No. 94559-6

NO. 48018-2-II

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

MICHAEL GILMORE,
Respondent

vs.

JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA,
Appellant

APPEAL FROM JEFFERSON COUNTY SUPERIOR COURT
Honorable Keith C. Harper

BRIEF OF RESPONDENT

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I. INTRODUCTION

"That's the whole idea of an adversary system. You have people advocating different points of view through cross-examination of witnesses, and different interpretation of the evidence. The jury sees all sides and they come up with the right – right decision."

– Defense counsel's closing argument, RP 1007.

"This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur; the Court does not find a basis to overturn the verdict."

– Hon. Keith Harper, Jefferson County Superior Court. CP 724.[1]

Michael Gilmore sustained severe and life-altering injuries when his vehicle was hit by a Jefferson County Transit Authority bus. It is undisputed that the collision injured his neck – even the defense's medical witness, Dr. Barbara Jessen, MD, acknowledged this. RP 887; CP 49. It also is undisputed that Mr. Gilmore underwent multi-level neck fusion surgery after this collision, and that his surgeon had to permanently implant surgical hardware into Mr. Gilmore to hold his spine together. Even after the surgery, Mr. Gilmore is only 70% recovered; he is doing better than he was before the surgery, but he still has pain and disability. RP 768.

Mr. Gilmore presented more than substantial evidence that the surgery he underwent, and his past and future pain and disability, were

[1]Plaintiff is not cross-appealing, but when balancing whatever equities there may be regarding alleged discovery violations and alleged misconduct, this Court should be aware that the defense engaged in conduct more egregious than the things it alleges plaintiff's counsel did. *See, e.g.*, fn. 24 and fn. 28, *infra*.

the result of this collision.[2] Dr. Frank Marinkovich, MD, Dr. Marc Suffis, MD, and Dr. Geoffrey Masci, DC, all testified that the collision caused the injuries which ultimately made the surgery necessary. Five "before and after" lay witnesses testified to Mr. Gilmore's health, strength, agility, and abilities before the collision, and to the changes in him after the collision: pain, disability, and loss of function.

Defendant invoked its Constitutional right to trial by jury. The jury, duly empanelled and properly instructed[3], and based upon the substantial evidence that Mr. Gilmore offered at trial, found in his favor and awarded appropriate damages. Dissatisfied with the verdict, the defense made a CR 59 motion for a new trial, citing a collection of after-the-fact rationalizations and new complaints. CP 475. The trial court quite properly denied that motion. CP 723-24; Appendix A. Unwilling to accept the decisions of the jury and the trial judge, the defense now has appealed to this Court.

In every trial, counsel must make tactical and strategic decisions. These decisions are made based upon a party's or lawyer's perception of the evidence. If these perceptions of the evidence are flawed, then counsel's tactical and strategic decisions are likely to be flawed as well. Here, the defense egregiously misjudged the evidence. Despite the medi-

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[2]The defense offered only one expert witness, Dr. Barbara Jessen, MD, who testified that the surgery was not the result of the collision. But even Dr. Jessen agreed that the collision had injured Mr. Gilmore. RP 887.

[3]Defendant proposed most of the jury instructions, and took no exceptions whatsoever to the instructions the court gave to the jury. RP 966.

cal and lay evidence that this collision caused Mr. Gilmore serious and lasting injuries, the defense refused to take responsibility for the consequences of the collision. It tried to convince the jurors that Mr. Gilmore's injuries were only minor, and that he was attempting to commit fraud by lying about his condition and its causes. The yawning chasm between the defense perception of the case and that of plaintiff was made clear not only from their presentations during trial, but in their respective closing arguments, where plaintiff asked the jurors to award $1.8 million, RP 1005, while the defense asked them to award "nothing or $1,000". RP 1028.

The defense has now shifted some of its attacks from Mr. Gilmore to his trial counsel, and to the trial judge. It continues to deny any responsibility for what happened to Mr. Gilmore. Instead, the defense wants this Court to give it a free "do-over". There is neither a legal nor factual basis for this. The appeal should be denied and the verdict affirmed.

II. MISSTATEMENTS IN DEFENDANT'S OPENING BRIEF.

At p. 5 of its brief, the defense incorrectly claims that Mr. Gilmore was Dr. Suffis' patient in 2004, and then implies that Mr. Gilmore had some duty to remind Dr. Suffis of this when he saw Mr. Gilmore again in 2008.[4] In fact, Mr. Gilmore was <u>not</u> Dr. Suffis' patient in 2004 – rather, Dr. Suffis happened to have conducted an independent medical

[4]This is but one example of how the defense attributes evil intent to everything Mr. Gilmore said or did. Why the defense believes that Dr. Suffis and Mr. Gilmore both forgetting one another is somehow important is difficult to fathom.

exam of Mr. Gilmore for the Navy, as part of Mr. Gilmore's retirement process.

On p. 4 of appellant's Opening Brief, it incorrectly states that in 2004, 4 years before this collision, Dr. Marc Suffis gave Mr. Gilmore a 60% disability rating. In fact, Dr. Suffis testified that he **did not** give Mr. Gilmore any disability rating at all. Testimony of Dr. Marc Suffis, MD, hereafter "Ex 161", p. 36[5] (emphasis added):

Q: Well, you found a disability, didn't you?

A: ***No, I found conditions***. The VA does their own disability rating.

On p. 18 of defendant's Opening Brief, it falsely claims that plaintiff's counsel "excoriated the defendant throughout the trial as frauds". In fact, none of the statements about which defendant now complains were made "throughout the trial" – all were made in closing argument, and the defense made no objection to them whatsoever.

On p. 30 of defendant's Opening Brief, it claims that Dr. Masci violated an Order in Limine. Not so. The trial court simply ordered that Dr. Masci could testify "to things that **he's qualified to testify to**". RP 33. The trial court correctly overruled defense objections during Dr. Masci's testimony because the doctor **was** qualified, and the issues defense counsel raised went to weight, not admissibility. RP 356. There never

[5]Dr. Suffis' video deposition was played for the jury at RP 481, and the transcript of that deposition was made Exhibit 161 below. Defendant made a supplemental designation of that Exhibit to this court on February 17, 2016.

was a violation of the Order in Limine, and for that reason, the trial court never made any finding of a violation.

III. COUNTERSTATEMENT OF THE CASE

A. Plaintiff Michael Gilmore sustained serious injuries when a Jefferson County Transit bus rear-ended him.

On March 31, 2008, Plaintiff Michael Gilmore was stopped at a traffic light on Haines Avenue at State Route 20, in Port Townsend, Washington. CP 002. Defendant's employee was driving a Jefferson County Transit Bus immediately behind Mr. Gilmore, failed to stop, and rear-ended Mr. Gilmore. CP 003. Mr. Gilmore described the impact as a "heavy-duty jolt."[6] RP 748.

1. There was more than substantial expert evidence that the collision injured and profoundly affected Mr. Gilmore.

Dr. Frank Marinkovich is a board-certified medical doctor. RP 407. He is certified by the Department of Labor & Industries to conduct Independent Medical Exams. RP 407. Dr. Marinkovich reviewed Mr. Gilmore's medical records. RP 648. He also reviewed the report of defense medical examiner Dr. Barbara Jessen, and the video surveillance footage the defense took of Mr. Gilmore. RP 649. Based on all of this information, Dr. Marinkovich summarized for the jurors Mr. Gilmore's treatment, his condition, his symptoms, and his prognosis.

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[6]The defense keeps calling this collision a "minor accident" or a "fender bender". Perhaps it was minor for the bus, which was not severely damaged. But the bus is not the plaintiff here – Mr. Gilmore is. And the collision was not minor for him or for his neck, which ultimately needed surgical repair.

Mr. Gilmore was taken from the collision scene to the emergency room by paramedics. RP 753. At the ER, he was having neck pain, right hip pain, low back pain, nausea, and a headache. RP 753. Over the next few days, Mr. Gilmore's headaches became so intense that he returned to the emergency room. RP 755.

On April 3, 2008, Mr. Gilmore went to the Harrison Medical Center ER, where a cervical (neck) MRI was performed. RP 665. That first MRI showed disc bulges at C3-C4, C4-5, C5-6, C6-7; two of these levels are the same ones where Mr. Gilmore eventually needed surgery, a 2-level anterior cervical fusion and discectomy. RP 664-65.

Complicating Mr. Gilmore's medical situation was the fact that in May of 2008 he was diagnosed with carpal tunnel syndrome, which required carpal tunnel release surgery. RP 668. During the time Mr. Gilmore was undergoing and recovering from the carpal tunnel surgery, he was essentially incapacitated. Ex 161, p. 14. Significantly, during this time, when he was not engaging in strenuous activity, his collision-caused pain subsided, but as soon as he returned to his usual work as a plumber in early 2009, the pain in his neck, shoulder region, and upper back returned. RP 669; Exhibit 161 p. 28. Mr. Gilmore also developed radiculopathy (radiating pain). RP 669. All of these symptoms linked up with what the 2008 MRI of Mr. Gilmore's neck had revealed. RP 669.

On April 16, 2009, Mr. Gilmore underwent another neck MRI. RP 669. The 2009 MRI revealed progression (worsening) of the injury

that had initially been documented in the 2008 MRI; the disc bulges at Mr. Gilmore's C5-6 and C6-7 had expanded in size. RP 670.

Based on the 2009 MRI findings, and the worsening since 2008, Mr. Gilmore was referred to neurosurgeon Dr. Christopher Kain. Dr. Kain opined that Mr. Gilmore would require neck surgery at C5-6 and C6-7 to help his symptoms. RP 672. Unfortunately, Mr. Gilmore could not get surgery at that time because he had just started his own plumbing business and could not afford to take the time away from work. RP 730.

When Mr. Gilmore's symptoms failed to improve, he was put on a "high risk" pain management program. Opioids were prescribed to help control Mr. Gilmore's pain so he could continue to work. RP 675.

In September 2010, Mr. Gilmore saw Dr. Enayat Niakan, a neurologist. RP 673. Dr. Niakan agreed with the prior doctors; he found that Mr. Gilmore had left cervical radiculopathy (pain radiating from the left side of his neck), and a left sided C5-6 disc bulge, which was impinging on Mr. Gilmore's left C6 nerve root. RP 674. Dr. Niakan also agreed with the prior opinions that these problems had originated with this collision. RP 674. However, Mr. Gilmore still wanted to avoid surgery if possible, and so he continued on with conservative care. RP 674.

