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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89625-9

(Court of Appeals no. 43078-9-II)

CATHY JOHNSTON-FORBES,

Petitioner,

v.

DAWN MATSUNAGA,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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INTRODUCTION

Allen Tencer's testimony was offered for one purpose – to tell the jury that this collision was not capable of causing Ms. Johnston-Forbes' injuries. Although he did not use those exact words, by opining that the forces experienced in the collision were so low – less than what one would experience during activities of daily living – his clear message was that Johnston-Forbes could not have been injured in this accident. The question on this appeal is whether Tencer should be permitted to give such an opinion. Division Two says yes; Division One says no.

SUMMARY OF ARGUMENT

Plaintiff advances four contingent arguments why Division One's reasoning is more persuasive than Division Two's. First, Tencer lacks the medical qualifications necessary to give an opinion on the cause of an injury. And even if he was qualified, he failed to review the medical records necessary to make such an opinion. Second, Tencer's opinion rests on a shaky foundation – the second hand reports from individuals involved in other collisions. Third, Tencer's opinion is nothing more than a general observation about the association between low speed collisions and the occurrence of injuries, and that has no relevance to the specific facts of this case. Fourth, and finally, if Tencer's general causation opinion has any probative value, it is outweighed by its confusing, misleading and unfairly prejudicial nature.

A. Tencer lacks the medical qualifications necessary to give an opinion on the cause of an injury

Whether this accident caused or contributed to any of plaintiff's injuries is a medical opinion that must be established with medical testimony. Tencer concedes that he is not qualified to give such opinion – whether the accident caused or contributed to plaintiff's injuries. Thus, Tencer's opinion that the forces generated in the collision were too low to cause plaintiff's injuries should not have been admitted.

Simply because Tencer avoids using terms such as “medical probability” or “injury,” that does not transform his causation opinion into one that is not “medical in nature.” Tencer's opinion describes how a trauma, the collision forces, affects the tissue of a human being, Johnston-Forbes. That is a medical opinion that Tencer is not qualified to give.

B. Tencer's opinion is speculative because it rests upon an unreliable foundation – the second hand reports from individuals involved in other collisions

Tencer's opinion is based in great part on his group-based studies – what other test occupants reported experiencing in comparable test collisions. ER 403, however, prevents experts from relying upon test collisions to offer opinions about real-life accidents unless the tests were conducted under circumstances substantially similar to those being litigated. But given the vast number of variables involved in real-life accidents, including the differences among bodies and their response to

trauma, Tencer cannot meet the “substantially similar” burden.

C. Tencer’s opinion only addresses the frequency in which injuries occur in collisions in general, and that is not relevant to the specific facts of this case

Tencer’s opinion that plaintiff’s body likely did not suffer harmful forces in the collision is based on observations and studies of what other occupants reportedly experienced in supposedly similar collisions. The frequency in which injuries occur in collisions in general is not relevant to the specific facts at hand. What is relevant here is whether this particular collision in fact caused plaintiff’s specific injuries, and Tencer’s general opinion does not address that.

D. The probative value of Tencer’s opinion is outweighed by its confusing, misleading and unfairly prejudicial nature

If Tencer’s general causation opinion has any probative value, it is outweighed by its confusing, misleading and unfairly prejudicial nature. Tencer conflates causation in general – the frequency in which injuries occur in low speed collisions – with whether this particular collision caused plaintiff’s specific injuries. The jury is misled into believing that because, in general, the probability of an injury occurring in any low speed collision in general is “not likely,” the probability that Johnston-Forbes suffered an injury in this collision is also “not likely.” The fallacy of logic creates the misimpression that plaintiff has failed to meet her burden to prove causation. ER 403.

TENCER'S OPINION

Tencer opined that the forces Johnston-Forbes experienced in this collision were likely low – comparable to what one would experience during activities of daily living:

Since the forces acting on Ms. Johnston-Forbes in this accident were low, relative to forces experienced in daily living, my conclusion is that the accident is not a likely source of significant forces acting on Ms. Johnston-Forbes' body.

CP 29.

