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Supreme Court Case No. 82264-6

WASHINGTON STATE SUPREME COURT

Julie Anderson, individually and on behalf of Dalton Anderson, a minor, and
Darwin Anderson,

Appellant,

vs.

Akzo Nobel Coatings, Inc. and Keith Crockett,

Respondents

APPELLANTS' ANSWER TO BRIEFING OF AMICUS CURIAE

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I. INTRODUCTION

The Anderson family submits this combined responsive memorandum to the amicus briefs which were submitted by the WDTL, the WSAJ, and the National Fibromyalgia Association. When analyzing these issues from any perspective, be it a defense lawyer, plaintiffs' attorney, Fibromyalgia advocate, or this Supreme Court invited to set precedent, it is important to keep in context an understanding of the original facts underlying the case commonly known as *Frye*. In the original *Frye* case, a criminal prosecution, the prosecutors introduced "expert" testimony purporting to be able to detect the truth or falsity of the Mr. Frye's statements premised upon a "deception test."¹ The prosecution expert's "deception" opinion was based upon the described methodology that "blood pressure rises are brought about by nervous impulses sent to the sympathetic branch of the autonomic nervous system. Scientific experiments, it [was] claimed, demonstrated that fear, rage, and pain always produce a rise in systolic blood pressure, and that conscious deception or falsehood, concealment of facts, or guilt of a crime, accompanied by fear of detection when the person is under examination, raises the systolic blood pressure curve, which corresponds exactly to the struggle going on in the subject's mind, between fear and attempted control of that fear, as the examination touches the vital points in respect

¹ *Frye v. United States*, 54 App. D.C. 46, 293 F. 1013 (1923).

of which he is attempting to deceive the examiner.”² The *Frye* Court understandably ruled that this lie detection “expert” opinion testimony was not a proper basis upon which to convict Mr. Frye and explained that the underlying methodology was not properly accepted in the scientific community: “We think the systolic blood pressure deception test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made.”³ The original intent behind *Frye* was to prevent prosecutors from obtaining criminal convictions based upon unreliable “deception” evaluations of a defendant’s blood pressure. Somehow, somehow, several incarnations later over the following eighty plus years, the *Frye* test has morphed into a litigation tool which, in this case, prevents experts from offering legitimate, though conflicting views, about whether or not exposure to dangerous toxins during pregnancy caused Dalton’s brain damage. *Frye*, as applied in this case, cannot possibly be nor remain the law.

² *Id.* at 1013-14.

³ *Id.*

II. ARGUMENT

A. At the trial court level, the Anderson family properly challenged the application of *Frye* “wholesale” and preserved all of the associated issues for appeal.

Both the WDTL and the WSAJ incorrectly suggest that the Anderson family did not challenge the applicability of *Frye* during the proceedings below.⁴ At the trial court level, the Anderson family’s lead argument in response to Akzo Nobel’s *Frye* motion was that a “*Frye* analysis need not be undertaken with respect to evidence that does not involve novel methods of proof or new scientific principles from which conclusions are drawn...a *Frye* hearing is not implicated, and Akzo Nobel’s motion in limine should be denied.”⁵ This oversight on the part of both of the WDTL and the WSAJ is understandable given the volumes of briefing and supportive submissions leading up to this Court accepting direct review.⁶ Moreover, the WDTL’s argument that this record is not fully developed and that the Anderson family is “wholesale” challenging *Frye* for the first time ever before this Court is also completely inaccurate. As a direct quote from the trial court briefing in response to Akzo Nobel’s motion to exclude Dr. Stephen Glass’ causation opinions, the Anderson

⁴ The trial court’s written order did not appropriately address the Anderson family’s argument ergo leading to this appeal and the impression that the issue was never properly raised.

⁵ See Appendix

⁶ While the oversight on the part of the WSAJ is understandable, the WDTL goes a step farther and accuses the Anderson family of “sand bag” litigation. The attorneys for the WDTL would be better served by actually reading the complete record before making arguments to the Washington State Supreme Court premised solely upon the purported lack of content therein.

family argued that “For *appellate purposes in order to preserve the argument*, in addition to the arguments which have already been set forth, the Anderson family submits that the Washington Courts should abandon the *Frye* standard all together and instead rationally apply Evidence Rule 702...”⁷ This record is fully developed. This case provides an excellent opportunity for this Court to review the applicability of *Frye* in civil cases in Washington.

