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.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is Cathy Johnston-Forbes, appellant in the Court of Appeals and the plaintiff in the Clark County Superior Court proceeding.

II. COURT OF APPEALS DECISION

Ms. Johnston-Forbes asks this Court accept review of the Court of Appeals decision in *Johnston-Forbes v. Matsunaga*, No. 43078-9-II, 2013 Wash. App. LEXIS 2569 (October 29, 2013). Attached as appendix A.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a biomechanical engineer is qualified to provide an opinion on the cause of injury.
2. Whether a biomechanical engineer can base such an opinion on the amount of vehicle damage sustained in a collision without regard to the medical findings.
3. Whether a biomechanical's prediction as to how often similar collisions result in injury is relevant in a personal injury case, and if so, whether its probative value is outweighed by its misleading and overly prejudicial nature.

IV. STATEMENT OF THE CASE

A. Introduction

Cathy Johnston-Forbes was injured in a motor vehicle collision. She is appealing the trial court's decision to admit the controversial

testimony of Allan Tencer.

Tencer is a biomechanical engineer. He claims that he can predict whether an individual was injured in a collision by the amount of damage that the vehicle sustained. Tencer does not expressly say that the collision could not have caused plaintiff injury, but by comparing the forces that her "body felt during impact" to activities such as walking "down stairs" or "jogging," his clear message is just that – Johnston-Forbes could not have been injured because the force of the impact was too small.

In reality, all Tencer is qualified to do, if anything, is to predict in general how often a collision of this sort may result in injury. That is not relevant to whether this collision caused harm to this plaintiff.

Both Division One and Division Two have addressed the issue and come to different conclusions. In *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012), Division One held that Tencer's opinion about the likelihood of injury drawn from the amount of vehicle damage is not "logically relevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident."

Division Two holds the opposite, stating in *Ma'ele v. Arrington*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002), that Tencer, was free to testify that "the maximum possible force in [the] accident was not enough

to injure a person."

B. Plaintiff Was an LPGA Golfer

Cathy Johnston-Forbes was an LPGA professional golfer. 3 RP 399. She is a major title holder, having won the du Maurier Ltd. Classic, the LPGA's equivalent to the British Open. Ex 7, 4 RP 446-47. She was in Vancouver to play in the LPGA tour's Safeway Classic. 3 RP 401-02.

On the first day of the tournament, Johnston-Forbes posted a four under par 68, good enough for third place. 3 RP 409. Had she continued to shoot 68 for the next two days of the tournament, she would have won the tournament and its $210,000 first place prize money. 2 RP 182-83.

C. The Collision

After she finished her first round, Johnston-Forbes and her family were returning to their hotel room in their 2006 Toyota Camry courtesy car. 3 RP 403. Johnston-Forbes was seated in the back seat between her two young daughters. 3 RP 404-05.

They had come to a complete stop for a red light. Johnston-Forbes was leaning forward and twisted back around to her left, facing one of her daughters so she could play with her daughter's hair. 3 RP 406. At that moment, her car was struck from behind by the defendant. 3 RP 406-07.

D. Plaintiff's Injuries

That evening, Johnston-Forbes experienced headaches, stiffening

muscles, and neck pain. 3 RP 409. She struggled to finish the tournament. 3 RP 410-11. Her symptoms worsened, extending down into her back. 3 RP 415-16. At the next tour stop, she obtained x-rays. 3 RP 417.

When she returned home, the pain in her back resolved, but not the pain in her neck. It prevented her from returning to the LPGA Tour. 3 RP 430; 4 RP 451.

In 2010, an MRI revealed a herniated disc. 3 RP 434. She tried cortisone shots, to no success. 3 RP 434-35. Doctors advised that surgery would not return to her pre-collision golfing ability. 1 RP 129-31.

E. Medical Opinions

Both sides agreed that Johnston-Forbes was suffering from a herniated disc at C6-7 level in her neck. The dispute was over causation.

