IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JOHN R. TONEY, Appellant, v. KEVIN T. MITCHELL and KIMBERLY S. MITCHELL, Respondents.	No. 45604-4-II UNPUBLISHED OPINION

SUTTON, J. – John R. Toney appeals the trial court's order dismissing his nuisance action against his neighbors, Kevin and Kimberly Mitchell. He argues that the trial court (1) abused its discretion when it granted the Mitchells' motion in limine to exclude all evidence of causation offered by Toney and his two expert physician witnesses, (2) was biased or prejudiced, and (3) erred in dismissing his nuisance action with prejudice without a trial. We hold that the trial court (1) did not err in excluding causation evidence by Toney and his two expert physician witnesses, and (2) was not biased or prejudiced.

But we further hold that the trial court erred in dismissing his nuisance action with prejudice because Toney may pursue claims that were not based on issues that require medical causation evidence. Thus, we reverse the trial court's order granting dismissal with prejudice for additional proceedings consistent with this opinion.

FACTS

I. BACKGROUND AND COMPLAINT

Toney and the Mitchells are neighbors. The Mitchells have a shooting range on their property. After years of conflict centered on the Mitchells use of the firing range and other firearm use, Toney filed a lawsuit against the Mitchells alleging that (1) the Mitchells' firing range did not comply with various county, state, and federal codes, (2) their use of the range and other firearm use created a public nuisance, (3) their use of the range and other firearm use interfered with his use and enjoyment of the property on which he resides,[1] and (4) their use of the range and other firearm use caused him mental and physical harm including hearing loss and a heart attack. Toney requested injunctive relief and damages.[2]

The Mitchells moved for dismissal under CR 12(b)(6) for failure to state a claim upon which relief could be granted. The trial court denied the Mitchells' CR 12(b)(6) motion and ruled that Toney's amended complaint alleged a nuisance claim.[3]

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[1] Toney's former wife, whom he now considers his girlfriend, owned this property; Toney was living with her.

[2] Specifically, Toney requested permanent orders for the following injunctive relief, barring the Mitchells from (1) discharging firearms on their property, (2) harassing, intimidating, or "pointing firearms at" him, (3) generating noise above 90 dB, (4) from using electronic surveillance, and (5) trespassing. He also requests orders requiring the Mitchells to permanently remove the firing range and to comply with certain county codes. Clerk's Papers (CP) at 8-9.

Toney also requested significant monetary damages for (1) exposure to excessive noise and the resulting adverse health effects and loss of sleep, (2) harassment, (3) "reckless endangerment," (4) violation of his constitutional rights, (5) "conspiracy and violation of U.S. Code," (6) trespass, and (7) violation of his privacy. CP at 9-10.

[3] RCW 7.48.120 defines "nuisance" as an act or omission that "either annoys, injures or endangers the comfort, repose, health or safety of others . . . or in any way renders other persons insecure in

II. DISCOVERY

During the discovery process, Toney, a retired chiropractor, submitted a "Report of findings" in which he discussed the nature and cause of his alleged injuries (hearing loss and heart issues). Clerk's Papers (CP) at 38-40. He also deposed two doctors: his personal physician Joseph Davis, M.D. and R. Sterling Hodgson, M.D. At trial, Toney intended to offer his personal opinions and that of Dr. Davis and Dr. Hodgson on the issue of causation.

A. TONEY'S "REPORT OF FINDINGS"

In his "Report of findings," Toney stated that he was a retired chiropractor with over 20 years of experience and that, as part of his practice, he diagnosed patients "per the conditions they presented with" and made appropriate referrals for treatment outside of his clinical specialty, including treatment for hearing impairment and vascular/heart related issues. CP at 38. He further stated that his "education and knowledge of the normal and abnormal way the human body reacts to various factors both internal and external and the many disease processes that may effect [sic] an individual's health adversely," rendered him able to "make several clinical findings involving the unwanted noise . . . and the resultant injuries [he has] sustained as a direct result of the unwanted noise." CP at 38.

