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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 49727-1-II

**IN THE COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON**

Tensar International Corp., a Georgia Corporation,

Appellant,

v.

Jeffrey and Lori Main, Husband and Wife, and the Marital Community
Composed Thereof,

Respondent.

RESPONSE OF TENSAR INT'L CORP. AS TO MAIN

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I. RESPONSE SUMMARY

Mains assign error to limitations on Dr. Perrillo's expert testimony. Mains' Br. at 47. The trial court carefully considered whether to admit this testimony and restricted Dr. Perrillo because he sought to testify outside of his expertise. Mains attach an excerpt from the trial record to give the mistaken impression that the trial court glossed over this evidentiary ruling. *See* Mains' Br., Attach. A. However, that hearing confirmed the trial court's earlier decision in ruling on motions in limine. CP 899-907 (No. 6 "reserved"). Furthermore, Dr. Perrillo's testimony limitations confirmed in the pretrial hearing were either stipulated to or accepted by Mains' counsel. Dr. Perrillo is not a biomechanical expert and he was not Mr. Main's treating physician. Further review of legal precedent confirms that the trial court acted well within its discretion in limiting Dr. Perrillo's testimony.

II. RESPONSE FACTS

The day Dr. Perrillo was to testify, the trial court and counsel discussed whether he should be allowed to use the phrase "axonal shearing" and whether he could opine that the accident was the cause of Mr. Main's concussion. Mains' Br., Attach. A. The trial court considered its notes from hearings on motions in limine in the discussion before proceeding. *Id.* at 4:23. These notes relate back to the resulting hearing where Sander opposed testimony regarding "Biomechanical Principles" and corresponding exhibits in his motion in limine. CP 528:17-528:17.

The trial court sided with Sander. CP 909:13-22 (request to exclude anything referencing "Biomechanical Principles" granted).

Defense counsels specifically opposed the use of the phrase "axonal shearing" because it had the possibility of giving the impression that Dr. Perrillo was a biomechanical expert and suggested causation. Mains' Attach. A. Regardless, counsel for Main stipulated to using the phrase "axonal damage" instead.

[Counsel for Main]: Your Honor, if we can streamline this by just agreeing that it's axonal damage as opposed to axonal shearing, then that's fine. Dr. Perrillo is here today to testify and we to try to get him done today.

[Counsel for Tensar]: Absolutely.

The Court: So if there's a stipulation, I don't need to rule on that.

Mains' Br. Attach. A at 10:8-12.

The trial court and counsel continued discussing biomechanical principles, namely "acceleration-deceleration force" and causation. Defense counsels continued to press that there was no foundation for Dr. Perrillo to testify about the day of the accident although he could testify about his tests and diagnosis of Mr. Main.

The Court: Okay, that's my ruling. [Dr. Perrillo] can certainly testify to all of his tests and so forth, but to make the final connection that this was—the accident was the cause, I don't believe he's qualified to do that. And that's my ruling.

[Mains' Counsel]: That's good.

The Court: Okay.

Mains' Br., Attach. A at 22:24–23:3.

This is in accord with the fact that Dr. Perrillo lacked specific knowledge of the accident because Dr. Perrillo where it was outside of his expertise, neuropsychology, and because he was not a treating physician. His tests and diagnoses were conducted over two years after the accident.

After that, Mains' counsel pushed to make sure a similar limitation was placed on expert witness Dr. Green who would testify that Mr. Main's more recent headaches were unrelated to the accident. *Id.* at 23. The Court agreed with Mains' counsel, but that Dr. Green could testify that the headaches were unrelated to *the concussion* because there was a long gap following Mr. Main's headaches after the accident. *Id.*

Accordingly, the court allowed Dr. Perrillo to testify as to his diagnosis and treatment—he could testify that he observed symptoms consistent with a concussion and discuss the nature of those symptoms. As Mains conceded, “[t]he bulk of his testimony ... was admitted.” Mains' Br. at 48. The Mains also conceded the issue to the trial court where it concluded Dr. Tay's testimony would allow them to meet their burden. *See* Mains' Br., Attach. A at 32:13–33:12. The trial court specifically allowed Dr. Tay to testify as to causation because “[t]hat's different for a treating physician.” *Id.* Attach. A at 32:18–25. The trial court did not single out any expert witness on this issue. Despite this, note that Dr. Tay admitted that his tests did not show any brain damage. Tay, 67 (Aug. 16, 2016).

