No. 50336-1-II

96998-1

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

GERALDINE IVERSON,
as personal representative of BESSIE RITTER,

Appellant,

v.

PRESTIGE CARE, INC.
and NORTHWEST COUNTRY PLACE, INC.,

Respondents.

Appeal from the Superior Court of Washington for Lewis County

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PETITION FOR REVIEW

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A. INTRODUCTION

The important issue presented in this appeal is whether the trial court's gatekeeping role in keeping novel science from the jury unless it is generally accepted in the scientific community — *i.e.*, the "*Frye* test" — applies to an expert's opinion on causation that is derived from a differential diagnosis. The Washington Court of Appeals held that any opinion derived from a differential diagnosis does not implicate *Frye*, based entirely on its misunderstanding of *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011) ("*Anderson*"). The Opinion also conflicts with an opinion that this Court just issued on March 21, 2019, *L.M. v Hamilton*, No. 95173-0, which describes and applies the *Frye* test to evaluate an expert's opinion about causation.

Although the decision in this case (the "Opinion") was unpublished, it will have a great impact on future cases because the court adopted an argument about the scope of *Frye* that is often made in the trial courts and was squarely presented in this case. The logic of the Opinion is not limited to medical cases. It would apply to any case where expert testimony is required to prove causation, and it creates an enormous, dangerous loophole for the admission of junk science in Washington courtrooms. It is an appropriate case for review by this Court.

B. IDENTITY OF PETITIONERS

Petitioners are defendants Prestige Care, Inc. and Northwest Country Place, Inc. (collectively, "Prestige").

C. COURT OF APPEALS DECISION

Petitioners request that this Court review the January 3, 2019, unpublished opinion by Division II of the Washington Court of Appeals in *Geraldine Iverson, as Personal Representative of the Estate of Bessie Ritter v. Prestige Care, Inc. and Northwest Country Place, Inc.,* No. 50336-1-II (2019 WL 92671). On February 26, 2019, the Washington Court of Appeals amended the Opinion after granting plaintiff's motion for reconsideration.

D. ISSUE PRESENTED FOR REVIEW

Whether the "*Frye* test" applies to an expert's opinion on causation that is derived from a differential diagnosis.

E. STATEMENT OF THE CASE

i. Background.

On July 25, 2014, Bessie Ritter was admitted to Liberty Country Place, a nursing home in Centralia, Washington. CP 1-2, 8. Part of Ms. Ritter's care plan included the house bowel protocol. CP 504, 506-507. On August 30, 2014, a nurse gave Ms. Ritter Milk of Magnesia, per the house bowel protocol. CP 379. By August 31, 2014, Ms. Ritter still had

not had a bowel movement, so a nurse administered a suppository. CP 389. By the following evening, Ms. Ritter had vomited more than once so the nurse sent her to the hospital. CP 390, 392. Ms. Ritter underwent surgery but died a few days later. CP 2, 424-27.

Plaintiff filed this lawsuit, alleging that defendants' failure in treating Ms. Ritter's constipation caused her to develop a "cecal volvulus," which in turn resulted in the rupture of her colon. CP 1-3; 484-86. A "cecal volvulus" is a twisting of part of the colon.

ii. Plaintiff's Expert Opinion on Causation.

Defendants filed a motion for summary judgment on the ground that plaintiff could not establish causation. Defendants focused on the question of whether constipation can cause a cecal volvulus, observing that this issue must be established through expert testimony. *See Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (noting that "expert testimony will generally be necessary to establish the standard of care . . . and most aspects of causation" when medical facts are at issue). Defendants submitted expert testimony that it is not generally accepted in the scientific community that constipation can cause a cecal volvulus.

For example, Dr. Michael Chiorean opined that there is "zero evidence that constipation leads to cecal volvulus." CP 387. Dr. Brant Oelschlager similarly opined that he did not know of any "literature that

shows that the short-term treatment of constipation in any way affects the development of cecal volvulus." CP 436. Having put causation at issue, defendants observed that plaintiff must show that their scientific theory that constipation can cause a cecal volvulus is generally accepted in the scientific community, and they could not do so. *See, e.g., State v. Copeland,* 130 Wn.2d 244, 255 (1996) (applying *Frye* to determine admissibility of scientific evidence).

In response, plaintiff pointed exclusively to the opinion of Dr. Teresa Brentnall, who opined that "it is my opinion more likely than not, that the untreated constipation of Bessie Ritter . . . led to her development of a cecal volvulus." CP 484, ¶ 9. Dr. Brentnall came to her conclusion based on a "differential diagnosis," which she described as "the method in medicine to determine the cause of an illness." *Id.*, ¶ 8. She explained:

> "[Differential diagnosis] involves using information such as symptoms, patient history and medical knowledge to determine the cause of an illness. The clinician applies known facts and clinical experience to narrow the possible causes of an illness and determine the likely cause. I have used this method to form the opinions contained in this declaration. Differential diagnosis is well accepted in the scientific community and is used every day by thousands of physicians throughout the country." *Id.*

Dr. Brentnall's opinion was based on "the anatomy of the colon and by the presence of a 'large amount of stool'" in the colon, which "likely led to her development of a cecal volvulus." *Id.* ¶ 9. She claimed her theory was supported by a "study of cecal volvulus in pregnant women," and she opined that "groups that are especially prone to constipation have an increased risk of volvulus," including "patients with chronic illnesses and decreased ambulatory capacity." *Id.* She also opined that "[p]atients with constipation are 7 times more likely to develop volvulus." *Id.* ¶ 10. In support of these statements, Dr. Brentnall cited two articles that were attached to her opinion as Exhibits 8 and 9, neither of which actually supported her opinion.[1] CP 524-33, 535-44.

