Bruce Wolf, Respondent/cross-appellant V. Jefferson Healthcare, Appellants/cross-respondents

2022 | Cited 0 times | Court of Appeals of Washington | January 4, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BRUCE A. WOLF, as Guardian ad Litem for LANA BURKE; ZACHARY BURKE, individually, and ANNA SCOTT, individually, No. 54598-5-II

Respondents/Cross-Appellants,

v. UNPUBLISHED OPINION

GE HEALTHCARE, a subsidiary of General Electric Company; GE MEDICAL SYSTEMS INFORMATION TECHNOLOGIES, INC., a foreign corporation; JEFFERSON COUNTY PUBLIC HOSPITAL DISTRICT NO. 2 d/b/a JEFFERSON HEALTHCARE and UNKNOWN DOES 1-50,

Appellants/Cross-Respondents.

MAXA, P.J. Jefferson County Public Hospital District No. 2 d/b/a Jefferson Healthcare

(JHC) appeals a number of trial court decisions following a $23.9 million jury verdict against

JHC in favor of Bruce Wolf as guardian ad litem for LB, Anna Scott, and Zachary Burke

(collectively the Burkes). The Burkes cross- amend the judgment on

lawsuit alleging that JHC failed to properly

during GE Filed Washington State Court of Appeals Division Two

January 4, 2022 Healthcare (GE) electronic fetal heart monitor was defective, causing LB to be born with

severe developmental disabilities and other health conditions.

We hold that:

(1) the trial court did not err in changing venue from Jefferson County to Kitsap County;

gender-neutral reasons for

using pe Batson 1 challenge;

(3) the trial court d midtrial CR 21 motion to dismiss GE

based on a high-low settlement agreement between the Burkes and GE, and JHC cannot raise

additional arguments regarding the high-low agreement for the first time on appeal;

(4) the trial court did not err when it experts from testifying about

Scott her prenatal marijuana

use ;

(5) the trial court did not err when it denied J the

; and

argument that the trial judge should have recused

herself on the grounds that she allegedly had a special needs child in her family.

-appeal, we hold that (1) the trial court did not err in granting

future economic damages under RCW 4.56.260, and (2) RCW 4.56.260 does not violate the

1 Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). to provide for periodic

payments of future economic damages under RCW 4.56.260.

FACTS

Background

The Burkes were expecting a baby in January 2014, with Dr. Rachel Bickling as their

obstetric provider. Dr. Bickling was a doctor at JHC. The delivery occurred at JHC, a public

hospital district located in Jefferson County.

JHC used GE-manufactured electronic fetal heart rate monitors to detect and follow fetal heart rates during labor and delivery. The GE monitor printed out the heartbeat it was tracing, also known as a fetal heart strip. The purpose of an electronic fetal heart rate monitor is to identify when a baby is in distress during labor. One issue that arises with fetal heart rate monitoring is

heart rate, then the person using the monitor would be unaware if the baby was in distress.

In January 2014, Scott was admitted to JHC to give birth. She periodically was hooked

day. Nurse Deanna Crawford took over the monitoring that evening. The nurse ending her shift conveyed her concerns to Crawford rate

the entire time before delivery. When LB was delivered, she was purple and limp. She began experiencing seizures

within 12 or 13 hours of being born. While LB still was inside the womb, the umbilical cord had been wrapped owed down her heart rate and decreased the amount of

blood flow and oxygenation to her brain. The umbilical cord ultimately caused decreased oxygenation and blood flow to the tissues in body, including her brain.

At the time of trial, LB was almost six years old, but had the mental age of a 12- to 18-month-old. LB had significant developmental and neurological deficits. LB experienced a seizure every few months, which manifested in convulsive activity that lasted between five and 20 minutes. She also suffered spastic quadriplegic cerebral palsy. LB will require 24/7 adult supervision and care for the rest of her life.

In October 2016, the Burkes filed a lawsuit against JHC for medical negligence and

against GE for product liability in Jefferson County Superior Court. The Burkes alleged that

JHC asserted in its answer an affirmative defense of third-party

liability, reserving its right to apportion a percentage of liability to GE.

4.56.260 for any award of future economic damages. JHC later referenced the intent to invoke

RCW 4.56.260 in answers to discovery requests.

The case ultimately was assigned to a visiting judge from Kitsap County.

High-Low Agreement with GE

In August 2018, the Burkes and GE entered into a proposed high-low agreement,

contingent on trial court approval. Under the proposed agreement, GE would owe the Burkes $1 million if the percentage of fault allocated to GE was 10 percent or less, and GE would owe no

more than $5 million if the jury found that GE was between 10 percent and 100 percent at fault.

If GE was allocated a percentage of fault between 10 percent and 100 percent, it would pay

get a credit or offset of up to $500,000 for any funds paid on behalf of [JHC] that will be applied

CP) at 3979. The

agreement did not release GE from liability.

The Burkes and GE filed a joint motion requesting that the trial court make a finding that

the agreement was reasonable under RCW 4.22.060(1). The motion explained that the proposed

high- the security of capping its potential risk and exposure, while providing [the Burkes] a certain

minimal recovery to help offset their medical and other bills, expenses and damages, while

at 3967. The motion also requested that the trial court

issue an order in limine barring any references to the high-low agreement at trial. The Burkes and GE represented that the motion was unopposed.

At the reasonableness hearing on the high-low agreement, JHC stated that it did not oppose the motion, noting that the Supreme Court in Barton 2 had approved of such high-low agreements. JHC did not argue that the agreement violated public policy or otherwise was improper. The trial court found that there was no evidence of bad faith, collusion, or fraud and found that the high-low agreement was reasonable. The court also concluded that the settlement did not release GE from liability.

2 , 178 Wn.2d 193, 207-08, 308 P.3d 597 (2013). In addition, the court granted the motion in limine to exclude references to the high-low agreement. JHC did not object to this in limine order.

to Exclude Expert Testimony

defenses of preexisting conditions and comparative fault. JHC withdrew the affirmative defenses, and the trial court dismissed them.

seizures .

JHC had disclosed two expert witnesses, Dr. Thomas Wiswell and Dr. Paul Fisher, to provide expert testimony regarding the issue of causation and to rebut the opinions of the ell. The parties also submitted excerpts from the depositions of the two experts.

Dr. Wiswell was board certified in pediatrics and perinatal-neonatal medicine. He stated by fetal

inflammatory response s

labor.

3

having

a seizure disorder, and a family history of multiple male family members having genetic

abnormalities.

3 We refer to Donna Scott by her first name to distinguish her from Scott. No disrespect is intended.
but not more probably than

CP at 3492. But Dr. Wiswell also stated that if

juana

use were not present or known, LB still would have sustained the same type of injuries because

at 3519. Dr. Wiswell admitted that

he did not know the diagnosis or cause of abnormalities.

Dr. Fisher was board certified in pediatrics and neurology with special qualifications in

infectious or inflammatory process that affected both Scott and LB between one to seven days

before the delivery.

at 3563. But Dr. Fisher did not believe that marijuana

In his deposition, Dr. Fisher stated that based on some photos he saw of LB, he believed

that her facial features showed some mild dysmorphisms. But he stated that her facial features

did not necessarily mean that she had some kind of genetic disorder, but rather that it triggered

the need to do a genetic evaluation. He did not know the type of genetic disorders that the male

disorders with LB.

le causes of injury. The court found that any expert testimony regarding genetic history and marijuana use was speculative and

irrelevant under ER 401, ER 402, ER 403, and ER 702.