B. As noted by the WSAJ, the current precedent of Washington involving civil cases and *Frye* provides that only the methodology is subject to scrutiny and not the actual conclusions which were drawn therefrom.

In essence, the Anderson family agrees with much of the sound reasoning and argument presented by the WSAJ.⁸ Most specifically, the Anderson family agrees with WSAJ’s reliance upon *Bruns v. PACCAR, Inc.*, 77 Wn. App. 201, 215-15, 890 P.2d 469 (1995) wherein “the court stated it need not engage in a *Frye* analysis and approved medical causation testimony based on ‘air sampling, chemical analysis, clinical examinations, and questionnaires,’ which ‘qualify as established scientific methods of the type relied upon by experts in the field, not novel scientific

⁷ See Appendix

⁸ The WSAJ does an excellent job and summarizing the issues: “Anderson appears to be advocating for general acceptance of Dr. Khattak’s opinions based on recognition that organic solvents *in general* can cause brain damage, and that they are capable of crossing the placenta and thereby causing brain damage in a fetus. For its part, Akzo Nobel appears to be advocating that Dr. Khattak’s opinion, otherwise based on a reasonable degree of medical certainty, nonetheless lack general acceptance because its not supported by precise epidemiological studies showing statistically that organic solvents are capable of causing the *particular* birth defect suffered by Dalton Anderson.” WSAJ Amicus Brief, pages 7-8

theories.”⁹ The WSAJ also cited *Intalco v. Department of Labor & Industries*, 66 Wn. App. 644, 833 P.2d 390 (1992) and notes that “in accordance with standard medical practice, proof of causation can be based on evidence of exposure, temporal proximity between exposure and injury, and ruling out alternative causes of injury.”¹⁰ In this case, the Anderson family’s causation experts, Dr. Khattak and Dr. Glass, relied upon the same sort of information and methodology as did the causation experts in *Bruns* and *Intalco*. See also *Berry v. CSX Transportation*, 709 So. 2d 552 (1998) (affirming analogous methodology for making connection between workplace exposure to organic solvents and brain injury). And because the Anderson family’s experts relied upon the same type of foundational materials and established methodology as the experts in *Bruns*, *Intalco*, and *Berry*, a *Frye* challenge is not implicated, and the trial court erred in reaching a contrary result.¹¹ Upon this reasoning alone, this matter should be remanded for further proceedings.

C. The WSAJ highlights additional precedent from this Court (*Reese*) which held that a medical causation expert is not required to rely upon epidemiological studies for a medical opinion to be admissible.

The WSAJ relies heavily upon *Reese v. Stroh*, 128 Wash. 2d 300, 907 P.2d (1995). In *Reese*, Justice Madsen, writing for the majority,

⁹ WSAJ Amicus Brief, Page 9

¹⁰ WSAJ Amicus Brief, Page 17

¹¹ It should be noted that the National Fibromyalgia Association agrees: “Anderson’s experts, qualifying under ER 702 and 703, deduced their causation opinions from reliable evidence that did not involve novel methods. *Frye* should not have been triggered.” National Fibromyalgia Association, Brief Pages 3-4

explained that an “expert opinion regarding application of an accepted theory or methodology to a particular medical condition does not implicate *Frye*.” *Id.* at 307. It is important to recognize that in *Reese*, a medical malpractice lawsuit, the defending doctor “did not argue that the theory of methodology involved...lacks acceptance in the scientific community.” *Id.* At the same time, Justice Madsen provided a useful illustration as to the proper application and analysis of ER 702 for civil cases involving complex medical testimony. Importantly, Justice Madsen explained that “[w]hile an expert may express an opinion based on statistics, such a basis is certainly not required...Such support is required neither by ER 702, ER 703, nor by the case law.” *Id.* at 309. Reconciliation of *Reese* with other precedent such as *Bruns*, *Intalco*, and *Berry* involving *Frye* challenges leads to only one logical conclusion: pinpoint perfect statistical studies are not required for an expert to offer a medical opinion in a civil case. *Id.* As in *Reese*, the Anderson family’s experts offered opinions based upon a “reasonable degree of medical certainty” and should therefore have been ruled admissible.

