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Division II  
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No. 50336-1

IN THE COURT OF APPEALS FOR  
THE STATE OF WASHINGTON  
DIVISION II

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GERALDINE IVERSON,  
as personal representative of BESSIE RITTER,

Appellant,

v.

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

Respondents.

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**REPLY BRIEF OF APPELLANT**

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MASTERS LAW GROUP, P.L.L.C.  
Kenneth W. Masters, WSBA 22278  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033  
Attorney for Appellant

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## REPLY RE STATEMENT OF THE CASE

NCPI's statement of the case falls short of RAP 10.3(a)(5): "A fair statement of the facts and procedure relevant to the issues presented for review, without argument." It fails to address the 10 days under NCPI's care (from August 22, to September 1, 2014) during which Ms. Ritter did not have a bowel movement. BA 4-5. It fails to acknowledge that during that time, it failed to follow its own house bowel protocols. BA 6-7. It fails to address the thorough and competent evidence of its negligence. BA 5-9.

## ARGUMENT

**A. The standard of review is *de novo*.**

NCPI concedes that the standard of review is *de novo*. BR 5.

**B. *Frye* still does not apply.**

Ritter's opening brief explained that this appeal is controlled by ***Anderson v. Akzo Nobel Coatings, Inc.***, 172 Wn.2d 593, 260 P.3d 857 (2011). BA 11-17. That Court expressly rejected arguments like NCPI's that a medical expert's causation opinion is subject to ***Frye v. U.S.***, 293 F. 1013 (1923). BA 14-15 (citing, quoting, and discussing ***Anderson*** at 609-10; ***Reese v. Stroh***, 74 Wn. App. 550, 565, 874 P.2d 200 (1994)). Simply put, a differential diagnosis like Dr. Brentall's is not subject to ***Frye***. BA 15-17.

NCPI claims that Ritter “misconstrues” **Anderson** and the trial court’s ruling. BR 4. But we *quoted Anderson’s* dispositive holding:

“[M]any expert opinions are pure opinions and are based on experience and training rather than scientific data. . . . Indeed, many “medical opinions on causation are based upon differential diagnoses.” . . .

A physician or other qualified expert may base a conclusion about causation through a process of ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms. *E.g.*, **Reese**, 128 Wn.2d at 307, 309; **Marsh v. Valyou**, 977 So. 2d 543, 548 (Fla. 2007). [Footnote omitted.]

BA 15 (quoting **Anderson**, 172 Wn.2d at 610) (emphases added in BA; some citations omitted). No misconstruction is involved.<sup>1</sup>

As for the trial court’s ruling, it improperly granted summary judgment. CP 764-65. Review is *de novo*, so that is the only relevant *ruling* on appeal. Again, no misconstruction is involved.

NCPI’s “ever more nuanced argument” (**Anderson**, 172 Wn.2d at 611) seems to be that **Anderson’s** holding (that Dr. Brentnall’s differential diagnosis showing NCPI caused Ms. Ritter’s death is not subject to **Frye**) does not foreclose NCPI’s argument that the “methodology that underlies that opinion” is subject to **Frye**.

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<sup>1</sup> NCPI abandons its trial-court argument that **Anderson’s** holding is *dicta*.

BR 7. Differential diagnosis *is* the methodology that underlies her opinion. BA 8-9 (quoting CP 484, BA App. A). NCPI is simply wrong.

NCPI devotes an entire section of its brief (nearly a third of its Argument) to claiming that Ritter “misconstrues **Anderson**, defendant’s summary judgment motion, and the trial court’s ruling.” BR 8-11. Again, **Anderson**’s holding is plain: **Frye** does not apply to Dr. Brentnall’s differential diagnosis that NCPI caused Ms. Ritter’s death. 172 Wn.2d at 610. Neither NCPI’s misleading trial-court briefing (neglecting to cite **Anderson** and then crying *dicta*) nor the trial court’s reasoning is relevant on *de novo* review.

And if the trial court’s reasoning mattered here, it is incorrect for the same reason that NCPI’s reasoning is incorrect: it thought some *additional* methodology – beyond performing a differential diagnosis – was required before Dr. Brentnall could render her causation opinion. See, e.g., BR 9. That is the same mistake the trial court made in **Anderson**: Ritter is not required to prove that 10 days of untreated constipation “can cause” cecal volvulus *in addition to* providing a highly qualified expert’s opinion that it did cause Ms. Ritter’s death. **Anderson**, 172 Wn.2d at 597. Rather, a qualified expert physician “may base a conclusion about causation” on a

differential diagnosis (“a process of ruling out potential causes”). 172 Wn.2d at 610.

Without challenging that **Anderson** is controlling here, NCPI proffers an inapposite decision from this Court, **Lake Chelan Shores Homeowners Ass’n v. St. Paul Fire & Marine Ins. Co.**, 176 Wn. App. 168, 313 P.3d 208 (2013). BR 10-11. This Court *distinguished Anderson* (a/k/a “Akzo”) because the novel (and unlikely) methodology used there – reverse-engineering the date when wood began to rot – was made up by the expert, not generally accepted in any scientific community. **Lake Chelan**, 176 Wn. App. at 177-81.

But here, as in **Anderson**, the methodology used – differential diagnosis – has been generally accepted in the scientific community since at least Hippocrates (460-370 B.C.), though examples may exist in the writings of Imhotep (2630-2611 B.C.) and the Babylonian Esagil-kin-apli (fl. 1069-1046 B.C.). See *generally* [https://en.wikipedia.org/wiki/differential\\_diagnosis](https://en.wikipedia.org/wiki/differential_diagnosis) and [/medical diagnosis](#)). In any event, this Court could not and did not overrule **Anderson**, which is directly on point and controlling here (which it was not, by the way, in **Lake Chelan**, as this Court held). 176 Wn. App. at 180 & n.2. **Lake Chelan** is no help to NCPI.

