NO. 89625-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CATHY JOHNSTON-FORBES,

Petitioner,

v.

DAWN MATSUNAGA,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Dawn Matsunaga ("Matsunaga"), the Defendant in the trial court and Respondent in this Court, files this Answer to Cathy Johnston-Forbes ("Johnston-Forbes") Petition for Review.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly determined in *Johnston-Forbes v. Matsunaga*, No. 43078-9-II, 2013 Wash. App. LEXIS 2569 (October 29, 2013) that the testimony of Dr. Allen Tencer was admissible. Johnston-Forbes argues that review is warranted because this decision conflicts with other appellate decisions addressing the testimony of Dr. Tencer. RAP 13.4(b)(2) It does not. The Court of Appeals opinion is consistent with other appellate precedent.

A trial court's ruling to allow the admission of expert testimony is reviewed for abuse of discretion which means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case. *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012). Different results by different courts with unique facts under an abuse of discretion standard for admission of evidence do not compel review.

Review is not warranted under RAP 13.4(b)(3) as there is no significant question of law under the Constitution of the State of Washington or of the United States. Johnson-Forbes makes several new arguments for the first time in Petition for Review. Having failed to present these issues and questions to the trial court or to the Court of Appeals, she cannot raise them now. RAP 2.5(a).

Johnston-Forbes has failed to demonstrate that there is a conflict under RAP 13.4(b)(2) or significant question of law under RAP 13.4(b)(3) under the Washington or United States Constitutions. It is respectfully submitted that this Court should decline review.

III. ISSUES PRESENTED FOR REVIEW

Matsunaga acknowledges the issues that Johnston-Forbes presents for review, but believes they are more appropriately formulated as follows:

1. When the Court of Appeals opinion is consistent with other decisions affirming the right of the trial judge to determine the admissibility of expert testimony under ER 702 and under ER 402 and 403 under the abuse of discretion standard, should review be denied under RAP 13.4(b)(2)?

2. When the Petition does not raise a significant question of law under the Constitution of the State of Washington should review be denied under RAP 13.4(b)(3)?

3. Should this Court decline to consider new issues raised for the first time in Johnston-Forbes' petition for review where the issues were never raised in the trial court or the Court of Appeals and this Court is limited to the questions and theories presented before and determined by those courts?

IV. STATEMENT OF THE CASE

Unlike the Statement of the Case in Johnston-Forbes' petition, the recitation of the facts in the Court of Appeals opinion is an accurate and fair description of the facts and procedure in this case. Op. at 2-6.

A. Background of the Case

This case arose from a low impact rear-end collision. The Toyota rental car in which Johnston-Forbes was riding was rear ended by Matsunaga's Ford Mustang. Johnston-Forbes alleged that she suffered injuries to her neck and back. (CP 117)

Matsunaga admitted that she collided with the vehicle in which Johnston-Forbes was riding, but denied that the forces involved in the collision caused Johnston-Forbes any injury. *Id.* Matsunaga called

Dr. Tencer, as the biomechanical expert, who testified as to the forces involved in the minor impact rear end collision.

B. Jury Verdict and Judgment

Trial was held from September 12 to 15, 2011. The jury rendered a defense verdict. (CP 64) The jury found that the negligence of the defendant was not a proximate cause of injury to the plaintiff. *Id.* Judgment was entered in favor of Matsunaga. (CP 188) The appeal to the Court of Appeals was filed on February 8, 2012. (CP 65)

C. Defense Expert Dr. Allan Tencer

Matsunaga retained Dr. Allan Tencer to testify at trial. Dr. Tencer's qualifications as a biomechanical engineer have been previously recognized by the Court of Appeals. *Ma'ele v. Arrington*, 111 Wn. App. 557, 563, 45 P.3d 557 (2002). Johnston-Forbes in her motion in limine challenged the ability of Dr. Tencer to testify as an engineer in Washington State without a license. This issue was decided in *Ma'ele*.

Dr. Tencer has a doctorate in mechanical engineering. He has been a professor in biomechanical engineering at the University Of Washington School Of Engineering for 23 years and also teaches in

medical school. He has published extensive research relating to the forces involved in low speed impacts. (RP Vol. 3, pgs. 297-310)

Dr. Tencer viewed photographs of the bumper of the Ford Mustang that Matsunaga was driving. (RP Vol. 3, pgs. 313-314) The photos showed the front and underside of the vehicle. (See Exs. 24, 25, 28 and 29) He did not view photographs of the Toyota rental car in which Johnston-Forbes was riding. (RP Vol. 3, pg. 317) The opinions of Dr. Tencer were submitted as an exhibit for Johnston-Forbes' motion in limine, which are set forth below:

