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STATE OF WASHINGTON

No. 41008-7-II

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

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FALINA HICKOK-KNIGHT, a single person,

Appellant,

v.

WAL-MART STORES, INC.,  
a foreign Corporation,

Respondent.

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BRIEF OF APPELLANT

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## *INTRODUCTION*

Falina Hickok-Knight, Plaintiff/Appellant, filed suit against Wal-Mart, Defendant/Respondent, for an incident that occurred on June 24, 2006. CP 1-2. On that day, Falina was exiting the Wal-Mart store and returning a shopping cart to an area set up by Wal-Mart to accommodate an ongoing remodel at the store. There were approximately 30 shopping carts lined up in this designated area and a Wal-Mart employee was operating a forklift nearby. As Falina was returning her shopping cart, the Wal-Mart employee struck the line of shopping carts with the forklift and pushed the lead cart into Falina's left foot. She was wearing sandals at the time and suffered extreme pain from the incident. She then sought treatment for her injured foot.

Falina was treated by her podiatrist Dr. Gavin Smith. Ex. 1 & 2. Immediately after the accident Dr. Smith performed a CT scan and it revealed that there was no acute fracture or dislocation in her foot. Ex. 2. However, Falina's foot pain did not go away. Dr. Smith then ordered an MRI which also came up unremarkable. Id. Still, Falina had persistent complaints of pain in her foot. It was not until some time after the accident that Dr. Smith ordered a bone scan which revealed decreased blood flow in Falina's left foot suggestive of reflex sympathetic dystrophy

(RSD), or the modern equivalent, complex regional pain syndrome (CRPS). Id.

Falina's condition was eventually evaluated by Dr. Long Vu who diagnosed Falina with CRPS. At trial, Dr. Vu testified that there are clear physical symptoms that must accompany a diagnosis of CRPS, including: skin changes in the affected area, nail growth changes, hair growth changes, muscle bulk and bone density abnormalities, and a change in the blood supply to the affected area which causes temperature changes. RP. 418. In addition, Dr. Vu stated that patients with CRPS also suffer from allodynia, a sensation of pain from a stimulus that is typically not painful. RP 419.

After Dr. Vu examined Falina he indicated that she had multiple complaints consistent with CRPS. RP 426. He indicated that her pain persisted well beyond the normal healing time of the contusion, that there was discoloration on her foot, and that she was experiencing allodynia during the examination. RP 426. In addition, he noted that her left foot was significantly colder than her right foot when he touched it, that she had mottled appearance on the skin, and that there were nail growth changes that started to occur. RP 426-27, RP 681. Further, Dr. Vu stated that Falina's abnormal bone scan also supported a diagnosis of CRPS. RP

428. He definitively stated that Falina's complaints of pain were not the result of psychological problems. RP 471.

Despite various treatments she received under the care of Dr. Vu, Falina continued to experience severe pain in her left foot up until the time of trial.

#### ***ASSIGNMENTS OF ERROR***

1. The trial court erred by ordering the jurors to perform a diagnostic test/experiment on Plaintiff in open court.

2. The trial court erred by admitting into evidence Plaintiff's prior and unrelated injuries and medical conditions.

3. The trial court erred by allowing Defense expert Dr. John Hamm to testify regarding Plaintiff's prior and unrelated medical history.

4. The trial court erred by showing a general bias against Plaintiff's CRPS claim.

5. The trial court erred by refusing to give Plaintiff's proposed damage instructions pertaining to aggravation, lighting up of a preexisting condition, susceptibility to injury, and impaired earning capacity.

6. The trial court erred by denying Plaintiff's motion for a new trial.

### ***ISSUES PERTAINING TO ASSIGNMENTS OF ERROR***

1. Did the trial court comment on the evidence and commit reversible error by ordering all the jurors to touch Plaintiff's foot for diagnostic purposes while she was seated on the witness stand and her left foot was in a painful condition?

2. Did the trial court commit reversible error by not excluding evidence, under ER 403, of Plaintiff's prior unrelated medical and social history, including history dating back to when Plaintiff was eight years old?

3. Did the trial court commit reversible error by allowing Dr. Hamm to testify when there were physical and organic findings that supported Plaintiff's CRPS diagnosis and Dr. Hamm's diagnosis was based on the premise that there were no physical or organic findings to support Plaintiff's CRPS claim?

4. Did the trial court violate the appearance of fairness doctrine by showing a bias against Plaintiff's CRPS claim and commenting on the evidence?

5. Did the trial court commit reversible error by refusing to give Plaintiff's proposed damage instructions, including instructions pertaining to aggravation or lighting up of a preexisting condition, the instruction pertaining to susceptibility to injury, and the impaired earning

capacity instruction, which were all supported by the record and Plaintiff's theory of recovery?

6. Did the trial court commit reversible error by denying Plaintiff's motion for a new trial pursuant to CR 59(a)(1), CR 59(a)(8), and CR 59(a)(9)?

7. In the event the appellate court upholds the jury verdict, did the trial court err in calculating costs awarded to the defendant?

#### ***STATEMENT OF THE CASE***

***A. The Court Ordered Jurors To Touch Plaintiff's Foot Despite Evidence That It Would Cause Her Extreme Pain And Suffering.***

On April 14<sup>th</sup> 2010 Marcia Hickok-Ritchie, Falina's sister, took the witness stand as the first witness called in the case. RP 129. Ms. Hickok-Ritchie testified in front of the jurors that even when she barely touched Falina's leg it would "set her off," and that "she would freak out and start crying." RP135 (16-17). When Ms. Hickok-Ritchie's testimony was finished, Plaintiff called Falina Hickok-Knight to the stand. RP 161. Falina's testimony carried over into the next day and it was clear that the condition of her foot was in an obvious agitated state. RP 211-214. Falina indicated that she was experiencing pain and felt "horrible." RP 211.

During Falina's testimony she stated that after receiving an ablation treatment from Dr. Vu, her treating physician, the symptom of coldness in her left foot was improved. RP 233. She stated that she still experienced coldness in her left foot, but that it was "off and on." RP 233. (19-21). In a written request to the court, juror number 7 asked: "can I touch those feet if I want?" RP 251 (24-25). The trial court contemplated granting juror number 7's request because there was testimony that Plaintiff's medical condition caused temperature differences in her feet. RP 252 (23-25).

Plaintiff then reminded the court that the temperature changes occurred "from time to time" and that Falina experienced pain when people touched her foot. RP 253. Plaintiff also expressed concern about a single juror diagnosing Falina's condition. *Id.* The trial court then responded that "[the jurors] may all wish to touch it." *Id.* Plaintiff objected once again, stating that it would be inappropriate for the jurors to all be touching Falina's foot. *Id.* Nevertheless, the trial court continued to argue that because there was testimony regarding the temperature differences in Falina's feet, it was an issue in the case; Plaintiff again explained to the court that the temperature difference was not always present, and that after she had the nerve ablation, it did correct the temperature difference in the feet so that the temperature differences in the

feet only appeared some of the time. RP 253-254. In addition, Plaintiff stated that the foot was ultra sensitive and he did not want 12 people touching Falina's foot because it would cause her pain. RP 254. Plaintiff even stated that it would be "like poking someone in a wound." RP 254. (12-13). The court replied, "I understand, Counsel." RP 254 (14).

Defendant then interjected and stated that if "the plaintiff feels that it's okay," he would like to proceed with allowing the jurors to touch her feet. RP 254. (19-20). Defendant told the court he would "like to voir dire the witness, if this would have any -- if she would have any problems [with 12 people touching her feet]." RP 255 (1-3). Then, without any further argument, the court simply stated, "[w]ell, Counsel, I've heard enough. I'm going to allow whatever jurors wish to compare the relative temperatures of the two feet to go ahead and do so." RP 255 (10-13). Plaintiff then directed the court's attention to Falina, who was shaking her head. RP 255. (14-15).

Plaintiff asked the court whether Falina could be questioned why she would not want to have 12 people touching her feet. RP 256. Unbelievably, the court simply stated, "I can understand. She says it's very, very, very painful." RP 256 (8-9). Then, the court changed the basis for letting the jurors touch Falina's foot, stating that because there was medical testimony indicating that Falina did not feel pain when she was

distracted, the court was going to allow members of the jury to touch her foot. RP 256. The court then took a recess. Id.

