

NO. 67371-8-I

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

AFRIQUE V. NERO, individually and as
Guardian of C.A. NERO, a minor,

Plaintiff-Appellants/Cross-Appellees,

v.

VIRGINIA MASON MEDICAL CENTER, a Washington non-profit
corporation; CYRUS CRYST, M.D. and JANE DOE CRYST, and the
marital community comprised thereof; and JOHN DOES 1-10,

Defendant-Appellees/Cross-Appellants.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Carol Schapira)

2012 MAY -3 AM 11:30
COURT OF APPEALS DIV I
STATE OF WASHINGTON

**REPLY BRIEF AND RESPONSE BRIEF ON CROSS-APPEAL OF
APPELLANTS/CROSS-APPELLEES AFRIQUE AND C.A. NERO**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

A. **The Erroneous Admission Of Racially Charged Evidence In The Clinic Note That Was Irrelevant And Unfairly Prejudicial.**

This medical malpractice case had nothing to do with race, and yet at trial the defense introduced evidence of racially charged statements. The statements in question – that Nero allegedly accused Dr. Cryst of racial bias and that Nero’s mother allegedly stated “don’t make us go all black on you now” – are contained in a “clinic note” prepared by Dr. Cryst from Nero’s May 30, 2007 doctor’s visit. *See* Exhibit 132 (Nero Opening Br. App. 2). Defense counsel questioned Dr. Cryst about that record and displayed it to the jury. *See* RP 1677:19–1680:5, 1759:9–22, 1824:21–1825:13 (May 18, 2011). The trial court, in turn, overruled Nero’s relevancy and unfair prejudice objections to the racially charged statements in the clinic note and delivered the unredacted clinic note to the jury for consideration during deliberations. *See* RP 2031:20–25, 2005:11–2009:19 (May 19, 2011).

In defense of the admission of the racially charged statements in the clinic note, Dr. Cryst does not attempt to explain why such statements are relevant to the disputed issues in the case. Rather, he argues (1) that Nero never made a relevancy objection; (2) that Nero waived an unfair prejudice objection by including the unredacted clinic note in her ER 904

disclosure; and (3) that, in any event, the racially charged statements are distinguishable from evidence of a party's immigration status or abortion history that Washington courts have held is inherently prejudicial. Dr. Cryst is incorrect on each of those points.

First, the record on appeal plainly establishes that Nero made a relevancy objection. Although Nero's trial counsel did not specifically use the words "relevant" or "irrelevant" in objecting to the racially charged statements, he argued that the probative value of such evidence was "nil." As evidence must be probative to be relevant, Nero's objection plainly pertained to relevance.

Second, Nero did not irrevocably waive an unfair prejudice objection to the racially charged statements by including the unredacted clinic note in her ER 904 disclosure. Under this Court's ER 904 jurisprudence, a party may amend or withdraw an exhibit listed under ER 904 to avert injustice, when doing so would not prejudice the opposing party. Here, Nero did exactly that by objecting to the racially charged statements in the clinic note and seeking to redact the clinic note *before* it was delivered to the jury for deliberations. As the racially charged statements were both irrelevant and presumptively prejudicial, Nero was entitled to raise an unfair prejudice objection.

Third, the law in Washington is clear: the admission of evidence appealing to prejudice or bias undermines the integrity of the judicial process and creates a presumption of harm. The absence of any explanation from Dr. Cryst as to which material facts the racially charged statements tend to prove or disprove yields one conclusion: the statements function solely to portray Nero as a stereotypical “angry black woman.” Such an appeal to prejudice is inimical to a fair, impartial judicial process and cannot be tolerated.

Fourth, Washington law is also clear that the only remedy for appeals to social prejudice and bias is reversal and remand for a new trial. That is because such evidence is so antithetical to our system of justice that the only way to guard against the harm caused is to hold a new trial. Accordingly, reversal and remand for a new trial are required.

B. Dr. Cryst’s Proposed Jury Instruction Regarding Income Taxation.

On cross-appeal, Dr. Cryst assigns error to the trial court’s refusal to instruct the jury that any damages awarded would not be subject to federal income taxation. *See* Cryst Response Br. 3, 13–14, 26–27. The Court need not address this issue because, if this matter is remanded, Dr. Cryst will have the opportunity to propose new jury instructions, and the trial court is best situated to determine whether a particular instruction is

warranted. But if the Court does address this issue, the trial court did not abuse its discretion in refusing to so instruct the jury. Nor, as explained below in Part II.B, is there a proper basis to direct the trial court to give such an instruction on remand.

