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SUPREME COURT  
OF THE STATE OF WASHINGTON

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CATHY JOHNSTON-FORBES,

Petitioner,

v.

DAWN MATSUNAGA,

Respondent.

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AMICI CURIAE BRIEF OF GOVERNMENT EMPLOYEES  
INSURANCE CO., FARMERS INSURANCE CO. OF WASHINGTON,  
AND PROGRESSIVE CASUALTY INSURANCE CO.

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Filed   
Washington State Supreme Court

MAY - 8 2014

Ronald R. Carpenter  
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A. INTEREST OF AMICI AND INTRODUCTION

The interest of the amici Carriers in the issue presented here on review, as required by RAP 10.3(e), is detailed in their motion for leave to submit an amicus brief and is not repeated here. That motion is incorporated herein by reference.

The present case addresses a significant question on the admissibility of the expert testimony of Dr. Allen Tencer on the force experienced in automobile accidents and its biomechanical effect. As much as what this case is about, it is also important to note what it is *not* about. This is *not* a case involving Dr. Tencer's expert credentials. Moreover, it is *not* a case about whether Dr. Tencer's testimony involves novel scientific issues. Additionally, although the amici here are insurers, there is nothing inherently pro-plaintiff or pro-defense about biomechanical evidence. It may be introduced in a variety of civil settings to advance the position of litigants.<sup>1</sup>

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<sup>1</sup> As noted in 46 Am. Jur. *Trials* 631 *The Use of Biomechanical Experts in Product Liability Litigation* in § 2:

Counsel in products liability cases are concerned with how the accident occurred and whether there was a causal connection between the alleged defect and the injury. These issues require scientific and technical testimony frequently beyond the understanding of the jury. A biomechanical expert can clarify these complex issues for the jury with a biomechanical analysis of the product and accident. A biomechanic's analysis is an analytical way to prove or disprove causal relationships between the injury and product defect. In analyzing such cases, biomechanical engineers focus on occupant injuries of particular

The decisions of this Court in interpreting the evidentiary rules pertaining to the testimony of expert witnesses, ER 702-05, express a liberal view on the admissibility of expert testimony. Consistent with that liberal perspective, Dr. Tencer's testimony assists triers of fact in understanding the biomechanical effect of forceful impacts in collisions such as automobile accidents and should be admissible here, as both the trial court and the Court of Appeals determined.

B. STATEMENT OF THE CASE

The Carriers acknowledge the recitation of the facts in the opinion of the Court of Appeals and the statements of the case in the parties' briefing in the Court of Appeals and this Court. The Carriers are not providing a separate statement of the case and will reference the record in their argument where appropriate.

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biomechanical significance, the type of impact, and reconstruction in terms of product factors and kinematics. The purpose of the analysis is to detail the injuries, the contacts producing the injury, and the occupant kinematics responsible for the injury producing contact. Biomechanical engineers will analyze the structural component and determine why it failed or broke.

The use of a biomechanical expert in products liability litigation can be extremely useful. Through their testing procedures, biomechanical experts can clarify, explain, and simplify complex scientific and technical issues for the jury. Biomechanics analysis of the product and the accident can help the jury determine whether the product was, in fact, defective and whether the accident could have occurred as plaintiff alleges. *Therefore, retention of a biomechanical expert should be considered when prosecuting or defending a products liability case.*

(emphasis added).

### C. SUMMARY OF ARGUMENT

Washington law on the admission of expert testimony, ER 702-05, has generally expressed a liberal policy in favor of its admission. The trial courts have broad discretion on the admission of such testimony, and such decisions are overturned only for clear-cut abuse of that discretion by trial courts.

The decisional law has summarized the requirements for admission of expert testimony as: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? The first two requirements are not at issue here.

On the third requirement, construed broadly in Washington in favor of admission, the trial court did not abuse its discretion in determining that Dr. Tencer's testimony on the force of the impact and its biomechanical impact on Ms. Johnston-Forbes was admissible in light of Court of Appeals decisions in our state and the better-reasoned decisions from courts in other jurisdictions.

