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SUPREME COURT OF WASHINGTON

No. 31617-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

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

90728-5

Case No. 10-2-03985-1

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GINGER SMITH, a single woman,

Appellant,

v.

MICHEL LUNDY,

Respondent.

**FILED**  
SEP 10 2014

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STATE OF WASHINGTON  
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**APPELLANT/PETITIONER GINGER SMITH  
PETITION FOR REVIEW**

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TABLE OF CONTENTS

I. INTRODUCTION.....1

II. IDENTITY OF PETITIONER.....1

III. COURT OF APPEAL’S DECISION.....2

IV. ISSUES PRESENTED FOR REVIEW.....2

1. Whether a psychological expert witness can testify at trial without objective findings supporting his opinion was excluded by the trial court, and it was left for the jury to determine whether the expert had a reasonable physiological basis for his other opinions.....2

V. STATEMENT OF CASE .....2

A. Factual Background.....2

B. Procedural Background.....3

VI. ARGUMENT.....11

A. RAP 13.4(b)(1) & (2) Requires Review because the Court of Appeals Holding Directly Conflicts With Decisions of the Supreme Court, Other Appellate Courts, and the Rules of Evidence.....11

1. The Court of Appeals Disregarded the Gate Keeping Role of the Trial Court, and Allowed The Jury to Determine Whether Dr. Klein had a Reasonable Basis for “Other Opinions”..... 11,12

2. The Court of Appeals Disregarded the Requirement for a Psychological Expert to Base Opinions on Objective Data, and Not Just Rely Upon Statements as Foundation for an Opinion.....15

VII. CONCLUSION.....20

TABLE OF AUTHORITIES

	<i>Page</i>
<i>Cases</i>	
<u>Anderson v. Akzo Nobel Coatings, Inc.</u> , 172 Wash.2d 593, 606, 206 P.3d 857 (2011) .....	1,12,14
<u>Griswold v. Kilpatrick</u> , 107 Wash. App. 757, 761, 27 P.3d 246 (2001).....	1,12,13,14
<u>Intalco Aluminum Corp. v. Dep’t of Labor &amp; Indus.</u> , 66 Wash. App. 644, 663, 833 P.2d 390 (1992) <i>review denied</i> at 120 Wash.2d 1031 (1993).....	1,12
<u>Miller v. Stanton</u> , 58 Wash.2d 879, 886 (1961).....	16
<u>O’Donoghue v. Riggs</u> , 73 Wash.2d 814, 824 (1968).....	19
<u>Queen City Farms v. Cent. Nat’l Ins. Co.</u> , 126 Wash.2d 50, 102, 882 P.2d 703 (1993).....	17
<u>Sanchez v. Haddix</u> , 95 Wash.2d 593, 627 P.2d 1312 (1981).....	1,12,13,14
<u>Sehlin v. Chicago, Milwaukee, Stg. Paul and Pacific R. Co.</u> , 38 Wash. App. 125, 133, 686 P.2d 492 (Div. 3 1994).....	17
<u>Smith v. Lundy</u> , No. 31617-3-III, 2014 Wash. App. LEXIS 1567 (Wn. Ct. App. June 26, 2014).....	2,14,17,20
<u>Smith v. Lundy</u> , No. 31617-3-III, 2014 Wash. App. LEXIS 1886 (Wn. Ct. App. July 31, 2014).....	2,11
<u>State v. Alexander</u> , 62 Wash. App. 147 (1992).....	1,18,20
<u>State v. Carlson</u> , 80 Wash. App. 116 (1995).....	1,17,19
<u>State v. Fitzgerald</u> , 39 Wash. App. 652 (1985).....	1,18,20

***Page***

Walker v. State, 121 Wash.2d 214, 218, 848 P.2d 721  
(1993).....12,13,14

***Other Authorities***

ER 102.....12,14  
ER104.....12,14  
ER 608.....1,6,7,8,19  
ER 701.....18  
ER 702.....1,6,7,18,19  
ER 703.....1  
ER 705.....1  
RAP 13.4(b)(1)&(2).....1,11,20  
RAP 13.4(b)(4).....20

## **I. INTRODUCTION**

The Court of Appeals disregarded Washington Law and affirmed the errors committed by the Trial Court by not completely excluding Respondent's expert witness Ronald Klein, PhD., from testifying at trial. The Court of Appeals ignored the holdings in several cases decided by the Supreme Court and other Appellate Courts, including but not limited to *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash.2d 593 (2011), *Sanchez v. Haddix*, 95 Wash.2d 593 (1981), *Griswold v. Kilpatrick*, 107 Wash. App. 757 (2001), *State v. Carlson*, 80 Wash. App. 116 (1995), *State v. Fitzgerald*, 39 Wash. App. 652 (1985), *State v. Alexander*, 62 Wash. App. 147 (1992), *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 6 Wash. App. 644 (1992), *review denied*, at 120 Wash.2d 1031 (1993), and disregarded Rules of Evidence 608, 702, 703 and 705.

