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Supreme Court No. 102630-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SIMONE SCOTT, Personal Representative on Behalf of the Estate of Shamarra Scott, an individual,

Appellant,

v.

CITY OF TACOMA, a municipal corporation; WADE and JANE DOE WHITE, a marital community,

Respondents.

RESPONDENTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The City of Tacoma (the "City") seeks review of Division II of the Washington Court of Appeals' ("Division II") opinion reversing the trial court's order granting the City's Motion to Exclude the testimony of two of Appellee Simone Scott's experts and its related grant of summary judgment in favor of the City.

II. COURT OF APPEALS DECISION

Division II filed its opinion on November 7, 2023. The opinion is attached in the Appendix to this Petition.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Division II's holding that *Frye*[1] does not apply to Dr. Steven Overman's expert testimony regarding Shamarra Scott's injuries and death, even though there is no evidence in the record of any (let alone general) acceptance in the relevant scientific community for his speculative theory that physical trauma in one area of the body can activate sarcoidosis

[1] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

in an area unaffected by trauma, conflicts with opinions of this Court and published opinions of the Court of Appeals? Likewise, whether Division II's holding that Dr. Overman's opinions should have been admitted under ER 702 conflicts with opinions of this Court and published opinions of the Court of Appeals?

2. Whether Division II's decision to not affirm summary judgment on legal causation grounds conflicts with opinions of this Court and published opinions of the Court of Appeals where the connection between Shamarra Scott's motor vehicle accident and her death five years later based on a rare disorder is too attenuated or insubstantial to impose liability on the City?

3. Whether Division II's improper application of *Frye* and lack of any analysis as to legal causation present issues of substantial public interest?

4. Whether to vacate Division II's decision and remand to the trial court the issue of the applicability of ER 702

to Dr. Overman's speculative and unhelpful opinions for additional fact-finding?

IV. STATEMENT OF THE CASE

A. Factual Background

In 2015, Shamarra Scott ("Ms. Scott") was involved in a car accident in North Tacoma with Tacoma Police Officer Wade White ("Officer White"). Clerk's Papers ("CP") at 2.[2] Ms. Scott declined medical treatment at the scene. CP 127. Later that day, she went to the hospital and was diagnosed with soft-tissue injuries, which were successfully treated with physical therapy and visits to a chiropractor. CP 127, 478. The medical records from Ms. Scott's hospital visit that day state that she "did not hit her head or lose consciousness" and that she denied "hitting

[2] The City incorporates herein the factual background set forth in its Respondents' Brief and recites only the most salient facts below.

head." CP 122, 139. There is no evidence in the record that she suffered any injury or trauma to her eyes.

Over three years after the accident, on December 1, 2018, Ms. Scott was hospitalized at St. Joseph's Medical Center with severe back pain and eventually diagnosed with multiple compression fractures. CP 242–55. She had suffered no physical trauma immediately before the hospitalization. CP 243. Ms. Scott's treating physicians noted that the "etiology of the fractures is not particularly clear;" ultimately, the cause of the fractures remained unknown. CP 248, 482.

On December 5, 2018, Ms. Scott began to have spasms and shaking of unknown origin. CP 251. Nothing was done to determine the cause, and without knowing the cause of her fractures or spasms, Ms. Scott's treating physicians performed a major spinal surgery on her. CP 251. Ms. Scott came out of the surgery and she appeared to be recovering before she developed numerous and serious complications that left her paralyzed and unable to speak. CP 251–55.

On January 12, Ms. Scott was transferred to UW Harborview because her treating physicians at St. Joseph's were unable to identify the etiology of her complications. CP 255. While at Harborview, multiple notes indicate that Ms. Scott did not have active sarcoidosis, and that her symptoms "have broad differential diagnoses including paraprotenemia and CNS viral infection which may necessitate additional workup." CP 258, 259, 262. Indeed, medical records from Harborview indicate that Ms. Scott's complications had an "unclear inciting event or etiology." CP 261.

Ms. Scott was transferred from Harborview to CHI Regional Hospital in February 2019, and to a long term care facility in March 2019. Medical records show that Ms. Scott's family members voiced concern on multiple occasions with the level of care Ms. Scott received at the facility. CP 266. Ms. Scott was transferred between the facility and the hospital on multiple occasions over the ensuing months due to infections that she developed. CP 437. She passed away in February 2020. The

cause of death on her death certificate is listed as Guillain-Barre syndrome. CP 268.

B. Procedural History

Simone Scott, as the Personal Representative of the Estate of Shamarra Scott ("the Estate") now claims in this lawsuit that the City's negligence in the 2015 car accident proximately caused a sequence of increasingly serious and unexplained medical maladies: (1) the accident caused "activation" of a dormant underlying condition known as sarcoidosis, (2) which caused issues with Ms. Scott's eyes (uveitis), (3) which led to prescriptions for steroids over a long period of time to treat vision problems, (4) allegedly leading to Ms. Scott developing an unconfirmed osteoporosis diagnosis, (5) which caused unexplained spontaneous spinal fractures in December 2018, (6) which led to spinal surgery a few days later, (7) which resulted in a rare allergic type reaction and numerous complications and eventual death caused by Guillain Barre Syndrome.

The Estate's theory on the first "link" of the causal chain

relies entirely on the testimony of Dr. Steven Overman, who initially opined that Ms. Scott's motor vehicle accident "activated" her sarcoidosis through physical and emotional trauma, setting into motion this chain of misfortune.[3] The City moved to strike Dr. Overman's opinion under *Frye* and ER 702, arguing that his opinion that the accident caused a flare-up of Ms. Scott's sarcoidosis is not generally accepted (or accepted at all) in the medical community. CP 770–83. The City also moved for summary judgment based on the gaps in the link of causation following exclusion of Dr. Overman's testimony, and on grounds that Ms. Scott's death was too attenuated from the accident for purposes of legal cause. CP 77–93.

In response to the City's motion to strike, Dr. Overman

[3] Division II correctly ruled that the Estate abandoned on appeal its argument that Dr. Overman's testimony regarding emotional trauma should not have been excluded. Appendix 6 n.15. In other words, it is undisputed that the trial court correctly ruled that Dr. Overman's testimony that the "emotional trauma" from the accident activated Ms. Scott's sarcoidosis should be excluded under *Frye* and ER 702.

submitted a declaration, attaching almost 300 pages of articles. CP 1334–1656. Not one article, however, supported Dr. Overman's novel theory. In his declaration, Dr. Overman implicitly conceded that there is no general acceptance for the theory that emotional and physical trauma activates sarcoidosis, as he instead asserted that aspects of other autoimmune conditions (like psoriasis) can be applied to sarcoidosis in order to boot-strap his prior theories. *E.g.*, CP 1338–39. But none of the literature cited by Dr. Overman endorsed his theory that the causes and "activations" of sarcoidosis are the same as those of psoriasis or other autoimmune conditions. Dr. Overman's declaration also misleadingly suggested that Ms. Scott suffered head trauma, despite medical records to the contrary. *Compare* CP 1358 *with* CP 1679.

