Supreme Court No. 99504-4

IN THE SUPREME COURT

OF THE STATE OF WASHINGTON

IMELDA MAGDALENO,
Petitioner,

v.

WALMART STORES, INC. & DEP'T OF LABOR AND INDUS.,
Respondents.

RESPONDENT WALMART'S ANSWER TO PETITION FOR REVIEW

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IDENTITY OF PETITIONER/RESPONDENT

Petitioner is Imelda Magdaleno. Respondents are Walmart Stores, Inc. ("Walmart") and the Washington State Department of Labor and Industries ("Department"). This matter first concerned an injury that Magdaleno sustained in the course of her employment with Walmart, but the dispute that has persisted is about whether Walmart can be held responsible for an unauthorized surgical procedure that Magdaleno underwent after the workers' compensation matter closed, which was billed to her private insurance, and which treated a condition that a jury would later regard as unrelated to the industrial injury.

CITATION TO COURT OF APPEALS' DECISION

Magdaleno asks this Court to disturb *Magdaleno v. Dep't of Labor and Indus. and Walmart Stores*, 2020 WL 6870503 (Wash. App. Div. 1, 2020), an unpublished decision of the Court of Appeals.

ISSUE PRESENTED FOR REVIEW

The issue Magdaleno presents is fact-specific. She asks this Court to second guess whether the Court of Appeals offered adequate grounds to find WAC 296-20-01002 and *Clark Cty. v. Maphet*, 10 Wn. App. 2d 420, 451 P.3d 715 (2019), had no application to the circumstances of her case.

Walmart counters that the proper issues are whether Magdaleno is entitled to review of an alleged error that is based on authorities the jury was not asked to consider; and, in that event, whether Magdaleno has articulated a basis for review under RAP 13.4(b).

STATEMENT OF THE CASE

The Court of Appeals summarized this case as follows:

> In 2007, Imelda Magdaleno hurt her back while working for Walmart Stores, Inc. The Department of Labor and Industries authorized a surgery, which she underwent in 2011. Later, she continued to experience back pain. She sought authorization for a second surgery, but the Department denied her request and closed her claim. Magdaleno proceeded with the second surgery but afterward her back worsened. She sought to reopen her claim, asserting that a claim-related condition had objectively worsened. The Department reopened the claim, but the Board of Industrial Insurance Appeals reversed, concluding that no claim-related condition objectively worsened between the terminal dates.
>
> Magdaleno appealed to Superior Court. There, a jury returned a verdict for Walmart, finding that the Board ruled correctly. Magdaleno moved for a judgment notwithstanding the verdict, which motion the trial court denied. On appeal, Magdaleno [claimed] that the trial court erred because substantial evidence or reasonable inferences [did] not support the jury's verdict. But the law require[ed] us to view the evidence in the light most favorable to the Department and Walmart. And [so] … we affirm[ed].

Magdaleno, 2020 WL 6870503, at *1 (Wash. App. Div. 1, 2020).

ARGUMENT

1. The Law of This Case Gave No Option for the Jury to Render a Verdict in Accordance with WAC 296-20-01002 or Maphet, so Magdaleno's Claim—that those Authorities were Misapplied After the Trial Concluded—is Inconsequential.

The issue Magdaleno presents is fact-specific. She asks this Court to second-guess whether the Court of Appeals offered adequate grounds to find that WAC 296-20-01002 and *Maphet* had no application to the circumstances of her case (Pet. at 8–16). This follows similar claims in the Superior Court, where Magdaleno moved for a judgment notwithstanding the verdict against her based on WAC 296-20-01002 and *Maphet*, and before the Court of Appeals, where Magdaleno, again based on WAC 296-20-01002 and *Maphet*, asserted error in denying said motion. What she fails to note, however, is that no doctrine emanating from WAC 296-20-01002 (later at the heart of *Maphet*[1]) was submitted to the jury for consideration at her trial. Hence, this argument has from its outset been at odds with the law of the case, and, to reach the challenge as Magdaleno presents it would require this Court to condone her failure to preserve it.

