

FILED
10/30/2017 12:21 PM
Court of Appeals
Division I
State of Washington

NO. 76019-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

L.M. a minor, by and through his Guardian ad Litem
WILLIAM L.E. DUSSAULT,

Appellant,

vs.

LAURA HAMILTON, individually and her
marital community; LAURA HAMILTON LICENSED
MIDWIFE, a Washington business,

Respondents.

PETITION FOR REVIEW

Simeon J. Osborn, WSBA #14484
Susan Machler, WSBA #23256
Attorneys for Appellant

OSBORN MACHLER
2025 First Avenue, Suite 1200
Seattle, Washington 98121
(206) 441-4110

TABLE OF CONTENTS

INTRODUCTION.....1

A. IDENTITY OF PETITIONERS.....1

B. COURT OF APPEALS DECISION.....1

C. ISSUES PRESENTED FOR REVIEW.....1

D. STATEMENT OF THE CASE.....2

 1. Substantive Facts.....2

E. ARGUMENT WHY REVIEW SHOULD
BE ACCEPTED.....6

 1. The decision of the Court of Appeals
 is in conflict with prior decisions of the
 Supreme Court regarding admission of
 scientific evidence6

 2. The Court of Appeals opinion conflicts
 with prior rulings of the Supreme Court
 and the Court of Appeals.....13

F. CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Akzo Nobel Coating, Inc.</i> , 172 Wn2d 593, 603 (2011).....	6
<i>Eakins v. Huber</i> , 154 Wn. App. 592, 599 (2010).....	7
<i>Fabrique v. Choice Hotels Int’l, Inc.</i> , 144 Wn. App. 675, 685,687-88, 183 P.3d 1118 (2008).....	15, 16
<i>Gilmore v. Jefferson County Public Transportation</i> , Case No. 94559-4.....	2, 20
<i>Johnston-Forbes v. Matsunaga</i> , 181 Wn.2d 346, 357 (2014).....	15
<i>Lakey v. Puget Sound Energy, Inc.</i> , 176 Wn.2d 909, 918, 919, 920-921 296 P.3d 860 (2013)....	6, 7, 17
<i>Ma’ele v. Arrington</i> , 111 Wn. App. 557, 45 P.3d 557 (Div. III 2002).....	14
<i>Rounds v. Nellcor Puritan Bennett, Inc.</i> , 147 Wn. App. 155, 162, 194, P.3d 274 (2008).....	16
<i>State v. Cauthron</i> , 120 Wn. 2d 879, 887 (1993).....	7
<i>State v. Gregory</i> , 158 Wn.2d 759, 829 (2006).....	6, 7
<i>Stedman v. Cooper</i> , 172 Wn. App. 9, 18, 292 P.3d 764 (Div. I 2012).....	14, 15, 19

A. IDENTITY OF PETITIONERS

Petitioner, Levi Zane Myhre, by and through his Guardian ad Litem, William L.E. Dussault, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The Court of Appeals' opinion was filed on August 28, 2017, (Appendix "App." 1), and a motion to publish was granted on September 29, 2017. (App. 2).

C. ISSUES PRESENTED FOR REVIEW

1. Whether a *Frye* hearing should have been conducted when it was undisputed that no medical literature exists that a brachial plexus rupture and/or avulsion can occur at all five levels of the brachial plexus complex by the natural forces of labor alone.

2. Whether a *Frye* hearing should have been conducted when the conclusions made in the medical literature that the natural forces of labor can cause permanent brachial plexus injuries lack scientific bases or are based upon methods that are not generally accepted in the scientific community.

3. Whether a biomechanical engineer and professor from the orthopedics department is qualified to opine that the forces occurring

during labor are insufficient to cause nerve injury.

4. Whether a biomechanical engineer can opine how much force is necessary to injure the brachial plexus nerve when virtually all the medical literature states that this force is not known and cannot be known.

5. Whether the Court should review this case along with the case concerning Alan Tencer already accepted for review: *Gilmore v. Jefferson County Public Transportation*, Case No. 94559-4.

D. STATEMENT OF THE CASE

1. Substantive Facts

On April 4, 2010, Levi Myhre was born with a motionless right arm at respondent Laura Hamilton's home birthing center in Chehalis, Washington. Hamilton acted as midwife for Levi's birth, and a family member video recorded his birth. In August, 2010, at Seattle Children's Hospital, Dr. Raymond Tse attempted surgical repair of Levi's brachial plexus nerve and found rupture of the nerve roots at the C5 and C6 vertebrae, avulsion of the nerve root at the C7 vertebrae, and partial avulsion of the C8 and T1 nerves. CP 1640. Levi has no functional use of his upper right arm, limited use of his right forearm, and impairment of his hand. He also suffers sensory loss and pain. CP 1665-1668; 1671.

Levi's expert obstetrician/gynecologist, Dr. Howard Mandel, reviewed the records and the video recording. He testified that shoulder

dystocia occurred during delivery, where Levi's right shoulder stuck on mother's pubic bone. CP 1670. This condition requires immediate intervention.

Dr. Mandel observed that "the midwife inserted her hands around the baby's neck in an apparent effort to manually turn the baby, and about 20 seconds later, she applied lateral (downward) manual traction of Levi's head and neck in her delivery process." CP 1642. Dr. Mandell testified that the placement of Hamilton's hands was improper and has long been associated with excessive forces that can and do result in brachial plexus injury. In this case, Levi's five brachial plexus nerve roots were 'avulsed' (ripped away from the spinal cord) or 'ruptured' (ripped apart). CP 1642. Midwife Hamilton's treatment fell below the standard of care. CP 1640.

Dr. Mandell also testified that the extensive damage to all five of Levi's brachial plexus nerve roots could only be caused by excessive traction. No medical data or literature reports "of such a serious brachial plexus neurological injury occurred without excessive manual traction by the delivering provider." CP 1640-1641.

Plaintiff's midwife expert, Pamela Kelly, RN, CNM, testified that Hamilton encountered shoulder dystocia and failed to use the recognized shoulder dystocia maneuvers to release the shoulder. Instead, Kelly observed from the video that Hamilton pulled "on the neck and anterior

shoulder to free it from under the pubic bone. The mother pushes simultaneously which further impacts the shoulder behind the pubic bone, so the midwife pulls even harder.” CP 1654-1656. Ms. Kelly also knows of no medical literature that “avulsion and ruptures of the brachial plexus nerve roots of an otherwise normal newborn can occur by way of the natural forces of labor (uterine contractions and maternal pushing).”

Dr. Stephen T. Glass, plaintiff’s pediatric neurology expert, reviewed the video of Levi’s birth and observed “lateral (downward) distraction of the head and neck are utilized in the process of delivery efforts.” Subsequently, “stronger pulling efforts are noted by delivering hands . . .” 1665-1668. Dr. Glass testified that: “Given the character of delivery and given the degree and extent of this severe plexus injury, it is improbable that the ‘natural forces’ of labor and delivery were solely responsible . . .” CP 1665-1668. In fact, Dr. Glass testified that excessive lateral or rotational traction manually applied to Levi’s head was the “only way” this injury could have occurred. CP 1672.

The case below was filed in King County Superior Court on January 27, 2014. On August 18, 2015, plaintiff filed his motion to exclude evidence that the natural forces of labor could cause Levi’s injury. Initially, the trial court granted the plaintiff’s motion. The court found: “The evidence that we have from the defense is not specific enough to this

type of injury because it just includes temporary and permanent, and whether it's a stretch, whether it's a rupture, whether it's an avulsion, whether it's a neuroma we don't really know." VRP, Sept. 18, 2015, Motion Hearing, p. 19, lines 19-23.

Plaintiff filed his motion for partial summary judgment of negligence and causation on September 15, 2015. CP 1621.