> "My opinions to a reasonable degree of Biomechanical Engineering certainty are:
>
> 1) The speed change of the Toyota was in the range of 4.4 mph or less, due to impact from the Mustang, with a peak acceleration (or jolt) of about 2.7g or less.
>
> 2) The bending force produced during impact on Ms. Johnston-Forbes' neck was in the range of 20 ft-lbs, and her lumbar spine experienced about 1.4 g of horizontal acceleration from the seat back.
>
> 3) 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 56. These opinions were presented at trial. (RP Vol. 3, pgs. 311-330)

D. Motions in Limine To Exclude Dr. Tencer

Johnston-Forbes filed motions in limine on September 9, 2011. (CP 8-15) The first motion in limine was to exclude the testimony of Dr. Tencer. There were four other motions in limine filed, which included motions to exclude photographs of Matsunaga's Mustang and to exclude the repair bill for Toyota rental car. *Id.*

Johnston-Forbes' motion in limine to exclude Dr. Tencer was made on three separate grounds, which are set forth below:

> "1. Qualifications – Dr. Tencer is not a licensed engineer and Washington prohibits anyone who is not licensed in Washington from giving engineering opinions.
>
> 2. Foundation – Dr. Tencer only viewed pictures of the defendant's vehicle. He did not examine her vehicle. More importantly, he did not examine any pictures of plaintiff's rental car and never examined that car either. In addition, Mr. Tencer cannot account for how plaintiff's precarious body position at the time of impact would increase her propensity for injury.
>
> 3. Confusing, misleading and prejudicial – Given the lack of foundation and plaintiff's precarious body position at the time of impact, any opinion as to the forces plaintiff's neck experienced at the time of injury is speculative, mislead, and confuse the jury and unfairly prejudice plaintiff." CP 8-9.

Johnston-Forbes did not move to exclude Dr. Tencer as a witness on the grounds of ER 402 Relevancy, or make a request for a *Frye* Hearing. Matsunaga filed her opposition to Johnston-Forbes' motions in limine on September 12, 2012. (CP Supp., pg. 119) Matsunaga argued that under ER 702 a biomechanical expert must have a license. There is no such licensing requirement in Washington, and there is no requirement in ER 702 that an expert must have a license in order to testify. (CP 11) The response of Matsunaga cited *Ma'ele v. Arrington* which expressly approved Dr. Tencer's testimony and opinions. (CP Supp., pgs. 119 -123)

The Court ruled that Dr. Tencer could testify at trial. (RP 28) The trial judge limited his testimony by stating that he could not testify as to the repair bill for the Johnston-Forbes Toyota, and limited the number of photographs of the Matsunaga vehicle. *Id.* The admission of the photographs of the Matsunaga vehicle's front bumper, which showed only a scruff on the bumper, was strongly opposed by Johnston-Forbes. (RP Vol. 1, pgs. 21-25)

E. Concession by Counsel for Johnston-Forbes Stating That Dr. Tencer Could Testify

Despite filing the motion in limine to exclude Dr. Tencer, counsel for Johnston-Forbes conceded in oral argument that Dr. Tencer

could testify about the forces involved in the collision. A review of the transcript will show that counsel for Johnston-Forbes was seeking to exclude photographs of the Matsunaga vehicle, and in a reversal of his previous position, conceded that Dr. Tencer could testify as to the forces involved in the accident, stating:

> "MR. BLOOM: And I don't have -- let me -- I don't have a problem with Mr. Tencer testifying about the forces involved.
>
> THE COURT: Uh-huh.
>
> MR. BLOOM: I mean, he can testify. I still think he has a problem not having some qualifications here and certainly -- but having these pictures being shown to the jury's another matter. And I would -- you know, I'd concede that he can testify, but that doesn't mean he can take the inadmissible evidence and show it to the jury. And these are just so misleading, aside from the fact it's half the equation, is we really don't know.

(RP Vol. 1, pgs. 19-20) Plaintiff's counsel clearly stated his position that Dr. Tencer could testify. He stated that he agreed in three different places in the above trial transcript passage. The trial court fashioned a ruling allowing Dr. Tencer to testify, but limited the use of the photographs and denied the use of the repair bill for the rental Toyota.

There was only one objection during the entire testimony of Dr. Tencer by counsel for Johnston-Forbes. (RP Vol. 3, pg. 316) The objection was for lack of foundation based upon the fact that Dr.

Tencer did not view a photograph of the Toyota in which Johnston-Forbes was riding. Dr. Tencer explained that he did not need to see a photograph of the Toyota for his analysis. (RP Vol. 3, pg. 317) There were no other objections to the testimony of Dr. Tencer at trial.

V. ARGUMENT AGAINST REVIEW

A. Standard of Review

The considerations governing acceptance of discretionary review by this Court are identified in RAP 13.4(b). Johnston-Forbes has based her petition on RAP 13.4(b)(2) and (3).

