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SUPREME COURT
STATE OF WASHINGTON

No. 82264-6

2009 NOV -3 P 2:24

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

JULIE ANDERSON, individually and on behalf of the Estate of
DALTON ANDERSON, and DARWIN ANDERSON individually,

Appellants

v.

AKZO NOBEL COATINGS, INC., and KEITH CROCKETT, a
Washington resident,

Respondents

**RESPONDENTS' ANSWER TO STATEMENT OF GROUNDS FOR
DIRECT REVIEW**

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INTRODUCTION

Respondents (defendants below) hereby answer Appellants Statement of Grounds. Appellants are seeking direct review of several orders issued by the King County Superior Court (“Superior Court”) in the above captioned case. In their Statement of Grounds, Appellants attempt to paint this case as one involving both a conflict among decisions of the appellate courts and a fundamental and urgent issue of broad public import requiring prompt and ultimate determination, under RAP 4.2(a)(3) and (4) respectively. Neither is true.

Appellants claim four decisions give rise to a right of direct review. First, they identify the Superior Court’s denial of Appellants’ motion to dismiss Respondents’ affirmative defense of contributory negligence. Appellants claim that the Superior Court’s ruling raises a reviewable public issue, under RAP 4.2(a)(4), regarding whether a woman may be held comparatively at fault as a result of her decision to work while pregnant. However, that issue was never addressed below.

Respondents never made this argument to the Superior Court, and the Superior Court made no findings in this regard. Because this “issue” did not, in fact, arise below, there is no basis for direct review under RAP 4.2(a)(4). Nor is there any basis for review under RAP 4.2(a)(3), as Appellants have not identified any conflicting decisions which warrant

review. In addition, the Superior Court's ruling is not, in any event, within the scope of review as it neither was designated in the notice of review nor prejudicially affected the decisions designated.

Second, Appellants have alleged in this case that certain birth defects of Dalton Anderson (the minor child of Appellant Julie Anderson) were caused by Ms. Anderson's exposure to organic solvents at her workplace while she was pregnant with Dalton. In the Statement of Grounds, Appellants identify the Superior Court's ruling excluding Appellants' proof of medical causation under the *Frye* test for admissibility of expert testimony, and granting summary judgment to Respondents as to Appellants' claims on this basis. Appellants argue that direct review is warranted under RAP 4.2(a)(3). However, the "conflict" identified by Appellants rests on Appellants' misreading of Washington case law, not on any actual conflict among decisions of the appellate courts of this state. Beyond this, Appellants are simply silent with respect to RAP 4.2(a)(4), asserting that the Superior Court's *Frye* ruling raises a public issue, but putting forth no argument in support of that assertion.

Appellants have also identified the Superior Court's ruling denying their motion to exclude Respondents' experts on medical causation. Again, they have failed to sufficiently identify the existence of conflicting appellate decisions or the presence of a public issue warranting review. In

addition, any error with respect to this ruling would be harmless error on appeal.

Fourth, Appellants alleged below that Ms. Anderson was wrongfully discharged in violation of public policy. Appellants mischaracterize the trial court's ruling dismissing this claim as holding that an exclusive statutory scheme is provided by the Washington Industrial Safety and Health Act (WISHA). In fact, the court held that Ms. Anderson's claim was barred because she chose to ignore an administrative remedy provided by the statutory scheme that adequately protects the public policy at issue. The court's ruling did not rely on a finding of exclusivity; thus, the "issue" identified by Appellants under RAP 4.2(a)(4) again was not, in fact, addressed below. And, with respect to RAP 4.2(a)(3), Appellants simply do not identify any conflicting decisions.

Finally, it should be noted that Appellants have included an extremely biased version of the facts in this case in their Statement of Grounds under the heading of "Nature of Case." This section, which is unsupported by any citation to the trial court's findings or the record below, violates RAP 4.2(c)(1), which calls for a "short statement of the substance of the case below and the basis for the superior court decision." An accurate, and unbiased, description of the nature of the case with

respect to the Superior Court's *Frye* ruling is contained in the court's order excluding Appellants' medical causation experts, as follows:

Dalton Anderson was born with birth defects: a malformation in his brain, and multi-cystic kidney. Dalton's treating doctors have described his condition as a neuronal migration defect, meaning that during embryonic development, some of Dalton's brain cells failed to develop in the specific anatomical area where they should have been located . . .

Plaintiffs claim that Dalton's birth defects were caused by plaintiff Julie Anderson's exposure to organic solvents at her workplace while she was pregnant with Dalton. Defendants argue that the theory that prenatal exposure to organic solvents can cause either neuronal migration defects or multicystic kidney disease is one that has not achieved general acceptance in the scientific community. Defendants also argue that there is little if any scientific literature that supports plaintiffs' causation theory.¹

The Superior Court likewise provided a succinct description of the issue raised by Respondents motion to dismiss Appellants' claim of wrongful discharge in its order granting the motion:

Defendants argue that plaintiffs claim for wrongful discharge in violation of public policy should be dismissed because another means of promoting public policy was available, i.e., the [WISHA] administrative process, RCW 49.17.160.²

¹ Attachment A at 6.

² Attachment B at 3.

ARGUMENT

A. Procedural History

Appellants filed a Notice of Direct Review in the trial court on October 8, 2008, which was forwarded to this Court on October 17, 2008. The Court designated Appellants' notice as one for discretionary review by a letter to counsel dated October 17, 2008. Appellants filed a Supplemental Notice of Direct Review and Statement of Grounds on October 20, 2008, and then a Motion to Redesignate October on 21. Respondents contacted the Supreme Court Clerk's office, which advised that an Answer to the Statement of Grounds was due within 14 days of filing, notwithstanding the pending Motion to Redesignate. Accordingly, Respondents hereby answer the Statement of Grounds.

B. Appellants' First Stated Grounds: Comparative Fault

Appellant asserts that, in proceedings below, Respondents "argued, and the trial court agreed" that Appellant Julie Anderson could be found comparatively at fault "because she decided to work and perform the essential functions of her job during pregnancy." Statement of Grounds at 6. This mischaracterizes both Respondents' argument below and the Superior Court's ruling.

The order complained of is a denial of Appellant's motion to dismiss certain affirmative defenses asserted by Respondents, including

the comparative fault of Appellant Ms. Anderson, which was entered by the Superior Court on August 31, 2007. (A true and correct copy of the Order is attached hereto as Attachment C.) Respondents argued, in opposition to the motion, that there was evidence sufficient to raise a genuine issue of material fact concerning whether Ms. Anderson was contributorily negligent because: (1) despite the fact that she was the safety coordinator for the paint mixing facility, she refused to wear a respirator while mixing paint; (2) she continued to mix paint while pregnant after being advised not to by her supervisor and fellow employees; and (3) she smoked while pregnant. (A true and correct copy of Respondents' Opposition is attached hereto as Attachment D.) At no point did Respondents argue that Ms. Anderson was contributorily negligent "simply because she decided to work and perform the essential functions of her job during pregnancy." To the contrary, Respondents put forth evidence showing that "if Ms. Anderson mixed paint while she was pregnant, it was directly contradictory to the directions and admonitions she was receiving from her supervisor and co-workers." Attachment D at 12.

In short, Respondents never made the argument Appellants now ascribe to them. Nor did the Superior Court make any such findings. *See* Attachment C. Appellants' first stated grounds for direct review is a

fiction. The issue identified by Appellants as warranting review under RAP 4.2(a)(4), which Appellants frame as “a woman’s right to work during pregnancy,” simply did not arise in this case, and Appellants fail to identify the existence of any conflicting decisions that warrant review under RAP 4.2(a)(3). Thus, direct review should not be granted.

Moreover, even if Appellants had properly asserted grounds for review under RAP 4.2, the ruling complained of is not within the scope of review on appeal because Appellants failed to designate it in their notice of direct review, and it does not prejudicially affect the decisions designated, or the final judgment. RAP 2.4(a), (b).

C. Appellants’ Second and Third Stated Grounds: *Frye* Test for Admissibility of Expert Testimony Concerning Novel Scientific Evidence.

Appellants’ second stated grounds for direct review rests on Appellants’ own misunderstanding of Washington decision law, not on any conflict among decisions of the appellate courts of this state. There is no such conflict.

Under Washington law, expert testimony concerning novel scientific evidence must satisfy the test for admissibility set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), as adopted and applied in Washington. There was no dispute that Appellants’ proof of medical causation in this case rested on novel scientific evidence, and, thus, that

the *Frye* test applied. The Superior Court correctly held, following *State v. Gregory*, 158 Wn.2d 759, 834 (2006), that in order to meet the *Frye* test: “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.” Attachment A at 4 (emphasis added). The Superior Court found that the Appellants’ scientific theory of medical causation was not generally accepted in the community, and granted Respondents’ motion to exclude. *Id.* at 12.

In the Statement of Grounds, Appellants survey several Washington decisions that have ruled that either the scientific theory underlying novel scientific evidence or the implementing methodology was deficient under *Frye*, and assert that “[t]he proper application of the *Frye* test in relation to the weight to be given to the methodology versus the scientific causation theory remains an issue.” Statement of Grounds at 11. This argument misreads the case law. In order to satisfy the *Frye* test under Washington law both the underlying theory and the implementing methodology must be generally accepted, and all of the reported cases recognize that both are required. There is no issue of “weight” between

two required elements.³ Because there is no conflict among the appellate courts of Washington with respect to the required elements of the *Frye* test, or its application, this Court should decline to accept direct review on this basis under RAP 4.2(a)(3).

Appellants also ask the Court to accept review under RAP 4.2(a)(4), which permits direct review of cases “involving a fundamental and urgent issue of broad public import which requires prompt and ultimate determination.” Appellants fail to make any supporting argument, however. This case is no different in terms of RAP 4.2(a)(4) than is any other case brought in the State of Washington alleging personal injury by exposure to allegedly harmful substances. The Court should decline to accept review.

In addition, Appellants complain not only of the exclusion of their experts on medical causation, but also of the Superior Court’s order denying their motion to exclude Respondents’ experts. Statement of Grounds at 13. As with the Superior Court’s denial of Appellants’ motion to dismiss Respondent’s affirmative defense of comparative fault, the court’s ruling denying their motion to exclude Respondents’ witness was

³ Appellants also discuss case law from other jurisdictions. Statement of Grounds at 9-10, 12-13. R.A.P 4.2(a)(3) is concerned only with conflicting decisions among Washington appellate courts.

mooted by its decision to exclude Appellants' witnesses and grant summary judgment to Respondents. Any error on the trial court's part would thus be harmless error, and play no part in a decision on appeal.