The trial court granted the City's motion to strike, ruling that Dr. Overman's opinions were not based upon generally accepted scientific theories under *Frye*. CP 1852–55. In pertinent part, the trial court excluded "Dr. Overman's ultimate opinions

as identified as the accident caused a flare-up of Ms. Scott's sarcoidosis and that she ultimately passed away because of a direct sequence of events from the accident." CP 1855; *see* CP 1720–22. The trial court did not rule on the ER 702 issue. CP 1721.

On summary judgment, the trial court denied the City's motion as to legal causation but granted summary judgment on the wrongful death claim based on proximate cause given the absence of general acceptance of Dr. Overman's testimony. CP 1870; *see* CP 1818–20.

The Estate appealed the trial court's grant of summary judgment to Division II. In an opinion issued on November 7, 2023, Division II reversed and held Dr. Overman's testimony was admissible under *Frye* and ER 702. Appendix 15–17. Division II further ruled that Dr. Overman's testimony presented a genuine issue of material fact, rejected the City's argument "that the causal chain is too remote and attenuated to impose

liability as a public policy matter," and reversed partial summary judgment. Appendix 18.

V. ARGUMENT WHY REVIEW IS MERITED

This Court may grant review of an opinion of the Court of Appeals reversing a grant of summary judgment when, as here, the requirements of RAP 13.4(b) are met. *Grp. Health Coop. v. Coon*, 193 Wn.2d 841, 849, 447 P.3d 139 (2019).

RAP 13.4(b)(1) and (b)(2) state that this Court will accept review of a decision by the Court of Appeals if the decision is in conflict with an opinion of this Court, or in conflict with a published opinion of the Court of Appeals. Division II's ruling admitting Dr. Overman's testimony conflicts with established precedents of both Courts, which require that the scientific theory or principle upon which an expert's evidence is based has gained general acceptance in the relevant scientific community, as there is no general acceptance of the theory that sarcoidosis can be triggered by remote physical trauma.

In addition, Division II's ruling departs from decisions of this Court and from published decisions of the Court of Appeals making clear that no legal cause exists when the ultimate result and the act of a defendant is too remote or insubstantial to impose liability. Here, the unprecedented remoteness in time and numerous intervening factors between Officer White and Ms. Scott's accident and her ultimate death renders her alleged wrongful death unforeseeable and nonactionable as a matter of law. Notably, Division II did not give any reason or cite to any authorities for its decision on this issue of legal cause – it simply indicated that it was "not persuaded."

Finally, RAP 13.4(b)(4) is satisfied here, as the continuing endurance of *Frye* itself has been called into question by Division II's Opinion. Under the rationale of Division II, an expert could make of any theory of causation, regardless of its acceptance in the field, based solely on the expert's experience in the field. This would render *Frye* meaningless. Accepting review would

allow this Court an opportunity to define the law regarding admission of expert testimony in Washington.

The City respectfully submits that RAP 13.4(b)(1), (2), and (4) are met here, and thus, that review of Division II's decision is required.

A. Division II's Gate-Opening Ruling that Dr. Overman's Novel Testimony is Admissible Without General Acceptance Conflicts with the Appellate and this Court's Precedents Regarding *Frye* and ER 702.

1. Washington law regarding admission of expert evidence.

Expert medical testimony is **required** where the cause and nature of "[an] injury involves obscure medical factors which are beyond an ordinary lay person's knowledge, necessitating speculation in making a finding." *Riggins v. Bechtel Power Corp.*, 44 Wn. App. 244, 254, 722 P.2d 819 (1986). Medical testimony as to a causal relationship between the negligent act and the subsequent condition complained of must demonstrate that the injury "probably" or "more likely than not" caused the subsequent condition. *Fabrique v. Choice Hotels Intern., Inc.*,

144 Wn. App., 675, 687, 183 P.3d 1118 (2008) (internal quotation omitted). The expert medical testimony must also be based upon a reasonable degree of medical certainty according to the facts of the case, as opposed to unsupported speculation. *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989); *Fabrique*, 144 Wn. App. at 687–88.

Once the defendant demonstrates "that the plaintiff lacks admissible expert testimony to support [her] case, the burden shifts to the plaintiff to present competent medical expert testimony establishing that the alleged injury was proximately caused by the defendant's actions." *Id.* at 685. If the plaintiff fails to come forward with the requisite expert medical testimony, summary judgment is appropriate. *Id.*; *Miller v. Likins*, 109 Wn. App. 140, 145, 34 P.3d 835 (2001) .

For expert testimony regarding novel scientific evidence to be admissible, it first must satisfy the *Frye* standard and then must meet the other criteria in ER 702. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013); *Lake*

Chelan Shores Homeowners Ass'n v. St. Paul Fire & Marine Ins. Co., 176 Wn. App. 168, 175, 313 P.3d 408 (2013).

> Under *Frye*, expert testimony is admissible where
>
> (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and
>
> (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results.

Lake Chelan, 176 Wn. App. at 175. **Both** (1) the theory underlying the evidence **and** (2) the methodology used to implement the theory must be generally accepted in the scientific community for evidence to be admissible under *Frye*. *Id.* When applying *Frye*, courts do not determine if the scientific theory underlying the proposed testimony is correct; rather, courts must "look to see whether [the theory] has achieved general acceptance in the appropriate scientific community." *Id.* at 175–76 (internal quotation omitted). To perform a *Frye* analysis, courts consider four sources of information and the hallmarks of reliability: expert testimony; scientific writings that have been

subject to peer review and publication; secondary legal sources; and legal authority from other jurisdictions. *Id.* at 176. Just as the scientific community plays a crucial role, so too do the courts as gatekeepers of admissibility and junk science.

Evidence that is admissible under *Frye* must still pass the two-part test under ER 702: (1) the witness must be qualified as an expert; and (2) the expert's testimony must be helpful to the trier of fact. *State v. King County Dist. Court W. Div.*, 175 Wn. App. 630, 637, 307 P.3d 765 (2013). Evidence is not helpful if it misleads the jury and unreliable testimony does not assist the trier of fact. *See Lakey*, 176 Wn.2d at 918.

If the moving party shows that expert testimony on an essential element is inadmissible because the scientific theory or methodology is not generally accepted in the relevant scientific community, the burden shifts to the non-moving party to provide evidence demonstrating general acceptance. *See Lake Chelan*, 176 Wn. App. at 179. The degree of confidence to support the *Frye* "general acceptance" standard is significantly higher than

the civil "preponderance" standard. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 607–08, 260 P.3d 857 (2011).

2. Division II ignored *Frye* and the absence of any evidence of general scientific acceptance for Dr. Overman's novel theory regarding sarcoidosis and merely required "clinical experience."

