No. 316173

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

GINGER SMITH,
Plaintiff/Appellant,

v.

MICHEL LUNDY,
Defendant/Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves allegations of personal injuries resulting from a motor vehicle accident. The Appellant (hereinafter, "Smith") alleged a closed head injury and *permanent* disability that prevented her from *ever* working again. She relied on the testimony of her family physician Dr. Duncan Lahtinen, M.D., and her retained expert Dr. Debra Brown, Ph.D., to support her allegations. The jury returned a verdict with total damages of $76,912.00, and did not award any future economic or non-economic damages. CP 1073. The jury did not find that Smith had the permanent disability that she claimed because of several factors, to include lack of credibility in her key expert witness, Dr. Lahtinen. See CP __--__, *Declarations of Jurors* (filed with the trial court February 7, 2013).

There was evidence at trial from many sources (medical evaluations, interview data, her videotaped deposition, etc.) showing that Smith had consistently underperformed in medical evaluations, and that she gave performances that were "nonphysiological," exaggerated and not consistent with the science of closed head injury.

Several written expert reports were exchanged during discovery, and many depositions taken of the various experts. Respondent Michel Lundy

(hereinafter, "Lundy") presented defense expert, Dr. Jennifer James, M.D. Dr. James conducted a medical examination and produced a report concluding that Smith could return to work, and that she was not permanently disabled – contrary to the opinion of Dr. Lahtinen. Lundy's expert, Dr. Ronald Klein, Ph.D., conducted a neuropsychological evaluation of Smith and produced two (2) written reports. Dr. Klein was also deposed, and had *voir dire* conducted by Smith's counsel in advance of testifying at trial. Dr. Klein's opinion was that Smith did not suffer from a closed head injury, and that she was not permanently disabled and could return to work.

The trial court properly concluded that there was a proper basis for Dr. Klein's opinion, and that the jury would be allowed to determine what weight to give it. The trial court properly exercised its discretion and should be affirmed.

II. STATEMENT OF ISSUES

Did the trial court abuse its discretion when it allowed Respondent's experts to testify at trial after receiving substantial evidence providing a basis for their opinions, and leaving it for the jury to determine what weight to give the testimony?

III. STATEMENT OF THE CASE

Smith attempted several times to have Dr. Klein excluded. The trial court made it clear from the initial attempt that Dr. Klein had a basis for his opinion, but that he would not be allowed to specifically opine that Smith was a malingerer. This was based on the trial court's interpretation, over Lundy's objection, of what was required by Evidence Rule 608. As the trial court clearly stated after reviewing the topic several times, "**[t]here is a basis**." VRP Volume 2, p. 412, ln. 12.

A. The trial court's ruling that limited Dr. Klein's testimony was narrow, and only applied to calling Appellant a malingerer, nothing else.

At hearing on October 19, 2012, regarding Dr. Klein's expert opinions, the trial court ruled:

> I believe the Court is required to grant the motion in limine as to Dr. Klein's testimony on malingering. So he will be ***limited*** on that. . . . By limiting this expert testimony on malingering, ***I do not limit any other aspects of Dr. Klein's testimony on traumatic brain injury and the like subject matters***.

VRP, Volume 1, p. 41, lns. 7-17, emphasis added. An *Order* was entered that limited Dr. Klein on only one thing, stating that Smith was a malingerer. CP 1093-1094.

At hearing on November 2, 2012, the trial court stated that, "the

contours of what Dr. Klein will be permitted to testify about is better addressed in the hearing next week [on November 9, 2012]." VRP Volume 1, p. 53, lns. 22-24. On November 9, 2012, the trial court made clear that Dr. Klein had a basis to testify apart from the narrow limitation that he could not opine that Smith was a malingerer. VRP Volume 1, p. 9, lns. 14-15; VRP Volume 1, p. 12, lns. 15-19.

1. Dr. Klein was properly allowed to testify that Appellant presented information that is not consistent with a traumatic brain injury.

As counsel for Lundy pointed out, Smith's test results on one test were ".1 percentile, grossly retarded[,]" and that this would mean that she could not even drive a vehicle - which she had done on multiple occasions following the accident. The trial court determined that there was a basis for such evidence, and it was admissible. VRP Volume 1, pp. 12-13, lns. 1-8. The trial court also ruled that, "[t]he witness is permitted to say what the patient told me is not consistent with what her claim of symptoms of diagnoses are." VRP Volume 1, pp. 15-16.

