

No. 36797-1-II

DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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KAREN CARLTON and MARJORIE HOLLAND, Co-Administrators/  
personal representatives for the estate of Miriam Elizabeth Carlton,

Plaintiffs/Petitioners

v.

VANCOUVER CARE LLC, d/b/a STONEBRIDGE  
MEMORY CARE,

Defendant/Respondent

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DIVISION II  
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ON DISCRETIONARY REVIEW  
FROM CLARK COUNTY SUPERIOR COURT  
(Hon. Diane Woolard)

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RESPONDENT'S ANSWERING BRIEF

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## I. INTRODUCTION

Under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), Washington courts must perform the gate-keeping function of excluding novel scientific evidence that has not been proven sufficiently reliable. The Washington Supreme Court in *State v. Black*, 109 Wn.2d 336, 342, 745 P.2d 12 (1987), expressly held that testimony regarding so-called Rape Trauma Syndrome (“RTS”), the type of expert testimony at issue in this case, did not satisfy the *Frye* standard. Since *Black* was decided, nothing has changed. RTS evidence remains scientifically unreliable, and therefore inadmissible, in cases like this one.

The trial court conducted a two-day *Frye* hearing to determine the admissibility of expert testimony on the theories of RTS and Compounded Rape Trauma Syndrome (“CRTS”), and the related concepts of implicit memory and conditioned fear response. Plaintiffs/Petitioners, representatives of the estate of Miriam Carlton (the “Estate”), intended to offer expert testimony on these topics to prove that Ms. Carlton suffered psychological harm following a sexual assault committed against her at the memory care community of Defendant/Respondent Stonebridge Memory Care (“Stonebridge”).

It was undisputed that at the time of the assault and afterward, Ms. Carlton suffered from severe degenerative dementia and was unable to

retain any cognitive memory of the assault. None of the Estate's experts ever interviewed Ms. Carlton and they conceded that it would have been impossible for them to do so given her cognitive deficits. It is also undisputed that there is no precise way to measure, test or quantify the impact of the assault on Ms. Carlton. Indeed, it is for this reason the Estate had hoped that RTS evidence could help them prove the ultimate issue that Ms. Carlton had suffered psychological injuries from the assault.

There is, however, a sharp disagreement in the scientific and medical community—and between the experts who testified in the *Frye* hearing below—over the reliability and acceptance of RTS, especially where, as here, it is being offered to prove an ultimate fact to the necessary exclusion of other causal factors. This debate is particularly acute given the unique circumstances of this case. For example, there have been no studies on CRTS; there is also no known studied or reliable error rate for CRTS; and there is no specific tool or methodology for reliably assessing RTS or CRTS in non-cognitive individuals with severe dementia, such as Ms. Carlton.

After a careful consideration of the foregoing, the trial court properly excluded all evidence of RTS, CRTS, implicit memory and conditioned fear response under *Frye* and ER 702. This Court should affirm the trial court's ruling, and remand the case for further proceedings.

## II. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Estate's proffered expert evidence regarding Rape Trauma Syndrome and/or Compounded Rape Trauma Syndrome theory is inadmissible under *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987), which held that Rape Trauma Syndrome evidence did not satisfy the standard of *Frye v. United States*, 293 F. 1103 (D.C. Cir. 1923) or ER 702.
2. Whether the Estate's proffered expert evidence of implicit memory and conditioned fear response must be considered inadmissible components of its Rape Trauma Syndrome theory, or is otherwise inadmissible under ER 702.
3. Whether, if the proffered expert evidence is not excluded under *Black*, *Frye* or ER 702, the Estate's experts should nonetheless be barred from giving opinion on the ultimate issue of whether Ms. Carlton suffered psychological harm as a result of assault and/or that her symptoms were necessarily caused by the assault.
4. Whether the Estate is entitled to recover its attorney fees and costs on appeal when, regardless of the outcome of the appeal, it has not yet prevailed under the terms of the Vulnerable Adult Statute.