Jury Selection for First Trial

The trial started in October 2018 in Jefferson County Superior Court. The court clerk

summoned 80 potential jurors and only 60 potential jurors showed up for jury selection. After

two days of voir dire, the trial court had dismissed 38 jurors for hardship or for cause. As a

result, there were only 22 potential jurors left, which was an insufficient number to seat a jury if

all parties exercised their peremptory challenges. The Burkes, GE, and JHC all agreed that the

court should declare a mistrial.

Motions in Limine

In December, the trial cour undisclosed or improperly disclosed opinions and evidence. The court also motion in limine to exclude references to any medical article or textbook without laying adequate

foundation and to preclude any articles or other learned treatises from going to the jury as

s in limine (1) regarding references to

articles or medical literature that was not provided to counsel as a basis for expert opinions and

(2) to exclude testimony not previously disclosed. JHC withdrew a motion in limine to prelude

references to post-January 2014 medical literature to establish standard of care.

Change in Venue

In April 2019, the Burkes filed a motion for a bench trial or, in the alternative, for transfer

of venue to King County in part on the grounds that an impartial jury could not be impaneled in

Jefferson County had to recuse himself, which resulted in a visiting judge from Kitsap County to be assigned to the case; (2) there was only one courtroom in Jefferson County, which meant that a civil trial could

be interrupted at any time by a criminal trial; (3) the earlier mistrial was a waste of expenses; and

(3) travel to Port Townsend from other areas of the state and Seattle-Tacoma airport (for out-of-

state witnesses) was limited, significantly increasing expenses and causing logistical difficulties.

JHC opposed the motion. In support of its opposition, JHC submitted a declaration from

Wendy Steadman, the director of the Family Birth Center at JHC. She explained that the Family

Birth Center had 17 registered nurses and that two nurses were assigned to each shift. If one

nurse was unavailable, then a travel nurse could be used in his or her absence. Steadman stated

urses and that it would pose as a

significant hardship to the Family Birth Center if they were unavailable for a long trial in King

Family

Birth Center.

The trial cou and instead ruled that venue would be changed to Kitsap County. The court found that a transfer

of venue was warranted pursuant to RCW 4.12.030(2) because an impartial jury could not be

impaneled in Jefferson County and pursuant to RCW 4.12.030(3) because the ends of justice

supported a change of venue to Kitsap County. JHC filed a motion for reconsideration, which

the trial court denied.

Trial was scheduled in November 2019 in Kitsap County Superior Court.

Jury Selection for Second Trial

During jury selection for the second trial, the Burkes challenged at least two female prospective jurors for cause; did not object when JHC challenged a female prospective juror for cause; and stipulated to removing other women from the jury. The Burkes also objected to

The Burkes had six peremptory challenges and JHC and GE each had three. All of the prospective jurors for which the Burkes and GE exercised their peremptory challenges were male. However, the Burkes used only four of their peremptory challenges and GE only used two of its peremptory challenges. JHC used its three peremptory challenges on women. There were five men on the final jury panel, including alternates, after the peremptory challenges were exercised.

JHC was concerned that the Burkes and GE were working together to remove male jurors from the panel and challenged the use of their peremptory challenges. The trial court treated Batson challenge and asked the Burkes and GE to provide gender-neutral reasons for their peremptory challenges. The Burkes and GE explained that they excluded jurors because they had a negative outlook on malpractice cases, had family members who were in the healthcare field, had political views that were concerning, or were unresponsive during the jury selection process. The court stated that the record did not support a Batson challenge and on.

CR 21 Motion to Dismiss GE

Eleven days after the start of trial, JHC filed a motion under CR 21 to dismiss GE as a defendant. JHC alleged -low agreement was a binding settlement agreement that released GE of all liability and that both the Burkes and GE had failed to produce

grounds that a CR 21 motion was procedurally improper or untimely and that JHC had never

withdrawn its affirmative defense of third- dismiss GE under CR 21 on the grounds that there were unresolved issues of liability with

respect to GE.

JHC did not argue in its written motion or during argument on the motion that the high-

low agreement violated public policy or otherwise was improper.

JHC Motion for Mistrial

delivery and fetal monitoring. She testified, among other things, about the nursing standard of care. During direct examination, the Burkes asked Dr. Lagana if she was familiar with the 2001, 2007, 2011, and 2019 editions of the textbook Essentials of Fetal and Uterine Monitoring by Michelle Murray. Dr. Lagana testified that she had reviewed those textbooks in her work as a fetal monitoring nurse educator and that they generally were considered to be an authoritative reference in the obstetrical community on the issue of fetal monitoring and maternal and fetal heart rate.

Dr. Lagana testified that the fetal heart strip in the 2019 textbook by Murray was a classic example of maternal and fetal heart rate confusion. The fetal heart strip in the 2019 textbook

rate]. Note the Smart BP feature with a MHR of 153 bpm [beats per minute]. The MHR taken approximately 35 seconds prior to the contraction is evidence that the entire tracing was MHR

at

the Burkes to use the 2019 textbook excerpt for illustrative purposes.

Dr. Lagana testified that she extensively reviewed the fetal heart strip that was involved

labor and delivery process, along with the standard of care for nurses as it related to analyzing and documenting their findings regarding the fetal heart strip. Dr. Lagana testified that part of

the standard of care for nurses included recognizing maternal and fetal heart rate confusion. Dr. Lagana stated that the standard of care with respect to being able to distinguish between the

maternal heart rate and the fetal heart rate on the electronic fetal monitor had remained consistent

over the last two decades.

motion in limine regarding the use of subsequent publications post-2014, which the trial court

overruled. The court determined that the motion in limine had been withdrawn and that

regardless, the standard of care had not changed between 2014 and 2019.

During direct examination of nurse Crawford, the Burkes displayed the fetal heart strip in

the 2019 textbook for the jury, which included the text description beneath the image stated

above. The Burkes asked Crawford whether the fetal heart strip in the 2019 textbook was

the use of the 2019 textbook excerpt, and the trial court overruled the objection.

during trial. JHC argued that the 2019 textbook excerpt was never disclosed during discovery

and that the use of the 2019 textbook excerpt violated several orders in limine. JHC also claimed

that the Burkes could not establish the standard of care from 2014 with the 2019 textbook

motion in part on the grounds that they properly disclosed the 2019 textbook before trial and that

they provided a copy of the exhibit to JHC via an online folder. rovided a curative instruction to

the jury to disregard the text in the 2019 textbook that described the fetal heart strip.

regarding t explained his methodology as to how he calculated the present net value of the costs detailed in

the life care plan, how that would be projected in the future, how it would be reduced to present

net value today, and how inflation and interest played a role in his calculations. For example, Dr. DeKay explained that he used 4.3 percent as the average wage inflation and that he reduced the future amounts he calculated by 0.9 percent to account for interest.

