Honorable Judge James W. Lawler
Hearing on April 19, 2022, at 1:00 PM
With Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

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

The record speaks for itself on this issue. The following facts are unambiguously established by the evidence that Defendant Hamilton has submitted and stand unrefuted:

- Defendants requested to take the depositions of Plaintiffs' experts on September 8, 2021. Plaintiffs had not requested to take any defense experts by that point.[1]
- Plaintiffs' counsel refused to make Dr. Freeman available for deposition until after defense experts were deposed. They claimed that he was a "rebuttal" expert and "won't have any opinions" until defense experts were deposed.[2]

[1] (*See* Rand Decl. Ex. E at 1.)
[2] (*See* Rand Decl. Ex. F at 1; Ex. H at 1 – 3; Ex. K at 2.)

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- Despite defense counsel's repeated objections, Plaintiffs' counsel maintained this same position until April 4, 2022, and refused to make Dr. Freeman available for deposition until after defense experts were deposed.[3]

- The parties' agreed Case Scheduling Order, set staggered deadlines for the parties to disclose fact and expert witnesses. Plaintiffs' deadline was February 25, 2022. Defendant Hamilton's deadline was March 25, 2022. In accordance with their deadline, Plaintiffs produced what purports to be a substantive witness disclosure on February 25, 2022. It contained no information about Dr. Freeman's substantive opinions and reiterated, again, that he would be a "rebuttal witness."[4]

- On March 30, 2022, in response to Defendant Hamilton's motion for protective order, Plaintiffs submitted a declaration from Dr. Freeman, which he signed on March 23, 2022, the day before Defendant Hamilton timely submitted her witness disclosure. This declaration made clear that Dr. Freeman was not merely a "rebuttal" witness and had, in fact, already formulated substantive opinions based on his own research. Defense counsel pointed this out during oral argument on April 1, 2022. In response, Plaintiffs' counsel represented to the Court that Dr. Freeman would only be offering rebuttal opinions.[5]

- On April 4, 2022—two days before the first defense expert was deposed—Plaintiffs' counsel informed defense counsel that they had changed their mind and would now be calling Dr. Freeman as part of their case-in-chief. They also provided a purported disclosure of Dr. Freeman's substantive opinions, such as his opinion that "the risk of injury is three times greater if traction is added to the maternal forces" and that "no five-level avulsion injury has ever been described as occurring

[3] (*See* Rand Decl. Ex. J; ¶9.)
[4] (*See* Rand Decl. Ex. A; Ex. C.)
[5] (*See* Rand Decl. Ex. I.)

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with just the natural forces of labor." None of this had been previously disclosed by Plaintiffs' counsel.[6]

- Trial is currently set for June 20th and the discovery cutoff is barely two weeks away on May 6th. Four of Defendant Hamilton's key liability experts have already been deposed and thus were deprived an opportunity to review and address Dr. Freeman's untimely opinions/testimony.[7]
- To date, Plaintiffs ***still*** have not produced Dr. Freeman's expert materials (literature, notes, correspondence, etc.) that were requested in discovery on **December 22, 2020**.[8]

A. The *Burnet* factors are satisfied.

The above facts demonstrate that there has been a major discovery violation. Indeed, Plaintiffs missed the deadline for disclosing Dr. Freeman's opinions by more than **five weeks.** (*See* Rand Decl. Ex. C.) And Plaintiffs still have not produced Dr. Freeman's expert materials in response to Defendant Hamilton's Requests for Production that were served at the beginning of this lawsuit. (*See* Rand Decl. Ex. D; ¶4.) The fact that Plaintiffs have not produced Dr. Freeman's expert materials is particularly inexcusable as Defendant Hamilton has identified this deficiency in prior discovery motions going back to March 24, 2022.[9]

Standing alone, Plaintiffs' untimely disclosure of Dr. Freeman's opinions warrants discovery sanctions as it is a substantial violation of the Scheduling Order. But Plaintiffs' counsel's conduct goes beyond that. Since at least October of 2021, Plaintiffs' counsel refused to allow Dr. Freeman to be deposed until after defense experts were deposed, falsely claiming that he was a "rebuttal" expert and thus did not have any opinions. Then, on April

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[6] (*See* Rand Decl. Ex. J.)
[7] Those experts are as follows: Dr. Scher (neurology), Dr. DeMott (OBGYN), Ms. Browder (midwife), and Dr. Grimm (biomechanical engineer). (*See* Rand Supp. Decl. at ¶3.)
[8] (*See* Rand Decl. Ex. D; ¶4.)
[9] (*See e.g.* Def. Resp. [dated 3/24/2022] at 7:5-10.)