Toney opined that unwanted noise and risk of danger can cause hearing loss and stress. He stated that, over time, the stress increases various hormones, which causes numerous physical

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life, or in the use of property." The trial court also determined that Toney did not have a private cause of action against the Mitchells for any violations of the Cowlitz County Code or any criminal statutes. Toney does not challenge that ruling, but we note that even if Toney did not have a private cause of action for any code violations, evidence of certain violations could be relevant to any remaining nuisance claim.

changes, including changes that can contribute to an increased risk for heart arrhythmias and heart attack. Citing information from the Acoustical Society of America, a study about exposure to recreational firearm noise, a United States Environmental Protection Agency study about noise pollution, and a Washington State Department of Ecology study about noise limits in residential areas, Toney stated that a "review of medical literature" suggested that loud noises cause permanent hearing loss and stress related to loud noises has been directly related to heart arrhythmias and heart attack. CP at 39.

Toney concluded that, based on his personal knowledge of his gunfire exposure, his "understanding [of] the associated effects of peak impulse noise upon a persons [sic] hearing," and the medical testing and literature, it was his professional opinion that his hearing loss was a direct result of unwanted noise. CP at 39. He further opined that

> [t]he well known and established links to stress and gunfire noise and the human body's natural reaction to fight or flight and adrenaline production are well understood and the associated blood vascular manifestations that occur as a direct result of unwanted exposure resulting in heart arrhythmia's [sic] and myocardial infarction." CP at 39-40. He concluded that his health issues "were in [his] opinion also a result of the unwanted excessive noise generated from the Mitchell's [sic] property."

CP at 40.

B. Dr. Davis's Deposition Testimony

When deposing Dr. Davis, the Mitchells questioned him about possible PTSD,[4] which was apparently the "mental" harm Toney alleged in his complaint; Toney's hearing issues; and Toney's

[4] Post-traumatic stress disorder.

heart issues.[5] As to the PTSD issue, Dr. Davis testified that it was "possible" that Toney could have PTSD as a result of his exposure to guns and gun noise as described by Toney and that it was "possible" or "potentially possible" that repetitive exposure to "uncontrolled or random" gunfire "could potentially cause a PTSD-like situation." CP at 48-50. Dr. Davis stated, however, that this would be something a psychologist would have to diagnose. Dr. Davis also testified that he had never discussed the possibility of PTSD with Toney when Toney was his patient, that he was not aware that Toney had been diagnosed with PTSD, and that he did not see any such diagnosis in the records he had reviewed.

As to Toney's hearing issues, Dr. Davis testified that although he had never tested Toney's hearing, he thought there may have been an audiogram in Toney's medical records showing that his hearing was compromised. Dr. Davis did not, however, recall the details of this record. Dr. Davis further stated that exposure to loud noises could "certainly contribute" to hearing loss. CP at 50-51. Dr. Davis agreed that although there was a "theoretical" chance Toney could have suffered hearing loss caused by repetitive, long-term exposure to gun noise, hearing also declined with age. CP at 50-51.

Regarding Toney's heart issues, Dr. Davis testified that Toney had "other risk factors for heart disease that the stress of . . . gunfire episodically or periodically *could certainly have helped* in terms of precipitating," but he also stated that such stress was "probably . . . not the sole contributing factor." CP at 51 (emphasis added). Dr. Davis opined that whether the gunfire caused

[5] The record contains only a portion of this deposition, which does not contain any information about Toney's questioning of Dr. Davis.

Toney's heart issues was theoretical, but he noted that "certainly stressful situations do increase the risk of a likelihood of a heart attack or myocardial infarction happening" if the patient was already predisposed to such issues. CP at 52. When the Mitchells asked Dr. Davis if he would be unable to give them an opinion as to what had caused Toney's heart attack, Dr. Davis responded, "Well, his heart attack was caused by a clot that basically caused a blockage in the artery. So yes, that was there. Now, yeah, did the stress contribute to that? *It is certainly possible that it did.* But, yeah." CP at 52 (emphasis added). Dr. Davis agreed that this was "another 'might have' or 'could have' situation." CP at 52.