Dr. DeKay stated that an annuity was a financial instrument that involved paying an initial lump sum and would provide for future payments over a specified time period. He e plan would be similar to the dollar figures he calculated. Dr. DeKay testified that the adequacy of any annuity quote would depend on the issue of inflation and unanticipated inflation and provided examples of how those factors impact periodic payments.

Periodic Payments

to invoke the periodic payment provisions of RCW 4.56.260 and to propose specific jury instructions regarding those provisions.

Following the close of evidence, the parties conferenced with the trial court to discuss jury instructions and the special verdict form. There was no court reporter present during the discussion, but GE took notes at the conference to memorialize their discussion that day. The notes showed that JHC intended to preserve its statutory right under RCW 4.56.260 to request periodic payments for future economic damages. As a result, JHC wanted the special verdict services, future wage loss, and future economic damages must be for the present cash value of those dam at 2156. reasonable rate of return, would equal the amount of loss at the time in the future when the expenses must be paid or the earnings would have been at 2156. Instruction

at 2156.

The special verdict form instructed the jury to award damages to LB in two separate categories: future economic damages and non-economic damages. Future economic damages had three separate categories: (1) medical care, treatment, and services; (2) lost earnings and earnings capacity; and (3) necessary nonmedical expenses.

CR 50 Dismissal of GE

At the end of trial, GE proposed bringing a motion for judgment as a matter of law under CR 50 to dismiss GE as a party. The Burkes agreed that the trial court should dismiss GE. JHC did not object to dismissing GE from the case.

Jury Verdict

After six weeks of trial, the jury returned a verdict finding JHC negligent and finding that damages. The jury awarded LB $2 million in future medical care, treatment, and services; $1,050,000 for future lost earnings and earnings capacity; $10 million for future necessary nonmedical expenses; and $6,250,000 for non-economic damages. The jury awarded Scott and Burke $4.6 million in damages.

On the same day that the jury rendered its verdict, the trial court entered judgment on the jury verdict with no objection from JHC. The judgment did not include periodic payments for the future economic damages.

Motion to Amend Judgment

amend the judgment to provide for periodic payments for future economic damages pursuant to

RCW 4.56.260(1). The Burkes opposed JH of judgment and that JHC should have raised the RCW 4.56.260 issue before trial and before

when it invok during discovery, and during cross-

but reserved its decision on how the periodic payments should be structured and did not request

any proposals for periodic payments until the conclusion of this appeal.

-appeal the

trial co for future economic damages. ANALYSIS

A. CHANGE IN VENUE

JHC argues that the trial court erred in transferring venue to Kitsap County because RCW

70.44.060(8) mandates that the venue of this case must be in Jefferson County and RCW

4.12.030 did not support a change in venue. This argument is incorrect.

1. Legal Principles

to believe that an

impartial trial cannot be had therein, RCW 4.12.030(2), the convenience of witnesses

or the ends of justice would be forwarded by the change, We review an

order to change venue for an abuse of discretion. Hatley v. Saberhagen Holdings, Inc., 118 Wn.

App. 485, 488, 76 P.3d 255 (2003). A trial court abuses its discretion when its decision is based

on untenable grounds or is made for untenable reasons. Id.

2. Effect of RCW 70.44.060(8)

JHC argues that RCW 70.44.060(8) requires that a lawsuit against a public hospital

district be tried in the county where the public hospital district is located. RCW 70.44.060(8)

o sue and be sued in any court of

competent jurisdiction: PROVIDED, [t]hat all suits against the public hospital district shall be

brought in the county in which the public hospital district is located.

RCW 70.44.060(8) does not state that all lawsuits against a public hospital district must

be tried in the county where the hospital district is located. The statute states that a lawsuit must

be brought ed. RCW 70.44.060(8) (emphasis

70.44.060(8) suggests that the venue cannot be changed after the lawsuit has been filed. And to strictly interpret the statute as JHC discretion to change venue when necessary to further the ends of justice and ensure a fair and

impartial trial.

JHC also relies on RCW 70.44.900, which provides that when a provision of chapter

7 s, limitation or restriction in any other law, this

act [1945 c 264] requires that a lawsuit against a public hospital district be filed in the county where the hospital

district is located. Therefore, a subsequent change of venue under RCW 4.12.030 does not

conflict with RCW 70.44.060(8).

Accordingly, we conclude that RCW 70.44.060(8) does not preclude a trial court from

changing venue under RCW 4.12.030.

3. Application of RCW 4.12.030

a. RCW 4.12.030(2)

The trial court found that a transfer of venue was warranted pursuant to RCW 4.12.030(2)

because an impartial jury could not be impaneled in Jefferson County.

Out of the 60 potential jurors who appeared for jury duty in the first trial, 38 jurors were dismissed for hardship or for cause. A number of potential jurors had personal relationships with the parties or witnesses and that they stated that those relationships would impact their ability to remain fair and impartial. For example, some jurors stated that they were family friends with the Burkes or that they grew up with Scott. Other potential jurors stated that they were former or current patients of JHC or Dr. Bickling, and Dr. Bickling had delivered the babies of some of the jurors. And both the Burkes and JHC agreed that no current employees of JHC could be on the jury. JHC argues that an impartial jury could have been created if the jury pool had been enlarged. But JHC fails to cite to any legal authority that requires the trial court to exhaust all possibilities of creating an impartial jury before exercising its discretion to change venue. In addition, the court noted that there was a large percentage of the potential jurors who had a connection with a party involved and that it would be difficult to continue bringing in additional potential jurors to empanel an impartial jury.

JHC also argues that prospective jurors would not need to be excused simply because they were acquainted with the parties or they had been treated at JHC. However, JHC does not argue that certain prospective jurors should not have been excused at the first trial. In fact, after two days of jury selection JHC agreed with the trial court that there were an insufficient number of potential jurors left after excusing the other potential jurors for cause or hardship.

We conclude that the trial court did not err when it determined that a change in venue was justified under RCW 4.12.030(2).

b. RCW 4.12.030(3)

The trial court also stated that the length of the trial and the logistics of the single

courtroom in Jefferson County supported a change of venue in the interest of justice under RCW

4.12.030(3). The court explained tha at

2467. In addition, the court noted that it would be difficult to bring in more jurors given the size

or layout of the courtroom.

JHC asserts that in deciding whether to change venue under RCW 4.12.030(3), the court

must consider whether the change would cause undue hardship. JHC claims that changing venue to Kitsap County was an undue hardship because Dr. Bickling and the two nurse witnesses

would be forced to commute at least an hour away from the hospital to attend trial. As a result,

they would have to take more time off from work and would be unavailable to their patients.

However, the declaration on which JHC relies merely stated without support that it could

have been an undue hardship on the hospital to have the witnesses unavailable at some point

during the trial because of the potential for increased patient populations or unforeseen

emergencies. Nor did the witnesses need to be present every day during the length of the trial. 4

We conclude that the trial court did not err when it determined that a change in venue

was justified under RCW 4.12.030(3).

B. BATSON CHALLENGE

prospective

jurors constituted a Batson violation and violated its constitutional right to a fair trial and the

This argument is incorrect.

