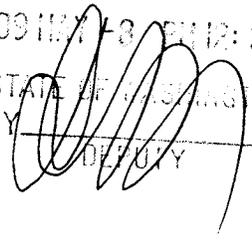


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 38699-2-II
**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

**COLLEEN EDWARDS and DENNIS EDWARDS, husband and wife, a married
man,**

Respondents,

vs.

**BARBARA LE DUC and JOHN DOE LE DUC, and the marital community
composed thereof,**

Appellants.

**APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Frederick Fleming, Judge**

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

This appeal stems from a jury trial at which plaintiff represented herself *pro se*. Throughout the trial, the court overtly assisted plaintiff in trying her case. Despite a dearth of evidence, the jury returned a verdict in the amount of \$100,000. The court denied defendants' post trial motion for remittitur or, in the alternative, a new trial. In light of the trial court's excessive assistance of plaintiff which amounted to a comment on the evidence, defendants were denied a fair trial. Further, the jury award was grossly in excess of the evidence presented, and the trial court committed reversible error in denying the motion for remittitur or a new trial.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by repeatedly providing assistance to plaintiff during the case which constituted an impermissible comment on the evidence and infringed on the defendants' right to a fair trial.

2. The trial court erred in failing to grant remittitur or a new trial where the jury's verdict was grossly in excess of any evidence supporting damages. (CP 195-97)

III. ISSUES PRESENTED

1. Did the trial court's assistance to plaintiff during the questioning of her witnesses and presentation of her case amount to

commenting on the evidence which deprived defendants of a fair trial?
(Pertaining to Assignment of Error No. 1)

2. Did the trial court err in failing to grant remittitur or a new trial where: 1) the court improperly interjected itself into the trial and commented on the evidence through its assistance of the *pro se* plaintiff; 2) the verdict was grossly in excess of any evidence supporting damages; 3) there was insufficient causation evidence to support a verdict for the plaintiff; and 4) substantial justice was not done? (Pertaining to Assignments of Error Nos. 1 and 2)

IV. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND.

Plaintiff Colleen Edwards was involved in a motor vehicle accident with Barbara Le Duc on November 5, 1995. (RP 584) Plaintiff stopped on the road and Mrs. Le Duc's vehicle, attempting to stop on the wet pavement, bumped into the back of plaintiff's vehicle. (RP 590-91) The two vehicles sustained moderate damage to their respective front and rear bumper areas. (RP 591) The impact was not strong enough to throw off the two dogs riding in the back seat of plaintiff's car, and they were not harmed. (RP 592, 596) Neither Mrs. Le Duc nor her husband, who was a passenger, was injured in any way (RP 595-96) Plaintiff also

indicated immediately after the accident that she was not injured.¹ (RP 589) Before and after the accident, plaintiff worked as a dog trainer and a private investigator. (RP 539-40)

As a result of the car accident, plaintiff claimed that she suffered seizures, pain, and fatigue. (RP 541) By her own admission, plaintiff has a complex medical history with permanent injuries. (RP 555) Plaintiff believed she suffered lung, retinal tissue, and possible brain damage at birth. (RP 552) In 1979, she was involved in a car accident and suffered a closed head injury, cervical nerve root injury, and injury to her right leg. (RP 553) For a period of time in 1984-85, she was confined to a wheelchair. (RP 556) Around that time, she suffered from chronic neck pain and was legally blind. (RP 99)

She suffered another head injury in 1986 which resulted in traumatic brain injury, seizure disorder, and syncopaty. (RP 553) During 1986-87, she was treated at the Harborview Medical Center epilepsy clinic related to her seizures. (RP 556) She also treated with a variety of neurologists for her seizure complaints including Dr. Overfield, Dr. Schwartz, Dr. Delyanis, and Dr. Rubenstein. (RP 560-62, 564) These

¹ There was no testimony that plaintiff struck her head on anything as a result of the accident. (RP 474, 601-02)

neurologists all held the opinion that plaintiff's pseudo-seizures were **psychological** in nature. (RP 394, 561-65) In fact, Dr. Delyanis expressly told plaintiff in 1999 that in his opinion, the auto accident was insufficient to have exacerbated her pre-existing conditions. Dr. Delyanis also said the accident did not cause her seizures. (RP 562-63)

Despite plaintiff's insistence that the accident caused neurological injuries and seizures, she did not call any of her neurologists to testify. (CP 27-32) Instead, she called a number of other health care providers. (*Id.*) Dr. Young, a rehabilitation physician, and Mr. Larson, a speech pathologist, testified about the treatment they provided after the accident, but they admitted that they were unable to attribute any of plaintiff's injuries to the car accident. (RP 221, 248, 484-85, 504-05)

Plaintiff also called Dr. Waltman, her primary care physician who treated her for several years until 1989, but then not again until 1997, two years after the accident. (RP 507, 510-11) Dr. Waltman testified generally about plaintiff's physical ailments before the accident, but he was not asked and did not attribute any of her current injuries to the accident. (RP 658)

Plaintiff called Dr. Davis, her naturopathic doctor, who treated her extensively in the years following the accident. He generally equivocated about whether the seizures were caused by the car accident. Dr. Davis

indicated that it was a “possibility” that plaintiff had sustained a head injury from the accident. (RP 332-33, 351) Plaintiff called Dr. Adkins, her chiropractor, who treated her after the accident for sprain/strain injuries. (RP 443) Finally, plaintiff called Mr. Crisman, her counselor, to testify about her mental health after the accident. (RP 197)

Mrs. Le Duc admitted liability for the accident and acknowledged that plaintiff was injured to some degree in the accident. (CP 6; RP 57-58) However, Mrs. Le Duc challenged the extent of plaintiff’s claimed injuries (particularly the neurological problems and seizures) and maintained that plaintiff only suffered temporary back pain as a result of a sprain/strain. (RP 63, 339, 377-79)

B. PROCEDURAL HISTORY.

Plaintiff filed a complaint against Mrs. Le Duc on June 24, 1998.² (CP 3-5) On March 31, 2000, the court allowed her attorney to withdraw as counsel, and the trial was continued. (CP 8-9) The case eventually proceeded to trial before Judge Frederick W. Fleming on March 12-22,

² There are some inconsistencies regarding which individuals are actually parties to this action. Initially, Colleen Edwards and her then-husband Dennis Edwards were the plaintiffs. (CP 3) Barbara Le Duc and her husband Clifford Le Duc were named as defendants. (CP 6) By the time of the jury verdict, Colleen Edwards was the sole plaintiff, and Barbara Le Duc was the sole defendant. (CP 26) However, in the judgment order, both Clifford and Barbara Le Duc were held to have a judgment against them by Colleen Edwards. (CP 78) Appellants will operate under the premise that the judgment identifies the proper parties for purposes of this appeal.

