IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

TONYA HENSLEY FOR HERSELF AND ON BEHALF OF THE ESTATE OF CHRISTOPHER HENSLEY, DECEDENT,
Plaintiffs/Appellants,

v.

PINAL COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF ARIZONA AND PINAL COUNTY SHERIFF'S OFFICE, A DEPARTMENT OF PINAL COUNTY,
Defendants/Appellees.

No. 2 CA-CV 2016-0117
Filed January 18, 2017

Appeal from the Superior Court in Pinal County
No. S1100CV201400602
The Honorable Jason R. Holmberg, Judge

REVERSED AND REMANDED

COUNSEL

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By David E. Johnson
Counsel for Plaintiffs/Appellants

Jellison Law Offices, PLLC, Phoenix
By James M. Jellison
Counsel for Defendants/Appellees

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 Appellant, Tonya Hensley, appeals from the trial court's order excluding the opinion of an expert, Dr. Daniel Wescott, under Rule 702, Ariz. R. Evid., and consequently granting summary judgment in favor of appellees, Pinal County and the Pinal County Sheriff's Office (hereafter Pinal County). Because we conclude Pinal County has failed on appeal to respond adequately to Hensley's argument regarding Wescott's opinion, we reverse.

Factual and Procedural Background

¶2 In reviewing a grant of summary judgment, "[w]e view the evidence in the light most favorable to the non-moving party." *Preston v. Amadei*, 238 Ariz. 124, ¶ 9, 357 P.3d 159, 164 (App. 2015). But the facts here essentially are undisputed. On April 15, 2015, Hensley's husband, Christopher, went for a hike in the Superstition Mountains. When he did not return home that night, Hensley notified the Pinal County Sheriff's Office. The next morning, sheriff's deputies began a search, which lasted four days. On April 18, Hensley enlisted a private search and rescue group to assist in locating Christopher. In the early morning of April 19, hikers associated with the private search and rescue group found Christopher's body at the foot of a cliff.

¶3 Hensley brought a wrongful death action against Pinal County alleging it had breached its duty to take reasonable steps to search for Christopher, and that he would have survived had he been found sooner. To support this allegation, Hensley offered the opinion of Dr. Daniel Wescott, a forensic anthropologist, who would testify that Christopher died either on April 17 or 18. Pinal County moved for summary judgment and to exclude Wescott's opinion under Rule 702. In the under-advisement ruling entered after a hearing addressing Pinal County's motion for summary judgment

and the *Daubert* issue, *see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), the court found Hensley had not established that Wescott "used a reliable methodology" and excluded his opinion.

¶4 The court then granted summary judgment in favor of Pinal County finding that, without Wescott's opinion, Hensley had "failed to present any evidence that [Christopher] had not died before [Pinal County] was notified that he was missing" and, therefore, she could not prove causation. Hensley timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(A)(1) and 12-120.21.

Standard of Review

¶5 Summary judgment is appropriate when there is "no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We "determine de novo whether . . . the trial court erred in applying the law." *Preston*, 238 Ariz. 124, ¶ 9, 357 P.3d at 164. We review "a trial court's decision to . . . preclude expert testimony for an abuse of discretion." *State ex rel. Montgomery v. Miller*, 234 Ariz. 289, ¶ 15, 321 P.3d 454, 462 (App. 2014). "This standard of review equally applies to admissibility questions in summary judgment proceedings." *Preston*, 238 Ariz. 124, ¶ 9, 357 P.3d at 164, *quoting Baker v. Univ. Physicians Healthcare*, 231 Ariz. 379, ¶ 30, 296 P.3d 42, 50 (2013).

Applicability of Rule 702

¶6 Hensley contends, in part, that the trial court erred by excluding Wescott's opinion, arguing Rule 702 and the *Daubert* standard do not apply to exclude experience-based expert opinions. And, Hensley claims, if Wescott's opinion was admissible the grant of summary judgment was erroneous.

