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

No. 707612

CHANNARY HOR,

Appellant,

v.

THE CITY OF SEATTLE, a Washington Municipal Corporation, and OMAR TAMMAM,

Respondents.

APPELLANT\CROSS RESPONDENT'S REPLY BRIEF AND OPENING BRIEF ON CROSS APPEAL

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I. INTRODUCTION AND MOTION TO STRIKE

As will be explored below, it is unfortunate that the Respondents (hereafter the City) would prefer to present to the Appellate Court, personal attacks on Appellant's counsel as opposed to forthrightly addressing the merits of the issues presented by Appellant's appeal and the City's cross appeal. A prime example of such an approach, is set forth at Pages 40 and 41 of the City's Opening Brief, wherein it cites to one of plaintiff's counsel's former cases, as being informative on an issue before the court. That opinion, *Elsmore v. Grenell*, 140 Wn. App. 1030 (2007) is an unpublished opinion that the City simply has no business citing. As the opinions of this Court establish, the prohibition in GR 14.1(a) against citing to unpublished opinions, has continuing vitality. See *Colley v. Peace Health*, 177 Wn. App. 717, 723, 312 P.3d 989 (2013). As explained in *Colley* so long as this rule exists, the appellate courts, do not, and will not permit efforts to avoid the rule by creative efforts to try to craft an exception to this brightline rule. Id. citing to *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005) (rejecting the use of such opinions as being "illustrative" or "persuasive" and as not being "authority"). Clearly there is no exception to this bright line rule based on the fact that the unpublished opinion involved one of the lawyers presently representing a client, in a different case, before the Court of Appeals.

When confronted with a similar issue this Court found that the appellate court should "strike", (not considered), the inappropriately cited and related argument. *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 153, 317 P.3d 1074 (2014). Beyond not considering such inappropriately citied unpublished opinions the Washington Appellate Courts have in the past imposed sanctions for such misconduct. See *Dwyer v. J. I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 1240 (2000), *review denied*, 143 Wn.2d 1024, 29 P.3d 717 (2001).

In this case, this is not the first time that the City has cited unpublished opinions. It did so repeatedly before the Trial Court when moving for summary judgment on plaintiff's claim which was, and is, predicated upon the seminal opinion of our Supreme Court in the case of *Mason v. Bitton*, 85 Wn.2d 321, 534 P.2d 1036 (1975). Mason surprisingly has generated few published opinions relating to police pursuits, but a variety of unpublished opinions.

As such, given the City's serial violations of GR 14.1, Appellant simply has no choice but to ask the Court not only to strike from consideration such an unpublished opinion but also request that the Court impose a reasonable sanction in an amount sufficient to deter future misconduct, and to educate counsel for the City that the rule means what it says, as do the opinions of this Court, which previously have condemned such practices.

It is respectfully suggested that the Court when determining the amount of sanctions should be mindful that the rule has been violated, in part, for the improper purpose of "taking a shot" at opposing counsel.[1] With respect to the merits of this matter appellant **provides the following.**

[1] One could go on. For example at Page 35, rather misleadingly, defense counsel suggests that plaintiff's accident reconstruction expert, Mr. Stockinger, performed no calculations but crafted his opinions based on "counsel's versions of events". This is misleading in that defense counsel fails to point out that the cross examination at issue related to an animation exhibit which was withdrawn by plaintiff's counsel and which was never presented to the jury as substantive evidence. From Appellant's perspective such cross examination, relating to a withdrawn exhibit, never should have been presented in front of the jury. The withdrawal of such animation exhibits rendered such issues irrelevant, not meeting basic tests for relevancy within ER's 401 and 402. Given the multitude of errors committed by the Trial Court, Appellant did not assign error to this particular evidentiary ruling, but given the comments set forth within defendant's brief, it is certainly worthy of passing reference. Additionally, and rather bizarrely at Page 16 through 17 of defendant's brief, it delves into irrelevant procedural history primarily relating to an earlier continuance of the case before Appellant's current counsel became involved. Thereafter the City makes a rather strange effort to tie such irrelevant procedural history into a rather strained service of process argument dealing with Co-defendant Tammam. It is pointed out that the City **did not** assign error to the Trial Court's grant of an earlier continuance of this case, nor any of the other issues discussed in what is now largely irrelevant early history of this litigation. It is Hornbook law that an Appellate Court in Washington will not consider issues for which no assignment of error has been made and no argument or legal citation has been presented. See *State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995). Further, even if the City assigned error to such earlier rulings it would have to establish that the Trial Court had "abused", its rather vast discretion, relating matters such as whether or not to grant a continuance, how it goes about managing discovery and what it will or will not consider in response to a motion for summary judgment. See 4 WAPRAC – CR40, Tegland (Sixth Edition 2014) (under CR 40(e) court has wide discretion in granting or denying continuances); *Howard v. Royal Specialty Underwriting, Inc.*, 121 Wn. App. 372, 379, 89 P.3d 265 (2004) (Trial Court has broad discretion relating to limitations of discovery and the like); and *Keck v. Collins*, 181 Wn. App. 67, 325 P.3d 306 (2014) review granted, - Wn.2d – 335 P.3d 941 (2014) (at a minimum, an abuse of discretion standard applies to the Court's consideration of summary judgment submissions). Here, even had the defense assigned error, under the deferential nature of the "abuse of discretion standard", it is unlikely that a case could be made for abuse.

II. REPLY ARGUMENT

A. Plaintiff's Exceptions To The Jury Instructions Upon Which Error Was Assigned Were Sufficient

Appellant is confident that the statement of facts set forth at Pages 7 through 23 of her Opening Brief, appropriately encapsulates the factual predicates for this appeal. In addition it is noted that the defendant(s) appears to be ignoring a number of salient facts relevant to the arguments set forth within Respondent's Opening Brief. This is particularly telling as it relates to the City's assertion that the Appellant failed to appropriately assign error to the jury instructions upon which error is alleged by Appellant. As the record reflects, Appellant's Opening Brief went through a number of versions prior to the final brief pending before this Court. An issue which was ultimately not brought forth, was the Trial Court's giving of Instruction No. 13 a "hindsight" instruction. Many courts have found such "hindsight" instructions are erroneous because in the context of negligence the law requires that an individual exercise foresight in order to comply with a duty. See *Goles v. Neumann*, 247 P.3d 1089 (M T. 2011); *Smith v. Finch*, 681 S.E.2d 147 (Ga. 2009). The reason why this issue was withdrawn from consideration was because on review of the record, exception was not taken to giving of this instruction. However the same is not true with

respect to the remaining instructions discussed within Appellant's Opening Brief.

To the extent that Appellant failed to specifically assign error to Instruction No. 25, it is noted that such an oversight is not fatal to this Court's consideration of the propriety of giving such an instruction. The assignment of error rule, RAP 10.3(a)(4), is an important rule. Nevertheless appellate courts can consider issues clearly set forth within an appellant and/or respondent's opening brief for which no error is assigned, if the nature of the challenge on appeal is perfectly clear. See *Cal Portland Co. v. Level One Concrete, LLC*, 180 Wn. App. 392, 321 P.3d 1261 (2014) ("Where a party's brief makes perfectly clear what part of the decision below is being challenged Appellate Court will overlook the party's failure to specifically assign error to it).

Ignored by the City is the fact that on June 26, 2013 the Trial Court held a preliminary instruction conference (RP Vol. 49, Page 178 – 237). Preliminary exceptions were taken on June 26, 2013 (RP Vol. 49, p. 178 – 327). It was during the course of this instructional conference that the trial judge announced that he was not going to include the individually named defendants in the caption of the jury instructions, or have them subject to apportionment of liability within the verdict form. (*Id.* at 226). It was also (again) pointed out to the Trial Court that, during this conference, the defendants were not entitled to the statutory

privilege set forth in RCW 46.61.035, based on their denials of request for admissions, and Judge Middaugh's prior ruling. The Court agreed, and invited Appellant's counsel to draft and submit the following day an appropriate instruction, addressing the unavailability of the statutory privilege, given Judge Middaugh's previous ruling.

The following morning June 27, 2013, there was a continuation of the instructional conference, as well as the taking of formal exceptions. (RP Vol. 50, Page 4) (RP Vol. 50, Page 9-24). Prior to the taking of formal exceptions, the plaintiff's counsel pointed out in court that there was a recent addition of WPI 71.06 to our pattern jury instructions. (*Id.* at Page 13). Despite the fact that the instruction was clearly "on point", the Trial Court nevertheless instructed the jury regarding the statutory privilege which had previously been found, as a matter of law, by Judge Middaugh to have a new application. As the jury was in the jury room awaiting closing which had to be completed that afternoon, (providing both parties less than one hour and a half for closing in a case where the testimony encompassed almost four weeks), plaintiff's counsel requested the Trial Court provide permission to submit additional written exceptions. (*Id.* at 18-19). The Trial Court in response, indicated among other things ".... that you wanted to submit them in writing that would be great. I would embrace that". (*Id.*) Following the making of exceptions, the case was argued to the jury.

Thereafter on July 24, 2013 Appellant filed a motion for a new trial, arguing many of the same points currently encompassed by this appeal. Within that motion for a new trial, Appellant specifically referenced that it should be considered plaintiff's written exception to the jury instructions. (CP 2960-83; 2977n.1) On August 9, 2013, without oral argument the Trial Court denied plaintiff's motion for a new trial.

Although pressed for time plaintiff more than adequately informed the Court during the above-referenced preliminary instruction conferences, and by formal exceptions, regarding to the infirmities within the instructions that are discussed in this appeal. The Court also agreed to accept written submissions. Under the plain language in CR 51(f) it is mandatory that the Trial Court provide adequate time for the taking of exceptions, "Counsel shall then be afforded an opportunity absent the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction". Generally when a court provides inadequate time, or discouraged the taking of detailed exceptions, the Appellate Court will nevertheless review the propriety of giving or failure to give instructions. See *Ouimette v. E. F. Hutton and Co., Inc.*, 740 F.2d 721 (1st Cir. 1984); *U.S. v. Wright*, 542 F.2d 975 (7th Cir. 1976).

The purpose of CR 51(f) is to assure the Trial Court is sufficiently apprised of any alleged error in the instructions, so that the

Court is afforded an opportunity to correct a mistake, before they are made, and thus avoid the inefficiencies of a new trial. See *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 616, 1 P.3d 579 (2000). Secondarily, the rule provides the reviewing court with a full opportunity to understand the points of law or facts in dispute and assures it that the Trial Court had an opportunity to correct its own error. Compliance with the purpose of the rule will excuse technical non-compliance. *Id.* Citing, *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703 (1994). Further, when a Trial Court permits the filing of post-trial written exceptions, a reviewing court is obligated to make a determination as to whether or not such post-instructional written exceptions are in and of themselves sufficient. See *Goehle,* 100 Wn. App. at 616 – 17. This is because post-instructional objections, that comply with the terms of CR 51(f), give the Trial Court an opportunity to consider whether a new trial is warranted due to significant instructional error, thus affording it an opportunity to correct error without the necessity of an appeal. *Id.*

Plaintiff's Motion for a New Trial substantially discussed all instructional error raised in this appeal. Thus, not only was the Trial Court prior to instructing the jury informed of the plaintiff's concerns regarding the propriety of its instructions, but also it was afforded a second opportunity to correct its rather egregious errors when passing on

plaintiff's motion for a new trial. As a result, the City's "waiver" arguments with respect to instructional errors have no merit.

B. Defense Counsel Engaged In Flagrant Misconduct And Violated a Number of Motions In Limine During The Course of His Opening Statement. As a Result There Was No Requirement That Appellant's Counsel Assert a Contemporaneous Objection at The Time The Misconduct Occurred

As noted in *State v. Latham*, 30 Wn. App. 776, 780, 638 P.2d 592 (1981):

> "The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation. *State v. Evans*, 96 Wn.2d 119, 123, 634 P.2d 845 (1981). Furthermore, Washington courts in numerous cases have stated that rulings on motion in limine are more than tentative; and once the court has granted such a motion, no objection is necessary to reserve the right and claim error if the evidence is nevertheless admitted. See, *Amend v. Bell*, 89 Wn.2d 124, 130, 570 P.2d 138 (1977); *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 91, 549 P.2d 483 (1976); *State v. Smith*, 189 Wn. 422, 65 P.2d 1075 (1937); *State v. Brooks*, 20 Wn. App. 52, 59 579 P.2d 961, *review denied*, 91 Wn.2d 1001 (1978); *Osborne v. Lake Washington School District*, 1 Wn. App. 534, 538 – 39, 462 P.2d 966 (1969)."

Further, the City's suggestion that appellant "gambled on the verdict" by not objecting to Mr. Christie's comments during opening

statement is indicative of a marked misunderstanding of the law. Typically "gambling on a verdict" occurs when misconduct has occurred that was subject to objection and a party refuses a Trial Court's offer to declare a mistrial and then, after a negative outcome, asserts the earlier misconduct as a basis for a new trial. *Estate of Lapping v. Group Health*, 77 Wn. App. 612, 892 P.2d 1116 (1995); *Portch v. Summerville*, 113 Wn. App. 807, 812, 55 P.3d 661 (2002). Here, although Appellant's counsel did not contemporaneously object to Mr. Christie's comments, **which violated a number of motions in limine**, Appellant did move for a mistrial well in advance of the jury's final verdict in this case. With respect to the defendant's violations of motions in limine it is again observed that where "The Trial Court has a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial." *State v. Koloske*, 100 Wn.2d 889, 896, 976 P.2d 456 (1984).

The fact that a comment made by Mr. Christie was violative of a number of motions in limine adds to the conclusion that such actions were "flagrant misconduct" of which no objection could have cured. When "flagrant misconduct" has occurred there is no requirement that there be a contemporaneous objection in order to preserve the issue for review and raising it in a motion for a new trial suffices. See *Sommer v. DSHS*, 104 Wn. App. 160, 171, 15 P.3d 664 (2001), citing to, *Warren v. Hart*, 71 Wn.2d 512, 518 – 19, 429 P.2d 873 (1967).

The City suggested that such misconduct was "invited" simply because Appellant's counsel quite appropriately pointed out the fact that the jury would be required to allocate fault, i.e. make a determination of "shared responsibility" is preposterous. Mr. Christie did not state that the City should be allocated fault because it was not negligent or the like. He stated the rather confusing proposition that "In order to allocate responsibility by 1 percentage point you have to find, and that is what this case is about, 100 percent negligence on the part of the City."

Frankly without placing such a comment in the context of being a message to the jury that a 1 percent allocation of fault to the City would result in potentially 100 percent payment of damages by the City, the statement itself makes absolutely no sense. Obviously Mr. Christie was trying to skirt the scope of the Trial Court's prior ruling on motions in limine or to baffle the jury with confusion. "Negligence is a failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do in the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances." See WPI 10.01. The concept of "negligence" is not something that can be readily referenced as having to be proved at a "100 percent" level. Indeed, the burden of proof with respect to such a claim is that of a "preponderance of the evidence" which means "more probably true than not". This is not something that can be necessarily expressed as a percentage. Clearly, in order to prevail

against the City there is absolutely no requirement that plaintiff prove "100 percent negligence" under any potential theory of the law. Erroneous statements of the law can be a basis for a mistrial and/or a grant of a new trial. See *Kuhn v. Schnall*, 155 Wn. App. 560, 576, 228 P.3d 828 (2010).

In sum, Appellant did not "waive" objections to Mr. Christie's comments during opening. Appelllant had taken great care in filing a number of motions in limine directly designed to prohibit such statements. Defense counsel instead of abiding by the Court's orders crafted a comment obviously designed to skirt the Trial Court's prohibitions. In order to not reward such misconduct, the Trial Court should have granted a mistrial and/or at a minimum a new trial once the jury, no doubt influenced by such misconduct, allowed the City to escape responsibility.

C. The Trial Court Committed Egregious Instructional Error

1. Instruction No. 17

Even after the Court has instructed the jury with respect to an instruction it nevertheless can be withdrawn. *State v. Cox*, 197 Wn. 67, 78, 84 P.2d 357 (1938). Thus the defense's remarks that Appellant had initially proposed Instruction No. 17 within her original instruction packet is simply of no moment. It was quite clear to the Trial Court that

it was Appellant's position that Instruction No. 17, (WPI 71.01), had no application under the facts of this case, particularly in light of the fact that Judge Middaugh had already ruled, as a matter of law, that the defense was not entitled to the statutory privilege applicable to emergency vehicles codified in RCW 46.61.035.[2] Plaintiff proposed Instruction No. 27, which was not given clearly was a correct statement of the law applicable **to this case**:

> "At the time of this occurrence defendant's vehicle did not qualify to be operated as an emergency vehicle. Accordingly, the driver of the vehicle was governed by the same rules and standards as applied to the operator of motor vehicles generally."

It is inexplicable for the Trial Court to have included in its instructions to the jury WPI 71.01, while refusing to give the WPI 71.06. The defense certainly cannot have it both ways.

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[2] The defense has not appealed Judge Middaugh's ruling in that regard. It is noted that even if it had the position that it had taken at trial, i.e. that the police officers were not engaged in a "pursuit" essentially waived any argument by the defense that it was entitled to this statutory privilege. See *Lybbert v. Grant County*, 141 Wn.2d 29, 38 – 39, 1 P.3d 1124 (2000) (a party may waive a defense if the defendant's assertion of the defense is inconsistent with the defense previous behavior"). Additionally the doctrine of judicial estoppel would preclude any argument on the part of the City that it was entitled to the statutory privilege addressed within WPI 70.01. See *Harris v. Fortin*, 183 Wn. App. 522, 526 – 27, 333 P.3d 556 (2014). Having taken the position that there was "no pursuit" (given the absence of use of emergency equipment such as lights and sirens), it would have been inequitable to allow the defense the advantage of the statutory privilege by taking a clearly inconsistent positon. Further, although Appellant counsel clearly agrees that Instruction No. 17, was and is a correct statement of the law, should such a privilege apply, that is certainly not a concession that the privilege has any application in this particular case.

The defense's rather disingenuous argument that the inclusion of WPI 71.01 permitted Appellant to argue her case, while superficially appealing, is incorrect. The Appellant was not driving an emergency vehicle nor would she be in any way benefitted by the application of a statutory privilege, which under the facts of this case, could only possibly apply to the defendant. See RCW 46.61.035. In addition, assuming that the Court ignores the fact that the Trial Court had already determined as a matter of law that the City had forfeited such a privilege at best the defense argument would justify the giving of **both** WPI 71.01 **and** WPI 71.06 which would have permitted the plaintiff to argue the alternative theory that the police, for at least a portion of the pursuit, were operating without lights and sirens, (according to their own testimony), and should be held to the same standards as any other driver.

Nothing in the case has changed between Judge Middaugh's ruling indicating that the City was not entitled to the statutory privilege, to the time the Trial Court instructed the jury with respect to the same. It was prejudicial error for the Trial Court to insert through instructions that which another trial judge had already rightfully removed from the case based on the City's inconsistent positions.

2. Instructions 26 and 27

It was erroneous folly for the Trial Court to instruct the jury in Court's Instructions No. 26 and 27 that the City of Seattle had "no duty

to control Omar Tamman's acts" and that the City had "no duty to protect her [appellant] from Omar Tamman's criminal acts". This is because, as pointed out at Page 25 of Respondent's opening brief there were no allegations in this case that there was a "special relationship" between the City and either Tammam or Ms. Hor or, for that matter that Mr. Tammam at the time in question was in custody or had a quasi custodial relationship with the City. While perhaps such language may reflect a correct statement of the law in other cases, in this case the giving of such instructions served to be tantamount to a directed verdict on Appellant's core theory of liability against the City of Seattle, and its officers. This case was governed by *Mason v. Bitton*, *supra*. The whole theory behind liability for "police pursuits", when the car being pursued is involved in the collision, is the fact that the police, by pursuing, are influencing, in effect "controlling" the actions of the party being pursued. See *The Constitutional Implication of High-Speed Police Pursuits Under a Substantive Due-Process Analysis: Homeward Through the Haze, 27 U. Mem. L. REV. 599, 600 – 01 (1997) (Alpert); Staley v. City of Omaha*, 73 N.W.2d 457 (Neb. 2006); *Seide v. State*, 875 A.2d 1259 (R.I. 2005); *Day v. State*, 98 P.2d 1771, 1177 (Utah 1999); *Suwenski v. Village of Lombard*, 794 N.E.2d 1016, 122 (Ill. App. 2003); *Sudin v. Hughes*, 246 N.E.2d 100 (Ill. App. 1969). As indicated in *Suwenski* in the context of a police pursuit "a reasonably prudent police officer is chargeable with the knowledge that it is probable the suspect

would act in a negligent or in an illegal manner and that the officer's conduct could be found to be a proximate cause of the plaintiff's injuries".

While the City desires to emphasize "standards" applicable to jury instruction, there is no standard which permits the Court to instruct the jury in a manner which eviscerates the plaintiff's theory of the case, or which permits the Trial Court to instruct the jury in a manner which at best is misleading and bound to create confusion. The Court's giving of Instructions No. 25 and No. 26 cannot be justified.

3. Court's Instructions 21 through 25 Were Erroneous

These instructions, which culminated in Court's Instruction No. 25 which provided "You are instructed that Omar Tammam's reckless driving was a proximate cause of plaintiff's injuries", simply overemphasized the defendant's theory of the case at the expense of the plaintiffs. When the Court's instruction overemphasizes one party's case over that of the opposition, it serves to deprive the aggrieved party of fair trial. See *Brown v. Dahl*, 41 Wn. App. 565, 579, 705 P.2d 781 (1985). As stated in *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969):

> "When the instructions as a whole so repetitiously cover a point of law or the application of a rule as to grossly overweigh their total effect on one side and thereby generating an

> extreme emphasis in favor of one party to the explicit detriment of the other party, it is, we think, error – even though each instruction is considered separately might be essentially correct. Thus, if the instructions on a given point or proposition are so repetitious and overlapping as to make them emphatically favorable to one party, the other party has been deprived of a fair trial."

In this case, the Trial Court by overemphasizing the criminality of Co-defendant Tammam's misconduct, and by sprinkling in the terms such as "reckless", "Class C felony", "gross misdemeanor", "vehicular assault", and the like, clearly overemphasize Mr. Tammam's negligence, which was to be compared and allocated against that of the City, to such a degree as to deprive Appellant a fair trial. Such words are highly inflammatory and simply had no place in the jury instructions in this case, where Mr. Tammam, (who has a default), negligence could have been easily addressed by simply instructing the jury that he had already been found negligent as a matter of law. On remand and re-trial of this case such instructions should not be permitted.

D. The Instant Case Was Tainted By Inappropriate Expert Testimony Perpetrated On Behalf of The Defense

1. The Admission Of The Defense Accident Reconstructionist Testimony Was Erroneous

Contrary to the defendant's assertions Appellant did challenge the basic foundations for such testimony, which in most part were absolutely ludicrous. According to the speculation of Defense Expert Rose, all vehicles involved in the pursuit were operating at their maximum speed capacities, even though there was no evidence supporting such a claim. Defense Expert Rose based his calculations on incomplete information, and did not even measure approximately the first one fourth of the pursuit route. What resulted from such speculative and piled on assumptions, was testimony that had an aura of expertise attached to it, but absolutely no substance. The testimony proffered by Defense Expert Rose was similar if not identical to that found inappropriate and inadmissible in another police pursuit case out of the State of Illinois. See *Lorenz v. Pledge*, 12 N.E.3d 550 (Ill. App. 2014). A courtesy copy of the *Lorenz* opinion is attached in the appendixes to this brief. In *Lorenz* the majority had little difficulty in finding that the admission of similar evidence including a video reconstruction to be inadmissible. This Court should reach the same conclusion.

2. The Defendant's Arguments Supporting Dr. Saxon's Testimony Should Be Viewed As Unpersuasive

Without knowing exactly when Mr. Tammam consumed illegal drugs, whatever was physically within his system, hours after the accident is not particularly helpful. Further, simply because Mr. Tammam had drugs on board at the time of the accident does not change the fact that there is simply no way of knowing, and that it is unknowable, as to how such drugs actually impacted the events in question, without relying on rank speculation. In that regard this case is indistinguishable from the case of *State v. Lewis*, 141 Wn. App. 367, 166 P.3d 786 (2007), which precluded the use of expert testimony regarding drug usage without a foundation of knowing in particular how the drugs actually affected the individual. Dr. Saxon's testimony was akin to trying to establish that Mr. Tammam had a particular character trait and on the evening in question he must have acted in conformity therewith without any foundation.

Such speculative testimony was highly inflammatory and prejudicial and should not have been admitted.

3. Mr. Partin Testimony Was So Far Outside of The Mainstream That It Should Not Have Been Deemed Admissible And The Defense Should Not Have Been Permitted To "Back Door" Medical Testimony Through Him Under the Guise of His Expert Opinions

After Mr. Partin's testimony plaintiff submitted declarations from not only the Appellant's economic expert William G. Brandt, who had previously worked with Mr. Partin, but also from another CPA Neil J. Beaton who strongly disagreed with Mr. Partin's use of a "blended portfolio" rate as being something acceptable within the forensic economic community. His use of such a "blended portfolio", to establish a discount rate, in fact is not recognized within the appropriate expert community, and **should not** have been admitted into evidence. The declarations of Mr. Beaton and Appellant's Expert Brandt are attached as Appendices No. 2 and 3. (CP 2984-2998; 2999-3045).

Further, Mr. Partin was not and is not a medical doctor. As discussed at Page 56 of appellant's opening brief he should have never been allowed to express medical-type opinions.

