

70868-6

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

NO. 70868-6-I

GENE ALFRED PALMER II, APPELLANT

vs.

ANDY LEE AND JANE DOE LEE, HUSBAND AND WIFE, AND THEIR MARITAL
COMMUNITY, RESPONDENTS

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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

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II. ARGUMENT

1.

It was reversible error for the court to refuse to instruct the jury on willful misconduct

Respondent in his Response Brief at 13 argues that there was no evidence offered at trial that would support the claim for willful misconduct and that there was no evidence to suggest that Mr. Palmer was unable to argue his case theory without the proposed instructions.

Respondent in his Response Brief at 15 argues that there is no record to indicate the Mr. Palmer complied with CR 51 to preserve the issue for appeal.

The trial court erred in denying jury instructions on Wanton and Willful physical assaults/battery and thereby left the second incident of injury to the jury as only negligence and it certainly is not negligent but intentional. THESE ARGUMENTS ARE ALL FACTUALLY AND LEGALLY WRONG AND THE INSTRUCTIONS SHOULD HAVE BEEN GIVEN FOR THE CAUSES AND SUPPORTED BY MUCH RECORD.

Standard of Review

The review of jury instructions are:

guided by the familiar principle jury instructions are sufficient if "they allow the parties to argue their theories of the case, do not mislead the jury and, when taken as a whole, properly inform the jury of the law to be applied." *Hue v. Farmboy Spray Co.*, 127 Wash.2d 67, 92, 896 P.2d 682 (1995). On appeal, jury instructions are reviewed de novo. *State v. Wanrow*, 88 Wash.2d 221, 559 P.2d 548 (1977). *Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (Wash. 2000)

Thus, proposed jury instructions are reviewed de novo to determine the relevance of the omitted instructions to the proposing party's theory in the case.

Error regarding jury instructions rejected and error in jury instructions ordered is a violation of due process for fair jury trials guaranteed by the Sixth Amendment of the United States Constitution and Washington State Constitution Article I Section 21. A party is "entitled to have the trial court instruct

upon [his] theory of the case if there is evidence to support the theory." State v. Hughes, 106 Wash.2d 176, 191, 721 P.2d 902 (1986). A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case. State v. Jones, 95 Wash.2d 616, 623, 628 P.2d 472 (1981). The standards of review of rejection of jury instructions errors clearly favor instruction of juries in relevant statutes.¹

Of all the errors committed by the court during the trial of this case, perhaps the most blatant disregard for Mr. Palmer's right to have his case fairly decided by the jury was the court's refusal to instruct the jury on willful misconduct.

Among other things, "[d]ue process requires that jury instructions allow the parties to argue all theories of their respective cases supported by sufficient evidence." State v. Allen, 161 Wash.App. 727, 734, 255 P.3d 784 (2011), *aff'd*, No. 86119–6, 2013 WL 259383 (Wash. Jan. 24, 2013). Under Washington law, a plaintiff is entitled to have his theory of the case presented by proper jury instruction if supported by the evidence. Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964). Accord, Naranen v. Harders, 1 Wash.App. 1014, 466 P.2d 521 (1970). Indeed, there is an "obligation of the trial court to submit specific instructions on a party's theory of the case on particular issues which are requested and which are supported by substantial evidence." Naranen v. Harders, 1 Wash.App. 1014, 466 P.2d 521, 526 (1970) (citing Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964); Woods v. Goodson, 55 Wash.2d 687, 349 P.2d 731 (1960)). When determining whether there is sufficient evidence to support a jury instruction, the court must view the evidence in the light most favorable to the party that requested the instruction. State v. Ponce, 166 Wash.App. 409, 416, 269 P.3d 408 (2012).

Mr. Palmer requested such an instruction and the evidence certainly supported such a theory of Mr. Lee's liability. For instance, Ashley Sellers, who observed the assault first-

hand, was called as a witness by Mr. Palmer gave more than ample testimony to support a finding that Mr. Lee committed the willful misconduct of assault and/or battery. As she testified, after observing that Mr. Lee was in his car and engaged in a verbal altercation with Mr. Palmer, who was riding a bicycle, the situation escalated when she “saw the driver get out of his car and come at the bicyclist, and then, uh, there was like a physical interaction -- aggressive, uh, physical contact from the driver to the bicyclist, and it seemed as if, um, the bicyclist was trying to defend himself.” (*Fuller quote below*). More succinctly, Ms. Sellers further clarified that “the motorist got out of his car, um, and that it seemed like from my point that he attacked the person on the bicycle.” (*Fuller quote below*) Further still, “there was definitely aggressive physical contact made with – from Mr. Lee to the, um, bicyclist... it was definitely some sort of aggressive, physical contact, and aggressive, physical movement towards the bicyclist.” (*Fuller quote below*)

A. Sellers testimony: VRP 8/7/13 at 10, L 15 – 16 L6:

A: Um, so as I was walking up to the scene, I saw a man in a car and a man with a bicycle **having a verbal argument**. And as I walking by I gleaned from their -- you know, from their conversation, that there had been some sort of accident prior, um, and that they were arguing about that, um, whether or not, you know, damage to either person’s property. And as I passed them and continued walking down, that’s when I heard **escalation**. I turned around and I saw the driver get out of his car and come at the bicyclist, and then, uh, there was like a physical interaction -- **aggressive, uh, physical contact from the driver to the bicyclist**, and it seemed as if, um, **the bicyclist was trying to defend himself**. Um, at that point, I, you know, stopped. I was watching the whole thing, um, and as I saw things start to unfold, I got the impression that the driver was going back to his car and I was concerned he was going to leave. And that’s when I called 911.