On October 1, 2015, Hamilton filed a motion for reconsideration. Hamilton submitted six new expert declarations, all dated after the court's September 18, 2015, ruling. CP 2933.

The trial court granted the motion on October 12, 2015, just seven days before trial. The trial court determined that "it would be substantially unfair to the defense to restrict them to testimony that said basically she did not violate the standard of care, she met the standard of care, and then on cross-examination to that witness, well, if she didn't how did this happen and then they can't say, well, it wasn't traction and then the jury's going to just be left with that void." VRP, 10/12/15, Motion Hearing, p. 27, lines 1-7. The trial court also determined that, although the medical literature does not state that an avulsion can be caused by the natural forces of labor, literature exists that a permanent injury can be caused by natural forces of labor. VRP, 10/12/15, Motion Hearing, p. 27, line 14, through p. 28, line 8. Finally, the trial court stated that, because the forces

acting on an infant's brachial plexus nerve cannot be studied prospectively based upon ethical considerations: "You can't get in there and manipulate and do those things to say, oh, that's how much it took, that's how much pressure it took." VRP, 10/12/15, Motion Hearing, p. 29, lines 5-7; p. 29, line 18, through p. 30, line 1.

The jury trial resulted in a defense verdict. Levi appealed. The Court of Appeals upheld the trial court's ruling, and this Petition for Review follows.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The decision of the Court of Appeals is in conflict with prior decisions of the Supreme Court regarding the admission of scientific evidence.

The Washington Supreme Court has held that the trial court must exclude evidence involving scientific evidence unless the testimony satisfies both *Frye* and ER 702. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860 (2013). Under *Frye* standard, the trial court must find that the underlying scientific theory and the "techniques, experiments, or studies utilizing that theory" are generally accepted in the relevant scientific community and capable of producing reliable results. *Id.* Evidence is inadmissible under *Frye* if, as here, there is a significant dispute among qualified scientists in the relevant scientific community. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 603 (2011); *State*

v. Gregory, 158 Wn.2d 759, 829 (2006); *State v. Cauthron*, 120 Wn.2d 879, 887 (1993); *Eakins v. Huber*, 154 Wn. App. 592, 599 (2010). A court's decision to admit scientific evidence under the *Frye* standard is reviewed de novo. *Lahey v. Puget Sound Energy, Inc.*, 176 Wn. 2d 909, 919, 296 P.3d 860 (2013).

In the present case, the Court of Appeals affirmed the trial court's admission of the "natural forces of labor" defense (NFOL), even though the very studies upon which the defense relies acknowledge that much is unknown regarding the causes of brachial plexus injuries in newborns. The extent of injury from the NFOL requires more investigation. The studies cannot show that avulsion injuries occur from NFOL. There is no method to test excessive traction. At least one study admits it was a "nonsystematic literature review." Another study states that the literature on brachial plexus injuries suffers from "lack of precision, conflicting findings, and lack of correlation." The theory is not generally accepted in the medical community, and it is not capable of producing reliable results as required by this Court's prior holdings.

The Court of Appeals allowed the NFOL defense, even though the trial court, the parties, the experts, and the medical literature confirm that no case of avulsion of the brachial plexus nerve from the NFOL has been identified in the medical literature. This Court should review the Court of

Appeals decision and reverse and remand for a *Frye* hearing.

Hamilton's defense expert, Dr. Sanford, testified that the literature "is still not very good in terms of telling us exactly what happens to cause" brachial plexus injury. CP 1467. She also testified: "I don't have anything in the literature that specifically – that I recall talks about [a]vulsion versus anything stretching . . . the medical literature does not really specifically state one way or another and more research is needed in whether [a]vulsion is any different than just a stretching or any type of thing that would cause a permanent injury." CP 1468; CP 1469.

A review of the literature confirms the trial court's finding that no medical literature supports Hamilton's defense. More importantly for the trial court's gatekeeping function, the medical literature almost universally concedes that more study is needed to understand the force needed to injure the brachial plexus nerve. Not only is the force needed to avulsion the nerve not known, but it cannot be known, because scientists cannot test these forces on newborn babies, a fact acknowledged by the trial court.

The medical literature also concedes that it has no tool for measuring the force applied by the practitioner. This detail is critical in this case (1) where the literature states such a tool is urgently needed; (2) where the forces of labor and the caregiver combine to cause injury; and (3) where *the literature shows that shoulder dysocia attended by either a*

midwife, nurse, corpsman, or osteopath are at 3- to 4-fold increased risk of neonatal brachial plexus injury. CP 2018. In this case, where Levi was delivered by a midwife, the NFOI defense completely fails to address this risk. Thus, the conjecture and extrapolation that occur in the literature should be carefully examined at a *Frye* hearing.

The American College of Obstetricians and Gynecologists (ACOG) acknowledges the need for more research in its 2014 publication on brachial plexus injuries in newborns, which was relied upon heavily by Hamilton. “There is some evidence that the cardinal movements of labor alone may cause stretch in the brachial plexus (2), *but the extent of this stretch requires more investigation.*” CP 1916. The authors further state: “Because of the nonlinear behavior of tissues such as nerve tissue, *an estimate of the force needed to cause a nerve rupture cannot be directly established.*” CP 1917.

Another article relied upon by the Hamilton concludes: “Further studies, including comparison of neurosurgical findings with obstetric antecedents and *development of a tool to gauge excessive downward traction,* are urgently needed.” CP 2016. Another states that the contribution of the different factors is unknown. CP 2039. Still another article reiterates that “there is no currently accepted method to objectively quantify ‘excessive’ lateral traction.” CP 2021. Dr. DeMott, Hamilton’s

expert, co-authored a “nonsystematic literature review,” which means he used no methodology at all, much less one that is generally accepted in the medical community. CP 2026-2030.

The textbook, *Williams Obstetrics*, also relied upon by Hamilton, states that “severe plexopathy may also occur without risk factors or shoulder dystocia. (Torki, 2012).” CP 1999. However, the Torki study does no analysis and provides no description of the “severe brachial plexus palsies” the authors claim to have studied. CP 539-541. The authors of the Torki study do not document a rupture or avulsion injury. They reference only vaguely “severe brachial plexus palsies.” Thus, the studies cited by the studies do not support the claim that an avulsion can occur from NFOL.

Case reports relied upon by Hamilton do not describe avulsion injuries or cases where the brachial plexus nerves were ruptured or avulsed at all five levels. CP 2009-2010; CP 2012- 2016; CP 2018;. CP 2024

Hamilton and her experts also relied on “Causes of Neonatal Brachial Plexus Palsy,” by Daniel T. Alfonso, M.D. CP 2036-2041. Dr. Alfonso writes directly about the lack of general consensus in the medical community:

“The literature on predisposing factors for obstetrical brachial plexus palsy suffers from *lack of precision, conflicting findings, and lack of correlation* between the alleged predisposing factors and obstetrical brachial plexus palsy. Most articles equate neonatal brachial plexus palsy with obstetrical brachial plexus palsy, *demonstrating a lack of precision in the literature.*” CP 2037.

Dr. Alfonso unequivocally states that the traction by the caregiver is necessary to produce obstetrical brachial plexus palsy: “. . .the magnitude, acceleration, and direction of the vector of the stretch force is the product of the sum of the traction force generated by the obstetrician and the propulsive force generated by spontaneous or induced uterine contractions.” PC 2038. The exact contribution of each force is unknown. CP 2039.