E. The Trial Court Had No Authority To Dismiss The Individual Officers From This Case.

There is nothing within CR 21 nor CR 17 which would permit a Trial Court to dismiss a named party from a lawsuit without making a substantive determination as to the validity of the claims being brought against them. Clearly the law permits a plaintiff to sue both an employer, an employee, or both at their election. See *Orwick v. Fox*, 65 Wn. App. 71, 828 P.2d 12 (1992). Without a determination by the Trial Court as to the substantive merits of such claims, dismissal would be

clearly violative of the plaintiff's right to a jury trial. See *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 644, 771 P.2d 711, 78 P.2d 260 (1989); Washington State Constitution Article 1, Section 21.

Frankly, the defense's response to this issue is not supported by any meaningful citation to authority or reasoned analysis, therefore it should be viewed as being no response at all.

III. RESPONSE TO CROSS APPEAL

A. The City of Seattle Lacks "Standing" To Raise Issues Regarding Service of Process of Co-defendant Tammam.

The City of Seattle's issues regarding service on **Co-defendant Tammam** are absolutely meritless. Appellant's efforts towards service of process on Defendant Tammam who ultimately **accepted service** in this case, are outlined in the declaration of Thomas Klein, which is attached as Appendix No. 4 to this Brief. (CP 4166 - 4217) As discussed below, even if it was Defendant Tammam who was raising service of process issues, under the facts of this case he would have no chance of success. As it is, the City simply has no "standing" to raise such issues.

The common law doctrine of "standing" prohibits a litigant from raising another's legals rights. *Grant County Fire Protection District v. City of Moses Lake*, 15 Wn.2d 719, 802, 83 P.3d 419 (2004). To have standing a party must have suffered or imminently will suffer an injury. The injury must be actual or imminent and cannot be abstract or merely

speculative. *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). The interest must be present and substantial not "a mere expectancy, or future contingent interest". *Primark Inc. v. Berreant Gardens Assocs.*, 63 Wn.App. 900, 907, 823 P.2d 1116 (1992). It is noted that for Appellate purposes, "an aggrieved party" who could seek appellate review must be a person or entity whose personal rights or pecuniary interests have been affected by the matter at issue. See *State Ex. Rel. Simeon v. Superior Court of King County*, 20 Wn.2d 88, 90, 145 P.2d 1017 (1944). Generally standing requires that a party asserting interest show an injury to a legally protected right. *Sprague v. Sysco Corp.*, 97 Wn.App. 169, 176 n.2, 982 P.2d 1202 (1999). As explored in *Cassell v. Portelance*, 172 Wn.App. 156, 294 P.3d 1 (2012) simply because someone might be able to gain a litigation advantage by raising the rights of another, does not confer "standing".

The same principles apply here, simply because the City could have gained a litigation advantage by asserting Mr. Tammam's rights, a litigation advantage is not the kind of interest that would confer standing.

Further it is noted that even if the City had "standing" to raise such issues, it was obligated to raise service of process as an affirmative defense in its answer or seek dismissal pursuant to CR 12(b). (CP 596-601) Under the terms of CR 12(h) a failure to plead such an affirmative defense or assert it within a 12(b) motion waives the issue. See

Northwest Administrators, Inc. v. Roundy, 42 Wn.App. 771, 776, 713 P.2d 126 (1986).

Even if we assume arguendo that the City has "standing" there is simply no doubt under the facts of this case that Mr. Tammam was properly served **three times** prior to this case actually being called for trial and that the City's challenges to such service are at best fanciful, and most likely could be characterized as both legally and factually frivolous.

B. Mr. Tammam Was Served.

As correctly pointed out by the City, under RCW 4.16.080 and RCW 4.16190, Ms. Hor, (a minor at the time of injury), had until her age of majority, plus 3 years to file her negligence-based lawsuit. That date calculates to October 30, 2010.

Once a lawsuit is filed, (near the expiration of the Statute of Limitations), the litigant must serve **one of the defendants within a 90-day time frame in order to toll statute of limitation**. See RCW 4.16.170; *Sidis v. Brodie/Dorhmann, Inc.*, 117 Wn. 2d 325, 815 P.2d 781 (1991). Here, it is undisputed that the City of Seattle was timely served within this time frame, thus under what is known in the "*Sidis* Rule", the statute of limitation was tolled – **period**. Nevertheless, despite such tolling, Ms. Hor's initial counsel, Mr. Klein and Mr. Martin,

made significant and extraordinary efforts to find Mr. Tammam who was concealing himself for the purposes of avoiding service. [3]

As it is, it is debatable that Mr. Tammam, until such time he was finally found and Appellant, who was able to procure an "acceptance of service", (well in advance of trial), that the statute of limitation, and the availability of service through Secretary of State under the "nonresident motorist statute" RCW 46.64.040, ever ceased. It cannot be disputed that following the accident he ran away from the scene, and did not provide the information required by RCW 46.52.020, and failed to file an accident report as required by RCW 46.52.030. As explored in the case of *Brown v. Pro West Transport Ltd.*, 76 Wn.App. 412, 421, 866 P.2d 223 (1994) a defendant is precluded from arguing that RCW 46.64.040 prevents tolling based on concealment, when they have failed to provide an address under the terms of the above-referenced statute.

In any event there is simply no question that appellant's counsel, (well in advance of trial), did all that was required in order to effectively serve Mr. Tammam on a number of occasions. He was served through the Secretary of State, he was served by publication, and ultimately he accepted service, which is the basis for an entry of a default order against

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[3] Though unnecessary to decide, because of the strength of the above-referenced arguments, arguably because Mr. Tammam was concealing himself to avoid service of process the statute of limitation was tolled as to him until he was finally contacted by Appellant's counsel and he signed an acceptance of service. Tolling by concealment is set forth in RCW 4.16.180 and is a valid basis for tolling even if service by publication otherwise would have been possible. See *Couette v. Martinez*, 71 Wn. App. 69, 75, 856 P.2d 723 (1993).

him. It is undisputed that Mr. Klein began trying to locate Mr. Tammam nearly 2 months in advance of filing of the complaint, and at various times did so throughout the course of litigation. The City's suggestion that Mr. Klein had to start his search earlier than 2 months prior to the filing of the complaint, and 3 months prior to the expiration of the statute of limitation, is unsupportable and contrary to well-established law.

In the case of *Carras v. Johnson*, 77 Wn.App. 588, 892 P.2d 780 (1995) the appellate court found that the plaintiff's attorney had engaged in "due diligence" in attempting to serve the defendant prior to service under the nonresident motorist statute, when he began his efforts to find the defendant **9 days before expiration of statute of limitation, as extended by the 90-day period afforded by RCW 4.16.170**. Similarly the Supreme Court found due diligence within the meaning of the nonresident motorist statute, when the plaintiff began efforts to serve the defendant 5 days before the expiration of the 90-day service of process period afforded by RCW 4.16170. See *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993).

As observed by the court of appeals in *Carras*, under *Triol* and the supreme court's opinion in *Martin v. Meier*, 111 Wn.2d 471, 480, 760 P.2d 925 (1988) a plaintiff has **the full period of the statute of limitation (plus 90 days) in which to effectuate service**. Thus the mere fact that the plaintiff waited days before the statute elapsed, does not

"militate against finding of due diligence". *Carras*, 77 Wn.App. at 593. As indicated by *Martin* at 481, it is not required that the plaintiff utilize "all conceivable means" in order to meet the "due diligence" "standard".

In this case, appellant's counsel employed **three investigators in an attempt to contact and effectuate personal service on Mr. Tammam and such efforts should be viewed as a model of "due diligence"; and certainly was more than adequate under existing case law**.

Given the fact that Mr. Tammam was personally served, and accepted service, it is somewhat puzzling that the City is still dwelling on whether or not he could be subject to service through the Secretary of State under RCW 46.64.040. In any event such concerns have already essentially been resolved by the *Triol* opinion.

In *Triol* the court looked through the various statutory schemes and found that based on the rules of statutory construction that tolling statutes, including RCW 4.16.170 should be harmonized with the language of RCW 46.64.040 and found that service upon the Secretary of State after 3 years, (and the statute of limitation had expired), was permissible so long as it was done within the 90-day window afforded by RCW 4.16.0170. Under the same principles of statutory construction, it would defy common sense not to also apply the principles of *Sidis* and

find that under the terms of RCW 4.16.170 that service upon one defendant (the City of Seattle) tolled the statute of limitations.

Further, the Supreme Court's opinion in *Huff v. Budbill*, 141 Wn.2d 1, 9, 1 P.3d 1138 (2000), cited *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996) belies any assertion by the City that strict contraction must always apply to substitute service statutes. As indicated in *Huff* our Supreme Court observed that "more recently we have applied liberal construction to service of process statutes in order to effectuate the purpose of the statutes while adhering to its spirit and intent".

While it is true in dicta the *Sidis* court suggested there are some limitations to the tolling afforded when one defendant has been served but not another, the Supreme Court's opinion, in *Bosteder v. City of Renton*, 155 Wn.2d 18, 48-49, 117 P.3d 316 (2005), (in part superseded by statute), indicates something more must be shown than a violation of the court rules "in the air", in order to undermine the tolling afforded by RCW 4.16.170. Beyond the City's efforts at professional insult, it is respectfully suggested that no interest of the City was impacted by the fact that Mr. Tammam was served well in advance of trial and ultimately subject to an order of default. Simply because the City theoretically could be exposed to joint and several liability should Mr. Tammam be a party to this lawsuit, (which he was), is not the kind of prejudice which

would warrant dismissal of Mr. Tammam from this case particularly given the fact that he was **actually served**, defaulted and had a judgment entered against him.

C. The City's Evidentiary Objections to Mr. Tammam's Statements are Nonsense.

As Mr. Tammam was **a proper party** in this case under the terms of ER 801 his statements against interest were not hearsay within the definition of that term. In addition as such statements were against Mr. Tammam's penal interests (acknowledging that he knew the police were behind him and suggesting a continuing plan to engage in the crime of elluding) such statements would constitute statements against penal interests under the terms of ER 804(b).

Further, the City's suggestion that one or more of the exceptions under ER 803 have no application to such statements are meritless. Once could question how Mr. Tammam's statements, which were occurring while he was being pursued by the police, in a high speed pursuit, would not be a "excited utterance" within the meaning of ER 803(a)(2). "The excited utterance exception to the rule against hearsay evidence is grounded in the notion that under the stress of excitement caused by a startling event a declarant may spontaneously blurt out a statement, and, because of the circumstances, will not have the opportunity to fabricate". See *Nationwide Ins. v. Williams*, 71

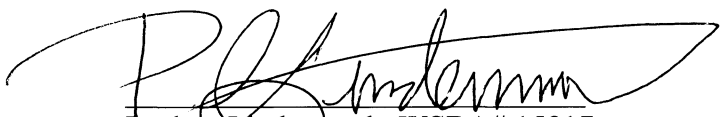
Wn.App. 336, 858 P.2d 516 (1993). That's exactly what occurred here Mr. Tammam was "blurting out" what his intent was in response to the police pursuit, and clearly the circumstances did not afford an opportunity to fabricate.

Further, under the terms of ER 803(a)(3), clearly Mr. Tammam's statements described his then existing emotional state or state of mind, including his intent or plan to stop if the police stopped pursuing him. The court should reject the City's efforts to exclude what was, and continues to be highly relevant evidence which was spontaneously uttered, and which directly tells us what Mr. Tammam's state of mind was at the time he was engaging in criminal activity. The defendant's evidentiary objections have no merit.

IV. CONCLUSION

For the reasons stated, above and in Appellant's Opening Brief, this case should be reversed and remanded for a new trial. Additionally defendant's cross appeal should be unequivocally rejected. The City of Seattle should be required to pay terms (sanctions) for citing to an unpublished opinion. Such behavior has become extremely repetitive and should cease.

DATED this 16 day of February, 2015.



Paul A. Lindenmuth, WSBA# 15817
Attorney for Plaintiff/Appellant

DECLARATION OF SERVICE

I, **SHERI MCKECHNIE,** hereby declares under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That I am over the age of 18 years of age, have personal knowledge of the facts herein, and am competent to testify thereto.

2. I am a paralegal working for the The Law Offices of Ben F. Barcus & Associates, PLLC.

3. On the 17th day of February, 2015, a true and correct copy of the APPELLANT'S REPLY BRIEF AND OPENING BRIEF ON CROSS APPEAL was sent for delivery as indicated to the following:

Original filed via hand delivery, with:
Court of Appeals, Division I
Clerk's Office
600 University St.
Seattle, WA 98101

Via email and legal messenger to:
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DATED this 17th day of February, 2015.

Sheri McKechnie, Paralegal

APPENDIX 1

H

Appellate Court of Illinois,
Third District.
Mark LORENZ, Gary Lorenz, and Leslie Lorenz, Plaintiffs,
v.
Thomas PLEDGE and The McDonough County Sheriff's Department, Defendants–Appellees (Brian Dayton, Individually and as the Special Administrator of the Estate of Jill D. Dayton, Deceased, and Amanda Dayton Nehring, Plaintiffs–Appellants).

No. 3–13–0137.
Feb. 5, 2014.
Modified Upon Denial of Rehearing June 24, 2014.

Background: Injured motorist and special administrator of passenger's estate filed suit against sheriff's deputy and sheriff's department for negligence and wrongful death arising out of fatal collision of deputy's squad car with motorist's vehicle during high speed pursuit of suspect. Following jury trial, the Ninth Judicial Circuit Court, McDonough County, Richard H. Gambrell, J., entered judgment on jury's verdict for defendants, and plaintiffs appealed.

Holdings: The Appellate Court, O'Brien, J., held that:
(1) adequate foundation was not laid for admission of line-of-sight video produced by defendants' expert;
(2) plaintiffs were prejudiced by admission of video;
(3) expert testimony about motorist's duty to yield cause of collision being motorist's failure to yield did not impermissibly invade province of jury;
(4) evidence of squad car video supported plaintiffs' closing argument about length of time that motorist could see approaching squad car; and
(5) factual issues as to whether deputy's actions were willful and wanton precluded summary judgment on grounds of immunity.

Reversed and remanded; rehearing denied.

Schmidt, J., filed dissenting opinion and filed an opinion concurring in part and dissenting in part on denial of rehearing.

West Headnotes

[1] Evidence 157 99

157 Evidence
157IV Admissibility in General
157IV(A) Facts in Issue and Relevant to Issues
157k99 k. Relevancy in general. Most Cited Cases

"Relevant evidence" is any evidence that has a tendency to make the existence of a fact of consequence in the case more probable or less probable than it would be without the evidence.

[2] Evidence 157 150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

The foundational requirements for the admission of experiments or tests case is whether the essential conditions or essential elements of the experiment are substantially similar to the conditions at the time of the accident.

[3] Evidence 157 150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

If an experiment is presented as a reenactment of the accident at issue, the proponent must establish the test was performed under conditions closely duplicating the accident.

[4] Evidence 157 ⚿150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

When an experiment is designed to test only one aspect or principle related to the cause or result of the accident at issue, the exact conditions of the accident do not need to be replicated but that particular aspect or principle must be substantially similar.

[5] Evidence 157 ⚿188

157 Evidence
157VI Demonstrative Evidence
157k188 k. Exhibition of person or object in general. Most Cited Cases

The admission of demonstrative evidence that may confuse or mislead the jury, or prejudice a party, constitutes an abuse of the trial court's discretion.

[6] Appeal and Error 30 ⚿1050.1(1)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
30k1050.1(1) k. In general. Most Cited Cases

Where a trial court abuses its discretion in admitting evidence, a reviewing court should grant a new trial only where the error was substantially prejudicial and affected the outcome of the case.

[7] Evidence 157 ⚿150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

It is proper to exclude experiments to determine the extent of a driver's visibility prior to the accident in question if the conditions are not substantially similar.

[8] Evidence 157 ⚿150

157 Evidence
157IV Admissibility in General
157IV(E) Competency
157k150 k. Results of experiments. Most Cited Cases

Evidence 157 ⚿359(6)

157 Evidence
157X Documentary Evidence
157X(C) Private Writings and Publications
157k359 Photographs and Other Pictures; Sound Records and Pictures
157k359(6) k. Motion pictures. Most Cited Cases

Essential conditions of line-of-sight video recorded by sheriff's deputy's expert were not substantially similar to those that existed at time deputy's cruiser collided with motorist's vehicle during high speed chase of suspect, and thus, adequate foundation was not laid for admission of video in action for wrongful death and negligence against deputy and sheriff's department; pursuit involved speeds in excess of 100 mph, while suspect's vehicle and cruiser in video were driving at 40 mph., vehicles in experiment were in different lane than suspect's vehicle and cruiser, standing traffic was visible in video that was not present when accident occurred, suspect vehicle's lights were on in video, contrary to evidence that suspect had turned lights off during pursuit, and video was taken from static position in left-turn lane, while evidence at trial suggested that motorist's vehicle was consistently moving through intersection at time of collision.

[9] Appeal and Error 30 1050.1(11)

30 Appeal and Error
30XVI Review
30XVI(J) Harmless Error
30XVI(J)10 Admission of Evidence
30k1050 Prejudicial Effect in General
30k1050.1 Evidence in General
30k1050.1(8) Particular Types of Evidence
30k1050.1(11) k. Documentary evidence; photographs. Most Cited Cases

Admission of line-of-sight video produced by sheriff's deputy's expert, when essential conditions depicted in video were not substantially similar to conditions in accident, was prejudicial to injured motorist and special administrator of passenger's estate, in action against deputy and sheriff's department for wrongful death and negligence arising out of deputy's collision with motorist during course of high speed pursuit of suspect's vehicle; critical issue at trial was motorist's negligence in proceeding through intersection, effect of video was to precondition jury to accept defendants' theory of accident, video depicted different scene in manner favorable to defense than what motorist observed, and thus, video had potential to mislead and confuse jury, and limiting instruction given did not comply with pattern limiting instruction that video's limited purpose related only to line-of-sight as basis for expert's opinion.

[10] Trial 388 213

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject–Matter
388k213 k. Matters of law in general. Most Cited Cases

Trial 388 242

388 Trial
388VII Instructions to Jury
388VII(C) Form, Requisites, and Sufficiency
388k242 k. Confused or misleading instructions. Most Cited Cases

The trial court must give instructions that fairly and accurately state the law and are clear enough so the jury is not misled.

[11] Trial 388 121(1)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k121 Comments on Evidence or Witnesses
388k121(1) k. In general. Most Cited Cases

Evidence supported wrongful death plaintiffs' closing argument inferring that deputy's squad car video depicted a five-second period when motorist could see approaching squad car based on when her vehicle came into view on video prior to squad car's crash with vehicle during deputy's high-speed pursuit of suspect, even though defense expert opined that the squad car was visible to motorist for 13 seconds, where the video, which was equipped with audio and an onscreen timer for jury to see, was admitted as substantive evidence without objection.

[12] Evidence 157 506

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters directly in issue. Most Cited Cases

Testimony by sheriff's deputy's expert that motorist had duty to yield to deputy's emergency vehicle before executing left turn, and that, in his expert opinion, cause of deputy's collision with motorist's vehicle was motorist's failure to yield, did not impermissibly invade province of jury, in action for wrongful death and negligence, where jury was free to reject expert's opinion and jury also had to determine whether deputy acted willfully and wantonly, which was a finding that jury could have made even if motorist failed to yield.

[13] Evidence 157 506

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k506 k. Matters directly in issue. Most Cited Cases

An expert may opine on an ultimate fact or issue as long as the other requirements for the expert testimony are met.

[14] Judgment 228 181(27)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(15) Particular Cases
228k181(27) k. Public officers and employees, cases involving. Most Cited Cases

Genuine issues of material fact existed as to whether deputy's actions during high speed pursuit of suspect were willful and wanton, precluding summary judgment on grounds of immunity in action against deputy and sheriff's department for wrongful death and negligence arising out of deputy's collision with motorist during pursuit. S.H.A. 745 ILCS 10/1–101 et seq.

***552** John M. Spesia (argued), Kent Slater, and Jacob Gancarczyk, all of Spesia, Ayers & Ardaugh, of Joliet, for appellants.

Craig L. Unrath (argued), of Heyl, Royster, Voelker & Allen, of Peoria, and Matthew R. Booker and Douglass R. Bitner, of Heyl, Royster, Voelker & Allen, of Springfield, for appellees.

OPINION

Justice O'BRIEN delivered the judgment of the court, with opinion.

****273** Plaintiffs Brian Dayton, individually and as special administrator of the estate of Jill Dayton, deceased, Amanda Dayton Nehring, and others not involved in this appeal, filed personal injury and wrongful death actions against defendants Thomas Pledge and the McDonough County sheriff's department, for damages they sustained following a car accident between the Daytons' minivan and a sheriff's squad car. Following a trial, the jury entered a verdict in favor of Pledge and the sheriff's ****274** ***553** de-

partment. The Daytons appealed. We reverse and remand for a new trial.

¶ 2 FACTS

¶ 3 On September 3, 2004, at approximately 11:30 p.m., defendant McDonough County sheriff's department received a call regarding an erratically driven sport utility vehicle (SUV). Defendant Deputy Thomas Pledge, who responded to the call, located and observed the SUV. His squad video activated, and after seeing the SUV swerve several times, Pledge effectuated a traffic stop. As Pledge approached the stopped SUV, it sped away, and he pursued the vehicle. The SUV and Pledge proceeded southbound on Route 67, heading into Macomb. Pledge's vehicle reached speeds as high as 110 miles per hour and was traveling at 100 miles per hour approximately four seconds before he entered the intersection of Route 67 and University Drive. The SUV turned off its headlights as it neared the intersection.

¶ 4 At the same time the SUV and Pledge were speeding toward the intersection, a minivan traveling northbound on Route 67 and occupied by 16–year–old Amanda Dayton, the driver; her mother, Jill Dayton, in the passenger seat; and their friend, Mark Lorenz, in the backseat, entered the intersection's center turn lane to proceed left onto University Drive. The SUV passed through the intersection, and as Amanda began the left turn, the squad entered the intersection and struck the minivan on the passenger side. Pledge, Amanda and Lorenz were injured, and Jill was killed in the accident.

¶ 5 Plaintiffs Mark Lorenz, Gary Lorenz, Leslie Lorenz (collectively, the Lorenzes), Brian Dayton, individually and as special administrator of the estate of Jill Dayton, and Amanda Dayton Nehring (collectively, the Daytons) sought to recover damages for their injuries from Pledge, individually and as a McDonough County deputy sheriff, and the McDonough County sheriff's department (collectively, the McDonough County defendants). The Lorenzes are not part of this appeal. The fourth amended complaint asserted wrongful death and bodily injury against Pledge and the sheriff's department. The complaint alleged that Pledge acted both negligently, and willfully and wantonly, and violated provisions of several statutes and the sheriff's department pursuit policy.

¶ 6 Both parties filed motions *in limine*. The Daytons sought to preclude a videotape prepared by a defense expert witness, Michael O'Hern. The video portrays a visibility or line-of-sight study undertaken by O'Hern and designed to give an indication of the line of sight down Route 67 that Amanda would have had from the left-turn lane. The Daytons argued that the video was an enactment of the crash and its probative value was outweighed by its prejudicial effect. Following a hearing, the trial court denied the motion *in limine*. The McDonough County defendants filed a motion for summary judgment, arguing that additional negligence counts the Daytons added in their fourth amended complaint were barred by tort immunity. The new counts alleged that Pledge was not executing or enforcing the law when he pursued the SUV, which the Daytons argued precluded Pledge and the sheriff's department from the protection of tort immunity. The motion was heard and denied, and the McDonough County defendants filed a motion seeking certification for an interlocutory appeal. The trial court denied the motion for certification.

¶ 7 A jury trial ensued. Testifying for the Daytons were Pledge, expert witness Robert Johnson, Amanda Dayton Nehring, and Brian Dayton. Evidence depositions of an occurrence witness and a medical doctor were read into evidence. The occurrence witness testified that she saw the ****275 *554** accident occur and that the Dayton minivan was starting to turn left when the squad car collided with it. The squad car did not swerve or brake and its brake lights did not come on. Michael O'Hern testified as an expert witness for the defense. He created the line-of-sight video in response to an early claim by the Daytons that there were trees

blocking Amanda's visibility. He undertook the experiment to determine whether there were any structures impeding Amanda's view; whether she could see Pledge's squad car; and whether it was necessary for her to yield to oncoming traffic. O'Hern reiterated a number of times that the video was not a reconstruction of the accident and explained the various differences between the conditions of the actual crash and the line-of-sight experiment, including speed, lane position, static position from the left lane, normal driving conditions, and an illuminated SUV. The conclusion O'Hern reached from the experiment was that Amanda had a "clear line of sight of both southbound lanes of traffic" for one-half mile as observed from the left-turn lane. In addition to the video, O'Hern also based his opinion on his experience and training.

¶ 8 The Daytons timely objected to use of the video, arguing it was cumulative, inaccurate, and confusing, and that its probative value was outweighed by its prejudicial effect. The trial court overruled the objection and gave a limiting instruction to the jury as follows:

> "The witness has explained why the video was produced and you should consider it only for purposes of the consideration that the witness took of the information that's contained therein. You can consider the material for that purpose in deciding what weight, if any, you give the opinions that have been testified to by the witness."