VRP 8/7/13 at 11, L 8-11:

A: I told them, um, that **I had just seen, you know, that argument escalate into a like a physical incident**, and that I was concerned that they should get a police officer out as soon as they could. And that’s what I said.

VRP 8/7/13 at 11, L 14-19:

A: Yeah, I did. I kinda described the situation, um, that the **motorist got out of his car**, um, and that it seemed like from my point that **he attacked the person on the bicycle**. And that’s, uh,

you know, I was concerned that he was going to leave because I saw him going back towards his car after the incident, and that's why I had called.

VRP 8/7/13 at 12, L 2-8:

A: I can't be sure of whether or not it was a punch or a shove, but I definitely know it was like **aggressive, physical contact**, um, to like the **upper torso and like possibly head area**. From where I was and from so long ago, it's difficult to say whether or not it was a punch or a shove only, but there was definitely aggressive physical contact made with -- from Mr. Lee to the, um, bicyclist.

VRP 8/7/13 at 13, L 9-18:

A: Um, like I said, I'm not -- I can't be 100 percent clear if it was a shove or a punch, but it was definitely some sort of aggressive, physical contact, and **aggressive, physical movement towards the bicyclist**. Um, it seemed at the time **strong enough to make the bicyclist stumble backward**, which to me, indicates that it **must have had quite a bit of force behind it**. Um, but I cannot be sure of whether or not, with any degree of certainty at this point, this far out from the incident, how, you know, specifically he contacted the bicyclist.

VRP 8/7/13 at 13, L 22-25:

A: Um, I can't be sure of the exact number. It seemed, uh, you know, kind of like a very brief physical interaction, um, but still enough that **the bicyclist was concerned and he was trying to defend himself**.

Furthermore a second eye witness, James Canova also agreed with Mr. Lee himself that he assaulted Mr. Palmer: James Canova testimony:

VRP 8/7/13 at 37 line 10 and 38 line 15: Lee lunged at Palmer on his bike and knocked him to the ground:

Um, but he basically lunged at the -- at the guy on the bike and the guy on the bike fell over. Still on the bike, just now on the ground.

VRP 8/7/13 at 40 line 6: Palmer made no aggressive action toward Lee

VRP at 46 line 12-47 line 17: Palmer was injured from Lee's physical assault:

A: Um, well he had -- he had sat down and was basically, uh, said, you know -- he was -- he was -- I asked, "So, what was that all about?" And he -- he sat down and started -- started telling me. I could tell that at the point, uh, where the bicycle had landed on his -- uh, his knee or leg, it hurt him because he was kind of limping on that. He had also -- he also was complaining that his neck was hurting. I didn't medically examine it or anything but I could tell that he -- he had least, you know, uh, felt pretty bad.

Q: You could tell?

A: Yeah. He would, you know -- he was -- he was rubbing his neck and his leg a lot. And he just sat down and I sat down next to him. I think the fire department were the first people to come to the scene.

Q: Uh-huh.

A: And then it was an ambulance because the fire department had called them and said he might need a -- one of those boards that they lay people on because they weren't sure if his neck was

hurt, because he was complaining of -- complaining about it. So, uh, I, uh -- once they had arrived, um, I gave them -- I said, um, I gave them what I can really, you know, describe in court. But if you need me to, I'll be a witness. But I was relieved this -- uh, another person who had -- who I had seen had a better vantage point gave them a business card as well. And so after I gave them my contact information -- um, I believe that the cops had just pulled up and I said, "All right, you should be good." And -- and I left.

Q: Okay.

A: And I think they were just putting him on the back brace at the time.

Not only did Ms. Sellers and Mr. Canova testify that Mr. Lee physically attacked Mr. Palmer without justification, but Mr. Lee's own testimony demonstrated himself to have initiated physical combat. According to Mr. Lee, after Mr. Palmer spit in the general direction of -- but not onto -- Mr. Lee, Mr. Lee "pushed him, and he got off his balance, and he fell to the ground."

(VRP 8/14/13 at 77)

Accordingly, any view of the evidence leads inexorably to the conclusion that an instruction on willful misconduct was warranted here. And the court's failure to so instruct was in no way ameliorated by the giving of a negligence instruction. In fact, if the jury believed the testimony of Ms. Sellers -- which is not in any way relevant to the issue of willful misconduct contradicted by the defendant -- then the jury, presumed to faithfully follow the instructions as given by the court, would have been bound to relieve Mr. Lee of what would otherwise be obvious fault and liability. As our courts have observed, to impose liability under negligence, the jury must find that the defendant's injurious act was unintentional and in a case such as this it would be proper to instruct on both negligence and willful misconduct. See, *O'Donoghue v. Riggs*, 440 P.2d 823, 73 Wn.2d 814 (Wash., 1968).

Not only did the court refuse to give the instruction specifically requested by Mr. Palmer, but the court refused to give any instruction whatsoever concerning willful misconduct. The resulting prejudice to Mr. Palmer's case is clear in light of the jury failing to find the defendant liable despite his own admission that he assaulted Mr. Palmer by pushing him to the ground.

