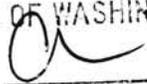


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DIVISION II

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STATE OF WASHINGTON

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No. 43078-9-II

**COURT OF APPEALS DIVISION 2
OF THE STATE OF WASHINGTON**

CATHY JOHNSTON-FORBES,

Appellant

v.

DAWN MATSUNAGA,

Respondent

APPELLANT'S REPLY BRIEF

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Reply Brief

I. ADDITIONAL BACKGROUND

Defendant argues that Tencer was not offering opinions on whether plaintiff was injured. It is true that Tencer did not utter the words – “the plaintiff could not have been injured in this collision” – but the implication is exactly that:

[W]hat I measure actually is how much tissue stretch.

* * * * *

And then the question is, how much tissue stretch, what causes pain is actually a separate issue that I –

3 RP 358.

*** I’m just describing the forces that she probably felt during the collision.

3 RP 340.

Tencer then described to the jury what Ms. Johnston-Forbes’ “body could feel” during impact by comparing it to what a person would feel during activities of daily living. He testified that the force Ms. Johnston-Forbes’ body “felt during the collision” was less than what one would feel while walking “down stairs” or “jogging.”

3 RP 325-26.

Although Tencer did not expressly say it, as the court emphasized in *Stedman*, Tencer’s “clear message was that [the plaintiff] could not have been injured in the accident because the force of the impact was too small.” *Stedman v. Cooper*, 170 Wn. App. 61, 71, 282 P.3d 1168 (2012).¹

II. SUMMARY OF REPLY ARGUMENT

A. Preservation Issues

Plaintiff did not waive or withdraw her motion to exclude Tencer. The transcript excerpt that defendant relies upon is taken out of context. That is why shortly thereafter, the trial court made a ruling on plaintiff’s motion to exclude Tencer, denying the motion. Had plaintiff in fact waived or withdrawn her motion, as defendant claims, the trial court’s ruling would not have been necessary.

Defendant’s contention that plaintiff had to object at trial to

¹ Two weeks ago, on reconsideration, the Court of Appeals issued a substitute opinion reversing part of its opinion in *Stedman v. Cooper* 170 Wn. App. 61, 71, 282 P.3d 1168 (2012), as it applied to the award of attorney fees only. *Stedman v. Cooper* ___ Wash. App. ___ LEXIS 2671 (November 19, 2012). The portion of the opinion relating to the exclusion of Tencer remained unchanged.

Tencer's testimony to preserve the issue for appeal is incorrect.

Unless the trial court requires a trial objection, which it did not, the party losing a motion in limine has a standing objection that is preserved for appeal.

Defendant's contention that plaintiff did not argue below that "Tencer is not qualified to predict the forces that a vehicle occupant experiences in low impact collisions, nor whether those forces cause the occupant tissue damage" is also without merit. Plaintiff's seven-page motion and 13 pages of supporting documents that followed, devoted exclusively to excluding Tencer from testifying, makes clear that is exactly what plaintiff was arguing. CP 8-14, 16-29.

Finally, defendant's contention that the relevancy of Tencer's testimony was not before the trial court is without merit. Plaintiff argued, amongst other things, that Tencer's testimony should be excluded under ER 702 and 403. Whether the evidence is relevant is the cornerstone of any ER 702 or ER 403 analysis.

B. Argument on the Merits

A trial court's discretion to admit expert testimony has

defined limits. A trial court is without the discretion to allow expert testimony that is irrelevant, speculative, or lacks foundation. Nor is a trial court permitted to allow expert testimony from an unqualified expert. Tencer is not qualified to testify about engineering and cause of injury. And his opinions are not relevant to whether plaintiff was injured in this particular collision. His opinions are speculative and the foundation upon which they rest – photographs taken of one vehicle, three years after the collision and after that vehicle had been repaired – is inadequate.

Reconciling *Stedman* and *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), is difficult. In *Ma'ele*, the issue was whether Tencer was qualified under ER 702 to give an opinion on “the connection between accident and injury.” *Ma'ele*, 111 Wn. App. at 562. In *Stedman*, the issue was whether Tencer’s testimony could meet the minimal standard of being “relevant” under ER 401 as to whether the plaintiff was injured. Although *Ma'ele* was focused on Tencer’s qualifications, *Stedman*’s holding that Tencer’s testimony is not even minimally relevant cannot be squared with *Ma'ele*’s language that Tencer may opine “that the maximum

possible force in this accident was not enough to injure a person” – regardless of the standard of review. *Ma'ele*, 111 Wn. App. at 564.

