

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**NO. 38699-2-II**

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

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**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.**

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

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**REPLY BRIEF OF APPELLANTS**

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*S.M. 11-14-2009*

**ORIGINAL**

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## **I. INTRODUCTION**

In her response brief, Ms. Edwards picks at the edges of Mrs. Le Duc's arguments, but she never addresses head-on the main issue of this appeal – the trial court's pervasive and invasive assistance during trial. The prejudicial impact of the court's involvement and the lack of evidence to support the jury verdict require reversal and remand for a new trial.

## **II. ARGUMENT**

### **A. PLAINTIFF FAILED TO PROVE MEDICAL CAUSATION.**

While Ms. Edwards (“plaintiff”) devotes a substantial portion of her brief to addressing the factual background in Mrs. Le Duc's brief, she again fails to establish that she presented evidence to establish proximate cause. (Response Brief 1-9) Many of the facts to which Ms. Edwards takes exception – the severity of the car accident, for example – generally provide context and the factual background, but they are not dispositive of this appeal. Even though the parties may disagree about the severity of the accident, Mrs. Le Duc never described the accident as “a minor ‘fender-bender.’” (Response Brief 4) At trial, both plaintiff and Mrs. Le Duc described the accident. Regardless of whether their versions differed, plaintiff bore the responsibility of putting forth expert testimony to establish her claimed injuries were caused by the accident. She failed to do so.

Plaintiff also takes exception to the recitation of her complex medical history in Mrs. Le Duc's opening brief. (Response Brief 3-9) This description is useful to demonstrate that plaintiff's prior conditions and alleged injuries were sufficiently complex to require expert medical testimony to causally connect any injuries to the car accident. *See Berger v. Sonneland*, 144 Wn.2d 91, 110, 26 P.3d 257 (2001) (expert testimony required when an essential element is beyond the expertise of a layperson). No qualified witnesses ever provided the requisite causal connection between the injuries and the accident.

Plaintiff correctly notes that none of her neurologists testified at trial. (Response Brief 4) However, plaintiff bore the burden of proving that her injuries, including the unusual seizures, were related to the accident. She declined to call a neurologist – treating or expert – as a witness. As a result, Mrs. Le Duc had no need to call Dr. Overfield, Dr. Schwartz, Dr. Delyanis, or Dr. Rubenstein to rebut nonexistent testimony. Rather, it was sufficient for her to discredit Dr. Davis, plaintiff's naturopathic doctor, about his opinions on neurological injuries. Mrs. Le Duc demonstrated that Dr. Davis' opinions were not well-founded because every neurologist who had treated plaintiff during the relevant time frame disagreed with his novel assessment of the seizures. (RP 394-95)

Notably, Dr. Schwartz's opinion was presented to the jury. Her January 15, 1996, report was admitted as Exhibit 7. (CP 10) *See also* RP 376-79, 383-84.

Plaintiff alleges that Dr. Waltman, her primary care physician, testified about the seizures. (Response Brief 6) Although he generally discussed seizures, it is more precise to note that Dr. Waltman never testified that plaintiff's alleged seizures were related to the accident.<sup>1</sup> Plaintiff acknowledges that Dr. Waltman "neither attributed nor discounted the connection" between the car accident and any injuries. (Response Brief 9) Certainly, the jury could not have reasonably inferred that based on his lack of testimony, Dr. Waltman felt that certain injuries were attributable to the accident. *See O'Donoghue v. Riggs*, 73 Wn.2d 814, 822, 440 P.2d 823 (1968) (expert causation opinions must be expressed to a reasonable degree of medical certainty).

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<sup>1</sup> Plaintiff takes issue with the citation in Mrs. Le Duc's brief to the defense lawyer's closing statement where it was pointed out that Dr. Waltman never offered any relevant causation opinions. (Response Brief 8) Mrs. Le Duc cited to the point in the record where the lack of testimony was most succinctly summarized. Obviously, it is difficult to cite to the absence of testimony, but a review of Dr. Waltman's entire testimony demonstrates that defense counsel's summation was accurate. (RP 507-28)

**B. COMMENTS OUTSIDE THE PRESENCE OF THE JURY ARE RELEVANT TO THIS APPEAL.**

Some of the judge's troubling comments were not made in the presence of the jury. Mrs. Le Duc acknowledges that by themselves, these examples of assistance are insufficient to constitute a comment on the evidence. However, these out of the jury's presence tutorials are significant for several reasons. First, the assistance was improper. Even though plaintiff was a pro se litigant, the trial court was required to treat her just as if she was represented by an attorney and to hold her to the same standards of legal knowledge. *In re Connick*, 144 Wn.2d 442, 455, 28 P.3d 729 (2001); *Batten v. Abrams*, 28 Wn. App. 737, 739 n.1, 626 P.2d 984, *rev. denied*, 95 Wn.2d 1033 (1981). The U.S. Supreme Court in *Pliler v. Ford*, 542 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004), recognized that a judge advising a pro se litigant could "undermine" his role as an impartial decision-maker.

