



1 delivered baby Z.H. on April 9, 2014. Baby Z.H. was born with a permanent four-level brachial  
2 plexus avulsion injury. Neff Decl. ¶ 3.

3 The medical community at large, as well as experts for both plaintiff and defendant, agree  
4 that permanent brachial plexus injuries are very rare and occur in 1-2 out of every 10,000 live  
5 births. Neff Decl., Ex. 1. p. 21, line 4 – p. 21, line 14. Permanent avulsion injuries, like those  
6 suffered by Levi Myhre and Z.H. while under the care of Laura Hamilton in 2010 and 2014,  
7 respectively, comprise a small subset of all permanent brachial plexus injuries and are thus even  
8 more rare. Plaintiff's expert obstetrician Dr. Gurewitsch Allen testified during deposition that,  
9 "when you're talking multilevel avulsions, those are more rare. At least 1 in 10,000 or less." Neff  
10 Decl., Ex. 2. p. 54, line 12 – p. 54, line 20. Defendant's expert Dr. Mark Scher also testified  
11 during deposition that, "permanent injuries are not more than one or two per 10,000.... then it's  
12 going to be a subset of that that's going to be the complete avulsions you're talking about. That's  
13 even rarer than that." Neff Decl., Ex. 1. p. 21, line 4 – p. 21, line 14. Between 2010 and 2014,  
14 when the deliveries of baby Levi and Z.H. occurred, defendant Hamilton delivered 550 babies.  
15 Neff Decl., Ex. 3. p. 10 – p. 11

16 Plaintiff filed their Complaint in this matter on August 20, 2020, alleging defendant  
17 Hamilton breached her duty of care to Z.H. during his delivery, causing him a permanent four-  
18 level brachial plexus avulsion injury, corresponding physical disability, and lifelong mental  
19 anguish. Defendant Hamilton filed her Answer to plaintiff's Complaint on November 20, 2020.  
20 Defendant Hamilton's answer set forth an alternative theory of causation framed as an  
21 affirmative defense – that "plaintiff [Z.H.'s] injury was caused by an act of God - the natural  
22 forces of labor." Neff Decl., Ex. 4.

### 23 **III. EVIDENCE RELIED UPON**

24 This Motion is based on the declaration of Austin J. Neff and the papers and pleadings in  
25 this case.

1 **IV. ISSUE PRESENTED**

2 Is evidence of prior permanent brachial plexus avulsion injury occurring under Laura  
3 Hamilton's care admissible to rebut defendant's claim that Z.H.'s injuries were caused by the  
4 natural forces of labor?

5 **V. AUTHORITY**

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7 **A. Defendant Hamilton's Alternative Theory of Causation Makes Evidence of Levi  
8 Myhre's Permanent Brachial Plexus Avulsion Injury Highly Probative.**

9 Defendant Hamilton is going to argue to the jury that Z.H.'s multiple-level avulsion  
10 injury was caused by an "the natural forces of labor." Multiple-level avulsion injuries occur in, *at*  
11 *most*, 1 out of every 10,000 live births amongst those handled by the obstetrical and midwifery  
12 communities at large. According to expert testimony from both plaintiff and defendant, the  
13 actual rate of occurrence is likely much lower. Between 2010 and 2014, multiple-level avulsion  
14 injuries occurred in 1 out of every 225 live births in which defendant Hamilton was responsible  
15 for delivering the child. This means multiple-level avulsion injuries were occurring under Laura  
16 Hamilton's care during this time period at a rate *at least* 44.4 times greater than average, based  
17 on generally accepted medical statistics and testimony from both parties' experts. This evidence  
18 is highly probative when offered in rebuttal to defendant's assertion that Z.H.'s injury was  
19 caused by an extremely rare but natural occurrence – the natural forces of labor.  
20

21 **B. ER 404(b) does not Preclude Admission of Prior Multiple-Level Avulsion Injuries  
22 for Purposes of Rebuttal.**

23 ER 404(b) prohibits admission of prior act evidence only when it is offered for the  
24 purpose of demonstrating the person's character and action in conformity with that character.

25 *State v. Gresham*, 173 Wash. 2d 405, 429, 269 P.3d 207, 217 (2012). ER 404(b) does not

1 prohibit admission of prior acts if such evidence is offered for another reason, such as proof of  
2 motive, intent, plan, knowledge, identity, or absence of mistake or accident. *Brundridge v. Fluor*  
3 *Fed. Servs., Inc.*, 164 Wash. 2d 432, 444, 191 P.3d 879, 887 (2008). Importantly, the list of  
4 permissible purposes outline in the text of ER 404 is illustrative, not exhaustive. *State v.*  
5 *Gresham*, 173 Wash. 2d 405, 429, 269 P.3d 207, 217 (2012). As the Supreme Court of  
6 Washington stated in *Gresham* when discussing the permissible purposes for admission of prior  
7 act evidence under ER 404, “there is one improper purpose and an undefined list of proper  
8 purposes.”  
9

10 Plaintiff is not offering evidence of Levi Myhre’s permanent brachial plexus avulsion  
11 injury for the purpose of showing conformity of Laura Hamilton’s character between his delivery  
12 and the delivery of Z.H and will not make any argument of this nature. Plaintiff seeks to offer  
13 this evidence for the narrow purpose of rebutting defendant’s alternative theory of causation –  
14 that Z.H.’s injuries were caused by “the natural forces of labor.” Because plaintiff has identified  
15 a proper purpose for admission of this prior act evidence, the evidentiary analysis shifts to the  
16 ER 403 balancing test.