III. REPLY ARGUMENT

A. Preservation Issues

1. Plaintiff did not waive her motion – the trial court denied it.

Defendant takes an excerpt of the transcript from the pre-trial argument out of context – a portion that concerned the admissibility of photographs – and claims that it reflects plaintiff’s withdrawing her motion to exclude Tencer’s testimony. As the following context makes clear, no one, not the trial court, not even defense counsel, believed that was the case.

In addition, to moving to exclude Tencer from testifying, plaintiff also moved to exclude the admission of the photographs taken of defendant’s vehicle three years after the collision. Plaintiff argued that because no damage pictures were taken of plaintiff’s courtesy car, admitting the pictures of defendant’s vehicle was misleading because they only represented “half of the equation.” CP 18, 21.

In response, defendant argued that the photographs were admissible because Tencer based his opinion on them. Plaintiff countered that argument by emphasizing that even if Tencer was otherwise qualified and if he were allowed to testify, that did not entitle defendant to use him to bootstrap into evidence the otherwise inadmissible photographs.

It is in this context that plaintiff made the following statements:

We have no idea, nobody's seen this vehicle. And I understand that Mr. Tencer could testify. If we get to him, he can testify on inadmissible evidence, and that's what the rule says. But that doesn't mean he can tell people what the inadmissible evidence is.

1 RP 18 (emphasis added).

I mean, he can testify. I still think he has a problem not having some qualifications here and certainly -- but having these pictures being shown to the jury's another matter. And I would -- you know, I'd concede that he can testify, but that doesn't mean he can take the inadmissible evidence and show it to the jury. And these are just so misleading, aside from the fact it's half the equation, is we really don't know.

1 RP 21 (emphasis added).

Clearly, engineers are generally competent to testify about vehicular forces. Calculating such forces only requires the engineer

to obtain the mass and acceleration of the vehicles involved and plug those figures into the age-old formula: Mass x Acceleration = Force. But that is all that plaintiff was saying Tencer was capable of testifying to, assuming he was otherwise qualified.

The record makes clear that everyone, including the defense counsel, understood that plaintiff was not waiving or withdrawing her motion to exclude Tencer's testimony; plaintiff's counsel was simply arguing that the photographs should be excluded regardless of whether Tencer was allowed to testify.

As further proof that plaintiff was not withdrawing her motion to exclude, after the above argument about the photographs occurred, the trial judge retired to chambers to read the applicable caselaw and then returned to the bench and ruled on the motions in limine, including plaintiff's motion to exclude Tencer:

Q: [MR. BLOOM] Yeah, I assume, reading between the lines, that you're denying our motion to exclude Mr. Tencer's --

A: [THE COURT] I am.

Q: -- testimony? So we have dealt with all of them.

A: Yes

1 RP 28.

The Court did not respond, “I thought you waived that motion.” And neither did defense counsel.

That plaintiff’s counsel requested the trial court confirm that it was denying plaintiff’s motion to exclude Tencer’s opinion testimony, and that the trial court did so by declaring that yes in fact she was denying plaintiff’s motion to exclude Tencer, demonstrates that everyone understood that the comments defendant now cites as a waiver were limited to the argument regarding the admissibility of the photographs.

If it were as defendant claims, one would have expected a response from the trial court, or at the very least from defense counsel, questioning why the court needs to rule on a motion that plaintiff had already “conceded” or “waived.” At the very least, one would have expected defense counsel to say something like – “Your honor, I thought plaintiff waived, conceded or withdrew her objection to Tencer’s testimony” – if defense counsel truly believed that was the case. But nothing like that was said, because everyone understood that plaintiff had not waived the motion.

2. A trial objection was not needed to preserve the error – the ruling on the motion in limine was sufficient.

Defendant also contends that in order to preserve her objection to Tencer's testimony for appeal, plaintiff had to repeat the objection during Tencer's examination at trial. That is not correct.

Unless the trial court indicates otherwise, the party losing a motion in limine has a standing objection that is preserved for appeal without having to object at trial:

The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation. Unless the trial court indicates further objections are required when making its ruling, its decision is final, and the party *losing the motion* in limine has a standing objection.