B. Review Should Not Be Granted Under RAP 13.4(b)(2)

Johnston-Forbes asserts that this opinion is in conflict with other decisions of the Court of Appeals and review should be granted under RAP 13.4(b)(2). The decisions in the Court of Appeals that involve the testimony of Dr. Tencer use the abuse of discretion standard for the trial court's admission of expert testimony. This grants the trial judge wide latitude to provide a fair trial. Different outcomes on the admission of expert testimony are to be expected based upon the broad abuse of discretion standard.

As the Court of Appeals explained in *Johnston-Forbes*, citing the *Stedman* decision, the trial courts can reasonably reach different

conclusions for whether, and to what extent, expert testimony will be helpful to the trier of fact, as shown below:

> "We again emphasize the standard of review for a trial court's decision to allow or to exclude expert testimony: "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Stedman*, 172 Wn. App. at 18."

Op. at 12-13. A review of the Court of Appeals' decisions involving Dr. Tencer shows that the opinions have strongly support the discretion of the trial judge to allow expert testimony and to limit the extent of that testimony.

The first case to consider the admission of Dr. Tencer's testimony was *Ma'Ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). The court found that Dr. Tencer's education and experience qualified him as an expert, and that the trial court did not err in allowing Tencer to testify as an expert. *Id.* at 560-561. In *Ma'Ele*, the court reiterated that the trial court's ER 702 decision is reviewed for abuse of discretion.

It should be noted that the opinion that Dr. Tencer rendered in the *Johnston-Forbes* case was more limited than his earlier opinion expressed in *Ma'Ele.* Here, Dr. Tencer was expressing an opinion

regarding the forces involved in the collision. He did not render an opinion on medical causation. His opinion in *Johnston-Forbes* relating to the forces involved in the collision was very similar to his opinion in *Stedman.*

In *Stedman v. Cooper*, 172 Wn. App. at 8-9, the Court of Appeals affirmed the trial judge's determination that the testimony of Dr. Tencer was to be excluded, with the court finding that it was misleading. *Stedman* and *Johnston-Forbes* can be reconciled. Despite different outcomes, they are consistent in many ways and do not present a true conflict between the divisions of the Court of Appeals.

Both cases upheld the decision of the trial court. *Stedman* did not overrule *Ma'Ele* and emphasized that: "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Id.* at 18.

The Court of Appeals' opinion in *Johnston-Forbes* states that: "[A]s is the case with evidentiary rulings in general, we review a trial court's ER 403 and ER 702 rulings with great deference under a manifest abuse of discretion standard." The *Johnston-Forbes* opinion disagreed with *Stedman* regarding what may be suggested by the

language regarding the relevancy or the inference from Dr. Tencer's force of impact testimony. This disagreement is not a conflict between Division 1 and Division 2 of the Court of Appeals. The *Johnston-Forbes* opinion cites the language contained *Stedman* granting the trial judge a broad range of discretion, with provides a way to harmonize the two decisions, as shown below:

> "**To the extent that the *Stedman* court suggested that the force of impact is always irrelevant or that it is improper for a jury to infer that minimal force did not cause injury in a particular case, we disagree. The force of impact—whether slight or significant—is often relevant in personal injury cases.** *See Murray v. Mossman*, 52 Wn.2d 885, 888, 329 P.2d 1089 (1958) (admission of automobile accident photographs not reversible error because they tended to show "force and direction of the impact" that resulted in injury); *Taylor v. Spokane, P. & S. Ry. Co.*, 72 Wash. 378, 379-80, 130 P. 506 (1913) (photograph properly admitted to show "probable force of the impact" where force of impact was material to whether passenger was actually injured). And there is nothing improper about allowing the jury to draw inferences from evidence explaining force of impact, as well as from other evidence, in determining proximate cause. **We again emphasize the standard of review for a trial court's decision to allow or to exclude expert testimony: "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Stedman*, 172 Wn. App. at 18;**
>
> **¶ 18 Here, we hold that the trial court did not abuse its discretion in denying Johnston-Forbes' motion to**

> **exclude Tencer's force of impact testimony, especially in light of Matsunaga's limiting Tencer's testimony such that he did not offer any opinion about whether the forces in the accident were or were not sufficient to cause injury."** (Emphasis Supplied)
>
> Op. 11-13.

The Court in *Johnston-Forbes* made the same conclusion with regard to finding that the ER 402 and ER 403 rulings by the trial court were proper, and were to be reviewed with great deference under a manifest abuse of discretion standard, as shown below:

> "Finally, Johnston-Forbes contends that Tencer's testimony was not helpful to the jury, as required by ER 702, and that its probative value was "'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,'" in violation of ER 403. Br. of Appellant at 36 (quoting ER 403). Johnston-Forbes focuses her argument on the prejudice she claims she suffered as a result of this testimony: She argues that (1) her "medical evidence that the collision caused her injury was strong"; and (2) had the trial court excluded Tencer's testimony, the jury's verdict would have likely been different, namely in her favor. Br. of Appellant at 39-40. The record does not support her characterization of the proceedings and evidence.
>
> ¶24 Although Johnston-Forbes testified that several hours after the accident she started having headaches and pain and stiffness in her neck, she also acknowledged that (1) one year after the collision, in August 2007, she had been involved in a golf cart collision in which she had flown forward and hit her chest on the steering wheel; and (2) two years later, in 2009, she had been involved in a snowboarding accident, in which she had fallen and fractured her thumb. **Consistent with**

