

No. 36797-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

KAREN CARLTON and MARJORIE HOLLAND, Co-Administrators/
personal representatives for the estate of Miriam Elizabeth Carlton,

Plaintiff/Appellant

v.

VANCOUVER CARE LLC, dba STONEBRIDGE
MEMORY CARE,

Defendant/Respondent

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DIVISION II
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APPELLANT'S REPLY BRIEF

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I. FACTUAL DISAGREEMENT

All parties agree that Mrs. Carlton was in a very advanced stage of her dementia. There is disagreement, however, about the cause of and the nature of her dementia. In his testimony, Dr. Olsen opined that Mrs. Carlton's dementia was vascular in nature. RP, May 22, 2007 at 134-141. Dr. Olsen described the nature of vascular dementia, as well as his method of determining the type of dementia suffered by Mrs. Carlton. *Id.* He further testified to the significance of that difference and its impact on a person's implicit memory structure (Only those portions of the brain where the vascular event occurred would be affected. Mrs. Carlton's implicit memory system could have been fully intact). *Id.*

II. ADMISSIBILITY OF EXPERT TESTIMONY

A. ER 702.

Expert testimony is admissible under ER 702 if it is helpful to the trier of fact. *ER 702, State v. Mitchell*, 102 Wn. App. 21, 26-27 (2000). The testimony must be relevant, however, the threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible. *State v. Gregory*, 158 Wn.2d 759, 835 (2006); *Mitchell* at 28; *Linkstrom v. Golden T. Farms*, 883 F.2d 269, 270 (3rd Cir. 1989).

Differences in the opinions of expert witnesses, even questions regarding the reliability of an expert's testimony, go to the weight of the evidence rather than to its admissibility. *Detention of Thorell*, 149 Wn.2d 724, 756 (2003); *Personal Restraint of Young*, 122 Wn.2d 1, 58-59 (1993). Despite any inherent imprecision or uncertainties of psychiatric or psychological testimony, the level of acceptance is sufficient to merit consideration at trial. *Young* at 56-57; Brief of Appellant at 13. Our courts have addressed the significance of this type of testimony in cases regarding questions of diminished capacity.

An opinion is helpful if it explains how the mental disorder relates to the asserted impairment of capacity. Under this standard it is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question – only that it could have, and if so, how that disorder operates. *Mitchell* at 27.

It is the jury's responsibility to make ultimate determinations regarding issues of fact. . . . The jury learns from the expert how the mental mechanism operates, then applies what it has learned to all the facts introduced at trial. *Id.*

B. ***FRYE* STANDARD.**

If the expert testimony being offered does not involve new methods of proof or new scientific principles, a *Frye* inquiry is not necessary. *State v. Sipin*, 130 Wn. App. 403, 415 (2005); *State v. Baity*,

140 Wn.2d 1 (2000); *State v. Ortiz*, 119 Wn.2d 294 (1992); *Kaech v. Lewis County Public Util. Dist. No. 1*, 106 Wn. App. 260 (2001); *Personal Restraint of Young*, 122 Wn.2d 1 (1993). In a *Frye* inquiry, the court is to consider the general acceptance of the evidence within the relevant scientific community without reference to its forensic application in any particular case. *State v. Greene*, 139 Wn.2d 64, 71 (1999). Acceptance within the relevant scientific community does not need to be unanimous. *Gregory* at 829; *Greene* at 72-73.

III. ADMISSION OF EXPERT TESTIMONY

A. TESTIMONY REGARDING RAPE TRAUMA SYNDROME IS ADMISSIBLE IN THIS MATTER.

In decisions since *State v. Black*, 109 Wn.2d 336 (1987), our courts have consistently distinguished the holding in that case and have held that syndrome evidence may be admitted for purposes other than to prove the fact of rape. Brief of Appellant at 14-17. Stonebridge has admitted that Mrs. Carlton was raped. RP, May 22, 2007, at 199, 201. The Estate is offering testimony regarding Rape Trauma Syndrome (RTS) for purposes other than proof of the fact of rape.

Some of the arguments raised by Stonebridge for exclusion of testimony regarding RTS actually argue for its admissibility. RTS was

developed as a therapeutic tool for professional rape counselors, to help identify, predict and treat emotional problems experienced by rape victims. **Black** at 347. Stonebridge asserts that RTS should not be admissible, as each rape victim responds to rape differently. Respondent's Answering Brief at 10. This is exactly why a therapeutic tool, such as RTS and CRTS, in the hands of a trained, competent professional, can help to sort out whether behaviors are a result of a rape. The Estate's experts have such training and expertise.

