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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 89625-9

(Court of Appeals no. 43078-9-II)

CATHY JOHNSTON-FORBES,

Petitioner,

v.

DAWN MATSUNAGA,

Respondent.

PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF

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INTRODUCTION

Johnston-Forbes' position is twofold. First, Tencer's opinion is a thinly disguised opinion on the cause of injury. But because the cause of human injury is a medical opinion based on medical evidence, Tencer's opinion based on car damage lacks the requisite medical foundation to be admissible. Second, Tencer's opinion based on what is generally true about collisions causing injuries is not relevant to whether this collision caused plaintiff's injuries. In fact, the opinion is misleading.

SUMMARY OF ARGUMENT

Insurance amici do not deny that Tencer's opinion is an opinion on the cause of injury. To their credit – unlike Tencer, the defendant and even the court below – Insurance amici do not pretend that Tencer's opinion is limited to forces. Nor do they dispute that an opinion on the cause of injury is a medical opinion.

Instead, Insurance amici argue that Tencer is entitled to give an opinion on whether the collision caused plaintiff's injuries. They claim that he possesses the requisite medical qualifications to give such an opinion.

In support of their position, Insurance amici rely on Washington caselaw that states nonphysicians, who are otherwise qualified, can provide medical testimony. They also rely on cases from other jurisdictions that they claim allow nonmedical experts to give opinions on

the cause of human injury based on car damage.

The fact of the matter is that Matsunaga never attempted to qualify Tencer as a medical expert. Her position from the outset was that *Ma'ele* made clear she did not need to – and the trial court agreed. 1 RP 11-12.

But the flaw in Insurance amici's argument runs much deeper than qualifications. Tencer's opinion was a medical opinion on the cause of injury. But instead of basing it on medical evidence, he based it on car damage – and that is an inadequate foundation for a medical opinion.

As to Insurance amici's claim at page 10 in their brief that other jurisdictions recognize that "accident reconstructionists, including engineers have generally been allowed to testify ... whether they believe accidents can cause injury," that statement is simply not supported. The great weight of authority is that biomechanical engineers are not even qualified to give such opinions.

ARGUMENT

A. Tencer Cannot Base a Medical Opinion on Car Damage

What Insurance amici ignores is that qualifications alone are not sufficient to give an expert medical opinion. The opinion must be based on a sufficient foundation – that means medical evidence, not car damage. Nevertheless, Matsunaga did not try to qualify Tencer as a medical expert.

1. Defendant did not qualify Tencer as a medical expert

Insurance amici argue that Tencer is qualified to give a medical

opinion on the cause of plaintiff's injury. They advance two alternative theories for their position. First, they contend that Washington's liberal view toward expert qualifications would lead this Court to find that Tencer was qualified to give a medical opinion. Second, they claim that because Tencer's qualifications to render a medical opinion were not challenged in the trial court, he is deemed to be qualified. Neither argument has merit.

The problem with that argument is that Matsunaga never attempted to qualify Tencer as a medical expert. She made it clear from the outset that she believed that she did not need to. *Ma'ele* had already decided that Tencer did not need medical qualifications to opine that the collision did not cause Johnston-Forbes' injury:

In *Ma'ele* versus *Arrington* -- and I've also cited that with respect to Dr. Tencer in the first part of our response -- there was an attack against Dr. Tencer saying he's a biomechanical expert, he's not a doctor, he can't say these things. These very self-same arguments that Mr. Bloom is making to the Court now were raised in *Ma'ele* versus *Arrington* about Dr. Tencer -- about exactly what he does in cases and exactly what he does in this case, and the court said no.

Defense counsel, pre-trial hearing, 1 RP 11-12. And the trial court agreed.

In fact, Matsunaga also claimed from the outset that Tencer's opinion was not a medical opinion on the cause of injury:

As a matter of fact, in that case [*Ma'ele*], you know, they even allowed him to say that there wasn't an injury in the case. I'm not going to have him testify to that. He's just going to talk about the forces and the limits and what those are like in terms of, you know, basically activities of daily

living.