The first article is titled, "Management of the Colonic Volvulus in 2016." CP 524-533. Consistent with its title, the article primarily discusses *management* of a colonic volvulus, not causation. It contains a very brief discussion of the etiology of colonic volvulus, stating that it is "probably multifactorial," and there are several possible "factors," including chronic constipation, a high fiber diet, frequent use of laxatives, history of laparotomy, and anatomic predisposition. CP 525. The article contains no citation to its brief statement that the etiology is "probably multifactorial," or

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[1] Plaintiff also cited to two abstracts of scientific articles, without further discussion. CP 535-537. It is unknown what those articles actually say.

that constipation is one of many possible risk factors, likely because the subject of the article is treatment and it draws no definitive conclusions about etiology. The article goes on to identify risk factors that are "more specific to cecal volvulus," and that list does *not* include constipation: "Some risk factors are more specific to cecal volvulus such as history of previous colonoscopy, laparoscopy and pregnancy." CP 525.

The second article, "Colonic Atony in Association with Sigmoid Volvulus: It's Role in Recurrence of Obstructive Symptoms," concerns sigmoid volvulus, which effects a different part of the colon. CP 583. On causation, the article states that science has yet to explain whether a megacolon (a stretched colon) causes chronic constipation, or chronic constipation causes megacolon: "Chronic constipation is a common malady that can have various causes . . . the underlying cause of the megacolon and constipation . . . is unknown, and it has not been demonstrated which comes first—megacolon or constipation." CP 539. Thus the second article supported defendants' position, not plaintiff's.

The trial court granted summary judgment to defendants because plaintiff failed to provide any evidence that constipation can cause a cecal volvulus. The trial court understood the nuanced point made by this Court in *Anderson,* and again recently in *L.M. v. Hamilton,* that while an expert's ultimate conclusion on causation (*i.e.*, the specific conduct at issue caused

the specific harm suffered by the plaintiff) did not have to be generally accepted, the underlying science that led to the conclusion (*i.e.*, the conduct at issue *can* cause the specific result) must always be generally accepted:

> "So there was some discussion, an expert's ultimate opinion, as to what caused the damage in this particular case. That doesn't have to be generally accepted. The opinions can be varied as long as it's based on something that is a methodology that is generally accepted, and we don't have here." RP 20:18-23.

The trial court observed that evidence supporting the theory that constipation causes a cecal volvulus "is just missing" and therefore, the "only conclusion [the trial court] can reach is that because it is not there it is not generally accepted in the scientific community, in the medical community." RP 21:11-17.

iii. The Court of Appeals Reverses Based on its Interpretation of *Anderson*.

On appeal, plaintiff argued that, under *Anderson*, "*Frye* does not apply to the causation question." (Brief, p. 17.) The Court of Appeals agreed, although it appeared to limit its ruling to opinions that are based on a differential diagnoses. It held that, "because Dr. Brentnall's causation opinion is based on a differential diagnosis, *Frye* is not implicated." Opinion, p.2.

The Court of Appeals' Opinion was based entirely on *Anderson,* which it read as approving of *any* expert opinion that derives from a differential diagnosis. It quoted this Court's statement in *Anderson* that a physician "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," and from that passage it concluded that any opinion based on a differential diagnosis "does not implicate *Frye*," no matter what potential causes are "ruled-in" to the process of elimination. Opinion, p. 9.

F. ARGUMENT

i. Summary of Argument.

Defendants request that this Court accept review because this appeal presents an important, recurring issue of law that has broad implications beyond the facts of this case. The Opinion conflicts with *Anderson,* the recent *L.M.* case and *Frye,* and numerous decisions from other jurisdictions. *See* RAP 3.4(b)(1), (2), (4).

This Court has never held that a trial court is precluded from exercising its gate-keeping function whenever an expert uses the magic words, "differential diagnosis." A plaintiff must always prove "general" causation (that something *can* cause a result) and "specific" causation (that the conduct *did* cause the specific result). Put another way, not only must

an expert "rule out" potential causes, the expert also must "rule in" potential causes that are generally accepted in the medical community. This is particularly so when the "potential cause" that the expert lands on as being the *likely* cause is directly challenged by the opposing party's expert as not generally accepted.

It is easy to see why this must be so. If the Opinion correctly states Washington law, then an expert could conclude that a vaccine caused a child's autism simply by including it in a differential diagnosis, without having to establish general acceptance of the scientific theory that the vaccine *can* cause autism. The Opinion creates a dangerous backdoor for junk science to enter the courtroom. It is inconsistent with *Anderson* and *L.M.*, and defeats the purpose of *Frye.* It should be reversed.

ii. Washington's Approach to the Admissibility of Expert Scientific Opinion.

