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No. 94559-4

IN THE 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.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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On Behalf of
Washington State Association
for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking redress under the civil justice system, including an interest in the proper application of the abuse of discretion standard on review, and the exclusion of evidence of the receipt of workers' compensation benefits.

II. INTRODUCTION AND STATEMENT OF THE CASE

Jefferson Transit Authority (Jefferson Transit) appealed a jury verdict for Michael Gilmore (Gilmore) in a motor vehicle collision case. The Court of Appeals reversed, finding that the trial court abused its discretion by excluding the testimony of Jefferson Transit's biomechanical engineering expert, by excluding evidence of Gilmore's receipt of benefits from the Department of Labor and Industries (L&I), and by denying Jefferson Transit's motion for a new trial or remittitur on the basis of attorney misconduct. The facts are drawn from the Court of Appeals' unpublished opinion and the briefing of the parties. *See Gilmore v. Jefferson County Public Transportation Benefit Area, dba Jefferson Transit Authority, a municipal corporation, noted at 198 Wn. App. 1056, 2017 WL 1477830 (2017), review granted, 189 Wn.2d 1009 (2017); Jefferson Transit App. Br. at 6-7; Gilmore Resp. Br. at 16-18; Gilmore Pet. for Rev. at 1-12; Jefferson*

Transit Ans. to Pet. for Rev. at 2-3; Gilmore Supp. Br. at 3-6, 8-12; Jefferson Transit Supp. Br. at 1-10.

Gilmore was driving his employer's van when a Jefferson Transit bus collided with the rear of the van. As a result of injuries from the accident, Gilmore received L&I benefits. Gilmore sued Jefferson Transit pursuant to RCW 51.24.030, seeking only general damages. Jefferson Transit admitted liability but disputed causation and the extent of the alleged injuries.

Gilmore moved to exclude the testimony of biomechanical engineer Allan Tencer, Ph.D. *See* Jefferson Transit App. Br. at 7, CP 47-56. Jefferson Transit filed a declaration from Tencer which stated his education and experience, described his methodology, and said that the essence of his testimony was a description of the forces experienced by the plaintiff in the crash and a comparison of those forces to forces of common experience. *See* Jefferson Transit App. Br. at 6-7, CP 365-67. Gilmore's motion listed claimed deficiencies in Tencer's testing, including: Tencer acknowledges that an important difference between his crash tests and real-world conditions is that the test subjects knew they were participating in a crash test; Tencer uses vehicle damage photos to estimate the speed of vehicles involved in an accident; and Tencer uses a formula for translating peak acceleration of the vehicle to peak acceleration of the occupant's head without regard to any specific factors related to the vehicle, the seat, the occupant or the collision. *See* Jefferson Transit App. Br. at 7, CP 52. Gilmore argued that Tencer's opinion was unreliable and based upon speculation and

conjecture because Tencer guessed at the speed of the bus based upon photographs alone, and guessed at Gilmore's height and weight and the extent of the damage done to the vehicles. *See* Gilmore Pet. for Rev. at 8.

Gilmore sought to exclude Tencer's testimony as irrelevant under ER 402, confusing and misleading to the jury under ER 403, and not helpful to the jury under ER 702. The trial court granted Gilmore's motion, stating:

As far as what I can tell from what I read, and the way I understand it ... he makes a number of assumptions, some of which are based on facts that are not going to be in evidence. And it does -- and he does create, ... to me, ... it's intended to create an inference with some aura of authority that I don't think is reasonable or justified. And I think that -- I think it will be confusing to the jury. I think that it will be misleading to the jury.

And... so I'm going to grant the motion to exclude Doctor Tencer, based on ... what I read.

Gilmore Pet. for Rev., App. E, RP 38-39.

Gilmore also moved to exclude evidence of his receipt of L&I benefits as a collateral source. The trial court granted Gilmore's motion on reconsideration, but ruled the evidence could come in if "the door was opened" at trial. *See Gilmore*, 2017 WL 1477830, at *2.

During trial, Gilmore called his two sons to testify regarding the effect of the accident on his daily life. His sons testified that Gilmore worked multiple jobs to support the family, and that being unable to work effectively after the accident led to his depression and alcohol addiction. Jefferson Transit argued that Gilmore had opened the door regarding the relevancy of his receipt of L&I benefits, but the trial court did not change its previous

ruling that the receipt of benefits was inadmissible as a collateral source. *See Gilmore* at *6.