Here, Magdaleno proposed a jury instruction arguably in accordance with WAC 296-20-01002. Yet the Superior Court did not issue

[1] *Maphet* was decided on August 6, 2019, nearly six months after the jury rendered a verdict in this case, on March 1, 2019.

the proposed instruction, or an analogous one, and so the jury was never empowered to conclude that Walmart was obligated under WAC 296-20-01002 to bear the costs of the medical procedure at issue (CP, at 211–34). Magdaleno did not object to the omission of her proposed WAC 296-20-01002 instruction, meaning that, even if its absence was *conceivably* an error, the Superior Court was not given proper opportunity to correct it. *See, e.g.*, *Harrison v. A Bar A Ranch, Inc.*, 63 Wn.2d 592, 600, 388 P.2d 531, 536 (1964) ("The rules require that to preserve a claimed error in an instruction given or refused, the party must point out with particularity to the trial court the basis for the exception"); *accord* CR 51(f).

It was not enough to overcome this waiver for Magdaleno to have raised the issue in her motion for judgment notwithstanding the verdict, or appeal. *Truex v. Ernst Home Ctr., Inc.*, 124 Wn. 2d 334, 380, 878 P.2d 1208, 1211 (1994) (in the context of alleged error in refusal to give proposed jury instruction, this Court does "not consider statements made in the motion for a new trial, on reconsideration, or on appeal.").

Indeed, if, as here, no assignments of error are directed to a jury instruction, the instruction becomes law of the case on appeal "and the sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions and rules of law laid down in the charge." *Noland v. Dep't of Labor & Indus.*, 43 Wn.2d 588, 590, 262 P.2d 765, 766

(1953); *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250, 255 (2001) ("Instructions to which no exceptions are taken become law of the case."); *see also Ralls v. Bonney*, 56 Wn.2d 342, 343, 353 P.2d 158, 159 (1960) (refusing to overturn a motion for judgment notwithstanding the verdict decided "under the law that the parties, by their approval of the instructions, made applicable to the case").

This means that any post-trial misapplication of WAC 296-20-01002 that Magdaleno perceives in this record is inconsequential because that regulation—and *Maphet*, which interpreted it—was not the law that the parties made applicable to the case. The instructions as submitted to the jury "were binding and conclusive" upon it and gave no option to render a verdict in accordance with the authorities Magdaleno cites here. *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998). Magdaleno does not recognize this defect, nor present another reason for this Court to grant review of—what is in all other respects—an unremarkable sufficiency of the evidence case. For this reason alone, review should be denied.[2]

[2] That the Court of Appeals discussed and distinguished this case from *Maphet* does not cure Magdaleno's failure to preserve this issue. *See, e.g.*, *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 7, 604 P.2d 164, 164 (1979) (per curiam) ("Without a record that shows that exceptions were taken under CR 51(f) on the grounds urged on appeal, we are unable to pass upon the merits of plaintiff's case *including the grounds for decision as set forth by the Court of Appeals*.") (emphasis added). This Court can and should recognize an insurmountable defect when it sees one. *See, e.g.*, *Blitzan v. Parisi*, 88 Wn.2d 116, 558

2. Even if This Court Looks Past Magdaleno's Waiver of Arguments Under WAC 296-20-01002 and *Maphet,* She Has Not Articulated a Basis for Review Under RAP 13.4(b).

Where, as here, the Court of Appeals has issued a decision terminating appellate review, this Court will not revive the matter unless:

> (1) the decision is in conflict with a decision of the Supreme Court;
> (2) the decision is in conflict with a published decision of the Court of Appeals;
> (3) the petition raises a significant question of constitutional law; or
> (4) the petition raises an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (considerations governing acceptance of review). Magdaleno invokes subsections (2) and (4), but fails to show that review is appropriate under either consideration. She does not assert that either remaining consideration compels review.

a. Magdaleno Fails to Show That the Court of Appeals Decision Conflicts With Maphet.