D. Appellants' Fourth Stated Grounds: Wrongful Discharge

Finally, Appellants ask this Court to accept direct review "to determine whether the Washington Industrial Safety and Health Act . . . provides sufficient protection from retaliatory employers and therefore preempts the corresponding common law claims." Statement of Grounds at 14. The ruling complained of is the Superior Court's dismissal of Appellants' common law claim of wrongful discharge in violation of public policy. (A copy of the Order is attached hereto as Attachment B).

As an initial matter, Appellants' argument appears more suited to a motion for discretionary review, rather than a motion for direct review. Appellants assert the existence of a conflict among decisions of the appellate courts under RAP 4.2(a)(4), but fail to identify any such conflict, instead arguing that the trial court failed to follow precedent. Because Appellants have failed to identify any conflicting decisions, the Court should decline to accept review under RAP 4.2(a)(4).

Moreover, the assertion that the Superior Court failed to follow precedent is incorrect. Appellants assert that "[t]he trial court's order does not cite or mention controlling precedent." Statement of Grounds at 15.

That is simply a misrepresentation of the Superior Court's Order, which expressly relies on this Court's decision in *Korlund v. Dyncorp Tri-Cities Servs., Inc.*, 156 Wn. 2d 168, 125 P.3d 119 (2005). The Superior Court recounted the holding in *Korlund*, expressly considered and rejected Appellants' argument that *Korlund* was not dispositive, and held as follows:

Because the administrative procedures of RCW 49.17.160 adequately provided an alternate means to promote and safeguard the public and because Anderson chose to ignore this statutory remedy, she cannot now argue that public policy against wrongful discharge is threatened if her common law tort claim is not recognized.

Defendant's motion for summary judgment concerning the wrongful discharge claim is granted pursuant to *Korlund v. Dyncorp Tri Cities Servs. Inc.*

Attachment B at 5. Simply because the trial court did not agree with Appellants' argument concerning whether *Korlund* was controlling does not mean that the court did "not cite or mention controlling precedent." It is misleading to characterize the court's ruling in that manner without noting the court's reliance on *Korlund*.

Nor are Appellants correct in asserting that the Superior Court held that RCW 49.17.060 provides an "exclusive remedy" for a claim of wrongful discharge allegedly in retaliation for reporting a WISHA violation. Statement of Grounds at 14-15. The trial court found that the

statutory scheme “provided an adequate means to preserve and protect the public policy against unlawful employment terminations,” and held, following *Korshund*, that, because Ms. Anderson had chosen to ignore the statutory policy, she could not argue that public policy against wrongful discharge would be threatened if her common law tort claim was not recognized. Attachment B at 4, 5. The issue was not one of the exclusivity of the statutory scheme, but rather one of adequacy.

Because the exclusivity of the statutory scheme was not at issue in this case, but only its adequacy in light of Ms. Anderson’s choice to ignore her statutory remedy, the issue identified by Appellants would not be before this Court on appeal. As with Appellants’ comparative fault argument, there is thus no basis for direct review under RAP 4.2(a)(4). And, also as with Appellants’ comparative fault argument, no conflicting decisions among the appellate courts of this state have been identified by Appellants that would warrant review under RAP 4.2(a)(3).

CONCLUSION

None of Appellants’ three stated grounds warrant direct review by this Court under RAP 4.2(a). Accordingly, the Court of Appeals has exclusive jurisdiction of this case, RCW 2.06.030, and transfer to the Court of Appeals is proper under RAP 4.2(e).

RESPECTFULLY SUBMITTED this 3rd day of November, 2008.

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CERTIFICATE OF SERVICE

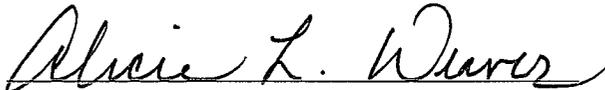
The undersigned declares as follows:

1. I am employed at Corr Cronin Michelson Baumgardner & Preece LLP, attorneys of record for defendant Akzo Nobel Coatings Inc.
2. On this date I caused true and correct copies of the foregoing document to be served on counsel below via hand delivery:

Lincoln Beauregard
John R. Connelly, Jr.
Law Offices of John R. Connelly, Jr.
2301 N. 30th Street
Tacoma, WA 98403

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

DATED this 3rd day of November, 2008, at Seattle, Washington.


Alecia L. Weaver

ATTACHMENT A

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JULIE ANDERSON, individually and on behalf of the Estate of DALTON ANDERSON, and DARWIN ANDERSON individually,

Plaintiffs,

vs.

AKZO NOBEL COATINGS, INC., and KEITH CROCKETT,

Defendants.

No. 07-2-10209-4 SEA

ORDER ON DEFENDANTS' MOTION IN LIMINE TO EXCLUDE PLAINTIFFS' EXPERTS SOHAIL KHATTAK, M.D., THOMAS SCHULTZ, Ph.D., AND STEPHEN GLASS, M.D.

THIS MATTER came on for hearing before the undersigned on Defendants' Motions in Limine to Exclude the testimony of Plaintiffs' experts Sohail Khattak, M.D., Thomas Schultz, Ph.D., and Stephen Glass, M.D. The court considered all pleadings filed by the parties in connection with the motion, including the declarations and the extensive attachments thereto, which included lengthy deposition excerpts and medical literature. The court also heard lengthy oral argument on August 7, 2008. Being fully advised, it is now hereby

ORDERED that the Defendants' motion is granted, for the following reasons:

1 **I. STANDARD FOR ADMISSION OF EXPERT SCIENTIFIC TESTIMONY**

2 “Washington has adopted the *Frye*¹ test for evaluating the admissibility of new sci-
3 entific evidence. . . . The primary goal is to determine ‘whether the evidence offered is based on
4 established scientific methodology.’” *State v. Gregory*, 158 Wn.2d 759, 834 (2006) (citations
5 omitted). While the Washington Supreme Court has not explicitly held that *Frye* continues to
6 be the standard for admissibility of scientific evidence in civil cases, at least two divisions of
7 the Court of Appeals have so held. See, e.g., *Grant v. Boccia*, 133 Wn. App. 176, 178 (2006),
8 *review denied*, 159 W.2d 1014 (2007) and *Ruff v. Dep’t of Labor & Industries*, 107 Wn. App.
9 289, 295-305 (2001).

10 Some other states utilizing the *Frye* standard for evaluating the admissibility of scienti-
11 fic evidence apply a relatively liberal standard, reserving use of the *Frye* test for cases where
12 the expert testimony “is based, at least in some part, on a new scientific technique, device, pro-
13 cedure, or method that is not generally accepted in the relevant scientific community.” *Roberti*
14 *v. Andy’s Termite & Pest Control, Inc.*, 113 Cal. App. 4th 893, 902 (2003). In these jurisdic-
15 tions, the *Frye* test does not bar scientific opinion evidence that is not in and of itself generally
16 accepted in the relevant scientific community, so long as the expert witness’ opinion is based
17 upon generally accepted scientific methodologies. *Id.* See also, *Marsh v. Valyou*, 977 So.2d
18 543 (Fla. 2007) (holding that an expert’s opinion that a plaintiff’s fibromyalgia was caused by
19 trauma was admissible, since it was based upon a doctor’s differential diagnosis, that did not
20 rely on a novel scientific technique, procedure or method) and *Keene Corp. v. Hall*, 626 A.2d
21 997 (Md. Ct. Spec. App. 1993) (holding that the *Frye* rule applies to the admissibility of
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26 ¹ *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

1 | evidence based upon novel scientific techniques or methodologies, but not to “medical opinion
2 | evidence which is not presented as a scientific test the results of which were controlled by
3 | inexorable, physical laws.”)

4 | Courts in states that apply *Frye* only to novel scientific techniques, procedures or meth-
5 | ods have concluded that “a typical opinion on medical causation should not be treated as a
6 | ‘new principle, subject to *Frye* analysis, simply because some other experts disagree with it
7 | and because the challenged expert does not rely on any specific authority to support his
8 | particular opinion.” *Marsh v. Valyou, supra*, 977 So.2d at 548, quoting *Gelsthorpe v. Wein-*
9 | *stein*, 897 So. 2d 504, 508 (Fla. Dist. Ct. App. 2005).

10 | The Supreme Court of California has noted: “[w]e have never applied the [*Frye*] rule
11 | to expert medical testimony.” *People v. McDonald*, 37 Cal.3d 351, 373 (1984). Rather,
12 | California subscribes to the principle that “medical theories of causation are not subject to the
13 | [*Frye*] rule when they are based entirely upon generally accepted diagnostics methods and
14 | tests, including statistical studies that are not definitive.” *Roberti*, , 113 Cal. App. 4th at 832.

15 | Illinois appears to adhere to similar principles. See, e.g., *Donaldson v. Cent. Ill. Pub.*
16 | *Serv. Co.*, 199 Ill. 2d 63, 78-79 (2002):

17 | Simply stated, general acceptance does not require that the methodology be
18 | accepted by unanimity, consensus, or even a majority of experts. A
19 | technique, however, is not “generally accepted” if it is experimental or of
20 | dubious validity. Thus, the *Frye* rule is meant to exclude methods new to
21 | science that undeservedly create a perception of certainty when the basis
22 | for the evidence or opinion is actually invalid.

23 | *Frye* does not make the trial judge a “gatekeeper” of all expert opinion tes-
24 | timony. The trial judge’s role is more limited. The trial judge applies the
25 | *Frye* test only if the scientific principle, technique or test offered by the
26 | expert to support his or her conclusion is “new” or “novel.” *Basler*, 193 Ill.

1 2d at 550-51. Only novelty requires that the trial court conduct a *Frye*
2 evidentiary hearing to consider general acceptance.

3 By contrast, Washington courts apply *Frye* differently. “Both the **scientific theory**
4 **underlying the evidence** and the technique or methodology used to implement it must be
5 generally accepted in the scientific community for evidence to be admissible under *Frye*.”
6 *State v. Gregory*, 158 Wn.2d 759, 834 (2006) (emphasis added). “If there is a significant
7 dispute among qualified scientists in the relevant scientific community, then the evidence may
8 not be admitted,” although “scientific opinion need not be unanimous.” *Id.* at 835.

