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SUPERIOR COURT
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*Honorable Judge James W. Lawler
Hearing on June 1, 2022 at @ 9:00AM
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 AMONDSO-MULLER,
Personal Representative of the ESTATE
of LAURA HAMILTON,

Defendants.

NO. 20-2-00543-21

DEFENDANT HAMILTON'S
MOTIONS *IN LIMINE*

I. RELIEF REQUESTED

Defendant Hamilton requests that the Court grant the motions *in limine* set out below. Defendant Hamilton asks the Court to order counsel and all witnesses to refrain from making any comments or asking any questions concerning these matters in the presence of the jury. Defendant Hamilton also requests that the Court order each party and counsel to abide by these rulings and notify all witnesses called by that party of these rulings to timely, fully, and fairly ensure compliance.

II. EVIDENCE RELIED UPON

Defendant Hamilton relies upon the Declaration of R. Pierce Rand and the pleadings and papers already on file with the Court.

III. AUTHORITY

The purpose of a motion *in limine* is to avoid the requirement that counsel object to contested evidence when it is offered during trial. *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The granting or denial of a pretrial motion to exclude evidence is a matter within the trial court's discretion. *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991) (quoting *Fenimore v. Donald M. Drake Constr. Co.*, 87 Wn.2d 85, 89-91, 549 P.2d 483 (1979)). The trial court should grant a motion *in limine* if the motion describes the evidence which is sought to be excluded with sufficient specificity to enable it to determine that the evidence is clearly inadmissible under the issues as drawn. *Douglas*, 117 Wn.2d at 255 (quoting *Fenimore*, 87 Wn.2d at 89-91). The specific issues sought to be excluded during trial in this matter include the following:

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1.	No questioning of witnesses about their religion, relationship with God, communications with God, or anything of the sort.	4
2.	Dr. Freeman should be excluded because his testimony is misleading and unhelpful to the jury.	9
3.	Motion to exclude Plaintiffs' untimely disclosed fact and expert witnesses, and for terms.	17
4.	Any reference to pain and suffering of the parents or family members and/or any claim for damages for the same must be excluded.	19
5.	Evidence regarding the defendant's history of prior medical malpractice lawsuits and/or Department of Health proceedings must be excluded.	20
6.	Evidence that Defendant Hamilton had other "bad outcomes" or brachial plexus injuries must be excluded.	22
7.	Plaintiffs' counsel should be precluded from asking witnesses questions intended to elicit improper character testimony about Laura Hamilton, such as whether she was a "good" and/or "safe" midwife.	23
8.	Any criticisms of Defendant Hamilton's care that are not linked to Z.H.'s alleged damages by standard of care and causation testimony must be excluded.	26
9.	Any evidence regarding Seng Hamilton's subsequent gestational diabetes and/or diabetes must be excluded.	28

1	10.	Defendant Hamilton respectfully requests that the Court exclude any argument by plaintiff's counsel requesting the jurors place themselves in the position of the plaintiff.	30
2			
3	11.	Plaintiffs should be precluded from substituting "safety" standards with the standard of care.	30
4	12.	All arguments – direct or indirect – about "sending a message" or otherwise punishing the Defendant must be excluded.	33
5	13.	Defendant Hamilton respectfully requests that the Court require a trial schedule.	34
6	14.	Defendant Hamilton respectfully requests that the Parties be required to give 48-hour notice of witnesses to be called at trial.	34
7	15.	No claim or evidence concerning lost earning capacity of Z.H.	35
8	16.	Defendant Hamilton respectfully requests that the Court exclude all witnesses from the courtroom prior to their testimony, <u>except</u> for expert witnesses.	36
9	17.	Defendant Hamilton respectfully requests that expert witnesses be allowed to review trial transcripts prior to their testimony.	36
10	18.	Plaintiffs should only be permitted to offer rebuttal witnesses or evidence that is not repetitive or whose testimony could not have been anticipated in their case in chief.	38
11	19.	Testimony by lay witnesses, including Z.H.'s parents, as to what they have been told by treating providers is hearsay and should be excluded.	39
12	20.	Testimony by lay witnesses, including Z.H.'s parents, about Z.H.'s state of mind, feelings, and pain and suffering is speculative and should be excluded.	40
13	21.	Learned treatises and medical literature are hearsay and Defendant Hamilton respectfully requests the Court allow their limited use only after proper authentication.	41
14	22.	All mention of settlement, settlement discussions, or the absence of settlement discussions is prohibited under ER 408 and should be excluded.	42
15	23.	Any reference to Defendant Hamilton's liability insurance should be excluded.	42
16	24.	Motion to permit questioning of Seng Hamilton's prior disciplinary history by the Washington State Bar Association for the purposes of impeachment on cross examination.	43
17	25.	Motion to preclude any evidence or argument of any theories of recovery or damages not disclosed in the Pleadings or discovery responses.	45
18	26.	Evidence of collateral source benefits is admissible in a medical malpractice action, and under the facts of this case.	45
19	27.	The parties should be limited to one expert per discipline.	47
20	28.	The Court should order that the parties confer no later than one week before trial to discuss a possible stipulation to facts.	49

29.	Dr. Allen should be precluded from offering testimony on standard of care and from offering personal opinions on the credibility of ACOG.	50
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1. No questioning of witnesses about their religion, relationship with God, communications with God, or anything of the sort.

Plaintiffs' counsel should be precluded from asking any witness about their religion, relationship with God, communications with God, whether "God would act on a baby like Z.H. and cause him injury," or anything of the sort. Religion is completely irrelevant to the issues in this case. Such questions are improper, highly prejudicial, and prohibited by ER 610 and our own State Constitution.

I. FACTS

As the Court is aware, Defendant Hamilton intends to defend this case on standard of care as well as on causation by arguing that Z.H.'s injury was solely caused by the natural forces of labor, not any negligence by the birth attendant. This is the same defense that Defendant Hamilton advanced in the *Myhre* case which was tried in this court. The validity of that defense went all the way up to our Supreme Court and was affirmed. *L.M. by & through Dussault v. Hamilton*, 193 Wn.2d 113, 436 P.3d 803 (2019). Without a doubt, Plaintiffs' counsel is aware of the natural forces of labor defense as their firm unsuccessfully prosecuted the *Myhre* case.

In her Answer to the Complaint in *Myhre*, Defendant Hamilton provided notice that she was advancing a causation defense predicated on the natural forces of labor, stating "If plaintiff has been damaged as alleged, such injury or damage was solely and proximately caused by an act of God." (See Rand Decl. Ex. A at 7.) An "act of God" is a commonly understood term of art that refers to an unpreventable event caused exclusively by forces of nature. This is how the term is defined in BLACK'S LAW DICTIONARY.¹ Indeed, the comments provided for that term in BLACK'S confirms that it has nothing to do with religion:

¹ BLACK'S LAW DICTIONARY defines an act of God as: "An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of

1 As a technical term, 'act of God' is untheological and infelicitous. It is an
2 operation of 'natural forces' and this is apt to be confusing in that it might
3 imply positive intervention of the deity. This (at any rate in common
4 understanding) is apparent in exceptionally severe snowfalls, thunderstorms
5 and gales. But a layman would hardly describe the gnawing of a rat as an
6 act of God, and yet the lawyer may, in some circumstances, style it such.
7 The fact is that in law the essence of an act of God is not so much a positive
8 intervention of the deity as a process of nature not due to the act of man,
9 and it is this negative side which needs emphasis.

10 *Id.* (quoting P.H. Winfield, *A Textbook of the Law of Tort* § 16, at 47 (5th ed. 1950)).

11 Plaintiffs' counsel obviously understood that Defendant Hamilton's reference to an "act of
12 God" was not in any way religious as that was never an issue during the *Myhre* case.

13 Plaintiffs originally filed the present lawsuit on May 3, 2017. In her Answer, dated
14 June 12, 2017, Defendant Hamilton again asserted this causation defense, but used even
15 more specific language: "Plaintiff Zachary Hamilton's injury was caused by an act of God
16 – the natural forces of labor." (*See* Rand Decl. Ex. B at 4.) Plaintiffs never served any
17 discovery request or did anything that suggested they misunderstood what this language
18 conveyed, and they certainly did not express any belief that this was a literal reference to
19 religion.

20 Following voluntary dismissal, Plaintiffs refiled this lawsuit on August 17, 2020. In
21 her Answer, Defendant Hamilton, again, reasserted her causation defense using the exact
22 same language as before: "Plaintiff Zachary Hamilton's injury was caused by an act of God
23 – the natural forces of labor." (*See* Answer at 3.) Inexplicably, Plaintiffs' counsel has
24 apparently decided that this defense is now, somehow, rooted in religion rather than science.
25 Plaintiffs served several discovery requests asking Defendant Hamilton to identify the basis
26 for the claim that God caused Z.H.'s injuries and to describe all communications with God
confirming this. (*See* Rand Decl. Ex. C.) Defendant Hamilton strongly objected to these

which could not be prevented or avoided by the exercise of due care or foresight. 42 USCA § 9601(1). — Also
termed *act of nature*; *act of providence*; *superior force*; *vis major*; *irresistible superhuman force*; *vis divina*.
"Act of God," BLACK'S LAW DICTIONARY (11th ed. 2019)

1 requests and explained that this defense theory was not religious in any way, shape, or form.
2 Interrogatory No. 22 provides the best example of this exchange and is reproduced below:

3 INTERROGATORY No. 22: Describe any and all communications you or
4 the decedent had with God in which He or She confirmed this act.

5 ANSWER: Objection, this request is vague, ambiguous, argumentative, and
6 not made in good faith or for a proper purpose in violation of CR 26(g).
7 Without waiving any objection, an Act of God is a term of art commonly
8 understood to mean that the injury or event in questions was the result of
9 natural forces or events rather than any act or omission of a person or persons.

8 (Id.)

9 Nonetheless, Plaintiffs' counsel has disingenuously and falsely maintained that this
10 defense theory is based in religion, not science. During the deposition of Defendant
11 Hamilton's midwife expert, Ms. Browder, and over defense counsel's vociferous objections,
12 Plaintiffs' counsel asked inappropriate and harassing questions about Ms. Browder's
13 religion, relationship with God, and whether she believed that God would cause the injury
14 that Z.H. sustained:

15 Q. Are you a religious person, Ms. Browder?

16 A. It depends on what you define as religion. I'm spiritual. I have moral
17 values. But I don't –

18 Q. Would you say that –

19 A. But I don't go to church.

20 Q. So you don't go to church?

21 A. No.

22 Q. Are you a member of any religious domination?

23 A. No.

24 Q. Do you consider yourself to have a relationship with God?

25 A. That's just a personal questions. I'd rather not answer that. That –
26 that's my personal issue.

Ms. MONIZ: You know what, Mr. Neff? We're – I'm trying to be
flexible here and respect the rules, but this is going way beyond the
proper scope of questioning.

MR. NEFF: I disagree. But we could take it up with the Judge Later.

1 Ms. MONIZ: Okay.

2 Q. Last question for you, Ms. Browder: Do you believe that God would
3 act upon a baby like Z.H. and cause him an injury?

4 MS. MONIZ: Object to form.

5 A. Oh, my gosh. That is really – I’m sorry, but that is just way out there.
6 I mean, God does all kinds – if you want to believe that God runs
7 everything in the world, there was a shooting in New York in the
8 subway yesterday that injured 23 people. Would God do that?

9 (See Rand Decl. Ex. D at 105:2-106:8) Again, over defense counsel’s objection, Plaintiffs’
10 counsel insisted on asking similar improper and harassing questions to the PR for Ms.
11 Hamilton’s estate, Linda Amondson-Muller, during her deposition. (See Rand Decl. Ex. E
12 at 29-34.) This was particularly egregious because Ms. Amondson-Muller had no
13 involvement in the relevant events. She has nothing to do with this case except that she
14 agreed to stand in as the Personal Representative for Ms. Hamilton’s estate after her untimely
15 death.

16 Plaintiffs’ counsel has made it clear that they intend to make religion an issue at trial,
17 as reflected in the following email from Mr. Neff, dated April 26, 2022:

18 Donna,

19 “Act of God” is not commonly understood to mean caused by a natural force.
20 That is an esoteric definition learned in law school or while working for
21 insurance companies. The Estate either knew or should have known the
22 meaning and significance the invocation of God’s name would mean to a jury
23 in Lewis County, a community of faith. Ms. Amondson-Muller is the
24 personal representative for the Estate of Laura Hamilton. We intend to ask
25 her about her decision to assert this affirmative defense and the basis
26 therefore. ...

(See Rand Decl. Ex. F at 2.) This motion follows.

II. AUTHORITY

Plaintiffs’ counsel’s position is disingenuous and in bad faith. They are deliberately
misconstruing Defendant Hamilton’s defense theory based on the natural forces of labor.
Plaintiffs’ counsel has been litigating, unsuccessfully, against this defense for years now in

1 both the *Myhre* case and this lawsuit. They know full well that it has absolutely nothing to
2 do with religion.