In its Opinion, Division II repeatedly required mere clinical experience rather than general acceptance of his scientific theories. Indeed, nowhere in the Opinion does Division II acknowledge that *any* other expert has endorsed Dr. Overman's theory:

> "As to his opinion that the collision caused a sarcoidosis flare, Dr. Overman testified that he relied on his *extensive clinical experience*. He explained that in his *experience*, trauma can cause inflammation in the body. He explained that sarcoidosis is an inflammatory disease and that uveitis is an inflammatory symptom, and this has not been disputed. To the extent he drew inferences about sarcoidosis *from his experience* with psoriasis patients, he explained how the diseases were similar and why it would be reasonable to draw such an inference. Nowhere does the City challenge Dr. Overman's clinical observations; rather, it has presented experts who disagree about Dr. Overman's causation opinions because the exact causal link has not been documented in the literature . . . . The City has not shown that Dr. Overman's

> opinion about the collision causing a sarcoidosis flare is based on novel science, so we do not apply *Frye* analysis to that opinion.

Appendix at 15–16 (emphasis added). Importantly, Division II erases *Frye*'s requirement that an expert's scientific theory be generally accepted, and allows an expert's qualifications (including, for instance, their experience) to be the sole metric of whether their opinion should be admitted. This is not the law under *Frye*, and is not the law in Washington. Division II did not, for instance, conclude that Dr. Overman's testimony was supported by "expert testimony, scientific writings that have been subject to peer review and publication, secondary legal sources, [or] legal authority from other jurisdictions." *Lake Chelan*, 176 Wn. App. at 176 (internal quotation omitted). To the contrary, none of the articles relied on by Dr. Overman supported his conclusion.

Indeed, this Court has consistently declined invitations to adopt the *Daubert*[4] test, which asks merely whether "the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at hand," in favor of the "**more stringent** *Frye* test." *Anderson*, 172 Wn.2d at 601–02 (citing *Reese v. Stroh*, 128 Wn.2d 300, 307, 907 P.2d 282 (1995)) (emphasis added). By requiring only Dr. Overman's experience and his professed use of a differential diagnosis method, Division II effectively applied the "*less* stringent" *Daubert* test.

The City does not contest that Dr. Overman lacks, in general, "practical experience and acquired knowledge" as a rheumatologist. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992). But Dr. Overman's opinion went far beyond "application of an accepted theory or methodology to a particular medical condition," under which conditions a court may properly

[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

conclude that *Frye* is not implicated because an expert's opinion is not based on novel science. *Reese*, 128 Wn.2d at 307–08. Dr. Overman's practical experience as a rheumatologist cannot permit a court to conclude that science is not novel and decline to apply *Frye*, thus opening the gate to a flood of his novel opinions. As the court in *Lake Chelan* stated, "**it makes little sense to conclude that an expert could avoid the application of *Frye* simply by eschewing the use of any particular methodology or technique and purporting to rely only on their knowledge and experience**." 176 Wn. App. at 181 (emphasis added). In dodging the *Frye* inquiry and relying on experience, Division II's approach directly contradicts *Lake Chelan*. The Opinion also contradicts *Anderson*, where this Court held that *Frye* did not apply based on the expert's reliance on a scientific study—here, as Division II implicitly recognized, Dr. Overman cited no scientific studies supporting his novel theory. *See Anderson*, 172 Wn.2d at 611.

Simply put, no evidence in the record shows that Ms. Scott's eyes were impacted in the motor vehicle accident, including by an airbag; and no scientific literature supports Dr. Overman's novel theory that physical trauma can trigger sarcoidosis in areas unaffected by the trauma.

3. Division II's Analysis of ER 702 is Superficial and Conclusory.

Division II effectively ignored all of the serious challenges to the admissibility of Dr. Overman's testimony under ER 702. The City highlighted several reasons why Dr. Overman's opinions were not admissible under that rule. First, the fact that Dr. Overman is not an ophthalmologist, and thus is not qualified to rely on ophthalmology patient interactions. Second, the lack of treatment or monitoring of Ms. Scott's alleged sarcoidosis between 2012 and 2015, and the resulting speculation as to the cause of her uveitis. Third, the contradiction between Dr. Overman's theory that "remote Koebner" caused Ms. Scott's uveitis and his (since abandoned) theory that uveitis was caused by emotional stress. Fourth, the lack of record support for his

assertion that Ms. Scott suffered any head and/or eye trauma, including from an airbag. Respondents' Brief 31–32, 48–49. *See Lakey*, 176 Wn.2d at 920–21 (excluding testimony under ER 702 despite compliance with *Frye* because the expert did not consider all relevant data, discounted studies, and selectively sampled data rendering his conclusions unreliable and therefore inadmissible).

Instead of addressing *any* of these arguments, Division II reasoned first (incorrectly) that the City had not challenged Dr. Overman's conclusions, and second, merely that "it is readily apparent that his testimony would prove helpful to lay jurors because few laypersons are well versed in the nuances of conditions like psoriasis and sarcoidosis. Nor is his testimony so technical that a jury would be unable to assess its reliability." Appendix 16–17. In deciding in a conclusory and unexplained fashion that Dr. Overman's testimony is "helpful," Division II plainly ignored ER 702's requirement that the testimony must also be reliable. *See id.* Even if Dr. Overman's testimony were

admissible under *Frye*—and it is not—it would be inadmissible under ER 702. An unsupported, unaccepted novel theory is not helpful to jurors, nor would it provide jurors with "well versed nuances."

B. Division II's Ruling that a Triable Issue of Fact Exists Contradicts Established Precedent Regarding Legal Cause.

The elements of a negligence claim are: (1) a legal duty owed by the defendant to the plaintiff; (2) breach of that duty; and (3) injury to the plaintiff proximately caused by the breach. *Miller,* 109 Wn. App. at 144. "A proximate cause of an injury is defined as a cause that, in a direct sequence, unbroken by any new, independent cause, produces the injury complained of and without which the injury would not have occurred." *Fabrique*, 144 Wn. App. at 683 (internal citation omitted).

Proximate cause is composed of two distinct elements: (1) cause in fact; and (2) legal causation. *Id.* Legal causation—at issue here—"rests on policy considerations as to how far the consequences of a defendant's acts *should* extend [and] involves

a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77 (1985).

Division II's legal cause "analysis" did not cite any cases, and did not even attempt to analyze any of the policy considerations underlying the legal cause doctrine: "logic, common sense, justice, policy, [or] precedent." *Lowman v. Wilbur*, 178 Wn.2d 165, 169, 309 P.3d 387 (2013). Instead, it merely stated: "[n]either has the City convinced us that we should affirm based on its alternative argument, that the causal chain is too remote and attenuated to impose liability as a public policy matter." Appendix 18. A complete dearth of application and transparency about just what "convinced us" is surely not generally accepted appellate guidance. Even taking the facts in the light most favorable to the Estate, any connection between Ms. Scott's death from a rare autoimmune disorder and the relatively low speed car accident five years earlier was unforeseeable and is far too remote and insubstantial to impose

liability on the City—both factually and as a matter of public policy.