9 Thus, for expert causation testimony to be admissible in Washington, the party offering
10 such evidence must show that the **causation opinion itself** is accepted by a majority of the
11 medical community. *Ruff v. Dep’t of Labor & Industries, supra*, 107 Wn. App. at 301-02. As
12 the court noted recently in *Grant v. Boccia*, a court “must look to see whether the theory has
13 achieved general acceptance in the appropriate scientific community. If there is significant
14 dispute in the relevant scientific community about the validity of the scientific theory, it may
15 not be admitted.” 133 Wn. App. at 179, citing *State v. Cauthron*, 120 Wn.2d 879, 887 (1993).
16 The assertion by a party offering causation evidence that its “experts’ methodologies are
17 common and well-accepted to prove causation does not take their opinions outside the ambit of
18 *Frye*”, because the “use of a general methodology cannot vindicate a conclusion for which
19 there is no underlying medical support.” *Grant v. Boccia, supra*, quoting *Black v. Food Lion,*
20 *Inc.*, 171 F.3d 308, 314 (5th Cir. 1999).

21 The approach taken by Washington courts has been criticized by the higher courts of
22 some other states as being unrealistically stringent in cases involving both “pure opinion
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1 testimony” and medical causation testimony.² The Washington approach also appears to go
2 beyond the original *Frye* case itself, which held that “the thing from which the deduction is
3 made [not the deduction itself] must be sufficiently established to have gained general
4 acceptance in the particular field in which it belongs.” *Frye v. United States*, 293 F. 1013,
5 1014 (Ct. App. D.C. 1923).
6

7 However, this court is bound by the precedents established by the Washington Supreme
8 Court and the Court of Appeals. In *Grant v. Boccia*, Division Three held that, before a medical
9 doctor could testify that the plaintiff’s fibromyalgia was caused by a car accident, the plaintiff
10 was required to show that his “theory on causation was an accepted theory.” 133 Wn. App. at
11 181. Finding that “the studies and articles cited by both parties . . . suggest there still is signi-
12 ficant dispute over whether physical trauma causes fibromyalgia”, *id.*, the court concluded:
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14 None of the authorities presented by either party has the effect of
15 persuasively establishing acceptance in the relevant community as to

16 ² See, e.g., *Kuhn v. Sandoz Pharms. Corp.*, 270 Kan. 443, 456-457, 14 P.3d 1170 (Kan. 2000):

17 We use the term "pure opinion" to characterize an expert opinion developed from
18 inductive reasoning based on the expert's own experience, observation, or
19 research. See, *Florida Power & Light Co.*, 729 So. 2d at 997. The *Frye* test does
20 not apply to pure opinion testimony. The *Frye* test does apply when an expert
21 witness reaches a conclusion by deduction from applying a new or novel
22 scientific principal, formula, or procedure developed by others.

23 See also *Keene Corp. v. Hall*, 96 Md. App. 644, 653, 626 A.2d 997 (Md. Ct. Spec. App. 1993):

24 [T]he *Frye-Reed* rule "generally applies to the admissibility of evidence based
25 upon novel scientific techniques or methodologies" but not to "medical opinion
26 evidence which is not 'presented as a scientific test the results of which were
27 controlled by inexorable, physical laws.'" 88 Md. App. at 458-459 (quoting
28 *Myers v. Celotex Corp.*, 88 Md. App. 442, 594 A.2d 1248 (1991), cert. denied,
29 325 Md. 249, 600 A.2d 418 (1992) and *State v. Allewalt*, 308 Md. 89, 98, 517
30 A.2d 741 (1986)).

1 the cause of fibromyalgia or the causal role of trauma in the
2 development of fibromyalgia. **Under *Frye* the existence of such a**
3 **consensus is necessary for admissibility of expert opinion testi-**
4 **mony** that trauma following a car accident caused Mr. Grant's fibro-
5 myalgia.

6 *Grant v. Boccia*, 133 Wn. App. at 183 (emphasis added).

7 II. PLAINTIFFS' EVIDENCE

8 Dalton Anderson was born with birth defects: a malformation in his brain, and a multi-
9 cystic kidney. Dalton's treating doctors have described his condition as a neuronal migration
10 defect, meaning that during embryonic development, some of Dalton's brain cells failed to
11 develop in the specific anatomical area where they should have been located. Dr. Stephen
12 Glass, one of plaintiffs' forensic experts, referred to Dalton's brain malformation as a "band
13 heterotopia." The defense experts assert that Dalton has polymicrogyria ("PMG"), and
14 plaintiff's primary forensic expert, Dr. Sohail Khattak, apparently does not disagree. All of
15 these conditions can loosely be described as types of neuronal migration defect; the exact name
16 of the defect is dependent upon the time during embryonic development when it occurred, and
17 the precise location of the brain affected.

18 Plaintiffs claim that Dalton's birth defects were caused by plaintiff Julie Anderson's
19 exposure to organic solvents at her workplace while she was pregnant with Dalton. Defendants
20 argue that the theory that prenatal exposure to organic solvents can cause either neuronal
21 migration defects or multicystic kidney disease is one that has not achieved general acceptance
22 in the scientific community. Defendants also argue that there is little if any scientific literature
23 that supports plaintiffs' causation theory.
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1 **A. Dr. Khattak**

2 Plaintiffs' primary expert regarding the cause of Dalton's birth defects is Sohail
3 Khattak, M.D. Dr. Khattak based his opinion that Dalton's birth defects were caused by *in*
4 *utero* exposure to organic solvents on his training and experience in medicine, pediatrics and
5 pharmacological toxicology, including during his fellowship with the Motherisk Clinic in
6 Toronto, Canada, and upon the medical literature.
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8 However, plaintiffs have cited only one item of medical literature that found an
9 association between prenatal exposure to organic solvents and a child born with a neuronal
10 migration defect. This was an epidemiological study from 1999, published in the Journal of
11 the American Medical Association ("JAMA"), entitled *Pregnancy Outcome Following Gesta-*
12 *tional Exposure to Organic Solvents.*³ Dr. Khattak was the first listed author of the article that
13 described this study, which was performed at the Motherisk Clinic during Dr. Khattak's
14 medical residency there. The study matched 125 women who were exposed to organic
15 solvents at their work places while they were pregnant, with 125 controls – expectant mothers
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18 ³Dr. Khattak also cited a 1993 article entitled *Correlation of Prenatal Events with the*
19 *Development of Polymicrogyria*, which was not a study, but a case report of two cases of PMG in
20 which one of the expectant mothers was exposed to "a combination of caffeine and ergotamine tartrate"
21 at 16-18 weeks gestation, and the other expectant mother was exposed to strong varnish fumes for 1-2
22 days, at 16-17 weeks gestation. The article noted that "[a]lthough toluene has not been directly
23 implicated as a cause of neuronal migration anomalies, it has been shown to cause variable growth
24 deficiency, minor craniofacial and limb anomalies, central nervous system dysfunction, and
25 microcephaly [small head size] in human and animal offspring of parental toluene abusers." *Id.* Dr.
26 Khattak agreed that this article does not establish that exposure to organic solvents causes PMG.
Khattak Dep. at 90, 137.

27 While plaintiffs cited in their response brief four additional medical articles involving studies of
28 children whose parents were exposed to organic solvents, none of these studies showed even an
29 association – let alone a causal relationship – between such exposure and neuronal migration defects,
30 PMG, or multicystic kidney disease.

1 | who were not exposed to organic solvents – and then followed these women prospectively.
2 | The study found that 13 members of the exposed group gave birth to babies with “major mal-
3 | formations,” versus only 1 member of the unexposed group. The expected rate of major mal-
4 | formations was 1% to 3%; thus the 10.4% rate (13 out of 125) in the exposed group was
5 | considered significant. The “major malformations” the study found ranged from heart
6 | malformations to urinary tract malformations. 13 different “major malformations” were listed
7 | in Table 4 of the study. One was described as a “neuronal migration defect and focal cortical
8 | dysplasia heterotopia”.

10 | Because the study stated that 13 of the children born to mothers who had been exposed
11 | to organic solvents had “major malformations” and listed 13 different “major malformations”,
12 | the implication is that only one of the children born to the mothers in the exposed group
13 | showed a neuronal migration defect.⁴ Dr. Khattak acknowledged at his deposition that PMG is
14 | found in at least 1 out of every 2,500 births, even in populations with no known organic solvent
15 | exposures. In light of the possibility that this single neuronal migration defect was the result of
16 | chance, this court would need additional statistical information to determine whether that one
17 | event was significant.

19 | In any event, while the 1999 JAMA study certainly suggests that exposure to organic
20 | solvents is associated with an increased risk of major malformations, it alone does not demon-
21 | strate any general consensus in the scientific community that prenatal exposure to organic
22 |

24 | ⁴It is impossible to be sure, since apparently all of the data underlying the article were destroy-
25 | ed. However, “neuronal migration defect” was not discussed in the body of the article, and it is likely
26 | that it would have been discussed had more than one child been born with this birth defect.

1 solvents specifically causes PMG or any other type of neuronal migration defect. Indeed, no
2 medical expert in this case has opined that one study that contained one finding of a particular
3 type of birth defect would be generally relied upon by scientists to establish a cause-and-effect
4 relationship.⁵

5
6 Dr. Khattak conceded that his theory that prenatal exposure to organic solvents is a
7 cause of neuronal migration disorder “has not been fully tested,” and that “we don’t have
8 enough research.” Khattak dep at 183-84. This appears to be an implicit acknowledgment by
9 Dr. Khattak that his opinions concerning the cause of Dalton’s birth defects are not admissible
10 under Washington’s version of the *Frye* standard.

