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No. 31617-3-III

SEP 23 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

GINGER SMITH, a single woman,

Appellant,

v.

MICHEL LUNDY,

Respondent.

APPEALED FROM SPOKANE COUNTY SUPERIOR COURT
CAUSE NO. 10-2-03985-1

THE HONORABLE GREGORY D. SYPOLT

GINGER SMITH'S OPENING BRIEF

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I. INTRODUCTION

On February 7, 2008, Appellant Ginger Smith was involved in a motor vehicle accident in Spokane, Washington. (CP 4). At the time of the accident, Ms. Smith was driving her vehicle southbound on Nevada Street when she was T-boned by the Respondent Michel Lundy's vehicle that was exiting a parking lot. (CP 4). Mr. Lundy's vehicle collided with the passenger side of Ms. Smith's vehicle with such force that Ms. Smith's vehicle was flipped onto the driver's side and into oncoming traffic in the northbound lane. (CP 4) Following the accident, Ms. Smith was treated for injuries at Holy Family Hospital. (VRP 224)

Ms. Smith suffered multiple injuries, including a closed head injury. (CP 5-6). On February 11, 2008, Ms. Smith's treating physician Duncan Lahtinen, MD, diagnosed her with a closed head injury as a result of the accident. (CP 147). After treating Ms. Smith without success, and determining that Ms. Smith could not return to work following the accident, Dr. Lahtinen referred Ms. Smith for a disability evaluation at the Washington Department of Social and Health Services (DSHS). (CP 150-151).

In February of 2009, DSHS hired Dr. Debra Brown, PhD, to evaluate Ms. Smith. (CP 150-151). Dr. Brown initially performed objective neuropsychological testing on February 5, 2009, and the testing indicated that Ms. Smith was permanently disabled due to a closed head injury. (CP 150-151). Dr. Brown conducted a second round of neuropsychological testing on April 25, 2012 and April 26, 2012, which consisted of the Halstead-Retain Neuropsychological Battery. (CP 151). Dr. Brown's second round of testing confirmed her original opinion that Ms. Smith had suffered a closed head injury as a direct result of the motor vehicle accident. (CP 151). Neither of the test batteries performed by Dr. Brown found any objective indication of malingering on the part of Ms. Smith. (CP 151). DSHS determined that Ms. Smith was permanently disabled as a result of closed head injury. (CP 150).

At the time of the accident, Ms. Smith was employed as Nurse Assistant at the Spokane Veteran's Home. (CP 165). Following the accident, Ms. Smith was never medically cleared to return to work of any kind. (CP 150). As a result of the injuries sustained and her

inability to return to work, Ms. Smith initiated a civil action against the Respondent Michael Lundy. (CP 1-7).

II. ASSIGNMENT OF ERROR

- A. The Trial Court Erred as a Matter of Law By Allowing the Jury to Determine the Basis and Admissibility for Expert Psychological Opinion.
- B. The Trial Court Abused Its Discretion By Failing to Conduct the Required Evidentiary Analysis Prior to Allowing Dr. Klein to Testify as an Expert Witness.
- C. The Trial Court Abused Its Discretion By Allowing Deborah LaPopinte and Erik West to Testify as Experts at Trial.

I. ISSUES

A. Ginger Smith's Issues on Appeal

5. Did the Trial Court error as a matter of law by allowing the jury to determine the basis and admissibility of Dr. Klein's expert psychological opinion?
6. Did the Trial Court abuse its discretion by allowing failing to conduct the required evidentiary analysis prior to allowing Dr. Klein to testify as an expert at trial?
7. Did the Trial Court commit harmless error by allowing Dr. Klein, Ms. Lapointe, and Mr. West to testify as experts at trial?
8. Did the Trial Court abuse its discretion by not excluding or limiting the expert testimony of experts Deborah LaPointe and Erik West?

IV. STATEMENT OF THE CASE

A. Background

During the course of litigation, Mr. Lundy retained Dr. Ronald Klein, PhD., as an expert witness to testify regarding Ms. Smith's closed head injury she claimed to have suffered in the February 7, 2008, motor vehicle accident. (CP 50). On August 5, 2011, Dr. Klein conducted a *CR 35* examination of Ms. Smith, which included objective neuropsychological testing. (CP 180-194).

