

COURT APPEALS
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STATE OF WASHINGTON
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No. 41008-7-II

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

FALINA HICKOK-KNIGHT, a single person,

Appellant,

v.

WAL-MART STORES, INC.,
a foreign Corporation,

Respondent.

REPLY BRIEF OF APPELLANT

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ORIGINAL

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ARGUMENT

A. The Trial Court Committed Reversible Error By Ordering The Jury To Touch Falina's Foot..

1. The prejudicial impact of the trial court's order substantially outweighed its probative value.

Respondent Wal-Mart's argument that the trial court did not abuse her discretion by ordering the jury to touch Falina's feet simply because the temperature differences in her feet were relevant lacks merit. Resp. Br. 29-31. Wal-Mart merely states that the jury is allowed to manually examine evidence when the trial court permits, but fails to acknowledge there are limits to this general rule. Resp. Br. 29. In fact, Wal-Mart does not even address the pain inflicted upon Falina as each juror touched her foot. It is understandable that Wal-Mart would seek to diminish the significance of this event, but by failing to address the issue altogether Wal-Mart has waived any meaningful response to Plaintiff's primary basis for appeal. Wal-Mart merely reproduces part of the court record which does not document Falina's reaction, apparently in a half-hearted attempt to minimize the significance of the court's order. Resp. Br. 6-8. However, it is already clear from the record that this event had an enormous impact on the jury. CP 541-42.

Wal-Mart cannot claim that simply because the temperature

differences in Falina's feet were relevant that there was no error on the part of the trial court in forcing the jurors to touch her foot. This is especially true because the trial court ordered the jury test over Plaintiff's repeated objections. RP 253-264. Wal-Mart cannot simply avoid these facts in an attempt to justify the trial court's order based on relevance. The prejudicial nature of the trial court's order substantially outweighed any probative value the test may have provided the jury.

2. The jury test was inappropriate and the trial court abused her discretion by forcing each juror to touch Falina's foot over Plaintiff's objections.

The admissibility of experiments, illustrations and other demonstrative evidence rests within the sound discretion of the trial court. *Seattle-First Nat'l Bank v. Rankin*, 59 Wash.2d 288, 367 P.2d 835 (1962); *Sewell v. MacRae*, 52 Wash.2d 103, 323 P.2d 236 (1958). And the trial court's decision to either permit or refuse the evidence is reviewed for an abuse of discretion. *City of Bremerton v. Smith*, 31 Wash.2d 788, 199 P.2d 95 (1948). It is ordinarily within the discretion of the court before which a trial is being conducted to permit or refuse to permit experiments and tests to be made by the jury. *Brown v. Billy Marlar Cheverolet, Inc.*, 381 So.2d 191 (Al.1980); *State v. Darrow*, 287 Minn. 230, 177 N.W.2d 778 (1970).

First, Wal-Mart attempts to obfuscate the facts leading up to the

trial court's order, claiming that Plaintiff motioned to have all of the jurors touch Falina's foot. Resp. Br. 30. This is simply untrue and the record clearly reflects that. RP 253-54. Plaintiff's objection to one juror diagnosing Falina's condition cannot be interpreted as a motion to have all jurors do so. Next, Wal-Mart argues that the jury's experiment was valid simply because it was conducted in court as opposed to out of court. Resp. Br. 30. This distinction fails to address one of the main points emphasized in *Cole v. McGhie*, 59 Wn.2d 436, 447, 367 P.2d 844 (1962), namely that the experiment was conducted over the protest of plaintiff's counsel both before and after the experiment. Another key component in *Cole* was that the experiment itself *likely* had an undue influence on the jury. *Id.* Here, this Court has ample evidence before it to see that the trial court's order had a profound effect on the jury and the verdict.

Wal-Mart fails to cite any legal authority to defend the trial court's order in this case, although this is understandable considering the extreme nature of the trial court's ruling. Instead, Wal-Mart merely cites a handful of cases from other states claiming that "[i]t is not error to permit the jury to manually examine evidence in a personal injury case." Resp. Br. 29. However, further analysis of Wal-Mart's own legal authority shows that there are clear limits to what a trial court should permit in terms of jury

tests and that these limits were clearly overstepped by the trial court in this case.

