Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 86611-7

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

BRAEDEN SIMON,

Respondent,

v.

KELLY HOLGUIN,

Petitioner.

PETITION FOR REVIEW

Sidney C. Tribe, WSBA No. 33160
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104
Telephone: (206) 622-8020

Attorneys for Petitioner Kelly Holguin

TABLE OF CONTENTS

Page

Page

APPENDICES

Appendix A: Court of Appeals opinion dated June 16, 2025

Appendix B: Court of Appeals order denying reconsideration and publication dated August 22, 2025

TABLE OF AUTHORITIES

Page(s)

Washington Cases

Page(s)

Federal Cases

Constitutional Provisions, Statutes and Court Rules

Page(s)

I. IDENTITY OF PETITIONER

Appellant Kelly Holguin requests the Court of Appeals review the decision designated in Part II.

II. COURT OF APPEALS DECISION

The Court of Appeals opinion in this matter was filed June 16, 2025; a copy is at Appendix A. The Court of Appeals order denying reconsideration and publication was filed August 22, 2025; a copy is at Appendix B.

III. ISSUES PRESENTED FOR REVIEW

1. Should this Court review a Court of Appeals decision that explicitly weighs evidence and renders credibility determinations on summary judgment, in violation of countless decisions of this Court and the appellate courts prohibiting such judicial fact finding?

2. Should this Court review a Court of Appeals decision that explicitly weighs evidence and renders credibility determinations on summary judgment, in violation of Washington Constitution requiring that disputed issues of fact be tried by the jury?

3. Should this Court review a Court of Appeals decision that upholds an improper and unconstitutional jury verdict in excess of $40 million dollars against a mom who was deprived of a fair trial?

IV. STATEMENT OF THE CASE

On summary judgment review, the Court of Appeals explicitly weighed evidence, resolved factual disputes, and rendered credibility determinations. It ruled that a mom was negligent as a matter of law, despite evidence that she turned left carefully after seeing no oncoming vehicles, and evidence that a joy-riding motorcyclist who had been drinking at a bar was riding 90 miles an hour or more and collided with her as she was about to clear the intersection.

In granting partial summary judgment to the motorcyclist and denying the mom a new trial, the Court of Appeals affirmed a verdict in excess of $40 million against her. That verdict was rendered by a jury who was instructed that she acted negligently in turning left.

A. Kelly Holguin's Evidence and Reasonable Inferences Therefrom that the Court of Appeals Discredited.

The critical facts on summary judgment as to Holguin's negligence (in the light most favorable to Holguin, the non-moving party) were as follows.

Plaintiff/Respondent Braeden Simon left a bar where he had been drinking with his friend and went out joy-riding on his motorcycle.[1] He approached the intersection of two roads at a reckless speed, approximately 90 miles per hour, which was twice the speed limit. CP 128, 133.

Holguin, who was driving to pick up her child from school with her toddler in the back seat, stopped at an intersection and prepared to cautiously turn left across a two-lane road that curved out of view about a quarter mile away from Holguin's position. Slip op. 2; CP 76-77, 80. She looked up the road and no

[1] The trial ruled the jury could not hear the truthful evidence Simon that was drinking at a bar just before he set out on his joy-ride, concluding it was irrelevant and inflammatory. However, at summary judgment, that fact was in evidence. CP 165, 168, 175.

oncoming vehicles were visible. Slip op. 2, CP 77, 80. Holguin began her slow left turn. Slip op. 2, CP 83.

Holguin was driving slowly and cautiously as she turned. CP 80. Once her car was pointed toward the cross-street, she was facing perpendicular to Simon's approach. Although Holguin was almost perpendicular to Simon's lane of travel, due to her slow rate of turn her vehicle had not cleared the curbside lane. CP 23, 80.[2]

Eight seconds after the moment Holguin began her turn, Simon came into view and closed the distance between the curve and the intersection. CP 183.[3] Although Holguin's vehicle was clearly visible straight ahead of Simon after he rounded the corner, slip op. 6, CP 183, he only saw it at the last moment. CP

---

[2] The images at CP 23 show that Holguin's vehicle came to rest completely out of Simon's lane of travel (the curbside lane). However, the impact was marked to have occurred when the front of Holguin's vehicle was at the right side of the curbside lane, even with the curb, when her turn was almost completed.

[3] According to Simon's accident expert calculations, it took Simon eight seconds to cover 1100 feet at 90 mph.

176. Simon attempted to swerve, but it was too late for him to avoid colliding with Holguin. *Id.*

The trial court ruled that Holguin was negligent as a matter of law and granted Simon partial summary judgment. The jury concluded that Holguin's court-adjudicated "negligence" was almost solely responsible for the collision and entered judgment against Holguin for over $40 million.

B. The Court of Appeals Explicitly Determined that Holguin's Evidence and the Reasonable Inferences Therefrom Were Insufficiently Weighty and Lacked Credibility.

On appeal to the Court of Appeals from the trial court's grant of partial summary judgment for Simon, Holguin laid out these facts. The Court of Appeals in its opinion measured Holguin's evidence against Simon's evidence and concluded it was:

> Holguin failed to provide substantive evidence, ***beyond her own testimony and testimony of lay witnesses*** who did not witness the accident, to establish a genuine issue of fact as to whether Simon was visible.

Slip op. 9 (emphasis added). The Court of Appeals did not explain how Holguin's eyewitness testimony that Simon was not visible is not "substantive evidence" that Simon was not visible. The Court of Appeals also did not explain how it was appropriate to discredit testimony from eyewitnesses to Simon's excessive speed just before the collision, simply because they did not see the actual moment of the collision. That analysis goes to the weight of their testimony, which is a jury function. And despite giving less weight to Holguin's eyewitnesses, the Court chose to give weight to Simon's expert, who also did not witness the collision.

The Court of Appeals also concluded that Simon had presented more persuasive expert testimony that he was visible, while Holguin had presented her own, apparently insufficiently persuasive, eyewitness testimony:

> Holguin confirmed that she did not see Simon or hear anything before the accident, and ***she offered no evidence … to explain her failure in this regard or to challenge Harbinson's calculations and opinions***.

Slip op. 6 (emphasis added). In other words, the Court of Appeals weighed Holguin's testimony and found it not credible, because she did not offer a sufficient explanation of *how* it was credible in light of Harbinson's opinion.

The very framing of the Court of Appeals' above language – that Holguin did not "explain her failure" to see Simon, is a concession that the Court was not viewing the evidence in the light most favorable to Holguin.

Also, Harbinson's opinion did not resolve the issue of Simon's visibility as a matter of law. It was a preliminary opinion based on variables, including Simon's speed, that were hotly disputed. Even the Court of Appeals admits that Harbinson's summary judgment opinion about Simon's speed was miscalculated, because he did not account for how contact with the stop sign slowed Simon's fall and changed his trajectory. Slip op. 6.

Finally, on the issue of evidence regarding Simon's speed, the Court of Appeals both mischaracterized testimony and gave greater weight to Simon's lay witnesses over Holguin's. The Court of Appeals repeatedly asserted that Holguin's witnesses "did not witness the accident," while Simon's witnesses did. Slip op. 7, 9.

The Court of Appeals weighed Harbinson's claim that Simon was traveling at 41-43 miles per hour against Holguin's witnesses Walker, who estimated Simon was traveling at 90 miles per hour, and concluded those witnesses did not "meaningfully dispute" Harbinson's opinion. Slip op. 7.

In one instance, the Court of Appeals not only failed to take the evidence in the light most favorable to Holguin, it blatantly mischaracterized the testimony to favor Simon. The Court of Appeals claimed that witness Veronica Musatkin "testified that she could not confirm whether Simon was speeding but noted that, even if he was, it was not by a significant amount." Musatkin repeatedly stated that she had not observed

Simon's speed, and that her *belief* that he was not "significantly speeding" was based on speculation, not memory:

> Musatkin: Me, my sister-in-law, and my cousin, ***we do not recall*** if he was or was not speeding.
>
> * * *
>
> …was he speeding? Probably. Was he reckless or like -- what was that other word? Significantly speeding. I do not think so. Like I -- ***I can't say for sure.*** It's pretty -- pretty subjective my -- my recollection, what I have.

CP 108, 114 (emphasis added). So the Court of Appeals characterized Musatkin's testimony at summary judgment as having definitively stated that Simon was not speeding by a significant amount, when in reality she admitted she was speculating and specifically stated she couldn't remember.