If the articles are looked at as a whole, two more issues arise that make a *Frye* hearing, not just appropriate, but necessary. First, the proponents of the “natural forces of labor theory” appear to be the same small group of doctors: Drs. Ouzounian, Sandmire, DeMott, and Gherman have written several of the articles. CP 1848-49. Dr. Gherman was chair of the Task Force on Neonatal Brachial Plexus Palsy that authored the ACOG publication, and Drs. Gherman and Ouzounian were on the committee. CP 1875; 1878. Some of the articles reference litigation as a consideration. CP 2009. Some acknowledge the “inherent ascertainment bias” of the authors. CP 2021.

Other doctors have disagreed with the methodologies or conclusions of the articles relied upon by Hamilton. CP 1516.

Gurewitsch and associates believe that the scientific foundation for etiologies of BPP other than excessive traction is questionable. The maternal propulsive-force theory as a cause of BPP [brachial plexus palsy] is challenged as **a subjective interpretation of retrospective data**, independent of whether shoulder dystocia was recorded and whether the injury was temporary or permanent.

Gurewitsch and colleagues state that evidence from 2 research studies shows that **maternal forces and in utero positioning are normally insufficient to cause injury** and that the most common cause of permanent injury is the application of traction laterally, torsionally, or in combination. **Gurewitsch et al state that there is not sufficient evidence to support other theories that permanent injury comes from anything other than excessive traction.**

CP 2051.

. . . [T]he claim that avulsion or rupture might be due to “endogenous “ factors (expulsive uterine forces and maternal pushing) capable of overstressing the brachial plexus is unsubstantiated. . . . [T]here is not even a single case report of permanent injury due to rupture or avulsion in the absence of traction having been applied. In addition our pediatric colleagues in neurology, orthopedics, and neurosurgery who evaluate and treat BPP recognize that avulsion or rupture results from excessive stretching of the brachial plexus by abduction (lateral traction).

CP 1462; 1643, par. 15

The second issue is that the studies examined the results of brachial plexus injuries, that is, whether the infant suffered from a “transient” or permanent brachial plexus palsy. CP 1852; 1856; 1860; 1884; 1990; 1993; 1996; 1999; 2009; 2012; 1303; 2024; 2026; 2032; and

2036. In many cases, it is simply not known whether the symptoms are the result of stretch, rupture, or avulsion, a fact pointed out by the trial court in its original ruling excluding the evidence. Thus, Hamilton's experts extrapolated studies of symptoms, without regard to the actual injury, to the present case where the nature of the actual injury is documented. CP 1667. The need for comparison of surgical findings with obstetric findings is acknowledged in the medical literature. CP 2016.

Given the uncertainty that is frankly acknowledged in the medical literature, a *Frye* hearing was required. The studies do not give any guidance for the practitioner or for the trier of fact regarding the force necessary to avulse the brachial plexus nerve and where the force comes from – the practitioner or the mother. When *shoulder dysocias attended by either a midwife, nurse, corpsman, or osteopath are at 3- to 4-fold increased risk of neonatal brachial plexus injury*, more is required than vague and speculative opinions that NFOL can cause brachial plexus injuries. CP 2018. This fact alone means that the healthcare provider can cause brachial plexus injury. The Court should reverse and remand for a *Frye* hearing.

2. The Court of Appeals opinion conflicts with prior rulings of the Supreme Court and the Court of Appeals.

The Court of Appeals' opinion affirming the admission of

Hamilton's expert, Alan Tencer, Ph.D., conflicts with prior opinions of this Court and the Court of Appeals regarding the admission of medical causation testimony. The Court of Appeals' opinion also conflicts with this Court's prior opinions for admission of expert testimony under ER 702. Tencer is not qualified to testify about labor and delivery. He is not qualified to testify about the cause of Levi's injury.

Furthermore, the Courts of Appeal disagree whether Tencer may offer testimony that the forces in a motor vehicle collision may be insufficient to cause injury. *See Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (Div. I 2012); *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (Div. III 2002). It seems Division One is on both sides of the fence. Its opinion in this case states that an opinion "that the maximum possible force in this accident was not enough to injure a person" is not a medical opinion." Opinion, p. 24. This is the opposite of its holding in *Stedman*, in which the Court stated: "*Schultz* persuasively explains why a trial court may regard such an opinion as more likely to be misleading than helpful." There is no credible evidence that there is a threshold below which a person cannot be injured, either in a motor vehicle accident or when a midwife uses too much traction on a baby's head and neck.

The opinion of the Court of Appeals in this case gives Tencer and others like him *carte blanche* to testify in any case that a person could not

be injured. If the evidence to support such an opinion is unreliable in motor vehicle accident cases, the evidence to support such an opinion is even more unreliable in a birth injury case, because the medical literature states unequivocally that the studies are unreliable, and there is no data to show the force required to avulse the brachial plexus nerve.

The Court of Appeals opinion that Tencer could testify contradicts Washington law under ER 702 that the expert have sufficient foundation for his opinions. The Court “must find that there is an adequate foundation so that an opinion is not mere speculation, conjecture, or misleading.” *Johnston-Forbes v. Matsunaga*, 181 Wn.2d 346, 357 (2014). *Stedman v. Cooper*, 172 Wn. App. 9, 18 (2012); *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 687-88 (2008) (Medical testimony must be based on the facts of the case and not on speculation or conjecture.).

In this case, no credible science exists to support Tencer’s attempt to quantify the forces present during labor and opine whether those forces were sufficient to cause the rupture and avulsion of Levi Myhre’s brachial plexus nerve at all five levels. ER 702. Tencer testified as if the forces present during labor, the force applied by the medical provider, and the forces required to rupture or avulse the brachial plexus nerve in a newborn human are well known and well understood. The literature relied upon by

Hamilton's own experts shows that this is false and misleading to the jury.

Furthermore, Tencer did not apply what little science that exists to the facts of this case. 10/27 RP (Tencer) 15: 4-7; 16:9-12. He did not know the force used by Hamilton when delivering Levi or the internal forces of the mother.

The Court of Appeals asserted erroneously that Levi does not dispute Tencer's "extensive training and experience in medical settings with injuries to the spinal cord and nerve roots." On the contrary, Levi pointed out that Tencer's training and experience was in the orthopedics, and he testifies about automobile collisions. Tencer is not in any way qualified to treat patients, and so, he has no experience in "medical settings." CP 2372. He has no specialized training in the mechanics of childbirth. CP 2372-2378. That his testimony was admitted in a medical malpractice case involving an orthopedic injury does not qualify him as an expert in a case involving injuries of child birth. CP 2376.

When an expert gives medical testimony, a medical degree has been required by Washington courts. The Court of Appeals has ruled in other cases that expert medical testimony is necessary to establish causation. *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 162, 194 P.3d 274 (2008); *Fabrique v. Choice Hotels Int'l, Inc.*, 144 Wn. App. 675, 685, 183 P.3d 1118 (2008).

Tencer's methods of calculating the natural forces of labor and of calculating the pressure required to cause avulsion of a nerve are unreliable. Washington courts have excluded expert testimony, because it was unreliable and failed to meet the helpfulness requirement of ER 702. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 920-921, 296 P.3d 860 (2013). In *Lakey*, the Court noted that the expert failed to consider all relevant data and discounted entire studies. He also selectively sampled data to support his opinion. The Washington Court found that the expert "created a false impression about what the study actually showed." *Id.* The Court should make a similar holding regarding Tencer's testimony.

Tencer implied that it is well established how much force is placed on an infant by endogenous (from the mother) or exogenous (from the practitioner) sources. CP 2373-2374; 1911-1912. However, little is actually known about the force used by "most practitioners." One study relied upon by Tencer included only two shoulder dystocia cases delivered by one physician. CP 3193. Another study used a training mannequin in which 113 deliveries were simulated. CP 3195. Tencer selected only the data that supported his opinion that "most clinicians used less than 150 N." However, that study measured forces as high as 254 N, and 28% of the clinicians used force in excess of 150 N. CP 3195. Nothing in the evidence suggests that Hamilton did not use more force than average.