Tencer expanded on what he meant by low forces “relative to forces experienced in daily living” by explaining that the forces that Johnston–Forbes’ “body could feel during impact” were less than what one would feel walking “down stairs” or “jogging.” 3 RP 325-26.

During cross examination, Tencer explained that what he measures is the “deformation” of tissue:

It's important for me because what I measure actually is how much tissue stretch.

3 RP 358.

The factual basis for Tencer's opinion was the property damage to defendant's vehicle's bumper shown in photographs taken some years after the collision. 3 RP 313-14. He also relied upon his group-based studies – observations and studies of what other test occupants reportedly experienced in supposedly similar collisions. 3 RP 325-26; 3 RP 372-86.

ARGUMENT

The admissibility of expert testimony in Washington is governed by ER 702, which provides:

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

ER 702 involves a two-step inquiry. The court must determine first whether the witness qualifies as an expert; and, second, whether the expert testimony would be helpful to the trier of fact. *See, e.g., State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747 (1994). Tencer's testimony and opinions fail both of ER 702's requisites.

A. Tencer lacks the medical qualifications necessary to give an opinion on the cause of an injury

1. The cause of human injury is a medical opinion that must be established by medical testimony

This Court has made clear that determining whether an accident caused or contributed to any of plaintiff's injuries is a medical opinion that must be established by medical testimony:

The causal relationship of an accident or injury to a resulting physical condition must be established by medical testimony beyond speculation and conjecture. The evidence must be more than that the accident "might have," "may have," "could have," or "possibly did," cause the physical condition. It must rise to the degree of proof that the resulting condition was probably caused by the accident, or that the resulting condition more likely than not resulted

from the accident, to establish a causal relation.

Miller v. Staton, 365 P.2d 333, 337, 58 Wn.2d 879 (1961); accord *Harris v. Groth*, 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (“expert [medical] testimony will generally be necessary to establish the standard of care and most aspects of causation”) (bracketed language added for context) (citations omitted); *Bennett v. Department of Labor & Indus.*, 95 Wn.2d 531, 533, 627 P.2d 104 (1981) (“The causal connection between a claimant’s physical condition and his employment must be established by medical testimony.”).

In addition, “medical opinion testimony that an accident caused a physical condition ‘must rise to the degree of proof that the resulting condition was probably caused by the accident, or that the resulting condition more likely than not resulted from the accident, to establish a causal relation.’” *Medcalf v. Dep’t of Licensing*, 133 Wn.2d 290, 310-11, 944 P.2d 1014 (1997); accord *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603, 260 P.3d 857 (2011) (“Expert medical testimony must meet the standard of reasonable medical certainty or reasonable medical probability.”).

That does not mean that a medical witness must possess a medical degree or license to testify. *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 172, 110 P.3d 844 (2005) (referring to medical expertise required in

malpractice action). But it does require that the witness have a solid familiarity with the diagnosis and treatment of the injury at issue. *Cf. Colwell v. Holy Family Hosp.*, 104 Wn. App. 606, 15 P.3d 210 (2001) (nurse not qualified to testify about causation in a medical malpractice case; testimony from a licensed physician was required).

At the trial level, this case was decided under *Ma'ele v. Arrington*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002). *Ma'ele* held that Tencer's causation opinion "was not a medical opinion," that Tencer was entitled to testify "that the maximum possible force in this accident was not enough to injure a person" and that "the jury was entitled to infer from his testimony that Ma'ele was uninjured in the crash." *Id.*

In the decision below, Division Two appears to have expressed reservations about its earlier holding that Tencer's opinion is not a medical opinion:

[W]e have previously held Tencer's testimony – that "the maximum possible force in [the] accident was not enough to injure a person" – was not a "medical opinion." *Ma'ele v. Arrington*[.] Because Tencer provided no such testimony here, we do not need to address whether that holding remains good law.

App. A at 7 (Citation to *Ma'ele* omitted). Given Tencer's admission in *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012)¹ and his

¹ In *Stedman*, the court noted that in Tencer's declaration, he agreed that he could not provide an opinion on whether the collision caused Stedman's injury. He claimed, however, that was not what he was doing:

concession here, that such an opinion is a medical opinion, that he is not qualified to give, Division Two's reservations are not surprising.