Additional support for Justice Madsen’s opinion in *Reese* as pertains to a case involving a *Frye* challenge and the relevance of epidemiological studies is also available in *Berry*. In *Berry*, the Florida Supreme Court provided a very explanative opinion describing the purpose and usefulness of epidemiological studies in litigation. 709 So. 2d 552. As background information, the *Berry* Court explained that

“Through epidemiological studies, scientists can assess the existence (and strength) or absence of an *association* between an agent and the disease. But ‘association is not causation.’” *Id.* at 557. “To establish that a given substance was a necessary causal link to the development of an individual’s disease, in theory a scientist might obtain reliable information by engaging in experimental studies with human beings.” *Id.* “For obvious ethical reasons, however, experimental studies with human beings are proscribed where the chemical agent is known or thought to be toxic.” *Id.*¹²

The *Berry* Court noted that the “use of ‘statistical significance’ to reject an epidemiological study has been roundly criticized by the experts in the field.” *Id.* at 570. “Professor Green, for example, concludes that rejecting studies that are not statistically significant would be cursory and foolish.” *Id.* “If there are weaknesses or technical deficiencies in the published epidemiological studies supporting that plaintiff’s experts’ opinions as the [defendant] claims, those perceived deficiencies are appropriate matters upon which to examine and cross examine the experts at trial and, then, for consideration by the fact finder. *Id.* at 571. Any contrary result would be in conflict with the civil rules, CR 56, prohibiting trial judges from deciding jury questions. “The fact that the experts have all derived their opinions from the same generally-accepted methodology, the epidemiological studies contained in the record, but simply disagree

¹² This ethical restriction begs the question as to how many pregnant women would need

upon how to interpret the scientifically (and legally) reliable data, is not a valid reason for excluding the plaintiffs' experts' opinions altogether." *Id.* And, in fact, is the whole point of the adversarial system.

The trial court's ruling below runs directly contrary to the majority's opinion in *Reese* and the reasoning set forth in *Berry* as pertains to the significance which should be inferred, or not, from epidemiological studies in litigation.¹³ The Anderson family's experts were excluded premised upon the trial court's own interpretation of the JAMA article which was coauthored by experts from both sides of the case, Dr. Khattak and Dr. Koren. It should not be forgotten that both Dr. Khattak and Dr. Koren agree that organic solvent exposure during pregnancy causes major fetal malformations and brain damage generally. In other words, both Dr. Khattak and Dr., Koren agree that it is plausible that organic solvents caused Dalton's condition. When deposed, Dr. Koren explained:

Q. So you've written articles supporting the premise that organic solvent exposure to pregnant women causes -- affects brain development in fetuses; is that right?

A. Yes.¹⁴

The only disagreement is to whether or not the JAMA article establishes with statistical certainty the "association" between Dalton's *particular* condition and organic solvent exposure. Because the trial

to be exposed to organic solvents for the Anderson family to prove their case.

¹³ There is a natural lawyerly inclination to analyze epidemiological studies the same was case precedent. Studies of this nature are not case law and do not necessarily develop in the same linear manner as do legal disputes through the courts of appeals.

¹⁴ CP 209-15 (Exhibit 21 to Declaration of Beauregard (Koren Deposition Page 16))

court's ruling is in conflict with *Reese* and runs contrary to *Berry*, the Anderson family's experts should not have been excluded. This matter should be reversed and remanded for further proceedings.

D. Justice Johnson previously explained that *Frye* should not even apply to civil cases.

It is important to note that WSAJ echoes arguments concerning the civil versus criminal application of *Frye* which were first illuminated by Justice Johnson's concurrence in *Reese*. Specifically, in reference to *Frye*, Justice Johnson explained that in "*criminal* cases, we follow this rule addressing the admissibility of expert scientific evidence, but never has it been, nor now should it be, adopted as the rule in civil cases." *Id.* at 310. Justice Johnson continued onto explain that the "primary reason for this distinction arises out of differences in the burden of proof-beyond a reasonable doubt in criminal cases, and preponderance of the evidence in civil cases." *Id.* at 313. "Higher burdens are not required, however, in the civil context because the parties are generally more evenly situated and better prepared to address the evidence of the opposing party." *Id.* In the concurring opinion, Justice Johnson also noted the fundamental problem with *Frye* which remains front and center in this case: "the difficulty in determining what is or is not novel scientific evidence." *Id.* This case illustrates all of the reasoning against applying *Frye* in civil cases as was delineated by Justice Johnson in *Reese*. The law in Washington presently provides no clear guidance for rationally determining when *Frye* should be

invoked. As a result, the trial court reached an unfair ruling based upon strained reasoning as to the proper application of *Frye*.

