

FILED
COURT OF APPEALS
DIVISION II

2014 JUN 23 AM 10:02

STATE OF WASHINGTON

BY _____
CLERK

NO. 45604-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

JOHN R. TONEY,

Appellant,

vs.

KEVIN T. MITCHELL and KIMBERLY S. MITCHELL

Respondents.

SECOND AMMENDED OPENING BRIEF OF APPELLANT

John R. Toney, pro se
9531 Barnes Drive
Castle Rock Wa. 98611
360-274-5840

pm 6/19/14

TABLE OF CONTENTS

I. INTRODUCTION1
II. ASSIGNMENT OF ERROR6

#1. The trial court erred when it applied the strict standards of the Frye test when excluding Toney's causation expert witnesses on the issues of unwanted excessive noise, and resultant myocardial infarction heart attack, hearing loss and loss of peace and tranquility and the enjoyment of life. when no adverse expert opinion evidence was presented indicating the experts testimony, theory or methodology, opinion on causation was not generally accepted within the relevant scientific community and entering the Order on pre-trial motions on September 30, 2013 .

#2. The trial court erred by not following the laws of the State of Washington, Cowlitz County code and Washington Administrative code, Toney had a reasonable expectation that the court would follow the law with regards to noise standards and taking the matter from the jury.

#3 The, trial court erred when it found that Doctor's Davis, Hodgson and Toney were not expert witness under, Anderson or ER 702 and that their testimony would not assist the jury in understanding the injuries sustained by repetitive firearm noise in excess of both county code and state regulation.

#4. The trial court erred making unfounded biased and prejudicial remarks based upon his personal prospective and not the Laws of the State of Washington, constituting an abuse of discretion.

#5. The trial court erred by denying Toney due process under Article 1 section 3 and 10 of the Washington State Constitution and Article 1 section 8 and 14 of the U.S. Constitution dismissing the case and not allowing Toney to be heard on the issues before the court.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 7

- A. Was the strict application of the Frye standard the correct case law in a civil cause of action to establish causation under current Washington case law. (error 1)
- B. Was it error for the exclusion of Toney's expert witnesses on causation appropriate or required under *Anderson* when the court heard no live testimony from Toney's expert witnesses, the court did not entertain testimony from Mitchell's experts or established that they were even qualified as experts on causation but was going to allow Mitchell's experts to testify as to causation before the jury. (error 1)
- C. Was it error for the trial court to take the matter from the jury and not allow the trier of fact to hear the expert testimony and determine the truth of the matter, even when no opinion evidence was presented indicating that Toney's experts testimony, theory, or methodology was not based upon a generally accepted relevant scientific basis and opinion. (error 1)
- D. Did the trial court error by dismissing the case with issues of excessive noise encroachment still before the court, with no testimony being introduced, but entering the order dismissing the case. (error 1)

- E. Was it error for the court to dismiss the case taking the matter from the jury without ever addressing the issue of excessive noise or allowing Toney's sound engineer expert testimony to be presented to the jury to establish personal injury. (error 1)
- F. Was it error for the court to dismiss the case taking the from the jury the ability to hear testimony of the decibel levels associated with high power rifle fire and Cowlitz County code and WAC regulations on allowable noise levels that can be received upon an adjoining property or resident. (error 2)
- G. Is the trial court bound by oath to follow and apply the Cowlitz County code, laws of the State of Washington and Constitutional provisions regarding personal rights of litigants. (error 2)
- H. Whether the trial court erred in finding that doctor's Davis, Hodgson and Toney were not expert's under Washington law or ER702. (Error 3)
- I. Did the trial court error by basing his rulings on his misunderstanding of the application of Anderson and causation under Washington law, the RCW statutes, and his own personal opinion of Toney's experts. (error 3)
- J. Was it error for the judge to rely upon his own personal experiences and knowledge as a basis for denying Toney or his expert witnesses to testify as experts and take the matter from the jury, thereby thwarting the adversarial concept of trial and not allowing the jury to determine the truth of the matter.
- (error 4)

- K. Was it an abuse of discretion for the judge to rely upon his own personal experiences and knowledge rather than the controlling case law, Washington Law and court rules when making rulings in this case. (error 4)
- L. Was it err for the trial court to strip Toney of his guaranteed Constitutional right to be heard on the issues and merits of the case under the due process clause. (error 5)