2001. (CP 27-32) Plaintiff represented herself during the proceedings. (CP 28) In her case, plaintiff called herself and six friends and colleagues as lay witnesses, and six health care providers as expert and/or lay witnesses. (RP 64, 114, 147, 197, 221, 281, 314, 332, 400, 443, 484, 507, 534) Ms. Le Duc testified via deposition for the defense. (RP 583) On March 22, 2001, the jury returned a verdict in favor of the plaintiff in the amount of \$100,000. (CP 26)

After several aborted attempts to enter judgment interspersed with lengthy periods of inactivity, plaintiff finally had the judgment entered on October 24, 2008. (CP 78-79) The trial court entered a judgment awarding plaintiff \$100,000. (*Id.*) Mrs. Le Duc moved for remittitur or a new trial which was denied. (CP 156-72, 195-97) Mrs. Le Duc filed this appeal. (CP 198-203)

V. ARGUMENT

A. SUMMARY OF THE ARGUMENT.

Plaintiff's lawsuit involved complicated issues of causation and medical damages. Despite the trial court's warnings, plaintiff decided to

represent herself *pro se* at trial.³ In spite of the court's acknowledgement that it could not provide assistance, and the stated intention it would not provide assistance, the court provided substantial assistance to plaintiff. The court advised and tutored her throughout the trial, sometimes in chambers, but often in front of the jury.⁴ At times when the court's instructions on how to properly question witnesses were ignored by plaintiff, the court actually conducted the critical questioning.⁵ Indeed, without the court's prompting, plaintiff would never have asked her witnesses to establish essential elements of proof: that the treatment was reasonable and necessary and that the medical bills were reasonable. She

³ THE COURT: You know you're really at a disadvantage when you're not a lawyer and trying a case like this.

MS. EDWARDS: I understand that.

THE COURT: And you know that it's improper for the court to give you any assistance and so I can't do that and of course your opponent won't do that, and my staff won't do that, so you're here on your own with Tonka.

(RP 21)

⁴ THE COURT: A concern that I have is when opinions are asked of the expert witnesses, that is the medical doctors, that they're asked on a more probable than not basis. Do you understand what I mean by that, Ms. Edwards?

(RP 239)

⁵ THE COURT: Can you state, Doctor, based upon a reasonable probability, reasonable medical probability to a medical certainty, what, if any, injuries Ms. Edwards suffered as a result of the automobile accident of 1995?

(RP 248)

would not have proven any economic damages.⁶

The court's repeated interjections were improper and amounted to a comment on the evidence in violation of the Washington Constitution. The court's pervasive assistance tainted the proceedings and prejudiced Mrs. Le Duc. In addition, despite plaintiff's failure to proffer much of the evidence needed to prove her case, the jury returned a verdict grossly in excess of the evidence that was properly before it. Either error requires that this Court reverse the judgment and remand the case for a new trial.

B. STANDARD OF REVIEW.

The Court of Appeals reviews a denial of remittitur for an abuse of discretion. *Bunch v. King County Dept. of Youth Services*, 155 Wn.2d 165, 178, 116 P.3d 381 (2005). Similarly, abuse of discretion is generally the standard of review for an order denying a motion for new trial. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978). A trial court abuses its discretion when its decision is "manifestly unreasonable or based upon untenable grounds or reasons." *State v. Brown*, 132 Wn.2d 529, 572, 940 P.2d 546 (1997).

⁶ THE COURT: Let's see. To accommodate this witness then let's go forward. Are you going to ask about medical or chiropractic expenses on a more probable than not basis related to this accident to date?

(RP 470-71)

Whether or not the trial judge tainted the proceedings by commenting on the evidence is an issue of law that is reviewed *de novo*. See *State v. Woods*, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001) (*de novo* standard of review used where alleged improper comments on the evidence occurred as part of the jury instructions). Where there are allegations of improper judicial comment, a reviewing court is to **independently evaluate** the facts and circumstances of the case. *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007). An attorney is not even required to object to preserve for appeal the issue of a trial judge commenting on the evidence. *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). “Since a comment on the evidence violates a constitutional prohibition, the defendant’s failure to object or move for a mistrial does not foreclose her from raising this issue on appeal.” *Id.* at 893.

If the court’s interjections are deemed to qualify as judicial comments on the evidence, the standard of review is whether the appellate court can conclude the error was harmless beyond a reasonable doubt. *State v. Levy*, 156 Wn.2d 709, 723-24, 132 P.3d 1076 (2006). Judicial comments are presumed to be prejudicial. *Id.* at 723-24.

An independent evaluation of the trial court’s comments reveals they constitute comments on the evidence. A new trial is warranted

because the comments were not harmless. Even if this Court grants deference to the trial court's self-assessment that it did not improperly comment on the evidence, a review of the record clearly reveals that the trial court's assistance to plaintiff constituted a pervasive and prejudicial abuse of discretion. Under whatever standard this Court applies, a new trial is warranted.

C. THE TRIAL JUDGE COMMENTED ON THE EVIDENCE.

Pursuant to CR 59(a)(1), a new trial is appropriate where there was “[i]rregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial.” A reversible irregularity can exist where the comments or actions of the trial court have an unintended effect on the jury to the prejudice of a party. *See, e.g., Morris v. Nowotny*, 68 Wn.2d 670, 415 P.2d 4 (1966). In this case, the trial court provided substantial assistance to Ms. Edwards, the *pro se* plaintiff, who proved to be incapable of trying the case without help. Many of these instances (and certainly the overall impact of the assistance) constituted an impermissible comment on the evidence.

1. A Judge Must Not Comment on the Evidence.

As a basic premise, “[a] judicial proceeding is valid only if it has an appearance of impartiality, such that a reasonably prudent and

disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” *State v. Ra*, 144 Wn. App. 688, 706, 175 P.3d 609, *rev. denied*, 164 Wn.2d 1016 (2008). In Washington, a trial judge is prohibited from commenting on the evidence. CONST. art. IV, § 16 provides that, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Washington courts have noted the purpose of this provision:

The object of this constitutional provision is **to prevent the jury from being influenced by knowledge conveyed to it by the court** as to the court’s opinion of the evidence submitted. The jury is the sole judge of the credibility and weight of the evidence, and **courts should be extremely careful of any comments made in the presence of the jury, because such comments may have great influence upon the final determination of the issues.**

Heitfeld v. Benevolent and Protective Order of Keglers, 36 Wn.2d 685, 699, 220 P.2d 655 (1950) (emphasis added). The reasoning behind this prohibition has long been a part of Washington jurisprudence:

Every lawyer who has ever tried a case, and every judge who has ever presided at a trial, knows that **jurors are inclined to regard the lawyers engaged in the trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended.** It is the working of human nature of which all men who may have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, **a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him**

out of his perplexity. On the other hand, **a presiding judge has no way to measure the effect of his interruption. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.**

State v. Jackson, 83 Wash. 514, 523, 145 P. 470 (1915) (emphasis added).

Although a judge may question a witness, the questioning must not be prejudicial. See *Hanna v. Bodler*, 173 Wash. 460, 23 P.2d 396 (1933) (new trial warranted where judge argued with the witness). In *Risley v. Moberg*, 69 Wn.2d 560, 419 P.2d 151 (1966), the Washington Supreme Court ordered a new trial where the trial court had impermissibly and prejudicially commented on the evidence. After plaintiff concluded her examination of her expert witness, an orthopedist, the trial court continued questioning him in a manner that assumed that plaintiff had been injured, a factual issue for determination by the jury. *Id.* at 565. The court's questions established the key elements of causation and damages for the plaintiff. *Id.* at 561. The Supreme Court concluded the questioning and comments had a prejudicial influence on the jury and remanded for a new trial. *Id.* at 565.

If a trial court chooses to question witnesses, it must not phrase its questions "in a manner indicative of the court's attitude towards the merits of the cause." *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 140, 606 P.2d 1214 (1980). "A trial judge should not enter into the 'fray

of combat' nor assume the role of counsel." *Id.* at 141. The *Egede-Nissen* Court noted that an "isolated instance of such conduct" may be harmless; for example if a court's response appears invited and represents a natural and limited reaction to an immediate stimulus. *Id.* However, "the **cumulative effect of repeated interjections** by the court may constitute reversible error." *Id.* (emphasis added).