Id. at 12. (Bracketed language added for context). Tencer himself agreed.¹

It is hard to argue that Tencer was qualified to give a medical opinion when Matsunaga did not seek to qualify him as a medical expert, and she and Tencer disavowed that he was giving a medical opinion.

2. Tencer's foundation does not support a medical opinion

What Insurance amici overlook is that the problem with Tencer's opinion runs much deeper than his lack of qualifications. The bigger problem is that Tencer's opinion rests on an inadequate foundation.

As Johnston-Forbes made clear in her pre-trial motion to exclude Tencer, in order for Tencer to give a medical opinion that the collision could not have caused plaintiff's injury, he must base it on the medical

¹ Tencer testified:

Q. Okay. Now, you're not testifying one way or another whether Ms. Johnston-Forbes was injured; correct?

A. Correct. I'm just describing the forces that she probably felt during the collision.

3 RP 340.

Q. But you're not making any opinions today whatsoever about whether Ms. Johnston-Forbes was injured in this collision?

A. Right. I'm just trying to give you a perspective on what G force –

Q. But that wasn't my question.

A. Right. I'm not.

3 RP 397.

evidence, not car damage:

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.

Plaintiff's Motion In Limine to exclude Tencer, CP 40.

An expert opinion has two core components: 1) the expert, an individual with the skill and training to interpret the facts and data and render opinions based on that interpretation, and 2) the foundation, the facts and data which the expert relies upon to form the opinion. *See generally* ER 702, 703, 704.

In the context of a medical opinion, the expert who possesses skill and training to interpret the facts and data and render opinions is normally a physician. The facts and data that form the foundation for the expert's medical opinion are the medical findings and records.

Tencer, however, did not base his opinion on the medical facts and data. He did not rely on Johnston-Forbes' medical history, examination findings, or medical records. Nor, to his credit, did he claim that he did.

In fact, Tencer made no bones about it. The primary piece of evidence that he relied upon was the pictures taken of the Matsunaga's car bumper. 3 RP 311-29. More specifically, it was the photographs that showed the Styrofoam absorber bar behind the bumper. Ex. 24, 25. Based on the damage to the absorber bar shown in the picture – the “striations”

indicating “compression” – he calculated the impact speed. Tr 327-31. He then looked to his studies to determine where this speed collision fell in the range of studies comparing various collision speeds with injuries.

Because Tencer did not rely on the medical evidence to form his opinion, this is not like the case where an expert may lack a formal title but otherwise possesses the qualifications needed to interpret the evidence and render opinions, as Insurance amici suggests. If anything, Tencer’s attempt to give a cause of injury opinion based on car damage is more like a physician attempting to give cause of injury opinion based on tax returns.

Thus, the physician vs. nonphysician cases that Insurance amici rely upon are not applicable. Those cases turn on whether the experts have sufficient qualifications – experience, training, or education – to interpret the pertinent medical record and render opinions based on those medical records. *See, e.g., Saldivar v. Momah* 145 Wn. App. 365, 400, 186 P.3d 1117 (2008) (Discussed in Insurance Amici’s Brief at 7-8).

Tencer’s opinion was not based on any medical records. Thus, his qualifications to interpret medical records and render opinions based on that interpretation is not in issue – because that is not what he did.

An expert can have all the qualifications in the world, but if the foundation is inadequate, the opinion is inadmissible. It is as simple as that. “Expert opinions lacking an adequate foundation should be excluded.” *In re Marriage of Katare*, 175 Wn.2d 23, 39, 283 P.3d 546

(2012), *cert. denied*, 133 S. Ct. 889 (2013). “It is an abuse of discretion to admit such testimony if it lacks an adequate foundation.” *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993). Tencer had neither the qualifications nor the foundation to give an opinion on the cause of injury.