3 Regardless, a witness's religious beliefs, relationship with God, communications
4 with God, etc. are completely irrelevant to the issues in this lawsuit. Plaintiffs' counsel
5 intends to ask such questions about religion because they believe that it will discredit defense
6 witnesses in the eyes of a Lewis County jury or bolster the credibility of their own witnesses.
7 Indeed, this is expressly confirmed in Mr. Neff's email quoted above: "The Estate either
8 knew or should have known the meaning and significance the invocation of God's name
9 would mean to a jury in Lewis County, a community of faith." (*See* Rand Decl. Ex. F.)
10 Religion is a charged and personal issue. Whether or not a witness believes in God or
11 believes that God causes bad things to happen can have a profound and unfair impact on
12 how a juror perceives a witness's credibility depending on the juror's own religious views.
13 For obvious reasons, such questions are expressly prohibited by ER 610, which states:
14 "Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for
15 the purpose of showing that by reason of their nature the witness' credibility is impaired or
16 enhanced." This protection is so important and fundamental that it is even codified in our
17 State's Constitution:

18 No religious qualification shall be required for any public office or
19 employment, nor shall any person be incompetent as a witness or juror, in
20 consequence of his opinion on matters of religion, **nor be questioned in
21 any court of justice touching his religious belief to affect the weight of
22 his testimony.**

23 Wash. Const. art. I, § 11 (emphasis added).

24 Religion is admissible only in the rare circumstance where it is independently and
25 directly relevant to an issue in the case. *See e.g. Matter of Lui*, 188 Wn.2d 525, 563, 397
26 P.3d 90, 113 (2017). There is no possible basis for relevance here. The term "act of God" is
not esoteric. It appears in a wide variety of insurance policies (homeowner, car, renters, etc.)
that lay people encounter commonly in everyday life. Lay people understand that this

1 denotes a natural force, not a literal divine intervention from a deity. It is even defined as
2 such in non-legal dictionaries, like Merriam-Webster.²

3 But for the sake of argument, let us take Plaintiffs' position at face value. Even if
4 Defendant Hamilton were advancing a theory that Z.H.'s injury was the result of a direct and
5 divine intervention from God (which the defense is *plainly* not arguing), the personal
6 religious beliefs and views of witnesses called at trial are completely irrelevant. Take, for
7 example, the following question that Plaintiffs' counsel asked during Ms. Browder's
8 deposition: "Do you believe that God would act upon a baby like Z.H. and cause him an
9 injury?" Whatever Ms. Browder's beliefs may be, she cannot speak for God or know God's
10 divine purpose and design. Only God knows that. Ms. Browder's subjective belief is, thus,
11 irrelevant. ER 402. Moreover, any supposed communications she had with God would be
12 hearsay. ER 802. The same would be true for any other witness in this lawsuit. The fact that
13 we even need to engage in this bizarre abstract exercise shows how ludicrous and untenable
14 Plaintiffs' position on this issue is.

15 Even if, somehow, religion had a shred of relevance in this lawsuit (which it does
16 not), it still must be excluded under ER 403 and ER 611(a). This lawsuit is rooted in science
17 and medicine. Injecting religion into this case would turn *voir dire* into a sideshow. It would
18 be prejudicial and confusing for the jury and an unduly embarrassing/intrusive subject of
19 questioning for witnesses. It would encourage a decision based on passion and belief rather
20 than the actual evidence. Religion has no place in this lawsuit and should be categorically
21 excluded.

22 **2. Dr. Freeman should be excluded because his testimony is misleading and**
23 **unhelpful to the jury.**

24 As the Court is well aware, Plaintiffs' expert, Dr. Freeman, has been a recurring
25 problem in this case. The specific issues will not be reiterated here but culminated in the

26 ² Merriam-Webster defines "act of God" as "an extraordinary interruption by a natural cause (such as flood or earthquake) of the usual course of events that experience, prescience, or care cannot reasonably foresee or prevent." "Act of God." *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/act%20of%20God> (Accessed 5 May. 2022).

1 Court's recent finding that Plaintiffs had committed a discovery violation with respect to
2 their late disclosure of Dr. Freeman's opinions. As a result, the Court entered an Order on
3 April 26, 2022, strictly limiting Dr. Freeman's testimony as follows:

4 Dr. Freeman shall only be permitted to testify about studies on which
5 defense experts are basing their opinions.

6 At his deposition on April 28, 2022, Dr. Freeman described his work as a forensic
7 epidemiologist as using population data and statistics to look at "risk." (*See e.g.* Rand Decl.
8 Ex. G at 90:12-91:3,132.) Dr. Freeman is not a licensed or trained obstetrician, midwife, or
9 neurologist. (*Id.* at 30.) He does not treat any patients in a clinical setting, has never delivered
10 a baby, and is not an expert specializing in brachial plexus injuries. (*Id.* at 19-20:6, 21:14-
11 18, 30, 125:3-9.) Dr. Freeman admits, fully and readily, that he is not qualified or able to
12 speak to the standard of care in this case. (*Id.* at 29, 93:16-18, 98:5.)

13 Likewise, Dr. Freeman also agrees that he is not able to offer an opinion on proximate
14 causation.

15 Q. And you're not offering an opinion in this case that something was
16 or was not the proximate cause of Zachary's injury. Correct?

17 A. That's correct.

18 (*Id.* at 125:10-13; *see also* 80:14-23, 90:18-91:21, 122:17-123:8.) Dr. Freeman cannot and
19 will not testify that Z.H.'s injury was or was not caused by excessive traction, just the same
20 as he cannot and will not testify that Z.H.'s injury was or was not caused by the natural
21 forces of labor. (*Id.*) Indeed, Dr. Freeman *agrees* that the natural forces of labor can cause
22 permanent brachial plexus injuries in newborn.

23 Q. And your opinion basically is the natural forces of labor can cause
24 brachial plexus injuries. Correct?

25 A. That is correct.

26 Q. And natural forces of labor can cause permanent brachial plexus
injuries. Correct?

A. That's at least potentially true, yes.

1 (Id. at 122:17-23.) In short, Dr. Freeman will not testify that anything Laura Hamilton did
2 or did not do violated the standard of care. He will not testify that anything Laura Hamilton
3 did or did not do was the proximate cause of Z.H.'s specific injury. And he will not offer
4 any opinion on damages. His testimony has no value to the substantive issues in this case for
5 the jury to decide and should be excluded under ER 402, 403 and 702.

6 A. Dr. Freeman's epidemiological opinions are not relevant to proximate
7 causation in this medical negligence case.

8 To support their medical negligence claim, Plaintiffs must present "expert medical
9 testimony" to prove the essential element of proximate cause, particularly that some act or
10 omission of Defendant Hamilton proximately caused Z.H.'s injury. *Reese v. Stroh*, 128
11 Wn.2d 300, 308, 907 P.2d 282 (1995); RCW 7.70.040(2). "Expert medical testimony must
12 meet the standard of reasonable *medical* certainty or reasonable *medical* probability."
13 *Anderson v. Akzo Nobel Coatings, Inc.*, 172 Wn.2d 593, 606-07, 260 P.3d 857 (2011)
14 (emphasis added). Expert medical opinions are often based on "experience and training
15 rather than scientific data" and involve conclusions about causation based on "a process of
16 ruling out potential causes with due consideration to temporal factors, such as events and the
17 onset of symptoms." *Id.* at 610. Expert medical testimony is necessary because jurors and
18 courts "generally do not possess sufficient knowledge and training to determine whether a
19 physician's or surgeon's actions actually caused plaintiff's injury." *Reese*, 128 Wn.2d at 308
20 (internal quotations omitted).

21 Dr. Freeman does not provide a *medical* opinion as to causation in this case. Instead,
22 his opinions are based on generalized population data, which he uses to assess "risk." But
23 Dr. Freeman's generalized epidemiological opinions about population "risk" cannot
24 constitute a *medical* opinion as to the cause Z.H.'s injury in this particular case. And Dr.
25 Freeman fully admitted this in his deposition. (*See* Rand Decl. Ex. G at 80:14-23, 90:18-
26 91:21, 122:17-123:8, 125:10-13.)

1 Dr. Freeman's epidemiological opinions may be relevant to causation in some types
2 of cases. For example, epidemiological opinions may be relevant to causation in a toxic tort
3 case to show a higher proliferation of a certain medical condition in populations exposed to
4 a certain chemical. But epidemiological opinions are not relevant in a medical negligence
5 case like this. To prevail at trial, Plaintiffs must prove that a *specific* act or omission of Laura
6 Hamilton violated the standard of care and that this *specific* negligent act or omission was a
7 direct proximate cause of the *specific* injury that Z.H. sustained. RCW 7.70.040; *Reyes v.*
8 *Yakima Health Dist.*, 191 Wn.2d 79, 86-88, 419 P.3d 819, 823 (2018). That burden must be
9 proven through competent medical expert testimony based on the *specific* facts and evidence
10 in this case. *Id.* Dr. Freeman cannot offer such an opinion, and his epidemiological testimony
11 about generalized population "risk" is not relevant to proximate causation and would be
12 highly misleading to the jury. ER 401, 402, 403.

13 This point is well illustrated by a decision of the Indiana Court of Appeals affirming
14 the exclusion of Dr. Freeman's epidemiological opinion testimony from a medical
15 malpractice trial. (*See* Rand Decl. Ex. H.) In *Tucker v. Harrison*, 973 N.E.2d 46, 50-51
16 (2012), the Court noted that epidemiological studies may provide general "circumstantial
17 evidence of cause and effect" that may be relevant in cases involving the existence of a
18 statistically significant link between the use of some substance or product and incidents of
19 similar outcomes in the general population. But, in the context of a medical malpractice case,
20 such epidemiological studies do not provide evidence that a medical provider's negligence
21 caused injury to "a particular plaintiff." *Id.* at 51. This is because the relevant question in the
22 case "is not whether this type of surgery is associated with an increase in ovarian failure; the
23 question is whether Dr. Harrison's negligence in performing the surgery caused Tucker's
24 ovarian failure." *Id.* The Court held that Dr. Freeman's "*mathematical* opinion" did not meet
25 the plaintiff's burden to produce "a *medical* opinion ... to show that Dr. Harrison was the
26 proximate cause of her injuries," and it did not "establish a causal relationship between Dr.
Harrison's acts or omissions and [plaintiff's] injury." *Id.* at 52. As the Court explained:

1 [A]llowing Dr. Freeman to testify it was ninety-nine percent more likely
2 that the surgery caused ovarian failure than it was coincidence is not
3 relevant to nor would it assist the jury in making the determination of Dr.
4 Harrison's performance of the bilateral cystectomy caused Tucker's ovarian
5 failure, and it runs the substantial risk of misleading the jury.

6 For the same reasons expressed by the Indiana Court of Appeals in *Tucker*, this Court should
7 exclude Dr. Freeman's testimony as irrelevant and misleading.

8 B. Dr. Freeman's opinions should be excluded under ER 702.

9 Under ER 702, an expert's testimony is only admissible if the "scientific, technical,
10 or other specialized knowledge will assist the trier of fact to understand the evidence or to
11 determine a fact in issue." ER 702. In exercising its essential function as "gatekeeper," the
12 Court is afforded broad discretion in determining whether expert testimony is admissible
13 under the rule. *State v. King Cnty. Dist. Ct. W. Div.*, 175 Wn. App. 630, 638, 307 P.3d 765,
14 769 (2013); *Anderson*, 172 Wn.2d at 600.

15 Dr. Freeman's testimony here does not satisfy the requirements of ER 702. As
16 previously stated, Dr. Freeman will not testify on standard of care or proximate causation.
17 Instead, his sole "purpose" is to criticize defense experts' reliance on the literature. (*See*
18 *Rand Decl. Ex. G* at 32:1-4, 62:7-8, 51:2-9, 68:11-20.) Essentially, Dr. Freeman is an
19 impeachment expert: a hired gun,³ whose only objective is to try to discredit defense experts.
20 He does not have any opinion that goes directly to the substantive issues in this case on
21 standard of care, proximate causation, and damages.

22 This is highly unusual. In terms of medical causation, it is typical for parties to
23 present competing testimony from qualified expert witnesses who arrived at different
24 conclusions from the evidence and for each expert to explain why their conclusion is correct
25 and the opposing expert's conclusion is incorrect. But here, Dr. Freeman has arrived at **no**

26

³ And Dr. Freeman is paid handsomely in this role, earning, on average, \$900,000 - \$1,000,000 per year doing expert work alone. He is the embodiment of a "professional expert," and overwhelmingly works for plaintiffs. (*See Rand Decl. Ex. G* at 26:18-28:1.)

1 **conclusion**; his self-proclaimed "purpose" is to merely sling mud at defense experts. (*Id.* at
2 43:20-24, 62:7-8.)

3 Even taken at face value, Dr. Freeman's testimony is nothing more than free-standing
4 criticisms of defense experts that do not link up to the substantive issues in this case. Dr.
5 Freeman may nitpick about the conclusions that defense experts draw from the literature,
6 but that is as far as he is able to go. He is unable take the necessary next step and say that
7 Z.H.'s injury was not caused by the natural forces of labor on a more probable than not basis
8 and to a reasonable degree of medical certainty. Indeed, he openly admits that the natural
9 forces of labor is an acceptable theory for the cause of Z.H.'s injury, as is the theory advanced
10 by Plaintiffs' experts that the injury was caused by excessive traction:

11 Q. Well, whether the risk of something is higher or lower in general
12 doesn't necessarily tell us what actually happened in a particular case
13 where we actually have evidence. Correct?