C. DR. HODGSON'S DEPOSITION TESTIMONY

The Mitchells also deposed Toney's other expert witness, Dr. Hodgson.[6] Dr. Hodgson agreed in his deposition that it was "possible that [Toney] potentially had a hearing loss that was attributable to the history of gunshot noise that [Toney] described." CP at 54. Dr. Hodgson clarified that he thought that the noise "possibly caused" the hearing loss, but, without other information, he could not say based on a reasonable degree of medical certainty that the gun noise caused the hearing loss or that the noise more likely than not caused the hearing loss. CP at 54. He stated that in order to say that the noise more likely than not caused the hearing loss, he would have "to have better data as to how much noise would come from those guns at that site, and/or to have a preinjury hearing test," which did not, to his knowledge, exist. CP at 55.

[6] The record contains only a portion of this deposition, which does not contain any information about Toney's questioning of Dr. Hodgson.

III. THE MITCHELLS' MOTION TO EXCLUDE EVIDENCE OF CAUSATION

On the day of trial, the Mitchells moved in limine to exclude as inadmissible (1) Toney's "Report of findings," (2) all evidence of personal injury to Toney based on his personal opinion, (3) Dr. Davis's videotaped deposition testimony about the nature and cause of Toney's alleged injuries, and (4) Dr. Hodgson's testimony about the nature and cause of Toney's alleged hearing loss.

A. TONEY'S CAUSATION EVIDENCE

The Mitchells argued that Toney was not qualified under ER 702[7] to testify on whether the noise from the Mitchells' shooting range was a proximate cause of his atrial fibrillation, which lead to his heart attack, because he was not qualified to opine on matters outside the scope of his chiropractic profession and practice. They asserted that chiropractic practice in Washington includes only: "[D]iagnosis or analysis and care or treatment of vertebral sublaxion complex and its effects, articular dysfunction, and musculoskeletal disorders." RCW 18.25.005(1); CP at 22-23.

Toney argued that he was qualified under ER 702 because (1) his knowledge and experience exceeded what was required under the Washington chiropractic licensing requirements as his chiropractic education was broader than what was necessary to practice in Washington, (2)

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[7] ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, and experience, training, or education, may testify thereto in the form of an opinion or otherwise.

he also had a basic science certificate from Vermillion South Dakota Medical University, and (3) he had continued to learn even after he was licensed in this state.

When the trial court asked him whether his knowledge and experience qualified him to testify about causation, Toney asserted that it did. The trial court then asked Toney whether he could testify to a reasonable degree of medical certainty that the nuisance from the Mitchells' shooting range was a proximate cause of his atrial fibrillation, which he alleged caused his heart attack. Toney responded by describing the alleged nuisance, the stress it caused, the resulting increase in adrenaline, and the effect of the adrenaline exposure on his heart. He mentioned that "numerous, numerous research articles" link adrenaline exposure to heart issues. Verbatim Report of Proceedings (RP) at 40. He also asserted that he "had patients that that was the cause and a factor of their atrial fibrillation," and he saw such patients in his practice and referred them to specialists and that his Washington chiropractic license authorized him to do so. RP at 40-41.

The trial court discussed its view of the chiropractic profession, noting that it was not always accepted "in our Westernized world." RP at 43. It then stated that under Washington licensing law, a chiropractor could not diagnose or "come to conclusions about causation," so Toney could not testify about causation. RP at 43. The trial court refused to consider Toney's knowledge and experience when it came to the causation issue. It also ruled, however, that Toney could "talk about his own well-being, it's his subjective feelings, it's how he feels." RP at 42.

B. DR. DAVIS'S AND DR. HODGSON'S MEDICAL OPINION TESTIMONY ON CAUSATION

At trial, Toney intended to offer testimony as to medical causation from Dr. Davis, Toney's primary care physician, and Dr. Hodgson, Toney's expert witness. The Mitchells argued in their motion in limine that their opinion testimony was inadmissible and should be excluded under

ER 702 because it did not establish causation, nor was it based on a reasonable degree of medical certainty.