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4th—barely a month before the discovery cutoff and only two days before the first defense expert was deposed—Plaintiffs' counsel conveniently decided that they will actually be calling Dr. Freeman in their case-in-chief. Clearly, it was improper for Plaintiffs to withhold Dr. Freeman's opinions and prevent the defense from taking his deposition.

This is exactly the sort of tactical move that Washington Courts have found to warrant exclusion of an expert. Indeed, such conduct is analogous to the discovery violation in *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003). There, a party designated an expert as a consultant in order to shield that expert from discovery. However, six weeks before trial, the party changed its position and decided to have that expert testify. The Court of Appeals affirmed the trial court's exclusion of that expert, noting that it had previously cautioned against using such tactics to delay expert discovery to gain an unfair advantage. Similarly, here, Plaintiffs' counsel used the "rebuttal" designation and their claim that Dr. Freeman "won't have any opinions"[10] until after defense experts were deposed as a tactic to delay discovery and prevent the defense from taking his deposition. Only after all defense expert depositions had been scheduled and the discovery cutoff was barely a month away did Plaintiffs' counsel conveniently change their mind and decide to call Dr. Freeman in their case-in-chief. (*See* Rand Decl. Ex. J.) By then, it was too late for defense expert depositions to be rescheduled without compromising the June 20th trial date.

Plaintiffs' counsel's conduct satisfies the three factors in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). First, their discovery violation was willful, if not tactical. A discovery violation is willful if it is was done without a reasonable excuse.[11] Plaintiffs' counsel has failed to articulate any reasonable excuse for this conduct

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[10] (*See* Rand Decl. Ex. F at 1 – 2.)

[11] Plaintiffs' counsel incorrectly claim in their brief that "the late-disclosing party's inability to 'provide an explanation' does not satisfy" the first Burnet factor. This is patently false. That is precisely what the standard for "willful" is. *See e.g. Carlson v. Lake Chelan Cmty. Hosp.*, 116 Wash. App. 718, 737, 75 P.3d 533, 543 (2003) ("'willful' violation means a violation without a reasonable excuse."); *Hampson v. Ramer*, 47 Wn. App. 806, 812, 737 P.2d 298, 302 (1987); *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674,

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because there is none. Indeed, as just explained, the record strongly suggests that Plaintiffs' counsel intentionally and tactically withheld Dr. Freeman's opinions in order to gain an unfair advantage.

Second, Defendant Hamilton has been substantially prejudiced in her ability to prepare for trial by Plaintiffs' discovery violation. Defendant Hamilton requested to depose Dr. Freeman long ago on September 8, 2021. This was before any defense expert deposition was requested. And defense experts will necessarily respond to Plaintiffs' experts because Plaintiffs solely bear the burden of proof. Plaintiffs' counsel's untimely disclosure of Dr. Freeman's opinions and decision to call him in their case-in-chief came on April 4th, came barely a month before the May 6th discovery cutoff. All defense expert depositions had been scheduled by then and the first defense expert deposition was only two days later on April 6th. By the time of this hearing, four of Defendant Hamilton's key liability experts will have been deposed. (*See* Rand Supp. Decl. at ¶3.) Plaintiffs' counsel's conduct wrongfully deprived these experts of an opportunity to consider and address Dr. Freeman's opinions in their testimony. Moreover, this gives Plaintiffs an unfair advantage on cross examination in a variety of ways. For example, it is clear that Plaintiffs now intend for Dr. Freeman to offer new/different opinions from their other experts.[12] Defense experts, understandably, may not have addressed these new/different opinions during their deposition—nor could they have done so, given the late disclosure and the fact that Dr. Freeman's deposition will not happen until April 28th. If defense experts testify at trial in response to Dr. Freeman's new/different opinions, Plaintiffs' counsel could cite to the absence of such testimony in their deposition transcripts to unfairly impeach their credibility. Moreover, Defendant Hamilton did not previously believe it was necessary to retain an expert in epidemiology based on Plaintiffs'

686-87, 41 P.3d 1175 (2002); *J.K. by Wolf v. Bellevue Sch. Dist. No. 405*, 20 Wn. App. 2d 291, 500 P.3d 138, 154 (2021).