In *Sampson v. St. Louis & S.F.R. Co.*, 156 Mo.App. 419, 138 S.W. 98, 99 (Mo.Ct. App. 1911), a plaintiff testified that his injured hand had an abnormal circulation of blood and that it remained cold **all the time**. Plaintiff's own counsel asked the plaintiff to exhibit his hands to the jury to feel them, over defendant's objection, which was overruled by the court. *Id.* at 100. The Court of Appeals ruled that the trial court did not err because there was nothing wrong with the plaintiff corroborating his own testimony by having the jury touch his hand. *Id.* This case is clearly distinguished here because the request came from the plaintiff's own counsel to corroborate plaintiff's own testimony that his hands were **always cold**. There was no element of pain involved, no objection by the plaintiff, and the touching was intended to corroborate plaintiff's own testimony. Next, Wal-Mart cites to *Dictz v. Aronson*, 244 A.D. 746, 746, 279 N.Y.S. 66 (N.Y. App. Div. 1935), a medical malpractice case where the Supreme Court of New York, Appellate Division 2, reviewed a trial court's refusal to permit the jury to examine an infant plaintiff's throat to determine the results of the operation. The Court found that the trial court erred in refusing to permit the jury to examine the plaintiff because the examination by the jurors would only require a "layman's knowledge of

cause and effect." *Id.* Similarly, in *McAndrews v. Leonard*, 99 Vt. 512, 134 A. 710, 714 (1926), the plaintiff, through her counsel, asked that the trial court permit the jury to examine plaintiff's skull which the reviewing court found appropriate only after plaintiff's expert state "it was a matter that could be ascertained by a layman feeling of the skull." *Bluebird Baking Co. v. McCarthy*, 3 O. O. 490, 36 N.E.2d 801, 806 (Ohio Ct. App. 1935) also involved a case jurors manipulating the skull to touch a claimed depression in the skull. All of these cases involved instances where the injured party requested to have the jury examine the evidence, the evidence was easily identifiable, and it only required a "layman's knowledge." In each of these cases there was no evidence that the plaintiff would endure any amount of pain or that the trial courts ordered the juries to physically examine the plaintiffs over the plaintiffs' objections. In addition, these were injuries that were clearly permanent and easily ascertainable by the juries.

Falina was diagnosed with complex regional pain syndrome (CRPS), a condition notorious for waxing and waning, meaning that the symptoms often come and go. RP 539. The symptoms are not readily identifiable and it certainly requires more than a "layman's knowledge" to properly diagnose it. CRPS is often difficult to diagnose which is why defendants in personal injury CRPS cases seek to promote theories that the

plaintiffs are consciously malingering, as Wal-Mart does in this case. Resp. Br. 1. There is a minimum value of proof in conducting a jury test to see if the temperature differences are presently there or not, especially given Falina's testimony that it was off and on after the nerve ablation. Due to the peculiar nature of CRPS itself, and especially considering Wal-Mart's theory of the case that Falina was faking it, the trial court never should have ordered the jury test. See 5 Wash. Prac., Evidence Law and Practice § 402.31 (5th ed.) (in certain bodily demonstrations where there may be more danger of fakery than in others, it is arguable that an objection should be sustained, especially when the demonstration itself has minimum value as proof). It is also important to note that in *Grubaugh v. Simon J. Murphy Co.*, 209 Mich. 551, 553, 177 N.W. 217 (1920) where the reviewing court stated that the trial court only permitted the test since it did not "have an undue influence upon the feelings and sympathies of the jury." The jury test in this case clearly had such an effect.

3. The trial court's order itself was a comment on the evidence and Plaintiff properly raised the issue at a time when the trial court could have corrected it, before she conveyed her personal opinion to the jury.