Rule of Appellate Procedure ("RAP") 13.4(b)(1) & (2) and Rules of Evidence 608, 702, 703, and 705 dictate that review be granted, and that the decisions of the Court of Appeals and Trial Court be reversed.

## **II. IDENTITY OF PETITIONER**

Petitioner Ginger Smith asks this Court to grant review of the decision by Division III of the Washington State Court of Appeals designated in Part III of this Petition for Review. Motion for Reconsideration was timely filed, and was denied on July 31, 2014.

### **III. COURT OF APPEAL'S DECISION**

Ms. Smith request review of Division III's decisions in *Smith v. Lundy*, No. 31617-3-III, 2014 Wash. App. LEXIS 1567, at \*1 (Wn. Ct. App. June 26, 2014), and *Smith v. Lundy*, No. 31617-3-III, 2014 Wash. App. LEXIS 1886, at \*1 (Wn. Ct. App. July 31, 2014).

### **IV. ISSUES PRESENTED FOR REVIEW**

1. Whether a psychological expert witness can testify at trial without objective findings supporting his opinion, after his only opinion was excluded by the trial court, and it was left for the jury to determine whether the expert had a reasonable physiological basis for his other opinions.

### **V. STATEMENT OF THE CASE**

#### **A. Factual Background.**

On February 7, 2008, Petitioner Ginger Smith was involved in a motor vehicle accident in Spokane, Washington. (CP 4). At the time of the accident, Ms. Smith was driving her vehicle southbound on Nevada Street in the County of Spokane, Washington when she was T-boned by the Respondent Michel Lundy's vehicle that was exiting a parking lot. (CP 4). Mr. Lundy's vehicle collided with the passenger side of Ms. Smith's vehicle with such force that Ms. Smith's vehicle was flipped onto the driver's side and into oncoming traffic in the northbound lane. (CP 4)

Following the accident, Ms. Smith was treated for injuries at Holy Family Hospital. (VRP 224)

Ms. Smith suffered multiple injuries, including a closed head injury. (CP 5-6). On February 11, 2008, Ms. Smith's treating physician Duncan Lahtinen, MD, diagnosed her with a closed head injury as a result of the accident. (CP 147). After treating Ms. Smith without success, and determining that Ms. Smith could not return to work following the accident, Dr. Lahtinen referred Ms. Smith for a disability evaluation at the Washington Department of Social and Health Services (DSHS). (CP 150-151).

In February of 2009, DSHS hired Dr. Debra Brown, PhD, to evaluate Ms. Smith. (CP 150-151). Dr. Brown performed objective neuropsychological testing on February 5, 2009; the testing indicated that Ms. Smith was permanently disabled due to a closed head injury. (CP 150-151). During litigation, Dr. Brown conducted a second round of neuropsychological testing on April 25, 2012 and April 26, 2012, which consisted of the Halstead-Retain Neuropsychological Battery. (CP 151). Dr. Brown's second round of testing confirmed her original opinion that Ms. Smith was permanently disabled as a result of suffering a closed head injury in the motor vehicle accident. (CP 151). Importantly, neither of the test batteries performed by Dr. Brown found any objective indication of

malingerer on the part of Ms. Smith. (CP 151). DSHS determined that Ms. Smith was permanently disabled as a result of closed head injury. (CP 150).

At the time of the accident, Ms. Smith was employed as Nurse Assistant at the Spokane Veteran's Home. (CP 165). Following the accident, Ms. Smith was never medically cleared to return to work of any kind. (CP 150). As a result of the injuries sustained and her inability to return to work, Ms. Smith initiated a civil action against the Respondent Michael Lundy. (CP 1-7).

**B. Procedural Background.**

Mr. Lundy retained Dr. Ronald Klein, PhD., as an expert witness to testify regarding Ms. Smith's claimed closed head injury. (CP 50). On August 5, 2011, Dr. Klein conducted a CR 35 examination of Ms. Smith, which included objective neuropsychological testing. (CP 180-194). Dr. Klein's performed a self-selected test battery, which included two psychological tests that specifically tested Ms. Smith for malingering. (CP 196-209) **Neither of the two objective tests conducted by Dr. Klein, which were specifically designed to test Ms. Smith for malingering, produced malingering results.** (CP 211-262).

On August 12, 2011, Dr. Klein authored a report, which was provided to Ms. Smith during the course of discovery. (CP 180-194). In



the August 12, 2011 report, Dr. Klein stated “[t]he overwhelming conclusion based on her performance during testing is that she was malingering, i.e. grossly exaggerating her deficits/complaints.” (CP 190). Malingering was the only opinion offered by Dr. Klein within his August 12, 2011, report as to why Ms. Smith had not suffered a closed head injury as a result of the accident. (CP 192-193).

In his report, Dr. Klein stated that his primary diagnosis of malingering diminished the weight of Ms. Smith’s verbal statements in general. (CP 192). Dr. Klein opined that Ms. Smith was malingering and was intentionally feigning illness, to achieve financial remuneration from the lawsuit. (CP 197-209). **The basis for Dr. Klein’s opinion was his record review, interview data, and multiple psychological tests, all of which Dr. Klein he stated were met with malingered responses.** (CP 192).