ISSUES PERTAINING TO THE CASE

III. STATEMENT OF THE CASE 10

III. ARGUMENT12

IV. CONCLUSION 22

TABLE OF AUTHORITIES

CASES

1. *Anderson v. Akzo Nobel Coatings, Inc.*, 171 Wn.2d 593, 608, 260 P.3d 857 (2011) 1
2. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) 2
3. *Frye v. United States*, 293 F. 1034 (D.C. Cir. 1923) 1
4. *in re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed. 2d 368 (1970) 14
5. *Kennewick v. Day*, 142 Wn. 2d. 1 (2000) 22
6. *Langlitz v. Board of Registration of Chiropractors*, 396 Mass. 374, 486 N.E. 2d. 48 4
7. *O'Donohue v. Riggs*, 73 Wn. 2d 814, 822-23, 440 P.2d 823 (1968) 18
8. *Reese v. Stroh*, 128 Wn. 2d. 300, 305, 907 P2d 282 (1995) 15
9. *Ritzschke v. Dep't of labor Indus.* 76 Wn 2d 29, 30, 454 P.2d 850(1969) 13
10. *Rock v. Arkansas*, 483 US. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987) 13
11. *Shah v. Allstate INs. Co.* 130 Wn. App. 74, 121,121 P3d. 1204 (2005). 12
12. *State v. Gregory*, 158 Wn. 2d. 759, 830, 147 P. 3d. 1201 (2006) 14
13. *State v. Gore*, 143 Wn. 2d. 288, 302, 21 P. 3d. 262 (2001) 14
14. *State v. Martin* , 101 Wn 2d. 713, 719, 684 P. 2d 651 (1984) 13
15. *State v. Ciskie*, 110 Wn. 2d 263, 279, 751 P.2d 1165 (1988) 15
16. *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993) 14
17. *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) 16

18. <i>State v. Riker</i> , 123 Wn.2d 351, 364, 869 P.2d 42 (1994)(in reference to <i>State v. Petrich</i> , 101 Wn.2d 566, 575, 683 P.2d 173 (1984))	12
19. <i>5B TEGLAND</i> , <i>supra</i> § 702.18 at 81	13
20. <i>Victor v. Nebraska</i> , 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 368 (1970)	19

CONSTITUTIONAL PROVISIONS

Washington State Constitution

Article 1 Section 3. Personal Rights.	14
Article 1 Section 10, Administration of Justice.	14

U.S. Constitution

Article 1 Section 8	14
Article 1 Section 14	14

STATUTES

RCW 18.25	3, 21
RCW 51.32.112	4, 21

RULES

ER702	1
ER703	13
ER102	12
ER104	12
ER401	12
ER402	12
ER403	12

LEGAL LITERATURE

JURIMETRICS J. 153, 154 & n.4 (1995)	15
--------------------------------------	----

EDMOND MORGAN, FORWARD, AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE 34 (1942)	15
THE LAW OF EVIDENCE IN WASHINGTON\$ 702.04[9] [A] at 702-29 (4 th . Ed. 2009)	16
41 JURIMETRICS J. 385 388-89 & N. 31 (2001)	13
CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 363 (1954)	16
MARCIA ANGEL, MD. SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREST IMPLANT CASE 114 (1996)	16

I. INTRODUCTION

The Superior Court of Cowlitz County in this civil case entered an order based upon the strict Washington court's application of *Frye v. United States*, 54 App. D.C. 46, 239 F. 1013 (1923), as the appropriate test for a finding of causation with regards to expert testimony in a civil setting, however many neighboring jurisdictions have abandoned *Frye* altogether, and instead, rely solely upon the evidentiary principles which have long been adopted to regulate the veracity of expert testimony under ER 702. Generally the testimony of experts in Washington is governed by ER 702 whereby "scientific, technical, or other specialized knowledge will assist the trier (jury) of fact to understand the evidence or to determine a fact at issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise.". The Washington courts have moved from *Frye* with the adoption of *Daubert*, *Resse*, *Cathron* and more recently the Supreme court ruling in regards to *Frye* and its application to expert testimony in *Anderson v. AKZO Nobel Coatings* 172 Wn. 2^d 593, 2011 and the numerous rulings of the Appellate and Supreme court since *Anderson*. The proper application in a civil case is no longer *Frye* with regards to expert testimony and causation in a civil action if the theory and

a

methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community, *Frye* is not implicated. The *Frye* test requires “general acceptance” however *Daubert v. Dow Pharmaceuticals. Inc.* 509, 113 S. Ct. 2786, 125 L. Ed. 2nd. 469 (1993) rejects the *Frye* test as a threshold standard , and *Daubert* follows a plain analysis of ER 702, in that regard, review and reversal of the trial court’s order’s is necessary to advance the interests of justice and fairness in this case.

a

Toney filed suit against the Mitchell’s due to unwanted gunfire noise generated on their property encroaching upon the peace and tranquility the area had enjoyed over the years and Mr. Mitchell’s aggressive behavior with his firearms, firing shots in Toney’s direction and scoping Toney with a high power rifle, all of which created a conditioned response of adrenaline rush and being the causative factor in the myocardial infarction and hearing loss suffered by Toney, when the current literature is reviewed concerning unwanted noise and fight or flight response. Toney was not free to travel about and work on the property which he resides upon without fear for life and limb and suffered a loss of his Constitutional Rights due to Mitchell’s negligence and aggression, contrary to law.

