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No. 68943-6

**WASHINGTON COURT OF APPEALS
DIVISION ONE**

**AIMEI CRETTOL and MARTIN CRETTOL, individually and the
Marital Community composed thereof**

Plaintiff / Appellant

v.

**FILBERTO GONZALEZ-REYES and JANE DOE GONZALEZ-
REYES individually and the marital COMMUNITY THEREOF**

Defendants / Respondents

REPLY BRIEF OF PLAINTIFF / APPELLANT

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FULLER RESTATEMENT OF Dr. BROOKE's TESTIMONY

Dr. Brooke's Testimony Regarding Somatic Focus – A fuller, and more complete version of the testimony of Dr. Brooke is presented below to place page 9 of Gonzalez-Reyes Response Brief in context. In sum, Dr. Brooke testified, under examination by Gonzalez-Reyes' counsel, that he never felt Crettol had somatization risks or pain behaviors.

Q. Did you believe she had these somatization risks or pain behavior risks?

A. Oh no. I felt that there was obvious anxiety and other issues that needed to be evaluated and treated in conjunction with other treatment. (CP 235:4-8).

Further, Dr. Brooke testified, upon examination by Crettol's Counsel, that referral to a psychologist, (Dr. Davis), and physical therapist, (Capen), had to do with the cumulative physical and psychological effects of two motor vehicle accidents, not observation of somatization or pain behaviors. See CP 245:7 – 246:16, below.

Q. Okay. Would the treatment at Capen Rehabilitation ... between March 23 of 2009 and April 30 of 2009, would that have been necessary without Motor Vehicle Accident No. 2 [the Crettol – Gonzalez-Reyes accident] ?

A. No.

Q. And are you qualified to issue an opinion as to whether a psychological visit – or let me put it in a different way – a referral to psychology would have been necessary or reasonable in the absence of Motor Vehicle Accident No. 2?

- A. I am qualified. And I don't think that her psychologist would have been necessary without Motor Vehicle Crash No. 2.
- Q. Right. At no point during your treatment of her for Motor Vehicle Accident No. 1 did you ever recommend that she see a psychologist?
- A. No.
- Q. But if you felt like she needed to see a psychologist, you would have made that recommendation?
- A. Yes.
- Q. So the complaints or the symptoms which warranted the psychologist visit did not present themselves to you during her treatment for the first motor vehicle accident?
- A. Correct.
- Q. And she went to the psychologist before she went to Capen Industrial, correct?
- A. Yes.
- Q. And you did not recommend Capen Industrial as a result of any psychology records you reviewed, did you?
- A. That's correct.
- Q. Did you even review any of her psychologist records from Dr. Davis?
- A. No. I did not. (CP 245:7 – 246:16).

Then in a long examination by Gonzalez-Reyes' counsel, Dr.

Brooke denied that he believed any of the somatization or pain behavior

allegations in the Capen records were warranted. See CP 230:10-20, then

CP 232:2 – 235:8, below:

- Q. All right. Let me – the question I’m going to ask you is, the physical therapist note says, she made good progress overall, however, has been limited by her own somatic focus and overall fear to progress. That’s –
- ... That’s what the [Capen] record says, correct?
- A. That’s what that says, yes. (CP 230:10-20).
...
- Q. Okay. Well didn’t you say that the treatment of Capen along with Dr. Davis [Crettol’s psychologist] was as good of the type of treatment (sic) she could have gotten per your recommendations?
- A. Well, no. I didn’t mean to say that if I did.
- Q. Okay.
- A. I meant to say that what she needed was a comprehensive program.
- Q. Uh – huh.
- A. -- that had psychology and physical therapy together and –
- Q. She had it split right? She saw a psych – a psychologist separate from –
- A. They were separate, yes.
- Q. All right. Are you familiar with the phrase “somatic focus?”
- A. I’m somewhat familiar with the phrase, yes?