Wal-Mart contends that Plaintiff did not object at trial "about any purported comment on the evidence." Resp. Br. 33. This is a disingenuous argument. The record is replete with Plaintiff's objections to the trial

court's order. RP 253-264. Plaintiff even informed the court of the nature of allodynia and the painful effect the jury test would likely have on Falina. RP 256-57. Plaintiff also objected in open court in the presence of the jury immediately prior to the jury test. RP 264.

In general, an objection must be specific to preserve an issue for appeal. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). However, an appellate court may consider the propriety of a ruling on a general objection if the specific basis for the objection is "apparent from the context". *State v. Braham*, 67 Wash.App. 930, 934-35, 841 P.2d 785 (1992)(quoting *State v. Pittman*, 54 Wash.App. 58, 66, 772 P.2d 516 (1989)); *see also State v. Black*, 109 Wash.2d 336, 340, 745 P.2d 12 (1987); ER 103(a)(1); *State v. Walker*, 75 Wash.App. 101, 879 P.2d 957 (Div. 1 1994) (basis for defense counsel's objection held to be apparent from context); *State v. Jones*, 71 Wash. App. 798, 863 P.2d 85 (Div. 1 1993) (appellate court reviewed propriety of allowing witness to express opinion on defendant's guilt, despite lack of precisely worded objection; the basis for defendant's objection was apparent from the context.)

In other words, if the basis for the objection should have been obvious to the judge and opposing counsel, a lack of specificity in the objection is immaterial for purposes of appeal. Here, there can be no

question that the trial court was fully aware of the nature of Plaintiff's objection and also that it was apparent from the context.

As to the trial court's order itself being a comment on the evidence, there can be no question that the trial court's personal opinions were conveyed to the jury when she ordered each of them to touch Falina's foot. As stated previously, this is truly a case of first impression, where the trial court, over plaintiff's objections, with knowledge that that the order itself would cause plaintiff pain, nevertheless permitted the jury to perform a test on the plaintiff in open court. This forced the jury to believe either Falina's complaints of pain were exaggerated or that the judge was willing to intentionally subject her to pain. There can be no question that the former impression was made upon the jury. CP 541-542.

B. The Trial Court Erred By Admitting Falina's Prior Medical And Social History Into Evidence And Allowing Dr. Hamm's Testimony.

The law states that an expert can testify regarding the basis for his opinion for the limited purpose of showing how he reached his conclusion only if the probative value of the basis for the opinion is not substantially outweighed by its prejudicial nature. *State v. Furman*, 122 Wash.2d 440, 452-53, 858 P.2d 1092 (1993); *State v. Martinez*, 78 Wash.App. 870, 879-880, 899 P.2d 1302 (1995); ER 403; Fed.R.Evid. 703 ("Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the

proponent ... unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.”).

1. Dr. Loeser’s review of Falina’s prior medical and social history did not provide a legal basis for Wal-Mart to cross-examine him on this evidence.

First, Wal-Mart reiterates its argument on appeal that simply because Dr. Loeser reviewed Falina’s prior medical records, Wal-Mart was allowed to cross-examine Dr. Loeser on those records, despite the prejudicial nature of those records. Resp. Br. 34-35. The case law cited above refutes this argument. In addition, Dr. Loeser made it clear that there was nothing in Falina’s medical history, all of which he reviewed, that formed the basis of his opinion or changed his opinion regarding her CRPS diagnosis. RP 624 (7-15). Wal-Mart mischaracterizes Dr. Loeser’s testimony, the basis of his diagnosis, and the probative value of Falina’s prior medical history on his diagnosis. To allow a defendant to cross examine a plaintiff’s expert on all of plaintiff’s prior medical history, simply because the expert reviewed that history, would completely undermine the rules of evidence designed to prevent such evidence from unduly influencing and misleading juries. There is no question that the trial court’s order had that effect in this case. CP 541-542..

2. Dr. Silver's testimony that a person's background is important in a psychological assessment does not provide a legal basis for Wal-Mart to cross-examine him on the details on Falina's prior medical and social history.