On April 23, 2012, Dr. Klein authored a second report, which was essentially a response to Ms. Smith’s expert witness Dr. Brown’s review of his first report. (CP 68-75). Once again, Dr. Klein’s only opinion as to why Ms. Smith did not suffer psychological injuries as result of the accident was malingering. (CP 68-75).

The psychological definition of malingering is contained within the “DSM-IV.” (CP 236). The DSM-IV states that “[m]alingerers

intentionally and purposefully feign illness to achieve some recognizable goal.” (CP 236). Dr. Klein agreed during his deposition that he did not find intent by Ms. Smith, or even look for Ms. Smith’s intent to malingering. (CP 208-209).

On October 19, 2012, Ms. Smith, moved the Trial Court for an order in limine to completely exclude the testimony of Dr. Klein. (CP 129-271). Ms. Smith presented argument and evidence supporting the exclusion of Dr. Klein pursuant to *Frye*, ER 702 and ER 608. (CP 130-279 & CP 459-469).

With regard to *Frye*, Ms. Smith’s counsel provided evidence that the two objective tests performed by Dr. Klein to determine whether Ms. Smith was a malingerer did not objectively show that Ms. Smith was a malingerer. (CP 211-262 & CP 197-209). Ms. Smith presented evidence from her experts, Dr. Brown and Dr. Kristopher Rhoads, that they did not find malingering within any objective testing that had been performed on Ms. Smith by anyone. (CP 150-151; CP 225-234). Ms. Smith also presented evidence that Dr. Klein did not find or even look for intent on the part of Ms. Smith to malingering, as required by DSM-IV in order to diagnosis malingering. (CP 208-209; CP 236). Ms. Smith presented evidence and argued that it was novel to diagnose malingering in the absence of objective findings, and such an opinion was not supported

within the neuropsychological community. (CP 136-141; CP 211-262; CP 197-209; CP 225-234).

With regard to *ER 702*, Ms. Smith also presented argument and evidence that Dr. Klein should be excluded as an expert witness because without an objective basis for diagnosing malingering, Dr. Klein's opinion was misleading, speculative, unreliable, not grounded in science, and not helpful to the jury. (CP 141-143 & CP 462-466). Finally, Ms. Smith presented argument that without objective findings supporting his opinion of malingering, Dr. Klein should be excluded as an expert witness pursuant to *ER 608*; because he was doing nothing more than commenting on the credibility of Ms. Smith by diagnosing her as a malinger. (CP 466-469).

The Trial Court granted Ms. Smith's motion in limine, and excluded Dr. Klein's malingering opinion. (RP 40-41). Respondent moved the Trial Court for reconsideration of its ruling. (CP 655-709). On November 9, 2012, the Trial Court denied Respondent's motion for reconsideration. (RP Vol. II, 5-9).

In denying the Respondents motion for reconsideration, the Trial Court noted that a review of the documents and reports authored by Dr. Klein showed his "unrelenting view is that Ms. Smith is a malingerer." (RP Vol. II, 5-6). "That's the theme that runs throughout his reports on

Ms. Smith.” (RP Vol. II, 6). The Trial Court reviewed Dr. Klein’s foundation for his opinion in light of the evidence, which included declarations and reports from Dr. Debra Brown and Dr. Rhoads, and found that the objective testing performed by Dr. Klein to serve, as the basis for his opinion of malingering did not support a finding of malingering. (RP Vol. II, 7-9). Without an objective basis for his opinion of malingering, Dr. Klein’s opinion was nothing more than a comment on the creditability of Ms. Smith. (RP Vol. II, 6-7). Dr. Klein’s opinion without supporting objective findings in this regard was found to mislead the jury pursuant to ER 702, and invade the province of the jury pursuant to ER 608. (RP Vol. II, 7).

After excluding Dr. Klein’s opinion of malingering, the Trial Court excluded Plaintiff’s expert witness Kristoffer Rhoads, PhD who would have provided testimony at trial regarding the problematic foundation for Dr. Klein’s opinion. (CP 225-234). Since the Trial Court excluded Dr. Klein’s only opinion of malingering, the Trial Court did not feel it was necessary for the Plaintiff to call Dr. Rhoads to rebut Dr. Klein’s opinion of malingering. (RP Vol II, 9). The Trial Court then conducted an abuse of discretion analysis and showed that its decision to exclude the opinion of malingering was support by substantial evidence. (RP Vol. II, 7).

After the trial court had excluded Dr. Klein's malingering opinion, on November 9, 2012, Ms. Smith moved to exclude Respondent's vocational expert Deborah LaPointe and economic expert Erik West. (CP 527-654). Ms. Smith argued that the basis for the opinions of Ms. Lapointe and Mr. West had been excluded when the trial court excluded Dr. Klein's only opinion of malingering, because their opinions were based upon Dr. Klein's opinion that Ms. Smith was a malingerer. (RP Vol. II, 19-24). Ms. Smith's motion to exclude Respondent's experts Ms. Lapointe and Mr. West was denied. (RP Vol. II, 24).