During the course of Dr. Klein's examination he performed a self-selected test battery, which included two psychological tests that specifically tested Ms. Smith for malingering. (CP 196-209) Neither of the two objective tests conducted by Dr. Klein, which were specifically designed to test Ms. Smith for malingering produced malingering results. (CP 211-262). Neither of the test batteries performed by Dr. Brown found any objective indication of malingering on the part of Ms. Smith. (CP 151).

After conducting the *CR 35* examination and reviewing the objective test results, Dr. Klein authored a report dated August 12, 2011, which was provided to Ms. Smith during the course of discovery. (CP 180-194). In the August 12, 2011 report, Dr. Klein stated "[t]he overwhelming conclusion based on her performance during testing is that she was malingering, i.e. grossly exaggerating her deficits/complaints." (CP 190).

Malingering was the only opinion offered by Dr. Klein within his August 12, 2011, report as to why Ms. Smith had not suffered psychological injuries as a result of the accident. (CP 192-193). His primary diagnosis of Ms. Smith was malingering, which he stated

diminished the weight of Ms. Smith's verbal statements in general. (CP 192). Dr. Klein's only opinion stated in his report as to why Ms. Smith had not suffered a head injury as a result of the accident was that she was a malinger. (CP 192). Dr. Klein opined that Ms. Smith was malingering and was intentionally feigning illness, to achieve financial remuneration from the lawsuit. (CP 197-209). The basis for Dr. Klein's opinion was his record review, interview data, and multiple psychological tests, all of which Dr. Klein he stated were met with malingered responses. (CP 192).

On April 23, 2012, Dr. Klein authored a second report, which was essentially a response to Ms. Smith's expert witness Dr. Brown's review of his first report. (CP 68-75). Once again, Dr. Klein's only opinion as to why Ms. Smith did not suffer psychological injuries as result of the accident was malingering. (CP 68-75).

The psychological definition of malingering is contained within the "DSM-IV." (CP 236). The DSM-IV states that "[m]alingerers intentionally and purposefully feign illness to achieve some recognizable goal." (CP 236). Dr. Klein agreed during his

deposition that he did not find intent by Ms. Smith, or even look for Ms. Smith's intent to malingering. (CP 208-209).

On October 19, 2012, counsel for Ms. Smith moved the trial court for an order excluding Dr. Klein from testifying as an expert witness. (CP 129-279) Ms. Smith presented argument and evidence supporting the exclusion of Dr. Klein pursuant to *Frye*, ER 702 and ER 608. (CP 130-279 & CP 459-469).

With regard to *Frye*, Ms. Smith's counsel provided evidence that the two objective tests performed by Dr. Klein to determine whether Ms. Smith was a malingerer did not show that Ms. Smith was a malingerer. (CP 211-262 & CP 197-209). Ms. Smith presented evidence that Dr. Brown did not find malingering within any of her objective testing. (CP 150-151). Ms. Smith also presented evidence that Dr. Klein did not find or even look for any intent on the part of Ms. Smith to malingering. (CP 208-209). Ms. Smith argued that that Dr. Klein had no basis for his opinion of malingering because he relied upon non-objective findings to diagnosis malingering. (CP 136-141). Ms. Smith presented evidence and argued that it was novel to diagnose malingering

in the absence of objective findings, and such an opinion was not supported within the neuropsychological community. (CP 136-141; CP 211-262 & CP 197-209). Ms. Smith argued that Dr. Klein should be excluded from testify as an expert. (CP 136-141).

Ms. Smith also presented argument and evidence that Dr. Klein should be excluded as an expert witness pursuant to *ER 702*, as without an objective basis for diagnosing malingering, Dr. Klein's opinion was misleading, unreliable, not grounded in science, and not helpful to the jury. (CP 141-143 & CP 462-466).

Ms. Smith further presented argument that without objective findings supporting his opinion, Dr. Klein should be excluded as an expert witness pursuant to *ER 608*, because he was doing nothing more than commenting on the credibility of Ms. Smith by diagnosing her as a malinger. (CP 466-469).