Second, the assistance further demonstrates how the trial court actively helped plaintiff. This was the same sort of active support that the trial court also supplied while the jury was present. The court aided plaintiff during all phases of the trial.

Third, it demonstrates that the additional assistance the trial court provided in front of the jury was not even necessary. The court spent a

significant amount of time schooling plaintiff on how to properly elicit opinion testimony before the examination of her health care providers. (RP 239-243) Despite the lengthy in camera tutorial, the trial court still repeatedly helped and corrected her during the actual trial. (RP 246-47, 258, 261, 265, 343-44, 350-51, 360, 362, 459, 465, 467, 526-27)

Finally, the assistance was indirectly known by the jury because plaintiff later informed the jury about the help she had received. (RP 238, 652, 689) Thus, the guidance provided when the jury was not present should be considered in connection with all of the other irregularities in determining whether the trial judge overstepped his bounds and commented on the evidence.

**C. THE JUDGE’S COMMENTS IN THE PRESENCE OF THE JURY WERE PERVASIVE.**

Contrary to plaintiff’s assertion, Mrs. Le Duc has never argued “that a judge is prohibited from ‘assisting’ a pro se litigant.” (Response Brief 11) Mrs. Le Duc recognizes that a court may make occasional helpful suggestions to move a case along. A court can find itself in an even more difficult position when a party is pro se. The court’s assistance in this case, however, went well beyond minor, occasional, helpful suggestions. It was widespread. The cumulative effect amounted to a comment on the evidence. The trial judge stepped over the line from

providing a helpful suggestion (to move the case along) to openly assisting plaintiff in trying her case (which altered the outcome of the trial).

Notably, plaintiff declines to specifically address any of the instances of the trial court's assistance. Instead, she merely makes the blanket assertion that the judge's involvement did not convey a belief about the facts of the case. (Response Brief 14) A comment on the evidence can exist where a judge's feelings are merely implied or can be inferred by the jury. *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006); *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). It is immaterial whether the judge actually held a particular view on the evidence. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004) (repeated reminders about how to properly testify constituted an impermissible comment on the evidence). Further, the cumulative effect of repeated interjections by the court can, by itself, amount to a comment on the evidence. *Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 141, 606 P.2d 1214 (1980).

In this case, the trial judge interceded repeatedly with plaintiff's medical experts. His assistance implied that the question being asked was important, despite a defense objection. The guidance allowed the jury to infer that the witness had testimony to prove plaintiff's case, and the judge intended to ensure that it was heard in open court. Sometimes the judge

suggested how to ask the question and plaintiff parroted it to the jury. (RP 360) Sometimes the judge properly phrased the question for her, and plaintiff simply referred the witness to the question asked by the judge. (RP 247, 261) Sometimes the judge jumped in and asked the question himself. (RP 248) Sometimes the judge overruled a valid objection and simply assumed that the question had been properly posed. (RP 459)

It is virtually impossible to read the record and not come away with the impression that the court was working with plaintiff to help her prove her case. It is immaterial whether the judge actually felt a particular way about the evidence. *See Casper*, 119 Wn. App. at 771. The assistance so permeated the trial, that even if unintended, it could not help but influence the jury. *Id.*; *Egede-Nissen*, 93 Wn.2d at 141. Ironically, years later the trial judge remembered plaintiff fondly, and referred to the case as “one of the greatest examples in [his] tenure on here that [he has] seen for justice.” (12/5/09 RP 18)

The trial court’s assistance and questioning altered the outcome of the trial. Without the court’s collaboration, plaintiff would not have been able to elicit testimony from her medical witnesses to a reasonable degree of medical certainty – Mrs. Le Duc would have successfully moved for a directed verdict. Also, plaintiff would not have established that any of her treatment and medical bills were reasonable and necessary had it not been

for the court's interjection. (RP 470-71) Indeed, the trial court joked years later at the hearing for a new trial, that if he had helped plaintiff try the case, he "did a good job." (12/5/08 RP 4)

Plaintiff's accusation that Mrs. Le Duc wanted to keep the jury "uninformed" by preying on "a pro se's technical ignorance" is misguided. (Response Brief 14-15) In fact, in the adversarial system of our judicial process, it is not contemplated or appropriate for opposing counsel or the judge to act as a pro se litigant's trial consultant. Plaintiff made the conscious choice to proceed pro se, and she was warned of the risks. (RP 21, 242-43) Plaintiff is unable to point to any improper defense objections. Her allegation on appeal that Mrs. Le Duc's counsel sought to take advantage of her by "[s]uppressing pertinent evidence" is baseless and irrelevant to this appeal. (Response Brief 14)

**D. THE VERDICT WAS IN EXCESS OF THE EVIDENCE.**

Plaintiff argues that because the verdict form did not segregate special and general damages, it is impossible to know whether the jury's award was so inflated as to be the result of passion and prejudice. (Response Brief 17-18) Plaintiff does not deny that she proved at most \$1,633.88 (RP 670) in special damages, and the jury awarded \$100,000

(CP 26).<sup>2</sup> Plaintiff offered testimony linking the four months of treatment for her back sprain to the accident, but there was no competent medical testimony establishing her seizures were caused by the accident. (RP 471-73) The exact breakdown of special and general damages is immaterial. Either the jury awarded an amount of special damages that was proven (less than or equal to \$1,633.88) and a grossly-inflated amount of general damages, or it awarded a more reasonable amount of general damages and special damages far in excess of what was proven. Either way, remittitur or a new trial is warranted because the verdict was not supported by the evidence.