14 A. You have evidence of what? I mean, that's such a nonspecific
15 question. There's no evidence as to where this child's injury occurred.
16 There's no evidence that this baby's shoulder got stuck on the sacral
17 promontory. It's a theory, and it's fine. Put that theory out. There's
18 also a theory that manipulating a child's head and shoulder to try to
19 release the posterior dystocia also caused the injury. Those are both
20 explanations given by clinicians.

I'm not weighing in on that one. ...

21 (*Id.* at 91:7-21.) So, what is the jury to make of that? Dr. Freeman's testimony cannot
22 possibly assist the fact finder in making an ultimate determination on proximate causation
23 when he agrees that both parties' theories are theoretically valid, and he is not qualified to
24 offer an opinion as to what the specific cause of Z.H.'s injury was in this specific case. ER
25 702.

26 "In addition, when ruling on somewhat speculative testimony, the court should keep
in mind the danger that the jury may be overly impressed with a witness possessing
the aura of an expert." *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835, 839 (2001).
This consideration is particularly pertinent here. Dr. Freeman's testimony is speculative as

1 to the specific facts in this case based on his interpretation of “risk” from epidemiological
2 data. Dr. Freeman is a career professional expert and is well practiced at flaunting (and
3 exaggerating) his credentials on the stand. (See e.g. Rand Decl. Ex. G at 106:6-107:4,
4 128:15-129:5.) Dr. Freeman will rely on his “aura” of supposed expertise to mislead and
5 confuse the jury about the substance and import of his testimony, as well as the applicable
6 legal standard. Indeed, Dr. Freeman is the only “medical” expert in this case who will **not**
7 testify to the standard of care or the specific proximate cause of Z.H.’s injury. Plaintiffs
8 intend to call Dr. Freeman as some form of a rebuttal witness,⁴ so his may be the last
9 testimony the jury hears before deliberations. There is a very real, substantial, and
10 unnecessary risk that Dr. Freeman’s testimony will confuse and mislead the jury on the
11 issues and applicable legal standard at this critical juncture in the trial.

12 Moreover, “unreliable testimony does not assist the trier of fact,” and thus must be
13 excluded under ER 702. In *Lakey*, our Supreme Court affirmed the exclusion of testimony
14 from plaintiff’s epidemiology expert under ER 702 as “unreliable” because, in large part,
15 the Court found that the expert had failed to consider all relevant studies and data and
16 specifically discounted studies and data that disagreed with his position. *Lakey v. Puget*
17 *Sound Energy, Inc.*, 176 Wn.2d 909, 918, 296 P.3d 860, 864 (2013). In support of the
18 decision, the Court noted that the “[expert’s] admission that he selectively used data created
19 the appearance that he attempted to reach a desired result, rather than allowing the evidence
20 to dictate his conclusions.” *Id.* at 921.

21 Similarly, here, Dr. Freeman has not considered relevant evidence or data in this
22 case. He has not reviewed (or even been provided) the deposition testimony of Plaintiffs’
23 experts or the literature that they relied on, and thus has formulated no opinions related to
24 the same. (See Rand Decl. Ex. G at 52-53.) As in *Lakey*, Dr. Freeman’s selective review of
25 materials and his pre-designation as a “rebuttal” expert to defense experts more than creates
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⁴ Defendants reserve the right to object to Dr. Freeman be called in rebuttal as unduly cumulative and improper rebuttal testimony, among other possible grounds.

1 the appearance that he is attempting to reach a desired outcome, rather than allowing the
2 evidence to dictate his conclusions and opinions.

3 Additionally, and perhaps most importantly, Dr. Freeman's actual opinions do not
4 make sense. The primary theme of his testimony, which was repeated multiple times during
5 his deposition, is that the literature does not support defense experts' testimony that traction
6 does not increase the risk of brachial plexus injury over the natural forces of labor. (*See e.g.*
7 *Rand Decl. Ex. G at 37:1-19, 38:2-14, 41:12-24, 45:2-5, 47:9-23.*) The following is but one
8 of many examples from his deposition transcript:

9 Well, the defendant's experts have – are using these papers to illustrate that
10 the kind of injuries observed in Z.H. can result from ordinary forces of labor
11 and then make the fallacious argument that that means that if you add traction
12 to the equation, that that doesn't increase the risk. And so they're making a
13 logical leap that isn't supported by any of this literature.

14 (*Id.* at 37:5-12.) This is a complete straw man. **No defense expert has testified that traction**
15 **cannot increase the risk of brachial plexus injuries in general.** The deposition transcripts
16 for defense experts have been reviewed and re-reviewed and not once was this opinion
17 stated.⁵ (*See Rand Decl. at ¶9.*) Frankly, it will be interesting to see how Plaintiffs respond
18 to this point.

19 Rather, defense experts opined that, based on the specific facts and evidence in this
20 case, the injury that Z.H. sustained was, more probably than not and to a reasonable degree
21 of medical certainty, caused by the natural forces of labor. (*See Rand Decl. Ex. I; ¶9.*) This
22 is very different than how Dr. Freeman framed their testimony. Dr. Freeman should not be
23 allowed to take the stand in rebuttal and mischaracterize defense expert opinions or reframe
24 them in a way that he believes is more susceptible to attack and criticism.⁶ This would be

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26 ⁵ Indeed, Dr. Freeman even acknowledged that Dr. Scher did not offer this opinion during his deposition. (*See*
Rand Decl. Ex. G at 39:4-7.)

⁶ Dr. Freeman admitted that his criticisms do not even take into account the specific reason a defense expert
cited to a piece of medical literature. Instead, he merely "summarized" each experts' main opinions and opined
on whether a particular article supported that "summary." (*See Rand Decl. Ex. G at 68:3-20.*)

1 highly misleading and prejudicial and plainly contrary to the requirements of ER 702 and
2 ER 403.

3 For all of these reasons, Defendant Hamilton requests that the Court enter an order
4 excluding Dr. Freeman from this lawsuit.

5 **3. Motion to exclude Plaintiffs' untimely disclosed fact and expert witnesses, and**
6 **for terms.**

7 On May 17, 2022—barely a month before trial is scheduled to begin—Plaintiffs'
8 served an untimely “amended” witness disclosure that discloses one new expert and three
9 additional fact witnesses. All of these witnesses should be excluded.

10 Plaintiffs' new expert is a theologian, Geraldine O'Mahony, PhD. According to the
11 disclosure, theologian Dr. O'Mahony will testify about religion, including that “the Estate
12 of Laura Hamilton has invoked God's name in vain to advance their own purposes, a tactic
13 commonly used by dictators and political leaders in third-world countries.” (*See* Rand Decl.
14 Ex. T at 11-12.)

15 This is unacceptable. As explained in MIL No. 1, Plaintiffs are deliberately
16 misrepresenting the defense theory regarding the natural forces of labor. Religion is
17 completely irrelevant to that theory and the issues in this lawsuit. Accordingly, theologian
18 Dr. O'Mahony should be excluded under ER 402 and ER 702 as her testimony will not, in
19 any way, assist the trier of fact. Moreover, Plaintiffs' disclosure confirms that the goal of
20 this testimony is to incite passion and prejudice in the jury against the defense. ER 403.
21 Indeed, they even go so far as to compare defense counsel to “dictators and political leaders
22 in third-world countries.”⁷ *Id.* This is inappropriate and offensive. The Plaintiff bar is
23 apparently adopting a new strategy: when their case is without merit, distract by attacking
24 the defense attorney instead. This disclosure, coupled with Plaintiffs' counsel's disingenuous
25 attempt to inject religion into this lawsuit is reprehensible and in bad faith. The Court should
26 consider awarding monetary sanctions under its inherent authority and/or CR 11 to punish

⁷ Plaintiffs' counsel knows full well that defense counsel drafted the Answer to their Complaint.

1 such conduct and deter future abuse. CR 11; *State v. S.H.*, 102 Wn. App. 468, 473, 8 P.3d
2 1058, 1060 (2000).

3 Alternatively, theologian O'Mahony should be excluded under the three factors
4 articulated in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). First,
5 this untimely disclosure was "willful." Plaintiffs' disclosure deadline was February 25, 2022,
6 so this deadline was missed by almost three months. There is no valid excuse for this
7 untimely disclosure. It is, thus, "willful" under Washington law. *Allied Fin. Servs., Inc. v.*
8 *Mangum*, 72 Wn. App. 164, 168, 864 P.2d 1, 3 (1993), *amended*, 72 Wn. App. 164, 871 P.2d
9 1075 (1994). Second, this untimely disclosure has caused irreparable prejudice to the
10 defense. Trial is barely a month away. There is no time for the defense to depose this new
11 expert or prepare/obtain rebuttal testimony. Third, and finally, no lesser sanction will remedy
12 this prejudice. Exclusion is particularly warranted given the offensive nature of Plaintiffs'
13 disclosure.

14 In addition to their theology expert, Plaintiffs' untimely disclosure lists three
15 additional fact witnesses. First, is Angela Lamb, RN, who is purportedly a nurse at
16 Providence Centralia Hospital. (*See* Rand Decl. Ex. T at 3.) The disclosure states that Ms.
17 Lamb will offer testimony about Laura Hamilton's "reputation in the Lewis County medical
18 community," and "specific instances in which Providence Centralis Hospital staff took over
19 care of Laura's Hamilton's patients due to issues occurring under her care." (*Id.*) This is
20 classic and improper character evidence prohibited by ER 404(a) and (b).⁸ Such testimony
21 is also irrelevant and unduly prejudicial under ER 402 and ER 403.

22 Plaintiffs' untimely disclosure also lists Katie Ulmer and Shannon Smith. Ms. Ulmer
23 was Laura Hamilton's assistant and Ms. Smith was Laura Hamilton's bookkeeper. (*See* Rand
24 Decl. Ex. T at 3.) Plaintiffs have known about these witnesses since Laura Hamilton's
25 deposition on June 27, 2019. (*See* Rand Decl. Ex. V.) Neither Plaintiffs nor the defense
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⁸ Additional discussion about case law surrounding ER 404 is set forth in MIL 5 and 6 below and is incorporated by reference.

1 included these individuals in their primary witness disclosures. (*See* Rand Decl. Ex. I, J.)
2 Defendant Hamilton did include them in her “rebuttal” disclosure to possibly address
3 speculative and baseless testimony from Plaintiffs’ experts that Laura Hamilton falsified
4 records. (*Id.* Ex. I [Rebuttal Disclosure].) However, Plaintiffs objected to this disclosure as
5 untimely. (*See* Rand Decl. Ex. U at 3.) A CR 26(i) conference was held during which
6 Plaintiffs’ counsel indicated that they would be filing a motion to exclude these witnesses.
7 (*Id.*) After considering this objection, Defendant Hamilton decided to withdraw Ms. Smith
8 and Ms. Ulmer as rebuttal witnesses. (*Id.*) It is highly ironic that Plaintiffs **now** want to call
9 both individuals in their case in chief. Plaintiffs are also attempting to subpoena these
10 witnesses for deposition, even though the discovery cutoff has already passed, and trial is
11 barely a month away.

12 All of this is improper. Plaintiffs knew about these witnesses long ago but failed to
13 timely disclose them in either their primary or rebuttal disclosure. All three of the *Burnet*
14 factors are satisfied for reasons articulated above.⁹ The discovery cutoff has passed, motions
15 *in limine* are about to be heard, and trial is barely a month away. Plaintiffs’ attempt to
16 conduct new discovery at this late stage and inject additional witnesses into this litigation is
17 improper, prejudicial, and nothing more than an effort to distract the defense from their trial
18 preparations.

19 **4. Any reference to pain and suffering of the parents or family members and/or**
20 **any claim for damages for the same must be excluded.**

21 In the prior lawsuit, the parents of Z.H. attempted to bring independent claims for
22 their own damages. However, their claims were commenced after the statute of limitations
23 had already expired and thus were time barred. As a result, Defendant Hamilton filed a
24 motion for partial summary judgment to dismiss the parents’ claims. (*See* Rand Decl. Ex.
25 K.) Rather than oppose the motion, Plaintiffs’ counsel voluntarily dismissed the parents’

26 ⁹ *See also Falk v. Keene Corp.*, 53 Wn. App. 238, 250-51, 767 P.2d 576 (1989) (affirming exclusion of two of plaintiffs’ pathologist experts when plaintiff failed to assert reasonable excuse for naming witnesses until trial “was virtually set to begin”).

1 claims for damages on March 26, 2018. (*Id.* Ex. K; ¶12.) Plaintiffs subsequently voluntarily
2 dismissed the entire action on July 25, 2019.

3 Although Plaintiffs have re-filed the lawsuit on behalf of Z.H., they have not
4 attempted to advance independent claims for damages on behalf of the parents or any of
5 Z.H.'s family members because any such claims are time-barred. At trial, it would be
6 improper and misleading for Plaintiffs' counsel to suggest or imply in any way that Z.H.'s
7 parents and/or family members have claims for damages that they are not pursuing.
8 Likewise, it would be improper for Plaintiffs' counsel to assert or suggest during opening
9 and closing that the "parents are not asking for any money" or anything similar. The parents
10 and family members do not have any valid claims for damages under Washington law, so
11 any such statement falsely suggesting altruism would be highly misleading and prejudicial.