¶ 9 Based on O'Hern's review of the squad car video, he concluded that Amanda's line of sight was blocked for one second by the passing SUV but the squad's emergency lights were still visible, and that Amanda could see the approaching squad for 13 to 15 seconds before the impact. He further opined that Pledge was traveling at 86 miles per hour entering the intersection, slowed to 73.9 miles per hour prior to impact, and to 70 miles per hour at impact. O'Hern stated that Amanda "would have a duty to yield and stop and not engage in that left turn maneuver in front of the vehicle." He opined that Amanda had a duty to yield to oncoming traffic in general, and to emergency vehicles in particular, when turning left. In O'Hern's professional opinion, Amanda's failure to yield was the cause of the accident and Pledge operated with due regard for the public's safety.

¶ 10 Pledge testified, in part, that he was aware of the license plate number of the SUV before he began to pursue the vehicle. He also heard on the police monitor that the Macomb police were placing spike strips to stop the SUV and were prepared to apprehend the driver. He anticipated that the SUV would ultimately crash and that it created a "huge safety concern" by traveling without its headlights. Pledge knew his speed reached 110 miles per hour during the pursuit. He saw the Dayton minivan in the left-turn lane but opted to proceed through the intersection in order to keep the SUV in sight. Pledge grew up in the Macomb area and was familiar with the intersection where the accident occurred and was aware that other accidents occurred there, often involving left-turning vehicles. As an officer, Pledge had responded to some of the accident scenes at the intersection. Pledge was also aware that Western Illinois University (WIU) was in session, increasing the population in the area of the intersection, which was an entrance to campus. It was a holiday ****276 *555** weekend, which also increased pedestrian and vehicular traffic.

¶ 11 Pledge further testified regarding the sheriff's department policy regarding high speed pursuits. The policy stated that " 'fresh pursuit' at *high* speeds is justified only when the officer knows or has reasonable grounds to believe the violator has committed or attempted to commit as serious felony." (Emphasis is original.) The policy also provides that it is not inconsistent with the pursuit policy "that it is sometimes better to discontinue pursuit, than to continue pursuit and risk the consequences." The policy provides other regulations and procedures regarding "fresh pursuit," including advising that the officer must consider,

"most importantly, the safety of citizens, whose protection is his major objective." The policy allows officers in pursuit to exceed the speed limit and violate other traffic regulations, but only with the squad's lights and siren employed and "[i]f the utmost safety is insured for self and others." Finally, the policy provides that an officer engaged in pursuit is not "relieved of his duty to drive with 'due regard' for the safety of all persons, nor protected from the consequences of any reckless disregard for their safety."

¶ 12 Closing arguments took place. Counsel for the Daytons argued that Amanda's vehicle was only visible for five seconds before the collision as indicated in the squad video. The defense objected, to which the trial court responded, as follows:

> "The objection is that you have misstated the fact. That is, I believe that there was testimony or some sort of evidence that there was a period of five seconds within which the squad car would have been viewed, and my recollection of the evidence is that there was no such testimony from any of the occupants of the [mini]van. There was no testimony from the evidence deposition of the occurrence witness, and there was no testimony of five seconds. The only testimony that I heard was the opinion witness of the defense."

¶ 13 During deliberations the jury asked to see the squad car video, along with other evidence. The video was replayed for the jury. The jury returned a verdict for the McDonough County defendants and against the Daytons. The Daytons filed a posttrial motion, maintaining that the O'Hern video was improperly admitted; O'Hern improperly gave an opinion on Amanda's duty; they were prejudiced by the defense's closing argument; and the trial court failed to properly instruct the jury. The Daytons' motion was heard and denied. They appealed.

¶ 14 ANALYSIS

¶ 15 The Daytons raise four issues on appeal. They challenge the trial court's rulings on the admission of the defense's line-of-sight video; the limiting instruction concerning the video; the limitations on their closing argument; and the defense expert's testimony regarding Amanda's duty.

¶ 16 The first issue is whether the trial court erred in admitting the defense video. The Daytons argue that the line-of-sight video submitted by the defense was improperly admitted. They maintain the conditions shown in the video were not substantially similar to the conditions of the accident, and the video was inaccurate, misleading, and confusing, unfairly biased to the defense theory, and an informal accident reconstruction.

[1] ¶ 17 The general guidelines for the admission of experiments are found in Illinois Rules of Evidence 401 and 402 (Ill. R. Evid. 401, 402 (eff. Jan. 1, 2011)) regarding relevant and irrelevant evidence. Relevant evidence is any evidence that has a tendency to make the existence of a fact of consequence in the case more probable or ****277 *556** less probable than it would be without the evidence. *Voykin v. Estate of DeBoer,* 192 Ill.2d 49, 57, 248 Ill.Dec. 277, 733 N.E.2d 1275 (2000); *People v. Monroe,* 66 Ill.2d 317, 321–22, 5 Ill.Dec. 824, 362 N.E.2d 295 (1977). In addition, a court may exercise its discretion and exclude evidence, even if it is relevant, if the danger of unfair prejudice substantially outweighs its probative value. Ill. R. Evid. 403 (eff. Jan. 1, 2011); *People v. Hanson,* 238 Ill.2d 74, 102, 345 Ill.Dec. 395, 939 N.E.2d 238 (2010). Distinguishing between an experiment (substantive evidence) and the use of demonstrative evidence (explanatory evidence) is sometimes difficult and confusing. See *People v. Hayes,* 353 Ill.App.3d 355, 360, 288 Ill.Dec. 981, 818 N.E.2d 916 (2004); *Foster v. Devilbiss Co.,* 174 Ill.App.3d 359, 365, 124 Ill.Dec. 600, 529 N.E.2d 581 (1988); Michael H. Graham, Graham's Handbook of Illinois Evidence § 401.11, at 190 (10th ed. 2010).

[2][3][4][5][6] ¶ 18 The foundational requirements for the admission of experiments or tests is "whether the 'essential conditions' or 'essential elements' of the experiment are substantially similar" to the conditions at the time of the accident. *Brennan v. Wisconsin Central Ltd.,* 227 Ill.App.3d 1070, 1087, 169 Ill.Dec. 321, 591 N.E.2d 494 (1992). If an experiment is presented as a reenactment, the proponent must establish the test was performed under conditions closely duplicating the accident. *Brennan,* 227 Ill.App.3d at 1087, 169 Ill.Dec. 321, 591 N.E.2d 494. When an experiment is designed to test only one aspect or principle related to the cause or result of the accident at issue, the exact conditions of the accident do not need to be replicated but that particular aspect or principle must be substantially similar. *Galindo v. Riddell, Inc.,* 107 Ill.App.3d 139, 144, 62 Ill.Dec. 849, 437 N.E.2d 376 (1982). This court reviews evidentiary errors for an abuse of discretion. *Bosco v. Janowitz,* 388 Ill.App.3d 450, 463, 328 Ill.Dec. 96, 903 N.E.2d 756 (2009). The admission of demonstrative evidence that may confuse or mislead the jury, or prejudice a party, constitutes an abuse of the trial court's discretion. *Hernandez v. Schittek,* 305 Ill.App.3d 925, 932, 238 Ill.Dec. 957, 713 N.E.2d 203 (1999). Where a trial court abuses its discretion in admitting evidence, a reviewing court should grant a new trial only where "the error was substantially prejudicial and affected the outcome of the case." *Taluzek v. Illinois Central Gulf R.R. Co.,* 255 Ill.App.3d 72, 83, 193 Ill.Dec. 816, 626 N.E.2d 1367 (1993).

[7] ¶ 19 It is proper to exclude experiments to determine the extent of visibility prior to the accident in question if the conditions are not substantially similar. See *Kent v. Knox Motor Service, Inc.,* 95 Ill.App.3d 223, 226, 50 Ill.Dec. 804, 419 N.E.2d 1253 (1981) (where type of vehicle, light condition, and conditions of highway in line-of-sight test were not the same, nor substantially the same, as during the accident, the trial court's refusal to admit experiment to determine extent of driver's visibility was not an abuse of discretion); *Amstar Corp. v. Aurora Fast Freight,* 141 Ill.App.3d 705, 709, 96 Ill.Dec. 31, 490 N.E.2d 1067 (1986) (proper to exclude videotape where the difference in vantage point from position of video camera and position of driver was significant and misleading); *French v. City of Springfield,* 65 Ill.2d 74, 81–82, 2 Ill.Dec. 271, 357 N.E.2d 438 (1976) (city was prejudiced by improper admission of motion picture, which depicted area where accident occurred and preconditioned the minds of the jurors to accept the plaintiff's theory of the case). This court recently addressed the same issue presented here in *Johnson v. Bailey,* 2012 IL App (3d) 110016, 359 Ill.Dec. 931, 967 N.E.2d 961, and rejected arguments similar to those presented by the McDonough**278 *557 County defendants. In *Johnson,* the trial court improperly admitted photographs that the defense argued portrayed the layout of the gas station parking where the plaintiff was injured in a collision with the defendant. *Johnson,* 2012 IL App (3d) 110016, ¶ 15, 359 Ill.Dec. 931, 967 N.E.2d 961. One vehicle shown in the photo accurately represented the position of the defendant's vehicle but the second vehicle in the photo was not in a location substantially similar to the location of the plaintiff's vehicle when the accident occurred. *Johnson,* 2012 IL App (3d) 110016, ¶ 15, 359 Ill.Dec. 931, 967 N.E.2d 961. In addition to depicting the lot's layout and traffic flow, the photos also showed an inaccurate location of the plaintiff's vehicle, which we considered could mislead the jury. *Johnson,* 2012 IL App (3d) 110016, ¶ 15, 359 Ill.Dec. 931, 967 N.E.2d 961. Because the photographs did not accurately portray the location of plaintiff's vehicle, we found that the foundation was incomplete and the plaintiff was prejudiced by their improper admission. *Johnson,* 2012 IL App (3d) 110016, ¶ 16, 359 Ill.Dec. 931, 967 N.E.2d 961.

[8] ¶ 20 The same circumstances are present in the instant case. The video does not meet the test for admissibility of experimental evidence. For the video to satisfy the foundational requirements, the defense needed to establish that the essential conditions of the line-of-sight experiment were substantially similar to

those that existed when the accident occurred. It is undisputed that the essential conditions regarding line of sight were not substantially similar when the video was created. The pursuit involved speeds in excess of 100 miles per hour, while the SUV and squad car in the video were driving at 40 miles per hour. The vehicles in the experiment were in a different lane than the SUV and Pledge's vehicle, and standing traffic is visible in the video that was not present when the accident occurred. The SUV's lights were on in the video, contrary to the pursued SUV, which had turned off its lights during the pursuit. The video was taken from a static position in the left-turn lane, while the evidence at trial suggests Amanda's minivan was consistently moving through the intersection.

¶ 21 The McDonough County defendants expressly admit the differences exist, but argue that they go to the weight the jury should give the evidence, not to its admissibility. The defendants assert the jury was informed repeatedly throughout the trial that the line-of-sight experiment was not a re-creation of the accident. We agree with the defense that it repeatedly informed the jury that the video was not a re-creation. Nevertheless, that does not relieve the McDonough County defendants of the obligation to demonstrate that the essential conditions of the line-of-sight evidence offered by their expert were substantially similar to the conditions as they appeared in Amanda's line of sight at the time of the accident. The various differences, as discussed above, preclude any substantial similarities regarding line-of-sight conditions. Like the defendant in *Johnson,* the McDonough County defendants cannot establish that the essential conditions regarding Amanda's line of sight were substantially similar to the conditions existing when the video experiment was performed. Because the defendants cannot satisfy the requirements for the admission of demonstrative evidence, we find the video was admitted in error.

[9] ¶ 22 We further find that the improper admission prejudiced the Daytons. A critical issue in the case was Amanda's negligence. The effect of the video was to precondition the jury to accept the defense's theory of the accident. Because its essential conditions were not substantially similar to conditions when the accident ****279 *558** took place, the video had the potential to confuse and mislead the jury. The video depicted a different scene than Amanda would have seen when the accident occurred and offered a portrayal of the accident's circumstances favorable to the defense. The prejudicial impact of the video outweighed its probative value and precluded its admission.

¶ 23 We find that the trial court abused its discretion in allowing the video to be admitted into evidence and that the Daytons are entitled to a new trial. Although the resolution of the first issue is dispositive, we briefly address the other issues the Daytons raise on appeal to the extent they are likely to arise in the new trial.

¶ 24 The Daytons challenge the limiting instruction provided by the trial court regarding the defense video, asserting it was confusing, prejudicial and improper. We agree. The Illinois Pattern Jury Instructions provide the following instruction on evidence admitted for a limited purpose:

> "The following evidence concerning [(describe evidence)] is to be considered by you solely as it relates to [(limited subject matter)]. It should not be considered for any other purpose." Illinois Pattern Jury Instructions, Civil, No. 2.02 (2000) (hereinafter, IPI Civil (2000) No. 2.02).

The trial court instructed the jury as follows:

> "The witness has explained why the video was produced and you should consider it only for purposes of the consideration that the witness took of the information that's contained therein. You can consider the material for that purpose in deciding what weight, if any, you give the opinions that have

been testified to by the witness."

[10] ¶ 25 The trial court's limiting instruction did not track the language of the applicable pattern jury instruction. See IPI Civil (2000) No. 2.02. The trial court must give instructions that fairly and accurately state the law and are clear enough so the jury is not misled. *Eskew v. Burlington Northern & Santa Fe Ry. Co.,* 2011 IL App (1st) 093450, ¶ 31, 354 Ill.Dec. 683, 958 N.E.2d 426. The limiting instruction given by the trial court did not clearly or comprehensively inform the jury that the video's limited purpose related only to line of sight as the basis for the defense expert's opinion.

[11] ¶ 26 The Daytons also challenge the trial court's limitation on their closing argument, arguing that the trial court prevented them from offering an inference arising from the squad car video. In closing argument, counsel for the Daytons inferred that the squad video depicts a five-second period when Amanda could see the approaching squad based on when her minivan comes into view on the video. We consider the Daytons' argument to be supported by the evidence presented. The squad video, admitted as substantive evidence without objection, was viewed by the jury, which was capable of determining the amount of time it thought Amanda had to see the squad car. The opinion of the defense expert that the squad was visible to Amanda for 13 seconds was based on his viewing of the squad video. The jury was free to reject his conclusion in favor of its own determination based on what the jurors saw in the squad video, which was equipped with audio and an on-screen timer. Watching the video and counting the seconds are not beyond the ken of the ordinary juror and not subjects limited to expert testimony. *Kimble v. Earle M. Jorgenson Co.,* 358 Ill.App.3d 400, 412–13, 294 Ill.Dec. 402, 830 N.E.2d 814 (2005). At retrial, the trial court should not limit the Daytons' presentation of this argument, if appropriate.

[12][13] ¶ 27 Lastly, the Daytons argue that the trial court improperly allowed the ****280 *559** defense expert to testify regarding Amanda's duty and that the testimony misstated Illinois duty law and prejudiced them. We find there was no error in O'Hern's testimony regarding Amanda's duty. It is well settled that an expert may opine on an ultimate fact or issue as long as the other requirements for the expert testimony are met. *Jackson v. Seib,* 372 Ill.App.3d 1061, 1071, 310 Ill.Dec. 502, 866 N.E.2d 663 (2007). O'Hern testified that Amanda had a duty to yield to Pledge's emergency vehicle before executing the left turn and that, based on his training, education and experience, the cause of the accident was Amanda's failure to yield. O'Hern's opinion does not impermissibly intrude on the jury's role because the jury was free to reject O'Hern's opinion. *Zavala v. Powermatic, Inc.,* 167 Ill.2d 542, 545, 212 Ill.Dec. 889, 658 N.E.2d 371 (1995).

[14] ¶ 28 The dissent claims that it is not necessary to reach the evidentiary issues because, as a matter of law, the Daytons cannot demonstrate that Pledge's actions were willful and wanton. To adopt the view of the dissent would be to grant immunity to the police in this circumstance when the legislature has specifically declined to do so in the Tort Immunity Act. See *Suwanski v. Village of Lombard,* 342 Ill.App.3d 248, 259, 276 Ill.Dec. 766, 794 N.E.2d 1016 (2003).

¶ 29 The facts in this case are similar, but not identical, to cases cited by the McDonough defendants and are likewise similar, but not identical, to cases cited by the Daytons in support of each side's argument concerning the imposition of a duty. See, *e.g.,* *Hall v. Village of Bartonville Police Department,* 298 Ill.App.3d 569, 232 Ill.Dec. 701, 699 N.E.2d 148 (1998); *Suwanski v. Village of Lombard,* 342 Ill.App.3d 248, 276 Ill.Dec. 766, 794 N.E.2d 1016 (2003). It is precisely because of the intense focus on the particular facts of each case that the determination of whether Pledge's actions were willful and wanton are factual matters for the jury to decide. *Doe–3 v.*

McLean County Unit District No. 5 Board of Directors, 2012 IL 112479, ¶ 45, 362 Ill.Dec. 484, 973 N.E.2d 880.

¶ 30 In denying the motion for summary judgment, the trial court found there were many factors that weighed for and against a determination of willful and wanton conduct and such a determination was a jury question. Evidence was presented at trial bearing on whether Pledge's pursuit was willful and wanton and included the following. Pledge testified he knew the license plate number of the SUV before the pursuit began; he knew that the Macomb police department had placed spike strips to stop the fleeing SUV; other accidents involving vehicles turning left had occurred at the intersection; and there was an increased population in the area of the intersection because school was in session and it was a holiday weekend. Pledge was also aware that his speed reached 110 miles per hour at one point in the pursuit. He saw the Dayton vehicle in the center lane intending to turn left. Pledge believed that the SUV would crash during the pursuit and that the SUV created a "huge safety concern" to vehicular and pedestrian traffic by traveling with its lights off.

¶ 31 Pledge also acknowledged the existence of and his familiarity with the sheriff's department pursuit policy. The policy allowed officers to engage in a high-speed pursuit only with the "utmost safety" and when the officer knows or has reasonable grounds to believe that the subject of the pursuit has committed or is going to commit a serious felony. A serious felony is one involving "an actual or threatened attack." Pledge did not know at the time of the pursuit whether the SUV driver had committed or was going to commit as serious felony involving "actual or threatened ****281 *560** attack." He admitted the pursuit did not meet the criteria of the policy but believed it was proper under the circumstances. Pledge admitted it was unlikely the SUV was going to stop as a result of the pursuit and in light of its flight from the earlier stop and extinguishing its lights to avoid detection by the police. Lastly, an eyewitness to the accident testified that she saw the minivan begin the left turn and then get hit by the squad car. The officer did not attempt to swerve or brake and she did not observe the squad car's brake lights come on. Based on the evidence presented, we find that the trier of fact is entitled to determine whether Pledge's actions were willful and wanton after considering all of the evidence.

¶ 32 For the foregoing reasons, the judgment of the circuit court of McDonough County is reversed and the cause remanded.

¶ 33 Reversed and remanded.

Justice CARTER concurred in the judgment and opinion.
Justice SCHMIDT dissented, with opinion.
Justice SCHMIDT also concurred in part and dissented in part upon denial of rehearing, with opinion.

¶ 34 SEPARATE OPINION UPON DENIAL OF REHEARING

¶ 35 Justice SCHMIDT, concurring in part and dissenting in part.

¶ 36 As the majority notes, plaintiffs raise four arguments on appeal: two issues relate to the line-of-sight video, one relates to the trial court allegedly limiting plaintiffs' argument during closing, and the final issue concerns the defense expert's testimony regarding Amanda's duty. *Supra* ¶ 15. I concur with the majority that the trial court committed no error in allowing the defense expert to opine on Amanda's duty. I dissent from the remainder of the majority's opinion.

¶ 37 The three remaining issues cannot serve as a basis to nullify the jury's verdict for numerous reasons. First, this matter never should have proceeded to trial, rendering any potential trial errors harmless. Second, assuming that the trial court properly denied defendants' motion for summary judgment, it did not abuse its discretion when admitting the line-of-sight video,

instructing the jury or during plaintiffs' closing argument. Finally, the jury's verdict makes clear that it found Deputy Pledge did not act willfully or wantonly. As the alleged errors are only relevant to Amanda's comparative fault and have no bearing on Pledge's actions, they are harmless at best. Even if the verdict had not made it clear, the verdict in favor of defendants and against Amanda is a general verdict. The alleged error only went to Amanda's alleged negligence. If we cannot know on which basis the jury ruled, the error is not reversible. *Witherell v. Weimer,* 118 Ill.2d 321, 113 Ill.Dec. 259, 515 N.E.2d 68 (1987).

¶ 38 I. Defendants' Motion for Summary Judgment/Directed Verdict

¶ 39 It is clear that this case never should have gone to trial and, therefore, any errors in evidentiary rulings are, at best, harmless and not a proper basis for reversal. *Wade v. City of Chicago,* 364 Ill.App.3d 773, 784–85, 301 Ill.Dec. 621, 847 N.E.2d 631 (2006). Likewise, defendants' motion for directed verdict should have been granted. The evidence at trial clearly establishes that defendants' motion for summary judgment should have been granted. While those with nothing more important to do can sit and ponder whether Pledge's decision to follow the fleeing vehicle was negligent, no reasonable person could conclude that his actions constituted willful and wanton conduct. As a ****282 *561** matter of law, the deputy's conduct did not constitute willful and wanton misconduct.

¶ 40 Willful and wanton conduct is "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." 745 ILCS 10/1–210 (West 2010). Our supreme court has held that "[w]illful and wanton conduct is found where an act was done with actual intention or with a conscious disregard or indifference for the consequences when the known safety of other persons was involved." (Internal quotation marks omitted.) *Burke v. 12 Rothschild's Liquor Mart, Inc.,* 148 Ill.2d 429, 451, 170 Ill.Dec. 633, 593 N.E.2d 522 (1992).

¶ 41 The defendants argue that any errors in evidentiary rulings were harmless because the plaintiffs, as a matter of law, failed to prove that Pledge was guilty of willful and wanton conduct. In dealing with this argument, the majority virtually ignores all the case law cited by defendants, including cases from this court affirming summary judgment granted in police pursuit cases. The majority's "analysis" consists of saying that the cases cited by defendants in support of their arguments contained "similar, but not identical" facts to those presented here. *Supra* ¶ 29. The majority does not explain what facts made this case similar to the case cited by plaintiffs, or why the facts in this case compel a result different than those reached in the cases cited by defendants.

¶ 42 The majority simply proclaims, "It is precisely because of the intense focus on the particular facts of each case that the determination of whether Pledge's actions were willful and wanton are factual matters for the jury to decide." *Supra* ¶ 29. If that is a correct statement of the law, then summary judgment, directed verdict and judgment *n.o.v.* are all dead letters. One can only conclude that the majority rejects the notion of taking any issue away from the jury. If so, some transparency would be helpful. If the issues presented here are always jury questions, then the cases cited by defendants are wrong and the majority should say that it is rejecting them.

¶ 43 The majority argues above (*supra* ¶ 28) that to adopt my view would be to grant the police immunity in this circumstance, despite the legislature's failure to do so. Of course, this argument is disingenuous. Neither defendants nor I have argued for immunity for willful and wanton misconduct. Defendants' argument is straightforward; Pledge's conduct in this case did not, as a matter of law, rise to the level of willful and wanton misconduct. Stated in

another way, Pledge's conduct in this case did not create a jury question as to whether it rose to the level of willful or wanton misconduct. Nonetheless, the majority's mischaracterization of the dissent is probably the strongest argument in the majority opinion.

¶ 44 Likewise, in paragraph 29 above, the majority refers to "each side's argument concerning the imposition of a duty." Neither side argued, nor do I, about the imposition of a duty. First of all, if the existence of a duty were the issue that would clearly be a question of law. No one has argued that the defendant did not have a duty to refrain from willful and wanton misconduct. The majority then cites *Doe–3 v. McLean County Unit District No. 5* for a general proposition of law which that case does not support.

¶ 45 *Doe–3* involved a lawsuit brought by pupils of a Champaign County school that were molested by a teacher who previously worked in a McLean County school. *Doe–3,* 2012 IL 112479, ¶ 3, 362 Ill.Dec. 484, 973 N.E.2d 880. The pupils claimed the McLean County school district acted willfully ****283 *562** and wantonly by failing to fully disclose the teacher's work history. *Id.* ¶ 8. The defendant McLean County school district filed motions to dismiss pursuant to sections 2–615 and 2–619.1 of the Code of Civil Procedure (735 ILCS 5/2–615, 2–619.1 (West 2010)), claiming it owed no duty of care to students in the Champaign County school district. *Doe–3,* 2012 IL 112479, ¶ 9, 362 Ill.Dec. 484, 973 N.E.2d 880. Our supreme court very clearly stated, in its opening line of *Doe–3,* that the "issue in this case is whether defendants owed plaintiffs a duty of care." *Id.* ¶¶ 1.

¶ 46 The majority herein cites to paragraph 45 of the *Doe–3* opinion, claiming it mandates in "each case that the determination of whether Pledge's actions were willful and wanton are factual matters for the jury to decide." *Supra* ¶ 29. What the *Doe–3* court actually said in paragraph 45 is this:

> "Finally, *we emphasize that our holding in this case is limited to finding, under the particular circumstances presented here, that the allegations in plaintiffs' complaints are sufficient to establish that defendants owed plaintiffs a duty of care.* We express no opinion on whether defendants have breached their duty of care, whether defendants acted willfully and wantonly, and whether defendants' breach was a proximate cause of plaintiffs' injuries, which are factual matters for the jury to decide." (Emphasis added.) *Doe–3,* 2012 IL 112479, ¶ 45, 362 Ill.Dec. 484, 973 N.E.2d 880.

¶ 47 Again, there is no dispute amongst the parties herein that Pledge owed plaintiffs a duty to refrain from acting willfully and wantonly. The majority cites to *Doe–3* in an attempt to avoid distinguishing cases that hold a court may decide, as a matter of law, whether an officer acted willfully and wantonly when conducting a high speed pursuit.