The trial court admitted a limited amount of plaintiff's medical billing records. (Exs. 40-46) The billing records from the hospital (Ex. 41) and from chiropractor Dr. Adkins (Ex. 43) were appropriate because Dr. Adkins testified about his own treatment and billing and defendants admitted the hospital records were reasonable and necessary. However, Dr. Davis's billing records (Ex. 46) should not have helped the jury form its verdict because neither he nor any other healthcare provider testified that they were reasonable or necessary. *Patterson v. Horton*, 84 Wn. App.

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<sup>2</sup> Again, the proof of special damages occurred only upon prompting by the judge. (RP 470-71)

531, 542-43, 929 P.2d 1125 (1997) (billing records can only prove past medical expenses if they are accompanied by testimony that treatment and bills were both reasonable and necessary). Similarly, the remaining billing records are either unintelligible or from care providers not discussed at trial. (Exs. 40, 42, 44-45) These limited records underscore the point that the jury had no reasonable evidentiary basis to make the award that it did.

Acknowledging that only limited special damages were discussed at trial, plaintiff argues that pre-trial rulings pared down the permitted evidence (including wage loss claims). (Response Brief 18) Evidence excluded based on pre-trial motions is irrelevant to the issue of whether the jury's verdict was excessive in light of the evidence before them. Further, Mrs. Le Duc is not required to demonstrate specifically what ignited the jury's passion or prejudice, only that there could be no other reasonable explanation. *See* RCW 4.76.030. In light of the lack of evidence to justify the award, there is no reasonable explanation for the inflated award other than passion or prejudice, likely fueled in part by the judge's excessive influence on the proceedings.

**E. LACHES DOES NOT APPLY.**

This Court should not consider plaintiff's laches discussion (Response at 21) because plaintiff has failed to set forth argument and legal citation. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*,

118 Wn.2d 801, 809, 828 P.2d 549 (1992). Nevertheless, laches does not apply. The doctrine of laches involves two essential showings: 1) inexcusable delay; and 2) prejudice to the other party from the delay. *Cotton v. City of Elma*, 100 Wn. App. 685, 694, 998 P.2d 339, *rev. denied*, 141 Wn.2d 1029 (2000). Plaintiff fails to make these showings.

First, Mrs. Le Duc did not cause an inexcusable delay. Pursuant to CR 54(e), the responsibility for entering a judgment lay squarely with plaintiff. Plaintiff was well aware of this obligation and even made several aborted attempts to enter judgment over the years. She alone was responsible for the lengthy delay after the jury verdict. Even if some culpability arguably lies with Mrs. Le Duc, plaintiff does not have the “clean hands” necessary to invoke the doctrine of laches. *Retail Clerks Health & Welfare Trust Funds v. Shopland Supermarket*, 96 Wn.2d 939, 948-49, 640 P.2d 1051 (1982).

Plaintiff also fails to demonstrate prejudice. She only makes vague assertions that it will be difficult to retry the case. A court cannot presume prejudice from the mere fact of a delay. *Cotton*, 100 Wn. App. at 695. Rather, the party seeking to invoke the principal of laches must show whether and to what extent she has been prejudiced by the delay. *Id.* Plaintiff makes no such showing. Neither laches nor any equitable doctrine is applicable here.

### III. CONCLUSION

Despite plaintiff's reluctance to acknowledge it, the trial transcript is littered with the judge's overt assistance to her. The actions of the trial court improperly influenced the jury and led to a grossly-excessive jury verdict. Mrs. Le Duc requests that this Court remand the case to the trial court to reduce the award or grant a new trial.

DATED this 4<sup>th</sup> day of November, 2009.

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Respondents,

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MAIL

vs.

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

Appellants.

STATE OF WASHINGTON )

) ss.

COUNTY OF KING )

The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action and competent to be a witness therein; that on the date herein listed below, affiant deposited in the United States mail, postage prepaid, copies of the following documents:

1. Reply Brief of Appellants; and
2. This Affidavit of Service by Mail;

addressed to the following parties:

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ORIGINAL

DATED this 4<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Susan Ferrell

SIGNED AND SWORN to (or affirmed) before me on November  
November 4, 2009, by Susan Ferrell.



  
\_\_\_\_\_  
Print Name: Jane Lading  
Notary Public Residing at Seattle, WA  
My appointment expires Aug. 11, 2010