Upon return, Plaintiff objected to the court's ruling again, explaining to the court that one of the symptoms of RSD or CRPS is allodynia, a supersensitivity to the skin, which causes pain when touched, especially when the condition is in an aggravated state. RP 256-257. The court again stated that it understood. RP 257. Plaintiff again objected to the court's ruling after a brief discussion regarding how the jurors' would touch Falina's foot, after Falina expressed concern [about the pain such touching would cause her]. RP 258. Again, the court stated that it understood. Id. In addition, the court stated that Falina had "been a little contradictory" about when there were and when there weren't temperature changes in her foot. RP 259 (1-7). (Dr. Vu later explained that the sympathectomy procedure he performed on Falina had significantly improved the blood flow to her foot, therefore improving the temperature difference in her foot). RP 447-48.

Plaintiff then asked how the court would handle Falina's pain, and whether Plaintiff could stop the jury in the event of any pain, or whether the jurors would just keep going. RP 259 (18-20). The court responded: "I don't think that the jury is going to be doing anything; and, you know, if there's pain, you know, we'll deal with it." RP 259 (23-25). Plaintiff then

simply stated: "I've objected enough that I'm not going to say any more about it. I'm just concerned for my client." RP 260 (17-19). When the jury was allowed back into the courtroom, the court told the jury that they would all touch Falina's feet. RP 264.

One by one the jurors were instructed to approach Falina and touch her foot. RP 265. During the course of this process she became visibly upset, forcing Plaintiff to request a court recess. *Id.* The scene had an enormous impact on the jury. CP 536-537. Many wondered why Falina was so adversely affected by the touching. CP 537. When all of the jurors had finished, Plaintiff asked Falina if, because of her condition, she could experience pain through such a light touch, and she stated "[y]es." RP 267. When asked whether she experienced this pain while the jurors touched her foot she stated, "[y]es, I did." In fact, when asked what it felt like when some of the jurors touched her foot, she responded, "[i]t was like a knife being drove through my foot." RP 268 (24). Falina further explained that when her foot was in an agitated condition, as it was then, it hurt more when someone touched her foot. RP 269.

***B. The Court Admitted Evidence Of Plaintiff's Prior Medical And Social History Unrelated To The Incident And Resulting Injury.***

On April 12, 2010, the trial court heard arguments on Plaintiff's

motion in limine to exclude evidence of Falina's prior injuries and unrelated injuries and/or medical conditions. CP 35-47. After hearing both arguments, the court granted Plaintiff's motion to exclude "[a]ny reference to prior physical or emotional health," further stating that the "case law is very clear" as to what evidence is admissible in an injury case. RP 12 (5-16). In addition, the court stated that "[t]here is diagnostic criteria that she matches, or she doesn't. If she doesn't, why she doesn't, whether she's malingering, faking it, or has some underlying psychological problem is really irrelevant." RP 12 (10-16).

Defendant then argued vehemently against the court's ruling, even claiming that Falina's prior injuries and social history went to the crux of Wal-Mart's defense. RP 15. In response, the court stated once again that "evidence of prior injuries, unrelated injuries, medical conditions, or claims will be excluded." RP 18 (11-12). The court further explained that "[u]nless there was something that was symptomatic at the time of the injury, was a latent preexisting condition which was made active by the injury, they are to be excluded." Id. (12-15). After further protest by Defendant on the issue, the court finally concluded that it would stand by the ruling because "it would be more prejudicial to let [the evidence] in." RP 22 (10-11).

The next day, April 13, 2010, the court addressed Plaintiff's motions in limine to exclude Defense expert Dr. John Hamm. CP 313-326, CP25-34,

CP 235-245, RP 92. Plaintiff sought to exclude Dr. Hamm's testimony because his medical opinion was based on the premise that Falina did not have any "objective, physical, or organic findings" of CRPS. CP 178-203. Plaintiff then read a portion of Dr. Hamm's declaration to the court: "[w]hen subjective complaints of pain and a diagnosis of complex regional pain syndrome are not casually supported by objective, physical, or organic findings, it is more probable than not that the complaints of pain are caused by psychosocial factors." RP 98 (12-16) CP 178-203.

Plaintiff explained to the court that "we don't win this case if we don't prove that she has RSD or CRPS." Id. (20-21). In fact, Plaintiff's language mirrored the language used by the court the previous day that "the case law is very clear that these kinds of cases are going to hinge on whether or not the alleged injury exists; and in this case, either she has regional pain syndrome or she doesn't." RP 12 (7-10). Further, Plaintiff argued that Dr. Hamm's testimony was not only based on a false premise, but also on an MMPI test which included all of Plaintiff's prior medical history and prior injuries, evidence that the court had already ruled inadmissible. RP 115.

Nevertheless, the court ruled that Dr. Hamm would be allowed to testify, but that his direct examination would be limited to where other doctors in the case supported his conclusions. RP 117-18. Then, inexplicably, the court ruled that Dr. Hamm could testify as to Plaintiff's

medical records “going back from whenever”—“if those records are saying there’s a psychological component [to them].” RP 122 (12-17). In Dr. Hamm’s declaration he detailed the various factors he had taken into account to diagnose Falina’s pain disorder, including, but not limited to:

- She suffered from a seizure disorder when she was a child (approximately ages 5-8).
- She repeated the first grade.
- She may have been dyslexic and was a “slow learner” in school.
- She faked seizures when she was a child.
- She was raped at the age of 13.
- She was teased and taunted by other girls in junior high. She got into a lot of fights and she was suspended from school at least five times.
- She was married in 1997 and divorced in 2002.
- She sought counseling once in 2002 when her husband was in Kuwait seeking a divorce and she was pregnant.
- She had a C-section on December 19, 2002.
- She had two years of dependency on DSHS.
- She hurt her shoulder in April 2004 while working at Wal-Mart and was off work for a couple months due to the injury. She filed a claim with the Department of Labor and Industries, although she did recover from the injury.
- She had a rhinoplasty in October 2003.
- She had a miscarriage in May 2005.

- She had a motor vehicle accident with mild-closed head-injury on March 15, 2005, from which she recovered.
- She had an ovarian cyst removed in February 2006.
- She was \$6,000.00 in debt for a school loan after graduating from her dental hygienist course in December 2005 and stopped making payments on this loan in March 2008.
- She has a history of menstrual irregularities and ovarian cysts.
- She has a history of headaches and chronic sinusitis.

CP 178-203.

Dr. Hamm did not conclude that these events were necessarily evidence of a pain disorder, but that they were “in essence always influencing her psychological character because they have all defined and formed, to some extent, her current psychological character.” CP 181-82. In other words, Dr. Hamm stated that there was a “psychological component” to all of the events in Falina’s life. In fact, Dr. Hamm did not even see Falina until three years after the incident in question and could not establish whether or not her alleged pain condition, and her past medical and psychological conditions, were symptomatic at the time of the Wal-Mart incident. CP 181. Plaintiff objected once again to the court’s ruling regarding Dr. Hamm’s testimony because his testimony was based on evidence that the court already ruled inadmissible. RP 126.

On April 20<sup>th</sup>, 2010, over a week after the trial started, Defendant asked the court to admit Ex. 58, “pretreatment evidence of the plaintiff.” RP 505. This included Falina’s medical reports from the time she was 8 years old. Plaintiff argued once again that this evidence had already been ruled inadmissible and prejudicial by the court, and that it would be a “travesty” to admit the evidence. RP 523-524. The court, nonetheless, admitted the evidence on the basis that Dr. Loeser reviewed the medical records (although there was no evidence that he relied on them in forming his diagnosis). RP 528. After this point, the court allowed Falina’s prior injuries and medical conditions to be brought up constantly throughout the trial. This constant display of Falina’s prior injuries and medical treatment, particularly her emergency room visits, led some of the jurors to question whether she was overreacting to her condition. CP 541-42.

***C. Dr. Hamm’s Testimony Was Inadmissible And Highly Prejudicial.***

Dr. Hamm readily admitted that his diagnosis of Falina was based on review of medical records “not only just in relation to this injury, but based upon a lifetime of data.” RP 887 (1-2). Dr. Hamm further explained that his diagnosis was based on a “holistic format” that included the “psychological, physical, [and] social aspect of an individual.” RP 887 (19-20). In other

words, he was factoring in all aspects of Falina's life, even medical and social issues she experienced as a small child.

