

COURT OF APPEALS  
DIVISION II

No: 41969-6-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
BY 

OF THE STATE OF WASHINGTON, TACOMA

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T. ARTHUR GUSCOTT,

Defendant/Counter-Plaintiff/Appellant

vs.

ADVANCED HEALTH CARE, INC.

Plaintiff/Counter-Defendant/Respondent

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REPLY BRIEF OF APPELLANT

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*ORIGINAL*

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I. INTRODUCTION.

Respondent Advanced Health Care (“AHC”) agrees that *de novo* review of a Frye ruling is appropriate, yet in effect advocates construing the evidence submitted on its motion *in limine* and all inferences that can be drawn therefrom in AHC’s favor. In this vein, AHC characterizes-Mr. Guscott’s physician\_experts as purveyors of “junk science” despite their unassailable credentials. In so doing, AHC ignores that its self-acclaimed “better” experts used the very techniques it criticizes to arrive at their own conclusions. In sum, AHC’s argument here echoes its argument to the court below - that\_Mr. Guscott’s experts’ theories are novel and lack scientific support because the experts hired by AHC happen to disagree with their conclusions. The determination of which set of physician experts is more credible should be left to the jury, not decided in summary fashion by the trial court.

II. The AKZO Decision Reaffirms the Limits of Frye and Supports Reversal of the Trial Court’s Order Barring Mr. Guscott from Presenting any Expert Medical Testimony on Causation.

Respondent AHC, in arguing that Anderson v. AKZO Nobel Coatings, Inc., 172 Wn.2d 593, 260 P.3d 857 (2011) supports the trial court’s application of Frye to bar Mr. Guscott’s causation experts, misinterprets AKZO’s basic explanation of the Frye Rule: Frye is

implicated only “where either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community.” AKZO at 611. AHC wrongly assumes, as did the trial court below, that “theory” in the context of Frye refers to a plaintiff’s theory of causation and not a “scientific theory” which assists the expert in reaching a conclusion. AKZO eliminated any doubt concerning Frye’s application to a plaintiff’s theory of causation as follows:

This court has 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 plaintiff’s theory of causation.** (citations omitted.) (Emphasis added.)

AKZO at 609.

Despite the clarity of AKZO and precedent cited therein addressing the limits of Frye, AHC maintains that the trial court’s application of Frye to Mr. Guscott’s theory of causation was not reversible error. The trial court stated:

It is agreed that a major trauma localized to the aneurysm, such as a seat belt’s impact during a car accident, can cause an aneurysm to leak or rupture. However, treating vascular surgeon Dr. Nam Tran stated that a fall to a person’s buttocks was unlikely to cause a (sic) AAA to leak or rupture. Mr. Guscott’s three experts conceded that they did not know of any scientific literature supporting their respective theories. Guscott has not found and provided any such literature; nor has he provided any other scientific

evidence to support this theory despite ample opportunity to do so. This testimony is, thus, stricken under Frye. Guscott may not offer any expert testimony that suggests his AAA leak was caused by his fall from his wheelchair.

(CP 355-56; CP 340-43) This ruling was the first time the trial court had articulated the specific burden it was placing on Mr. Guscott and first notice that the trial court had misunderstood his theory of causation and his experts' assumption of how the fall occurred as "a fall to one's buttocks." Setting aside for now the court's accepting AHC's version of the fall as an established fact, what is equally disturbing about the court's ruling is its rejection of Mr. Guscott's theory of causation, despite its acknowledgment that trauma may cause an AAA to leak. The trial court, thus, required "widespread acceptance of plaintiff's theory of causation," a burden specifically rejected by courts of review even prior to AKZO at 607-9.

Mr. Guscott's experts opined Mr. Guscott's admittedly hard fall on cement caused his pre-existing AAA leak to begin leaking. The "scientific theory" of Mr. Guscott's experts was not that "falls on buttocks cause AAA leaks." Rather, the medical assumptions relied on by each of Mr. Guscott's medical experts were: (1) deceleration injuries have been known to injure even healthy aortas; (2) Mr. Guscott at the time of his hard fall had an enlarged, diseased aorta which was brittle and weak and more susceptible to tearing, leaking and rupture due to wall stress from

deceleration forces produced by trauma; (3) given the fragility of Mr. Guscott's aorta, the timing and retroperitoneal location of the bleed, and the apparent age of blood visible on imaging, the probable cause of Mr. Guscott's AAA bleed was the described hard fall from the wheelchair. (CP 738, 742-43, 676, 679)

