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STATE OF WASHINGTON

NO. 41008-7-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

FALINA HICKOK-KNIGHT, a single person,

Appellant,

v.

WAL-MART STORES, INC., a Delaware corporation,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Wal-Mart Stores, Inc. ("Wal-Mart"), respectfully requests that the trial court be affirmed. The appeal lacks merit.

Appellant sued Wal-Mart after she sustained a minor bruise to her left foot on June 24, 2006, after it was run over by a shopping cart in the parking lot of the Bonney Lake Wal-Mart store. Liability was not at issue at trial. The only issues at trial were what injuries and damages were proximately caused by the subject incident.

Rather than simply seek damages for her bruised foot, Appellant alleged that she suffered from Complex Regional Pain Syndrome ("CRPS"), alternatively referred to as Reflex Sympathetic Dystrophy ("RSD"), and therefore chronic pain. Wal-Mart's theory of the case was that Appellant sustained nothing more than a bruise and that Appellant's subjective complaints of pain were due to conscious malingering or psychosomatic issues. This theory was supported by the opinions of neurologist Linda Wray, M.D., and psychiatrist John Hamm, M.D. Dr. Hamm reviewed Appellant's complete medical records, which Appellant had provided to her expert, took a detailed history from Appellant, and administered psychological tests. Dr. Hamm opined that Appellant had an unrelated somatic pain disorder that was not caused by, lit up, or aggravated by the incident.

After a civil jury trial that lasted several weeks, the verdict was much less than the amount that had previously been offered by Wal-Mart. As the prevailing party, Wal-Mart was granted its taxable costs. Appellant

unsuccessfully moved for a new trial before filing this appeal.

II. ASSIGNMENTS OF ERROR

Wal-Mart does not assign any error to the jury verdict or the trial court's post-trial rulings.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court exercise its discretion in responding to a juror's request to touch Appellant's feet after there was conflicting testimony regarding temperature changes on the skin? Yes.

2. Did the trial court exercise its discretion, permitting Wal-Mart to (1) cross-examine Appellant's expert witnesses regarding what they considered in rendering their opinions and (2) offer and explain the basis of Dr. Hamm's opinion that Appellant's complaints were a psychological problem unrelated to the subject incident? Yes.

3. Does the record reflect that a reasonably prudent and disinterested observer would conclude that Appellant received a fair, impartial, and neutral trial, because there is no evidence of bias? Yes.

4. Did the trial court exercise its discretion in instructing the jury where the trial court (1) listed as an element of future economic loss "[t]he reasonable value of earnings with reasonable probability to be lost in the future," (2) declined to give an instruction on aggravation or lighting up of a preexisting condition, and (3) declined to give an instruction regarding heightened susceptibility? Yes.

5. Did the trial court exercise its discretion in denying

Appellant's motion for new trial, where Appellant failed to establish any basis a new trial? **Yes.**

6. Did the trial court exercise its discretion in calculating and awarding costs to Wal-Mart under RCW 4.84.010 and Washington caselaw, as well as CR 68? **Yes.**

IV. COUNTER-STATEMENT OF THE CASE

A. **After Appellant introduced conflicting testimony regarding temperature differences in her foot, the trial court permitted the jury to touch her feet, in response to a juror's request.**

Appellant's sister, Marcia Hickok-Ritchie, testified that she had observed discoloration on Appellant's foot, as well as coldness.¹ Appellant's counsel asked the following questions regarding the coldness:

Q. And when you say the coldness, what do you mean by that?

A. To the touch. **You can touch one foot and feel how warm it is and then touch the other one, and it's freezing.** It's like she has no circulation in it.

Q. Okay. Now, is that coldness there all the time, or is it—or the bruising, or does it come and go?

A. The bruising—because I haven't seen her feet all the time, but when I've seen them, there's always—on the top, it looks like there's a little bruise on the top that's always there; and there's times that it's bigger or more spottier, but **the coldness is always there.**²

After this, Appellant testified that, since the alleged injury, her foot “went

¹ RP at 141:5–7.

² *Id.* at 141:10–20 (emphasis added).

really cold.”³ “It was like ice always[.]”⁴

Appellant testified that after a nerve ablation procedure, she noticed a big change between temperature, and “both of them were the same temperature.”⁵ Appellant then testified that “[s]ince then, the cold has returned; but it’s not constant like it was before. It is off and on.”⁶ Appellant also testified that her foot changed color as she was testifying, that the color was getting more pronounced.⁷

Because of Appellant’s testimony regarding the spontaneous change in foot color, the trial court indicated that it would permit the jury to view the foot.⁸ Appellant had no objection to this.⁹ Juror 7 asked: “Can I touch those feet if I want?”¹⁰ The trial court indicated that this would be taken up after the recess.¹¹

After the jury was excused and not present,¹² the trial court stated

³ *Id.* at 233:11–12.

⁴ *Id.* at 233:12–13.

⁵ *See id.* at 233:13–17.

⁶ *Id.* at 233:19–21. Appellant called Long Dai Vu, D.O., who testified that “[i]n the chronic phase, it tends to go the opposite, cold extremity. There can be color changes and swelling.” *Id.* at 418:11–13. Dr. Vu documented that one foot was significantly colder than the other foot when he touched it. *Id.* at 426:23–427:2. According to Dr. Vu, this was significant because it was part of the criteria used to diagnose CRPS. *Id.* at 427:3–7.

⁷ *See id.* at 250:11–251:2.

⁸ *See id.* at 251:3–21.

⁹ *See id.* at 251:22 (stating “All right.”).

¹⁰ *Id.* at 251:24–25.

¹¹ *See id.* at 252:1–18.

¹² *Id.* at 252:19.

“there’s testimony that if there’s different temperatures between the feet, I assume that she wants to see that for herself.”¹³ Appellant’s counsel mentioned his own client’s testimony, but then stated “I guess my concern is more the pain that my client feels when people touch her foot; so I don’t mind them looking, but I don’t know if I want somebody—especially one juror—diagnosing something.”¹⁴ The trial court recognized that the jurors may all wish to touch the foot, noted that they were permitted to ask questions, and noted that it was obvious that Juror 7 had an interest because of the testimony regarding temperature differences.¹⁵

Appellant’s counsel apparently forgot about Appellant’s sister’s testimony, because he then said:

It’s not an issue for the purpose of touching the foot and finding out if it’s an issue because my client has already—**now, if she said something like it’s always cold compared to the other one, that would be one thing.** I think the one thing she did say that made it clear to all the jurors, and presumably everyone in the courtroom here, is that after she had the nerve ablation, the one thing that it did take care of for a good period of time was the cold versus hot; and now it only happens occasionally where it’s cold and not hot, so I don’t want the jury touching her for that reason. There’s no good reason to do it, given her testimony; and I’m not going to have 12 people coming up and touching my client’s foot when it’s ultra sensitive. There’s just no reason to do it.¹⁶

¹³ *Id.* at 252:24–253:1.

¹⁴ *Id.* at 253:2–8.

¹⁵ *Id.* at 253:9–20.

¹⁶ *Id.* at 253:21–254:9 (emphasis added); *see also id.* at 256:1–7.

After additional colloquy, the trial court ruled that it would allow the jurors to compare the relative temperatures of the two feet.¹⁷

Appellant's counsel then pressed for an all-or-nothing approach:

If the ruling of the Court is that my client's foot be touched by whatever juror wants to do it, I guess my concern is, then, if some other jurors don't want to do it, then what you have is evidence that some jurors have but other jurors don't; and then they're going to be relying on those jurors; so either none or all of the jurors would, otherwise, have to touch my client's foot.¹⁸

The trial court agreed with Appellant's counsel, saying "Well, I think, at this point, it will have to be all the jurors."¹⁹ Appellant's counsel said, "I agree with you if you're going to order this," and then the trial court and the attorneys began discussing ways to minimize or avoid causing discomfort.²⁰ The trial court recognized that there was an issue in the case created by the contradictory testimony about when the color changes or temperature changes.²¹ The jury was brought back in, and the proceedings occurred as follows:

THE COURT: You may be seated. All right. Now, at this time, we're going to allow the jury to touch the foot, all of you.

MR. WEST: Your Honor, excuse me. Your order—your ruling was pursuant to a motion, and I just want to make

¹⁷ *See id.* 255:10–13.

¹⁸ *Id.* at 257:7–14.

¹⁹ *Id.* at 257:15–16.

²⁰ *See id.* at 257:17–259:25.

²¹ *See id.* at 258:23–260:14.

sure the jury knows what the motion is.

THE COURT: Pursuant to a motion to allow—there was a question raised by Juror No. 7 that she wanted to touch the foot. After we allowed you to recess, there was a motion regarding that. The Court has ruled that the jury will be allowed to touch the foot now.

MR. WEST: And I've objected.

THE COURT: And, yes, Mr. West has objected for the record.

All right. Now, here's the ground rules: No pressing, no squeezing, no lifting the foot. Use the hand sanitizer, which is right over there, before you touch the foot and then after you touch the foot. All right?

So we'll start with Juror No. 6, same procedure around the box. Juror No. 1?

JUROR NO. 1: Are we required to touch the foot, Your Honor?

THE COURT: We would like you all to touch the foot so that all of you have the same experience as each other. All right. Juror No. 7?