Despite excluding Dr. Klein's only opinion of malingering, the Trial Court refused to completely exclude Dr. Klein as an expert witness. (RP Vol II, 9-29). At trial Ms. Smith conducted voir dire of Dr. Klein where Dr. Klein admitted his only opinion as to why Ms. Smith had not suffered a traumatic brain injury as a result of the accident was that she was a malingerer. (RP 402; RP 407). Following voir dire of Dr. Klein, Ms. Smith moved again to completely exclude Dr. Klein as an expert witness. (RP 408-411). Ms. Smith argued that since the malingering opinion had been excluded, there was no foundation for any other opinion. (RP 411). In denying Ms. Smith's motion to exclude Dr. Klein as an expert, *the trial court ruled it was within the purview of jury to*

*determine whether Dr. Klein had a medical of psychological basis for his opinions.* (RP 411-412).

At trial, Dr. Klein admitted that his objective testing showed that Ms. Smith was impaired. (RP 397-398). When asked by Respondent's counsel for the psychological explanation for the deterioration of objective findings, Dr. Klein stated, "**[w]ell I know I'm not supposed to say any bad words;**" referring to the trial court's ruling excluding **malingering.** (VRP 505). Ms. Smith's counsel objected and moved to strike Dr. Klein's response. (VRP 505). The trial court stuck Dr. Klein's response. (VRP 505).

Because Dr. Klein only had one opinion, malingering, that had been excluded, and the Trial Court ruled that the jury could determine whether there was a reasonable basis for Dr. Klein's expert opinion, Ms. Smith appealed. (1077-1094). The Appellate Court filed its decision on June 26, 2014, affirming the Trial Court's decision. (*See Appendix A, Ex. 1*). The Appellate Court found there were other admissible opinions that were not dependent upon the excluded opinion of malingering. (*See Appendix A, Ex. 1*). Because the "other opinions" were in fact based on the excluded foundation and opinion of malingering. Ms. Smith asks the Appellate Court to reconsider its decision.

Ms. Smith motion for reconsideration was denied by the Court of Appeals. *Smith v. Lundy*, No. 31617-3-III, 2014 Wash. App. LEXIS 1886, at \*1 (Wn. Ct. App. July 31, 2014). Ms. Smith now petitions the Supreme Court for review, as the decision of the Court of Appeals conflicts with several decision of the Supreme Court, other Appellate Courts, and the Rules of Evidence. *RAP 13.4(b)(1) & (2)*.

## VI. ARGUMENT

### A. RAP 13.4(b)(1) & (2) Requires Review Because the Court of Appeals Holding Directly Conflicts With Decisions of the Supreme Court, Other Appellate Courts, and the Rules of Evidence.

The Supreme Court may grant a petition for review when the Court of Appeal's holding conflicts with a decision of the Supreme Court, another Appellate Court, or the Rules of Evidence. *RAP 13.4(b)(1) & (2)*. It is important for the Supreme Court to grant review in this matter because the decision of the Court of Appeals has allowed an expert psychological witness to testify at trial without: (1) objective findings to support his opinion; (2) to testify after the foundation for his opinion was excluded by the Trial Court; and (3) allowed the the jury determine whether there was a reasonable psychological basis for the experts other opinions.

#### 1. The Court of Appeals Disregarded the Gate Keeping Role of the Trial Court, and Allowed the Jury to

**Determine Whether the Dr. Klein had a Reasonable Basis for “Other Opinions.”**

The trial court “in its gatekeeping role, must decide if evidence is admissible.” *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash.2d 593, 606, 260 P.3d 857 (2011), citing *ER 102 & ER 104(a)*. “It is the function of the court, not the jury, to rule on the admissibility of evidence.” *Intalco Aluminum Corp. v. Dep’t of Labor & Indus.*, 66 Wash. App. 644, 663, 833 P.2d 390 (1992), *review denied* at 120 Wash.2d 1031 (1993). “Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.” *Griswold v. Kilpatrick*, 107 Wash. App. 757, 761, 27 P.3d 246 (2001). As the Appellate Court stated:

**The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert’s conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of fact.**

*Id.* at 761-62, citing, *Sanchez v. Haddix*, 95 Wash.2d 593, 627 P.2d 1312 (1981). “[I]t is an abuse of discretion for a court to admit expert testimony that lacks an adequate foundation.” *Walker v. State*, 121 Wash.2d 214, 218, 848 P.2d 721 (1993).

The Trial Court abused its discretion by allowing Dr. Klein to testify when he did not have adequate foundation for any other opinion other than his excluded opinion of malingering. *Walker*, 121 Wash.2d at



218. The Trial Court specially allowed the jury to determine whether there was a basis for any other opinion offered by Dr. Klein. (RP 411-412). As the Trial Court stated, “[a]nd it may well be, according to the understanding and reckoning of the jury, that there is no reasonable basis or psychological basis for the Dr. Klein offering his opinion.” (RP 411). The Trial Court also stated, “[i]t may not be deemed to be meterious in the plaintiff’s view, plaintiff’s counsel’s view either, nonetheless, it will be within the jury’s purview to determine whether or not there is no reasonable basis whatever...” (RP 412). These statements within the Trial Court’s ruling are clear error. *Walker v. State*, 121 Wash.2d 214, 218, 848 P.2d 721 (1993).