ER 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Despite the deceiving simplicity of this rule, "determining whether scientific-seeming evidence is sufficiently reliable to be admissible has vexed courts at least since *Frye* [1923], and possibly

since the 14th century when judges first started consulting with scientists." *Anderson*, 172 Wn.2d at 600-01. Thus trial courts must "perform an important gate keeping function" when at issue is the admissibility of novel, scientific evidence. *Id.* at 600.

a. *Frye's* "General Acceptance" Test.

Washington courts follow the *Frye* test for determining the reliability of novel scientific evidence, based on a test articulated in *Frye v. United States*, 293 F. 1013 (1923):

> "Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs*." *Id.* at 1014 (emphasis added).

The *Frye* test allows "disputes concerning scientific validity to be resolved by the relevant scientific community," it "shields juries from any tendency to treat novel scientific evidence as infallible" and it "insulates the adversary system from novel evidence until a pool of experts is available to evaluate it in court." *State v. Copeland*, 130 Wn.2d 244, 922

P.2d 1304 (1996) (quoting 1 *McCormick on Evidence* § 203, at 873 (4th ed. 1992)).

Federal courts went in a different direction in 1993, after the U.S. Supreme Court issued *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed.2d 469 (1993). While the Court reaffirmed that trial courts have an important gatekeeping function to keep junk science from the jury, it provided a non-exclusive list of factors for determining whether the reasoning or methodology is "scientifically valid" and can be applied to the facts.

In *State v. Copeland*, this Court told trial courts to continue to apply *Frye* to novel scientific evidence. 130 Wn.2d at 260. It reasoned that the trial court's gatekeeper role under *Frye* "involves by design a conservative approach, requiring careful assessment of the general acceptance of the theory and methodology of novel science, thus helping to ensure, among other things, that 'pseudoscience' is kept out of the courtroom." *Id.* It noted that "*Daubert* has drawbacks which we decline to import into our standards for admissibility." *Id.* at 260.

b. *Anderson v. Akzo Nobel Coatings, Inc.* and *L.M. v. Hamilton.*

At issue in *Anderson* was the admissibility of an expert's opinion that a pregnant woman's exposure to certain organic solvents at work

caused her baby's malformations, which was based on the medical records, materials from the employer, his experience and training, and "the work he himself did that was reported in the Journal of the American Medical Association (JAMA)," which the Court summarized and quoted in its opinion. 172 Wn.2d at 604. The Court noted that it "appears the relevant scientific community has yet to seriously research whether exposure to the specific typic of organic solvents present in [the employer's] auto paint can cause the specific type of birth defects at issue," but it disagreed that "there must be scientific consensus that a specific type of exposure causes a specific type of injury before expert testimony is admissible under *Frye.*" *Id.* at 605. It instead had "consistently found that if the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation." *Id.* at 609.[2]

In a passage that confused the Court of Appeals, the Court then noted:

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[2] Although this Court has never definitively decided whether *Frye* applies in civil cases, *see Anderson*, 173 Wn.2d at 860-61, the recent *L.M.* opinion implies that it does. The parties in this case assumed that *Frye* applies, although as the case law from other jurisdictions shows, the Opinion is incorrect under *Frye* or *Daubert*.

> "Many expert medical opinions are pure opinions and are based on experience and training rather than scientific data. . . . Many medical opinions on causation are based upon differential diagnoses. 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." *Id.* at 610.

The Court's mention of differential diagnoses did not purport to preapprove of any expert opinion that was derived from a process of elimination. Instead, the Court in *Anderson* described the specific scientific evidence which supported the expert's opinion, noting that it is "generally accepted by the scientific community that toxic solvents like the ones to which Anderson was exposed are fat soluble, pass easily through the placenta and dissolve into the amniotic fluid inside the uterus, and may damage the developing brain of a fetus within the uterus." *Id.* And while there was an absence of evidence linking the *specific* organic solvent to the *specific* birth defect at issue, there is "nothing novel about the theory that organic solvent exposure may cause brain damage and encephalopathy," nor was there anything "novel about the methods of the study about which [the expert] wrote."

Based on that reasoning, the Court held that the expert's deduction that the specific toxic solvents at issue likely caused the baby's specific

injuries did not implicate *Frye.* The Court noted: *"Frye* does not require that the specific conclusions drawn from the scientific data . . . be generally accepted in the scientific community. *Frye* does not require every deduction drawn from generally accepted theories to be generally accepted." *Id.* at 611.

This Court decided *L.M.* on March 21, 2019, and thus is familiar with the facts of that case. At issue was a defense expert's opinion that a child's brachial plexus injury ("BPI") was caused by "natural forces of labor" ("NOFL"). The court reaffirmed *Anderson's* basic holding that while the underlying science must be generally accepted, the ultimate deduction the expert makes about specific causation need not be. The Court held that an expert opinion about NOFL was admissible because a substantial amount of medical literature showed that NOFL *can* cause permanent BPIs, and thus the experts could deduce that the child's specific permanent BPI was caused by NOFL. *Id.* at 6-8, 16.