On September 28, 2013, Mr. Gilmore saw Dr. Geoffrey Masci, DC. RP 322. Dr. Masci is a chiropractor with 41 years of experience; he is certified by the Department of Labor & Industries as an approved chi-

ropractic examiner, and he has been doing forensic chiropractic examinations on and off for 35 years. RP 317.

Dr. Masci spent almost four hours with Mr. Gilmore. RP 364. He reviewed extensive records and performed a physical examination of Mr. Gilmore. RP 322. Based on his record review, his physical examination, and the history, Dr. Masci came to the opinion that Mr. Gilmore had sustained the following injuries as a result of this collision: cervical subluxation, aggravation or exacerbation of cervical degenerative disc disease and degenerative joint disease, cervical disc herniation, and myositis (muscle inflammation). RP 324-25, 328, 357. Dr. Masci also testified that Mr. Gilmore's pain was "chronic", *i.e.*, it lasted longer than the early "acute" phase of several months. RP 360.

Dr. Masci testified that at least in Mr. Gilmore's case, cervical subluxation meant that the joints in Mr. Gilmore's neck did not move properly. RP 327. Dr. Masci also explained that Mr. Gilmore's herniated discs would have, and did, present with certain neurological symptoms. RP 343. Those symptoms included pain, sensory deficits, motor dysfunction (the muscles not working properly), weakness, and wasting of the muscles. RP 343-44.

Mr. Gilmore did not have these neurological symptoms before the collision, but they were present almost immediately after the collision. RP 345. Some of these symptoms can be similar to symptoms associated with carpal tunnel syndrome; however in this case Dr. Masci testified that

he attributed the symptoms to Mr. Gilmore's collision-caused neck injuries and not to his carpal tunnel, because even after the successful carpal tunnel release procedure, Mr. Gilmore continued to experience weakness, loss of sensation, reduced strength, and pain. RP 352.

Dr. Masci also reviewed both the 2008 MRI and the 2009 MRI, and opined that the initial MRI showed disc bulges at C3-C4, C4-C5, C5-C6, and C6-C7, and that the 2009 MRI was consistent with progression (worsening) of those injuries. RP 354. This worsening had caused Mr. Gilmore's pain to become more and more constant and chronic over time. RP 403.

Dr. Marc Suffis, MD, an Occupational Medicine doctor, Board Certified in Emergency Medicine, Independent Medical Examinations, and Disability Evaluations, Ex. 161, p. 5-6, testified by video preservation deposition. Dr. Suffis testified that the collision caused Mr. Gilmore's cervical disc herniation with spinal stenosis and pain radiating into his left arm – an acute injury which was still causing pain over a year later. Ex. 161, p. 28. Dr. Suffis also agreed with Dr. Masci that Mr. Gilmore's pain lessened when he was resting, but became worse when he worked at his normal job activities. *Id.*

In late 2014, Mr. Gilmore was able to close his business for a time and schedule the neck surgery he needed. RP 767. That surgery, a two-level anterior (front entry) cervical discectomy and fusion, took place on January 28, 2015. RP 767. The surgeon, Dr. Jeffrey Roh, went in

through the front of Mr. Gilmore's neck, which is a risky approach. RP 660. Dr. Roh cut through Mr. Gilmore's skin and muscles, and other multiple layers of tissue, and moved aside his carotid artery and jugular vein in order to get to one of the discs. RP 660-61. After getting to the disc, Dr. Roh used a "Rogers", a big chopper-pliers type tool, to remove the disc. RP 661. He placed a graft, made of bone taken from Mr. Gilmore's hip, in the place of the removed disc. RP 661. Dr. Roh then went in with a router-type blade and routed out any rough spots of bone; he also routed out the canals that the nerves travel through in order to make the openings bigger. RP 662. This entire procedure was done twice, once at each of the two disc levels. RP 662. The surgeon then screwed surgical plates and screws into place within Mr. Gilmore's neck. RP 650. Fortunately for Mr. Gilmore, the surgery was a success and he had partial relief from his pain and symptoms. RP 767-68.

In summary, Dr. Marinkovich testified that the collision caused injuries to Mr. Gilmore's neck that necessitated the two-level laminectomy, foraminotomy, and fusion surgery that Mr. Gilmore underwent. RP 650.

Dr. Marinkovich also testified to some of the future medical problems that Mr. Gilmore faces: the risk that the fusion will not work and he would need to have the operation redone, RP 678; and the 25% risk that, due to the permanent changes the collision and surgery caused

in Mr. Gilmore's neck, Mr. Gilmore will need even more surgical repairs on new levels of his neck. RP 677.[7]

2. *There was more than substantial evidence of changes in Mr. Gilmore's condition from before to after this collision, which also proved the collision had profoundly affected his life.*

Before the collision, Mr. Gilmore had spent 20 years in the United States Navy before he retired in 2004. RP 595. At the time of his retirement, Mr. Gilmore had a complete physical examination, during which veterans are encouraged to tell the evaluating doctor every condition, problem, or injury they had while on active duty. Ex 161, p 11. Mr. Gilmore told the examiner about conditions that he had developed during his many years of service – issues with his hips, left elbow, low back, knees, etc. were all evaluated. Ex 161, p. 10. But this 2004 complete medical evaluation neither reported nor even mentioned any neck pain, neck injuries, or neck-related complaints. RP 874.

In the four years between his retirement from the military and this collision, Mr. Gilmore worked as a service plumber. RP 747. He was physically capable of doing all aspects of service plumbing, including installing water heaters, digging trenches, and replacing main water lines. RP 562, 747. Mr. Gilmore had no problems completing his work, and in fact he routinely would work 80+ hour weeks, becoming the standard by which other employees were measured. RP 461.

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[7]A person who faces a less than 50% risk of future medical complications still can recover for the mental anguish that risk causes. *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 810, 701 P.2d 518 (1985).

Jonathan Coon was Mr. Gilmore's former co-worker, RP 458, who had worked as an apprentice with Mr. Gilmore. He testified to the very physical nature of the work that he and Mr. Gilmore did before the collision. RP 460. Jobs included digging every day, replacing water heaters, and crawling under people's homes. RP 460. Before the collision, Mr. Gilmore completed all these jobs without any problems. RP 461. Mr. Coon testified that Mr. Gilmore was the hardest worker he had ever known, and though Mr. Gilmore was "old enough to be my father," he still routinely worked 80 hours a week. RP 461.

Richard Schneider was one of Mr. Gilmore's customers, RP 296, who first met him during a major plumbing project at his home in 2005 or 2006, 2-3 years before the collision. A main water line was leaking, and Mr. Gilmore had to dig a ditch to access it. RP 297. Mr. Schneider testified that Mr. Gilmore called the shop for help, but no one was available, so Mr. Gilmore just started digging on his own. RP 297. He had no problem digging a wide muddy wet ditch, "three or four foot deep and just as wide". RP 299.

After the collision, though, things were very different. When Mr. Gilmore went to Mr. Schneider's house to complete plumbing jobs, he brought someone with him to do the heavy work. Mr. Gilmore was able to do very little of the actual work himself. RP 302-03.

Mr. Gilmore's former neighbor Dana Neely-DuBose testified that before the collision, she never noticed Mr. Gilmore having any physical

limitations. RP 556. He collected large amounts of fire wood. RP 563. He did significant plumbing work at her house before the collision; he replaced both of her toilets, her hot water heater, bathroom sinks, and faucets, without difficulty or assistance from anyone else. RP 561-62. Mr. Gilmore also was very active with Ms. Neely-Dubose's son, playing basketball with him and serving as a positive adult male role model. RP 555. He also helped her son move to Bremerton. RP 567.

After the collision, however, there was a tremendous difference. RP 564. Mr. Gilmore was not outside as much, was not on his boat with his kids as much, and was physically unable to complete basic plumbing tasks. RP 564. Ms. Neely-Dubose testified that there was a very clear "line in the sand" between Mr. Gilmore before the collision and Mr. Gilmore after. RP 566. After the collision there was no more activity, fun, or play, and Mr. Gilmore's mood was "somber". RP 566.

Mr. Gilmore's son Alex testified that before the collision, his dad was the strongest person he knew, RP 505, that he had never known his dad not to have a job, and that Mr. Gilmore usually had more than one job. RP 503. Even while on active duty in the Navy, Mr. Gilmore worked multiple jobs. RP 503. When he retired from the Navy, Mr. Gilmore went right back to plumbing. RP 505. He instilled a strong work ethic in all of his sons early on. RP 505.

Before the collision, Alex would sometimes accompany his father to job sites, carrying the tools, but Mr. Gilmore was the one completing

the hard physical labor. RP 506-7. Alex described how one time, before the collision, he and his father were at a job that lasted more than 10 hours, but his dad was adamant about getting it done. RP 507.

After the collision, Alex wound up doing most of the physical labor, such as digging ditches. RP 521. It took Alex a while to realize it, but after the collision Mr. Gilmore had lost his ability to complete heavy physical tasks; when he did attempt to do more physical work, the next day he would be unable to work at all due to the increase in his pain. RP 522. Alex recalled one project that required running a 600-foot water service line, and Mr. Gilmore had to bring in his other son Chris to help Alex do the digging, because if Mr. Gilmore had done the digging, he would have been unable to work at all the next day. RP 523.

Mr. Gilmore's son Matthew testified that after the collision his father became hunched over and had a lot of neck and shoulder pain. RP 533. Before the collision, they used to hunt and fish together regularly. RP 527. After the collision, Mr. Gilmore just could not do the things he used to do. RP 533. For example, after the collision, Matthew was ready to go on his first elk hunt. He invited his dad to come along so they could share the experience of Matthew bagging his first elk. RP 534. Unfortunately, Mr. Gilmore could not go elk hunting due to his pain. RP 534.