In another apparent instance of tipping the scales, the Court of Appeals added the *trial* testimony of a witness to its evidentiary evaluation in Simon's favor, even though Simon never presented it at summary judgment. Slip. op. 7. In its recitation of the witness testimony in Simon's favor on speed, the Court of Appeals stated: "Nozdsrin testified that she had time

to glance north along 134th, see the motorcycles approaching, turn back and begin talking to her companions before the collision occurred." *Id.*[4] But Nozdsrin's testimony was not in evidence at summary judgment. CP 19-243. Nor was her testimony listed or relied on in Harbinson's report submitted at summary judgment. CP 170.

The Court of Appeals reviewed only the evidence submitted in connection with the initial summary judgment motion in considering this issue. RAP 9.12. Both parties, not just Holguin, were constrained by that requirement. To his credit, Simon *never mentioned* Nozdsrin in his appellate brief. Yet the Court of Appeals recited Nozdsrin's trial testimony with the effect (perhaps unintended) of bolstering Simon's summary

---

[4] The Court of Appeals did not cite to the record, but its characterization of Nozdsrin's trial testimony appears to paraphrase Simon's motion for a special speed and causation jury instruction. Compare the Court of Appeals' recitation of Nozdsrin's trial testimony to CP 4277: "Zhanna Nozdsrin in particular testified that she had time to glance north up Sunrise Blvd, see the motorcycle coming south, turn back and started talking to her companions, before the collision occurred."

judgment evidence. It leaves the impression that the Court of Appeals sought to pile up the weight of the evidence was important to support its decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

It is certainly not a novel legal proposition that courts must not supplant the jury's role by resolving fact disputes on summary judgment. On the contrary, the preeminence of the jury's role in fact-finding is as old as our legal system itself:

> Anglo-American jurisprudence widely and perhaps wisely recognizes as preeminent among all other processes the truth-finding capability of a selectively chosen few of the litigants' peers. Their collective wisdom under the guidance of a learned director produces a consensus judgment... .

Buffelen Woodworking Co. v. Cook, 28 Wn. App. 501, 506, 625 P.2d 703 (1981).

The jury's role as factfinder is one of constitutional magnitude. Granting summary judgment implicates the Seventh Amendment in that it denies parties their right to have a jury decide their claims. *See Thompson v. Mahre*, 110 F.3d 716, 719

(9th Cir. 1997) ("[W]here there is a genuine issue of fact on a substantive issue of qualified immunity, ordinarily the controlling principles of summary judgment and, if there is a jury demand ..., the Seventh Amendment, require submission to a jury."); *see also LaLonde v. County of Riverside*, 204 F.3d 947, 954 (9th Cir. 2000).

Improper summary judgment takes the factfinding role away from the jury, violating a party's due process rights. *Id.* If a court improperly resolves credibility issues or weighs evidence on summary judgment, it deprives the nonmoving party of their right to a trial, where such issues should be resolved.

This Court's review serves an indispensable function in ensuring that our judicial system functions properly, applies the law to all parties equally, and conforms to constitutional requirements. RAP 13.4(b).

The Court of Appeals here weighed, discounted and discredited Holguin's summary judgment evidence, finding it less persuasive and weighty than Simon's summary judgment

evidence. And this due process violation was not with respect to some ancillary issue. The decision here discarded direct eyewitness testimony about the central matter in dispute: whether Holguin was negligent when she turned left because (1) Simon was visible at the time, and (2) Simon was so close to the intersection when Holguin began her turn that no reasonable driver would have concluded they could make the turn safely.

The due process violation here did not deprive Holguin of her physical freedom, but it did result in a $40,000,000.00 verdict against her that will irrevocably harm her life and her family's future forever. This Court should take review.

A. The Court of Appeals Decision Conflicts with Both This Court's Precedent and Court of Appeals Bedrock Precedent Prohibiting Judicial Factfinding on Summary Judgment.

This Court should take review under RAP 13.4(b)(1) and (2) because the Court of Appeals explicitly weighed evidence and made credibility determinations on summary judgment. The conflict is not mitigated by the fact that the Court of Appeals

issued an unpublished decision. It may not have announced a new rule of law on the court's role on summary judgment, but it did implicitly modify those rules by explicitly engaging in factfinding.

In our justice system, jurors are " 'the sole and exclusive" arbiters of conflicting evidence. *State v. Coryell*, 197 Wn.2d 397, 414, 483 P.3d 98 (2021). Conflicts in the evidence present a question of fact for the jury. *State v. Kirkby*, 20 Wn.2d 455, 456, 147 P.2d 947 (1944).

On summary judgment, courts "may not weigh the evidence, assess credibility, consider the likelihood that the evidence will prove true, or otherwise resolve issues of material fact." *Haley v. Amazon.com Servs.*, LLC, 25 Wn. App. 2d 207, 217, 522 P.3d 80 (2022). Although summary judgment exists to avoid pointless trials where no material fact is in dispute, a trial is "absolutely necessary where there is a genuine issue as to any material fact." *Id.* (quoting *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963)).

"The function of a summary judgment proceeding, or a judgment on the pleadings is to determine whether or not a genuine issue of fact exists, not to determine issues of fact." *Id.,* citing *State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962).

Absent specific circumstances, at the summary judgment stage, the court must only determine whether the nonmoving party has met a burden of production, "not whether the evidence produced is persuasive" as that role belongs to the jury. *Renz v. Spokane Eye Clinic, PS*, 144 Wn. App. 611, 623, 60 P.3d 106 (2002).

The Court of Appeals itself recently applied the standard it now eschews in *Deutscher v. Cortes*, 2024 WL 3027296 *6, 31 Wn. App. 2d 1040 (2024), *review denied*, 4 Wn.3d 1008, 563 P.3d 457 (2025).[5] The Court of Appeals in *Deutscher* reversed summary judgment dismissing an unjust enrichment claim. The

[5] Unpublished opinion cited for persuasive value only under GR 14.1.

plaintiff/appellant "provided a declaration asserting that he performed substantial landscaping work and repairs on the property…". *Id.* The defendants/respondents "claimed that they received no benefit at Cortes' expense…". *Id.* The Court of Appeals correctly identified this as a material factual dispute that a court could not resolve:

> This discrepancy in testimony is precisely the sort that precludes summary judgment because only a fact-finder may weigh credibility to resolve this type of competing evidence.

Id.

1. The Court of Appeals discredited Holguin's testimony by saying she did not "explain" it to the court's satisfaction.

Contrary to its limited role on summary judgment, the Court of Appeals found Holguin's testimony not credible. The finding is implicit, but unmistakable.

On summary judgment as to Holguin's negligence, Simon's expert declaration proclaimed that Holguin was negligent because she turned when Simon was "there to be seen." CP 187. Holguin stated that both before and during her turn, she

was careful, looked up the road and looked at her surroundings. *Id.*, CP 84. Holguin testified that when she looked up the road before her turn, she did not see Simon. CP 77-78.

These two conflicting pieces of evidence established a clear dispute of material fact: Simon's expert testified that Simon was visible to Holguin when she began her turn; Holguin testified she looked before she turned and he was not visible. Only a jury could resolve this conflict.

Despite this direct conflict on a key material fact, the Court of Appeals weighed the two pieces of evidence against each other and discredited Holguin's testimony:

> Holguin confirmed that she did not see Simon or hear anything before the accident, and ***she offered no evidence … to explain her failure in this regard or to challenge Harbinson's calculations and opinions***.

Slip op. 6 (emphasis added). Holguin's burden at summary judgment was not to prove to the Court that her testimony was credible, or to disprove an expert opinion. It was to offer evidence that raised a genuine issue of material fact for trial. She

stated that she looked and Simon was not visible when she began her turn. It was for the jury, not the Court, to weigh her testimony against Simon's expert.

The Court of Appeals again explicitly violated the summary judgment standard by finding Holguin's direct eyewitness evidence insufficiently weighty to persuade the court it could be true:

> Holguin failed to provide substantive evidence, ***beyond her own testimony and testimony of lay witnesses*** who did not witness the accident, to establish a genuine issue of fact as to whether Simon was visible. ***This evidence does not establish that Simon was not visible or that a reasonable person in her position would have made the same turn.***

Slip op. 9 (emphasis added). The Court of Appeals could not have more explicitly stated that it was rejecting Holguin's evidence as insufficiently credible and weighty.

Holguin's testimony was not speculative or vague. She was clear and specific: she looked and Simon was not visible. Nor was Holguin's testimony conclusory. She did not testify "I was not negligent." She stated a fact: she looked and did not see

Simon. The Court of Appeals was not permitted to discredit or discard her testimony.