In closing argument, Gilmore's attorney asked the jury to help Gilmore "fight the government" and "hold the government accountable," and accused Jefferson Transit of fraud. *See id.* Jefferson Transit's attorney made no objection during Gilmore's closing argument. *See id.* at *7.

The jury returned a verdict for Gilmore for \$1.2 million for past and future noneconomic damages. *See id.*

Jefferson Transit moved for a new trial or remittitur on several bases, including that Gilmore's receipt of L&I benefits should have been admitted because Gilmore opened the door to such evidence, and that Gilmore's attorney improperly inflamed the jury by claiming Jefferson Transit had called him "a liar, a cheat, and a fraud" and urging that the jury had to "fight the government." The trial court denied Jefferson Transit's motion. *See id.*

Jefferson Transit appealed. The Court of Appeals reversed, holding the trial court abused its discretion by excluding Tencer's testimony. *See id.* at *9. The appellate court held that the trial court erred by excluding the testimony on the basis that Tencer made assumptions "which [were] based on facts that [were] not going to be in evidence." *Id.* at *8. The court stated that under ER 703, experts are permitted to rely on facts not in evidence if the information is of the type reasonably relied on by experts in the particular field in forming opinions, and the data Tencer intended to rely upon was permitted under ER 703. *See id.* at *8-9. The Court of Appeals also noted

that the trial court found that Tencer's testimony would be confusing or misleading to the jury, but held that the proposed testimony was neither cumulative nor speculative and would assist the jury given the contradictory evidence regarding whether the collision was significant enough to cause injury. *See id.* at *9.

The Court of Appeals stated that given its conclusion regarding the trial court's error excluding Tencer's testimony, it did not need to address the other issues. *See id.* However, the Court proceeded to address other issues that seemed likely to recur at trial. *See id.* at *9-12. The Court held that while the receipt of L&I benefits was protected by the collateral source rule, the trial court erred by excluding the evidence after Gilmore's witnesses opened the door by testifying about Gilmore's financial stress due to the accident. *See id.* at *10. "To the extent that the trial court ruled that such evidence could never come in, we conclude that excluding the L&I payments after Gilmore opened the door to its admission was error." *Id.* at *11.

The Court of Appeals also found the trial court abused its discretion in refusing to grant a new trial based upon party misconduct, consisting primarily of plaintiff's attorney's statements in closing argument. *See id.* at *11-12. The court held that Gilmore's attorney's closing argument calling upon the jury to help Gilmore "fight the government" and "hold the government accountable," and accusing Jefferson Transit of fraud, was inflammatory and improper misconduct that prejudiced Jefferson Transit's case. *See id.* at *12.

This Court granted Gilmore's Petition for Review.

III. ISSUES PRESENTED

1. In an admitted liability low impact vehicle collision case, did the trial court abuse its discretion by excluding the testimony of Dr. Allan Tencer, which the trial court observed relied upon "a number of assumptions, some of which [were] based on facts that [were] not going to be in evidence," and was "intended to create an inference with some aura of authority" that was unreasonable and unjustified, and would confuse and mislead the jury?
2. Did the trial court abuse its discretion by excluding evidence of Gilmore's receipt of benefits from the Department of Labor & Industries as a collateral source, when lay witnesses called by Gilmore testified at trial that Gilmore worked multiple jobs to support the family and that Gilmore's inability to work after the accident led to depression and alcohol addiction?
3. Did the trial court abuse its discretion by denying Jefferson Transit's motion for a new trial based upon the alleged misconduct of Gilmore's attorney in closing argument, in which she argued that Jefferson Transit was attempting to "cover up" liability, and that Jefferson Transit accused Gilmore of fraud, and called upon the jury to "fight the government," and "hold the government accountable?"

IV. SUMMARY OF ARGUMENT

The trial court's exclusion of Tencer's testimony is subject to the abuse of discretion standard. The trial judge was presented with evidence and argument that Tencer's proposed testimony was based upon speculation regarding the specific factors and measurements concerning Gilmore and the vehicles involved in the accident, and therefore was unreliable, prejudicial, confusing and misleading. The trial court's exclusion of Tencer's testimony was an appropriate exercise of discretion under ER 403.