11 Defendants have presented expert witnesses who directly challenge plaintiffs’ assertion
12 that that there is a consensus in the medical community that prenatal exposure to organic
13 solvents causes birth defects such as the ones suffered by Dalton Anderson. For example,
14 Gideon Koren, M.D., who is the founder of the Motherisk Clinic, the senior author of the 1999
15 JAMA article, and a “mentor” for Dr. Khattak, stated in deposition: “My opinion is that an
16 attempt to claim that neuronal migration is caused by organic solvent [*sic*] at present time is
17
18
19

20
21 ⁵By contrast, in *Berry v. CSX Transp.*, 709 So. 2d 552 (Fla. Dist. Ct. App. 1998) (a case relied
22 upon by plaintiffs), the experts relied on “numerous” epidemiological studies to support their opinion
23 that exposure to organic solvents caused a particular type of brain damage in adults: “The record
24 reflects that appellants’ proposed expert testimony was grounded upon numerous peer-reviewed and
25 published epidemiological studies demonstrating an association between exposure to organic solvents
26 and toxic encephalopathy.” 709 So. 2d at 554 (emphasis added). The court in *Berry* noted: “The
validity of scientific conclusions is often based upon the replication of research findings, and
consistency in these findings is an important factor in making a judgment about causation.” *Id.* at 559.
There was no evidence presented by the Andersons of any such replication of the results from the 1999
JAMA article.

1 not known, not proven in a way that any scientist that I know in the field of teratology⁶ would
2 say.” Koren Dep. at 20.

3 Dr. Koren acknowledged that another study he had done suggested that prenatal expos-
4 ure to organic solvents resulted in a higher incidence of mild cognitive or language problems in
5 children, but he opined that this was not evidence that organic solvents caused neuronal migra-
6 tion defects. Dr. Koren stated that none of the children in that study showed evidence of neur-
7 onal migration defects. *Id.* at 14-17. Dr. Koren summarized this study as follows:

9 “[V]ery minimal changes in some cognitive functions were shown by one
10 group, our own group, yet not confirmed by other groups, and even for
11 that, although we conducted the study, even that need [*sic*] more corrobor-
12 ation from other groups before we can prove it. The fact that another
13 group has not done it yet is just because [*sic*] how difficult it is to do those
14 studies.

15 *Id.* at 20.⁷ Dr. Koren additionally testified:

16 Defendants also have presented testimony from Williams Dobyms, M.D., a professor of
17 human genetics, neurology and pediatrics at the University of Chicago, who is an expert on
18 PMG. Dr. Dobyms expressed the opinion that Dalton has PMG, and that in most cases, the
19 cause of PMG is genetic. It was Dr. Dobyms’ opinion that Dalton’s birth defects were most
20 likely genetic, both because of the specific appearance of Dalton’s malformation on MRI, and

21 ⁶Teratology is a branch of medicine that studies the causes and biological processes leading to
22 abnormal development and birth defects. Dr. Khattak claimed to be an expert in teratology because of
23 his training under Dr. Koren at the Motherisk Clinic during Dr. Khattak’s fellowship there. However,
24 Dr. Koren stated that, while Dr. Khattak received some training in the field of teratology during his
25 fellowship rotation under Dr. Koren at the Motherisk Clinic, this did not make Dr. Khattak a teratol-
26 ogist. Dr. Koren also stated that Dr. Khattak was not considered to be a teratologist by his peers, and
did not practice in that field. Koren dep at 21-24.

⁷This study was *Child Neurodevelopmental Outcome and Maternal Occupational Exposure to Solvents*, published in ARCHIVES OF PEDIATRICS AND ADOLESCENT MEDICINE in 2004.

1 also because of Dalton's cystic dysplastic kidney: "So he has two separate birth defects, both
2 of which are thought to be genetic. Putting those two things together makes it much more
3 likely than not that in Dalton, his PMG is, in fact, genetic." Dobyms Dep at 11-12, 15.⁸

4 **A. Thomas Schultz, Ph.D.**

5 Dr. Schultz is an organic chemist, who holds a doctorate degree in synthetic organic
6 chemistry. He teaches chemistry at the community college level, and has done so for over 25
7 years. He has expertise in handling organic solvents, and is familiar with their properties.
8 However, Dr. Schultz is not a medical doctor, has no medical training, and does not appear to
9 have any education, training or experience that would qualify him to render either a medical
10 diagnosis or an opinion as to the cause of any medical condition. Nevertheless, Dr. Schultz has
11 claimed expertise in teratology, because "I've read the literature and talked to colleagues and
12 formed opinions about those kinds of things."
13

14 Dr. Schultz does not have the expertise necessary under ER 702 to express opinions
15 concerning the cause of Dalton's birth defects. See, e.g., *State v. Swan*, 114 Wn.2d 613
16 (1990); *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722 (1998). That being the case,
17 this court need not reiterate its previous finding that the theory that prenatal exposure to
18 organic solvents causes PMG or neuronal migration disorder, and/or multicystic kidney disease
19 has not been generally accepted in the scientific community, and therefore fails Washington's
20 *Frye* test.
21

22
23
24 ⁸ Another of plaintiffs' experts, Stephen Glass, M.D., a pediatric neurologist, diagnosed
25 Dalton's brain malformation as "band heterotopia," which Dr. Dobyms testified is "100% genetic" in
26 origin.

1 | However, Dr. Schultz may testify concerning the chemical properties of organic solvents in
2 | general, or of those to which Ms. Anderson claims she was exposed to at her work place, as
3 | well as testimony concerning safe handling practices when working around such organic
4 | solvents, so long as such testimony is within his area of knowledge and expertise.

5 |
6 | Defendants' motion to exclude the testimony of Stephen Glass, M.D., is granted insofar
7 | as Dr. Glass would offer any opinion that Dalton's birth defects were caused by prenatal
8 | exposure to organic solvents. However, as a qualified pediatric neurologist, Dr. Glass may
9 | offer opinions at trial concerning Dalton's diagnosis, prognosis, and past and future special
10 | needs.

11 | It is so ordered.

12 | DATED this _____ day of August, 2008.

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15 | _____
16 | Andrea Darvas
17 | Superior Court Judge
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ATTACHMENT B

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

JULIE ANDERSON, individually and on)
Behalf of the Estate of DALTON)
ANDERSON,)
PLAINTIFFS,)
vs,)
AKZO NOBEL COATINGS, INC., and)
KEITH CROCKETT, a Washington resident,)
DEFENDANTS.)

No. 07-2-10209-4 SEA
ORDER

THIS MATTER comes before the Court on Defendants' Motion for Summary Judgment on Plaintiff Julie Anderson's Individual Claims. The Court has considered the records and files herein, has heard argument from counsel and has had the following documents specifically called to its attention:

1. Defendants' Motion for Summary Judgment on Plaintiff Julie Anderson's Individual Claims;
2. Declaration of William H. Walsh;

ORDER.

Judge Harry J. McCarthy
King County Superior Court
516 Third Avenue
Seattle, WA 98104
206-296-9205

1 R.C.W. 4.24.010 permits a parent to join in an action "for the injury or death of a child."
2 The statute also requires that both parents must join in the same suit to prevent piecemeal,
3 duplicative litigation. It is clear that the intent of R.C.W. 4.24.010 was to allow parents to file
4 an individual claim which derives from a child's injuries, to include recoveries for all medical
5 expenses related to that injury or death. It would be contrary to the statutory intent of R.C.W.
6 4.24.010 to bar a parental claim for medical expenses and related costs which derive from the
7 child's injury. If the parents' claim could not be preserved for the same period as the minor
8 child, it would result in a multiplicity of claims. The individual claim submitted by Anderson is
9 soundly based on R.C.W. 4.24.010 and allows her to sue individually on the basis of derivative
10 injury to Dalton. C.J.C. v. The Corporation for the Catholic Archbishop, 138 Wn 2d 699, 729,
11 985 P.2d 262 (1999). Therefore the motion for summary judgment for a violation of the statute
12 of limitations is denied.

13 II

14 SHOULD PLAINTIFFS' CLAIM OF WRONGFUL DISCHARGE BE DISMISSED?

15 Defendants argue that plaintiffs claim for wrongful discharge in violation of public
16 policy should be dismissed because another means of promoting public policy was available,
17 i.e., the Washington Industrial Safety and Health Act (WISHA) administrative process, R.C.W.
18 49.17.160. Defendants rely on Korslund v. Dyncorp Tri-Cities Servs. Inc., 156 Wn. 2d 168, 125
19 P.3d 119 (2005) in support of this argument.

20 In Korslund, the Supreme Court held that the common law tort of wrongful retaliation in
21 violation of public policy was not available because there were adequate statutory remedies in
22 the administrative procedures established by the Energy Reorganization Act of 1974 ("ERA")
23 42 U.S.C. §5851. The ERA authorized individual claimants to have their claims of wrongful
24 discharge to be heard and administratively adjudicated as a matter of statutory right.

25 The Supreme Court observed that to establish the common law tort of wrongful
26 discharge in violation of public policy, a claimant must prove that discouraging the disclosure of
27 unlawful employment practices would jeopardize that public policy. Korslund at 181. Further,
28 a plaintiff must show that other means of promoting the public policy are inadequate. Id. at 182.

29 ORDER

1 The Court went on to review the ERA administrative process and found that the process
2 provided “comprehensive remedies that serve to protect the specific policy identified by the
3 plaintiffs.” Id.

4 Plaintiffs here argue that Korslund is not dispositive of this wrongful discharge claim
5 because the administrative remedies available through this Washington Industrial Safety and
6 Health Act (“WISHA”) do not adequately address the public policy element at issue. Plaintiffs
7 point out that the ERA process entitles a complainant to an adjudicative hearing before an
8 Administrative Law Judge, but the same right does not exist under WISHA administrative
9 procedure. Plaintiffs also note that R.C.W. 49.17.60 only requires WISHA to assist a plaintiff in
10 superior court if an investigation indicates a violation of the statute.

11 However, a comparison of the ERA and WISHA procedures shows that each statute
12 provides for an administrative process for those claimants who believe that they had been
13 wrongfully discharged or otherwise suffered from unlawful discrimination. While it may be
14 true that the protections differ in certain respects and the ERA process may be arguably superior,
15 it is apparent that both statutory schemes provide a legislatively determined means to promote
16 and protect the public policy against wrongful discharge. It appears that the legislature, in
17 enacting R.C.W. 49.17.160, established a process that provided an adequate means to preserve
18 and protect the public policy against unlawful employment terminations.