III. ARGUMENT

A. Main Misstates Testimony Excluded and Standard of Review

Mains misconstrue the nature of Dr. Perrillo's excluded testimony: "The Trial Court committed an error of law in holding that a neuropsychologist (sic) is not qualified to offer an opinion regarding the effect of an accident on his patient's cognitive functions." Mains' Br. at 49. This is not in accord with the facts and Mains offer no citation to authority or to the record to support it. Mains had correctly stated the nature of the excluded testimony in the paragraph above in saying the trial court "barred Dr. Perrillo from testifying to causation[.]" Mains' Br. at 49 (citing Attach. A at 22:24-23:3).

Main incorrectly states that the standard of review of this evidentiary ruling as "*de novo*." See Main Br. at 49 (citing *Frausto v. Yakima, LLC*, 188 Wn.2d 227, 231, 393 P.3d 776 (2017)). As *Frausto* provides, the standard of review for evidentiary rulings is "abuse of discretion." 188 Wn.2d at 231-32 (citing *McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 706, 782 P.2d 1045 (1989)). However, *Frausto* went on to apply the *de novo* standard because the trial court there made its evidentiary ruling in conjunction with a motion for summary judgment. *Id.* (citing *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)). More specifically, the trial court in *Frausto* had rejected the admissibility of testimony proffered in opposition to a motion for summary judgment, weighing the evidence impermissibly, and dismissed the suit. *Id.* Here, the evidentiary ruling on Dr. Perrillo's testimony was

independent of any summary judgment ruling and, as conceded by Main, Dr. Perrillo testified at trial. *See* Main Br. at 48 (“Dr. Perrillo ... testified as an expert witness at trial”).

Accordingly, abuse of discretion is the proper standard of review here, and it is the standard of review the Mains offer earlier in defending the court for excluding an email that would hurt the credibility of their other witness. Main Br. at 42 (citing *Carson v. Fine*, 123 Wn.2d 206, 226, 867 P.2d 610 (1994)). In reviewing a trial court’s exclusion of expert testimony under the rules of evidence, the standard is abuse of discretion. *State v. Yates*, 161 Wn.2d 714, 762, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008). To be admissible, expert witness testimony must be relevant and helpful to the trier of fact. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011). Conclusory or speculative expert opinions lacking an adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

B. The Court properly limited Dr. Perrillo’s testimony because he was going to testify beyond his expertise.

Mains tout Dr. Perrillo’s expertise and then claim that he should have been allowed to testify on causation. Mains’ Br. at 47. However, no explanation is given on how this expertise supports allowing Dr. Perrillo to testify as to causation. In fact, Mains offer conflicting argument. Mains cite Dr. Perrillo’s educational and academic background, and his years of practice (all as a neuropsychologist) but then cites *Frausto* to say

professional title is not important. Mains Br. at 49–50. Importantly, none of these issues or concerns about professional title were brought up by Mains during the pretrial hearing. *See id.*, Attach. A. Dr. Perrillo has a Ph.D in “Clinical/Counseling Psychology.” CP 588–90.

Mains assert, without citation to the record, that the testimony was excluded because of some alleged defect within Dr. Perrillo’s field of expertise, psychology. *See Mains’ Br.* at 49–50. However, this argument is about him not being a biomechanical engineer, which is not his field of expertise. Dr. Perrillo *was* permitted to testify that he believed Mr. Main suffered from a concussion as a neuropsychologist, and he was prevented from testifying that the accident *caused* the concussion. The problem is that Dr. Perrillo did not have biomechanical expertise and he was not the treating physician, so he could not testify that this specific accident caused Mr. Main’s concussion. This was the reason acknowledged by the trial court.

THE COURT: Well, it seems to me that he [Dr. Perrillo] does need to get into the physiology of how this damage occurs. Not that he has direct knowledge of this incident. So he can’t speak to acceleration or deceleration of the vehicle which causes this. What he can speak to is that this type of damage is caused by the movement of the brain.

Mains’ Br., Attach. A, 11:12–17.

When ruling on somewhat speculative testimony, the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001).

Mains cannot claim the trial court erred in limiting Dr. Perrillo's testimony to the extent that limitation was part of a stipulation. Mains' Br. Attach. A at 10:8-12. Mains' general contentions were relinquished when Mains' counsel accepted that Dr. Tay would testify about causation and were satisfied limitations on Dr. Perrillo would similarly be applied to Dr. Green. Mains' Br., Attach. A at 32:13-33:12. The trial court performed its proper function as a gatekeeper and this Court should affirm. *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 355, 333 P.3d 388 (2014).