The trial court's exclusion of evidence of workers' compensation benefits was appropriate and required under RCW 51.24.100 and the strict

exclusion rule. In the event that RCW 51.24.100 and the strict exclusion rule do not absolutely bar evidence of workers' compensation benefits, then that evidence was properly excluded as an exercise of the trial court's discretion under ER 403.

Denial of Jefferson Transit's motion for a new trial or remittitur based upon alleged misconduct of Gilmore's attorney in closing argument is also subject to the abuse of discretion standard. The trial judge is in the best position to assess alleged attorney misconduct during trial, and the reviewing court should not substitute its judgment for the trial court regarding the occurrence or effect of claimed misconduct. Here, the trial court correctly exercised its discretion in finding that no misconduct sufficient to warrant a new trial occurred.

V. ARGUMENT

A. **A Reviewing Court May Not Reverse A Trial Court For An Abuse Of Discretion Unless The Trial Court Applies The Wrong Legal Standard Or Takes A Position That No Reasonable Person Would Take**

The issues concerning the admissibility of Tencer's testimony and alleged attorney misconduct are subject to the abuse of discretion standard of review. The admissibility L&I benefits is subject to either a strict exclusion standard or, alternatively, the abuse of discretion standard of review.

A court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds.... A discretionary decision is manifestly unreasonable or based on untenable grounds if it results from applying the wrong legal standard or is unsupported by the record.... A reviewing court

may not find abuse of discretion simply because it would have decided the case differently – it must be convinced that *no reasonable person* would take the view adopted by the trial court.

State v. Salgado-Mendoza, __ Wn.2d __, 403 P.3d 45, 49 (2017) (italics in original; internal quotations and citations omitted); *see also Teter v Deck*, 174 Wn.2d 207, 222, 274 P.3d 336 (2012).

B. The Trial Court Properly Excluded Tencer’s Proposed Testimony Under ER 403 Because It Was Unreliable, Prejudicial, Confusing And Misleading

In *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014), the Supreme Court considered whether the trial court properly admitted Tencer’s biomechanical testimony in an automobile collision case. The trial court denied plaintiff’s motion to exclude the testimony, Tencer testified at trial and the plaintiff appealed from the jury’s verdict that the defendant’s negligence did not proximately cause the plaintiff’s claimed injuries. The Supreme Court affirmed the court of appeals’ holding that the trial court did not abuse its discretion in admitting Tencer’s testimony. 181 Wn.2d at 357.

The Court stated that it is not remarkable that trial courts have sometimes allowed Tencer’s testimony, and sometimes have excluded Tencer’s testimony, citing *Ma’ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002) (Tencer’s testimony allowed), *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) (Tencer’s testimony not allowed), and *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014) (Tencer’s testimony not allowed). *See Johnston-*

Forbes, 181 Wn.2d at 353. The Court reasoned that the broad abuse of discretion standard means trial courts can reasonably reach different conclusions about the admissibility of Tencer's testimony in different cases, which appears consistent with the approach to expert testimony in ER 702-705. *See id.* at 353-54. "[T]rial courts are given broad discretion to determine the circumstances under which expert testimony will be allowed." *Id.* at 354 (brackets added). "[T]rial courts are afforded wide discretion, and trial court expert opinion decisions will not be disturbed on appeal absent an abuse of such discretion." *Id.* at 355 (brackets added; citations omitted).

One of Johnston-Forbes' bases for seeking the exclusion of Tencer's opinion was that he lacked the necessary foundation to testify about the forces involved in the collision. The Supreme Court held that whether Tencer had the necessary foundation was a matter for trial court discretion:

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. It is the proper function of the trial court to scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue.

Id. at 357.

The concurring opinion cautioned that the Court's opinion "is not an endorsement of Tencer or the use of biomedical engineers in cases concerning soft tissue injuries caused by car accidents," and does not overrule *Stedman* and *Berryman*, which held that it was within the trial court's discretion to exclude Tencer's testimony. *See id.* at 358 (Yu, J.,

concurring). Like the majority, the concurring opinion emphasized the trial court's discretion in ruling upon the admissibility of Tencer's testimony:

The case-by-case nature of this inquiry stands for the proposition that an expert permitted to testify in a particular case does not bind future courts to automatically admit the same expert, even in a relatively analogous case. Rather, in the exercise of discretion, the trial court must perform a new fact-specific inquiry concerning the admissibility of an expert in every given case. Before allowing an expert to render an opinion, trial courts must scrutinize the expert's underlying information and determine whether it is sufficient to form an opinion on the relevant issue to ensure that the opinion is not mere speculation, conjecture, or misleading to the trier of fact.