Again, the Court did *not* bless any opinion on causation as outside the court's gatekeeping role. It held that because the theory that NOFL *can* cause a permanent BPI was generally accepted, and in fact had been endorsed by courts in numerous jurisdictions, then the ultimate deduction that NOFL caused the child's specific injury did not implicate *Frye.*

iii. The Opinion Conflicts with *Anderson* and *L.M.*

The Court of Appeals' decision cannot be reconciled with *Anderson* or *L.M.* The court read *Anderson* as precluding trial courts from requiring general acceptance of *any* expert opinion that derives from a differential diagnosis. In so holding, it essentially removed the trial judge as a "gatekeeper" for most scientific opinions on causation, which is the exact result plaintiff argued for below.

The Court in *Anderson* and *L.M.* held that an expert's ultimate conclusion did not implicate *Frye* only after describing the underlying science in detail. In both cases, the Court identified the scientific literature that showed general acceptance of the general medical theory, *i.e.*, that a pregnant woman's exposure to organic solvents can result in harm to the baby in *Anderson*, and that NOFL can cause BPI in *L.M.* The Court of Appeals in this case did not require general acceptance of the theory that constipation can cause a cecal volvulus.

The Court of Appeals instead read dicta from this Court as creating a blanket exception from *Frye* for any scientific theory that is "ruled-in" to a differential diagnosis, and then survives a process of elimination. But that is not what the *Anderson* court held. If it had, then there would have been no reason for the Court to address, at length, the scientific article authored by the expert on the impact on pregnant women of exposure to

organic solvents. *Id.* at 604. Nor would there have been any reason for the Court to observe that there is "nothing novel about the theory that organic solvent exposure may cause brain damage" and *then* note that "*Frye* does not require every deduction drawn from generally accepted theories to be generally accepted." *Id.* The same is true in *L.M.*

Here, the scientific theory that constipation *can* cause a cecal volvulus is novel. Including it in a differential diagnosis does not remove the novelty; it simply assumes what the expert is supposed to prove, which is not consistent with any valid scientific methodology. The literature that Dr. Brentnall submitted did not show general acceptance of that theory. She cited two articles, one of which concerned management of a cecal volvulus and made no definitive conclusions about etiology, and the other concerned a different medical condition, with the authors admitting that they did not know what caused the condition.

The Court noted in *Anderson* that many opinions are "pure opinions" based on "experience and training" rather than scientific data, but defendants did not challenge any "pure opinions" or the absence of scientific data. The Court of Appeals missed the nuance of *Anderson* when it held that *any* opinion that is "ruled-in" to a differential diagnosis is not subject to *Frye* simply because a differential diagnosis is a common method for determining specific causation.

iv. The Opinion Conflicts with Opinions from Other Jurisdictions.

Many courts from other jurisdictions have considered the reliability of a novel opinion derived from a differential diagnosis, almost always in the context of the more lenient *Daubert* standard, and warned of the very error that the Court of Appeals made in this case. An example is *Carlson v. Okerstrom*, 675 N.W.2d 89 (Neb. 2004), where the Nebraska Supreme Court noted that while a differential diagnosis "*generally* is a technique that has widespread acceptance in the medical community," that does not mean that "simply by uttering the phrase 'differential diagnosis,' an expert can make his or her opinion admissible." *Id.* at 105. Rather, the expert must first "rule in" potential causes, and "the question becomes which of the "competing causes are *generally* capable of causing the patient's symptoms." *Id.* at 106 (quoting *Clausen v. M/V NEW CARISSA*, 339 F.3d 1049, 1058 (9th Cir. 2003)). *Then* "the next step is to "engage in a process of elimination, eliminating hypotheses on the basis of a continuing examination of the evidence so as to reach a conclusion as to the most likely cause of the findings in that particular case." *Id.*

Similarly, in *McClain v. Metabolife*, the expert used a differential diagnosis to rule out all causes for the plaintiffs' injury, other than the drug at issue. In affirming the exclusion of this testimony, the Eleventh

Circuit explained that a differential diagnosis "may offer an important component of a valid methodology" but it could not "overcome the fundamental failure of laying a scientific groundwork for the general toxicity of the drug and that it can cause the harm a plaintiff suffered." 401 F.3d 1233, 1252 (11th Cir. 2005).[3]

The Court of Appeals made the very error addressed by these courts. It interpreted *Anderson* as preapproving of any expert opinion that purports to be based on a differential diagnosis, without determining whether the scientific theories that underlay the differential diagnosis were scientifically valid.

v. The Opinion Involves an Issue of Substantial Public Interest.

This petition raises an issue of substantial public interest because the Opinion allows the admission of junk science into Washington

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[3] *See also, e.g., Blackwell v. Wyeth*, 971 A.2d 235, 260 (Md. 2009) (ruling the expert "improperly 'rules in' thimerosal as a potential cause of autism"). *Glastetter v. Novartis Pharm. Corp.*, 107 F. Supp. 2d 1015, 1027 (E.D. Mo. 2000) (noting a "fundamental assumption underlying [a differential diagnosis] is that the final, suspected 'cause' remaining after this process of elimination must actually be capable of causing the injury"), *aff'd,* 252 F.3d 986, 989 (8th Cir. 2001); *In re Breast Implant Litig.*, 11 F. Supp. 2d 1217, 1229–30 (D. Colo. 1998) (noting "a fundamental assumption underlying" a differential diagnosis "is that the final, suspected 'cause' remaining after this process of elimination must actually be capable of causing the injury" and "be derived from a scientifically valid methodology.").

courtrooms. It is relatively easy to imagine examples where an expert can sneak junk science into an opinion simply by including it in a differential diagnosis, and then eliminating all other potential causes. An expert could tell a jury that autism was caused by a vaccine by doing nothing more than including it in a differential diagnosis. There is nothing "scientific" about such an approach. It is the very thing that *Frye* and *Anderson* are meant to prohibit, and it is the reason this Court should accept review.