During the trial, Dr. Hamm testified that Falina had a "long-standing history of physical problems," going back to when she was a child. RP 896 (17-21). He stated that there had been various incidents throughout her life in which she visited the Good Samaritan Hospital, including incidents of "passing out," "back problems," and an incident where she went to the emergency room "because of a fall," when there wasn't "that much wrong with her." RP 896. (22-25). He mentioned that this occurred when she was "just a little girl," only ten years old. RP 897 (1). In addition, Dr. Hamm stated that she had a history of febrile seizures as a child and that she "responded in an excessive way [to those seizures]." RP 897. (2-6).

Dr. Hamm continued his testimony, indicating that Falina was having problems at school as a child; that she had problems learning; that she was dyslexic; that she had to repeat a grade; that kids were mean to her at school; and that she was noted to have faked a seizure at school when she was 12 years old. RP 897 (14-24). Next, Dr. Hamm explained to the jury that Plaintiff was raped at the age of 13; that she had menstrual irregularities; that she experienced abdominal discomfort; that she was diagnosed as having a possible ovarian cyst; that she had headache symptoms she'd

complained of as late as 2005; and also that she went to the ER out of concerns that she had meningitis. RP 900 (6-18).

Dr. Hamm continued his testimony that not only did Falina have a difficult time in school, she also had “unhappy relationships with men.” RP 904 (7-8). He noted that she had a marriage that didn’t work out in 2002-2003; that she was left with two children (husband left at the time when she was pregnant with the second child); that she had to have a C-section; that she had to rely on public assistance; that she was dependent on her parents; and that she recently had moved to live in with her boyfriend. RP 904 (9-19). Dr. Hamm explained that it was necessary to consider all of these factors because “it is important to understand the whole person in order to really treat somebody where the diagnosis isn’t clear...” RP 905 (1-5).

After providing a summary of Plaintiff’s entire medical and social history, Dr. Hamm testified that the shopping cart incident did not cause or even aggravate Plaintiff’s alleged pain disorder. RP 929. He based this medical opinion on her “similar physical problems in the past” which were “emotionally based.” RP 930 (14-15). In fact, when defense counsel asked Dr. Hamm “whether or not there was anything physically wrong” with Falina (Plaintiff objected to the question and the court overruled), Dr. Hamm simply stated that “she has a psychological borne problem.” RP 931 (4-5, 13). Finally, Defendant asked Dr. Hamm whether or not the treatments

Falina received were in any way related to her alleged injury from the shopping cart incident (again Plaintiff objected to the question and the court overruled). RP 933. Dr. Hamm responded, “she has a psychological disorder; and so the treatment wasn’t appropriate for that.” Id.

***D. The Trial Court’s Bias Against Plaintiff’s CRPS Claim, And Other Rulings Related Thereto, Denied Plaintiff A Fair Trial.***

***1. The Trial Court Labeled Plaintiff’s CRPS Diagnosis “Murky.”***

Plaintiff’s expert neurologist, Dr. John Loeser, who served as director at the University of Washington Pain Clinic for nearly 20 years, testified that CRPS is not a psychiatric or psychological condition. RP 560. In fact, he stated that there had been “repeated reviews” by “very prominent psychiatrists and psychologists” who stated “over and over again” that CRPS is not a psychiatric diagnosis, but a medical diagnosis. RP 561 (2-5). He also stated that Falina had an “absolutely classic, typical case of CRPS in all respects.” RP 542 (22-23).

Dr. Long Vu, Falina’s treating physician, testified that there are clear physical symptoms that must accompany a diagnosis of CRPS. RP 418. In fact, he testified that Falina had a number of these physical symptoms, including, but not limited to: discoloration of her foot; significant temperature differences in her foot; and an abnormal bone

scan. RP 426-428. These were objective, physical findings Dr. Vu relied on when he diagnosed Falina with CRPS. He definitively stated that Falina's complaints of pain were not the result of psychological problems. RP 471.

Despite the above testimony, the court clearly expressed her bias towards Falina's CRPS diagnosis:

This is a case where even some of the plaintiff's medical doctors have testified that it is a murky and uncertain area when you're suffering from the chronic regional pain syndrome where there are no organic or objective findings, so I think it is an appropriate one regarding the medical testimony because I think even Plaintiff's witnesses testified that it is not a definitive area of treatment at this point and that – Dr. Vu, himself used the word 'murky'; so, I mean, that could be, may have, could have, or possibly did; and I think that there is, you know, evidence here where a jury could find that it's simply speculation whether or not this kind of CRPS even exists." RP 1561 (11-22).

– I mean, even one of [Falina's] own doctors, the one that did the nerve conduction, basically said that this was a very murky diagnosis. They all testified there were no organic findings that can support this which, I think, does lead into a supposition that it is in her head; so I'm going to deny the motion for a new trial. RP 1633-34 (23-04).

Dr. Vu never stated that his diagnosis of Falina was a "murky" diagnosis. In fact, he clearly articulated the "organic findings" that supported his diagnosis of CRPS as indicated above. The only witness in the case who used the term "murky" to describe a CRPS diagnosis was

Defendant's expert, neurologist Dr. Linda Wray. She described the medical condition of CRPS itself as a "very murky and controversial condition," indicating that it may in fact be "a psychological condition." CP 7-16, RP 779. During the trial she testified that Falina did not fit the criteria for CRPS and that she felt the "condition [itself] is fairly controversial and unclear in any case." RP 708. The court adopted Dr. Wray's definition of CRPS as a "murky" medical condition.

**2. *The Trial Court Allowed Defendant To Constantly Bring Up Evidence Of Falina's Prior And Unrelated Injuries.***

During the course of the trial, Wal-Mart was allowed to continually bring up Falina's past medical and social history. For example, during the course of Defendant's cross-examination of Dr. Loeser, the court allowed Defendant to summarize and read parts of medical records describing events that occurred when Falina was only 12 years old:

Q. Okay. Doctor, are you aware that on March 25<sup>th</sup> of 1992 is when [Falina]'s 12 years old. She was supposedly having seizure activity at school lasting approximately seven to eight minutes.

Mr. West: Objection; irrelevant.

The Court: I'll overrule the objection.

RP 596 (16-21).

Defendant was allowed to continue with the court's permission:

The child reported that she vomited at school once today. And she said the doctor did a physical examination, felt that she is somewhat histrionic; and when he tried to pry her eyes open, it resulted in her even squinting her eyes even tighter. She cooperated with some movements and resisted other movements, obviously attempting to feign seizure activity and not do a convincing job.

The doctor did a medical review and diagnosed fictitious seizure: I've discussed with the patient and with Dr. Garcia, and he is concerned about some dysfunctional family dynamics. I have told the parents that I felt this was a fictitious-appearing seizure and offered signs of psychogenic stress or manipulative behavior. ...

RP 597 (11-24)

The highly prejudicial nature of this irrelevant medical record is self evident. However, the questioning did not stop there. Defendant was allowed to question Dr. Loeser on a number of Falina's prior injuries and medical conditions, most of which occurred long before the 2006 incident in question. For example, Defendant asked Dr. Loeser about Falina's visits to the emergency room from 1989-2007, noting that she visited the emergency room 11 times. RP 599. Defendant asked Dr. Loeser whether he was aware of an incident in which Falina went to the ER in an ambulance back in 1995, when Falina felt her "kneecap popped out," but "there was no swelling or deformity," and the "x-rays were normal." RP 599 (7-16).

The court allowed Defendant to continue questioning Dr. Loeser on other prior injuries and incidents in Falina's past. RP 599-608. The court's basis for allowing this line of questioning was that Dr. Loeser reviewed Falina's medical records prior to giving his diagnosis. RP 598. However, Dr. Loeser made it clear that Falina's medical history did not change his opinion with regard to the actual existing symptoms of CRPS. RP 623. In fact, he stated that nothing in her previous medical history would lead him to believe that she did not have CRPS. RP 624.

Defendant continually brought up these events throughout the course of the trial despite Plaintiff's objections. Eventually, after the court denied Plaintiff's objections regarding the admissibility of this kind of evidence, the court even allowed Defendant to summarize Falina's prior injuries and medical history into a single question when cross-examining Dr. Silver:

Doctor, let's go through this timeline; and I'd like you to assume that there are records that have been admitted into this trial involving this that – this is from her medical records before that she had – back when she was a young girl, she went to the ER, was complaining of pain after a fall. Her x-rays were normal.

