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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 31617-3-III

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

GINGER SMITH, a single woman,

Appellant,

v.

MICHEL LUNDY,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT CAUSE
NO. 10-2-03985-1

THE HONORABLE GREGORY D. SYPOLT

GINGER SMITH'S REPLY BRIEF

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I. PRELIMINARY MATTERS

It is Appellant's position after reading the Respondent's brief that the Respondent has failed to address the issue of a lack of medical basis for Dr. Klein's opinion within his responsive brief. The responsive brief submitted by the Respondent is completely devoid of what the psychological basis was for Dr. Klein's opinion. There is no statement by the Respondent as to what the psychological basis for Dr. Klein's opinion was, nor is there any citation to the record indicating the basis for the expert opinion.

The Respondent merely relies upon a partial quotation from the Trial Court that there was a basis for Dr. Klein's expert opinion, and never elaborates or provides any support within the record for what that "basis" was for the expert opinion. The main issue on appeal is whether it was proper for the Trial Court to allow the jury to determine whether Dr. Klein had a psychological basis for his expert opinion at trial. The Respondent has failed within his responsive briefing to show that: (1) Dr. Klein had a psychological basis for his expert opinion; (2) that the Trial Court did not allow the jury to determine what the psychological basis for Dr. Klein's opinion was, and (3) that there was psychological evidence other than the excluded opinion of malingering serving as the basis for Dr. Klein's opinion.

Based on the Respondent's brief alone, the Trial Court's decision to allow Dr. Klein to testify at trial as an expert witness should be reversed. This matter should be remanded with instructions to exclude Dr. Klein as an expert witness. There should also be instructions excluding Deborah Lapoint, vocational expert, and Erik West, economic expert, from testifying as experts, as they based their opinions on the inadmissible expert testimony of Dr. Klein. Instructions should be given to enter a judgment as a matter of law with regard to the issue of a permanently disabling head injury. *CR 50(a)(1)*. Alternatively, this case should be remanded for a new trial with the aforementioned instructions.

II. ARGUMENT

1. **Ms. Smith Suffered Prejudice At Trial Because Without The Testimony Of Dr. Klein There Was No Independent Evidence Showing Ms. Smith Did Not Suffer A Head Injury.**

Respondent argues in his brief that there was substantial evidence independent of Dr. Klein showing that Ms. Smith did not suffer a permanently disabling head injury. (Response Brief pp. 18). Therefore, Respondent argues that Ms. Smith did not suffer prejudice by the Trial Court allowing Dr. Klein to testify at trial. (Response Brief pp. 18-22). This argument is without merit because without the testimony and opinion of Dr. Klein serving as a basis, all independent evidence apart from Dr.

Klein is inadmissible to show that Ms. Smith did not sustain a permanently disabling head injury as a result of the collision.

Medical testimony is required to “establish the causal relationship between the liability-producing situation and the claimed physical disability resulting therefrom.” *O’Donoghue v. Riggs*, 73 Wash.2d 814, 824 (1968). As the Appellate Court stated:

The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation or conjecture. 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, or the resulting condition more likely than not resulted from the accident, to establish a causal relation.

Carlos v. Cain, 4 Wash. App. 475, 477 (1971), citing, *Miller v. Stanton*, 58 Wash.2d 879, 886 (1961) (emphasis added.).

The requirement for a reasonable degree of medical certainty is not based on *ER 702*, but rather on *ER 403*. See, *5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence 702, at 379* (2011-2012). **“Medical testimony on causation is simply regarded as irrelevant if the medical expert cannot say, with reasonable medical certainty, what the cause of the injury was.”** *Id.* at 379 (bold emphasis added.).

Had the Trial Court properly excluded Dr. Klein, the Respondent would have not been able to present any evidence at trial in opposite to Ms. Smith's claim of a permanently disabling head injury. No other expert for the Respondent stated an opinion, on a more probable than not basis, at trial that Ms. Smith did not suffer a head injury as a result of the collision. Without Dr. Klein's expert opinion, all other independent medical evidence would be irrelevant, as the evidence independent of Dr. Klein did not meet the required standard of reasonable medical certainty. *Carlos*, 4 Wash. App. at 477 (1971).