The basis for a psychological opinion must be established prior to an expert taking the stand at trial. *Griswold*, 107 Wash. App. at 761-762; citing, *Sanchez v. Haddix*, 95 Wash.2d 593, 627 P.2d 1312 (1981). As the gatekeeper of evidence, the Trial Court has a duty to ensure that the scientific basis must be sufficiently trustworthy and reliable to remove the danger of speculation con conjecture and give at least minimal assurance that the opinion can assist the trier of fact. *Id.* The Trial Court allowed the jury to determine whether Dr. Klein had a reasonable basis for his expert opinion while he was on the stand, which defeats the entire purpose of the gatekeeping role of the Trail Court. By allowing the jury to

determine the basis for Dr. Klein’s “other opinions,” the Trial Court committed clear error. *Walker v. State*, 121 Wash.2d 214, 218, 848 P.2d 721 (1993).

In its decision affirming the Trial Court’s the Appellate Court states that Dr. Klein had other relevant testimony and other admissible opinions. *Smith v. Lundy*, 2014 Wash. App. LEXIS 1567 \* 7. However, all of the “other opinions” and “other relevant testimony” were based on Dr. Klein’s excluded opinion that Ms. Smith was a malingerer. (CP 180-194; Cp 225-234; CP 925-1003; RP 391-408). The Appellate Court recognized within its opinion that all “these opinions fed into and support Dr. Klein’s ultimate opinion that Ms. Smith was malingering...” *Smith v. Lundy*, 2014 Wash. App. LEXIS 1567 \* 8. As the Appellate Court stated:

**[a]lthough these opinions fed into and supported Dr. Klein’s ultimate opinion that Ms. Smith was malingering, the fact that Dr. Klein could not support a full opinion of malingering did not make these component opinions any less relevant and helpful to determining the nature and extent of Ms. Smith’s injuries.**

*Id.* By affirming the Trial Court’s ruling in this regard, the Appellate Court disregarded the Trial Court’s duty as the gatekeeper of evidence, and obligation to ensure that a psychological expert has a basis for his opinion prior to taking the stand at trial. *See, Anderson*, 172 Wash.2d at 606, citing *ER 102 & ER 104(a)* *See also, Griswold*, 107 Wash. App. at 761-

762; citing, *Sanchez v. Haddix*, 95 Wash.2d 593, (1981). The Court of Appeals committed error as well. *Walker*, 121 Wash.2d at 218.

For these reasons Ms. Smith asks that the Supreme Court grant review of the Court of Appeals decision.

2. **The Court of Appeals Disregarded the Requirement for a Psychological Expert to Base Opinions on Objective Data, and Not Just Rely Upon Statements as Foundation for an Opinion.**

In the present matter, Dr. Klein's objective testing showed that Ms. Smith was impaired with a closed head injury. (RP 397-398). Dr. Klein's objective testing of Ms. Smith for malingering did not produce malingered results. (CP 150-151, 202-203, & 211-271; (RP Vol. II, 5-7). Also, Dr. Klein did not find intent on the part of Ms. Smith necessary to diagnosis malingering pursuant to DSM-IV. (CP 236). Despite not producing objective findings of malingering, or intent, Dr. Klein found that Ms. Smith did not suffer a closed head injury as a result of the motor vehicle accident because she was a malingerer. (CP 910).

Dr. Klein simply found that Ms. Smith did not suffer a closed head injury because he personally did not believe her statements. In the absence of objective findings, Dr. Klein's report states his opinion is based solely on his perception of Ms. Smith's truthfulness:

**To a reasonable degree of medical certainty, Ginger Smith has not suffered psychological injuries as a result of the 02/07/2008**

**MVA. Her description of symptoms/problems is inconsistent with known clinical patterns and inconsistent with her own stated history. While the description of the accident certainly sounds like an event capable of creating psychological injuries, our attempts to verify that in a careful investigative manner, using record review, interview data, and multiple psychological tests, were all met with a series of malingering responses from Ginger, as noted above throughout this report. The data not only establish Malingering as her primary diagnosis, but also diminish the clinical weight of her verbal statements in general. Thus when she complains of panic attacks, and checks off a series of symptoms from the DSM-IV diagnostic criteria, we are faced with whether or not to place psychological weight on her assertions, or whether this is just another aspect of her malingering presentation. In a sense she has “polluted the waters” by presenting herself as she has.**

(CP 910) (emphasis added). Despite Dr. Klein’s neuropsychological testing showing that Ms. Smith sustained a closed head injury, he disregarded the objective test results and simply chose not to believe Ms. Smith complaints. (CP 910; RP Vol. II 5-7).

The Trial Court excluded Dr. Klein’s opinion that Ms. Smith was a malingerer because Dr. Klein did not have an objective basis to support his opinion. (RP 40-41; RP Vol. II, 5-7). However, the Trial Court allowed Dr. Klein to testify at trial without a foundation for any other opinions. The Court of Appeals affirmed the Trial Court’s decision.

