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No. 85591-9

SUPREME COURT OF THE STATE OF WASHINGTON

Brajesh Katare,

Petitioner,

v.

Lynette Katare,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL LIBERTIES
UNION OF WASHINGTON

Nancy L. Talner, WSBA No. 11196
Arnold R. Jin, WSBA No. 42482
ACLU of Washington Foundation
901 Fifth Ave, Suite 630
Seattle, WA 98164
(206) 624-2184

Attorneys for *Amicus Curiae*
American Civil Liberties Union of Washington

ORIGINAL

Table of Contents

I. IDENTITY AND INTEREST OF AMICUS CURIAE..... 1

II. ISSUE ADDRESSED BY AMICUS 1

III. STATEMENT OF THE CASE 1

IV. ARGUMENT 6

 A. The Expert Testimony Here Consisted of Clearly Improper
 Profile Evidence and Stereotypes Based on National Origin.
 Evidence Like This has been Strongly Condemned by Other Courts. 6

 B. A Party’s Use of Improper Profile and Risk Factor Testimony
 Consisting of Prejudicial Ethnic Stereotypes in a Proceeding
 Impacting a Parent’s Constitutional Rights Offends the Integrity of
 the Court System, Necessitating this Court’s Strong Condemnation
 of It. 12

 C. Reversal is the Proper Remedy Based not Only on the
 Egregious Nature of the Expert Testimony but also Based on A Valid
 Factual and Legal Analysis for Determining when Reversible Error
 has Occurred..... 16

V. CONCLUSION..... 20.

WASHINGTON CASES

<i>Eggert v. City of Seattle</i> , 81 Wn.2d 840, 845, 505 P.2d 801 (1973).....	15
<i>In re Marriage of Akon</i> , 160 Wn.App. 48, 248 P.3d 94 (2011).....	9
<i>In re Parentage of L.B.</i> , 155 Wn.2d 679, 710, 122 P.3d 161 (2005).....	13
<i>Katare v. Katare</i> , 125 Wn.App. 813, 817, 105 P.3d 44 (2004).....	2
<i>Katare v. Katare</i> , 159 Wn.App. 1017, 2011 WL 61847 *1-*2 (2011)	passim
<i>State v. Melton</i> , 63 Wn.App. 63, 817 P.2d 413 (1991).....	17
<i>State v. Miles</i> , 77 Wn.2d 593, 601, 464 P.2d 723 (1970).....	18
<i>State v. Read</i> , 147 Wn.2d 238, 242, 53 P.3d 26 (2002).....	18
<i>Thomas v. French</i> , 99 Wn.2d 95, 659 P.2d 1097 (1983).....	19
<i>Thornton v. Annest</i> , 19 Wn.App. 174, 574 P.2d 1199 (1978).....	19

FEDERAL CASES

<i>Bangerter v. Orem City Corp.</i> , 46 F.3d 1491, 1503 (10th Cir. 1995).....	13
<i>Bird v. Glacier Elec. Coop., Inc.</i> , 255 F.3d 1136, 1151 (9th Cir. 2001).....	7
<i>Cnty. House, Inc. v. City of Boise</i> , 490 F.3d 1041, 1050 (9th Cir. 2007).....	13
<i>Hirabayashi v. United States</i> , 320 U.S. 81, 100, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943).....	6
<i>Jinro America v. Secure Investments, Inc.</i> , 266 F.3d 993, 1009 (9th Cir. 2001).....	7, 8, 10, 11
<i>Moore v. City of East Cleveland</i> , 431 U.S. 494, 504, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977).....	13
<i>Sierra v. City of New York</i> , 579 F.Supp.2d 543, 548 (S.D.N.Y. 2008).....	12
<i>Thorsted v. Gregoire</i> , 841 F.Supp. 1068, 1080 (W.D. Wash. 1994).....	15
<i>Troxel v. Granville</i> , 530 U.S. 57, 65-66, 147 L.Ed.2d 49, 120 S.Ct. 2054 (2000).....	13
<i>Vang v. Xiong</i> , 944 F.2d 476 (9th Cir. 1991).....	10, 11