Id. (citation omitted).

In *Gilmore*, when ruling to exclude Tencer's testimony, the trial judge stated: 1) Tencer makes a number of assumptions, some of which are based on facts which are not going to be in evidence; 2) Tencer's testimony is intended "to create an inference with some aura of authority" that the trial judge didn't think "is reasonable or justified"; 3) Tencer's testimony will be confusing and misleading to the jury. *See Gilmore Pet. for Rev.* at 8, App. E, RP 38-39.

The trial judge did not state that the legal basis for excluding the testimony was that Tencer made assumptions based on facts which are not going to be in evidence. Nevertheless, the Court of Appeals interpreted the trial court's statement that some of Tencer's assumptions are based on facts which are not going to be in evidence to mean that the trial judge intended this to be the legal basis for excluding Tencer, rather than merely a description of some of Tencer's assumptions. Applying this interpretation of

the trial judge's statement, the Court of Appeals found that the trial court erred by excluding Tencer, holding: 1) ER 703 expressly provides that expert testimony may rely on facts or data that will not be admissible in evidence, so the trial court applied the wrong legal standard; 2) Tencer's proposed testimony was neither cumulative nor speculative, so it would not have been confusing or misleading to the jury. *Gilmore* at *9.

Even if the trial court erred in failing to properly interpret ER 703, the trial court also had independent reasons for excluding Tencer's testimony. "A trial court's ruling on the admissibility of evidence will not be disturbed on appeal if it is sustainable on alternative grounds." *Thomas v. French*, 99 Wn.2d 95, 103-4, 659 P.2d 1097 (1983). Whether Tencer relied upon facts or data allowable under ER 703 does not end the inquiry regarding the admissibility of his testimony. "Even when the expert purports to have formed an opinion based upon the kind of facts or data permitted by Rule 703, there remains the separate question of whether the expert considered sufficient information, or the right information, to form an opinion." 5B K. Tegland, *Wash. Prac., Evidence Law and Practice*, § 703.8, at 255 (6th ed. 2016). In addition to observing that Tencer was relying on facts which would not be in evidence, the trial judge concluded that his testimony would be confusing and misleading to the jury.

Gilmore provided argument and reasoning that support the trial court's conclusion. *Gilmore* pointed out alleged deficiencies in Tencer's testing methods in his motion in limine, and at argument on the motion

Gilmore's counsel contended that Tencer's testimony was based on speculation as to the speed of the defendant's bus, the damage done to the vehicles, and Gilmore's height and weight.

In *Carson v. Fine*, 123 Wn.2d 206, 867 P.2d 610 (1994), this Court discussed a trial judge's failure to explain the reasons for admitting testimony despite an objection of unfair prejudice:

Because of the trial court's considerable discretion in administering ER 403, reversible error is found only in the exceptional circumstance of a manifest abuse of discretion.... While discretion does not mean immunity from accountability, we see no need or justification for extending the requirement of a balancing on the record to evidentiary objections and claims of error based on ER 403 alone.... Such a rule would unnecessarily and unreasonably intrude upon the trial court's management of the trial process.... While some reference to the ER 403 evaluation in the record is helpful to a reviewing court, we reject the 6-factor test proposed by the Court of Appeals as unworkable and contrary to the purposes of ER 403 and the Rules of Evidence in general.... While a balancing of probative value versus prejudicial effect on the record is helpful, it is not essential....[W]e are mindful of the admonition that if judicial self-restraint is ever desirable, it is when a Rule 403 analysis of a trial court is reviewed by an appellate tribunal.

123 Wn.2d at 226 (quotations and citations omitted).

Gilmore argued that Tencer's testimony was based on conjecture and speculation, and was unreliable and prejudicial. Gilmore's motion in limine provided a sufficient basis for the trial court to find that Tencer's proposed testimony would be confusing and misleading to the jury.