Even if Dr. Silver believed Falina's prior medical and social history were pertinent to his opinion concerning her psychological condition, this does not form a legal basis by which Wal-Mart would be permitted to cross examine him on the particular facts and data of this evidence. Resp. Br. 36-37. As stated above, this argument is contrary to basic evidentiary rules. Additionally, whether or not Wal-Mart believed Dr. Silver was equivocating on any particular question is irrelevant to the issue.

3. Dr. Hamm's testimony was **highly prejudicial and inadmissible.**

Wal-Mart erroneously states that Plaintiff's appeal was solely based on Dr. Hamm's "speculative" testimony and that Plaintiff's arguments "go to weight, not admissibility." Resp. Br. 38. Wal-Mart apparently overlooked the entire argument clearly articulated in Appellant's Brief which stated that Dr. Hamm's testimony was not only speculative, but also "highly prejudicial and irrelevant," and numerous examples of this were provided. App. Br. 40-43. This is yet another attempt by Wal-Mart to avoid one of the primary bases of Plaintiff's appeal in this case.

Wal-Mart relies on *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991), but in this case involved crime lab technicians and crime lab experiments where the defendant's primary objection related to the language of the experiment, such as "could have," and "possible," claiming that it was speculative testimony. *Id.* at 853. The court ruled that expert testimony couched in terms of "could have" and "possible" is uniformly admitted at trial, and that the lack of certainty goes to the weight to be given the testimony, and not to its admissibility. *Id.* This case is clearly distinguished from the one before the Court. In *Lord* the experts were crime lab experts engaged in experiments accepted by the general scientific community and the experiments they performed were within their own field. *Id.* at 850-52. Here, Dr. Hamm is testifying as a psychiatrist in a case involving CRPS. His testimony is not only speculative because it is erroneously based on the presumption that Falina did not have objective findings in her case, but also because he has no special knowledge of CRPS. Wal-Mart also relies on *Sigurdson v. Seattle*, 48 Wn.2d 155, 164-65, 292 P.2d 214 (1956), a case that is similarly distinguished because the expert in *Sigurdson* was practicing within his own field and based his conclusions on his own subjective and objective findings, i.e. there was nothing speculative about his findings.

Wal-Mart then attempts to defend Dr. Hamm's testimony based on

Dr. Vu's testimony in trial, but this irrelevant. The question is simply whether Dr. Hamm's testimony should have been admitted considering his testimony was highly prejudicial and had nothing to do with Falina's CRPS claim. Dr. Hamm's entire diagnosis is based on a lack of objective findings in Falina's CRPS case, despite clear evidence that there were objective findings. RP 426-28, 471, 681. Dr. Hamm also testified, over Plaintiff's objections which were overruled by the trial court, that there was nothing wrong physically with Falina, a comment that is clearly outside his field of expertise. RP 931. Further, Dr. Hamm was allowed to testify that the treatments Falina received for CRPS were inappropriate, despite any knowledge of CRPS or the treatments, over Plaintiff's objection again, and overruled by the trial court again. RP 933.

Wal-Mart chose not to address the prejudicial nature of Dr. Hamm's commentary on the voluminous details of Falina's prior medical and social history during his testimony, therefore there is no need to address it again here.

4. Plaintiff properly preserved error for appeal regarding Dr. Hamm's testimony.

The record clearly reflects that the trial court denied Plaintiff's motion in limine to exclude Dr. Hamm's testimony and specifically stated that Dr. Hamm could testify as to Falina's medical records "going back

from whenever,” – “if those records are saying there’s a psychological component [to them].” RP 122 (12-17). In addition, the trial court admitted defense Ex. 58, “pretreatment evidence of the plaintiff,” over Plaintiff’s repeated objections that it would be a “travesty.” RP 523-528. These rulings by the court effectively denied Plaintiff’s numerous motions in limine regarding both Dr. Hamm’s testimony and Falina’s prior medical treatment and social history. CP 25-34, 135-159, 118-134, 160-177, 215-229, 235-245, 313-326, 327-331, 381-386. There was no question that this evidence was being admitted by the trial court. In fact, immediately following the trial court’s decision to exclude this evidence, Plaintiff objected in court to their relevance and was overruled . RP 596 (16-21). There is no question that the court was allowing all of Falina’s prior medical and social history into evidence, even events that occurred when she was 12 years old and younger.