12 Similarly, because the parents and family members do not have any claims for
13 damages, they should be precluded from testifying about their own pain and suffering or
14 personal hardship, if any, stemming from Z.H.'s injury. Any such testimony would be
15 irrelevant as it has no probative value toward Z.H.'s alleged damages or any other issue in
16 this case. ER 401, 402. It would also be unduly prejudicial and misleading as it could
17 wrongly induce the jury to award damages outside of those available under Washington law
18 to Z.H., who is the only plaintiff in this lawsuit.

19 **5. Evidence regarding the defendant's history of prior medical malpractice**
20 **lawsuits and/or Department of Health proceedings must be excluded.**

21 This medical malpractice lawsuit must be adjudicated on its own merits by the jury.
22 The Plaintiffs should not be permitted to influence the jury by injecting facts of other
23 lawsuits or complaints against Defendant Hamilton. ER 401, 402, 403 and 404(b) preclude
24 any reference to prior claims, lawsuits, or state disciplinary actions brought against a party,
25 including prior representation by defense counsel in any prior matter. ER 404(b), in
26 particular, states as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the
character of a person in order to show action in conformity therewith.

1 This Rule makes acts of "misconduct" inadmissible to show or imply negligence in the
2 present case; rather the allegations and evidence in this specific case must stand on its own.
3 Tegland, Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions;
4 Other Crimes, 5D Wash. Prac., Handbook Wash. Evid. ER 404 (2021 ed.). This rule applies
5 to civil as well as criminal cases. *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 432-33,
6 814 18 P.2d 687 (1991) (new trial was proper where evidence of prior bad conduct was
7 erroneously admitted at trial).

8 Evidence of other prior legal actions may be properly excluded, particularly when
9 relevance is tenuous. *State v. Majors*, 82 Wn. App. 843, 849 (1996); *Panitz v. Orange*, 10
10 Wn. App. 317, 518 P.2d 726 (1973). Similarly, the general credibility of a witness cannot
11 be impeached by proof of particular acts of misconduct. *State v. Robbins*, 35 Wn.2d 389,
12 397, 213 P.2d 310 (1950); ER 404(b). Only specific acts that are probative of a character of
13 untruthfulness can be admitted for the purposes of impeachment. ER 608(b). Importantly,
14 evidence of other potential wrongs or misconduct is inadmissible to show lack of care or
15 negligence in the present case, or to show action in conformity therewith. *Calbom v.*
16 *Knudtson*, 65 Wn.2d 157, 396 P.2d 148 (1964); *Himango v. Prime Time Broadcasting, Inc.*,
17 37 Wn. App. 259, 680 P.2d 432, *rev. denied*, 102 Wn.2d 1004 (1984); *McCabe v. Spokane*
18 *County Civil Service Commission*, 14 Wn. App. 864, 545 P.2d 575 (1976); *Shuck v. Everett*
19 *Sports Cars, Inc.*, 12 Wn. App. 28, 527 P.2d 1321 (1974).

20 The Plaintiffs have the burden of proving the applicable allegations against
21 Defendant Hamilton. The existence of and facts relating to other lawsuits, complaints,
22 disciplinary actions have no bearing on the issue at hand. Just as the exclusion in ER 404(b)
23 applies to misconduct, even more so does it apply to allegations and claims of misconduct.
24 The court should not allow evidence regarding other lawsuits, complaints, or disciplinary
25 actions against Defendant Hamilton to be presented to the jury because it is irrelevant. ER
26 402. Also, any limited relevance is far outweighed by the prejudice to Defendant Hamilton.
ER 403.

1 In the present case, it is anticipated that Plaintiffs' counsel will try to introduce
2 evidence surrounding the prior *Myhre* lawsuit and Department of Health matters (one of
3 which Scott and Seng Hamilton submitted). The only possible reason for Plaintiffs to want
4 to introduce this evidence would be to suggest that because Ms. Hamilton had other "bad
5 outcomes" or lawsuits she must have been negligent here. This is exactly the sort of
6 impermissible character inference that ER 404(b) prohibits. Moreover, the conclusion and
7 findings of the Department of Health, including those relating to Ms. Hamilton's care of
8 Z.H., are not relevant to this proceeding. The jury is the sole finder of fact here. The jury
9 must weigh the evidence and come to its own conclusion. Allowing the Plaintiffs to
10 introduce evidence about DOH matters would be immensely prejudicial and create a real
11 risk that the jury would abdicate its fact-finding responsibility and merely adopt the findings
12 and conclusions of the DOH. Accordingly, even if there were some minimal relevance
13 (which there is not) the probative value would be substantially outweighed by the danger of
14 unfair prejudice. ER 403.

15 It should be noted that the Court granted this same motion *in limine* in the *Myhre*
16 case. It should be granted here as well. There has been no change in the law that would
17 warrant a different outcome.

18 **6. Evidence that Defendant Hamilton had other "bad outcomes" or brachial**
19 **plexus injuries must be excluded.**

20 For the same reasons set forth in the prior MIL (No. 5) the Court should enter an
21 order precluding Plaintiffs' from introducing any evidence about any other alleged "bad
22 outcome" or brachial plexus injury sustained by one of Ms. Hamilton's patients. Any such
23 evidence is irrelevant and would plainly violate ER 404(b). Evidence of other potential
24 wrongs is inadmissible to show lack of care or negligence in the present case, or to show
25 action in conformity therewith. *Calbom*, 65 Wn.2d 157; *Himango, Inc.*, 37 Wn. App. 259;
26 *McCabe*, 14 Wn. App. 864; *State v. Gresham*, 173 Wash. 2d 405, 420, 269 P.3d 207, 213
(2012). The only possible reason for Plaintiffs to want to introduce this evidence would be

1 to suggest to the jury that because Ms. Hamilton had other "bad outcomes" she must have
2 been a "bad" or "careless" midwife and thus must have been negligent here. This is exactly
3 the sort of impermissible character inference that ER 404(b) prohibits. A poor medical result
4 is not by itself evidence of negligence. WPI 105.07; *Watson v. Hockett*, 107 Wn.2d 158, 727
5 P.2d 669 (1986); *Christensen v. Munsen*, 123 Wn.2d 234, 248, 867 P.2d 626, 634 (1994).
6 The present lawsuit must be decided based on the facts and evidence alone. The court should
7 not allow evidence regarding any other "bad outcomes" or brachial plexus injuries to be
8 presented to the jury because it is irrelevant. Moreover, any minimal relevance is
9 substantially outweighed by the unfair prejudice to Defendant Hamilton. ER 402 and 403.

10 It should be noted that the Court granted this same motion *in limine* in the *Myhre*
11 case. It should be granted here as well. (*See* Rand Decl. Ex. L.) There has been no change in
12 the law that would warrant a different outcome.

13 **7. Plaintiffs' counsel should be precluded from asking witnesses questions**
14 **intended to elicit improper character testimony about Laura Hamilton, such as**
15 **whether she was a "good" and/or "safe" midwife.**

16 During the deposition of the Personal Representative of Ms. Hamilton's estate, Linda
17 Amondson-Muller, and over objection, Plaintiffs' counsel asked a series of questions
18 designed to elicit improper character evidence, including whether Ms. Amondson-Muller
19 felt that Ms. Hamilton was a "good midwife" and provided "safe care" to prior patients. The
20 following is an excerpt from the deposition transcript:

21 Q. Do you plan to testify that Laura Hamilton was a good midwife at
22 trial?

23 A. Yes, I believe so.

24 Q. And do you plan to testify about that at trial?

25 MS. MONIZ: She's not going to be asked that questions at trial.

26 Q. (BY MR. NEFF) You can answer the questions, Ms. Amondson-
Muller.

MS. MONIZ: You may answer.

A. Would you ask the question again?

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Q. (BY MR. NEFF) Do you plan to testify at trial that Laura Hamilton was a good midwife?

MS. MONIZ: I'm going to object to the form. I said she wasn't going to testify about that. That's not an issue in the case. The issue is whether she acted within the standard of care in this case. You may answer.

A. Well, I believe that Laura Hamilton is a good midwife.

Q. (BY MR. NEFF) And do you plan to make that part of your testimony at trial?

MS. MONIZ: Same objection. It's not up to her what her testimony is about. It's what she's asked and what are the issues in the case.

MR. NEFF: Only Ms. Amondson-Muller can control what she says on the witness stand, Donna.

MS. MONIZ: Yeah. Same objection. You may answer.

A. We're back to: Now what's the question? I've not done this before, so repeat it one more time.

Q. (BY MR. NEFF) Sure. Do you plan to testify at trial that Laura Hamilton was a good midwife?

MS. MONIZ: Same objections.

A. I believe that Laura Hamilton was a good midwife.

Q. (BY MR. NEFF) And I know what you believe. But my questions is: Do you plan to testify about that at trial?

MS. MONIZ: Same objections.

A. If I were asked that questions, I would say yes, she was a good midwife.

Q. (BY MR. NEFF) Do you plan to testify that Laura Hamilton provided safe care to patients in the past, before she became involved with Seng Hamilton and Zachary Hamilton?

MS. MONIZ: Same objections. You may answer, if you're able to.

A. I have never seen anything to the contrary of that.

Q. (BY MR. NEFF) And do you plan to testify about that at trial?

MS. MONIZ: Same objections.

A. To be truthful with you, I don't know exactly if I will be asked that question or not.

Q. (BY MR. NEFF) Do you plan to testify that Laura Hamilton successfully delivered babies in the past, before becoming involved with Seng and Zachary Hamilton?

Ms. Moniz: Same objections.

1 A. I'm going to say yes to that.

2 Q. (BY MR. NEFF) Do you plan to testify that Laura Hamilton never had
3 an issue providing care to patients prior to providing care to Seng
4 and Zachary Hamilton?

MS. MONIZ: Object to the form and all the prior objections
reasserted.

5 (See Rand Decl. Ex. E at 34:11-37:1.) Whether or not Ms. Amondson-Muller believes that
6 Laura Hamilton was a "good midwife," provided "safe care to patients in the past," etc. is
7 completely irrelevant. ER 401, 402. It has no probative value as to whether Ms. Hamilton
8 complied with the standard of care in the present case. Moreover, as outlined above in
9 Defendant Hamilton's MIL No. 5 and 6, such testimony is classic impermissible character
10 evidence under ER 404—i.e. if Ms. Hamilton provided "good" and "safe" care to patients
11 in the past, she must have done so here as well. As plainly stated in Ms. Moniz's objections
12 on the record, defense counsel has **no intention** of asking improper character questions to
13 Ms. Amondson-Muller or any other witness in this case.

14 However, based on the deposition excerpt quoted above, the defense now has
15 legitimate concern that Plaintiffs' counsel may ask such questions. Even though this would
16 be plainly improper, it would still be strategically advantageous for the Plaintiffs.

17 For example, if Plaintiffs' counsel were to ask Ms. Amondson-Muller if she believes
18 that Laura Hamilton was a "good midwife," defense counsel would be forced to object. This
19 would look terrible in front of the jury and be immensely prejudicial. The jury would be left
20 to speculate why the defense did not want Ms. Hamilton's friend and the PR of her estate to
21 answer that question. From those optics, the jury would probably conclude that Ms.
22 Amondson-Muller did not believe that Ms. Hamilton was a good midwife—otherwise, why
23 would Plaintiffs' counsel ask that question and why would defense counsel object. Of course,
24 if defense counsel did not object, and Ms. Amondson-Muller testified that she believes Ms.
25 Hamilton was a good midwife, then Plaintiffs' counsel would argue that this opens the door
26 to prior DOH matters and other "bad outcomes" which are otherwise inadmissible for

1 reasons previously discussed. Either way, the Plaintiffs benefit from asking improper
2 questions like this.

3 This is exactly the sort of situation that motions *in limine* are designed to guard
4 against. *Douglas v. Freeman*, 117 Wn.2d 242, 255, 814 P.2d 1160, 1167 (1991). Such
5 testimony is irrelevant and inadmissible character evidence under ER 402, 403, and 404.
6 Defense counsel should be spared the necessity and prejudice of objecting at trial to such
7 questions in the presence of the jury.

8 **8. Any criticisms of Defendant Hamilton's care that are not linked to Z.H.'s**
9 **alleged damages by standard of care and causation testimony must be excluded.**

10 The elements necessary to establish the plaintiff's burden of proof in a medical
11 negligence action are statutory. Specifically, RCW 7.70.040 requires that the plaintiff prove
12 the following three elements: (1) the health care provider failed to exercise that degree of
13 care, skill, and learning expected of a reasonably prudent health care provider in the
14 profession or class to which she belongs, in the State of Washington, acting in the same or
15 similar circumstances; and (2) that such failure was a proximate cause (3) of the injury
16 complained of. RCW 7.70.040; *see also, Pelton v. Tri-State Mem. Hosp.*, 66 Wn. App. 350,
17 355, 831 P.2d 1147 (1992); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 25, 851 P.2d
18 689, 693 (1993); *Harris v. Groth*, 99 Wn.2d 442, 645 P.2d 1003 (1982).