II. ARGUMENT

A. **The Trial Court Committed Reversible Error By Admitting The Clinic Note Without Redacting The Racially Charged Statements, Which Were Both Irrelevant And Unfairly Prejudicial.**

1. **Contrary To Dr. Cryst's Assertion, Nero Made A Timely Relevancy Objection.**

Although Dr. Cryst agrees that Nero retained the right to make a relevancy objection to the racially charged statements in the clinic note (*see* Cryst Response Br. 19–20), he nonetheless contends that the trial court properly admitted those statements because, in his view, Nero “*never objected on relevancy grounds.*” *Id.* at 19. Instead, he asserts that Nero’s “sole argument regarding admissibility of [the clinic note] . . . was grounded in its probative value, not its relevance.” *Id.* That assertion is wrong.

The Report of Proceedings establishes that Nero’s trial counsel objected to the clinic note as irrelevant *and* unfairly prejudicial. Before the clinic note was delivered to the jury, Nero’s trial counsel specifically

referred to the racially charged statements contained therein and argued, “the probative value of that is *nil*. The prejudicial effect is high.” RP 2006:4-5 (May 19, 2011) (emphasis added).

The definition of “probative” is “[t]ending to prove or disprove.” *Black’s Law Dictionary* 1240 (8th ed. 2004). Similarly, “probative evidence” is evidence that “tends to prove or disprove a point in issue.” *Id.* at 598. To be relevant, evidence must have the “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Taken together, these definitions make clear that evidence is relevant only if it is probative evidence. Thus, although Nero’s trial counsel did not use the word “relevant,” his argument, fairly interpreted, was that the racially charged statements were irrelevant and therefore inadmissible.

Moreover, if a party makes an imprecise objection, such objection is nonetheless sufficient if the basis for it is “apparent from the context.” ER 103(a)(1); *see also State v. Walker*, 75 Wn. App. 101, 879 P.2d 957 (1994) (concluding that party objected to the prejudicial effect of evidence even though counsel did not use the word prejudicial); *State v. Jones*, 71 Wn. App. 798, 813, 863 P.2d 85 (1993) (concluding that objection to

improper opinion testimony as to guilt was apparent from context). Considering the context of Nero's objection to the racially charged statements in the clinic note, it is apparent that her trial counsel made a relevancy objection. After arguing that the racially charged statements had no probative value for the disputed issues, Nero's trial counsel asked "*why do you need that* other than to try to use that to impugn the character of my client?" RP 2006:9–12 (May 19, 2011) (emphasis added). When that statement – *why do you need that* – is considered in the context of trial counsel's other statement that the probative value was "nil," it is apparent that Nero raised a relevancy objection.

That Nero made a relevancy objection is also apparent from her pretrial motion *in limine* and the trial court's ruling on that motion. Before trial, Nero moved *in limine* under ER 401, 402, and 403 to exclude allegations in medical records from her Alaska physicians that Nero's mother had previously made accusations of racial bias. *See* CP 320–21. She specifically argued that such statements were irrelevant. *See id.* During oral argument on that motion, both Nero's trial counsel and the trial court judge commented that such comments both lacked any probative value and were highly prejudicial. *See* RP 25:25–26:8, 41:8–9 (Mar. 18, 2011). The trial court then granted Nero's motion *in limine*. *See*

id. at 36:21. In light of the similarities between Nero’s motion *in limine* and her oral objection at trial, it is apparent that Nero made a relevancy objection to the racially charged statements in the clinic note.

Accordingly, Dr. Cryst’s argument that Nero did not make a relevancy objection fails.

2. Nero Did Not Irrevocably Waive Her Unfair Prejudice Objection To The Racially Charged Statements In The Clinic Note By Including The Unredacted Clinic Note In Her ER 904 Disclosure.