In its decision affirming the Trial Court’s the Appellate Court states that Dr. Klein had other relevant testimony and other admissible

opinions. *Smith v. Lundy*, 2014 Wash. App. LEXIS 1567 \* 7. As the Appellate Court stated:

**[a]lthough these opinions fed into and supported Dr. Klein’s ultimate opinion that Ms. Smith was malingering, the fact that Dr. Klein could not support a full opinion of malingering did not make these component opinions any less relevant and helpful to determining the nature and extent of Ms. Smith’s injuries.**

*Id* at 8. The Court of Appeals holding is in conflict with other Appellate Court decisions in this regard.

In *State v. Carlson*, 80 Wash. App. 116, 118 (1995), the Appellate Court addressed the opinion rendered by expert witness Dr. Virginia Feldman. Dr. Feldman was hired by the prosecution to conduct an examination of the alleged victim in a child molestation case. *Id.* Dr. Feldman was unable to form an opinion, based on physical findings, whether the alleged victim had been molested. *Id.* Despite the lack of objective physical findings, Dr. Feldman testified that it was her opinion that the alleged victim had been molested. *Id.* at 118-121. The basis for Dr. Feldman’s expert opinion was that she “trusted the interview that [E] had been sexually abused by her father.” *Id.* at 120. On cross-examination, the defense challenged the foundation for Dr. Feldman’s opinion; that the opinion was not based upon physical findings. *Id.* at 122.

The defense unsuccessfully moved to exclude Dr. Feldman's opinion, and appealed the trial court's decision. *Id.*

The Appellate Court noted that Dr. Feldman's opinion could not be offered to prove the creditability of the alleged victim. *Id.* at 123, citing *ER 701* and *ER 702*. Dr. Feldman's opinion as a lay witness was inadmissible because she lacked personal knowledge. *Id.* at 124, *ER 701*. Dr. Feldman's opinion was also inadmissible as an expert witness because the "general rule is that a witness qualified as an expert may testify on the basis of 'scientific, technical or other specialized knowledge' if his or her testimony 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Id.* at 124, citing *ER 702*. "Washington law has never recognized the ability of a doctor or other expert to diagnose sexual abuse based only on the statements of an alleged victim." *Id.* at 125. Without objective physical findings, the Appellate Court found Dr. Feldman's opinion to be inadmissible. *Id.*

**In making its determination, the Appellate Court found that an expert may not offer an opinion on an ultimate issues of fact based solely on the expert's perception of the witnesses truthfulness.** *Id.* at 127-128, citing *State v. Fitzgerald*, 39 Wash. App. 652, 656-657 (1985); *State v. Alexander*, 62 Wash. App. 147, 154 (1992). The Appellate Court

reversed the decision of the trial court, finding it was error to admit Dr. Feldman's opinion based on the rules of evidence. *Id.* at 129.

The Trial Court's analysis and ultimate finding that the objective neuropsychological testing performed by Dr. Klein to support his opinion of malingering did not meet the criteria that an expert would use to determine whether a person was in fact a malingerer was correct. (RP Vol. II, 8-9). Without an objective basis for his opinion of malingering, Dr. Klein's opinion was nothing more than a comment on the creditability of Ms. Smith. (RP Vol. II, 6-7). Dr. Klein's opinion without supporting objective findings in this regard was found to mislead the jury pursuant to ER 702, and invade the province of the jury pursuant to ER 608. (RP Vol. II, 7).

By excluding Dr. Klein's opinion of malingering, the Trial Court excluded the very foundation upon which the malingering opinion was formed. (RP Vol. II, 8-9). Because the Trial Court had excluded Dr. Klein's opinion of malingering, and the foundation upon which it was based, Dr. Klein's "component opinions" were not supported by objective findings. Without an objective basis for his opinions, Dr. Klein was permitted to offer opinions that were solely based upon the veracity of Ms. Smith's statements in violation of Washington Law. *Carlson*, 80 Wash.

App. at 127-128, citing *State v. Fitzgerald*, 39 Wash. App. 652, 656-657 (1985); *State v. Alexander*, 62 Wash. App. 147, 154 (1992).

The Appellate Court also stated that these “other opinions” were admissible because there were no challenges to the facts or data relied upon by Dr. Klein to reach these other opinions. *Smith v. Lundy*, 2014 Wash. App. LEXIS 1567 \* 9. However, all of the facts and data relied upon by Dr. Klein were excluded by the Trial Court, leaving nothing for Ms. Smith to challenge. (RP Vol. II, 7-9).

For these reasons, Ms. Smith asks that the Supreme Court accept review in this matter.

## VII. CONCLUSION

Pursuant to the forgoing, Ms. Smith requests this Court accept her petition for review pursuant to RAP 13.4(b)(2) and/or RAP 13.4(b)(4).

DATED this 2<sup>nd</sup> day of September, 2014.