Even Smith's counsel conceded that:

> We all know the experts that testify in these cases a lot of times and they will have an opinion and their opinion will be I don't think you're injured at all or I don't think you were injured to the extent, and then they'll have that sort of

opinion."

VRP Volume 1, p. 16, lns. 20-24.

Regarding Lundy's experts, Erick West and Deborah Lapoint, the trial court pointed out that, "both counsel pointed out experts are commonly relied upon and certainly are permitted to utilize and incorporate reports of other experts in order to reach their own expert opinions." VRP November 9, 2012, p. 24, lns. 8-11.

At hearing on December 10, 2012, the trial court made it even more clear that it was proper for opinion testimony to include medical comparative testimony and "nonphysiological reasons." VRP Volume 1, p. 99, lns. 1-14.

2. The Physical Capacity Evaluation (PCE) that Appellant completed was compelling evidence contrary to Smith's claims at trial.

When Kathryn Drader, OTR, the person that administered Smith's PCE, testified she confirmed that the PCE was invalid. This meant that the results were, "not true; not consistent." VRP Volume 2, p. 148, lns. 10-13. Smith also demonstrated a "cogwheel release" during the PCE, which is evidence of "simulated weakness," that cannot be explained by neurologic origin. VRP Volume 2, p. 161, lns. 4-16.

Smith's reported pain levels did not equate to her movement patterns,

or her observed heart rate – meaning that her reported pain levels were not valid. VRP Volume 2, p. 163-164. Ms. Drader did not observe any sign or symptom during the PCE that would indicate that Smith suffered from a mild traumatic brain injury. VRP Volume 2, p. 165, lns. 18-19.

3. The emergency room physician that treated Appellant observed nothing that would indicate Appellant had a traumatic brain injury.

According to the attending physician in the emergency room, Dr. Edwin Stroup, had no issue with recalling the events involved in the accident. VRP Volume 2, p. 213, lns. 2-5. Her head and face had, "no erythema, which means no redness; no hematoma, which means no black and blue bruising or swelling." VRP Volume 2, p. 216, lns. 2-4. Dr. Stroup's impression in the emergency room was that Smith did not have a traumatic brain injury. *Id.*, pp. 219-220.

4. Dr. Jennifer James conducted a medical examination and concluded that Appellant could return to work, and that she saw no indication that Appellant suffered from a traumatic brain injury.

Dr. James has a professional history that includes previous work as a physical therapist. This work included administering many PCEs. VRP Volume 2, pp. 306-307. She also had extensive experience in working with people that have had traumatic brain injury. *Id.*, pp. 308-309. As part of her

examination she specifically looks for cognitive issues. *Id.*, pp. 310-311. Dr. James specifically recounted her review of the incident report from the first responders, Emergency Medical Services, and the fact that this report classified the incident as a "[m]otor vehicle accident with no injuries," and the report also stated that is was a "[n]on-injury motor vehicle accident." VRP Volume 2, pp. 313-314.

Dr. James also noted that Smith's pain complaints do "not make neuroanatomical, physiologic sense." VRP Volume 2, p. 321, lns. 4-13. Dr. James also testified that it was her opinion that some of Smith's symptoms are explained by her use of prescription medication, and not a result of the accident. *Id.*, pp. 327-329.

Dr. James testified that Smith "did an excellent job of describing the accident" at the IME, that Smith was articulate and gave an excellent visual-spatial picture of what happened, and this "is not consistent with someone who is suffering from a brain injury." VRP Volume 2, pp. 331-332.

Dr. James also observed Smith not really put any weight on her cane (*i.e.*, used it as a prop), and that Smith demonstrated no issues with balance. VRP Volume 2, pp. 333-335. Dr. James also noted that Smith complained of pain and dysfunction with "no physiologic basis." *Id.*, pp. 336-337, 340-

342, 345, 347-349, 351. In other words, Smith was not providing credible information or test results. In her opinion, she found "no information anywhere in the medical records to support a closed head injury." VRP Volume 2, p. 374, lns. 15-17. And that "[Smith] doesn't meet enough of the objective criteria to confirm a mild traumatic brain injury." *Id.*, p. 379, lns. 18-19.