Accordingly, the jury verdict must be set aside and this case remanded for a new trial. Palmer's Complaint (CP2) alleged and the testimony at the trial supported verdict for:

FROM THE COMPLAINT (CP2):

On or about May 28, 2010, plaintiff was riding his bicycle eastbound on N.E, 50th St. approaching Roosevelt Way N.E. in Seattle, WA. Defendant, going in the same direction, struck plaintiff. Defendant left the scene. Later, defendant approached plaintiff, got out of his car, and expressing hate language physically assaulted plaintiff unmercifully and repeatedly, causing injury. He sued on these two injuries, but the court cut his time unreasonably, allowed jurors who were clearly troubled by and biased, cut his ER904 documents and especially his extensive medical treatment, would only instruct on negligence instead of instructions for the physical assault, and the courts would not issue subpoena for the defendants fraudulent attempt at getting a second ,lower policy of insurance on an accident he confessed to have caused, perjuring himself in two courts, and all this cries out for reversal and directed verdict for plaintiff.

NEGLIGENCE

Defendant proximately caused damages to the plaintiff by ***negligently, wantonly, recklessly, tortuously and unlawfully*** failing to exercise ***ordinary care in driving***, by striking plaintiff on his bicycle with defendant's automobile, by publicly, hatefully, yelling at and cursing at plaintiff, and then by ***intentionally assaulting plaintiff***, knocking plaintiff to the ground and repeatedly employing his fists and feet to inflict bodily injury on the plaintiff.

Defendant admitted to assaulting Plaintiff but jury found no negligence Judge rejected instruction based on complaint and evidence when Plaintiff asked for instruction on willful, wanton or intentional acts toward Plaintiff and not just negligence

And court rejected this instruction thinking that negligence was broad enough to cover assault. The Judge erred and cut off discussion with Palmer's attorney, who wanted to tie in the second incident physical assault into the Jury instruction as a separate thing for the Jury to consider, along with negligence. This argument was made in the Court – reviewed Plaintiff's third supplemental proposed Jury instructions with and without Citations at page 3 (see Appendix 1 hereto) and The Court denied discussion of it, having already made its decision. VRP 8/15/13 at 169. The Court eliminated Palmer's intended assault liability theory to go to the Jury, at least through the Wanton instruction and wanted to request an assault instruction along with it (there is no civil assault WPI and Plaintiff wanted to argue this, but the judge was done with it and having nothing of it and did not want to do a follow-up instruction what the jury is to do if they find wanton or assault, but they do a consideration of damages just like the instruction the judge already approved for negligence), but the Court shut it down and would give anything but a negligence instruction. Plaintiff already made his proposed rejected instruction and hope for a Wanton and physical assault instruction, but was shut down and so when, in the next breath, the court asked for Jury instruction exceptions, he only had to add his earlier reiteration of the Cox case instruction request.

This Court should set aside verdict of no negligence and minimally order a verdict in favor of Plaintiff on negligence for the physical assault and MININALLY award all of the cost of the stipulated UW Medical for the 5/28/10 treatment above \$ 10,000 (See Clerk's Minutes 8/14/13 at 9:11A) because both defendant's expert and Dr. Sherwood of the UW said that treatment was reasonably and necessary for the injuries incurred for that day (there was a lots of following thereafter, but that is for new trial).

ASSAULT

In Brower v. Ackerley, 88 Wn. App. 87 (1997), the court held:

The elements of civil assault have not been frequently addressed in Washington case. The gist of the cause of action is “the victims’ apprehension of imminent physical violence caused by the perpetrator’s action or threat.”[5] In the 1910 case of Howell v. Winters [6], the Supreme Court relied on a definition provide in Cooley, Torts (3d Ed.): An assault is an attempt, with unlawful force, to inflict bodily injuries upon another, accompanied with the apparent present ability to give effect to the attempt if not prevented. Such would be the raising of the hand in anger, with an apparent purpose to strike, and sufficiently near to enable the purpose to be carried into effect; the pointing of a loaded pistol at one who is in its range; the pointing of pistol not loaded at one who is not aware of that fact and making an apparent attempt to shoot; shaking a whip or the fist in a man’s face in anger; riding or running after him in threatening and hostile manner with a club or other weapon; and the like. The right that is invaded here indicates the nature of the wrong. Every person has a right to complete and perfect immunity from hostile assaults that threaten danger to his person; ‘A right to live in society without being put in fear of personal harm.’ [7]

The court should have allowed Plaintiff an instruction on assault and battery because the evidence supported it and negligence alone is a confusing standard for the jury because an assault is never negligent but intentional.

This court should set aside verdict of no negligence and minimally order a verdict in favor of Plaintiff on negligence for the physical assault and MINIMALLY award all of the cost of the stipulated UW Medical for the 5/28/10 treatment above \$ 10,000 because both defendant’s expert and Dr. Sherwood of the UW said that treatment was reasonably and necessary for the injuries incurred for that day (there was a lots of following thereafter, but that is for new trial).

2.

Respondent in his Response Brief at pages 16 and 17, section IV, paragraph B2 argues that since the trial date was rescheduled at Mr. Palmer’s request, he cannot complain now. THIS IS NOT TRUE. DEFENDANT’S COUNSEL ASKED FOR THE CONTINUANCE TO CLIMB MOUNT RAINIER

Respondent in his Response Brief at pages 17-19, section IV, paragraph B3 argues that a fact specific inquiry that demonstrates a good cause in compelling circumstances for preference over live testimony and that the identity of the witness as well as the reason for the unavailability is unknown. THIS IS RIDICULOUS; THE COURT ALLOWED EYEWITNESS TO THE ASSAULT UW PROFESSOR STETTLER TO TESTIFY BY SKYPE BUT WHEN IT CAME TO HIS TURN SHE CHANGED HER MIND AND THERE WAS NO WAY TO GET HIM IN AGAIN GIVEN THE COURT'S TIME CONSTRAINTS ON ONLY PLAINTIFF.