C. The Trial Court Properly Limited the Doctor's Testimony per Washington Case Law.

Mains assert that our courts have rejected the proposition that only medical experts may testify as to the cause of injuries in accidents. Mains Br. at 50 (citing *Ma'ele v. Arrington*, 11 Wn. App. 557, 563-64, 45 P.3d 557 (2002)). And Tensar could not agree more. However, Dr. Perrillo is an expert witness ... of neuropsychology, and he has a Ph.D in "Clinical/Counseling Psychology." CP 588-90. He does not have a Ph.D in engineering like the expert witness permitted to testify on causality in *Ma'ele* did. 111 Wn. App. at 563-64. To the extent Mains made their assertion to argue Dr. Perrillo should be allowed to testify (outside of his field) on biomechanics and causation, Tensar strongly disagrees.

Mains muddy the waters on causation of a concussion and *existence* of a concussion throughout their brief. Mains assert that "neuropsychologists are better equipped to testify as to the cause of concussions," but then goes on to discuss the superiority of

neuropsychologists in diagnosing the *existence* of a concussion. Mains' Br. at 51-52 (Mains cite solely to Dr. Perrillo regarding concussion causation). Dr. Perrillo testified fully about the existence of Mr. Main's concussion. Further, the trial court never ruled that neuropsychologists are categorically barred from testifying as to the cause of concussions. *Contra* Mains' Br. at 54. In fact, the trial court opined that it might have allowed Dr. Perrillo to testify as to causation if he was one of Mr. Main's treating physicians. *Id.*, Attach. A at 32:24-25.

Despite Mains meager attempt to invoke foreign precedent in allowing neuropsychologists to testify about causation, it is a matter of first impression in Washington. Mains' Br. at 52. If the trial court had decided to *allow* Dr. Perrillo's causation testimony, it could be argued that the trial court acted with reasonable discretion in relying on foreign courts. But that is not the case. Accordingly, the trial court acted well within its discretion to lightly restrict Dr. Perrillo's testimony.

Mains say that some foreign states limit neuropsychologist testimony on causation because of state statutes defining the roles of psychologists. Mains' Br. at 54. Washington has such a statute. *See* RCW 18.83.010. The statute defines the roles filled by psychologists in diagnosing and treating mental illness, like concussions. It does not provide that psychologists determine that a car accident occurred and that that accident caused a concussion. In any case, Mains have not provided any explanation as to how Dr. Perrillo can determine a specific accident

from years ago, caused a concussion and not some other event. Most importantly, the trial court did base its ruling along these lines.

D. Abandoned Issue Related to Exclusion of Dr. Perrillo's Biomechanical Principles and Causation Testimony

Although it was not specifically mentioned in their broadly written Notice of Appeal, Mains have abandoned on appeal any issues related to the exclusion of Dr. Perrillo's potential treatment, NeurXercise, by not raising it in their opening brief. *See* CP 775-76.

IV. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court because it acted as a gatekeeper. It properly limited Dr. Perrillo's testimony, not because he a neuropsychologist, but because he is not a biomechanical engineer and because he wanted to testify as to what caused Mr. Main's concussion even though he first observed Mr. Main several years after the accident.

Respectfully submitted this 23rd day of August, 2017.

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BY _____
DEPUTY

NO: 49727-1-II

DECLARATION OF SERVICE

JEFFREY AND LORI MAIN,
husband and
wife and the marital community
composed
thereof,

Plaintiffs,

v.

GERHARD J. SANDER AND
JANE DOE
SANDER, husband and wife and
the marital community thereof;
and TENSAR
INTERNATIONAL
CORPORATION, a Georgia
corporation,

Defendants.

On this day, the undersigned served pursuant to CR5(b) all parties
listed below with copies of:

1. Response of Tensar Int'l Corp. as to Main; and
2. Declaration of Service.

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DECLARATION OF SERVICE- 1

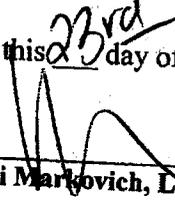
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The Response of Tensar Int'l Corp. as to Main designated by
 Tensar were delivered via E-Mail and USPS Mail.

I certify under penalty of perjury under the Laws of the State of
 Washington that the foregoing is true and correct.

Dated at Tacoma, Washington, this 23rd day of August, 2017.

By:


 Kari Martovich, ~~Litigation Assistant~~