Wal-Mart cites to both *State v. Rasmussen*, 70 Wn. App. 853, 855 P.2d 1206 (1993) and *State v. Kendrick*, 47 Wn. App. 620, 736 P.2d 1079 (1987), but fails to show how these cases would apply in this case. *Rasmussen* was a criminal case in which the defendant failed to raise specific objections or even arguments at trial which would allow the trial court to rule on the issue to preserve the matter for appeal. *Rasmussen* at 859, 855 P.2d 1206. The appellate court correctly declined to review

these issues. *Kendrick* involved a case where counsel for defendant failed to specify the particular grounds of objection at trial and therefore failed to preserve the right to appeal. *Kendrick* at 636, 736 P.2d 1079 (1987). Both of these cases are clearly distinguishable to the present case where the court made multiple rulings on specific evidentiary issues that were presented to court through Plaintiff's motions in limine and made clear rulings effectively denying Plaintiff's motions.

It is well established law that where the trial court denies a motion to exclude evidence, the moving party has a standing objection and preserves the issue for appeal. *State v. Powell*, 126 Wash. 2d 244, 893 P.2d 615 (1995); *State v. Ortiz*, 119 Wash. 2d 294, 831 P.2d 1060 (1992) (defendant's motion in limine was sufficient to preserve the issue of admissibility for appeal); *State v. Kelly*, 102 Wash. 2d 188, 685 P.2d 564 (1984). *State v. Justiniano*, 48 Wash. App. 572, 740 P.2d 872 (Div. 2 1987) (pretrial motion to exclude hearsay statements by child was sufficient to assert the hearsay rule again on appeal, even though no further objection had been made at trial). There are very limited exceptions to this rule. *State v. Clark*, 91 Wash. App. 69, 954 P.2d 956 (Div. 2 1998), *aff'd*, 139 Wash. 2d 152, 985 P.2d 377 (1999) (in prosecution for child molestation, trial court denied defendant's pretrial motion to exclude as hearsay the child's out-of-court statements

implicating defendant; on appeal, appellate court held defendant waived any objection by not renewing his objection at trial because facts elicited were innocuous and did not involve any state or federal constitutional issues); *Sturgeon v. Celotex Corp.*, 52 Wash. App. 609, 762 P.2d 1156 (1988) (trial court's denial of defendant's motion in limine was not sufficient, standing alone, to preserve for appeal error in admitting hearsay testimony of plaintiff, where motion was an oral motion made at commencement of trial prior to opening statements, it was not supported by a memo of authorities, and was very broad in scope). None of these exceptions apply here. Wal-Mart cites to *State v. Sullivan*, 69 Wn. App. 167, 172-73, 847 P.2d 953 (1993), but *Sullivan* applies in the specific case where a trial court grants a motion in limine and then the adversely affected party subsequently violates that motion in limine. *Sullivan* clearly does not apply in this case because the trial court emphatically denied Plaintiff's motions in limine to exclude Falina's prior medical and social history and Dr. Hamm's testimony.

5. Plaintiff did not waive or invite any error by cross examining Dr. Hamm.

Finally, Wal-Mart claims that Plaintiff somehow waived or invited the trial court's error by "repeatedly eliciting testimony on this issue." Resp. Br. 40-41. However, Wal-Mart merely states that because Plaintiff

asked Dr. Hamm “numerous questions” regarding his basis for his opinion in an attempt to “undermine Dr. Hamm’s credibility” that this somehow constituted a waiver of the trial court’s error. There is absolutely no legal basis to support this argument. A party does not waive an objection solely if it is used in self-defense or to explain or rebut the incompetent evidence. *Sevener v. Northwest Tractor & Equipment Corp.*, 41 Wash.2d 1, 15, 247 P.2d 237, 245 (1952). Wal-Mart fails to show how Plaintiff’s cross-examination of Dr. Hamm is anything other than an attempt to defend or rebut Dr. Hamm’s testimony.