Trial court erred in denying a star witness to the assault testifying by Skype when all lay witnesses had been allowed if needed.

The Court allowed testimony by Skype for lay witnesses (See VRP 8/7/13 at 28 line 13) and this was done for several witnesses , but when plaintiff's star witness, UW architecture professor Stettler—an eye witness to the actual physical assault by Mr. Lee in such a way that he was moved to stop his car and intervene—came to Skype, the Judge denied him, thinking that she really meant to make her ruling to allow only doctors because the witnesses in the entire case were all from central and north Seattle and the case had been moved to Kent from Seattle, causing enormous problem for the professionals and employed witnesses. This erroneous ruling is contrary to what even defense counsel thought was being allowed for lay witnesses and certainly unfair to plaintiff and at the last minute so he could not get this witness again. See and See VRP 8/7/13 at 60 and 8/8/13 at 64-67 and Clerk's minutes 8/7/13 2:55:25 and 8/8/13 2:49:49. It was error decisions like this that showed the judge's bias against Mr. Palmer and really hurt his case such that the jury did not even find negligence in Mr. Lee's beating of Mr. Palmer. A new trial will rectify these errors.

3. Respondent DID NOT RESPOND TO THIS AND CONCEDES this argument ..

The court erred and was biased against plaintiff and cut Palmer's own testimony time to an hour because he was unable to come to court on his scheduled time because his house and the road were cut off from the world by a huge mudslide and the road inaccessible for miles and eventually he and his dog were airlifted out.

The judge severely limited Mr. Palmer's time of testimony and grilled him repeatedly to prove that he truly was in a natural disaster. See VRP 8/12/13 at 67 through 8/13/13 at 90. Still, after plenty of proof of the extent of this natural disaster and how it stranded so many people and affected daily obligation, the judge thought it was all a lie just to drag out the trial and she cut his time to only one hour of testimony [See Clerk's Minutes 8/14/13 at 9:11 and Clerk's Minutes 8/13/13 showing direct of Mr. Palmer was limited strictly to 9:25A-10:13A (48 minutes) and 10:39A-10:59A (20 minutes) for a total of only 68 minutes] to do the impossible of explaining all the facts, the injuries, all the many doctors and their various treatments and the studies and surgeries they wanted and get into evidence all the damages of so many billings, medical records, property damage all the dental damages, loss of employment due to injury and pain and suffering and major impacts on his life over the previous three years, etc.---an impossible task with the fastest talker attorneys and clients answering bullet-like and certainly his counsel objected strenuously that this was simple unfair and impacted his case because the evidence of severity and damages could not adequately be presented to the jury in one day. There was no reason for this cutting of plaintiff's time and ruining his presentation of a fair balanced and complete trial. This was a significant abuse of the judge's discretion and not a fair trial at all for him.

See VRP:
8/12/13 9:19:51-9:34:14
8/12/13 11:26:50-11:32:35
8/12/13 3:50:20 -3:55:25
8/13/13 9:22:14-9:24:21
8/13/13 10:15:13-10:17:17
8/14/13 9:29:15-9:34:10

4. Respondent in his Response Brief at page 19, section IV, paragraph C argues that the medical bill and records relate to damages and have no bearing on the liability issue.

Respondent in his Response Brief at pages 20 and 21, section IV, paragraph C2 argues that Mr. Palmer's ER 904 submission was not made in accordance with section (b) and that ER 904 does not require the court to admit the documents.

BY DISALLOWING PROPER ER904 documents proposed by plaintiff according to the RULE AND CASELAW, THE JUDGE CUT OFF MY MEDICAL DAMAGES

Damages is an element of negligence. The elements of negligence are duty, breach, causation and damages. *Gaines v. Pierce County*, 834 P.2d 631, 66 Wn.App. 715,720 (Wash.App. Div. 2 1992).

The trial court erred in denying Plaintiff significant medical records AND BILLINGS IN PROPER ER904 documents because Plaintiff's ER904 Notice and Admissibility of Documents Complies with the Rules

Defendant filed and served a set of ER 904 documents 30 days or more before trial. It included all of the medical and billing records collected under court orders or other rules of court in mid-September 2012 and in March of 2013 (upon court order). For some reason, a very small number of the hundreds and hundreds of pages of records and bills was excluded by Defendants in their ER 904, and therefore were included in Plaintiff's ER 904 notice. See attached.

Defendants, in their objection to Plaintiff's ER 904 argue that it should be ineffective to admit the records because the notice must include records the party being served the notice already collected, has, and provided to the party giving notice and that it was untimely because one copy of the notice was mailed on the due date and Defendant's felt that this means that it would be three days short. Furthermore, Defendants made a vague argument that all health records and bills are not admissible under ER 904 without someone coming in and providing foundation testimony and that they might contain hearsay. All of these grounds are unsupported by any cases and not proper grounds.