At the October 19, 2012, hearing the trial court found in favor of Ms. Smith, and entered an order in limine excluding Dr. Klein's opinion of malingering. (CP 787-788). Mr. Lundy subsequently filed a motion for reconsideration regarding the trial court's exclusion of Dr. Klein's malingering opinion, which the trial court

denied. (CP 113 & CP 1040-1041). When the trial court ruled on the motion for reconsideration, the trial court found that Dr. Klein's unrelenting view throughout his reports was that Ms. Smith was a malingerer. (VRP 6, November 9, 2012). The trial court determined that there were no objective findings for the opinion of malingering, and without objective findings Dr. Klein was prevented from offering the malingering opinion pursuant to *ER 608* and *ER 702*. (VRP 5-9, November 9, 2012).

The trial court also, in anticipation of an appeal, considered the abuse of discretion standard for its decision and concluded that there was no abuse of discretion because Dr. Klein had no basis for his opinion of malingering. (VRP 7-9, November 9, 2012) Following the court's decision, the court clarified its ruling that it excluded Dr. Klein's opinion of malingering, but Dr. Klein could still testify as an expert at trial to other opinions. (VRP 9-29, November 9, 2012).

After the trial court had excluded Dr. Klein's malingering opinion, on November 9, 2012, Ms. Smith moved to exclude Respondent's vocational expert Deborah LaPointe and economic

expert Erik West. (CP 527-654). Ms. Smith argued that the basis for the opinions of Ms. Lapointe and Mr. West had been excluded when the trial court excluded Dr. Klein's opinion of malingering, because their opinions were based upon Dr. Klein's opinion that Ms. Smith was a malingerer. (VRP 19-24, November 9, 2012). (VRP 19-24, November 9, 2012). Ms. Smith's motion to exclude Respondent's experts Ms. Lapointe and Mr. West was denied. (VRP 24, November 9, 2012).

On the first day of trial, Ms. Smith again moved in limine during pretrial motions to exclude Dr. Klein as a expert witness as Dr. Klein's only opinion rendered throughout litigation was malingering, which had been previously excluded. (VRP 97-99). Ms. Smith's motion in limine to totally exclude Dr. Klein from testifying as an expert was denied. (VRP 99).

Prior to Dr. Klein taking the stand at trial, counsel for Ms. Smith conducted voir dire Dr. Klein to confirm that his only opinion as to why Ms. Smith did not sustain a head injury was malingering. (VRP 391-413). At the conclusion of voir dire, Ms. Smith then moved once again to exclude Dr. Klein from testifying as an expert

witness because Dr. Klein had no objective basis for his opinion and did not meet the qualifications *ER 702*, *ER 703* or *ER 705*. (VRP 408-411). The trial court again denied Ms. Smith's motion to exclude Dr. Klein. (VRP 411-413). In denying Ms. Smith's motion to exclude Dr. Klein as an expert, *the trial court ruled it was within the purview of jury to determine whether Dr. Klein had a medical or psychological basis for his opinions*. (VRP 411-412).

During direct examination of Dr. Klein, counsel for Ms. Smith objected to the foundation for Dr. Klein's opinion, which was overruled by the trial court. (VRP 472). At trial, when asked by Respondent's counsel for the psychological explanation for the deterioration of objective findings, Dr. Klein also stated, "[w]ell I know I'm not supposed to say any bad words;" referring to the trial court's ruling excluding malingering. (VRP 505). Ms. Smith's counsel objected and moved to strike Dr. Klein's response. (VRP 505). The trial court struck Dr. Klein's response. (VRP 505).

At the end of trial, the jury returned a verdict consistent with the Respondent's expert witnesses that Ms. Smith did not suffer a permanent disabling head injury and could return to work. (CP 1073-

1076). Ms. Smith now brings this appeal seeking to overturn the trial court's ruling that allowed Dr. Klein, Ms. LaPointe, and Mr. West to testify as expert witnesses at trial. None of the aforementioned expert witnesses had a basis for their expert opinions, thus the Washington Rule of Evidence requires their exclusion.

V. ARGUMENT

1. The Trial Court Erred as a Matter of Law by Allowing the Jury to Determine the Admissibility of a Medical Opinion.

The trial court erred as a matter of law by allowing the jury to determine the basis and ultimate admissibility of Dr. Klein's expert testimony. It is an abuse of discretion when a trial court applies the *wrong legal standard*, or despite applying the right legal standard adopts a position no reasonable person would take. *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006). "*Question of law are reviewed de novo.*" *Id.* at 684, citing, *In re Firestorm 1991*, 129 Wash.2d 130, 135, 916 P.2d 411 (1996).