Without Dr. Klein, the Respondent did not have any other expert witness that was qualified to meet the evidentiary standard of "more probable than not" testimony of causation. *See, Carlos*, 4 Wash. App. at 477 (1971). In fact, each of the experts who testified at trial on behalf of the Respondent: (1) Dr. Jennifer James, (2) Dr. Edwin Stroup, and (3) Kathy Drader, did not, and could not testify on a more probable than not basis that Ms. Smith did not suffer a head injury. (VRP 147-167; 196-230) Because of Dr. Klein's testimony, the Respondent was able to draw inferences from other expert's testimony and use non-physiological testing as evidence that Ms. Smith did not suffer a head injury.

Specifically, the Respondent used the testimony of a physical therapist through deposition at trial as evidence to show Ms. Smith did not

have a head injury. Because of Dr. Klein's opinion, the Respondent was able to argue the inconsistencies within a physical capacities examination (PCE) administered by Kathy Drader was evidence that Ms. Smith did not have a head injury. By its title alone, a "PCE" is a "physical" examination, which offers no reliable evidence as to whether Ms. Smith sustained cognitive injury. Further, a psychical therapist lacks the necessary foundation to render an opinion as to a neuropsychological injury.

Without Dr. Klein's underlying opinion, any testimony based on Ms. Drader's PCE would be irrelevant to the issue of Ms. Smith's head injury, as Ms. Drader did not, and could not, say that Ms. Smith did not suffer a head injury on a more probable than not basis. In fact, Ms. Drader was not asked to state an opinion at trial as to whether Ms. Smith had sustained a head injury at trial. (VRP 147-167).

Ms. Drader's testimony reflected that she was unaware that Ms. Smith was diagnosed with a closed head injury during her examination, and specifically did not look for signs of a head injury during her lone visit with Ms. Smith. (VRP 167). Ms. Drader's testimony was not admissible independent evidence that Ms. Smith did not sustain a head injury as a result of the collision because the testimony did not meet the required evidentiary standard. *Carlos*, 4 Wash. App. at 477 (1971).

With regard to Dr. Stroup, he did not testify on a more probable than not basis that Ms. Smith did not suffer a head injury. (VRP 196-230). In fact, Dr. Stroup was never asked to state an opinion at trial as to whether Ms. Smith had suffered a head injury as a result of the collision. (VRP 196-230). Dr. Stroup testified that he would not dispute the diagnosis of Ms. Smith treating physician that she had sustained a head injury. (VRP 229). Thus, without Dr. Klein's underlying opinion that Ms. Smith had not suffered a head injury, Dr. Stroup's testimony would have been irrelevant at trial because it did not meet the necessary evidentiary standard. *Carlos*, 4 Wash. App. at 477 (1971).

Also, because of Dr. Klein's underlying psychological opinion, Dr. James was able to discuss inconsistencies in her physical examination of Ms. Smith as being consistent with Dr. Klein's opinion that Ms. Smith did not suffer a head injury. In the absence of Dr. Klein, Dr. James would not have been able to discuss whether Ms. Smith suffered a head injury as a result of the collision because she lacked the proper foundation.

Dr. James' purpose was to conduct a physical examination and offer an opinion regarding Ms. Smith's physical injuries. Dr. James did not possess the foundation or qualifications to independently state with a reasonable degree of medical certainty that Ms. Smith did not suffer a head injury as a result of the collision. (VRP 307-309). Dr. James testified

that when a patient has suffered a traumatic brain injury she refers that patient for a neuropsychological evaluation. (VRP 309).

At trial, Dr. James was not asked to state an opinion as to whether Ms. Smith had suffer a head injury as a result of the collision. (VRP 361-363). Dr. James merely relied upon the opinion of Dr. Klein and offered testimony consistent with Dr. Klein's opinion that Ms. Smith had not suffered a head injury based upon her subjective observations. (VRP 305-363).