Dr. Cryst also contends that Nero waived her unfair prejudice objection to the racially charged statements in the clinic note because she included the unredacted clinic note in her ER 904 disclosure. *See* Cryst Response Br. 17–19. In support of that argument, Dr. Cryst principally relies on *Hendrickson v. King County*, 101 Wn. App. 258, 2 P.3d 1006 (2000), and asserts that a party who designates a piece of evidence under ER 904 “will be deemed to have waived any objection” to such evidence. Cryst Response Br. 17. In so doing, Dr. Cryst has misinterpreted and misapplied *Hendrickson*.

Hendrickson involved a situation where the Hendricksons included certain medical records in their ER 904 designation but did not seek to introduce those records at trial, while King County sought to introduce the medical records designated by the Hendricksons at trial despite having not

included such records in its exhibit list and previously having made a blanket objection to the records. 101 Wn. App. at 262–63, 268–69. The narrow question presented was whether the trial court properly excluded the medical records offered by the County on the basis that the Hendricksons lacked notice that the County might introduce those documents. *Id.* at 268. In reversing the trial court’s ruling, the Court of Appeals explained that “the benefits of a[n ER 904] designation are available to all parties” and that the County’s earlier blanket objection was inconsequential because ER 904 “requires the opponent [of a piece of evidence] to make *specific* objections to a finding of admissibility.” *Id.* (emphasis added). Thus, the court ruled that “the Hendricksons could not rely upon the County’s general objections to prevent admission of the documents.” *Id.* at 269.

Critically, the Court of Appeals *did not* hold, as Dr. Cryst suggests, that the Hendricksons had irrevocably waived any objection to the medical records, including objections based on unfair prejudice. *See* Cryst Response Br. 18 (“Therefore, if the original proponent of the evidence decides not to offer the document as evidence, the document may be offered by the opposing party, and the original proponent will be deemed to have waived any objection.” (citing *Hendrickson*, 101 Wn. App. at

268)). Rather, the Court of Appeals specifically considered the Hendricksons' "trial objection to the admission of [the medical records] . . . on the ground that the County failed to give them notice of its intent to offer these documents." *Hendrickson*, 101 Wn. App. at 269. It ruled that the Hendricksons "were already on notice" because their designation of the records created an "expectation of admission" under ER 904. *Id.* But it did not rule that the Hendricksons were barred from making such an objection. Thus, Dr. Cryst is simply mistaken that, under *Hendrickson*, Nero waived altogether her objection to the clinic note under ER 403.

On that point, *Miller v. Arctic Alaska Fisheries Corp.*, 83 Wn. App. 255, 921 P.2d 585 (1996), *affirmed in part, reversed in part*, 133 Wn.2d 250, 944 P.2d 1005 (1997), is instructive. There, this Court specifically explained that a party may object to evidence in an ER 904 disclosure after the time period set forth in the rule "in circumstances where the objections could not have been anticipated, or where admission would create an injustice" and when doing so would not prejudice another party. 83 Wn. App. at 262. In reviewing this Court's decision in *Miller*, our Supreme Court affirmed this Court's ruling that the trial court erroneously excluded medical records and did not disturb this Court's reasoning that an ER 904 designation is not an irrevocable waiver. *See*

133 Wn.2d at 260. Therefore, this Court’s reasoning in *Miller* discussed above remains controlling.

This Court’s pronouncement in *Miller* is consistent with the guiding principle that the Rules of Evidence should be construed to ensure “that the truth may be ascertained and proceedings justly determined.” ER 102. *Miller* also is consistent with the principles embodied elsewhere in the law that a party should be able to change its mind or correct mistakes. *See In re Disciplinary Proceedings Against Van Camp*, 171 Wn.2d 781, 798–99, 257 P.3d 599 (2011) (affirming hearing officer’s allowance of a rebuttal expert witness not included on witness list because there was no showing that witness’s testimony was manifestly unreasonable); CR 36(b) (providing that parties may amend answers to requests for admission “when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits”); *Santos v. Dean*, 96 Wn. App. 849, 859–61, 982 P.2d 632 (1999) (analyzing CR 36(b)). Dr. Cryst’s rigid approach, in contrast, ignores those principles and would not allow any opportunity to correct a mistake or an oversight.