B. Foreign Caselaw Fails to Support Insurance Amici’s Position

In support of Insurance amici’s position that Tencer is entitled to give an opinion on the cause of injury, they make the bold statement that in other jurisdictions “accident reconstructionists, including engineers have generally been allowed to testify ... whether they believe accidents can cause injury.” Insurance Amici’s Brief at 10. Insurance amici fails to support this statement with any law. The three cases that they cite for the proposition, certainly do not support it.² Nor is plaintiff aware of any authority that recognizes such a proposition.

Typically, accident reconstructionists and engineers offer testimony about facts involved in the “sequence of events immediately preceding an accident,” such as those relating to “vehicle mass; direction of skid marks;

² *Harrison v. Sears, Roebuck & Co.*, 981 F.2d 25 (1st Cir. 1992), held only that an engineer’s prior training and experience in reading x-rays qualified him to discuss the x-ray findings. *Id.* at 29-30. *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 845 n. 19 (3d Cir. 1981) held only that an engineer could testify that a safer alternative window retaining system design could have prevented the occupants from being ejected from the vehicle. There is a significant difference between how the event that led to the injury occurred, and what injuries were suffered as a result of the event. An engineer could be qualified to testify about the former but not the latter. *State v. Phillips*, 123 Wn. App. 761, 98 P.3d 838 (2004), held only that “[a]ccident reconstruction software programs and computer simulations” can be used by engineers to reconstruct accidents.

dimensions of vehicles involved; dents, breaks and paint transfers of vehicles; road surface textures; and physics principles of mechanics such as inertia, velocity, coefficients of friction, and operating characteristics of vehicles.” *Tuato v. Brown*, 85 Fed App'x 674, 677 n.3 (10th Cir. 2003) (internal quotation marks and citations omitted). They do not offer opinions about the cause of injury.

The other foreign jurisdiction cases that Insurance amici cite are not much help either. Their authority falls into three categories, 1) cases where biomechanical engineers testified on unrelated subject matters, 2) cases where biomechanical engineers provided testimony similar to Tencer's, but the admission of their testimony was not in issue on appeal, and 3) cases where biomechanical engineers provided testimony similar to Tencer's and the admission of that testimony was in issue on appeal.

With regard to this last category, Matsunaga cites three cases. One involved a medical physician, another turned solely on expert qualifications, and the third turned on a narrow relevancy ground. Little rationale was provided in any of them. But as will be discussed in section C, below, the great weight of authority holds that biomechanical engineers are not qualified to testify about the cause of injury.

1. Cases cited where biomechanical engineers testified on unrelated subjects are not relevant

In an apparent attempt to reframe the issue, Insurance amici argues

that “foreign authorities are fully in accord with the decision of *Ma’ele* court that biomechanical evidence is not ‘junk science.’” Insurance amici then cite a number of cases where biomechanical engineers were allowed to testify on various unrelated subject matters.³

These cases have no value to the issue at hand. The issue is not whether biomechanical evidence is “junk science.” The issue is whether a biomechanical engineer can testify that a particular collision did not cause a particular plaintiff’s injuries, based on the amount of vehicle damage.

2. Cases cited where the admission of the opinion was not in issue on appeal are not relevant

The second category of cases cited by Insurance amici involve cases where a biomechanical engineer’s opinion was admitted, but its admission was not being challenged on appeal.⁴ Because we do not know how the court would have ruled had the testimony been challenged, these

³ In *Stanul v. State*, 870 S.W.2d 329 (2004), the biomechanical engineer testified for the defense in a criminal trial. The defendant was convicted. Thus, the testimony was not in issue on appeal. In *Boutte v. Kelly*, 863 So. 2d 530 (La. App. 2003), a biomechanical engineer testified, but the admission of his testimony was not in issue. In *Hansen v. Roberts*, 154 Idaho 469, 475, 299 P.3d 781, 786 (2013), the sole ruling on appeal was the general objection that “biomechanical engineering was not a legitimate science, but [plaintiff] provided no factual or legal explanation to support this objection.”

