NO. 43078-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CATHY JOHNSTON-FORBES,

Appellant,

v.

DAWN MATSUNAGA,

Respondent.

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BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

Table of Contents ..... i-ii

Table of Authorities ..... iii-v

A. INTRODUCTION 1

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

(1) Assignments of Error 2

(2) Issues Pertaining to Assignments of Error 2

C. RESTATEMENT OF THE CASE 3

(1) Background of the Case 3

(2) Jury Verdict and Judgment 4

(3) Defense Expert Dr. Allen Tencer 4

(4) Motion in Limine to Exclude Dr. Tencer 6

(5) Concession by Counsel Stating that Dr. Tencer Could Testify 9

D. SUMMARY OF ARGUMENT 11

E. ARGUMENT 15

(1) Standard of Review 15

(2) Johnston-Forbes Conceded at Trial that Dr. Tencer Could Testify 16

(3) Johnston-Forbes Failed to Properly Preserve Error 18

(4) The Trial Court was Correct in Finding that Dr. Tencer was Qualified to Testify 22

(5) *Steadman v. Cooper* Does Not Compel A Different Result..... 29

F. CONCLUSION..... 31

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Davidson v. Mun. of Metro. Seattle
43 Wn. App. 569, 572, 719 P.2d 569 (1986) 16

In re the Detention of Audett
158 Wn. 2d 712, 725, 147 P.3d 982 (2006) 19

In *Harris v. Robert C. Groth, M.D., P.S*
99 Wn.2d 438, 663 P.2d 113 (1983) 24

In the Matter of the Welfare of Young
24 Wn. App. 392, 397, 600 P.2d 1312 (1979) 21, 23

In re Post
145 Wn. App. 728, 755-756, 187 P.3d 803 (2008) 20

Levea v. G.A. Gray Corp.
17 Wn. App. 214, 220-21, 562 P.2d 1276 (1977) 16

Ma'ele v. Arrington,
111 Wn. App. 557, 45 P.3d 557 (2002) ..... 4, *passim*

Marr v. Cook
51 Wn.2d 338, 341-42, 318 P.2d 613 (1957) 22

Marriage of Katare
175 Wn.2d 23, 283 P.3d 546 (2012) ..... 12, *passim*

Miller v. Likens
109 Wn. App. 140, 34 P.3d 835 (2001). 16

Nguyen v. Sacred Heart Med. Ctr.,
97 Wn. App. 728, 735, 987 P.2d 634 (1999) 17

Presnell v. Safeway Stores, Inc.
60 Wn.2d 671, 675, 374 P. 2d 939 (1962) 22

Salax v. Hi-Tech Erectors
168 Wn.2d 664, 671, 230 P.3d 583 (2010) 21

State v. Florczak
76 Wn. 55, 72-73, 883 P.2d 199, 209 (1994) 20

State v. Rasmussen
70 Wn. App. 853, 858, 855 P.2d 1206 (1993) 20

Stedman v. Cooper
282 P.3d 1168, 1173 (2012) ..... 13, *passim*

Tokarz v. Ford Motor Co.
8 Wn. App. 645, 653, 508 P.2d 1370 (1973) 23

White v. Fenner
16 Wn.2d 226, 245-46, 133 P.2d 270 (1943) 22

Statutes

RCW 2.44.010 17

Court Rules

CR 2A 17

RAP 2.5 ..... 3, 18, 21

ER 402 7

ER 403……18

ER 702……8, 20, 22, 24

A. INTRODUCTION

The issue presented is whether the trial judge abused her discretion by allowing the testimony of a bio-mechanical expert, Dr. Allen Tencer, to be used in the trial of a low speed rear end automobile accident. A defense verdict was rendered in favor of Respondent Dawn Matsunaga ("Matsunaga") in the trial court.

Cathy Johnston-Forbes' ("Johnston-Forbes") sole assignment of error is that the trial court erred in denying her motion in limine to exclude the testimony and opinions of Dr. Allan Tencer. The trial judge properly exercised her discretion by allowing Dr. Tencer to testify, but placed limits on the number of photographs and evidence used during his testimony.

Counsel for Appellant Johnston-Forbes conceded during argument on the motions in limine that Dr. Tencer could testify at trial regarding the forces involved in the accident. Johnston-Forbes waived her objection to his testimony.

Furthermore, there was no abuse of discretion. Johnston-Forbes presents no basis for this Court to overturn the jury verdict.

B. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Johnston-Forbes' sole assignment of error is set forth below:

(1) Assignment of Error

1. Did the trial court err when it denied Plaintiff's Motion in Limine to exclude the testimony of Dr. Allan Tencer?

(2) Issues Pertaining to Assignments of Error

Matsunaga acknowledges Johnston-Forbes' Issues Pertaining to Assignments of Error and designates the following issues:

1. Did Counsel for Johnston-Forbes concede in open court that Dr. Tencer could testify at trial as to the forces involved in the accident, thereby waiving any objection and

precluding any review on this issue on appeal? (Assignment of Error 1.)

2. Did the Appellant properly object at trial to the introduction of testimony by Dr. Tencer at trial? (Assignment of Error 1.)

3. Did the Appellant properly raise under RAP 2.5 all arguments presented in this appeal to the trial court below? (Assignment of Error 1.)

4. Did the trial court abuse its discretion in allowing Dr. Tencer to testify? (Assignment of Error 1.)

C. RESTATEMENT OF THE CASE

1. 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.

2. 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. This appeal was filed on February 8, 2012. CP 65.

3. 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. See, *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 research relating to forces involved in low impact car accidents. 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-Ibs, and her lumbar spine experienced about l.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.

4. 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 experience 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.

5. 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.

D. SUMMARY OF ARGUMENT

This is a low impact rear end collision case. Johnston-Forbes' sole assignment of error is that the trial court erred in denying the motion in limine to exclude the testimony and opinions of bio-mechanical expert Dr. Allan Tencer. The trial court did not abuse its discretion by admitting the expert testimony of Dr. Tencer.

Johnston-Forbes' counsel conceded in argument on the first day of trial that Dr. Allen Tencer could testify as to the forces involved in the collision. There was a waiver of any objections to his testimony by this concession. Johnston-Forbes cannot represent to the court that they will not object to Dr. Tencer testifying, and then reverse course on Appeal by arguing that the trial court abused its discretion.

The trial court, in exercising its discretion, allowed Dr. Tencer to testify, but did limit his testimony in part by reducing the number of photographs of the Matsunaga vehicle's front bumper that could be shown to the jury, and also ruled

that the repair bill for the rental car in which Johnston-Forbes was riding could not be used as a basis for his opinion or be shown to the jury.

Johnston-Forbes failed to object and present argument in the trial court for any challenge to the relevancy of Dr. Tencer's testimony. Johnston-Forbes failed to object and present argument at trial to establish that Dr. Tencer's testimony should have been excluded as unreliable scientific evidence.

Johnston-Forbes' argument that Dr. Tencer is not a physician, and not a licensed engineer in the State of Washington, was raised and rejected by this Court in *Ma'Ele v. Arrington*. This argument goes to the weight of his testimony and not the admissibility. Similarly, the arguments raised about the foundation of Dr. Tencer's testimony go to the weight of his testimony. The recent Washington Supreme Court decision in *Marriage of Katare*, 175 Wn.2d 23, 283 P.3d 546 (2012) explained that while an adequate foundation is required for

expert testimony, an expert is not required to personally perceive the subject of their analysis.

Johnston-Forbes argued that there was no foundation for his opinions due to the fact that Dr. Tencer did not view photographs of the Toyota rental car. Dr. Tencer was familiar with the type of bumper on the Toyota from his past experience. He could determine the forces involved in the impact from viewing the photo of the deformation of the bumper on the Matsunaga Ford Mustang, consider the weight of the two vehicles, take into account the testimony of Matsunaga as to the speed of her vehicle, and then compute the forces at impact. Johnston-Forbes' counsel had the opportunity to cross-examination Dr. Tencer at length in the trial.

Stedman v. Cooper, 282 P.3d 1168, 1173 (2012) does not compel a different result. The Court in *Steadman* upheld the discretion of the trial judge in excluding the testimony of Dr. Tencer. The court cited *Ma'ele* and did not overrule it, noting that the facts in *Ma'ele* involved a rear-end collision; the

only issue at trial was damages. *Id.* at 1172 Here, like *Ma'ele*, Dr. Tencer's testimony was not being used to establish liability, only to explain to the jury the magnitude of the forces involved in the collision. His testimony was more limited than in *Ma'ele* as he did not testify that the forces generated at impact caused no medical injuries. Instead he compared the forces to what is encountered in everyday living.

Steadman strongly upholds the discretion of a trial judge to allow or exclude expert testimony depending on the facts of each case. The court stated 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 1172.