Johnston-Forbes' description of her later sports-related accidents and injuries, Matsunaga's medical expert, Paul Tesar, testified that "there are many, many things in terms of life activities that can cause a herniated disc," including a "sneeze," "a swing," or any "slip and fall"; this testimony was uncontroverted. 2 VRP at 142. The record also shows that Johnston-Forbes waited over two years before filing suit against Matsunaga and nearly four years after the collision before obtaining an MRI showing a herniated disc. Based on this evidence, the jury could have reasonably concluded that Johnston-Forbes' pain and injury related back to one of these other previous accidents.

As is the case with evidentiary rulings in general, we review a trial court's ER 403 and ER 702 rulings with great deference under a manifest abuse of discretion standard. *See State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). **We find no abuse of discretion in the trial court's rejecting Johnston-Forbes' ER 702 and ER 403 challenges as bases for excluding Tencer's testimony.** (Emphasis supplied)

Op. 15-17.

Johnston-Forbes brief cites two recent unpublished decisions that were issued in 2013. Both of these decisions recognize that a trial court retains broad discretion to admit or exclude expert biomechanical testimony. In *Gonzalez-Mendoza v. Burdick*, 2013 Wash. App. LEXIS 1555, 13-14 (Wash. Ct. App. July 8, 2013), the court considered the testimony of Bradley Probst, a biomechanical expert, and stated:

> "'Both this court in *Stedman v. Cooper* n28 and Division Two in *Ma'ele* n29 have recognized that a trial court retains broad discretion to admit or exclude expert biomechanical testimony. As we stated in *Stedman*, "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." n30 The trial court was well within its discretion to allow Probst to testify about the forces involved in the accident, as well as about his calculation of those forces."

The most recent decision involving Dr. Tencer is *Berryman v. Metcalf*, 2013 Wash. App. LEXIS 2630 (Wash. Ct. App. Nov. 12, 2013), the court found that it was not an abuse of discretion to exclude Dr. Tencer's testimony. The *Berryman* court affirmed the trial court's ruling with little discussion under the abuse of discretion standard. The court in *Berryman* in the discussion of the award of attorney fees explained that the testimony that Dr. Tencer typically provides is not a novel issue. *Id.* at 22-23. The *Berryman* case shows that the issues surrounding Dr. Tencer's testimony are now a well-known routine matter, and this supports denial of review by this court.

In summary, the trial judge has broad discretion to decide whether expert testimony is admissible. The trial judge's ruling will not be disturbed if the basis for admission of expert testimony is "fairly debatable." Different results by different courts under an abuse of

discretion standard do not compel review by this Court. Johnston-Forbes has failed to demonstrate that there is a conflict under RAP 13.4(b)(2)

C. Review Should Not Be Granted Under RAP 13.4(b)(3)

This case does not present any question of law under the Constitution of the State of Washington or of the United States. RAP 13.4(b)(3). This case primarily involves the rules of evidence. Johnson-Forbes raised RAP 13.4(b)(3) in her brief but does not cite any constitutional claim. (Petition, pg. 8) There is no basis for review under this rule. Johnston-Forbes fails to satisfy the standard set forth under RAP 13.4(b)(3).

D. The Court of Appeals Correctly Decided The Case

1. Johnson Forbes Failed to Properly Raise Issues At Trial

The record in this case does not support many of the arguments that Johnston-Forbes raises in her Petition for Review. Review should be denied for this reason.

Johnston-Forbes argues that Dr. Tencer's testimony involves tests that do not have "substantial similarity of conditions" and questions the validity of the science behind the testimony. Petition, Pgs. 15 - 17. The record is deficient here. Johnston-Forbes presented

no expert biomechanical testimony to counter Dr. Tencer. There was no request to challenge Dr. Tencer's testimony as not being generally accepted in the scientific community and there was no request for a *Fry* hearing, as shown below:

> "Johnston-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. 7-8.

Johnson-Forbes argues that that Dr. Tencer's testimony of the forces involved in a collision is misleading as it supports the inference of medical causation. However, Johnson-Forbes introduced the issue of medical causation herself into the trial through the cross-examination questioning of Dr. Tencer. Dr. Tencer in his response stated: "let's leave the injury term out of it." 3 VRP at 365. The Count of Appeals' opinion addressed this issue in a footnote, stating:

> "In response to Johnston-Forbes' questions on cross-examination, Tencer testified about the amount of "tissue stretch" caused by the impact. 3 VRP at 358. Johnston-Forbes also asked Tencer: "So wouldn't you also agree ... if [the] distance between the seat and ... driver, the greater it got, the greater the chance of injury? Wouldn't you agree to that?" 3 VRP at 365. He replied, "Yeah. Again, let's leave the injury term out of it." 3 VRP at 365."