First, the record establishes as a matter of law that Ms. Scott was not seriously injured in the accident and had fully recovered to "pre-accident status" and "maximum medical improvement" less than a year later, by September 12, 2016. CP 115–40, 478. The compression factures in Ms. Scott's back that led to her hospitalization occurred more than two years after she had fully recovered from the accident. Washington courts have recognized that remoteness in time limits legal causation: as recognized by the majority opinion authored by Justice Madsen in *Kim v. Budget Rent A Car Sys., Inc.*, "remoteness in time between the criminal act and the injury" may be dispositive to the question of legal cause. 143 Wn.2d 190, 205, 15 P.3d 1283 (2001). Indeed, none of Ms. Scott's physicians ever linked her compression fractures or any of her subsequent maladies to the accident.

Second, a myriad of unrelated and unforeseeable events

occurred after September 2016 that broke any assumed chain of causation between the accident and her death. *See Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 311–12, 151 P.3d 201 (2006) (plaintiff failed to establish legal causation where she "did not link any breach of duty by [defendant] to an unbroken chain of causation."). Post-surgery complications further broke any causal connection between the accident and her ultimate death. These events were outside the "range of danger" of Officer White's conduct at the time of the car accident. *See McKown v. Simon Property Group, Inc.*, 182 Wn.2d 752, 764, 344 P.3d 661 (2015) ("[T]he duty to use ordinary care is bounded by the *foreseeable* range of danger.") (emphasis added). For instance, Ms. Scott received vancomycin during her spinal surgery; she then suffered acute kidney injuries that her physicians believed were "likely" due to "vancomycin toxicity"—a completely unforeseeable result at the time of the 2015 car accident. *See* CP 251–55.

The record establishes as a matter of law that legal

causation does not exist. It was simply not foreseeable—factually or legally—that a relatively low speed car accident in 2015, which caused Ms. Scott only soft tissue damage could cause a cascading series of events ultimately leading to her death from a rare autoimmune disorder five years later. Simply put, "[t]he record fails to show a sufficiently close, actual causal connection between the tragedy which struck the decedents and the original negligence of the defendant in causing an automobile accident." *Maltman v. Sauer*, 84 Wn.2d 975, 983, 530 P.2d 254 (1975).

Division II's position appears to suggest that a driver involved in a car accident could theoretically be held liable for any subsequent injury, medical condition, or death of anyone else involved in the accident. Policy considerations demand that risk of liability terminates at some foreseeable point. *McKown*, at 763–64 ("The concept of foreseeability limits the scope of the duty owed" and "considers whether the harm is sustained is reasonably perceived as being within the general field of danger

covered by the duty owed by the defendant."). The unbounded, eternal liability proposed by this theory of causation would lead to a proliferation of lawsuits and exposure, even where a plaintiff's "injuries resulted not directly from the defendant's negligence but, rather, from an intervening cause only tenuously related and totally unforeseeable, in a causal sense, to the . . . defendant's conduct." *Maltman*, 84 Wn.2d at 982–83.

C. Division II's Ruling Presents Issues of Substantial Public Importance: the Court as Gatekeeper.

Division II's Opinion presents the question of whether *Frye* has <u>any</u> application at all in cases where medical experts testify.

Under *Frye*, trial courts exclude testimony based on novel scientific theories or methodologies until there is consensus in the relevant scientific community that the theory or methodology is reliable. *Lakey*, 176 Wn.2d at 918–19. The policy underpinning the *Frye* standard is that expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying

principles. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996).

The problem illustrated by this case occurs when medical experts testify regarding causation based on differential diagnosis. *Anderson*, 172 Wn.2d at 610 ("A physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms."). Because medical expert testimony may employ the differential diagnosis methodology without implicating *Frye*, it is imperative that the court remains vigilant in its gatekeeping role regarding whether expert testimony is based on generally accepted scientific theories. But if courts defer to "extensive clinical experience" to allow experts to testify based on novel, untested, and unreliable theories, the *Frye* standard is effectively overruled and nonexistent as applied to medical causation testimony.

Accepting review of this Opinion would allow this Court to further explain whether and to what extent Washington law

still upholds *Frye* as the standard of whether an expert's testimony should be admitted, and in particular: (1) define when an expert is merely applying an accepted theory or methodology (or their practical experience) to a particular medical condition, as opposed to applying novel science; and (2) whether an expert's experience, standing alone, can establish "general acceptance" of a scientific theory under Washington law's application of *Frye*. This Court should correct the lower courts' misimpression exemplified by this Opinion and clarify how the *Frye* standard applies in future cases like this.

Accepting review of this matter would also provide the Court with opportunity to define the appropriate scope of just how attenuated a plaintiff's harm may be from a defendant's allegedly negligent act for legal cause to exist. The extreme facts in this matter present an ideal test case for the Court to place some limits on the extent to which municipalities and individuals may be liable to persons for allegedly negligent acts.

D. Alternatively, this Court may remand the ER 702 issue to the trial court for further proceedings.

As discussed *supra*, Division II's Opinion barely addresses Respondent's ER 702 objections. In fact, the trial court never submitted rulings or made factual findings related to ER 702. Rather than let Division II's cursory analysis stand, this court may grant review and remand to the trial court for further proceedings.

VI. CONCLUSION

Division II misreads and contradicts this Court's *Frye* precedents when it held that Dr. Overman's testimony did not implicate *Frye*. To the contrary, this case presents a glaring example of the type of case that requires the court to perform its gatekeeping role. Further, the trial courts and courts of appeal require clarification and guidance from this Court on the application of *Frye*, especially with respect to when a medical expert's opinion constitutes "novel science."

Respondents respectfully submit that review of Division II's Opinion is merited by this Court.

DATED: December 7, 2023.

This document contains 4,994 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

The undersigned certifies as follows:

1. I am employed at Corr Cronin LLP, attorneys for Respondents herein.

2. On December 7, 2023, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED: December 7, 2023 at Seattle, Washington.

s/ Christy A. Nelson
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Filed
Washington State
Court of Appeals
Division Two

November 7, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SIMONE SCOTT, as Personal Representative of the Estate of Shamarra Scott, Appellant, v. CITY OF TACOMA, a municipal corporation; WADE and JANE DOE WHITE, a marital community, Respondents.	No. 57335-1-II UNPUBLISHED OPINION

CRUSER, A.C.J. — Shamarra Scott's estate (Estate) sued Tacoma, arguing that a 2015 collision between Scott and a Tacoma police cruiser caused Scott's death in 2020. The Estate claims that the collision caused a flare in Scott's sarcoidosis,[1] requiring treatment with steroids that in turn caused osteoporosis[2] and spinal fractures. Scott had surgery in 2018 to treat the fractures, and later died of neurological complications after an extended period of paralysis.

[1] Sarcoidosis is "a chronic disease of unknown cause that is characterized by the formation of nodules especially in the lymph nodes, lungs, bones, and skin." *Sarcoidosis*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/sarcoidosis (last visited Oct. 23, 2023).