Experts for the Estate, Drs. Burgess, Olsen and Johnson, testified that RTS is generally accepted in the community of mental healthcare providers, and is routinely used by such professionals to treat victims of rape. Brief of Appellant at 6-10, 16-17. This is consistent with the **Black** court's analysis. *Supra*. Dr. Johnson further testified that studies since the original work by Drs. Burgess and Holstrom have developed information relative to symptoms of rape victims, which are consistent with the original work of Drs. Burgess and Holstrom. RP, May 23, 2007 at 218.

As explained by Dr. Olsen, Mrs. Carlton suffered from expressive aphasia, as well as dementia. RP, May 22, 2007 at 139-140. She was unable to tell anyone about anything that was bothering her. *Id.* When a rape victim is unable to verbally communicate, a therapeutic tool, such as

RTS, would be helpful in an analysis of the harm to the victim.

Stonebridge is relying on its own records to demonstrate that, upon her return to their facility from the emergency room, Mrs. Carlton returned to her “baseline.” Stonebridge further intends to use these records to establish that Mrs. Carlton did not demonstrate any adverse effects from the rape, following her return from the emergency room. The Estate’s experts should be allowed to use RTS to explain why such behaviors, even if accurately recorded, would not be inconsistent for a victim of a rape. The evidence is relevant and it is helpful to the finder of fact. It should be admitted.

B. TESTIMONY REGARDING IMPLICIT MEMORY AND EXPLICIT MEMORY IS ADMISSIBLE.

All experts agree that implicit memory and explicit memory are not novel scientific evidence, and that this understanding of brain function is generally accepted in the relevant scientific community. That includes Dr. Burgess (RP, May 22, 2007 at 17-22), Dr. Olsen (RP, May 22, 2007 at 116-123) and Stonebridge’s expert, Dr. Hinton (RP, May 23, 2007 at 315-318). While all experts agreed on the acceptance of implicit memory and explicit memory, none testified that implicit memory and explicit memory are related in any way to RTS. There is no expert testimony to support

Stonebridge's position on this issue.

Drs. Burgess and Olsen explained what implicit memory and explicit memory are, and how those different memory systems function. RP, May 22, 2007 at 17-22; 116-123. They both described their analysis of Mrs. Carlton's records, as well as other information, in developing their opinions. RP, May 22, 2007 at 40-64; 144-150. They both expressed their opinions to a degree of medical probability. *Id.* Stonebridge's expert, Dr. Hinton, agreed that it was possible for someone like Mrs. Carlton to experience a conditioned fear response with no cognitive memory of the rape. RP, May 23, 2007 at 332, 339-340.

This evidence is relevant. It explains how someone with advanced dementia, like Mrs. Carlton, can still be traumatized on an ongoing basis following the type of attack that she suffered. It is helpful to the trier of fact. This is not information that would be understood by the average juror. Many people have pre-conceived notions of how a rape victim should or should not behave following a rape. This evidence should be admitted.

C. A PSYCHIATRIC OR PSYCHOLOGICAL FORENSIC EVALUATION BASED ON RECORD REVIEW IS ADMISSIBLE.

In its responsive brief, Stonebridge asserts that the opinions of the Estate's experts, based only on record review, are suspect. Respondent's Answering Brief at 20. The fact that an opinion may be suspect goes to the weight of the opinion, not to its admissibility. *Detention of Thorell* at 756; *Personal Restraint of Young* at 58-59.

Drs. Burgess and Olsen described the process of a forensic evaluation. RP, May 22, 2007 at 28-33; 126-131. They testified that it is an acceptable practice to make such an evaluation based on record review. *Id.* The fact that they did not actually examine Mrs. Carlton does not preclude them from being able to develop their opinions. Even Dr. Trowbridge, relied upon by Stonebridge, states that the better practice is to allow expert testimony from an expert who has not personally evaluated the rape victim. Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes*, 27 **Seattle U. L. Rev.** 453, 463-464.