⁴ In *Baerwald v. Flores*, 930 P.2d 816, 820 (N.M. App. 1997), the trial court actually prevented the biomechanical engineer from testifying about the cause of injury: “it is clear from the testimony that the trial court ... refused to allow him to offer an opinion as to the causation of [the plaintiff’s] specific injury by this particular accident.” In *Daddona v. Thind*, 891 A.2d 786 (Pa. Cmwlth. 2006), the issue on appeal was limited to whether the biomechanical engineering expert’s testimony exceeded his expert disclosure; the opinion’s reliability was not being challenged. In *Gainsco County Mut. Ins. Co. v. Martinez*, 27 S.W.3d 97 (Tex. App. 2000), the issue on appeal was whether the jury’s award of zero damages for pain and mental suffering was an inconsistent verdict.

cases also have little value.

3. Cases cited where the admission of biomechanical's testimony was in issue are distinguishable

Insurance amici cite three cases from other jurisdictions where the court held a biomechanical engineer was able to testify that the collision could not have caused the complained-of injuries. The first case, *Wilson v. Rivers*, 593 S.E.2d 603, 606 (S.C. 2004), is easily distinguishable. In *Wilson*, the biomechanical expert was also a medical doctor: “[B]ecause Dr. Harding is a medical doctor, [he is qualified to render] an opinion regarding the cause of respondent’s particular medical problems.”

In the second case, *Person v. Shipley*, 962 N.E.2d 1192, 1196 (Ind. 2012), the court limited its analysis to whether the biomechanical engineer’s skill, training and education qualified him to give such an opinion and, once it found that he was, no further analysis was performed.

In the third case, *Valentine v. Grossman*, 724 N.Y.S. 2d 504, 505-06 (App. Div. 2001), defendant offered two biomechanical engineers who testified the collision forces were not sufficient enough to injure the plaintiff’s back. The trial court found both opinions valid, but then excluded one as irrelevant because it relied in part on “studies [that] did not involve living people or differed from the specific facts of this accident.” *Id.* 572. The appellate court reversed on this narrow ground of relevancy.

C. Foreign Jurisdiction Caseslaw Supports Plaintiff's Position

Defendants and insurers started using biomechanical engineers to disprove injury in low speed collisions in the 1990s. It is a relatively new phenomenon. Plaintiff believes the first known appellate case is *Tittsworth v. Robinson*, 475 S.E.2d 261 (Va. 1996).

In *Tittsworth*, over the plaintiff's objection, the trial court allowed a biomechanical engineer to rely "upon the photographs of the vehicles and the rear-end collision experiments" to opine that "the force of this accident was not enough to cause any injury." *Id.* at 262-63. The jury returned a defense verdict.

The Virginia Supreme Court reversed, holding the trial court erred in admitting the biomechanical engineer's opinion. *Id.* at 262. In doing so, the court reasoned that the biomechanical engineer's testimony

"is speculative, is founded upon assumptions lacking a sufficient factual basis, relies upon dissimilar tests, and contains too many disregarded variables. Consequently, we hold that the testimony is unreliable as a matter of law, and, therefore, the trial court erred in admitting it."

Id. at 263-64 (footnote omitted).

Since *Tittsworth*, the jurisdictions that have addressed the issue have overwhelmingly held that the biomechanical engineers cannot give opinions on the cause of injury. The primary rationale for doing so is that the biomechanical engineer lacks both the medical training and medical

foundation to give such an opinion. But other rationales have been advanced and will be discussed below.