Consider the implications of Dr. Cryst's position. Medical records can contain a wide variety of information – including information that might be highly prejudicial, such as photographs of injuries or accident scenes, HIV test results, history of a past abortion, or treatment for drug addiction to name a few. If Dr. Cryst's argument were accepted, a party would be precluded from withdrawing or amending an exhibit containing such information simply because he or she included that evidence in an ER 904 designation, which, in the context of medical records, can involve thousands of pages of documents, as was the case herein. That kind of elevation of form over substance is not – and cannot be – the law.

Applying these principles allowing for correction of mistakes here, Nero was entitled to amend the clinic note included in her exhibit list by making an unfair prejudice objection to the portion of the note containing racially charged statements. That is because, as set forth immediately below, the objected-to portions were both irrelevant and, by their very nature, unfairly prejudicial. As Dr. Cryst has not shown that redaction of the clinic note would have inhibited his defense, it would be nonsensical and unduly harsh to penalize Nero for designating the unredacted clinic note under ER 904 when her trial counsel sought to redact the offensive portions of the clinic note before the document was delivered to the jury.

3. The Racially Charged Statements In The Clinic Note Were Both Irrelevant And Unfairly Prejudicial And Should Have Been Excluded.

As Nero previously explained, the alleged accusations of racial bias and the alleged statement, “don’t make us go all black on you now,” contained in the clinic note had absolutely nothing to do with the material issues in this case. *See* Nero Opening Br. 11. The parties agree that those issues are whether Dr. Cryst adhered to the standard of care and whether Nero gave informed consent and complied with her prescribed treatment. *See id.*; Cryst Response Br. 1. Indeed, as Dr. Cryst commented in the clinic note regarding the alleged racially charged statements, “I tend not to confront her [Nero] about this as all this really distracts from the real issue – her renal failure.” Nero Opening Br. App. 3. That is precisely the point: issues relating to racial bias or racial stereotypes have no tendency to make the existence of any fact of consequence to determining material facts more or less probable. *See* ER 402. The racially charged statements in the clinic note, therefore, are irrelevant.

Remarkably, Dr. Cryst does not even attempt to demonstrate how the racially charged statements in the clinic note are germane to the disputed issues. Rather, he asserts *without explanation* that Nero’s “statements made to and relationships with her medical providers w[ere]

highly relevant to every aspect of this medical negligence action” and argues that the clinic note was relevant simply because it was a medical record. Cryst Response Br. 15–16, 17. But just because the clinic note is a medical record does not mean that *all* information in it was admissible. It is well-established that courts should redact irrelevant and prejudicial information from documents containing otherwise admissible statements. *See, e.g., State v. Coleman*, 155 Wn. App. 951, 958–59, 231 P.3d 212 (2010) (“[I]rrelevant and prejudicial statements should be redacted from immunity or plea agreements upon request.”); *State v. Green*, 119 Wn. App. 15, 24, 79 P.3d 460 (2003) (“Evidence is not admissible merely because it is contained in an agreement; references to irrelevant or prejudicial matters should be redacted.” (citing *State v. Jessup*, 31 Wn. App. 304, 316, 641 P.2d 1185 (1982))). The trial court, therefore, erred by failing to redact the racially charged statements in the clinic note before delivering the note to the jury for its deliberations.

Even if the racially charged statements in the clinic note could be considered relevant – which they cannot – the trial court still should have excluded the statements as unfairly prejudicial. As Nero previously explained, it is a strongly rooted principle in Washington law that appeals to biases or stereotypes, however subtle, are, by their nature, unfairly

prejudicial. Nero Opening Br. 7–10. And as Nero also explained previously, the admission of the racially charged statements in the clinic note constituted such an appeal to racial bias because the statements function to portray Nero as a stereotypical “angry black woman” who played the race card. *Id.* at 11–13.

In response, Dr. Cryst offers several arguments why the allegations of racial bias and the alleged threat, “don’t make us go all black on you,” are not unfairly prejudicial. *See* Cryst’s Response Br. 21–26. None of these arguments has merit.

First, Dr. Cryst asserts that there was no error because Nero did not move *in limine* to exclude the racially charged statements. *See id.* at 21, 25. This argument is irrelevant because no rule requires a party to file a motion *in limine*. *See* Karl B. Tegland, *Washington Practice: Evidence* § 103.2 (5th ed. 2007) (“Motions in limine are not mentioned in the Evidence Rules”). Nero’s counsel objected to the racially charged statements before the clinic note was delivered to the jury. *See* RP 2005:11–2009:19 (May 19, 2011). That objection was timely under ER 103(a)(1) and therefore sufficient.