[2] Osteoporosis is "a condition that affects especially older women and is characterized by decrease in bone mass with decreased density and enlargement of bone spaces producing porosity and fragility." *Osteoporosis*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/osteoporosis (last visited Oct. 23, 2023).

The Estate's case hinges on the connection between the collision and Scott's sarcoidosis. It proffered expert testimony from Dr. Steven Overman, who opined that the collision caused Scott's sarcoidosis flare and untimely death. On a defense motion, the trial court struck Dr. Overman's testimony, finding that his opinion was based on novel science not generally accepted in the scientific community. The court then granted the City's partial summary judgment motion and dismissed the Estate's wrongful death claim.

The Estate now appeals, arguing that (1) the trial court erred when it struck Dr. Overman's testimony and that (2) even without that testimony, the remaining expert opinions created a genuine issue of material fact as to causation that should have been submitted to a jury. The City responds that (1) Dr. Overman's testimony was properly excluded and that (2) without that testimony, the Estate failed to create an issue of fact as to whether the collision caused a sarcoidosis flare.

We hold that the trial court erred in excluding Dr. Overman's testimony because Dr. Overman's opinions were based on his extensive clinical experience, not on novel scientific methods or concepts. Dr. Overman's opinions were informed by literature on similar inflammatory diseases, such as psoriasis, but the City has not shown that science to be novel. In short, the City has presented experts who disagree with Dr. Overman's causation opinions but has not shown that Dr. Overman's opinions are the type of "junk science" that *Frye* is intended to exclude.

We further hold that the trial court erred in granting the City's summary judgment motion. Having determined that Dr. Overman's opinions, including on the ultimate issue, are allowable, we conclude that genuine issues of material fact remain for the jury to decide. We reverse the trial court's decision and remand for further proceedings.

FACTS

I. PRE-COLLISION MEDICAL HISTORY

Shamarra Scott passed away in 2020 at the age of 40. Scott developed Bell's palsy[3] and iritis[4] in 2012 and was referred to Dr. Anastasia Fyntrilakis "for a workup for sarcoid." Clerk's Papers (CP) at 99. Scott's medical records indicate she had a self-reported history of psoriasis.[5] Scott's iritis responded well to steroid treatment with prednisolone eye drops. Dr. Fyntrilakis ordered a chest x-ray and various labs. The labs revealed that Scott's angiotensin converting enzyme (ACE) level was moderately elevated, a finding that was "consistent with sarcoidosis." *Id.* at 355.[6] Other labs returned normal results. Dr. Fyntrilakis also referred Scott to a pulmonary specialist, but Scott did not schedule an appointment at that time because she did not have insurance.

II. 2015 COLLISION AND IMMEDIATE HEALTH PROBLEMS

Around 8:20 AM on October 14, 2015, Officer White of Tacoma Police Department pulled out from a parking lot as Scott approached at a rate of 30 miles per hour, and the police cruiser

[3] Bell's palsy is "paralysis of the facial nerve producing distortion on one side of the face." *Bell's palsy*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/Bell%27s%20palsy (last visited Oct. 23, 2023).

[4] Iritis is "inflammation of the iris of the eye." *Iritis*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/iritis (last visited Sep. 4, 2023).

[5] She had a family history of psoriasis (father), goiter (brother), Grave's disease (brother), and sarcoidosis (aunt).

[6] Dr. Fyntrilakis would later testify that in 2012, Scott's ACE was elevated to a level that was "pathognomonic for sarcoidosis." CP at 359. She did not know of anything else that could cause such an elevation. A City expert, Dr. Mohai, testified that ACE was a "soft marker" for sarcoidosis. *Id.* at 1178.

collided with the passenger side of Scott's car. Scott's frontal airbags deployed on impact and her car was towed from the scene.[7] It is not disputed that Officer White was at fault for the collision.

Scott went to the emergency room (ER) at 11:45 AM, complaining of neck pain and headache. Scott denied visual changes and eye pain and her eyes appeared normal. Scott's ER record indicates she denied hitting her head or losing consciousness, but Scott would later tell a chiropractor she hit her head on the headrest in the collision. Scott was diagnosed with neck sprain and discharged from the ER with instructions to schedule a follow up appointment with a non-emergency provider. Following discharge, Scott received chiropractic care until, in September 2016, her chiropractor believed she had returned to her pre-accident status and reached maximum medical improvement.

About a week after the collision, Scott's primary care physician noticed some prominence[8] of her eyes and referred her to Dr. Myers-Powell, an ophthalmologist. Scott saw Dr. Myers-Powell on December 9, 2015, and was diagnosed with panuveitis,[9] sarcoidosis, and glaucoma.[10] Dr. Myers-Powell's record indicates that Scott "started to have recurrent flare mid October following

[7] The record does not indicate where on her body Scott contacted the airbag.

[8] According to Dr. Smith, prominence could refer to protrusion or reddening of the eyes.

[9] Uveitis is "inflammation of the uvea." *Uveitis*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/uveitis (last visited Oct. 23, 2023). Panuveitis indicates uveitis that is "more universal with probably the entire orbit as opposed to one area." CP at 915.

[10] Glaucoma is "a disease of the eye marked by increased pressure within the eyeball that can result in damage to the optic disc and gradual loss of vision." *Glaucoma*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/glaucoma (last visited Oct. 23, 2023).

an MVA." *Id.* at 398. Scott was treated with prednisone for uveitis from December 2015 to September 2016. She would later restart prednisone in August 2017.

III. HEALTH PROBLEMS BETWEEN 2018-2020

On December 1, 2018, Scott presented to the local ER with severe back pain. An MRI showed compression fractures in two of Scott's vertebrae. The ER physician noted that any fractures were "likely due to chronic steroid use." *Id.* at 244. Another provider wrote that the fractures were "thought to be [due to] steroid induced osteoporosis." *Id.* at 251.[11] Because the pain was so severe that she could not walk, Scott requested a surgical consultation.

On December 6, 2018, Scott underwent spinal fusion surgery, which involved bracing her vertebrae with internal rods. On December 9, Scott was intubated and admitted to the ICU because she had "developed acute kidney injury and encephalopathy[12] which likely is due to multifactorial etiology (sepsis, uremia, medication induced)." *Id.* at 252-53.

After repeated bouts of seizure-like episodes, Scott was sedated and transferred to Harborview's ICU on January 12, 2019. The Harborview rheumatologist noted that Scott had a "history of sarcoidosis since 2012" that manifested in "adenopathy,[13] bilateral uveitis, hand

[11] Dr. Mohai agreed that steroid use was linked to fractures. He disagreed, however, that Scott's fractures were steroid-induced because "several things that were also done to mitigate [the risk of] osteoporosis" including alternate-day dosing and bone strengthening medication. CP at 1185.

[12] Encephalopathy is a general term meaning "a disease of the brain." *Encephalopathy*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/encephalopathy (last visited Oct. 23, 2023).