¶ 48 One such case is *Hall v. Village of Bartonville Police Department,* 298 Ill.App.3d 569, 232 Ill.Dec. 701, 699 N.E.2d 148 (1998). In *Hall,* the driver of a vehicle that collided with a truck, which was being pursued by police, filed suit against the pursuing officer "alleging violations of department procedures, willful and wanton conduct, and reckless disregard for the safety of others." *Id.* at 570–71, 232 Ill.Dec. 701, 699 N.E.2d 148. In affirming summary judgment on behalf of the officer and his department, this court highlighted main facts contained within the record, including: (1) the truck driver's perceived intoxication; (2) the officer activated his lights and siren; (3) the officer noted the truck's license plate number before the truck accelerated and sped off; (4) the chase occurred on a four-lane highway; (5) the location of the chase was not a densely populated urban area; (6) the weather was clear; (7) the road was dry; (8) the duration of the chase was relatively brief; and (9) the chase reached speeds of 105 miles per hour near the town of Bartonville. Based on those facts, this court affirmed the trial court's conclusion, that as a

matter of law, "the officer did not act in disregard for the safety of others." *Id.* at 573, 232 Ill.Dec. 701, 699 N.E.2d 148.

¶ 49 The facts of *Hall* are incredibly similar to the case at bar. Yet, the majority relieves itself of its duty to explain why both the trial court and this court properly found the police officer in *Hall* did not act willfully or wantonly, as a matter of law, and yet a similar determination would be improper in this matter. The closest the majority comes to explaining why judgment as a matter of law is inappropriate in this case can be found at paragraph 30, *supra.* In it, the majority notes that Pledge knew the license number of the offending vehicle. So did the officer in *Hall.*

***563 **284** ¶ 50 This is not a case where the officer would reasonably think, "Oh, I'll arrest this guy tomorrow." It is a case where a reasonable officer would think, "I've gotta get this idiot off the road."

¶ 51 The majority then misquotes the record, claiming Pledge "knew that the Macomb police department had placed spike strips to stop the fleeing SUV." *Supra* ¶ 30. He knew no such thing. During the 75–second chase, he heard over his radio "the Macomb Police Department talking about putting out spike strips." He had no knowledge of where the Macomb police department might eventually put the spike strips. He had limited knowledge of how spike strips worked as his department did not use them. Since Pledge had "no assumption of where it was going to go," I fail to see how the Macomb police department discussing the possibility of setting up spike strips at a location unknown to Pledge is evidence of willful and wanton conduct. There was no other evidence regarding the spike strips. Query: Just how would the Macomb police know where to put the spike strips unless someone was behind the reckless driver reporting his position?

¶ 52 The majority further cites the fact that Pledge "was also aware that his speed reached 110 miles per hour at one point in the pursuit" as evidence "weighed for" a "determination of willful and wanton conduct." *Supra* ¶ 30. Again, willful and wanton conduct can only be found where an act is done with actual intention to harm or with a conscious disregard or indifference for the consequences of your actions. *Burke,* 148 Ill.2d at 451, 170 Ill.Dec. 633, 593 N.E.2d 522. Uncontroverted evidence indicated that as the vehicles approached town, Pledge had decreased his speed to between 70 and 75 miles per hour. The majority fails to explain how a jury could reasonably conclude that Pledge's decision to significantly slow down as he entered town evinced an utter indifference for the safety of others. Instead, the majority simply states that Pledge knew his speed reached 110 miles per hour sometime during the incident. That is irrelevant. Had Pledge maintained that speed, he would have been through the intersection before Amanda turned.

¶ 53 The operative facts in this case are as follows: (1) the driver of the van fled a traffic stop and drove at a high rate of speed at night with no lights. (2) Pledge made the snap decision that it was best to follow this vehicle rather than let the vehicle continue to drive at a high speed with no lights. (3) The pursuit in this case was not the basis for the erratic driving by the suspect vehicle. It was in response to a citizen complaint to 911, reporting the suspect vehicle driving in an "erratic and menacing" manner. (4) Pledge had his lights and siren activated. (5) The pursuit occurred on a four-lane highway. (6) The location of the pursuit was not a densely populated urban area. (7) The weather was clear. (8) The road was dry. (9) The visibility was good. (10) The duration of the pursuit from the time the suspect vehicle fled the traffic stop to the collision was only 75 seconds. (11) Pledge entered the intersection on a green light. (12) The police officer's speed at the time of impact was between 70 to 75 miles per hour. (13) Sixteen-year-old Amanda Dayton Nehring made a left turn into the path of the oncoming police car, turning between the suspect vehicle and the police car.

¶ 54 To summarize, Pledge had his first encounter with the suspect vehicle after a citizen complaint about the nature of the vehicle's driving. This obviates any argument that it was the presence of the police officer that caused the dangerous driving of the suspect vehicle. After the stop, the suspect vehicle fled toward Macomb at a **285 *564 high rate of speed with no lights. Pledge made a determination that it was better to try to stop that vehicle than it was to let it go. I should not need to list the obvious dangers to the public by a vehicle driving at a high rate of speed at night with no lights. The fact that the collision took place between the plaintiffs' vehicle and the squad car as opposed to the plaintiffs' vehicle and the suspect vehicle is simply a cruel twist of fate. Had the squad car not slowed, or had it gone faster, it likely would have been through the intersection before Amanda made the turn.

¶ 55 No reasonable person could conclude that this deputy's decision to try to stop a vehicle that was driving at night at high speeds with no lights constituted willful and wanton behavior. As a matter of law, any error was harmless. Imagine, if you will, a police officer parked by the side of the road when a speeding car passes by at night with no lights. Would any thinking person suggest that the officer should do nothing because adding a police car with lights and siren to the mix would increase the danger?

¶ 56 In this case, we have a driver who is driving in an erratic and dangerous manner prompting at least one citizen to call the police. Pledge got behind him, observed more such conduct and made the stop. After stopping, the vehicle then fled, turning off its lights and driving at a high speed. Pledge determined that the best thing to do was try to stop that vehicle. Tragically, this accident happened when a 16–year–old driver made a left turn into the path of a police car, which was coming into an intersection at a high speed with its lights and siren activated. To suggest that Pledge's conduct in deciding to try to stop the suspect vehicle constituted willful and wanton misconduct or that a jury could find willful and wanton misconduct on these facts flies in the face of common sense and numerous reported decision. See, for example, *Urban v. Village of Lincolnshire,* 272 Ill.App.3d 1087, 209 Ill.Dec. 505, 651 N.E.2d 683 (1995); *County of Sacramento v. Lewis,* 523 U.S. 833, 854, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998); *Wade v. City of Chicago,* 364 Ill.App.3d 773, 301 Ill.Dec. 621, 847 N.E.2d 631 (2006).

¶ 57 Plaintiffs argue that the deputy violated department guidelines; maybe so, but most probably not. Regardless, this deputy did what any reasonably qualified and conscientious police officer would have done faced with the same situation. More importantly, a violation of self-imposed rules or internal guidelines does not constitute evidence of willful and wanton misconduct. *Wade,* 364 Ill.App.3d at 781, 301 Ill.Dec. 621, 847 N.E.2d 631.

¶ 58 II. Claimed Errors Are Harmless

¶ 59 Even if the trial court erred when admitting the video, instructing the jury as to the video and commenting during plaintiffs' closing arguments, such alleged errors are harmless as a matter of law as all three of those issues are only relevant to Amanda's comparative fault. None of those issues are relevant to whether Pledge acted with willful or wanton disregard for the safety of others.

¶ 60 If a circuit court commits an evidentiary error or errs when instructing a jury, "we must determine if that error is harmless or reversible." *Nolan v. Weil–McLain,* 233 Ill.2d 416, 429, 331 Ill.Dec. 140, 910 N.E.2d 549 (2009). A "party is not entitled to reversal based upon the trial court's evidentiary rulings unless the error substantially prejudiced the aggrieved party and affected the outcome of the case." *Wilbourn v. Cavalenes,* 398 Ill.App.3d 837, 848, 338 Ill.Dec. 77, 923 N.E.2d 937 (2010). "The party seeking reversal bears the burden of establishing such prejudice." *Id.* The alleged errors of which plaintiffs complain are

harmless.

***565 **286** ¶ 61 Reversal is in no event appropriate as to the jury's verdict in favor of defendants and against Amanda. With no objection from Amanda's counsel, the trial court instructed the jury to complete verdict form K in favor of the defendants if "you find for defendants against Amanda Dayton Nehring on Count IX of the complaint, or if you find that plaintiff Amanda Dayton Nehring's contributory negligence was more than 50% of the total proximate cause of the injury or damage for which she seeks recovery."

¶ 62 Amanda's counsel chose not to ask, through special interrogatory, whether any defense verdict against her was based on the jury's belief that Pledge did not act willfully or wantonly or whether it was based on the belief that Amanda was more than 50% contributorily negligent for this accident. We need not speculate on the issue, as when "there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory, and the [party], having failed to request special interrogatories, cannot complain." *Witherell v. Weimer,* 118 Ill.2d 321, 329, 113 Ill.Dec. 259, 515 N.E.2d 68 (1987). Therefore, the alleged errors, even if error, are not reversible.

¶ 63 Moreover, it is clear from a review of the jury instructions and verdict forms returned that the jury found Pledge's actions were not willful and wanton. While defendants filed an affirmative defense against Amanda arguing comparative fault, the jury instructions clearly state that if "you find that there was negligence on the part of the driver of the vehicle in which Mark Lorenz and Jill Dayton were riding, then the driver's negligence cannot be charged to these passengers." Undoubtedly, the verdict forms returned in favor of the passengers necessitated a finding that Deputy Pledge did not act willfully and wantonly toward those plaintiffs.

¶ 64 The errors complained are irrelevant with respect to whether Pledge acted willfully or wantonly. The majority acknowledges that these errors weigh only upon Amanda's comparative fault. While discussing the line-of-sight video, the majority makes no comment regarding how Amanda's line of sight is relevant whatsoever to Pledge's actions, yet acknowledges that "[a] critical issue in the case was Amanda's negligence." *Supra* ¶ 22. Again, it is the plaintiffs' burden to explain how these errors substantially prejudiced them and affected the outcome of the case. *Id.* Plaintiffs, and the majority, have failed to explain how Amanda's line-of-sight, or whether Amanda could see the squad car for more than five seconds, renders Pledge's decision to pursue the vehicle more or less willful and wanton. Undoubtedly, those matters are relevant to Amanda's comparative fault. However, the jury instructions and verdict forms indicate the jury clearly found Pledge did not act willfully and wantonly. As the alleged evidentiary errors are irrelevant to that finding, any potential error is harmless.

¶ 65 III. No Abuse of Discretion

¶ 66 I disagree with the majority's conclusions that the trial court abused its discretion when admitting the line-of-sight video, instructing the jury regarding the video and when commenting on plaintiffs' five-second argument during closing arguments.

¶ 67 a. Line–of–Sight Video

¶ 68 The majority acknowledges that the "jury was informed repeatedly throughout the trial that the line-of-sight experiment was not a re-creation of the accident" (*supra* ¶ 21) yet, nevertheless, concludes that for "the video to satisfy the foundational requirements, the defense needed to establish that the essential conditions of the line-of-sight experiment were substantially similar to those that existed when the accident**287 *566 occurred" (*supra* ¶ 20). The majority uses that passage to create a more exacting standard than our rules of evidence employ.

¶ 69 The majority acknowledges, then ignores, the evidentiary rule which holds that "when an experiment is not represented to be a reenactment of the accident and it deals with *one aspect* or principle directly related to the cause or result of the occurrence, the *exact conditions* of the accident need not be duplicated." (Emphases added.) *Galindo,* 107 Ill.App.3d at 144, 62 Ill.Dec. 849, 437 N.E.2d 376; *Supra* ¶ 18. Clearly, the trial court found that the line-of-sight aspect of the accident and of the video were substantially similar to warrant the video's introduction into evidence for the limited purpose of showing that singular aspect of the occurrence. I find that the trial court did not abuse its discretion on the matter. The authorities cited by the majority, *Kent, Amstar Corp., French,* and *Johnson* (*supra* ¶ 19) do not persuade me otherwise.

¶ 70 In *Kent* and *Amstar Corp.,* each appellate court deferred to the discretion of the trial court when measuring the similarities or differences between the actual facts of the accident and the circumstances under which the video's sought to be introduced into evidence were created. *Kent,* 95 Ill.App.3d at 225, 50 Ill.Dec. 804, 419 N.E.2d 1253 ("The narrow issue to be determined is whether in the instant case the trial court abused its discretion by its ruling."); *Amstar Corp.,* 141 Ill.App.3d at 709, 96 Ill.Dec. 31, 490 N.E.2d 1067 ("We believe, therefore, that the court's discretion was not abused.").

¶ 71 In *French,* our supreme court found the trial court erred when admitting a video with the stated "purpose * * * to familiarize the jury with the area surrounding the accident." *French,* 65 Ill.2d at 81, 2 Ill.Dec. 271, 357 N.E.2d 438. In reversing the trial court's decision to admit the video, the *French* court specifically noted that the proffered video "was filmed in daylight, while the accident occurred at night." *Id.* at 82, 2 Ill.Dec. 271, 357 N.E.2d 438. Moreover, the *French* court found that the trial judge made comments suggesting "that the film was a dry run of the events which occurred the night of the collision." *Id.* No comments exist in the case at bar suggesting that the trial judge led the jury to believe this video was a "dry run" of the events of the night of the accident. Furthermore, both the video introduced herein and the accident occurred at night rendering this case significantly different than *French.*

¶ 72 The majority further justifies its decision to ignore the trial court's discretion and negate the jury verdict by citing to *Johnson,* 2012 IL App (3d) 110016, 359 Ill.Dec. 931, 967 N.E.2d 961, a case in which a majority of this court followed a similar path. Strangely, the dissenting member of the *Johnson* court now cites *Johnson* with approval. I agree with the assessment of the dissent in *Johnson* that the *Johnson* majority failed to give proper deference to the trial court and the standard of review, instead, choosing to independently consider each similarity and difference between the photograph and scene, which were matters "that went to the weight of the evidence and not to the admissibility of the evidence." *Johnson,* 2012 IL App (3d) 110016, ¶ 26, 359 Ill.Dec. 931, 967 N.E.2d 961 (Carter, J., dissenting).

¶ 73 After observing the testimony of the witnesses, the trial court found sufficient similarities between the video and the facts of the accident to admit the video for the limited purpose of showing the line-of-sight of vehicles traveling in the direction of plaintiff's vehicle. I cannot say no reasonable person could agree with the position taken by the trial court.

***567 **288** ¶ 74 b. Jury Instruction

¶ 75 I also disagree with the majority's conclusion that the trial court's limiting instruction amounted to reversible error. *Supra* ¶ 25. Even assuming the instruction was erroneous for failing to follow IPI Civil (2000) No. 2.02 as the majority claims, such error is reversible only if it prejudiced the complaining party by misleading the jury and affecting the outcome of the trial. *Solich v. George & Anna Portes Cancer Prevention Center of Chicago, Inc.,* 273 Ill.App.3d 977, 210 Ill.Dec. 235, 652 N.E.2d 1211 (1995).

¶ 76 Ignoring the prejudice requirement, the majority concludes that the instruction amounted to reversible error as it "did not clearly or comprehensively inform the jury that the video's limited purpose related only to line of sight as the basis for the defense expert's opinion." *Supra* ¶ 25. The majority cannot seriously be claiming that the jury was confused regarding the purpose of the video.

¶ 77 Four short paragraphs above its conclusion, the majority "agree[s] with the defense that it repeatedly informed the jury that the video was not a re-creation." *Supra* ¶ 21. Moreover, just prior to the introduction of the video at trial, it's creator, O'Hern, stated:

> "The purpose of the video was there was—Mr. Johnson had given some indication that there were trees and stuff that blocked the view or the line of sight for Amanda Dayton and that was one of the issues of why she couldn't see the squad car approaching. So obviously, going there in the daylight you can sit in that turn lane or be in that turn lane and look all the way down University Drive, see it all the way to Tower Road. So you could see it during the day. We did a video to just show that at night you can see all the way down there regardless of the lane you're in. And, furthermore, that you can see the flashing lights of the squad car as it approaches the intersection."

¶ 78 The number of times the parties referred to the video as a line-of-sight video and reminded the jury that it was not a reenactment are too numerous to count. Plaintiffs' own counsel highlighted this fact as, on cross-examination, plaintiffs' counsel read a part of O'Hern's deposition transcript in which O'Hern testified that the reason the video was created was due to "an issue with one of the—with your expert, your pursuit expert, indicating that the shrubbery and bushes and stuff played a part in the visibility." To suggest that the jury was misled by the court's instruction regarding the video or the instruction somehow prejudiced the plaintiffs is belied by the record on appeal.

¶ 79 c. Plaintiffs' "Five–Second" Argument on Closing

¶ 80 I also disagree with the majority's conclusion that the trial court committed reversible error by "limiting" the plaintiffs' ability to argue that it is reasonable to infer from the squad car video that Amanda could only see the squad car for five seconds before impact. During plaintiffs' closing arguments, counsel reiterated his recollection of O'Hern's testimony, specifically that O'Hern opined that the squad car would have been visible to Amanda for 13 seconds.

¶ 81 While doing so, counsel played the squad car video, starting it and stopping it during the course of his arguments concerning what he believed the video showed. He stated, "If Mr. O'Hern is correct, then you will see Amanda Dayton's van at 32 minutes flat, because you will see it for 13 seconds, because Amanda has 13 seconds to see him. He has 13 seconds to see her. None of you are accident reconstruction people, but I bet all of you can see this tape. Let's look at the tape from 32 minutes for the next 13 seconds. And let's see ****289 *568** if at 32 minutes, we can actually see Amanda Dayton."

¶ 82 After showing the jury the last 13 seconds of the video, plaintiffs' counsel stated, "When you look at the video of this accident which is in evidence, you will be able to understand the following simple point. Amanda Dayton and Officer Pledge saw each other for a total of five seconds. At the 32 minutes and eight seconds is the first time he saw her." Defense counsel objected, claiming no one testified to the five-second time frame. Plaintiffs' counsel responded that the five-second time frame is a reasonable inference from the squad car video as the jurors can see for themselves when Amanda's headlights come into focus.

¶ 83 The record reflects that the trial court never actually ruled on the objection. The court stated:

"At no point did I hear anybody testify that there was a five-second window. So, let me just advise the jury that any statement made by a lawyer that's not based on the evidence should be disregarded by you. You should use your own recollection of the evidence, not mine, not the attorneys, your own. Again, I remind you that what the lawyers say during argument is not evidence. Okay."

¶ 84 Immediately thereafter, plaintiffs' counsel stated:

"You will have the opportunity to judge for yourself. You will have an opportunity to look at the evidence. You will have an opportunity to see from the evidence how long Amanda Dayton and Officer Pledge had a chance to see each other. If I have misstated anything, ignore what I have said."

¶ 85 Plaintiffs' counsel continued noting, "We're going to run the tape again. * * * I asked you to look at the tape and decide for yourself * * *. All you have to do is look at the tape and judge for yourself. You don't need me to try and convince you of anything. * * * See how long they can see each other. See when they can first see the car."

¶ 86 The record reflects, and the majority ignores, the fact that plaintiffs' counsel never sought a ruling on defendants' objection and the trial court never explicitly ruled on the matter. Counsel voluntarily abandoned his five-second argument; he was never forced to do so by the court. Our supreme court held long ago that where there is no ruling made on an objection, an appellate court has nothing to review. *Mitchell v. Chicago, B. & Q. Ry. Co.,* 265 Ill. 300, 106 N.E. 833 (1914). " 'To avail of an objection, counsel must insist upon a ruling of the trial court upon the objection, and must either obtain a ruling or a refusal of the court to rule. Mere failure to rule is not sufficient.' " *Karris v. Woodstock, Inc.,* 19 Ill.App.3d 1, 10, 312 N.E.2d 426 (1974) (quoting *Cusanelli v. Steele,* 287 Ill.App. 490, 495, 5 N.E.2d 296 (1936), citing *City of Salem v. Webster,* 192 Ill. 369, 61 N.E. 323 (1901)).

¶ 87 The record is clear that the trial court never sustained defendants' objection to plaintiffs' counsel's five-second argument. Moreover, the trial court freely allowed plaintiffs' counsel to continue on his chosen course of arguing that the jury can draw its own conclusion as to whether Amanda's vehicle is visible for 13 seconds or some other amount of time. The trial court's statements on the matter are in no way reversible error.

¶ 88 IV. Conclusion

¶ 89 For the foregoing reasons, I find that the record contains no evidence that Deputy Pledge acted with willful and wanton disregard for the safety of others. As such, summary judgment/directed verdict should have been granted in favor of the defendants. I further find the trial court did not abuse its discretion when admitting **290 *569 the line-of-sight video or when instructing the jury as to the video's limited purpose. Similarly, the trial court did not err when commenting on plaintiffs' five-second argument during closing. Finally, plaintiffs' claims of error are only relevant to issues regarding Amanda's comparative fault and have no bearing on the issue of Pledge's alleged willful and wanton misconduct. As such, they cannot serve as bases to reverse. *Witherell v. Weimer,* 118 Ill.2d at 339, 113 Ill.Dec. 259, 515 N.E.2d 68.

Ill.App. 3 Dist.,2014.
Lorenz v. Pledge
2014 IL App (3d) 130137, 12 N.E.3d 550, 382 Ill.Dec. 271

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APPENDIX 2

The Honorable Jeffrey Ramsdell

SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

CHANNARY HOR, individually,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Washington Municipal Corporation; and OMAR TAMMAM,

Defendants.

No. 10-2-34403-9 SEA

DECLARATION OF NEIL J. BEATON, CPA/ABV/CFF, CFA, ASA

I, Neil J. Beaton, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That my name is Neil J. Beaton. I am over the age of 18 years, competent to testify to the facts herein, and make this Declaration based upon personal knowledge and/or information and belief.

2. That I am a Managing Director at Alvarez & Marsal Valuation Services, LLC, in Seattle, Washington. I have over 24 years of experience performing valuations and

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economic analyses and that I specialize in the valuation of public and privately held businesses and intangible assets for purposes of litigation support. I have been qualified as an expert many times in various venues, including the Superior Court for the State of Washington in the County of King, to perform economic analysis for personal injury claims, wrongful termination and wrongful death actions. My qualifications to render forensic economic opinions are set forth within my curriculum vitae, which is attached as Exhibit No. 1 to this Declaration.

3. That I have had an opportunity to review the relevant portions of the trial testimony of William Partin on June 26, 2013, attached as Exhibit No. 2 to this Declaration, and identified the following opinions with regard to his testimony:

   - Mr. Partin stated that discount rates which include a component of stock returns are accepted within the forensic economics community for personal injury claims.
   - Mr. Partin stated that my own expert reports for personal injury losses, along with those by other experts, use a "similar" discount rate approach with a component of stock returns.

4. Mr. Partin's testimony in this regard was completely inaccurate and misleading to the jury and court. I have never used stock returns as a component of my discount rate for future earnings in a pure personal injury claim and for Mr. Partin to suggest or testify otherwise is utterly false.

5. I do not believe that it is appropriate for forensic economists to utilize stock yields or even corporate bond yields in the calculation of discount rates for pure personal injury and wrongful death claims. It is my understanding and practice that a discount

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rate that is to be utilized to discount to present value a plaintiff's future wages must be "risk-free". As a proxy for a risk-free discount rate, I only utilize short-, medium- and long-term government bonds.

6. I have been an active practitioner in the forensic economics community for approximately 24 years. I have analyzed over 500 personal injury and wrongful death claims during this period, and I have observed and reviewed the work of other economists in a similar number of personal injury and wrongful death claims. I have regularly attended and spoken at conferences of the American Institute of Certified Public Accountants, and other similar organizations, for approximately 15 years where the discounting of personal injury and wrongful death claims is discussed. During that entire period, I have not come across any economists or forensic accountants (other than Mr. Partin in this case) that have used corporate stock returns as a component for discounting future losses for personal injury or wrongful death claims. I have a faint recollection that a few economists (other than Mr. Partin) may have used corporate bond returns in discounting such losses, but that is not my practice, nor has it ever been.

7. If I can be of any further assistance in this matter, I would be happy to provide any additional necessary information for the assistance of the Court.

DATED this 22nd day of July 2013, at Seattle, Washington.

Neil J. Beaton, CPA/ABV/CFF, CFA, ASA

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APPENDIX 3

The Honorable Jeffrey Ramsdell

SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF KING

CHANNARY HOR, individually,

Plaintiffs,

vs.

THE CITY OF SEATTLE, a Washington Municipal Corporation; and OMAR TAMMAM,

Defendants.

No. 10-2-34403-9 SEA

DECLARATION OF WILLIAM G. BRANDT

I, William G. Brandt, hereby declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. That my name is William G. Brandt, CPA, ABV, CFF, MBA, I am over the age of 18 years, competent to testify to the facts herein, and make this Declaration based upon personal knowledge and/or information and belief.
2. That I am Owner and Founder of Brandt Forensic Economics in Bainbridge Island, WA. I have over 7 years of experience in the economic valuation industry and

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specialize in litigation support, loss calculation and presentation of expert testimony. I have provided financial analysis and loss calculation for a vast range of claims including but not limited to life care plan valuation, wrongful death, personal injury, disability, medical negligence, shareholder disputes, anti-trust violations, wrongful termination, and income loss. My qualifications to render forensic economic opinions are set forth within my curriculum vitae, which is attached as Exhibit No. 1 to this Declaration.