Magdaleno contends that this Court should grant review under RAP 13.4(b)(2) because, as she tells it, the Court of Appeals "refus[ed] to follow [*Maphet*] and otherwise ignore[d] WAC 296-20-01002" (Pet. at 1). As outlined above, the jury was never asked to consider whether Walmart was obligated under WAC 296-20-01002 to bear the costs of the medical procedure at issue, and so to reach the challenge as Magdaleno presents it

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P.2d 775 (1977) (dismissing challenge sua sponte where this Court found no adequate exception had been taken to instruction that formed the basis for appeal).

would require this Court to endorse her failure to preserve it. In any event, Magdaleno is incorrect; the Court of Appeals did not "ignore" the regulation or *Maphet*, but rather found those authorities inapplicable.

The Court of Appeals was unquestionably acquainted with WAC 296-20-01002 and *Maphet*, as the opinion provides meticulous discussion on the very concepts said to have been "ignore[d]." *See Magdaleno*, 2020 WL 6870503, at *5 (subsection 3 of the opinion, titled "WAC 296-20-01002 and *Maphet*"). For reasons it explicitly rooted in fact—rather than law—the Court of Appeals nonetheless found it could not sensibly apply those authorities to this case. *Id.* ("WAC 296-20-01002 does not apply here … [a]nd *Maphet* is distinguishable …").

The Court of Appeals' reasons for distinguishing this case from WAC 296-20-01002 were well-founded. Unlike *Maphet*, there was substantial evidence in this matter to show that the authorized surgical procedure did not cause the problem that the unauthorized procedure was meant to correct. Compare *Magdaleno*, 2020 WL 6870503, at *5, with *Maphet*, 10 Wn. App. 2d at 443 ("This [procedure] was a consequence of the [former] authorized surgery and it subsequently led to the need for the [latter] surgery …"). Also unlike *Maphet*, this record reflected substantial evidence that the unauthorized surgery treated different problems than the authorized surgery addressed. *Compare Magdaleno*, 2020 WL 6870503, at

*5, with *Maphet*, 10 Wn. App. 2d at 483 ("The evidence shows that Maphet's [latter] surgery treated … the same condition addressed by the surgeries that the [employer] had previously authorized."). The Court of Appeals did not "conflict" with WAC 296-20-01002 or *Maphet* by simply finding that their doctrines did not apply.

Indeed, there could be no clearer attempt to *avoid* an actual or apparent "conflict" with *Maphet* and WAC 296-20-01002 than what was put forth in this opinion; the Court explicitly noted: "[W]e do not address whether *Maphet* was correctly decided, or whether WAC 295-20-01002 is binding." *Magdaleno*, 2020 WL 6870503, at *5 n.7. The Court of Appeals did not so much as *imply* disagreement with *Maphet* or any principle discussed therein. *Grisby v. Herzog*, 190 Wn. App. 786, 810, 362 P.3d 763, 774 (2015) (recognizing that, when a panel concludes that a previous decision "used faulty legal analysis or has been undermined by some new development in the law," the opinion will usually state that the panel "'disagrees with,' 'departs from,' or 'declines to follow' the other opinion.").[3]

[3] Even if the Court of Appeals had invoked such language, this Court does not grant review as a matter of course. *See, e.g.*, *State v. Mohamed*, 175 Wn. App. 45, 55, 301 P.3d 504 ("We disagree ... because, in our view, the statement is legally incorrect dicta that we decline to follow"), *review denied*, 178 Wn. 2d 1019, 312 P.3d 651 (2013); *State v. Grant*, 172 Wn. App. 496, 503, 301 P.3d 459 (2012) ("We respectfully disagree with the *Korum* court's analysis"), *review denied*, 177 Wn. 2d 1021, 304 P.3d 115 (2013); *State v. Giles*, 132 Wn. App. 738, 741, 132 P.3d 1151 (2006) ("We respectfully