Steadman can be factually distinguished. Most importantly, Johnston-Forbes' counsel expressly agreed on the record that Dr. Tencer could testify. There was no express objection raised to the relevancy of Dr. Tencer's testimony.

There was no request for a *Frye* hearing. Johnston-Forbes failed to object in order to preserve these arguments for appeal.

The trial court's jury verdict should be affirmed.

E. ARGUMENT

(1) Standard of Review

This Court reviews the trial court's ruling allowing the admission of expert testimony under an abuse of discretion standard. In *Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546 (2012), the Washington Supreme Court recently stated:

> "Generally, a party may introduce expert testimony as long as the expert is qualified, relies on generally accepted theories, and assists the trier of fact. ER 702. Determining the admissibility of expert evidence is largely within a trial court's discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). "'[T]he exercise of [such discretion] will not be disturbed by an appellate court except for a very plain abuse thereof.'" *Hill v. C&E Constr. Co.*, 59 Wn.2d 743, 746, 370 P.2d 255 (1962) (quoting *Wilkins v. Knox*, 142 Wash. 571, 577, 253 P. 797 (1927))."

A trial court has wide discretion in ruling on the admissibility of expert testimony. An abuse occurs only when the discretion is exercised on untenable grounds or for untenable reasons. *Davidson v. Mun. of Metro. Seattle*, 43 Wn.App. 569, 572, 719 P.2d 569 (1986).

A court will not disturb a trial court's ruling "if the reasons for admitting or excluding the opinion evidence are both fairly debatable." *Miller v. Likens*, 109 Wn.App. 140, 34 P.3d 835 (2001). In *Levea v. G.A. Gray Corp.*, 17 Wn.App. 214, 220-21, 562 P.2d 1276 (1977), the court stated the trial court is given particular deference when there are fair arguments both for and against admissions.

(2) Johnston-Forbes Conceded at Trial that Dr. Tencer Could Testify

Johnston-Forbes' counsel conceded that Dr. Tencer could testify as to the forces involved in the collision. This concession was made at the pre-trial hearing for the motions in limine, as shown below:

> "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**." (Emphasis Supplied)

RP Vol. 1, pgs. 19-20.

Under CR 2A and RCW 2.44.010, attorneys have authority to bind their clients to agreements or stipulations on the record. The standard for review is that this court will not review an agreement on the record "unless the party contesting it can show that the concession was a product of fraud or that the attorney overreached his authority." *Nguyen v. Sacred Heart Med. Ctr.*, 97 Wn.App. 728, 735, 987 P.2d 634 (1999).

There is no basis for Johnston-Forbes to argue that the concession was induced by fraud or that her counsel overreached his authority. It appears that this was a tactical concession on the part of her attorney to buttress his argument that photographs of the Matsunaga Ford Mustang should not be shown to the jury. RP Vol. 1, pgs. 19-20. Johnston-Forbes has waived her right to argue that Dr. Tencer's testimony should have been excluded.

(3) Johnston-Forbes Failed To Properly Preserve Error on Appeal

There were three grounds for exclusion of Dr. Tencer's testimony raised in the motion in limine. These were objections to his qualifications; (2) the foundation for his testimony; and (3) objections to his testimony based on ER 403. CP 8 -14.

Johnston-Forbes failed to properly preserve error in accord with RAP 2.5, with respect to his argument that Dr. Tencer's testimony should have been excluded as unreliable scientific evidence. (Br. of Appellant at pgs. 15-22.) Johnston-

Forbes did not request a *Frye* hearing. Absent an objection, Johnston-Forbes cannot raise her claimed *Frye* error for the first time on appeal.

Johnston-Forbes in her brief argues that Dr. Tencer's opinions are not generally accepted in the scientific community, as shown below:

> "Tencer is not qualified to predict the forces that a vehicle occupant experiences in low impact collisions, nor whether those forces cause the occupant tissue damage."

(Br. of Appellant at pg. 15.) This argument was not raised in the motion in limine, and no objection was made to Dr. Tencer's testimony at trial on this issue.

The Washington Supreme Court in *In re the Detention of Audett*, 158 Wn.2d 712, 725, 147 P.3d 982 (2006) applied the perseveration of error doctrine stating that "Opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their case to issue and theories, at the trial level, rather than facing newly-asserted error or new theories

and issues for the first time on appeal." See also *In re Post*, 145 Wn.App. 728, 755-756, 187 P.3d 803 (2008) (appellant failed to preserve error by not requesting a *Frye* hearing or objecting under ER 702); *State v. Florczak*, 76 Wn. 55, 72-73, 883 P.2d 199, 209 (1994).