The collision did not just limit Mr. Gilmore physically. The pain and the treatment caused personality changes. RP 532-34. Matthew testified that before the collision he had never seen his father drink, had ne-

ver seen his father cry, and had never seen his father depressed. RP 532. After the collision, Mr. Gilmore started drinking. Matthew realized that his father had turned to alcohol to deal with his injuries and his physical pain, and Matthew could see the sadness and pain in his father's eyes. RP 532. Matthew believed his father had become an alcoholic after the collision, and this seriously affected their relationship. RP 532. Mr. Gilmore had become a completely different person, and it got so bad that Matthew cut off contact with his father for a time because he could not handle being around his father when Mr. Gilmore was drinking and taking pain medicine. RP 534.

B. The defense attacked Mr. Gilmore's character from before the beginning of the trial to its very end.

Before the trial even began, defense counsel Andrew Becker told plaintiff's counsel Richard McMenamin that Mr. Gilmore was a liar who was bringing a "frivolous claim", and that an associate would try this case because it was "beneath [Mr. Becker's] dignity" to try it. CP 705.

Because plaintiff's trial counsel knew before trial that the defense would attack Mr. Gilmore's character, she filed Motion in Limine #13, seeking permission to introduce positive character evidence in plaintiff's case in chief. CP 18. Even before the Court heard argument on that motion, the defense had very clearly laid out its theory of the case:

> [T]he Defendant's, uh, witnesses that will say that any injuries he received were very minor and should have resolved quickly, that allows – that – in light of, uh, the Defendant's theory of the case,

that is very probative to Mr. Gilmore's motive for secondary gain.[8] RP 9 (emphasis added).

Defense counsel repeated the allegations that Mr. Gilmore was lying to get money, that he was a disability cheat, and that he was committing fraud, at least 5 more times during pretrial hearings (emphasis added):

- "And that is relevant to **motive for secondary gain**." RP 8.
- "[H]e was frankly **milking the system**." RP 8.
- "So the fact of previous disability is certainly admissible because **it affects Mr. Gilmore's credibility**." RP 10.
- "So the fact that Mr. Gilmore was, uh, a poor historian to all his providers is certainly **relevant to his credibility in causation of his injuries**." RP 11.
- "In this case, we're offering it as, uh – to show, uh, **motive**, uh, inaccurate reporting by, uh – by the Plaintiff that he had these preexisting issues; that **he knew he had these preexisting issues. He had to have known. And he was getting monthly checks**." RP 15.

The trial court got the message. "This defendant's theory [is] that Mr. Gilmore is either a fraud or a malingerer…" RP 56.

When the Court heard argument on Plaintiff's Motion in Limine #13 – Character Evidence, **defendant offered no objection**. Defense counsel recognized that plaintiff's counsel was "entitled to present it" and "[s]he can present it if she likes." CP 18-19, RP 24.

[8]"Secondary gain" is of course a common defense lawyer euphemism for "lying to get money".

The defense continued its mudslinging during the trial. It cross-examined witnesses about Mr. Gilmore's reputation in the community for truthfulness, emphasized alleged errors or inconsistencies in the medical records, and **even brought in a "bad character witness"**, Melvin Eidsmoe, to testify that Mr. Gilmore had a "bad" reputation in the community. RP 832, CP 661.[9]

Defense counsel called Mr. Gilmore a liar approximately **sixteen times** during his closing argument (emphasis added):

- "The significance is that he was **not truthful** with any of his care providers." RP 1018.
- "He was **not truthful** with Dr. Suffis." RP 1018.
- "He was **not truthful** with Dr. Cain." RP 1018 (emphasis added).
- "He was **not truthful** with the neurologist, Dr. Niakan." RP 1018.
- "And as a result of him **not being truthful**, they, uh, had a determination of causation relating to the motor vehicle accident, okay." RP 1018.
- "Unfortunately, you know, Mr. Gilmore was – was **less than accurate**." RP 1018.
- "They had a neurologist, Dr. Niakan, to whom Mr. Gilmore **did not tell the truth**." RP 1018.
- "When Dr. Suffis found out that he **hadn't been told the truth**..." RP 1019.
- "What would Dr. Niakan say if somebody told him, '**Mr. Gilmore lied to you** about everything'?" RP 1019.

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[9]The defense now seems to be arguing that plaintiff should not have introduced good character evidence until after defendant attacked his character. But the Court allowed it when defendant conceded the point during pretrial motions in limine. Moreover, issues regarding the order in which testimony is to be presented are very much within the trial court's discretion.

- Why didn't they call Dr. Cain and tell Dr. Cain, "**He lied to you...**" RP 1019.

- "Everything was on board, **until the lies started surfacing**." RP 1022.

- "**He intentionally did not reveal** to his doctors that he had previously low back pain." RP 1022.[10]

- **"Uh, so anyway, the 60 percent,** we bring it up because **a bunch of untruths**." RP 1023.

- "Because **Mr. Gilmore hid the facts**." RP 1025.

- "You know he was saying – he was saying something else to his providers all along **until he got caught**..." RP 1025.

- **"It all boils down to credibility of the Plaintiff. How can you believe anything he says?"** RP 027-28.

The defense in closing also expressly accused Mr. Gilmore of committing disability fraud upon the VA and the Federal government:

- "Not everybody that gets out of the military goes in and **claims disability they don't have** just so they can get an additional government check..." RP 1023-24 (emphasis added).

To summarize, the defense made the strategic decision to present as its theory of the case that the collision caused only minor, transient injuries to Mr. Gilmore and that he was a liar trying to get money he was not owed – that he deliberately lied to his doctors, that he was a cheat who sought money for injuries that he did not have, and that even before this collision he was committing fraud by collecting government benefits for disabilities he did not have.

[10]At trial, Mr. Gilmore did not claim damages for his low back nor for his carpal tunnel.

Unfortunately for the defense, the jurors did not accept this theory. They weighed the evidence, and by their verdict – which was supported by substantial evidence – the jurors recognized the degree to which Mr. Gilmore was injured as a result of this collision. It is bizarre, to say the least, that after calling Mr. Gilmore a liar a score or more times before and during the trial, defendant now complains that plaintiff's counsel succinctly and accurately described the defense theory as one of calling Mr. Gilmore a liar.

IV. THE STANDARD OF REVIEW & PRESERVATION OF ERROR.

A. Almost all the alleged errors about which defendant now complains were not preserved; defendant neither objected nor sought a remedy to mitigate the alleged harm.

It has long been the law in Washington that an appellate court will not consider an argument or theory not timely raised by objection in the trial court. *See, e.g., Seth v. Dept. of Labor & Indus*, 21 Wn.2d 691, 693 152 P.2d 976 (1944); RAP 2.5(a). In addition to objecting, if a party believes an error has occurred, its counsel must exercise due diligence in seeking a remedy that would mitigate or ameliorate the alleged harm. *State v. Jackman* 113 Wn.2d 772, 781-82, 783 P.2d 580 (1989). In *Jackman*, counsel failed to seek a continuance that might have remedied the problem with which he was faced, and that failure precluded appellate relief. "[Jackman] cannot contend that the court erred in denying him any relief, as he asked for none." *Id.*

In this case, defendant failed to preserve the errors it now complains of – it did not move to strike nor request curative instructions. *State v. Neukom*, 17 Wn. App. 1, 4, 560 P.2d 1169 (1977). "Failure to request an appropriately worded limiting instruction waives the right to the instruction and fails to preserve the error for appeal." *Sturgeon v. Celotex Corp.*, 52 Wn. App. 609, 624, 762 P.2d 1156 (1988).[11]

In the very recent case *State v. Jones*, No. 89321-7 (April 21, 2016), the Supreme Court addressed failure to object as a waiver of the alleged error: "A motion for new trial is not a substitute for raising a timely objection that could have completely cured the error." *State v. Jones*, Slip Opinion at 16. "Indeed, the failure to raise a timely objection strongly indicates that the party **did not perceive any prejudicial error until after receiving an unfavorable verdict.**" *Id.* (emphasis added) citing *State v. Williams*, 96 Wn.2d 215, 226, 634 P.2d 868 (1981).

> Based on the record presented, we must conclude that "[t]he defense made a tactical decision to proceed, 'gambled on the verdict', lost, and thereafter asserted the previously available ground as a reason for a new trial. This is impermissible."

Id., at 17.

This Court should come to the same conclusion. Defendant gambled on the verdict, lost, and should not now be heard to complain.

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[11]For example, the defense now complains that one of the lay witnesses, Ms. Neely-DuBose, said something contrary to the orders in limine. If it were a violation, it would have been well within the trial court's discretion to strike or allow the testimony, had the defense raised a proper objection and requested an appropriate remedy, such as an instruction to disregard. The defense failure to do this waived any alleged error.

B. Whether preserved for appeal or not, every trial court decision about which appellant now complains was discretionary, and must be upheld unless appellant proves abuse of that discretion.

Regarding those few alleged errors which defendant properly preserved, the verdict still should be affirmed because the decisions complained of were well within the range of the trial court's discretion. Nothing in this record supports, much less proves, that any abuse of discretion occurred.

> An abuse of discretion standard often is appropriate when (1) the trial court is generally in a better position than the appellate court to make a given determination; (2) a determination is fact intensive and involves numerous factors to be weighed on a case-by-case basis; (3) the trial court has more experience making a given type of determination and a greater understanding of the issues involved; (4) the determination is one for which "no rule of general applicability could be effectively constructed,"; and/or (5) there is a strong interest in finality and avoiding appeals....

State v. Sisouvanh, 175 Wn.2d 607, 621-22, 290 P.3d 942 (2012) (numerous citations omitted).

In *State ex rel Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971), the Court held:

> Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

In Re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997) (substantive family law holding superseded on other grounds by Legislature; *see*, *In re Marriage of Christel & Blanchard*, 101 Wn. App. 13, 24 n. 3, 1 P.3d 600 (2000)).

A trial court's decision "is presumed to be correct and should be sustained absent an affirmative showing of error." *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). This Court should not substitute its judgment for that of the trial court. *Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187 (1980). If the issue is "fairly debatable", a trial court's decision will not be disturbed. *Group Health v. Department of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986).

Finally, even if the trial court's reasoning were both incorrect and outside the range of its discretion, reversal still is inappropriate unless there exists **no basis** upon which to uphold the decision. For example, "[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, 104, 659 P.2d 1097 (1983).