[12] If not, then Dr. Freeman's options are unduly cumulative.

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longstanding representation that Dr. Freeman would only be offering rebuttal testimony to defense experts and would not offer any opinions in Plaintiffs' case-in-chief. However, that assessment could well change based on the expanded scope of Dr. Freeman's untimely disclosed opinions and depending on the substance of his upcoming deposition testimony. But with the discovery cutoff on May 6th and trial to follow shortly after on June 20th, there is no time for Defendant Hamilton to go out and retain an additional expert.

Third, and finally, no lesser sanction will suffice. It is simply too close to the discovery cutoff and trial date to mitigate the prejudice to Defendant Hamilton through other means. Defense expert depositions cannot be rescheduled. Indeed, four of Defendant Hamilton's key liability experts have already been deposed. Plaintiffs conduct deprived these experts of an opportunity to consider and address Dr. Freeman's withheld opinions during their deposition. That prejudice cannot be undone.

As an alternative sanction, Plaintiffs' counsel proposes that the Court limit Dr. Freeman to rebuttal. But that is hardly a sanction considering that Plaintiffs wrongfully used their ostensible designation of Dr. Freeman as a "rebuttal" expert to shield him from discovery for most of this case. Moreover, such a sanction would not address or punish the late disclosure of Dr. Freeman's opinions and the prejudice this has caused as described above. A discovery sanction "must not be so minimal [...] that it undermines the purpose of discovery." *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 356, 858 P.2d 1054, 1085 (1993). *Id.* "The sanction should ensure that the wrongdoer does not profit from the wrong." *Id.* Exclusion is the proper remedy in this situation.

B. Plaintiffs' opposition has no support in the record.

Rather than address the actual evidence that Defendant Hamilton submitted that demonstrates the severity of their discovery violation, Plaintiffs' counsel, instead, attempts to blame the defense. This is an obvious deflection strategy, and one that they have employed previously. Such arguments have no merit whatsoever.

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Plaintiffs' counsel first claims that Defendant Hamilton is the reason for their late disclosure of Dr. Freeman's opinions because the defense did not provide a substantive summary of their experts' substantive opinions until March 24, 2022. This makes little sense. Per the agreed Scheduling Order, Defendant's deadline to disclose experts was March 25th. (*See* Rand Decl. Ex. C.) Defendant Hamilton submitted her disclosure a day early on March 24th.

The record is clear that Plaintiffs did not disclose any of their experts' opinions until mere days before their depositions, beginning in January of 2022. And by the time Defendant Hamilton submitted her expert disclosure on March 24th, four of Plaintiffs' experts *still* had not been deposed, including Plaintiffs' midwife expert. Defense experts needed to review and consider the opinions/testimony of Plaintiffs' experts before completing their review and formulating/finalizing their opinions. This is simply how the burden of proof works: plaintiffs present their evidence that they believe will prove their case, and defendants present their evidence in response. Plaintiffs' counsel is a seasoned and highly experienced plaintiff attorney specializing in medical negligence litigation. Her feigned ignorance on this subject is disingenuous, **particularly when she expressly agreed to staggered expert disclosure deadlines in the Case Scheduling Order.** (*Id.*)

Also disingenuous is Plaintiffs' assertion that they could not know that they would be calling Dr. Freeman in their case-in-chief until after Defendant Hamilton's March 24th disclosure. Plaintiffs' counsel retained Dr. Freeman in the prior lawsuit filed back in 2017—it is difficult to believe that they did not have substantive discussions with him about this case or his opinions until April 4, 2022. Nor does their position make any sense when Dr.