Second, Dr. Cryst argues that Nero could not have suffered any prejudice because she included the unredacted clinic note in her ER 904

disclosure. *See* Cryst’s Opening Br. 21–22. That argument has nothing to do with whether the substance of the racially charged statements was unfairly prejudicial, and is a rearticulation of the earlier argument that Nero irrevocably waived an unfair prejudice objection by including the clinic note in her ER 904 disclosure. As set forth above in Part II.A.2, that argument fails.

Third, Dr. Cryst criticizes Nero’s Opening Brief for analogizing the admission of the racially charged statements in this case to the erroneous admission of evidence concerning a party’s immigration status and history of abortion procedures in *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 230 P.3d 583 (2010) (immigration); *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987) (abortion); and *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 806 P.2d 766 (1991) (abortion). That criticism is unfounded. Courts routinely draw analogies to similar, but different, legal concepts and fact patterns. *See, e.g., State v. Bradley*, 105 Wn.2d 898, 719 P.2d 546 (1986) (drawing analogy between a border search conducted by federal officials and a search conducted in a different jurisdiction); *Welsh v. Callvert*, 34 Wash. 250, 254, 75 P. 871 (1904) (analogizing between a deed issued by the state and a land patent issued by the United States); *Spradlin Rock Prods., Inc. v. P.U.D. No. 1 of*

Grays Harbor Cnty., 164 Wn. App. 641, 660 n.11, 266 P.3d 229 (2011) (noting that reasoning in another case dealing with an inapplicable provision of the UCC may nonetheless be applied by analogy to interpret a contract).

It is appropriate to analogize this case to the situations presented in *Salas*, *Kirk*, and *Garcia*. Those cases each involved argument or evidence appealing to social prejudice. Likewise, the admission of the racially charged statements cannot be viewed as anything other than an appeal to social prejudice. That is because Dr. Cryst has not explained – and cannot explain – what material fact those statements tend to prove or disprove. The absence of such an explanation leads inexorably to one conclusion: the statements function to portray Nero as a stereotypical “angry black woman.”

Contrary to Dr. Cryst’s suggestion (Cryst’s Opening Br. 23), the negative stereotype of the “angry black woman” is frequently the subject of litigation. *See, e.g., Bowdish v. Fed. Express Corp.*, 699 F. Supp. 2d 1306, 1314 (W.D. Okla. 2010); *Na'im v. Clinton*, 626 F. Supp. 2d 63, 75 (D.D.C. 2009); *Mertes v. Wynne*, No. CIV.S-06-1742, 2007 WL 3203004, at *3 (E.D. Cal. Oct. 29, 2007); *Walker v. Brownlee*, 385 F. Supp. 2d 1126, 1131 (D. Kan. 2005). And it is a contemporary, well-known

problem, as recent news reports describe. See Katherine Skiba, *Michelle Obama rejects 'angry black woman' label*, Chi. Trib., Jan. 12, 2012 (attached hereto as App. 1–3). The prejudice toward that stereotype is real. Therefore, *Salas*, *Kirk*, and *Garcia* are instructive.

Fourth, Dr. Cryst argues that *State v. Monday*, 171 Wn.2d 667, 257 P.3d 551 (2011), is inapposite because it is a criminal case. See Cryst Response Br. 25. Dr. Cryst offers no principled reason why an impartial, reasoned adjudicative process should be of paramount concern in criminal proceedings but not in civil litigation. There is none. The guiding principle emphasized in *Monday*, that “[t]heories and arguments based upon racial, ethnic and most other stereotypes are antithetical to and impermissible in a fair and impartial trial,” applies as equally to civil cases as it does to criminal prosecutions. 171 Wn.2d at 678 (quoting *State v. Dhaliwal*, 150 Wn.2d 559, 583, 79 P.3d 432 (2003) (Chambers, J., concurring)). Consistent with that view, the Ninth Circuit has recognized that principles governing the introduction of racially charged evidence in criminal matters are directly applicable to civil matters. See *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1006–07 (9th Cir. 2001) (explaining that fairness principles addressed in criminal cases involving racial stereotyping are relevant to civil matters (citing *Bird v. Glacier*

Elec. Coop., Inc., 255 F.3d 1136, 1151 (9th Cir. 2001))). This Court can, and should, look to *Monday* for guidance.