C. The Trial Court Properly Excluded Evidence Of L&I Benefits Under RCW 51.24.100 And The Strict Exclusion Rule; Alternatively, Evidence Of Benefits Is Properly Excluded Under ER 403 Because It Is Prejudicial

Gilmore filed this third party action pursuant to RCW 51.24.030. RCW 51.24.100 governs the admissibility of L&I benefits in a third-party action. It provides: “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*” (emphasis added). In *Entila v. Cook*, 187 Wn.2d 480, 386 P.3d 1099 (2017), this Court recognized the statute is unambiguous in stating that an employee’s receipt of L&I benefits is inadmissible in a third party action. *See* 187 Wn.2d at 489.

RCW 51.24.100 is consistent with the common law rule that evidence of collateral source compensation, including L&I benefits, is strictly excluded. Evidence of the receipt of L&I benefits is excluded as a collateral source because of its prejudicial effect on the jury. *See Cox v. Spangler*, 141 Wn.2d 431, 440, 5 P.3d 1265 (2000). Even when it is otherwise relevant, including for purposes of impeachment, proof of collateral payments is usually excluded on the basis that it could be improperly used by the jury to reduce the plaintiff’s damage award. *See Cox*, 141 Wn.2d at 440-41. Accordingly, this Court has recognized that courts generally follow a policy of strict exclusion, because the relevance of such evidence is outweighed by the unfair influence it would likely have upon a jury. *See id.* at 441 (citing *Boeke v. International Paint Co.*, 27 Wn. App. 611, 618, 620 P.2d 103 (1980), *review denied*, 95 Wn.2d 1004 (1981) (quoting *Reinan v. Pacific Motor Trucking Co.*, 270 Or. 208, 213, 527 P.2d 256 (1974))).

In *Boeke*, the court cited the analysis in *Reinan*, where the Oregon Supreme Court identified three distinct approaches to the collateral source rule: strict exclusion, general admissibility, and granting the trial judge discretion to admit the evidence in limited circumstances. *Boeke*, 27 Wn. App. at 617. In *Reinan*, the Court surveyed cases from other jurisdictions regarding the admissibility of evidence that a plaintiff received benefits from a collateral source when offered to prove malingering. The Court found that some jurisdictions apply a rule of strict exclusion, holding that evidence of receipt of collateral source benefits is inadmissible even when offered for a very limited purpose, and that admission of the evidence constitutes an abuse of the trial court's discretion. *Reinan*, 527 P.2d at 257. Some courts adopt a liberal view that plaintiff's receipt of collateral source benefits has sufficient probative value to render it admissible for the purpose of demonstrating possible malingering. *Id.* at 258. Other courts adopt an intermediate position, and hold that the admissibility of collateral source evidence is within the discretion of the trial judge. *Id.* The court in *Boeke* agreed with the Oregon Court that the rule of strict exclusion represents the better view. 27 Wn. App. at 618.

The Washington Supreme Court has cited with approval the statement from *Boeke* that "strict exclusion" of collateral sources represents the "better view." See *Cox*, 141 Wn.2d at 441; *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998). However, Washington decisions have not addressed whether under the rule of strict exclusion evidence of

collateral sources is excluded under all circumstances, thus precluding any ER 403 balancing of the probative value of such evidence. In *Cox*, in upholding the trial court's exclusion of the plaintiff's receipt of L&I benefits as a collateral source, the Court relied both upon cases holding that courts generally follow a policy of strict exclusion of collateral sources, and upon cases holding that a trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion. *See* 141 Wn.2d at 439, 441.

In *Johnson v. Weyerhaeuser Co.*, *supra*, the Supreme Court reversed rulings by an industrial appeals judge and a superior court judge admitting evidence of a worker's receipt of L&I benefits, holding that the collateral source rule bars admission of such evidence, without any discussion of the lower courts' discretion for admitting that evidence. *See* 134 Wn.2d at 804. The Court quoted and cited with approval the United States Supreme Court's decision in *Eichel v. New York Central R.R.*, 375 U.S. 253 (1963), where the Court barred evidence of the plaintiff's receipt of disability pension payments in a Federal Employers' Liability Act case. *See* 134 Wn.2d at 801-03. In *Eichel*, the majority barred the evidence as a matter of law, while the dissent argued that exclusion of the evidence should have been upheld on the basis of deference to the trial court's weighing of the probative value of the evidence, rather than exclusion as a matter of law. *See* 375 U.S. at 256-57 (Harlan, J., dissenting).