Also, the Court of Appeals weighed and discarded Holguin's evidence that Simon was driving recklessly at 90 miles an hour:

> Unlike in *Bordynoski*, where both the defendant's speed and the bicyclist's awareness were in dispute, Holguin did not present sufficient evidence to raise a genuine issue of material fact regarding Simon's speed or visibility. Harbinson's unchallenged report established that Simon was within Holguin's field of vision, and the eyewitnesses did not testify that Simon's speed was reckless.

Finding Harbinson's report "unchallenged" completely ignores the testimony and reasonable inferences therefrom of both Holguin and Larry Crowley, who testified that he observed two motorcycles "screaming" at speeds of 80-90 MPH just before the collision.

The Court of Appeals suggested Crowley and other evidence of Simon's reckless speed was insufficient because it was from "lay witnesses who did not witness the accident." Slip

op. 9. This implicit weighing of Holguin's witnesses as less persuasive because they were some distance from the collision point is borrowed straight from Simon's briefing: "The trial court also considered the testimony of Monica Walker and Larry Crowley, both of whom were out of sight of the intersection, about a half a mile away. Neither heard nor saw the collision." Br. Resp. 10.

Neither the fact that (1) Holguin's witnesses were lay witnesses, as opposed to experts, or (2) that they only witnessed Simon's reckless speed and not the accident itself should have factored into a summary judgment ruling. It goes to the weight of their testimony, not to whether they raised a genuine dispute of fact.[6]

---

[6] The Court of Appeals at oral argument met Crowley's testimony with skepticism because he could not definitely state that the two motorcycles he saw driving 90 miles per hour just before the collision were in fact Simon and his friend. However, the question of whether the cyclist he saw was Simon goes to the weight of his testimony for the fact finder, not to its sufficiency on summary judgment.

As the Court of Appeals recently noted, testimony is evidence. *State v. Lattin*, 31 Wash. App. 2d 1079, *8 (2024) (unpublished cited as persuasive under GR 14.1).[7] As long as the testimony is of a kind that can be offered by a lay witness, no expert need be retained to bolster the witness or create an issue of fact for the jury. *See, e.g., State v. McPhee*, 156 Wn. App. 44, 65, 230 P.3d 284 (2010) (property owner can testify as to market value without being qualified as expert).

When a court comments on the credibility of evidence and discounts it as being insufficiently persuasive, that is classic weighing of evidence. *See, e.g., In re Jacobson*, 120 Wn. App. 770, 781, 86 P.3d 1202 (2004) (commenting that testimony was "guarded" or had "caveats" is impermissible weighing of evidence).

The Court of Appeals weighed and discredited Holguin's testimony that Simon was not visible. It commented that

[7] Unpublished opinion cited for persuasive value only under GR14.1.

Holguin did not sufficiently explain how her testimony could possibly be true in light of Simon's expert opinion. Slip. op. 6.

No authority supports discrediting Holguin's testimony on summary judgment. Holguin was not required to prove her credibility to the Court of Appeals through introduction of expert testimony or additional evidence. Holguin's evidence is sufficient without a competing expert declaration, because the facts she attested to were facts a lay witness could assert.

Contrary to its duty as described in *Haley* and in a long list of well-established precedent, the Court of Appeals improperly concluded that Holguin was not credible when she testified that she looked and Simon wasn't visible when she began her turn. Holguin was not required to offer additional evidence to "establish" the truth of her lay testimony that Simon wasn't visible. Nor should the Court of Appeals have disregarded the evidence of witnesses that contradicted Simon's witnesses. Her evidence at summary judgment was sufficient to create a genuine issue of material fact for trial.

2. The Court of Appeals found that as a matter of law Simon was visible and Holguin negligent only by ignoring reasonable inferences in Holguin's favor.

Again, after recounting the details of Harbinson's expert declaration and recounting the evidence of Simon's other witnesses, the Court of Appeals compared it to Holguin's evidence and found that no reasonable juror could believe that Holguin's testimony was credible, because she did not provide additional "substantive evidence beyond her own":

> Holguin failed to provide substantive evidence, ***beyond her own testimony and testimony of lay witnesses who did not witness the accident***, to establish a genuine issue of fact as to whether Simon was visible.

Slip op. 9 (emphasis added)

However, the summary judgment standard required the Court of Appeals to not just look at the evidence in the light most favorable to Holguin, but to draw all "reasonable inferences" therefrom. *TracFone, Inc. v. City of Renton*, 30 Wn. App. 2d 870, 875, 547 P.3d 902 (2024).

The Court of Appeals did not fulfill its duty to draw all reasonable inferences from the evidence in Holguin's favor. Holguin testified that she looked and did not see Simon before starting her turn. She said she turned slowly. Witnesses stated that Simon was driving recklessly, possibly at twice the speed limit or more. From these facts alone, a jury could reasonably conclude that after Holguin looked and began her slow turn, Simon rounded the corner and closed the gap between the vehicles, colliding with her when she had almost cleared the curb lane. The jury could then have concluded that Holguin was not negligent by turning when she saw no oncoming vehicles, because was she not obligated to anticipate that a vehicle would be recklessly speeding toward the intersection such that she could not clear it in time.

The Court of Appeals misapplied the law when it discredited Holguin's evidence because she did not bolster it with "substantive evidence beyond" the substantive evidence she *did* provide. Slip. op. 9. It is directly contrary to the admonition

that courts should not be gatekeepers of credibility, weigh evidence, or ignore the reasonable inferences from evidence. Nor does the opinion explain how Holguin's eyewitness testimony that he was not visible "does not establish that Simon was not visible" for purposes of defeating summary judgment, Slip. Op. 9.

B. The Court of Appeals Decision also Conflicts with Precedent Because It Holds that Turning Left when an Oncoming Vehicle Is Visible, Regardless of the Oncoming Vehicle's Speed or Distance, Is Negligence as a Matter of Law.

It is not negligent as a matter of law to turn left any time there is an oncoming vehicle, even if a collision resulted. *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003).

In, *Morse* our Supreme Court ruled that it is error for a court to substitute its judgment about whether a driver was "there to be seen" when the evidence on that point conflicts. In *Morse,* defendant Antonellis was eastbound on a four-lane street, traveling in the inside lane. *Morse,* 149 Wn.2d at 573. She planned on turning left onto Perry Street, so she stopped at the

intersection. *Id.* A pickup truck was stopped in the inside lane opposite Antonellis, signaling to also turn left. Antonellis said she did not see any cars in the opposing curb lane, so she slowly initiated her left turn. *Id.* Morse was traveling westbound on the four-lane street. Whether Morse was in the inside or outside lane and whether Antonellis could see beyond the pickup truck were the subjects of conflicting testimony. *Id.* As Antonellis turned left and crossed into the curb lane of the opposing traffic, Morse collided with her.

Division Three of the Court of Appeals ruled Antonellis was negligent as a matter of law because she had a statutory duty to yield to oncoming traffic and a common law duty to see what a reasonable person would see, and that Morse's car was "there to be seen." *Id.* at 573-574.

But this Court reversed the Court of Appeals' ruling that Antonellis was negligent as a matter of law. *Id.* at 575. The jury, not the court, must weigh the plaintiff's evidence that he was

"there to be seen" against the defendant's evidence that he wasn't. *Id.*

Despite *Morse* being Simon's lead case and virtually indistinguishable from this case, the Court of Appeals failed to contend with *Morse* in its decision. The jury here, as it was in *Morse,* should have been allowed to weigh all the facts, including Holguin's testimony that she looked, and Simon was not visible and decide each party's comparative fault.

C. Resolving Issues of Fact at Summary Judgment Is a Due Process Violation, Review Is Warranted on that Ground as Well.

This Court has discretion to take review of decisions that raise issues of constitutional law under RAP 13.4(b)(3).

Washington Constitution protects the right to a jury trial in civil cases that are legal in nature. Washington State Constitution, article 1, section 21; *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980).

Although proper summary judgment does not violate the right to a jury trial, improper summary judgment does. A jury

trial right violation arises if a court improperly engages in fact-finding, weighs evidence, or makes credibility determinations during summary judgment proceedings. For example, the Ninth Circuit[8] in *Chinaryan* recognized that granting summary judgment implicates the Seventh Amendment when it denies plaintiffs their right to have a jury decide their claims. *Chinaryan v. City of Los Angeles,* 113 F.4th 888, 903 (9h Cir. 2024), citing *Thompson v. Mahre*, 110 F.3d 716, 719 (9th Cir. 1997). Similarly, in *Stanko v. Maher*, the Tenth Circuit noted that a Seventh Amendment claim is valid when summary judgment was improperly entered when genuine issues of material fact exist. *Stanko v. Maher*, 419 F.3d 1107 (2005).