In the context of a personal injury action, determining a cause of human injury requires medical expertise. One of the bedrock foundations of tort law is that a tortfeasor "takes the plaintiff as he finds him." *Derheim v. N. Fiorito Co.*, 80 Wn.2d 161, 168, 492 P.2d 1030 (1972). At the core of that principle is the universal truth that every human being is unique and that different human beings respond differently to the same trauma. Put simply, medical doctors are qualified – indeed, uniquely qualified – to offer opinions as to medical causation; biomechanical engineers like Tencer are not.

2. Ruling out trauma as a cause of injury is a medical opinion that requires a medical expert

Division Two attempts to avoid Tencer's lack of medical qualifications by now stating that his "testimony is not medical in nature" and that his conclusion "that the collision was not likely the source of significant forces acting on Johnston-Forbes' body" is not a "medical opinion." App. A at 6.

Division Two is in error. Tencer's opinion goes well beyond

Tencer declared that he agreed with the ruling in *Schultz* and that his testimony was different because "I ... have never described any threshold for injury in my opinions."

Stedman, 172 Wn. App. at 20.

describing the forces generated in a collision. He describes how a trauma, the collision forces, affects a human being, Johnston-Forbes. He not only describes what Johnston-Forbes' "body could feel during impact" as insignificant, but he compares the effect of the force as similar to what she would feel while performing activities of daily living, and less than what she would feel while walking "down stairs" or "jogging." 3 RP 325-26.

How trauma affects a human being is an opinion based in medicine – not a calculation arrived at with the aid of math and physics. Simply because Tencer avoids using terms such as "medical probability" or "injury," that does not transform his causation opinion into one that is not "medical in nature."

Moreover, by comparing what Johnston-Forbes' body felt during impact to what one feels during activities of daily living, Tencer's unmistakable message is that the amount of forces generated in the collision were too low to cause injury.

The *Stedman* court agreed, stating that by making such comparisons, Tencer's

clear message was that ... the forces generated by the impact were not sufficient to cause the type of injuries Stedman was claiming.

Stedman, 172 Wn. App. at 20.

Here, too, the clear implication of Tencer's testimony is that the

amount of forces generated in the collision were not sufficient enough to damage Johnston-Forbes' body tissues. In fact, Tencer all but admitted that during cross examination, stating what he measures is the "deformation" of tissue:

It's important for me because what I measure actually is how much tissue stretch.

3 RP 358.

Describing how trauma affects the human body and how the human body responds to trauma are medical opinions that Tencer concedes he is not qualified to give.

From a medical standpoint, there is no difference between an opinion that a trauma is the cause of an injury and an opinion that the trauma is not the cause of an injury. Both are medical opinions, requiring medical testimony, neither of which Tencer is qualified to provide.²

If Tencer is not qualified to diagnose a sprain, strain or herniated disk, he certainly is not qualified to know the threshold level of force necessary to cause a sprain or strain or herniated disk, much less the amount of force necessary to cause those body tissues to stretch.

² *Pon Kwock Eng v. Klein*, 127 Wn. App. 171, 177-78, 110 P.3d 844 (2005) (ruling out potential causes of injury to identify the most probable cause is a well accepted method in the medical field known as differential diagnosis.)

3. Even if Tencer was qualified to give an opinion on medical causation, he failed to review the medical records necessary to give such an opinion

Even if this Court were inclined to find that Tencer possesses the qualifications to give an opinion on medical causation, he failed to review the medical records and medical history necessary to give such an opinion.

The sole factual basis for his opinion was his review of the photographs of the bumper of defendant's Ford Mustang taken some years after the collision. 3 RP 313-14. Tencer did not rely upon Johnston-Forbes' medical records nor her medical history in arriving at his opinion.

Thus, his opinion should be excluded on the additional ground that it lacked the necessary medical foundation that a medical expert would need to determine whether Johnston-Forbes suffered injury in this collision. *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991) ("It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted.").