Counsel for Johnston-Forbes intentionally interjected the issue of medical causation at trial during his lengthy cross-examination of Dr. Tencer. This issue was developed on cross-examination, and Johnston-Forbes should not be able to now complain that the jury could infer that there was medical causation in this particular case.

2. Johnson-Forbes' Arguments Go To the Weight of the Expert Testimony

Johnson-Forbes's arguments against Dr. Tencer go to the weight of the expert testimony. A reviewing court generally does not weigh expert testimony. Op. at pgs. 8-9; *Kaech v. Lewis County Pub. Util. Dist.*, 106 Wn. App. 260, 274-75, 23 P.3d 529 (2001), *review denied*, 145 Wn.2d 1020 (2002).

3. The Court Should Not Consider the New Issues that Johnston-Forbes is Raising For the First Time on Appeal or In the Petition for Review

Johnston-Forbes raises several issues in her Petition for Review never before addressed in this case. Review of these issues and questions is not merited because they are not properly before the Court. Johnston-Forbes never briefed these issues or raised these questions in the trial court or in the Court of Appeals. She only asserted them after the Court of Appeals issued its decision. This is improper.

There is nothing in the trial court record of the argument based on conditional probability analysis. (Petition, pgs. 17- 20) The assertion that there was a "failure to appreciate conditional probability analysis" makes no sense when it was never argued in the trial court. This argument cannot be raised for the first time before this court. The proximate cause argument in the same section of the brief was not argued at trial. There are no cites record for this argument. *Id.*

The argument regarding the type of evidence that an expert can rely upon under ER 703 was greatly expanded in the Petition for Review and was not fully developed in the trial court. Petition, Pgs. 9– 11. There are no cites to the record to this portion of the petition. The arguments that the tests that Dr. Tencer conducted under

conditions that were the same or "substantially similar" to the circumstances being litigated in this case were not developed in the trial court and the record is not cited. Petition, pgs. 15-16.

It is well established in Washington that new issues cannot be raised for the first time in a petition for review. RAP 2.5(a); *Heg v. Alldredge*, 157 Wn.2d 154, 162, 137 P.3d 9 (2006) (noting this Court will not review an issue raised for first time in a petition for review, citing RAP 2.5(a); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (same). Thus, the Court is limited to the questions and theories presented before and determined by the Court of Appeals, and to claims of error directed to that court's resolution of such issues. *People's Nat'l Bank v. Peterson*, 82 Wn.2d 822, 829-30, 514 P.2d 159 (1973) (declining to review issues and theories raised for the first time in a petition for review where they were not presented in the trial court or the Court of Appeals). Since Johnston-Forbes did not raise these issues or pose these questions in a timely fashion at the trial court or in the Court of Appeals, it is too late for her to do so in his petition. The Court should decline to address them.

VI. CONCLUSION

The Court of Appeals correctly determined that Dr. Tencer could testify at trial. In making its arguments, Johnston-Forbes misleads the Court on the facts of this case and seeks to distort Washington law. The Court of Appeals decision is correct and this Court should deny review.

Dated this 31st day of January, 2014.

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VII. APPENDIX

Johnston-Forbes v. Matsunaga,
No. 43078-9-II, 2013 Wash. App. LEXIS 2569 (October 29, 2013)

CERTIFICATE OF SERVICE

I, Douglas Foley, certify that I served the foregoing document on the following by the means indicated:

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DATED this 31st day of January, 2014.

By */s/ DOUGLAS F. FOLEY*
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CATHY JOHNSTON-FORBES, Appellant, v. DAWN MATSUNAGA, Respondent.	No. 43078-9-II PUBLISHED OPINION

HUNT, J. — Cathy Johnston-Forbes appeals the jury's special verdict[1] finding that Dawn Matsunaga's negligence had not proximately caused Johnston-Forbes' injuries in a car accident. Johnston-Forbes argues that the trial court committed reversible error in denying her motion in limine to exclude defense expert Allan Tencer's testimony about the forces involved in this accident. Holding that the trial court did not abuse its discretion in allowing Tencer's limited testimony, we affirm.

FACTS

I. CAR ACCIDENT

In August 2006, Dawn Matsunaga's vehicle struck at low speed the rear end of the stopped vehicle in which Cathy Johnston-Forbes was a passenger. Johnston-Forbes exited her

[1] Johnston-Forbes assigns error to only the trial court's denial of her pretrial motion to exclude Allan Tencer's expert testimony. At the end of her opening and reply briefs, however, she asks us to "remand to the trial court for a new trial," Br. of Appellant at 43, and to "reverse the trial court's judgment." Reply Br. of Appellant at 25. *See also* notice of appeal from the "judgment." Clerk's Papers (CP) at 65.

vehicle, told Matsunaga that "everybody was fine," and walked 100 yards to a field while her husband waited with the car for police to arrive. 4 Verbatim Report of Proceedings (VRP) at 490. Johnston-Forbes did not experience any bruising from the impact; nor did she believe that she was injured. That evening, however, she experienced a headache and stiffness in her neck, for which she did not seek medical treatment.