The Court of Appeals' summary judgment decision here is not simply procedurally flawed, it also raises issues of

---

[8] Although there is more federal authority on this particular question, this Court can look to federal courts' reasoning on this issue because the protection for jury trial rights in Washington is broader than the federal right. *State v. Hobble,* 126 Wn.2d 283, 298, 892 P.2d 85 (1995).

constitutional magnitude. It deprives Holguin of the right to have the jury, not the court, resolve disputed material issues of fact.

VI. CONCLUSION

The Court of Appeals should not have acted as a finder of fact on summary judgment. It should have followed precedent both on the law of summary judgment and the law of negligence. The improper summary judgment decision violated Holguin's constitutional right to have a jury consider her defense that she was not negligent and resulted in a catastrophic verdict against her in excess of $40 million. This Court should take review.

This document contains 4,841 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Respectfully submitted this 19th day of September, 2025.

CARNEY BADLEY SPELLMAN, P.S.

By */s/ Sidney C. Tribe*_____
Sidney C. Tribe, WSBA No. 33160

Attorneys for Petitioner Kelly Holguin

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Via Appellate Portal:

Rory W. Leid, III Lucy Wilhelm Lauren I. Fugere Wathen Leid Hall & Rider, PC 222 Etruria Street Seattle, WA 98109 rleid@cwlhlaw.com lwilhelm@cwlhlaw.com lfugere@cwlhlaw.com	Karen Koehler Lisa Benedetti Shannon M Kilpatrick STRITMATTER KESSLER KOEHLER MOORE 3600 15th Ave W Ste 300 Seattle, WA 98119-1330 karenk@stritmatter.com lisa@stritmatter.com shannon@stritmatter.com

DATED this 19th day of September, 2025.

*/s/ Patti Saiden*_____
Patti Saiden, Legal Assistant

APPENDIX A

FILED
6/16/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

BRAEDEN SIMON, Respondent, v. KELLY HOLGUIN and SPOUSE DOE HOLGUIN, Appellant.	No. 86611-7-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, C.J. — Kelly Holguin challenges several rulings from various stages of litigation in a tort action that stems from a collision at an uncontrolled intersection. She assigns error to the court's decisions to grant partial summary judgment in favor of Braeden Simon and to grant a continuance, its refusal to grant a new trial or remittitur, and a number of jury instructions. Because Holguin fails to establish reversible error, we affirm.

FACTS[1]

I. The Collision

On February 27, 2020, Braeden Simon was riding his motorcycle southbound on 134th Avenue East, also known as Sunrise Avenue, approaching the intersection at 164th Street East in Pierce County. Kelly Holguin was driving

[1] Additional facts are set out in each section as necessary for analysis of the various assignments of error.

a mid-size SUV[2] northbound on 134th and intended to turn left onto 164th. She turned her left signal on and stopped at the intersection for about 45 seconds before turning because there were three women with strollers at the corner who she thought might try to cross. She estimated that she glanced at the pedestrians for 5 seconds, looked for oncoming traffic for 10 seconds, looked back at the pedestrians for 5 seconds, and then started a "slow turn." When she turned, her vehicle collided with Simon's motorcycle in the uncontrolled, open intersection. Simon flew through the air and impacted a street sign, breaking the signpost and landing on the grass beyond it. As a result of the collision, Simon suffered severe life-changing injuries. The speed limit was 40 miles per hour and, at the time of the collision, traffic was minimal and the weather was clear.

134th at 164th is a five-lane arterial with north and south lanes for travel. There is a divider in the middle of the street with trees, which ends and becomes a dedicated left turn lane just before the intersection with 164th. 134th is designed with a gradual arc from the northwest to the southwest; it is not a straight north and southbound roadway. The two northbound and two southbound lanes are separated by dashed white lines. Opposing left-turn-only lanes are marked with a solid white line at the right side and an outside double yellow line at the left. There are no traffic controls at the intersection.

II. Procedural History

On September 8, 2020, Simon filed his initial complaint against Holguin for negligence and damages. Holguin filed an answer on September 25 and both

[2] Sport utility vehicle.

denied negligence and asserted that Simon's own negligence either solely caused or greatly contributed to the collision. On October 7, Simon filed an amended complaint. The trial was initially set for September 7, 2021, but was continued to February 16, 2022.

During the discovery phase of the case, Simon disclosed his collision reconstruction expert Steve Harbinson and produced Harbinson's report and expert file. Relying primarily on Harbinson's report, Simon moved for partial summary judgment on November 5, 2021, asking the court to rule that Holguin was negligent as a matter of law and remove the issue from the jury's consideration. On December 8, the court granted summary judgment in part and denied it in part, ruling that Holguin was negligent as a matter of law because, as the disfavored left-turning driver, she failed to see the oncoming vehicle. However, the court also found that genuine issues of material fact remained regarding whether Simon was contributorily negligent.

On December 17, two months before trial, Holguin moved for a continuance to allow more time for discovery. Simon objected on several bases. On January 7, 2022, the court granted Holguin's motion and continued trial from February 16 to September 6. The court later moved the trial date to September 13.

The jury subsequently returned a verdict finding Simon comparatively negligent, concluding that both Simon and Holguin were proximate causes of his damages. The jury apportioned 95 percent of the fault to Holguin and 5 percent to Simon. The jury awarded Simon just over $44.7 million in damages.

On October 13, Holguin moved for a directed verdict and reconsideration of the partial summary judgment ruling that Holguin was negligent as a matter of law. The trial court denied both motions on October 17.

On November 14, 2022, Holguin filed motions for remittitur, seeking to reduce the $2 million awarded for past medical expenses, and for new trial. The trial court denied both motions.

Holguin timely appealed.

ANALYSIS

I. Partial Summary Judgment

Holguin first assigns error to the trial court's partial grant of Simon's motion for summary judgment, reiterating her assertion at trial that Simon was not visible to her when she began her left turn.

We review summary judgment orders de novo and engage in the same inquiry as the trial court, considering the facts and reasonable inferences in the light most favorable to the nonmoving party. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182 (1989); *Desranleau v. Hyland's, Inc.*, 10 Wn. App. 2d 837, 842, 450 P.3d 1203 (2019). Because we perform the same analysis, we consider only the evidence and issues raised before the trial court. *Wash. Fed'n of State Emps., Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 157, 849 P.2d 1201 (1993); *see also* RAP 9.12. Summary judgment is proper if the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000). "A genuine issue of

material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

Summary judgment motions are governed by "'a burden-shifting scheme.'" *Bucci v. Nw. Tr. Servs., Inc.*, 197 Wn. App. 318, 326, 387 P.3d 1139 (2016) (quoting *Ranger Ins.*, 164 Wn.2d at 552). When seeking dismissal, "the moving party bears the initial burden of showing the absence of an issue of material fact." *Young*, 112 Wn.2d at 225. If the moving party satisfies its burden, it then shifts to the nonmoving party to "set forth specific facts evidencing a genuine issue of material fact for trial." *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665 (1995). In opposing summary judgment, the nonmoving party "may not rely on speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

"Whether there has been negligence or comparative negligence is a jury question unless the facts are such that all reasonable persons must draw the same conclusion from them, in which event the question is one of law for the courts." *Hough v. Ballard*, 108 Wn. App. 272, 279, 31 P.3d 6 (2001); *see also Shook v. Bristow*, 41 Wn.2d 623, 625, 250 P.2d 946 (1952). Negligence is the failure to exercise reasonable care. *Gordon v. Deer Park Sch. Dist. No. 414*, 71 Wn.2d 119, 122, 426 P.2d 824 (1967).

Simon met his initial burden on summary judgment. In his motion, he asserted that Holguin, as the disfavored driver, was negligent as a matter of law

for making a left turn into his path when he was the favored oncoming driver, because she failed to see him despite having over one thousand feet of unobstructed visibility. Simon further argued that his actions were immaterial to Holguin's negligence since she admitted she did not see or hear him before turning. In her deposition, Holguin, confirmed that she did not see Simon or hear anything before the accident, and she offered no evidence at the motion hearing to explain her failure in this regard or to challenge Harbinson's calculations and opinions.