G. CONCLUSION

Defendants request that this court accept review, and either reverse or remand in light of its decision in *L.M.*

Respectfully submitted this 26th day of March, 2019.

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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GERALDINE IVERSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BESSIE RITTER, Appellant, v. PRESTIGE CARE, INC. and NORTHWEST COUNTRY PLACE, INC., Respondents.	No. 50336-1-II UNPUBLISHED OPINION

SUTTON, J. — Geraldine Iverson, personal representative of Bessie Ritter's estate, appeals the superior court's orders granting summary judgment dismissal and denying reconsideration of her medical negligence claim against a nursing home owned and operated by Prestige Care, Inc. and Northwest Country Place, Inc. (collectively "NCPI"). Iverson alleges that NCPI's failure to properly monitor and treat Ritter's constipation caused Ritter to develop a cecal volvulus[1] resulting in her death. NCPI argues that the medical causation opinion offered by Iverson's expert, Dr. Teresa Brentnall, is a novel scientific theory subject to the *Frye*[2] test, and because the experts

[1] A "cecal volvulus" is a twist in the bowel resulting from the cecum being loose in the abdomen. A cecal volvulus occurs when the cecum, the first portion of the large intestine, loops around itself and creates a bowel obstruction. Clerk's Papers at 336.

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

disagree as to whether her causation opinion is generally accepted in the medical community, the opinion is not admissible under *Frye*.

We hold that because Dr. Brentnall's causation opinion is based on a differential diagnosis, *Frye* is not implicated. Because Dr. Brentnall's causation opinion is admissible, there are genuine issues of material fact on causation. Thus, the superior court erred in granting summary judgment dismissal of Iverson's medical negligence claim. We reverse and remand for further proceedings.

FACTS

On July 25, 2014, Ritter was admitted to NCPI, a nursing home in Centralia, Washington. The record reflects that in the 10 days between August 22 and September 1, she did not have a bowel movement. The facility did not treat Ritter's constipation until August 30 when she was given Milk of Magnesia. The following day she was given a Dulcolax suppository because she still had not had a bowel movement. On September 1, Ritter was admitted to the hospital after vomiting several times.

On September 2, Ritter underwent emergency surgery that showed a "[d]istal 15-20 cm of terminal ileum and cecum wrapped in it twisted closed loop obstruction with markedly nonviable ileocecal valve." Clerk's Papers (CP) at 425. The attending physician's postoperative diagnosis stated that Ritter had a bowel obstruction with cecal volvulus. Ritter died on September 4.

Following Ritter's death, Iverson sued NCPI for medical negligence and violation of the Abuse of Vulnerable Adults Act.[3] Iverson alleged that the NCPI staff failed to (1) monitor Ritter's bowel movements, (2) act on her lack of bowel movements, and (3) answer her call light. Iverson alleged that these failures caused Ritter's death; specifically, that NCPI's negligence in treating Ritter's constipation caused Ritter to develop a cecal volvulus that resulting in the rupture of her colon and, ultimately, her death. It is undisputed that Ritter died due to a cecal volvulus.

NCPI filed a motion for summary judgment dismissal. NCPI argued that Iverson failed to establish a prima facie case for medical negligence because she did not produce any admissible testimony from a qualified medical expert to explain that any of NCPI's agents or employees caused Ritter's death. In addition, NCPI argued that summary judgment dismissal was proper as a matter of law because Iverson relied on Dr. Brentnall's causation opinion which was not admissible under *Frye* because the opinion was based on a novel scientific theory which was not generally accepted by the medical community.

In support of its motion for summary judgment, NCPI provided the opinions of Dr. Michael Chiorean (a gastrointestinal specialist), Dr. Brant Oelschlager (a general gastrointestinal surgeon), and Dr. Michael Peters (a diagnostic radiologist). Dr. Chiorean explained that "[t]here's zero evidence that constipation leads to cecal volvulus." CP at 387. Dr. Oelschlager echoed this assertion and expounded that he was unaware of any "literature that shows that the short-term treatment of constipation in any way affects the development of cecal volvulus." CP at 436. Dr. Oelschlager further explained that cecal volvulus is not caused by constipation; rather, it occurs

[3] Iverson does not appeal the superior court's summary judgment dismissal of the Abuse of Vulnerable Adults Act, ch. 74.34 RCW, claim.

when the cecum is loose in the abdomen rather than attached. Dr. Peters also testified that constipation plays no causal role in the development of a cecal volvulus. He, like Dr. Oelschlager, stated that the only possible cause of cecal volvulus is that the cecum is not fixed in the abdomen in the right place.

In response to NCPI's motion for summary judgment, Iverson provided the declaration of Dr. Brentnall (a board-certified gastroenterologist). In her declaration, Dr. Brentnall stated that she reviewed "records from [the facility] for the admission beginning July 25, 2014 and records from Providence Centralia Hospital, including records from the admissions of August 19, 2014, and [of] September 1, 2014." CP at 482.

