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LEWIS COUNTY

THE HONORABLE JAMES W. [REDACTED]

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Date of Hearing: June 1, 2022 @ 9:00 a.m.

SUPERIOR COURT  
CLERK'S OFFICE

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

PLAINTIFF'S MOTION RE:  
EXPERT TESTIMONY

**I. RELIEF REQUESTED**

Plaintiff respectfully requests that the Court require defense experts to testify to their opinions on a more probable than not basis, because the defense pled the natural forces of labor as an affirmative defense. The Court should also exclude expert testimony for which the expert offers no basis in the facts of this case. Further, the plaintiff requests that the Court exclude expert testimony to which the expert is unqualified to testify. The specific testimony is set forth below.

**II. AFFIRMATIVE DEFENSE**

In its answer to plaintiff's complaint, the defense pled as an affirmative defense that: "Plaintiff Zachary Hamilton's injury was caused by an act of God – the natural forces of labor." It is well settled that a defendant asserting an affirmative defense bears the burden of proof with

1 respect to the affirmative defense. *Wash. Fed. Sav. & Loan Ass'n v. McNaughton*, 181 Wn. App.  
2 281, 297, 325 P.3d 383 (2014). The Court should order that defense experts testify only to  
3 matters where they can testify on a more probable than not basis.

4 It is improper to provide an opinion to the jury that is based upon speculation or conjecture.  
5 See *State v. Jones*, 67 Wn.2d 506, 512 (1965) (“Courts should exclude evidence that is remote,  
6 vague, speculative, or argumentative because otherwise ‘all manner of argumentative and  
7 speculative evidence will be adduced,’ greatly confusing the issue and delaying the trial.”). See also  
8 *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761–62 (2001) (“The factual, informational, or scientific  
9 basis of an expert opinion, including the principle or procedures through which the expert's  
10 conclusions are reached, must be sufficiently trustworthy and reliable to remove the danger of  
11 speculation and conjecture and give at least minimal assurance that the opinion can assist the trier of  
12 fact.”).

### 14 III. CAUSATION TESTIMONY BY NONPHYSICIANS

15 The Court should exclude all causation testimony by nonphysicians. Both defense  
16 midwives have testified that the natural forces of labor were the cause of Z.H.’s injuries. Neither  
17 midwife has medical training, outside of the practice of midwifery. Neither midwife is a nurse. In  
18 fact, Ms. Browder seemed unclear what medical training is. Browder Dep., p. 26, line 15 through  
19 p. 29, line 23. Ms. Moniz began to testify for her. Browder Dep., p. 29, lines 9-13. Machler Decl.,  
20 Exh. 1.

21 Similarly, defense engineering expert, Michelle Grimm, who has also testified that the  
22 natural forces of labor caused Z.H.’s injuries, has no medical training and is not a medical doctor  
23 or a nurse.

24 Q. And in your education, do you have any medical training?  
25

1 A. Not clinical medical training. I have learned biomedical science alongside  
2 engineering from freshman year all the way through my Ph.D. I did take gross  
3 anatomy with the medical students at the University of Pennsylvania, and my  
4 physiology course at Hopkins, which was a total of 12 credits over two semesters.  
5 It was taught by the same faculty who taught the medical school physiology  
6 course.

7 Q. All right and do you have -- so do you have any formal obstetrical training?

8 A. I do not.

9 Q. Do you have any formal neurology training?

10 A. No, nothing in clinical disciplines of medicine.

11 Q. Have you had any nursing training?

12 A. No.

13 Q. Or midwife training?

14 A. No.

15 Grimm Dep., p. 6, line 13 through p. 7, line 7. Machler Decl., Exh. 2.

16 In Washington, a medical doctor must testify regarding the cause of a specific injury. The  
17 Washington Supreme Court has held that the causal relationship between an accident or injury to  
18 a resulting physical condition must be established by medical testimony beyond speculation and  
19 conjecture. *Miller v. Staton*, 58 Wn.2d 879, 886, 365 P.2d 33 (1961). In *O/Donoghue v. Riggs*,  
20 the Court explained:

21 Medical testimony must be relied upon to establish the causal relationship  
22 between the liability-producing situation, and the claimed physical disability  
23 resulting therefrom. The evidence will be deemed insufficient to support the  
24 jury's verdict if it can be said that considering the whole of the medical testimony  
25 the jury must resort to speculation or conjecture in determining such causal  
relationship.

*O/Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968).