Harbinson, a former traffic detective with advanced training and experience in collision investigations and reconstruction, prepared a report that determined Simon's speed at impact was 41-43 MPH. Although he did not incorporate the effect of Simon's impact with the street sign, his speed analysis was based on the trajectory of Simon's body post-impact. He calculated Holguin had over 1,150 feet of clear sightline down 134th in the direction of Simon's approach. Assuming Simon was traveling at 41-43 MPH, Harbinson calculated that Simon would have been in Holguin's view for approximately 17.4 to 18.2 seconds before the collision. Even assuming Simon was traveling at higher speeds, Harbinson's calculations indicated that Simon would have been visible to Holguin for approximately 13.2 seconds at 60 MPH and at least 10 seconds at 80 MPH. Additionally, Harbinson calculated that Simon had less than 1.7 seconds to perceive Holguin as a hazard after she entered his lane, which was insufficient time to prevent the collision.

There were three eyewitnesses on the sidewalk on the southwest corner of 134th and 164th and one eyewitness on 134th. Suzanna Odarchuk was walking

with Zhanna Nozdsrin, Veronica Musatkin, and their children. Jonathan Lawson, Simon's riding partner, was following Simon and witnessed the accident. Additionally, pedestrians several blocks away from the collision site, Larry Crowley and Monica Walker, did not witness the collision but saw motorcycles prior to the accident. The depositions of these witnesses, taken during the early stage of discovery, did not meaningfully dispute Harbinson's report. For example, Musatkin testified that she could not confirm whether Simon was speeding but noted that, even if he was, it was not by a significant amount. Odarchuk saw the motorcycle coming south on 134th in the right lane while she was waiting on the corner of the intersection and estimated it was going 45 MPH or "a bit over." More specifically, she estimated that the motorcycle was traveling at "about the speed other cars were going." Nozdsrin testified that she had time to glance north along 134th, see the motorcycles approaching, turn back and begin talking to her companions before the collision occurred. Lawson stated that he and Simon were traveling at approximately the posted speed limit before entering the large curve that turned Sunrise Avenue southward, but his motorcycle lost speed due to a mechanical issue. When he looked up, about a hundred yards behind Simon, he saw Holguin's car in the middle of the road. He described Simon's attempt to steer right to avoid the collision and noted that Simon struck the front passenger tire of Holguin's SUV, flew over the car, hit a street sign, and landed in a grass field. By contrast, Crowley, who did not witness the collision itself, testified that he observed two motorcycles "screaming" at speeds of 80-90 MPH, weaving between cars. Similarly, Walker, who also did not witness the crash, testified that she heard the

motorcycles approach from behind on Sunrise Avenue and saw them traveling faster than 40 MPH, possibly reaching 50, 60, or even 70 MPH, "enough to pass four, maybe five cars."

Pierce County Sheriff's Deputy James Cowan, who investigated the crash, reported that the motorcycles were likely traveling "a bit over the speed limit," possibly 50-55 MPH. Despite this, Cowan concluded that Holguin's failure to yield was the primary cause of the collision. He determined that Simon's speed was not a contributing factor because he would not have had sufficient time to react or swerve to avoid the crash.

Holguin argued that her decision to begin the turn was reasonable because she saw no oncoming traffic and Simon's excessive speed both caused the collision and prevented him from reacting to avoid it. She further contended that the testimony of Crowley and Lawson was sufficient to present to a jury because it was based on the rational perception of each witness and sufficient to defeat a motion for summary judgment. She also averred that the fact that Simon had insufficient time to react raises an issue of whether the collision was avoidable.[3] She contended that Simon's rate of speed is a direct issue of material fact to be decided by a jury because of the intimate nature of negligence and contributory negligence, and as a result, all liability questions, including that of her own negligence, should also be left to the jury.

[3] While facts regarding the results of the blood alcohol test that was conducted on Simon after the accident were not ultimately presented to the jury, Holguin also argued in her response to his motion for partial summary judgment that Simon's "intoxication . . . impacted [his] riding and reaction time." (Capitalization omitted.)

Drawing all inferences in favor of Holguin as the nonmoving party, the primary legal question is whether she provided sufficient evidence to raise a genuine issue of material fact to defeat Simon's motion for partial summary judgment. While Simon met his initial burden, the burden of production then shifted to Holguin. However, she cannot rely on "speculation, [or] argumentative assertions that unresolved factual issues remain" to survive summary judgment. *Seven Gables Corp.*, 106 Wn.2d at 13. Holguin failed to provide substantive evidence, beyond her own testimony and testimony of lay witnesses who did not witness the accident, to establish a genuine issue of fact as to whether Simon was visible. Nevertheless, she argues summary judgment on the issue of her liability was inappropriate because factual disputes existed regarding whether Simon exercised reasonable care. In her appellate briefing, Holguin relies on *Bordynoski v. Bergner* to argue that a trial court commits reversible error when it disregards one party's testimony, on which reasonable minds could differ, and finds that party negligent as a matter of law. 97 Wn.2d 335, 343, 644 P.2d 1173 (1982). In *Bordynoski*, a directed verdict case, the defendant was a following driver who struck a bicyclist attempting to turn into his lane. *Id.* at 336-37. Our Supreme Court held that the trial court erred in concluding a bicyclist was contributorily negligent and such negligence was the proximate cause of the accident as a matter of law because there were disputed facts, such as the speed of the following car and whether the injured bike rider was aware of the car's presence. *Id.* at 337-38. It further noted that these factual disputes made summary judgment inappropriate because determinations of negligence are typically reserved for the

jury unless reasonable minds could not differ in interpreting the facts. *Id*. at 338-41; *see also Pudmaroff v. Allen*, 138 Wn.2d 55, 67, 977 P.2d 574 (1999).

Holguin asserts that the trial court committed prejudicial error by summarily ruling on disputed facts and instructing the jury that her defense was not viable, while Simon's was. For this aspect of her argument, she again relies on *Bordynoski*, which emphasized that "issues of negligence and contributory negligence are so intertwined that they cannot realistically be dealt with as separate issues." 97 Wn.2d at 341. Holguin asserts that it was for the jury to decide whether or not it was reasonable for her to see Simon because he was coming around a curve and she looked and did not see him. She emphasizes Crowley's deposition, wherein he testified that Simon was speeding, and claims that if Simon was speeding around a corner, a reasonable person in Holguin's position could have perceived the conditions to be safe to turn.

However, Holguin's reliance on these arguments fails to overcome the evidentiary shortcomings in her case. Unlike in *Bordynoski*, where both the defendant's speed and the bicyclist's awareness were in dispute, Holguin did not present sufficient evidence to raise a genuine issue of material fact regarding Simon's speed or visibility. Harbinson's unchallenged report established that Simon was within Holguin's field of vision, and the eyewitnesses did not testify that Simon's speed was reckless. Holguin did not identify the "point of notice" at which Simon, in the exercise of reasonable care, would have known Holguin was not going to yield the right of way to him. She has produced no evidence to create a question of material fact about whether Simon was or was not there to be seen.

On appeal, Simon argues that partial summary judgment was appropriate because the original pleadings filed in response to the motion contained "no evidence, expert or otherwise, to explain [Holguin's] failure to see Simon." He further asserts that Holguin's argument on appeal fails because it relies on trial testimony that was not before the trial court when it ruled on summary judgment. Simon is correct that we cannot consider trial testimony when reviewing rulings on summary judgment as we perform the same analysis as the trial court on the materials and argument in the record at the time of the ruling. He relies on *Owens v. Kuro* to argue that a left-turning driver can be found negligent as a matter of law, without regard for the negligence of the oncoming driver, where a left-turning vehicle collides with an oncoming vehicle that was there to be seen. 56 Wn.2d 564, 572, 354 P.2d 696 (1960). That case is distinguishable as Owens was injured while riding as a passenger in his own northbound automobile when the driver attempted a left turn in a light-controlled intersection on a yellow light. *Id*. at 565. Nevertheless, our Supreme Court held that the left-turning driver had a duty to observe oncoming traffic, failed to see the approaching vehicle until the collision, and had an unobstructed view. *Id*. at 571-72. The court further emphasized that the oncoming driver's alleged contributory negligence did not negate the left-turning driver's negligence in turning directly into the vehicle's path. *Id*. at 572. The left-turning driver argued he had a right to rely on the assumption that the oncoming vehicle would stop at a yellow light. *Id*. The court rejected this, noting that because the driver did not see the oncoming car, he could not have relied on it to stop. *Id*. at 572-73.