### D. ARGUMENT

- (1) Washington Has a Liberal Rule for the Admission of Expert Testimony

Washington law on the admissibility of expert testimony is set forth in four core rules. ER 702 generally establishes when expert testimony may be utilized at trial:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

ER 704 authorizes an expert to testify on an ultimate fact issue the trier of fact must resolve:<sup>2</sup>

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

ER 703 allows an expert to base his or her testimony on facts received before the hearing in the case and may even include facts not otherwise admissible:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

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<sup>2</sup> An expert may testify on an ultimate issue for the trier of fact so long as the expert does not render a legal conclusion. *Davis v. Baugh Indus. Contractors, Inc.*, 159 Wn.2d 413, 420-21, 150 P.3d 545 (2007) (expert could testify to “hazardous condition” and existence of “zone of danger” in tort case).

ER 705 indicates that an expert need not disclose the facts on which his or her opinion is based, although the court may require their disclosure and the expert may be subject to cross-examination on them.

These rules of evidence closely follow parallel rules in the federal rules of evidence. This Court has long perceived that ER 702-05 express a liberal policy on the admissibility of expert testimony.<sup>3</sup>

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<sup>3</sup> As Professor Teglund stated:

The Evidence Rules reflect the widely-held view that a reasoned evaluation of the facts is often impossible without the proper application of scientific, technical, or specialized knowledge. Expert testimony is expressly permitted under Rule 702, and the normal rules requiring a witness to avoid opinionated testimony and to testify from firsthand knowledge are modified to accommodate the testimony of the expert.

Rule 702 permits expert testimony, opinion or otherwise, in order to assist the trier of fact in understanding the evidence or issues. The rule gives the trial court considerable discretion in determining the circumstances under which expert testimony will be allowed. Prerule Washington cases are generally in accord.

Testimony admissible under Rule 702 is not limited to scientific matters. The rule refers, very broadly, to testimony based upon "scientific, technical, or other specialized knowledge." Further, the rule refers to an expert as a person qualified as such by "knowledge, skill, experience, training, or education." Thus the rule contemplates testimony from traditional expert witnesses such as physicians, physicists, and architects, as well as from other skilled witnesses such as bankers, engineers, criminologists, and the like.

The admissibility of expert testimony under Rule 702 will depend upon whether the witness qualifies as an expert and upon whether an expert opinion would be helpful to the trier of fact.

5B Karl B. Teglund, *Wash. Practice Evidence* (5th ed.) at 39.

This stance on the admission of expert testimony is particularly noteworthy in the auto accident setting where modern

Since *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984), this Court has employed a three-part test to determine if expert testimony is admissible: (1) is the witness qualified to testify as an expert? (2) is the expert's theory based on a theory generally accepted in the scientific community? and (3) would the testimony be helpful to the trier of fact? *Accord, Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

In applying this test, trial courts are afforded wide discretion and trial court expert opinion decisions will not be disturbed on appeal absent a "very plain abuse" of such discretion. *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012).

(2) Two of the Three Elements of the Test for Admission of Expert Testimony Are Not Before the Court

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Washington case law more frequently sees expert testimony as assisting the trier of fact:

Assuming the witness qualifies as an expert and has a reasonable basis for an opinion, it seems likely that the witness's opinion would be helpful in resolving questions of speed, point of impact, and the like. To conclude otherwise is to overestimate the ability of the jury to draw an informed conclusion from the facts presented. Perhaps in recognition of this fact, the more recent cases reflect a trend towards greater admissibility of expert opinion in accident cases.

Thus, more recent cases hold that an expert may estimate speed on the basis of skid marks. Likewise, an expert may give an opinion as to the point of impact, based upon observations of the scene of the collision after the accident.

*Id.* at 116-17.

In this case, the first two elements of the test are not at issue. In her petition for review, Johnston-Forbes has not raised an issue pertaining to Dr. Tencer's credentials, even though she contended below that Dr. Tencer's lack of licensure as an engineer foreclosed his testimony. Br. of Appellant at 28-33.

In any event, Washington has taken a liberal perspective on experts' credentials, concluding that experience can "credential" a witness. Op. at 9.<sup>4</sup> For example, in *Saldivar v. Momah*, 145 Wn. App. 365, 397-99, 186 P.3d 1117 (2008), *review denied*, 165 Wn.2d 1049 (2009), the Court of Appeals found that the trial court abused its discretion in categorically excluding the testimony of Professor Karil Klingbeil, the former director of social work and founder of Harborview Medical Center's Sexual Assault Center, that the plaintiff suffered from post-traumatic stress disorder. The trial court had concluded the Klingbeil, who has an MSW (master's in social work), could not testify on a psychiatric condition. The Court of Appeals, however, reaffirmed the principle in Washington that social workers may testify regarding mental conditions so long as such