In *Carlos v. Cain*, 4 Wn. App. 475, 477, 481 P.2d 945 (1971), the Court noted that the  
causal relationship between an accident and an injury presents a question of reasonable medical

1 probability, and ruled a lay witness was not competent to testify on this issue. Thus, in  
2 Washington, it is a medical determination how a particular injury was caused, and the defense  
3 midwives and the defense engineer are not qualified to provide this testimony. None have  
4 medical degrees, licenses, or training. The Court should preclude them from offering causation  
5 opinions.

#### 6 IV. OPINIONS BY NEUROLOGIST

7  
8 The Court should exclude defense neurology expert Dr. Scher from opining on obstetrics  
9 and the natural forces of labor. He should further be precluded from opining that Zachary  
10 suffered “excessive hypotonia” and that hypotonia alone can cause multiple brachial plexus  
11 avulsions. Dr. Scher should be precluded from opining that Seng and Zachary Hamilton have  
12 “anatomical variations” that caused multiple brachial plexus avulsions.

13 Dr. Scher should be precluded from offering any opinions based on what he talked about  
14 with defense life care planner, Dana Penilton. Scher Dep., p. 14, lines 15-23. Machler Decl., Exh.  
15 3. The defense withdrew Ms. Penilton before plaintiff could take her deposition, and she never  
16 generated a life care plan. The plaintiff has no idea what her opinions might be and would not be  
17 able to cross-examine Dr. Scher on any testimony related to what Ms. Penilton told him.

18 First, defense neurologist, Dr. Scher, opines that Z.H.’s suffered four brachial plexus  
19 avulsions spontaneously in the shoulder that was posterior with respect to the mother. He  
20 testified that the posterior shoulder impacted the sacral promontory. Scher Dep., p. 17, lines 20-  
21 24. Machler Decl., Exh. 3. He testified that the nerves avulsed from the “position of the shoulder  
22 in which – will increase the angle from the – of the head and – away from the shoulder, because  
23 the neck – angle of the neck get increased.” P. 19, lines 20-23. Machler Decl., Exh. 3. Dr. Scher  
24 testified that Zachary suffered this injury before his head delivered and the shoulder dystocia was  
25

1 diagnosed. Of course, no one could see and verify that this occurred.

2 Further, Dr. Scher admits that he has no knowledge based upon the facts of this case that  
3 the injured shoulder was posterior. He testified that he has to have:

4 “... verifications of that [whether the injured shoulder was posterior] by  
5 the treater, by someone who was actually there. Not me.

6 Q: ... is there verification from somebody who was actually there  
7 that the injured should was posterior?

8 A. Not that’s documented in the records. Because it was a home  
9 delivery. I mean, to the best of the ability that I could tell from the records, no,  
there nothing else.” P. 26, lines 8-15. Machler Decl., Exh. 3.

10 Dr. Scher is not an obstetrician and is not qualified to testify regarding the forces on the  
11 body of an infant during birth. He is not qualified to testify regarding the bony structures of the  
12 mother by which an infant allegedly suffers spontaneous nerve avulsions prior to birth.

13 The defense has an engineering expert and an obstetrician who will testify regarding the  
14 natural forces of labor and the bending and stretching that an infant endures during labor and  
15 delivery. Dr. Scher’s testimony should be limited to the nature of nerve tissues and damages.

16 Second, Dr. Scher testifies that Z.H. suffered “excessive hypotonia” and that the  
17 hypotonia caused his brachial plexus nerves to spontaneously avulse. This opinion is not based  
18 on any medical science or the facts of this case and is entirely speculative. The Court should  
19 exclude it.

20 Dr. Scher cited to two articles in the medical literature by DeFrancesco and Abzug that he  
21 claims show that hypotonia causes an infant’s brachial plexus nerves to spontaneously avulse.  
22 Scher Dep., p. 33, lines 14-16. Machler Decl., Exh. 3. Neither of these articles support Dr.  
23 Scher’s opinion about Zachary. Neither article even mentions anatomical variations in the  
24 mother, and neither studied this in any way.  
25

1 The authors of the DeFancesco paper wrote:

2 Although birth hypoxia may *theoretically* be confounded with other risk factors in  
3 bivariable analysis, our logistic regression accounted for interactions between  
4 hypoxia and variables like shoulder dystocia and macrosomia, showing that birth  
5 hypoxia increased the risk of BPBP independent of these other determinants. On  
6 the basis of this finding, *we theorize* that fetal hypotonia associated with  
7 prepartum or intrapartum hypoxia is the main mechanism for the observed  
8 relationship. Because of decreased muscle ton and dampened reflex arcs, affected  
9 infants may not be able to limit shoulder displacement as they transit the birth  
10 canal, possibly leading to increased BPBP susceptibility. *To evaluate this theory*,  
11 future investigators may examine relationships between BPBP and indicators of  
12 fetal or neonatal vigor that were not available in the KID . . . “ Macher Decl. Exh.  
13 4, p. 138.