Johnston-Forbes made only one objection to Dr. Tencer's testimony at trial based on lack of foundation. RP Vol. 3, pg. 316. The objection was made on the basis that Dr. Tencer did not view photographs of the Toyota in which Johnston-Forbes was riding. This question was then re-phrased and Dr. Tencer explained why he did not need to see a photograph of the Toyota. *Id.* at 317. No more objections to the testimony of Dr. Tencer were made.

A party must specifically object to evidence presented at trial and allow the trial court to rule on the issue to preserve the matter for appellate review. *State v. Rasmussen,* 70 Wn.App. 853, 858, 855 P.2d 1206 (1993). "Errors raised for the first

time on appeal need not be considered." *In re Young*, 24 Wn.App. 392, 397, 600 P.2d 1312 (1979).

Under RAP 2.5(a), the court will generally not consider arguments raised for the first time on appeal, except for (1) lack of trial court jurisdiction, (2) failure to establish facts on which relief can be granted, and (3) manifest error affecting a constitutional right. The purpose of RAP 2.5(a) is to give trial courts the opportunity to address any errors. *Salax v. Hi-Tech Erectors*, 168 Wn.2d 664, 671, 230 P.3d 583 (2010). None of the exceptions are present here.

In addition, Johnston-Forbes did not argue that Dr. Tencer's testimony was not relevant in the trial court. This argument was not raised in the motion in limine and was not objected to at trial. Instead, Johnston-Forbes agreed that Dr. Tencer could testify.

Washington courts have long held that an objection that does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *See,*

e.g., Marr v. Cook, 51 Wn.2d 338, 341-42, 318 P.2d 613 (1957); *White v. Fenner*, 16 Wn.2d 226, 245-46, 133 P.2d 270 (1943). "Objections must be accompanied by a reasonably definite statement of the grounds therefore so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." *Presnell v. Safeway* Stores, Inc., 60 Wn.2d 671, 675, 374 P.2d 939 (1962).

There was a failure to assert these arguments in the motion in limine and failure to object at trial. Johnston-Forbes cannot now raise these arguments for the first time on appeal.

(4) The Trial Court was Correct in Finding That Dr. Tencer Was Qualified To Testify

Dr. Tencer has a PhD in engineering, teaches at the University of Washington Medical School, and does federally-funded research. RP Vol. 3, pgs. 297-310. These qualifications satisfy ER 702. The trial court properly exercised its discretion

by allowing Dr. Tencer's testimony. The same conclusion was reached in *Ma'Ele. Ma'Ele*, 111 Wn.App. at 563.

Once the trial court has determined that the basic qualifications for admissibility are established, any deficiency in an expert's qualification is a matter of weight, not admissibility. *In the Matter of the Welfare of Young*, 24 Wn.App. 392, 397, 600 P.2d 1312 (1979). Likewise, the thoroughness of an expert's examination is a matter of weight for the jury. *Tokarz v. Ford Motor Co.*, 8 Wn.App. 645, 653, 508 P.2d 1370 (1973).

As previously discussed, Johnston-Forbes agreed that Dr. Tencer could testify. It should be noted that the record would certainly have been different if this issue was actively contested and not conceded. The specific objections that Johnston-Forbes presented in her motion in limine will be addressed.

4.1 Lack of Licensing As an Engineer in Washington State

ER 702 does not require a biomechanical expert to have a license. There is no such licensing requirement in Washington State. There is no requirement in ER 702 that an expert must have a license in order to testify. In *Harris v. Robert C. Groth, M.D., P.S.,* 99 Wn.2d 438, 663 P.2d 113 (1983), the court allowed a non-physician expert testify in a medical malpractice case. The court in *Harris* explained:

> "While most courts have imposed per se limitations on the testimony of otherwise qualified nonphysicians (*see, e.g., Rodriguez v. Jackson*, 118 Ariz. 13, 17, 574 P.2d 481 (Ct. App. 1977)), such limitations are not in accord with the modern trend in the law of evidence generally. That trend is away from reliance on formal titles or degrees. 5A K. Tegland, § 290. The witness need not possess the academic credentials of an expert; practical experience may suffice. Training in a related field or academic background alone may also be sufficient."

Id. at 449-450. This argument was raised and rejected in *Ma'ele,* where the Court found that Dr. Tencer was qualified to testify as an expert. *Ma'ele*, 111 Wn.App. at 565.