1. Cases where opinions excluded for lack of medical qualifications and lack of medical foundation

Many courts have precluded biomechanical engineers from giving opinions on the cause of human injury because they lack the medical training. They cannot treat injuries, cannot recommend treatment, cannot interpret diagnostic studies, and cannot practice medicine in any manner. *See, e.g., Santos v. Nicolos*, 879 N.Y.S.2d 701, 704 (2009) (“This court also agrees with the conclusions reached by courts in other jurisdictions that the testimony should be precluded on the ground a biomechanical engineer is not a doctor and is therefore not qualified to testify about the causal relationship between a motor vehicle accident and the injuries that the person sustained.”) (Citations omitted); *Combs v. Norfolk & W. Ry. Co.*, 507 S.E.2d 355, 358-59 (Va. 1998) (In holding that the trial court abused its discretion in permitting a biomechanical engineer to give an expert opinion regarding the cause of the plaintiff’s ruptured disc, the court noted that “the question of causation of a human injury is a component part of a diagnosis.”).

Whether a trauma is sufficient to injure a human being, depends on the particular make up of that human being. That knowledge can only come from medical findings and history, not car damage. But

“biomechanical engineers lack the medical training necessary to identify the different tolerance levels and preexisting medical conditions of individuals, both of which ‘could have an effect on what injuries resulted from an accident.’” *Bowers v. Norfolk Southern Corp.*, 537 F. Supp. 2d 1343, 1377 (M.D. Ga. 2007) *aff’d*, 300 Fed. App’x 700 (11th Cir. 2008) (quoting *Smelser v. Norfolk Southern Ry. Co.*, 105 F.3d 299, 305 (6th Cir. 1997).

2. Cases where opinions based on group studies excluded because not relevant to the specific facts

Other jurisdictions have excluded the opinions because they are in part based on group studies that are not relevant to the specific facts of the instant case. *Stedman v. Cooper*, 172 Wn. App. 9, 292 P.3d 764 (2012) and *Schultz v. Wells*, 13 P.3d 846 (Colo. App. 2000), fall into this category. And there are others.

In *Suarez v. Egeland*, 801 A.2d 1186 (N.J. App. Div. 2002), the New Jersey appellate court reversed the trial court judgment, holding that the trial court committed reversible error in admitting a biomechanical engineer’s opinion that “the car in which plaintiff was riding did not involve sufficient force to have caused plaintiff’s herniated disc.” *Id.* 1188-89. In *Suarez*, the biomechanical engineer calculated an impact speed based on damage photographs and then compared the impact speed with studies relating various collisions speeds and injuries.

In reversing, the New Jersey appellate court cut to the heart of the matter, stating that no study proved this collision “could not possibly have caused plaintiff to suffer a herniated lumbar disc.” *Id.* at 1193. The court also pointed out that the test crashes were performed “under controlled conditions quite dissimilar from an automobile accident [and there is no indication that tests] provide a reliable foundation for drawing any conclusions concerning the physiological effects of a low-impact automobile accident upon a middle-aged woman, [a person like the plaintiff].” *Id.*

In *Martin v. Sally*, 792 N.E.2d 516 (Ill. 2003), the court held that the trial court erred in admitting a biomechanical expert’s opinion, based on vehicle damage and crash studies, that the impact was not sufficient enough to injure plaintiff’s back. In doing so, the court stated that the group studies had no relevance to the specific facts of the instant case:

We find that Strauss was improperly allowed to testify because he rendered an opinion as to individuals in general, which had no relevance to plaintiff. That other individuals might not suffer injuries in low-impact vehicular crashes has no bearing on whether this particular plaintiff might have suffered injury in this particular crash.

Id. at 522-523. *Accord Clemente v. Blumenberg*, 705 N.Y.S.2d 792, 795 & fn. 2 (N.Y. S. Ct. 1999). (“While ‘crash dummies’ of various sizes are widely used by automobile designers, they do not indicate that a potential occupant cannot sustain serious cervical or lumbar injuries.”); *Cromer v.*

Mulkey Enterprises, Inc., 562 S.E.2d 783, 787 (Ga. App. 2002) (“We find limited evidence in the record that the field of biomechanics includes a technique of determining if specific injuries result from specific accidents, let alone that the technique has reached a scientific stage of verifiable certainty. Simply mentioning that there have been ‘cadaver tests’ or that volunteers have been filmed in low-speed accidents does not answer the question.”).