Several weeks later, Johnston-Forbes visited the hospital complaining about lower back pain. During the following year she received periodic physical therapy treatments. A year after the collision she complained to her doctor that she was experiencing neck pain. Approximately four years after the accident, a December 2010 MRI (magnetic resonance imaging) revealed that Johnston-Forbes had a herniated disc in her lower neck.

II. PROCEDURE

In the meantime, in May 2009, Johnston-Forbes sued Matsunaga for general and special damages arising from Matsunaga's alleged negligence in the August 2006 car accident. Matsunaga admitted that she had struck Johnston-Forbes' vehicle but denied that this collision had caused Johnston-Forbes' injuries.

Johnston-Forbes moved in limine to exclude the vehicle damage photographs[2] and the testimony of Allan Tencer, Matsunaga's expert witness. She argued that Tencer should not be allowed to testify, based on his lack of qualifications as a licensed engineer and the lack of a foundation for his testimony because (1) he had viewed only photographs of Matsunaga's

[2]Johnston-Forbes argued that the vehicle damage photographs were "incomplete, taken too remote in time and [would] tend to confuse and mislead the jury and [were] unfairly prejudicial." CP at 41. Admission of these photographs, however, is not before us in this appeal.

vehicle and had not physically examined it; (2) he had neither viewed photographs of nor examined Johnston-Forbes' vehicle; and (3) he failed to account for Johnston-Forbes' body position at the time of impact and how it had affected her injuries. Johnston-Forbes further argued that Tencer's testimony and the photographs would be "speculative," would "mislead and confuse the jury," and would "unfairly prejudice [her]." Clerk's Papers (CP) at 9.

Matsunaga responded:

> Dr. Tencer, who has studied accidents like this many, many times, published a couple hundred papers, done a couple of hundred tests on biomechanics, is able to look at a photograph. What you'll hear from him is that he can tell upper limits. He can say without body damage, without deformation, without physical damage to the bumper grille, because he knows what's behind these bumpers, he knows how these cars are constructed, he takes them apart, he tests them, he tests volunteers, he writes about them, he's a published author—and as I said, he's got a couple hundred in different journals—owns patents in this area in terms of car design.
>
> He'll testify that there are upper limits to what can happen in terms of exchange of forces, and he can credit [Johnston-Forbes'] case by saying the most that could have happened to [her] in this case in terms of force and the potential for injury is the upper limit, which is established by the absence of damage from these photographs.

1 VRP at 10-11. Matsunaga further clarified that (1) Tencer's testimony would discuss solely biomechanics, which focuses on "the forces exchanged and the *capacity* for injury"; (2) he would not testify about whether there actually *was* any injury to Johnston-Forbes; and (3) he would "talk about the forces and the limits" involved in the collision and compare them to "activities of daily living." 1 VRP at 12 (emphasis added).

The trial court denied Johnston-Forbes' motions to exclude Tencer's testimony and to exclude the photographs of Matsunaga's vehicle, which showed no visible damage. But the trial court limited Tencer's testimony by (1) excluding a repair bill from Johnston-Forbes' rental car

because it was "misleading" (implying minimal damage), and (2) instructing Matsunaga to "tailor" Tencer's testimony so as not to refer to this repair bill. 1 VRP at 19, 28. Matsunaga also agreed to limit the number of photographs of her vehicle that she would present at trial.

The case proceeded to trial. Tencer testified generally about the forces acting on the two vehicles and Johnston-Forbes' body during the collision; consistent with the trial court's limiting order, he did not discuss any injury that Johnston-Forbes might have sustained. Johnston-Forbes' extensive cross-examination of Tencer drew out the following facts: (1) Tencer is neither a medical doctor nor a licensed engineer; (2) he did not examine Johnston-Forbes' vehicle or any photographs of it; (3) a basketball hoop had fallen on Matsunaga's vehicle between the time of the accident and when she took the photographs of it; and (4) Johnston-Forbes' body position at the time of the accident could have resulted in greater stress on her body than Tencer's collision force analysis predicted. Johnston-Forbes also asked Tencer, "[Y]ou're not testifying one way or another whether Ms. Johnston-Forbes was injured; correct?" Tencer replied, "Correct. I'm just describing the forces that she probably felt during the collision."[3] 3 VRP at 340.

The jury returned a special verdict of "no" on the question of whether Matsunaga's negligence proximately caused Johnston-Forbes' injuries. CP at 64. Johnston-Forbes appeals.