OTHER CASES

<i>Abouzahr v. Matera-Abouzahr</i> , 824 A.2d 268, 281-2 (N.J. Super. 2003).....	16
<i>In the Matter of Rix</i> , 20 A.3d 326, 329 (N.H. 2011).....	16

STATUTES & COURT RULES

ER 401.....	12
ER 702.....	12
RCW 26.09.191(3).....	2

OTHER AUTHORITIES

2A Karl B. Tegland, <i>Washington Practice</i> , Rules Practice 2.5§ 49, 277 (7th ed. 2011).....	18, 19
BBC News, 31 March 2011, <i>India Census: population goes up to 1.21 bn</i> , available at http://www.bbc.co.uk/news/world-south-asia-12916888	15

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of Washington (“ACLU”) is a nonprofit, nonpartisan organization with over 19,000 members statewide that is dedicated to constitutional principles of liberty and equality. The ACLU has long been committed to the defense of civil liberties, including the right to a justice system free of discrimination or bias. The ACLU has submitted amicus briefs and engaged in direct representation in numerous cases involving evidence that improperly injects stereotypes on the basis of race or national origin in a legal proceeding.

II. ISSUE ADDRESSED BY AMICUS

Whether expert testimony purporting to show a risk of child abduction based on national origin stereotypes, rather than any individualized facts, so improperly tainted the proceedings that it should be presumed prejudicial error?

III. STATEMENT OF THE CASE

The following facts are relevant to the issue addressed by *amicus*. This case is a continuation of two earlier appeals by the Petitioner, Brajesh Katare, the father of A.K. and R.K. (ages 11 and 10), who opposed his ex-wife’s request that he be restricted from traveling to India with his children to see their grandparents. *Katare v. Katare*, 159 Wn.App. 1017,

2011 WL 61847 *1-*2 (2011) [hereinafter *Katara III*]. Since the original hearing, the trial court has restricted Brajesh from traveling anywhere outside the United States with his children and he must turn in his passport each time he visits with them. Pet. for Rev. at 1. The trial court's previous imposition of passport and foreign travel restrictions was reversed on appeal twice, because the court's findings were not adequate to support the restrictions. Pet. for Rev. Appendix E and F. Another remand hearing was held on January 14-15, 2009. The issue at the hearing was whether the evidence, including current circumstances, supported foreign travel restrictions under RCW 26.09.191(3). RP (1-14-09) Vol. 1, at 4.

Brajesh moved to the United States from India in 1989 and has been an American citizen since 2000. *Katara v. Katara*, 125 Wn.App. 813, 817, 105 P.3d 44 (2004). He has lived and worked in the United States for many years, and returned to live in the United States several years ago, after a 2-year placement in India. Pet. for Rev. at 3.

Lynette Katara called Michael C. Berry to testify as an expert witness at the 2009 remand hearing. He had not testified at any of the previous hearings. He is a Florida attorney with some experience in legal proceedings involving the return of abducted children. Lynette asserted that Berry would testify "about the difficulties and expense of obtaining

the return of an abducted child and the profile of persons who ... are likely to abduct.” *Katara III, supra*, at *5. Brajesh moved in limine to exclude this profile testimony, on the grounds that Berry was not qualified to testify about the profile of a potential child abductor, and his testimony did not satisfy the requirements of the *Frye* test. *Id.* at *6.

Berry had never been to India, neither for work nor pleasure. RP (1-15-09) Vol. 1, at 9. He asserted the dangers of India included a coordinated terror attack in Mumbai that “targeted areas frequented by westerners.” *Id.* at 10. When questioned about whether such attacks occur in other countries, Berry answered: “Well, the level of terrorism in that part of the world.” *Id.* “India in [sic] quite unique and it’s a known fact it’s a unique situation.” *Id.* at 11.

Continuing to describe the alleged dangers of India, Berry stated: “I’m not a medical person. But [tuberculosis] is a concern in India.” RP (1-15-09) at 12. “Travel by road is dangerous in India.” *Id.* “[I]f a driver hits a pedestrian or cow, the vehicle and its occupants are at risk of being attacked by passerby.” *Id.* “That’s something that would not occur in the United States.” *Id.* “Buses ... are driven fast and recklessly and without consideration for the rules of the road.” *Id.* When questioned about whether “traffic accidents are common in Florida,” Berry responded: “I suspect they are not as common as they would be in India.”