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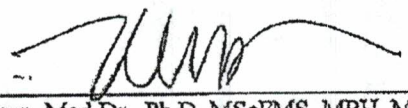
Freeman signed his declaration on March 23, 2022, **the day before Defendant Hamilton's expert disclosure was served:**

> Dated this 23 day of March, 2022, at Portland, Oregon.
>
> 
>
> Michael Freeman, Med.Dr., Ph.D. MScFMS, MPH, MFFLM, FACE

(*See* Rand Decl. Ex. I.) Clearly, Plaintiffs' counsel had been in contact with Dr. Freeman prior to Defendant Hamilton's March 24th expert disclosure and knew his substantive opinions. Plaintiffs' counsel does not even attempt to reconcile this evidence with their position. Instead, they ignore it.

Moreover, Plaintiffs' counsel's complaints about Defendant Hamilton's expert discovery is hypocritical. This will not be addressed here in detail as it has been well explained in prior briefing. But Plaintiffs have demonstrated a pattern of obstructing expert discovery dating back to the prior lawsuit. Indeed, production of Plaintiffs' expert materials remains incomplete,[13] and they still have not produced any of Dr. Freeman's expert materials in response to Defendant Hamilton's valid discovery requests served at the beginning of this case. At this point, one must wonder if Plaintiffs' counsel is deliberately withholding Dr. Freeman's expert materials until after this hearing because they do not want the Court to know what it contains.

With respect to the article that Dr. Grimm referenced during her deposition, the defense has already made clear that they would make Dr. Grimm available for brief additional deposition questioning that is limited to her late materials. (*See* Rand Supp. Decl. Ex. 1.) Defendant Hamilton will not be producing her own life care plan, so there is no basis

[13] Additionally, Plaintiffs' biomechanical engineering expert, Dr. Allen, testified that he provided an outdated reference list of articles/literature and did not provide his entire testimonial history list that was requested via subpoena.

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for Plaintiffs' complaint about that—Plaintiffs' counsel would have been told this if she had simply asked. (*See* Rand Supp. Decl. at ¶4.) Plaintiffs also complain that Dr. DeMott did not produce a complete and up-to-date list of his prior testimony. Yet, Dr. DeMott does not have such a list in his possession. Plaintiffs' counsel was told this and knows full well that there is no Rule or authority requiring a non-party expert to create new materials in response to a subpoena. (*See* Rand Supp. Decl. Ex. 2.) Defendant Hamilton has acted appropriately and in good faith in all discovery matters.

Finally, Plaintiffs' claim that they will be "extremely prejudiced" if Dr. Freeman is excluded. This is exaggerated, at best. Plaintiffs were not even going to call Dr. Freeman in their case in chief until just recently. And even if Dr. Freeman is excluded, Plaintiffs will still have **eight experts**, including three obstetricians, a biomechanical engineer, a midwife, and a neurologist. If Plaintiffs' counsel does not believe that they will be able to adequately present their case with this arsenal of experts, then that just speaks to how weak their case really is.

CONCLUSION

There is no doubt that Plaintiffs' untimely disclosure of Dr. Freeman's opinions and tactical decision to now call him in their case-in-chief constitutes a major discovery violation that satisfies the first two *Burnet* factors. Plaintiffs need to be sanctioned for such conduct. The only question that remains is whether any lesser sanction would suffice. Defendant Hamilton respectfully submits that exclusion of Dr. Freeman is the only viable option, considering the proximity to the discovery cutoff and the trial date, and the fact that four key liability experts for the defense have already been deposed. Anything less would not cure the prejudice and allow Plaintiffs' counsel to profit from their improper conduct.

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DATED this 17th day of April, 2022, at Seattle, Washington.

JOHNSON, GRAFFE, KEAY,
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CERTIFICATE OF SERVICE

I declare that on the date below I sent this ***Defendant Hamilton's Reply to Her Motion to Exclude Plaintiffs' Expert Dr. Freeman as a Discovery Sanction*** to be filed with the Clerk of the Court, and that I served the same on the following parties of record in the manner described:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 17th day of April 2022, at Seattle, WA.

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