1. The standard of review on evidentiary rulings is abuse of discretion.

Defendant complains about the trial court's rulings on objections and on motions in limine, such as decisions excluding proposed defense witness Alan Tencer, regarding the permissible scope of Dr. Geoffrey Masci's testimony, and regarding the inadmissibility of collateral sources. Plaintiff will respond to these claims on the merits below. But note that all such rulings were within the trial court's discretion and may be reversed **only** if there were abuse of that discretion.

> [A] trial court has broad discretion to make a variety of trial management decisions, ranging from "the **mode and order of interrogating witnesses and presenting evidence,**" **to the admissi-**

> **bility of evidence**, to provisions for the order and security of the courtroom. In order to effectuate the trial court's discretion, we grant the trial court broad discretion: even if we disagree with the trial court, we will not reverse its decision unless that decision is "manifestly unreasonable or based on untenable grounds or untenable reasons."

State v. Dye, 178 Wn.2d 541, 547-48 (2013) (emphasis added, footnotes omitted). Rulings on motions in limine also are discretionary. *Clark v. Gunter*, 112 Wn. App. 805, 808, 51 P.3d 135 (2002). So are rulings on the admission or exclusion of evidence. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

2. The standard of review regarding allegations of discovery violations and attorney misconduct also is abuse of discretion.

A trial court's rulings regarding discovery, witness disclosure, and sanctions, are reversed only for abuse of discretion. *Mayer v. Sto Industries Inc.*, 156 Wn.2d 677, 684-90, 132 P.3d 115 (2006). Furthermore, any errors that do occur in this arena are subject to a harmless error analysis. *Jones v. Seattle*, 179 Wn.2d 322, 355-56, 314 P.3d 380 (2013) (affirming verdict despite erroneous witness exclusion as "harmless error"); *Thornton v. Annest*, 19 Wn. App. 174, 181, 574 P.2d 1199 (1978).

There may be no decision-making arena in which the trial court is entitled to more deference than this one. "When a trial court evaluates occurrences during trial and their impact on the jury, **great deference** is afforded the trial court's decision." *Dickerson v. Chadwell*, 62 Wn. App. 426, 433, 814 P.2d 687 (1991), *review denied*, 118 Wn.2d 1011 (1992) (emphasis added). The Court of Appeals "must accord considerable def-

erence" to the trial court's assessment of the effect on the jury of events occurring during the trial. *Taylor v. Cessna Aircraft Co.*, 39 Wn. App. 828, 831, 696 P.2d 28, *review denied,* 103 Wn.2d 1040 (1985). Similarly, a trial court's decision regarding the imposition of sanctions, if any, is reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

As the Court held in *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991) *cert. denied*, 506 U.S. 856, 113 S. Ct. 164, 121 L.Ed.2d 112 (1992), "The trial court is in the best position to most effectively determine if [counsel's] misconduct prejudiced a [party's] right to a fair trial." *Lord* was a criminal case, but it was cited with approval in *Teter v. Deck*, 174 Wn.2d 207, 223, 274 P.3d 336 (2012). *Teter* is the centerpiece of defendant's argument on this issue, but as will be shown below, it does not support defendant's arguments.

3. *The standard of review upon denial of a motion for new trial is abuse of discretion, defendant fails to show abuse of discretion, and defendant failed to preserve any alleged error. The trial court also was correct to deny a new trial on the grounds of "misconduct".*

The defense repeatedly cites and heavily relies upon *Teter v. Deck*, 174 Wn.2d 207, 274 P.3d 336 (2012). *Teter* is not merely distinguishable from the instant case – it is inapposite. In *Teter*, the trial court exercised its discretion and **granted** a new trial; here, the trial court exercised its discretion and **denied** a new trial. In fact, the ultimate Supreme Court holding in *Teter* was quite succinct: "We hold that the trial judge

was well within his discretion in granting the new trial." *Id.* at 210 (emphasis added). That holding in no way suggests that the trial court here abused its discretion in denying a new trial.

In *Teter*, the aggrieved party (the plaintiff) repeatedly objected to improper comments and arguments by defense counsel. The objections were repeatedly sustained, and the trial court repeatedly admonished defense counsel. In this case, the allegedly aggrieved party (the defendant) did not even object to most of what it now complains of. In particular, the defense did not object ***even once*** during plaintiff's closing argument.

In *Teter*, the trial court made specific factual findings of misconduct, and the Supreme Court affirmed those findings. "Applying the **deferential review** appropriate to misconduct findings **in civil cases**...we conclude that the record supports Judge González's findings of misconduct." *Teter*, at 223. (emphasis added) The trial court here made no finding of misconduct.

The *Teter* Court set forth the standard for when a trial court ***may*** grant a new trial:

> [A] court properly grants a new trial where (1) the conduct complained of is misconduct, (2) the misconduct is prejudicial, (3) the moving party objected to the misconduct at trial, and (4) the misconduct was not cured by the court's instructions.

Teter, *supra* at 226. Addressing these factors in the present case:

(1) The trial court found there was no "event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur..." CP 724.

(2) The conduct complained of here was not prejudicial, and here

the trial court made no finding of prejudice.

(3) and (4) The defense did not object at trial to the arguments it now claims were "misconduct", and therefore the trial court had no opportunity to cure any alleged misconduct in its instructions.

As the Court held in *Dickerson v. Chadwell* and in *Taylor v. Cessna*, *supra*, the trial judge who heard and saw the trial **in context and in its entirety** deserves and receives **great deference** in determinations regarding the effect of behavior upon the jury. The trial court's decision on a motion for new trial is reviewed only for abuse of discretion. *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002).

This result is consistent with sound public policy. When a defendant "lies in the weeds" and makes no objection, it denies the trial judge the opportunity to do his job; it deprives the parties the opportunity to correct matters and proceed through a fair trial to a valid verdict; and it deprives the jurors of their right and opportunity to meaningfully participate in what Jefferson called "the anchor of all our liberties".[12]

Even if this Court were to find error, it did not affect the outcome of the trial, because the jury was properly instructed and this Court must "firmly presume" that the jury followed the court's instructions. *Diaz v. State*, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). In *Diaz*, the trial court erroneously interpreted a statute and admitted evidence of a settlement. The Supreme Court held that the error was harmless because the jury

[12]"I consider it [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 The Writings of Thomas Jefferson 71 (Washington ed. 1861).

"was specifically instructed not to consider settlement evidence in determining liability". *Id.*

Similarly, in *Rowe v. Dixon*, 31 Wn.2d 173, 187-88, 196 P.2d 327 (1948), the trial court admitted into evidence a contract that made reference to liability insurance. The trial court instructed the jury to disregard the insurance information, and the Supreme Court affirmed, holding "The portion of the instruction relating to the matter of insurance was direct and positive, and it should be assumed that the jury regarded the same and followed the court's directions contained therein." *Id.* at 188.

Here, the trial court instructed the jury orally and in writing that the remarks, statements, and arguments of counsel are not evidence, and "you should disregard any remark, statement or argument that is not supported by the evidence or the law as I have explained it to you." RP 969. This Court should follow the Supreme Court's lead and presume the jurors followed that instruction. So long as the jurors did so, the alleged misconduct could not possibly have caused any harm to the defense.

This Court also should note that defendant's failure to complain about alleged misconduct until weeks after the trial is further evidence that whatever happened was insufficiently prejudicial to be the basis for a new trial. *Mulka v. Keyes,* 41 Wn.2d 427, 437, 249 P.2d 972 (1952).

C. The decision to exclude Alan Tencer was well within the trial court's discretion and was correct given the facts in this case.

It seems that as long as certain defendants offer the testimony of Alan Tencer, plaintiffs will object to it, and trial judges will have to decide whether to admit or exclude his testimony **on a case by case basis**. In *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), Tencer's testimony was **admitted** by the trial court. This Court affirmed, holding, "The trial court **did not abuse its discretion** by allowing Tencer to testify." *Id.*, at 565 (emphasis added). In *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), Tencer's testimony was **excluded** by the trial court. The Court of Appeals affirmed, holding "we conclude that excluding Tencer's testimony was **not an abuse of discretion**..." *Id.*, at 21 (emphasis added). And in the case upon which appellant herein relies so heavily, *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 333 P.3d 388 (2014), Tencer's testimony was allowed by the trial judge and affirmed by the Supreme Court, which held "we find **no abuse of discretion** for the trial court here to allow Tencer to testify." *Johnston-Forbes*, *supra*, at 357 (emphasis added). *Johnston-Forbes* reiterated that "trial 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 352.[13]

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[13]Similarly, when *Johnston-Forbes* was in Division II before it went up to the Supreme Court, this Court held, "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." 177 Wn. App. 402, 406, 311 P.3d 1260 (2013).

Rather than supporting appellant's position herein, the authorities appellant cites **actually refute it.** The one consistent holding in these three cases is that **the admission or rejection of Tencer's testimony is a matter addressed to the sound discretion of the trial court.** A decision finding no abuse of discretion in admitting evidence is a far cry from **requiring** admission of that evidence. Appellant is asking this Court to do what none of the cited cases ever did – reverse a trial judge's discretionary ruling regarding the admissibility of Tencer's testimony.

All nine Justices concurred in the result in *Johnston-Forbes*; four justices signed a concurrence authored by Justice Yu, who further clarified the law with respect to experts such as Tencer:

> 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.

Johnston-Forbes at 358 (concurrence) (emphasis added).[14]

Turning to the instant case: **If** there were a dispute over whether Mr. Gilmore was injured **at all** by the collision, and **if** a defense doctor were prepared to testify that the forces Mr. Gilmore underwent (as calcu-

[14]Since *Johnston-Forbes* was decided in August of 2014, the trial courts of this state are indeed admitting or excluding Tencer's evidence on a case-by-case basis. *See*, Appendix B.

lated by Tencer) were insufficient to injure **any** human being in **any** way, then **perhaps** Tencer's testimony might be admissible on the issue of whether Mr. Gilmore was injured **at all**. But in this case, even the defense admitted – through its own medical expert, Dr. Jessen – that the collision injured Mr. Gilmore's neck. CP 49, RP 887. Nor was there any dispute that Mr. Gilmore did indeed require surgery on his neck.