Id. at 13. “I base that upon going to many countries that don’t have DOT regulations.” *Id.* at 14. “Where [in the publication] do we see that India has no DOT type regulations?” *Id.* “Well, I don’t know if they have. I’m sure they don’t have a department of transportation that we have in the United States.” *Id.* When asked about India’s criminal penalties, Berry asserted: “I don’t think they have the same constitution in India that we have here.” *Id.* at 15. But he subsequently remarked: “I don’t study India law in that arena.” *Id.* As to Brajesh’s alleged lack of ties to the United States, Berry said: “because of his ability to travel internationally and his savvy in that regard, he certainly could go to any city in the U.S. or he could go to any country.” *Id.* at 21.

Berry also incorrectly referred to Brajesh as a citizen of India, and claimed in his assessment that that erroneous fact indicated a risk of abduction. *Id.* at 23. Additionally, Berry said it was a risk factor that Brajesh has “innumerable family ties in India ... the ties there are very deep.” *Id.* at 26. Berry opined that a “preventative order” is necessary “because of the risk factors that are apparent in this case.” *Id.* at 53-54. He explained “[t]here are also indications in the parenting plan that the cultural aspects of India are very important to Mr. Katare” and “because of his cultural affiliations, he clicked into profile six.” RP (1-14-09) Vol. 2, 86. Furthermore, Berry said “It’s my understanding that his primary

social interactions are with people of the Indian culture here in Washington.” *Id.* Brajesh’s friends, according to Berry, lived in “primarily Indian culture households” based on decorations, lifestyle, cooking, and furniture. *RP (1-15-09) Vol. 1*, . at 49. Moreover, “family living abroad, certainly his family in India makes that a clear indicator” of being a potential abductor. *RP (1-14-09) Vol. 2*, 86.

Although Berry had no experience with child abduction litigation in India, the trial court admitted his testimony, ruling that it would “assist it in understanding the literature on international child abduction submitted as exhibits” *Katare III, supra, at *10*. The trial court deleted its earlier finding that Brajesh presents “no serious risk of abduction” and used evidence from the hearing where Berry testified to find that Brajesh made credible threats to take the children to India without the mother in 2002. *Id.* at *6. The trial court’s ruling specifically referenced the evidence that Brajesh met the criteria for “profiles” indicating a risk of abduction. *Pet. for Rev.* at 7-8; *Katare III, supra, at *7*. From these and other findings, the trial court concluded the risk of abduction had increased rather than abated. *Katare III, supra, at *7*.

After Brajesh appealed this ruling, Division I held in an unpublished decision that Berry’s testimony lacked adequate foundation,

was not relevant or helpful to the trier of fact, and failed to meet the *Frye* standard requiring that it be based on established scientific methodology. *Katara III*, 2011 WL 61847 *11. Although the Court held that the testimony was inadmissible, and that the trial court abused its discretion in admitting and considering it, the Court of Appeals nevertheless affirmed. The reason given for affirming was that the trial court did not state that it was relying on any of the risk factors cited in Berry's testimony and Brajesh's conduct alone supported the foreign travel restrictions. *Id.* at *12. This Court then granted review.

IV. ARGUMENT

A. **The Expert Testimony Here Consisted of Clearly Improper Profile Evidence and Stereotypes Based on National Origin. Evidence Like This has been Strongly Condemned by Other Courts.**

Years ago, the Supreme Court recognized that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Hirabayashi v. United States*, 320 U.S. 81, 100, 87 L.Ed. 1774, 63 S.Ct. 1375 (1943). “[F]airness to parties and the need for a fair trial are important not only in criminal but also in civil proceedings, both of which require due process. Racial stereotyping cannot be condoned in

civil cases.” *Bird v. Glacier Elec. Coop., Inc.*, 255 F.3d 1136, 1151 (9th Cir. 2001).