During the motion *in limine* stage, the court in a gate keeper role excluded both Dr. Davis's and Dr. Hodgson's testimony on causation without entertaining a full *Frye* hearing, the trial court ruled that Dr. Davis's testimony would be excluded "He didn't use the magical words" (VR 72) regarding his testimony as related to causation. The court reviewed *Anderson v. Akzo Nobel Coatings* (VR 71) and found that it was basically a *Frye* case and proceeded to apply the strict *Frye* causation theory to Dr. Hodgson's testimony as well and excluded his testimony. The court also excluded Toney a retired Chiropractor from testifying as an expert witness based upon the court's understanding of the laws of Washington concerning the practice of Chiropractic RCW 18.25.

"Chiropractic " defined

- (1) Chiropractic is the practice of health care that deals with the diagnosis or analysis and care or treatment of the vertebral subluxation complex and its effects, articular dysfunction, and musculoskeletal disorders, all for the restoration and maintenance of health and recognizing the recuperative powers of the body.
- (2) (2) Chiropractic treatment or care includes the use of procedures involving spinal adjustments and extremity manipulation. Chiropractic treatment also includes the use of heat, cold, water, exercise, massage, trigger point therapy, dietary advice and recommendation of nutritional supplementation, the normal regimen and rehabilitation of the patient, first aid, and counseling on hygiene, sanitation, and preventive measures. Chiropractic care also includes such physiological therapeutic procedures as traction and light, but does not include procedures involving the application of sound, diathermy, or electricity.
- (3) (3) As part of a chiropractic differential diagnosis, a chiropractor shall perform a physical examination, which may include

diagnostic x-rays, to determine the appropriateness of chiropractic care or the need for referral to other health care providers. The chiropractic quality assurance commission shall provide by rule for the type and use of diagnostic and analytical devices and procedures consistent with this chapter.

RCW 51.32.112 Medical Examination – Standards and Criteria – Special Examinations by chiropractors – Compensation guidelines and reporting criteria.

(1) The department shall develop standards for the conduct of special medical examinations to determine permanent disabilities, including, but not limited to: (a) The qualifications of persons conducting the examinations; (b) The criteria for conducting the examinations, including guidelines for the appropriate treatment of injured workers during the examination; and (c) The content of examination reports. (2) Within the appropriate scope of practice, chiropractors licensed under chapter 18.25 RCW may conduct special medical examinations to determine permanent disabilities in consultation with physicians licensed under chapter 18.57 or 18.71 RCW. The department, in its discretion, may request that a special medical examination be conducted by a single chiropractor if the department determines that the sole issues involved in the examination are within the scope of practice under chapter 18.25 RCW. However, nothing in this section authorizes the use as evidence before the board of a chiropractor's determination of the extent of a worker's permanent disability if the determination is not requested by the department.

The court showed bias and abused it's discretion with the comment at VR 43 1- 21. Chiropractors are licensed physicians *Langlitz v. Board*, 396 Mass. 374, 486 N.E. 2d 48 of registration of Chiropractors.

The court abused it's discretion by disregarding *Daubert*, *Anderson* and ER702 regarding the case law in a civil case to establish causation by doctors. 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*. Although the court did agree that Dr. Davis could come in and testify in person, but then recanted and based upon his personal experience with Dr. Davis ruled that he would have nothing to add for the jury. The court entered no ruling or entertained any testimony concerning the expert opinion of DSA Engineering, Kerry Standlee, with regards to the sound studies of high power rifles and their relation to both county and state code maximum decibel levels, which leaves the alleged excessive noise allegation in Toney's complaint and resultant damages still before the court. °

The trial court then after finding that the experts would not be able to present helpful information to the jury, (Dr. Davis M.D. , DR. Hodgson M.D. and Dr. Toney D.C. retired) apparently under *Frye* they were only lay persons, excluded all evidence of personal injury (heart attack and hearing loss) to Toney on the issue of causation, as the court would not even allow them to be experts under ER702. No experts or opinions were ever presented by Respondent to oppose the Toney experts for the courts consideration. Nor were claims of new or novel science presented to the court that would implicate *Frye* .The dismissal based upon lack of ° causation and the inclusion of the remainder of the allegations in Toney's

complaint being dismissed with prejudice by the court without ever hearing the allegations was biased and prejudicial on the part of the court and violate the Constitutional provisions of due process and the right to be heard. The trial courts dismissal is inconsistent with the controlling case law rulings on causation under *Anderson*.^o

The trial court at (VR 59) made a ruling that Dr. Dorevich, Matthew Nodel, and Scott Kranz would all be allowed to testify as experts based upon their curriculum vitae with no offer of proof other than internet advertisements of those individuals none of whom had any first hand knowledge of either Toney or the decibel levels of noise before the court. Therefore the trial courts order of dismissal should be reversed and this matter remanded for further proceedings on the merits.