Jefferson Transit contends the trial court based its ruling to exclude evidence of Gilmore's receipt of L&I benefits on untenable grounds, "in holding that the door to collateral source L&I benefits can *never* be opened." Jefferson Transit Supp. Br. at 14. Jefferson Transit's argument – that the trial judge held that a party can never open the door to admission of L&I benefits – is based upon the following statement by the judge:

[F]or now, I'm going to ... deny the request,... absent some case and authority on opening the door on the collateral source rule....[I]f there is a case out there that suggests to me that she's opened the door and this L&I stuff can come in, then it'll probably come in. But as of right now, I haven't seen that case or anything so I'm not going to go down that road.

RP 543, cited in Jefferson Transit's Supp. Br. at 16 (brackets added).

If the trial judge's quoted statement is interpreted as a rule of strict exclusion of L&I benefits, it is consistent with RCW 51.24.100 and this Court's approval of the statement from *Boeke* that "strict exclusion" of collateral sources represents the "better view." *See Cox*, 141 Wn.2d at 441; *Johnson*, 134 Wn.2d at 798 (citing *Boeke*, 27 Wn. App. at 618).

However, in *Johnson*, the Court also suggested there may be a role for trial court discretion in some cases: "[T]he collateral source rule is designed to protect injured parties.... Injured parties may, however, waive the protections of the collateral source rule by opening the door to evidence of collateral benefits. The trier of fact is free to make this determination upon remand." *Johnson*, 134 Wn.2d at 804 (brackets added).

In *Gilmore*, the Court of Appeals held the trial court erred by excluding evidence of L&I benefits when Jefferson Transit sought admission of that evidence to contradict witnesses' testimony about Gilmore's financial stress. *Gilmore* at *10. Seeking to offer contradictory evidence "is actually the process of offering relevant, substantive evidence to rebut the opponent's evidence. Consequently, the contradictory evidence must be admissible under the usual rules of evidence." 5A K. Tegland, *Evidence Law and Practice*, § 607.22 at 420 (6th ed. 2016) (citation omitted). "Contradictory evidence may be excluded under Rule 403 if it is unfairly prejudicial." *Id.* at 421 (citations omitted). Accordingly, even if the receipt of L&I benefits is relevant for purposes of impeachment, "such evidence is excluded on the basis that it is unfairly prejudicial because the jury could use it for improper purposes." *Cox*, 141 Wn.2d at 440.

Here, if the trial court's quoted statement excluding admission of L&I benefits is interpreted as a rule of strict exclusion, and if that standard is determined to be erroneous, the trial court's exclusion of the evidence will be upheld if it is sustainable on alternative grounds. *See Thomas v. French*, *supra*, 99 Wn.2d at 103-04. The trial court's quoted statement – "if there is a case out there that suggests to me that she's opened the door and this L&I stuff can come in, then it'll probably come in" – may be alternatively interpreted as the application of a discretionary standard. The court does not categorically state that the door can never be opened. Rather, the court asks whether there is an analogous case where a party had been deemed to open

the door. The court also stated that evidence of L&I benefits was more prejudicial than probative, but could be admitted if the door was opened at trial. *See Gilmore* at *2. These statements, taken in context, may be interpreted as an exercise of discretion grounded in the facts of this case.

If the trial court's statement is interpreted as an application of discretion, it is subject to the abuse of discretion standard applicable to ER 403 evidentiary rulings, and can be reversed only if no reasonable person would have excluded the evidence. *See Salgado-Mendoza*, 403 P.3d 49.

WSAJ Foundation urges a strict exclusion rule regarding evidence of L&I benefits, which comports with the unambiguous exclusion language in RCW 51.24.100 and this Court's citation with approval of the statement in *Boeke* that strict exclusion represents the "better view." *See Cox*, 141 Wn.2d at 441; *see also Johnson*, 134 Wn.2d at 798 (citing *Boeke*, 27 Wn. App. at 618). While *Gilmore's* verdict was solely for general damages, other third-party cases filed pursuant to RCW 51.24.030 may be subject to the repayment provisions of Ch. 51.24 RCW. In addition to preventing prejudice, strict exclusion avoids potential juror confusion from the attendant complications of instructing a jury regarding reimbursement formulas if evidence of L&I benefits is admitted.