Applying these well-established principles to cases where similar federal rules of evidence were involved, several Ninth Circuit cases explain why inadmissible expert cultural testimony is manifestly prejudicial against civil litigants. The Court in *Jinro America v. Secure Investments, Inc.*, 266 F.3d 993, 1009 (9th Cir. 2001) said “[f]ormal equality before the law is the bedrock of our legal system.” (quoting *United States v. Vue*, 13 F.3d 1206, 1213 (8th Cir. 1994)). “This principle—at least with regard to prejudicial, unreliable, ethnically biased testimony—must apply to civil litigants as well.” *Jinro*, 266 F.3d at 1009. The *Jinro* Court recognized: “Allowing an expert witness in a civil action to generalize that most Korean businesses are corrupt, are not to be trusted and will engage in complicated transactions to evade Korean currency laws is tantamount to ethnic or cultural stereotyping.” *Id.* at 1007.

In *Jinro*, a South Korean consortium brought suit in a complicated breach of contract action. The defendants relied heavily on an expert witness to testify about Korean law and culture, 266 F.3d at 1001, and the so-called expert’s testimony bears some striking similarities to Berry’s

testimony here. The *Jinro* expert opined on entering into oral agreements with “Koreans”:

A: I would never recommend anybody rely on oral agreements.

Q: Why is that?

A: Well, I don’t think oral agreements are a very safe way to do business anyplace, but particularly in Asia and probably more particularly in Korea.

Q: Why is that?

A: Well, because of the culture, dealing with Korean businessmen can end up with some pretty sorry results if you haven’t safeguarded yourself.

Jinro, 266 F.3d at 1003. Like Berry, the *Jinro* expert

had no education or training as a cultural expert generally, or as an expert on Korean culture specifically. He was not a trained sociologist or anthropologist, academic disciplines that *might* qualify one to provide reliable information about the cultural traits and behavior patterns of a particular group of people of a given ethnicity or nationality.

Id. at 1006 (emphasis in original). Faced with the same kind of alleged expert evidence that “lacked adequate foundation” and was “inherently speculative and unhelpful” as the Court of Appeals found in *Katara III*, *supra*, at *11, the Ninth Circuit correctly recognized that “the risk of racial or ethnic stereotyping is substantial, appealing to bias, guilt by association and even xenophobia.” *Jinro*, 266 F.3d at 1008.

Other cases illustrate when expert testimony relating to certain aspects of a litigant's culture, race, ethnicity, or nationality is properly admissible. The contrast with the case at bar reveals why Berry's testimony constituted a particularly harmful type of evidence. For example, in *In re Marriage of Akon*, 160 Wn.App. 48, 248 P.3d 94 (2011), the issue before the trial court was whether the mother had engaged in a valid cultural marriage in Sudan, a fact necessary to the determination of the parentage claim. *Id.* at 56. Since the mother and father were members of the Dinka tribe in Southern Sudan, it was permissible for the trial court to consider expert evidence about cultural marriage practices and traditions. The expert's evidence in *Akon* was objective, grounded in fact and, most significantly, relevant to the individualized circumstances at issue rather than generalizations based solely on the parents' country of origin.

Here, by contrast, Berry's testimony did not shed any individualized context or information as to whether or not Brajesh was likely to abduct his children to India. Rather, Berry's entire syllogism was that because of Brajesh's ethnicity he is more likely to abduct his children. The taint of Berry's testimony in this record coupled with the trial court's decision to hear and rely on the evidence should not be permitted.

Another case, distinguished in *Jinro, supra*, also illustrates the proper use of cultural evidence to establish a specific, individualized fact that is of consequence in the proceeding. In *Vang v. Xiong*, 944 F.2d 476 (9th Cir. 1991), the plaintiffs offered expert testimony by “an epidemiologist and anthropologist” to explain why the Hmong women plaintiffs would have repeatedly submitted to rapes and “remained silent about them” in a 42 U.S.C. § 1983 action “accusing a city refugee counselor of repeatedly raping them.” *Id.* At trial, the expert explained “that Hmong women are generally submissive, and are raised to respect and obey men. He described the role of Hmong women in marriage, their attitudes towards sex, discussion of sex, and extramarital affairs.” *Id.* at 1009. He further explained that “upon fleeing from Laos, Hmong refugees were reliant on government officials for their needs and would not survive in the United States without government assistance. Because of this reliance on government assistance, the Hmong have developed an awe of persons in government positions.” *Id.* On appeal, the Ninth Circuit took note of several circumstances that were missing in *Jinro*: (1) “the trial court limited the scope of the testimony, both in its pretrial ruling on admissibility and in sustaining defendant’s objection when plaintiffs tried to expand upon this limited scope at trial”; (2) the expert was the “only expert either side had been able to locate who could ‘explain to the