Prior to Dr. Klein taking the stand at trial, counsel for Ms. Smith conducted a voir dire of Dr. Klein to confirm that he did not

have any other opinions other than the malingerer opinion that had been excluded prior to trial. (VRP 391-407). During the course of voir dire, Dr. Klein admitted that all of the opinions that he intended to testify to at trial were contained within the two reports he authored and provided during the course of discovery. (VRP 391-392). During this voir dire, Ms. Smith showed that the only opinion Dr. Klein rendered as to why Ms. Smith had not suffered a head injury was that she was a malingerer. (VRP 395-396, 401-404). Ms. Smith's position that Dr. Klein's only basis as to why she did not suffer a head injury was bolstered during trial by the testimony of Dr. Klein. When asked by Respondent's attorney at trial for the "basis" of deterioration of test scores by Ms. Smith, Dr. Klein stated, "Well, I know I'm not supposed to say any bad words." (VRP 505). Dr. Klein's own testimony proved there was no other basis for his opinion as to why Ms. Smith had not suffered a permanently disabling head injury other than malingerer.

Following the voir dire of Dr. Klein, Ms. Smith moved the court to exclude Dr. Klein as an expert witness. (VRP 408-412). Ms. Smith moved to exclude Dr. Klein because the court had

previously entered an order in limine excluding Dr. Klein's opinion of malingering. Again, by virtue of his own testimony Dr. Klein confirmed that the only basis he had for his opinion as to why Ms. Smith had not suffered a closed head injury was malingering. (VRP 408-412) Had Dr. Klein had another basis for his opinion he would have provided it in response to the person who hired him as an expert. Dr. Klein could not answer that question. Thus, Dr. Klein had no basis for any other opinion as to why Ms. Smith did not suffer a closed head injury at trial. (VRP 408-412). The trial court, notwithstanding these facts, denied Ms. Smith's motion to exclude following voir dire of Dr. Klein. (VRP 411-413).

In denying Ms. Smith's motion to exclude Dr. Klein as an expert witness, the court stated as follows:

This matter has been addressed on one or more previous occasions. And it may be, according to the understanding and reckoning of the jury, that there is no reasonable basis or psychological basis for Dr. Klein offering his opinion. However, the Court is of the view that this whole question is one that goes to the weight rather than the admissibility.

Again, I get the point that Mr. Freebourn contends that the test data trumps everything else under these

particularly unique circumstances. However, I don't agree that it's appropriate to exclude Dr. Klein completely. There is a basis. It may not be deemed to be meritorious in plaintiff's view, plaintiff's counsel's view either; nonetheless, it will be within the jury's purview to determine whether or not there is no reasonable basis whatever, reject the testimony, which the finder of fact is permitted to do, or otherwise consider it and accord appropriate weight to it.

(VRP 411-412) (emphasis added). By making the above quoted ruling, the Court failed to decide if there was a sufficient basis for the medical opinion to be offered. Instead, it incorrectly allowed the jury to decide whether the basis for admissibility existed.

The trial court "in its gatekeeping role, must decide if evidence is admissible." *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wash.2d 593, 606, 260 P.3d 857 (2011), citing *ER 102 & ER 104(a)*. "It is the function of the court, not the jury, to rule on the admissibility of evidence." *Intalco Aluminum Corp. v. Dep't of Labor & Indus.*, 66 Wash. App. 644, 663, 833 P.2d 390 (1992), *review denied* at 120 Wash.2d 1031 (1993). "Admissibility of expert opinions is left to the sound discretion of the trial court." *Id* at 663, citing *State v. Ortiz*, 119 Wash.2d 294, 310, 831 P.2d 1060

(1992); *Fraser v. Beutel*, 56 Wash. App. 725, 734, 785 P.2d 470, review denied, 114 Wash.2d 1025 (1990).

In *Intalco*, the trial court was presented with a similar situation regarding the admissibility of expert opinion. The plaintiff in *Intalco* contended that the trial court erred by refusing to give the following jury instruction:

You are instructed that the opinion of an expert is not entitled to any weight unless it is or reflects a scientific view generally accepted within the community of experts to which the witness belongs.

Intalco, 66 Wash. App. at 663. The Appellate Court affirmed the trial court's decision to refuse the instruction because it is "the function of the court, not the jury, to rule on the admissibility of evidence." *Id.* at 663. This is precisely where the trial court erred in this matter.