II. ASSIGNMENT OF ERROR^o

#1. The trial court erred when it applied the strict standards of the Frye test when excluding Toney's causation expert witnesses on the issues of unwanted excessive noise, and resultant myocardial infarction heart attack, hearing loss and loss of peace and tranquility and the enjoyment of life. when no adverse expert opinion evidence was presented indicating the experts testimony, theory or methodology, opinion on causation was not

generally accepted within the relevant scientific community and entering the Order on pre-trial motions on September 30, 2013 .

#2. The trial court erred by not following the laws of the State of Washington, Cowlitz County code and Washington Administrative code, Toney had a reasonable expectation that the court would follow the law with regards to noise standards and taking the matter from the jury.

#3 The, trial court erred when it found that Doctor's Davis, Hodgson and Toney were not expert witness under, *Anderson* or ER 702 and that their testimony would not assist the jury in understanding the injuries sustained by repetitive firearm noise in excess of both county code and state regulation.

#4. The trial court erred making unfounded biased and prejudicial remarks based upon his personal prospective and not the Laws of the State of Washington, constituting an abuse of discretion.

#5. The trial court erred by denying Toney due process under Article 1 section 3 and 10 of the Washington State Constitution and Article ! section 8 and 14 of the U.S. Constitution dismissing the case and not allowing Toney to be heard on the issues before the court.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Was the strict application of the Frye standard the correct case law in a civil cause of action to establish causation under current Washington case law. (error 1)
- B. Was it error for the exclusion of Toney's expert witnesses on causation appropriate or required under *Anderson* when the court heard no live testimony from Toney's expert witnesses, the court did not entertain testimony from Mitchell's experts or established that they were even qualified as experts on causation but was going to allow Mitchell's experts to testify as to causation before the jury. (error 1)
- C. Was it error for the trial court to take the matter from the jury and not allow the trier of fact to hear the expert testimony and determine the truth of the matter, even when no opinion evidence was presented indicating that Toney's experts testimony, theory, or methodology was not based upon a generally accepted relevant scientific basis and opinion. (error 1)
- D. Did the trial court error by dismissing the case with issues of excessive noise encroachment still before the court, with no testimony being introduced, but entering the order dismissing the case. (error 1)

- E. Was it error for the court to dismiss the case taking the matter from the jury without ever addressing the issue of excessive noise or allowing Toney's sound engineer expert testimony to be presented to the jury to establish personal injury. (error 1)
- F. Was it error for the court to dismiss the case taking the from the jury the ability to hear testimony of the decibel levels associated with high power rifle fire and Cowlitz County code and WAC regulations on allowable noise levels that can be received upon an adjoining property or resident. (error 2)
- G. Is the trial court bound by oath to follow and apply the Cowlitz County code, laws of the State of Washington and Constitutional provisions regarding personal rights of litigants. (error 2)
- H. Whether the trial court erred in finding that doctor's Davis, Hodgson and Toney were not expert's under Washington law or ER702. (Error 3)
- I. Did the trial court error by basing his rulings on his misunderstanding of the application of Anderson and causation under Washington law, the RCW statutes, and his own personal opinion of Toney's experts. (error 3)
- J. Was it error for the judge to rely upon his own personal experiences and knowledge as a basis for denying Toney or his

expert witnesses to testify as experts and take the matter from the jury, thereby thwarting the adversarial concept of trial and not allowing the jury to determine the truth of the matter. (error 4)

K. Was it an abuse of discretion for the judge to rely upon his own personal experiences and knowledge rather than the controlling case law, Washington Law and court rules when making rulings in this case. (error 4)

L. Was it err for the trial court to strip Toney of his guaranteed Constitutional right to be heard on the issues and merits of the case under the due process clause. (error 5)

IV. STATEMENT OF THE CASE

Toney resides at 9531 Barnes Drive (30 acres) and the Mitchell's residence was at 9475 Barnes Drive (3 acres) both located in Castle Rock Washington, (CP-12), and originally the same piece of property, shortly after the Mitchell's purchased their property the adjoining property 9531 was under sub-division, which the Mitchell's objected to " as they wanted no close neighbors", as the sub-division proceeded the Mitchell's invited friends over and discharged large caliber firearms on numerous occasions in the direction of the 9531 property. Kevin Mitchell continued to harass and intimidate Toney on a ongoing basis (CP- 12) until, to obtain relief

after suffering a Myocardial Infarction heart attack from the continual bombardment of unwanted extremely loud, large caliber rifle noise pollution which encroached upon the 9531 Property from the Mitchell property, disrupting the peace and tranquility the residential area had known over the years prior to the Mitchell's arrival in the neighborhood. (CP- 12 at 3,4,5,6, 7) Toney, filed suit after several years of attempting to get both Cowlitz County building and Planning to perform a proper investigation of the Respondent's non-compliance with county code for the construction and operation of a sub-standard shooting range within a residential neighborhood,(CP-12) and the Cowlitz County Sheriff's department to investigate and make sound measurements as required by law of the unwanted excessive noise generated from the respondent's property and for Respondent pointing and discharging firearms in Toney's direction. The court determined the suit to be based upon the theory of nuisance.