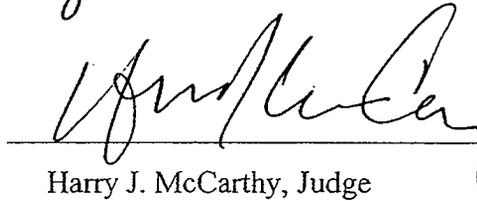
19 Anderson asserts that the investigation conducted pursuant to WISHA was ineffective
20 and “the WISHA investigator had been duped by Akzo Nobel [and] [a]t that point turning to
21 WISHA seemed like a lost cause.” Julie A. Anderson Declaration at 5. Because of her apparent
22 dissatisfaction with the investigation, Anderson did not pursue the administrative process under
23 R.C.W. 49.17.160. While it may be that plaintiff was dissatisfied and frustrated by the WISHA
24 investigation, her personal lack of confidence in WISHA did not relieve her of the obligation of
25 seeking administrative relief under R.C.W. 49.17.160. When a statutory scheme exists for the
26 overall protection of the public policy, a complaint may not ignore the process because it may
27 not be available to a particular individual Hubbard v. Spokane County, 146 Wn. 2d 699,717, 50
28 P.3d 602 (2002);

29 ORDER

1 Because the administrative procedures of R.C.W. 49.17.160 adequately provided an
2 alternate means to promote and safeguard the public and because Anderson chose to ignore this
3 statutory remedy, she cannot now argue that public policy against wrongful discharge is
4 threatened if her common law tort claim is not recognized.

5 Defendant's motion for summary judgment concerning the wrongful discharge claim is
6 granted pursuant to Korslund v. Dyncorp Tri Cities Servs. Inc.

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8 DATED this 17 day of July, 2007

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13 Harry J. McCarthy, Judge

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29 ORDER

ATTACHMENT C

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7 THE HONORABLE JUDGE HARRY J. MCCARTHY

8
9 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

10 JULIE ANDERSON, individually and on behalf
11 of the Estate of DALTON ANDERSON,

12 Plaintiffs,

13 v.

14 AKZO NOBEL COATINGS, INC., and KEITH
15 CROCKETT, a Washington resident,

16 Defendants.

NO. 07-2-10209-4

**ORDER ON MOTION FOR SUMMARY
JUDGMENT**

HEARING DATE: AUGUST 31, 2007

17 THIS MATTER having come on regularly before the above entitled Court upon the
18 plaintiffs' motion to for summary judgment, and the Court having reviewed:

- 19
- 20 1. The Anderson family's motion for summary judgment Re: comparative fault
21 and third party fault;
 - 22 2. Akzo Nobel's response to the Anderson family's motion for summary
23 judgment Re: comparative fault and third party fault;
 - 24
 - 25
 - 26

ORDER ON MOTION FOR SUMMARY
JUDGMENT - 1 of 3

ORIGINAL

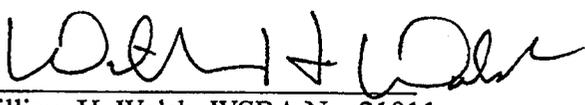
Law Offices of John R.
Connelly, Jr.
2301 N. 30th Street
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1 Presented by:

2 LAW OFFICES OF JOHN R. CONNELLY, JR.

3
4 John R. Connelly, Jr., WSBA No. 12183
5 Lincoln C. Beauregard, WSBA No. 32878
6 Attorneys for Plaintiffs

7 CORR CRONIN MICHELSON

8 
9
10 William H. Walsh, WSBA No. 21911
11 Attorney for Defendants

ATTACHMENT D

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JULIE ANDERSON, individually and on
behalf of the Estate of DALTON ANDERSON,

No. 07-2-10209-4

Plaintiffs,

DEFENDANTS' OPPOSITION TO
PLAINTIFFS' SUMMARY JUDGMENT
RE: COMPARATIVE FAULT & THIRD
PARTY FAULT

v.

AKZO NOBEL COATINGS, INC., and
KEITH CROCKETT, a Washington resident,

Defendants.

I. RELIEF REQUESTED

Plaintiffs' motion is based on the premise that "Akzo Nobel will be unable to come up with sufficient evidence from which the jury could find that Julie ...Anderson contributed to [her] own injuries.¹ That premise is faulty for several reasons. First, defendants have already come up with evidence to take to the jury on the issue of contributory negligence. This includes evidence related to Ms. Anderson's respirator use, alleged paint-mixing while pregnant (despite being told not to do so) and smoking while pregnant. Second, Washington courts have repeatedly said that it is not appropriate to take an issue of negligence or contributory negligence from the jury outside of

¹ Defendants stipulate that Dalton Anderson did not contribute to his condition.

1 extreme circumstances.² This case does not involve extreme circumstances. Finally, the
2 discovery cutoff in this case is not until July 21, 2008—a year away. Trial is not until September
3 2008. Although the parties have been diligent in pursuing discovery, there is still much more to be
4 done, including the deposition of Ms. Anderson.³ It is not appropriate to dismiss a contributory
5 negligence claim based on the assumption of what “will be” obtained in discovery under any
6 circumstances, but especially a year before the discovery cutoff and more than a year before trial.⁴
7 Accordingly, if this motion is not denied based on the evidence of Ms. Anderson’s contributory
8 negligence (which is overwhelming), the Court should then continue this motion under CR 56(f) to
9 allow completion of the discovery schedule. A CR 56(f) continuance is particularly appropriate on
10 the issue of potential third party fault.
11

12 II. STATEMENT OF FACTS

13 Specific facts related to various aspects of Ms. Anderson’s contributory negligence are
14 described in greater detail in the Legal Authorities section below. Generally, the Court is aware
15 that this case involved plaintiffs’ contention that Dalton Anderson’s congenital malformations
16 were caused by his mother’s (plaintiff Julie Anderson’s) exposure to paint chemicals during her
17 employment with defendant Akzo Nobel Coatings, Inc.
18

19 Ms. Anderson was an operations supervisor at the Akzo Nobel autopaint distributor shop in
20 Pacific, Washington. She was a front office (not warehouse) worker and her job description did
21

22 ² See Legal Authorities section below, Section IV(A).

23 ³ As of this writing, plaintiffs have moved to amend their complaint for a third time, to add back in
24 Dalton’s father, Darwin, as a plaintiff. Darwin Anderson (the father) earlier dropped out of the case and has
not provided discovery.

25 ⁴ The discovery cutoff is July 21, 2008, and the trial is scheduled for September 2008.

1 not include mixing paint.⁵ Ms. Anderson nevertheless claims that she was required to mix paint
2 while pregnant and was told by her supervisor, co-defendant Keith Crockett, that it was safe to mix
3 paint while pregnant as long as she wore a respirator.⁶ Consequently, she claims she wore a
4 respirator every time she mixed paint while pregnant.⁷ That contention is categorically denied by
5 Mr. Crockett who actually told her to stay out of the warehouse where paint mixing operations
6 took place.⁸ Also, several witnesses strongly dispute her claim that she mixed paint “very
7 frequently” at any time and especially while she was pregnant.⁹ Several witnesses have provided
8 sworn testimony that they told her not to mix paint while pregnant and that others were available to
9 perform that task. And two witnesses have provided testimony that Ms. Anderson did not wear a
10 respirator in the mixing room despite the undisputed fact that her training told her to wear a
11 respirator while mixing paint, “no exceptions.”¹⁰

14 _____
15 ⁵ Exhibit A to Walsh Decl.

16 ⁶ Declaration of Julie Anderson dated January 8, 2007 at ¶5, Exhibit B to Walsh Decl. As discussed
17 in the evidence submitted in this opposition and discussed below, defendants strongly dispute that Ms.
18 Anderson mixed paint while pregnant and contend that if she did, she was ignoring the direction of her
19 supervisor and fellow employees.

20 ⁷ *Id.* Her assertion that she always wore a respirator while mixing paint begs the question of why
21 she continually points to the 1998 Callewaert memorandum block-quoted at page 2 of her brief which she
22 claims is evidence that Akzo Nobel told employees it was safe to mix paint without a respirator. If she
23 always wore a respirator, then the memo is irrelevant. This is merely one of the problems with Ms.
24 Anderson’s reliance on this memo. The others include the fact that (1) the air levels were so low it was
25 true, (2) she was the person who did the filing at the time in 1998 and claims to have never seen the memo
until it was produced two months ago (suggesting it was never received at the branch), (3) she copied all the
branch offices safety memos for her lawyers in 2003 and it did not include that memo (suggesting it was
never received or, at least not filed by Ms. Anderson) and (4) they have no evidence the branch office or
Mr. Crockett received it (the evidence is the opposite). The memo, therefore, is a classic red herring.

23 ⁸ See Dep. of Keith Crockett, Exhibit C to Walsh Affidavit.

24 ⁹ See Mr. Crockett’s testimony excerpted below as well as the Declarations of D. Sparks, B. Craig
and J. Smith, Exhibits D, E and F to the Walsh Affidavit, respectively.

25 ¹⁰ Mr. Crockett and Ms. Craig, Exhibits C and E to Walsh Affidavit.

1 One of Ms. Anderson's core allegations relates to the effectiveness of her respirator. She
2 admits her training required her to change the filters on her respirator when she detected the smell
3 of paint or chemicals through the sorbent (charcoal fibers) in the filters.¹¹ This was a standard
4 practice in the industry, though Ms. Anderson now disputes this.¹² Nevertheless, Ms. Anderson
5 claims that she applied this standard and never changed out her filters.¹³ Thus, according to her,
6 she used the same mask and same filters every time she mixed paint while pregnant. According to
7 her theory, the mask allegedly became ineffective at some point during her pregnancy and failed to
8 protect her. However, in coming up with this story, which by necessity navigates between her
9 training (wear a respirator—"no exceptions") and her litigation theory (chemical exposure
10 sufficient to cause *in utero* congenital malformations), she has failed to account for an inherent
11 "Catch-22" that negates defendants' liability: if what she says is true, then one of two things also
12 have to be true: (1) she never smelled paint through the filters (meaning the filters continued to be
13 effective and she was not exposed¹⁴) or (2) she smelled paint and continued to use the mask
14
15

16
17 ¹¹ Anderson Decl. of January 7, 2007. At least one witness has testified by declaration that she
18 personally told Ms. Anderson before she became pregnant to change out her filters routinely. *See*
19 Declaration of Betty Craig, quoted below.

20 ¹² *See* Declaration of Darryl Sparks, Exhibit D to Walsh Decl. As Mr. Sparks and others have
21 pointed out, the 8-hour change out schedule that plaintiffs claim would have made all the difference is
22 problematic because it suggests that employees could ignore paint fumes in their respirator as long as they
23 had not worn the mask for eight hours of use. In some environments, 8 hours of use would exceed the
24 respirator's capacity. In addition, the OSHA regulation that Ms. Anderson cites to did not apply if the air
25 monitoring revealed exposure levels below OSHA standards. As documented elsewhere in this case, the air
monitoring done at the time she was pregnant revealed exposure levels at less than 1% of OSHA limits.