Dr. Klein's opinions, prior to testifying at trial, were contained in two different written reports, and his deposition testimony. VRP Volume 2, p. 393, lns. 1-5. Dr. Klein's opinions were included throughout his written reports, with his ultimate opinion being that Smith did not have a closed head injury and she was capable of returning to work. Dr. Klein was plainly qualified to offer his opinion, having done over 1200 neuropsychological assessments over the course of a long career. VRP Volume 2, p. 394, lns. 24-25; CP 319-331. The basis for his opinion that Smith did not have the mild traumatic brain injury that she claimed was her medical history (including the PCE of Smith), interview data, and neuropsychological test results (of which, he considers the total set of scores and comparisons within a test) which were all presented in his written reports and deposition testimony. VRP Volume 2, pp. 394-396; CP 838-852; CP 68-75. Dr. Klein found no evidence of the

panic attacks claimed by Smith. *Id.* He did not find evidence to support an opinion that she had a closed head injury in her medical history, interview data or testing results. VRP Volume 2, p. 404, lns. 2-8.

5. Dr. Ronald Klein had substantial evidence in support of his opinion that Appellant could return to work, and that she did not suffer from a traumatic brain injury.

Dr. Klein opined in his written report that her cognitive scores are consistent with normal functioning, and there was nothing in those scores to support a diagnosis of a closed head injury or traumatic brain injury. VRP Volume 2, p. 405, lns. 5-22; *see also* VRP Volume 3, p. 456, lns. 6-25. The medical records also did not support a conclusion that Smith suffered from a head injury. *Id.*, p. 406, lns. 2-15.

Smith also did not present herself consistent with a person with a head injury when she recounted her vocational history to Dr. Klein; rather, she had fluent speech (contrary to her claims), appropriately handled abstract conceptual terms, and her thoughts flowed in a logical sequence. *Id.*, pp. 406-407. Dr. Klein also reviewed the video-recording of Smith's deposition, and found substantial evidence that supported an opinion of no closed head injury; namely, many things that are "highly inconsistent, inconsistent with any head injury." VRP Volume 2, pp. 441-451.

One of Smith's test scores put her deep within the mentally retarded range, which was not in any way consistent with any other evidence in the case, let alone her test performance for Smith's expert, Dr. Brown, in original testing in 2009. VRP Volume 2, pp. 466-468. Smith's MMPI testing was "highly elevated," and "elevated in the direction of exaggerating" her symptoms. *Id.*, p. 471, lns. 7-10.

The testing was only a portion the collection of data, and the medical history and interview process are also objective data. VRP Volume 3, pp. 495-498. A neuropsychological analysis cannot be properly done by only reviewing a couple of bare numbers in isolation. *Id.*; VRP Volume 3, pp. 506-507. In part, Smith's test scores went down, which is clearly not indicative of a traumatic brain injury and inconsistent with the neuropsychological science relating to traumatic brain injury. *Id.*, pp. 504-505.

Dr. Klein testified that it was his opinion, on a more probable than not basis, that Smith is not brain injured and she is able to return to work. VRP Volume 2, pp. 472-473.

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6. The trial court properly concluded that there was a basis for Dr. Klein's testimony in the three independent sources of data considered as part of his neuropsychological evaluation.

Ultimately, after making it clear on previous occasions, the trial court's view was that the "whole question is one that goes to the weight rather than the admissibility." VRP Volume 2, p. 411, lns. 19-20. The trial court noted that Dr. Klein relied upon the three components of a neuropsychological evaluation, which are three independent sources of data that a neuropsychologist "should and does consider." *Id.*, p. 412, lns. 1-7. As the trial court plainly stated, "[t]here is a basis." *Id.*

As part of Dr. Klein's evaluation he noted, among other things, the following evidence in support of his opinion:

- Medical records from Smith's emergency room visit immediately after the accident make no mention of any reported unconsciousness, and no indication that there was any kind of brain injury based on examination. Affidavit of Counsel, Exhibit C. The only report of "unconsciousness" comes from Smith, and only her, sometime later.

- Dr. Klein notes his review of the PCE that Smith underwent that had invalid results due to multiple inconsistencies in observed performance on measured versus non-measured tasks. CP 838-852.

- Smith complained of memory deficits that come and go randomly during the day. "[A] rather unlikely sequence." *Id.*
- Smith demonstrated that within the first hour after the motor vehicle accident at issue she was able to recall information or

long-term memory, associate that memory with emotionally and evaluative cognitions, and arrive at her decision about not going in the ambulance. *Id.* (Dr. Klein's report at p. 6).