[13] Adenopathy is a general term meaning swelling or enlargement of glandular tissue, often lymph nodes. *Adenopathy*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/medical/adenopathy (last visited Oct. 23, 2023).

arthropathy,[14] possible psoriasis with nail pitting and psoriatic arthritis, Bell['s] palsy, and elevated ACE level." *Id.* 259. Throughout her time at Harborview, she was not thought to be in active sarcoidosis.

By February 3, 2019, Scott had developed quadriparesis (also known as locked-in syndrome) meaning she was conscious but was entirely paralyzed apart from her eyes. She remained paralyzed until she died in hospice on February 11, 2020. Scott's death certificate lists Guillain-Barre Syndrome as her cause of death, and lists the following "other conditions contributing to death: chronic kidney disease, large left ischium wound, quadriparesis, long term tracheostomy, sarcoidosis, [and] seizure disorder." *Id.* at 267.

IV. LITIGATION

Scott's Estate sued the City, bringing claims for negligence and wrongful death. In the early stages of litigation, treating providers and professional experts testified about Scott's medical conditions. Specifically, the Estate hired two experts who testified that Scott's death could be traced back to the collision. Those experts, Drs. Overman and Rai, believed that the trauma[15] of the collision triggered a flare in Scott's underlying sarcoidosis necessitating steroid treatment that weakened her bones, causing her to undergo surgery and ultimately to develop fatal complications. The City's experts, Drs. Mohai and Smith, disagreed and testified that any supposed link between

[14] Arthropathy is a general term meaning joint disease. *Arthropathy*, MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/medical/arthropathy (last visited Oct. 23, 2023).

[15] These witnesses testified to the effects of both physical and emotional trauma. However, the Estate has abandoned its argument that the testimony regarding emotional trauma should not have been excluded.

trauma and sarcoidosis was unsupported by scientific literature. Scott's treating providers endorsed some links in the causal chain but expressed doubt about others.

A. The Estate's Experts

Dr. Overman, an internist and rheumatologist, prepared a report[16] opining that the collision caused Scott's untimely death, in part by flaring up Scott's sarcoidosis symptoms. He was later deposed and testified the same. Dr. Rai, a pulmonary and critical care physician, also testified that Scott's death could be traced back to the collision. Specifically, Dr. Rai testified, "we can trace the cascade back to the fracture of her back, . . . which we can trace back to the osteoporosis, which we can trace back to the sarcoidosis flare-up that resulted from her auto accident." *Id.* at 556. Dr. Rai also declared,

> but for Ms. Scott's need for prolonged steroid use, she would not have had compression fractures. She would not have required emergent surgery, nor experienced rebound inflammatory response. Without these antecedent events, Ms. Scott would not have experienced failure of multiple organ systems and a prolonged painful death. In short, but for the hospitalization Ms. Scott would not have died.

Id. at 1325.

Dr. Overman opined in his deposition that Scott's sarcoidosis flare would not have occurred but for the physical trauma from the collision. Dr. Overman repeatedly stated he formed his opinions based on his clinical experience. For example, he explained, "over the years [I] saw a number of persons who had post-physical and emotional injury triggered, activated, lit up psoriasis. Or psoriatic arthritis, I should say." *Id.* at 196.

[16] In preparing his report, Dr. Overman reviewed the depositions of the treating providers as well as medical records as far back as 2003.

To the extent his opinions derived from his understanding of psoriasis, Dr. Overman testified to the similarities between psoriasis and sarcoidosis. He emphasized "the biological foundational similarity between psoriasis and sarcoidosis in terms of their immune response" as the basis for making cross-disease inferences. *Id.* at 189. He explained that sarcoidosis was "one of many, many, many inflammatory diseases that have the same -- the same clinical patterns." *Id.* at 166. And among inflammatory diseases, he emphasized that psoriasis was "30 times more prevalent than sarcoidosis with a similar pathophysiology" to explain why psoriasis and its symptoms were much better understood, both in the research and from his own experience. *Id.* at 190.

Dr. Overman went on to explain the mechanisms by which physical trauma could trigger inflammation in an individual with these diseases. By way of background, he explained that "individuals [with psoriasis] can have uveitis as one of the target organs for their inflammatory disease." *Id.*at 173. He explained, when discussing the "plausibility of physical trauma activating uveitis," that "[p]hysical traumas can disrupt or injure connective tissue, and that connective tissue then can become the site for inflammatory response." *Id.* He also explained, when asked about the mechanism by which physical trauma in a different part of the body could have reactivated Scott's sarcoidosis in her eyes, that "[a]n activation of a localized inflammatory illness can cause systemic inflammation which then can be part of the generalized flare of a systemic illness. In other words, start locally, becomes general." *Id.* at 187. Dr. Rai explained that "[i]nflammatory processes can be activated by soft tissue injury" and explained that he had seen patients whose underlying disease was activated by a car accident in his own practice. *Id.* at 553.

B. The City's Experts

The City proffered the testimony of Drs. Mohai and Smith, both of whom disagreed with Dr. Overman's causation opinions. Regarding physical trauma, Dr. Mohai, a rheumatologist, declared,

> Dr. Overman's opinion that physical trauma associated with the motor vehicle accident activated Ms. Scott's sarcoidosis is not generally accepted in the medical community. There is no support in the medical and scientific literature for the theory that physical trauma can activate or "flare up" underlying sarcoidosis in areas where there was no physical trauma.

Id. at 784-85. Dr. Smith, a neurologist and neuro-ophthalmologist, also declared, "[t]here is simply no support in the medical and scientific literature for the theory that physical trauma can activate or 'flare up' underlying sarcoidosis in areas where there was no physical trauma." *Id.* at 788.

Although the City's experts disagreed that a sarcoidosis flare in the eyes could be caused by physical trauma *outside* of the eyes, Dr. Mohai endorsed the concept that skin trauma could cause a sarcoidosis or psoriasis flare localized to where the trauma occurred. Dr. Smith opined, however, that this was not the case for Scott because Scott did not sustain any ocular trauma in the collision, or, if she did, that it was not the correct type of trauma to cause such a response. Dr. Mohai also disputed the idea that one could reliably extrapolate from psoriasis to sarcoidosis. However, he stated he was aware of "[l]iterature that discusses the link between psoriasis and sarcoidosis and how there is a significant overlap in triggers of those two conditions." *Id.* at 1198. He also endorsed the idea that "many of these autoimmune and inflammatory diseases act similarly" and, when asked specifically about sarcoidosis and psoriasis, stated "they're all different flavors of the same abnormality of our immune surveillance systems making mistakes." *Id.* at 1225.

C. Scott's Treating Providers

Scott's treating providers expressed mixed opinions about the connection between trauma and sarcoidosis. When asked whether a car crash could cause sarcoidosis or change the course of its natural progression, Dr. Fyntrilakis testified "no" and "not that I know of," respectively. *Id.* at 1046-47.