Plaintiff's radiologist testified that the MRI showed that the herniation was due to trauma and not the aging process. 1 RP 41, 54, 60. Plaintiff's orthopedic surgeon agreed, stating that the herniation "was caused by the motor vehicle accident." 2 RP 95.

Defendant hired orthopedic surgeon Paul Tesar to examine plaintiff. 2 RP 222. Dr. Tesar agreed that plaintiff was suffering from a herniated disc at C6-7. Dr. Tesar testified, however, that he was not sure when the herniation occurred. 2 RP 261-62. According to Dr. Tesar, it could have happened at any time – while Johnston-Forbes was "sleeping"

or even "bending." 2 RP 263-64. The only time that he ruled out was during the motor vehicle collision. 2 RP 240, 259.

F. Allan Tencer Named as an Expert

Prior to trial, defendant identified Tencer as an expert. Plaintiff obtained his report and deposed him. Tencer reported the following opinion "to a reasonable degree of Biomechanical Engineering certainty:"

> 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 based his opinion on photographs taken of defendant's vehicle some years after the collision (3 RP 313-14) and on the assumption that a one-line $149 invoice from Tina's Touch Up reflected the extent of damage to the plaintiff's bumper (1 RP 16-19, CP 87). He did not know, and claimed he did not need to know, the extent of damage sustained by plaintiff's courtesy car in the collision. 3 RP 317-18.

Tencer used the damage photographs to estimate impact forces. He then used the impact force to compare this collision with other similar collisions from laboratory crash testing, such as head restraint testing, and based on those results, he predicted that this collision would not result in significant forces to Johnston-Forbes body. 3 RP 325. He emphasized

how insignificant the forces were by comparing them to less than what one would feel while walking "down stairs" or "jogging." 3 RP 325-26.

G. Motion in Limine

Plaintiff moved pre-trial to exclude Tencer's opinions on a number of grounds.[1] Defendant opposed the plaintiff's motion, relying heavily on the Division II's decision of *Ma'ele v. Arrington.* CP 119-23, 1 RP 11-12.

The trial court denied plaintiff's motion. 1 RP 28. Not surprising, given *Stedman* had not yet been decided, and *Ma'ele* was still the governing law on the admissibility of Tencer's opinions.

H. Trial

At trial, Tencer testified that the forces that Johnston–Forbes' "body could feel during impact" were "not significant" – no greater than what one feels during activities of daily living, and were less than what one would feel while walking "down stairs" or "jogging." 3 RP 325-26. Although he did not expressly state it, his clear message was that Johnston-Forbes could not have been injured in the accident because the force of the impact was too small. The jury returned a defense verdict.

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[1] Plaintiff asserted that Tencer' qualifications were lacking; his foundation was insufficient; his testimony was not helpful to the jury under ER 702; and even if it were helpful, its probative value was outweighed by its unduly prejudicial nature under ER 403. CP 8.

V. ARGUMENT

A. Reasons for Review

1. The Court of Appeals Decision and Division Two's Precedent Is in Conflict with Division One's Precedent.

Review is warranted under RAP 13.4(b)(2). The Court of Appeals decision in *Johnston-Forbes*, as well as Division Two's prior precedent, *Ma'ele v. Arrington*, 111 Wn. App. 557, 4 P.3d 557 (2002), is in conflict with the Division One's precedent of *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) and *Berryman v. Metcalf*, 2013 Wash. App. LEXIS 2630 (November 12, 2013).[2]

The Division Two cases of *Johnston-Forbes* and *Ma'ele* hold that a biomechanical engineer's determination that this type of collision generally would not result in significant forces to the occupant is relevant to whether Johnston-Forbes suffered injury in this particular collision.