In *Egede-Nissen*, the trial court made facial expressions and examined witnesses in an overly-extensive manner, sometimes usurping the questioning both in and out of the jury's presence. *Id.* at 139-40. The court noted that under these circumstances, the trial court intervened, although perhaps inadvertantly, more frequently and at greater length than the circumstances warranted. *Id.* at 141. The *Egede-Nissen* Court affirmed the appellate court's remand for a new trial. *Id.* at 142.

In *Ra*, the appellate court also noted that the trial court had entered the fray of combat or otherwise assumed the role of counsel: "RP at 856 (defense counsel objects because '[c]ounsel is testifying'; trial court responds, 'He may ask. It's prepatory to asking the question. [*To prosecutor:*] Ask him if he knows that.')." 144 Wn. App. at 705, n.2 (emphasis in original). The trial judge also made a comment that could have been construed to address the defendant's character and scolded him for nodding his head. *Id.* at 705. Although the *Ra* Court reversed on other

grounds and did not rule on whether the appearance of partiality alone warranted reversal, it did direct that the case be assigned to another judge on remand. *Id.*

A court need not overtly express an opinion to the jury. A court's statement may constitute a comment on the evidence if its attitude towards a disputed issue is merely **inferable** from its statements. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is sufficient to constitute a comment on the evidence if a judge's personal feelings are merely **implied**. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006). Further, a judge should refrain from interceding too frequently during the trial, or the jury may infer the judge's views on the merits resulting in impermissible comment. *State v. Eisner*, 95 Wn.2d 458, 626 P.2d 10 (1981). Assisting one party too much can result in reversible error. In *Eisner*, the trial court's questioning "went far beyond clarifying questions to the witness." 95 Wn.2d at 463. In fact, without the questions posed by the judge, the prosecution would not have been able to prove one of its charges. *Id.* The Washington Supreme Court reversed the decision, noting that "[t]he prosecutor did not prove the case; the court did." *Id.*

In *Casper v. Esteb Enterprises Inc.*, 119 Wn. App. 759, 765-66, 82 P.3d 1223 (2004), the trial court repeatedly reminded defendant not to testify about matters that had been ruled inadmissible in pretrial rulings.

The appellate court determined that the court's repeated reminders constituted impermissible comment on the evidence, although it did not reverse because it found that defendant had invited the error by deliberately attempting to so testify. *Id.* at 771.

At least one Washington opinion contains language recognizing that assisting a *pro se* party can amount to commenting on the evidence. *State v. Nordstrom*, 89 Wn. App. 737, 943, 950 P.2d 946 (1997) (trial court commented on the record, “I need to let you know that the court can’t do anything to assist you, it’s called commenting on the evidence . . . you can’t ask the court for help with that.”); *see also Oko v. Rogers*, 125 Ill. App. 3d 720, 466 N.E.2d 658 (Ill. App. 1984) (appellant appealed based on the trial court’s attempts to assist the *pro se* defendant in presenting his case). The *Oko* Court noted that “[t]he judge cannot presume to represent the *pro se* party,” but ultimately determined that the trial court had not overstepped its bounds. *Id.* at 723-24.

In *Pliler v. Ford*, 542 U.S. 225, 231, 124 S.Ct. 2441, 159 L. Ed. 2d 338 (2004), the United States Supreme Court held that federal trial court judges “have no obligation to act as counsel or paralegal to *pro se* litigants.” (italics in original). The Supreme Court noted that judges are under no requirement to take over duties that would normally be attended to by trained counsel. *Id.* In fact, requiring the trial judges to advise and

assist a *pro se* litigant can “undermine the district judges’ role as impartial decisionmakers.” *Id.*

2. The Trial Court Improperly Provided Excessive Guidance and Legal Advice to Plaintiff.

In this case, the trial was punctuated at every turn with the court providing assistance to the *pro se* plaintiff. The most damaging comments occurred in front of the jury, but improper assistance was also given when the jury was not present.

a. The Trial Court Provided Improper Assistance to Plaintiff When the Jury Was Not Present.

Some of the court’s assistance to plaintiff occurred outside the jury’s presence and constituted attempts to educate plaintiff about the law and what she could and could not ask. This, by itself, was inappropriate. *See Pliler*, 542 U.S. at 231. At the outset, the judge reminded plaintiff that she was at a disadvantage trying the case without a lawyer, and that he would not provide her with any assistance.

THE COURT: And you know that it’s improper for the court to give you any assistance and so I can’t do that and of course your opponent won’t do that, and my staff won’t do that, so **you’re here on your own** with Tonka.

(RP 21) (emphasis added). Unfortunately, as the trial wore on, such an arms-length, impartial approach proved to be impossible for the trial court to maintain.

Early on, the court advised plaintiff how best to conduct her questioning to make an impact on the jury. (RP 128-29)

THE COURT: Bring it in the morning then and you know you might think about moving along because **you don't want the jury to get impatient**, you know what I mean? **So think about moving it along would be my suggestion to you.** I'm not trying to hurry or anything, **I just think for presenting your case you want to move it along.** Do you understand what I mean?

MS. EDWARDS: Well, I understood what you said. I don't know if I have the experience to know what –

THE COURT: **You might just keep asking questions**, you know, get your questions out and ask your next question and move along.

MS. EDWARDS: I don't know that I can always go as fast.

THE COURT: Well, you do the best you can.

MS. EDWARDS: I am doing the best I can.

THE COURT: But you don't want to get them – **you'll lose their attention.**

(RP 128-29) (emphasis added). The court also suggested to plaintiff how best to handle her expert witnesses.

THE COURT: It's your case. You're the one that's prosecuting this case so you know, I will tell you that **I think it's in your best interest to see that, you know, he's under subpoena. I think it's in your best interest to try to accommodate his schedule** so you get him on would be my suggestion to you at 3:00 on Monday, otherwise, you're going to have a hostile witness.

MS. EDWARDS: I understand.

THE COURT: **And then that's not good for your case, is it?**

MS. EDWARDS: No, it's not.

(RP 349-50) (emphasis added).

In addition, the court spent a significant amount of time in conference with plaintiff and Mrs. Le Duc's counsel explaining to plaintiff that medical opinions must be based on a more probable than not basis to a reasonable degree of medical certainty. The court educated plaintiff that she needed to phrase her questions in such a manner. (RP 239-43)

THE COURT: A concern that I have is when opinions are asked of the expert witnesses, that is the medical doctors, that they're asked on a more probable than not basis. Do you understand what I mean by that Ms. Edwards?

MS. EDWARDS: I think you should define that little bit more for me. Thank you.

THE COURT: Opinion, medical doctors opinions must be on a more probable than not basis based upon their medical training; opinion must be based upon a more probable than not basis.

MS. EDWARDS: Are you referring to something specific?

THE COURT: No, I'm referring to whether or not a medical expert witness is admissible and to be considered if it's not on a more probable than not basis.

MS. EDWARDS: Okay, I think I'm getting it.

(RP 239) (emphasis added). The court recognized the danger that plaintiff would not be able to structure her questions properly and would fall short of the level of proof that she needed.

THE COURT: It's what the law is, Ms. Edwards, and I don't want to go through this whole procedure and have

this thing go for naught because opinions were not given on a more likely than not or more probable than not basis based upon reasonable medical certainty.