In response, Toney argued that this medical opinion testimony was admissible, citing *Anderson v. AKZO Nobel Coatings, Inc.*, 172 Wn.2d 593, 260 P.3d 857 (2011). The trial court reviewed *Anderson*, and stated:

> Okay, so, just taking a look at that *Anderson* case, you know, it talks a lot, it's—it's basically a *Frye*[8] case, in that *it's somewhat not directly on point*, but I think it highlights some important points of law that are well-settled in Washington. One is that the trial court has a gatekeeping role and must decide if evidence is admissible, number one; it must take a look at, you know, whether—look at the probative values, relevance, and also the appropriate standard of probability, which is kind of the issue we're talking about here—is the reasonable degree of medical certainty, or what they call "reasonable medical probability."
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> And there—in the law, there—there's certain things we call "*magic word*"—"*magical words*" that if they're not used—you know, like in a—in a Will. You know, they use fancy words like "bequest" and "bequeath" and "give," and those are important words and in the law they have specific meanings and they operate and everybody knows that they operate using those particular meanings. Mr. Toney's argument is basically that, you know, there's—we're kind of moving beyond this—this—this simple notion of a reasonable degree of medical certainty as being—being a causation.

RP at 71-72 (emphasis added).

[8] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

C. THE TRIAL COURT'S RULING

The trial court noted that Dr. Davis used "conditional language" in his deposition such as "'might have,' 'may have,' 'could have,' [and] 'possibly did.'" RP at 73. The court found that although Dr. Davis was not required to use the "magic words," an evaluation of Dr. Davis's testimony as a whole did not suggest that he concluded by a reasonable degree of medical certainty that the alleged nuisance was a proximate cause of Toney's alleged injuries. RP at 73. The court excluded Dr. Davis's deposition testimony in its entirety because his testimony as to causation was speculative under ER 702. The court excluded Dr. Hodgson's opinion under ER 702 because he opined in his deposition, that without additional information, he could not state based on a reasonable degree of medical certainty that the gun noise had caused Toney's hearing loss.

After the trial court granted the Mitchells' motion in limine to exclude this causation evidence, they moved to dismiss Toney's amended complaint arguing that he had no other competent evidence on causation. A colloquy ensued with the trial court as to whether Toney had other evidence to present on damages or other claims, and the Mitchells stated he did not. Toney agreed he had no property damages and appeared to agree that he could not support any other claim given the evidence that was excluded. But, despite this apparent agreement, Toney also expressed concern that the "interest of justice" was not going to be served if the case was dismissed because the Mitchells could continue to be the "neighborhood bully" without recourse. RP at 96.

The trial court granted the Mitchells' motion and dismissed the case with prejudice. Toney moved for reconsideration but did not argue that the trial court lacked the authority to dismiss the case without the Mitchells first filing a motion for summary judgment which they had not done.

The court denied the motion to reconsider and entered judgment in favor of the Mitchells. Toney appeals the trial court's order granting the motions in limine and the order dismissing the case.

ANALYSIS

I. EXPERT TESTIMONY AND CAUSATION EVIDENCE

Toney argues that the trial court erred when it applied the *Frye* standards to determine whether the opinion testimony offered by him, Dr. Davis, and Dr. Hodgson was novel scientific evidence and that the court erred in excluding these opinions under ER 702. These arguments fail because the trial court did not apply the *Frye* standards when it excluded this evidence and the trial court properly excluded the evidence under ER 702.

A. STANDARD OF REVIEW

A trial court has "'broad discretion in ruling on evidentiary matters and will not be overturned absent manifest abuse of discretion.'" *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000) (quoting *Sintra, Inc. v. City of Seattle*, 131 Wn.2d 640, 662-63, 935 P.2d 555 (1997)). A trial court abuses its discretion when it applies the wrong legal standard to an issue or "takes a view no reasonable person would take." *Cox*, 141 Wn.2d at 439. We can affirm the trial court on any grounds supported by the record. *Wash. Fed'n of State Emps. v. State Dep't of Gen. Admin.*, 152 Wn. App. 368, 378, 216 P.3d 1061 (2009).

