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No. 94559-4

SUPREME COURT
OF THE STATE OF WASHINGTON

MICHAEL GILMORE, a single man,

Petitioner,

v.

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

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellate courts owe deference to a trial court's evidentiary rulings only when those decisions are based on the correct legal standard. Where the trial court excludes evidence based on an erroneous application of the law, the reviewing court has no obligation to defer to the trial court's discretion. The Court of Appeals correctly remanded for a new trial because the trial court's erroneous evidentiary rulings crippled Jefferson Transit's ability to put on its defense. In addition, the jury's unprecedented \$1.2 million verdict in general noneconomic damages for a low-speed "fender bender" was caused by egregious misconduct of plaintiff's counsel, who accused "the government" of "fraud" and "murder," which also deprived Jefferson Transit of a fair trial. This Court should affirm the Court of Appeals decision remanding for a new trial.

II. RESTATEMENT OF THE CASE

Respondent Jefferson Transit restates the facts relevant to the three remaining issues in this Court.

A. After a low-impact collision with a Jefferson Transit bus, Mr. Gilmore claimed serious injuries of the same type for which he had previously sought medical treatment.

Plaintiff Michael Gilmore was driving a box van owned by his employer, Brothers Plumbing, in Port Townsend on March 31, 2008.

(CP 2; RP 747-48) A transit bus operated by Jefferson County Public Transportation Benefit Area (“Jefferson Transit”) came to a stop behind the van at a stop light and then moved forward slightly and hit the rear of the van. (CP 6-7; RP 748) The damage to both vehicles was minimal: a bike rack on the front of the bus cost \$1,200 to replace; Brothers Plumbing did not bring a claim against Jefferson Transit for any damage to the plumbing van. (RP 578, 772)

In 2004, Mr. Gilmore had received (and was compensated for) a 60% disability rating from the Veterans Administration for degenerative arthritis in his thoracolumbar spine, left elbow, and both hips and knees. (CP 376-78, 745; RP 614-16) Between August and November 2007, Mr. Gilmore sought treatment on several occasions for neck pain. (CP 756-57, 779-80; RP 665-66) Immediately following the March 2008 accident, Mr. Gilmore went to the emergency room complaining of nausea and head, neck, hip, and lower back pain. (RP 753) He returned several days later complaining of headaches and numbness in his hands. (RP 754-55)

Jefferson Transit learned soon after the impact that Mr. Gilmore was claiming the low-impact collision had caused serious injuries. Four months after the accident, a private investigator took video of Mr. Gilmore putting a boat on a trailer, jogging, and moving his head and

neck with full range of motion. (RP 802, 898-903; CP 63) After Mr. Gilmore filed his complaint in this action in 2010, Jefferson Transit admitted liability but denied that its negligence had caused Mr. Gilmore's claimed injuries. (CP 6-7; RP 753)

B. The trial court prevented Jefferson Transit from putting on its causation defense by excluding its expert witness because he relied on facts not in evidence and because his testimony could "create an aura of authority."

At trial, Mr. Gilmore dismissed any claim for special damages, and sought only general damages for a herniated neck disc – an injury he claimed was different and unrelated to the conditions for which he had received a VA disability rating in 2004 and sought treatment in 2007. (RP 13, 618, 979-82) Because causation of Mr. Gilmore's claimed neck injury was critical to its defense, Jefferson Transit sought to call Dr. Allan Tencer as an expert to testify to "a quantitative description of the forces experienced by the Plaintiff in the crash and a comparison of those forces to forces of common experience." (CP 366)

Dr. Tencer holds a Ph.D. in Mechanical Engineering. (CP 365) He had recently retired after 25 years as a Professor in the Department of Mechanical Engineering and the Department of Orthopedic Surgery and Sports Medicine at the University of Washington. (CP 365) In addition to teaching orthopedic residents and engineering