## III. COUNTERSTATEMENT OF THE CASE

### A. Background

The case arose out of a July 3, 2004 sexual assault of Ms. Carlton, a resident of Stonebridge at the time, by another resident of Stonebridge. (See Clerk's Papers (CP) 1-4) (Amended Complaint, ¶¶ 1.1-3.3). After Ms. Carlton's death from natural causes more than a year later, the Estate sued Stonebridge for negligence and violation of Chapter 74.34 RCW, Washington's Vulnerable Adult Statute, in connection with the assault. *Id.* Stonebridge has admitted responsibility for the assault, but has denied

causation and damages. (CP 6) (Answer to Amended Complaint, ¶¶ 2-5). The only issue raised by this appeal is whether the Estate can use expert testimony as a means of proving psychological harm allegedly suffered by Ms. Carlton following the rape.

**B. Procedural History**

**1. Initial Motions In Limine**

Before trial, Stonebridge moved in limine to exclude the testimony of the Estate's expert Dr. Anne W. Burgess, a psychiatric nurse, regarding "rape trauma syndrome," "compounded rape trauma syndrome," or "implicit memory." (CP 25) (Defendant's Amended Motions in Limine). The Honorable Diane M. Woolard of the Clark County Superior Court granted this motion, but subsequently ordered a hearing under *Frye v. United States*, 293 F. 1103 (D.C. Cir. 1923) to further explore the admissibility of RTS, CRTS and related theories. (See Verbatim Report of Proceedings, Volume II, May 22-23, 2007 ("RP (II)" 1).

**2. Following A Two-Day *Frye* Hearing, The Court Excludes Evidence Of RTS, CRTS, Implicit Memory And Conditioned Fear Response.**

In the course of the two-day *Frye* hearing, the trial court heard testimony from the Estate's expert witnesses Dr. Burgess, Dr. Robert Olsen and Dr. Kirk Johnson and from Stonebridge's expert witnesses, Dr. Ladson Hinton and Dr. Deena Klein. (CP 54-55) (Order Granting Defendant's

Motion to Strike Plaintiff's Expert Witnesses and Evidence). Following the hearing, the court affirmed its prior ruling and ordered that the Estate would not be allowed to introduce evidence of RTS, CRTS, implicit memory or conditioned fear response. (CP 55). The Estate had sought to introduce this expert evidence to prove that Ms. Carlton suffered ongoing psychological harm following the rape up until the time of her death. (RP (II) 61:10-18; 62:11-25; 63:1-11).

**3. The Expert Testimony Regarding RTS And CRTS At The *Frye* Hearing.**

Dr. Burgess described RTS as a clustering of signs or symptoms involving a two-phase response pattern featuring a "disorganization" phase, in which people who have been raped experience a wide variety of symptoms and responses to the event, followed by a "reorganization" phase, in which the individual tries to return to a pre-rape level. (RP (II) 23: 4-19). She testified that CRTS refers to RTS in individuals who have a primary disorder of another nature, such as severe dementia. (RP (II) 31:21-24). Dr. Johnson, the Estate's psychologist expert, admitted that CRTS and RTS are clinical processes developed and used to help treat victims who may have been raped, not forensic assessment tools. (See RP (II) 217:13-15).

Dr. Burgess and Dr. Johnson specifically acknowledged that neither RTS nor CRTS are medical diagnoses and that there is no differential diagnosis for RTS or CRTS. (RP (II) 72:21-25; 73:2-3; 74:1-25; 75:14-25;

216:15-23). She further admitted that there have not been any studies on CRTS and there is no known studied or reliable error rate for CRTS. (RP (II) 75:23-24; 73:4-5; 80:16-24). Likewise, there is no specific tool or methodology for reliably assessing RTS or CRTS in non-cognitive individuals with severe dementia. (RP (II) 81:19-25; 82:13-17; 217:6-15; 219:6-8). Indeed, as Dr. Johnson confirmed, “[t]here’s no specific assessment, device or psychological test” for assessing RTS. (RP (II) 217:13-15).

Nevertheless, Drs. Burgess and Olsen testified that RTS is generally accepted in the scientific community. (RP (II) 23:20-24; 132:14-18). Stonebridge’s expert, Dr. Hinton disagreed, testifying that neither RTS nor CRTS are generally accepted diagnoses in the psychiatric community. (RP (II) 236:20-24). As Dr. Hinton explained, and Dr. Burgess conceded, neither RTS nor CRTS are recognized as valid medial diagnoses. (RP (II) 236:12-19; 72:22-25).