(RP 240) (emphasis added.)

THE COURT: Injuries, whatever injuries they give their opinion about, have to be based upon reasonable medical certainty. Do you have a opinion, Doctor, based upon reasonable medical certainty, as to what injuries Ms. Edwards suffered as a result of this particular accident, or the accident in 1986 and so on. **All those opinions have to be based upon reasonable medical certainty or we're going to be going through this thing for nothing.**

MS. EDWARDS: I understand.

THE COURT: And if they can't give a opinion on reasonable medical certainty, then **it's not admissible and you do not have any evidence as to your injuries.**

MS. EDWARDS: I understand that.

(RP 241-42) (emphasis added).

The judge even demonstrated proper questioning of the witnesses for plaintiff.

THE COURT: Continue, Ms. Edwards.

MS. EDWARDS: Okay. I would say that I went – I received treatment from neurologists –

THE COURT: Let me do this. I understand what you're going to say, but **let me ask the doctor one simple question.** I think he's already answered it.

MS. EDWARDS: Go ahead.

THE COURT: **Can you state, Doctor, based upon a reasonable probability, reasonable medical probability to a medical certainty, what, if any, injuries Ms. Edwards suffered as a result of the automobile accident of 1995?**

(RP 248) (emphasis added)

The court later instructed plaintiff how to ask questions of a witness for an offer of proof.

THE COURT: Now in the way of what we call a offer of proof, Ms. Edwards, what do you intend for this witness – **what’s the testimony that you intend to elicit from this witness?**

MS. EDWARDS: I intend to have him – he can describe what I could do previous to 1995.

THE COURT: In the way of training dogs.

MS. EDWARDS: Yes. He can testify to what I can do now. He can testify to what I cannot do now. He can testify to a number of things.

THE COURT: Your activities before and after and your abilities and training dogs before and after the accident?

MS. EDWARDS: Yes.

THE COURT: **And you want to ask him, as a foundation, you want to ask him questions about his background and training as a dog trainer so that that gives credibility to him defining training activities before and after,** is that what you’re doing?

MS. EDWARDS: Yes, basically.

(RP 315-16) (emphasis added). The court then counseled plaintiff about how to get certain certificates admitted into evidence.

MS. EDWARDS: There are 11.

THE COURT: Who’s going to identify them?

MS. BLOOMFIELD: 11 certificates and three others.

THE COURT: **Who do you have to identify them?** You know what I mean, how you get records introduced.

MS. EDWARDS: Yes

THE COURT: Who's going to identify them then?

MS. EDWARDS: My current witness is going to identify lots of them.

MS. BLOOMFIELD: She's not named on any of these certifications.

MS. EDWARDS: They're my certifications. Those are all my certifications. If you note, my name is on them.

THE COURT: **So it seems to me that the best way to try to get them admitted would be for when you testify.**

(RP 399-400) (emphasis added).

The judge should not have given this advice and taken over the duties that would otherwise have been addressed by trained counsel. *See Pliler*, 542 U.S. at 231. Even though the preceding comments were outside of the presence of the jury, they had a harmful effect. On at least two occasions, plaintiff later told the jury about the court's assistance: **"This court has asked me to evaluate** my future medical needs..." and **"the Court has been very helpful to me** in helping me...." (RP 238, 652) (emphasis added).

The court's instructions and guidance when the jury was not present set the tone for how the trial was run when the jury was present. Essentially, the trial court assumed the responsibility to ensure that plaintiff would properly present her case and advise her if she ever became confused or failed to hit on a key point.

THE COURT: **You have to ask that each time.**

MS. EDWARDS: Sometimes I forget.

THE COURT: Ms. Bloomfield won't let you forget.

MS. EDWARDS: Neither will you.

THE COURT: **And neither will I.**

MS. EDWARDS: Thank you very much Your Honor.

(RP 360) (emphasis added).

Defendants acknowledge that a judge may give occasional helpful directions to speed trial, but the assistance the trial court provided in this case went well beyond a couple of minor hints to streamline the proceedings. Plaintiff made the decision to try her case *pro se*, and she should have been left alone to sink or swim in the courtroom. Although plaintiff chose to represent herself rather than to retain legal counsel, the trial court was required to treat her just as if she was represented by an attorney. *See In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001).

“[T]he law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel — both are subject to the same procedural and substantive laws.” *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155, *rev. denied*, 100 Wn.2d 1013 (1983). A *pro se* litigant is held accountable to the same standards of ethics and legal knowledge as an attorney. *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033

(1981). Indeed, as the *Batten* Court pointed out, “[t]he maxim of Roman law, ‘ignorantia legis neminem excusat’ applies.” *Id.*

b. The Trial Court Made Improper Comments in the Presence of the Jury.

Undeniably, the most damaging comments by the court were made **in the presence of the jury**. The court’s comments and assistance in front of the jury relating to presentation of expert testimony were especially prejudicial. Because liability was admitted, the nature of plaintiff’s injuries and whether the car accident caused them were the critical issues in the case. The trial court not only guided plaintiff, it composed particular questions to witnesses, especially the medical witnesses. Sometimes plaintiff parroted to her witness the language that the court had suggested, and sometimes she simply referred the witness to the question crafted by the court. The trial court virtually took over the questioning at key junctures.

The court’s overt assistance with questioning plaintiff’s experts began during the testimony of Dr. Sherwood Young, plaintiff’s rehabilitation medicine physician.

Q Okay. Now the neuropsychological results, that was – is that considered a medical opinion or a medical fact?

MS. BLOOMFIELD: You Honor, I’m not sure I understand where we’re going here or what the relevance of medical opinion versus medical fact is in a court of law.

THE COURT: Sustained. There isn't any. **It has to be medically more probable than not a medical certainty, his opinions.**

Q (By Ms. Edwards) Is there more medical certainty after neuropsychological testing that I had sustained a brain injury?

(RP 246) (emphasis added).

THE COURT: **Then ask him the question. Does he have an opinion, based upon reasonable medical probability, to a reasonable medical certainty, whether or not you suffered any injuries as a result of the 1995 automobile accident.**

Q (By Ms. Edwards) Could you answer the Judge's question so I don't have to repeat it?

THE COURT: **On a more probable than not basis.**

(RP 247) (emphasis added).

MS. BLOOMFIELD: I guess again to the extent that's asking for a more probable than not basis of a suspicion it's improper. The opinion should be is it your opinion, Doctor, more probable than not.

THE COURT: Sustained. **Leave out the word suspicion. On a more probable than not basis did you suffer injury, brain injury from the 1995 accident. Is that what you want to ask?**

MS. EDWARDS: Yes.

THE COURT: **Without the word suspicion, on a more probable than not basis.**

(RP 258) (emphasis added).

Q Sequela, excuse me. Thank you. What do you suspect?

MS. BLOOMFIELD: Again, the suspicions aren't relevant and not admissible.

THE COURT: Sustained.

MS. EDWARDS: What?

THE COURT: **Just ask very simply in the preparatory aspect of it you've stated what you want to know on a more probable than not basis does he have an opinion as to whether or not you suffered, based on that history, you suffered injury as a result of the accident in 1995.**

Q (By Ms. Edwards) Could you answer the Judge's question?

(RP 261) (emphasis added).

Q (By Ms. Edwards) What I'm trying to ask him is if I remain to not have good seizure control, what do you expect my vocational outcome to be?

