THE HONORABLE JAMES W. LAWLER

Date of Hearing: April 19, 2022 @ 1:00 p.m.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON, LEWIS COUNTY

SCOTT HAMILTON, as guardian ad litem for Z.H., Plaintiffs, vs. LINDA AMONDSON-MULLER, Personal Representative of the ESTATE of LAURA HAMILTON, Defendants.	NO. 20-2-00543-21 PLAINTIFFS' REPONSE TO DEFENDANTS' MOTION TO EXCLUDE DR. FREEMAN AS A DISCOVERY SANCTION

I. INTRODUCTION

Defendants have been gunning for Dr. Freeman since he was first disclosed as an expert in this case. The reason for this is simple – defendants do not want the jury to hear what Dr. Freeman has to say in response to their experts' epidemiological misrepresentations of the medical literature surrounding their natural forces of labor affirmative defense. Defendants first attempted to exclude Dr. Freeman by arguing the court should order plaintiffs to strike him as an expert in order to mitigate "undue burden and expense in discovery." Defendants' Motion was heard on April 1, 2022, and was denied by the court.

Defendants now seek to exclude Dr. Freeman as a witness under Washington's *Burnet* test. Defendants' arguments fail under each of *Burnet's* three prongs. Plaintiffs' decision to have Dr. Freeman testify during their case-in-chief was not willful or deliberate and defendants suffer no actual prejudice as a result. Furthermore, in the event the court concludes to the

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contrary, a lesser sanction is both available and far more appropriate, as there is ample time for defendants to prepare for Dr. Freeman's trial testimony. The Burnet factors cannot be met, and the court should deny the motion to exclude Dr. Freeman.

II. FACTS

This is a medical malpractice case. Now-deceased defendant Laura Hamilton (defendant Hamilton) was actively holding herself out to the Lewis County community as a healthcare provider capable of managing pregnancy, labor, and delivery within Washington's standard of care. On June 27, 2019, defendant Hamilton testified under oath several times that she was unable to define the standard of care or explain what it requires of a health care provider.

Defendant Hamilton's care of Z.H. and his mother Seng Hamilton during pregnancy, labor, and delivery underscores her admissions during deposition. Defendant Hamilton first failed Z.H. by failing to properly screen his mother Seng Hamilton for gestational diabetes (which correlates positively with fetal weight), failing to direct the performance of an ultrasound, and failing to provide an proper estimate of fetal weight, a known risk factor for shoulder dystocia. Defendant Hamilton next failed Z.H. during his labor and delivery by failing to properly manage his shoulder dystocia. In addition to failing to properly perform the shoulder dystocia management techniques expected of a reasonably prudent health care provider, Defendant Hamilton urged Z.H.'s mother to push despite the fact Z.H.'s shoulder was stuck on her pubic bone and pulled and twisted infant Z.H.'s head and neck in an effort to free his shoulder. Z.H. was born with a permanent five-level brachial plexus avulsion injury and a non-functioning right hand.

Dr. Freeman holds a Ph.D. in Public Health and Epidemiology and a Master of Public Health in Epidemiology and Biostatistics from Oregon State University, in addition to his other relevant qualifications. Plaintiffs retained Dr. Freeman in June of 2019 in order to rebut any potential epidemiological misrepresentations of the medical literature surrounding defendant

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Hamilton's natural forces of labor affirmative defense. For obvious reasons, Dr. Freeman was unable to form his rebuttal opinions until defendant Hamilton disclosed her expert's opinions and the bases therefore.

The parties agreed to postpone depositions of plaintiffs' experts until January of 2022 due to scheduling conflicts and a mutual desire to avoid intensive litigation during the holiday season. Plaintiffs have never refused to allow deposition of their experts. Plaintiffs approached defendants regarding deposition postponement and defendants agreed. Defendants deposed all of plaintiffs' experts in January and early February of 2022, with the exception of Dr. Robert Allen and Dr. Freeman. *See* Machler Decl. ¶ 2.