AXTELL, BRIGGS & FREEBOURN, PLLC



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Attorney for Appellant Ginger Smith



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 2<sup>nd</sup> day of July, 2014, I caused to be served a true and correct copy of the foregoing document to the following:

- |                                     |                  |                          |
|-------------------------------------|------------------|--------------------------|
| <input checked="" type="checkbox"/> | HAND DELIVERY    | Todd Startzel            |
| <input type="checkbox"/>            | U.S. MAIL        | Kirkpatrick & Startzel   |
| <input type="checkbox"/>            | OVERNIGHT MAIL   | 1717 S. Rustle, Ste. 102 |
| <input type="checkbox"/>            | FAX TRANSMISSION | Spokane, WA 99224        |
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CHAD FREEBOURN

**APPENDIX A**  
**EXHIBIT “1”**

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**JUN 27 2014**

**AXTELL, BRIGGS,  
& FREEBOURN, PLLC**

**FILED**

**JUNE 26, 2014**

**In the Office of the Clerk of Court  
WA State Court of Appeals, Division III**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

GINGER M. SMITH, a single person,	)	No. 31617-3-III
	)	
Appellant,	)	
	)	UNPUBLISHED OPINION
v.	)	
	)	
MICHAEL LUNDY and JANE DOE	)	
LUNDY, a marital community,	)	
	)	
Respondents.	)	

KORSMO, J. — Plaintiff Ginger Smith won a motion-in-limine, but it did not have the desired effect of keeping the defendant’s expert witnesses off the stand. Finding no abuse of discretion in the trial court’s rulings, we affirm.

**FACTS**

In February of 2008, Michael Lundy struck a vehicle being driven by Ms. Smith. The force of the collision caused Ms. Smith’s vehicle to roll over. She suffered numerous physical injuries and possibly a closed head injury.

As time passed, Ms. Smith's physical injuries largely resolved, but she appeared to have sustained a permanent neuropsychological impairment. Prior to the collision, Ms. Smith worked as a certified nursing assistant (CNA) and also attended school with the hope of becoming a registered nurse. After the collision, she never felt well enough to return to work or school.

Believing herself permanently disabled, Ms. Smith filed for disability benefits. In early 2009, the Washington State Department of Social and Human Services (DSHS) referred Ms. Smith for a neuropsychological exam with Debra Brown, Ph.D., to determine the nature and extent of her claimed mental disability. Dr. Brown found that Ms. Smith had several mild to moderate forms of dysfunction in different places in the brain, no indication of malingering, cognitive disorder not otherwise specified, and post-traumatic stress disorder. Ms. Smith obtained disability benefits based on these findings.

In September of 2010, Ms. Smith filed her complaint against Mr. Lundy. Ms. Smith claimed that the collision caused her debilitating mental impairment. She claimed that this impairment permanently prevents her from returning to work as a CNA and from being able to complete nursing school.

Mr. Lundy retained neuropsychologist Ronald Klein, Ph.D. In 2011, Dr. Klein performed a CR 35 mental examination on Ms. Smith. Based on his testing and examination, Dr. Klein believed Ms. Smith to be malingering her mental impairment. He also found that Ms. Smith's self-described symptoms did not match the recognized

No. 31617-3-III  
*Smith v. Lundy*

clinical patterns of someone with her claimed mental injuries. He found a lack of causation between Ms. Smith's claimed anxiety disorder and the collision with Mr. Lundy. He also believed that Ms. Smith's pre-injury educational and vocational history suggested that Ms. Smith was never likely to have completed college and become a registered nurse.

To support her allegations, Ms. Smith retained Dr. Brown—the same neuropsychologist who examined Ms. Smith on behalf of DSHS. Dr. Brown conducted additional testing on Ms. Smith and found the results to be consistent with her original tests in 2009.

Dr. Klein reviewed Dr. Brown's updated findings. In a follow-up report, Dr. Klein argued that Dr. Brown misinterpreted the data from her testing on Ms. Smith. Instead of showing a mental impairment, Dr. Klein believed that the results from Dr. Brown's testing data showed a person with average mental capacity.

Ms. Smith filed a motion to exclude Dr. Klein's opinion of malingering. Ms. Smith supported her motion with a declaration from her rebuttal expert, neuropsychologist Kristoffer Rhoads, Ph.D. Dr. Rhoads explained that Dr. Klein's test results did not fall within the range of malingering. He also explained that Dr. Klein's interpretation of the testing data and resulting opinion regarding malingering substantially departed from the generally accepted standards applied by the neuropsychological community. After a hearing, the court excluded Dr. Klein's malingering opinion.

No. 31617-3-III  
*Smith v. Lundy*

Ms. Smith then brought motions to completely exclude Dr. Klein, and Mr. Lundy's two damages experts—Erick West and Deborah Lapoint – on the basis that all of their testimony was predicated entirely on the excluded malingering opinion. The court denied the motions because Dr. Klein had other helpful opinions to present, and because the exclusion of the malingering diagnosis did not render the damages experts' opinions unreliable.