¹³ Anderson Decl. of January 7, 2007, ¶ 5.

¹⁴ This is actually what she claims—*see id.* None of the chemicals associated with the products at
issue were "odorless"—Sparks Decl. If plaintiffs are claiming that these malformations were caused by
substantial exposure to some mysterious, odorless chemical present at Ms. Anderson's work place, they
have failed to produce any evidence of it. Both toluene (characterized by the National Institute of Health

1 anyway. The latter situation, of course, would be a clear basis for contributory negligence in light
2 of Ms. Anderson's undisputed training to change the filters if she smelled paint. So, she has
3 provided her own evidence of contributory negligence based on her theory of the case.

4 In addition, Ms. Anderson smoked while she was pregnant with Dalton. Her medical
5 records show that as late as July 22, 1999, two months into the pregnancy, she was smoking a half
6 pack a day.¹⁵ She did this despite Surgeon General warnings on cigarettes and her doctor's
7 warnings about smoking and efforts to get her to quit. In fact, one witness who worked in the
8 warehouse (where the paint mixing was done) has provided a declaration saying the only time she
9 saw Ms. Anderson in the warehouse while she was pregnant was when Ms. Anderson was walking
10 through to go to the smoking area. Ms. Anderson's decision to smoke, despite knowing the
11 dangers that decision posed to her unborn child, is evidence of contributory negligence.
12

13 For these and other reasons detailed below, there is ample evidence of Ms. Anderson's
14 contributory negligence in the record.
15

16 III. STATEMENT OF ISSUES

- 17 1. Should the Court deny this motion because there is ample evidence of Ms. Anderson's
18 contributory negligence and Washington law is clear that such contributory negligence
19 should be decided by the jury under these circumstances?
- 20 2. Alternatively, should the Court continue this motion under CR 56(f) to allow the parties to
21 complete discovery, especially when the discovery cutoff is a year away and trial is not
22 until September 2008?

23 [NIH] as an "aromatic solvent") and xylene (described by NIH as having an "aromatic odor"), the only
24 chemicals plaintiffs have implicated to date, have distinctive odors. Alternatively, the fact that she never
25 smelled paint may be due to the fact that she did not "very frequently" mix paint or use the respirator.

¹⁵ Copy of record at Exhibit G to Walsh Declaration.

1 **IV. EVIDENCE RELIED UPON**

2 The Declaration of William H. Walsh in Opposition to Plaintiffs' Motion for Summary
3 Judgment Re: Contributory Negligence ("Walsh Decl.")(with attachments) and the materials on
4 file in the matter herein.

5 **V. LEGAL AUTHORITIES**

6 **A. Contributory Negligence is A Factual Matter for the Jury to Decide.**

7
8 Washington courts have repeatedly confirmed that a plaintiff's contributory negligence is a
9 factual matter for the jury unless no reasonable minds could differ. *See, e.g., Bordynoski v.*
10 *Bergner*, 97 Wn.2d 335, 338, 644 P.2d 1173 (1982) ("Moreover, a finding of contributory
11 negligence as a matter of law should be made 'only in the clearest of cases' and 'a condition
12 precedent for such a determination is a conclusion that reasonable minds could not have differed in
13 their interpretation of the factual pattern.'" (citations omitted); *Gaines v. N. P. R. Co.*, 62 Wn.2d
14 45, 49, 380 P.2d 863 (1963) ("Inherent in either or both negligence and contributory negligence is
15 the question of proximate cause -- a jury question unless it can be said that the minds of reasonable
16 men cannot differ."); *Hough v. Ballard*, 108 Wn. App. 272, 279, 31 P.3d 6 (2001) (because
17 defendant produced ample facts for a jury to conclude that plaintiff was contributorily negligent,
18 trial court erred in granting plaintiff's motion for partial summary judgment on liability); *Wood v.*
19 *City of Bellingham*, 62 Wn. App. 61, 67-68, 813 P.2d 142 (1991) (trial court did not err in
20 submitting contributory negligence issue to jury because there were facts from which a jury could
21 reasonably conclude plaintiff was contributorily negligent); *Baughn v. Malone*, 33 Wn. App. 592,
22 598, 656 P.2d 1118 (1983) ("A finding of contributory negligence or proximate cause as a matter
23
24
25

1 of law should be made only in the clearest of cases and when reasonable minds could not have
2 differed in their interpretation of a factual pattern."); *Amant v. Pac. Power & Light Co.*, 10 Wn.
3 App. 785, 794, 520 P.2d 181 (1974) ("Whether plaintiff was contributorily negligent . . . creates
4 an issue of material fact because different results might be honestly reached by different minds.").

5
6 In short, it is hornbook law in Washington that the plaintiffs' contributory negligence is an
7 issue for the jury. This case should not be an exception, especially given the overwhelming
8 evidence of Ms. Anderson's contributory negligence in this case.

9 **B. The Evidence of Ms. Anderson's Contributory Negligence is Already**
10 **Overwhelming.**

11 **1. Respirator Issues Reveal that Ms. Anderson Was Negligent**

12 It is undisputed that Ms. Anderson was provided respirator and other safety training when
13 she started at Akzo Nobel. This included training regarding respirator use and replacement. With
14 regard to respirator use, she was told that it was company policy that employees were required to
15 use respirators while mixing paint. She received a "Warehouse Procedures" form that said
16 employees were required to wear respirators while mixing paint—"no exceptions."¹⁶ She was also
17 trained to be the Health Safety and Environmental ("HSE") Coordinator for the Seattle Branch.
18 Among other things, this meant that she was required to train new employees on safety procedures,
19 including respirator use.
20

21 The evidence of Ms. Anderson's contributory negligence regarding respirator use is
22 substantial. For example, one witness who worked in the warehouse during the time Ms.
23

24 ¹⁶ Provided with Crockett Dep. at Exhibit C, along with a copy of Ms. Anderson's responses to
25 safety test questions.

1 Anderson was pregnant testified that Ms. Anderson never wore a respirator. Also, as stated above,
2 if she truly mixed paint “very frequently” and never changed her respirator, then she is admitting
3 that she continued to mix paint despite smelling paint in the mask (or she has to concede the mask
4 effectively prevented exposure).

5
6 Finally, amid her several criticisms of Akzo Nobel’s safety practices between 1998 and
7 2003, Ms. Anderson has conveniently failed to account for the fact that she was the HSE
8 Coordinator, the employee primarily responsible for ensuring health, safety and environmental
9 compliance for the branch.¹⁷ As such, she cannot point to safety deficiencies of the branch without
10 pointing the finger right back at herself. To the extent that she has presented evidence of such
11 deficiencies (which Akzo Nobel denies), she has presented evidence of her own negligence as a
12 manager and HSE Coordinator for Akzo Nobel.

13
14 Beyond this, there is overwhelming evidence that Ms. Anderson was repeatedly told by
15 several witnesses not to mix paint while pregnant. And it is undisputed that there were warning
16 labels on the cans of paint were mixed that contained warnings about pregnancy.¹⁸ So, if she really
17 did mix paint while pregnant, not only did she ignore the admonitions of her supervisor and fellow
18 employee, but she also ignored the warning label on every can of paint she mixed. Accordingly,
19 she assumed the risk posed to her unborn child.

20
21 ¹⁷ Excerpts from Rick Callewaert Deposition at 63:13-25, 108:25-114:13, Exhibit H to Walsh
22 Affidavit.

23 ¹⁸ Copies of labels, Exhibit I to Walsh Affidavit. These related to lead chromate (not an organic
24 compound which is at issue here) contained in three specific colors of paint. Copies of labels and excerpt of
25 Charles Stone, Akzo Nobel Labeling Manager, collectively Exhibit J. to Walsh Decl. Defendants strongly
dispute the causal connection between these elements and the alleged injuries. What is important here is
that if Ms. Anderson mixed a can of paint during her pregnancy, she was ignoring warnings related to
pregnancy on the label.

1 **2. Ms. Anderson Was Told Not to Mix Paint While Pregnant**

2 Witnesses who worked with Ms. Anderson uniformly agree that she was told not to mix
3 paint while she was pregnant. Her supervisor, co-defendant Keith Crockett testified as follows:
4

5 Q [Plaintiffs' counsel]: Can you tell me, sir, you told
6 Ms. Anderson it was okay to mix paint while she was
7 pregnant as long as she wore a respirator; is that
8 correct?

9 A [Mr. Crockett] Incorrect.

10 Q What did you tell her in that regard?

11 A When I learned she was pregnant or when she told me
12 she was pregnant, what I remember telling her was stay
13 out of the back rooms, stay out of the warehouse, stay
14 out of there. Completely out of there.

15 Dep. of Keith Crockett [Ex. C to Walsh Aff.] at 77:11-20.

16 Under repeated questioning by plaintiffs' counsel, Mr. Crockett continued to reaffirm this
17 testimony and that by telling Ms. Anderson to stay out of the warehouse, he was telling her not to
18 mix paint while pregnant:
19

20 A And on how many occasions when you were working did
21 you see Ms. Anderson mix paint while she was pregnant?

22 A Zero.

23 Q Okay. Do you have an impression as to whether or not
24 Ms. Anderson mixed paint while she was pregnant?

25 A When she told me she was pregnant, I told her to stay
completely out of there, okay? And when I say "stay
out of the back," I meant the whole warehouse, all of
it. I didn't want her lifting things and, you know,
moving freight around or doing any of that stuff at
all. I wanted her to stay in the office, "Do your
paperwork and stay completely out of there."
Her job was never to make any paint in the
first place. So it really didn't enter my mind that
she was back there making any paint at all, that was

1 not her job. That's what we had Betty Craig and Laurinda
2 Rowland's job, was to make paint. As far as I was
aware, those were the two people making paint back there.

3 Q If Ms. Anderson wasn't involved in making paint, why
did you tell her not to do it?

4 A My comment to Ms. Anderson was to stay out of the back
5 room.

6 *Id.* at 78:14-79:13.

7 Q And what made you want her to stay out of there?

8 A I didn't want her lifting boxes and stuff like that,
moving freight around or any of that heavy stuff that
she might wander back there and do.