First, Plaintiff's ER 904 notice was timely. Plaintiff hand delivered and mailed and submitted through the court's e-filing system, an ER 904 notice regarding all of the same documents Defendants had produced and shared with Plaintiff at cost and a listing of approximately one hundred pages of medical bills and records, pictures, property damage evidence, etc. on May 2, 2013. The Declaration of Service is attached. At that time, the trial was set for June 3, 2013. This is substantial compliance with the 30 day in advance rule. In any case, the argument is moot because the trial was moved approximately three more times to eventually July 13, 2013 and the court rule only says it has to be 30 days before trial, and not 30 days before the original trial date. As the court below ruled, the Defendants designating the great majority of all these documents in their own ER 904, have no grounds to object even if they have not received any notice from Plaintiff that the records would be ER 904 records.

Second, the court rules would never require a party to do anything redundant or wasteful or certainly unnecessary. Defendants already had all of the exhibits mentioned in Plaintiff's ER 904 notice, as explained exactly therein where Defendants got the documents mentioned.

In Hendrickson v. King County, 101 Wash.App. 258, 2 P.3d 1006 (2000), the court rejected Defendant's other arguments because Defendants cannot object to documents they themselves put in an ER 904 and produced, lack of foundation is not an objection to an ER 904 document because the whole purpose of ER904 is to admit documents without the necessity of having to show foundation with live testimony or other means, and general objections without specifics such as an allegation that there may be hearsay in the documents is not a proper objection and stricken by the courts. But this is exactly the general vague, non-specific objection defendants gave here with any reason given and the trial; court here ruled that that was good

enough—that so long as defendants said the word objection that that was enough to make them inadmissible under ER904. See trial ER904 rulings starting at VRP 8/6/13 at 109-112. That simply is contrary to the law and requires a new trial because defendant raised this only working day before trial and the judge only ruled on it the first day of trial and left Plaintiff stuck with trying to get custodial records keepers to testify 20 miles from their offices because of the court's own decision to change venue from Seattle to Kent for some seven medical facilities and yet the judge wanted a very limited time schedule to put on witnesses. The big problem is that this caused a huge elimination of medical records and billing that significantly hurt Plaintiff's case to support severity of injury, damages, and future surgeries of major expense. For example defendant gutted the Virginia Mason records and bills received by them with Plaintiff's stipulation and received by both and actually delivered to plaintiff by defendant and actually included in Defendant's ER904—as were all the medical records of some 8 inches and exchanged by both and included in both Plaintiff's and defendant's ER904 notices. But when it came to time at trial WHEN DEFENDANT BROUGHT A SET OF RECCORDS FOR THE JUDGE AND Clerk's Exhibits—not only did defendant not provide plaintiff a copy and the judge would not make them provide one when plaintiff objected(making the trial extremely difficult for Plaintiff because the exhibits were not complete records but chosen bit by bit by defendant) BUT they also were missing many of the parties' ER904 records and when the Plaintiff asked to have the doctors—particularly Virginia Mason doctors—testify about the full medical workup and all the things the other doctors there were trying to treat Mr. Palmer about, the court denied these records to admission because of her improper and erroneous ruling about plaintiff's ER904 records and without this other doctor records the one doctor testifying could not fully testify about what all the doctors were doing. One only needs to look at the Trial exhibits

of one after another medical records and billings excluded—all due to the judge’s erroneous ER904 ruling, and supporting a new trial. This was a substantial disadvantage for Plaintiff and an abuse of discretion. Of course, the judge’s ruling that one only having to say objection vaguely and then ER904 records are kept out is contrary to ER904 law and defeats the whole purpose of ER904 to avoid such testimony when documents come from reputable places and especially by stipulation and collected by the defendant trying now to exclude them. As the Hendrickson court stated:

At trial, the Hendricksons successfully objected to the admission of these exhibits on the ground that the County had not provided notice of its intention to offer them. On appeal, they provide the following four bases to support the trial court's ruling: (1) one party's ER 904 designation does not make the evidence automatically admissible by another party; (2) even assuming that generally ER 904 allows a party to introduce documents designated by another party, this does not apply when the other party has objected to the evidence; here the County objected to every one of the designated exhibits; (3) assuming that the automatic admissibility rule does not apply, the County failed to raise and thus preserve any argument as to why the court should have admitted these hearsay statements; and (4) the evidence was cumulative and, thus, the trial court had discretion to exclude it; if it did so erroneously, the error was harmless.

We disagree with the Hendricksons' first proposition. As the court stated in *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wash.2d 250, 258, 944 P.2d 1005 (1997), **the purpose of ER 904 is to expedite the admission of documentary evidence. Its use can create an “expectation of admission.”** *Miller*, 133 Wash.2d at 260, 944 P.2d 1005. **The County persuasively argues that to require each party to file and serve a separate ER 904 designation regarding the same documents “contravenes the very intent and purpose of the rule” and invites “waste of time and legal expense.”**

We are cognizant of the risk posed by this interpretation of the rule, that litigants might become wary of using ER 904 for fear that the records they designate may, unbeknownst to them, contain damaging material that they would prefer to exclude. Nonetheless, **the language of ER 904 consistently supports the conclusion that the benefits of a designation are available to all parties.** The rule refers specifically to individual parties when discussing filing requirements, e.g., ER 904(b): “Notice. Any party . must serve.” But when referring to the consequences of a party so serving, the rule uses the passive phrase “shall be deemed authentic and admissible.”