Holguin's main argument remains that Simon's excessive speeding made him impossible to see and her testimony alone establishes that he was not visible. She claims that Simon was driving so fast and closed the distance between himself and Holguin's vehicle so quickly that he could not slow down or swerve to avoid a collision. Even if assumed to be true, the explanation does not address why she failed to see him when she had a duty to observe oncoming traffic. At the time of the summary judgment hearing, Holguin relied solely on her own testimony and that of lay witnesses to argue that Simon's speed prevented her from seeing him. This evidence does not establish that Simon was not visible or that a reasonable person in her position would have made the same turn. She also failed to provide any evidence to rebut Harbinson's findings that Simon was in her field of vision for at least 10 seconds or Cowan's report concluding that Simon's speed did not contribute to the crash. Again, viewing the facts in the light most favorable to Holguin, there was insufficient evidence to raise a genuine issue of material fact as to whether a reasonable person would have failed to see Simon too.

We conclude that the trial court properly granted Simon's motion for partial summary judgment.

II. Motion for Reconsideration

Holguin next challenges the trial court's decision to deny her motion to reconsider or revise the partial summary judgment ruling.

After a month of trial and at the close of her case-in-chief, Holguin moved for reconsideration of the partial summary judgment order in which she was found to have been negligent as a matter of law. The trial court denied her motion,

explaining that its timing, so late in the proceeding, would "cause a tremendous amount of prejudice to the Plaintiff" and would "be very confusing for the jury," who had been informed from the start of trial that Holguin's negligence was established.

The parties disagree about whether Holguin's motion was made under CR 59(a)(4), which governs motions for reconsideration based on newly discovered evidence. Simon argues that Holguin's motion relied on claims of "new and material evidence that it could not have discovered and produced' previously" and should be treated as a motion for reconsideration under CR 59(a)(4), which is reviewed for an abuse of discretion. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88, 60 P.3d 1245 (2003). An abuse of discretion is a decision or ruling which is manifestly unreasonable, exercised on untenable grounds, or for untenable reasons. *Nichols v. Peterson Nw., Inc.*, 197 Wn. App. 491, 498, 389 P.3d 617 (2016). "A decision is manifestly unreasonable if the trial court takes a view that no reasonable person would take." *Clipse v. Com. Driver Servs., Inc.*, 189 Wn. App. 776, 787, 358 P.3d 464 (2015). "[A] trial court's decision rests on untenable grounds or reasons if the trial court applies the wrong legal standard or relies on unsupported facts." *Id.*

"CR 59 deals exclusively with judgments and orders entered following a verdict." *Chaffee v. Keller Rohrback, LLP*, 200 Wn. App. 66, 75, 401 P.3d 418 (2017). "'[A] partial summary judgment is not a final judgment, [nor appealable unless this particular interlocutory order is made appealable by statute,] but is merely a pre-trial adjudication that certain issues in the case shall be deemed established for the trial of the case.'" *Maybury v. City of Seattle*, 53 Wn.2d 716,

718-19, 336 P.2d 878 (1959) (internal quotation marks omitted) (second alteration in original) (quoting 6 Moore's Federal Practice (2d ed.) 2311, ¶ 56.20 [4]). CR 59 is not applicable to interlocutory orders. *Chaffee*, 200 Wn. App. at 77.

Holguin contends that because the partial summary judgment order was interlocutory, it could be revised at any time prior to final judgment and should be reviewed de novo. However, she captioned her motion as one for reconsideration and argued it under that standard, not as a motion for revision. In her motion, she explicitly cited the abuse of discretion standard under sections entitled "discretion to reconsider" and "grounds for reconsideration." (Capitalization omitted.) At the motion hearing, Holguin further argued that "there is substantial evidence via expert testimony that Mr. Simon was speeding such that Ms. Holguin's actions could've been reasonable and not negligent, and the collision could still have occurred" and "new facts in evidence as presented to the jury that have raised a question of fact as to Ms. Holguin's negligence." Even if we accept Holguin's new argument on appeal that it was actually a motion for revision, she fails to demonstrate how the trial court erred when it applied the standard relevant to the motion she herself presented as one for reconsideration, particularly given that is the standard her own counsel argued in the trial court.

Holguin argues that trial courts do not have discretion to make errors of law, but she fails to specify what errors of law the trial court made other than her continued assertion that the adverse ruling was erroneous. The court considered Holguin's new expert testimony, including her expert witness Allan Tencer's report that attempted to explain why she did not see Simon when she looked. Yet, the

court concluded that the new evidence did not change the fact that Holguin "still was the disfavored driver who took a left turn" and failed to see Simon. The record demonstrates that the trial court considered the new evidence and made the following determinations:

> The evidence cited does relate to the driving of Mr. Simon, but it doesn't relate to the Defendant's actions so much in that she still was the disfavored driver who took a left turn, and her testimony was still that she did not see Mr. Simon. And there were some pedestrians on the corner that may have drawn her attention away, but she looked and then did not—she looked down the road and then looked towards where she was turning, and I forget—a number of seconds passed by and she made the turn. And so that was the reason for granting the summary judgment. And that reason hasn't really changed.
>
> What is at issue in this trial is comparative fault and whether or not Mr. Simon has comparative fault, and it really relates to this issue that the Defense has brought up in this motion to reconsider. Does Mr. Simon have comparative fault? Was he traveling at an excessive speed? And that will be a decision for the jury that they'll have to make, but it doesn't cause the [c]ourt to question the decision on the summary judgment. . . .
>
> So for all these reasons, the [c]ourt will deny the motion for reconsideration.

The expert testimony addressed Simon's actions but did not alter the fact that Holguin, by her own admission, did not see Simon despite looking in his direction.

We conclude that the trial court correctly ruled on Holguin's motion, based on her own framing and argument, and did not abuse its discretion.

III. Jury Instructions

Holguin next asserts that the trial court erred in its decision to give jury instructions 6, 7, 8, and 16. Simon, however, avers that Holguin failed to preserve this assignment of error. We agree with Simon.

An appellate court may refuse to hear any claim of error not raised at trial. RAP 2.5(a); *Fireside Bank v. Askins*, 195 Wn.2d 365, 374, 460 P.3d 157 (2020). Regarding jury instructions, any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review. *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 310, 372 P.3d 111 (2016). Objections must be made before the reading of the instructions to the jury to permit the trial court to correct any error that may exist. *See* CR 51(f); *Washburn v. City of Fed. Way*, 178 Wn.2d 732, 746, 310 P.3d 1275 (2013). We consider a claimed error in a jury instruction only if the specific issue was timely raised to the trial court by a specific adequate exception to that instruction. *Van Hout v. Celotex Corp.*, 121 Wn.2d 697, 702, 853 P.2d 908 (1993). "[J]ury instructions are sufficient if 'they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied.'" *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000) (quoting *Hue v. Farmboy Spray Co.,* 127 Wn.2d 67, 92, 896 P.3d 682 (1995)). The specific language of jury instructions is within the discretion of the trial court. *Douglas v. Freeman*, 117 Wn.2d 242, 256, 814 P.2d 1160 (1991). We review jury instructions de novo, asking first whether an instruction is erroneous, and second whether the error prejudiced a party. *Cox*, 141 Wn.2d at 442.

Careful review of the record reveals that Holguin did not object to jury instructions 6 and 16. In fact, she proposed jury instruction 16 and agreed to its final wording. She also expressly agreed to jury instruction 6. Accordingly, she has waived review of instructions 6 and 16. Holguin did object to jury instructions

7 and 8, but her objections were not substantive and differed from those she now presents on appeal. At trial, she merely argued that instruction 7 was duplicative and "not necessary," and that instruction 8 contained inappropriate bracketed language from Washington Pattern Instruction 23.02 referencing the special verdict form. These objections were not sufficient to preserve the errors Holguin now assigns to those instructions.

Holguin contends that she is entitled to a new trial because the jury instructions improperly emphasized her negligence, claiming that the "trial court's error resulted in the jury being told repeatedly by the court that Holguin was negligent because she failed to 'see what was there to be seen' and that she was unreasonable when she made her turn." Holguin did not raise this specific issue at trial and, therefore, did not preserve it for review. *See Van Hout*, 121 Wn.2d at 702.