14 The authors of this paper admit that they are only theorizing about the effect of hypotonia  
15 on the brachial plexus nerves. Dr. Scher offers no medical literature that shows that this *theory*  
16 has been proven to any extent.

17 The authors of the Abzug paper acknowledged that their paper had limitations. In  
18 particular, they wrote: “*Lastly, hypotonia may have been coded during the discharge as a result*  
19 *of decreased tone in the affected extremity, as opposed to hypotonia being present in all 4*  
20 *extremities.*” Macher Decl. Exh. 5, p. 7. Thus, the paper has no analysis or data to conclude that  
21 hypotonia is a cause of newborn brachial plexus palsy in the absence of traction applied by a  
22 birth attendant.

23 In fact, like the authors of the Abzug paper, Dr. Scher cannot testify that the any decrease  
24 in muscle tone observed by Laura Hamilton was not just in the affected arm, as opposed to  
25 hypotonia being present in all four extremities. Scher Dep., p. 31, line 25 through p. 32, line 3.  
Macher Decl. Exh. 3.

His opinion is not based upon any facts in this case, other than the Apgar score recorded  
by Laura Hamilton, in which she recorded a “1” for muscle tone at one minute and a “2” at five  
minutes. Macher Decl. Exh. 3. He testified: “So clearly at birth and into one minute, there was

1 some degree of tone. *We don't know at birth if it's worse than at one minute.*" Scher Dep., p.  
2 24, lines 22-24. Macher Decl. Exh. 3. Dr. Scher cannot support his claim that Zachary had  
3 hypotonia before he was born to the extent that it was excessive and caused his injury.

4 Dr. Scher does not know how Laura Hamilton evaluated muscle tone at one minute or  
5 whether she observed all four limbs. Scher Dep. p. 29, 17-20. Macher Decl. Exh. 3

6 Further, despite Dr. Scher's opinion that *excessive* hypotonia caused this injury, he  
7 cannot tell the jury what was excessive about Zachary's hypotonia.

8 Q. . . . And so how much hypotonia was there?

9 A. There's no way of quantifying. That's a good question . . . But one cannot  
10 quantitate it." Scher Dep., p. 27, lines 10-14.

11 Finally, Dr. Scher testified that Zachary's multiple brachial plexus nerve avulsions were  
12 caused by "anatomical variations" in the mother and the child. However, he cannot say what  
13 variations they had and how the variations caused the brachial plexus injuries.

14 Q Okay. So I want to talk about the anatomical variations of the brachial  
15 plexus. So is it your opinion that -- that Zachary and his mother had  
16 anatomical variations?

17 A In essence, yes.

18 Q Okay. And what anatomical variations did they have?

19 A To the limits of what I can see in the records, I don't know. Scher Dep., p.  
20 34, lines 9-14.

21 Q . . . So is there a way for you to determine -- like, to go backwards in time  
22 after the fact and postulate what kind of anatomical variations existed that  
contributed to this injury?

23 MS. MONIZ: Object to the form of the question.

24 A So the answer is based to the level of what's documented, no. Scher Dep.,  
25 p. 35, lines 4-9.

1 Dr. Scher cites to two articles from the medical literature. In the paper by Kirik, the  
2 researchers examined the brachial plexus nerves of 20 fetal cadavers. Macher Decl. Exh. 6. No  
3 mention is made in this paper of any avulsed nerves or how anatomical variations contribute to  
4 brachial plexus avulsions during birth. Unless Dr. Scher intends to make the outrageous claim  
5 that Zachary's nerve roots were never attached to his spinal cord, the Kirik paper is completely  
6 irrelevant.

7  
8 The Court should preclude Dr. Scher from even hinting that Zachary did not suffer a  
9 severe injury during birth. Such a statement is contrary to the facts of this case. Dr. Tse, the UW  
10 surgeon who tried to repair Zachary's brachial plexus nerves, noted his findings in his operative  
11 report: "FINDINGS: Avulsions of C6, C7, C8 and T1 with a severe scarification of nerve  
12 elements intermingled with scarred elements of avulsed muscle." Macher Decl. Exh. 7.

13 The other paper referenced by Dr. Scher, the Wozniak paper, the researchers studied  
14 brachial plexuses from "[f]etuses that did not reveal symptoms of postmortum autolysis or  
15 external developmental defects . . ." Macher Decl. Exh.8, p. 224. No brachial plexus avulsions  
16 were studied or found. The paper includes no analysis of brachial plexus avulsions or injuries.  
17 Like the Kirik paper, this paper is irrelevant and does not support Dr. Scher's conclusions in any  
18 way.

