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Court of Appeals  
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IN THE WASHINGTON STATE  
COURT OF APPEALS

MUHAMMAD AHSAN and	)	
FAIZA AHSAN	)	
Appellants,	)	Case Number: 512611-1-II
	)	
vs.	)	
	)	Superior Court Case No.: 16-2-01347-7
	)	
SLOANS ENTERPRISE	)	
OF AMBOY, LLC	)	
	)	
Respondent.	)	
_____	)	

**APPELLANT'S REPLY BRIEF**

RESPECTFULLY SUBMITTED,

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I.

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**II.**

**STATEMENT OF THE CASE**  
**AND OF THE FACTS**

The Respondent has failed to identify a single case, where the manifest error of permitting expert testimony as to believability of a party, or as to a conclusion of law, has been affirmed on appeal.

In addition, the Respondent has failed to identify a single case, where an expert witness has been permitted to testify, as in the instant case, as to whether the acts or omissions or any party were 'reasonable' or 'unreasonable.'

This Court must reverse the verdict and order a new trial.

III.

ANALYSIS

A.

WHERE THERE IS MANIFEST ERROR,  
THE FAILURE TO OBJECT TO  
TESTIMONY DOES NOT PRECLUDE  
REVIEW ON APPEAL

Rules Of Appellate Procedure, RAP 2.5 - CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW - provides:

**(a) Errors Raised for First Time on Review.** The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ..., and (3) manifest error affecting a constitutional right.

The holding in *Johnson-Forbes v. Matsunaga*, 181 Wash.2d 346 (2014), analyzed in the Appellant's main brief, clearly states that the trial court has a gatekeeper role, that is irrespective of what counsel at trial may say or do. Once an expert takes the stand, the trial judge must be ever vigilant.

In the first instance, manifest error occurs where the testimony removes from the jury its right to decide on the credibility and believability of a party to the matter. In *State v. Kirkman*, 59 Wash.2d 918 (2017), an RAP 2.5 case, a number of expert witness opinions were challenged, and rejected, where it became clear that the experts were not testifying as to the ultimate issue. In

one instance, the Court found, for example, “Dr. Stirling did not come close to testifying that Kirkman was guilty...” *Id.* at 930. Detective Kerr’s testimony, similarly, did not cross the ‘reasonableness’ line, and was, thus, allowed: “The challenged portion of Kerr’s testimony is simply an account of the interview protocol he used to obtain A.D.’s statement. Kerr did not testify that he believed A.D. or that she was telling the truth. Therefore, no manifest error occurred that could relieve Kirkman of his duty to object. **By testifying as to this interview protocol, Kerr “merely provided the necessary context that enabled the jury to assess the reasonableness of the ... responses.”** (Emphasis supplied) *Id.* at 931.

In another place, concerning another victim, Dr. Stirling’s testimony was, again, not deemed to be manifest error: “Dr. Stirling did not come close to testifying on any ultimate fact. He never opined that Candia was guilty nor did he opine that C.M.D. was molested or that he believed C.M.D.’s account to be true. Dr. Stirling testified only that he was able to communicate with C.M.D. because she “had good language skills for her age, she spoke clearly,” 2B RP at 244. His testimony was content neutral, focusing upon the clear communication, rather than the substance of \*\*134 matters discussed. The doctor’s testimony did not constitute manifest error.” *Id.* at 932.

With respect to certain interview protocols used by detectives, testifying as experts, as to Detective Kerr, the court held: “51 **This interview protocol, including that the child promised to tell the truth, does not impermissibly infringe on the jury’s province given that the same**

**child takes the witness stand in front of the jury and swears under oath that the testimony given will be truthful.** (Emphasis supplied) See RCW 5.28.020; ER 603. Thus, we do not find the testimony constitutes a manifest error of constitutional magnitude.” *Id.* at 932.

*Kirkman, supra*, holds that ‘manifest’ means a showing of actual prejudice. The Appellant must make, on appeal, a plausible showing that the error had a practical and identifiable consequence on the trial. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.” *Id.* at 936.

*Kirkman, supra*, stands in stark contrast with both the question by defense counsel, and the answer by defendant’s expert witness in this matter. Defense counsel asked his expert if he, the expert, believed that the defendant’s acts were unreasonable: “And was there anything unreasonable about Mr. Sloan going ahead...” . (Appellant’s Appendix) The answer involved not some scientific, engineering evidence about mudslides, but directly implied that the expert believed that the defendant was, in effect, not guilty. As *Kirkman, supra*, instructs, however, the believability of the witness, in fact, the credibility of the witness, is something that is solely within the province of the jury. In the instant matter, defense counsel removed from the jury the

Appellant's right to a trial by jury. Such result is manifest, as a removal of the Appellants' fundamental right to a trial by jury. *Kirkman, supra*, preserves that right, thusly:

*Role of the Jury*

This court's decision respects both the constitutional role and the assumed abilities of juries. The right of jury trial: "is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Id.* at 938.