Dr. Myers-Powell, the treating ophthalmologist, testified that in her experience, uveitis can be caused by physical trauma. She testified that when a car crash causes uveitis, the crash usually involves "head or eye trauma, whether that be airbags, steering wheel, whatever." *Id.* at 429. When asked about car crashes *not* involving head or eye trauma, Dr. Myers-Powell stated that "there's a very real possibility" such an accident could cause uveitis. *Id.* She explained that she had another patient who had an undiagnosed risk factor for uveitis, who presented with uveitis following a minor car crash, "whether that be coincidence or trigger, I don't know." *Id.*

D. Summary Judgment Proceedings and Motion to Strike Expert Testimony

The City moved for partial[17] summary judgment on July 11, 2022, arguing that the Estate failed to create a genuine issue of material fact as to whether the collision was the legal and factual cause of Scott's death.[18] The Estate on August 1, 2022, responded that the City failed to meet its

[17] The motion appears to request a complete dismissal, but counsel clarified at oral argument that it sought dismissal of only the wrongful death claim.

[18] The City also argued that the Estate was estopped from claiming that the collision caused sarcoidosis and Scott's ultimate death because the Estate's representative, in a statement seeking disability insurance for Scott, disclaimed sarcoidosis as a contributing factor to her medical condition as of 2019. This argument was abandoned by the City and then ultimately rejected by the court.

burden of showing an absence of a genuine issue of material fact. The Estate attached to its response several exhibits, including highlighted copies of medical records and expert depositions.

On August 2, 2022, the City moved to strike the opinions of Drs. Overman and Rai, arguing that they were unqualified to render causation opinions relating to Scott's sarcoidosis, osteoporosis, and steroid use, and that any such opinions were based on novel science not generally accepted in the scientific community. The Estate responded that *Frye* was not implicated because Drs. Overman and Rai formed their opinions based on practical experience, not novel science.

The trial court heard arguments on August 19, 2022, regarding both the motion to strike and the summary judgment motion.

The Estate made two arguments at oral argument on the motion to strike. First, it urged that where medical records indicated that Scott's airbag deployed in the accident, a reasonable inference could be made that Scott sustained trauma to the area around her eyes. It noted that the eye is located within the head and subject to the same whiplash forces. It contended that this inference, paired with defense expert testimony agreeing that physical trauma can cause localized sarcoidosis, indicate that there is agreement that Scott's sarcoidosis could have been activated by the accident. Whether there was an eye trauma in the accident, the Estate argued, was a question of fact for the jury. Second, the Estate argued that Dr. Overman's actual methodology was the Hill

criteria,[19] which was not novel, but was applied to Scott's case to reach his opinion on causation. It argued that physicians regularly apply principles from one disease to another, and that Dr. Overman's application of concepts from other diseases to sarcoidosis was proper.

The court granted the City's motion to strike Dr. Overman's testimony, concluding that it is inadmissible under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). The court's reasoning, in summary, was that sarcoidosis is rare and poorly understood, that its etiology is unknown, and that no articles or studies provided to the court said that trauma[20] can serve as the "direct cause" of a reactivation of dormant sarcoidosis, nor could Dr. Overman produce such a study or article when asked. *Id.*at 1792-93.

The court granted in part the City's motion to strike Dr. Rai's causation opinions. Specifically, it struck Dr. Rai's testimony opining that "(a) the accident caused a flare-up of sarcoidosis; (b) the accident caused issues with Ms. Scott's eyes leading to prescription of steroids; and, (c) Ms. Scott would not have passed away but for the accident." *Id.* 1721. It allowed Dr. Rai's testimony opining that "(a) steroid use caused osteoporosis resulting in compression fractures; and

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[19] Dr. Overman described the Hill criteria as

> [nine] possible perspective[s] to be considered in making causality inferences: 1) Strength of association 2) Consistency across different populations 3) Specificity of effect 4) Temporality 5) Biological gradient 6) Plausibility 7) Coherence or there is no other explanation for causal suggestion 8) Experimental evidence 9) Analogy.

CP at 1343. Dr. Overman declared that his causal opinions relied on the following factors, which he said derived from the "broader Hill criteria":

> 1) temporal association; 2) exclusion of other probable explanations; 3) scientific reports and for prevalent conditions, controlled studies; 4) reported plausible basic science mechanisms, and finally, 5) response to therapeutic strategies that were based on these mechanisms.

Id. at 1339-40.

[20] The court here referred to both physical and emotional trauma.

(b) Ms. Scott would not have passed away but for the progression of disease during her 2018 hospitalization," finding no *Frye* implications in that testimony. *Id.*

Finally, the court concluded that without Dr. Overman's causation opinions, the Estate could not demonstrate a genuine issue of material fact as to whether the collision reactivated Scott's sarcoidosis. The court therefore granted the City's partial summary judgment motion and dismissed the wrongful death claim. It declined to rule on legal causation, basing its opinion solely on the Estate's failure to present evidence going to factual cause.

ANALYSIS

I. ADMISSIBILITY OF DR. OVERMAN'S TESTIMONY

The Estate argues that the trial court improperly struck Dr. Overman's testimony because *Frye* did not apply to that testimony and the testimony was otherwise allowable under ER 702. Specifically, the Estate argues that Dr. Overman's opinion was not based on novel science, but was rather a novel application of generally accepted methods. The Estate goes on to argue that Dr. Overman is well qualified and that his opinions would be helpful to jurors who may be unfamiliar with sarcoidosis. The City responds that Dr. Overman's theory was indeed novel and that he presented no literature supporting the mechanism by which he opined the crash caused a sarcoidosis flare. The City further argues that Dr. Overman's testimony would not be helpful to jurors because it is unreliable and misleading. We agree with the Estate.

A. Legal Principles

We review a trial court's *Frye* ruling de novo. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 600, 260 P.3d 857 (2011). We also review de novo a trial court's evidentiary ruling

made in conjunction with a summary judgment ruling. *See Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

The *Frye* test serves to keep out "unreliable, untested, or junk science." *Anderson*, 172 Wn.2d at 606. The test requires that we exclude opinions based on novel science that is not "widely accepted in the relevant scientific community." *Id.* at 609. However, "*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted. Other evidentiary requirements provide additional protections from deductions that are mere speculation." *L.M. v. Hamilton*, 193 Wn.2d 113, 129, 436 P.3d 803 (2019) (citation omitted) (quoting *Anderson*, 172 Wn.2d at 611). "[T]rial courts should admit evidence under *Frye* if the scientific community generally accepts the science underlying an expert's conclusion; the scientific community does not also have to generally accept the expert's theory of specific causation." *Id.* at 129.

