beneficiary is entitled to compensation under this title shall not be pleaded or admissible in evidence in any third party action under this chapter." The plain language of the statute does not allow any exceptions. Therefore, it is questionable whether the "opening the door" doctrine even applies to the

collateral source rule for L&I benefits. Both parties have cited *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998), which did not actually rule on the question of whether the door was opened, but did suggest that the door could be opened. The *Johnson* court also left the question of whether evidence elicited by a Plaintiff's witness opens the door to evidence of receipt of L&I benefits to the discretion of the trial court. 134 Wn.2d at 804.

An abuse of discretion occurs only when no reasonable person would take the view adopted by the trial court. *Id.* at 169-70, citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). As argued below, the trial court did not abuse its discretion, particularly where, as here, the trial court invited defense trial counsel to provide authority that the L&I collateral source door could be opened, and the defense did not do so. RP 541, 543.

B. The Trial Court Correctly Excluded Evidence of L&I Benefits Because the "Opening The Door" Doctrine is Not as Broad as Jefferson Transit Suggests.

"The collateral source rule is an evidentiary principle that enables an injured party to recover compensatory damages from a tortfeasor without regard to payments the injured party received from a source independent of a tortfeasor." *Mazon v. Krafchick*, 158 Wn.2d 440, 452, 144 P.3d 1168,

(2006) citing *Johnson*, 134 Wn.2d at 798 (1998). The rule comes from tort principles as a means of ensuring that a fact finder will not reduce a defendant's responsibility because the claimant received money from other sources. *Id.* The collateral source rule also has an independent basis in RCW 51.24.100 for L&I benefit payments.

"Opening the door" is a doctrine that sometimes applies when otherwise inadmissible evidence may become admissible due to the other party's presentation of evidence. *State v. Olsen*, 187 Wn. App. 149, 158, 348 P.3d 816 (2015) citing *State v. Jones*, 144 Wn. App. 284, 298, 183 P.3d 307 (2008). The effects of opening the door can be triggered in two ways:

"(1) a party who introduces evidence of questionable admissibility may open the door to rebuttal with evidence that would otherwise be inadmissible, and (2) a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party's evidence."

Id. (quoting 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 103.14 at 66-67 (5th ed. 2007)).

State v. Olsen is illustrative. In *Olsen*, the trial court granted the defense's motion in limine specifically excluding past assault evidence. 187 Wn. App. at 158. That order was supported by the trial court's own well-reasoned discretionary determination. During the testimony of one of

the witnesses, Ms. Wortham, defense counsel asked her what happened on Mr. Olsen's birthday in December. Ms. Wortham testified that she kicked Mr. Olsen out that day, and then offered information about a physical fight that later occurred in the front yard. *Id.* The State argued this opened the door to additional questioning about the front yard fight between Mr. Olsen and Ms. Wortham. *Id.*

The Court of Appeals disagreed with the State and found this testimony did not open the door to such evidence, because (a) defense counsel asked about the on-and-off nature of the relationship, but did not ask about any physical altercations in the relationship; (b) defense counsel did not invite Ms. Wortham's testimony regarding a fight in the front yard; and (c) defense counsel did not probe into this passing reference. *Olsen*, 187 Wn. App. at 158. A mere passing reference in response to a question does not "open the door" to additional questions about prior bad acts on the part of the defendant. *Id.*; *See, State v. Stockton*, 91 Wn. App. 35, 40, 955 P.2d 805 (1998).

Similarly, during Alex Gilmore's testimony, Plaintiff's counsel asked him to tell the jury what his father was like in the first month or six weeks after the collision. As part of his response, Alex Gilmore answered that his father was unable to work and it was hard to pay the bills. RP 508. A few minutes later, Plaintiff's counsel asked him to tell the jury what sort

of changes he saw in his father after the collision. RP 531. Alex Gilmore testified that his father started drinking, and opined that the reason for the drinking was that Mr. Gilmore “didn’t feel like he was able to provide for his family the way he should and wasn’t able to work.” RP 532. As a comparison, Alex Gilmore testified that his father worked 80 hours a week prior to the accident. RP 532.