Tencer's testimony could mislead the jury that less than 150 N was applied in this case.

With respect to the force required to injure the brachial plexus nerve, Dr. Grimm, the biomechanical engineer relied upon by Tencer, states in her ACOG chapter: "Because of the nonlinear behavior of tissues, such as nerve tissue, *an estimate of the force needed to cause a nerve rupture cannot be directly established.*" CP 3202. (Emphasis added.) She also states: "*The nerve tissue properties of the newborn brachial plexus have not been adequately studied to establish thresholds for damage based on either applied force or resulting stretch.*" CP 3202. Most importantly, Dr. Grimm states that "the fact that 200 N of force could be applied to a fetus to effect delivery in the absence of clinical shoulder dystocia *does not establish a permissible or 'safe' traction force* in the presence of shoulder impaction with the maternal pelvis. CP 3202.

Similarly, in Dr. Grimm's article detailing the mathematical modeling of forces, also cited by Tencer, she states: "Additionally, *there are no data* to quantify the threshold pressures needed to induce traction versus compression related nerve injury." CP 3204. Dr. Grimm concludes: "Obviously, the mathematical exercise presented here *can only crudely examine* this complex issue of forces and pressures related to the shoulder dystocia event." CP 3200.

At trial, Tencer referred to Dr. Grimm's study and testified that both internal and external forces have an effect, "but it seems like the internal force has a greater effect." *See* 10/27 RP (Tencer) 35:9-10. Levi's counsel asked Dr. Tencer whether he would agree with the study that: "there are no data to quantify the threshold pressures needed to induce traction versus compression related nerve injury." CP 3204; 10/27 RP (Tencer) 28:18-23. Tencer evaded this question: "See, this was published in 1999. And, you know, science moves forward ... So I think that for at that point in time that was probably correct. At this point in time there's probably more data around." 10/27 RP (Tencer) 18:24-19:4. After a follow-up, Dr. Tencer stated "you know, science is all about new knowledge, so I'm not sure that statement's completely accurate for this point in time." 10/27 RP (Tencer) 29:9-11.

However, Dr. Tencer presented no evidence of newer studies that work to discount Dr. Grimm's conclusion. This leaves his entire opinion resting on a study that concludes that there are no data quantify threshold pressures for nerve injury. Generally accepted science has not determined an estimate of the force needed to cause a nerve rupture. *See* CP 3202.

For the reasons given in *Stedman*, the Court should rule that the trial court abused its discretion in allowing Tencer's testimony, when his opinions were unsupported by science, speculative, and not based upon the

facts of this case. Tencer's opinions were logically irrelevant to the issue the jury had to decide: whether Hamilton's response to the shoulder dystocia fell below the standard of care, and she applied excessive traction that ruptured and avulsed Levi's brachial plexus at all five levels.

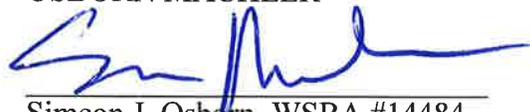
Finally, this Court has recently accepted another case for review concerning the testimony of Tencer. The Court should accept this case and review both together. The recently accepted case is *Gilmore v. Jefferson County Public Transportation*, Case No. 94559-4.

F. CONCLUSION

Respondents respectfully request that the Court reverse the Court of Appeals and remand the case for a *Frye* hearing. The Court should also determine that the trial court abused its discretion when it admitted Tencer's testimony.

Respectfully submitted this 30th day of October, 2017.

OSBORN MACHLER



Simeon J. Osborn, WSBA #14484
Susan Machler, WSBA #23256
Attorneys for Appellants

DECLARATION OF SERVICE

I hereby declare that on this day I caused to be served via Legal Messenger, true and correct copies of the foregoing PETITION FOR REVIEW upon the following counsel of record:

Mary H. Spillane Fain Anderson, et al. 701 5 th Avenue, Suite 4750 Seattle, WA 98104	Karen Southworth Weaver Soha & Lang, PS 1325 4 th Avenue, Suite 2000 Seattle WA 98101-2570
Donna Marie Moniz Karin Jeanne Mitchell Johnson, Graffe, Keay, Moniz & Wick 925 4 th Avenue, Suite 2300 Seattle, WA 98104-1145	Carla Tachau Lawrence 10700 Meridian Avenue N. Suite 215 Seattle, WA 98133-9008

Dated this 30th day of October, 2017.


Jenine K. Michaelis, *Paralegal*

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

L.M., a minor, by and through his
Guardian ad Litem, WILLIAM L.E.
DUSSAULT,

Appellant,

v.

LAURA HAMILTON, individually and her
marital community; LAURA HAMILTON
LICENSED MIDWIFE, a Washington
business,

Respondents.

No. 76019-0-1

DIVISION ONE

UNPUBLISHED

FILED: August 28, 2017

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2017 AUG 28 AM 10:22

Cox, J. — Frye v. United States¹ is implicated only where “either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community.”² In this professional negligence action, the record shows that neither the theory and techniques nor methods at issue are novel. Thus, Frye is not implicated in whether to admit the natural [maternal] forces of labor (NFOL) evidence of

¹ 54 App. D.C. 46, 293 F. 1013 (D.C. Cir. 1923).

² Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 919, 296 P.3d 860 (2013) (quoting Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 611, 260 P.3d 857 (2011)).

No. 76019-0-1/2

causation. And this evidence satisfies the requirements of ER 702, as being helpful to the jury. The trial court properly admitted NFOL evidence.

Likewise, the trial court did not abuse its discretion under ER 702 by admitting a biomechanical engineer's testimony, subject to certain limitations, concerning the biomechanics of labor. And it did not abuse its discretion in excluding a medical expert who treated the child but who was not qualified to testify on causation of his injuries. Finally, the trial court properly exercised its discretion in granting the renewed motion to change venue to Lewis County.

We affirm.

Midwife Laura Hamilton delivered L.M. in Lewis County. Shortly after his birth, he was diagnosed with avulsion and rupture damage to five nerve roots in his brachial plexus. As a result, he has limited functional use of his arm and suffers continuing pain.

L.M., through his guardian ad litem, brought this action in King County against Hamilton, her business entity, and Joint Underwriters Association of Washington State (JUA). The latter entity is the statutorily created program that provides medical malpractice insurance to midwives. He later added Midwifery Support Services (MSS), JUA's administrative service company, as an additional defendant.

The trial court granted summary judgment, dismissing the claims against JUA and MSS. Thereafter, the court granted Hamilton's renewed motion to change venue to Lewis County, the county of residence of the principals in this litigation and the location of L.M.'s delivery.

No. 76019-0-1/3

L.M. claimed that Hamilton was professionally negligent in performing his delivery. L.M. moved in limine to exclude testimony from Hamilton's experts that NFOL caused his injury. The trial court granted that motion.

Hamilton moved for reconsideration, submitting additional expert declarations. The trial court granted this motion, permitting evidence at trial of NFOL as a cause of the injuries.

The trial court also ruled in limine, over L.M.'s opposition, that the testimony of biomechanical engineer Dr. Alan Tencer, subject to certain limitations, could be admitted. Dr. Tencer does not hold a medical degree. His testimony addressed the different levels of external and internal forces on the mother that affect delivery.

At trial, the jury returned a verdict in Hamilton's favor. The trial court entered judgment on that verdict.

L.M. appeals.

FRYE AND NATURAL FORCES OF LABOR

L.M. argues that the trial court improperly admitted expert testimony regarding the NFOL theory of causation. We disagree.

Scientific expert testimony is admissible only if it satisfies both the Frye test and ER 702.³ Frye excludes such testimony where "either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community."⁴ But unanimity is not

³ Id. at 918.