In the absence of Dr. Klein's opinion, there was no relevant medical evidence to show that Ms. Smith did not suffer a head injury as a result of the collision. In the absence of Dr. Klein's opinion, Dr. Deborah Brown offered the only evidence that met the appropriate medical standard on a more probable than not basis. (CP 150-151). Dr. Brown testified to a reasonable degree of medical certainty that Ms. Smith had suffered a permanently disabling head injury as a result of the collision. (CP 150-151).

The Trial Court's failure to exclude Dr. Klein as an expert witness due to him not having any medical basis for his opinion, allowed the Respondent to use irrelevant medical evidence to establish that Ms. Smith had not suffered a permanently disabling head injury as a result of the collision. The Trial Court erred by not excluding Dr. Klein, and this error

caused substantial prejudice to Ms. Smith at trial. As will be discussed below at length, the outcome of the trial would have most certainly been different in the absence of Dr. Klein as an expert witness.

2. Had The Trial Court Properly Excluded Dr. Klein, The Issue Of Ms. Smith's Head Injury Would Have Been Determined In Pretrial Motions and Taken Out Of Consideration Of The Jury.

Had the Trial Court properly excluded Dr. Klein in pretrial motions made by Ms. Smith, there would not have been an issue at trial as to whether Ms. Smith suffered a head injury as a result of the collision. Without the contrary evidence offered by Dr. Klein, Ms. Smith would have prevailed on summary judgment regarding whether she sustained a head injury in the collision. At a summary judgment hearing, Ms. Smith would have presented medical evidence on a more probable than not basis from Dr. Brown that she sustained a permanent disabling head injury as a result of the collision. (CP 150-151). Had Dr. Klein been properly excluded, the Respondent would not have been able to refute the evidence.

The Respondent had no one other than Dr. Klein qualified to state on a more probable than not basis or to reasonable degree of medical certainty that Ms. Smith did not suffer head injury as a direct result of the collision. *Carlos*, 4 Wash. App. at 477 (1971). As set forth in the above section of this brief, the Respondent did not have any other expert render

an opinion or state an opinion on a more probable than not basis that Ms. Smith had not suffered a head injury as a result of the collision.

Once Ms. Smith obtained a summary judgment order relating the head injury to the collision, she would have been able to submit a jury instruction directing the jury to find that Ms. Smith suffered a permanent head injury as a direct result of the collision. Therefore, the jury would not have been able to consider any evidence independent of Dr. Klein to show that Ms. Smith did not sustain a head injury; the evidence would have been irrelevant because it would not meet the necessary standard of reasonable medical certainty. *See, O'Donoghue*, 73 Wash.2d at 824, and *See, 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence 702, at 379 (2011-2012)*.

Even if the Trial Court failed to grant the pretrial motion for summary judgment regarding the issue of Ms. Smith's head injury, Ms. Smith would have been able to obtain a directed verdict at trial. *CR 50(a)(1)*. Without Dr. Klein testifying as an expert, the Respondent would not have been able to produce any relevant medical testimony to refute Ms. Smith's claim of a head injury at trial. *Carlos*, 4 Wash. App. at 477 (1971). After the issue regarding Ms. Smith's head injury was heard at trial, and the Respondent unable to present any legally sufficient evidentiary basis for a reasonable jury to find otherwise, the court would

have to enter judgment as a matter of law as to the issue of a head injury sustained as a result of the collision. *CR 50(a)(1)*.

By not properly excluding Dr. Klein, it prevented Ms. Smith from bringing the aforementioned summary judgment motion to take the issue of her head injury out of the realm of consideration by the jury. By allowing Dr. Klein to testify at trial, and allowing the jury to determine whether Dr. Klein had a medical basis for his opinion, the Trial Court erred and created substantial prejudice to Ms. Smith at trial. (VRP 411-412). The Trial Court's error in allowing Dr. Klein to testify as an expert at trial was not harmless.

3. The Trial Court's Error In Not Excluding Dr. Klein Was Not Harmless.

The error by the trial court was not harmless. "The error is harmless unless it was reasonably probable that it changed the outcome of the trial." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 452, 191 P.3d 879 (2008). Had Dr. Klein had been properly excluded, the outcome of the trial would have most definitely changed for Ms. Smith.