All experts who reviewed Ms. Carlton’s medical records agreed that at the time of the July 3, 2004 incident, she suffered from severe degenerative dementia and could not thereafter form any cognitive memory of the event itself. (RP (II) 41:21-25; 42:5; 109:2-8; 134:7-25; 151:5-14; 248:10-18). None of the Estate’s experts ever interviewed, observed or spoke with Ms. Carlton. (*See* RP (II) 82:18-22). And, in any event, Ms.

Carlton's severe degenerative dementia would have made it impossible for them to do so. (RP (II) 82:18-22). Rather, their diagnoses, as well as their opinions regarding RTS, CRTS and related theories, were based exclusively on their review of Ms. Carlton's medical records and reports of her behavior following the rape. (RP (II) 41:6-24). Dr. Burgess testified that her diagnosis was based on her belief that she could obtain reliable behavioral information from the records she reviewed. (*See* RP (II) 109:3-8).

Dr. Hinton disagreed with Dr. Burgess. He testified that Ms. Carlton's severe dementia prevented her from being able to store any active memory of the incident or remember it. (RP (II) 253:11-25; 26:1-20). Based on his review, Dr. Hinton opined to a reasonable medical probability that there was no scientific way to determine whether Ms. Carlton had any memory of the incident. (RP (II) 257:12-22). And, it would be extremely difficult to make any scientific assessment of the psychological impact of the assault given Ms. Carlton's severe degenerative dementia. (*See* RP (II) 263:4-25). On this last point, Dr. Burgess agreed with Dr. Hinton; she conceded that standard assessment tools would be extremely challenging and difficult to use on anyone with Ms. Carlton's cognitive impairments. (RP (II) 82:13-25).

#### IV. STANDARD OF REVIEW

The Court of Appeals reviews a trial court's decision to admit evidence under *Frye* de novo. *Ruff v. Dep't of Labor and Indus.*, 107 Wn. App. 289, 300, 28 P.3d 1 (2001). This review "need not be confined to the record and may involve consideration of the available scientific literature, secondary legal authority, and cases in other jurisdictions." *Id.* at 300. The Court reviews a trial court's decision to exclude expert testimony under ER 702 for abuse of discretion. *State v. Willis*, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons. *State v. Stenson*, 132 Wn.2d 688, 701, 940 P.2d 1239 (1997).

#### V. ARGUMENT

##### A. **The Estate's Expert Evidence Regarding RTS And CRTS Is Inadmissible Under *Frye* And ER 702.**

In Washington, expert testimony is admissible only if it passes two related but separate inquiries: (1) whether the scientific theory or principle on which the evidence is based has reached the general acceptance in the relevant scientific community required to satisfy the standard of *Frye v. United States*, and (2) if so, whether it is admissible under ER 702. *State v. Riker*, 123 Wn.2d 351, 359, 869 P.2d 43 (1994). The Estate's proffered expert testimony regarding RTS and CRTS fails both inquiries.

**1. Expert Testimony Based On RTS And CRTS Does Not Meet The *Frye* Standard.**

Under *Frye*, the scientific principle from which the expert's opinion is based must be sufficiently established and generally accepted in the relevant scientific community. *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996); *State v. Black*, 109 Wn.2d 336, 342, 745 P.2d 12 (1987). The rationale behind this standard is that "expert testimony should be presented to the trier of fact only when the scientific community has accepted the reliability of the underlying principles." *Copeland*, 130 Wn.2d at 255. That is, scientists, not the courts, must initially determine if a scientific theory is reliable, and "[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted." *Id.* at 255.

**a. The Washington Supreme Court Has Previously Determined That RTS Evidence Is Scientifically Unreliable Under The *Frye* Standard.**

Employing a thoughtful analysis of the core *Frye* criteria, in *State v. Black*, the Washington Supreme Court expressly held that expert testimony on so-called rape trauma syndrome is scientifically unreliable, and therefore inadmissible. *Black*, 109 Wn.2d at 338.<sup>1</sup> *Black* remains

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<sup>1</sup> One of the experts excluded in *Black* was Dr. Burgess—the Estate's primary expert in this case. As the *Black* Court noted, the term  
(continued . . .)

controlling authority in Washington. In *Black*, the Court appropriately placed considerable weight on the scientific literature on the subject of RTS. *Id.* at 342-46. From that literature, the Court identified several fundamental problems relating to RTS evidence, leading it to conclude that it was not generally accepted in the relevant scientific community. As explained below, RTS theory continues to lack general acceptance for the purpose the Estate seeks to use it, and the problems inherent in the theory are as prevalent here as they were in *Black* itself.