The medical-legal issue therefore was whether the **admitted-liability collision** and the **admitted collision-caused injuries** were **a** proximate cause of the need for the neck surgery. That is a question for expert health care providers to answer, and four of them did so: three for plaintiff and one for defendant.[15] In reaching their answers, none of the medical experts on either side of the issue cited or relied upon Tencer or his calculations in any way.

So what exactly was Tencer's evidence offered to prove? How was it relevant? Tencer might be able to testify that the forces in this collision were not huge, but Washington adheres to the ancient and honorable tort principle of the "eggshell plaintiff"[16]. Even if this collision would not have injured most people as severely as it injured Mr. Gilmore,

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[15]Plaintiff also offered lay witnesses to prove the before and after changes in Mr. Gilmore's health and activities, and the extent of his disability. This evidence was consistent with the opinions of Drs. Marinkovich, Masci, and Suffis that the collision caused the injuries that led to Mr. Gilmore's surgery and associated pain and disability.

[16]The "eggshell plaintiff" has been the law in Washington since at least 1902. "The duty of caring and of abstaining from the unlawful injury of another applies to the sick, the weak, the infirm, as fully as to the strong and healthy; and when the duty is violated the measure of damages is for the injury done, even though the injury might not have resulted but for the peculiar physical condition of the person injured, or may have been augmented thereby." *Jordan v. Seattle*, 30 Wash. 298, 70 P. 743 (1902). *See also* WPI 30.18.

that is no defense to his claim. Whatever slight probative value Tencer's evidence had here, it was substantially outweighed by the danger of unfair prejudice and confusion. ER 403. Without any medical evidence linking Tencer's calculations to Mr. Gilmore's body, his testimony could only be used by lay jurors if they improperly speculated about how much force it **might** take to set in motion the medical chain of events that ultimately required surgical neck repair.

Under the facts of this case, the trial court was correct to exclude Tencer. More to the point, the trial court was **well within its discretion** to exclude him. The defense has not pointed to one single case where a trial court was reversed for excluding Tencer. This case certainly should not be the first.

D. The decisions regarding Dr. Masci's testimony were well within the trial court's discretion and were correct given Dr. Masci's qualifications.

"Under [ER 702], the trial court has discretion to admit expert testimony if the witness qualifies as an expert and if the expert testimony would be helpful to the trier of fact." *State v. Russell*, 125 Wn.2d 24, 51, 882 P.2d 747 (1994). Once that happens, debates over expert qualifications go to weight, not to admissibility. "Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to the weight, rather than the admissibility, of his testimony." *Life Designs Ranch, Inc. v. Sommer*, 191 Wn. App. 320, 360-61, 364 P.3d 129, 149 (2015).

Furthermore, ER 702 says nothing about formal licensure. Thus, "[p]er se limitations on the testimony of otherwise qualified non-physicians are not in accord with the general trend in the law of evidence, which is away from reliance on formal titles or degrees." *Loushin v. ITT Rayonier*, 84 Wn. App. 113, 118-120, 924 P.2d 953 (1996). "Training in a related field or academic background alone may also be sufficient." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 81, 877 P.2d 703 (1994), *aff'd on other grounds*, 127 Wn.2d 401, 899 P.2d 1265 (1995). An expert can qualify by experience alone. *State v. Rodriguez*, 163 Wn. App. 215, 259 P.3d 1145 (2011). Expertise in a related field also can qualify an expert. *Hall v. Sacred Heart Medical Center*, 100 Wn. App. 53, 995 P.2d 621 (2000) (though not a nurse, physician can testify to nursing standard of care).

1. Dr. Masci was well qualified by his education, training, experience, and license to express the opinions he expressed.

Dr. Masci testified to his extensive qualifications, education, and experience, to the scope of chiropractic medicine in general, and to his specific examination of both Mr. Gilmore and his records. RP 317-323. With this evidence before the trial court, issues with Dr. Masci's testimony clearly went to weight, not to admissibility. Defendant made this very point in closing, arguing that Dr. Masci's opinion should not be given weight because he had not testified exclusively about chiropractic treatment but about other things. RP 1018-19. It was for the jurors to

give that argument, and Dr. Masci's testimony, such weight as they believed each deserved.

RCW 18.25.005(1) defines chiropractic to include "the diagnosis or analysis and care or treatment of ... articular dysfunction and musculo-skeletal disorders." RCW 18.25.006(7) states: "'Musculoskeletal disorders' means abnormalities of the muscles, bones, and connective tissue." The intervertebral discs in the neck and back are connective tissues. Therefore, a chiropractor's scope of practice includes diagnosis and treatment of disc bulges and herniations, and the nerves those herniations impinge upon. These were the injuries Mr. Gilmore sustained in this collision.

Moreover, chiropractors are expected to perform a differential diagnosis and to refer patients to other health care providers when appropriate. RCW 18.25.005(3); 18.25.006(8). Chiropractors routinely co-ordinate with other medical professionals, including medical doctors, to ensure that patients receive appropriate care. The law thus recognizes that doctors of chiropractic will interact with other health care providers and, inevitably, with their records and reports as well.[17]

The defense argues that Dr. Masci went beyond his expertise in testifying about disc diseases, disc herniation, MRI findings, and neurological symptomology. All of these subjects fall squarely within what

[17]Indeed, RCW 18.25.005 states that "[a]s part of a chiropractic differential diagnosis, a chiropractor shall perform a physical examination, which may include diagnostic x-rays, to determine the appropriateness of chiropractic care **or the need for referral to other health care providers**." (emphasis added).

chiropractors are statutorily authorized to deal with. They also fall within the realm of matters that chiropractors in general and Dr. Masci in particular do deal with. *See*, Declaration of Dr. Masci, DC, CP 707-08.

The defense took inconsistent positions at trial on this issue, initially withdrawing its objection to Dr. Masci's testimony, but later renewing it. Defense counsel voir dired Dr. Masci about the scope of his expertise and **then withdrew this objection**, at RP 325:

> Mr. Rovang: Doctor, excuse me. Is – is, uh, degenerative disc disease a condition that's within your scope of specialty and licensing in the State of Washington?
>
> A: Certainly.
>
> Mr. Rovang: Okay. No objection.

It was not until Dr. Masci began to give damaging testimony that the defense suddenly began to object repeatedly to his testimony.

2. *Defendant never objected to Dr. Masci's testimony as "vouching" and therefore waived the issue.*[18] *Dr. Masci did not improperly "vouch" for Mr. Gilmore – he used information reasonably relied upon by experts in his field, including his physical examination, patient history, and patient records.*

Defendant failed to make any objection during Dr. Masci's testimony that he was "improperly vouching" for Mr. Gilmore. Had defense counsel done so, and had the trial court agreed with this characterization, it would have been easy for the trial court to limit Dr. Masci's testimony and/or to give a corrective or limiting instruction. As with so many other

[18]The defense eventually did object to Dr. Masci's testimony as being outside the scope of his license. *See, e.g.*, RP 345-46, 349, 351, 355. The trial court dealt with that issue outside the jury's presence, exercising discretion to move the trial forward by acknowledging this objection and exercising discretion to overrule it. RP 356-57.

issues, the defense's failure to timely raise this issue or to request a corrective instruction waives it. It was not preserved for appeal.

As for the merits of this issue, experts can rely upon types of information "reasonably relied upon by experts in the particular field", even if that information is not itself admissible. ER 703. Doctors of medicine and of chiropractic reasonably rely upon records, tests, and other information, together with the patient's history, in reaching their conclusions. Dr. Masci did that here. RP 322. There was nothing improper about it.

The defense claims Mr. Gilmore's history was "unreliable". But it would have been improper for any court to accept that partisan opinion as a matter of law and to therefore exclude Dr. Masci's testimony. Rather, the usual remedy for an adversary when an expert testifies based in part upon allegedly unreliable information is to highlight that issue for the jurors. The jury instructions told the jurors that they could consider an expert's information sources in weighing the expert's testimony. RP 972. The defense argued in closing argument that Mr. Gilmore was "not truthful" with his doctors. RP 1018. The fact that the defense argument didn't work is not a basis for appeal.[19]

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[19]The case defendant cites, *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986), involved an accident reconstructionist who based his opinions **solely** on "facts" about the collision which were contradicted by all witnesses. Here, Dr. Masci's opinions were based upon records and test results, not solely upon what Mr. Gilmore told him. RP 323.

E. The trial court's decisions pertaining to alleged discovery violations regarding Dr. Marinkovich were both correct and well within the trial court's discretion.[20]

At one time, it was common for trial courts to exclude witnesses because of discovery violations.[21] But in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997), the Supreme Court announced a far more stringent standard: before the "harsher" remedies of CR 37(b) can be imposed, a trial court must find **on the record** that (1) the offending party's action was willful or deliberate; (2) the offense substantially prejudiced the opponent's ability to prepare for trial; and (3) no lesser sanction would suffice.

In *Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006), the *Burnet* doctrine was extended to witness exclusion for discovery violations. And in *Blair v. TA-Seattle E. No. 176*, 171 Wn.2d 342, 344, 254 P.3d 797 (2011), the Supreme Court reversed the trial court's exclusion of witnesses, holding it was an **abuse of discretion** to exclude a witness without conducting the required "*Burnet* analysis" **on the record**.

In *Jones v. Seattle*, 179 Wn.2d 322, 344, 314 P.3d 380 (2013), the Supreme Court went even further. In *Jones,* the Court held that even when a witness was first disclosed **during trial** – the most egregious pos-

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[20]In denying defendant's CR 59 motion, the trial court expressly held, "The issues regarding Dr. Marinkovich do not warrant a new trial or remittitur." CP 724-25.

[21]The cases defendant cites in support of its argument that the issues regarding Dr. Marinkovich mandated a new trial are no longer good law after *Burnet v. Spokane Ambulance* and its progeny, especially *Jones v. Seattle.*

sible discovery violation – the trial court nevertheless was required to conduct an **on the record *Burnet* analysis before it could properly bar the late-disclosed witness from testifying.** *Jones*, at 340.[22]

The defense here complains that some details about what Dr. Marinkovich reviewed and when he reviewed it, in forming his opinions, were not timely disclosed. But **defense counsel already got the remedy he asked for below**. He stated on Thursday, April 11, 2015 (RP 431-32):

> I think what I'd like as a remedy, Judge, is an order from the Court requiring the plaintiff to give me a copy of everything the doctor has reviewed, and a copy of all his opinions...a copy of everything that's in his notes, the correspondence and so forth. Uh, if I could have that before Monday that would give me an opportunity to review. I don't think I'm going to gain anything significant by questioning the doctor here today. But if I could have the materials, uh, before he testifies on Monday, **that would give me an opportunity to prepare.** (emphasis added)

A few moments later, defense counsel stated: "Counsel can give me all of [Dr. Marinkovich's] opinions based on everything that he's reviewed. That – and I'll **be prepared Monday**." RP 434 (emphasis added).

