

No. 44337-6-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEANNE M. BECHTEL

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF PIERCE COUNTY

Cause No. 11-1-01077-7

REPLY BRIEF OF APPELLANT

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I. STATEMENT OF THE CASE

Appellant relies on the statement of facts set forth in her opening brief.

II. ARGUMENT

A. *The trial court erred in allowing Dr. Hayes' biomechanical testimony as his testimony does not satisfy the Frye standard and did not assist the trier of fact.*

As this Court is aware, “a trial court’s determination of the admissibility of expert testimony [is reviewed] for an abuse of discretion.” Weyerhaeuser Co. v Commercial Union Insurance Company, 142 Wn.2d 654, 683, 15 P.3d 115 (2000). “A trial court abuses its discretion by issuing manifestly unreasonable rulings or rulings based on untenable grounds, such as a ruling contrary to law.” Lakey v. Puget Sound Energy, Inc., 176 Wn.2d 909, 919, 296 P.3d 860 (2013). Thus stated, “the trial court must exclude expert testimony involving scientific evidence unless the testimony satisfies both Frye and ER 702.” State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996). “To admit evidence under Frye, the trial court must find that the underlying, scientific theory and the “techniques, experiments, or studies utilizing that theory” are generally accepted in the relevant scientific community and capable of producing reliable results.” Lakey v. Puget Sound Energy Inc., 176 Wn.2d 909, 918, 296 P.3d 860 (2013). “To admit expert testimony under ER 702, the trial court must determine that the witness qualifies as an expert and the testimony will assist the trier of fact.” Id. “Unreliable testimony does not

assist the trier of fact.” Id. “Frye and ER 702 work together to regulate expert testimony: Frye excludes testimony based on novel scientific methodology until a scientific consensus decides the methodology is reliable; ER 702 excludes testimony where the expert fails to adhere to that reliable methodology.” Id. at 918-919.

Appellant is mindful that this court has recently addressed biomechanic testimony related to auto collisions. See Johnston-Forbes v. Matsunaga, 2013 Wash.App. LEXIS 2569 (2013). Appellant is also mindful that a split between the divisions exists. See Stedman v. Cooper, 172 Wn.App. 9, 292 P.3d 764 (2012); Berryman v. Metcalf, 2013 Wash.App. LEXIS 2630 (2013).

Importantly, appellate counsel is unaware of any case law that allows biomechanic testimony when the objects analyzed are a dog and the pediatric skull. Here, respectfully, the trial court erred by admitting Dr. Hayes’ testimony before conducting a Frye standard and in violation of ER 702. The gravamen of appellant’s complaint is that the trial court allowed Dr. Hayes to testify, from a biomechanical standpoint, regarding the amount of force that the dog, Dozer, exerted when he collided with A.F.

Although Dr. Hayes’ general understanding and knowledge of biomechanics is not at issue, appellant asserts that his unreliable methodology of using population statistics and data obtained from traffic highway safety experiments does not transfer into the analysis Dr. Hayes

provided at trial. Further, the scientific research outlined in appellant's opening brief states that because the mechanical properties of the pediatric skull are unknown, Dr. Hayes' opinions are unreliable and, therefore, not helpful to the jury, which violates ER 702. See Appellant's Opening Brief at pgs. 19-24. Respectfully, given that the scientific methodology is novel, as related to the biomechanics of the infant's skull, and Dr. Hayes' opinion did not satisfy ER 702, the trial court erred by allowing Dr. Hayes' testimony.

B. The trial court erred when it allowed the re-enactment.

As set forth in appellant's opening brief, "factual inaccuracies and potential prejudicial effect" are touchstones to consider when deciding whether this type of evidence is admissible. See State v. Stockmyer, 83 Wn.App. 77, 85, 920 P.2d 1201 (1996).

Here, given that appellant urges that Dr. Hayes' testimony should not have been admitted without a Frye hearing, and that it was inadmissible, pursuant to ER 702, allowing Dr. Hayes' re-enactment further unfairly prejudiced Ms. Bechtel because it was based upon Dr. Hayes' "facts". Accordingly, the trial court erred by admitting the re-enactment

III. CONCLUSION

Based upon the aforementioned, appellant respectfully requests that this court reverse the jury's decision and remand for a new trial.

Respectfully submitted this 16th day of December, 2013.

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By:



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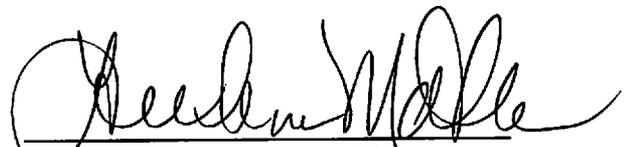
CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the reply brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

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Signed at Tacoma, Washington, this 16th day of December, 2013.


LEE ANN MATHEWS

HESTER LAW OFFICES

December 16, 2013 - 4:10 PM

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