Mr. Michael Gilmore testified that he could not get the surgery that was recommended in April 2009 because he had just started his business and if he shut it down right after it started he did not think he could support his family and did not think the business would recover. RP 762. This contributed to his mental pain and suffering. Plaintiff’s counsel asked Mr. Gilmore if there was something in 2014 that allowed him to take time off to get the surgery done and Mr. Gilmore said yes. RP 764. In the context of this entire line of questioning, Mr. Gilmore’s financial stress was related to his worrying about keeping his new business afloat. RP 763-64. In any event, this time period that both Alex Gilmore and Michael Gilmore testified about was several months before Mr. Gilmore received his PPD from L&I. *See*, RP 518.

Just like in *Olsen*, Plaintiff’s counsel (a) asked about Mr. Gilmore’s life after the crash, but did not ask about his specific financial situation; (b) Plaintiff’s counsel did not invite Alex Gilmore’s testimony

regarding Mr. Gilmore's financial status; and (c) Plaintiff's counsel did not probe into this passing reference. No testimony was elicited about Mr. Gilmore's sources of income, reduction in income, or whether Mr. Gilmore had any income at all. RP 517-18, 537.

This questioning and resulting testimony pertained to Mr. Gilmore's loss of enjoyment of life. He was no longer able to work the hours he worked before, which made him feel that he was not a good provider, and so he turned to drinking. The questioning did not elicit the amount of money Mr. Gilmore was bringing in and whether it was enough to cover all the bills. RP 508, 531-32.

If it were the law that injured workers could open the door to L&I benefits simply by eliciting testimony in support of their damages for pain and suffering and lost enjoyment of life, it could preclude injured workers from seeking damages which they are entitled to by law. Or, it would invite the factfinder to conclude that the injured worker already received enough money and that he is not disabled, or worse, that he is exaggerating or falsifying his pain and suffering. The exception would swallow the collateral source rule.

The trial court applied the correct legal standard in this case. To find an abuse of discretion here would require radical expansion of the "opening the door" doctrine. Raising the subject of loss of enjoyment of

life does not open the door to rebuttal with evidence of medical payments, time loss payments, or a PPD that was paid months or years after the worker's pain and suffering began. The medical and time loss payments that Jefferson Transit sought to introduce do not "explain, clarify, or contradict" Mr. Gilmore's emotional suffering. He was unable to work as much as he had and, as a result, his life was less enjoyable. No amount of time loss payments changed that fact.

In addition, Mr. Gilmore felt he could not shut down his newly opened business to undergo surgery in 2009 because he did not think the business would recover. RP 762. Again, no amount of time loss payment or medical payments would change the fact that Mr. Gilmore felt inadequate and enjoyed life less. Mr. Gilmore's concern about his business is apparent from his later testimony that the reason he was able to get the surgery in 2014 was because something happened to allow him to take time off. RP 764. None of this testimony rose to the level of opening the door. *Olsen*, 187 Wn. App. at 158 citing *Jones*, 144 Wn. App. at 298. (quoting 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* § 103.14 at 66-67 (5th ed. 2007)). Certainly it was not an abuse of discretion for the trial court to conclude that the door had not been opened.

The danger in expanding the opening the door doctrine, is that it radically erodes the collateral source rule, which would then leave L&I to pay for the wrongful acts of a third party. This is the evil which the collateral source rule was designed to combat: tortfeasors benefiting from collateral sources and thereby avoiding responsibility for the harm they cause. In the case of an L&I third party claim, this also would increase L&I rates, and could deter injured workers from bringing a suit against the real party at fault.

C. In Third Party Negligence Claims that Involve L&I payments, if The “Opening the Door” Doctrine Were Ever Applied It Should Be Only In Exceptional Circumstances, Because it Increases the Cost of Litigation, and Creates an Unworkable Situation.

The very essence of the collateral source rule is to protect the claimant from an inference by the factfinder that the factfinder should nullify the defendant's responsibility. *Johnson*, 134 Wn.2d at 804. “If evidence of collateral benefits is admitted, the message received by the factfinder is that the claimant already has enough money and, therefore, is not disabled.” *Id.* As explained below, the rule supported by the defense in this case would inevitably create unworkable situations. If evidence of L&I collateral benefits were admitted, the worker would have to offer evidence to explain the different types of payments he or she received, and the difference in his or her financial status before the injury, after the

injury but before the benefits, while receiving the benefits, and after the benefits ended. This would necessitate a vast detour into the injured worker's budget and finances. The jury also would have to be instructed about the complex formula by which part of the plaintiff's recovery is paid to L&I, lest they mistakenly believe that the injured worker is seeking some type of double recovery which the worker would not in fact receive.