9 Q You didn't tell her not to mix paint?

10 A I assumed she wasn't making any paint in the first
place. It wasn't her job to make paint.

11 Q Did you tell her not to mix paint?

12 A I believe me telling her to stay out of the back room
13 completely, that would have precluded her from making
any paint which she would have to go in the back room
to make.

14 *Id.* at 81:25-82:11.

15 Mr. Crockett's testimony was supported by other employees who worked in the warehouse,
16 including Betty Craig who remembered Mr. Crockett adamantly trying to keep Ms. Anderson out
17 of the warehouse:
18

19 The only other time I remember Julie being in the warehouse while
20 pregnant was when she walked through the warehouse to get to the
21 smoking area outside the warehouse door. We did encourage her to stop
22 smoking during the pregnancy. The idea that Keith Crockett would have
told Julie Anderson that it was safe to mix paint with a respirator is totally
23 at odds with my recollection of how Keith dealt with Julie's pregnancy.
To the contrary, he was consistently telling her to stay out of the
24 warehouse.

25 Declaration of B. Craig ([Exhibit E to Walsh Aff.]).

1
2 Despite this, Ms. Craig did recall catching Ms. Anderson mixing paint one time while
3 pregnant:

4
5 During the time that Julie Anderson was pregnant from May 1999 to
6 January 2000 (and for some period of time thereafter when she was on
7 maternity leave), she did not mix paint, with one exception. I know this
8 because when Ms. Anderson informed us that she was pregnant, I and
9 others refused to let Julie in the warehouse area and we insisted on mixing
10 the paint during the time of her pregnancy to keep her from doing so. I
11 personally recall telling her to stay out of the warehouse and mixing room
12 during this time, and I recall our branch manager, Keith Crockett, telling
13 her the same thing. Keith made every effort possible to accommodate
14 Julie during her pregnancy, including preventing her from having to go in
15 the warehouse or mixing room. So, when I did find her in the mixing
16 room one time while she was pregnant (the one exception), I scolded her
17 and took over mixing the paint. I do not recall any other time she mixed
18 paint while pregnant and if she did so, it was directly contrary to the
19 direction that Keith Crockett and I gave her. There was never a need for
20 Julie to be in the warehouse or mixing room during her pregnancy because
21 she could always page or call someone to handle the duties in the
22 warehouse if necessary. Keith Crockett also spent a lot of time in the front
23 office where Julie worked to ease her workload during the pregnancy.

24 *Id.*

25 The testimony of Mr. Crockett and Ms. Craig is further supported by Laurinda Rowland,
another warehouse employee who worked at Akzo Nobel during Ms. Anderson's pregnancy:

Q [Mr. Walsh] Do you remember a day when she came to the
office and
said, Hey, I'm pregnant, or words to that effect?

A Yes.

Q What did you tell her in response, with regard to
paint mixing?

A I told her that she shouldn't be doing it, and if it
was at all possible, for her to leave it for the
drivers when they would get back, that we would be

1 more than happy to do it.

2 Q You also worked with a Betty Craig?

3 A Uh-huh.

4 Q Do you recall what Betty said to Julie with regard to
5 paint mixing?

6 A She also offered to mix for her whenever she could.

7 Dep. of Laurinda Rowland [Exhibit S to Walsh Aff.] at 12:8-21

8 Consequently, if Ms. Anderson mixed paint while she was pregnant, it was directly
9 contradictory to the directions and admonitions she was receiving from her supervisor and co-
10 workers.¹⁹

11 Beyond the issue of mixing paint while pregnant, there is also evidence that Ms. Anderson
12 ignored other information and directives with regard to respirators. For instance, Ms. Craig
13 recalls telling Ms. Anderson about proper respirator use and replacement, but that Ms. Anderson
14 simply refused to wear a respirator at all:

15 With regard to the use of respirators and the requirement to change
16 out respirator filters or cartridges, I personally instructed Julie on these
17 procedures before she was pregnant. I knew these procedures from my
18 time in the autopaint industry before working at Akzo Nobel. I recall that
19 I made her aware of the proper use and storage of respirator and the
20 change-out time of filter cartridges which she then started to pass on to our
21 customers. Keith Crockett also consistently reminded us of the proper
22 procedures for safety within the branch. Accordingly, Ms. Anderson's
23 claim that she was unaware of the proper use of respirators and the need to
24 change the filter and/or cartridge on a respirator mask before Dalton was
25 born is false. Again, I specifically recall informing her about these
procedures before she became pregnant with Dalton.

¹⁹ Mr. Crockett and Ms. Craig both agree that Ms. Anderson, when not pregnant, would not wear a respirator. The air monitoring would suggest that this did not endanger her health, but to the extent she claims otherwise, then she is responsible for her own exposed given her undisputed training to wear a respirator at all times, "no exceptions."

1 With regard to Julie Anderson's respirator, she purchased for
2 herself the most expensive 3M respirator (with the exception of air
3 filtration respirators) through the 3M catalogue. This was not the same
4 respirator used by most of the other employees, many of whom used fully
5 disposable masks (i.e., they did not utilize filters and cartridges like
6 Julie's). I was present when she was looking through the catalogue and
7 made the selection. However, even after she acquired this respirator, and
8 despite Akzo Nobel's clear and unmistakable direction to her and all
9 employees, constantly reinforced by Keith Crockett, that respirators were
10 to be worn while mixing paint at all times, no exceptions, Julie
11 consistently failed to do so. Although she rarely had reason to be in the
12 mixing room (even when she was not pregnant), she would occasionally
13 go into the mixing room to train new drivers. During these times, which
14 were infrequent, she would not wear her respirator. Keith and I would
15 remind her to do so when we found her in the mixing room without the
16 respirator, but Julie was very stubborn and would not listen to us. I never,
17 ever saw her wear her respirator. Her suggestion that she had somehow
18 exceeded eight hours of use with her respirator before Dalton's birth is
19 false because, not only did she rarely go into the mixing room, but she
20 refused to wear the respirator when she did. She was well aware that she
21 was supposed to, but simply refused to do it.

22 Craig Decl., Exhibit E to Walsh Aff.

23 Mr. Crockett also saw Ms. Anderson mix paint without a respirator:

24 Q Did you see her in the paint mixing room without a
25 respirator?

A I remember one time early on, when we just got the
mixing room up and running, that she was making a mix
of paint, and she was bitching about having to wear a
respirator. And I told her, "It's company policy. You've got to
wear it."

Dep. of Keith Crockett at 84.

In sum, there is evidence that Ms. Anderson stubbornly refused to wear a respirator at any
time. This, along with the evidence related to Ms. Anderson's alleged decision to mix paint while

1 pregnant despite the efforts of her supervisor and co-workers to stop her from doing so, provide
2 sufficient evidence to take to the jury on Ms. Anderson's contributory negligence.
3

4 3. Ms. Anderson Smoked While Pregnant

5 Ms. Anderson admits that she smoked during her pregnancy, although she attempts the
6 minimize the degree to which she smoked.²⁰ Her medical records, however, reveal that at least in
7 July 22, 1999, which she had been pregnant at least two months, she was smoking a half pack a
8 day.²¹

9 It is fundamental that Ms. Anderson's decision to smoke during her pregnancy is a basis for
10 a contributory negligence claim in this case. As a threshold matter, there can be no doubt that Ms.
11 Anderson knew that smoking could cause harm to her unborn child. First, the federal government
12 requires cigarette manufacturers to provide one of a series of rotating labels on cigarette packages,
13 at least two of which relate directly to pregnancy:
14

15 (1) It shall be unlawful for any person to manufacture, package, or
16 import for sale or distribution within the United States any cigarettes
17 the package of which fails to bear, in accordance with the requirements
of this section, one of the following labels:

18 SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer,
19 Heart Disease, Emphysema, And **May Complicate Pregnancy.**

20 SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly
Reduces Serious Risks to Your Health.

21 SURGEON GENERAL'S WARNING: **Smoking By Pregnant Women**
May Result in Fetal Injury, Premature Birth, And Low Birth Weight.

22 SURGEON GENERAL'S WARNING: Cigarette Smoke Contains
Carbon Monoxide.

23
24 ²⁰ Plaintiffs' responses to defendants first requests at Exhibit K to Walsh Affidavit and second
responses at Exhibit L to Walsh Affidavit.

25 ²¹ Copy of record at Exhibit G to Walsh Affidavit.

1 15 U.S.C. § 1333.

2 Moreover, Ms. Anderson's physician was trying to help her quit smoking by proscribing
3 nicotine patches and has testified that he would have provided her a standard warning about
4 smoking while pregnant that would including information about the potential harm to the fetus.²²
5 As for whether Ms. Anderson's fetus was affected by her smoking, there is evidence of that as
6 well. The Surgeon General issued a report in 2004 that updated prior Surgeon General Reports on
7 Smoking and Health. That report included the following findings significant to this case²³:

Surgeon General's Finding	Significance to this Case
<p>9 "Increasing levels of maternal smoking result in 10 a highly significant increase in the risk of 11 abruption placentae²⁴, placenta previa, bleeding 12 early or late in pregnancy, premature and 13 prolonged rupture of membranes, and preterm 14 delivery...." 2004 Surgeon General's Report 15 ("Report") at 530(citing 1980 report; sell also 16 identical reference in 2001 Report on the same 17 page).</p> <ul style="list-style-type: none">14 • "The evidence is sufficient to infer a 15 causal relationship between maternal active 16 smoking and premature rupture of the 17 membranes, placenta previa, and placental 18 abruption." Report at 576.	<ul style="list-style-type: none">• Ms. Anderson experiences a placental hemorrhage (a version of placental abruption) in the first trimester of her pregnancy. Exhibit U to Walsh Aff.• Ms. Anderson also was on bedrest for the latter part of her pregnancy due to the threat of preterm delivery...
<ul style="list-style-type: none">• "According to studies of long-term growth and development, smoking during pregnancy may affect physical growth, mental development, and behavioral characteristics of	Dalton's condition includes physical growth and mental/intellectual development issues. Exhibit T to Walsh Aff.

20 ²² Exhibit L to Walsh Affidavit. Dr. Robinettes' deposition was taken on July 19 2007 and the
21 transcript was not ready by the writing of this opposition brief. To the extent that this testimony is in
22 dispute, defendants can provide a copy of the transcript at a later time under CR 56(f). It is not anticipated
23 that this evidence is disputed.