MS. BLOOMFIELD: I would again object because the earning capacity claims aren't at issue and I think there's a lack of foundation. This witness is not prepared to give a vocational opinion on rehab.

MS. EDWARDS: I'm not asking about earning claims, I'm asking about my life.

THE COURT: It's –

MS. EDWARDS: Shall I restate it?

THE COURT: **Well, you're going about what you're going to be able to do to earn a living, isn't that what you're asking?**

MS. EDWARDS: Earning a living being take [sic] care of myself.

THE COURT: Take care of yourself is one thing, earn a living is a thing **we've ruled upon before because of the procedural problems. Do you remember?**

(RP 265) (emphasis added).

The court continued to assist plaintiff during the testimony of Dr. Steven Davis, plaintiff's naturopathic physician.

Q Did you feel in the early stages of 1995 that this was an aggravation or a new injury?

MS. BLOOMFIELD: I'm going to object as lack of foundation and not calling for admissible conclusion.

THE COURT: Sustained. **Remember what you have to ask about more probable than not to reasonable certainty.**

Q (By Ms. Edwards) Would you feel more probable than not?

THE COURT: **Do you have an opinion, Doctor.**

Q (By Ms. Edwards) Okay. Do you have an opinion, Doctor, more probable than not that this was an aggravation in 1995, or a new injury?

(RP 343-44) (emphasis added).

Q In 1995 or any period to 1992 did you feel I had incurred a head injury or a traumatic brain injury or a closed head injury from the 1995 accident?

A From the accident in 1995?

MS. BLOOMFIELD: I'm going to object as lack of foundation and that this is not a appropriate opinion without being to more probable than not to a reasonable degree of medical certainty.

THE COURT: **Remember about opinions, they have to be more probable than not.**

(RP 350-51) (emphasis added)

Q Okay. Do you feel my condition is permanent?

MS. BLOOMFIELD: I'm going to object for lack of foundation.

THE COURT: **Do you have a opinion based upon more probable than not.**

MS. EDWARDS: Okay, he got that question.

THE COURT: **You have to ask that each time.**

MS. EDWARDS: Sometimes I forget.

THE COURT: Ms. Bloomfield won't let you forget.

MS. EDWARDS: Neither will you.

THE COURT: **And neither will I.**

MS. EDWARDS: Thank you very much Your Honor.

Q (By Ms. Edwards) More probable than not do you feel my condition –

THE COURT: **Do you have an opinion regarding the permanency of my condition.**

Q (By Ms. Edwards) Do you have an opinion regarding the permanency of my condition?

(RP 360) (emphasis added).

Q (By Ms. Edwards) More probable than not do you believe that I sustained a brain injury in the 1995 motor vehicle accident?

MS. BLOOMFIELD: I'm going to continue my objection on lack of foundation.

THE COURT: **Why don't you use the same word he did, cognitive.**

(RP 362) (emphasis added).

The court also assisted plaintiff during her questioning of Dr. Peter Adkins, plaintiff's chiropractor. For example, when plaintiff's question did not articulate the proper standard, the court interjected it for her.

Q I'll try. Do you think that given brain stem pressure, increased brain stem pressure and increased spinal injury, that I incurred more susceptibility to seizures?

MS. BLOOMFIELD: Same objection.

MS. EDWARDS: Not quite.

THE COURT: **I'm going to allow the answer on a more probable than not basis.**

(RP 459) (emphasis added).

Q (By Ms. Edwards) Okay. I can't quite grasp where I was at. Could you describe to me what you would think you would see, according to your training, what you would see if I did not relieve the pressure on my brain stem?

MS. BLOOMFIELD: Objection, calls for a improper opinion to the extent it's not on a more probable than not basis.

MS. EDWARDS: Okay. I'll put it on that unless you want me to state.

THE COURT: **On a more probable than not [basis] it has to be.**

(RP 465) (emphasis added).

Q Can you think of any other changes you might see?

MS. BLOOMFIELD: Objection. If we're not asking, again, asking for something more probably than not will occur, it's improper.

THE COURT: Sustained. **Probable than not, not possibly, more probable than not.**

MS. EDWARDS: Okay.

(RP 467) (emphasis added).

Finally, the court guided plaintiff again on the standard of care during her examination of Dr. Richard Waltman, her primary care physician:

Q Okay. That wasn't quite the question, but that's okay I'll take it. Do you feel that I will get any more recovery from my brain injury?

MS. BLOOMFIELD: Same objection as to improper opinion.

THE COURT: **More probable than not what the prognosis is.**

Q (By Ms. Edwards) More probable than not, what do you feel the prognosis is as related to you?

(RP 526-27) (emphasis added).

In addition to the advice on the critical issue of framing causation and damages testimony, the trial court aided the plaintiff on various other issues throughout trial. The court reminded plaintiff to ask her chiropractor whether his expenses were related to treatment for the accident.

THE COURT: Let's see. To accommodate this witness then let's go forward. **Are you going to ask about medical or chiropractic expenses on a more probable than not basis related to this accident to date?**

MS. EDWARDS: Yes.

Q (By Ms. Edwards) Dr. Adkins, do you have, on a more probable than not basis, do you have any medical expenses or liens that I have incurred as a result of this accident?

(RP 470-71) (emphasis added).

The trial court explained to plaintiff how to go about providing rebuttal testimony:

THE COURT: **Well the only rebuttal witness you would have is yourself. So if you have anything to testify to in rebuttal to that deposition, then I'll allow you to take the stand again and to testify.** But if, you know, if you've addressed it previously, it's up to you.

MS. EDWARDS: Well, I don't want to go outside the scope of defense testimony and the witness is clearly not available, you know that. I would have one or two comments. She may not allow them and I don't want to –

THE COURT: **Why don't you take the stand and take the deposition with you and you can respond in rebuttal to the deposition.**

(RP 598-99) (emphasis added).

MS. EDWARDS: Okay, got you. Thank you. Thank you. To my knowledge this vehicle did not hit me at 15 to 20 miles an hour.

MS. BLOOMFIELD: Objection, lack of foundation for her knowledge of the other vehicle's speed.

THE COURT: **You can describe the impact, but you don't know how fast they were going, but you do know what you felt and what the impact was, so you can testify to that....**

....

You can describe what happened to the impact with the vehicles. You can also describe what happened to you within the vehicle upon impact.

(RP 600-01) (emphasis added).

The court repeatedly helped plaintiff's laywitnesses provide acceptable testimony after the Le Ducs' counsel objected. (RP 68, 71, 72, 82, 87, 123, 124, 154-55, 178-80, 206, 219, 265, 296-97, 308, 322, 324, 327, 332, 409, 419) One example of this assistance and participation by the court occurred during the testimony of Martin Dyke, another dog trainer who had worked with plaintiff:

Q And then I moved. Why did I not complete that day with him, do you recall?

MS. BLOOMFIELD: Again to the extent that he knows from observation as opposed to what Ms. Edwards told him?

MS. EDWARDS: No, he was there.

THE COURT: What you observed. **Why didn't she complete it, do you know?**

THE WITNESS: Her legs were sore. She was getting numbness in the leg. That was the reason that I've – why she didn't complete the show of the dog.

MS. BLOOMFIELD: For the record, Your Honor, I move to strike as there's no way he can know that without being told by Ms. Edwards.

THE COURT: **What did you observe about Ms. Edwards?**

THE WITNESS: Well, she was limping when she got ready to go into the ring. She was pale and looked tired and that was about it, Your Honor.