In *Black*, the Court noted “[e]ach rape victim responds to and integrates the experience differently depending on her age, life situation, the circumstances of the rape, her specific personality style, and the responses of those from whom she seeks support.” *Id.* at 344 (*quoting* Notman & Nadelson, *The Rape Victim: Psychodynamic Considerations*, 133 Am. J. Psychiatry 408, 409 (1976)). As the *Black* Court recognized:

[T]he symptoms displayed by victims occur in various combinations and sequences. Moreover, Burgess & Holmstrom concede that victims of rape may display one of two directly conflicting emotional manifestations which are referred to as “styles”. Some women display an “expressed style” (outwardly emotional) while others display a “controlled style” (calm, composed and subdued). Among the latter group, some display no visible symptoms at all.

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(. . . continued)

“rape trauma syndrome” was “first coined” by Dr. Burgess and one of her colleagues. 109 Wn.2d at 343-44.

*Id.* at 344. In short, due to the “overriding theme” that there is “no ‘typical’ response to rape,” proving the ultimate fact of rape based on the presence or absence of particular symptoms was highly questionable.

The Court also recognized that “[s]everal authors . . . criticized the methodology of the studies which have been conducted to determine symptoms of rape victims.” *Id.* at 345.<sup>2</sup> These shortcomings include (1) different definitions and criteria for a “rape,” (2) unrepresentative, biased, or inadequate sampling of victims, (3) inadequate means of eliciting information about victims, (4) lack of long-term victim assessments, and (5) the lack of a control group of women who had not been raped. *Id.* at 345. The Court concluded that “these studies provide little, if any scientifically valid data regarding the effects of a rape experience.” *Id.* at 346 (*quoting* Kilpatrick, Veronen & Resick (*note above*), at 658-59). Indeed, on the issue of the reliability of RTS evidence, the Estate’s own expert acknowledged that Dr. Burgess’ 1974 study has been criticized as “being a little loose and not rigorously empirical.” (RP (II) 218:18-20).

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<sup>2</sup> As noted in the opinion, these authors include, but are not limited to: Ruch & Leon, *Type of Sexual Assault Trauma: A Multidimensional Analysis of a Short-term Panel*, 8 *Victimology* 237, 238-39 (1983); Kilpatrick, Resick & Veronen, *Effects of a Rape Experience: A Longitudinal Study*, 37 *J. Soc. Issues* 105, 108-09 (1981); Kilpatrick, Veronen & Resick, *The Aftermath of Rape: Recent Empirical Findings*, 49 *Am. J. of Orthopsychiatry* 658, 658-59 (1979).

In the years since *Black* was decided, the problems with RTS evidence continues to be a source of debate within the scientific and legal literature. Many scholars recognize that RTS evidence is not yet generally accepted as a reliable forensic diagnosis. See, e.g., Trowbridge, *The Admissibility of Expert Testimony in Washington on Post Traumatic Stress Disorder and Related Trauma Syndromes*, 27 Seattle U. L. Rev. 453 (2003) (“[a] person’s behavior after an alleged rape could be ‘consistent’ with either having been raped or not having been raped . . . the Washington Supreme Court appears to be correct that rape trauma evidence is not sufficiently ‘reliable’”); Dixon & Dixon, *Gender-Specific Clinical Syndromes and Their Admissibility Under the Federal Rules of Evidence*, 27 Am. J. Trial Advoc. 25, 64 (2003) (“Rape Trauma Syndrome lack[s] the necessary empirical research and acceptance in the clinical community to satisfy the admissibility guidelines for scientific and technical evidence”); Boesch, Sales & Koss, *Rape Trauma Experts in the Courtroom*, 4 Psychol., Pub. Pol’y & L. 414, 428 (1998) (“Although RTS has historical importance, it makes for confusing and potentially unscientific expert testimony and should no longer be used in the courtroom.”).