Based on its **Lake Chelan** analysis, NCPI argues that Ritter “failed” to establish general acceptance. BR 12-18. None of this matters because none of it is required. For instance, NCPI argues that Dr. Brentnall’s experience is irrelevant under **Frye**. BR 13. True. But that is why **Anderson** holds that “many expert medical opinions are pure opinions and are based on experience and training *rather than* scientific data” and that a “physician . . . may *base* a conclusion about causation” on her differential diagnosis (“ruling out potential causes with due consideration to temporal factors, such as events and the onset of symptoms”). 172 Wn.2d at 610 (emphasis added). In other words, **Frye** is irrelevant.

To perhaps put too fine a point on it, if the doctor and patient in **Anderson** need not prove a consensus in the scientific community that organic solvents **can** cause a polymicrogyria birth defect, then Dr. Brentnall and Ritter did not have to prove that 10 days of untreated constipation (a “grossly abnormal” condition) **can** cause colon distention leading to twisting of the cecum and death. *Compare* 172 Wn.2d at 609-10 *with* CP 484 (BA App. A). Dr. Brentnall’s opinion that NCPI **did** cause Ms. Ritter’s death is enough to carry this case to a jury. This Court should reverse and remand for trial.

As a second example, NCPI argues that Ritter's proffered scientific literature does not support her causation opinion. BR 14-17. Not only is this assertion irrelevant – because *Frye* is irrelevant under *Anderson* – but it is wrong.

NCPI appends to its brief the two studies presented to the trial court. The first says this (CP 525, emphasis added):

The etiology of colon volvulus is probably multifactorial. Some factors are common to all locations of volvulus, such as ***chronic constipation***. . . .

The word “etiology” means this:

**1** : CAUSE, ORIGIN . . . *specif* : all of the causes of a disease or an abnormality . . . **2** . . . . **b** : . . . *specif* a branch of medical science concerned with the causes and origins of diseases.

WEBSTER'S THIRD NEW INT'L DICTIONARY 782 (1993). Thus, in plain English, one cause of cecal volvulus is chronic constipation.

Dr. Brentnall's differential diagnosis concluded that, in light of all the circumstances and contributing factors, Ms. Ritter's untreated constipation – chronic as it was – caused her cecal volvulus and concomitant death. At a minimum, she presents sufficient evidence of a proximate cause of the death to carry this case to a jury.

While the second article is specifically about sigmoid volvulus, it does discuss chronic constipation more generally (CP 539-40):

Chronic constipation is a common malady that can have various causes. . . . Such are typically found in elderly . . .

patients . . . The underlying cause of the megacolon and constipation in these patients is unknown, and it has not been demonstrated which comes first—megacolon or constipation. If however, motility of the large bowel is examined by barium enema, effective peristalsis is found to be almost nonexistent in the dilated bowel. Whether absence of motility first produces constipation and megacolon or whether it is chronic constipation that precedes dilatation and subsequent loss of motor tone is uncertain **and probably moot**.

The practical problem to be faced is that a colon with absent or ineffective peristalsis often produces a functional obstruction, which may indeed become complete. [Emphasis added; paragraphing altered for readability.]

The first article also identifies acute obstructions as symptomatic of cecal volvulus. CP 526 (“The classic patient is elderly, institutionalized, and under psychotropic medications that cause chronic constipation”; “cecal volvulus may present with a picture of acute intestinal obstruction”).

Taken together, this medical literature makes clear that chronic constipation is endemic to cecal volvulus. Again, Dr. Brentnall’s differential diagnosis pinpoints NCPI’s failure to follow its own protocols requiring treatment of chronic constipation as a proximate cause of death. That opinion is supported in the literature.

**C. NCPI’s other factual arguments do not permit summary judgment.**

NCPI abandons its other arguments by failing to respond to BA 17. This Court should reverse and remand for trial.

**CONCLUSION**

Do no harm.

—*Hippocrates*

Excellent! I cried.  
"Elementary," said he.

Dr. Watson (Sir Arthur Conon Doyle), "*The Crooked Man*," in  
THE MEMOIRS OF SHERLOCK HOMES, p. 412 (Doubleday 1893).

This Court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 28<sup>th</sup> day of March 2018.

MASTERS LAW GROUP, P.L.L.C.



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Kenneth W. Masters, WSBA 22278  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033  
[ken@appeal-law.com](mailto:ken@appeal-law.com)

**CERTIFICATE OF SERVICE**

I certify that I caused to be filed and served, a copy of the foregoing, **REPLY BRIEF OF APPELLANT**, on the 28<sup>th</sup> day of March 2018, as follows:

**Co-counsel for Appellant**

Stephen Hornbuckle  
THE HORNBUCKLE FIRM  
1408 – 140<sup>th</sup> Place NE, Suite 250  
Bellevue, WA 98007  
[shornbuckle@thehornbucklefirm.com](mailto:shornbuckle@thehornbucklefirm.com)

U.S. Mail  
 E-Service  
 Facsimile

**Counsel for Respondent**

Matthew J. Kalmanson  
HART WAGNER  
1000 SW Broadway  
Portland, OR 97205  
[MJK@hartwagner.com](mailto:MJK@hartwagner.com)

U.S. Mail  
 E-Service  
 Facsimile



Kenneth W. Masters, WSBA 22278  
Attorney for Appellant

# MASTERS LAW GROUP

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## Transmittal Information

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Bainbridge Island, WA, 98110  
Phone: (206) 780-5033

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