MR. WEST: Your Honor, as long as they're doing—

JUROR NO. 1: Can I feel both feet, so I can feel—

THE COURT: Well, you can put your hands on both feet to compare the temperatures.

JUROR NO. 7: That's fine.

JUROR NO. 1: Thank you.

(The jury proceeds to the witness stand.)

MR. WEST: All right. Your Honor, could we take a break?

THE COURT: We'll go ahead and take a momentary break. If you would be so kind as to step into the jury room, please, the usual cautions.

MR. WEST: Are you okay there?

THE COURT: All right. We'll take the recess.

(A recess was taken.)

(The jury was not present.)

THE COURT: All right. We'll bring the jury back in.

MR. WEST: Finish up?

THE COURT: Yes. Finish up.

(The jury was present.)

THE COURT: You may be seated. Thank you. All right. I believe we were to Juror No. 11. All right. If you'll come forward, if 12 and 13 could just maybe step out of the box briefly. Thank you.

(The jury proceeds to the witness stand.)

THE COURT: All right. We'll continue with direct.

MR. WEST: Okay.²²

After this, Appellant's counsel asked questions regarding her foot and the jurors' touching of the foot.²³

²² *Id.* at 264:8-266:14.

²³ *See, e.g., id.* at 268:19-271:13.

B. The trial court properly permitted testimony regarding Appellant's prior medical history, because this history was reviewed and either disregarded or considered by both parties' expert witnesses.

Wal-Mart sought to offer the testimony and opinion of John Hamm, M.D., a psychiatrist who was retained to perform a thorough psychiatric examination of Appellant. Dr. Hamm was prepared to testify regarding somatic pain disorders, and his opinion that Appellant's somatic pain disorder was the cause of her complaints when there was no organic explanation, that there was nothing physically wrong.²⁴ On motions in limine, Wal-Mart argued that this was important testimony because it provided an alternative theory, namely, that Appellant's subjective complaints of chronic pain were not CRPS, were not caused by the accident in question, and were completely explainable by Appellant's personality characteristic and somatoform pain disorder.²⁵ Nevertheless, the trial court initially granted Appellant's motion in limine, ruling that any reference to prior physical or emotional health was not admissible.²⁶

After Appellant testified, and before Appellant's witness, John Loeser, M.D., was set to testify, Wal-Mart renewed its request to offer testimony regarding Appellant's pretreatment evidence, providing argument, outlining what Drs. Loeser and Silver had considered, and making an offer of proof.²⁷ Not only did Wal-Mart argue that this

²⁴ See, e.g., *id.* at 5:22–7:10.

²⁵ See *id.* at 7:19–24.

²⁶ See, e.g., *id.* at 12:5–7.

²⁷ See *id.* at 505:19–520:6.

evidence was critical to its theory of the case, but it also submitted that the trial court saw Appellant testify and that the jury could conclude that Appellant was not malingering.²⁸ Without the pretreatment evidence, Walmart would not have been able to provide its alternate theory of the case, which was that Appellant had psychosomatic problems that were unrelated to the incident.²⁹ Appellant argued, *inter alia*, as follows:

If she has some psychosomatic problem, as well, that's going to come out frankly, through Dr. Silver who is going to say that; and it's also going to come out through Dr. Hamm who is going to say that. They're going to agree. The difference they are going to have in their opinions is that Dr. Hamm believes there is no medical component to the psychosomatic problem.³⁰

The trial court considered the evidence that Appellant had been to the emergency room eleven times, four of which were in 2005.³¹ The trial court also learned that Appellant's counsel had the medical records in question, retained Dr. Loeser, gave Dr. Loeser a copy of Dr. Hamm's report, and had not given the medical records to Dr. Silver, Appellant's psychologist.³² The trial court ruled that the defense was entitled to cross-examine Dr. Loeser as to whether he considered these records in forming his opinion.³³ The trial court further ruled that it would allow the defense

²⁸ *Id.* at 508:1–5.

²⁹ *Id.* at 508:5–14.

³⁰ *Id.* at 509:8–14.

³¹ *Id.* at 520:8–23.

³² *Id.* at 526:7–23.

³³ *See id.* at 527:6–9.

to go into this information, depending on Dr. Loeser's testimony:

I'm going to allow him to go into it. What happens in terms of what's put up on the overhead projectors is going to depend on what the testimony of Dr. Loeser is; but I think in formulating a medical opinion regarding whether or not she's got CRPS, you know, I mean, they are entitled to go into the extent of his knowledge regarding her prior medical history. There may be things that do tend to support Dr. Hamm's conclusion that, you know, she may well have this somatization disorder. I don't know. Ultimately, that's the jury's decision; but I think the jury is entitled to know what the basis of Dr. Loeser's opinion is; and if they were to find out that he wasn't given enough information, or he didn't consider things that might be relevant, they may well disregard his opinion.³⁴

After Appellant's counsel represented that he had not provided the records to Dr. Loeser, and after he spoke again with Dr. Loeser, he corrected this, stating, "We're ready to go; and, actually, I was wrong. Dr. Loeser, I believe, did see all the medical records. We did send him everything he received, so he looked at them; so I think we're ready to go. I think we can get going on this thing, and I'm ready."³⁵

1. Dr. Loeser considered Appellant's prior medical history because doing so was valuable to his diagnosis.

On questions from Appellant's counsel, Dr. Loeser testified that he had reviewed the medical records, pre-injury records, depositions, and videotapes of Appellant.³⁶ Appellant's counsel also asked Dr. Loeser

³⁴ *Id.* at 528:11-25.

³⁵ *Id.* at 529:7-11.

³⁶ *Id.* at 542:6-17.

about his review of Dr. Hamm's report, whether Dr. Hamm's report and the underlying medical records affected his opinions, and why they did not affect his opinions; Dr. Loeser answered at length as to why he did not believe that Appellant had a psychological problem,³⁷ even likening CRPS to headaches.³⁸ Dr. Loeser testified that CRPS was not a psychological or psychiatric condition.³⁹

On cross-examination, Dr. Loeser testified that he believed that it was valuable to look at Appellant's past medical history and had done so.⁴⁰ Dr. Loeser was aware of and wanted to know about Appellant's prior medical history.⁴¹ Over no objection, Dr. Loeser testified that he knew from his review of the records that Appellant visited the emergency room eleven times between 1989 and 2007, visited the emergency room six since she was 18 years old, complained of severe knee pain and felt that

³⁷ *Id.* at 547:3–548:24.

³⁸ Dr. Loeser testified as follows:

Even Dr. Hamm would agree, I suspect, that people can have headaches. There's nothing you can see in somebody who has a headache; yet, we don't say people who have headaches must have some problems with childhood that's causing them to have a headache; so headaches are perfectly real, even though you can't find some broken part; and the same thing is true of CRPS. You can't see a broken part, but that doesn't mean the patient isn't telling you the truth about what they feel and what is happening to their body.

Id. at 548:8–17.

³⁹ *Id.* at 560:20–561:5.

⁴⁰ *Id.* at 596:8–15.

⁴¹ *Id.* at 598:21–24.

her kneecap popped out where there was no swelling or deformity.⁴² Dr. Loeser was asked about Appellant's prior medical history, including Appellant's claim to have passed out at school, complaint of blurred vision, a fall, a history of seizures, and complaints,⁴³ and Appellant's only objections made at the time of this testimony were to form or vagueness.⁴⁴

Over no objection, Dr. Loeser was also asked about Appellant's prior emergency room complaint of breathing pain and diffuse body aches and myalgias, and return to the ER.⁴⁵ This testimony continued without objection.⁴⁶ Dr. Loeser agreed that when someone makes a complaint of pain, there are three things that can be occurring: (1) something is physically wrong, (2) something is in the person's head like hypochondria,⁴⁷ or (3) the person is outright malingering.⁴⁸ Dr. Loeser agreed that when a person complains of pain, a doctor always has to consider all of the various possibilities, including the role of psychological factors.⁴⁹ On questions from Appellant, Dr. Loeser testified that to diagnose CRPS, one had to look at Appellant's history well before the

⁴² *Id.* at 598:25–599:17.

⁴³ *See id.* at 599:18–602:3.

⁴⁴ *See id.*

⁴⁵ *Id.* at 605:3–18.

⁴⁶ *See id.* at 605:19–606:16, 608:4–12.

⁴⁷ Dr. Loeser testified that the modern term for hypochondria is somatoform disorder. *Id.* at 610:20–21.

⁴⁸ *Id.* at 607:22–608:3.

⁴⁹ *See generally id.* at 608:13–23, 609:14–610:3.

accident, including that which was referenced on cross-examination.⁵⁰

2. Dr. Vu agreed that psychological overlay, secondary gain, and malingering had to be considered.

Over no objection, Dr. Vu testified about somatization and malingering,⁵¹ and he stated, *inter alia*, that if there is litigation going on, one has to consider psychological overlay, secondary gain, and malingering.⁵² Dr. Vu also testified, without any objection, that he was only vaguely aware of Appellant's treatment history before the subject incident.⁵³ Dr. Vu admitted that as a pain specialist, he must consider the psychological and psychiatric components of a patient's pain, and there must be a psychological assessment before a surgery or implantation.⁵⁴

Dr. Vu "basically deferred to Dr. Hamm's evaluation since [Dr. Vu is] not a psychologist and ... never did any formal psychological testing on [Appellant]."⁵⁵ But Dr. Vu disagreed that part of Appellant's pain complaints in August 2009 were psychological.⁵⁶ Dr. Vu testified that Appellant's pain was "distractable," meaning that when she was distracted, she did not have pain.⁵⁷ Dr. Vu also agreed that his records

⁵⁰ See *id.* at 623:21–624:6.

