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STATE OF WASHINGTON

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CLERK *h* IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JULIE ANDERSON, individually and on behalf of the Estate of
DALTON ANDERSON, and DARWIN ANDERSON, individually,

Appellants

v.

AKZO NOBEL COATINGS, INC., and KEITH CROCKETT,

Respondents

BRIEF OF *AMICUS CURIAE*
WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION

Amicus, Washington Defense Trial Lawyers (“WDTL”), is an organization of trial lawyers in the State of Washington that appears on a pro bono basis before the Court. WDTL respectfully requests that Plaintiff Anderson’s “alternative request” to abandon *Frye* be rejected. This is not the appropriate case, nor the appropriate record, for such a weighty decision.

Anderson did not object to or challenge *Frye*’s applicability at the trial court level. Accordingly, the issue was never factually ripened by the parties below, nor raised when Anderson sought direct review. And even now, in briefing, Anderson limits her attack on *Frye* to conclusory disapproval—with no suggestion of an alternative standard. WDTL would submit that deviating from 80 years of precedent and expert practice—in both civil and criminal matters—is no trifling thing. Because the necessary groundwork has not been laid, this is not the case for a wholesale reevaluation of *Frye*.

Just as significantly—as a more practical matter—a change in the standard would not even be outcome-determinative in this case because Dr. Khattak would not be permitted to express his causation opinion under any prevailing standard. Abandoning *Frye* in dicta will only generate confusion, while adding little to state practice.

II. ANALYSIS

A. The *Frye* Standard Generally

As is oft-cited in the case law, trial courts perform a gatekeeper function in considering—and sometimes excluding—unreliable opinion testimony. *State v. Copeland*, 130 Wn.2d 244, 259, 922 P.2d 1304 (1996).

The purpose of this pretrial inquiry is straightforward:

[I]t assures uniformity in evidentiary rulings, that it shields juries from any tendency to treat novel scientific evidence as infallible, that it avoids complex, expensive, and time-consuming courtroom dramas, and that it insulates the adversary system from novel evidence until a pool of experts is available to evaluate it in court. The *Frye* standard allows disputes concerning scientific validity to be resolved by the relevant scientific community[.] In effect, *Frye* envisions an evolutionary process leading to the admissibility of scientific evidence. A novel technique must pass through an ‘experimental’ stage in which it is scrutinized by the scientific community. Only after the technique has been tested successfully in... This stage will it receive judicial recognition.

Id. at 256-57 (internal citations omitted).

This test—which requires that both methodology and theory obtain “general acceptance” in the scientific community—has been the law in Washington for almost a century. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Indeed, only months ago, this Court considered the

extent to which a prosecutor could go in impeaching an expert under the *Frye* standard. *In re Pouncy*, No. 81769-3 (March 11, 2010).

Yet, almost in passing, Plaintiff Anderson suggests that the Court abruptly abandon *Frye* altogether:

In the alternative, the Anderson family submits that the Washington Courts should abandon the *Frye* standard all together and instead rationally apply Evidence Rule 702 as in many other jurisdictions (sic).

Appellants' Br. at 42.

Though WDTL takes no long-term position as between *Frye* and an alternative standard, for the reasons noted below, it would suggest that this is not the appropriate case for such a significant change in the law.

B. *Frye* Should Not Be Reevaluated On An Incomplete Record

In Washington, both civil and criminal litigators understand the *Frye* standard. It is tested on the bar exam and regularly applied by both practitioners and the judiciary alike. Over time, it has become well-developed in the state's body case law. If the Court is prepared to leave this behind—along with the usual considerations of *stare decisis*—it should be done on a complete record, for compelling reasons.

Here, that is not the case.

1. THIS ISSUE WAS NOT DEVELOPED AT THE TRIAL COURT
LEVEL

WDTL believes that Anderson's attack on the *Frye* standard should not be reached at this late hour. Under RAP 2.5(a) an appellate court may refuse to review any claim of error which was not raised in the trial court first. *Martin v. Johnson*, 141 Wn. App. 611, 617, 170 P.3d 1198 (2007) (refusing to review issue that trial court did not have opportunity to rule on first); *Re v. Tenney*, 56 Wn. App. 394, 400, 783 P.2d 632 (1989) (same).

Here, there is nothing in the briefing or superior court order that would suggest that this issue was ever raised or considered below. The parties therefore were not permitted to develop the factual issues associated with an alternative standard in an open record briefing schedule, nor were the issues sharpened through trial court analysis.