E. The trial court in this case felt constrained by Washington precedent and cited approvingly to California's version and application of the *Frye* test.

The trial court in this case engaged in an analysis of cases from other jurisdictions in order to ascertain how, and if, *Frye* was applied in the context of civil cases.¹⁵ When ruling against the Anderson family on the motion to exclude Dr. Khattak and Dr. Glass, the trial court expressly noted that the "approach taken by Washington courts has been criticized by the higher courts of some other states as being unrealistically stringent involving both 'pure opinion testimony' and medical causation testimony. The Washington approach appears to be beyond the original *Frye* case itself, which held that 'the thing from which the deduction is made [not the deduction itself] must be sufficiently established to have gained general acceptance in the particular field in which it belongs."¹⁶ Then, the trial court noted being "bound by precedents established by the Washington Supreme Court and Court of Appeals" such as *Grant v. Boccia* and then excluded the causation opinions of Dr. Khattak and Dr. Glass.¹⁷ Put another way, not even the trial court believes that its own ruling was fair.

¹⁵ Trial Court Order dated September 26, 2008

¹⁶ Trial Court Order dated September 26, 2008, Pages 4-5

¹⁷ *Id.* It should also be noted that the trial court, Judge Andrea Darvas, mentioned at one of the hearings when ruling upon the *Frye* issues that she would not be at all upset to get reversed on this case. As stated in the Anderson family's opening brief, the trial court offered to certify this question for direct review but the Anderson family declined for procedural reasons.

The trial court also cited favorably to precedent from California noting that “[w]e have never applied the [Frye] rule to expert medical testimony.’ *People v. McDonald*, 37 Cal.3d 351, 373 (1984).”¹⁸ In response to the WDTL’s argument that the Anderson family did not provide clear enough guidance to this Court as to an alternative to *Frye* as presently applied in Washington, in addition to the other case law which was previously cited to this Court, the Anderson family joins with the trial court’s reference to precedent and the approach taken by the California courts:

Under California law, the predicate for application of the [Frye] rule is that the expert testimony is based, at least in some part, on new scientific technique, device, procedure, or method that is not generally accepted in the relevant scientific community. The predicate is not that the opinion or underlying theory asserted by the expert is itself not generally accepted in the relevant scientific community or is faulty.

* * *

...medical theories of causation are not subject to the [Frye] rule when they are based entirely upon generally accepted diagnostic methods and tests, including statistical studies that are not definitive.

Roberti v. Andy’s Termite & Pest Control, Inc., 113 Cal App. 4th 893 (2004).

The *Roberti* Court’s approach provides some level of comprehensible guidance as to when *Frye* should be invoked, or not, and stops short of allowing trial court’s to usurp the role of the jury in

¹⁸ *Id.* at 11-12.

weighing the competing conclusions of dueling experts. Moreover, the *Roberti* Court's approach also provides an understandable analytical framework upon which to test expert testimony which does involve novel scientific methods:

...this court held that evidence obtained through a new scientific technique may be admitted only after its reliability has been established under a three-pronged test. The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. The third prong requires proof that the person performing the test in the particular case used correct scientific procedures.

Id. at 900 (citations omitted). It should be noted that California's version of the *Frye* test would accommodate the WDTL's concern that "*certainly some standard is necessary.*"¹⁹

In *Roberti*, the experts at issue testified that a child suffered from brain damage (autism) as a result of certain chemical exposure. *Id.* at 828. "The experts based their opinions on plaintiff's medical records, including results of neuropsychological testing, and in utero postpartum medical history, as well as on numerous peer-reviewed articles in scientific journals." *Id.* 828-9. After applying California's version of *Frye*, the *Roberti* Court concluded that "the medical opinion drawn by plaintiff's experts concerning causation of autism clearly does not meet the predicate for application of the [*Frye*] rule. Nor did the defendant demonstrate that the methodology used in the studies relied upon by plaintiff's experts,

including the use of animal studies to extrapolate to effects of substance on humans, is in any way *novel* or *unaccepted* in the scientific community, requiring the application of the [*Frye*] test.” *Id.* at 903. “Defendant’s objections are actually to the conclusions plaintiff’s experts reached based on the studies available, not with the methodology used in the studies, upon which the experts relied in reaching their conclusions.” *Id.* at 904.