3. That I have had an opportunity to review relevant portions of trial testimony provided by William Partin on June 26, 2013, along with statements from The Court, attached as Exhibit No. 2 to this Declaration. This Declaration addresses the following assertions made by Mr. Partin:

- That the use of a "blended portfolio" discount rate based on yields from an equal mix of corporate stocks (as calculated by Mr, Partin from the annual S&P 500 Index of Large Company Stocks), corporate bonds and government securities is a common practice in the forensic economics profession.
- That the results from Survey Question 3 of the article, *A 2009 Survey of Forensic Economists: Their Methods, Estimates, and Perspectives*, co-authored by Michael L. Brookshire, Michael R. Luthy, and Frank L. Slesnick, attached as Exhibit 3 to this Declaration, indicate that it is a common practice in forensic economics to utilize a mix of yields from corporate stocks and corporate bonds in calculating the discount rates used to reduce future losses to net present value in personal injury claims (see Exhibit 2, Page 1).
- That the results from Survey Question 3 of the above-referenced article also

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indicate that my discounting method (based on One-Year U.S. Treasury yields) is at "the very lowest" of the range of discount rates applied by forensic economists in personal injury and wrongful death cases (see Exhibit 2).

- That my statement, attached as Exhibit 4 to this Declaration, indicating that I did not know of another economist that would use an approach similar to Mr. Partin's "Blended Portfolio" approach, is at the lowest end of the survey responses in the article cited by Mr. Partin (as indicated by Mr. Partin in Exhibit 2, page 2).

4. The use of stock returns as a component for the discounting of future losses in personal injury and wrongful death claims is generally regarded within the forensic economics community as a violation of the U.S. Supreme Court's guidance on discount rates, as indicated in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983), which states that "the discount rate should be based on the rate of interest that would be earned on 'the best and safest investments.' *Chesapeake & Ohio R. Co. v. Kelly*, 241 U.S. 485 (1916), at 491. Once it is assumed that the injured worker would definitely have worked for a specific term of years, **he is entitled to a risk-free stream of future income** to replace his lost wages; therefore, **the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default**" (Emphasis added), see Exhibit 5, page 6. Mr. Partin's assertion that it is common within the forensic economics community to discount future losses in personal injury and wrongful death claims using stock returns, in contravention of the above guidance by the U.S. Supreme Court, is false and misleading.

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5. Mr. Partin's use of the responses to Survey Question 3 from the 2009 survey article (Exhibit 3, Pages 1-2) as an indication that forensic economists use stock yields in deriving discount rates for personal injury claims is false and misleading. The survey question only addresses the final mathematical result of an entire series of calculations that forensic economists make, involving a number of variables in their growth and discount rates, in reducing future income losses for a personal injury claim to their net present value. It does not address the methods used by those economists in deriving their gross discount rates, and it certainly does not address the nature of the investment yields that they used to derive those rates. This survey question can only be used, at best, to draw speculative inferences about the underlying methodology that forensic economists use.

6. Notwithstanding the above, Mr. Partin cited an old 2009 survey in making his assertions. The 2012 survey, published in the *Journal of Forensic Economics* in approximately April 2013, and attached as Exhibit 6 to this Declaration, provides much more current information about the current practice of forensic economists. I have attached the same question from the 2012 survey, Question #3, as shown in Exhibit 6. The 2012 survey indicates that "the long-term forecast of the net discount rate has declined" relative to the 2009 survey results. Use of the 2009 survey, rather than the 2012 survey which was available to Mr. Partin at the time of trial, presented a false and misleading picture to the jury.

7. Mr. Partin compared his "Blended Portfolio" gross discount rate, 5.98%, to the highest net discount rate indicated by the 171 respondents to this question in the 2009 survey, 7.66%, in justifying his "Blended Portfolio" rate. This comparison is false

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and misleading. The highest outlier in a survey is not statistically significant in any interpretation of survey results, and it often represents an erroneous entry or a misinterpretation of the survey question. Moreover, the highest outlier in the more current 2012 survey, which Mr. Partin declined to cite in his testimony, was only 5.60%, less than Mr. Partin's gross discount rate. In any event, neither of these extreme outlying values have any statistical significance, as they only represent the most extreme value among all of the responses submitted in each respective survey. Mr. Partin's citation of the old 2009 outlier value as a statistically significant benchmark in evaluating his discounting approach was false and misleading.

8. The most relevant comparison might have been drawn from the interquartile range for Question 3 in the 2012 survey (Exibit 6, Page 1), where the 25th percentile value was 1.00% and the 75th percentile value was 2.04% (indicating that the 75th percentile value exceeded the 25th percentile value by 1.04%). The difference between Mr. Partin's "Blended Portfolio" rate and his wage growth rate was 3.15%, which exceeds the 75th percentile value in the 2012 Survey Question 3 by 1.11%. Thus, the difference between Mr. Partin's "Blended Portfolio" rate and the high end of the interquartile range (the 75th percentile value) was actually GREATER THAN the corresponding difference within the entire interquartile range itself! The only inference that might be drawn from such an analysis is that Mr. Partin's "Blended Portfolio" rate is very much out of the mainstream for forensic economists. Any alternative conclusion of these results is false and misleading.

9. Mr. Partin also asserted that my discounting approach using the yields from one-year Treasury yields corresponds to the lowest outlier response for Question 3 of the 2009

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survey. That assertion is false and misleading. Question 3 of the survey clearly requested the respondents to submit their calculation of the net discount rate "(approximately) equal to the interest [discount] rate minus **the general rate of increase in total compensation for all U.S. workers**" (emphasis added). Mr. Partin summarized some of the survey results from that question in his testimony, and then incorrectly compared those results to his rough calculation of my net discount rate for *life care costs*. The discounting of life care costs is an entirely separate issue which was not addressed in any way in Question 3 of either the 2009 survey or the 2012 survey. If Mr. Partin had properly compared the survey responses to my net discount rate for *wages* (3.34% - 2.82 % = + 0.52%), rather than life care costs, he would have shown that my rate falls at an appropriate level for economists who apply the "short-term rollover" discounting method, one of the two discounting methods clearly falling within the Supreme Court's constraints in *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). I clearly and openly testified about the split within the forensic economics community regarding the two discounting methods referenced in *Jones & Laughlin*, along with my reasons for using the "short-term rollover" approach. If I had known that Mr. Partin was going to impeach my testimony regarding my use of the "short-term rollover" method, particularly by introducing the survey results from this article, along with his false and misleading presentation of those results, I would have vigorously refuted Mr. Partin's false and misleading presentation of that information.

10. Mr. Partin also testified under oath to the court that "in fact, when Mr. Brandt worked for me and prepared reports, he used that [Bended Postfolio] method. Mr. Brandt

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reviewed reports of other experts, including Neale [sic] Beaton. I think the court is probably familiar with Neale [sic], who used a similar discount rate" (Exhibit 7, Page 2). I only used Mr. Partin's "Blended Portfolio" approach because my work as Mr. Partin's employee was my very first exposure to the analysis of personal injury and wrongful death claims, and I deferred to him at that time for his expertise. It was not until I left his firm, performing my own research and attending conferences with other forensic economists, that discovered how unusual this method was, and how strongly that method violated the constraints of *Jones & Laughlin.* I have not used any approach similar to Mr. Partin's "Blended Portfolio" method in the valuation of personal injury and wrongful death claims, and I don't recall observing any other economist who used such an approach or who seriously discussed the use of such an approach, even though the issue of discounting has been a frequent topic of conversation on the 20 or so professional conferences that I have attended and participated in nationwide over the last 4 years. I also do not recall ever reviewing the analysis of any other economist that used this approach, including analyses authored by Neil Beaton. Mr. Partin's testimony regarding Mr. Beaton's use of that method was false and misleading. Mr. Partin's testimony regarding my review of the work of other economists was false and misleading. Mr. Partin's testimony that I used those methods only pertains to the period when my knowledge of such procedures was limited to the procedures that he had taught me. Any implication that I have used this method, or any similar method, after performing my own appraisal of that method is false and misleading.

11. Paragraph 6 of Mr. Beaton's Declaration addresses his observations regarding the use

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of corporate stock returns by other economists as a component for discounting future losses in personal injury and wrongful death claims. Mr. Beaton's observations, expressed in Paragraph 6 of his Declaration, are very similar my own observations, which I testified to in Exhibit 4. The only economists that Mr. Partin was able to cite as using an approach "similar" to his "Blended Portfolio" method were myself and Neil Beaton. Mr. Partin's implication that either Mr. Beaton or myself use that method, or have observed the use of that method by others, is false and misleading.

12. I know two of the authors of the survey article cited by Mr. Partin, and have spoken with them about Mr. Partin's use of their article. They have both expressed to me that Mr. Partin misused their article in his effort to support his assertion that the "Blended Portfolio" approach is generally accepted within the forensic economics community. Many of the points that they discussed with me have been incorporated into the preceding paragraphs of this Declaration.

13. I was never given any prior knowledge that Mr, Christie and Mr. Partin were going to cite the 2009 survey article as an indication that Mr. Partin's "Blended Portfolio" discounting approach was commonly used in the profession. I would have vigorously refuted Mr. Partin's assertions if I had been aware that he was going to cite this article and then misrepresent it to the jury in the manner that he did. Unfortunately, I was never given any notice that this article was going to be introduced by Mr. Partin and presented to the jury in such a false and misleading manner. I was thus not able to address Mr. Partin's false and misleading testimony until after trial testimony was concluded.

14. Mr. Partin and myself arrived at starkly different conclusions regarding the value of

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losses allegedly sustained by the plaintiff in this case. The credibility of the two economists was an issue of paramount importance to be resolved by the jury. I strongly asserted that I had seen the work of many other economists, that I had attended numerous professional conferences in which discounting issues were discussed, and that I was not aware of any economist other than Mr. Partin and his staff that utilize a discounting approach similar to his "Blended Portfolio" approach. Mr. Partin strongly asserted, on both direct examination and cross examination, that my assessment was incorrect, and that his "Blended Portfolio" approach was within the mainstream of contemporary forensic economic practice. The contrast between my position and his on this issue, the acceptance of the "Blended Portfolio" method in the forensic economic community, was irreconcilable. Thus, the jury's perception of my credibility, versus that of Mr. Partin, was likely swayed by their conclusions on this particular issue. Mr. Partin's use (without advanced notice) of the 2009 survey article to support his assertion on the general acceptance of his method, along with his false and misleading testimony regarding the survey results, strongly hindered the jury's ability to properly evaluate the credibility of the two economists in this case.

15. If I can be of any further assistance in this matter, I would be happy to provide any additional necessary information for the assistance of the Court.

DATED this 24th day of July, 2013, at Bainbridge Island, WA.

William G. Brandt

William G. Brandt,

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Exhibit 1

William G. Brandt, CPA, ABV, MBA, CFF

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Independent Professional Contractor: Forensic Accounting & Economics; Finance

Seven years of experience in litigation support, loss calculation and presentation of expert testimony. Clients include attorneys, claimants and insurance companies. Professional contractor working independently. Significant experience in financial analysis and loss calculation for the following types of claims:

- Life Care Plan Valuation
- Personal Injury
- Medical Negligence
- Partner Disputes
- Wrongful Termination
- Wrongful Death
- Disability
- Shareholder Disputes
- Malpractice Claims
- Income Loss
- Breach of Contract
- Anti-Trust Violations
- PIP Losses
- Business Interruption
- Construction Defects

Experienced Financial Manager

Expertise in Accounting, Financial Analysis, Information Systems. Experience in large "Fortune 100" companies as well as startup enterprises. Significant experience in:

- Business Valuations
- Mergers & Acquisitions
- Budgeting
- Strategic Planning
- Financial Analysis
- "Rolling" Forecasts
- Financial Modeling
- Litigation Support
- Cash Flow Forecasting
- Feasibility Studies
- Auditing
- Ad-Hoc Analysis
- Management Reporting
- Corporate Investment
- Risk Management
- Project Management
- Sensitivity Analysis
- Negotiation Support

Past Professional Experience

Forensic Accounting & Economics:

Professional Consultant in Forensic Accounting (Mueller & Partin, CPA's, Bellevue, WA, 2002 - 2007)
Prepare economic analysis reports and trial exhibits for legal cases and insurance claims involving business valuation disputes, anti-trust violations, breach of contract cases, property damage disputes and personal injury claims.

- Performed financial valuations of numerous privately held companies ranging in annual sales from $25,000 to $150,000,000, including manufacturers, retailers, construction companies, real estate agencies, insurance agencies, investment brokers, hotels and various service companies.
- Prepared analysis reports refuting valuations submitted by other economists and accounting firms.
- Worked with attorneys in formulating economic aspects of case strategy.
- Assisted attorneys and insurance companies in mediation proceedings and settlement negotiations.
- Developed complex financial models involving the use and analysis of economic statistics and financial records.

Professional Experience (Continued)

Corporate Finance:

Senior Financial Analyst (Starbucks Coffee Co., Seattle, WA, 2007 – 2008, Wizards of the Coast, 1995 – 2000, UTILX Corporation, 1989 – 1995)
Coordinated the budget process; Analyzed financial statements; Prepared reports and presentations for senior management and the board of directors and performed analysis as required.

- Performed acquisition and valuation analysis on five successful acquisitions. The average annual revenue of these companies was approximately $25,000,000.
- Performed strategic planning, performance analysis, market analysis and focused studies on specific areas of concern.
- Performed strategic planning, pricing studies, market analyses and other analytical projects.
- Gave testimony in litigation which resulted in a $2,600,000 favorable judgment.
- Designed and programmed a fully-integrated budgeting system using Cognos Planning Software (aka Adaytum). Consolidated the budget input from more than 250 departments.
- Prepared quarterly sales analysis reports for Investor Relations and the Board of Directors.
- Performed a broad array of ad-hoc financial analysis.
- Worked extensively with investment bankers and potential investors.

Director of Corporate Development (Western Wireless Corporation, 2000 - 2001)
Identified and analyzed potential acquisition targets in accordance with the strategic objectives of the company.

- Performed valuation analysis reports of prospective acquisition candidates.
- Prepared reports for the Board of Directors analyzing the performance of the company's stock versus that of its major competitors.

Previous Financial & Accounting Experience: Big-Four Audit Experience (Deloitte & Touche, 1981 – 1984) & Controller of Small Businesses (1984 – 1991).

Education and Certifications

- **Master of Business Administration (Finance Concentration), University of Washington:** Dean's Scholar (Top 10% of Class)
- **Bachelor of Science, Business Administration (Accounting Concentration), Indiana University**
- **Certified Public Accountant (Washington Board of Accountancy)**
- **Accredited in Business Valuation ("ABV") and Certified in Financial Forensics ("CFF"), granted by the AICPA**

Professional Affiliations and Community Involvement

- National Association of Forensic Economics (Conference Speaker)
- American Institute of Certified Public Accountants
- Washington Society of Certified Public Accountants
- Collegium of Pecuniary Damages Experts (Conference Speaker, President-Elect)
- American Academy of Economic & Financial Experts (Conference Speaker)
- Western Economic Association International (Conference Speaker)

Exhibit 1

William G. Brandt, CPA, ABV, CFF, MBA
Brandt Forensic Economics, L.L.C.
Testimony over Previous Four Years:

Date	Type	Case
6/24/2010	Trial	Aurdal v. Huntingford
8/16/2010	Deposition	Wentz v. Carroll
8/25/2010	Deposition	Cassell v. Portelance
10/21/2010	Trial	McKenzie v. French
11/4/2010	Deposition	Krolow v. Khalis
11/16/2010	Deposition	MacDonald v. Alpha Sigma Phi
1/26/2011	Trial	Krolow v. Khalis
4/12/2011	Deposition	TT v. Bellevue School District
5/19/2011	Deposition	Kok v. Tacoma School District
6/6/2011	Trial	Thompson v. Assoc. Petroleum
6/6/2011	Deposition	Jones v. Harding
6/15/2011	Deposition	Trujillo-Murphy v. Franciscan
8/5/2011	Deposition	Schlosser v. Huerta
8/22/2011	Deposition	Schley v. Garnett
8/25/2011	Deposition	Ouimette v. U.S. Bakery
10/4/2011	Trial	Schley v. Garnett
10/11/2011	Deposition	Enman v. Agrishop
11/3/2011	Deposition	American Best Food v. Alea
11/17/2011	Deposition	Overton v. State of Washington
12/16/2011	Trial	Wheeler v. BNSF Railway Co.
1/23/2012	Deposition	Jonassen v. Port of Seattle
1/25/2012	Deposition	Mikels v. NW Commercial Improvements
2/7/2012	Trial	Enman v. Agrishop
3/19/2012	Deposition	Mynatt v. Gordon Trucking
3/21/2012	Deposition	Le v. Brutscher
4/9/2012	Deposition	Osborne v. REI
4/11/2012	Trial	Gangle v. Swedish Health Services
4/24/2012	Trial	Le v. Brutscher
4/27/2012	Deposition	DeArman v. Marcoo, Inc.
5/2/2012	Trial	Jumamil v. Lakeside Casino
5/22/2012	Deposition	Leung v. Murakami & Dodson
6/14/2012	Deposition	Moorlag v. Barron Heating
8/17/2012	Deposition	Johnston v. Hidden Cove POA
10/18/2012	Deposition	Richard Davis v. Timothy Beaver
10/25/2012	Trial	Knappett v. Safeco
10/30/2012	Deposition	Hoffman v. Foss Maritime
1/14/2013	Deposition	Suarez v. GLY Construction
1/16/2013	Deposition	Wilson v. Good Samaritan Hospital
1/18/2013	Deposition	Johnson v. McGuire
1/24/2013	Deposition	Wittenberg v. PUD #1 of Skamania Cty.
1/29/2013	Trial	Currier v. Northland Services, Inc.
1/30/2013	Deposition	Johnson v. A-1 Best Computers

Exhibit 1

William G. Brandt, CPA, ABV, CFF, MBA
Brandt Forensic Economics, L.L.C.
Testimony over Previous Four Years:

Date	Type	Case
2/11/2013	Deposition	Joslin v. Swedish Health Services
3/1/2013	Deposition	McCormick v. Lagerway
3/7/2013	Deposition	Flesher v. Unimark Truck Transport
3/7/2013	Deposition	Hodgdon v. Multicare Health Care
3/19/2013	Trial	Wilson v. Good Samaritan Hospital
4/10/2013	Trial	Joslin v. Swedish Health Services
4/10/2013	Trial	Williams v. McLean
4/11/2013	Trial	McCormick v. Lagerway
5/10/2013	Deposition	Forhan v. PCS
5/14/2013	Deposition	Noel v. State of Washington
5/23/2013	Deposition	Binchus v. WA
6/17/2013	Arbitration	Powers v. Kroger
6/18/2013	Trial	Hor v. City of Seattle
7/2/2013	Deposition	Hinds v. Lyckman
7/8/2013	Deposition	Basra v. Tyndall

Publications over Last 10 Years:

None.

19 Q. You indicated that there were articles that support your

20 use of blended stock portfolio?

21 A. Yes.

22 Q. One of the articles that you have relied upon is the

23 Journal of Forensic Economics, Volume 21, December 2009,

24 number 1?

25 A. Yes.

1 Q. Over the lunch hour you were able to pull that up?

2 A. I was.

3 Q. Where in that article does it have a reference to

4 stocks?

5 A. It talks about the yields, sir. I will look at the

6 yields. This one addresses the net discount rate, which is

7 really what we are talking about here. That is the

difference between wage growth and the discount rate. You can see -- there it is here.

Go to page 9. All right. The first paragraph on page 9, the range was 1 to 2.9 percent. I might add that my 10-year T-bill net discount rate falls smack in the middle of that. The minimum value was minus two percent. That happens to be Mr. Brandt's value or very close to it.

The maximum net was 7.66 percent. So that is higher on a net basis than my gross discount rate.

In addition, it says, "approximately, 8.2 percent of the responses to this survey indicated that the net discount rate was zero percent or lower."

Meaning that Mr. Brandt's methodology is only used by less than 8 percent of the economists of that 8 percent he is at the very lowest.

MR. BARCUS: Objection, Your Honor, non-responsive.

THE COURT: Sustained.

MR. BARCUS: Move to strike.

THE COURT: I am going to deny the motion to strike. Just ask your question, again, counsel.

BY MR. BARCUS:

Q. My question to you, sir, where in this article does it say that you can use stocks in a life care plan investment?

A. By getting to the 7.66 net rate, the only way that you can get there is using the stocks.

Q. It doesn't say that anywhere in the article; does it?

A. In this particular article, it is talking about a net discount rate. In the other article that I presented to you.

Q. Can we talk about one thing at a time?

MR. BARCUS: Your Honor, non-responsive. I ask him to be admonished.

MR. CHRISTIE: Your Honor.

THE COURT: Counsel, just listen to the question, sir, and answer the question. And if you feel the need to elaborate later on, counsel will be able to ask you some follow-up questions.

So let's just talk about this particular article for the moment. Thank you.

Q. This article doesn't reference use of stocks; does it?

A. In that paragraph, no. I would have to go through the rest of the article.

Q. I thought that you just did.

A. This isn't the entire article. I just brought up the

point that I was making, I was relying on it.

Q. There are four -- no, three authors of this article, Michael Brookshire, Michael Lathey, and Frank Slesnick; isn't that right?

A. Yes.

Q. If Mr. Slesnick said over the lunch hour that, "the use of the stock and the corporate bond return in calculating the discount rate for the personal injury losses was not addressed in our survey, because it is not accepted practice in the forensic economics community."

That would be contrary to your testimony; correct?

A. Well, that comment would. But it would also be contrary to the very journal that he just published that article in.

Q. If he is willing to provide a declaration under oath --

MR. CHRISTIE: Your Honor, improper form of the question.

17 THE COURT: Sustained.

18 BY MR. BARCUS:

19 Q. You have never spoken to any author of this article;

20 have you?

21 A. I may have spoken to Brookshire on other issues.

22 Q. If in fact one of the authors says that that is an

23 improper use a blended stock portfolio that you have proposed

24 in this case, then you would have to reassess your

25 calculations; wouldn't you?

27

1 A. No, I WONLT. I would disagree with that author' the

2 statement and I would check with the other two and I would

3 also just point out to him that he had better read the

4 journals that you are publishing in.

5 Q. Now, you used growth rates from 2002 to 2007; isn't that

If you could give me, essentially, an offer of proof from Mr. Partin as to where we are getting this from, that would be great. I think that that resolve that all.

MR. CHRISTIE: Happy to do that, your Honor, just to assist him, I am going to, because he wasn't here when we had the discussion.

This relates to the testimony by Mr. Brandt, which you have reviewed. Essentially, he testified to the jury that no one in your field uses a discount rate that includes any component of stocks.

So, I have represented to the court that you would testify about why you are using that and the acceptance within the forensic economists community of your approach to your blended portfolio. Maybe you could outline that for the court.

THE WITNESS: Sure.

19 The economic community has a publication called the
20 national -- The Journal of Forensic Economists. That
21 publication surveys economists periodically regarding the
22 methodology used for the discount rates. You will find that
23 a variety of methods are used by a variety of economists.
24 The method that I use is used.
25 In fact, when Mr. Brandt worked for me and prepared

1 reports, he used that method. Mr. Brandt reviewed reports of
2 other experts, including Neale Beaton. I think that the
3 court is probably familiar with Neale, who used a similar
4 discount rate.
5 I am not sure where Mr. Brandt's comment is coming from,
6 because he clearly prepared analyses during his five to
7 six-year term with my firm using that approach.

THE COURT: I believe that he said no forensic economist would use stock in determining the discount rate in this case, or words to that effect. I don't have the exact quote. But, is that your understanding of what Mr. Christie was asking about?

THE WITNESS: Yes, it is.

THE COURT: From your perspective that's just not an accurate assessment as an expert in the field?

THE WITNESS: That's correct.

THE COURT: Do you want to voir dire, counsel?

MR. BARCUS: Yes.

THE COURT: I want to make sure that we get this right.

VOIR DIRE EXAMINATION

BY MR. BARCUS:

Q. You have referenced a journal of forensic economists?

The above surveys are for years 1990, 1997, 2006, and 2009. The interquartile range of responses was between 2.7% and 3.3%, indicating a tight distribution. The answers varied between 0% and 6.5%. The mean forecast value of estimated inflation over the next 30 years has fallen nearly 2 percentage points since the 1990 survey, although it is unchanged since the previous survey in 2006.

Selected Written Comments from Survey Respondents on Question 1:

- This was the most recent forecast (Q4/2009) from the Federal Reserve Bank of Philadelphia, Survey of Professional Forecasters.
- This is the average annual increase in the overall CPI from 1946 to 2007.
- This is the current long-term projection of the Social Security Trustees, and consistent with historic changes in the CPI.
- I rely on CBO forecast.
- I would typically be close to the average social security increase over the past several years.
- Economic Report of the President. Actually I use a 40-year span for almost all calcs.
- Geometric average annual growth in CPI-U, 1990-2008.

Question 3. *Assume the judge instructs that you MUST estimate a net discount rate in your forecast of economic loss for a 30-year period. The net discount rate may be based upon either nominal or real values. Please note that for this question the net discount rate is (approximately) equal to the interest rate minus the general rate of wage increase for all U.S. workers. Complete the following sentence: "I would use _____% per year as the average net discount rate over 30 future years." (Please note that if you would not use a fixed rate, provide an explanation in the "Comments" section below.)*

The number of usable responses was 171. There are two general methods for computing the net discount rate (NDR). One method, as utilized in the current survey, is to ask the question directly. The other method, used in the previous survey, is to ask for an estimate of the rate of increase in earnings and the discount rate and then calculate the difference between these two variables. Results of the 1999, 2003, and current survey, which all used the direct method, are given below.