- Q. And what does that mean to you?
- A. So I mean, literally it means focusing on the somatic, which is an adjective meaning the body. So it means focusing on the body.
- Q. All right. What about pain behaviors; are you familiar with that?
- ...
- A. I'm familiar with the term pain behaviors.
- Q. And what does that mean?
- ...
- A. That would mean behaviors that are in some way connected with pain but aren't necessarily connected with any other finding.
- Q. In other words, is that similar to the phrase subjective complaints without correlating objective findings?
- ...
- A. It's similar and often used that way, yes.
- Q. Have you ever diagnosed anyone with pain behavior? Have you ever used that phrase in your clinical practice?
- A. I usually don't just use that phrase. I usually add a lot more information.
- Q. Would it be important for you as a treating physician to know whether one of the ancillary modality providers believed that there was somatic focus or pain behaviors in your patient?
- A. It would be helpful to know that's what they felt, yes.
- Q. And why would that be?
- A. Well, then I could correlate that with my own impression and look for other supporting or conflicting information and other factors that may or may not explain what was

observed.

- Q. Isn't pain behaviors (sic) and somatization, aren't those some signs of poor prognosis?
- A. In general when they're in reports that way it's a sign of poor prognosis.
- Q. Meaning that it's not likely that any treatment is going to help the person recover because the focus isn't necessarily physiological in terms of muscle damage, correct?
- A. Well, I'd have to say no and yes. **I think if they're used as simple terms like that out of context, they aren't helpful.** I think if it's in context, as I've intimated with other information –
- Q. Uh-huh.
- A. It is important.
- Q. Is that why you recommended the psychologist for Mrs Crettol?
- A. That's why I recommended the comprehensive program, yes.
- Q. **Did you believe she had these somatization or pain behavior risks?**
- A. **Oh, no.** I felt that there was obvious anxiety and other issues that needed to be evaluated and treated in conjunction with her other treatment. (CP 232:2 - 235:8).

ARGUMENT

- A. **THE TRIAL COURT ABUSED ITS DISCRETION IN GIVING AN EMERGENCY INSTRUCTION BECAUSE ZOOK CLEARLY PROHIBITED THE TRIAL COURT FROM GIVING ONE AND GONZELEZ-REYES RELIANCE ON ZOOK IS MISPLACED**

“In situations of obscured vision where sudden confrontations with peril are to be anticipated and there is evidence that the party claiming a sudden emergency was responsible for it, the doctrine is inappropriate.” Zook v Baier, 9 WnApp 708, 714, 514 P2d 923 (1973), citing Mills v Park, 67 Wn2d 717, 409 P2d 646 (1966) and Hinkel v Weyerhaeuser Co., 6 WnApp 548, 494 P2d 1008 (1972).

According to all parties’ testimony, Witness Steiner, Plaintiff Crettol, and Defendant Gonzalez-Reyes were all in the same lane of travel, in that order, proceeding in the same direction. (See Crettol’s Opening Brief, “Statement of the Case”). According to Gonzalez-Reyes’ own testimony, the reason he could not see Crettol stop in front of him and, therefore, stop in time to avoid her, was because there was a red car between him and Crettol when Crettol stopped. (See below). In other words, his vision was “obscured” as that term was meant to be understood in Zook.

... I was behind a red car, not too close ... the car that was in front of mine could see the lady [Crettol] that was stopped. But he go to one side, and I couldn’t see, and I tried, but I couldn’t do it as fast as I should have ... I couldn’t see it and I stopped, but it wasn’t as fast as it should have been, (4/23/12 VRP of Gonzalez-Reyes 4:6-16) ... the car that was in front of me go to one side. And because of that, I couldn’t avoid the accident with [Crettol]. (VRP of Gonzalez-Reyes, 5:5-9).

Likewise, Zook provides another spear which should have gored the trial court's emergency instruction. In its discussion of whether the trial court should have given an "unavoidable accident" instruction, Zook ruled that: "it is error to give the instruction if there is no evidence of an unavoidable accident or if the only issue possible under the facts is that of negligence and contributory negligence." Id. at 715.

The evidence before the trial court in the above-captioned case was simply that Steiner stopped, Crettol stopped behind him, and Gonzalez-Reyes ran into the back of Crettol. (See Crettol's Opening Brief, "Statement of the Facts"). There was nothing unavoidable about this accident if Gonzalez-Reyes had been proceeding at a safe enough distance to stop in the event that traffic in front of him came to a stop.

Nothing described in the testimony or evidence in this case explains how an emergency was present from Gonzalez-Reyes' perspective. He never testified that he saw anything in front of him other than the red car changing lanes and then the Crettol van stopped in front of him. It was an abuse of discretion to issue emergency instructions.