⁵¹ *Id.* at 467:17–470:9.

⁵² *Id.* at 469:17–470:9.

⁵³ *Id.* at 668:25–14.

⁵⁴ See *id.* at 669:16–24.

⁵⁵ *Id.* at 473:7–9.

⁵⁶ *Id.* at 488:12–16.

⁵⁷ See *id.* at 493:15–494:2; see also *id.* at 661:2–14.

stated that Appellant's stated symptoms continued to be more than what Dr. Vu had seen on physical exam or documented in the photographs that Appellant brought it.⁵⁸ Dr. Vu agreed that Appellant had possible or probable mood disturbances, but "[w]hether that's the cause of the pain or the pain causing it, I don't know."⁵⁹ CRPS is a "tough diagnosis."⁶⁰

3. Dr. Silver took a detailed social history, was familiar with Appellant's prior medical treatment, and agreed in part with Dr. Hamm.

Frederick Silver, Ph.D., Appellant's own psychologist, testified that he diagnosed Appellant with a pain disorder with anxiety, depression, and a general medical condition, probably complex regional pain syndrome.⁶¹ He also found that Appellant had either a dysthymic disorder or an adjustment disorder with mixed anxiety and depressed mood.⁶² Dr. Silver testified that depression, anxiety, and stress were probably contributing factors to Appellant's pain experience.⁶³ When Dr. Silver met with Appellant, he took a detailed social history from her, which was significant to him.⁶⁴

Although Dr. Silver testified that psychological factors that

⁵⁸ *Id.* at 662:20–25.

⁵⁹ *See id.* at 670:10–24; *see also id.* at 674:3–16.

⁶⁰ *Id.* at 677:21.

⁶¹ *Id.* at 1092:17–20.

⁶² *See id.* at 1092:20–24.

⁶³ *Id.* at 1096:7–11.

⁶⁴ *Id.* at 1168:3–13.

contributed to the pain disorder preexisted the accident, at least in part,⁶⁵ when Dr. Silver was asked whether he formed an opinion as to when Appellant's pain disorder came into being, he testified "[n]ot specifically[,]” and “I would say after the accident.”⁶⁶ Dr. Silver testified that psychological problems influenced Appellant's pain experience but did not cause her pain.⁶⁷ Dr. Silver agreed that anything that affects one's life affects one psychologically.⁶⁸ But he testified that “[m]y opinion was that her injury and the pain that she experienced afterwards and the complex regional pain syndrome or, you know, whatever pain syndrome ends up being diagnosed.”⁶⁹

Over no objection, Dr. Silver testified that when he took Appellant's history, he took a history that included a psychological traumatic event when Appellant was a teenager.⁷⁰ Dr. Silver agreed that, as a psychologist, the more one knows about a person's background and who they are as a person, the better the psychological assessment.⁷¹ Dr. Silver also agreed that people have learned behaviors from childhood, which can be carried into adulthood.⁷² Although Dr. Silver testified that

⁶⁵ *Id.* at 1099:8–11.

⁶⁶ *Id.* at 1098:19–25.

⁶⁷ *Id.* at 1099:12–16.

⁶⁸ *Id.* at 1099:23–25.

⁶⁹ *Id.* at 1110:17–20.

⁷⁰ *Id.* at 1119:22–25.

⁷¹ *Id.* at 1128:17–22; *see also id.* at 1137:7–17.

⁷² *Id.* at 1128:23–1129:7.

people who have such trauma situations generally are more vulnerable and do not cope as well with injuries and pain,⁷³ Dr. Silver did not testify that Appellant was, in fact, more susceptible to the specific injuries and pain.

Exhibit 87, which was a timeline of Appellant's history from the records, was admitted for illustrative purposes and without objection.⁷⁴ The only objections to the questions stemming from that exhibit were to correct the form, which was corrected each time.⁷⁵ Dr. Silver agreed that the MMPI that Dr. Hamm administered supported the diagnosis of somatoform disorder and possibly anxiety-related disorder.⁷⁶

4. Dr. Hamm's opinions provided an alternative theory of the case, establishing that Appellant had an unrelated somatoform disorder.

John Edward Hamm, M.D., is a medical doctor who specializes in psychiatry.⁷⁷ He has been licensed in the state of Washington since 1976,⁷⁸ and he has extensive experience treating traumatic injuries, anxiety disorders, depression, and pain disorders.⁷⁹ Dr. Hamm has evaluated and treated people with chronic complaints of pain as a continuous part of his practice since his time in the Navy.⁸⁰ Dr. Hamm has diagnosed and

⁷³ *Id.* at 1120:5–8.

⁷⁴ *See id.* at 1129:8–1130:2.

⁷⁵ *Id.* at 1132:1–1133:7; *see also id.* at 1137:7–1143:13.

⁷⁶ *Id.* at 1153:9–16.

⁷⁷ *Id.* at 861:19–25.

⁷⁸ *Id.* at 862:1–2.

⁷⁹ *See id.* at 864:20–865:16.

⁸⁰ *Id.* at 866:12–15.

evaluated several thousand people with somatization or somatoform disorder over his 30 years of practice.⁸¹ He has also treated, diagnosed, and evaluated people with the label of CRPS.⁸² Wal-Mart asked Dr. Hamm to conduct a records review, which included a complete set of Appellant's medical records, her deposition transcript, and Dr. Silver's psychological records and testing.⁸³

Unlike other medical specialties, psychiatry evaluates the total person, not just a body part.⁸⁴ When a psychiatrist looks at the medical records, one sees not only the medical problems that a person has had, but also how that person has adapted or responded to it, used the medical care system, and had complaints or difficulties, all of which is important to a psychiatrist in understanding an individual.⁸⁵ A psychiatric diagnosis, and Dr. Hamm's diagnosis in this case, necessarily requires an extensive review of medical records, not just in relation to the specific injury in this case, but "based upon a lifetime of data that's available concerning medical symptoms and treatment."⁸⁶

Based on his review of Appellant's medical records, the

⁸¹ *Id.* at 866:16–19.

⁸² *Id.* at 866:20–22.

⁸³ *Id.* at 866:23–867:8. Dr. Hamm also examined Appellant, took a history from her, and conducted psychological testing. *See id.* at 868:2–11.

⁸⁴ *Id.* at 867:14–16.

⁸⁵ *Id.* at 867:17–22.

⁸⁶ *Id.* at 886:23–887:12. The history that Dr. Hamm took was significant to him. *See, e.g., id.* at 924:20–926:23.

psychological tests that he administered, the psychological test data that Dr. Hamm obtained from Dr. Silver, Appellant's deposition testimony, Dr. Hamm's examination and history that he took from Appellant, Dr. Hamm testified that Appellant had:

psychological based pain disorder, sometimes called somatoform or just a pain disorder based on psychological factors; and the ideology or cause of this is, basically, her underlying personality characteristics, the way she copes with things. Also, she has multiple stressors in her life that cause some difficulty for her that, I think, are independent of anything that happened on June 24, 2006.⁸⁷

A psychologically based pain disorder exists when a chief complaint is pain in one or more body parts, and where there are not adequate physical explanations in the sense of objective findings or tests to find a cause for the pain, along with "subjective complaints that way in excess of objective findings on testing[.]"⁸⁸ Dr. Hamm continued:

[F]urthermore, the impairment that the person has is disproportionate, as well; and they say they can't do anything. The pain is so terrible, they just can't do anything; but you're not finding much in the way of any objective reason for why they have that pain, or it may be murky.⁸⁹

Dr. Hamm testified that Appellant did not need any specific treatment

⁸⁷ *Id.* at 868:13–20; *see also id.* at 868:12–869:5, 886:9–17. Dr. Hamm testified that it was possible that Appellant's pain disorder developed since chronic pain from CRPS, but that this was not his opinion. *Id.* at 1031:1–13. Dr. Hamm also testified about the basis for his opinions. *See, e.g., id.* at 871:23–872:13.

⁸⁸ *Id.* at 872:16–22.

⁸⁹ *Id.* at 872:22–873:2; *see also id.* at 873:3–874:5.

other than that she would benefit from employment, structured time, recreational activities, and socialization.⁹⁰ He noted that it would benefit her to de-emphasize her excessive mental focus on pain and to get more active, because “[a]ctivity has been shown to help people with psychological problems and also people with chronic pain problems.”⁹¹ Dr. Hamm testified unequivocally that Appellant had a somatoform pain disorder, also referred to as pain disorder with psychological factors, and he explained the basis for his Axis I diagnosis.⁹² Dr. Hamm testified that Appellant had a psychogenic pain disorder that was psychologically based, not related to CRPS.⁹³

Dr. Hamm’s Axis II diagnosis was of hysteroid personality traits, and he explained the basis for that opinion as well.⁹⁴ Axis III involved various pain complaints, and Dr. Hamm testified about the significant basis for that component, which necessarily included a chronological history of Appellant’s medical problems, stressors, and reactions thereto, as well as his Axis IV diagnosis.⁹⁵ It was necessary for Dr. Hamm to explore all of this because one’s life experiences affect how one responds to normal life events, and is able to function in the world.⁹⁶ A psychiatrist

⁹⁰ *See id.* at 869:14–870:8.