trier of fact who these people are, where they came from, and why they have responded the way they have in these various functions and various relationships”; (3) most significant was that his “testimony derived from his expertise as an anthropologist and his study of the Hmong.” *Id.* Thus, the court concluded that the “nature and purpose of the cultural testimony” in *Vang* was to provide an “academic, non-inflammatory explanation of Hmong culture in order to explain the seemingly inexplicable behavior of the two women plaintiffs in repeatedly submitting to rape by a government official.” *Id.*

In contrast to the expert testimony in *Vang*, the purported expert in *Jinro* “spoke from the perspective of a professional investigator about the assumed motives of Korean businesses, repeatedly implying that Korean businesses were a corrupt lot.” *Jinro*, 266 F.3d at 1009. Accordingly, it was not the “informative testimony of the anthropologist in *Vang*,” but rather the “kind of guilt-by-ethnic-association testimony condemned by this and other courts.” *Id.* Further, it was “the manner in which *Jinro*’s status as a Korean business was exploited that begged” an adverse inference to be drawn “based entirely on its ethnic identity or national origin.” *Id.*

Here, much like the proffered expert testimony in *Jinro*, Berry’s testimony was so tinged with ethnic and national origin stereotyping that it

begged the court to draw a negative inference to Brajesh based entirely on his ethnic identity or national origin. The alleged expert in *Katara* used negative stereotypes about an entire country to conclude that the father met the criteria for several “profiles” and “red flags” indicating a risk of abduction. It is true, as the Court of Appeals properly recognized, that the trial court abused its discretion in admitting Berry’s inadmissible profile evidence because the evidence was neither relevant nor helpful to the trier of fact. *Katara III, supra*, at *11-12, *citing* ER 401; ER 702. But when the trial court in its ruling linked Berry’s term “profiles” to Brajesh’s risk of abduction, just as Berry had improperly done and as the courts have ruled is improper in the above-cited cases, a more serious error than a mere violation of the evidence rules occurred.

B. A Party’s Use of Improper Profile and Risk Factor Testimony Consisting of Prejudicial Ethnic Stereotypes in a Proceeding Impacting a Parent’s Constitutional Rights Offends the Integrity of the Court System, Necessitating this Court’s Strong Condemnation of It.

The courts have long recognized that legal proceedings involving constitutionally protected rights should not be grounded in discriminatory generalizations or stereotypes. *See e.g., Sierra v. City of New York*, 579 F.Supp.2d 543, 548 (S.D.N.Y. 2008) (ruling that “the conclusion that the presence of such households has a detrimental impact on children is one

that could rely only on speculation and on impermissible stereotypes.”); *Cnty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1050 (9th Cir. 2007) (holding that facially discriminatory restrictions under the FHA may not be justified by stereotypes); *Bangerter v. Orem City Corp.*, 46 F.3d 1491, 1503 (10th Cir. 1995) (“Restrictions predicated on public safety cannot be based on blanket stereotypes....”).

Washington courts likewise should not rely upon false generalizations and stereotypes when ruling on constitutionally protected rights in a family law case. The fundamental liberty interest of “natural parents in the care, custody, and management of their child” is without question. *Troxel v. Granville*, 530 U.S. 57, 65-66, 147 L.Ed.2d 49, 120 S.Ct. 2054 (2000) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166, 88 L.Ed. 645, 64 S.Ct. 438 (1944): “It is cardinal with us that the custody, care and nurture of the child first reside in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”)); accord *In re Parentage of L.B.*, 155 Wn.2d 679, 710, 122 P.3d 161 (2005). Also constitutionally protected is the long recognized tradition of children’s visitation with their grandparents. *Moore v. City of East Cleveland*, 431 U.S. 494, 504, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977) (“The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with

parents and children has roots equally venerable and equally deserving of constitutional recognition.”). Court proceedings restricting these very rights should not be tainted by the admission of the national origin stereotypes in Berry’s testimony .