4.2 Objection based on Dr. Tencer Not Being a Medical Doctor

Dr. Tencer is a forensic expert who testified as to the forces involved in the low-speed collision. He did not render a medical opinion. In *Ma'Ele*, the court explained:

> "In contrast, 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. See *Wise v. Hayes*, 58 Wn.2d 106, 108, 361 P.2d 171 (1961). Tencer simply testified about the nature of the forces involved in low-speed collisions and the likelihood of injury from such forces."

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

The opinions expressed by Dr. Tencer provide a description of the forces experienced by the occupant of the vehicle that is hit in an automobile accident. He calculated the forces operating on the Plaintiff during impact based upon fundamental engineering principles. Specifically, Dr. Tencer uses the weights of the vehicles provided by the automobile industry, the speed of the striking vehicle based upon its level of damage and the coefficient of restitution which describes the elasticity of the impact and braking forces, to compute the speed change and acceleration of the struck vehicle. These computations are based upon the conservation of energy, momentum, and restitution, which is a method commonly employed by engineers.

Dr. Tencer did not testify to "causation" or that the subject motor vehicle accident did not "cause" the Plaintiff's alleged injuries. He testified regarding the forces experienced in this accident "based upon a reasonable degree of

biomechanical engineering" and he did not render an opinion to whether the Plaintiff was or was not injured.

In addition, Dr. Tencer provides the relevant forces of daily living so that the forces he has calculated can be placed into context in order to assist the jury in determining the nature of the accident.

4.3 Objections Based On Lack of Foundation

Johnston-Forbes argues that Dr. Tencer's testimony lacked an adequate foundation because he did not personally view or review photographs of the Toyota rental automobile in which she was riding. Dr. Tencer has tested vehicles with bumpers similar to the Toyota rental car in which Johnston-Forbes was riding and is not required to physically examine or view a photograph of the actual car bumper. RP Vol. 3, pgs. 317-318.

In *Marriage of Katare*, the court stated that while an adequate foundation is required for expert testimony, an expert

is not required to personally perceive the subject of their analysis, stating:

> "But, an expert is not always required to personally perceive the subject of his or her analysis. ER 703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." (emphasis added)). That an expert's testimony is not based on a personal evaluation of the subject goes to the testimony's weight, not its admissibility"

Katare, 175 Wn.2d. at 39.

Dr. Tencer was familiar with the type of bumper on the Toyota from his past experience. He could determine the forces involved in the impact from viewing the photo of the deformation of the bumper on the Matsunaga Ford Mustang, determine the weights of the vehicles, consider the testimony of Matsunaga as to the speed of her vehicle, and then compute the forces at impact. RP Vol. 3, pgs. 311-330.

(5) <u>*Steadman v. Cooper* Does Not Compel A Different Result</u>

The trial judge's decision was made before the Court of Appeals decision in St*edman v. Cooper*, which held that the trial court did not abuse its discretion in excluding the testimony of Dr. Tencer. *Steadman*, 282 P.3d at 1173.

The *Stedman* court discussed the *Ma'ele* decision as follows:

> "One Washington case in which Tencer was allowed to give expert testimony reached the appellate level in *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002). *Ma'ele* involved a rear-end collision; the only issue at trial was damages. Tencer opined that "the maximum possible force in this accident was not enough to injure a person." *Ma'ele*, 111 Wn. App. at 564. There was a defense verdict. The plaintiff appealed, and the decision to admit Tencer's testimony was affirmed against a challenge under ER 702. "His testimony about the force involved in low-speed collisions and the impact on the body helped the jury determine whether Ma'ele got hurt in this

> accident." *Ma'ele*, 111 Wn.App. at 563." *Id*. at 1172.

The *Stedman* court emphasized that its decision rested on the broad abuse of discretion standard for the trial judge, as shown below:

> "The fact that an appellate court has affirmed a decision allowing Tencer's testimony does not, of course, necessarily mean that the trial court erred by excluding his testimony in this case. 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 1172.

This decision leaves the door open for the trial judge to make their own determination about whether to exclude Dr. Tencer. Trial judges can reasonably reach different conclusions in a particular case.

///

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F. CONCLUSION

The trial court did not abuse its discretion by admitting Dr. Tencer's expert testimony. The jury verdict should be affirmed.

DATED this 6th day of November, 2012.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I certify that, on the date indicated below, I caused a true copy of the Brief of Respondent be served by the means indicated, on:

Michael H. Bloom ***Via Overnight Mail***
Attorney at Law
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Attorneys for Appellant

DATED this 6th day of November, 2012.

By _____
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