In her reply brief, Holguin does not dispute that she failed to specifically object that the instruction overemphasized her negligence. But she cites a footnote from *Kaplan v. Northwest Mutual Life Insurance Co.* to argue that this court has previously "summarily rejected" this procedural argument. 115 Wn. App. 791, 804 n.6, 65 P.3d 16 (2003). The footnote states,

> We summarily reject Northwestern Mutual's contention that Kaplan waived the ambiguity issue by submitting instructions, which the trial court gave to the jury, regarding interpretation of ambiguous contract language. *At that stage of the proceedings, having lost the summary judgment motion, Kaplan was entitled to request the most favorable instructions available to him based on the trial court's view of the applicable law.* Neither was Kaplan required to bring a futile CR 50 motion at the close of the evidence, asking the court to reverse its previous summary judgment ruling, in order to preserve the issue for appeal. In any event, the record shows that Kaplan

> again reminded the trial court of the applicable law regarding ambiguous insurance clauses, while arguing against Northwestern Mutual's CR 50 motion.

(Emphasis added.) Holguin argues that we should reject Simon's waiver argument here as well. In *Kaplan*, the court held a CR 50 motion was not required in order to preserve the appeal of a denial of summary judgment because the decision turned solely on an issue of substantive law, the interpretation of an insurance policy clause, rather than disputed issues of material fact. Holguin's reliance on *Kaplan* is misplaced.

Because these arguments were not presented in the trial court, they are waived and we decline to reach the merits of Holguin's challenge to the jury instructions.

IV. Late Disclosed Experts

Holguin next challenges the trial court's decision to admit Simon's late-disclosed experts. Simon avers that she waived this assignment of error because she abandoned her motion to strike his new experts and instead requested a 90-day trial continuance. We agree with Simon.

During the hearing on Holguin's motion to exclude Simon's late-disclosed witnesses on September 12, 2022, Holguin's counsel stated,

> I think that if Your Honor excluded these experts, that might have us have to try the case again. And we're certainly not looking to try this case twice.
>
> So I think that the only fair result under the *Burnett*[4] [sic] factors is at least a 90-day continuance.

[4] *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

We decline to address this issue on the merits because Holguin's briefs fail to provide any citation to authority or supporting argument as to why the trial court erred in denying her motion to strike Simon's expert witnesses, especially after she abandoned that motion at the hearing. "[T]his court does not review issues not argued, briefed, or supported with citation to authority." *Christian v. Tohmeh*, 191 Wn. App. 709, 727-28, 366 P.3d 16 (2015); *see also* RAP 10.3(a)(6). Furthermore, in her reply brief, she concedes this error by clarifying, "Holguin seeks review of the trial court's decision on a continuance, not its decision to admit the testimony." This assignment of error was abandoned.

V. Motion for Continuance

Holguin next challenges the trial court's decision to deny her motion for a continuance of the trial. She argues it abused its discretion because Simon introduced multiple new experts right before trial and she needed time to properly prepare.

"The decision to grant a continuance is at the discretion of the trial court and its decision will be upheld absent an abuse of discretion." *Harris v. Drake,* 152 Wn.2d 480, 493, 99 P.3d 872 (2004). "A trial court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or is arbitrary." *Id.*; *see also Weyerhaeuser Co. v. Com. Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

Two weeks after the discovery cutoff, Holguin disclosed two new experts, accident reconstructionist Patrick Riedlinger and biomechanical engineer Tencer. Riedlinger applied a projectile equation from classical physics to estimate Simon's

speed, concluding that he would need to be traveling at least 67 MPH to fly over the pedestrians' heads and strike the top of the signpost. Tencer's speed calculations, on the other hand, were based on fractures Simon sustained to his hips, sacroiliac joint, and pelvic ring. Tencer argued that such injuries could only result if Simon's center mass impacted the signpost with considerable force and the signpost provided significant resistance. He used the ultimate tensile strength of Douglas fir to claim Simon lost 30.4 MPH in speed due to impact with the signpost.

Simon moved to strike these experts, arguing that Holguin's late disclosure was willful because she lacked a legitimate explanation for failing to retain experts until the eve of trial and the late disclosure unduly prejudiced his trial preparation. On August 24, the trial court denied Simon's motion to exclude the experts.[5] Although Holguin disclosed them after the discovery cutoff, the trial court ruled the late disclosure was not willful and permitted Holguin to present evidence at the trial on Simon's contributory negligence. It also awarded Simon fees and costs.

On August 30, two weeks before trial, Simon disclosed two supplemental experts, a human factors expert, Kevin Rider, and motor vehicle damage expert, Mark Olson. Rider was retained to testify about Holguin's capacity to perceive and react to Simon during the collision, while Olson was to address the nature and extent of the vehicular damage, including damage to both Simon's motorcycle and Holguin's SUV. After Tencer explained in his September 5 deposition that he

[5] The trial court also granted the motion in part, mostly as to establishing production dates for various documents and a number of matters related to the question of fees and costs. Those rulings are not challenged on appeal.

concluded the signpost was peak-strength Douglas fir, Simon hired arborist Favero Greenforest to address the type of wood the signpost was made from and the amount of rot it had.

On August 31, Holguin moved to strike Simon's supplemental experts. Holguin's motion was scheduled for September 12, one day before the trial. But she retracted her request to strike Simon's new experts, and instead requested a 90-day trial continuance. Simon objected and averred that a 90-day continuance was impossible given his counsel's trial schedule and further argued the much longer continuance that would result from counsel's schedule would significantly burden Simon. Simon's counsel offered to call the new experts only in rebuttal, to give defense counsel more time to prepare for them, but Holguin was clear that she objected to allowing their testimony at all. The trial court denied both Holguin's abandoned motion to strike and her motion for continuance. The court found Simon's late disclosure of experts was neither willful nor deliberate because it came in response to Holguin's own late disclosures. Furthermore, the court determined that the opinions of Simon's experts were simply intended to rebut Holguin's new expert opinions. The court ordered that Holguin could depose the experts during several court recess days before opening statements, Simon's three new experts would testify only in rebuttal and not in his case-in-chief, and upon Holguin's request, the court would allow a brief trial recess for either additional discovery or other preparation regarding Simon's experts before rebuttal.

Holguin claims that the trial was conducted using new and speculative testimony that she had no meaningful opportunity to challenge, arguing that the denial of a continuance was unfair and prejudicial. She asserts that this resulted in a fundamentally unfair trial, with "invented 'facts' and speculation."

Both parties blame each other in their briefs for not retaining experts earlier, arguing who was less diligent. However, our review focuses solely on whether the trial court's decision to deny Holguin's motion was manifestly unreasonable, arbitrary, or exercised on untenable grounds; an abuse of discretion. *Harris*, 152 Wn.2d at 493. The judge explained his reasoning by saying,

> So just reviewing a little bit of the history in this case . . . the defense was preparing for trial, and they believed that—discovered that Mr. Simon's accident reconstruction expert, Mr. Harbinson, in calculating Mr. Simon's driving speed, they believed that he omitted or failed to consider that Mr. Simon collided with a street sign prior to coming to a stop after the collision.
>
> The defense consulted with an expert and learned that the street sign should have been considered when calculating Mr. Simon's speed at collision and that failing to account for the street sign, they believed, could greatly estimate [sic] Mr. Simon's speed. And so they proposed new witnesses, experts, who would rebut plaintiff's accident reconstruction expert's analysis of the collision.
>
> So going to what Ms. Kilpatrick said, it is sort of—we're caught in a vicious circle here, and now these witnesses are being proposed by the plaintiff, including the arborist Mr. Greenforest, as rebuttal witnesses, taking into account what Ms. Koehler offered as rebuttal witnesses. And, she indicated they're willing to call them as rebuttal witnesses in their rebuttal case. And the arborist, Mr. Greenforest, would be called in response to Dr. Tencer, and he's an expert in wood strength and could testify as to the strength of the wood.
>
> And that does seem to be relevant to this issue that was raised by the defense expert, relevant rebuttal evidence as well as the testimony of the other witnesses, Mr. Olson and Dr. Rider.
>
> So looking at the *Burnett* Factors [sic] that Mr. Leid talked about, I think it is important to go through those [f]actors. This was a Washington Supreme Court case, *Burnett* [sic] *v. Spokane Ambulance*, at 131 Wn.2d 484, and in that case, the [c]ourt held that when a party fails to obey an order entered under Rule 26(f) , the

> [c]ourt in which the action is pending may make such orders in regard to the failure as are just under—citing Civil Rule 37(b)(2), and among the sanctions available are an order refusing to allow the disobedient party to support designated claims or prohibiting him from introducing designated matters in evidence.
>
> This rule, the [c]ourt said, is consistent with the general proposition that a trial court has broad discretion as to the choice of sanctions for violation of a discovery order.
>
> When the trial court chooses one of the harsher remedies allowed under Civil Rule 37(b), it must be apparent from the record that the [c]ourt considered whether a lesser sanction would probably have sufficed and whether it found the disobedient party's refusal to obey the discovery order was willful or deliberate and substantially prejudice the opponent's ability to prepare for trial.
>
> In this instance, the [c]ourt finds that the plaintiff has not—that this was not willful or deliberate, because as Ms. Kilpatrick stated in her argument, it was in reaction to what they learned from deposing the defense experts and viewing their reports.
>
> Trials are often of this nature. They can change quickly, and that's not unusual. There's no such thing as a perfect trial either, but we have to get through them as best we can. So the [c]ourt finds this wasn't a willful or deliberate violation of the [c]ourt's discovery orders or the discovery rules. The [c]ourt also finds that—my hope, through what I'm going to order, that there will not be prejudice, substantial prejudice, to the defense. I do take into account what Mr. Leid said in his argument. They do need a chance to review this evidence and depose the witnesses, but the [c]ourt is also taking into account Mr. Simon. This case has been pending for a long time, and he has severe injuries. I mentioned this last time. That does concern the [c]ourt. And I don't want to prejudice Mr. Simon any more through a long continuance.
>
> So this trial is expected to last at least ten days and possibly more. The parties anticipate that motions in limine will take up September 13—Tuesday, September 13. And then we will choose a jury on Wednesday, September 14. That could go into September 15, if necessary.