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

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

Mr. Gilmore moved in limine to exclude Dr. Tencer’s testimony, claiming that Dr. Tencer was “not qualified” to testify that Mr. Gilmore was “very likely not injured,” that such testimony would not be helpful in any event because “causation with regard to the fact of injury . . . is not in question,” and that Dr. Tencer’s “scientific method” – fundamental engineering principles derived from physics – was “simply not reliable.” (CP 47-56; RP 33-36, 38) The trial court excluded Dr. Tencer’s testimony for “mak[ing] a number of

assumptions, some of which are based on facts that are not going to be in evidence,” concluding that Dr. Tencer’s testimony was “intended to create an inference with some aura of authority” that was not “reasonable or justified.” (RP 39)

C. The trial court excluded evidence of Mr. Gilmore’s receipt of L&I benefits after he opened the door, preventing Jefferson Transit from defending against plaintiff’s noneconomic general damages claim – the only damages Mr. Gilmore sought.

Because Mr. Gilmore was on the job at the time of the collision, his medical bills were paid by the Department of Labor and Industries (“L&I”). (CP 14) Mr. Gilmore also received L&I time loss payments for five months, as well as a lump sum payment at the end of 2009. (RP 6, 518, 543) Mr. Gilmore moved to have evidence of L&I payments excluded, on the basis of the collateral source rule, and to prohibit Jefferson Transit from asking “about his current or past financial status,” arguing that plaintiff’s financial status was “irrelevant” to his claim for general damages. (CP 14-15; RP 17)

The trial court initially denied Mr. Gilmore’s motion in limine (RP 15-16), but on reconsideration ruled that “[t]he L&I payments will not be admissible unless the door is opened.” (RP 56) The trial court also granted Mr. Gilmore’s motion to exclude evidence of his financial status when Jefferson Transit stipulated that it agreed “to the extent

that this asks the Court to rule that [the defense] should not argue in closing that recovery for [Mr. Gilmore] would be a financial windfall.” (RP 18)

In violation of the order in limine he had himself requested, Mr. Gilmore then introduced evidence of his financial status at trial as the basis for his noneconomic general damages.¹ Mr. Gilmore and his son testified that he worked two or three jobs “80 hours a week prior to the accident” because he “needed money to support his family.” (RP 530, 532, 602, 605) Mr. Gilmore elicited testimony of his claimed inability to work after the impact and the effect that had on him and his family. (RP 508, 532) Mr. Gilmore’s sons testified that because “it was hard to pay the bills” and their father “didn’t feel like he was able to provide for his family,” he “went way downhill,” and turned to alcohol because “he didn’t know what to do.” (RP 508, 532) His son also testified that Mr. Gilmore and his wife “didn’t exactly get along very well for . . . much longer after [the impact]” because there were “lots of financial issues causing them to argue.” (RP 508) Mr. Gilmore testified that even though his doctor had recommended surgery for

¹ Most of the testimony elicited at trial in support of plaintiff’s noneconomic general damages claim was of “hedonic” damages – a “general loss of enjoyment of life.” Jacob A. Stein, *Stein on Personal Injury Damages Treatise* § 8:34 (3d ed.). The jury was instructed to consider Mr. Gilmore’s “loss of enjoyment of life” in awarding damages. (CP 396)

“bulging discs” in April 2009, he put off the surgery because he “didn’t think [he]’d be able to support [his] family” and “couldn’t afford to” have the procedure done until January 2015 – resulting, he claimed, on an increasing reliance on opiates. (RP 762-63)

To rebut this testimony, Jefferson Transit moved to admit evidence of L&I medical and time loss payments, as Mr. Gilmore had opened the door by introducing evidence of his financial status in support of his claim for general noneconomic damages. (RP 536) Reversing its pretrial position that collateral source evidence could be admitted if plaintiff opened the door, the trial court ruled that a party could *never* open the door to “this L&I stuff.” (RP 543-44)

D. The jury awarded \$1.2 million in general noneconomic damages after plaintiff’s counsel urged the jury to “fight the government.”