4. Absent a medical connection, Tencer's opinion on forces is not relevant to cause of injury

Plaintiff is not asserting that testimony like Tencer's can never be relevant. Even though a biomechanical engineer, such as Tencer, lacks the qualifications and foundation to provide an opinion as to whether the collision caused or contributed to any of plaintiff's injuries, his testimony could be relevant if a defense medical expert relied upon the evidence in

forming his causation opinion. ER 703. But absent such a connection, Tencer's testimony is not relevant.³

When Washington adopted ER 703, it formally abandoned the common law requirement that expert witnesses must base their opinions upon facts either personally observed or admitted into evidence.⁴ ER 703 now permits experts to base their opinions on inadmissible data so long as it is "of a type reasonably relied upon by experts in the particular field."⁵

Thus, had defendant's medical expert relied upon Tencer's opinions in forming his causation opinion, Tencer's testimony may have been relevant.⁶ But that did not happen.

³ Even if a medical connection was present, making Tencer's testimony relevant, that does not necessarily mean Tencer's opinion is admissible. Under ER 703, relevance and admissibility are treated as separate issues. See note 6 *supra*.

⁴ ER 703, Judicial Council Task Force Comment; 5 R. Meisenholder, Wash. Prac. § 357 (Supp. 1979).

⁵ ER 703 requires that the experts in the field customarily rely upon the inadmissible evidence in practice. The judicial comment to ER 703 notes that it is not enough "if the expert can show only that he customarily relies upon such material or that it is relied upon only in preparing for litigation." *Id.* The case *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, (E.D.N.Y. 1985) *aff'd*, 818 F.2d 187 (2d Cir. 1987), confirms the comment's language. In *Agent Orange*, some of the expert witnesses relied upon checklists of symptoms prepared by the litigants to form causation opinions. The trial court invoked Rule 703 to exclude the expert opinions, stating that "no reputable physician relies on hearsay checklists by litigants to reach a conclusion with respect to the cause of their affliction." *Id.* at 1246-47.

⁶ But even if defendant's expert had relied upon Tencer's force testimony as a basis for his causation opinion, that would not make Tencer's evidence per se admissible. *In re Det. of Marshall*, 156 Wn.2d 150, 125 P.3d 111 (2005) ("[ER 703] allows expert opinion testimony based on hearsay data that would otherwise be inadmissible in evidence. *** However, 'it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.'" *Id.* 162-63.).

In fact, defendant's medical expert specifically disavowed any relationship between the severity of the crash forces and the likelihood of a neck injury, stating that no credible medical data exists supporting such a relationship:

A. In the studies there was no -- we have no evidence of the effect of crash severity on the development of whiplash associated disorder neck injury. We don't have the data. There's no study that we're able to look at and say, see, this causes it. And that's my opinion based on my reading of the literature.

* * * * *

Q. To summarize, you're saying there just is no credible data to relate crashing of a vehicle to injury of a neck in the occupant. Is that fair?

A. Correct. There's no evidence on the crash severity.

2 RP 275-76. (Dr. Paul Tesar, Defendant's IME physician.).

If defendant's own medical expert testified that the "crash severity" cannot be relied upon in diagnosing the cause of neck injury, then Tencer, who is not a trained medical professional and who did not review plaintiff's medical records, should not be able testify to the contrary.

B. Tencer's opinion is speculative because it rests upon an unreliable foundation – the second hand reports from individuals involved in other collisions

If this Court were to find that Tencer's opinion was not "medical in nature" but instead narrowly limited to forces, his opinion still would not be admissible. The primary basis for Tencer's opinion that plaintiff's body likely did not suffer significant forces in the collision is his group-

based studies – observations and studies of what test participants reported experiencing in supposedly comparable collisions. 3 RP 324-35.

The group-based testing upon which Tencer relies is suspect and unreliable, making his opinion also suspect and unreliable. *Queen City Farms, Inc. v. Cent. Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 103, 882 P.2d 703, 731 (1994) (“Where there is no basis for the expert opinion other than theoretical speculation, the expert testimony should be excluded.”).

ER 403 prevents an expert from using comparable test collisions unless they were conducted under circumstances substantially similar to those being litigated:

[E]vidence concerning such tests, as that now under discussion, should be admitted with care – and only when it appears that the conditions under which the test was made and all of the surrounding circumstances are reasonably comparable to those with which the court is concerned

Quinn v. McPherson, 73 Wn.2d 194, 201, 437 P.2d 393 (1968).