In this case, when applying either Washington or California’s version of the *Frye* test, the result here should be no different than in *Roberti*. Neither Dr. Khattak nor Dr. Glass relied upon any novel methodology for reaching the conclusion that Dalton suffers from brain damage as a result of in utero exposure to organic solvents at an Akzo Nobel plant. Moreover, both Dr. Khattak and Dr. Glass relied upon the same types of foundation as did the causation expert in *Roberti*: “The experts based their opinions on plaintiff’s medical records, including results of neuropsychological testing, and in utero postpartum medical history, as well as on numerous peer-reviewed articles in scientific journals.” *Id.* 828-9. On this reasoning and in accord with the trial court’s own sense of injustice when excluding the Anderson family’s causation experts, this matter should be reversed and remanded for further proceedings.

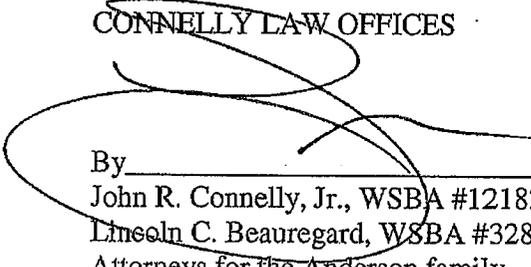
¹⁹ WDTL Brief, Page 10

III. CONCLUSION

The trial court erred when scrutinizing the actual medical causation opinions which were offered by the Anderson family's experts. The proper application of *Frye* in Washington remains unclear. Precedent from this Court, such as in *Reese*, and from other jurisdictions, such as in *Berry*, illustrates the impracticability of requiring an indefinable threshold showing of epidemiological studies and/or literature in order for a causation opinion to be admissible. In this case, when ruling against the Anderson family, the trial court felt constrained by precedent, offered to certify this matter for direct review, and cited approvingly to case law from other jurisdictions such as California's version of *Frye*. Under any version of the *Frye* test, the Anderson family's experts, Dr. Khattak and Dr. Glass, offered proper expert opinions premised upon sound and accepted methodology. Therefore, this matter should be reversed and remanded for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of June, 2010.

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Attorneys for the Anderson family

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WASHINGTON STATE SUPREME COURT

Julie Anderson, individually and on behalf of Dalton Anderson, a minor, and
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Appellant,

vs.

Akzo Nobel Coatings, Inc. and Keith Crockett,

Respondents

**APPENDIX TO APPELLANTS' RESPONSE TO BRIEFING OF AMICUS
CURIAE**

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7 THE HONORABLE ANDREA DARVAS

8
9 SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

13 Plaintiffs,

14 v.

15 AKZO NOBEL COATINGS, INC., and KEITH
CROCKETT, a Washington resident,

16 Defendants.

NO. 07-2-10209-4

**PLAINTIFFS RESPONSE TO AKZO
NOBEL'S MOTION *IN LIMINE* TO
EXCLUDE SOHAIL KHATTAK, M.D.
AND THOMAS SHULTZ, Ph.D.**

HEARING DATE: AUGUST 7, 2008

17 I. INTRODUCTION

18 The Anderson family submits this response to Akzo Nobel's motion *in limine* to
19 exclude the expert opinions of Sohail Khattak, M.D., and Tom Schultz, Ph.D. There is a
20 wealth of medical literature, local case law, out of state case law, law review articles, and
21 other supporting resources including the actual Material Safety Data Sheets (MSDS) taken
22 directly from Akzo Nobel indicating that workplace exposure to the organic solvents, such as
23 toluene, causes fetal harm including brain damage and kidney malformations. The widely
24 embraced methodology for evaluating workplace exposure levels, which has been repeatedly
25
26