- Smith recounted historical information to Dr. Klein relating to certain life experience with fluent speech, appropriate handling of abstract conceptual terms, expressed thoughts following a logical sequence and in a very clear and understandable way – all of which were inconsistent with the clinical presentation of someone with a head injury. *Id.* (Dr. Klein's report at p. 9).

- Smith made multiple anxiety complaints about driving to Dr. Brown, yet she told Dr. Klein that she could drive, but that her mother refuses. Smith said she would drive if she was not under pressure from her parents not to. *Id.* (Dr. Klein's report at p. 10).

- On auditory processing tests, scores were both "grossly impaired," and "quite likely the worst performance [Dr. Klein had] seen in 37 years of practice." *Id.* (Dr. Klein's report p. 11).

- The profile that Smith provided on the MMPI-2-RF was so grossly exaggerated that her symptoms were at a level "well beyond currently hospitalized psychiatric patients . . . ." *Id.* (Dr. Klein's report p. 12).

Even a cursory review of Dr. Klein's written reports and deposition testimony demonstrates a broad, global review of many tests and factors to derive his opinion that Smith does not suffer from a traumatic brain injury. Smith can dislike his opinion, but that is the purpose of a trial – adverse testimony does not equate to prejudice.

The trial court properly instructed the jury with the following instruction:

> A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts. You are not, however, required to accept his or her opinion.
>
> To determine the credibility and weight to be given this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

VRP Volume 4, p. 536, lns. 2-14 (Instruction No. 3).

IV. ARGUMENT

A. The standard of review on this appeal is abuse of discretion, and the trial court clearly did not abuse its discretion when it permitted Dr. Klein to testify.

The trial court's decision to admit expert testimony is discretionary, "and will not be disturbed on appeal absent some abuse of discretion." *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn.App. 229, 271, 215 P.3d 990, 1012 (2009). Dr. Klein's testimony was admissible because: (i) his expertise was supported by the evidence, (ii) his opinion is based on material reasonably relied on in his professional community, and (iii) his testimony was helpful to the trier of fact. *Id.*; ER 702 and ER 703.

Abuse occurs only where discretion is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). A trial court's decision is to be given "particular deference" where there are fair arguments to be made both for and against admission. *In re Bennett*, 24 Wn.App. 398, 404, 600 P.2d 1308 (1979).

In other words, "[i]f the reasons for admitting or excluding the opinion evidence are both fairly debatable, the trial court's exercise of discretion will not be reversed on appeal." *Levea v. G.A. Gray Corp.*, 17 Wn.App. 214, 220–21, 562 P.2d 1276 (1977); *Grp. Health Co-op. of Puget Sound, Inc. v. State Through Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787, 791 (1986).

In the present case, the evidence was overwhelmingly in support of allowing Dr. Klein to testify at trial. His opinion testimony clearly exceeded any threshold for the admissibility of such testimony in Washington. The trial court properly articulated that there was a basis for his testimony, and properly instructed that jury. The jury was properly given the job of determining what weight to give the testimony of all of the expert witnesses.

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B. Substantial evidence showed that Appellant did not have the claimed brain injury, and Dr. Klein had a clear basis for his opinion.

Smith argues that the trial court abused its discretion because "the substantial evidence showed that Dr. Klein did not have any other opinion as to why Smith did not have a head injury other than she was a malingerer." *Appellant's Opening Brief*, at p. 20. The record plainly runs counter to Smith's argument on appeal because Dr. Klein relied on an overwhelming amount of data that indicated that Smith did not actually suffer from a traumatic brain injury. And that was his opinion.

Evidence must be probative, relevant, and meet the appropriate standard of probability. ER 102; ER 401; ER 402; ER 403. Dr. Klein's expert opinion testimony, as described extensively herein, provides evidence that is admissible under each of these Rules. His expert opinion demonstrates both relevance and the ability to aid the jury in their pursuit of truth.

Dr. Klein presented an opinion with depth and breadth, and is supported by generally accepted clinical methods and reasoning in the field of psychology. Evidence Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Evidence Rule 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

ER 703.

Based on the record, and as described above, the trial court properly exercised its discretion when it allowed Dr. Klein to testify at trial.