Other courts have strongly condemned an improper focus on a parent’s national origins in a family law case, explaining it “mistakenly change[s] the focus from the parent to whether his or her native country’s laws, policies, religion or values conflict with our own. Such an inflexible rule would border on xenophobia, a long word with a long and sinister past.” *Abouzahr v. Matera-Abouzahr*, 824 A.2d 268, 281-2 (N.J. Super. 2003) (declining to adopt bright-line rule prohibiting out-of-country visitation by a parent whose country is not signatory to the Hague Convention); *In the Matter of Rix*, 20 A.3d 326, 329 (N.H. 2011) (concluding that a foreign country’s Hague Convention signatory status, by itself, cannot be determinative of whether it is in the child’s best interest to travel overseas).

Although purporting to testify about the risks of child abduction to a foreign country, Berry’s testimony, under the guise of expertise, amounted to little more than fear-mongering and xenophobic statements that attempt to paint a picture of a country of 1.21 billion people with one broad brush stroke. BBC News, 31 March 2011, *India Census*:

population goes up to 1.21 bn, available at

<http://www.bbc.co.uk/news/world-south-asia-12916888>. It was not based on any relevant statistical information nor any experiences personally observed by Berry nor, as the Court of Appeals pointed out, any individualized risk assessment. The inferences about risks based on national origin which permeated Berry's testimony are the exact kind of guilt-by-ethnic-association testimony that is condemned by Washington and other courts.

Moreover, in purporting to justify the very travel and passport restrictions the trial court ultimately adopted, Berry claimed Brajesh was more at risk to abduct his children because he chose to value his Indian culture and heritage. It "is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Thorsted v. Gregoire*, 841 F.Supp. 1068, 1080 (W.D. Wash. 1994) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)). The use of Berry's improper testimony to interfere with Brajesh's fundamental liberty rights, including his right to travel, should be condemned in no uncertain terms, to prevent recurring violations of parents' rights to travel and association. *See Eggert v. City of Seattle*, 81 Wn.2d 840, 845, 505 P.2d 801 (1973).

C. Reversal is the Proper Remedy Based not Only on the Egregious Nature of the Expert Testimony but also Based on A Valid Factual and Legal Analysis for Determining when Reversible Error has Occurred.

Despite recognizing the inadmissibility of Berry's profile testimony, the Court of Appeals concluded the error did not require reversal of the trial court's ruling. The Court rested its conclusion on a few words in the trial court's findings, rather than the trial court's actions as a whole, and failed to identify what legal theory it was using as the basis for not reversing despite the error. For the following reasons, this Court should rule that reversal was necessary.

The issue before the trial court in the current remand hearing was whether the travel and passport restrictions imposed on Brajesh were justified as of 2009. Berry's improper expert testimony was offered on precisely that issue. Far from recognizing that the testimony was inadmissible, the trial court specifically stated that it would be allowed because it would assist the court. When the previous hearings occurred without Berry's testimony, the trial court repeatedly made a finding that Brajesh presented no serious risk of abduction. After hearing Berry's testimony, the trial court deleted that critical finding. After hearing Berry's testimony, the trial court also for the first time found that the risk had increased rather than abated, despite Brajesh's increased ties to the

United States. The evidence of Brajesh's alleged threats to take the children involved matters that occurred years ago, and that the trial court had heard before. What was new at the remand hearing was Berry's testimony. The trial court used the same "profile" term that Berry had injected into the proceedings, and linked it to risk as Berry had done, for the first time in the current remand hearing.

Based on these facts, it was error for the Court of Appeals to conclude that Berry's testimony was disregarded simply because the trial court did not specify exactly the same risk factors as Berry. It was equally erroneous for the Court of Appeals to conclude the trial court's findings were "independent" of Berry's risk factor analysis, or based solely on the alleged evidence of Brajesh's threats and conduct that it had heard before, when the trial court changed its findings to indicate the risk had increased only after hearing from Berry.