⁹¹ *Id.* at 869:19–25.

⁹² *Id.* at 888:22–893:5.

⁹³ *See id.* at 893:23–894:9.

⁹⁴ *Id.* at 894:14–895:9.

⁹⁵ *Id.* at 895:16–904:22.

⁹⁶ *See id.* at 905:1–3.

needs to understand the whole person in order to treat, especially when “the diagnosis isn’t clear or if the subjective complaints are the predominant finding rather than some really specific objective finding that can be treated like an infection or something.”⁹⁷ Dr. Hamm testified that CRPS was not clearly accepted in the medical community and that there was a medical controversy about what the criteria are for a diagnosis.⁹⁸ Dr. Hamm also noted that there was a strong psychological component to CRPS, and sometimes it is all psychological, with a CRPS misdiagnosis.⁹⁹

Dr. Hamm unequivocally testified that Appellant had her psychological problems before the incident, and they were not caused or aggravated by the incident.¹⁰⁰ Dr. Hamm’s opinion was that, rather than anything physically wrong with Appellant, she had a psychologically borne problem.¹⁰¹ Dr. Hamm testified that Appellant was fully capable of work, and that work could be good for her.¹⁰²

On cross-examination, Appellant asked Dr. Hamm about other Appellant’s prior injury history, including a shoulder injury that she sustained,¹⁰³ seizures that she faked,¹⁰⁴ Appellant’s social history,¹⁰⁵ and

⁹⁷ *Id.* at 905:3–8.

⁹⁸ *Id.* at 943:6–19.

⁹⁹ *Id.* at 943:21–944:4.

¹⁰⁰ *Id.* at 929:3–8; *see also id.* at 930:11–17.

¹⁰¹ *See id.* at 931:1–13. Over no objection, Dr. Hamm explained how the concept of secondary gain was a contributing factor. *See id.* at 932:17–933:6.

¹⁰² *Id.* at 932:11–16.

¹⁰³ *Id.* at 995:8–999:8.

the dramatic and frequent nature of Appellant's emergency room visits.¹⁰⁶ Appellant even elicited testimony from Dr. Hamm that if he did not know all about the emergency room visits, his opinion or diagnosis might be erroneous.¹⁰⁷ Even if Appellant had CRPS, Dr. Hamm would have the opinion that Appellant had a psychological pain disorder with a medical condition of CRPS.¹⁰⁸

Appellant thoroughly cross-examined Dr. Hamm regarding the propriety of his reliance or review of the prior medical history, focusing on Appellant's early factitious seizure disorder and a febrile seizure, as well as other social stressors and history that Dr. Hamm considered in arriving at his opinions.¹⁰⁹ After Appellant's cross-examination, Dr. Hamm explained, *inter alia*, that prior traumas, even in childhood, were significant because they shape personality and brain development, and influence subsequent experiences.¹¹⁰

Appellant's pain complaints were based on psychological problems, not physical problems.¹¹¹ Appellant's symptomatic pain disorder preexisted the shopping cart incident, and the incident did not

¹⁰⁴ *Id.* at 999:16–1000:7.

¹⁰⁵ *Id.* at 1000:8–15.

¹⁰⁶ *See id.* at 1000:16–1004:20.

¹⁰⁷ *See id.* at 1010:25–1011:4.

¹⁰⁸ *Id.* at 1013:15–19.

¹⁰⁹ *See, e.g., id.* at 1021:17–1025:12, 1026:11–1029:12.

¹¹⁰ *See, e.g., id.* at 1051:11–1052:1.

¹¹¹ *Id.* at 1047:6–8.

play any role whatsoever in causing or aggravating Appellant's psychological pain disorder.¹¹²

C. The record shows no trial court bias.

The trial court did not describe Appellant's diagnosis as "murky"; it stated—outside the presence of the jury and during argument on jury instructions—that it believed that the witnesses had made this characterization.¹¹³ The jury was not in the courtroom at this time.

Dr. Loeser used the word "murky" in his testimony about CRPS, in response to a hypothetical question posed by Appellant's counsel. Dr. Loeser testified, *inter alia*, as follows:

The first thing I would say about the hypothetical, it was probably a neurologist; and this is why over the last 40 years, the new field of pain management has developed because physicians have failed to recognize that pain is, in itself, a disease that needs to be treated and that patients can have pain problems of which CRPS is a typical example that you can't just dismiss because you can't find some anatomic cause; and, you know, neurologists typically see people with headaches all the time; and they don't say, [i]t's murky; **You have a headache; It's a murky condition. Headaches are every bit as murky as CRPS. Nobody knows why. Treatments are sometimes effective, sometimes not.**¹¹⁴

Dr. Vu admitted that diagnosing CRPS was "more challenging" than diagnosing a broken arm¹¹⁵ and called it a "tough diagnosis."¹¹⁶ Dr. Vu

¹¹² *Id.* at 1040:14–1041:15.

¹¹³ *See id.* at 1561:8–22.

¹¹⁴ *Id.* at 550:10–21 (emphasis added).

¹¹⁵ *See id.* at 489:20–24.

also admitted that on certain days Appellant did not present with symptoms on certain visits.¹¹⁷

The trial court did not state or imply that Appellant was malingering. When the trial court noted (outside the presence of the jury)¹¹⁸ that “we haven’t even established whether or not she suffers from the touch,” it was obviously referring to the fact that Appellant had not yet presented expert testimony on that point:

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, [Dr. Vu] 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 or whether or not for whatever

¹¹⁶ *Id.* at 677:21.

¹¹⁷ *See id.* at 491:13–492:14; *see also id.* at 666:2–10.

¹¹⁸ RP at 421:22–25.

reason—

MR. WEST: Okay.

THE COURT: —she doesn't suffer from it.

MR. WEST: I'll do it—I'll—

THE COURT: All right.

MR. WEST: I will proceed as you've indicated.¹¹⁹

Wal-Mart was unable to find any bias in the record on review.

D. The trial court properly exercised its discretion in selecting jury instructions.

1. Future lost earnings

The trial court instructed the jury that it should consider as an element of future economic damages “[t]he reasonable value of earnings with reasonable probability to be lost in the future.”¹²⁰ The jury did not award any future economic damages.¹²¹ It awarded \$1,000 for past and future noneconomic damages.¹²²

Dr. Loeser testified that there was no medical reason why a person with CRPS cannot work, as long as the pain does not preclude the person from functioning in the job.¹²³ Dr. Vu did not testify regarding Appellant's

¹¹⁹ RP at 422:1–423:3.

¹²⁰ CP 479. The instruction for past economic damages stated that the jury should consider “[t]he reasonable value of earnings lost to the present time.” *Id.*

¹²¹ CP 490.

¹²² *Id.*

¹²³ *See* RP at 644:12–645:13. Appellant's counsel attempted to ask Dr. Loeser questions about pain and working, but did not establish a foundation and then abandoned the line of questioning. *Id.* 646:21–649:9.

ability to work,¹²⁴ other than to testify that Appellant asked to have a week off and that Dr. Vu said that she could have five days off and then go back to work.¹²⁵ In his deposition, Dr. Vu agreed that CRPS was an especially tough diagnosis because of Appellant's psychological situation.¹²⁶ Dr. Vu agreed that it was in Appellant's best interest to get off the couch, as much as is tolerable, walk, be vigorous, and be active.¹²⁷ As a psychologist, Dr. Silver was not able to comment on Appellant's ability to work,¹²⁸ but he was impeached by his deposition testimony, in which he testified that from a psychological point of view, he thought that Appellant probably could return to work as a dental assistant.¹²⁹

2. Aggravation, lighting up, or susceptibility

Appellant did not propose an instruction on aggravation of pre-existing injury.¹³⁰ Appellant proposed jury instructions on previous infirm condition and particular susceptibility.¹³¹ Wal-Mart proposed an

The record on review does not contain any testimony from any other expert witness regarding economic loss, ability to work, or earning capacity.

¹²⁴ See *id.* at 411:16–495:25, 650:5–688:10.

¹²⁵ *Id.* at 654:10–17. Dr. Vu testified that he could not tell whether Appellant's alleged CRPS was permanent. *Id.* at 676:22–677:1. The appellate record contains no testimony from Appellant's vocational and economic experts.

¹²⁶ *Id.* at 677:5–19.

¹²⁷ *Id.* at 678:7–24.

¹²⁸ *Id.* at 1121:22–25.

¹²⁹ *Id.* at 1122:20–1123:24.

¹³⁰ See CP 410–413 & 452–455; RP at 1586:6–8.