1. There is no proper legal basis to apply *Frye* to Dr. Klein's opinion testimony.

"[E]vidence that does not involve new methods of proof or new scientific principles does not implicate *Frye*." *Eakins v. Huber*, 154 Wn.App. 592, 600, 225 P.3d 1041, 1044 (2010), emphasis added. "[T]here is a distinct difference between the development of a new scientific technique, i.e., 'a novel method of proof' ... and the development of a body of medical knowledge and expertise." *State v. Young*, 62 Wn.App. 895, 906, 802 P.2d 829, 836, *opinion modified on reconsideration*, 62 Wn.App. 895, 817 P.2d 412 (1991), quoting *People v. Mendibles*, 199 Cal.App.3d 1277, 245 Cal.Rptr. 553, 562 (1988).

Under *Young*, the *Frye*-test is inapplicable and the testimony is in

accord with ER 702 when: (1) the testimony shows a familiarity with the relevant literature consistent with the opinions given, (2) the testimony does not involve any new methods of proof or new scientific principles from which conclusions are drawn, (3) the testimony presents the existence of certain clinical findings, and (4) that in the expert's own professional experience those clinical findings are consistent with a given diagnosis. *Young*, 62 Wn.App. at 906, 802 P.2d at 836.

Thus, *Frye* does not apply to Dr. Klein's testimony in the present case because his opinions satisfy each of the outlined elements in *Young*, and this evidence is clearly in accord with ER 702.

2. Even if *Frye* applied, it is not proper for the court to evaluate the correctness of the neuropsychological theory, or pass judgment on Dr. Klein's forensic application of the theory.

Even, assuming for argument sake, that *Frye* applies, courts "do not evaluate whether the scientific theory is correct, but whether it has achieved general acceptance in the relevant scientific community[,]" recognizing that "judges do not have the expertise to assess the validity of a challenged scientific theory and, therefore, they must defer this judgment to the qualified scientists." *Eakins*, 154 Wn.App. 592, 599, 225 P.3d 1041, 1044 (2010).

The Frye-test is to be applied "without reference to [ ] forensic

application in any particular case." *State v. Greene*, 139 Wn.2d 64, 71, 984 P.2d 1024, 1028 (1999). In *Greene*, the Washington Supreme Court held that inclusion of a diagnosis or class of behavior in the DSM-IV means, legally and for purposes of *Frye*, that it has reached general acceptance within the scientific community.

Thus, the complete and competent neuropsychological evaluation conducted by Dr. Klein must be considered generally accepted in the field of neuropsychology, and thus any requirement of *Frye* is satisfied. *See also* CP 381-442; CP 669-674, 676, 678-688, and 690-697.

C. There was substantial evidence at trial, independent of Dr. Klein's testimony, that was contrary to Appellant's claims of permanent disability.

Smith argues that had Dr. Klein not testified, Lundy would not have been able to present any evidence that Smith did not sustain a permanently disabling head injury. *Appellant's Opening Brief*, p. 21. And by result Smith would have been able to succeed on summary judgment, or at worst, a directed verdict. *Id.* This is obviously not the case because, among other things, the jurors declared under the penalty of perjury that they did not believe the opinions offered by Smith's experts (Dr. Lahtinen), there was evidence in the PCE that clearly demonstrated that she was exaggerating or

feigning her symptoms, Dr. James offered opinions that Smith had non-physiological complaints and symptoms, and Smith's own videotaped deposition provide evidence inconsistent with her claims at trial.

1. An evidentiary error can only justify a reversal if it was prejudicial, and by allowing Dr. Klein to testify the trial court did not cause Appellant any prejudice.

An evidentiary error justifies reversal only if it is prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An evidentiary error is only considered prejudicial if the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). In the present case, it is not reasonable to conclude that the trial would have had a different result if Dr. Klein did not testify. Smith's own expert witness, Dr. Lahtinen, was damaging to her case. The amount of evidence supporting the jury's verdict and award of damages was substantial even without Dr. Klein's opinion testimony. It is not proper for court's to invade the province of the jury. *Nunn v. Turner*, 133 Wn. 654, 660, 234 P. 443, 445 (1925).

The trial court properly instructed the jury (Instruction No. 3) and left "credibility determinations to the trier of fact[,]" and "such determinations are not subject to appellate review." *Hickok-Knight v. Wal-Mart Stores, Inc.*, 170

Wn.App. 279, 313, 284 P.3d 749, 766-67 (2012), *review denied*, 176 Wn.2d 1014, 297 P.3d 707 (2013). Evidence is tested by the "adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence." *Id.* at 317, 284 P.3d at 768.