Determining an impact speed, then finding out where it fits on a chart, cannot be relevant to whether a particular person was injured in a particular collision. This “one size fits all” approach to collisions and injury threshold levels cannot form a foundation for determining whether a particular collision caused a particular plaintiff specific injuries.

3. Cases where testimony excluded because misleading

Another factor that Courts have relied upon for excluding the evidence is the “lack of similarity between horizontal G-forces sustained during daily living activities and the numerous forces sustained during an unexpected rear-end automobile collision, evidence of the former would have been misleading.” *Schultz v. Wells*, 13 P.3d 846, 852 (Colo. App. 2000). *Accord Worley v. State Farm Mut. Auto. Ins. Co.*, 2013 U.S. Dist. LEXIS 173098 (M.D. Fla. 2013) (Court excluded biomechanical engineer’s use of analogies to daily activities as misleading.)

D. Tencer's Opinion Is Irrelevant, Unhelpful and Misleading

Insurance Amici claim Tencer's opinion is admissible under ER 702 because it assists the jury and is not misleading. Neither is correct.

1. *Stedman vs. Ma'ele*

First, Insurance amici attempts to distinguish *Stedman*, stating that the reason *Stedman* found "Dr. Tencer's testimony did not assist the trier of fact (was) because that testimony allegedly was misleading on the issue of causation where Dr. Tencer testified that he was not offering an opinion on whether the plaintiff was injured but the jury could infer such an opinion from his testimony." Insurance Amici's Brief at 13-14. (parenthetical added for readability). The fact pattern that Insurance amici describes is identical to the facts here – to a tee.

The real difference between *Stedman* and *Ma'ele* is that the *Stedman* court understood the difference between general and specific causation, and the *Ma'ele* court did not. The *Stedman* court understood that causation opinions based on group studies, such as Tencer's, are only relevant to general causation – whether the type of event is capable of causing the type of trauma, disease or condition. The *Stedman* court also understood that opinions based on group studies have no relevance to specific causation – whether a particular collision caused a specific injury.

2. Tencer's causation opinion is not relevant or helpful

Tencer's opinion based on group studies may be helpful in determining the capability or potential for injury but it does not assist the jury in deciding its issue – whether this collision caused Johnston-Forbes' injuries.

“As Gunther Siegmund, one of the most respected researchers in the area of biomechanical engineering, has pointed out ...

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.

Plaintiff's Motion in Limine, CP 39-40 (quoting Thomas L. Bohan, ed. Forensic Accident Investigation: Motor Vehicles –2, ch 1 at 106 (1997) (quoting Gunther Siegmund) (emphasis added).

General causation issues normally do not arise in rear-end collision cases because it has long been scientifically established that such collisions are capable of causing injury. But it did arise in a Colorado district court opinion issued a little over a month ago. *Etherton v. Owners Ins. Co.*, 2014 U.S. Dist. LEXIS 43460 (D. Colo. Mar. 31, 2014). The opinion illustrates both how general and specific causation apply in a rear-end collision case and the potential for confusing the two concepts.

In *Etherton*, a medical physician who was also a biomechanical

engineer opined that a rear-end collision caused plaintiff's injuries. The physician gave an opinion on both general and specific causation.

In giving his general causation opinion, the physician "relied on experimental data and medical literature to support his conclusion that plaintiff's injury could have been caused by the collision." *Id.* at *11. (Emphasis added).

Defense counsel examined the doctor on whether he considered plaintiff's vehicle speed and her particular physical characteristics in arriving at his opinion on general causation. The doctor responded "that the amount of force on, and the strength of, an individual's spine prior to a collision are not relevant to a determination of general causation."

The defense counsel's follow-up questioning made it clear that he had confused general causation with specific causation:

[I]n your methodology, you would say that every single rear-end collision that has ever occurred is a plausible mechanism for causing a lumbar disc injury?" Dr. Ramos replied, "Yes."