¹³¹ CP 410–413 & 452–455.

aggravation instruction,¹³² but only if Appellant's instruction was given.¹³³

The trial court considered the testimony and evidence offered at trial and determined that it was inappropriate to instruct the jury as to aggravation of a preexisting condition or previous infirm condition, because there was no testimony from any witness that there was a preexisting condition that was lit up or made active.¹³⁴ The evidence presented on preexisting condition was speculative.¹³⁵ It was inappropriate to give a susceptibility instruction because there was no such testimony.¹³⁶ The trial court recognized that none of the testimony rose to the level where such jury instructions were needed.¹³⁷

E. The trial court exercised its discretion and calculated the cost bill.

The jury verdict was \$6,433.35 in favor of Appellant.¹³⁸ This was less than Wal-Mart's \$30,000.00 offer of judgment.¹³⁹ Wal-Mart was the prevailing party.¹⁴⁰

Wal-Mart subsequently submitted its cost bill, requesting

¹³² See CP 463.

¹³³ RP 1584:2-8.

¹³⁴ *Id.* at 1587:22-1588:1.

¹³⁵ *Id.* at 1588:1-3.

¹³⁶ *Id.* at 1588:12-16.

¹³⁷ *Id.* at 1589:20-23.

¹³⁸ CP 490.

¹³⁹ CP 501, 528.

¹⁴⁰ RCW 4.84.010.

\$5,526.17 in costs.¹⁴¹ Appellant filed a two-page response to the cost bill.¹⁴² The trial court granted Wal-Mart its costs.¹⁴³ The net judgment entered for Plaintiff was in the amount of \$907.18, with post-judgment interest at 2.188% per annum.¹⁴⁴ Appellant's new trial motion was denied.

V. ARGUMENT AND AUTHORITY

A. Standard of review

Evidentiary rulings are reviewed for abuse of discretion.¹⁴⁵ A trial court's decision whether to give a particular instruction to the jury is reviewed for abuse of discretion.¹⁴⁶ This standard also applies to questions regarding the number and specific wording of instructions.¹⁴⁷

Discretion is abused only when no reasonable person would adopt the trial court's position.¹⁴⁸ If reasonable people could differ as to the propriety of the trial court's action, then there is no abuse of discretion.¹⁴⁹ The judgment of the trial court will not be reversed when it can be sustained on any theory, even if different from the one stated.¹⁵⁰

¹⁴¹ CP 493–94. The cost bill was supported by affidavit. CP 500–15.

¹⁴² CP 516–517.

¹⁴³ CP 526–29.

¹⁴⁴ CP 527–29.

¹⁴⁵ See, e.g., *Veit v. Burlington N. Santa Fe Corp.*, 171 Wn.2d 88, 99, ___ P.3d ___ (2011).

¹⁴⁶ *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

¹⁴⁷ *Id.*

¹⁴⁸ See *Jankelson v. Cisel*, 3 Wn. App. 139, 142, 473 P.2d 202 (1970).

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 347, 552 P.2d

B. Permitting jurors to touch Appellant's foot was not an abuse of discretion.

1. Evidence regarding the temperature of Appellant's feet was relevant.

The trial court's evidentiary rulings provide no basis for reversal. Error cannot be predicated on the admission of evidence unless the substantial right of a party is affected and a timely objection or motion to strike is made, stating specifically the grounds.¹⁵¹ Generally, all relevant evidence is admissible.¹⁵² Relevant evidence is that which has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.¹⁵³ It is not error to permit the jury to manually examine evidence in a personal injury case.¹⁵⁴

184 (1976).

¹⁵¹ WASH. R. EVID. 103(a).

¹⁵² WASH. R. EVID. 402.

¹⁵³ WASH. R. EVID. 401. In order to exclude admissible evidence based on prejudice, its probative value must be "substantially outweighed" by the danger of unfair prejudice, confusion of issues, misleading the jury, or undue delay, waste of time, or needless presentation of cumulative evidence. WASH. R. EVID. 403.

¹⁵⁴ See, e.g., *Sampson v. St. Louis & S.F.R. Co.*, 156 Mo. App. 419, 428, 138 S.W. 98 (1911) (following testimony that plaintiff's injured hand had abnormal circulation of blood and remained cold all the time, the jury was permitted to feel them); *Dictz v. Aronson*, 244 A.D. 746, 279 N.Y.S. 66 (N.Y. 1935) (error to not permit jury to examine infant plaintiff's throat); *McAndrews v. Leonard*, 99 Vt. 512, 519-521, 134 A. 710 (1926) (no error where jury was permitted to touch parts of plaintiff's head to compare softness and hardness between normal area and area from which portion of skull was removed); *Grubaugh v. Simon J. Murphy Co.*, 209 Mich. 551, 561-62, 565, 177 N.W. 217 (1920) (no error to permit plaintiff to enter jury box and allow jurors to feel a lump on his injured arm); and *Bluebird Baking Co. v. McCarthy*, 36 N.E. 801 (1935) (no prejudicial error in permitting the jurors to place fingers on a skull depression that was

In this case, the evidence regarding the temperature of Appellant's feet was relevant, and introduced on direct examination of Appellant and her sister. Even if the temperature evidence was somehow inadmissible, Appellant cannot cry foul because she opened the door to that evidence.¹⁵⁵

2. There was no experiment.

The jurors' touching of Appellant's feet did not constitute an experiment in which the jury acquired evidence outside of trial. First, it occurred in court, during trial, at the request of a juror, and following colloquy of counsel, during which Appellant's counsel moved that, if one juror was going to be permitted to do so, all should. Second, even if it were like viewing an accident scene, it is not error to allow jurors to do so in order to better understand the testimony in the case.¹⁵⁶ Third, no diagnosis was made by the jurors; they simply asked to touch the feet because of the contradictory testimony that Appellant elicited on direct examination regarding foot coldness. Fourth, the purpose of the touching

concealed by hair).

¹⁵⁵ See, e.g., *Estate of Stalkup v. Vancouver Clinic, Inc., P.S.*, 145 Wn. App. 572, 585, 187 P.3d 291 (2008).

Even if it were error to permit the jury to touch the foot after receiving conflicting testimony about temperature differences, Appellant invited the error by asking for an all-or-nothing approach. "Under the invited error doctrine, a party may not set up an error at trial and then complain of it on appeal." *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wn. App. 677, 681, 50 P.3d 306 (2002). The invited error doctrine prevents a party from taking an affirmative and voluntary action that induces the trial court to take an action that a party later challenges on appeal. See *id.*

¹⁵⁶ Appellant cites to *Cole v. McGhie*, 59 Wn.2d 436, 444-45, 367 P.2d 844 (1962), but the facts in *Cole* are nothing like this case.

was not to elicit pain. The record shows that the jurors were simply permitted to compare the relative temperatures of the two feet.¹⁵⁷

The trial court exercised its discretion to permit manual examination of evidence following lay testimony regarding temperature. Jurors look at exhibits. They listen to testimony, observe witnesses, and read documents. They are also entitled to manually examine evidence when the trial court, in its discretion, so permits.

3. A ruling is not a comment on evidence.

The rule against judicial comments on evidence “forbids only 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 the trial.”¹⁵⁸ The rule is intended to prevent the jury from being influenced by knowledge conveyed by the trial judge as to his opinion of the evidence submitted.¹⁵⁹ “An impermissible comment conveys to the jury a judge’s personal attitudes toward the merits of a case or permits the jury to infer from what the judge said or did not say that he or she believed or disbelieved the testimony in question.”¹⁶⁰ The purpose of the rule is to avoid influencing

¹⁵⁷ RP at 255:11–13; *see also id.* at 265:12–13.

¹⁵⁸ *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970) (citations omitted).

¹⁵⁹ *See, e.g., Casper v. Esteb Enterprises*, 119 Wn. App. 759, 770–71, 82 P.3d 1223 (2004).

¹⁶⁰ *See, e.g., id.* (citing *Hamilton v. Dept. of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988)).

the jury.¹⁶¹ Permitting the jury to have and examine exhibits does not convey to the jury, either directly or by implication, any suggestion as to the court's opinion of credibility, sufficiency, or weight of evidence.¹⁶²

In this case, the trial court made no comment on the evidence. Appellant's brief identifies no words or conduct whatsoever made by the trial court in the presence of the jury.¹⁶³ Appellant's argument implies that its ruling on a question from a juror, alone, was a comment on evidence. Appellant has no legal basis for this argument.

4. Appellant failed to preserve error on this issue.

Even if there had been a comment on evidence, Appellant did not

¹⁶¹ See *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Put another way, the jury must be able to infer from the trial court's comments that it personally believes or disbelieves evidence related to a disputed issue. *Jankelson v. Cisel*, 3 Wn. App. 139, 145, 473 P.2d 202 (1970). Even in criminal cases, there must first be a demonstration that the trial court's conduct or remarks constitute a comment on the evidence before there can be any presumption of prejudice. See generally *Lane*, 125 Wn.2d at 838.

¹⁶² See *State v. Jacobsen*, 78 Wn.2d 491, 494–95, 477 P.2d 1 (1970); see also *State v. Cerny*, 78 Wn.2d 845, 855–56, 480 P.2d 199 (1971) (holding that "A trial court, in passing upon objections to testimony, has the right to give its reasons therefore and the same will not be treated as a comment on the evidence.").

Moreover, juries are presumed to have followed the court's instruction. *Id.* at 856. Here, the trial court instructed the jury that the trial court was not permitted to comment on evidence in any way and that if it appeared to the jury that the court had done so, either during trial or in giving the instructions, the jury must disregard it entirely. See CP 468.