Cardiology expert Dr. John Holmes specifically opined that "the shear forces on the aorta are related to how big the aorta is and blood pressure and heart rate, and so a significant injury deceleration or stress would put additional wall stress on the diseased aorta, and we've already said that increased stress and expansion are associated with increased risk of rupture." (CP 214, p. 28-29)

AHC's expert, Dr. Johansen, essentially agreed with the principle that AAAs "rupture on the basis of wall tension, which is a product – it's a function of the pressure and the size." (CP 144, p. 10-11) Dr. Johansen, however, reached an opposing conclusion by assuming (without knowing) that "the force in this case was ... was an axial" direction," and claimed this was a "protective" force. (CP 143, p. 7)

Conversely, Mr. Guscott's ER specialist, Dr. Heller, assumed that a deceleration injury produced "translational" forces, whether Mr. Guscott fell on his side or his buttocks, creating a small tear producing a leak that sealed off. (CP 736, p.30-31; CP 743, p. 58) Thus, the experts employed

the same physiological principle but reached different conclusions. On this record, there was no novel science, only basic medical principles employed by all experts.

Mr. Guscott's arguments apply with equal force to the two specific rulings of the trial court: (1) the ruling barring Dr. Gore from testifying that the blood density visualized on Mr. Guscott's CT scan, coupled with other signs and his history of trauma, suggest blood approximately 3 days old; and, (2) the ruling barring Dr. Heller from testifying that Mr. Guscott's AAA leaked on December 25, tamponaded, and leaked again.

In barring radiologist Dr. Gore's opinions, the trial court did not question his viewing the CT scan as novel, but questioned his ability to approximate the age of blood visualized, based on its density, despite the fact that AHC's radiologist, Dr. Peter, had done exactly the same thing. AHC was not candid with the trial court and is not candid now in avoiding its own expert's reliance on precisely the same technique as Dr. Gore in reaching a conclusion favorable to AHC. The only difference was Dr. Peter assigned a different age to the visualized blood. (CP 633)

In barring Dr. Heller's opinions, the trial court did not find that he relied upon novel science in concluding that Mr. Guscott's AAA had leaked on the day of his fall and then contained itself. Rather, the court rejected his conclusion because "there is no scientific support in the record

for this belief.” (CP 420) In so doing, the court disregarded its own finding that Dr. Heller was qualified to give such medical opinions because he diagnosed leaking AAAs. (CP 354) The court also disregarded Dr. Holmes’, Dr. Tran’s and even Dr. Johansen’s agreement that the body can stop AAA leaks for a time. (CP 144-45, 681, 699, 736, 738-39) and Dr. Tran’s testimony that Mr. Guscott’s AAA rupture was unusual in that it was “contained.” (CP 699) The trial court’s ruling also implicitly barred Dr. Holmes testimony that AAA leaks may stop and again begin leaking, after having found him qualified to give such opinions. (CP 681, p. 32; CP 354) This too was a matter for cross-examination, not summary determination.

Yet another point unaddressed by AHC is the long-standing requirement for admissibility of pure medical opinions in Washington courts: “We only require that ‘medical expert testimony...be based upon a reasonable degree of medical certainty’ or probability.” AKZO at 610. The Supreme Court further observed that a physician “may base a conclusion about causation... with due consideration to temporal factors, such as events and the onset of symptoms,” a process employed by each of Mr. Guscott’s experts. Id.

Likewise, AHC’s argument that Dr. Holmes’ opinions are “junk science” because he never diagnosed a traumatically ruptured AAA is

wrongheaded and inaccurate – Dr. Holmes treats vascular diseases including patients with AAAs. (CP 210) He is entitled to rely upon his medical knowledge and education as a basis for his medical opinions concerning the impact of wall tension and stress upon an AAA as well as the temporal nexus between trauma and injury.

To the extent AHC’s citation to the testimony of Dr. Penner is relevant, Mr. Guscott submits that Dr. Penner, who examined Mr. Guscott in the emergency room after his fall, never testified, as AHC claims, that he ruled out an AAA leak or rupture after Mr. Guscott’s fall. Rather, Dr. Penner testified that Mr. Guscott had declined AAA repair in the past (when it was asymptomatic). According to Dr. Penner, “how hard you would look for a ruptured AAA – it’s variable” and “sort of pointless.” (CP 112, p. 33-34) The parties agree that Dr. Penner never ordered a CT scan of Mr. Guscott’s AAA on December 25 to rule out a leak or rupture.

Mr. Guscott submits that given the facts before this Court, the AKZO decision’s affirmation of the limitations of Frye in a civil case provide ample basis for reversal.