C. The Trial Court’s Bias Was Clearly Conveyed To The Jury

Wal-Mart summarily dismisses Plaintiff’s claim that the trial court showed her bias in this case and conveyed that bias to the jury, violating the appearance of fairness doctrine. However, Wal-Mart again does not even address the trial court’s order to have each juror touch Falina’s foot or the trial court’s decision to admit all of her prior medical and social history. Both of these actions by the trial court effectively denied Falina her constitutional right to a fair trial.

Wal-Mart merely argues that Plaintiff mischaracterized the trial court’s comments and took them out of context in order to show her bias. Resp. Br. 42. It is unclear what these mischaracterizations were, especially considering Wal-Mart merely reproduced what was already in Appellant’s

brief. Resp. Br. 24-25. In addition, Wal-Mart's attempt to show that Dr. Loeser described CRPS as a "murky" condition is comical. Reps. Br. 23. Dr. Loeser was responding to a hypothetical question regarding Dr. Wray's description of CRPS as murky and this is apparent even from the context in which Wal-Mart provided the testimony.

Wal-Mart seems to rely primarily on the argument that Plaintiff did not preserve the matter for appeal by failing to motion for recusal based on the trial court's bias. Resp. Br. 42. However, this is contrary to the law. See RCW 4.12.050; *State v. Franulovich*, 89 Wash.2d 521, 573 P.2d 1298 (1978); *State v. Dixon*, 74 Wash.2d 700, 446 P.2d 329 (1968). A party is only obligated to file an affidavit of prejudice and motion for recusal when he proceeds to trial **knowing of potential bias** by the trial court who waives his objection and cannot challenge the court's qualifications on appeal. *Brauhn v. Brauhn*, 10 Wash.App. 592, 518 P.2d 1089 (1974). Plaintiff had no reason to believe prior to trial that the trial court would be biased. In addition, in cases where a plaintiff is deprived of her constitutional right to a fair trial the matter will be preserved for appeal even without raising it at trial. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007) (citing *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *Scott*, 110 Wash.2d at 688, 757 P.2d 492). Plaintiff

was not required to make a motion for recusal in this case to preserve the matter for appeal.

D. The Trial Court Erred In Declining To Give Any Jury Instruction On Aggravation, Lighting Up, Or Susceptibility.

1. Aggravation

Once the defense was allowed to submit to the jury medical testimony that plaintiff was suffering from a pain disorder before the incident occurred, and that the incident caused no more than a bruise, the defense can not be allowed to say now that plaintiff would not be entitled to an aggravation instruction. See the entirety of Dr. Hamm's testimony. With regard to aggravation, the respondent wants to have its cake and eat it, too, by claiming at trial that plaintiff suffered from a pain disorder prior to the incident, which continued on through the incident up until the present day, and which accounted for her pain complaints. Interestingly, respondent defeats its own position at trial by arguing that:

It is not appropriate to give an instruction on aggravation when there is no evidence that any pain or disability was being caused by the preexisting condition prior to the occurrence, and it is error to do so without evidence of such an injury.

(P. 44, Fns. 221 and 222). The foregoing quote only strengthens plaintiff's/appellant's claim that Dr. Hamm should not have been allowed to testify in the first place.

2. Lighting Up.

Depending on the competing theories of plaintiff's pain disorder, assuming for the moment, as the respondent says "It is not appropriate to give an instruction on aggravation, etc...." p. 44 of the response brief, then the finding of a pain disorder, as testified to by both Dr. Hamm and Dr. Silver, support plaintiff's/appellant's alternate theory that preexisting psychological conditions were lit up or made active because of the incident.