19 Expert testimony is required to prove standard of care and causation. *Reyes v. Yakima*
20 *Health Dist.*, 191 Wn.2d 79, 86, 419 P.3d 819, 823 (2018); *Pelton*, 66 Wn. App. at 355;
21 *Guile*, 70 Wn. App. at 25; *Harris*, 99 Wn.2d at 449. Furthermore, negligence cannot be
22 inferred from the mere fact that a complication occurred. *Guile*, 70 Wn. App. at 26. To
23 establish causation between the alleged failure to meet the applicable standard of care and
24 the claimed injuries, medical testimony must reasonably exclude, as a probability, every
25 hypothesis other than the one relied on to remove it from the realm of speculation or
26 conjecture. *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968); *Merriman v.*
Toothaker, 9 Wn. App. 810, 814, 515 P.2d 509 (1973). The testimony must be sufficient to

1 establish that the injury-producing situation “‘probably’ or ‘more likely than not’ caused the
2 subsequent condition, rather than that the accident or injury ‘might have,’ ‘could have,’ or
3 ‘possibly did’ cause a subsequent condition.” *Ugolini v. States Marine Lines*, 71 Wn.2d 404,
4 407, 429 P.2d 213 (1967).

5 ... [E]xpert testimony is essential to a showing of ‘an act or omission by the
6 defendant which breaches a standard of care owed by him to the plaintiff,
7 which breach is the cause, both in fact and proximately, of damage to the
8 plaintiff.’ *Hayes v. Hulswit*, 73 Wn.2d 796, 797, 440 P.2d 849 (1968). **A bad
9 result is not in itself evidence of negligence** (*Teig v. St. John’s Hosp.*, 69
10 Wn.2d 369, 387 P.2d 527 (1963)), nor is a mere difference of professional
11 opinion as to a diagnosis or treatment, evidence of negligence. *Hayes v.*
12 *Hulswit, supra*.

13 *Stone v. Sisters of Charity of The House of Providence*, 2 Wn. App. 607, 611, 469 P.2d 229
14 (1970) (emphasis added); WPI 105.07. The plaintiff may not present evidence on the
15 standard of care only and leave causation to the lay jury or vice versa. Criticisms of
16 Defendant Hamilton’s care and actions that do not support all three elements of RCW
17 7.70.040 are irrelevant and should be excluded for this reason. ER 402. Also, the danger of
18 unfair prejudice, misleading the jury, etc. from such testimony far outweighs the probative
19 value of such evidence. ER 403.

20 Criticisms of care which are not expressed by a qualified expert to be a violation of
21 the standard of care **and** a proximate cause of the damages alleged are not relevant and do
22 not satisfy the plaintiff’s burden. ER 402; *see also, Miller v. Jacoby*, 145 Wn.2d 65, 74, 33
23 P.3d 68, 72 (2001) (*en banc*).

24 It should be noted that the Court granted this motion *in limine* in the *Myhre* case. It
25 should be granted here as well. (*See* Rand Decl. Ex. L.) There has been no change in the law
26 that would warrant a different outcome.

1 **9. Any evidence regarding Seng Hamilton's subsequent gestational diabetes**
2 **and/or diabetes must be excluded.**

3 Plaintiffs allege that Seng Hamilton had undiagnosed gestational diabetes, which
4 they claim is a risk factor for shoulder dystocia. The evidence in this case shows that Laura
5 Hamilton performed two glucose tests during the pregnancy which both came back in the
6 normal range. Defense experts agree that, more probably than not, Seng Hamilton did not
7 have gestational diabetes during Z.H.'s pregnancy. (*See* Rand Decl. Ex. I.) Even Plaintiffs'
8 own medical experts were unable to say that she had gestational diabetes on a more probable
9 than not basis during their depositions, with the sole exception being Plaintiffs' midwife
10 expert Ms. Wilkinson.¹⁰ Nonetheless, whether or not Seng Hamilton had gestational diabetes
11 will be an important and contested issue at trial.

12 Seng Hamilton has had five children. Z.H. is the second youngest. There is no
13 evidence that Seng Hamilton had gestational diabetes (or any other form of diabetes) in any
14 of the three pregnancies prior to Z.H. As discussed above, the evidence does not indicate
15 that Seng Hamilton had gestational diabetes (or any other form of diabetes) during Z.H.'s
16 pregnancy in 2014, either. However, records indicate that Seng Hamilton developed
17 gestational diabetes during the pregnancy of her youngest (and last child) in 2016 two years
18 later and Seng Hamilton also testified during her deposition that she subsequently was
19 diagnosed with type two diabetes. (*See* Rand Decl. Ex. P.)

20 The fact that Seng Hamilton *subsequently* developed gestational and/or type two
21 diabetes during her final pregnancy long after Z.H. was born is irrelevant. ER 402. It does
22 not have any tendency to prove that Seng Hamilton had gestational diabetes during her
23 pregnancy with Z.H., just as it does not prove that she had gestational diabetes during any
24 of her other three prior pregnancies. The necessary inference Plaintiffs are trying to make is
25 purely speculative and does not logically follow. This is particularly true as there is no
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¹⁰ Specifically, Plaintiffs' OBGYN experts, Dr. Hindi Stohl and Dr. Brian Sollers, agreed that they could not say that Seng Hamilton had gestational diabetes on a more probable than not basis and to a reasonable degree of medical certainty during their depositions. (*See* Rand Decl. Ex. M; N.)

1 evidence whatsoever that Seng Hamilton had any form of diabetes during the almost two
2 years after Z.H. was born and her subsequent pregnancy.

3 No qualified medical expert in this case has testified that the fact that Seng Hamilton
4 developed gestational diabetes during her subsequent pregnancy alone proves, more
5 probably than not and to a reasonable degree of medical certainty, that she had undiagnosed
6 gestational diabetes during her pregnancy with Z.H. almost two years earlier. *McLaughlin*
7 *v. Cooke*, 112 Wn.2d 829, 836, 774 P.2d 1171, 1175 (1989) (internal citation omitted)
8 (“medical expert testimony must be based upon ‘a reasonable degree of medical certainty.’”)
9 Plaintiffs’ midwife expert Ms. Wilkinson testified that the subsequent onset of diabetes long
10 after Z.H. was born “raises a concern” that Seng Hamilton had undiagnosed gestational
11 diabetes during her pregnancy of Z.H., but a mere “concern” is not enough under the
12 applicable standard.¹¹ *Rounds v. Nellcor Puritan Bennett, Inc.*, 147 Wn. App. 155, 163, 194
13 P.3d 274, 278 (2008) (internal citation omitted) (“expert testimony must be based on facts in
14 the case, not speculation or conjecture.”); *Ugolini v. States Marine Lines*, 71 Wn.2d 404,
15 407, 429 P.2d 213, 215 (1967) (internal citations omitted) (“medical testimony as to a causal
16 relationship between the liability-producing situation and the claimed injuries or subsequent
17 condition must be, ‘that the injury ‘probably’ or ‘more likely than not’ caused the subsequent
18 condition, rather than that the accident or injury ‘might have,’ ‘could have,’ or ‘possibly did’
19 cause the subsequent condition.”)

20 Even if Seng Hamilton’s diagnosis of gestational diabetes during the last of her five
21 pregnancies had some minimal relevance as to whether she had gestational diabetes during
22 her pregnancy with Z.H., almost two years earlier, that evidence should still be excluded
23 under ER 403. Such evidence is inherently rife with speculation and would seriously mislead
24 and confuse the jury leading to irreparable prejudice.

25
26

¹¹ (See Rand Decl. Ex. O at 32:2-3.)

1 **10. Defendant Hamilton respectfully requests that the Court exclude any argument**
2 **by Plaintiffs' counsel requesting the jurors place themselves in the position of**
3 **the plaintiff.**

4 It is each juror's duty to act disinterestedly and impartially. WPI 1.01. Any request
5 that the jury "step into the shoes" of the plaintiff—otherwise known as the "Golden Rule"
6 argument—violates each juror's duty of impartiality and disinterest, and should not be
7 permitted. In *Adkins v. Aluminum Co.*, 110 Wn.2d 128, 140, 750 P.2d 1257 (1988), the
8 Washington Supreme Court held that:

9 We conclude that whether made by plaintiff's counsel or defendant's
10 counsel, **an argument in a civil case is improper which appeals to the**
11 **jurors to place themselves in the position of a litigant** and to decide the
12 case upon what they would then want under the circumstances. Where an
13 argument is designed to affect the outcome of the case, **either upon the**
14 **question of liability or damages**, a plaintiff's potential recovery or
15 defendant's potential success in defending is involved.

16 *Id.* at 140 (emphasis added). Asking the jury to place itself in Plaintiffs' position is improper
17 and expressly prohibited under Washington law. The Court should enter an Order *in limine*
18 prohibiting any such argument.

19 **11. Plaintiffs should be precluded from substituting "safety" standards with the**
20 **standard of care.**

21 The Court should prohibit any "reptile" tactics or arguments that would encourage
22 the jury to apply a non-legal "safety" standard instead of the expert-based standard of care
23 required in a medical negligence case. *See* RCW 7.70.040

24 The "reptile" approach advocates trying cases by appealing to the emotions of the
25 jury rather than the facts and evidence. It encourages efforts to "get the jury mad" at the
26 defendant and seeks to set out nebulous "safety-rules" that are then alleged to have been
violated by the defendant. *See David Ball on Damages* at p. 10 (3rd Ed., revised printing)
NITA (2011). This is little more than a thinly veiled attempt to resurrect the long-forbidden
"Golden Rule" argument which asks the jury to place themselves in the plaintiffs' position,
combined with the equally forbidden concepts of "protecting their community" and "sending

1 a message” by awarding punitive damages. *Adkins*, 110 Wn.2d at 140; *State v. Ramos*, 164
2 Wn. App. 327, 337, 263 P.3d 1268, 1273 (2011); *WPI 30.01.01*

3 Plaintiffs’ counsel has already demonstrated their intention to employ the reptile
4 strategy during this lawsuit based on the questions that they have asked during the
5 depositions of Defendant Hamilton’s experts. The following are some examples:

6 Q. Okay, we can agree that midwives are not allowed to needlessly endanger
7 their patients?¹²

8 Q. And in fact, the standard of care requires midwives, as medical providers,
9 to avoid needlessly endangering their patients, right?¹³

10 Q. I know that, you know, you are a big advocate for midwifery, but do you
11 agree that if a midwife falls below the standard of care and injures a child
12 that she should be held accountable for that?¹⁴

13 Q. Would you agree that one of the main reasons pregnant women seek out
14 midwives and doctors is to ensure that labor and deliver is as safe as
15 possible?¹⁵

16 Q. And similar questions: Do you personally believe that it’s safe for a
17 woman with a high-risk pregnancy to give birth in the home?¹⁶

18 Q. Knowing everything we know now, do you think it would have been safer
19 for Seng Hamilton to have a C-section when she gave birth to Z.H.?¹⁷

20 Q. If a midwife doesn’t know they could injury a baby by applying too much
21 traction during deliver, would you be concerned that that’s a safety
22 issue?¹⁸

23 Q. Do you agree that – if a midwife has any doubt about their ability to safely
24 deliver a baby, that they should refer that baby’s mother to the hospital
25 for birth?¹⁹

26 ¹² (See Rand Decl. Ex. D at 41:14.)

¹³ (Id. at 41:20.)

¹⁴ (Id. at 49:2.)

¹⁵ (Id. at 51:19.)

¹⁶ (Id. at 92:3.)

¹⁷ (Id. at 99:22.)

¹⁸ (See Rand Decl. Ex. Q. at 31:14-17.)

¹⁹ (Id. at 47:21.)

1 Q. Ms. Burgess, would you agree that one of the main reasons women seek
out midwives is to ensure that labor and delivery is as safe as possible?²⁰

2 Q. Well, a midwife wants to ensure that a delivery is as safe as possible,
3 right?²¹

4 Q. My question is: Do you agree that a midwife should try to ensure that a
5 labor and deliver is a safe as possible?²²

6 Q. You said it should be every midwife's goal to make sure that labor and
7 delivery is as safe as possible?²³

8 Q. Is patient safety one of the reasons you reach out to other midwives to
9 help you with births?²⁴

10 Q. Is patient safety one of the reasons that you want a second set of hands in
the birthing room?²⁵

11 Q. So is safety not one of the reasons you reach out to another midwife or
12 assistant during a birth?²⁶

13 Q. And to keep them as safe as possible, too, right?²⁷

14 Q. Do you agree that home birth is not safe for every baby?²⁸

15 Q. Is one of those reasons concerns for safety of the child?²⁹

16 These are but some examples. Indeed, Plaintiffs' counsel Austin Neff used some
17 form of the term "safe" more than 30 times in his questioning of Defendant Hamilton's two
18 midwife experts, Ms. Browder and Ms. Burgess. This is no coincidence. Such questions are
19 pulled directly from the "reptile" playbook and only serve an improper purpose. They appeal
20 to the jury's emotions and fears while simultaneously misrepresenting the standard of care
21 i.e., what is expected of a reasonably prudent midwife acting under the same or similar
22

23 ²⁰ (*Id.* at 52:20.)

24 ²¹ (*Id.* at 53:11.)

²² (*Id.* at 53:20.)

25 ²³ (*Id.* at 54:24.)

²⁴ (*Id.* at 57:9.)

26 ²⁵ (*Id.* at 57:18.)

²⁶ (*Id.* at 58:2.)

²⁷ (*Id.* at 58:9.)

²⁸ (*Id.* at 84:22.)

²⁹ (*Id.* at 85:4.)

1 circumstances in the state of Washington at the time of the care at issue. ER 403; RCW
2 7.70.040; *State v. Powell*, 62 Wn. App. 914, 918, 816 P.2d 86, 89 (1991). Plaintiffs should
3 be prevented from confusing the jury into rendering a verdict based on nebulous “safety”
4 standards rather than the standard of care, as required by RCW 7.70.040.