AKZO’s new pronouncement, that a plaintiff need not establish that a particular toxic exposure can cause a particular type of birth defect, is relevant should this Court consider whether Mr. Guscott’s experts were required to provide general acceptance for the premise that a hard fall onto

cement from a wheelchair, or from a similar distance, can injure a diseased aorta. Under AKZO, Mr. Guscott is not required to establish that a specific type of deceleration injury can cause an AAA to leak, particularly when it is uncontroverted that deceleration injuries can rupture a healthy aorta and wall stress can cause an AAA to leak or rupture.

III. Reversible Error occurred where no Frye Hearing was Held.

Should this Court find that no novel science is at issue and the trial court's application of Frye was error, then the trial court's failure to conduct an evidentiary hearing is a moot issue. Conversely, if this Court finds that novel science is at issue, Mr. Guscott submits that an evidentiary hearing was required.

A trial court's decision not to hold a Frye hearing is reviewed *de novo*. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). Generally, the case law has grown around instances where a court has found no Frye hearing necessary because scientific methodology was found to not be novel; this case presents the circumstance where a court found scientific methodology to be novel and barred expert opinions on that basis without conducting a Frye hearing, despite Mr. Guscott's request that it do so. Appellants have found no case where a court found scientific methodology novel without conducting a Frye hearing in the

face of a request to hold one. Finding scientific methodology “novel” and barring expert opinions on that basis without conducting a Frye hearing was error.

Nor, as AHC argues, did Guscott ever claim he did not know a Frye challenge had been raised. Clearly, AHC moved to bar all opinions which causally related Mr. Guscott’s fall to his AAA leak. (CP 960) But, other than referencing Dr. Gore’s reading of Mr. Guscott’s CT scans, AHC failed to specify what it claimed to be novel science underlying the experts’ opinions. Rather, AHC in footnote 2, stated, “A full copy of Dr. Johansen’s deposition is attached to this motion, so the court can understand the basis by which AHC’s motion is made.” (CP 962) In the first place, it was not Mr. Guscott’s duty as a respondent to hunt through the testimony of AHC’s retained expert and determine where that expert has criticized the underpinnings of Mr. Guscott’s opinions as novel and without acceptance in the medical community. Nor, apparently, was the trial court able to do so since it simply barred all opinions causally relating Mr. Guscott’s fall to his injury in derogation of Frye.

Mr. Guscott responded to AHC’s vague attempt to implicate Frye, stating that Dr. Heller had testified to his “extensive experience with AAAs and with the impact of deceleration and shearing forces of the body;” his opinion was based on “deceleration and shearing forces related

to the fall.” (CP 324) Mr. Guscott further noted that Dr. Johansen “agreed trauma can cause AAAs to rupture. However, he argues the amount of trauma involved in this case at bar was insufficient.” (CP 324-25)

AHC also sought to bar Dr. Holmes’ pure medical opinions that the temporal relationship between Mr. Guscott’s signs and symptoms and his injury had “no medical basis generally accepted in the relevant medical community.” (CP 976-977) Mr. Guscott responded that Dr. Holmes had reviewed Mr. Guscott’s “symptoms described by AHC caregivers over the two days subsequent to the fall” in reaching his opinions, thus showing this was a pure medical opinion based on a temporal relationship supported by healthcare records.

Additionally, AHC sought to bar Dr. Gore’s pure medical opinions that a slit-like inferior vena cava sign was absent from Mr. Guscott’s CT scan, indicating Mr. Guscott suffered a slow leak and that the CT scan showed blood that was approximately three days old based on its density. In response, Mr. Guscott provided the trial court with a list of Dr. Gore’s publications including “CT Manifestations of Ruptured Abdominal Aneurysms,” and Dr. Gore’s testimony that surgeons “frequently ask him to age bleeding seen on CT because they want to know how long the bleed has been going on.” Also submitted to the court was Dr. Gore’s

testimony that “it was apparent Mr. Guscott’s bleed was not all fresh blood” and was not older than 3 to 5 days, given the absence of hematocrit effect and the absence of inferior cava sign. (CP 323-24)

AHC also sought to bar Dr. Heller’s opinion that Mr. Guscott’s leaking AAA clotted soon after it tore and later rebled. (CP 972-74) On this point, Mr. Guscott responded that Dr. Tran testified that the rupture was different compared to others; it was “contained.” (CP 97, p. 13; 324) Mr. Guscott also informed the court that AHC’s expert, Dr. Johansen, also stated retroperitoneal AAA bleeds can bleed, stop bleeding and then start bleeding again sometime later. (CP 325)