Later on in that same year, a couple of months later, she had back pain in a fall at a bus stop and normal findings. She had x-rays, diagnosed as a back strain.

She came in the ER, again, in 1990. This is when she's approximately, 10 years old, 11 years old, passed out, fell

at school; and she complained of blurred vision, memory problems. X-rays, EEG, and CT were normal, diagnosed a head bruise; and she was off school for a day.

Now, this one is March 25, 1992. She was 12 years old at this time. She came in, again, in an ambulance; and she claimed she had a seizure at school that lasted seven to eight minutes. There was nothing when the paramedics got there. The mother said she had a great tendency to act out. She said she had fictitious seizure disorder; and the doctor says in the medical record, she's attempting to feign seizures and not doing very good job. She kept her eyes closed like this; and then when he tried to pry them open, he couldn't; and then he put some ammonia under nose, and she started laughing.

Then she came in the ER, again, in the ambulance – this is when she was 14 or 15 – claiming severe knee pain, felt like her kneecap popped out. There was no swelling, and the kneecap was normal. The x-rays were normal. She went to Good Samaritan, claims she fell and injured her ankle. The x-rays were normal.

In August of '97, this is when she's 18 years old, severe left abdominal pain, possible ovarian cyst.

She had a –she was lifting a can weighing 3.5 ounces. This is on May 30<sup>th</sup> of 2003. She felt her shoulder pop. She felt pain down her arm, claimed she injured her right shoulder when stocking shelves. She was off five and a half months. She had chronic complaints of pain. They were talking about the pain clinic back then. This is when she was working in the Wal-Mart store. She eventually went on. She had surgery about a year and a half after this, but there were chronic complaints of pain. She would hold her arm as if it was in a sling.

Let's continue –”

RP 1130-1131 (3-21).

This line of questioning continued throughout the course of the trial with the court's permission. Defendant even constructed a "pre-incident" timeline as an exhibit which he presented to the jury upon closing. Ex. 87. The trial court, as the gatekeeper, literally allowed Falina's life history to be put before the jury throughout the trial.

**3. *The Trial Court Indicated That It Did Not Believe Plaintiff's Complaints Of Pain.***

As the jurors touched Falina's foot she became visibly upset and it had a significant effect on the jurors, some of whom questioned whether she was overreacting. CP 541-42. Plaintiff attempted to rehabilitate Falina in front of the jury, by asking Dr. Vu whether Falina's reaction to the jurors' touching was reasonable due to her condition. RP 421-22. Defendant objected to Plaintiff's line of questioning and the court hastily removed the jury from the courtroom. RP 421. When the jury left the courtroom, the court questioned Plaintiff:

The Court: Counsel, where are we going with this?

Mr. West: Well, I want the jury to understand that when my client reacted the way she did, there was a reason for it. It's very simple.

The Court: Counsel, he wasn't here when we did the test stroking last week.. We haven't even established whether or not she suffers from the touch, or which kind of allodynia she suffers from. You haven't gotten into his treatment or diagnosis with her; and you're asking him now

to comment on something that occurred outside his presence, you know. I'm going to sustain the objection. I don't think we're going anywhere with this.

Mr. West: Well, what I'll do is establish through him that the allodynia that she has is to light touch, if, in fact, that's what he says.

The Court: Well, then you can go ahead and establish that; and I think the jury can determine whether or not when they touch her she was in pain or not. That's ultimately going to be a jury question, anyway, whether or not she suffers from this...

RP 422 (3-21).

When the court stated "we don't even know if she suffers from the touch," the court is in effect stating that Falina's overt painful reaction to the jurors' touching was insufficient evidence that she suffered from such touching. Before the jury returned, Defendant objected again to any questions to Dr. Vu that would elicit comments on the hypothetical in which the jurors touched Falina's foot in an agitated condition. RP 423. The trial court reassured Defendant, "I've sustained your objection." RP 423 (13-14). When the jury returned, Dr. Vu confirmed that Falina suffered predominantly from "light touch" allodynia. RP 424. However, Plaintiff was unable to rehabilitate Falina through Dr. Vu's testimony.

***E. Trial Court Committed Reversible Error By Failing To Give Plaintiff's Proposed Damage Instructions Which Were Consistent With The Facts Presented In The Case, Thereby***

***Denying Plaintiff's Ability To Present Her Damage Claim To The Jury.***

The court committed reversible error by refusing to give Plaintiff's proposed damage instructions, including instructions pertaining to aggravation or lighting up of a preexisting condition, the instruction pertaining to susceptibility to injury, and the impaired earning capacity instruction.

Plaintiff submitted jury instructions, CP 398-418, along with additional proposed instructions, CP 432-433 and CP 440-461, including instructions pertaining to aggravation of a preexisting condition, lighting up of a preexisting asymptomatic condition, and susceptibility to injury, along with an impaired earning capacity instruction contained within the general damages instruction relating to amounts that could be awarded in various categories.

In a rushed discussion of the appropriate jury instructions to be given, accented by the court's comments such as "You guys are eating up a lot of your time," RP 1575, the court declines to give instructions requested by both defense and plaintiff, RP 1585 and RP 1574.

The court's rationale for failing to give those instructions raises serious concerns about the court's understanding of the law relating to damages.

The court even made the comment that earning capacity and lost earnings were basically the same thing and that Plaintiff's counsel could argue for impaired earning capacity, without a jury instruction for the same, commenting at RP 1574 that she is only going to give "the reasonable value of earnings with reasonable probability to be lost in the future. That covers everything." Despite repeated argument to the court that the Plaintiff's proposed instruction for impaired earning capacity is vital to Plaintiff's case and is the basis for the Plaintiff's future economic loss claim, RP 1567-1575; RP 1596; RP 1610; RP 1611. The court, in effect, obliterates Plaintiff's future economic loss claim due to impaired earning capacity by stating at RP 1575 "I think that, you know, if they can't work, and they want to be compensated for the fact that they can't work, that takes in earning capacity in all of its facets."

The court did not state there was not sufficient evidence to present an impairment of earning capacity claim, allowing that argument to be made to the jury, but believed it was the same thing as a claim for lost earnings and was, in fact, subsumed in the lost earnings instruction.

Dr. Loeser, the Plaintiff's expert, and Dr. Vu, the treating physician, both testified that Plaintiff's CRPS condition was permanent in nature. RP 546 and RP 459, and their general testimony referenced above was supportive of Plaintiff's impaired earning capacity claim presented in

the economic loss testimony of Eugene Silberberg, reflected in his report dated May 4, 2009 which was admitted for purposes of argument to the jury and presentation at trial for illustrative purposes (Ex. 31).

Notwithstanding all the medical testimony, both from Dr. Hamm, Dr. Silver, Dr. Loeser and Dr. Vu, particularly Dr. Hamm's references throughout his testimony to the Plaintiff's preexisting condition, whether symptomatic or not, and Dr. Silver's testimony that based on his review of the records Plaintiff was more vulnerable and had psychological factors that were not causing a problem, apparently, before the incident occurred, and after the incident those psychological factors developed to the point where she did have a pain disorder, RP 1119 and RP 1120, and the fact that Dr. Hamm stated that it was possible that the pain disorder developed after the injury (RP 1031), the court declined to give the jury instructions proposed by both the defense and the plaintiff on the theory of aggravation of a preexisting condition, lighting up of a previously asymptomatic condition, and the susceptibility to injury instructions.

The court states at RP 1586-1587 "I'm not going to give either one of these [preexisting or lighting up] because I don't think there is any testimony from any witness that there was a preexisting condition that was lit up or made active."

At RP 1589 there was a discussion about the susceptibility instruction, where argument was made about the concept of the “eggshell” plaintiff, a concept not unknown to the court, but the trial court refused to give that instruction as well.

During the course of the discussions about the medical condition of the Plaintiff, the court stated again at RP 1561, consistent with its bias against the Plaintiff’s damage claim, “This is a case where even some of Plaintiff’s medical doctors have testified that it is a murky and uncertain area when you’re serving from a Chronic Regional Pain Syndrome where there are no organic or objective findings. Dr. Vu himself used the word ‘murky’.” (As this court can see from Dr. Vu’s testimony, he never used the word “murky” to describe Plaintiff’s condition or CRPS generally).