From those records Dr. Brentnall determined that Ritter suffered from constipation following her return to NCPI on August 22, as evidenced by the imaging study taken on September 1 at Providence Centralia Hospital. Additionally, she determined that Ritter went without a bowel movement between August 22 and September 1 because an oral contrast, administered on August 19, remained in her system when an imaging study was conducted on September 1. Dr. Brentnall stated that, "it is in my opinion more likely than not, that the untreated constipation of Bessie Ritter . . . led to her development of a cecal volvulus." CP at 484.

Iverson argued that under *Anderson*,[4] *Frye* is not implicated by an expert opinion on causation.

[4] *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011).

In response, NCPI argued that (1) Iverson failed to satisfy *Frye,* (2) Dr. Brentnall's expert opinion on causation is not admissible, (3) Iverson either misunderstood or misconstrued *Anderson,* (4) Dr. Brentnall's expert testimony was not based on the complete medical record because she did not consider Ritter's adhesions[5] as an alternative cause for her development of a cecal volvulus, and (5) Iverson failed to prove a genuine issue of material fact.

The superior court agreed with NCPI, granted summary judgment, and dismissed Iverson's medical negligence claim. Iverson filed a motion for reconsideration, which the superior court denied. Iverson appeals the orders granting summary judgment and denying reconsideration.[6]

ANALYSIS

Iverson argues that the superior court erred by granting summary judgment dismissal because under *Anderson, Frye* is not implicated when an expert's causation opinion is based on a differential diagnosis.[7] Thus, under *Anderson,* Dr. Brentnall's causation opinion is admissible and her opinion creates genuine issues of material fact on causation rendering summary judgment dismissal improper. We hold that because Dr. Brentnall's causation opinion is based on a differential diagnosis, *Frye* is not implicated.

[5] "Adhesions" are bands of scar tissue. CP at 556.

[6] Iverson did not provide any arguments to support her challenge to the order denying reconsideration; therefore, we do not consider this issue. RAP 12.1(a).

[7] *Anderson,* 172 Wn.2d at 597.

I. STANDARDS OF REVIEW

We review a grant of summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). Summary judgment dismissal is proper only when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). The purpose of a summary judgment motion is to avoid an unnecessary trial where no genuine issue as to a material fact exists. *Young*, 112 Wn.2d at 225-26.

The moving party bears the initial burden of showing there are no genuine issues of material fact. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008). If the moving party meets its burden of producing factual evidence showing that it is entitled to judgment as a matter of law, the burden shifts to the nonmoving party to "'produce evidence sufficient to support a reasonable inference that the [moving party] was negligent.'" *Rounds*, 147 Wn. App. at 162 (quoting *Seybold v. Neu*, 105 Wn. App. 666, 676, 19 P.3d 1068 (2001)). To make the requisite showing, the party opposing summary judgment must submit "competent testimony setting forth specific facts, as opposed to general conclusions[,] to demonstrate a genuine issue of material fact." *Thompson v. Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993).

Summary judgment is proper in a medical negligence case if the plaintiff fails to produce competent medical expert testimony establishing that the injury was proximately caused by a failure to comply with the applicable standard of care. *Rounds*, 147 Wn. App. at 162-63 (citing *Seybold*, 105 Wn. App. at 676).

II. *FRYE* IS NOT IMPLICATED

A. APPLICABILITY OF *ANDERSON*

Our Supreme Court in *Anderson* explained when *Frye* is implicated. *Anderson* held that "the *Frye* test is not implicated if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community." *Anderson v. Alzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 597, 260 P.3d 857 (2011). "[I]f the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation." *Anderson*, 172 Wn.2d at 609. This is because "[m]any medical opinions on causation are based upon differential diagnoses." *Anderson*, 172 Wn.2d at 610. The Frye test is implicated only where the opinion on causation is based on novel science. *Anderson*, 172 Wn.2d at 611.

A physician "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." *Anderson*, 172 Wn.2d at 610. *Anderson* further explained that

> [I]f the science and methods are widely accepted in the relevant scientific community, the evidence is admissible under *Frye*, without separately requiring widespread acceptance of the plaintiff's theory of causation. Of course the evidence must also meet the other evidentiary requirements of competency, relevancy, reliability, helpfulness, and probability.

> . . . .
>
> Many expert medical opinions are pure opinions and are based on experience and training rather than scientific data. We require only that "medical expert testimony . . . be based upon a reasonable degree of medical certainty" or probability.

Anderson, 172 Wn.2d at 609-10 (citations omitted, internal quotation marks omitted) (quoting *McLaughlin v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989)).

Here, Dr. Brentnall conducted a differential diagnosis of Ritter's symptoms by reviewing "the events that led to the cecal volvulus that was the immediate cause of Ms. Ritter's demise." CP at 485. She considered Ritter's medical records along with her own experience, education, and training as a board certified gastroenterologist with 20 years of experience. CP at 481-82. In her declaration, Dr. Brentnall stated that she reviewed "records from [the facility] for the admission beginning July 25, 2014 and records from Providence Centralia Hospital, including records from the admissions of August 19, 2014, and [of] September 1, 2014." CP at 482.