4. The Only Remedy Is Reversal And Remand.

As previously explained, the only remedy for the trial court's improper admission of the racially charged statements is reversal and remand for a new trial. *See* Nero Opening Br. 13–15. Prejudice from such evidence is presumed, and it is impossible to know what weight a jury might have given to such evidence. *Salas*, 168 Wn.2d at 673 (citing *Thomas v. French*, 99 Wn.2d 95, 105, 659 P.2d 1097 (1983)). Because such evidence creates such a great risk of unfair prejudice and there is no way to say that such evidence had no effect on the jury, a court “cannot hold that it was harmless to admit” such evidence, and a new trial is necessary. *Id.*

In response, Dr. Cryst ignores these governing principles, arguing only “that there is absolutely no evidence that the jurors engaged in actual prejudice, nor does Ms. Nero demonstrate actual prejudice.” Cryst's Response Br. 24. That argument ignores the rule that unfair prejudice in this context is presumed. *Salas* 168 Wn.2d at 672; *Garcia*, 60 Wn. App. at 644. Additionally, as Nero introduced substantial evidence in support of her claims and in refutation of Dr. Cryst's defenses (*see* Nero Opening

Br. 14–15), and in light of the presumption of prejudice resulting from the admission of the racially charged statements, it is permissible to infer manifest prejudice.

Furthermore, Dr. Cryst’s argument that Nero could not have suffered any prejudice because no one testified about the racially charged statements in the clinic note is legally incorrect. *See* Cryst Opening Br. 17, 21–22. Testimony about an exhibit is not required for the jury to consider it. The jury was specifically instructed to consider during its deliberations the exhibits admitted into evidence and made available in the jury room. *See* CP 2205 (Instruction No. 1). As “[j]urors are presumed to follow the court’s instructions” (*State v. Kirkman*, 159 Wn.2d 918, 937, 155 P.3d 125 (2007) (citation omitted)), the jury herein is presumed to have considered the clinic note in its entirety.

Moreover, Dr. Cryst’s argument that the admission of the racially charged statements was inconsequential because the alleged statements were “isolated” (Cryst Response Br. 21) suffers from a fatal internal dissonance. If the jury was not meant to focus on the racially charged statements in the clinic note, there is no rational explanation why Dr. Cryst was specifically questioned about this particular clinic note during his direct examination (*see* RP 1677:19–1680:5, 1759:9–22, 1824:21–1825:13

(May 18, 2011); Cryst Response Br. 1) and why Dr. Cryst's counsel, in a lengthy colloquy with Nero's trial counsel and the trial court, later vigorously opposed Nero's objection to those statements and request that they be redacted. *See* RP 2005:11–2009:19. The explanation, of course, is that the racially charged statements in the clinic note portrayed Nero in a negative light. Regardless of intent, the evidence functions as an appeal to latent bias and prejudice against a negative stereotype. Such an error cannot be tolerated, and reversal and remand, therefore, are required.

B. Contrary To Dr. Cryst's Arguments, There Is Neither A Need Nor A Basis To Reverse The Trial Court's Ruling On The Proposed Jury Instruction Regarding Income Taxation.

On cross-appeal, Dr. Cryst seeks reversal of the trial court's refusal to give a proposed jury instruction that any damages award would not be subject to federal income taxation. *See* Cryst Response Br. 26–27. Dr. Cryst contends that this instruction accurately states federal tax law and that he will offer the same instruction on remand. Be that as it may, the trial court did not err.

As an initial matter, the Court need not even address this assignment of error. If this case is remanded, Dr. Cryst will have the opportunity to propose new jury instructions. Whether the proposed instruction would be appropriate will turn, in part, on whether there is

“substantial evidence” to support a particular theory. *Bulzomi v. Dep’t of Labor & Indus.*, 72 Wn. App. 522, 526, 864 P.2d 996 (1994) (citing *Codd v. Stevens Pass, Inc.*, 45 Wn. App. 393, 403, 725 P.2d 1008 (1986)).