The court required Toney to provide reports from his experts linking the alleged allegations in the Amended Complaint to excessive noise, heart attack and hearing loss, Ex. 1, DSA noise level report, Ex. 2, Dr. Davis, EX. 3 Dr. Hodgson, Ex 4. Dr. Toney. The reports were to be served upon attorney Lillegren or the matter would be re-set for dismissal on

respondents motion for summary judgment . The reports apparently satisfied counsel .

The court after hearing Motions in Limine on September 17, 2013 made a ruling dismissing the nuisance law suit leaving other issues pending before the court and un resolved. (CP- 118) (VR 94 – 97).

III. ARGUMENT

The trial court erred When holding that the *Frye* test was the correct standard on causation, disregarding other case law, and excluding Toney’s expert witnesses concerning Toney’s medical conditions, hearing loss and enjoyment of life.

According to Washington law , the existence of legal causation between two events is determined “ on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent.”

Shah v. Allstate Ins. Co. 130 Wash. App. 74, 121, 121 P. 3d. 1204 (2005).

The Washington Supreme Court Gender and Justice Commission’s report set forth their findings as follows:

[5-9] ¶17 Again, the trial court, in its gate keeping role, must decide if evidence is admissible. ER 102; ER 104(a). To satisfy the pursuit of truth, evidence must meet certain criteria. Evidence must be probative, relevant, and meet the appropriate standard of probability. ER 102; ER 401; ER 402; ER 403; *see, e.g., State v. Riker*, 123 Wn.2d 351,

359, 869 P.2d 43 (1994). Expert testimony, in addition, must be helpful. ER 702. Evidentiary rules provide significant protection against unreliable, untested, or junk science. 5B *TEGLAND*, *supra*, § 702.18, at 81. The *Frye* test is an additional tool used by judges when proffered evidence is based upon novel theories and novel techniques or methods. *Reese*, 128 Wn.2d at 306. In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). Having satisfied *Frye*, the evidence must still meet the other significant standards of admissibility. For example, persons performing experiments and interpreting results must be qualified. ER 702 and ER 703 mandate the evidence must be relevant and helpful. «4» Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability. *See, e.g., Ritzschke v. Dep't of Labor & Indus.*, 76 Wn.2d 29, 30, 454 P.2d 850 (1969); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 822-23, 440 P.2d 823 (1968); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY OF PHYSICAL AND EMOTIONAL HARM § 28 cmt. c(5); BLACK'S LAW DICTIONARY 1380 (9th ed. 2009) (noting that "reasonable medical probability" and "reasonable medical certainty" are used interchangeably). Finally, evidence is tested by the adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." (citing *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987))).

II. Expert Testimony

A. *Frye* Rule

1. General acceptance test

The *Frye* general acceptance test,¹ rather than the *Daubert* standard,² is used by Washington courts in determining the admissibility of scientific testimony.³ The "general acceptance" test looks to the scientific community to determine whether the evidence in question has a valid, scientific basis.⁴ If there is a significant dispute among experts in the relevant scientific community as to the validity of the scientific evidence, it is not admissible.⁵ If expert testimony does not concern novel theories or sophisticated and technical matters, it need not meet stringent requirements for general scientific acceptance

0

2. Evidence considered by the court

In determining whether scientific evidence meets the *Frye* test, the court may consider, in addition to materials presented to it, sources outside the record such as scientific literature, law articles, and decisions in other jurisdictions.⁷ However, the relevant inquiry by the court is whether there is acceptance by scientists, not by courts or legal commentators.⁸

4. De Novo review

Questions as to the admissibility of scientific evidence under *Frye* are reviewed de novo.¹⁷

- A. From the outset it must be noted that “ Appellate review of a *Frye* ruling (issued after a *Frye* hearing is *de novo*.” *State v. Gregory*, 158 Wn. 2d. 759, 830, 147 P. 3d. 1201 (2006), citing, *State v. Gore*, 143 wn. 2d. 288, 302, 21 P. 3d. 262 (2001).

In the instant case no actual *Frye* hearing where the court could examine the depositions, reports or experts was ever held. Toney’s Constitutional Rights under Due Process were violated, article 8 and 14 of the U.S. Constitution and under Article 3 and 10 of the Washington State Constitution. Toney has an right to be heard before the trier of fact.