THE COURT: **And then didn't continue?**

THE WITNESS: Yes, she didn't – she did not continue to go into the ring.

(RP 123-24) (emphasis added).

The court assisted plaintiff in designating and using some exhibits for illustrative purposes, identifying other exhibits to show to the jury, and admitting them into evidence:

THE COURT: **And this is intended for illustrative purposes** to illustrate your activities in the spring of '84 and the other –

MS. EDWARDS: Yes, and this witness has knowledge of this activity.

THE COURT: **I'll allow it for illustrative purposes.** Now your witness needs to be examined starting with your witness' name.

(RP 147) (emphasis added).

MS. BLOOMFIELD: With the exception of No. 19 which wasn't identified, I have no objection to admitting those Your Honor.

MS. EDWARDS: I will remove it.

THE COURT: For the record **ask him the question if those pictures that he's identified fairly and accurately depict the vehicle at the time that we're talking about, at the time of the accident.**

Q (By Ms. Edwards) Okay. To your knowledge Mr. Larson, do these pictures fairly and accurately depict my vehicle at the time of the accident?

A Yes.

Q Thank you.

THE COURT: Without objection I'll admit all of them except 19. **Now you're moving to publish those to the jury; is that right?**

MS. EDWARDS: Yes, I am.

THE COURT: Granted.

(RP 303-04) (emphasis added).

MS. BLOOMFIELD: Your Honor, I will object. I haven't seen any of these photographs.

THE COURT: **They have to be identified and shown to Ms. Bloomfield.**

MS. EDWARDS: Okay. Just a minute. Ms. Bloomfield will look at these.

WITNESS: I think he's probably the biggest shepherd I've ever seen and one came close was at the Humane Society and that was old Sarge and he was big too.

MS. BLOOMFIELD: I'll object on relevance basis of photographs of dogs, dog shows, ribbons.

THE COURT: **Your purpose for admitting these is to show the size, to show how much of a dog he was and**

how you were able to handle a big dog like this before the accident, is that what you're doing?

MS. EDWARDS: Yes.

(RP 408-09) (emphasis added).

3. The Cumulative Effect of the Court's Assistance to Plaintiff Deprived the Le Duc's of a Fair Trial.

Any one of the judge's comments could have given the jury the impression that the trial court felt a particular way about the question being asked. *See Lane*, 125 Wn.2d at 838 (a statement may constitute a comment on the evidence if the jury can **infer** the court's attitude). It is immaterial whether the court actually held a particular view of the evidence – the repeated assistance likely allowed the jury to infer that the court had a favorable stance on the merits of plaintiff's case. *See Casper*, 119 Wn. App. at 771 (repeated reminders about how to properly testify constituted an impermissible comment on the evidence). Further, as *Egede-Nissen* held, it does not matter whether the judge's intervention was inadvertant. 93 Wn.2d at 141. The trial judge interceded in the trial, particularly with the expert witnesses, more frequently and at greater length than the circumstances warranted. *Id.* These frequent interjections likely caused the jury to infer the judge's views on the merits of the case. *Id.* at 141-42.

The trial court's questions and reminders were not always invited. The trial court's questions did not represent a natural and limited reaction to an immediate stimulus. *See Egede-Nissen*, 93 Wn.2d at 141. In other words, the assistance did not always come after the Le Ducs' counsel objected. Rather, the judge **proactively** commented and helped plaintiff try her case. As one example, the court, without any impetus, suggested plaintiff should ask Dr. Adkins what his bills were and whether they were reasonable and necessary. (RP 470-71). Prior to the court's interjection, plaintiff was asking her chiropractor about future care that might be required. (RP 469-70) Without the court's guidance, plaintiff would likely not have elicited any testimony on the reasonableness or necessity of the treatment.

Plaintiff had the burden to prove what injuries were caused by the accident. (CP 19) Without the court's ongoing assistance, plaintiff would likely not have elicited testimony from any of the medical witnesses on a more probable than not basis to a reasonable degree of medical certainty. Without that evidence, the Le Ducs would have successfully moved for a directed verdict. This was the very thing that the court acknowledged that it was trying to prevent. (RP 239-41) Providing such assistance was not the judge's responsibility, and doing so undermined his role as an impartial decisionmaker. *See Pliler*, 542 U.S. at 231.

The assistance provided by the trial court signaled to the jury that the question being asked was important and that the court wanted to ensure the witness answered despite the objection by the Le Ducs' counsel. Any time the court interjected with a rephrased question or a suggestion on how to answer in light of the objection, the jury's attention was unduly called to that testimony. *See Jackson*, 83 Wash. at 523 (jurors are "quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended"). The cumulative effect of these constant interjections left the jury with the impression that plaintiff's claims were well-founded and deserved extra attention.

The repeated guidance in questioning plaintiff's experts gave the distinct impression that these witnesses, who were supporting plaintiff's injuries, had valid statements to make. When the judge actually asked the questions himself, this emphasis was magnified further. The jury was given the impression that the court was working with the plaintiff to establish her case. Indeed, the dialogue between plaintiff and the court often made it appear that they were working together. As a few examples:

MS. EDWARDS: I'm not asking about earning claims,
I'm asking about my life.

THE COURT: It's –

MS. EDWARDS: Shall I restate it?

THE COURT: Well, you're going about what you're going to be able to do to earn a living, isn't that what you're asking?

MS. EDWARDS: Earning a living being take [sic] care of myself.

THE COURT: **Take care of yourself is one thing, earn a living is a thing we've ruled upon before because of the procedural problems. Do you remember?**

MS. EDWARDS: That's past, not future, correct.

THE COURT: It's based on the earning issue has been resolved, past, present and future, **but you can talk about your living activities and so on, past, present and future.**

Q (By Ms. Edwards) Okay. Could you address that according to the Judge's instructions?

(RP 265-66) (emphasis added).

Q Mr. Nikl, have you ever seen me perform similar work to this videotape?

A Yes, I have seen you work the first dog and the second dog in the sequence, similarly.

THE COURT: **Do you want to establish the time, date?**

Q I would say –

THE COURT: **Well, ask him.**

Q (By Ms. Edwards) Would you like to establish a time date frame?

(RP 327) (emphasis added).

Q Would you like qualifications?

THE COURT: **You need to ask him background, history information, professional history.**

(RP 332) (emphasis added). Undeniably, such an alignment of the court and plaintiff against Mrs. Le Duc was contrary to the basic tenants of our judicial system and patently prejudicial to Mrs. Le Duc.

Even plaintiff acknowledged that as a *pro se* litigant she had received assistance from the court.

Q So would you say if I'm a little slower in the court it might not be unusual, or that's not right word. Not only am I not a attorney, correct, I'm also a plaintiff, correct?

A Yes.

Q So I'm at a slight disadvantage?

(RP 256-57) (emphasis added). On one occasion, plaintiff told the witness and the jury that the court had asked her to evaluate her medical needs, and so she began a line of questions about that.

Q Okay. **This court has asked me to evaluate my future medical needs.**

(RP 238) (emphasis added). Then, in closing arguments, she told the jury:

I would just say taking on a case of this magnitude by myself has been a increased work burden for me, very intensive. Sometimes I can't get everything I want done with this case done. **And the Court has been very helpful to me in helping me do that and realizing that I had a limited amount of time to do this and just know that for a brain injury person to take a case like this on is quite rare.**

(RP 652) (emphasis added).