B. *FRYE* STANDARD DOES NOT APPLY

Toney first argues that the trial court erred when it applied the *Frye* standard to exclude his proposed causation testimony by himself and Drs. Davis and Hodgson. Toney misconstrues the record. The record shows that neither party requested a *Frye* hearing because no argument was advanced that the proposed causation testimony was novel scientific evidence requiring a *Frye*

hearing. The trial court stated that *Anderson* was not entirely on point because it was a *Frye* case, but the court relied on the portions of *Anderson* that did not implicate *Frye*. Because the trial court did not apply the *Frye* standard, Toney's argument fails.[9]

C. ADMISSIBILITY OF EXPERT TESTIMONY

Toney next argues that the trial court erred in finding that Toney, Dr. Davis, and Dr. Hodgson were not experts under ER 702. This argument also fails.

ER 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The trial court did not exclude Dr. Davis's and Dr. Hodgson's evidence because they were not experts—it excluded this evidence because neither doctor's testimony was admissible evidence on causation since it was speculative and would not be helpful to the trier of fact as required to be admissible under ER 702. The only evidence the trial court excluded because the witness was not an "expert" was Toney's own opinion as to causation. The trial court excluded this testimony because it found that this proposed testimony was beyond the scope of Toney's chiropractic practice under Washington law.

Whether a witness is licensed in a particular area of practice is a factor the court can consider when evaluating the admission of medical testimony, but the court can also consider the

[9] To the extent Toney is also arguing he was entitled to a *Frye* hearing before the trial court examined the evidence under the *Frye* standard, that argument has no merit because the trial court did not determine whether this evidence was admissible under *Frye*.

witness's training and experience in areas outside the witness's practice area. *See Loushin v. ITT Rayonier*, 84 Wn. App. 113, 118-120, 924 P.2d 953 (1996). "Per se limitations on the testimony of otherwise qualified nonphysicians are not in accord with the general trend in the law of evidence, which is away from reliance on formal titles or degrees." *Goodman v. Boeing Co.*, 75 Wn. App. 60, 81, 877 P.2d 703 (1994), *aff'd on other grounds*, 127 Wn.2d 401, 899 P.2d 1265 (1995). "Training in a related field or academic background alone may also be sufficient." *Goodman*, 75 Wn. App. at 81. Thus, the trial court erred to the extent it excluded Toney's causation evidence solely on the ground that it was outside of his practice area.

Although a witness can qualify as an expert on medical causation without possessing a license to practice medicine, this does not mean that anyone claiming expertise is allowed to testify regardless of their qualifications. *Harris v. Robert C. Groth, M.D., Inc.*, 99 Wn.2d 438, 450, 663 P.2d 113 (1983). As our Supreme Court explained in *Harris*:

> Our rejection of the rule that nonphysicians are per se disqualified from testifying as experts in medical malpractice actions should not be read as requiring that they always or even usually be allowed to testify. Trial courts retain broad discretion in determining whether an expert is qualified.

99 Wn.2d at 450.

Here, the record shows that Toney undoubtedly has knowledge outside of his specific practice area; such knowledge would be necessary to identify issues that were outside his practice areas and to make appropriate referrals. The record also shows that Toney had general knowledge about how the body might react in stressful situations, such as those he alleged he had been subject to. But nothing before the trial court established that Toney had any experience or training in

identifying what *causes* medical issues outside of his practice area. Thus, we hold that the trial court did not err in excluding this evidence.

D. MEDICAL OPINION TESTIMONY OF CAUSATION

Toney next argues that the trial court erred in excluding Dr. Davis's and Dr. Hodgson's opinions on causation. We disagree.