***F. The Trial Court Committed Reversible Error By Failing/Refusing To Grant Plaintiff’s Motion For New Trial.***

Plaintiff filed a motion for new trial June 7, 2010, CP 531-535, supported by the declaration of Mike Canonica, the presiding juror, CP 536-537; CP 541-542, citing the “touching of the feet” and the submission of Plaintiff’s life history prior to the incident to the jury as a basis for the same.

Canonica confirmed that the Plaintiff became upset and was expressing pain and discomfort to the touch of the jurors, many of whom

formed the impression that Plaintiff was overreacting, or somehow faking her response.

The jurors felt that such a light touch on the Plaintiff's foot could not have caused that type of discomfort and that affected the jury's view of the Plaintiff's claim and her credibility generally.

Also, evidence from her past medical history from the time she was a small child led a number of the jurors to believe that Plaintiff was overreacting by seeking emergency room treatment for a variety of problems, although it did not appear that any of those problems were bothering her at the time of the accident of June 24, 2006.

The medical history, of course, is outlined in previous sections which pertain to the testimony of Dr. Hamm.

During the course of the motion for new trial at RP1621-1635, the court attempted to reinvent history.

At RP 1622 it was argued the court ordered the jury to touch the feet of the Plaintiff, at which time the court interrupted stating, "It wasn't either side, it was at the request of a juror..." Then the court, in a relatively astounding attempt to shift responsibility for the entire procedure, stated, "I know, and then you [Plaintiff's attorney] said if one juror does it, all jurors need to do it. And I, more or less, granted that motion." This inaccurate, if not disingenuous, rendition of events was met

with further argument by Plaintiff's counsel to the effect "It wasn't my motion, and it was absurd to have them do that since they are not doctors or qualified."

Even defense counsel did not accept the court's defensive posture as to who was responsible for the "foot touching" stating, "...Mr. West did object; and we [defense attorney's] merely stated that if one juror is allowed to touch her feet, then all jurors should do so that they'll all be on an equal playing field and all know what the other -- you know, what the evidence was. Now, the Plaintiff...she opened the door to this temperature difference." RP 1628.

The defense attorney also, interestingly, supported Plaintiff's arguments that the "foot touching" should never have occurred. He stated, "She testified she had temperature differences, and she...she and her medical experts all testified about the fact that her symptoms wax and wane. They come and go. They could have been coming or going at any particular time period...Clearly, the jurors weren't medical doctors; and they had to rely on the medical doctors' testimony about the symptoms..."

Plaintiff's counsel made it clear at RP 1632 that the jury was doing as they were told by the judge. "They considered what they were told to consider, and what they were considering was not only temperature differences, if any they noted or cared about, but they also had to consider

my client's reaction to their light touching. Again, you placed them in the position of being witnesses, evidence in the case. You made jurors evidence, and we don't know what that evidence that was, and I think that is an abuse of discretion...and given the fact that my client's credibility was affected by that, she did not receive a fair trial; and she should be granted a new trial under the circumstances." RP 1632.

Unfortunately, this touching occurred in the trial before the jury heard Plaintiff's doctors' testimony days later concerning the significance of allodynia in CRPS and so the prejudice against the Plaintiff was at its greatest point at the time of the "touching."

The court resorted at RP 1633 to her misconception of the evidence, consistent with her bias, when she stated, "I mean, even one of her own doctors, the one that did the nerve conduction, basically said that this was a very murky diagnosis. They all testified there were no organic findings that can support this..." RP 1634.

In effect, the court ignored the entirety of the testimony of Drs. Vu, Loeser and Silver. Dr. Silver (RP 1079-1149), Dr. Loeser (RP 532-624) and Dr. Vu (RP 411-491). And finally, the appellate court must consider the testimony and colloquy between the court and counsel, as well as references to the foot touching event, which can be fully appreciated only by reading the entirety of the proceeding. RP 206-218, RP 250-277.

***G. In the Event The Appellate Court Upholds The Jury Verdict And The Subsequent Rulings Of The Trial Court, The Trial Court's Ruling On It's Calculation Of Costs Awarded To The Defendant Should Be Reversed Due To The Trial Court's Legal Error In Calculating Costs.***

On May 14, 2010, Defendant submitted a cost bill allegedly based on an offer of judgment, CP 493-499, which was opposed by Plaintiff's response to Defendant's cost bill, CP 516-518, to which the Defendant replied at CP 521-524.

Basically, Defendant asked for all costs incurred that were taxable under CR 68 even though the costs were incurred before the offer of judgment allegedly dated October 23, 2009.

In response, Plaintiff referred to CR 68, which pertains to offers of judgment, and which is the basis of the Defendant's claim for costs, citing the rule, in pertinent part, as follows:

If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. (emphasis added)

Only one cost for a video deposition of Dr. Gavin Smith in the amount of \$228.00, and maybe the statutory attorney's fee of \$200.00, should have been granted, although Plaintiff requested costs allowed for deposition transcripts to be reduced to the portion of the transcript that was used and otherwise introduced into evidence, citing RCW 4.84.010(7).

Even though the costs in dispute were clearly incurred before the offer of settlement, defense counsel offered the innovative argument that even though the cost of obtaining medical records or depositions was so incurred, to the extent the documents were introduced at trial as evidence “Necessarily those costs can’t be incurred until the trial happens, and they’re actually introduced as evidence, and the depositions are either introduced as evidence or used for discovery purposes.” This fascinating argument somehow appealed to the trial court after Plaintiff’s response at page 5 of the verbatim transcript of proceedings, with defense counsel making clear the nature of his argument that “...these costs cannot necessarily be incurred until their admitted in evidence at trial.”

Again, the court’s lack of understanding about the concept of the offer of judgment, and the relevance of its timing, was apparent, if not her bias against Plaintiff’s claim, when she stated:

I’ll go ahead and grant the Defendant’s cost bill. The statute RCW 4.84.010(5) does say “that are admitted in trial.” They were in trial. Now, there may be a conflict between the language in one and the specific statute. That would up to the appellate courts to resolve that conflict, but I will go ahead and grant the Defendant’s cost bill.

When reminded about the portion of the depositions that should be charged, if any, the court responded:

They were published in full. It wasn’t published particular portions. It was published in full and utilized. I’m not about

to start breaking it down by how much it costs per how much might have actually been referenced at how many times for some percentage.

Basically, the court decided that it didn't really matter when the offer of judgment was made and it didn't matter how much or how little of the deposition(s) was used in the proceeding.

### ***ARGUMENT***

- A. The Trial Court Committed Reversible Error By Forcing The Jurors To Touch Falina's Foot When It Was Clearly In An Agitated Condition And She Was Complaining Of Severe Pain In Her Foot.***
  - 1. The Court's Order Was A Comment On The Evidence And Was Highly Prejudicial To Plaintiff's Case.***

The Washington State constitution prohibits the trial judge from commenting on the evidence in any way. Article IV, § 16 states: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

This constitutional provision is intended to prevent the jury from being influenced by knowledge conveyed to it by the trial judge as to her opinion of evidence submitted, and it forbids those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight, or sufficiency of some evidence introduced at trial. *Casper v. Estev Enterprises, Inc.*, 119 Wash.App. 759, 82 P.3d 1223 (2004).

A statement by the court constitutes a comment on the evidence if the court's attitude toward the merits of the case or the court's evaluation relative to the disputed issue is inferable from the statement. *State v. Lane*, 125 Wash.2d 825, 889 P.2d 929 (1995). The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury. *Id.*

In determining whether words or actions amount to a comment on the evidence, the court looks to the facts and circumstances of each case. *State v. Jacobsen*, 78 Wash.2d 491, 495, 477 P.2d 1 (1970); *State v. Knapp*, 14 Wash.App. 101, 540 P.2d 898 (1975); *Jankelson v. Cisel*, 3 Wash.App. 139, 473 P.2d 202 (1970). Also, it is possible that the personal opinion of a trial judge may be conveyed both directly and by implication. *State v. Lampshire*, 74 Wash.2d 888, 447 P.2d 727 (1968). Finally, a judge's comment on the evidence is deemed to be prejudicial, and reversible error is committed, unless it affirmatively appears from record that appellant could not have been prejudiced by the trial court's action. *Seattle v. Arensmeyer*, 6 Wash.App. 116, 491 P.2d 1305 (1971).