3. Susceptibility.

The entire testimony of Dr. Silver should be reviewed, but specifically, the appellate court can see that the respondent, with surgical precision, omitted references to the report of proceedings RP 119, p. 1119, lines 22-25 and p. 1120, lines 1-4, which clearly indicate, and from which the jury can infer, that Dr. Silver was speaking specifically about the plaintiff and not "some individuals."¹ Certainly, if plaintiff was suffering from a pain disorder or had a particularly high susceptibility to react in such a way to evidence a pain disorder, as established apparently by Dr. Hamm's testimony, plaintiff should at least be allowed to argue that she

¹ Throughout the respondent's briefing, accusations have been made that the appellant has taken testimony out of context. This is another example of the respondent engaging in such conduct.

was more susceptible to an aggravation or lighting up of a pain disorder whether it was aggravated or lit up by the occurrence.

The trial court's failure to give plaintiff's instructions either on aggravation, lighting up, or susceptibility completely denied the plaintiff the ability, in any way, to argue that her psychological condition, prospective or preexisting, was affected by the incident.

E. The Trial Court Erred In Failing To Properly Instruct The Jury On Plaintiff's Sole Theory Of Future Income Loss.

Respondent contends that the court's failure to refer to impaired earning capacity in a future lost earnings instruction did not prejudice the appellant. Specifically, respondent states "The trial court exercised its discretion and concluded that it was unnecessary to include an instruction separating future wage loss from impaired future earning capacity. This was not error, and it caused no prejudice." (Pg. 43 of Response).

To the contrary, the plaintiff's/appellant's entire future economic loss claim was based on impaired earning capacity. See Exhibit 31, which the court allowed to be presented to the jury as the basis of plaintiff's/appellant's future income loss claim.

Close examination of Exhibit 31 will show that "no loss of earnings has been included prior to January 2008." Although plaintiff/appellant had jobs other than dental assistant jobs between June

2006 and January 2008, no loss of earnings was attributable to her failure to work in those jobs. Instead, plaintiff/appellant was not seeking wage loss from a particular job, but was seeking future damages based on her inability to work as a dental assistant versus an office assistant, with the projected residual loss, reduced to present cash value. There was a significant difference between future wage loss, which was not claimed, and future income loss due to impaired earning capacity, upon which the trial court failed to instruct, effectively denying plaintiff the ability to persuade the jury of such loss.

The most current comments relative to the recognition of the difference between wage loss and impaired earning capacity are found in the 5th Ed., 2011 Supplement to Vol. 6 of Washington Practice at p. 308:

Impairment of earning capacity is different from loss of wages. It is the permanent diminution of the ability to earn money. *Kelley v. Great Northern Ry. Co.*, 59 Wn.2d 894 371 P.2d 528 (1962); *Murray v. Mossman*, 52 Wn.2d 885 329 P.2d 1089 (1958).

Although the court stated that impaired earning capacity could be argued, there was nowhere in the jury instructions that would allow the jury to consider impaired earning capacity as an element of damage. So, even if the jury had agreed with the plaintiff's theory of future lost income based on impaired earning capacity, there was nothing in the instructions to inform them they would be allowed to award damages on that theory.

There was also no danger of duplicate damages being awarded for lost wages, since plaintiff's sole theory for future income loss was based on impaired earning capacity. The court clearly erred in failing to instruct the jury on plaintiff's sole theory of future income loss, which is supported by Exhibit 31, as well as the testimony of plaintiff's vocational rehabilitation expert and the economist responsible for the preparation of Exhibit 31. The testimony of both those experts is the subject of appellant's motion to supplement the record, filed recently in response to respondent's comment in footnote 217, which states "[i]n obtaining the verbatim report of proceedings, appellant did not include any expert vocational and economic testimony." Appellant was unaware that the respondent would mischaracterize, or at least fail to acknowledge, the nature of her future income loss claim at trial.

F. The Trial Court Erred In Failing To Grant Appellant's Motion For New Trial.

The motion for new trial was based on plaintiff's/appellant's belief that she did not receive a fair trial due to the "touching of the feet" ordered by the court, and the admission of evidence of plaintiff's medical and social history from the time she was five years old, notwithstanding the absence of any evidence of an existing psychological condition, of any kind, prior to the incident at Wal-Mart.