As stated above, without Dr. Klein's opinion serving as a basis, all evidence independent of Dr. Klein would be irrelevant to the issue of Ms. Smith's head injury. *See, O'Donoghue*, 73 Wash.2d at 824, and *See, 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on*

Washington Evidence 702, at 379 (2011-2012). Thus, the outcome would have been different at trial because the Respondent would not have been able to present any evidence *on a more probable than not* basis that Ms. Smith had not sustained a head injury as a direct result of the accident. *Carlos*, 4 Wash. App. at 477 (1971). Without any competent medical evidence to the contrary, the jury would have had to find damages consistent with a permanently disabling head injury presented by Ms. Smith at trial.

The jury finding of damages in this regard is certain, because without Dr. Klein's opinion serving as the basis, Respondent's experts on damages, Deborah Lapointe and Erik West, would not have been able to testify inconsistent with a permanently disabling head injury. Both Mr. West and Ms. Lapointe testified that they relied solely upon the opinions of Dr. Klein and Dr. James to formulate their opinions regarding damages. (VRP 256-258 & VRP 293-294).

Dr. James was the Respondent's expert that conducted the physical examination of Ms. Smith, and offered an opinion regarding the physical injuries sustained by Ms. Smith as a result of the accident. (VRP 361-363). Dr. Klein was the only expert for the Respondent who examined and offered an opinion regarding the mental/psychological injuries sustained by Ms. Smith as a result of the accident. Whether Dr. James found Ms.

Smith physically healed or physically capable of returning to work was of no consequence to Ms. Smith at trial on the issue of damages. Without being mentally capable of recovery or mentally capable of working, Ms. Smith was permanently disabled and incapable of ever returning to work. (CP 150-151).

By making the conscious choice to only consider the opinion of Dr. Klein regarding Ms. Smith mental capabilities, Ms. Lapointe and Mr. West aligned themselves with Dr. Klein. Thus, when Dr. Klein does not have a basis for his opinion, Ms. Lapointe and Mr. West do not have a basis for their opinions.

After the Trial Court excluded Dr. Klein's opinion of malingering, Dr. Klein's only opinion, Ms. Smith moved the court for the exclusion of Ms. Lapointe and Mr. West consistent with the Trial Court's ruling. (CP 527-654) Again, Mr. West and Ms. Lapointe relied upon Dr. Klein's opinion of malingering to determine that Ms. Smith was mentally healed and capable of returning to work. (VRP 256-258 & VRP 293-294). Ms. Smith's motion to exclude Ms. Lapointe and Mr. West was denied. (CP 1038-1039)

The Trial Court's error in not excluding, Dr. Klein, Ms. Lapointe, and Mr. West, when there was no medical basis for their opinions, allowed the Respondent to present a defense at trial to Ms. Smith's damage claim

stemming from her permanent disabling head injury. It is without question that had the Trial Court properly excluded Dr. Klein, the opinions of Ms. LaPointe and Mr. West would have had to be excluded for relying upon Dr. Klein's opinion. At the very least, the Trial Court would have had to limit the opinions of Ms. Lapointe and Mr. West to conform to the exclusion of Dr. Klein, essentially rendering their opinions useless at trial.

4. Dr. Klein Should Not Have Been Permitted To Testify As An Expert Without Objective Findings Supporting His Opinion.

On October 5, 2012, Ms. Smith filed a motion moving the court for an order excluding Dr. Klein as an expert in this matter. (CP 129) At this October 19, 2012, hearing Ms. Smith presented evidence and argument that Dr. Klein had no objective basis for his opinion that Ms. Smith did not suffer a head injury because she was a malingerer. (CP 130-271 & VRP 4-43). The Trial Court agreed with Ms. Smith and excluded Dr. Klein's opinion of malingering. (VRP 40-43). The Trial Court found that Dr. Klein did not have an objective basis for his opinion that Ms. Smith was a malingerer, therefore, pursuant to *ER 608* and *ER 702* the opinion of malingering was excluded. (VRP 40-43 & VRP November 9, 2012, pp. 5-9).