The trial court ordered that the materials defense counsel requested be provided to him by Friday, April 12, at 4 pm. RP 432. If defense counsel had wanted a trial continuance or recess, he could have asked for it. He did not. Instead, he obtained the relief he sought, and he represented to the trial court that that relief was sufficient – that he would be

[22]The Supreme Court ultimately found that the improper exclusion was harmless error and affirmed the verdict. *Jones* at 355-56.

prepared to cross examine Dr. Marinkovich the following Monday.[23]

Defense counsel's concession that this remedy would be sufficient for him to be ready to cross examine Dr. Marinkovich precluded the trial court from finding that defendant's ability to prepare for trial had been "substantially prejudiced", and indeed the trial court made no such finding. And obviously there existed a sufficient remedy short of excluding Dr. Marinkovich. The trial court granted that remedy – the very remedy defendant sought. Far from it being reversible error for the trial court to allow Dr. Marinkovich to testify, **it would have been error to exclude him.**[24] *Burnet, supra*; *Blair, supra.*

Furthermore, this Court should be aware that there also were issues about what information the defense provided to its own medical witness, Dr. Jessen. Dr. Jessen did not have a number of important medical records when she completed her own report; she saw them for the first time at trial. RP 921.[25] This information is provided for two reasons.

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[23]Dr. Marinkovich did return on Monday to be cross examined, **at plaintiff's expense**. This was in an additional *de facto* sanction upon plaintiff's counsel.

[24]Appellant focuses on the trial court's offhand comment that something was "fishy", RP 432, as "proof" that the court found "willful misconduct". "Fishy" is a far cry from an affirmative finding of willful misconduct. But the point is moot because, in the clear absence of the other two *Burnet* findings, witness exclusion on discovery grounds would have been error, even if there had been an express finding on the record of willful misconduct.

[25]Specifically missing from the records Dr. Jessen was provided by the defense were the June 25, 2009 record from West Sound Orthopedics, in which a Dr. Kane opined that Mr. Gilmore would require surgery to treat the injuries he sustained in the motor vehicle collision, RP 927-928; a July 27, 2009 record from Dr. Suffis noting his opinion that, on a more probable than not basis, Mr. Gilmore's on-going symptoms were related to the motor vehicle collision, RP 925; and the September 10, 2010 assessment from Dr. Niakan in which he opined that Mr. Gilmore's symptoms began after this collision, RP 927.

First, since appellant has challenged the validity of the jury's deliberations and verdict, this Court should be aware that the trial evidence provided the jurors with at least one very good reason for rejecting Dr. Jessen's conclusion that the surgery was unrelated to the collision: that her opinion was based upon incomplete information. Second, it shows that inadvertent errors in communications with experts do occur in the realm of real-world litigation, and that such common errors are not in and of themselves proof of "willful misconduct". The defense now complains bitterly about when plaintiff's witness received certain information. Do they claim it also was "willful misconduct" when the defense did essentially the same thing with its own witness?

F. The exclusion of evidence of collateral source benefits was both correct and well within the trial court's discretion.

The defense complains that the trial judge kept out evidence of L&I payments as a "collateral source". Appellant's Opening Brief, p. 10. Defendant now argues on appeal that plaintiff "opened the door" when some lay witnesses testified about financial issues in Mr. Gilmore's life. But in *Boeke v. International Paint, Inc.*, 27 Wn. App. 611, 617-18, 620 P.2d 103 (1980), the Court of Appeals specifically forbade admission of L&I payments under the collateral source rule, even where, as here, they were offered to show plaintiff's alleged lack of motivation to return to work.

The *Boeke* rule was repeated and reinforced in *Cox v. Spangler*, 141 Wn.2d 431, 441, 5 P.3d 1265 (2000) (emphasis added), where the Supreme Court held:

> Thus, **even when it is otherwise relevant**, proof of such collateral payments is usually excluded, lest it be improperly used by the jury to reduce the plaintiff's damage award. *Boeke v. International Paint Co.*, 27 Wn. App. 611, 618, 620 P.2d 103 (1980) (quoting *Reinan v. Pacific Motor Trucking Co.*, 270 Or. 208, 213, 527 P.2d 256 (1974)). **In this respect, courts generally follow a policy of strict exclusion**. Although the fact that Cox received industrial insurance benefits **might have some marginal relevance regarding the apportionment of Cox's damages, to show malingering, or to attack her experts' credibility, we believe such relevance is outweighed by the unfair influence this evidence would likely have had upon the jury**.

In this case, the trial judge noted that he knew of no authority that collateral source evidence in a personal injury case is even subject to "opening the door". RP 543. The trial court offered the defense the opportunity to cite such authority, RP 541, but it never tried to do so until this appeal, thereby depriving the trial court of the opportunity to deal with the issue below. "As a general matter, an argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." *Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008), *review denied*, 165 Wn.2d 1017, 199 P.3d 411 (2009); *Washington Fed. Sav. v. Klein*, 177 Wn. App. 22, 29, 311 P.3d 53 (2013); RAP 2.5(a). By declining the trial court's invitation to brief the "opening the door" issue, defendant waived the issue for appeal.

Moreover, even now defendant has failed to cite to any authority that actually supports its position. The cases defendant cites that tacitly

allowed a trial court to find "opening the door" to collateral sources were not civil cases for personal injury, but a worker's compensation proceeding and a PERS pension hearing.[26] *See*, *Johnson v. Weyerhaeuser*, 134 Wn.2d 795, 953 P.2d 800 (1998) and *Marler v. Dept. of Ret. Sys.*, 100 Wn. App. 494, 997 P.2d 966 (2000). *Cox v. Spangler*, *supra*, is the Supreme Court's last word on collateral sources in personal injury lawsuits, and it calls for a "policy of strict exclusion" of collateral sources. *Cox*, at 441.

The defense also attempts to distinguish the many cases that exclude L&I payments as a collateral source by claiming without citation to authority that, where plaintiff seeks no special damages, the long-standing, well-established collateral source rule somehow suddenly becomes inapplicable. This unsupported assertion makes no sense, and should be rejected.

Even if the cases defendant cites did stand for the proposition that one **can** open the door to collateral source evidence in a personal injury case, the trial court's decision remains discretionary. In light of the unfairly prejudicial effect collateral source evidence has, compared with its slight probative value, the trial court correctly exercised its discretion and found as an independent alternative ground for exclusion, that its preju-

[26]Lest the distinction we are making between a civil lawsuit for personal injury and a worker's compensation proceeding be seen as "nitpicking", this Court should note that the sole issue upon which review was granted in *Johnson v. Weyerhaeuser* was whether the collateral source rule applied **at all** in L&I cases. The Court held it did. *Id.*, at 804.

dicial effect outweighed its probative value, pursuant to ER 403. RP 56. This conclusion was well within the trial court's discretion.

G. The amount of damages awarded was both reasonable and well within the range of the evidence presented at trial.

The verdict in Mr. Gilmore's favor is not evidence of passion or prejudice, but rather is evidence the jurors were paying attention to the evidence and the law. It was a reasonable verdict for a man who has irreparable injury to his spine, who had to undergo multi-level spine fusion surgery, and who, despite improvement following the surgery, still faces a lifetime of pain and disability. The defense has offered no evidence for its claim of an excessive verdict, except defense counsel's personal opinion that the verdict was somehow "too large" or some kind of "record".[27] That is not evidence, and this Court should not disturb the jury's decision.

A new trial is not a matter of right. *Getzendaner v. United Pac. Ins. Co.,* 52 Wn.2d 61, 322 P.2d 1089 (1958). The trial court has wide discretion in granting or denying motion for new trial, and an appellate court will not interfere unless there has been a manifest abuse of that discretion. *Coats v. Lee & Eastes Inc.*, 51 Wn 2d 542, 320 P.2d 292 (1958). The Court presumes the jury's verdict is correct, *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 654, 771 P.2d 711, 780 P.2d 260 (1989), and is obliged to presume that the damages awarded by the jury are correct and "***shall prevail***" unless the damages are so excessive as to indicate the verdict, not "may have been", but "***must have been***" the result of passion

[27]Comparing awards in other cases to determine appropriateness of a damage verdict is "improper". *Washburn v. Beatt Equipment*, 120 Wn.2d 246, 248, 840 P.2d 860 (1992).

or prejudice. RCW 4.76.030 (emphasis added).

The jury has the constitutional role of determining questions of fact, and the amount of damages is a question of fact. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971). If substantial evidence is presented on both sides of an issue, the jury's finding is final. *Thompson v. Grays Harbor Cmty. Hosp.*, 36 Wn. App. 300, 675 P.2d 239 (1983).

In *James*, the Supreme Court reversed a trial court's remittitur (which had been upheld by the Court of Appeals), stating: "Whether substantial justice was done depends in a large degree on whether the verdict was so excessive or inadequate as ***unmistakably*** **to indicate passion and prejudice.**" (emphasis added). The trial judge is in a "favored position" on motions for remittitur because the trial judge saw the evidence and heard the witnesses and counsel. *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985) (reversing the Court of Appeals, which had overruled the trial court and ordered remittitur).

An appellate court should not disturb an award of damages made by a jury "unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice." *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005). "Passion and prejudice must be 'unmistakable' before they [can be presumed to] affect the jury's award." *Id.* "The determination of the amount of damages, particularly in actions of this nature, is primarily and peculi-

arly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made." *Bingaman, supra*. Moreover, verdict size alone cannot be a basis to overturn a verdict. *Bingaman*, at 838.

Damages need not be proven with mathematical certainty, but only need be supported by competent evidence. *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 530-31, 544 P.2d 1041 (1976). Here, the verdict reflected the doctors' testimony that Mr. Gilmore's injuries and surgery were caused by the collision, and who opined that he faced life-long pain, and a worsening condition as he aged, plus extensive lay witness evidence that Mr. Gilmore's life had been severely affected by his injuries.