¶7 "Prior to 2010, Arizona's standard [under Rule 702] for the admissibility of scientific expert testimony was the general acceptance test set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)." *Miller*, 234 Ariz. 289, ¶ 17, 321 P.3d at 462. In 2012, the supreme court amended the rule to "embod[y] the principles set forth in *Daubert*." *Id.* Rule 702 currently states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Under this standard, "the trial judge serves as a 'gatekeeper' who makes a preliminary assessment as to whether the proposed expert testimony is relevant and reliable." *Miller*, 234 Ariz. 289, ¶ 19, 321 P.3d at 463. Thus, "the party seeking to admit expert testimony must prove, by a preponderance of the evidence, that the testimony is both relevant and reliable." *Id.*

¶8 The comment to this rule clarifies that it is not "intended to permit a challenge to the testimony of every expert, [nor] preclude the testimony of experience-based experts." Ariz. R. Evid. 702 cmt. This court has recognized that Rule 702 was not "intended to prevent expert testimony based on experience." *McMurtry v. Weatherford Hotel, Inc.*, 231 Ariz. 244, ¶ 17, 293 P.3d 520, 527 (App. 2013). Further, in a case construing Rule 702 under the *Frye* standard, our supreme court held that "*Frye* is inapplicable when a qualified witness offers relevant testimony or conclusions based on experience and observation." *Logerquist v. McVey*, 196 Ariz. 470, ¶ 30, 1 P.3d 113, 123 (2000). Thus, it appears that there is at least a debatable issue as to whether our supreme court intended the amended Rule 702 to preclude the opinions of experience-based experts based on the *Daubert* standard.

¶9 Here, Hensley contends Wescott "could not have been more clear that his opinion was based on his experience." Therefore, Hensley reasons, the trial court erred in applying the *Daubert* standard to Wescott's proposed experience-based opinion.

¶10 In responding to this argument, Pinal County conclusorily states "it is beyond question that the admissibility of an expert, like Dr. Wescott, is subject to Fed. R. Evid. 702 and *Daubert*." It cites solely *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), without any further explanation. It then argues that the trial court properly excluded Wescott's opinion under Rule 702.

¶11 This argument is inadequate for several reasons. First, Pinal County fails to address Hensley's argument that the comments to Arizona's rule show that our supreme court did not intend Rule 702 to apply to experience-based opinions. Second, we note that federal authority on Rule 702, such as *Kumho*, is not binding on this court. *Miller*, 234 Ariz. 289, ¶ 18, 321 P.3d at 462 ("[F]ederal decisions interpreting Federal Rule 702 'are persuasive but not binding' authority in interpreting Arizona Rule of Evidence 702."), *quoting State v. Bernstein*, 234 Ariz. 89, ¶ 11, 317 P.3d 630, 636 (App. 2014). Finally, Pinal County has made no attempt to explain why Arizona's Rule 702 applies to experience-based expert opinions or how *Kumho* would apply in this case.

¶12 Due to the inadequacy of Pinal County's brief, we consider it a confession of error and accept Hensley's argument. Ariz. R. Civ. App. P. 13(a)(7)(A), (b)(1) (answering brief must contain argument "with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"); *Polanco v. Indus. Comm'n*, 214 Ariz. 489, n.2, 154 P.3d 391, 393 n.2 (App. 2007) (argument waived for failure to develop). "Failure to respond in an answering brief to a debatable issue constitutes confession of error." *Chalpin v. Snyder*, 220 Ariz. 413, n.7, 207 P.3d 666, 676 n.7 (App. 2008); *see also Tucson Estates Prop. Owners Ass'n, Inc. v. McGovern*, 239 Ariz. 52, ¶ 15, 366 P.3d 111, 115 (App. 2016). Thus, Pinal County has effectively admitted Wescott's opinion was experience-based and therefore not subject to Rule 702, and as a result, its exclusion was error.

Disposition

¶13 Based on Pinal County's lack of argument, Wescott's testimony was admissible and the trial court's grant of summary judgment on this ground was reversible error. We reverse the trial court's judgment and remand this case for further proceedings consistent with this decision.