In *Stedman v. Cooper*, on the other hand, Division One affirmed the trial court's exclusion of Tencer's testimony because is was too general to be "logically relevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident." In other words, Division One found that the same testimony does not even meet the low threshold of relevant evidence. *State v.*

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[2] Division One's *Berryman v. Metcalf*, 2013 Wash. App. LEXIS 2630 (November 12, 2013), that reaffirmed *Stedman*, came down 14 days after Johnston-Forbes was decided.

Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

To add to the confusion, *Johnston-Forbes* now questions whether its earlier Division Two precedent is still good law:

> [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*, 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.

App. A at 7.

2. <u>This is a recurring issue at the trial level.</u>

This is a recurring issue at the trial court. Tencer himself "has been retained frequently as an expert defense witness in similar cases." *Berryman v. Metcalf*, 2013 Wash. App. LEXIS 2630, *8 (November 12, 2013); *see Santos v. United Parcel Servs. Inc.*, 2013 Wash. App. LEXIS 1460 (June 19, 2013); *Stedman v. Cooper,* 172 Wn. App. 9, 292 P.3d 764 (2012); *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002).

But Tencer is not the only one who testifies as a defense expert in these types cases. There are others. *See, e.g.*, *Gonzalez-Mendoza v. Burdick*, 2013 Wash. App. LEXIS 1555 (July 8, 2013).

3. <u>The public has a substantial interest in safeguarding how a cause of injury is determined in a court of law.</u>

Review is also warranted under RAP 13.4(b)(3). The public has a substantial interest in ensuring that the evidence relied upon by experts in

a court of law for opinions on the cause of a injury should be no less reliable than that relied upon by those in the medical field who make those determinations in practice.

ER 703 specifies that the type of evidence that an expert can rely upon must be "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." ER 703.[3]

Reasonable reliance is measured by whether experts in the "field regularly rely" upon the evidence in practice, not whether testifying experts rely upon the evidence for the purpose of litigation.[4]

Although the Johnston-Forbes Court may "disagree[] that Tencer's testimony was medical in nature," it nevertheless is an opinion on the causation of plaintiff's injury. App. A at 6. Experts that normally give an opinion on the cause of injury are trained medical professionals. *Taber's*

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[3] ER 703 is based on its federal counterpart, FRE 703. *State v. DeVries*, 149 Wn.2d 842, 856-57, 72 P.3d 748 (2003). FRE was adopted primarily in response to the reality that some experts, such as physicians, regularly rely upon "numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X-rays. *** The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes." FRE 703 Advisory Committee Note; Paul D. Rheingold, *The Basis of Medical Testimony*, 15 Vand. L. Rev. 473, 531 (1962).

[4] "Reasonable reliance is established when the court is convinced not just that other experts in the field regularly rely on similar information in arriving at opinions and conclusions formed for non-litigation purposes, but that the reliance by this expert in this case [for this opinion] is reasonable."

JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C.L. REV. 53, 81 (1994) (Interpreting FRE 703).

Cyclopedic Medical Dictionary at 530-31 (Clayton L. Thomas, M.D. ed.) (18th ed. 1997).

Information that medical professionals regularly rely upon to form opinions on the cause of injury include a number of sources, such as the statements from the patient, reports and opinions from nurses, technicians and other doctors, hospital records, X-rays, and prior medical records. FRE 703 Advisory Committee Note; Paul D. Rheingold, *The Basis of Medical Testimony*, 15 Vand. L. Rev. 473, 531 (1962). They do not rely upon the amount of vehicle damage or statistical compilations from crashworthiness tests.

Tencer did not rely upon medical information. He relied upon damage photographs, a repair estimate and crash test data. This is not the type of information that those who regularly make diagnoses about the cause of an injury rely upon.

In fact, defendant's own orthopedic surgeon confirmed that the amount of vehicle damage sustained in a collision is not a reliable source for determining either the cause or extent of injury:

> 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 amount of vehicle damage is not regularly relied upon for diagnosing the cause of an injury in the medical field, how can Tencer, who is not a trained medical professional and who did not review plaintiff's medical records, testify to the contrary?