December 14, 2010, three days before the trial court issued its ruling, AHC submitted a brief, replete with inflammatory language and exclamation points, in response to Mr. Guscott’s Supplemental Brief. (CP 329) Paradoxically, AHC claimed that Mr. Guscott’s experts had no scientific support that an “axial fall” could injure an AAA (CP 330) notwithstanding the absence of testimony from Mr. Guscott’s experts suggesting their opinions were based on the assumption of an axial fall. December 17, 2010, the trial court issued its blanket barring order without addressing which of Mr. Guscott’s experts held “axial fall” opinions (none of them expressed anything about axial falls) or the medical issues in the case, e.g. the effect of wall tension, shearing forces and deceleration

trauma on the aorta, the temporal association, or the findings of a “slit-like inferior vena cava” and hemacrit sign on Mr. Guscott’s CT scan. In sum, the trial court granted the blanket relief AHC sought and barred all causation opinions. The only specific rulings made by the trial court dealt with Dr. Gore’s blood density opinion and Dr. Heller opinion that Mr. Guscott’s AAA leak had tamponaded and later rebled. Ironically, Advanced Health Care’s radiologist used the same technique to age the blood and it was uncontroverted that AAAs can tamponade and rebleed especially if they are retroperitoneal. (CP 633; CP 325)

Mr. Guscott advised the trial court both orally and in his supplemental response to AHC’s motion that a Frye hearing was needed should the court determine that Frye was implicated. (CP 322). Mr. Guscott could not have anticipated such a finding of scientific novelty without an evidentiary hearing and could not have anticipated the court’s misapprehension of fact, echoed by AHC in its Response: that Mr. Guscott slid out of his wheelchair onto his elbow and buttocks. (Response p.3)

The record cited by AHC for these facts, actually states:

Client asleep in recliner in living room when I arrived.  
Previous caregiver told me he fell out of his wh/ch and hit  
the cement hard after church today & she took him to ER.

CP 261. No document cited by AHC states that Mr. Guscott slid from his wheelchair to his buttocks. The above account of a hard fall, documented

by an AHC caregiver on the day of the fall, is fairly consistent with Mr. Guscott's own recollection, that he "went over," landed on his arm, and when he was starting to get up, he hit his bottom. (CP 76 p. 37 l. 5-9).

Nonetheless, the trial court ruled:

The major issue in this case is whether falling out of a wheelchair and landing one one's buttocks can cause a (sic) AAA to leak or rupture.

(CP 355) Following the trial court's ruling, Mr. Guscott had no meaningful opportunity to renew his request for a Frye hearing prior to trial. On receiving the trial court's December 17, 2010, ruling Mr. Guscott's counsel contacted the trial court's clerk and was informed that the court would not be sitting until after the holidays, on January 3, 2011, the date of trial.

#### IV. Mr. Guscott Presented a Proper Basis for Reconsideration.

The trial court's characterization of Mr. Guscott's basis for Reconsideration, set forth in AHC's Response, is that Mr. Guscott "did not believe that the trial court would rule in the way that it did and therefore did not think he had to present this evidence in earlier proceedings." (CP 784) Respectfully, Mr. Guscott raised arguments in the trial court that he now presents in this forum, all set forth in his Motion for Reconsideration. (CP 391-92). Mr. Guscott did not assume he would prevail and therefore

elect to present no evidence; rather he assumed an evidentiary hearing would be held if the trial court concluded that Frye was implicated.

Mr. Guscott submits that because his Motion for Reconsideration encompassed a renewed request for a Frye hearing, the appropriate standard of review is *de novo*. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). Moreover, all issues raised therein, with the exception of the trial court's barring Mr. Guscott's own testimony, centered on the court's application of Frye. Had Mr. Guscott not sought Reconsideration and simply appealed the Summary Judgment Order and its basis, the barring of experts under Frye, the standard of review would be *de novo*.

Should this Court find the abuse of discretion standard of review appropriate, the trial court's denial of Reconsideration was still reversible error.

AHC further contends that Mr. Guscott failed to meet the requirements of CR 59 in seeking Reconsideration. This is not so. In support of reconsideration, Mr. Guscott raised the following points which fall within the purview of Rule 59(a)(7):

- How Mr. Guscott fell from the wheelchair was a fact in controversy, where each side's experts assumed a different version; therefore the trial court erred in assuming a fact had been conclusively established for purposes of implicating Frye (CP 373-76);

- The trial court had misapprehended the Frye standard (CP 376-80); and,
- The trial court overlooked that Guscott's experts and AHC's experts had relied upon the same data and underlying medical principles in reaching their opposing conclusions, resulting in a Frye ruling not supported by the evidence presented (CP 381-389).