ER 904 is equally clear that the automatic admissibility provision applies when the opposing party does not properly object to the evidence. Just as ER 904 requires the proponent of evidence to examine it carefully before offering it, the rule requires the opponent to make specific objections to a finding of admissibility. **To allow general, blanket objections to all designated documents would defeat the purpose of the rule, which is to expedite the admission of evidence.**

The County based its blanket objection to the designated documents on the grounds of relevance and foundation. As ER 904 reserves relevance objections for trial, this objection had no significance at this point. And as ER 904 requires any other objections to be specifically set forth, the foundation objection also did not comply with ER 904. ER 904 (c)(2). “An objection claiming a lack of foundation is a general objection.” City of Seattle v. Carnell, 79 Wash.App. 400, 403, 902 P.2d 186 (1995). Thus, under the rule, the Hendricksons could not rely upon the County's general objections to prevent admission of the documents.

We consider the Hendricksons' trial objection to the admission of these documents. **The Hendricksons based their objection on the ground that the County failed to give them notice of its intent to offer these documents. But their own designation of the documents created an “expectation of admission” under the rule; they were already on notice that the documents might be offered.** Thus, we conclude that the trial court erred in refusing to admit the medical records.

5.

Respondent in his Response Brief at pages 24 and 25, section IV, paragraph E2 argues that the conviction was a crime of dishonesty and is per se admissible under ER 609(a)(2).

NOT HERE BECAUSE FAR TOO PREJUDICIAL, IRRELEVANT, AND RUINED PLAINTIFF IN THE EYES OF THEN JURY MAKING HIM A VICTIM OF DEFENDANT A SECOND TIME.

The Court erred in allowing irrelevant long past Plaintiff CRIMINAL CONVICTIONS FAILS UNDER ER 609

Defendants have listed in their trial exhibits multiple criminal trial documents involving Plaintiff. Most of these were not included in Defendant's ER904 and they hoped to convince the court to allow into evidence to the jury these criminal adjudications which are concerningly very old and totally irrelevant to the Auto-bike accident and assault against Plaintiff here. See VRP

8/6/13 starting at 116. The following request of exhibits does not meet the requirements of ER 609:

1. Defendant's trial exhibit 64, State v. Palmer, Snohomish County Superior Court 07-1-00525-5-a claim by WA L&I for a false claiming of benefits.
2. Defendant's trial exhibit 66 State v. Palmer, King County Superior Court 79501 dated 6/1/1978 burglary second degree.
3. Defendant's trial exhibit 67, State v. Palmer, Snohomish County Superior Court 93-1-00354-5-9 -- dated 9/26/1994 burglary first degree.
4. Defendant's trial exhibit 68, State v. Palmer, Snohomish County Superior Court 00-1-00253-4--this allegedly is a City of Marysville vs. Palmer case about something unknown and it was appealed to Superior Court and exhibit 68 is the one page document dismissing the appeal. It is unknown what this case is about.
5. Defendant's trial exhibit 69 State v. Palmer, King County Superior Court 03-1-08976 dated 4/2/2004 escape in the second degree.
6. Defendant's trial exhibit 70 State v. Palmer, Edmonds Municipal Court CR 17346 dated 11/16/2005 theft third degree.
7. Defendant's trial exhibit 71, State v. Palmer, Snohomish County Superior Court 07-1-00525-5-a claim by WA L&I for a false claiming of benefits. This is not an additional case, but is the judgment for the file in exhibit 64 above (item number 1)

None of these 6 judgments are admissible under ER 609 and the court must strike them from the exhibits and prohibit any mention of them during the trial. ER 609(b) prohibits such judgments to attack Plaintiff's character for truthfulness by evidence of criminal conviction if more than 10 years have passed and if so the evidence of conviction is only admissible if "its probative value, *supported by specific facts and circumstances*, substantially outweighs its prejudicial effect."

Courts look to the underlying facts of the criminal charge pled to in determining whether theft or dishonesty is involved regardless of the name of the charge pled to. In discussing restitution in criminal cases, a court has stated: "In determining whether a causal connection exists, we look to the underlying facts of the charged offense, not the name of the crime to which the defendant entered a plea." *State v. Landrum*, 66 Wn.App.791, 799, 832 P.2d 1359 (1992).

Here, Defendants provide the court absolutely no "specific facts and circumstances" of these convictions other than the final judgment document (exhibit 68 does not even provide the judgment or what type of case it was). Defendants never address how any of these documents have any probative value that outweigh their obvious prejudicial effect to shine the worst light possible on Plaintiff regarding old mistakes in his life having nothing whatsoever to do with his bike ride on 5/28/10.

6.

Respondent in his Response Brief at pages 22 and 23, section IV, paragraph D2 argues that post trial discovery is not warranted and that discovery for a new theory of recovery is not sufficient reason to grant a new trial.

OFCOURSE HE WOULD SAY THIS ABOUT THE FRAUD ON THE COURT FROM DEFENDANT.

Trial Court erred in not granting a Subpoena for State Farm records proving Defendant perjury and liability for all incidents.

From: Gene Palmer

Re: Request for criminal Charges and warrant for State Farm Insurance records

Gene Palmer alleges against Andy Lee, his family members involved with the purchase of his car, State Farm Insurance Company, All State Insurance, attorney David Wieck (Andy Lee's Civil Law Suit Attorney), and King County Superior Court Judge Andrea Darvas as follows:

Andy Lee had a front right-side mirror on his Mercedes Benz that was in a broken state before the coalition of his car mirror hitting Gene Palmer on a bike on May /28/10 (SPD incident number 10-177126 – See Ex. J), causing injury and other damages to Gene Palmer.