This is an unworkable situation for many reasons. First, it defeats the purpose of the collateral source rule because it would allow defendants to argue or the jurors to find that the defendant is not liable for all the worker's damages and pain and suffering, because he or she already was compensated. *See Mazon*, 158 Wn.2d at 452 citing *Johnson*, 134 Wn.2d at 798. Second, it needlessly increases the complexity and cost of litigation.

When a worker receives time loss compensation, it can replace some, but never all, the wages a worker was earning. "Time loss' is workmen's compensation parlance for temporary total disability ... compensation, a wage replacement benefit paid under RCW 51.32.090." *Matthews v. The Dep't. of Labor & Indus.*, 171 Wn. App. 477, 494, 288 P.3d 630, (2012) citing *Jacobsen v. Dep't of Labor & Indus.*, 127 Wn. App. 384, 386 n.1, 110 P.3d 253 (2005). The monthly time-loss compensation rate is calculated by taking the worker's gross monthly wage at the time of the injury and multiplying it by a percentage whose exact size is determined

by the number of the worker's dependents. Wash. State Dep't of Labor & Indus., Wages and Temporary Total Disability Self-Insurance Claim Adjudication Guidelines at Pg. 40 available at <http://www.lni.wa.gov/ClaimsIns/Files/SelfIns/ClaimMgt/WageTempTotDis.pdf>. The gross monthly wage has many variables and there is an entire manual dedicated to calculating the amount. *See id.* By definition, time loss never replaces all the wages, so potentially every worker is short on money and may experience financial stress if he or she is injured on the job.

Permanent partial disability (PPD) is calculated according to RCW 51.32.080. A PPD must be rated by a qualified doctor. Wash. State Dep't of Labor & Indus. Information on Permanent Partial Disability is available at <http://www.lni.wa.gov/ClaimsIns/Claims/Benefits/Ppd/default.asp>.

When a worker is successful in collecting from a negligent third party, the money collected is disbursed according to a complex formula:

The attorney is paid reasonable fees and costs. The injured worker receives 25 percent of the net recovery. L&I or [the worker's] self-insured employer is then reimbursed for benefits paid, less its proportionate share of fees and costs. Any remaining balance is paid to the worker. The amount of this remaining balance, less L&I's or self-insurer's proportionate share of fees and costs, is subject to offset against any future benefit entitlement under the claim.

Wash. State Dep't of Labor & Indus., Questions About Third Party Claims?, How is third party recovery distributed? Citing RCW 51.24.060

available at
<http://lni.wa.gov/ClaimsIns/Claims/File/3rdParty/Questions/default.asp>

This calculation is even further complicated because in some cases it will not be clear to which dollar amount the subrogation formula should be applied. *See, e.g., Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 423-24, 869 P.2d 14 (1994) (L&I cannot claim against lost spousal consortium recovery); RCW 51.24.030(5) (L&I has an interest in all damages recovered from third parties except spousal consortium).

If evidence of receipt of L&I benefits were admitted in personal injury cases, then evidence and testimony about the exact calculation of time-loss compensation and PPD would also have to be admitted for the jury to fully understand a Plaintiff's financial situation. The Plaintiff would have to procure an expert to testify about how the payments are calculated, and how to determine the worker's obligation to reimburse L&I out of any recovery. This would only increase the cost of litigation and would ultimately decrease the worker's and the Department's portion of the recovery.

For example, in this case, as a matter of law, Jefferson Transit is liable for all of Mr. Gilmore's pain and suffering without regard to any third party compensation. If Jefferson Transit were permitted to put in evidence of Mr. Gilmore's time loss payments, Mr. Gilmore would have

had to explain that his time loss payments did not put him in the same position he was in prior to the collision. It would be necessary for him to submit expert testimony on how L&I calculated the benefits. It would further be necessary to put his family's entire budget into evidence to compare how much money was allocated for each category, such as groceries, laundry, bills, or rent, both before and after the collision. (Plaintiff's counsel pointed out this problem for the trial court to contemplate before making its decision. RP 541-43, 544, 634-35.) The jury would have had to distinguish Mr. Gilmore's financial stress during the months he did not receive time loss payments and the months in which he did. This line of evidence would permit the jury to make an erroneous inference that Mr. Gilmore's pain and suffering and loss of enjoyment of life is only compensable for the months in which he received no time-loss payments.