The rule requiring substantial similarity of conditions is meant to prevent admission of evidence which tends to mislead and confuse the jury. *Jackson v. Fletcher*, 647 F.2d 1020, 1027 (10th Cir. 1981). “In many instances, a slight change in the conditions under which the experiment is made will so distort the result as to wholly destroy its value as evidence, and make it harmful, rather than helpful.” *Navajo Freight Lines v. Mahaffy*, 174 F.2d 305, 310 (10th Cir. 1949).

Here we know little about the individual “comparable test collisions” that provide the basis for Tencer’s opinion. We do know that they were not re-creations of the collision involved here. *See, e.g.*, 3 RP 372-86. But more importantly, given the vast number of variables involved in a collision, including the differences among bodies and their response to trauma, it would be nearly impossible for Tencer to meet the “substantially similar” burden.

As pointed out in *Schultz v. Wells*, 13 P3d 846 (Colo App 2000), the purpose behind many of these crash tests was to help in “designing cars,” not for “assessing a threshold of applied force for injury in rear-end car accidents.” *Id.* at 851-52.

Group-based studies involving reports from unknown individuals following collisions conducted under unknown conditions cannot provide the necessary foundation to result in anything but a speculative opinion.

C. Tencer’s opinion addresses the frequency in which injuries occur in collisions in general, and that is not relevant to the specific facts of this case

Tencer’s opinion that plaintiff’s body likely did not suffer harmful forces in the collision is based on observations and studies of what other occupants reportedly experienced in supposedly comparable test collisions. Causation based on group-based statistical associations is a

general causation opinion.⁷ Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 28 cmt. c(1) (2010). It is a concept that is “widely accepted among courts confronting causation issues with toxic agents.” *Id.* at § 28 cmt. c(3). General causation is used to determine whether a causal relationship exists when such a relationship has not been established or recognized, for example, between a toxin or drug and a disease. General causation is only concerned with whether the substance is capable of causing the alleged injury, in general, without regard to the particular facts at hand. Once a strong enough association is proven to conclude a causal relationship exists, then that particular plaintiff must still establish specific causation, that the substance did in fact cause the alleged injury, the traditional “but for” causation standard. *See, e.g., In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1133 (9th Cir. 2002) (applying Washington law).

Tencer’s opinion on the likelihood that plaintiff was injured in this collision is based on the frequency that injuries occurred in his group-based studies. A general causation opinion based on statistical associations has no relevance in traumatic injury cases such as automobile collisions, however. ER 401.

⁷ For example, epidemiological studies are statistically significant and meet the general causation standard if the studies show that exposure to substance doubles the risk of injury.

“Traumatic-injury cases, by contrast [to toxic tort cases], do not require this form of evidence because ... we have a reasonably good understanding of the causal mechanisms involved from trauma to injury.” Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 28 cmt. c(3) (2010). The physiology is well established – it is understood that even low speed automobile collisions are capable of causing injury, as defendant’s own medical expert acknowledged. 2 RP 275-76.

What is relevant in a traumatic injury case is specific causation – would plaintiff have suffered her injuries but for this accident. *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Tencer’s opinion based on the statistical association between low speed collisions and injury is not relevant to that question, however.

Tencer’s opinion is nothing more than the odds in the abstract of any low speed collision resulting in harmful forces to the occupant. His opinion is no different than giving the betting odds of some future event occurring, such as a team winning the Super Bowl – predictive causality.⁸

In fact, Tencer’s opinion does not even rule out the possibility that this collision as a cause of plaintiff’s injury. His opinion, couched in

⁸ “It is important to distinguish causal prediction from causal explanation.” Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1824 (1985). Many writers have confused the betting odds that a person is willing to accept on the existence or nonexistence of a certain fact with the belief that the fact actually exists or not. *See e.g.*, Kaye, *The Paradox of the Gatecrasher and Other Stories*, ARIZ. ST. L.J. 101, 105 (1979).

terms of reasonable probabilities, states nothing more than the association between low speed collisions and injury is less than 51%.⁹ In other words, injury will occur in low speed collisions less than 51% of the time.¹⁰

The disconnect between Tencer's general conclusion derived from his group-based studies and the facts of the case at hand is the very reason that the *Stedman* court found that Tencer's opinion was not "logically relevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident." *Stedman*, 172 Wn App at 19.