17 **C. The ER 403 Balancing Test Favors Admitting Evidence of Levi Myhre’s Permanent**  
18 **Brachial Plexus Avulsion Injury.**

19 ER 403 contains a presumption of admissibility. *See* 5A K. Tegland § 237, at 243; 5 K.  
20 Tegland § 105, at 346; *Erickson v. Kerr*, 125 Wash. 2d 183, 190, 883 P.2d 313, 317 (1994).  
21 Evidence may only be excluded if the danger of unfair prejudice substantially outweighs its  
22 probative value. *Bengtsson v. Sunnyworld Int’l, Inc.*, 14 Wash. App. 2d 91, 105, 469 P.3d 339,  
23 347 (2020). The burden of showing unfair prejudice is on the party seeking to exclude the  
24 evidence. *Lodis v. Corbis Holdings, Inc.*, 192 Wash. App. 30, 36, 366 P.3d 1246, 1249 (2015).

25 The ability of the danger of unfair prejudice to substantially outweigh the probative force of

1 evidence is "quite slim" where the evidence is undeniably probative of a central issue in the case.  
2 *Carson v. Fine*, 123 Wash. 2d 206, 224, 867 P.2d 610, 620 (1994).

3 This is a medical negligence case. The central issue for the jury to decide is whether  
4 Laura Hamilton complied with the standard of care in the prenatal care of Seng Hamilton and the  
5 delivery of Z.H. Defendant Hamilton has chosen to pose another central issue to the jury through  
6 the pleading of their affirmative defense. This issue is whether Z.H.'s injuries were caused by an  
7 "the natural forces of labor." As outlined above, the decision by defendant Hamilton to assert an  
8 alternative theory of causation dramatically increases the probative value of evidence  
9 surrounding Levi Myhre's permanent brachial plexus avulsion injury and tips the ER 403  
10 balancing test in favor of admission.

11 Once defendant Hamilton elicits evidence or offers argument that Z.H.'s permanent  
12 brachial plexus avulsion injury was caused by the natural forces of labor, Z.H. is permitted to  
13 rebut this defense. As the Division 1 Court of Appeals explained in *Hollins v. Zbaraschuk*, 200  
14 Wash. App. 578, 580, 402 P.3d 907, 909 (2017):

15 [u]nder the "open door" rule, when one party opens the door to a topic, the other party  
16 may also introduce evidence in order to establish the truth for the jury. It would be a  
17 curious rule of evidence which allowed one party to bring up a subject, drop it at a point  
18 where it might appear advantageous to him, and then bar other party from all further  
19 inquiries about it. Rules of evidence are designed to aid in establishing truth. To close the  
20 door after receiving only a part of the evidence not only leaves the matter suspended in  
21 air at a point markedly advantageous to the part who opened the door, but might well  
22 limit the proof to half-truths.

23 The interests of justice will not be served by allowing defendant Hamilton to claim Z.H.'s  
24 injuries were caused by the extremely rare phenomena of the "natural forces of labor," while the  
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1 most probative evidence to rebut this claim – the recent occurrence of another permanent  
2 brachial plexus avulsion injury under Laura Hamilton’s care – remains hidden from the jury.  
3 This would allow defendant Hamilton to mislead the jury as to a central issue in this case.  
4 Defendant Hamilton is free to allege an alternative theory of causation and open this door, but  
5 plaintiff should then be allowed to walk through it.

6  
7 **D. Any Danger of Unfair Prejudice to Defendant Hamilton can be Cured with a**  
8 **Limiting Instruction.**

9 The party against whom the prior act evidence is admitted is entitled, upon request, to a  
10 limiting instruction informing the jury that the evidence is to be used only for the proper purpose  
11 and not for the purpose of proving the character of a person to show that the person acted in  
12 conformity with that character. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The  
13 trial court should explain to the jury the purpose for which the evidence is admitted and should  
14 give a cautionary instruction that the evidence is to be considered for no other purpose. *State v.*  
15 *Brown*, 113 Wash. 2d 520, 529, 782 P.2d 1013, 1019 (1989).

16 Plaintiff will stipulate to a limiting instruction advising the jury that evidence of prior  
17 permanent brachial plexus injuries under Laura Hamilton’s care may only considered to rebut  
18 defendant’s alternative theory of causation – that Z.H.’s injuries were caused by “the natural  
19 forces of labor.” Plaintiff believes the jury will be able heed the court’s instruction and that any  
20 danger of unfair prejudice will be effectively mitigated.

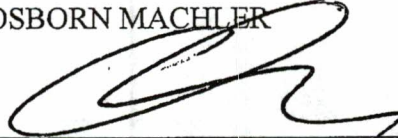
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22 **VI. CONCLUSION**

23 Defendant Hamilton’s assertion that Z.H.’s injuries were caused by “the natural forces of  
24 labor,” an extremely rare phenomenon, has opened the door to evidence of prior permanent  
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1 brachial plexus avulsion injuries occurring under her care. The court conditionally should admit  
2 this evidence in the interests of justice to allow plaintiff the fair opportunity to rebut this defense.

3 Dated this 19<sup>th</sup> day of May, 2022.

4 OSBORN MACHLER



5  
6 Susan Machler, WSBA #23256  
7 Simeon J. Osborn, WSBA #14484  
8 Austin Neff, WSBA #57059  
9 2025 1<sup>st</sup> Ave., Ste. 1140  
10 Seattle, WA 98121  
11 Phone: (206) 441-4110  
12 Fax: (206) 441-4220  
13 Email: [sosborn@osbornmachler.com](mailto:sosborn@osbornmachler.com)  
14 [smachler@osbornmachler.com](mailto:smachler@osbornmachler.com)  
15 *Attorneys for Plaintiffs*