Mr. Gilmore moved in limine to allow character evidence of his “reputation in the community for truthfulness, work ethic, and honesty,” claiming that Jefferson Transit’s defense had put Mr. Gilmore’s credibility at issue by implying he was “a liar, a cheat, and a fraud.” (CP 18-19) The court initially held that “simply whatever complies with [ER] 608” would be admissible. (RP 24) Although only plaintiff’s counsel used the terms “liar,” “cheat,” or “fraud” in referring to her own client (*see, e.g.*, RP 273, 276, 977, 1029, 1032),

Mr. Gilmore then repeatedly elicited testimony at trial of his character (*see, e.g.*, RP 299, 305-06, 461-63, 555-56, 640-41, 644-46), contending that “the Defense has opened the door to Mr. Gilmore’s character and opened the door to him being a liar, a cheat and a fraud.” (RP 305)

Despite recognizing that “[t]he door hasn’t been opened” (RP 305; *see also* RP 560), the trial court allowed plaintiff to put on improper testimony concerning the “character” of *both* parties. Plaintiff’s “character evidence” about the defense accused Jefferson Transit, and its defense counsel, of “fraud” because it challenged causation of Mr. Gilmore’s claimed injuries. For instance:

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

The trial court did nothing to stop these unwarranted attacks. Instead, the trial court rebuked the defense, in front of the jury, for

making proper objections. (RP 356: “If we have to hash this out between each question, I’m happy to do that and we can be here for a month”; RP 552: “[O]verruled. Come on, let’s . . . cut some slack here”; RP 559: “I mean, yeah, objections are appropriate and need to be made. But, I mean, we just need to use some discretion and are the objections really important or necessary or not?”) Despite the trial court’s admonishments, plaintiff’s counsel continued to comment on defense counsel’s objections in front of the jury. (RP 551: “When he objects, which he will do often . . .”; RP 552: “[L]et me ask you another question to appease Defense Counsel”; RP 557: “Let me ask another question so we don’t get an . . . objection”)

In closing, plaintiff’s counsel “doubled down” on her attacks, repeatedly urging the jury to “fight the government” because Mr. Gilmore “can’t do it alone.” (RP 989, 991, 996, 1032) Plaintiff’s counsel told the jury to award damages to send a message to Jefferson Transit as a governmental entity, because “the government murders innocent people,” “gets away with it,” and “tries to . . . blame it on the victim.” (RP 1031) Plaintiff’s counsel told the jury to award damages to deter Jefferson Transit and “hold the government accountable.”

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

(RP 1032)

The jury, inflamed with plaintiff's charge to "fight the government," which "murders innocent people" and "gets away with it," awarded \$1.2 million in general damages – reportedly the largest tort verdict in Jefferson County history. (CP 401) This Court accepted Mr. Gilmore's petition for review of the Court of Appeals unpublished decision reversing and remanding for a new trial raising the three issues addressed in this supplemental brief.

III. SUPPLEMENTAL ARGUMENT

A. **The trial court abused its discretion by applying an incorrect legal standard in excluding expert testimony.**

The trial court abused its discretion by excluding relevant expert evidence without first applying the correct legal standard. Scientific or technical testimony is admissible if the witness "is qualified by knowledge, skill experience, training or education" and the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702; *see Reese v. Stroh*, 128 Wn. 2d 300, 308, 907 P.2d 282 (1995) ("Expert testimony is usually admitted under ER 702 if helpful to the jury's understanding of a matter outside the competence of an ordinary layperson."); *Anderson v. Akzo Nobel*

Coatings, Inc., 172 Wn.2d 593, 600, 260 P.3d 857 (2011) (reversing for trial in light of expert opinion when trial court erred in granting motion in limine excluding plaintiff's expert for failing to satisfy *Frye*).

While the trial court has discretion in reaching its conclusions on admissibility, it has no discretion *not* to “perform a new fact-specific inquiry concerning the admissibility of an expert in every given case.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 358, ¶ 25, 333 P.3d 388 (2014) (Yu, J., concurring). Failure to do so is legal error. *Reese*, 128 Wn.2d at 310 (although “the admission or refusal of evidence lies within the sound discretion of the trial court,” the “trial court abuse[s] its discretion by applying the wrong legal standard to the evidence”). Because the trial court “must scrutinize” the proffered expert testimony and perform a “fact-specific inquiry,” *Johnston-Forbes*, 181 Wn.2d at 358, ¶ 25 (Yu, J., concurring), that inquiry should be apparent from the record.