Defendants refused to make their experts available for deposition until all of plaintiffs' experts were deposed. Defendants' claimed reason for their refusal was that their experts needed to "respond" to the opinions of plaintiffs' experts, despite not citing a single piece of legal authority to support this position. The first deposition of a defense expert took place on April 6, 2022. Three additional defense expert depositions took place between April 13, 2022, and April 14, 2022. An additional defense expert deposition is scheduled for April 22, 2022, and the final defense expert deposition is scheduled for April 25, 2022, just two days before Dr. Freeman's scheduled deposition on April 28, 2022. *See* Machler Decl. ¶ 3.

In addition to their refusal to make their experts available for deposition, defendants refused to produce ***any*** information on their experts except for their names until March 24, 2022, despite being served with discovery requests and sent numerous emails by plaintiffs' counsel requesting the information. Dr. Freeman was retained to epidemiologically address the studies which defense experts claim support their opinions that the natural forces of labor cause multi-level permanent brachial plexus avulsion injuries. Plaintiffs saw no point having Dr. Freeman's

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deposition taken before the studies and articles relied upon by defendant's experts were disclosed. *See* Machler Decl. ¶ 4 and ¶ 6.

When defendants finally provided a ***partial*** disclosure of their experts' epidemiological opinions and the bases therefore on March 24, 2022, it became evident to plaintiffs that it might be possible to properly address the epidemiological opinions of defendants' experts during their case-in-chief. Plaintiffs' counsel was unable to speak with Dr. Freeman to confirm this possibility until April 4, 2022, after which an email was immediately sent to defense counsel to inform them. *See* Machler Decl. ¶ 5.

The defendant is targeting Dr. Freeman in order to distract the court from their own misconduct during the discovery process. Plaintiffs deposed defense expert Dr. Michelle Grim on April 14, 2022. Defendants produced a 17-page article ***during the middle of the deposition*** that Dr. Grim relied upon in forming her opinions. Dr. Grim was also the author of the article and testified under oath that the article had been available online for approximately the last two years. Furthermore, the defendant has still not provided plaintiffs with a life care plan from their life care planner, whose deposition is scheduled for April 22, 2022. Defendant's claimed reason for their lack of disclosure is a need to examine Z.H. inside his home and execute a search of the plaintiffs' family home to look for Z.H.'s assistive devices. In addition to the facially intrusive nature of this request, defendant took the position that they are permitted to search drawers and closets belonging to other minor children in the home who are not parties to this lawsuit. Defendants indicated they would no longer be pursuing this matter after plaintiffs indicated they would be moving for a protective order. Defendants have still not produced their life care plan, which plaintiffs expect to be ambushed with on the eve, or in the middle, of the defense life care planner deposition on April 22, 2022. *See* Machler Decl. ¶ 9 and ¶ 13.

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Defense experts have also refused or failed to comply with the subpoenas duces tecum sent by plaintiffs before their depositions. Dr. DeMott provided an incomplete list of prior testimony of the past five years. Dr. DeMott's list ended February 20, 2019, even though he testified in a trial in January of 2020, regarding a brachial plexus injury. *See* Machler Decl. ¶ 12.

III. ISSUE

Should the Court impose the most severe sanction of excluding Dr. Freeman as a witness Where all three *Burnet* factors cannot be met?

IV. EVIDENCE RELIED UPON

Plaintiff's Response relies upon the Declaration of Susan Machler and the exhibits attached thereto and the papers and pleadings in this case.

V. ARGUMENT

A. There is no evidence to satisfy the *Burnet* factors and justify the exclusion of Dr. Freeman as an expert witness.

Dr. Freeman was retained to rebut the defendants' anticipated epidemiological misrepresentations of the medical literature surrounding their natural forces of labor affirmative defense. However, defendants refused to disclose their experts' epidemiological opinions or the bases therefore until March 24, 2022, despite numerous requests from plaintiffs that they do so. After Dr. Freeman reviewed the defendants' expert disclosures and spoke with plaintiffs about his responsive opinions, it became clear that Dr. Freeman could address the epidemiological testimony of defendants' experts during plaintiffs' case in chief without creating unnecessary litigation around the issue of plaintiffs' designation of Dr. Freeman as a rebuttal witness – which defendants have indicated they oppose. Discovery in this case is still ongoing and trial is over two months away.