These very issues were also disputed by the parties’ experts at the *Frye* hearing below. Notably, they disagreed about whether RTS was generally accepted in the scientific community. (*Compare* RP (II) 23:20-

24; 132:14-18 *with* RP (II) 236:20-24). That alone is sufficient to prevent any renewed consideration of *Black's* holding here. *See State v. Cauthron*, 120 Wn.2d 879, 887, 846 P.2d 502 (1993) (“[i]f there is a significant dispute between qualified experts as to the validity of scientific evidence, it may not be admitted” under *Frye*). The Estate’s own expert conceded that even today, “[t]here’s no specific assessment, device or psychological test” for assessing RTS. (RP (II) 217:13-15). Critically, as it relates to the specific variant of RTS at issue here, even Dr. Burgess admitted that there were no studies of, or reliable error rates for, CRTS. (RP (II) 75:23-24; 73:4-5; 80:16-24). In short, the basis of *Black's* holding that RTS evidence does not satisfy the *Frye* standard for scientific reliability remains viable, and the Estate offers no reason why this Court can depart from it here.

**b. *Black* Controls Here Because RTS Evidence Cannot Be Used To Prove An Ultimate Fact.**

As a result of its conclusion that RTS was not generally accepted in the scientific community, the Supreme Court in *Black* ruled that RTS evidence could not be admitted to prove the ultimate fact that the victim had been raped. *Black*, 109 Wn.2d at 348. The Court reached this conclusion, in large measure, because the relevant studies showed at the time (and continue to show today) that there is no typical response to rape. *Id.* at 343-45. In other words, because so-called RTS symptoms are often caused by something other than rape, expert evidence regarding RTS is

too unreliable under *Frye* to be admitted as proof of the ultimate issue of rape. *Id.* (“Because the symptoms associated with ‘rape trauma syndrome’ embrace such a broad spectrum of human behavior, the syndrome provides a highly questionable means of identifying victims of rape”).

The holding and reasoning of *Black* is equally applicable here. The Estate seeks to use expert RTS (and CRTS) testimony to prove the ultimate issues of causation and damages. (RP (II) 61:10-18; 62:11-25; 63:1-11). But just as RTS evidence was not sufficiently reliable to prove the fact that a rape occurred in *Black*, it is similarly too unreliable to prove the fact that Ms. Carlton suffered psychological harm here. This is so because the symptoms commonly associated with RTS are not exclusive to the trauma of rape; they can be caused by other events or, in some victims of rape, fail to arise at all. *See Black*, 109 Wn.2d at 343-44. Thus, as in *Black*, RTS testimony is not a reliable forensic method of proof that the Estate can use to show that Ms. Carlton’s symptoms were caused by the assault or indicative of harm.

Indeed, on this critical issue, the Supreme Court specifically noted, consistent with Dr. Burgess’s testimony at the hearing below, that RTS was “not intended to be a forensic, fact-finding device,” and thus failed the *Frye* standard of reliability:

There is, however, a fundamental difference between rape trauma syndrome . . . and other scientific methods of proof

that have in the past been evaluated against the *Frye* standard of reliability. Unlike fingerprints, blood tests, lie detector tests, voiceprints or the battered child syndrome, rape trauma syndrome was not devised to determine the 'truth' or 'accuracy' of a particular past event - i.e., whether, in fact, a rape in the legal sense occurred - but rather was developed by professional rape counselors as a therapeutic tool, to help identify, predict and treat emotional problems experienced by the counselors' clients or patients.

*Id.* at 347-48 (quoting *People v. Bledsoe*, 36 Cal.3d 236, 249-250, 203 Cal.Rptr. 450 (1984)). Of course, the Estate's experts did not examine or diagnose Ms. Carlton for therapeutic reasons, but for the purpose of trying to demonstrate the "the 'truth' or 'accuracy'" of their theory of damages. As *Black* makes clear, RTS evidence may not be used for this purpose.

These reliability concerns are particularly relevant here. The Estate's proffered RTS and related testimony is the *only* evidence that Ms. Carlton suffered psychological harm after the assault. As noted above, Ms. Carlton's persistent dementia rendered her incapable of retaining (or expressing) any cognitive memory of the event. Under these circumstances, there simply is too great a risk that RTS evidence would unduly influence the jury—and effectively supplant its fact-finding role—concerning the dispositive issue in this case. *See Black*, 109 Wn.2d at 348 (RTS evidence "unduly prejudicial because it . . . invad[es] the exclusive province of the jury as a finder of fact"). This risk is significant because, following the assault, Ms. Carlton was subject to changing conditions that

could also cause her to manifest RTS-type symptoms. (RP (II) 259:10-25; 54:9-15; 170:11-24). As the *Black* court held, the *Frye* standard was intended to guard against the use of unreliable expert opinion in precisely this kind of situation.