The declaration of Michael Canonica, who served as the presiding juror, does not limit the prejudicial impact to him alone. The fact that he was the presiding juror suggests that his words had import, and if there was one juror who would have knowledge of the impact of this evidence on the jury it would certainly be the presiding juror, whether or not Mr. Canonica shared the opinions of those impacted by those evidentiary events to which plaintiff had so strenuously objected.

The respondent, without any legal authority, suggests that the plaintiff would have to submit three such declarations in order to raise an issue about the propriety of the jury verdict. It should be clear that the plaintiff/appellant is not blaming the jury for its decision, only the court that ordered them to touch the feet of the plaintiff, even if they had reservations about doing so. The court's rulings forced the jurors into a personal relationship with the plaintiff that went far beyond the bounds of decency by requiring the jurors to touch the plaintiff's foot even though the court acknowledged that such an experience for the plaintiff, unbeknownst to the jurors at the time, "would be very, very painful." It should come as no surprise that the jurors would be defensive about having caused such pain to the plaintiff and be more receptive of the defense arguments that the plaintiff was faking or was under some psychological delusion about the source of her pain. Further, what juror in

their right mind would think that the court would order them to intentionally inflict pain on a litigant, without coming away with the impression that the court itself was unconvinced or unbelieving of plaintiff's claim in the first place? Effectively, this ruling by the court was a comment on the evidence of such proportion that plaintiff could not possibly have received a fair trial.

Mr. Canonica also referenced the medical and social history of the plaintiff as having a prejudicial impact upon the jury, not just himself. Given the nature of a trial, it was not difficult for the jury to condense plaintiff's life, even though the critical time frames spanned twenty years, to put the young girl who was faking a seizure at the age of ten to gain attention on the heels of that same young lady experiencing significant pain (due to CRPS) far out of proportion to what one would normally expect for such an injury (the nature of CRPS). That the trial court would then blame plaintiff's counsel for making a motion to allow the jurors to touch the feet of the plaintiff as a basis for her "foot touching" order defied the record at trial.

G. The Trial Court Erred In Calculating Costs Awarded To Defendant.

Wal-Mart was the prevailing party solely on the basis of its offer of judgment. Otherwise, plaintiff/appellant would have been the prevailing

party, given the verdict in favor of the plaintiff. That is, the sole basis for an award of costs to Wal-Mart would have been pursuant to CR 68. As such, defendant/respondent would only have been entitled to costs incurred after the offer had expired (ten days) after receipt of the same.

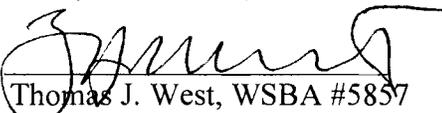
Wal-Mart's claim that all their costs were not incurred until the depositions were published at trial, medical records submitted (although not all were submitted at trial), is contrary to the language, intent and spirit of that rule. Otherwise, it wouldn't matter when the offer of judgment was made during the course of the proceedings.

Respondent's arguments make a mockery of CR 68, coupled with an attempt to bootstrap their cost argument with references to RCW 4.84.010 which can only apply as modified by CR 68. The statute addresses the type of costs that can be awarded, and CR 68 addresses whether those costs can be awarded in circumstances where the plaintiff recovers at trial, but does not beat the offer under CR 68.

The appellant court should address this cost issue, for instructional purposes, regardless of a favorable outcome to the appellant.

RESPECTFULLY SUBMITTED this 2nd day of June 2011.

KRILICH, LA PORTE, WEST & LOCKNER, P.S.

By: 
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Attorney for Appellant

CERTIFICATE OF SERVICE

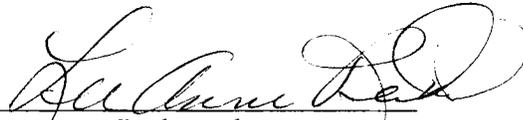
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I certify that on the 2nd day of June, 2011, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated below:

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