5 **12. All arguments – direct or indirect – about “sending a message” or otherwise**
6 **punishing the Defendant must be excluded.**

7 In line with MIL Nos. 10 and 11, any evidence or argument that references or implies
8 that the jury could (or should) base their verdict on the fear that members of their community
9 could be harmed, to “send a message,” or to prevent harm to others, is prohibited.

10 Since 1891, punitive damages have been forbidden unless expressly authorized by the
11 legislature. See *Winchester v. Stein*, 135 Wn.2d 835, 858, 959 P.2d 1077 (1998); *Barr v.*
12 *Interbay Citizens Bank*, 96 Wn.2d 692, 699, 649 P.2d 827 (1981); *Spokane Truck & Dray Co.*
13 *v. Hoefler*, 2 Wn. 45, 56, 25 Pac. 1072 (1891). Chapter 7.70 of the Revised Code of Washington,
14 the statutory framework under which all actions resulting from health care must be brought,
15 does not provide for punitive damages. Further, the Washington Supreme Court has
16 consistently disapproved punitive damages as contrary to public policy. See *Dailey v. North*
17 *Coast Life Ins. Co.*, 129 Wn.2d 572, 574, 919 P.2d 589 (1996).

18 The purpose of awarding damages in a negligence case is to “reasonably and fairly
19 compensate the plaintiff” for damages proximately caused by the defendant’s negligence. WPI
20 30.01.01. It is well-established law that counsel may *not* ask the jury to step into the position
21 of Plaintiffs and may *not* request an award of punitive damages either directly or indirectly.
22 See WPI 30.01.01; RCW 7.70 *et seq*; *Meabon v. State*, 1 Wn. App. 824, 831, 463 P.2d 789
23 (1970); *Winchester v. Stein*, 135 Wn. 2d 835, 858, 959 P.2d 1077 (1998); *Adkins v. Aluminum*
24 *Co.*, 110 Wn.2d 128, 140, 750 P.2d 1257 (1988).

25 Accordingly, the Court should enter an Order *in limine* precluding Plaintiffs from
26 circumventing Washington’s prohibition on punitive damages by arguing that the jury should,
with its verdict,” send a message” to the defendant, “protect their community,” or anything of

1 that sort. Any such argument seeks to appeal to the jury's emotions, rather than reason, and
2 therefore would be prohibited under ER 403 as unduly prejudicial. *Carson v. Fine*, 123 Wn.2d
3 206, 223 (1994).

4 **13. Defendant Hamilton respectfully requests that the Court require a trial**
5 **schedule.**

6 Counsel for the Plaintiffs indicated during the pretrial conference that they require
7 five (5) days for their case in chief. Based on this representation Defendant Hamilton has
8 scheduled her out-of-state experts. Those experts have blocked their schedule and made
9 travel arrangements. Any change to that schedule due to the Plaintiffs' case in chief requiring
10 fewer or more days would be costly and potentially deprive the Defendant Hamilton of one
11 of her expert witnesses. Therefore, Defendant Hamilton moves the Court for an order
12 establishing a trial schedule in which the scheduling of out-of-state witnesses is considered,
13 and Defendant Hamilton not be deprived or have a significant increase in expenses due to
14 the Plaintiffs' conclusion of their case early or late even assuming the experts are able to
15 adjust their schedules.

16 Pursuant to CR 16(a)(5), this Court has authority to make any orders or ruling that
17 "may aid in the disposition of the action." A trial schedule will also enable the parties to
18 efficiently schedule the testimony of out-of-town witnesses and minimize last minute
19 reshuffling of witnesses, allowing trial to proceed more smoothly. For all of these reasons,
20 Defendant Hamilton asks the Court to grant this motion.

21 **14. Defendant Hamilton respectfully requests that the parties be required to give**
22 **48-hour notice of witnesses to be called at trial.**

23 ER 102 and 611 give the Court broad discretion to control the trial to secure "fairness
24 in administration" and eliminate "unjustifiable expense and delay." ER 102, ER 611. This
25 motion involves a matter of fundamental fairness. Defendant Hamilton respectfully requests
26 that the Court require that both parties give the Court and each other forty-eight hours' notice
of each witness to be called at trial to facilitate a prompt and orderly presentation of witnesses
and to expedite this trial. Such notice will permit counsel to prepare for examination more

1 effectively. This ruling will allow both parties time to object to the testimony outside the
2 presence of the jury and to prepare for the anticipated testimony.

3 **15. No claim or evidence concerning lost earning capacity of Z.H.**

4 In written discovery, Defendant Hamilton expressly requested that Plaintiffs
5 "itemize, in detail, all damages that plaintiffs are alleging in the case," including "any alleged
6 general and/or special damages, and the basis thereof." Plaintiffs did not object to this
7 request and did not disclose any claim of damages relating to lost future income on behalf
8 of Z.H. Plaintiffs have not produced any evidence supporting a claim of damages for lost
9 earning capacity. Even Plaintiffs own vocational rehabilitation expert, Cloie Johnson,
10 testified that she has not quantified any loss of earning capacity and does not intend to offer
11 testimony about any loss of earning capacity at trial:

12 Q. Okay. So you're not going to offering any testimony that -- that on a
13 more probable than not basis, Zach will earn less now because of his
injury than he would have without the injury; right?

14 A. I think, as I say in my opinion, that in order to avoid a loss of earning
15 capacity, tuition, books and supplies is now a necessity.

16 Q. Okay. Ms. Johnson, that wasn't my question. Would you please
17 answer my question? At trial, you will not be offering any opinion,
that more probably than not, because of Zach's injury, he now has a
diminished earning capacity?

18 MS. MACHLER: Object to the form.

19 A. I believe my opinion is, as I've written it. Education and the tuition,
20 books and supplies is the great leveler. Absent that, it would have a
negative impact on his earning capacity; I've just not quantified it.

21 Q. So you won't testify at trial that because of Zach's injury, more
22 probably than not, he will earn less during his lifetime; is that correct?

MS. MACHLER: Object to the form

23 MR. RAND: Susan, what's wrong with that question?

24 MS. MACHLER: It's argumentative. And it's been asked and answered,
25 and asked and answered, and asked and answered.

BY MR. RAND:

26 Q. Ms. Johnson, will you be offering that opinion at trial?

A. I'm offering the opinion that his earning capacity will not be

diminished with the provision of tuition, books and supplies.

(See Rand Decl. Ex. R at 89:5-90:13.) Because Plaintiffs lack any qualified expert testimony from a vocational specialist, they cannot provide the requisite foundation for any alleged future income loss or loss of earning capacity. *Riccobono v. Pierce Cnty.*, 92 Wn. App. 254, 268, 966 P.2d 327, 334 (1998). Nowhere during the discovery process has Plaintiffs articulated a basis for a claim of lost earning capacity. Nowhere in the discovery process have the Plaintiffs provided any documents or reports to substantiate any claim of lost future income or earning capacity. The discovery cutoff has now passed, and the parties are on the eve of trial. Any attempt to now introduce a claim for lost earning capacity would be irreparably prejudicial and in clear violation of Washington law. *Stark v. Allis-Chalmers & Nw. Roads, Inc.*, 2 Wn. App. 399, 405, 467 P.2d 854, 858 (1970); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

16. Defendant Hamilton respectfully requests that the Court exclude all witnesses from the courtroom prior to their testimony, except for expert witnesses.

Defendant requests that all witnesses, except for expert witnesses, be excluded from the courtroom during the testimony of other witnesses. ER 615.

17. Defendant Hamilton respectfully requests that expert witnesses be allowed to review trial transcripts prior to their testimony.

Defendant Hamilton requests that expert witnesses be exempted from this Court's witness exclusion order pursuant to ER 615. Ms. Hamilton requests that this court allow expert witnesses to review trial testimony transcripts on the basis that defense experts are necessary witnesses under ER 615(3), and pursuant to ER 703.

Although a court generally has discretion to exclude witnesses, the purpose of the witness exclusion rule is to avoid collusion between fact witnesses so that they cannot hear the testimony of other witnesses. This concern does not arise with respect to experts because they are testifying as to their opinions, rather than as fact witnesses. *See Morvant v. Construction Aggregates Corp.*, 570 F.2d 626, 629-630 (6th Cir. 1978). ER 703 allows

1 experts great leeway in formulating the basis of their opinion testimony; that rule specifically
2 permits an expert to base his or her opinions on information made known to the expert from
3 a hearing on the matter. ER 703. Further, "the facts or data need not be admissible in
4 evidence." *Id.* The language of ER 703 authorizes an expert to rely on information from a
5 hearing (i.e. the trial) or, for example, from a deposition. There is no difference between an
6 expert reading prior deposition testimony and reading a transcript of another expert witness'
7 trial testimony.

8 Given the policy considerations underlying both ER Rules 615 and 703, there is no
9 reasonable basis for excluding an expert from reviewing other trial testimony. *Morvant*, 570
10 F.2d at 629-630.

11 Additionally, the medical issues in this case are complex, and trial counsel must be
12 able to discuss these issues with their experts. Thus, Ms. Hamilton requests her experts be
13 considered necessary witnesses under ER 615(3) and, as such, they are exempt from a
14 witness exclusion order under ER 615.

15 In *Morvant v. Construction Aggregates Corp.*, *supra*, the court considered whether
16 the trial court erred in excluding plaintiffs' expert. While not binding, the analysis in
17 *Morvant* is consistent with federal rulings interpreting a similar federal exception. In
18 *Morvant*, the court acknowledged the Advisory Committee Notes; these notes recognize that
19 the essential person exception in Rule 615 includes persons such as "an expert needed to
20 advise counsel in the management of the litigation." *Id.* at 629. Next, the court outlined the
21 general policy behind exclusion of witnesses, stating:

22 We perceive little, if any, reason for sequestering a witness who is to testify
23 in an expert capacity only and not to the facts of the case. As Professor
24 Wigmore's treatise summarizes: The process of sequestration consists merely
25 of preventing one prospective witness from being taught by hearing another's
26 testimony6 Wigmore on Evidence § 1838 at 461 (Chadbourn rev. 1976).
Theoretically at least, the presence in the courtroom of an expert witness who
does not testify to the facts of the case but rather gives his opinion based upon
the testimony of others hardly seems suspect and will in most cases be
beneficial, for he will be more likely to base his expert opinion on a more
accurate understanding of the testimony as it evolves before the jury.

1 *Id.*. The Ninth Circuit in *Seschillie* cited to *Morvant*, with agreement, stating: “In many
2 circumstances, a potential expert witness will be an ‘essential party’ within the meaning of
3 Rule 615(3). The Advisory Committee Notes to Rule 615(3) contemplate as much, stating
4 that the exception includes ‘an expert needed to advise counsel in the management of
5 litigation.’” *United States v. Seschillie*, 310 F.3d 1208, 1213 (2002, CA9 Ariz), *cert den* 538
6 U.S. 953, (2003) (citing *Morvant, supra*).

7 In *Seschillie*, the court explained there were no countervailing reasons to exclude the
8 expert from the court room (or, by extension, from reading trial transcripts from other
9 experts). *Id.* at 1214. The expert would not offer fact witness testimony but would “only
10 assume[] facts for purposes of rendering opinions.” *Id.* In that case, it was better to let the
11 expert hear all of the “trial testimony so as to be able to base his opinion on more accurate
12 factual assumptions.” *Id.*

13 Pursuant to ER 615 and ER 703, as well as the persuasive federal decisions cited
14 above, this trial court should exempt Ms. Hamilton’s experts from any ER 615 order
15 otherwise excluding witnesses. Alternatively, the Court should consider Ms. Hamilton’s
16 request to designate its experts as “essential to the presentation of the [Defendant’s] cause.”
17 ER 615(3).

18 **18. Plaintiffs should only be permitted to offer rebuttal witnesses or evidence that**
19 **is not repetitive or whose testimony could not have been anticipated in their case**
20 **in chief.**

21 Rebuttal testimony does not include testimony that is admissible as part of the
22 plaintiff’s case in chief. The plaintiff may not call a “rebuttal” witness on matters which are
23 part of the plaintiff’s burden of proof, when the witness’ opinions are already available to
24 the plaintiff. *Kremer v. Audette*, 35 Wn. App. 643, 648, 668 P.2d 1315 (1983); *Vasquez v.*
25 *Markin*, 46 Wn. App. 480, 493, 731 P.2d 510, 519 (1986) (“Genuine rebuttal evidence is not
26 simply a reiteration of evidence in chief but consists of evidence offered in reply to new
matters.”) “The plaintiff, therefore, is not allowed to withhold substantial evidence
supporting any of the issues on which it has the burden of proving in its case in chief merely

1 in order to present this evidence cumulatively at the end of the defendant's case." *State v.*
2 *White*, 74 Wn.2d 386, 395, 444 P.2d 661 (1968). The court should preclude Plaintiffs from
3 offering rebuttal testimony that is admissible and could have been offered as part of the
4 Plaintiffs' case in chief.

5 **19. Testimony by lay witnesses, including Z.H.'s parents, as to what they have been**
6 **told by treating providers is hearsay and should be excluded**

7 Hearsay is inadmissible unless it falls within an exception. Here, it is anticipated that
8 the Z.H.'s parents and/or family members may attempt to testify about statements doctors
9 have made to them regarding Z.H.'s health care issues, including diagnoses, prognosis,
10 future medical needs, and the causes of Z.H.'s deficits. Such testimony must be excluded.
11 Testimony regarding statements made by physicians (or others, such as teachers) would be
12 hearsay, improper medical testimony from a lay witness, bolstering of other witnesses, and
13 cumulative. For all these reasons, this testimony must be excluded.