After excluding Dr. Klein's only opinion of malingering the trial court left it up to the jury to decide whether Dr. Klein had a basis for any other medical or psychological opinion at trial. (VRP 411-412) In its own words, the trial court erred by allowing the jury to determine whether Dr. Klein had a basis for his psychological opinion. See, *Intalco*, 66 Wash. App. at 663, review denied at 120

Wash.2d 1031 (1993). Because “Trial judges perform an important gate keeping function when determining the admissibility of evidence.” *Anderson*, 172 Wash.2d at 600 (2011). It is for the trial court to determine whether evidence is admissible under the rule of evidence. *Intalco*, 66 Wash. App. at 663, *review denied* at 120 Wash.2d 1031 (1993). Had the trial court adhered to its gatekeeping duties, Dr. Klein would not have been allowed to testify.

2. The Trial Court Abused Its Discretion, By Failing to Conduct the Required Evidentiary Analysis Prior to Allowing Dr. Klein to Testify as an Expert Witness.

A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *City of Spokane v. Neff*, 152 Wash.2d 85, 91, 93 P.3d 158 (2004). “The determination of whether expert testimony is admissible is within the discretion of the trial court.” *State v. Stenson*, 132 Wash.2d 668, 715, 940 P.2d 1239 (1994). “When a trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons, and abuse of discretion exists.” *Id.* at 701. “An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on

an erroneous view of law.” *Tatham v. Rogers*, 170 Wash. App. 76, 89, 283 P.2d 585 (2011), *citing*, *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006).

The trial court abused its discretion by allowing Dr. Klein to testify as an expert witness at trial. Before expert testimony can be admitted into evidence, it must meet certain criteria. *Anderson*, 172 Wash.2d at 606. “Evidence must be probative, relevant, and meet the appropriate standard of probability.” *Id.* at 606, *citing* *ER 102*; *ER 401*; *ER 402*; *ER 403*; *see, e.g. State v. Riker*, 123 Wash.2d 351, 359 (1994). Additionally, expert testimony must be helpful to the jury. *Anderson*, 172 Wash.2d at 606. “Evidentiary rules provide significant protection against unreliable, untested, or junk science.” *Anderson*, 172 Wash.2d at 606. In the instant case, Dr. Klein’s testimony failed to meet the required evidentiary threshold for the admission of expert psychological testimony.

“To admit scientific evidence, the evidence must satisfy both the *Frye* standard and *ER 702*.” *Moore*, 158 Wash. App. at 417.

“Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight

and admissibility under *ER 702*, which allows a qualified expert witness to testify if scientific, technical, or other specialized knowledge will assist the trier of fact.” *Anderson*, 172 Wash.2d at 603. “Scientific evidence will assist the jury whenever it involves matters beyond common understanding and will not mislead them.” *Moore v. Harley Davidson Motor Company Group*, 158 Wash. App. 407, 417, 241 P.3d 808, *review denied*, 171 Wash.2d 1009 (2011). “Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability.” *Anderson*, 172 Wash.2d 606-607.

“Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.” *Griswold v. Kilpatrick*, 107 Wash. App. 757, 761, 27 P.3d 246 (2001), citing, *Queen City Farms, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 126 Wash.2d 50, 103, 882 P.2d 703 (1994). As the Appellate Court stated:

The factual, informational, or scientific basis of an expert opinion, including the principle or procedures through which the expert’s conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of speculation con conjecture and give at least minimal assurance that the opinion can assist the trier of fact.

Id. at 761-62, citing, *Sanchez v. Haddix*, 95 Wash.2d 593, 627 P.2d 1312 (1981).

It is the trial court's obligation to determine whether or not Dr. Klein had a reasonable medical or psychological basis for offering his opinion. *See, Intalco*, 66 Wash. App. at 663. The very purpose of the evidentiary rules is to ensure that prior to an expert taking the stand that the testimony of an expert is reliable, not speculative, meets the appropriate standard, and will not mislead the jury. *Griswold*, 107 Wash. App. at 761-62. All of the aforementioned must be found by the trial court prior to an expert being qualified to testify as an expert at trial under *ER 702*. *Id.* at 761-62; *ER 702*. It is not for the jury to decide during the expert's testimony at trial. *Intalco*, 66 Wash. App. at 663.