The current case law under *Anderson v. Akzo Nobel Coatings, Inc.* 172 Wn.2d. 593 set a new standard for causation admissibility with the majority concurring with the extensive and comprehensive analysis of the laws on causation by Judge Chambers:

“[1, 2] ¶7 Questions of admissibility under *Frye* are reviewed de novo. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996) (quoting *State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993)).” The court further clarified Causation and *Frye* under

Anderson:

CAUSATION AND *Frye*

¶8 Trial judges perform an important gate keeping function when determining the admissibility of evidence. ER 104. Courts must interpret evidence rules mindful of their purpose: "that the truth may be ascertained and proceedings justly determined." ER 102. Generally, the admissibility of expert testimony in Washington is governed by ER 702. «1» See also *Reese v. Stroh*, 128 Wn.2d 300, 305, 907 P.2d 282 (1995). Expert testimony is usually admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary lay persons. *Reese*, 128 Wn.2d at 308 (citing *State v. Ciskie*, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988)). Unreliable evidence is not helpful to the jury, and determining whether scientific-seeming evidence is sufficiently reliable to be admissible has vexed courts at least since *Frye*, and possibly since the 14th century when judges first started consulting with scientists. See Lee Loevinger, *Science as Evidence*, 35 JURIMETRICS J. 153, 154 & n.4 (1995) (citing EDMUND MORGAN, FOREWORD, AMERICAN LAW INSTITUTE MODEL CODE OF EVIDENCE 34 (1942)). Nonetheless, novel scientific evidence, especially that still in the experimental stage, continues to present special challenges. See ROBERT H. ARONSON, THE LAW OF EVIDENCE IN WASHINGTON § 702.04[9][a] at 702-29 (4th ed. 2009).

«1» "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." ER 702.

¶9 There are two accepted common law approaches for determining the admissibility of novel scientific evidence. The *Frye* test was established in 1923 by the United States Court of Appeals of the District of Columbia Circuit. The *Frye* court articulated the approach as follows:

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.

Frye, 54 App. D.C. at 47. Thus, under *Frye*, the court's role is to determine whether the theory has been generally accepted in the relevant scientific community. *Reese*, 128 Wn.2d at 306.

¶10 Precisely seven decades later, in *Daubert*, the United States Supreme Court rejected the *Frye* general acceptance test because Federal Rule of Evidence 702 does not expressly require general acceptance, and such a requirement is inconsistent with the thrust in the Federal Rules of Evidence's relaxation of the traditional barriers to opinion testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Under *Daubert*, the court must determine if the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at hand. *Id.* at 592-93. These two tests, the *Frye* test and the *Daubert* test, are often referred to as the "general acceptance" and "reliability" tests, respectively. *See, e.g.*, David E. Bernstein, *Frye, Frye, Again: the Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 388-89 & n.31 (2001) (citing CHARLES T. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE 363 (1954); *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243-48 (E.D.N.Y. 1985), *aff'd on other grounds*, 818 F.2d 187 (2d Cir. 1987)).

¶11 Washington courts, at least in criminal cases, have long adopted the *Frye* "general acceptance" standard. In *Copeland*, 130 Wn.2d 244, we were asked to reject the *Frye* test in favor of *Daubert*. Despite the national trend toward *Daubert*, we declared our continued adherence to the more stringent *Frye* test. *Id.* at 251; *see also* ARONSON, *supra*, at § 702.04.[9][c][ii]. In civil cases, we have neither expressly adopted *Frye* nor expressly rejected *Daubert*. In *Reese*, we concluded that it was unnecessary for the Court of Appeals to have reached the issue of whether *Daubert* applied in a civil case since the opponent of the testimony "did not argue that

the theory or the methodology involved . . . lacks acceptance in the scientific community." *Reese*, 128 Wn.2d at 307. Since the real challenge was whether the proffered testimony had a proper foundation, we resolved the question presented under ER 702 and 703. *Id.* at 304, 308-09. However, since the courts below in *Reese* considered *Frye* and *Daubert*, we reviewed their applicability. «2» *Id.* at 305-08; see also generally 5B KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW & PRACTICE § 702.19, at 88 (5th ed. 2007) ("For the moment, it seems safe to presume that *Frye* continues to apply in civil cases until the Washington Supreme Court explicitly says otherwise." (citing *Reese*, 128 Wn.2d 300)). In the case before us, the parties and lower courts assume that *Frye* is applicable, and for the purposes of this opinion, we will assume without deciding that *Frye* is the appropriate test for civil cases.

«2» In *Reese*, the concurrence suggested that the *Daubert* test was the appropriate test to apply in a civil case given the different burden of proof required in a civil proceeding. See *Reese*, 128 Wn.2d at 310, 312 (C. Johnson, J., concurring).