The Court of Appeals' failure to reverse cannot stand because it assumed that the trial court did not rely on the inadmissible evidence and failed to properly analyze its effect for prejudicial or harmless error, under one of the accepted legal tests for that analysis. The Court briefly cited to *State v. Melton*, 63 Wn.App. 63, 817 P.2d 413 (1991), for the proposition that a trial judge is presumed to be able to disregard inadmissible evidence. *Katara III, supra*, at *11. A few of this Court's cases have

adopted that rule. *State v. Read*, 147 Wn.2d 238, 242, 53 P.3d 26 (2002) (citing *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970)). The presumption that inadmissible evidence is disregarded in a non-jury matter may make sense when a trial judge states that evidence is inadmissible or of little weight, or otherwise indicates she is disregarding it, or when the evidentiary error relates to a minor matter in the proceeding, as in *Read* and *Miles*. But even assuming the presumption applies here, this Court has always recognized it is rebuttable by precisely the circumstances that were present here – the trial court’s changed findings regarding risk only after ruling the evidence would assist as to the issue of risk. *Read*, 147 Wn.2d at 245-46 (quoting *Builders Steel Co. v. Comm’r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950) (“An appellate court will not reverse judgment in a nonjury case because of the admission of incompetent evidence, unless ... it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.”)).

Alternatively, the Court of Appeals may have been applying a harmless error standard, even though it did not use that term. Washington courts do not adhere to any single formulation of the harmless error rule and it “has been stated in various ways.” 2A Karl B. Tegland, *Washington Practice*, Rules Practice 2.5§ 49, 277 (7th ed. 2011). One

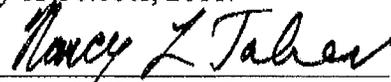
test is that “an error is harmless unless it materially affected the outcome below or related to an important issue of procedural fairness.” *Id.*, citing *Thomas v. French*, 99 Wn.2d 95, 659 P.2d 1097 (1983); *Thornton v. Anest*, 19 Wn.App. 174, 574 P.2d 1199 (1978) (improperly excluded evidence would have been cumulative only). It has also been stated that “an error is not reversible unless ‘within reasonable probabilities, had the error not occurred, the result might have been materially more favorable to the one complaining of it.’” *Id.* Applying the proper test, the record here shows that the error regarding Berry’s testimony was not harmless. It materially affected the outcome, and related to an important issue of procedural fairness, and without it within reasonable probabilities the result might have been more favorable to Brajesh.

This Court should hold that when such manifestly prejudicial evidence taints a civil proceeding, a court commits reversible error unless it can be shown clearly and convincingly by the beneficiary that the proceeding has not been tainted. Alleged expert testimony consisting of the kind of national origin and ethnic stereotypes presented here offends the integrity of the justice system and must be strongly deterred with a reversal remedy.

V. CONCLUSION

For the reasons set forth herein, Amicus respectfully requests that the Court of Appeals' ruling be reversed.

Respectfully submitted this 14th day of October, 2011.



Nancy L. Talner, WSBA #11196
Arnold R. Jin, WSBA #42482

Attorneys for *Amicus Curiae*
ACLU of Washington

DECLARATION OF SERVICE

RECEIVED BY E-MAIL

I declare, under penalty of perjury, under the laws of the State of Washington, that on the date below I served a copy of the ACLU-WA amicus motion and brief in this case on the attorneys of record for the parties and amici by emailing the same, with consent, to:

Jim Lobsenz, lobsenz@carneylaw.com

Greg Miller, miller@carneylaw.com

Catherine Wright Smith, cate@washingtonappeals.com

Valerie Villacin, valerie@washingtonappeals.com

Gordon Wilcox, gwilcox@gwwinc.com

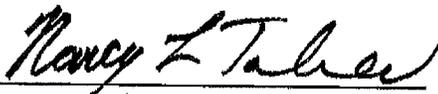
Lori Bannai, bannail@seattleu.edu

David Perez, perezd@seattleu.edu

Lam Nguyen-Bull, hqnguyen@gsblaw.com

Keith Talbot, kat@pattersonbuchanan.com

Signed this 14th day of October, 2011, at Seattle, King County, Washington.



Nancy L. Talner