At trial in December of 2012, Ms. Smith's counsel conducted a voir dire examination of Dr. Klein. Counsel asked Dr. Klein if he had any reason, other than malingering, for rebutting the objective testing that showed Ms. Smith had suffered a closed head injury. Dr. Klein responded that his finding of malingering was the only way he could rebut the testing, but also testified that he still maintained additional opinions that were not dependent on a malingering opinion. Ms. Smith renewed her motion to exclude Dr. Klein completely. The court denied the motion, noting that "there's quite a bit of information and material on which a skillful and searching cross-examination of Dr. Klein can be conducted even without Dr. Klein's ability to testify on the subject of malingering." Report of Proceedings at 411.

Dr. Klein then testified in front of the jury on direct examination that Ms. Smith did not suffer a closed head injury and that she did not have any psychological impediment that would prevent her from returning to work. Dr. Klein testified that the long-delayed manifestation of Ms. Smith's neuropsychological symptoms weighed

No. 31617-3-III  
*Smith v. Lundy*

against there being a causal connection to the collision. He also testified that Ms. Smith's self-reported symptoms did not match known manifestation patterns of other brain injury patients. He further testified that the tests done by Dr. Brown were all within normal functioning ranges and that Dr. Brown misinterpreted the data.

At the conclusion of the trial, Ms. Smith asked the jury to award past economic and non-economic damages as well as future economic and non-economic damages due to Ms. Smith's permanent mental impairment. The jury returned a special verdict awarding past economic and non-economic damages, but refused to award any future damages. Ms. Smith then appealed to this court.

#### ANALYSIS

Ms. Smith primarily challenges the trial court's refusal to exclude Dr. Klein under ER 702. This court reviews evidentiary rulings for abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). A court abuses its discretion when it exercises discretion on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "If the trial court's ruling is based on an erroneous view of the law or involves application of an incorrect legal analysis it necessarily abuses its discretion." *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833, 161 P.3d 1016 (2007).

To admit expert testimony, the proponent must show that the testimony would be helpful to the jury. ER 702. Expert testimony is not helpful if the judge determines that

No. 31617-3-III  
*Smith v. Lundy*

the testimony is based on speculation or is unreliable. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001); *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 920, 296 P.3d 860 (2013). A court also may not admit expert testimony if the court determines that the facts or data relied on by the expert are not of a type reasonably relied upon by experts in the particular field. *Lakey*, 176 Wn.2d at 918.

Ms. Smith argues that Dr. Klein should have been excluded as unhelpful because he did not have any admissible opinions to offer to the jury. She directs the court to her voir dire examination of Dr. Klein where he testified that his only basis for discounting Ms. Smith's impaired test results was to opine that she was malingering.

However, the fact that Dr. Klein could not tell the jury the full reason why he did not trust the test results did not mean that he did not have other relevant testimony to provide. Dr. Klein had other admissible opinions that did not rely on the excluded diagnosis of malingering, including his partial disagreement with Ms. Smith's test results because he believed that Dr. Brown misinterpreted the testing data. He testified that Ms. Smith's pre-injury educational and vocational history made it doubtful that she would have completed nursing school with or without having suffered a closed head injury. He believed that Ms. Smith's clinical presentation did not match the recognized clinical patterns of someone who had suffered Ms. Smith's claimed mental impairment. Although these opinions fed into and supported Dr. Klein's ultimate opinion that Ms. Smith was malingering, the fact that Dr. Klein could not support a full opinion of



No. 31617-3-III  
*Smith v. Lundy*

malingering did not make these component opinions any less relevant and helpful to determining the nature and extent of Ms. Smith's injuries. Accordingly, the trial court had tenable grounds for denying the motion.

Ms. Smith also argues that the trial court abused its discretion by delegating its gatekeeping function to the jury. While the court under ER 702 must make a threshold determination of reasonability, the trier of fact must also make a determination of reasonability. Reviewing in full the record on the motion, rather than focusing on the limited excerpt of the ruling relied on by counsel, we conclude that the court did not delegate its gatekeeping function to the jury. After reviewing the record, listening to Dr. Klein testify, and receiving argument from counsel, the court found that Dr. Klein had plenty of opinions other than malingering. Because there were no challenges to the facts or data relied on by Dr. Klein to reach these other opinions, the court was not required to delve further before permitting him to testify.

Ms. Smith next challenges the trial court's refusal to exclude Mr. Lundy's two damages experts whose opinions were based on Dr. Klein's reports. Because the court properly permitted Dr. Klein to offer his opinions to the jury, the court did not err by also permitting Mr. Lundy's damages experts to testify based on those opinions.

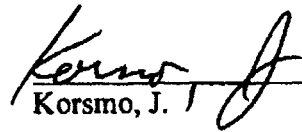
Finally, Mr. Lundy requests his attorney fees on appeal for having to defend against what he believes was a frivolous appeal. While Ms. Smith did not ultimately

No. 31617-3-III  
*Smith v. Lundy*

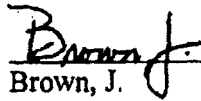
prevail in her appeal, we do not believe that this appeal is so lacking in merit as to warrant an award of attorney fees under RAP 18.9.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Korsmo, J.

WE CONCUR:

  
Brown, J.

  
Siddoway, C.J.