14 Hearsay is not admissible under ER 801 and 802 and on that basis alone, all lay
15 witnesses, including Z.H.'s parents should be prevented from offering any testimony
16 regarding statements made by physicians about Z.H. Additionally, medical testimony is
17 beyond the knowledge of lay witness and must be offered by experts. *Young v. Key*
18 *Pharmaceuticals, Inc.*, 112 Wn.2d 216, 228, 770 P.2d 182 (1989). Lay witnesses cannot
19 render opinion testimony outside of limited circumstances. ER 701. Usually, a lay witness
20 may only testify about opinions or inferences "which are (a): rationally based on the
21 perception of the witness; and (b) helpful to a clear understanding of the witnesses'
22 testimony or the determination of a fact in issue." *Id.* Therefore, the presentation of medical
23 evidence, taken out of the context of testimony by a medical provider and presented by lay
24 witnesses, would be improper. Moreover, any limited probative value would be far
25 outweighed by the danger of prejudice. ER 402 and 403. Lay witnesses lack specialized
26 medical education and training. Thus, there is a very real risk that a lay witnesses would

1 incorrectly represent the hearsay statements and information that was purportedly
2 communicated to them by a medical provider.

3 Testimony regarding statements made by doctors should also be excluded because it
4 is improper bolstering of the credibility of Z.H.'s treating health care providers, which is not
5 permitted. *State v. Bourgeois*, 133 Wn.2d 389, 400-01, 945 P.2d 1120 (1997). Plaintiffs have
6 the opportunity to call Z.H.'s treating providers if they choose or show their records to the
7 jury. To allow Z.H.'s parents, or other lay witnesses, to repeat the presumed testimony of
8 providers or testify personally about those providers' records is not only improper but also
9 cumulative. ER 403 prevents the introduction of evidence on the basis that it is cumulative
10 and/or a waste of time. *Christiansen v. Munsen*, 123 Wn.2d 234, 240, 867 P.2d 626 (1994)
11 (court held each party to one expert per specialty).

12 For all of these reasons, Defendant Hamilton respectfully requests that the Court
13 enter an order preventing Z.H.'s parents, and other lay witnesses from testifying about
14 hearsay statements made to them by Z.H.'s health care providers. It should be noted that the
15 Court granted this same motion *in limine* in the *Myhre* case. (See Rand Decl. Ex. L.) It should
16 be granted here as well. There has been no change in the law that would warrant a different
17 outcome.

18 **20. Testimony by lay witnesses, including Z.H.'s parents, about Z.H.'s state of**
19 **mind, feelings, and pain and suffering is speculative and should be excluded.**

20 Defendant Hamilton moves for an order precluding lay witnesses from testifying
21 regarding Z.H.'s pain and suffering since such testimony would be speculative. Evidence
22 Rule 701 limits opinion testimony of lay witnesses to "inferences which are rationally based
23 on the perception of the witness and (b) helpful to ... the determination of a fact in issue."
24 Further, "lay opinion must be based upon personal knowledge." Tegland, § 701.3 Lay
25 opinion must be based upon personal knowledge, 5B Wash. Prac., Evidence Law and
26 Practice § 701.3 (6th ed.) (citing *U.S. v. Carlock*, 806 F.2d 535 (5th Cir. 1986) (lay testimony

1 must be “more than an educated guess”) and *U.S. v. Jackson*, 569 F.2d 1003 (7th Cir. 1978)
2 (wife may not testify on why her husband was depressed)).

3 In this case, Z.H.’s parents and siblings may only testify as to their observations; they
4 may not give testimony as to their perception of Z.H.’s state of mind or pain and suffering.
5 *Bitzan v. Parisi*, 88 Wn.2d 116, 121, 558 P.2d 775 (1977). Rather, the lay witnesses’
6 testimony must be limited to their “observation” after establishing that they have had “a
7 sufficient time to observe” Z.H. *See Stat v. Stumpf*, 64 Wn. App. 522, 526, 827 P.2d 294
8 (1992) (lay witness not allowed to testify on mental state of defendant). No “unsupported
9 conclusional statements” should be permitted. *Carr v. Deking*, 52 Wn. App. 880, 886, 765
10 P.2d 40 (1988). For all of these reasons, Z.H.’s parents and any other witnesses should be
11 instructed not to testify about his pain and suffering or state of mind, but only of their
12 observations.

13 It should be noted that the Court granted this same motion *in limine* in the *Myhre*
14 case. (See Rand Decl. Ex. L.) It should be granted here as well. There has been no change in
15 the law that would warrant a different outcome.

16 **21. Learned treatises and medical literature are hearsay and Defendant Hamilton**
17 **respectfully requests the Court allow their limited use only after proper**
18 **authentication.**

19 A learned treatise or medical literature is hearsay. To qualify as an exception to the
20 hearsay rule, a proper foundation must be established to introduce the material at trial. *See*
21 ER 803 (a)(18). The document must be established as reliable authority by testimony or
22 admission of the witness being examined, by another expert, or by judicial notice. ER 803
(a)(18).

23 On cross examination, a party may call the attention of an expert to the learned
24 treatise when an appropriate foundation has been established. *State v. Measaros*, 62 Wn.2d
25 579, 583, 384 P.2d 372 (1963), ER 803(a)(18). On direct examination, it can be used only
26 when the expert has relied upon the learned treatise for the basis of his or her opinion. ER

1 803(a)(18). In either situation, statements may be read into evidence, but the document
2 cannot be received as an exhibit. ER 803(a)(18).

3 **22. All mention of settlement, settlement discussions, or the absence of settlement**
4 **discussions is prohibited under ER 408 and should be excluded.**

5 ER 408 specifically prohibits any mention of settlement offers or proposals to prove
6 the validity or invalidity of a claim. The reference to settlement negotiations in *Discargar v.*
7 *Seattle*, 30 Wn.2d 461, 468, 191 P.2d 870 (1948), resulted in the Court issuing an order
8 granting a new trial after a plaintiff's verdict in a personal injury action. Defendant requests
9 that any reference to settlement efforts, offers, or absence of offers, be prohibited.

10 **23. Any reference to Defendant Hamilton's liability insurance should be excluded.**

11 Pursuant to ER 411, "evidence that a person was or was not insured against liability
12 is not admissible upon the issue of whether he acted negligently or otherwise wrongfully."
13 The fact that a defendant carries liability insurance is entirely irrelevant to a party's liability.
14 *Williams v. Hofer*, 30 Wn.2d 253, 191 P.2d 306 (1948). Additionally, no aspect of liability
15 insurance has any relevance to the issues to be resolved by the jury in this case and should
16 be excluded under ER 402. Finally, injection of insurance into a case by the plaintiff is
17 ground for reversal because reference to insurance has a highly prejudicial effect on juries.
18 ER 403; *King v. Starr*, 43 Wn.2d 115, 260 P.2d 351 (1953). Defendant Hamilton requests
19 that this motion *in limine* be considered as a continuing motion for mistrial if medical
20 malpractice insurance is mentioned during the trial of this matter.

21 Just as ER 411 requires exclusion of evidence regarding liability insurance, any
22 evidence of the defendant's financial condition must also be excluded. Whether a defendant
23 has insurance, no insurance, insufficient funds, or a vast fortune, is irrelevant to issues of
24 liability, causation, or damages. Such evidence is not only irrelevant but would be
25 immensely prejudicial and must be excluded under ER 402 and 403. *Brown v. Quick Mix*
26 *Co.*, 75 Wn.2d 833, 841, 454 P.2d 205 (1969).

1 Additionally, Plaintiffs have commenced this action solely under RCW 11.40.060,
2 which expressly limits their recovery, if any, to the Defendant Hamilton's insurance policy.
3 Any reference or suggestion to alternative sources of recovery, such as Ms. Hamilton's estate
4 or assets, would be improper, misleading, and incorrect under the law. Likewise, any
5 suggestion that there is any limit on Plaintiffs' recovery is likewise irrelevant and prejudicial
6 and would be nothing more than an improper appeal to sympathy. ER 403.

7 **24. Motion to permit questioning of Seng Hamilton's prior disciplinary history by**
8 **the Washington State Bar Association for the purposes of impeachment on cross**
9 **examination.**

10 ER 608(b) expressly permits a party to impeach a witness's credibility by questioning
11 him or her about prior specific instances of conduct that are probative of a character for
12 untruthfulness. The Rule states in pertinent part as follows:

13 Specific instances of the conduct of a witness, for the purpose of attacking
14 or supporting the witness' credibility, other than conviction of crime as
15 provided in rule 609, may not be proved by extrinsic evidence. They may,
16 however, in the discretion of the court, if probative of truthfulness or
17 untruthfulness, be inquired into on cross examination of the witness (1)
18 concerning the witness' character for truthfulness or untruthfulness ...

19 ER 608(b). "In exercising its discretion [under ER 608(b)], the trial court may consider
20 whether the instance of misconduct is relevant to the witness's veracity on the stand and
21 whether it is germane or relevant to the issues presented at trial." *State v. O'Connor*, 155
22 Wn.2d 335, 349, 119 P.3d 806 (2005). "Any fact which goes to the trustworthiness of the
23 witness may be elicited if it is germane to the issue," *State v. York*, 28 Wn. App. 33, 36, 621
24 P.2d 784 (1980), and thus "Washington case law allows cross-examination under ER 608(b)
25 to specific instances that are relevant to veracity." *State v. Wilson*, 60 Wn. App 887, 808
26 P.2d 754 (1991).

 In the present case, the mother, Seng Hamilton, is a personal injury attorney licensed
in Washington State. Her license to practice was suspended for 21 months (almost two years)
starting on July 27, 2017, for unethical conduct pursuant to a stipulation with the Washington

1 State Bar association, which was unanimously approved. (*See* Rand Decl. Ex. S.) As outlined
2 in the stipulation, Seng Hamilton was found to have committed major ethics violations. Most
3 pertinent here, she mismanaged her client trust account and disbursed settlement funds
4 directly to her law firm that should have gone to her clients. (*Id.*) Specifically, the
5 disciplinary authority found at least two instances in 2014 where Seng Hamilton over-drafted
6 her client trust account by thousands of dollars and that she “disbursed approximately
7 \$55,000 more to her law firm than was permitted by her fee agreements.” (*Id.* at ¶22.) The
8 disciplinary authority also found that in 40 client matters, Seng Hamilton had “provided
9 clients with settlements statements that did not accurately reflect how the clients’ settlement
10 funds were being disbursed.” (*Id.* at ¶20.) In part, those settlement statements “understated
11 the amounts being paid to [Seng Hamilton’s] firm.” (*Id.*) The disciplinary authority found
12 that Seng Hamilton either knew or should have known that this conducted constituted an
13 ethical violation. Seng Hamilton’s signature on the stipulation confirms her assent.

14 “A lawyer has the highest fiduciary duty to steward his client’s funds with the utmost
15 care, transparency, and prudence.” *In re Disciplinary Proceeding Against McKean*, 148
16 Wn.2d 849, 865, 64 P.3d 1226, 1233 (2003). Mismanaging and/or misappropriating client
17 funds is considered to be such a grave ethics violation that it often results in disbarment.
18 *Matter of Disciplinary Proceeding Against Waechter*, 191 Wn.2d 20, 33, 419 P.3d 827, 834
19 (2018); *In re Disciplinary Proceeding Against Schwimmer*, 153 Wn.2d 752, 763, 108 P.3d
20 761, 766 (2005). Here, Seng Hamilton not only mismanaged her client trust fund, but
21 improperly disbursed approximately \$55,000 to her firm in settlement funds that should have
22 gone to her clients. She misappropriated her clients’ funds in both respects. And she
23 concealed this misappropriation as she did not adequately disclose these disbursements in
24 settlement statements to her clients. This conduct plainly speaks to her credibility and
25 character for untruthfulness, particularly considering the high degree of trust required by her
26 fiduciary duty.

1 Washington has found theft to be a per se crime of dishonesty for purposes of ER
2 609. *State v. Ray*, 116 Wn.2d 531, 545, 806 P.2d 1220, 1228 (1991), *abrogated on other*
3 *grounds by State v. Crossguns*, 505 P.3d 529 (Wn. 2022). Our Supreme Court has stated that
4 an attorney misappropriating client funds is comparable to embezzlement. *In re Disciplinary*
5 *Proceeding Against Schwimmer*, 153 Wn.2d at 760. Indeed, it is even *more* probative for
6 untruthfulness because “[u]nlike theft by taking, embezzlement involves a **violation**
7 **of trust** and does not require proof of intent to permanently deprive the owner of the
8 property taken.” *Id.* (citing *State v. Ager*, 128 Wn.2d 85, 91, 904 P.2d 715, 718 (1995))
9 (emphasis added). Moreover, Seng Hamilton’s disciplinary history is not remote in time, as
10 the order was entered in July of 2017, and expired in April of 2019, roughly three years ago.
11 Defense counsel should be permitted to impeach Seng Hamilton on cross examination by
12 asking her questions about her disciplinary history under ER 608(b).