It appears Magdaleno believes the Court of Appeals could not rule against her without creating a conflict with *Maphet*. But the Court of Appeals' opinion itself demonstrates meticulous consideration of the same arguments Magdaleno presents here, and, with detailed explanation, judiciously concluded that the principles reflected in WAC 296-20-01002 and *Maphet* had no application to the circumstances of her case. This is a fundamental component of the practice of law: the application of law to facts. The Court of Appeals did not contravene its own precedent simply by undertaking to see that it was faithfully applied.

b. Magdaleno Fails to Show That This Case Presents an Issue of Substantial Public Interest.

Magdaleno contends that this Court should grant review under RAP 13.4(b)(4) because, in her view, "whether *Maphet* was correctly decided" by the Court of Appeals is an issue of substantial public interest (Pet. at 17). But neither she nor Walmart present a direct challenge to *Maphet* in this Court. The issue Magdaleno presents is whether the Court of Appeals erred in *distinguishing Maphet*, and Walmart has outlined concerns that should give this Court pause in even reaching *that* question. Specifically, the jury was never asked to consider whether Walmart was obligated under WAC 296-20-01002 to bear the costs of the medical procedure at

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disagree with our learned colleagues ... and diverge from their holding here"), *review denied*, 160 Wn. 2d 1006, 158 P.3d 615 (2007).

issue; and that the Court of Appeals did not "ignore" the regulation or *Maphet*, but rather found those authorities inapplicable. Indeed, to grant review of *Maphet* on this record would be putting the cart before the horse.

Magdaleno's remaining points on this issue are speculative, belying any notion that *this case* presents an issue of public importance. For instance, she contends that because Walmart argued *Maphet* was incorrectly decided below, it "will likely continue to adjudicate its claims contrary" to the decision and "other self-insured employers … could also" argue that *Maphet* was incorrect (Pet. at 17). On the first point, Walmart recognizes that *Maphet* is the law in Washington and it is wrong to suggest that good-faith legal arguments presented to the Court of Appeals somehow evince an intent to violate it. And the second point, to the extent it is not conjecture, would be all the more reason for this Court to await a challenge to *Maphet* that is not plagued by the defect outlined in Section 1.

Magdaleno also contends that this Court should grant review under RAP 13.4(b)(4) because the Court of Appeals supposedly "irrationally relied on evidence" to support the jury's verdict (Pet. at 17). This argument is pure invitation to reweigh evidence, a measure this Court does not endorse. *See, e.g.*, *In re Lain*, 179 Wn. 2d 1, 22, 315 P.3d 455, 465 (2013) ("Where it is evidence that the [fact-finder] considered the

evidence … and supported [its] decision with objective facts, it is not our role to reweigh the evidence and substitute our own discretionary judgment."). Moreover, Magdaleno discusses no evidence outside of that submitted *in her case*, and so it strains credulity to suggest that this presents to an issue of substantial *public* interest. This Court should not grant review for the reasons Magdaleno offers.

CONCLUSION

This case is plagued by an insurmountable defect, which is that the law presented to the jury gave no option for it to render a verdict in accordance with the authorities Magdaleno cites here. To reach the challenge as Magdaleno presents it would require this Court to condone her failure to preserve it. If that were not enough, Magdaleno fails to show that any consideration in RAP 13.4 justifies this Court's attention. The Court of Appeals decision does not conflict with WAC 296-20-01002 or *Maphet*, but rather meticulously, and for reasons based entirely in fact, found those authorities inapplicable. Moreover, Magdaleno's proffered arguments belie any notion that *this case* presents an issue of public importance; her concerns are either limited to this record or are based in speculation.

Respectfully submitted,

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