⁴ Id. at 919 (quoting Anderson, 172 Wn.2d at 611).

required.⁵ If the theory or method has general scientific consensus, its application to reach novel conclusions as to causation does not implicate Frye.⁶

For example, expert medical testimony can be admissible even if it reflects “pure opinions and [is] based on experience and training rather than scientific data.”⁷ To require that each and every such conclusion independently satisfy Frye would allow “virtually all opinions based upon scientific data [to be] argued to be within some part of the scientific twilight zone.”⁸

Put simply, “Frye does not require that the specific conclusions drawn from the scientific data upon which [an expert] relied be generally accepted in the scientific community. Frye does not require every deduction drawn from generally accepted theories to be generally accepted.”⁹

ER 702 excludes expert testimony that fails to adhere to that methodology or assist the jury.¹⁰

We review de novo a trial court’s exclusion of evidence under Frye.¹¹ We review for abuse of discretion a trial court’s admission of expert testimony.¹² “A

⁵ Anderson, 172 Wn.2d at 603.

⁶ Lakey, 176 Wn.2d at 920.

⁷ Anderson, 172 Wn.2d at 610.

⁸ Id. at 611.

⁹ Id.

¹⁰ Lakey, 176 Wn.2d at 919.

¹¹ Id.

¹² Id.

No. 76019-0-1/5

trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds.”¹³

Here, the parties dispute whether Frye requires that the scientific community generally accept that NFOL can cause the specific sort of brachial plexus injury (BPI) L.M. suffered. They also dispute whether such evidence is otherwise admissible.

The brachial plexus is a network of nerves that connects the spinal cord to the muscles and skin of the shoulder and arm. Damage to the brachial plexus can cause BPIs, either transient or permanent, which can lead to neonatal brachial plexus palsy (NBPP), characterized by movement loss or weakness of the arm. BPIs can take a number of forms, from temporary stretching to rupture (tearing in the nerve) or avulsion (tearing of the nerve from its spinal cord root).

Expert testimony on the level of acceptance the medical community has afforded NFOL was given in numerous declarations from obstetric providers, both M.D.s and midwives. These experts reviewed the labor and delivery records as well as video of L.M.’s birth, relevant depositions and declarations of other experts, and other scholarly literature.

For example, midwife Beth Coyote explained that it was commonly “know[n] that babies can have permanent brachial plexus injuries caused by the natural forces of labor.”¹⁴ Dr. Elizabeth Sanford testified that “[i]t is agreed that permanent brachial plexus injuries can be caused by the natural forces of

¹³ Id.

¹⁴ Clerk’s Papers at 2653.

labor.”¹⁵ Such BPIs include ruptures and avulsions of the type L.M. suffered. Dr. Thomas Collins testified that “[t]here is a general consensus in the medical community that permanent brachial plexus injury can occur due to the natural forces of labor and delivery.”¹⁶

Dr. David DeMott also testified that no evidence supports the contention that more force is required to cause an avulsion or rupture BPI than an intact stretch or that “a permanent brachial plexus injury cannot be caused by the same mechanisms as a temporary injury.”¹⁷ The only difference, he testified, was of degree. By contrast, he noted that the relevant literature “*does* describe permanent injury to the brachial plexus as a result of maternal forces of labor.”¹⁸

L.M. also provided testimony from similarly qualified experts who disagreed about the relevant scientific consensus.

Dr. Howard Mandel testified that while NFOL alone could cause stress BPIs, it could not cause a brachial plexus avulsion or rupture “without excessive manual traction by the delivering provider.”¹⁹

¹⁵ Id. at 2663.

¹⁶ Id. at 2674.

¹⁷ Id. at 2924.

¹⁸ Id. at 1839.

¹⁹ Id. at 1641.

No. 76019-0-1/7

But, upon deposition, Dr. Mandel conceded that he could not cite a single study supporting his opinion. He further admitted he had not “done any research on nerve avulsion or specific reading on it in over ten years.”²⁰

Nurse Pamela Kelly had “never heard of nor read any medical literature that says *avulsion* and *ruptures* of the brachial plexus nerve roots of an otherwise normal newborn can occur by way of the natural forces of nature.”²¹ Rather, she posited such damage could “occur only from the application of excessive manual traction by the delivering provider.”²²

Dr. Stephen Glass examined L.M. at 5 years old. He testified that:

[t]he current medical literature suggests that the occurrence of transient stretch-type brachial plexus injuries in newborns can occur spontaneously *in utero* without manual traction (pulling) to the head, ***but avulsion injuries are caused only by application of excessive manual traction of the delivering provider while trying to alleviate the shoulder dystocia.***^[23]

He also explained that “no meaningful scientific studies . . . have measured the forces necessary to cause a brachial plexus injury compared with the forces exerted by a laboring mother.”²⁴

Courts may also consider peer reviewed scientific literature.²⁵ Hamilton’s experts, in particular Dr. DeMott, reviewed and presented this literature at length.

²⁰ Id. at 1511, 1690.

²¹ Id. at 1656.

²² Id.

²³ Id. at 1672.

²⁴ Id.

²⁵ Eakins v. Huber, 154 Wn. App. 592, 599, 225 P.3d 1041 (2010).

Dr. DeMott traces the evolution of thinking on the issue in Williams Obstetrics, a preeminent authority in the field. The 21st volume of that treatise had posited that BPIs “usually result[] from downward traction on the brachial plexus during delivery of the anterior shoulder.”²⁶ By the 24th edition, published in 2014, the textbook had begun to explain that even severe plexopathy could occur without risk factors associated with traction or other iatrogenic applied forces.

Another textbook entitled Precis, published by the American College of Obstetricians and Gynecologists (the “ACOG”), the licensing board in that discipline, is also helpful and relied upon by the defense experts. The 4th edition of Precis explains that where past textbooks had stressed the excessive traction theory, more recent thought “supported the concept that most brachial plexus palsies are not caused by the [midwife].”²⁷

The ACOG also issued an important report in 2014 entitled Neonatal Brachial Plexus Palsy. This report discusses anterior shoulder NBPP to explain that an infant with low injury tolerance might suffer transient or persistent NBPP due to NFOL absent obstetric maneuvers. It includes many statements “indicat[ing] that it is not simply clinician-applied traction that is responsible for [brachial plexus] injuries.”²⁸ This report is relevant not only for its substance but

²⁶ Clerk’s Papers at 1990.

²⁷ Id. at 1841.

²⁸ Id. at 1913.

No. 76019-0-1/9

for its widespread acceptance. It has been endorsed by many Gynecological-Obstetrical organizations in the United States and worldwide.

Dr. DeMott also discusses other peer reviewed articles on the subject. For example, a 2012 article, Severe Brachial Plexus Palsy in Women Without Shoulder Dystocia, published in Obstetrics & Gynecology, states that the results of several permanent NBPP cases “corroborate that factors other than traction applied at delivery . . . had to have been responsible.”²⁹

Courts may also look to the example of other jurisdictions that have considered the question.³⁰ Such precedents offer further perspective, not so much on other legal analyses, but on discussion in the scientific community.³¹ Hamilton presented several such cases in her motion for reconsideration.

Many of these cases hold that the NFOL theory is generally accepted based on the same medical authorities cited here. In Luster v. Brinkman, the Colorado Court of Appeals relied on the growing “body of literature finding that intrauterine forces can cause brachial plexus injuries.”³² That literature includes a favorable reference to the Precis textbook. Similarly, the Illinois Court of Appeals, in Ruffin ex rel. Sanders v. Boler,³³ reached the same result based on

²⁹ Id. at 1846.

³⁰ Eakins, 154 Wn. App. at 599.

³¹ Id. at 600.

³² 205 P.3d 410, 415 (Colo. App. 2008).