PLTFS' RESPONSE RE: MOTION TO EXCLUDE KHATTAK AND
SCHULTZ - 1 of 30

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1 endorsed by a defense expert, provides for a comprehensive evaluative process by which to
2 determine (retrospectively and without air testing for specific concentrations of chemicals)
3 whether or not an expecting mother was exposed to harmful levels of organic solvents during
4 pregnancy. This methodology includes the identification of symptomology to the exposed
5 mother (Julie Anderson had these symptoms which were, in fact, documented in her medical
6 records during the pregnancy), and a weighted evaluation of all the surrounding circumstances
7 including the duration of exposure, timing of exposure, and the effectiveness of the safety
8 measures. As is set forth herein, the opinions of Dr. Khattak and Dr. Schultz are firmly
9 grounded in generally accepted scientific principles, and Akzo Nobel's motion *in limine* must
10 be denied.¹

12 II. ARGUMENT AND AUTHORITY

13 A. The applicable medical and legal authorities already established that long term 14 workplace exposure to organic solvents causes serious harm.

15 A "Frye analysis need not be undertaken with respect to evidence that does not
16 involve new methods of proof or new scientific principles from which conclusions are
17 drawn." *Ruff v. Department of Labor and Industries*, 101 Wash. App. 289, 300, 28 P.3d 1
18 (2001). According to the controlling medical literature and the case law, the fact that
19 exposure to neurotoxins such as organic solvents in the workplace causes brain damage has
20 already been well established as applied to adults. *See Pregnancy Outcome Following*

21
22
23 ¹ EVIDENCE RELIED UPON: The Anderson family relies upon the declarations of Lincoln C. Beauregard
24 dated July 9 and 21, 2008 and the exhibits attached thereto (nos. 1 to 19) which were filed in support of the
25 motion to exclude Akzo Nobel's genetics based opinions, the declaration of Richard Gleason dated April 24,
26 2008, the declaration of Joyce Smith dated May 14, 2008, the declaration of Thomas Schultz, Ph.D. dated July
29, 2008, the declaration of Lincoln C. Beauregard filed herewith and the exhibits attached thereto (nos. 20 to
25), the declaration of Julie Anderson dated July 29, 2008 attached herewith, and the pleadings and filings which
are already of record in accordance with CR 10(c).

1 *Gestational Exposure to Organic Solvents (1999); Intalco v. Department of Labor &*
2 *Industries, 66 Wn. App. 644, 833 P.2d 390 (1992) (long term neurotoxin exposure causes*
3 *brain damage); Berry v. CSX Transportation, 709 So. 2d 552 (1998) (long term organic*
4 *solvent exposure causes brain damage). As for transferring the harmful organic solvents from*
5 *a pregnant mother to a fetus, the key medical principle is not disputed: organic solvents “are*
6 *fat soluble, they go right through the placenta, dissolve right into the amniotic fluids inside of*
7 *the uterus, and they’ve been found in the cell membranes of fetuses.”² In light of the existing*
8 *medical and legal authorities, a Frye hearing is not implicated, and Akzo Nobel’s motion in*
9 *limine must be denied.*

11 **B. It is generally accepted within the scientific community that workplace exposure**
12 **to organic solvents causes major malformations including brain maldevelopment**
13 **and kidney malformations.**

14 In previous filings before the Court, Akzo Nobel had the gumption to claim that ~~the~~
15 “there is no medical evidence in the medical literature to support plaintiff’s theory of the
16 case.”³ And as was previously submitted and pointed out by the Anderson family, there is an
17 abundance of supportive evidence and medical literature, including articles that were authored
18 and coauthored by experts for both the Anderson Plaintiffs and Akzo Nobel: *e.g. Pregnancy*
19 *Outcome Following Gestational Exposure to Organic Solvents (1999), Prenatal Exposure to*
20 *Organic Solvents and Child Neurobehavioral Performance (2001), Effects of Maternal*
21 *Occupational Exposure to Organic Solvents on Offspring Visual Functioning: A Prospective*
22 *Controlled Study (2001), Child Neurodevelopmental Outcome and Maternal Exposure to*
23 *Solvents (2004), and Paternal Organic Solvent Exposure and Adverse Pregnancy Outcomes:*

25

26 ² Exhibit 23 to Declaration of Beauregard (Schultz Deposition Page 65 lines 20 to 25 to Page 26 lines 1 to 4).

³ Akzo Nobel Motion to Compel Genetics Testing, Page 1 to 2.