1. Legal Principles

During the jury selection process, each party may exercise peremptory challenges to remove prospective jurors without cause. See Portch v. Sommerville, 113 Wn. App. 807, 810, 55 P.3d 661 (2002). RCW 4.44.130 states that each party is allowed to make three peremptory challenges. Courts have recognized that peremptory challenges are Batson, 476 U.S. at 91. However, the United States Supreme Court held in Batson that peremptory challenges may not be exercised on the b Id. at 89. To do so would

4 JHC lists a number of factors that it claims the trial court must consider, but those factors are from cases addressing forum non conveniens, not venue. See Myers v. Boeing Co., 115 Wn.2d 123, 128, 794 P.2d 1272 (1990). constitute a violation of the equal protection clause under the United States Constitution because

Id. at 85-86. Although Batson challenges typically are raised in criminal cases, the same principles apply to civil cases as well. See Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631, 111 S. Ct. 2077, 114 L. Ed. 2d 660 (1991).

As noted above, Batson addressed alleged racial discrimination. 476 U.S. at 93-94. Most Washington cases applying Batson also have involved claims of racially motivated juror challenges. E.g., State v. Jefferson, 192 Wn.2d 225, 232, 429 P.3d 467 (2018). However, in State v. Burch, the court held that the traditional Batson analysis also applies to gender-based discrimination. 65 Wn. App. 828, 836, 830 P.2d 357 (1992); see also J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 129, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994). The Burkes do not argue that Batson does not apply here. We assume that Batson applies to claims of gender-based juror challenges.

Washington has adopted the Batson three-step analysis when the use of a peremptory

race. Jefferson, 192 Wn.2d at 231. First, the party raising the

Batson an

Id. at 231-32 (quoting Batson, 476 U.S. at 94). This

requires establishing that (1) the peremptory challenge was exercised against a constitutionally

protected group, and (2) that fact and additional relevant circumstances raise an inference that

the peremptory challenge was based on group. State v. Evans, 100 Wn. App. 757, 763-64, 998 P.2d 373 (2000). Relevant

circumstances may include a pattern of strikes against members of the group or the particular questions asked during voir dire. Id. at 764 (quoting State v. Rhodes, 82 Wn. App. 192, 196,

917 P.2d 149 (1996)).

Second, the burden then shifts to the party exercising the peremptory challenge to provide

a neutral explanation for the challenge. Jefferson, 192 Wn.2d at 232. The party must offer more

than a general denial of discriminatory intent. Evans, 100 Wn. App. at 764.

The traditional third step is if a neutral explanation is provided, the trial court must

determine if the challenging party has established purposeful discrimination. Jefferson, 192

Wn.2d at 232. However, the Supreme Court in Jefferson modified the third step of a Batson

analysis because the court concluded that the traditional inquiry of whether the challenging party

has established purposeful discrimination did not adequately address pervasive racial

discrimination during jury selection. Id. at 24243, 252. The court stated:

[W]e hold that the question at the third step of the Batson framework is not whether the proponent of the peremptory strike is acting out of purposeful discrimination. Instead, the relevant question is ethnicity as a factor in the use of the peremptory challenge If so, then the

peremptory strike shall be denied.

Id. at 249.

Under the traditional analysis, we review Batson Id. at 232. But because

the modified third step involves an objective standard, we review de novo the record and the trial

modified step. Id. at 249-50.

2. Analysis

After the Burkes and GE identified their peremptory challenges, JHC objected to the use

of those challenges to strike only male prospective jurors. The trial court acknowledged that this

objection triggered a Batson analysis. a. First Step

The trial court did not expressly find that JHC had established a prima facie case of

purposeful gender discrimination. Instead, the court went straight to the second step, asking the

Burkes and GE to provide gender-neutral reasons for their challenges. Therefore, the court made

an implied finding that JHC had satisfied the first step of the Batson analysis.

The Burkes argue that JHC failed to establish a prima facie case giving rise to an

inference of discriminatory purpose. However, all of the peremptory challenges the Burkes and

GE used were on men. Under an abuse of discretion standard, we conclude that this fact

supports the t established a prima facie case.

b. Second Step

Regarding the second step of Batson, the Burkes and GE both provided gender-neutral

explanations for the peremptory challenges used against male prospective jurors. The Burkes

excluded juror 41 because he had negative thoughts on malpractice cases and because his wife

5 Report of Proceedings (RP) at 1059. He also

was unmarried and had no children, which the Burkes stated could lead to an inability to relate to

their experience. type of news outlets that he followed. 5 RP at 1060. Finally, the Burkes excluded juror 2

5 RP at 1060. -law enforcement capacity as a security guard. 5

RP at 1061. GE excluded juror 4 because he had done some consulting work for law firms and

potentially could persuade other jurors to follow his opinions, he had a nurse in his family, and

he had a family member who suffered a negative medical outcome.

There is no question that both the Burkes and GE provided gender-neutral justifications

for their six peremptory challenges. JHC does not argue otherwise.

c. Third Step

The court in Jefferson modified the third step of the Batson analysis to address pervasive

racial discrimination during jury selection. 192 Wn.2d at 242-43, 252. Therefore, it is unclear

whether the modification (and de novo review) would apply to Batson challenges unrelated to

racial discrimination as in this case, or whether the traditional third step (and abuse of discretion

review) applies here.

Regardless of the standard of review, the record shows that JHC did not establish

purposeful discrimination (traditional third step) and an objective observer would not view

gender as a factor in peremptory challenges (modified third step).

rather than pretextual. For example, a medical negligence plaintiff certainly would be concerned

about jurors who have negative views about malpractice cases or think lawsuits are increasing

health costs. And while striking jurors because they were not engaged in the jury selection

process could reflect bias, that fact was significant for a complex, six-week trial.

males or in favor of females. They challenged two female jurors for cause, did not object when JHC challenged a female for cause, and stipulated to removing other females from the jury. And

Third, the Burkes used only four of their six peremptory challenges and GE used only

two of their three challenges even though that meant that several men remained on the jury.

Arguably, if the Burkes and GE were attempting to systematically remove men from the jury,

they would have used their remaining peremptory challenges on men.

Finally, out of the final jurors and alternates, five jurors were male. Therefore, the jury

We conclude that the record does not support a finding of purposeful discrimination or a

finding that an objective observer could view gender as a factor in

peremptory challenges. Batson challenge regarding the exclusion of male prospective jurors. 5

C. CR 21 MOTION TO DISMISS GE

21. However, in its brief JHC raises a number of additional arguments regarding the high-low

agreement between the Burkes and GE. JHC argues that (1) the high-low agreement between the

trial court erred in ruling that the high-low agreement would not be disclosed to the jury, (3) the

trial court should have dismissed GE as a party under RCW 4.22.060 at the reasonableness

5 JHC claims that the trial court should have held an evidentiary hearing to assess its Batson challenge, relying on State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019). But the Supreme Court in Berhe discussed an evidentiary hearing to address explicit and implicit racial bias as a factor during jury deliberations, not during the jury selection process. 193 Wn.2d at 657, 661- 62. No Washington case has suggested that a trial court must hold an evidentiary hearing as part of a Batson analysis.
hearing, and (4) the trial court should have given JHC an offset equivalent to the reasonable

value of the high-low agreement at the reasonableness hearing.

because JHC only assigned error to the trial

at trial, we decline to address those issues.