	(S5,4,70)	(S6,4,31)	(S8)
Mean	2.13%	1.89%	1.76%
Median	2.00%	2.00%	1.75%

The results of this survey support the conclusion that how a question is asked may influence the response. In three earlier surveys (1990, 1993, and

1997), the indirect method was utilized and the net discount rate was approximately 1%. As shown above, the net discount rate was significantly higher in the following two surveys. In the 2006 survey, the indirect method was once again utilized. The result was a net discount rate equal to 1.33%—a significant decline from the previous survey (S6). In the current survey, the net discount rate is 1.75%. It would be hard to justify an increase of the net discount rate from 1.33% to 1.75% based upon evidence from the past three years. A reasonable conclusion is that the form of the question has an impact on the answer provided.

The interquartile range was 1% to 2.19%. The minimum value was –2% and the maximum value 7.66%. Approximately 8.2% of the responses indicated that the net discount rate was 0% or lower. A 0% NDR is commonly referred to as the total offset rule. The survey results show that the large majority of respondents do not support the total offset rule.

Selected Written Comments from Survey Respondents on Question 3:

- This is the difference between the average real interest rate over the past 10 years (2.2%) and the average increase in private sector earnings over the past 10 years (0.77%).
- I use TIPS rate less 0.4% for non-inflation wage increases.
- I use a laddered interest rate assumption and estimate that the NDRs would be between 0.6% and 2.5%.
- I would use a range depending on the plaintiff's educational attainment level. The net discount rate I use is lower the higher the plaintiff's educational attainment level.
- I would provide three scenarios comparing ECI to 1-year, 10-year, and Aaa corporate bonds. From 1980-present these numbers average roughly 2%, 3%, and 4% respectively.
- Because the 30-year T-bond rate has fluctuated around 4% while the increase in weekly wages has fluctuated around 3%, the net discount rate in this case would be about 1%.

Question 5. *Assume the judge instructs that you MUST forecast the rate of increase in the cost of nursing home care for an individual who will be living in such a facility over the next 30 years. The nursing home will provide for all necessary services except for specialist physicians and diagnostic services. Complete the following sentence: "I would use_____% as the average annual (nominal) rate of increase in nursing home care costs over the 30-year period."*

The number of usable responses was 169. This is a new question. The mean value is 4.36% and the median value is 4.4%. The 50% interquartile range is from 3.5% to 5%. The minimum value is –0.5%, and the maximum value is 11%. It should be noted that eliminating the few obvious outliers had little impact on the overall statistics. This question was written in conjunction with the following question concerning the rate of increase in attendant care costs, since a significant part of the labor costs incurred by nursing homes are those of attendants.

didn't allow you to come in and present your testimony?

A. He didn't delegate the task of giving testimony; correct.

Q. Do you know of any economist, other than Mr. Partin, who would use a mixed portfolio for -- that included stocks, for a medical life care plan, such as, we have and represents the need for cares -- care, lifetime care of a severely injured person, such as Channary Hor?

A. Absolutely not.

In my conferences, I have probably discussed the issue with more than 200 different economists, not a single one would even consider using stocks in the discount rate.

Beyond that, not a single one would construct it the way that Mr. Partin has constructed it.

I would like to point out something from his calculation.

Exhibit 5

Supreme Court of the United States

Jones & Laughlin Steel Corp. v. Pfeifer

462 U.S. 523 (1983)

Certiorari to the United States Court of Appeals for the Third Circuit
No. 82-131.
Argued February 28, 1983
Decided June 15, 1983

Respondent was injured in the course of his employment while employed by petitioner as a loading helper on petitioner's coal barge in Pennsylvania. The injury made respondent permanently unable to return to his job or to perform other than light work. Respondent brought an action in Federal District Court against petitioner, alleging that his injury had been "caused by the negligence of the vessel" within the meaning of 5(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA). The District Court found in respondent's favor and awarded damages of $275,881.31, holding that receipt of compensation from petitioner under § 4 of the LHWCA did not bar a separate recovery of damages for negligence. In calculating the damages, the court did not increase the award to take inflation into account nor did it discount the award to reflect the present value of the future stream of income. Instead, the court followed a decision of the Pennsylvania Supreme Court, which had held "as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." The Court of Appeals affirmed.

Held:

1. A longshoreman may bring a negligence action under § 5(b) against the owner of a vessel who acts as his own stevedore, even though the longshoreman has received compensation from the owner-employer under § 4. The plain language of § 5(a), which provides that the liability of an employer for compensation prescribed in § 4 "shall be exclusive and in place of all other liability of such an employer to the employee," appears to support petitioner's contention that since, as respondent's employer, it had paid compensation to him under § 4, § 5(a) absolves it of all other responsibility to respondent for damages. But such contention is undermined by the plain language of § 5(b), which authorizes a longshoreman whose injury is caused by the negligence of a vessel to bring a separate action against such a vessel as a third party, unless the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If § 5(a) had been intended to bar all negligence suits against owneremployers, there would have been no need to put an additional sentence in § 5(b) barring suits against owner-employers [462 U.S. 523, 524] for injuries caused by fellow servants. And the history of the LHWCA further refutes the contention that § 5(a) bars respondent's suit under § 5(b). Pp. 528-532.

2. The District Court, in performing its damages calculation, erred in applying the theory of the Pennsylvania decision as a mandatory federal rule of decision. Pp. 533553.

(a) The two elements that determine the calculation of a damages award to a permanently injured employee in an inflation-free economy are the amount that the employee would have earned during each year that he could have been expected to work after the injury, and the appropriate discount rate, reflecting the safest available investment. Pp. 533-538.

(b) In an inflationary economy, inflation should ideally affect both stages of the calculation described above. This Court, however, will not at this time select one of the many rules proposed by the litigants and amici in this case and establish it for all time as the exclusive method in all federal courts for calculating an award for lost earnings in an inflationary economy. First, by its very nature the calculation of an award for lost earnings must be

a rough approximation. Second, sustained price inflation can make the award substantially less precise. And third, the question of lost earnings can arise in many different contexts. Pp. 538-547.

(c) Respondent's cause of action is rooted in federal maritime law, and thus the fact that Pennsylvania has adopted the total offset rule for all negligence cases in that forum is not of controlling importance in this case. Moreover, the reasons that may support the adoption of the rule for a State's entire judicial system are not necessarily applicable to the special class of workers covered by the LHWCA. P. 547.

(d) In calculating an award for a longshoreman's lost earnings caused by a vessel's negligence, the discount rate should be chosen on the basis of the factors that are used to estimate the lost stream of future earnings. If the trier of fact relies on a specific forecast of the future rate of price inflation, and if the estimated lost stream of future earnings is calculated to include price inflation along with individual factors and other societal factors, then the proper discount rate would be the after-tax market interest rate. But since specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of longshoremen's resources to make such forecasts the centerpiece of litigation under § 5(b). On the other hand, if forecasts of future price inflation are not used, it is necessary to choose an appropriate below-market discount rate. As long as inflation continues, the amount of the "offset" against the market rate should be chosen on the basis of the same factors that are used to [462 U.S. 523, 525] estimate the lost stream of future earnings. If full account is taken of the individual and societal factors (excepting price inflation) that can be expected to have resulted in wage increases, then all that should be set off against the market interest rate is an estimate of future price inflation. Pp. 547-549.

(e) On remand, whatever rate the District Court may choose to discount the estimated stream of future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law. Pp. 552-553.

678 F.2d 453, vacated and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Robert W. Murdoch argued the cause for petitioner. With him on the brief was Daniel R. Minnick.

Jerome M. Libenson argued the cause and filed a brief for respondent. *

*Briefs of amici curiae urging reversal were filed by Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Geller, Richard G. Wilkins, and Jeffrey Axelrad for the United States; by John T. Biezup, Michael D. Brophy, and E. D. Vickery for Alcoa Steamship Co. et al.; and by Robert C. Wert and Norman Hegge, Jr., for the Southeastern Pennsylvania Transportation Authority.

Raymond J. Conboy filed a brief for the International Longshoremen's and Warehousemen's Union as amicus curiae.

JUSTICE STEVENS delivered the opinion of the Court.

Respondent was injured in the course of his employment as a loading helper on a coal barge. As his employer, petitioner was required to compensate him for his injury under § 4 of the Longshoremen's and Harbor Workers' Compensation Act (Act). 44 Stat. 1426, 33 U.S.C. 904. As the owner pro hac vice of the barge, petitioner may also be liable for negligence under § 5 of the Act. 86 Stat. 1263, 33 U.S.C. 905. We granted certiorari to decide whether petitioner may be subject to both forms of liability, and also to consider whether the Court of Appeals correctly upheld the trial court's computation of respondent's damages. 459 U.S. 821 (1982). [462 U.S.

523, 526]

Petitioner owns a fleet of barges that it regularly operates on three navigable rivers in the vicinity of Pittsburgh, Pa. Respondent was employed for 19 years to aid in loading and unloading those barges at one of petitioner's plants located on the shore of the Monongahela River. On January 13, 1978, while carrying a heavy pump, respondent slipped and fell on snow and ice that petitioner had negligently failed to remove from the gunnels of a barge. His injury made him permanently unable to return to his job with the petitioner, or to perform anything other than light work after July 1, 1979.

In November 1979, respondent brought this action against petitioner, alleging that his injury had been "caused by the negligence of the vessel" within the meaning of § 5(b) of the Act. The District Court found in favor of respondent and awarded damages of $275,881.36. The court held that receipt of compensation payments from petitioner under § 4 of the Act did not bar a separate recovery of damages for negligence.

The District Court's calculation of damages was predicated on a few undisputed facts. At the time of his injury respondent was earning an annual wage of $26,025. He had a remaining work expectancy of 12½ years. On the date of trial (October 1, 1980), respondent had received compensation payments of $33,079.14. If he had obtained light work and earned the legal minimum hourly wage from July 1, 1979, until his 65th birthday, he would have earned $66,352.

The District Court arrived at its final award by taking 12½ years of earnings at respondent's wage at the time of injury ($325,312.50), subtracting his projected hypothetical earnings at the minimum wage ($66,352) and the compensation payments he had received under § 4 ($33,079.14), and adding $50,000 for pain and suffering. The court did not increase the award to take inflation into account, and it did not discount the award to reflect the present value of the future stream of income. The court instead decided to follow a decision of the Supreme Court of Pennsylvania, which had held [462 U.S. 523, 527] "as a matter of law that future inflation shall be presumed equal to future interest rates with these factors offsetting." Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A. 2d 1027, 1038-1039 (1980). Thus, although the District Court did not dispute that respondent could be expected to receive regular cost-of-living wage increases from the date of his injury until his presumed date of retirement, the court refused to include such increases in its calculation, explaining that they would provide respondent "a double consideration for inflation." App. to Pet. for Cert. 41a. For comparable reasons, the court disregarded changes in the legal minimum wage in computing the amount of mitigation attributable to respondent's ability to perform light work.

It does not appear that either party offered any expert testimony concerning predicted future rates of inflation, the interest rate that could be appropriately used to discount future earnings to present value, or the possible connection between inflation rates and interest rates. Respondent did, however, offer an estimate of how his own wages would have increased over time, based upon recent increases in the company's hourly wage scale.

The Court of Appeals affirmed. 678 F.2d 453 (CA3 1982). It held that a longshoreman may bring a negligence action against the owner of a vessel who acts as its own stevedore, relying on its prior decision in Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 38-44 (1975), cert. denied, 423 U.S. 1054 (1976). On the damages issue, the Court of Appeals first noted that even though the District Court had relied on a Pennsylvania case, federal law controlled. The Court of Appeals next held that in defining the content of that law, inflation must be taken into account:

Full compensation for lost prospective earnings is most difficult, if not impossible, to attain if the court is blind to the realities of the consumer price index and the recent historical decline of purchasing power. Thus if we recognize, as we must, that the injured worker is [462 U.S. 523, 528] entitled to reimbursement for his loss of future earnings, an honest and accurate calculation must consider the stark reality of inflationary conditions." 678 F.2d, at 460-461.[1]

The court understood, however, that the task of predicting future rates of inflation is quite speculative. It concluded that such speculation could properly be avoided in the manner chosen by the District Court—by adopting Pennsylvania's "total offset method" of computing damages. The Court of Appeals approved of the way the total offset method respects the twin goals of considering future inflation and discounting to present value, while eliminating the need to make any calculations about either, "because the inflation and discount rates are legally presumed to be equal and cancel one another." Id., at 461. Accordingly, it affirmed the District Court's judgment.

The Liability Issue

Most longshoremen who load and unload ships are employed by independent stevedores, who have contracted with the vessel owners to provide such services. In this case, however, the respondent longshoreman was employed directly by the petitioner vessel owner. Under § 4 of the Act, a longshoreman who is injured in the course of his employment is entitled to a specified amount of compensation from [462 U.S. 523, 529] his employer, whether or not the injury was caused by the employer's negligence.[2] Section 5(a) of the Act appears to make that liability exclusive.[3] It reads: "The liability of an [462 U.S. 523, 530] employer prescribed in section 4 [of this Act] shall be exclusive and in place of all other liability of such employer to the employee . . . ." 44 Stat. 1426, 33 U.S.C. 905(a). Since the petitioner was the respondent's employer and paid him benefits pursuant to § 4 of the Act, it contends that § 5(a) absolves it of all other responsibility for damages.

Although petitioner's contention is, indeed, supported by the plain language of § 5(a), it is undermined by the plain language of § 5(b). The first sentence of § 5(b) authorizes a longshoreman whose injury is caused by the negligence of a vessel[4] to bring a separate action against such a vessel as a third party. Thus, in the typical tripartite situation, the longshoreman is not only guaranteed the statutory compensation from his employer; he may also recover tort damages if he can prove negligence by the vessel.[5] The second sentence of § 5(b) makes it clear that such a separate action is authorized against the vessel even when there is no independent stevedore and the longshoreman is employed directly by the vessel owner. That sentence provides: "If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel." If § 5(a) had been intended to bar all negligence suits against owner-employers, there would have been no need to put an additional sentence [462 U.S. 523, 531] in § 5(b) barring suits against owner-employers for injuries caused by fellow servants.[6]

The history of the Act further refutes petitioner's contention that § 5(a) of the Act bars respondent's suit under § 5(b). Prior to 1972, this Court had construed the Act to authorize a longshoreman employed directly by the vessel to obtain a recovery from his employer in excess of the statutory schedule, even though § 5 of the Act contained the same exclusive liability language as today. Reed v. The Yaka, 373 U.S. 410 (1963); Jackson v. Lykes Brothers S. S. Co., 386 U.S. 731 (1967). Although the 1972 Amendments changed the character of the longshoreman's action against the vessel by substituting negligence for unseaworthiness as the basis for liability,[7] Congress clearly intended to preserve the rights of longshoremen employed by the vessel to maintain such an action. The House Committee Report is unambiguous:

The Committee has also recognized the need for special provisions to deal with a case where a longshoreman or shipbuilder or repairman is employed directly by the vessel. In such case, notwithstanding the fact that the [462 U.S. 523, 532] vessel is the employer, the Supreme Court in Reed v. S.S. Yaka, 373 U.S. 410 (1963) and Jackson v. Lykes Bros. Steamship Co., 386 U.S. 371 (1967), held that the unseaworthiness remedy is available to the injured employee. The Committee believes that the rights of an injured longshoreman or shipbuilder or repairman should not depend on whether he was employed directly by the vessel or by an independent contractor. . . . The Committee's intent is that the same principles should apply in determining liability of the vessel which

employs its own longshoremen or shipbuilders or repairmen as apply when an independent contractor employs such persons. H. R. Rep. No. 92-1441, pp. 7-8 (1972).

In Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266 (1979), we observed that under the post-1972 Act, "all longshoremen are to be treated the same whether their employer is an independent stevedore or a shipowner-stevedore and that all stevedores are to be treated the same whether they are independent or an arm of the shipowner itself." If respondent had been employed by an independent stevedore at the time of his injury, he would have had the right to maintain a tort action against the vessel. We hold today that he has the same right even though he was in fact employed by the vessel.

The Damages Issue

The District Court found that respondent was permanently disabled as a result of petitioner's negligence. He therefore was entitled to an award of damages to compensate him for his probable pecuniary loss over the duration of his career, reduced to its present value. It is useful at the outset to review the way in which damages should be measured in a hypothetical inflation-free economy. We shall then consider how price inflation alters the analysis. Finally, we shall decide whether the District Court committed reversible error in this case. [462 U.S. 523, 533]

I

In calculating damages, it is assumed that if the injured party had not been disabled, he would have continued to work, and to receive wages at periodic intervals until retirement, disability, or death. An award for impaired earning capacity is intended to compensate the worker for the diminution in that stream of income.[8] The award could in theory take the form of periodic payments, but in this country it has traditionally taken the form of a lump sum, paid at the conclusion of the litigation.[9] The appropriate lump sum cannot be computed without first examining the stream of income it purports to replace.

The lost stream's length cannot be known with certainty; the worker could have been disabled or even killed in a different, non-work-related accident at any time. The probability that he would still be working at a given date is constantly diminishing.[10] Given the complexity of trying to make an [462 U.S. 523, 534] exact calculation, litigants frequently follow the relatively simple course of assuming that the worker would have continued to work up until a specific date certain. In this case, for example, both parties agreed that the petitioner would have continued to work until age 65 ($12\frac{1}{2}$ more years) if he had not been injured.

Each annual installment[11] in the lost stream comprises several elements. The most significant is, of course, the actual wage. In addition, the worker may have enjoyed certain fringe benefits, which should be included in an ideal evaluation of the worker's loss but are frequently excluded for simplicity's sake.[12] On the other hand, the injured worker's lost wages would have been diminished by state and federal income taxes. Since the damages award is tax-free, the relevant stream is ideally of after-tax wages and benefits. See Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490 (1980). Moreover, workers often incur unreimbursed costs, such as transportation to work and uniforms, that the injured worker will not incur. These costs should also be deducted in estimating the lost stream.

In this case the parties appear to have agreed to simplify the litigation, and to presume that in each installment all the elements in the stream would offset each other, except for gross wages. However, in attempting to estimate even such a stylized stream of annual installments of gross wages, a trier of fact faces a complex task. The most obvious and most appropriate place to begin is with the worker's annual wage at the time of injury. Yet the "estimate of the loss [462 U.S. 523, 535] from lessened earnings capacity in the future need not be based

solely upon the wages which the plaintiff was earning at the time of his injury." C. McCormick, Damages 86, p. 300 (1935). Even in an inflation-free economy—that is to say one in which the prices of consumer goods remain stable—a worker's wages tend to "inflate." This "real" wage inflation reflects a number of factors, some linked to the specific individual and some linked to broader societal forces.[13]

With the passage of time, an individual worker often becomes more valuable to his employer. His personal work experiences increase his hourly contributions to firm profits. To reflect that heightened value, he will often receive "seniority" or "experience" raises, "merit" raises, or even promotions.[14] Although it may be difficult to prove when, and whether, a particular injured worker might have received such wage increases, see Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 392-393 (CA2 1975) (Friendly, J., concurring dubitante), they may be reliably demonstrated for some workers.[15]

Furthermore, the wages of workers as a class may increase over time. See Grunenthal v. Long Island R. Co., 393 U.S. 156, 160 (1968). Through more efficient interaction among labor, capital, and technology, industrial productivity may increase, and workers' wages may enjoy a share of that growth.[16] Such productivity increases—reflected in real increases [462 U.S. 523, 536] in the gross national product per worker-hour—have been a permanent feature of the national economy since the conclusion of World War II.[17] Moreover, through collective bargaining, workers may be able to negotiate increases in their "share" of revenues, at the cost of reducing shareholders' rate of return on their investments.[18] Either of these forces could affect the lost stream of income in an inflation-free economy. In this case, the plaintiff's proffered evidence on predictable wage growth may have reflected the influence of either or both of these two factors.

To summarize, the first stage in calculating an appropriate award for lost earnings involves an estimate of what the lost stream of income would have been. The stream may be approximated as a series of after-tax payments, one in each year of the worker's expected remaining career. In estimating what those payments would have been in an inflation-free economy, the trier of fact may begin with the worker's annual wage at the time of injury. If sufficient proof is offered, the trier of fact may increase that figure to reflect the appropriate influence of individualized factors (such as foreseeable promotions) and societal factors (such as foreseeable productivity growth within the worker's industry).[19]

Of course, even in an inflation-free economy the award of damages to replace the lost stream of income cannot be computed simply by totaling up the sum of the periodic payments. For the damages award is paid in a lump sum at the conclusion of the litigation, and when it—or even a part of it—is invested, it will earn additional money. It has been [462 U.S. 523, 537] settled since our decision in Chesapeake & Ohio R. Co. v. Kelly, 241 U.S. 485 (1916), that "in all cases where it is reasonable to suppose that interest may safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award." Id., at 490.[20]

The discount rate should be based on the rate of interest that would be earned on "the best and safest investments." Id., at 491. Once it is assumed that the injured worker would definitely have worked for a specific term of years, he is entitled to a risk-free stream of future income to replace his lost wages; therefore, the discount rate should not reflect the market's premium for investors who are willing to accept some risk of default. Moreover, since under Norfolk & Western R. Co. v. Liepelt, 444 U.S. 490 (1980), the lost stream of income should be estimated in after-tax terms, the discount rate should also represent the after-tax rate of return to the injured worker.[21]

Thus, although the notion of a damages award representing the present value of a lost stream of earnings in an inflation-free economy rests on some fairly sophisticated economic concepts, the two elements that determine its calculation can be stated fairly easily. They are: (1) the amount that the employee would have earned during each year that he could have been expected to work after the injury; and (2) the appropriate [462 U.S. 523, 538] discount rate, reflecting the safest available investment. The trier of fact should apply the discount rate to each of the estimated installments in the lost stream of income, and then add up the discounted installments to

determine the total award.[22]

II

Unfortunately for triers of fact, ours is not an inflation-free economy. Inflation has been a permanent fixture in our economy for many decades, and there can be no doubt that it ideally should affect both stages of the calculation described in the previous section. The difficult problem is how it can do so in the practical context of civil litigation under § 5(b) of the Act.

The first stage of the calculation required an estimate of the shape of the lost stream of future income. For many workers, including respondent, a contractual "costof-living adjustment" automatically increases wages each year by the percentage change during the previous year in the consumer price index calculated by the Bureau of Labor Statistics. Such a contract provides a basis for taking into account an additional societal factor—price inflation—in estimating the worker's lost future earnings.

The second stage of the calculation requires the selection of an appropriate discount rate. Price inflation—or more precisely, anticipated price inflation—certainly affects market [462 U.S. 523, 539] rates of return. If a lender knows that his loan is to be repaid a year later with dollars that are less valuable than those he has advanced, he will charge an interest rate that is high enough both to compensate him for the temporary use of the loan proceeds and also to make up for their shrinkage in value.[23]

At one time many courts incorporated inflation into only one stage of the calculation of the award for lost earnings. See, e. g., Sleeman v. Chesapeake and Ohio R. Co., 414 F.{4)d 305 [462 U.S. 523, 540] (CA6 1969); Johnson v. Penrod Drilling Co., 510 F.2d 234 (CA5 1975) (en banc). In estimating the lost stream of future earnings, they accepted evidence of both individual and societal factors that would tend to lead to wage increases even in an inflation-free economy, but required the plaintiff to prove that those factors were not influenced by predictions of future price inflation. See Higginbotham v. Mobil Oil Corp., 545 F.2d 422, 434-435 (CA5 1977). No increase was allowed for price inflation, on the theory that such predictions were unreliably speculative. See Sleeman, supra, at 308; Penrod, supra, at 240-241. In discounting the estimated lost stream of future income to present value, however, they applied the market interest rate. See Blue v. Western R. of Alabama, 469 F.2d 487, 496-497 (CA5 1972).

The effect of these holdings was to deny the plaintiff the benefit of the impact of inflation on his future earnings, while giving the defendant the benefit of inflation's impact on the interest rate that is used to discount those earnings to present value. Although the plaintiff in such a situation could invest the proceeds of the litigation at an "inflated" rate of interest, the stream of income that he received provided him with only enough dollars to maintain his existing nominal income; it did not provide him with a stream comparable to what his lost wages would have been in an inflationary economy.[24] This inequity was assumed to have been minimal because of the relatively low rates of inflation.

In recent years, of course, inflation rates have not remained low. There is now a consensus among courts that [462 U.S. 523, 541] the prior inequity can no longer be tolerated. See, e. g., United States v. English, 521 F.2d 63, 75 (CA9 1975) ("While the administrative convenience of ignoring inflation has some appeal when inflation rates are low, to ignore inflation when the rates are high is to ignore economic reality"). There is no consensus at all, however, regarding what form an appropriate response should take. See generally Note, Future Inflation, Prospective Damages, and the Circuit Courts, 63 Va. L. Rev. 105 (1977).