**c. The Estate Cannot Circumvent *Black* By Purporting To Use RTS Evidence Merely To Explain Ms. Carlton's Behavior.**

Citing various lower court decisions, the Estate seeks to distinguish *Black* on the theory that RTS evidence is admissible when it is not offered as a direct assessment of the credibility of the victim, but as a means of explaining the behavior of the victim. Op. Br. at 14. Even putting aside the fact that none of these cases have anything to do with RTS (and none involve victims with cognitive deficits), the Estate's efforts to distinguish *Black* on this basis is misguided. The cases support *Stonebridge*. They all show that, while syndrome testimony may at times be admissible as a shield to rebut a defense theory, it is always inadmissible as a sword to prove the ultimate issue in dispute.

For example, in *State v. Graham*, 59 Wn. App. 418, 424, 798 P.2d 314 (1990), the court allowed a counselor to testify that it is not uncommon for young women to delay reporting sexual abuse where the defense sought to undermine the victim's allegation by emphasizing her delay in reporting the abuse. The testimony was limited to this particular

purpose, never offered to establish the ultimate issue of guilt, and the court specifically found that it was helpful to the jury “as rebuttal to [the defendant’s] attack on [the victim’s] credibility.” *Id.* at 425.

Similarly, in *State v. Stevens*, 58 Wn. App. 478, 794 P.2d 38 (1990), the court approved the use of expert testimony to show that child sexual abuse victims exhibit common behavioral symptoms. The trial court, however, had ruled that the expert could not testify that “the victims fit any controversial ‘profile’ or ‘syndrome ‘of abuse’” to establish the defendant’s guilt, but rather permitted the testimony to rebut a defense theory that the victims’ behavior was the result of other trauma. *Id.* at 497-98; *see also State v. Jones*, 71 Wn. App. 798, 820, 863 P.2d 85 (1993) (“generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under *Frye*”).

Finally, the Supreme Court’s decision in *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988), perhaps best exemplifies the distinction between an impermissible and permissible use of syndrome testimony. The Court approved the use of testimony on battered woman’s syndrome to explain the victim’s delay in reporting the abuse and her failure to leave the abusive relationship. The testimony was admitted to dispel the defense’s theory that the victim’s behavior was inconsistent with having

been raped. *Id.* at 276-79. Critically, the Supreme Court noted that the trial court had properly barred the expert from testifying that the victim had been raped, or that the victim's symptoms of post-traumatic stress syndrome were caused by rape. *Id.* at 279-80.

In short, even if relevant to the admissibility of RTS evidence, the post-*Black* caselaw confirms that it is improper to offer symptom evidence as a means of proving that a victim was raped or, as in *Ciskie*, that the victim's symptoms were caused by rape. But the Estate seeks to use RTS evidence for exactly this kind of improper purpose here, and it admits as much. (*See, e.g.*, Op. Br. at 3; (RP (II) 61:10-18; 62:11-25; 63:1-11; 344:10-15)). Certainly, unlike the above cases, RTS (or other syndrome) evidence would not be helpful (or relevant) to rebut an attack on the victim's credibility. Nor is it relevant for any other credible purpose. The Estate's effort to circumvent *Black* must be rejected.

## **2. The Trial Court Did Not Abuse Its Discretion Excluding The Expert Evidence Under ER 702.**

Even “[i]f the Frye test is satisfied, the trial court must then determine whether expert testimony should be admitted under the two-part test of ER 702, *i.e.*, whether the expert qualifies as an expert, and whether the expert's testimony would be helpful to the trier of fact.” *Copeland*, 130 Wn.2d at 256. Expert testimony is helpful to the jury only if its

relevance has been established. *Riker*, 123 Wn.2d at 364. The *Riker* Court expressly recognized that helpfulness and relevancy are intertwined:

The helpfulness test subsumes a relevancy analysis. In making its determination, the court must proceed on a case-by-case basis. Its conclusions will depend on (1) the court's evaluation of the state of knowledge presently existing about the subject of the proposed testimony and (2) on the court's appraisal of the facts of the case.