³³ 384 Ill. App.3d 7, 890 N.E.2d 1174 (Ill. App. Ct. 2008); see also Stapleton ex rel. Clark v. Moore, 403 Ill. App.3d 147, 153-54, 932 N.E.2d 487 (Ill. App. Ct. 2010).

Precis, Williams Obstetrics, and articles published in the American Journal of Obstetrics and Gynecology. The Louisiana Supreme Court held likewise in Salvant v. State.³⁴

Some cases have discussed a common critique of the data underlying the NFOL theory of causation. Aside from artificial modeling and similar studies, much of the research is retrospective. “[R]etrospective study analyzes existing medical records” while prospective study allows for the most systemic determination of testing parameters.³⁵ Retrospective studies are often considered less reliable “because of the potential for inclusion of inaccurate, incomplete[,] or inconsistent information in the records being reviewed.”³⁶

The Texas Court of Appeals explained why this reliability concern does not, by itself, justify exclusion of NFOL causation evidence in Taber v. Roush.³⁷ It began by rejecting the argument that the NFOL theory was inadmissible simply because it was not prospectively testable.³⁸ It explained that “ethical considerations . . . preclude a prospective study subjecting mothers and babies to potential injury while measuring excessive traction.”³⁹ Faced with such issues, it held that such a hypothesis is “supported by reliable data and methodology”

³⁴ 935 So.2d 646 (La. 2006).

³⁵ Taber v. Roush, 316 S.W.3d 139, 152 (Tex. App. 2010).

³⁶ Id.

³⁷ 316 S.W.3d 139 (Tex. App. 2010).

³⁸ Id. at 159.

³⁹ Id. at 152.

No. 76019-0-1/11

may still be found generally accepted in the scientific community.⁴⁰ Peer reviewed literature from ACOG provided sufficient support for such data and methodology.⁴¹

While the cases cited in other jurisdictions generally support admission of experts testifying about the NFOL theory of causation, they are not unanimous. Two recent New York cases reach different conclusions.

In the first, Muhammad v. Fitzpatrick,⁴² the Appellate Division of the New York Supreme Court affirmed a trial court's exclusion of such evidence under Frye. It did not provide extensive reasoning because the "defendants failed to rebut plaintiff's showing that their theory was not generally accepted within the relevant medical community."⁴³ This is not very helpful.

In the second case, Nobre v. Shanahan,⁴⁴ the defendants made a stronger showing and the court considered it at greater length. Specifically, they cited articles in the Journal of Obstetrics and Gynecology, Williams, and ACOG publications.⁴⁵ The court concluded that the methodologies underlying the cited research, "such as animal studies, medical literature[,] and computer modeling"

⁴⁰ Id. at 159.

⁴¹ Id.

⁴² 91 A.D.3d 1353, 937 N.Y.S.2d 519 (N.Y. App. Div. 2012).

⁴³ Id. at 1354.

⁴⁴ 42 Misc. 3d 909, 976 N.Y.S.2d 841 (N.Y. App. Div. 2013).

⁴⁵ Id. at 918.

No. 76019-0-1/12

had general acceptance.”⁴⁶ In light of this data, the court could not “conceive how a theory that has been studied, tested,^[,] and debated for more than 20 years can be deemed to be novel.”⁴⁷

In that case, the plaintiffs conceded that NFOL could cause temporary BPIs but not permanent ones.⁴⁸ The court described the specific question in the case, whether NFOL could cause permanent BPIs, as “simply a further refinement on a much-debated theory.”⁴⁹ Viewed in that light, the court determined that “the factual disagreement . . . ‘should not [be] resolved as a matter of law by the [court] in the course of [a] Frye inquiry.”⁵⁰ The court distinguished Muhammad based on the weaker showing on general acceptance in that case.⁵¹

Nobre ultimately declined to hold admissible expert testimony regarding NFOL as a cause of permanent BPIs.⁵² Although it concluded the theory and underlying methodology to be generally accepted in the scientific community, other reliability concerns also arose.⁵³ The court specifically discussed the

⁴⁶ Id. at 922.

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Id. at 924 (quoting Lugo v. New York City Health & Hosps. Corp., 89 A.D.3d 42, 62, 929 N.Y.S.2d 264 (N.Y. App. Div. 2011)).

⁵¹ Id.

⁵² Id. at 929-30.

⁵³ Id. at 927-29.

impossibility of controlled prospective testing on causation, “given the moral and ethical constraints imposed by our society against using live infants as guinea pigs.”⁵⁴ Although the court respected these concerns, it disagreed with the cases that concluded that ethics concerns excuse the “analytic gap” between theoretical retrospective research and a permanent BPI.⁵⁵ Without scientific evidence explaining specific causation, even a differential diagnosis was unreliable.⁵⁶

But the Taber court was able to reconcile the same analytical gap. It specifically discussed the “analytical gap” that lay “between non-specific brachial plexus injuries discussed in the literature and the particular avulsion injury [the plaintiff] suffered.”⁵⁷ The parties in that case provided alternative mechanisms to bridge that gap: NFOL or excessive traction.⁵⁸ The court explained that the trial court’s role was not to judge which “has more medical merit” but to rather act as gatekeeper and admit the relevant evidence if reliable.⁵⁹ On this basis, it admitted the NFOL evidence.

Here, the trial court, on reconsideration, reviewed these extensive declarations, scientific authorities, and cases from other jurisdictions. It correctly

⁵⁴ Id. at 927.

⁵⁵ Id. at 928.

⁵⁶ Id. at 929.

⁵⁷ Taber, 316 S.W.3d at 153.

⁵⁸ Id.

⁵⁹ Id.

explained that it was the methodologies and theories underlying the experts' testimony that must have general acceptance in the scientific community, not their "ultimate opinion as to what caused the damage."⁶⁰ It recognized that many of these sources did not discuss avulsions directly. But they considered permanent BPIs and, as such, provided "enough there for [the NFOL theory] to go through to the jury."⁶¹

The trial court also examined the disagreement between Taber and the New York cases, namely whether the ethical dilemmas posed by prospective testing excuse the absence of such research. The trial court agreed with Taber. It granted Hamilton's reconsideration motion and admitted the evidence for trial, allowing L.M.'s counsel to challenge it on cross-examination.

In ruling as it did on reconsideration, the trial court properly fulfilled its gatekeeper function and properly determined that Frye was not implicated. Extensive peer-reviewed literature supports the theory that NFOL may cause BPIs. Numerous experts and other courts agree.

L.M. argues the trial court erred by concluding that the scientific community generally accepts the NFOL theory of causation despite express statements of uncertainty in Hamilton's cited literature. For example, the 2014 ACOG report states that the "estimate of the force needed to cause a nerve rupture cannot be directly established" at the current state of research.⁶²

⁶⁰ Report of Proceedings (October 12, 2015) at 26.

⁶¹ Id. at 28.

⁶² Clerk's Papers at 1917.

No. 76019-0-I/15

Hamilton also cites an article by Dr. Daniel T. Alfonso that discusses “a lack of precision in the literature.”⁶³ This argument is unpersuasive.

As our supreme court recently stated, “science never stops evolving and the process is unending.”⁶⁴ Thus, while “[l]aw must resolve disputes finally and quickly, . . . science may consider a multitude of hypotheses indefinitely.”⁶⁵ It is to be expected that a scientific theory, even if generally accepted and helpful to the jury, will still have doubters in the scientific community. And experts expressing it may properly note these concerns. If a trial court required an “exacting level of scientific certainty to support opinions . . . [it] would, in effect, change the standard for opinion testimony in civil cases.”⁶⁶

Here, the doubts are similar. The NFOL theory, like any other in science, is imperfect. In recent decades, the consensus on the roles of NFOL versus traction has shifted. Unsurprisingly, many experts, including those in this case, disagree. And the specific nature of this issue raises special concerns. Reliable prospective testing is impossible at this time, given the risk of injury it would pose to mothers and infants. As such, the scientific community can ascertain that NFOL can and does cause BPIs. It is more divided on whether it can and does

⁶³ Id. at 2037.