While it is true that a continuance would have allowed the parties and the court additional time to thoroughly review the expert reports, conduct depositions, and file motions in limine, the trial court considered the potential prejudice to Simon and used its discretion to deny Holguin's motion. Furthermore, the case had been pending for two years and the trial had been continued multiple times at the time

of this challenged ruling. We conclude that under the circumstances of this case, it was not an abuse of discretion for the trial court to deny Holguin's motion for a continuance.

VI. Motion for New Trial

Holguin next assigns error to the trial court's decision to deny her motion for a new trial.

"An order denying a new trial will not be reversed except for abuse of discretion. The criterion for testing abuse of discretion is: '[H]as such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a litigant from having a fair trial?'" *Moore v. Smith,* 89 Wn.2d 932, 942, 578 P.2d 26 (1978) (quoting *Slattery v. City of Seattle,* 169 Wash. 144, 148, 13 P.2d 464 (1932)); *see also Gilmore v. Jefferson County Pub. Transp. Benefit Area*, 190 Wn.2d 483, 502, 415 P.3d 212 (2018). "This rule of abuse of discretion specific to motions for a new trial stands in juxtaposition to the general test for abuse of discretion"; that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000).

RAP 10.3(a)(6) directs that an appellate brief includes the "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." We do not consider conclusory arguments. *See Joy v. Dep't of Lab. & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012); *Christian*, 191 Wn. App. at 728. "Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration." *West v.*

Thurston County, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App 533, 538, 954 P.2d 290 (1998)).

Here, Simon avers that Holguin waived this assignment of error by failing to provide substantive argument explaining how the trial court erred in denying her motion for a new trial. Holguin, in her reply, points to her opening brief, where she argued that the partial summary judgment ruling affected the trial. While she repeatedly claims throughout her briefing that the trial court deprived her of a fair trial, she does not separately argue the facts or law of this issue. Holguin's motion for a new trial raised many of the same arguments analyzed in the other sections herein, including the trial court's denial of her motion for a continuance and the contested jury instructions. Her motion for a new trial also raised several other issues that she has either declined to address on appeal or failed to support in her appellate briefing with substantive argument and citations to relevant legal authority. Because Holguin fails to properly present or argue these other additional issues and her assignment of error, we decline to consider them. *See West*, 168 Wn. App. at 187.

VII. Motion for Remittitur

Finally, Holguin avers the trial court erred in its decision to deny her motion for remittitur. We disagree.

"Trial court orders denying a remittitur are reviewed for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent." *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 176, 116 P.3d 381 (2005). "The jury is given the constitutional

role to determine questions of fact, and the amount of damages is a question of fact." *Id*. at 179. "An appellate court will 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." *Bingaman v. Grays Harbor Cmty. Hosp.*, 103 Wn.2d 831, 835, 699 P.2d 1230 (1985). "A jury's verdict will be overturned only if it is 'clearly unsupported by substantial evidence.'" *Dexheimer v. CDS, Inc.*, 104 Wn. App. 464, 475, 17 P.3d 641 (2001) (internal quotation marks omitted) (quoting *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 15-16, 914 P.2d 67 (1996)). "The requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind.'" *Bunch*, 155 Wn.2d at 179 (internal quotation marks omitted) (quoting *Indus. Indem. Co. of Nw., Inc. v. Kallevig*, 114 Wn.2d 907, 916, 792 P.2d 520 (1990)). "We strongly presume the jury's verdict is correct." *Id*. at 179. "A trial court's denial of a remittitur strengthens the verdict." *Id*. at 180; *see also Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp*., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993).

Holguin argues that the jury's economic damages award was not supported by the evidence presented at trial and exceeded the range of substantial evidence. The jury's $2,000,000 award for medical expenses exceeded the maximum amount of evidence on record, $487,472.09.

Simon contends that the evidence demonstrated that he had incurred $1,512,527.91 in medical expenses up to mid-May 2022, four months before trial. He further asserts that after mid-May, he underwent significant additional treatment

related to the collision, which was not included in either figure. This treatment included multiple emergency department visits, multi-day hospitalizations, and four surgeries including the removal and replacement of hardware, as well as a bone biopsy, imaging, and repeated wound care. Simon argues that the jury could reasonably rely on the value of Simon's earlier medical expenses to extrapolate the costs of Simon's additional treatment and arrive at the $2 million award. He also notes that the jury was presented with ample evidence of the extensive additional medical care Simon received, allowing them to assess the reasonable value of the additional treatment.

Reviewing these facts under the "strong presumption in favor of the jury's verdict," we hold that the trial court did not abuse its discretion in denying Holguin's request to reassess Simon's economic damages award. *Bunch*, 155 Wn.2d at 176. Holguin fails to address how substantial evidence presented at trial fails to support a higher amount of economic damages. She argues that because Simon did not present specific evidence of the costs for medical procedures he underwent in the four-month gap between his last quantified medical expenses and the trial, the jury should not have awarded damages for this additional treatment. Holguin argues that Simon provided no bills to document these procedures and there was nothing for the jury to rely on regarding the cost of this medical care beyond speculation, but substantial evidence does not call for precise calculations. In fact, case law establishes the opposite: "[m]athematical exactness is not required." *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 757, 649 P.2d 828 (1982).

Accordingly, we hold that Holguin has failed to demonstrate that the trial court abused its discretion in denying her motion for remittitur.

Affirmed.

WE CONCUR:

APPENDIX B

FILED
8/22/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

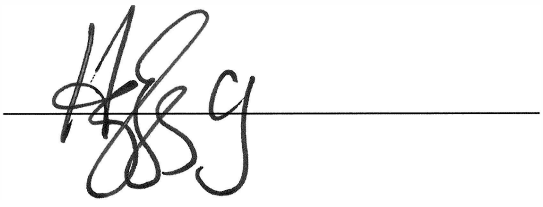
BRAEDEN SIMON, Respondent, v. KELLY HOLGUIN and SPOUSE DOE HOLGUIN, Appellant.	No. 86611-7-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND TO PUBLISH OPINION

Appellant filed a motion for reconsideration and to publish opinion on July 7, 2025. A panel of the court called for an answer which was filed by respondent on August 7. After consideration of the motion and answer the panel has determined that the motion shall be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration and to publish is denied.

FOR THE COURT:



CARNEY BADLEY SPELLMAN

September 19, 2025 - 9:55 AM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Appellate Court Case Title:	Braeden Simon, Respondent v. Kelly Holguin, Appellant (866117)

The following documents have been uploaded:

- PRV_Petition_for_Review_20250919095451SC273703_7280.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf.pdf

A copy of the uploaded files will be sent to:

- Karenk@stritmatter.com
- aa@leesmart.com
- kristinm@stritmatter.com
- lisa@stritmatter.com
- lisewell1092@gmail.com
- lwilhelm@legros.com
- rleid@cwlhlaw.com
- shannon@dawson-brown.com
- shannon@stritmatter.com

Comments:

Sender Name: Patti Saiden - Email: saiden@carneylaw.com
Filing on Behalf of: Sidney Charlotte Tribe - Email: tribe@carneylaw.com (Alternate Email:)

Address:
701 5th Ave, Suite 3600
Seattle, WA, 98104
Phone: (206) 622-8020 EXT 149

Note: The Filing Id is 20250919095451SC273703