[3] In response to Johnston-Forbes' questions on cross-examination, Tencer testified about the amount of "tissue stretch" caused by the impact. 3 VRP at 358. Johnston-Forbes also asked Tencer: "So wouldn't you also agree . . . if [the] distance between the seat and . . . driver, the greater it got, the greater the chance of injury? Wouldn't you agree to that?" 3 VRP at 365. He replied, "Yeah. Again, let's leave the injury term out of it." 3 VRP at 365.

ANALYSIS

Johnston-Forbes argues that the trial court erred in denying her motion in limine to exclude Tencer's testimony because (1) Tencer's underlying theory is not generally accepted in the scientific community, in violation of *Frye*[4]; (2) he is not a physician and could not testify about medical causation of injuries; (3) he "is not a licensed engineer, thus he [could not] testify to the engineering principles that form the basis of his opinions"; (4) he lacked the necessary foundation to testify about forces involved in the collision; and (5) his testimony violated ER 702 and 403.[5] Br. of Appellant at 28. These arguments fail.

I. UNPRESERVED *FRYE* CHALLENGE

Johnston-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.

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[4] *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

[5] Although Johnston-Forbes told the trial court that she had no "problem with Mr. Tencer testifying," based on the full record of this hearing, we reject Matsunaga's request to treat this colloquoy as a waiver of her motion in limine. 1 VRP at 20.

II. OTHER EXPERT TESTIMONY CHALLENGES

A. Standard of Review

We review a trial court's determination of the admissibility of expert testimony for an abuse of discretion. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000). If the basis for admission of the evidence is "fairly debatable," we will not disturb the trial court's ruling. *Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue*, 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (internal quotation marks omitted) (quoting *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)). Washington appellate courts generally do not weigh expert testimony. *See In re Marriage of Sedlock*, 69 Wn. App. 484, 491, 849 P.2d 1243 (1993).

B. Medical Opinion

Johnston-Forbes challenges Tencer's expert testimony as improper medical opinion because, by comparing the collision forces to daily living activities (such as "walking 'down stairs' or 'jogging'")[6], the "clear message . . . was that this collision could not have *injured* [the] plaintiff." Br. of Appellant at 27.

We disagree that Tencer's testimony was medical in nature. Significantly, Tencer did *not* offer an opinion about whether the forces involved in the accident would or would not have caused personal injuries to anyone in general or to Johnston-Forbes in particular. On the contrary, he expressly stated that he would *not* testify about whether Johnston-Forbes' injury was possible at the speeds involved in this case. Tencer limited his testimony to the forces generated in the collision and his conclusion that the collision was not likely the source of significant forces

[6] Br. of Appellant at 25 (citing 3 VRP at 325-26).

acting on Johnston-Forbes' body. We hold that an expert's description of forces generated during a collision is not medical testimony.[7]

Johnston-Forbes also argues that even though Tencer disavowed an intent to give medical testimony, his opinions directly related to a medical issue—whether the force of impact was enough to injure her. She claims that Tencer's testimony improperly allowed the jury to infer that she could not have been injured in the accident. Johnston-Forbes relies on *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), in which Division One of our court affirmed a trial court's ruling excluding Tencer's testimony because it was "'logically irrelevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular accident.'" *Stedman*, 172 Wn. App. at 18-19.

The *Stedman* court noted that Tencer did not provide medical testimony, but suggested that his opinions were misleading anyway:

> Tencer declared that . . . "[he] never described any threshold for injury in [his] opinions.'" Emphasizing that he testifies from a biomechanical rather than a medical perspective, he disavowed any intention of giving an opinion about whether Stedman got hurt in the accident. Nevertheless, his clear message was that Stedman could not have been injured in the accident because the force of the impact was too small. Indeed, according to [the defendant's] brief, Tencer's conclusion was exactly 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 (footnotes omitted). The *Stedman* court also implied that Tencer's opinions should be excluded because they improperly allowed the jury to infer that the minimal accident forces could not have caused injury. *See Stedman*, 172 Wn. App. at 19-20.

[7] In a different case, we 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*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002). Because Tencer provided no such testimony here, we do not need to address whether that holding remains good law.

To the extent that the *Stedman* court suggested that the force of impact is always irrelevant or that it is improper for a jury to infer that minimal force did not cause injury in a particular case, we disagree. The force of impact—whether slight or significant—is often relevant in personal injury cases. *See Murray v. Mossman*, 52 Wn.2d 885, 888, 329 P.2d 1089 (1958) (admission of automobile accident photographs not reversible error because they tended to show "force and direction of the impact" that resulted in injury); *Taylor v. Spokane, P. & S. Ry. Co.*, 72 Wash. 378, 379-80, 130 P. 506 (1913) (photograph properly admitted to show "probable force of the impact" where force of impact was material to whether passenger was actually injured). And there is nothing improper about allowing the jury to draw inferences from evidence explaining force of impact, as well as from other evidence, in determining proximate cause. We again emphasize the standard of review for a trial court's decision to allow or to exclude expert testimony: "The broad standard of abuse of discretion means that courts can reasonably reach different conclusions about whether, and to what extent, an expert's testimony will be helpful to the jury in a particular case." *Stedman*, 172 Wn. App. at 18.