In his testimony, Stonebridge's expert, Dr. Hinton, stated that he was unfamiliar with the term "forensic evaluation." RP, May 23, 2007 at 315. Dr. Hinton further testified that he had never previously testified as

an expert witness. *Id.* Yet, Dr. Hinton expressed opinions, without the benefit of having actually examined Mrs. Carlton, and on record review only. He testified that he had relied on clinical notes and observations. RP, May 23, 2007 at 331. However, Dr. Hinton was never provided with the deposition testimony of Mrs. Carlton's care givers, and he based his opinions only on records provided to him. RP, May 23, 2007 at 313-314. Dr. Hinton's reliance only on clinical notes and observations in developing his opinions is consistent with the forensic process described by Drs. Burgess and Olsen above.

No expert testimony has been introduced to support Stonebridge's claim that a forensic evaluation based on records review only is not admissible.

IV. THE TRIAL COURT DID NOT CONDUCT AN ER 702 ANALYSIS

In rendering its decision, the trial court stated that the Estate's proffered evidence did not meet the "Frye Standard of a DSM-IV Diagnosis," and therefore was not relevant. RP, May 23, 2007 at 379-381. Not being relevant, the trial Court held that the evidence was therefore not admissible under ER 702. *Id.* The trial court based this ruling on *State v. Black* and on the article by Dr. Trowbridge. *Supra.*

Stonebridge, in its response, has not controverted the Estate's position that a DSM-IV diagnosis is not a necessary prerequisite for an expert to express an opinion of psychological harm to a degree of medical probability. As set forth in the Brief of Appellant, there is no legal basis to maintain that position. Therefore, the trial court based its decision to exclude the Estate's expert witnesses upon a faulty premise.

Having based its decision on a faulty premise, the trial court failed to make the appropriate ER 702 analysis. Under that analysis, properly performed, the expert testimony proffered by the Estate is both relevant and helpful to the trier of fact, and should be admitted.

V. TESTIMONY FROM THE ESTATE'S EXPERTS SHOULD BE LIMITED ONLY BY ER 702

The parameters for admission of expert testimony are set forth in ER 702. Questions involving the reliability of an expert's testimony go to the weight of the evidence rather than to its admissibility. *Detention of Thorell* at 756. The jury makes the ultimate determination regarding issues of fact. *Mitchell* at 27.

The jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial. The *Ellis* Court also made clear that expert's opinions are not dispositive. Rather, the expert's opinions 'would be subject to cross examination as they were as 'hostile witnesses' in the pre-trial proceeding . . . [t]he trier of fact—the jury—can then

determine what weight, if any, it will give to their testimony. This is fundamentally fair and consistent with due process.’ *Mitchell* at 27-28.

Our Rules of Evidence provide adequate safeguards on the admission of evidence. There is no reason to place any additional, unnecessary restrictions on the admission of the Estate’s expert testimony.

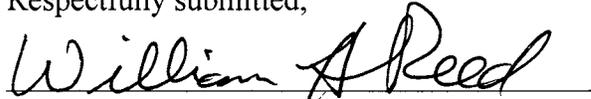
VI. ATTORNEY’S FEES

In its answering brief, Stonebridge erroneously states that the Estate has not prevailed under the Vulnerable Adult Statute. As set forth on page 22 of the Brief of Appellant, Stonebridge has admitted liability under the Vulnerable Adult Statute. RP, May 14, 2007 at 120, 139, 146; May 22, 2007 at 199-200.

The trial court granted Stonebridge’s Motion in Limine to exclude any evidence of fault in this matter. RP May 14, 2007 at 139-147. That included any evidence of the perpetrator’s behaviors, and any evidence of Stonebridge’s prior notice of the perpetrator’s behaviors. *Id.* If liability under the Vulnerable Adult Statute was still an issue, the Estate would be entitled to put forth evidence to establish Stonebridge’s neglect and/or abuse. The trial court granted Stonebridge’s Motion in Limine, because liability under the Vulnerable Adult Statute has been admitted by Stonebridge. *Id.*

RCW 74.34.200(3) provides an award of costs and attorney's fees to a prevailing plaintiff. This is one-sided and includes the award of costs and fees on appeal. *Conrad v. Alderwood Manor*, 119 Wn. App. 275, 299 (2003). The Estate is entitled to fees and costs on appeal.

Respectfully submitted,

A handwritten signature in cursive script that reads "William H. Reed". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Appellant's Reply Brief* on the following parties at the following addresses:

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by mailing full, true and correct copies thereof in sealed, first-class postage-prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Vancouver, Washington on the date set forth below.

The undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Vancouver, Washington this 11th day of April, 2008.

Lori Blunt

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