Defendants correctly cite the test articulated in *Burnet v. Spokane Ambulance*, 131 Wn.2d

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484, 933 P.2d 1036 (1997) as controlling the issue of witness exclusion based on an alleged discovery violation. A trial court may impose the most severe discovery sanction of witness exclusion only upon a conjunctive showing that (1) the discovery violation was willful or deliberate, (2) the violation substantially prejudiced the opponent's ability to prepare for trial, and (3) the court explicitly considered less severe sanctions. *Id; Jones v. City of Seattle,* 179 Wn.2d 322, 344, 314 P.3d 380 (2013). Failure to consider these factors constitutes an abuse of discretion. *Keck v. Collins*, 184 Wn.2d 358, 362, 357 P.3d 1080 (2015). A court must consider whether the moving party is **substantially** prejudiced by the late disclosure of an expert opinion. *Porter v. Kirkendoll*, 5 Wn. App.2d 686, 706, 421 P.3d 1036 (2018), aff'd in part, rev'd in part on other grounds, 194 Wn.2d 194, 449 P.3d 627 (2019) (emphasis added). The court may impose the most severe sanction of witness exclusion only if no lesser sanction would suffice. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993). The presumption is that absent proof of each of the *Burnet* factors, the testimony will be admitted. *Jones*, 173 Wn.2d at 343.

1. Plaintiffs did not willfully or deliberately violate a court order.

There is no evidence that plaintiff's disclosure of Dr. Freeman's rebuttal opinions was willful or deliberate. As to willful misconduct, the late-disclosing party's inability to "provide an explanation" does not satisfy this factor. *Burnet*, 131 Wn.2d at 496-97. "Something more" than the very fact of violating an order is needed. *Jones*, 179 Wn.2d at 345. If there is good cause for not disclosing the opinion sooner, there is no willfulness for failure to disclose. *Id.*

Here, plaintiffs have good cause which is that the failure by defendants to disclose their own liability experts' opinions and the bases therefore establishes reasonable grounds for any alleged late disclosure by plaintiffs of Dr. Freeman's rebuttal opinions as well as the decision to

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call Dr. Freeman during plaintiffs' case-in-chief. Without knowing what defendants' experts were going to testify to and rely upon in support of their testimony, it was impossible for Dr. Freeman to form his rebuttal opinions. Once defendant finally disclosed their expert opinions and the bases therefore and Dr. Freeman's opinions were formed, it became clear plaintiffs could pre-emptively address the defense expert testimony during their case-in-chief while avoiding litigating the issue of his rebuttal testimony. It is that simple. Defendants offer no evidence of "something more" indicating willfulness of this late disclosure.

Defendants cite *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003) in support of their argument. However, the situation before the court is easily distinguishable. *Stevens* stands for the proposition that a party who has shielded a consulting expert from discovery may be prevented from later converting the consulting expert into a testifying expert if the discovery cutoff date has passed and it would be fundamentally unfair to subject the opposing party to last minute discovery. *Id.* Dr. Freeman has been designated as a testifying expert since July of 2021, discovery in this case is still ongoing, and Dr. Freeman's deposition is scheduled for April 28, 2022, over two weeks away at the time of this writing. In addition to the lack of factual and procedural similarities, the *Stevens* appellate court makes no mention of whether the trial court considered the *Burnet* factors, which as defendants admit, controls the issue before the court. Defendants' attempt to analogize *Stevens* to this case is telling as to the lack of support for their position.