24 ²³ Excerpts from Chapter 5 of 2004 Surgeon General's Report, Exhibit M to Walsh Affidavit.

25 ²⁴ "A placental abruption occurs when the normally implanted placenta prematurely separate from
the wall of the uterus, and it is associate with high rates of preterm deliveries, stillbirths and early infant
deaths." Report at 554. Cf. Exhibit U to Walsh Aff (describing placental hemmorage Ms. Anderson
experienced early in her pregnancy).

<p>1 children at least up to the age of 11.” Report at 2 532 (citing to 1979 Report). 3 • “Maternal smoking during pregnancy 4 may adversely affect the child’s long-term 5 growth, intellectual development, and 6 behavioral characteristics.” <i>Id.</i> at 532 (citing to 7 1980 Report).</p>	
<p>6 “Maternal smoking was associated with 7 increased risks for a number of specific 8 malformations, including microcephalus.” <i>Id.</i> 9 at 581</p>	<p>Although born with a normal sized head (normachephalus), Dalton was later diagnosed microcephalus (small than normal head). Exhibit T to Walsh Aff.</p>
<p>8 Maternal cigarette smoking during pregnancy 9 poses a unique risk for neurodevelopmental impairment among children. Report at 597.</p>	<p>Dalton developed neurodevelopmental impairment issues. Exhibit T to Walsh Aff.</p>

10 It is evident from the evidence that Ms. Anderson’s smoking affecting the fetus and may
11 provide an explanation for other congenital or developmental issues. As such, even though
12 discovery on these complex issues continues, the current state of the evidence is enough to suggest
13 that the jury should determine whether Ms. Anderson’s decision to smoke a half pack a day of
14 cigarettes during her pregnancy, despite knowledge the dangers to her unborn child, constituted
15 contributory negligence.

16 **4. Ms. Anderson Herself Wondering If She Caused Her Son’s Problems.**

17 Ms. Anderson, herself, raised questions regarding whether her conduct may have caused
18 her son. As former employee, Joyce Smith, said:
19

20 I recall one time, which I think was early 2002, when Julie, my sister
21 Claudia and I were sitting at work talking about Dalton. Julie was crying
22 and wondered if her prior drug use may have caused Dalton’s problems.
23 She admitted that she had previously been addicted to cocaine and was
24 very upset by the idea that this may have contributed to Dalton’s
25 problems. Claudia and I tried to comfort her.

Declaration of Joyce Smith.

1
2 If Ms. Anderson, herself, wondered whether her drug use may have affected her son's
3 development, then she cannot complain if others wonder that as well. That evidence should be
4 considered by the jury.

5
6 **C. Alternatively, CR 56(f) Continuation is Warranted.**

7 Given the amount of evidence of Ms. Anderson's contributory negligence, this motion
8 should simply be denied. However, a CR 56(f) continuation is warranted as alternative relief.

9 "Courts grant motions for continuances [under Rule 56f] 'almost as a matter of course...'"
10 Burlington N. & Santa Fe R.R. Co. v. The Assiniboine, 323 F.3d 767, 773-74 (9th Cir. 2003).
11 "Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons
12 stated, present by affidavit facts essential to justify his opposition, the court may refuse the
13 application for judgment or may order a continuance to permit affidavits to be obtained or
14 depositions to be taken or discovery to be had or may make such other order as is just." CR 56(f).
15 "The primary consideration in the trial court's decision on the motion for a continuance should
16 [be] justice." Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (1990). The rule is based on
17 the fundamental belief that parties engaged in civil litigation are entitled to an adequate time to
18 prepare responses to issues raised in summary judgment motions. See e.g., Butler v. Joy, 116 Wn.
19 App. 291, 299, 300 (2003) (court abused its discretion in granting the motion for summary
20 judgment when opposing party had not time to prepare a response to the motion); Tellevik v.
21 31641 W. Rutherford St., 120 Wn.2d 68, 91, 838 P.2d 111 (1992) (court should have allowed
22 plaintiffs to complete discovery because the necessary information had not been obtained); Coggle,
23 supra, 56 Wn. App. at 508 (court abused its discretion in denying motion for continuance when
24 opposing party identified evidence sought and new counsel had not had time to follow through on
25 work begun by previous counsel); see also National Life Ins. Co. v. Solomon, 529 F.2d 59, 61 (2d

1 Cir. 1975) (summary judgment is a "drastic device" that should not be granted when one party has
2 yet to exercise its opportunities for pretrial discovery).

3 Here, the discovery cutoff is a year away. The parties working diligently through
4 discovery, but there is a great deal left to be done. For one thing, plaintiffs are currently seeking to
5 bring Mr. Darwin Anderson, Dalton's father and Julie's ex-husband, back into the lawsuit. If that
6 happens, Mr. Anderson has not provided any discovery in this case and defendants are entitled to
7 obtain discovery from him to address the issues of contributory negligence and many others. In
8 addition, Ms. Anderson's deposition has not been taken. Before that can be done, however, the
9 parties need to address various outstanding discovery issues especially with regard to medical
10 discovery.

11 1. Medical Discovery

12 This is a case that clearly involves complex issues of medical causation. Indeed, it is
13 recognized that more than 99% of congenital malformations have causes other than chemical
14 exposure and that genetic or unknown causes account for 80-to-95% of such cases.²⁵ It is,
15 therefore, critical that defendants obtain full medical discovery in this case and that the case not be
16 allowed to go forward on some sampling of medical records that plaintiffs choose to produce.

17 When this litigation began in the fall of 2006, defendants served plaintiffs with discovery
18 requests which sought, among other things, the names of Ms. Anderson's medical providers since
19 1990.²⁶ She provided a short list of providers.²⁷ Defendants again requested a list of providers in
20 their second requests.²⁸ Ms. Anderson then provided a list of an additional providers.²⁹ However,

21 _____
22 ²⁵ Robert L. Brent, *Environmental Cause of Human Congenital Malformations: the Pediatrician's*
Role in Dealing With These Complex Clinical Problems Caused by a Multiplicity of Environmental and
Genetic Factors, Pediatrics 2004; 113; Table 3 at p. 959; Ex. R to Walsh Affidavit.

23 ²⁶ Plaintiffs responses to first discovery requests. Exhibit K to Walsh Aff.

24 ²⁷ *Id.*

25 ²⁸ Walsh Aff.

1 without objection or explanation, the second list related to providers from 1999 to the present with
2 none identified prior to 1999. When asked for a list of providers prior to 1999, Ms. Anderson
3 claimed to be unable to recall any. Defendants then reminded her, through her counsel, that she
4 had had two children in the late 1980's.³⁰ She then provided the name of the hospital where they
5 were born.³¹ Defendants then reminded her, through her counsel, that her records indicated that
6 she had had miscarriages and abortions.³² She responded that she had had all her abortions at an
7 clinic "behind the Denny's near the airport in SeaTac."³³ Defendants have not been able to
8 independently locate this clinic.

9 Moreover, Ms. Anderson has admitted drug use and addiction but not produced evidence
10 related to treatment. She is claiming emotional harm, but has not produced evidence related to
11 treatment of that either. She was diagnosed with the Hepatitis C antibody in her blood in May of
12 1999—the month she became pregnant with Dalton.³⁴ Ms. Anderson denies that she had Hepatitis
13 C and has not provided discovery related to the cause of her condition, but the Center for Disease
14 Control cites intravenous drug use as the most common cause of the disease.³⁵ More discovery on
15 that issue is, therefore, warranted.

16 Meanwhile, plaintiffs initially provided a blank medical release to defendants and allowed
17 them to collect records from the providers she disclosed and others referred to in her records
18

19 ²⁹ Plaintiffs responses to second discovery requests, Exhibit L to Walsh Aff.

20 ³⁰ *Id.*

21 ³¹ E-mail, dated May 14, 2007, Exhibit N to Walsh Affidavit.

22 ³² See letter of May 3, 2007 from W. Walsh to L. Beauregard, and related medical record,
collectively at Exhibit O to Walsh Affidavit.

23 ³³ E-mail dated May 14, 2007, Exhibit N to Walsh Affidavit.

24 ³⁴ Medical record at Exhibit P to Walsh Affidavit. In fact, Ms. Anderson flatly denied having
Hepatitis C. See plaintiffs responses to second discovery requests, Exhibit K to Walsh Affidavit.

25 ³⁵ See Exhibit P, *supra*, previous note (CDC information related to Hepatitis C).

1 through a medical record provider. However, when that expired, plaintiffs refused to provide
2 another blank release and, instead, insisted that defendants investigate and come up with Ms.
3 Anderson's providers on their own and then submit specific releases. Although defendants felt
4 that it was untenable to have to comb the countryside for Ms. Anderson's providers (rather than
5 simply have her name them which she claims to be unable to do), defendants have been trying to
6 comply with plaintiffs' request. And, to be fair, when defendants have come up with providers and
7 submitted releases, plaintiffs have been cooperative in executing them. Still, at some point, Ms.
8 Anderson has to take responsibility for her discovery obligations and properly identify her
9 providers. That evidence is related to contributory negligence to the extent that such information
10 reveals conduct on Ms. Anderson's part that could have affected her pregnancy. It is also related
11 to the larger issues of causation in this case.³⁶

12 Moreover, plaintiffs have refused, or claimed to be unable, to produce medical evidence
13 related to their other children.³⁷ Again, in a case where the vast majority of causes are recognized
14 as genetic, that position is untenable. How that plays out in light of plaintiffs burden in this case
15 remains to be seen, but the issue of Anderson's negligence should not be decided in her favor
16 while these medical discovery issues linger. Defendants will attempt complete the medical
17 discovery it can before this issue is raised with the Court. In the meantime, this issue supports
18 defendants' request for CR 56(f) relief.

19
20
21
22 ³⁶ For example, the article plaintiffs are relying on to suggestion causation, the 1999 JAMA article,
23 Pregnancy Outcome Following Gestational Exposure to Organic Solvents, Vol. 281, No. 12 (copy at
24 Exhibit Q to Walsh Decl.) shows that the mothers of the subject study were paired according to, among
25 other things, history of pregnancies, miscarriages and induced abortions. *Id.* at Table 2. Given plaintiffs'
reliance on this article, they certainly cannot disclaim relevance of this information.

³⁷ E-mail dated May 22, 2007, Exhibit N to Walsh Affidavit.