Division One is correct. Tencer's opinion is not relevant to whether this particular collision caused plaintiff's specific injury. ER 401, ER 702.

D. The probative value of Tencer's opinion is outweighed by its confusing, misleading and unfairly prejudicial nature

If Tencer's general causation opinion is relevant, it still should be excluded because its probative value is outweighed by its unfairly prejudicial nature. Tencer conflates causation in general – the frequency that a collision will result in injury – with whether this particular collision

⁹ In addressing whether the collision was capable of causing significant force or injury to plaintiff's body, Tencer speaks in terms of absolutes. But the qualifiers in his opinion make clear that he is giving his opinion on a "more probable than not" basis. His entire opinion is prefaced to a degree of reasonable certainty. CP 29. His specific opinion on forces is stated to a degree of probability: "the accident is not a likely source of significant forces acting on Ms. Johnston-Forbes' body." CP 29.

¹⁰ The corollary to his opinion that less than 51% of occupants experience significant forces in low speed collisions is that some – up to 50% – of the occupants do experience "significant forces" in low speed collisions.

caused plaintiff's specific injuries. Although the questions sound similar – what are the chances that a collision will cause an injury and what are the chances that this collision caused plaintiff's injury – they are crucially different. Mixing these probabilities is misleading and causes confusion.

Tencer can only say that, based on his studies, more times than not a low speed collision will not result in injury. But what the jury hears him saying, is that it is unlikely this particular collision caused Johnston-Forbes specific injuries. Thus, the jury is misled into believing Tencer is opining that plaintiff has failed to meet her burden to prove causation. See *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005) (Plaintiff must establish on a more likely than not basis that “the harm [she] suffered would not have occurred but for [collision].”).

The Colorado court, upon which *Stedman* relied, agreed:

[T]he force threshold for probability of injury demonstrated in the test results could not be used to “prove that a particular person was not injured or was likely not injured in this accident.” [Moreover,] presenting [such] a probability theory to the jury ... would be confusing and misleading to the jury.

Schultz v. Wells, 13 P3d 846, 851 (Colo App 2000) (quoting trial court).

Once injury occurs, the probability of an injury occurring in the abstract are no longer relevant. That ship sailed. The causation question is: given plaintiff's injury, what is the probability that this collision was the cause?

Tencer's general causation opinion is misleading and unfairly prejudicial. ER 403. The trial court erred in failing to exclude it.

PROPOSED GUIDELINES

To help guide the bench and bar, plaintiff proposes the following guidelines for personal injury actions:

1. If expert testimony is required to establish the cause of an injury, then the expert must be a medical expert and the opinion must be given to a degree of medical probability.
2. Whether expert testimony about the forces generated in an accident is relevant to the cause of an injury depends upon whether a medical expert relies upon such testimony to establish the cause of an injury. But even if the evidence is relevant, its admissibility is governed by the rules of evidence and ER 703.

CONCLUSION

Based upon the foregoing, plaintiff requests that this Court reverse the trial court's judgment and remand this case to the trial court for a new trial.

Respectfully submitted,

s/ Michael H. Bloom

Michael H. Bloom, WSB # 30845
Attorney for Petitioner

CERTIFICATE

I certify that I mailed a copy of the PETITIONER'S SUPPLEMENTAL BRIEF to Douglas Foley and Vernon Findley, Defendant/Respondent's attorneys, at 13115 NE 4th Street, Ste. 260, Vancouver, Washington 98684, postage prepaid, and via email on April 18, 2014.

s/ Michael H. Bloom

Michael H. Bloom
Attorney for Petitioner

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Dear Clerk:

Attached for filing please find a Petitioner's Supplemental Briefs in *Johnston-Forbes v Matsunaga*, Case No. 89625-9, which is being filed by counsel for Petitioner Johnston-Forbes, Michael H. Bloom, WSBA 30845, 503-223-2608, bloompc@easystreet.net.

Thank you.

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