(Citation omitted. Italics originals.) *State v. Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984).

Here, the trial court was able to make a determination on the admissibility of Tencer's testimony prior to its introduction at trial. Rather than instructing counsel to object as the evidence was offered, the trial judge made a final ruling on the motion in limine.

Q: [MR. BLOOM] Yeah, I assume, reading between the lines, that you're denying our

motion to exclude Mr. Tencer's --

A: [THE COURT] I am.

Q: -- testimony? So we have dealt with all of them.

A: Yes

1 RP 28.

The clear ruling eliminated the need for plaintiff to lodge a subsequent objection to the Tencer's testimony at trial.

3. Plaintiff adequately raised objections below

Defendant further contends that plaintiff did not argue below that:

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

Brief of Respondent at 19 (quoting Brief of Appellant at 15). For this contention, defendant relies on plaintiff's one page summary of her motion to exclude Tencer's testimony. The summary, however, is just that: a summary. It does not set out every argument presented in the seven-page motion and 13 pages of supporting documents that followed – all of which were devoted exclusively to excluding

Tencer from testifying. CP 8-14, 16-29.

In her motion, plaintiff raised a variety of alternative arguments. She argued that Tencer was not qualified to testify to principles of engineering because he was not licensed under Washington law. CP 11-12. She argued that Tencer is not qualified to diagnose injuries, regardless of whether he could testify to engineering principles. *Id.*

Plaintiff also argued that Tencer was not qualified to testify regarding forces plaintiff experienced. Plaintiff emphasized that ER 702 only allows a “qualified” expert to testify about “scientific, technical, or other specialized knowledge” and only then if it “assists the trier of fact to understand the evidence or to determine a fact in issue.” CP 3-4.

She also cited scientific authority that Tencer’s opinion testimony regarding the forces plaintiff supposedly experienced does not meet that standard. As plaintiff’s motion in limine recites:

As Gunther Siegmund, one of the most respected researchers in the area of bio-mechanical engineering, has pointed out, making that determination is near impossible:

“Occupant-injury potential may be best

predicted by some measure of forces and moments transmitted through the neck; however, *estimating these forces and moments from the vehicle evidence left after a low speed impact is extremely complicated and, in most cases, practically impossible.*”

Thomas L. Bohan, ed. *Forensic Accident Investigation: Motor Vehicles –2*, ch 1 at 106 (1997) (emphasis added) (Relied upon below).

CP 13-14.

Defendant neither challenged plaintiff’s scientific authority nor rebutted her supporting evidence. Nor did defendant suggest that the manner in which plaintiff objected to Tencer’s testimony was somehow procedurally inadequate – a charge that she is now raising for the first time in this appeal.

Plaintiff went further, however. In her motion, plaintiff laid out, step by step, the near impossible practical and scientific hurdles that Tencer would have to overcome in order to be able to “predict the forces that a vehicle occupant experiences in low impact collisions,” or to predict “whether those forces caused the occupant tissue damage.”

Plaintiff argued in the motion in limine:

Calculating the causal relationship between a vehicle's damage and its occupant's injuries is an extremely difficult task. The first problem is calculating how much energy is transferred from one car to another from the extent of damage sustained. Vehicles vary considerably in construction, as does their ability to absorb certain impacts without showing damage. In fact, the same vehicle may show little damage in one type of impact, but extensive damage in another type of impact.

Here, however, Mr. Tencer does not know the extent of the damage to plaintiff's rental car. He is just speculating. Moreover, he did not examine the defendant's vehicle either. He only reviewed pictures from defendant's vehicle taken at some unspecified time, and apparently after it had had some repairs. Although he says he can calculate the forces imparted on plaintiff's vehicle to a degree of reasonable certainty, without knowing what the damage is, how can he? This alone will serve to mislead and confuse the jury, not to mention unfairly prejudice plaintiff.

The second problem is calculating the amount of force that was transferred from defendant's vehicle through plaintiff's rental car to plaintiff's body. As Gunther Siegmund, one of the most respected researchers in the area of bio-mechanical engineering, has pointed out, making that determination is near impossible.

* * * * *

Here, plaintiff was leaning forward and twisted far to the left in order to play with her daughter in the car seat. Even Mr. Tencer concedes that fact adds variables to the calculation that affect not only the forces but the ability to cause injury.