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<sup>4</sup> Here, not only did Dr. Tencer have extensive experience, his academic credentials were impressive, holding a PhD in mechanical engineering. He also taught for 23 years at the University of Washington School of Engineering and its Medical School, he conducted federally-funded research on automobile crash investigations, and published on the forces involved in low speed impacts. RP III:297-310.

testimony did not constitute an assessment of the victims' credibility. *Id.*

at 398. The court stated:

Here, because PTSD causes a person to be “overwhelmed,” “confused,” and “in disarray mentally,” it is relevant to explain one possible reason for Perla’s apparent inability to tell a consistent story. CP at 440. But the trial court categorically excluded Klingbeil’s testimony, finding that “[she] was not qualified to opine on psychiatric conditions” (CP at 408) and that with “a master of social work ... was in no way qualified to make any kind of diagnosis of [PTSD].” CP at 408. But our Supreme Court has held that social workers may render opinions on the existence of mental disorder because it is clearly within their scope of practice. *See A.S.*, 138 Wash.2d at 917-18, 982 P.2d 1156. Klingbeil’s graduate education in social work and her years of experience qualify her to render an opinion about whether or not Perla suffered from PTSD and how it might have affected her ability to “act” like a victim. *See A.S.*, 138 Wash.2d at 917-18, 982 P.2d 1156; *see also, Stevens*, 58 Wash. App. at 496, 794 P.2d 38.

Notably, our Supreme Court has previously held that Klingbeil is qualified to diagnose victims of domestic violence as suffering from battered woman’s syndrome, a subcategory of PTSD. *See State v. Ciskie*, 110 Wash.2d 263, 279, 751 P.2d 1165 (1998); *see also, Allery*, 101 Wash.2d at 596, 682 P.2d 312. And there is a reasonable correlation between victims of domestic violence displaying symptoms of PTSD and victims of sexual abuse displaying symptoms of PTSD. Because under ER 702, Klingbeil is a qualified expert through her education and experience, the trial court abused its discretion when it ignored Klingbeil’s experience and held categorically that her masters in social work degree disqualified Klingbeil as an expert and refused to allow her to testify that Perla suffered from PTSD and discuss its effects.

*Id.* at 398-99.

Similarly, this Court's recent decision in *Katare* also made clear that a focus only upon an expert's licensure in a particular field with respect to credentials would be an abuse of discretion. In *Katare*, this Court rejected a party's insistence that an attorney of 17 years experience in child abduction cases was not qualified to testify regarding the risk factors for child abduction and the consequences of a possible abduction to India:

Brajesh alleges Berry, the expert called by Lynette at the second remand hearing, was not qualified to testify as an expert on risk factors for child abduction or to attest to the consequences of abduction to India. An expert may not testify about information outside his area of expertise. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wash.2d 50, 104, 882 P.2d 703, 891 P.2d 718 (1994). While Berry's formal education was not related to child abduction, an expert may be qualified by experience alone. ER 702. Berry had 17 years of experience in the field of child abduction, during which he participated in related organizations, attended numerous conferences, consulted with governmental entities, and testified as an expert in other abduction cases. Given the length and range of Berry's experience, it was not an abuse of discretion for the court to have concluded that his testimony would be helpful.

*Katare*, 175 Wn.2d at 38-39.

To the extent that Johnston-Forbes contends that Dr. Tencer is not qualified to render a medical opinion, that position is not consistent with the trend in the law. The modern trend is not to impose per se limitations on the testimony of otherwise qualified non-physicians, as practical

experience may suffice to qualify an expert. *Breit v. St. Luke's Memorial Hosp.*, 49 Wn. App. 461, 464-65, 743 P.2d 1254 (1987). (“...the modern trend in the law is not to impose per se limitations on the testimony of otherwise qualified non-physicians, i.e. less reliance on formal titles and degrees.”). Accident reconstructionists, including engineers, have generally been allowed to testify about accidents and whether they believe that the accidents can cause injury. *E.g.*, *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25, 27-28 (1st Cir. 1992); (engineering expert allowed to testify regarding implications of x-ray results for accident); *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 844-45 (3rd Cir. 1981) (auto safety engineer qualified to testify on window system in van in support of plaintiffs’ contention of better alternatives for product at issue in case). Washington courts have, for example, even permitted expert testimony on a computer program that reconstructed an accident, estimating vehicle speeds involved. *State v. Phillips*, 123 Wn. App. 761, 770-71, 98 P.3d 838 (2004), *review denied*, 154 Wn.2d 1014 (2005). Division II concluded in *Ma'ele v. Arrington*, 111 Wn. App. 557, 561, 45 P.3d 557 (2002) that Dr. Tencer’s testimony did not constitute medical testimony but was relevant on causation.