¹⁶³ Appellant argues that the court said, "I can understand. She says it's very, very, very painful." *E.g.*, Appellant's Brief at 36 (citing "RP 256 8–9"). But this was not said within the presence of the jury. RP at 252:19 (stating, "(The jury was not present.)"), and 256:21–22 (stating "(A recess was taken.) (The jury was not present.)").

raise this issue at a time when the trial court could have corrected it. To preserve error, a party must call it to the court's attention at a time when the error can be corrected.¹⁶⁴ Although a party is not necessarily precluded from raising the question on appeal if they were brought on a motion for new trial,¹⁶⁵ “[c]ounsel cannot, in the trial of a case, remain silent as to claimed errors and later, if the verdict is adverse, urge this trial objections for the first time on appeal.”¹⁶⁶ When a party makes claims regarding bias and appearance of fairness, the party must timely object at trial.¹⁶⁷

In this case, Appellant did not object at trial about any purported comment on evidence. Appellant's motion for new trial did not argue,¹⁶⁸ and the declaration of one of the jurors in no way indicated that there had been a comment on the evidence.¹⁶⁹ It was not until oral argument on the motion for new trial that Appellant mentioned this theory, and only then in passing.¹⁷⁰ This issue was not preserved for appeal.

¹⁶⁴ *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

¹⁶⁵ *Id.*

¹⁶⁶ *Seattle v. Harclaon*, 56 Wn.2d 596, 597, 354 P.2d 596 (1960) (citations omitted).

¹⁶⁷ *See State v. Morgensen*, 148 Wn. App. 81, 90, 197 P.3d 715 (2008).

¹⁶⁸ *See* CP 531–35.

¹⁶⁹ *See id.* at 536–37.

¹⁷⁰ *See* RP at 1624:2–14. Appellant's counsel argued that “when I asked the Court, [‘]You’ve got to stop this,[’] you said, [‘]No, she’s got to go through it.[’]” *Id.* at 1623:25–1624:1. Of course, there was no such exchange between Appellant's counsel and the trial court. *See id.* at 265:17–266:14.

To the extent that Appellant implies that a limiting instruction should have been made, the failure to make such a request “constitutes a waiver of that party's right to such an instruction and fails to preserve the claimed error

C. Wal-Mart was entitled to cross-examine Appellant's experts and provide the testimony of Dr. Hamm, testified unequivocally that Appellant's complaint was actually an unrelated somatoform pain disorder.

A party is entitled to cross-examine experts regarding the facts and data underlying their opinions, regardless of whether those underlying facts and data are themselves admissible in evidence.¹⁷¹ This is especially appropriate when the information supplied to a witness contains irregularities or evidence that it was incomplete or unreliable.¹⁷²

Appellant offered testimony from Dr. Loeser and Dr. Silver, and Wal-Mart was entitled to cross-examine them regarding the basis of their opinions. Wal-Mart's expert, Dr. Hamm, rebutted the opinions of Dr. Loeser, and Dr. Silver, and he testified on a more probable than not basis that Appellant's complaint was an unrelated somatoform pain disorder that was not caused, lit up, or aggravated by the subject incident.

1. Appellant's counsel provided Dr. Loeser with all of the medical records, and Wal-Mart was entitled to ask about these on cross-examination.

Appellant's counsel expressly stated that Dr. Loeser had seen all of the medical records at issue: "We're ready to go; and, actually, I was

for appeal." *State v. Newbern*, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999).

¹⁷¹ WASH. R. EVID. 705; *see also* WASH. R. EVID. 703. To the extent that Appellant argues that the trial court changed its ruling on evidence, this does not provide a basis for appeal. Motions in limine are, by their nature, interlocutory in character. *See, e.g., Jordan v. Berkey*, 26 Wn. App. 242, 611 P.2d 1382 (1980).

¹⁷² *See Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 556, 519 P.2d 278 (1974).

wrong. Dr. Loeser, I believe, did see all the medical records. We did send him everything he received, so he looked at them; so I think we're ready to go."¹⁷³ On direct examination, Dr. Loeser testified that he had reviewed all of the records and testified at length that he did not believe that Appellant had a psychological problem.¹⁷⁴

On cross-examination, Dr. Loeser testified that he believed that it was valuable to look at Appellant's past medical history and had done so.¹⁷⁵ Dr. Loeser was aware of and wanted to know about Appellant's prior medical history.¹⁷⁶ Much of the cross-examination of Dr. Loeser was made without objection.¹⁷⁷ Most of Appellant's objections as to certain history were made as to form, not relevance or prejudice.¹⁷⁸

Dr. Loeser even agreed that when a person complains of pain, a doctor always has to consider all of the various possibilities, including the role of psychological factors.¹⁷⁹ Appellant elicited Dr. Loeser's testimony that in order to diagnose CRPS, one had to look at, *inter alia*, Appellant's history well before the accident.¹⁸⁰

These were proper areas of inquiry under the evidence rules.

¹⁷³ RP 529:7-11.

¹⁷⁴ *Id.* at 542:6-17, 547:3-548:24, 560:20-561:5.

¹⁷⁵ *Id.* at 596:8-15.

¹⁷⁶ *Id.* at 598:21-24.

¹⁷⁷ *See, e.g., id.* at 598:25-599:17, 605:3-18, 605:19-606:16, 608:4-12.

¹⁷⁸ *See, e.g., id.* at 599:18-602:3.

¹⁷⁹ *See generally id.* at 608:13-23, 609:14-610:3.

¹⁸⁰ *See id.* at 623:21-624:6.

Appellant's argument regarding other conditions is misplaced. Wal-Mart was not inquiring about these areas in order to cause the jury to speculate about preexisting injuries.¹⁸¹ To the contrary, Appellant's medical history formed the basis of a completely alternative theory of Appellant's complaints: that Appellant's present complaints were not from CRPS, but rather a longstanding somatoform pain disorder that was not caused by or related to the subject incident and for which Wal-Mart was not liable.

2. Wal-Mart was entitled to cross-examine Dr. Silver regarding his opinions and the basis for them after he testified that Appellant's detailed history was significant to him and that Appellant had a pain disorder as well as CRPS.

Wal-Mart was also entitled to inquire about the facts and data underlying Dr. Silver's opinions on cross-examination.¹⁸² Appellant called Dr. Silver, who testified that he diagnosed Appellant with a pain disorder with anxiety, depression, a general medical condition that was probably complex regional pain syndrome,¹⁸³ and a dysthymic disorder or an adjustment disorder with mixed anxiety and depressed mood.¹⁸⁴

Dr. Silver took a detailed social history from Appellant, and this

¹⁸¹ Brief of Appellant at 38–42. Appellant's cases are not on point. None of them involves a set of facts like this case, where preexisting medical history was considered by experts and formed part of the basis for an unequivocal expert opinion. Even if there were error, it was harmless. See *Hoskins v. Reich*, 142 Wn. App. 557, 174 P.3d 1250, rev. denied, 164 Wn. 2d 1014, 195 P.3d 88 (2008).

¹⁸² WASH. R. EVID. 705.

¹⁸³ RP at 1092:17–20.

¹⁸⁴ See *id.* at 1092:20–24.

was significant to him.¹⁸⁵ Dr. Silver equivocated when asked when Appellant's pain disorder came into existence, testifying, "[n]ot specifically[.]" and "I would say after the accident."¹⁸⁶ He also testified that psychological problems influenced Appellant's pain experience but did not cause her pain.¹⁸⁷ Dr. Silver agreed that, as a psychologist, the more one knows about a person's background and who they are as a person, the better the psychological assessment.¹⁸⁸ Like Dr. Loeser, Dr. Silver's testimony demonstrated that Appellant's medical and social history was pertinent to the psychiatric or psychological expert opinions.

3. Dr. Hamm testified unequivocally regarding his opinions and the basis for his opinions.

Experts may testify as to opinions when scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.¹⁸⁹ Dr. Hamm testified as to his psychiatric opinion that Appellant's complaints resulted from a somatoform pain disorder that preexisted the incident, and was not lit up by, aggravated by, caused by, or related to the incident. His opinion was relevant. It provided an alternate diagnosis/explanation of Appellant's problems, one for which Wal-Mart was not liable. In reaching this opinion, Dr. Hamm reviewed and relied upon Appellant's available

¹⁸⁵ *Id.* at 1168:3-13; *see also id.* at 1119:22-25.

¹⁸⁶ *Id.* at 1098:19-25.

¹⁸⁷ *Id.* at 1099:12-16.

¹⁸⁸ *Id.* at 1128:17-22; *see also id.* at 1137:7-17.

¹⁸⁹ *See* WASH. R. EVID. 702.

medical and social history.

If of a type reasonably relied upon by experts in the particular field, the facts and data underlying an expert's opinion need not be admissible in evidence.¹⁹⁰ Expert witnesses can be required to disclose the facts or data underlying an opinion on cross-examination or by court order.¹⁹¹ Appellant argues that Dr. Hamm's testimony was speculative, but the record shows that there was nothing speculative or equivocal about his testimony and opinions. Appellant's arguments go to weight, not admissibility,¹⁹² and such arguments do not permit reversal.¹⁹³ The jury is entitled to disregard the opinions of expert witnesses and treating doctors that it finds incredible.¹⁹⁴

Even Dr. Vu testified about somatization and malingering,¹⁹⁵ and he stated, *inter alia*, that if there is litigation going on, one has to consider psychological overlay, secondary gain, and malingering.¹⁹⁶ Dr. Vu admitted that as a pain specialist, he must consider the psychological and psychiatric components of a patient's pain, and there must be a

¹⁹⁰ WASH. R. EVID. 703.