B. Division One's Reasoning in *Stedman v. Cooper* Is Sound

In *Stedman*, the Division One Court affirmed the trial court's exclusion of Tencer's testimony because it was too general to be "logically relevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident." Its rationale is sound and should be adopted by this Court.

In *Stedman*, the plaintiff moved pre-trial to exclude Tencer's testimony asserting his opinion was cumulative and irrelevant. The trial court agreed and excluded Tencer's testimony on both grounds." *Id.* at 18.

On appeal, the Court found the trial court erred in excluding Tencer's testimony as cumulative. *Id.* But relevancy was still an issue:

> The closer question is whether the court erred in ruling that Tencer's testimony was "logically irrelevant to the issue the

> jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident."

Id. at 19.

In analyzing the issue, the *Stedman* court quoted a Colorado Court which had found that the crash test data that formed the basis for the expert's opinion was not substantially similar to the litigated case:

> The trial court "reasoned that tests used to ascertain safety for the purposes of doing a cost-benefit analysis with regard to the expense of designing the seat of a car were not applicable to prove that a particular person was unlikely to be injured in a specific accident."
>
> "Additionally, the [trial] court questioned the validity of using a series of tests designed for one purpose (designing cars) for a different purpose (assessing a threshold of applied force for injury in rear-end car accident). Specifically, the court addressed the circumstances of the tests that did not correspond with the circumstances of a rear-end car accident. It noted the fact that the statistical sample in the tests was 'extremely low,' and there were 'no controls among and between the experiments with regard to age, physical conditions [and] actual position of the body.' Also, the [trial] court noted the 'expectation factor' of knowing one is going to be hit, as opposed to being unaware of an impending collision. The [trial] court concluded that there 'is great controversy in the field about the quality and comparability of these tests.'"

Stedman, 172 Wn App at 19-20 (quoting *Schultz v. Wells*, 13 P3d 846, 849, 851-52 (Colo. App. 2000)) (Brackets language added for context).

The *Stedman* 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:

> 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. Emphasizing that he testifies from a biomechanical rather than a medical perspective, he disavowed any intention of giving an opinion about whether Stedman was hurt in the accident.

Stedman, 172 Wn. App. at 20.

The *Stedman* Court did not buy Tencer's response for a minute. By comparing the collision forces to "common daily activities" such as "walking and running," the Court stated that Tencer's

> clear message was that Stedman could not have been injured in the accident because the force of the impact was too small. Indeed, *** Tencer's conclusion was exactly that: the forces generated by the impact were not sufficient to cause the type of injuries Stedman was claiming.

Id. at 20.

The *Stedman* Court ruled that the expert testimony was "logically irrelevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident." In other words, Tencer's opinion could not even clear the low bar of relevancy. *State v. Darden*, 145 Wn.2d 612, 41 P.3d 1189 (2002) ("The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible.")

C. *Johnston-Forbes*: Division Two Disagrees with Division One and Adheres to *Ma'ele*

Tencer's testimony in *Johnston-Forbes* was strikingly similar to that which was excluded in Stedman: he used the same activities, "walking and running," to describe the amount of force that he claims Johnston-Forbes experienced in the collision.

Johnston-Forbes argued that the clear message of Tencer's comparisons was that she could not have been injured in the accident because the force of the impact was too small:

> 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'"), the clear message ... was that this collision could not have injured [the] plaintiff.

App. A at 6. (Parenthetical in original).

The Court disagreed with Johnston-Forbes' characterization:

> 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. [Tencer only testified] that the collision was *not* likely the source of significant forces acting on Johnston-Forbes' body.

App. A at 6. (Italics in original).

The same flaws in *Johnston-Forbes* Court's reasoning were articulated a decade ago in the earlier Division Two decision of *Ma'ele*:

> Tencer opined that the maximum possible force in this accident was not enough to injure a person. And this was

> not a medical opinion; Tencer expressed no opinion about Ma'ele's symptoms or possible diagnosis from those symptoms. He did not say that Ma'ele was uninjured in the crash, although the jury was entitled to infer that from his testimony.