The third problem is that even if it were possible to calculate the amount of energy that is transferred from

the vehicle to the plaintiff's body while in the precarious position that she was in at the time of impact, it says little about the ability of that energy to cause injury to the occupant. Again, Mr. Tencer admits that how an occupant is positioned at the time of impact increases the propensity for injury.

Plaintiff concluded by pointing out in her motion that:

All of this will confuse and mislead the jury and unfairly prejudice plaintiff. The cause, nature and extent of plaintiff's injuries should be properly left to medical experts. His testimony should be excluded.

No one really knows how much force is necessary to injure a person sitting in a vehicle that has been struck from the rear. But that determination should be based on a medical examination and patient history, not to the degree to which metal appears bent or broken in a photograph.

Excerpt from plaintiff's motion in limine CP 13-14.

It is difficult to imagine being any more specific. No one was sandbagged here. Both the trial court and defense counsel were well aware of plaintiff's arguments, all pointing to the same conclusion – Tencer is not qualified to predict the forces that a vehicle occupant experiences in low impact collisions, nor whether those forces cause the occupant tissue damage.

4. Relevancy was before the trial court

Finally, defendant claims that the relevancy of Tencer's

testimony was not before the trial court. That misses the significance of plaintiff's objection. Plaintiff argued, amongst other things, that Tencer's testimony should be excluded under ER 702 and 403.

The cornerstone of an ER 702 analysis requires the court to determine whether the expert's evidence is relevant: "ER 702 and ER 703 mandate the evidence must be relevant and helpful."

Anderson v. Akzo Nobel Coatings, Inc., 172 Wn.2d 593, 606, 260 P.3d 857 (2011).

The same is true for the trial court's balancing under ER 403. The trial court cannot balance the probative value of the evidence against its prejudicial nature without considering its relevance. It is a necessary part of the equation. Probative value along with materiality is the definition of relevant evidence. 5 K. Tegland, *Washington Practice: Rules Practice*, § 82 (5th ed. 2006).

In summary, in ruling that Tencer's testimony was admissible over plaintiff's objections under ER 403 and ER 702, the trial court necessarily assessed the relevance of that testimony as to whether Ms. Johnston-Forbes was injured in this particular collision.

B. Argument on the Merits

1. Standard of review

Defendant pins her entire substantive response on the argument that the standard of review under ER 403 or 702 is abuse of discretion. A trial court's discretion in admitting experts has defined limits, however. Even the case that defendant relies upon, *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 719 P.2d 569 (1986), makes this clear. In *Davidson*, "despite the trial court's discretion in determining the admissibility of expert testimony, [the court held] that the expert opinion *** lacked a factual basis [and] reversed." *Id.* at 578.

a. ER 702 prohibits unqualified witnesses

The starting point for admitting testimony under ER 702 is that the witness be qualified as an expert. "[A]n expert may not testify about information outside his area of expertise." *In re Marriage of Katare*, 175 Wn.2d 23, 38, 283 P.3d 546, (2012). This is not a discretionary standard. If the witness lacks the necessary qualifications to testify in the particular area, then the court "may not" allow the testimony. *Id.*

Plaintiff argued that Tencer was not qualified to testify about whether plaintiff's "tissue stretched" or how "Ms. Johnston-Forbes' body felt" during impact because that opinion must be left to a qualified physician. CP 14. Plaintiff also argued that Tencer is not qualified to testify about engineering principles in Washington because he does not have a license to practice engineering in the State of Washington. CP 17-19. The trial court's decision to allow Tencer's testimony despite his lack of qualifications was beyond any permissible exercise of discretion.

It is no secret that defendant relied exclusively on *Ma'ele v. Arrington*, 111 Wn. App. 557, 45 P.3d 557 (2002), at trial for the contention that Tencer could testify as to whether the collision forces were sufficient to cause plaintiff's tissue to stretch. And *Ma'ele* does support such a conclusion.