Here, we hold that the trial court did not abuse its discretion in denying Johnston-Forbes' motion to exclude Tencer's force of impact testimony, especially in light of Matsunaga's limiting Tencer's testimony such that he did not offer any opinion about whether the forces in the accident were or were not sufficient to cause injury.

C. Engineering Opinion

Johnston-Forbes next challenges Tencer's testimony because he "is not a licensed engineer, thus he cannot testify to the engineering principles that form the basis of his opinions."[8] Br. of Appellant at 28. Johnston-Forbes is incorrect.

ER 702 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.

Nothing in ER 702 requires an expert witness to be licensed in his profession to give testimony. On the contrary, practical experience alone may suffice to qualify a witness as an expert. *State v. Yates*, 161 Wn.2d 714, 765, 168 P.3d 359 (2007), *cert. denied*, 554 U.S. 922 (2008). We hold that the trial court did not abuse its discretion in denying Johnston-Forbes' motion to exclude Tencer's expert testimony because he lacked an engineering license.

D. Foundation Challenge

Johnston-Forbes bases her challenge to Tencer's testimony as lacking the necessary foundation on the following assertions: (1) He neither physically examined Johnston-Forbes' rental vehicle nor viewed any photographs of it; (2) he did not have an adequate description of the repair work performed on this rental vehicle; (3) Matsunaga took the photographs of her own vehicle, which Tencer used in his analysis, approximately three years after the collision; and (4)

[8] We note that the statutes governing the practice of engineering, which Johnston-Forbes cites in her brief, do not control the trial court's ability to conclude that a witness is qualified as an expert. *See* ER 702; RCW 18.43.010.

Tencer "did not have sufficient information to consider [Johnston-Forbes'] awkward positioning in the vehicle at the time of impact." Br. of Appellant at 35. Again, we disagree.

Johnston-Forbes' challenges to Tencer's testimony for lack of foundation go to the weight of the evidence, not its admissibility. *See Kaech v. Lewis County Pub. Util. Dist.*, 106 Wn. App. 260, 274-75, 23 P.3d 529 (2001), *review denied*, 145 Wn.2d 1020 (2002). Moreover, Johnston-Forbes ably raised these foundational challenges for the jury's consideration during Tencer's cross-examination. We hold that the trial court did not abuse its discretion in denying Johnston-Forbes' motion to exclude Tencer's testimony for lack of foundation.

E. Relevancy Challenge under ER 702 and ER 403

Finally, Johnston-Forbes contends that Tencer's testimony was not helpful to the jury, as required by ER 702, and that its probative value was "'substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury,'" in violation of ER 403. Br. of Appellant at 36 (quoting ER 403). Johnston-Forbes focuses her argument on the prejudice she claims she suffered as a result of this testimony: She argues that (1) her "medical evidence that the collision caused her injury was strong"; and (2) had the trial court excluded Tencer's testimony, the jury's verdict would have likely been different, namely in her favor. Br. of Appellant at 39-40. The record does not support her characterization of the proceedings and evidence.

Although Johnston-Forbes testified that several hours after the accident she started having headaches and pain and stiffness in her neck, she also acknowledged that (1) one year after the collision, in August 2007, she had been involved in a golf cart collision in which she had flown forward and hit her chest on the steering wheel; and (2) two years later, in 2009, she

had been involved in a snowboarding accident, in which she had fallen and fractured her thumb. Consistent with Johnston-Forbes' description of her later sports-related accidents and injuries, Matsunaga's medical expert, Paul Tesar, testified that "there are many, many things in terms of life activities that can cause a herniated disc," including a "sneeze," "a swing," or any "slip and fall"; this testimony was uncontroverted. 2 VRP at 142. The record also shows that Johnston-Forbes waited over two years before filing suit against Matsunaga and nearly four years after the collision before obtaining an MRI showing a herniated disc. Based on this evidence, the jury could have reasonably concluded that Johnston-Forbes' pain and injury related back to one of these other previous accidents.

As is the case with evidentiary rulings in general, we review a trial court's ER 403 and ER 702 rulings with great deference under a manifest abuse of discretion standard. *See State v. Vreen*, 143 Wn.2d 923, 932, 26 P.3d 236 (2001). We find no abuse of discretion in the trial court's rejecting Johnston-Forbes' ER 702 and ER 403 challenges as bases for excluding Tencer's testimony.

We affirm.

Hunt, J.

We concur:

Worswick, C.J.

Maxa, J.

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Re: Cathy Johnston-Forbes v. Dawn Matsunaga
Clark County Superior Court Case No. 09 2 02318 6
Court of Appeals Case No. 43078-9II

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