1. Failure to Preserve Arguments

Although JHC raises a number of additional arguments regarding the high-low

CR 21. JHC did not assign error to any of the additional arguments. We generally do not

address issues not included in the assignments of error. RAP 10.3(g); Phillips v. Greco, 7 Wn.

App. 2d 1, 9, 433 P.3d 509 (2018).

More significantly, JHC did not raise these additional arguments in the trial court. We

generally do not consider arguments raised for the first time on appeal. RAP 2.5(a); Samra v.

Singh, 15 Wn. App. 2d 823, 838, 479 P.3d 713 (2020).

-low agreement was void as against public policy,

the record shows that JHC had ample opportunity to oppose the high-low agreement and failed to

do so. When the Burkes and GE moved for approval of the agreement, JHC did not argue that

the agreement was improper or void. Instead, JHC stated that it did not file an opposition, did

not oppose the motion, and noted that the Supreme Court in Barton had approved of such high-

low agreements. At the beginning of the second trial, JHC stated high-low agreement] rises to the level of a Mary Carter agree 3 RP at 507.

-low agreement should have been disclosed to the

limine to preclude references to the high-low agreement and did not object when the trial court ordered that there would be no reference to the agreement at trial. And JHC never attempted to

revisit this order during trial.

4.22.060 after the reasonableness hearing on the high-low agreement, JHC never argued that the

the high-low agreement was not a release under RCW 4.22.070 because it did not fully and

finally resolve the claims between the Burkes and GE. Finally, JHC did not argue pursuant to its CR 21 motion that GE should have been dismissed after the reasonableness hearing.

the high-low agreement at the reasonableness hearing, the record shows that JHC did not ask the court at the reasonableness hearing to establish the amount of an offset to JHC. JHC also did not request an offset when the Burkes and GE moved to dismiss GE under CR 50 at the end of trial, when judgment to address periodic payments.

JHC never argued that (1) the high-low agreement violated public policy or otherwise was improper, (2) the jury should be informed of the high-low agreement, (3) the trial court should have dismissed GE under RCW 4.22.060 after the reasonableness hearing, or (4) it was entitled to an offset based on the high-low agreement. Therefore, we arguments raised for the first time on appeal.

2. CR 21 Motion to Dismiss GE

JHC argues that the trial court erred by denying its midtrial motion to dismiss GE as a party under CR 21. This argument is incorrect. a. Legal Principles

motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately We review a from a case under CR 21 for abuse

of discretion. Shelby v. Keck, 85 Wn.2d 911, 918, 541 P.2d 365 (1975).

In Shelby, Keck accidentally shot and killed husband after consuming

alcohol at a bar. 85 Wn.2d at 912. The plaintiff sued both Keck and the bar, but then entered

seek any recovery from Keck above that amount. Id. dismiss Keck under CR 21. Id. at 913. The Supreme Court affirmed, concluding that the

agreement was a binding settlement that left no justiciable dispute between the parties. Id. at 918.

In Barton, the plaintiff was injured in an accident and sued the driver who crashed into him, her parents under the family car doctrine, and the State for negligent highway design and maintenance. 178 Wn.2d at 197-98. The parents entered into a stipulation with the plaintiff to provide advance payment in the amount of $20,000. Id. at 198. The stipulation provided that any future settlement or verdict against the parents would be reduced by $20,000 and that the plaintiff would not execute on any judgment against the parents in excess of their liability insurance. Id. The stipulation expressly stated that the advance payment was not a settlement of any claims brought against the parents. Id.

The court concluded that the stipulation did not release the parents from all liability because (1) the motorcyclist and the parents did not intend to settle all claims between the parties through the stipulation, (2) the State still had the right to seek contribution from the parents, and (3) the parents remained potentially liable to the motorcyclist in the amount of $20,000 to $100,000, the maximum allowable under their liability insurance. Id. at 212-13.

b. Analysis

JHC relies on Shelby to argue that the high-low agreement was a binding settlement agreement that left no justiciable issues to be resolved. But in Shelby, the settling defendant already paid the plaintiff the maximum amount of damages that could have been asserted against him pursuant to the settlement agreement. 85 Wn.2d at 912. Here, GE remained potentially liable to the Burkes for an amount between $1 million and $5 million. And the record shows that

at the time of the settlement, GE was prepared to fully defend itself at trial to minimize its liability and the amount in damages owed to the Burkes. The high-low agreement here is more similar to the stipulation in Barton, which the court concluded did not release the defendant from liability. 178 Wn.2d at 213.

suggestion in Barton that the issue of whether a

settlement releases a party of liability depends on the intent of the parties. Id. at 209. Here, the record supports the inference that the Burkes and GE did not intend for the high-low agreement to release GE.

Finally, in Shelby the other defendant filed the CR 21 motion before trial started. 85 Wn.2d at 912. Here, JHC did not file its motion until the middle of the trial. That fact may have

.

The standard of review for CR 21 motions is abuse of discretion. Shelby, 85 Wn.2d at

918. We -trial

motion to dismiss GE as a party under CR 21. D. ORDER IN LIMINE TO EXCLUDE OTHER CAUSATION THEORIES

r prenatal marijuana

use. This argument is incorrect.

1. Legal Principles

We review Gunn v. Riely, 185 Wn. App. 517, 531, 344 P.3d 1225 (2015). A trial court abuses its discretion

when its decision is manifestly unreasonable or based on untenable grounds. Terrell v.

Hamilton, 190 Wn. App. 489, 499, 358 P.3d 453 (2015).

a. ER 702

ER 702 provides that a court may permit a witness qualified as an expert to provide an

opinion regarding scientific or specialized knowledge if such testimony may assist the trier of

fact.

Volk v. DeMeerleer, 187 Wn.2d 241, 277, 386 P.3d 254 (2016). grounded on facts and cannot be conclusory or based on an assumption. Id.

An expert opinion that lacks adequate foundation must be excluded. Johnston-Forbes v.

Matsunaga, 181 Wn.2d 346, 357, 333 P.3d 388 (2014). Similarly, expert testimony is

inadmissible when it is speculative and not helpful to the trier of fact. Volk, 187 Wn.2d at 277.

ions will

Johnston-Forbes, 181 Wn.2d at

352. An abuse of discret Gilmore v. Jefferson County Pub. Transp. Benefit Area, 190 Wn.2d 483, 494, 415 P.3d 212 (2018).

b. ER 401, 402, and 403

tendency to make the existence of any fact that is of consequence to the determination of the

threshold to admit relevant evidence is low and even minimally relevant evidence is admissible.

Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc., 178 Wn. App. 702, 729, 315 P.3d 1143

(2013).

However, even relevant evidence may be excluded under ER 403 is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

evidence against its prejudicial impact. Needham v. Dreyer, 11 Wn. App. 2d 479, 493, 454 P.3d

136 (2019), review denied, 195 Wn.2d 1017 (2020).

c. Case Law

In Colley v. Peacehealth, the court held that the trial court did not err when it allowed

either by his documented history of several preexisting conditions, his history of heavy alcohol

drinking, or his prior traumatic brain injury. 177 Wn. App. 717, 728-31, 312 P.3d 989 (2013).

his hospital preexisting conditions, such as obstructive sleep apnea, and CT scans of his brain before and

after the respiratory event at the hospital. Id. at 728-30. In Needham, the court held that the trial court erred when it relied on Colley to admit

expert testimony that was irrelevant and highly prejudicial on the issue of causation. 11 Wn.