Lee admitted he had sold the vehicle on 5/27/10 and was supposed to deliver it to the buyer on 5/29/10, but in court under oath he said that he sold the car 10 days after, which was a lie. Lee ran over Gene Palmer on 5/28/10, and confessed that he did so to bring a claim of insurance over the accident, On 5/28/10 Lee, already having insurance on the vehicle through Allstate, purchased a new policy with State Farm Insurance Company to bring the claim with them under a policy with lower limits of coverage, thereby limiting recovery for anyone seeking anything under the policy (See Appendix 2 hereto- State Farm Policy and Ex. B - Allstate Policy

---all this was argues with a declaration gene Palmer filed with a motion for this court or trial court to issue a SUBPEOENA FOR State Farm Records denied by this court last week). He admitted to these things when State Farm investigated the circumstances of the policy purchase. Andy Lee had family members put the vehicle in their names after the accident in an attempted to hide it from discovery from police investigators, and Gene Palmer. This was done in conspiracy with his family members who rendered criminal assistance to hide his crimes. Andy Lee committed perjury when testifying at his trial for criminal hit and run, assault, and harassment--threat to cause injury (Seattle Municipal Court Case number 565057) and Andy Lee's appeal thereof (King County Superior Court Case Number 12-1-05388-6SEA) which will be re-opened due to the State Farm information and in the civil law suit about the accident Palmer v. Lee (King County Superior Court case Number 11-2-42278-0SEA) which will be re-tried due to the State Farm information by stating that Gene Palmer hit his vehicle and broke the mirror and by stating that he owned the vehicle in the day of the accident. He hid his crimes and injury to Palmer. His attorney, David Wieck was hired and paid for by Allstate Insurance and acted for Lee. David Weick found out about the fraud and intentional crimes of Andy Lee and the admissions to State Farm and with fund from Allstate, paid \$ 2,500 to state Farm to keep quiet about the acts of Lee so that they would not become known in the criminal and civil cases. State Farm and its employees, including Ryan Hunt, conspired with Lee and Wieck and Allstate to perpetrate this fraud in the courts and Palmer and knew of the perjury, obstruction of justice and rendering criminal assistance.

Gene Palmer requested a copy of all records from State Farm Insurance regarding all dealings with Andy Lee and State Farm tried to extort \$ 2,500 from Gene Palmer before they would provide the information. Gene Palmer did not have these funds even if he wanted to pay them because of his injuries caused by Lee. State Farm has done everything possible not to provide this information to Palmer despite a Federal court subpoena to provide the information (Palmer v. Lee and State Farm, US District Court Western Division, Civil Cause Number C14-1139RAJ) (Subpoena Ex. E and D). When you open a case and issue a warrant to State Farm, before they destroy the records, there will be proof of the illegal activities of the parties.

Turns out, Andy Lee is allegedly a drug lord and is involved in all sorts of criminal activity and even allegedly supplying drugs to two individuals who attacked Gene Palmer and caused property damage, injury to his pet, and threatened the landlord's life with a baseball bat or some lead pipe, all of these believed to be orchestrated by Andy Lee and his goon squad (Ex. E). These individuals have made his life a living hell and he has been living in fear of his personal safety since all this began, because Andy Lee has made threats against his life several times since the day of the accident including when he was at his mother's funeral in Arizona and he has sent his goons after him, his wife and his family. This assault and threatening behavior must stop. It took a long time to put all of this together because it was so well hidden by Andy Lee and his accomplices rendering criminal assistance.

The 911 records of 5/28/10 show that Gene Palmer was on the phone with 911 explaining the need for police after Lee hit him with his car and then came back, got out of his car and beat him. While talking to 911, Lee can be heard by 911 recording saying “Call the police on me “white boy, I know people, I will have you killed”. This, of course, makes it a malicious harassment hate crime, which should be charged.

In addition, to the above acts of David Wieck, he also continue Lee’s hate crime acts and acted in conspiracy with him by poisoning the jury through the civil trial in Palmer v. Lee by continually discriminatorily making slanderous and defaming attacks on him, such as introducing inappropriately using prior criminal history and mental health issues totally unrelated to the collision and assault 5/28/10, stating that he was supposedly a mis-identified Sex offender (wrong: the State of Washington apologized and the Federal Court Jury awarded him compensation for this “sex offender” error – Ex. F)—poisoning the Jury against him and Judge Darvas discriminatorily allowed this to happen contrary to law and reason. Palmer complaints against Wieck (Ex. G) and Judge Darvas (Ex. H) are attached.

The Palmer v. Lee civil trial is on appeal (Court of Appeals Number 708686-I) and the court of appeal has granted an extension of time for filing the opening appeals brief until 2/13/15 because Palmer need it additional time to get the State Farm Lee Records and to get the 911 5/28/10 recordings (destroyed and not preserved in the case is what is being told) (See Ex. I). So, I need action by SPD immediately in these matters..

7. Respondent in his Response Brief at page 25, section IV, paragraph F argues that there was no discrimination of Mr. Palmer’s disability because it was raised by the jury, Mr. Palmer’s attorney and never objected to.

RIDICULOUS—PLAINTIFF’S counsel objected day and night—see the record provided.

Trial Court erred in allowing discrimination in the courts against the disabled plaintiff in violation of State Law, the Constitutions of US and Washington and the ADA Act

Plaintiff was denied Access to Justice by the trial judge allowing defense counsel to taint the jury pool during voir dire by repeatedly barraging the venire with rhetoric related to the plaintiff’s Bi-Polar Disorder and then continuing to interject such irrelevant slander throughout the trial.