But contrary to defendant's claim, *Ma'ele* does not support the contention that an unlicensed engineer can testify about engineering principles in a Washington court of law in apparent violation of RCW 18.43.010. That issue was not before the court in *Ma'ele*. Moreover, given the statute's purpose – to ensure that those giving

engineering opinions are qualified to do so – it is particularly appropriate here where Tencer’s command of basic engineering calculations is questionable.²

Defendant also claims that because Tencer labels himself a biomechanical engineer, he is exempt from complying with the statute. CP 19. How Tencer chooses to label himself does not matter. What matters is what he is testifying about. And if it involves principles of traditional engineering, which it clearly does in this case, then he is not qualified to testify because he does not

² It is not uncommon for lay persons, especially runners, to know the ratio for converting kilometers to miles is .62 – a 10k run is the equivalent of 6.2 miles. That knowledge should be common place, however, among engineers, especially those who work with motor vehicles on a regular basis. Yet Tencer was not familiar with it:

Q: Three kilometers [per hour] is two and a half miles an hour?

A: About.

Q: Three kilometers [per hour] is two and a half miles an hour?

A: All right. Well, that’s --

Q: Take another look at that one.

A: I’ll have to check that out.

* * * * *

Q: **** You know the conversion rate?

A: I don’t know, uhm -- I don’t know it offhand.

3 RP 374-75.

have a Washington license. If Tencer wants to testify about engineering principles, he has two options – he can comply with the statute by obtaining a license, or he can petition the legislature to change the statute.

b. ER 702 prohibits irrelevant and speculative opinions

A trial court’s discretion also does not extend to admitting testimony based on speculation. “To be admissible, expert witness testimony must be relevant and helpful to the trier of fact. *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606, 260 P.3d 857 (2011) (emphasis added). Expert opinion based on “speculation *** should be excluded.” *Queen City Farms, Inc. v. Central Nat’l Ins. Co* 126 Wn.2d 50, 87-88, 882 P.2d 703, 731 (1994).

As Gunther Siegmund stated, estimating the “forces and moments transmitted through the neck *** from the vehicle evidence left after a low speed impact is extremely complicated and, in most cases, practically impossible,” let alone from photographs taken of only one of the vehicles three years after the collision and after that vehicle had been repaired.

It is equally speculative to presume to know what an

individual “felt” during a collision. Tencer himself is living proof. He along with three engineers co-authored a study where the authors themselves, including Tencer, personally participated in a low speed collision. 3 RP 372-86. Their intent was to experience what collisions at 3 kmph and 8 kmph, or 1.9 mph and 5 mph respectively, “felt” like. 3 RP 374. But “due to the severity” of the 1.9 mph collisions, three of the four authors, including Tencer, refused to participate in the higher 5 mph collisions. 3 RP 377-78, 382 -83.

If Tencer and two engineers “felt” a 1.9 mph impact was too “severe,” it is sheer speculation to assume that what Ms. Johnston Forbes’ “body felt during an impact” of “eight miles an hour,”³ was less than what another person would feel while “walking down the stairs” or “jogging.” 3 RP 326.

If the evidence is not relevant or if it is speculative, the trial court must exclude it. Again, this is not a matter of discretion.

c. ER 702 prohibits opinions based on inadequate foundations

Expert opinions that are based on unsubstantiated

³ Tencer assumed that defendant’s Mustang was traveling at a speed of “eight miles per hour” when it impacted Ms. Johnston Forbes’ courtesy car. 3 RP 312-13.

assumptions are not admissible. See *Bellevue Plaza, Inc. v. City of Bellevue*, 121 Wn.2d 397, 851 P.2d 662 (1993). “[C]onclusory or speculative expert opinions lacking an adequate foundation will not be admitted.” *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 817 P.2d 861 (1991). As stated above, Tencer had little if any evidence on which to base an opinion about forces in this case. All he had were photographs of one vehicle taken three years after the collision and after the vehicle had been repaired.

2. Reconciling *Stedman* and *Ma'ele*

According to defendant, the cases of *Stedman* and *Ma'ele* are reconcilable and should be read together to mean that each “trial judge [gets to] make their own determination about whether to exclude Dr. Tencer.” Brief of Respondent at 30. Defendant argues that the abuse of discretion standard means it’s okay for “trial judges *** to reach different conclusions in a particular case.”

Respondent’s Brief at 30.