Further, the second element of the test, the element that largely incorporates the so-called *Frye* test for novel scientific evidence,<sup>5</sup> is not at issue here. The Court of Appeals concluded this issue was not preserved by Johnston-Forbes:

Johnson-Forbes did not challenge Tencer's testimony below as being not generally accepted in the scientific community; nor did she request a *Frye* hearing. We do not consider an issue a party raises for the first time on appeal unless that party demonstrates it involves a manifest error affecting a constitutional right. RAP 2.5(a)(3). More specifically, a party who fails to seek a *Frye* hearing below does not preserve this evidentiary challenge for review. *In re Det. of Post*, 145 Wn. App. 728, 755, 187 P.3d 803 (2008), *aff'd*, 170 Wn.2d 302, 241 P.3d 1234 (2010). Accordingly, we do not further address Johnston-Forbes' *Frye* challenge to Tencer's expert testimony.

Op. at 5.<sup>6</sup> Johnston-Forbes has not challenged this facet of the Court of Appeals decision anywhere in her petition for review, so that this issue is

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<sup>5</sup> In *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), a case involving lie detector results, the court ruled that evidence deriving from a scientific theory is admissible only if the underlying theory has gained general acceptance in the relevant scientific community. Washington has adhered to *Frye*. *State v. Martin*, 101 Wn.2d 713, 684 P.2d 651 (1984) (evidence derived from hypnosis); *State v. Canaday*, 90 Wn.2d 808, 812-13, 585 P.2d 1185 (1978) (breathalyzer results); *State v. Woo*, 84 Wn.2d 472, 572 P.2d 271 (1974) (polygraph results).

Washington rejected the federal approach to scientific evidence established in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). See *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996) (adhering to the *Frye* analysis, Court permits admission of expert testimony on DNA testing).

<sup>6</sup> Washington has expressed a liberal stance on the use of expert opinions in the auto accident setting in any event. See, e.g., *Phillips*, 123 Wn. App. at 770-71 (computer program used to reconstruct accident and estimate speed satisfied *Frye*). This Court has also made it clear that the *Frye* analysis is not necessary where the theory and

not now before this Court. RAP 13.7(b); *State v. Leyda*, 157 Wn.2d 335, 340, 138 P.3d 610 (2006) (Court will generally not consider issue raised for first time in supplemental brief). In any event, Dr. Tencer's testimony satisfies *Frye* as being generally accepted in the scientific community. *Ma'ele*, 111 Wn. App. at 562-63.

Consequently, the sole issue before this Court is whether Dr. Tencer's testimony would be helpful to the trier of fact. Evidence is helpful if it concerns matters beyond the common knowledge of lay people and does not mislead the trier of fact. *State v. King County Dist. Court West Div.*, 175 Wn. App. 630, 638, 307 P.3d 765, review denied, 179 Wn.2d 1006 (2013). This is an issue that is construed "broadly" in Washington and will favor admissibility in doubtful cases. *Philippides*, 151 Wn.2d at 393; *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001); *State*, 175 Wn. App. at 638.

(3) Dr. Tencer's Testimony Assisted the Trier of Fact

Expert testimony on the force experienced in auto collisions and its biomechanical effect has been the subject of decisional law in Washington and other jurisdictions.

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methodology employed by the expert to reach an opinion is generally accepted in the scientific community. *Anderson v. Azko Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). Johnston-Forbes has not denied that the theory and data measurement used in biomechanical testimony are generally accepted in the scientific community.

(a) Washington Law

The parties have spent considerable time analyzing the Court of Appeals decisions addressing the admissibility of expert testimony on the force in auto collisions and its biomechanical effect. The Carriers do not intend to duplicate the arguments of the parties. Suffice it to say, however, that the Court of Appeals opinion below correctly discerns that a trial court does not abuse its broad discretion on expert testimony in admitting testimony such as Dr. Tencer's here. Op. at 11.