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7 THE HONORABLE ANDREA DARVAS

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

13 Plaintiffs,

14 v.

15 AKZO NOBEL COATINGS, INC., and KEITH
16 CROCKETT, a Washington resident,

Defendants.

NO. 07-2-10209-4

PLAINTIFFS RESPONSE RE: AKZO
NOBEL'S MOTION *IN LIMINE* TO
EXCLUDE PLAINTIFFS' EXPERT
STEPHEN GLASS' CAUSATION
OPINION

HEARING DATE: AUGUST 7, 2008¹

17 I. INTRODUCTION

18 The Anderson family submits this memorandum in response to Akzo Nobel's motion
19 *in limine* to exclude the medical causation opinions of Stephen Glass, M.D. Akzo Nobel's
20 motion regarding Dr. Stephen Glass was filed separately and was originally noted for a
21 hearing five (5) days after the motion *in limine* regarding Dr. Khattak and Dr. Schultz. Akzo
22 Nobel noted the hearings separately in this manner quite possibly to prevent the Court from
23
24
25

26 ¹ The motion was originally noted for August 12th but was reset for August 7th by invitation of the undersigned counsel.

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1 Neurology located in Woodinville, Washington.¹⁹ Educationally, Dr. Stephen Glass holds an
2 undergraduate degree (cum laude) from Harvard College, and a medical degree from the
3 University of Vermont College of Medicine.²⁰ Dr. Stephen Glass has maintained assorted
4 fellowships and internships at the best pediatric hospitals in the region, Children's Hospital
5 and the University of Washington, and has been selected as one of Washington's top doctor's
6 for 10 years in a row.²¹ Academically, presently, and for the past 12 years, Dr. Stephen Glass
7 has maintained a position as a Clinical Associate Professor in Neurology at Children's
8 Hospital.²² Dr. Stephen Glass's opinions are regularly accepted by the Court's in Washington
9 as authoritative in the litigation context.²³ Overall, Dr. Stephen Glass's credentials with
10 respect to pediatric neurology are impeccable and he is eminently well qualified to opine
11 about the cause of Dalton's malformations.
12

13
14 **E. The Anderson family submits that the Washington Courts should abandon the
15 *Frye* standard.**

16 For appellate review purposes in order to preserve the argument, in addition to the
17 arguments which have already been set forth, the Anderson family submits that the
18 Washington Courts should abandon the *Frye* standard all together and instead rationally apply
19 Evidence Rule 702. See e.g. *State v. Brown*, 297 Or. 404, 687 P.2d 751 (Oregon 1984)
20 (opting for ER 702 instead of *Frye*); *Van Wyk v. Norden Laboratories, Inc.*, 345 N.W. 2d 81
21 (Iowa 1984); *Barmeyer v. Montana Power Co.*, 202 Mont. 185, 657 P.2d 594 (Montana
22 1983). As is illustrated in this litigation, for lawsuits involving the *Frye* standard, legitimate
23

24 ¹⁹ Exhibit 24 to Declaration of Beauregard (Glass C.V.).

25 ²⁰ Exhibit 24 to Declaration of Beauregard (Glass C.V.).

26 ²¹ Exhibit 24 to Declaration of Beauregard (Glass C.V.).

²² Exhibit 24 to Declaration of Beauregard (Glass C.V.).

²³ Exhibit 24 to Declaration of Beauregard (Glass Deposition Page 55 to 56).

1 claims are susceptible to the whims of highly paid experts, such as Gideon Koren, M.D., who
2 are willing to testify against their own medical research for a high enough price. Well funded
3 and exceptionally well skilled defense lawyers, and their clients, need only pay their expert
4 witnesses enough to come up with an erroneous and novel sounding medical diagnosis in
5 order to later use that foundational "medical testimony" to support an otherwise meritless
6 *Frye* challenge. To prevent the type of medical gamesmanship being demonstrated by Akzo
7 Nobel, the Washington Courts should abandon the *Frye* standard.

9 **IV. CONCLUSION**

10 For the reasons set forth herein, and in the Anderson family's response to the motion
11 *in limine* to exclude Dr. Khattak and Dr. Schultz, the motion to exclude the medical causation
12 opinions of Dr. Stephen Glass should be denied.

13 Dated this 4 day of August, 2008.

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