As the Washington Supreme Court has held:

> It would be a curious rule of evidence which allowed one party to bring up a subject [i.e., Smith's allegation of brain injury and psychological impairment, and her inseparable reporting of symptoms and problems], drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths.

State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969); Tegland, 5A Washington Practice Series, Evidence Law and Practice §§ 608.2 and 608.6; see also Tegland, 5 Washington Practice Series, Evidence Law and Practice § 103.14.

What Smith is asking for on appeal is contrary to these basic principles. There was substantial evidence providing a basis for Dr. Klein's opinion that Smith did not suffer from a traumatic brain injury. To exclude his testimony would be unjust and contrary to the Rules of Evidence. Smith

is asking that she be allowed to present evidence without having to deal with competent and well-supported adverse testimony from the opposing party – that would be patently unfair. Thus, the trial court's exercise of discretion to allow Dr. Klein to testify must be affirmed.

2. Smith placed in issue the symptoms and problems that *she* reports being related to her alleged brain injury.

It is not a comment on the "credibility" of a witness for an expert to testify about that witness's "dishonesty" in the context of statements made to a forensic therapist. *In re Detention of Post*, 145 Wn.App. 728, 750-52, 187 P.3d 803, 815-16 (2008). It is also not a comment on the veracity of a witness to describe the witness's demeanor or the "absence of total candor" in the context of psychological treatment. *Id.* Thus, it is not improper for Dr. Klein to testify about Smith's inconsistent and plainly exaggerated claims.

When a plaintiff testifies about her present condition and degree of impairment, or plaintiff's expert provides opinion testimony about plaintiff's condition and impairment, that plaintiff has "placed in issue" her credibility. *Tamburello v. Dept. of Labor and Industries*, 14 Wn.App. 827, 828, 545 P.2d 570, 571 (1976). If a plaintiff's condition and impairment are "placed in issue," then it is proper to admit testimony about observations made of a plaintiff's alleged condition. *Id.* Similarly, ER 608 does not bar testimony

that contradicts testimony on material facts offered by plaintiff or plaintiff's expert. *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993). This type of contradictory testimony goes to material facts at issue, and not to a witness's general character of truthfulness, or credibility, at trial. *Id.* at 640.

A trial court should not pick and choose which diagnosis from competing experts is correct. See *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826, 871-72 (Del. Super. 2000). A diagnosis that implicitly or explicitly involves malingering is admissible from competing experts, and the decision concerning whether the diagnoses of plaintiff's expert or the defendant's expert are to be believed should be left to the trier of fact. *Id.*; accord *Pcolar v. Casella Waste Systems, Inc.*, - - - A.3d - - - , 2012 WL 3055027 (2012); *Re v. State*, 540 A.2d 423 (1988); *Hastings v. Abernathy Taxi Association, Inc.*, 16 Ill.App.3d 671, 306 N.E.2d 498 (1973); *Burrowes v. Skibbe*, 146 Ore. 123, 124, 29 P.2d 552, 553 (1934); *Glamann v. Kirk*, 29 P.3d 255, 259 (2001); *Samaniego v. City of Kodiak*, 80 P.3d 216, 219-20 (2003); *Sturzenegger v. Father Flanagan's Boy's Home*, 276 Neb. 327, 754 N.W.2d 406 (2008); *Strange v. Glascock*, 695 N.W.2d 504 (Iowa Ct. App. 2005); *State v. Cone*, 3 S.W.3d 833, 844 (Mo. Ct. App. 1999).

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D. Defense experts Erick West and Deborah Lapoint were properly allowed to testify at trial, and they properly relied on the opinions of Dr. James, Dr. Klein and the results of the PCE.

The Rules of Evidence are to be construed to "secure fairness," and applied to the "end that truth may be ascertained and proceedings justly determined." ER 102. Exclusion of Mr. West and Ms. Lapoint would be contrary to the Rules of Evidence because it will unfairly allow Smith to present only her side of the case at trial. *State v. Gefeller*, 76 Wn.2d 449, 455, 458 P.2d 17, 20 (1969).