B. **THE LACK OF EVIDENCE IN SUPPORT OF THE JURY'S VERDICT AND THE INCENDIARY ITEMS ADMITTED INTO THE CASE GIVE THE APPEALS COURT AN AMPLE BASIS FOR ORDERING A NEW TRIAL.**

This is a simple rear-end case, but when the trial court admitted evidence, without foundation, that Crettol was complaining of pain which had no objective basis, *infra*, then admitted evidence that Gonzalez-Reyes suffers from leukemia, then presented evidence that allowed the jury to, in essence, free a leukemia victim from liability to an known exaggerator, it invited, if not encouraged, the jury to render a verdict based on sympathy and unfounded prejudice. Based on the above, Crettol should be granted a new trial with instructions that exclude the irrelevant leukemia evidence, Capen physical therapy opinions, and emergency instruction.

C. **DEFENDANT GONZALEZ-REYES' LEUKEMIA WAS NOT RELEVANT TO ANY ISSUE IN THE CASE AND THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING IT.**

Gonzalez-Reyes' argument that the cause of his limp was relevant at trial "in order to avoid [speculation] as to whether he was limping because of the accident, or whether he was limping at the time of the accident and perhaps should not have been driving" is misplaced. (Gonzalez-Reyes' Response Brief at p 18). The issue at trial was how Gonzalez-Reyes was driving and whether it constituted negligence, not whether he should have been driving.

Crettol called Gonzalez-Reyes in her case on direct but never examined Gonzalez-Reyes on whether he should have been driving.

Crettol also never examined Gonzalez-Reyes about what caused his limp or whether he had health conditions. In addition, no counterclaim from Gonzalez-Reyes for his own injuries was ever filed. As a result, the above issues were never before the jury until Gonzalez-Reyes' counsel placed evidence of his leukemia before the jury on cross-examination.

As for Gonzalez-Reyes argument that Crettol is speculating over what effect the leukemia testimony had on the jury, it seems preposterous to presume that anyone would be cold and callous enough not to be moved by Mr. Gonzalez-Reyes plight. In the absence of a discernible reason for otherwise bringing it up, it was, clearly, a bald move by Gonzalez-Reyes' counsel to engender sympathy for Gonzalez-Reyes.

D. **THE SOMATIC FOCUS and PAIN BEHAVIOR OPINIONS ARE INADMISSIBLE, UNDER ER 702 and ER 703, BECAUSE THE ONLY EXPERT, DR. BROOKE, TESTIFIED THEY ARE NOT RELIABLE**

1. **Even a Business Record Has Admissibility Limits**

A business record which contains expressions of opinion, conjecture, or speculation is inadmissible unless proper foundation is laid for the admission of such items. Young v Liddington, 50 Wn2d 78, 83-4, 309 P2d 761 (1957) and Bradley v Maurer, 17 WnApp 24, 30, 560 P2d 719 (1977). As a result, the simple fact that the somatic focus opinions of

Capen are contained within its physical therapy records for Crettol do not provide admissibility.

Expert witnesses may testify in the form of an opinion if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue the witness qualifies as an expert,¹ but the facts or data on which the expert bases his or her opinion must be of a type reasonably relied upon by experts in the particular field regardless of whether the fact or data relied upon, itself, is admissible in evidence. ER 703.

2. The implication in ER 702 and 703 is that an expert theoretically introducing another's opinions for admission, should, at the very least, testify that he/she believes the outside opinion to be well-grounded.

It seems axiomatic and plain that facts or data sought to be admitted should be believed reliable by the expert through whom the proponent seeks to admit the evidence. If not, then there is no evidence that it is "of a type reasonably relied upon by experts in the particular field." See ER 703. This axiom is not voided by the business records exception. State v Wicker, 66 WnApp 409, 413, 832 P2d 127 (1992). Under Wicker, an expert witness may testify only to acts, conditions or

¹ ER 702, State v Allery, 101 Wn2d 591, 596, 682 P2d 312 (1984), and State v We, 138 WnApp 716, 724-5, 158 P.3d 1238 (2007), rev denied, 163 Wn2d 1008, 180 P3d 785 (2008)

events, not to entries in the form of opinions or causal statements. Id.