*Id.* (quoting *State v. Reynolds*, 235 Neb. 662, 683, 457 N.W.2d 405 (1990)). In the particular context of expert psychological diagnoses, "[t]he diagnosis must, under the facts of the case, be capable of forensic application." See *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). That is, to be relevant, the diagnosis must reasonably relate to the ultimate question for the jury's consideration. *Id.*

Even if the Estate's RTS or CRTS evidence satisfies *Frye*, the trial court did not abuse its discretion in refusing to admit the Estate's proffered expert testimony under ER 702. That testimony is not helpful to the jury, and thus irrelevant for any purpose. The Estate concedes that there is "no precise way to measure test or quantify the impact of" the assault on Ms. Carlton. Op. Br. at 13. Dr. Hinton testified that there was no scientific way to determine if Ms. Carlton had any memory of the incident whatsoever (RP (II) 257:12-22), and given her dementia, it would have been extremely difficult to make any reliable assessment of her. (See RP (II) 263:14-25). Dr. Burgess, the Estate's expert, agreed, admitting that standard

assessment tools would be difficult to use on one with Ms. Carlton's cognitive impairments. (RP (II) 82:13-25). And, of course, no expert ever actually observed Ms. Carlton or performed a psychological evaluation of her after the incident.

Thus, even had Ms. Carlton been evaluated by the Estate's experts during her life, it would have been virtually impossible to diagnose her with RTS or CRTS using standard assessment tools. Yet, the Estate's experts claimed that, after Ms. Carlton's death, it was possible to make such a diagnosis based solely on information gleaned from their review of records and testimony. (*See* RP (II) 109:1-8). That claim is suspect, and it was well within the trial court's discretion to exclude the proposed testimony under ER 702 for this reason. Moreover, Dr. Johnson admitted that RTS and CRTS are clinical, or therapeutic, processes developed to help treat victims of rape, not forensic assessment tools. (*See* RP (II) 217:13-15). Thus, to the extent the Estate's experts could make a legitimate diagnosis here, for many of the same reasons discussed above, RTS is not "capable of forensic application," *Atsbeha*, 142 Wn.2d at 918, to establish any relevant issue in this case. It was not an abuse of discretion to exclude the Estate's RTS evidence on this basis as well.

**B. The Estate’s Proposed Expert Testimony Regarding “Implicit Memory” and “Conditioned Fear Response” Theory Is Also Inadmissible.**

The Estate attempts to separate the concepts of “implicit memory” and “conditioned fear response” from their underlying RTS and CRTS theories in an obvious attempt to avoid the reach of *Black* and *Frye*. See Op. Br. at 12-14. But the Estate’s new-found argument in this regard is inconsistent with the record. Implicit memory and conditioned fear response are not separate theories, but rather are necessary components of the Estate’s primary (and inadmissible) RTS/CRTS theory.

Drs. Burgess and Olsen, the Estate’s experts, testified that implicit memory is a physiologically (rather than cognitively) based involuntary, non-associative, memory system. Conditioned response refers to the way that the implicit memory system manifests itself in terms of observable behavior. (See RP (II) 17:19-25; 18:1-19; 19:11-25; 117:3-25; 119:14-25; 120:5-20). As the testimony of both experts makes plain, implicit memory and conditioned fear response are merely elements of the Estate’s theory because they provide the psychological mechanisms by which RTS/CRTS symptoms can be manifested and observed in someone who, like Ms. Carlton, has no capacity for cognitive memory. (*Id.*; see also RP (II) 35:21-25; 36:1-9; 37:2-25; 38:7-15; 46:20-22; 50:21-25; 60:8-25; 61:1-7; 116:20-25; 117:1-23; 119:15-25; 120:7-12). The Estate’s proffered

testimony regarding these secondary topics is therefore inadmissible for the same reasons its primary RTS evidence is inadmissible.

Finally, even if the “implicit memory” and/or “conditioned response” theories are considered separately from the Estate’s RTS evidence, the trial court did not abuse its discretion excluding the evidence under ER 702. Dr. Hinton specifically testified to a reasonable medical probability that there was no way to scientifically determine if Ms. Carlton had an implicit memory of the incident. (RP (II) 257:12-22). Put simply, given her undisputed severe degenerative dementia, Ms. Carlton was unable to store any memory of what had happened. (RP (II) 254:12-20). Moreover, as noted above, even if she did have a capacity for implicit memory, testimony regarding that fact is relevant only if has a forensic application. *See Atsbeha*, 142 Wn.2d at 918. On this issue, even the Estate’s expert conceded that Ms. Carlton’s dementia made standard forensic tools unavailable. (RP (II) 82:13-25). There was no abuse of discretion.