¹⁹¹ WASH. R. EVID. 705.

¹⁹² See *State v. Lord*, 117 Wn.2d 829, 853, 822 P.2d 177 (1991).

¹⁹³ The weight of an expert's testimony falls solely within the province of the jury. See, e.g., *Sigurdson v. Seattle*, 48 Wn.2d 155, 164-65, 292 P.2d 214 (1956).

¹⁹⁴ See, e.g., WPI 2.10.

¹⁹⁵ RP at 467:17-470:9.

¹⁹⁶ *Id.* at 469:17-470:9.

psychological assessment before a spinal cord surgery or implantation.¹⁹⁷

He admitted that CRPS was a “tough diagnosis.”¹⁹⁸

Dr. Hamm reviewed Appellant’s prior medial records and social history and formed a psychiatric opinion. That opinion was made unequivocally and without speculation. It was admissible.

4. Appellant did not preserve error regarding Dr. Hamm’s testimony.

Even if any of the testimony elicited from Drs. Loeser, Silver, Vu, or Hamm was inadmissible, Appellant did not make contemporaneous objections to many of the questions. Appellant has not indicated how the few questions to which there were objections created any error.

When it comes to testimony offered at trial, “[a] party must specifically object to evidence presented at trial and allow the trial court to rule on the issue to preserve the matter for appellate review.”¹⁹⁹ “Counsel’s tactical choices may dictate that he remain silent to otherwise objectionable testimony. However, the decision to remain silent is not without consequence.”²⁰⁰ By failing to object at a point that will give the trial judge an opportunity to correct an alleged error, counsel waives the right to appeal on that issue.²⁰¹ “Raising the issue in a motion for a new

¹⁹⁷ See *id.* at 669:16–24.

¹⁹⁸ *Id.* at 677:21.

¹⁹⁹ *State v. Rasmussen*, 70 Wn. App. 853, 859, 855 P.2d 1206 (1993).

²⁰⁰ *State v. Kendrick*, 47 Wn. App. 620, 636, 736 P.2d 1079 (1987).

²⁰¹ *Id.* (citing RAP 2.5(a) and *State v. Jones*, 70 Wn.2d 591, 597, 424 P.2d 665 (1967)).

trial does not provide the trial court with the requisite opportunity to correct error.”²⁰² “Consequently, counsel may not ‘remain silent at trial as to claimed errors and later, if the verdict is adverse, urge trial objections for the first time in a motion for new trial or appeal.’”²⁰³ If the trial court grants a motion to exclude evidence but permits that evidence to be admitted, the complaining attorney should renew the objection at trial to make a record for appeal.²⁰⁴

For example, Appellant did not contemporaneously object when Dr. Loeser testified about what he reviewed. Appellant did not contemporaneously object when Dr. Hamm testified about what he reviewed and considered, except for the one time cited in Appellant’s brief, which provides no indication as to how the overruling of that objection was so prejudicial so as to require a new trial. It does not appear that Appellant ever made an objection in trial that prejudice substantially outweighed probative value of testimony or that any testimony was cumulative and prejudicial.

5. Even if it were error to permit certain testimony from Dr. Loeser or Dr. Hamm, Appellant waived or invited error by repeatedly eliciting testimony on this issue.

When a party objects to evidence but then subsequently uses that

²⁰² *Kendrick*, 47 Wn. App. at 636.

²⁰³ *Id.* (quoting *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986)); see also *Payless Car Rental Sys. v. Draayer*, 43 Wn. App. 240, 243, 716 P.2d 929 (1986).

²⁰⁴ *State v. Sullivan*, 69 Wn. App. 167, 172–73, 847 P.2d 953 (1993).

evidence for her own purposes, or by introducing evidence that is similar to that which was already objected to, that party waives her objection.²⁰⁵

Appellant asked numerous questions regarding Dr. Hamm's basis for his opinions, in an attempt to attack his credibility. Appellant attempted to use that which she now labels as inadmissible and prejudicial in her own campaign to undermine Dr. Hamm's credibility and bolster that of her own experts.

D. The record provides no support for Appellant's argument that there was bias or a violation of the appearance of fairness doctrine.

The appearance of fairness doctrine was not violated. Appellant must demonstrate actual or potential bias.²⁰⁶ Without such evidence, such a claim has no merit.²⁰⁷ If a reasonably prudent and disinterested observer would conclude that there was a fair, impartial, and neutral trial, then the claim has no merit.²⁰⁸ Bias is not presumed.²⁰⁹

The record on review indicates that the trial was conducted in a fair and even-handed manner. Appellant disagrees with certain rulings and the verdict. But this is not enough. Appellant must demonstrate actual or

²⁰⁵ See, e.g., *Storey v. Storey*, 21 Wn. App. 370, 376–77, 585 P.2d 183 (1978); see also *Sevener v. Northwest Tractor & Equip. Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952) (holding that by using a notebook to support testimony about a negotiation, the appellant used the notebook for its own benefit and thereby waived the objection).

²⁰⁶ See, e.g., *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995).

²⁰⁷ See *Carter*, 77 Wn. App. at 12.

²⁰⁸ See *State v. Dominguez*, 81 Wn. App. 325, 330, 914 P.2d 141 (1996).

²⁰⁹ *Id.* at 328–29.

potential bias. This she does not do.

Appellant's argument is comprised solely of mischaracterizations of statements or rulings, which are also taken completely out of context. The trial court did not demonstrate any bias, let alone in front of the jury. The trial court did nothing that showed bias. Appellant cannot even articulate the nature, type, or measure of any particular bias.

Even if there were any such a demonstration, Appellant made no motion for recusal based on any perceived bias. A party must use due diligence to discover possible grounds for recusal, and then it must act upon this information by promptly seeking recusal.²¹⁰ Recusal was never mentioned by Appellant, and the trial court had no reason to know of any basis for recusal. The issue was not preserved for appeal. Appellant's disingenuous argument lacks both merit and propriety.

E. The trial court exercised discretion in choosing the number of jury instructions on wage loss.

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.²¹¹ It is a well established rule that jury instructions must be considered in their entirety.²¹² A trial court's decision whether to give a particular instruction

²¹⁰ See *State v. Carlson*, 66 Wn. App. 909, 916, 833 P.2d 463 (1992), *rev. denied*, 120 Wn.2d 1022, 844 P.2d 1017 (1993).

²¹¹ *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

²¹² *Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 194, 668 P.2d 571 (1983).

to the jury is a matter that the appellate court reviews for abuse of discretion.²¹³ It is not an error for the trial court to refuse to give cumulative or repetitious instructions.²¹⁴

In this case, the trial court instructed the jury as to future lost earnings, which encompasses impaired earning capacity had the jury had given the plaintiff any award for future economic damages. The case law on this jury instruction focuses on whether the plaintiff receives a double recovery for both lost earnings and lost earning capacity.²¹⁵ In fact, the appellate cases on jury instructions that consider the distinction between future earnings and future earning capacity are instances where the defendant has appealed a jury's award in favor of the plaintiff, not the other way around.²¹⁶

The trial court exercised its discretion and concluded that it was unnecessary to include an instruction separating future wage loss from impaired future earning capacity. This was not error, and it caused no prejudice. Appellant was permitted to present and argue her damages theory with the instruction provided.²¹⁷ There obviously was no such duplication of elements in this case, because the jury awarded no future

²¹³ *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010).

²¹⁴ *State v. Hawkins*, 70 Wn.2d 697, 708–09, 425 P.2d 390 (1967).

²¹⁵ *Meissner v. Seattle*, 14 Wn. App. 457, 461, 542 P.2d 795 (1975).

²¹⁶ *See, e.g., id.* at 461.

²¹⁷ In obtaining the verbatim report of proceedings, Appellant did not include any expert vocational and economic testimony.

economic damages whatsoever. There is no basis for reversal.

F. The trial court did not abuse its discretion in declining to give an instruction on aggravation, lighting up, or susceptibility.

The trial court considered the evidence and testimony offered at trial, recognized that the evidence and testimony did not warrant jury instructions on aggravation, lighting up, or susceptibility, and exercised its discretion to decline to give those instructions.²¹⁸ A trial court's decision to give a jury instruction is reviewed for abuse of discretion when based upon a matter of fact.²¹⁹ Each instruction must be supported by substantial evidence.²²⁰ It is not appropriate to give an instruction on aggravation when there is no evidence that any pain or disability was being caused by the pre-existing condition prior to the occurrence,²²¹ and it is error to do so without evidence of such an injury.²²² In order to give an instruction on

²¹⁸ Appellant did not submit a jury instruction on aggravation. Appellant should not be permitted to now claim that the trial court erred by not instructing the jury on an issue when Appellant did not propose that the jury be instructed on it in the first place.