The Trial Court found that without objective findings supporting his opinion of malingering, Dr. Klein's opinion was nothing more than a comment on Ms. Smith's creditability. (VRP November 9, 2012, pp. 5-9).

The Trial Court also found that without objective findings, Dr. Klein's testimony and opinion were not helpful to the jury and was misleading, therefore precluded by *ER 702*. (VRP November 9, 2012, pp. 5-9).

In making its decision, the Trial Court relied upon *State v. Carlson*, 80 Wash. App. 116 (1995). The present matter is similar to *Carlson* in that the Appellate Court determined an expert could not testify to an opinion in the absence of supporting objective findings. *Id.* In *Carlson*, a pediatrician named Dr. Virginia Feldman was asked to render an opinion as to whether a minor child had been molested. *Id.* at 118. Dr. Feldman conducted an examination of the child, which resulted in inconclusive physical evidence of molestation. *Id.* Despite the lack of physical findings of molestation, Dr. Feldman offered an opinion that the minor child was molested based only on the medical history and interview of the child. *Id.* at 119-120. The Appellate Court reversed the Trial Court's decision that allowed Dr. Feldman to testify as an expert. The *Carlson* court state that without physical findings, Dr. Feldman's opinion was inadmissible pursuant to *ER 701*, *ER 702*, and *Frye*. *Id.* at 123-129.

In the instant action, Dr. Klein testified during voir dire that all of his opinions were contained within the reports he provided during discovery as well as in his deposition testimony (RP 392-93). Dr. Klein also testified that he derived the opinions stated within his neuropsychological report from three sources: (1) medical history, (2) interview data, and (3) neuropsychological testing. (RP 394-95). At the conclusion of Dr. Klein's August 12, 2011, report, within the section entitled, "Clinical Impressions," Dr. Klein stated as follows:

To a reasonable degree of medical certainty, Ginger Smith has not suffered psychological injuries as a result of the 02/07/2008 MVA. Her description of symptoms/problems is inconsistent with known clinical patterns and inconsistent with her own stated history. While the description of the accident certainly sounds like an event capable of creating psychological injuries, our attempts to verify that in a careful investigative manner, using record review, interview data, and multiple psychological tests, were all met with a series of malingering responses from Ginger, as noted above throughout this report. The data not only establish Malingering as her primary diagnosis, but also diminish the clinical weight of her verbal statements in general. Thus when she complains of panic attacks, and checks off a series of symptoms from the DSM-IV diagnostic criteria, we are faced with whether or not to place psychological weight on her assertions, or whether this is just another aspect of her malingering presentation. In a sense she has "polluted the waters" by presenting herself as she has. To give her the benefit of the doubt I will list it here with diagnosis but there is no evidence of such panic attacks, if they exist, cause anything more than intermittent momentary interruption in her functioning, and therefore don't carry much impact. Furthermore, there is nothing definitive that establishes a causal connection between the MVA and the panic attacks so they still wouldn't establish a psychological injury.

(CP 910). As is clear from Dr. Klein's report, his only opinion was that Ms. Smith did not suffer a head injury because she was a malingerer.

Dr. Klein performed a self-selected neuropsychological test battery to obtain his objective test scores. Within the self-selected test battery, Dr. Klein performed two tests specifically designed to test for malingering, the TOMM and the M-FAST. (CP 202). Neither the TOMM nor the M-FAST performed by Dr. Klein on Ms. Smith produced malingered results. (CP 150-151, 202-203, & 211-271). Ms. Smith's expert Dr. Brown performed the same malingering tests on Ms. Smith, and similarly tests did not produce malingered results. (CP 150-151).

Despite Dr. Klein's objective tests producing non-malingered results, Dr. Klein opined that Ms. Smith did not suffer a head injury because she was a malinger. (CP 910). Further, the DSM-IV that Dr. Klein and all other neuropsychologists rely upon in making diagnosis of malingering requires a showing of intent. (CP 236). Dr. Klein testified in his deposition that he never found intent on the part of Ms. Smith to malingering, and in fact, Dr. Klein did not even look for intent on the part of Ms. Smith. (CP 208-209).