The jury did not give plaintiff more than he asked for, or even the amount that he asked for in damages. Obviously, the jurors weighed the evidence and chose which parts to believe and which to disbelieve, as was their right and duty. The trial judge held that the verdict was within the range of the evidence when he denied the motion for remittitur. This Court should give great deference to the jury and to the trial court on damages issues, and should uphold the verdict.

The defense makes the strange argument that medical bills which were neither offered nor admitted into evidence at trial should somehow, in the post-trial world, prove that the verdict was "excessive". The defense submitted copies of certain medical bills in connection with its CR 59 motion for a new trial. CP 477-493, 628-629. However, these bills

are inadmissible,[28] and should be stricken by this Court. Plaintiff has filed a separate Motion to Strike.

Even if this Court declines to strike the bills for lack of proper foundation, the bills still are irrelevant. How much a surgery costs tells us nothing about how painful it was, how risky it was, how prolonged its recovery period was, nor its result. And since the jurors never saw the bills, the bills could not possibly have caused them to violate their oaths and return an excessive verdict. These bills are irrelevant to this appeal. If the defense had wanted the bills in evidence at trial, it could have offered them. For defendant to make the tactical decision not to offer the bills, and then to appeal a verdict not to its liking, is yet another example of its improper "gambling on the verdict".

H. Plaintiff's closing argument was proper, and any impropriety was waived because defendant never objected to any part of it.[29]

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[28]In submitting the medical bills, defendant failed to lay a foundation that would make them admissible as business records. They are thus inadmissible hearsay. Nor did the defense offer any evidence that these bills were reasonable, necessary, or related to the injuries caused by the collision. Plaintiff made a motion to strike the medical bills from the trial court's consideration when they were submitted by the defendant as part of its CR 59 motion, but the trial court did not rule on the motion to strike.

[29]In balancing any "equities" regarding this issue, the Court should be aware that **defendant** violated the trial court's orders in limine during its own closing. Plaintiff's Motion No. 4 requested that there be no argument that a plaintiff verdict would be a "windfall". CP 15. The intent of the motion was clear – that the defense could not characterize a requested verdict as "jackpot justice" or argue a verdict for plaintiff would be a windfall for him. RP 17. The Court granted the motion when defense counsel conceded the point, stating "I'm not going to argue that any recovery would be a windfall for the plaintiff, which I think is what this motion goes to." RP 18. The defense even stated "**that would be improper**." RP 18 (emphasis added).

Yet the defense repeatedly violated this order, arguing in closing, "[t]hey're hoping you know, you're gonna go for $1.8 million for a minor collision. It's ridiculous. This is not a lottery." RP 1008. The defense later said it again: "It's not a lottery" and "it's not an opportunity to retire." RP 1023.

Although the defense now complains about plaintiff's closing argument, the defense neither objected nor sought any curative instruction during plaintiff's entire closing argument. Any alleged error therefore was waived.[30]

1. Plaintiff made no "golden rule" argument and defendant never objected to the argument plaintiff did make.

The defense falsely claims, at p. 47-48 of its Opening Brief, that plaintiff's counsel made an improper "golden rule" argument. The Court should note that the defense does not actually quote the allegedly offending language. That is because there is none.

The jurors needed to decide how to measure the monetary value of time lived in pain and disability, so they could fairly determine the amount of money needed to compensate for it. Because most people's jobs involve being paid for their time, our society's trade-off of time for money is one familiar to most jurors. For this reason, plaintiff's counsel sometimes make a damages argument by analogizing to a job. This is one of many variations of the "per diem" argument, which is entirely proper in Washington. *Jones v. Hogan*, 56 Wn.2d 23, 351 P.2d 153 (1960) (per diem argument proper so long as jury is instructed that arguments of counsel are not evidence, which they were here via standard WPI instructions, RP 969). The defense claims that plaintiff's counsel was "repeatedly asking the jurors what it would take for *them*, person-

[30]Defendant's argument rests on criminal cases of prosecutorial misconduct, which are inapplicable in a civil case because of the accused's constitutional rights and the uniquely ultra-high standard to which prosecutors are held. *See, e.g.*, RPC 3.8, comment [1].

ally" to be in Mr. Gilmore's shoes, to take this "job". Counsel did no such thing. She described the "job" and asked the jurors to consider different "wage rates", some being too high, some being too low, and some being, in counsel's argument, "fair and reasonable". RP 1004.

Directly on point is *A.C. ex rel. Cooper v. Bellingham School Dist.*, 125 Wn. App. 511, 524, 105 P.3d 400 (2004). In *A.C.*, the complained-of argument was analogous to that given in the instant case, talking about wages as a means of expressing the value of money. But unlike in the instant case, in *A.C.* counsel **did** ask the jurors to think about what an amount of money would mean **to them** (emphasis added):

> The number that I want to give you for all of the damages in the case is half of a year of an average worker's pay. If you think that's fifteen thousand or twenty thousand, that's an appropriate number. That's a lot that you go through. **If you had that amount of money, what would it mean to you? Would it be a lot of money to you?** That's an issue for the jury to decide.

The Court nevertheless held "this was not an improper 'golden rule' argument". *A.C.*, *supra*, at 524. The Court also held that appellant "did not object to the argument she now characterizes as an improper 'golden rule' statement. **For this reason alone, A.C. is not entitled to relief on appeal on this point.**" *Id.* (emphasis added). Nor is defendant here entitled to any relief, both because the argument was proper and because the defense never objected.

2. Plaintiff did not ask for punitive damages and defendant never objected to the argument plaintiff did make.

Defendant also claims, at p. 47-48 of its Opening Brief, that plain-

tiff's counsel asked the jury for "punitive damages" by asking the jury to "send a message". Not true. Counsel never said "send a message". What counsel did was, again, quite common and entirely proper in a personal injury case – she asked the jurors to hold the tortfeasor accountable for the harm done. RP 1032. Compensation is, after all, a purpose of tort law. *Seattle First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 238, 588 P.2d 1308 (1978). Improvement of public safety is another purpose of tort law. *See*, *Jackson v. City of Seattle*, 158 Wn. App. 647, 657, 244 P.3d 425 (2010); *Maynard v. Sisters of Providence*, 72 Wn. App. 878, 884 n. 5, 866 P.2d 1272 (1994). There is nothing improper about reminding jurors of these policy goals.

Miller v. Kenny, 180 Wn. App. 772, 816, 325 P.3d 278 (2014), is analogous. There, as here, the defense complained that plaintiff's counsel had made an improper argument when he appealed to the jurors to "reflect the 'conscience of the community' and serve as a protector and guardian for the community." The Court held that this speech was not a golden rule argument, nor otherwise improper. *Miller*, *supra*, at 816-17: The Court also noted (citations omitted, emphasis added):

> The effect of a golden rule argument on a jury is 'difficult to ascertain,' and in most cases, **any prejudicial effect can be removed, if there is a timely objection**, by the trial court instructing the jury to disregard the argument.... Safeco did not make a timely objection. And the challenged remarks when read in the overall context of the trial are **more properly characterized as aggressive advocacy than as misconduct**. We therefore conclude the argument of counsel did not furnish a basis for ordering a new trial.

In the instant case, as in *Miller*, *supra*, there was no objection. The argument was proper, and no alleged error was preserved.

Finally, the defense complains about what it calls plaintiff's use of "extraordinarily inflammatory language" about the government murdering people and getting away with it. What the defense omits from its brief is that it was **defense counsel** who started his closing argument by talking about the government getting away with murder – the police shooting a child holding a toy gun; the police shooting a Walmart customer holding an empty BB gun picked up from the store shelf, and then pressuring his widow to blame the victim; the police shooting a man in the back and then planting a taser on his body. RP 1005-06.

Was this a plea for sympathy for the government? An attempt to make what the government did to Mr. Gilmore seem unimportant by contrast? An indirect argument that the government cannot afford to pay Mr. Gilmore because it has to pay for its other, more serious misdeeds? Whatever the purpose of this defense argument, plaintiff's counsel had the right and the duty to respond in rebuttal, and so she did at RP 1031:

> I think it's funny that the defense started his closing argument talking about the government and how the government murders innocent people. And how the government gets away with it. And how the government brings in the widows of those innocent people and tries to get them to blame it on the victim. That's how he started his closing statement.
>
> But that's what the government does. Why do they do that? They do that because no one holds them accountable.

Plaintiff's counsel then went on to encourage the jury to hold defendant

accountable for injuring Mr. Gilmore.

The defense never objected. Indeed, had it done so, one hopes the trial court would have overruled the objection on the ground that it was proper rebuttal to the **subject matter defendant had raised**. In any event, if the defense is now unhappy that the specter of government misconduct entered the courtroom, it has only itself to blame. That specter was brought in by defense counsel, not by plaintiff.

V. CONCLUSION

In this case, defense counsel took a "high risk" approach to the case. If he had succeeded, there would have been either a small damage award or a complete defense verdict. But the high risk approach failed. What the defense really wants now is a do-over, another bite of the apple, in which to try the case again in a different manner and perhaps obtain a result more to the defense's liking. The trial court rejected this request, and so should this honorable Court.

DATED this 26 day of May, 2016.