Our sister common-law nations generally continue to adhere to the position that inflation is too speculative to be considered in estimating the lost stream of future earnings; they have sought to counteract the danger of systematically undercompensating plaintiffs by applying a discount rate that is below the current market rate. Nevertheless, they have each chosen different rates, applying slightly different economic theories. In England, Lord Diplock has suggested that it would be appropriate to allow for future inflation "in a rough and ready way"

by discounting at a rate of 4¾%. Cookson v. Knowles, 1979. A. C. 556, 565-573. He accepted that rate as roughly equivalent to the rates available "[i]n times of stable currency." Id., at 571-572. See also Mallett v. McMonagle, 1970. A. C. 166. The Supreme Court of Canada has recommended discounting at a rate of 7%, a rate equal to market rates on long-term investments minus a government expert's prediction of the long-term rate of price inflation. Andrews v. Grand & Toy Alberta Ltd., 1978. 2 S. C. R. 229, 83 D. L. R. 3d 452, 474. And in Australia, the High Court has adopted a 2% rate, on the theory that it represents a good approximation of the long-term "real interest rate." See Pennant Hills Restaurants Pty. Ltd. v. Barrell Insurances Pty. Ltd., 55 A. L. J. R. 258 (1981); id., at 260 (Barwick, C. J.); id., at 262 (Gibbs, J.); id., at 277 (Mason, J.); id., at 280 (Wilson, J.).

In this country, some courts have taken the same "real interest rate" approach as Australia. See Feldman v. Allegheny [462 U.S. 523, 542] Airlines, Inc., 524 F.2d, at 388 (1.5%); Doca v. Marina Mercanti Nicaraguense, S. A., 634 F.2d 30, 39-40 (CA2 1980) (2%, unless litigants prove otherwise). They have endorsed the economic theory suggesting that market interest rates include two components—an estimate of anticipated inflation, and a desired "real" rate of return on investment—and that the latter component is essentially constant over time.[25] They have concluded that the inflationary increase in the estimated lost stream of future earnings will therefore be perfectly "offset" by all but the "real" component of the market interest rate.[26] [462 U.S. 523, 543]

Still other courts have preferred to continue relying on market interest rates. To avoid undercompensation, they have shown at least tentative willingness to permit evidence of what future price inflation will be in estimating the lost stream of future income. Schmitt v. Jenkins Truck Lines, Inc., 170 N. W. 2d 632 (Iowa 1969); Bach v. Penn Central Transp. Co., 502 F.2d 1117, 1122 (CA6 1974); Turcotte v. Ford Motor Co., 494 F.2d 173, 186-187 (CA1 1974); Huddell v. Levin, 537 F.2d 726 (CA3 1976); United States v. English, supra, at 74-76; Ott v. Frank, 202 Neb. 820, 277 N. W. 2d 251 (1979); District of Columbia v. Barriteau, 399 A. 2d 563, 566-569 (D.C. 1979). Cf. Magill v. Westinghouse Electric Corp., 464 F.2d 294, 301 (CA3 1972) (holding open possibility of establishing a factual basis for price inflation testimony); Resner v. Northern Pacific R. Co., 161 Mont. 177, 505 P.2d 86 (1973) (approving estimate of future wage inflation); Taenzler v. Burlington Northern, 608 F.2d 796, 801 (CA8 1979) (allowing estimate of future wage inflation, but not of a specific rate of price inflation); Steckler v. United States, 549 F.2d 1372 (CA10 1977) (same).

Within the past year, two Federal Courts of Appeals have decided to allow litigants a choice of methods. Sitting en banc, the Court of Appeals for the Fifth Circuit has overruled its prior decision in Johnson v. Penrod Drilling Co., 510 F.{4)d 234 [462 U.S. 523, 544] (1975), and held it acceptable either to exclude evidence of future price inflation and discount by a "real" interest rate, or to attempt to predict the effects of future price inflation on future wages and then discount by the market interest rate. Culver v. Slater Boat Co., 688 F.2d 280, 308-310 (1982).[27] A panel of the Court of Appeals for the Seventh Circuit has taken a substantially similar position. O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1200 (1982).

Finally, some courts have applied a number of techniques that have loosely been termed "total offset" methods. What these methods have in common is that they presume that the ideal discount rate—the after-tax market interest rate on a safe investment—is (to a legally tolerable degree of precision) completely offset by certain elements in the ideal computation of the estimated lost stream of future income. They all assume that the effects of future price inflation on wages are part of what offsets the market interest rate. The methods differ, however, in their assumptions regarding which if any other elements in the first stage of the damages calculation contribute to the offset.

Beaulieu v. Elliott, 434 P.2d 665 (Alaska 1967), is regarded as the seminal "total offset" case. The Supreme Court of Alaska ruled that in calculating an appropriate award for an injured worker's lost wages, no discount was to be applied. It held that the market interest rate was fully offset by two factors: price inflation and real wage inflation. [462 U.S. 523, 545] Id., at 671-672. Significantly, the court did not need to distinguish between the two types of sources of real wage inflation—individual and societal—in order to resolve the case before it.[28] It simply observed:

It is a matter of common experience that as one progresses in his chosen occupation or profession he is likely to increase his earnings as the years pass by. In nearly any occupation a wage earner can reasonably expect to receive wage increases from time to time. This factor is generally not taken into account when loss of future wages is determined, because there is no definite way of determining at the time of trial what wage increases the plaintiff may expect to receive in the years to come. However, this factor may be taken into account to some extent when considered to be an offsetting factor to the result reached when future earnings are not reduced to present value. Id., at 672.

Thus, the market interest rate was deemed to be offset by price inflation and all other sources of future wage increases.

In State v. Guinn, 555 P.2d 530 (Alaska 1976), the Beaulieu approach was refined slightly. In that case, the plaintiff had offered evidence of "small, automatic increases in the wage rate keyed to the employee's length of service with the company," 555 P.2d, at 545, and the trial court had included those increases in the estimated lost stream of future income but had not discounted. It held that this type of "certain and predictable" individual raise was not the type of wage increase that offsets the failure to discount to present value. Thus, the market interest rate was deemed to be offset by price inflation, societal sources of wage inflation, and individual sources of wage inflation that are not "certain and predictable." Id., at 546-547. See also Gowdy v. United States, 271 F. Supp. 733 (WD Mich. 1967) (price inflation and [462 U.S. 523, 546] societal sources of wage inflation), rev'd on other grounds, 412 F.2d 525 (CA6 1969); Pierce v. New York Central R. Co., 304 F. Supp. 44 (WD Mich. 1969) (same).

Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A. 2d 1027 (1980), took still a third approach. The Pennsylvania Supreme Court followed the approach of the District Court in Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271 (Conn. 1974), and the Court of Appeals for the Fifth Circuit in Higginbotham v. Mobil Oil Corp., 545 F.2d 422 (1977), in concluding that the plaintiff could introduce all manner of evidence bearing on likely sources—both individual and societal—of future wage growth, except for predictions of price inflation. 491 Pa., at 579-580, 421 A. 2d, at 1036-1037. However, it rejected those courts' conclusion that the resulting estimated lost stream of future income should be discounted by a "real interest rate." Rather, it deemed the market interest rate to be offset by future price inflation. Id., at 580-582, 421 A. 2d, at 1037-1038. See also Schnebly v. Baker, 217 N. W. 2d 708, 727 (Iowa 1974); Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 310-312 (CA5 1976) (Wisdom, J., concurring).

The litigants and the amici in this case urge us to select one of the many rules that have been proposed and establish it for all time as the exclusive method in all federal trials for calculating an award for lost earnings in an inflationary economy. We are not persuaded, however, that such an approach is warranted. Accord, Cookson v. Knowles, 1979. A. C., at 574 (Lord Salmon). For our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a "rough and ready" effort to put the plaintiff in the position he would have been in had he not been injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and [462 U.S. 523, 547] unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than in others.

These conclusions all counsel hesitation. Having surveyed the multitude of options available, we will do no more than is necessary to resolve the case before us. We limit our attention to suits under § 5(b) of the Act, noting that Congress has provided generally for an award of damages but has not given specific guidance regarding how

they are to be calculated. Within that narrow context, we shall define the general boundaries within which a particular award will be considered legally acceptable.

III

The Court of Appeals correctly noted that respondent's cause of action "is rooted in federal maritime law." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409 (1953). See also H. R. Rep. No. 92-1441 (1972). The fact that Pennsylvania has adopted the total offset rule for all negligence cases in that forum is therefore not of controlling importance in this case. Moreover, the reasons which may support the adoption of the rule for a State's entire judicial system—for a broad class of cases encompassing a variety of claims affecting a number of different industries and occupations—are not necessarily applicable to the special class of workers covered by this Act.

In calculating an award for a longshoreman's lost earnings caused by the negligence of a vessel, the discount rate should be chosen on the basis of the factors that are used to estimate the lost stream of future earnings. If the trier of fact relies on a specific forecast of the future rate of price inflation, and if the estimated lost stream of future earnings is calculated to include price inflation along with individual factors and other [462 U.S. 523, 548] societal factors, then the proper discount rate would be the after-tax market interest rate.[29] But since specific forecasts of future price inflation remain too unreliable to be useful in many cases, it will normally be a costly and ultimately unproductive waste of longshoremen's resources to make such forecasts the centerpiece of litigation under § 5(b). As Judge Newman has warned: "The average accident trial should not be converted into a graduate seminar on economic forecasting." Doca v. Marina Mercante Nicaraguense, S. A., 634 F.2d, at 39. For that reason, both plaintiffs and trial courts should be discouraged from pursuing that approach.

On the other hand, if forecasts of future price inflation are not used, it is necessary to choose an appropriate below-market discount rate. As long as inflation continues, one must ask how much should be "offset" against the market rate. Once again, that amount should be chosen on the basis of the same factors that are used to estimate the lost stream of future earnings. If full account is taken of the individual and societal factors (excepting price inflation) that can be expected to have resulted in wage increases, then all that should be set off against the market interest rate is an estimate of future price inflation. This would result in one of the "real interest rate" approaches described above. Although we find the economic evidence distinctly inconclusive regarding an essential premise of those approaches,[30] we do not believe [462 U.S. 523, 549] a trial court adopting such an approach in a suit under § 5(b) should be reversed if it adopts a rate between 1 and 3% and explains its choice.

There may be a sound economic argument for even further setoffs. In 1976, Professor Carlson of the Purdue University Economics Department wrote an article in the American Bar Association Journal contending that in the long run the societal factors excepting price inflation—largely productivity gains—match (or even slightly exceed) the "real interest rate." Carlson, Economic Analysis v. Courtroom Controversy, 62 A. B. A. J. 628 (1976). He thus recommended that the estimated lost stream of future wages be calculated without considering either price inflation or societal productivity gains. All that would be considered would be individual seniority and promotion gains. If this were done, he concluded that the entire market interest rate, including both inflation [462 U.S. 523, 550] and the real interest rate, would be more than adequately offset.

Although such an approach has the virtue of simplicity and may even be economically precise,[31] we cannot at this time agree with the Court of Appeals for the Third Circuit that its use is mandatory in the federal courts. Naturally, Congress could require it if it chose to do so. And nothing prevents parties interested in keeping litigation costs under control from stipulating to its use before trial.[32] But we are not prepared [462 U.S. 523, 551] to impose it on unwilling litigants, for we have not been given sufficient data to judge how closely the national patterns of wage growth are likely to reflect the patterns within any given industry. The Legislative Branch of the Federal Government is far better equipped than we are to perform a comprehensive economic analysis and to fashion the proper general rule.

As a result, the judgment below must be set aside. In performing its damages calculation, the trial court applied the theory of Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A. 2d 1027 (1980), as a mandatory federal rule of decision, even though the petitioner had insisted that if compensation was to be awarded, it "must be reduced to its present worth." App. 60. Moreover, this approach seems to have colored the trial court's evaluation of the relevant evidence. At one point, the court noted that respondent had offered a computation of his estimated wages from the date of the accident until his presumed date of retirement, including projected cost-of-living adjustments. It stated: "We do not disagree with these projections, but feel they are inappropriate in view of the holding in Kaczkowski." Id., at 74. Later in its opinion, however, the court declared: "We do not believe that there was sufficient evidence to establish a basis for estimating increased future productivity for the plaintiff, and therefore we will not inject such a factor in this award." Id., at 76.

On remand, the decision on whether to reopen the record should be left to the sound discretion of the trial court. It bears mention that the present record already gives reason to believe a fair award may be more confidently expected in [462 U.S. 523, 552] this case than in many. The employment practices in the longshoring industry appear relatively stable and predictable. The parties seem to have had no difficulty in arriving at the period of respondent's future work expectancy, or in predicting the character of the work that he would have been performing during that entire period if he had not been injured. Moreover, the record discloses that respondent's wages were determined by a collective-bargaining agreement that explicitly provided for "cost of living" increases, id., at 310, and that recent company history also included a "general" increase and a "job class increment increase." Although the trial court deemed the latter increases irrelevant during its first review because it felt legally compelled to assume they would offset any real interest rate, further study of them on remand will allow the court to determine whether that assumption should be made in this case.

IV

We do not suggest that the trial judge should embark on a search for "delusive exactness."[33] It is perfectly obvious that the most detailed inquiry can at best produce an approximate result.[34] And one cannot ignore the fact that in many instances the award for impaired earning capacity may be overshadowed by a highly impressionistic award for pain and suffering.[35] But we are satisfied that whatever rate the District Court may choose to discount the estimated stream of [462 U.S. 523, 553] future earnings, it must make a deliberate choice, rather than assuming that it is bound by a rule of state law.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Footnotes

1. The court drew support for that conclusion from the recent Pennsylvania case, Kaczkowski v. Bolubasz, 491 Pa. 561, 421 A. 2d 1027 (1980), a venerable Vermont case, Halloran v. New England Telephone & Telegraph Co., 95 Vt. 273, 274, 115 A. 143, 144 (1921), and a few federal decisions. McWeeney v. New York, N. H. & H. R. Co., 282 F.2d 34, 38 (CA2) (en banc), cert. denied, 364 U.S. 870 (1960); Yodice v. Koninklijke Nederlandsche Stoomboot Maatschappij, 443 F.2d 76, 79 (CA2 1971); Doca v. Marina Mercante Nicaraguense, S. A., 634 F.2d 30, 36 (CA2 1980), cert. denied, 451 U.S. 971 (1981); Steckler v. United States, 549 F.2d 1372, 1375-1378 (CA10 1977); Freeport Sulphur Co. v. S/S Hermosa, 526 F.2d 300, 308-311 (CA5 1976) (Wisdom, J., concurring); United States v. English, 521 F.2d 63, 72-76 (CA9 1975).

2. Section 4 of the Act provides:

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury. 44 Stat. 1426, 33 U.S.C. 904.

3. The full text of § 5 of the Act reads as follows:

(a) The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the [462 U.S. 523, 530] vessel except remedies available under this Act. 86 Stat. 1263, 33 U.S.C. 905.

4. "The term `vessel' means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 86 Stat. 1263, 33 U.S.C. 902(21).

5. The longshoreman cannot receive a double recovery, because the stevedore, by paying him statutory compensation, acquires a lien in that amount against any recovery the longshoreman may obtain from the vessel. See Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 269 -270 (1979).

6. Of course, § 5(b) does make it clear that a vessel owner acting as its own stevedore is liable only for negligence in its "owner" capacity, not for negligence in its "stevedore" capacity.

7. Until 1972, a longshoreman could supplement his statutory compensation and obtain a tort recovery from the vessel merely by proving that his injury was caused by an "unseaworthy" condition, Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), even if the condition was not attributable to negligence by the owner, Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 549 -550 (1960). And an owner held liable to the longshoreman in such a situation was permitted to recover from the longshoreman's stevedore-employer if he could prove that the stevedore's negligence caused the injury. Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956). The net result, in many cases, was to make the stevedore absolutely liable for statutory compensation in all cases and to deny him protection from additional liability in the cases in which his negligence could be established. The 1972 Amendments protect the stevedore from a claim by the vessel and limit the longshoreman's recovery to statutory compensation unless he can prove negligence on the part of the vessel.

8. See generally D. Dobbs, Law of Remedies 8.1 (1973). It should be noted that in a personal injury action such as this one, damages for impaired earning capacity are awarded to compensate the injured person for his loss. In a wrongful-death action, a similar but not identical item of damages is awarded for the manner in which diminished earning capacity harms either the worker's survivors or his estate. See generally 1 S. Speiser, Recovery for Wrongful Death 2d, ch. 3 (1975) (hereafter Speiser). Since the problem of incorporating inflation into the award is the same in both types of action, we shall make occasional reference to wrongful-death actions in this opinion.

9. But cf. Uniform Periodic Payment of Judgments Act, 14 U. L. A. 22 (Supp. 1983). See generally Elligett, The Periodic Payment of Judgments, 46 Ins. Counsel J. 130 (1979); Kolbach, Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards, 64 Iowa L. Rev. 138 (1978); Rea, Lump-Sum Versus Periodic Damage Awards, 10 J. Leg. Studies 131 (1981).

10. For examples of calculations that take this diminishing probability into account, and assume that it would fall to zero when the worker reached age 65 see Fitzpatrick, The Personal Economic Loss Occasioned by the Death of Nancy Hollander Feldman: An Introduction to the Standard Valuation Procedure, 1977 Economic Expert in Litigation, No. 5, pp. 25, 44-46 (Defense [462 U.S. 523, 534] Research Institute, Inc.) (hereafter Fitzpatrick); Hanke, How To Determine Lost Earning Capacity, 27 Prac. Lawyer 27, 2933 (July 15, 1981).

11. Obviously, another distorting simplification is being made here. Although workers generally receive their wages in weekly or biweekly installments, virtually all calculations of lost earnings, including the one made in this case, pretend that the stream would have flowed in large spurts, taking the form of annual installments.

12. These might include insurance coverage, pension and retirement plans, profit sharing, and in-kind services. Fitzpatrick 27.

13. As will become apparent, in speaking of "societal" forces we are primarily concerned with those macroeconomic forces that influence wages in the worker's particular industry. The term will be used to encompass all forces that tend to inflate a worker's wage without regard to the worker's individual characteristics.

14. It is also possible that a worker could be expected to change occupations completely. See, e. g., Stearns Coal & Lumber Co. v. Williams, 164 Ky. 618, 176 S. W. 15 (1915).

15. See, e. g., Fitzpatrick 33-39; Henderson, Income Over the Life Cycle: Some Problems of Estimation and Measurement, 25 Federation Ins. Counsel Q. 15 (1974).

16. P. Samuelson, Economics 738-756 (10th ed. 1976) (hereafter Samuelson).

17. See Henderson, The Consideration of Increased Productivity and the Discounting of Future Earnings to Present Value, 20 S. D. L. Rev. 307, 310-320 (1975) (hereafter Henderson).

18. See Samuelson 584-593, 737; Henderson 315, and n. 15.

19. If foreseeable real wage growth is shown, it may produce a steadily increasing series of payments, with the first payment showing the least increase from the wage at the time of injury and the last payment showing the most.

20. Although this rule could be seen as a way of ensuring that the lumpsum award accurately represents the pecuniary injury as of the time of trial, it was explained by reference to the duty to mitigate damages. 241 U.S., at 489 -490.

21. The arithmetic necessary for discounting can be simplified through the use of a socalled "present value table," such as those found in R. Wixon, Accountants' Handbook 29.58-29.59 (4th ed. 1956), or 1 Speiser 8:4, pp. 713-718. These tables are based on the proposition that if i is the discount rate, then "the present value of $1 due in n periods must be 1/(1+i)[n]." Wixon, supra, at 29.57. In this context, the relevant "periods" are years; accordingly, if i is a market interest rate, it should be the effective annual yield.

22. At one time it was thought appropriate to distinguish between compensating a plaintiff "for the loss of time from his work which has actually occurred up to the time of trial" and compensating him "for the time which he will lose in [the] future." C. McCormick, Damages 86 (1935). This suggested that estimated future earning capacity should be discounted to the date of trial, and a separate calculation should be performed for the estimated loss of earnings between injury and trial. Id., 86, 87. It is both easier and more precise to discount the entire lost stream of earnings back to the date of injury—the moment from which earning capacity was impaired. The plaintiff may then be awarded interest on that discounted sum for the period between injury and judgment, in order to ensure that the award when invested will still be able to replicate the lost stream. See In re Air Crash Disaster Near Chicago, Illinois, on May 25, 1979, 644 F.2d 633, 641-646 (CA7 1981); 1 Speiser 8:6, p. 723.

23. The effect of price inflation on the discount rate may be less speculative than its effect on the lost stream of future income. The latter effect always requires a prediction of the future, for the existence of a contractual cost-of-living adjustment gives no guidance about how big that adjustment will be in some future year. However, whether the discount rate also turns on predictions of the future depends on how it is assumed that the worker will invest his award.

On the one hand, it might be assumed that at the time of the award the worker will invest in a mixture of safe short-term, medium-term, and long-term bonds, with one scheduled to mature each year of his expected work-life. In that event, by purchasing bonds immediately after judgment, the worker can be ensured whatever future stream of nominal income is predicted. Since all relevant effects of inflation on the market interest rate will have occurred at that time, future changes in the rate of price inflation will have no effect on the stream of income he receives. For recent commentaries on how an appropriate discount rate should be chosen under this assumption, see Jarrell & Pulsinelli, Obtaining the Ideal Discount Rate in Wrongful Death and Injury Litigation, 32 Defense L. J. 191 (1983); Fulmer & Geraghty, The Appropriate Discount Rate to Use in Estimating Financial Loss, 32 Federation Ins. Counsel Q. 263 (1982). See also Doca v. Marina Mercante Nicaraguense, S. A., 634 F.2d 30, 37, n. 8 (CA2 1980). On the other hand, it might be assumed that the worker will invest exclusively in safe short-

term notes, reinvesting them at the new market rate whenever they mature. Future market rates would be quite important to such a worker. Predictions of what they will be would therefore also be relevant to the choice of an appropriate discount rate, in much the same way that they are always relevant to the first stage of the calculation. For a commentary choosing a discount rate on the basis of this assumption, see Sherman, Projection of Economic Loss: Inflation v. Present Value, 14 Creighton L. Rev. 723 (1981) (hereafter Sherman). We perceive no intrinsic reason to prefer one assumption over the other, but most "offset" analyses seem to adopt the latter. See n. 26, infra.

24. As Judge Posner has explained it:

But if there is inflation it will affect wages as well as prices. Therefore to give Mrs. O'Shea $2318 today because that is the present value of $7200 10 years hence, computed at a discount rate—12 percent—that consists mainly of an allowance for anticipated inflation, is in fact to give her less than she would have been earning then if she was earning $7200 on the date of the accident, even if the only wage increases she would have received would have been those necessary to keep pace with inflation. O'Shea v. Riverway Towing Co., 677 F.2d 1194, 1199 (CA7 1982).

25. In his dissenting opinion in Pennant Hills Restaurant Pty. Ltd. v. Barrell Insurances Pty. Ltd., 55 A. L. J. R. 258, 266-267 (1981), Justice Stephen explained the "real interest rate" approach to discounting future earnings, in part, as follows:

It rests upon the assumption that interest rates have two principal components: the market's own estimation of likely rates of inflation during the term of a particular fixed interest investment, and a 'real interest' component, being the rate of return which, in the absence of all inflation, a lender will demand and a borrower will be prepared to pay for the use of borrowed funds. It also relies upon the alleged economic fact that this 'real interest' rate, of about two per cent, will always be much the same and that fluctuations in nominal rates of interest are due to the other main component of interest rates, the inflationary expectation.

26. What is meant by the "real interest rate" depends on how one expects the plaintiff to invest the award, see n. 23, supra. If one assumes that the injured worker will immediately invest in bonds having a variety of maturity dates, in order to ensure a particular stream of future payments, then the relevant "real interest rate" must be the difference between (1) an average of short-term, medium-term, and long-term market interest rates in a given year and (2) the average rate of price inflation in subsequent years (i. e., during the terms of the investments). The only comprehensive analysis of this difference that has been called to our attention is in Feldman v. Allegheny Airlines, Inc., 382 F. Supp. 1271, 1293-1295, 1306-1312 (Conn. 1974).

It appears more common for "real interest rate" approaches to rest on the assumption that the worker will invest in low-risk short-term securities and will reinvest frequently. E. g., O'Shea v. Riverway Towing Co., 677 [462 U.S. 523, 543] F.2d, at 1199. Under that assumption, the relevant real interest rate is the difference between the short-term market interest rate in a given year and the average rate of price inflation during that same year. Several studies appear to have been done to measure this difference. See Sherman 731-732; Carlson, Short-Term Interest Rates as Predictors of Inflation: Comment, 67 Am. Econ. Rev. 469 (1977); Gibson, Interest Rates and Inflationary Expectations: New Evidence, 62 Am. Econ. Rev. 854 (1972).

However one interprets the "real interest rate," there is a slight distortion introduced by netting out the two effects and discounting by the difference. See Comments, 49 U. Chi. L. Rev. 1003, 1017-1018, n. 66 (1982); Note, Future Inflation, Prospective Damages, and the Circuit Courts, 63 Va. L. Rev. 105, 111 (1977).

27. The Fifth Circuit recommended replacing the estimated stream of actual installments with a stream of installments representing the "average annual income." See 688 F.2d, at 309. As we have noted, a worker does not generally receive the same wage each year. If, as an accurate estimate would normally show, the estimated wages increase steadily, then averaging will raise the estimate for the early years and lower it for the later years. Since the early years are discounted less than the later years, this step will necessarily increase the size of the award, providing plaintiffs with an unjustified windfall. Cf. Turcotte v. Ford Motor Co., 494 F.2d 173, 186, n. 20 (CA1 1974).