App. 2d at 493. In that case, the plaintiff had been found unconscious in a winter cabin a few

Id. at 481.

Id. He sued his primary care physician and

hospital, alleging medical negligence. Id. at 481-82. The trial court allowed

his collapse. Id. at 486.

The court determined that Colley was distinguishable because the experts there relied on

admissible evidence of a detailed medical history and a documented history of alcoholism. Id. at

495. In comparison, the experts in Needham shots of alcohol on the day of the incident and merely speculated that it was possible that alcohol

caused the collapse despite the fact that there was no alcohol found in his system when he was

admitted into the hospital. Id. at 496. The court concluded that the expert testimony was both

speculative and highly prejudicial with little probative value. Id. at 496-97.

2. Analysis

The trial court distinguished Colley from this case

y and her

prenatal marijuana and tobacco use were irrelevant, unduly speculative, lacked foundation,

ies did not meet the evidentiary

foundational requirements of ER 401-03 and ER 702. Both Dr. Wiswell and Dr. Fisher speculated that genetics was a possible y of

been restricted to males and that he had no knowledge about what type of genetic disorders the

CP

at 3484. Although Dr. Fisher believed that photos of LB showed some dysmorphic features, he

also admitted that it did not necessarily mean she had some kind of genetic disorder and that

there was nothing in her medical records that identified dysmorphia. Dr. Wiswell testified that

there was no specific diagnosis for the cause of the genetic abnormalities in the male family

membe

possibly was connected through

Donna, who had a seizure disorder. But Donna was diagnosed with adolescent epilepsy, which

presented differently from the type of seizures that LB experienced. And Dr. Wiswell admitted

that he had no knowledge as to what type of seizures that Donna had or whether it was

hereditary.

In short, the record shows that neither expert could draw the connection between

shortly after her birth.

In addition, neither expert provide marijuana use could have caused the type of injuries that LB sustained. Both Dr. Wiswell and

may have contributed Dr. Fisher also stated that there was no medical literature that showed a correlation between the prenatal marijuana use with the type of brain injury that LB sustained and that marijuana could

on likewise

acknowledged that the research was developing on how marijuana may change the brain or to

what extent marijuana use may affect pregnancy.

Finally, in Colley the court allowed defense experts to testify about possible causes of a

juries even though they could not state opinions regarding causation on a more

probable than not basis. 177 Wn. App. at 728-32. But Dr. Wiswell and Dr. Fisher did state

opinions regarding causation on a more probable than not basis s injuries

were caused by inflammatory or infectious processes. Colley is distinguishable on that basis.

still was reasonable under ER 403. JHC failed to establish that the proffered expert testimony

medical records that genetics may have caused or even contributed to her health issues or that

prenatal marijuana use could result in the type of injuries that LB sustained. Dr. Wiswell also

testified that a family history of genetic abnormalities and seizures and prenatal marijuana use

the CP at 3519.

Accordingly, we lim E. MOTION FOR MISTRIAL

JHC argues that the trial court erred in denying its motion for a mistrial on the grounds

that the Burkes committed a number of discovery and in limine order violations when they relied

on an excerpt from a 2019 textbook to establish the 2014 standard of conduct at trial. This

argument is incorrect.

1. Legal Principles

Under CR 59(a)(2), a court may vacate a verdict and grant a new trial if the prevailing

Spencer v.

Badgley Mullins Turner, PLLC, 6 Wn. App. 2d 762, 790, 432 P.3d 821 (201 A party seeking

a new trial ba s conduct must establish that (1) the conduct was misconduct, (2)

the misconduct was prejudicial, (3) the misconduct was objected to at trial, and (4) the

misconduct w s instructions. Id.

We review 59(a)(2) for abuse of discretion. Id. we consider

whether the aggrieved party was so prejudiced by the prevailing she was deprived of a fair trial. Id. The trial court is in the b to most effectively

s right to a fair trial. Id. (quoting Miller

v. Kenny, 180 Wn. App. 772, 815, 325 P.3d 278 (2014)).

2. Discovery Violations

JHC argues that the Burkes committed several discovery violations when they failed to

disclose that (1) they were in communication with the authors of a 2019 textbook regarding the

fetal heart strip as an example of maternal heart rate confusion and (2) they intended to use the 2019 textbook excerpt to establish the standard of care in 2014. This argument is

incorrect.

JHC fails to explain which specific discovery rules that it believes the Burkes violated.

60 in their amended trial witness and exhibit list and was provided to JHC through an online

folder. In addition, the 2019 textb

for impeachment and illustrative purposes, not as a form of expert opinion. Kitsap County Local

Rules 16(b)(1)(B) and (C) do not require parties to exchange exhibits that are used only for

impeachment or illustrative purposes.

Here, the 2019 textbook excerpt containing the fetal heart strip was used for

impeachment and illustrative purposes during trial, such as asking Dr. Lagana whether she

believed that the excerpt in the 2019 textbook was an example of how the fetal heart rate can be

heart

strip was identical to another example of maternal heart rate during contractions. Accordingly,

the Burkes were not required to disclose the 2019 textbook excerpt in discovery, but apparently

did so anyway.

3. In Limine Order Violations

limine orders, primarily on the grounds that the Burkes used the 2019 textbook excerpt to

establish the 2014 standard of care rather than for illustrative purposes. JHC also claims that

these violations were unduly prejudicial because it allowed the Burkes to prevail on its medical

negligence claim by holding Crawford to a new 2019 standard of care. These arguments are

incorrect. actually admitted as an expert opinion to establish standard of care. But the 2019 textbook
was

offered as a learned treatise that was admissible under ER 803(a)(18) for illustrative purposes.

referencing a 2019 standard of care, Dr. Lagana testified that the standard of care with respect to

the ability to distinguish the maternal heart rate from the fetal heart rate had not changed between

2001 and 2019. Further, there were several experts who reviewed the actual fetal heart strip

s a breach of standard of conduct while

monitoring the fetal heart rate. As a result, any misconduct was not prejudicial.

The trial court also provided a curative instruction to the jury to disregard the text in the 2019 textbook that described the fetal heart strip example. Therefore, any violation that may have occurred did not rise to the level of prejudice that requires a grant of new trial.

JHC argues that it was denied the opportunity to cross-examine the authors of the 2019 textbook. But JHC cites to no authority that has treated authors of a learned treatise as expert testimony. And as stated above, the 2019 textbook excerpt was used purely for illustrative purposes. JHC also had the opportunity to probe on cross-examination the validity and weight that should be afforded to the 2019 textbook excerpt. Accordingly, we reject this argument.