Washington courts have recognized that an instruction on income taxes “might be helpful” “in an appropriate case, such as a case involving high income and significant tax impact.” *Janson v. N. Valley Hosp.*, 93 Wn. App. 892, 905, 971 P.2d 67 (1999) (discussing *Hinzman v. Palmanteer*, 81 Wn.2d 327, 334, 501 P.2d 1228 (1972)). Dr. Cryst has not pointed to any evidence even suggesting that such an instruction is appropriate. Such a determination, therefore, is best left to the trial court’s discretion on remand.

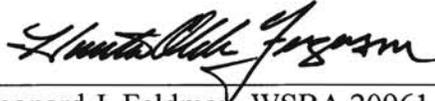
Even if the Court decides to address this issue, Dr. Cryst has failed to show that the trial court abused its discretion. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44–45, 244 P.3d 32 (2010) (stating that refusal to give a jury instruction is reviewed for abuse of discretion). The court in *Janson* – on which Dr. Cryst relies (*see* Cryst Response Br. 27) – made clear that Washington law disfavors such instructions because they “make the issue of damage awards more complicated” than they otherwise are. 93 Wn. App. at 906. Thus, Dr. Cryst cannot demonstrate that the trial court misapplied the law.

Nor has Dr. Cryst shown that the trial court misapplied pertinent facts. Although Dr. Cryst notes that Nero's trial counsel suggested to the jury that a damages award between \$1 million and \$2 million would be appropriate (*see* Cryst Response Br. 27), Dr. Cryst does not explain how an income tax instruction would assist the jury in determining damages. Moreover, Dr. Cryst does not point to any evidence of a high income that might make an income tax instruction appropriate under *Hinzman*. In the absence of any such argument or evidence, there is no basis to direct the trial court to give such an instruction on remand.

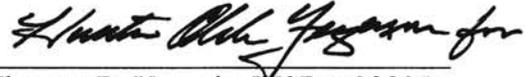
III. CONCLUSION

For the foregoing reasons, this Court should vacate the judgment herein and remand for a new trial. If it does remand this matter, the Court need not address the trial court's ruling on Dr. Cryst's proposed jury instruction, but if it does, it should affirm.

Dated: May 3, 2012.



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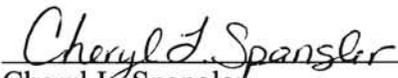
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HEADLINE: 'Angry black woman' label irks Obama \ In television interview, first lady challenges new book's depiction of her; adviser weighs in

BYLINE: By Katherine Skiba, Tribune reporter

DATELINE: WASHINGTON

BODY:

With a new book portraying Michelle Obama as an assertive force within the White House, the first lady has challenged the notion that she's "some kind of **angry black woman**."

Obama, entering the fourth year of a mostly gaffe-free White House run, made the remark in an interview aired Wednesday with CBS' Gayle King, a friend.

A careful and largely admired first spouse, Obama gives media interviews sparingly. And although some people have criticized how she is portrayed in "The Obamas," at least one expert on first ladies questioned Obama's decision to speak out Wednesday.

"Every first lady gets hit, and if the first lady hits back, she becomes the word that rhymes with witch," said Robert Watson, a professor of American studies at Lynn University in Boca Raton, Fla., who thought Obama would have been better off taking the high road.

Top Obama campaign strategist David Axelrod, who was among those interviewed by author Jodi Kantor for the book, told the Tribune that "any of these books is skewed a little bit by the perspectives of those who cooperate and the absence of those who don't." At the top of the latter list are the president and first lady.

Axelrod rejected suggestions that there was warfare between the East Wing (her side) and West Wing (the president's). He also downplayed the "**angry black woman**" comment as a "passing remark" and said that early during Obama's first presidential bid, "there were efforts to make her someone she wasn't."

'Angry black woman' label irks Obama \ In television interview, first lady challenges new book's depiction of her; adviser weighs in Chicago Tribune January 12, 2012 Thursday

His overall take? "She's been splendid at what she's done," he said, "and she's had a real impact as first lady. She's never pretended to be a politician, and she's not performing for the approbation of a political science professor."

Watson, the professor, said first ladies have come under criticism since Martha Washington was ridiculed for having too many horses pull her carriage.