That I can conduct this trial, I think you guys have seen me falter quite a few times. **I think you've seen the court assist me quite a few times.**

(RP 689) (emphasis added).

Without the court's assistance and framing of questions to the medical witnesses, plaintiff would not have been able to present the requisite evidence to establish that her claimed injuries were caused by the accident. *See Risely*, 69 Wn.2d at 561 (court improperly took over questioning of medical expert to establish evidence of causation and damages). Without the court's assistance and framing of questions to the medical witnesses, plaintiff would not have been able to elicit any proof that the medical bills were reasonable and necessary. As in *Eisner*, the trial court's assistance went well beyond clarifying questions to the witness. 95 Wn.2d at 463. As in *Eisner*, the plaintiff did not prove her case; the court did.⁷ *Id.*

Mrs. Le Duc acknowledges that the trial court was in a difficult position. The court was cognizant of the need to avoid comments on the evidence. (RP 48) The judge was also fully aware that he and his staff could not assist plaintiff in trying the case. (RP 21) The court at least paid lip service to the fact that plaintiff needed to try the case on her own

⁷ Although, as discussed *infra*, even with the court's assistance, plaintiff failed to prove that many of her claimed injuries resulted from the car accident, and the jury's verdict was thus unsupported by the evidence.

and that she did so at her “own peril.” (RP 242-43) Yet, as the trial proceeded, the court ignored its own admonitions and guided the plaintiff in an ever-increasingly hands-on manner. The court’s assistance to plaintiff during the trial tipped the balance beyond fairness and deprived Mrs. Le Duc of a fair trial. Even if unintentional, the effect of the court’s constant interjections amounted to a comment on the evidence which prejudiced Mrs. Le Duc. A new trial is warranted.

D. THE EVIDENCE DID NOT SUPPORT THE JURY’S AWARD.

Mrs. Le Duc admitted liability for the accident. The only questions left for the jury were what injuries were proximately caused by the accident and what damages would compensate plaintiff for those injuries. (CP 19)

1. Plaintiff Did Not Prove That the Accident Was the Proximate Cause of Her Injuries.

A proximate cause of an injury is “a cause which, in a direct sequence, unbroken by any new independent cause, produces the injury complained of and without which such injury would not have happened.” WPI 15.01. Experts may be employed to assist the jury in determining causation. *See Ma’ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). “In general, expert testimony **is required** when an essential element of the case is best established by an opinion which is **beyond the expertise of a layperson.**” *Berger v. Sonneland*, 144 Wn.2d 91, 110, 26

P.3d 257 (2001) (emphasis added); *see* ER 702, 703. In this case, with plaintiff's complex medical history, including previous head injuries and the unusual nature of her seizures, expert medical testimony was necessary to establish causation. *See Berger*, 144 Wn.2d at 110.

A court cannot permit a witness to express an expert opinion on the matter at issue where the witness states that he is unable to express that opinion to a reasonable degree of medical certainty. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 822, 440 P.2d 823 (1968). In *Miller v. Staton*, 58 Wn.2d 879, 365 P.2d 333 (1961), the court held that mere speculation and conjecture was insufficient to establish causation. "The evidence must be more than that the accident 'might have,' 'may have,' 'could have,' or 'possibly did,' cause the physical condition. It must rise to the degree of proof that the resulting condition was probably caused by the accident." *Id.* at 886.

Here, plaintiff was not competent to testify that the car accident caused her injuries. *See Berger*, 144 Wn.2d at 110. She and a variety of lay witnesses discussed her physical problems, but due to her complex medical history, qualified experts were necessary to establish that the accident **actually caused** those problems. Plaintiff called several health care providers to testify during her case in chief, but she struggled throughout the trial to elicit opinions from them that were on a more

probable than not basis. Dr. Young (the rehabilitation physician) was unable to attribute **any** of plaintiff's injuries to the car accident:

THE COURT: Can you state, Doctor, based upon a reasonable probability, reasonable medical probability to a medical certainty, what, if any, injuries Ms. Edwards suffered as a result of the automobile accident of 1995?

THE WITNESS: No, I cannot. All I can do is quote other peoples' opinions.

(RP 248) This was corroborated by Mr. Larson (the speech pathologist) who said that he and Dr. Young had discussed the issue and were unable to determine whether the car accident caused any of plaintiff's complaints.

(RP 504-05) Dr. Waltman (plaintiff's primary care physician) was not asked and did not provide **any** causation testimony linking the accident to any claimed injuries. He did, however, testify that plaintiff's pre-accident seizures were emotional and not as a result of a medical cause. (RP 515)

Dr. Davis (the naturopathic doctor) testified that plaintiff had a cervical sprain injury. (RP 339, 391). However, by January of 1996 (two months after the accident), plaintiff had no cervical range of motion problems, and her cervical MRI was normal. (RP 377-79) Dr. Davis equivocated about whether the seizures were caused by the car accident. He admitted that plaintiff had suffered the seizures both before and after the car accident. (RP 347) He indicated that it was a "possibility" that plaintiff had sustained a head injury from the accident. (RP 351) *See*

Miller, 58 Wn.2d at 886 (causation opinion evidence must be expressed as more than just a possibility). He eventually testified that he believed that plaintiff had sustained a “cognitive” injury from the car accident. (RP 362) Importantly, Dr. Davis never opined on a more probable than not basis to a reasonable degree of medical certainty that plaintiff’s claimed **seizures** resulted from the car accident.

In addition, plaintiff never established that Dr. Davis, a naturopathic doctor, was qualified to offer neurological opinions. Dr. Davis admitted that while he had performed a neurological test after the accident, he had not compared it to any test prior to the accident to see if plaintiff’s functioning had changed. (RP 363) He knew that plaintiff suffered from seizure activity before the accident. (RP 365-68) Plaintiff admitted during her cross-examination that Dr. Delyanis, her neurologist, did not believe that the car accident caused her seizures. (RP 563) Another of plaintiff’s neurologists, Dr. Schwartz, believed plaintiff’s seizures were emotional and not due to any physical injury (RP 383-84) Naturopath doctor Davis simply disagreed with the group of plaintiff’s treating neurologists (Dr. Overfield, Dr. Dylanis, Dr. Schwartz and Dr. Rubenstein) who had indicated that plaintiff’s seizures were actually just pseudo-seizures. (RP 394)

Finally, Dr. Adkins, plaintiff's chiropractor, testified about his treatment of plaintiff's injuries. Dr. Adkins diagnosed plaintiff with whiplash. (RP 475) He attributed plaintiff's spinal injury to the accident. (RP 458) Dr. Adkins admitted that he was not qualified to read an MRI. (RP 475) He further admitted that by statute, he was only designated to treat misaligned vertebra. (RP 443) By May of 1996 (six months after the accident), plaintiff was 80 percent improved and stopped treatment with him. (RP 471-73) Without any competent expert testimony to link the accident to her claimed seizures, the vast majority of the evidence put forth by plaintiff was irrelevant.

2. Plaintiff Did Not Prove That the Treatment She Received and the Medical Bills She Incurred Were Reasonable or Necessary.