In the second instance, manifest error affecting a constitutional right occurs when the testimony of the expert reaches the level of becoming a conclusion of law. In this appeal, the expert was asked, specifically, as to a party defendant, whether the party defendant's acts or omissions were 'unreasonable.' Such is purely a legal conclusion, because, the testimony leads to the conclusion that, therefore, the defendant was not negligent, which leads to a legal judgment in favor of the defendant.

In *Tortes v. King County*, 119 Wn. App. 1, 84 P.3d 252 (2003), although a summary judgment case, the Court held, specifically, that the testimony by an expert witness on a purely legal conclusion, constituted manifest error. *Tortes, supra*, was a bus shooting case, where the element of negligence concerned foreseeability. The expert in that case, the court agreed, was an expert on security and law enforcement. The expert, however, in his affidavit, made statements that went to the issue of foreseeability. The court explained that, although an expert's testimony may embrace an ultimate issue, it cannot cross the line into the area of a pure legal conclusion.

“Under the facts of this case, foreseeability became the ultimate legal issue before the trial court at summary judgment.” *Id.* at. 13. The court warned, further: “Experts may not offer opinions of law in the guise of expert testimony.” *Id.* at 12.

*Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 150 P.3d 545 (2007), cited by the Respondent in this matter, is also instructive. In that case, the expert used the terms ‘hazardous condition’ and ‘zone of danger.’ Those terms were found to embrace an ultimate fact, but, on appeal, the court found that such did not opine on a legal conclusion: “While Black’s declaration may have embraced an ultimate fact under ER 704, his statement was not a legal conclusion.” *Id.* at 548.

This analytical framework in mind, and under either prong, removing from the jury its right to evaluate the party defendant, or testimony that is a legal conclusion, the cases cited by the Respondent are inapposite.<sup>1</sup>

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<sup>1</sup> *State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982), *review denied*, 98 Wn.2d 1017 (1983), merely states that a failure to object waives the issue on appeal, unless RAP 2.5 applies, which it does here. *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975) requires a timely objection, but is not an RAP 2.5 case. *State v. Gilchrist*, 15 Wn. App. 892, 552 P.2d 690 (1976), *review denied*, 89 Wn. 2d 1004 ( 1977), is a case where an objection was made at trial, and is, thus, not an RAP 2.5 case. *State v. Parker*, 9 Wn. App. 970, 515 P.2d 1307 (1973) is a non-expert, non-RAP 2.5 case. *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046, 112 L. Ed. 2d 772, 111 S. Ct. 752 (1991), is a waiver case dealing with a lack of foundation in the question. *Walker v. Bangs*, 92 Wn.2d 854, 601 P.2d 1279 (1979), testimony of a legal expert in a legal malpractice case no prohibited because the expert is not admitted in the State of Washington.

**B.**

**AN EXPERT WITNESS MAY NOT  
USE THE TERM 'REASONABLE' TO  
REFER TO THE PRESENT FACTS  
OF ANY CASE**

The Respondent has failed to cite a single case, where an expert has been permitted to use the word 'reasonable' in expert testimony.

Rule 703 provides the only place in the evidence code where, in the context of expert witnesses, the word 'reasonable' appears. Thusly:

**RULE ER 703**

**BASES OF OPINION TESTIMONY BY EXPERTS**

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

Such reliance is permitted solely in order that the expert's testimony not be excluded on hearsay grounds.

In its Answer Brief, the Respondent appears to seek to engage this Court into a review of the battle of the experts. Such is not the standard of review in this matter. The issue as to the testimony of the expert, leaving aside the RAP 2.5 issue, is whether using the term 'reasonable' by an expert, is permissible expert testimony. Asking this Court to assume that two wrongs make

a right, is not the standard, because, among the experts, only the Respondent's expert actually testified that the Respondent's acts were reasonable.<sup>2</sup>

For example, in Respondent's citation to *Allyn v. Boe*, 87 Wn. App. 722, 943 P.2d 364 (1997), the expert testified to an element of damages, and although largely a case of juror misconduct, there was no dispute that such testimony did not include any testimony using the term 'reasonable.' The expert did not testify that the damages were 'reasonable' or 'unreasonable.'