19  
20 In Washington, an expert's opinion must have some basis in the facts of the case at hand.  
21 An expert cannot testify in generalities and not specifically about the case. *State v. Lewis*, 141  
22 Wn. App. 367, 166 P.3d 786 (2007). Conclusory or speculative expert opinions lacking an  
23 adequate foundation will not be admitted. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835  
24 (2001). ER 703 requires:

25 The facts or data in the particular case upon which an expert bases an  
opinion or inference may be those perceived by or made known to the expert at or

1 before the hearing. If of a type reasonably relied upon by experts in the particular  
2 field in forming opinions or inferences upon the subject, the facts or data need not  
be admissible in evidence.

3 Dr. Scher has no facts or data regarding this particular case to support the assertion that  
4 anatomical variations in Seng and Zachary Hamilton caused his brachial plexus nerves to  
5 spontaneously avulse. He should not be allowed to misrepresent the contents of the two papers  
6 he claims support his assertion. His opinion that anatomical variations caused this injury is  
7 speculative and without foundation.  
8

9 The Court should exclude Dr. Scher from opining on obstetrics and the natural forces of  
10 labor. He should further be precluded from opining that Zachary suffered "excessive hypotonia"  
11 and that hypotonia alone can cause multiple brachial plexus avulsions. Dr. Scher should be  
12 precluded from opining that Seng and Zachary Hamilton have "anatomical variations" that  
13 caused multiple brachial plexus avulsions.

#### 14 **V. UNDISCLOSED STUDIES**

15 The parties' experts rely on studies to support their opinions. The plaintiff requests that  
16 the Court preclude testimony based on studies that were previously undisclosed. The plaintiff  
17 should, at least, have the opportunity to look up any studies to prepare for cross-examination.  
18

#### 19 **VI. ACOG BULLETIN APPROVED BY PEDIATRIC DOCTORS**

20 Defense expert Dr. DeMott testified in the Myhre trial that various pediatric groups  
21 endorsed the 2014 ACOG bulletin. However, there is no information regarding why these groups  
22 endorsed the bulletin. Without this knowledge, the defense can imply and lead the jury to  
23 speculate that the pediatric groups agree with the defense that injuries such as Zachary's are  
24 caused by the natural forces of labor.

25 Not only is it speculative that pediatric groups agree with the defense in this case, but

1 such evidence is highly prejudicial and should be excluded. ER 403.

2 **VII. ECONOMIST LIFECARE PLAN TESTIMONY**

3 Defense expert economist Eric Knowles testified in his deposition regarding the accuracy  
4 of plaintiff's lifecare plan. The Court should exclude such testimony. Mr. Knowles is not a  
5 lifecare planner and has no expertise that would allow him to testify what Zachary may or may  
6 not need over his lifetime.

7  
8 First, Mr. Knowles substitutes so-called "healthy life tables" instead of the Washington  
9 State Insurance Commissioner's mortality tables that the jury instructions require. Machler Decl.,  
10 Exh. 9, p. 19, line 16 through p. 27, line 8. Mr. Knowles will be testifying about mortality tables  
11 that directly conflict with the mortality tables that will be in the jury instructions. This will  
12 certainly be confusing to the jury. ER 403. The Court should preclude the use of the healthy life  
13 tables.

14 Second, Mr. Knowles testifies that Zachary Hamilton will not need domestic or lawn care  
15 services starting at age 21. He testified that that "... no one's going to own their own home at  
16 age 21 or very few people do." Machler Decl. Exh. 9, p. 27, lines 19-21. Mr. Knowles is an  
17 economist, not a life care planner. He has no expertise to determine whether Zachary might live  
18 in a home where he is required to maintain the lawn. The Court should exclude this testimony.

19  
20 Third, Mr. Knowles testified that no one requires lawn or yard care in the months of  
21 November through March. He is not a gardening expert and does not even mow his own lawn.  
22 Exh. 9, p. 29, line 14 through p. 30, line 4. The Court should preclude Mr. Knowles from  
23 testifying about Zachary's future needs.

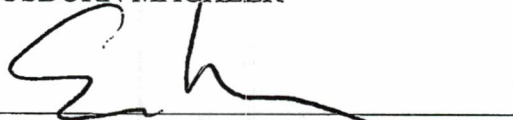
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VII. CONCLUSION

Based upon the foregoing, the plaintiff respectfully requests that the Court grant this motion and limit speculative and misleading evidence by defense experts, as well as exclude opinions that the expert is unqualified to make.

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

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