It was wrong and illegal for the opposing defense counsel and judge to allow 2 days of voir dire in Plaintiff’s auto accident trial slamming he and bipolar people in general and asking

all the jurors about it in their family and all the symptoms and bad acts that can come from it, etc. over strenuous objections and then throughout trial as well. At least 4 of the 34 juror pool said they wanted excused because they could not be impartial and had not even heard a word of the trial yet and already wanted to find for the defendant. He was denied due process and access to the courts in a fair trial. The transcript reads like something from 100 years ago. See VRP 8/ 6 /13 at 41-115 and then incredibly the voir dire goes into a second day of this unconstitutional poisoning of the jury pool with so many of them saying they cannot possibly rule for Mr. Palmer before the trial even began and the court grappling with these issues and hearing arguments from both sides, while somehow trying to keep a jury out of this poisoned group when she should have just started with a new pool and set guidelines about where defendant could go to ruin Plaintiff's view by the jury in discrimination . VRP 8/7/13 at 2-48. This cries out for a new trial.

They never said at trial that this second incident of assault and battery was caused by his bipolar manifestations, but throughout trial just kept bringing it up without ever tying it to anything more than they are to come to their own conclusion about how bipolar people are and you cannot trust them/believe them—without ever saying those specific words---more like we all know he is bipolar and you know what that is like (literally hours spent on the topic in voir dire first 2 days—asking if they know bipolar people and what they are like and the jurors all saying bad things about mood swings, yelling, vulgarities, making up things, etc.).

All of the actual events had nothing to do with him being bipolar. The witnesses all said there was a yelling argument but that my client did nothing physical and only used his hands defensively to try to stop the beating. The Supreme Court has said that "programs, services, and activities" covers everything that state and local governments do. *Penn. Dep't of Corrs. v.*

Yeskey, 524 U.S. 206, 210 (1998) (Title II applies to the activities of “any department, agency, special purpose district, or other instrumentality of a State or States or local government.”)

(citing 42 U.S.C. § 12131(1)(B)) (“As we have said before, the fact that a statute can be ‘applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.’”) (citations omitted).

§ 35.130 General prohibitions against discrimination

- (a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.
- (b)
 - (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—
 - (i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;
 - (ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;
 - (iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;
 - (iv) Provide different or separate aids, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others;
 - (v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;
 - (vi) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;
 - (vii) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.
 - (2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

- (3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration—
 - (i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;
 - (ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities; or
 - (iii) That perpetuates the discrimination of another public entity if both public entities are subject to common administrative control or are agencies of the same State.
- (4) A public entity may not, in determining the site or location of a facility, make selections—
 - (i) That have the effect of excluding individuals with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination; or
 - (ii) That have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the service, program, or activity with respect to individuals with disabilities.
- (5) A public entity, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.
- (6) A public entity may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may a public entity establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. The programs or activities of entities that are licensed or certified by a public entity are not, themselves, covered by this part.
- (7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.
- (8) A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered.
- (c) Nothing in this part prohibits a public entity from providing benefits, services, or advantages to individuals with disabilities, or to a particular class of individuals with disabilities beyond those required by this part.
- (d) A public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.
- (e)

- (1) Nothing in this part shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit provided under the ADA or this part which such individual chooses not to accept.
- (2) Nothing in the Act or this part authorizes the representative or guardian of an individual with a disability to decline food, water, medical treatment, or medical services for that individual.
- (f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.
- (g) A public entity shall not exclude or otherwise deny equal services, programs, or activities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.
- (h) A public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities. However, the public entity must ensure that its safety requirements are based on actual risks, not on mere speculation, stereotypes, or generalizations about individuals with disabilities.

The plaintiff objected, the Judge overruled, the judge allowed this discrimination in public courts, justice, etc. on account of Plaintiff being bipolar.

A person's character is on trial for credibility, etc. according to the judge so it comes in. BUT it should not if it is not relevant because being judged based on one's disability irrelevant to the true underlying facts and events under consideration is against the State and ADA law and an unconstitutional violation of due process, fair trials, etc.

Request for Attorney Fees and Costs

Appellant requests all reasonable attorneys fees and costs under all statutes, court rules, and case law applicable to this appeal or available through the court's equitable powers. If the court does not award any of these, appellant requests that the attorneys fees and costs on appeal be reserved for determination of reasonableness by the trial court after any remand.

VI. CONCLUSION

Therefore, Appellant requests that the court remand this case for new trial and other relief just and equitable.

Dated this 23 day of May, 2015.

Respectfully submitted,

Gene A Palmer

Gene Palmer, Pro Se

THE COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

) No. 70868-6-I

GENE ALFRED PALMER II,

) Appellant,)

APPELLANT'S CERTIFICATE
OF SERVICE

v.)

ANDY LEE AND JANE DOE LEE,
HUSBAND AND WIFE, AND THEIR
MARITAL COMMUNITY,

) Respondent.)

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 MAY 26 PM 9:38

CERTIFICATE OF SERVICE

I certify that on the 23 day of May, 2015, I caused a true and correct copy of the Reply Brief of Appellant to be served on the following in the manner indicated below:

- Clerk of the Court (X) U.S. Mail
- Court of Appeals () Hand Delivery
- () E-filing by e-mail

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DATED this 5-23-15 at Everett, Washington.

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Appellant