[3, 4] ¶12 As we recently summarized, under *Frye*:

The primary goal is to determine "whether the evidence offered is based on established scientific methodology." *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. *Id.* "If there is a *significant* dispute among *qualified* scientists in the relevant scientific community, then the evidence may not be admitted," but scientific opinion need not be unanimous. *Id.*

State v. Gregory, 158 Wn.2d 759, 829, 147 P.3d 1201 (2006).

¶13 Specifically, our courts consider "(1) whether the underlying theory is generally accepted in the scientific community and (2) whether there are techniques, experiments, or studies utilizing that theory which are capable of producing reliable results and are generally accepted in the scientific community." *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). "Once a methodology is accepted in

the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact." *Gregory*, 158 Wn.2d at 829-30 (citing ER 702). Only after novel scientific evidence is found admissible under *Frye* does the court turn to whether it is admissible under ER 702. *Cauthron*, 120 Wn.2d at 889-90.

[5-9] ¶17 Again, the trial court, in its gate keeping role, must decide if evidence is admissible. ER 102; ER 104(a). To satisfy the pursuit of truth, evidence must meet certain criteria. Evidence must be probative, relevant, and meet the appropriate standard of probability. ER 102; ER 401; ER 402; ER 403; *see, e.g., State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). Expert testimony, in addition, must be helpful. ER 702. Evidentiary rules provide significant protection against unreliable, untested, or junk science. 5B *TEGLAND, supra*, § 702.18, at 81. The *Frye* test is an additional tool used by judges when proffered evidence is based upon novel theories and novel techniques or methods. *Reese*, 128 Wn.2d at 306. In our courts, scientific evidence must satisfy the *Frye* requirement that the theory and technique or methodology relied upon are generally accepted in the relevant scientific community. *State v. Martin*, 101 Wn.2d 713, 719, 684 P.2d 651 (1984). Having satisfied *Frye*, the evidence must still meet the other significant standards of admissibility. For example, persons performing experiments and interpreting results must be qualified. ER 702 and ER 703 mandate the evidence must be relevant and helpful. «4» Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability. *See, e.g., Ritzschke v. Dep't of Labor & Indus.*, 76 Wn.2d 29, 30, 454 P.2d 850 (1969); *O'Donoghue v. Riggs*, 73 Wn.2d 814, 822-23, 440 P.2d 823 (1968); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY OF PHYSICAL AND EMOTIONAL HARM § 28 cmt. c(5); BLACK'S LAW DICTIONARY 1380 (9th ed. 2009) (noting that "reasonable medical probability" and "reasonable medical certainty" are used interchangeably). Finally, evidence is tested by the adversarial process within the crucible of cross-examination, and adverse parties are permitted to present other challenging evidence. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence,

0

and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." (citing *Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987))).

¶19 Further, scientific standards and legal standards do not always fit neatly together. «5» Generally, the degree of certainty required for general acceptance in the scientific community is much higher than the concept of probability used in civil courts. While the standard of persuasion in criminal cases is "beyond a reasonable doubt," the standard in most civil cases is a mere "preponderance." *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 30.13, at 228 (2d ed. 2009). In order to establish a causal connection in most civil matters, the standard of confidence required is a "preponderance," or more likely than not, or more than 50 percent. See Lloyd L. Wiehl, *Our Burden of Burdens*, 41 WASH. L. REV. 109, 110 & n.4 (1966) ("The Washington court has reduced the burden to the probability factor."). By contrast, "[f]or a scientific finding to be accepted, it is customary to require a 95 percent probability that it is not due to chance alone." MARCIA ANGELL, M.D., SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE 114 (1996). The difference in degree of confidence to satisfy the *Frye* "general acceptance" standard and the substantially lower standard of "preponderance" required for admissibility in civil matters has been referred to as "comparing apples to oranges." *Id.* To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases. See *Reese*, 128 Wn.2d at 310, 312 (C. Johnson, J., concurring). «6»

The court erred by not following the Laws of the State of Washington, case law, Cowlitz County code and WAC code, taking the matter from the jury. Toney had a reasonable expectation that the court would follow the law. The

courts findings that Dr's. Davis Hodgson and Toney were not experts under the case law and standards for causation in a civil trial under Washington law was totally without any legal basis and acts as a violation of Toney's Constitutional rights under due process.

Doctors Davis and Hodgson are both medical doctors that have over 20 years in active practice within their specialties and Dr. Davis is also a retired (24 Years) U.S. Air Force flight surgeon with deployments in the Iraq and Afganistan theaters treating the injured service men for PTSD and noise related injuries which most likely would make him the best expert witness available for the injuries suffered by Toney. The trial courts decision that he would have nothing to offer the jury is biased and prejudicial based upon his own experience with Dr. Davis on one office visit. (VR 92-93)

The courts exclusion of expert testimony based upon "he didn't use the magical words" (VR 72) is in no way supported by the case law in Washington State or anywhere, the courts own statement:

"I looked over Dr. Davis's trans—the transcription of his deposition, the portions that were provided by both parties. And the thing that really struck me was the language that he used. He used conditional language, "might have", "may have," " could have", "possibly did", probably caused." (VR 73).