We

F. FAILURE TO RECUSE

JHC argues that the trial judge erred when she failed to reveal her potential bias regarding the alleged fact that she had a special needs child and subsequently failed to recuse herself given the appearance of bias. We decline to address this argument. JHC alleges that the trial judge stated during a side bar conference that she had a special needs child in her family. JHC argues that the judge should have notified the parties of this fact and ultimately should have recused herself. However, the record cites that JHC provides do not support its allegation that the trial judge revealed that she had a special needs child in her family. And nothing else in the record supports the allegation.

The party presenting an issue for review bears the burden to provide an adequate record to support his or her argument on appeal. Fahndrich v. Williams, 147 Wn. App. 302, 307, 194 P.3d 1005 (2008); see also RAP 9.2(b). JHC has not provided any record that supports its

argument that the trial judge acted inappropriately with regard to recusal.

Further, JHC did not object or raise any concern when the trial judge allegedly stated that she had a special needs child in her family. JHC responds that it was precluded from taking any action in the trial court because the trial court did not reveal her potential conflict during trial except for a passing reference. But nothing in the record shows that JHC asked the court to explain the statement or request more information. And JHC never filed a recusal motion or motion for mistrial based on this information. We generally do not consider issues raised for the first time on appeal. Samra, 15 Wn. App. 2d at 838.

G. AMENDING JUDGMENT TO PROVIDE FOR PERIODIC PAYMENTS UNDER RCW 4.56.260

The Burkes argue on cross-appeal periodic payments of future economic damages because JHC waived any right to seek periodic payments by (1) not providing sufficient notice that it planned to invoke RCW 4.56.260, (2) not proposing a periodic payment plan as required by RCW 4.56.260(2), and (3) not objecting to entry of This argument is incorrect.

1. Legal Principles

RCW 4.56.260(1) provides,

In an action based on fault seeking damages for personal injury or property damage in which a verdict or award for future economic damages of at least one hundred thousand dollars is made, the court or arbitrator shall, at the request of a party, enter a judgment which provides for the periodic payment in whole or in part of the future economic damages. With respect to the judgment, the court or arbitrator shall make a specific finding as to the dollar amount of periodic payments intended to compensate the judgment creditor for the future economic damages.

RCW 4.56.260(2) states that (1) r to entry of judgment, the court shall request each party

to submit a proposal for periodic payment of future economic damages to compensate the claimant ; and (2) the court shall select the proposal, with any changes the court deems proper, which in the discretion of the court and the interests of justice best provides for the future needs

Statutory interpretation is an issue of law that we review de novo. TST, LLC v. Manufactured Housing Dispute Resolution Program of Office of Attorney General, 17 Wn. App. 2d 662, 668, 485 P.3d 977 (2021). The primary goal of interpretation is to discern and give effect to the Id. We look to the plain language of the statute, the context of the statute in which the provision is found, and related statutes. Id. We give effect to all the language in the statute and do not render any portion meaningless or superfluous. Id.

Under CR 59(h), a trial court may alter or amend a judgment if a motion is brought within 10 days after its entry. CR 59(a) states nine grounds that support a new trial or reconsideration. But there are no required grounds for altering or amending a judgment under CR 59(h). CR 59(h) can be used t regarding the terms of the judgment. See Coulter v. Asten Group, Inc., 135 Wn. App. 613, 618-

to amend the judgment to provide for joint and several liability rather than several liability).

We review discretion. Worden v. Smith, 178 Wn. App. 309, 322, 314 P.3d 1125 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. Id. at 323. A court necessarily abuses its discretion if its decision is based on an erroneous view of the law. Id.

2. Sufficient Notice

The Burkes argue that JHC waived its right to request periodic payments because it did

not give sufficient notice that it planned to invoke RCW 4.56.260. This argument is incorrect.

In Esparza v. Skyreach Equipment, Inc., the defendant failed to notify the plaintiff of its

intention to request periodic payments under RCW 4.56.260 until after the jury returned its

verdict. 103 postverdict motion for periodic payments because it came too late, and the appellate court

agreed. Id. at 942. The court quoted with approval a California case stating that a request for

Id. at

943. The court emphasized that advance notice was required because the plaintiff must have the

opportunity to have its economic expert address the present value of future damages and the jury

must be instructed to allocate separate amounts for each category of future damages. Id. at 943-

44. Here, the record shows that JHC provided notice of its intent to invoke RCW 4.56.260 on

answers to discovery requests, dur

noneconomic damages as JHC requested for purposes of RCW 4.56.260. In comparison, the

defendant in Esparza failed to provide any notice regarding its intent to seek periodic payments

until after the jury had returned its verdict, which included a lump sum award for future

economic damages. 103 Wn. App. at 921.

must be at would equal the amount of loss at the time in the future when the expenses must be paid or the

at 2156. Instruction number 20 further instructed the

at 2156. In Esparza, there apparently was no expert testimony regarding

present value and the jury was not instructed on discounting future damages to present value.

103 Wn. App. at 944.

The better course of action may have been for JHC to reiterate its previously stated intent

t expert testified. However, Dr. DeKay testified at length about the present value of future

economic damages anyway. We conclude that JHC gave the Burkes and the trial court sufficient notice of its intent to

request periodic payments under RCW 4.56.260.

3. Submission of Periodic Payment Proposal

The Burkes argue that JHC waived its right to request periodic payments because it did

not submit a proposal for a periodic payment plan before judgment was entered. This argument

is incorrect.

to entry of judgment, the court shall request

each party to submit a proposal for periodic payment of future economic damages to compensate

the claimant. proposal for periodic payment when it notifies the other party and the court of its intent to seek

periodic payment under RCW 4.56.260. Instead, a periodic payment proposal need only be

submitted after the trial court requests one.

We conclude that JHC did not waive its right to request periodic payments under RCW

4.56.260 by not submitting a proposal for a periodic payment plan before judgment was entered.

4. Failure to Object to Judgment

The Burkes argue that JHC waived its right to request periodic payments because it did

not object to the judgment on the verdict that the trial court entered without a provision for

periodic payments for future economic damages. This argument is incorrect.

The plain language of RCW 4.56.260(1) and (2) contemplates that a defendant will

request periodic payments before entry of judgment. RCW 4.56.260(1) states that a trial court must include periodic payments in the judgment when a party requests it. And RCW 4.56.260(2) requires the court to request proposals for periodic payments before entry of judgment. Here, JHC allowed the trial court to enter a judgment on the verdict that did not include periodic payments. JHC certainly should have raised RCW 4.56.260 before entry of the judgment and requested that the court follow the procedure set forth in RCW 4.56.260(2).

However, CR 59(h) allows a party to file a motion to amend a judgment within 10 days after the judgment was entered. CR 59(h) does not state that a party is required to object to entry of the judgment in order to file a motion to amend, and the Burkes do not argue otherwise. In addition, the Burkes do not argue that CR 59(h) did not authoriz the judgment here. In fact, the Burkes do not mention CR 59(h) at all.

We conclude that JHC did not waive its right to request periodic payments under RCW 4.56.260 by not objecting to entry of the original judgment.

5. Summary

We to provide for periodic payments regarding future economic damages. On remand, the trial court must follow the procedure outlined in RCW 4.56.260(2). The t value.

H. CONSTITUTIONALITY OF RCW 4.56.260

The Burkes argue in the alternative that JHC cannot seek periodic payments under RCW 4.56.260 because it is unconstitutional on its face. This argument is incorrect.