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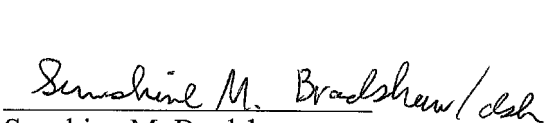

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Oral Argument: August 14, 2015

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SUPERIOR COURT OF WASHINGTON FOR JEFFERSON COUNTY

MICHAEL GILMORE, an individual, Plaintiff, vs. JEFFERSON COUNTY PUBLIC TRANSPORTATION BENEFIT AREA, d/b/a/, Jefferson Transit Authority, Defendant.	No. 10-2-00390-7 ORDER ON MOTION FOR NEW TRIAL OR REMITTITUR

THIS MATTER having come before the undersigned upon the defendant's Motion for New Trial or Remittitur, the Court has reviewed the following items, except for such items, if any, that the Court struck pursuant to the Court's ruling on Plaintiff's Motion to Strike:

1. Defendant's Memorandum in Support of New Trial or Remittitur;
2. Declaration of Counsel Rovang, and the Exhibits thereto;
3. Declaration of Julie DuChene, and the Exhibits thereto;
4. Declaration of Victoria Vigoren, and the Exhibits thereto;
5. Plaintiff's Response to Defendant's Motion for New Trial or Remittitur;

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6. Declaration of Counsel Bradshaw, and the Exhibits thereto;

7. Declaration of Dr. Geoff Masci, DC;

8. Declaration of Counsel Richard McMenamin;

9. _____

The Court heard the oral arguments of both parties. The Court also considered its own observations while presiding over both the pretrial matters and the jury trial of this case. The Court now makes the following Findings of Fact:

1. A sufficient foundation was laid for the admission of the testimony of Dr. Masci, and any issues regarding his credentials went only to the weight of his testimony; (CW)

1-a The issues regarding Dr. Marinkovich do not warrant a new trial or remittitur. (CW)

2. This was a hard-fought case characterized by aggressive advocacy, but the Court does not find, in the context of the entire record, that there was any event, misconduct, or discovery violation sufficient to justify a new trial or a remittitur;

The court does not find a basis to overturn the verdict. (CW)

~~3. The jury's verdict was within the range of the evidence presented at trial, and was supported by substantial competent evidence.~~

WHEREFORE, defendant's Motion for Remittitur or New Trial is DENIED.

Dated this 14 day of August, 2015.

SUPERIOR COURT JUDGE

Presented by:

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SUPERIOR COURT OF WASHINGTON FOR

COUNTY OF KING

KEVIN FOLEY, Plaintiff, vs. BRANDIE D. DEAL, Defendant	No. 13-2-23557-9 SEA ORDER RE: MOTION TO EXCLUDE ALLAN F. TENCER PHD

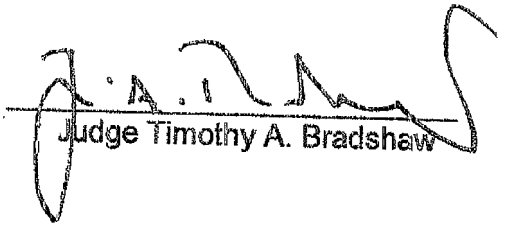
This matter comes before the court on Plaintiff's Motion for an order to exclude the proffered testimony of Allan F. Tencer, PhD. The Court has considered the following:

- Plaintiff's motion and Declaration,
- Defendant's Response and Declaration with exhibits;
- Supplemental Response and Declaration;
- Plaintiff's Reply and Declaration;
- Pertinent legal authority, including *Johnston-Forbes v. Matsunaga*, 333 P.3d 388; 177 Wn. App. 402 (Div. 2, 2013), *Berryman v. Metcalf*, 177 Wn.App. 644 (Div. I, 2013), *Stedman v. Cooper*, 172 Wn.App (Div. I, 2012), *Schultz v. Wells, 13 P.3d 846* (Colo.App. 2000).

The facts at bar involve: a) admitted liability for the collision, b) conceded causation for immediate injuries, and c) the plaintiff's preexisting susceptibility to injury. Here, non-medical, biomechanical expert testimony would not assist a trier of fact to understand the evidence or to determine a fact in issue, pursuant

ER 702. Such testimony is additionally inadmissible since any relevance is substantially outweighed by the danger of confusion of the issues and misleading the jury, pursuant ER 403. Accordingly, the motion is GRANTED. The Court, however, defers to the trial court whether such limited expert testimony would, on balance, become sufficiently relevant and hence admissible in rebuttal should plaintiff offer (as the defendant here presumes) specific testimony regarding the transferability of forces peculiar to the specific trailer hitch and resulting injuries here.

SO ORDERED this 04th day of December, 2014.



Judge Timothy A. Bradshaw

HONORABLE CATHERINE SHAFFER

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

ANTHONY W. HOPKINS, Plaintiff, v. MICHAEL J. TEETER, Defendant.	NO. 13-2-25739-4 SEA ~~[PROPOSED]~~ ORDER GRANTING PLAINTIFF'S MOTION TO EXCLUDE TESTIMONY OF ALLAN TENCER, Ph.D.

This matter, having come before the Court on plaintiff's Motion to Exclude Testimony of Allan Tencer, Ph.D., and the court having reviewed the records and files herein, and being fully advised, finds Allan Tencer, Ph.D.'s testimony in this case not helpful to the trier of fact, unfairly prejudicial, and likely to confuse the jury.

Dr. Tencer is not a medical professional and may not testify to causation of injury. There is no logical inference from Dr. Tencer's testimony in this case other than that plaintiff could not have been injured from the collision because the force of impact was too small. This inference, this opinion, and this conclusion of the testimony of Dr. Tencer constitute "causation of injury" evidence not permitted. Beyond this improper inference, Dr. Tencer's testimony is not relevant to any ~~issues material to this case~~ the material issue in this case: the degree to which plaintiff was injured by this particular automobile collision. ~~Furthermore, Dr. Tencer's opinions are unreliable and based~~ on

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speculation using methods and information that is outside his area of expertise and not generally accepted within the scientific community.

The Court adopts the reasoning of the Court of Appeals in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), and finds that the facts are analogous in the case before this Court and the purpose of Dr. Tencer's testimony is for the same purpose as in *Stedman*. This Court also finds persuasive and adopts Judge North's ruling in his decision of June 9, 2009 attached.

Now, therefore, it is ORDERED that plaintiff's Motion to Exclude Testimony of Allan Tencer, Ph.D. is GRANTED ~~on the basis that Dr. Tencer's testimony is more likely to be misleading than helpful to a jury.~~

Dated this ____ day of April, 2015.

HONORABLE CATHERINE SHAFFER

Presented by:

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Attorneys for Plaintiff

Arbitrator: Honorable Sean O'Donnell

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

LISA WALKER, Plaintiff, v. RONNIE L. BARNES, Defendant.	NO. 14-2-15848-3 ~~[PROPOSED]~~ **ORDER GRANTING MOTION TO EXLCUDE TESTIMONY OF ALLAN F. TENCER, PHD.**

THIS MATTER came on before the Court on Motion to Exclude Testimony of Allan F. Tencer, PhD. The Court considered the following papers filed in this matter:

1. Motion to Change Exclude Testimony of Allan F. Tencer, Ph.D
2. Declaration of James W. Kytle;
3. Defendant's opposition
4. Decl. of Ryan Volkens
5. Plaintiff's Reply
6. _____

Having considered the foregoing materials, and being fully informed by the arguments of counsel, the Court hereby ORDERS as follows: the Motion to Exclude Testimony of Allan F.

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Tencer, PhD. is GRANTED:

It is hereby duly ORDERED this 12th day of April 2016.

The Honorable Sean O'Donnell

Presented by:
MANN & KYTLE, PLLC

James W. Kytle, WSBA# 35048
Mary Ruth Mann, WSBA# 9343
Attorneys for Plaintiff

Approved as to form
Notice of presentation waived

Ryan Vollans WSBA #45302

There is a conundrum in the defendant's position regarding Dr. Tencer. On the one hand, 'Defendant does not dispute that Dr. Tencer cannot offer medical causation testimony' and assures the court no such testimony will be offered. Response at 8. On the other hand, Dr. Tencer's testimony would be offered to help the jury determine 'whether or not plaintiff's ongoing complaints could be attributable to the subject collision.' Defendant further states that 'the forces involved in the subject crash are directly relevant to the issues in this case.' Response at 7.

The purpose of Dr Tencer's testimony would be to link the force of the crash to plaintiff's 'ongoing complaints.' Yet the only 'complaints' plaintiff expresses are resulting from the plaintiff's (alleged) injuries. Defendant wraps the proposed testimony as helping the jury understand the forces involved in the crash and whether those forces can be attributable to plaintiff's injuries. This posture is distinguishable from Johnston-Forbes v. Matsunaga, where the proffered testimony examined force of collision to supposedly similar forces experienced in daily living. Johnston-Forbes, 181 Wn 2d at 374.

Additionally, based on the evidence / proffer submitted, the court finds that Dr Tencer's testimony would not be helpful to the jury and, therefore, irrelevant.

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CERTIFICATE OF SERVICE

The undersigned declares, under penalty of perjury under the laws of the State of Washington, that on the below date I caused the foregoing document to be served via email and messenger on the following attorney:

Ryan Vollans
Betts, Patterson & Mines
One Convention Place
701 Pike Street, Suite 1400
Seattle, WA 98101-3927

DATED this ____ day of _____, 2016 in Seattle, WASHINGTON.

_____
JAMES W. KYTLE

CONT

Dr. Tencer cannot testify that the force involved in this crash caused plaintiff's alleged injuries. He has also relied on an for his opinions experiment that shows little, if any, similarity to the accident at issue in this case. Moreover, the sample size of his experiment is too small, in this court's estimation, to provide a statistically significant inference. (NOTE: In opposing the motion to exclude, defendant provided little, if any, documentation supporting the basis for Dr. Tencer's opinion. The court has reviewed and relied upon exhibits 3 and 5 to Mr. Kytle's declaration.

For all these reasons, the court is granting plaintiff's motion. See also, Anderson v. Akzo Nobel Coatings, 172 Wn2d 593, 606 (2011); Steedman v. Cooper, 172 Wn App 9 (2012) and ER 702.

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HELLER LAW FIRM PLLC

May 02, 2016 - 2:55 PM

Transmittal Letter

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Case Name: Gilmore v. Jefferson County Transit
Court of Appeals Case Number: 48018-2

Is this a Personal Restraint Petition? ○ Yes ◉ No

The document being Filed is:

- ○ Designation of Clerk's Papers ☐ Supplemental Designation of Clerk's Papers
- ○ Statement of Arrangements
- ○ Motion: ____
- ○ Answer/Reply to Motion: ____
- ◉ Brief: __Respondent's__
- ○ Statement of Additional Authorities
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
  Hearing Date(s): _____
- ○ Personal Restraint Petition (PRP)
- ○ Response to Personal Restraint Petition
- ○ Reply to Response to Personal Restraint Petition
- ○ Petition for Review (PRV)
- ○ Other: _____

Comments:

No Comments were entered.

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