13 **25. Motion to preclude any evidence or argument of any theories of recovery or**
14 **damages not disclosed in the Pleadings or discovery responses.**

15 As outlined above, Plaintiffs must prove by a preponderance of the evidence that the
16 alleged failure to follow the applicable standard of care was a proximate cause of Z.H.’s
17 damages. Here, the parties disclosed their respective experts and made these experts
18 available for deposition. All of Plaintiffs’ experts have been deposed and were asked for the
19 totality of their opinions concerning liability. The Plaintiffs should not be allowed to offer
20 any theory or evidence of liability at trial that was not identified by their experts at
21 deposition. This principle is elucidated in *Kramer v. J. I. Case Manufacturing Co.*, 62 Wn.
22 App. 544, 815 P.2d 798 (1991). In *Kramer*, the Plaintiffs asserted his alternate theories of
23 liability just five or six days before the discovery cutoff. *Id.* at 552. The trial court granted
24 the defendant’s motion *in limine* to exclude these theories as untimely, and the Court of
25 Appeals affirmed, finding that exclusion was appropriate because such untimely disclosure
26 surprised the defendant and did not permit ample time to obtain rebuttal witnesses. *Id.*

1 Permitting testimony regarding allegations of negligence that were either not
2 previously disclosed and/or not previously supported by deposition testimony from
3 Plaintiffs' experts would unduly prejudice Ms. Hamilton and should be excluded. ER 403,
4 CR 26, and CR 33.

5 **26. Evidence of collateral source benefits is admissible in a medical malpractice**
6 **action, and under the facts of this case.**

7 In medical malpractice actions, the trier of fact may consider certain evidence that
8 the plaintiff has already been compensated for the injury complained of from another source.
9 RCW 7.70.080; *see also, Haskins v. Multicare Health Sys.*, 186 Wn. App. 11, 17, 347 P.3d
10 460, 462 (2014), *amended on denial of reconsideration* (Mar. 3, 2015), *review denied*,
11 (Wash. Sept. 2, 2015) (RCW 7.70.080 is constitutional with respect to the admission of
12 evidence of past collateral source payments.) In actions for injuries resulting from health
13 care, RCW 7.70.080 replaces the common law collateral source rule. *Mahler v. Szucs*, 135
14 Wn.2d 398, 412 n.4, 957 P.2d 632, 966 P.2d 305 (1998). RCW 7.70.080 provides in relevant
15 part:

16 Any party may present evidence to the trier of fact that the plaintiff has
17 already been compensated for the injury complained of from any source
18 except the assets of the plaintiff, the plaintiff's representative or the
19 plaintiff's immediate family. In the event such evidence is admitted, the
20 plaintiff may present evidence of an obligation to repay such compensation
21 and evidence of any amount paid by the plaintiff, or his or her representative
22 or immediate family, to secure the right to the compensation.

23 RCW 7.70.080.

24 The Court of Appeals found error where a trial judge failed to allow a jury to consider
25 collateral source evidence but rather himself undertook to determine what collateral source
26 offsets applied. *See Adcox v. Children's Orthopedic Hospital & Medical Ctr.*, 123 Wn.2d
15, 41, 864 P.2d 921 (1993). In *Adcox*, the Court of Appeals found that RCW 7.70.080
reserves for the *finder of fact* the task of assessing both (1) "the extent to which the plaintiff
has already been compensated by third parties for injuries incurred by the defendant" and

1 (2) “the additional task of offsetting these recoveries from the damages being assessed
2 against the defendant.” *Id.* at 40. The *Adcox* Court also noted that RCW 7.70.080 eliminates
3 the collateral source rule in medical malpractice actions, stating:

4 The primary motivation in doing away with the collateral source rule is the
5 rule allows plaintiffs to recover more than their total damages. Because the
6 rule overcompensated plaintiffs, it came to be viewed as imposing
7 unnecessary costs on society and causing higher insurance premiums.

7 *Id.* at 40.

8 It is a long-standing tenet of Washington law that “[t]he fundamental conception of
9 damages is ... compensation.” *Nelson v. Western Steam Navigation Co.*, 52 Wn. 177, 184,
10 100 Pac. 325 (1909) (holding that the plaintiff could not recover for the value of medical
11 care he received free because no expense had been incurred). The jury, as the finder of fact,
12 should be allowed to hear evidence that the Plaintiffs have already been compensated from
13 a collateral source for any damages caused by the negligence alleged.

14 Here, only billing records reflecting the amounts *actually paid* for services (and not
15 just the amounts billed) should be submitted to the jury. Additional information would be
16 confusing to the jury and will prejudice the defendant. ER 403. Furthermore, documented
17 proof indicates that the medical expenses billed and the medical expenses paid for are very
18 different. All information regarding medical expenses billed but not paid should be excluded
19 as prejudicial, irrelevant, and confusing to the jury. ER 402, 403.

20 **27. The parties should be limited to one expert per discipline.**

21 “The admissibility and scope of an expert’s testimony is a matter within the court’s
22 discretion.” *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626, 630 (1994).
23 “Similarly, the admissibility of cumulative evidence lies within the trial court’s discretion.”
24 *Id.*; ER 403. The Trial Court has inherent authority to limit the scope and number of experts
25 to be called at trial. *Christensen*, 123 Wn.2d at 241 (trial court appropriately limited the
26 parties to one expert per specialty.) Indeed, this is expressly permitted by CR 16(a)(4) which

1 authorizes the Court to order a pretrial conference to consider, among other thing, “[t]he
2 limitation of the number of expert witnesses.”

3 Here, the parties have collectively disclosed 17 expert witnesses. (See Rand Decl.
4 Ex. I; J.) Ten of those experts belong to the Plaintiffs, which includes three expert
5 obstetricians. Seven of those experts belong to the defense, including three midwife experts
6 (one of which is designated as an alternate).

7 Plaintiffs do not need three obstetrician experts to present their case the same as the
8 defense does not need three midwives.³⁰ Not surprisingly, the deposition testimony from
9 Plaintiffs’ three obstetricians overlaps cumulatively in many respects. ER 403.

10 This case will already involve substantial, complex, and multifaceted expert
11 testimony. There is no overriding need or benefit for the parties to present duplicative and
12 cumulative testimony from multiple experts in the same discipline. Accordingly, the Court
13 should order that each party is limited to one expert per discipline. This is a fair and
14 evenhanded request as it requires concessions from both the defense and the Plaintiffs. Such
15 an order will facilitate an orderly and expedient trial, eliminate unduly cumulative testimony,
16 and will better ensure that everything stays on schedule.

17 It should be noted that Plaintiffs’ counsel and their expert Dr. Freeman have made it
18 abundantly clear that Dr. Freeman’s testimony is based in the field of epidemiology *and*
19 biomechanics. This is clearly reflected in Dr. Freeman’s answers to Plaintiffs’ counsel’s
20 questioning during his deposition:

21 Q. And you were asked whether or not you’re an engineer. And you’re
not an engineer. Is that correct?

22 A. That’s correct.

23 Q. But have you testified before on the subject of biomechanics?

24 A. Yes. Biomechanics and engineering overlap. But there’s also –
25 people are experts in biomechanics that aren’t engineers. Even
though I have a background in engineering.

26

³⁰ Of course, if Plaintiffs are permitted to call all three of their obstetrician experts, then the defense should be permitted to call all of their midwife experts.

1 Q. And is the subject matter that Dr. Grimm³¹ testified about in this
2 case, is that – does that include biomechanics?

3 A. It does.

4 Q. And approximately how many times have you had – have you been
5 approved or authorized or whatever by a Court to testify in court in
6 the field of biomechanics?

7 MS. MONIZ: Object to the form.

8 A. Multiple hundreds of times. Probably 400 or 500 times in cases
9 where I've been offered. ...

10 ...

11 Q. (By Ms. Moniz) Do you consider yourself an expert in
12 bioengineering?

13 A. I am an expert in biomechanics of injury or injury biomechanics and
14 have published extensively. I've designed a faculty peer-reviewed
15 curriculum and course that I taught for 15 years at Oregon Health
16 and Science University School of Medicine. About a third of the
17 coursework was biomechanics of injury.

18 So yes, I'm definitely an expert in biomechanics, and I've published
19 extensively about it. And I've been a consultant to NASA and to the
20 U.S. Congress on the topic of injury biomechanics.

21 (See Rand Decl. Ex. G at 126:25-128:21, 133:11-22.) Clearly, Plaintiffs hold Dr. Freeman
22 out as being an expert in biomechanics and believe that this discipline is relevant to his
23 opinions. But Plaintiffs already have an expert in biomechanics, Dr. Allen. Plaintiffs do not
24 need both Dr. Allen and Dr. Freeman to testify from the same field. Defendant Hamilton has
25 already moved *in limine* to exclude Dr. Freeman's testimony as unreliable and irrelevant. If
26 that motion is denied, and this motion granted, then Plaintiffs should be required to choose
between Dr. Freeman and Dr. Allen.

**28. The Court should order that the parties confer no later than one week before
trial to discuss a possible stipulation to facts.**

It may be possible for the parties to negotiate a stipulation regarding the facts in this
case that are not in dispute. Such a stipulation, if possible, would promote an expedient and
orderly litigation. Accordingly, pursuant to CR 16 and the Court's inherent authority, an

³¹ Dr. Grimm is Defendant Hamilton's biomedical engineering expert.

1 Order should be entering requiring the parties, in good faith, to confer no less than a week
2 before trial for the purpose of discussion what, if any, facts can be stipulated to.

3 **29. Dr. Allen should be precluded from offering testimony on standard of care and**
4 **from offering personal opinions on the credibility of ACOG.**

5 Dr. Allen is Plaintiffs' biomechanical engineer expert. He is not a medical doctor and
6 made it clear during his deposition that he will not offer an opinion on standard of care. (*See*
7 *Rand Decl. Ex. W* at 12:5-6, 21:15-23, 31:6-8, 61:8). Nor is he qualified to do so. Dr. Allen's
8 general opinion is that a permanent brachial plexus injury can only be caused by traction
9 from the birth attendant. Although the defense experts disagree, Dr. Allen is qualified to
10 offer that opinion in his capacity as a biomechanical engineer. But Dr. Allen went further
11 than that during his deposition and testified that Z.H.'s injury was caused by traction in
12 "excess of that normally used." (*Id.* at 33:9.) This crosses the line into standard of care. Dr.
13 Allen is not an obstetrician or midwife and is not qualified to speak to what amount of
14 traction is standard of care, whether that amount of traction is "normal," whether traction
15 beyond that amount is excessive, and whether there may be circumstances where traction in
16 excess of the normal amount is within the standard of care.³² Moreover, testimony that
17 traction is in "excess" of what is normal coming from an expert not qualified to speak to the
18 standard of care is misleading. It strongly implies negligence and would be unduly
19 prejudicial to the defense under ER 403. Such testimony from Dr. Allen should be excluded.

20 Additionally, Dr. Allen offered an improper opinion on The American College of
21 Obstetricians and Gynecologists (ACOG), which should be excluded. ACOG is widely
22 regarded as the most respected medical association in this field of medicine. Since at least
23 2014, ACOG publications have endorsed the growing body of research indicating that the
24 natural forces of labor alone cause brachial plexus injuries. During his deposition, Dr. Allen
25 testified as follows:

26 Q. What would you have said?

³² For example, to save the child from death or hypoxic brain injury.

1 A. I can talk about the ACOG Neonatal Brachial Plexus Palsy
2 publications and comment on some of the statements that it makes.

3 Q. And what would those comments be?

4 A. You have to get into the publications.

5 Q. Well, do you have any comments as you sit here today?

6 A. **I think that it was a publication designed to protect providers.**

7 (See Rand Decl. Ex. W at 64:25-65:9) (emphasis added). Dr. Allen's personal opinion about
8 the credibility of ACOG and the motivation for its publications is completely irrelevant and
9 speculative. ER 402. Indeed, Dr. Allen is not even an obstetrician, midwife, or medical
10 doctor. Washington law has consistently maintained that a witness, even an expert witness,
11 is not qualified to offer a personal opinion on the credibility of another witness. *State v.*
12 *Alexander*, 64 Wn App. 147, 154, 822 P.2d 1250, 1255 (1992) (counselor's opinion that he
13 believed victim was not lying "effectively testified that [the Defendant] was guilty as
14 charged"); Tegland § 702.46 Credibility of other witnesses, 5B Wash. Prac., Evidence Law
15 and Practice § 702.46 (6th ed.). That is essentially what Dr. Allen is doing here. Dr. Allen
16 may disagree with the publications of ACOG, but his personal opinion that it exists to
17 "protect providers" goes well beyond what is permitted. There is no evidence to support this
18 contention. Moreover, such testimony is highly inflammatory and thus unduly prejudicial
19 under ER 403. Dr. Allen should be precluded from offering such an opinion at trial.

20 **DATED** this 19th day of May, 2022, at Seattle, Washington.

21 JOHNSON, GRAFFE, KEAY,
22 MONIZ & WICK, LLP

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24 s/ R. Pierce Rand

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CERTIFICATE OF SERVICE

I declare that on the date below I served this **Defendant Hamilton's Motions in**
Limine on the following parties of record in the manner described:

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Via Email

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

EXECUTED this 20th day of May 2022, at Seattle, WA.

/s/Monica M. Welch

Monica M. Welch, Legal Assistant