1. Standard of Review

Whether a statute is constitutional is a question of law that we review de novo. Afoa v. & Indus., 3 Wn. App. 2d 794, 804, 418 P.3d 190 (2018). A statute is presumed

constitutional, and if possible, we will construe an enactment so as to render it constitutional. Kitsap County v. Kitsap Rifle & Revolver Club, 1 Wn. App. 2d 393, 413, 405 P.3d 1026 (2017).

The party challenging an enactment has the burden of showing beyond a reasonable doubt that it is unconstitutional. Afoa, 3 Wn. App. 2d at 804.

2. Jurisdictional Requirement of RCW 7.24.110

Initially, JHC argues that the Burkes have failed to preserve their constitutional challenges to RCW 4.56.260 because they failed to serve the attorney general with a copy of their proceedings as required by RCW 7.24.110. We disagree.

RCW 7.24.110 states When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. (Emphasis added.) The statutory requirement to notify the attorney general only applies when an action is brought under the Declaratory Judgment Act. See Watson v. Washington Preferred Life Ins. Co., 81 Wn.2d 403, 407-08, 502 P.2d 1016 (1972).

damages originated as a tort claim against JHC. They are challenging the constitutionality of RCW 4.56.260 in an appeal, and as a result, RCW 7.24.110 is inapplicable here. A party is not expected to serve the attorney general every time a constitutional challenge to a statute is raised. See Watson, 81 Wn.2d at 407-08. And all the cases that JHC cites to were brought under the Uniform Declaratory Judgment Act. Therefore, we

3. Right to Jury Trial

The Burkes argue that RCW 4.56.260 violates their right to a jury trial because it requires

This argument is incorrect. he right of trial by jury

shall remain inviolate highest protection. Davis v. Cox, 183 Wn.2d 269, 288, 351 P.3d 862 (2015), abrogated on other

grounds by Maytown Sand & Gravel, LLC v. Thurston County, 191 Wn.2d 392, 423 P.3d 223

(2018) questions of disputed ma Id. at 289. This includes the measure of damages. Sofie v.

Fibreboard Corp., 112 Wn.2d 636, 645, 771 P.2d 711 (1989). However, the right of trial by jury

is not limitless. Davis, 183 Wn.2d at 289.

RCW 4.56.260 has no effect on the amount of damages awarded by the jury. Nor does

RCW 4.56.260 dictate how the jury should compute the amount of damages to be awarded, such as whether the award should be at present cash value with inflation, present cash value without inflation, or what interest rate should apply. The jury makes the factual determination as to how to fairly compensate an injured plaintiff for future economic damages. RCW 4.56.260 only determines the manner in which injured plaintiffs will receive a portion of their judgment. And unlike in Sofie, where the Supreme Court held that RCW 4.56.250 was unconstitutional for placing a limit on recoverable noneconomic damages in violation of the right to a jury trial, 112 Wn.2d at 638, the plain language of RCW 4.56.260 does not impose a cap on damages available to an injured plaintiff.

The Burkes raise a number of arguments for the first time in their reply brief regarding

RCW 4.56.260(4). But we need not consider arguments that are raised for the first time in a

reply brief. , 12 Wn. App. 2d 815,

842, 460 P.3d 667, review denied, 196 Wn.2d 1025 (2020). Accordingly, we trial.

4. Separation of Powers

The Burkes argue that RCW 4.56.260 violates the separation of powers doctrine because

the legislature cannot dictate to the courts how judgments on jury verdicts should be entered.

This argument is incorrect.

The separation of powers doctrine ar the constitutional distribution of the

Port of Seattle v. Pollution Control H Bd.,

151 Wn.2d 568, 625, 90 P.3d 659 (2004) (quoting State v. Moreno, 147 Wn.2d 500, 505, 58 P.3d

265 (2002)). Although the separation of powers doctrine creates a clear distinction between each

branch of government and their respective functions, the legislative, executive, and judicial

Colvin v. Inslee, 195

Wn.2d 879, 891, 467 P.3d 953 (2020) (quoting Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d

173 (1994)).

tatute details the means by which the trial court

should enter judgment. The Burkes apparently allege that the legislature has eliminated a trial

quest. However, when RCW 4.56.260 is properly applied, the trial court simply

is fashioning the method by which the injured plaintiff will receive his or her total future

economic damages. And the court retains discretion with respect to which proposal for periodic

payment should be adopted after the jury has already considered various factors related to computing a fair and just award of future economic damages. Therefore, RCW 4.56.260 does

not violate the separation of powers doctrine.

The Burkes argu that a trial court must enter periodic payments upon request under certain circumstances is

equivalent to a legal conclusion, citing to Sofie, 112 Wn.2d 654 and City of Tacoma v ,

85 Wn.2d 266, 271-72, 534 P.2d 114 (1975). However, we need not consider any arguments

raised for the first time in a reply brief. Winter, 12 Wn. App. 2d at 842. Regardless, instructing

the trial court to provide for periodic payments in the final judgment is not the equivalent of a

legal conclusion. RCW 4.56.260 only impacts the way that certain future economic damages are

distributed. And both Sofie and are distinguishable from or inapplicable to this case.

Accordingly, we conclude that the Burkes failed to show that RCW 4.56.260 violates the

separation of powers doctrine.

5. Right to Equal Protection

The Burkes argue that RCW 4.56.260 violates the right to equal protection because the

statute discriminates between severely injured plaintiffs and less severely injured plaintiffs. This

argument is incorrect.

The equal protection clause of article I, section 12 of the Washington Constitution, and

the Fourteenth Amendment to the United States Constitution require that similarly situated

persons receive the same treatment. White v. Qwest Corp., 15 Wn. App. 2d 365, 373, 478 P.3d

96 (2020), review denied, 197 Wn.2d 1014 (2021).

If no fundamental right is being infringed and no suspect class is involved, as here, we

apply the rational basis standard of review to an equal protection challenge. Id. Under this

(1) it applies alike to all members within the designated class, (2) reasonable grounds exist to support the classification, and (3) the

classification bears a rational relationship to the purpose of the legislation Id.

The Burkes identify the relevant class as injured plaintiffs who obtain verdicts for future economic damages, and argue that RCW 4.56.260 treats members of the same class differently because only plaintiffs who are awarded at least $100,000 in future economic damages are subject to periodic payment modifications. As a result of this classification, the Burkes claim that RCW 4.56.260 violates their right to equal protection.

However, a rational basis exists for the $100,000 threshold. One reason for requiring periodic payments is to relieve the burden on defendants who otherwise might have to make large lump sum payments for future economic damages. That concern is not as significant for smaller economic damage awards. In addition, RCW 4.56.260 was enacted as part of the 1986 LAWS OF 1986, ch. 305, §§ 100, 801. Periodic payments arguably reduce costs for defendants. But again, the reduction in costs is not significant for smaller economic damage awards.

We conclude that the Burkes failed to show that RCW 4.56.260 violates their right to equal protection.

CONCLUSION

We and affirm the trial court

economic damages under RCW 4.56.260. A majority of the panel having determined that this opinion will not be printed in the

Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

MAXA, P.J.

We concur:

CRUSER, J.

VELJACIC, J.