In Respondent's citation to *Batten v. South Seattle Water Co.*, 65 Wn.2d 547, 398 P.2d 719 (1965), another battle of the experts case, experts testified about a sewer cover being 'safe' or 'not safe,' but not about being 'unreasonably' not safe, or being 'reasonably' safe.

In *Brewer v. Copeland*, 86 Wn.2d 58, 542 P.2d 445 (1975), also one of Respondent's cases, the court rejected a trooper's testimony as to speed, because, in the hypothetical, the trooper could not commit to the known facts in the case. He did not come close to any opinion as to whether the speed was 'reasonable' or 'not reasonable.'

The Respondent's analysis of *Carlton v. Vancouver Care LLC*, 155 Wn.App. 151,231 P.3d 1241 (2010), excludes the relevant portions of the analysis, clearly recited in the case. In this case, largely about the protocol of rape syndrome testing, another experts case, there was

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<sup>2</sup> See, Appellant's discussion of *Weyerhaeuser Company v. Commercial Union Insurance Company*, 142 Wash.2d 654 (2001), in Appellant's Brief at page 5.

permissible testimony as to the ultimate facts of the case by the experts. The court, however, was ever mindful of the experts crossing the line on the two specific RAP 2.5 issues, stating, clearly: “No witness may express an opinion that is a conclusion of law or that tells the jury what result to reach.” *Id.* at 1250.

Other cases cited by the Respondent, similarly, do not show any holding where an expert witness was permitted to testify in either of those two areas, expressing a conclusion of law, or telling the jury what result to reach. *See, Gerberg v. Crosby*, 52 Wn.2d 792, 329 P.2d 184 (1958); *Grismore v. Consolidated Prods. Co.*, 232 Iowa 328, 5 N.W.2d 646 (1942); *Group Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 722 P.2d 787 (1986); *In re Marriage of Katare*, 175 Wn.2d 23, 283 P.3d 546 (2012), *cert. denied*, 133 S. Ct. 889 (2013).<sup>3</sup>

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<sup>3</sup> Respondent also cites to *Blyv. Henry*, 28 Wn. App. 469, 624 P.2d 717, 718 (1980), and makes the anecdotal statement in its brief that *pro se* litigants must be treated the same as other litigants. The Appellants are unaware how this citation is relevant to these proceedings, or an issue on appeal, and the Respondent has not cross-appealed on this issue. The Appellants were represented at trial. Although they may be appearing *pro se* on appeal, it does not follow that the Appellants do not have a legal team behind them. Similarly, the Appellants have not raised the issue of jury instructions in this appeal, because such is only ancillary to the question of manifest error. The Respondent has raised it, but, again, has not filed a cross-appeal as to this issue. Such is not, therefore, properly before this Court.

#### IV.

#### CONCLUSION

Manifest error occurred under two key doctrines, which permit this Court to proceed with this appeal under RAP 2.5:

a ) the Respondent's expert witness testifying as to the Respondent's acts or omissions, told the jury how to find in its verdict, and;

b ) the Respondent's expert witness, testifying as to 'reasonableness,' made a conclusion of law, that only the trial judge could make, after the jury returned its verdict.

Either of these, standing alone, constitute manifest error, for which reversal and new trial are authorized. This Court should so hold.

There is no place in the evidence code, and there are no cases, where an expert has been permitted to use the word 'reasonable' in testimony about the acts or omissions of a party to the action. Only a jury can arrive at a verdict as to what is 'reasonable' or not, and, for this reason, in addition, this Court should reverse this matter, and order a new trial.

This Court should reverse the judgment and order a new trial, and award such costs to the Appellants as are consistent with this appeal.

RESPECTFULLY SUBMITTED,

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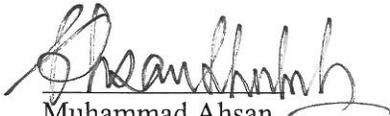
Muhammad Ahsan



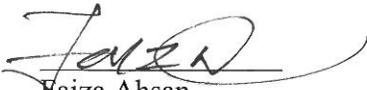
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**CERTIFICATE OF SERVICE**

WE HEREBY certify that on the 12th day of July, 2018, the original of this Appellants' Reply Brief, was provided to the Clerk of the Court of Appeals, as a pdf. attachment by electronic mail to: [coa2@courts.wa.gov](mailto:coa2@courts.wa.gov), and that a copy of the email and of this Appellant's Appendix was provided by electronic mail to: Amber L. Pearce, Esquire, [APearce@floyd-ringer.com](mailto:APearce@floyd-ringer.com) .



Muhammad Ahsan



Faiza Ahsan

**MUHAMMAD AHSAN - FILING PRO SE**

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