Division Two correctly held that the trial court abused its discretion by failing to properly apply the three-part test articulated in *Johnston-Forbes*, 181 Wn.2d at 352, ¶ 10, instead excluding relevant and qualified expert testimony for legally erroneous reasons. Mr. Gilmore objected that Dr. Tencer's “scientific method” was “not one relied on in the community” and was “simply not reliable.” (RP 36, 38)

Yet the trial court conducted no *Frye* hearing or otherwise make any findings on the record regarding Dr. Tencer's methodology aside from concluding that it was inadmissible because his conclusions were "based on facts that are not going to be in evidence." (RP 39) Absent any further analysis of "reliability" by the trial court, Division Two correctly held that the court applied the incorrect legal standard. (Op. 17; App. Br. 21, 26-28; Reply Br. 8-9)

Mr. Gilmore also objected that Dr. Tencer was "not qualified to provide that opinion" that the "implication is small impact, really low severity, very likely not injured" and that any such testimony would not be helpful to the jury because, "unlike the *Johnston-Forbes* case, causation with regard to the fact of injury in this case is not in question by either side." (CP 49; RP 33-34) But causation *was* in dispute: the defense theory of the case was that Mr. Gilmore's condition was preexisting, and that he was not injured in the impact. (See Reply Br. 9 n.4; Op. 17-18) Nor did Dr. Tencer offer any testimony regarding the likelihood of injury (CP 364-68); that would have been left to the jury to decide.

Rather than adhering to *Johnston-Forbes*, the trial court excluded Dr. Tencer's testimony on the ground that it was based on "facts that are not going to be in evidence." (RP 39) Division Two

properly held that the trial court's justification was legal error because "[e]xperts are permitted to rely on facts not in evidence if the information or data is of the type reasonably relied on by experts in the particular field in forming opinions or inferences on the subject." (Op. 17, quoting ER 703) *Accord, Grigsby v. City of Seattle*, 12 Wn. App. 453, 457, 529 P.2d 1167 ("trial court exercised its discretion on untenable grounds" in excluding expert testimony as a "'substitute' for factual evidence"), *rev. denied*, 85 Wn.2d 1012 (1975).

The trial court also erroneously justified its exclusion of Dr. Tencer's testimony by noting that it was "intended to create an inference with some aura of authority" that the court did not think was "reasonable or justified." (RP 39) The trial court did not elaborate what "improper" "inference" the jury might make from Dr. Tencer's testimony. As Division Two noted, it appeared that the trial court agreed with Mr. Gilmore that "[e]very single juror that's going to sit in that box can figure out a bus going slow that hits another vehicle is not resulting in a catastrophic collision," based on "photographs." (RP 37; Op. 17) But Division Two also correctly recognized that the "inference" that Gilmore was not injured by the impact was a perfectly acceptable inference for the jury to make. (Op. 17-18)

In *Johnston-Forbes*, this Court noted that Dr. Tencer’s testimony “was relevant and helpful to the jury” particularly because, as was the case here, “the jury was charged with determining causation.” 181 Wn.2d at 356, ¶ 20. And, just as in *Johnston-Forbes*, Dr. Tencer’s proffered testimony here was “not medical,” did “not relate to the degree of injury suffered by the Plaintiff,” and would “not state[] that Plaintiff was or was not injured.” (CP 365-67) This Court should affirm the Court of Appeals decision that the trial court abused its discretion in failing to apply the correct legal standard before excluding qualified expert testimony that was relevant to the key disputed issue – whether the low-impact collision was significant enough to have caused Mr. Gilmore’s claimed neck injury.