28. See supra, at 535-536.

29. See n. 23, supra.

30. The key premise is that the real interest rate is stable over time. See n. 25, supra. It is obviously not perfectly stable, but whether it is even relatively stable is hotly disputed among economists. See the sources cited in Doca, 634 F.2d, at 39, n. 10. In his classic work, Irving Fisher argued that the rate is not stable because changes in expectations of inflation (the factor that influences market interest rates) lag behind changes in inflation itself. I. Fisher, The Theory of Interest 43 (1930). He noted that the "real rate of interest in the United States from March to April, 1917, fell below minus 70 percent!" Id., at 44. Consider also the more recent observations of Justice Stephen of the High Court of Australia:

Past Australian economic experience appears to provide little support for the concept of a relatively constant rate of 'real interest.' Year by year [462 U.S. 523, 549] a figure for 'real interest' can of course be calculated, simply by subtracting from nominal interest rates the rate of inflation. But these figures are no more than a series of numbers bearing no resemblance to any relatively constant rate of interest which lenders are supposed to demand and borrowers to pay after allowing for estimated inflation. If official statistics for the past twelve calendar years are consulted, the Reserve Bank of Australia's Statistical Bulletins supply interest rates on two-year Australian government bonds (non-rebatable) and the O. E. C. D. Economic Outlook—July 1980, p. 105 and p. 143, supplies annual percentage changes in consumer prices, which gives a measure of inflation. The difference figure year by year, which should represent the 'real interest' rate, averages out at a negative average rate of interest of—1.46, the widest fluctuations found in particular years being a positive rate of 2.58 per cent and a negative rate of—6.61 per cent. Nothing resembling a relatively constant positive rate of 2 per cent—3 per cent emerges. An equally random series of numbers, showing no steady rate of 'real interest', appears as Table 9.1 in the recent Interim Report of the Campbell Committee of Inquiry (Australian Government Publication Service—1980). For the period of thirty years which that Table covers, from 1950 to 1979, the average 'implicit real interest rate' is a negative rate of—.7 per cent, with 4 per cent as the greatest positive rate in any year and—20.2 per cent as the greatest negative annual rate." Pennant Hills Restaurants Pty. Ltd., 55 A. L. J. R., at 267.

31. We note that a substantial body of literature suggests that the Carlson rule might even undercompensate some plaintiffs. See S. Speiser, Recovery for Wrongful Death, Economic Handbook 36-37 (1970) (average interest rate 1% below average rate of wage growth); Formuzis & O'Donnell, Inflation and the Valuation of Future Economic Losses, 38 Mont. L. Rev. 297, 299 (1977) (interest rate 1.4% below rate of wage growth); Franz, Simplifying Future Lost Earnings, 13 Trial 34 (Aug. 1977) (rate of wage growth exceeds interest rate by over 1% on average); Coyne, Present Value of Future Earnings: A Sensible Alternative to Simplistic Methodologies, 49 Ins. Counsel J. 25, 26 (1982) (noting that Carlson's own data suggest that rate of wage growth exceeds interest rate by over 1.6%, and recommending a more individualized approach). See generally Note, 57 St. John's L. Rev. 316, 342-345 (1983). But see Comments, 49 U. Chi. L. Rev. 1003, 1023, and n. 87 (1982) (noting "apparent

congruence" between Government projections of 2% average annual productivity growth and real interest rate, and concluding that total offset is accurate).

It is also interesting that in O'Shea v. Riverway Towing Co., 677 F.2d 1194 (CA7 1982), Judge Posner stated that the real interest rate varies between 1 and 3%, id., at 1199, and that "[i]t would not be outlandish to assume that even if there were no inflation, Mrs. O'Shea's wages would have risen by three percent a year," id., at 1200. Depending on how much of Judge Posner's estimated wage inflation for Mrs. O'Shea was due to individual factors (excluded from a total offset computation), his comments suggest that a total offset approach in that case could have meant over-discounting by as much as 2%.

32. If parties agree in advance to use the Carlson method, all that would be needed would be a table of the after-tax values of present salaries and fringe benefits for different positions and levels of seniority ("steps") within an industry. Presumably this would be a matter for stipulation before trial, as well. The trier of fact would be instructed to determine how [462 U.S. 523, 551] many years the injured worker would have spent at each step. It would multiply the number of years the worker would spend at each step by the current net value of each step (as shown on the table) and then add up the results. The trier of fact would be spared the need to cope with inflation estimates, productivity trends, and present value tables.

33. Judge Friendly perceived the relevance of Justice Holmes' phrase in this context. See Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 392 (CA2 1975) (Friendly, J., concurring dubitante), quoting Truax v. Corrigan, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting).

34. Throughout this opinion we have noted the many rough approximations that are essential under any manageable approach to an award for lost earnings. See supra, at 533-544, and nn. 11, 25, 26, 30.

35. It has been estimated that awards for pain and suffering account for 72% of damages in personal injury litigation. 6 Am. Jur. Trials, Predicting Personal Injury Verdicts and Damages 24 (1967). [462 U.S. 523, 554]

Exhibit 6

Question 3. *Assume the judge instructs that you MUST estimate a net discount rate in your forecast of total compensation for a 30-year period. The net discount rate may be based upon either nominal or real values. Please note that for this question the net discount rate is (approximately) equal to the interest rate minus the general rate of increase in total compensation for all U.S. workers. Complete the following sentence: "I would use _____% per year as the average net discount rate over 30 future years."(Please note that if you would not use a fixed rate, provide an explanation in the "Comments" section below.)*

The number of usable responses was 172. There are two general methods for computing the net discount rate (NDR). One method is to ask the question directly, as utilized in Question 3. The other method is to ask for an estimate of the rate of increase in compensation and the discount rate and then calculate the difference between these two variables. Results of the 1999, 2003, 2009, and current survey, which all used the direct method, are given below.

	(S5,4,70)	(S6,4,31)	(S8,3,8)	(S9)
Mean	2.13%	1.89%	1.76%	1.61%
Median	2.00%	2.00%	1.75%	1.50%

For this survey, the mean value was 1.61% and the median value 1.50%. The interquartile range was between 1.00% and 2.04%. The minimum value was -1.03% while the maximum value was 5.60%. One of the rules frequently seen by forensic economists is the total offset rule, which implies that the net discount rate equals 0%. Based upon the results of this survey, only 10% of the respondents believed that the net discount rate was equal to 0% or less. It is clear, however, that the long-term forecast of the net discount rate has declined. The misunderstanding of terms problem, which affected a noticeable minority of respondents, will be discussed in regard to question 5 and 7 answers below.

Select Respondents' Comments to Question 3:

- I do not use the net discount rate approach. I develop separate nominal growth rates and discount rates for each case. I often use multiple growth rates and discounts.
- I use specific earnings growth rates with period matching discount rates. Discount rates are generally based upon the relevant yield on constant maturity treasuries, with some exceptions.
- Percent is the historical difference between the average of interest rates on 3 and 10 year U.S. Government securities and the BLS Index of Hourly Compensation.
- Most recent OASDI (Intermediate Forecast) Trustees Report values for wage growth rate and nominal interest rates.

- 7.11% - 3.64% - 1.06% = 2.41%. 10-year Treasuries minus CPI-U minus Real Compensation per Hour (Business Sector). This is Real Interest Rate minus Real Compensation. These time series are all 30-year averages.

- The 2% is based on the last 25 years with wage increases and one-year bond rates. This has been trending significantly down.

- As with the growth rate, my net discount rate (NDR) would depend on the factors of plaintiff's educational attainment level, earnings level and earnings history, and how many years of work life he had remaining. If the remaining work life is less than 7 to 8 years, I would drop my NDR accordingly.

- For a 30-year period, we would generally adopt a wage increase of 3.9% per annum, and a long-term discount rate of 5%. This yields an approximate long-term net discount of 1.1%.

- I really prefer to use current market rates with any reliable predictions of wage increases.

- I do a lower and an upper bound estimate, using 1% for the upper and 0% for the lower.

- The net discount rate is junk science. There is no economic relationship between expected wage growth and expected yields.

- Utilizing a risk-free rate of return on a fixed income investment of 5% per annum and a growth rate of 3% per annum based upon projected inflation, the actual net discount rate would be (1.05/1.03)-1 = 1.94%.

- Current long-term UST about 3.15% & inflation of 3%, so difference about 0.2%.

- Based on average of January 2012 CBO projections for 2012-2022: 10-Year Treasury Rate minus CPI.

Some jurisdictions require that estimates of increases in compensation, medical costs, and interest rates must be in nominal terms. Based upon this hypothetical, answer questions 5 and 7.

Question 5. *Assume that the judge instructs that you MUST incorporate an estimate of the nominal rate of increase in total compensation into a 30-year forecast of economic loss. Assume an average worker in the private sector with no allowance for age-earnings factors. Complete the sentence: "I would use_____% as the average annual rate of increase in total compensation over this 30-year period."*

If you could give me, essentially, an offer of proof from Mr. Partin as to where we are getting this from, that would be great. I think that that resolve that all.

MR. CHRISTIE: Happy to do that, your Honor, just to assist him, I am going to, because he wasn't here when we had the discussion.

This relates to the testimony by Mr. Brandt, which you have reviewed. Essentially, he testified to the jury that no one in your field uses a discount rate that includes any component of stocks.

So, I have represented to the court that you would testify about why you are using that and the acceptance within the forensic economists community of your approach to your blended portfolio. Maybe you could outline that for the court.

THE WITNESS: Sure.

19 The economic community has a publication called the
20 national -- The Journal of Forensic Economists. That
21 publication surveys economists periodically regarding the
22 methodology used for the discount rates. You will find that
23 a variety of methods are used by a variety of economists.
24 The method that I use is used.
25 In fact, when Mr. Brandt worked for me and prepared

1 reports, he used that method. Mr. Brandt reviewed reports of
2 other experts, including Neale Beaton. I think that the
3 court is probably familiar with Neale, who used a similar
4 discount rate.
5 I am not sure where Mr. Brandt's comment is coming from,
6 because he clearly prepared analyses during his five to
7 six-year term with my firm using that approach.

THE COURT: I believe that he said no forensic economist would use stock in determining the discount rate in this case, or words to that effect. I don't have the exact quote. But, is that your understanding of what Mr. Christie was asking about?

THE WITNESS: Yes, it is.

THE COURT: From your perspective that's just not an accurate assessment as an expert in the field?

THE WITNESS: That's correct.

THE COURT: Do you want to voir dire, counsel?

MR. BARCUS: Yes.

THE COURT: I want to make sure that we get this right.

VOIR DIRE EXAMINATION

BY MR. BARCUS:

Q. You have referenced a journal of forensic economists?

APPENDIX 4

The Honorable Laura G. Middaugh
Hearing: December 14, 2012 @ 9:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

CHANNARY HOR, individually, Plaintiff vs. THE CITY OF SEATTLE, a Washington Municipal Corporation, AARON GRANT, ADAM THORP, and OMAR TAMMAN, Defendants.	)	**NO: 10-2-34403-9 SEA** **DECLARATION OF THOMAS F. KLEIN IN SUPPORT OF PLAINTIFF'S MOTION TO STRIKE AND FOR SANCTIONS, AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT REGARDING SERVICE OF PROCESS ON CO-DEFENDANT TAMMAM**

I, Thomas F. Klein, declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am one of Channary Hor's attorneys in this matter, am over the age of 18 years of age, competent to testify and make this Declaration based on personal knowledge.

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2. Most of the facts declared below have previously been attested to within pleadings already on file herein, and are matters which the attorney for the City of Seattle would be well aware of, given her vexatious practice of filing repetitive and sometime mislabeled motions before this Court, including the formally assigned Trial Judge, the Honorable Mariane C. Spearman.

3. As this Court is well aware, the City, through its counsel, has made multiple Motions for Summary Judgment in this case on the issue of "duty," all of which, for the most part, have been denied. Also, as explored in more detail below, Ms. Boatright, Assistant City Attorney and lead counsel for the City of Seattle in this case, has also made multiple motions challenging the service of process on Co-defendant Tammam, even though the standing of the City of Seattle to do so is at best dubious. Given that these motions were so grossly mislabeled and procedurally incorrect, it may be difficult for the newly assigned trial judge to recognize the repetitive natures of the pending motion, while familiarizing herself with the file in this case, which has already been heavily litigated.[1]

The first mislabeled Motion for Summary Judgment regarding the service of Mr. Tammam, was rather deceptively labeled as "Defendant City of Seattle, Aaron Grant, and Adam Thorp's Motion to Amend the Caption." This motion was filed on March 7, 2012, and requested that the individual officers' names be removed from the case caption, (apparently out of concerns for injury to their credit rating), and suggested that the Court should enter an Order "amending the caption to reflect that Omar Tammam is not a party to this litigation and removing Officer Grant and Officer Thorp by name."

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[1] It is noted that the City of Seattle never raised service of process, and/or in sufficiency of service as affirmative defenses within its Answer.

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As this Court recently made a determination that Plaintiff is "fault free" for the purposes of RCW 4.22.070, the implications of this rather cavalier motion, which were made without any meaningful citation to authority by Ms. Boatright, should be rather obvious.

4. In response to this motion, I drafted a very detailed response pointing out that clearly, with respect to Defendant Tammam, the City's effort to have him dismissed under the guise of "an amendment of the caption" was purposeful, and an attempt to thwart the application of joint and several liability principles which are available under RCW 4.22.070 when a Plaintiff is otherwise fault free. My response to that motion is attached hereto as Exhibit No. 1 for the Court's easy review. In my response, I explain that on February 16, 2012, Notice of Service on the Secretary of State, Summons and Complaint and Declaration of Attorney were sent by certified mail, with return receipt requested, to Defendant Tammam's last known address in Seattle, Washington. This is the same address that was listed in multiple places in the Seattle Police Department accident reports and records relating to the accident which brings this matter before the Court. Again, on March 12, 2012, the same documents and pleadings were also sent by registered mail, return receipt requested, to Defendant Tammam at the address listed in the police report and to two other potential addresses. Plaintiff's Declaration of Compliance was appended to each of these processes as well.

Within my Amended Response, I explained how diligent efforts had been made, (by myself, and co-counsel Thad Martin), to find Mr. Tammam, and that had employed three investigators, who also diligently searched for him, but who could not find him within the state. His family members were contacted and advised our investigator that he was avoiding service and testimony in this matter. We also made contact with the Department of Corrections Probation Office and attempted to

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repeatedly locate Mr. Tammam through their auspices. Our private investigator spent many hours staking out possible locations to contact and serve him. Plaintiff's investigator advised that Mr. Tammam was not staying at any residence, but was constantly moving and/or was homeless and living on the street. Plaintiff also tried to contact Mr. Tammam through Facebook pages without success. In other words, Plaintiff, through counsel, "diligently" tried to serve Mr. Tammam personally.

After attempting unsuccessfully to serve Defendant Tammam, both before and after this action was filed, and for approximately 15 months thereafter, Defendant Tammam was served via substitute service authorized by RCW 46.64.040.

In our legal memorandum which, unlike Defendant's initial brief, contained citation to authority, I argued, among other things, that the Defendant had waived any affirmative defenses relating to service of process by not affirmatively pleading such a defense within its Answer, and by not asserting such a defense earlier in the course of the litigation. See generally, *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000).

5. Also, by way of legal authority, it was pointed out that, given the fact that there was no question that the City of Seattle had been subject to timely service, the rule enunciated in the case of *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), had full application. In *Sidis,* the Supreme Court held that RCW 4.16.170 under its terms that the service on one defendant within the 90-day grace period afforded under its terms serves to toll the statute of limitations as to all other defendants named. We also argued that the terms of RCW 46.6.040 had to be read consistent with all other statutes relating to service of process including RCW 4.16.170 which is addressed by the *Sidis* opinion.

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6. The results of this rather bizarre motion filed by the City was that Judge Spearman entered an Order on March 15, 2012, which granted Defendant's Motion to Amend the Caption, but denied Defendant's Motion to Amend the Caption to Remove Omar Tammam as a named Defendant. The Order which is attached as Exhibit No. 2 to this Declaration in that regard specifically provides:

> *IT IS ALSO ORDERED that the defendant's motion to amend the caption to remove Omar Tammam as a named defendant is DENIED.*[2]

7. Undaunted, and before the ink had barely dried on Judge Spearman's Order denying Defendant's Motion to Amend the Caption to Exclude Defendant Tammam, counsel for the City of Seattle filed Defendant City Of Seattle's "Motion For Determination Of Judgment Severally Only As A Matter Of Law" on March 23, 2012. As the City failed to cite any particular court rule authorizing this motion, Plaintiff, on March 30, 2012, filed a prompt reponse, noting that Defendant's motion should have been filed under the terms of CR 56, and it should have been calendared accordingly. A copy of Plaintiff's response to this re-cast motion is attached hereto as Exhibit No. 3 for the Court's easy review. Again, it was pointed out that prior to the filing of both of these motions, Mr. Tammam had been served through the Secretary of State, and such service was sent to him, as required by the statute, by certified mail to his last known address, as well as to additional local addresses where he may have been residing. In my second response, I again noted that the City had waived any issues regarding insufficient service of process because it was not within the affirmative defenses asserted with its Answer, citing to *O'Neill v. Farmers Ins. Co. of Wash.*, 124 Wn. App. 516, 527, 125 P.3d 134

[2] In other words, at this point in time the City of Seattle had in its possession information that Plaintiff's counsel had already served Mr. Tammam by way of the Secretary of State under the "non-resident" motorist statute RCW 46.64.040.

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(2004), citing to *Lybbert v. Grant County, supra.* It was also pointed out that the City had no "standing" to raise Mr. Tammam's service of process issues.

Again, it was pointed out that Mr. Tammam was properly served by way of RCW 46.64.040, and such service was timely on consideration of the *Sidis* rule, and given the fact that Plaintiff's minority status tolled the statute of limitations under RCW 4.16.190, until she turned 21 years of age on October 30, 2010. It was also pointed out that the entire predicate for the defense motion, that RCW 46.64.040 must be strictly construed to permit only service within three years from the date of tort, had been already rejected by the Supreme Court in the case of *Martin v. Triol,* 121 Wn.2d 135, 847 P.2d 471 (1993), which expressly found that the tolling provisions set forth in RCW 4.16.170 had full application to Secretary of State service pursuant to 46.64.040. In *Martian v. Triol,* 121 Wn.2d at 148-49, the Supreme Court, on application of the rules of statutory construction, found that RCW 46.64.040 had to be construed consistent with the other statutes passed by the legislature relating to tolling on the statute of limitations under various circumstances.

8. Given the procedural irregularities of the City's motion, your Declarant felt compelled to file a surreply which attached declarations from three licensed private investigators who had been retained by the Plaintiff in order to effectuate service on Mr. Tammam. These Declarations are attached hereto as Exhibit No. 4 (a) through (d), and are inclusive of the Declaration of Angel Suarez, David A. Larson, and Michael Crockett. Also attached within Exhibit No. 4 is my Supplemental Declaration Re: Certificate of Service which had attached to it a Certificate of Service issued by the Office of Secretary of State.

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9. Predictably, Judge Spearman entered an Order Denying the City of Seattle's Motion for Determination of Judgment, on April 5, 2012, specifically finding;

> *1. The City was properly served within the statute of limitation period. RCW 4.16.080 and RCW 4.16.190.*
>
> *2. Service on one codefendant tolls the statute of limitation as to all defendants. Sidis v. Brodie, 117 Wn.2d 325 (1991).*
>
> *3. So long as the plaintiff can demonstrate good faith efforts and due diligence in attempting personal service on defendant Tammam, substitute service via the Secretary of State under RCW 46.64.040 is valid personal service as required by RCW 4.16.170. Martin v. Triol, 121 Wn.2d 135 (1993).*
>
> *IT IS ORDERED, ADJUDGED AND DECREED that the defendant's motion is DENIED."*

(A copy of Judge Spearman's April 5, 2012 Order is attached hereto as Exhibit No. 5, for easy review.

10. Finally, out of an absolute abundance of caution, we had Defendant Tammam served by publication. Attached hereto as Exhibit No. 6 (a), is my Declaration in support of service by publication on Defendant Omar Tammam. Exhibit 6 (b) is the Summons by Publication that I prepared. In my Declaration, I provide additional detail with respect to my personal efforts to locate and serve Defendant Tammam which commenced even prior to the filing of this lawsuit, on September 29, 2010. In August 2010, I personally made contact with DOC, given the fact that Mr. Tammam had been placed on probation as a result of his accident-related criminal charges. Such efforts did not come to fruition, as explained in my Declaration. Exhibit 6 (c) is a true and correct copy of the Affidavit of Publication by The Seattle Times, establishing that publication in fact occurred.

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11. I also performed several internet searches and was able to make contact with a number of individuals who appeared to have close connections to Defendant Tammam, but who were wholly uncooperative in our efforts. It also came to our attention that, through Mr. Tammam's family members, he was "paranoid" and believed that he was being "set up" by Plaintiff's counsel and he was making purposeful efforts not to allow himself to be located, contacted or served.

12. Finally, attached hereto as Exhibit No. 7 is a copy of Mr. Tammam's Acceptance of Service which he signed on November 12, 2012. We were able to acquire this Acceptance of Service directly from Mr. Tammam, after we were able to make contact with him. It is my understanding that co-counsel Paul Lindenmuth has sent a letter to Ms. Boatright indicating that given the Acceptance of Service on file with Mr. Tammam, that she should strike her motion, which is now moot or face a cross-motion seeking to have it stricken, as well as for terms.

13. I am fully supportive of any request for terms in this case against Ms. Boatright, counsel for the City of Seattle. I have been involved in this case from the beginning, and have had to face the brunt of a number of Ms. Boatright's frivolous and vexatious tactics. Such tactics include filing repetitive motions, which require an extraordinary amount of work to respond to. Also, within such motions, she constantly includes skewed versions of irrelevant procedural history that have nothing to do with the motion which is currently pending before the Court. She often makes gross misstatements of both fact and law, which she unabashedly makes no effort to correct. There is no question that it would simply be an impossibility for this lawyer to actually comply with RPC 3.3(a)(3), which requires that an attorney disclose to the tribunal legal authority that the lawyer knows to be

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directly adverse to the position of the client. She also has made many, many misstatements of fact, which certainly implicate RPC 3.3.

In addition, Ms. Boatright's "advocacy" oftentimes is well over the boundaries of RPC 3.1, which commands that attorneys not assert frivolous arguments and, at a minimum, point out to the Court that authority is adverse to them, and that the City is making a "good faith argument for an extension, modification or reversal of existing law." It is suggested that Ms. Boatright's constant attacks on myself and Mr. Martin are unethical, and the only way in which the Court can control such conduct is by awarding terms.

14. Personally, I take extreme umbrage and insult from Ms. Boatright's suggestion that I violated the "RPCs" (somehow) due to a "lack of diligence" when, as explained in our legal memorandum, we did all that the law required of us, if not more, when it came to trying to ferret out Mr. Tammam's location so we could effectuate in-person service. The City seems to ignore that Mr. Tammam now has been served **three times**, first via the Secretary of State under RCW 46.64.040, then by publication pursuant to RCW 4.28.100 and finally personally as evidence by his acceptance of service which is on file with this Court.[3]

[3] Counsel for the City of Seattle has a habit of misrepresenting Judge Spearman's rulings and/or misinterpreting them to an extraordinary degree. There is nothing within Judge Spearman's prior orders denying Defendant's motion regarding service on Mr. Tammam which were in any way tentative, or which invited the filing of yet another motion, when two nearly identical motions had already been denied. It is noted that a portion of the procedural history that the City apparently feels is somehow relevant (it is not) is the fact that Plaintiff previously acquired a continuance. That is true and as a result Judge Spearman was inclined to award continuance-related terms had they been appropriately presented to her. That is not what the City did, they submitted a highly inflated request for costs, that ultimately was rejected by Judge Spearman by way of an Order dated on March 30, 2012, which is attached hereto as Exhibit No. 8. In that Order, she clearly indicated that her denial was "without prejudice" permitting the City to once again provide a cost submission once it got its act together. The Orders at issue here, have no such "without prejudice" limiting language within their text.

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15. In response to a number of the allegations set forth within Defendant's pleading, it is noted that it is my view that her filing of repetitive motions, and her repeated over-the-top and *ad hominem* attacks are unethical and violative of CR 11 or, at a minimum, are matters which should be addressed by the Court's inherent authority to control the conduct of counsel which appears before it. While she wants to engage in a litany of allegations against the Plaintiff, and her counsel, frankly, Ms. Boatright's actions in this matter have been far less than stellar and have included not only the repetitive filing of motions after they have already at least once been denied, (here twice), but also regular citation to unpublished opinions in violation of GR 14.1. We view her unwarranted attacks as a ploy to cover up her own lack of diligence which included an almost total failure to conduct any discovery prior to the previous trial continuance, to which she has rather disingenuously, allegedly taken great affront.

It is noted that, prior to that continuance, Ms. Boatright had not taken a single deposition, not even that of the Plaintiff.

16. Further, Ms. Boatright's assertions regarding the limited appearance of the "Connelly Law Firm" is erroneous. Lincoln Beauregard, aided us in filing an Opposition To A Motion For Certification Pursuant To CR 54(b), and while there was certainly some discussions associating with Mr. Connelly, who is an extraordinarily talented lawyer, he was right in the middle of a State Senate run, which only recently concluded, and was otherwise unavailable. Thus, we have associated with Ben F. Barcus & Associates, who are equally talented counsel, and also have the resources to appropriately prepare and put on Plaintiff's rather significant damages case.

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17. While one could go on and on with respect to Ms. Boatright's rather skewed version of reality, it is suffice to say that not only should the current repackaging of the same motion be denied, but also, it is humbly urged that the Court put an end to such vexatious litigation practices by striking the Defendant's current Motion and awarding Plaintiff's counsel reasonable and fair terms.

That the exhibits attached hereto are true and correct copies of they purport to be.

Dated this 3rd day of December 2012 at Kirkland, Washington.

Thomas Klein
WSBA No. 31823

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