Ma'ele, 111 Wn. App. at 564.

As *Stedman* makes clear, this is a distinction without a difference. It is also a distinction that neither the medical community[5] nor legal community[6] recognize.

D. Division One's Rationale in *Stedman* Squares with Other Washington Precedent

Divsion One's rationale in *Stedman* also squares with the requirement under Washington law that tests must be conducted under conditions that were the same or "substantially similar" to the circumstances being litigated in this case. *See Quinn v. McPherson*, 73 Wn.2d 194, 201, 437 P.2d 393 (1968).

Tencer may be able to calculate the force when the two vehicles

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[5] In *Taber's Cyclopedic Medical Dictionary*, diagnosis is defined as follows:

> 1. The term denoting name of the disease or syndrome a person has or is believed to have. 2. The use of scientific and skillful methods to establish the cause and nature of a person's illness .... *d., medical.* The entire process of determining the cause of the patient's illness or discomfort.

Id. at 530-31 (Clayton L. Thomas, M.D. ed.) (18th ed. 1997).

[6] Black's Law Dictionary defines "diagnosis" as "[a] medical term, meaning the discovery of the *source* of a patient's illness or the determination of the nature of his disease from the study of its symptoms." *Id.* at 312 (6th ed. 1991) (Emphasis added.)

collide. The formula only requires the vehicle weights and the speed at impact However, there is no formula for determining the force that was transmitted to Johnston-Forbes' neck and whether that force is sufficient to cause injury. For that, Tencer must rely on test results from other collisions. However, those tests have little relevance to whether Johnston-Forbes' neck was injured in this collision. They reflect unknown individuals in collisions conducted under unknown conditions.

The rule requiring "substantial similarity of conditions" is meant to prevent admission of evidence which tends to mislead and perhaps confuse the jury. *Jackson v. Fletcher*, 647 F.2d 1020, 1027 (1981).[7]

Here, we know little about the tests that Tencer relies upon. We do not even know how it was determined whether the test subjects were injured. Soft tissue injuries do not manifest themselves until some period after the trauma, sometimes quite a while later.

The test Tencer himself conducted exemplifies how the definition of injury alone can skew the test results. He and three male engineers participated in low speed rear-end collisions of 1.9 mph. None of the

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[7] "Evidence of this kind should be received with caution, and only be admitted when it is obvious to the court, from the nature of the experiments, that the jury will be enlightened, rather than confused. 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).

participants reported injuries. But those same participants, including Tencer, refused to participate in rear-end collisions that exceeded 1.9 mph because they reported that the 1.9 mph collisions were too "severe" on their bodies. 3 RP 372-86.

E. Tencer's Opinion Is Irrelevant and Confusing

Tencer's testimony is not only irrelevant to causation, but it misleads and confuses the jury as to the standard required to prove causation. Cause in fact or "but for" refers to "the physical connection between an act and an injury." *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985).[8] The plaintiff "must establish that the harm suffered would not have occurred but for an act or omission of the defendant." *Joyce v. Dept. of Corr.*, 155 Wn.2d 306, 322, 119 P.3d 825 (2005). Tencer contends that he is not providing an opinion of cause of harm.

But even taking Tencer at his word – that all he is providing is an opinion as to whether the forces generated in this type of collision would not normally result in significant forces to plaintiff's body – his opinion is still not relevant in a personal injury case.

Tencer's prediction is based on two primary assumptions: 1) an

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[8] Proximate causation, includes both "[c]ause in fact and legal causation." *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985) "Legal causation, on the other hand, rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact." *Id.* Clearly, Tencer's opinion is not relevant to legal causation.

estimate of the impact force, and 2) the knowledge that collisions involving similar impact forces did not result in significant forces to the occupant. In short, he reasons that because other collisions involving similar impact forces rarely resulted in the occupants experiencing significant forces or injury, it is unlikely that plaintiff experienced significant forces or injury in this collision.