**C. If The Estate’s Proposed Expert Testimony Is Admissible For Some Purpose, Its Use Must Be Strictly Limited.**

The Estate’s expert testimony regarding RTS and related theories is being offered for impermissible purposes, and is therefore inadmissible under *Black* and ER 702. But even if this Court were to determine that some or all of this testimony is admissible for some other, limited purpose,

the Estate's experts should not be permitted to testify to the ultimate issue in this case; that is, Ms. Carlton suffered psychological harm following the assault, or her purported RTS symptoms were caused by rape. The Estate's experts also should be prevented from using the phrase "rape trauma syndrome" because of its inherently inflammatory effect.

Similar limitations were approved by the Supreme Court in *State v. Ciskie*, discussed above. The Court held that testimony about battered-wife syndrome was admissible for the limited purpose of rebutting a defense attack on the victim's veracity, but only because the expert was barred from testifying that (a) the victim had been raped, or (b) rape was the event that caused the victim to manifest battered-wife syndrome symptoms. *Ciskie* 110 Wn.2d at 279.<sup>3</sup> The Court also noted with approval that the trial court had "ruled specifically that the State's expert could not use the phrase 'rape trauma syndrome,' because of its potentially inflammatory effect upon the jury." *Id.* at 270 n.1.

In sum, even were the Estate's experts permitted to testify about RTS (or the related theories) for some limited purpose (and they should

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<sup>3</sup> Indeed, the *Ciskie* court criticized the trial court for even letting the expert offer a diagnosis that the victim did in fact suffer from battered-wife syndrome and/or post-traumatic stress disorder, although it refused to find an abuse of discretion on this basis. 110 Wn.2d at 279-80. Given the uncertainties inherent to Ms. Carlton's condition here, even permitting the Estate's experts to diagnose Ms. Carlton with any variety of post-traumatic stress disorder would likely constitute an abuse of discretion.

not), that testimony must be restricted to a general description of the syndrome, without reference to it by name or any diagnosis or opinion that any RTS-like symptoms exhibited by Ms. Carlton were caused by the assault at issue. Under any circumstance, these ultimate issues must be left to the jury.

**D. The Estate Is Not Entitled To An Award Of Attorneys' Fees And Costs On Appeal Because It Has Not Yet Prevailed Under The Vulnerable Adult Statute.**

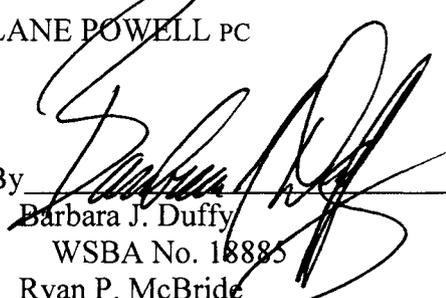
The Estate relies solely on the attorney fee provision in the Vulnerable Adult Statute, RCW 74.34.200(3), to support its request for their attorney fees and costs on appeal. Op. Br. at 22. This argument ignores the fact that this appeal presents only issues regarding the admissibility of the Estate's proffered expert evidence, not the merits of the Estate's claims under the VAS. The Estate has not prevailed under the terms of that statute, and that will be the case even if the Estate obtains a complete and unqualified reversal of the trial court's August 31, 2007 order. Regardless of how this Court decides the evidentiary issue presented here, the Estate still has the burden of proving Stonebridge's liability under the VAS. Its request for an interlocutory award of fees and costs must be rejected.

**VI. CONCLUSION**

For the reasons stated above, Stonebridge respectfully requests that the trial court's August 31, 2007 Order excluding all evidence of Rape Trauma Syndrome, Compounded Rape Trauma Syndrome, implicit memory or conditioned fear response be affirmed in its entirety.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of March, 2008.

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CERTIFICATE OF SERVICE

On the 17th day of March 2008, declarant caused the following document(s):

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I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington this 17th day of March, 2008.

Kathryn Savaria  
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