Anderson's "alternative" attempt to attack *Frye* for the first time on appeal is not supported by the case law. *McPhail v. Municipality of Culebra*, 598 F.2d 603, 607 (1st Cir. 1979) ("party may not 'sandbag' his case by presenting one theory to the trial court and then arguing for another on appeal."). The adverse party had a right to address arguments on an open record, and Judge Darvas had a right to an error-free trial.

Neither consideration can be realized if parties can raise significant legal issues with no development below.

Consistent with RAP 2.5, the Court should prudently decline to reach this newly generated appellate argument.

2. THIS ISSUE WAS NOT RAISED WHEN ANDERSON PROVIDED GROUNDS FOR DIRECT REVIEW, NOR SUPPORTED IN SUBSEQUENT BRIEFING

Prior to filing a brief, Plaintiff Anderson successfully sought direct review by this Court. In doing so, she never mentioned that she would be asking the Court to abandon *Frye*. Accordingly, Defendant Azko Nobel was never able to respond as it pertained to the wisdom of granting review on this point.

Then, even after review was granted, Plaintiff Anderson's attack on *Frye* remained conclusory. It was limited to arguments that the standard is "antiquated" and "unworkable." Appellant's Br. at 43. Such cursory treatment does not compel an appellate court to review issues. *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986) ("Contentions unsupported by argument or citation of authority will not be considered on appeal"); *see also U.S. v. Montoya*, 45 F.3d 1286, 1300 (9th Cir. 1995) (issues not "specifically and distinctly raised and argued" need not be considered).

Similarly, no coherent legal record has been developed by the parties through appellate briefing. In fact, the *only* authorities cited by Anderson are three extra-jurisdiction cases that “abandoned *Frye*.” See *Appellant’s Br.* at 42 (citing *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984); *Van Wyk v. Norden Laboratories, Inc.*, 345 N.W.2d 81 (Iowa 1984); *Barmeyer v. Montana Power Co.*, 202 Mont. 185, 657 P.2d 594 (1983)).

These cases do not bring anything new to the table. *All* of them were decided prior to 1996—the last time this Court reaffirmed its adherence to *Frye*. See *Copeland*, 130 Wn.2d at 259. In doing so, it deemed fit to reject arguments that were nearly identical to those advanced by Plaintiff here. Compare *Appellant’s Br.* at 43 (“... the *Frye* test is antiquated and virtually impossible to apply...”) with *Copeland*, 130 Wn.2d at 258 (“... the *Frye* standard has endured for over 70 years, indicating that it has not been so difficult to apply as to call for its abandonment.”). Stated plainly, these issues were thoroughly briefed, carefully considered, and soundly resolved in 1996. Anderson offers nothing new today.

To the extent that the *Frye* issue is revisited, it should be on a complete legal and factual record. Here, there is no compelling reason for the Court to depart from precedent.

C. The Expert's Testimony Would Not Be Admissible Under Either Standard

Perhaps one day, the court will be confronted with a fully developed record in which an expert passes muster under an alternative standard, but not *Frye*. But that day is not today because the choice-of-standard issues, in this case, is not outcome determinative; Dr. Khattak's novel theory of causation seems to fail under any prevailing standard. Markedly altering the expert standard—in dicta—will only operate to confuse practitioners and commentators, adding additional uncertainty and cost to the already heavy burden of litigation.

1. WASHINGTON COURTS APPLY BOTH ER 702 AND *Frye* TO OBTAIN "THE BEST OF BOTH WORLDS"

Plaintiff does not offer any alternative to *Frye*, merely suggesting that courts "rationally apply ER 702." Appellant's Br. at 42. But Washington courts already apply ER 702. In *Cauthron*, the Court explained that ER 702 and *Frye* coexist, providing this jurisdiction with the "best of both worlds." *Copeland*, 130 Wn.2d at 259 (citing *State v. Cauthron*, 120 Wn.2d 879, 846 P.2d 502 (1993)).

If the given theory and methodology are deemed "generally accepted," then the trial court considers the expert opinion under ER 702. This is a completely separate inquiry from *Frye*. *Id.* The question under ER 702 is whether (1) the witness qualifies as an expert and (2) the expert

testimony would be helpful to the trier of fact. *Cauthron*, 120 Wn.2d at 890.