²¹⁹ See *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

²²⁰ *Enslow v. Helmcke*, 26 Wn. App. 101, 104, 611 P.2d 1338 (1980). Evidence is substantial when it is sufficient to persuade a fair-minded person of the truth of the declared premise. *Bryant v. Palmer Coking Coal Co.*, 86 Wn. App. 204, 210, 936 P.2d 1163 (1997).

²²¹ See Comment to WPI 30.17 (Aggravation of Pre-Existing Injury) (citing *Greenwood v. Olympic, Inc.*, 51 Wn.2d 18, 23, 315 P.2d 295 (1957) (determining that it was improper for the jury to speculate about a prior injury when there was no testimony of such a prior injury)); see also *Reeder v. Sears, Roebuck & Co.*, 41 Wn.2d 550, 557, 250 P.2d 518 (1952) (concluding that there was no evidence in the record that the plaintiff was suffering from injury to his back from a prior injury).

²²² *Vaughan v. Bartell Drug Co.*, 56 Wn.2d 162, 164, 351 P.2d 925 (1960) (stating that "the instruction could only inject into the case an issue on

lighting up, there must be evidence presented that a condition was lit up or made active because of the incident, which requires a showing of proximate causation.²²³ An instruction on susceptibility cannot be given unless there is evidence that the preexisting condition made the plaintiff more susceptible to an injury than a person in normal health.²²⁴

In this case, there was no medical testimony on a more probable than not basis that Appellant was more susceptible to any particular injury caused by the incident.²²⁵ There is no indication that declining to give these instructions prejudiced Appellant's case in any way. The selection of jury instructions did not constitute an abuse of discretion.

G. The trial court properly denied Appellant's motion for new trial.

The denial of Appellant's motion for new trial should be affirmed. A trial court's ruling on a new trial motion is reviewed for abuse of discretion.²²⁶ A jury award will not be disturbed when it is supported by

which there was no evidence.”).

²²³ See WPI 30.18 (Previous Infirm Condition); *Compare Xieng v. Peoples Nat'l Bank*, 63 Wn. App. 572, 582, 821 P.2d 520 (1991) (concluding that the psychiatrist's testimony that in his opinion it was reasonably certain that the events “lit up” the plaintiff's preexisting posttraumatic stress disorder supported the trial court's finding that the defendant's discrimination caused the plaintiff's emotional disability).

²²⁴ See WPI 30.18.01 (Particular Susceptibility).

²²⁵ RP 1119:19–21 & 1120:5–8 (Dr. Silver describing that some individuals can be more vulnerable to the pain disorder but never stating that the plaintiff was more vulnerable or susceptible).

²²⁶ See, e.g., *RWR Mgmt., Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 274, 135 P.3d 955 (2006).

substantial evidence.²²⁷ Sufficient evidence exists if the record contains enough evidence to persuade a rational, fair-minded person.²²⁸ In this case, the jury verdict is supported by substantial evidence. Appellant sustained nothing more than a minor bruise, not CRPS. There was no abuse of discretion in denying Appellant's motion.²²⁹

Appellant's new trial motion argued only (1) whether the jury should have been permitted to touch Appellant's feet, and (2) whether the experts were permitted to be examined on the facts and data of Appellant's medical history. As previously stated, there was no error regarding the manual examination of evidence or the expert testimony.

On her motion for new trial, Appellant submitted the Declaration of Michael S. Canonica, which provided no basis for granting Appellant's motion. Mr. Canonica purported to testify as to what effect the foot touching had on all of the jurors regarding Appellant's credibility.²³⁰ Mr. Canonica had no personal knowledge as to the effect that evidence had on any juror other than himself. He simply speculated.²³¹ The jury verdict was unanimous. Even if the evidence made a difference to Mr. Canonica,

²²⁷ *See id.* Even though errors of law are reviewed *de novo*, the error complained of must be prejudicial in order to warrant reversal. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 429, 814 P.2d 687 (1991) (citing *Rasor v. Retail Credit Co.*, 87 Wn.2d 516, 533, 554 P.2d 1041 (1976)).

²²⁸ *RWR Mgmt.*, 133 Wn. App. at 275.

²²⁹ A new trial will not be granted for harmless error. *See, e.g.*, RCW 4.36.240. Appellant has not shown that claimed error was prejudicial.

²³⁰ CP 536-37.

²³¹ *See* CP 537.

this merely would have changed the vote on the jury verdict from being 12-0 to 11-1. The trial court correctly denied Appellant's new trial motion.

H. The trial court did not err in calculating costs.

The trial court did not err in granting Wal-Mart its costs following trial. Wal-Mart's offer of judgment was made in October 2009,²³² and the jury verdict was less than this.²³³ Wal-Mart was the prevailing party.²³⁴

Appellant's response to the cost bill was that some costs were incurred after the offer of judgment and that Wal-Mart would only be entitled to the statutory attorney fee and the cost of Dr. Gavin Smith's perpetuation deposition, which was read into the record during trial.²³⁵

There are several different ways in which the prevailing party can obtain costs. First, CR 54(d) provides that costs may be awarded under RCW 4.84 or any statute that permits them. Second, CR 68 permits the recovery of all costs incurred after the expiration of a CR 68 offer of judgment. Third, the statute permits certain enumerated taxable costs may be awarded, regardless of when those costs were incurred.²³⁶ Neither CR 54(d) nor CR 68 limit the costs that can be awarded under RCW 4.84.010.²³⁷ The statute operates independently of CR 68. The express

²³² CP 501.

²³³ CP 490.

²³⁴ RCW 4.84.010.

²³⁵ CP 516-17.

²³⁶ See RCW 4.84.010.

²³⁷ When no cost bill is filed, the clerk is to tax only three types of costs and disbursements: the statutory attorney fee, the clerk's fee, and the sheriff's fee. WASH. R. CIV. P. 78(e).

statutory text provides that statutory costs are awarded “in addition to costs otherwise authorized by law[.]”²³⁸

Under CR 68, a party may obtain all costs incurred after the making of an offer of judgment. But this rule does not exclude other means by which a party might seek costs. When an offer of judgment is not accepted within 10 days of service, and 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.²³⁹ The rule provide a mandatory minimum of costs that “must” be awarded. Notably, it does not preclude other costs. Statutory costs are not limited by time, only type.

The prevailing party statute allows not only for statutory attorney fees, but also for certain reasonable expenses:

Reasonable expenses, exclusive of attorneys’ fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;²⁴⁰

The prevailing party is also entitled to the reasonable expense of the transcription of depositions used at trial:

To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at

²³⁸ RCW 4.84.010.

²³⁹ WASH. R. CIV. P. 68.

²⁴⁰ RCW 4.84.010(5).

the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.²⁴¹

In this case, it is undisputed that the depositions for which Wal-Mart sought reasonable expenses were published in their entirety.

For the purposes of statutory costs, a party “who obtains a verdict for an amount equal to or less than what is already in hand has not received an affirmative judgment and is not the prevailing party.”²⁴² In this case, Appellant was obviously not the prevailing party, because she did not obtain a verdict in an amount greater than what was already in hand. Therefore, she did not receive an affirmative judgment. Because Appellant did not receive an affirmative judgment, she was not a prevailing party.

Wal-Mart was the prevailing party and was entitled to its costs and disbursements.²⁴³ Unlike CR 68, the costs that are taxable under the statute are not limited temporally.

In the alternative, even if Wal-Mart had sought costs solely under CR 68, rather than both under the rule and pursuant to the statute, then the trial court was still correct to tax costs as it did, because those costs were not incurred and taxable until they were utilized at trial.²⁴⁴ The trial court

²⁴¹ RCW 4.84.010(7).

²⁴² *Stout v. State*, 60 Wn. App. 527, 528, 803 P.2d 1352 (1991) (citing *Tippie v. Delisle*, 55 Wn. App. 417, 421, 777 P.2d 1080 (1989), *rev. denied*, 114 Wn.2d 1003 (1990)).

²⁴³ RCW 4.84.030.

²⁴⁴ *Cf.* RCW 4.84.010(5) (providing for the recovery of “Reasonable expenses, exclusive of attorneys’ fees, **incurred in obtaining reports and records, which are admitted into evidence at trial...**in superior...court,

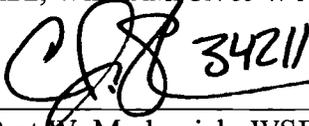
properly exercised its discretion and calculated costs pursuant to statute.

VI. CONCLUSION

Appellant has not and cannot demonstrate any abuse of discretion or error prejudicially affecting the outcome of the case. Appellant's disappointment in the jury's verdict does not warrant reversal. The trial court should be affirmed in all respects.

Dated this 3rd day of May, 2011.

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including but not limited to medical records..." (emphasis added)) and RCW 4.84.010(7) (providing that, "[t]o the extent that the court...finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial...: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.").

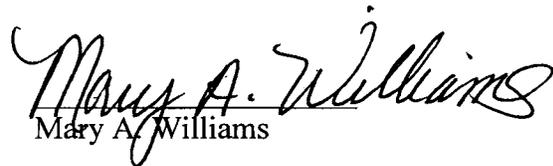
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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2011, I caused to be served via E-mail and U.S. Postal Service, ordinary first class mail the foregoing *Brief of Respondent* on the following party at the following address:

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