Here, the trial court ordered every member of the jury to touch Falina's foot after the jury had heard evidence that even barely touching her foot would cause her pain. RP 129. Prior to the court's order, Falina

had just conveyed to the jury that she was experiencing pain in her foot and felt “horrible.” RP 211. Plaintiff objected to the court’s order and even pleaded with the court to reconsider the decision, reminding the court that even light touching would cause Falina pain, but the court simply stated, “I can understand. She says it’s very, very, very painful.” RP 256 (8-9).

There can be no question that the court’s decision to force each of the jurors to touch Falina’s foot, after they had just heard evidence that it would cause her pain, was a glaring comment on the evidence. It conveyed to the jury the court’s lack of confidence in the integrity of Falina’s testimony and the testimony of her sister. The jurors were forced to conclude that either the court didn’t believe Falina’s complaints of pain (when a light touch would produce pain in her foot), or that the court was willing to intentionally inflict pain upon Falina in order to accommodate an unusual request by one of the jurors.

***2. The Court’s Order Constituted An Experiment By The Jurors.***

It is generally held that where a test, demonstration or experiment is conducted during an authorized view, which concerns matters forming a material part of a civil action, upon which evidence has been submitted by both parties to the proceeding and which test, demonstration or experiment in a sense amounts to the reception of evidence independently acquired

out of court, tending to influence the verdict, where there is no question of waiver on the part of the complaining party, relief should be granted to the losing party in the form of a new trial or reversal of the judgment. *Cole v. McGhie*, 59 Wash.2d 436, 367 P.2d 844 (1962).

In *Cole*, the Supreme Court of Washington reviewed a trial court's decision to conduct a jury view of the scene of an accident in which the plaintiff had fallen over a timber which was designed to serve as a brake to the front wheels of cars parked in the defendant's parking lot. *Id.* at 845-846. The question at issue was whether the plaintiff should have seen the timber and avoided falling over it. An effort was made to simulate the lighting conditions on the night of the accident, and the members of the jury were instructed to walk between two parked cars, as the plaintiff had done, to ascertain whether they could see the timber. *Id.* at 846.

The Supreme Court of Washington found that the trial court's decision to recreate the scene of the accident constituted an experiment, whereby the jury obtained new evidence not introduced at trial, and that the conducting of this experiment was prejudicial error. The Court also noted that the plaintiff in that case objected and argued against the court's order. Here, the trial court first stated that the purpose for the order was to allow the juror's to compare the temperature differences in Falina's foot, but also to test the theory that she did not feel pain when she was

distracted. RP 255-256. This forced each one of the jurors to perform a diagnostic experiment on Falina's foot, not simply viewing, but actually applying pressure on her foot, causing her pain, and witnessing the effects of the pain they had just caused. The jurors, by the court's order, obtained new evidence which was not introduced at trial. The effect of this evidence clearly prejudiced Plaintiff's case.

***B. The Trial Court Erred By Admitting Falina's Entire Medical And Social History Into Evidence.***

The law clearly states that to be admissible, evidence must be relevant. Washington Rules of Evidence, Rule 402. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the resolution of the action more or less probable than it would be without the evidence. ER 401; *Peterson v. State*, 100 Wn.2d 421, 439, 671 P.2d 230 (1983). However, ER 403 gives the trial court the discretion to exclude evidence if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *State v. Hettich*, 70 Wash.App 586, 854 P.2d 1112 (1993); *Himango v. Prime Time Broadcasting, Inc.*, 37 Wash. App. 259, 266, 680 P.2d 432 (1984).

Evidence causes unfair prejudice when it is “more likely to arouse an emotional response than a rational decision by the jury.” *State v. Cronin*, 142 Wash.2d 568, 584, 14 P.3d 752 (2000) (quoting *State v. Gould*, 58 Wash.App. 175, 183, 791 P.2d 569 (1990)).

The law clearly states that any evidence or reference to Plaintiff’s prior physical or emotional health is improper unless (a) such condition was symptomatic at the time of the injury, or was (b) a latent pre-existing condition that was made active by the injury. *Bennett v. Messick*, 76 Wn.2d 474 (1969); *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18 (1957); *Harris v. Drake*, 116 Wash.App. 261, 65 P.3d 350 (2003).

Here, the trial court admitted the case law is clear when it comes to prior injuries and emotional health. RP 12. In fact, the court initially ruled that it would be inadmissible in this case, even stating that to allow Falina’s prior injuries into evidence would be prejudicial to her. RP 22.

However, despite this ruling, the trial court inexplicably violates the evidence rules to accommodate Defense expert Dr. Hamm’s testimony. RP 122. But then, after nearly a week into trial, the court allowed Defendant to bring into evidence a number of Falina’s medical records dating back to when she was 8 years old. RP 528. The court’s rulings on the admissibility of this evidence are so varied and contradictory it is

difficult to keep track of them. However, it appears that the court accepted the notion, proposed by Dr. Hamm, that all of the events in Falina's life were "in essence always influencing her psychological character," and therefore admissible. The court made this ruling despite the fact that there is no evidence that Falina's alleged pain disorder was either symptomatic at the time of the incident, nor that it was a latent preexisting condition made active by the injury in question. There is also no evidence that any of the medical experts, apart from Dr. Hamm, found Falina's medical history significant in their diagnosis.

The nature and extent of the inadmissible and prejudicial evidence the court admitted, even by the court's own admission, clearly prejudiced Plaintiff's case.

***C. Trial Court Erred By Allowing Dr. Hamm To Testify And His Testimony Was Highly Prejudicial And Irrelevant.***

The admission of expert testimony is governed by Washington Rules of Evidence, Rule 702, which provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

ER 703 states: "The facts or data in the particular case upon which an

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

It is also well established law that an expert’s opinion must be based upon facts in the case and not upon conjecture and speculation. *Clements v. Blue Cross of Washington and Alaska, Inc.*, 37 Wn. App. 544, 682 P.2d 942 (1984). Medical opinion testimony that an accident caused a physical condition must be based on a more probable than not, or more likely than not, causal relationship. *Sacred Heart Med. Ctr. v. Carrado*, 92 Wash.2d 631, 636, 600 P.2d 1015 (1979); see *Medcalf v. State, Dep’t of Licensing*, 133 Wash.2d 290, 310-11, 944 P.2d 1014 (1997) (Madsen, J., concurring). Evidence establishing proximate cause must rise above speculation, conjecture, or mere possibility. *Reese v. Stroh*, 128 Wn.2d 300, 309, 907 P.2d 282 (1995). Thus, a claimant cannot be questioned about other possible causes of injury unless an expert opinion, expressed on a more probable than not basis, supports the fact that the other possible cause actually affected the claimant.

Dr. Hamm has no special knowledge of CRPS and does not even

purport to address CRPS in his report. CP 178-203. However, he was allowed to give testimony that the treatment Falina received for CRPS was not appropriate. RP 933. In addition, when Defendant asked him whether there was anything physically wrong with her, he stated, “she has a psychological borne problem.” RP 931 (4-5). The court allowed Dr. Hamm’s diagnosis of Falina’s “psychological borne problem” despite the evidence that there were physical and organic findings of CRPS reported by her treating physician Dr. Vu.

Despite this evidence, the court allowed Dr. Hamm to testify regarding a number of events in Falina’s life going back to when she was a child. RP 896-933. He made numerous comments about these prior injuries that were highly prejudicial to Plaintiff, including stating that she visited Good Samaritan Hospital as a child when there wasn’t “that much wrong with her.” RP 896 (22-25) Dr. Hamm explained to the jury that he based his medical opinion of Falina on “similar physical problems in the past” which he described as “emotionally based.” RP 930 (14-15).

Dr. Hamm’s testimony was highly prejudicial and was based solely on Falina’s prior injuries and her past medical and social history. The trial court committed reversible error by allowing him to testify.

***D. The Trial Court Expressed Bias Towards Plaintiff's CRPS Claim And Violated The Appearance Of Fairness Doctrine.***

The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. *State v. Carter*, 77 Wash.App. 8, 12, 888 P.2d 1230 (1995) (citing *State v. Post*, 118 Wash.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)), *review denied*, 126 Wash.2d 1026, 896 P.2d 64 (1995). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wash.App. 720, 722, 893 P.2d 674 (1995), *review denied*, 127 Wash.2d 1013, 902 P.2d 163 (1995).