Evidentiary Rule 702, while an integral part of the evidentiary process, has no mechanism for filtering out pseudoscience. It is, rather, a mechanism for ensuring that an expert is actually needed. *See, e.g., State v. Hudson*, 150 Wn. App. 646, 654-55, 208 P.3d 1236 (2009) (medical expert precluded when testimony was already within the purview of a lay juror); *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 735-36, 959 P.2d 1158 (1998), *rev'd on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999) (excluding expert who's opinion was based on exhibits that could, themselves, be examined by the jury). Here, the parties generally agree that the link between prenatal exposure to organic solvents and brain malformation is outside the ken of the average lay juror.

The only question, then, is whether Plaintiff has established that causal link with reliable scientific evidence. ER 702, by its own terms, does not address this question and Plaintiff advocates for no alternative test.

2. THE AUTHORITIES RELIED UPON BY ANDERSON CALL FOR A STANDARD FOR SCREENING UNRELIABLE SCIENCE

To the extent that Plaintiff is asking the Court to abandon standards altogether—thereby allowing any and all novel theories to be placed before juries—her own cases do not support her.

The first cases cited for the proposition that *Frye* should be abandoned in favor of exclusive reliance on ER 702 is *State v. Brown*, 297 Or. 404, 687 P.2d 751 (1984). In that case, the Oregon court reevaluated its standards and opted for a seven factor test for consideration of new, scientific evidence. Significantly, “general acceptance in the field” is the first factor. *Id.* at 417; *see also Marcum v. Adventist Health System/West*, 215 Or. App. 166, 179, 168 P.3d 1214 (Or. App. 2007). If anything, Oregon has a more onerous, complex process than Washington.

Next, *Barmeyer v. Mont. Power Co.*, 202 Mont. 185, 193-94, 657 P.2d 594, 598 (1983), is cited. This case was actually overruled a few years later by *Martel v. Mont. Power Co.*, 231 Mont. 96, 103, 752 P.2d 140, 145 (1988). The Montana Courts now apply *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), to assess the reliability of novel expert testimony. *See State v. Clark*, 347 Mont. 354, 366, 198 P.3d 809 (2008).

And finally, Plaintiff mentions *Van Wyk v. Norden Laboratories, Inc.*, 345 N.W.2d 81 (1984), an Iowa case, in support of the suggestion that Washington should just “rationally apply Evidence Rule 702.” Appellant’s Br. at 42. Iowa, like the others, does not exclusively rely on ER 702. It applies the *Daubert* factors. *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532-33 (1999).

While WDTL does not, on this record, take a position as to *which* standard is superior, certainly *some* standard is necessary. The authorities cited by Plaintiff, when placed in context, support this view.

3. THE OTHER PREVAILING STANDARD—*DAUBERT*—WOULD NOT ALLOW DR. KHATTAK’S TESTIMONY

As noted above, Assuming for the sake of argument that the Court were to consider Dr. Khattak’s testimony under the *Daubert* standard, a similar threshold inquiry would be in order.

Under *Daubert*, evidence must be relevant and reliable, *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589 (1993), and the trial court must act as a “gatekeeper” to exclude “junk science” by making a preliminary determination. *Mukhtar v. California State University*, 299 F.3d 1053, 1063 (9th Cir. 2002), *amended* 319 F.3d 1073 (9th Cir. 2003). As is the case under *Frye*, the proponent of the testimony bears the burden of laying *Daubert* foundation. *Daubert v. Merrell Dow Pharmaceuticals*,

43 F.3d 1311, 1316 (9th Cir. 1995), *cert. denied*, 516 U.S. 869.

Daubert provides a non-exhaustive list of factors for determining whether expert testimony is sufficiently reliable:

- (1) whether the scientific theory or technique can be (and has been) tested;
- (2) whether the theory or technique has been subjected to peer review and publication;
- (3) whether there is a known or potential error rate; and
- (4) whether the theory or technique is generally accepted in the relevant scientific community.

Cabrera v. Cordis Corp., 134 F.3d 1418, 1420 (9th Cir. 1998); (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (applying *Daubert* to testimony based on technical and specialized knowledge).

“Reliability” requires a “sufficiently rigorous analytical connection between the methodology and the expert’s conclusions.” *Nimely v. City of New York*, 414 F.3d 381, 397 (2d Cir. 2005). “Nothing in either *Daubert* or the Federal Rules of Evidence requires the district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert.” *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (9th Cir. 1997); *see also McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir. 2000) (an expert’s opinion must rest on “good

grounds” which is “more than subjective belief and unsupported speculation”).¹

Here, Dr. Khattak seems to acknowledge that the link between organic solvents and prenatal brain injury is *not* subject to general agreement in any community. Respondents’ Br. at 8-9. And the only objective scientific evidence in that regard is a publication—the 1999 JAMA article—which the lead author denies is indicative of “general acceptance.” *Id.* at 11-12. This lack of acceptance, lack of sufficient peer-review analysis, lack of an error rate, and lack of testing all tilt in favor of exclusion under *Daubert*.