Without objective findings supporting his opinion, Dr. Klein's of malingering essentially equates to Dr. Klein saying that Ms. Smith is lying

about her condition. (VRP November 9, 2012, pp. 5-9). Dr. Klein's objective tests produced results showing Ms. Smith had a head injury, and the tests for malingering performed by Dr. Klein showed Ms. Smith was being honest. Despite the objective results, Dr. Klein disregarded his objective findings and Dr. Brown's objective findings showing a head injury, and opined Ms. Smith was not injured because she was faking her injuries. (CP 910 & VRP 404).

The Trial Court was correct to excluded Dr. Klein's opinion that Ms. Smith was a malingerer. However, the Trial Court committed error by allowing Dr. Klein to testify when he did not have any other opinion other than malingering. As shown above in the quoted material from Dr. Klein's report, his data showed the primary diagnosis was malingering, which diminished Ms. Smith's verbal statements made during the interview process. (CP 910).

Further, Dr. Klein stated in his report that all aspects of his review was met with malingered responses: the medical history, interview data and objective data. (CP 910 & VRP 401-402). Even if Dr. Klein did have another opinion other than malingering as to why Ms. Smith was not injured, that other opinion would have to be based on malingered responses and not supported by objective data. (CP 910 & VRP 401-402). Thus, all opinions rendered by Dr. Klein are based upon his belief that Ms.

Smith was malingering, which was the opinion excluded by the Trial Court. (CP 703-704).

As clearly stated in *Carlson*, an expert cannot testify in the absence of objective findings where the basis of the expert's opinion was that she believed the child during the interview process. *Carlson*, 80 Wash. App. at 123-129. The same principle applies in the present matter. Dr. Klein cannot testify in the absence of objective findings (that she has a closed head injury) based upon his subjective belief that Ms. Smith is not telling the truth. *ER 608*. An expert cannot testify to an opinion in the absence of supporting objective findings. *Carlson*, 80 Wash. App. At 116.

The record and evidence show that Dr. Klein did not have an objective basis to support his opinion that Ms. Smith did not suffer a head injury as a result of the collision. Therefore, the Trial Court erred by not completely excluding Dr. Klein as an expert witness in this matter.

VII. CONCLUSION

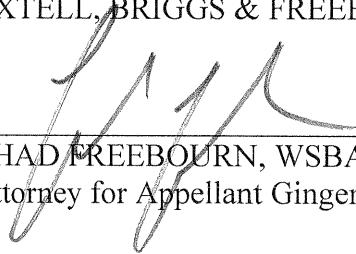
Respondent failed to address the salient issue on appeal, that the Trial Court erred by allowing the jury to determine the basis for Dr. Klein's opinion. Pursuant to the foregoing, Appellant Ginger Smith respectfully requests that the Appellate Court remand the case with instructions to exclude the expert testimony of Dr. Klein, exclude or limit the expert testimony of Ms. Lapointe and Mr. West consistent with the

exclusion of Dr. Klein's testimony, and enter directed verdict on the issue of permanent disabling head injury.

Alternatively, Ms. Smith asks that the case be remanded for a new trial with instructions to exclude Dr. Klein as an expert witness, and instructions to exclude or limit the testimony of Ms. Lapointe and Mr. West consistent with the exclusion of Dr. Klein as an expert witness.

DATED this 22nd day of November, 2013.

AXTELL, BRIGGS & FREEBOURN, PLLC

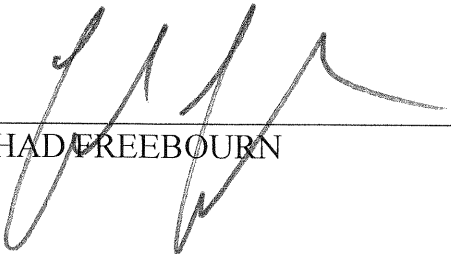


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of November, 2013, I caused to be served a true and correct copy of the foregoing document to the following:

- | | | |
|-------------------------------------|------------------|--------------------------|
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| <input type="checkbox"/> | FAX TRANSMISSION | Spokane, WA 99224 |
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