⁶⁴ Anderson, 172 Wn.2d at 607.

⁶⁵ Id. (quoting Lee Loevinger, Science as Evidence, 35 JURIMETRICS J. 153, 177 (1995)).

⁶⁶ Id. at 608.

cause certain avulsions and ruptures. An analytical gap thus exists, apparent to scientists and courts alike.

But this gap goes to the weight, not admissibility, of this evidence. The trial court properly determined that Frye did not require exclusion of the NFOL evidence of causation.

Helpful to the Trier of Fact

L.M. also argues that the challenged testimony would not be helpful to the trier of fact. Specifically, he contends that nothing in the research or record link NFOL to an injury of the sort he suffered, a permanent five-point avulsion or rupture. We disagree.

Washington courts have provided extensive guidance on what renders expert testimony helpful. An expert's testimony is helpful if it assists the jury in "understanding matters outside the competence of ordinary lay persons."⁶⁷ And the court gauges the extent of that helpfulness on what the parties bear the burden of proving or disproving in a particular claim.⁶⁸ Further, the expert must also "ground his or her opinions on facts in the record."⁶⁹

Colley v. Peacehealth⁷⁰ is instructive. That case arose out of a medical negligence claim after Lewis Colley suffered alleged brain damage that he

⁶⁷ Id. at 600.

⁶⁸ See Colley v. Peacehealth, 177 Wn. App. 717, 728-29, 312 P.3d 989 (2013).

⁶⁹ Volk v. DeMeerleer, 187 Wn.2d 241, 273, 386 P.3d 254 (2016).

⁷⁰ 177 Wn. App. 717, 312 P.3d 989 (2013).

attributed to the Peacehealth Hospital's negligent care during an episode of respiratory failure he suffered.⁷¹ Colley moved in limine to exclude evidence from three experts he identified as defense witnesses on causation but whom he argued had no opinions on causation.⁷²

The first expert, Dr. Ralph Pascualy, identified "several factors besides oxygen deprivation that could have caused" the alleged brain damage.⁷³ Colley argued this testimony should have been excluded unless Dr. Pascualy could say definitively that oxygen deprivation was not the cause of the brain damage or identify some other specified and certain cause.⁷⁴

This court disagreed. It was Colley's burden to prove causation.⁷⁵ The Hospital did not have to either prove or disprove causation.⁷⁶ Rather, it could put forth Dr. Pascualy's evidence to attack the "premise" of Colley's case, by explaining that "there could be other explanations for memory loss and it was not possible to infer with certainty that Colley experienced serious oxygen deprivation while at the hospital."⁷⁷

⁷¹ Id. at 719-22.

⁷² Id. at 727.

⁷³ Id. at 728.

⁷⁴ Id.

⁷⁵ Id. at 728-29.

⁷⁶ Id.

⁷⁷ Id. at 729.

Similarly here, L.M. bore the burden to prove that Hamilton's alleged conduct caused his injury.⁷⁸ Hamilton bore no such burden. She was entitled to make her defense by attacking the premises of L.M.'s claim. The trial court noted the important fairness of admitting the expert testimony to allow that defense.

And Hamilton's experts based their opinions on application of generally accepted theories to the particular facts of this case. As we stated, these experts reviewed documentary and video records of L.M.'s birth, as well as deposition and declaration transcripts from other experts. Each attested in light of their expertise that Hamilton met the appropriate standard of care for a licensed midwife.

Importantly, they noted specific features of L.M.'s birth that justified their conclusions regarding NFOL and traction. Midwife Coyote referenced the "rapid labor and particularly rapid second stage. The usual second stage in a first time mother lasts about two hours. In this case it lasted just a few minutes."⁷⁹ Based on her observation, she characterized L.M.'s presentation at birth as "unusual." She testified that he came out first "occiput anterior meaning the back of the head was up, and then he restituted to left occiput anterior. Then he rotated 180 degrees on his own to right occiput anterior meaning he was facing the mother's

⁷⁸ Miles v. Child Protective Services Dep't, 102 Wn. App. 142, 159-60, 6 P.3d 112 (2000).

⁷⁹ Clerk's Papers at 2652; see also Report of Proceedings (October 26, 2015) Testimony of Dolly Browder at 26.

left thigh.”⁸⁰ Based on these observations, she opined that nothing suggested Hamilton applied excessive force and she alternatively suggested that NFOL might have caused L.M.’s injury. Similarly, Midwife Dolly Browder concluded that Hamilton “provided appropriate management of a fast first birth” and did not apply excessive traction.

Dr. Sanford also stated that the video of the birth showed no evidence of excessive traction but rather that Hamilton met the appropriate standard of care. She provided several reasons that supported her conclusion that NFOL caused L.M.’s injury. First, she cited the rapid second stage of labor. Second, she noted that L.M.’s mother “pushed unusually hard as evidenced by broken vessels in her eyes.”⁸¹ Third, the video indicated L.M. rotated on his own.⁸² Based on these observations, she opined that it was “most likely that [his injuries] occurred during the descent and rotation of the second stage of labor just before delivery.”⁸³ NFOL and the mother’s pushing “caused [the] baby’s brachial plexus to be stretched and pressed against the mother’s pubic bone causing rupture and avulsion of the brachial plexus.”⁸⁴

This testimony is helpful to the jury for several reasons. First, the complexity of the subject, let alone the surrounding debate, place this information

⁸⁰ Clerk’s Papers at 2653.

⁸¹ Id. at 2664.

⁸² Id.

⁸³ Id.

⁸⁴ Id.

beyond the lay jury's competence. Second, this testimony was deeply relevant to important issues in the litigation, namely allowing Hamilton to defend herself by attacking the premises of L.M.'s causation theory that excessive traction caused his injury. The trial court referenced this reason in its oral ruling. Third, these experts grounded the application of their theories and expertise in a deep consideration of the record and specific facts of the case. Because the lay jury is untrained in the complexities of obstetrics and midwifery, these experts provided helpful testimony in understanding what occurred.

For these reasons, the trial court did not abuse its discretion in granting reconsideration and admitting the challenged testimony.

L.M. contends that such testimony is unhelpful because it relies upon studies that do not differentiate between stretches, ruptures, or avulsion. This argument is unpersuasive.

The supreme court considered a similar issue in Anderson v. Akzo Nobel Coatings, Inc.⁸⁵ In that case, Julie Anderson had been exposed to certain paint toxins.⁸⁶ She gave birth to a child suffering from certain medical abnormalities.⁸⁷ At trial, the company that had exposed Anderson to the paint successfully moved to exclude expert testimony linking paint exposure causally to the birth defects.⁸⁸

⁸⁵ 172 Wn.2d 593, 260 P.3d 857 (2011).

⁸⁶ Id. at 597-98.

⁸⁷ Id. at 598.

⁸⁸ Id. at 599.