Anderson’s unstated but faulty premise is that *Frye* is “too specific.” In her Reply Brief, she asserts that:

[a]herence to *Frye* in the manner which requires proving that *specific* causation theory (sic) is generally accepted in the scientific community places an insurmountable and unrealistic burden upon litigants such as the Anderson family.

Reply Br. at 19. This betrays a misunderstanding of the inquiry.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)—one of the leading federal cases—the U.S. Supreme Court specifically cautioned against permitting experts with an accepted “general theory” to opine on

¹ The practical purpose of this inquiry is to ensure that the expert did not develop his opinions expressly for the purposes of testifying. After all, “a scientist’s normal workplace is in the lab or the field, not the courtroom or the lawyer’s office.” *Daubert*, 43 F.3d at 1317.

“narrow unknowns.” In *Kumho Tire*, the expert opined that a design defect caused a tire to fail, leading to a fatal collision. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 142 (1999). The opinion was excluded as unreliable, which led to dismissal.

On appeal, the plaintiff argued that the expert’s reliance on “visual and tactile inspection of a tire” was “generally accepted.” The U.S. Supreme Court acknowledged as much, but pointed out that *this was not the specific issue before it*:

... the specific issue before the court was not the reasonableness *in general* of a tire expert’s use of a visual and tactile inspection to determine whether overdeflection had caused the tire’s tread to separate from its steel-belted carcass. Rather, it was the reasonableness of using such an approach, along with Carlson’s particular method of analyzing the data thereby obtained, to draw a conclusion regarding *the particular matter to which the expert testimony was directly relevant*.

Id. at 153-54 (emphasis in original). In other words, the expert could not explain or account for issues related to *the specific tire in that case*, such as wear-and-tear or abuse. Thus, the generally accepted “visual and tactile inspection” was inadequate. *Id.* at 154-55.

This makes sense as a practical matter. Any theory, if backed out far enough, can become “generally accepted.” An expert is not entitled to opine that shoelaces cause cancer based upon “physiology,” or that we live in a geocentric universe based upon “astronomy.” Though both

physiology and astronomy are “generally accepted,” the theories at issue are much more narrow than that. Accordingly, that, which is offered to the jury, is rightfully subject to scrutiny.²

Both *Frye* and *Daubert* address this consideration. Trial courts are generally trusted to determine what that offered theory is, and whether it is based upon good science. *Copeland*, 130 Wn.2d at 259 (trial court acts as “gatekeeper”). In this case, by any standard, Dr. Khattak’s causation opinion does not appear to rest on the good science necessary to be presented to a jury. Accordingly, a switch from *Frye* would not be outcome determinative or necessary to resolve the case. It would be dicta.

As such, it would be subject to varying treatment in terms of precedential value. See, e.g., *State v. Pawlyk*, 115 Wn.2d 457, 487, 800 P.2d 338 (1990) (“statements not necessary to the decision of any issue in the... case are dicta which do not control future cases”); *Marriage of Roth*, 72 Wn. App. 566, 570, 865 P.2d 43 (1994) (dictum is language not necessary to the decision); *Plankel v. Plankel*, 68 Wn. App. 89, 92, 841 P.2d 1309 (1992) (rationale not necessary to the decision is nonbinding dicta). With this, the applicable standard will be arguable in future cases,

² The same general-to-specific evils are presented with expert qualifications. While the undersigned attorneys have some experience in writing, none would be qualified to offer opinions on specialized subsets, such as technical writing or poetry.

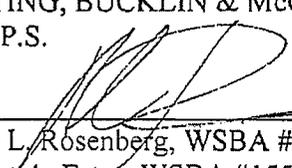
leaving practitioners and trial courts to guess at the level of guidance provided by this opinion.

III. CONCLUSION

Amicus, WDTL, would therefore suggest that the Court decline Plaintiff's request for the "alternative relief" of abandoning *Frye*. Because this issue was not been properly raised or briefed below—nor is it necessary to render a proper decision—the choice of standard question should not be reached.

RESPECTFULLY SUBMITTED this 21st day of May 2010.

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