The Court of Appeals opinion is consistent with Division II's well-reasoned opinion in *Ma'ele* that has been the law in Washington for more than a decade. No case since *Ma'ele* has disagreed with its conclusion that a biomechanical expert's testimony on the impact of low-speed auto collisions comports with *Frye*. The determination in *Ma'ele* and in the Court of Appeals decision below that Dr. Tencer was qualified and his testimony was admissible comports with Washington's liberal view of the admissibility of expert testimony. Division I's decision in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) pointedly did not purport to overrule *Ma'ele* on the fact that biomechanical evidence met *Frye*. *Id.* at 18-19. It only concluded that under its particular facts, Dr. Tencer's testimony did not assist the trier of fact because that testimony allegedly was misleading on the issue of causation where Dr. Tencer testified that he

was not offering an opinion on whether the plaintiff was injured but a jury could infer such an opinion from his testimony. As noted *infra*, the *Stedman* court's analysis on causation is an outlier view and inconsistent with *Ma'ele*.

(b) Other Jurisdictions

To provide appropriate perspective for the Court in its analysis of the Court of Appeals opinion below in light of *Ma'ele*, *Stedman*, and *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014), this Court should consider the decisional law of other jurisdictions that has found biomechanical testimony to aid the trier of fact.

The better-reasoned authorities from other jurisdictions conclude that the expert may give an opinion that touches upon medical issues and may testify whether an accident is sufficiently severe to cause the injury claimed by party.

In *Person v. Shipley*, 962 N.E.2d 1192 (Ind. 2012), the Indiana Supreme Court determined that an engineer was qualified to provide biomechanical testimony concerning an accident, including the calculation of momentum transfer in an accident and the causation of injuries. There, the witness had a degree in biomechanics that covered the musculoskeletal system. He had 12 years of experience in reviewing similar cases. He

testified that he had studied much literature as to velocity and changes in speed based upon force.

Similarly, biomechanical engineering testimony was allowed by the court in *Baerwald v. Flores*, 930 P.2d 816 (N.M. App. 1997), *cert. denied*, 122 N.M. 589 (1997). The defense expert in that case testified about the forces involved in the accident based on pictures of the vehicles and the damage caused by the accident. He further testified that it was unlikely that the accident could cause a temporomandibular joint injury. The New Mexico Court of Appeals rejected an effort to exclude the expert's testimony because he lacked an engineering license. Moreover, although the plaintiff argued that biomechanical testimony was "junk science," the court found that other courts around the country have admitted causation testimony from biomechanical engineers. The expert was further allowed to discuss medical articles on which he relied in formulating his opinion. *See also, Stanul v. State*, 870 S.W.2d 329, 331 (Tex. App. 1994) (biomechanic expert testified in child abuse case as to amount of force required to cause certain injuries); *Gainsco County Mutual Ins. Co. v. Martinez*, 27 S.W.3d 97, 105 (Tex. App. 2000) (biomechanical expert testified as to speed and force of impact, based in part upon amount of damage to vehicle); *Boutte v. Kelly*, 863 So. 2d 530, 541 (La. App. 2003), *writ denied*, 874 So. 2d 172 (La. 2004) (plaintiff

presented testimony of biomechanical expert that plaintiff's injury pattern was consistent with seatbelt that did not function properly); *Hansen v. Roberts*, 299 P.3d 781 (Idaho 2013) (trial court did not abuse its discretion in admitting testimony of biomechanical expert concluding that an adequate foundation was laid at trial for the admission of the expert's testimony).

With respect to biomechanical expert testimony on the issue of causation, the court in *Valentine v. Grossman*, 724 N.Y.S.2d 504 (N.Y. App. Div. 2001) allowed such testimony. There, the plaintiff claimed personal injuries as a result of a motor vehicle accident that took place when the defendant's vehicle struck the plaintiff's vehicle. At trial, the defendant called two biomechanical engineers to testify that the force generated in the accident was not sufficient to cause the plaintiff's herniated disk. The plaintiff requested a *Frye* hearing to determine the admissibility of the expert testimony, specifically, whether the scientific methods used by these experts were valid.