Medical expert testimony may not be speculative; the opinion must be grounded on a reasonable medical certainty. *Anderson*, 172 Wn.2d at 606-07. In his deposition testimony, Dr. Davis used equivocal language when assessing whether the alleged nuisance caused Toney's injuries. Dr. Davis stated that it was "possible" or "potentially possible" that the nuisance "might have" or "could have" contributed to Toney's injuries. CP at 48-51. And as to Toney's hearing loss, Dr. Davis knew only that there may have been a test showing that Toney's hearing was compromised, and he opined that there was a "theoretical" chance the hearing loss could have been caused by the alleged nuisance. CP at 50-51. The trial court did not abuse its discretion in excluding this evidence because it did not meet the reasonable medical certainty standard.

Similarly, Dr. Hodgson's deposition testimony established only that it was "possible" that the alleged nuisance contributed to Toney's hearing loss. CP at 54. In fact, Dr. Hodgson stated that he could not evaluate Toney's hearing loss without more information. Again, the trial court

did not err in excluding this evidence because it did not meet the reasonable medical certainty standard.[10]

E. TONEY'S REMAINING CLAIMS

Although we agree that the trial court did not abuse its discretion in dismissing Toney's medical injury claims after excluding his proposed causation evidence, it is not clear from the record that Toney had no other damages or claims that could be proven at trial.

Toney alleged in his amended complaint that he suffered hearing loss, a heart attack, and emotional distress as a result of the allegedly unsafe shooting, harassment, and loud firearm noise from the Mitchells' property.[11] After granting the Mitchells' motions in limine on causation, the trial court tried to clarify with the parties whether there were any remaining damages or claims, and Toney agreed with Mitchells' counsel that nothing remained.

Although Toney appeared to agree that no claims remained, the statute defining nuisance, RCW 7.48.120, allows him to recover damages proven for annoyance or injury to his comfort, repose or safety or for actions which render him insecure in life or in the use of his property, which

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[10] Toney also contends that the trial court should not have determined the admissibility of the doctors' evidence based on whether the witnesses used certain "magical words." Brief of Appellant at 3, 20; Reply Brief of Appellant 9-10. Toney misconstrues the trial court's statements. Although the trial court mentioned "magical words," it expressly stated that it was not "bound by" any magical words and its analysis focused on the degree of certainty the experts expressed. RP at 72-73.

[11] According to the Mitchells, Toney made similar allegations to the Cowlitz County Department of Building and Planning and the Cowlitz County Sheriff's Office. These agencies investigated and concluded that the Mitchells use of firearms and any resulting noise complied with the law. Also according to the Mitchells, in 2007, both parties also filed anti-harassment petitions in district court against one another and in both cases, the court found in the defendant Kevin Mitchell's favor.

would not require medical testimony on causation, and for injunctive relief. And the trial court did not disallow Toney from testifying about "his own well-being" or how the alleged nuisance made him feel. RP at 42. Thus, we hold that the trial court erred when it dismissed the entire case with prejudice before trial. We remand for further proceedings to Toney's claims that were not based on issues that require medical causation evidence.

II. JUDICIAL BIAS OR PREJUDICE

Toney next argues that the trial court erred in making biased and prejudicial remarks and that this demonstrates that the trial court based its decision to exclude the causation evidence on its personal perspective rather than on the laws of Washington. We disagree.

Toney argues that the trial court exhibited bias and abused its discretion when it commented:

> As far as—you know, I think what's interesting about chiropractic care in—in our Westernized world is that we kind of poo-poo it a little bit, and maybe there is much to be learned form, maybe, the Eastern—Eastern medicines and chiropractic health, but we're working under the—the societal constraints that are in place.
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> So, I think that the licensure—the licensing issue is kind of a key issue. It sounds like Mr. Toney has read information, has made referrals—referrals under the licensing. The licensing doesn't allow him, where it may in other states, to make diagnoses and basically come to conclusions about causation. So, I think causation and any claims to causation from Mr. Toney himself is restricted, he wouldn't be able to do that. But, he can certainly speak to his issues of what he feels; the timing of when he feels it, in conjunction with other activities by other people. So, he would be precluded—Mr. Toney would be precluded from making any claim to knowledge of why—what the causation is.