Alternatively, the jury might improperly conclude that L&I already had somehow determined when Mr. Gilmore was or was not disabled, and might treat that determination as binding upon them. This is exactly the problem that the collateral source rule is designed to protect against – that the defendant should be found not liable for pain and suffering it caused because plaintiff received L&I benefits and therefore was “adequately compensated”. *Johnson*, 134 Wn.2d at 798.

Because the formula used to calculate benefits paid and benefits that must be reimbursed is so complex, and given all the problems this evidence could create, the trial court in this case was well within its discretion to exclude the L&I evidence. Because RCW 51.24.100 does not allow for any exceptions, because of the certainty of complicating the trial and the likelihood of distracting and confusing the jurors, and because of the danger of allowing or even encouraging impermissible inferences, the “opening the door” doctrine should not apply to the L&I collateral source rule. If it is to be applied, it should be applied only in exceptional circumstances. Cases involving L&I benefits will rarely if ever fall into that category.

D. If Evidence of L&I Benefits are Admitted, the Court Should Give an Instruction Not to Consider it for an Improper Purpose

Here, the trial court correctly excluded the evidence of L&I benefits. However, it is clear that a bright line rule would be helpful in guiding trial courts on when -- if ever -- such evidence can be admissible. Such a bright line rule should allow room for the trial court’s discretion because this is an evidentiary determination, and the trial court is in the best position to determine what is relevant to the issues being litigated. A rule that allows a defendant to introduce evidence of collateral source benefits whenever a plaintiff claims noneconomic damages would infringe upon a trial court’s

discretion. It may also harm the injured worker because a PPD award may be a form of general damages, so it is possible that even if, as here, the worker seeks no medical bills or wage loss from the defendant at trial, the Department still might have some claim against the recovery.

Instead, a more workable rule would be that the “opening the door” doctrine may apply to L&I benefits only under exceptional circumstances. If evidence of L&I benefits are admitted under the “opening the door” doctrine, then instead of allowing open-ended cross examination that would only serve to mislead or confuse the jurors, the information should be provided via a carefully crafted jury instruction. In this way, only the precise information needed to correct a perceived problem would be provided, in a manner carefully controlled by the trial court, acting within its discretion.

The Court of Appeals approved this type of approach in *Terrell v. Hamilton*, 190 Wn. App. 489, 358 P.3d 453 (2015). This was not an L&I case, but one where the trial court determined that evidence of insurance needed to be admitted. In *Terrell*, the plaintiff and the defendant were domestic partners, and the “specter of insurance” was present from the beginning of the trial. *Id.* at 492-93. During jury selection, jurors expressed confusion about why someone would sue their spouse or partner. *Id.* at 493. The trial court admitted a statement Terrell had made to

Hamilton's insurance agent, so the jury was aware that insurance was involved. *Id.* at 502. Therefore, the trial court gave the jury the following in-trial oral instruction:

As you heard in jury selection, Ms. Paula Terrell and Mr. Gordon Hamilton, the plaintiff and the defendant, are domestic partners. There was some discussion about litigating against your own marital community. Because your sole focus will be the factual issues that this court gives to you for consideration, I wish to advise you at this time that Mr. Hamilton is insured and the only way Ms. Terrell can access insurance is through this case. The fact that there is insurance shall not be considered in any way in the way that you view the facts and shall not be considered in any award of damages if any are awarded.

Id. at 495-96.

If extraordinary circumstances force a trial court to “open the L&I door”, it could be done with this type of case-specific instruction, giving the jurors only the information they need to address the perceived problem, and avoiding prejudice to the injured worker by allowing the worker to emphasize the insignificance of the L&I benefits in closing argument.

E. CONCLUSION

The trial court did not abuse its discretion in excluding evidence of L&I benefits under the collateral source rule. Therefore, this Court should

reverse the Court of Appeals and affirm the trial court's decision to exclude evidence of L&I benefits received by Mr. Gilmore.

Expanding the Opening the Door doctrine would create an unworkable solution for future L&I third party negligence claims. Instead, in the rare event that evidence of L&I benefits must be admitted under the "opening the door" doctrine, it should be done via a carefully drafted instruction.

Respectfully submitted this 27th day of November, 2017.



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