Contrary to Smith's argument, and her reliance on *Griswold v. Kilpatrick*, 107 Wn.App. 757, 27 P.3d 246 (2001), the opinions of Mr. West and Ms. Lapoint rely on information that is sufficiently trustworthy and reliable. A review of the materials before the Court shows that their opinions are not based on speculation or conjecture.

Neither Mr. West nor Ms. Lapoint had to assume facts, unlike in *Riccobono v. Pierce County*, 92 Wn.App. 254, 966 P.2d 327 (1998). The records before the Court show that Mr. West and Ms. Lapoint both properly relied upon "facts or data" that showed that Smith was both physically and psychologically capable of returning to work in no longer than six (6) months after the accident at issue. *See* ER 703.

Ms. Lapoint reviewed the PCE that was done for Smith, and it was relied upon by her in forming her opinion that Smith could return to work. VRP Volume 2, pp. 243-245. Ms. Lapoint noted that the report concluded that the results were "invalid" because of a large number of "inconsistencies." *Id.* When Smith's grip strength was measured for the test it was not considered functional, but Smith was observed pulling open clinic doors which required producing 20-42 pounds of force in terms of isometric grip strength. *Id.*, p. 244, lns. 11-17.

Ms. Lapoint also reviewed the IME (Independent Medical Examination) that was completed by Dr. Jennifer James, and the IME completed by Dr. Klein. VRP Volume 2, p. 246. Ms. Lapoint relied on the opinion of Dr. James that Smith could return to work, and that her injuries should have resolved in no more than three (3) to six (6) months. *Id.* Ms. Lapoint relied on the opinion of Dr. Klein that Smith did not have a brain injury, and that there was nothing to prevent her from returning to work. *Id.*, pp. 247-248.

Ms. Lapoint testified that based on her review of the PCE, alone, that her opinion was still that Smith could work. *Id.*, p. 267, lns. 16-23.

Mr. West relied upon the opinions of Dr. Jennifer James, Dr. Ronald

Klein and Deborah Lapoint. VRP Volume 2, pp. 273-274, 276.

All of the opinions relied upon by Mr. West and Ms. Lapoint were supported by substantial evidence and properly allowed at trial under applicable Rules of Evidence. Dr. Klein was properly allowed to testify at trial, and it was proper for Mr. West and Ms. Lapoint to rely on his opinion as part of their analysis and in forming their opinions.

E. Fees and Costs on Appeal – Respondent is entitled to fees and costs on appeal for having to incur unnecessary expense responding to an appeal that clearly lacks merit.

Under Title 14 Rules on Appeal, including RAP 14.1 and 14.2, RAP 18.1, and 18.9, Respondent requests an award of costs and fees associated with responding to the Smith's appeal because it totally lacks merit. There is neither law nor evidence in the record that could support any reversal of the trial court's exercise of discretion in the present case. Smith has failed to consider the lack of actual support for this appeal, and this has caused Lundy to incur unnecessary expense in responding to this appeal, and justice calls for an award of fees and costs.

V. CONCLUSION

Dr. Klein is an experienced and accomplished neuropsychologist, and he conducted a thorough three-part evaluation of Smith. The data

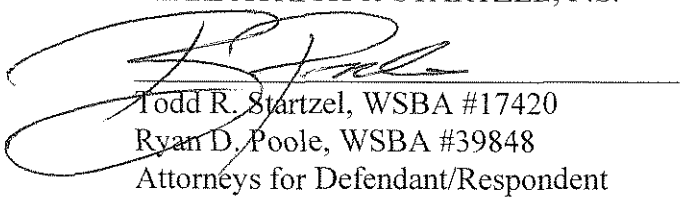
overwhelming indicated that Smith did not have the traumatic brain injury she claimed. It was proper for Dr. Klein to testify and his expert opinion clearly assisted the jury in understanding Smith's neuropsychological condition.

Aside from Dr. Klein's opinion testimony, the amount of evidence that was contrary to Smith's claims was substantial.

Based on the foregoing, Respondent respectfully requests that the trial court's exercise of discretion on this evidentiary issue be affirmed because there was clearly no abuse of discretion.

Respectfully submitted this 23rd day of October, 2013.

KIRKPATRICK & STARTZEL, P.S.



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CERTIFICATE OF SERVICE -- RESPONDENT'S BRIEF

I hereby certify that on the 23rd day of October, 2013, I caused to be served a true and correct copy of *Respondent's Brief* to the following attorneys of record as follows:

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