The supreme court reversed, concluding that the trial court improperly required there “be scientific consensus that a specific type of exposure causes a specific type of injury before expert testimony is admissible under Frye.”⁸⁹ Instead, it emphasized, as discussed above, that expert opinion testimony is admissible “if the science and methods are widely accepted in the relevant scientific community . . . without separately requiring widespread acceptance of the plaintiff’s theory of causation.”⁹⁰ Thus, it was enough that the scientific community generally accepted “that toxic solvents like the ones to which Anderson was exposed are fat soluble, pass easily through the placenta and dissolve into the amniotic fluid inside the uterus, and may damage the developing brain of a fetus within the uterus.”⁹¹ It was not necessary to show general acceptance that ***this*** toxin caused ***this specific*** form of birth defect.⁹²

Here, the relevant studies discuss at length the general acceptance that endogenous NFOL can cause BPIs, both transient and permanent. Under Anderson, this is sufficient. It was not necessary to show that a specific level of NFOL had been shown to cause the specific sort of avulsion or rupture that L.M. suffered. The jury, presented with helpful expert testimony, was required to determine whether a causative link existed. It appears that it concluded there was such a link.

⁸⁹ Id. at 605.

⁹⁰ Id. at 609.

⁹¹ Id. at 610.

⁹² (Emphasis added.)

Prejudice

L.M. argues that the trial court prejudiced him by admitting this testimony on reconsideration one week before trial. The record does not support this argument.

This court will not reverse upon a trial court's decision to admit expert testimony absent prejudice to the appellant.⁹³

Here, the trial court granted reconsideration shortly before trial. But the record shows that L.M. long knew of this theory of causation. Importantly, he had deposed the experts on this theory and had their declarations. We do not see any prejudice based merely on the proximity to trial of the court's ruling on reconsideration.

BIOMECHANICAL FORCES OF LABOR TESTIMONY

Expert Qualification

L.M. next argues that the trial court abused its discretion in admitting Dr. Tencer's biomechanical forces of labor testimony because he does not have a medical degree. We disagree.

ER 702 requires that an expert providing opinion testimony be qualified. An expert can be qualified "by virtue of knowledge, skill, experience, training, *or*

⁹³ Driggs v. Howlett, 193 Wn. App. 875, 903, 371 P.3d 61, review denied, 186 Wn.2d 1007 (2016).

No. 76019-0-1/23

education.”⁹⁴ Thus, an expert’s “practical experience” or “[t]raining in a related field or academic background alone may also be sufficient.”⁹⁵

We review for abuse of discretion a trial court’s decision whether to qualify an expert.⁹⁶

Washington courts have long applied this rule to permit otherwise qualified nonphysicians to testify as to “causation, reasonable prudence, or underlying facts tending to prove [those] ultimate facts” in medical malpractice actions.⁹⁷ This reflects a recognition that “the line between chemistry, biology, . . . medicine[,]” and other related fields “is too indefinite to admit of a practicable separation of topics and witnesses.”⁹⁸

Dr. Tencer has extensive training and experience in medical settings with injuries to the spinal cord and nerve roots as well as the force levels necessary to cause them. L.M. does not dispute this.

L.M. contends that Dr. Tencer impermissibly provided a medical causation opinion. Not so.

⁹⁴ Harris v. Robert C. Groth, M.D., Inc., P.S., 99 Wn.2d 438, 449, 663 P.2d 113 (1983) (quoting 5A KARL B. TEGLAND, WASH. PRACTICE: EVIDENCE § 289 (1982)).

⁹⁵ Id. (quoting 5A TEGLAND, supra, § 289).

⁹⁶ Johnston-Forbes v. Matsunaga, 181 Wn.2d 346, 352, 333 P.3d 388 (2014).

⁹⁷ Harris, 99 Wn.2d at 450.

⁹⁸ Id. (quoting 2 JOHN HENRY WIGMORE, EVIDENCE § 569, at 790 (rev. 1979)).

A non-medical expert like a biomechanical engineer may be qualified to give certain opinions but not others. An opinion “that the maximum possible force in this accident was not enough to injure a person” is not a medical opinion.⁹⁹ This is so because it includes no opinion about the injured person’s “symptoms or possible diagnosis from those symptoms.”¹⁰⁰

Here, the trial court limited Dr. Tencer’s testimony, precluding him from testifying to causation. There is no evidence that he violated this restriction in his trial testimony. Accordingly, we reject this argument.

Helpful to the Jury

L.M. also argues that the trial court abused its discretion in admitting Dr. Tencer’s testimony when it was not helpful to the jury. We disagree.

The trial court did not abuse its discretion in deciding Dr. Tencer’s testimony would be helpful to the jury in understanding the biomechanical forces at play.

PLASTIC SURGEON’S TESTIMONY

L.M. argues that the trial court abused its discretion in excluding Dr. Raymond Tse from testifying based on lack of qualification as an expert and the cumulative nature of his testimony. We disagree.

Here, Dr. Tse testified by deposition that, because he had only a “secondhand history of the birth,” he could not give an opinion on the cause of

⁹⁹ Ma’ele v. Arrington, 111 Wn. App. 557, 564, 45 P.3d 557 (2002).

¹⁰⁰ Id.

No. 76019-0-1/25

L.M.'s BPI.¹⁰¹ He also testified that the "most common cause of brachial plexus injury is traction in adults. In kids it's thought that it's kind of a traction injury as well to the nerves."¹⁰² But he had not reviewed the "literature from the [obstetrics] side to see what studies have been done in order to figure out how these brachial plexus injuries occur."¹⁰³

Based on such testimony alone, the trial court did not abuse its discretion in precluding Dr. Tse from testifying. He could not testify as an expert because he could not give a relevant expert opinion. Nor had he studied the relevant literature. Thus, this testimony would not have been helpful to the jury and does not satisfy ER 702. Accordingly, we need not reach the issue whether it was also cumulative.

CHANGE OF VENUE

Lastly, L.M. argues that the trial court abused its discretion in granting Hamilton's renewed motion to change venue to Lewis County. We disagree.

RCW 4.12.030(3) authorizes a trial court to change venue if, among other reasons, "the convenience of witnesses or the ends of justice would be forwarded by the change."

We review for abuse of discretion an order to change venue.¹⁰⁴

¹⁰¹ Clerk's Papers at 4926-27.

¹⁰² Id. at 4938.

¹⁰³ Id. at 4950.

¹⁰⁴ Unger v. Cauchon, 118 Wn. App. 165, 170, 73 P.3d 1005 (2003).

No. 76019-0-1/26

Here, the King County superior court concluded that Lewis County was a more proper venue because Hamilton and L.M. both resided in the latter county and all relevant events occurred there. The trial court did not abuse its discretion in considering the parties' home county a more convenient forum.

L.M. contends he could not receive a fair trial in Lewis County because of the small size of the community. He argues that it would be impossible to empanel 12 jurors who did not know Hamilton. This contention is speculative and lacks evidence in the record.

L.M. further argues that the trial court paid inadequate attention to the convenience of his counsel and out-of-state witnesses. We see nothing wrong in the trial court giving more weight to the location of the principals than convenience of counsel in this case.

We affirm the judgment on the jury verdict.

Cox, J.

WE CONCUR:

Trickey, ACJ

Appelwhite

APPENDIX 2

OSBORN MACHLER

October 30, 2017 - 12:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 76019-0
Appellate Court Case Title: LM, GAL W Dussault, Appellants v Laura Hamilton, et al, Respondents
Superior Court Case Number: 14-2-01043-3

The following documents have been uploaded:

- 760190_Petition_for_Review_20171030121812D1163399_2606.pdf
This File Contains:
Petition for Review
The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- carla@ct-lawrence.com
- carrie@favros.com
- donna@jgkmw.com
- mary@FAVROS.com
- mitchellk@jgkmw.com
- ronperey@me.com
- sosborn@osbornmachler.com
- weaver@sohalang.com

Comments:

Sender Name: Jenine Michaelis - Email: jmichaelis@osbornmachler.com

Filing on Behalf of: Susan Machler - Email: smachler@osbornmachler.com (Alternate Email:)

Address:
2025 1st Avenue
Suite 1200
Seattle, WA, 98121
Phone: (206) 441-4110

Note: The Filing Id is 20171030121812D1163399