The exception provided under the business records act allowing one expert to provide the opinion of, or refer to the opinion of, another expert was admissible in Gonzalez-Reyes' cited cases because the actual testimonial expert *agreed* with the outside expert, was found qualified to issue an opinion based on his/her qualifications, and the data reviewed. See Gonzalez-Reyes' citations to State v Garrett, 76 WnApp 718, 721, 887 P2d 488 (1995). Also, in Gonzalez-Reyes cases, reference was made to the satisfaction of an additional five-point test issued in and State v Kreck, the most germane requirement being that "the [trial] court was satisfied that 'the sources of information, method, and time of preparation were such to justify its admission. Garrett at 723-4, *supra*, citing State v Kreck, 86 Wn2d 112, 119, 542 P2d 782 (1975). In the above-captioned case, the Court should be mindful of the fact that Dr. Brooke testified that there was insufficient information in Capen's records for its opinions which should impeach the "method" it used, as per Kreck. It strains the bounds of credulity to assert that basing a conclusion on insufficient data is a sound "method."

The exclusion of testimony of the opinion of a non-testifying expert is deemed proper if the testifying expert through whom the outside opinion is introduced is, himself or herself, not qualified to agree or

disagree with the outside opinion. Harris v Robert Grouth, M.D., 99 Wn2d 438, 451, 663 P2d 113 (1983). The outside opinion is excludable, under the above circumstances, even if the non-testifying expert is otherwise qualified to give the opinion and has sufficient data under his/her profession's standards to give it.² Id. As a result, it is, again, begging the bounds of credulity for Gonzalez-Reyes to argue that an outside opinion can be admitted when the actual qualified testimonial expert, Dr. Brooke, testified he does not agree with the outside opinion, there is insufficient data in the outside expert's records for that opinion, and the records supposedly supporting the outside opinion are "not helpful" in assessing it. (See Brooke's cited testimony).³

The necessity of presenting an expert who actually believes in the reliability of the proposed evidence he/she introduces is supported by the fact that undersigned counsel could not find any cases of record, in Washington State, where a proponent of non-lay evidence argued it was properly admitted in spite of the fact it was declared unreliable by the

² A trial court decision excluding an outside expert's opinion is buttressed where, as in the above-captioned case, other evidence actually within the non-testifying expert's field of specialty was admitted. See Harris v Robert Grouth M.D., *supra*, at 450-452.

³ Dr. Brooke:

[When the above terms are] in reports that way, it's a sign of poor prognosis, [but][if they're used as simple terms like that out of context, they aren't helpful. (CP 234:11-22).

testifying expert.

Nevertheless, an examination of why evidence is sometimes excluded, even in instances when the proponent actually produces a supportive expert, is instructive in explaining why the trial court abused its discretion in admitting Capen's records and Dr. Brooke's testimony, over Crettol's objection, defining somatic focus and pain behaviors for Gonzalez-Reyes counsel and confirming, for Gonzalez-Reyes' counsel, that such allegations existed in the Capen records.

Opinion evidence was found inadmissible in State v Maule where Nancy Ousley, a worker at the Harborview Sexual Assault Center, testified, for the prosecution, that a majority of child abuse cases involved a male parent figure, with biological parents in the majority. Maule, 35 WnApp 287, 667 P2d 96 (1983).

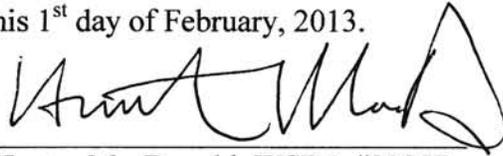
The Court of Appeals presumed, for purposes of argument, that Ousley was qualified as an expert under, but stated: "The real question was whether a proper foundation had been laid to make [Ousley's] opinion admissible under ER 702 and 703" after Defendant Maule objected to the opinion on relevance grounds. Id at 292.

The Maule Court concluded that no such foundation had been laid because:

Even if Ousley's theory possesses probative value, in the

explain the types of testing the unavailable technician performed and the results of each test ... The supervisor testified that it is typical in his office to rely on the data of a subordinate to reach his own conclusion ... The Court held that the supervisor failed to establish that persons in his field outside of his office customarily relied upon the material for purposes other than preparation for litigation ... The testimony was therefore inadmissible under ER 703. The same is true here. State v Brown at 66, internal citations to Nation omitted.

Respectfully submitted this 1st day of February, 2013.

A handwritten signature in black ink, appearing to read "F. Hunter MacDonal", written over a horizontal line.

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