Eleanor Roosevelt was taken to task for "buck teeth," Julia Dent Grant for having slightly crossed eyes and Ida Saxton McKinley for suffering from epilepsy, the professor said.

Watson, who would give Obama a grade of B-plus as first lady, said he's not surprised she is sometimes in the cross hairs in the new book.

"There's a very long history of unnecessary criticisms of the first lady, since the position is unelected, unappointed and unpaid, and in a democracy, power is not supposed to be vested in a wedding band," he said.

In the CBS interview, Obama denied friction with White House aides such as former chief of staff Rahm Emanuel, now Chicago mayor. "Rahm is -- and Amy (Rule), his wife, are some of our dearest friends," Obama said. "Rahm and I have never had a cross word. He's a funny guy."

The first lady, who said she had not read the book, added: "I guess it's just more interesting to imagine this conflicted situation here. That's been an image people have tried to paint of me since the day Barack announced, that I'm some kind of **angry black woman**."

Late last year, a USA Today/Gallup poll found Obama the third most admired woman in the country. A Marist Poll in mid-September found 63 percent of registered voters have a positive impression of her.

Once touted as mom-in-chief to two young daughters, Obama has expanded her portfolio while settling in at 1600 Pennsylvania Ave. She's won applause for embracing military families, fighting childhood obesity, mentoring young people and planting a vegetable garden, all while taking care of Malia, 13, and Sasha, 10, with her live-in mother.

In April, she'll make her debut as an author with a book on the now-famous garden.

She's hit 20 foreign countries, with ecstatic receptions. She's graced more than 20 magazine covers, from Vogue to Reader's Digest. She's appeared at 28 Obama campaign fundraisers in the last eight months.

While performing on the world stage, there have been some missteps for the 47-year-old Chicagoan who has two Ivy League degrees, one from Harvard Law.

In August 2010, while the country was mired in a recession, she took heat for a luxurious trip to Spain. Tall as a runway model at 5 feet 11 inches, she's won bouquets -- and brickbats -- for wearing couture clothing with flair. There was criticism in September, when in New York, according to press accounts, she wore borrowed diamond bracelets valued at \$42,000 to a Democratic National Committee fundraiser.

Letitia Baldrige, top aide to former first lady Jacqueline Kennedy, said her late boss was always taken to task during JFK's presidential run for her attire. "She was always criticized for being too royal, too expensive, too glamorous."

Watson, the American studies professor, said it's the rare first lady who doesn't come under withering scrutiny, naming Grace Coolidge and Laura Bush as exceptions.

Anita McBride, now with American University, was chief of staff to Laura Bush. No one is going to be more invested in the president's success than his wife, she said, and first lady is the president's "closest adviser -- whether people like it or not."

'Angry black woman' label irks Obama \ In television interview, first lady challenges new book's depiction of her; adviser weighs in Chicago Tribune January 12, 2012 Thursday

As for Obama bringing up the "**angry black woman**" characterization, McBride saw it as an attempt to "take it head on and try to put an end to it."

"I don't know if it's wise or unwise," she added, "but she's trying to dispute it."

Meantime, Baldrige has no problem with the first lady striking back at critics. "She's smart to have made that public, because it's true," she said. "People are always trying to catch her on this and that. I think she's a remarkable woman."

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NOTES: CHICAGOLAND / FOCUS: CAMPAIGN 2012

GRAPHIC: Photo (color): First lady Michelle Obama, shown at an event last fall, says she and former White House chief of staff Rahm Emanuel were never at odds. OLIVIER DOULIERY/ABACA PRESS PHOTO

Graphic (color): Michelle Obama's ratings

An October poll found that 67 percent of Americans have favorable impressions of Michelle Obama, down slightly from 72 percent in March 2009, just after her husband took office, and 74 percent in January 2010.

Percent with favorable impressions

White dots indicate months polls were conducted, Jan. 2010 - Oct. 2011

Oct. 13-17, 2011: 67%

Poll conducted by GfK Roper Public Affairs & Corporate Communications. Oct. 13-17, 2011. 1,000 adults nationwide.

Margin of error + or - 4 percentage points.

SOURCE: Polling Report, Inc.

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- See microfilm for complete graphic

Photo(s) Graphic(s)

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