In addition, Mr. Guscott raised a basis not specifically encompassed within Rule 59, namely, that if the trial court concluded, on Reconsideration, that a Frye hearing is necessary, the court should not limit its inquiry to the record Mr. Guscott relied upon to establish that Frye was not implicated. In keeping with that basis, Mr. Guscott did submit additional materials of the type typically considered at a Frye hearing, which presumably would be received prior to a Frye hearing. (CP 406-08) AHC is correct that Mr. Guscott relies on State v. Copeland, 130 Wn.2d 244, 922 P.2d 1293 (1996), and on the trial court's failure to conduct a Frye hearing prior to barring experts.

Mr. Guscott submits that once the trial court determined that novel science was at issue, a Frye hearing was required. Under Rule 59(a)(3), (a)(7), (a) (8) and (a)(9), the trial court abused its discretion in denying reconsideration. Mr. Guscott submits that of all the criteria set forth in Rule 59, subparagraph (a)(9) resounds: substantial justice has not been served.

V. The Application of Frye in Civil Cases Remains an Unresolved Question which is Ripe for Review.

AHC contends that plaintiff “assigns error” to the trial court’s application of the Frye Test and urges instead the reliability standard. (Response, p. 26) This is not entirely accurate. Plaintiff has assigned error to the trial court’s applying Frye for all reasons stated in the Opening Brief. Plaintiff did not ask the court below to apply the Daubert standard for good reason -- neither standard is implicated where no “novel” science has been raised. Moreover, because the trial court applied Frye, not Daubert, to bar Mr. Guscott’s experts, an opening brief which did not thoroughly address Frye would be absurd.

Plaintiff has raised a Daubert argument in this Court for three significant reasons: first, should this Court determine that “novel science” has been raised the AKZO decision strongly suggests that the Daubert standard is the fair and proper standard to be applied in civil cases; second, in AKZO the Supreme Court noted that the parties assumed the applicability of Frye – Mr. Guscott makes no such assumption; and, third, the Supreme Court specifically stated it would decide the AKZO case “without deciding that Frye is the appropriate test for civil cases,” indicating it is an open question, ripe for review. AKZO at 603.

The Supreme Court could have ended the matter there but did not. The Court explored the differences between the Frye and Daubert standards, stating that the United States Supreme Court rejected Frye's "general acceptance standard" because such a requirement is inconsistent with the Federal Rules' relaxation of traditional barriers to opinion testimony, also noting that the national trend is toward Daubert. AKZO at 601-2.

Much has changed since 1923 when Frye was decided as recognized by the Supreme Court's compelling discourse in AKZO as follows:

Frye envisioned an evolutionary process with novel scientific techniques passing through an "experimental" stage during which they would be scrutinized by the scientific community until they arrive at a "demonstrable" stage. .. However, science never stops evolving and the process is unending. Each scientific inquiry becomes more detailed and nuanced. As one commentator has noted, there is a "difference between the quest for truth in the courtroom and in the laboratory. (citations omitted)

AKZO at 607. Thus, the Court recognized that scientific proof in the twenty-first century is elusive. The Court explained the Daubert standard or "reliability" test, stating that that a trial court must determine if the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts. AKZO at 601-2. Significantly, the Court in AKZO stated, "In civil cases, we have neither expressly adopted Frye nor expressly rejected Daubert." AKZO at 602. The court noted that

application of Frye in a civil case would have the impact of raising the burden of proof beyond mere probability and suggested this would be improper. The question is ripe for review.

Should this Court determine that any one of Mr. Guscott's experts relied upon novel science, then this case would present a classic case for application of Daubert in a civil suit to determine whether the basic principles relied upon by physicians are valid and apply to the case at hand.

#### VI. CONCLUSION

WHEREFORE, for all of the foregoing reasons, and all other reasons set forth in the Brief of plaintiff-appellant, the plaintiff-appellant, T. Arthur Guscott, respectfully requests that this Court reverse the judgment of the trial court and remand this matter for trial consistent with the rulings made by this Court.

Dated this 8th day of March, 2012.

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I, Cynthia L. Ringo, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish, County, Washington, and am over the age of 18 years.

2. On the 8th day of March, 2012, I caused to be served these document as follows:

- Reply Brief of Appellant; and
- Certificate of Service

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 8<sup>th</sup> day of March, 2012.

  
Cynthia L. Ringo