In the present matter, the trial court abused its discretion by not conducting the required evidentiary analysis under *ER 702* prior to allowing Dr. Klein to testify as an expert witness at trial. The substantial evidence showed that Dr. Klein did not have any other opinion as to why Ms. Smith did not have a head injury other than she was a malingerer. The trial court excluded Dr. Klein's opinion

of malingering, thus leaving Dr. Klein without any opinion to render. Thus, Dr. Klein should not have been allowed to testify.

3. The Trial Court's Error in Allowing Dr. Klein To Testify As an Expert Was Not Harmless.

The error by the trial court was not harmless. "The error is harmless unless it was reasonably probable that it changed the outcome of the trial." *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wash.2d 432, 452, 191 P.3d 879 (2008). Had the trial court properly excluded Dr. Klein as required by the Rules of Evidence, the Respondent would not have been able to present any evidence that Ms. Smith did not sustain a permanently disabling head injury. Thus, Ms. Smith would have been entitled to summary judgment prior to trial, or at worst, a directed verdict at trial on the issue of the permanent disabling head injury. In addition, because Dr. Klein was presented as a medical expert, the jury was necessarily misled to place more weight on the hypothetical opinions he offered and to apply those to Ms. Smith.

Further, as will be discussed at length below, the Respondent's vocational expert Deborah LaPointe and economic expert Erik West admitted at trial that they relied solely upon the

opinion of Dr. Klein when conducting their damage analysis. (VRP 256-258 & VRP 293-294). Both Ms. LaPointe and Mr. West assumed that Ms. Smith had not suffered a permanently disabling head injury when formulating their opinions. (VRP 257 & VRP 293). Both Ms. LaPointe and Mr. West testified at trial that their opinions regarding Ms. Smith being able to return to work and damages would have no basis if Dr. Klein had no basis for his opinion that Ms. Smith did not suffer a head injury. (VRP 256-258 & VRP 293-294). Thus had the trial court properly excluded Dr. Klein from testifying at trial, Ms. LaPointe and Mr. West would not have been able to testify to their opinions. Furthermore, the jury would not have been able to give any weight to these expert opinions.

Without the opinion of Dr. Klein to establish no permanent head injury, the opinion of Ms. LaPointe that Ms. Smith could return to work, and Mr. West that Ms. Smith suffered limited economic damages, the jury would have had to rely upon Ms. Smith's experts. Had Dr. Klein been excluded, the resulting damage award by the

jury would have been vastly different. Thus, the error by the trial court of not excluding Dr. Klein was not harmless.

4. The Trial Court Abused Its Discretion By Allowing Deborah LaPointe and Erik West to Testify as Experts at Trial.

On November 9, 2012, Ms. Smith moved to exclude Respondent's experts Deborah Lapointe and Erik West because their expert opinions were based on the excluded opinion of malingering proffered by Dr. Klein. (VRP 19-24, November 9, 2012). The trial court denied the motion to exclude these experts. (VRP 24, November 9, 2012). The trial court abuse its discretion by not excluding the testimony of Respondent's expert witnesses Ms. LaPointe and Mr. West because there opinions were based upon the excluded opinion of Dr. Klein.

During cross-examination at trial, Ms. Smith's counsel proved that Dr. Klein's expert opinion served as the basis for the opinions of Ms. Lapointe and Mr. West. (VRP 256-258 & VRP 293-294). Ms. Smith was also able to show that if Dr. Klein did not

have a basis for his opinion, Ms. Lapointe and Mr. West had no basis for their opinions. (VRP 256-258 & VRP 293-294).

With regard to Ms. LaPointe, she testified that her opinion would change if Dr. Klein did not have a basis for his opinion. (VRP 258). Mr. West testified that he would not have a basis for his opinion if Dr. Klein did not have a basis for his opinion. (VRP 294). Neither of the aforesaid experts offered alternative opinions that assumed that Ms. Smith had suffered a head injury as a result of the accident. (VRP 256-258 & VRP 293-294).

When the trial court failed to exclude Dr. Klein as an expert witness, it allowed Ms. Lapointe and Mr. West to render opinions that were not supported by medical or psychological evidence. In order for Ms. Lapointe to conduct her vocational analysis it was necessary to rely upon Dr. Klein's psychological opinion to determine whether Ms. Smith could return to work and what work Ms. Smith was capable of performing. (VRP 256-258). It was necessary for Ms. West to rely upon Dr. Klein's opinion to determine the economic loss suffered by Ms. Smith as a result of the accident. (VRP 293-294).