RP at 43; Br. of Appellant at 4.

These statements are not evidence of bias nor do they suggest bias played a role in the trial court's refusal to admit Toney's personal causation testimony. The trial court was merely

commenting on how society in general viewed chiropractic practice. Accordingly, this argument fails.

Toney also appears to argue that the trial court determined that Dr. Davis would have no additional evidence to offer the jury based on the trial judge's personal contact with Dr. Davis on one office visit. Toney appears to assert that this was evidence of bias and prejudice. Toney misconstrues the record. When making its ruling, the trial judge commented that he had seen Dr. Davis once for a physical exam, and that he did not think that this contact would "cause any issues." RP at 93. The trial court then commented that based on its review of the portion of Dr. Davis's deposition testimony that had been presented to the court, it did not think that Dr. Davis would "change his testimony" if he were to testify in person. RP at 93. The trial judge did not base his decision to exclude evidence on his personal contact with Dr. Davis; he merely informed the parties of this personal contact and told the parties that he did not think this contact would interfere with the court sitting on this case.

III. ADDITIONAL ARGUMENTS

Toney also argues that the trial court should not have excluded the causation evidence because the Mitchells failed to present expert opinions showing that Toney's experts were incorrect. But it was Toney's burden, as the plaintiff, to prove causation and the Mitchells had no burden to disprove Toney's evidence. Accordingly, this argument has no merit.

Toney also appears to argue that he was prepared to present other evidence about gunfire causing hearing loss and that the trial court should have considered his sound engineering expert's testimony on the excessive noise issue. But the trial court dismissed Toney's claim because he

had failed to provide causation evidence specific to his alleged injuries, thus, general evidence about whether gunfire or excessive noise can cause hearing loss was irrelevant.

Additionally, Toney asserts that the trial court erred in not following the laws of Washington, the Cowlitz County Code, and the Washington Administrative Code in regard to "noise standards and taking the matter from the jury." Br. of Appellant at 7. He also contends that the trial court erred when it dismissed the case when "issues of excessive noise encroachment" were still before the court. Br. of Appellant at 8. He seems to suggest that he should have been allowed to present evidence about the decibel levels associated with the gun fire and whether those noise levels exceeded that allowed by law. Without medical causation evidence, Toney could not prove any medical damages. Thus the trial court properly dismissed this medical claim without hearing additional evidence on this matter. To the extent evidence of code violations and decibel levels are relevant to any remaining nuisance claims, the trial court should allow such evidence.

Finally, in his reply, Toney argues that the trial court's dismissal following its rulings on the Mitchells' motions in limine was the equivalent of granting summary judgment without notice. We decline to address this issue because Toney raises this issue for the first time in a responsive brief.[12]

CONCLUSION

We hold that the trial court (1) did not err in excluding opinion testimony as to causation offered by Toney based on his chiropractic license and practice, and opinion testimony offered by

[12] RAP 10.3(c); *State v. Clark*, 124 Wn.2d 90, 95-96 n.2, 875 P.2d 613 (1994) (we do not address issues raised for the first time in a responsive brief), *overruled on other grounds by State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997).

Dr. Davis and Dr. Hodgson, which opinion testimony was not helpful and was inadmissible under ER 702, and (2) was not biased or prejudiced. But we further hold that the trial court erred in dismissing his entire nuisance action with prejudice because Toney may pursue additional issues that did not require evidence of medical causation.[13] Thus, we reverse the trial court's order granting dismissal with prejudice for additional proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.
SUTTON, J.

We concur:

Bjorgen, A.C.J.
BJORGEN, A.C.J

Worswick, J.
WORSWICK, J.

[13] The Mitchells move to strike plaintiff's exhibits 1, 2, 3, and 4, that Toney refers to at page 11 of his opening brief. The Mitchells assert these exhibits are not part of the record. We have not considered any exhibits that are not part of the record on appeal.