B. The trial court abused its discretion by excluding collateral source evidence based on the incorrect legal standard.

The trial court also incorrectly interpreted the collateral source rule and this Court’s decision in *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 953 P.2d 800 (1998) in holding that the door to collateral source L&I benefits can *never* be opened. This Court “review[s] a trial court’s interpretation of an evidentiary rule de novo.” *Central Puget Sound Reg. Transit Auth. v. Airport Invest. Co.*, 186 Wn.2d 336, 350, ¶ 32, 376 P.3d 372 (2016). Only “[o]nce the rule is correctly

interpreted, the trial court’s decision to admit or exclude the evidence is reviewed for an abuse of discretion.” *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (emphasis added).

Although collateral source benefits are “generally” excluded, *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000), this Court has never held that a party cannot open the door to such evidence. In fact, this Court expressly held that “[i]njured parties may, however, waive the protections of the collateral source rule by opening the door to evidence of collateral benefits. The trier of fact is free to make this determination upon remand.” *Johnson*, 134 Wn.2d at 804. *Johnson* is consistent with the well-settled rule that a “party may open the door to otherwise inadmissible evidence by introducing evidence that must be rebutted in order to preserve fairness and determine the truth.” *State v. Wafford*, 199 Wn. App. 32, 36-37, ¶ 12, 397 P.3d 926, *rev. denied*, 189 Wn.2d 1014 (2017) (citing *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)); *State v. Jones*, 144 Wn. App. 284, 298, ¶ 33, 183 P.3d 307 (2008) (“a party who is the first to raise a particular subject at trial may open the door to evidence offered to explain, clarify, or contradict the party’s evidence”) (quoting Teglund, *Wash. Practice: Evidence* §103.14, at 66-67 (5th ed. 2007)).

The trial court expressly noted that evidence of Mr. Gilmore's L&I benefits would "probably come in" if the door could in fact be opened. (RP 543) Yet, despite *Johnson* and the general rule that a party may open the door to otherwise inadmissible evidence, the trial court then (wrongly) concluded that it did not "have authority to show [it] that that concept applies to the collateral source rule." (RP 543) The Court of Appeals correctly held that the trial court erred in excluding "L&I stuff" on this basis.

A bright-line rule that the door to L&I benefits can *never* be opened in a civil case would be a particularly ill-advised, encouraging other plaintiffs to do as Mr. Gilmore did here: tactically abandoning claims for special damages and seeking only general damages from which L&I could never seek reimbursement at the start of trial, thereby preventing the Department of Labor and Industries from timely intervening to protect its statutory interest in recovery. *See* RCW 51.24.030; *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 402, ¶¶ 19-20, 239 P.3d 544 (2010) (pain and suffering damages not subject to L&I reimbursement calculation under RCW 51.24.060). This Court should instead hold that a defendant may introduce evidence of collateral source benefits where a plaintiff abandons any

claim for special damages and relies on claimed “financial suffering” as the basis for an award of only general noneconomic damages.

C. Plaintiff’s counsel impermissibly galvanized the jury to “fight the government” in its verdict, contrary to the statutory waiver of sovereign immunity and prohibitions of punitive damages.

Mr. Gilmore’s trial counsel repeatedly excoriated Jefferson Transit *as a governmental entity*, accusing the defense of fraud and charging the jury to punish the government and hold it “accountable” for “murder[ing] innocent people.” Not only did the trial court’s erroneous evidentiary rulings eviscerate Jefferson Transit’s defense as to both causation and damages; the reprehensible misconduct of plaintiff’s counsel left Jefferson Transit unable to defend itself against these attacks before the jury.

A governmental entity is only liable in tort to the same extent as a “private person or corporation,” RCW 4.96.010(1), and Washington law prohibits punitive damages intended “to punish the defendant and deter similar conduct.” *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 78, ¶ 18, 272 P.3d 827, *cert. denied*, 133 S. Ct. 199 (2012). Parties also may not make “golden rule” arguments “urging the jurors to place themselves in the position of one of the parties” or “to grant a party the recovery they would wish themselves.” *Adkins v. Aluminum Co. of Am.*, 110 Wn.2d 128, 139-40, 750 P.2d 1257, 756 P.2d 142 (1988)

(quoted source omitted). Government defendants in particular are prohibited from appealing to “the jurors’ self-interest or prejudice as taxpayers” or arguing “that a verdict entered directly against a governmental unit adversely affects taxpayers.” *See generally, Counsel’s Appeal in Civil Case to Self-Interest or Prejudice of Jurors as Taxpayers, as Ground for Mistrial, New Trial, or Reversal*, 93 A.L.R.3d 556 (1979 as supplemented).