Predicting in the abstract how often a collision generally results in significant forces or injury is misleading and is not relevant to causation in a personal injury case. The relevant question is "but for" the collision would plaintiff have been harmed.

Although they are similar sounding questions – what are the chances that collision could have caused the injury and what are the chances that injury was caused by the collision – they are crucially different. In the latter, the conditional fact – harm– has occurred and is considered. It is no longer a matter of odds in the abstract of how often injury would result. It is now a matter of whether a relationship between the harm and collision exist. The only science or physics question is whether the forces were sufficient to cause injury – a question that Tencer never disputed.

This error stems from the failure to appreciate conditional probability analysis. A "conditional probability" is the probability that a

particular fact is true given the knowledge that a related fact or event is known to occur or to have occurred.[9]

Once medical evidence establishes the existent of an injury, the likelihood of an injury occurring in the abstract is no longer the issue – it is meaningless. The probability analysis must account for the occurrence of the conditional fact that injury occurred. The causation question becomes – how likely is it that there is a "physical connection between [the] act and [the] injury." In other words, given that plaintiff suffered an injury in temporal proximity to the collision, what is the likelihood that the collision forces were the cause of the injury.

To illustrate how these two probabilities are different, assume a person can fall the same way 99 times out of 100 without breaking a bone. In biomechanical terms, it would be fair to say that it is unlikely that the forces involved would result in a broken bone – a 1 percent chance. But once the person falls and in fact breaks a bone, the probability of the harm occurring, no matter how remote it may have been prior to the fall, now becomes 100 percent.

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[9] "Many mundane mistakes in reasoning can be traced to a shaky grasp of the notion of conditional probability." John Allen Paulos, *Innumeracy: Mathematical Illiteracy and its Consequences* 63 (1988). The key consideration is that although some events are independent (coin flips, for example), other events are dependent: "the occurrence of one of them makes the occurrence of the other more or less likely . . . ." John Allen Paulos, *Beyond Numeracy: Ruminations of a Numbers Man* 189 (1991). "Those who do not take into account conditional probability are prone to making mistakes in judging evidence. *Al-Adahi v. Obama*, 613 F.3d 1102, 1105 (D.C. Cir. 2010).

The confusion is evident from the *Johnston-Forbes*' opinion. In disagreeing with *Stedman*, it stated:

> 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.
>
> 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.

App. A at 7-8.

Even though Tencer's clear message was that the collision forces could not have caused Johnston-Forbes' injury, his opinion was no more than a general prediction as to how often a collision of this type would result in injury. But once Johnston-Forbes suffered an injury, that analysis became meaningless. To, nevertheless, allow Tencer's opinion gives the misleading impression that the chances of this collision causing Johnston Forbes' injury are remote – and to argue that, is intellectually dishonest.

VI. CONCLUSION

Based upon the forgoing, Johnston-Forbes prays her Petition for Review be granted.

Respectfully submitted,

s/ Michael H. Bloom
Michael H. Bloom, WSB # 30845
Attorney for Petitioner

CERTIFICATE

I certify that I mailed a copy of the PETITION FOR REVIEW to Douglas Foley and Vernon Findley, Defendant's/Respondent's attorneys, at 13115 NE 4th Street, Ste. 260, Vancouver, Washington 98684, postage prepaid, on December 2, 2013.

s/ Michael H. Bloom
Michael H. Bloom
Attorney for Petitioner

APPENDIX A

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.

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[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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From: Sue Lorance <slorance@easystreet.net>
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Subject: Petition for Review Court of Appeals no. 43078-9-II
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Dear Clerk:
Attached please find the Petition for Review in the above matter. Pursuant to the Court's instructions, since the filing fee and the case file has already been forwarded to the Supreme Court, we are to file the Petition directly with the Supreme Court, not the Court of Appeals Division II.
Thank you.
--

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