Dr. Klein opined that Ms. Smith had not suffered a permanently disabling head injury, thus, Ms. Lapointe and Mr. West assumed as the basis for their opinions that Ms. Smith had not suffered any psychological limitations following the accident. (VRP 256-258 & VRP 293-294). Because Ms. Lapointe assumed no permanent psychological injury as a result of the accident, she opined that Ms. Smith could return to work without limitation. (VRP 231-254) Because Mr. West assumed no permanent psychological injury as a result of the accident, he offered an economic opinion consistent with Ms. Smith returning to her job at the time of her injury without limitation. (VRP 293-294). If Dr. Klein had been properly excluded, the evidence showed that Ms. Smith suffered a permanently disabling head injury that prevented her forever returning to work following the accident.

In the present matter, the trial court abused its discretion by allowing Ms. LaPointe and Mr. West to testify as experts at trial. Similar to the error allowing Dr. Klein to testify, allowing Ms. Lapointe and Mr. West to testify was certainly not harmless. Had the trial court properly excluded Dr. Klein as required by the Rules

of Evidence, the Respondent would not have been able to present any evidence that Ms. Smith did not sustain a permanently disabling head injury. Ms. LaPointe would not have been able to present testimony that Ms. Smith could return to work, and Mr. West would not have been able to offer testimony as to limited economic damages as a result of Ms. Smith returning to work.

It is reasonably probable that the outcome of the trial would have been vastly different without the testimony of Ms. LaPointe and Mr. West, because the jury returned a verdict consistent with their opinions that Ms. Smith could return to work.

VII. CONCLUSION

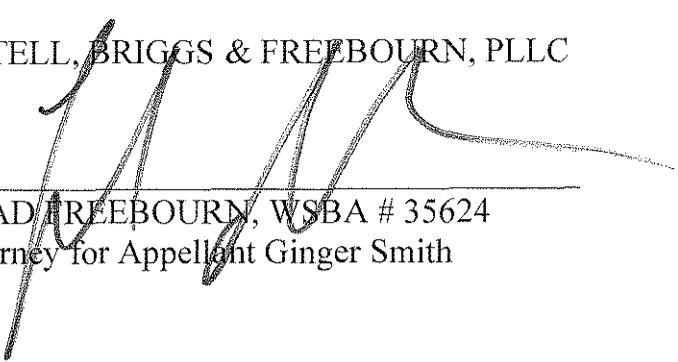
Pursuant to the foregoing, Appellant Ginger Smith respectfully requests that the Appellate Court remand the case with instructions to exclude the expert testimony of Dr. Klein, exclude or limit the expert testimony of Ms. Lapointe and Mr. West consistent with the exclusion of Dr. Klein's testimony, and enter directed verdict on the issue of permanent disabling head injury.

Alternatively, Ms. Smith asks that the case be remanded for a new trial with instructions to exclude Dr. Klein as an expert witness,

and instructions to exclude or limit the testimony of Ms. Lapointe
and Mr. West consistent with the exclusion of Dr. Klein as an expert
witness.

DATED this 23rd day of September, 2013.

AXTELL, BRIGGS & FREEBOURN, PLLC

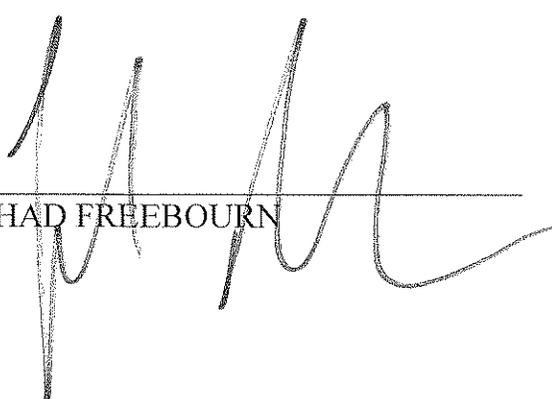


CHAD FREEBOURN, WSBA # 35624
Attorney for Appellant Ginger Smith

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 23rd day of September, 2013, I caused to be served a true and correct copy of the foregoing document along with a copy of the Clerk's Papers and Verbatim Report of the Proceedings to the following:

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CHAD FREEBOURN

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