Dr. Brentnall explained that from those records she determined that Ritter suffered from constipation following her return to NCPI on August 22, as evidenced by the imaging study taken on September 1 at Providence Centralia Hospital. Additionally, she determined that Ritter went without a bowel movement between August 22 and September 1 because an oral contrast, administered on August 19, remained in her system when an imaging study was conducted on September 1.

Through the process of differential diagnosis, Dr. Brentnall opined that "the untreated constipation of Bessie Ritter during the period between [August 22] and [September 1] led to her development of a cecal volvulus." CP at 484. Because Dr. Brentnall's causation theory is based

on a differential diagnosis, a process well accepted in the medical community, her opinion does not implicate *Frye*.

NCPI's experts, Drs. Chiorean, Oelschlager, and Peters, disagreed with Dr. Brentnall's conclusion that constipation causes a cecal volvulus, but they did not disagree with Dr. Brentnall's underlying methodology. Because the experts have differing opinions on causation, there are genuine issues of material fact. Because there are genuine issues of material fact on causation, and viewing the facts and inferences in the light most favorable to the nonmoving party, we hold that the superior court erred in granting summary judgment dismissal. Thus, we reverse the order of summary judgment dismissal of the medical negligence claim 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.

Sutton, J.
SUTTON, J.

We concur:

J., A.C.J.
LEE, A.C.J.

Bjorgen, J.
BJORGEN, J.

Filed
Washington State
Court of Appeals
Division Two

February 26, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GERALDINE IVERSON, as personal representative of BESSIE RITTER, Appellant, v. PRESTIGE CARE, INC. and NORTHWEST COUNTRY PLACE, INC., Respondents.	No. 50336-1-II ORDER GRANTING APPELLANT'S MOTION FOR RECONSIDERATION AND ORDER AMENDING UNPUBLISHED OPINION

The unpublished opinion in this case was filed on January 3, 2019. Upon the motion of appellant for reconsideration, it is hereby

ORDERED that appellant's motion for reconsideration is granted and the unpublished opinion previously filed on January 3, 2019, is amended as follows:

Page 3, footnote no. 3 following the first sentence is deleted.

Page 5, footnote no. 6 following the last sentence of the second paragraph is deleted.

IT IS SO ORDERED.

Sutton, J.
SUTTON, J.

We concur:

, A.C.J.
LEE, A.C.J.

Bjorgen, J.
BJORGEN, J.

Filed
Washington State
Court of Appeals
Division Two

January 3, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GERALDINE IVERSON, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BESSIE RITTER, Appellant, v. PRESTIGE CARE, INC. and NORTHWEST COUNTRY PLACE, INC., Respondents.	No. 50336-1-II UNPUBLISHED OPINION

SUTTON, J. — Geraldine Iverson, personal representative of Bessie Ritter's estate, appeals the superior court's orders granting summary judgment dismissal and denying reconsideration of her medical negligence claim against a nursing home owned and operated by Prestige Care, Inc. and Northwest Country Place, Inc. (collectively "NCPI"). Iverson alleges that NCPI's failure to properly monitor and treat Ritter's constipation caused Ritter to develop a cecal volvulus[1] resulting in her death. NCPI argues that the medical causation opinion offered by Iverson's expert, Dr. Teresa Brentnall, is a novel scientific theory subject to the *Frye*[2] test, and because the experts

[1] A "cecal volvulus" is a twist in the bowel resulting from the cecum being loose in the abdomen. A cecal volvulus occurs when the cecum, the first portion of the large intestine, loops around itself and creates a bowel obstruction. Clerk's Papers at 336.

[2] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

disagree as to whether her causation opinion is generally accepted in the medical community, the opinion is not admissible under *Frye*.

We hold that because Dr. Brentnall's causation opinion is based on a differential diagnosis, *Frye* is not implicated. Because Dr. Brentnall's causation opinion is admissible, there are genuine issues of material fact on causation. Thus, the superior court erred in granting summary judgment dismissal of Iverson's medical negligence claim. We reverse and remand for further proceedings.

FACTS

On July 25, 2014, Ritter was admitted to NCPI, a nursing home in Centralia, Washington. The record reflects that in the 10 days between August 22 and September 1, she did not have a bowel movement. The facility did not treat Ritter's constipation until August 30 when she was given Milk of Magnesia. The following day she was given a Dulcolax suppository because she still had not had a bowel movement. On September 1, Ritter was admitted to the hospital after vomiting several times.

On September 2, Ritter underwent emergency surgery that showed a "[d]istal 15-20 cm of terminal ileum and cecum wrapped in it twisted closed loop obstruction with markedly nonviable ileocecal valve." Clerk's Papers (CP) at 425. The attending physician's postoperative diagnosis stated that Ritter had a bowel obstruction with cecal volvulus. Ritter died on September 4.

Following Ritter's death, Iverson sued NCPI for medical negligence and violation of the Abuse of Vulnerable Adults Act.[3] Iverson alleged that the NCPI staff failed to (1) monitor Ritter's bowel movements, (2) act on her lack of bowel movements, and (3) answer her call light. Iverson alleged that these failures caused Ritter's death; specifically, that NCPI's negligence in treating Ritter's constipation caused Ritter to develop a cecal volvulus that resulting in the rupture of her colon and, ultimately, her death. It is undisputed that Ritter died due to a cecal volvulus.