The trial court allowed the testimony of the first biomechanical engineer who testified that the accident subjected the plaintiff to a 3.6 F-force. The second biomechanical engineer testified there was not enough force to cause a herniated disk. He came to this conclusion by adopting the calculations of the first biomechanical engineer, in addition to relying

on studies that applied a 3.2 G-force to living people, and a 3.6 G-force or greater to dummies, cadavers, and animal tissue. He correlated those forces to the plaintiff's injuries and testified the difference between 3.6 G-force and 3.2 G-force was negligible. The trial court rejected the second expert's testimony on relevancy grounds (although it found that the conclusions were valid), concluding that not only were the studies involving living people irrelevant because only a 3.2 G-force was applied, but the other studies were also irrelevant because they did not use living people.

The New York appellate court held it was an error to exclude the second biomechanical engineer's testimony on relevancy grounds because the expert testified that the difference between the force applied in the studies conducted on living people versus the actual accident itself was not significant. The testimony was relevant because it was probative on the central issue in the case and "tended to make the defendant's contention, that the accident was not severe enough to have caused the injuries sustained, more probable" (internal citation omitted). *Id.* at 573.

In *Daddona v. Thind*, 891 A.2d 786, 808-09 (Pa. Cmwlth. 2006), *appeal denied*, 909 A.2d 306 (Pa. 2006), the appellate court upheld the admissibility of the biomechanical expert's testimony on causation.

Similarly, in *Wilson v. Rivers*, 593 S.E.2d 603 (S.C. 2004), the South Carolina Supreme Court concluded that a biomechanical expert was qualified to testify on the cause of an injury, *id.* at 605-06, and reversed a trial court determination that the expert's testimony should be rejected under South Carolina's ER 403. *Id.* at 606. In particular, the court noted that any defects in the expert's education and experience went to the weight of his testimony, not its admissibility. *Id.* at 605.

These foreign authorities are fully in accord with the decision of the *Ma'ele* court that biomechanical evidence is not "junk science" under *Frye*, and the decision of the Court of Appeals below that a biomechanical expert like Dr. Tencer is not only qualified to testify, such testimony affirmatively assists the trier of fact in addressing issues such as causation that a jury faces in a low-impact automobile accident.

.....

In this case, the trial court correctly determined that Dr. Tencer's testimony would aid the trier of fact. The trial court was careful in limiting the scope of Dr. Tencer's testimony. *Op.* at 3-4. Moreover, counsel for Matsunaga carefully limited the scope of Dr. Tencer's testimony as well. *Id.* at 3. Johnston-Forbes aggressively cross-examined Dr. Tencer. *Op.* at 4. Ultimately, Dr. Tencer did not testify as to whether Johnston-Forbes' injury occurred, but rather he confined his analysis to

the forces she likely experienced in the collision. Op. at 4. That assisted the trier of fact, given our courts' "broad" assessment of that facet of the test for the admission of expert testimony in Washington.

E. CONCLUSION

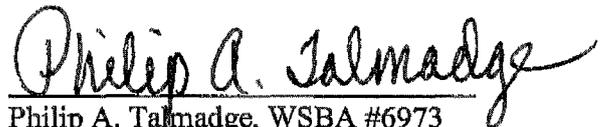
The Court of Appeals was correct in determining that the trial court here did not abuse its discretion in admitting the expert testimony of Dr. Allan Tencer on the force in automobile collisions and its biomechanical effect under Washington's liberal treatment of the admission of expert testimony.

Dr. Tencer's testimony here was appropriate as it advanced the trier of fact's understanding of how an automobile accident affects its participants.

This Court should affirm the decision of the Court of Appeals.

DATED this ~~21<sup>st</sup>~~ day of April, 2014.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion for Leave to File Brief of Amici Curiae and the Amici Curiae Brief of Government Employees Insurance Co., Farmers Insurance Co. of Washington, and Progressive Casualty Insurance Co. in Supreme Court Cause No.89625-9 to the following:

Michael H. Bloom  
One Centerpointe Drive, Suite 570  
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Douglas Foley & Associates, PLLC  
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Original emailed for filing with:  
Washington Supreme Court  
Clerk's Office  
415 12<sup>th</sup> Street W  
Olympia, WA 98504-0929

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

DATED: April 29, 2014, at Tukwila, Washington.

  
\_\_\_\_\_  
Irelis Colon, Paralegal  
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Tuesday, April 29, 2014 10:43 AM  
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Rec'd 4-29-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

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Dear Clerk:

Attached please find a Motion for Leave to File Brief of Amici Curiae and an Amici Curiae Brief for the following case:

**Case Name:** *Johnston-Forbes v. Matsunaga*

**Supreme Court Cause No.:** 89625-9

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