If a governmental entity cannot appeal to the jury as taxpayers, a plaintiff likewise cannot appeal to the jury as citizens to award a tort verdict in order to “fight the government” – a government that “murders innocent people” and “gets away with it” – by asking the jury to “send a message” and “hold the government accountable.” (RP 989, 991, 996, 1031-32) By charging the jury to help Mr. Gilmore in his “fight” against the government, because he “can’t do it alone,” plaintiff’s counsel improperly urged the jurors to place themselves in Mr. Gilmore’s position and to punish Jefferson Transit *because* the defendant was “the government,” in complete disregard of RCW 4.96.010 and this State’s prohibition on punitive damages.

Piling on this egregious misconduct, plaintiff’s counsel not only attacked “the government” for “get[ting] away with” murder and “run[ning] into anybody in this community and just walk[ing] away,”

but impermissibly (and without cause) accused defense counsel of fraud for putting on a defense to causation. *State v. Lindsay*, 180 Wn.2d 423, 433, ¶ 20, 326 P.3d 125 (2014) (improper to “directly impugn defense counsel” by calling defense argument “a crock”); *State v. Thorgerson*, 172 Wn.2d 438, 451-52, ¶ 30, 258 P.3d 43 (2011) (“It is improper . . . to disparagingly comment on defense counsel’s role or impugn the defense lawyer’s integrity.”); see *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 538, 998 P.2d 856 (2000) (analogizing counsel misconduct in civil cases to prosecutorial misconduct). Telling the jury that “there has been a fraud perpetuated in this courtroom during this trial,” “[t]here has been someone in this trial who has continually tried to mislead you,” “the frauds that the Defense has tried to perpetuate,” “the fraud continues, and that Jefferson Transit had “set the tone” for “what they were willing to do” to “cover up” their liability (RP 978-81, 982-83, 985) further galvanized the jury and inflamed their prejudices against Jefferson Transit as “the government,” which “runs over its own citizens.”

As this Court held in *Carabba v. Anacortes Sch. Dist.*, 72 Wn.2d 939, 954, 435 P.2d 936 (1967), where incurable acts of prejudicial misconduct “occurred at or near the end of the trial,” the trial court errs in denying a new trial based on the “philosophy” of “gambling on the

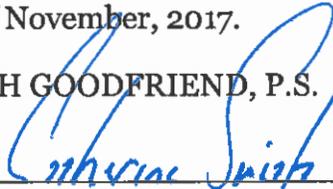
verdict.” “To hold otherwise would be to place appellant on the horns of an impossible dilemma.” *Carabba*, 72 Wn.2d at 954. Here, plaintiff’s counsel put Jefferson Transit in that “impossible dilemma” by making her most inflammatory remarks during closing and rebuttal argument. The Court of Appeals correctly recognized that no “admonition to disregard” would have “suffice[d] to remove the harm caused. . . . The only effective remedy is a new trial, free from prejudicial misconduct of this magnitude.” *Carabba*, 72 Wn.2d at 954.

IV. CONCLUSION

Although the trial court has discretion in its trial management decisions, those discretionary rulings are reviewable on appeal, and the appellate court has an obligation to do as Division Two did here and reverse prejudicial trial court rulings based on a misapplication of law. This Court should affirm the Court of Appeals decision reversing and remanding for a new trial.

Dated this 3rd day of November, 2017.

SMITH GOODFRIEND, P.S.

By: 

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DECLARATION OF SERVICE

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

That on November 3, 2017, I arranged for service of the foregoing Supplemental Brief of Respondent, to the Court and to the parties to this action as follows:

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Tara D. Friesen

SMITH GOODFRIEND, PS

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