Under *Daubert and Anderson* this would meet the criteria for causation by a preponderance (51%) and Dr. Davis should not have been excluded as a expert witness.

The trial court erred with regards to his understanding of Chiropractic within this state:

The laws of the State of Washington clearly allow Chiropractor's to make differential diagnosis, RCW 18.25 perform physical examinations to arrive at a determination of appropriateness of Chiropractic care and to refer non-Chiropractic diagnosed conditions to appropriate health care providers, whatever condition the patient may present, referral for further evaluation and care. If a patient came in with a life threatening condition the Chiropractor by law would be allowed to provide first aid, diagnose the condition and refer the patient out for other care if required or face liability claims.

Chiropractors are allowed under RCW 51.32.112 to evaluate permanent RCW 18.57 and 18.71, causation is a consideration of the injury being related on a more probable than not basis to the accident in question. Dr. Toney would be entitled to an expert opinion based upon his almost 20 years of active practice, training, acquired knowledge, experiences and consultation with Dr's. Davis and Hodgson as well as his other treating physicians at St. Johns and OHSU hospitals concerning his presented conditions pre and post heart attack.

Toney's knowledge is well in excess of any knowledge a lay person or the trier of fact might possess and the jury would benefit from the first hand experience of Toney, it was error for the trial court to disqualify Toney as an expert witness. In the interest of justice the matter should be reversed and remanded for further proceedings.

The trial court making unfounded biased and prejudicial remarks based upon his own personal prospective and not the laws of the state of Washington constituting an abuse of discretion.

The court's allowing defendant's expert witnesses to testify and disallowing Toney's expert's is abuse of discretion,

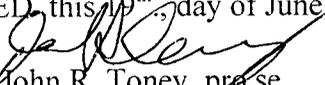
An evidentiary ruling based on an incomplete analysis of the law based on a misapprehension of the legal issues constitute untenable grounds and is a abuse of discretion. *Kennewick v. Day*, 142 Wn.2d 1 (2000).

The court disparaging remark at (VR 43) constitutes bias, prejudice and lack of knowledge by the court of the laws of Washington State with regards to Chiropractic and should not be tolerated in a court of law. The case should be remanded for a fair and full hearing an the merits.

V. CONCLUSION

The Supreme court analysis in *Anderson* clearly rejects the "general acceptance" standard and in civil cases requires only the "preponderance" for admissibility in civil matters concerning legal causation. The court's abuse of discretion and disregard for the laws of the State of Washington which would require that a *Frye* de novo hearing by law be had, reverse and remand for further proceedings on the merits of the case and allow the expert testimony to be presented to the jury, and allow Toney his day in court on all the allegations within the suit.

RESPECTFULLY SUBMITTED, this 19th, day of June, 2014.


By: John R. Toney, pro se
9531 Barnes Dr.
Castle Rock Wa. 98611
360-274-5840

FILED
COURT OF APPEALS
DIVISION II

2014 JUN 23 AM 10:02

STATE OF WASHINGTON
BY _____
K
JENNY

COURT OF APPEALS. DIVISION II, FOR THE STATE OF WASHINGTON

John R. Toney, a proper person,
Plaintiff,

No. 45604-4-II

v.

Kevin T. Mitchell and Kimberly
S. Mitchell, Jointly and Severally,

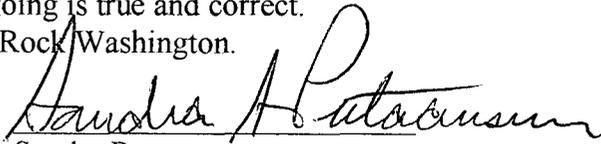
Proof of Service

I Sandra Putaansuu, being of majority age and not a party to the action and competent to testify in the above named matter state as follows:

1. That I did place in the U.S. mail, two copies of Plaintiff's Second Amended Opening Brief of Appellant postage prepaid addressed to the Court of Appeals Division II, 950 Broadway, suite 300, Tacoma Wa. 98402
2. One copy of Appellant's Second Amended Opening Brief and a copy of the proof of service, addressed to Shawn Lillegren, 888 S.W. 5th. Ave. Suite 500, Portland Or. 97204 at Castle Rock Washington on June 19, 2014.

Declaration: I Sandra Putaansuu, certify/ declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated June 19, 2014, signed at Castle Rock Washington.

A handwritten signature in black ink, appearing to read "Sandra A. Putaansuu". The signature is written in a cursive style with a large initial "S" and "P".

Sandra Putaansuu

9531 Barnes Dr.

Castle Rock Wa. 98611