But a closer look reveals that reconciling *Stedman* and *Ma'ele* is more difficult than defendant believes. In *Ma'ele*, the Court reviewed whether Tencer was qualified under ER 702 to give an

opinion on “the connection between accident and injury.” *Ma’ele*, 111 Wn. App. at 562. “*Ma’ele* argued that a party must offer medical testimony to show the connection between accident and injury, and Tencer, according to *Ma’ele*, was not qualified to give such an opinion.” *Id.* at 562. Although Tencer was not a physician, the *Ma’ele* Court found that the trial court did not abuse its discretion in finding that Tencer’s education and experience qualified him to give an opinion about injury. *Id.* at 563.

Qualifications under ER 702 was not the issue in *Stedman*, however. Unlike in *Ma’ele*, the issue in *Stedman* was whether Tencer’s testimony could meet the minimal standard of being “relevant” under ER 401 as to whether the plaintiff was injured:

Here, the trial court excluded Tencer’s testimony as both irrelevant and cumulative. We agree with Cooper that the court erred in characterizing the testimony as cumulative. * * * The closer question is whether the court erred in ruling that Tencer's testimony was “logically irrelevant to the issue the jury must decide: the degree to which these particular plaintiffs were injured in this particular automobile accident.”

Stedman, 170 Wn. App. at 69-70 (quoting the trial court’s ruling.)

ER 401 defines “relevant evidence” as that “having any tendency to make the existence of any fact that is of consequence to

the determination of the action more probable or less probable than it would be without the evidence.” Thus, “the threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible.” *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). All that is necessary is some “reasonable connection between the evidence and the relevant issues.” *State v. Suarez-Bravo*, 72 Wn. App. 359, 364, 864 P.2d 426 (1994).

While this determination is also reviewed under the abuse of discretion standard,⁴ the *Stedman* Court agreed with the trial court’s ruling that, in essence, there was not even a reasonable connection between Tencer’s opinion and whether “particular plaintiffs were injured in this particular automobile accident.” *Id.* at 70-71.

Regardless of the standard of review, *Stedman*’s holding that Tencer’s testimony is not even minimally relevant to whether the “particular plaintiffs were injured in this particular automobile accident,” *Id.* at 70-71, is difficult to square with *Ma’ele*’s language that Tencer may opine “that the maximum possible force in this

⁴ *See, e.g., State v. Gregory*, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006) (“A trial court’s relevancy determinations are reviewed for manifest abuse of discretion.”).

accident was not enough to injure a person.” *Ma'ele*, 111 Wn. App. at 564.

It is easy for defendant to argue that each of Tencer’s cases are different and must rise and fall on their individual facts. But the fact of the matter is that the format of Tencer’s testimony, and those like him, varies little from trial to trial. As the *Stedman* court noted: “Tencer has testified as an expert witness in many similar cases.”

Although defendant attempts to portray Tencer as primarily a teacher at the University of Washington, he only works there half time, mostly supervising students performing research. 3 RP 341-42. His primary work is testifying for the defense in cases similar to the instant one – low speed motor vehicle collisions. 3 RP 342. The volume of cases is significant, generating him over a quarter million dollars a year – and that amount has remained fairly constant since *Ma'ele* was decided over a decade ago. 3 RP 344.

Even though Tencer’s testimony format varies little from trial court to trial court, the rulings on his admissibility vary significantly. In fact, they are all over the board. *Stedman*, 170 Wn. App. at 68-69. Despite the decade-old holding in *Ma'ele*, many trial courts have

nevertheless refused to allow Tencer to testify, as the *Stedman* court noted. *Id.*

It is up to this Court to reexamine *Ma'ele* or attempt to reconcile it with *Stedman*. Otherwise, the bench and bar will be left with less guidance than ever. Defendant's approach of leaving it up to each individual "trial judge to make their own determination about whether to exclude Dr. Tencer" is not workable. Brief of Respondent at 30. That type of inconsistency promotes litigation – not resolutions.

IV. CONCLUSION

This Court should adopt *Stedman's* reasoning and hold that the trial court erred in allowing Tencer to testify. And because his opinions confused and misled the jury to plaintiff's substantial prejudice, this Court should reverse the trial court's judgment and remand this case to the trial court for a new trial.

Respectfully submitted,



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CERTIFICATE

I certify that I mailed a copy of the REPLY BRIEF OF APPELLANT to Douglas Foley, Defendant's/Respondent's attorney, at 13115 NE 4th Street, Ste. 260, Vancouver, Washington 98684, postage prepaid, on December 11, 2012.



Michael H. Bloom
Attorney for Appellant

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