Id. at *16.

Later, the physician also gave a specific causation opinion – that this particular collision caused plaintiff's specific injuries. But unlike Tencer, the physician was medically qualified to give that opinion; and unlike Tencer, the physician based that opinion on the medical evidence.

Tencer 's group study research is relevant to from a general

causation opinion – whether rear-end collisions of this type are capable of causing neck injuries. But it is not relevant to form a specific causation opinion – whether this collision caused plaintiff’s specific injuries.

3. Tencer’s opinion misleads the jury

The *Stedman* court was also correct about the misleading nature of Tencer’s opinion. The burden of proof for general and specific causation are the same, but the issues and probabilities involved are very different.

In order to prove general causation, the plaintiff must prove that the trauma or condition is capable of causing the injury – in anyone:

General causation is whether a substance is capable of causing a particular injury or condition in the general population and specific causation is whether a substance caused a particular individual’s injury. *** In other words, if silicone breast implants are incapable of causing systemic injuries in anyone, it follows a fortiori that silicone breast implants could not have caused systemic injuries in Plaintiff.

Norris v. Baxter Healthcare Corp., 397 F.3d 878, 881 (10th Cir. 2005).

To meet that burden, the plaintiff must prove the existence of a valid association between the trauma and injury. In the Ninth Circuit, that is satisfied when the studies show that the risk of an injury in the exposed population is more than double that in the unexposed or control population. *Daubert v. Merrell Dow Pharms. Inc.*, 43 F.3d 1311, 1315 (9th Cir.), *cert. denied* 516 U.S. 869, 116 S. Ct. 189, 133 L. Ed. 2d 126 (1995). Although the risk in the exposed population may be double that of

the unexposed population, the risk may still be very small, i.e., 1 in 100 in the unexposed population versus 2 in 100 in the exposed population.

In order to prove specific causation, on the other hand, the plaintiff must prove that the particular trauma caused the plaintiff's specific injury by a preponderance of evidence – more than 50 percent.

Tencer, however, relies on his group studies, that only reflect the probability of a collision causing injury in the general population, and improperly tells the jury, in essence, that it reflects the probability of this collision causing Johnston-Forbes' specific injury. Tencer in essence artificially lowers the probability of this collision causing plaintiff's injury to the odds of any collision causing injury. It is deceptively misleading to the jury. What the jury hears is Tencer saying that it is unlikely that this collision could have caused Johnston-Forbes' injuries. An opinion that he lacks the foundation to give.

CONCLUSION

Based upon the foregoing, plaintiff requests that this Court reverse the trial court's judgment and remand this case for a new trial.

Respectfully submitted,

s/ Michael H. Bloom

Michael H. Bloom, WSB # 30845
Attorney for Petitioner

CERTIFICATE

I certify that I mailed a copy of the PETITIONER'S ANSWER TO AMICUS BRIEF to Paul A. Talmadge, 2775 Harbor Ave., SW, Third Floor Ste C, Seattle WA 98126 and Douglas Foley and Vernon Findley, Defendant/Respondent's attorneys, at 13115 NE 4th Street, Ste. 260, Vancouver, Washington 98684, postage prepaid on May 19, 2014.

s/ Michael H. Bloom

Michael H. Bloom
Attorney for Petitioner

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
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Rec'd 5-19-14

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From: Sue Lorance [mailto:slorance@easystreet.net]
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To: OFFICE RECEPTIONIST, CLERK
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Subject: Case No. 89625-9

Dear Clerk:

Attached for filing please find Petitioner's Answer to Amicus Curiae Brief in *Johnston-Forbes v Matsunaga*, Case No. 89625-9, which is being filed by counsel for Petitioner Johnston-Forbes, Michael H. Bloom, WSBA 30845, 503-223-2608, bloompc@easystreet.net.

Thank you.

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