NCPI filed a motion for summary judgment dismissal. NCPI argued that Iverson failed to establish a prima facie case for medical negligence because she did not produce any admissible testimony from a qualified medical expert to explain that any of NCPI's agents or employees caused Ritter's death. In addition, NCPI argued that summary judgment dismissal was proper as a matter of law because Iverson relied on Dr. Brentnall's causation opinion which was not admissible under *Frye* because the opinion was based on a novel scientific theory which was not generally accepted by the medical community.

In support of its motion for summary judgment, NCPI provided the opinions of Dr. Michael Chiorean (a gastrointestinal specialist), Dr. Brant Oelschlager (a general gastrointestinal surgeon), and Dr. Michael Peters (a diagnostic radiologist). Dr. Chiorean explained that "[t]here's zero evidence that constipation leads to cecal volvulus." CP at 387. Dr. Oelschlager echoed this assertion and expounded that he was unaware of any "literature that shows that the short-term treatment of constipation in any way affects the development of cecal volvulus." CP at 436. Dr. Oelschlager further explained that cecal volvulus is not caused by constipation; rather, it occurs

[3] Iverson does not appeal the superior court's summary judgment dismissal of the Abuse of Vulnerable Adults Act, ch. 74.34 RCW, claim.

when the cecum is loose in the abdomen rather than attached. Dr. Peters also testified that constipation plays no causal role in the development of a cecal volvulus. He, like Dr. Oelschlager, stated that the only possible cause of cecal volvulus is that the cecum is not fixed in the abdomen in the right place.

In response to NCPI's motion for summary judgment, Iverson provided the declaration of Dr. Brentnall (a board-certified gastroenterologist). In her declaration, Dr. Brentnall stated that she reviewed "records from [the facility] for the admission beginning July 25, 2014 and records from Providence Centralia Hospital, including records from the admissions of August 19, 2014, and [of] September 1, 2014." CP at 482.

From those records Dr. Brentnall determined that Ritter suffered from constipation following her return to NCPI on August 22, as evidenced by the imaging study taken on September 1 at Providence Centralia Hospital. Additionally, she determined that Ritter went without a bowel movement between August 22 and September 1 because an oral contrast, administered on August 19, remained in her system when an imaging study was conducted on September 1. Dr. Brentnall stated that, "it is in my opinion more likely than not, that the untreated constipation of Bessie Ritter . . . led to her development of a cecal volvulus." CP at 484.

Iverson argued that under *Anderson*,[4] *Frye* is not implicated by an expert opinion on causation.

[4] *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011).

In response, NCPI argued that (1) Iverson failed to satisfy *Frye,* (2) Dr. Brentnall's expert opinion on causation is not admissible, (3) Iverson either misunderstood or misconstrued *Anderson,* (4) Dr. Brentnall's expert testimony was not based on the complete medical record because she did not consider Ritter's adhesions[5] as an alternative cause for her development of a cecal volvulus, and (5) Iverson failed to prove a genuine issue of material fact.

The superior court agreed with NCPI, granted summary judgment, and dismissed Iverson's medical negligence claim. Iverson filed a motion for reconsideration, which the superior court denied. Iverson appeals the orders granting summary judgment and denying reconsideration.[6]

ANALYSIS

Iverson argues that the superior court erred by granting summary judgment dismissal because under *Anderson, Frye* is not implicated when an expert's causation opinion is based on a differential diagnosis.[7] Thus, under *Anderson,* Dr. Brentnall's causation opinion is admissible and her opinion creates genuine issues of material fact on causation rendering summary judgment dismissal improper. We hold that because Dr. Brentnall's causation opinion is based on a differential diagnosis, *Frye* is not implicated.

[5] "Adhesions" are bands of scar tissue. CP at 556.

[6] Iverson did not provide any arguments to support her challenge to the order denying reconsideration; therefore, we do not consider this issue. RAP 12.1(a).

[7] *Anderson,* 172 Wn.2d at 597.

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We review a grant of summary judgment de novo, viewing the facts and reasonable inferences in the light most favorable to the nonmoving party. *Keck v. Collins*, 184 Wn.2d 358, 368, 357 P.3d 1080 (2015). Summary judgment dismissal is proper only when the pleadings, depositions, and admissions in the record, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225-26, 770 P.2d 182 (1989). The purpose of a summary judgment motion is to avoid an unnecessary trial where no genuine issue as to a material fact exists. *Young*, 112 Wn.2d at 225-26.

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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.

Sutton, J.
SUTTON, J.

We concur:

J., A.C.J.
LEE, A.C.J.

Bjorgen, J.
BJORGEN, J.

CERTIFICATE OF FILING AND SERVICE

I certify that on the 26th day of March, 2019, I filed the original **PETITION FOR REVIEW** with the Court of Appeals, Division II by Electronic Filing.

I further certify that on the same date, I caused the foregoing to be served upon the following counsel of record by electronic filing:

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Respectfully submitted this 26th day of March, 2019.

HART WAGNER LLP

By: */s/ Matthew J. Kalmanson*
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HART WAGNER LLP

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Transmittal Information

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