If this Court does not adopt a rule of strict exclusion of L&I benefits under all circumstances, then the Court should generally follow a policy of strict exclusion even when receipt of benefits is otherwise relevant. *See Cox*, 141 Wn.2d at 440-41.

D. The Trial Court Is In The Best Position To Assess Misconduct During Trial, And Correctly Exercised Its Discretion In Ruling No Misconduct Sufficient To Justify A New Trial Occurred

A trial court's order on a motion for a new trial on the basis of attorney misconduct is reviewed solely for abuse of discretion when it is not based on an error of law. *See Teter*, 174 Wn.2d at 222; *Clark v. Teng*, 195 Wn. App. 482, 491, 380 P.3d 73 (2016), *review denied*, 187 Wn.2d 1016 (2017). The test for whether a trial court abused its discretion in denying a motion for a new trial is whether "such a feeling of prejudice [has] been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial[.]" *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000) (brackets added; citations omitted).

A motion for a new trial may be granted where the misconduct of the prevailing party materially affects the substantial rights of the losing party. *See Teter*, 174 Wn.2d at 222; *Aluminum Co. of Am.*, 140 Wn.2d at 539. Not every misguided closing argument warrants a new trial; misconduct must have a substantial likelihood of affecting the jury's verdict. *See Broyles v. Thurston County*, 147 Wn. App. 409, 445, 195 P.3d 985 (2008). In *Clark v. Teng, supra*, the court noted that the trial court is in the best position to gauge the prejudicial impact of attorney conduct on the jury, stating:

Particularly when the grounds for a new trial involve the assessment of misconduct during the trial and its potential effect on the jury, we will give the trial court's order and findings of misconduct great deference. We are also mindful not to substitute our own judgment for the trial court's

judgment in evaluating the scope and effect of that misconduct.

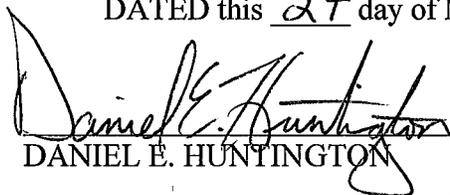
195 Wn. App. at 492 (quotations and citation omitted).

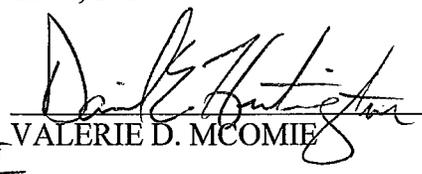
In his appellate briefing, Gilmore cited and quoted additional statements from both parties' counsel, placing the passages quoted by the Court of Appeals from plaintiff's closing argument in context and demonstrating that the plaintiff's attorney was engaging in advocacy, not misconduct. Gilmore Resp. Br. at 16-18; Pet. for Rev. at 3-5, 7-12; Gilmore Supp. Br. at 3-5, 8-12. The trial court is in the best position to most effectively determine if alleged misconduct prejudices a party's right to a fair trial, and the appellate court should not have substituted its judgment for the trial court in evaluating the effect of the alleged misconduct.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

DATED this 27 day of November, 2017.


DANIEL E. HUNTINGTON


VALERIE D. MCOMIE

for

On Behalf of WSAJ Foundation

CERTIFICATE OF SERVICE

I hereby certify that on the 27 day of November, 2017, I electronically filed the foregoing document with the Clerk of the Court using the Washington State Appellate Courts Portal which will send notification of such filing to all counsel of record herein.

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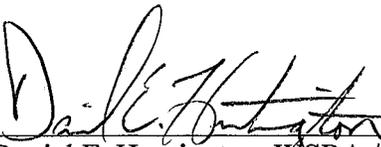
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APPENDIX

RCW 51.24.100**Right to compensation not pleadable or admissible—Challenge to right to bring action.**

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. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law.

[1977 ex.s. c 85 § 8.]

RICHTER-WIMBERLEY, P.S.

November 27, 2017 - 7:21 AM

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