The test for determining whether a judge's impartiality might reasonably be questioned is an objective one that assumes the reasonable person knows and understands all the relevant facts. *Sherman v. State*, 128 Wash.2d 164, 206, 905 P.2d 355 (1995). The party claiming bias or prejudice must support the claim with evidence of the trial court's actual or potential bias. *State v. Dominguez*, 81 Wash.App. 325, 328-29, 914 P.2d 141 (1996).

The trial court described Falina's diagnosis of CRPS as "murky," and stated that there were no organic or objective findings to justify her

complaints of pain. RP 1561. However, Plaintiff's expert stated that Falina had an "absolutely classic, typical case of CRPS in all respects." RP 542 (22-23). In addition, Dr. Vu, Falina's treating physician, indicated that she had a number of physical and organic findings consistent with CRPS. RP 426-27. In fact, the only person who described CRPS as "murky" was Defense witness Dr. Wray, who felt that the CRPS condition itself was "murky and controversial." CP 7-16. It is clear that the trial court was biased against Plaintiff's CRPS claim in general through her own statements in court.

The trial court also allowed Defendant, over Plaintiff's objections, to continually bring up Falina's prior injuries and medical conditions throughout the trial. This was contrary to the laws of evidence and highly prejudicial to Plaintiff. The court, playing the role of the gatekeeper, allowed Falina's entire life to be put on trial by failing to limit any of the evidence Defendant sought to admit. In fact, Defendant was even allowed to construct a "pre-incident timeline" to show the jury upon closing. The court's decision to allow highly prejudicial and irrelevant information to be exposed to the jury constantly throughout the trial also showed a bias.

Finally, the trial court clearly indicated to the jury it did not believe Falina's complaints of pain were valid. Prior to ordering each of the jurors to touch Falina's foot, the court admitted to Plaintiff that she understood

the process would be “very, very, very painful” to Falina, yet ordered the jurors to touch her foot, nonetheless. It can only be assumed that she did not believe Falina’s complaints of pain were valid, otherwise she wouldn’t have forced the jurors to touch her foot. In addition, after she had witnessed Falina suffering during the process, she stated to Plaintiff, “we haven’t even established whether or not she suffers from the touch,” indicating that she believed Falina was malingering in open court. RP 422.

The trial court’s own admitted beliefs about Falina’s CRPS condition and her actions show a clear bias.

***E. The Trial Court Committed Reversible Error By Failing To Give Plaintiff’s Proposed Damage Instructions Which Were Consistent With The Facts Presented In The Case, Thereby Denying Plaintiff’s Ability To Present Her Damage Claim To The Jury.***

Plaintiff was deprived of her ability to present her case on damages due to the court’s failure to properly instruct the jury on issues relating to aggravation or lighting up of a preexisting condition, susceptibility to injury, and future lost income due to impaired earning capacity.

With regard to the impaired earning capacity theory of Plaintiff’s claim, the court actually allowed the Plaintiff to argue impaired earning capacity within the context of the instruction pertaining to lost earnings. “... the reasonable value of earnings with reasonable probability to be lost

in the future. That covers everything" (emphasis added). (RP 1574). The court also stated "I think that, you know, if they can't work, and they want to be compensated for the fact that they can't work, that takes in earning capacity in all of its facets." RP 1575. Further, Plaintiff's attorney sought clarification from the court that it is acceptable to argue lost earning capacity and the court stated "Well, I assume you would be arguing about that." RP 1596. The court ignored Plaintiff's counsel's request to give the jury instruction if he was going to be allowed to argue it anyway on behalf of the Plaintiff, RP 1611, and Plaintiff's counsel made it clear at RP 1610 that "As the court knows, impairment of earning capacity is different than lost earnings. It's a different element of damage...all I am saying is that earning capacity is a permanent diminution of the ability to earn money."

The court was unmoved, and allowed Plaintiff to argue impaired earning capacity without putting it before the jury in the form of Plaintiff's proposed jury instruction. Unfortunately, the jury was not instructed it could award damages based on impaired earning capacity and was told it could only award damages as instructed.

The law in Washington is fairly clear on this point. First of all, there is case law which states that each party is entitled to have their theory of the case presented to a jury by proper instructions and it is within the trial court's discretion to determine how many instructions are

necessary to present fairly each litigant's theory, and the instructions are sufficient on that party's theory if he is not limited thereby in his argument to the jury. *Flaks v. McCurdy*, 64 Wn.2d 49, 390 P.2d 545 (1964). Nonetheless, Plaintiff's theory of recovery on the basis of impaired earning capacity was never put before the jury in an instruction, so Plaintiff's attorney being allowed to argue impaired earning capacity has absolutely no import if there is not a jury instruction which at least mentions that theory of recovery and defines it sufficiently for the jury to distinguish it from lost earnings from a particular job. Since Plaintiff's entire future lost income was based on impaired earning capacity, as opposed to lost earnings, given her employment history, she was virtually deprived of any future income loss claim.

It is axiomatic that each party is entitled to have their theory of the case presented to a jury and the failure to do so constitutes reversible error. *Meabom v. State*, 1 Wn.App. 824, 463 P.2d 789 (1970).

No one complained about whether or not the requested instruction was a correct statement of the law, and the refusal to give the same was reversible error, particularly when there was no instruction given covering part of the Plaintiff's theory of damage recovery in this case. *Izett v. Walker*, 67 Wn.2d 903, 410 P.2d 802 (1966).

Additionally, the medical testimony of Drs. Hamm and Silver, established that Plaintiff had a preexisting psychological condition, which was either symptomatic or asymptomatic, and at the very least, a condition that made her vulnerable, because of her past medical history, or susceptible, to additional psychological injury. Dr. Hamm testified at length about these elements, and Dr. Silver acknowledged that these elements, although she may not have been suffering from a pain disorder at the time, made her more susceptible to a pain disorder once the medical condition became apparent (CRPS). In other words, depending on what the jurors thought of the Plaintiff, from a psychological standpoint, they could very well have awarded damages to the Plaintiff for psychological injuries that were either aggravated, lit up, or made her more susceptible to psychological injury by virtue of her medical/social history, which was highlighted by the defense throughout the trial.

Although at the onset of the trial Plaintiff requested that the court keep out such evidence, as it was Plaintiff's theory that the injury was a sole cause of any injury or any pain disorder, or other psychological condition, which may have been diagnosed thereafter, this presentation was disrupted the court's ruling that the jury should consider such evidence as it constituted a "psychological component" upon which the defense was basing its entire case. If, in fact, this component existed, and

made Plaintiff more susceptible to a pain disorder, or if the pain disorder was aggravated or lit up, shouldn't the jury be properly instructed?

Once those prejudicial elements of evidence were admitted, Plaintiff attempted to make lemonade out of lemons, and the facts presented by the defense supported a theory that this injury aggravated or lit up a preexisting condition, or made the Plaintiff more susceptible (eggshell) to the development of a pain disorder which may have not developed otherwise in a person who had not had the life experiences of the Plaintiff.

Contrary to the facts contained in the record, and which have been referenced above, the court found no need to instruct on these matters.

It is also axiomatic that the instructions must be considered as a whole, and any presumption of prejudice which may arise out of the giving of an erroneous instruction, or failure to give a proper instruction, may be overcome if the record, including all other instructions taken as a whole, reveal that the jury could not have been misled or confused by it. *Owens v. Anderson*, 58 Wn.2d 448, 364 P.2d 14 (1961).

In this particular case, it is evident that the court was going to allow evidence submitted over the Plaintiff's objection to be used for the benefit of the defense only, even if that evidence supported theories of recovery for the Plaintiff on which the jury was not properly instructed.

The court's rulings with regard to the jury instructions are consistent with the court's bias against Plaintiff's damage claim in toto.

***F. The Trial Court Committed Reversible Error By Failing/Refusing To Grant Plaintiff's Motion For New Trial.***

Plaintiff brought a motion for a new trial pursuant to CR 59 and specifically CR 59(a)(1), CR 59(a)(8) and CR 59(a)(9). The primary emphasis of the motion was related to the "foot touching" procedure that was ordered and conducted solely by the trial court and the evidence of past medical history that had been allowed.