Frye concerns arise only where expert opinions are based upon novel science. *Anderson*, 172 Wn.2d at 611. *Frye* is not implicated where an expert bases their opinion on practical experience and acquired knowledge or where an expert merely applies a non-novel theory or methodology to a particular medical condition. *State v. Ortiz*, 119 Wn.2d 294, 311, 831 P.2d 1060 (1992) (plurality opinion); *Reese v. Stroh*, 128 Wn.2d 300, 307, 907 P.2d 282 (1995). Indeed, the supreme court has stressed that "[m]any expert medical opinions are pure opinions and are based on experience and training rather than scientific data." *Anderson*, 172 Wn.2d at 610. In those cases, "[w]e require only that 'medical expert testimony . . . be based upon a reasonable degree of medical certainty' or probability." *Id.* (internal quotation marks omitted) (quoting *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989)).

Anderson is instructive. In that case, Julie Anderson was exposed to paint fumes at work and later gave birth to a son who suffered "medical abnormalities." *Id.* at 598. Anderson's expert planned to testify that the abnormalities were caused by the paint fumes, and the trial court excluded that testimony under *Frye*. *Id.* The trial court reasoned that scientific consensus did not support the conclusion that "the specific type of birth defects at issue" could have been caused by "the specific type of organic solvents" to which Anderson was exposed. *Id.* at 605. The supreme court clarified that *Frye* does not require this type of specificity. *Id.* at 611. It emphasized that requiring " 'general acceptance' of each discrete and ever more specific part of an expert opinion" would place "virtually all opinions based upon scientific data" into "some part of the scientific twilight zone." *Id.* at 611. The supreme court reversed, finding nothing novel about the expert's theory or methods. *Id.* at 611-12.

Further, under ER 702, testimony must be excluded if it is proffered by an unqualified expert or is unhelpful to the jury. We apply ER 702 by asking first whether the witness is qualified as an expert and second whether the testimony would be helpful. *Reese*, 128 Wn.2d at 306. Testimony is helpful if it helps jurors understand "a matter outside the competence of an ordinary layperson." *Id.* at 308. Testimony is unhelpful if it is unreliable or lacks an adequate foundation. *L.M.*, 193 Wn.2d at 137.

B. Application

First, we must decide whether *Frye* applies to Dr. Overman's challenged opinions by determining if the opinions rely on novel science. As to his opinion that the collision caused a sarcoidosis flare, Dr. Overman testified that he relied on his extensive clinical experience. He explained that in his experience, trauma can cause inflammation in the body. He explained that

sarcoidosis is an inflammatory disease and that uveitis is an inflammatory symptom, and this has not been disputed. To the extent he drew inferences about sarcoidosis from his experience with psoriasis patients, he explained how the diseases were similar and why it would be reasonable to draw such an inference. Nowhere does the City challenge Dr. Overman's clinical observations; rather, it has presented experts who disagree about Dr. Overman's causation opinions because the exact causal link has not been documented in the literature. But that is not the test. *See Id.* at 129; *Ortiz*, 119 Wn.2d at 311; *Reese*, 128 Wn.2d at 307; *Anderson*, 172 Wn.2d at 611. The City has not shown that Dr. Overman's opinion about the collision causing a sarcoidosis flare is based on novel science, so we do not apply *Frye* analysis to that opinion.

We must also decline to apply *Frye* to Dr. Overman's opinion that the collision caused Scott's untimely death. Having determined that the first link in the causal chain is not based on novel science, we turn to whether any other links are based on novel science. The parties do not dispute that Scott presented with spinal fractures after taking steroids to treat eye inflammation. Nor do the parties dispute that steroids can cause one's bones to weaken. Indeed, contemporaneous medical records show that treating providers believed steroids were to blame for Scott's spinal fractures. Finally, it is undisputed that Scott underwent a spinal fusion surgery to treat her fractures and suffered fatal complications. The only link in the causal chain that the City challenges as based on novel science is the first one, and having determined that *Frye* does not apply to that link, we decline to apply *Frye* to Dr. Overman's opinion on the ultimate issue.

Turning to ER 702, the City has presented no argument that Dr. Overman is unqualified to present expert opinions on sarcoidosis. And it is readily apparent that his testimony would prove helpful to lay jurors because few laypersons are well versed in the nuances of conditions like

psoriasis and sarcoidosis. Nor is his testimony so technical that a jury would be unable to assess its reliability.

Having determined that neither *Frye* nor ER 702 precludes admitting the challenged opinions, we reverse the trial court order excluding Dr. Overman's opinion.

II. SUMMARY JUDGMENT

A. Legal Principles

We review summary judgment rulings de novo, viewing the facts in the light most favorable to the nonmoving party. *Davies v. Multicare Health Sys.*, 199 Wn.2d 608, 616, 510 P.3d 346 (2022). Summary judgment is properly granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider only the evidence that was brought to the trial court's attention. *Davies*, 199 Wn.2d at 616; RAP 9.12.

The initial burden lies with the moving party to show there is no genuine issue of material fact. *Zonnebloem, LLC v. Blue Bay Holdings, LLC*, 200 Wn. App. 178, 183, 401 P.3d 468 (2017). After the moving party has shown an absence of evidence supporting their opponent's case, "the burden shifts to the nonmoving party to set forth specific facts that rebut the moving party's contentions and show a genuine issue of material fact." *Id.* at 183.

To rebut the moving party's contentions, the nonmoving party's response must be based on "personal knowledge, must set forth facts that would be admissible in evidence, and must show affirmatively that the declarant of such facts is competent to testify to the matters stated therein." *Lane v. Harborview Med. Ctr.*, 154 Wn. App. 279, 286, 227 P.3d 297 (2010). Conclusory statements, speculation, and argumentative assertions are insufficient to create a genuine issue of material fact. *Greenhalgh v. Dep't of Corrs.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011). A

genuine issue of material fact exists where the evidence would allow a reasonable jury to return a verdict in favor of the nonmoving party. *Zonnebloem*, 200 Wn. App. at 182-83.

"Generally speaking, expert opinion on an ultimate question of fact is sufficient to establish a triable issue and defeat summary judgment." *Strauss v. Premera Blue Cross*, 194 Wn.2d 296, 301, 449 P.3d 640 (2019). This is true so long as the opinion is not speculative, conclusory, or based on assumptions. *Id.*

B. Application

Having reviewed Dr. Overman's testimony carefully, and finding it grounded in his personal experience as informed by relevant literature, we hold that his opinion on causation in fact has created a triable issue of fact. The City has not presented argument showing that Dr. Overman's opinion was speculative, conclusory, or based on assumptions. *Id.* Neither has the City convinced us that we should affirm based on its alternative argument, that the causal chain is too remote and attenuated to impose liability as a public policy matter. And because the City agrees that Officer White was driving negligently when he caused the accident, a triable issue as to whether the crash caused Scott's death would allow a reasonable jury to find for Scott. We hold that the trial court erred in granting partial summary judgment and dismissing the Estate's wrongful death claim.

CONCLUSION

We reverse the trial court's *Frye* ruling and summary judgment ruling, and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

CRUSER, A.C.J.

We concur:

VELJACIC, J.

CHE, J.

CORR CRONIN LLP

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