2. **Defendants are not substantially prejudiced by the plaintiffs' decision to call Dr. Freeman during their case-in-chief prior to the discovery cutoff, prior to Dr. Freeman's deposition, and more than two months before trial.**

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Defendants are not substantially prejudiced by plaintiffs' decision to call Dr. Freeman during their case-in-chief. As stated, Dr. Freeman was retained by plaintiffs to rebut anticipated epidemiological misrepresentations of the medical literature by defendants' experts surrounding the natural forces of labor affirmative defense. Discovery in this case is still ongoing, trial is over two months away, Dr. Freeman's deposition is scheduled for April 28, 2022. Defendants still have over two months to depose Dr. Freeman and prepare for his testimony at trial. There is no prejudice to the defendants' ability to prepare for trial.

Generally, disclosures occurring on the eve of trial or during trial are more likely to be found to be prejudicial. See *Jones*, 173 Wn.2d at 344-46; *Burnet*, 131 Wn.2d at 496. In *Jones*, the court found the late disclosures of three witnesses were prejudicial where the relevant witnesses were disclosed three days into trial, at least one week into trial, and three weeks into trial. *Jones*, 173 Wn.2d at 330, 333, 344, 346, 352-53. The court found that these late disclosures left the plaintiffs with no ability to properly prepare for or respond to this testimony and that it constituted an "ambush." *Id.* at 395. However, here, the parties are not at the eve of trial. Plaintiffs disclosed Dr. Freeman's opinions prior to the discovery cutoff and his deposition is scheduled for April 28, 2022. Defendants still have ample time to depose Dr. Freeman and prepare for his testimony. There is no real substantial prejudice to the plaintiffs.

Defendant claims they are "entitled" to depose Dr. Freeman before the depositions of their defense experts so that their defense experts can "respond." Defendant cites no legal authority to support this position, presumably because none exists. This is simply another attempt by defendant at gamesmanship in order to gain an unfair advantage in this litigation. Defendants cannot claim they are prejudiced by plaintiffs alleged violation of a discovery rule

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that does not exist. The right to discovery is bilateral. *See* CR 26. By refusing to produce their experts for deposition until plaintiffs' experts are deposed, defendants have placed an artificial precondition on plaintiffs' right to seek discovery and prepare their case. If any party has faced prejudice as a result of a discovery issue in this case, it is plaintiffs.

3. A lesser sanction, if any sanction, is more appropriate than exclusion.

Exclusion of testimony is a last resort. *Burnet* requires that a trial court consider lesser sanctions "that could have advanced the purposes of discovery and yet compensated [the opposing party] for the effects of the ... discovery failings." *Jones*, 179 Wn.2d at 345 (quoting *Burnet*, 131 Wn.2d at 497 & n. 5). The decision to exclude evidence that would affect a party's ability to present its case is a severe sanction. *Keck v. Collins*, 184 Wn. 2d 358, 368, 357 P.3d 1080 (2015).

If the court finds that defendants are somehow substantially prejudiced by plaintiffs' decision to call Dr. Freeman during their case-in-chief, the court itself can designate Dr. Freeman as a rebuttal expert, as plaintiffs originally intended. This will of course invite additional litigation as to Dr. Freeman's rebuttal testimony, which plaintiffs were attempting to avoid. However, that is the extent of "sanctions" that should be imposed in this matter.

If Dr. Freeman is excluded from testifying at trial, plaintiffs will be extremely prejudiced in their ability to rebut defendants' natural forces of labor affirmative defense. Defendants failed to disclose their expert opinions on the natural forces of labor and the bases therefore, which delayed the formation of Dr. Freeman's opinions and the decision to ultimately call Dr. Freeman during plaintiffs' case-in-chief. Plaintiffs have a right to both present their case

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and rebut any epidemiological misrepresentations by defense experts surrounding the natural forces of labor affirmative defense.

Defendants cannot establish all three *Burnet* factors and the court should deny the motion to strike Dr. Freeman as an expert witness.

VI. CONCLUSION

Defendants do not satisfy any of the conjunctive Burnet factors, and exclusion of plaintiffs' expert witness is therefore improper. Defendants' motion to exclude Dr. Freeman should be denied.

Dated this 14th day of April, 2022.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that I caused the foregoing to serve upon the following in the manner indicated below:

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Dated this 15th day of April 2022 at Seattle, Washington.

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