Presumably, the court thought the jurors should test Plaintiff's complaints about occasional coldness in the affected limb, as opposed to the other, and to determine if they thought perhaps the Plaintiff was faking. The court acknowledged that this could be "very painful" for the Plaintiff, due to the allodynia, but since the Plaintiff had testified about these symptoms the jury ought to be able to make their own determination first hand. In other words, the judge elevated the jurors to the status of doctors, or, at the very least, witnesses to the Plaintiff's condition outside the scope of the evidence submitted by either party. The jurors could not be examined or cross-examined, and for all the parties knew at that time, after the "touching of the feet", and watching the Plaintiff's reaction to the same, they may have all made up their minds at that time, without having

testimony, or where they visited the scene on their own without court approval, etc. There is no case law that Plaintiff has found that even approaches what the trial court accomplished in the way of prejudice against the Plaintiff, in a few short minutes, and which could not possibly be undone during the remaining course of the trial.

Even without the declaration of the presiding juror, the appellate court would have to assume that one or more of the jurors formed definite opinions about the Plaintiff unfavorable to the Plaintiff, particularly when you couple the trial court's admission of evidence which included the time she faked a seizure when she was a ten year old child, a fact that was repeated over and over again by defense counsel to every medical witness who testified. That error compounded with the court's biased comments about CRPS, which shaped her rulings throughout the trial, amounted to one thing: that substantial justice had not been done. CR 59(a)(9).

By the time the motion for new trial was argued, it should have been clear to the trial court, had the trial court not been responsible for the bizarre "foot touching" procedure and the admission of evidence that she initially deemed highly prejudicial and irrelevant to the issue of whether Plaintiff had CRPS, that the trial was an absolute travesty.

When the appellate court also considers the trial court's rationale for allowing the touching, i.e., to determine temperature differences

between one foot and the other, to determine if the Plaintiff feels pain when she is “distracted”, etc. It must be found the trial court also commented on this “evidence” by virtue of her order, whether due to bias or a lack of understanding the impact this procedure would likely have on a jury.

Basically, what the court was saying to the jury, by way of comment, was that there were temperature changes claimed and the Plaintiff’s foot was very painful during periods of exacerbation of the condition, which was testified to earlier by the Plaintiff on that particular day and earlier by family members, and the jury should check the validity of such claims. Either the court was telling the jury that the court didn’t care whether the jury inflicted pain on the Plaintiff, which was apparent during the course of the foot touching, or that she was so skeptical of Plaintiff’s claim that she wanted the jury to see that Plaintiff was faking. Or, even more likely, that the court was not thinking at all about the order she had just given to the jurors, or the impact that it might have on the case. In other words, the court was disengaged from the whole process of the trial to such an extent, for whatever reason, she could not appreciate the impact of her own rulings.

It is for that reason that when the court of appeals overturns this unjust verdict, it should direct that the matter be assigned to another trial judge.

**G. *The Trial Court Erred In It's Calculation Of Costs Awarded To The Defendant.***

Defendant's cost bill of \$6,000.000 was based on an offer of judgment allegedly made on October 23, 2009 in the amount of \$6,433.35. Since the offer arguably exceeded the jury award, Defendant claimed all costs, even those incurred before October 23, 2009, arguing that they really weren't incurred until they were used at trial. In other words, Defendant argued that it doesn't matter when the offer of judgment is made during the course of the proceeding, as long as the medical records or deposition transcripts are used during the course of the trial, that is all that's required. The court agreed with that approach and decided that the defense was entitled to the complete cost of the entire transcript of every deposition used, even though any deposition would have been used in a limited fashion.

Plaintiff responded to that motion and countered that CR 68 only applies to costs incurred after the offer of judgment is made (costs that are recoverable) and that Defendant is only entitled, assuming costs of deposition transcripts are to be allowed, to the cost of a deposition

transcript on a pro rata basis for those portions actually introduced into evidence or used for the purposes of impeachment. RCW 4.84.010(7); CP 516-518.

The court rationalized that since the documents, such as medical records, were “admitted in trial”, then the entire cost of those records should be taxed to the Plaintiff, regardless of when the cost was incurred for copies of those medical records. Further, the court was not going to break down the cost on how much or what testimony might have been actually referenced in depositions, and awarded the full cost to the Defendant for depositions transcribed in their entirety, assuming a part of those were used at trial--which was not established at the hearing in any event.

It’s clear that the rule stands for the proposition that a party cannot collect for costs incurred before the offer of judgment, particularly where the plaintiff would otherwise be the prevailing party but for the offer of judgment. In other words, the only costs that can be awarded to the defendant after an offer of judgment are any costs incurred after that offer was made. Otherwise, there would be not point in making an offer of judgment at any particular time during the course of the litigation. CR 68.

The editorial commentary to CR 68 makes it clear that the court erred in awarding all of Defendant’s costs.

Because only post offer costs are shifted, the defending party should make an offer of judgment as soon as it is able to identify a reasonable settlement amount. As a practical matter, it may be difficult to identify a reasonable amount early on in the case, thus limiting the usefulness of the rule [CR 68].

In the event the appellate court wishes to uphold this unjust jury verdict, it should set aside the trial court's order granting costs to the Defendant and direct the trial court to properly apportion costs in accordance with CR 68 and RCW 4.84.010(7).

### ***CONCLUSION***

The trial in the above matter was a manifest injustice to the claims brought by the Plaintiff. Not only did the trial court abuse its discretion by admitting evidence that the trial court initially found was clearly prejudicial and irrelevant, inexplicably changing her mind during the trial, but the court also presided over the most bizarre procedure of ordering the jury to basically conduct a medical exam to determine whether the symptoms Plaintiff complained of, even though it was made clear to the court that sometimes these symptoms don't exist, and when it was evident that the examinations were causing pain and distress to the Plaintiff. This procedure had a profound impact on the jurors, as per the declaration of the presiding juror submitted in support of Plaintiff's motion for new trial. The court's bias against the CRPS claim brought by Plaintiff was so evident that the court on a number of occasions through the course of the

trial stated that all the health care providers for Plaintiff testified that CRPS was a “murky” condition and that there were no objective findings to support Plaintiff’s claims. Not only was the court incorrect in that respect (only the expert hired by the Defendant referred to CRPS as being a “murky” diagnosis), but at the end of the trial and during the course of the argument for new trial, the court attempted to blame Plaintiff’s counsel for making a motion (inviting error) for all the jurors to touch Plaintiff’s feet. Even the defense attorney opposing the motion for new trial, to his credit, reminded the court that the court had ordered that the jurors touch the Plaintiff’s feet and that Plaintiff’s counsel had objected to that procedure.

Generally, jurors expect the trial court to take an unbiased and fair approach to the presentation of evidence, without comment on the same, so that none of the jurors will be swayed by some misimpression that the court favors one side or the other.

In this case, the Plaintiff had testified that she was having an exacerbation of her CRPS condition and the jury observed the changes of color in her foot and Plaintiff also testified that her foot was very sensitive and just the slightest touch would cause pain to her foot during such an exacerbation. The court then ordered the jury to touch her foot for diagnostic purposes. If this is not a comment on what the judge thought of

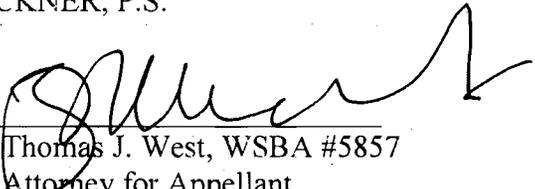
Plaintiff's pain complaints, unless the judge wanted the jury to think she was a sadist, then she thought so little of Plaintiff's pain complaints, that is, of the CRPS claim, that she was willing to risk Plaintiff's fair trial out of her own curiosity as to how the Plaintiff might react. Not only was this an abuse of discretion by the trial court, assuming for a moment any discretion whatsoever was used, it was a cruel act inexplicably perpetrated upon the Plaintiff. The defense encouraged the court to have all twelve members of the jury touch the Plaintiff, even though the defense knew about allodynia, as did the court, and the affect it would have on a person who is experiencing an exacerbation of CRPS.

The prejudice to the Plaintiff was profound, as it was a result of a direct order from the trial court. The case should be reversed with the verdict set aside and sent back to a different trial judge in Pierce County. Appellant requests an award of all costs on appeal including, but not limited to, filing fee and court reporting fees for cost of transcript(s). RAP 14 et seq.

RESPECTFULLY SUBMITTED this 4 day of April 2011.

KRILICH, LA PORTE, WEST &  
LOCKNER, P.S.

By:

  
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