A plaintiff requesting remuneration for medical costs in a personal injury lawsuit has the burden of proving that the medical costs were reasonable and necessary. In so doing, the plaintiff cannot rely solely on medical records and bills. *Patterson v. Horton*, 84 Wn. App. 531, 542-43, 929 P.2d 1125 (1997). “[M]edical records and bills are relevant to prove past medical expenses **only if supported by additional evidence that the treatment and the bills were both necessary and reasonable.**” *Id.* at 543 (emphasis added). Of all of the health care providers called to testify by plaintiff, Dr. Adkins was the **only one** who reviewed his medical

records and testified that the care he provided and the charges that plaintiff incurred were reasonable and necessary.⁸ Plaintiff's chiropractor bills (along with the emergency room bills which Mrs. Le Duc conceded were appropriate) amounted to only \$1,633.88. (CP 670)

3. The Trial Court Erred in Failing to Grant Remittitur.

A trial judge may order remittitur after a jury verdict pursuant to

Washington statute:

If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be **so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice....**

RCW 4.76.030 (emphasis added).

Generally, a trial court does not have discretion to reduce a verdict if the verdict is "within the range" of the credible evidence. *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000). However, even though there is a strong presumption of validity of jury verdicts, verdicts must always be supported by the evidence. *Himango. v. Prime Time Broadcasting, Inc.*, 37 Wn. App. 259, 268, 680 P.2d 432, *rev. denied*, 102

⁸ Indeed, Dr. Adkins only testified that his services and bills were reasonable and necessary because the court **prompted** plaintiff to ask the question. "Let's see. To accommodate this witness then let's go forward. Are you going to ask about medical or chiropractic expenses on a more probable than not basis related to this accident to date?" (RP 470-71)

Wn.2d 1004 (1984). A court “may grant remittitur if the damages are so excessive as to manifestly have been the result of passion or prejudice, or if the verdict is unsupported by substantial evidence.” *Green*, 103 Wn. App. at 462.

There are numerous Washington cases in which the trial court properly reduced damages awarded by the jury. *See Hill v. GTE Directories Sales Corp.*, 71 Wn. App. 132, 856 P.2d 746 (1993) (evidence supported the trial court’s reduction of the jury’s \$40,000 lost income damages award to \$19,000 and the noneconomic damages from \$410,000 to \$125,000); *Himango*, 37 Wn. App. 259 (trial judge did not abuse his discretion in reducing damages from \$250,000 to \$70,000); *Scobba v. City of Seattle*, 31 Wn.2d 685, 198 P.2d 805 (1948) (trial court properly reduced verdict from \$10,000 to \$4,000).

Certainly, any situation in which remittitur may be appropriate is driven by the specific facts of the case. In this case, the evidence did not support the jury’s verdict of \$100,000. Without any further explanation or proof, plaintiff argued that she was entitled to \$150,000 in special damages, some of which she indicated that the court did not let the jury see. (RP 686) She also sought \$2 million for general damages. (RP 686) However, the only medical bills established as reasonable and necessary amounted to \$1,633.88. (RP 471, 670)

In light of the low economic damages and the absence of medical proof that plaintiff's seizures were caused by the accident, the only explanation for the unduly large verdict (which amounted to over 61 times her established special damages) is that it was based on passion or prejudice. It is possible that the jury was confused by plaintiff's claim in closing argument and during her testimony that she had incurred \$150,000 in medical bills. (RP 542, 686) It is possible that the jury mistakenly believed that there was a wage loss component to her claims (which there was not) because a large amount of the testimony elicited by plaintiff related to her inability to train large dogs since the accident. In addition, plaintiff repeatedly played to the jury's sympathy by alleging that she was handicapped. (RP 692) She also stressed the fact that she was not a lawyer, hinting that she needed special assistance during the proceedings. (RP 689)

It is not clear precisely what influenced the jury to make such a large award, but the award was clearly out of scale with the evidence on the record. The trial court's refusal to reduce the award to an amount more in line with the evidence was an abuse of discretion.

4. The Le Ducs Are Entitled to a New Trial.

CR 59 provides numerous bases for the trial court to grant a new trial. Pursuant to CR 59(a)(5), a new trial is appropriate where damages

are “so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice.” It is not within the province of the jury to punish the defendant with an award that “exceeds rational bounds” and is above the amount of full compensation for plaintiff’s loss. *Ryan v. Westgard*, 12 Wn. App. 500, 513, 530 P.2d 687 (1975). A new trial may be granted where the verdict so grossly exceeds a just award that passion or prejudice must be presumed. *Skeels v. Davidson*, 18 Wn.2d 358, 374-75, 139 P.2d 301 (1943), *overruled in part on a other grounds by Lockhart v. Besel*, 71 Wn.2d 112, 426 P.2d 605 (1967). As discussed above, the size of the jury’s award can only be explained by passion and prejudice.

Pursuant to CR 59(a)(7), a new trial is appropriate where “there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.” A new trial is properly granted where no evidence or reasonable inference from the evidence would sustain the verdict. *Sommer v. Department of Social and Health Services*, 104 Wn. App. 160, 172, 15 P.3d 664, *rev. denied*, 144 Wn.2d 1007 (2001). In this case, plaintiff testified about the pseudo-seizures that she claimed resulted from the accident. However, no competent physician was able to make such a causal connection.

In the end, the jury did not have a reasonable basis to conclude that the car accident was a proximate cause of the injuries claimed by plaintiff (with the exception of the cervical sprain testified to by Dr. Adkins and Dr. Davis). Without a causal connection, it was manifestly unreasonable for the jury to have awarded any damages for injuries other than the minor sprain treated by Dr. Adkins. There were no injuries reported at the scene of the accident, and the cars suffered only moderate damage. (RP 589, 591, 595-96) Both the spinal x-rays taken a day after the accident and the MRI taken two months later were normal. (RP 379) After 14 visits from January to May of 1996, plaintiff indicated that she was 80 percent improved and she stopped treatment with Dr. Adkins. (RP 471-73) The medical bills from the ER and Dr. Adkins amounted to \$1,633.88. (RP 670) An award for any other alleged injuries is not justified by the evidence, and the jury's award of \$100,000 clearly encompassed damages for more than the whiplash injury diagnosed and treated by Dr. Adkins. In short, the evidence does not justify the jury's verdict.

CR 59(a)(9) provides a catchall provision which allows a new trial where "substantial justice has not been done." The cumulative effect of all of the factors discussed above deprived Mrs. Le Duc of a fair trial. The court's comments on the evidence were likely linked to the excessive verdict which was otherwise unsupported by the evidence. Despite the

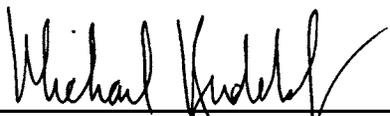
lack of evidence, the jury was likely swayed by the participation by the court into awarding a much larger amount than the evidence actually supported. As such, justice was not done, and a retrial is appropriate.

VI. CONCLUSION

Faced with a *pro se* plaintiff who was unable to adequately elicit testimony to prove her case, the trial court impermissibly entered the “fray of combat” by coaching (and even stepping in for) the plaintiff throughout the trial. The nature and sheer number of these interventions amounted to a comment on the evidence. The harm from these comments is patent. The jury was clearly influenced, as evidenced by the grossly excessive verdict it returned. The case should be remanded to the trial court to substantially reduce the award or to hold a new trial.

DATED this 7th day of May, 2009.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Michael N. Budelsky WSBA #35212
Attorneys for Appellants

DATED this 7th day of May, 2009.

Cathi Key

Cathi Key

SIGNED AND SWORN to (or affirmed) before me on May 7,
2009, by Cathi Key.

Leone Powers

Print Name: Leone Powers
Notary Public Residing at King Co, WA
My appointment expires 8/11/2010

